

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

George C. James, Circuit Court Judge

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S.C. SUPREME COURT

NATHANIEL BRADLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001121

APPENDIX

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
APPLICANT’S EXHIBIT #7 (MAP); APPLICANT’S EXHIBITS #8-23
(PHOTOGRAPHS)**

1 Does that make any sense?

2 If not, then ask the State to tell you when do
3 they think the pond -- the body got put in the pond.
4 Okay. Maybe it was Saturday night. But was it
5 Saturday night while Nate was at Mrs. Sinkler's?

6 Was it Sunday night? The Coroner couldn't tell
7 you -- not the Coroner, the doctor. They got the
8 doctor when the body went up there -- the doctor said
9 that the man died Monday because they found him
10 Monday.

11 And their best evidence from the Coroner looking
12 at him now -- I'm -- not the Coroner, the medical
13 examiner, the doctor or the pathologist -- he said,
14 I'm looking at the man, I know he was found in the
15 water, I know it's May, it looks like to me he died
16 must be on the 23rd, recently.

17 Wasn't a lot of decomposure (sic). There was
18 some. He talked to you about it. Then he gets a --
19 then he gets a fax from Sumter County saying, no,
20 change it to the 22nd.

21 What evidence was there to change it? He just
22 did it because Sumter Law Enforcement and Sumter
23 Coroner said, we think it's the 22nd. So I asked
24 him.

25 I said, well doctor, could it have been the

1 21st? Yeah, could have been the 21st. He didn't see
2 the body. So guess where the balls -- guess who had
3 the responsibility?

4 Sumter County comes to the bridge, looks over,
5 sees the body, pulls the body out. It's got a brick
6 on his foot. Right then and there they should have
7 said oh, time out, we don't handle this, this is
8 unusual. This is unusual. Let's call an expert.

9 Let's get somebody in here to look at the body,
10 to look at the scene, to make some tests. Let's find
11 out when this thing got put in here. Didn't do that.

12 How many people do you think were fishing on
13 that bridge on Friday, Saturday, and Sunday at
14 Boyle's Pond? The man who came in and testified he
15 found the body was fishing on Monday afternoon at
16 1:30. It must be a pretty good fishing spot.

17 People were fishing on Monday. So, most people
18 they don't work on the weekends, they go fishing on
19 the weekend. Nobody saw anything down there during
20 the daylight hours, Saturday, Sunday, Friday. Just
21 something to think about.

22 Let me say a few more things. I know my time is
23 probably getting -- three more things and I'm going
24 to sit down.

25 Don't forget, ladies and gentlemen, that the

1 responsibility of proving the case is on the State.
2 And when you see that there were areas that weren't
3 checked out and weren't done properly, you have to
4 hold that person who had that responsibility
5 accountable.

6 No lab work was done on the blood that was on
7 the bridge. Nobody dropped the ball there for Sumter
8 County. Nobody. That's not something that anybody
9 else could have checked out and got the information
10 from you to know about what that blood was except
11 Sumter County.

12 The bullet comparisons from Donna's house. She
13 said she gave them a bullet. No bullet was sent to
14 SLED. No reason why they couldn't have gone up
15 there.

16 One officer said they saw a bullet. She said
17 she gave them a bullet. The bullet comparison should
18 have been done. We could have found out if Donna's
19 gun had bullets that matched the bullets or were
20 similar to the bullets that were in evidence. That
21 wasn't done.

22 The cellphone records were not analyzed. They
23 got them. They looked at them. They didn't analyze
24 them. They didn't put it together to see when Sunday
25 morning when he was on Cobblestone, was he using his

1 phone on Cobblestone on that tower. No information
2 about that.

3 We brought you those cellphone records because
4 we knew that those cellphone records would show he
5 was at Donna's house -- at Calvin Davis' house
6 waiting on Donna to get her friend out of there so
7 he'd go over there and get that paint, and those
8 records prove that.

9 One more thing on the cellphone records. If
10 they really wanted to know what was going on in
11 Ernest James' life, they should have take Ernest
12 James' cellphone record and looked at the five days
13 before he died who he was talking to, who he was
14 planning things with.

15 They have those records. They haven't done an
16 analysis on Ernest's records to see who he was
17 talking to. That might have given us the unknown
18 man. Nobody did.

19 No expert was called on the body of the deceased
20 when they found it in the pond. They just sent it to
21 the pathologist and said, tell us what he died from.
22 It was pretty positive.

23 Investigator McMillan testified to you that on
24 May 26th, which was Thursday, after he talked to
25 Mr. Koenig or find out what Mr. Koenig had said about

1 the positive ID, he sat down in the Magistrate's
2 office and signed out an arrest warrant for murder
3 against Nathaniel Bradley, May 26th. That was the
4 day before he talked to Donna.

5 He didn't even know that Donna's gun was
6 missing. He didn't even know that Donna's brick was
7 missing. He had already made up his mind. And when
8 he makes up his mind, he's a criminal investigator,
9 he's going to start putting the bullets in his gun
10 that he need to get the man that he's already signed
11 up -- and that's what he did.

12 Donna was probably not ready for what the
13 investigator -- they weren't investigating at that
14 point. They were just saying, give me evidence of
15 guilt. That's what I'm here for. I have already
16 charged you. I have already made up my mind.

17 Criminal responsibility have already been
18 determined. They are not investigating any more.
19 Based on Koenig's testimony, before they checked the
20 cellphone records they decided he did it.

21 The Judge is going to tell you that you have a
22 right to decide this case on two important legal
23 issues. One is called alibi and one is called
24 circumstance evidence.

25 I think I talked to you about circumstantial

1 evidence. If the circumstances don't fit, you can't
2 convict on circumstantial evidence.

3 Alibi. Alibi is very important because the
4 State must prove that the defendant, Nate Bradley,
5 actually was present at the scene of the crime and
6 that he participated in it and that he was not
7 elsewhere.

8 If you have a reasonable doubt as to whether the
9 defendant was present, you must resolve this doubt in
10 favor of the defendant. That is the law of South
11 Carolina on alibi.

12 The Judge is going to charge you that alibi, in
13 order to be a good defense, you have to be able to
14 prove the alibi over the time when the crime
15 occurred.

16 Ask the Solicitor what time the crime occurred.
17 How can they prove his alibi with a time? What he
18 can do is the best he can. And the best he can is
19 all of the people he was with that came in here
20 yesterday and told you what he was doing and when he
21 was doing it to the best of their ability.

22 On Saturday and Sunday, nobody was looking for
23 Ernest James because it wasn't unusual for him to
24 take off and go low, undercover, two days, one day,
25 maybe he was in jail, somebody needed to call and

1 find out if he was in jail. Nobody was looking for
2 him.

3 Nathaniel Bradley was living his normal life,
4 doing his normal things. They have proof that he
5 actually participated in the crime, that he was
6 present at the scene of a crime? No, they did not.

7 And you can do the right thing in this case and
8 you can vote to do what the law says you must do. We
9 ask you to give this man back his life. This has
10 been a burden for him for a long time. He wants it
11 off.

12 I ask you, talk among yourselves, communicate
13 among yourselves, disagree among yourselves. Come to
14 the conclusion that only one logical conclusion can
15 be made, they did not prove this man guilty of a
16 crime. He has a right to have his name cleared.
17 Thank you.

18 *THE COURT:* Madam Solicitor?

19 *MS. FANT:* May it please the Court.

20 *THE COURT:* Yes, ma'am.

21 *MS. FANT:* Mr. Finney.

22 CLOSING STATEMENT

23 *MS. FANT:* Ladies and gentlemen of the jury, I
24 want to start with a quote from Sir Walter Scott that
25 I think sums up this case in a perfect way. And that

1 is, oh, what a tangled web we weave when first we
2 practice to deceive.

3 That man's own lies, his own inability to tell
4 the truth created a trap in which he now finds
5 himself. The Judge is going to instruct you on the
6 law of this case. But I wanted to talk to you a
7 little bit about just what we do have to prove,
8 because I agree we do have to prove our case.

9 Murder is the killing of another with malice
10 aforethought. Is there any question in this case
11 that Ernest James was killed by another?

12 I think an autopsy, the fact that a concrete
13 block was tied around his foot, the fact that he was
14 thrown in a pond can tell you right there this is not
15 a suicide, it's not an accident, it's a homicide.

16 In addition, the Judge will instruct you on
17 malice. And he will tell you that malice is the
18 purposeful doing of a wrongful act without excuse or
19 justification. And one way it's defined in our law
20 as a malignant or evil-doing heart.

21 Implied malice as the Judge will tell you can be
22 inferred from the use of a handgun as we believe was
23 used in this case. And that's particularly important
24 when you don't have any evidence of express malice.
25 But we have that here.

1 We have him saying, I'm going to kill him, I'm
2 going to get him. The crazy talk. I'm going to take
3 care of Ernest. He's done this for the last time.

4 It is the State's job to prove the crime of
5 murder, that the defendant killed Ernest James with
6 malice aforethought either express or implied, and we
7 can do that with any evidence, any evidence that the
8 Judge and the Court deem admissible.

9 Would we rather have a video of every crime that
10 occurs in Sumter County? Of course we would. We
11 would never have trials. But we don't. That's not
12 real life. Life is complicated. And the fact is,
13 when someone tries to cover up a crime as he did
14 here, it gets even more complicated.

15 That's why circumstantial evidence is so
16 powerful. It helps to determine what we otherwise
17 might not have known had the defendant not managed to
18 cover up so much of his crime.

19 And it's very interesting to me that defense
20 attorneys always claim that circumstantial
21 evidence -- oh, it's just circumstantial evidence,
22 it's defective, it's tainted, don't worry about that.

23 But people who commit crimes like this do so
24 with the purpose to get away with it. They do so
25 under cover of darkness and when no one else is

1 looking.

2 And very interestingly, Mr. Finney himself
3 referred to circumstantial as opposed to direct
4 evidence, which the Judge will tell you there is
5 absolutely no difference under the law, under the --
6 of the weight that you're to give either. Each is
7 equally valid.

8 And he mentioned that, you know, oh,
9 circumstantial evidence isn't like fingerprint
10 evidence or other evidence. But in fact, fingerprint
11 evidence is circumstantial evidence.

12 Fingerprint evidence is physical evidence,
13 something that you actually leave there. But it's
14 circumstantial because you have to infer, you have to
15 use your mind to infer that the person who owns that
16 fingerprint was the one that left it at the crime.

17 If you have somebody who saw the person at the
18 crime, you wouldn't need the fingerprint. It's
19 circumstantial evidence, and people like
20 fingerprints. Circumstantial evidence is just as
21 good as direct evidence and we have a lot of it in
22 this case.

23 Reasonable doubt. Interesting concept, and one
24 I fully believe in. But it's not a doubt beyond all
25 doubt. It must be reasonable and it must be a doubt

1 for which you can assign confidently a reason for it.

2 If you say, well, the State doesn't know where
3 he was killed and they don't have an eye witness and,
4 you know, they don't know when, that's not reasonable
5 because we are not required to prove that.

6 And why are we not required to prove that? Mr.
7 Finney points out, well, that's not fair to the
8 defendant because, you know, he doesn't know where he
9 was for those three days and -- what about what's
10 fair to the victim in this case?

11 Are we going to say it's okay to murder people
12 if you just do a good job of it? I think fairness
13 cuts both ways in this case. And it's only fair to
14 the State that you follow the law which does not
15 require us to prove something that the law does not
16 require us to prove.

17 If you are firmly convinced that the defendant
18 committed this crime, then he is guilty under the
19 law.

20 And there's one thing I do agree with Mr. Finney
21 on, and that's in evaluating this evidence, I want
22 you to use your common sense. Because if you ask
23 yourself what makes this fact or this testimony
24 appear to be true or false, I think you will realize
25 that the circumstantial evidence gives you the

1 complete picture in this case.

2 Now how many of you have heard the phrase,
3 means, motive and opportunity? That's not a legal
4 phrase. It's kind of a pop phrase that people use,
5 but it's important because that is exactly what shows
6 that a crime has been committed.

7 The defendant in this case had the means, he had
8 the opportunity, and he had the motive. No one --
9 there is no evidence in this case that anyone else
10 had any motive to kill Ernest James.

11 Now, Mr. Finney would have you believe that the
12 van isn't incentive enough to be a motive. But
13 frankly, when people do crimes like this, I find that
14 even the slightest little thing can push them over
15 the edge.

16 And the bottom line is, he was already angry,
17 they had jealousy issues over a woman, the van gets
18 impounded, his stuff is in the van, can't do his job,
19 he's angry. Why would he say that if he wasn't angry
20 about it?

21 And first of all, in terms of the other evidence
22 that we presented, I want to get this whole issue
23 about the purported blood speck out of the way.
24 Should this evidence have been sent to SLED? Yeah.
25 I mean, in hindsight, yeah.

1 But I ask you, what is so vitally important
2 about it that it would have proved if in fact it had
3 been done? You know, just because you think that Gil
4 Brisborn (sic) might have been able to take this
5 little speck and prove the whole case with it doesn't
6 mean that that's what happened. That's a TV
7 character played by an actor, not a scientist.

8 The science in this case is going to show you
9 that or -- and the other evidence that there was no
10 evidence that the victim was alive at this time.
11 There's no evidence of a struggle indicating that
12 there would be blood everywhere, and the photographs
13 will show you that.

14 If there were blood spatter everywhere, yeah, it
15 would have been a reasonable assumption to think it
16 was blood. If it was the perpetrator's blood, and
17 you know that the perpetrator would have to be alive
18 and well because they are doing the crime, they're
19 standing there, they're injured, it is going to drip.

20 Blood drips down from you. It is not going to
21 drip on to a concrete wall at an angle like that. It
22 might drip on top of it. It might have dripped on
23 the ground, but it is not going to drip on the side
24 of it.

25 We also have no knowledge of when that speck was

1 left on the bridge. Suppose it had tested positive,
2 though, and come back to match the defendant. What
3 would that have shown?

4 Well, you better believe they'd be telling us
5 that didn't prove anything because we didn't know
6 when it was left there. So that's a wash.

7 On the other hand, suppose it was blood and
8 didn't match the defendant. What would that prove,
9 that someone else probably was there? No. That some
10 unknown person was the real killer? No.

11 It's just one piece in the puzzle that obviously
12 is missing in this case that we don't think is
13 important.

14 But sure, they should have done it, and they
15 acknowledge that. In reality, though, the importance
16 of the speck is that it could have helped convict the
17 defendant, but it wouldn't have exonerated him.

18 And it's very important -- the defense mentioned
19 two things in this case, some cellphone records that
20 belonged to the victim, Ernest James, and the fact
21 that the State didn't send this evidence to SLED.

22 What he neglected to tell you and what is very
23 important is that he had Ernest James' cellphone
24 records and he was free to give them to you, and he
25 did not do that.

1 And secondly, that this alleged blood speck
2 evidence which was in evidence at the Sumter County
3 Sheriff's Office is equally available to the defense.
4 Under our laws the defense has just as much right as
5 the State to that evidence.

6 If they thought it was important, they could
7 have taken it, had an independent person test it and
8 an expert here to tell you that. But why didn't they
9 do that? Because either they agree with us that it
10 wasn't important or they knew it would damn the
11 defendant because it would be his blood.

12 The Judge is going to instruct you on witness
13 credibility. And that's for you alone to decide.
14 It's not for me to tell you who to believe and it's
15 not for Mr. Finney to tell you who to believe.

16 You decide based on all of your human nature and
17 experience that you have had in life. Did they
18 appear to be telling the truth? What was their
19 demeanor? Did they have a motive to lie to you?

20 Did what they say make sense? Was it logical?
21 Was their testimony internally consistent? Was it
22 consistent with other people?

23 First of all, Leonard McCray. He was straight
24 forward and told you what he knew. If he wanted to,
25 oh, blame this on the defendant without a reason, he

1 could have come up with a lot better than just a
2 little bit of testimony.

3 He could have come with the whole darn story,
4 but he told you what happened, that he saw that man
5 who he knew at Henry Kirkland's place at the softball
6 game with somebody that we don't know.

7 The unknown person who is amazingly right there,
8 but he doesn't know him five minutes later when he's
9 down the street. He says that he actually saw this
10 other person get in the car with him and drive down
11 there. So how can he have picked him up along the
12 road or how could he already have been at the house?

13 He also says that he witnessed an argument
14 between Ernest and that man the Thursday before this
15 happened in the vehicle. He couldn't tell you what
16 was said, but he could tell you the hands were
17 flying, voices were raised, and he told you that when
18 Ernest came back in, he was upset.

19 And what did he respond? I got your back
20 Ernest, I got your back. And unfortunately he wasn't
21 there when this happened.

22 William McCray. He told you what he indicated
23 in his statement, that he was home. The defense --
24 the defendant was not there -- excuse me, I take that
25 back.

1 William said he came up and the defendant was
2 there in the Beretta with the car. He walked up and
3 said, hey, I think I know this guy. Oh no, you don't
4 know him. He's from New Jersey, New York, he's from
5 up north, you don't know him.

6 This is supposedly the same man that he picked
7 up on the lane that was a stranger, that he was just
8 giving a ride to. Indeed -- excuse me -- he says
9 that this guy is his partner.

10 That's what he actually tells him. So why would
11 he say that if in fact this was somebody he didn't
12 know that he picked up earlier?

13 William told you that Ernest left in Martha
14 Ann's Volvo and that the defendant and the unknown
15 man left in the Beretta, and that is exactly what
16 Martha Ann told you.

17 And there is no other evidence to say that
18 that's not what happened. And that was the last time
19 William saw Ernest James alive.

20 Martha Ann Ransom, the defendant's girlfriend.
21 She could have come in here distraught because her
22 boyfriend had been killed and made up a ton of stuff.
23 But she said some things. She said, I don't know.

24 She was honest about what she knew. And what
25 she did know is that that man and an unknown man that

1 he had introduced to no one left in the Beretta and
2 that Ernest followed behind in the Volvo, and that
3 that was the last time she saw Ernest James.

4 The importance of the other witnesses that were
5 kind of -- very little part, not big witnesses. I
6 agree, but that's what we are trying to show you,
7 that it's every little piece, not just one
8 overwhelming thing.

9 Thomas McCutchen, Robin McCutchen, Bobby Lee
10 Hughes, Claude Lloyd, Matt Bramlett, Major Simon.
11 That was the one that Donna herself trusted and he
12 corroborated everything that Sumter Law Enforcement
13 did.

14 Lubertha Bradley, the defendant's ex-wife who
15 sat over there and is sitting there today, right
16 behind the defendant, told you that he came to her
17 house and he said, oh, that's my partner, and he
18 never got out of the car for an hour and a half.
19 This guy sits there and eats his meal in the car.
20 I'm telling you, that's not normal.

21 In addition, you had Tracy Drayton who in my
22 opinion was clearly terrified on the stand, denied
23 things she had told Sergeant McMillan the day before.
24 And in fact, what she told Sergeant McMillan is what
25 Lubertha told you when she took the stand.

1 Wayne Anthony Johnson, the defendant's own
2 son-in-law told you he heard the victim -- excuse
3 me -- the defendant threaten the victim and that when
4 he had to meet up with him later, he armed himself
5 because you never know what he's going to do.

6 One of the things interestingly about Bobby Lee
7 that I wanted to point out. Mr. Finney made a big
8 deal of the fact that that's part of -- that's part
9 of the defendant's alleged alibi, that Bobby Lee said
10 that he left -- the victim left with somebody else,
11 an unknown man, in the Volvo.

12 But that's not what Bobby Lee said. What Bobby
13 Lee said is the defendant told him that and it was a
14 lie just like everything else that he said in this
15 case.

16 Tracy Thrower from SLED -- that got a lot more
17 complicated than we intended. And we know -- we knew
18 we couldn't prove what the murder weapon was. We
19 didn't have the murder weapon.

20 But what we could show was that under the
21 evidence that we did have, it's possible that it's a
22 38 and that is the gun that Donna McMillan -- Donna
23 McDuffie -- Excuse me -- had in her house that went
24 missing.

25 Daniel Reighley from SLED talked about how the

1 victim's alcohol content was high. I think that's
2 consistent with people getting him drunk so he is not
3 able to fight back and he did not realize what was
4 coming. And importantly, there were no -- present,
5 not a one. Not a one.

6 Dr. Sexton, he talked to you about the
7 timeframe. And the defendant tried to make a big
8 deal out of that. But the scientific evidence in
9 this case supports the State.

10 The only thing we know is that we don't know.
11 And that's unfortunate, but that is life and that
12 just happens sometimes. So we brought you Dr. Sexton
13 to explain to you why that happened.

14 And he explained to you post-mortem versus
15 pre-mortem injuries. He explained to you the scrapes
16 on the defendant's (sic) forehead and chest being
17 linear from dragging along.

18 There were no injuries on the defendant's arm
19 and no injuries of a struggle. And I submit to you
20 that that indicates that the victim in this case,
21 Ernest James, knew and or trusted the person who did
22 this to him. Not a stranger, but someone he knew.

23 And common sense tells you that. It also tells
24 you that the way that Dr. Sexton described the
25 injury, that the order that they most likely occurred

1 in is a victim looking someone in the eye, realizing
2 he's going to be shot, putting up his arm, being shot
3 through there, that bullet lodging in the abdomen,
4 and him turning around and running and being shot in
5 the back.

6 And when he was shot in the back and it severed
7 his spinal cord and he was laying on the ground, they
8 came in for the kill shot and shot him in the back of
9 the head.

10 There's no question that that's what killed him,
11 the laceration of his brain. And Mr. Finney may
12 quibble as to whether or not that's an execution
13 style play.

14 But I submit to you when someone is laying on
15 the ground and you are less than -- or -- or, you
16 know, close -- no evidence that it wasn't any further
17 away, that that's about as execution style as you
18 get.

19 Dr. Sexton also told you about small, medium,
20 and large caliber bullets. And he said these were
21 medium caliber bullets, generally 38. That's
22 consistent.

23 Excuse me. Darrell Koenig. Mr. Finney would
24 like you to think that he has some ax to grind here
25 or God knows that he wants to be a star. All I can

1 say about that is in addition to the fact that his ID
2 is unshakable, I mean unshakable.

3 We have a lot of people who ID people and they
4 just, you know, they are not sure. He never wavered,
5 not that day, not when they showed him the line-up,
6 and not when he came to you here in court.

7 But more importantly, he never saw a picture of
8 the defendant beforehand. If there had been a
9 picture on TV or something and we could say, oh yeah,
10 maybe he just kind of got that confused, but there
11 wasn't.

12 He never had seen the man before in his life and
13 he picked him out. And frankly, if you look at him
14 right now, what is the most distinctive thing about
15 him?

16 The overbite in his mouth. And that is what
17 Darrell Koenig noticed and that is what he relied on
18 in addition to his other observation.

19 Donna McDuffie. I -- Mr. Finney is right about
20 Donna. And the Judge is going to instruct you that
21 when discussing the credibility of the witnesses, you
22 can believe all of what they say, you can believe
23 none of what they say, or you can believe some of
24 what they say.

25 And up until she testified, I never really

1 understood the some part. Might believe some of what
2 someone says but not all of it.

3 But I think in looking at her testimony and the
4 demeanor that she presented on the stand, that you
5 can fully find that the things that she testified
6 about were the truth, the obvious truth, that she had
7 lived in her house for 27 years, that she went to
8 Penny's and met him and gave him the money.

9 That certain things, you know, had happened.
10 She sat upright. She was very clear, you know, there
11 was no question.

12 But when there came anything about what she had
13 said about what the defendant said or purported alibi
14 or anything like that, she changed positions, she got
15 fidgety, she couldn't remember anything.

16 I don't know whether that's because she -- she
17 wanted to help him or because she was terrified like
18 everybody else.

19 But I don't think it negates what she told
20 officers originally which was that he is not her
21 boyfriend, that he called her out of the blue after
22 six months of not finishing her house, the week
23 before the crime and suddenly wants to come over
24 right away to do it, that he called her and told her
25 that he was out in the woods, that he called her --

1 that he told her that he was going to kill him.

2 He was talking crazy talk. He was going to get
3 Ernest because he got the van locked up. She told
4 you about the telephone number which she wrote down,
5 a number that she wouldn't have known.

6 And if she did in fact know, that's the 408
7 number that's in her statement, and you can read that
8 when you're in the jury room. If he had known the
9 defendant sooner, she would have known her
10 name wasn't Bradley, that her name was in fact
11 Dorothy Bradley Nelson.

12 But interestingly, out of the blue she has a
13 number the defendant says, hey man, if I get in
14 trouble, you know, call her, her husband is a bail
15 bondsman.

16 What the heck would you need a bail bondsman for
17 if you weren't already thinking about doing something
18 illegal?

19 The things you can believe and be confident in
20 that Donna testified about are her statement, the
21 original one she gave to law enforcement, that the
22 defendant called her and wanted to come pick up some
23 paint to do someone else's house and that he never
24 picked it up.

25 In fact, that paint is still under her house

1 today. So why is he calling her all the time? Why
2 are you trying to get her? Mostly trying to find out
3 when she's not there, I submit to you, not when she's
4 there. He's not trying to see her.

5 He's trying to find out when she's not home.
6 She told you that the concrete block was missing.
7 She -- excuse me -- and she indicated that she showed
8 them the bullet.

9 And law enforcement corroborated that and said,
10 yeah, she showed us the bullet. Why didn't they take
11 one? Because a bullet tells you nothing. A bullet
12 of Donna's, unless it were the same bullet that was
13 in the gun when it was shot, is not going to tell us
14 anything.

15 And we -- we couldn't prove that. So there was
16 no need for that bullet. Why she said that, I don't
17 know. Why she said they took a concrete block. I
18 mean, my God.

19 Use your common sense. If that isn't a CSI
20 fantasy, I have never heard of one. That you can
21 take a cement block like this and match it to another
22 one from some certain batch? That's ridiculous.
23 Believe me.

24 If that were possible, we would have done it,
25 because we knew that that block had come from there

1 and the photographic evidence indicates that that
2 block came from there.

3 Gloria Portee. She was the only witness, the
4 only witness brave enough to come up here and tell
5 you that she is terrified of the defendant. I think
6 some of the other ones are, but they won't admit it.

7 But she told you, heck yeah, I'm scared. And
8 she dated him. She had dated him for a year. She
9 knew him. She told you -- what she told you up here
10 was totally consistent with what she told law
11 enforcement right after it happened, that the
12 defendant said, I don't get that van back, I'm going
13 to kill Ernest, and she believed him.

14 And if you sat in here and watched the defendant
15 as she testified staring at her, trying to intimidate
16 her, you would know that what she was saying was
17 true.

18 And finally, the letters. I'm going to say I
19 had to laugh when I read that. Here's a man, he's
20 got three women going on at the same time, juggling
21 them in the air. They're talking about breaking up,
22 talking about getting together.

23 He gets arrested. A year passes by, she doesn't
24 see him, she doesn't talk to him, and out of the blue
25 she gets a letter of a marriage proposal, a very

1 romantic marriage proposal if you read it again.

2 I think it says, will you marry me? Oh,
3 changing the subject, let's talk about this. I
4 submit to you that that is his way of trying to get
5 her to not testify because he had found out that she
6 told the police what he said.

7 And he thought that she would fall for that
8 ridiculous ploy. And you heard what she said. She
9 said it's bullshit, and it clearly is when you read
10 it.

11 We also have the defendant's own statement.
12 When did you last see Ernest James alive. We agree
13 he came in voluntarily, but he didn't once say, I'm
14 here to help my friend Ernest.

15 Who did this? What happened? He never -- it's
16 very interesting he never asked what had happened,
17 what the details were. Wouldn't you be really
18 concerned if this is your best friend?

19 My God, how did they do it? Did he suffer? Was
20 it long? No, he's there because they called him and
21 asked him and he thought it would look bad if he
22 didn't show up.

23 But what they didn't realize was, you know, law
24 enforcement is not as dumb as they look -- or as dumb
25 as he thought they were because they're sitting there

1 and he's coming up with a cock-amaney (sic) story
2 about Donna being his girlfriend and he's out in
3 Bishopville at her house.

4 And what did they do? Well, give us her phone
5 number. Yeah, we'll check that out. Oh, no, let me
6 call her, I will call her. Here, use our phone. Oh,
7 she's not home. Okay.

8 And he thought that would be the end of it.
9 What do they do? They step out, punch it back in.
10 Lo and behold, the number comes up. Sergeant
11 McMillan calls up. Who answers the phone? Donna
12 McDuffie.

13 Are you his girlfriend? Oh, no. Did he spend
14 the night with you last -- no. My cousin -- my
15 cousin from New Jersey was there. And she told you
16 about that.

17 He then goes on to say that he never called --
18 that the defendant last saw Ernest at the -- on the
19 lane going to the Springhill house. He said that an
20 unknown subject picked him up -- excuse me -- we gave
21 him a ride, he had never seen him before, and that
22 Ernest alone had taken the Volvo and followed him and
23 the unknown subject to the end of the drive, of
24 course, after nobody could see him because from the
25 map and from the testimony you can tell you can't see

1 from the house to the end of the road.

2 How convenient that that is when the guy gets
3 out of the car and gets into the other car. That
4 makes no sense. If you're going with the other guy,
5 you're going to get in at the start. You're not
6 going to stop at some point and get in -- and that
7 that's the last time he ever saw him.

8 Interestingly he didn't mention that he had been
9 at Henry Kirkland's place because he knew Leonard
10 McCray had seen him there and that he had seen him
11 with that guy and could say, huh-uh, they knew each
12 other, he was with him, he was in the same car.

13 He also told Bobby Lee Hughes a similar story,
14 but changed it in two significant details. He said
15 that he told Bobby Lee that the other guy who he
16 didn't know was already there, even though this was
17 the same guy that was supposed to be doing some kind
18 of deal together.

19 So they were supposed to be doing it together,
20 but he didn't know him, and he was already there.
21 Well, we know that's not true because Martha Ann and
22 William told us that Ernest left alone.

23 And in addition, he says this is the same guy he
24 picked up on a dirt road who stayed in his car the
25 whole time and was never introduced to anyone but was

1 yet his partner and also the person that was supposed
2 to go do this job.

3 I don't think there's any way -- any way you can
4 reconcile those statements to make any sense or fit
5 together. They are lies.

6 At that time he left. And they didn't arrest
7 him. They allowed him to go. They pointed out --
8 and in -- every officer said this. There wasn't a
9 difference among them -- that he started acting
10 nervous.

11 He realized when they came back in the room, oh
12 God, man, they checked that out, I'm in trouble here,
13 I'm getting out of here, and he left, and they let
14 him.

15 As he was leaving, Sergeant McMillan asked him
16 what had happened to his eye, and he indicated that
17 he was painting and caught it on a branch. But
18 remember, he told Donna McDuffie that he hit it on a
19 cabinet.

20 Why would you lie about an eye injury unless it
21 occurred when you were doing something you didn't
22 want them to find out about?

23 The next day he came to the Law Enforcement
24 Center again. When he knew that there was some
25 discrepancy -- well, actually at first he insisted he

1 was at Donna McDuffie's house on Saturday night.

2 When told there were some discrepancies in that,
3 he's like, no, actually I was picking up Tanisha
4 Williams from the hair dresser and then I went by my
5 brother Paul's house and then I went to Barbara Jean
6 Williams' house, my girlfriend, so actually spent the
7 night there.

8 Then when they told him, uh-oh, no, no, no, we
9 have already talked to Barbara Jean Williams and we
10 have talked to her mother, Eloise Sinkler, and we
11 talked to her daughter, Tanisha Williams, and we know
12 that you didn't spend the night there.

13 He's like, oh yeah, that's right, I spent it
14 at -- the house that I was painting at and I was
15 there. But he didn't elaborate. Then he got
16 agitated again.

17 He said if they didn't arrest him then, he was
18 getting the hell out of there. After that, law
19 enforcement never talked to the defendant again.

20 The defense witnesses. Frankly Mr. Kind, Cody
21 Rembert Kind and Calvin Bozo Davis, I don't think
22 it's worth me trying to discredit them. I think they
23 did that to themselves on the witness stand.

24 Lieutenant Rick Nelson and Robert Jones, there's
25 no reason to doubt their testimony. The defendant

1 maybe stopped by for 45 minutes, not giving you the
2 exact time, but they both testified that he parked
3 down the street and that there was a black male that
4 never got out of the vehicle.

5 Does that sound familiar? He said it was a
6 nephew, but why is it that every time he's somewhere
7 and seen in a car, somebody sees him with somebody
8 else that he doesn't introduce to anybody?

9 If it were once, if it were twice, maybe even
10 three times, but every time they see him, every bit
11 of the evidence he's seen with another person who he
12 refuses to introduce to anybody.

13 Tina Leon. There's no reason to doubt what she
14 said either. In fact, her testimony supports the
15 evidence that Martha Ann Ransom and William McCray
16 provided to you, and that is indeed that the
17 defendant had in fact lined up a painting job for
18 Monday, and he knew he needed a helper.

19 And that is why he called Ernest James'
20 cellphone on that Sunday, looking for William McCray
21 to help him paint because he knew Ernest wasn't
22 coming back to do this. He wasn't looking for
23 Ernest.

24 He was looking for William. And Martha Ann and
25 William told you that he called that Sunday and that

1 Monday morning asking would he paint, and the
2 cellphone records will support that.

3 When William refused, the defendant contacted
4 Terrell Johnston and he did the painting, and there's
5 no dispute on that.

6 Tanisha Williams. First of all, she's biased.
7 She said the defendant is like a father to her and
8 she doesn't want anything to happen to him.

9 But it's very interesting that she didn't
10 remember anything else but the date and the alleged
11 time that her father was with her.

12 She doesn't remember -- she remembered the times
13 associated -- excuse me -- with the prom, the exact
14 time in fact she claimed, but not where the prom was.

15 I don't know about you, ladies and gentlemen.
16 My high school prom was more than 30 years ago. It
17 wasn't even that great, but I can tell you right now
18 where it was, and I think any sane, normal person can
19 tell you that after a few years.

20 Eloise Sinkler. She also gave some alleged
21 times, but she and Tanisha seemed to fudge a little
22 bit on those. And most important, though, on
23 Tuesday, May 24th, she corroborated her statement
24 that she had given to law enforcement that she said
25 she asked the defendant, do you know what happened to

1 Ernest? He lowered his head, grabbed his chest and
2 said, yes.

3 Why would his girlfriend's mother make up
4 something like that?

5 Terrell Johnston. He says they knocked off --
6 they were painting. They knocked off about four or
7 five pm and went drinking, that the -- they went to
8 the store in fact. I think, picked up what he referred
9 to as a case or whatever of beer, that the defendant
10 at that time made a call, a phonecall on his
11 cellphone.

12 And clearly by this time it would have to be six
13 or seven in the evening, and that he broke down
14 crying, crying like no man he'd ever seen.

15 Well, what is very interesting is if you
16 contrast that statement with the statement of the
17 defendant's own brother, you come up with a very
18 different conclusion because Paul Bradley, Paul
19 Bradley -- and I'm sure he didn't even realize he
20 provided one of the most important pieces of evidence
21 in this case -- when Mr. Finney asked him -- not me,
22 but Mr. Finney asked him -- what time did the
23 defendant tell you about Ernest being dead?

24 He said 1:00 in the afternoon. The body of
25 Ernest James was not found and not reported until

1 1:45 pm on Monday, May the 23rd. How did he know
2 that Ernest was dead if he didn't do it?

3 Now, a few more things. The defense mentioned
4 the cellphone records and they're going to prove this
5 and they're going to prove that. Let me tell you a
6 little bit about cellphone records -- after I move
7 this out of the way.

8 The bottom line is that a cellphone record is
9 only going to tell you about exchanging information.
10 Unless you have other proof, it is not going to tell
11 you who was possessing the phone at a certain time or
12 who was even talking on the phone at a certain time.

13 The State can't prove that and the defense can't
14 prove it either. What we do know is that the
15 cellphone that is assigned to the defendant and his
16 number was linked to both Donna McDuffie's cellphone,
17 her home phone number, and to the defendant, Ernest
18 James' cellphone.

19 We didn't bring you records of Donna McDuffie's
20 cellphone. We didn't need to because we believe what
21 she said about the cellphone calls, and we think the
22 records are going to show you that.

23 Mr. Finney could have always subpoenaed them if
24 he thought they were so important. But he didn't
25 show you them either.

1 But what is significant about those cellphone
2 records is what I talked to you about yesterday, and
3 that is the pattern that they show, the undisputed
4 pattern that they show of calls that were made.

5 To whom, where, and who had the phone, we don't
6 know. But what we do know is that on Monday he's
7 calling Donna a couple times Tuesday, Wednesday
8 because he's probably talking about putting her doors
9 up and painting her house so he can get in there.

10 Look at Thursday. Just look at that. All --
11 and if you will look very carefully, out of 68 calls,
12 all of these to Donna McDuffie's cellphone. Look at
13 this. Maybe once he talked to her about two minutes
14 there and maybe at 177.

15 But the rest of them he didn't talk. He called
16 her like crazy every 6:15:52, 16, 33. He is anxious
17 and he is anxious to get to Donna and get in her
18 house.

19 On Friday he calls her a few times. He knows
20 she's at work during the day. And this time right
21 here will correspond to the time she told you he
22 called on Friday night. She said it was just dark,
23 or I forget how she phrased it. She didn't claim it
24 was midnight.

25 Saturday, what in the world is this? This is

1 his girlfriend? And he is calling her at 1:32:45,
2 1:33, 1:35, 1:37, 1:38, 1:49, 1:56, 3:48, 3:49, 3:52,
3 3:53, 4:06, 4:06, 4:07, 40 -- I'm exhausted just
4 reading it.

5 How many times does she answer the phone? One.
6 Right there, at nine in the morning which is when --
7 and excuse me -- maybe right there when she said he
8 had called.

9 But even if we don't know who was answering and
10 who was calling, we know that that is odd, very odd
11 behavior, that all of a sudden he just has to
12 desperately talk to her. And he continues to call
13 her up through the day.

14 And then on Sunday he's still calling her, still
15 calling her. He's trying to -- to go there on
16 Saturday to pick up paint that he never picked up,
17 trying to do the same thing according to them on
18 Sunday, to pick up paint that he never picked up.

19 And on Monday is when he calls her -- excuse
20 me -- and she tells you that that's the call that she
21 had. I'm not sure if she's confused about that or
22 not, but she might be.

23 And why would that be? Because she told you she
24 wasn't good with dates. That's why she wrote
25 everything down in a calendar, a calendar that was

1 mysteriously stolen about two weeks after the
2 defendant found out she had it.

3 Well, why would somebody break into someone's
4 house, not take their TV, not take their valuables,
5 but take a paper calendar that was two years old from
6 under her mattress and some other papers?

7 Because it has important information that could
8 pinpoint dates and times that Donna might not be able
9 to remember also.

10 Also significant about the cellphone records are
11 the calls to Ernest James' number. You have got one
12 call to him on Tuesday and a couple on Wednesday,
13 couple on Thursday.

14 That might reflect, you know, a good friendship
15 there, just checking in. What about Friday? How
16 many times is he talking to him? Maybe there, maybe
17 there, maybe voicemail.

18 Clearly Mr. James is not answering the
19 defendant's calls. On Saturday he starts calling at
20 7:00 in the morning.

21 He calls at nine. Then during the end of the
22 day he calls again. And this right here is
23 absolutely the most important thing in all of the
24 cellphone records, because what does it tell you?

25 It tells you that that is the last time --

1 corresponds to the last time that the defendant --
2 the victim was seen alive 5:30 pm on Saturday, May
3 21st, 2005, and that his next call -- he doesn't call
4 him any after that.

5 This is his best friend who just Friday he was
6 apparently desperately trying to get a hold of -- on
7 Sunday morning calls at 11:02, a call that came
8 immediately after -- and you can see this on the
9 cellphone records -- immediately after Martha called
10 him and said, Ernest didn't come home last night,
11 where is he?

12 So we have from 5:30 when he's last seen alive
13 till 11:00 the next morning he never called him,
14 somebody he clearly wanted to talk to on Friday.

15 Then he called a few times during the day, but
16 he knows at this point because Martha Ann told him
17 that Ernest didn't come home last night.

18 If he went off with a strange person and he
19 hasn't showed up, you are his best friend, aren't you
20 going to try to find out where he is?

21 No. Instead you're calling asking about
22 painting, asking William if he'll come do some paint
23 jobs with you. And he calls William again in the
24 morning, and he never calls Ernest James' cellphone
25 again.

1 The defense also mentioned this question of
2 alibi. And the Judge is going to charge you on that.
3 And an alibi must be complete. It's not an alibi if
4 it doesn't alibi you for the whole time period that's
5 involved.

6 So they say, oh yeah, we might have somebody
7 here, we might have somebody there. Even if you
8 believed all of his witnesses, which frankly, I -- I
9 would find hard, if you look at it, the most they say
10 is that for a few hours on Saturday night and a few
11 hours on Sunday afternoon, and they couldn't even
12 agree with eachother when they were, and Monday being
13 a nonissue, that the defendant might have been there
14 during those times.

15 I would tell you that looking at the evidence in
16 this case, it is reasonable to conclude that Ernest
17 James was dead by 3:45 pm on Sunday afternoon when
18 the bulk came -- we don't know how soon it was before
19 that, we don't know whether it was Saturday.

20 And again, we don't have to tell you. We don't
21 have to prove that. But certainly if his car is
22 found burned up in the cemetery in the woods, then
23 he's no longer alive at that point. So anything
24 after 3:45 pm is irrelevant.

25 The defense wants to say that we don't have any

1 real evidence, that nothing shows that. And again, I
2 would say that circumstantial evidence is just as
3 good.

4 And this is some of the circumstantial evidence
5 that we have. That the victim, Ernest James, is last
6 seen alive wearing a basketball jersey and some khaki
7 shorts about 5:30 pm on Saturday afternoon, May 31st.

8 When his body is fished out of Boyle's Pond on
9 Monday the 23rd at 1:45 pm, he has on the same exact
10 clothes. But the defendant made a statement to law
11 enforcement, to Donna McDuffie, to Gloria Portee.

12 Ones to law enforcement were inconsistent with
13 what we know from other people. To Donna McDuffie
14 and Gloria Portee he said he was going to do bodily
15 harm to Ernest. He said he was going to kill him.

16 We have a gun that just happens to go missing
17 from Donna McDuffie's house. She's had the gun since
18 1998, I believe, and this is 2005. Never had a
19 problem.

20 He knows where it is. He knows where the key
21 is. And he has access to her house. She even told
22 you, too, he had come into her house before and she
23 didn't even know about, that he told her about one
24 time. You know, I have been to your house before
25 when you're not even there.

1 We have a concrete block missing. We have
2 testimony from three officers that it appeared to be
3 freshly removed. That the calendar is missing from
4 Donna's house, a calendar which she wrote every
5 important date and transaction that she had with that
6 man.

7 We have the pattern of calls to Donna McDuffie
8 and the pattern to the defendant's cellphone. We
9 have an eye injury and no explanation -- or the
10 different explanations for it. We have the letters
11 to Gloria Portee.

12 We have an unknown black male that shadows the
13 defendant all weekend, he's never introduced to
14 anyone, and he never got out of the defendant's
15 vehicle. And we have the defendant's last call being
16 right before the last time he was ever seen alive.

17 Now, a reasonable person could look at this and
18 go, you know, maybe one or two of those things,
19 understand, see how that could be. And this isn't
20 even all of them. This is the ones that I came up
21 with, and I'm sure you could think of more.

22 Is everything on here a coincidence? Can it
23 possibly be that this man is just the unluckiest man
24 on the face of the Earth? I don't think so. I don't
25 think so.

1 I think that that is all circumstantial evidence
2 of his guilt. The defendant indicated that, you
3 know, you don't kill somebody who is your friend. It
4 is his best friend. Why would you kill him?

5 The sad fact in our society is that most violent
6 crimes, most common crimes are committed by people
7 who know the victim.

8 The scenario of a stranger being snatched off
9 the street and taken into a serial killer's hideout
10 and killed is not what happens.

11 The reality in our society is domestic violence,
12 people getting fed up with each other, drug deals,
13 whatever, that is how most homicides occur.

14 I agree that if you take each piece of evidence
15 in this case and just look at it totally by itself
16 out of context without concern for the other pieces
17 of evidence, you might have nothing.

18 But taken together, the sum total of all of it
19 together is what's important because taken together
20 these pieces build a mosaic, a mosaic that forms the
21 picture of what happened that weekend, and it paints
22 the defendant guilty.

23 There's another old saying that I think you're
24 probably all familiar with. If it walks like a duck,
25 waddles like a duck, swims like a duck, quawks like a

1 duck, it's a duck, it's not anything else.

2 And the duck in this case is quacking rather
3 loudly. It's crying for you to look at this evidence
4 and give justice to Ernest James.

5 On behalf of the State of South Carolina and the
6 people of Sumter and Bishopville, we ask that you
7 give to him and find the defendant guilty as charged.

8 *THE COURT:* Ladies and gentlemen, you have been
9 sitting there about two hours. And before I charge
10 you on the law, I will take about a 10 minute break
11 and give you a chance to go to the restroom, stretch
12 your legs, then I will bring you back out, charge you
13 on the law which will take 20 or 30 minutes, and then
14 give you this case to deliberate.

15 You can't talk about it quite yet. You got to
16 hear the law first. But if you'll go back to your
17 jury room, I will get you back out in 10 or 15
18 minutes and we will finish this case.

19 (Jury left the courtroom at 12:04 pm.)

20 *THE COURT:* All right. We'll take a 10 minute
21 recess.

22 (Whereupon court was in recess.)

23 *THE COURT:* State ready?

24 *MS. FANT:* Yes, Your Honor.

25 *THE COURT:* Defense ready?

1 MR. FINNEY: Yes, sir.

2 THE COURT: If the jury is ready -- I understand
3 it's 13 of them, it's only... y'all satisfied with
4 the verdict form?

5 MR. FINNEY: Yes, sir.

6 (Whereupon the jury entered the courtroom.)

7 JURY CHARGE

8 THE COURT: Ladies and gentlemen, you have paid
9 close attention throughout this trial. You have
10 heard all of the evidence in this case as well as the
11 closing arguments of both the defendant and the State
12 and you have paid close attention, and I thank you
13 for that and I appreciate that.

14 It now becomes my duty under the Constitution to
15 instruct you on the law that you are to apply to this
16 case.

17 And under our Constitution and code of laws,
18 only the jury can make a finding of facts in this
19 case. I am not permitted to indicate to you how I
20 might feel about the facts.

21 So if I said anything or done anything
22 throughout this case that you think that I may have
23 an opinion about the facts, you are to disregard that
24 because I am not allowed to have an opinion.

25 You're not to read anything into that because

1 you and only you are the sole judges of the facts of
2 this case.

3 Under the same Constitution and code of laws
4 that designates you as the exclusive judges of the
5 fact also makes me the exclusive judge of the law.

6 So if you have some idea of what you think the
7 law is or what the law ought to be and that differs
8 from what I now tell you the law is, you must
9 disregard the idea that you had and apply the law
10 that I -- exactly as I now give it to you.

11 The defendant in this case was arrested,
12 charged, and indicted. And I instruct you that the
13 indictment in this case is not evidence and cannot be
14 considered as evidence of the defendant's guilt nor
15 does it create any presumption or inference of guilt.

16 The indictment is simply the formal written
17 instrument which contains the charges made against
18 the defendant. It serves as a formal document by
19 which this case is processed and brought into this
20 court.

21 To this indictment and to these charges the
22 defendant has pled not guilty. And when that
23 happens, it places the burden upon the State of South
24 Carolina to prove the defendant's guilt beyond a
25 reasonable doubt.

1 A person charged with committing a criminal
2 offense in South Carolina is never required to prove
3 himself or herself guilty -- I mean innocent. They
4 are not required to prove their innocence. The State
5 has the burden of proving their guilt.

6 It is an important rule of law in this country
7 that a defendant in a criminal trial will always be
8 presumed innocent of the crime for which he or she is
9 charged and indicted unless and until his guilt has
10 been proven by evidence which satisfies you, the
11 jury, of his guilt beyond a reasonable doubt.

12 The presumption of innocence is not a mere legal
13 theory. It is not just a legal phrase. It is a
14 substantial constitutional right to which every
15 defendant is entitled.

16 This presumption of innocence accompanies the
17 defendant -- I'm sorry -- accompanies the defendant
18 from the time he's charged, throughout the trial,
19 until you reach a verdict of evidence which satisfies
20 you, the jury, beyond a reasonable doubt of his
21 guilt.

22 Now, proof beyond a reasonable doubt can be
23 described as proof that leaves you firmly convinced
24 the defendant's guilt.

25 There are very few things in this world that we

1 know with absolute certainty. And in a criminal
2 case, the law does not require proof that overcomes
3 every possible doubt.

4 If based on your consideration of the evidence
5 you are firmly convinced that the defendant is guilty
6 of the crime charged, you must find him guilty. If
7 on the other hand, you think that there's a real
8 possibility that he is not guilty, you must give him
9 the benefit of that doubt and find him not guilty.

10 In determining what facts of a case you must
11 consider, you must necessarily pass upon the
12 credibility, which simply means believability of the
13 witnesses, and the weight and value to be given to
14 their testimony.

15 You alone must decide the force and effect, the
16 truth of their testimony. In making these decisions
17 there are many things that you may consider.

18 The appearance and the manner of the witness on
19 the stand, sometimes referred to as the demeanor of
20 the witness. Was the witness forthright or hesitant.
21 Was the witness's testimony consistent or did it
22 contain discrepancies.

23 What was the ability of the witness to know the
24 facts about which he or she testified. Did the
25 witness have a cause or reason to be biased and

1 prejudiced in favor of his or her testimony.

2 Was the testimony of a witness corroborated or
3 made stronger by other evidence or testimony or was
4 it made weaker or impeached by other evidence or
5 testimony.

6 The rules of evidence do not ordinarily permit a
7 witness to testify to opinions or conclusions. An
8 exception to this rule is for witnesses we call
9 expert witnesses.

10 A witness who by education and experience has
11 become an expert in some art, science, profession or
12 calling may state an opinion as to relevant and
13 material matter in which the witness claims to be an
14 expert and may also state the reasons for that
15 opinion.

16 You should consider an expert opinion received
17 in evidence in this case like any other evidence,
18 give it the weight you think it deserves.

19 If you decide that the opinion of an expert is
20 not based on sufficient education and experience or
21 if you conclude that the reasons given in support of
22 that opinion are not sound or that opinion is
23 outweighed by other evidence, you may disregard that
24 opinion in its entirety.

25 An expert's testimony is to be given no greater

1 weight than any other witnesses simply because that
2 person is an expert. Further, you are not to
3 inquire -- not required to accept an expert's opinion
4 even though it is not contradicted.

5 As jurors you have a right to believe a small
6 portion of a witness's testimony and disregard the
7 larger or vice versa. You may believe all of a
8 witness's testimony or none of a witness's testimony.

9 You may believe the testimony of a single
10 witness against that of many witnesses or the other
11 way around.

12 Now, criminal intent is a necessary element of
13 each crime that must be proven by the State beyond a
14 reasonable doubt. Criminal intent is always a matter
15 that must be determined by the jury from the
16 circumstances surrounding the situation.

17 There is no way to prove intent to a
18 mathematical certainty. There is no way medical
19 science can dissect a person's brain and determine
20 what he or she had in mind.

21 So the law states criminal intent may be
22 inferred from the circumstances shown to have existed
23 both before and after the fact. This is how you the
24 jury make a determination of whether or not the
25 elements -- the element of intent was present.

1 Criminal intent is a state of mind that operates
2 jointly with an act or omission in the commission of
3 a crime. Criminal intent is a mental state of
4 conscious wrongdoing.

5 So it is up to you, the jury, to determine what
6 the defendant intended to do based on circumstances
7 shown to have existed.

8 I tell you that the State must prove criminal
9 intent beyond a reasonable doubt just as the State
10 must prove every element beyond a reasonable doubt.

11 There are two types of evidence which are
12 generally presented during a trial, direct and
13 circumstantial evidence.

14 Direct evidence is the testimony of a person who
15 asserts or claims to have actual knowledge of a fact
16 such as an eye witness.

17 Circumstantial evidence is proof of a chain of
18 facts and circumstances indicating the existence of
19 the fact.

20 To give you an example of circumstantial
21 evidence, if I go to bed tonight and I look out my
22 front door and it has snowed all afternoon and my
23 lawn is beautiful and white and there's no tracks
24 going in my front lawn, I go to bed, and I wake up in
25 the morning, I open my front door and there's a set

1 of footprints on the sidewalk to my front door and
2 back to the sidewalk.

3 I did not see anybody walk from the sidewalk to
4 my front door, but I can infer from the circumstances
5 that somebody must have because there's a set of
6 footprints from the sidewalk to my front door in the
7 snow and back. That is an example of circumstantial
8 evidence.

9 The law makes absolutely no distinction between
10 the weight or value to be given either direct or
11 circumstantial evidence. Nor is a greater degree of
12 certainty required of circumstantial evidence than
13 that of direct evidence.

14 You should weigh all of the evidence in the
15 case. After weighing all of the evidence, if you are
16 not convinced of the guilt of the defendant beyond a
17 reasonable doubt, you must find the defendant not
18 guilty.

19 If a crime has been committed by two or more
20 people who are acting together in committing a crime,
21 the act of one is the act of all.

22 A person who joins with another to accomplish an
23 illegal purpose is criminally responsible for
24 everything done by the other person which occurs as a
25 natural consequences of the acts done in carrying out

1 the common plan and purpose.

2 If two or more people acting together -- are
3 together acting together, assisting each other in
4 committing the offense, the act of one is the act of
5 all, sometimes referred to as the hand of one is the
6 hand of all.

7 Prior knowledge that a crime is going to be
8 committed without more is not sufficient to make a
9 person guilty of that crime.

10 The mere knowledge that another person is going
11 to commit a crime, even if the defendant is present
12 when the crime is committed, is not sufficient to
13 convict the defendant as a principal.

14 Guilt as a principal is shown by actual or
15 constructive presence at the scene as a result of a
16 prior arrangement. Therefore, a finding of a prior
17 arrangement, plan, or common scheme is necessary for
18 a finding of guilt as a principal.

19 The State must prove beyond a reasonable doubt
20 by competent evidence that -- by the theory of the
21 hand of one is the hand of all.

22 A principal in a crime is one who either
23 actually commits the crime or who is present aiding,
24 abetting, or assisting in the committing of the
25 crime.

1 When a person does an act in the presence of --
2 of and with the assistance of another, the act is
3 done by both. Where two or more are acting with a
4 common plan or intent and are present at the
5 commission of the crime, it does not matter who
6 actually commits the crime, all are guilty. The hand
7 of one is the hand of all.

8 Presence at the commission of a crime means to
9 be sufficiently near to aid and abet and assist in
10 the commission of the crime.

11 However, mere presence at the scene of a crime
12 is not sufficient to convict one as a principal on
13 the theory of aiding and abetting.

14 Intent is also a necessary element or there must
15 have been a common design or intent to commit the
16 crime. And the crime must have been committed
17 pursuant thereto with the person aiding and abetting
18 by some overt act.

19 Intent means intent -- intending the results
20 which actually occurred, not accidentally or
21 involuntarily.

22 Intent may be shown by acts and conduct of the
23 defendant and other circumstances which you may
24 naturally and reasonably infer intent. The State
25 must prove these elements beyond a reasonable doubt.

1 Mere presence at the scene is insufficient to
2 prove someone guilty of a crime. The burden is upon
3 the State to prove every element of the crime
4 charged.

5 If you find after receiving all of the evidence
6 that the State has proved that the defendant was only
7 present at the scene of the crime and that they have
8 not proved beyond a reasonable doubt any other
9 participation in the crime, then you must find the
10 defendant not guilty.

11 The law is that proof of mere presence at the
12 scene of a crime is not sufficient to find someone
13 guilty. An issue in this case is the identification
14 of the defendant as the person who committed the
15 crime charged.

16 The State has the burden of proving beyond a
17 reasonable doubt the identity of the defendant. You
18 must be satisfied beyond a reasonable doubt of the
19 accuracy of the identification of the defendant
20 before you can convict the defendant.

21 Identification testimony is an expression of a
22 belief or impression by a witness. You must
23 determine the accuracy of the identification of the
24 defendant. You must consider the believability of
25 each identification witness in the same way as any

1 other witness.

2 You may consider whether the witness had an
3 adequate opportunity to observe the offender at the
4 time of the offense.

5 This will be affected by things like how long or
6 how short of a time was available. How far or how
7 close the witness was. The lighting conditions.
8 Whether the witness had a chance to see or know the
9 person in the past.

10 Once again, I instruct you that the burden of
11 proof is on the State and extends to every element of
12 the crime charged. And this is specifically
13 including the burden of proving beyond a reasonable
14 doubt the identity of the defendant as the person who
15 committed the crime.

16 If after examining the testimony you have a
17 reasonable doubt as to the accuracy of
18 identification, you must find the defendant not
19 guilty.

20 I instruct you and emphasize to you the fact
21 that the defendant did not testify is not a factor to
22 be considered by you in any way in your deliberation.
23 And in this question and this consideration of his
24 guilt, the fact that he did not testify cannot be
25 considered by you. It cannot even be discussed in

1 the jury room.

2 The -- a defendant has a constitutional right to
3 remain silent, and the assertion of this right must
4 not be considered by you in your deliberations.

5 I repeat. Under your oath, you're not to
6 draw -- are you draw no conclusions whatsoever from
7 the fact that the defendant in this case did not
8 testify.

9 The fact that this defendant did not testify
10 should not even be discussed as I told you in the
11 jury room. The burden of proof as I have stated to
12 you is on the State of South Carolina. The defendant
13 is not required to prove his or her innocence.

14 The defendant has raised the defense of alibi.
15 In order to establish an alibi, it must be shown that
16 the defendant was at another specified place at the
17 time the crime was committed and that it was
18 therefore impossible for the defendant to have been
19 at the scene of the crime.

20 Mere denial of presence at the scene of a crime
21 does not constitute an alibi. There is no burden on
22 the defendant to prove an alibi.

23 The burden is on the State to prove beyond a
24 reasonable doubt that the defendant was actually
25 present at the scene of the crime, actually

1 participated in it, and that it was -- and was not
2 somewhere else.

3 In other words, the State has the burden of
4 disproving the defendant's alibi defense.

5 The defendant is charged with the crime of
6 murder. The State must prove beyond a reasonable
7 doubt the defendant killed another person with malice
8 aforethought.

9 Malice is hatred, ill will, or hostility towards
10 another person. It is the intentional doing of a
11 wrongful act without just cause or excuse with the
12 intent to inflict an injury or -- or under
13 circumstances that the law would infer an evil
14 intent.

15 Malice aforethought does not require that the
16 malice exist for any particular time before the act
17 is committed, but malice must have existed in the
18 mind of the defendant just before and at the time of
19 the act -- that the act was committed.

20 Therefore, there must be a combination of
21 previous ill intent and the act. Malice aforethought
22 may be express or inferred.

23 These terms express and inferred do not mean
24 different kinds of malice but merely the manner in
25 which the malice may be shown to have existed. That

1 is either by direct evidence or by inference from the
2 facts and circumstances to which -- which have been
3 proved.

4 Express malice is shown when a person speaks
5 words which express hatred or ill will for another or
6 when the person's -- person prepared beforehand to do
7 the act which was later accomplished.

8 For example, lying in wait for a person or
9 another act of preparation going to show that the
10 deed was within the defendant's mind and would be
11 express malice.

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

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

21 The following are examples of instruments of
22 deadly weapons. A pistol, a shotgun, a rifle, a
23 dirk, a dagger, a knife, a slingshot, metal knuckles,
24 a razor blade, gasoline, fire bomb, molotov cocktail.
25 A gun may be a deadly weapon even if it is not

1 operating.

2 The defendant is also charged with possession of
3 a weapon during the commission or attempt to commit a
4 violent crime. The State must prove beyond a
5 reasonable doubt that the defendant was in possession
6 of a firearm or visibly displayed that -- what
7 appeared to be a firearm during the commission of a
8 violent crime.

9 A firearm means any machine gun, automatic
10 rifle, revolver, pistol or any weapon which will --
11 is designed to or may be readily converted to expel a
12 projectile.

13 In order to find the defendant guilty of
14 possession of a weapon during the commission of a
15 violent crime, you must first find the defendant
16 guilty of either committing a violent crime or
17 attempting to commit a violent crime. And I instruct
18 you that murder under our law is a violent crime.

19 Now ladies and gentlemen, you're not partisans
20 either for the State of South Carolina or this
21 defendant. You're not here to reward your friends or
22 punish your enemies.

23 You have been selected by both the State and
24 this defendant to be fair and impartial jurors. It
25 is your duty there by your joint deliberation to

1 determine the truth in this case giving this
2 defendant the benefit of every reasonable doubt on
3 each and every issue.

4 Then to the facts which you determine to be
5 true, you are to take and apply the law which I have
6 now given to you and reach a verdict that speaks the
7 truth.

8 When you have accomplished this, you have --
9 will have satisfied your oath as jurors and you will
10 have discharged your duty to this court.

11 Now, I have had my Law Clerk prepare a verdict
12 form for you. And it is simply the caption of the
13 case, State of South Carolina versus Nathaniel
14 Bradley, and there are two possible verdicts on each
15 count.

16 Count one of the indictment is murder. We the
17 jury unanimously find the defendant, Nathaniel Noel
18 Bradley, one, guilty of murder or not guilty of
19 murder.

20 Number two, we the jury unanimously find the
21 defendant, Nathaniel Noel Bradley, guilty of
22 possession of a weapon during the commission of a
23 violent crime or not guilty of possession of a weapon
24 during the commission of a violent crime.

25 The order that I put them in you're to draw no

1 inference from whatsoever. I just simply had to put
2 them in some order.

3 When you have reached a verdict and it's a
4 unanimous verdict, you're to check the appropriate
5 block and sign your name and date at the bottom. And
6 by signing your name you're confirming to the Court
7 that this is in fact a unanimous verdict.

8 As I told you, you cannot find the defendant
9 guilty of possession of a weapon during a violent
10 crime if you do not find him guilty of murder.

11 So when you go down -- if your verdict on count
12 one, murder, is not guilty, you don't need to
13 consider count two. You only have to consider count
14 two -- because he has to be convicted of a violent
15 crime before count two even applies.

16 I'm going to send you to the jury room. The --
17 I'm going to have to be sure that I didn't forget to
18 tell you anything. I will go over with the attorneys
19 to see if I forgot to charge you on any matter of
20 law.

21 If I do, I will bring you back out and instruct
22 you further. If I have covered everything, then I
23 will send the evidence in the jury room along with
24 this verdict form.

25 When you get this verdict form, that will be

1 your indicator to start your deliberations.

2 While -- throughout your deliberations, if at
3 any point one of you have to get up and be excused,
4 you have got to stop your deliberations until that
5 person returns. All 12 of you must be seated at the
6 table deliberating the entire time.

7 And when you have reached your verdict, if you
8 will simply knock on the door and tell the bailiff
9 that you have reached a unanimous verdict, we will
10 bring you back out and read that verdict to the
11 Court.

12 So I will send you to the jury room. Either I
13 will bring you back out and instruct you further or I
14 will send you the evidence along with this sentencing
15 sheet.

16 My understanding is that the Clerk's ordered
17 y'all lunch, so you will receive lunch some time,
18 hopefully soon, and you certainly hope -- can enjoy
19 your lunch.

20 And you can decide whether you just want to take
21 a break and eat your lunch or whether you want to eat
22 and talk, that's your call. All -- I need all 12 of
23 you present, though, when you talk.

24 So like I say, whenever you get -- someone goes
25 to the restroom, you've got to stop till that one

1 gets back. If you will go to the jury room. I will
2 either send you the evidence or get you back out.

3 (Jury left the courtroom at 12:39 pm.)

4 *THE COURT:* Any exceptions or deletions by the
5 State?

6 *MS. FANT:* No, Your Honor.

7 *THE COURT:* By the defense?

8 *MR. FINNEY:* No, Your Honor.

9 *THE COURT:* All right. If y'all would be sure
10 that all the evidence is there and turn it over to
11 the bailiff, we can send it in the jury room. Y'all
12 have reviewed the verdict form; is that correct?

13 *MR. FINNEY:* Yes, sir.

14 *THE COURT:* Hand the verdict form... y'all...

15 *MS. FANT:* I believe we have been through all
16 the evidence. Get it while...

17 *THE COURT:* Y'all satisfied the evidence is
18 there? If y'all have already done it, that's
19 wonderful.

20 (Jury began deliberations at 12:42 pm.)

21 (Whereupon the alternate juror was excused.)

22 (Whereupon this case was in recess.)

23 *THE COURT:* State ready?

24 *MS. FANT:* Yes, Your Honor.

25 *THE COURT:* Defense ready?

1 MR. FINNEY: Yes, Your Honor.

2 THE COURT: Ladies and gentlemen, I understand
3 that we have a verdict. I understand this is an
4 emotional case. If you do not think you can control
5 yourself -- none of us know what that verdict is.

6 But if you can't control yourself when the
7 verdict is read, you need to leave now. All right.
8 Bring us the jury.

9 VERDICT

10 (Jury entered the courtroom at 2:49 pm.)

11 THE COURT: Mr. foreman, I understand y'all have
12 reached a verdict.

13 FOREMAN: We have, Your Honor.

14 THE COURT: Is it a unanimous verdict?

15 FOREMAN: It is, Your Honor.

16 THE COURT: If you would pass it up, please sir.

17 (Bailiff approached the foreman, then approached
18 the Court.)

19 THE COURT: All right. You may publish the
20 verdict.

21 BAILIFF: Case number 2007-GS-43-390, State of
22 South Carolina versus Nathaniel Noel Bradley. We the
23 jury unanimously find the defendant, Nathaniel Noel
24 Bradley, guilty of murder.

25 As to count two, we the jury unanimously find

1 the defendant, Nathaniel Noel Bradley, not guilty of
2 possession of a firearm during the commission of a
3 violent crime. Dated January 18th, 2008. Signed by
4 the foreperson, Mark Berdeaux.

5 This be your verdict, so say you all by raising
6 your right hand. Thank you.

7 *THE COURT:* Anything further from the State?

8 *MS. FANT:* No, Your Honor.

9 *THE COURT:* Anything further from the defense?

10 *MR. FINNEY:* We would request polling, Your
11 Honor.

12 *THE COURT:* All right, sir. If you will poll
13 the jury for me.

14 *BAILIFF:* Ladies and gentlemen, as I call your
15 name, would you please stand, please? Jeanette
16 Boland Tucker, is this be your verdict? Is this your
17 verdict and still your verdict?

18 *JUROR:* Yes.

19 *BAILIFF:* Thank you. You may be seated. Jackie
20 Bennett, is this your verdict and still your verdict?

21 *JUROR:* Yes.

22 *BAILIFF:* Thank you. Samuel Parks, is this your
23 verdict and still your verdict?

24 *JUROR:* It is.

25 *BAILIFF:* Thank you. Gwendolyn Gaymon, is this

1 your verdict and still your verdict?

2 JUROR: Yes.

3 BAILIFF: Thank you. Cynthia Wolf, is this your
4 verdict and still your verdict?

5 JUROR: Yes.

6 BAILIFF: Thank you. Mark Berdeaux, is this
7 your verdict and still your verdict?

8 JUROR: It is.

9 BAILIFF: Thank you. James McFadden, is this
10 your verdict and still your verdict?

11 JUROR: Yes, sir.

12 BAILIFF: Thank you. Mark Sathewait, is this
13 your verdict and still your verdict?

14 JUROR: Yes, it is.

15 BAILIFF: Thank you. Steven Arscott, is this
16 your verdict and still your verdict?

17 JUROR: Yes, it is.

18 BAILIFF: Thank you. Lora Pressly, is this
19 your verdict and still your verdict?

20 JUROR: Yes, it is.

21 BAILIFF: Thank you. William Bellinger, is this
22 your verdict and still your verdict?

23 JUROR: Yes, sir.

24 BAILIFF: Thank you. Ernest Wactor, is this
25 your verdict and still your verdict?

1 *JUROR:* Yes.

2 *BAILIFF:* Thank you. Your Honor, the jury has
3 been polled and the verdict stands.

4 *THE COURT:* Thank you, sir. Ladies and
5 gentlemen, I want to thank y'all for y'all's service
6 this week. I understand it's been a long week for
7 everybody.

8 You have paid close attention throughout this
9 trial. You have rendered a verdict, and I appreciate
10 your service. I have been telling you all week you
11 couldn't talk about this case with anybody. Well,
12 now you can talk about it with anybody you want to.

13 You can go talk about it at home. You can speak
14 to anyone you want to about your verdict. You don't
15 have to talk to anyone about your verdict.

16 If someone approaches you and asks you about
17 your verdict and you don't want to talk to them, all
18 you have to do is simply say, I don't want to discuss
19 it, and they should not press it further.

20 If they do and you have some concerns, you can
21 report it to this court. But that's your call as to
22 whether you discuss this or not. I appreciate your
23 service.

24 You won't have to serve again for three years if
25 you so choose. But you have done a good job to the

1 citizens of Sumter County by serving this week. I
2 enjoyed being with you.

3 If I run into you in the grocery store or
4 somewhere, I hope you will speak to me and remind me
5 where we met. I look forward to seeing you again in
6 the future and good luck to you. Thank you. You're
7 welcome to leave or you can stay.

8 You can sit in the jury box, you can go sit in
9 the panel or you can go home, whatever you want to
10 do. I'm going to have to deal with the sentencing
11 aspect of this.

12 *THE COURT:* Yes, sir.

13 (Jury dismissed.)

14 *THE COURT:* Any reason we shouldn't proceed with
15 sentencing?

16 *MS. FANT:* No, Your Honor. The State is ready.

17 *THE COURT:* I need the appropriate paperwork.
18 You want to come forward, Mr. Finney? I'm sorry.
19 You got any motions or anything else you want to deal
20 with?

21 *MR. FINNEY:* Yes. Please, Your Honor. On
22 behalf of Mr. Bradley I would move for a judgment NOV
23 or in the alternative for a new trial feeling that
24 the verdict by the jury does not meet the standard of
25 having been reached in a fair and impartial manner.

1 I would note for the record, Your Honor, that
2 this case took five days to try, and it's 3:00 --
3 it's 10 minutes to three in the afternoon and the
4 jury took less than two hours to reach their
5 conclusion.

6 They did not ask for any additional information
7 or testimony, re-hearing testimony. I would say,
8 Your Honor, that this was a very complicated case
9 because there was a -- a lot of issues involved that
10 are not what we consider standard issues.

11 I would ask the Court to look at the information
12 or to consider the information in the verdict itself,
13 to have found him guilty of the greater charge and
14 yet not found him guilty of possessing of a handgun
15 during the crime which could only have been
16 occasioned by a handgun is inconsistent and
17 unattainable conclusion for the jury to reach, and on
18 those bases we would ask the Court to grant a new
19 trial.

20 *THE COURT:* All right. And I respectfully deny
21 your motion. The -- there was sufficient evidence in
22 the record even though it's circumstantial evidence,
23 the jury weighed it, you know.

24 It was a lot of those in this record, and the
25 jury weighed that and credibility of witnesses and

1 came up with their decision which is consistent. And
2 I deny your motion.

3 As far as the verdict, I guess the jury just
4 found that the State did not meet its burden of proof
5 of possession of weapon during a violent crime in
6 that they -- there was no testimony that all -- your
7 client possessed a weapon.

8 But I certainly think that they found that the
9 State had proven beyond a reasonable doubt that he in
10 fact committed the murder and was involved with
11 knowingly aiding and abetting someone who committed
12 the murder, and the verdicts are not inconsistent.

13 Certainly they could feel that the State just
14 didn't give them sufficient evidence to prove beyond
15 a reasonable doubt that he possessed a firearm.

16 MR. FINNEY: Your Honor, let me state as an
17 additional ground that the motions made throughout
18 the trial by the defense that were denied should be
19 reconsidered in light of this verdict and especially
20 in light of the fact that we move to not have the
21 Court charge the hand of one is the hand of all.

22 And that the only way they could arrive at the
23 verdict that they reached would have been to believe
24 that he was in the association with somebody and that
25 the evidence did not warrant that charge, and that

1 therefore as they have speculated based on the
2 charge, that somebody else did the murder and he was
3 there, although there is no evidence in the record of
4 him being present at the time of Mr. James' death.

5 *THE COURT:* And I understand that and the
6 circumstantial evidence involved in this case. But
7 I -- but one of the elements of possession of a
8 weapon during violent crime, the State had to prove
9 beyond a reasonable doubt that he in fact possessed
10 the weapon.

11 But you can certainly could -- you know, it's
12 the same argument that you could have drugs in your
13 system and you could be tested for -- and have
14 cocaine in your system, but that does not meet the
15 standard of possession of cocaine.

16 It's a number of case law in that you have to
17 actually possess the drug. So you can obviously
18 conclude that the only way you could have had cocaine
19 in your system is possess cocaine at one time to get
20 in your system. .

21 I don't know what the jury's rationale is, but
22 certainly you could have used a deadly weapon to
23 commit a violent crime, but the State didn't meet its
24 burden of proof on that element that you possessed
25 that weapon, just was no evidence in the record that

1 he possessed it, you know.

2 No one saw him with a gun, there was no evidence
3 in the record that he possessed a pistol. And the
4 jury found that that -- they didn't infer the State
5 proved it, the State hadn't proved beyond a
6 reasonable doubt that he possessed it with the
7 commission of a violent crime.

8 They found him guilty of committing the violent
9 crime, but decided that the State had not met its
10 burden of proof beyond a reasonable doubt -- all the
11 evidence of possession of a weapon during a violent
12 crime, found him not guilty.

13 And that has happened a number of other times in
14 this -- that the jury looks at the evidence, the law
15 that I give them and make their determination on each
16 and every allegation. I think that it's not totally
17 inconsistent that -- it's happened plenty of times.

18 MR. FINNEY: All right, Your Honor. Of course,
19 we -- just the final point is that the defendant
20 would show that the State relied heavily upon his
21 access to the handgun of Ms. McDuffie and the fact
22 that it was missing and the fact that it has not been
23 found since, and the fact that the young man died of
24 a gunshot wound of a similar caliber, those -- that
25 there was an abundance of relying -- reliance by the

1 State on that testimony to make this circumstantial
2 case, and if the jury did not believe those
3 circumstances, then they should not have believed
4 that he intentionally took the life of this young
5 man.

6 THE COURT: Well, I understand that, but I think
7 there was clear testimony in the evidence that --
8 that the victim was in fact dead and he died as a
9 result of the gunshot wound, that it was not an
10 accident, it was not -- based on the evidence, it
11 wasn't suicide, as a result of being shot three times
12 in a block (sic), he obviously died at the hand of
13 others.

14 The jury has determined that he died at the
15 hands of your client but determined that the State
16 did not meet its burden of proving beyond a
17 reasonable doubt that he possessed a weapon during
18 the commission of a violent crime.

19 And so I think the jury verdict stands. I
20 understand your motions. They're preserved for the
21 record.

22 MR. FINNEY: Thank you, Your Honor.

23 THE COURT: Now, is there any reason we can't
24 deal with sentencing at this time? Yes, ma'am.

25 SENTENCING

1 MS. FANT: Your Honor, the defendant in this
2 case does in fact have a prior criminal history
3 beginning in 1975 for possession of marijuana, 1976
4 housebreaking and three counts of forgery, another
5 possession of marijuana, a petty larceny, in 1978 a
6 housebreaking, unlawful carrying of a pistol, in 1979
7 obtaining goods unlawfully, 1984 arson in the second
8 degree, 1994 unlawful weapon, 1999 grand larceny and
9 receiving stolen goods, malicious injury to real
10 property, and in 2003 assault with intent to kill,
11 failure to stop for a blue light and forgery.

12 Your Honor, the State's main concern in this
13 case is in addition to the brutality of the crime is
14 that this arson conviction that the defendant was
15 convicted of in 1984 was an attempt by him to burn
16 the house down, a trailer down with his wife and
17 children inside.

18 Thank God they survived. His wife in fact saw
19 him do this, and he was convicted of it and spent
20 many years in prison. I believe that's why he lacks
21 a greater criminal history because of that.

22 Our feelings would be that that is just about as
23 serious a crime as you can get combined with
24 something like this where you do this to someone that
25 supposedly is your friend.

1 Your Honor, I do have the family with us today.
2 I'm not sure yet who would like to speak.

3 MR. HAM: My name is Clinton Ham. I'd like to
4 speak on the behalf of my family. For the last two
5 and a half years this has been very hard. I'm pretty
6 sure it'd be that way for anyone else.

7 Been deployed overseas. Talking to my mother at
8 least four to five times a week, praying that she
9 be -- that she's all right. This is a bittersweet
10 day.

11 Reason I say it's a bittersweet day is because
12 bitter days for the Bradley family, that this guy --
13 hope and pray that he don't see a day of light again
14 because if so, this incident would happen -- another
15 incident will happen again.

16 But for my family, we got some source of peace.
17 I would not say a total complete peace because we
18 will never ever get over someone been -- someone
19 getting killed. If you do, something -- you have a
20 serious problem.

21 But I think personally as a human being, myself
22 and some of my family members and my sister that I
23 talk to, they not able to make it, forgive this guy
24 as a human being.

25 I cannot forgive him for what he has done. I

1 don't think I ever will. For him being a man, a
2 human being, and that's living, I forgive him for
3 that. So Mr. Bradley and your family, may God bless
4 you.

5 *THE COURT:* Anyone else?

6 *MS. FANT:* That's all, Your Honor.

7 *THE COURT:* Okay. Anything else from the State?

8 *MS. FANT:* No, Your Honor.

9 *THE COURT:* Mr. Finney?

10 *MR. FINNEY:* Judge, I'm not prepared to make a
11 long summation. Mr. Bradley is 56 years old. He's
12 been in Sumter most of his life. Got a lot of family
13 members here present with him today.

14 And we did not feel that we were going to have
15 this result, obviously. We worked very hard over the
16 last several months getting the case ready. And of
17 course, we have more work to do now that this result
18 has been put on us.

19 I would ask the Court to consider that this
20 young man has been incarcerated for two and a half
21 years waiting for this day in court, that he had a
22 significant quality of life in terms of his working
23 in the community and taking care of family in the
24 community.

25 That's all that you heard about him with the

1 exception of maybe some girlfriends who didn't get
2 along with him and didn't -- didn't like some things
3 he did.

4 But the people who by and large testified in
5 this case, whether they were on his side or the other
6 side said that he was a good fellow, that he was very
7 friendly with Mr. Ernest James, and that it was, you
8 know, it was just shocking that Mr. James met his
9 death.

10 We feel very sorry for the James family, and we
11 are just very shocked by this verdict. I would ask
12 for the mercy of the Court. And do you want to say
13 anything? Would you please listen to Mr. Bradley.

14 *THE COURT:* Yes, sir.

15 *THE DEFENDANT:* I just want to say to Mr. James'
16 family that I didn't kill Mr. James with my hand
17 neither with the capacity of my mind. I love that
18 boy. My family was his family.

19 Y'all live in Cheraw. In the Christmas
20 holidays, the Thanksgiving holidays, he spent
21 Christmas, Thanksgiving with us.

22 I did not kill your brother, your son with my
23 hand neither with the capacity of my mind, and I miss
24 him as well as you do.

25 *MR. FINNEY:* That's all, Your Honor.

1 THE COURT: Okay.

2 (Whereupon there was a pause.)

3 THE COURT: In passing this sentence I'm taking
4 into consideration the nature of this trial, the fact
5 it was a circumstantial evidence trial it was
6 involved in this case.

7 The -- in giving the defendant some benefit of
8 the doubt, the Sentence of the Court is he's
9 committed the State Department of Corrections for a
10 term of 30 years.

11 Understanding he's 56 years old now and the
12 chances of a 30 year sentence is in fact probably a
13 life sentence for him. But as you know, that's the
14 minimum sentence that I can give him.

15 I normally would have given him a life sentence
16 under the circumstances. The victim in this case
17 certainly didn't deserve the death he met. It was a
18 very violent death, and even worse is the way the
19 body was trying to be -- being disposed of.

20 But in light of all of the issues involved in
21 this case, the Sentence of the Court is 30 years.

22 MR. FINNEY: Thank you, sir.

23 (End of requested transcript of record.)
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

I, KATHLEEN RICHARDSON, RPR, CRR, Official Court Reporter for the third Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Sumter County, South Carolina, on the eighteenth day of January, 2008.

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

June 5, 2008



KATHLEEN RICHARDSON, RPR, CRR

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Ralph F. Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NATHANIEL NOEL BRADLEY,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred by denying Bradley a directed verdict, as there was no direct evidence or substantial circumstantial evidence reasonably tending to prove that he had killed Ernest James.

STATEMENT OF THE CASE

On January 14 through 18, 2008, Nathaniel N. Bradley stood trial in Sumter County, before Judge R. Ferrell Cothran, Jr., and a jury, on an indictment charging him with the murder of his close friend, Ernest James, and possession of a firearm during the commission of a violent crime. James was shot three times and his body was dumped in a pond. The State's case against Bradley was purely circumstantial. Although Bradley himself did not testify, defense witnesses established his alibi. There was also testimony of a mysterious third party "from New York or New Jersey," who was seen with Bradley and may have actually been the killer. The jury found Bradley guilty of murder, but not the firearm charge and the judge sentenced him to imprisonment for thirty years, noting that "he's fifty- six years old now and ... a thirty year sentence is in fact probably a life sentence for him."

ARGUMENT

The trial judge erred by denying Bradley a directed verdict, as there was no direct evidence or substantial circumstantial evidence reasonably tending to prove that he had killed Ernest James.

Witnesses described Nathaniel Bradley and Ernest James as “very close friends” and “close as brothers... couldn’t have been no closer.” ROA p. 59 lines 23-25; ROA p. 418 lines 11-15. They had been working together as painters for close to a decade at the time of James’ death. ROA p. 60 lines 1-2.

Shortly before, James had been arrested and the work van he and Bradley owned together impounded. ROA p. 108 lines 16-20; ROA p. 127 line 15- ROA p. 128 line 18. Several witnesses testified Bradley and James were “having some words... arguing with each other” a couple of days before James was killed. ROA p. 63 line 21-ROA p. 64 line 6; ROA p. 128 lines 19-23; ROA p. 234 line 19- ROA p 235 line 7. Bradley and the unidentified stranger from the North were the last people seen with James prior to his death. ROA p. 81 line 7-ROA p. 82 line 3. Bradley and his passenger and James drove off in separate cars. ROA p. 83 lines 1-5. (The existence of this third party is not in doubt, as several witnesses saw him with Bradley around this time. ROA p. 61 line 15- ROA 63 line 15; ROA p. 381 line 10- ROA p. 383 line 2; ROA p. 476 line 18- ROA p. 478 line 20; ROA p. 488 line 21- p. 489 line8.)

James’ body had been wired to a cement block and dumped in a pond. ROA p. 516 lines 4-20. A gun and a cement block were found to be missing from a residence where Bradley and James had been working. ROA p. 146 line 8- ROA p. 150 line 12; ROA p. 153 line 21- ROA p. 154 line 22. One witness testified that, presumably after James’ death but

before his body was discovered, James and the third party had driven slowly past where the body would be discovered. ROA p.477 line 3- ROA p. 478 line 20; ROA p. 488 line 21- ROA p. 489 line 8.

Bradley told James' girlfriend and his brother that "the guy that was in the car with him got out [of] the car and got in the car with Ernest and they left and he... didn't see Ernest anymore." ROA p. 103 lines 6-15; ROA p. 429 lines 14-16. This is what he also told the police. ROA p. 444 line 23- ROA p. 445 line 12; ROA p. 529 line 25 – ROA p. 530 line 17.

Defense counsel unsuccessfully moved for a directed verdict both after the State had rested and after the defense had finished presenting the evidence of alibi. ROA p. 665 line 5- ROA p. 674 line 8; ROA p. 780 line 20 – ROA p. 783 line 3.

A defendant is entitled to a directed verdict when the state fails to present evidence of the offense charged. *State v. Hernandez*, _ S.C._, 677 S.E.2d . 603 (2009). A case may not be submitted to the jury when there is no direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused. *Id.* A mere suspicion will not support a guilty verdict. *Id.*

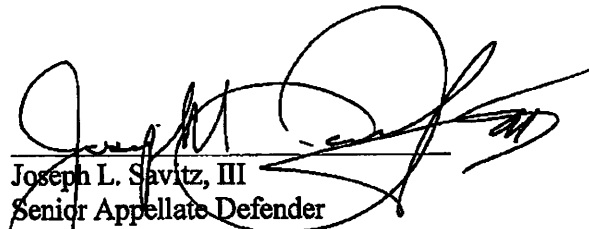
Since there was no direct evidence Bradley killed James, the State was required to introduce substantial circumstantial evidence reasonably tending to prove his guilt. The State failed to meet its burden of proving either that Bradley killed James or his mysterious friend killed James aided and abetted by Bradley. *Hernandez* points out that, while "the traditional substantial evidence charge" has been abandoned, it is nonetheless relevant to measure the adequacy of the State's evidence:

Every circumstance relied upon by the State must be proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

677 S.E.2d at 605, footnote 2. The State simply failed to prove that Bradley killed James.

For this reason, the Court of Appeals should direct a verdict acquitting Nathaniel Bradley of the murder of Ernest James.

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender

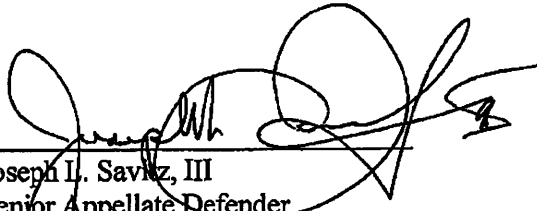
ATTORNEY FOR APPELLANT

This 12th day of January, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 12, 2010



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Ralph F. Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

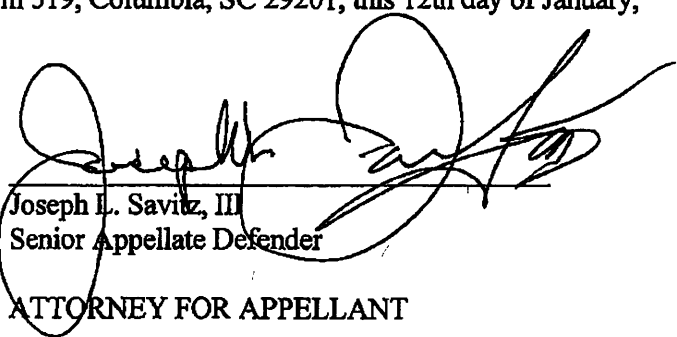
V.

NATHANIEL NOEL BRADLEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of January, 2010.


Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of January, 2010.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: July 1, 2019.

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal From Sumter County
The Honorable R. Ferrell Cothran, Circuit Court Judge**

THE STATE,

Respondent,

vs.

NATHANIEL NOEL BRADLEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred by denying Bradley a directed verdict, as there was no direct evidence or substantial circumstantial evidence reasonably tending to prove that he had killed Ernest James.

COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial judge properly denied Bradley's motion for a directed verdict because, when the evidence presented at trial is viewed in the light most favorable to the State, it is clear that the prosecution presented substantial circumstantial evidence that Bradley murdered the victim - either acting alone, or with the assistance of an accomplice?

STATEMENT OF THE CASE

Appellant (Nathaniel Noel Bradley, "Bradley") is currently incarcerated Lieber Correctional Institution of the South Carolina Department of Corrections, as the result of his Sumter County convictions and sentence. The Sumter County Grand Jury indicted him at the January 2008 term of court for murder and possession of a firearm during the commission of a violent crime (07-GS-43-390), in connection with the May 2005 shooting death of Ernest James. Ernest A. Finney, III, Esquire, represented him on these charges. Assistant Third Circuit Solicitor Catherine Fant prosecuted him for the State.

On January 14-18, 2008, Bradley received a jury trial before the Honorable R. Ferrell Cothran. The jury convicted him of murder but acquitted him of the firearms charge. Judge Cothran sentenced to him to thirty years imprisonment.

Bradley timely served and filed a notice of appeal. This appeal followed.

ARGUMENT

The trial judge properly denied Bradley's motion for a directed verdict because, when the evidence presented at trial is viewed in the light most favorable to the State, it is clear that the prosecution presented substantial circumstantial evidence that Bradley murdered the victim - either acting alone, or with the assistance of an accomplice.

Bradley's sole claim is that the trial judge erred by refusing to grant his directed verdict motion on the charge of murder. The State disagrees and submits that the trial judge properly denied his motion because, when the evidence presented at trial is viewed in the light most favorable to the State, it is clear that the prosecution presented substantial circumstantial evidence that Bradley murdered the victim - either acting alone, or with the assistance of an accomplice.

Viewed in the light most favorable to the State, the evidence showed the following. In May of 2005, Leonard McCray lived in a family home in Rembert, South Carolina, which is in Sumter County. His two brothers, his sister Martha Branson, and Ernest Jones (the victim), who was dating Martha, also lived there. Leonard had met Bradley through the victim. Bradley and the victim worked together and they were friends. However, Bradley and the victim had purchased a van, together, for use in their painting business; and Bradley was upset with the victim because he felt that the victim had cheated him. Leonard explained that the van had been impounded by police when the victim was arrested in Camden, and that the van was impounded on May 21, 2005. **R. pp. 58-60; 68; 75-76.**

On Thursday, May 19th, Bradley and another man came to the family house, and Bradley called the victim out to his car. Although Leonard could not hear what was being said, it was clear that Bradley and the victim were arguing. The other man got out of the car and stood during this argument. When the victim got out of the car, he immediately went into the house. He was

emotionally upset, and Leonard told him that he (Leonard) “had [the victim’s] back.” **R. pp. 63-64; 66-68.**

On Saturday, May 21st, Leonard was at a small club near the family home called Kirkland’s Place, watching softball, when Bradley approached him between 5:00 and 6:00 p.m. Bradley was accompanied by another man, whom he only identified as “his friend.” Bradley asked whether the victim was at the family home. When Leonard said that the victim was at there with Leonard’s brother and sister, Bradley and the other man got into Bradley’s blue Chevrolet Berretta and Bradley drove to the family house. Leonard never saw the victim after his conversation with Bradley. **R. pp. 60-63; 72.**

William McCray also lived in the same family home with Leonard, Thomas McCray, Martha and the victim. William came home between 5:00 and 5:30 p.m. on May 21, 2005. Bradley, whom William had worked with on painting jobs, was there with another man. They were sitting in the blue Chevrolet Berretta (See State’s Ex. 33). William had never seen the other man before, and Bradley told him that the man was from either New York or New Jersey. **R. pp. 78-83; 85-87; 89; 92; 94-95.**

The victim came out of the house minutes after William’s conversation with Bradley. Bradley got out of his car and said that he needed to talk to the victim in private. So, William went into the house. Shortly thereafter, the victim briefly came into the house. However, the victim soon left in Martha’s blue Volvo. Bradley and “his partner” had pulled out just before him, and he was alone. **R. pp. 78-83; 85-87; 89; 92; 94-95.**

The victim’s girlfriend at the time, Martha Ransom, testified that she had known him for slightly over a year; and that they were staying in the McCray family house in late May of 2005. She had met Bradley through the victim and testified that they were “friends and working partners.” In

the week leading up to his death, the victim seemed to be “nervous and agitated.” However, he said nothing was wrong when Martha asked. **R. pp. 96-97; 99-100; 107-08; 119-20.**

Martha explained that the victim and Bradley had jointly bought a van to use in their painting ventures. The victim was arrested in Camden a week or so before his murder, and the van was impounded. The victim tried to get the van back, but he did not have enough money to pay for it. Bradley and the victim had some conversations about the van in the weeks before the murder. While Martha could not hear the details, the victim seemed concerned about them. **R. pp. 96-97; 99-100; 107-08; 119-20.**

On Saturday, May 21, 2005, the victim was asleep¹ when Bradley came to the house and blew his horn. Martha went to the door and Bradley asked her if the victim was there. She told Bradley he was, and she awakened the victim. Bradley was in a small Blue Chevrolet and he was accompanied by a man whom Martha did not recognize. The victim went outside for about ten minutes. When he came back into the house he got the keys to Martha’s Volvo and left in it, following Bradley and the unknown man. The victim was alone. Martha never saw the victim alive again. **R. pp. 100-03.**

Because the victim did not come back home that night, Martha became concerned. She called Bradley the next morning, using the victim’s cell phone, and she asked Bradley whether he knew where the victim was.² Bradley told her that the unknown man, who had been in his car, got

¹ The victim had not been drinking in her presence the previous day. **R. p. 100.**

² It was unusual for the victim not to call and tell her that he was not coming home if he was not coming back at night. **R. pp. 103-05.**

out of his car at the end of the road and got into the victim's car. Bradley said that he had not seen the victim after those two men left. **R. pp. 103-05.** On Monday, May 23rd, Bradley called her and asked where the victim was because they supposedly had some jobs to do. **R. p. 114.**

Donna McDuffie testified that she is a resident of Bishopville, South Carolina. She had know the victim for five or six years, and she hired Bradley to do some painting for her over six months before the murder. The victim helped Bradley with the painting, and she paid Bradley for it. At that time, the victim and Bradley seemed to be friends. She trusted both men because she knew the victim. **R. pp. 121-25.**

Mrs. McDuffie testified that she and Bradley had never had a physical relationship, and she denied that they had never been boyfriend and girlfriend. Bradley had said that he had previously slept at her house, but he had not. On the week before the victim was murdered, Bradley called Ms. McDuffie "out of the blue" about painting the doors that he and the victim had not painted. Ms. McDuffie told him that would be okay and she left a spare key out for him.³ Bradley told her that the victim had stolen the van and that it had been impounded.⁴ Bradley wanted to get it out of the impound. Ms. McDuffie ascertained from him how much that would cost, and she agreed to give him one-half of the amount he told her. He told her that he could come up with the rest of the money. Bradley also told her that he was going to "get Ernest." Ms. McDuffie asked him not to "do anything

³ Thus, it was possible for Bradley to get into her house without her knowledge.

⁴ She did not believe that the victim had stolen the van because the two men were friends. **R.**

stupid.” Bradley also gave her a telephone number and told her that she should call “Betty” if he got in trouble because her husband was a bail bondsman. R. 125-28; 135-36.⁵

Ms. McDuffie thereafter met Bradley at the area Penny’s on Thursday, May 19th, and she gave him the money that she had promised. Another man was also present near Bradley. However, Bradley did not introduce the man to her, and she did not know the man. Bradley also telephoned Ms. McDuffie on Friday night, May 20. R. 128-32.

At this point in her direct examination, Ms. McDuffie’s testimony became evasive and inconsistent with her statement to law enforcement. She also testified to several minor details that were specifically denied by law enforcement. *See* R. pp. 132-45; 145-70. Therefore, the State was permitted to introduce her May 27, 2005 statement to law enforcement as State’s Exhibit 42 (R. pp. 784-85), R. pp. 208-09; and the State was later allowed to publish her written statement as a prior inconsistent statement under Rule 801(d)(1)(A), SCRE. R. pp. 563-66. Because her May 27th statement is more favorable to the prosecution’s case than her inconsistency on the remaining matters to which she testified and because her prior statement was admissible as substantive evidence, *see State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), Respondent will rely upon the statement in connection with this argument.

In pertinent part, she told law enforcement that:

pp. 127-28.

⁵ Officers later determined that the number that Bradley had given to McDuffie belonged to Dorothy Nelson Bradley. R. p. 572.

We also spoke again Friday night. He stated that he was lost in the woods and trying to find his car. He said that he was at the end of the road and he said give me a ride. I don't know who he was talking to.

He called me early Saturday morning and said that he was at a friend's house and was thinking about painting a lady's house. In the background I could hear a lady cursing. He then said that he'll talk to me later.

Nate called . . . me back Saturday around 1:00 p.m. and said that he needed to talk to me, but I told him I wasn't going to be home and my cousin was staying with me. He said okay and hung up.

Nate called me around 9:00 a.m. Sunday leaving a message for me to leave \$10.00 for him. I called him back and left a message for him that the money would be under the flower pot. I then went to church.

I returned home around 6:00 p.m. and checked the flower pot and the money was gone. After Sunday I hadn't talked to Nate until about 9:00 p.m. Monday. He came by my house to talk with me. He acted like he was upset or scared.

He said that something happened to Ernest. He said that Ernest was killed. I asked him what happened, what happened to Ernest, and said that he couldn't talk to me. He said that he wasn't going to get me in any trouble, and he left.

I told him to call me later. I asked about his eye, and he said that he hit it on a – a cabinet. Nate called back Monday night about 10:00 p.m. saying that he needed to talk to me.

I asked him what happened to Ernest, but he said that he couldn't talk to me on the telephone and that he needed to talk to me in person. He said that the phones might be tapped. He asked me to come – to come out, but I told him I couldn't, so he hung up saying – he hung up – excuse me – saying that he couldn't talk to me.

After this conversation I hadn't talked to him since. I noticed my .38 caliber pistol missing on Thursday, May the 26th, 2005. I bought it from Brooks in Bishopville and reported it missing today, May the 27th, 2005. Nate knew where I kept the gun and my key that I had outside.

R. p. 565, l. 10 - p. 566, l. 24. See also State's Ex. 42.

Both Bradley and the victim knew that she had the gun. **R. pp. 158-59.** Officers eventually obtained her .38's serial number and they entered it N.C.I.C. However, they never successfully

located it. **R. pp. 347-50.**

With respect to Ms. McDuffie's trial testimony, Respondent would further note that there was an impediment to her recalling dates and conversations precisely. She had kept all of the important information in her life on a calendar. However, this calendar was stolen during a break-in of her home. Although she denied that she suspected that Bradley was involved in that crime, a reasonable inference is that he was behind it because **the break-in did not occur until after she had met with defense counsel and the defense investigator, and it was the only item that was stolen. R. pp. 164-67; 199-200.**

Thomas and Robin McCutchen live near the Broad Branch Cemetery in Bishopville, South Carolina. On Sunday afternoon, May 22nd, the McCutchens saw a burned up vehicle when were in the area of the cemetery. Therefore, they called the police and reported it. Neither of them touched the car, and Mrs. McCutchen testified that the vehicle had not been there the previous day. **R. pp. 210-20.** Although defense counsel tried to establish that it was unreasonable to believe that anyone would burn the car in broad daylight, the McCutchens told Sergeant McMillan that it would not be unusual to see smoke or something burning in the area because the area was being cleared out and loggers often burned debris. **R. p. 585.**

In 2005, Mr. Carol Lloyd, Jr., was employed by the Lee County Sheriff's Department. He received the report of the burned car around 3:35 p.m. on May 22, 2005, and he responded to the Broad Branch Cemetery. He spoke to the McCutchens, who told him what they had found. The cemetery is located between forty and sixty yards off of St. Charles Road. The vehicle he saw appeared to be a mid-1990's Volvo 240DL. (See State's Exhibit 43). Mr. Lloyd was able to obtain a partial VIN from the Volvo. The car was thereafter towed to a local garage. **R. pp. 221-29.**

Gloria Portee testified that she is from Rembert, and that she knew the victim because he had

dated her friend. The victim had introduced her to Bradley and she had dated Bradley "on and off" for roughly a year, in May of 2005. She described the victim and Bradley as friends and co-workers. On Thursday, May 19th, she and Bradley stayed together, in an effort to reconcile their relationship. **R. pp. 193-97; 200-51.**

He drove her home on Friday morning, May 20th, in his Berretta. When they reached her house, they began a discussion about the van being impounded. Bradley told her that "as much as he [did] for Ernest, he was tired of Ernest fucking him around, and if Ernest [didn't] have his van back by Monday, he was going to kill Ernest." Bradley was mad at the time. He also told Gloria that he had a gun in his car. Gloria took his threat seriously. **R. pp. 193-97; 200-51.**

Gloria did not have any further contact with Bradley after that, and she refused to take his call when he called her. However, he wrote her a letter on March 1, 2006. While much of this letter purports to be a love letter and a marriage proposal, he asked her in the "love letter" how she could have provided law enforcement with the same information to which she testified at trial. He also suggested that Gloria was mad at him either because he owed her money or because he had been romantically involved with another woman. (*See State's Exhibit 50, R. pp. 786-90*). Gloria did not view the letter as a love letter; and she let her sister read it, instead of reading it herself. **R. pp. 239-45.**

Although Gloria did not have any further contact with Bradley, he wrote her a second letter (*State's Ex. 52, R. pp. 791-93*), in which he again professed his "love" for her and asked to see her. Gloria again testified that the letters were not truly love letters, despite their tenor. She explained that Bradley was not the type of person who wrote letters, and that when they were together, their relationship had its "ups and downs." She also denied that Bradley owed her any money, and she testified that she was afraid of him. **R. pp. 245-48; 250-51.**

Matt Bramlett lives across the street from the Broad Branch Cemetery in Bishopville. Early in the morning of Saturday, May 22nd, his dog began barking and barked continuously for twenty or thirty minutes. Mr. Bramlett got up, went outside and called his dog to the porch, to make the dog stop barking. However, by the time that Mr. Bramlett got back into bed, his dog had gone back to the same spot in his yard - across from the cemetery - and again barked for at least twenty or thirty minutes. This was unusual for his dog, who had not done this in the eight years that Mr. Bramlett had owned him. Also, his dog would have chased off any animals. **R. pp. 312-17.**

Tracy Dayton testified that she attended a cookout at the Sumter County home of Bradley's ex-wife, Lubertha Bradley, on Sunday, May 22, 2005. At some point, Bradley arrived. He was with another man. Bradley did not introduce her to the other man, but he referred to the man as his "partner." At Bradley's request, Drayton prepared some food for the men. **R. pp. 369-71; 374-75.**

Lubertha Bradley testified that she had a small cookout on Sunday afternoon, May 22nd. Somewhere around 2:00 or 3:00 p.m., Bradley (her ex-husband) arrived with another man, whom he referred to as his "partner."⁶ Lubertha had never seen the man before. They were in Bradley's blue Berretta. Lubertha had not invited Bradley to the small gathering. **R. pp. 379-82.**

Both men ate food while they were at Lubertha's residence, but Bradley's "partner" never got out of the car. Bradley left the party for a brief period of time in the vehicle of Lubertha's daughter. However, he returned and tinted the windows of that vehicle. In all, Bradley and "his partner" were there "off and on" for two hours before they left in Bradley's Berretta. **R. pp. 382-84.**

Wayne Anthony Johnson testified that he was Bradley's son-in-law, and that he is married to Bradley's youngest daughter. Wayne, the victim and Bradley had all worked together on painting

⁶ She had not invited Bradley to the cookout.

jobs. Two or three weeks before the murder, Bradley and the victim had an "altercation" on the telephone. Bradley was not "mad" but he was upset. The victim was on the speaker phone during the conversation. Bradley told the victim that he did not like what the victim had done and that, if the victim did not leave town, then Bradley was going to "send some boys at" the victim. The victim was upset; and he told Bradley that they were good friends and had been friends for a long time. In response, Bradley simply laughed. The victim called back or short time later and said the same thing. Wayne was under the impression that the dispute concerned a woman. **R. pp. 395-400; 411-13.**

Although Wayne claimed that he had not thought that Bradley intended to physically harm the victim, he admitted that it was possible. He also testified that Bradley was "very straightforward" and did not "bite his tongue." **R. pp. 397-98; 406; 412.** More importantly, Bradley called Wayne sometime after the victim's death and after there was some suspicion that Bradley was involved in the killing. He asked Wayne to help him move his girlfriend's car. Before Wayne met with Bradley, he armed himself with two butcher knives and three steak knives. At trial, he explained that he was "being defensive" before their subsequent meeting. **R. pp. 414-16.**

Darnell Koenig testified that he is a commercial airline pilot. In 2005, he and his wife owned a six acre lot near Boyle's Pond. On Sunday morning, May 22nd, he was "dressing up the entryway" to their property because they were "getting ready to build the house." Around 9:30 a.m., he saw a blue Volvo sedan turning onto his street and headed in the direction of the pond. The car was traveling slowly, as if the occupants were looking for something. As the car drove slowly by him, he and the driver made eye contact for ten to fifteen seconds. He continued to watch the car until it left his sight. He could tell that there were two black males in the car but he did not get a closer look at the passenger. The car returned shortly thereafter, traveling in the opposite direction. He noticed

that the car had a yellow, temporary tag with red writing on it. **R. pp. 472-84; 507-08.**

He learned about a body being found in Boyle's Pond on the next night. So, he contacted law enforcement and told them what he had seen on May 24th. He met with Inv. Bennie Barfield on Wednesday and repeated what he had seen. On Thursday, May 26th, Sergeant Clarence McMillan and Investigator Wesley Gardner met him at his house and they showed him a photographic lineup. Before he looked at the lineup, he described the person he had seen as having very short hair, with light facial hair, a fairly thin face and "a different look to his mouth." Also, a picture of Bradley had not been distributed as a possible suspect, and Mr. Koenig had not seen Bradley. When shown the photographic lineup, he immediately selected Bradley's photograph as the man he had seen driving the blue Volvo. He was 100% positive in his identification. He likewise identified Bradley in court. **R. pp. 484-90. See also R. pp. 461-63; 471-73; 554-62.**

Martha Ransom confirmed that she had purchased her blue Volvo at Easy Auto Credit and that it had a paper tag on it. **R. pp. 377-78.** Sergeant McMillan testified that his investigation reflected that the Easy Auto paper tag would have been bright yellow. Also, the partial VIN number obtained from the burned car was consistent with the VIN number for Martha's blue Volvo. Moreover, there was a G.P.S. chip in the car that would allow the car dealership to monitor the car's location when parked. However, this chip was not functioning on Martha's car, which indicated that the vehicle was probably destroyed or parked in a garage where the chip would not give a signal. **R. pp. 526-27.**

On Monday afternoon, May 23, 2005, Walter Lunberg was taking his children fishing on Boyle's Pond in Sumter County. As he approached the bridge, he saw something floating in the water. They parked the car and got out of it. When he got closer, he realized that it was a dead person. So he sent his children back to the car and he called 911. He stayed there until law

enforcement arrived. **R. pp. 8-11.**

Captain James Turner, of the Sumter County Sheriff's Department testified that he and other officers responded to the scene sometime after lunch that day. He estimated the time as between 1:30 and 2:00 p.m. He is also a certified diver, and he brought his diving equipment with him. The victim, Ernest Jones, was in roughly six feet of water and in "a vertical position." When he investigated, Captain Turner discovered that a concrete cinder block was tied to the victim's leg with a clothes hanger. Captain Turner did not disturb the body and it was eventually retrieved from the pond. **R. pp. 14-22. See also R. pp. 24-37; 516.**

Sergeant Ray MacKessy, who photographed the scene at the pond, testified that it was obvious that the victim had been shot. **R pp. 34-36.** Fortunately, the victim had a South Carolina ID card and an old address. **R. pp. 517; 524-25.**

Bobby Lee Hughes testified that the victim was his oldest brother. Although Bobby lived in Cheraw, he had previously lived in Sumter and he knew Bradley "somewhat." Bradley and the victim were "the best of friends, they [were] about as close as brothers." **R. pp. 417-18.**

Bobby received a call on Monday, May 23, 2005, notifying him that his brother had been murdered. Bobby then called his parents and his brother, and he "got the family together." His family first stopped at the residence of Jean Spann, the victim's former girlfriend. In turn, Spann directed them to Martha's residence. After meeting with Martha Ransom, they also met with the coroner and learned, officially, that Ernest was dead. **R. pp. 418-20; 425.**

Following their meeting with the coroner, they returned to Jean Spann's residence in Rembert. Bradley thereafter arrived in his Berretta. Bradley spoke to the entire family, then, he had a private conversation with Bobby. "At first, he was kind of boo-hooing, and crying. To me . . . he wasn't upset[.]. . . he was play [] crying." Bradley also told Bobby about the last time that he

supposedly saw the victim. **R. pp. 420-21; 427-30; 434-35.**

Bradley claimed that an unknown person was present at the victim's Rembert residence when Bradley arrived. Bradley did not know the man. All three men were supposed to do something together,⁷ but Bradley supposedly could not participate because he had picked up his daughter or step-daughter from the hair dresser. Bobby did not believe Bradley because the victim would not have done anything with someone he did not know well. However, his brother probably would have participated if Bradley had told the victim that the person was his partner. **R. pp. 421-23.**

Bobby also testified that he was aware that there was some dispute between Bradley and the victim over Barbara Jean Williams. Further, the victim called Bobby about two weeks before his murder. In response to what the victim told him, Bobby told the victim that he was not going to come to Sumter and intervene in a dispute between the victim and Bradley, only to have the two be best friends the next day. He reacted this way because he had received similar calls every other week for the previous six months. **R. pp. 423-25.**

Sergeant Clarence McMillan, of the Sumter County Sheriff's Department, testified that he was the chief investigator assigned to this case. He first became involved in the case after the victim's body had been discovered on May 23rd, and he actually was present when the victim's body was retrieved from the pond. After discovering the South Carolina ID card, he went to Jean Spann's residence. She told him that she and the victim had previously lived together but that he was dating Martha Ransom. Jean gave him Martha's address and the names of several other persons with whom

⁷ Through Sergeant McMillan, jurors learned that Bradley had told Bobby that the victim and Bradley had planned to rob a drug dealer, with the assistance of this unknown third person. **R. p. 528.**

he should speak. R. pp. 512-25.

Sergeant McMillan then went to see Martha and briefly spoke to her. On May 34th he discovered where Martha had purchased her Volvo; and he met with the victim's family, along with several other investigators. Bobby Hughes provided the officers with the information to which he testified at trial. Bobby also gave a formal statement and he gave the officers Bradley's business card, which had Bradley's phone numbers on it. Sheriff Dennis was able to contact Bradley, who came to the law enforcement center between 2:00 and 3:00 p.m. on May 24th. R. pp. 525-29.

Sergeant McMillan, Sheriff Dennis, Lieutenant David Florence and Investigator Wesley Gardner were all present for this interview. Bradley was not under arrest and he was told that he was free to leave if he wanted. When asked when he had last seen the victim, Bradley said that he saw an unknown person walking down the road as he was headed to the victim's resident on Saturday, May 21st. Bradley picked up this stranger and gave him a ride to the victim's house.⁸ R. pp. 444-47; 454-56; 529-30; 532.

The victim came out of the house and got into the Volvo and drove to the end of the road. At that point, this man that Bradley did not know got into the Volvo with the victim. Allegedly, this was the last time that Bradley had seen the victim. When asked where he had been on Saturday night, Bradley claimed that he had gone to the Bishopville home of his girlfriend, Ms. McDuffie; and he said that he had stayed there that night. Officers asked Bradley if he would call McDuffie to verify his story. When he replied that his cell phone was dead, Sergeant Florence loaned Bradley his cell phone. Bradley then dialed a number and said no one answered. R. pp. 445-46; 454-56; 530-34.

Sergeant Florence retrieved his phone and left the room. Using "caller retrieve," he got the

⁸ Bradley did not disclose that he had been to Kirkland's Place before he went to see the victim. R. p. 530.

telephone number that Bradley had dialed. Sergeant Florence called Sergeant McMillan out of the room where they were interviewing Bradley, and he showed McMillan the number. Sergeant McMillan called the number. The woman who answered identified herself as Ms. McDuffie. She verified that she knew Bradley. However, she denied that Bradley had spent the night at her house on the 21st. Instead, she said that he had called her that night. **R. pp. 446-47; 454-56; 534-35.**

McDuffie was also asked whether or not Bradley was her boyfriend. She said no and she described their relationship as "friends." Sergeant McMillan returned to the interview room and told Sergeant Florence what Ms. McDuffie had said. The officers present testified that Bradley was "agitated" and "nervous." He asked whether he was under arrest and they told him he was not. He immediately refused to answer any other questions and he left. **R. pp. 446-47; 454-56; 535-36.**

During this interview, the officers who were present had noticed that one of Bradley's eyes was "bloodshot red." They asked him what had happened to it, and he told them that a limb caught him in the eye while he was doing some painting. **R. pp. 550-51.**

Major Simon, of the Lee County Sheriff's Department, contacted Sheriff Dennis on the evening of the 24th and told him about the Volvo they had seized. **R. pp. 350-53.** Sergeant McMillan testified that he and Investigator Gardner thereafter went to the garage where the vehicle was stored and, at their request, it was moved to a more secure location. Sergeant McMillan "could tell that some type of accelerant" had been used to burn the car. The parties stipulated that a SLED agent who subsequently processed the vehicle did not retrieve anything of evidentiary value. **R. pp. 536-39; 544-45; 547.**

When Sergeant McMillan went to the law enforcement center on May 25th, he unsuccessfully tried to call Bradley. Sergeant McMillan left a message in Bradley's voicemail asking Bradley to

come back in and talk to him. Bradley later called and said that he would come in that evening.⁹ Then, an investigator contacted Barbara Jean Williams, Tanisha Williams, and Eloise Sinkler. The investigator then relayed the information that she gathered to Sergeant McMillan. R. pp. 540-43; 547-48.

When Bradley arrived, he was told that he was free to leave but Sergeant McMillan wanted to "clarify some things" that he had told the officers on May 24th. When asked whether he was sure that he had stayed at Ms. McDuffie's house on the previous Saturday, he said yes. Sergeant McMillan then told him that when McMillan spoke to Ms. McDuffie, she had said that Bradley had called her that night but he did not stay there. R. pp. 456-57; 548-49.

At that point, Bradley changed his story and said that he had stayed with Barbara Jean Williams and that he had taken Tanisha Williams to the hair dresser. He had also gone to visit one of his daughters. When Sergeant McMillan told him that officers had spoken to those individuals and that they denied that he had stayed there, he again changed his story. This time he claimed that he had stayed at a residence that he was painting and that a white man was watering the grass when he left at 6:45 a.m. R. pp. 456-57; 549-50.

Curiously, he did not give officers the address of this supposed house. Also, he had not mentioned either Barbara Jean Williams or this empty house in his earlier interview. Again, Bradley became agitated when Sargent McMillan told him that his story was inconsistent with the other information that the officers had. He asked whether or not he was under arrest, said he was getting the hell out of there, and he got up and left around 3:30 p.m. or so. R. pp. 456-57; 550-51.

⁹ Before he came in, officers discovered that he was driving the blue Berretta and they had it under surveillance. R. p. 542.

Following Mr. Koenig's identification of Bradley on May 25th, Sergeant McMillan obtained an arrest warrant charging Bradley with the victim's murder. **R. p. 561.** As discussed, Ms. McDuffie gave a statement to the officers on May 27th. Sergeant McMillan, Investigator Gardner and Major Simon were all present at that time. Following the interview, the officers went to her Bishopville residence, and they discovered that a concrete cinder block similar to the one found attached to the victim's leg, was missing. Ms. McDuffie was unaware that it was missing. The officers did not take another block with them. Also, Ms. McDuffie showed them the bullets for her .38 caliber handgun but they did not take a bullet with them. **R. 347-55; 457-58; 562-63; 567-71.**

Dr. Joel Sexton, the renown forensic pathologist, performed the autopsy on Ernest's body. Dr. Sexton opined that the body had some early decomposition. He also found linear scrapes on the victim's forehead and chest that were "most consistent with being [made] after death." The only injuries found that had occurred while the victim was alive were the gunshot wounds. One wound entered the outer aspect of the victim's left elbow, exited the inner aspect of the elbow and entered the left side of the victim's body. This bullet traveled a short distance, stopping in the soft tissue in between the skin and abdomen. Dr. Sexton recovered this projectile. This was a superficial, non-fatal wound. **R. pp. 260-71; 274; 281-84; 291-92.**

The second wound entered the left side of the victim's head in the area of the temple, and it exited on the right side of his head. This was the fatal wound. The third wound entered the victim's back, "fairly close to the middle of the back." It went into the spinal cord and traveled up to the base of his neck. This would definitely would have paralyzed the victim from the waist down and "perhaps even his arms." Also, he would not have been conscious or moving after receiving this injury, and Dr. Sexton opined that this wound was potentially fatal, but opined that the gunshot to the head was the cause of death because it passed through vital areas of the brain. He was also able to

remove this bullet. **R. pp. 271-74; 281-84.**

Dr. Sexton conceded that he could not tell in which order the three wounds were inflicted. However, he opined that the sequence was more consistent with the wound to the arm occurring first, with the victim's arm raised somewhat, and the head wound was last. Because there was no evidence of either stippling or tattooing on any of the gunshot wounds, Dr. Sexton opined that the victim was at least one to one and one-half feet away from the gun when he was shot. **R. pp. 272-78; 285-88.** He further opined that the scrapes on the victim's forehead and chest were consistent with his body being dragged over some surface. Dr. Sexton did not find any evidence that the victim had been in a fist fight. **R. pp. 280-81; 289.**

Dr. Sexton was unable to give a specific time of death, but opined that his findings were not inconsistent with the reports of when the victim was last seen alive and when his body was found. He again opined that the gunshot wound to the head was the cause of death, and he opined that the manner of death was a homicide. **R. pp. 289-95; 307-11.**

SLED Agent Samuel Heighley is an expert in toxicology, who received the blood and urine samples as well as tissue samples that were taken by Dr. Sexton at autopsy. He performed a blood alcohol analysis and a series of drug screens on the blood sample and he performed an alcohol test on the urine sample. The test revealed a blood alcohol level of 0.217% weight by volume, but the drug screens were negative for amphetamine and methamphetamine, barbiturates, Benzodiazepines, cannabinoids (marijuana) and cocaine or cocaine metabolites. The urine test showed a blood alcohol level of 0.245% weight by volume. The legal limit for driving at the time of Bradley's trial was 0.08%. **R. pp. 339-46.**

SLED agent Tracy Thrower is an expert in firearms identification. He testified that he cannot identify a specific firearm with a particular bullet unless he has both a firearm and a fired bullet. The

two bullets that Dr. Sexton retrieved at autopsy were provided to him for analysis. By examining the “overall physical characteristics” of these bullets (including their shape, size and weight), Agent Thrower determined that “they were most consistent with lead bullets that are loaded into some 38 special or 357 magnum cartridges.” Using a database of firearms manufacturers, he compiled a list of firearms that could have fired the two bullets. A .38 caliber Rossi has the same general rifling characteristics of the bullets that he examined; but he conceded that other weapons were likewise consistent. **R. pp. 322-29; 333-34.**

A 9 mm. Highpoint handgun was located, at some point, in an area reasonably close to where the victim’s body was found. It was sent to SLED for testing as a matter of the Sumter County Sheriff’s Department’s protocol, rather than because there was any reason to believe that the weapon was connected to this murder. **R. pp. 437-39.** Agent Thrower determined that the 9 mm. was inconsistent with the bullets that killed the victim. **R. pp. 328-29.**

Bradley moved for a directed verdict at the conclusion of the State’s case. He argued that the State had failed to prove that he was involved in the crimes. He further argued that the State had failed to prove the county in which Ernest Jones had died or the time and place of his death. *Contra State v. Allen*, 266 S.C. 468, 480, 224 S.E.2d 881, 885 (1976) (“where some acts material and essential to the offense, and requisite to its consummation, occur in one county and some in another, the accused may be tried in either”); *State v. Owens*, 293 S.C. 161, 166, 359 S.E.2d 275, 277-78 (1987) (Court stated that “[v]enue in a criminal case need not be affirmatively proved if there is sufficient evidence from which it can be inferred” and held that because the facts indicated that the victim was last seen at his Horry County residence, “where there were found signs of a struggle [and the] ransom money was demanded and delivered in Horry County” the evidence was sufficient to establish venue in Horry County). The trial judge denied his motion. **R. p. 665, l. 5-p. 674, l. 8.**

The trial judge denied his renewed motion, which he made after the defense had presented its case.
R. p. 780, l. 20-p. 783, l. 25.

“In reviewing a motion for directed verdict, the trial judge is concerned with the existence of evidence, not with its weight.” *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) . On appeal, a reviewing court must review the evidence in the light most favorable to the State. *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). *See also State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886 (App.2005); *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct.App.2003). “If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” *Id*; *Curtis, supra*. *See also State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989), *cert. denied*, 493 U.S. 895 (1989); *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); *State v. Wilds*, 355 S.C. 269, 584 S.E.2d 138 (Ct.App.2003).

South Carolina has defined the crime of murder as the “killing of any person with malice aforethought, either express or implied.” S.C. Code Ann. § 16-3-10 (2003). *See also Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005). “Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. [*Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69]. It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).” *State v. Reese*, 370 S.C. 31, 39, 633 S.E.2d 898, 902 (2006).

Respondent submits that the prosecution’s evidence was more than sufficient to withstand the directed verdict motion and that the trial judge was thus required to submit the question of Bradley’s guilt to the jury. *See Edwards, Epes and Littlejohn, supra*. *See also State v. Weston*, 367 S.C. 279, 293-95, 625 S.E.2d 641, 648-49 (2006); *State v. Williams*, 303 S.C. 274, 400 S.E.2d 131 (1991)

(affirming denial of directed verdict where victim was employed by and last seen with the defendant and victim's decomposed body was found 7 ½ months later); *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997); *cf. State v. Owens*, 293 S.C. at 166, 359 S.E.2d at 277-78. Moreover, Bradley errs by relying on the Supreme Court's decision in *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009). According to the Court's decision in *Hernandez*, all the prosecution failed to establish "any evidence such as acts, declarations, or specific conduct to support" an inference of knowledge under the marijuana trafficking statute, S.C.Code Ann. § 44-53-370 (Supp.2009). Rather, the prosecution merely proved that the petitioners' actions in *Hernandez* "may have been suspicious." 382 S.C. at 624-26, 677 S.E.2d at 605-06.

Here, however, the State's evidence reasonably tended to prove that the victim was clearly murdered. Further, the State presented substantial circumstantial evidence identifying the defendant as the assailant. Specifically, the prosecution presented evidence showing that:

- Bradley had threatened to kill the victim two weeks before the murder because of a dispute over a woman.
 - Several witnesses testified that Bradley had made threats to kill the victim in the days immediately before the murder because the victim had caused the van to be impounded; and he told his girlfriend at the time, Gloria Portee, that he had a gun in his car and that he was going to kill the victim if the victim did not get the van back to him by Monday, May 23rd.
 - Bradley gave Ms. McDuffie a telephone number and told her that she should call "Betty" if he got in trouble because her husband was a bail bondsman, following a conversation in which he had threatened the victim
- Bradley was the last person seen with the victim, on the afternoon of Saturday, May 23rd, as the victim, driving Martha's blue Volvo, followed Bradley and Bradley's mysterious "partner."
- Several witnesses saw Bradley and the unknown man, who was supposedly from New York or New Jersey, but Bradley would never introduce the man by name and the man never said anything.

- Bradley had free access to Donna McDuffie's .38 caliber Rossi revolver,¹⁰ which was a gun consistent with the weapon used to kill the victim; and Ms. McDuffie's weapon turned up missing after the murder.
- The victim's body was placed in a pond with a concrete cinder block to anchor it and thereby conceal it. Also, the car the victim had been driving was burned to destroy possible evidence.¹¹
- A concrete cinder block that was consistent with the one tied to the victim's leg was also recently taken from Ms. McDuffie's yard, without her knowledge.
- At least two witnesses testified that they noticed an injury to Bradley's eye, which they described as bloodshot.

¹⁰ He had called Ms. McDuffie "out of the blue" about painting the doors that he and the victim had not painted, and she left him a spare key to her residence,

¹¹ The jury could infer from the destruction of the car and the hiding of the body in the pond that Bradley murdered the victim and he took these actions to cover up his crime. *See State v. Al Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct.App. 2003) (Concealment of the body of a person is a circumstance that tends to show guilt and should go to the jury to weigh the evidence); *State v. Epes*, 209 S.C. 246, 265, 39 S.E.2d 769, 777 (1946) ("The action of the appellant in concealing the body of his wife so as to divert suspicion from himself, was a relevant circumstance tending to show guilt, and it was for the jury to estimate its weight, and it was for the jury to determine whether his explanation and the motive he assigned were truthful or otherwise"). *See also State v. Beckham*, 334 S.C. 302, 513 S.E.2d 606 (1999) (attempted destruction of evidence is regarded as relevant incriminating circumstance); 40A Am Jur.2d *Homicide* section 462 (1999) (concealment or attempted destruction of body of murder victim is regarded as incriminating circumstance..., an inference of guilt may be drawn therefrom).

- Bradley seemed nervous and upset on Monday, May 23rd, when he told Ms. McDuffie the victim had been killed and, in another conversation with her that night, he said that he couldn't talk to her on the telephone and that he needed to speak to her about what had happened in person because he thought that "the phones might be tapped."
- A calendar on which Ms. McDuffie kept all important information was stolen during a break-in of her home. Also, a reasonable inference is that Bradley was involved because the break-in did not occur until after she had met with defense counsel and the investigator, and, it was the only item that was stolen.
- An eyewitness, Mr. Darnell Koenig identified Bradley, from a photographic lineup and in court, as the driver of a blue Volvo, with a yellow paper tag, that drove past him in the direction of Boyle's Pond, around 9:30 a.m. on Sunday, May 22nd; and he gave a description of the driver that was very consistent with Bradley before he ever saw any photograph of him.
- The car described by Mr. Koenig was consistent with Martha's blue Volvo, which was discovered, completely burned, later that afternoon.
- The Volvo that the victim was driving was burned in an effort to conceal evidence of the crime and the identification of the vehicle itself.
- Bradley gave varying accounts as to the events surrounding the last time he saw the victim and his whereabouts after he supposedly last saw the victim on May 21st: Bradley told Bobby Huhes claimed that an unknown person was present at the victim's Rembert residence when Bradley arrived. Bradley allegedly did not know the man, but Bradley, this unknown man and the victim were supposedly going to rob a drug dealer. On the other hand, he told law enforcement that he picked the unknown man up and took him to the victim's residence. He also changed his answer about where he had stayed on the night of the 21st three times when told his answers with information provided by other witnesses with whom he had claimed to have stayed.
- Finally, he wrote a feigned love letter to his girlfriend, in which he falsely suggested that she had a reason to falsely implicate him in Ernest James' murder and, when that letter did not work, wrote a second letter.

Even Bradley's own brother, Paul, implicated him in the murder. Paul Bradley was called as a defense witness. He testified on direct examination that Bradley told him in a conversation around

1:00 p.m. on Monday, May 21st, that the victim had been killed. R. 774-75. Thus, Bradley had knowledge that only the murder could know, since the victim's body had not yet been found, much less identified!¹² Therefore, Bradley's argument lacks merit. *Id.*

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the circuit court should be affirmed.

Respectfully submitted,

HENRY D. MCMASTER
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JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

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By: _____

¹² Walter Lunberg found the body in Boyle's Pond and he notified law enforcement. R. pp. 8-1. Captain Turner testified that he and other officers responded to the scene sometime after lunch that day. He estimated the time as between 1:30 and 2:00 p.m. R. pp. 14-22. *See also* R. pp. 24-37; 516.

**WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT**

January 12, 2010.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Nathaniel Noel Bradley,

Appellant.

Appeal From Sumter County
Ralph F. Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2010-UP-494
Submitted November 1, 2010 – Filed November 8, 2010

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, and Assistant Attorney General William

Edgar Salter, III, all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

PER CURIAM: Nathaniel Noel Bradley appeals his murder conviction and thirty-year sentence, arguing the trial court erred in denying his directed verdict motion. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authority: State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 863 (Ct. App. 2005) ("The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling."); Id. at 103, 610 S.E.2d at 864 ("Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing.").

AFFIRMED.

HUFF, KONDUROS, and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

NATHANIEL NOEL BRADLEY,

APPELLANT

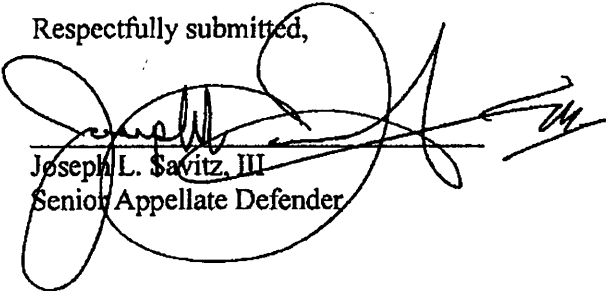
Appeal from Sumter County
Ralph F. Cothran, Circuit Court Judge

Opinion No. 2010-UP-494

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Nathaniel Joel Bradley petitions the Court of Appeals for rehearing because there was no evidence Bradley was even present when Ernest James was murdered. The case cited by the Court in its summary unpublished affirmance, *State v. Ziegler*, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005), is thus inapposite. For this reason, the Court should grant rehearing, reverse Bradley's conviction for murder and remand for a new trial.

Respectfully submitted,


Joseph L. Savitz, III
Senior Appellate Defender

This 23rd day of November, 2010.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

Ralph F. Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

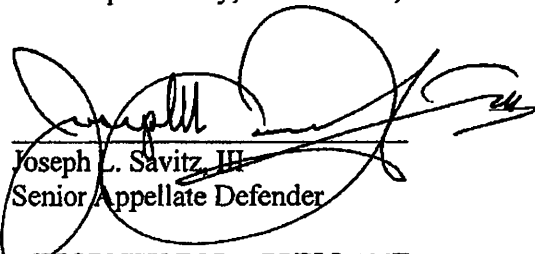
V.

NATHANIEL NOEL BRADLEY,

APPELLANT

CERTIFICATE OF SERVICE

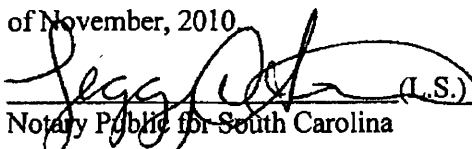
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; and upon Nathaniel Bradley, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899 this 23rd day of November, 2010.



Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 23rd day
of November, 2010.



Notary Public for South Carolina

My Commission Expires: December 4, 2017.

The South Carolina Court of Appeals

The State,

Respondent,

v.

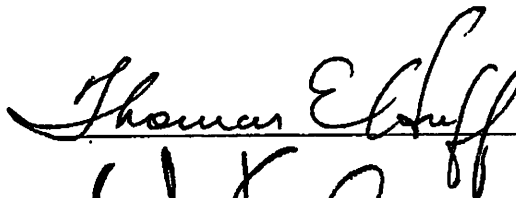
Nathaniel Noel Bradley,

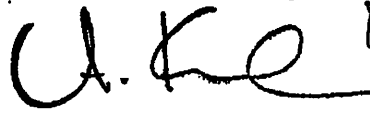
Appellant.

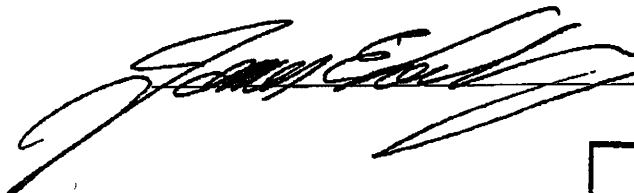
The Honorable Ralph F. Cothran, Jr.
Sumter County
Trial Court Case No. 2007-GS-43-00390

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

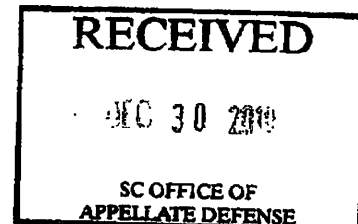
 Huff, J.

 Konduros, J.

 Lockemy, J.

Columbia, South Carolina

FILED
DEC 30 2010



STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Ralph F. Cothran, Circuit Court Judge

Opinion No. 2010-UP-494 (S.C. Ct. App. filed 11/8/2010)

07-GS-43-0390.

THE STATE,

RESPONDENT,

V.

NATHANIEL NOEL BRADLEY,

APPELLANT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

TRISTAN M. SHAFFER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 12/30/2010.

QUESTION PRESENTED

When there was no direct or circumstantial evidence tending to show the identity of a killer, is the Petitioner's alleged suspicious behavior sufficient to meet the substantial circumstantial evidence standard for the denial of a directed verdict?

STATEMENT OF THE CASE

Procedural History

On January 14 through 18, 2008, Nathaniel N. Bradley stood trial in Sumter County, before Judge R. Ferrell Cothran, Jr., and a jury, on an indictment charging him with the murder of his close friend, Ernest James, and possession of a firearm during the commission of a violent crime. R. 795.

The jury found Bradley guilty of murder, but not the firearm charge and the judge sentenced him to imprisonment for thirty years.

Petitioner appealed. For the Appeal Petitioner was represented by Joey Savitz. Petitioner argued that the trial court improperly denied his motion for directed verdict¹. In an unpublished opinion the Court of Appeal affirmed. A petition for rehearing was filed but denied. This petition follows.

Factual History

Petitioner and Ernest were the best of friends; as close as brothers—Ernest's own brother would later say. R. 118, ll. 16-19. Like brothers, they would get into arguments and then quickly make up. The two worked together painting houses.

In May of 2005, Petitioner had recently purchased a van for their painting business. Over the weekend of May 14-15, 2005, Ernest was driving the van in Camden when he was arrested and the van was impounded. The impound lot was going to charge \$240 to release the van. Petitioner did not have the money to get the van and was understandably upset.

Over the next week, Petitioner complained to many mutual friends about Ernest getting arrested and not returning the van. Petitioner even went so far as to idly say if Ernest had not

returned the van by Monday, May 23rd, that some harm would befall him. R. 134, l. 23 – R. 135, l. 1. That week Petitioner and Ernest even had an argument, which left Ernest upset.

Toward the end of that week petitioner was often accompanied by a mysterious stranger. Petitioner would introduce the mysterious stranger as his partner. The mysterious stranger was either from New York or New Jersey. R. 81 ll. 10-14. Even though many people saw the two men together during that week, no one was formally introduced to the mysterious stranger.

On Saturday May 21st, petitioner and the mysterious stranger went to a horseshoe tournament and asked where Ernest was. R. 61, 11-24. Leonard McCray told the man that Ernest was at his house; so the two men left to see Ernest. When they got to the house, Petitioner, Ernest, and the mysterious stranger had a discussion. After talking to the other men, Ernest told his girlfriend that he had to go out. Ernest left the house in his girlfriend's car and followed Petitioner's car down the street. At the end of the street, the mysterious stranger exited Petitioner's car and rode with Ernest. From the evidence presented at trial, this was likely the last time anyone saw Ernest alive. R. 103, ll. 6-15.

Ernest was killed sometime between the evening of Saturday May 21st and the afternoon of Monday May 23, 2005. Ernest was shot with either a .38 or .357 revolver. His body was thrown off a bridge into a Boyle's Pond in Sumter County. R. 9, ll. 18-23. A cinder block was tied to the body with a clothes hanger. R. 20, ll. 22-23. A 9 mm highpoint pistol was found near the body, but the State would later exclude this gun as being the gun that killed him. R. 329 ll. 5-17. The Volvo was found burned in a field on Sunday May 22nd. R. 211, ll. 2-17. There was no direct or circumstantial evidence that would suggest the killer's identity.

¹ R. 665- 675.

When petitioner found out that Ernest was dead he became very upset. He was crying and his eyes were bloodshot. R. 143, ll. 8-15; R. 421, ll. 14-23. He told Ernest's brother that Ernest and an unidentified man were supposed to do a deal² on Saturday night, but that something came up and he was unable to do it. So, the unidentified man and Ernest went to do the deal without him.

After leaving Ernest's family petitioner went to Donna McDuffie's house. R. 421, l. 18—r. 423, l. 1. He told her that Ernest had been killed. Having found out Ernest had been killed, Donna was scared so she got down her .38 caliber pistol from her closet and left it on her bed stand. Sometime between Monday and Thursday that pistol was stolen³. It is also suspected that a cinder block was missing from her yard. R. 153, l. 15 – R. 155, l. 14.

Even though there was no evidence that Petitioner was the killer, based on what police believed to be Petitioner's suspicious behavior, he was arrested and charged with Ernest's murder. There is no record that the mysterious stranger's identity was ever discovered.

At trial, petitioner presented an alibi defense. However the jury found him guilty of murder and the trial court sentenced him to 35 years.

² This deal was never explained by the Ernest's brother, but Petitioner would later say that the men planned to rob a drug dealer.

³ Had this been the gun that killed Ernest, the killer would have had to have stolen it, then returned it, then stolen it again. R. 149 l. 1 – R. 151 l. 8.

ARGUMENT

When there was no direct or circumstantial evidence tending to show the identity of a killer, is the Petitioner's alleged suspicious behavior sufficient to meet the substantial circumstantial evidence standard for the denial of a directed verdict?

There was *no evidence* that Petitioner or his mysterious friend *actually killed* Ernest. At trial, State presented circumstantial evidence that raised a suspicion that Petitioner *could* have been involved in Ernest's death. The State essentially asked the Court of Appeals to use suspicion as circumstantial evidence of guilt. However, the law does not allow a trial court to substitute suspicion for evidence of guilt.

Substantial Circumstantial Evidence

Trial courts should only submit a case to a jury if there is any direct evidence or *substantial circumstantial evidence* reasonably tending to show the guilt of the accused. *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2005); *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955). When evidence merely raises suspicion that the accused is guilty, directed verdict should be granted. *State v. Hernandez*, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (citing *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004)). Although the evidence in the record must be viewed in the light most favorable to the State, the Court should not substitute unsupported inferences and conjecture for circumstantial evidence of guilt. *See Hernandez*, 382 S.C. at 625, 677 S.E.2d at 605 (finding no support for the inference defendants had knowledge of a drug transaction because they knew the drug dealers).

In *Arnold*, the victim met Arnold through a mutual friend the weekend before the victim's disappearance. *Arnold*, 361 S.C. at 386, 605 S.E.2d at 530. The mutual friend had introduced the victim to Arnold because he knew that the victim liked having sex with truck

drivers. Prior to the incident, Arnold was seen in possession of a gun by the mutual friend. The day of his disappearance, the victim had borrowed a car because his was in the shop. The victim left work in Savannah for a dentist appointment around 11:00 a.m. That afternoon the victim withdrew money from an ATM in Hardeeville and was never seen alive again.

Three days after his disappearance the victim's body was found off a dirt road. The car was later found in Tennessee. The car had new scratches as if it had been driven down a rough road. *Id.* 361 S.C. at 391, 605 S.E.2d at 532 (Toal, C.J. Dissenting). Arnold's thumb print was found in the car. *Id.* 361 S.C. at 389, 605 S.E.2d at 530. Arnold was arrested at his father's house in Tennessee. However, there was no direct or circumstantial evidence connecting Arnold to the murder. This Court held that the fact that the victim's car was found in close proximity to where Arnold was arrested was evidence worthy of suspicion, but the suspicion was not substantial circumstantial evidence that Arnold killed the victim. *See id.* 361 S.C. at 390, 605 S.E.2d at 531.

The evidence raise mere suspicion that Petitioner was involved in Ernest's death.

Appellant's case is on all fours with *Arnold*. In the light most favorable to the State, the evidence merely suggested that Petitioner was upset at Ernest, Petitioner was driving Ernest's car the day before Ernest's body was found, and instruments used in the killing *might* have come from a house Petitioner painted.

A witness testified that Petitioner was in Ernest's car with an unidentified black male the morning after his disappearance. This might be suspicious, but in *Arnold*, the defendant's fingerprint was found in the car the victim was driving. Additionally, the fact that both the car and Arnold were found in Tennessee makes that case far more suspicions than Petitioner driving his good friend's car in close proximity to his home.

The State also alleges that Petitioner was angry at Ernest over either the impounded van or a woman. The State suggested that Petitioner's rants about the van and Ernest show that Petitioner had a motive to kill Ernest. Similarly in *Arnold*, the State argued that Arnold killed the victim for money. However, a motive merely raises suspicion of guilt not evidence of guilt.

Finally, Ernest *could* have been killed with a .38 caliber revolver and his body was weighted down with a cinder block. So, the State asked the Court of Appeals to *assume* that these items came from Donna's house⁴. There was also circumstantial evidence that the victim *could* have had access to a home around the time Ernest was killed. From these *speculations* the State expected the Court of Appeals to *assume* that Petitioner had the gun that killed Ernest and the cinder block that held his body under water. Not only is this asking the court to make assumptions based – not off circumstantial evidence – but on *other assumptions*. Even if the State's assumptions were correct, Petitioner's access to Donna's gun was more limited than Arnold's access to *his own gun* in that case. Therefore, the circumstantial evidence concerning access to a gun raises less suspicion than it did in *Arnold*.

In Sum, the State only presented circumstantial evidence suggesting Petitioner was acting suspiciously, but that suspicion is *not* substantial circumstantial evidence of *guilt*. There is no evidence circumstantial or otherwise that suggest the killer's identity. Essentially, the State asked the Trial Court and the Court of Appeals to speculate that because Petitioner was acting suspiciously he must have either killed Ernest or aided and abetted the mysterious stranger in killing Ernest. But the State's argument fails because there was no direct or no substantial

⁴ The State must have assumed that Petitioner stole the gun prior to Monday evening then returned it, and then stole it again before Thursday when Donna noticed it missing. Donna testified that she had the gun on evening of Monday May 23rd but that she noticed it missing on

circumstantial evidence which would support this assumption. Therefore this case should be reverse.

Thursday May 26th. This is un-contradicted testimony that she told police about during her first statement. R. 149, l. 1 – R. 151, l. 8.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant writ of certiorari and reverse the trial court's denial of his motion for directed verdict concerning Ernest's murder.

Respectfully submitted,



Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR PETITIONER.

This 1st day of April, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
Ralph F. Cothran, Circuit Court Judge

Opinion No. 2010-UP-494 (S.C. Ct. App. filed 11/8/2010)
07-GS-43-0390.

THE STATE,

RESPONDENT,

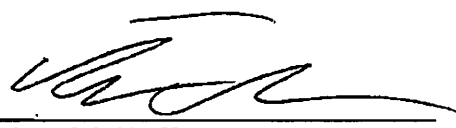
V.

NATHANIEL NOEL BRADLEY,

APPELLANT

CERTIFICATE OF SERVICE

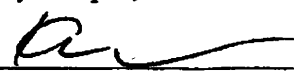
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, and the S.C. Court of Appeals this 1st day of April, 2011.



Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this
1st day of April, 2011.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Sumter County
The Honorable R. Ferrell Cothran, Circuit Court Judge**

THE STATE,

Respondent,

vs.

NATHANIEL NOEL BRADLEY,

Petitioner.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA COURT OF APPEALS**

**ALAN WILSON
Attorney General**

**JOHN W. McINTOSH
Chief Deputy Attorney General**

**DONALD J. ZELENKA
Assistant Deputy Attorney General**

**WILLIAM EDGAR SALTER, III
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ATTORNEYS FOR RESPONDENT.

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STATEMENT OF ISSUE ON APPEAL

When there was no direct or circumstantial evidence tending to show the identity of a killer, is the Petitioner's alleged suspicious behavior sufficient to meet the substantial circumstantial evidence standard for the denial of a directed verdict?

COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the Court of Appeals correctly held that the trial judge properly denied Bradley's motion for a directed verdict because, when the evidence presented at trial is viewed in the light most favorable to the State, it is clear that the prosecution presented substantial circumstantial evidence that Bradley murdered the victim - either acting alone, or with the assistance of an accomplice?

STATEMENT OF THE CASE

Petitioner (Nathaniel Noel Bradley, "Bradley") is currently incarcerated Lieber Correctional Institution of the South Carolina Department of Corrections, as the result of his Sumter County convictions and sentence. The Sumter County Grand Jury indicted him at the January 2008 term of court for murder and possession of a firearm during the commission of a violent crime (07-GS-43-390), in connection with the May 2005 shooting death of Ernest James. Ernest A. Finney, III, Esquire, the current Third Circuit Solicitor, represented him on these charges. Assistant Third Circuit Solicitor Catherine Fant prosecuted him for the State.

On January 14-18, 2008, Bradley received a jury trial before the Honorable R. Ferrell Cothran, Jr. The jury convicted him of murder but acquitted him of the firearms charge. Judge Cothran sentenced to him to thirty years imprisonment.

Bradley timely served and filed a notice of appeal. The Court of Appeal affirmed in an unpublished opinion filed on November 8, 2010. *State v. Nathaniel Noel Bradley*, 2010-UP-494 (S.C. Ct. App., Nov. 8, 2010). **App. pp. 1-2.** The Court denied Bradley's timely Petition for Rehearing (**App. p. 3**) in a December 30, 2010 Order. **App. p. 5.** Bradley thereafter filed his Petition for Writ of Certiorari.

ARGUMENT

The Court of Appeals correctly held that the trial judge properly denied Bradley's motion for a directed verdict because, when the evidence presented at trial is viewed in the light most favorable to the State, it is clear that the prosecution presented substantial circumstantial evidence that Bradley murdered the victim - either acting alone, or with the assistance of an accomplice.

Bradley's sole claim is that the trial judge erred by refusing to grant his directed verdict motion on the charge of murder. The State disagrees and submits that the trial judge properly denied his motion because, when the evidence presented at trial is viewed in the light most favorable to the State, it is clear that the prosecution presented substantial circumstantial evidence that Bradley murdered the victim - either acting alone, or with the assistance of an accomplice.

Viewed in the light most favorable to the State, the evidence showed the following. In May of 2005, Leonard McCray lived in a family home in Rembert, South Carolina, which is in Sumter County. His two brothers, his sister Martha Branson, and Ernest Jones (the victim), who was dating Martha, also lived there. Leonard had met Bradley through the victim. Bradley and the victim worked together and they were friends. However, Bradley and the victim had purchased a van, together, for use in their painting business; and Bradley was upset with the victim because he felt that the victim had cheated him. Leonard explained that the van had been impounded by police when the victim was arrested in Camden, and that the van was impounded on May 21, 2005. R. pp. 58-60; 68; 75-76.

On Thursday, May 19th, Bradley and another man came to the family house, and Bradley called the victim out to his car. Although Leonard could not hear what was being said, it was clear that Bradley and the victim were arguing. The other man got out of the car and stood during this argument. When the victim got out of the car, he immediately went into the house.

He was emotionally upset, and Leonard told him that he (Leonard) "had [the victim's] back." R. pp. 63-64; 66-68.

On Saturday, May 21st, Leonard was at a small club near the family home called Kirkland's Place, watching softball, when Bradley approached him between 5:00 and 6:00 p.m. Bradley was accompanied by another man, whom he only identified as "his friend." Bradley asked whether the victim was at the family home. When Leonard said that the victim was at there with Leonard's brother and sister, Bradley and the other man got into Bradley's blue Chevrolet Berretta and Bradley drove to the family house. Leonard never saw the victim after his conversation with Bradley. R. pp. 60-63; 72.

William McCray also lived in the same family home with Leonard, Thomas McCray, Martha and the victim. William came home between 5:00 and 5:30 p.m. on May 21, 2005. Bradley, whom William had worked with on painting jobs, was there with another man. They were sitting in the blue Chevrolet Berretta (See State's Ex. 33). William had never seen the other man before, and Bradley told him that the man was from either New York or New Jersey. R. pp. 78-83; 85-87; 89; 92; 94-95.

The victim came out of the house minutes after William's conversation with Bradley. Bradley got out of his car and said that he needed to talk to the victim in private. So, William went into the house. Shortly thereafter, the victim briefly came into the house. However, the victim soon left in Martha's blue Volvo. Bradley and "his partner" had pulled out just before him, and he was alone. R. pp. 78-83; 85-87; 89; 92; 94-95.

The victim's girlfriend at the time, Martha Ransom, testified that she had known him for slightly over a year; and that they were staying in the McCray family house in late May of 2005. She had met Bradley through the victim and testified that they were "friends and working

partners." In the week leading up to his death, the victim seemed to be "nervous and agitated." However, he said nothing was wrong when Martha asked. R. pp. 96-97; 99-100; 107-08; 119-20.

Martha explained that the victim and Bradley had jointly bought a van to use in their painting ventures. The victim was arrested in Camden a week or so before his murder, and the van was impounded. The victim tried to get the van back, but he did not have enough money to pay for it. Bradley and the victim had some conversations about the van in the weeks before the murder. While Martha could not hear the details, the victim seemed concerned about them. R. pp. 96-97; 99-100; 107-08; 119-20.

On Saturday, May 21, 2005, the victim was asleep¹ when Bradley came to the house and blew his horn. Martha went to the door and Bradley asked her if the victim was there. She told Bradley he was, and she awakened the victim. Bradley was in a small Blue Chevrolet and he was accompanied by a man whom Martha did not recognize. The victim went outside for about ten minutes. When he came back into the house he got the keys to Martha's Volvo and left in it, following Bradley and the unknown man. The victim was alone. Martha never saw the victim alive again. R. pp. 100-03.

Because the victim did not come back home that night, Martha became concerned. She called Bradley the next morning, using the victim's cell phone, and she asked Bradley whether he knew where the victim was.² Bradley told her that the unknown man, who had been in his car, got out of his car at the end of the road and got into the victim's car. Bradley said that he had not

¹ The victim had not been drinking in her presence the previous day. R. p. 100.

² It was unusual for the victim not to call and tell her that he was not coming home if he was not coming back at night. R. pp. 103-05.

seen the victim after those two men left. R. pp. 103-05. On Monday, May 23rd, Bradley called her and asked where the victim was because they supposedly had some jobs to do. R. p. 114.

Donna McDuffie testified that she is a resident of Bishopville, South Carolina. She had know the victim for five or six years, and she hired Bradley to do some painting for her over six months before the murder. The victim helped Bradley with the painting, and she paid Bradley for it. At that time, the victim and Bradley seemed to be friends. She trusted both men because she knew the victim. R. pp. 121-25.

Mrs. McDuffie testified that she and Bradley had never had a physical relationship, and she denied that they had never been boyfriend and girlfriend. Bradley had said that he had previously slept at her house, but he had not. On the week before the victim was murdered, Bradley called Ms. McDuffie "out of the blue" about painting the doors that he and the victim had not painted. Ms. McDuffie told him that would be okay and she left a spare key out for him.³ Bradley told her that the victim had stolen the van and that it had been impounded.⁴ Bradley wanted to get it out of the impound. Ms. McDuffie ascertained from him how much that would cost, and she agreed to give him one-half of the amount he told her. He told her that he could come up with the rest of the money. Bradley also told her that he was going to "get Ernest." Ms. McDuffie asked him not to "do anything stupid." Bradley also gave her a telephone number and told her that she should call "Betty" if he got in trouble because her husband was a bail bondsman. R. 125-28; 135-36.⁵

³ Thus, it was possible for Bradley to get into her house without her knowledge.

⁴ She did not believe that the victim had stolen the van because the two men were friends. R. pp. 127-28.

⁵ Officers later determined that the number that Bradley had given to McDuffie belonged to Dorothy Nelson Bradley. R. p. 572.

Ms. McDuffie thereafter met Bradley at the area Penny's on Thursday, May 19th, and she gave him the money that she had promised. Another man was also present near Bradley. However, Bradley did not introduce the man to her, and she did not know the man. Bradley also telephoned Ms. McDuffie on Friday night, May 20. R. 128-32.

At this point in her direct examination, Ms. McDuffie's testimony became evasive and inconsistent with her statement to law enforcement. She also testified to several minor details that were specifically denied by law enforcement. See R. pp. 132-45; 145-70. Therefore, the State was permitted to introduce her May 27, 2005 statement to law enforcement as State's Exhibit 42 (R. pp. 784-85), R. pp. 208-09; and the State was later allowed to publish her written statement as a prior inconsistent statement under Rule 801(d)(1)(A), SCRE. R. pp. 563-66. Because her May 27th statement is more favorable to the prosecution's case than her inconsistency on the remaining matters to which she testified and because her prior statement was admissible as substantive evidence, see *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), Respondent will rely upon the statement in connection with this argument.

In pertinent part, she told law enforcement that:

We also spoke again Friday night. He stated that he was lost in the woods and trying to find his car. He said that he was at the end of the road and he said give me a ride. I don't know who he was talking to.

He called me early Saturday morning and said that he was at a friend's house and was thinking about painting a lady's house. In the background I could hear a lady cursing. He then said that he'll talk to me later.

Nate called . . . me back Saturday around 1:00 p.m. and said that he needed to talk to me, but I told him I wasn't going to be home and my cousin was staying with me. He said okay and hung up.

Nate called me around 9:00 a.m. Sunday leaving a message for me to leave \$10.00 for him. I called him back and left a message for him that the money would be

under the flower pot. I then went to church.

I returned home around 6:00 p.m. and checked the flower pot and the money was gone. After Sunday I hadn't talked to Nate until about 9:00 p.m. Monday. He came by my house to talk with me. He acted like he was upset or scared.

He said that something happened to Ernest. He said that Ernest was killed. I asked him what happened, what happened to Ernest, and said that he couldn't talk to me. He said that he wasn't going to get me in any trouble, and he left.

I told him to call me later. I asked about his eye, and he said that he hit it on a – a cabinet. Nate called back Monday night about 10:00 p.m. saying that he needed to talk to me.

I asked him what happened to Ernest, but he said that he couldn't talk to me on the telephone and that he needed to talk to me in person. He said that the phones might be tapped. He asked me to come – to come out, but I told him I couldn't, so he hung up saying – he hung up – excuse me – saying that he couldn't talk to me.

After this conversation I hadn't talked to him since. I noticed my .38 caliber pistol missing on Thursday, May the 26th, 2005. I bought it from Brooks in Bishopville and reported it missing today, May the 27th, 2005. Nate knew where I kept the gun and my key that I had outside.

R. p. 565, l. 10 - p. 566, l. 24. See also State's Ex. 42.

Both Bradley and the victim knew that she had the gun. **R. pp. 158-59.** Officers eventually obtained her .38's serial number and they entered it N.C.I.C. However, they never successfully located it. **R. pp. 347-50.**

With respect to Ms. McDuffie's trial testimony, Respondent would further note that there was an impediment to her recalling dates and conversations precisely. She had kept all of the important information in her life on a calendar. However, this calendar was stolen during a break-in of her home. Although she denied that she suspected that Bradley was involved in that crime, a reasonable inference is that he was behind it because the break-in did not occur until after she had met with defense counsel and the defense investigator, and it was the only item that was stolen. **R. pp. 164-67; 199-200.**

Thomas and Robin McCutchen live near the Broad Branch Cemetery in Bishopville, South Carolina. On Sunday afternoon, May 22nd, the McCutchens saw a burned up vehicle when they were in the area of the cemetery. Therefore, they called the police and reported it. Neither of them touched the car, and Mrs. McCutchen testified that the vehicle had not been there the previous day. **R. pp. 210-20.** Although defense counsel tried to establish that it was unreasonable to believe that anyone would burn the car in broad daylight, the McCutchens told Sergeant McMillan that it would not be unusual to see smoke or something burning in the area because the area was being cleared out and loggers often burned debris. **R. p. 585.**

In 2005, Mr. Carol Lloyd, Jr., was employed by the Lee County Sheriff's Department. He received the report of the burned car around 3:35 p.m. on May 22, 2005, and he responded to the Broad Branch Cemetery. He spoke to the McCutchens, who told him what they had found. The cemetery is located between forty and sixty yards off of St. Charles Road. The vehicle he saw appeared to be a mid-1990's Volvo 240DL. (See State's Exhibit 43). Mr. Lloyd was able to obtain a partial VIN from the Volvo. The car was thereafter towed to a local garage. **R. pp. 221-29.**

Gloria Portee testified that she is from Rembert, and that she knew the victim because he had dated her friend. The victim had introduced her to Bradley and she had dated Bradley "on and off" for roughly a year, in May of 2005. She described the victim and Bradley as friends and co-workers. On Thursday, May 19th, she and Bradley stayed together, in an effort to reconcile their relationship. **R. pp. 193-97; 200-51.**

He drove her home on Friday morning, May 20th, in his Berretta. When they reached her house, they began a discussion about the van being impounded. Bradley told her that "as much as he [did] for Ernest, he was tired of Ernest fucking him around, and if Ernest [didn't] have his

van back by Monday, he was going to kill Ernest." Bradley was mad at the time. He also told Gloria that he had a gun in his car. Gloria took his threat seriously. R. pp. 193-97; 200-51.

Gloria did not have any further contact with Bradley after that, and she refused to take his call when he called her. However, he wrote her a letter on March 1, 2006. While much of this letter purports to be a love letter and a marriage proposal, he asked her in the "love letter" how she could have provided law enforcement with the same information to which she testified at trial. He also suggested that Gloria was mad at him either because he owed her money or because he had been romantically involved with another woman. (See State's Exhibit 50, R. pp. 786-90). Gloria did not view the letter as a love letter, and she let her sister read it, instead of reading it herself. R. pp. 239-45.

Although Gloria did not have any further contact with Bradley, he wrote her a second letter (State's Ex. 52, R. pp. 791-93), in which he again professed his "love" for her and asked to see her. Gloria again testified that the letters were not truly love letters, despite their tenor. She explained that Bradley was not the type of person who wrote letters, and that when they were together, their relationship had its "ups and downs." She also denied that Bradley owed her any money, and she testified that she was afraid of him. R. pp. 245-48; 250-51.

Matt Bramlett lives across the street from the Broad Branch Cemetery in Bishopville. Early in the morning of Saturday, May 22nd, his dog began barking and barked continuously for twenty or thirty minutes. Mr. Bramlett got up, went outside and called his dog to the porch, to make the dog stop barking. However, by the time that Mr. Bramlett got back into bed, his dog had gone back to the same spot in his yard - across from the cemetery - and again barked for at least twenty or thirty minutes. This was unusual for his dog, who had not done this in the eight years that Mr. Bramlett had owned him. Also, his dog would have chased off any animals. R.

pp. 312-17.

Tracy Dayton testified that she attended a cookout at the Sumter County home of Bradley's ex-wife, Lubertha Bradley, on Sunday, May 22, 2005. At some point, Bradley arrived. He was with another man. Bradley did not introduce her to the other man, but he referred to the man as his "partner." At Bradley's request, Drayton prepared some food for the men. R. pp. 369-71; 374-75.

Lubertha Bradley testified that she had a small cookout on Sunday afternoon, May 22nd. Somewhere around 2:00 or 3:00 p.m., Bradley (her ex-husband) arrived with another man, whom he referred to as his "partner."⁶ Lubertha had never seen the man before. They were in Bradley's blue Berretta. Lubertha had not invited Bradley to the small gathering. R. pp. 379-82.

Both men ate food while they were at Lubertha's residence, but Bradley's "partner" never got out of the car. Bradley left the party for a brief period of time in the vehicle of Lubertha's daughter. However, he returned and tinted the windows of that vehicle. In all, Bradley and "his partner" were there "off and on" for two hours before they left in Bradley's Berretta. R. pp. 382-84.

Wayne Anthony Johnson testified that he was Bradley's son-in-law, and that he is married to Bradley's youngest daughter. Wayne, the victim and Bradley had all worked together on painting jobs. Two or three weeks before the murder, Bradley and the victim had an "altercation" on the telephone. Bradley was not "mad" but he was upset. The victim was on the speaker phone during the conversation. Bradley told the victim that he did not like what the victim had done and that, if the victim did not leave town, then Bradley was going to "send some

⁶ She had not invited Bradley to the cookout.

boys at" the victim. The victim was upset; and he told Bradley that they were good friends and had been friends for a long time. In response, Bradley simply laughed. The victim called back or short time later and said the same thing. Wayne was under the impression that the dispute concerned a woman. **R. pp. 395-400; 411-13.**

Although Wayne claimed that he had not thought that Bradley intended to physically harm the victim, he admitted that it was possible. He also testified that Bradley was "very straight-forward" and did not "bite his tongue." **R. pp. 397-98; 406; 412.** More importantly, Bradley called Wayne sometime after the victim's death and after there was some suspicion that Bradley was involved in the killing. He asked Wayne to help him move his girlfriend's car. Before Wayne met with Bradley, he armed himself with two butcher knives and three steak knives. At trial, he explained that he was "being defensive" before their subsequent meeting. **R. pp. 414-16.**

Darnell Koenig testified that he is a commercial airline pilot. In 2005, he and his wife owned a six acre lot near Boyle's Pond. On Sunday morning, May 22nd, he was "dressing up the entryway" to their property because they were "getting ready to build the house." Around 9:30 a.m., he saw a blue Volvo sedan turning onto his street and headed in the direction of the pond. The car was traveling slowly, as if the occupants were looking for something. As the car drove slowly by him, he and the driver made eye contact for ten to fifteen seconds. He continued to watch the car until it left his sight. He could tell that there were two black males in the car but he did not get a closer look at the passenger. The car returned shortly thereafter, traveling in the opposite direction. He noticed that the car had a yellow, temporary tag with red writing on it. **R. pp. 472-84; 507-08.**

He learned about a body being found in Boyle's Pond on the next night. So, he contacted

law enforcement and told them what he had seen on May 24th. He met with Inv. Bennie Barfield on Wednesday and repeated what he had seen. On Thursday, May 26th, Sergeant Clarence McMillan and Investigator Wesley Gardner met him at his house and they showed him a photographic lineup. Before he looked at the lineup, he described the person he had seen as having very short hair, with light facial hair, a fairly thin face and "a different look to his mouth." Also, a picture of Bradley had not been distributed as a possible suspect, and Mr. Koenig had not seen Bradley. When shown the photographic lineup, he immediately selected Bradley's photograph as the man he had seen driving the blue Volvo. He was 100% positive in his identification. He likewise identified Bradley in court. **R. pp. 484-90. See also R. pp. 461-63; 471-73; 554-62.**

Martha Ransom confirmed that she had purchased her blue Volvo at Easy Auto Credit and that it had a paper tag on it. **R. pp. 377-78.** Sergeant McMillan testified that his investigation reflected that the Easy Auto paper tag would have been bright yellow. Also, the partial VIN number obtained from the burned car was consistent with the VIN number for Martha's blue Volvo. Moreover, there was a G.P.S. chip in the car that would allow the car dealership to monitor the car's location when parked. However, this chip was not functioning on Martha's car, which indicated that the vehicle was probably destroyed or parked in a garage where the chip would not give a signal. **R. pp. 526-27.**

On Monday afternoon, May 23, 2005, Walter Lunberg was taking his children fishing on Boyle's Pond in Sumter County. As he approached the bridge, he saw something floating in the water. They parked the car and got out of it. When he got closer, he realized that it was a dead person. So he sent his children back to the car and he called 911. He stayed there until law enforcement arrived. **R. pp. 8-11.**

Captain James Turner, of the Sumter County Sheriff's Department testified that he and other officers responded to the scene sometime after lunch that day. He estimated the time as between 1:30 and 2:00 p.m. He is also a certified diver, and he brought his diving equipment with him. The victim, Ernest Jones, was in roughly six feet of water and in "a vertical position." When he investigated, Captain Turner discovered that a concrete cinder block was tied to the victim's leg with a clothes hanger. Captain Turner did not disturb the body and it was eventually retrieved from the pond. R. pp. 14-22. See also R. pp. 24-37; 516.

Sergeant Ray MacKessy, who photographed the scene at the pond, testified that it was obvious that the victim had been shot. R. pp. 34-36. Fortunately, the victim had a South Carolina ID card and an old address. R. pp. 517; 524-25.

Bobby Lee Hughes testified that the victim was his oldest brother. Although Bobby lived in Cheraw, he had previously lived in Sumter and he knew Bradley "somewhat." Bradley and the victim were "the best of friends, they [were] about as close as brothers." R. pp. 417-18.

Bobby received a call on Monday, May 23, 2005, notifying him that his brother had been murdered. Bobby then called his parents and his brother, and he "got the family together." His family first stopped at the residence of Jean Spann, the victim's former girlfriend. In turn, Spann directed them to Martha's residence. After meeting with Martha Ransom, they also met with the coroner and learned, officially, that Ernest was dead. R. pp. 418-20; 425.

Following their meeting with the coroner, they returned to Jean Spann's residence in Rembert. Bradley thereafter arrived in his Berretta. Bradley spoke to the entire family, then, he had a private conversation with Bobby. "At first, he was kind of boo-hooing, and crying. To me . . . he wasn't upset[,]. . . he was play [] crying." Bradley also told Bobby about the last time that he supposedly saw the victim. R. pp. 420-21; 427-30; 434-35.

Bradley claimed that an unknown person was present at the victim's Rembert residence when Bradley arrived. Bradley did not know the man. All three men were supposed to do something together,⁷ but Bradley supposedly could not participate because he had picked up his daughter or step-daughter from the hair dresser. Bobby did not believe Bradley because the victim would not have done anything with someone he did not know well. However, his brother probably would have participated if Bradley had told the victim that the person was his partner. **R. pp. 421-23.**

Bobby also testified that he was aware that there was some dispute between Bradley and the victim over Barbara Jean Williams. Further, the victim called Bobby about two weeks before his murder. In response to what the victim told him, Bobby told the victim that he was not going to come to Sumter and intervene in a dispute between the victim and Bradley, only to have the two be best friends the next day. He reacted this way because he had received similar calls every other week for the previous six months. **R. pp. 423-25.**

Sergeant Clarence McMillan, of the Sumter County Sheriff's Department, testified that he was the chief investigator assigned to this case. He first became involved in the case after the victim's body had been discovered on May 23rd, and he actually was present when the victim's body was retrieved from the pond. After discovering the South Carolina ID card, he went to Jean Spann's residence. She told him that she and the victim had previously lived together but that he was dating Martha Ransom. Jean gave him Martha's address and the names of several other persons with whom he should speak. **R. pp. 512-25.**

Sergeant McMillan then went to see Martha and briefly spoke to her. On May 34th he

⁷ Through Sergeant McMillan, jurors learned that Bradley had told Bobby that the victim and that Bradley had planned to rob a drug dealer, with the assistance of this unknown third person. **R. p. 528.**

discovered where Martha had purchased her Volvo; and he met with the victim's family, along with several other investigators. Bobby Hughes provided the officers with the information to which he testified at trial. Bobby also gave a formal statement and he gave the officers Bradley's business card, which had Bradley's phone numbers on it. Sheriff Dennis was able to contact Bradley, who came to the law enforcement center between 2:00 and 3:00 p.m. on May 24th. R. pp. 525-29.

Sergeant McMillan, Sheriff Dennis, Lieutenant David Florence and Investigator Wesley Gardner were all present for this interview. Bradley was not under arrest and he was told that he was free to leave if he wanted. When asked when he had last seen the victim, Bradley said that he saw an unknown person walking down the road as he was headed to the victim's resident on Saturday, May 21st. Bradley picked up this stranger and gave him a ride to the victim's house.⁸ R. pp. 444-47; 454-56; 529-30; 532.

The victim came out of the house and got into the Volvo and drove to the end of the road. At that point, this man that Bradley did not know got into the Volvo with the victim. Allegedly, this was the last time that Bradley had seen the victim. When asked where he had been on Saturday night, Bradley claimed that he had gone to the Bishopville home of his girlfriend, Ms. McDuffie; and he said that he had stayed there that night. Officers asked Bradley if he would call McDuffie to verify his story. When he replied that his cell phone was dead, Sergeant Florence loaned Bradley his cell phone. Bradley then dialed a number and said no one answered. R. pp. 445-46; 454-56; 530-34.

Sergeant Florence retrieved his phone and left the room. Using "caller retrieve," he got

⁸ Bradley did not disclose that he had been to Kirkland's Place before he went to see the victim. R. p. 530.

the telephone number that Bradley had dialed. Sergeant Florence called Sergeant McMillan out of the room where they were interviewing Bradley, and he showed McMillan the number.

Sergeant McMillan called the number. The woman who answered identified herself as Ms. McDuffie. She verified that she knew Bradley. However, she denied that Bradley had spent the night at her house on the 21st. Instead, she said that he had called her that night. R. pp. 446-47; 454-56; 534-35.

McDuffie was also asked whether or not Bradley was her boyfriend. She said no and she described their relationship as "friends." Sergeant McMillan returned to the interview room and told Sergeant Florence what Ms. McDuffie had said. The officers present testified that Bradley was "agitated" and "nervous." He asked whether he was under arrest and they told him he was not. He immediately refused to answer any other questions and he left. R. pp. 446-47; 454-56; 535-36.

During this interview, the officers who were present had noticed that one of Bradley's eyes was "bloodshot red." They asked him what had happened to it, and he told them that a limb caught him in the eye while he was doing some painting. R. pp. 550-51.

Major Simon, of the Lee County Sheriff's Department, contacted Sheriff Dennis on the evening of the 24th and told him about the Volvo they had seized. R. pp. 350-53. Sergeant McMillan testified that he and Investigator Gardner thereafter went to the garage where the vehicle was stored and, at their request, it was moved to a more secure location. Sergeant McMillan "could tell that some type of accelerant" had been used to burn the car. The parties stipulated that a SLED agent who subsequently processed the vehicle did not retrieve anything of evidentiary value. R. pp. 536-39; 544-45; 547.

When Sergeant McMillan went to the law enforcement center on May 25th, he

unsuccessfully tried to call Bradley. Sergeant McMillan left a message in Bradley's voicemail asking Bradley to come back in and talk to him. Bradley later called and said that he would come in that evening.⁹ Then, an investigator contacted Barbara Jean Williams, Tanisha Williams, and Eloise Sinkler. The investigator then relayed the information that she gathered to Sergeant McMillan. R. pp. 540-43; 547-48.

When Bradley arrived, he was told that he was free to leave but Sergeant McMillan wanted to "clarify some things" that he had told the officers on May 24th. When asked whether he was sure that he had stayed at Ms. McDuffie's house on the previous Saturday, he said yes. Sergeant McMillan then told him that when McMillan spoke to Ms. McDuffie, she had said that Bradley had called her that night but he did not stay there. R. pp. 456-57; 548-49.

At that point, Bradley changed his story and said that he had stayed with Barbara Jean Williams and that he had taken Tanisha Williams to the hair dresser. He had also gone to visit one of his daughters. When Sergeant McMillan told him that officers had spoken to those individuals and that they denied that he had stayed there, he again changed his story. This time he claimed that he had stayed at a residence that he was painting and that a white man was watering the grass when he left at 6:45 a.m. R. pp. 456-57; 549-50.

Curiously, he did not give officers the address of this supposed house. Also, he had not mentioned either Barbara Jean Williams or this empty house in his earlier interview. Again, Bradley became agitated when Sargent McMillan told him that his story was inconsistent with the other information that the officers had. He asked whether or not he was under arrest, said he was getting the hell out of there, and he got up and left around 3:30 p.m. or so. R. pp. 456-57;

⁹ Before he came in, officers discovered that he was driving the blue Berretta and they had it under surveillance. R. p. 542.

550-51.

Following Mr. Koenig's identification of Bradley on May 25th, Sergeant McMillan obtained an arrest warrant charging Bradley with the victim's murder. R. p. 561. As discussed, Ms. McDuffie gave a statement to the officers on May 27th. Sergeant McMillan, Investigator Gardner and Major Simon were all present at that time. Following the interview, the officers went to her Bishopville residence, and they discovered that a concrete cinder block similar to the one found attached to the victim's leg, was missing. Ms. McDuffie was unaware that it was missing. The officers did not take another block with them. Also, Ms. McDuffie showed them the bullets for her .38 caliber handgun but they did not take a bullet with them. R. 347-55; 457-58; 562-63; 567-71.

Dr. Joel Sexton, the renown forensic pathologist, performed the autopsy on Ernest's body. Dr. Sexton opined that the body had some early decomposition. He also found linear scrapes on the victim's forehead and chest that were "most consistent with being [made] after death." The only injuries found that had occurred while the victim was alive were the gunshot wounds. One wound entered the outer aspect of the victim's left elbow, exited the inner aspect of the elbow and entered the left side of the victim's body. This bullet traveled a short distance, stopping in the soft tissue in between the skin and abdomen. Dr. Sexton recovered this projectile. This was a superficial, non-fatal wound. R. pp. 260-71; 274; 281-84; 291-92.

The second wound entered the left side of the victim's head in the area of the temple, and it exited on the right side of his head. This was the fatal wound. The third wound entered the victim's back, "fairly close to the middle of the back." It went into the spinal cord and traveled up to the base of his neck. This would definitely would have paralyzed the victim from the waist down and "perhaps even his arms." Also, he would not have been conscious or moving after

receiving this injury, and Dr. Sexton opined that this wound was potentially fatal, but opined that the gunshot to the head was the cause of death because it passed through vital areas of the brain. He was also able to remove this bullet. R. pp. 271-74; 281-84.

Dr. Sexton conceded that he could not tell in which order the three wounds were inflicted. However, he opined that the sequence was more consistent with the wound to the arm occurring first, with the victim's arm raised somewhat, and the head wound was last. Because there was no evidence of either stippling or tattooing on any of the gunshot wounds, Dr. Sexton opined that the victim was at least one to one and one-half feet away from the gun when he was shot. R. pp. 272-78; 285-88. He further opined that the scrapes on the victim's forehead and chest were consistent with his body being dragged over some surface. Dr. Sexton did not find any evidence that the victim had been in a fist fight. R. pp. 280-81; 289.

Dr. Sexton was unable to give a specific time of death, but opined that his findings were not inconsistent with the reports of when the victim was last seen alive and when his body was found. He again opined that the gunshot wound to the head was the cause of death, and he opined that the manner of death was a homicide. R. pp. 289-95; 307-11.

SLED Agent Samuel Heighley is an expert in toxicology, who received the blood and urine samples as well as tissue samples that were taken by Dr. Sexton at autopsy. He performed a blood alcohol analysis and a series of drug screens on the blood sample and he performed an alcohol test on the urine sample. The test revealed a blood alcohol level of 0.217% weight by volume, but the drug screens were negative for amphetamine and methamphetamine, barbiturates, Benzodiazepines, cannabinoids (marijuana) and cocaine or cocaine metabolites. The urine test showed a blood alcohol level of 0.245% weight by volume. The legal limit for driving at the time of Bradley's trial was 0.08%. R. pp. 339-46.

SLED agent Tracy Thrower is an expert in firearms identification. He testified that he cannot identify a specific firearm with a particular bullet unless he has both a firearm and a fired bullet. The two bullets that Dr. Sexton retrieved at autopsy were provided to him for analysis. By examining the "overall physical characteristics" of these bullets (including their shape, size and weight), Agent Thrower determined that "they were most consistent with lead bullets that are loaded into some 38 special or 357 magnum cartridges." Using a database of firearms manufacturers, he compiled a list of firearms that could have fired the two bullets. A .38 caliber Rossi has the same general rifling characteristics of the bullets that he examined; but he conceded that other weapons were likewise consistent. R. pp. 322-29; 333-34.

A 9 mm. Highpoint handgun was located, at some point, in an area reasonably close to where the victim's body was found. It was sent to SLED for testing as a matter of the Sumter County Sheriff's Department's protocol, rather than because there was any reason to believe that the weapon was connected to this murder. R. pp. 437-39. Agent Thrower determined that the 9 mm. was inconsistent with the bullets that killed the victim. R. pp. 328-29.

Bradley moved for a directed verdict at the conclusion of the State's case. He argued that the State had failed to prove that he was involved in the crimes. He further argued that the State had failed to prove the county in which Ernest Jones had died or the time and place of his death. *Contra State v. Allen*, 266 S.C. 468, 480, 224 S.E.2d 881, 885 (1976) ("where some acts material and essential to the offense, and requisite to its consummation, occur in one county and some in another, the accused may be tried in either"); *State v. Owens*, 293 S.C. 161, 166, 359 S.E.2d 275, 277-78 (1987) (stating that "[v]enue in a criminal case need not be affirmatively proved if there is sufficient evidence from which it can be inferred" and holding that because the facts indicated that the victim was last seen at his Horry County residence, "where there were found signs of a

struggle [and the] ransom money was demanded and delivered in Horry County” the evidence was sufficient to establish venue in Horry County). The trial judge denied his motion. **R. p. 665, l. 5-p. 674, l. 8.**

The trial judge denied his renewed motion, which he made after the defense had presented its case. **R. p. 780, l. 20-p. 783, l. 25.**

The Court of Appeals affirmed the trial judge’s ruling “pursuant to Rule 220(b)(1), SCACR, and the following authority: State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 863 (Ct. App. 2005) (“The appellate court may reverse the trial judge’s denial of a motion for a directed verdict only if there is no evidence to support the judge’s ruling.”); Id. at 103, 610 S.E.2d at 864 (“Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing.”).” **Bradley, App. p. 2.**

“In reviewing a motion for directed verdict, the trial judge is concerned with the existence of evidence, not with its weight.” *State v. Curtis*, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). On appeal, a reviewing court must review the evidence in the light most favorable to the State. *State v. Burdette*, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). *See also State v. Crawford*, 362 S.C. 627, 608 S.E.2d 886 (App.2005); *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct.App.2003). “If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” *Id*; *Curtis, supra*. *See also State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989), *cert. denied*, 493 U.S. 895 (1989); *State v. Littlejohn*, 228 S.C.

324, 89 S.E.2d 924, 926 (1955); *State v. Wilds*, 355 S.C. 269, 584 S.E.2d 138 (Ct.App.2003).

Under South Carolina law, the crime of murder is the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). *See also Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005). " 'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69. It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).

Respondent submits that the prosecution's evidence was more than sufficient to withstand the directed verdict motion and that the trial judge was thus required to submit the question of Bradley's guilt to the jury. *See Edwards, Epes and Littlejohn, supra*. *See also State v. Weston*, 367 S.C. 279, 293-95, 625 S.E.2d 641, 648-49 (2006); *State v. Williams*, 303 S.C. 274, 400 S.E.2d 131(1991) (affirming denial of directed verdict where victim was employed by and last seen with the defendant and victim's decomposed body was found 7 ½ months later); *State v. Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997); *cf. State v. Owens*, 293 S.C. at 166, 359 S.E.2d at 277-78. Moreover, Bradley errs by relying on this Court's decision in *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009). According to the Court's decision in *Hernandez*, all the prosecution failed to establish "any evidence such as acts, declarations, or specific conduct to support" an inference of knowledge under the marijuana trafficking statute, S.C. Code Ann. § 44-53-370 (Supp.2011). Rather, the prosecution merely proved that the petitioners' actions in *Hernandez* "may have been suspicious." 382 S.C. at 624-26, 677 S.E.2d at 605-06. Here, however, the State's evidence reasonably tended to prove that the victim was clearly murdered.¹⁰

¹⁰ Likewise, *State v. Arnold*, 361 S.C. 386, 605 S.E.2d 529 (2004) (Circumstantial evidence was insufficient to support murder conviction, even though presence of defendant's fingerprint established that he was in vehicle driven by victim on same day that victim was last seen alive, and fact that vehicle was found

Further, the prosecution introduced substantial circumstantial evidence identifying

Bradley as the assailant. Specifically, it presented evidence showing that:

- Bradley had threatened to kill the victim two weeks before the murder because of a dispute over a woman.
- Several witnesses testified that Bradley had made threats to kill the victim in the days immediately before the murder because the victim had caused the van to be impounded; and he told his girlfriend at the time, Gloria Portee, that he had a gun in his car and that he was going to kill the victim if the victim did not get the van back to him by Monday, May 23rd.
- Following a conversation in which he had threatened the victim, Bradley gave Ms. McDuffie a telephone number and told her that she should call "Betty" if he got in trouble because her husband was a bail bondsman.

Bradley was the last person seen with the victim, on the afternoon of Saturday, May 23rd, as the victim, driving Martha's blue Volvo, followed Bradley and Bradley's mysterious "partner."

- Several witnesses saw Bradley and the unknown man, who was supposedly from New York or New Jersey, but Bradley would never introduce the man by name and the man never said anything.
- Bradley had free access to Donna McDuffie's .38 caliber Rossi revolver,¹¹ which was a gun consistent with the weapon used to kill the victim; and Ms. McDuffie's weapon turned up missing after the murder.
- The victim's body was placed in a pond with a concrete cinder block to anchor it and thereby conceal it. Also, the car the victim had been driving was burned to destroy possible evidence.¹²

abandoned in other state, which was same state where defendant was located after his stay in city were victim lived, raised suspicion of guilt; fact that vehicle was found in other state was not evidence that defendant killed victim; and there was no evidence that defendant was at scene of crime) is distinguishable because here the State presented overwhelming proof of identity and murder, as set forth on pp. 2-19; 22-25.

¹¹ He had called Ms. McDuffie "out of the blue" about painting the doors that he and the victim had not painted, and she left him a spare key to her residence.

¹² The jury could infer from the destruction of the car and the hiding of the body in the pond that Bradley murdered the victim and he took these actions to cover up his crime. See *State v. Al Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct.App. 2003) (Concealment of the body of a person is a circumstance that tends to show guilt and should go to the jury to weigh the evidence); *State v. Epes*, 209 S.C. 246, 265, 39 S.E.2d 769; 777 (1946) (appellant's act of "concealing the body of his wife so as to divert suspicion from himself, was a relevant

- A concrete cinder block that was consistent with the one tied to the victim's leg was also recently taken from Ms. McDuffie's yard, without her knowledge.
- At least two witnesses testified that they noticed an injury to Bradley's eye, which they described as bloodshot.
- Bradley seemed nervous and upset on Monday, May 23rd, when he told Ms. McDuffie that the victim had been killed and, in another conversation with her that night, he said that he couldn't talk to her on the telephone and that he needed to speak to her about what had happened in person because he thought that "the phones might be tapped."
- A calendar on which Ms. McDuffie kept all important information was stolen during a break-in of her home. Also, a reasonable inference is that Bradley was involved because the break-in did not occur until after she had met with defense counsel and the investigator, and, it was the only item that was stolen.
- An eyewitness, Mr. Darnell Koenig identified Bradley, from a photographic lineup and in court, as the driver of a blue Volvo, with a yellow paper tag, that drove past him in the direction of Boyle's Pond, around 9:30 a.m. on Sunday, May 22nd. Also, Mr. Koenig gave a description of the driver that was very consistent with Bradley before he ever saw any photograph of Bradley.
- The car described by Mr. Koenig was consistent with Martha's blue Volvo, which was discovered, completely burned, later that afternoon.
- The Volvo that the victim was driving was burned in an effort to conceal evidence of the crime and the identification of the vehicle itself.
- Bradley gave varying accounts as to the events surrounding the last time he saw the victim and his whereabouts after he supposedly last saw the victim on May 21st: Bradley told Bobby Huhes claimed that an unknown person was present at the victim's Rembert residence when Bradley arrived. Bradley allegedly did not know the man, but Bradley, this unknown man and the victim were supposedly going to rob a drug dealer.

circumstance tending to show guilt, and it was for the jury to estimate its weight, and it was for the jury to determine whether his explanation and the motive he assigned were truthful or otherwise"). *See also State v. Beckham*, 334 S.C. 302, 513 S.E.2d 606 (1999) (attempted destruction of evidence is a relevant incriminating circumstance); 40A Am Jur.2d *Homicide* section 462 (1999) (concealment or attempted destruction of body of murder victim is regarded as incriminating circumstance. . . , an inference of guilt may be drawn therefrom).

On the other hand, he told law enforcement that he picked the unknown man up and took him to the victim's residence. He also changed his answer about where he had stayed on the night of the 21st three times when told his answers with information provided by other witnesses with whom he had claimed to have stayed.

Finally, he wrote a feigned love letter to his girlfriend, in which he falsely suggested that she had a reason to falsely implicate him in Ernest James' murder and, when that letter did not work, he wrote her a second letter.

As demonstrated, the prosecution presented sufficient circumstantial evidence that Bradley murdered the victim - either acting alone, or with the assistance of an accomplice. *See Zeigler, Williams and Kelsey, supra. Contra State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011). Even Bradley's own brother and defense witness, Paul Bradley, implicated him in the murder. Paul Bradley testified on direct examination that Bradley told him in a conversation around 1:00 p.m. on Monday, May 21st, that the victim had been killed. R. 774-75. Thus, even his brother's testimony demonstrated that Bradley had knowledge that only the murder could know, since the victim's body had not yet been found, much less identified!¹³

Therefore, contrary to Bradley's argument, there was sufficient proof of his identity to go to the jury. *Id.* To rule otherwise would essentially prevent a conviction based upon circumstantial evidence.

¹³ Walter Lunberg found the body in Boyle's Pond and he immediately notified law enforcement. R. pp. 8-11. Captain Turner testified that he and other officers responded to the scene sometime after lunch that day. He estimated the time as between 1:30 and 2:00 p.m. R. pp. 14-22. *See also* R. pp. 24-37; 516.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny certiorari.

Respectfully submitted,

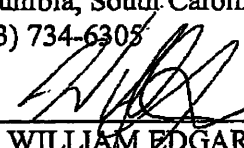
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 

WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

July 12, 2011.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal From Sumter County
The Honorable R. Ferrell Cothran, Circuit Court Judge**

THE STATE,

Respondent,

vs.

NATHANIEL NOEL BRADLEY,

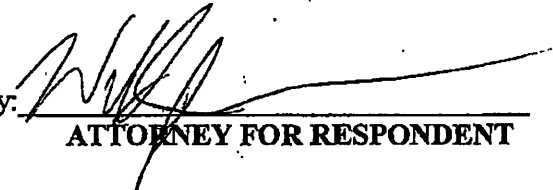
Petitioner.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same via United States Mail, first class, postage prepaid to his attorney of record, Tristan M. Shaffer, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 12th day of July, 2011.

By: 

ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

State of South Carolina, Respondent,

v.

Nathaniel Noel Bradley, Petitioner.

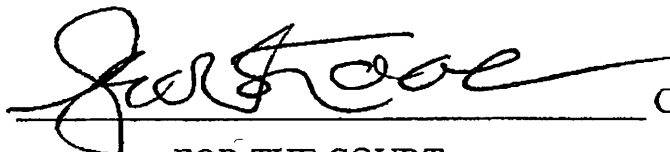
Appellate Case No. 2011-183966

RECEIVED

ORDER

RECEIVED
APPELLATE DIVISION

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Bradley*, Op. No. 2010-UP-494 (S.C. Ct. App. filed Nov. 8, 2010) (order attached). We deny the petition.


C.J.
FOR THE COURT

Columbia, South Carolina

June 21, 2012

cc:

The Honorable Jenny Abbott Kitchings

W. Edgar Salter, III

Wanda H. Carter

R. Ferrell Cothran, Jr.

James C. Campbell



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11628
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 05, 2012

The Honorable James C. Campbell
141 N. Main St. Rm 308
Sumter, SC 29150-4965

REMITTITUR

Re: The State v. Bradley, Nathaniel Noel
Lower Court Case No. 2007GS4300390
Appellate Case No. 2008-079528

RECEIVED

JUL -5 2012

NO OFFICE OF
APPELLED DEFENSE

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Joseph L. Savitz, III
W. Edgar Salter, III
Cecil Kelly Jackson

CLOSING LETTER SENT
ON 6-25-12

Attorney initials ELC

Assistant initials EB

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of SUMTER 2012 JUL 27 PM 3:56Nathaniel Noel Bradley JAN 26 2012 CAMPBELL
CLERK OF COURT

Case No:

2012-CP-43-1519

Full name and prison number (if any) of Applicant

v.

CERTIFIED TRUE COPY
OF ORIGINAL FILE

APPLICATION FOR

State of South Carolina

CITY CLERK OF COURT

POST-CONVICTION RELIEF

SUMTER COUNTY
SOUTH CAROLINA**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution, 386 Redemption Way, McCormick, South Carolina 29899
2. Name and location of Court which imposed sentence Sumter County Court of General Sessions -Sumter, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Murder - 2007-GS-43-390
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) January 18, 2008 - 30-years
 (b) _____
 (c) _____
6. Check whether a finding of guilty was made:
 (a) after a plea of guilty _____
 (b) after a plea of not guilty XXXXXXXX
 (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
 Yes

8. If you answered "yes" to (7), list:
 (a) the name of each Court to which you appealed:
 i. S.C. Court of Appeals
 ii. _____
 iii. _____
 (b) the result in each such Court to which you appealed:
 i. Affirmed
 ii. _____
 iii. _____
 (c) the date of each such result:
 i. 11-8-2010
 ii. _____
 iii. _____
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. State v. Bradley, Op. No. 2010-UP-494 (S.C. Ct. App. filed
 Nov. 8, 2010)
 ii. _____
 iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
 (a) N/A
 (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel was ineffective for failing to investigate this case
- (b) by failing to interview potential witnesses. Counsel has a
- (c) duty to investigate, See Ard v. Catoe, 642 S.E.2d 590, 597 (2007)
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Petition for Writ of Certiorari
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Supreme Court - Columbia, SC 29211
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

i. Petition denied

ii.

iii.

iv.

(d) the date of each such disposition:

i. June 21, 2012

ii.

iii.

iv.

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

See copy of ORDER, page 8 of this application

i.

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court. State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii.

iii.

(b) the proceedings in which each ground was raised:

i. N/A

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first opportunity the Applicant has have to
 (b) present these issues.
 (c)

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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

(a) the name and address of each attorney who represented you:
 i. Ernest Finney, Sumter County Public Defender Office, Sumter, SC.
 ii. Joseph L. Savitz, III, Chief Appellate Defense, S.C Commission on Indigent Defense
 iii. Tristan M. Shaffer, Appellate Defender

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

i. 18(a)(i) - 17(a)(b)(c)
 ii. 18(a)ii - 17(d)
 iii. 18(a) iii - 17(e)

19. State clearly the relief you seek in filing this application:
Reverse conviction and sentence and remand for a new trial, and
any other relief this Court deems just and proper.

20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA)

County of McCormick)

VERIFICATION

I, Nathaniel Noel Bradley #262526, 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.

Nathaniel Bradley

SWORN to and subscribed before me this 25
day of July, 2012

JCF Rankin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Nathaniel Noel Bradley #262526, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Nathaniel Bradley
Applicant

SWORN or affirmed to and subscribed before me this

25 day of July, 2012.

JCF Franklin
Notary Public

My Commission Expires: 12-16-2019

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Nathaniel Noel Bradley, #262526,

Case No. 2012-CP-43-01519

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

The Respondent, making its Return to the application for post-conviction relief, filed July 27, 2012, 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 Sumter County Clerk of Court. The Applicant was true bill indicted at the May 2007 term of the Sumter County Grand Jury for Murder and Possession of Firearm During the Commission of a Violent Crime (2007-GS-43-390). Ernest A. Finney, III, Esquire, represented him. On January 14-18, 2008, Applicant proceeded to a jury trial before the Honorable R. Ferrell Cothran, Jr. On January 18, 2008, Applicant was found guilty of Murder and not guilty of Possession of Firearm During the Commission of a Violent Crime. Judge Cothran sentenced Applicant to thirty years imprisonment for Murder.

Applicant appealed his convictions and an appeal was perfected. The South Carolina Court of Appeals affirmed the conviction. State v. Nathaniel Noel Bradley, 2010-UP-494 (filed November 8, 2010). A Petition for Rehearing was filed on November 23, 2010. In a written order, filed December 30, 2010, the South Carolina Court of Appeals denied the Petition for

Rehearing. Counsel for the applicant filed a Petition for Writ of Certiorari on April 1, 2011. The State made its Return to Petition for Writ of Certiorari on July 12, 2011. In a written Order, the South Carolina Supreme Court denied the Petition for Writ of Certiorari on June 21, 2012. The Remittitur was sent July 5, 2012.

Attached herewith and incorporated herein are the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

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.
 - a. "Counsel was ineffective for failing to investigate this case by failing to interview potential witnesses. Counsel has a duty to investigate, See Ard v. Catoe, 642 S.E.2d 590, 597 (2007)."

Any claims not specifically enumerated in the post-conviction application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his 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, 334 S.E.2d 813.

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, 466 U.S. 668. 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.

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.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

By: Megan E. Harrigan
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

February 12, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS

2012-CP-43-01519

NATHANIEL NOEL BRADLEY, 262526,)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Fulton Casey Dale Cornwell, Esquire
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, SC 29250

DATED this 12th day of February, 2013.

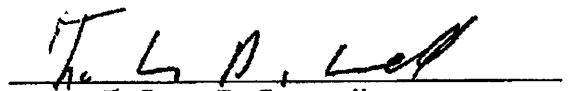
Lauren Meara
Lauren Meara, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUTMER	)	THIRD JUDICIAL CIRCUIT
	)	
Nathaniel Noel Bradley,	)	CASE NO. 2012-CP-43-01519
Applicant,	)	
v.	)	AMMENDMENT TO APPLICATION
	)	FOR POST CONVICTION RELIEF
State of South Carolina,	)	
Respondent.	)	

The Applicant, by and through his Attorney, F. Casey D. Cornwell, Esquire, would amend his Application for Post Conviction Relief filed on July 27, 2012, by adding the following specific allegations to his original allegation of ineffective assistance of counsel.

1. Ineffective assistance of trial counsel for failure to properly prepare and investigate, specifically, but not limited to the following claims:
 - a. Failure to review and explain the complete discovery materials to Applicant prior to trial.
 - b. Failure to conduct an independent investigation into the evidence and witnesses that formed the State's case against Applicant
 - c. Failure to call witnesses whose testimony was vital to client's defense. Specifically Failure to obtain expert witnesses to analyze the cell phone information and the wreckage of the burnt car.

Respectfully submitted,


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This 19 day of September, 2013.

1

2 STATE OF SOUTH CAROLINA

3 COUNTY OF SUMTER

4

5

6 Nathaniel Bradley PCR Hearings
Plaintiff) 2012-CP-43-01519
7)

8 vs.

9 The State of South Carolina) April 15, 2015 &
 Defendants) July 5, 2016
10 Sumter, S.C.

11

12 Before the Honorable George C. James, Jr., Judge.

13

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

15 Mr. Bradley Myers Kirkland,
Attorney for Plaintiff

17 Mr. Daniel F. Gourley,
Attorney for Defendants

19 Ms. Julie Amanda Coleman,
Attorney for Defendants

21

22 Margaret T. Sullivan,
Court Reporter

24

25

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1 THE COURT: This is the post-conviction
2 relief proceeding of Nathaniel Bradley
3 2012-CP-43-1519. Mr. Kirkland is present for the
4 applicant. Mr. Gourley and Ms. White are here for
5 the State. Mr. Finney is present. And you can
6 either tell me a little bit about your grounds, or
7 you can begin by calling your first witness.

8 MR. KIRKLAND: What I will do, Your Honor,
9 because it is a complex circumstantial case. I'll
10 take about 5 minutes if you don't mind, just to walk
11 through the evidence that was presented at the
12 trial, so that you can sort of have a framework for
13 receiving the evidence once I put it up. Is that
14 okay, with you?

15 MR. GOURLEY: Absolutely.

16 MR. KIRKLAND: Your Honor, this case
17 involves the death of Ernest James, if I m not
18 mistaken. The case really begins on Saturday May
19 21st. So you can mark that on the calendar that I
20 have handed you. On Saturday May 21st, Mr. James,
21 I'll just call him the victim. Mr. James was last
22 seen around 5:30 p.m. by three witnesses. And I may
23 have those witness names so that you can note them.
24 I do right here, Your Honor. Leonard McCray,
25 William McCray, and Martha Ransom. They'll testify

1 that they saw the victim on the 21st, around 5:30,
2 speaking with my client, the defendant. I'll call
3 him the defendant to make it easy, speaking with the
4 defendant outside of the victim's home. All three
5 of them witnessed it. They perceived it as being an
6 argument, although they could not hear anything.
7 Mr., the victim, came back inside, grabbed some
8 keys. And at that point and time, got into a blue
9 Volvo. And that was the only evidence elicited from
10 them that the Volvo was blue.

11 THE COURT: And who got in that car?

12 MR. KIRKLAND: The victim got into a blue
13 Volvo. The defendant, and another unknown black
14 male, were seen in a blue Chevrolet Beretta. And
15 after he came in, and he was visibly upset according
16 to the witnesses, he goes out and gets, the victim
17 gets into the blue Volvo. My client and the unknown
18 black male, and this was uncontested at the trial.
19 I didn't see anybody contest this, get into the blue
20 Beretta. They all drive off, and the people in the
21 house lose site of them. That is the last time that
22 anybody sees the victim.

23 The next day, and I'm just going to run
24 you through it fast. The next day at, this is
25 Sunday the 22nd, a fellow named, Daniel Koneig, said

1 that he witnessed the defendant and an unknown black
2 male, driving the blue Volvo. And he specified that
3 there was a yellow tag, which will become important
4 later, down Cobblestone Road. Cobblestone Road is
5 about half mile, quarter mile, one mile north of
6 Boyle pond. Boyle pond is very critical.

7 THE COURT: It's Boyle's. Apostrophe s,
8 doesn't make any difference.

9 MR. KIRKLAND: Correct. Boyles pond.
10 Boyles pond is critical. Because on Monday the
11 16th, the victim was found floating in Boyles pond.

12 THE COURT: It would have to be Monday the
13 23rd.

14 MR. KIRKLAND: Oh, I am sorry. I bumped
15 up a little. Monday the 23rd, he was floating in
16 Boyles pond with a cement block tied around his
17 ankle with a coat hanger. According to State
18 witnesses around 2:30 that same day, the car was
19 found was burned out at a cemetery. And the name of
20 the cemetery was---

21 THE COURT: Broad Branch.

22 MR. KIRKLAND: Broad Branch Cemetery.
23 Broad Branch Cemetery, I am going to have witnesses
24 testify is around 23 to 26 miles from Boyle pond and
25 Cobblestone Road. I think that's the only structure

1 that you need. What we're going to be doing, Your
2 Honor, is, I'm going to put up witnesses that
3 basically establish issues with the eye witness
4 identification of Darrell Koenig that morning. I am
5 going to put up witnesses concerning the car fire.
6 And whether or not that car could have been burned
7 between 9:30 in the morning and 3 o'clock that
8 afternoon on Saturday the 22nd, and what condition
9 that car would have been in had---

10 THE COURT: That Saturday was the 21st.

11 MR. KIRKLAND: Excuse me, Saturday the
12 21st, correct.

13 THE COURT: Okay.

14 MR. KIRKLAND: Wait a minute. It's
15 Sunday. They found the car on Sunday.

16 THE COURT: Okay.

17 MR. KIRKLAND: Yeah, Sunday the 22nd,
18 Daniel Koenig sees the car at 2:30 a.m. I mean,
19 excuse me, at 9:30 a.m. The car is found burned
20 26 miles away, the same day. And I am going to put
21 up a witness that is going to challenge the eye
22 witness identification as an eye witness
23 identification expert. I am going to call a witness
24 that is going to establish how cars burned, the time
25 line for them burning, the type of heat, the type of

1 smoke, the type of light that they produce. And I'm
2 also going to put up a telecommunication's expert
3 that is going to Darrell where Mr. Bradley's phone
4 was during this period of time.

5 Now that is a skeletal. A truly skeletal
6 understanding of the case. I just wanted you to
7 understand the predate.

8 THE COURT: All right.

9 MR. KIRKLAND: And if Mr. Gourley wants to
10 add anything to that skeletal understanding, please,
11 do so.

12 THE COURT: Now let me ask you this
13 question before I hear from him. Now the amendment
14 to application for post-conviction relief, I have
15 page 1, 2, 3.

16 MR. KIRKLAND: Correct.

17 THE COURT: But I do not have a signature
18 page. I don't have what pages might come after
19 that. So on those three pages there are 11
20 grounds.

21 MR. KIRKLAND: You did not see the rest of
22 them, Your Honor, but I have a clocked copy.

23 MR. GOURLEY: Sorry, Judge.

24 MR. KIRKLAND: If they sent me a clocked
25 copy, it must not have made it.

1 THE COURT: It is 4 pages long with 16
2 grounds.

3 MR. KIRKLAND: And is that one clocked?

4 MR. GOURLEY: No.

5 THE COURT: If you have an extra copy, I'd
6 love to have it.

7 MR. KIRKLAND: I will be happy to give you
8 the clocked copy.

9 THE COURT: Thank you. And these, it
10 says amendment. These are all the grounds, correct?
11 Other than what you might---

12 MR. KIRKLAND: Yes, they are all the
13 grounds. We're not adding -- weren't not using any
14 of the grounds -- we've added every ground including
15 what he put into his original application. Any
16 other grounds.

17 THE COURT: Okay.

18 MR. KIRKLAND: So the first person I am
19 going to call, Your Honor, I'm going to call them
20 out of order, so that I can get them back.

21 THE COURT: All right.

22 MR. KIRKLAND: I am going to go ahead and
23 call Lori Van Wallendael. The identification
24 expert.

25 THE COURT: Come on up please, ma'am.

Lori Van Wallendael-Direct by Kirkland

1 Your full name.

2 A. Lori Van Wallendael.

3 THE COURT: How do you spell your first
4 name?

5 A. L-O-R-I.

6 THE COURT: And is it Van Wallendael your
7 last name, or is Van a middle name?

8 A. That is one name. My last name Van
9 Wallendael.

10 THE COURT: Spell that, please.

11 A. V-A-N W-A-L-L-E-N-D-A-E-L.

12 THE COURT: D-A-E-L. And is Van
13 Wallendael is that altogether or is there -- excuse
14 me, is the W in Wallendael capitalized?

15 A. Yes, it is.

16 Lori Van Wallendael, being first duly
17 sworn, testified as follows:

18 THE COURT: Thank you. You may have a
19 seat.

20 DIRECT EXAMINATION by Mr. Kirkland:

21 Q. And there is a space between Van and
22 Wallendael.

23 THE COURT: She said that.

24 Q. Where do you work right now? I'm going to
25 call you Doctor.

Lori Van Wallendael-Direct by Kirkland

1 A. Thank you.

2 Q. Where do you work, Doctor?

3 A. I work at the University of North Carolina
4 at Charlotte.

5 Q. How long have you worked there?

6 A. Since 1986.

7 Q. If you could, please give me your
8 educational history?

9 A. I received a bachelor's degree in
10 Psychology in 1982, from Murray College in Central
11 Illinois. And then my master's and PhD in 1986,
12 from Northwestern University.

13 Q. Now what was your master's in PhD in?

14 A. Experimental Psychology.

15 Q. Experimental Psychology. Now after you
16 graduated, have you done any research in the area of
17 witness or eye witness identification?

18 A. Yes, I have.

19 Q. Explain to the court some of the things
20 that you have done in that area.

21 A. I have done research on people's ability
22 to recognize faces of different races.

23 Q. Who did you do that research with?

24 A. That was with some of my students.

25 Q. So you did that as part of at UNC?

Lori Van Wallendael-Direct by Kirkland

1 A. Yes.

2 Q. Anything else?

3 A. Yes. I have done a number of studies on
4 how different types of lineup presentation can
5 affect witness accuracy both computerized
6 presentations, sequential versus simultaneous
7 presentations, and those have been published in peer
8 review journals.

9 Q. Now tell me about the difference initially
10 between sequential and nonsequential identification
11 lineup.

12 A. Sequential lineup is a relatively new
13 procedure where instead of presenting what we think
14 of as the standard 6-pack lineup---

15 Q. Yes, ma'am.

16 A. ---or what we call simultaneous lineup.
17 With the subsequential procedure, photographs are
18 presented one at a time. And the idea is that you
19 are trying to discourage the witness from comparing
20 the photos and just picking the one that looks most
21 like the person they remember. And instead you are
22 asking the person to look at each photo
23 individually, make a comparison with what is in
24 their memory, and make more of an absolute judgment
25 as to whether this person is the correct person or

Lori Van Wallendael-Direct by Kirkland

1 not.

2 Q. So if I understand that procedure, it
3 would be 6 photos, let's say. And then one photo
4 would be showed at a time, and then set down.

5 A. Correct.

6 Q. And then the next photo would be shown at
7 a time and then set down.

8 A. Right.

9 Q. And may be asked to answer any questions
10 after each photo was shown or---

11 A. Yes.

12 Q. ---or do they wait until all of them are
13 shown?

14 A. They are supposed to answer a yes or no
15 after each photo is shown.

16 Q. Now you said that you did some research in
17 this particular area.

18 A. Yes.

19 Q. Tell me about the research.

20 A. There's two types of research that I have
21 been involved in, in this area. One is a laboratory
22 experiment in which students or other participants
23 view a videotape of a basically a criminal
24 situation. And that then they asked to look at a
25 lineup. And some of the studies that we have done

Lori Van Wallendael-Direct by Kirkland

1 in the laboratory have simply compared to
2 simultaneous and sequential lineups. Some of those
3 studies have compared computerized lineups with
4 lineups administered by a person. The second sort
5 of prong or research---

6 Q. Tell me, were there results from the --
7 did you reach any conclusions with the first
8 study---

9 A. Yes.

10 Q. ---despite that it was a laboratory,
11 artificial environment?

12 A. Laboratory studies have shown that there
13 are fewer false identifications with the
14 simultaneous -- with the sequential procedure than
15 with the simultaneous procedure.

16 Q. Okay. Now the -- do you know what the
17 difference is between the rate of success between
18 sequential versus the 6-pack? Do you remember?

19 A. It's a little variable depending on the
20 circumstances that you're working with, but the
21 comparison is statistically significant across a
22 variety of laboratory studies. And regardless of
23 whether it's computer administered or a person
24 administered.

25 Q. Now the second type of study I'm actually

Lori Van Wallendael-Direct by Kirkland

1 more interested in. Tell me what happened in the
2 second study.

3 A. The second type of study is one that was
4 published by Gary Wells and his colleagues a little
5 less than a year ago now. It involved actual
6 lineups for real crimes and police departments in
7 four different cities in the United States.

8 Q. So there were real world victims, let's
9 assume.

10 A. Yes.

11 Q. Trying to pick out assailants, let's just
12 say.

13 A. Yes.

14 Q. And you were working with various police
15 departments. Do you remember where these police
16 departments were located?

17 A. Yeah. My colleague Bryan Cutler and I,
18 worked with the Charlotte Mecklenburg Police
19 Department who provided some of the data for the
20 study. We ultimately discovered that there was a
21 similar nationwide study going on as we were
22 beginning to work with Charlotte, and so we became
23 part of that. And that also involved Tucson,
24 Arizona, San Diego, California. And I believe the
25 last one was Texas somewhere. Austin, Texas.

Lori Van Wallendael-Direct by Kirkland

1 Q. So these were real world situations in
2 which the police officers had a suspect in mind.

3 A. Yes.

4 Q. So I would assume from that, it's
5 impossible for you to know whether they picked the
6 right person, because you don't. But---

7 A. Correct.

8 Q. ---when they pick a wrong person the
9 police know, because those are other photos that
10 they put in there, correct?

11 A. Correct. So we have at least a known
12 minimum error rate from people who pick foils or
13 fillers in the lineups.

14 Q. And what, do you recall the percentages or
15 the differences between correct identification
16 versus incorrect identification? First, sequential
17 versus the 6 pack.

18 A. Yes, I do. We were very surprised by the
19 results actually. What was done in the studies is
20 that the police departments involved actually used
21 scientific methodology to randomly assign cases to
22 either a sequential or a simultaneous lineup, so
23 that we would know that basically the cases that
24 were getting assigned to one or the other were
25 equivalent. And at the end of the data collection

Lori Van Wallendael-Direct by Kirkland

1 there were over 400 actual lineups studied. And in
2 these sequential lineup condition of the people who
3 actually picked someone out of the lineup,
4 30 percent made errors.

5 Q. So 70 percent possibly correct.

6 A. Right.

7 Q. 30 percent for sure error.

8 A. Correct.

9 Q. What about the 6 pack.

10 A. The 6 pack lineup, the error rate was just
11 about 40 percent. It was 40.6 or 40.7.

12 Q. So make sure I understand this, 40.6 for
13 sure because they knew they were foils.

14 A. Right.

15 Q. And then 60 percent we don't know---

16 A. Right.

17 Q. ---whether they did it or not. But we
18 know 46, 47 for sure wrong, correct?

19 A. Yes.

20 Q. Now how long have you been researching in
21 this area of eye witness? Do you have any other
22 publications that you can, I don't remember. Is
23 there any other publications involving any eye
24 witness identification?

25 A. There are a few. I have done studies

Lori Van Wallendael-Direct by Kirkland

1 published in applied cognitive psychology. Journal
2 of North American Psychology, psychological reports,
3 as well as some review articles in the handbook of
4 eye witness psychology and the encyclopedia of
5 psychology and law and so forth.

6 Q. How long have you been researching, and I
7 know you do -- you have multiple disciplines, but
8 how long have you been researching in the area of
9 eye witness identification?

10 A. I have been researching memory in general
11 since graduate school.

12 Q. What year was that?

13 A. 1985, 86.

14 Q. 1985.

15 A. As far as specific interests in eye
16 witness psychology, I've probably had most focused
17 interest there in the last, I'd say, 10 or 12 years.

18 Q. So we'll just say 10. We'll use the---

19 A. Sure.

20 Q. ---smaller number. Do you teach any or
21 have you teach -- have you taught any courses in
22 eye witness identification?

23 A. I teach a course in forensic psychology
24 where we spend a good deal of time on eye witness
25 identification. It's also a topic that comes up

Lori Van Wallendael-Cross by Gourley

1 when I teach general psychology and when I teach
2 human cognitive processes, which is kind of a
3 general study of memory and decision making and
4 problem solving.

5 Q. Now have you been qualified in the area of
6 an expert in the psychology of eye witness
7 identification prior to today, assuming we can make
8 that happen?

9 A. Yes, I have.

10 Q. How many times do you recall that
11 occurring?

12 A. I probably testified about 30 times
13 roughly.

14 Q. Now what sort of cases have you been
15 qualified in? Civil?

16 A. Primarily criminal.

17 Q. Primarily criminal.

18 MR. KIRKLAND: Your Honor, at this time, I
19 would ask that Lori Van Wallendael be accepted as an
20 expert in the field of eye witness identification.

21 THE COURT: Any questions of the witness?

22 MR. GOURLEY: Your Honor, just briefly.

23 Cross Examination by Mr. Gourley:

24 Q. You said that you began the consequential
25 research around 10 years ago, 10 or 12 years ago?

Lori Van Wallendael-Cross by Gourley

1 A. I began research in general in eye witness
2 memory, yeah.

3 Q. About 10 or 12 years ago?

4 A. Yeah.

5 Q. You also say that you testified
6 approximately 30 times.

7 A. Yes, I think that's right.

8 Q. And who do you typically testify for?

9 A. For the defense.

10 MR. GOURLEY: Your Honor, I don't have any
11 other questions.

12 THE COURT: Any objections to her being
13 qualified?

14 MR. GOURLEY: No, Your Honor.

15 THE COURT: The witness is qualified. Is
16 the proper area, ma'am, the field of psychology of
17 eye witness identification, or eye witness
18 identification?

19 A. Psychology of eye witness identification
20 is my.

21 THE COURT: She is qualified in that
22 field. Mr. Kirkland, you can continue.

23 MR. KIRKLAND: Thank you, Your honor.

24 Direct Examination by Mr. Kirkland:

25 Q. If you can briefly tell the judge what it

Lori Van Wallendael-Direct by Kirkland

1 is that I asked you to do. What I asked you to look
2 at, what I asked you to render an opinion on. Can
3 you explain that to the judge.

4 A. Sure. I was basically given the court
5 testimony of Mr. Koenig, the man who identified the
6 defendant as driving the blue Volvo. And then I
7 also---

8 Q. Before you go beyond that, let me tell the
9 judge that testimony starts on page 623, Your Honor.

10 THE COURT: Okay.

11 Q. What else did you look at?

12 A. I looked at the testimony of the two
13 police officers who administered the lineup to
14 Mr. Koenig.

15 Q. And that was Clarence McMillan and Wesley
16 Gardner?

17 A. Yes.

18 MR. KIRKLAND: And, Your Honor, Clarence
19 McMillan starts on 710. Wesley Gardner starts on
20 611.

21 Q. Anything else that you recall?

22 A. Yes. I also had a chance to view a black
23 and white photocopy of the lineup used, and the
24 instructions that were given to the witness.

25 Q. Did you also -- let me look at, let me

Lori Van Wallendael-Direct by Kirkland

1 have you -- is there anything else that you
2 remember?

3 A. No.

4 Q. Let me hand you this, and see if you
5 remember if that refreshes your recollection.

6 A. Yes. It's a statement of Investigator
7 Barfield, I think his name was.

8 Q. Yes, ma'am.

9 A. About his initial meeting with Mr. Koenig.

10 Q. And those are all of the materials that
11 you reviewed.

12 A. Yes.

13 Q. Now I made a mess over here. We'll start
14 out with, can you briefly explain to the court and
15 to the attorney general's office, how memory works
16 according to your psychological research that you've
17 done.

18 A. Sure, when I teach this area to students,
19 one of the first things that I try to make them
20 understand is that, memory doesn't work at all like
21 a videotape. It's not something that is verbatim
22 stored in our brain that we can play back when we
23 wish. The analogy---

24 Q. And does the research support---

25 A. Yes.

Lori Van Wallendael-Direct by Kirkland

1 Q. ---that?

2 A. Yes.

3 Q. Go ahead.

4 A. We have probably a hundred years that
5 supports that. The model of memory that's most
6 accepted in psychology today is one that's more a
7 reconstructive process. And the idea is when you
8 remember something, it's a little more like putting
9 a jigsaw puzzle together. When you experience an
10 event, in order to put it into memory, or what we
11 encoding into memory, we first have to pay attention
12 to it. And we know that as human beings our
13 attention is actually quite limited. Our senses may
14 take in a wide variety of information, but the
15 amount that we actually attend to is much smaller.
16 And as we process that information and become
17 conscious of it, probably only about 7 or so pieces
18 of information really gets processed consciously at
19 any given moment. So to have information be
20 recalled at a later date, it needs to be meaningful
21 to us. It needs to be processed at a level that our
22 brain will hold on to it, and be able to retrieve it
23 later. And what typically happens when any of us go
24 back and think about an event that we've lived
25 through; is that, we're probably recalling some

Lori Van Wallendael-Direct by Kirkland

1 features that were actually encoded at the time that
2 our brain actually remembers. But we're also
3 probably filling in the gaps with a lot of
4 inferences.

5 Q. Let me ask you one thing about that.

6 A. Yes.

7 Q. I hate to interrupt you, but does the
8 research over the last 100 years support that
9 theory, or is that the most -- that's the accepted
10 theory right now.

11 A. Yes, that is the accepted theory.

12 Q. Go ahead.

13 A. And when we fill in the gaps, we can do
14 that from our own logic and common sense. We can do
15 that from what we know about the way the world
16 generally works. And we also fill in the gaps based
17 on things that we've discussed with other people,
18 things that other people might have said to us,
19 things that we may have learned from other sources.
20 So that when we recall something and testify about,
21 we're really kind of looking at a combination of---

22 Q. Of all those factors.

23 A. Right. Of all of those things. Things
24 that we really experienced, and also things that we
25 may have learned later. Things that we may be just

Lori Van Wallendael-Direct by Kirkland

1 guessing about. And we can't really know what parts
2 of our memories are really encoded experiences from
3 the past, and what parts are inferences. Because
4 once they're all put together they are -- they're
5 glued.

6 Q. So as a layman, as I have never called an
7 eye witness identification expert. You're saying
8 that there is a certain impression when you see
9 something or hear something or---

10 A. Correct.

11 Q. ---experience something. But then
12 experiences prior to that, and experiences
13 subsequent to that, may fill in any blanks in the
14 experience that you perceived.

15 A. Correct.

16 Q. And may in fact impact the way you
17 perceived them.

18 A. Correct. And the key really is that your
19 memory is always changing. So every time that you
20 recall something personally, every time that you
21 talk about it somebody else, ever time you tell your
22 story, your story changes a little bit.

23 Q. I was going to say something. It Was a
24 joke, but I am not going to say that. Now in your
25 review of the materials that were just listed, did

Lori Van Wallendael-Direct by Kirkland

1 you note any factors that might effect witness
2 accuracy in this case? And I'm referring to the
3 witness of Darrell Koenig, which I think you have
4 already have, Your Honor, starting on page 623.

5 A. Yes. The first factor that jumps out as
6 being problematic; is that, this was what we call a
7 cross racial identification of a white witness
8 attempting to identify a black male. And there are
9 many decades of study now that have shown that
10 people in general are not very good at identifying
11 people of other races. So what tends to happen
12 according to the research, is that the percentage of
13 false identifications goes up usually by around 50
14 percent or so when you're identifying.

15 Q. Of misidentifications?

16 A. Yes, misidentifications. So roughly one
17 and half times as many for cross racial
18 identifications as for within race identifications.

19 Q. And so and that would play a role in this
20 case because of differences in the race you think.

21 A. Yes.

22 Q. Or it could.

23 A. It could. It's something that I think,
24 yeah, a jury would need to consider.

25 Q. Now I am going to hand you, and I want you

Lori Van Wallendael-Direct by Kirkland

1 to look at this, and tell me what this document is.

2 A. This is the lineup that was given to
3 Mr. Koenig, and the instructions that he was given
4 as to how to indicate his choice.

5 THE COURT: If you're going to show a
6 witness a document, let's mark it at least for Id.

7 MR. KIRKLAND: I am going to move to admit
8 that.

9 MR. GOURLEY: Yes, Your Honor. No
10 objection.

11 THE COURT: And you call it Plaintiff's 1.

12 MR. KIRKLAND: Plaintiff's 1.

13 THE COURT: And that is what, doctor?

14 A. That is the lineup that was shown to
15 Mr. Koenig.

16 THE COURT: And the instructions.

17 A. And the instructions that we given with
18 it.

19 (Lineup marked Plaintiff's 1 into
20 evidence.)

21 Q. What I am doing is, I am going to hand you
22 Plaintiff's Exhibit 1. If you don't mind, describe
23 that document that you're looking at. What's on the
24 first page, and what's on the second page.

25 A. The first page is a witness lineup

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1 identification form. It states to the witness, the
2 positions of the persons in the lineup will be
3 numbered left to right, beginning with one on your
4 left. If you've previously seen one or more of the
5 person's in the lineup, place an X in the
6 appropriate circle corresponding to the number of
7 the person in the lineup. Then sign your name and
8 fill in the date and time. When completed, hand it
9 to the officer. No. 3 has been circled on the
10 choices. And then the dot underneath it has been
11 X'd and filled in.

12 It looks like Mr. Koenig signed this on
13 May 26th 2005. And then there is a signature of the
14 law enforcement officer and the attorney.

15 MR. KIRKLAND: And, Judge, I ask the
16 prosecutor if I may hand you a copy of that.

17 THE COURT: This is No. 1.

18 MR. KIRKLAND: That's No. 1, Your Honor.
19 And that's just certainly for your purposes to
20 follow along.

21 Q. Now explain to me is this a sequential
22 identification procedure, or a 6 pack sort that you
23 were talking about?

24 A. This is a simultaneous 6 pack.

25 Q. Simultaneous 6 pack. And just reiterate

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1 very quickly, briefly, because you've already talked
2 about it, the concerns that you have with this
3 particular lineup.

4 A. Well first of all, it is simultaneous. So
5 the witness was able to look at all 6 photos
6 simultaneously. The instructions to the witness did
7 not indicate in any way that it's okay to pick none
8 of the above. Now days instructions typically will
9 be very explicit about how, you know, it's just as
10 important to rule out suspects as it is to choose
11 one. And if you don't see -- if you're not sure,
12 you know, to not pick any one, there's none of that
13 sort of language here.

14 Q. Anything else that you see concerning that
15 lineup?

16 A. Yes. When you look at the actual photos
17 used in the lineup, it looks as though first of all,
18 the photographs were chosen to attempt to match the
19 suspect's appearance. And I believe the testimony
20 of the officers also indicated that. Research tends
21 to show that the better way to choose foils is to
22 match everyone to the description that the witness
23 initially gave. So if there are factors that the
24 witness did not talk about, you want to have them a
25 be a little more variable.

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1 This lineup it looks like for instance,
2 there was -- it looks like there was an attempt made
3 to chose all people with fairly large lips. That
4 was not anything that the witness spoke about when
5 he gave his statements to the police as far as I
6 can tell from the testimony. But it does look to me
7 that photo Number 3 stands out. First of all, he's
8 the only one who is kind of looking to the side a
9 little bit. And there is a -- it's hard to tell on
10 the photocopy, but it looks like his mouth is open
11 more. You can see his teeth kind of protruding a
12 little, so that the photo seems to jump out a
13 little, yeah.

14 Q. We talked over, and it's my fault. You're
15 saying his mouth is open a little more so than the
16 others in the picture?

17 A. Yeah, it seems to me that that feature is
18 accentuated on his photo.

19 Q. Now the record indicates, in multiple
20 places in the record that this lineup was generated
21 by a computer and not hand picked by a---

22 A. Correct.

23 Q. ---person. Is there anything that you
24 have, any opinion that you have about that sort of
25 thing?

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1 A. That's not a bad practice. But again the
2 key would be to focus on the witness' initial
3 description. And this witness really didn't say a
4 lot that was helpful there. He basically said black
5 male. Really thin face.

6 Q. Let me do this. Let me interrupt you.
7 Because you're basing that I assume on the voluntary
8 statement that he gave to officers?

9 A. Yes.

10 Q. If I may, I am going to hand you
11 something. Tell me if you recognize this.

12 A. Yes, this was the statement that
13 Mr. Koenig gave to Investigator Barfield on
14 May 25th.

15 MR. KIRKLAND: And, Your Honor, these
16 materials were in the discovery materials. I would
17 ask---

18 THE COURT: Any objection?

19 MR. GOURLEY: No, Your Honor.

20 THE COURT: It's No. 2.

21 (Statement of Daniel Koenig marked as
22 Plaintiff's Exhibit No. 2 into evidence.)

23 Q. While you are looking at Plaintiff's
24 No. 2, tell me what you notice about the description
25 he gave to officers at that time.

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1 A. The description is, a black male, dark
2 skin, slim face and light facial hair. Also that he
3 appeared to have a dark colored tee shirt on. So
4 this is a pretty sketchy description that doesn't
5 give any distinctive features of the driver. So it
6 doesn't talk about perhaps the size of the lips, or
7 anything about a distinctive appearance to the
8 mouth. This is kind of a very generic description.
9 Slim face is, you know, probably the most
10 distinctive element of the description.

11 Q. Does that description that he gave
12 officers include, which we're going to talk about
13 more in a minute, anything in particular about this
14 defendant's mouth, and how unbelievably recognizable
15 that mouth was?

16 A. No, nothing.

17 Q. It doesn't mention anything about that.

18 A. No.

19 Q. Anything else that you want to say about
20 this statement? I think we have it all, but
21 anything else?

22 A. No.

23 THE COURT: And what was that question
24 about unbelievably distinctive mouth?

25 MR. KIRKLAND: Yes, sir. We're going to

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1 talk about it.

2 THE COURT: That's what your question was,
3 make sure.

4 MR. KIRKLAND: Yeah.

5 THE COURT: You can explain it later.

6 MR. KIRKLAND: Yes, sir.

7 Q. Now that we've put those two in, I am
8 going to refer to Darrell Koenig himself. And you
9 have said that you had an opportunity to review the
10 information, the transcript of Darrell Koenig.

11 A. Yes.

12 Q. In looking at that transcript, did you see
13 anything that might have given jurors undue
14 confidence in his identification?

15 A. Yes. My main concern is, we know that
16 first of all, jurors are very influenced by the
17 confidence of a witness. And both Mr. Koenig and
18 the two investigators who gave them the lineup, all
19 stated that he had expressed 100 percent confidence
20 in his identification.

21 Q. So now just to keep the court on track,
22 we're talking about Wesley Gardner on page 611, and
23 Clarence McMillan on 710, testified that the
24 witness -- well then you tell me.

25 A. As I recall, they testified that when

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1 Mr. Koenig picked No. 3 from the lineup, that he
2 said he was 100 percent sure.

3 Q. And so tell me why that's a concern.

4 A. It's a concern because research shows very
5 clearly that confidence and accuracy are very weakly
6 related. There are many people who lack confidence
7 who are correct. There are many people who are 100
8 percent confident who are incorrect.

9 Q. So those studies over the past, not just
10 including the ones you were involved in, have shown
11 that that is---

12 A. Yes.

13 Q. ---case?

14 A. It's statistically speaking the
15 relationship between confidence and accuracy is very
16 similar in strength to the relationship between
17 gender and height. So on the average, men are
18 taller than women, but we all know short men. We
19 all know tall women. We all know couples where the
20 woman is taller than the man. And it's the same
21 kind of thing with, you know, highly confident and
22 accurate witnesses, and relatively unconfident
23 accurate witnesses.

24 Q. Now just so I can -- I don't think I
25 really understood.

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1 A. Okay.

2 Q. So you're saying -- I really don't think I
3 did understand that. So you're saying that more
4 often witnesses say that men are taller. And more
5 often they say women are shorter.

6 A. No, what I'm saying, I'm trying to make an
7 analogy here for, statistically when we talk about a
8 relationship or a correlation, for instance, if
9 you're accurate and if you're confident. I think
10 most people assume that there's a nice, straight
11 line relationship there, where the more confident
12 you are the more likely you are to be accurate.

13 Q. Just as women---

14 A. Right.

15 Q. ---are often shorter.

16 A. Just as we assume that men are going to be
17 shorter than -- or that men are going to be taller
18 than women.

19 Q. Got it.

20 A. But in fact that's not really a very
21 accurate assumption at all. And it's certainly not
22 an assumption that you can use to look at any one
23 particular witness and say, you know, just because
24 they're accur -- just because they're confident they
25 must be accurate. That would be like saying, just

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1 because your a male, you must be tall.

2 Q. Got it. Now anything else concerning that
3 testimony that caught your eye?

4 A. Yes. The witness in his testimony gives a
5 number of very specific details that I think would
6 certainly have impressed the jury as being details
7 that only a very observant person with a very good
8 memory would recall. So for instance, he talks
9 about seeing a 1990, I think, ugly blue Volvo. He
10 talks specifically about the yellow temporary
11 license tag. And those are things that sound like,
12 you know details that would be -- that would make
13 him more accurate. But in fact, we don't know
14 whether he actually noticed any of those details on
15 the day that he saw the car.

16 Q. And why is that?

17 A. Because he also -- he himself talks about
18 how after he saw the car, he didn't think too much
19 of it. And then a day or so later, he hears about
20 this body being found. And a neighbor told him that
21 they had seen on the news that the police were
22 looking for a 1990 blue Volvo with temporary tags.

23 Q. And then when is it that he first contacts
24 police?

25 A. After that.

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1 Q. After that.

2 A. So, you know, he's giving a memory. He
3 thinks he's seen this particular car. And he now
4 has, you know, whatever he remembers from his own
5 memory. And maybe that's just ugly blue car, and
6 maybe that's boxy car, and maybe that's ugly blue
7 Volvo. But once he's heard about the news report
8 and what the neighbor said, that all becomes part of
9 his memory.

10 Q. Potentially. To be fair, potentially.

11 A. Right. Potentially. So ultimately we
12 don't know how many of those details he really
13 noticed when he saw the car, and how many have
14 become part of his memory after talking to the
15 neighbor. But on the stand he sounds like, you
16 know, I noticed all of that and remembered it on the
17 day that I saw the car.

18 Q. And so the transcript indicates that he
19 then called the police.

20 A. Correct.

21 Q. And the police come out and talk to him.

22 A. Correct.

23 Q. And then he gives this statement.

24 A. Yes.

25 Q. Now in that statement since it's already

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1 in evidence, he does mention yellow 45 days---

2 A. Yes.

3 Q. ---tags on the rear of the Volvo.

4 A. Yes.

5 Q. Did he mention the color in there?

6 A. Blue green box top Volvo.

7 Q. Blue green.

8 A. Uh-huh. (Affirmative.)

9 Q. Now we'll move on to another. Is there
10 anything else that you saw in that testimony that
11 gave you some concern?

12 A. Yes. In this case it's a matter of what
13 was not seen, as much as what was. And that is the
14 fact that he has not ever mentioned anything about
15 the driver's mouth until---

16 Q. We're talking---

17 A. ---he sees the lineup.

18 Q. We're talking about the voluntary
19 statement.

20 A. Okay.

21 Q. That's what I am asking.

22 A. Yeah. No, I mean what I notice about the
23 voluntary statement is that he does not mention
24 anything further. Other than---

25 Q. So there's nothing in that statement

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1 concerning his mouth.

2 A. Right.

3 Q. Now at trial, what did he basically say he
4 based his entire identification on?

5 A. He says he based it on -- he was drawn to
6 that photo because of the unusual mouth. And at
7 that point, he says he remembers the mouth.

8 Q. Now there was some cross examination about
9 the mouth.

10 A. Yes.

11 Q. Did he indicate prior to seeing that
12 lineup at any point and time in the transcript that
13 he remembered the mouth? Prior to the transcript?

14 A. No, not until he saw lineup.

15 Q. And then when he got to the stand, what
16 did he testify about the mouth?

17 A. When he got to the stand, he testified
18 that the mouth drew his attention; that that was
19 kind of the reason that picked No. 3. And the
20 reason that he ultimately points out the defendant
21 on the stand as being the person he remembers as the
22 driver.

23 Q. Now Nathaniel Bradley is sitting right
24 here in the courtroom. Do you believe that he does
25 possess, or, you know, does it appear he possesses

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1 that trait, that overbite with this teeth showing
2 that he described?

3 A. Yes.

4 Q. But he had never mentioned that prior to
5 taking the stand?

6 A. Correct.

7 Q. Anything else that you saw in there?

8 A. I guess the one other thing was just the
9 very brief amount of time that he had to be exposed
10 to the driver's face.

11 Q. Well I do want to fair about that, and I
12 appreciate your opinion. But I think he did say
13 that he got -- he saw him, and locked eyes with him
14 for 15 straight seconds?

15 A. He did say that. And what research tends
16 to show is that we tend to over estimate the passage
17 of time when we're looking back on something in
18 memory. My guess is that it was probably 5 to 10
19 seconds just kind of trying to mentally estimate how
20 long you might be able to lock eyes with the driver,
21 who is the one going slowly.

22 Q. Now there was another passenger in the car
23 on that day.

24 A. Yes.

25 Q. Do you recall what he was able to testify

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1 as to the other driver? Other person, excuse me.

2 A. He stated that was there was were
3 passenger, that he thought the passenger was a black
4 male, but he didn't give any details or even any
5 certainty whether the passenger was in fact black.

6 Q. Now with this extremely concise memory
7 that he has, would that throw up any red flags for
8 you; that he can't remember anything about the other
9 person in the car?

10 A. Well to a certain extent it goes along
11 with what we know about memory, and what our
12 limitations are in terms of paying attention to
13 detail. But it does given the totality of the
14 experience that Mr. Koenig had, looking up from
15 working in a ditch, seeing a car at an angle for
16 only a few seconds, you know, the fact that he was
17 not able to remember much about the passenger, as
18 well as the fact that he did not describe very much
19 about the driver either, just seems to suggest to me
20 a very limited ability to view the two men, if two
21 men they were.

22 Q. I am going to ask you something, and I
23 honestly don't know the answer to this. Do you
24 remember if other than the blue Volvo and the yellow
25 paper tag, do you remember if he talked about his

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1 identification with any of his neighbor's or anyone
2 other than that?

3 A. I don't recall him saying.

4 MR. KIRKLAND: I don't remember that
5 either. Your Honor, I believe that's all I have.
6 So Mr. Gourley is going to ask you some questions.

7 THE COURT: Make sure that the exhibits
8 that were introduced stay up here, okay. Go ahead,
9 Mr. Gourley.

10 Cross Examination by Mr. Gourley:

11 Q. Now you would agree with me that
12 Mr. Koenig is not a lay person, correct? Based off
13 of his past work experience?

14 A. Correct.

15 Q. Now he was a pilot, judge for your
16 information, he was pilot and studied instrumental
17 things dealing with aircraft.

18 A. Correct.

19 Q. So this isn't just your average Joe off
20 the street, and when it comes to dealing with memory
21 or identification. Would you agree with me on that?

22 A. I am not sure that I would agree with
23 that.

24 Q. Well he has a level of degree specialized
25 training that others do not.

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1 A. He has a specialized training in a
2 particular type of identification, yes.

3 Q. Now when did you start specially
4 researching, I am sorry I forgot what you called it.

5 THE COURT: Sequential versus
6 nonsequential.

7 A. Sequential and simultaneous.

8 Q. Sequential versus nonsequential. When did
9 you specifically start focusing on that?

10 A. Probably let's see, I'd say within the
11 last 8 to 10 years.

12 Q. The last 8 to 10 years. And wouldn't you
13 agree with me that the research has evolved since
14 let's say the defendant's trial in 2008?

15 A. Certainly, yes.

16 Q. So and then a expert in 2008, may have had
17 different beliefs than what they do now?

18 A. An expert in 2008, would certainly have
19 had some laboratory studies to back them. None of
20 the field studies had been conducted at that time,
21 so.

22 Q. But you would agree with me that back in
23 2008, the experts may have had different beliefs to
24 what you have testified to today?

25 A. Yeah, the research was much earlier there.

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1 We didn't have the kind of, you know, build up of
2 studies that we have now.

3 Q. So you would agree in 2008, was relatively
4 new?

5 A. Yes.

6 Q. Kind of cutting edge stuff?

7 A. Yeah.

8 Q. Now you stated, what are some factors in
9 your opinion that led to a positive identification?

10 A. Good opportunity to view. So good
11 lighting. Seeing someone reasonably close, not
12 being under a great deal of stress.

13 Q. Okay. So good lighting. I think
14 Mr. Koenig saw the defendant at 9:30 in the morning.
15 Of course we don't know if it whether it was sun
16 shining or not or a beautiful day---

17 A. Right.

18 Q. ---or not. But you would agree---

19 A. I think he actually describes it as a
20 sunny day in---

21 Q. Yeah.

22 A. ---part of his statement.

23 Q. So you would agree with me that leads to a
24 good lighting to visibly see the defendant?

25 A. Yes.

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1 Q. And also you said 5 to 10 seconds. You
2 don't know how long Mr. Koenig had to see the
3 defendant, do you?

4 A. No, we can only estimate.

5 Q. And he said approximately about 15 seconds
6 according to his own testimony.

7 A. Said about 15.

8 Q. Now Mr. Koenig was of course working out
9 in his yard. Would you agree with that that doesn't
10 sound like a very stressful situation. He wasn't
11 surrounded by multiple people and training points,
12 so on and so forth.

13 A. Correct.

14 Q. And the area that Mr. Koenig lived in was
15 actually a desolate area if you will, a new
16 construction of a neighborhood.

17 A. Right.

18 Q. There wasn't a lot of traffic. And
19 actually Mr. Koenig made a comment that the gates
20 had been taken down because the road had just been
21 paved. So typically this is a gated community---

22 A. Correct.

23 Q. ---that there is no traffic whatsoever
24 other than local residences.

25 A. Right.

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1 Q. And would you agree with me that
2 Mr. Koenig was surprised by the fact that here is
3 this 1990 blue Volvo driven by two black males, that
4 he doesn't recognize, right?

5 A. Correct.

6 Q. And that actually there was only a couple
7 of residences at that time living in that area,
8 correct?

9 A. Correct.

10 Q. And of course, the defendant was not one
11 of them.

12 A. Correct.

13 Q. So you would agree with me that that would
14 lead to Mr. Koenig paying special attention to the
15 defendant.

16 A. Yes. I would agree that's a perfectly
17 reasonable reason that the car would have caught his
18 eye.

19 Q. And the person driving the car, correct?

20 A. Correct.

21 Q. Now you also made mention of the fact that
22 he did not focus on the passenger. Would you agree
23 with me that that may lead to the assumption that
24 defendant or Mr. Koenig was focusing more so on the
25 driver of the vehicle, the defendant, versus the

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1 passenger.

2 A. It's, yeah, in his statement, he indicates
3 that, you know, it was the driver that he locked
4 eyes with and the driver that he focused on.

5 Q. And again, Mr. Koenig not only saw the
6 defendant once, but twice, correct?

7 A. His statement is that he saw the car go
8 back later, but that he didn't actually see the
9 driver's face at that time.

10 Q. So the car came into the neighborhood.

11 A. Correct.

12 Q. One way in. He was curious as to why this
13 random car is driving through the neighborhood.

14 A. Correct.

15 Q. And then the car of course exited as well.
16 But approximately I think 5 minutes later is what
17 Mr. Koenig testified to.

18 A. Correct. And I think that was when he
19 noticed the license plate.

20 Q. And that actually startled him when he
21 came by, because according to Mr. Koenig, he was
22 creeping by like 5 miles an hour?

23 A. Right he didn't hear it until it was right
24 on him, I think was the way he testified.

25 Q. So you would agree though that two

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1 opportunities to visualize the car, the driver of
2 the vehicle, in a non-stressful situation, in an
3 environment that's a desolate area at 9:30 or 8
4 o'clock in the morning, lends to the opportunity to
5 have a decent identification.

6 A. Yes, it does.

7 Q. And that's what occurred in this case.

8 A. Yes.

9 MR.GOURLEY: Your Honor, if I beg the
10 court's indulgence.

11 THE COURT: Okay.

12 MR. GOURLEY: I have no further questions,
13 Your Honor.

14 THE COURT: Redirect.

15 MR. KIRKLAND: That's it.

16 THE COURT: Thank you, Doctor. You can
17 step down. Make sure you leave the exhibits.
18 Mr. Kirkland, you can continue if you'd like, or you
19 can break for lunch. I'll leave that up to you.

20 MR. KIRKLAND: I say let's just push as
21 hard as we can push.

22 THE COURT: How long is your next witness
23 going to last?

24 MR. KIRKLAND: It's going to be an hour.
25 We can break at some point and time.

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1 THE COURT: We'll stop. We'll meet back
2 at two o'clock.

3 (Whereupon, court takes a lunch recess.)

4 We will put on the record what I spoke
5 briefly about. Mr. Gourley, I think you had stepped
6 out. Did Mr. Kirkland explain to you?

7 MR. GOURLEY: Yes, Your Honor.

8 THE COURT: I saw Mr. Olson in the
9 courtroom. I was in private practice, I guess it's
10 been -- it's been over 10 years. But I did some I
11 guess, work for various clients where fires were
12 issues.

13 MR. GOURLEY: Yes, sir.

14 THE COURT: I believe I actually retained
15 Mr. Olson one time. And It might have been on a
16 cotton picker case. I think it was a cotton picker
17 case involving Case International. Some type of
18 cotton picker. Do you have a problem with me going
19 forward?

20 MR. GOURLEY: No, sir. Not at all, Judge.

21 THE COURT: Mr. Kirkland.

22 MR. KIRKLAND: Well then we're ready to
23 go.

24 THE COURT: Do you have a problem?

25 MR. KIRKLAND: Absolutely not, Your Honor.

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1 THE COURT: And I do feel like I can be
2 fair and impartial, regardless.

3 MR. GOURLEY: Yes, sir, Judge.

4 THE COURT: You can call you next witness.

5 MR. KIRKLAND: I am going to call Ben
6 Levitan.

7 THE COURT: Your Name.

8 MR. LEVITAN: Ben Levitan.

9 THE COURT: L-E-V--

10 MR. LEVITAN: I-T-A-N.

11 Ben Levitan, being first duly
12 sworn, testified as follows:

13 THE COURT: Mr. Kirkland.

14 MR. KIRKLAND: Your Honor, before we get
15 started, I am going to go ahead and hand up what I
16 have handed to the assistant attorney general. It
17 is the power point presentation that he intended to
18 utilize. However I have printed it out since we
19 don't how to get the computers going.

20 THE COURT: I can help with that.

21 MR. KIRKLAND: It's up to you. It's
22 exact copy of what we would put up.

23 THE COURT: If this is an exact copy, then
24 we don't have a jury, this will be fine with me.

25 MR. KIRKLAND: And what I am going to do

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1 after he talks about it, Your Honor, is I'm probably
2 going to ask that it be made at least a court's
3 exhibit, because we'll have it in the record so if
4 somebody.

5 THE COURT: Any objection?

6 MR. GOURLEY: No, Your Honor.

7 THE COURT: I'll just go ahead and make it
8 Applicant's No. 3.

9 MR. KIRKLAND: Yes, sir, Your Honor.

10 THE COURT: Or Plaintiff's No. 3.

11 MR. KIRKLAND: If you don't mind, if you
12 could mark that one, because that's the colored one.

13 THE COURT: I'll make a photocopy of it.

14 MR. KIRKLAND: You may need to make some
15 notes on it.

16 THE COURT: I definitely will.

17 MR. KIRKLAND: So let me do this. If you
18 don't mind, I'll make a photocopy of it.

19 (Power point slide marked Plaintiff's No.
20 3 into evidence.)

21 Direct Examination by Mr. Kirkland:

22 Q. Would you state your name for the record
23 again. I didn't hear if you did.

24 A. My name is Ben Levitan. L-E-V-I-T-A-N.
25 V, like Victor.

Ben Levitan-Direct by Kirkland

1 Q. Where you from, Mr.?

2 A. Raleigh, North Carolina, sir.

3 Q. Now what is it that you do?

4 A. I'm an electrical engineer. My specialty
5 is cell phone networks and self design in -- design
6 of cell phone networks.

7 Q. How long have you done that?

8 A. Approximately 25 years.

9 Q. And who have you worked for during that 25
10 years?

11 A. I've worked Verizon, Sprint, Nextel.
12 Those companies. And about 10 companies that merged
13 to become those companies. But essentially those
14 are the companies I've worked for.

15 Q. Now if you could, without going into a
16 tremendous amount of detail, what is designing a
17 cell phone network?

18 A. Well I'm an engineer. My specialty is
19 telephone systems. And I have been engineer for
20 various telephone companies. And my specialty has
21 been the design of cell phone networks. Everybody
22 is probably familiar with 1G, 2G, 3G, 4G, those
23 types of things. The way those generations, 1G,
24 would be the first generation cellphones. The way
25 those generations come about is, we as an industry,

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1 we all sit together and we together design the cell
2 phone network. Because these are companies that are
3 worldwide. They all have to work together. So
4 engineers have to sit down and make agreements.

5 So when I'm working for Verizon for
6 example, I'm very familiar with how Verizon's cell
7 phone network as we're talking of adding new
8 features to the next generation, we all have to
9 agree on how it's done. A quick example is, in
10 1994, the FCC mandated that cell phone companies
11 have to be able to provide 911 service; be able to
12 locate someone when they dial 911. And so we at
13 Verizon could come up with a way, and Sprint could
14 come up with a way, but it's a benefit to everybody
15 that we all the engineers sit together and we design
16 one system. And my company, Verizon, hires me to go
17 and make sure it's done and whatever designs come
18 out don't impact our network.

19 It's a lot of engineering, and a lot of
20 working. Along the way what I'm asked to do is,
21 develop patents to make my company a little more
22 special or provide features that are special so.

23 Q. Tell me what that -- how many awards or
24 patents have you worked on or been awarded?

25 A. Well there's a -- you know, we work

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1 together to come up with things like 911, and making
2 sure that camera phones will work across any works.
3 Independently I come up with ideas on my own and
4 submit them. I've got 27 patents pending. Of
5 those, I believe at this point, 10 patents are
6 published. So I have 10 published patents.
7 Besides that, I have four what they call trade
8 secrets, which are systems and designs that I
9 developed while I was at Sprint, that the company
10 doesn't want to even publish as a patent, because
11 they don't want to give it away.

12 Q. Now those are all related to cell phone
13 networks, correct?

14 A. It's strictly cell phone networks.
15 Everything I've designed is cell phone. I've also
16 represented the U.S.A. on a U.N. committee that
17 develops worldwide cell phone systems.

18 Q. Have you ever been qualified as an expert
19 in cell phones and how they work before?

20 A. Yes, sir, numerous times.

21 Q. How many times would you?

22 A. Approximately 20 times, sir.

23 Q. What sort of cases are you typically asked
24 to testify?

25 A. I typically do three types of cases. I do

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1 patent infringements. For example, Apple is suing
2 Google over a patent. I do criminal cases similar
3 to this. And about a third of my practices I do
4 civil matters. Well like investigating why 911
5 failed in a municipality. Or if a trucker was
6 texting and driving during an accident, civil type
7 cases.

8 Q. Now in criminal cases what are you
9 typically asked to do?

10 A. Typically an attorney like yourself will
11 call me and say the---

12 Q. Well tell the court what I called you and
13 asked you to do.

14 A. Well this is typical. An attorney will
15 call me and say that there is cell phone evidence
16 being used in a case that purports the location and
17 movements of a defendant, and would I be able to
18 analyze that, and come up with the facts. What I do
19 is look at -- I'm able to tell an attorney where to
20 get certain phone records, what those cell phone
21 records are capable of showing you. And then
22 analyzing those records and presenting them in court
23 like today.

24 Q. Now how is it that you come to conclusions
25 typically.

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1 A. Well like I said---

2 Q. I mean just briefly.

3 A. I've worked on the design of cell phone
4 networks for 25 years. I'm very familiar with the
5 records that we keep. The records we keep are
6 engineering records. But those engineering records
7 basically keep a record of every time you make a
8 call, or receive a call, or a text or anything, we
9 keep a record. And that record tells you among the
10 other things, who called who, what time that call
11 occurred, and what cell tower or facilities you were
12 using when you made that call. And from where those
13 cell towers are located, I can determine what the
14 coverage of those cell towers is. And then I can
15 make a determination as to the general location
16 where someone was located when they made that call,
17 by inference, by inference where the person was.

18 Q. Now this field, as I say, scientific
19 field, and do you utilize the scientific method in
20 making these determinations?

21 A. Absolutely. The cell phone network is
22 designed with very specific, it's a radio system.
23 And this is radio science. It's very clear and very
24 specific. The way it's designed, it leaves very
25 little doubt. As I say in court often, this is not

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1 DNA. You know, the best location you can get is
2 when someone calls 911. Other than that, I can
3 place you in a general location.

4 Q. Now is it realistically possible for a
5 lay person to obtain these records, and do the same
6 thing that it is that you do?

7 A. Unfortunately everybody seems to try to do
8 that. Anybody can go subpoena these phone records.
9 And the phone records you can generally with most of
10 the carriers, AT&T and Verizon, you can look at each
11 of these records and it will show you where the cell
12 tower is located. And then you can plot that on a
13 map. And a lot of people do that and present it in
14 court, and it's not scientifically accurate. The
15 biggest mistake I see is, agencies, every agency in
16 this country has a person who has got an interest in
17 cell phone, and is pretty good at drawing Goggle
18 maps, and then trying to present that as an expert.
19 And it's completely done without any knowledge of
20 how the cell phone networks actually works, or
21 without the background and experience to actually
22 make those opinions.

23 Q. Is there, and I'm actually asking this
24 based on your slots. Is there a particular software
25 that you use that is typically not available to

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1 others in doing this?

2 A. No. I mean, you know, we have invented
3 every feature and function that you have in the cell
4 phone network over the past 25 years. We're up to
5 5G so to speak. You know, we develop -- you know, I
6 develop my own software, to make this easier to, you
7 know, y'all see maps and charts that I've put
8 together.

9 Q. So you're not going to Google maps.
10 You're using specialized software that you put
11 together yourself and plot these points.

12 A. Yeah, and I do utilize public maps that
13 just, you know, to show streets and things like
14 that. But everything I designed, everything I'll
15 show you today, is from systems that I've developed
16 myself. Specifically to analyze cases like this.

17 Q. Now what is that you were asked by me to
18 do in this case?

19 A. I was told that in this matter
20 Mr. Bradley, I'm not always clear exactly what the
21 criminal -- what the case is, but I was asked to
22 look at his phone records for May 21st. I am sorry.
23 I was asked to look at his phone records from
24 Saturday May 21st through Monday May 23rd. And you
25 asked me if based on his cell phone records, because

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1 I determine his location and movements throughout
2 that day and throughout that weekend. And further
3 you gave me three different locations where it was
4 alleged that he was located. One was near a place
5 called Boyd's (sic) pond. A second place was near a
6 cemetery that I found to be called Cooper's
7 Cemetery. And---

8 Q. Well let's do this.

9 A. Yeah.

10 Q. Because I think that explains what I asked
11 you to do.

12 A. Yeah.

13 Q. So I basically asked you to track this
14 phone.

15 A. Correct.

16 Q. Now my understanding is, that you intend
17 to talk about three areas now. And I'll let the
18 court know, and the court reporter know, that in the
19 sharing, if I need to speak up was, Madam Court
20 Reporter, you let me know. My understanding is,
21 that you want to go through how cell phones work in
22 general. Two, to figure out where the cell phone
23 was. And three, what is the evidence -- what the
24 evidence in this case shows.

25 A. Generally, that's what you have to do. I

Ben Levitan-Cross by Gourley

1 mean, if I'm presenting to a jury or in this case,
2 Your Honor, I'm presenting to you, I want to give
3 you a quick overview of how cell phones work, just a
4 few slides, so you'll understand what actual,
5 technical evidence, what material we actually use,
6 what that material really can show you. And then we
7 can look at the evidence, and I can show you what I
8 interpreted, or, you know, what I did with the
9 evidence that I did receive, and you'll understand
10 how I came up with that.

11 MR. KIRKLAND: Before we get started.

12 A. Yes, sir.

13 MR. KIRKLAND: At the point, Your Honor, I
14 would move to qualify Mr. Levitan, in the area of,
15 what do you call, Mr. Levitan?

16 A. We call it cell phone, I guess, historical
17 cell phone analysis is what they call it in court.

18 MR. KIRKLAND: I would move to qualify him
19 as a expert in that field.

20 THE COURT: Questions or objections?

21 MR. GOURLEY: Your Honor, just briefly.

22 Cross Examination by Mr. Gourley:

23 Q. How many criminal cases have you been
24 qualified as an expert in?

25 A. I would estimate about 20, sir.

Ben Levitan-Cross by Gourley

1 Q. All criminal cases?

2 A. Yeah, well like I said, I do civil. I do
3 patent infringements as well.

4 Q. Can you give a rough estimate of the
5 breakdown on what are criminal, what are patent,
6 what are civil?

7 A. Criminal cases is what I thought you asked
8 me. I've done about 20 criminal cases.

9 Q. In addition to the 20 criminal cases,
10 you've also been qualified.

11 A. I've also done civil cases and numerous
12 depositions as well.

13 Q. Do you recall the last time that you were
14 qualified as an expert?

15 A. A week ago in Memphis, Tennessee.

16 MR. GOURLEY: Perfect. Thank you, Judge.

17 THE COURT: And the technical area again,
18 sir. It's historical.

19 A. It would be the historical analysis of
20 cell phone records, because I'm looking at records
21 of calls that have already been made. And I'm using
22 those records. I'm giving you an analysis
23 historically where those records were so.

24 THE COURT: He's qualified in that area.
25 You can question the witness.

Ben Levitan-Direct by Kirkland

1 MR. KIRKLAND: Thank you, Your Honor.

2 Direct Examination by Mr. Kirkland:

3 Q. Now walk us through the, how it is the
4 cell phones work.

5 A. I don't spent to much time, but I am going
6 to give you, Your Honor, a quick overview starting
7 with the slide that says: How do cell phones work.
8 And basically the next slide shows---

9 Q. What is the number of your slide so the
10 judge can call.

11 A. I'm on Slide No. 4. On Slide No. 4. And
12 telephones are really simple. If you've ever done
13 the tin can and string with your kids, where you
14 talk into a can, it vibrates along the string if
15 it's another can.

16 Q. Right. We get that.

17 A. That's it.

18 Q. We understand that.

19 A. A cell phone today is exactly the same
20 thing. You talk into the mic. It vibrates. But it
21 goes, the string is now a radio, is a radio. It's
22 just a radio frequency.

23 Q. Yes, sir.

24 A. And that's it. And when you are listening
25 to someone, someone has spoken into their phone by

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1 radio, their voice goes to your ear, and this part
2 of your phone it's just like you're holding an AM
3 radio up to your ear listening to it.

4 Q. Now how do those two phones connect to one
5 another over a long distance?

6 A. Okay, so if you go to the -- if you look
7 at the bottom, you know, the cell phone connects to
8 a radio, a cell tower. A cell tower connects to the
9 phone company. And then that phone company figures
10 out where to send the call. And if the reverse
11 process, it gets sent out to the -- the radio signal
12 gets -- or the call gets sent to a cell tower near
13 the recipient, and then that cell tower by radio
14 broadcast, broadcasts your voice down to the
15 recipient. So that's the string, the tin can and
16 string.

17 Q. Right.

18 A. And if you look at the next slide 5, this
19 is exactly like when you have two DJ's in a town
20 arguing with each other. It's just completely
21 radio. The top part is exactly a, like an FM radio
22 turned to one station for you, for the duration of
23 your call. And then the bottom is your broadcaster.
24 You have one broadcast channel for the duration of
25 your call. So a cell phone is two radio links

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1 connected to a cell tower that are uniquely yours
2 for the period you are using the call.

3 Q. Or receiving and sending.

4 A. I'm sorry?

5 Q. The two radio frequencies for receiving
6 and sending?

7 A. Yes. So and that's the same thing on the
8 next slide.

9 Q. So we can skip that one?

10 A. So, yeah, now we're on Slide 7. And what
11 this shows is, this is an overview of your phone
12 connected to a cell tower. A cell tower covers a
13 specific geographic area. And your communication is
14 back and forth with that cell tower.

15 Every time you make a call, every time you
16 receive a call, if someone even tries to call you,
17 or you send a text, the phone company keeps a real,
18 accurate technical record. These are engineering
19 records, highly reliable. It will have the date of
20 the call, the time of the call, duration of the
21 call. Who the two parties to that call were. This
22 is even if the call didn't go through.

23 Q. The two phone numbers.

24 A. Yeah, who made the call, who received the
25 call. And the number you dialed. Obviously you may

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1 call someone and they may not be there. So the
2 receiver of the call could be your voice mail
3 system.

4 Q. But here's one of the things I just want
5 to clear up right from the start.

6 A. Yeah.

7 Q. Before we get too far. Your expertise is
8 not in identifying who made the call. It's
9 identifying a phone number, the phone itself that
10 made a call to another phone.

11 A. Clearly I only talk about cell phones. I
12 can't tell you who was on the phone obviously. I
13 can't tell you what was said on the phone.

14 Q. Now let me ask you about this Slide 7.

15 A. Yeah.

16 Q. There is this sort of half circle, almost
17 half of an ellipse. Is that representing the
18 coverage average of the tower?

19 A. Yeah, what I'm trying to represent is,
20 every cell tower covers, and we're going to get to
21 that next. It covers a geographic area. These
22 records I just talked about, these are called
23 detailed records. These are highly reliable
24 engineering records. They're kept in the normal
25 course of business by cell phone -- every cell phone

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1 company, every telephone company in the world,
2 keeps these records. And this is what your phone
3 bill is made out of eventually, but this is what we
4 can use also to do, you know, to determine where
5 people were, or where their phones were at any
6 specific time.

7 Q. And you talk about a cell phone data.

8 A. Yeah.

9 Q. That's contained in records that can be
10 obtained from cell phone companies.

11 A. In the industry they are called, Call
12 Detail Records, yes.

13 Q. I am going to hand you two stacks, and I
14 want you to briefly look at these two stacks. And
15 look at the first one and tell me if you recognize
16 that stack.

17 A. Yes. The first stack is cell phone
18 records for Bradley and James. I recognize this is
19 the document I took my data from. This is copies of
20 what you see it says at the top, Call Detail
21 Records, for the two phone numbers in this matter.

22 MR. KIRKLAND: And in fact, Your Honor, at
23 this point, I would like to move those into
24 evidence. I believe they were in evidence at the
25 original trial.

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1 MR. GOURLEY: They were, Your Honor.

2 THE COURT: The number of those. Just
3 hand them to her. Yeah, let's let her mark those
4 separately. And then the witness can identify which
5 one is which number.

6 (Cell phone records of Bradley/James
7 marked Plaintiff's Exhibit No. 4.)

8 Q. Now this first document is Plaintiff's
9 Exhibit 4. And for the record, Your Honor, I am
10 going to, it has a, some written text on the front.
11 And the written text on the front of this record is
12 cell phone records, Bradley and James. And it is
13 approximately I'm guessing, 60 pages long. So
14 that's what we just put in, Your Honor.

15 THE COURT: And who is James?

16 MR. KIRKLAND: James is the victim.

17 THE COURT: I just want to make sure we
18 are clear on the record on that.

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

20 A. It's a 59 page file, Your Honor. The
21 second set of records, look at those and tell me
22 what those are.

23 THE COURT: Plaintiff's Number?

24 MR. KIRKLAND: Judge, I want to make sure
25 we have got this straight. I think we have one

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1 being the lineup. Two being the voluntary
2 statement. Three being cell phone records with no
3 Bradley and James on it. And 4 being cell phone
4 records with Bradley and James. So I will hand
5 these back to you, Mr. Levitan.

6 THE COURT: Wait just a second.

7 MR. GOURLEY: Your Honor, I believe No. 3
8 was the power point.

9 A. That's true.

10 THE COURT: Three is the power point.
11 Four will be -- let's just leave No. 4 cell phone
12 records Bradley and James. And No. 5 will cell
13 phone records.

14 (Cell phone records marked Plaintiff's
15 Exhibit No. 5 into evidence.)

16 THE COURT: Just leave No. 4 like it is,
17 Bradley and James.

18 MR. KIRKLAND: And just to make sure, Your
19 Honor, your No. -- your records up there are marked
20 No. 4.

21 THE COURT: 59 pages that are cell phone
22 records of Bradley and James is No. 4.

23 MR. KIRKLAND: And the one -- the cell
24 phone records without Bradley and James is No. 5.
25 Thank you, Your Honor. I apologize. It just gets

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1 confusing.

2 Q. Now which of those two stacks would like
3 to talk about first, Mr. Levitan. Explain what they
4 are.

5 A. I'll explain this in a minute.

6 Q. Yeah, let's do that.

7 A. Let me get to it.

8 Q. Yeah, let's continue on then.

9 A. And I'll explain this in a minute.

10 Q. Yeah, let's continue---

11 A. Let me get to it.

12 Q. Let's continue on then.

13 A. Let me just -- so what I want to represent
14 here is that when you're connected cell tower, that
15 cell tower has a coverage area. And if we go the
16 next slide.

17 Q. Which No.?

18 A. No. 8. What's important to understand
19 when evaluating cell phone records is, the records
20 we talked about, these Call Detail Records, you may
21 have heard in the news these records refer to as
22 metadata. Telephone metadata. When you hear that
23 the news that maybe NSA is collecting metadata.
24 Meaning they are collecting these Call Detail
25 Records. And one of the items on that Call Detail

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1 Record is the cell tower. And this chart, Chart 08,
2 shows you that every cell tower covers one specific
3 area with as little overlap as possible.

4 Q. For financial reasons, I presume.

5 A. Yeah, we are very cheap as a cell phone
6 industry. If we could put up one cell tower that
7 would cover all of South Carolina, we would do that.
8 But the science is, like I said, when you are making
9 a phone call, you are using two radio channels. And
10 just to make it easy, every cell tower can only have
11 about 200 radio stations. So basically 100 people
12 can make a phone call off a, I'm using round
13 numbers. Basically only 100 people can use a cell
14 tower at the same time. So if you make the cell
15 tower coverage too big, everybody is going to get a
16 message, sorry, all circuits are busy.

17 Q. Which is why it doesn't work at football
18 games and things like that.

19 A. Well exactly why it doesn't work at
20 football games. Because we estimate how many people
21 are going to be using a cell phone in a specific
22 area. And then we draw what you are showing on
23 this -- what I am showing on this chart is an RF
24 plan. That's our plan for coverage.

25 So if you're in the everglades in Florida,

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1 you can put up one cell tower to cover 25-miles in
2 every direction.

3 Q. I got it.

4 A. Because you're not going to have a 100
5 calls at once. If you're in downtown Columbia,
6 you're probably going to need a cell tower at every
7 block. So in this area, the cell towers run about
8 3 to 5-miles wide. But this is---

9 Q. This is like a downtown area.

10 A. Yeah.

11 Q. That we're talking about right now.

12 A. Right. And as you get into a more urban
13 area, they go out larger.

14 Q. You mean rural area?

15 A. I'm sorry, rural area.

16 Q. Go ahead.

17 A. But what's important to know is that if
18 the cell phone records identify you as being
19 connected to a specific cell tower, that's a very
20 well defined geographic area. That means if you're
21 connected to say cell tower 4 on this picture, I can
22 exclude you from being where cell tower 6, 7 and 2
23 are. I mean people have talked in court that well,
24 maybe the cell phone jumped over three or four cell
25 towers. It doesn't work that way.

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1 Q. Okay.

2 A. This is -- like I said, just like when
3 you're driving out of town listening to your radio,
4 your favorite radio station, at some point you lose
5 that station and that's it.

6 Q. And so looking at this to be fair, as I
7 often say, you could not necessarily exclude it from
8 exclude it from 5, 1 and 3, because it could be in
9 the overlapping cover.

10 A. Exactly. And there is no way to tell---

11 Q. Exactly.

12 A. Exactly. Like I said, this is not DNA.
13 But the best that science can do, if you're
14 connected to cell tower 4, you're in this general
15 area.

16 Q. Got it.

17 A. And the overlap is just minimal. You've
18 had that experience where you're talking on your
19 cell phone, driving down the highway, and it's
20 starting to crack and sound really bad, and all of a
21 sudden it gets clear again, you've been handed off
22 to the next cell tower.

23 Q. Now the next line I think is 9. And
24 you've covered---

25 A. Yes.

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1 Q. ---some of them.

2 A. And I've covered all of this. So these
3 records are called, Call Detail Records, kept in
4 the normal course of business. They're extremely
5 reliable. We use them for engineering and billing
6 purposes. So next is, how do you take all this data
7 and figure out where is a phone is located. So now
8 I am on Slide 11. So you need -- when I do my
9 analysis, I need three things. You need these Call
10 Detail Records. Those Call Detail Records only have
11 the list as you'll see in Exhibit 4. And it only
12 lists a number as to the cell tower. In the second,
13 in the third column here, it says initial cell---

14 Q. You have to kind how many pages in it
15 might be.

16 A. On every page. These Call Detail Records
17 are showing spread sheets of all the calls by these
18 phones.

19 Q. So that particular item that you're
20 looking at really is just Call Detail Records.

21 A. These are Call Detail Records. One of the
22 columns of Call Detail Records is called initial
23 cell ID. Initial Cell ID means what cell tower was
24 I connected to when this call started. And it's
25 only a number.

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1 Q. And when you say it's only a number, what
2 are you referring to?

3 A. It's a four digit number. It refers.

4 Q. What is the four digit number.

5 A. For example, the four digit number here is
6 5240. When this particular phone call started, your
7 phone -- the phone was connected to cell tower was
8 connected to 5240. We don't know where that's
9 located, so we need a second document.

10 Q. What's the second document.

11 A. The second document is a list of cell
12 towers, and that would Plaintiff's Exhibit No. 5.
13 Whoever did this initial analysis, kind of did a
14 poor job of getting this document.

15 Q. Well I'll tell you, according to the
16 record, and I think that you've read this in the
17 record. The sheriff's department subpoenaed those
18 records.

19 A. This is a mistake---

20 Q. Would that be somebody that you would
21 recommend to subpoena those records?

22 A. No, this is a mistake that these agencies
23 make frequently. They don't understand what's
24 available and they further don't know how to write
25 proper subpoenas to get this data. The cell phone

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1 records that were received, the Call Detail Records,
2 it's 2005 that these were obtained. This only
3 shows the first cell tower that was used by the cell
4 phone. I don't know if more was available at the
5 time, but generally when today when I request cell
6 phone records, Call Detail Records, I ask for all
7 cell tower locations. And this is very important,
8 because if somebody is on a 10 minute phone call and
9 they start on cell tower No. 1, and the call ends on
10 cell tower No. 6, I can make the presumption that
11 they were traveling. And based on the distance, I
12 could make a presumption that they were traveling by
13 car possibly.

14 If the call starts and ends on the same
15 cell tower, I can't make the presumption that they
16 were not traveling, but they may have been --
17 they've been stationary, or they were within one
18 cell tower.

19 Q. I got you.

20 A. Obviously if you're making circles around
21 a cell tower, you're first and last cell tower will
22 be the same. So when the---

23 Q. So once again, let me just---

24 A. Yeah, so they improperly -- I'll not say
25 it's possible in 2005, that this is all you could

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1 only obtain, only they first cell tower. So I can't
2 say that a mistake was made here. But what was --
3 when the cell towers---

4 Q. Wait let's back up for one second. We've
5 got to keep the record clear. So you're saying that
6 Exhibit 4.

7 A. Yes.

8 Q. You cannot say that there would be anymore
9 records available in 2005.

10 A. I am not able to tell you that.

11 Q. Now we're talking about exhibit.

12 A. This is Exhibit No. 5.

13 Q. Now tell me about one.

14 A. So this is the second thing on my list.
15 The second thing is, you need to know where those
16 cell towers are located. So generally what you
17 would get is a document similar to the -- from the
18 phone company that lists all the cell towers in a
19 specific area.

20 Q. Okay.

21 A. So for example, I would expect if I had
22 subpoenaed these records, I'd ask for Call Detail
23 Records, a list of base stations for South Carolina.

24 Q. The entire state.

25 A. The entire state, because that's generally

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1 what they would send you.

2 Q. Okay.

3 A. And then what that would allow me to do
4 is, know where every cell tower was in the Columbia,
5 in the Sumter area, and the Bishopville area. So I
6 would have a complete picture of where all the cell
7 towers were. Then what I could do is draw an RF
8 plan like I showed you. What the mistake was done
9 here.

10 Q. Yeah, that's what I was going to ask.
11 What is the mistake there, and how did it impact the
12 analysis.

13 A. The testimony that I read, this is a list,
14 a typed list of 20 cell towers.

15 Q. Right. And does it include all the maps?

16 A. And it also includes some maps, which is
17 not -- I don't know where these maps came from. But
18 this is a typed list of cell towers.

19 Q. Yes.

20 A. It's incomplete, because it doesn't
21 include all the cell towers that are in the Sumter
22 area. And this is not what I expect to receive. So
23 someone here, it appears the sheriff or whoever did
24 this investigation.

25 Q. McMillan.

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1 A. He testified that he called Suncom.

2 Q. Right.

3 A. And asked them from the Call Detail
4 Record, he had a list of cell tower numbers, and he
5 wanted to know where those were located. And he
6 asked them---

7 Q. Specifically for those.

8 A. For these cell towers. He did not get all
9 the cell towers. And the areas, you want the entire
10 list for the area, otherwise you can't make a plan.
11 And they will read to him over the phone.

12 Q. Right. According to his testimony.

13 A. So clearly that's not the way to do it.

14 Q. That was to Clarence McMillan. And I
15 believe, Your Honor, just for your reference, his
16 testimony concerning cell towers and what not, and
17 what he asked for, begins on page 676 of the
18 transcript. So we now have the records, the list of
19 cell towers, the phone records and then I guess you
20 have to develop the coverage.

21 A. Yeah, now the next thing is, there were --
22 obviously I went through all the Call Detail
23 Records, and I found several missing cell towers.
24 But using data -- industry data bases that I am
25 aware, specifically I went on the FCC data base, and

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1 I looked for cell towers in the Sumter area that
2 were built in 2005, and I was able to fill in some
3 of the -- I was able to fill in the gaps.

4 Q. Of the records that Sergeant McMillan---

5 A. Yeah.

6 Q. Or Investigator McMillan has.

7 A. Yeah, I did not get them all, but I did
8 get the critical ones. For example, this list of,
9 I'll just give you one specific example. This list
10 of cell towers does not include cell tower 6004.
11 6004 is the cell tower that was most used by the
12 victim's phone. My assumption would be that
13 generally the cell tower that you use the most is
14 one that's at your home. We did not have on this
15 list an address for it. I was able to go in the FCC
16 database and find out that Farmer's Telecom
17 Cooperative had a cell tower in Sumter in 2005.
18 That's the only cell tower in that area. The
19 location of that cell tower is very close to the
20 victim's home.

21 So in using kind of some investigation, I
22 was able to do that.

23 Q. And those would be records that you would
24 normally use in your field of expertise.

25 A. Yes. Normally in the normal course, I

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1 would get a spread sheet with every cell tower
2 sometimes in the country.

3 Q. And what I am asking is though, that is
4 completely normal for you if you had an incomplete
5 to go to this FCC database.

6 A. This is what I did. This is because of my
7 knowledge, I was aware that I could go to the FCC
8 database and look for cell towers that were in the
9 area, and identify which cell tower was used.

10 Q. Okay.

11 A. But extra work obviously.

12 Q. Let's move on to, I guess, 12 or 13,
13 wherever.

14 A. On 11 basically decide, now we have to
15 make an RF plan. So here are my steps. We have
16 gone over this several times. CDR's tell you what
17 cell tower was used. The cell tower map tells you
18 where that cell tower is. And the RF plan tells you
19 the coverage of each tower.

20 Q. And this is on No. 12.

21 A. This is No. 12.

22 THE COURT: RF stands for radio frequency.

23 A. Radio frequency, Your Honor, yes. RF plan
24 means what area does this cell tower cover. And
25 that's from my experience is, I just was able to

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1 determine that for each cell tower. So on site---

2 Q. Before you go on if you don't mind.

3 A. Yeah.

4 Q. You mentioned CDR's and I forgot what you
5 said.

6 A. I'm sorry, Call Detail Records. That's
7 the industry phone records.

8 Q. I got it.

9 A. Phone records with all the good stuff on
10 it. The metadata. So all I have to do then is I've
11 determined where all the cell towers are, what their
12 coverage area is. The next thing I did was
13 determine what the relevant locations were for this
14 matter specifically. And you gave me those, and
15 then I just determined where the phone was in
16 relation to those relevant locations.

17 Q. All right.

18 A. So the next slide, let me move on. I can
19 move up to Slide 15. This is my list of relevant
20 locations.

21 Q. And this is location of Nathaniel
22 Bradley's phone.

23 A. Correct. And this is Slide 15. These are
24 the relevant locations in this matter.

25 Q. Now when you say relevant, you culled

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1 these from the vast records that you received.

2 A. From the records, from the testimony, from
3 the alibi statement.

4 Q. From the testimony of the witnesses.

5 A. The testimony of the witnesses. I took
6 out every location---

7 Q. That was relevant.

8 A. ---that was relevant to where Nathaniel's
9 phone or Nathaniel claimed he was.

10 Q. I got you.

11 A. So I took every record of where he claimed
12 he was. Obviously the first location that was
13 relevant, was the victim's address, which is [REDACTED]
14 Spring Hill Road.

15 Q. So let me talk about that real quick.
16 According to the record, Leonard McCray, William
17 McCray, Martha Ransom, all said they saw to remind
18 everyone of this, they saw the defendant get into an
19 argument with the victim. There was another black
20 male present at approximately 5:30 or so. And this
21 would have been on the 21st, correct, of May 2005? .

22 A. Yes, sir.

23 Q. So that's where we are starting.

24 A. Correct. So these are all and we will
25 go -- these are all the relevant locations. And

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1 then of course the next slide I've mapped these
2 using a system I've developed.

3 Q. Let's talk about your map that you've
4 done.

5 A. I just -- this is just where these
6 locations are.

7 Q. The locations that you took out of the
8 testimony and---

9 A. Yeah. So if you go back to Slide 15, I've
10 located, I either was given the address of each of
11 these locations, or I determined the address.

12 Q. Okay.

13 A. And then from there what I need to do is
14 determine the GPS location of those addresses. And
15 then so what I've done is, I've mapped them.

16 Q. So this is just a general map of all the
17 locations of interests in this case.

18 A. Yes. And the three, obviously there's
19 three or four that are important to this matter as I
20 found out.

21 Q. Let's talk about that real quick so the
22 judge can just see that.

23 A. Yeah.

24 Q. According to the records, some of the most
25 important locations, I am going to lead you a little

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1 bit here to keep this moving, is the cemetery in the
2 top right.

3 A. Right.

4 Q. And another very important one was the
5 Volvo witness sort of in the bottom left.

6 A. Yeah.

7 Q. And Boyle pond.

8 A. Yeah, those two kind of overlap, but yes,
9 they're both down there.

10 Q. And the Volvo witness according to the
11 witness testimony was when Daniel (sic) Koenig
12 witnessed what he says is Nathaniel -- he said
13 Nathaniel Bradley was driving the blue Volvo at 9:30
14 in the morning. And the cemetery is where the car
15 was burned and found around 2:30 or 3 p.m.

16 A. That's the information I have. I believe,
17 yes, sir.

18 Q. Is there anything else just immediately
19 that is as important as those two locations?

20 A. And obviously the victim's location in the
21 upper left. But no, those are the three locations.

22 Q. Oh, and the victim address is what
23 occurred at---

24 A. Yes.

25 Q. ---at 5:30.

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1 A. Yes.

2 Q. On the 21st.

3 A. Yeah, and you'll see.

4 Q. And then we will start rolling through
5 these.

6 A. And then let me just say. So then thing,
7 these are all cell towers location. And then if you
8 go to the next map, this is kind of an eye chart,
9 but we'll be looking at this closer. You can see
10 this is both the blue are cell towers, and the other
11 colors are the relevant locations. So it's pretty
12 clear to understand. For example, if you look in
13 the upper left hand corner, you see it says, the
14 victim's address. And the closest cell tower that
15 I'm aware of to the victim's address is called the
16 FTC tower.

17 Q. Now was that the one that you looked up?

18 A. Yes, Farmer's Telecommunication Tower.

19 Q. And that tower was in existence in 2005.

20 A. That was the only tower in existence in
21 2005, that provided cell phone service. And I've
22 since confirmed that that is cell tower 6004.

23 Q. 6004.

24 A. So as you can see where I'm going, if a
25 cell phone is using this FTC tower, I cannot say

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1 he's specifically at the victim's address, but he's
2 in an area that's consistent with being at the
3 victim's home.

4 Q. I want to use the proper language. You
5 can say that the phone.

6 A. I'm sorry, you're right. I can say that
7 the phone is in the vicinity of the victim's
8 address. If you were at the victim's address using
9 your cell phone, you would be attached to the cell
10 tower. So that's all the relevant locations. So
11 then now we step through the actual phone records
12 and we'll -- so now we'll get a little more
13 specific. So I started evaluating the records on
14 Saturday May 21st at 3:30 p.m.

15 Q. And that is the page that starts activity,
16 it says at the top right, activity starts at
17 3:30 p.m., right?

18 A. Yes. And so this activity occurred where
19 the shaded box is. And I am going to zoom in so we
20 can see this.

21 Q. And so the next line---

22 THE COURT: What number are you on?

23 MR. KIRKLAND: It doesn't have a number,
24 Your Honor. It is at the top -- it's after relevant
25 locations and cell towers in the top right. And it

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1 says activity starts at 3:30 p.m., zoom to this
2 area. Top right. Are you there?

3 THE COURT: I got it.

4 Q. So you just said that you placed a box.
5 And you're going to zoom to that area.

6 A. We're going to zoom to that location.

7 Q. So here we go on the next slide and zoom
8 to that area.

9 A. So you can see at 3:30. So now what we're
10 doing is, we're looking at the Call Detail Records,
11 and the map. And now we're able to track the
12 location and movements of this phone.

13 Q. Now which phone are we talking about?

14 A. We're talking about a phone with area code
15 (803)236-6215. Which has been identified as---

16 Q. Nathaniel Bradley.

17 A. ---Nathaniel's phone.

18 Q. Let's talk about it. Tell me what this
19 all means.

20 A. So at when I go back to 3:30, from 3:30 to
21 3:50, the phone is located. You see Number 1 in the
22 upper right hand corner.

23 Q. I got it.

24 A. It's using cell tower 6472.

25 Q. Okay.

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1 A. So this excludes the phone from being at
2 the victim's address at this time or anywhere else.
3 I can't tell you exactly where it was so.

4 Q. But there is no testimony to that.

5 A. Then the phone moves south. And by 4:42,
6 so somewhere between 3:50 and 4:42, the phone
7 arrives at cell tower 6462. And makes a call there
8 at 4:42. Also at 4:43.

9 Q. Which is prior to of course the testimony.

10 A. Yes. Then that's a No. 3. Then the phone
11 starts moving northwest. And it makes calls at
12 4:43. And then 5:20---

13 Q. You don't have to list all the calls. You
14 just 4:43 to 5:30 p.m. or so---

15 A. Yeah.

16 Q. ---to make the calls.

17 A. And you can see the general area of tower
18 6005. So it makes those calls between 4:43 and
19 5:30.

20 Q. Now tell me about this sort of bubble
21 tower general tower of 6005. Why is that a bubble
22 and not a dot like everything else?

23 A. Well because the investigator forgot to
24 ask for the location of cell tower 605.

25 Q. Now how would you determine that then?

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1 A. Well the -- I looked at the calls. The
2 phone, you use cell tower 6005, when it was going
3 from Item 1 up in the upper right hand corner down
4 to Item 3. And then it used 6005 again when it was
5 going from---

6 Q. So you are forming---

7 A. This is an opinion as to---

8 Q. An opinion to a reasonable decree of
9 scientific certainty---

10 A. Yes.

11 Q. ---that the tower was located within that
12 area.

13 A. In that general area. And for you guys
14 who always wonder what cloud technology is,
15 engineers when we're not sure, we draw a cloud. So
16 that's---

17 Q. When we get up here to the victim's
18 address, around 5:48, which is consistent with the
19 testimony, correct?

20 A. So now like I said at 4:43 -- at 5:30,
21 the 5:30 call uses tower 6005. The next call we
22 have is at 5:48. That is using tower 6004, which is
23 consistent with being in the area of the victim's
24 home. And so that call occurs at 5:46, and then
25 another call occurs at 5:56. That's consistent---

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1 Q. Where is 6004? I don't see that.

2 A. It's inadvertently left off this chart.

3 Q. So you know what it is?

4 A. It's exactly underneath the label that
5 says, "Victim's address." We had it plotted
6 previously. It's what we call the FTC tower. If
7 you go back two slides, you'll see it. I apologize.

8 Q. So it's directly under the says, "Victim's
9 Address."

10 A. Yes. If you go back two slides you'll see
11 it is shown on that one. I don't know why it fell
12 off this chart.

13 Q. So---

14 A. So this is consistent with testimony that
15 the defendant was at the victim's house having an
16 argument in the driveway.

17 Q. Let me ask you one more thing.

18 A. Yes.

19 Q. Because I'm going to go back two slides
20 and look at it, and let's keep everything perfectly
21 clear.

22 A. Okay.

23 Q. About the FTC tower.

24 A. Yes.

25 Q. So that is the tower that you are

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1 referring to as 6004.

2 A. Yes, I am sorry. I very recently
3 discovered that.

4 Q. No, that's fine. We got cleared up. I
5 think it's fine.

6 A. I was right. It's nice once in a while.

7 Q. So we know where he is on Saturday May
8 21st from 3:30 to 5:48. What happens after that?

9 A. My understanding from the testimony is
10 that---

11 Q. And we're moving to the next slide.

12 A. Well the reason this is consistent with
13 the alibi that says that the defendant went to a
14 convenience store on Spring Hill Road, which would
15 still be covered by this cell tower, and socialized.
16 So that would have happened 5:56. That's consistent
17 with that story. So the next slide on Saturday, the
18 defendant claims that he went from socializing at
19 this convenience store down to Artistic Hair Salon.

20 Q. Let me talk about that for a minute.
21 Witness Tamisha Williams. And I apologize, Judge, I
22 don't have the page number for Tamisha Williams.
23 She lives at South -- it's 835, Your Honor. Tamisha
24 Williams. She lives at South Forge Apartments off
25 of Highway 261 in Wedgefield, South Carolina.

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1 And her allegations according to the
2 testimony, Your Honor, was that she met with Bradley
3 at her residence. He took her to get her nails done
4 at Artistic Hair Design. He picked her up from
5 there. Took her to Paul Bradley's house to get some
6 money for a camera. Then they went to the Food
7 Lion out past Shaw Field to buy a camera. All of
8 this apparently according to testimony occurred
9 sometime 6 and 8. But to be the fair, the times
10 were very shaky.

11 THE COURT: Is she an alibi witness?

12 MR. KIRKLAND: She was an alibi witness.

13 THE COURT: Okay.

14 MR. KIRKLAND: Yes, sir.

15 THE COURT: I know where the Food Lion is.
16 I don't know where the nail place is.

17 A. It's on this chart.

18 Q. So let's talk about, that is Tamisha
19 Williams. And then Eloise Sinkler, Eloise Sinkler,
20 Your Honor, also corroborated Tamisha Williams'
21 testimony, and that is on page 855. Continue,
22 Mr. Levitan.

23 A. Okay. At 5:56 the phone is consistent
24 with being on Spring Hill Drive. At 6:59 it's
25 consistent with being at the hair salon or the nail

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1 salon, because it's making a phone call using tower
2 6453.

3 Q. Let's talk about Spring Hill Drive. What
4 location is Spring Field (sic) Drive?

5 A. That was back -- Spring Hill Drive is
6 where the victim's address is located. And it's
7 also where the convenience store was that---

8 Q. Okay. Let's move down to the hair salon.

9 A. So that's the hair salon. So the cell
10 phone evidence is consistent with the phone
11 traveling to a area near the hair salon.

12 Q. Now were you able to look at South Forge
13 Apartment's off of Highway 261 and Wedgefield? Do
14 you have that on the map?

15 A. It's probably on another map.

16 Q. Well let's look right now since this is
17 the hair salon.

18 A. Yes.

19 Q. According to Tamisha Williams and Eloise
20 Sinkler sometime around 6:00 to 8 p.m., they go to
21 this hair salon.

22 A. Correct.

23 Q. Now is his phone consistent with that
24 testimony?

25 A. Yes, it is.

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1 Q. Now let's move to the next slide.

2 A. The next call, so this is 6:59. 7:10,
3 this phone makes a 5 minute and 57 second call. And
4 again, it's using the tower that's consistent with
5 being near the hair salon.

6 Q. So that's still---

7 A. It's still in that general area.

8 Q. Now Paul Bradley testified that during
9 that period of time, sometime around 6:30, he had no
10 idea. But his brother called him and said he was
11 coming by to pick up some money.

12 A. Okay. During the time let's see, from
13 6:59 to 8:06, this phone is traveling around in this
14 general area, that includes the hair salon and
15 includes Paul's, Paul is one of the witnesses.

16 Q. Right.

17 A. The Food Lion. And this arrow shows that
18 the phone could have traveled north of this area,
19 but it wouldn't have traveled very far north. This
20 is probably the limit. The black arrows essentially
21 show the maximum distance this phone could have
22 traveled. But it was being covered by this cell
23 tower 6451.

24 Q. So let me ask you this.

25 A. Yeah.

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1 Q. So Tamisha Williams, Paul Bradley, and
2 Eloise Sinkler basically talked about him traveling
3 to the Food Lion, to Artistic Nail Salon or
4 something like that, and to Paul Bradley's house
5 during that period of time. Is his phone travel
6 consistent with that testimony.

7 A. It is very consistent with that alibi.
8 806, the 806 call basically puts him near the Food
9 Lion area and near Paul's area.

10 Q. So after -- how long is he there? Because
11 I think Eloise Sinkler's says he stayed there until
12 12 or 1 o'clock. Is there any indication that he
13 was there at those times?

14 A. Well at his last call of the day is 8:06.
15 After 8:06 I have no info -- you know,----

16 Q. Okay.

17 A. ---there is no information as to where the
18 phone was after 8:06, because it was the last call.

19 Q. When is the next time you pick up the
20 phone?

21 A. Well the next call is at 6:39 the next
22 morning, which is the next slide. The claim was
23 that Nathaniel was working on a house, was painting
24 a house; that on the night of the 21st, he slept at
25 that house. And he said that he woke up at 6:45 in

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1 the morning.

2 Q. Well let's, you know, I'm going to do
3 this. I am going to skip that, because that was not
4 in the testimony. So let's move on to the next
5 thing, because that's really not fair to bring that
6 up.

7 A. Okay.

8 Q. Because he didn't testify at this own
9 trial.

10 A. Then he's -- what I can say is, I was
11 given the address of a house where he was painting.

12 Q. He says he was painting.

13 A. He says he was painting. And at 6:39, I
14 find the phone a.m., to be in that area.

15 Q. So when is the next time that we see the
16 phone?

17 A. The next phone call happens at 7:16 in the
18 morning.

19 Q. And that's on the next slide?

20 A. Yeah. So understanding that at 6:39 in
21 the morning he was at a cell tower 6455. And at
22 7:16 he's at a cell tower 6472. It's consistent
23 with him driving in that half hour time.

24 Q. Let me ask you this, because I don't see
25 it on here. Is this, because we're talking about

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1 the next morning.

2 A. Correct.

3 Q. Which is?

4 A. Sunday, May 22nd.

5 Q. Sunday, May 22nd. So we're on May 22nd.

6 So May 22nd is the morning that the car was seen

7 burnt on Cobblestone Road. The Sunday morning when

8 Daniel (sic) Koenig witnessed the car on Cobblestone

9 Road. Is that correct?

10 A. Yeah, I recall that there was a witness,

11 okay, yes, I am. I recall. There is a witness that

12 said.

13 Q. So we have him traveling potentially up to

14 this tower 642.

15 A. Yes, I remember the testimony.

16 Q. Now tell me about 642, because---

17 THE COURT: 6472.

18 A. 6, correct, Your Honor.

19 MR. KIRKLAND: 6472. Thank you, Your

20 Honor.

21 A. 6472 is consistent with the location that

22 we call Donna's house.

23 Q. Now let's talk about that a minute, and

24 let the judge know what's going on. Two witnesses

25 were called, Calvin Davis, he was called at trial.

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1 And the only address he gave was that he lives off
2 Wasaki Road if that's how you say it, in
3 Bishopville, less than one mile from Donna McDuffy.
4 But we did get Donna McDuffy's exact address in her
5 testimony.

6 A. Correct.

7 Q. He said he remembered seeing Bradley on
8 Sunday morning, and saw him talking on his mobile
9 phone. He said Bradley told him he didn't want to
10 go over to Donna's house, because a man was over
11 there. So he apparently was waiting at Davis'
12 house. He said Bradley left some time after
13 10:00 p.m. Is that consistent with Calvin Davis'
14 testimony that Sunday morning?

15 A. Let's see, he left it---

16 Q. It's about a mile from Donna McDuffy's
17 house.

18 A. Well if you go to the next slide, it will
19 be closer. The next slide you will see, in the
20 lower part, you will see a location at Donna's
21 house.

22 Q. Okay.

23 A. And then Donna's neighbor. And if you are
24 at Donna's house or Donna's neighbor, they would
25 both be using cell tower 6472.

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1 Q. And this was 8:45 to 9:48 a.m.

2 A. Yes. So at 8:45 a.m. -- at 8:45 a.m., the
3 phone arrives in this area, but it came from the
4 west. Because it had to come from west, because at
5 8:34 there's a call that was made that used the cell
6 tower 6471.

7 Q. So what we're saying here, because I want
8 to make sure we get this. So at 7:16, the cell
9 phone tower, the slide before, Sunday May 22nd,
10 2005. At 7:16 to 7:45 we see him pinging off of
11 tower 6472. Correct?

12 A. Correct.

13 Q. It's the slide before the one we were just
14 talking about, is that correct?

15 A. That is correct.

16 Q. Then at 8:34, he has now somehow, and
17 there is no way for us to know. But now he is
18 somewhere pinging off tower 6471 on the next slide?

19 A. That's correct. It doesn't mean, now you
20 understand, that tower 6472 covers part of I-20.
21 And 6471 also covers part of I-20.

22 Q. So you can't actually tell necessarily
23 which tower he was on?

24 A. No, in fact, I've gone too far.
25 Generally, like I said, cell towers are not going to

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1 overlap too much. And our first priority when we
2 put up cell towers is to cover highways. So it's
3 likely that 6471 has a beam that points straight
4 down I-20. So the reason I've drawn this arrow this
5 wide is, I can't tell you where along that arrow
6 that these calls have occurred. But all of the
7 calls from 8:34 to let's see 9:48, all the way to
8 10:32, all these calls occurred somewhere along this
9 black line.

10 Q. I understand that. And so we're talking
11 about, did it actually hit off of 6471? Did the
12 phone actually hint off of that tower?

13 A. Yes. At 8:34 and at 9:52 both those calls
14 hit off of 6471. So like you said, it might have
15 been in that overlap area. This could have been an
16 overlap area where these two cell towers.

17 Q. And so you're saying that he's driving
18 east, because we see at 8:40---

19 A. It is hard to say where.

20 Q. But it's just somewhere along. That's all
21 you can say.

22 A. It has to be between these two cell
23 towers, it can't be anywhere else.

24 Q. I got it. SO Calvin Davis said that he
25 was at his house, which is one mile from Donna, from

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1 Donna---

2 A. McAlister.

3 Q. McDuffy.

4 A. McDuffy. That's depicted. You can see
5 the two green dots.

6 Q. Was that consistent with -- and he says
7 that he left around 10. Is consistent with Calvin
8 Davis' testimony?

9 A. Yes, it is.

10 Q. Now let me ask you this. At that point
11 and time, and it may be on the next slide.

12 A. It is on the next slide.

13 Q. At that point and time is when Daniel
14 (sic) Koenig says that he see Calvin Davis between
15 9:30 and 10:15, and his exact testimony once he was
16 pressed on it was, I believe that it was closer to
17 9:30 a.m. Now he says he saw him on a road called
18 Cobblestone Road. Now let's talk about that. Do
19 you know where Cobblestone Road is?

20 A. Yeah, if you go to the next slide you'll
21 see -- you said it is Mr. Koenig.

22 Q. K-O-E-N-I-G.

23 A. He's the one who witnessed that the Volvo,
24 this red dot at the bottom of Slide 26 is on
25 Cobblestone Road.

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1 Q. And what you've done here, because I am
2 going to push us along a little bit, is you've drawn
3 a little ellipses, it looks like.

4 A. Yes.

5 Q. That represents the area that you believe
6 within a reasonable degree of scientific certainty,
7 that the phone at the time Mr. Koenig witnessed the
8 Volvo.

9 A. That's correct. From 8:34, like I said,
10 these cell towers cover highways primarily. That's
11 the RF plan I would use. I'd say the phone between
12 8:34 and 10:32 was in this blue shaded area. That's
13 23 and a quarter miles from where the witness
14 Mr. Koenig said he witnessed the Volvo which was on
15 Cobblestone Road.

16 Q. Got it. Now let's go to---

17 A. So that would exclude the phone from --
18 that's---

19 Q. That would exclude that phone from that
20 area.

21 A. Absolutely excludes the phone from being
22 near there. Because there is other cell -- you
23 would have been connected to another cell tower.

24 Q. Now but it is consistent with Calvin Davis
25 that said he saw Nathaniel Bradley with his phone,

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1 one mile from Donna Bradley's -- I mean Donna
2 McDuffy's house.

3 A. Yes, that is consistent.

4 Q. Let's move on to the next line.

5 THE COURT: Number, does it have a number
6 on it?

7 A. 27.

8 Q. You can barely see it on the bottom right.
9 What is this depicting?

10 A. I said up until 10:32, the phone is in
11 this general area of I-20 in Bishopville.

12 Q. And let me point out some other testimony.
13 Donna McDuffy of [REDACTED] Spann Road, which we have been
14 talking about. She said during her testimony that
15 Bradley called her Sunday morning and left a message
16 for her on her phone. Did you check to see if a
17 call was made to Donna McDuffy around 9 to 10?

18 A. He made numerous calls. On Sunday morning
19 he made---

20 Q. I'll show you what you handed me.

21 A. He made seven calls, and he left one
22 message. Likely at 9:35, all these calls are short,
23 Your Honor. These are like three second, two
24 second calls. Which implies he either did not
25 connect; made the call and did not connect, or got

Ben Levitan-Direct by Kirkland

1 voice mail immediately and hung up. The only call
2 that is sufficient length where he could have left
3 any voice mail was at 9:35 and also at 7:45.

4 Q. So that would be consistent with Donna
5 McDuffy's testimony that he left a voice mail.

6 A. Yes.

7 Q. So it would imply, well I am not going
8 even to say that. I'll let the judge imply whatever
9 he wants from that. Because that's not your area of
10 expertise.

11 A. Each of those calls we have a location
12 that puts them in the I-20 Bishopville area.

13 Q. Let's move -- so what does this arrow
14 represent on Slide 27 from the bottom left?

15 A. So we have identified where the phone is
16 until 10:32. The next call after 10:32 is 10:51.
17 And at 10:51 the and it's not -- the phone is using
18 cell tower 6463.

19 Q. So that's just south of that little black
20 arrow.

21 A. Right. Now the reason I put the arrow, I
22 estimated that the phone went in this direction.

23 Q. Because it pinged off the new tower.

24 A. Yes, and there is testimony Nathaniel
25 stopped at a gas station, and identified the

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1 location of the gas station.

2 Q. That actually wasn't in the testimony---

3 A. I apologize.

4 Q. That was on the alibi notice, so let's
5 forget all that.

6 A. Then at 10:51 the phone moved to an area
7 where it was using tower 6463. And the reason I
8 picked this location is that if the phone was south
9 of 6463, it would have probably used tower 6462,
10 which is some below that. So it's an opinion based
11 on my experience. And if the phone any further
12 west, it would have used 6460. So it's my opinion
13 the phone was in this general area.

14 Q. So it was 6463 that you were just talking
15 about.

16 A. Yes.

17 Q. So the testimony was, Calvin Davis saw him
18 between nine -- excuse me, Daniel (sic) Koenig at
19 this point and time, saw him 9:30 to 10:15. And the
20 car was found at the cemetery which is depicted on
21 the top right of that---

22 A. Yes.

23 Q. ---at 2:30 to three o'clock. So what we
24 see is at 10:51, he is -- the phone is up near
25 Donna's house.

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1 A. Correct.

2 Q. And moving southwest away from the
3 cemetery towards tower 6463, correct?

4 A. That's correct, sir.

5 Q. Next slide.

6 A. Next slide. Then there is testimony that,
7 or I aware that Nathaniel was working at a house,
8 which is the green dot -- where it's marked work
9 house. And there's calls from 3:07 to 3:10 using
10 cell tower 6455, which would be consistent with
11 being at the work house. Then from 3:10 to 3:50---

12 Q. Let me go back over it, because I think --
13 I want to make sure everybody understood that. So
14 at 3:07 and 3:10, he's hitting off of tower---

15 A. 6455, sir.

16 Q. So the car was found, the burned car was
17 found, between 3:07 and 3:10, right?

18 A. I don't know.

19 Q. That's fine. It's in the record. He's
20 heading back down here at this point. He's nowhere
21 near the cemetery, correct?

22 A. Yes, he's excluded at this time from
23 being---

24 Q. In fact,---

25 THE COURT: The phone is.

Ben Levitan-Direct by Kirkland

1 A. I'm sorry, Your Honor. The phone is
2 excluded from being at the cemetery.

3 Q. So at 10:51 that slide before 27.

4 A. Correct.

5 Q. He's down on tower 64 or 63.

6 A. Yes, sir.

7 Q. And then 3:07 to 3:10, you don't have any
8 calls in between 10:51 -- oh, you have 11:10 over
9 there.

10 A. Yeah, I have an 11:10 on this tower 60 --
11 I did, there are several calls that use tower 6055,
12 which was that cloud area.

13 Q. So then we have him moving, you know,
14 nowhere near the cemetery at this point.

15 A. Right.

16 Q. We then have him moving according to your
17 slide, we don't have any calls from 11:10 until
18 3:07 to 3:10, and 3:10 to 3:30, right?

19 A. We have calls. They use that 6005.
20 They're all in this general. I apologize.

21 THE COURT: The cloud.

22 A. I'm on Slide 27.

23 Q. 28, I am looking. Let's go back to 27,
24 and let's just look.

25 A. I'm on Slide 27. Yeah, 10:51, 11:10, and

Ben Levitan-Direct by Kirkland

1 then there's several more calls that are all down in
2 this general area.

3 Q. So what's the latest call, well I take it,
4 are there any calls between 11:10 and 3:07 on your
5 next slide?

6 A. Well on this slide here, at 11:20, there's
7 a phone call that uses 6462, which you can see is
8 just south of there. Then at 12:03---

9 Q. But it's not on your slide.

10 A. No, it's not on my slide.

11 Q. But you say that there's in phone records,
12 he bounces off of 6462 at 11:20.

13 A. That's correct. At 12:30 he uses 6005,
14 which was that cloud area, which is still generally
15 this, in this southern area.

16 Q. So he's still traveling around down here
17 not near the cemetery.

18 A. Yeah. And then at 1:38---

19 Q. Not he, the phone.

20 A. I'm sorry. The phone. Then at 1:34,
21 this is another call that uses 6463.

22 Q. So he's still down there. Or the phone is
23 still down there.

24 A. The phone is still down there. At 1:38---

25 Q. The phone is still down there.

Ben Levitan-Direct by Kirkland

1 A. At 1:38, it's using 6462.

2 Q. So he's a little bit further south.

3 A. Yeah. And at 1:40 the phone is using
4 6462 again. Then at 1:41 we have a gap that goes up
5 to 3:07.

6 Q. Now at 3:07 where is he? The phone.
7 Where is the phone?

8 A. Slide 28, the phone is using cell tower
9 6455. Cell tower 6455 includes -- would provide
10 coverage to the home that was being painted.

11 Q. And that was Rick Nelson, a deputy
12 sheriff.

13 A. That's not yet.

14 Q. Not yet. Go ahead.

15 A. So at 3:07 and 3:10, there's two calls.
16 They're consistent with being at the work house.

17 Q. Continue.

18 A. Then at 3:23, let's see 3:23, 3:10 to
19 3:30 -- 3:10 to 3:30 it's using the cell tower
20 that's consistent that would cover the sheriff's --
21 there was a house being built.

22 Q. Built by the sheriff.

23 A. Built by the sheriff.

24 Q. And that's Rick Nelson.

25 A. Okay.

Ben Levitan-Direct by Kirkland

1 Q. Who was a witness at the trial. And he
2 says that he remembers speaking with Bradley between
3 three and 5:00 p.m. Sunday.

4 A. And the phone is in a location that's
5 consistent with that.

6 Q. And that was he said in the Idlewild
7 Subdivision off of Loring Mill Road. Now Robert
8 Jones also testified and he gave the address of his
9 house, because Rick Nelson was building the house
10 for Robert Jones. They were both deputies at the
11 time, but Rick Nelson was doing some moonlighting.
12 Now Robert Jones gave the exact address of
13 [REDACTED] Canvasback Cove in Sumter County in the Idlewild
14 Subdivision. So is this consistent with their
15 testimony?

16 A. Yes, it is. That's what marked as the
17 sheriff's house on this.

18 Q. 28.

19 A. Slide 28. The sheriff's house is that
20 address, sir.

21 Q. So after, we can go to the next one,
22 because that's the next time you pick up his phone?

23 A. Correct.

24 Q. 3:30 to 4:01, where is he?

25 A. 3:30 to 4:01 his phone is using tower

Ben Levitan-Direct by Kirkland

1 6457. And there is 2, 4, 6, 7 calls, 8 calls, that
2 all use 6467 -- 6457. That's consistent with if you
3 were at Tina's house.

4 Q. That was Tina Leone. We are talking about
5 now, this is next day. I don't want to get
6 confused, because that can get confusing. So Sunday
7 May 22nd, Slide 28, right?

8 A. Correct.

9 Q. That is all on Sunday May 25th, all those
10 times.

11 THE COURT: May 22, 2005.

12 A. Correct, sir. Yes, sir.

13 Q. Now this next slide, because I know Tina
14 Leone's -- 29, Your Honor, Tina Leone testified that
15 Bradley painted her house from 10 a.m. until
16 4 p.m. This occurred on Monday.

17 A. This is Sunday, yeah. We're still on
18 Sunday.

19 Q. No, no, no.

20 THE COURT: So 29 is out of order.

21 MR. KIRKLAND: It may be out of order.

22 Well here's what we'll do, Your Honor. Because what
23 I'll say is this, you're showing the phone. And you
24 are certain this is Sunday at 3:30 to 4:01?

25 A. That's what I am showing in my log.

Ben Levitan-Direct by Kirkland

1 Q. You're showing the phone still around this
2 area.

3 A. Yea, I am.

4 Q. But we're not -- there's no testimony that
5 it was at Tina's house. That's what got everybody
6 confused.

7 A. I apologize.

8 Q. So we're still on Sunday.

9 A. Yes.

10 Q. Tell me what we are looking at on Sunday
11 now.

12 A. Now we go Slide 30, and calls that occur
13 at 4:10 -- there's a call that occurs at 4:10, that
14 Nathaniel is calling his daughter. There is a phone
15 call that occurs at 4:10, using cell tower 6461.
16 The claim is that the phone was moving from the
17 general area that I've marked Tina's house, to the
18 general area where there was a cook out, that I've
19 marked as the cook out.

20 Q. Right. That was Lou -- was that Lou
21 Bertha Bradley that said that? Lou Bertha testified
22 that there was a cookout at her house.

23 A. That's correct. And I'm showing the
24 phone---

25 Q. And she -- and her testimony was it was on

Ben Levitan-Direct by Kirkland

1 Sunday she thinks between two around three, but
2 couldn't nail it down. He was there for
3 approximately two hours. So is that generally
4 consistent?

5 A. I show that this phone is moving towards
6 that cookout at 4:10. And then at 5:36, the next
7 call we have with the cell tower, the phone is using
8 cell tower 6460, which is consistent with being at
9 the cookout at approximately 5:30.

10 Q. And that's Lou Bertha Bradley's testimony.

11 A. Right.

12 Q. Let's move to the next slide.

13 A. The next slide shows calls that occurred
14 at 6:24, and then 6:38. And these use cell towers
15 where this black arrow is. So 6:34 and 6:30 -- 6:24
16 and 6:38 on Slide 31, this is the general area of
17 the phone at that time.

18 Q. Let me check one thing real quick. So
19 we're still on Sunday here.

20 A. Correct.

21 Q. So there's two things going on in the
22 testimony here, I just want to point out to you. We
23 talked about Rick Nelson, and we talked about Robert
24 Jones with the sheriff's deputies. And they gave
25 estimates that he was [REDACTED] Canvasback Cove in Sumter

Ben Levitan-Direct by Kirkland

1 County at the Idlewild Subdivision between three and
2 five, four, three and six. So these calls, is he
3 near that house at this point and time?

4 A. I don't, at that time, I don't believe.

5 Q. So this might have been after that. So
6 he's driving somewhere after meeting with the
7 sheriffs.

8 A. Correct.

9 Q. So we don't know from the testimony where
10 he is at this point and time.

11 A. Yeah, at---

12 Q. So we get those two calls, and he's
13 bouncing off tower 6461 at some point and time?

14 A. Yes, he is.

15 Q. Where does he go -- where does the phone
16 go after that?

17 A. After 6:38, the next call is on Slide 32.
18 At 6:56, you can see that the phone is using tower
19 6459. And then at -- and there's three calls in
20 that area. So that puts the phone in the area of
21 tower 6459 from 6:40 -- I'm sorry, 6:56 p.m. to
22 7:32 p.m.

23 Q. So is this in anywhere -- how far away is
24 that approximately from Boyle pond?

25 A. From where now?

Ben Levitan-Direct by Kirkland

1 Q. Boyle pond.

2 A. Oh, oh, pond.

3 Q. Well I know you didn't calculate it, but
4 it shows that tower and it shows Boyle pond. Is
5 that -- would that tower he be pouncing off of if he
6 was Boyle pond at the time?

7 A. No. No, he would not.

8 Q. Where is he after that?

9 A. Let me just get back here. So then the
10 next, what are we up to here, 656 to---

11 Q. 7:32 we already nailed that down. How
12 about 7:48 until 8:33?

13 A. And then so 7:32, then after 7:32, the
14 next call is about 15 no, not even -- yeah, is about
15 12 minutes later at 7:48, the phone is bouncing off
16 cell tower 6455.

17 Q. At which time? 7:48, I got it.

18 A. 7:48 to 8:33, 6455.

19 Q. And let's move on, because I don't think
20 there's any testimony related to this, that would
21 put the phone in his hand. How about this 11:07
22 until 6 a.m.

23 A. At 11:07 the phone is using cell tower
24 6453.

25 Q. But there's no testimony in the record

Ben Levitan-Direct by Kirkland

1 that would corroborate the phone was in his hand at
2 that point and time either.

3 A. No.

4 Q. So let's move along. I understand where
5 it is. But what is important is that there's calls
6 there at 11:07 p.m., 11:08, 11:14. And then Sunday
7 morning at 6:00 a.m. All from this location. Now
8 one of the people that testified was Tina Leone.
9 And she I believe testified that Bradley had
10 indicated to her, I don't know if she said 6 o'clock
11 or not; that he was going to come and paint at her
12 house the next day. Or that morning. We're on
13 Monday now, on the same morning. Do you know who
14 that call was made to? If you don't know, that's
15 fine.

16 A. Yes. At 6 a.m. a call was made from Donna
17 McDuffy.

18 Q. From Donna McDuffy to him.

19 A. That was a 39 second call.

20 Q. Let's move then to what happens, he drives
21 over. This 7:33, 6:53, 8:16, and 1:03.

22 A. Yes.

23 Q. Now here is the question. Because at this
24 point and time, he is supposed to be at Tina Leone's
25 house from 10 a.m. until 4 p.m. at [REDACTED] Richardson

Ben Levitan-Direct by Kirkland

1 Road.

2 THE COURT: What slide is that address on?

3 MR. KIRKLAND: That address is not on the
4 slide.

5 A. I don't see that the phone is -- let's see
6 6450. Here we go, I apologize. Your Honor, yeah, I
7 didn't know this testimony, Tina's address was going
8 to be asked about this. But 6457, that cell tower
9 is consistent with Tina's house.

10 THE COURT: All right.

11 A. So the---

12 Q. Oh, it's consistent with Tina Leone's
13 house?

14 A. Yes, it is.

15 Q. Tina Leone's testimony was that he painted
16 from 10 a.m. to 4 p.m.

17 A. 10 a.m. -- well I see him in that area at
18 6:53, 8:16 and 1:03.

19 Q. So that's -- he's in the area within at
20 least the beginning of that period of that.

21 A. Yeah, he's in that area. Presumably the
22 phone was -- you can see on the Slide 33. At 6 a.m.
23 the phone is shown at the right side that's marked
24 farmer's house. And then the rest of the times the
25 phone is shown off 6457, which is consistent with

Ben Levitan-Direct by Kirkland

1 Tina's house.

2 Q. And the point that I am making; is that,
3 if he was there in Tina's house that, painting as
4 she said, then you could infer that the phone was in
5 his hand, because at least it's within the range.

6 A. That's where the phone was at those times.

7 Q. So what are the conclusions that we can
8 reach from all of this?

9 A. The conclusions are one, the phone's
10 movements and location are generally consistent with
11 the testimony. I said alibi, but---

12 Q. The testimony.

13 A. Yeah.

14 Q. Because we left out what was in the alibi
15 notice.

16 A. Right. On Saturday May 21st at
17 approximately 5:30, the phone is shown where the
18 initial incident occurred in the driveway. The
19 phone is shown to be in the area of the victim's
20 house. And it stayed there until about 6 p.m. which
21 is consistent with testimony that the phone---

22 Q. Right.

23 A. ---Nathaniel stayed at the convenience
24 store.

25 Q. Now No. 3, there was testimony that the

Ben Levitan-Direct by Kirkland

1 victim's phone -- he left his phone at the house.

2 And so we can forget No. 3, because---

3 A. Okay, because, yeah.

4 Q. ---one of the house members said that he
5 left the phone at the house. So let's forget the
6 victim's phone. We can't make determinations about
7 that. No. 4.

8 A. So the question is, could the phone, does
9 this evidence show that the phone was at Cobblestone
10 Road at 9:30 and 10:15. This is absolutely
11 conclusive that the phone is excluded for being in
12 the area of Boyd's (sic) pond and Cobblestone Road
13 between 9:30 a.m. and 10:15. The phone in my
14 opinion, is 23 miles away from that.

15 Q. And we have testimony, if I am not
16 correct, that the phone was in his hand before and
17 after that, but I don't think we have any testimony
18 exactly where you -- who was using the phone at that
19 point and time. Because that's when you just have
20 that area, that bubble of him driving down the road.
21 So we don't have any testimony in the record. All
22 you can say is the phone -- we don't know that it
23 was in his hand, but we know the phone wasn't there.

24 A. That's where the phone was.

25 Q. So No. 5, the defendant's phone, we don't

Ben Levitan-Direct by Kirkland

1 need to talk about that. No. 6. When the burnt
2 Volvo was found and in between the times, 9:30 and
3 3:00 o'clock, was the defendant's phone found
4 anywhere near that cemetery?

5 A. No, if you were at the cemetery, you would
6 be using tower 6473. There might have been other
7 cell towers that were included. Like I said, I
8 didn't get a full list of cell towers. It's
9 possible there's a cell tower that would be closer,
10 but based on the cell phones I received, if you were
11 at the cemetery, you would using cell tower 6473.
12 During the period this phone is never using that
13 cell tower.

14 Q. Now on the next day -- wait a minute.
15 Tell me about No. 7. I don't know think I know what
16 No. 7 exactly means.

17 A. I was also asked was this phone ever at
18 Boyd's (sic) pond.

19 Q. Yes.

20 A. And from Saturday morning or from Saturday
21 to Monday morning, the phone uses cell tower 6457,
22 eight times. Okay the closest cell tower that I
23 received, like I said, the investigator did get a
24 full list of cell towers. The closest cell tower
25 that I have, that would cover Boyd's (sic) pond also

Ben Levitan-Cross by Gourley

1 and Cobblestone Road and the house of Tina Leone,
2 are all tower 6457. So tower 6457 was used 8 times.
3 I can't tell you if the phone was, based on this
4 information, if the phone was Boyd's (sic) pond, or
5 it was at Tina's home, or was on Cobblestone Road at
6 those times.

7 MR. KIRKLAND: I think that's all I have.

8 THE COURT: Are Boyle's pond and
9 Cobblestone near each other?

10 MR. KIRKLAND: They are one mile apart
11 approximate. And Cobblestone is one mile north.

12 THE COURT: Mr. Gourley.

13 MR. GOURLEY: Thank you, Your Honor.

14 Cross Examination by Mr. Gourley:

15 Q. Just to summarize your basic presentation
16 we can condense it down to two major points, if you
17 will. A., that the defendant's phone was not in
18 area of Daniel (sic) Koenig at the time he was
19 alleged to have been ID'd, right?

20 A. Not in the area where, sir?

21 Q. Where he was alleged to have been ID'd by
22 Daniel (sic) Koenig?

23 A. Yes, sir, that's correct.

24 Q. That's the first major point that you're
25 trying to make with these cell phone records, right?

Ben Levitan-Cross by Gourley

1 A. I'm just telling you where the cell
2 phones.

3 Q. Where the cell phones.

4 A. I just look at cell phones. That's what I
5 am telling you.

6 Q. Would you agree with me -- have you had
7 the opportunity to read the transcript?

8 A. Yes, I have, sir.

9 Q. Would you agreed with me that Mr. Finney
10 cross examined the sheriff who subpoenaed the
11 records on these issues?

12 A. I don't recall, sir.

13 MR. GOURLEY: Let me, Your Honor, may I
14 approach? I have you got it right here.

15 MR. KIRKLAND: The exact pages.

16 MR. GOURLEY: I have got it right here.
17 May I approach, Your Honor.

18 THE COURT: Uh-huh. (affirmative.)

19 Q. Your Honor, I am going to start with page
20 788 line 24 through 789 line 6.

21 THE COURT: If you, I didn't hear that.

22 MR. GOURLEY: 788 line 24 through 789 line
23 6. And that's the cross examination of Officer
24 McMillan, Judge.

25 THE COURT: That was the extent of it, one

Ben Levitan-Cross by Gourley

1 page?

2 MR. GOURLEY: Just what I'm referencing.

3 THE COURT: Okay.

4 A. Okay.

5 Q. And you would agree with me that

6 Mr. Finney was able to elicit from the officer that

7 Nathaniel Bradley's cell phone was not in the area

8 at the time that Daniel (sic) Koenig alleged to have

9 seen him.

10 A. I don't know what the -- I'm not clear

11 what the context of this testimony is.

12 THE COURT: That will speak for itself.

13 And you can argue that later, Mr. Gourley. Or

14 Mr. Finney can explain it.

15 MR. GOURLEY: Yes, Your Honor. Your

16 Honor, I don't have any other questions then.

17 MR. KIRKLAND: Nothing, Your Honor.

18 THE COURT: Thank you, Mr. Levitan, you

19 can step down.

20 A. Thank you, Your Honor.

21 THE COURT: Next witness.

22 MR. KIRKLAND: Dan Olson.

23 THE COURT: Would you like for Mr. Levitan

24 to remain or would you?

25 MR. KIRKLAND: No, he can be released.

Ben Levitan-Cross by Gourley

1 He's from Raleigh. We need to get him back.

2 A. Thank you, Your Honor.

3 THE COURT: Any objection, Mr. Gourley?

4 MR. GOURLEY: No, Your Honor.

5 THE COURT: Thank you, sir. Drive
6 carefully. Your full name, and spell your last
7 name.

8 MR. OLSON: Daniel Norman Olson. That's
9 O-L-S-O-N.

10 Daniel Norman Olson, being first duly
11 sworn, testified as follows.

12 MR. KIRKLAND: Before we get started,
13 Mr. Olson, and this has nothing to do directly with
14 your testimony. You handed me two things that we
15 were going to talk about. Do you have a copy of
16 these two?

17 A. I do.

18 THE COURT: Are these going to be offered,
19 and is there going to be any objection?

20 MR. KIRKLAND: These are going to be
21 offered. I don't know, we'll see if there's going
22 to be any objection.

23 MR. GOURLEY: Your Honor, if I may make my
24 decision.

25 THE COURT: Sure, that's fine.

1 Direct Examination by Mr. Kirkland:

2 Q. Mr. Olson, where are you from, Mr. Olson?

3 A. I live in Chapin, South Carolina.

4 Q. Where do you work right now?

5 A. I work for a company that is called

6 Warren. Warren Group.

7 Q. It's in the Irmo area?

8 A. It is.

9 Q. Let me talk to you about your educational
10 background. Tell me -- well tell me about your
11 educational background. Where did you go to
12 college? What degrees do you have?

13 A. I am a farmer's son from Southern
14 Minnesota that decided to study agricultural
15 engineering. And I did that at the University of
16 Minnesota.

17 Q. What year was that?

18 A. Graduated there in 1970.

19 Q. After that, what did you do?

20 A. And then the spring that I graduated, the
21 very first draft lottery was enacted. And I had a
22 draft book No. of 45. And I decided that I would
23 rather serve in flight than on the ground, so I
24 joined the Air Force.

25 Q. Ah, you joined the Air Force. Now how

Daniel Olson-Direct by Kirkland

1 long were you in the Air Force?

2 A. For 20 years and one day.

3 Q. 20 years and one day. So how old were you
4 when you retired from the Air Force?

5 A. 43.

6 Q. During the time that you were in the Air
7 Force, did you continue your education?

8 A. I did. I enrolled at the University of
9 South Carolina in the course of study towards a
10 Master of Science in Mechanical Engineering.

11 Q. And did you complete that degree?

12 A. I did.

13 Q. What year?

14 A. 1990.

15 Q. While you were on active duty, tell me
16 what your job was. What did you do while you were
17 on active duty?

18 A. Well primarily, I was fighter pilot. But
19 as an adjunct to that, additional duty, I was
20 assigned flight safety officer duties.

21 Q. How many, I'm just curious. How many
22 combat missions, or did you fly any combat missions?

23 A. I did in Vietnam 177.

24 Q. One hundred seventy seven. Now did in
25 addition to being a combat pilot, what else did you

Daniel Olson-Direct by Kirkland

1 do for the Air Force?

2 A. As an additional duty, I was assigned
3 duties as a flight safety officer.

4 Q. Now tell me what a flight safety officer
5 does.

6 A. Well primarily, it's to prevent aircraft
7 mishaps. But involved in that investigating
8 aircraft mishaps.

9 Q. So when there was a mishap, you would be
10 called in to investigate.

11 A. I've been called in. I've investigated or
12 been involved in 5 or 6. I think 5 major aircraft
13 crashes.

14 Q. And while in the military.

15 A. While in the military, yes.

16 Q. Now after you retired, I suppose, from the
17 military. I don't know what you call it.

18 A. Yes. Well I retired from active duty.

19 Q. Retired from active duty.

20 A. While stationed right next door here at
21 Shaw Air Force Base.

22 Q. What did you do after you retired from
23 active duty?

24 A. I continued on in graduate school. I
25 graduated with that Master of Science in August of

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1 1990. I continued in graduate school. I started
2 teaching as an adjunct faculty at Midland's
3 Technical College and University of South Carolina
4 in mechanical engineering. And worked towards a
5 PhD, but did---

6 Q. Did you complete your PhD?

7 A. No, I got all the course work done, but
8 did not complete the dissertation.

9 Q. Now after 1996, I assume that, were you
10 teaching at the time, did you say?

11 A. I was at Midland's. I am---

12 Q. Midland's Tech.

13 A. I was a department chair for engineering
14 technology at Midland's Technical College.

15 Q. Now at some point and time, I guess or
16 based on your experience in the military, you got
17 hooked up with Warren the Warren Group. And what
18 year was that?

19 A. That was, I left the college at end of the
20 fall semester in 1996, and joined Warren, Jeff
21 Warren, in the first of February 97.

22 Q. Now tell me what is the main purpose of
23 the Warren Group?

24 A. The Warren Group, does engineering
25 consulting for forensic purposes.

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1 Q. I know the judge knows this, but we've got
2 to put it in the record. What is forensics?

3 A. Forensics means for the courts.

4 Q. So once you were at the Warren Group, what
5 sort of -- what kind of work were you doing? How
6 did you get started out? What were you doing?

7 A. Well because my background in flight
8 safety and aircraft accident investigations, ground
9 accidents investigations, it was a pretty good fit
10 for me to get in to doing this primarily for law
11 firms, insurance companies, those kinds of people,
12 that wanted help figuring out what went wrong. So
13 I started out, first of all, working with
14 Dr. Warren. He showed me how he did his
15 investigations. I started working for him. And it
16 eventually evolved, I was getting my own cases,
17 going off to continuing education, getting
18 certified.

19 Q. Right, well before we get to that, what
20 sort of cases were you working? Were you working
21 fire cases at that point and time?

22 A. I assisted with fire cases until such time
23 as I was certified for it to do myself.

24 Q. While under Dr. Warren.

25 A. That's correct.

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1 Q. Now at some point and time, I'm going to
2 move us along here. At some point and time, you had
3 been working with Dr. Warren, examining fires under
4 his supervision. And at some point and time you got
5 some certifications while you were working there.
6 What were those certifications?

7 A. I'm certified as a fire and explosion
8 investigator.

9 Q. Where did you get that certification?

10 A. Through at Eastern Kentucky University at
11 a session that a program that is conducted and run
12 by The National Association of Fire Investigators.

13 Q. And that is premier fire investigation
14 organization in the United States.

15 A. There are two. Nafi, N-A-F-I -- and
16 I-W-A-I, The International Association of Arson
17 Investigation.

18 Q. Now how is it that you go about even being
19 certified? How do you -- what is it? How do you
20 get tested or whatever?

21 A. Well you gain some experience like I did,
22 under the tutelage of someone else who is certified.
23 You then bring in credentials, such as mine, with an
24 advanced degree in mechanical engineering, and also
25 with a licensed professional engineer.

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1 Q. Right.

2 A. And you apply to Nafi, and they look at
3 your resume and say yes, you can, or no, you can't.
4 Come and take an examination.

5 Q. Right. And so that only gives you, your
6 experience only gives you a right to take the
7 examine.

8 A. That's correct.

9 Q. And then you took the examine.

10 A. I did.

11 Q. And?

12 A. I'm now certified fire explosion
13 investigator.

14 Q. Now I am going to ask you some more
15 questions about that. But did you go through the
16 same process as a vehicle fire investigator?

17 A. I did. That took, and then subsequent to
18 that, I went through an examination to be certified
19 vehicle fire investigator.

20 Q. It's a process.

21 A. Yes.

22 Q. You submit your resume, so to speak. They
23 invite you to take the test or not. You take the
24 test. If you pass, you become certified.

25 A. That's correct.

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1 Q. Now once you are certified, what is
2 required of you as far as maintaining your
3 certification?

4 A. Right. Maintain certification is to
5 continue updating a resume and also certain
6 continuing requirements that they specific.

7 Q. So every year you have to a certain number
8 of hours.

9 A. You have a certain number of hours. They
10 actually do it at every 5-year increments to take a
11 look. But yes, a certain number of hours per year.

12 Q. Do they also check work that you've done
13 during that period of time to make sure, or I don't
14 know.

15 A. No, they don't.

16 Q. So they just -- it's just every 5 years
17 you have to have an additional amount of training.

18 A. That's correct, to stay current and up to
19 date with sciences.

20 Q. Now my father was an engineer. And my
21 understanding there is some kind of licensing with
22 engineers. Do you have any sort of license as an
23 engineer?

24 A. I do. I'm a licensed professional
25 engineer in the states of South Carolina, Georgia,

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1 Alabama. And just recently, Florida.

2 Q. Now in two sentences, what does that mean,
3 and how do you do it?

4 A. Well to start out, you have to have a
5 degree from American Board of Engineering
6 Technologies curriculum. You have a degree from a
7 certified college. Then you need to sit for the
8 fundamentals of engineering exam, which is a one day
9 exam. Now that gives you---

10 Q. Is it different states, or just one state?

11 A. Each state has their own requirements.

12 Q. So you had to take them in all those
13 states.

14 A. Well it's -- there is a thing called
15 comity---

16 Q. I got you.

17 A. ---that allows you, the fundamentals of
18 engineering exam is common right now to all states.

19 Q. Okay.

20 A. And you sit for that. Then you, now you
21 get 4 years of experience. But now you sit for the
22 licensure exam.

23 Q. And then you became a licensed
24 professional engineer.

25 A. That's right.

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1 Q. And you have been able to maintain that
2 license since then.

3 A. Since then. That was 1992.

4 Q. And so whatever requirements they require
5 of you, you have met all of those requirements.

6 A. That's correct.

7 Q. Now current forensic experience I want to
8 talk to you about. How long have you been
9 practicing in forensic engineering?

10 A. Since February of 97. So that's a little
11 over 18 years.

12 Q. What is your primary experience then at
13 this point and time?

14 A. Well I hold myself out to be an expert in
15 mechanical engineering with special expertise in
16 origin and cause of fires; particularly, in machines
17 and vehicles. And I also part of my work is done
18 in collision reconstruction.

19 Q. How many times have you been -- how many
20 times have you testified as an expert? Now I'm
21 going to draw a distinction between two. Depose
22 versus being in court.

23 A. By deposition, I've sat for depositions I
24 believe it's 80 times.

25 Q. And how many times have you testified in

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1 court as an expert?

2 A. 26.

3 Q. In these areas.

4 A. 25 or 26.

5 Q. In the areas that you just referred to.

6 A. As a mechanical engineer, yes.

7 Q. Have your credentials ever been challenged
8 in court?

9 A. They have.

10 Q. How many times have they been challenged?

11 A. Several times. But one in particular I'd
12 like to tell you about is the state court in
13 Colorado that has a similar case law like what we
14 call Daubert here. They challenged my credentials.
15 I testified for five hours in front of the trier of
16 fact, and the trier of fact determined that I had
17 the right and authority to testify.

18 Q. Have you ever not have been qualified?

19 A. No. Never been told I can't.

20 Q. Now let's go to your involvement in this
21 case.

22 THE COURT: Do you want to offer him?

23 MR. KIRKLAND: Yes, sir, Your Honor.

24 THE COURT: Any questions?

25 MR. GOURLEY: I was just going to say,

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1 Your Honor, I don't have any objection.

2 THE COURT: He's qualified in the area of
3 mechanical engineering and origin and cause of
4 fires.

5 MR. KIRKLAND: Mechanical and automobile
6 fires.

7 A. And machinery and automobile.

8 MR. KIRKLAND: Machinery and automobile
9 fires.

10 THE COURT: Okay.

11 MR. KIRKLAND: Thank you, Your Honor. I
12 appreciate that.

13 Q. Now involvement in this case, what were
14 you asked to do?

15 A. Well I was asked to reveal -- review parts
16 of the testimony that were associated with the
17 burning of a certain car. I think it was
18 identified as a Volvo. And to look at that to help
19 you and the court understand the circumstances or
20 well the characteristics of that car burning, how
21 time, how much time may have been involved before it
22 would be completely consumed. How hot it got. What
23 kind of, what it would look like. Those are the
24 kinds of things you asked me to review and to bring
25 to this court.

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1 Q. And in particularly what we are going to
2 be talking about is a time frame between 9:30 a.m.
3 on a Sunday the 22nd, until 3:00 p.m. the 22nd, in
4 which the car was found.

5 A. That's correct.

6 Q. We have Koenig's testimony---

7 THE COURT. 9:30 a.m. what day?

8 MR. KIRKLAND: The 22nd. Is that---

9 THE COURT: That would be the Sunday.

10 MR. KIRKLAND: Sunday. That's correct. I
11 brought those calendars.

12 THE COURT: 9:30 a.m. that day until what
13 time that day?

14 MR. KIRKLAND: 3 p.m. And the reason why,
15 Your Honor, is the testimony was that Daniel Koenig
16 saw Nathaniel Bradley, according to his testimony,
17 driving the blue Volvo.

18 THE COURT: I got that.

19 MR. KIRKLAND: Found it burned at
20 3:00 o'clock.

21 Q. Now what -- now I gave you a bunch of
22 testimony, correct?

23 A. You did.

24 Q. Now what parts of the testimony did you
25 find particularly useful or pertinent?

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1 A. Well I looked at photographs that were
2 parts of that record.

3 Q. Well can do this, let's talk about the
4 testimony a little bit first. Not Daniel Koenig's
5 testimony. Nathaniel Bradley.

6 A. I did read parts of Daniel Koenig's
7 testimony, and it was -- he had testified that he
8 saw Mr. Bradley in the Volvo at 9:30 a.m. on Sunday
9 morning, thereabouts. There was some uncertainty
10 with that time, but that's probably the earliest
11 that was established.

12 Q. In fact, he testified if you recall this,
13 I mean, just tell me if you recall it; that he saw
14 the car between 9:30 and 10:15. And it was closer
15 to 9:30 he believes.

16 A. That's correct.

17 Q. In addition to Koenig, so that established
18 the time line for you.

19 A. It does. And it also talked about being
20 on Cobblestone Road and that was important to find
21 the location where there is a claim or an
22 observation or testimony about the location of a car
23 at 9:30 Sunday morning.

24 Q. Now Daniel Simon also sent you his
25 testimony, and he gave a rather elaborate

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1 description of the location of the cemetery. Did
2 you look at that testimony?

3 A. I did.

4 Q. Were you able to determine the location of
5 the cemetery?

6 A. Yes. With the benefit of Google Earth,
7 and another piece of software that I use for
8 planning trips, Delorme Street Atlas, I was able
9 then---

10 Q. Tell me what that is.

11 A. Delorme. D---

12 Q. Delorme Street Atlas.

13 A. Yes, D---

14 Q. Is that generally more accurate than
15 google maps?

16 A. No, it uses the same data. Google Earth
17 is what I use, because it has an aerial view of what
18 is going on. The Delorme Street Atlas is a street
19 map.

20 Q. I got you. So now Thomas McCutcheon and
21 Robin McCutcheon I gave you their testimony, what
22 did they establish?

23 A. Well Thomas McCutcheon lives, he says he
24 lives about a quarter mile from this cemetery where
25 the vehicle was found. He's riding around on a golf

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1 cart. He found the burned out car, but he said it
2 was no longer burning. The time when he was asked
3 well sometime after church and after lunch. And
4 later he refines that, he estimates about 2:30.
5 Maybe as late as three.

6 Q. Well let's talk about his testimony. Let
7 me check and make sure I'm not going to ask you this
8 twice. No, I am not going to ask you that right
9 now. So let's talk about this timeline and these
10 locations for one minute. Let's so we're talking
11 about a -- let's just take the worse case scenario
12 for the defendant. Let's say 9:30 is when he saw
13 him. Despite he said 9:30 to 10:15---

14 A. Yes.

15 Q. ---he saw him at 9:30.

16 A. That's right.

17 Q. On Cobblestone Road. Now if he saw him at
18 9:30 on Cobblestone Road, were you able to determine
19 approximately how far away the cemetery was, and how
20 far it would take to get to the cemetery?

21 A. Yes. And if we could, there are three
22 illustrations that would be useful.

23 Q. Here let me stand by you. We're going to
24 look at the map.

25 A. We actually don't need this one, because

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1 what's on this is duplicative.

2 Q. So if you don't mind, Mr. Olson, pick the
3 one you want me to use here.

4 A. These two.

5 Q. Let's get rid of this. I would offer
6 these into evidence, Your Honor, at this point and
7 time.

8 THE COURT: What are you offering?

9 MR. KIRKLAND: I am going to have him
10 describe them to you.

11 THE COURT: No, what is them?

12 MR. KIRKLAND: Excuse me?

13 THE COURT: What is them?

14 MR. KIRKLAND: It's going to be two maps.

15 THE COURT: Mark them.

16 MR. KIRKLAND: Yeah. And then I'll have
17 him describe them.

18 THE COURT: And the record will be clear.

19 MR. KIRKLAND: And I am going to describe
20 them as soon as they are marked, and I have the
21 numbers.

22 (Maps marked Plaintiff's Exhibit Nos. 6
23 and 7 into evidence.)

24 Q. I am going to hand you what is now marked
25 Plaintiff's 6 and 7. And what I would like you to

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1 do is, use these. Unless you want me to write it on
2 yours. In fact, just use these. Use these so we
3 don't get mixed up. And let's get yours. Now tell
4 me what 6---

5 A. I want to talk about No. 7, first.

6 Q. Right. Tell me what No. 7 is.

7 A. No. 7 is an aerial view from Google Earth
8 that depicts the location that was described in the
9 testimony where that cemetery was. And it also is
10 consistent with the address -- some of the addresses
11 that I was able to glean from the testimony. So I
12 determined that the place that we were talking
13 about, was this triangle right in the center of
14 illustration No. 7 or Exhibit No. 7, and that has
15 St. Charles Highway, Big George Road, where
16 Manville, Wasaki Road turns in to Cooper's Mill
17 Road.

18 Q. Now this is interesting, Big George Road.
19 According to Simon's testimony, it said Big Joy Road
20 and then sick.

21 THE COURT: Who is Simon?

22 MR. KIRKLAND: Excuse me?

23 THE COURT: Who is Simon?

24 MR. KIRKLAND: He was one of the officers
25 that testified, and I'll get you the page number,

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1 Your Honor.

2 THE COURT: Just go ahead, I got you.

3 MR. KIRKLAND: I can give it to you real
4 quick.

5 MR. GOURLEY: Judge, 488.

6 Q. 488. Now during his testimony, he gives a
7 detailed description of the location of the
8 cemetery.

9 A. I used that to define this part of the
10 world, and then I did a closer inspection, and you
11 cannot see it on this imprint. But if you Zoom in
12 on and get closer on Google Earth, you can actually
13 see gravestones.

14 Q. You can see the gravestones.

15 A. You can see gravestones.

16 Q. So that is what that represents is the
17 location or the area. Did you mark on this where
18 the cemetery was?

19 A. No, it's in this triangle, and it's most
20 likely right at the end of this road. The end of
21 this. There is a dirt road that goes in off of
22 St. Charles Highway and it goes, there's another
23 dirt road that goes off to big George Road.

24 Q. And he said it was between those two
25 roads.

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1 A. Right.

2 Q. And so what I'll say, Your Honor, to
3 describe what he just described to me; is that,
4 there is in the triangle between 34, Big George Road
5 and St. Charles Highway, there's a little dirt road
6 that curves around on the left side. It's off of
7 St. Charles.

8 THE COURT: Will you show it to me,
9 because you are talking about it.

10 MR. KIRKLAND. Off of St. Charles Highway.

11 THE COURT: I see that.

12 Q. I'll describe it for the record when
13 somebody else has to. So we're talking about in
14 between Big George Road, in between St. Charles
15 Highway on the left side---

16 THE COURT: Well just to give you a little
17 local knowledge, I believe 154 is St. Charles
18 Highway.

19 MR. KIRKLAND: Correct. It's on the --
20 near the bottom there.

21 THE COURT: 34 is not Big George Road.

22 MR. KIRKLAND: Correct. Big George Road
23 is the road that V's off.

24 THE COURT: I know where it is, because I
25 know where this area is. I was just explaining it

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1 to you.

2 MR. KIRKLAND: Thank you, Your Honor.

3 THE COURT: I already knew where you were
4 talking about.

5 MR. KIRKLAND: Thank you, Your Honor. I
6 appreciate that.

7 Q. So you have located, based on that
8 testimony, the location of the cemetery.

9 A. That's right.

10 Q. And that's what the purpose of this slide
11 is.

12 A. That's right.

13 Q. No. 6, tell me about.

14 A. Then No. 6, I used this when I described
15 to you as the Delorme Street Atlas. I found the
16 Cobblestone Road on this map. I plotted that as the
17 start point. And I plotted the cemetery as the
18 ending point, and let the program find the closest
19 and the shortest route there, and that's what's
20 plotted on Exhibit No. 6.

21 Q. And let's talk about this so it makes
22 sense. What we are doing is, we are talking about
23 a travel route. The start is the bottom left. And
24 it says on your exhibit, Sumter County, S.C. 85,
25 South Carolina, S.C. 29154. And you put start.

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1 A. That's correct.

2 Q. It looks like I'm color blind, but is that
3 a little red dot.

4 A. Little green dot.

5 Q. A little green dot. And south of that is
6 Boyle's pond, if I am not mistaken.

7 A. It is.

8 Q. So that is the start place. And the end
9 point from what you've described is where the
10 cemetery is located.

11 A. That's correct.

12 Q. Now what did this tell you when you
13 plotted this?

14 A. That just tells me about how far it was
15 between the two places where the car was supposedly
16 seen, or purportedly to be at.

17 Q. What was the approximate distance?

18 A. The approximate 26.66 miles.

19 Q. Now were you able through any of the
20 software that you were using, were you able to
21 determine an approximate period of time that it
22 would take to drive from the Boyle's pond area to
23 Cobblestone Road all the way up to the cemetery?

24 A. Well under the perimeters the program
25 uses, it tries to use speeds that are consistent

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1 with speed limits and that sort of thing.

2 Q. Posted speed limits.

3 A. It calculated that it would take 46 almost
4 47 minutes to get there.

5 Q. So let's talk about that. Let's talk
6 about the worse case scenario for the defense.

7 A. Yes.

8 Q. That car left at 9:30. I'm going to say
9 9:30 on the dot, when would it arrive at the
10 cemetery approximately?

11 A. 10:17.

12 Q. 10:17. So that's worse case scenario for
13 the defense. If the car was set on the fire exactly
14 at the point that it arrived at the cemetery, which
15 was 10:17.

16 A. Yes.

17 Q. How long approximately would it take based
18 on your experience for that car to burn? How long
19 would it be burning and smoking and what not?

20 A. Right. Even during our training we do --
21 I've observed fires and car fires purposely set car
22 fires, to give the experience while the training was
23 going on. Those are usually then put out. So I
24 also then contacted the two fellows that were
25 teaching at the school. And asked them---

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1 Q. At which school?

2 A. At the University of Kentucky. Eastern
3 Kentucky, associated with NAFI, who teach vehicle
4 fire investigation.

5 Q. Now let me ask you this. Is it a normal
6 practice for an expert to consult with other experts
7 about particular facts in a particular case?

8 A. Almost certainly is.

9 Q. And you do that how often?

10 A. Oh, routine. The first place is within
11 our own company with the associates. And then when
12 we need specific expertise we will then contact
13 others who have knowledge and experience that is
14 useful to us.

15 Q. Now the knowledge and experience of these
16 two people that you talked to, what was their
17 knowledge and experience?

18 A. Multiple, setting and observing multiple
19 car fires.

20 Q. Now how long did they let those fires
21 burn?

22 A. In certain indications, they let some of
23 them go all the way to complete burn out.

24 Q. And to burn out and even cool down maybe?

25 A. Even burn out and cool out.

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1 Q. So based on the information that you
2 received as a normal part of the validating an
3 opinion, when did they what did they tell you would
4 be the just the average time that a car would take
5 to burn?

6 A. Well flames would be emanating in like
7 5 to 7 minutes that we would see flames. But that
8 is also predicated on whether the windows are up or
9 down, doors are open or closed.

10 Q. We're going to get in to that.

11 A. Yeah, but there's variation in all of
12 this.

13 Q. Well let's say the best case scenario
14 burning one up, windows down, doors open.

15 A. Five to seven minutes you're going to see
16 flames coming out of the car.

17 Q. Right.

18 A. And then visible flames and black smoke,
19 dense black smoke. A bright, high visible flames
20 with plume as high as 20 feet.

21 Q. Now my understanding is that they sent you
22 or directed you to some photos of car fires that
23 they had done.

24 A. That's right.

25 Q. Do you have those with you?

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1 A. I do.

2 MR. KIRKLAND: Your Honor, I would offer
3 these next three exhibits.

4 THE COURT: 8, 9, 10. Mercedes No. 8.

5 MR. KIRKLAND: Got that.

6 THE COURT: The school bus No. 9.

7 MR. KIRKLAND: The school bus in the
8 background.

9 THE COURT: Yes.

10 MR. KIRKLAND: Got it.

11 THE COURT: The one that looks like it's
12 about to catch that house on fire.

13 MR. KIRKLAND: Got it.

14 (Photographs marked Plaintiff's Exhibits
15 No. 8, 9, 10.)

16 Q. Plaintiff's 8, 9 and 10. And I would like
17 you to talk to them, about them, in order that you
18 wish, and tell us what we need to learn about car
19 fires.

20 A. Let's talk to them in order. Exhibit
21 No. 8, shows a Mercedes that was set on fire in a
22 cabin. That and we're seeing the fires, the flames
23 emanating out of the cabin. Fairly high in this
24 place where the photograph was taken, you can see
25 them at least twice as high as the vehicle is. And

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1 then a dark, a plume of dark smoke raising from the
2 fire. What's interesting about this one, also then
3 if we go to No. 9 we see---

4 Q. Well let me talk about this one for one
5 minute, because there's a few characteristics I want
6 to identify. It appears in this particular
7 photograph that as far as we can see, only the cabin
8 is on fire. Is that correct?

9 A. When this photograph was taken, the cabin
10 is fully engulfed, yes.

11 Q. And the windows appear to be broken out
12 because of the fire. Because I see it coming out of
13 the front windshield.

14 A. Coming out of the wind screen, yes.

15 Q. For sure the front window is broken out.

16 A. Yes.

17 Q. When the front wind screen is broken out,
18 or the windows break out, does that change the
19 combustion?

20 A. It does.

21 Q. Because.

22 A. Because the fire needs air.

23 Q. Right. So this is a somewhat advanced,
24 slightly advanced fire. The windows were up,
25 regardless, the cabin is burning, and it's receiving

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1 air, and we get the smoke and all of that stuff.

2 Now move on to the next one you want to talk about.

3 A. No. 9, here is one where they set the
4 engine compartment on fire. And what we see here is
5 fire that's emanating from just engine compartment
6 burning at the time. By the way, the fires will
7 then spread between the compartments if they are not
8 controlled. And you'll see that there's very bright
9 visible flames that could be hard to miss if you
10 were looking at it.

11 Q. Do you know what kind of car that is, it
12 looks like an SUV.

13 A. It probably is. It's not identified.

14 Q. Now tell me this, I wouldn't have imaged
15 as a layperson that an engine is 99 percent metal
16 and stuff. How is it that it can just turn into
17 this huge flame?

18 A. The fuels that are involved here, are
19 inside the engine compartment. This is pounds and
20 pounds of plastic parts anymore; that all the air
21 intake system is plastic, all the shrouds around the
22 fan and the radiator.

23 Q. And they're plastic.

24 A. They're plastic.

25 Q. And a lot of plastic. And I'm a layman.

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1 I've heard they're petroleum based a lot of them.

2 A. The plastic is difficult, well it's not
3 terribly difficult to ignite, but you do get it
4 ignited, it burns just like what it is made from,
5 petroleum.

6 Q. So that's what's causing this huge fire.

7 A. It is that, and the fender wells are made
8 plastic, and they're rubber tires.

9 Q. And it's apparently getting ventilation
10 from underneath the car.

11 A. And the grill is plastic. Now there's
12 also gasoline that's plumed in there. There's fuel
13 filters. And even at the right temperatures, and
14 you can have the ethylene glycol that serves as a
15 coolant will ignite. The power steering fluid will
16 ignite. The brake fluid will ignite.

17 Q. So that's what causes it. That's the
18 reason why it can get so huge inside of an engine
19 compartment. Now the next one.

20 A. No. 10, well the reason I chose this
21 photograph, it shows the intense, dark blue, black,
22 smoke emanating from a vehicle fire.

23 Q. Now this compared to the other two appears
24 to be a far more advanced fire. It appears the
25 engine is on fire, the cabin is on fire, is that

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1 correct?

2 A. We're seeing fire emanating from the
3 engine compartment and from the cabin, yes. And we
4 can even see in the corner one of the left front
5 tire is burning.

6 Q. Because there is far more, maybe not far
7 more, but a good bit more smoke on this one. Would
8 that happen as the car continues to burn, more and
9 more smoke?

10 A. Well it will produce that smoke just
11 through the products of the combustion produce smoke
12 that the amount of air that it is getting, those
13 kinds of things will affect the nature of the smoke.
14 It's, we are trained and warned it doesn't
15 necessarily tell you what was burning, but more
16 about the character of the fire.

17 Q. Now either Mr. -- who are two folks that
18 found the car, do you remember their names?

19 A. Thomas McCutcheon and Robin McCutcheon.

20 Q. Now in the testimony, I believe it was
21 Thomas McCutcheon said that he was able to see the
22 vehicle from the road when it was burned out.

23 A. I recall that, yes.

24 Q. Now is there any significance to that in
25 your mind?

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1 A. Well yes, there is.

2 Q. What is the significance?

3 A. When I was searching the Google Earth
4 images there are places that could have been hidden
5 between tree lines.

6 Q. Right.

7 A. But if McCutcheon is operating his golf
8 cart along the highway as he said he was, and he
9 looked in and he didn't travel inside there, he saw
10 the burned out car from the road.

11 Q. So he is seeing a car that according to
12 him, is not smoldering in the slightest, is not on
13 fire in the slightest, which we're going to talk
14 about in a minute.

15 A. Yeah.

16 Q. And he sees it from the road.

17 A. And he sees it from the road. And I think
18 that's important because we've got a very intense
19 fire with lots of smoke emanating out it, that's
20 happening in the middle of the day on Sunday, on a
21 road that is -- it's a rural road, but there should
22 be traffic. There should have been---

23 Q. Well what time---

24 A. ---apparently somebody.

25 Q. ---are we talking about here? He says he

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1 saw it at 3:00 p.m.

2 A. He saw at 2:30.

3 Q. 2:30 to three.

4 A. 2:30 to three.

5 Q. Let's take the worse case scenario---

6 A. Three o'clock.

7 Q. Is three. So if the car is burned at

8 10:18 or whatever---

9 A. 17.

10 Q. At 17.

11 A. If it starts, it ignited at 7:17.

12 Q. Let's walk through the process of it

13 burning in a standard fire. How much time would it

14 take to burn approximately?

15 A. It's going to burn for 45 minutes. It's

16 going to burn at this intensity for 45 minutes to an

17 hour.

18 Q. So what time are we at then?

19 A. We're at---

20 Q. And I'm terrible at math.

21 A. High flames, black smoke from 10 to about

22 11. And maybe a little, 11 to 11:30.

23 Q. So maybe a little bit past 11:30.

24 A. Where it burns, finally burns out about

25 11:30 in that case.

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1 Q. Burns out. Now from 11:30 until three,
2 what would be the condition of the car?

3 A. Then it's cooling off. It got very, very
4 hot. There is a photograph that---

5 Q. How hot does it get?

6 A. Well I can show you in one of the
7 photographs of debris that remained after they took
8 the car. There's---

9 Q. Let's do that. Let's do---

10 THE COURT: Just let him finish the
11 answer.

12 MR. KIRKLAND: Yes, sir, Your Honor. Go
13 ahead.

14 A. There is a puddle of aluminum that's
15 resolidified. It more likely came from the engine
16 compartment. And it takes 1800 degrees to melt
17 aluminum.

18 MR. KIRKLAND: I'm going to let you look
19 at these two photographs.

20 THE COURT: Any objection to 11 and 12?

21 MR. GOURLEY: No, Your Honor.

22 THE COURT: Let's mark them, and then you
23 can hand them to the witness.

24 (Photographs marked Plaintiff's Exhibit
25 Nos. 11 and 12 into evidence.)

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1 THE COURT: Were those introduced at
2 trial?

3 MR. GOURLEY: Yes, Your Honor.

4 MR. KIRKLAND: Judge, I am going to let
5 you look at these first, and then I'll describe
6 them.

7 THE COURT: A close up and far off, right.

8 MR. KIRKLAND: Yes.

9 Q. Now let's talk about the close up first,
10 because the judge -- that one is easy to remember.

11 A. Right.

12 Q. Now tell me what point you were making
13 about this.

14 A. There is---

15 Q. What Exhibit No. is that?

16 A. No. 11.

17 Q. No. 11 is the close up of what you believe
18 to be.

19 A. Of the region that used to be below the
20 engine compartment.

21 Q. And why do you believe that is below the
22 engine compartment?

23 A. Because I can see components in the area
24 that I normally see an engine compartment like this
25 pulley, but it's attached to something that's got a

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1 tube out of it, was most likely powering steering
2 pump.

3 Q. So that's how you identified that at the
4 front of the car.

5 A. That's right. There is another circular
6 device that may be associated with the cooling fan.

7 Q. Now that's exactly in the middle of the
8 photo.

9 A. That is. Or some other thing that fell
10 out.

11 Q. Is there anything else in there that you
12 identified of significance here?

13 A. Well I looked at pieces that looked like
14 angle iron.

15 Q. What does that mean?

16 A. I don't know. Those kinds of things you
17 normally don't see in an engine -- in a car.

18 Q. Let me ask you something about that.

19 THE COURT: Let him, the court reporter
20 needs to hear you and then him. Not you and him.

21 MR. KIRKLAND: Yes, sir.

22 THE COURT: So you ask, let him answer,
23 and don't interrupt him. That will make the record
24 flow much more smoothly.

25 MR. KIRKLAND: I agree.

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1 A. There's what appears to be angle irons,
2 and I'm not able to identify those. And what
3 immediately comes to mind is something foreign. It
4 may be part of the bumper system but right now I
5 can't identify that. I'm -- that is usual to find
6 these kind of things in the rumble left behind of a
7 burnt car.

8 Q. Now I sent you every single photograph
9 that was introduced into evidence. Were there any
10 photographs that I sent you of the car in the field
11 subsequent to being burned?

12 A. No, sir.

13 Q. Would those have helped you understand
14 what you're looking at here?

15 A. That and just to help me understand the
16 quality of the fire investigation that took place.

17 Q. Now the second photo I am holding.

18 A. Yes, sir.

19 Q. Describe that one. Well let me describe
20 it first to make it easy. It looks like a
21 photograph from, is it the back end or the front end
22 of the car, do you think? Can't tell?

23 A. I am not certain.

24 Q. But it looks to be because of the shape,
25 the rectangular shape, the back end or front end,

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1 correct?

2 A. Yes.

3 Q. And that is a picture after the car has
4 been removed, and that is the burn material that was
5 left under underneath the car.

6 A. I believe that to be so. That's a good
7 interpretation of it.

8 Q. What do you -- tell me about that picture
9 and what it means to you.

10 A. Well I do see as you described, a burnt
11 out region that is typical of what you find, the
12 debris that's left when a car burns to completion.

13 Q. And that's Exhibit 12 that we're talking
14 about.

15 A. Yes.

16 Q. Go ahead.

17 A. There's up in this corner if you would be,
18 as you're looking at it over on the left side, what
19 appears, although the resolution in the photograph
20 is not great, it appears to be the remains of a
21 tire. And if you're trying to figure out what be
22 the front or rear of---

23 Q. Well let's not get too technical.

24 A. I don't think you can say with great
25 certainty where the nose of the car was.

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1 Q. We don't need to get tangled up in that,
2 so let's do this. What you were talking about is,
3 is you were talking about the amount of heat, and
4 how that would impact a car. And you asked me to
5 give you these two photographs.

6 A. Yes.

7 Q. So do you have comments on what we're
8 looking at, and the amount of heat.

9 A. Yes, sir. I think I already mentioned.

10 Q. Hold that up so the judge and---

11 A. This puddle right here is resolidified
12 aluminum.

13 Q. So that's in the -- there's that thing
14 that you called some kind of pulley or wheel. And
15 then to the bottom right of that, there's this
16 whitish.

17 A. It's a light color. And that has the
18 character of aluminum that has melted, fallen down,
19 and made a little lake and then refroze.

20 Q. What does that mean to you?

21 A. Well the aluminum melted at 18 degrees.

22 Q. So that fire reached 1800 degrees.

23 A. Yes.

24 Q. Now why would you believe that is
25 aluminum?

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1 A. Well I know that many automobiles use a
2 lot of aluminum for weight savings. And the primary
3 place they started in the designs was in certain
4 components in the engine compartment, like the water
5 pump, like engine block, like the heads, like the
6 intake manifold.

7 Q. Is that consistent with the water pump? I
8 think you might have mentioned to me.

9 A. It's -- this is probably consistent with
10 the power steering pump, because of the tube that I
11 see.

12 Q. How long have they been using aluminum in
13 powering steering pumps and in various components?

14 A. Oh, at least 20 years or more.

15 Q. So that was within 2005.

16 A. Right.

17 Q. Is there anything about these photographs
18 concerning the heat that you would like to point out
19 to the judge?

20 A. Well the heat, also the character of the
21 fire is partially burned tire in the corner, would
22 indicate that, tires are interesting to watch them
23 burn. They are hard to ignite, but when they do,
24 they burn a long time. They burn very -- with a lot
25 of black smoke. They're often used to set trash --

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1 forest trash piles on fire. And they then when they
2 sit underneath the car, when the car is down on top
3 of them, when the rims of the car, and tires
4 partially burn, they blow out, they fall down, and
5 the rim then limits the amount of oxygen that can
6 get to these tires. That doesn't put it out. They
7 will continue to smolder for a very long time.

8 Q. So that brings me to my next question,
9 which is when you asked me you to show you those
10 pictures. What should, let's go back to the top.
11 You said it would -- the fire would have been
12 potentially out at what time 11?

13 A. 11:30 Probably thereabouts.

14 Q. So from 11:30 until 2:30 or three when
15 they said they found it, at that point and time what
16 in your expert opinion would be the condition of the
17 car? What would they have observed when they walked
18 up to that car?

19 A. It should have -- there should -- in that
20 period of time, it doesn't have time to completely
21 cool off. The sheet metal may cool down because
22 it's thin, and there's lots of air moving around it.
23 But the heavier parts like the rear axle, like the
24 tire wheel rims, like the brakes, like parts of the
25 suspension, those heavier steel parts would have

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1 still been hot, because they got up to 1800 decrees.

2 Flowing red hot.

3 Q. Right.

4 A. And they would have still been hot. The

5 tires most likely, you see, they weren't completely

6 consumed. And they would have still been smoky.

7 I've been to machinery fires where the tires are

8 still burning a week later.

9 Q. So based on the testimony nobody

10 testified -- they did testify to a smell, did they

11 not? How does a smell last?

12 A. That will last for days. You can go to

13 one in a junk yard and still smell it.

14 Q. So no one testified that there was any

15 smoldering, correct?

16 A. That's correct.

17 Q. I sent you all the testimony about the car

18 fire.

19 A. That's correct.

20 Q. Did you see anyone testify that they

21 observed in any way, shape or form any heat---

22 A. That's correct.

23 Q. ---emanating from the car?

24 A. They did not.

25 THE COURT: Is it your opinion, did you

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1 state your opinion that these tires would have still
2 been smoldering by 2:30 or three?

3 A. I believe they still would have been, yes.

4 Q. And your opinion is still that there would
5 have been at least the heavier components; such as,
6 the engine block, the transmission, all of those
7 heavy metal, solid metal pieces would still be
8 cooling down.

9 A. Yeah. The steel and cast iron pieces.

10 Q. Cast iron.

11 A. Yes.

12 Q. Like an engine. I guess is it engine cast
13 iron?

14 A. Well some of it. In this car, I am not
15 sure. It may have been. Volvo was leading edge in
16 lighting -- making cars lighter. And it may have
17 very well have had aluminum block even back at the
18 age of this car.

19 Q. So it could have melted the engine.

20 A. But the transmission case and the axle
21 parts, especially the brakes and suspension parts,
22 would have been steel. Substantial steel that would
23 have retained the high -- retained heat for awhile.

24 Q. So at 3:00 o'clock, 2:30, you think those
25 two things would have been observed potentially by

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1 anybody standing around, smoldering, plastic, tires,
2 things like that, it would have still been,
3 especially, let's just say tires. The tires would
4 have been still been smoldering.

5 A. I believe they would have, yes, sir.

6 Q. And part of the reason that you said that
7 a moment ago is because of the way that a car falls
8 down on them, and restricts some of the oxygen and
9 so they smolder for a long period of time.

10 A. That's correct.

11 Q. And a tire, it's a partially a petroleum
12 product and it has a lot of energy in it, and it can
13 burn for a long time.

14 A. It's lots of carbon and hydrocarbons, and
15 there are fibers, all that.

16 Q. And you testified that machinery fire, in
17 which you have gone out and they have tires on them,
18 have even a week later been smoldering.

19 A. Admittedly much larger tires, of course.

20 Q. I understand.

21 A. But yes, they've been -- actually the wind
22 came up and flames erupted a week later.

23 Q. Now let's talk about what was done at the
24 scene, what investigation was done, because I turned
25 over to you every bit of testimony concerning this

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1 car. What did you see that they did as far as
2 investigating the fire?

3 A. I think it if please the court, I'd like
4 to point out the things that I couldn't find in the
5 record.

6 Q. Well let me, but I do want to ask you
7 this first. Did anyone testify, an arson expert,
8 anything about that car?

9 A. No, not the things that I would typically
10 look for.

11 Q. But did an arson expert, did anybody get
12 qualified as an arson expert?

13 A. I didn't see that there was anyone -- an
14 investigator---

15 THE COURT: Let him finish, because the
16 court reporter is going to have a horrible time. So
17 restate your question and then let him answer.

18 Q. Did you see that anybody did any
19 investigation in the transcript, any investigation
20 into the vehicle? Just that general question.

21 A. I only saw that there was a police officer
22 who came, responded to the scene, and did something.
23 But I don't know anything about that police
24 officer's credentials, whether or not they had any
25 kind of certification to investigate fires, or did

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1 anything other than recover, order the vehicle
2 recovered and taken to some shop someplace.

3 Q. In fact, the officer actually testified he
4 was not an expert in vehicle fires, and when he was
5 asked to render an opinion, the prosecutor objected.
6 Do you recall that?

7 A. Yes.

8 Q. Now tell me what you would have liked to
9 have seen done.

10 A. Well a couple of things would help to
11 establish this timeline a little bit closer. For
12 instance, if the windows were up or down, if the
13 doors were open, it would burn faster. Or if they
14 were closed, it would take longer for the fire to
15 erupt and to break through the windows, breach the
16 windows and let that oxygen in. And you can tell
17 whether the windows are up or down, even if the
18 glass is shattered and burned away by looking at the
19 window regulator in the door. You don't even have
20 to take the door apart, because all the plastic
21 parts are burned away. So you can look down there
22 and you can see where if the channel -- if the
23 window was put and up and down, it's where it is.
24 And you can tell were the windows up or were they
25 down.

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1 Q. So it's that physical mechanism that
2 pushes the window up.

3 A. Right, that's important. That's important
4 in helping to Darrell this timeline.

5 Q. Now is there---

6 A. You can tell----

7 Q. ---testimony as to whether the doors were
8 opened or closed?

9 A. No, but you can tell that generally from
10 patterns. You make that -- you can look and see in
11 the patterns. The quality of the photographs we had
12 to look at, didn't help me. They were most likely
13 closed by virtue of some really dark, not quite so
14 burned out parts at the lower parts of the doors.
15 But not having seen it myself, there is some
16 uncertainty. But if we -- but recognizing or
17 documenting or making a record whether or not the
18 doors were open or closed, would have been useful.

19 Q. I'm asking you this. I've never asked you
20 this before. But does this almost perfectly
21 rectangular burn pattern here, give you indication
22 at all whether the doors were opened or closed or
23 not?

24 A. No.

25 Q. So if they had -- let's just take the best

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1 case scenario for the defendant, if, well let me ask
2 you this. Did anybody determine if there was
3 accelerant used and how would that affect the fire?

4 A. I didn't find that anyone had -- there is
5 nothing in the record that I was aware of. It
6 talks about analyzing the debris. You can find
7 debris. I can tell you an example from not too
8 recent past a Volvo about this vintage. Completely
9 burned out. The origin of the fire I determined,
10 was in the passenger compartment behind the driver's
11 seat.

12 Took samples from the debris, had it sent
13 to the laboratory and found gasoline in it, even
14 after it burned completely down like this. So it's
15 a gas chromatograph technique. And so that would
16 have been useful to know. If someone had taken
17 samples from this vehicle and sent it to a
18 laboratory and had to determine if there were
19 accelerants; such as, gasoline, kerosene, diesel
20 fuel. I've also seen them set by fingernail polish.

21 Q. And those would all be accelerants.

22 A. Accelerants, that would be right.

23 Q. And so that would increase how quickly the
24 car burned.

25 A. That's correct.

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1 Q. And the windows down would have increased.

2 Doors open would have increased.

3 A. That's right.

4 Q. Now let's talk about -- because we don't
5 know any of that stuff. Let's talk the best case
6 scenario for the defendant. Windows up, no
7 accelerant used. How could you light a car on fire
8 without an accelerant, by the way?

9 A. You can take a bag of potato chips, put it
10 under the dash, take the cigarette lighter and light
11 the plastic on fire. It will then set the vegetable
12 oil inside the potato chips on fire. It will burn
13 intensely enough to light the plastic dash
14 compartments in the compartment, upholstery in the
15 compartment, and set the vehicle on fire. That's
16 just one way that you could do this.

17 Q. And that would burn it to the ground.

18 A. Eventually, yes.

19 Q. Now so let's say no accelerant is used.
20 Some simple method is used to light it. Let's say
21 the windows were up. Let's say the doors were
22 closed. How would that impact your opinion of how
23 long it would have taken this car to burn?

24 A. Well it might take as long in that case
25 with the windows up, it might take as long as an

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1 hour for the flames to emanate and to break through
2 and breach the window glass.

3 Q. So that, we're putting that at 11:30. At
4 one hour.

5 A. Right.

6 Q. So then how much longer would it take for
7 the car to completely burn up?

8 A. Then now it's open, and now it's going to
9 burn fairly quickly. And it's going to consume
10 everything there is to burn in a car.

11 Q. About how quickly though?

12 A. In about what -- in what these other
13 experts tell me, is somewhere between 45 minutes and
14 an hour. To consume what's in the cabin and what's
15 in the engine compartment to burn. It's
16 combustible.

17 Q. So under the best case scenario for the
18 defendant, the fire could have gone out instead of
19 at 11:30, it could have gone out at 12:30 if the
20 windows had been up.

21 A. I believe so, yes.

22 Q. So how does that impact what you think
23 they should have observed at 2:30 to 3 o'clock that
24 day?

25 A. That would have had less time to cool off,

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1 and it would have still been very apparent that it
2 was a recent, very recent fire.

3 Q. And the reason why it would have been
4 apparent is because you mentioned smoking tires,
5 heat, and things like that.

6 A. That is correct.

7 Q. But the smell is not something that's
8 significant, because they'll smell forever.

9 A. It depends on how good your nose is.

10 Q. It could be, here's the big question, and
11 if you can't do this, don't do it. But do you have
12 an opinion within a reasonable degree of scientific
13 certainty, whether or not that car could have been
14 seen best case scenario for the prosecution, at
15 9:30, and then at 2:30 to 3 o'clock, 3 o'clock in a
16 condition in which no one noticed any heat, and is
17 no smoldering whatsoever off the tires or anything
18 else?

19 A. It's my opinion that it's more probable
20 than not. The car that burned in the cemetery was
21 not the car that was seen at 9:30 that morning and
22 just to the southeast of Sumter.

23 Q. So you're saying that Koenig did not see
24 that car because the timeline does not fit.

25 A. The timeline for how long it takes this

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1 fire to burn, is not consistent with that amount of
2 time elapsing. That short amount of time.

3 Q. Now I am going to hand you a series of
4 photographs, and it actually isn't going to add a
5 tremendous amount to what we've already been talking
6 about. But flip through these and tell me if you
7 recognize those photographs.

8 A. Yes, I have seen these photographs.

9 Q. Did you utilize those photographs in
10 forming your opinions that you just talked about?

11 A. They helped to confirm the level of how
12 far the car burnt. And they were useful for that to
13 say the fire was completely burned out. The car was
14 completely burned out.

15 Q. So it's similar to some of the photos that
16 you showed the court of exemplars of car fires.

17 A. Well the exemplars are fires in progress.

18 Q. Right.

19 A. Those tell me, showed me that the car is
20 completely burned out. And all of the combustible
21 fuels that was there to burn, burnt.

22 MR. KIRKLAND: I have 11 pictures, Your
23 Honor. And I'll let her mark these.

24 MR. GOURLEY: No, objection, Your Honor.

25 THE COURT: Nos. 13 through whatever.

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1 Hold off on asking anything until she finishes.

2 MR. KIRKLAND: Yes, sir, Your Honor.

3 (Photographs marked Plaintiff's Exhibit
4 Nos. 13-23 into evidence.)

5 Q. Now we've talked a lot about car fires,
6 and I really, you've explained it extremely well.
7 What do those pictures tell you about the intensity
8 of the car fire?

9 A. Well that it completely burned out. It
10 appears that all the windows were shattered, fell
11 in, and collapsed. All the upholstery inside the
12 cabin was burned away. I cannot see down in the
13 floorboards very well to see if the carpet was
14 completely consumed. A typical car fire like this,
15 there will still be layers down in where your feet
16 go, that is useful to dig out to determine the
17 layers that you find in there. Like for instance,
18 where the glass is in that layer, is an indicator
19 of, did the fire start in the engine compartment and
20 move to the cabin, it will be in one place. If it
21 starts in the cabin and moves to the engine
22 compartment, glass will be in a different place.

23 Those are just things that you dig out and
24 you learn that are important to trying to figure out
25 the origin and cause of the fire. In that way you

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1 can help identify the compartment of origin. You
2 may not be able to narrow the origin down to a
3 point, but you generally can even with burned out
4 car like this, you can determine the compartment
5 origin.

6 Q. So these photographs support the opinion
7 that you have already given to the court.

8 A. They do.

9 Q. Where are these? I know you don't know
10 the exact location. Are these photos taken in the
11 field where the car was burned?

12 A. They appear to be taken inside of
13 somebody's garage.

14 MR. KIRKLAND: And I'll let you look
15 through these, Your Honor.

16 Q. Now the last thing. Did you find any
17 other testimony from any other witness that gave you
18 any potential incite as to when this fire may have
19 been started?

20 A. You'll have -- I don't recall the name of
21 the person, but it was the person who lives a
22 quarter of a mile from this.

23 Q. Matt Bramlett.

24 A. He lives---

25 MR. KIRKLAND: Mr. Gourley, do you have

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1 Mr. Bramlett's?

2 MR. GOURLEY: Page 453, Your Honor.

3 Q. Matt Bramlett. Matt Bramlett testified
4 that at 1:30 a.m., and he was very, he stuck to that
5 time, one to 1:30 a.m., he heard his dogs barking,
6 and he was a quarter of a mile away from the
7 cemetery, according to his testimony. He called his
8 dogs up to his porch, according to the testimony.
9 He tried to go back to the bed, his dogs had been
10 barking for 25 minutes, they continued barking for
11 25 minutes afterwards.

12 Now I do not want you to give me any
13 opinion.

14 THE COURT: What time?

15 MR. KIRKLAND: 1:30 a.m.

16 Q. And the dogs had barked for 25 minutes.
17 He stopped them from barking. They barked for
18 another 25 minutes. Now do not give me an opinion
19 about a dog. What a dog's sense is. But if those
20 dogs were barking at this fire---

21 MR. GOURLEY: Your Honor, and I am going
22 to object to that. That is speculation.

23 MR. KIRKLAND: I don't think it is
24 speculation. I'm talking about the time frame.

25 MR. GOURLEY: He's saying the dogs were

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1 barking.

2 THE COURT: Well I'll decide whether it's
3 speculation or not. But based on my view of the
4 weight of the evidence, that's what I'll base it on.
5 But you're talking about 8 hours before Mr. Koenig
6 allegedly saw somebody in a blue Volvo.

7 MR. KIRKLAND: Correct.

8 THE COURT: And you haven't established
9 where Mr. Bramlett lived, but I will leave that up
10 to you.

11 MR. KIRKLAND: Yes, sir.

12 Q. Mr. Bramlett where did he say that lived?

13 A. Quarter of a mile from the cemetery.

14 Q. So if at 1:30 this car -- let's just say
15 it like this. If at 1:30 the car had been burned,
16 okay. Would that be more consistent with what they
17 saw at 2:30 to 3:00 o'clock on Sunday afternoon than
18 it having been burned at between 9:30 and 3 p.m.?

19 A. It would give it time. If this fire was
20 set at some time in the earlier, earlier morning
21 hours of Sunday morning, then it would have time to
22 cool and for the tires to go out and those kind of
23 things. That would be consistent if that happened.

24 MR. KIRKLAND: With that, let me make
25 absolutely certain. That is everything that I have.

Daniel Olson-Cross by Gourley

1 Mr. Gourley will have some questions.

2 THE COURT: Any objection to me asking a
3 question, so I can---

4 MR. KIRKLAND: No, sir.

5 MR. GOURLEY: No, sir, Your Honor.

6 THE COURT: Mr. Olson, Mr. Kirkland
7 prefaced one of his questions about no evidence of
8 the vehicle being hot, no evidence of the tire
9 smoldering. Was there any evidence either way of
10 what any of the observers saw or felt or smelled,
11 other than seeing a burned car?

12 A. My recollection was that they saw the
13 burned car. And there were some questions if I
14 recall what was the character.

15 THE COURT: Whether it was hot.

16 A. Was it smoking. Because I think there is
17 some discussion of that in the record.

18 THE COURT: I'll have to find that. Thank
19 you. Mr. Gourley, you can go ahead.

20 MR. GOURLEY: Thank you, Your Honor.

21 Cross Examination by Mr. Gourley:

22 Q. Basically you're asserting that the
23 sheriff's office and the police department did a bad
24 job investigating this fire, right?

25 A. It's certainly incomplete.

Daniel Olson-Cross by Gourley

1 Q. Now how long Mor what kind of time span do
2 you need to investigate a car being burned to
3 discover the information that you've talked about
4 today?

5 A. I've looked at burned fires, burned car
6 fires weeks after they've occurred. I don't like
7 it, but it's still information to be learned.

8 Q. What about like an accelerant?

9 A. They will dissipate. But I found in that
10 case of the one that I told you about that was, it
11 had already been recovered to and taken to a
12 disposal yard, and it had been there for some period
13 of time. And I was still able to determine that
14 there was accelerant in the car.

15 Q. Did you have the opportunity to review the
16 records of law enforcement in South Carolina to
17 determine if there was an accelerant used?

18 A. I didn't find that in -- I've looked for
19 things like that in the record, but didn't find it.

20 Q. In the record in the transcript?

21 A. Yes, in the transcript.

22 Q. Did you contact the sheriff's office to
23 see if you could find anything about it?

24 A. I didn't do anything beyond review the
25 documents that were provided to me in the

Daniel Olson-Cross by Gourley

1 transcript.

2 Q. In the sample photos that Mr. Kirkland
3 gave you to look at, it doesn't determine whether or
4 not an accelerant was used, right?

5 A. No, you can't do that by just observing
6 patterns and some serious mistakes have been made in
7 the past. And we fire investigators have learned
8 from that, and learned from each other. And we no
9 longer base our opinions or whether or not an
10 accelerant was used based on patterns.

11 Q. Now can we just briefly go over some
12 factors that affect fire burning and the cooling
13 off?

14 A. Sure.

15 Q. What are some factors?

16 A. One of the factors would be the wind
17 conditions.

18 Q. Yes, sir.

19 A. The ambient temperature.

20 Q. Yes, sir.

21 A. Rain.

22 Q. Right.

23 A. Was, you know, many times the fire is
24 observed and fought, and put out. And so that
25 changes things.

Daniel Olson-Cross by Gourley

1 Q. But certainly we don't have anybody saying
2 they observed the fire, and put it out. We have no
3 witnesses of that. But we also don't have any
4 information or do you have any information as far as
5 what the weather was the day of the fire, that the
6 car was burned?

7 A. The only thing that I recall that we
8 talked about earlier and that's in the area, that it
9 was a sunny, sunny---

10 Q. Sunny day.

11 A. ---day.

12 Q. You don't know if it had recently rained,
13 though?

14 A. No, but recent rain isn't going affect it.

15 Q. What about, you said, temperature maybe?

16 A. Yeah, the ambient temperature will have
17 some effect, but when we're talking about the
18 relative difference between 50 degrees and 90
19 degrees versus 1800---

20 Q. Certainly.

21 A. ---the initial cool down is going to
22 happen whether it's a a spring day or a summer day.

23 Q. Now we were going off this time line of an
24 investigation area of 9:30 into three. The witness
25 that identified the car, he also stated he drove by

Daniel Olson-Cross by Gourley

1 that area, and didn't see the car the prior day,
2 correct?

3 A. That's correct.

4 Q. And he also stated that he observed the
5 car that afternoon around 2:30 to 3, but he did not
6 touch it, correct?

7 A. I think that's correct, yes.

8 Q. And then he called the police, right?

9 A. Right.

10 Q. So we have an unknown amount of time after
11 2:30 to 3 before the police arrived.

12 A. Correct.

13 Q. We just know that the car was burned
14 around 2:30 to three when it was first discovered.

15 A. Yes.

16 Q. So to say between 9:30 and three, of
17 course, we're just an approximation.

18 A. Yes.

19 Q. Now you've mentioned that the tires would
20 have potentially been still smoldering given this
21 time frame?

22 A. I believe so.

23 Q. Now did you examine -- well obviously you
24 weren't able to examine what kind of tires were on
25 the Volvo, correct?

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1 A. That's correct.

2 Q. Now did those affect in any way the amount
3 of smoldering or the heat or in any way whatsoever?

4 A. Although there's subtle differences in
5 all kinds of different brands of tires, some of them
6 different mixtures, they're all predominantly the
7 same composition, carbon and hydrocarbons mixed
8 together in a mixture, and fibers to give them
9 strength. And so these are not huge tires,
10 they're -- but like on a machine, but they would
11 still be substantial, and would be especially in
12 that region underneath the rims where the oxygen is
13 restricted that would smolder for a long time.

14 It doesn't take much oxygen to keep that
15 smoldering fire going.

16 Q. Right.

17 A. And so that's one of the things that I
18 would have expected that somebody would have
19 observed, and would have mentioned that if the fire
20 had started that morning---

21 Q. Yes, sir.

22 A. ---that would have still been going on.
23 If the fire had started some time in somewhat, you
24 know, in the earlier, earlier morning hours, then
25 they had time for that to self extinguish.

Daniel Olson-Cross by Gourley

1 Q. And you said that's what you would expect,
2 but you can't say with absolute certainty that the
3 tires on that specific car or those specific tires,
4 would have still been smoldering had the car been
5 lite at 9:30, 10, 10:15, 11.

6 A. It's more probable than not on the basis
7 of the experience I've had, and from the discussions
8 I've had with other investigators.

9 Q. And what about the rim size? Does that
10 affect the amount of oxygen that's allowed to the
11 tires?

12 A. No.

13 Q. No. Rim size has nothing to do with
14 anything regarding the tires?

15 A. Well it's just that they're -- they fall
16 down, they protect part of the tire that was
17 burning, and squeeze it to make it so that the
18 oxygen can't get to it as readily, and it has to
19 burn, burn away for the oxygen to get there. So it
20 will burn a long time.

21 Q. And again you were reiterating that this
22 isn't just your average garbage fire. This would be
23 a massive fire with a lot of smoke, and a lot of
24 flames for at least an hour.

25 A. Yes, sir.

Daniel Olson-Cross by Gourley

1 Q. And you recall in the testimony that
2 Mr. Finney cross examined all these witnesses that
3 surrounded that, area and they all agreed that they
4 didn't see any smoke, any fire, anything like that,
5 correct?

6 A. There was nothing that alerted them to the
7 fire that I could see in the record.

8 Q. And that would have been inconsistent with
9 your conclusions.

10 A. If they had found that someone had seen
11 the fire, and one of the things that was really
12 important to me to look for, is the fact that were
13 able to see this burned out car from the roadway.
14 So that it was, the line of site to the car was not
15 obscured by forest.

16 Q. A witness testified that their house was
17 obscured by the woods, correct?

18 A. Their house was, but traffic going up and
19 down the road and someone on the road, their view of
20 the location where the car burned, was not obscured.

21 Q. Now have you been out to the cemetery?

22 A. I have not been there.

23 Q. So you don't know what this area looks
24 like.

25 A. Other than my aerial views and what's in

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1 the public demand to look at.

2 Q. So you don't know what -- how heavily the
3 trafficked the road is, do you?

4 A. Not for certain. It just is, although
5 there is some testimony that it is a fairly heavily
6 traveled road.

7 Q. But you're making the assumption. You
8 have no personal knowledge as to how heavily traffic
9 this road is, what type of area it is, or what
10 surrounds that area at that time.

11 A. All I've got to base my opinion is what
12 was in the record. So I was not able to go there.
13 And on top of that, this is several years ago---

14 Q. Yes, sir.

15 A. ---the foliage would change. It would be
16 changed in the circumstances, and the traffic would
17 be different.

18 Q. But you would agree with me that this is a
19 fairly rural, isolated area?

20 A. It is rural for sure.

21 MR. GOURLEY: Your Honor, I don't have any
22 other questions thank you.

23 MR. KIRKLAND: I do have one.

24 Redirect Examination by Mr. Kirkland:

25 Q. There's testimony in the record you

Daniel Olson-Redirect by Kirkland

1 indicated that the fire -- that the car was visible
2 from the road; that, Mr. McCray, was that it?

3 A. McCutcheon.

4 Q. McCutcheon saw the non-burning vehicle
5 from road.

6 A. He did.

7 Q. And then you introduced as exemplars of a
8 burning car, No. 10, No. 9 and No. 8. Now would a
9 person driving down the road be able to see if they
10 drove past the car, would they have been able -- how
11 bright is this? Would they have been able to see
12 it?

13 A. Well certainly.

14 Q. How bright is that? I mean, is it easy to
15 even look at when you're burning or?

16 A. It's -- we've all been around fires that
17 ignite. Possibly you've ignited your charcoal fire,
18 you put the lighter on it, and you'll see the flames
19 come up at first. That's the brightness of it.
20 These photographs I think are quite representative
21 of the brightness of a car fire that I've seen when
22 we did one in training.

23 Q. So it's bright.

24 A. It is bright.

25 Q. And the smoke plume. When you were

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1 training, how high does the smoke plume go?

2 A. Well the smoke bloom would definitely rise
3 and it would be the above tree line.

4 Q. How many -- can you just, don't do it if
5 you can't. Can you estimate the number of feet in
6 which a smoke plume might be visible, and if you
7 can't.

8 A. It would go up and it would be dispersed
9 by any kind of winds that are there. It would
10 certainly rise up above the tress and then be blown
11 away. But it would certainly rise to above the tree
12 line.

13 Q. So it could visible actually for a long
14 distance even if you couldn't see the base of the
15 fire.

16 A. Yes.

17 Q. You could see the smoke.

18 A. Yes.

19 Q. Like we've seen smoke. All of us have
20 been driving down the road and seen smoke coming up
21 from somewhere. That would be the sort of thing
22 that you might see?

23 A. Yes. And if I might add then, that would
24 for me, it would initiate my curiosity. I am going
25 to be looking as I went by to see what might be

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1 causing that fire.

2 Q. Did anyone testify that they saw this fire
3 burn?

4 A. We don't have anything in the record that
5 I could find.

6 Q. And clearly according to the record, we
7 are between 9:30 a.m. on a Sunday morning and
8 3 p.m., although we know it couldn't be too close to
9 three, because it had cooled off. But between
10 9:30 and three, correct?

11 A. If we follow the time line that's in the
12 record, then we would accept that. We saw that the
13 car was seen, and it was in fact that car, then the
14 fire would have been in its most intense somewhere
15 between 11 and 12 o'clock.

16 Q. Well let me ask you this. As a layperson,
17 I don't want an expert opinion. Between 9:30 and
18 12 on Sunday morning, what are a lot of Americans
19 doing? Sunday morning.

20 A. Sunday morning, I am at church.

21 MR. KIRKLAND: That's it.

22 MR. GOURLEY: Judge, if I may, just very
23 briefly.

24 THE COURT: Sure.

25 Recross Examination by Mr. Gourley:

Daniel Olson-Recross by Gourley

1 Q. Would you agree with me, fire is obviously
2 bright at night, it would be more, easily readily
3 visible?

4 A. If in the same way, if someone is going
5 down the roadway, it would be. But the smoke plume
6 would be obscure.

7 Q. So when Matt Bramlett is talking about his
8 dogs barking on earlier morning on Sunday, wouldn't
9 you agree with me that he would be more inclined to
10 see a bright burning car in the middle of the night?

11 A. I think that Mr. Bramlett also testified
12 that there's trees between and his -- between his
13 house, his porch, where he was observing and where
14 the cemetery is.

15 Q. And do you any recollection whether it was
16 in the record or from a personal knowledge, how tall
17 the trees were at this time?

18 A. You can -- I can just tell you from
19 looking at Google Earth images street view, that
20 they're -- the trees are somewhere between anywhere
21 from some areas are like 15. And that's an
22 estimate, 15 to 30 feet.

23 MR. GOURLEY: No further questions, Your
24 Honor.

25 THE COURT: Is that it?

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1 MR. KIRKLAND: Nothing.

2 THE COURT: Thank you, sir. You can step
3 down. How many more witnesses will you have?

4 MR. KIRKLAND: I've got my client.

5 THE COURT: Well how long is it going to
6 take, because it's 5 o'clock.

7 MR. KIRKLAND: Well tell me what you
8 think.

9 THE COURT: No, you tell me what you're
10 thinking.

11 MR. KIRKLAND: I'll go until---

12 THE COURT: The question is, how long is
13 he going to take? Because he's coming from
14 McCormick?

15 MR. KIRKLAND: Yes, sir.

16 THE COURT: Because these folks have got
17 to get back. These folks have to get back. If you
18 want to submit to me to make that call, I'll make
19 the call. But I'm asking you to tell me.

20 MR. KIRKLAND: Here's what my preference
21 would be to finish it up. But here's the problem.

22 THE COURT: We're not going to finish the
23 entire thing because Mr. Finney is going to be
24 called.

25 MR. KIRKLAND: Correct.

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1 THE COURT: He's going to have to be
2 present for that. And so I would assume based on
3 what we have here so far today, with a fair amount
4 of repetition; that Mr. Bradley will take at least
5 an hour. And then Mr. Finney will take at least an
6 hour.

7 MR. KIRKLAND: Yes.

8 THE COURT: And so we're not going to be
9 here until 7 o'clock.

10 MR. KIRKLAND: Yes, sir.

11 THE COURT: So we will adjourn for the
12 day. And that will gave both sides a chance to get
13 their ducks in a row for the next witnesses.

14 MR. KIRKLAND: Yes, sir.

15 THE COURT: And of course, you're not
16 foreclosed from deciding to call other witnesses
17 other than Mr. Bradley, but we'll have to find a
18 time to get this done.

19 MR. KIRKLAND: Yes, sir.

20 THE COURT: McCormick, I don't even know
21 how you get there from here. It's a long way away.
22 And I don't want anybody to feel rushed. But it's,
23 McCormick is almost not even in South Carolina.

24 MR. KIRKLAND: I get it. I've been going
25 out there to see him.

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1 THE COURT: So we can check our schedules.
2 Mr. Gourley, you will be, I guess more at the mercy
3 of the court than Mr. Kirkland will be.

4 MR. GOURLEY: Yes, sir.

5 THE COURT: But we will get back together
6 soon, and then that will you chance to refine your
7 focus since we apparently know what the current
8 expert focus is on. So we'll adjourn for the day.

9 MR. KIRKLAND: Thank you, Your Honor.

10 MR. GOURLEY: Thank you.

11 (Whereupon, the hearing resumes on Tuesday,
12 July 5th 2016 at 9:30 a.m.)

13 THE COURT: This is Nathaniel Bradley.

14 And Mr. Kirkland and Mr. Bradley are here.

15 Mr. Kirkland, you represent the applicant. And I
16 know we had some proceedings before. I've got the
17 transcript from that. And I have read it, the
18 testimony of Olson, Levitan. First. That was in
19 reverse order. And then Van Wallendael. What do
20 you intend to present today?

21 MR. KIRKLAND: I have my client, and that
22 should be it. But I may have one other witness that
23 may be 15 minutes, but I am not sure.

24 THE COURT: Just to give me an idea, and
25 I'm not going to hold you to it. What's your

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1 intended schedule?

2 MR. KIRKLAND: I always underestimate. I
3 think three and a half to 4 hours. That's truly
4 what I believe it is. I went over last night the
5 cross examination that I have with Mr. Finney. And
6 incidentally I asked Mr. Finney if I can refer to
7 Mr. Finney during these proceedings and he agreed.
8 And it looks like it's going to be so very brief,
9 but I thought that last time as well.

10 THE COURT: Well I just want to make---

11 MR. KIRKLAND: Your Honor, I have -- I did
12 meet with my client on Thursday, and we tried to
13 pare it down to be efficient.

14 THE COURT: Just to be---

15 MR. KIRKLAND: Not to not present it, just
16 to be efficient.

17 THE COURT: Just to be completely clear,
18 you have all the time you need.

19 MR. KIRKLAND: Yes, sir.

20 THE COURT: I'm just trying to get an
21 idea. So if we get close to 12:30, one, we are
22 going to stop for lunch. We're not going to work
23 all the way through two, because we did that a
24 couple of days last week, and that doesn't do
25 anybody any good. I know that the folks from SCDC

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1 have the schedule, and they don't want to wait
2 unnecessarily, but I'm not going to starve people to
3 death.

4 Now Mr. Finney is here of course. Do you
5 intend to call him?

6 MR. KIRKLAND: I do not.

7 THE COURT: If the State wants to talk to
8 him about whether or not he wants to be present to
9 listen to all of this, that's y'all's call. But if
10 you want him to go downstairs work, y'all have --
11 well it's a chambers week, so there is no court
12 anywhere. I'll leave that up to you all about
13 whether or not you want him to sit here and listen.

14 Mr. Kirkland.

15 MR. KIRKLAND: My first witness is my
16 client, Nathaniel Bradley.

17 THE COURT: Mr. Bradley, come on up,
18 please, and put your left on the bible and raise
19 your right hand.

20 Nathaniel Noel Bradley, being first duly
21 sworn, testified as follows:

22 MR. KIRKLAND: I'd introduced maybe 15 or
23 20 exhibits. I assumed that they would be here
24 today since they were part of that record.

25 THE COURT: I have a lot of them. I

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1 don't know if they are the originals. But we can
2 certainly get.

3 MR. KIRKLAND: The only issue I'm
4 concerned about is referring to them by the correct
5 number.

6 THE COURT: Sarah, if you would go
7 downstairs to the clerk's office and ask them to get
8 the exhibits. And this is the docket number. I
9 have photocopies. You can go ahead.

10 Direct Examination by Mr. Kirkland:

11 Q. Mr. Bradley, state your full name for the
12 record, please.

13 A. Nathaniel Noel Bradley.

14 Q. And how old are you right now?

15 A. 63. Almost 64.

16 Q. Where you currently housed?

17 A. McCormick Correctional Institution in
18 McCormick, South Carolina.

19 Q. McCormick?

20 A. Yes, sir.

21 Q. What were you convicted of, Mr. Bradley?

22 A. Murder.

23 Q. And what was the sentence? Excuse me, was
24 it a plea or was it a trial?

25 A. It was a trial.

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1 Q. What was your sentence?

2 A. 30 years.

3 Q. Did you receive any other sentence other
4 than the 30 years for murder?

5 A. No, sir.

6 Q. Just murder, 30 years for murder?

7 A. Yes, sir.

8 Q. Now I going to actually start walking
9 through the amendments in the post conviction relief
10 application. And if you will remember, Your Honor,
11 my amendment, I had told you at the first hearing,
12 you probably saw it in the transcript, that is our
13 complete application. We have disregarded his
14 earlier application that he filed. So we would
15 simply be going through the matters contained in the
16 amendment, Your Honor.

17 THE COURT: Four pages, 16 grounds.

18 MR. KIRKLAND: Correct, Your Honor.

19 Q. Let's go to issue No. 1, Mr. Bradley.
20 Mr. Bradley, do you happen to have a copy of your
21 warrants?

22 A. Yes, sir, I do.

23 MR. KIRKLAND: Hold on a second. That may
24 have been introduced in the first trial, but I may
25 have them right here. Actually I do.

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1 THE COURT: So we are on issue
2 No. 1, regarding the warrants.

3 MR. KIRKLAND: Yes, sir. And I will
4 continue to go through the application by the
5 numbers. This is what I am going to talk to him
6 about right now.

7 THE COURT: Is this in evidence?

8 MR. KIRKLAND: Not yet, but it will be.

9 Q. Mr. Bradley.

10 A. Yes sir.

11 Q. Could I hand you a copy of the warrant?

12 A. Yes, sir.

13 Q. Do you recognize that?

14 A. Yes, sir.

15 Q. What is that?

16 A. It's the arrest warrant that they arrested
17 me on.

18 Q. And that was the warrant that was
19 contained in the discovery materials provided to
20 Mr. Finney, correct?

21 A. That's correct.

22 MR. KIRKLAND: Your Honor, I'd ask to move
23 this into evidence at this time.

24 THE COURT: Any objection?

25 MR. GOURLEY: No objection.

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1 THE COURT: What is the number?

2 THE REPORTER: 24.

3 (Arrest warrant marked Plaintiff's Exhibit
4 No. 24 into evidence.)

5 Q. So this we're going to be referring to,
6 Mr. Bradley, as Exhibit 24. I am going to give it
7 back to you in a moment. Now the first ground is,
8 and let me look directly at the filing that we made,
9 was that your trial counsel erred when he failed to
10 quash the arrest warrant on the basis that the
11 information in the warrant was demonstratively
12 false.

13 Now explain to the judge, well first of
14 all, if you don't mind, just take a moment and read
15 it very slowly, because I know you speak fast. Read
16 it very slowly, what the probable cause was that is
17 listed in your warrant.

18 A. Probable cause for arrest. Law
19 enforcement have a statement from the witness who
20 placed the defendant at the crime scene. Law
21 enforcement was dispatched to the scene.

22 Q. Now that's the sentence that you take
23 issue with, so we don't need to read the first part,
24 correct?

25 A. Correct.

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1 Q. Now explain to me how that particular
2 sentence was demonstratively false in your case.

3 A. It was false because there is no -- there
4 was no evidence placing me at any crime scene. And
5 I feel trial counsel should have moved to squash the
6 arrest warrant at that time, because the State put
7 up the 26 witnesses. Nobody put me at a crime
8 scene. In fact, they don't know what date, what
9 time, or place, what place the crime occurred at.

10 Q. So there was an eye witness in the case.
11 Do you remember what his name was?

12 A. Darrell Koenig.

13 Q. Where did he identify? Where does he say?

14 THE COURT: Let's get the spelling
15 straight. K-O-E-N-I-G.

16 MR. KIRKLAND: Correct, Your Honor.

17 Q. Where was it that Darrell Koenig said that
18 he saw you?

19 A. Darrell Koenig, he said he was working on
20 some property he owned on 4200 Cobblestone Road.

21 Q. Now where was the body?

22 A. The body was allegedly located in Boyles
23 pond on St. Paul Church Road.

24 Q. Well it wasn't alleged, but clearly found.

25 A. In Boyles pond on St. Paul Church Road.

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1 Q. And now how far away is that from where
2 this identification took place?

3 A. Approximately a mile away.

4 Q. Now you also state in your application in
5 the last sentence, Investigator McMillan had hinted
6 that he had no evidence that the victim would be
7 killed in Sumter County. So that is part of your
8 claim; that there was no, this warrant contained
9 incorrect information because the only eye witness
10 that said he saw you drive your car, correct?

11 A. That's correct.

12 Q. And that wasn't the alleged scene of the
13 crime.

14 A. No, sir.

15 Q. They don't know where the alleged scene of
16 the crime was.

17 A. No, sir.

18 Q. So your is claim is, that your attorney
19 should have made a motion to quash the warrant on
20 the basis that?

21 A. The information in the arrest warrant was
22 demonstratively false. And therefore, the
23 magistrate's issued them based on false information.

24 MR. KIRKLAND: And, Your Honor, if you'll
25 look at the application, I'll just kind of -- some

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1 of these things are getting done early on. You'll
2 notice that I put transcript numbers in my
3 application, so that you can check the testimony.
4 That's all we have for that issue, Your Honor, so
5 I'll move on to issue 2.

6 Trial counsel erred when he failed to
7 argue in his directed verdict motion that the State
8 failed to place him at the scene of the crime, or
9 show any evidence of his participation in the murder
10 of the victim. Now this is on transcript Page 820
11 to 831. Tell the court what your issue was with the
12 way he presented the directed verdict motion.

13 A. I'm saying that trial counsel failed to
14 argue any direct verdict motion; that the State
15 failed---

16 Q. Hold on a second, because you have a
17 little bit of an accent and you talk fast.

18 THE COURT: I can read it. Are you going
19 to ask him to read this?

20 MR. KIRKLAND: No.

21 THE COURT: Well I think that's what he
22 was doing, but go ahead.

23 Q. Well just tell me what your -- don't read
24 anything. Just tell me what your issue was with the
25 directed verdict and how he argued it. And just

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1 state it slowly and clearly.

2 A. I'm saying trial counsel didn't argue the
3 directed verdict properly, because he didn't allege
4 any case law to support his argument on a directed
5 verdict motion.

6 Q. That's one issue. He didn't argue any
7 case law. You also mentioned in your application
8 that he did not -- he failed to place him at the
9 scene of the crime. Tell me why that was an issue.

10 A. He failed to place me at the scene of the
11 crime, because that is a necessary issue. I mean if
12 you can't place a person at the scene of the crime,
13 then he's not guilty of the crime.

14 MR. KIRKLAND: And I think that's all we
15 have on that issue, Your honor, so we're going to
16 move on. Very well, Mr. Bradley.

17 Q. Now trial counsel erred when he waived the
18 Neil v. Biggers hearing. This is issue 3. And he
19 allowed in testimony concerning the identification
20 of Mr. Bradley by witness -- by the State's witness
21 Darrell Koenig. Let's talk about that for a minute.
22 What testimony which was between 583 and 585, what
23 testimony was it, and you can summarize it, you
24 don't have to read it. What testimony was it that
25 you had a problem with?

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1 A. When trial counsel waiving the
2 Neil v. Biggers hearing.

3 Q. And tell me why you needed to have a Neil
4 v. Biggers hearing.

5 A. No. 1, Darrell Koenig is a Caucasian man.
6 And Darrell Koenig stated he got a 7-second glimpse
7 of me as I passed by on the other road.

8 THE COURT: I thought it was a 15 seconds..

9 A. It was 7 seconds.

10 MR. KIRKLAND: There's actually a little
11 bit of disagreement in the transcript, Your Honor.

12 THE COURT: Okay.

13 MR. KIRKLAND: What I am going to plan to
14 do to straighten some of these issues out, is ask at
15 the end if we can put together proposed orders, and
16 then we'll try to lay out for you exactly what the
17 testimony was.

18 THE COURT: But he just 7, correct?

19 MR. KIRKLAND: He said 7, and that's his
20 recollection of what he saw. And what he recalled
21 reading in the transcript.

22 Q. Now by having -- well let's talk about it.
23 What happened with the Neil v. Biggers hearing,
24 because there was some discussion in the transcript,
25 and the judge asked in the transcript, do you want a

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1 Neil v. Biggers hearing. He asked Mr. Finney that.

2 What do you recall happening?

3 A. Yes, it was supposed to have been the next
4 day. The solicitor said well we'll have the
5 Neil v. Biggers hearing the next day. So Mr. Koenig
6 asked for me. Mr. Finney asked me a few questions,
7 then he turned around and actually told the judge
8 that Mr. Bradley waives the Neil v. Biggers hearing.

9 Q. Now was that a true statement?

10 A. No, sir. I did not waive the
11 Neil v. Biggers hearing.

12 Q. Now just so this is clear, because it's an
13 unusual situation. You told -- you're claiming that
14 you told Mr. Finney that you did not wish to waive
15 your Neil v. Biggers hearing. And then he stood up
16 and he told the court, you waive it. What was your
17 reaction? Did you say anything to him at that point
18 and time?

19 A. I mean the true is at that time, I didn't
20 know what Neil v. Biggers hearing were.

21 Q. I see.

22 A. He took it upon himself to waive. He said
23 that the judge didn't want the case to go into the
24 weekend. The judge wanted to go deer hunting
25 Saturday.

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1 Q. Excuse me, say that one time?

2 A. He said the judge wanted to go deer
3 hunting Saturday.

4 Q. Deer hunting Saturday.

5 A. Yeah, the judge didn't want the case to go
6 into the weekend.

7 Q. So that's your belief for one of the
8 motivations for him in waiving the hearing?

9 A. Yes.

10 Q. Now additionally in this issue, you raised
11 the issue that counsel failed to object to the
12 lineup introduced through Mr. Koenig, and
13 Mr. Koenig's in court identification, which I
14 believe was 621 through 661 in the transcript. Tell
15 me what your issue is with him not objecting to the
16 introduction of the -- and the introduction, and the
17 identification is actually contained in the evidence
18 or in our evidence already. But what was your
19 objection to him not objecting to this lineup coming
20 in?

21 A. I mean he should have. I mean he really
22 should have objected to that identification, because
23 Mr. Koenig was in the courtroom identifying me,
24 sitting in the courtroom. Mr. Koenig never seen me
25 a day in his life. He don't know me.

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1 Q. What was the problem with the lineup that
2 you perceived?

3 A. Well the picture in the lineup -- the
4 picture in the lineup, I stands out in among the
5 other 5 people in the lineup.

6 Q. So it's your belief that the lineup was
7 not an appropriate lineup because you stood out, or
8 looked different than the other people in the
9 lineup.

10 A. That's true.

11 MR. KIRKLAND: If I may have one moment,
12 Your Honor, to sort this out.

13 THE COURT: What Exhibit No. is that?

14 MR. KIRKLAND: Exhibit No. 1.

15 Q. Is this the lineup that you are referring
16 to?

17 A. Yes, it is.

18 Q. And what was it in your opinion that made
19 you stand out among others?

20 A. Well my mouth is open. You can see my
21 teeth in my mouth, my head turned to the side.

22 Q. That's you?

23 A. Yes, sir.

24 Q. So that's your complaint is that you could
25 see teeth; whereas, you don't believe that you can

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1 in anyone else. And your head was tilted and no one
2 else's head was tilted.

3 THE COURT: So open mouth and the head
4 tilted to the side?

5 MR. KIRKLAND: Yes, sir. And that would
6 also I think that my witness at the first hearing
7 also commented the identification.

8 THE COURT: Was that the lineup presented
9 to the jury, or was it in color?

10 Q. Do you know if this was the lineup
11 presented to the jury?

12 A. I have no idea.

13 MR. KIRKLAND: I don't know the answer to
14 that either, Your Honor. In fact, I am willing to
15 bet it was in color. Which we can get you the
16 original lineup.

17 Q. And I think you've already stated the
18 objection that you have with the identification, the
19 in court identification of Mr. Bradley, and this
20 sort of dovetails in to the Neil v. Biggers hearing,
21 there was no questioning made. There was no
22 questioning ever done at a Neil v. Biggers hearing
23 that established that he could easily see you, knew
24 who you were, or whatever. Things like that. The
25 five factors I think in Neil v. Biggers were never

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1 asked of him, correct?

2 A. No, sir. And I---

3 Q. Go ahead.

4 A. And I feel if the Neil v. Biggers hearing
5 had been had, Mr. Koenig would never be able to
6 testify, because he couldn't pass the Neil v.
7 Biggers hearing.

8 Q. So the transgression or where your
9 attorney was ineffective was not asking for the
10 hearing. And the difference it would have made is
11 the identification would have been ruled
12 inadmissible, correct?

13 A. Yes, sir.

14 Q. Now let's move to issue No. 4. And this
15 one does get a little bit more complicated.

16 MR. KIRKLAND: And unfortunately, Your
17 Honor, I'm going to breeze through some pages,
18 because he's probably going to have to point out a
19 few things in the transcript.

20 THE COURT: All right.

21 Q. Trial counsel failed to investigate Easy
22 Auto to see if they in fact used yellow temporary
23 tags on their vehicle, and if other cars similar to
24 blue Volvo, would have been sold near the time of
25 the murder. Let's talk about that. What do mean

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1 he did not investigate Easy Auto?

2 A. I am saying he never investigated Easy
3 Auto to see whether they sell any other car
4 resembling the blue Volvo around the time of the
5 murder.

6 Q. And what was the problem with him not
7 doing that?

8 A. It caused -- I mean, you know, he's not
9 being able to do -- not doing that, you know, it
10 caused me to suffer dearly, because the car is what
11 allegedly caused me to be locked up in the first
12 place.

13 Q. Correct. Or one of the reasons, correct.
14 He said that he identified in the transcript, he
15 said that he identified the car as a blue, light
16 blue Volvo. And it contained a yellow tag with red
17 writing on it, correct?

18 A. Yes, sir.

19 Q. Now did your attorney go to Easy Auto and
20 find out if they had huge yellow tags like that in
21 the past?

22 A. No, sir, he didn't.

23 Q. And so that's basically your issue is that
24 the tags may very have not been yellow.

25 A. That's correct.

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1 Q. And in fact at some point and time later,
2 they called the owner of the Volvo. Do you recall
3 that?

4 A. Yes, sir.

5 Q. What was her name?

6 A. It was Martha Ann Ramsey.

7 Q. What was her name?

8 A. Martha Ramsey.

9 Q. Now what did she say was on the back of
10 the Volvo?

11 A. She said she think it was a red tag on the
12 back of the Volvo.

13 Q. A regular tag.

14 A. A red.

15 THE COURT: Red.

16 Q. Red tag.

17 A. Yeah.

18 Q. Red tag. Did she also say in the
19 transcript that she thought that she may have
20 already had her regular tags at the time?

21 A. That's correct.

22 Q. And she then admitted if it was a paper
23 tag that she believed that it was red?

24 A. Yes, sir, she did.

25 Q. And your attorney never went out to talk

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1 to Easy Auto and ask what sort of tag did they
2 issue.

3 A. No, sir.

4 Q. And that was three parts. That was one of
5 three parts of this identification according to the
6 transcript.

7 A.- Yes, sir.

8 Q. He identified you. He identified the
9 blue. Car, and he identified the yellow tag. Is
10 that---

11 A. Yes, sir.

12 Q. ---correct? And so that's your issue.

13 A. Yes, sir.

14 Q. Additionally you say trial counsel failed
15 to object to hearsay testimony by an employee of
16 Easy Auto during the trial. I believe this is on
17 680 through 681, Your Honor.

18 THE COURT: What was the employee's name?

19 MR. KIRKLAND: I will look and tell you in
20 one second, Your Honor.

21 A. His name was Mr. Fields. James Fields.

22 MR. KIRKLAND: That is correct.

23 Q. Now they refer to the -- early in the
24 trial they referred to the automobile dealership as
25 Easy Auto, correct?

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1 A. Yes, sir.

2 Q. However this investigator on 680 through
3 681 refers to it as Boyles Pay Here Buy Here,
4 correct?

5 A. Yes, sir.

6 Q. Which is that that appeared to be from
7 looking at the trial the same automobile place.

8 A. Yes, sir, it is.

9 Q. He's referring to it by a different name?

10 A. Yes, sir.

11 Q. Now during this point and time, starting
12 with line 4 on 680 and going to line 14 at 681, what
13 did Detective McMillan, what did he testify to?

14 A. You want me to read it or just?

15 Q. No, just summarize it. The judge has the
16 pages.

17 A. He testified that he talked with
18 Mr. James Fields and Mr. James Fields gave him
19 advice of how to locate the car, and the car should
20 have a tracking device in it, that would tell them
21 how to pick the vehicle up if somebody didn't pay
22 their payment.

23 Q. They also talked about the tag. And what
24 did he say about the tag?

25 A. He said the car had -- it should have had

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1 a bright yellow, or either or paper tags on it, at
2 the time it was sold.

3 Q. Now did this employee testify at the
4 trial?

5 A. No, sir, he didn't.

6 Q. So the only thing in the record indicating
7 that it was a yellow tag on the car, was that the, I
8 suppose hearsay testimony of---

9 A. Yes, sir.

10 Q. ---Mr. McMillan?

11 A. Yes, sir, he testified.

12 THE COURT: Just a minute ago he said that
13 Mr. Finney didn't object to hearsay testimony from
14 the witness. And then I said who is the witness,
15 and he said, Mr. Fields. So this is Deputy
16 McMillan.

17 MR. KIRKLAND: Deputy---

18 THE COURT: He's saying what Mr. Fields
19 told him?

20 MR. KIRKLAND: Correct, Your Honor. I'm
21 sorry

22 Q. So this is Deputy McMillan 680, 681. So
23 you were concerned that testimony got into the
24 record that was basically a police officer saying
25 what someone told him.

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1 A. Yes, sir.

2 Q. Which you indicated in your application
3 that you believe all of that was hearsay.

4 A. Yes, sir.

5 Q. And in the fact the issue as you explained
6 it to me; was that, this was the only place in the
7 record that corroborated the yellow tag on the car.

8 A. Yes, sir. That's correct.

9 Q. And that's why you believe he should have
10 objected to it.

11 A. Yes, sir.

12 Q. We can move on to issue 5 then. Now issue
13 5, trial counsel failed to object to the prosecutor
14 referring to Mr. Bradley as a liar in her closing
15 argument, while arguing that her witnesses were
16 credible. Don't read, you can read one maybe. Just
17 like one. Do you have your stuff with you right
18 there?

19 A. Yes, sir.

20 Q. Just go ahead and read one example of that
21 to the judge, just so that he understands what you
22 are talking about.

23 A. I'm saying trial counsel prejudiced me
24 when he failed to object or move for a mistrial.

25 Q. Well hold on. I'm talking about -- I

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1 understand the issue. The judge understands the
2 issue, I promise. Give me an example of what she
3 said, and then...

4 A. In other words, on page 1009, line 3
5 through 5, she said that man only lies. His own
6 inability to tell the truth has created a trap in
7 which he now finds himself.

8 Q. Now my understanding is the issue that you
9 have with that, was that you didn't believe that
10 that's an appropriate closing argument; that it was
11 inflammatory and and prejudicial.

12 A. Yes, sir, it is.

13 Q. Now and she did that also on page 116,
14 117, 1024 and 1025. And, Your Honor, I've listed
15 the pages in my application.

16 THE COURT: Well you said 116 and 117.
17 It's actually 1,016 and 1,017.

18 Q. Excuse me correct, 1,016 and 1,017. But
19 I've put the pages in there. So rather than read
20 them all, that's a good enough example. Now she
21 also argued in one of those pages, you mentioned
22 that she argued that her witnesses were credible.
23 Do you have that at hand easily? If you don't, we
24 can find it later.

25 A. It's on page 1027. Line 14 through 17.

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1 THE COURT: I'm sorry.

2 MR. KIRKLAND: 1027. I did not list that
3 page, Your Honor, so I'm going to have to add that.

4 THE COURT: Well you're talking about the
5 credible part?

6 MR. KIRKLAND: I'm referring to---

7 THE COURT: Or the liar part? The liar?

8 MR. KIRKLAND: ---her bolstering the
9 credibility of her witnesses.

10 THE COURT: While I'm asking, have you
11 ever seen that not to be the case that the lawyer
12 who's making that closing argument says, I submit to
13 you our witnesses are credible?

14 MR. KIRKLAND: I---

15 THE COURT: Are they not permitted to---

16 MR. KIRKLAND: The concern and the issue
17 that I'm going to end up raising, Your Honor, is
18 that the way that she stated it, was potentially
19 inflammatory and there could have been a bit of
20 burden shifting.

21 THE COURT: What are those page numbers
22 again, please?

23 MR. KIRKLAND: Well the last page number
24 is -- the last page you just gave, Mr. Bradley.

25 A. That was...

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1 Q. Was it 1,027?

2 A. One thousand -- yeah, 1027.

3 MR. KIRKLAND: And the other pages, Your
4 Honor, I believe I listed correctly in my.

5 THE COURT: But which ones are liar pages,
6 and which ones are credible pages?

7 MR. KIRKLAND: I think, okay.

8 THE COURT: No, you can tell me
9 Mr. Kirkland.

10 MR. KIRKLAND: I think, I believe it's all
11 of them except the last one. Unless you know
12 something different.

13 THE COURT: All of them are what, except
14 for the last one?

15 MR. KIRKLAND: Calling him a liar. The
16 vast majority of those pages are calling him a liar.
17 There's only one or two examples of her bolstering
18 witnesses.

19 THE COURT: So we're adding page 1,027.

20 MR. KIRKLAND: Correct, Your Honor. But
21 obviously my order, I'll list it out very carefully.

22 Q. And that's your issue. Your issue is, it
23 was inflammatory to call you a liar. It was
24 potentially burden shifting. And then on the other
25 hand, she was bolstering her own witnesses and

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1 vouching for their credibility.

2 A. Yes, sir.

3 Q. So that's that issue. Now the failure to
4 call expert witnesses, you had mentioned that you
5 wanted to say something about that. But we've
6 already heard from the witnesses. Is there anything
7 brief, that you want to raise concerning your expert
8 witnesses and why they were not called? And you
9 don't need to read---

10 A. Yes.

11 Q. ---the judge any law.

12 A. When Mr. Finney came out to Lee Regional
13 Detention Center to go over the discovery with me.

14 Q. Say that one more time, I didn't
15 understand you.

16 A. I said, when Mr. Finney came out to the
17 jail to go over the discovery with me.

18 Q. Yes, sir.

19 A. He told me that an expert would be for the
20 cell phone record. Well a new cell phone record.
21 But when I go to court they are not there.

22 Q. So your complaint is, that you -- this was
23 an issue that was known ahead of trial, and you
24 spoke to your attorney about it, correct?

25 A. Yes, sir.

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1 Q. And your attorney indicated to you based
2 on what you just, that the State would have a cell
3 phone expert there, so he did not need to retain
4 one.

5 A. That's correct.

6 Q. So he never made any efforts to retain
7 one, expecting the State to call one.

8 A. That's correct.

9 Q. But he admitted to you that you would need
10 one.

11 A. Yes, sir.

12 THE COURT: Run that by me again. I don't
13 understand. You're saying that Mr. Finney told him
14 that he didn't need an expert, because the State had
15 one?

16 MR. KIRKLAND: Correct. That's what his
17 testimony is. Do you want me to ask him to make
18 that more clear on the record?

19 THE COURT: No, I understood what he said,
20 but I didn't understand the flow.

21 MR. KIRKLAND: Thank you, Your Honor.

22 Q. Other than that, is there anything else?
23 Because the expert has already testified,
24 Mr. Bradley, the court got to hear them and read the
25 transcript. So is there anything other than that

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1 conversation that you had with Mr. Finney?

2 A. Yeah, I'm saying if Mr. Finney had before
3 trial, the expert that we had in this PCR hearing,
4 if he had those experts or someone similar to those
5 experts, I wouldn't be here today.

6 Q. So that's the two prongs. One, he failed
7 to call the expert. And that 2, it affected the
8 outcome of the trial, because you believe that your
9 phone in particular---

10 A. Yes, sir.

11 Q. ---would have....

12 A. Would have pinpointed exactly where I was.

13 Q. And the car would have shown....

14 A. That I couldn't be the driver of the car
15 that Darrell Koenig saw.

16 Q. Because of?

17 A. The other car was -- I guess the car was
18 already burned up. You know, it's...

19 Q. And that was his theory at the trial,
20 right; is that, the car had burned the night before.
21 And therefore, Koenig could not have seen you at
22 9:30, 10:30 a.m. the next morning.

23 A. That's right.

24 Q. But he didn't have -- he didn't have
25 experts to establish those -- that expert opinion of

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1 how long it would take the car to cool down or
2 exactly where your phone was located at various
3 times.

4 A. That's correct.

5 THE COURT: Was there any evidence
6 presented about whether or not it had rained?

7 MR. KIRKLAND: No, sir.

8 THE COURT: At all?

9 MR. KIRKLAND: Not to my recollection,
10 Your Honor. If they remember something different.

11 THE COURT: So Mr. Finney's theme was that
12 the car had been burned the night before. And it
13 was impossible for Mr. Koenig to have seen
14 Mr. Bradley.

15 MR. KIRKLAND: Correct.

16 THE COURT: Driving that Volvo.

17 MR. KIRKLAND: And I'll explain it to you
18 from the record. I'll just summarize it.

19 Mr. Finney appeared to be trying to
20 establish that the car was burned at around
21 1:30 a.m., because a neighbor someone that lived
22 across the street, his dogs started barking, which
23 he said was an extremely usual thing. And that
24 man's name was, Mr. Bradley?

25 A. Mr. Matt Bramlett.

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1 MR. KIRKLAND: Matt Bramlett. So Matt
2 Bramlett lived across the street. The dogs were
3 barking at 1:30. And my understanding of reading
4 the transcript, which of course Mr. Finney can make
5 any corrections if he wishes. But that he was
6 trying to establish that the car burned at 1:30, and
7 therefore the eye witness could not have seen
8 Mr. Bradley driving that car at 10:30, or 9:30 to
9 10:30 the next morning if the car had already been
10 burned. And then finally, the final issue that
11 we're referring to, Your Honor, is that Mr. Finney
12 attempted through various witnesses, to establish
13 how long it would take a car to cool off, and
14 whether the car was cool to the touch at the time
15 that it was located, which was around 3:30, 2:30.
16 Mr. Bradley, do you remember the exact time?

17 A. 2:30, three o'clock.

18 MR. KIRKLAND: 2:30 or so the next day.
19 And Mr. Bradley is saying that had he had these
20 experts and that they had established these time
21 lines on how long it would take to burn, the amount
22 of smoke it would have, the heat of the car, things
23 like that, then it would have been clear to a jury
24 that Mr. Koenig's identification was incorrect,
25 because the car had been burned some 9 hours

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1 earlier. That's our theory, Your Honor.

2 Q. Now let's move on to issue 7. Issue 7,
3 Your Honor, we have decided to abandon. So we are
4 abandoning issue 7. And I will make that clear in a
5 proposed order.

6 THE COURT: So Mr. Bradley wants to
7 abandon No. 7.

8 MR. KIRKLAND: Yeah, and I'll ask him on
9 the record.

10 Q. Mr. Bradley, we talked about this, and we
11 have agreed to abandon issue No. 7, is that correct?

12 A. Yes, sir.

13 THE COURT: No. 8.

14 Q. Trial counsel failed to move for a
15 mistrial when the the security belt worn by
16 Mr. Bradley accidentally discharged and caused
17 Mr. Bradley to fall out of his chair. This is
18 located at 201 through 206. And quite frankly, Your
19 Honor, because this involved a physical act, the
20 transcript is not extremely clear as to what was
21 going on. So what I'll do is have Mr. Bradley
22 explain to me what was occurring physically, in the
23 courtroom, because no one was talking. Explain to
24 me physically what happened between pages 206 -- 201
25 and 206.

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1 A. Well that was the second day of trial.

2 And Ms. Martha Ramsey was on the stand for the
3 State. And I was sitting between Mr. Finney and the
4 private investigator. And the officer, I don't know
5 his name, the white officer had put the taser belt.

6 Q. Yeah, explain that now. You were wearing
7 some kind of belt. What was that?

8 A. Yes, sir. This was a taser belt that he
9 had up under my my clothes.

10 Q. Okay.

11 A. And he mashed the button. And when he
12 mashed the button on the taser belt, it gave me an
13 electrical shock, and knocked me to one knee out of
14 the chair. And when I go to get up, he mashed the
15 button again, and that's the time Mr. Finney
16 realized what was going on and asked for a recess.

17 THE COURT: He says it accidentally
18 discharged. He's saying now that the man pushed the
19 button. So let's clarify that, please.

20 Q. Well the officer claimed in the transcript
21 that it was accidental. That's correct, right?

22 A. No, sir. Mr. Finney say, they said
23 malfunction.

24 Q. Okay, malfunction.

25 A. But I saw the man push the button.

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1 Q. That's what the judge is asking. So you
2 physically with your own eyes---

3 A. Yes, sir.

4 Q. ---you saw him press the button.

5 A. Yes, sir.

6 Q. So you do not believe that it
7 malfunctioned.

8 A. It did not malfunction.

9 Q. Now in response to that occurring, what
10 did the -- what did your attorney do? Or what did
11 your attorney fail to do that you believe he should
12 have done?

13 A. He failed to ask for a mistrial.

14 Q. Well let's just summarize for the judge
15 sort of the discussions that went on concerning the
16 mistrial and all of that.

17 A. Well when that happened, they asked for --
18 Mr. Finney asked for a recess. The paramedic was
19 called. The paramedic cleaned my little back up, a
20 little blood, where a prong went in my back.

21 Q. Say that one more time.

22 THE COURT: They cleaned up a little blood
23 where the thing went off in his back.

24 Q. I thought he said pawn. Go ahead.

25 A. Prong.

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1 THE COURT: Prong.

2 Q. Prong.

3 A. And when they came back to the courtroom,
4 Mr. Finney asked the judge, he respectfully request
5 that the judge inform the jury because of how
6 secured that all defendants are required to a wear
7 security belt.

8 Q. And what was the response of the
9 prosecutor to that suggestion, that curative
10 instruction?

11 A. She wholehearted object, she said because
12 that would be telling the jury a lie.

13 Q. So what did your attorney do in response
14 to that?

15 A. Well then the judge decide to come up with
16 well how about if I tell the jury many times
17 defendants in this case are required to wear a
18 security belt. And they went along with it, but
19 then when the judge brought the jury back in, he
20 told the jury the same thing that Mr. Finney wanted
21 to tell him. And the solicitor called it a lie.

22 Q. Oh, the solicitor called what the judge
23 told the jury a lie.

24 A. No, she called what Mr. Finney said was a
25 lie. Then the judge turned around and told the jury

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1 the same thing Mr. Finney wanted to tell them.

2 Q. Oh, I understand what you are saying. So
3 you're saying that judge -- that Mr. Finney asked
4 the judge, tell him all defendants have to wear it,
5 and then let's just move on with the trial. And
6 then solicitor said, I wholeheartedly disagree, you
7 are lying to the jury, not all defendants have to
8 wear it.

9 A. That's correct.

10 Q. And then your attorney decided to go with
11 many defendants. He decided to go along with that
12 language, many defendants have to wear this.

13 A. That's correct.

14 Q. But then the judge said to the jury, all
15 defendants have to wear this.

16 A. That's correct.

17 Q. Now you just said a moment ago that you
18 believe the correct motion your attorney should have
19 made is not for a curative instruction, but for
20 what?

21 A. File for a mistrial.

22 Q. And the reason why is?

23 A. Because it couldn't erase what done been
24 planted in the head of the jury. And that singled
25 me out to the jury and prejudiced me by the jury by

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1 him doing that.

2 Q. Perfect, Mr. Bradley. You stated your
3 position well. So we'll move to No. 9. We're
4 talking about Paul Bradley. Now who is Paul
5 Bradley?

6 A. That's my brother.

7 Q. Now you're -- now Paul Bradley testified.
8 Well let's go back. What was Paul Bradley, why was
9 he called as a witness in this case?

10 A. Well he was my brother, and he was the
11 first person I spoke with and told him that my
12 friend Ernest James got killed.

13 Q. Right. So what was the strategy decision
14 as far as you could tell as to why he called Paul
15 Bradley?

16 A. Excuse me.

17 Q. What do you think the strategy decision
18 was in calling Paul Bradley, to establish an alibi
19 or what?

20 A. I assume he called him to establish a time
21 frame, you know, when did I talk to him concerning
22 this matter.

23 Q. Now what was it that Paul Bradley told the
24 judge, or told the jury as to when he spoke with
25 you?

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1 A. He said he spoke with me about 1 o'clock.

2 About 1 o'clock that Monday.

3 Q. And that was important because what time
4 did they locate the police -- the police say they
5 located the body in this case?

6 A. They said between 1:30 and 2 o'clock.

7 Q. So essentially your attorney put up a
8 witness that expressed that you knew about the death
9 prior to the police knowing about the death.

10 A. Yes, sir.

11 Q. And that was your issue.

12 A. Yes, sir.

13 Q. And so you're claiming that by failing to
14 either prepare or talk to the witness ahead of time,
15 and knowing this, he called a witness, his own
16 witness, your own witness that actually damaged your
17 case.

18 A. Yes, sir.

19 Q. And that's your issue with that.

20 A. Yes, sir.

21 Q. So and it harmed you because.

22 A. I mean---

23 Q. It made it look as if you---

24 A. If I knew about the man's death before the
25 police did.

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1 Q. Right. We'll move on to 10. This one's
2 is actually pretty simple thankfully. Trial counsel
3 failed to object to hearsay entered by Mr. Koenig.
4 Mr. Koenig testified that the neighbors told him
5 that the police were looking for a blue Volvo with
6 temporary tags. And that's on page 634 through 635.
7 Tell me what your issue is with that.

8 A. I'm saying trial counsel failed to -- I
9 mean trial counsel should have objected because
10 Darrell Koenig is the one that implicated me in this
11 case to the authorities, by informing the
12 authorities that he saw me driving a blue Volvo.

13 Q. And why is allowing -- admittedly, well
14 the judge will look at it. It's hearsay testimony,
15 what he said the neighbors told him. But what would
16 be -- how did that effect the outcome of your trial?

17 A. That claimed to have violated my 6th
18 Amendment and 14th Amendment of the United States
19 Constitution.

20 Q. Let's move on to issue 11. Trial counsel
21 failed to object to the prosecutor assertions that
22 she did not have to prove when or where the victim
23 was murdered. Which is transcript page 93, which I
24 believe was in opening statements, correct?

25 A. Yes, sir.

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1 Q. Now tell me what your attorney should have
2 done.

3 A. My attorney, he should have wholeheartedly
4 object.

5 Q. And the reason why he should have objected
6 is?

7 A. Because it's a murder case, I mean, and
8 you've got to have a time, date, and place of the
9 crime.

10 Q. And so by doing that, by failing to point
11 that out to the jury, you believe that harmed your
12 case.

13 A. Yes, sir. Most definitely.

14 Q. And you believe that changed or played a
15 role in the outcome of your case.

16 A. Yes, sir.

17 Q. No. 12. Trial counsel you say failed to
18 object to two letters introduced by Gloria Portee.
19 And this is at transcript 378 through 386. I am
20 going to hand you up.

21 THE COURT: Page 378 through 386.

22 MR. KIRKLAND: Thank you.

23 THE COURT: And this was trial exhibit No.
24 what?

25 MR. KIRKLAND: I do not recall. I'm

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1 sorry, Your Honor, I do not recall the trial
2 exhibit.

3 Q. Do you recognize that letter that you
4 looking at right now.

5 A. Yes, sir.

6 Q. Who wrote it?

7 A. I did.

8 Q. Do you recall if it was introduced during
9 the trial of your case?

10 A. Yes, sir, it was.

11 Q. I am going to introduce the other one as
12 well, so you we can talk about them both.

13 THE COURT: So the witness just said he
14 wrote.

15 MR. KIRKLAND: He wrote the letter. He
16 admitted to writing the letter.

17 THE COURT: These are two separate
18 letters.

19 MR. KIRKLAND: Two separate letters, Your
20 Honor. Now the second letter that I just handed you
21 up what -- tell me what that letter. Who wrote that
22 letter.

23 THE COURT: May I ask you a question
24 before you do that?

25 MR. KIRKLAND: Of course.

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1 THE COURT: The bate stamps at the top
2 left, what do those numbers indicate?

3 MR. KIRKLAND: I do not know.

4 THE COURT: 78, would it be the appendix
5 maybe on the appeal?

6 MR. KIRKLAND: It could have been, Your
7 Honor.

8 THE COURT: At least the bate stamps on
9 the upper left are 786 through 790. And then second
10 letter is 791 and 792. At least that will be
11 identified for the record.

12 MR. KIRKLAND: Right. And what I'll do
13 is, I'll have both of these, if I get them in to
14 evidence, I'll have them both marked separately as
15 20, whatever that next number is.

16 Q. So both of these are letters that you
17 wrote. They were sent to Gloria Portee, and they
18 were introduced at the trial against you, correct?

19 A. Yes, sir.

20 MR. KIRKLAND: I'll just ask to move these
21 in as the next two defense or excuse me applicants,
22 pieces of evidence, Your Honor.

23 THE COURT: 25 and 26, Margaret.

24 THE REPORTER: 25 and 26.

25 THE COURT: Any objection?

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1 MR. GOURLEY: No.

2 THE COURT: They're in.

3 (Letters marked Plaintiff's Exhibit Nos.
4 25 and 26 into evidence.)

5 Q. Tell me what the issue was with
6 Plaintiff's Exhibit 25 and 26.

7 A. Well these letters is, I mean they had
8 nothing to do with this case. They're primarily
9 character evidence. You know, it's like maybe 7 or
10 8 lines they're talking about, you know, I told
11 Gloria Portee, I asked her why she did she the
12 police that I told her that I was going to kill her.
13 She was wrong for that. Other than that, the whole
14 letter is character evidence.

15 Q. You just made an interesting point. So
16 the aspects of the letter in which were asking about
17 the murder, were admissible.

18 A. Yes, sir.

19 Q. But the rest of the letter concerning your
20 relationship with her, infidelities with her, and
21 other various matters, you believe were character
22 evidence that should have been redacted from the
23 letters prior to allowing the jury to see it,
24 correct?

25 A. Yes, sir.

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1 Q. And that's your issue with both of these
2 letters coming in, correct?

3 A. Yes, sir.

4 MR. KIRKLAND If I may take one moment,
5 Your Honor.

6 THE COURT: Yes, sir.

7 Q. Let's move on to 13, because I think that
8 you have established everything you want to in 12.
9 13, trial counsel erred in allowing Wayne Johnson to
10 say that he had an altercation with Bradley and
11 armed himself. And I am on page 560 of the
12 transcript, is that correct?

13 A. Yes, sir.

14 Q. Now on page 560, I am afraid we are going
15 to have to look at this, Your Honor. Do you have
16 your page 560 with you?

17 A. Yes, sir.

18 THE COURT: Do you want to put it up on
19 the screen, or do you want to just let him have a
20 copy?

21 MR. KIRKLAND: I'll just let him have a
22 copy.

23 Q. Identify for the judge the part of this
24 transcript 560 that you have a problem with. Read
25 that section. It's not very hard. Just read that

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1 section. Read it slow and clearly.

2 A. I remember that okay, because this, I
3 think this was after Ernest was dead.

4 Q. Are you reading from page 560?

5 A. Yes, sir.

6 Q. What line are you at?

7 A. I start at line 5.

8 Q. Starting at line 5. Go ahead. And this
9 is an answer from Wayne Johnson.

10 A. Yes, sir. I remember that okay, because
11 this, I think this was after Ernest was dead. But
12 that's correct. Answer: Okay. I know you know me
13 being a man so, you know, he is a man and he was --
14 it was talk that he had some folks had done it.

15 Q. Now let me ask you this. It was talk that
16 he had supposedly done it. What was that?

17 A. That's prejudiced to me, you know.

18 Q. That's hearsay, correct.

19 A. Hearsay. Trial counsel should object to
20 that.

21 Q. So the next line it starts with so.

22 A. He said, so, so he called me one night.
23 He wanted me to help him with his girlfriend's car.
24 Me and my wife, we were lying down, you know. I am
25 not going to a dog fight without a dog, man. Okay.

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1 So, you know, I am not going to a dog fight without
2 a dog. I never own a gun. So I say well, I put
3 three steak knives in my pocket, and had two butcher
4 knives in my back pocket, and I had two razor blades
5 in my hand. I said well if I am going, I am not
6 going by myself. But I wanted him to know that I am
7 not afraid of him. I not afraid to die man.

8 Q. The next question.

9 A. But and that's when you went to meet with
10 your father-in-law, the defendant. Answer: He came
11 by the house and he picked me up and he said, I
12 think--

13 Q. And he saw.

14 A. And he saw. I think he seen one of the
15 knives I had in my hand.

16 Q. And go on.

17 A. In my hand yeah, but okay. And that was
18 after Ernest James was found dead.

19 Q. Hold on. It goes on to 561. It starts at
20 the top.

21 A. I don't have 561.

22 Q. I got you right here. I got you. So it
23 continues on 561 at the top.

24 A. And he was like: He said boy, what is
25 wrong with you. I said well, pop, I can't be too

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1 careful. I didn't know what was going on, you know.
2 You know. And he was like, man, I would never do
3 anything to hurt you, man. I said well, you know,
4 whatever. I said whatever, whatever. And he -- and
5 so he -- and so we got in the car and we rode. And
6 we went and got in his car.

7 THE COURT: In the car.

8 A. We went---

9 Q. You got in the car.

10 A. Went and got -- excuse me, in the car.

11 Q. And that's the section that you have an
12 issue with is the -- him arming himself, or
13 relating to the jury that he armed himself prior to
14 talking to you, right?

15 A. Yes, sir.

16 Q. And why did you have a problem with that?

17 A. That's portraying me as a dangerous felon,
18 and it should have been objected to.

19 THE COURT: And he was what?

20 MR. KIRKLAND: It portrayed him as a
21 dangerous felon, and should have been objected to.

22 Q. Did your attorney object to any of that
23 testimony?

24 A. No, sir.

25 Q. Do you believe that that testimony was

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1 more prejudicial than it was probative on any issue
2 in the case?

3 A. Yes, sir, It was.

4 THE COURT: Just the context,
5 Mr. Kirkland. Why did he arm himself? I don't, I
6 may gather that. I didn't read this part of the
7 transcript over again. What was the context of what
8 the---

9 MR. KIRKLAND: The context was---

10 THE COURT: ---witness was talking about?

11 MR. KIRKLAND: ---that he had heard, it
12 was his understanding that Nathaniel Bradley may
13 have been involved in the murder in some way. So
14 when he met with him, he armed himself up in case
15 something bad happened, I guess.

16 THE COURT: Are you talking about that
17 line 9 where it says there was talk that he had
18 supposedly done it?

19 MR. KIRKLAND: Yeah.

20 THE COURT: That was the complete context.

21 MR. KIRKLAND: That was my understanding,
22 but I will allow them to correct that if they have a
23 different understanding.

24 THE COURT: Go ahead.

25 Q. Let's now go on to No. 14. Trial counsel

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1 failed to object to Bobby Lee Hughes saying that he
2 thought the defendant might have something to do
3 with his death. Now this was 570 and 580. Do you
4 have those pages, Mr. Bradley?

5 A. Yes, sir.

6 Q. What did he say on 570?

7 A. Question: Did you think it had anything
8 to do with the defendant. Answer: No it -- yeah,
9 in a way, and in a way I think it is, and in a way I
10 think it don't. But my thing is, if you all are
11 supposed to be such brothers you ought to know more
12 than what's coming out. You know, you all was like
13 cool. You all was calling each other brothers.
14 Somebody know a little more than what they're
15 saying.

16 Q. And that's the line that you have a
17 problem with on 570, correct?

18 A. Yes, sir.

19 Q. Now what was your issue with that?

20 A. I am saying, trial counsel should have
21 objected to that, because---

22 Q. Go ahead.

23 A. Because that painted me as a dangerous
24 felon.

25 Q. And it was speculation.

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1 A. Speculation.

2 Q. So they allowed an opinion on your
3 dangerousness, essentially. And what did your
4 attorney do about that?

5 A. Nothing.

6 Q. Did he object?

7 A. No, sir.

8 Q. Did he ask that it be stricken from the
9 record?

10 A. No, sir.

11 Q. Now on page 580.

12 A. 580 line 16 through 21. Question: Tell
13 me exactly what you said if you remember.

14 Answer: I said somewhere or not another if he
15 didn't commit a murder himself he knows something
16 about it, and he got something to do with it. If he
17 actually didn't do the killing, he knows something
18 about. He is involved some kind of way.

19 Q. Now had you talked to him about the
20 murder?

21 A. No, sir. I talked to him, but I didn't --
22 when I talked to his brother, I didn't know nothing
23 about the murder. He was telling me about what had
24 happened that day.

25 Q. So what this essentially is, is once again

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1 speculating; is that, based on things he had heard,
2 which I suppose is hearsay, that he thought even if
3 you didn't do it, you must have had something to do
4 with it.

5 A. Yes, sir, that's what he said.

6 Q. And what did your attorney do about that?

7 A. Nothing.

8 Q. Did he make an objection?

9 A. No, sir.

10 Q. Did he ask that it be stricken from the
11 record?

12 A. No, sir.

13 Q. No. 15 we are going to. Trial counsel
14 failed to object to hearsay of officer Wesley
15 Gardner and Clarence McMillan. When saying that
16 Koenig said he was 100 percent sure of his
17 identification. And that's located on page 613 and
18 715. I don't need you to read that. Just based on
19 your -- on what you put in here, you're alleging
20 that they both said that when they were asked, how
21 sure was, and they said he was 100 percent sure.
22 A. He stated that's what they said. He was
23 said 100 percent sure. But I'm saying they
24 bolstered that. They bolstered accumulative errors
25 which should never have been allowed.

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1 Q. So they essentially bolstered his
2 testimony.

3 A. Yes, sir.

4 Q. And it was hearsay.

5 A. Yes, sir.

6 Q. And that's the issue that you have with
7 that.

8 A. Yes, sir.

9 Q. And you believe that had your counsel
10 objected to that and asked it be stricken from the
11 record, that it would changed the outcome of your
12 trial.

13 A. Yes, sir.

14 Q. Now the final question I have for you, is
15 concerning that your appellate counsel erred by not
16 appealing the decision by the trial judge to give a
17 jury charge on accomplice liability. And
18 additionally, appellate counsel did not include
19 relevant case law in her brief, that would have
20 likely resulted in a reversal of the conviction.
21 And I have done here transcript 972 through 974.
22 And page 979. I am not sure what's on those pages,
23 to be honest with, Your Honor. I've seemed to have
24 forgotten. But nevertheless, we can handle this
25 issue easily.

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1 I am going to hand this up to you, and
2 have a look at this, and see if you recognize it.

3 A. Yes, sir.

4 Q. What is that?

5 A. That's the initial brief that was did in
6 my direct appeal.

7 Q. And who wrote that initial brief?

8 A. Joseph Savage, III.

9 Q. And who did he work---

10 A. South Carolina Defense Commission.

11 Q. South Carolina Commission on Indigent
12 Defense.

13 A. Indigent defense for me.

14 MR. KIRKLAND: Your Honor, I would move
15 this in to evidence as Plaintiff's No. 27.

16 THE COURT: 27 is the final brief.

17 MR. KIRKLAND: Yes, it's the final brief
18 of the appellate.

19 (Appellate brief marked Plaintiff's
20 Exhibit No. 27 into evidence.)

21 Q. Without getting, because you mentioned a
22 lot of case law when you and I talked. Just tell me
23 the two issues and why they should have been raised.
24 But talk about it in layman's terms.

25 A. Appellate counsel failed to raise and

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1 argue the issue the hand of one hand, the hand of
2 all.

3 Q. Failed to, what do you mean he failed to
4 raise and argue it?

5 A. It was the important issue for the
6 appellant court to consider, because the judge
7 charged the jury on the hand of one, the hand of
8 all.

9 Q. There you go now, we are getting there.
10 So the judge charged hand of one is hand of all.

11 A. Yes, sir.

12 Q. And the problem you have with that being
13 charged is?

14 THE COURT: Was it objected to?

15 MR. KIRKLAND: No, sir.

16 THE COURT: Well wouldn't it be an
17 alleged trial error for failing to object after the
18 appellate counsel argues something that wasn't
19 raised?

20 MR. KIRKLAND: I understand your concerns,
21 Your Honor.

22 A. Excuse me a minute. Mr. Finney did
23 object.

24 Q. Oh, he did object?

25 A. Yes, sir.

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1 Q. I apologize.

2 A. He objected to it two times.

3 Q. Oh, so he did object.

4 THE COURT: He did object, and it wasn't
5 argued on appeal.

6 MR. KIRKLAND: Correct.

7 THE COURT: So you are on the right track.
8 Go ahead.

9 A. Yes, sir.

10 Q. So by not raising that issue, what was
11 your issue? What was the problem? Don't use legal
12 terminology. What was your problem with your trial
13 counsel, your appellate counsel not arguing that?

14 A. If he has to argue that issue, that's like
15 I said, was one of issues for the appellate court to
16 consider, because the State failed to place me or
17 anybody else at the scene of the crime.

18 Q. And so consequently, you couldn't have had
19 any accomplice liability with someone, because it
20 was never identified who was the accomplice was, or
21 that you were at the scene of the crime or anything
22 like that.

23 A. That's true.

24 Q. And that was your problem with that. Now
25 additionally, he did not include the trial

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1 counsel -- excuse me, appellate counsel did not
2 include relevant case law. And you have put
3 together a list of and some case law.

4 A. Yes, sir.

5 THE COURT: Let's not cite -- I don't want
6 him to read the citations. You can mark them as an
7 exhibit, and give me a copy.

8 MR. KIRKLAND: What I am going to do, Your
9 Honor, is if you don't mind, put them in my proposed
10 order.

11 THE COURT: Well I'd like wrote ahead
12 time.

13 MR. KIRKLAND: Oh, you will. I'll make
14 sure that I'll get them to you immediately.

15 THE COURT: Okay. But he doesn't need to
16 be reading case citations.

17 MR. KIRKLAND: Oh, I know. I wasn't going
18 to get him do that. That's what I have been trying
19 to get it as efficient as possible.

20 THE COURT: But no, to make sure the
21 record is clear, I want that list to be an exhibit
22 to this hearing.

23 MR. KIRKLAND: Okay.

24 THE COURT: If you've got a copy of it.

25 MR. KIRKLAND: I don't have a copy of it.

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1 Can I -- can we---

2 THE COURT: No, just go ahead. Do you
3 have the citations?

4 MR. KIRKLAND: I think that I do.

5 THE COURT: You read the citations into
6 the record. Any objection to that from the State?

7 MR. GOURLEY: No, sir.

8 THE COURT: You know how to read the
9 citations probably better than Mr. Bradley does.
10 How many are there?

11 MR. KIRKLAND: Oh, I know exactly which
12 ones these are, Your Honor. It is only four.

13 THE COURT: Okay.

14 MR. KIRKLAND: He has the State v.
15 Hernandez, 677 S.E. 2d, 603, 2009 case. He has
16 State v. Shrock.

17 THE COURT: How do you spell Shrock?

18 MR. KIRKLAND: S-H-R-O-C-K.

19 MR. KIRKLAND: And if you can give me one
20 second, I can get to my questions. I think I have
21 the U.S. citations of these in my notes.

22 THE COURT: The U.S.?

23 MR. KIRKLAND: Supreme Court citations.

24 THE COURT: Are you talking about the S.C.
25 cites?

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1 MR. KIRKLAND: Yes, Your Honor. Yes, I
2 do. State v. Shrock, 283, S.C. 129, S-H-R-O-C-K. A
3 1984 case. State v. Arnold, 361 S.C. 386, 2004.
4 State v. Martin, 340, S.C. 572, 2000 case. The year
5 2000.

6 Q. And those are the cases that you wanted
7 him to argue in your brief concerning your two
8 issues that you have cited.

9 A. Yes, sir.

10 THE COURT: That's hand of one, hand of
11 all. What's the other one?

12 MR. KIRKLAND: The other ones have to do
13 with the -- let me go back to my notes. I don't
14 recall. I don't recall the other.

15 THE COURT: Okay.

16 MR. KIRKLAND: He can probably tell you in
17 just a sentence. What were the other cases that you
18 were concerned about?

19 A. The case law issue.

20 Q. All those that we just listed, what was
21 the general, the very general law in that case that
22 would have applied to you?

23 A. The State has failed to place me at the
24 scene of the crime.

25 Q. So all of that was -- were cases in which

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1 cases were overturned because the---

2 A. Correct. The State has failed to place me
3 at the scene of the crime.

4 MR. KIRKLAND: Now if you can give me one
5 moment, Your Honor, just to flip through my notes to
6 make sure there is nothing else I need to.

7 THE COURT: Let's do this, we'll take 10
8 minutes, because if you are through, then we'll take
9 a break anyway. If you may not be, this will be the
10 time to look.

11 MR. KIRKLAND: Thank you, sir. Your
12 Honor.

13 THE COURT: You can step down, sir. Thank
14 you.

15 (Whereupon, the court takes a recess.)

16 MR. KIRKLAND: That's all the questions I
17 have, Your Honor.

18 THE COURT: Ms. Coleman.

19 MR. GOURLEY: Ms. Coleman, will cross
20 examine.

21 Cross Examination by Ms. Coleman:

22 Q. Mr. Bradley, how many times did you meet
23 with your attorney before going to trial?

24 A. About -- several times.

25 Q. Do you recall your discussions with him?

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1 A. Yes, I have.

2 Q. Did he go over your evidence again with
3 you?

4 A. Yes, we did.

5 Q. Did you go over the discovery testimony
6 with your attorney?

7 A. No, we didn't.

8 Q. Did you prevent him, or did you give him
9 any leads, or potential witnesses to investigate?

10 A. No, I just told him where I was at the
11 particular time.

12 Q. The Neil v. Biggers hearing, which was one
13 of your allegations, you told Mr. Finney at the time
14 that you wanted to waive that hearing, is that
15 correct?

16 A. No, ma'am.

17 Q. I think you testified earlier that
18 something about the judge didn't to go into the
19 weekend, and you wanted to finish the trial quickly,
20 is that correct?

21 A. That's correct.

22 Q. So you thought at the time that it was
23 okay to do that, to waive the hearing.

24 A. No, ma'am. He waived the Neil v. Biggers
25 not me. He did.

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1 THE COURT: Can we agree for the record
2 that the trial was held January 14th through 18,
3 2008. The transcript says everybody agrees with
4 that?

5 MS. COLEMAN: Yes, Your Honor.

6 THE COURT: And he said that Mr. Finney
7 told him that Judge Cothran wanted to go deer
8 hunting.

9 MR. KIRKLAND: Correct.

10 Q. The letters introduced by Gloria Portee,
11 you admitted that you wrote those, correct?

12 A. Yes, ma'am.

13 Q. Where did you tell Mr. Finney that you
14 were that weekend?

15 A. I was in normally in a different place.
16 Mr. Calvin -- from like 7:16 until 10:32, I was in
17 Bishopville at Mr. Calvin Davis' house.

18 THE COURT: I'm sorry, from when?

19 A. From 7:16 to 10:32.

20 THE COURT: What does that mean, 7:16
21 until 10:32. Are you talking time of day?

22 A. Yes, sir. Time in the morning was
23 7:16 a.m. until 10:30 a.m. Sunday morning, May 22nd
24 of 2005.

25 THE COURT: From 7:16 until 10:32 a.m.,

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1 you were where?

2 A. At Mr. Calvin Davis' house.

3 THE COURT: And this is what you told Mr.
4 Finney.

5 A. Yes, sir.

6 THE COURT: And that was a Sunday May
7 22nd.

8 A. Yes, sir.

9 THE COURT: 2005.

10 A. Yes, sir.

11 THE COURT: Go ahead.

12 Q. What about on Saturday night, what did you
13 tell Mr. Finney?

14 A. Saturday night the young lady that I was
15 dating, her daughter had the prom, and I give her
16 the car and she went to the prom. I stayed with
17 her grandmother until they got back from the prom.

18 THE COURT: I'm sorry, I didn't follow
19 that. Where were you Saturday night, sir? Your
20 girlfriend's daughter was at the prom?

21 A. Right.

22 THE COURT: And what about, whose
23 grandmother are you talking about?

24 A. The girl that went to the prom, her mother
25 lived in Spanish Gardens on 261. Highway 261.

Derrick Slater-Direct by Kirkland

1 MS. COLEMAN: I believe that was all
2 testified to at trial, Your Honor.

3 THE COURT: I just wanted to make sure.

4 MS. COLEMAN: So it's in the transcript.
5 No further questions. Thank you.

6 THE COURT: Redirect?

7 MR. KIRKLAND: Oh, no, sir, Your Honor.

8 THE COURT: Step down please, sir.

9 MR. KIRKLAND: I have one other witness,
10 Your Honor. He's in the hallway, I'm going to bring
11 him in. I would call Derrick Slater.

12 THE COURT: Your name, sir.

13 MR. SLATER: Derrick Slater.

14 THE COURT: How do you spell Derrick?

15 MR. SLATER: D-E-R-R-I-C-K.

16 THE COURT: And Slater is Slater?

17 MR. SLATER: Uh-huh. (Affirmative.)

18 THE COURT: Thank you, sir. You may have
19 a seat.

20 Derrick Slater, being first duly
21 sworn, testified as follows:

22 Direct Examination by Mr. Kirkland:

23 Q. Mr. Slater, where is it that you are
24 employed?

25 A. I work for my father. And I work at

Derrick Slater-Direct by Kirkland

1 Pilgrim's Pride.

2 Q. And what was the second one?

3 A. Pilgrim's Pride.

4 Q. Now what does your father do?

5 A. He's got a towing service business.

6 Q. Towing service?

7 A. Uh-huh. (Affirmative.)

8 Q. I am just going to jump straight into it
9 and make this simple. Do you recognize what is
10 Plaintiff's Exhibit No. 23, which was entered into
11 on 4/5/15? Do recognize that picture?

12 A. Uh-huh. (Affirmative.)

13 THE COURT: Is that a yes?

14 A. Yes, sir.

15 Q. What is that?

16 A. Do you mean what kind of car it is?

17 Q. No, no. Just what was your relationship
18 with it? How do you recognize it?

19 A. Because it was burned. I remember towing
20 the car.

21 Q. Ah, so you were the person that the police
22 called to tow this vehicle?

23 A. Called my father, and my father sent me
24 out to get it.

25 Q. So this was the Volvo that was involved in

Derrick Slater-Direct by Kirkland

1 the Nathaniel Bradley murder case.

2 A. Uh-huh. (Affirmative.)

3 THE COURT: You need say yes or no---

4 A. Yes, sir.

5 THE COURT: ---because she can't take down
6 a uh-huh.

7 Q. And although I don't have a picture of it
8 sitting in the field, do you recognize Plaintiff's
9 Exhibit No. 12? Does that appear to be the area
10 that you towed it out of?

11 A. Uh-huh. (Affirmative.)

12 Q. Yes, sir, or no, sir.

13 A. Yes, sir.

14 Q. You don't have to say yes, sir, to me, but
15 to the judge.

16 A. Yes, sir, that's it.

17 Q. Now do you recall approximately what time
18 you went out to tow that car?

19 A. It's around probably about 5:30 to maybe 6
20 o'clock in the evening.

21 Q. 5:30 or 6 o'clock. Now when you got there
22 to tow the car, were there people there surrounding
23 the car?

24 A. Some officers were there. Once you get a
25 call like that there, the officers automatically be

Derrick Slater-Direct by Kirkland

1 there. When the officers get there, put their the
2 flashers on beside, to make sure we're at the right
3 place location to get the car's location.

4 Q. Okay.

5 A. Once we got there, he was there. When I
6 started loading up, he left.

7 Q. So how many officers were there when you
8 were there?

9 A. Two. There was two.

10 Q. Were they road deputies?

11 A. Yeah, that's all.

12 Q. So the detectives and the other people?
13 Or nobody was there?

14 A. Nobody was there when I there.

15 Q. Now when you started hooking up that car,
16 you had touch to car,---

17 A. Uh-huh. (Affirmative.)

18 Q. ---is that correct?

19 A. Yes, sir.

20 Q. Did you notice when you touched that car,
21 if the car felt, and I'm going to give you a range,
22 warm, cool or air temperature room? Do you know
23 what the term room temperature means?

24 A. Yeah, I mean it was already -- it was not
25 that day. A little warm out there. But the car

Derrick Slater-Direct by Kirkland

1 was not, you know, hot, because I take my hand and
2 touch it on top of the car, you got to burn it where
3 the hook at. If that car was hot, It would have
4 burned through my gloves. I would feel some kind of
5 heat from it, which that car was not hot.

6 Q. So you didn't notice on your hand or on
7 your face let's say.

8 A. None of that.

9 Q. Any -- do you even know what the term
10 radiant heat is?

11 A. Yeah.

12 Q. So did you feel any radiant heat?

13 A. None of that. Only it was, when I got
14 there, you could smell the burns from it, the smell
15 from it. But the car was not hot.

16 Q. What sort of smell was it?

17 A. Like, you know, like a car burning up, you
18 can smell the fuel from it is burning. That's how
19 inside of a car like cloth burning up.

20 Q. Because you've dealt with cars---

21 A. Yes.

22 Q. ---before they were burned.

23 A. Uh-huh. (Affirmative.)

24 Q. I haven't, I don't know what they smell
25 like. So it was a typical car burn smell.

Derrick Slater-Direct by Kirkland

1 A. Yeah, you know what car burn up, you can
2 smell like it can smell strong, because it's got the
3 carpet in there, and burned all the way up.
4 Everything is melted down. It was burnt. That's
5 all it had to it. You could smell the burnt smell,
6 but the car was not hot.

7 Q. Now where did you take the car? Where
8 were you asked to tow the car?

9 A. To the impound lot.

10 Q. And whose impound lot is that?

11 A. The sheriff's department.

12 Q. Now this I'm just---

13 THE COURT: Would you please clarify with
14 the witness what day of the week he towed the car?
15 He said 5:30 or 6. But I don't know if it was
16 Monday, Tuesday, Wednesday, Thursday.

17 Q. Do you recall the day?

18 A. It was a Sunday.

19 Q. Which incidentally, Your Honor, that, I
20 think that corroborates with the transcript.

21 THE COURT: Did he testify?

22 MR. KIRKLAND: He did not testify.

23 Q. Tell me this, you took it to the impound
24 yard for the sheriff's department, you said. And is
25 that just a big facility out there with a fence

Derrick Slater-Direct by Kirkland

1 around it?

2 A. Uh-huh. (affirmative.)

3 THE COURT: You need to say no or yes.

4 A. Yes, sir.

5 THE COURT: You don't need to say sir to
6 anybody unless you -- that's the way you talk. But
7 you can't say uh-uh. Because nobody knows what that
8 means.

9 A. Yes, sir.

10 Q. I'll get you next time. I'll make sure
11 you do it. Do you -- do you recognize the car in
12 that photo?

13 A. Yes.

14 Q. Now this is Plaintiff's Exhibit No. 13.
15 Do you know where that is?

16 A. What do you mean?

17 Q. Do you recognize where that car is
18 located? If you don't, you don't.

19 A. This is here, I don't know where this is
20 at. It looks like the sheriff's department.

21 Q. That's fine. So that's now where you--

22 A. Uh-uh. (Negative.)

23 Q. ---towed it?

24 A. Uh-uh. (Negative.)

25 MR. KIRKMAN: That's all the questions I

Derrick Slater-Cross by Coleman

1 have.

2 THE COURT: Cross examination.

3 MS. COLEMAN: Just briefly.

4 Cross Examination by Ms. Coleman:

5 Q. Did you testify you were wearing gloves
6 when you towed the car?

7 A. Uh-huh. (Affirmative.)

8 THE COURT: You need to.

9 A. Yes, sir. I mean, yes, sir. Yes, ma'am.
10 That's a facility, I got to have more gloves.

11 Q. So you always wear gloves when you---

12 A. Always.

13 Q. ---tow the cars?

14 MS. COLEMAN: Thank you. I have no
15 further questions.

16 MR. KIRKLAND: Redirect?

17 THE COURT: No, sir. I'd ask that he be
18 excused. He's got to go to work.

19 THE COURT: Any objection.

20 MS. COLEMAN: No objection.

21 THE COURT: Thank you, sir. You can step
22 down. Mr. Kirkland.

23 MR. KIRKLAND: The applicant rests, Your
24 Honor.

25 THE COURT: Ms. Coleman, Mr. Gourley.

Ernest Finney-Direct by Coleman

1 MR. GOURLEY: Yes, Your Honor.

2 MS. COLEMAN: The State calls Mr. Ernest
3 Finney to the stand.

4 THE COURT: Come on up, please, Mr.
5 Finney.

6 Ernest A. Finney, III, being first duly
7 sworn, testified as follows:

8 Direct Examination by Ms. Coleman:

9 Q. Good morning, Mr. Finney.

10 A. Good morning, Ms. Coleman.

11 Q. And I'll call you Mr. Finney.

12 A. That's fine.

13 Q. Since that's what I have been doing. How
14 long have you been practicing law, please.

15 A. Since 1981.

16 Q. Do you recall whether you were appointed
17 or retained in this case?

18 A. I believe I was retained.

19 Q. How many times did you met with the
20 applicant prior to the trial?

21 A. I would say many times. More than a
22 dozen. I would say probably more like two dozen
23 times. I don't specifically see any notes as to
24 every visit that I made to the jail, but my client
25 was not out on bond, and so I would have to go to

Ernest Finney-Direct by Coleman

1 the jail to see him. He was someone who was very
2 concerned about his case. And we spent a lot of
3 time getting the case prepped. He also had a close
4 family unit. I think his family hired me. I had a
5 lot of contact with his older brother at my office.
6 We would talk about concerns he had, and I would go
7 out to the jail and try to respond to the concerns.

8 As my file reflects, there were a lot of
9 letters written by my client, asking me to check out
10 things, and come and talk to him about things, and I
11 did my best to do that.

12 Q. So when he requested you to look in to
13 something, you would do your best?

14 A. Yes, because quite frankly this was a very
15 unusual case from the beginning. In my experience
16 in Sumter County, we hadn't really had a case like
17 this with different parts of the case. In my
18 experience, I don't think I've ever tried a case
19 quite like this before.

20 Q. So the applicant was cooperative during
21 the course of your representation?

22 A. Yes.

23 Q. And did he provide you with his side of
24 the story and some defenses?

25 A. Yes.

Ernest Finney-Direct by Coleman

1 Q. Did you file any Brady or Rule 5 motions?

2 A. I did. Both motions were filed at the
3 beginning at the discovery process.

4 Q. And did you review the discovery material
5 with the applicant?

6 A. Yes.

7 Q. Prior to trial, did you discuss with the
8 applicant the elements of the charges, and what the
9 State was required to prove?

10 A. Yes.

11 Q. Would you briefly describe the State's
12 evidence against your client?

13 A. Well it was a circumstantial murder case
14 in the sense that, they did not have any direct
15 testimony or evidence that Mr. Bradley fired a
16 weapon, taking the life of, I believe his name is
17 Mr. James. And that he later disposed of Mr. James'
18 body in a pond called Boyles pond. They had
19 circumstantial evidence that the two men knew each
20 other, had worked together; that there was perhaps
21 an argument or disagreement about Mr. James getting
22 arrested and having their work van impounded.

23 Mr. Bradley was seen at Mr. James' house
24 on, I believe it was either Friday or Saturday.
25 Let me look at my notes please. I believe the

Ernest Finney-Direct by Coleman

1 testimony was that on Saturday the 21st of May,
2 Mr. Bradley was at Mr. James' house about 5:30 in
3 the evening. And that the men were seen leaving
4 that house in different cars. Mr. James was never
5 seen again until he was found in the Boyles pond on
6 Monday, May 23rd.

7 THE COURT: So you're saying that
8 Mr. Bradley and the victim left in separate cars?
9 Is that what you said, you said the men.

10 A. The men. Mr. Bradley was seen, or the
11 testimony was, Mr. Bradley was at Mr. James' house,
12 but left in his own car with an unknown male. And
13 Mr. James left in the Volvo that was owned by his
14 girlfriend.

15 THE COURT: All right.

16 A. And Mr. James was never seen again, until
17 he was found in Boyles pond on Monday the 23rd.

18 Q. Can you tell me a little bit about the
19 unknown man you just mentioned?

20 A. The unknown man was kind of an issue that
21 kind of was in the case. He was supposedly seen
22 with Mr. Bradley on the 21st, which was Saturday.
23 He was also seen or an unknown man was also seen
24 with Mr. Bradley on Sunday at a picnic at
25 Mr. Bradley's ex-wife's house. There may -- and

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1 there was also, Mr. Koenig testified that when he
2 saw the men driving the Volvo on Sunday morning the
3 22nd, there were two men in the car. One he
4 identified as Mr. Bradley. And one he identified as
5 a stocky, I believe, black male.

6 Q. But this man was never identified at
7 trial, correct?

8 A. Never.

9 Q. What kind of investigation did you do?

10 A. Well I spoke with my client and got a, my
11 recollection is that at the trial of case, we
12 actually put up a timeline, and every witness that
13 was called was somehow placed on the timeline. My
14 notes reflect that the defense -- in the defense of
15 the case, we called 9 witnesses to establish the
16 timeline of Mr. Bradley's movement between 5:30 on
17 Saturday evening, and around one o'clock or
18 2 o'clock on the day the body was found, which was
19 the 23rd of May.

20 THE COURT: And the timeline again is .
21 when, Mr. Finney?

22 A. 5:30 on the 21st of May, which was
23 Saturday.

24 THE COURT: And it ends at what time?

25 A. Sometime in the afternoon on Monday the

Ernest Finney-Direct by Coleman

1 23rd.

2 Q. So you had a witness to account for every
3 time in that time?

4 A. Well Mr. Bradley helped me put together
5 the timeline. And as much as possible, we
6 contacted, we had nine live witnesses at trial. So
7 I think we did a pretty good job of establishing
8 where he was, other than at night when he was
9 sleeping, and usually that was by himself. We
10 didn't have anybody to establish that.

11 Q. What was your trial strategy in this case?

12 A. Number one, because there was no direct
13 evidence, we wanted to show there that there was
14 reasonable doubt about the State's case. We argued
15 strongly that they didn't have proof that Mr.
16 Bradley had taken the life of Mr. James. We had --
17 we argued strongly that the State didn't even know
18 concretely which county was involved in terms where
19 the young man lost his life. We argued that it just
20 circumstantial from beginning to end. And that
21 there was no motive for Mr. Bradley take the life of
22 a friend, who he had known for along time, and they
23 had been, so to speak, business together. And that
24 there wouldn't have been any reason for him to fall
25 out with this guy over the fact that the guy

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1 Mr. James had been arrested, and the truck had been
2 impounded. And supposedly Mr. Bradley had gone and
3 had to pay 2 or \$300 to get the truck out of impound
4 so they could go back to work.

5 Q. Now if you don't mind, I am going to go
6 through the allegations just in order. That might
7 make it easiest. So I'll start with the first
8 allegation. Applicant is alleging that you failed
9 to move to quash the arrest warrant on the basis
10 that the information on the warrant was
11 demonstratively false. Did you have a preliminary
12 hearing?

13 A. We did.

14 Q. And you did not move to quash the arrest
15 warrant, is that correct?

16 A. No, ma'am, I don't -- the record doesn't
17 indicate that I did.

18 Q. Was the indictment true billed?

19 A. It was.

20 Q. So had you successfully quashed the arrest
21 warrant, could the solicitor have direct presented
22 the indictment?

23 A. Yes, he could have.

24 Q. You also move -- well that might go into
25 my next. Let's talk about the directed verdict.

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1 Your motion for a directed verdict. You made the
2 motion, the pretrial motion, for a directed verdict.
3 Oh, I'm sorry. You made a pretrial motion to quash
4 the indictment in this, case, correct?

5 A. I did.

6 Q. And then you later moved for a directed
7 verdict.

8 A. Yes, I did.

9 Q. For many of the reasons. Can you explain
10 these reasons too?

11 A. I think basically the pretrial motion was
12 based on the fact that the State did not have
13 evidence as to which county, where the venue was
14 proper. And that they had a speculative, in my
15 opinion, a probable cause to arrest and charge this
16 man, based on the fact that he knew the man was last
17 seen leaving the man's house on a particular day.
18 And then there was really a void, unless you
19 considered Mr. Koenig's evidence to be substantial,
20 which was that he was seen in the neigh -- he was
21 seen a mile away from where the body was located,
22 the day before the body was located, driving a car
23 that had been linked to the dead man's family.

24 Q. And you were not successful on this motion
25 for a directed verdict.

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1 A. That's correct.

2 Q. And the judge stated in the transcript, I
3 believe, his reason. He, I believe he testified
4 that he did believe there was enough evidence
5 presented by the State, is that correct?

6 A. He believed that the jury could have found
7 that there was enough circumstantial evidence to
8 render a verdict in the case. Either way, the judge
9 wasn't saying that he was convinced that the case
10 was tight, but that he was bound by his obligation
11 to consider whether or not the State had raised
12 certain issues to the point where the jury could
13 consider it. And the judge felt that the jury could
14 consider the evidence that had been brought in.

15 MS. COLEMAN: I beg the court's
16 indulgence.

17 Q. Moving on to the third allegation, the
18 Neil v. Biggers hearing. You waived the
19 Neil v. Biggers hearing in this case, correct?

20 A. Yes, ma'am.

21 Q. And what was your strategy behind that?

22 A. My recollection on this is not strong as
23 I'd like it to be. The record reflects that I had
24 an in court communications with my client. I
25 checked with my client, he didn't have any objection

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1 to us waiving it. My theory as trial counsel was,
2 that the Neil v. Biggers hearing, there was enough
3 evidence for the judge to allow it, and that it was
4 going to be allowed, I didn't think that we needed
5 to hold up the trial of the case, because I thought
6 the issue of identification. There were two parts
7 to the identification issue which we talked about in
8 trial.

9 One was, that the opportunity for this
10 witness, Mr. Koenig, to see my client was very
11 short. It was a cross racial identification. And
12 in opinion, I was going to hammer hard on the fact
13 that he didn't really have a good opportunity to see
14 this man. The man who he saw was driving the car,
15 he never got out and walked so he could see his
16 height and all of that. And quite frankly, the
17 other part it was, there was very strong evidence
18 that when Mr. Koenig saw the car by Boyles pond, the
19 car was sitting in a field 20 or 30 miles away in
20 Lee County being burned up. And it wasn't -- he
21 couldn't have it both ways. So I thought that this
22 was a good case to go on to the jury, and even
23 though the identification wasn't going to help us,
24 we thought it was basically unreliable
25 identification, and therefore, we were going to be

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1 able to prove that to the jury.

2 Q. So in your opinion was there a sufficient
3 basis to challenge the lineup conducted by the
4 police?

5 A. No. And my recollection in looking at the
6 lineup this morning, there were six black males
7 selected by a computer. That's what the officer
8 testified. And that there are at least three black
9 males in that picture, including Mr. Bradley whose
10 teeth you could see. I didn't see anything wrong
11 with the lineup to warrant me making a motion to
12 suppress the lineup.

13 Q. And during cross examination, did you
14 elicit the inconsistencies with the identification?

15 A. I think we did. I think we were able to
16 show the problems with the identification by the
17 witness. And also kind of supplement that with the
18 fact that the police officer's theory was that
19 sometime between Sunday night, early in the morning
20 Sunday morning 12:30, 1:30 in the morning.

21 THE COURT: 12:30 and 1:30 on which
22 morning?

23 A. Sunday morning; that the car was being
24 burned in the cemetery on the north side of Sumter
25 County. And Mr. Koenig was seeing the car being

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1 driven by Mr. Bradley at 9:30 Sunday morning, on the
2 south side of Sumter County.

3 Q. I'll move on to allegation No. 4. Trial
4 counsel failed to investigate Easy Auto to see if
5 they in fact used yellow or temporary tags on their
6 vehicles.

7 A. I will tell you honestly, I don't remember
8 the name Easy Auto. I see in the transcript that it
9 was Boyles pay and---

10 Q. Pay here, Buy here.

11 A. Pay here, Buy here. Again, I did not
12 myself investigate the Easy Auto site. I don't
13 remember them. I didn't investigate Boyle Pay Here
14 either. But I will say, the circuit judge granted
15 us funds to hire an investigator. The investigator
16 whose name was Mr. Johnson, submitted hourly, an
17 hourly bill for work that he did in 2006 and 2007,
18 all the way up to 2008. And so there were things
19 being investigated outside of my presence so to
20 speak. But I don't remember ever talking to or
21 having a part of any witness from the car.

22 Again, there was a very strong indication
23 that there were something very unstable about the
24 State's case as it came to the Volvo, because it was
25 burned so far away from the pond where Mr. James was

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1 found; that we felt very strongly that they had a
2 defect in their case about that.

3 Q. So did you feel it was important to
4 investigate the yellow tag on the Volvo?

5 A. I just don't -- I can't say that we were
6 impressed by the fact that there was a yellow tag.
7 I think that my understanding of Mr. Koenig's
8 testimony was that the car had a paper tag. I don't
9 remember his testimony as to the color. I may have
10 missed that when I reviewed the transcript last
11 week. I know that the young lady who bought the car
12 said something about going to get the car; that it
13 had a paper tag. She may have given the color as
14 red or yellow or whatever. That just wasn't
15 something we focused on.

16 Q. Because you felt that the discrepancies in
17 their story---

18 A. That's right.

19 Q. ---were more important.

20 A. Weren't going to match up.

21 Q. Was there any question that Martha
22 Ransom's car was found burned?

23 A. No, I don't think there was any question.
24 Now I don't believe that there was any technical
25 information like serial numbers that were put in the

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1 record to prove that that was the car. But it
2 seemed to be the same body style. Circumstantially
3 they had a good case that the Volvo that they found
4 burned was the car that she had purchased.

5 Q. And I believe, correct me if I am wrong, I
6 believe I wrote the Vin number, or a partial VIN
7 number.

8 A. It could have been. I'm sorry, I just
9 don't know that.

10 Q. Can you tell me a little bit about your
11 strategy for your objecting at trial? When you
12 think it's important to object and when not to?

13 A. Well I would say that my training has
14 taught me that's it probably not a good idea to
15 object unless there's something really strong going
16 on. Opening arguments and closing arguments, tend
17 to be in my opinion, time for the lawyer. And I
18 don't want somebody objecting against my arguments,
19 and I don't tend to get up and to object about their
20 arguments.

21 The burden shifting or the kinds of things
22 that have been talked about in the courtroom today
23 about things that the prosecutor would have said, I
24 would tend to try to use those things against her.
25 If she said well, we don't have to prove the time

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1 and place of the murder. I would use those against
2 her in closing argument to say that, you know, in
3 fact they do have prove them. And in fact they
4 didn't prove them, and that's why you have to give
5 the benefit of the doubt to the defendant.

6 Q. And again, I bring that up because in the
7 allegation, I'm sorry just a minute. Yes, No. 4.
8 Trial counsel failed to object to hearsay testimony
9 by an employee of Easy Auto during trial. Did you
10 think that it was important to object to this
11 testimony?

12 A. My understanding if I'm correct, is that
13 the officer talked to the employee, and then the
14 officer answered questions at the trial regarding
15 that conversation. And I didn't review all of the
16 testimony. But I didn't think that even though it
17 was technically hearsay, I didn't think it was
18 hurtful to the case, because the owner of the
19 vehicle, Ms. Ransom, had testified at trial. She
20 was available to talk about what she had done with
21 the car. And so the testimony was pretty much
22 cumulative. There was a sale, and there was a paper
23 tag on the car.

24 Q. Allegation No. 5. Trial counsel failed to
25 object to the prosecutor referring to Mr. Bradley as

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1 a liar in her closing argument. And you just
2 touched on this a little bit a moment ago. But will
3 you tell us again why you didn't find it necessary
4 to object.

5 A. I just don't think that it's an
6 unconstitutional or an illegal argument to say that,
7 that a witness didn't tell the truth. I mean that's
8 what we do all the time basically in the courtroom
9 is try to show inconsistencies or things that don't
10 make sense, and try to get the jury to understand
11 that there's really only one common sense way to
12 look at this case. And either they made their case
13 or they didn't. The closing argument is in my
14 opinion, is the time for her to make her case.

15 In this particular case, I would not have
16 had had closing, the last closing. She would have
17 had the last closing. So I did have the right to
18 object. But I had already put mine in, and I guess
19 I was letting her put hers in. I don't think she
20 went too far from my reading of the transcript to
21 say that she actually did something illegal, so to
22 speak.

23 Q. So at the time you didn't think that this
24 was prejudicial to your case.

25 A. That's correct.

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1 Q. Not to object.

2 A. That's correct.

3 Q. Allegation No. 6, failure to call expert
4 witnesses. And we've already had our first hearing
5 where we presented some testimony from some experts.
6 Did you ever consider getting experts in this case?

7 A. I don't think we did. I don't remember
8 the State telling me or giving me the name of the
9 expert that they intended to call. Quite frankly,
10 as I remember the case, the cell phone records were
11 probably the strongest factor that we had in proving
12 that Mr. Bradley was innocent, because the records
13 show that Sunday morning, when he was supposedly
14 been seen by Mr. Koenig on the south side of the
15 county, his cell phone was pinging all over the
16 north side of the county near the young lady's house
17 that he was -- had done some work at. McDuffy, I
18 believe is her name.

19 Ms. McDuffy's house was on the north side
20 near Clarendon -- near the Kershaw Lee County line.
21 and the records clearly show his phone was pinging
22 off the towers there that morning. Plus we called
23 at least one witness who sat down and just kind of
24 was sitting outside Sunday morning with Mr. Bradley
25 as he was waiting to get Ms. McDuffy on the phone.

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1 And he testified that Bradley was there, had his
2 cell phone was making calls. And this was a great
3 distance away from Boyles pond.

4 Q. And the State had their investigator
5 testify about the cell phone records, correct?

6 A. They did. And I think his name was
7 McMillan. I thought Investigator McMillan was
8 quite frankly not as prepared as we were. He hadn't
9 counted the number of calls. He hadn't really gone
10 through the records from the cell phone company to
11 show that the towers were located on the north side.
12 We had a map. We had him identify the location of
13 the towers on the map, to show the jury that he was
14 in fact helping show that Mr. Bradley's phone was
15 using those towers Sunday morning.

16 Q. And did you cross examine him on all those
17 details?

18 A. I did.

19 Q. Pretty thoroughly, correct?

20 A. I hope so, yes, ma'am.

21 Q. And as far as the arson experts, we
22 talked about the car being burned, the Volvo being
23 burned in the cemetery. Did you cross examine their
24 witnesses as to the heat of the car at the time it
25 was found?

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1 A. Yes, ma'am. The family that found the car
2 at 2:30 Sunday afternoon testified that they didn't
3 see any smoke or heat coming from the car. They
4 thought it was unusual to have the car there,
5 because they hadn't seen it there the day before or
6 whatever. So they called Lee County sheriff's
7 deputies in to investigate. And none of the
8 witnesses that I remember being called by the State
9 or the defense testified that there was any heat
10 from that car at 2:30 or 3 o'clock in the afternoon
11 on Sunday.

12 I also cross examined the witness whose
13 dog was barking at 1:30 Sunday morning, and he saw
14 no flame, smelled no smoke, didn't think enough of
15 it to go outside. He just basically checked.
16 Looked outside and checked. And then he tried to
17 calm his dog down. So went back to bed and didn't
18 think anything of it. The next morning when he got
19 up, I remember asking him, did he see any smoke or
20 see anything. And he was the closest one as for as
21 the resident to the graveyard where the car was, and
22 he saw nothing early Sunday morning.

23 Q. So did you believe that that testimony
24 that you elicited on cross examination was enough to
25 present the jury with the idea of your theory, your

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1 timeline of the case?

2 A. Well quite frankly I don't know -- I don't
3 that I had a theory when the car got burned. We
4 don't think it was burning Sunday morning early at
5 10 o'clock. Because Mr. Koenig had seen the car at
6 9:30. So in order for the car to be driven up to
7 the north side of the county, put in a field and set
8 afire, it would have been, we think, smoking burning
9 for hours, right in the middle of the Sunday morning
10 go to church hour. Nobody reported it. And the
11 people who found it at 2:30, 3:00 o'clock said it
12 was cool to the touch. There was no indication of a
13 fire.

14 And of course if it had burned Sunday
15 night, excuse me, if it had burned Saturday night,
16 Mr. Koenig wouldn't have been able to see it
17 driving around on a Sunday morning.

18 Q. Right. We have abandoned allegation 7,
19 so I'll move to allegation No. 8 about the security
20 belt. Trial counsel failed to move for a mistrial
21 when the security belt went off in the court. Did
22 you ask the judge for a mistrial when this
23 happened?

24 A. I told the judge that if I didn't get a
25 curative instruction, which I thought was

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1 reasonable, that I would move for a mistrial.

2 Q. And he did offer a curative instruction,
3 correct?

4 A. He did. Ms. Fant was the prosecutor, she
5 did not want the judge to tell the jury that all
6 secure -- all defendants wore security belts. Which
7 was my way of kind of keeping Mr. Bradley in the
8 population of all people who come to trial. So the
9 judge ended up watering the language down to say
10 that defendant's are made or are dressed in security
11 belts for the protection in the courtroom. And that
12 there was a miss malfunction of the security belt.
13 What really and is not in the record, is the belt
14 was so powerful that Mr. Bradley actually called
15 out. He jumped out of his seat and said some words,
16 and it kind of shocked the courtroom. And we had a
17 recess and got things calmed down, but I was afraid
18 that the jury didn't know what had happened, and
19 they needed to have explanation. So we took care of
20 it.

21 Quite frankly the reason I didn't ask for
22 a mistrial is because I thought we were doing very
23 well. It was in early in the trial. Mr. Bradley, I
24 think he testified it was on page 200, so it was
25 early in the trial. We had not chance to call eye

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1 witnesses. And by the time a lawyer preps his case
2 and picks the jury, I think he has a pretty good
3 feel of whether or not he's going to be able to
4 accomplish what he set out to do. And I thought we
5 were very well on our way to accomplishing what we
6 wanted in the trial, which was to get a not guilty.
7 And I didn't want to have this little technical
8 issue stop us.

9 I also lost probably thought very much of
10 the jury. I thought that we had selected a good
11 jury, and that I wasn't going to throw this jury
12 away and take a chance that we would get not a good
13 jury if we mistried the case and had to come back
14 two months later and try it with a new jury.

15 Q. Did you discuss these with the applicant,
16 your reasons for--

17 A. We did. Mr. Bradley and I, he was upset
18 at the time. He didn't know why the belt had gone
19 off. There was a rumor that the officer who was in
20 charge of the belt or the button had gone to sleep,
21 and pushed it by mistake. We don't know. I had
22 never had this happen in a courtroom before. It was
23 in a murder case. Mr. Bradley was already very
24 nervous about being in trial and it took us awhile.
25 It didn't take an hour, but it took us awhile to get

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1 calmed down. And I know we talked about the fact
2 that if we get a mistrial, we're going to have to
3 get a new jury. We don't know what that jury is
4 going to look like. If we get a mistrial, it's
5 going to be a month or two down the road. We don't
6 know if our witnesses are going to come back. I
7 thought that we were on solid and we needed to go
8 ahead forward. And I think he agreed with it.

9 Q. And he testified that you weren't sure
10 what happened with the belt. But did the applicant
11 tell you that at the time that he saw the officer
12 push the button?

13 A. No, ma'am. Nobody. We were in the middle
14 of an examination. We were not focusing on, I was
15 not focusing on the officer. I was sitting right
16 next to my client. I am pretty sure we didn't know
17 what happened. We just knew that it had gone off.

18 Q. I'll move on the No. 9. Trial counsel
19 erred when he called the defendant's brother Paul
20 Bradley to testify; that the defendant told him the
21 victim was deceased prior to the police finding the
22 body.

23 THE COURT: Let's get the semantics
24 correct. Paul testified that the defendant told him
25 before the body was found, that he was dead.

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1 MS. COLEMAN: Yes.

2 THE COURT: The way it's worded in the
3 application is a little bit -- could be read
4 differently. Go ahead. You can continue.

5 Q. What was your basis for calling Paul
6 Bradley?

7 A. Mr. Bradley was the leader of the family.
8 He was an older gentleman. He was very stable. He
9 was the man who came and hired me to represent
10 Nathaniel Bradley at the trial. He was a good
11 witness to have the jury see that the Bradley family
12 was a solid family. He also was -- he was also on
13 the timeline because the night that they had the
14 prom, Nathaniel spent a lot of time getting the
15 young lady ready for the prom. And one of the
16 places they went that night, was to get some money
17 from Paul, so that he could buy a camera for the
18 young lady to take to the prom to take pictures.

19 And so Paul was on the timeline, and I
20 thought it was very important for him to be along
21 with the other eight witnesses we called, to show
22 what Nathaniel was doing; that he wasn't drinking.
23 He wasn't walking around mad saying I'm going to get
24 Ernest James. He was doing things with this family,
25 and taking care of young people in his family.

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1 Q. And did Paul Bradley also testify about
2 how they had no relatives in the cemetery here? The
3 Bishopville cemetery?

4 A. I remember there being some mention of
5 that. I don't remember specifically Mr. Bradley,
6 his testimony on that issue.

7 Q. Were you aware that Paul Bradley was going
8 to testify that the defendant says that he was dead
9 before the police got there?

10 A. No, ma'am, I don't think so. I think that
11 was -- I think that was an estimation by Mr. Bradley
12 as to when he was talking to his brother, the
13 defendant, and what the conversation was about it.
14 I don't know if anybody actually knew what time
15 that, it was just an estimation. He said one
16 o'clock. It could have been later whatever. I
17 don't know. I quite frankly, I can't remember right
18 now when Mr. Bradley, my client, found out that his
19 friend was dead. I don't remember that completely.

20 Q. But you thought Paul Bradley was a good
21 witness to use.

22 A. Yes, ma'am.

23 Q. I'll move on to No. 10. Failure to object
24 to hearsay testimony entered by Mr. Koenig from the
25 neighbors. The neighbors told him that the police

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1 were looking for a blue Volvo with a temporary tag.
2 Did you feel that this was objectionable hearsay at
3 the time?

4 A. No, ma'am, I think probably I was in the
5 middle of a trial. Koenig was the one witness that
6 we were most probably most worried about. I don't
7 think that there was anything in this case outside
8 of Koenig. I do realize now looking back that his
9 testimony was probably very important to the State's
10 case. He was somebody who came to the police on his
11 own a day or two after the body was found. And he
12 had information that the police didn't know about.
13 In other words, he was a citizen said, hey, I saw a
14 car. And I saw somebody in the car, and it was a
15 mile from the where was the body was found, and they
16 were acting suspicious.

17 He did identify Mr. Bradley as the driver
18 of the car based on the short time he said he saw
19 Mr. Bradley there. And also I guess, also from the
20 fact that a lineup was shown to him, he picked
21 Mr. Bradley out of a lineup. The problem with
22 Mr. Koenig's testimony was that by all accounts, the
23 car was burned or was burning in Lee County at the
24 time he saw it driving around in Sumter County. And
25 we were going to try to use that against him as much

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1 as possible.

2 At some point in the testimony, I
3 remembered telling the court, and hopefully I told
4 the jury in closing that, you know, it was
5 inconceivable that a man would plan a murder, and
6 not make sure that the body he threw in the river or
7 the lake was concealed. He took steps, whoever
8 killed Mr. James, took steps to conceal the body.

9 But here there was testimony that this man was
10 driving around on a Sunday morning when people were
11 going to church, to check on the body. Or it was
12 inconceivable that he would be throwing the body
13 over the rail of the bridge on Sunday morning at
14 Mr. Koenig's hour was 9:30, in the middle of, you
15 know, people getting up on Sunday morning and doing
16 things.

17 So it just didn't seem to make any sense
18 to us. It wasn't connected very well, and it had a
19 lot of parts to it that certainly didn't fit, in our
20 opinion.

21 Q. Issue No. 11, the prosecutor asserted that
22 she did not have to prove when or where the victim
23 was murdered.

24 A. We had a number of opportunities pretrial
25 to talk to the judge about stopping the trial,

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1 because the State didn't have this technical
2 information. The judge had already let us know that
3 he thought that there were enough parts to go
4 forward. And so when the opening statement took
5 place, it wasn't something that she repeated. It
6 was something she said and keep on going, and I
7 didn't think it was objectionable.

8 Q. So you had already argued this at
9 pretrial.

10 A. Yes, ma'am.

11 Q. Did the State ask you---

12 THE COURT: Did you argue that in your
13 closing?

14 A. Judge, I did not read my closing. But I
15 feel sure that I did argue that the jury should take
16 into consideration there was no proof that the man
17 was killed in Lee County. Excuse me, Sumter County.
18 But that the body was found in Sumter County. That
19 doesn't mean he was killed here. And there are
20 other inconsistencies.

21 Q. Did the State have to prove when and where
22 the victim was killed?

23 A. Apparently Judge Cothran reviewed cases
24 that were presented to him by the State and found
25 that there were several cases that held or stood for

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1 proposition that reasonable evidence must be
2 introduced, that they could find a connection as to
3 time and place. For example, I remember Judge
4 Cothran saying that the body was located in Sumter
5 County. The car was seen in Sumter County. The man
6 was last alive at his house driving away on Saturday
7 in Sumter County. So therefore Sumter County was a
8 reasonable place for the jury to expect that the
9 crime occurred.

10 Q. Allegation No. 12 about the letters.
11 Failed to object to the two letters introduced by
12 Gloria Portee. Did the applicant tell you that he
13 wrote these letters?

14 A. I don't remember.

15 Q. But the applicant admitted that he did
16 write these letters today, correct?

17 A. He did.

18 Q. He did. Would you have been able to keep
19 them out of evidence?

20 A. I don't believe so.

21 Q. Did you want to keep them out of evidence?

22 A. Well if I had had possession of the
23 letters, I wouldn't have put them into evidence. I
24 don't really believe that it said anything that
25 proved that he was guilty or showed he was guilty.

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1 But the solicitor used it as a motive to show that
2 he was not believable, because the letters were
3 written in a kind of a situation where he was
4 already -- he hadn't been in contact with this lady
5 for awhile, and the letters kind of came out of the
6 blue.

7 Q. Is it possible do you think that these
8 letters could have helped him? Make him look
9 better? I believe some of the testimony, or some of
10 the writing in the letters stated that he, he
11 doesn't know why she lied when she told the
12 investigators that he told her he was going to kill
13 her?

14 A. I think the letters, and my recollection
15 of the letters was that there was some indication
16 that he was seeing more than one woman. And that he
17 was trying to be romantic with this woman, who
18 happened to be a witness, who happened to own the
19 gun, who the State claims the gun was probably the
20 murder weapon. Although they couldn't prove it. So
21 there was some connections there that I would have
22 preferred not to have the letters. We were already
23 dealing with this lady and she had already
24 testified, or was testifying that in some ways it
25 wasn't helpful. Her gun was missing. Her brick

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1 from her yard was missing. There was a brick tied
2 to the body. There were some things about this lady
3 that certainly we didn't like.

4 THE COURT: When you say this lady, do you
5 mean Ms. Portee?

6 A. Ms. Portee.

7 Q. But again I think as you just testified,
8 if you had objected you're not sure that you would
9 have been successful in keeping them out of
10 evidence?

11 A. I don't think the letters were -- they
12 weren't objectionable from a legal standpoint,
13 because he had written the letters and sent them to
14 her.

15 Q. No. 13, trial counsel erred in allowing
16 Wayne Johnson to say that he had an altercation with
17 Bradley and armed himself. Did Mr. Johnson ever say
18 there was an altercation?

19 A. I don't believe he did. In my quick
20 review this morning of page 560, Mr. Johnson, I
21 believe he was a family member of Mr. Bradley's,
22 like his son-in-law or something. And for some
23 reason Mr. Johnson testified that he was not
24 comfortable being with Mr. Bradley and so he armed
25 himself. But he never said Mr. Bradley was armed.

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1 As a matter of fact, he said Mr. Bradley kind of
2 trial to talk him down and say, hey, man, I'm in
3 your family. I'm not going to hurt you. Everything
4 is good. And of course we had no way of knowing
5 what he was going to say beforehand. We didn't have
6 a statement as far as I know from Wayne Johnson,
7 beforehand.

8 Q. Do you believe that this testimony
9 portrayed Mr. Bradley as a dangerous felon?

10 A. I don't think so. I think it just showed
11 that Mr. Johnson was skittish, because he had heard
12 that, and he did mention in his testimony that he
13 had heard that Bradley might be involved.

14 Q. And did you think that was something that
15 needed to be objected to at the time?

16 A. Not at the time. I think you will find
17 too, if you review the transcript, that actually
18 came out on recross. So we had already had direct
19 by the State. Cross examination by me, and then
20 Ms. Fant was up asking a few additional questions
21 when this kind of came out. And I don't think we
22 either of us knew it had come out. He had never
23 said anything about harming himself during his -- as
24 far as I can remember, during his direct or cross
25 examine.

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1 Q. No. 14, trial counsel failed to object to
2 Bobby Lee Hughes in saying that he thought that the
3 defendant might have had something to do with the
4 death. What did he -- what did you know about Bobby
5 Lee Hughes? Can you tell us about him?

6 A. I can tell you I don't know much. I don't
7 remember that witness very much. I think the State
8 called Mr. Hughes. Mr. Hughes was the oldest
9 brother of Ernest James, the victim. And he
10 testified that he was aware that they had had
11 arguments over the course of their relationship.
12 And then when I got up to cross examine him, we were
13 talking about they wanting to date the same girl.
14 They being the defendant and the victim. Whether he
15 knew that. And that's kind of all I remember. I
16 don't remember, his testimony went on for several
17 pages. And then when I sat down, Ms. Fant did
18 redirect for a few more pages. But I don't really
19 remember Mr. Hughes being an important. He wasn't
20 in the house or in the -- as far as I can remember,
21 he wasn't around during the time that the victim
22 went missing or the body was found. He was just a
23 family member that was kind of called to give some
24 background on the relationship between the defendant
25 and the victim.

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1 Q. And as you mentioned just a moment ago, he
2 testified that they had had several arguments for
3 the past 6 months?

4 A. He did testify that there was a -- that he
5 knew about there being some arguments. He said
6 about the two of them arguing over nothing really,
7 at the top of page 7. That was under examination by
8 Ms. Fant before I got a chance to. And then he was
9 the one that said, you know, he thought that they
10 were acting cool with each other, and they were
11 supposed to be such brothers. So he didn't have any
12 evidence that Nate was mad at this brother, or his
13 brother was mad at Nate. It was just that the two
14 of them apparently had a pretty good relationship,
15 although they had ups and downs.

16 Q. So did you think at the time that this was
17 something you should have objected to?

18 A. No, ma'am. I thought he had basically had
19 said that the relationship, he told honest about
20 the -- he testified honestly about the
21 relationship; that they were good friends. They
22 called each other brothers. They acted cool with
23 each other, but they did have difficulty from time
24 to time.

25 Q. No. 15. Trial counsel failed to object

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1 hearsay of Officer Wesley Gardner in clearly in
2 failing when saying Koenig said he was 100 percent
3 sure of his identification.

4 A. I don't think that that was something I
5 could object to. The witnesses were testifying
6 about recollection of Mr. Koenig's identification.
7 That's the way they described it. Mr. Koenig had
8 already testified that he had picked the man out of
9 the lineup, the defendant. And that was based on
10 his viewing the driver of the car, 2 or 3 days
11 earlier.

12 MS. COLEMAN: I being the court's
13 indulgence one moment. I have no further questions.
14 Thank you, Mr. Finney.

15 THE COURT: Yes, ma'am. Cross.

16 MR. KIRKLAND: Thank you, Your Honor.

17 Cross Examination by Mr. Kirkland:

18 Q. Hi, Mr. Finney.. It's good to see you here
19 today.

20 A. Thank you, sir.

21 Q. I'm going to first talk -- start talking
22 to you about Issue 4. And I'll just remind you of
23 Issue 4, and it refers to the Easy Auto, not
24 investigating the place in which the Volvo was
25 bought. And I want to take you back through the

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1 transcripts a little bit. Now Martha Ransom, do you
2 have?

3 A. I have the transcript.

4 Q. If you can just look at the table of
5 contents for a moment. Martha Ransom was
6 originally called on page 198 of the transcript.

7 A. Yes, sir.

8 Q. And then she was recalled on page 522 of
9 the transcript.

10 THE COURT: Five what?

11 MR. KIRKLAND: 22?

12 A. All right.

13 Q. And you have the transcript in front of
14 you?

15 A. I do.

16 Q. I made you a copy in case you didn't have
17 one. On 522, something very fascinating happened.
18 And I want to see if you agree with it. I'm going to
19 read you a portion of this, so the judge can follow
20 along or anybody else in the courtroom can. She
21 says---

22 THE COURT: Page what?

23 Q. 522. Ms. Fant, the prosecutor, says, good
24 afternoon. I apologize for making you come back up
25 here. In bulk of the witnesses we had, I forgot to

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1 ask something that I didn't ask you, and that was
2 vehicle that you were talking about in this case,
3 the Volvo. Answer: Uh-huh. Who owned that,

4 Question: Who owned that vehicle?

5 A. Answer: I did.

6 Q. Question: And could you tell us what
7 color it was?

8 A. Light blue.

9 Q. And how long had you owned it before this
10 incident. Answer: Not long. Maybe about a month
11 or two. Question: Okay, and what was the vehicle
12 tag number on the license? I had to move my

13 paperclip. On the license was the rest of that
14 question. Answer: I don't know. I am not sure

15 right now. Question: Did it actually have a
16 regular tag or was it a paper tag. Answer: I had,
17 I think I had done got the regular tags for it.

18 Question: There was a what, an Easy Auto credit

19 paper tag? Answer: Yes, ma'am. Question: Do you

20 recall that? Answer: Yes. Question: Okay. And

21 it said, is that where you bought it from. Answer:

22 Yes, ma'am. Question: Easy Auto Credit. Answer:

23 Credit, yes. Question: And it's a temporary tag I

24 guess that they gave you when you first buy it.

25 Answer: Yes. Question: Was that still on the car.

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1 Answer: I'm thinking it could have been, because we
2 didn't have it that long. I know I went down and
3 got -- took care of the insurance that same day.
4 And I am not sure whether they had sent the tags out
5 or not.

6 Question: Do you remember the color of
7 that little paper tag. Next page 524. Answer: No.
8 It could have been read, I don't know. Question:
9 Okay. Answer: To be honest, I don't know.

10 Question: You don't know. Answer: I don't
11 remember. Question: That's fine. Thank you very
12 much, I appreciate it.

13 Q. So at this point and time in the trial, do
14 you recall that the only person in the trial that
15 had identified a paper, a yellow paper tag on that
16 car was Mr. Koenig? K-O-E-N-I-G, in his earlier
17 identification of the car and Mr. Bradley?

18 A. No, sir, I don't remember sitting here
19 now. My recollection from what I reviewed of the
20 transcript in the last 30 days, was that Mr. Koenig
21 remembered it had a paper tag. I don't remember him
22 referring to a color. And this lady's testimony
23 didn't help, because she started off on page 523,
24 saying she thought the regular tag on the car by the
25 time the car disappeared.

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1 Q. Well that actually was quite helpful was
2 it not, because there was no paper tag.

3 A. Well it would have been helpful to me,---

4 Q. Correct.

5 A. ---but she didn't know.

6 Q. Right.

7 A. And she spend two pages in the transcript
8 saying basically she didn't remember whether she had
9 a temporary tag, whether she didn't. She didn't
10 remember the color. She just didn't know. And
11 that's why I probably, I didn't ask her any
12 questions.

13 Q. No, I understand that. And I'm not -- I
14 have no issue with how you handled that at all. You
15 handled it quite well. But my question was a little
16 bit different. My question was, and I'll try to
17 find it in the transcript very quickly, because I
18 thought that you would have remembered it. Was at
19 this point the trial, Darrell Koenig, and the
20 transcript is the transcript so we may -- you may
21 not -- if you don't remember, you don't remember.
22 But at this point of trial, Darrell Koenig
23 testified, if you remember, the face of Nathaniel
24 Bradley, color of the blue Volvo, and the bright
25 yellow tag.

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1 He was very specific to that. You do not
2 recall him testifying to that? I can try to find it
3 for you real quick.

4 A. Mr. Koenig begins his testimony on page
5 623, I believe.

6 Q. Correct.

7 A. I believe.

8 Q. Yes.

9 A. If that's the first time he testified, he
10 testified after the testimony that you're referring
11 to from Ms. Ransom.

12 Q. Correct. So here's what I'm telling you,
13 or here's what I'm asking you, is that we have now
14 two people testifying. One of them saying, I
15 remember the car. I remember the face. I remember
16 the yellow tag. We have the owner of the car
17 saying, I may have had the regular license on. It
18 may have been red tag, I can't really remember. And
19 so we certainly have a opposing testimony that is
20 not consistent testimony. You would agree with
21 that.

22 A. Counsel, can I ask you to show where me
23 Mr. Koenig talks about the color of the tag? I
24 don't remember that.

25 Q. Sure. 628 line 12 through 18. I'll just

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1 go ahead and read it while you're looking for it.
2 As it went on by me, I just kind of sat for a second
3 and watched the car go by. And I noticed on the
4 back was a bright yellow license plate with red
5 writing on it. A temporary tag. Or excuse me,
6 temporary tag. And I just remembered thinking to
7 myself, that's the ugly car -- the ugliest car I've
8 ever seen, because it was very pale shocking blue
9 color with a bright yellow license plate on it. Do
10 you recall that now?

11 A. I have reviewed it. I believe that is
12 what his testimony was.

13 Q. Do you have question that it?

14 A. I believe that's what his testimony was at
15 the trial.

16 Q. I understand what you're saying, and this
17 is a difference. Do you think there is any chance
18 this transcript is wrong?

19 THE COURT: No, he said that's what he
20 remembers.

21 MR. KIRKLAND: Oh, okay. Thank you, Your
22 Honor.

23 THE COURT: You're not challenging the
24 accuracy of the---

25 A. I'm not challenging the accuracy of the

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1 transcript.

2 Q. I'm just was making I didn't misunderstand
3 what you are saying. So you do remember that. And
4 so now you know that at the minimum we have two
5 pieces of testimony that are not in agreement with
6 one another.

7 A. I disagree with your assessment of that,
8 because I believe the young lady testified a 100
9 pages earlier in the transcript that she didn't know
10 what was on the car.

11 Q. But she did suggest regular tags or a red
12 tag, but she couldn't remember?

13 A. She couldn't remember.

14 Q. But she threw two suggestions out,
15 correct?

16 A. Could we go back to that page?

17 MR. KIRKLAND: Absolutely, we can.

18 A. What page was that on?

19 Q. 522. Because we've read it already, so
20 I'll let you go through it.

21 A. In response to questioning by the State,
22 she said, it could have been a temporary tag, and it
23 could have been red, but I don't know. To be
24 honest, I don't know. She said, I don't remember.

25 Q. But the best of her recollection, was that

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1 it that could have been a red tag. But my point is
2 really simple. That's not something that hurt you
3 at all, correct. That if she, that's something you
4 can argue that, that hey, she said it was a red tag
5 or either a regular tag. I mean, she said she
6 couldn't really remember, but she threw out those
7 two things. That's something that you certainly
8 could have argued, correct?

9 A. Yes.

10 Q. Now here's how it dovetails in to this
11 other issue. Later on, they called Clarence
12 McMillan to the stand. And Clarence McMillan on
13 680, begins with a question. And tell me when
14 you're at 680.

15 A. I'm there.

16 Q. What did you do on Tuesday. What did you
17 start out doing. Tuesday the 24th, I went by
18 Boyle. Boyles Pay Here Buy Here, which was the
19 place where the blue Volvo was purchased from. I
20 actually this read into the record earlier, so I am
21 not going to reread it.

22 I am going to point yourself, point to,
23 line 13 and 14. He said well at the time of
24 purchase, he had had a bright yellow Easy Auto paper
25 tag. So this was the first confirmation of Darrell

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1 Koenig's identification. This is the first person
2 that confirmed that they have yellow tags, correct?

3 A. If you believe that Ms. Ransom had not put
4 a regular tag on the car, as she first testified she
5 thought she had done.

6 Q. Right. But she didn't confirm the yellow
7 tag in any of her testimony.

8 A. She did not.

9 Q. So this is the first confirmation that
10 Easy Auto uses yellow tags. This is the first
11 corroborating evidence.

12 A. This fits in with what Mr. Koenig
13 testified to on page 629.

14 Q. And that's very important, because you
15 stated earlier that your strategy was to attack his
16 identification in part. And that is something that
17 he believed, well I shouldn't say that. That could
18 have been attack based on the testimony of Koenig
19 and the testimony of Martha Ransom, correct?
20 Because she had seen a red tag or regular tag, and
21 you could bring that up to the jury and say we have
22 no one in here to corroborate what kind of tag it
23 was. And we only have Mr. Koenig saying it, and
24 Martha Ransom couldn't not remember it at all,
25 correct?

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1 A. I am sorry, counsel, I kind of lost you,
2 because you were talking about Mr. McMillan
3 verifying what Mr. Koenig had talked about.

4 Q. Right. I'm going to get to that.

5 A. Okay.

6 Q. Well let me start by saying this. Do you
7 agree that virtually every single word that's stated
8 on page 680 line 4 through 680 through 681 line 14,
9 is hearsay because he is relating a conversation
10 that he had with an employee from a car dealership?

11 A. I would say that that was information
12 learned by this investigator in the course of an
13 investigation. It did rely on Mr. Fields providing
14 that information, but I didn't think it was
15 objectionable, because if the judge said well
16 Mr. McMillan you can't testify about it, I think
17 Mr. Fields would have been brought in to testify
18 about.

19 Q. You have no idea whether he would have
20 been. That's speculating of 100 percent.

21 A. I'm in charge of winning the war when I'm
22 trying a case, not every battle. And so this battle
23 about Mr. McMillan verifying what Mr. Fields had
24 said to him, that was not going to win me the war.
25 Because the Volvo was the car that was found burned.

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1 It was the car that Mr. James was seen driving away
2 on Saturday evening. And I had to convince the jury
3 my client was not driving the Volvo, so he didn't
4 have to do with the death.

5 So what color the tag was, in my opinion,
6 just based on where I'm sitting right now, I'm not
7 talking about how I felt at trial. But based on
8 where I'm sitting right now, I would have not wanted
9 to get into a battle about what color the tag was,
10 because I felt that they had enough to say that this
11 was the car; that this car was burned. It had
12 something to do with a dead man, and I had to
13 convince that jury that my client didn't have
14 anything to do with that.

15 Q. That's right. You are 100 percent
16 correct.

17 THE COURT: Just ask him the question.
18 You don't need to agree with him or disagree with
19 him.

20 Q. And that was your strategy, isn't that
21 correct? That was your strategy to prove that he
22 didn't have anything to do with it.

23 A. Yes, sir.

24 Q. Part of that then would be to discredit
25 the testimony of the only eye witness to anything

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1 involved in this case, which would have been

2 Mr. Koenig, correct?

3 A. Correct.

4 Q. And one way that you could have attacked
5 it in addition to attacking the differences in the
6 lineup and the description, was to attack a
7 description of the car, and particularly, his vivid
8 recollection of this yellow tag, correct? Because
9 if the tag hadn't been yellow, that would have been
10 a big discrepancy, correct?

11 A. Well, sir, we had a situation where again
12 I'm thinking that if I am going to try to make this
13 jury believe that I'm not trying to hide anything or
14 I am not trying to berate a man who is a citizen,
15 who lived a mile where the body was found, who says,
16 100 percent to the officers, I know who that driver
17 was, I've got to win that argument on more than just
18 the fact that he might have described the color of
19 the tag incorrectly.

20 Q. So part of your strategy was to allow in
21 inadmissible hearsay.

22 A. Mr. Koenig testified about what color the
23 car was. Ms. Ran -- the tag was. Ms. Ransom didn't
24 remember. There was no tag on the car when the
25 police found it.

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1 Q. Right.

2 A. So the issue of what color, and whether or
3 not there was a disagreement about the three
4 witnesses, McMillan, Ransom and Koenig, as to color
5 of the tag, did not matter to me enough to go into
6 an assault on Mr. Koenig's memory.

7 Q. I'm not asking about an assault on his
8 memory. I'm asking you on page 680, we're having
9 sort of a disconnect here, and that's
10 understandable. On page 680, starting at line 4, he
11 starts by saying Tuesday on the 24th, I went by
12 Boyle's Pay Here Buy Here, which was the place that
13 it was purchased from. I spoke to Mr. Field. And
14 then boom, from that second forward everything he
15 relates is hearsay. We would have never gotten to
16 his testimony about the VIN number. We would have
17 never gotten to his testimony about the GPS tracking
18 system.

19 He even goes into saying that the car was
20 either in a parking garage or something, or it had
21 been destroyed. None of that testimony would have
22 come in if you had objected with Line 6, I spoke to
23 Mr. Field. Objection. Hearsay. That would have
24 ended that inquiry right there, and you would not
25 have been attacking his credibility. Is that

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1 correct?

2 A. I disagree. I think that the court would
3 have allowed the officer to testify about an
4 investigation in which he was performing a recovery
5 of information. He wanted the color of the vehicle.
6 He wanted the VIN number. In my opinion, the judge
7 would not have found that to be hearsay.

8 Q. What exception of hearsay does that fall
9 under?

10 A. It's part of the investigation in
11 inquiring details about a vehicle that was burned in
12 a crime investigation. I don't see where that's
13 hearsay at all.

14 Q. I mean, the law is the law, and we'll sort
15 it out. And I appreciate your answer.

16 A. Yes, sir.

17 Q. And I want to talk to you about Issue 6.
18 The expert witnesses.

19 A. Yes, sir.

20 Q. I think this is going to go faster from
21 here on out. Now you knew, I think you stated that
22 you just didn't feel like a cell phone expert was
23 necessary, correct?

24 A. I can tell you that we did not discuss
25 hiring, I can't say for certain. I can say my

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1 recollection is, we did not discuss the client and
2 the family did not discuss getting a cell phone
3 expert. Once we received the discovery and we were
4 able to put together what I thought was a very
5 credible argument, the cell phone was being used
6 near Ms. McDuffy's house on Sunday morning, and it
7 was knocked down near Boyles pond on Sunday morning.
8 That was going to help prove that Nate Bradley was
9 no where near the pond.

10 Q. So you tried to get the information in
11 through Officer McMillan.

12 A. Correct.

13 Q. Correct? Now originally if my memory
14 serves me correctly, the prosecution objected
15 because that's hearsay evidence, and he's not an
16 expert.

17 A. Okay.

18 Q. However ultimately strategically for
19 whatever reason she decides to agree, to allow you
20 to put the cell phone records and ask him questions
21 about that.

22 A. Right.

23 Q. The issue was that as an investigator he
24 was not a cell phone, correct?

25 A. Correct.

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1 Q. And there were certain questions that you
2 asked him about cell towers and how they worked.
3 And they objected and said, he's not an expert, he
4 can't answer those questions. Do you recall that?

5 A. I don't disagree with that.

6 Q. And he told the jury at one point, I'm
7 not an expert in response to one of your questions.
8 Do you recall that sort of thing, what might have
9 been said by him?

10 A. Might have been said, yes, sir.

11 Q. Now throughout the testimony in which you
12 were trying to elicit this information from him, and
13 I'll just -- I am going to let the transcript speak
14 for itself and you remember it speak for itself,
15 instead of going back through what we just did not.
16 No need to do all that.

17 My reading of the transcript, and I am
18 going to see if you remember this; was that, he was
19 pretty resistant to your cross examination because
20 he didn't feel qualified to answer questions, and
21 certainly didn't want to help you. Do you recall?

22 A. I recall that he was not prepared as I
23 expected him to be, because he had the cell phone
24 records before I had them.

25 Q. Correct.

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1 A. And I had prepared the case for
2 Mr. Bradley to show that the cell phone records
3 showed that my client was not in the area where they
4 said they had testimony that he was.

5 Q. Now---

6 A. So you are right, he did not want to help
7 me, but the records that he had that I had, also
8 showed that Mr. Bradley was not in the area where
9 they wanted him to be on Sunday morning.

10 Q. I understand what you're saying, and that
11 sort of thing I'll admit is in the record to some
12 degree. But if I recall his answer was, if you're
13 trying to ask me if he could be in two places at
14 once, no, he couldn't. That was his ultimate answer
15 to your final question on the issue. Do you recall
16 that?

17 A. No, sir. I don't recall that.

18 Q. That's fine. But prior to him getting to
19 that point, and like I said we'll just if you
20 remember any of them, we'll later we can talk about
21 them and compare the transcript after this is all
22 over with. Didn't he several times when you asked
23 him very simple questions about where cell phone
24 towers were, about where address were, you know,
25 because you had put up witnesses as you said

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1 earlier, trying to develop a timeline of where he
2 was; that the solicitor actually objected and said,
3 Your Honor, there's no addresses on that map, he
4 can't give exact addresses. He doesn't know exactly
5 where these cell phone towers are. And there was a
6 lot of back and forth concerning those sorts of
7 issues throughout his testimony, is that correct?

8 A. Yes, sir.

9 Q. So he wasn't the ideal witness to call to
10 try to establish all this, is that correct?

11 THE COURT: Ideal witness for who to call?

12 MR. KIRKLAND: For the defense to call.

13 Excuse me, for the defense to cross examine
14 concerning this issue.

15 A. But he was the witness that the State
16 called.

17 Q. Correct.

18 A. And I had to cross examine him based on
19 the information that he had supplied not only to the
20 court, but also to the defense.

21 Q. There's two issues I want to talk you to
22 about.

23 A. All right.

24 Q. No. 1, you do understand that had the
25 prosecutor maintained her objection that it was