

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND

vs.

Criminal Trial 07-1664X

KEITH A. WASHINGTON,

Defendant.

/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Trial on the Merits)

Volume VIII of IX

Upper Marlboro, Maryland

Thursday, February 21, 2008

BEFORE:

HONORABLE MICHAEL P. WHALEN, Associate Judge

(and a jury)

APPEARANCES:

For the State of Maryland:

WILLIAM D. MOOMAU, ESQUIRE
JOSEPH L. WRIGHT, ESQUIRE
RAEMARIE ZANZUCCHI, ESQUIRE

For the Defendant:

VINCENT H. COHEN, JR., ESQUIRE
MICHAEL STARR, ESQUIRE

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P R O C E E D I N G S

(Jury not present upon convening.)

THE DEPUTY CLERK: Criminal trial 07-1664X, State of Maryland versus Keith A. Washington.

MR. MOOMAU: Good morning, Your Honor. William Moomau present for the State.

MS. ZANZUCCHI: Raemarie Zanzucchi for the State.

MR. COHEN: Good morning, Your Honor. Vincent H. Cohen, Jr., on behalf of Mr. Washington.

MR STARR: Good morning. Michael Starr, also for Mr. Washington. Mr. Washington is present.

(Joseph Wright enters the courtroom.)

THE COURT: Are we doing the preliminary matter at the bench?

MR. MOOMAU: Yes, Your Honor.

THE COURT: However you wish to handle it, that's fine.

MR. STARR: Yes.

(Counsel approached the bench and the following ensued.)

MR. WRIGHT: Good morning, sir.

THE COURT: Good morning.

RENEWED MOTION FOR JUDGMENT OF ACQUITTAL

MR. STARR: Your Honor, at this time we're going to move for judgment of acquittal on all counts.

1 I want to begin, though, by moving for judgment of
2 acquittal on the voluntary manslaughter count, which is count
3 5 in the indictment. I want to put on the record that we had
4 a meeting in chambers yesterday evening, when this issue came
5 up and was discussed. The defense's position is that the
6 State has only presented evidence offered for the truth of a
7 theory that Mr. Washington fired his gun at Mr. White and
8 Mr. Clark without any provocation whatsoever.

9 During this discussion in chambers, Mr. Moomau
10 agreed and conceded that, on the issue of whether there's
11 legally adequate provocation for the voluntary manslaughter
12 count on which the Court, at this point, plans to instruct
13 the jury, that there is not legally adequate provocation.
14 That occurred in chambers yesterday.

15 So that puts us in a position where the State wants
16 the jury to have a count to consider and, presumably, wants
17 to argue Mr. Washington's guilt on this count in their
18 closing, when it is their belief that that count is
19 inapplicable, and it is their factual theory that that count
20 is false and that the elements are not met.

21 That is a due process violation. There is no good
22 faith argument that the State can make that the elements of
23 that offense have been satisfied when it is their theory that
24 the elements of that offense have not been satisfied.

25 So for that reason, Your Honor, that count has to

1 be disposed of through a motion for judge judgment of
2 acquittal.

3 I also believe, Your Honor, that the count is
4 inapplicable because -- and I submitted two cases, that I'm
5 relying on for the record, to the State and to the Court.
6 The first was Roy v. State, and that actually goes to the
7 felony murder issue, but the site on that case -- I just want
8 to put on the record -- is 385 Md. 217.

9 I also submitted -- and this goes to this point,
10 Your Honor, the point that I'm making now about the voluntary
11 manslaughter count. The case of Pagoto v. State, which is
12 127 Md. App. 271, a 1999 case. What's discussed in that
13 case, Your Honor, is the fact that the State had an entire --
14 their case was based entirely on a theory of involuntary
15 manslaughter, of the gross negligence variety, and the
16 voluntary manslaughter count was MJOA'd because that had not
17 been the State's theory.

18 I think that that's where we are, and I think we're
19 in the same position that the Court was in -- the case is in
20 the same posture because there's no evidence offered for the
21 truth that supports this count. The State has the burden of
22 proving guilt on this count, proving that the elements are
23 satisfied, and they have conceded that they are not. It is
24 their theory that they are not. They have presented no
25 evidence that those elements are satisfied, and they cannot,

1 cannot in good faith make an argument to the jury that they
2 are.

3 It puts Mr. Washington in an unfair position and he
4 is unfairly prejudiced because we then have to defend against
5 multiple inconsistent state theories in this trial, and that
6 is a position that he cannot be in from a due process
7 standpoint. So that count should be disposed of through
8 motion for judgment of acquittal.

9 THE COURT: Do you want to go on your other counts
10 first, one by one?

11 MR. STARR: I can, yes. The other count that I'll
12 address specifically is count 1, second degree felony murder.
13 Your Honor, with regards to the second degree felony murder,
14 this is where I believe the Rory case comes into play,
15 because that case discusses -- and it's a discussion that
16 takes place at page 228 in the Maryland Reporter. The issue
17 of whether felony murder charges are limited to situations in
18 which there's not justification presented -- and the Court, I
19 will say -- I mean, I think this puts us -- this Court in a
20 difficult position here because the question is expressly
21 left open by the Court of Appeals in Rory. I will put that
22 out there.

23 But they do go through -- I think that in Rory they
24 are signaling the direction which they would go, because they
25 very specifically talk about Georgia's law, they talk about

1 the position taken by a number of other state courts which do
2 not permit assault to be an underlying felony in a felony
3 murder conviction, and it's in the context of whether -- and
4 a felony murder can apply in a situation where there is
5 justification, and in the context of whether -- because what
6 happens is every assault then becomes a homicide if it
7 results in a death, and the intent element is basically
8 eviscerated.

9 Now, there are some legal situations where that's
10 allowed in the context of felony murder, but it's not allowed
11 in the context of justification. We have presented evidence
12 of self-defense. The Court doesn't have to, you know, accept
13 that evidence as having been proven by any legal standard at
14 this point, but it only has to recognize the posture that it
15 puts that count in, which is that to present it to the jury
16 as it's charged is to basically eviscerate the intent element
17 that justification defenses are geared towards.

18 The next counts that I'll address specifically are
19 the involuntary manslaughter counts contained in count 6 and
20 count 7. Now, during our discussion in chambers yesterday, I
21 wanted the record to reflect that for a period of time the
22 government agreed to abandon count 7. The State agreed to
23 abandon count 7 but then decided that they wanted it back in.
24 Now, that wasn't done on the record, but it happened.

25 It is our contention, Your Honor, that the

1 involuntary manslaughter counts are factually inapplicable
2 and not consistent with the State's theory in the same way in
3 which we discussed the voluntary manslaughter count.

4 Their theory is that Mr. Washington, without any
5 justification whatsoever, because he was mad at a furniture
6 company, shot these men, and that has nothing to do with
7 gross negligence, nothing to do with gross negligence. There
8 is no act of negligence specified in the indictment. There's
9 been no act of negligence that they've presented evidence of
10 during the trial.

11 Their evidence is he got angry at these men or he
12 got angry at Marlo, he was angry before they even got there,
13 and Mr. Moomau said in his opening statement that he answered
14 the door with his gun ready to kill somebody. Their theory
15 is that this is not gross negligence. So there's no way,
16 Your Honor, that these counts are applicable and can go to
17 the jury.

18 The same applies to the unlawful act count.

19 For those reasons I move for judgment of acquittal
20 on the manslaughter counts because they're factually
21 inapplicable and inconsistent with the State's theory that
22 the State has presented in its opening statement and through
23 evidence.

24 I also want to put on the record, Your Honor, that,
25 as to all counts, it's our contention that the totality of

1 the evidence, even drawing the inferences and constructing it
2 in the way that the Court has to, does not satisfy the intent
3 element for any of the charged offenses, and that the State's
4 proof has been legally insufficient for all of them, and that
5 we move for judgment of acquittal on every count in the
6 indictment.

7 MR. MOOMAU: First of all, Your Honor, as far as
8 the involuntary manslaughter, I did state at one point that I
9 was withdrawing that. I think it was the unlawful act in
10 voluntary manslaughter. After considering the facts, both
11 what was introduced by the State, the defense, direct and
12 cross-examination, I decided it was the State's position to
13 leave that requested instruction in as I initially had
14 requested it.

15 Second, as far as the -- and this argument goes to
16 the involuntary manslaughter and the voluntary manslaughter.
17 These charges were indicted separately. They're not lesser
18 included. The standard at this time is can a reasonable jury
19 return a verdict based on that, based on the evidence that's
20 come in from the State and the evidence that has come in from
21 the defense, direct and cross.

22 There has been evidence introduced by the defense
23 that Mr. Washington had a little bit of swelling, maybe that
24 he was hit, on the 911 recording, repeatedly. He was beaten,
25 beaten. Mrs. Washington testified that he was beaten. A

1 reasonable jury can conclude that perhaps that is legally
2 adequate provocation. We sustained the evidence necessary
3 for that charge, Your Honor, and the jury should be able to
4 consider that, as well as the involuntary manslaughter.

5 MR. STARR: Your Honor, my response --

6 MR. MOOMAU: I'm not finished, Your Honor. As far
7 as second degree felony murder, the same argument with that.
8 The evidence that's been introduced through the State and
9 through the defense that the jury has heard satisfies each
10 and every element of that.

11 As far as my personal beliefs go about what
12 happened, that's really irrelevant here. What is relevant is
13 evidence that the jury has heard and can a jury return a
14 verdict based on the crimes that have been indicted and the
15 crimes that we're asking that they be presented the
16 opportunity with to deliberate.

17 MR STARR: Your Honor, my response is this.

18 Mr. Moomau wants the Court to allow him to argue that he's
19 met his burden of proof based on evidence that the State
20 contends is false. It is the State's contention that
21 Mr. Washington had no injuries and that's been their theory.
22 They've fought tooth and nail during this trial to prove that
23 he had no injuries. Because Robert White says he was never
24 touched. That's their theory, and they cannot argue and the
25 jury cannot find that the State has carried its burden based

1 on evidence the State contends is false.

2 It's not about Mr. Moomau's personal beliefs. It's
3 about the State's theory, and the way the State has
4 proceeded -- this argument I'm making right now doesn't apply
5 the all of the counts. It applies to the counts in which the
6 State expressly wants the jury to find that they've met their
7 burden, that elements of those counts don't exist, and that
8 cannot happen.

9 There is no way, Judge, that it is legally proper
10 for the State to argue to the jury or for the jury to find
11 guilt, meaning that the State has carried its burden, based
12 on evidence that the State disavows, that they expressly
13 contend and will argue during this closing -- that's what's
14 going to happen. They're going to argue that it's false
15 during the closing, and we're going to be right back up here.

16 Unless they're going to argue that Mr. Washington
17 had injuries, they cannot have these charges. And if they're
18 going to argue that Mr. Washington had injuries, then they're
19 going to be conceding that there was some kind of fight, and
20 that's not what Robert White says, and Robert White's
21 testimony is the only evidence that they've offered for the
22 truth of what happened in that house. The only evidence.

23 MR. MOOMAU: Just because we put a witness up, Your
24 Honor, we don't vouch for everything they say. We put them
25 up on the stand. They were a witness, and you'll never see

1 me standing in front of a jury saying everything this
2 particular witness says is the truth. I can't do that as a
3 prosecutor. We put the evidence up, the jury considers it,
4 and that's what was done in this case. All of the evidence,
5 a jury could reasonably return a verdict for voluntary
6 manslaughter.

7 Now, that's it. And it was indicted, that count,
8 and the evidence supports it.

9 MR. STARR: The fact that it was indicted came long
10 before they presented this theory at a trial and that's what
11 the jury's verdict has to be based on. They're going to be
12 instructed that they have to find that the State's carried
13 its burden of proof, and they cannot find that the State has
14 carried its burden of proof based on evidence that the State
15 disavows. That cannot legally happen, Your Honor. It
16 cannot.

17 **THE COURT'S RULING**

18 THE COURT: Well, insofar as the defense arguments
19 regarding count 1, which is second degree felony murder, it
20 is the Court's view that there is, based on a totality of the
21 testimony and the evidence presented during the course of
22 this trial, that there are sufficient facts -- whether or not
23 they may be in dispute between one side or the other, there
24 are sufficient facts to be presented to the jury in which
25 they could decide beyond a reasonable doubt one way or

1 another.

2 With regard to count 5; that is, voluntary
3 manslaughter, again, looking at the testimony and evidence in
4 its entirety, whether facts are in dispute or not, which is
5 always the case in trials, there is sufficient evidence that
6 can be put before a jury for them to be able to reasonably
7 conclude beyond a reasonable doubt, either way, with regard
8 to count 5.

9 With regard to counts 6 and 7, the Court rules
10 similarly, for the same reasons as it does with all of the
11 remaining counts for which motion for judgment of acquittal
12 has been requested.

13 Looking at the instructions, before we proceed,
14 this Court would like to take note that it appears that the
15 14 sets of homicide instructions provided in the Maryland
16 Criminal Patterned Jury Instructions, as they are structured
17 by said, do not, by way of particularity, seem to cover the
18 exact nature of the charges brought by the State or the
19 circumstances involved in this case. To some extent we had
20 to separate the instructional sets in an attempt to balance
21 the interests and demands of both the State and the defense
22 particularly.

23 In charging with the particularity that the State
24 did, by way of separate second degree murder counts, it is
25 not unlike if the State had charged under common law murder.

1 It would have included all of the lesser included offenses,
2 both second degree and manslaughter.

3 In this case, the defense, even though case law
4 generates, properly raised the defense of self-defense and
5 properly requested an instruction on self-defense. Our case
6 law provides that if there is sufficient evidence generated
7 to show self-defense, there is sufficient evidence generated
8 to show imperfect self-defense.

9 Specifically, the defense didn't want that
10 instruction. They didn't want any mitigation with respect to
11 those issues involving voluntary manslaughter that are
12 charged in this instance, and the Court agreed properly that
13 it believed, despite the case law saying that if it had been
14 requested by the defense, it would be given, that they did
15 not wish to have that considered and, therefore, the Court
16 isn't providing an instruction on imperfect self-defense.

17 Reviewing everything in its totality, having put
18 all of those comments on the record, your motion for judgment
19 of acquittal on all counts is denied.

20 MR. STARR: Just very briefly, Your Honor.
21 Co-counsel reminded me just to put on the record that we did
22 make that motion, and we did move for judgment of acquittal
23 with regard to call counts, including count 5, at the
24 conclusion of the State's case.

25 THE COURT: Correct.

1 MR. STARR: What I would ask, without abandoning my
2 motion for judgment of acquittal or any arguments that I made
3 therein and maintaining that objection and those arguments
4 for the appellate record, I would ask that in some form,
5 through jury instruction or through the State's argument,
6 that they concede that they do not believe everything that
7 Robert White is saying. Because the due process violation
8 has to be cured somehow.

9 It can't be presented -- they can't be saying
10 inconsistent things. They can't be relying on evidence that
11 they disavow, and it has to be acknowledged in some form and,
12 Your Honor, I'm trying to cure it. I'm trying to come up
13 with some way to cure it, and I would suggest that we fashion
14 something along those lines or some other relief to deal with
15 the fact that the State is asking the jury to convict on
16 counts that they disavow and that they've now conceded in
17 some form, which I think is a form of Brady, that is the
18 feeling by the prosecution that their only eyewitness is not
19 telling the truth about everything, under oath, in this
20 trial.

21 MR. MOOMAU: And I never said that, Judge. What I
22 said is, as a prosecutor, I cannot vouch for the credibility
23 of a witness. I'm prohibited from doing that, and I object
24 to any instruction requiring the State to say, on the record,
25 it doesn't believe this and doesn't believe that. That's not

1 proper. The jury can believe what it wants to believe. The
2 question at this stage is is there evidence to support the
3 charges.

4 MR. STARR: And in order for count 5 to go forward
5 and the involuntary counts, the jury has to not believe
6 Robert White. That's the only way they can get there.
7 That's the only way.

8 THE COURT: And the jury has that right to
9 disbelieve Robert white, as they would have the ability to
10 put credibility in his testimony. That's a jury decision.

11 MR. STARR: That's our request.

12 THE COURT: Okay. Thank you.

13 MR. STARR: Is there a ruling on that request?

14 THE COURT: Is there a ruling on the request for me
15 to order the State to put on the record whether or not they
16 believe or disbelieve their own witness? No.

17 MR. STARR: No, meaning there is no ruling?

18 THE COURT: I'm not -- no ruling on what?

19 MR STARR: I'm sorry. I'm just trying to figure
20 out the state of the record. I just want to know whether the
21 Court has ruled on my request for either a jury instruction
22 or for the State to put on the record what Mr. Moomau said
23 and what has to be the state of their argument, which is not
24 believing their only eyewitness, either in whole or in part,
25 to try and cure what I believe is the constitutional

1 violation of --

2 THE COURT: You've made your record.

3 MR. MOOMAU: Your Honor, there's one exhibit that
4 needs some redactions and things that we're going to need to
5 talk about. I don't mind doing that after we close.

6 THE COURT: Right, it should be after and before
7 anything is produced to the jury.

8 (Counsel returned to trial tables and the following
9 ensued.)

10 THE COURT: Why don't we approach one more time
11 just for --

12 (Counsel returned to trial tables and the following
13 ensued.)

14 THE COURT: Before I give the instructions, I now
15 need to know, even though we've had informal discussion in
16 chambers, which specific instructions either side may object
17 to or wish to take exceptions with.

18 MR. STARR: I have to go get them.

19 MR. MOOMAU: You just want us to indicate any
20 objections we have now?

21 THE COURT: Yes.

22 MR. MOOMAU: The State doesn't have any objections,
23 only I did request some language to be in the self-defense
24 instructions saying that the defendant wasn't the aggressor,
25 and the Court didn't put that in because it was under the

1 imperfect self-defense part. But I just wanted the record to
2 reflect I did ask for that.

3 THE COURT: Appreciate it.

4 MR. STARR: Your Honor, for the record, Mr. Cohen
5 is just checking his notes, but as I recall, I think that the
6 defense --

7 THE COURT: Objected to proof of intent.

8 MR. STARR: To proof of intent, believing that the
9 natural and probable consequences language, specifically, was
10 prejudicial. So objected to that just on the grounds that I
11 think it, in a crude way, says that a person can shoot
12 someone, which in actual and probable consequence may be
13 death or serious injury, but if they do it in self-defense,
14 then they don't have criminal intent, and I think that the
15 instruction can be misleading in that way.

16 THE COURT: Okay.

17 MR. STARR: One moment. There is only one more
18 issue that we're looking for. We have no further objections.
19 Thank you.

20 (Counsel returned to trial tables and the following
21 ensued.)

22 (The jury entered the courtroom at 10:00 a.m.)

23 THE COURT: Good morning, ladies and gentlemen.
24 Again, I have to ask you that now ever familiar question, and
25 that is that, after we recessed yesterday for the afternoon,

1 that time period through this morning, were any of you put in
2 a position to hear, see or read any news media accounts of
3 any of the circumstances regarding this case or this trial?

4 The Court sees no affirmative response. Thank you.

5 **THE COURT'S INSTRUCTIONS**

6 Alright, ladies and gentlemen. As I mentioned to
7 you yesterday, the evidentiary portion of this matter has
8 been concluded, and the time has come to explain to you the
9 law that applies to this case. The instructions that I give
10 you about the law are binding upon you. In other words, you
11 must apply the law as I explain it to you in arriving at your
12 verdict. Any comments that I may make about the facts are
13 not binding upon you and are advisory only. It is your duty
14 to decide the facts and apply the law to those facts.

15 The defendant is presumed to be innocent of the
16 charges. This presumption remains with the defendant
17 throughout every stage of the trial and is not overcome
18 unless you are convinced beyond a reasonable doubt that the
19 defendant is guilty.

20 The State has the burden of proving the guilt of
21 the defendant beyond a reasonable doubt. This burden remains
22 on the State throughout the trial. The defendant is not
23 required to prove his innocence; however, the State is not
24 required to prove guilt beyond all possible doubt or to a
25 mathematical certainty, nor is the State required to negate

1 every conceivable circumstance of innocence.

2 A reasonable doubt is a doubt founded upon reason.
3 Proof beyond a reasonable doubt requires such proof as would
4 convince you of the truth of a fact to the extent that you
5 would be willing to act upon such belief, without
6 reservation, in an important matter in your own business or
7 personal affairs. However, if you are not satisfied of the
8 defendant's guilt to that extent, then reasonable doubt
9 exists and the defendant must be found not guilty.

10 In making your decision, you must consider the
11 evidence in this case, and that is testimony from the witness
12 stand, physical evidence or exhibits that have been admitted
13 into evidence, and the stipulations which you've heard.

14 In evaluating the evidence, you should consider it
15 in light of your own experiences. You may draw any
16 reasonable inferences or conclusions from the evidence that
17 you believe to be justified by common sense and your own
18 experiences. The following things are not evidence and you
19 should not give them any weight or consideration: The
20 charging document, inadmissible or stricken evidence, and the
21 questions and objections of counsel.

22 The charging document in this case is the formal
23 method of accusing the defendant of a crime. It is not
24 evidence against the defendant and must not create any
25 inference of guilt.

1 Inadmissible or stricken evidence must not be
2 considered or used by you. You must disregard questions that
3 I did not permit the witness to answer, and you must not
4 speculate as to the possible answers. If, after an answer
5 was given, I ruled that the answer should be stricken, you
6 must disregard both the question and the answer in your
7 deliberations.

8 During the trial I may have commented on the
9 evidence or asked a question of a witness. You should not
10 draw any inferences or conclusions from my comments or my
11 questions either as to the merits of the case or as to my
12 views regarding the witness.

13 Opening statements and closing arguments of the
14 lawyers are not evidence in this case. They are intended
15 only to help you to understand the evidence and to apply the
16 law. Therefore, if your memory of the evidence differs from
17 anything the lawyers or I may say, you must rely on your own
18 memory of the evidence.

19 As mentioned to you earlier, the State and the
20 defense have agreed to the facts contained in the
21 stipulations. These facts are not in dispute and should be
22 considered proven.

23 There are two types of evidence, ladies and
24 gentlemen, direct and circumstantial. The law makes no
25 distinction between the weight to be given to either direct

1 or circumstantial evidence. No greater degree of certainty
2 is required of circumstantial evidence than of direct
3 evidence. In reaching a verdict, you should weigh all of the
4 evidence presented, whether direct or circumstantial. You
5 may not convict the defendant unless you find that the
6 evidence, when considered as a whole, establishes guilt
7 beyond a reasonable doubt.

8 You are, as well, the sole judge of whether a
9 witness should be believed. In making this decision, you may
10 apply your own common sense and every day experiences.

11 In determining whether a witness should be
12 believed, you should carefully judge all the testimony and
13 evidence and the circumstances under which the witness
14 testified. You should consider such factors as the
15 following:

16 The witness's behavior on the stand and manner of
17 testifying;

18 Did the witness appear to be telling the truth;

19 The witness's opportunity to see or hear the things
20 about which testimony was given;

21 The accuracy of the witness's memory;

22 Does the witness have a motive not to tell the
23 truth;

24 Does the witness have an interest in the outcome of
25 the case;

1 Was the witness's testimony consistent;

2 Was the witness's testimony supported or
3 contradicted by evidence that you believe;

4 And whether and the extent to which the witness's
5 testimony in court differed from the statements made by the
6 witness on any previous occasion.

7 You need not believe any witness, even if the
8 testimony is uncontradicted. You may believe all, part or
9 none of the testimony.

10 The weight of the evidence does not depend upon the
11 number of witnesses on either side. You may find that the
12 testimony of a smaller number of witnesses for one side is
13 more believable than the testimony of a greater number of
14 witnesses for the other side.

15 In this case, ladies and gentlemen, you have heard
16 what we refer to as expert testimony. And expert is a
17 witness who has special training or experience in a given
18 field. You should give expert testimony the weight and value
19 you believe it should have. You are not required to accept
20 any expert's opinion. You should consider an expert's
21 opinion together with all of the other evidence. In weighing
22 the opinion of an expert, you should consider the expert's
23 experience, training and skills, as well as the expert's
24 knowledge of the subject matter about which the expert is
25 expressing an opinion.

1 In this case you have heard evidence that
2 Mr. Robert White has been convicted of crimes. You may
3 consider this evidence in deciding whether the witness is
4 telling the truth, but for no other purpose.

5 In this case, as well, you have heard testimony
6 that Mr. Robert White made a statement before trial and at
7 another hearing. You have also heard that Mrs. Stacey
8 Washington made a statement before trial and that Mr. Keith
9 Washington made a statement at another hearing. Testimony
10 concerning these statements was permitted only to help you
11 decide whether to believe the testimony that the witnesses
12 gave during this trial. It is for you to decide whether to
13 believe the trial testimony of Mr. White, Mrs. Washington and
14 Mr. Washington in whole or in part, but you may not use the
15 earlier statements for any purpose other than to assist you
16 in making that decision.

17 Intent, ladies and gentlemen, is a state of mind
18 and, ordinarily, cannot be proven directly because there is
19 no way of looking into a person's mind. Therefore, a
20 defendant's intent may be shown by surrounding circumstances.
21 In determining the defendant's intent, you may consider the
22 defendant's acts and statements, as well as their surrounding
23 circumstances. Further, you may, but are not required to,
24 infer that a person ordinarily intends the natural and
25 probable consequences of his acts or omissions.

1 Motive is not an element of the crime charged and
2 need not be shown. However, you may consider the motive or
3 lack of motive as a circumstance in this case. Presence of
4 motive may be evidence of guilt. Absence of motive may
5 suggest innocence. You should give the presence or absence
6 of motive, as the case may be, the weight you believe it
7 deserves.

8 In this case, ladies and gentlemen, the defendant
9 is charged with second degree murder concerning Brandon
10 Clark. There are four types of second degree murder: Second
11 degree felony murder, second degree murder (specific intent
12 to kill), second degree murder (with specific intent to
13 inflict grievous or serious bodily injury), and second degree
14 murder (depraved heart).

15 He is also charged with voluntary manslaughter,
16 involuntary manslaughter (gross negligence), and involuntary
17 manslaughter (unlawful act), as well as first degree assault.

18 As to Mr. Robert White, the defendant is charged
19 with attempted second degree murder and first degree assault.

20 You must consider each charge separately and return
21 a separate verdict as to each charge with the following
22 exception: Do not consider the charge of use a handgun in
23 the commission of a felony until you have reached a verdict
24 on the enumerated felonies. Only if your verdict on any one
25 of these charges is guilty should you consider whether the

1 defendant is guilty or not guilty of use of a handgun in the
2 commission of a felony.

3 If, however, your verdict on these charges is not
4 guilty, you must find the defendant not guilty on use of a
5 handgun in the commission of a felony.

6 The defendant is charged with the crime of second
7 degree felony murder. Felony murder does not require the
8 State to prove that the defendant intended to kill the
9 victim. In order to convict the defendant of second degree
10 felony murder, the State must prove the following: One, that
11 the defendant committed the crime of first degree assault;
12 two, that the defendant killed Brandon Clark; and, three,
13 that the act resulting in the death of Brandon Clark occurred
14 during the first degree assault.

15 To convict the defendant of first degree assault,
16 the State must prove, one, that the defendant intentionally
17 caused serious physical injury to Brandon Clark and, two,
18 that the injury was not consented to by Brandon Clark.

19 For second degree felony murder, serious physical
20 injury means injury that creates a substantial and
21 foreseeable risk of death.

22 The defendant is also charged with second degree
23 murder involving the killing of another person with either
24 the intent to kill or the intent to inflict such serious
25 bodily harm that death would be the likely result. Second

1 degree murder does not require premeditation or deliberation.

2 In order to convict the defendant of second degree
3 murder, the State must prove, one, that the conduct of the
4 defendant caused the death of Brandon Clark; two, that the
5 defendant engaged in the deadly conduct either with the
6 intent to kill or with the intent to inflict such serious
7 bodily harm that death would be the likely result; or, three,
8 that the killing was not justified. Complete self-defense is
9 a justification.

10 The defendant is also charged with voluntary
11 manslaughter. Voluntary manslaughter is an intentional
12 killing, which would be murder, but is not murder because the
13 defendant acted in hot-blooded response to legally adequate
14 provocation. This does not result in a verdict of not guilty
15 but, rather, reduces the level of guilt from murder to
16 manslaughter.

17 You have heard evidence that the defendant killed
18 Brandon Clark in hot-blooded response to legally adequate
19 provocation. In order to convict the defendant of murder,
20 the State must prove that the defendant did not act in
21 hot-blooded response to legally adequate provocation. If the
22 defendant did act in hot-blooded response to legally adequate
23 provocation, the verdict should be guilty of voluntary
24 manslaughter and not guilty of murder.

25 Killing in hot-blooded response to legally adequate

1 provocation is a mitigating circumstance. In order for this
2 mitigating circumstance to exist in this case, the following
3 five factors must be present:

4 One, the defendant reacted to something in a
5 hot-blooded rage; that is, the defendant actually became
6 enraged;

7 Two, the rage was caused by something the law
8 recognizes as legally adequate provocation; that is,
9 something that would cause a reasonable person to become
10 enraged enough to kill or inflict serious bodily harm. The
11 only act that you can find to be adequate provocation under
12 the evidence in this case is the battery by the victim upon
13 the defendant;

14 Three, the defendant was still enraged when he
15 killed the victim; that is, the defendant's rage had not
16 cooled by the time of the killing;

17 Four, there was not enough time between the
18 provocation and the killing for a reasonable person's rage to
19 cool;

20 And, five, the victim was the person who provoked
21 the rage.

22 In order to convict the defendant of murder, the
23 State must prove that the mitigating circumstance of
24 hot-blooded provocation was not present in this case. This
25 means that the State must persuade you beyond a reasonable

1 doubt that at least one of the five factors was absent. If
2 the State has failed to persuade you that at least one of the
3 five factors was absent, you cannot find the defendant guilty
4 of murder but may find the defendant guilty of voluntary
5 manslaughter.

6 In order to convict the defendant of murder, the
7 State must prove that the defendant did not act in
8 hot-blooded response to legally adequate provocation. If the
9 defendant did act in hot-blooded response to legally adequate
10 provocation, the verdict should be guilty of voluntary
11 manslaughter and not guilty of murder.

12 The defendant is also charged with second degree
13 depraved heart murder. This is the killing of another person
14 while acting with an extreme disregard for human life. In
15 order to convict the defendant of second degree murder,
16 depraved heart, the State must prove the following three
17 things:

18 That the conduct of the defendant caused the death
19 of Brandon Clark;

20 Two, that the defendant's conduct created a very
21 high degree of risk to the life of Brandon Clark;

22 And, three, that the defendant, conscious of such
23 risk, acted with extreme disregard of the life-endangering
24 consequences.

25 The defendant is also charged with the crime of

1 involuntary manslaughter, gross negligence. In order to
2 convict the defendant of involuntary manslaughter, gross
3 negligence, the State must prove the following: That the
4 conduct of the defendant caused the death of Brandon Clark
5 and that the defendant, conscious of the risk, acted in a
6 grossly negligent manner; that is, in a manner that created a
7 high degree of risk to human life.

8 The defendant also is charged with the crime of
9 involuntary manslaughter, unlawful act. In order to convict
10 the defendant of involuntary manslaughter, unlawful act, the
11 State must prove the following three things: That the
12 defendant committed first degree assault, an unlawful act;
13 that, two, the defendant killed Brandon Clark; and, three,
14 that the act resulting in the death of Mr. Clark occurred
15 during the commission of the unlawful act.

16 The defendant is also charged with the attempted
17 second degree murder of Robert White. Attempted second
18 degree murder is a substantial step, beyond mere preparation,
19 toward the commission of a murder in the second degree. In
20 order to convict the defendant of attempted murder in the
21 second degree, the State must prove the following three
22 things:

23 That the defendant took a substantial step, beyond
24 mere preparation, toward the commission of murder in the
25 second degree;

1 Two, that the defendant had the apparent ability,
2 at that time, to commit the murder in the second degree;

3 And, three, that the defendant actually intended to
4 kill Robert White.

5 The defendant is also charged with the crime of
6 first degree assault against Robert White. In order to
7 convict the defendant of first degree assault, the State must
8 prove all of the elements of second degree assault, and they
9 are:

10 One, that the defendant caused physical harm to
11 Mr. White;

12 Two, that the contact was the result of an
13 intentional or reckless act of the defendant and was not
14 accidental;

15 And, three, that the contact was not consented to
16 by Mr. White or not legally justified.

17 And the State must also prove that the defendant
18 used a firearm to commit the assault, or the defendant
19 intended to cause serious physical injury in the commission
20 of the assault.

21 A firearm is a weapon that propels a bullet by
22 gunpowder or similar explosive.

23 Serious physical injury means injury that, one,
24 creates a substantial risk of death or, two, causes serious
25 and permanent or serious and protracted disfigurement or loss

1 of impairment of the function of any bodily member or organ.

2 The defendant is also charged with two counts of
3 the crime of use of a handgun in the commission of a felony.
4 The felonies in this case are second degree murder, voluntary
5 manslaughter, involuntary manslaughter, and first degree
6 assault. In order to convict the defendant, the State must
7 prove the following two things: One, that the defendant
8 committed at least one of the felonies enumerated above; and,
9 two, that the defendant used a handgun in the commission of
10 at least one of these felonies.

11 A handgun is a pistol, revolver or other firearm
12 capable of being concealed on or about the person and which
13 is designed to fire a bullet by the explosion of gunpowder.

14 Use of a handgun means that the defendant actively
15 employed a handgun. Mere possession of a handgun at or near
16 the crime, without active employment is not sufficient.

17 Although the term "use" connotes something more
18 than potential for use, there need not be conduct that
19 actually produces harm but only conduct that produces a fear
20 of harm or force by some means. Such means include
21 brandishing, displaying, striking with, firing, or attempting
22 to fire a handgun in furtherance of the felony.

23 In this case, ladies and gentlemen, you have heard
24 evidence that the defendant acted in self-defense.

25 Self-defense is a defense, and you are required to find the

1 defendant not guilty if all of the following three factors
2 are present:

3 One, that the defendant actually believed that he
4 was in immediate and imminent danger of bodily harm;

5 Two, the defendant's belief was reasonable;

6 And, three, the defendant used no more force than
7 was reasonably necessary to defend himself in light of the
8 threatened or actual harm.

9 Deadly force is that amount of force reasonably
10 calculated to cause death or serious bodily harm. If you
11 find that defendant used deadly force, you must decide
12 whether the use of deadly force was reasonable. Deadly force
13 is reasonable if the defendant actually had a reasonable
14 belief that the aggressor's force was or would be deadly and
15 that the defendant needed a deadly force response.

16 In addition, before using deadly force, the
17 defendant is required to make all reasonable effort to
18 retreat. The defendant does not have to retreat if the
19 defendant was in his home, retreat was unsafe or that the
20 avenue of retreat was unknown to the defendant. In you find
21 that the defendant did not use deadly force, then the
22 defendant had no duty to retreat.

23 In order to convict the defendant, the State must
24 prove that self-defense does not apply in this case. The
25 State must prove beyond a reasonable doubt that at least one

1 of these three factors previously stated was absent; that is,
2 that the defendant did not actually believe that he was in
3 immediate and imminent danger of bodily harm or that the
4 defendant's belief was not reasonable or that the defendant
5 used more force than was reasonably necessary to defend
6 himself.

7 You have also heard evidence that the defendant
8 acted in defense of another. Defense of others is a defense,
9 and you are required to find the defendant not guilty if all
10 of the following four factors are present:

11 One, that the defendant actually believed that the
12 person or persons defended were in immediate or imminent
13 danger of bodily harm;

14 Two, the defendant's belief was reasonable;

15 Three, the defendant used no more force than was
16 reasonably necessary to defend the person or persons defended
17 in light of the threatened or actual force;

18 And, four, the defendant's purpose in using force
19 was to aid the person or persons defended.

20 In order to convict the defendant, the State must
21 prove that defense of others does not apply in this case.
22 This means that you are required to find the defendant not
23 guilty unless the State has persuaded you beyond a reasonable
24 doubt that at least one of the four factors of this defense
25 of others was absent.

1 You have also heard evidence that the defendant
2 acted in defense of his home. Defense of one's home is a
3 defense, and you are required to find the defendant not
4 guilty if all of the following three factors are present:

5 One, the defendant actually believed that Robert
6 White and Brandon Clark were committing the crime of assault
7 in his home;

8 Two, the defendant's belief was reasonable;

9 And, three, the defendant used no more force than
10 was reasonably necessary to defend against the conduct of
11 Mr. Clark and Mr. White.

12 In order to convict the defendant, the State must
13 show that the defense of one's home does not apply in this
14 case by proving beyond a reasonable doubt that at least one
15 of the three factors previously stated was absent.

16 As we have mentioned throughout the trial, ladies
17 and gentlemen, you must completely disregard any newspaper,
18 television or radio reports that you may have read, seen or
19 heard concerning this case. Such reports are not evidence.
20 You must not be influenced in any manner by any publicity.

21 You must consider and decide this case fairly and
22 impartially. You are to perform this duty without bias or
23 prejudice as to any party. You should not be swayed by
24 sympathy, prejudice or public opinion.

25 Your verdict must represent the considered judgment

1 of each juror and must be unanimous. In other words, all 12
2 of you must agree.

3 Now, we know, ladies and gentlemen, that that is a
4 lot of information for you to take in with regard to the
5 instructions. All counsel and the Court are going to provide
6 you with a set of the written instructions that I have read
7 to you precisely. The law requires us to be precise in
8 giving you these instructions. Therefore, we're giving you a
9 copy of the written instructions to use, should you need
10 them, during your deliberations.

11 We're also giving you what we call the verdict
12 sheet. It lists the charges for you, and you can proceed
13 downward as to each charge. You will have this available in
14 the jury room for you during deliberations as well.

15 Counsel, wish to approach the bench?

16 (Counsel approached the bench and the following
17 ensued.)

18 THE COURT: Other than your earlier exceptions and
19 objections, is the State satisfied with the instructions as
20 given?

21 MR. MOOMAU: Yes, subject to everything I said
22 before.

23 THE COURT: Okay. And, defense, subject to
24 everything you earlier put on the record as well?

25 MR. STARR: Correct.

1 MR. COHEN: Yes, Your Honor.

2 THE COURT: How would you like to --

3 MR. MOOMAU: I need to turn the Nomad on and get it
4 set up. Mr. Wright wanted to play a portion of the 911
5 during his closing. We've had some technical difficulties
6 before, and I don't anticipate any, but I don't want to
7 fumble around in closing.

8 THE COURT: Do you have a problem with excusing the
9 jury for ten minutes while the equipment is set up?

10 MR. COHEN: No objection.

11 THE COURT: Before we proceed to closing argument,
12 we're going to give you a ten-minute recess so that some
13 equipment can be set up in the courtroom.

14 (The jury was excused from the courtroom at
15 10:30 a.m.)

16 THE COURT: Are we ready to bring the jury back?

17 MR. WRIGHT: Yes, Your Honor.

18 (The jury returned to the courtroom at 10:50 a.m.)

19 THE COURT: Mr. State's Attorney.

20 MR. WRIGHT: May I, Your Honor?

21 THE COURT: Yes, please.

22 **CLOSING ARGUMENT BY MR. WRIGHT**

23 MR. WRIGHT: Brandon Clark, he woke up at about
24 4 a.m. to start a good, honest, hard day's work. He did more
25 before 6 a.m. than I would venture most of us here today. He

1 delivered heavy, back-breaking furniture. He got --

2 MR STARR: Objection, Your Honor.

3 THE COURT: Approach, please.

4 (Counsel approached the bench and the following
5 ensued.)

6 MR. STARR: Your Honor, they're using the photo to
7 create sympathy for the jury. The issue of identity is
8 established.

9 THE COURT: Overruled.

10 (Counsel returned to trial tables and the following
11 ensued.)

12 MR. WRIGHT: He got to his last delivery of that
13 day, and he didn't realize that this would be the last
14 delivery of his life. He lost his fight on February the 2nd
15 of 2007. This is for Brandon.

16 MR. STARR: Objection, Your Honor.

17 THE COURT: Let the record note that Ms. Zanzucchi
18 is sitting down with that photograph now.

19 MR. WRIGHT: Robert White woke up at six. He found
20 out that he was needed to come help do some manual labor. He
21 was out on the corner, ready to work, ready to earn money.
22 He worked all day, hard, back-breaking work. When he laid
23 down on that carpet with the bullets in him, you heard him
24 saying I cannot believe I'm going to leave this place today
25 over some bed rails. This is for Robert.

1 MR. STARR: Objection, Your Honor.

2 THE COURT: Sustained.

3 MR. STARR: Move those comments be stricken.

4 THE COURT: Stricken.

5 MR. WRIGHT: And when he sat in his house, mad, at
6 1:30, over the delivery, angrier at five, angrier at six,
7 fuming by 7:30, when they arrived and when he was still
8 looking for a fight, as Brandon Clark told Mr. White, and
9 when they called Marlo and they said this is messed up, and
10 when he fired the shots into the young men, and he kept
11 shooting until the gun jammed, this is also for him.

12 MR. STARR: Objection.

13 THE COURT: Sustained.

14 MR. STARR: Move to strike.

15 THE COURT: Stricken.

16 MR. WRIGHT: This is what we heard. Robert White
17 told you that they were being given directions to get to this
18 house. They arrive, get to the house. It's dark. The
19 person knew they were coming. They were to exchange bed
20 rails. Bed rails.

21 They ring the doorbell. We're here to change bed
22 rails. Do you have the rails that we're supposed to take
23 back? Of course not; I don't have any rails. Nah.

24 They called back to Marlo. The rails aren't here
25 to exchange; this is messed up; I don't know what's going on,

1 but we can't just leave these rails without bringing
2 something back; I need authorization; I am only a delivery
3 driver; can I get authorization to just leave these rails?
4 Yes; go back, please; just deliver the rails and install them
5 and go; I'll see you later.

6 They go with those instructions. Mr. Washington
7 follows them up to that fateful place. They go up, they
8 follow. Brandon kneels down, to start getting the bed ready
9 to put the rails on, when he starts getting hit. He gets
10 pushed.

11 Brandon is large. He's a furniture delivery guy.
12 He's large, to the point where you remember Mr. White said do
13 you know him or something; what's going on? Brandon wasn't
14 being hurt, by any stretch of the imagination, but it was
15 just odd how he was being pushed, poked, talked to any kind
16 of way, to the point where -- and this is where your notes
17 will always control. Your memory will always control.
18 Something was said to the effect of, sir, I think you really
19 need to watch how you talk to people. Do you all remember
20 that? What did that comment do to him? Set him into what he
21 calls an out-of-mind, out-of-body experience.

22 MR. STARR: Objection. Mischaracterization.

23 THE COURT: Overruled.

24 MR. WRIGHT: Do you remember when he said I started
25 showing them to the stairs and to get out of my house? Do

1 you remember the motion he was making when he said I was
2 pointing them to the stairs? Did he make this kind of motion
3 or did he make this kind of motion? And at the point when he
4 said get out of my house, get the "F" out of my house, he had
5 the gun.

6 What happened? Robert White tells you. Look,
7 Brandon, come on; let's just get out of here; this is crazy;
8 let's go. And he starts walking him out. Then shot. Boom.
9 Brandon is hit in the chest. Or he may have been hit in the
10 knee, but I do know, with the first shot, there was no
11 gunshot residue. We know this, right?

12 And what does that mean? You heard the fact that
13 there is no gunshot residue on that first shot. It was more
14 than at least four feet away. I'm sure some of you have that
15 in your notes.

16 After the first shot at a distance of well more
17 than four feet -- and we're talking about a foyer, correct?
18 A foyer where it can't be no more than -- I think their
19 expert -- and I don't even want to call her an expert -- said
20 eight feet, six feet, five feet. I don't care. It was
21 close. It was probably no bigger than where I am or a little
22 bigger than where I am right now. That first shot was from a
23 distance of more than four feet. There is no gunshot
24 residue.

25 The second shot, though, has gunshot residue.

1 Which means what? It means that after he fired the first
2 shot, he kept walking on, towards Brandon, and got closer,
3 and he got within a point where he was within four feet and
4 fired the second shot, and there was gunshot residue on that
5 shot. Boom.

6 Robert White told you he couldn't believe what was
7 happening. His cousin gets shot in front of him and it's not
8 like -- they were at their job, doing their job. He's shot.
9 He kind of helps him down. He says this. He starts looking
10 for his cell phone to call for help. He's on the second
11 step. Brandon is right here, and at some point he is shot.
12 Boom. That shot goes in him, comes down and there's no
13 gunshot residue. What does that mean? That shot was also
14 more than four feet away.

15 What is going through his mind after the first
16 shot, I have no idea. But he gets up. He was going to make
17 his way over and he gets shot again. Boom. And he goes --
18 because his cousin is here, bleeding. He comes over to here,
19 to his resting place, and he's down.

20 The thing is this. He says he gets up at some
21 point because, you know, he's not trying to die right here.
22 He gets up. Mr. Washington goes into a bedroom or something.
23 He stands up. Washington comes out, sees him standing up.
24 Didn't I tell you to stay where you are? Close range to his
25 knee. The gunshot residue proves it. Bam. That's why we

1 have gunshot residue on his knee.

2 Miraculously, the gun jams and no more shots come
3 out the gun.

4 Stacey Washington was in the kitchen during this
5 incident. She was sitting there with her daughter at the
6 kitchen. She says they were eating dinner. There was a wine
7 glass right there. She says it's not my wine glass; I don't
8 know what's in that wine glass. It's probably not Kayla's
9 wine glass. Whose wine glass was that with the red substance
10 in it? Who had been drinking at dinner while armed with a
11 gun in his belt? But she heard the yelling, "get out of my
12 house," "get out of my house," and she got up and she went to
13 the foyer.

14 What does she see? The day of the killing she
15 never said she saw the shots. I heard some shots, grabbed
16 the phone and I ran outside. But the reality becomes she
17 did, in fact, see the shots because then she says yes, I did
18 see not a shot but flashes from the gun. She saw the
19 killing. She saw the shooting. She didn't want to say it.
20 She saw her husband shoot Robert White. She grabbed the
21 phone and went outside.

22 When you see a shooting like this, what was Stacey
23 supposed to do? She saw her husband just kill two furniture
24 deliverymen who had been in the house by her own --

25 MR. STARR: Objection.

1 THE COURT: Sustained.

2 MR. WRIGHT: One deliveryman dead and one who has
3 been damaged for life. I apologize for that.

4 She picks up the phone and says, 911, I think
5 someone's been shot. Not I heard shots, I heard gunfire, but
6 I think someone was actually shot. When you hear gunfire and
7 don't see it, do you think someone has been shot or do you
8 think you hear gunfire?

9 Number two, when you hear five bullets, do you
10 think one person -- when you only hear five bullets, do you
11 think only one person has been shot, or do you think two
12 people were shot? She was asked, who were shot; how many
13 people were shot? Two people. How does she know that not
14 only one person was shot but two people were shot? She knew
15 two people were shot because she, in fact, saw the shooting.
16 She calls 911 to get help. She tells them two people have
17 been shot.

18 He picks up the phone and he refuses to answer very
19 important questions. What happened? He refuses to answer.
20 Did they break in? Refuses to give a correct or good answer.
21 Tell me what happened again, sir. Refuses to answer. Why
22 were they there? Refuses to answer. By then, again, it's
23 still okay. How did they get there? The dispatcher had no
24 idea what happened because all she ever was told was this:
25 They were beating me, assaulting me, beating me, assaulting

1 me, and I'm a police officer; in my house; deep up in my
2 house and they're bleeding on my carpet. That's the only
3 thing he would say. I'm in my house. At one point he says
4 deep up in my house and they are bleeding on my carpet. He
5 felt free to always say that. He refused to answer the
6 important questions. He refused to answer the questions that
7 lead directly to this, why we're here today. His omissions
8 speak volumes.

9 You also never heard anything about they were in my
10 daughter's bedroom. You didn't hear anyone -- you didn't
11 hear anything about that on the tape, not once.

12 I'm going to deal with the scientific evidence at
13 this point and what we heard today. Scientific evidence,
14 Dr. Locke. I believe that's the correct name, one of the
15 early doctors in. No close-range shooting. No close-range
16 shooting. Check your notes; feel free. No close-range
17 shooting, and I assume some of you wrote that down.

18 Because remember what we heard? I was down, they
19 were on me, and I just pow, pow, pow, pow, pow.

20 Do you remember what she said? I heard five shots
21 in a row, pop, pop, pop, pop, pop.

22 That does not comport, fudge, go with, that does
23 not match, track, or anywhere comes close to what we've heard
24 today, that version. It's just not true.

25 DNA. Robert White's DNA is on the gun. Keith

1 Washington never once said that Robert White touched the gun.
2 Robert White never once said he touched the gun. So how in
3 the world did Robert White's DNA get on the gun? I think
4 what you did hear about DNA transfer is this: Either I can
5 touch the gun or, while I'm down, the gun can touch me.

6 Option number two: I can touch the gun or, while
7 I'm gone and I'm walking around in the house, my gun can
8 touch the blood all over my carpet.

9 But no one has ever said that Robert White touched
10 the gun; yet, his DNA is on it.

11 I'm going to deal with it since it came up. The
12 clothes, fiber transfers. There was some fiber that was said
13 belonging to Mr. Clark, found on something of
14 Mr. Washington's. The clothes sat in Mr. Washington's house
15 for a week. The clothes were in his house for at least two
16 or three hours before -- I'm sorry. The clothes were in his
17 house with him at least two or three hours, with all the
18 police there and everything else. He never changed his
19 clothes.

20 The fibers could have come from anywhere because
21 fibers, much like DNA, I can lay on the tissue box as I've
22 been shot, and my fibers are all over that carpet. I'm taken
23 to the hospital. Keith Washington is there for the next
24 week, four days, five days. His clothes can drag all along
25 this thing and, oh, my gosh, we have fiber transfer. That's

1 what you were told today, this past week.

2 Essentially, this is the lesson. Bad data in,
3 troubling results out. If you can't trust where "X" comes
4 from, you sure cannot believe "Y."

5 The toxicology of White. I'm going to address this
6 too. Here's the toxicology report that has been admitted
7 into evidence. This report states on it, "This is a
8 screening test only. Not intended for legal purposes. No
9 chain of custody has been documented. Confirmation needs to
10 be done." And in it it says cocaine, it says positive, with
11 an asterisk on it. The only asterisk I see down here, come
12 down here, it says abnormal. I'm not sure what this means.
13 If you can figure it out, good luck, but it's for you to look
14 at.

15 But the one thing we have always heard is that
16 Robert White says "I don't use cocaine;" yes, the report says
17 I do; yes, the report says it's a screening, not a test; yes,
18 the report says confirmation is necessary; yes, the report
19 also says asterisk, abnormal, but I'm telling you this, I
20 didn't use cocaine. But like I learned growing up, you know,
21 everybody wasn't made perfect, but everybody was made at some
22 point.

23 Susan Lee, the firearms expert. What I want you to
24 gather from her testimony is this: What she said is one shot
25 means one pull of the trigger. Two shots means what? Two

1 pulls of the trigger. Three shots means what? Three pulls
2 of the trigger. Four shots means four pulls of the trigger.
3 Five shots, five pulls of the trigger. Six shots, the gun
4 jammed, and she told you at that point he couldn't shoot
5 anymore. And, remember, he told you he don't know if he
6 would have kept shooting or not.

7 MR. STARR: Objection, Your Honor.

8 THE COURT: Sustained.

9 MR. STARR: Move to strike.

10 THE COURT: Stricken.

11 MR. WRIGHT: You want to know What the medical
12 testimony that we heard in this case and it's -- it is what
13 it is. Mr. White -- I'm sorry. Mr. Washington. I deeply
14 apologize. Mr. Washington, Keith, the defendant, said I was
15 being beaten; I was beaten in the face; I was hit in the
16 head. He said I was kicked in the face by these two large
17 men.

18 This here shows he said that he was injured but no
19 evidence of trauma. No evidence of trauma. If a 300-pound
20 man and his cousin, who is 280, beat, kicked, punched for 10
21 or 15 seconds, would you have a bruise? Would you have
22 something that the doctor would have said, but the doctor,
23 Dr. Dixon, said no trauma, no bruising, no swelling, not a
24 scratch, not a cut, no laceration observed. But she said but
25 he always said he had pain, so I wrote that down.

1 Concepcion. Concepcion, the nurse. She said no
2 injuries observed on him, no lacerations on him, but he said
3 he had pain. Skin, normal. Not flushed, not pink.
4 Everything was clear. Everything looked fine. Nothing. The
5 nurse said I see nothing, but when a patient comes in and
6 says he was hurt, I write down the fact that he says that,
7 but I didn't see any evidence of two 300 pounders beating,
8 punching him, kicking him in the face.

9 Clyde Washington. I don't remember who he was or
10 not. He was the ambulance who came back for Mr. Washington,
11 eventually, that night. He told you he came back out, and
12 what Defendant's Exhibit Number 10 will show you, he arrived
13 back out at the scene at 9:15. He didn't leave the scene for
14 35 -- 32 minutes later. And what did he say he was doing for
15 those 32 minutes? He had been called up there to get
16 Mr. Washington. He pulls up with an ambulance, and he was
17 told he had to sit there for 20 minutes. He just sat. We
18 had an ambulance sitting out front of his house, waiting for
19 him for 20 minutes, and Mr. Washington told you I saw no
20 injuries, but he said he was in pain, so.

21 He also told you that the police went with him.
22 They rode with him to the hospital. The police got in the
23 back with him and rode to the hospital. The police also went
24 to his wife's, where she was over -- I think the name is the
25 Hamptons. They went over with him. The police were walking

1 around with him for hours during this incident.

2 Taylor. He testified he took this picture. You
3 saw it already. The one thing I can say about pictures, a
4 picture is a picture. Do you see the fact that he was kicked
5 in the face? Do you see the fact that he was beaten in the
6 face? Beat in the head? Do you see the fact that two
7 300-pound men jumped on him and beat him mercilessly. To use
8 Mrs. Washington's words, "severely beating him to death."
9 Does this look like this picture was taken before he went to
10 the hospital?

11 MR STARR: Objection, Your Honor.

12 THE COURT: Sustained.

13 MR. STARR: Move to strike.

14 THE COURT: Stricken as to the wording.

15 MR. WRIGHT: Another picture. This picture was
16 taken by Lieutenant Walls, and your notes will always control
17 as to what Lieutenant Walls said. Check your notes. Does
18 this picture, taken a couple hours later, reflect a person
19 who has been beaten, kicked in the face, punched, bruised,
20 hurt, severely beaten, pummeled? These were all the words
21 that were used by Mr. Washington and Mrs. Washington by the
22 two 300-pound men. No, it doesn't.

23 You heard a lot of testimony over this last week.
24 It felt like four weeks; I grant you that. You heard from
25 Marilyn Clark. Marilyn Clark told you she hired the lawyer.

1 She dealt with the lawyer. She is not a lawyer. She hired
2 the lawyer. She dealt with the lawyer. She is not a lawyer.
3 She did not draft the lawsuit, create the lawsuit, she did
4 not file the lawsuit, but she knew about the lawsuit, and
5 she's the one who deals with him, and she told you she misses
6 her son.

7 MR. STARR: Objection.

8 THE COURT: Sustained.

9 MR. WRIGHT: We heard from Robert Rascoe who told
10 you that his job is to assist drivers. Mr. Rascoe is
11 interesting because he said he received a call at what time?
12 1:30 from Mr. Washington asking about his delivery, and he
13 told you that Mr. Washington was cursing on the phone with
14 him at 1:30. He told Mr. Washington, look, sir, you do not
15 even need to be there. You can have anyone sign for it.
16 Look in the computer; it's just a redelivery. And
17 Mr. Washington hangs up the phone on him, mad --

18 MR STARR: Objection.

19 MR. WRIGHT: -- at 1:30.

20 THE COURT: Overruled.

21 MR. WRIGHT: Steven Gorham spoke with Washington
22 about seven o'clock. I'm just a sales guy. His customer is
23 calling. I'll take the phone call. It's Mr. Washington.
24 Mr. Washington says wears my delivery? I don't know; let me
25 check. Let me just check. Let me just check. Let me call

1 you back, sir. Let me get some information to call you back.

2 He checks on the delivery. He calls him back.

3 Sir, your delivery is en route. I have lost time and money
4 sitting here waiting for my furniture. Who is going to
5 compensate me? I need \$400. Sir, I'm a salesman. I'm only
6 a salesman. I cannot compensate or get involved with any
7 type of \$400. You can talk to my manager. I'm going to give
8 you his number, but your delivery is on the way.

9 Michael Robinson. Michael sat there and remember
10 he started crying at some point. Why? Because he knew he
11 was supposed to be on that truck. It is his truck. The only
12 reason why he wasn't there that day is because his girlfriend
13 had to go to class and wanted his car, and he's like alright,
14 I'm going to let Brandon go and he can get Robert. He was
15 supposed to take the bullets, and he is crying to this day
16 and he cried for you.

17 MR. STARR: Objection.

18 THE COURT: Sustained.

19 MR. WRIGHT: And he told you --

20 MR. STARR: Move to strike.

21 THE COURT: Stricken.

22 MR. WRIGHT: What he told you is this: I talked to
23 him at about 7:39, and I called him back when they said they
24 had issues; it was all messed up. I called him back at 7:42,
25 and I told them, look, you can leave the rails, install them

1 and just get out of there and go home.

2 Charles Carlson, the EMT, says he gets there on the
3 scene and Brandon is handcuffed. He's shot, he's handcuffed,
4 he's on the floor. He deals with Robert White, who tells him
5 that whole phrase that I can't believe I'm checking out of
6 here over bed rails. Carlton tells you he sees a shell
7 casing over by Mr. Clark. What does that mean? Shell
8 casings over here, where the initial shootings occur.

9 So how does a shell casing get to the other side of
10 the foyer? Because this is what happened, as I told you
11 before. Shot, shot to Brandon. He's down. Shot, shot to
12 Robert. He's down. But he moves over here. Keith goes in.
13 Comes back out. Robert gets back up. Close range shot to
14 knee. Robert is down for good.

15 That's why the casing is over here on Robert.
16 That's why the other casings are over here by the initial
17 scene, because it was, essentially, the shooting is over
18 here, shootings over there. That's why we have gunshot
19 residue over here, and we have some gunshot residue here and
20 not here. Take your time with this.

21 Charles Nelson -- I'm sorry. You heard from George
22 Jones. George Jones was the police officer on the scene. He
23 said he came in there and he came in and he handcuffed
24 Brandon Clark. Listen to the 911. That's what happened. He
25 handcuffed Brandon Clark. I secured the scene. I didn't

1 leave that scene until four in the morning, but the question
2 becomes who did he secure the scene from? He secured it from
3 Brandon and Robert, but did he secure it from the defendant?
4 Who secured the scene from the defendant?

5 Charles Nelson, he came on the scene. He received
6 evidence. He said, well, about two hours later I got there.
7 I had to take his gun, so I went up to him and I said can I
8 have your gun, and he pulled it out of his pants and he gave
9 me his gun. He was walking around with his gun for almost
10 two hours, stuck in his pants. And that's where I got it
11 from, I got it from him; that's where I got the gun from.

12 Jury instructions. The judge read to you many jury
13 instructions. You'll have a copy of them. I only want to
14 make a couple notes on a couple of key points that I find
15 interesting. You are to look at each and every charge
16 against the defendant in this matter. When you do certain
17 crimes, you commit a host of acts. When you do certain acts,
18 like shoot someone, shoot two people with a handgun, you kill
19 one, you attempt to kill the other one, you commit a host of
20 crimes.

21 What you have to do is look at each and every
22 specific crime there and weigh the evidence, and the evidence
23 will lead you to find beyond a reasonable doubt that he, in
24 fact, committed these crimes. But look at every charge. You
25 can find him guilty of the four second degree murder charges,

1 the attempt murder charge. You can find him guilty of two
2 murder charges and one of the attempt murder charges, but you
3 need to look at every particular charge.

4 You were also given instructions on impeachment by
5 prior conviction. Robert White has a prior conviction. It
6 happened a long time ago. I want to say it was '93 and '95,
7 theft. You have determine whether that has anything to do
8 with today. You have to look at that. You have to remember
9 what happened to him 10, 15, whatever the math is, years ago
10 had anything to do with today. Mr. White does, in fact, have
11 a prior, but you have to determine whether that has anything
12 to do with today.

13 You also received an instruction called proof of
14 intent. What it says to you -- and you're going to get this
15 in writing. You can tell what a person meant to do by their
16 acts or their omissions, what they did, what they didn't do.
17 That you're going to have to look at carefully.

18 Time line. This is what we have. I'm going to ask
19 for help in this. Time line is Keith -- just to keep clear
20 in your head what we're dealing with:

21 1:30, Washington calls the store to speak with
22 Rascoe. Feel free to take notes along with this, if you
23 wish.

24 7:00, Washington calls store, speaks with Gorham.

25 7:15, Washington speaks with Marlo's again when

1 drivers are en route.

2 7:30, Marlo arrives. Clark tells White this guy is
3 looking for a fight.

4 7:39, Michael Robinson speaks with Clark and Clark
5 says this delivery is all messed up.

6 7:42, the last Marlo phone call with instructions
7 to just do the delivery, install the rails, go home. 7:42,
8 that call lasts about a minute and a half.

9 7:45, the movers come in the house and they go
10 upstairs.

11 MR STARR: Objection, Your Honor.

12 THE COURT: Approach the bench.

13 (Counsel approached the bench and the following
14 ensued.)

15 THE COURT: Where are you getting this 7:45?

16 MR. WRIGHT: The phone call was a minute and a half
17 long, which takes you to about 7:43 and a half. They have to
18 get from the truck to the stairs, and he walks them upstairs.

19 MR. STARR: I object. There's no evidence of that.
20 I mean they're writing 7:45 as if there was evidence of it.

21 MR. WRIGHT: And Mrs. Washington says they went
22 were upstairs for maybe three minutes or five minutes, and we
23 know the 911 call is at 7:48. Counting backwards from the
24 911 call --

25 THE COURT: On or about or approximately.

1 MR. WRIGHT: That's fine.

2 (Counsel returned to trial tables and the following
3 ensued.)

4 MR. WRIGHT: 7:42, Marlo phone call, install the
5 rails, go home. That phone conversation lasted somewhere
6 around a minute and a half.

7 At that point, sometime around, on or about,
8 around, approximately 7:45, the movers come in the house and
9 they go upstairs.

10 7:48, 911 is called.

11 7:45 movers go upstairs.

12 7:48, 911 call.

13 9:12, ambulance comes back for Washington.

14 9:47, Washington finally gets in an ambulance and
15 leaves the scene.

16 It is very hard, listening to the sound of someone
17 dying. It's very difficult to listen to the sounds of
18 someone dying.

19 MR. STARR: Objection.

20 THE COURT: Sustained.

21 MR. STARR: Move to strike both references.

22 THE COURT: Strike the second.

23 MR. WRIGHT: But the 911 calls how calculating,
24 cold his demeanor was and his manner was. You must listen,
25 though, for omissions to what wasn't said. Your must also

1 listen for the refusal to answer the questions. Every time a
2 question comes to Mr. Washington, I'm going to raise my hand
3 for you, and every time he refuses, we will note.

4 I want to know do you hear anything about a child's
5 bedroom? The dispatcher kept asking all kind of questions.
6 Did you hear anything at all about a children's bedroom?

7 The dispatcher keeps asking for some kind of
8 conceivable reason as to why the two men would, all of a
9 sudden, start hitting. No one gave her that reason.

10 Did Stacey Washington say she saw the shooting?
11 Did she say I saw flashes from the gun? Did she say I saw my
12 husband shoot two people? Did she say anything at all about
13 her daughter's bedroom? How many times did he actually
14 refuse to answer the questions?

15 (The 911 audiotape plays.)

16 MR. WRIGHT: Voluntary manslaughter is an
17 intentional killing. It's not considered murder, as the
18 Judge told you, but if the defendant acted in hot-blooded
19 rage or response that was to legally adequate provocation,
20 you can find him guilty of voluntary manslaughter. You have
21 to look for five factors, and you'll have these instructions
22 with you. Was he enraged? Number one.

23 But number two is an important factor. Was this
24 rage caused by something that a reasonable person would
25 become so enraged about? Would a reasonable person become so

1 enraged over the lateness of the delivery of the furniture?
2 If you feel that a reasonable person would, then, yes, find
3 him guilty of voluntary manslaughter. If you believe the
4 fact that that rage over bed rails, if you believe that,
5 that's okay.

6 Factor number five is that the victim was the
7 person who provoked the rage. If you believe that Robert
8 White and Brandon Clark provoked this rage by being late and
9 that this rage was reasonable, then find him guilty of
10 voluntary manslaughter.

11 Second degree felony murder. Felony murder does
12 not require the State to prove that he intended to kill
13 Brandon Clark but, in order to convict him of second degree
14 felony murder, the State must prove that the defendant
15 committed the crime of first degree assault on Brandon Clark
16 when he pulled the gun on Brandon Clark and that he, in fact,
17 killed Brandon Clark, period.

18 In order to find the defendant guilty of attempt
19 second degree murder on Robert White, the State needs to show
20 the fact that he took a substantial step; that is, trying to
21 kill him. If you feel as though the defendant pulled out his
22 gun and shot Robert White, if you feel as though he was
23 trying to kill Robert White, then you must find him guilty of
24 attempt second degree murder on Robert White.

25 The defendant is charged with second degree,

1 depraved heart, murder. That is the killing of another
2 person with actions that show an extreme disregard for life.
3 In order to convict Mr. Washington of second degree, depraved
4 heart, murder, we must show that his conduct caused the death
5 of Brandon Clark. His conduct was risky. His conduct showed
6 extreme disregard for life. If you feel as though he did
7 those things, then you must find him guilty of second degree,
8 depraved heart, murder.

9 There are other crimes also, first degree assault,
10 using a weapon. If you find, in fact, that he used a weapon
11 to do that, there are other charges to consider.

12 Much like the 911 tape, you're going to get a
13 question, do you find the defendant guilty or not guilty as
14 to second degree murder of Brandon Clark, you must check
15 guilty.

16 You're going to get another question, much like the
17 911 kept asking questions, do you find the defendant guilty
18 or not guilty to the charge of voluntary manslaughter of
19 Brandon Clark? When you are asked that question, you're
20 going to answer guilty.

21 When you are asked the question, do you find the
22 defendant guilty or not guilty as to the charge of
23 involuntary manslaughter of Brandon Clark, please answer the
24 question guilty.

25 This came down to an amazing two-minute span,

1 three-minute span, however you want to calculate it. Three
2 minutes. Look at your watches. Three minutes. In this
3 three-minute time period, what Mr. Washington wants you to
4 believe is that two men, on their way home, probably thinking
5 about dinner on their way home, in this two-minute span
6 decided to let's do this.

7 That's not what happened, because if you look at it
8 that way, this was a two-minute crime. This wasn't -- this
9 took a while to think about. This took time for that pot to
10 start simmering. That pot started simmering at 1:00, 1:30,
11 3:00, 5:00. Now we're hitting a nice little simmer now.
12 We're feeling the water come up. And then by 7:00 he starts
13 to demand my \$400. But now we're getting there, but we're
14 not over the top yet. And then it's at that point the movers
15 come in, and they have the nerve to say where are the bed
16 rails that you're supposed to give us.

17 At this point he is ready to blow his top. He
18 comes in. They go up the stairs. He starts hitting them and
19 touching them. They're like what is this dude doing. Sir,
20 you need to watch your mouth. That set him off.

21 And that's when he had the out-of-mind experience.
22 He grabs his gun. Get out of my house. I got something for
23 you that should get you out of my house. Bam. Bam. Bam,
24 bam. And when White gets up, trying to go for help, didn't I
25 tell you to stay still? Boom.

1 MR STARR: Objection.

2 THE COURT: Sustained.

3 MR STARR: Move to strike.

4 THE COURT: As to the action of the hands,
5 stricken.

6 MR. WRIGHT: Nothing further.

7 MR. STARR: May we approach?

8 (Counsel approached the bench and the following
9 ensued.)

10 MR. STARR: There's a couple of different issues.
11 One is kind of a scheduling issue. I don't know if you want
12 to give the jury a break.

13 THE COURT: I do.

14 MR. STARR: The other issue is this, Your Honor. I
15 don't want to delay the closings too much. We have a number
16 of issues to argue and put on the record. The one that I
17 want to do right now -- and I want to say that by waiting
18 until after rebuttal to deal with some of these, I'm not in
19 any way diminishing their significance. If the Court wants
20 me to deal with them all up front, I will.

21 I'm not trying to delay the proceedings, even
22 though I am going to contend that there should be a mistrial.
23 I want to make that clear on the record that, by continuing,
24 I am not saying that there should not be a mistrial, but I
25 will respect the Court, at this point, at this time, but I

1 will respect the Court if the Court wants the closing to
2 continue.

3 The one issue that I do think has to be raised
4 before the defense's closing at this point is that, with
5 regard to the voluntary manslaughter count, the State has
6 done precisely the thing that they are legally prohibited
7 from doing.

8 The instruction that the Court gave reads -- this
9 is 4:17.4 at number two. In that instruction, which the
10 Court has given to the jury, it says "the only act that you
11 can find to be adequate provocation under the evidence in the
12 case is a battery by the victim upon the defendant."

13 Mr. Wright has expressly argued that the adequate
14 provocation was something completely different. He expressly
15 argued it and asked the jury to find that that was the
16 adequate provocation that satisfies that element, Your Honor.
17 He has done exactly what they are not allowed to do. He is
18 saying -- he told the jury to base the conviction on
19 different adequate provocation than what is in the legal
20 instruction. This charge is all messed up. There is no
21 way -- he said that the adequate provocation was something
22 other than the battery.

23 THE COURT: What are you saying he said?

24 MR. COHEN: I think we should look at the record,
25 Your Honor, because there was something about the exchange

1 between the two men. It was not battery. I don't recall
2 specifically what it was, but it was something either --
3 either something about them saying you need to watch the way
4 you talk to people. It was something like that. It was
5 something distinct, separate, distinct, and other than the
6 battery.

7 And, one, it was based on evidence that they don't
8 believe is true but, also, he expressly instructed them to
9 base a conviction on something that the instructions tell
10 them they can't do.

11 THE COURT: Well, let me put this on the record.
12 They charged him, among other crimes, with voluntary
13 manslaughter, correct?

14 MR STARR: Yes.

15 THE COURT: Okay. And that was one of the charges
16 early on in this case, which we were all discussing, among
17 other charges and other issues, in chambers, when there was
18 some -- in terms of instructions, some give and take back and
19 forth -- not give and take back and fort, but I believe what
20 I heard in terms of the argument that Mr. Wright gave was in
21 relation to all of the charges, and not specifically
22 voluntary manslaughter, when he was indicating what happened
23 between the two men over -- well, actually, what was
24 happening from the earliest point in time of when the
25 delivery was expected, conversations that Mr. Washington had

1 with various representatives up until the point he got there.

2 And in light of all of the charges and in light of
3 the argument that was had, the jury has the instruction on
4 what they have to consider. I don't think Mr. Wright, in
5 your words, inadequately or improperly singled out any other
6 setting that may have occurred as a result of the other
7 charges, as the facts portray the disputes between the
8 parties in this matter.

9 In terms of the legally adequate provocation, I
10 deny your motion.

11 MR. STARR: The only thing I want to say in
12 response, before we give the jury their break, is this. We
13 did have discussions in chambers, but there has never been
14 any give and take on this issue of voluntary manslaughter. I
15 brought it to the Court's attention in chambers --

16 THE COURT: You mean in terms of when you indicated
17 what may or may not be withdrawn in terms of charges?

18 MR. STARR: That's what I was relating to.

19 THE COURT: There was no give and take, on your
20 part, with regard to voluntary manslaughter. I understand
21 that. We're clear on that.

22 MR. STARR: Thank you. The only other thing I want
23 to do is ask -- because there was a sentence, and the court
24 reporter will have it and it's in the record. It begins with
25 if you find something to be legally adequate provocation,

1 then convict him. And Mr. Wright said it and it's in the
2 record.

3 MR. COHEN: We would ask for leave, Your Honor, if
4 we could, to -- not to slow the Court down, but at least to
5 review the court reporter's notes and to bring it to the
6 Court's attention. That's all we're asking.

7 MR. STARR: It was said on the record.

8 MR. COHEN: We can do it during lunch on our time.

9 THE COURT: You want me to give them a short
10 recess?

11 MR. STARR: I don't know whether the Court would
12 want to send them to lunch or give them a short recess.

13 THE COURT: We're feeding them in today. So at one
14 o'clock they're going to have a bunch of pizzas. I'm going
15 to tell them that. I'm going to tell them that at one
16 o'clock we've ordered food for them, so that they know
17 there's -- but I want to give them a break now. Is that
18 proper if I tell them?

19 MR. STARR: That's fine.

20 THE COURT: How long you going to -- roughly --

21 MR. STARR: There's a lot to respond to. I can't
22 say that, after a break, I'll be done by one; I really can't.

23 THE COURT: We'll just be as close as we can. I'm
24 not limiting you.

25 MR. STARR: Okay.

1 (Counsel returned to trial tables and the following
2 ensued.)

3 THE COURT: Ladies and gentlemen, we're going to
4 take a brief ten-minute recess for you to stretch your legs,
5 use the restrooms. You're going to be delivered food at a
6 respectable hour, but instead of halting and starting as we
7 have done every day, we're going to try to do it this hour.
8 Thank you.

9 (A brief recess was taken at 12 noon.)

10 MR. STARR: Your Honor, may we briefly approach on
11 that last issue?

12 THE COURT: Yes.

13 (Counsel approached the bench and the following
14 ensued.)

15 MR. COHEN: During the break, Your Honor, we were
16 able to review the Court transcript of Mr. Wright's closing,
17 and I was able to, actually verbatim, write down exactly the
18 portions that we referenced earlier, before the break. It's
19 at -- and this page number is not necessarily where it would
20 end up, but it's around page 56.

21 THE COURT: You mean from the recorded -- you mean
22 the transcribed part. Not the transcript, but the
23 transcribed portion that she's doing now.

24 MR. COHEN: Yes. I looked at Madam Reporter's
25 screen. The statements that we want to read into the record,

1 that are transcribed verbatim, that Mr. Wright made regarding
2 the voluntary manslaughter instruction, he said, "but number
3 two is an important factor. Was this rage caused by
4 something that a reasonable person would become so enraged
5 about? Would a reasonable person become so enraged over the
6 lateness of the delivery of furniture? If you feel that a
7 reasonable person would, then, yes, find him guilty of
8 voluntary manslaughter. If you believe the fact that rage
9 over bed rails, if you believe that, that's okay."

10 And just so the record is clear, the voluntary
11 manslaughter instruction, hot-blooded response to legally
12 adequate provocation, which is at 4:17.4, has a number 2, and
13 the number 2 reads "the rage was caused by something the law
14 recognizes as legally adequate provocation; that is,
15 something would cause a reasonable person to become enraged,
16 enough to kill or inflict serious bodily harm."

17 The only act -- and I emphasize, the only act that
18 you can find to be adequate provocation under the evidence in
19 this case is a battery by the victim upon the defendant.

20 THE COURT: Okay. The jury has the instructions.
21 They are just that. That's what they are instructed by the
22 Court.

23 MR. STARR: We renew our motion, Your Honor.

24 THE COURT: Yes. Your motion is denied.

25 (The jury returned to the courtroom at 12:15 p.m.)

1 MR. STARR: May I?

2 THE COURT: Yes, please.

3 **CLOSING ARGUMENT BY MR. STARR**

4 MR. STARR: All right, ladies and gentlemen.
5 You've heard all the evidence. You've got the legal
6 instructions from Judge Whalen, and soon it's going to be
7 time for you to go back into that jury room and decide this
8 case.

9 Reviewing all the evidence, it is clear that the
10 only reason that Keith Washington fired his gun was to defend
11 himself, his family and his home. Judge Whalen has told you
12 that the State has to prove beyond a reasonable doubt that
13 Mr. Washington was not doing those things. Now, based on the
14 evidence that's been presented to you, there is no way that
15 you can find that they have proven that.

16 Ladies and gentlemen, the starting point of your
17 deliberations should be this: The only person, the one,
18 single, only witness who says that Mr. Washington committed a
19 crime is Robert White. You have to believe, to credit, you
20 have to trust Robert White beyond a reasonable doubt if
21 you're going to convict this man of these crimes, and there's
22 no way that you can do it.

23 One of the reasons that you know you cannot trust
24 Robert White is that he is inconsistent with every item of
25 agreed-upon physical evidence that exists in this case. We

1 can start with something simple, something very basic and
2 work from there.

3 Robert White is asked, Brandon Clark is your
4 cousin. Yes. He's 6'7", 330. No, he's not. He can't even
5 agree on that. The State's doctor tells you that that's
6 true. And if his size and Brandon Clark's size didn't play a
7 role in this incident, didn't have something to do with what
8 was happening to Mr. Washington when he fired his gun, then
9 Robert White would be able to admit that.

10 Ladies and gentlemen, Robert White denies to you,
11 as he denied in front of the grand jury that he has ever, in
12 his life used cocaine. He's tested at the hospital on this
13 night and cocaine is inside of his body.

14 Robert White denies that there was ever any kind of
15 physical attack, altercation, fight, contact whatsoever
16 between him and Mr. Clark and Mr. Washington. Completely
17 denies that that happened. And every bit of forensic,
18 scientific or medical evidence that you have seen in this
19 case shows you that that simply is not true.

20 You heard, ladies and gentlemen, that fibers from
21 Brandon Clark's pants are on Keith Washington's vest and his
22 shirt when those things were analyzed. You heard, ladies and
23 gentlemen, that Robert White, as Mr. Washington said,
24 consistent with what Mr. Washington said, was shot from
25 between three and 12 inches. And you heard, ladies and

1 gentlemen, that Brandon Clark, the wound in his abdomen, was
2 from a gun that was fired from as close as 12 inches and no
3 more than 24. That is totally inconsistent with what Robert
4 White tells you and it is one hundred percent consistent with
5 what Keith Washington told you happened to him on that night.

6 Robert White denies that there was any physical
7 contact between he and Mr. Clark and Mr. Washington. I'm
8 going to talk to you a little bit more about the injuries and
9 the medical personnel, but everyone must agree on this. When
10 Keith Washington went to the hospital, the doctor that saw
11 him wrote on her report "diagnosis, assault." That's her
12 diagnosis after reviewing that man. She wrote on her report
13 that he had a contusion and a neck strain. That's not him
14 saying that. That's her saying that that's what she saw on
15 that man.

16 MR. MOOMAU: Objection.

17 THE COURT: Sustained.

18 MR. COHEN: And remember this, ladies and
19 gentlemen --

20 MR. MOOMAU: Move to strike that.

21 THE COURT: That last portion is stricken.

22 MR. COHEN: Her records show contusion, clearly.
23 And when Mr. Cohen was asking her questions, after she said
24 on direct examination I saw no evidence of trauma, Mr. Cohen
25 questions her, you wrote that Keith Washington had a

1 contusion, right? Yes. And a contusion is trauma, right?
2 Yes. Keith Washington had trauma, and Dr. Dixon, despite
3 what she said on direct examination, said that on cross. And
4 Dr. Arden told you that a contusion is trauma, and there is
5 no denying that he had that.

6 There's also no denying, ladies and gentlemen, that
7 Dr. Dixon, after her examination of Mr. Washington,
8 prescribed prescription-strength Motrin and Vicodin,
9 prescription-strength drugs for pain based on her
10 examination. Are doctors giving that stuff out to people
11 when there is no medical justification? Of course not. Of
12 course not. She saw that contusion. She diagnosed that neck
13 strain, she diagnosed assault, she wrote it in her records.

14 The records are in evidence and they're the truth,
15 and the truth in this case, over and over and over again, is
16 totally inconsistent with what you get from Robert White.

17 Ladies and gentlemen, Robert White tells you -- and
18 there's a stipulation as to some phone records. You don't
19 know anything about it yet because it wasn't read into the
20 record. But Robert White tells you that he heard Keith
21 Washington saying all kinds of things when he was on the
22 phone, and the 911 call shows you that Keith Washington
23 didn't say any of those things.

24 Robert White said Keith Washington called and he
25 said these men broke in my house. He never said that. He

1 never said that.

2 Mr. Wright, on cross-examination, tries to
3 establish that, when Keith Washington was asked how did they
4 get in, he didn't answer the question, but what you're going
5 to hear when you listen to the tape, and what you've heard
6 several times by now, is that when Keith Washington is asked
7 how did they get in, he said I let them in. Direct response
8 to a direct question. How did they get in? I let them in.
9 That's what the tape shows.

10 Robert White says that Keith Washington said they
11 beat me with a pipe. Is that on the tape? No way. And one
12 of them is dead. Is that on the tape? No way. He didn't
13 say those things.

14 During your deliberations, over and over again,
15 when you compare the evidence, the physical evidence, the 911
16 call, the medical evidence to what Robert White says, you are
17 going to see that it doesn't match. That's the only person
18 who says that Keith Washington wasn't defending himself and
19 wasn't defending his family and wasn't defending his home.

20 Now, another way, ladies and gentlemen, that you
21 know that you cannot believe and trust Robert White is that
22 you saw, while he was testifying, that he has given two
23 different versions of how the shooting happened, one in front
24 of you and one when he testified in grand jury.

25 In court he tells you that Brandon Clark is walking

1 backwards, hands up in the surrender position. He says that
2 he is in front of Mr. Clark, facing him, when Keith
3 Washington shoots Mr. Clark. Well, we'll talk about
4 Dr. Arden's testimony and your common sense when it comes to
5 that story, but there's no way that that happened. It makes
6 no sense, but that's what he said to you in court.

7 In the grand jury he said that he had walked out
8 before Mr. Clark and Mr. Clark walked out of the room
9 backwards; I don't know if he was all the way out of the room
10 or in the room because I didn't look back at him. It's two
11 completely different scenarios, and if either one of them is
12 true, if what he was saying was true, it wouldn't be that
13 way. It wouldn't be that way.

14 Ladies and gentlemen, Robert White you know had
15 cocaine in his system, and not only do you know he had
16 cocaine in his system, but you know that, under oath in the
17 grand jury, he denied that he's ever used it. Under oath,
18 before you, he denied that he's ever used it. You have
19 watched this man say things, that we have to agree on, under
20 oath, that aren't true.

21 Now, the State talks about the toxicology report,
22 and they read some language off the toxicology report saying
23 it's not supposed to be used for legal purposes. Ask
24 yourself this. First of all, their doctor, Dr. Khan, his
25 name is on there. He's the treating physician. He's

1 ordering that test and he's trying to save Robert White. Is
2 he ordering an unreliable test? Is that what the doctor is
3 doing? Their doctor, who they sponsor as credible and
4 reliable, is that what he's doing? Of course not.

5 You hear from Dr. Arden that the test is reliable.
6 Two witnesses, one on each side tells you that's a reliable
7 test.

8 During this trial I suggest to you that you have
9 seen an amazing thing happen. You have watched the State try
10 and back away from and deny physical, medical and scientific
11 evidence time and time again, and that's the kind of
12 evidence, ladies and gentlemen, that you have to listen to.
13 That's the kind of evidence that you have to believe, because
14 it doesn't have the problems associated with it that are
15 associated with Robert White.

16 What other reasonable doubts about Robert White?
17 Robert White wants you to believe that he does not know that
18 he has brought a \$480 million lawsuit based on this incident.
19 He wants you to believe that he doesn't know about that.

20 First of all -- and it's in the instructions --
21 just use your common sense, okay? Sometimes we start talking
22 about all these instructions and all this law, and it's
23 almost like we can't use our common sense. Use your common
24 sense about that and, if you believe that, that he doesn't
25 know that he's brought that lawsuit, then, on your way home

1 today, check the clerk's office and see if you filed any \$480
2 million lawsuits.

3 MR. MOOMAU: Objection.

4 THE COURT: Sustained.

5 MR. STARR: Ladies and gentlemen, you know that
6 Robert White knows about that lawsuit from the evidence
7 that's been presented to you during this trial. First of
8 all, in the hospital he has the civil lawyer. On January
9 31st, while he's in the hospital, he gives notice to Prince
10 George's County, through that lawyer, of his intent to sue
11 based on this incident. And he's signing documents, that are
12 in evidence as exhibits, with that lawyer while he's still in
13 the hospital.

14 Now, the State knows -- you don't have to take my
15 word for it that the lawsuit is an issue. Look at how the
16 trial unfolded. The State knows, ladies and gentlemen, that
17 the lawsuit is an issue because they try and clean it up by
18 calling Marilyn Clark back to the witness stand to talk about
19 this lawyer, and every single thing that Marilyn Clark told
20 you shows you that Robert White knew about that lawsuit.

21 First of all, ladies and gentlemen, let's all
22 establish, she doesn't say Robert White didn't know because
23 she can't say that. And she admits that Robert White has all
24 kinds of communications with this lawyer that she's not a
25 part of, and she wasn't there when he was signing the

1 documents with the lawyer in the hospital.

2 She tells you that, after the lawsuit was filed,
3 the attorney that filed the lawsuit came to her and told her
4 that her lawsuit was filed. Of course that's true. Of
5 course that's what happened. And why would he tell her and
6 not tell Robert White, one of her co-plaintiffs in the same
7 lawsuit? It doesn't make any sense.

8 So what the State really wants you to believe is
9 that Robert White gives notice on January 31st of 2007 that
10 he's going to file a lawsuit, based on this incident, through
11 that attorney. Lawsuit filed January 24, 2008. During that
12 year, during those 51 weeks, they don't talk about the fact
13 that the lawsuit is going to be filed, and you're asked to
14 believe the man who wants you to believe that. You're asked
15 to base convictions on these offenses on the word of that
16 man, and it doesn't make any sense. You simply cannot do it.

17 Now, you also know that, before he ever spoke with
18 the police to give them his version of what happened in that
19 house, he sat down with a civil lawyer and they wrote a
20 statement for the media and they released it that way. Is
21 that way, ladies and gentlemen, that someone, who has been
22 the victim of a crime in the way that Robert White says he
23 was, behaves, or is that how someone behaves when they're
24 looking for money?

25 And ask yourself this. If he is the plaintiff in

1 that \$480 million lawsuit, and you know that he is, why can't
2 he just admit that to you if it doesn't have anything to do
3 with his testimony? The most reasonable explanation for that
4 is that he knows that that lawsuit is a motivation for him to
5 say what he has to say in this case and, if it wasn't, he
6 would admit that he knew about it and that he filed it.

7 What else about Robert white? Robert White says no
8 physical fight, no attack, no nothing at the time that
9 Mr. Washington shoots. But, ladies and gentlemen, his DNA,
10 we learn from the State's witness, Monica Ammann, is on the
11 gun.

12 Now, Mr. Wright is talking about blood and is
13 Mr. Washington dragging the gun across the floor, scooping up
14 blood. That's foolish. That is completely foolish, and
15 there is no evidence that anything like that happened. In
16 fact, the evidence is that the technician that did the swabs
17 said he didn't see any blood, and that the analyst,
18 Ms. Ammann, said she didn't see any blood on the gun.

19 What you were told by the two experts, one for the
20 State and one for the defense, about the most direct, likely
21 way that DNA could end up on that gun from Robert White is
22 direct physical contact with his skin.

23 The firearms expert called by the State, Susan Lee,
24 told you. She talked about that casing that never came out
25 of the chamber, and she told you, ladies and gentlemen, that

1 that happens when the slide on the top of the gun is impeded.
2 And even when she was asked about it -- she's reaching out --
3 and she told you that can happen, when Mr. Cohen was asking
4 her questions, when someone's got their hand on the slide
5 when the gun is fired.

6 Ladies and gentlemen, Robert White, when he's asked
7 how do you explain, as someone who was there, that his DNA is
8 on that gun, he doesn't have any explanation. He doesn't
9 have any explanation for more scientific, physical forensic
10 evidence that is nothing but the agreed upon, plain truth of
11 this case.

12 Robert White's criminal record. Mr. Wright, during
13 his closing, continually says Robert White has a criminal
14 conviction. Ladies and gentlemen, first of all, with regard
15 to Mr. White's record, it's not just the fact that he has a
16 criminal record and that's the only witness saying
17 Mr. Washington committed a crime. He's also the only witness
18 in the whole trial who has a criminal record, and the judge
19 has instructed you that you can consider that in deciding
20 whether he's telling you the truth.

21 It's not just that. It's not just that he has
22 these convictions. It's that he cannot tell the truth about
23 them. He can't tell the truth about his record. And because
24 he can't tell the truth, the stipulation that hasn't been
25 read to you, but you'll have it back there as evidence,

1 because he can't tell the truth, the State and the defense
2 have to agree on what everyone knows is the truth.

3 MR. MOOMAU: Objection.

4 THE COURT: Grounds?

5 MR. MOOMAU: He's saying that because of that, the
6 State and the defense have to agree. That's not the
7 motivation.

8 THE COURT: Overruled.

9 MR. STARR: Because he can't tell the truth about
10 his record, the State and the defense have to agree to a
11 stipulation as to what his record is, because that's the only
12 way we can get the truth in front of you. And the
13 stipulation says that Robert White has each of the two
14 convictions, one that he denied in the grand jury, first
15 degree burglary, and one that he said he didn't know anything
16 about in front of you, receiving stolen goods.

17 So with regard to Robert White's convictions, it's
18 not only that he has them, it's that, again, he can't tell
19 you the truth.

20 And if Robert White's convictions don't have
21 anything to do with anything, why can't he tell you the truth
22 and why can't he tell the grand jury the truth? Why can't he
23 tell the grand jury, yes, I had a first degree burglary
24 conviction? Is it because that, again, he's up to no good in
25 someone's house? Is that a reasonable inference? Of course

1 it is. It's the most reasonable inference.

2 And then he sits in front of you, and you watch him
3 say that he doesn't know anything about his receiving stolen
4 goods conviction. The man is being convicted of crimes and
5 he doesn't know anything about it? And he's filing lawsuits
6 and he doesn't know anything about it? Is that a believable
7 person? Is that a person that you trust beyond a reasonable
8 doubt? Of course it isn't. Of course it isn't.

9 Now, ladies and gentlemen, what you find in Robert
10 White -- and you watch this -- is that whenever he's
11 confronted with something he doesn't like, something he
12 doesn't want you to know about, whenever he's asked a
13 question about that, he says I don't know. So I don't know
14 about my \$480 million lawsuit. I don't know how my DNA is on
15 the gun. I don't know why cocaine is inside of my body. I
16 don't know what I said in the grand jury, and I don't know
17 why I was shot.

18 You can't believe he doesn't know those things, and
19 you can't believe a person, who wants you to believe that he
20 doesn't know those things, beyond a reasonable doubt. No
21 way.

22 Now, another way that you know you cannot believe
23 what Robert White says happened in that house is that his
24 story makes absolutely no sense. Mr. White wants you to
25 believe, ladies and gentlemen, that he and Mr. Clark go up

1 stairs to deliver the bed rails, and that Keith Washington
2 just starts pushing and shooting people, based on nothing.
3 Based on nothing. That's their witness. That's what he says
4 happened, and there is no way that that happened. It makes
5 absolutely no sense that Keith Washington, at his size, 5'1",
6 155, starts pushing a 6'7", 330 pound man for no reason, and
7 then just starts shooting at them as they're leaving.

8 What else do you know about that story that shows
9 you that it doesn't makes any sense? He says that when
10 Mr. Washington shoots Brandon Clark, he says I know how to
11 get you the "F" out of my house and he shoots them. But
12 Mr. White says that when Brandon Clark is shot, they're
13 leaving. They're already leaving. It doesn't make any
14 sense.

15 If he wants them to leave, and that's the reason
16 why he's shooting them -- first of all, that doesn't make any
17 sense either because shooting them doesn't make them leave.
18 If he wants them to leave and that's the reason why he's
19 shooting them, why does he shoot them when they're leaving?
20 You piece this together and it makes absolutely no sense.

21 Mr. White tells you that, as Mr. Clark was backing
22 up, he's standing in-between Mr. Washington and Mr. Clark,
23 facing Mr. Clark when Mr. Clark is shot. And you know that
24 doesn't make any sense, ladies and gentlemen. You know that
25 doesn't make any sense because of where Mr. Clark was shot

1 and how. It doesn't add up. It makes no sense.

2 And Mr. White tells you -- you've heard this 911
3 call a lot. Don't forget that one of the things you heard
4 about it when it was introduced is that the State, during
5 their investigation, sent it to -- I think it was an FBI lab
6 somewhere in Houston to have it enhanced so that you could
7 hear more clearly what's going on.

8 And, ladies and gentlemen, Robert White wants you
9 to believe that he's shot at the top of the stairs, on the
10 second step, he comes back up the stairs, makes a right, goes
11 all the way down to the end of the hall. So he's shot here,
12 he comes all the way over here, lays down after he's shot.

13 Mr. Washington goes into another room and does
14 something else for a while and then comes back out and shoots
15 him in the knee again. Now, first of all, Mr. Wright wants
16 you to believe -- and I'm not going to be able to catch them
17 all. There are several things that have been said to you
18 that don't match up with the evidence. Between all of you, I
19 think you're going to catch them all. But I don't have time
20 to go through them all.

21 Mr. Wright says to you that there was testimony
22 that that knee shot was three to 12 inches, that he walked
23 right up on him, close range. Robert White didn't say that.
24 Nobody said that. There is nothing like that before you, no
25 testimony about that whatsoever.

1 But, ladies and gentlemen, if there was a break,
2 the testimony and the evidence would be different. If
3 Mr. Washington did fire these shots and then go do something
4 else and then shoot Robert White again, then you would hear
5 that knee shot on the 911 call.

6 And you know from the 911 call and from her
7 testimony that Stacey Washington was on 911 immediately.
8 She's already turned, after she sees them beating her husband
9 and she hears the shots while she's going to get the phone.
10 Straight to the phone, grab their daughter, in the garage, in
11 the car, 911 call. An enhanced version of the 911 call, it
12 is reasonable for you to believe, would contain that knee
13 shot and it's not there. And there's no corroboration, no
14 evidence whatsoever that Robert White was shot in that
15 fashion in the way that he claims he was.

16 Now, Judge Whalen has given you some legal
17 instructions, and these instructions are critical to how you
18 have to view the evidence as you deliberate and try to reach
19 a verdict in this case. They control how you must view
20 Mr. Washington, all of the witnesses and all of the evidence.

21 And the judge has told you, ladies and gentlemen,
22 that Keith Washington is presumed to be innocent of these
23 charges. Presumed by you to be innocent of these charges.
24 And the judge explained to you that that presumption, your
25 presumption that Mr. Washington is innocent, remains with him

1 throughout every stage of the trial and is not overcome
2 unless you are convinced, beyond a reasonable doubt, that
3 he's guilty, that what Robert White says is true and that he
4 started shooting these men because he was angry because the
5 delivery was late, while he was having dinner with his wife
6 and his daughter in their home. Unless you can find that
7 that's been proven to you beyond a reasonable doubt, he
8 remains presumed innocent and your verdict has to be not
9 guilty on every charge.

10 So what it means to you as jurors is that, as he
11 sat there during the opening statement, he was innocent.
12 While we were picking you during jury selection, innocent.
13 During the presentation of the evidence and right now,
14 innocent, unless you can say that the evidence that the State
15 has presented to you proves that he is guilty beyond a
16 reasonable doubt, and there's no way that you can find that
17 that has happened.

18 Now, he also explained to you, Judge Whalen, that
19 the State has the burden of proof in this case, and that's
20 critical to you thinking about the evidence and how you
21 deliberate. The State has to prove beyond a reasonable doubt
22 that Mr. Washington was not defending himself, was not
23 defending his family, and was not defending his home. Beyond
24 a reasonable doubt.

25 And the only theory that they have in evidence,

1 what they've presented to you, what you have to believe in
2 order to find that that's been proven beyond a reasonable
3 doubt is what Robert White says happened. That's what you
4 have to believe beyond a reasonable doubt. That's their
5 burden.

6 So what it means to you, as jurors, is, when you go
7 back in that jury room and you find yourself thinking and
8 saying things like, you know, how can we be convinced when
9 the only person who says that Mr. Washington did what the
10 State claims he did is Robert White, and there's so many
11 problems with Robert White's credibility.

12 Or, ladies and gentlemen, if you go back in that
13 jury room, and you find yourself thinking and saying things
14 like how can we be convinced, when we hear on that 911 call
15 Stacey Washington call, frantic, immediately and say they're
16 upstairs beating my husband in my house; I think someone has
17 been shot. No evidence that she had a second to think before
18 she went and dialed those numbers and made that call and told
19 the dispatcher that.

20 Or when you go back there and find yourselves
21 thinking and saying things about how can you be convinced
22 when every bit of scientific and medical evidence in this
23 case says that those men were right on Keith Washington, just
24 like he says they were, when those shots were fired.

25 When you go back there, ladies and gentlemen, and

1 you find yourself thinking and saying those things, you have
2 what the law calls reasonable doubt. Judge Whalen has
3 explained it to you. He's explained just how high the
4 standard is.

5 The first thing he told you, reasonable doubt is a
6 doubt based upon reason. How many doubts like that do you
7 have in this case about Robert White and his truthfulness?
8 He told you how high the standard is. He said proof beyond a
9 reasonable doubt requires such proof as would convince you of
10 the truth of a fact to the extent that you would be willing
11 to act, without reservation, in an important matter in your
12 own business or personal affairs.

13 Ladies and gentlemen, you would not trust Robert
14 White without reservation under any other circumstances in
15 life. And just because he sits on a witness stand and says
16 something doesn't mean you can trust him beyond that standard
17 here, especially when all of the physical evidence shows that
18 he's not telling the truth.

19 So, keep in mind, your job is to look at the
20 State's evidence, apply those legal instructions and decide
21 whether the State has proven these crimes beyond a reasonable
22 doubt.

23 The first thing, ladies and gentlemen, one of the
24 first things you have to think about is the fact that there
25 is absolutely no sensible motive whatsoever that the State

1 has proven to you. And Judge Whalen gave you a jury
2 instruction on motive, and you're going to have it, while
3 your back there, to review. It says that the absence of a
4 motive may be suggestive of innocence. And the motive that
5 they have here, they want you to believe beyond a reasonable
6 doubt that Keith Washington started shooting these men
7 because a delivery was late, and that is ridiculous. Not
8 only is it ridiculous when you apply your own common sense to
9 it, but it doesn't add up with the evidence.

10 First of all, their first phone call, the phone
11 call that they say happened at about 1:30 that took place
12 between Mr. Washington and Mr. Rascoe at Marlo. Think about
13 that. Mr. Rascoe told you. He said it on the witness stand
14 that it was normal and that he gets one to two phone calls
15 like that every day.

16 Everything about what these Marlo employees have
17 told you, what Mr. Rascoe and Mr. Gorham told you about their
18 interactions with Keith Washington shows you that this is a
19 normal run of the mill service issue until those men start
20 beating him in his house.

21 Now, you're going to have phone records, and
22 there's a stipulation about a number of phone records. One
23 of them that you're going to see, the stipulation tells you
24 that it's the phone record of Keith Washington, and on some
25 of the -- it's his cell phone. On some of the Marlo

1 documents that have been admitted, you're going to see this
2 number, and you're going to see the phone call at 1:44 from
3 Keith Washington to Marlo, the phone call between Keith
4 Washington and Robert Rascoe.

5 Robert Rascoe told you, ladies and gentlemen, that
6 the phone call was between 10 to 15 minutes, and the phone
7 record shows you that it was 47 seconds. Forty-seven
8 seconds. Is Keith Washington carrying on like that in 47
9 seconds? It doesn't even make sense because the delivery
10 isn't even supposed to be there yet. What he told you makes
11 sense, when he told you that he called to see if they were
12 coming before he took off work. That's what happened.

13 And when Robert Rascoe tells you, ladies and
14 gentlemen, that it was normal and he gets one or two calls
15 like that every day, you know those things are true.

16 And when he tells you it was 10 to 15 minutes, when
17 it's 47 seconds, you see something that happens to people
18 when they have to sit where Keith Washington is sitting.
19 When people come in here and talk about things a year later
20 after all that's happened, sometimes what they say now
21 doesn't match up with what really happened and what the
22 evidence is.

23 Forty-seven seconds. The delivery is not even
24 supposed to be there yet. No reason whatsoever for Keith
25 Washington to be angry and no evidence that he was because

1 Robert Rascoe said it was normal.

2 Now, the State also talks to you and they present
3 to you Mr. Gorham, and Mr. Gorham's testimony is critical.
4 That's the last person that Mr. Washington talks to on the
5 phone before the delivery arrives. The last person. And the
6 State wants you find that these phone calls are evidence that
7 this man was in a homicidal rage before the deliverymen got
8 there.

9 Mr. Moomau said in his opening statement that Keith
10 Washington answered the door ready to kill someone. When he
11 gets up from where he's having dinner with his wife and his
12 six-year-old child, he answers the door ready to kill
13 someone? That is ridiculous.

14 And the reason that that's their motive/theory is
15 that that has to be their motive/theory, because they are
16 presenting Robert White to you, and Robert White says there
17 was no fight whatsoever. The physical evidence shows you
18 that's not true. Everything shows you that Keith Washington
19 was attacked, but they can't say -- they have to say that's
20 the motive because Robert White says nothing else happened.

21 So they want you to believe that this man answered
22 the door in a homicidal rage with Marlo. He's not even mad
23 at the deliverymen. He never even met them before. He's so
24 mad at the company, Marlo, that he decides, in his house,
25 he's going to kill some people, with his wife home and his

1 daughter home.

2 That, ladies and gentlemen, is what you are being
3 asked to find happened beyond a reasonable doubt, and when
4 you apply your common sense to that and that alone, before
5 you even start to look at the evidence, you know that that is
6 foolish. That is not what happened. It doesn't make any
7 sense.

8 And when you've listened to Mr. Gorham and what he
9 told you, you know it's not what happened, because Mr. Gorham
10 tells you that when Mr. Washington, when they got off the
11 phone, Mr. Washington said thank you for calling me back.
12 The conversation ended friendly and that he said have a good
13 night.

14 Is that a person that's in a homicidal rage? Can
15 you find that beyond a reasonable doubt, based on what
16 they're asking you to base it on, which is Mr. Gorham and
17 Mr. Rascoe? Of course you can't.

18 MR. MOOMAU: Objection.

19 MR STARR: It doesn't make any sense. So what else
20 do you know? At the time that Mr. Washington gets off the
21 phone with Mr. Gorham, he knows when the delivery is coming.
22 He's expecting it. He goes and plays with his six-year-old
23 child in the living room and has dinner with his family, and
24 the delivery comes at the time he's expecting it to come.
25 Ladies and gentlemen, that's not a man that is in a homicidal

1 rage, and there's no way that you can find that it is.

2 So when you apply the motive instruction that you
3 got from Judge Whalen with that evidence, you see that the
4 motive evidence is suggestive of innocence.

5 Now, I want you to follow that whole instruction.
6 Please don't let the State get up here in their closing and
7 say, well, motive is not an element because, while it's not
8 an element, their theory has to make sense in order for you
9 to believe it beyond a reasonable doubt, and Judge Whalen has
10 told you that the absence of a motive is suggestive of
11 innocence.

12 The 911 call. At this point there's been so much
13 said about the 911 call that misrepresents and distorts
14 what's on that tape that I'm sure you're going to have to
15 listen to it during your deliberations. What you're going to
16 find is that the State is trying to take a 911 call that
17 shows Mr. Washington and his wife having a normal reaction, a
18 human reaction to what just happened to that man and that
19 family in that house.

20 Now, Mr. Wright says -- and they make a big deal
21 out of this statement -- they're bleeding over my carpet.
22 But, ladies and gentlemen, don't fall for that, because this
23 is what happened on the tape. He is responding to a question
24 about where the men are shot. He does not know where the men
25 are shot.

1 The EMT that came in here, that they called, told
2 you they don't know where the men are shot because of the
3 dark clothes that they're wearing. That's why they're asking
4 Robert White where the men are shot.

5 Mr. Washington is trying to tell them. Every time
6 he's asked that question, he's trying to tell them one in the
7 leg, one is holding his -- I don't know, I don't know, but
8 they're bleeding over my carpet. You see the blood on the
9 carpet in the pictures, and the way that that man knows that
10 these men are bleeding is because he sees it on the carpet.
11 Because, as the State's witnesses have told you, with the
12 dark shirts they are wearing, you can't see it on those.

13 He's talking out loud. He's not saying -- and
14 please, ladies and gentlemen, please, common sense. Did that
15 man call 911 because he was concerned about his carpet?
16 Listen to the 911 call and think about it and use your common
17 sense as you ask yourselves whether you can find that the
18 State has proven what they're asking you to believe.

19 On that call Mr. Washington asks for an ambulance.
20 He's told its coming. He asks for an ambulance again. He
21 asks for units to come to the scene six times.

22 The State wants you to believe that Mr. Washington
23 was evasive and wouldn't tell the 911 dispatcher what
24 happened. Listen to the call. When he's on the phone with
25 the 911 dispatcher, he says I'm trying to watch them, where

1 are my wife and daughter, he's talking about all those
2 things, and the dispatcher says to him I know you're upset.
3 You're going to hear it on the tape, I know you're upset.
4 They say Mr. Washington didn't want to tell the dispatcher
5 what happened in response to her questions and when he calls
6 to tell what happened and to ask for help with these men.
7 Once help is on the way, he's done what he's trying to do
8 with that call.

9 And Mr. Washington told you that he wanted as much
10 help on the scene as possible. And on the 911 call, he says
11 I'm just trying to get some help down here. That's what he
12 says, and you're going to hear it come out of his mouth, and
13 if he doesn't sound the way that they want him to sound, that
14 means you're going to convict him beyond a reasonable doubt
15 of crimes?

16 The man is a police officer. They deal with
17 stressful situations. They're not screaming and wailing on
18 911 calls. That's not reality. That's not what happens,
19 and that's not what happens on the 911 call that you'll
20 hear because that's not what should have happened.

21 They say Mr. Washington doesn't want to tell the
22 dispatcher what happened, and this is amazing. It is
23 actually amazing that when he is being cross-examined, as he
24 sits in the witness stand, Mr. Wright says to him you didn't
25 want to tell them whether you let the men in; you avoided

1 that question.

2 When you listen to the 911 call, question, how did
3 they get in? Answer, I let them in. He's saying -- what
4 kind of vehicle did they pull up in? A big, old furniture
5 truck. Marlo. Is that where they work? Clearly, that's
6 where they work. He says they were delivering furniture when
7 he's asked what happened. Listen to it.

8 On the 911 call, Mr. Washington says, ladies and
9 gentlemen -- one moment. I want to get it right. Eight
10 different times, in different ways, that he was assaulted by
11 those men. He mentions his wife and his daughter seven times
12 on the 911 call. Seven times. He says I want to check on my
13 wife and daughter; they're downstairs; no, they're in the
14 garage. He's talking about what was real, what was really
15 happening at this moment, and that is that he had just been
16 attacked and he was concerned about his wife and his
17 daughter.

18 Now, should he, under those circumstances, if he
19 was hit and kicked and those men were punching down on him,
20 but they're shot, should he be saying more about his injuries
21 then he's saying about theirs? No, but he's telling them
22 what happened, and he's telling them that he has injuries,
23 and he's responding to this in a way that a human being would
24 respond to a situation just like the one that he was in and
25 just like the one that his family was in on that night.

1 You hear on that call -- think about this. Robert
2 White wants you to believe that he and Mr. Clark were begging
3 Mr. Washington to call 911 and he refused. That's what
4 Mr. White told you. Well, it's remarkable that -- and that's
5 the only witness. Remember, that's the only one who says
6 that Keith Washington has committed a crime. We know it's
7 not true. He did call 911 and everything that Robert White
8 says will be on that tape isn't there.

9 And there's stipulations about the phone records.
10 There's a number of them. And, ladies and gentlemen, when
11 you look at them -- and we have to do this. The defense has
12 to request these stipulations, and they have to be sent back
13 to you because, ladies and gentlemen, what we're dealing with
14 here is Robert White and whether you can believe him beyond a
15 reasonable doubt.

16 There's stipulations -- I already told you -- about
17 Mr. Washington's cell phone records, about Stacey
18 Washington's cell phone records, about Mr. Washington's other
19 cell phone issued by the police department, about Stacey
20 Washington's cell phone, and about their home phone, and
21 there are no other calls at that time made by Mr. Washington
22 and that's what the records show.

23 Make no mistake about it, Robert White is talking
24 about the 911 calls because that's the only call there was,
25 and nothing that he said would be on that tape is on that

1 tape. And nothing, ladies and gentlemen, about the fact that
2 Mr. Washington called 911 and asked for an ambulance is at
3 all consistent with Mr. White saying that they were begging
4 Mr. Washington to call 911 and that he refused.

5 Now, the 911 call, by itself, certainly when you
6 add it up with the physical evidence, with your common sense
7 and with the fact that they have to rely on Robert White, is
8 reasonable doubt.

9 Because these people didn't have time to think.
10 You hear the emotion in Stacey Washington's voice. They're
11 calling 911 seconds after it happened. Mrs. Washington is on
12 the phone seconds after it happened. Mr. Washington saying I
13 collected myself, I went to look for the phone. He's dialing
14 911. He doesn't even know she's on the phone. After those
15 men are shot in that house, Mr. Washington and his wife
16 panic, and that is a reasonable human response to exactly
17 what Keith Washington says happened to him, and that is that
18 he was assaulted by those two men, attacked by those two men
19 in his house, and that is the only thing that he has ever
20 said happened to him. And he's saying it seconds, seconds
21 after it happened.

22 He didn't wait until he talked to his civil lawyer
23 to draft a statement for the media. He's saying it on the
24 scene to Corporal Jones. He's saying it on the 911 call, and
25 he's never said anything different. And what he says is

1 completely consistent with what Stacey Washington says, and
2 what she tells you she saw is completely consistent with what
3 Keith said, he's crouched down, and those men are on either
4 side of him, hitting him.

5 You, ladies and gentlemen, have the diagram.
6 Mr. Washington says he's in this hallway with these men on
7 either side of him, hitting him, and that Mr. White is on the
8 right side and Mr. Clark is on the left side. After the
9 shooting, Mr. Clark is laying down here, an area where
10 Mr. Washington says he was shot, and Mr. White is fallen here
11 and is leaning up against the wall.

12 Does that make more sense than Mr. White getting
13 shot on the steps and decide he's going to come back up the
14 steps, walk down the other part of the hallway and sit there?
15 Or does it make more sense that they were shot, fell near
16 where they were shot.

17 They were both shot in the knee. And
18 Mr. Washington told you, demonstrated for you that when he
19 started firing, he was down here, covering up, firing like
20 this, and that's what he said happened when he started
21 firing. And that makes perfect sense and is consistent with
22 the shots to their knees.

23 On that call Stacey Washington describes seeing her
24 husband beaten three times. The State wants you to believe
25 that, without talking to each other -- because there's no

1 evidence, absolutely no evidence, and your common sense tells
2 you that it didn't happen, they didn't talk to each other
3 before the 911 call. They want you to believe that it's just
4 a coincidence that they end up saying the same thing from day
5 one. From day one.

6 Corporal George Jones, who they go after a little
7 bit, their witness, the first police officer on the scene,
8 says when he gets there -- and they want to say -- because
9 they think that it's going to sway you emotionally and
10 distract you from the evidence. They want to say, well,
11 Brandon Clark was handcuffed. Ladies and gentlemen, Corporal
12 Jones told you why he handcuffed Brandon Clark. Because,
13 when he got there, he sees Stacey Washington, outside of the
14 house, crying, saying they're beating my husband. And then
15 Keith Washington says he was assaulted and he sees that Keith
16 Washington, his lip is bleeding. That's why he did it,
17 because of what he saw.

18 What everybody did on the scene in response to this
19 incident is one hundred percent consistent with what Keith
20 Washington and Stacey Washington say happened; everything.

21 Now, the State has charged Mr. Washington with a
22 number of crimes. Under this and apply the legal
23 instructions that you received from Judge Whalen.

24 Self-defense is a defense to every murder,
25 manslaughter or assault crime that that man is charged with,

1 a complete defense, as is defense of his home and defense of
2 his family.

3 And when you talk about self-defense, ladies and
4 gentlemen, the law is reasonable. It's reasonable because
5 what Judge Whalen has told you and what you'll see in the
6 written legal instructions is that, ordinarily, before
7 defending yourself with deadly force, you, in this state,
8 have a duty to retreat. But the law changes when people
9 attack you in your home, and what he has told you is that
10 when you are in your home, you do not have that duty to
11 retreat, and you don't have to retreat if it couldn't be done
12 under the circumstances. We know he was in his home.

13 The law of self-defense is reasonable, ladies and
14 gentlemen, and it asks you to look at a few things. One, did
15 Mr. Washington -- they have to disprove these things beyond a
16 reasonable doubt. Did Mr. Washington actually believe that
17 he was in imminent danger of bodily harm?

18 What in the world is more reasonable than believing
19 you can be seriously hurt or killed by two men, one 6'7",
20 330, and one 6'2", 280, that have started hitting you in your
21 house after you find one of them in your daughter's bedroom
22 and asked them to leave and they refused. What in the world
23 is more reasonable than that, ladies and gentlemen? That's
24 610 pounds between the two of them.

25 The law allows you to be reasonable, it allows you

1 to be human, and you don't, in the calm, sterile atmosphere
2 of this courtroom, a year later, pass judgment on that man.
3 You look back, based on the legal instructions to the
4 circumstances that he was under at the time, at the time, and
5 was it reasonable for him to believe at that time that he
6 could be hurt, and there's nothing in the world that's more
7 reasonable than that.

8 The State talks to you a lot about injuries, and I
9 think Mr. Moomau will get back up to talk to you again. They
10 get a chance to talk to you again; we don't. They want you
11 to pay close attention to the injuries and so do we.

12 Because, ladies and gentlemen, Robert White says that Keith
13 Washington was never touched. Never touched.

14 Mr. Washington, despite their best efforts, has
15 never said, and you won't see it anywhere, that he had some
16 kind of broken bone or he was unconscious or anything like
17 that. He has never said that, and witness after witness
18 after witness has come in here and told you that they saw
19 injuries on that man that are consistent with what he
20 described that night.

21 First of all, Corporal George Jones, the State's
22 witness, takes the stand and says that Mr. Washington's lip
23 was bleeding.

24 Daren Livingston comes to the scene, takes the
25 witness stand and tells you that he saw Mr. Washington's

1 mouth swollen. And you know, because it was agreed upon by
2 everyone, that Mr. Washington was treated on the scene with
3 ice for the purpose of reducing swelling and that the photos
4 they have are taken hours, hours later.

5 Lieutenant Charlie Walls tells you he saw redness
6 on Mr. Washington's face. And the EMT, Clyde Washington, who
7 came in here, testified to you not just to what
8 Mr. Washington said, but to what he saw. His report is
9 before you and you'll have it in evidence, and it says,
10 quote, patient's mouth was swelling. That's what he saw and
11 that's what he told you he saw.

12 Witness after witness after witness that comes in
13 here tells you they saw something, and if Robert White is
14 telling the truth and the State's got it right and these
15 charges fit, then there's no injuries whatsoever.

16 Now, Dr. Dixon, Dr. Karen Dixon. They put her on
17 the stand, ladies and gentlemen, and, again, something
18 amazing happens. And this is what I'm talking about. This
19 is what can happen you when you have to sit where that man is
20 sitting. She says to you that she saw no trauma on
21 Mr. Washington, and she writes in the records that he had a
22 contusion and that he had a neck strain. And she ends up
23 telling you on cross-examination, because she has no choice,
24 she says, yes, a contusion is trauma. Because she has to say
25 that because it is.

1 And then, when she's confronted with the fact that
2 she wrote at the time -- I'm not talking to you about a year
3 later -- on that night, at that time she wrote in those
4 medical records that there was a contusion. She has to
5 change it and say yes, there was trauma. Because that's what
6 it is, and it's consistent with what this man says happened
7 to him on that night in his house.

8 Dr. Arden told you that a contusion was trauma.
9 And Dr. Dixon, ladies and gentlemen, told you that she
10 prescribed prescription Vicodin and prescription Motrin,
11 narcotics for this man for the purpose of dealing with pain,
12 based on her evaluation of him and that she diagnosed in the
13 records, assault.

14 When you look at what was happening that night,
15 it's all consistent with what Mr. Washington and Stacey
16 Washington tell you.

17 Now, Mr. Washington also told you that, while he
18 was down, he was covering up, and he demonstrated for you
19 that he was covering up his head and his face to protect from
20 being hit by those men. And the fact that he may have
21 blocked their blows has nothing to do with the fact that it
22 was reasonable for him to believe that they could seriously
23 hurt him.

24 Now, ladies and gentlemen, the whole way that this
25 issue has been presented to you is misleading anyway, because

1 you don't have one legal instruction from Judge Whalen that
2 you have to find some certain amount of injury before a
3 person can use self-defense. That's not what it's about.
4 It's about whether, under the circumstances, Mr. Washington
5 had a reason to believe that he could be killed or seriously
6 hurt based on what was happening to him.

7 The law doesn't require you to wait, under those
8 circumstances, until you have certain types of injuries
9 before you can defend yourself. Because the law allows you
10 to be human and it allows you to be reasonable. You don't
11 have to sit there and wait to see what happens. You don't
12 have to ask these men what are their intentions towards you
13 while you're bent over covering up and they're hitting you in
14 your house. You don't have to do that. There's no legal
15 instruction that says you do.

16 Ladies and gentlemen, the fact that all of these
17 things and all of these people say they saw something tells
18 you that something happened, and the only witness who tells
19 you that nothing happened is the witness that you're asked to
20 base all of this on, that you're asked to base convictions of
21 this man for these crimes on and there's no way. It doesn't
22 add up. The evidence simply doesn't add up.

23 Now, self-defense. There's nothing that you've
24 been told, ladies and gentlemen, that says that it is illegal
25 to use a gun in self-defense. You were -- may we approach?

1 It's awkward, but I have a basis.

2 (Counsel approached the bench and the following
3 ensued.)

4 MR. STARR: Your Honor, I've been going for a while
5 and they've heard a lot. Just looking at them, I think it's
6 reasonable to give the jury a five-minute break.

7 THE COURT: I think they would be more upset
8 without being given a break after you stop then before
9 rebuttal.

10 MR. STARR: I just want to say the problem is it
11 looks like some of them are having trouble paying attention
12 because of the length of time they've been sitting there.

13 THE COURT: Okay.

14 (Counsel returned to trial tables and the following
15 ensued.)

16 MR. STARR: Ladies and gentlemen, there's nothing
17 in the law and no legal instruction that says you cannot use
18 a gun in self-defense, and there's nothing in the law and
19 there's no legal instruction that says that you cannot use a
20 gun in self-defense when you are under attack by men much
21 larger than you, as Brandon Clark and Robert White are.
22 There's nothing in the law that says that. If you are
23 afraid, and it's reasonable for you to be afraid that you
24 are in danger of serious injury or death, then you can defend
25 yourself in that fashion.

1 The Judge has given you an instruction, because the
2 third thing you have to find in evaluating self-defense is
3 whether the response was reasonable. No more force than was
4 reasonably necessary to defend himself in light of the threat
5 or actual harm.

6 Ladies and gentlemen, Mr. Washington told you there
7 was no sign that these people were going to stop. They're
8 bigger than him, they're stronger than him. There's no way
9 that he can get them to stop, and the law doesn't require him
10 to wait, because it allows you to be afraid under those
11 circumstances and to react. Afraid under those
12 circumstances.

13 Ladies and gentlemen, when you think about, when
14 you think about the evidence, think about what it shows you,
15 think about the ways in which these men are shot. He's not
16 shooting, aiming, firing, calculating from a distance.
17 They're shot sporadically. He says I was just shooting to
18 try to get them off of me.

19 The reason he doesn't know where they're shot on
20 the 911 call is because he doesn't know where he shot them.
21 Because they're on top of him. Just like he says, he's
22 firing at them in the direction where they were to get them
23 off of him. That's why he doesn't know where they're shot,
24 because of the way this happened.

25 There's no evidence -- they want you to believe

1 specific intent to kill, that he was trying to kill these
2 men, that he was thinking about anything other than defending
3 himself. As a police officer, he could have shot these men,
4 if it happened the way they say it happened, in the head, in
5 the heart. They're laying on the ground. He's not trying to
6 kill them. He's calling 911. And that's what they want you
7 to believe? There's no way. There is absolutely nothing,
8 when you apply those legal instructions to the facts of this
9 case, that makes what he did a crime. Absolutely nothing.

10 Now, ladies and gentlemen, you've also been
11 instructed by Judge Whalen that the State has to disprove
12 beyond a reasonable doubt that Mr. Washington was acting in
13 defense of others. He mentions his wife and his daughter
14 eight times on the phone call. He says if I get knocked out,
15 if my weapon gets taken from me, if I'm unconscious, these
16 men are in his house, they've just attacked me, and they can
17 do anything to my wife and my daughter, who he knows are
18 right downstairs. Is it reasonable to believe that he would
19 be thinking about that under those circumstances? Of course
20 it is. Of course it's reasonable to believe that, ladies and
21 gentlemen, and all of the evidence shows you that that is
22 exactly what Mr. Washington was thinking about at that time.

23 I told you the law changes a little bit when you're
24 in your home and that the Judge has instructed you that the
25 State has to disprove Mr. Washington acting in defense of his

1 home. If he believed that Mr. Clark and Mr. White were
2 assaulting him, he can defend himself. He can defend
3 himself.

4 And the same language applies for all of the
5 instructions, the belief has to have been reasonable and,
6 under the circumstances as they appeared to him at the time,
7 the use of force has to have been reasonable.

8 What you see is that he's not trying to kill or
9 hurt these men. It's just like he said, he's trying to get
10 them off of him, trying to get them off of him. And that's
11 what all of the physical forensic and scientific evidence
12 shows you. If he wanted them dead, it was easy. If he
13 wanted anything other than to get them off of him, he could
14 have done it. But it didn't happen that way because that's
15 not what he was thinking about. He got them off of him, and
16 they laid down close to the areas where they were shot.

17 Now, you heard from a couple of witnesses in the
18 defense case that we had to call so that you could hear some
19 things that the State didn't present to you and didn't want
20 you to hear.

21 MR. MOOMAU: Objection.

22 THE COURT: Sustained.

23 MR. STARR: You heard from Leanora Brun-Conti, the
24 woman who did the fiber analysis, ladies and gentlemen, and
25 you heard what she told you, that she analyzed Brandon

1 Clark's pants and Mr. Washington's vest and shirt and that
2 fibers consistent with and in all likelihood from Brandon
3 Clark's pants --

4 MR. MOOMAU: Objection.

5 THE COURT: Sustained.

6 MR. MOOMAU: Move to strike.

7 THE COURT: Stricken.

8 MR STARR: She told you, ladies and gentlemen, that
9 the shape of the fibers was unique. So when she saw them on
10 Mr. Washington's clothes, they were easy to identify. That's
11 what she told you. And in her report she says that they're
12 consistent, completely consistent. Not inconsistent in any
13 way with the fibers that she analyzed from Brandon Clark's
14 pants. Ask yourselves this: How do fibers from Brandon
15 Clark's lower body end up on --

16 MR. MOOMAU: Objection.

17 THE COURT: Overruled.

18 MR. STARR: The most reasonable explanation, when
19 you look at the evidence, is the way that fibers from Brandon
20 Clark's lower body clothing end up on Mr. Washington's upper
21 body clothing is that he was in this position, like he says
22 he was, with Brandon Clark right next to him, over top of
23 him, like he says he was, kicking him.

24 Now, again, you see the State try -- amazing -- to
25 get you to disregard the forensic scientific evidence that

1 shows you what happened in this case. So they cross-examine
2 Ms. Brun-Conti and they ask her things like, well, if one
3 garment is hanging up in a closet, next to another one, and
4 they touch, can fibers be transferred that way? Well, if
5 they're in the dryer together, can fibers be transferred that
6 way?

7 I'm going to ask you this. What is the evidence in
8 this case that Brandon Clark's pants are hanging up with
9 Mr. Washington's shirt and vest in the closet? What is the
10 evidence in this case that Brandon Clark's pants are in the
11 dryer with Mr. Washington's shirt and vest? There is
12 absolutely none and, just like the rest of the physical,
13 scientific and medical evidence, it shows you that
14 Mr. Washington has told you the truth about defending
15 himself.

16 Now, ladies and gentlemen, they also try to make
17 the point on this evidence that, well, it was a week later.
18 Well, the State, when they're investigating the case, they
19 didn't go get the stuff until a week later. Is that his
20 fault? And when you use your common sense and you think back
21 to the testimony of Ms. Conti during that week, it's more
22 likely that fibers came off and trace evidence was lost than
23 it is that the pants, that are somewhere else, came into
24 contact in a dryer with Mr. Washington's shirt.

25 What they want you to believe about the physical

1 evidence and what they say about it doesn't make sense. Ask
2 yourselves why they have to go to these lengths to disprove
3 forensic evidence that their investigators gathered as they
4 were investigating this case. That's because, ladies and
5 gentlemen, they know it shows --

6 MR. MOOMAU: Objection.

7 THE COURT: Overruled.

8 MR STARR: The State knows that the forensic
9 evidence shows contact between these people, and they know
10 that contact between these people is completely consistent
11 with what Mr. Washington tells you and one hundred percent
12 totally inconsistent with what Robert White tells you.
13 Robert White doesn't give you any explanation as to how there
14 could be any of Brandon Clark's pant fibers on
15 Mr. Washington's clothing. None whatsoever.

16 So they have to get you to not believe scientific
17 forensic evidence. And when you're applying the reasonable
18 doubt standard, there is no way that you can do that.
19 Because all you have to ask yourself is whether all of this
20 evidence raises a reasonable doubt about what Robert White
21 says. You have to find and convict this man that all of this
22 evidence doesn't even make it reasonably possible that Keith
23 Washington and Stacey Washington aren't telling the truth,
24 and there's absolutely no way that you can say that, ladies
25 and gentlemen.

1 Now, you heard the testimony of Keith Washington,
2 consistent with the physical evidence, consistent with the
3 scientific evidence, consistent with what he said on the 911
4 call, consistent with the medical evidence, consistent with
5 Stacey Washington. Mr. Washington told you that he could not
6 get these men off. They were bigger; they were stronger. He
7 had not been expecting them to do this to him and, under
8 those circumstances, he felt that he could be seriously
9 injured or killed, and that's why he defended himself. Under
10 those circumstances, ladies and gentlemen, for him to use
11 that gun is reasonable. It is reasonable.

12 So the State tries to make a big deal of the fact,
13 well, he had a gun. Ladies and gentlemen, this isn't a case
14 where a guy has a gun illegally, with a scratched off serial
15 number. It's not like that. This man is a police officer.
16 That's why he had a gun.

17 And they want to say, well, he was at home and the
18 safety was off. Keith Washington and Stacey Washington told
19 you that when that man goes to bed at night, he locks up that
20 gun. And Keith Washington told you that the only reason the
21 safeties are off is because the Prince George's County Police
22 Department general orders require it. Require it. And in
23 their rebuttal case, did the State come in here with a
24 general order that says anything different?

25 MR. MOOMAU: Objection.

1 THE COURT: Overruled.

2 MR STARR: Did they come in here with a general
3 order that says anything different than what Keith Washington
4 told you? Did they present a witness that told you, no,
5 that's not what's supposed to happen? No, they didn't do
6 that. Keith Washington tells you that it's true and, if it
7 wasn't true, they would have presented some evidence to
8 disprove it and they can't.

9 That man is telling you the truth, and everything
10 about what he did on that day was normal and reasonable under
11 the circumstances, and now it's being twisted around. That's
12 the reason the safeties were off. They're required to be
13 off. That's the police department regulation. If you don't
14 like it, that's a different issue, but he was following it.

15 Now, I'm going to talk to you a little bit about
16 the physical evidence. I'm going to go on for a long time
17 about the physical evidence. I have to talk about the
18 physical evidence. I have no choice because the physical
19 evidence is reasonable doubt in this case.

20 It's amazing. In his closing argument Mr. Wright
21 says to you, well, Dr. Locke, when he did the autopsy, found
22 no evidence of close-range firing. That is a manipulation of
23 the facts of this case.

24 Dr. Locke found no evidence of close-range firing
25 on the skin. And you have heard that there was all kinds of

1 evidence of close-range firing on the clothing of these
2 people.

3 You're going to have a stipulation that makes it
4 clear -- you're going to have a stipulation, ladies and
5 gentlemen, that makes it clear as to exactly what each item
6 of physical evidence was and that makes it clear as to
7 exactly where forensic evidence was found.

8 The stipulation that you're going to have tells you
9 that this item, which is a photo attached to State's Exhibit
10 10, labeled CN8A, is a shirt that was being worn by Robert
11 White. That's an agreed upon fact. This is a shirt being
12 worn by Robert White.

13 You know that Robert White was shot once in the
14 chest, once in the lower abdomen area, the belly area, and
15 once in the knee. And you recall that when she was talking
16 to you about this piece of evidence, the State's expert,
17 firearms expert Susan Lee, told you that, to the visual eye,
18 this material around the hole appeared to be soot and smoke,
19 and that soot and smoke is consistent with close-range
20 firing.

21 MR. MOOMAU: Objection.

22 THE COURT: Sustained.

23 MR. MOOMAU: Move to strike that.

24 THE COURT: Strike as to the last comment or the
25 last sentence.

1 MR STARR: CN8C, ladies and gentlemen, Robert
2 White's white shirt being worn underneath of the dark blue
3 one that I just showed you. And she showed you this black
4 material around the hole in this one. This is the
5 undershirt, and you can see what, to the naked eye, she said
6 she believed to be soot and smoke. And you know from the
7 testimony that when the shots are fired from beyond a certain
8 distance, you don't see that kind of thing on the garment.
9 You don't see that kind of thing on the garment.

10 Now, she says -- and the State makes a big deal
11 about it -- well, I put a question mark by it because it was
12 based on the naked eye. So a confirmation test is required.
13 There's no evidence that she did a confirmation test that
14 disproved it. And is that Mr. Washington's fault that it
15 wasn't done? She's writing down soot and smoke; that's what
16 it appears to be to the naked eye. And it wouldn't be there
17 if the shots were fired beyond a certain distance. So you
18 know, ladies and gentlemen, that they were not.

19 MR. MOOMAU: Objection.

20 THE COURT: Sustained.

21 MR. STARR: She tells you and the stipulation tells
22 you that on Mr. Clark's pants, item B/C, around the wound to
23 his knee, that there appeared to be soot and smoke. She
24 tells you. You're going to have the photo, you're going to
25 have the stipulation, and you're going to know that that's

1 what she said.

2 Gunshot residue testing, presented by the State's
3 witness, shows you that on the outer clothing of Brandon
4 Clark, his abdomen wound, his abdominal wound, from between
5 12 and 24 inches. Between 12 and 24 inches.

6 And Robert White wants you to believe that he was
7 standing in front of Mr. Clark when that shot was fired, when
8 Mr. Clark was shot and went down. Is there any way that with
9 Robert White standing in front of him, in-between the two of
10 them, that Keith Washington could shoot Brandon Clark in the
11 abdomen from 12 inches away? From 24 inches away? There's
12 no way.

13 And, remember, the wounds, they're not even
14 straight. And you heard what Dr. Arden said about people
15 bending over. And you heard Mr. Washington and his wife talk
16 about people bending over, hitting Keith Washington, and
17 where you saw how Keith Washington demonstrated, the way that
18 he fired the shots, and you will remember exactly what you
19 saw and you'll remember that you saw him down in this
20 position. He said he was covering up, he took out his gun
21 and he fired and he fired. You saw that.

22 And you heard Dr. Arden say that when people are
23 shot and when they're assaulting someone and someone is being
24 assaulted, these people are moving in all kinds of different
25 directions, and you get trajectories, ladies and gentlemen,

1 that I suggest to you are one hundred percent with the
2 trajectories you see on the wounds that these men have.
3 Close range, in all sorts of different trajectories, from all
4 sorts of different angles. That's what you have in this
5 case.

6 Robert White, three to 12 inches, according to the
7 gunshot residue. Three inches. Twelve inches. That is
8 completely consistent with what Keith Washington says. And
9 the gunshot residue testing, as much as any of the physical
10 testing in this case, is completely consistent with what
11 Keith Washington says and it's a reasonable doubt. When you
12 add it up with all of the other evidence, it's a reasonable
13 doubt.

14 Fiber transfers, a reasonable doubt when you add
15 them up with all of the other evidence. A reasonable doubt.

16 Ladies and gentlemen, the reason that I have to
17 talk to you about the forensic evidence and the reason that
18 you have to consider the forensic evidence is that that's the
19 type of evidence you can trust. That's the type of evidence
20 that doesn't file lawsuits and deny it. That's the type of
21 evidence that doesn't have cocaine in its body and deny it.
22 That's the type of evidence, ladies and gentlemen, that
23 doesn't have criminal convictions. And that type of
24 evidence, the type of evidence that you can trust, all of it,
25 adds up to a mountain of reasonable doubt because it

1 disproves what the State wants you to believe and what Robert
2 White wants you to believe. And there's no other way to look
3 at it.

4 They can come up here. They can try and explain it
5 and make excuses for every single item of physical evidence.
6 Well, there's some language on the report that says not for
7 legal purposes. Well, the items were in a hamper and weren't
8 recovered by us until a week later, and there's no evidence
9 that it came into contact with Mr. Clark's pants during that
10 time, but just forget about that and disregard it. Our
11 expert wrote soot and smoke but, because she didn't do the
12 confirmation test, disregard it.

13 They're trying to explain away the most powerful
14 evidence in this case because they have to, because it shows
15 that they don't have a case, because their case is Robert
16 White, and you know you can't believe him beyond a reasonable
17 doubt.

18 Before you even get to the physical evidence and
19 when you get to the physical evidence, not only do you know
20 that you can't believe Robert White, but you know that you
21 must've believe Keith Washington and you must believe Stacey
22 Washington.

23 Now, you've been given -- before I talk about the
24 charges, I want to talk to you real quickly about Dr. Arden.
25 Dr. Arden came in here and he testified as a qualified

1 forensic pathologist, and the State did not object to his
2 qualifications, and the state's attorney's office, this same
3 state's attorney's office has called him as a witness before.
4 I bet you, ladies and gentlemen, that when they called him,
5 they weren't asking him the same questions they were asking
6 him in this trial.

7 MR. MOOMAU: Objection.

8 THE COURT: Sustained.

9 MR. STARR: The instruction about expert witnesses
10 tells you consider his qualifications and consider his
11 opinions, and everything that he said is perfectly consistent
12 with the common sense and with the physical evidence in this
13 case.

14 Because of that, because there's nothing that you
15 can say to impeach his opinions when he tells you that the
16 physical evidence is inconsistent with Robert White's
17 different scenarios, they have to try to smear him. They
18 talk about an allegation, and they use words like harassment,
19 hoping that you will forget, not consider what that man said
20 and that man's qualifications, and just be so enflamed by
21 that, that you don't think about the evidence in this case.

22 No truth presented to any of it, nothing about how
23 it turned out, nothing about whether it was true, just an
24 allegation was made, so that you don't think about the
25 testimony and you don't think about the physical evidence.

1 Now, ladies and gentlemen, not only did Dr. Arden
2 tell you that the scenarios provided by Robert White don't
3 make any sense, but he told you, ladies and gentlemen, about
4 how someone being assaulted can affect the trajectory of
5 wounds, can send them in any kind of different direction. He
6 told you, ladies and gentlemen, about how people bending over
7 can affect trajectory of the wounds. It makes them downward,
8 like the wounds to Robert White and the wounds to Robert
9 Clark.

10 And everything that he told you about how people
11 respond to being shot. He was shot in the knee first. How
12 do you think that makes him react? Does it make them turn?
13 Does it make them bend? Of course it does.

14 If Keith Washington fired in exactly the way that
15 he demonstrated to you, and you remember what you saw, with
16 him starting in that crouched position, and coming up and
17 firing --

18 MR. MOOMAU: Objection.

19 THE COURT: Sustained.

20 MR. MOOMAU: Move to strike that statement.

21 THE COURT: That last portion is stricken.

22 MR STARR: You know what you saw in that
23 demonstration, and your memory is going to control back in
24 that jury room, and you know, based on what you saw, Keith
25 Washington demonstrated that everything that he said about

1 what happened is completely consistent with all of those
2 wounds and adds up to the testimony of every witness,
3 including Dr. Arden.

4 Now, ladies and gentlemen, the charges in this
5 case. There's a number of them, and in the charges you see
6 some amazing things. First, you see that Mr. Washington --
7 and remember the defenses we've raised, the truth of what
8 happened to that man, the fact that he was defending himself
9 in his home, and his family is a complete defense to every
10 charge that he's facing in this indictment.

11 But I'm going to tell you the first charge, felony
12 murder. You have to find he was committing a felony by
13 attacking, assaulting Brandon Clark, when all of evidence is
14 that he was bent over, being assaulted, and self-defense and
15 defense of others and defense of his home is a complete
16 defense to that charge.

17 You're told, ladies and gentlemen, that
18 Mr. Washington is charged with specific intent, having the
19 specific intent to kill. This is that motive theory. So
20 angry with Marlo Furniture that he decides to kill the
21 delivery people that he's never met, inside of his home, with
22 his wife and child there, based on nothing. That's what
23 you're asked to find beyond a reasonable doubt. And it
24 doesn't make sense on its face, so there is no way you can
25 find that he's guilty of that charge.

1 They give you the charge of voluntary manslaughter.
2 Voluntary manslaughter -- before I get to the voluntary
3 manslaughter, ladies and gentlemen, he's charged with two
4 other types of second degree murder.

5 Specific intent to inflict serious bodily injury,
6 meaning that he is not thinking about defending himself;
7 Robert White is telling the truth; he's not thinking about
8 defending his family and responding to that; Robert White is
9 telling the truth; he's thinking I want to cause a
10 significant injury to these men, and that's the reason that
11 I'm firing. And there's no evidence from which you can
12 conclude that anything like that was going through this man's
13 mind.

14 The final second degree murder charge that you're
15 asked to consider is second degree murder of what the law
16 calls a depraved heart, meaning that Mr. Washington acted
17 with an extreme disregard, extreme disregard for human life
18 when he fired those shots. So, beyond a reasonable doubt,
19 not defending himself. Beyond a reasonable doubt not
20 defending his family. Beyond a reasonable doubt not
21 defending his home. Instead of that, thinking that there is
22 a risk to human life and I'm going to disregard it; an
23 extreme risk to human life and I'm going to disregard it.
24 And there is no way, ladies and gentlemen, based on the
25 evidence, that anything like that was going through that

1 man's mind. Simply no way. He was under attack. Every bit
2 of evidence proves it.

3 You're asked to consider a charge that the State
4 has presented to you of voluntary manslaughter, and you learn
5 a lot about this prosecution when you look at that charge --

6 MR. MOOMAU: Objection.

7 THE COURT: Overruled.

8 MR. STARR: -- that the State has asked you to
9 consider. You learn a lot about it. They want you to
10 find -- and Mr. Wright asked you to find Keith Washington
11 guilty of this charge, voluntary manslaughter, based on what
12 the law calls a hot-blooded response to legally adequate
13 provocation. He asks you to find him guilty of that.

14 Their theory, their evidence is that there was no
15 provocation. Does he want you to disregard their own
16 evidence and find that there was provocation? The witness
17 that they presented about what happened in that house is
18 Robert White. He says no provocation.

19 And then Mr. Wright argues to you, ladies and
20 gentlemen -- and I'm telling you, you're learning about this
21 prosecution when you look at this charge -- not only does he
22 argue to you to convict Mr. Washington based on something
23 that is inconsistent with what they want you to believe
24 happened, but he says to you, during his closing argument, if
25 you believe that Mr. Washington was responding, that his

1 reaction was to the lateness of the delivery, then convict
2 him of this charge.

3 Number two, he referred to it specifically. What
4 you're going to see is that number two says -- this is their
5 charge that they brought. It's inconsistent with their
6 evidence and their witness. The only act that you can find
7 to be adequate provocation under the evidence in this case is
8 a battery by the victim upon the defendant.

9 But they know their evidence says that's not what
10 happened, so he wants you to convict this man not just by
11 ignoring evidence that they want you to believe is true, but
12 by finding something that is in contradiction to the law that
13 has been given to you by Judge Whalen, and there is no way
14 that you can convict this man of voluntary manslaughter when
15 you read that.

16 Because the State has the burden of proof. You're
17 going to find that the State met its burden of proving that
18 crime when it's their theory that it didn't happen? When
19 it's their theory that there was no provocation? When it's
20 their theory they want you believe that Mr. Washington shot
21 these men because a delivery was late, a delivery that he
22 knew was coming, when he was having dinner with his wife and
23 daughter? There is no way. There is no way.

24 And when you look at that and you look at this
25 indictment and you look at all these charges, what you see is

1 that the State is presenting you with anything they legally
2 can, anything that they can get in front of you, hoping that
3 you're going to ignore the physical evidence, ignore the
4 scientific evidence, ignore all the problems with Robert
5 White, and find this man guilty of something so you can go
6 home. That's what they want. That's why he's charged with
7 all these different homicides, ladies and gentlemen, based on
8 one act. Anything that you might somehow agree on, they're
9 going to try and get you to agree on.

10 And when you think about what you were asked to do
11 with regard to this voluntary manslaughter count, you know
12 that they're going to try to get you to convict on things
13 that they don't even think are true, that they don't even
14 think are true? How can they stand in front of you and say
15 to convict this man based on provocation when they say there
16 was none? So in addition to denying, trying to explain away
17 physical, scientific and forensic evidence, you see what's
18 happening here.

19 You're asked to consider counts of involuntary
20 manslaughter. Same thing. Involuntary manslaughter based on
21 a grossly negligent or an unlawful act. The State wants you
22 to do it two different ways on involuntary manslaughter when
23 their theory is it wasn't involuntary.

24 Their theory isn't that these men were shot because
25 of some kind of gross negligence. Their theory is that these

1 men were leaving Mr. Washington's house, and he decided to
2 shoot them in his house because he was mad because a delivery
3 was late. That's not negligence, that's not involuntary
4 manslaughter, and when you look at those legal instructions,
5 you're going to know that. What they're asking you to do is
6 to convict this man based on things that they don't even
7 think happened.

8 When you evaluate the scene and you look at what
9 Robert White says happened, and you consider that gunshot
10 residue, you think about what Deborah Martin told you the
11 measurement was from the master bedroom door to the second
12 step, eight feet, five inches; eight feet, five inches.

13 Robert White said to you Keith Washington was
14 standing in front of the master bedroom door. He has himself
15 on the second step. He has Brandon Clark at the top of the
16 stairs and, if that's true, there's no gunshot residue on
17 Brandon Clark's abdomen showing 12 to 24 inches.

18 It's reasonable, based on the testimony, for you to
19 conclude that Susan Lee saw soot and smoke on the wound to
20 Mr. White's stomach, as well as other wounds, and there is no
21 way that, if Mr. Washington was where Mr. White says he was,
22 and Mr. Clark and Mr. White are where Mr. White says they
23 were, that you would see that kind of evidence. There is
24 simply no way, ladies and gentlemen.

25 Now, the 911 call. The State has played it for you

1 a couple of times. I'm not going to play the whole thing
2 again.

3 We're almost there. Just give me a couple more
4 minutes. It's very important, but I'm sorry. Only a few
5 more minutes.

6 Now, ladies and gentlemen, every single time that
7 the State plays this tape, they stop it at about nine
8 minutes, 19 seconds; nine minutes, 20 seconds. This tape
9 shows you in so many ways what happened. But it also shows
10 you what the State doesn't want you to hear, and that's the
11 words at the end of the call of Stacey Washington talking to
12 the 911 dispatcher in response the question "so what exactly
13 happened, ma'am?" I mean, were they delivering furniture?
14 And when you hear her response to that, you know that you
15 cannot find proof beyond a reasonable doubt because that
16 woman is telling the truth right then and there on the scene.

17 Now, ladies and gentlemen, their cross-examination
18 of Mrs. Washington. The State says, well, a year ago you
19 were saying you saw the shooting; you were saying you saw the
20 shooting. That woman has never said in her life that she saw
21 the shooting, and they don't have any statement where she
22 says that she did see the shooting. She explains, I didn't
23 see a gun; I saw two men over top of my husband, hitting him;
24 as I turned, I heard the shots as I was going to get the
25 phone. She says if I said I saw flashes, seeing flashes as

1 you're turning is not seeing the shooting. If she says if I
2 said I saw flashes a year ago, then I did; I just don't
3 remember that now. That's a person who is telling the truth.

4 If you go to this tape, you're going to hear, at
5 about ten minutes and 59 seconds, the following:

6 (Audiotape plays.)

7 MR. STARR: Every time the State plays this tape,
8 they don't play that, ladies and gentlemen, because that
9 tells you what Stacey Washington saw and that's the truth.
10 The State doesn't want you to hear that evidence, just like
11 they don't want you to think about the physical evidence and
12 consider it for what it really is.

13 Stacey Washington doesn't have prior convictions.
14 Stacey Washington, there's no evidence of cocaine use that
15 she can't explain. Stacey Washington is consistent with the
16 911 call, consistent with Mr. Washington and consistent with
17 the physical evidence.

18 Keith Washington was a police, and what Stacey
19 Washington saw happening to him made her feel like she had to
20 call the police, and the only explanation for that is that
21 she saw that man helpless.

22 I'm going to sit down now, ladies and gentlemen. I
23 don't get a chance to talk to you again. Mr. Cohen doesn't
24 get a chance to talk to you again. The State does. That's
25 the way it works.

1 What I'm going to ask you to do is that, as you're
2 listening to the State as they talk to you again, just think
3 about what Mr. Cohen or I might say if we got another chance
4 to talk to you.

5 Ultimately, we are only asking you to do one thing,
6 apply the law to the evidence that you've received in this
7 case. If you do that, you will see that, in order to convict
8 Keith Washington, you have to believe Robert White beyond a
9 reasonable doubt.

10 And in deciding whether there is reasonable doubt,
11 you are not limited to the ones that I've talked about and
12 you don't all have to have the same ones, but if you have one
13 single reasonable doubt about a charge, your vote has to be
14 that Keith Washington is not guilty.

15 When you evaluate this evidence, the medical
16 evidence, the testimony, Robert White, Keith Washington,
17 Stacey Washington, you see, ladies and gentlemen, that your
18 verdict has to be and can only be that Keith Washington is
19 not guilty of any of these charges.

20 Thank you.

21 THE COURT: Ladies and gentlemen, we're going to
22 take a recess.

23 (Counsel approached the bench and the following
24 ensued.)

25 The jury was excused from the courtroom at

1 1:55 p.m.)

2 THE COURT: I've got to feed them.

3 MR. MOOMAU: What time do you want us back?

4 THE COURT: The pizza is in there now, so I don't
5 want to bring them out again. They may not be happy with any
6 one of us about anything. Tell them to go ahead and eat.

7 THE COURT: What time do you want to give them?

8 MR. MOOMAU: Until three, 3:15.

9 MR. COHEN: Three is fine.

10 THE COURT: Three. Because they're in there;
11 they're not wandering around.

12 (Counsel returned to trial tables and the following
13 ensued.)

14 THE COURT: Ladies and gentlemen, we wanted to feed
15 the jury. So we're recessing until three o'clock, when the
16 State will conclude with its rebuttal comments. They've been
17 sitting since early this morning without a break. They're
18 hungry. They want to eat.

19 (At 2:00 p.m. a luncheon recess was taken.

20 -oOo-

21 **AFTERNOON SESSION**

22 3:00 p.m.

23 THE DEPUTY CLERK: Criminal trial 07-1664X, State
24 of Maryland versus Keith A. Washington.

25 MR. MOOMAU: Good afternoon, Your Honor. William

1 Moomau present for the State.

2 MR. WRIGHT: Joseph Wright for the State.

3 MS. ZANZUCCHI: Raemarie Zanzucchi for the State.

4 MR. COHEN: Good afternoon, Your Honor. Vincent H.
5 Cohen, Jr., on behalf of Mr. Washington.

6 MR. STARR: And Michael Starr on behalf of
7 Mr. Washington, who is present.

8 THE COURT: Are we ready for the jury to return?

9 MR. MOOMAU: Yes, Your Honor.

10 (The jury returned to the courtroom at 3:05 p.m.)

11 THE COURT: Mr. State's Attorney.

12 MR. MOOMAU: Thank you, Your Honor.

13 **CLOSING ARGUMENT BY MR. MOOMAU (Rebuttal)**

14 MR. MOOMAU: Good afternoon. Mr. Starr, in his
15 closing, spent a lot of time telling you this case didn't
16 make sense and I'll agree with that. It doesn't make sense.
17 It doesn't make sense that, after two years of delivering
18 furniture, going in and out of people's homes, particularly
19 on this day, at the end of the run, Brandon Clark, for no
20 reason, is going to attack Keith Washington. It makes no
21 sense.

22 Now, Brandon Clark, of course, wasn't here to
23 testify. But from State's Exhibit 6, you'll see a little bit
24 about what Brandon did that day, and that's why this doesn't
25 make sense. You can see from State's Exhibit 6 what was

1 delivered, where it was delivered to. They delivered beds.
2 They deliver a bar. They deliver a dresser. On and on and
3 on, with Brandon's writing on it about anything that was
4 wrong with the delivery. Broken in the box, needs service
5 tag, damaged, coming back, needs service tag. And people
6 signing their deliveries. Clear down until, of course, you
7 get to 1513 Shellford Lane. It doesn't make sense.

8 But what is true in this case, based on the
9 evidence, is that Keith Washington would not have come to
10 that door with a loaded firearm, in position ready to fire,
11 and Brandon Clark would still be here. And Keith Washington
12 would look the same as he does now, the same way he looked
13 then.

14 Mr. Starr asked you to evaluate the crime scene.
15 Now, one of two things happened in that hallway. There was a
16 severe beat-down with two giant men, totalling over 600
17 pounds, beating on Keith Washington, or he shot them because
18 he was mad.

19 I ask you to look at the pictures. This is State's
20 Exhibit 33. Look at the pictures in that hallway. You look
21 and see whether there is any scuffs on the wall, holes in the
22 wall, whether that banister is broken in any way. No
23 testimony about that. There's still a sculpture sitting
24 right there, where this terrible beat-down supposedly took
25 place, where they were supposedly wailing on him. No

1 evidence of that at all.

2 Robert White. The majority of those two hours was
3 spent attacking Robert White. This case has never been just
4 about Robert White.

5 Now, I told you in opening statement about the
6 positive cocaine test from the hospital, I told you in
7 opening statement about the lawsuit, and I told you in
8 opening statement that they would raise questions about him.
9 They spent a lot of time talking about him.

10 So let's talk a little bit about him. Does he have
11 convictions? Yes. In '95, that was what the stipulation
12 said. There was ones before that.

13 He has this lawsuit. They make a big deal about
14 saying that he doesn't know anything about a multimillion
15 dollar lawsuit. He testified he hadn't seen the papers. We
16 don't know what type of communication he's having with his
17 lawyer. He said he had heard about the lawsuit and he didn't
18 know about it. Mrs. Clark said she hasn't had any
19 communication with him about the lawsuit.

20 There was a positive cocaine test. He said he
21 hasn't used cocaine. I told you about that in my opening
22 statement. They searched the clothing items that were there.
23 They searched the truck. No drugs or weapons were found.

24 They say it doesn't make sense because of the
25 forensics. I want to talk about the forensics a little bit.

1 First of all, I want to talk about this fiber transfer that
2 they say we were trying to hide by not bringing it in. You
3 heard the testimony about the fiber transfer. What does that
4 tell you? Nothing. Because we don't know if those fibers
5 from Brandon Clark's pants went on Keith Washington's vest.
6 We don't even know what part of the shirt they rolled. It
7 could have been the part that was under the vest.

8 But most importantly -- and they called her as a
9 witness. But, most importantly, she did not testify to, she
10 didn't say that she had found any of Washington's fibers on
11 Clark's pants; did she? No testimony about that, and they
12 would have brought that out.

13 So what is that worth anyway? It's not DNA. All
14 they can say is, well, looks like fibers might be, could be.
15 It's nothing.

16 The medical and the firearms. I want you to
17 remember what Keith Washington said. He gave a little
18 demonstration right in front of you. Now, they're trying to
19 change it now in closing statement. They're trying to say
20 that he was down like this, and that that's what he said when
21 he was doing the shooting. Now they're trying to say he was
22 raising up when he was doing the shooting.

23 MR STARR: Objection.

24 THE COURT: Overruled.

25 MR. MOOMAU: Remember that, what you saw him do

1 when he demonstrated. He said both of these men, these giant
2 men were on each side of him, beating him. On the 911,
3 hitting and kicking him in the face.

4 Now, Dr. Khan said that the shot to Robert White,
5 upper chest, down. You saw it on the x-ray. The other shot
6 to the abdomen was downward, because he showed you on x-ray
7 where the fragments ended up.

8 Dr. Arden testified that the shot to Brandon Clark
9 in the abdomen was downward.

10 Now, these two men are beating on him and he's
11 shooting like this, boom, boom, boom. How is Robert White
12 getting shot in the upper chest and it's coming down? How is
13 Brandon Clark getting shot in the abdomen and it's coming
14 down? That doesn't make sense.

15 And another thing. He says that both of these guys
16 were right there, beating him when he's down here, shooting,
17 right beside him, beating him.

18 And they preach about the gunshot residue. Well,
19 let's talk about the gunshot residue. Brandon Clark's
20 shirt -- and it's in the written report, this stuff about the
21 smoke, that she couldn't confirm -- that Susan Lee didn't
22 feel comfortable enough putting in her written report.
23 There's nothing in there about that.

24 She microscopically and chemically analyzed the
25 area around the gunshot holes for gunshot residue. That's

1 what she testified to and that's in her written report.

2 Brandon Clark's shirt, 12 to 24 inches from the
3 muzzle. His pants, no gunshot residue found around the
4 bullet hole. White shirt, where the bullet holes were, no
5 gunshot residue found. For his pants, three to 12 inches
6 from the muzzle.

7 So what do you get from that? Well, this testimony
8 about being down and shooting and them right up on you,
9 beating, that doesn't make sense because it says it in her
10 report, and she testified that that gun stops leaving residue
11 around 48 inches. Around 48 inches. So they say what Robert
12 White says doesn't make sense. Back at 'em, because what he
13 said clearly doesn't make any sense.

14 The 911. I'm not going to play it again. But what
15 is important about that is you heard Keith Washington testify
16 about Robert White going into the bedroom. He's on that tape
17 for about nine minutes. Not once, not once did he say
18 anything about anybody going into his daughter's bedroom.

19 And whether Mrs. Washington saw it or not, I
20 believe there's a statement in part of the recording where
21 she says two people were shot. They say that's a
22 misinterpretation; she meant something else. Listen to it
23 yourself and decide what you want with that. But one thing
24 is for certain. After she sees, in her words, her husband
25 being beaten, beaten, beaten, she doesn't ask him if he's

1 been shot. She doesn't ask him how he is. Because she knew.
2 She knew and she saw him shoot those two guys up in the
3 hallway.

4 They make reference in some phone records to -- and
5 I stipulated to the phone records, but I never heard anyone,
6 even the defendant, testify about what Marlo's number was.
7 So they're referring to some reference in a phone bill
8 somewhere. It's just basically the statement of the lawyer
9 saying that there was a 45-second call --

10 MR. STARR: Objection.

11 THE COURT: Overruled.

12 MR. MOOMAU: They're referring to some phone number
13 in a phone record somewhere that there was a 40-second call
14 to Marlo's that you've heard no testimony about at all.

15 Where did he make the call from? He could have
16 made it from work. I don't know where he made it from.

17 He says he never said anything about a \$400
18 discount or payback or anything like that. Yet the Marlo
19 employee does.

20 I want to talk about this gun, State's Exhibit 71.
21 Now, general orders. Yes, the defendant is a quasi-police
22 officer.

23 MR. STARR: Objection.

24 THE COURT: Overruled.

25 MR. MOOMAU: He worked as deputy director of

1 homeland security, but I guess, technically, he was still a
2 police officer. He worked in the County Administration
3 Building and he would carry a gun. If he wanted to do that,
4 he could do it. He doesn't make arrests. He doesn't do
5 investigations. He talks, says it's okay to carry a gun by
6 the general orders. They keep telling you to use your common
7 sense, and I'll ask you to use your common sense, because
8 he's testified that everything he did was in accordance with
9 police practices.

10 Now, he's carrying this gun in his belt.

11 MR STARR: Objection.

12 THE COURT: Overruled.

13 MR. MOOMAU: That's where he's carrying it, in his
14 belt. I know we see police officers on TV cowboying it. But
15 you use your own common sense. Do you see police officers
16 out on the street like that? Or do you see police officers
17 out on the street with the guns in their holsters, clips
18 shut, so that no one can get at their gun? If you can show
19 me a general order that says you can do that, I'd like to see
20 it.

21 They say over and over this case is about
22 self-defense, but this case has never, this case has never
23 been about self-defense. What this case has been about is
24 respect. Keith Washington, that day, gets up in the morning,
25 goes to work, probably wearing his suit, holsters his gun,

1 takes it into work. He's at the office. He comes home early
2 for the delivery. Changes clothes, gets into blue jeans,
3 puts the camo shirt on and the vest. By the way, I got to
4 load up here, make sure it's loaded and chambered. I'm going
5 to walk around my house. I'm going to wait until my wife
6 gets home. I'm going to wait until my daughter gets home.
7 I'm going to sit down and have a little supper, and I'm going
8 to wait for the Marlo guys to come. And this gun is loaded
9 and chambered with the safety off.

10 Police orders? No. This is about respect. It's
11 no different than he was a police officer; that's about
12 respect. And when you judge the reasonableness of his
13 actions, when he pulled that gun out and shot those young
14 men, you look at that. Judge the reasonableness of that.

15 Right from the beginning in this case, when he
16 called 911, he wanted the respect of being a police officer.
17 He said it was a police officer-involved shooting, and he got
18 that respect. They sent a whole lot of police there.

19 The first officer that was there, what did he do
20 out of that respect? Brandon Clark is laying there, shot up,
21 on his back. He's cuffed and slammed to the floor.

22 Robert White is watching that, and they criticize
23 Robert White for getting a lawyer? When they're shot up, for
24 delivering furniture, by a police officer, and the police
25 comes in there and cuffs Brandon Clark and slams him down on

1 the floor in front of him. And they criticize Robert White's
2 family for getting a lawyer for him? Respect.

3 Respect. Walking around the house with the FOP,
4 Fraternal Order of Police representatives.

5 Respect. Ambulances leave the scene. As an
6 afterthought, an afterthought, well, we better get an
7 ambulance back here for him. The ambulance comes back. And
8 what's he do for 20 minutes or more while an ambulance is
9 waiting out there? Walking around.

10 He goes to the hospital. He tells everyone there
11 about the pain and about the beating. I want you to remember
12 the doctor's testimony. Don't take my word, the defense's.
13 Remember what his own doctor said that we brought in here.
14 No trauma. No trauma.

15 And the triage nurse, Nilda Concepcion. You look
16 at that list. It's admitted as an exhibit. She didn't check
17 anything, no swelling, no bruising, no abrasions, no redness,
18 no nothing.

19 And what he thought was because he shot two large
20 men, burly furniture movers, because of that respect, there
21 weren't going to be any questions. There weren't going to be
22 any questions, even with his doctor saying that.

23 What is significant in this case is, when he shot
24 Brandon and Robert, he wasn't wearing no badge. But what
25 does he do shortly after that, while they are laying there,

1 bleeding on his carpet? He goes and gets his badge out and
2 he wears it. Respect.

3 Now, that badge, it stands for a lot of things. It
4 stands for fairness, it stands for compassion, and it stands
5 for justice. But it is only as compassionate and it's only
6 as fair and it's only as just as the person that's wearing
7 it. If Keith Washington would have shown an ounce of those
8 things that night, Brandon Clark would still be here, and
9 Keith Washington would look the same way he does now, the
10 same way he did then.

11 When you go to deliberate in this case, all we ask
12 is that you be fair and that you be just. Be all the things
13 that, that night, Keith Washington was not.

14 Thank you.

15 THE COURT: Thank you, Mr. State's Attorney. Swear
16 the bailiff.

17 (Bailiff sworn.)

18 THE COURT: Jurors number 51, 53, 55, and 59, as
19 you know, you were selected as alternates and, had there been
20 the possibility of some emergency or someone becoming ill or
21 someone called an emergency to home, you would have filled in
22 for that regular juror during the deliberation process.
23 Those things, fortunately did not happen. Your services are
24 now ended. You are discharged with the thanks of a grateful
25 county and a grateful state, 51, 53, 55, and 59.

1 (The alternate jurors were discharged from the
2 courtroom.)

3 THE COURT: Mr. Foreman, ladies and gentlemen, we
4 are now at the point where you are to have no verbal
5 communications with anyone, outside of yourselves, unless it
6 is to the bailiff, to advise her that a verdict has been
7 reached. Any other communication must come through your
8 foreperson and must be in writing.

9 (The jury retired to commence deliberations at
10 3:30 p.m.)

11 THE COURT: Do you want to approach the bench?

12 MR. STARR: We do, yes.

13 (Counsel approached the bench and the following
14 ensued.)

15 THE COURT: We have one housecleaning matter.
16 She's getting me the file to amend the count in the
17 indictment to felony on use of a handgun.

18 MR. MOOMAU: We got some redacting we got to do
19 too.

20 THE COURT: There were two that you wanted me to
21 remind you. I'm sure none of you have forgotten. Redact
22 hair from fiber transfer report.

23 MR. MOOMAU: Yes.

24 THE COURT: Redact autopsy homicide --

25 MR. STARR: That, I think, was done.

1 MR. MOOMAU: You all did that?

2 MR. COHEN: No, we didn't. We got to look at it
3 first.

4 MR. STARR: That one is not done.

5 THE COURT: And you have a transcript that needs to
6 be worked on.

7 MR. MOOMAU: Raemarie is handling that issue.

8 MS. ZANZUCCHI: Right. I haven't had an
9 opportunity to speak to counsel yet.

10 MR. MOOMAU: Here's what I would suggest. Let me
11 return all the exhibits that we have on the table. I'll take
12 those two reports and copy them, and you can come with me if
13 you want to.

14 MR. STARR: And I have a motion to make.

15 THE COURT: And the thickness of this file is due
16 to?

17 MR. MOOMAU: It's not that bad.

18 MR. STARR: What's that?

19 THE COURT: I said it's almost hard to pick up this
20 file.

21 MR. STARR: I am proud of that.

22 THE COURT: There's count 12, and my understanding
23 is there is no objection to amend that, instead of crime of
24 violence felony.

25 MR. STARR: It's lost on me what we got in exchange

1 for it, but we said it; we stand by our word.

2 MR. MOOMAU: Move to amend.

3 THE COURT: So amended.

4 MR. STARR: There was some quid pro quos, and I
5 think that some of the quids fell out of the --

6 THE COURT: I think you managed to make the most of
7 the exchanges. The amendment was made to count 12, no
8 objection.

9 MR. MOOMAU: Now, I might have to make a copy of
10 the --

11 MR. STARR: Wasn't there some talk about the 911
12 call and there's some other stuff on there?

13 MR. MOOMAU: If they listen to it. They got to
14 stop where after you all -- they would have to come out here
15 and listen to it.

16 MR. STARR: Right. But I guess the issue is that
17 there's all kinds of -- well, not admitted, whether it was
18 played or not, police communications that followed, the 911
19 radio run, like they usually are.

20 THE COURT: We can have them come in here, and I
21 can clear the courtroom, and we can designate someone to
22 operate the machinery.

23 MR. MOOMAU: We can bring the lady up to do it.

24 THE COURT: But I need agreement on that, because,
25 obviously, no one is supposed to be in the jury deliberation

1 room. So you're going to have to work that out somehow.

2 MR. MOOMAU: Well, she's the courthouse person
3 that's in charge of the machine.

4 THE COURT: Well, I understand. She can't have any
5 conversations with them at all. She's just playing the times
6 that you indicate and turning it off, period.

7 MR. MOOMAU: Right.

8 MR. STARR: Okay.

9 THE COURT: No one except her, and apparently she's
10 done it for Judge McKee several times. She doesn't talk to
11 them. She doesn't do anything, and I'll instruct her
12 specifically in your presence.

13 MR. MOOMAU: The phone records, I know what I got
14 to do on that.

15 THE COURT: Well, let me give you these then.

16 MR. STARR: I guess the State can just do what they
17 can do with their copying machine and we'll take a look.

18 THE COURT: You need to sort of bring these back.

19 MR. MOOMAU: I will.

20 THE COURT: And both of you, look at your exhibit
21 list. We're not going to send anything back in there until
22 everybody has agreed to it.

23 And there's another motion?

24 MR. STARR: Oh, yes. Your Honor, I just want to
25 put on the record -- we mentioned this before, and we agreed,

1 you know, without waiving any objections or requests, to move
2 the trial along, that we wanted to raise some issues about
3 the closings. And they have to do with the initial closing
4 by the State. We think there were a number of things said
5 that were improper, unfairly prejudicial and warrant relief
6 in the form of a mistrial.

7 The first is repeated statements -- or one as to
8 each, Mr. Clark and Mr. White. "This is Robert White's
9 case." "This is Brandon Clark's case." I think that those
10 things are designed to unfairly and unduly arouse sympathy
11 and are prejudicial.

12 There was a statement made about Mr. Washington
13 saying -- and it was saying out-of-mind experience, and the
14 record very clearly shows that he never said that. His exact
15 words were out-of-body experience. He never said out of
16 mind.

17 THE COURT: Okay.

18 MR. STARR: It's prejudicial to characterize him as
19 saying out of mind or out of his mind or the words that were
20 used, and that's not what he said and that's not in the
21 record.

22 There was also a statement made and a demonstration
23 done about the issue of whether Mr. Washington -- or the
24 argument was made that Mr. Washington would have continued to
25 fire the gun, and Mr. Wright demonstrated, extended his hand,

1 as though he was pulling a trigger, and said, "click, click,"
2 demonstrating Mr. Washington. I believe he was talking about
3 Mr. Washington leaning over Robert White, shooting him.

4 There is no -- he made a reference, and the record
5 will show what he said, about Mr. Washington would have kept
6 firing or said that he would have kept firing, and both the
7 demonstration and what was said mischaracterized the
8 testimony, because there was no evidence of any -- first of
9 all, there's no testimony that remotely resembles what
10 Mr. Wright demonstrated, and there was no testimony from
11 Mr. Washington that he would have continued to fire if the
12 gun hadn't jammed or stopped firing or whatever the term is.

13 There was a statement, that we believe was
14 inconsistent with the record, about pictures of
15 Mr. Washington being taken before he went to the hospital.
16 We don't believe any witness said that.

17 And there was a statement that we know was not
18 testified to, that Marilyn Clark, quote, she said she missed
19 her son. That was never testified to at testimony. That
20 testimony, that's prejudicial. It falls along the same line
21 as "this is for Robert" and "this is for Brandon" and those
22 statements.

23 There was an improper statement about Michael
24 Robinson and why he was crying and could have been him and
25 all of these things.

1 There was a statement, I believe also designed to
2 impact the jury emotionally and enflame, about it's very
3 difficult to hear someone dying. I think that's prejudicial.

4 There was the issue that we raised previously --

5 (Talking in the courtroom.)

6 THE COURT: Folks, I don't want to tell you again.
7 Please, we are still doing business on this case up here.
8 We've been saying it all along that there's feedback on these
9 mikes. We need you to be quiet so we can continue. Thank
10 you.

11 MR. STARR: That was the statements about the
12 voluntary manslaughter count that --

13 THE COURT: (To the bailiff.) I want them out of
14 the courtroom. They're sitting in the back and they're still
15 talking and I wan them out.

16 MR. STARR: There was a statement made about the
17 voluntary manslaughter count that mischaracterized the law,
18 expressly and explicitly misstated the jury instruction, and
19 those statements about the voluntary manslaughter count,
20 those misstatements create grave potential for prejudice in
21 that they expressly misstate the law that the jury is being
22 asked to apply, and the jury has not been told that those
23 were misstatements. The jury has not been told that what the
24 State argued is inconsistent with the law. The jury has not
25 been told that what the State argued was inconsistent with

1 the expressed legal instruction given by the Court. So that
2 potential remains and, I think based on the argument and the
3 way that it was made, is likely.

4 There's another one that we, to be completely
5 candid, are having a little trouble deciphering our own notes
6 here. But, Your Honor, based on each one of those things
7 that I've raised and the cumulative impact of all of them, we
8 ask for a mistrial. And I note that this is not our first
9 request for a mistrial in this case, because there was
10 testimony given that the Court ordered not to occur, and we
11 moved for a mistrial at that time and, based on all of this,
12 we move for a mistrial again.

13 THE COURT: Go back to court ordered not to occur.
14 What are you referencing?

15 MR. STARR: Oh, I'm talking about when
16 Michael Robinson said something about Mr. Washington being
17 hostile. After we held a hearing outside the presence of the
18 jury, the Court ordered the State to instruct him not to say
19 it, and we go back on the record and, within five minutes, he
20 said it.

21 THE COURT: Well, let me take that one first. That
22 is the statement referencing Michael Robinson's testimony,
23 when he was, in fact, instructed by the State, at the Court's
24 direction, not to give his opinion about whether his
25 impression of Mr. Washington was angry, upset or hostile.

1 And he did testify that he was hostile, my recollection of
2 it.

3 And quite clear on this is I gave a very strong
4 curative instruction, well beyond what may have been actually
5 necessary to cure it, and told the jury that he had
6 absolutely no basis whatsoever for making that comment, and
7 we never knew, because there was no foundation laid, whether
8 he could provide that testimony or not. But I made it a
9 point that they had to strike it from their mind, totally
10 disregard it and couldn't consider it. And I said that in a
11 very strong way.

12 I believe, with respect to that issue, that
13 instruction was appropriate and corrective.

14 MR. COHEN: Your Honor, in all fairness as well, I
15 mean, you polled the jury as well and did the note.

16 THE COURT: Correct. Thank you. As to your issues
17 regarding Mr. Wright referencing Robert White's case, his
18 hand gesture as to what I believe is you believe to be, in
19 effect, demonstrating the gun being fired and then jamming,
20 there was testimony or there was evidence and testimony
21 relating to a cartridge being in the chamber, which
22 ordinarily doesn't happen unless it's jammed.

23 But as to his hand gesture, as to him saying Robert
24 White's case, as to his comment about Marilyn Clark missing
25 her son, and as to the comment he made about Michael Robinson

1 crying to this day, I sustained all of your objections,
2 struck those matters from the record.

3 The jury has been instructed on, in fact, what to
4 do with stricken evidence, and that is to totally disregard
5 it and they can't consider it, and that has taken place.
6 Those were part of the instructions.

7 As to Mr. Wright's mentioning or stating, quoting
8 Mr. Washington saying an out-of-mind or out-of-body
9 experience, and I believe that he switched between the two on
10 a couple of different occasions, there was testimony from
11 Mr. Washington that he had an out-of-body experience. I
12 don't recall him saying "mind," but I don't believe that's of
13 the dimension that you're making it out to be, and that was
14 part of the testimony.

15 The pictures you're making reference to, and I
16 believe that's the picture of Mr. Washington that you
17 indicated that there was no testimony about the picture being
18 taken before he proceeded to the hospital, in point of fact,
19 I don't recall.

20 MR. MOOMAU: They were pictures taken of
21 Mr. Washington by the evidence tech Rob Taylor before
22 Mr. Washington went to the hospital.

23 THE COURT: I don't recall that, and I don't
24 believe that that would be improper argument, if that's part
25 of the record and the testimony.

1 MR. STARR: Our contention is that it was not
2 stated that it was before he went to the hospital, so the
3 record will speak to that.

4 THE COURT: Insofar as, as you refer to them, the
5 voluntary manslaughter misstatements, you are referring
6 again, I believe, to your earlier motion for a mistrial, when
7 you put forward to the Court Mr. Wright saying that the
8 defendant's anger could be considered as legally adequate
9 provocation, I believe, instead of the instruction that I
10 gave them, saying that battery was the only legally
11 recognized provocation that was consistent or were available
12 in this case.

13 They were instructed to that. They were instructed
14 that that was by written instruction. They have taken an
15 oath to abide by those instructions. They were asked in voir
16 dire about whether they could abide by those instructions.
17 They were instructed specifically to that.

18 And in the context of what Mr. Wright was arguing
19 in terms of all of the murder charges, that is not going to
20 be, in my mind, distinguishable for them and was part and
21 parcel of argument covering several different things.

22 I don't feel that any of those reasons, looking at
23 the totality of the issues in the case, the complexity of the
24 case, and all of the testimony and evidence that's been
25 presented, to be meritorious, I believe, for mistrial and,

1 with respect, deny your motion.

2 MR. STARR: The only thing I would say following
3 that, Judge, is that -- and this is maintaining all the
4 arguments that we've made for a mistrial and not abandoning
5 any of them. I would ask the Court to consider, based on the
6 misstatements about voluntary manslaughter, because we don't
7 know that the jury heard all those statements -- or heard all
8 the instructions that the Court was giving or that they all
9 registered. We don't know that. The instructions were
10 lengthy. And I know that they have them --

11 THE COURT: They have the instructions with them.
12 I looked at them, and they appeared to me to be listening to
13 my instructions. They have the written instructions in front
14 of them, and I don't intend to reinstruct them, if that's
15 what you're asking.

16 MR. STARR: I am asking to give them -- like I
17 said, I don't abandon any previous arguments, but I do ask
18 the Court to give them an instruction that they heard
19 argument about the voluntary manslaughter. It can be done in
20 the cleanest possible way -- please, I just want to finish,
21 Your Honor. That is inconsistent with the legal instructions
22 that they received, and they are to disregard that argument.

23 THE COURT: There are many arguments that you made,
24 as well as the State, that were relatively close to some
25 factual or evidentiary issues in the case that may or may not

1 have been objected to. I think you made the most of your
2 very strong argument. You're entitled to argue that. You
3 did argue that. You argued it with vigor, and you were
4 permitted to do so. I do not intend to reinstruct as you
5 wish on that issue.

6 (Counsel returned to trial tables and the following
7 ensued.)

8 MR. STARR: Judge, we need to approach.

9 THE COURT: Why don't you gentlemen look at this
10 while you're up here. Take it back with you. That's what we
11 usually put in the jury room with them.

12 THE COURT: Do you want to approach on the other
13 issues, I guess the --

14 MR. COHEN: Yes.

15 (Counsel approached the bench and the following
16 ensued.)

17 THE COURT: I think the stipulation, or lack
18 thereof, on the grand jury portions of testimony of
19 Mr. White. Now, please remind me or refresh my recollection.
20 There was going to be a stipulation as to the portions?

21 MS. ZANZUCCHI: Your Honor, these portions of the
22 redacted testimony of the grand jury of Robert White were
23 admitted, pending review by the State, to bring them in as
24 prior inconsistent statements that he made.

25 THE COURT: That's right.

1 MS. ZANZUCCHI: So I have had an opportunity to
2 review the transcript of Robert White's trial testimony.
3 Based on that and the statements that they are wanting to
4 admit from the grand jury, the State will objecting to every
5 single one.

6 I don't know if you want me to go through and tell
7 you why, give our reasons why we don't believe there have
8 been any inconsistent statements.

9 THE COURT: Okay. I'm going to need the grand jury
10 transcript.

11 MS. ZANZUCCHI: There's the redacted portion.
12 That's what I looked at. And then I reviewed it based on his
13 trial testimony, to find any inconsistent statements. Do you
14 want me to start with the first one?

15 THE COURT: Yes. This says, "he got his hands up,
16 walking backwards, and I'm in front of him."

17 MR. STARR: I think the first one is on the first
18 page. Turn one page.

19 THE COURT: So a juror is questioning in this.
20 "Was Mr. Washington in his bedroom when he shot you?"

21 "THE WITNESS: When he shot me he was standing in
22 front of the bedroom door, and I was, like, the second step."

23 MS. ZANZUCCHI: Taking that statement, there's two
24 parts to it, where the defendant was and where Robert White
25 was. Robert White states that he was standing on like --

1 THE COURT: Well, for purposes of this, give the
2 page number and the line.

3 MS. ZANZUCCHI: The page number of the testimony?

4 THE COURT: Yes.

5 MS. ZANZUCCHI: The trial testimony or the grand
6 jury testimony?

7 THE COURT: What are you doing first? Are you
8 doing the trial testimony?

9 MS. ZANZUCCHI: Well, I'm just, right now,
10 rereading the grand jury testimony that you just read.

11 THE COURT: You're rereading it.

12 MS. ZANZUCCHI: Right. As you stated in grand
13 jury, he stated, in response to the question of where
14 Mr. Washington was, that he was standing in his bedroom door.

15 Now, throughout the trial testimony, page 41, page
16 46, he admits that he doesn't remember where Mr. Washington
17 was.

18 On cross-examination on page 42, this question is
19 asked to him. This portion of the grand jury testimony was
20 read to him, and he admits, yes, that is what I said in the
21 grand jury.

22 When we asked again, on page 46, he still says,
23 "but I don't remember today where Mr. Washington was."

24 That's not an inconsistent statement. That is just
25 he couldn't remember. He was refreshed through his grand

1 jury testimony, but his testimony in court was that he
2 couldn't remember where Mr. Washington was.

3 The second portion of that answer was that he was
4 on -- of the grand jury testimony is that he was on like the
5 second step. That is completely consistent with all of his
6 testimony. Page 18 and page 40, he states that he was on the
7 second step when he was shot.

8 MR. STARR: Your Honor, the record will show and
9 the transcript shows that it wasn't a refreshing
10 recollection. It was an impeachment and it actually
11 occurs -- may I see the exhibit, please? The impeachment
12 actually occurs beginning on page 34. We got a daily. I'm
13 not quite sure that all these pages are going to match up
14 with the record later.

15 THE COURT: Read it.

16 MR. STARR: I might be able to get a copy, that I
17 can just supply the Court a clean copy.

18 MR. STARR: Well, we wrote on all of them, so I'm
19 going to have to do the best I can, Judge. The question
20 asked in the grand jury is, quote, was Mr. Washington in his
21 bedroom when he shot you, and the witness answers the
22 question stating where Mr. Washington was. I'll read it just
23 so the record is clear.

24 THE COURT: I read it already.

25 MR. STARR: Then, first on page 34, he's asked, on

1 cross-examination, "at the time that you were shot,
2 Mr. White, and you were on the second or third step,
3 according to you, where was Mr. Washington?" "I couldn't
4 really say." So he's not saying he doesn't remember. He's
5 saying he can't say.

6 Then he's impeached on page 35. "And when you
7 testified in the grand jury, weren't you asked the following
8 questions and didn't you give the following answers?"

9 (Court reporter instructs counsel to read slower.)

10 MR. STARR: Question, this is from a juror at line
11 22. "Was Mr. Washington in his bedroom when he shot you?"

12 "ANSWER: When he shot me he was standing in front
13 of his bedroom door and I was, like, on the second step."

14 Then the followup is, "do you remember being asked
15 that question and giving that answer," and he says, "I don't
16 think so." So that one is clear.

17 THE COURT: That one is clear.

18 MR STARR: It doesn't matter that, later, he said
19 something else in his testimony. That's an impeachment.

20 MS. ZANZUCCHI: One second. I think my page
21 numbers are different than yours. No, see, I have, on page
22 42, the exact same thing, where they're asking him, "taking
23 your attention to the grand jury testimony, page 33, line 22,
24 does it say, 'A JUROR: Was Mr. Washington in his bedroom
25 when he shot you?"

1 "'THE WITNESS: When he shot me he was standing in
2 the front of his bedroom door, and I was, like, on the second
3 step.' Does it say that?" The answer from Mr. White is,
4 "Correct."

5 And then opposing counsel asks, "And that's what
6 you said, correct?" And he says, "Correct."

7 THE COURT: That's not the same thing.

8 MR. STARR: No, it's not the same thing, but what I
9 read to you is an impeachment. She's reading from a
10 different part of the transcript. That's later in the
11 transcript. I'll show the Court my copy with my notes, just
12 so you can see.

13 It starts -- that's the question that begins the
14 impeachment. The Court can just read it. It's exactly what
15 I read into the record.

16 And then the impeachment starts down here,
17 question, this is from a juror at line 22. It's exactly
18 about where Mr. Washington was when he shot him.

19 THE COURT: That's what I have.

20 MS. ZANZUCCHI: Well, this is what I have.

21 MR. STARR: What she's reading happens later, and I
22 can show you what she's reading. It's testimony that occurs
23 later in his examination. What she's reading happens two
24 pages later.

25 THE COURT: What I read is impeachment.

1 MR. MOOMAU: Okay.

2 THE COURT: So at least on the first one.

3 MS. ZANZUCCHI: Can I just point out to Your Honor
4 that, two pages later, he re-asks the same question --

5 THE COURT: He's already said that.

6 MR. STARR: The second one, for the record, the
7 redaction simply says, "He got his hands up, walking
8 backwards, and I'm in front of him and all I heard were
9 shots. So I see him falling. So I caught him and I laid on
10 top of him. I laid on top of him."

11 I'm going to find that in this trial transcript.

12 MS. ZANZUCCHI: I don't know if ours are the same
13 page numbers, but according to what I have, page 45, I have
14 him testifying that when Mr. Clark was -- Court's indulgence.
15 Sorry. Page 46, when he's crossed about this statement, when
16 Mr. Starr asks him, "And at one point in the grand jury you
17 stated," and then he reads his statement, the response is,
18 "Correct."

19 THE COURT: The one about got his hands up?

20 MR. STARR: There's another clear impeachment here.
21 It begins -- I think that my page numbers might actually
22 match up. On page 46 he says -- I ask him, "QUESTION: Your
23 testimony is that you were in-between Mr. Clark and
24 Mr. Washington."

25 "ANSWER: Correct."

1 So just to make sure I understand it correctly,
2 this is the question: "Mr. Clark is walking out of the room,
3 with his hands up in a surrender position, and you are facing
4 Mr. Clark, correct?"

5 "ANSWER: Correct."

6 "Mr. Washington is behind you, correct?"

7 "ANSWER: Somewhere. I don't know."

8 "You don't know where he was?"

9 "ANSWER: I don't know where he was."

10 "Well, you testified about this in the grand jury,
11 about where everyone was positioned, correct?"

12 "ANSWER: Correct."

13 I'm at page 9, line 4. Mr. Moomau, question: "And
14 at one point in the grand jury you said, 'He got his hands
15 up, walking backwards, and I'm in front of him, and all I
16 heard were shots. So I see him falling, so I caught him and
17 I laid on top of him.' Do you recall saying that in the
18 grand jury?" "Correct."

19 So at trial he said he was in-between them, facing
20 them, and then in the grand jury he said that he was in front
21 of him and all he heard was the shots. It's inconsistent.
22 That's why he was impeached, and that's why I was allowed to
23 impeach him.

24 THE COURT: What was inconsistent?

25 MR STARR: Well, first of all, he said, and what I

1 read, that he was facing Mr. Clark at the time of the
2 shooting. And what I asked him -- that's what I asked him at
3 trial, and that's not what he said in the grand jury.

4 MS. ZANZUCCHI: Your Honor, he did say that in the
5 grand jury because, according to the grand jury, he's in
6 front of him, meaning facing him, and he's walking backwards.

7 THE COURT: I don't find it to be an impeachment.

8 MR. STARR: Okay. There was no objection to that
9 as an improper impeachment when it happened and I --

10 THE COURT: Well, the issue is whether these
11 matters are coming in as substantive evidence, and they're
12 entitled to come in as substantive evidence --

13 MR. STARR: Correct.

14 THE COURT: Right. If it's an impeachment,
15 correct? You can use it for impeachment and it comes in --
16 but they're not stipulating that this is one, and it doesn't
17 seem to me to be one.

18 MR. STARR: I disagree. I think it's impeachment.
19 I think it's an inconsistent statement, and that's why it was
20 done in trial.

21 THE COURT: This doesn't appear to me to be one.

22 MR. STARR: Well, what the Court is doing then, as
23 I see it, is --

24 THE COURT: The Court is making a ruling. That's
25 all the Court is doing. I said if you can't work out a

1 stipulation on the inconsistent statements, then I'd make the
2 determination. So the Court isn't doing anything but doing
3 what both parties agreed for me to do, in fact, if you
4 couldn't make a stipulation.

5 You've told me the portion that you believe to be
6 an impeachment. I've heard it, and I'm comparing it to this
7 answer, and I don't find it to be an inconsistent statement
8 for which there should be admitted as -- you had the ability
9 to ask him about it and --

10 MR. STARR: Yes, Your Honor. All I was going to
11 say -- I wasn't going to say anything rude.

12 THE COURT: I never said you were.

13 MR. STARR: I just was going to say that I felt
14 like the Court was making a determination that I felt like
15 was a determination for the jury as to whether or not it
16 actually is inconsistent. I mean, it was used during the
17 trial. The testimony to it is in the record and it wasn't
18 objected to. So if the jury is going to look at it and say
19 it's not inconsistent, then I guess I look like a fool in
20 front of the jury.

21 THE COURT: How are you going to do that? They're
22 not even going to know about it.

23 MR. STARR: They heard the trial testimony. Now
24 they're going to get this. You think they can remember all
25 those instructions but they can't remember the impeachments?

1 THE COURT: They have the instructions in writing.

2 MR. STARR: And they should have the impeachment as
3 well.

4 THE COURT: I don't find that to be an impeachment,
5 in terms of its admissibility, in terms of substantive
6 evidence in front of the jury. You had the ability to do
7 what you felt was impeaching the witness, orally, on the
8 stand.

9 MR. STARR: Well, with that ruling, I guess we move
10 on to the next one.

11 THE COURT: Let me read that. They're separate on
12 these two pages?

13 MS. ZANZUCCHI: Separate.

14 THE COURT: "Do you want to explain anything based
15 on what he asked you? Do you want to explain more about
16 that?"

17 "ANSWER: I could. What I'm saying was when
18 Brandon went out of the room backwards, I'm behind him. I
19 don't know if he was all the way out of the room or in the
20 room because I didn't really look back at him. I was just
21 trying to get me and Brandon out of there before anything
22 escalated. You know, because that was our last stop. I was
23 tired. I was ready to go home, and all I heard was the
24 shots."

25 MR. STARR: And, Your Honor, that impeachment

1 occurs on what I think would be page 47 of Ms. Zanzucchi's
2 document.

3 First, the witness, when asked that question, when
4 asked whether he said that, said that he didn't remember
5 whether he said that in the grand jury.

6 But what he is being confronted with there is the
7 inconsistency -- and this goes back to the previous one as
8 well, where he says I'm in front of him, and now in this one
9 he's saying I'm behind him, and those two things are very
10 different. In front of him, behind are inconsistent. I'm
11 sorry; there's just no way that they're not.

12 THE COURT: I agree.

13 MR. STARR: Okay. But it's also inconsistent with
14 the previous one.

15 THE COURT: I see that, but this will cover both.

16 MR. STARR: Yes, Your Honor. My only point was
17 that it should make the previous one admissible as well,
18 because they're two inconsistencies.

19 THE COURT: Well, I could put the whole thing in,
20 and then they're going to see, overall, the totality of the
21 situation. You did impeach him on the issue. This is a
22 clear impeachment in my mind.

23 MR. STARR: Yes, sir. I don't know what's next.
24 There's one.

25 THE COURT: Is this an answer or a statement?

1 MS. ZANZUCCHI: I believe that's an answer.

2 THE COURT: So for the record, "So he called
3 somebody on the phone. I heard part of the conversation. He
4 called somebody on the phone. He said two guys just busted
5 up in my house, beat me up with a pipe. I shot both of them.
6 One of them is dead, bleeding out nose and mouth."

7 MR. STARR: What page is that on?

8 MS. ZANZUCCHI: Well, I have page 50. It starts on
9 page 50.

10 MR. STARR: He was asked this question at trial and
11 gave this answer. Now, on this one he's asked, "And when you
12 testified in the grand jury, you also talked about the 911
13 call, correct, or the call you heard, correct? And there you
14 said you heard Mr. Washington say on the phone that one of
15 the guys was dead. Did you say that?"

16 "I don't remember."

17 "Mr. White, I'm going to show you -- this is
18 Defense Exhibit 4 for identification purposes." And I go
19 through the impeachment. And it says, "Tell me if this paper
20 says, 'So he called somebody on the phone. I heard part of
21 the conversation. Called somebody on the phone. He said two
22 guys just busted up in my house or busted up my house, beat
23 me up with a pipe. I shot both of them. One of them is
24 dead, bleeding out nose and mouth.' Does it say that?"

25 "Correct."

1 "And you said that in the grand jury."

2 "Correct."

3 "So your testimony is that you heard Mr. Washington
4 on the phone say that one of the two men that he shot was
5 dead, correct?"

6 And that's what happened at trial.

7 MR. MOOMAU: What's the inconsistency?

8 MS. ZANZUCCHI: At first he says he doesn't
9 remember. Then he's shown the grand jury testimony, and then
10 he admits that that is what he heard.

11 THE COURT: I don't believe that's an inconsistency
12 because he said correct to your question.

13 MR. STARR: After he was shown the transcript.

14 THE COURT: Right. How is that inconsistent, "I
15 don't recall"?

16 MR. STARR: Well, he said that he didn't remember
17 what he said in the grand jury.

18 THE COURT: I don't believe that to be an
19 inconsistent statement. Do you have any cases?

20 MR STARR: I believe it to be -- I believe the
21 portions of the grand jury that are used during the trial are
22 admissible as substantive evidence.

23 THE COURT: Yes.

24 MR. STARR: I don't think that the cases --

25 THE COURT: There is no inconsistent statement.

1 MR STARR: Well, I don't think the cases say that
2 only inconsistent statements or statements that are admitted
3 as inconsistent statements are admissible.

4 THE COURT: How would you get the entire grand jury
5 transcript into evidence, into substantive evidence, if there
6 was no inconsistent statement intended for its purpose?

7 MR. STARR: I'll give you a perfect example.

8 THE COURT: Are you asking me to admit the entire
9 grand jury testimony of Mr. White?

10 MR. STARR: Clearly not.

11 THE COURT: Okay.

12 MR. STARR: Only the portions that were used, that
13 were read in the trial in front of the jury.

14 MR. MOOMAU: It's got to be inconsistent for it to
15 come in as substantive evidence.

16 MR. STARR: I disagree that that's the law. If
17 that's the Court's ruling, we can move on to the next one.

18 (The Court has a discussion with the clerk off the
19 record.)

20 MR. STARR: I just was saying, Your Honor --

21 THE COURT: I understand. Sorry for the
22 interruption.

23 MR STARR: That's no problem. I just don't think
24 that that's the only evidentiary mechanism, that impeachment
25 by prior inconsistent statement is the only evidentiary

1 mechanism through which statements can be admitted, if they
2 were read in front of the jury and it was proper for it to
3 have been done at the time.

4 THE COURT: What would be the term, what would be
5 the legal reason for having it admitted --

6 MR. STARR: It's admissible as substantive
7 evidence, to show what was said in the grand jury, because it
8 was relevant to the trial.

9 THE COURT: Inconsistent statements are admissible
10 as substantive evidence under the situation of sworn grand
11 jury testimony to the extent of the inconsistency and --
12 correct? I'm just trying to -- what other --

13 MR STARR: Here's what I would say. And I'm not
14 trying to belabor it. Like I said --

15 THE COURT: I know you're not.

16 MR. STARR: -- if this is the Court's ruling, I'm
17 happy to, without abandoning my position, accept the ruling
18 and move on.

19 But I do think that if a statement, that is
20 admissible as substantive evidence, is used during the trial
21 in front of the jury, then when it was being read,
22 essentially, it was admissible as substantive evidence at
23 that point, and that allows for the transcript to come in.

24 THE COURT: Okay. I note your exception, and I
25 don't believe -- I believe that an inconsistent statement,

1 under the circumstances of prior grand jury testimony, as
2 compared to trial testimony, can come in to substantive
3 evidence to the extent of the inconsistency. I don't find --

4 MR. STARR: Is anyone keeping track of the rulings?

5 MS. ZANZUCCHI: I am.

6 THE COURT: I don't find that to be inconsistent.

7 MR. STARR: The next page is just a continuation of
8 that same one.

9 THE COURT: So the next answer from Mr. White in
10 the grand jury was, "When we got in the house, we went
11 upstairs. Brandon kneeled down. I kneeled down. Brandon
12 was closest to the door. Mr. Washington was on the side of
13 him. I was to the far right. He took the rails out, and he
14 was upset already."

15 MR. STARR: This is an impeachment that occurs on
16 what I believe would be page 54 of Ms. Zanzucchi's
17 transcript. The trial testimony was as follows:

18 "QUESTION: Now, these bed rails that you were
19 delivering, you agree with me that the bed rails were never
20 taken out of their box, correct?"

21 "ANSWER: That's right."

22 "QUESTION: Did you say in the grand jury the bed
23 rails had been taken out of the box?"

24 "ANSWER: No."

25 "QUESTION: Did you say in the grand jury we took

1 the rails out?"

2 "ANSWER: I don't remember that."

3 The impeachment goes on for a few lines, where I
4 direct him to the grand jury, and then it says:

5 "QUESTION: And line 13, it says -- okay, let's go
6 up a little higher to line 9. When we got in the house, we
7 went upstairs. Brandon kneeled down. I kneeled down.
8 Brandon was closest to the door. Mr. Washington was on the
9 side of him. I was at the far right. We took the rails out,
10 and he was upset already."

11 So he said he didn't take them out, and in the
12 grand jury he said he did.

13 MS. ZANZUCCHI: No, Your Honor. This is a
14 statement, and this is only a portion of the statement in the
15 grand jury testimony, where he talked about the rails being
16 taken out or not. It was actually cleared up towards the
17 middle of the grand jury, after this question.

18 Plus, Mr. Moomau, on redirect, page 66,
19 rehabilitates him on this question. Page 66 --

20 MR. STARR: It doesn't matter.

21 MS. ZANZUCCHI: No, because what he said -- he
22 didn't finish his answer on page 54. He admitted that he
23 made that particular statement to the grand jury, but that
24 wasn't the full and complete statement made to the grand
25 jury. Unfortunately, I don't have the entire thing in here.

1 But Mr. Moomau, page 25, line 14 of the grand jury
2 testimony, Mr. Moomau had him explain that -- Court's brief
3 indulgence. Okay, page 66 of the trial testimony.

4 Mr. Moomau asks, "Now, Robert, you were asked questions about
5 whether or not the rails were ever taken out of the box" --

6 (Court reporter instructs counsel to read slower.)

7 THE COURT: Slow down.

8 MS. ZANZUCCHI: Sorry. "Now, Robert, you were
9 asked questions about whether or not the rails were ever
10 taken out of the box."

11 "ANSWER: Correct."

12 "QUESTION: Were they?"

13 "ANSWER: No."

14 "QUESTION: Did anyone ever, I guess, start to or
15 commence taking them out of the box?"

16 "ANSWER: No, because he started with Brandon in
17 the room, and he kept cursing at Brandon, and then, after he
18 started putting his hands on him, I was more concerned of
19 getting him out of there, because I didn't want to go in, and
20 we just left the box in there. The bed was still made up,
21 and that was the last thing I remember."

22 "QUESTION: Now, referring you to grand jury
23 testimony as far as that issue, at page 25, line 14, can you
24 look at your grand jury testimony. And, again, for record,
25 I'm referring to Defense Exhibit 4, line 14.

1 Were you asked a question there?"

2 "Yes."

3 "QUESTION: What question were you asked by the
4 juror?"

5 "ANSWER: 'Did you set up the rails?'"

6 "QUESTION: What was your answer?"

7 "ANSWER: No, we didn't get a chance to."

8 So even in his grand jury testimony, he never said
9 the rails were taken out of the box. Mr. Moomau cleared that
10 up for the jury. It wasn't an inconsistent statement --

11 THE COURT: Cleared that up before the grand jury,
12 or cleared that up --

13 MS. ZANZUCCHI: In the trial testimony --

14 MR. MOOMAU: In the trial.

15 THE COURT: Okay.

16 MS. ZANZUCCHI: Correct. In the trial testimony,
17 he testified they were never taken out of the box. Now, that
18 portion of the grand jury testimony he used to impeach him
19 was mischaracterized because --

20 MR STARR: Well, that's not true. What I read is
21 exactly what it says in the grand jury. It's exactly what it
22 says.

23 MS. ZANZUCCHI: No, it's what it says, but, several
24 questions later, it gets cleared up. And it does say in the
25 grand jury testimony, which we don't have here, that the

1 rails were never set up; they didn't get a chance to.

2 MR. STARR: Your Honor, that's not the issue. The
3 issue is, when I asked him this question --

4 THE COURT: I think that is impeachable.

5 MR. MOOMAU: Then can his redirect go back?

6 THE COURT: Yes.

7 MR. STARR: I thought that the Court said the only
8 thing that goes back is are prior inconsistent statements.

9 THE COURT: You want all of the information,
10 concerning the totality of all the answers, coming in.

11 MR. STARR: And, also, the State has argued that
12 when he agrees with something, that it doesn't come in and
13 that's --

14 MS. ZANZUCCHI: Your Honor, no. A prior consistent
15 statement can come in if he's being impeached on a prior
16 inconsistent statement used to rehabilitate him.

17 THE COURT: Correct.

18 MR STARR: Prior consistent statements are only
19 admissible if made after the motive to fabricate has
20 attached. I mean, that's one of the elements of the hearsay
21 exception.

22 THE COURT: Hold on.

23 MR STARR: I'm sorry; if made before the motive for
24 fabrication.

25 THE COURT: Okay.

1 MR. STARR: For the record, this grand jury
2 transcript was in June, which is about six months after the
3 incident, about six months after he gave notice of intent to
4 sue.

5 THE COURT: Okay. Impeachable.

6 MS. ZANZUCCHI: And is the State allowed to --

7 THE COURT: No. Put your exception on the record.
8 I mean, you have to remember there was no objection to this
9 at trial, and now you're asking me to stipulate -- or you
10 couldn't work it out, and now I have to determine it. So
11 that's what it is.

12 MR. STARR: We're also evaluating a defense
13 exhibit, which is Defense Exhibit 4. The next one -- the
14 Court can read it.

15 THE COURT: "QUESTION: And on the blood test I
16 showed you from Prince George's Hospital, it had a lot of
17 drugs listed, and it said negative for this drug and negative
18 for that drug. By the word cocaine, it said positive,
19 correct?"

20 "ANSWER (Mr. White): Yes, it did."

21 "QUESTION: Which means that they found cocaine in
22 your system by a blood test."

23 "ANSWER: Yes, sir."

24 "QUESTION: Were you doing cocaine that day?"

25 "ANSWER: No, sir, I wasn't."

1 "QUESTION: Were you doing it anytime leading up to
2 that day?"

3 "ANSWER: No, sir."

4 "How did cocaine end up in your system?"

5 "ANSWER: That a question I can't answer. I can't
6 answer that. I can't answer that. I mean, I don't know."

7 "QUESTION: But you saw the blood test. It said
8 cocaine."

9 "Yes, I did."

10 "QUESTION: Have you used cocaine before?"

11 "No."

12 MR. STARR: And the Court ruled, on a pretrial
13 motion that we filed, that Mr. White's denial of cocaine use
14 in the grand jury was admissible under 5-608 or 5-609, I
15 believe, whatever your rule is, the Maryland rule is, as a
16 statement relevant to untruthfulness, and it was admitted for
17 that purpose.

18 THE COURT: Yes. It wasn't admitted for perception
19 of the witness at the event, but it was admitted as a result
20 of --

21 MS. ZANZUCCHI: Your Honor, may I be heard?

22 THE COURT: Yes.

23 MS. ZANZUCCHI: Mr. Starr had an opportunity to
24 cross him on that and let the jury see that, but he never
25 made any inconsistent statements about that. He testified

1 exactly the same in grand jury as he testified in trial. He
2 denied using the cocaine every time. The extrinsic evidence
3 of the grand jury statement should not come into evidence.

4 MR. STARR: This isn't a prior inconsistent
5 statement issue.

6 THE COURT: Pardon me?

7 MR. STARR: This is not a prior inconsistent
8 statement issue.

9 THE COURT: What is it?

10 MR STARR: The Court has ruled that this is
11 admissible as a statement relevant to his untruthfulness.
12 And that's in the order that the Court wrote.

13 THE COURT: It's substantive evidence. This is in.

14 MR. MOOMAU: They were able to impeach him on that.

15 THE COURT: Yes, they were.

16 MS. ZANZUCCHI: Did the order say that he could
17 bring in the extrinsic evidence of it?

18 THE COURT: Extrinsic evidence being the toxicology
19 report? Yes.

20 MR. MOOMAU: The statement to exclude the
21 toxicology report, you held that it could come in based upon
22 the fact that, I guess, it was medically germane. We
23 admitted to that. Plus the fact that he had --

24 THE COURT: No. I let it in because it had been
25 stipulated to, its authenticity had been given, and because

1 he denied it in the grand jury report. It goes to the issue
2 of credibility.

3 MR. MOOMAU: Right. So the report comes in, but
4 that didn't mean that extrinsic evidence of what he said
5 before --

6 MS. ZANZUCCHI: Of the grand jury testimony.

7 (Court reporter instructs counsel to talk one at a
8 time.)

9 THE COURT: One person at a time. Show me a law
10 where it says it doesn't. Show me a case that says it does.
11 I'll do it that way.

12 MR. STARR: Your Honor, may we see our motion from
13 the Court file?

14 THE COURT: Yes. We haven't even sent any of the
15 exhibits back there yet. We got to get this rolling.

16 MR. COHEN: All our exhibits are fine except for
17 this one.

18 THE COURT: I'm going to have them bring them back.

19 MR. COHEN: Can I check with Mr. Moomau? Is that
20 the only one we need to redact?

21 MR. MOOMAU: Yes.

22 MR. COHEN: Yes, Your Honor, we're fine.

23 THE COURT: Alright, let's go; come on. I'm sorry,
24 but we've got to get these things back there.

25 MR. STARR: Your Honor, our primary argument is

1 that this is -- the Court ruled that Mr. White's denial of
2 cocaine use, in the face of a positive test, in the grand
3 jury was admissible as relevant to his truthfulness or
4 untruthfulness, based on the rule, I believe, was 5-608(b).

5 This is the statement. This is not an
6 impeachment -- well, in a way it's an impeachment issue,
7 because he's being confronted with a test that's inconsistent
8 with his testimony. I mean, he's being impeached with the
9 toxicology report, in a sense.

10 But this is the actual statement that the Court
11 allowed to come in, and that's why we did it in the way we
12 did it. I mean, we worked very hard to follow the Court's
13 rules, and the Court ruled that this portion of the grand
14 jury was admissible as relevant to his truthfulness.

15 MR. MOOMAU: That's not what the Court ruled. The
16 Court ruled the test could come in because of what he said in
17 front of the grand jury, not that what he said in front of
18 the grand jury was admissible. He said the same thing at
19 trial as what he said in the grand jury. It's consistent.

20 THE COURT: You're objection is noted. I don't
21 believe -- I believe my ruling was that the toxicology report
22 would come in as a result of what he said to the grand jury,
23 and you were able to impeach him on that statement. So I
24 don't believe it comes in as substantive evidence.

25 MR STARR: I think the last one is the same

1 argument.

2 THE COURT: And that's page 14. If that's the same
3 argument, I'm making the same ruling.

4 MR. MOOMAU: Your Honor, I want to say one more
5 thing. I know you've made your ruling, but the circumstance
6 where they cross and say something is inconsistent, and then
7 I redirect and point to a part of the transcript that's
8 consistent, and then they're able to get in the inconsistent
9 part, I guess the thinking is I should have moved it in, the
10 consistent part of it. Them getting the inconsistent part,
11 without the consistent part, isn't fair and it's clear --

12 THE COURT: Well, I believe the issue goes to not
13 when you had the ability to redirect, but what came out on
14 cross-examination. We're talking about --

15 MR. MOOMAU: But, Your Honor, you got to view it in
16 the totality though.

17 THE COURT: No, not on impeachment. I don't
18 believe that's the case. I mean if you have a case --

19 MR. MOOMAU: I don't have a case on it.

20 THE COURT: I mean, then you could have people
21 going back and forth all day long, and I don't think that was
22 intended that way.

23 MR. STARR: What we're discussing, Your Honor,
24 is -- well, I'll stop.

25 THE COURT: It's the grand jury testimony of Robert

1 White. What was the date of that, for purposes of the
2 record?

3 MR. STARR: It was in June.

4 THE COURT: Now, we need to get that done so that
5 we can get it in there as quickly as we can, as to those
6 portions.

7 MR. COHEN: June 26th, Your Honor.

8 THE COURT: June 26th for purposes of the record.

9 MR. STARR: 2007, yes, sir.

10 THE COURT: 2007. So all the exhibits you can
11 bring in now, except this one. We'll bring that very
12 shortly.

13 THE DEPUTY CLERK: Did everybody have a chance to
14 look at everything?

15 THE COURT: Everybody said that they had to look at
16 all of the exhibits, and they just told me you can bring them
17 all in.

18 That's clear, right? Everybody has looked at the
19 exhibits, and we can, except for the one that you're still
20 working on, bring those all in to the jury, correct?

21 MR. COHEN: Yes. The ones that were redacted, yes.

22 THE COURT: Bring them all in, except this one.
23 Unless we have a note or anything sooner, we'll all meet back
24 in here at six.

25 MR. COHEN: That's fine, Your Honor.

1 (The parties reconvened at 6:00 p.m. Counsel
2 approached the bench and the following ensued.)

3 THE COURT: What would you like me to do? I say
4 let them sit.

5 MR. WRIGHT: I thought we were sending them home.

6 THE COURT: I don't want to do anything of the
7 kind. There's supposed to be a snowstorm, ice and sleet
8 after midnight. So I'm just saying that no notes, no
9 nothing --

10 MR. MOOMAU: What about supper?

11 THE COURT: I'm not doing anything until they ask
12 me to do something.

13 MR. MOOMAU: Okay.

14 MR. WRIGHT: Okay.

15 THE COURT: What do you want me to do?

16 MR. COHEN: We're just surprised, Your Honor. If
17 we could have a couple minutes. We thought at six o'clock
18 the jury was going to be released.

19 THE COURT: No. I said at six o'clock we'll all
20 get together and determine what we're going to do next.

21 MR. COHEN: That was just my assumption, Your
22 Honor. If I could have just a moment. Your Honor, we're
23 just wondering. What time does Your Honor usually release a
24 jury in this kind of situation? Like ten? Eleven?
25 Midnight? I'm not being funny. I'm just trying to figure it

1 out.

2 THE COURT: No, no, no. I sort of go with the
3 circumstances. I mean, they've only been out, what, since
4 3:30 or 4. They didn't even get the exhibits until around
5 five.

6 I know it's projected to snow after midnight and
7 then one to three inches and then turn into a freezing rain,
8 is what they're saying on all of the channels.

9 MR. COHEN: We haven't been watching television
10 recently, Your Honor.

11 THE COURT: I haven't seen a thing. This is what
12 my secretary told me.

13 MR. STARR: We were just used to them being sent
14 home kind of at the end of the business day. That's why we
15 were surprised that we'd go into the evening. We had been
16 assuming that we were going to walk up here and the Court was
17 going to say, well, it's six o'clock; it's a good day's work
18 and everybody can go home. That's why we were responding
19 with surprise.

20 THE COURT: I mean, it depends a little bit about
21 the circumstances. For instance, if they had asked are we
22 going home? I confer with you and say what do you want me to
23 do. If they want to go home and everybody is fine with it,
24 they go home.

25 If I know that there's some weather problem that

1 may be arising, which it seems to be, I wait a little while
2 to see if there's any -- if we all can get a feel for this.
3 I mean, at some point, usually, they'll say -- at least in my
4 experience, and correct me if I'm wrong -- I can say bring
5 them back in and say do you want dinner; we can have it
6 brought into you.

7 It just seems to be such a short period of time
8 before we really know what they would care for or what they
9 wouldn't care for.

10 MR. COHEN: That's fine, Your Honor. Can I just
11 ask the Court, in terms of just planning purposes, what is
12 the outermost time that Your Honor would hold them? What's
13 the outermost time you've ever held a jury?

14 THE COURT: One o'clock in the morning. Only
15 because I brought them in twice and they said no, we want
16 to -- I mean, if they were to tell me they want to go home,
17 then they're going home. So I don't think it's going to be
18 that way.

19 Now, I know that we take all the cell phones from
20 them when they're in deliberations, so they have no idea
21 about the weather situation or anything like that.

22 I mean, you give me a feel. If you all give me a
23 sense of what you'd like to do, I'd certainly consider
24 anything that you're talking about.

25 MR. COHEN: We defer to the Court, Your Honor. The

1 storm system is coming later this evening, correct?

2 THE COURT: Yes, apparently. Is that what
3 everybody has heard, after midnight?

4 MR. MOOMAU: I just heard tomorrow it's supposed to
5 be bad.

6 MR. COHEN: So we'll remain here, Your Honor.

7 THE COURT: You sound so plaintiff about it.

8 MR. COHEN: No, no, no. We have to get back at
9 some point. As long as it starts at 12 midnight, that's
10 fine. I didn't know if the snowstorm was coming now.

11 THE COURT: No. At least I haven't heard that.
12 But do you want me to set another time? It would be my sense
13 of it that they'll probably say -- do you want me to send
14 them a note and ask them? Do you want me to send them a note
15 and ask them what they want to do?

16 MR. COHEN: We don't have a problem. We'll wait.

17 THE COURT: I mean about dinner. No or yes?

18 MR. WRIGHT: I would say don't ask them about
19 dinner yet.

20 MR. MOOMAU: I don't care about that either way.

21 THE COURT: Do you want me to come back in at
22 seven, if there is no note before?

23 MR. COHEN: That's fine.

24 (The parties reconvened at 6:00 p.m. Counsel
25 approached the bench and the following ensued.)

1 THE COURT: We're on the record. Nothing strange.
2 At 7:13 the jury sent a note requesting air-conditioning or a
3 fan, plus cold ice water. We got a fan right out there.
4 We're going to put it in the room. Sheila is giving them
5 cold ice water. It is extremely hot in the room. Also, we
6 have a juror that is pregnant.

7 MR. MOOMAU: Which we didn't know about.

8 THE COURT: No one knew about. But none of them
9 that I've seen visibly looked like it, but we'll secure more.
10 Somebody want to sign for me, and I'll sign it too and I'll
11 have that filed.

12 Cindy, we're off.

13 (The parties reconvened at 10:10 p.m.)

14 THE COURT: Would you like to approach the bench?
15 (Counsel approached the bench and the following
16 ensued.)

17 THE COURT: They're giving an indication that they
18 are hopelessly deadlocked. They went out at 3:30. They
19 didn't get the exhibits until around 5 or 5:30. No note,
20 except this one, other than the ones we sent in about food.
21 And it's now 10:16.

22 Usually, in these situations, I would give them the
23 Allen Kelly charge. That's this instruction.

24 MR. STARR: And are there options that are
25 different, instructions for --

1 THE COURT: That's it. That's the one they
2 recommend in situations of doing it up front or doing it in
3 deadlock.

4 Now, in this note, they were not asked for and did
5 not ask them for anything at all. They roughly gave a break
6 down of it.

7 MR. STARR: I guess, Your Honor --

8 THE COURT: Which is why I'm not --

9 MR. STARR: Believe it or not, I was going to ask
10 this question before you said that, but I didn't want the
11 note to -- aside from the breakdown, can you tell us what the
12 note says?

13 THE COURT: "Judge Whalen, we are hopelessly
14 deadlocked," and the remainder is the breakdown.

15 MR. MOOMAU: I don't know. I mean, they need to be
16 read the charge and then --

17 THE COURT: What I have done in the past and -- I
18 mean, I'll work with everyone. I usually do this because, in
19 the realm of going through this trial and the settings around
20 it, that's not a long period of time that they've been
21 deliberating, considering. So I usually do that, and I've
22 done that in most all cases, just read them the Allen charge
23 and have them go back in. Generally, they respond shortly or
24 they don't. You know, there's no -- I don't have a feel for
25 it, and if what happens -- I mean, I can't keep them here,

1 obviously --

2 MR. STARR: I want to go get our book. Can I get
3 our book --

4 THE COURT: -- with the snowstorm or whatever it's
5 supposed to be. I usually ask them would any more time
6 assist you to reach a verdict in this case. Depending on
7 what they say -- not at this moment. I just read them this
8 charge flat out.

9 MR. COHEN: Your suggestion is to send them back
10 for tonight or --

11 THE COURT: No. I'm saying I bring them out, I
12 read them that charge, then I send them back to the
13 deliberating room?

14 MR. MOOMAU: Will you ask them any questions about
15 going home or anything?

16 THE COURT: No. But I'll listen, if you have any
17 other --

18 MR. COHEN: Can we just get a brief moment, Your
19 Honor?

20 THE COURT: Yes, sure.

21 MR. STARR: Our position is this, Your Honor. I've
22 heard the Court indicate what the Court normally does and put
23 on the record that your feelings about the length of
24 deliberations relative to the presentation of the evidence.
25 Our position is that because the jurors are expressing that

1 they're hopelessly deadlocked and, in fact, given a split in
2 the note, that it does indicate that the deadlock is a
3 hopeless one.

4 We also feel that the length of deliberations,
5 which is -- I believe it's about -- I think the note says
6 10:08 p.m., and I think they got the case somewhere around
7 3:30. Is that accurate?

8 THE COURT: They did, but they didn't get the
9 exhibits until 5:30, 6:00.

10 MR. STARR: Well, then that gives them -- I mean,
11 six and a half hours or so of deliberations, the earlier part
12 without exhibits, and then they've had the exhibits. So our
13 motion, based on all that, is for a mistrial. If the
14 Court -- well, that's our motion.

15 MR. MOOMAU: It's way too premature for even that.
16 This case started -- we made openings Wednesday. And then
17 Thursday -- it's a six- or seven-day jury trial. It's way
18 too early for that. They need to be instructed as to whether
19 they know they can go home and then come back tomorrow. I'll
20 leave that up to you.

21 THE COURT: Say that again.

22 MR. MOOMAU: I don't know if they know that they
23 can ask to leave and come back tomorrow. I don't know what
24 the Court's preference is as far as that issue goes. But at
25 the very least, no mistrial and they need to be instructed.

1 MR. STARR: I think, actually, we did start opening
2 statements on Wednesday. So we took evidence, I think, on
3 Wednesday, Thursday, Friday. And then we had a holiday. So
4 Tuesday and Wednesday. And then there was no evidence
5 presented today. So the presentation of evidence is a bit
6 shorter than the calculations.

7 MR. MOOMAU: Wednesday, Thursday, Friday, Monday
8 Tuesday.

9 MR. STARR: There's no Monday.

10 MR. MOOMAU: That's right. Five days. Well,
11 closing arguments was six days.

12 THE COURT: A day and a half for picking the jury.
13 Well, with all due respect, I think it is early and they, in
14 my considered opinion, based on this case, have not been out
15 that long, and I intend to read them the instruction 2:01 on
16 the jury's duty to deliberate.

17 MR. STARR: And what does the Court intend to do
18 with regard to -- I mean, it is our position that it becomes
19 coercive at some point for them to have to remain here.
20 They've been here since 8:30 a.m. It's almost 10:30 p.m.

21 THE COURT: They've been here since 8:30 a.m. every
22 morning. The first morning when they reported for jury
23 service, they reported at 7:30 a.m. Every day following
24 that, which is normal practice, they have been here at 8:30
25 in the morning. We've usually proceeded somewhere between

1 9:30 and 10.

2 MR. STARR: It's just a 14-hour day at this point
3 for a jury and that's --

4 THE COURT: I will bring them back in a little
5 while -- I'm going to wait a little while to see if they have
6 a note. They haven't been hesitant to asking us, by note,
7 for fans, which they did, and ice water, which they did. We
8 sent a note in and asked them if they wished to have dinner
9 and they said they did.

10 So the circumstances, I think, suggest to me, in
11 any event, and as a result of everybody's efforts, to read
12 them this, call them back in a short while. If there's no
13 note, ask them if any more time would be of any assistance to
14 them, and make our next decision after that.

15 MR. STARR: Yes, Your Honor. I don't know if I
16 finished what I was saying. I understand that the Court has
17 made its decision. Our request would just be to send them
18 home because they've been here so long.

19 THE COURT: Okay. Thank you. Bring them in.

20 (Counsel returned to trial tables and the following
21 ensued.)

22 THE COURT: For the record, I'm filing the note
23 that was filed at 10:08 in the case. I have advised counsel
24 about the note and have not provided them with a numerical
25 breakdown. None was requested by counsel but was volunteered

1 by the jury.

2 (The jury returned to the courtroom at 10:30 p.m.)

3 THE COURT: Ladies and gentlemen, we have received
4 your note and, in response, the verdict must be the
5 considered judgment of each of you. In order to reach a
6 verdict, all of you must agree. Your verdict must be
7 unanimous.

8 You must consult with one another and deliberate
9 with a view towards reaching an agreement, if you can do so
10 without violence to your individual judgment. Each of you
11 must decide the case for yourself, but do so only after an
12 impartial consideration of the evidence with your fellow
13 jurors.

14 During deliberations do not hesitate to reexamine
15 your own views. You should change your opinion if convinced
16 you are wrong, but do not surrender your honest belief as to
17 the weight or effect of the evidence only because of the
18 opinion of your fellow jurors or for the mere purpose of
19 reaching a verdict.

20 Please return to the jury deliberation room.

21 (The jury returned to the deliberation room at
22 10:30 p.m.)

23 MR. MOOMAU: Are we excused, Your Honor?

24 THE COURT: Yes.

25 (The parties reconvened at 11:15 p.m., and counsel

1 approached the bench and the following ensued.)

2 MR. COHEN: Your Honor, good evening. The defense
3 wants to make a request that the jurors be excused at this
4 point. They have been deliberating now for almost a little
5 less than eight hours. They got the case at around 3:30,
6 plus eight, I believe, is 11:30. So I guess about a seven
7 hours and 45 minutes. And they also have been here since
8 8:30 in the morning. So they've been here for about 15
9 hours.

10 THE COURT: Okay.

11 MR. COHEN: Okay.

12 THE COURT: No, because I was about to come in
13 anyway because I'm concerned about the weather. So I was
14 going to bring them in and -- they may not know that.

15 MR. COHEN: The weather part.

16 THE COURT: Right.

17 MR. COHEN: I'm not sure they do.

18 THE COURT: We can bring them back tomorrow if the
19 weather permits.

20 MR. MOOMAU: What time tomorrow? Ten?

21 THE COURT: That sounds reasonable.

22 MR. COHEN: That's fine.

23 THE COURT: I'm going to give them two telephone
24 numbers too, depending on the weather. Actually, I'm only
25 going to give them one number. 952-4810 is the main

1 information number where they'll call and get a recording
2 that will tell them whether or not court is closed.

3 MR. COHEN: Can the lawyers use that as well?

4 THE COURT: Yes.

5 THE COURT: 952-4810, it's a recording. If you
6 have no objection to this, I'm going to tell them that there
7 have been reports that the weather could become a little
8 rough at midnight to three or something like that, in terms
9 of snow, maybe some icy rain, and we're going to excuse them
10 for the evening. I'll admonish them again. I'll tell them
11 that they have to come back tomorrow at ten, if the weather
12 permits, and that they have to call this number to determine
13 whether the court is open or not. Fair enough?

14 If the courthouse is closed, then it's going to be
15 Monday.

16 MR. MOOMAU: Okay.

17 MR. COHEN: Yes, Your Honor.

18 MR. WRIGHT: And let's say there is a two-hour
19 delay. What time will they -- I guess I'm trying to think
20 ahead. Will they report at --

21 MR. MOOMAU: A school delay?

22 MR. WRIGHT: No. If the courthouse has a two-hour
23 delay, will they report --

24 THE COURT: Well, if it's a two-hour delay and we
25 tell them to come back at ten. Didn't you say ten?

1 MR. WRIGHT: Yes.

2 THE COURT: Well, if the courthouse -- if it says
3 two-hour delay.

4 MR. MOOMAU: The courthouse would still be open.
5 It's very rare that they have the courthouse closed.

6 MR. WRIGHT: We've never closed, but I know we've
7 delayed before. It's rare for us to close. We'll just stick
8 with ten; ten no matter what.

9 MR. MOOMAU: Just stick with ten.

10 THE COURT: Unless court is closed. Now, if it
11 does have a two-hour delay, and sometimes they do have that
12 on that recording, that means ten anyway.

13 MR. MOOMAU: Now, will you just have them come into
14 the room and start deliberating at ten, or would you come on
15 the bench?

16 THE COURT: I'll do whatever you wish, but I think
17 I'd have to inquire of them, in some fashion, whether they
18 exposed themselves to anything.

19 MR. COHEN: We'll be in the courtroom at ten, Your
20 Honor.

21 (Counsel returned to trial tables, and the jury
22 returned to the courtroom at 11:25 p.m.)

23 THE COURT: Ladies and gentlemen, thank you for
24 your very long, hard working day for us. We all appreciate
25 it.

1 There are some reports that there may be some
2 inclement weather starting, supposedly, after midnight
3 until -- I think it's two or three. I actually haven't heard
4 it, but it's been reported to me that it may involve some
5 snow and perhaps some freezing rain.

6 So we're going to excuse you for the evening. I'm
7 going to give you a telephone number for tomorrow morning to
8 call, if you don't mind. It's a recording informational
9 service from the county government. The number is 952-4810,
10 952-4810.

11 We're going to ask you, tomorrow, to report back to
12 the main juror's lounge at 10 a.m. Before you do that, you
13 need to call that number that I just gave you, and it will
14 either say the courthouse is closed or the courthouse is open
15 or there may be a two-hour delay. So we're taking that
16 two-hour delay in account for ten in the morning.

17 If the courthouse is closed, obviously, you don't
18 have to come. And if that's the case, then we're going to
19 ask you to return on Monday at 8:30.

20 Again, as I have done on each and every occasion, I
21 have to admonish you that you're not entitled to discuss this
22 case with anyone with whom you may come into contact, either
23 this evening or tomorrow, if the courthouse is open, or
24 through the weekend, until Monday. You're not even entitled
25 to discuss this matter amongst yourselves. You're to conduct

1 no independent investigation of any kind and, please, do not
2 put yourself in a position to either hear, see or read any
3 accounts that may be in the news media involving any of the
4 circumstances of this case or this trial.

5 We appreciate very much -- we know how much time
6 you've spend in this trial and your deliberations are
7 important. We appreciate all your efforts.

8 If the weather is good tomorrow and the courthouse
9 is open, we'll see you back at ten o'clock in the main
10 juror's lounge. If not and the courthouse is closed, we'll
11 see you Monday at 8:30. Thank you.

12 (The jury was dismissed at 11:30 p.m.)

13 MR. COHEN: Your Honor, can I approach on one
14 matter very quickly?

15 (Counsel approached the bench and the following
16 ensued.)

17 MR. COHEN: I know it's late, Your Honor. Just
18 very quickly.

19 We have noticed that there are what I believe is
20 Mr. Brandon Clark and Mr. Robert White's families have on
21 T-shirts that have pictures of Mr. Brandon Clark on it with
22 some writing. I can't actually remember what exactly is on
23 the writing, but they are memorial type of photos that are on
24 their T-shirts, and they're sitting right behind the jurors.
25 And then a lot of them have on the black shirts with the

1 faces of Brandon Clark on the front.

2 MR. COHEN: And I saw -- Marilyn Clark's shirt
3 says, over the portrait of her son, and she's sitting in the
4 front row, right behind the jury, where she's been sitting
5 for the whole trial, says "Justice for Brandon."

6 THE COURT: I haven't seen it. I haven't noticed
7 it, except that I --

8 MR. STARR: Your Honor, that can't go on. The jury
9 is deliberating, and there cannot be appeals to the jury from
10 the decedent's family in any way.

11 THE COURT: I understand that. Number one, we
12 don't know if they saw anything. Number one.

13 Number two, I didn't see anything. I'm not saying
14 that what you may have observed isn't accurate.

15 Today, for today's purposes -- are you saying
16 you've noticed them wearing it all day long?

17 MR STARR: Yes.

18 MR. COHEN: Yes.

19 THE COURT: Mr. State's Attorney, do what you can
20 for me on that issue, please.

21 MR. MOOMAU: Okay.

22 THE COURT: I mean, I didn't notice that. I don't
23 know whether the jury has or has not. I wouldn't think that
24 they would have, but I don't know that.

25 MR. STARR: Well, when they walk in, they're facing

1 directly at the Clark family when they walk in.

2 I saw another one that said "We miss you," near
3 Brandon Clark's picture. And, I mean, we don't know whether
4 they've seen them; we don't know that they haven't. And the
5 Clark family, throughout the whole trial, has occupied the
6 entire front row, closest to the jury box, and that's what
7 they've done today as well, while wearing these shirts.

8 We've put some other issues about the Clark family
9 on the record, about the Clark family, a number of them did
10 get up and leave during the closing argument and --

11 THE COURT: Again, if you want to bring that up,
12 I'm going to tell you that I saw that. Two people got up.
13 They did it very quietly. They made no demonstration
14 whatsoever, and they walked very slowly to the door and out.
15 There were no tears, no handkerchiefs, no crying, no -- they
16 just knew what was going to be coming on the 911 tape, I
17 presume, and they'd heard it before and they walked out
18 quietly. That I did see.

19 And I also again saw, because I was waiting for
20 that again, and the jury was listening to that tape. I
21 mean -- so I understand on this instance that you're talking
22 about. I haven't seen anything like that.

23 And, you know, I've been sitting here looking
24 around the courtroom. I haven't noticed anything in
25 particular about the clothing, but I'm not saying, again,

1 that's not true, and I'm asking the state's attorney to just
2 make sure that, if he noticed that or notices that, that it
3 would be better to advise them that, with all due respect,
4 that that's probably not the appropriate place to wear
5 clothing in the courtroom, unless it's covered with a jacket
6 or a sweater or something.

7 MR. MOOMAU: Mr. Wright went out and tried to catch
8 them. Are we excused?

9 MR. COHEN: Thank you, Your Honor. See you in
10 morning.

11 (The trial was recessed at 11:30 p.m.)
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REPORTER'S CERTIFICATE

I, Cindy S. Davis, an Official Court Reporter for the Circuit Court for Prince George's County, Maryland, do hereby certify that I stenographically recorded the proceedings in State of Maryland versus Keith A. Washington, criminal trial 07-1664X, on February 21, 2008, before the Honorable Michael P. Whalen, Associate Judge.

I further certify that the page numbers 1 through 200 constitute an official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter in a complete and accurate manner.

In Witness Whereof, I have affixed my signature this 26th day of June, 2008.

Cindy S. Davis, RPR

Official Court Reporter