

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

Honorable Brian M. Gibbons, Circuit Court Judge

App. Case No.: 2022-000026

Brandon Berry, 352671,

Petitioner,

vs.

State of South Carolina,

Respondent.

APPENDIX
VOLUME II of III

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1 **MR. STEADMAN:** No, Your Honor.

2 **THE COURT:** All right. Thank you. You may step down.

3 (Witness excused.)

4 **THE COURT:** May the witness be excused?

5 **MR. STEADMAN:** Yes, Your Honor.

6 **THE COURT:** Any objection?

7 **MS. ZMROCZEK:** No, objection, Your Honor.

8 **THE COURT:** You are excused. Thank you for coming.

9 All right. Solicitor, call your next witness.

10 **MS. WALKER:** Thank you, Your Honor. The State calls
11 Amanda Metz.

12 **THE COURT:** What's the witness's name, Ms. Walker?

13 **MS. WALKER:** Your Honor, the witness's name is Amanda
14 Metz.

15 AMANDA METZ,

16 having been duly sworn, testified as follows:

17 **THE CLERK:** Thank you. Please have a seat on the
18 witness stand and state your full name for the record.

19 **THE WITNESS:** Amanda Metz, M-E-T-Z.

20 DIRECT EXAMINATION

21 BY MS. WALKER:

22 Q. Good morning.

23 A. Good morning.

24 Q. Where are you currently employed?

25 A. Richland County Sheriff's Department in the forensic

1 sciences laboratory.

2 Q. And how long have you been with the sheriff's
3 department?

4 A. I've been with the sheriff's department for
5 approximately five years, three of which were in the
6 forensic sciences laboratory.

7 Q. And what exactly do you do in the forensic sciences
8 laboratory?

9 A. I'm a firearm and tool mark identification examiner.

10 Q. And can you explain to the jury, I guess, a little bit
11 of your background and education in firearm and tool mark
12 examination?

13 A. I was hired with Richland County Sheriff's Department
14 in February of 2010. I worked a year and a half on the
15 road. After that, I was moved up to the forensic sciences
16 division. At that point I underwent a very extensive
17 three-year training program in firearm and tool mark
18 identification. I went to the ATF National Firearms
19 Examiner Academy and during that time completed training in
20 firearm and tool mark identification. I came back, did
21 in-house training for a couple of more months with Richland
22 County Sheriff's Department. Actually, sorry, it was more
23 than a couple of months. Probably like a year and a half
24 more. And during that time I completed competency in
25 firearm and tool mark identification, along with serial

1 number restoration and muzzle to target distance
2 determination.

3 Q. And have you been qualified as an expert before in the
4 area of firearm and tool mark examination?

5 A. Yes, I have.

6 **MS. WALKER:** Your Honor, at this point in time we'd
7 offer this witness as an expert in firearm and tool mark
8 examination.

9 **THE COURT:** Voir dire with regard to qualification?

10 **MS. ZMROCZEK:** Not with regard to qualifications,
11 Your Honor.

12 **THE COURT:** All right. The Court will qualify this
13 witness as an expert in the field of firearm and tool mark
14 identification.

15 And, ladies and gentlemen, you heard me tell you
16 before the difference between a lay witness and an expert
17 witness and I have qualified this witness as an expert in
18 the field that has been submitted and she may give an
19 opinion.

20 All right. Go ahead.

21 **MS. WALKER:** Thank you, Your Honor.

22 BY MS. WALKER:

23 Q. Can you tell the jury what exactly firearm and tool
24 mark examination means?

25 A. Yes. Firearm identification is a forensic discipline

1 or forensic science that primarily focuses on determining
2 whether a bullet, a cartridge case or other ammunition
3 component was fired by a particular firearm. We also look
4 at serial number restoration and distance determination or
5 muzzle to target distance determination. Some of our
6 examinations, the majority of them, are bullet to bullet
7 examination, cartridge case to cartridge case examination
8 and bullet to firearm examination and cartridge case to
9 firearm examination.

10 Q. Okay. Can you explain what you mean, I guess in lay
11 terms, when you talk about cartridge casings and bullets
12 and things like that?

13 A. Sure. So one single piece of ammunition is called a
14 cartridge. That's composed of the cartridge case and in
15 that cartridge case, the head of it is the primer, which
16 holds the primer, and inside the cartridge case it houses
17 the gunpowder. Kind of seated on top and inside is the
18 bullet and that single piece is called a cartridge.

19 Q. Okay. And how -- I guess the different types of
20 firearms that you usually examine, what are the two
21 different types?

22 A. We generally see handguns in the vast majority of our
23 cases. There are two different types of handguns. One
24 is a revolver, another one is a pistol. A revolver is
25 comprised of one barrel and then multiple chambers housed

1 in a cylinder that revolves. This is the type firearm that
2 you would normally see in your old western movies, cowboy
3 shoot 'em up movies. Pistols are generally what you see
4 now in your crime shows and video games. It is where it's
5 a single chamber and barrel that are attached to one
6 another and the difference between the revolver and the
7 pistol is that the pistol will eject and extract its
8 cartridge cases, whereas -- fired cartridge cases, whereas
9 the revolver it will stay inside the cylinder unless you
10 manually extract it, so we see generally pistol cartridge
11 cases a lot because they're left behind at a scene.

12 Q. So if I'm committing a crime and I use a pistol,
13 unless I pick them up will the shell casings remain at the
14 scene?

15 A. Yes.

16 Q. And how are you able to determine -- to match a shell
17 casing to a certain firearm?

18 A. So the premise behind firearm and tool mark
19 identification is that a harder object will impress its
20 mark onto a softer object, so this is the overall lapping
21 tool mark identification. We focus mostly on firearms,
22 which a firearm is just generally a tool, and so it
23 impresses its mark onto the softer objects that are the
24 cartridge cases and the bullets. When -- during firing
25 when the bullet is expelled down and out the barrel and

1 the cartridge case is pressed against the rear of the
2 firearm, the marks during manufacturing that are unique,
3 individual marks, along with manufacturing, kind of class
4 characteristic marks, are impressed or striations are
5 made on those bullets that are kind of unique, like a
6 fingerprint, for that particular firearm.

7 Q. You mentioned -- let me show you what's been marked as
8 State's Exhibit Number 141. Is this what you're talking
9 about?

10 A. Yes. That's a cartridge case, yes.

11 Q. And individual cartridge casings can be matched to an
12 individual gun?

13 A. If we have a particular firearm, we have a known
14 firearm, we take that firearm and create known standards or
15 test fires. So we have a water tank at our facility in
16 which we test fire that firearm into which gives us our
17 standards of cartridge cases and bullets and then we put
18 those test fires up on a comparison microscope, which is
19 just essentially two microscopes combined by an ocular
20 bridge, that allows me to view both of them at the same
21 time under the same magnification and lighting and then
22 I look at the class characteristics and individual
23 characteristics and see if the marks that are -- that the
24 firearm might be making are reproducing and look at those
25 and then once I determine that the firearm is reproducing

1 marks, I then will compare it to our evidence cartridge
2 cases and come to my conclusion, whether it be an
3 identification or not.

4 Q. And were you given a number of items to examine for
5 the case that we are here for today?

6 A. I was given two cartridge cases. I believe there's
7 two separate cases.

8 Q. Right.

9 A. Yes.

10 Q. But you received two cartridge cases?

11 A. Correct, yes.

12 Q. Did you also receive the gun to make a comparison?

13 A. In a separate case, yes, I did.

14 Q. Right. And can you walk the jury through the process
15 you went through --

16 A. Sure.

17 Q. -- in order to compare the gun from one case to the
18 shell casings in another?

19 A. Yes. So it's pretty much exactly what I just
20 described. So I received a firearm in this case and I
21 first mechanically examined it to make sure it functioned
22 properly.

23 Q. Well, let me show you State's Exhibit Number 135A. Is
24 this the firearm that you received in this case?

25 A. Yes.

1 Q. I'm sorry I interrupted you. You said you wanted to
2 make sure that it was working properly?

3 A. Yes.

4 MS. WALKER: And, Your Honor, for the record the gun
5 is locked --

6 THE COURT: All right.

7 MS. WALKER: -- and unable to fire.

8 A. Yes. So when we receive a firearm, we first make
9 sure that it's safe to fire -- for us to fire. So we do
10 a mechanical examination where we make sure that it
11 functions properly and that all of the safeties and
12 everything are functioning properly. At that time we'll
13 take it into our -- our water tank area and I -- we do
14 three test fires generally. Sometimes we have to do more
15 if there's a difference in ammunition type. And from that
16 point, once I get my known standard or test fires, I,
17 again, take it back to my comparison microscope, place
18 those test fires underneath the comparison microscope and
19 do a comparison to make sure that the individual markings
20 of that firearm are reproducing and then I'll use those
21 test fires and compare them to our evidence cartridge cases
22 and do the same thing and come to a conclusion.

23 BY MS. WALKER:

24 Q. And was this firearm working properly?

25 A. Yes.

1 Q. And the shell casings that you received from the other
2 case?

3 A. Yes.

4 Q. What, if any, conclusions were you able to -- let me
5 back up. Do you know where the shell casings -- where they
6 originate from once you start your testing?

7 A. I do not, no. I don't -- I mean, I could access that
8 information, but it's not pertinent to my examination.

9 Q. Right. The shell casings that you received, were you
10 able to determine whether or not they matched this weapon?

11 A. Yes, they were identified to that firearm.

12 Q. And was there any other evidence that you were asked
13 to test in conjunction with this case?

14 A. I -- I just -- I also received the magazine that goes
15 with that particular firearm and some unfired cartridges,
16 but that's all. And the two fired cartridge cases.

17 Q. And did you say -- I just wanted to make sure I
18 understood. It's like a fingerprint comparison?

19 A. Yes. So when a firearm goes through manufacturing
20 processes, each manufacturing process leaves individual
21 unique markings in the form of nicks, burrs and cuts, and
22 then those are what make the marks on our fired evidence.

23 Q. And if the -- if two guns are manufactured by the same
24 company, are they going to have the same nicks or --

25 A. No. So the nicks, burrs and cuts are what we call

1 individual characteristics. They're just randomly
2 occurring and they happen through the manufacturing
3 process, wear and tear, anything like that, normal just
4 use and abuse, and that's what we look at as far as making
5 it unique. Firearm manufacturers also have what's known as
6 class characteristics and so they come up with a certain,
7 you know, shape of a firing pin that they want, shape of a
8 firing aperture that they want, how they're gonna finish
9 their breech face, whether it's grinding or sanding, so
10 they all have kind of their same, you know, what they --
11 how they know they're gonna make their firearm, which
12 replicates from firearm to firearm, but the individual
13 markings we look at are totally random and are unique to
14 that particular firearm.

15 Q. And you said that you received -- that the cases had
16 two different case numbers?

17 A. Yes.

18 Q. Is that common when you test evidence?

19 A. It's neither common or uncommon. It happens. I mean,
20 sometimes there's just different cases. Like they might
21 confiscate the gun on one day or at another time or -- it's
22 not uncommon. I just recently had a case that had eight
23 different case numbers, so.

24 Q. But you were able to link that gun to those shell
25 casings?

1 A. Correct.

2 MS. WALKER: Thank you. I don't have any further
3 questions.

4 THE COURT: Cross-examination.

5 MS. ZMROCZEK: Thank you.

6 CROSS-EXAMINATION

7 BY MS. ZMROCZEK:

8 Q. Ms. Metz, are you familiar with the National Academy
9 of Science?

10 A. I am, yes.

11 Q. Are you familiar with their view of firearms and tool
12 mark identification?

13 A. I'm familiar with both their 2008 and 2009 report,
14 which are recommendations and comments on science, yes.

15 Q. And the comments include that it lacks evidentiary
16 validity, doesn't it?

17 A. Are you talking about the 2008 report?

18 Q. Yes.

19 A. It mentions it; however, there have been since then
20 both my professional organization, AFTE -- or the American
21 Firearm -- or I'm sorry, Association of Firearm Examiners
22 -- Firearm and Tool Mark Examiners, has made a rebuttal
23 since that and also one of the members of that 2008
24 National Academy of Sciences committee came back to say
25 that that report -- and in the report it actually states

1 that their report was in no way a comment on the validity
2 or the admissibility or firearm and tool mark
3 identification.

4 Q. You would agree that you can't give a statistical
5 analysis?

6 A. No, that's correct. Yes. We cannot give -- we cannot
7 give a statistic. I cannot be -- you know, there's no way
8 for us to give a statistic on our science that every
9 identification is like DNA. The reason for that is because
10 there's no possible way for us to know how many firearms
11 there are in the world unlike we know approximately how
12 many human beings are in the world. The reason for that
13 is because you can make a firearm out of a pen or a super
14 soaker or anything else. So it's kind of difficult for
15 us to be able to come up with a statistic, but because we
16 know manufacturing processes and we know that everything
17 leaves its own unique mark, we're still able to come to
18 our conclusions of an identification.

19 Q. So it's not like fingerprints because fingerprints are
20 able to look in a database, but you're not, right?

21 A. No, that's incorrect. We actually -- we sort of have
22 a database. It's called NIBIN or the National Imaging --
23 excuse me -- National Integrated Ballistic Information
24 Network. What that does is with our cartridge cases
25 especially we can sort of do the same thing that AFIS does

1 where they take a picture of the head of the cartridge
2 case, which is what we generally look at, and it can sort
3 of make -- sort of like what AFIS does where it can make
4 correlations, but much like fingerprints we still have to
5 get those two actual cartridge cases and do the comparison
6 just like fingerprints actually have to get those
7 fingerprints and do the comparison. They don't rely on
8 AFIS to say that it is for sure that person.

9 Q. So you sort of have one?

10 A. Oh, we do have one. It's just not exactly -- I mean,
11 it's not for people, it's for firearms.

12 Q. Tell me about the proficiency testing that you do.

13 A. Yes. So we have proficiency tests and I do
14 proficiency tests in all my subdisciplines, which include
15 firearm identification, tool mark identification, serial
16 number identification, and muzzle to target distance
17 determination, and they're provided to us by an outside
18 agency who kind of gives them to just about everybody.

19 Q. All right. And so when you -- you're very proficient
20 and then you run these tests. Tell the jury about what
21 your error rates are in these cases.

22 A. Well, error rates are, again, a little difficult for
23 our science to come up with. The reason for that is
24 because in our science we don't just have yes and no. We
25 don't just have identification and elimination. We also

1 have this large gray area that's called an inconclusive.
2 It means that I can't say that it's not, but neither can
3 I say that it is this firearm, and so because of that an
4 error rate is very difficult to come up with because it's
5 not wrong to come up with an inconclusive, so it's a
6 little difficult to come up with that error rate. But
7 the most recent error rate taking into account false
8 positives and false negatives, that means someone came to
9 an identification when it wasn't that firearm and then,
10 vice versa, someone eliminated that cartridge case when
11 it was that firearm, and right now for firearm and tool
12 mark identification it's around somewhere between one to
13 three percent because in firearm identification you have
14 multiple examinations. So you have bullet to bullet, you
15 have cartridge case to cartridge case, and then tool marks
16 you have a wide range, so it's somewhere between one to
17 four percent for both false and -- false positive and false
18 negative.

19 Q. And which -- who's publishing that error rate?

20 A. SWGGUN, our working group.

21 Q. And you would agree with me that it's a subjective
22 science?

23 A. Yes, it is very -- I mean, it's based on science,
24 but my conclusion is -- my conclusion is very subjective.

25 Q. It's very subjective.

1 **MS. ZMROCZEK:** Thank you.

2 **THE COURT:** Redirect?

3 **MS. WALKER:** Thank you, Your Honor.

4 REDIRECT EXAMINATION

5 BY MS. WALKER:

6 Q. She asked you questions about error rates and
7 subjectivity. Are there things that your department
8 specifically does to account for error rates and the
9 subjective nature of the science? Do y'all have people
10 check your results?

11 A. Yes. So in our department everything that I do is
12 one hundred percent peer reviewed; meaning that it's not
13 just me looking at it, another qualified tool mark --
14 firearm and tool mark examiner comes and they look at that
15 evidence and come to their very own conclusion, and so it
16 -- they do a verification which just means whether or not
17 they agree with my conclusion or not.

18 Q. And was that done in this case?

19 A. Yes, one hundred percent of the time. It's always
20 done.

21 Q. How many people reviewed that?

22 A. Well, in this particular case, there were actually
23 multiple because at this time I was in training, so it
24 wasn't -- I did my work, then my training supervisor went
25 back behind me, did it, made sure she agreed, then we also

1 had our verifier come in, which is our third qualified
2 firearm and tool mark examiner, who did the exact same
3 thing, looked at the evidence and came to the same
4 conclusions.

5 Q. And all three of you matched those shell casings to
6 that gun?

7 A. Correct.

8 MS. WALKER: Thank you. I don't have any other
9 questions.

10 THE COURT: Recross?

11 MS. ZMROCZEK: Briefly, Your Honor.

12 RECROSS EXAMINATION

13 BY MS. ZMROCZEK:

14 Q. How many times has one of your peer reviews not agreed
15 with you?

16 A. So far, none that I can recall.

17 Q. A hundred percent perfect?

18 A. I mean, at this time, yes.

19 MS. ZMROCZEK: Thank you.

20 THE COURT: All right. Thank you. You may step down.

21 (Witness excused.)

22 THE COURT: Ms. Walker, would you like to have the
23 witness excused?

24 MS. WALKER: Yes, Your Honor. Please.

25 THE COURT: All right. You are excused. Thank you

1 for coming.

2 All right. Ladies and gentlemen, you've been in the
3 courtroom now for about an hour and fifteen or twenty
4 minutes and I think it is appropriate that we take our
5 morning recess at this time, so I'm gonna allow you to go
6 to your jury room for about fifteen minutes and we'll be
7 ready to resume at that time.

8 Again, it's still premature for you to begin any
9 discussion about this case. You still have not heard all
10 of the evidence that you will hear in this case and any
11 discussion of the case among yourselves would be premature.
12 So just go to your jury room and relax for a few minutes
13 and the bailiffs will get you some refreshments if you need
14 it and we'll send for you in about fifteen minutes. Thank
15 you.

16 (Whereupon, the jury retires to the jury room
17 at 11:18 AM.)

18 **THE COURT:** All right. Counsel, we'll be in recess
19 until 11:35. That's about sixteen, seventeen minutes.

20 (Recess taken.)

21 **BAILIFF:** Come to order, please.

22 **THE COURT:** Thank you. You may be seated.

23 **BAILIFF:** Make sure your electronics are cut off.

24 **THE COURT:** All right. Ms. Campbell, anything before
25 the jury is brought back in?

1 **MS. CAMPBELL:** No, Your Honor.

2 **THE COURT:** Anything from the defense?

3 **MS. ZMROCZEK:** No.

4 **THE COURT:** All right. Bring the jury in please.

5 (Whereupon, the jury returns to the courtroom at
6 11:41 PM.)

7 **BAILIFF:** Jurors all seated, Your Honor.

8 **THE COURT:** Thank you, ladies and gentlemen, and we
9 are now ready to proceed. The State is continuing to
10 present their case. Ms. Campbell.

11 **MS. CAMPBELL:** May it please the Court? The State
12 calls Investigator Odom.

13 TRICIA COLLINS ODOM,
14 having been duly sworn, testified as follows:

15 **THE CLERK:** Have a seat on the witness stand and state
16 your full name for the record. Trisha Collins Odom. The
17 spelling of my last name is O-D-O-M.

18 DIRECT EXAMINATION

19 BY MS. CAMPBELL:

20 Q. Investigator Odom, where are you employed?

21 A. At the Richland County Sheriff's Department.

22 Q. And what do you do there, ma'am?

23 A. I'm the latent print analyst.

24 Q. And as the latent print analyst what do your duties
25 include?

1 A. My primary duty is to look at all of the latent prints
2 that are submitted by the line unit and by our crime scene
3 units and try to determine the source that made those
4 latent prints.

5 Q. Can you tell this jury a little bit about your
6 education and training?

7 A. Sure. I have a degree in criminal justice from the
8 University of South Carolina and I am a certified Class
9 One officer through the South Carolina Criminal Justice
10 Academy. And as soon as I was promoted to the crime scene
11 latent print section, I attended a number of classes
12 outside our office, and also we have an extensive inside
13 training program. Some of the classes that I have been to
14 are the complex latent prints examination, recovery of
15 latent print evidence from human skin, forensic ridgeology,
16 ID technician school, basic fingerprint training, advanced
17 palmprint identification, chemical development of latent
18 prints. And also in May of 2014 I was certified as a
19 latent print analyst through the International Association
20 for Identification.

21 Q. And have you been qualified before as an expert in
22 latent print examination?

23 A. I have.

24 Q. And approximately how many times have you been
25 qualified?

1 A. Thirty.

2 MS. CAMPBELL: Your Honor, at this time we'd offer
3 her as an expert in latent print examination.

4 MS. ZMROCZEK: No objection, Your Honor.

5 THE COURT: All right. The witness will be qualified
6 as an expert in the field the latent fingerprint analysis.
7 Again, ladies and gentlemen, this is an expert witness and
8 I have told you before about the difference between a lay
9 and an expert witness.

10 You may proceed, Ms. Luck -- or Ms. Campbell.

11 MS. CAMPBELL: Thank you.

12 BY MS. CAMPBELL:

13 Q. Investigator, in doing latent print examination,
14 typically how do you receive your evidence and what
15 evidence is necessary for you to do a comparison?

16 A. Well, typically I'll receive the latent prints. The
17 latents are the crime scene prints that we receive. I will
18 get them from our evidence room and then we will either get
19 a suspect from our AFIS system or we'll get a request to
20 compare from an investigator.

21 Q. And there's been mention about a database y'all have
22 that has known prints in it called AFIS, correct?

23 A. Yes, ma'am.

24 Q. But in order to come to court and testify and
25 everything, do you have to do your own personal

1 confirmation before as far as comparing known prints to
2 evidence taken from a crime scene?

3 A. Right. The AFIS itself is just a jumping off point.
4 It's an investigative tool to give us a place to start, but
5 every examination that we do, every comparison that we do
6 we actually take the evidence with a known print card and
7 do a comparison that way.

8 Q. And are fingerprints, in doing that, are they unique
9 to each individual?

10 A. Yes, ma'am.

11 Q. No matter if they're related or whatever?

12 A. Right. Each -- each individual finger on each
13 individual person is different.

14 Q. And if I walk up and, say, I touch this surface like
15 that, am I necessarily going to leave a fingerprint?

16 A. Not necessarily. It depends upon a lot of factors;
17 the surface type, the cleanliness of your hands, if the
18 item has been touched before, the temperature, things like
19 that.

20 Q. And can you tell when, say, someone is processing a
21 crime scene how long a fingerprint may have been there?

22 A. No, ma'am.

23 Q. I want to turn your attention to this case. Did you
24 receive some known fingerprints from certain people
25 involved in this case?

1 A. I did.

2 Q. And who were the known fingerprints that you received?

3 A. I received fingerprints of Michael Dewan Keith,
4 Brandon Joseph Berry and Nickilous O'Neal Wallace.

5 Q. And when we say known prints, is that typically how
6 prints are rolled with the black ink and then put on a
7 piece of paper?

8 A. That's right.

9 Q. And those three sets of prints were provided to you in
10 this case?

11 A. Yes.

12 Q. And did you also receive evidence that had been taken
13 by Sergeant Richards in this case from a car?

14 A. Yes, ma'am.

15 Q. And were you able to do any comparisons?

16 A. I was.

17 Q. And taking them in order, do you assign numbers to
18 your comparisons just in order to keep them differentiated?

19 A. What we actually do is each of the individual latent
20 print cards, which are just the little cards that the
21 latent prints are adhered to, we give those an L number.
22 L, for latent, and then if there's -- the prints that are
23 on the card, we number each of those, we sub number them,
24 so if we have two latent print cards we'll have an L-1 and
25 an L-2 and if each of those have two prints on them we'll

1 have and L-1.1, L-1.2, L-2.1 and L-2.2, and so forth.

2 Q. In taking them in the order that you received them --
3 and when the areas of fingerprints are lifted, can there be
4 more than one area that you make a comparison within that
5 same lift?

6 A. I'm sorry, could you say that again, please?

7 Q. When an area, let's say, of the exterior of a car is
8 lifted --

9 A. Yes, ma'am.

10 Q. -- and there's an area where there may be some
11 fingerprint impression, can there be more than one?

12 A. Fingerprint impression?

13 Q. Yes, in the same lift is all I'm saying.

14 A. Yes, ma'am.

15 Q. And in this case, when you looked at the first lift
16 that was submitted to you, were there different areas you
17 looked at?

18 A. On the first lift, there were four individual
19 fingerprints that I looked at.

20 Q. Okay. And that was a card from the exterior rear
21 windshield; is that correct?

22 A. That's correct.

23 Q. And what were your conclusions when looking at those?

24 A. L-1.1 was made by the right middle finger of
25 Mr. Keith. On L-1.2, it wasn't made by Mr. Berry or

1 Mr. Wallace, but I couldn't tell if it was made by
2 Mr. Keith due to the incomplete known prints. The same
3 with L-1.3. And L-1.4 was made by Mr. Keith's right little
4 finger.

5 Q. Okay. And do you have those prints with you, the
6 lifts?

7 A. No, ma'am.

8 Q. When you do that comparison, you said that you were
9 able to determine that two out of those four in that same
10 area were from Mr. Keith; is that correct?

11 A. Yes, ma'am.

12 Q. And the other two you said you were inconclusive. You
13 excluded Mr. Berry and Mr. Wallace, but you weren't able to
14 make a conclusion as to Mr. Keith, and why is that?

15 A. Due to the lack of individual minutia points in the
16 fingerprint.

17 Q. In the fingerprint itself?

18 A. Yes, ma'am.

19 Q. And how were those --

20 A. No, I'm sorry. Let me correct myself. Due to the
21 incomplete known fingerprint. I apologize.

22 Q. And what was missing in your known fingerprints of
23 Mr. Keith?

24 A. I don't recall specifically.

25 Q. But there was a part missing?

1 A. I don't recall specifically. Just that they're
2 incomplete.

3 Q. And those fingerprints were all grouped together; is
4 that correct?

5 A. Yes, ma'am.

6 Q. And I want to move to the next lift, Item Number 2, on
7 your thing.

8 A. Yes, ma'am.

9 Q. Two partial prints developed from the right rear
10 exterior trunk?

11 A. That's correct.

12 Q. And were you able to make any determination as far as
13 those two?

14 A. I was able to exclude all three subjects from having
15 deposited those fingerprints.

16 Q. And, again, when you're doing your fingerprint
17 comparisons, are you able to determine how long that
18 fingerprint may or may not have been on that trunk?

19 A. No, ma'am.

20 Q. And looking at Item Number 3, were you able to -- that
21 was from the right rear passenger door. Were you able to
22 make any conclusions there?

23 A. That was inconclusive to all three subjects.

24 Q. And what does that mean?

25 A. It just means that I can't tell one way or the other.

1 Q. There just weren't enough points?

2 A. Right, there's not enough information in the prints.

3 Q. And when you say there's not enough information in the
4 print, there just simply isn't enough of a print there?

5 A. Correct.

6 Q. Is that an easier way to put it?

7 A. Well, when we look at the fingerprints, we're looking
8 for the individual points that are on the fingerprints. It
9 could be that there just wasn't a good enough quantity or
10 enough -- excuse me, enough quality or enough quantity to
11 be able to make a determination one way or the other.

12 Q. So are you including or excluding? You can't do
13 either one?

14 A. That's correct.

15 Q. Moving on to Item Number 4, which were prints
16 developed from the rear center exterior top of the vehicle,
17 what information were you able to come up with there?

18 A. I was able to exclude Mr. Wallace and Mr. Berry. It
19 was inconclusive to Mr. Keith. It was a palmprint and we
20 didn't have any known palmprints on Mr. Keith.

21 Q. Okay. And that was what was missing in Mr. Keith's?

22 A. Yes.

23 Q. Okay. And so this was -- and is there a difference
24 between a palmprint versus a fingerprint?

25 A. Yes.

1 Q. But both can have identifying information?

2 A. Yes.

3 Q. So at that point you were able to identify both
4 Mr. Wallace and Mr. Berry, but you didn't have Mr. Keith's
5 palmprint?

6 A. I was able to exclude Mr. Wallace and Mr. Berry, but
7 not Mr. Keith because I didn't have his palmprints to look
8 at.

9 Q. And, finally, the last item, I believe, was this
10 Number 5 on your report from the top exterior roof at the
11 right rear passenger door?

12 A. That's right.

13 Q. And were you able to find any individual prints in
14 that lift?

15 A. Yes, there were six individual prints marked on L-5.

16 Q. And specifically on those, what conclusions were you
17 able to make?

18 A. L-5.1 was made by Mr. Keith's left ring finger,
19 L-5.2 was made by Mr. Keith's left middle finger. L-5.3
20 was made by Mr. Keith's left index finger. L-5.4 was
21 made by Mr. Keith's left ring finger. L-5.5 was made
22 by Mr. Keith's left middle finger. And L-5.6 was
23 inconclusive. And we were able to exclude Mr. Berry and
24 Mr. Wallace.

25 Q. And whenever you're matching it to someone, that

1 automatically excludes everyone else, doesn't it?

2 A. Yes.

3 Q. Okay. And, again, they were inconclusive on L-5.6
4 because of the palmprint being missing?

5 A. I believe that's correct.

6 Q. Because you were able to exclude the palmprints from
7 Berry and Wallace on that?

8 A. That's correct. And it was inconclusive to Mr. Keith
9 because we didn't have any palmprints to compare.

10 Q. And so during the course of your investigation, you
11 were able to match some of the prints to the victim in the
12 case, Mr. Keith?

13 A. Yes.

14 Q. And some of your results were just inconclusive
15 because of either the quality of the print or you didn't
16 have the palmprints?

17 A. Right.

18 Q. And then both Wallace and Berry were excluded --

19 A. Yes.

20 Q. -- on the ones you weren't able to do anything?

21 A. (Nods head.)

22 Q. And there was only one print where you actually
23 excluded all three and that was L-2?

24 A. That's correct. Well, yes. There were two prints on
25 that and they were excluded to all three of the subjects.

1 Q. All three of the subjects. And that was on the trunk
2 area; is that correct?

3 A. Yes.

4 MS. CAMPBELL: Thank you, ma'am. I don't have
5 anything further.

6 THE COURT: Cross-examination?

7 MS. ZMROCZEK: Thank you.

8 CROSS-EXAMINATION

9 BY MS. ZMROCZEK:

10 Q. Good morning.

11 A. Good morning.

12 Q. Were you provided pictures of the vehicles?

13 A. No, ma'am.

14 Q. Or of the locations?

15 A. No, ma'am.

16 Q. Okay. Let me pull those out for you real quick. I'm
17 handing you Government's 55 through 59 and 60. Those
18 correspond with letters, but -- and 27.

19 A. Thank you.

20 Q. Those correspond with letters, but when you received
21 the information were you aware that Mr. Richards had marked
22 the fingerprints with letters and the footprints with
23 numbers?

24 A. No.

25 Q. Okay. So when you received it, it was 1 through 5?

1 A. Right. Well, when we get them, we -- they're not
2 numbered until we receive them and all of the latents are
3 individually numbered completely separate from any of the
4 other evidence.

5 Q. Okay. And so I wanted to talk to you -- here's the
6 other one. I'm sorry. Government's -- what number was
7 that?

8 A. That one is 65.

9 Q. Okay. 65. So does that represent A through E? Do
10 those pictures?

11 A. I'm sorry. I've got two A's, two C's and an E.

12 Q. Okay. And A is the one that was on the exterior
13 windshield -- or your latent print Number 1, right?

14 A. That's what I -- all I got were the latent print
15 cards, so I'm not familiar with these.

16 Q. Okay. So the exterior print of the windshield is --
17 you just got the lift, right?

18 A. That's correct.

19 Q. Okay. And then -- and those all matched to Mr. Keith
20 and excluded Mr. Berry, correct? Except for one that was
21 you couldn't -- was inconclusive?

22 A. Right, the two on L-2. That's correct.

23 Q. And then the one L-2, which was not made by any of
24 these, you said was located on which -- on the rear?

25 A. According to -- what I do when I write my report is I

1 quote what they write on the back of the latent print card,
2 so that's all of the information I have. But on the card
3 I've written in my report was right rear exterior trunk,
4 Marker B.

5 Q. Okay. And that handprint or fingerprint was excluded
6 to everybody?

7 A. Yes.

8 Q. And it could have matched somebody, but it didn't
9 match any of the ones that you had?

10 A. That's correct.

11 Q. Okay. And which one was the one from the roof?
12 Number 4?

13 A. Yes.

14 Q. Okay. And that one was not made by Berry or Wallace,
15 correct?

16 A. That's right.

17 Q. And your indication is that that print was taken from
18 the top of the -- of the roof?

19 A. That was what was written by Sergeant Richards on the
20 latent print card.

21 Q. Okay. Did you ever -- did you run any and all of
22 these prints through AFIS?

23 A. No, ma'am.

24 Q. Okay. Were you ever asked to do that?

25 A. They were submitted through AFIS -- excuse me. The

1 reason I got them to begin with was there was an AFIS hit,
2 which one of our other analysts ran it through AFIS and got
3 the hit and gave it to me for comparison, and then I was
4 subsequently asked to compare Mr. Berry and then, I think,
5 the day after that Mr. Wallace.

6 Q. Okay. But so never -- AFIS when they generate a hit
7 they have like twenty possible markers or something?

8 A. Well, you can actually set it for as many as you would
9 like to receive. I think ours is thirty.

10 Q. Okay. So you specifically compared it against
11 Mr. Berry and Mr. Wallace and they were excluded. Did
12 Investigator Carwell or anybody ever ask you to go back
13 and check any of those other AFIS hits?

14 A. Well, I have -- I have the AFIS worksheet which shows
15 where they were submitted.

16 Q. Okay. We just never got the results back with it?

17 A. Right. Well, there wasn't a hit and so then I was
18 subsequently asked to compare them.

19 Q. Perfect.

20 **MS. ZMROCZEK:** Thank you.

21 **THE COURT:** Redirect?

22 **MS. CAMPBELL:** Just one question.

23 **REDIRECT EXAMINATION**

24 **BY MS. CAMPBELL:**

25 Q. She asked you about the print from the top of the car;

1 that it excluded Mr. Wallace and Mr. Berry?

2 A. That's correct.

3 Q. But you weren't able to make a conclusion as to the
4 victim because you didn't have his palmprint?

5 A. That's right.

6 Q. And what effect does wearing gloves have on leaving
7 prints on a car?

8 A. You're not gonna leave them.

9 **MS. CAMPBELL:** Thank you.

10 **THE COURT:** Recross?

11 **MS. ZMROCZEK:** No, thank you.

12 **THE COURT:** Thank you, ma'am. You may step down.

13 (Witness excused.)

14 **THE COURT:** Would you like to have her excused,
15 Ms. Campbell?

16 **MS. CAMPBELL:** Yes, sir.

17 **MS. ZMROCZEK:** No objection.

18 **THE COURT:** All right. You are excused. Thank you
19 for coming.

20 **THE WITNESS:** Thank you, sir.

21 **THE COURT:** All right.

22 **MR. STEADMAN:** Your Honor, may we approach?

23 **THE COURT:** Yes.

24 (Proceedings held at the bench; not reported.)

25 **THE COURT:** All right. Ladies and gentlemen of the

1 jury, we have an evidentiary matter that I have got to
2 address and so I'm going to ask you to go to your jury
3 room while I take care of this matter. It will probably
4 take us about ten minutes, but do not discuss this case
5 among yourselves while we address this matter and hear
6 this legal issue.

7 You may go with the bailiff.

8 (Whereupon, the jury retires to the jury room at
9 12:03 PM.)

10 (State's Exhibit Number 163 was marked for
11 identification.)

12 **THE COURT:** All right. From the bench conference it
13 is my understanding that the next witness the State wishes
14 to call is a representative from the detention center who
15 wishes to introduce certain phone calls, video -- audio
16 recordings, I guess, of the phone calls, three phone calls
17 from the Defendant to different -- are they all to the same
18 person?

19 **MR. STEADMAN:** No, Your Honor. Two of them are to
20 his girlfriend, Kayla, and the other one is to Nickilous
21 Wallace.

22 **THE COURT:** Okay. And it's my understanding and,
23 again, from the bench conference that the defense does not
24 object to two of those, but does object to one of them; is
25 that right?

1 **MS. ZMROCZEK:** Well, I have objections, but I
2 understand what the Court's previous discussion was about
3 -- one of my objections was to hearsay and it's the Court's
4 position that they're gonna say that they're not offering
5 these --

6 **THE COURT:** Well, wait a minute. How are they hearsay
7 if he made the calls?

8 **MS. ZMROCZEK:** Well, I mean what the other people say
9 on them.

10 **THE COURT:** Pardon?

11 **MS. ZMROCZEK:** What the other person says on them.
12 One of them I understand is unavailable, and that's
13 Mr. Wallace, so I don't have an issue with that. They had
14 Kayla Geiger here this morning.

15 **THE COURT:** Well, I'm going to allow them in, but I
16 want to -- let's go ahead and get the record straight as
17 to what your position is. Let's identify the calls,
18 Mr. Solicitor, so we can see what we've got. The first
19 one is a -- how long of a call and who is it to?

20 **MR. STEADMAN:** Your Honor, I believe the first one,
21 the one to Nickilous Wallace, and we'll pull it up here
22 shortly, I believe that one was about ten minutes. I can't
23 remember the exact time.

24 **THE COURT:** That's from Mr. Wallace?

25 **MR. STEADMAN:** Yes, Your Honor.

1 **THE COURT:** All right. What's your position on that?

2 **MS. ZMROCZEK:** Your Honor, I understand that he's
3 unavailable. That's the co-defendant who's not testifying.

4 **THE COURT:** All right. Unavailable and so -- you have
5 no other objection than based on that?

6 **MS. ZMROCZEK:** Correct.

7 **THE COURT:** All right. So the audio telephone
8 conversation between the Defendant and Wallace is
9 admissible because he -- at least the hearsay objection
10 is not applicable because Mr. Wallace is unavailable.

11 All right. What's the next one?

12 **MR. STEADMAN:** Your Honor, the next one would be
13 Brandon Berry to his girlfriend Kayla and we can click on
14 that one.

15 **MS. ZMROCZEK:** I believe that's the one that I have
16 the issue with the relevance after the first couple of
17 minutes, Your Honor.

18 **THE COURT:** All right. So the objection is to
19 relevance and it's about how long, Mr. Solicitor?

20 **MR. STEADMAN:** Your Honor, this one is about four
21 minutes and nine seconds and this is the one, I believe --

22 **THE COURT:** And that's one. All right. And what's
23 the third call?

24 **MS. ZMROCZEK:** I mean, there are two to her, so I
25 don't know which order.

1 **MR. STEADMAN:** And the third one --

2 **MS. ZMROCZEK:** It's probably the third one.

3 **MR. STEADMAN:** The third one to her is about
4 fifteen minutes or approximately sixteen minutes long
5 and I believe that's the one she has --

6 **MS. ZMROCZEK:** Yes, the third one is my issue with
7 relevance, Your Honor.

8 **THE COURT:** All right. So you don't have a relevance
9 objection on Number 2?

10 **MS. ZMROCZEK:** No.

11 **THE COURT:** And the relevance objection as to
12 Number 3 is after a certain point?

13 **MS. ZMROCZEK:** After a certain point.

14 **THE COURT:** All right. I'll listen to it and you tell
15 me at what point you think it becomes irrelevant.

16 **MS. ZMROCZEK:** Okay.

17 **THE COURT:** Turn that volume down a little bit.
18 (Whereupon, jail phone call Number 3 was played.)

19 **THE COURT:** Is that the point?

20 **MS. ZMROCZEK:** Yes.

21 **THE COURT:** All right. Let me make a note of that
22 point. Where is it on the audio?

23 **MS. WALKER:** Four minutes and thirty-nine seconds,
24 Your Honor.

25 **THE COURT:** All right 4:39. All right. Go ahead with

1 it.

2 (Whereupon, jail phone call Number 3 was played in its
3 entirety.)

4 **THE COURT:** All right. Yes, ma'am, Ms. Zmroczek.

5 **MS. ZMROCZEK:** Thank you. Your Honor, after 4:39 I
6 fail to see any relevance.

7 **THE COURT:** Okay. That's what I -- I understand
8 that, Ms. Zmroczek. Let me hear from the State as to
9 what parts after 4:39 that they contend are relevant to
10 the issues here.

11 **MS. WALKER:** I'm going to quote the relevance --

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

13 **MS. WALKER:** -- so excuse my language. But at the
14 eight minute ten -- at the eight minute ten second mark, he
15 goes back to "I'm fucked." And she says, "Yeah, you're a
16 stupid ass". He says, "I know I'm stupid. I know I'm
17 stupid." And she says, "Nick's face was priceless". He
18 says, "Yeah, I know. I know I'm fucked. If I don't get a
19 lawyer, I'm fucked."

20 I think at that point, Your Honor, the reason he knows
21 or feels as though he is in a bad position at that point is
22 because he knows he didn't get rid of the gun.

23 **THE COURT:** All right. So you say those statements
24 are relevant to an admission on his part?

25 **MS. WALKER:** Yes, Your Honor.

1 **THE COURT:** All right. Anything else?

2 **MS. WALKER:** No, Your Honor.

3 **THE COURT:** Okay. How about that, Ms. Zmroczek?

4 **MS. ZMROCZEK:** Your Honor, I would object on two
5 grounds. One, I believe it's impermissible under Doyle v.
6 Ohio that he talk about why he needs a lawyer. They're
7 assuming that it's because he didn't get rid of the gun,
8 but he doesn't say it's because he didn't get rid of the
9 gun. Your Honor, I think that any of that testimony is
10 more prejudicial -- it's highly prejudicial -- more
11 prejudicial than probative.

12 **THE COURT:** Whoa, whoa, whoa. Your initial objection
13 was relevance.

14 **MS. ZMROCZEK:** Right. I don't think it has any
15 relevance, I mean, to --

16 **THE COURT:** Well, she just explained what she thought
17 the relevance was and so now you're changing horses as far
18 as what you think the reason it's not admissible is.
19 You're saying it's not -- it's not relevant, but not
20 admissible because it's -- the prejudicial effect outweighs
21 the probative value under 403.

22 **MS. ZMROCZEK:** No. And I'm sorry, Your Honor. I've
23 maintained that I don't think that it has any relevance.
24 I think they believe that that sentence at eight minutes
25 and ten seconds has the relevance. As to that sentence,

1 Your Honor, I would first object that it's not relevant.
2 If the Court were to find that it were relevant, then I
3 would go to the second test of that, which would be that it
4 be more highly prejudicial than probative.

5 **THE COURT:** And why is it more prejudicial than
6 probative?

7 **MS. ZMROCZEK:** Well, because, Your Honor, it's a
8 statement that is full of -- of cuss words and he's saying
9 "I'm F'd".

10 **THE COURT:** The whole tape is.

11 **MS. ZMROCZEK:** Well, of course, the whole tape is,
12 which is, I believe, why they would --

13 **THE COURT:** Okay. So just the fact that it's got
14 profanity doesn't make any more prejudicial.

15 **MS. ZMROCZEK:** No, no. No, Your Honor, but because
16 we don't know what he's talking about in that, I think it
17 almost forces him to give up his Fifth Amendment right to
18 get up and explain that. They -- they want to say oh, it's
19 because we think it's because he didn't get rid of the gun,
20 but we don't know, and I don't think he can be forced to
21 give up his right to have to explain one sentence in a
22 phone call.

23 **THE COURT:** Well, he made the statements and -- and,
24 you know, he chose to make those statements and he was not
25 talking to law enforcement, so it's not anything protected

1 by any kind of a constitutional right. So when he makes a
2 statement to a friend, that's not protected by any kind of
3 constitutional right.

4 **MS. ZMROCZEK:** I understand, Your Honor. If the
5 Court thinks that that sentence is admissible, then I
6 would ask that the stuff around it be redacted. And I
7 know that they can do that, Your Honor, because it's been
8 done in all the cases that I've had here.

9 **THE COURT:** All right. The Court's ruling would be
10 that from the point of 4:39 on there is a great deal of
11 whatever -- all through the whole tape there's a great deal
12 of profanity and language, but that does not make it
13 irrelevant or inadmissible. There is I think relevant
14 testimony after the 4:39, and that is his statements at
15 the 8:10 mark, and that for the jury to understand the
16 entire conversation, why they need to hear the whole thing.
17 I think it is relevant to the overall situation. He called
18 his friend and was discussing it and went on up until the
19 8:10 mark at least of discussing matters that he felt like
20 that he was in a bad position because of something that he
21 had done, and I think the jury has the right to hear that.
22 And I think it is relevant. I do not think that the
23 evidence -- that the probative value is substantially
24 outweighed by the -- by the danger of unfair prejudice or
25 confusion of the issues or misleading the jury or by

1 consideration of undue delay, wasted time or needless
2 presentation of evidence. I think that the objection
3 would be overruled on the grounds of 401, relevance, and
4 also it would be overruled on the fact that the probative
5 value is not substantially outweighed by the prejudicial
6 effect. The entire tape will be admitted.

7 All right. Are you going to call a witness to
8 authenticate these or do you have any question about the
9 authentication?

10 **MS. ZMROCZEK:** Yes, Your Honor, we would. I do
11 believe the witness is here, so we would authenticate.

12 **THE COURT:** All right. And then do you want to go
13 forward -- are you ready to go forward? The witness is
14 here to authenticate it?

15 **MR. STEADMAN:** Yes, Your Honor.

16 **THE COURT:** All right. Bring the jury in.

17 **MR. STEADMAN:** And, Your Honor, one more quick thing.
18 Lieutenant Friedley from Alvin S. Glenn Detention Center
19 is here and it was originally supposed to be Sergeant --

20 **MS. ZMROCZEK:** I'm fine with --

21 **MR. STEADMAN:** She is his supervisor.

22 **MS. ZMROCZEK:** I have no problem with that.

23 **THE COURT:** All right.

24 (Whereupon, the jury returns to the courtroom at
25 12:30 PM.)

1 **THE COURT:** All right. Thank you, ladies and
2 gentlemen. Excuse the delay, but we have taken care of
3 the matter that we needed to take care of and are ready to
4 go forward.

5 Mr. Solicitor, you may call your next witness.

6 **MR. STEADMAN:** The State calls Lieutenant Friedley.

7 MARGITA FRIEDLEY,

8 having been duly sworn, testified as follows:

9 **THE CLERK:** Thank you. Please have a seat on the
10 witness stand and state your full name for the record.
11 And, please, spell your last name.

12 **THE WITNESS:** Margita Friedley. It's F-R-I-E-D-L-E-Y.

13 DIRECT EXAMINATION

14 BY MR. STEADMAN:

15 Q. Ma'am, where are you employed?

16 A. Alvin S. Glenn Detention Center.

17 Q. What do you do for the Alvin S. Glenn Detention
18 Center?

19 A. I'm part of Internal Affairs. We monitor the daily
20 activities.

21 Q. And how many people do you oversee at Alvin S. Glenn
22 Detention Center?

23 A. One. One person.

24 Q. And what are your daily duties?

25 A. We monitor the phone calls, video surveillance, review

1 incident reports.

2 Q. And does Alvin S. Glenn monitor inmate phone calls?

3 A. Yes.

4 Q. Do they record these phone calls?

5 A. Yes.

6 Q. What system is used to record these phone calls?

7 A. Am-Tel.

8 Q. And does Alvin S. Glenn Detention Center have a
9 contract with Am-Tel?

10 A. Yes.

11 Q. Can you briefly describe the process once an inmate's
12 booked in, how do they set up an Am-Tel account?

13 A. Well, they set up their own PIN number. Their inmate
14 number is their account and then they have a PIN number
15 that's just used by them that only they know to access the
16 phone. Then their family or whoever they want to call they
17 access Am-Tel and set up an account.

18 Q. So they're given a specific PIN number assigned to
19 each inmate?

20 A. Their inmate number and then their PIN number they
21 create themselves.

22 Q. And have you seen inmates use other inmates' PIN
23 numbers to disguise their phone calls?

24 A. Yes.

25 Q. Are the inmates on these phone calls clearly advised

1 that they are being recorded?

2 A. Yes.

3 Q. And is the person on the other line advised that this
4 phone call is from the Alvin S. Glenn Detention Center?

5 A. Yes.

6 Q. I'm gonna show you what's been marked as State's 163.
7 Have you had a chance to listen to these three phone calls?

8 A. Yes.

9 Q. Are these three phone calls made from the Alvin S.
10 Glenn Detention Center?

11 A. Yes.

12 Q. And are these three phone calls kept in the regular
13 course of business for Alvin S. Glenn?

14 A. Yes.

15 **MR. STEADMAN:** Your Honor, at this point we would
16 introduce State's 163 into evidence.

17 **THE COURT:** Subject to the objections previously made,
18 Exhibit Number 163 is admitted into evidence.

19 (State's Exhibit Number 163, three jail phone calls,
20 was admitted into evidence.)

21 **MR. STEADMAN:** Permission to publish, Your Honor?

22 **THE COURT:** Permission granted.

23 I will tell you, ladies and gentlemen, it's not gonna
24 be anything to see, but he's just bringing it around so the
25 speakers will be facing toward you, so don't worry about

1 watching the screen.

2 (State's Exhibit Number 163, Call Number 1, was played
3 for the Court and jury beginning at 12:35 PM.)

4 (State's Exhibit Number 163, Call Number 2, was played
5 for the Court and jury beginning at 12:39 PM.)

6 **THE COURT:** Let's just stop it right there a minute.
7 Counsel come up.

8 (Proceedings held at the bench; not reported.)

9 **THE COURT:** All right. Ladies and gentlemen, this
10 does not conclude the matters that the State wishes to
11 present by way of audio tape, but to go ahead would run
12 well into the lunch hour. So I'm going to go ahead and
13 take a break at this time and allow you to go and get your
14 lunch and I'm gonna ask you -- it's five minutes till one.
15 I'm gonna ask you to be back in the jury room, please, at
16 2:15 and we'll be ready to start at that time.

17 So, if you would, go and get your lunch and return to
18 your jury room about 2:15. Do not discuss the case among
19 yourselves, don't discuss it with anyone else and don't
20 allow anyone to discuss it with you, and I will see you
21 after lunch. Have a pleasant lunch.

22 (Whereupon, the jury retires to the jury room at
23 12:56 PM.)

24 **THE COURT:** All right. Counsel, the reason for having
25 it that way was -- I didn't tell you, but I knew from the

1 last part of the in-camera hearing that the last tape was
2 around at least fifteen minutes, maybe closer to twenty,
3 and I thought it would be better to go ahead and let the
4 jury take their break at this time and we'll play it for
5 them first thing after lunch.

6 How many more witnesses do you anticipate having,
7 Ms. Campbell?

8 **MS. CAMPBELL:** (Indicating.)

9 **THE COURT:** One more? All right.

10 Okay. We'll take a break then until 2:15. We'll be
11 ready to go forward with the remainder of this tape and let
12 the State continue with their case.

13 Thank you.

14 **MR. STEADMAN:** Your Honor?

15 **THE COURT:** Oh, I'm sorry. Yes, the witness is
16 excused. You're to be back at 2:15, please.

17 **THE WITNESS:** Yes, sir.

18 **THE COURT:** Thank you.

19 (Whereupon, a luncheon recess was taken.)

20 **BAILIFF:** Court come to order, please.

21 **THE COURT:** Thank you. You may be seated.

22 All right. We are back on the record with regard to
23 the matter of the State versus Berry a little bit early.
24 Is everybody here? Ms. Walker, are we still waiting for
25 the witness?

1 **MS. WALKER:** The witness is outside, Your Honor.
2 Mr. Steadman should be coming. It's his witness that's
3 on the stand. I'll step outside and get him.

4 **THE COURT:** Okay. Here she comes.

5 **MS. CAMPBELL:** We have the witness.

6 **MS. WALKER:** We have the witness, Your Honor.

7 **MS. ZMROCZEK:** We just need the Solicitor.

8 (Whereupon, the witness resumes the stand.)

9 **MS. CAMPBELL:** Judge, as a housekeeping matter,
10 State's Exhibit Number 164 is the actual prints that
11 were taken that have been referred to in testimony. She
12 just didn't have them in her file when she was on the
13 stand, which I thought she'd brought with her, but the
14 defense doesn't have a problem with me offering them at
15 this point.

16 **THE COURT:** 164?

17 **MS. ZMROCZEK:** No objection, Your Honor.

18 **THE COURT:** All right. 164 admitted into evidence
19 without objection.

20 (State's Exhibit Number 164, latent prints, was marked
21 for identification and admitted into evidence.)

22 **THE COURT:** We are back on the record with regard to
23 the State versus Berry. The State is represented by the
24 Fifth Circuit Solicitor's Office. The Defendant is present
25 with his counsel. I've been advised that the jurors have

1 returned from lunch. Do you need some technicians to
2 finish playing the tape, Ms. --

3 **MS. CAMPBELL:** It's beyond me.

4 **THE COURT:** Okay.

5 **MS. CAMPBELL:** I'm sorry.

6 **THE COURT:** We better bring him back in. Maybe
7 Ms. Walker -- here he comes.

8 **MR. STEADMAN:** Sorry, Your Honor.

9 **THE COURT:** All right. Bring the jury in, please.

10 **BAILIFF:** Yes, Your Honor.

11 (Whereupon, the jury returns to the courtroom at
12 2:15 PM.)

13 **BAILIFF:** Jurors all seated, Your Honor.

14 **THE COURT:** All right. Thank you, ladies and
15 gentlemen, for your promptness in getting back here.
16 Again, I will ask you if while you were away from the
17 courthouse if anyone has approached you or tried to talk
18 to you about this case, I need to know about it now.
19 Negative response, and that's good.

20 All right. At the time that we recessed for lunch,
21 the State was presenting an audio tape to you and they're
22 going to continue with that audio tape. You may proceed.

23 (Whereupon State's Exhibit Number 163, Call Number 3,
24 was played for the Court and jury beginning at 2:16 PM.)

25 **MR. STEADMAN:** No further questions.

1 CROSS-EXAMINATION

2 BY MS. ZMROCZEK:

3 Q. Hi. How are you?

4 A. Good. How are you?

5 Q. Okay now. You maintain your records at the jail?

6 A. The phone records?

7 Q. Yes, ma'am.

8 A. Do I?

9 Q. Or --

10 A. Yes, we've got -- they're on recordings.

11 Q. Okay. And so sometimes people -- Mr. Steadman earlier
12 asked you if sometimes people use other people's PIN
13 numbers to hide phone conversations?

14 A. That's correct.

15 Q. Sometimes they use it because different people have
16 money on their accounts, right?

17 A. I don't know what the reason is as to why they're
18 using it.

19 Q. There are lots of reasons, right? There could be,
20 right?

21 A. Yes.

22 Q. And how much does an Am-Tel -- how much does it cost
23 for somebody in the jail to talk to a loved one?

24 A. I don't know the exact amount. I want to say like
25 \$1.65.

1 Q. For how long?

2 A. Fifteen minutes.

3 Q. But they have to put a certain amount down on their
4 phone?

5 A. Yes, they have to have a phone account activated with
6 funds on there.

7 Q. Are you aware in this case that there were 697 phone
8 calls made?

9 A. No.

10 **MS. ZMROCZEK:** Thank you.

11 **THE COURT:** Redirect?

12 **MR. STEADMAN:** I beg the Court's indulgence, Your
13 Honor. Nothing further, Your Honor.

14 **THE COURT:** All right. Thank you. You may step down.
15 (Witness excused.)

16 **THE COURT:** All right. You may call your next
17 witness.

18 **MS. CAMPBELL:** May it please the Court? The State
19 calls Sergeant Carwell.

20 **THE COURT:** All right. Come around, please.

21 JOHN CARWELL,

22 having been duly sworn, testified as follows:

23 **THE CLERK:** Thank you. Please have a seat on the
24 witness stand and state your full name for the record.

25 **THE WITNESS:** I'm John Carwell, C-A-R-W-E-L-L.

1 DIRECT EXAMINATION

2 BY MS. CAMPBELL:

3 Q. Sergeant Carwell, where are you employed?

4 A. The Richland County Sheriff's Department.

5 Q. What do you do there, sir?

6 A. I'm currently the sergeant over the burglary unit.

7 Q. Prior to becoming sergeant over the burglary unit,
8 what were your duties?

9 A. I was assigned to major crimes and the robbery unit.
10 I was also a primary homicide investigator.

11 Q. And can you tell this jury a little bit -- well, how
12 long have you been in law enforcement?

13 A. Since October of 2003, so I'm on my thirteenth year.

14 Q. And where did you start out and what department?

15 A. I started out on patrol down in what we call Region 1,
16 you've heard us talking about regions, which is the
17 Leesburg Road, Garners Ferry Road, Bluff Road area. I
18 started out there and worked down there for about five
19 years. I became a master deputy during that time, which is
20 a first line supervisor. Then I was promoted to a field
21 training officer through the training division where I
22 trained new hires to answer calls for service, policy and
23 procedures. Then I would take the test to become an
24 investigator. I was promoted to become an investigator
25 where I first started back in 2009 with the burglary unit.

1 Then I would go to the major crimes and worked robbery and
2 then I was promoted about six months ago to the sergeant
3 over the burglary unit.

4 Q. I want to turn your attention back to July the 29th of
5 2014. How did you become involved in this case?

6 A. Again, we come in at 8:30 in the morning when we're
7 assigned our reports that we're to work. So that morning I
8 was assigned to a shooting that occurred at 1460 Oakcrest
9 Drive that involved Michael Keith.

10 Q. And when you're assigned the case, do you actually get
11 a copy of the actual incident report that was generated?

12 A. I do.

13 Q. From the initial crime in this case?

14 A. That's correct.

15 Q. And were you able to review it that morning?

16 A. I was.

17 Q. And after reviewing the incident report, is it common
18 for you to then follow up and start interviewing possible
19 witnesses that may have information?

20 A. Yes, there was a witness listed on the incident
21 report, Kristin Settles, who we've heard from during this
22 trial. She was in my office -- or I spoke to her about
23 10 AM that same morning, so about an hour and half later
24 I was on the phone with her. She was able to come to my
25 office. She was there about 10:37 when I began my

1 statement with her, talking to her about what she observed.

2 Q. And were you able to confirm that she was actually the
3 witness that called 9-1-1?

4 A. Yes, she was one of them.

5 Q. Later on that morning and into the early afternoon,
6 what happened next on this case as far as your involvement?

7 A. Once I finished up with her interview and statement, I
8 would receive a call from Deputy Pennington stating that
9 they were --

10 Q. About what time was that?

11 A. About 12:15-ish I received a call from him.

12 Q. Okay. And without saying -- you can't say what he
13 said to you, but was he able to give you information that
14 became of interest to you?

15 A. Yes. When he called me he provided me with some
16 details that I felt were important to my job and what I
17 did at the time, so I responded to that location.

18 Q. And, in fact, when you responded to that location,
19 where did you go?

20 A. I went to the apartment complex off of [REDACTED]

21 Q. And specifically which apartment complex was that?

22 A. [REDACTED] -- I'm sorry [REDACTED] off of

23 [REDACTED] It's [REDACTED] Drive and the [REDACTED]
24 place.

25 Q. And when you got to the [REDACTED] apartment

1 complex, about what time was it?

2 A. I got there about 12:55.

3 Q. When you got there, were there several people there
4 at the scene that were of interest to you?

5 A. Yes, there was a lot of people at the scene as you
6 can imagine in an apartment complex and what had gone on.
7 There was a lot of people there.

8 Q. And when you first got there, who did you first make
9 contact with?

10 A. I first spoke with Deputy Pennington and Deputy Owens.

11 Q. And after speaking to them, did you make contact with
12 any other young men out there that day?

13 A. Yes, I did.

14 Q. And who was that?

15 A. Nickilous Wallace.

16 Q. And where was he when you made contact with him?

17 A. He was with -- he was in a patrol car sitting in the
18 back seat waiting for me to get there.

19 Q. Okay. And did you become aware of whether or not he
20 had been advised of his rights?

21 A. I was. He was advised of them.

22 Q. And at that point did you have a conversation with
23 him?

24 A. I did.

25 Q. You can't say what he said.

1 A. I did.

2 Q. And during the course of that conversation, did you
3 get permission to collect certain evidence from him?

4 A. I did.

5 Q. And who gave you that permission?

6 A. He did.

7 Q. Nickilous Wallace himself?

8 A. Yes.

9 Q. What type of evidence were you attempting to get from
10 Nickilous Wallace at that point?

11 A. I wanted to get a buccal swab from his mouth for DNA
12 and he gave written consent for that.

13 Q. Was Brandon Berry also there at the scene that day?

14 A. He was.

15 Q. And while you were there, did you also make contact
16 with -- did you become aware that there was a small child
17 that was in the car?

18 A. Yes.

19 Q. And did you make contact with the child's mother there
20 at the scene?

21 A. I did.

22 Q. And tell the jury how that came about and what was
23 discussed.

24 A. It was brought to my attention that she was there and
25 she was upset. We've heard Lourisa Katio had a job at

1 Blue Cross Blue Shield, which is a pretty good job, I
2 think. She was upset. She had gone to work that morning
3 and left her child at her apartment to be kept there and
4 she's having to leave work to go pick up her two-year-old
5 child and she knew a little of the details of what
6 happened. She was upset.

7 Q. Was there another young woman also there that day when
8 you got there?

9 A. I didn't speak with her that day.

10 Q. But did you become aware from the video?

11 A. I did.

12 Q. And specifically in the video, do you see the second
13 young lady we're talking about? And what was her name?

14 A. Ms. Geiger.

15 Q. Kayla?

16 A. Kayla Geiger.

17 Q. And do you actually see her in the video, the dash cam
18 from the car, drive up?

19 A. Yes, she's the one that pulls up in the green car and
20 stops right beside Nickilous Wallace's Camry and backs in
21 front of them.

22 Q. And actually parks?

23 A. Parks and stays there.

24 Q. She parks and stays there kind of over to the right?

25 A. Yes.

1 Q. And then shortly thereafter she gets there is when he
2 changes seats and takes off?

3 A. Yes.

4 Q. And when you were having a conversation with,
5 Ms. Katio, Lourisa Katio, the mother of the child -- of
6 that child of his, she was upset about the circumstances
7 involving Ms. Geiger?

8 A. Yes, and her child.

9 Q. And her child. Did you ask her permission to do
10 anything that day?

11 A. Yes.

12 Q. Can you explain how that happened to the jury?

13 A. She was more than willing to help us out because her
14 child was involved. She was upset she had to leave work.
15 She -- she told me that the father of her child came to her
16 apartment that morning, so I allowed her to drive herself
17 back to her apartment with her child and we met again at
18 her apartment because I also wanted to check and make sure
19 everything was all right with the living conditions for
20 this child and to see if her -- the father of her child
21 had anything in the apartment, and she was willing to give
22 consent. I didn't force her. She was more than willing
23 is all I can say.

24 Q. Okay. And once you got to where she -- where did she
25 live?

1 A. [REDACTED] Drive.

2 Q. And is that near -- what's a major thoroughfare near
3 there?

4 A. [REDACTED]

5 Q. And at that point did you ask her to sign a consent to
6 search?

7 A. I did.

8 Q. I'm gonna show you State's Exhibit Number 2. Do you
9 recognize that?

10 A. Yes, ma'am.

11 Q. And is that the consent to search that you filled out
12 and used and that Ms. Katio signed that day indicating you
13 could search her apartment?

14 A. It is.

15 Q. And you actually witnessed her signature, I believe?

16 A. I did.

17 **MS. CAMPBELL:** Your Honor, at this we'd offer State's
18 Exhibit Number 2 into evidence.

19 **THE COURT:** Any objection?

20 **MS. ZMROCZEK:** No objection.

21 **THE COURT:** All right. Admitted into evidence without
22 objection.

23 (State's Exhibit Number 2, consent to search, was
24 admitted into evidence.)

25 **BY MS. CAMPBELL:**

1 Q. And at that point were you also given information
2 about whether or not Brandon Berry actually lived in that
3 house or whether it was Ms. Katio's house?

4 A. I asked her who lived there with her and she explained
5 that it was -- the apartment was in her grandmother's name,
6 but her grandmother did not live there, it was just her and
7 her two-year-old daughter that lived in the apartment.

8 Q. You mentioned though that she had mentioned that she
9 had made contact with the Defendant at that apartment the
10 night before?

11 A. Yes, she did say he was there.

12 Q. On the early morning hours actually?

13 A. Yes.

14 Q. Prior to going to her house, I skipped one thing, did
15 you look at any of the evidence involved in this case that
16 had been recovered after the Defendant fled from the scene
17 and threw some bags?

18 A. I did. Two backpacks that were recovered by Deputy
19 Owens and Pennington. They showed them to me, I
20 photographed them and I actually took custody of them
21 myself, placed them in my truck, and I would have entered
22 them into evidence.

23 Q. And at that point did you become aware there was a
24 gun?

25 A. I did.

1 Q. And what caliber gun was it?

2 A. It was a .9 millimeter.

3 Q. And at that point did you know what caliber shell
4 casings had been recovered from the crime scene the night
5 before?

6 A. I wasn't sure, so I called Sergeant Stan Richards, who
7 was over the crime scene that we heard from earlier, and he
8 was able to tell me that it was a .9 millimeter casing that
9 was recovered from the shooting incident location.

10 Q. But do all .9 millimeter shell casings match every
11 .9 millimeter gun?

12 A. No.

13 Q. So did you eventually request that certain testing be
14 done in this case?

15 A. Yes, there's a form, a forensic request form, that we
16 fill out and I asked for those be compared to each other.

17 Q. Around 1:50 that afternoon I believe you arrived at
18 Ms. Katio's house off [REDACTED]

19 A. Yes, ma'am.

20 Q. And once you went inside, just tell the jury what you
21 observed and what you were looking for, if anything.

22 A. Like I said, her grandmother was there, she was there
23 her with her two-year-old child. She kind of directed me
24 around the house, where the living room was, the bedroom
25 was. I asked her what belongings may have belonged to her

1 child's father. She pointed out some black jeans and there
2 was gray and black -- mostly black shoes that were right
3 outside the closet door, but they were probably a foot away
4 from each other, like somebody had just taken them off, and
5 they were right there together. I asked her who those
6 belonged to and she said Brandon Berry. I would also see a
7 cable tie in the bedroom as well that was similar to the
8 ones that were found in the backpack.

9 Q. I want to show you what's been marked as State's
10 Exhibits 156, 157 and 158, and ask you if you recognize
11 these photographs?

12 A. Yes.

13 Q. And are those the photographs you took that day during
14 the search warrant?

15 A. It is.

16 Q. And what do those photographs show?

17 A. Two pictures are of the black jeans that were in the
18 closet and one picture is of a cable or a zip tie. It's on
19 a DVD case.

20 **MS. CAMPBELL:** Your Honor, at this time we'd offer
21 these into evidence.

22 **THE COURT:** Any objection?

23 **MS. ZMROCZEK:** May I see them.

24 **MS. CAMPBELL:** (Handing.)

25 **MS. ZMROCZEK:** No objection.

1 **THE COURT:** Admitted into evidence without objection.

2 (State's Exhibit Number 156 through 158, photographs,
3 were admitted into evidence.)

4 BY MS. CAMPBELL:

5 Q. You mentioned that you saw jeans. I'm gonna show you
6 what's been marked as State's Exhibit 133. Are these the
7 jeans you collected that day --

8 A. Yes.

9 Q. -- that are shown in the picture from inside the house
10 in 156?

11 A. Yes, ma'am.

12 Q. And you collected them from what area of the house?

13 A. The bedroom -- master bedroom. Or the closet of the
14 master. Excuse me.

15 Q. In addition to that, you also mentioned that you
16 collected some shoes in this case?

17 A. I did.

18 Q. And I'm gonna show you what's been marked as State's
19 Exhibit Number 134. Do you recognize those?

20 A. Yes.

21 Q. And are those the shoes that you collected that day?

22 A. Yes. They were in the bedroom as well just outside
23 the closet on the floor.

24 Q. And at that point did you know whether or not either
25 of these items had any relevant evidence on them?

1 A. I could see there was dirt on the shoes, which I knew
2 there was a scuffle outside of the apartment building, and
3 I also could see what's been described as the reddish-brown
4 stain that was visible to me that they were on the shoes
5 and the jeans, so I collected those as well.

6 Q. Was there other male clothing there as well?

7 A. Not that I can recall. Nothing else stood out.

8 Q. And you also mentioned a zip tie similar to the ones
9 -- when you were back at the scene where the Defendant was
10 apprehended after the chase, in that one bag were the masks
11 and what other items?

12 A. Masks, gloves, toboggan, a hat, zip ties.

13 Q. Similar to this?

14 A. Yes.

15 Q. I don't know where that one went. Like this?

16 A. Yes.

17 Q. And at the scene where Brandon Berry's child lived,
18 you actually observed this and this?

19 A. Yes. That was in the same bedroom on the dresser.

20 Q. On the dresser?

21 A. (Nods head.)

22 Q. So that was significant to you as well?

23 A. It was.

24 Q. When you did a search of the house, were you also
25 concerned about the safety of the child still at this

1 point?

2 A. I was, but everything -- there was no weapons --
3 additional weapons that I found. Ms. Katio, she was
4 well-spoken, and I knew she was a good mother.

5 Q. So was her child turned back over to her that day?

6 A. Yes.

7 Q. Did you ever call DSS or any other agency to
8 interfere?

9 A. No, I never made a phone call to DSS.

10 Q. That day -- was that pretty much what happened on that
11 day as far as evidence collection and things of that sort?

12 A. Yeah. That was a lot at that point.

13 Q. So at that point did you go back to the sheriff's
14 department and turn in all the evidence so that future
15 processing could be requested and completed?

16 A. I did.

17 Q. And, specifically, were you focussed at that point on
18 the jeans where you observed blood and the shoes?

19 A. Yes.

20 Q. And the other items that were collected by the
21 deputies, those were also turned over to you as well?

22 A. That's correct.

23 Q. And you also entered those into evidence for
24 processing?

25 A. Yes.

1 Q. The next morning did you collect -- or did you request
2 that certain items be tested?

3 A. I believe later that night I also asked an on-call
4 investigator to go get a swab from Mr. Keith at the
5 hospital and then the next day I would request that items
6 be tested.

7 Q. And was that swab from the victim? And you'd already
8 collected the one from Nickilous Wallace prior?

9 A. Yes.

10 Q. And I'm gonna show you State's Exhibit -- and that was
11 only after he gave consent?

12 A. Right.

13 Q. I'll show you State's Exhibit 131 and 128. Do you
14 recognize those two swabs?

15 A. Yes, this first one is the buccal swab from Nickilous
16 Wallace. The second one is the buccal swab of Michael
17 Keith, the victim.

18 MS. CAMPBELL: Your Honor, at this time we'd offer
19 these into evidence, 128 and 131.

20 MS. ZMROCZEK: Without objection.

21 THE COURT: Admitted without objection.

22 (State's Exhibit Number 128 and 131, buccal swabs,
23 were admitted into evidence.)

24 BY MS. CAMPBELL:

25 Q. And next after entering those into evidence as well

1 that next morning, did you request certain items be tested?

2 A. Yes. I knew a little bit about the rapid DNA hit
3 machine just from them talking about it in meetings and
4 from knowledge -- my limited knowledge of it I knew -- or
5 I felt this was a good case to use this instrument, so I
6 went and spoke to Dr. Gray Amick about it and he agreed.

7 Q. And, additionally, did you request that testing be
8 done between the gun and the shell casings?

9 A. I did do that as well.

10 Q. That next day also did you make contact with another
11 witness in the case, Ms. Sidara Allen?

12 A. Yes.

13 Q. And was she able to come to your office and provide
14 you with a statement?

15 A. She was.

16 Q. Later that day did you get the results from the rapid
17 DNA testing?

18 A. That same day I got the DNA rapid hit and I got the
19 firearms report.

20 Q. And at that point with that information, what did you
21 do?

22 A. I put a hold on Brandon Berry at the jail because he
23 was just in on the blue tickets as they were described
24 earlier for the child endangerment and the traffic
25 offenses, so I put a hold on him at the jail.

1 Q. And then the next day, on the 31st, did you get arrest
2 warrants for Mr. Berry?

3 A. I did.

4 Q. And that's for the attempted murder and robbery in
5 this case?

6 A. Correct.

7 Q. And at that point did you actually serve an armed
8 robbery warrant on him?

9 A. Yes, at the time I just missed it. We thought his
10 phone was taken during the robbery, but it was actually
11 recovered by Investigator Holt during the processing of
12 the scene.

13 Q. So it was really an attempted armed robbery?

14 A. Yes, we changed it to attempted.

15 Q. And then on the 31st did you also have an opportunity
16 to just serve him with those warrants?

17 A. I did. I went down to the jail and personally served
18 Brandon Berry with those two warrants.

19 Q. And you served those on July 31st around what time?

20 A. Let's see. It was about 2:46, 1446 hours.

21 Q. On the 31st to be clear?

22 A. Yes.

23 Q. So that's the first time he was served with those
24 warrants?

25 A. That's correct.

1 Q. On August the 4th, did you make contact with the
2 victim in this case?

3 A. I did.

4 Q. And where did you make contact with him?

5 A. He was able to come to my office.

6 Q. And at that point was he out of the hospital?

7 A. Yes.

8 Q. And in meeting with him, did you show him -- or did
9 you get him to try to explain to you the type of mask that
10 was involved in this?

11 A. Yes.

12 Q. And did he have a certain way of explaining it?

13 A. Yeah, he -- he described it as like a backup dancer
14 would wear on a television show. We actually looked on
15 Google. We used Google because I didn't know what he was
16 talking about at first, but we ended up finding it. It was
17 -- we found one that was white in color and he described it
18 as being a black mask.

19 Q. Okay. And I'm gonna show you State's Exhibit Number
20 159, which is the one that he actually -- and he's the one
21 that pointed this mask out to you and not vise versa?

22 A. Yes. Right.

23 Q. That he actually said it was the type of mask used,
24 but it was black?

25 A. That's correct.

1 Q. I'll show you State's Exhibit -- was is that?

2 A. 159.

3 Q. And that's the one he actually picked out without you
4 showing him any of these other masks?

5 A. Right.

6 MS. CAMPBELL: Your Honor, at this time we'd offer
7 State's Exhibit Number 159 into evidence.

8 MS. ZMROCZEK: No objection.

9 THE COURT: Admitted into evidence without objection.

10 (State's Exhibit Number 159, a photograph, was
11 admitted into evidence.)

12 BY MS. CAMPBELL:

13 Q. And, again, he never wavered from the fact that the
14 mask was black?

15 A. Never.

16 Q. But that this was the type of mask?

17 A. That's correct.

18 Q. Did you also become aware in the course of your
19 investigation that there had been some footprint
20 impressions lifted from the car?

21 A. Yes, I was.

22 Q. And did you request anything be done with those?

23 A. Yes, I asked for the gel lifts to be compared with the
24 shoes that were collected from the apartment.

25 Q. Turning your attention to August the 5th of 2014, did

1 you, again, make contact with Nickilous Wallace? You can't
2 say what he said. Just you made contact with him?

3 A. Yes.

4 Q. And did he actually -- where did that meeting take
5 place?

6 A. Again, it took place in my office.

7 Q. And who was he accompanied with?

8 A. His attorney.

9 Q. At that point did you ask him for permission for
10 anything?

11 A. I asked for consent to search his vehicle and he --
12 he gave written consent to search the Camry.

13 Q. And, in fact, turning your attention back again to
14 that dash cam, on the video, in fact, right around --
15 before the Defendant got in the driver's seat and took off,
16 what was Nickilous Wallace asked to do and what was his
17 answer?

18 A. He was asked for consent verbally to search his
19 vehicle and he gave it and that's at the same time that
20 Brandon Berry jumped over into the driver's seat.

21 Q. And, in fact, did you confirm that he was in control
22 or that was his car?

23 A. Yes.

24 Q. I show you State's Exhibit Number 1. Do you recognize
25 that?

1 A. Yes, I do.

2 Q. And this was on August the 5th, I believe, when you
3 actually asked for his consent again since everything got
4 kind of out of control?

5 A. Yes, that's correct.

6 Q. And at that point did he give you consent?

7 A. Yes.

8 Q. Thank you.

9 A. And his attorney witnessed it.

10 Q. And his attorney actually witnessed it?

11 A. Yes.

12 **MS. ZMROCZEK:** Without objection.

13 **THE COURT:** Admitted without objection.

14 (State's Exhibit Number 1, consent to search, was
15 admitted into evidence.)

16 BY MS. CAMPBELL:

17 Q. In the course of this investigation, did you receive
18 -- request any kind of video in this case?

19 A. I requested a video from the guy that runs the
20 Statewide Security business. He has the cameras in The
21 Vista, Five Points, pretty much all over Columbia. I deal
22 with him on a regular basis. I called him up. I wanted to
23 request video from Two Notch, which is -- I wanted to see
24 if I could find the victim's car going down Two Notch and
25 see if anybody was following him. I requested video from

1 there, I requested video through him from Mr. Lucky's,
2 which is a club off of Broad River Road. I also asked
3 him to look for the victim's vehicle in the downtown area
4 near Club Blue or the Blanding Street club, which is -- I
5 can't remember the name of it -- where Knuckle Up Monday
6 was that same night. I asked him to look for videos that
7 would have the victim's vehicle in it and he couldn't find
8 the victim's vehicle on either of those, but he did drop
9 off video from Two Notch and the club -- from Mr. Lucky's.

10 Q. And did you review those videos?

11 A. Yes, I reviewed both of those videos.

12 Q. Was there anything relevant or helpful one way or the
13 other in this case on those videos?

14 A. No, there wasn't.

15 Q. Did you ever request video from the interior of those
16 bars?

17 A. I did not.

18 Q. Okay. Did you also during the course of this
19 investigation make contact with a witness in this case
20 whose car had been damaged that night?

21 A. Yes, he would call me.

22 Q. And did he ever provide you with a photograph of the
23 actual damage to his car?

24 A. He did.

25 Q. And I show you State's Exhibit Number 154. Does that

1 look like the photo he provided to you?

2 A. Yes.

3 MS. CAMPBELL: Your Honor, at this time we'd offer it
4 into evidence.

5 MS. ZMROCZEK: Your Honor, I had not originally
6 received that, I saw it today, so without objection.

7 THE COURT: Pardon me?

8 MS. ZMROCZEK: This is the first time I've seen it,
9 but without objection.

10 THE COURT: Okay. Without objection admitted into
11 evidence.

12 (State's Exhibit Number 154, a photograph, was
13 admitted into evidence.)

14 BY MS. CAMPBELL:

15 Q. At some point did you also look into the cell phones
16 and cell phone records of the Defendant, Brandon Berry, as
17 well as Nickilous Wallace?

18 A. Yes. The afternoon of the traffic stop we collected
19 two phones, one from each. They were placed into evidence
20 and I would do search warrants on them looking for cell
21 phone tower information and once I received that data back
22 I would ask our intel supervisor to look into those more
23 closely to see if we could get their phones being used in
24 the area of the shooting that morning.

25 Q. Did you also request that certain testing be done on

1 the two masks that were recovered in that one bag?

2 A. I requested for the buccal swab that was taken -- or
3 not the buccal swab, excuse me, the DNA swab that was taken
4 from both masks to be tested further for DNA to see if
5 there was a profile.

6 Q. Also did you end up getting some medical records
7 involving the victim in this case?

8 A. Yes. There's a form that I fill out the top portion
9 and he signs allowing me to go down to the hospital to
10 request his medical records.

11 Q. The victim in this case, you've kind of kept up with
12 him as well through the year since all this happened?

13 A. Yes.

14 Q. And, in fact, did he change his residence sometime
15 shortly after this happened?

16 A. He did.

17 Q. And in addition to that, did you become aware of
18 whether or not he got a concealed weapons permit?

19 A. After this incident he did get his concealed weapons
20 permit.

21 Q. I'll show you what's marked as State's Exhibit Number
22 160. Does that indicate that he got his concealed weapons
23 permit?

24 A. Yes.

25 Q. And this is with the pertinent information, like

1 Social Security number, blacked out?

2 A. Right.

3 MS. ZMROCZEK: Your Honor, I object to the relevance.

4 THE COURT: What's the exhibit number?

5 MS. CAMPBELL: It's Exhibit Number 160. I can just
6 have him testify from it. I don't have to offer it if she
7 objects.

8 THE COURT: Okay.

9 BY MS. CAMPBELL:

10 Q. But he did get the concealed weapons permit and was
11 approved for that?

12 A. Yes.

13 Q. After this happened?

14 A. After, yes.

15 Q. In the video, as well as the dash cam video, when the
16 car kind of starts to roll to a stop and Mr. Berry exits
17 quickly, can you see certain lights in the taillights?

18 A. Yes, you can see the reverse lights. The white
19 lights.

20 Q. Was Nickilous Wallace charged in this case as well?

21 A. Not in the shooting.

22 Q. Not in the shooting?

23 A. That's correct.

24 Q. But was he charged with a violation of the gun laws?

25 A. Yes, by the deputies --

1 Q. By the deputies?

2 A. -- that stopped him.

3 Q. And you're aware that more than one person can be
4 charged with one gun?

5 A. Yes.

6 Q. And are his charges still pending?

7 A. Yes, they are.

8 Q. And he will have his day in court?

9 A. Yes.

10 Q. The people -- I want to talk a little bit about the
11 phone calls that we just heard. On those phone calls
12 there's certain numbers that go along the front end. Does
13 that indicate anything of significance on those numbers
14 that are assigned to each phone call?

15 A. The time and date -- or date, year and month.

16 Q. And the two phone calls we heard first to the young
17 woman, are you aware of what young woman that was?

18 A. Yes.

19 Q. And who was it?

20 A. It was Kayla Geiger.

21 Q. And that's the mother of his other child?

22 A. I don't know if they have a child. I just know she's
23 another girlfriend.

24 Q. And she was the one that actually pulls up in the car
25 in the video?

1 A. Yes.

2 Q. What are the dates of those two calls and can you tell
3 that from the numbers that have already been put into
4 evidence beside each of those calls?

5 A. I'm sorry, what was the last part?

6 Q. What are the numbers? The numbers are assigned to the
7 call, right?

8 A. Yes.

9 Q. And, specifically, are those significant as to the
10 date they were made?

11 A. Yes.

12 Q. Can you explain that to the jury?

13 A. One of them was made on July 31st, which is the day I
14 served the warrants.

15 Q. That's July 31st of 2014?

16 A. Yes.

17 Q. Okay.

18 A. And the second one was August 1st of 2014 as well.

19 Q. And the final call made to the young man, do you know
20 who that was he was talking to?

21 A. It was Nickilous Wallace.

22 Q. And the first two calls, were those made with his --
23 so you're familiar with the system at the jail?

24 A. Yes.

25 Q. And the first two calls, were those made with the PIN

1 number that was assigned to this Defendant?

2 A. No, he used the PIN number of another inmate trying to
3 disguise his phone call.

4 Q. On that last phone call?

5 A. Yes.

6 Q. And when was that last call made to Nickilous Wallace?

7 A. That was November 29, 2015.

8 Q. And that would have been the day before Thanksgiving,
9 which was last week?

10 A. Yes.

11 Q. I'll be corrected. Obviously this trial started on
12 the 28th -- 30th.

13 A. The day before the trial started.

14 Q. The day before the trial started. What day was the
15 phone call made? Let's go back to that.

16 A. The day before the trial started.

17 Q. And what date was that?

18 A. The 29th.

19 Q. I apologize. So now that I've got that straight, it
20 was made this Sunday?

21 A. Yes.

22 Q. Prior to all the testing being done in this case, did
23 you also have occasion to get a buccal swab from Mr. Berry?
24 I believe that was last summer.

25 A. I did.

1 Q. And I'll show you State's Exhibit Number 129. Do you
2 recognize that?

3 A. I do.

4 Q. And is that the buccal swab you got from Mr. Berry?

5 A. Yes, but it wasn't last summer.

6 Q. When was it?

7 A. It was August 13th of this year.

8 Q. Of this --

9 A. Well, that is last summer. It still feels like
10 summer.

11 MS. CAMPBELL: Your Honor, at this time I'd offer
12 State's Exhibit 129.

13 MS. ZMROCZEK: Without objection.

14 THE COURT: Admitted without objection.

15 (State's Exhibit Number 129, a buccal swab, was
16 admitted into evidence.)

17 BY MS. CAMPBELL:

18 Q. When you met with Mr. Stetson, in addition to the
19 photographic damage to his car, did he also provide you
20 with other evidence that he said was recovered from his
21 car?

22 A. Yes, he provided me with a projectile that was taken
23 out of his car during the repairs.

24 Q. And this is State's Exhibit Number 130?

25 A. Yes.

1 Q. And that's what he provided to you?

2 A. That is.

3 MS. CAMPBELL: Your Honor, at this time we'd offer
4 State's Exhibit Number 130 into evidence.

5 MS. ZMROCZEK: Without objection.

6 THE COURT: Admitted with objection.

7 (State's Exhibit Number 130, a bullet fragment, was
8 admitted into evidence.)

9 BY MS. CAMPBELL:

10 Q. And nobody from the sheriff's department actually
11 collected that, it was collected by Mr. Stetson from the
12 body shop?

13 A. He provided it to me.

14 Q. And the person that you made contact with there at the
15 scene today -- that day when you were shown the masks and
16 the diaper bag with the gun in it, the person that's
17 Brandon Berry, do you see him here in the courtroom?

18 A. Yes, he's sitting at the table with the white shirt
19 and blackish tie.

20 MS. CAMPBELL: Your Honor, may the record reflect that
21 he's identified the Defendant?

22 THE COURT: Yes.

23 MS. CAMPBELL: I don't have anything further.

24 THE COURT: Cross-examination?

25 MS. ZMROCZEK: Thank you.

1 CROSS-EXAMINATION

2 BY MS. ZMROCZEK:

3 Q. Good afternoon.

4 A. How are you doing?

5 Q. Great. You are the lead investigator?

6 A. Yes.

7 Q. You're in charge of reviewing all the evidence in the
8 case?

9 A. Yes.

10 Q. You are in charge of putting the case together?

11 A. Yes.

12 Q. You are in charge of presenting all of the evidence to
13 this jury?

14 A. Not presenting all of it.

15 Q. Collecting all of the evidence to be presented to the
16 jury?

17 A. Like I said --

18 Q. You agree you're familiar with all of the evidence in
19 the case?

20 A. Not the final reports. We had our experts and people
21 in those field testify to those.

22 Q. But do you review them?

23 A. I can't testify to them, so sometimes I may not look
24 at them fully, but I know the gist of what's going on.

25 Q. You request search warrants?

1 A. Yes.

2 Q. You requested search warrants in this case?

3 A. Yes.

4 Q. For two telephones?

5 A. Yes.

6 Q. You received those records?

7 A. Yes.

8 Q. You reviewed those records?

9 A. I gave them to Linda Houck from our intel.

10 Q. Right. But prior to -- prior to that you looked at

11 the reports, for example, the Cellebrite, where the text

12 messages --

13 A. That was from a cell phone download.

14 Q. Right. You look at those?

15 A. Yes.

16 Q. You're familiar with those?

17 A. Yes.

18 Q. Okay. Part of your job is to interview witnesses?

19 A. Yes.

20 Q. You interviewed Mr. Keith?

21 A. I did.

22 Q. And you interviewed his girlfriend?

23 A. I did.

24 Q. And you interviewed one of the 9-1-1 callers, right?

25 A. Three actually.

1 Q. Three? But you only provided a report for one.

2 A. No, Ms. Allen, the girlfriend. Mr. Stetson, he said
3 he called 9-1-1, I interviewed him.

4 Q. And Ms. Settles?

5 A. Ms. Settles. Kristin Settles.

6 Q. How many -- you requested all the 9-1-1 calls?

7 A. Yes.

8 Q. You listened to them?

9 A. I don't have the CDs.

10 Q. So you knew that -- didn't know that there were seven?

11 A. I have the printout of what calls were made and how
12 many 9-1-1 calls.

13 Q. Did you listen to them or no?

14 A. No.

15 Q. You didn't listen to them?

16 A. (Shakes head.)

17 Q. Okay. So you weren't aware that other people might
18 have saw different things?

19 A. Well, I talked to three callers and the victim.

20 Q. But there were four other people who called 9-1-1 that
21 you didn't speak with?

22 A. No.

23 Q. Okay. It's important to get the full story?

24 A. Yes.

25 Q. To get everyone's perspective?

- 1 A. Not all the time.
- 2 Q. Okay. People can make mistakes?
- 3 A. I guess.
- 4 Q. In this case, there was a mistake that they thought
- 5 the cell phone was stolen, right?
- 6 A. Correct.
- 7 Q. But that was just a mistake?
- 8 A. It was found on the car.
- 9 Q. It was found on the hood of the car, right?
- 10 A. (Nods head.)
- 11 Q. So maybe some perspectives can be different than
- 12 others?
- 13 A. Uh-huh.
- 14 Q. Right?
- 15 A. Okay.
- 16 Q. The items that connected the car stop to the robbery
- 17 were found in whose car?
- 18 A. Nickilous Wallace's. Actually they weren't found in
- 19 the car. They were found on the path that Brandon Berry
- 20 ran down and threw them after he left the car.
- 21 Q. Right. After he left the car?
- 22 A. Correct.
- 23 Q. Right, correct?
- 24 A. After he ran from the car, yes.
- 25 Q. Right. So he was in the car with those items?

- 1 A. Correct.
- 2 Q. Right?
- 3 A. Yeah.
- 4 Q. And that car belonged to?
- 5 A. Nickilous Wallace.
- 6 Q. Okay. Describe his car.
- 7 A. It's a silver Toyota Camry.
- 8 Q. Light color?
- 9 A. Yes.
- 10 Q. Square back?
- 11 A. Right.
- 12 Q. Okay. You've been -- I want to talk a little bit
- 13 about -- you talked with Mr. Keith about where he worked
- 14 that evening, right?
- 15 A. I spoke to his girlfriend first about it.
- 16 Q. To his girlfriend. Okay. And I'm just gonna -- so we
- 17 can kind of orient ourselves, draw a little -- a terrible
- 18 map, but -- all right. If this is Main Street, right?
- 19 A. Yeah.
- 20 Q. And we're here. The club that -- that Mr. Keith was
- 21 working at was on Blanding, right?
- 22 A. One of them.
- 23 Q. One of them. The first one. 1800 Blanding Street?
- 24 A. (Nods head.)
- 25 Q. Correct?

- 1 A. Yeah.
- 2 Q. For Knuckle Up Monday?
- 3 A. Correct.
- 4 Q. And you've been there to that club, haven't you?
- 5 A. No.
- 6 Q. You didn't go and check it out?
- 7 A. No.
- 8 Q. You didn't see the security camera right above the
- 9 front door?
- 10 A. No.
- 11 Q. You didn't see the security cameras inside, all seven
- 12 of them?
- 13 A. No.
- 14 Q. Okay. You would agree if we had those that we could
- 15 see what people were wearing that night, correct?
- 16 A. No.
- 17 Q. Possibly? You don't know because you didn't look.
- 18 Do you know what kind of shoes Mr. Berry was wearing that
- 19 evening?
- 20 A. I knew the shoes that I collected.
- 21 Q. Did you know -- were you told what kind of shoes
- 22 Mr. Berry was wearing that evening?
- 23 A. No.
- 24 Q. You weren't? Did you take a statement in this case
- 25 from Ms. Katio?

1 A. Yes.

2 Q. And did she tell you what kind of shoes he was wearing
3 that evening?

4 A. She said that when he left the house she thought he
5 had on white Air Force Ones with a black check.

6 Q. Why are those significant?

7 A. That's what he had on during the time of the traffic
8 stop.

9 Q. Okay. The next place that you learned that Mr. Keith
10 worked at or went to was Blue. Obviously this map is not
11 drawn to scale, but you would agree with me --

12 MS. CAMPBELL: Your Honor?

13 MS. ZMROCZEK: This is just demonstrative, Your Honor,
14 so we can get a look at where everything is.

15 THE COURT: Pardon me?

16 MS. CAMPBELL: It's just not right.

17 THE COURT: Well, you'll have a chance to clarify it.

18 MS. ZMROCZEK: Right. I mean, I understand it's
19 not --

20 THE COURT: All right. No comments.

21 MS. ZMROCZEK: Thank you.

22 BY MS. ZMROCZEK:

23 Q. This is not drawn to scale. Blue is located in The
24 Vista?

25 A. Yes.

1 Q. It has indoor security cameras?

2 A. I don't know.

3 Q. It has outdoor security cameras?

4 A. Other than what I've told you about -- or what I
5 testified to about Statewide Security, that's the only
6 cameras I know of.

7 Q. Okay. You testified that Mr. Wallace gave you
8 permission to search his vehicle, State's Exhibit 1?

9 A. Yes.

10 Q. And you searched his vehicle?

11 A. At the compound on a later date, not the date of the
12 incident.

13 Q. You never found any drugs?

14 A. No.

15 Q. Never found any sand?

16 A. No.

17 Q. Never found any blood?

18 A. Unh-unh.

19 **THE COURT:** Answer out, please.

20 A. Oh, I'm sorry. Sorry about that.

21 Q. You never found any blood?

22 A. No.

23 Q. You know -- you met with Mr. Wallace several times,
24 right?

25 A. Yes.

1 Q. You know him to be shorter than Mr. Berry?

2 A. Yes, he is shorter.

3 Q. A couple of inches?

4 A. He's five-eight and Brandon Berry is about six-one.

5 Q. Okay. You collected Government's Number 138? Yes?

6 A. Yes.

7 Q. Did you alter Government's 133 in any way or is this
8 how they were collected? Minus the circles.

9 A. Yes, this is how they were collected.

10 Q. You didn't cuff the pants at the bottom?

11 A. I don't know what DNA did during their testing, but
12 I'm sure they did roll them up to get the scrapings from
13 underneath.

14 Q. You're sure they are? You can testify to that?

15 A. Yeah, I'm pretty sure that DNA had to scape the
16 inside. They testified the cuffs or the bottom are the
17 best places that they're gonna have contact with the skin.

18 Q. Actually he said waistband.

19 A. He said cuff, too. Shirts and collars as well.

20 Q. Right, right. Shirts and collars and waistband for
21 jeans?

22 A. Right.

23 Q. Right. And you took pictures of those jeans where you
24 found them?

25 A. Yes.

1 Q. And you didn't see any other men's clothing there. Is
2 that what you testified to?

3 A. I said I don't recall seeing anything that stood out
4 to me as far as being men's clothing.

5 Q. Okay. So these dark jeans here, you --

6 A. I don't know.

7 Q. You don't know?

8 A. No.

9 Q. The white shirt?

10 A. (Shakes head.)

11 Q. You don't know?

12 A. I don't know.

13 Q. Okay. You met with Mr. Keith. He gave you a
14 description?

15 A. Yes.

16 Q. A black T-shirt?

17 A. Correct.

18 Q. He never described any tattoos?

19 A. It was dark.

20 Q. I'm sorry. It's a yes or no question. He never
21 described any tattoos?

22 A. No.

23 Q. Okay. You never interviewed Kayla?

24 A. No, I didn't.

25 Q. I'm sorry?

1 A. No.

2 Q. Okay. You investigated the distance between the
3 locations?

4 A. As far as what?

5 Q. As far as knowing how long it takes to get from
6 Ms. Katio's house to {sic} Circle -- or Drive?

7 A. I never drove it and timed it.

8 Q. Okay. I want to finish up briefly. You talked that
9 you -- that there was a Cellebrite examination done of the
10 phones, right?

11 A. Yes, there was.

12 Q. And you reviewed it?

13 A. Yes.

14 Q. So you're familiar that there are three different text
15 messages in the relevant time period from Nick --

16 **MS. CAMPBELL:** Objection, Your Honor. If she wants
17 to talk about those, I'll be happy to provide them and she
18 can put them in evidence.

19 **THE COURT:** All right. Come up a minute.

20 (Proceedings held at the bench; not reported.)

21 BY MS. ZMROCZEK:

22 Q. You knew there were text messages between Brandon and
23 Nick?

24 A. Yes.

25 Q. Lastly, Investigator Carwell, you subpoenaed cell

1 phone records and cell towers you said, right?

2 A. Yes.

3 Q. And you received that subpoena?

4 A. Yes.

5 Q. You received the return?

6 A. Right. Yes.

7 Q. And then you turned that information over to an
8 investigator in your office?

9 A. Linda Houck. She's the supervisor over the intel
10 unit.

11 Q. Okay. And because we can use cell phone records to
12 help locate where phones are at a certain time, right?

13 A. Right.

14 Q. And there were two phone calls --

15 **THE COURT:** Wait just a minute. Now you can't
16 testify.

17 **MS. CAMPBELL:** Objection, Your Honor. I mean, if she
18 wants --

19 **THE COURT:** Objection's sustained.

20 **MS. CAMPBELL:** Thank you.

21 BY MS. ZMROCZEK:

22 Q. You were aware that it provided you an out -- an
23 output of times for the phone calls?

24 A. She believed -- or she told me that --

25 **MS. CAMPBELL:** Objection.

1 **MS. ZMROCZEK:** Don't tell me what she said.

2 **THE COURT:** You can't testify to what she said.

3 BY MS. ZMROCZEK:

4 Q. My question is you were aware that you received
5 records with cell phone sites?

6 A. Yes.

7 Q. During the exact relevant time of this incident?

8 **MS. CAMPBELL:** Objection, Your Honor.

9 **THE COURT:** All right. He's answered the question.
10 You're trying to do indirectly what you can't do directly
11 by getting the point across. He said he's aware that there
12 were records to that effect and that's as far as it can go.

13 **MS. ZMROCZEK:** Thank you.

14 BY MS. ZMROCZEK:

15 Q. When you give -- when you collect that kind of
16 evidence you said you turn it over to the experts?

17 A. Sometimes. Sometimes I'll -- I'll look at them myself
18 or we'll both look at them.

19 Q. Okay. But what did you do in this case?

20 A. I let her look at them.

21 Q. And you let her draw maps?

22 A. Yes.

23 Q. Okay. Because she's the expert that can tell you
24 where the phones were located during these times, right?

25 A. Yes, she can tell me where the phones are.

1 **MS. ZMROCZEK:** Thank you.

2 **THE COURT:** Redirect, Ms. Campbell?

3 **MS. CAMPBELL:** Your Honor, just a couple of questions.

4 REDIRECT EXAMINATION

5 BY MS. CAMPBELL:

6 Q. She asked you about the physical description between
7 the two. Is there a significant physical disparity between
8 Nickilous Wallace and this young man?

9 A. Yes.

10 Q. And who is the one that's taller?

11 A. Brandon Berry.

12 Q. And how much shorter is Nickilous Wallace than Brandon
13 Berry?

14 A. Five-eight -- it's about four inches, I'd say, five
15 inches.

16 Q. Four to five inches?

17 A. Yes.

18 Q. Shorter?

19 A. Yes.

20 Q. And Brandon Berry is, again, what height
21 approximately?

22 A. Six-one.

23 Q. Who's the older of the two?

24 A. Brandon Berry is.

25 Q. By how much?

1 A. About two years.

2 Q. She asked you about video from Knuckle Up and the
3 other bar. Where did this robbery take place?

4 A. 1460 Oakcrest. Off Trenholm Road, that area.

5 Q. Was there any video you could get from that area?

6 A. No.

7 Q. And didn't you, in fact, attempt to get video?

8 A. I did.

9 Q. From both bar areas as well?

10 A. Yes.

11 Q. And who -- she asked you about interviewing Kayla.
12 Who -- why was Kayla even there at the scene that day when
13 he was stopped?

14 A. That's who they were going to visit.

15 Q. So she had a relationship with the Defendant?

16 A. That's correct, Brandon Berry.

17 Q. As does Nickilous Wallace?

18 A. Yes.

19 **MS. CAMPBELL:** I beg the Court's indulgence.

20 BY MS. CAMPBELL:

21 Q. And you listened to the phone call between Brandon
22 Berry and Nickilous Wallace that's just been published to
23 the jury?

24 A. I did.

25 Q. And the case they were referencing was this case here?

1 A. Yes.

2 MS. CAMPBELL: Thank you.

3 THE COURT: Recross?

4 MS. ZMROCZEK: Thank you.

5 RECROSS EXAMINATION

6 BY MS. ZMROCZEK:

7 Q. You didn't arrest Nickilous Wallace -- you didn't
8 arrest anybody else besides Brandon Berry for this?

9 A. Right. I only charged Brandon Berry.

10 Q. You would agree with me that video and telephone
11 records can't be altered or subject to interpretation, they
12 are what they are?

13 A. Right.

14 MS. ZMROCZEK: Thank you.

15 THE COURT: All right. Thank you, sir. You may step
16 down.

17 (Witness excused.)

18 THE COURT: All right. Madam Solicitor, you may call
19 your next witness.

20 MS. CAMPBELL: May I just check the exhibits real
21 quick?

22 THE COURT: Yes, ma'am.

23 MS. CAMPBELL: Thank you.

24 MS. WALKER: Your Honor, at this time the State rests.

25 THE COURT: All right.

1 All right. Ladies and gentlemen, you have heard the
2 State announce that they have rested. That means that you
3 have heard all of the testimony that you will hear from the
4 State at this time. There are now matters of the law that
5 I need to take up with the lawyers. I have to do that on
6 the record and outside of your presence.

7 You've been in the courtroom about hour and ten or
8 fifteen minutes, so it's probably appropriate that we take
9 our afternoon recess at this time as well. So we will
10 take up these matters of law and take a short recess for
11 court personnel and then be able to resume very shortly.
12 We'll try to get you back in the courtroom in the next
13 fifteen minutes or so.

14 Thank you. You can go to your jury room and do not
15 discuss the case among yourselves.

16 (Whereupon, the jury retires to the jury room at
17 3:27 PM.)

18 **THE COURT:** All right. Now, Ms. Zmroczek, are there
19 motions on behalf of the Defendant?

20 **MS. ZMROCZEK:** Your Honor, at this time we would move
21 for a directed verdict specifically on the child neglect
22 charge. We think that the evidence that's been proven
23 shows that there was failure to restrain the child, which
24 is a blue ticket, and we would ask that that charge be
25 nol-prosed specifically. And the rest, Your Honor --

1 **THE COURT:** Whoa, whoa, whoa. Why? I don't
2 understand. I know you're asking for it to be dismissed,
3 but for what reason?

4 **MS. ZMROCZEK:** For -- excuse me. For a directed
5 verdict, not for nol-pros, Your Honor.

6 **THE COURT:** Well, I mean on what basis?

7 **MS. ZMROCZEK:** The basis, Your Honor, would be that
8 the evidence testified to would show that -- that Mr. Berry
9 didn't have the child restrained, which is -- under the
10 case law, Your Honor, for -- to be guilty of child neglect,
11 you have to have -- and I'm reading from State v. Jenkins.
12 Unlawful neglect, Your Honor, lists elements specifically
13 to do with health and welfare so that the life, health or
14 comfort is in danger or likely to be in danger. Your
15 Honor, we would say that -- at this time that the elements
16 have not been proved in that case.

17 **THE COURT:** Well, you agree with me the law of this
18 state -- the statute of this state is that the child must
19 -- a child under a certain age must be restrained in a
20 proper child restraint seat?

21 **MS. ZMROCZEK:** I agree.

22 **THE COURT:** And failure to do so is a violation of
23 that law?

24 **MS. ZMROCZEK:** It is, Your Honor, and I agree with
25 that and there is a specific law for that.

1 **THE COURT:** All right. Then why is that not -- the
2 failure of an adult to take that precaution, why is that
3 not unlawful neglect of the child?

4 **MS. ZMROCZEK:** Because there are two separate -- there
5 are two separate elements. I agree that he is guilty of
6 not restraining his child, which is a blue ticket, Your
7 Honor, which is what Officer Pennington testified to. It's
8 a blue ticket to not restrain your child. I do not believe
9 that that rises to the level of neglect.

10 **THE COURT:** Okay. Ms. Walker?

11 **MS. WALKER:** Your Honor, I -- I understand that point,
12 but not only does he fail to restrain the child, he then
13 speeds off with the child unrestrained fleeing from the
14 police. And one of the elements of the unlawful neglect
15 charge, Your Honor, is abandonment and then he, by his own
16 words, looks at the child in the back seat of the car and
17 then flees and leaves the child unattended in the car. So
18 not only has he put the child at an unreasonable risk of
19 harm to the child's safety by fleeing police officers with
20 the child unrestrained in a moving car, he then leaves the
21 car in reverse, exits the car and abandons his own child in
22 a moving vehicle, Your Honor.

23 **THE COURT:** What about that, Ms. Zmroczek? How about
24 this leaving the child in the car and taking off running,
25 aside from the restraint provision?

1 **MS. ZMROCZEK:** Again, Your Honor, the testimony from
2 the stand was that when the mother came she was not in
3 fear, she was not affect --

4 **THE COURT:** Yeah, but that doesn't -- I mean, that --
5 why wouldn't it? It doesn't have to -- it has to place her
6 in fear, she doesn't have to be in fear. Just has to be
7 placed in any danger. Why wouldn't running from the police
8 and then abandoning the car with a two-year-old child in it
9 be unlawful neglect?

10 **MS. ZMROCZEK:** Your Honor, it's simply our position
11 that those -- those facts do not rise to that.

12 **THE COURT:** All right. That motion will be
13 respectfully denied.

14 **MS. ZMROCZEK:** And as far as the others, Your Honor,
15 we would just ask for a directed verdict just due to the
16 insufficiency of the evidence.

17 **THE COURT:** Directed verdict what?

18 **MS. ZMROCZEK:** Due to the insufficiency of evidence.

19 **THE COURT:** All right. The way it's worded, that
20 makes it very easy, Ms. Zmroczek. The Rule 19 provides
21 that the -- on motion of the Defendant or on it's own
22 motion, the Court may direct a verdict in the defendant's
23 favor on any offense charged in the indictment after the
24 evidence on either side is closed if there's a failure of
25 competent evidence tending to prove the charge in the

1 indictment.

2 I've always thought that the word "competent" is an
3 unfortunate word used in that rule because it implies a
4 weighing of the evidence to determine the sufficiency. I
5 was appointed a number of years ago to chair a task force
6 for revision of the criminal rules. We worked on those
7 diligently for a couple of years, submitted them to the
8 Supreme Court, and there they sit. One of the things that
9 we wanted to change was the word "competent" when you have
10 a motion for directed verdict because it does imply a
11 weighing of the testimony. But the rule goes on to say in
12 ruling on this motion the trial judge can consider only the
13 existence or nonexistence of the evidence and not its
14 weight.

15 And so based upon the fact that the motion's made on
16 the insufficiency of the evidence, not on the nonexistence
17 of the evidence, the motion would be respectfully denied.

18 **MS. ZMROCZEK:** Thank you.

19 **THE COURT:** All right. Ms. Zmroczek, is your client
20 prepared to address the Fifth Amendment situation?

21 **MS. ZMROCZEK:** He is, Your Honor.

22 **THE COURT:** All right. Would you stand, please, sir?

23 Mr. Berry, yesterday I advised you of your rights
24 under the Fifth Amendment to the Constitution and your
25 right to remain silent. At that time I asked you if you

1 understood what I had explained to you about your privilege
2 against self-incrimination and you indicated you did; is
3 that correct?

4 **THE DEFENDANT:** Yes, sir.

5 **THE COURT:** Do you have any questions that you want to
6 ask me about your Fifth Amendment rights?

7 **THE DEFENDANT:** No, sir.

8 **THE COURT:** Have you had an opportunity to consult
9 with your lawyers about whether you should or should not
10 testify?

11 **THE DEFENDANT:** Yes, sir.

12 **THE COURT:** Have you understood your discussions with
13 your lawyer about your Fifth Amendment rights?

14 **THE DEFENDANT:** Yes, sir.

15 **THE COURT:** Do you have any questions of her or me
16 that you would like to ask us about your Fifth Amendment
17 rights?

18 **THE DEFENDANT:** No, sir.

19 **THE COURT:** Have you made a decision as to whether you
20 do or do not wish to testify in this case?

21 **THE DEFENDANT:** Yes, sir.

22 **THE COURT:** And what is that decision?

23 **THE DEFENDANT:** I wish not to.

24 **THE COURT:** You wish not to. All right. And is that
25 decision on your part made freely and voluntarily?

1 **THE DEFENDANT:** Voluntarily.

2 **THE COURT:** All right. The Court would find,
3 therefore, that the Defendant has chosen to exercise his
4 rights under the Fifth Amendment to the Constitution of
5 the United States and the similar counterpart provision of
6 the Constitution of the State of South Carolina; has made
7 a free, voluntary, intelligent and knowing decision to
8 exercise that right and not testify, and has had those
9 rights explained to him both by the Court and by his
10 attorney.

11 All right, sir. Thank you. You may be seated.

12 All right. Ms. Zmroczek, with the Defendant not
13 testifying, will the Defendant be presenting any further
14 testimony or any evidence?

15 **MS. ZMROCZEK:** Will not, Your Honor. The defense will
16 rest.

17 **THE COURT:** Okay. So you will rest at this time?

18 **MS. ZMROCZEK:** Yes, sir.

19 **THE COURT:** All right. We'll have to do that on the
20 record.

21 All right. Counsel, come up, please.

22 (Proceedings held at the bench; not reported.)

23 **THE COURT:** All right. Let the record reflect that a
24 note has been handed to me by the clerk that was handed to
25 her by the bailiff who got it from a juror who indicated

1 that he had worked on the Statewide camera system in the
2 Five Points area around Yesterdays and some of The Vista.

3 After sharing this with counsel, both parties agree
4 that no action needs to be taken in response to that, and
5 we will make the note a part of the record as a Court's
6 exhibit so the record will be complete, but that no
7 instruction or action needs to be taken.

8 Do you agree with that, Ms. Walker?

9 **MS. WALKER:** Yes, Your Honor.

10 **THE COURT:** Do you agree with that?

11 **MS. ZMROCZEK:** I do.

12 **THE COURT:** All let. The record reflect.

13 (Court's Exhibit Number 6, Juror Number 54 Note, was
14 marked for identification.)

15 **THE COURT:** All right. I'm gonna bring the jury back
16 in and when I do I'm going to ask the defense if they wish
17 to present any evidence and you can rest on the record at
18 that time and then I am going to excuse the jury because it
19 is about 3:35. By the time we hear arguments, it will be
20 4:30 at least and the charge will run us past 5:00 and it
21 would really be too late to send the matter to the jury
22 this afternoon. So I'm going to bring the jury back, if it
23 suits them, at 9:00 in the morning since it is a Friday in
24 an attempt to get the arguments in the morning and go to
25 the jury by mid morning tomorrow morning.

1 Any objection to that procedure on behalf of the
2 State, Ms. Campbell or Ms. Walker?

3 **MS. WALKER:** No, Your Honor.

4 **THE COURT:** On behalf of defense?

5 **MS. ZMROCZEK:** No objection.

6 **THE COURT:** All right. Bring the jury in, please.

7 (Whereupon, the jury returns to the courtroom at
8 3:39 PM.)

9 **BAILIFF:** Jurors seated, Your Honor.

10 **THE COURT:** All right. Thank you. As I said, ladies
11 and gentlemen, you've now heard the testimony from the
12 State and now the Defendant will have the opportunity to
13 present any evidence or testimony to you that he wishes to
14 present.

15 Ms. Zmroczek?

16 **MS. ZMROCZEK:** The defense rests, Your Honor.

17 **THE COURT:** All right. The Defendant has announced
18 through his attorney that the defense has rested, so that
19 means that you have heard all of the testimony that you
20 will hear in this case. There are only two things that
21 remain to be done; those are the arguments of counsel and
22 the instructions on the law by the Court. However, it is
23 now twenty minutes till four and if we were to go into
24 closing arguments this afternoon -- or summations this
25 afternoon and instructions, it would mean that this case --

1 you would not be able to get this case for deliberation
2 until after 5:00, maybe closer to 5:30, and -- you know, I
3 tell lawyers this all the time. I don't mind making the
4 lawyers work, but I know that jurors have lives outside of
5 this courtroom and so I try to be considerate of their
6 time. I think the better thing for us to do is to adjourn
7 for the afternoon and do arguments and charge first thing
8 in the morning, so that's what we're going to do.

9 I am going to allow you to go to your homes and
10 families. I'm gonna ask, and I'll ask if it suits
11 everybody, if it doesn't suit you, tell me, but I'd like
12 to ask everybody to be back at 9:00 tomorrow morning. Does
13 that suit everyone? 9:00? Okay. I see a lot of nods,
14 affirmatives, no negatives, so we will allow them -- we
15 will plan to be ready to convene tomorrow morning at 9:00.

16 Over the evening recess, do not discuss the case with
17 anyone, do not allow anyone to discuss it with you, and do
18 not discuss it in the jury room until you have heard the
19 arguments of counsel and the instructions on the law by the
20 Court.

21 With those admonitions, I'm going to excuse you for
22 the afternoon and ask that you be back, please, tomorrow
23 morning at 9:00 and I will see you at that time. Thank you
24 very much.

25 (Whereupon, the jury is excused for the day at

1 3:42 PM.)

2 **THE COURT:** Counsel, I want you to think about this a
3 little bit. You don't have to give me a decision right
4 now, but you'll recall that early on we made Court's
5 Exhibit Number 5. Ms. Randall, Juror Number 231, indicated
6 that beginning Sunday she had a problem and would carry on
7 into next week. We're going to the jury in the morning.
8 We've got to make a decision whether she should continue on
9 in this case and go forward with it tomorrow with the idea
10 that if the jury doesn't reach a verdict tomorrow, I'm
11 gonna bring them back on Monday. So y'all think about how
12 you -- how you think you ought to handle things with
13 Ms. Randall, whether you ought to excuse her and replace
14 her with the alternate, or what we ought to do. Just give
15 a little bit of thought to that because I did assure her
16 that we would not mess up her week next week.

17 All right. Charges, counsel. First of all, let me
18 tell you what I generally charge and y'all tell me if there
19 are any special requests to charge. I will -- my general
20 charge includes the presumption of innocence, burden of
21 proof and reasonable doubt. The reasonable doubt charge I
22 use is not just -- it's a little fuller than the just
23 hesitate to act. It's the one that, if any of you have
24 ever heard, that Judge Baxley authored is the one I
25 generally use.

1 Also I will use the substantive charge of attempted
2 murder since that is now a separate offense of attempted
3 murder. The charge is an armed robbery. I'll charge the
4 armed robbery statute and then what basically attempted
5 armed robbery is by simply stating that an attempt can be
6 defined as an effort to accomplish a specific purpose but
7 falling short of success. Attempted armed robbery is
8 defined as the crime of attempting robbery while armed with
9 a pistol, dirk, slingshot, metal knuckles, razor or other
10 deadly weapon. Of course, I will by that point have given
11 a more detailed instruction on armed robbery itself. Then,
12 of course, the unlawful pistol.

13 And let's talk about the unlawful conduct toward a
14 child. I assume that the unlawful conduct toward a child
15 statute would probably be the appropriate thing to charge
16 in any case as set forth in the indictment. And the
17 arresting arrest, I will give that.

18 Direct and circumstantial evidence I think the
19 appropriate charge as approved now by the Supreme Court is
20 the Logan charge.

21 **MS. ZMROCZEK:** That's what we would request.

22 **MS. CAMPBELL:** Yes.

23 **THE COURT:** Expert witnesses. Since there are a
24 number of them in this case, I will give the expert witness
25 charge and I will give the -- charge them about the

1 Defendant's right not to testify and that nothing should be
2 assumed from that.

3 Just by way of further instructions, I would tell the
4 jurors that there is electronic evidence in this case, that
5 they do, of course, have a right to take the exhibits back
6 to the jury room with them, but if they wish to view any of
7 the electronic evidence as introduced in the case, to give
8 us a note and we'll make arrangements for them to see that
9 either by bringing them back into the courtroom or taking
10 it out to them.

11 **MS. CAMPBELL:** What we've done in the past is
12 actually --

13 **THE COURT:** I'm sorry?

14 **MS. CAMPBELL:** What we've done in the past is use
15 this, but we also have a computer that's clean that we
16 might be able to send back, but I'll check with her on
17 that.

18 **THE COURT:** Okay. And other than that, just general
19 instructions unless there are any specific requests by the
20 State.

21 **MS. CAMPBELL:** Your Honor, the only other thing that
22 I think we would be requesting is on the reasonable doubt
23 charge. Do you do the -- the language from Victor v.
24 Nebraska? State versus Darby?

25 **THE COURT:** Reasonable doubt? I'll tell you -- I

1 don't mind telling you what I use. Hold on just a minute.

2 **MS. CAMPBELL:** We have no problem with whatever you
3 normally use, but we might want to add that language as
4 well. It may be already in your charge.

5 **THE COURT:** Let's see. Do you want to come up and
6 look at it, counsel? I'll show you my charge on reasonable
7 doubt and tell me if there's anything you want me to add to
8 that.

9 (Proceedings held at the bench; not reported.)

10 **MS. CAMPBELL:** We request the State v. Darby language.

11 **THE COURT:** All right. Have you got the Darby request
12 at this time?

13 **MS. CAMPBELL:** Just a second. We can go ahead and
14 address something else.

15 **THE COURT:** All right. Any other specific requests
16 on behalf of the Defendant, Ms. Zmroczek?

17 **MS. ZMROCZEK:** Not -- not at this time, Your Honor.
18 Not that I can see.

19 **THE COURT:** All right. Y'all still haven't decided
20 about your arguments yet, but let me ask you how much time
21 you ought to have. I always ask lawyers how much time they
22 need to argue the case, even though when I was practicing
23 law I never liked arguing against the clock and I'm not
24 real strict on it, but when I first got this job I was
25 hearing a little ordinary garden variety automobile wreck

1 case that I thought could have been argued in ten minutes
2 and fifty-five minutes later the defense lawyer was still
3 going strong and so I decided I was gonna get some idea
4 about how much time people needed to argue.

5 And I'm not going to be real strict on it, but if it
6 gets way out of hand, I might call you out on it. How much
7 time do y'all think you will need approximately?

8 **MS. WALKER:** Your Honor, forty-five minutes to an
9 hour?

10 **THE COURT:** I will tell you like I tell my preacher.
11 Anything after twenty minutes is lost.

12 All right. That's a long time. What do you think,
13 Ms. Zmroczek?

14 **MS. ZMROCZEK:** Twenty-five minutes.

15 **THE COURT:** Twenty-five?

16 **MS. ZMROCZEK:** (Nods head.)

17 **THE COURT:** One argument or two?

18 **MS. WALKER:** Your Honor, there's debate about that.

19 **THE COURT:** All right. We'll talk about it in the
20 morning, but I -- you know, I think if you go more than
21 thirty or forty minutes you're gonna bore them to death,
22 but that's your call.

23 **MS. WALKER:** I've been accused of that before, Judge.

24 **THE COURT:** All right. With that change in the
25 verdict form, you have no problem with the verdict,

1 Ms. Zmroczek?

2 MS. ZMROCZEK: That's correct, Your Honor.

3 THE COURT: Okay.

4 All right. Anything else, counsel, that you think we
5 need to address this afternoon?

6 MS. CAMPBELL: Your Honor, I'm handing up --

7 THE COURT: Is that Darby?

8 MS. CAMPBELL: -- Darby.

9 THE COURT: I think that would be appropriate to add
10 to the end of my charge since it's from the Supreme Court.

11 MS. CAMPBELL: Thank you, Your Honor.

12 THE COURT: All right, counsel. Then we will be in
13 recess until 9:00 tomorrow morning.

14 MS. WALKER: Thank you, Your Honor.

15 THE COURT: Thank you.

16 MS. ZMROCZEK: Oh, Your Honor, the only -- I'm sorry.
17 The only other thing -- Mr. Berry was asking me a question
18 and reminded me to ask you if you're going to charge that
19 these are separate indictments that have to be considered
20 separately?

21 THE COURT: I will, yeah. I didn't.

22 MS. ZMROCZEK: I'm sorry. He just asked me a question
23 about that, which reminded me that I needed to ask you.

24 THE COURT: Yeah, I normally tell them you've got to
25 consider each indictment separate and a decision made

1 separately on each indictment.

2 **MS. ZMROCZEK:** I can just e-mail it to you. I know I
3 have a copy.

4 **THE COURT:** Just bring it in the morning.

5 **MS. ZMROCZEK:** Okay.

6 **THE COURT:** And think about it, counsel, and be
7 prepared to give me your thoughts on Ms. Randall so I
8 don't forget or something.

9 (Recess taken.)

10 **THE COURT:** Back on the record in regard to the matter
11 of State versus Berry. After recessing for the afternoon,
12 Ms. Zmroczek approached the Court and said that she wished
13 to request a lesser included. I'm not sure lesser included
14 about what, but let the record reflect that the Defendant
15 had already -- had already left the courtroom and that the
16 solicitors had already left the courtroom. The court
17 reporter was still here and I asked that they be called --
18 the solicitors be called to come back up. The purpose of
19 having a charge conference and the purpose of having an
20 approval of the verdict form was to preclude this very
21 problem and this very situation.

22 I'll be glad to hear from you, Ms. Zmroczek.

23 **MS. ZMROCZEK:** Thank you, Your Honor. And it -- it's
24 certainly my mistake. As a one-man show I simply had it
25 written down to ask for lesser includeds under attempted

1 murder for ABHAN, assault and battery first and assault and
2 battery second, and I forgot to ask for those requests.

3 **THE COURT:** Ms. Walker?

4 **MS. WALKER:** Your Honor, the State's position would be
5 that -- do you care if -- if you'll give us one moment,
6 Your Honor?

7 **THE COURT:** Yes, you were caught by surprise just like
8 I was.

9 (Discussion off the record.)

10 **MS. WALKER:** Your Honor, we would -- we understand her
11 asking for assault and battery of a high and aggravated
12 nature and assault and battery first degree, but I think
13 assault and battery second degree is a bit of a stretch
14 because --

15 **THE COURT:** Slow down and speak a little louder.

16 **MS. WALKER:** I'm sorry. We understand her asking for
17 the assault and battery of a high and aggravated nature and
18 assault and battery in the first degree. We don't think
19 assault and battery in the second degree is appropriate in
20 this instance. The victim testified that he was shot at
21 and heard the bullets whooshing past his head and he was
22 actually shot and hit, so.

23 **THE COURT:** So you don't object to having the lesser
24 included of ABHAN?

25 **MS. WALKER:** No, Your Honor, we do not object.

1 **THE COURT:** And A and B first?

2 **MS. WALKER:** We do not object to either of those.

3 **MS. CAMPBELL:** Are you good with that?

4 **MS. ZMROCZEK:** Yes, that's fine.

5 **MS. CAMPBELL:** I think we can both agree on that. Are
6 you good with those being lesser included?

7 **MS. ZMROCZEK:** I am.

8 **MS. CAMPBELL:** We all agree to those.

9 **THE COURT:** Okay.

10 **MS. CAMPBELL:** Do you want me to get you the charge on
11 those?

12 **THE COURT:** No, I have charges. Assault and battery
13 of --

14 **MS. CAMPBELL:** ABHAN and then A and B first.

15 **THE COURT:** Okay. I think I've got them. Let me see
16 what I've got. Yeah, I have a charge on each one of them.

17 **MS. CAMPBELL:** Okay. And, again, defense counsel
18 agrees with us that those would be appropriate.

19 **THE COURT:** All right. Do you still want your --

20 **MS. ZMROCZEK:** I'll withdraw the second, Your Honor.

21 **THE COURT:** -- on A and B second?

22 **MS. ZMROCZEK:** Right. I'll withdraw that. Oh, and,
23 of course, I don't think A and B third is appropriate in
24 this case.

25 **THE COURT:** Just ABHAN and first?

1 **MS. ZMROCZEK:** Correct.

2 **THE COURT:** Okay. All right. That's what we'll do,
3 counsel. May I see the verdict form?

4 **MS. CAMPBELL:** Thank you.

5 **MS. WALKER:** Thank you, Your Honor.

6 **MS. ZMROCZEK:** Thank you.

7 (Whereupon, the proceedings were concluded for
8 December 3, 2016, at 4:04 PM.)

9 (The following proceedings were held on December 4,
10 2015, beginning at 9:05 AM.)

11 **BAILIFF:** Court come to order. All rise. If you have
12 cell phones or electronic devices at this time, please turn
13 them off.

14 **THE COURT:** Thank you. Please be seated.

15 We're back on the record with regard to the matter of
16 the State versus Berry and Mr. Berry is present with his
17 attorney. The State is present and represented by the
18 Fifth Circuit Solicitor's Office.

19 I had shown verdict forms to both counsel, looked at
20 it myself and all three of us approved it, but, Madam
21 Clerk, his name shows on the verdict form as "Perry"
22 instead of "Berry", so that needs to be changed.

23 **THE CLERK:** I can change that.

24 **THE COURT:** Okay.

25 All right. Ms. Campbell, anything before we bring

1 the jury in?

2 **MS. CAMPBELL:** Yes, Your Honor, we do have a couple
3 of matters. In reviewing my notes from opening statement,
4 the defense got up here and said that this case is not a
5 slam dunk or we wouldn't be here. Your Honor, that is not
6 a true statement of why we are here. Of course, the State
7 can never force the Defendant to plead guilty regardless of
8 what the evidence is. I don't know quite how to address
9 that other than -- I mean, she's the one that had said it
10 and in my opinion that would open the door for me refuting
11 that because, of course, I'm going to argue that there is
12 substantial overwhelming evidence in this case.

13 **THE COURT:** What say you, Ms. Zmroczek?

14 **MS. ZMROCZEK:** Your Honor, I'm not quite sure what the
15 confusion is, but if we're gonna -- I mean, if she feels
16 like she needs to argue that there's substantial evidence,
17 I think that she's entitled to that.

18 However, Your Honor, while we're on that they did put
19 a tape in yesterday that talked about ten and thirty years,
20 and I'm gonna address that he's facing time because they --

21 **THE COURT:** Wait a minute. Let's do one thing at a
22 time. First of all -- and I did hear you make the
23 statement that if it was a slam dunk we wouldn't be here.
24 She has the right to refute that.

25 **MS. ZMROCZEK:** Absolutely.

1 **THE COURT:** Okay.

2 **MS. CAMPBELL:** And, Your Honor, I would just -- I
3 want to make sure I'm in the parameters of what the Court
4 thinks is proper. She said it's not a slam dunk. We, the
5 State, cannot force anyone to plead guilty to a charge. I
6 mean, she's opened the door and I don't know how --

7 **THE COURT:** I agree and I think you've got the right
8 to --

9 **MS. CAMPBELL:** And I would limit it to that.

10 **THE COURT:** I think you've got the right to say that.
11 Now what was this about the time?

12 **MS. ZMROCZEK:** Well, Your Honor, yesterday in the
13 phone call that they put in he said "I'll take ten years
14 but I'm not taking thirty years", and I understand that
15 sentencing -- that they're not to consider sentencing, but
16 I have to address what was put into evidence by them and I
17 think I'm allowed to address the fact that they -- there
18 were plea negotiations. They opened the door to that,
19 Your Honor.

20 **THE COURT:** Do you have any problem with that?

21 **MS. CAMPBELL:** I have no problem that he said he would
22 take ten if she sticks to what's in evidence.

23 **MS. ZMROCZEK:** Absolutely.

24 **THE COURT:** As long as you stick with what's in
25 evidence.

1 **MS. CAMPBELL:** Your Honor, would you also do during
2 your charge a brief statement about that it's their duty
3 to find guilt or innocence; they aren't to be concerned
4 with any sentencing?

5 **THE COURT:** I'll make a note to do that, yes.

6 **MS. ZMROCZEK:** Absolutely. I was gonna say that, but
7 if you'll say it, that's fine.

8 **THE COURT:** Okay.

9 **MS. CAMPBELL:** And then, finally, Your Honor, in her
10 opening as well she talked about some facts that weren't
11 in -- that aren't in evidence. She talked about the fact
12 that the phone records would show that he was nowhere near,
13 which is a misstatement and an untruth, the place and the
14 time. What the phone records reflect is --

15 **THE COURT:** Well, first of all, that was her
16 statement, not the witness's statement.

17 **MS. CAMPBELL:** Yes.

18 **THE COURT:** So that's not evidence.

19 **MS. CAMPBELL:** Yes, sir. And I'm just cautioning
20 again that -- for her not to try to -- there's a lot of
21 things that we know about that aren't in front of this
22 jury. We have to stick with what's in front of the jury.
23 Like where they were all night is not in front of this
24 jury.

25 **THE COURT:** I'm gonna require both of you to stick to

1 the evidence.

2 **MS. ZMROCZEK:** Thank you. And, Your Honor, all I'm
3 going to say is that there were phone records that weren't
4 put in and I think I'm entitled to say that.

5 **MS. CAMPBELL:** That's not a problem. I'm just saying
6 she can't talk about what was shown like she did in her
7 opening and things of that nature.

8 **THE COURT:** Not what they would show.

9 **MS. ZMROCZEK:** Right.

10 **THE COURT:** There were phone records that weren't put
11 into evidence. All right.

12 **MS. ZMROCZEK:** And lastly, Your Honor, I've tried many
13 cases with these solicitors and my concern is that there be
14 no talk about remorse or lack of remorse and that there be
15 no discussion about any burden shifting, how we could have
16 put the phone records in or how we could have put up
17 evidence, because that sometimes comes out and I just want
18 -- I know that Your Honor knows --

19 **THE COURT:** I can't anticipate everything they're
20 going to say. If it's not proper, then you can object.

21 **MS. ZMROCZEK:** Thank you.

22 **MS. CAMPBELL:** Thank you, Your Honor.

23 **THE COURT:** All right. Anything else?

24 Bring the jury in, please.

25 (Whereupon, the jury enters the courtroom at 9:12 AM.)

1 **BAILIFF:** Jurors seated, Your Honor.

2 **THE COURT:** Thank you. And good morning, ladies and
3 gentlemen, and thank you for your promptness in getting
4 back here. We are now ready to proceed.

5 As I told you yesterday, you have now heard all of the
6 evidence in this case and there are only two things that
7 remain to be done; that is the arguments of counsel and the
8 instructions on the law by the Court. I will tell you now,
9 as I did at the first of this case when we began, that the
10 arguments of counsel are not evidence. The evidence that
11 you will decide this case on is the evidence that you have
12 heard from the testimony on this witness stand and from any
13 exhibits that have been introduced into evidence. But the
14 lawyers do have the right, and not only the right but the
15 duty, on behalf of their clients at this time to address
16 you and to give you their views of what they think the
17 evidence shows.

18 After they have concluded their summations to you, I
19 will then instruct you on the law of South Carolina as it
20 pertains to the facts in this case as you may find those
21 facts to be and then you will be allowed to go to your jury
22 room to deliberate your verdict. You will hear first from
23 the assistant solicitor on behalf of the State and then
24 from the defense counsel on behalf of the Defendant.

25 Ms. Campbell.

1 **MS. CAMPBELL:** May it please the Court?

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

3 **MS. CAMPBELL:** Good morning. The first thing I'd
4 like to do on behalf of the State of South Carolina and on
5 behalf of Michael Keith and his family is to thank you for
6 your service here this week. I know on Monday morning when
7 you showed up for court you might have tried to anticipate
8 what type of case you might be sitting on, maybe a car
9 wreck, maybe a contract dispute, but as you have seen over
10 the course of this week, even though this trial has not
11 gone on that long, that this is a very important case to
12 the State of South Carolina and to the Defendant, Brandon
13 Berry. You've been very attentive. There's been a lot of
14 technical information that has been relayed to you and we
15 just appreciate your service.

16 Now you have heard all of the evidence that you can
17 consider in this case. You must base your verdict on the
18 evidence. As the judge has told you, and will tell you
19 again, what is the evidence? It's the sworn testimony and
20 the actual physical evidence, which will go back with you
21 to the jury room, the video from the camcorder, the
22 evidence, the DNA chart. That is all evidence that you
23 will have.

24 What he will also tell you is you aren't to base your
25 verdict on what's not evidence. Not on questions by

1 lawyers, innuendo, speculation, wishful thinking, fishing
2 expeditions. That doesn't make it in evidence. Just
3 because a question is asked, doesn't mean that it's true.
4 You have to listen to the answer and we just ask that you
5 do that.

6 Now the roles in this courtroom are defined and
7 there's a reason for that. And what is the role of the
8 State? To present to you the relevant, admissible evidence
9 about what happened that night and that morning surrounding
10 the facts of this case. It's not about what happened the
11 night before in a bar. It's about what happened in the
12 charges in this case on the front lawn of that apartment
13 complex, what happened after the traffic stop. That is the
14 evidence that you are to consider.

15 The defense role is to defend her client to the best
16 of her ability. The judge's role is to determine what
17 evidence you are actually allowed to hear, and then
18 ultimately, once we sit down, because this is the last
19 opportunity I'm gonna have to address you, once the defense
20 counsel sits down, he will tell you what the law is. But
21 the most important role in this courtroom, ladies and
22 gentlemen, is yours. Each of you individually, and then
23 once you get back into that jury room collectively,
24 because you must determine what happened that night and
25 that morning back on July the 29th. No one will say that

1 anyone's role is more important than yours. You are the
2 factfinders and then you must apply the law as the judge
3 gives it to you.

4 And I want to apologize if over the course of this
5 week if we have done anything to offend you, Mr. Steadman,
6 Ms. Walker, the State. At times our questions get clumsy,
7 some of us don't know what day it is, things of that
8 nature. It's not intentional on our part, so please don't
9 hold it against Mr. Keith and his family.

10 Now criminal cases are unique. In criminal cases,
11 the law recognizes that you, the jury, should have the
12 right to judge the credibility of each and every witness.
13 They must appear before you. You've heard references to
14 statements, but you haven't seen any depositions, audio
15 depositions, video depositions. You haven't seen anything
16 like that and the reason for that is very clear. Because
17 you have to determine the credibility of each and every
18 witness that comes before you.

19 You've also heard us talk a little about some stupid
20 questions about like chain, did anyone alter or tamper with
21 anything, and that is before evidence may be admissible,
22 especially with testing involved, we must prove that there
23 was no one that tampered with anything or altered anything.
24 The chain of evidence must be proven before you consider
25 that and that's the reason for those questions.

1 Now I'm gonna take this opportunity to talk to you
2 about the law and then from there I'm going to talk to you
3 about the facts in this case. The burden of proof, as it
4 should be, is on the State of South Carolina to prove this
5 Defendant's guilt beyond a reasonable doubt. It's the
6 highest level of proof, as it should be, in criminal cases
7 and, ladies and gentlemen, I submit in this case, in this
8 courtroom, on this date, that is a burden the State
9 welcomes. The evidence in this case is not only beyond a
10 reasonable doubt. It's overwhelming.

11 What is proof beyond a reasonable doubt? And the
12 judge will instruct you on this. I want to talk to you
13 some about what he's gonna say because he's going to tell
14 you that anybody can doubt anything any day, but proof
15 beyond a reasonable doubt is not that. Reasonable doubt is
16 a substantial doubt, not an insignificant doubt. You can
17 look at what evidence is before you, what evidence is not,
18 but if the evidence before you is sufficient to prove him
19 beyond a reasonable doubt, that is the correct standard.
20 Just because there's reference to something, as long as the
21 evidence is sufficient beyond a reasonable doubt, then if
22 you find evidence, you must hold him responsible for his
23 actions.

24 The judge will go further and talk to you a little
25 bit about in our law it's been held that proof beyond a

1 reasonable doubt is proof that leaves you firmly convinced
2 of the Defendant's guilt. There are very few things in
3 this world that we know with absolute certainty. In
4 criminal cases, the law does not require proof that
5 overcomes every possible doubt. If, based upon your
6 consideration of the evidence, you are firmly convinced
7 that the Defendant is guilty of the crime charged, you must
8 find him guilty. If, on the other hand, you think there
9 is a real possibility he is not guilty, then you must give
10 him the benefit of the doubt and find him not guilty. All
11 we must prove is evidence that leaves you firmly convinced
12 of the Defendant's guilt, and I'll talk a little bit more
13 about that.

14 Now there are multiple indictments that are before
15 you and these arose out of two events that morning that
16 were connected obviously as you've seen and when a person
17 commits a crime they can commit more than one crime at one
18 time.

19 And the first charge -- I'm gonna take them out of --
20 I don't know what order the judge is gonna talk to you
21 about, is the crime of attempted murder. And very simply,
22 ladies and gentlemen, what is attempted murder? It's a
23 person who, with intent to kill, attempts to kill another
24 person with malice aforethought, either express or implied.
25 That is the offense of attempted murder. So what does the

1 term mean? What is malice? The easiest way for me to
2 think about is the word "malicious" comes from the word
3 "malice". Were his actions that night malicious? And I
4 submit, ladies and gentlemen, when you point a gun at
5 someone, pull the trigger multiple times in an attempt to
6 hit him, it doesn't get any more malicious than that. This
7 case reeks of malice. While you're attempting to rob a
8 man, as you point a gun at him, give me your money or I'm
9 going to I'll kill you.

10 And that takes me to the next point. What is express
11 or implied malice? And listen carefully to the judge. It
12 doesn't get more expressed than this because the law
13 recognizes in most cases people don't use the words to
14 express malice and the judge may define express malice as
15 such a thing as lying in wait. He had the car parked down
16 the road and waited for him to go through the gate. He
17 said the words "If you don't give me your money, I'm going
18 to kill you". Malice? In this case, both express and
19 inferred. The judge will tell you even without lying in
20 wait, even without express malice, words, tell you I'm
21 gonna kill you, you can infer it from his actions alone.
22 Were his actions such? But you don't even have to get to
23 that in this case because you have so much malice it's
24 attempted murder. We have to prove the specific intent to
25 kill.

1 And the courts have gone a little further in defining
2 and showing if you don't have express malice, which you do
3 in this case, what is the specific intent to kill? The
4 Defendant consciously intended the completion of acts
5 comprising the attempted offense. Intent means intending
6 the result which actually occurred, not accidentally or
7 involuntary. He had the gun pointed at him. It's not that
8 it went off accidentally or involuntarily. He shot not
9 once, but twice. Intent may be shown by acts and conduct
10 by the Defendant and other circumstances from which you
11 may naturally and reasonably infer intent. Intent may
12 also be inferred when it is demonstrated that the Defendant
13 voluntarily and willfully commits an act, the natural
14 tendency of which is to destroy another's life. And I
15 submit, ladies and gentlemen, when you take a gun and you
16 start pointing it at people and shooting, the natural
17 tendency is to destroy another's life. We're lucky in this
18 case. Mr. Keith is here, but not by any fault of him, and
19 that's why we're here on attempted murder and attempted
20 armed robbery.

21 And remember this. This young man has been given the
22 benefit of the doubt because he was originally charged with
23 armed robbery and as soon as we realized it wasn't the
24 correct charge, it was downgraded to attempted armed
25 robbery. There's no one trying to hold him. He's been

1 given the benefit of the doubt there for the lesser charge.

2 The judge will also tell you that if you think that
3 the State hasn't met their proof of burden and proof of
4 malice in this case, which I submit is overwhelming, then
5 you may consider a lesser included. In many cases, such
6 as a murder case, there's always lesser includeds. And the
7 first lesser included we'll tell you can consider, if you
8 don't find that he acted with the intent to kill or malice,
9 is assault and battery of a high and aggravated nature.
10 And what is the definition of that? Assault and battery
11 of a high and aggravated nature, if the person unlawfully
12 injures another person. And, ladies and gentlemen, in
13 this case there were multiple shots. The first bullet,
14 remember, it whizzed by his head. But for the grace of
15 God he jerked over and it's over. But if they injure
16 another and the act is accomplished by a means to likely
17 produce death or great bodily injury. The gun worked and
18 he used it.

19 Also, another lesser included, which is the lowest
20 degree, if you find that we didn't prove malice and you
21 find that shooting someone with a gun is not likely to
22 produce great bodily injury or death, then you can consider
23 assault and battery of the first degree. That they
24 unlawfully injure a person or offer an attempt to injure
25 another person with the present ability to do so and the

1 act is accomplished by means likely to produce death or
2 great bodily injury or occurred during the commission of a
3 robbery, burglary or kidnapping offense.

4 I submit, ladies and gentlemen, he's already been
5 given the benefit of the doubt because to get up here and
6 argue that this wasn't an attempted murder and attempted
7 armed robbery borders on offensive.

8 Now what is attempted armed robbery? The judge may
9 go into the elements of armed robbery, which I'm not going
10 to go into, but basically armed robbery is when a person
11 attempts to take property from the person or presence of
12 the victim while armed with a pistol, dirk, or while
13 alleging. In this case, there's no alleging. There were
14 bullets, there were shell casings, there were projectiles
15 in people's cars, there was bullet holes in Michael Keith.
16 So it's not that we just allege he had a gun, he had a gun.

17 And basically what is attempted armed robbery? Very
18 simply, it's stealing. It comes from the lesser included
19 of larceny, but the only one that applies here is attempted
20 armed robbery, which is basically stealing from another
21 person with threat or intimidation and while armed with a
22 deadly weapon. The fact that he didn't succeed, because
23 luckily for Mr. Keith he's here today because his
24 girlfriend happened to come out on the porch at the right
25 moment, because any time he thinks he's about to get

1 caught, his natural instinct is to flee. He's consistent
2 there. But for Ms. Allen, you wouldn't hear from Michael
3 Keith. Remember, it was hot, pointed to my head, and I
4 knew I was gonna die. Those are the charges of attempted
5 murder and attempted armed robbery.

6 Now he is charged with additional conduct for when he
7 tried to get rid of the evidence in this case. And, again,
8 I don't know what order the judge will charge you on
9 these. Unlawful conduct towards a child. It is unlawful
10 in this state, as it should be, for a person who has
11 charge or custody of a child, and it was his child, that's
12 undisputed, or who is the parent and is responsible for
13 the welfare, to place the child at unreasonable risk of
14 harm. Ladies and gentlemen, I submit putting a toddler --
15 I think there's been testimony she was two, in the back
16 seat, unrestrained with a gun in her diaper bag right next
17 to her, that alone. But let's go further. Because to
18 place a child at unreasonable risk of harm affecting the
19 child's life, physical, mental, or cause to be done
20 unlawfully so that the life or health is in danger. When
21 you hear your buddy say -- and it's on the video -- yeah,
22 you can search my car, then jumping in the driver's seat,
23 taking off, speeding around the corner while the police
24 chase you with blue lights, then jumping out of the car and
25 not even checking to make sure you've got it in park, he

1 left it running, as it backs across. And luckily nothing
2 happened to her that permanently scarred her, but that
3 doesn't relive him of violating that law.

4 He's also charged with resisting arrest. You heard
5 from the officers after he ran. And she's gonna get up
6 here and say oh, well, you can't believe anything that's
7 not on video. The reason it's not on video is because he
8 ran. He's the one that took it out of the scope of the
9 video. The police couldn't drive the car through the
10 woods. He made sure of that. It's unlawful for a person
11 to oppose or resist law enforcement in serving, executing
12 or attempting to serve or execute a legal writ or process,
13 or, to resist an arrest being made by whom the person knows
14 or reasonably should know is a law enforcement officer.
15 They had their uniforms on. He's yelling stop. You can
16 hear that.

17 And finally the unlawful carrying of a pistol. It is
18 unlawful in the state to have near you, around you, on your
19 person or to basically throw it away because it's evidence
20 you need to get rid of. It's not gonna be good for you.
21 About the person. A weapon is about the person when it's
22 readily assessable, convenient for immediate use. We know
23 he was reaching back in the diaper back and giving her
24 cookies before he took off in a high speed chase and then
25 he took it with him before he threw it and he had it the

1 night before because otherwise nobody's shot.

2 The judge will tell you there's two different kinds
3 of evidence you can consider in the case. Circumstantial
4 evidence and direct evidence. He's gonna tell you that
5 basically one is not better than the other, you can use
6 both. In this case, you have eyewitness testimony from the
7 neighbors and Michael Keith, you've got circumstantial
8 evidence that shows where the Defendant was and when he
9 was doing it, and all of that is what you can consider when
10 you combine the two.

11 Finally, ladies and gentlemen, I'm gonna talk to you a
12 little bit about credibility or believability. That's all
13 it is. It's up to you and that's what each of these
14 witnesses have to appear to you. Do they have something to
15 gain, lose, bias, prejudice? Michael Keith doesn't care.
16 He did this to him. He just wants the person that did it
17 held responsible. The DNA department didn't care who the
18 DNA matched to. That's not their job, that's not their
19 role, and for anyone to argue it is, is ludicrous. All
20 the police did in this case -- and I remember when she
21 said in opening statement the police did a good job in
22 this case. That's true. They didn't do a good job. They
23 did a great job. They did their job. They even went and
24 searched the young lady's home to make sure the child got
25 back in a proper environment. They did their job. She

1 admitted it in opening. And they don't have a dog in the
2 fight as to who the evidence should point to. Credibility.
3 Believability. It's totally up to you. Listen to the
4 judge. And I submit, ladies and gentlemen, all of the
5 evidence in this case, as much as he wishes pointed to
6 Nickilous Wallace, yeah, it was Nickilous Wallace's car,
7 but all of the evidence -- and it's so funny to listen
8 because in many cases there isn't DNA because DNA can
9 exculpate, it can inculpate someone, it can exonerate
10 people, and in this case all the DNA points to one person
11 and that just corroborates all the other evidence in the
12 case.

13 Now as I was getting ready for this case last week
14 and you prepare and try to anticipate what the defense is
15 gonna do, and typically in attempted murder, armed robbery
16 case you think well, maybe it will be an ID case. There's
17 one eyewitness, they're gonna say they were mistaken, the
18 lighting was bad, they were too far away, they really
19 couldn't see what was going on. Or maybe they're gonna say
20 the defense is that it's not really an armed robbery, he
21 didn't have a gun. He, you know, might have acted like he
22 had a gun, but it's just a strong arm robbery. Or maybe
23 the defense is gonna be oh, well, this is just like a drug
24 deal gone bad or something of that nature.

25 But as I have listened to opening statements and I

1 have listened to the cross-examination, it's -- it's
2 different, it's unusual, because first you kind of attack
3 the victim, ridiculed him because he has a job. He doesn't
4 have one job, he works all the time. And then as it
5 evolved I guess maybe Nickilous Wallace is the one that
6 kind of framed him amazingly. And if it wasn't Nickilous
7 Wallace because, oh, we don't have any of his DNA, then
8 perhaps it's just an unknown third person because there's a
9 fingerprint on the trunk that doesn't belong to any of the
10 players in this case. A fingerprint -- excuse me, two,
11 right next to each other, at a place where, say, if his
12 friend was helping him load things. Remember they went to
13 I-Hop? Hold the trunk down. And then it became well, the
14 police really -- even though she said it, didn't do a job,
15 they were bad. They moved the evidence because they didn't
16 want to leave it out there for small children to find.

17 You can't rely on the evidence because they did what
18 their protocol tells them to do and make sure the community
19 -- because their number one priority is making the
20 community safe, and that's why we're here? And then it
21 became I guess everyone's in this grand conspiracy to frame
22 Brandon Berry. These officers would put their careers on
23 the line to frame this man? Is there any evidence of that?
24 And they're so good. I guess they're in cahoots with
25 Michael Keith and he's willing to get shot for it to frame

1 this poor, innocent man? Is that their theory?

2 You know, when I was in law school, and that's been a
3 long time ago, there was a joke and it went around that,
4 you know, there are two people walking down the street,
5 one's a preacher, one's a lawyer, and as they're walking
6 down the sidewalk, it had rained the night before, and they
7 looked down and there's a puddle of water and at the bottom
8 of the puddle is a large silver coin, and the preacher
9 looks at the lawyer and he says, "Look, there's a silver
10 coin", and the lawyer picks up a stick and he stirs up the
11 water and the mud and the dirt and clouds it and you can't
12 see anything. And I submit, ladies and gentlemen, that's
13 exactly what's happened here.

14 So I want to take this opportunity to talk about the
15 facts, the real facts in this case, what the evidence
16 overwhelmingly shows in this case. I'm talking about the
17 witnesses and who you have heard from, and what did you
18 hear? You first heard from Michael Keith. And I'm not
19 taking these quite in the order they testified in just to
20 kind of make sense. And she brought out his nickname is
21 Cadillac, and he told you that, and it was like she was
22 derogatory towards him, and he got up here and he was
23 angry. You could tell he's a proud person, he's a
24 competent person, or he was, who thought he was going to
25 die that night. And this wasn't easy for him. Everybody

1 reacts differently when they've been traumatized. Some
2 people get mad, some get sad, but as he testifies she's
3 saying and your name is Cadillac? Yeah, that's what he
4 does for a living because he works.

5 And then she questioned him. Well, didn't you have a
6 gun? No, he legally got one after this because he has to
7 protect himself now because what he does involves him being
8 out late at night, but he's not the one out late at night
9 without a job. He's working. He talked to you about what
10 happened, how he got out of his car. He had even checked
11 his rear behind him before he pulled through the gate
12 because he was known for having large amounts of money
13 because that's how his job pays him usually unless it's a
14 wedding, and there was no one behind him and that's how we
15 know that Brandon Berry had already scoped out this dude.
16 He's down the street as the neighbor, remember her,
17 Ms. Settles told you he jumps across the fence and then
18 she sees the lights come on in the car as he gets in.

19 I submit she may get up here and argue well, he
20 doesn't have his driver's license, he wouldn't have been
21 able to drive. You think he's not gonna break that law?
22 He told you that as he got out of his car at first he
23 thought it was a joke and then he heard him rack the gun
24 and then they started running around the car and, funny,
25 the majority of the fingerprints are whose? The victim's.

1 And as they ran around the car finally the Defendant
2 jumped on the top of it. His shoes were dirty. They left
3 prints. The first shot whizzed by his head. Obviously it
4 ricocheted off something because it ends up in the front
5 wheel of the car next to it, or down one or two, I'm not
6 sure, but they got into a struggle, that he was down, that
7 he pointed the gun at his head and then he pointed it at
8 his leg and shot. I guess we're lucky he didn't hit the
9 artery in his leg. But then he took the gun he just shot
10 him with and put it to his forehead and he could feel the
11 heat and at that moment his girlfriend literally saved his
12 life because Brandon Berry is not gonna get caught if he
13 has anything to do with it. He didn't know which direction
14 he went. He was frantic. He asked his girlfriend to check
15 for his keys, then he realized they needed to get inside.
16 You actually see on the ground the spots of blood and
17 they're not even transferred because the first blood which
18 we notice now ended up on these pants. As they struggle,
19 they drip onto the tops of his shoes. It's only as he's
20 trying to get up that the blood drips onto the ground.
21 You even see as he hops in the blood right outside his
22 apartment.

23 And, oh, there was the question of nobody was allowed
24 in that apartment. There wasn't a crime committed in the
25 apartment. That's where they went for sanctuary. Is the

1 inference that he was hiding something inside? No, he
2 couldn't stay and give permission for the police to go in
3 the apartment because he needed to go to the hospital and
4 get treatment so that he could get an operation for where
5 he shot him. Again, inference, innuendo. It doesn't make
6 it true. It's just offensive.

7 He said he threw the Minute Maid bottle. I don't
8 know. The inference is because he's a DJ he's a bigger --
9 he says he's got that bigger than life personality. He
10 should be penalized for that? The Minute Maid bottle, I don't
11 know where it went. Is it under another car? Probably.
12 But think about it. Because everything Michael Keith told
13 you is absolutely and totally corroborated by Sidara Allen,
14 his girlfriend, what she saw when she looked out the
15 window, what she saw when she got on the balcony and was
16 literally trying to come across it, and he's yelling no,
17 no, no to her telling to her to go back in.

18 And, finally, his account is, once again, totally
19 corroborated by Ms. Settles who doesn't know anybody
20 involved. She's just a nice lady who happened to look out
21 her window at 4:30 something in the morning because Brandon
22 Berry decided that was when he did his best work. And when
23 she looked out the window she saw -- she'd already heard
24 one shot, but she saw him shoot him there on the ground.
25 Is Michael Keith believable? Don't let anyone get up here

1 and argue that this happened any other way.

2 Ms. Settles is important because she sees him jump the
3 fence. His car is parked, remember, on the road, not in
4 the gate, on the road, this fence. You can see it right
5 here. He jumps across where he's had his car, his getaway
6 car, stashed, and the lights come on and all she can see
7 are the rear lights, remember? And what does the car look
8 like? It sounded a lot like the car that Nickilous Wallace
9 was in, the car he had access to, the car where he stored
10 his tools of the trade, his gun, his mask, his gloves, his
11 zip ties.

12 You also heard from Thomas Stetson. Basically all he
13 knew was he heard the shots and he had to take his infant
14 child and hide in the bathroom with his wife at 4:30
15 something in the morning. He called 9-1-1, as did many
16 other people who also hid, worried they were getting shot.
17 The next morning he goes out and his front tire's flat
18 because but for the grace of God those bullets didn't
19 ricochet somewhere else, they just hit his car. We can be
20 thankful of that.

21 And you heard from Lourisa Katio. She and Brandon
22 were on and off. They had been arguing about money. He
23 stayed with her sometimes. That's not who he was going to
24 see the next morning, but he stayed with her sometimes.
25 They had a child. That she thought she said, and this is

1 how she phrased it, what I told the police is he left in
2 his white shoes because those are the shoes he had on the
3 next day, but that was at nine or 10:00. When she gets the
4 call at work, she responds, and when she gets there she
5 finds her child. Brandon is not right there where the
6 child was because they didn't bring him back to that area,
7 they had to take him to another area because he chose to
8 run to another apartment complex, so he's put in another
9 officer's car. That they asked her about her child. She
10 was the mother. She told them they were more than welcome
11 to search her house. They wanted to search to make sure
12 there weren't any other weapons that he may have left. He
13 needed to make sure her child was safe and they wanted to
14 search, and they were upfront about it, for anything
15 belonging to Brandon, and she let them. And she even
16 showed them where some of Brandon's stuff was in that
17 bedroom, her bedroom, where she slept, where they found --
18 and you have a photograph of it -- these pants and these
19 shoes. And the reason they took those items -- they don't
20 just take random items because they can, they took them
21 because they had blood on them, because they matched the
22 description of what was told the night before, a guy in all
23 black, six feet tall, by the way, not five foot eight.

24 And the defense is gonna get up here and say these
25 pants have cuffs on him. Yeah, they do. I don't know how

1 he wears his pants. I don't know whether he wears them
2 high, I wouldn't think so, or if he wears them low, but
3 the important part is Lourisa, his girlfriend, said
4 unequivocally to the police, and she told you, these were
5 Brandon's pants. As much as they don't want that to be
6 true, these aren't Nickilous Wallace's pants. Or I guess
7 Nickilous Wallace showed up at her bedroom at five in the
8 morning and just discarded his clothing while she slept in
9 the bed. Is that the theory? Or some unknown third person
10 happened to have access to frame him and leave these --
11 this evidence in Lourisa's bedroom while she slept? Is
12 that the theory? Because that's where they were. Does
13 that even make sense? Is that even possible?

14 She said that he got home that morning. On the stand
15 she said she thought it was around -- it was before she
16 woke up at six, she didn't know when, she was asleep. Back
17 then she told the police it was sometime she thought around
18 5 AM, which just happens to be after he did that. And then
19 there was the question did Investigator Carwell ever drive
20 from the crime scene to Lourisa's house. Lourisa told you
21 she wasn't sure of the time. And she didn't live in Camden
22 or in Orangeburg. She lives in Columbia. And at 4 AM the
23 traffic was better than it was this morning. Did he have
24 time? She can't tell you the exact moment he was there.
25 She said when she woke up he was there. And what else was

1 there when she woke up? These pants and these shoes in her
2 bedroom on the floor. She left her child with him. He was
3 supposed to take care of her at her home. He didn't even
4 have a child seat to take her anywhere, but he had places
5 to go and she was out of the picture, so he went.

6 You also heard from Dr. Jones. He talked about the
7 surgery, the injury. Luckily in this case it didn't cost
8 him his life. You heard from an EMT and he told you about
9 treating him and taking him to the hospital because he
10 needed treatment, that his injury was bleeding. And
11 notice, too, you know, she talked about how Trevor Holt
12 couldn't get in the apartment. Did she ever ask the EMT
13 one question? Because remember where he found the victim?
14 It was in the apartment. It wasn't like they weren't
15 letting people in. The police were in at that point. Did
16 she ask Clay Short any of those questions? He was in the
17 apartment because that's where he made contact with the
18 victim. That's where the victim was when EMS got there.
19 Clay Short took it down basically at that point. The
20 victim was still in pain, he couldn't give a real specific
21 description, but he was unwavering when he did give the
22 description. The guy was about my height, which is about
23 six feet, six foot one, skinny, in all black clothes. And
24 guess what, ladies and gentlemen? No, he wasn't able to
25 identify anyone because Brandon Berry made sure no one was

1 gonna be identified.

2 And even during the course of this trial -- I've torn
3 this -- you heard from Deputy Pennington and Owens and you
4 see everything that happened as they made that traffic
5 stop. They stop them because he sees them putting their
6 seatbelts on and then when he goes up to the car he notices
7 there's a two-year-old in the back seat unrestrained and
8 that caused them to call it in. Because if they get up
9 here and argue this is anything but a routine traffic stop,
10 he can't let them go with the child unrestrained in the
11 back seat. What if there was a wreck? What if anything
12 else happened? They had to be there and get the child into
13 some type of proper seat, if that makes sense. There was a
14 problem with the insurance card, he didn't have it, but
15 what's the most -- remember Brandon kept talking over
16 Nickilous. Remember who's older. And you heard the phone
17 call. Who's in charge? They were nervous. They wanted to
18 make sure everything was okay. There's a child in the back
19 seat. If she argues anything, they're doing their job the
20 right way.

21 They ask Mr. Wallace to get out of the car and come
22 talk to them. He's talking about his insurance. And then
23 as you see in the video, remember -- and she made some big
24 deal, too, when she was talking about -- what was it? She
25 was talking about there was a ringing on the computer, what

1 was that, and he said it was his computer, it alerts him
2 when there's a message waiting, it does that ringing sound.
3 And then she asked Deputy Owens about calling him ten times
4 that day and he said yeah, I call him all the time, I don't
5 know what I was referring to, but, yeah. What is that?
6 Because the ringing stops as soon as he gets in his car and
7 contacts headquarters and calls in the driver's licenses.
8 She made a big deal about how he said -- when the deputies
9 met he said I didn't see anything, why don't you go look.
10 They want to make sure the child is okay, that everything
11 is okay. They don't go up there and drag somebody out of a
12 car. They don't go up there and shoot somebody. They do
13 their job. They observe. They asked Mr. Wallace to get
14 out of the car and he complies because, guess what, the one
15 thing in this case, Nickilous Wallace is cooperative. Then
16 she made a big deal about how they thought they found some
17 marijuana and some tweezers in the car that was never
18 recovered. By the time the car comes back in play after
19 the chase and the child is recovered, there are bigger fish
20 than trying to find trace amounts of marijuana.

21 And notice on the video, you'll have it, Deputy
22 Pennington is talking to Mr. Wallace and he asks
23 Mr. Wallace do you mind if we search your car or something
24 to that effect, I don't remember the exact words, and he
25 says not a problem. Once that's said, what does Brandon

1 Berry do? Not Nickilous Wallace. He jumps into the
2 driver's seat, he throws the car into drive and he takes
3 off. Because Brandon Berry knows that a search of that
4 car is gonna be a problem, the problem he has here today.
5 Because Brandon Berry doesn't go anywhere without his
6 tools. He takes off and he runs into a dead end and at
7 that point he makes a choice and his choice is to save
8 himself. He throws the car into -- maybe he thought it
9 was going into park, but it didn't, reverse, and leaves his
10 two-year-old in a moving car while he grabs not one bag,
11 but two bags. If Brandon Berry didn't do this, why is the
12 gun from the shooting in his baby's diaper bag? If Brandon
13 Berry didn't do this, why does he know that he needs to
14 grab both bags, the one with the gun and the one with the
15 mask, the gloves and the zip ties? And if Brandon Berry
16 didn't do this, why is his DNA on the gloves, his DNA on
17 the mask? And how would he know that he needed to get rid
18 of that evidence? And at the moment he thought he was out
19 of sight of that police officer, he tossed those items and
20 thought they never would find them.

21 But, luckily, as she said in her opening, this was
22 good police work. They chased him. And, by the way, they
23 did have to tase him, there's no dispute about that,
24 because he wouldn't come off the fence. But he was taken
25 into custody, he wasn't hurt, and he was booked. But this

1 officer saw him throw something and he went back to the
2 scene. And, luckily, in this case we have Henry Owens
3 because Henry Owens was astute enough to notice the one bag
4 with the diapers in it he was fiddling with it. Remember
5 what he testified to? I saw him reach back there and give
6 the child something to eat or drink out of the bag. And
7 when the first deputy, Pennington, went to the scene and
8 found the first bag, which had been thrown, that's all he
9 thought had been thrown when he came back and that's the
10 bag that has the mask and those things, the blue-ish bag,
11 but luckily in this case Henry Owens is observant enough
12 that he knew that there was another bag that had been
13 taken out of the car and it was no longer there and they
14 went back and they did their job. And, yes, ladies and
15 gentlemen, they picked up those items and they collected
16 them because they wanted to ensure the safety of that
17 community, as they should, and you want to fault them for
18 that? It doesn't relieve him of any responsibility of
19 what's in them because it's not the deputy's DNA, it's
20 Brandon Berry's. But let's move on. And think about it,
21 too. If Nickilous Wallace did this, is Brandon Berry
22 someone to protect him that he would grab those bags and
23 leave his own child unattended in a moving car, to protect
24 Nickilous Wallace?

25 You heard from Investigator Holt who went out there

1 that day and processed the crime scene. He even told you
2 when she asked him isn't the proper way to leave it there
3 and he told you this is a public safety exception. And,
4 remember, this is near the cut between the apartment
5 complexes. He told you that at times it is proper to
6 collect the evidence and that's what was done here.

7 You heard from Amanda -- excuse me, Kerri McClary, and
8 all she did was process the masks. Then she asked well,
9 did you process them separately? No. And, ladies and
10 gentlemen, I submit it doesn't matter which one of the
11 masks he used that night, just that he used one of the
12 masks. Did she do one swab from both of them? Yes.

13 You heard from Sergeant Stan Richards and what did
14 he tell you? He processed the car, he collected the
15 fingerprints, he collected the gel lifts of the footprints.
16 He later compared those and they just happened to match the
17 shoes that happened to come with the victim's blood on them
18 that happened to be found in the bedroom of Brandon Berry's
19 girlfriend -- or the mother of his child.

20 You heard from Trisha Odom, fingerprints, and the
21 defense got up here -- and, ladies and gentlemen, it's our
22 job to bring forth all relevant evidence. Brandon Berry's
23 DNA is on this glove. Do we expect to find Brandon Berry's
24 fingerprints? This is the tools he had with him, with his
25 mask and his gloves, to do his job. We wouldn't expect to

1 find them, but she's gonna get up here and say -- like in
2 one place she's gonna point out on Item -- Lift L-1, which,
3 I think, is on a window -- well, I don't have that picture
4 up here. I guess it got moved. Anyway, it's here. It's
5 on the back. It shows you. These are the actual lifts of
6 the prints. Remember on this one, on L-1, like she said,
7 that she was able to match two of these fingers to Michael
8 Keith and because of the quality of the known prints she
9 had she couldn't match the other two. Well, we don't know
10 who those belong to. Look at the print. It's a handprint,
11 there are four fingers. Is it -- even common sense at some
12 point has to play a role. It's a handprint from four
13 fingers. She was able to match two to Michael Keith. If
14 she gets up here and argues we don't know who the other two
15 are, is that even reasonable? She's going to talk about
16 the second, L-2, which is from the rear of the car on the
17 top, right there where you pull down the trunk. As you've
18 heard, we can't tell how long fingerprints have been there,
19 we can't tell who all was in and out of Michael Keith's car
20 and anticipate that. We can't tell if somebody just came
21 by and touched it. We would expect, ladies and gentlemen,
22 to find fingerprints that may not match the victim,
23 although in this case, surprisingly, overwhelmingly, he got
24 his car was washed the day before, the majority of them
25 did.

1 But she's gonna want you to ignore, I guess, the gel
2 prints, the foot -- the tread wear that matches and focus
3 on the one fingerprint. Ladies and gentlemen, I submit
4 that's what makes this credible. This is real life. Of
5 course, there's gonna be other fingerprints. And, no,
6 she's gonna get up here and tell you not to convict Brandon
7 Berry because his fingerprints weren't on that car? They
8 shouldn't be. He knows what he used to cover to make sure
9 there's no fingerprints. So the fact that there are no
10 fingerprints exonerates him and then just ignore all the
11 DNA? Is that the argument?

12 And then you heard from Amanda Metz and she testified
13 that the two shell casings -- she wasn't asked to test the
14 projectile because that was collected by other people, but
15 the two shell casings, and they matched the gun that he had
16 and he threw when he left his child. And then she got up
17 here and questioned the science; ballistic testing, firearm
18 examination, evidence that's been admissible in this court
19 for longer than I have been alive, and that's a long time,
20 because that doesn't help her. That's not good.

21 So moving on to Dr. Amick. And you have his chart.
22 And remember how she focussed on certain areas? He talked
23 about how small amounts of evidence are needed to do the
24 testing in this case. I don't even remember. Was it a
25 nano -- something small, small amounts, in order to do

1 testing. And she asked him specifically about the scraping
2 of the waistband and she harped on that. Well, wouldn't it
3 be the owner? Wouldn't it be the owner? Somebody else
4 could have worn it, somebody else could have worn it, and
5 wouldn't it be true that the last person -- the owner would
6 be more likely to leave that than the last person that wore
7 them? And she didn't get the answer she liked because he
8 told you about examples when they do steering wheels. They
9 thought they would get the owner's DNA, but instead they
10 found that it was much more likely to get the DNA from the
11 person who had last touched the steering wheel. So then
12 she moved on to say that oh, well, perhaps he was wearing
13 boxers. Does that even make sense? By the way, the pants
14 that were found and identified by his girlfriend as his,
15 regardless of the cuffs, the shoes, they did that.

16 Getting down to the blue bag with the masks. The
17 brown gloves with grips, mixture, major contributor.
18 Remember, this is supersensitive science and in these
19 mixtures you gonna expect to find somebody else. It could
20 be the person that packaged the gloves, it could be the
21 person who sold him the gloves because that's how sensitive
22 this is, but look at this. Never once is Brandon Berry the
23 minor contributor because the person that wore the gloves
24 it gonna slough off. Remember touch DNA? Because that's
25 not blood right there. The brown gloves, mixture; major

1 contributor is Brandon Berry. The black stocking cap.
2 Remember dressed in all black with a mask on? Major
3 contributor. The red polo shirt, too weak. But it gets
4 better, or worse, I guess, for Brandon Berry because the
5 police did do their job.

6 The swab from the outside leg matches Michael Keith's.
7 Brandon Berry. One swab that was not blood from the
8 outside of the leg and I submit, ladies and gentlemen,
9 that's what makes this credible. That's how we know
10 nobody's up here framing him because this is real life,
11 this is real evidence. Did he brush up against somebody
12 else? Did Lourisa handle his pants before he put them on
13 and leave her DNA? That's what makes this credible. Yes,
14 there was one swab that wasn't blood from the outside of
15 one leg that all three are excluded. And, by the way, it's
16 not Nickilous Wallace again. All the swabs matched Michael
17 Keith whenever there is blood and they're able to get a
18 result. Rapid DNA. All three of those matched Michael
19 Keith. The swab from the shoes. And they're gonna say
20 well, they didn't do ownership on the shoes. Lourisa,
21 they're his shoes. She said so. They're in his -- where
22 he has access to, not some unknown third-party, not some --
23 Nickilous Wallace. At some point common sense has to
24 prevail. The swab from the Glock, too weak.

25 Finally, ladies and gentlemen, Item 31. Remember

1 about blood, excuse me, body fluids, they leave stronger
2 results and that's why you get these blood matches. Two
3 swabs that matched. Major contributor matches Brandon
4 Berry. Michael Keith and Nickilous Wallace are excluded as
5 minor contributors. And you'll have this evidence.

6 Sergeant Carwell. She talked about there were a
7 number of people that called 9-1-1 that he didn't
8 interview. That's true. He interviewed people who had
9 information that was pertinent to the case. She asked him
10 about the cuffs on the pants. He doesn't know whether the
11 pants were cuffed or whether they weren't. There's a
12 picture of how they were collected. Were they cuffed at
13 that point? Yes. Did he wear them cuffed? Possibly.

14 He talked about -- she asked him about the fact that
15 oh, this was Nickilous Wallace's car, wasn't it, where the
16 guns were and everything. Yeah, it was Nickilous Wallace's
17 car, but it was Brandon Berry who needed to get rid of the
18 evidence. Then she talked about video from inside the two
19 clubs, they never went and got the videos from inside the
20 clubs. He even went so far as to try to get video from
21 around the clubs to see if there was anything. There was
22 nothing there. That is uncontroverted. But, ladies and
23 gentlemen, video from inside the clubs doesn't have
24 anything to do with what happens when someone was lying in
25 wait for him that night. We don't have to prove who was

1 inside the clubs. We have to prove who committed this
2 crime.

3 She's gonna talk about the fact that there -- that
4 they collected phone records, and they did, and that the
5 phone records weren't reviewed. No, you have all the
6 evidence you can consider in this case; the relevant,
7 probative evidence. She talked about how he didn't
8 interview Kayla. She's the one that showed up on the
9 scene. You can see her in the video. She pulled up in a
10 car. She's the one that was holding the baby and called
11 Lourisa after the baby was recovered by the police. She
12 asked him why he didn't collect all the clothing in that
13 closet. Because his job is to collect anything that may
14 be probative to this case, not to destroy people's lives by
15 just taking random evidence. She asked him about whether
16 or not he timed how far it was from one scene to the other.
17 She didn't ask him about the zip tie that was on the bed
18 stand in the photograph. It's right there.

19 And finally, ladies and gentlemen, I want to talk
20 to you about the jail calls, the dates on those and
21 everything. The first two, when he first got arrested,
22 and he used his own PIN number on those. On the third
23 one, the one last Sunday, I've got it right now, he used
24 someone else's because he was doing -- doing prevalent
25 things. And she mentioned that there were hundreds of

1 phone calls, we could bring so many. These were pertinent
2 because it was right after he gets arrested he was talking
3 to -- not Lourisa, but the other girlfriend. And what does
4 he say? And these are just tidbits. You listen to the
5 calls. Everything's in. It's you. What does he say? I
6 did some -- excuse my language -- dumb-ass shit, wasn't
7 F'ing thinking. Again, left because they were about to
8 search the car. Lo and behold, that's corroborated by
9 the video. Wasn't thinking. And then talks about how he
10 cried because he left his daughter in the car and he looked
11 at her before he left because he knew he had to get rid of
12 the evidence that implicated him.

13 The next phone call the next day, on August the 1st,
14 from Brandon to Kayla. Brandon: Why the F did I -- did
15 that dumb-ass shit? And, remember, this is after he's been
16 served with the warrants. That was some dumb-ass shit I
17 did. Kayla: I know why you did it though. You was trying
18 to get rid of that shit. Uh-huh. Brandon, later on, I
19 need a paid lawyer for my shit. I'm F'd, word. I don't
20 know what it is. I'm F'd.

21 And what's in these calls is basically a confession
22 and these are when he's calling and this is to his friend,
23 his girlfriend, but what's interesting is he doesn't say
24 I'm F'd because of what Nickilous did, he doesn't say I'm
25 F'd because of what somebody else did. I'm F'd because of

1 what my -- dumb-ass shit I did.

2 And, finally, November 29th under a different PIN
3 number, using somebody else's so we wouldn't find it, he
4 calls his friend, Nickilous Wallace, who's got his own
5 charges and has his own day in court and says hey, but G-D
6 listen, bro, G-D, I don't think you're gonna have to be
7 there tomorrow -- and that would have been Monday --
8 because tomorrow ain't shit happening. Yeah. Know what
9 I'm saying? I don't think you got to be there tomorrow,
10 but whenever you do got to be there, brother, you ain't got
11 to say shit now. Nickilous Wallace is like oh, I looked it
12 up last night and I clearly know what plead the Fifth
13 means. Brandon: Yeah, you ain't got to say shit. Not a
14 word, bro, and that's what I want you to do, bro. You
15 ain't got to say shit.

16 Notice who's telling who what to say. Who's in charge
17 here? I don't want you to get up there and think you're
18 trying to make shit look good for me and F it up, make shit
19 bad, you know what I'm saying? All right. Because them
20 people G-D might ask you all kinds of scary-ass kinds of
21 questions and whatever, you feel me? And you might get up
22 there, you know what I'm saying, and choke up or some shit,
23 but you don't need to say a M-F thing, bro.

24 And then later on in that same call -- and I'm just
25 taking -- this whole call is in evidence. When he's

1 talking about what he thinks he should do, that they
2 might offer thirty and what he might do if they were to
3 offer something else. Bro, go to court tomorrow, take the
4 plea or whatever. The lawyer can go back tomorrow and be
5 like he don't want that, let's negotiate or something.
6 Negotiate like fifteen, boom. I already know you'll take
7 like fifteen.

8 Why does he know he should take fifteen? Because he
9 committed the robbery? Because he committed the attempted
10 murder? Brandon Berry replies, unh-unh, I will take ten,
11 nonviolent, know what I'm saying? I will take that, you
12 know. I'm really not going to speak too much. Again, I'm
13 not -- he doesn't say I'm not taking anything, I'm
14 innocent. Those are confessions.

15 Ladies and gentlemen, I don't know what she will
16 argue when I sit down. All I ask is that you focus on the
17 overwhelming evidence in this case. Brandon Berry made
18 choices. He needed money. He needed to work and get
19 money. Lourisa told you that. Lourisa told you he didn't
20 have a job. Nickilous did. There's not just one piece
21 of evidence that I'm asking you to rely on, ladies and
22 gentlemen. I submit that the DNA on the mask alone would
23 be enough, but you don't have to stop there. You've got
24 DNA on the pants, on the shoes. The pants identified by
25 his own girlfriend, pants found in his -- the bedroom where

1 only he had access. The evidence in this case, ladies and
2 gentlemen, is overwhelming as he acknowledges the day
3 before he has to go to court and confesses. And those are
4 his words and you actually get to hear him saying them.
5 All we ask is that you told him responsible for his choices
6 and what he did. Thank you.

7 **THE COURT:** All right. Ladies and gentlemen, you now
8 will hear from defense counsel in this matter and I want to
9 know if you'd like to go ahead and take a break before we
10 go any further? Anybody want to take a quick break?

11 Okay. We'll take about five minutes. It's going
12 to be a very short time. Do not discuss the case among
13 yourselves. We'll send for you in just a few minutes, but
14 we'll take about five minutes. And the lawyers also need
15 to get the evidence moved around and the defense counsel
16 needs to check on matters that she wants to refer to, so
17 we're gonna make it quick, five minutes, and we'll be ready
18 to go forward. Thank you. Do not discuss the case among
19 yourselves.

20 (Whereupon, the jury retires to the jury room at
21 10:20 AM.)

22 **THE COURT:** All right. Five minutes, counsel. We'll
23 be in recess.

24 **MS. ZMROCZEK:** Thank you.

25 (Recess taken.)

1 **BAILIFF:** Court come to order.

2 **THE COURT:** Thank you. Keep your seats.

3 We were waiting for the jury to tell us if they're
4 ready and they have done so, so we are ready to go forward.
5 Anything further before we bring the jury in?

6 **MS. CAMPBELL:** (Shakes head.)

7 All right. Bring the jury in, please.

8 (Whereupon, the jury returns to the courtroom at
9 10:30 PM.)

10 **THE COURT:** All right. Thank you very much, ladies
11 and gentlemen. We are now ready to proceed. You have
12 heard the State's argument and now you're going to have
13 the right to hear the summation or argument from defense
14 counsel.

15 Ms. Zmroczek.

16 **MS. ZMROCZEK:** Thank you, Your Honor. May it please
17 the Court?

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

19 **MS. ZMROCZEK:** Good morning. I, too, on behalf of
20 Brandon Berry would like to thank you for the time and the
21 attention that you've paid during this case. And it hasn't
22 been long. I'm sure on that side of the bench it felt
23 really long, but we appreciate the time as do my friends
24 and colleagues.

25 Brandon Berry, you got to hear a little bit of him, I

1 submit, and I'll talk about those phone calls in a little
2 bit, but Brandon Berry is twenty-five years old as you
3 heard and they played three phone calls in which he cussed
4 a lot and he said he didn't have friends and family. He
5 sat there all week with nobody behind him. The judge is
6 going to --

7 **MS. CAMPBELL:** Objection, Your Honor. May we
8 approach?

9 **THE COURT:** Yes.

10 (Proceedings held at the bench; not reported.)

11 **THE COURT:** I caution counsel against arguing anything
12 that's not in evidence.

13 **MS. ZMROCZEK:** The solicitor's office asked you to not
14 hold anything against Mr. Keith, the victim. The judge is
15 going to tell you that it's not your job to have sympathy
16 for either side. I submit the telephone calls were played
17 for one reason and one reason only and that was so you
18 would dislike or hate Brandon Berry because he has a fowl
19 mouth, because he's twenty-five years old, because he cares
20 about his brother. And they spent a lot of time talking
21 about -- making you listen to an entire phone call that
22 they were having conversations that had nothing to do with
23 this case, but had cuss words every other sentence. Is he
24 dumb? Yeah. But those two phone calls that they played
25 and that she put up here with the "F" words and "S" words.

1 Those were the two phones calls that he was talking about
2 where he F'd up or he messed up. Those two phone calls
3 were before warrants for attempted murder and robbery were
4 ever served.

5 **MS. CAMPBELL:** Objection, Your Honor. That's not
6 true.

7 **THE COURT:** All right. Not -- not in evidence. The
8 jury will disregard that. There's no evidence of that fact
9 and the jury will disregard that statement.

10 **MS. ZMROCZEK:** Your Honor, may we approach?

11 **THE COURT:** Yes.

12 (Proceedings held at the bench; not reported.)

13 **THE COURT:** All right. Ladies and gentlemen, again,
14 I will tell you that the arguments of counsel in this case
15 are not evidence. You are to rely on the evidence that you
16 heard from this witness stand. The attorneys have the
17 right to argue what they believe the evidence shows, but it
18 is up to you to make the final determination of what the
19 witness actually said.

20 **MS. ZMROCZEK:** May it please the Court?

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

22 **MS. ZMROCZEK:** Thank you. Investigator Carwell was
23 asked when he got and executed those warrants. Ladies and
24 gentlemen, the State talked a lot about rules. The Court
25 is full of rules. We have rules in evidence, we have rules

1 in presentation of the evidence. The judge has rules. He
2 can't comment on the facts. And you have rules and your
3 rules that you were sworn and you were selected to be fair
4 and impartial, not only to the defense, but to the State.
5 Because the State and the defense have a dispute and that
6 dispute is whether or not Brandon Berry committed attempted
7 murder and attempted armed robbery.

8 I solved half of the dispute for you. I told you
9 he's absolutely guilty. He had the gun. We know it's on
10 video and we'll talk about why these two cases were tried
11 together to help explain what we think the evidence shows
12 and why that was presented that way. Resisting arrest.
13 You heard Officer Pennington. He resisted. They tased
14 him. Check that off. Thank you. Find him guilty. Child
15 neglect. I submit that he should have gotten a ticket for
16 not restraining his child, but absolutely find him guilty
17 of child neglect. Ladies and gentlemen, they have proven
18 their case in that regard, and they have all along. So in
19 those discussions about the ten to thirty or I'll take
20 fifteen, he's guilty, ladies and gentlemen. He's guilty of
21 unlawful possession, neglect and resisting arrest.

22 That's not why we're here. Why we're here is because
23 he's not guilty of attempted murder or attempted armed
24 robbery. There were lots of charts and I'm not going to go
25 through the law again. The judge will give you the law and

1 he will tell you that you decide the facts and you apply
2 the facts to the law. You don't have to find him guilty of
3 everything. You can split it. Each and every one of you
4 has to be firmly convinced that he has been proved guilty
5 of attempted murder and attempted armed robbery. And if I
6 were representing the person who pulled the trigger, I
7 would argue that he was guilty of assault and battery first
8 or whatever those lesser includeds were, but that's not my
9 job. My job is to represent Brandon Berry and my job is
10 just to not give him my best. My job is to do my job under
11 the constitution.

12 The way that I've broken down my closing arguments and
13 remarks, because I don't want to keep you here all morning,
14 is I want to talk a little bit about the evidence, what it
15 showed, what we think it showed. I want to talk a little
16 bit about the evidence that wasn't presented, what we think
17 that showed, and why it wasn't presented. And then I want
18 to talk to you a little bit more about the phone calls.
19 But first I want to talk about my greatest fear, and I've
20 talked to you a little bit about it, is that you only base
21 your decision and your opinion on those phone calls and who
22 they want to show Brandon Berry is. They didn't play the
23 six hundred and however many phone calls or we would have
24 been here all week. And maybe you're wondering well,
25 Ms. Zmroczek, why didn't you play the good phone calls or

1 why didn't you put up any evidence? And the judge is going
2 to tell you it's because as much -- as much as I want to
3 prove someone innocent, that's not our job. It's never my
4 job to prove somebody innocent. And it seems it doesn't
5 make sense; well, if it's there, just do it. There are
6 reasons. There are reasons that people don't take the
7 stand. These -- these expert witnesses you see are skilled
8 and prepared in the way that they answer questions. Other
9 people are not.

10 Ms. Campbell told you a story that she heard in law
11 school about the puddle and the coin. What I heard her
12 say was a priest and a lawyer. What I think that she was
13 inferring was a priest and a defense lawyer. A defense
14 lawyer in just trying to muddy the water, but that's not
15 what I'm doing. I'm actually trying to clarify the water.

16 When I was in law school, not at the same time as
17 Ms. Campbell, I heard a different story and it was from my
18 professor who taught criminal law and, of course, the first
19 day everybody's excited and it's one of the first classes
20 we have in law school and they've already told you look to
21 the left, look to the right, people won't be here, we're
22 all nervous, we're all excited, and the professor gets up
23 and he doesn't yell and he doesn't scream or start calling
24 out our names to answer, but what he says is when I was a
25 kid I heard a story about Thomas, the apostle, Doubting

1 Thomas, and as you go through criminal law I want you to
2 remember Doubting Thomas because if you recall the story of
3 the apostle who was told he's risen, he's risen, he's --

4 **MS. CAMPBELL:** Objection, Your Honor.

5 **THE COURT:** Outside the evidence. Sustained.

6 **MS. ZMROCZEK:** I'm sorry?

7 **THE COURT:** As to commenting or making comments to the
8 jury that are not in evidence. The objection is sustained.

9 **MS. ZMROCZEK:** Thank you. May we approach again, Your
10 Honor?

11 **THE COURT:** No, ma'am. No, ma'am.

12 **MS. ZMROCZEK:** The point is, is that we are supposed
13 to question and were are supposed to doubt and I'm supposed
14 to ask questions because that's what the Constitution says
15 and if things don't add up, that's what I'm supposed to
16 show you.

17 Ms. Campbell said by the grace of God that Mr. Keith
18 is still with us, but you heard the doctor's testimony. He
19 wasn't going to bleed out. He was injured, no doubt. He
20 was absolutely injured, but that injury was not caused by
21 Brandon Berry. She said that I'm gonna make a big deal
22 about what the evidence shows and what the evidence doesn't
23 show. Absolutely I am. And she said rely on the DNA. So
24 let's talk about that real briefly.

25 Rely on the DNA. Mixtures. Mixtures. Mixtures. Oh,

1 she's gonna point them out that they're mixtures. Yes,
2 because I asked their expert that mixture means that it's
3 somebody else's DNA. They want you to speculate that it
4 could be the person that manufactured the items, but isn't
5 it just as reasonable, perhaps a little more, that the
6 waistband with the mixture of DNA could have been from
7 somebody that was wearing those jeans? They want you to
8 believe Ms. Katio's testimony except for the parts where
9 she says that Brandon shared his shoes, Brandon shared his
10 clothes, and he was like a brother to Nickilous Wallace.
11 Disregard that because that means that somebody could have
12 been wearing his jeans. Is that unreasonable?

13 They want you to say that the swabs from inside
14 of his jeans that don't match anyone could just be from
15 brushing up. It could be. It could also be from somebody
16 taking the jeans off. It's just as reasonable. But what
17 about the gloves? What about the gloves? Because the
18 testimony that I heard, and the judge is going to tell you
19 this over and over and over and over, rely on what you
20 heard. But the testimony that I heard from each and every
21 one of these witnesses included a black mask, a T-shirt --
22 a black T-shirt and black jeans. Never once did I hear
23 that that person was wearing gloves.

24 And that's, ladies and gentlemen, why the fingerprints
25 are so important are. Number 3 lift. And you'll have all

1 these pictures back there -- back with you. I submit that
2 most of these pictures show the same thing, but they're all
3 in evidence. Number 3, the roof of the car. The roof of
4 the car. Not the trunk, the roof. L-4, it was not made
5 by Wallace, was not made by Berry, inconclusive as to
6 Mr. Keith. The roof of the car, ladies and gentlemen. The
7 same roof that the person who shot Mr. Keith ran across.
8 Isn't it reasonable that their hand would be up there?
9 There was somebody else who committed this shooting. Not
10 Brandon Berry.

11 Cuffs in the pants. Now there's cuffs in the pants
12 because they realize there is a picture of it. It's not
13 done by the DNA person who swabbed it. It was done by the
14 person who wore his clothes and they want you to ignore all
15 the other clothes because they weren't pertinent and they
16 want you to say -- I did say the police did a good job.
17 Not a great job, but a good job. Because a great job would
18 have been to follow up, get the video to see what Brandon
19 Berry was wearing that evening if it would have shown, but
20 we don't know.

21 What shoes? They want you to believe Lourisa's
22 testimony about everything, but not the shoes that he was
23 wearing that night because they were white with a black
24 check. The same ones he had on the next day. They said
25 is it reasonable that somebody snuck into her room and put

1 clothes in there at five in the morning? If you recall
2 Lourisa's testimony, she woke up at six and left by seven
3 or 7:30. This home was searched after 1:00 in the
4 afternoon. Is it reasonable, is it possible that Brandon
5 let his dumb friends come over? Yes, it's reasonable and
6 possible, which is why the DNA is in the waistband, which
7 is why the shoes are on the car, which is why his handprint
8 is not. Is it reasonable when he gets pulled over if the
9 gun is already in the backpack to have it open and be
10 fiddling in it when Deputy Owens can see? Or is it also
11 reasonable that he knows that his friend lent his car and
12 he lent his clothes to another friend and that I need to
13 get that gun? Is it reasonable? Is it possible? And,
14 yes, I made a big deal about no pictures and no video at
15 the scene where the bag or bags were located because they
16 talked about credibility and I submit that the mask and the
17 glove bag were found inside the trunk. It's a reasonable
18 inference. That's why we don't have any pictures. Even
19 though Deputy -- Investigator Carwell had his camera that
20 day, we have no pictures from that scene. And it's just a
21 mistake and that's okay. Do I think that that's because
22 they're trying to frame anybody? No, it's an honest
23 mistake. But those honest mistakes when they consider
24 crucial evidence aren't important -- and does it make
25 sense, ladies and gentlemen, that he would grab the bag

1 with masks and gloves and zip ties, which were never
2 mentioned, and bring those but not hide shoes -- or not
3 leave them with the shoes and the pants? That just doesn't
4 make any sense.

5 His car was washed the day before, his cell phone was
6 on the car. The fingerprints could have been made by --
7 the fingerprints on the rear of the trunk that could have
8 been made by somebody who was shutting it also could have
9 been made by somebody who was jumping on it. It's just as
10 reasonable, ladies and gentlemen, but they want you to
11 dislike Brandon and to discount those reasons to doubt.

12 Nickilous Wallace, he didn't testify, and they want to
13 tell you it's because he told him not -- he, Brandon, made
14 him not testify. Is it reasonable to think that Nickilous
15 also knows who he gave his car to? Is it reasonable to
16 think that he would not be eaten alive by a seasoned
17 prosecutor on cross-examination? Is it reasonable that he
18 would not implicate himself? Common sense, ladies and
19 gentlemen, is not something we leave at the door or in this
20 jury box.

21 Phone records. Don't you think -- don't you think
22 they would have had a hundred more maps, a hundred more
23 big poster boards showing that phone --

24 **MS. CAMPBELL:** Objection, Your Honor, as to
25 speculation.

1 **THE COURT:** All right. I'm gonna overrule that
2 objection and she can comment on it if she thinks it's a
3 reasonable inference from the evidence. Go head.

4 **MS. ZMROCZEK:** Don't you think that had that evidence
5 placed Brandon Berry at the scene we would have every
6 single word of every single phone call and every single
7 text message? There's a reason that information wasn't
8 presented.

9 Ladies and gentlemen, I'll just briefly talk about
10 reasonable doubt. Again, we're talking about attempted
11 murder and attempted armed robbery, and to demonstrate that
12 I would like to tell a story to demonstrate what I believe
13 my understanding of reasonable doubt is. And the judge
14 is going to tell you the law and that's what you should
15 follow, but when I was a kid -- and I have six sisters.
16 When I was a kid, I would always get in trouble always
17 because of what my sisters did or one of my sisters'
18 friends did. It's so frustrating and my dad just wanted a
19 boy, so they just kept having kids and so we have all
20 girls. And we would fight and we would fight about clothes
21 and no matter what, as the oldest one, I'd always get in
22 trouble. And so when I would get in trouble, I would then
23 say that's not fair, that's ridiculous, and I would
24 sometimes use cuss words, inappropriate, and I learned it
25 from my dad, but he didn't care, and as soon as that first

1 cuss word came out of my mouth, I knew what was gonna
2 happen, and he'd get the belt and I'd run. And so I'd run
3 up the stairs and slam my door and hide because I knew what
4 was coming. You could hear him come up the stairs and my
5 mom's following him going don't, don't, she's just -- don't
6 hit her, don't, you know, but every time.

7 And then this one afternoon I came home and there was
8 crayons all melted on the floor. My sister -- growing up
9 in Louisiana, my sister had friends over and they played
10 and they would leave the crayons and just make a mess, but
11 I wasn't home that day and I came home from swim practice
12 and I walked in the door and I can hear my dad screaming
13 about the crayons. And at first I said what have I done?
14 But I haven't been home, so I knew it wasn't me and I knew
15 I couldn't be blamed. And my dad's yelling and my sister
16 dropped the F bomb. Nine years old and she drops it. And
17 I was like oh, yeah, here we go. And she goes running up
18 the stairs and my dad grabs his belt and he's running up
19 the stairs and I'm running up the stairs behind him going
20 yes, yes, and the door slams and at that point I knew what
21 was coming and my dad stomps and opens the door and she's
22 sitting on the bed, she's crying no, daddy, no, and he
23 lifts that belt and the breeze blows and it slams the door
24 and he lowers the belt because, ladies and gentlemen, it
25 wasn't the words, it was the defiance in slamming the door,

1 and when he thought that the wind blew it shut, that gave
2 him a reason to doubt.

3 Ladies and gentlemen, I can give you three, four,
4 five, and I'm sure you can find more, reasons to doubt
5 Brandon Berry's guilt of attempted murder and attempted
6 armed robbery. And as a true believer in the system, I
7 believe that each and every one of you will follow your
8 oath and that you will find him guilty of the charges of
9 which he is guilty and you will find him not guilty of the
10 two charges for which they have not proved him guilty
11 beyond a reasonable doubt. Thank you.

12 **THE COURT:** All right. Madam Forelady, and ladies
13 and gentlemen of the jury, if you would give me your
14 attention. You have followed very patiently and listened
15 very attentively to the presentation of the evidence in
16 this case and also to the able arguments made by the
17 solicitor, Ms. Campbell, on behalf of the State and by
18 Ms. Zmroczek on behalf of the Defendant, and I thank you
19 for that.

20 It now becomes the duty of the trial judge under the
21 Constitution of this state to charge and instruct you on
22 the law applicable to this case and it is your duty as
23 jurors to accept and apply the law as the Court will now
24 state it to you. And as jurors it is your exclusive duty
25 to decide all of the issues of fact in this case and for

1 that purpose to determine the effect, the value, the
2 weight, and the truth of the evidence. Both the State
3 and the Defendant have the right to expect that you will
4 conscientiously consider and evaluate the evidence and
5 apply the law of the case thereto to the end that both the
6 State of South Carolina and the Defendant will receive a
7 fair and impartial trial.

8 Now when I use the word "Defendant", I refer, of
9 course, to Mr. Brandon Berry. The State of South Carolina
10 by the bills of indictment, and there are five of them,
11 charge Mr. Berry with five separate offenses. Indictment
12 Number 020 is an indictment for attempted murder and
13 charges that Mr. Berry did on or about July the 29th, 2014,
14 with intent to kill, attempt to kill Michael Keith with
15 malice aforethought, either express or implied. That is
16 the charge for attempted murder.

17 Indictment Number 5062 charges that on July the 29th,
18 2014, while armed with a deadly weapon that Joseph {sic}
19 Berry did attempt to take and carry away the personal
20 property from the immediate presence of Michael Keith
21 with intent to deprive him of possession by use of force,
22 threats or intimidation, and that is the charge for
23 attempted armed robbery.

24 Indictment Number 015 charges that on or about
25 July the 29th, 2014, that Mr. Berry did in Richland County

1 carry about his person a pistol not being authorized to do
2 so by law.

3 Indictment Number 017 charges that on July the 29th,
4 2014, that Joseph Brandon Berry, while having custody or
5 charge or being a parent or being responsible for the
6 welfare of a minor child, [REDACTED], age two years,
7 did place the child in unreasonable risk of harm by placing
8 the child's life, physical or mental health or safety, or
9 did unlawfully or maliciously cause -- or cause to be done
10 bodily harm to the child so that the life or health of the
11 child was in danger, or did willfully abandon the child,
12 and that is the charge of unlawful neglect of a child.

13 And, finally, in Indictment Number 018 Mr. Berry is
14 charged on or about July the 29th, 2014, with knowingly and
15 willfully opposing or resisting an arrest being made by an
16 individual who the Defendant knew or should have known was
17 a law enforcement officer.

18 Now to these bills of indictment the Defendant has
19 entered a plea of not guilty on each charge. This plea of
20 not guilty by the Defendant places the burden of proof on
21 the State to prove by evidence the guilt of the Defendant
22 beyond a reasonable doubt on each and every charge before
23 you can -- you, the jury, can find him guilty. The
24 Defendant, Mr. Berry, is presumed in the law innocent of
25 the charges contained in these indictments. It is a

1 cardinal and fundamental rule of the law of evidence that
2 the Defendant, irrespective of the enormity of the charges
3 against him, will always be presumed innocent of the crime
4 for which he is indicted, unless and until, the guilt of
5 the Defendant has been proven by the evidence which
6 satisfies you, the jury, of his guilt beyond a reasonable
7 doubt.

8 The presumption of innocence is not a mere legal
9 theory. It is not just a legal phrase. The presumption
10 of innocence is a substantial right to which every accused
11 is entitled. Our Supreme Court has declared that the
12 presumption of innocence is like a robe of righteousness
13 placed upon the shoulders of this Defendant and it remains
14 with him and assigns to him that class to be innocent until
15 the presumptive robe of righteousness has been stripped
16 from his person by evidence that satisfies you, the jury,
17 of his guilt beyond a reasonable doubt.

18 The presumption of innocence accompanies the Defendant
19 from the time of his arraignment in this courtroom and
20 continues with the Defendant until you retire to the jury
21 room to deliberate your verdict. The presumption of
22 innocence continues with the Defendant to his benefit
23 until you, the jury, reach the conclusion that the State
24 has proven the guilt of the Defendant beyond a reasonable
25 doubt.

1 Now the State is not required to prove the guilt of
2 a Defendant beyond all doubt or beyond every doubt, but
3 beyond a reasonable doubt. What is a reasonable doubt?
4 It is not an imaginary or fanciful doubt or a weak doubt.
5 It is a substantial doubt. It is a doubt which the words
6 imply, a doubt for which you can give or assign a reason
7 based on the testimony or the evidence in this case. A
8 reasonable doubt is not any sort of a doubt. You and I
9 know from everyday life experiences that you may have a
10 sort of a doubt about any matter that arises no matter
11 how trivial it may be or how serious it may be. A
12 reasonable doubt is a doubt which makes an honest,
13 sincere, conscientious juror in search of the truth
14 hesitate to act. Proof beyond a reasonable doubt is
15 proof which leaves you firmly convinced of the Defendant's
16 guilt. If you have a doubt for which you can give or
17 assign a reason as to the guilt of the Defendant, then he
18 is entitled to a verdict of not guilty.

19 Reasonable doubt may arise from the evidence which is
20 in the case or from the lack of evidence which is in the
21 case. You, the jury, must make the determination of
22 whether or not reasonable doubt exists as to the guilt
23 of the Defendant in this case. If, based upon your
24 consideration of the evidence, you are firmly convinced
25 that the Defendant is guilty of the crime charged, you

1 must find him guilty. If, on the other hand, you find
2 there is a real possibility that he is not guilty, you
3 must give him the benefit of that doubt and find him not
4 guilty.

5 The very fact, however, that the jury engages in a
6 full and a free discussion of the issue of guilt or
7 non-guilt in the case with the normal conversational ebb
8 and flow on these issues does not automatically mean that
9 reasonable doubt exists in this case or in any other case.

10 I charge you that the Defendant is entitled to every
11 reasonable doubt arising in the whole case and on each
12 individual charge. If upon any issue of fact essential to
13 a conviction and a verdict of guilty you have a reasonable
14 doubt as to how that issue should be resolved, it would be
15 your duty to resolve that issue -- that doubt in favor of
16 the Defendant.

17 A defendant, ladies and gentlemen, is not required to
18 prove his innocence, but the State is required by law to
19 prove every essential element of the offense charged
20 against the Defendant by evidence which satisfies you, the
21 jury, of the guilt of the Defendant beyond a reasonable
22 doubt before you can convict the Defendant and find him
23 guilty. If then upon the whole case you have a reasonable
24 doubt as to the guilt or innocence of the Defendant, he is
25 entitled to that reasonable doubt and would be entitled to

1 acquittal and a verdict of not guilty. But, on the other
2 hand, if upon the whole case you find the State has proven
3 by the evidence which satisfies you, the jury, of the guilt
4 of the Defendant beyond a reasonable doubt, then in certain
5 circumstances it would equally be your duty to convict the
6 Defendant and find him guilty.

7 Now if you find the Defendant guilty, but you have a
8 reasonable doubt as to whether he is guilty of the greater
9 crime charged or the lesser crime charged, you would then
10 resolve that reasonable doubt in favor of the Defendant
11 and write a verdict of guilty only as to the lesser crime
12 charged. But, of course, you could not write a verdict of
13 guilty to any charge unless you find all of the elements
14 of the charge have been proven by the State beyond a
15 reasonable doubt.

16 Now I instruct you that the indictments in this case,
17 which I hold in my hand, are not evidence as I told you
18 at the first of the case and they cannot be considered by
19 the jury as evidence in this case. The indictments are
20 simply the formal written instruments which contain the
21 charges against the Defendant and they serve as the formal
22 documents by which this case is brought to trial.

23 You are instructed not to take into account the fact
24 that the accused has been charged in more than one
25 indictment. The reason for this is that the accused is

1 entitled to a fair and impartial determination on each
2 indictment based upon your determination of the evidence
3 on each indictment. The accused is not prejudiced by the
4 fact that there is more than one charge pending against
5 him.

6 Now, ladies and gentlemen, during this trial each of
7 us, you and I, have certain duties to perform. As trial
8 judge, it is my responsibility to preside over the trial
9 of this case and I also have the duty to rule upon or to
10 pass upon the admissibility of evidence. You are to
11 consider only the competent evidence before you. You are
12 to disregard and disabuse from your mind any testimony
13 ordered stricken from the record during the trial of this
14 case, if there be any, and you are to consider only the
15 evidence which has been presented from the witness stand
16 together with any exhibits admitted into the record of this
17 case and any stipulations made by counsel into the record,
18 if there are any.

19 I have the additional duty to charge you applicable
20 law in this case. As the presiding judge, I am the sole
21 judge of the law of this case and it is your duty to accept
22 and apply the law as I now state it to you. If you have a
23 preconceived idea as to what the law is or what the law
24 ought to be and it does not agree with what I tell you the
25 law is, you are obligated under your oath to abandon this

1 preconception on your part because you are sworn to accept
2 the law precisely as I state it to you.

3 In every case tried in this court before a jury, the
4 jury becomes the sole and exclusive judge of the facts of
5 the case. You, the jury, are the judge of the facts in
6 this case. The Court is the judge of the law. The
7 Constitution of this State has declared that the trial
8 judge shall not intimate, state, comment upon or make any
9 statement to a trial jury about the facts in a case. Since
10 you are the sole judges of the facts, you are not to infer
11 from anything that I have said during the progress of this
12 trial in ruling upon the admissibility of evidence, or
13 otherwise, or anything that I say now during the course of
14 this charge to you, that I have an opinion about the facts
15 of the case. I do not. The law does not permit me to have
16 an opinion about the facts. This is a matter solely for
17 you, the jury, to determine. As jurors then, it is your
18 duty to determine, as I have said, the effect, the value,
19 the weight, and the truth of the evidence presented during
20 the course of this trial.

21 Necessarily, then you must assess the credibility of
22 the witnesses who have testified in this case. Credibility
23 is simply a legalistic term which means believability. It
24 becomes your duty then to analyze and evaluate the evidence
25 and to determine that evidence which convinces you of its

1 truth. I charge you that in determining the question of
2 credibility or believability of the witness, you may
3 believe one witness as against several witnesses or several
4 witnesses as against one witness. You may believe a part
5 of the testimony of a witness and reject the remaining part
6 of the testimony of that same witness. You may believe the
7 testimony of a witness in its entirety or you may reject
8 the testimony of a witness in its entirety. You may
9 consider whether any witness has exhibited any interest,
10 any bias, or any prejudice in the case. And you may
11 consider the demeanor of the witness, that is the
12 appearance of the witness, from the witness stand. And
13 you may consider the opportunity for knowledge concerning
14 those things about which a witness testified. These
15 considerations you do not exercise arbitrarily, but if in
16 your good judgment there is sound reason in the record for
17 so doing because your objective, ladies and gentlemen, is
18 to find the truth whether it comes from one or more
19 witnesses.

20 And in doing so, in exercising your mental processes
21 and in determining what you consider to be true, the law
22 simply requires that you exercise your good judgment, your
23 common sense, your sense of logic and reason, and your
24 experiences in life. You then apply these attributes of
25 ability to the evidence and determine what you consider to

1 be the truthful evidence and to these true statements of
2 facts as determined by you, the jury, you take and apply
3 the law as I now state it to you and thus arrive at a true
4 verdict in this case.

5 Now, as I have said, there are five separate
6 indictments that you will consider, five separate charges,
7 separately and must find the Defendant guilty beyond a
8 reasonable doubt on each charge. The first indictment,
9 and the first offense, is the crime of attempted murder,
10 and I want to define that charge for you. South Carolina
11 Code Section 16-3-29 provides a person who, with intent
12 to kill, attempts to kill another person with malice
13 aforethought, either express or implied, commits the
14 offense of attempted murder. And as I said, the Defendant
15 is charged with attempted murder. Murder is the killing
16 of another person with malice aforethought. Malice is
17 hatred, ill will or hostility towards another person. It
18 is the intention of doing a wrongful act without just
19 cause or excuse and with the intent to inflict the injury,
20 or under circumstances where the law will infer an evil
21 intent.

22 Malice aforethought does not require that malice exist
23 for any particular time before the act is committed, but
24 malice must exist in the mind of the Defendant just before
25 and at the time the act is committed. Therefore, there

1 must be a combination of the previous evil intent and the
2 act. Malice aforethought may be express or inferred. The
3 terms "express" and "inferred" do not mean different kinds
4 malice, but merely the manner in which malice may be shown
5 to exist; that is either by direct evidence or by inference
6 from the facts and circumstances which are proven.

7 Express malice is what's shown when a person speaks
8 words which express hatred or ill will for another or when
9 the person prepared beforehand to do the act which was
10 later accomplished. For example, lying in wait for a
11 purpose or any other acts of preparation going to show that
12 the deed was within the Defendant's mind would be express
13 malice. Malice may be inferred from conduct showing a
14 total disregard for human life. The law says that if one
15 intentionally attempts or kills another with a deadly
16 weapon, the implication of malice may arise. If facts are
17 proven beyond a reasonable doubt sufficient to raise an
18 inference of malice to your satisfaction, this inference
19 would be simply an evidentiary fact to be taken into
20 consideration by you, the jury, along with other evidence
21 in this case and it may be given such weight as you may
22 determine it deserves.

23 The next charge that the Defendant is charged with is
24 the crime of armed robbery or attempted armed robbery.
25 I'll talk about attempted in just a minute, but let me

1 first talk about what armed robbery is. Section 16-11-330
2 of the Code of Laws of South Carolina provides that armed
3 robbery is committed when a robbery is committed while
4 armed with a pistol, dirk, slingshot, metal knuckles,
5 razor, or other deadly weapon, or while alleging, either
6 by action or words, that he was armed with using -- while
7 using a representation of a deadly weapon, or any object
8 which a person present during the commission of a robbery
9 reasonably believed to be a deadly weapon. To convict a
10 person of armed robbery, the State must prove, first, that
11 he committed a robbery; second, that while armed with a
12 pistol, dirk, slingshot, metal knuckles, or other deadly
13 weapon, or alleging that he had such a weapon.

14 Now what is robbery? Robbery is larceny from the
15 person or immediate presence of another by violence,
16 intimidation, or by putting such person in fear. A thing
17 is in the presence of person with respect to robbery when
18 it is so within his reach, inspection, observation and
19 control that he could, if not overcome by violence or
20 prevented by fear, retain possession of it. Robbery is
21 basically larceny compounded by aggravation or intimidation
22 or force used in taking the property from the person or the
23 presence of another. Larceny is the felonious taking or
24 carrying away a person -- of the goods of another person
25 against a person's will with the intent to appropriate them

1 for one's own use and to permanently deprive the owner of
2 possession of the property.

3 Now the Defendant in this case is charged with
4 attempted armed robbery and I will tell you that -- just
5 a moment -- an attempt can be defined as an effort to
6 accomplish a specific purpose, but falling short of
7 success. Attempted armed robbery is defined as the crime
8 of attempting robbery while armed with a pistol, dirk,
9 slingshot, metal knuckles, razor, or other deadly weapon.

10 Now the Defendant also is charged with the crime of
11 unlawful pistol, and I want to read you the South Carolina
12 Code on that particular charge. Section 16-23-10 of the
13 South Carolina Code defines a handgun as any firearm
14 designed to expel a projectile and the code section prior
15 to that provides that it is unlawful for anyone to carry
16 about the person any handgun, whether concealed or not,
17 except as follows, and there are a number of exceptions
18 which are not applicable in this situation.

19 The State must prove the elements of unlawful carrying
20 of a handgun beyond a reasonable doubt. These elements are
21 that the Defendant did, in fact, possess a handgun. If you
22 find the item which the Defendant possessed was something
23 other than a handgun, then you cannot find him guilty of
24 this offense. Secondly, the Defendant carried the handgun
25 about his person. The phrase "about the person" means any

1 position where the handgun is readily accessible and
2 convenient to the immediate use, whether or not it actually
3 touches the person of the Defendant. The State is not
4 required to negate each exception to -- well, we don't have
5 the exceptions. I said they were not applicable in this
6 case. So the two elements of the unlawful handgun are that
7 the Defendant did, in fact, possess a handgun and that
8 carrying it about his person means that it is readily
9 accessible or convenient to his immediate use.

10 The Defendant is also charged with the crime of
11 unlawful conduct toward a child. South Carolina Code
12 Section 63-5-70, excuse me, provides as follows. It is
13 unlawful for a person who has charge or custody of a child,
14 or who is a parent or guardian of a child, or who is
15 responsible for the welfare of a child, to place the child
16 at unreasonable risk of harm affecting the child's life,
17 physical or mental health or safety, or to do cause or to
18 cause to be done maliciously and unlawfully any harm to the
19 child so that the child's health is in danger or likely to
20 be in danger, or willfully abandon the child.

21 And, finally, the Defendant is charged with the crime
22 of resisting arrest, and I want to read the code section
23 to you on resisting arrest. The law says that resisting
24 arrest is knowingly and willfully opposing or resisting a
25 law enforcement officer when that officer is making a

1 lawful arrest. South Carolina Code Section 16-9-320
2 provides it is unlawful for a person knowingly and
3 willfully to oppose or resist a law enforcement officer
4 in serving, executing, or attempting to serve or execute a
5 legal writ or process, or to resist an arrest being made by
6 one whom the person knows or reasonably should know is a
7 law enforcement officer, whether under process or not.

8 Now, ladies and gentlemen, those are the definitions
9 of the substantive charges in this matter, but there are
10 several other matters of law that I need to discuss with
11 you. One is that -- the matter of evidence. There are
12 generally two types of evidence that are presented during
13 a trial, direct evidence and circumstantial evidence.
14 Direct evidence directly proves the existence of a fact
15 and does not require deduction. Circumstantial evidence
16 is proof of a chain of facts and circumstances indicating
17 the existence of a fact. Crimes may be proven by
18 circumstantial evidence. The law makes no distinction
19 between the weight or value to be given to either direct
20 evidence or circumstantial evidence. However, to the
21 extent that the State relies on circumstantial evidence,
22 all of the circumstances must be consistent with each
23 other and when taken together point conclusively to the
24 guilt of the accused beyond a reasonable doubt. If these
25 circumstances merely portray the Defendant's behavior as

1 suspicious, the proof has failed.

2 The State has the burden of proving the Defendant
3 guilty beyond a reasonable doubt and this burden rests
4 with the State regardless of whether the State relies
5 upon circumstantial evidence, direct evidence or some
6 combination of the two.

7 Now you have heard testimony in this case from what
8 we have described as expert witnesses. Although normally
9 lay witnesses are limited to testifying about the facts
10 within their knowledge and are not allowed to give
11 opinions, certain witnesses who by their training,
12 education or experience are considered experts in a
13 particular field, may give their opinions in that field
14 based upon the facts of the matter and their conclusions.
15 These opinions constitute evidence to be considered by you
16 in connection with all of the other testimony and evidence
17 in this case. You may consider the expert's opinion just
18 as you do all other evidence in this case. It is for you,
19 the jury, to give it such weight as you in your experience
20 and discretion may determine. You must weigh the evidence
21 and accept or reject it in the same manner as you do all
22 other evidence in this case.

23 Now, ladies and gentlemen, the Defendant in this case
24 has not testified. This is his legal right. It is his
25 constitutional right and it is not a circumstance that you

1 can take into consideration or even allow to enter into
2 your discussions in the jury room. Under the Constitution
3 of the State of South Carolina and the United States
4 Constitution, it is a Defendant's constitutional right not
5 to testify. The burden of proof is on the State of South
6 Carolina to establish his guilt by competent evidence
7 beyond a reasonable doubt. The fact that the Defendant
8 did not take the witness stand and testify in this case
9 does not create any inference against him and you are not
10 permitted to weigh -- or not permitted to use that fact
11 or to weigh that in the slightest degree against the
12 Defendant, nor should this fact even enter into your
13 discussions or deliberations in the jury room.

14 Now, ladies and gentlemen, you will also recall that
15 I have told you throughout the trial of this case that the
16 questions of the lawyers are not evidence. Unless the
17 witness testifies to a statement you should not consider
18 it. Additionally, you are not to consider in this matter
19 the punishment or possible punishment that the Defendant
20 may receive. That is a matter for the Court. Your duty
21 is to find only the guilt or innocence of the Defendant.

22 Now I've also told you that and you know that there
23 are certain electronic evidence in this case and if during
24 -- and all the evidence will go with you back to the jury
25 room when I send you to the jury room in just a few

1 minutes, but if you do want to review the disc or any of
2 the electronic evidence we can make arrangements for that
3 to be shown to you. What I would tell the forelady in
4 this case is that any time you've got anything you need to
5 communicate to me, simply give a signed note to the bailiff
6 and they will give it to me and we will take care of your
7 situation.

8 Now, ladies and gentlemen, you are not partisans or
9 advocates for the State of South Carolina or for this
10 Defendant. You have no friends to reward and no enemies
11 to punish. Obviously such a verdict under our system
12 would be intolerable. You have been selected by both the
13 State of South Carolina and by this Defendant as fair and
14 impartial jurors. It is your duty then by your joint
15 deliberations to determine the truth in this case giving
16 to the Defendant the benefit of every reasonable doubt on
17 each and every issue and then to the facts which you
18 determine to be true, you then take and apply the law which
19 has been given to you by this Court and thus arrive at a
20 verdict which does speak the truth. Because the word
21 "verdict", ladies and gentlemen, has a Latin derivative.
22 It comes from the Latin word "veredictum", meaning to speak
23 the truth or truth saying. And when you have accomplished
24 these responsibilities you would have discharged your oath
25 as jurors and your duties to this Court.

1 Now, ladies and gentlemen, I want to instruct you on
2 your forms of verdict in this case. If the State has
3 failed to prove the guilt of the Defendant on any charge,
4 your verdict would be two words, not guilty. If the State
5 has proven the guilt of the Defendant on any charge, your
6 verdict would be one word, guilty. The verdict that you
7 render in this case must be the verdict of each and every
8 juror. It must be your unanimous verdict. All twelve must
9 agree on the verdict, which you authorize the foreperson to
10 write.

11 Now, Madam Forelady, I have prepared a sheet of paper
12 that contains the possible verdicts in this case, in fact,
13 there's two pages, and I will tell you now that the order
14 in which I have put the possible verdicts on this papers
15 has absolutely no significance. You should not infer from
16 the order in which I have put these possible verdicts that
17 I have any opinion as to what your verdict should be. I do
18 not -- it does not. The law does not allow me to have an
19 opinion as to what your verdict should be, but obviously to
20 put something down on paper, I had to put something down
21 first and put something down second.

22 But across the top up here we have the State of South
23 Carolina, County of Richland, Court of General Sessions,
24 the name of the case and the indictment number, and the
25 first one is: We, the jury, by unanimous agreement find

1 the Defendant, Brandon Joseph Berry, number one, on
2 Indictment -- well, and I need to go back on that. I
3 forgot to tell you that on the theory of lesser included
4 offenses that on the attempted murder charge it includes
5 certain lesser included offenses that are not in the
6 indictment, but that you can consider, and let me tell you
7 what those are.

8 The first of those is assault and battery of a high
9 and aggravated nature, and I need to tell you what that
10 lesser included offense is. Section 2 -- South Carolina
11 Code provides that a person commits the offense of assault
12 and battery of a high and aggravated nature if the person
13 unlawfully injures another person and, A, great bodily
14 injury to another person results or, B, the act is
15 accomplished by means likely to produce the death or great
16 bodily injury, and it is a lesser included offense of the
17 charge of attempted murder.

18 To prove assault and battery of a high and aggravated
19 nature, the State must first prove beyond a reasonable
20 doubt that the Defendant unlawfully injured another
21 person. Next the State must prove beyond a reasonable
22 doubt that either great bodily injury resulted or the act
23 was accomplished by means likely to produce death or great
24 bodily injury.

25 Great bodily injury is defined as bodily injury which

1 causes a substantial risk of death and which cause serious
2 permanent disfigurement or protracted loss or impairment of
3 the function of a bodily member or orifice.

4 Also included as a lesser included offense, although
5 not set forth in the indictment, is the offense of assault
6 and battery in the first degree. Assault and battery in
7 the first degree occurs when, according to the code and is
8 defined in the code, a person commits the offense of
9 assault and battery in the first degree if that person
10 unlawfully, A, injures another person and the act involves
11 nonconsensual touching of the private parts of an adult,
12 which is not applicable here. Secondly, it occurred during
13 the commission of a robbery, burglary, kidnapping or theft,
14 or, B, offers or attempts to injure another person with the
15 present ability to do so and the act is accomplished by
16 means likely to produce death or great bodily injury and/or
17 occurred during the commission of a robbery, burglary,
18 kidnapping, or theft. It is a lesser included offense of
19 attempted murder and of attempted -- assault and battery of
20 a high and aggravated nature.

21 To prove assault and battery of a high and aggravated
22 -- to prove assault and battery in the first degree, the
23 State must prove beyond a reasonable doubt that the
24 Defendant either injured another person and the act
25 occurred during the commission of a robbery, burglary,

1 kidnapping, or theft, or that the Defendant offered or
2 attempted to injure another person with the present ability
3 to do so and the act was accomplished by means likely to
4 produce death or great bodily injury.

5 So with regard to the first indictment, of course, I
6 have defined for you what attempted murder is and a lesser
7 included offense of attempted murder is assault and battery
8 of a high and aggravated nature and a lesser included
9 offense of these is also assault and battery in the first
10 degree. So when considering that indictment, there are
11 three possible verdicts and I have put those on the first
12 page of this sheet. As I say, don't take any -- the order
13 that they're put on here as having any meaning whatsoever.
14 It does not.

15 We, the jury, by unanimous agreement, find the
16 Defendant, Joseph {sic} Berry, on the Indictment 2015-020
17 for attempted murder; guilty, not guilty, or, the lesser
18 included offense of assault and battery of a high and
19 aggravated nature; guilty, not guilty, or, the lesser
20 included offense of assault and battery of a high and
21 aggravated nature; guilty, not guilty, or, the lesser
22 included offense of assault and battery in the first
23 degree; guilty or not guilty.

24 Only one of those on that indictment. So you will
25 have one verdict on that indictment and you would indicate

1 the unanimous agreement of the jury by checking one of
2 those six blocks or putting an "X" in one of those six
3 blocks.

4 Then you are to go on and consider the other charges
5 in this case, and they are contained on the second page
6 of the sentencing sheet and, again -- I mean, on the
7 verdict form, and it says that on the Indictment Number
8 2015-GS-5062 for attempted armed robbery; guilty or not
9 guilty. Then you would go to the Indictment Number
10 2015-015 for unlawful carrying of a pistol; guilty or not
11 guilty. Then you would go to Indictment Number 2015-017
12 for unlawful conduct toward a child; guilty or not guilty.
13 And, finally, on Indictment Number 2015-018 for resisting
14 arrest; guilty or not guilty. So there are five possible
15 verdicts in this case according to how you view the facts
16 in this matter.

17 Now, ladies and gentlemen, as I said, if at any
18 time during the course of your deliberations you wish to
19 communicate with me, please give a signed note to the
20 bailiff and they will bring it to me and I will address
21 your problem. Let me tell you that there is nothing that
22 I can do to help you with the facts on this matter. You
23 will have to determine this case based upon the facts that
24 you've heard from this witness stand and from any exhibits
25 that have been introduced and I cannot comment on the

1 facts. However, if I can be of any help in any definitions
2 of the law or anything on the law of this case, again, send
3 me a signed note and I will attempt to clarify that for you
4 by giving you an additional charge on the law. I will tell
5 you though that throughout your deliberations in this case
6 at no time does the Court want to know what the jury's
7 counts or status is on any charge. That is a matter that
8 is solely within your prerogative, but do not at any time
9 include on any communications to this Court what the count
10 is with regard to where y'all stand on reaching a unanimous
11 verdict.

12 Now with that, I am going to send you to the jury
13 room. I'm gonna ask that you not begin your deliberations
14 just yet. The law does require that I give you certain --
15 that I confer with the lawyers over certain matters and if
16 it's necessary for me to bring you back into the courtroom
17 for additional instructions, I will do so. If that is not
18 necessary, then you will be brought the exhibits in this
19 case and the verdict form by the bailiff and they'll will
20 tell you to begin your deliberations.

21 As you know, we have ordered lunch. It will be here
22 in a little while. As soon as it gets here, you can
23 either stop and eat your lunch, Madam Forelady, or y'all
24 can continue to work through lunch, but your lunch will be
25 here. We did this in order to expedite and give the jury

1 an opportunity to have as much time as they needed to
2 deliberate the charges in this case and so when lunch comes
3 you can either stop or you can keep on working and then eat
4 your lunch during the process.

5 I am going to excuse you at this time. Do not begin
6 your deliberations just yet. Wait until you are told to
7 begin your deliberation, but you may go to your jury room
8 with the exception of the two alternates and I'm gonna ask
9 that they stay with me. Thank you.

10 (Whereupon, the jury retires to the jury room at
11 11:39 AM.)

12 **THE COURT:** Additions or exceptions on behalf of the
13 State, Ms. Campbell?

14 **MS. CAMPBELL:** No, sir.

15 **THE COURT:** On behalf of the defense?

16 **MS. ZMROCZEK:** No. I have another issue I'd like
17 to put on the record after -- none with respect to the
18 charges?

19 **THE COURT:** Ma'am?

20 **MS. ZMROCZEK:** I have an issue just to put on the
21 record for my closing, but none due to the charges, Your
22 Honor.

23 **THE COURT:** Please listen to the question,
24 Ms. Zmroczek.

25 **MS. ZMROCZEK:** I have no objection or exception to the

1 charges.

2 **THE COURT:** Okay. Thank you.

3 All right. Mr. Bailiff, here's the verdict form and
4 if y'all would gather up the exhibits and take those to the
5 jury and tell them to begin their deliberations.

6 And I will address this to the two alternates. You
7 have heard all of the evidence in this case, but the law
8 only allows me to have twelve jurors. The purpose of
9 drawing alternates is to substitute an alternate if
10 somebody gets sick or can't serve for some reason, but
11 I'm not permitted to have more than twelve jurors. So
12 even though you've heard all of the testimony in this
13 case, you will not be participating in the decision and
14 I'm going to excuse you from any further participation in
15 this matter.

16 I'll tell you that once you've been excused as a
17 juror, there is nothing illegal about your talking with
18 anybody about your service on this case. There is nothing
19 illegal about anybody talking to you about your service on
20 this case. It is a practice of which I strongly disapprove
21 and I strongly discourage, but it's not illegal. But
22 it's up to you as to whether you wish to discuss it with
23 anybody. However, I would ask that you not discuss this
24 case with anybody until after this jury returns a verdict,
25 and you don't know when that's going to be, so I'll ask

1 that you not discuss it with anybody at least until
2 tomorrow because I suspect that we will have a verdict
3 sometime today, but I would ask that you not discuss it
4 with anyone or allow anyone to discuss it with you until
5 at least tomorrow.

6 I will also tell you that if anybody wants to talk to
7 you about your service on this case and you don't want to
8 discuss it with them and they continue to harass and bother
9 you, you let court personnel know and we will deal with
10 them. It's solely your call as to whether you wish to
11 discuss it with anybody or don't wish to discuss it with
12 anybody.

13 I will also tell you that next week sometime you will
14 receive a small check from the clerk's office. It will
15 in no way pay you or compensate you for the time that
16 you've spent in court this week, but it's a small token
17 of appreciation on behalf of Richland County and the State
18 of South Carolina for your service.

19 Also, if you need a certificate to show that you were
20 serving on a jury to take your to employer, the clerk has
21 those and will give those to you and you can take those to
22 your employer.

23 I hope that you have a better appreciation of the
24 criminal justice system as a result of having served on
25 the jury this week. I know it is never convenient to serve

1 on a jury, but it is important that we have good citizens
2 willing to come forward and serve when they are requested
3 to do so and I do appreciate your being here.

4 Having said that, again, you are free to go. Thank
5 you for your service.

6 (Whereupon, the alternates were dismissed at
7 11:43 AM.)

8 **THE COURT:** All right. Ms. Zmroczek, I'll be glad for
9 you to put on the record whatever you'd like.

10 **MS. ZMROCZEK:** Thank you, Your Honor. I renew my
11 previous objections, but additionally -- throughout the
12 case. And then, additionally, Your Honor, I wanted to put
13 on the record that I felt the objection to a story that I
14 learned in law school after Ms. Campbell discussed a story
15 that she learned in law school was completely improper and
16 was done I guess -- I don't know why, just to throw me off,
17 but --

18 **THE COURT:** Well, what was the legal objection? I
19 mean, that was not something that was in evidence.

20 **MS. ZMROCZEK:** I understand it was a demonstration.

21 **THE COURT:** I overruled -- I sustained the objection
22 based upon the fact that it's not facts in evidence.

23 **MS. ZMROCZEK:** Certainly, Your Honor. I was using
24 that as a demonstrative just as Ms. Campbell had used that
25 as a demonstrative and I --

1 **THE COURT:** There was no objection to her argument.

2 **MS. ZMROCZEK:** Correct.

3 **MS. CAMPBELL:** Your Honor, I'd just put on the record
4 that I believe there's case law that says quoting the Bible
5 or using stories from the Bible is improper.

6 **THE COURT:** All right. Well, they -- your objection
7 is noted and it's on the record.

8 **MS. ZMROCZEK:** Thank you, Your Honor.

9 **THE COURT:** All right. Counsel, we will be at ease
10 until we hear from the jury. Look at all the exhibits and
11 make sure that there's not anything that -- I don't know
12 that there was anything that was marked for ID only that
13 didn't go in, but make sure that there are no -- nothing
14 was marked for ID only or no Court's exhibits go to the
15 jury.

16 And also if we do get into a situation where they
17 want to view some of the video or any of that sort of
18 stuff, we can do it with the computer in the jury room,
19 but we'll wait until we hear from the jury to see if they
20 want that, okay?

21 **MS. CAMPBELL:** Thank you, Your Honor.

22 **THE COURT:** All right. We'll be at ease.

23 (Recess taken.)

24 (Whereupon, the exhibits were inventoried and sent
25 back to the jury at 11:56 AM.)

1 (Recess taken.)

2 (Court's Exhibit Number 7, Jury Note, was marked for
3 identification.)

4 **BAILIFF:** Court come to order, please.

5 **THE COURT:** Thank you. Please be seated. Be seated.
6 Counsel, we have a question from the jury.

7 Back on the record with regard to the State versus
8 Berry. Mr. Berry is not present. Do you waive his
9 presence for purposes of the attention to this question?

10 **MS. ZMROCZEK:** I do.

11 **THE COURT:** Okay. The question is: The jury
12 respectfully requests the transcript, if any, of the
13 telephone recordings, parenthesis, three of them, closed
14 parenthesis, that were admitted into evidence. If the
15 transcript is not available, we request the three
16 recordings be played for us again.

17 I don't believe the transcript was introduced, was it?

18 **MS. WALKER:** No, Your Honor.

19 **THE COURT:** So it's just gonna be the video of the --
20 of the three.

21 Ms. Walker, how do you suggest we handle this?

22 **MS. WALKER:** Your Honor, my suggestion would be that
23 we get -- I think Ms. Zmroczek is in agreement, that we
24 get a clean computer and all that doesn't have anything on
25 it, we take the disc -- the disc should be back there with

1 them, send the computer back there and let them hear it in
2 the jury room.

3 **THE COURT:** Is somebody gonna need to play it for them
4 or can they --

5 **MS. WALKER:** Your Honor, I mean, they can --

6 **THE COURT:** Is there anything on that disc other than
7 this?

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

9 **THE COURT:** So there's no danger of anything --

10 **MS. ZMROCZEK:** No, I think the disc is --

11 **MS. WALKER:** The disc is in evidence and should be
12 back there.

13 **MS. ZMROCZEK:** And then the computer -- we've had this
14 issue before, so we -- they have clean computer.

15 **MS. WALKER:** We have a clean computer.

16 **THE COURT:** So it's agreeable to y'all to send the
17 computer back and see if there's somebody computer literate
18 enough to run it themselves?

19 **MS. WALKER:** Yes, sir. Really it's just a push play
20 and they'll be good to go.

21 **MS. ZMROCZEK:** Yeah.

22 **THE COURT:** Okay. Let's see what we got here.

23 All right. We have another question that I'll have
24 marked as a Court's exhibit. This will be Court's Exhibit
25 Number 8.

1 (Court's Exhibit Number 8, Jury Note, was marked for
2 identification.)

3 **THE COURT:** The jury respectfully requests the
4 statutory definition of the following crimes: Attempted
5 murder and assault and battery of a high and aggravated
6 nature.

7 All right. I can do that without any problem. I do
8 note that lunch has just come. What I would propose to
9 do, Counsel, if it's agreeable with you is just bring the
10 forelady in and tell her what we're gonna do with the
11 recording and let them have the computer and play it
12 themselves and then I can bring them all back in and do
13 this. Or do they want to eat lunch first or do they want
14 to come back in and let me give them the definition and
15 then -- you know, whatever their preference is.

16 **MS. WALKER:** We don't object to either of those, Your
17 Honor. As long as it's agreeable, I don't mind if you send
18 the definitions back there.

19 **MS. ZMROCZEK:** We would ask that you just read it.
20 Unless we send all of the definitions back.

21 **THE COURT:** I'll do what they've asked for and they
22 just said -- I think that it would be appropriate that I
23 just give them the same charge that I gave before.

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

25 **THE COURT:** Ask the forelady -- where's my bailiff?

1 **THE DEPUTY:** I'll go check, sir.

2 **BAILIFF:** Here I am.

3 **THE COURT:** Just ask the forelady to come out here
4 for just a minute. I want to ask her a question or two
5 and then decide which way we want to proceed.

6 **BAILIFF:** Yes, sir.

7 (Whereupon, the foreperson of the jury enters the
8 courtroom at 12:18 PM.)

9 **THE COURT:** You can stand right there for just a
10 minute. I just want to ask you a question. We have both
11 of your notes. First of all, with regard to the first
12 note, there is no transcript available of the recordings,
13 but the disc is in evidence and can be played. We propose
14 to send a computer back to the jury room and let y'all play
15 the disc and look at it right there in the jury room. I
16 think somebody can probably play that disc and the disc is
17 in evidence and you can play that in the jury room.

18 **THE FOREPERSON:** Okay. That's fine.

19 **THE COURT:** So we'll handle that that way. The second
20 question we had was for additional legal definitions by me
21 and I'll have to bring all the jurors back in the courtroom
22 for that purpose. I can either do it now or allow you to
23 go ahead and eat lunch and then come in or whichever --

24 **THE FOREPERSON:** I don't think we have the lunch yet,
25 so what we --

1 **BAILIFF:** It's here.

2 **THE FOREPERSON:** Can I clarify what we're asking?

3 **THE COURT:** No, I need -- let me read the note and
4 see. Here's what it says. The jury respectfully requests
5 the transcript, if any, of the telephone recordings. We've
6 addressed that one.

7 The jury respectfully requests the statutory
8 definitions of the following crimes: Attempted murder and
9 assault and battery of a high and aggravated nature. And I
10 can give you those definitions, the legal definitions. Is
11 that what you need?

12 **THE FOREPERSON:** Yes, sir.

13 **THE COURT:** Okay. Well, I can -- that will be just
14 that portion of the charge. That's all I'll be able to
15 do. Now do you want to do that before you get into your
16 sandwiches or do you want to go ahead and eat?

17 **THE FOREPERSON:** No, let's go ahead and do it.

18 **THE COURT:** Go ahead and do it?

19 **THE FOREPERSON:** Yes, sir.

20 **THE COURT:** All right. If you will return to the jury
21 room and -- Mr. Bailiff, will you bring all the jurors back
22 and -- maybe we ought to have the Defendant here for that.

23 **MS. ZMROCZEK:** Right, Your Honor. I don't think I can
24 -- here's the bailiff.

25 **THE COURT:** Okay. Tell the bailiff to hold off just

1 a moment until we get the Defendant in the courtroom. We
2 probably need the Defendant in here for this.

3 **MS. ZMROCZEK:** Yes. Thank you, Your Honor.

4 **THE COURT:** Do you have a computer available to take
5 to the jury room?

6 **MS. WALKER:** Your Honor, I think she's getting it now.
7 Our paralegal is going to get that.

8 **MS. CAMPBELL:** It's the one we always use that's
9 clean.

10 **MS. ZMROCZEK:** Yes.

11 (Whereupon, the Defendant enters the courtroom at
12 12:24 PM.)

13 **THE COURT:** Come have a seat, Mr. Berry.

14 All right. We're back on the record with regard to
15 the matter of the State versus Berry. Mr. Berry is present
16 in the courtroom. Mr. Berry?

17 **THE DEFENDANT:** Yes, sir.

18 **THE COURT:** Wait just a minute. We have two
19 notes from the jury. The first one is that the jury
20 respectfully requests the transcript, if any, of the
21 telephone recordings, three of them, that were admitted
22 into evidence. If the transcript is not available, we
23 request that the three recordings be played for us again.
24 Signed by the forelady. And I've marked this as a Court's
25 exhibit.

1 We've conferred with counsel and your counsel as well.
2 There is no transcript of the telephone recordings, only
3 the video, and the parties have agreed to allow a computer
4 to go into the jury room for the purpose of playing the
5 recording, the video recording, which was introduced into
6 evidence, so that's the way that's going to be handled. Do
7 you understand that?

8 **THE DEFENDANT:** Yes, sir.

9 **THE COURT:** And the other question is the jury
10 respectfully requests the statutory definitions of the
11 following crimes: Attempted murder and assault and battery
12 of a high and aggravated nature. And I'm gonna bring the
13 jury back in and we'll instruct them on those charges
14 again.

15 **THE DEFENDANT:** Yes, sir.

16 **THE COURT:** All right. Bring the jury back in.

17 (Whereupon, the jury returns to the courtroom at
18 12:26 PM.)

19 **BAILIFF:** Jurors seated, Your Honor.

20 **THE COURT:** All right. Thank you. Sorry to interrupt
21 your lunch, ladies and gentlemen, but we felt like it
22 better to address these questions that you had before you
23 ate lunch and so we're going to do that. The way we're
24 going to handle the first question with regard to the
25 video -- the telephone conversations is to tell you that

1 there is no transcript of those telephone conversations,
2 but we're going to allow you to have a computer in the jury
3 room where you can play that disc, which is in evidence,
4 and you will be able to play that back in its entirety or
5 any part of it that you want to hear.

6 The second question dealt with a definitions of
7 attempted murder and assault and battery of a high and
8 aggravated nature, and in that connection I'll redefine
9 and give you the law on those two offenses.

10 Section 16-3-29 of the Code of Laws of South Carolina
11 provides that a person who, with intent to kill, attempts
12 to kill another person with malice aforethought, either
13 express or implied, commits the offense of attempted
14 murder. The Defendant in this case is charged with
15 attempted murder. Murder is the killing of another person
16 with malice aforethought. Malice is hatred, ill will, or
17 hostility toward another person. It is the intentional
18 doing of a wrongful act without just cause or excuse and
19 with the intent to inflict an injury or under circumstances
20 that the law will infer an evil intent.

21 Malice aforethought does not require that malice exist
22 at any particular time before the act is committed, but
23 malice must exist in the mind of the Defendant just before
24 and at the time of the act. Therefore, there must be a
25 combination of the previous evil intent and the act.

1 Malice aforethought may be express or inferred. These
2 terms "express" and "inferred" do not mean different kinds
3 of malice, but merely the manner in which malice may be
4 shown to exist; that is either by direct evidence or by
5 inference from the facts and circumstances that are proved.

6 Express malice is shown when a person speaks words
7 which express hatred or ill will toward another, or if a
8 person prepared beforehand to do the act which was later
9 accomplished. For example, lying in wait for a person or
10 any other acts of preparation going to show that the deed
11 was within the Defendant's mind would be express malice.
12 Malice may be inferred from conduct showing a total
13 disregard for human life.

14 The law also says that if one intentionally kills
15 another with a deadly weapon the implication of malice
16 may arise. If facts are proven beyond a reasonable doubt
17 sufficient to raise an inference of malice to your
18 satisfaction, this inference will be simply an evidentiary
19 fact to be taken into consideration by you, the jury,
20 along with other evidence in this case, and you may give
21 it such weight as you determine it should receive.

22 An attempt is an effort to accomplish a crime which
23 does not succeed. An attempt includes a specific intent
24 to do a particular criminal act along with an act falling
25 short of the act intended. The State must show more than

1 mere preparation and intent. There must be some overt
2 act committed in an effort to commit the crime. Intent
3 means intending the result which actually occurred, not
4 accidentally or involuntary. Intent may be shown by acts
5 and conduct of the Defendant and other circumstances from
6 which you may naturally and reasonably infer intent. To
7 prove attempted murder, the State must prove beyond a
8 reasonable doubt that the Defendant attempted to kill
9 another person without -- with malice aforethought.

10 Now the other lesser included offense is assault and
11 battery of a high and aggravated nature, for which you
12 asked a definition, and I will give you the statutory
13 definition on that as well.

14 South Carolina Code provides that a person commits the
15 offense of assault and battery of a high and aggravated
16 nature if the person unlawfully injures another person and,
17 A, great bodily injury to another person results, or, the
18 act is accomplished by means likely to produce death or
19 great bodily injury. And, as I said, assault and battery
20 is -- of a high and aggravated nature is a lesser included
21 offense of murder as defined earlier. To prove assault and
22 battery of a high and aggravated nature, the State must
23 first prove beyond a reasonable doubt that the Defendant
24 unlawfully injured or attempted to injure another person.
25 Next, the State must prove beyond a reasonable doubt that

1 either great bodily injury resulted or that the act was
2 accomplished by means likely to produce death or great
3 bodily injury. Great bodily injury is defined as bodily
4 injury which causes a substantial risk of death or which
5 causes serious permanent disfigurement or protracted loss
6 or impairment of a function of a bodily member or organ.

7 Those are the legal definitions. I can't really add
8 anything to that to make it any clearer, but that's the
9 exact definitions of attempted murder and assault and
10 battery of a high and aggravated nature. And having given
11 you that, I'll ask that you return to your jury room, enjoy
12 your lunch, and continue your deliberations.

13 (Whereupon, the jury retires to the jury room at
14 12:33 PM.)

15 **THE COURT:** Any exceptions or objections on behalf of
16 the State?

17 **MS. CAMPBELL:** No, sir.

18 **THE COURT:** On behalf of the Defendant?

19 **MS. ZMROCZEK:** None, Your Honor.

20 **THE COURT:** All right. We'll be at ease until we hear
21 back from the jury.

22 **MS. WALKER:** Your Honor, Ms. Allen has the computer in
23 the back and we'll hand it to the bailiff as soon as she
24 gets it turned on.

25 **THE COURT:** Yeah, just give it to the bailiff when she

1 gets it turned on and gets it set up so all they've got to
2 do is put the disc in. Give it to the bailiff and he'll
3 give it to the jury.

4 **MS. WALKER:** Okay. Thank you, Your Honor.

5 (Whereupon, a computer was sent back to the jury room
6 at 12:34 PM.)

7 (Recess taken.)

8 **BAILIFF:** Court come to order. Remain seated.

9 **THE COURT:** Ms. Zmroczek, do you want the Defendant
10 in?

11 **MS. ZMROCZEK:** No, I waive his presence, Your Honor.

12 **THE COURT:** Okay. Back on the record with regard to
13 the State versus Berry. Mr. Berry is not present, but his
14 counsel waives his presence. We have another note from
15 the jury. The jury respectfully requests the statutory
16 definition of attempted murder. May we please get a
17 written copy of the law or, if not, will you show us the
18 printed copy of the statutory definition that the assistant
19 solicitor used in her closing argument.

20 A document has been put on my desk. It's Section
21 16-3-29, attempted murder, and says -- gives the definition
22 -- statutory definition, and I guess both sides have looked
23 at this and are agreeable to sending it to the jury?

24 **MS. CAMPBELL:** Yes.

25 **MS. ZMROCZEK:** Yes, Your Honor.

1 **THE COURT:** I don't think it's necessary to bring them
2 in for that purpose. I'm going to mark it as Exhibit --
3 the question as Exhibit Number --

4 **THE COURT REPORTER:** Nine. It will be nine.

5 **THE COURT:** -- Court's Number 9, and just ask the
6 bailiff to give this definition to them -- to the forelady.
7 Any problem with that? All right. Just tell them here is
8 the response to their question.

9 All right. Thank you. We'll be at ease.

10 **MS. CAMPBELL:** Thank you, Judge.

11 **MS. ZMROCZEK:** Thank you.

12 (Court's Exhibit Number 9, Jury Note, was marked for
13 identification.)

14 (Recess taken.)

15 **BAILIFF:** Court come to order. All rise.

16 **THE COURT:** Thank you. Please be seated.

17 All right. We're back on the record with regard to
18 the matter of the State versus Berry. Mr. Berry is present
19 with his counsel. The State is present and represented by
20 the Fifth Circuit Solicitor's Office.

21 Let me first say to all the spectators here that
22 obviously this is an important matter for all of the people
23 concerned. I don't know what the verdict is, nobody at
24 this point does, but I'm gonna have to require that order
25 and decorum in the courtroom be maintained when the verdict

1 is published. So if there's anybody present who thinks
2 that they cannot sit quietly without any kind of show of
3 emotion, clapping or anything else, when the verdict is
4 published, I would ask that you leave now.

5 All right. Anything before we bring the jury in,
6 Ms. Campbell?

7 **MS. CAMPBELL:** No, sir.

8 **MS. ZMROCZEK:** No.

9 **THE COURT:** All right. Bring the jury in, please.

10 (Whereupon, the jury returns to the courtroom to
11 report their verdict at 2:46 PM.)

12 **BAILIFF:** The jurors are seated, Your Honor.

13 **THE COURT:** Thank you, sir.

14 Madam Forelady, I understand that you've reached a
15 verdict; is that correct?

16 **THE FOREPERSON:** Yes, sir, we have.

17 **THE COURT:** Will you past it up, please, to the clerk.

18 **BAILIFF:** (Hanging.)

19 **THE COURT:** All right. From the standpoint of the
20 form, the verdict appears to be correct from a form
21 standpoint. Ms. Zmroczek, will you and your client stand,
22 please.

23 Madam Clerk, you may publish the verdict.

24 **THE CLERK:** Yes, sir, Your Honor.

25 State of South Carolina, County of Richland, in

1 the Court of General Sessions, Indictment Number
2 2015-GS-40-00020, Indictment Number 2015-GS-40-05062,
3 Indictment Number 2015-GS-40-00015, Indictment Number
4 2015-GS-40-00017, and Indictment Number 2015-GS-40-00018,
5 the State of South Carolina versus Brandon Joseph Berry.
6 We, the jury, by unanimous agreement find the Defendant,
7 Brandon Joseph Berry, on Indictment Number 2015-GS-40-00020
8 for attempted murder, guilty. On Indictment Number
9 2015-GS-40-05062 for attempted armed robbery, guilty. On
10 Indictment Number 2015-GS-40-00015 for unlawful carrying of
11 a pistol, guilty. On Indictment Number 2015-GS-40-00017
12 for unlawful conduct towards a child, guilty. On
13 Indictment Number 2015-GS-40-00018 for resisting arrest,
14 guilty. Signed Number 168, Lewis, Foreperson,
15 December 4, 2015.

16 Madam Forelady, were these your verdicts and the
17 verdicts of the entire jury?

18 **THE FOREPERSON:** Yes, they are.

19 **THE CLERK:** Thank you.

20 **THE COURT:** You may be seated. Anything before the
21 jury is excused, Ms. Zmroczek?

22 **MS. ZMROCZEK:** We would ask to poll the jury.

23 **THE COURT:** All right. Poll the jury, please, ma'am.

24 **THE CLERK:** Yes, Your Honor.

25 Ladies and gentlemen of the jury, I'm gonna ask you

1 two questions related to your verdict. Please answer yes
2 or no to both questions.

3 Number 168, [REDACTED], were these your verdicts?

4 JUROR: Yes.

5 THE CLERK: Are they still your verdicts?

6 JUROR: Yes.

7 THE CLERK: Number 296, [REDACTED] Wiggins, were these
8 your verdicts?

9 JUROR: Yes.

10 THE CLERK: Are they still your verdicts?

11 JUROR: Yes.

12 THE CLERK: Number 26, [REDACTED] Brady, were these your
13 verdicts?

14 JUROR: Yes.

15 THE CLERK: Are they still your verdicts?

16 JUROR: Yes.

17 THE CLERK: Number 182, [REDACTED] Malseed, were these
18 your verdicts?

19 JUROR: Yes.

20 THE CLERK: Are they still your verdicts?

21 JUROR: Yes.

22 THE CLERK: Number 57, [REDACTED] Cooper, were these your
23 verdicts?

24 JUROR: Yes.

25 THE CLERK: Are they still your verdicts?

1 JUROR: Yes.

2 THE CLERK: Number 231, [REDACTED] Randall, were these
3 your verdicts?

4 JUROR: Yes.

5 THE CLERK: Are they still your verdicts?

6 JUROR: Yes.

7 THE COURT: Number 54, [REDACTED] Connaker, were these
8 your verdicts?

9 JUROR: Yes.

10 THE CLERK: Are they still your verdicts?

11 JUROR: Yes.

12 THE CLERK: Number 315, [REDACTED] Phipps, were these
13 your verdicts?

14 JUROR: Yes.

15 THE CLERK: Are they still your verdicts?

16 JUROR: Yes.

17 THE CLERK: Number 17, [REDACTED] Beaty, were these
18 yours verdicts?

19 JUROR: Yes.

20 THE CLERK: Are they still your verdicts?

21 JUROR: Yes.

22 THE CLERK: Number 95, [REDACTED] Gantt, were these your
23 verdicts?

24 JUROR: Yes.

25 THE CLERK: Are they still your verdicts?

1 **JUROR:** Yes.

2 **THE CLERK:** Number 37, [REDACTED] Buchanan, were these
3 your verdicts?

4 **JUROR:** Yes.

5 **THE CLERK:** Are they still your verdicts?

6 **JUROR:** Yes.

7 **THE CLERK:** Number 150, [REDACTED] Jones-Robinson, were
8 these your verdicts?

9 **JUROR:** Yes.

10 **THE CLERK:** Are they still your verdicts?

11 **JUROR:** Yes.

12 **THE CLERK:** The jury has been polled, Your Honor.

13 **THE COURT:** All right. Thank you.

14 Anything else, Ms. Zmroczek, before the jury is
15 excused?

16 **MS. ZMROCZEK:** No, Your Honor.

17 **THE COURT:** All right. Ladies and gentlemen, this
18 will conclude your services in connection with this case
19 and I'm going to excuse you in just a few minutes. I
20 want to tell you that in my view the jury's role in the
21 factfinding process is so important that the trial judge
22 cannot comment on the verdict of a jury even after the jury
23 has returned a verdict, and I make it a practice to never
24 comment on the verdict of the jury. I will tell you that
25 there was evidence in the record by which you could reach

1 the decision that you did.

2 This will excuse your service -- this will complete
3 your service on this case and I'm going to excuse you
4 from any further service on this case and for any further
5 service this week, even though it is Friday afternoon.
6 This will conclude your jury service for this week.

7 There's several things that I want to tell you.
8 First of all, by serving on the jury this week, you have
9 met your citizenship responsibilities for jury service in
10 the Circuit Court of South Carolina, that's either the
11 Court of Common Pleas, which is the civil side of this
12 court, or the Court of General Sessions, for the next three
13 years. If you were to get a summons from the clerk in the
14 next year, we couldn't take you even if you wanted to serve
15 because you would be disqualified. In the second and third
16 years, you have an exemption and you could serve if you
17 wanted to, but you could be excused, but you cannot be
18 required to serve as a juror in the Circuit Court more than
19 once every three years.

20 And I can't help you with Federal court or
21 Magistrate's court. If you get a summons for one of
22 those courts, you'll just have to take that up with the
23 court, but as far as the Circuit Court is concerned,
24 you've met your citizenship responsibilities for the next
25 three years.

1 I will also tell you that next week sometime you will
2 get a small check from the County.

3 **THE CLERK:** I have their checks.

4 **THE COURT:** She's already get the checks written, so
5 right in time for Christmas. I don't think it's going to
6 be any problem, but don't spend it all in one place. It
7 is only a small token of appreciation from the County for
8 your services this week and it will in no way compensate
9 you for the time that you spent up here this week, but
10 it's a small token of appreciation on behalf of the County.

11 I will also tell you that once you have been
12 discharged there is nothing illegal about your talking with
13 anybody about your service on this case. You can talk to
14 anybody or not talk to anybody and anybody can talk to you
15 or not talk to you, but it's your call. If you don't want
16 to talk about it and they continue to bother or harass you
17 about it, you let the court personnel know and we'll deal
18 with them, but it is -- it's your call as to whether you
19 do want to discuss it with anybody or you don't want to
20 discuss, but it's not illegal. It's a practice for which
21 I strongly -- the contact with the jurors is a practice
22 which I strongly discourage and I strongly disapprove, but
23 it's not illegal. But if anybody wants to talk to you
24 about it and they harass you about it, you let us know and
25 we will deal with them, but it's your call.

1 Also the clerk has a certificate that you can take to
2 your employer to show that you were serving on the jury
3 this week. I hope that you have found your jury service
4 interesting and informative. I know that it is never
5 convenient to serve on a jury, but it is important that we
6 have good citizens who are willing to come forward and
7 serve when they are summoned to do so. Although I know you
8 didn't have much choice about being here, it is important
9 that we have good citizens willing to serve. And the
10 citizenship participation in the judicial process is one
11 of the things that makes our system the best in the world.
12 It's not without its flaws, but it's still the best in the
13 world and so devised by man and it is because we have this
14 citizen participation in the judicial system.

15 The only thing remaining to be done is for the
16 imposition of sentencing. We're going into the sentencing
17 phase of this case in just a few minutes. I know that
18 sometimes -- and many times jurors are anxious to know
19 what the final outcome is and what the sentence that the
20 Defendant is going to receive as a result of their verdict.
21 What I'm going to do is allow you to go out this way. If
22 you would like to stay for the sentencing phase, if you
23 would go around the way that you come in and come in the
24 back of the courtroom and just have a seat right there in
25 the back of the courtroom. You're welcome to stay for the

1 sentencing phase and then I will dismiss you before anyone
2 else will be released from the courtroom and the courthouse
3 so you can get out of the building without running into any
4 of the participants of the trial.

5 So if you'd like to stay, you're welcome to, but you
6 don't have to. Once I excuse you, you can go on and go
7 home, but if you'd like to just come on around and have a
8 seat in the back of the courtroom as we go into the
9 sentencing phase.

10 With that, I will make one final comment. I hope
11 that you have found not only your service interesting --
12 I think you probably have found that it's a great deal
13 different than television, and I have always said that it
14 never ceases to amaze me that on television they can have a
15 crime committed, an investigation, a trial and sentencing
16 and all in sixty minutes less commercials. It doesn't work
17 that way in real life. So I hope you have a better
18 appreciation of our criminal justice system as a result of
19 having served this week.

20 Thank you. You are free to go. Have a pleasant
21 holiday.

22 (Whereupon, the jury is excused at 2:55 PM.)

23 **THE COURT:** Motions on behalf of the Defendant,
24 Ms. Zmroczek?

25 **MS. ZMROCZEK:** Yes, Your Honor. At this time I would

1 renew all of my previous motions, as well as make a motion
2 to set aside the verdict based on -- well, set aside the
3 verdict on the two, attempted murder and attempted armed
4 robbery, Your Honor, just for the previous reasons that I
5 had set forth.

6 **THE COURT:** I'm sorry?

7 **MS. ZMROCZEK:** For the previous reasons that I had
8 argued before.

9 **THE COURT:** All right. Your motion is that you want
10 to renew your previous motions and also judgment not --
11 judgment in arrest of verdict for the same reasons; is that
12 right?

13 **MS. ZMROCZEK:** Correct, Your Honor. And to be more
14 specific, Your Honor, on the reasons for the attempted
15 murder and the attempted armed robbery, my objections would
16 be -- the reason that I would ask that be set aside is
17 because the jury specifically asked to listen to the three
18 phone calls and one of the phone calls was between the
19 co-defendant in one of the charges and I just -- as I told
20 the Court prior, I just had issues with that coming in.
21 And I understand the Court's ruling. I just simply wanted
22 to put that on the record.

23 **THE COURT:** Okay. That was one of the things they
24 asked for, but they also asked for further definition of
25 attempted murder and I felt like based on the questions

1 that were asked, whether the jury -- what the jury was
2 deliberating really and whether they were having a problem
3 with the overall case, was making their decision between
4 the attempted murder and the attempted armed robbery and
5 once they resolved that in their minds, they returned a
6 verdict of guilty on all charges, and I would respectfully
7 deny the motions for the same reasons that have been
8 previously put on the record. I believe there was evidence
9 by which the jury could reach all of the decisions they
10 have reached on all of these five cases, and so the motion
11 for a new trial or judgment in arrest of verdict is denied.

12 All right. Prior record.

13 **MS. WALKER:** Thank you, Your Honor. The Defendant's
14 prior record goes back to 2009 in South Carolina. He has a
15 receiving stolen goods in 2009. In 2010, he was convicted
16 of assault and battery in the third degree, possession of
17 marijuana and miscellaneous criminal offenses. In 2011, he
18 was convicted of two counts of burglary, Your Honor. He
19 received probation for that. Probation was violated,
20 Your Honor, when he was convicted of unlawful carrying of a
21 weapon.

22 **THE COURT:** What happened on the probation violation?
23 Was some time revoked? Do you have -- does it show that?

24 **MS. WALKER:** Yes, sir. It looks like he got one year
25 revocation on each of them.

1 **THE COURT:** All right. So he had -- in 2011, he had a
2 conviction for two counts of burglary?

3 **MS. WALKER:** Yes, Your Honor. He was convicted of two
4 counts of burglary. That probation was revoked.

5 **THE COURT:** What was his sentence?

6 **MS. WALKER:** Your Honor, his sentence at that point --
7 it was five years suspended to probation for two years.

8 **THE COURT:** All right. And one year was revoked?

9 **MS. WALKER:** Yes, Your Honor.

10 **THE COURT:** And I assume terminated. You don't know
11 that?

12 **MS. WALKER:** I don't -- I don't have that on here,
13 Your Honor.

14 **MS. ZMROCZEK:** That's correct. It was terminated.

15 **THE COURT:** One year revoked and probation terminated.
16 All right. Go ahead.

17 **MS. WALKER:** And then going to North Carolina, Your
18 Honor, he was found guilty of a misdemeanor larceny, four
19 counts -- five counts of misdemeanor larceny in North
20 Carolina.

21 **THE COURT:** When was that?

22 **MS. WALKER:** Your Honor, that was in 2008.

23 **THE COURT:** All right.

24 **MS. WALKER:** Your Honor, Mr. Steadman went outside.
25 He will be back to talk about the Defendant's gang

1 affiliation, which we didn't get into.

2 **THE COURT:** I'm sorry, the Defendant's what?

3 **MS. WALKER:** Gang affiliation, which we did not get
4 into during the course of this trial. He is a documented
5 Blood, Your Honor, by the Richland County Sheriff's
6 Department and -- I'm sorry, by the Columbia Police
7 Department.

8 **THE COURT:** Pardon?

9 **MS. WALKER:** He's a documented member of the Blood
10 street gang by the Columbia Police Department.

11 **THE COURT:** Okay.

12 **MS. WALKER:** Also, I think, Your Honor, at the
13 appropriate time the victim's mother would like to address
14 the Court and then I'll finish up.

15 **THE COURT:** All right. Let me see if I summarize
16 this thing correctly right now to make sure. The earliest
17 criminal record that you have on him is 2009?

18 **MS. WALKER:** Yes, Your Honor.

19 **THE COURT:** And that was for receiving stolen goods?

20 **MS. WALKER:** Yes, Your Honor.

21 **THE COURT:** And then in 2010 assault and battery
22 third?

23 **MS. WALKER:** Yes. Yes, Your Honor.

24 **THE COURT:** And in 2011, burglary two counts, for
25 which he was given probation and that was -- he was unable

1 to keep his probation and one year was revoked and he was
2 terminated?

3 **MS. WALKER:** Yes, Your Honor.

4 **THE COURT:** And then he has a North Carolina record of
5 some larcenies up there?

6 **MS. WALKER:** Yes.

7 **THE COURT:** All right.

8 **MR. WALKER:** And there's also an additional pending
9 burglary in our office.

10 **THE COURT:** Okay. All right. Ms. Zmroczek, has the
11 solicitor correctly recited the Defendant's criminal
12 record?

13 **MS. ZMROCZEK:** Yes, they have, Your Honor.

14 **THE COURT:** All right. And we'll come to the gang
15 situation in just a minute, Ms. Walker, but let me address
16 the victim in this case or the victim's family. You, of
17 course, have the right to be present during the entire
18 trial, and you have been here, and you've kept advised of
19 everything that's been going on with the -- by the
20 solicitor's office and I'm sure the solicitor's office has
21 kept you advised. You also have the right to address the
22 Court at this time. So if there's anything that you would
23 like to tell me, if you will give me your -- give the court
24 reporter your name and your affiliation with the victim in
25 this case, and I'll be glad to hear from you.

1 **MRS. KEITH:** Janice Keith, and I'm the mother of
2 Michael Keith. Your Honor, I just want to thank you, and
3 the jury, for what they've done. But, Your Honor, I taught
4 my child from a young age, if he wanted something, you
5 work for it. And I also told him if he ever went downtown
6 for a crime and it's not self-defense, he will stay there.
7 This young man, Mr. Berry, I'm going -- I forgive you and
8 I pray that whenever you do get out that you will change
9 your life because, if not, you can't continue to live like
10 this. And I pray that the laws will change with all the
11 shooting. It just -- it needs some changes and I just pray
12 to God that I was able to come to the court for him being
13 shot and not going to the graveyard to visit my child every
14 day and I just thank you again and that's all I'm saying.

15 **THE COURT:** All right. Thank you for being here.
16 Mr. Keith, is there anything you'd like to say?

17 **MR. KEITH:** No, I'm good, Your Honor. Thank you.

18 **THE COURT:** Okay.

19 All right. What else, Ms. Campbell?

20 **MS. CAMPBELL:** Your Honor, we're getting the
21 documentation. He is a documented Blood gang member.
22 Actually, the tattoo on his neck is inscribed with the
23 South Carolina code for that. We do have -- I don't know
24 if you want to see the documentation. I don't think they
25 dispute that. It's in the rap sheet. He's documented and

1 was at the time this occurred.

2 **THE COURT:** All right. Unless you dispute that or
3 want to refute it in any way, I don't need to see the
4 documentation.

5 **MS. ZMROCZEK:** No, we don't dispute it.

6 **THE COURT:** All right.

7 **MS. CAMPBELL:** Your Honor, we would on behalf of the
8 citizens of Richland County just ask for a very substantial
9 sentence. We're just lucky today we weren't here on a
10 murder charge. We do feel like that his actions that
11 night, lying in wait, going there for the purpose of
12 robbing him and then when the victim was not cooperative
13 basically shooting at him at least once, shooting him the
14 second time, and then but for the actions of his girlfriend
15 putting the gun to his head and shooting him a third time,
16 I don't know that it gets much more serious than this.

17 **THE COURT:** All right. Thank you. Let's make sure
18 we're on the same page in connection with this, and I
19 think that we are, but I just want to confirm this. The
20 attempted murder, I believe, carries up to thirty years,
21 zero to thirty. The attempted armed robbery carries zero
22 to twenty. The unlawful pistol, one year or a thousand
23 dollars. Unlawful conduct toward a child, zero to ten and
24 a fine in my discretion. And the resisting arrest, one
25 year and a fine between five hundred and one thousand. Is

1 that correct?

2 **MS. CAMPBELL:** That's correct.

3 **MS. ZMROCZEK:** That's correct, Your Honor.

4 **THE COURT:** All right. Anything else on behalf of the
5 State at this time, Ms. Campbell? Or Ms. Walker?

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

7 **THE COURT:** All right. Yes, ma'am.

8 **MS. ZMROCZEK:** Thank you, Your Honor. Mr. Berry is
9 twenty-four years old and he did graduate high school. He
10 has two children as you've heard with two different women.
11 Your Honor, he -- I did tell his friends not to come to
12 court, but he does not have any family support. He's never
13 met his father. It's not an excuse for his behavior. In
14 fact, I think during the jail calls when they were being
15 played he finally had a little bit of a reality check
16 about how -- he's much smarter than what he appears, Your
17 Honor. I know that several people are -- their initial
18 offer in this case was thirty years and then we had some
19 negotiations between fifteen and twenty, which Your Honor
20 is aware that he rejected. And I know that Your Honor is
21 not a fan of trial tax. I would ask that -- that you give
22 some sort of sentence that would run these cases concurrent
23 instead of consecutive. I think he's facing a substantial
24 amount of time and -- and for those reasons, Your Honor, we
25 would just ask that you give him a serious, but consecutive

1 -- or concurrent, not consecutive, sentence.

2 **THE COURT:** All right. Is there anything he'd like to
3 say?

4 **MS. ZMROCZEK:** Your Honor, at this time he requests
5 not to speak.

6 And, I'm sorry, I know you're writing, but, Your
7 Honor, and I'm pretty sure that they do this automatically,
8 but we would ask that he receive credit for the time that
9 he's been in jail.

10 **THE COURT:** Oh, yes.

11 When I got this job about eighteen years ago, I was
12 told by my colleagues that the most difficult thing we
13 would have to do would be criminal sentencing. And I'm
14 more firmly convinced of that fact now than I was
15 eighteen years ago when I first went on the bench. It is
16 the most difficult thing we have to do. It is something
17 that I've never gotten comfortable with and I hope that I
18 never get comfortable with it because I think if you get
19 comfortable with it, it means you don't care.

20 We judges have no -- first of all, we can't see the
21 future. We only make a decision on the case that is before
22 us and the individual that is before us based upon our
23 experience and the law and the needs of the society and the
24 community.

25 Mr. Berry, you're a mighty young man, twenty-four

1 years old, to be in the kind of trouble that you're in. I
2 could give you sixty-two years in prison for all of these
3 crimes if I ran them all consecutive. That means that you
4 would die in prison. But I'm going to give a sentence that
5 will enable you to one day get out of prison. I hope that
6 you will learn something while you're there, but you are
7 definitely going to prison and you're going to go there for
8 a long time. I'm most concerned about this situation with
9 gang affiliation and I hope this sentence will send some
10 message to your fellow gang members out there that if
11 they're going to commit these kind of crimes, they're going
12 to end up in the South Carolina Department of Corrections.

13 Starting with the less serious offenses, the two
14 weapons charges, not -- the weapons charge, that is
15 Indictment 2015-015, it carries a maximum of one year. The
16 sentence of the Court is the Defendant is sentenced to the
17 State Department of Corrections for one year, given credit
18 for time served, and it is concurrent with all charges.

19 The same thing with the resisting arrest, carrying a
20 maximum of one year. The sentence of the Court is the
21 Defendant's committed to the State Department of
22 Corrections for a term of one year to run concurrent with
23 all charges.

24 I'm going to come back to the neglect of the child
25 situation because I'm doing this consciously and I know

1 what I'm doing when I do it.

2 The sentence of the Court on the attempted murder and
3 the attempted armed robbery, the Defendant is committed to
4 the State Department of Corrections for a determinat term
5 of twenty years, concurrent with each other.

6 However, on the unlawful neglect of a child, the
7 sentence of the Court is that the Defendant is committed
8 to the State Department of Corrections for five years
9 consecutive to the armed robbery and attempted murder
10 charges. And, of course, the reason for that is it pretty
11 much means he'll do all of that twenty years before he
12 starts serving the five years on the other charge and
13 that's the reason for setting it up that way.

14 So the twenty years on the -- on the armed robbery and
15 the resisting -- or the armed robbery and the attempted
16 murder, five years after that on the neglect or unlawful
17 conduct toward a child, with the other charges all running
18 concurrent.

19 **MS. CAMPBELL:** Thank you, Your Honor.

20 **MS. ZMROCZEK:** Thank you, Your Honor.

21 **MS. WALKER:** Thank you, Your Honor.

22 **THE COURT:** All right. Everyone else keep your seats,
23 please. Jurors, you are welcome to leave and we'll give
24 you an opportunity to leave before anyone else is excused.

25 Let's wait just a moment to see if the -- give the

1 jurors a chance to get out of the building before we
2 adjourn.

3 **THE COURT:** All right. Ms. Campbell, is there any
4 further business to come before the Court this term?

5 **MS. CAMPBELL:** No, sir.

6 **THE COURT:** All right. We're adjourned. Sine die.

7 **MS. CAMPBELL:** Thank you, Judge.

8 **MS. ZMROCZEK:** Thank you, Your Honor.

9 (Whereupon, the proceedings were concluded at
10 3:20 PM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned case in the Circuit Court of General Sessions held November 30th through December 4th, 2015.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

April 12, 2016

Stacy S. Johnson
STACY S. JOHNSON, RPR
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Richland

VS.

Brandon Joseph Berry

AKA:

Race: BLACK Sex: M Age: 24

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Columbia, SC 29209-5037

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Weapons / Unlawful carrying of pistol

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2015GS4000015

A/W#: 2014A4010202677

Date of Offense: 7/29/2014

S.C. Code § : 16-23-0020

CDR Code #: 0044

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-23-0020 of the S.C. Code of Laws, bearing CDR Code # 0044

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Campbell, Luck

13009
SC Bar#

Defendant

Attorney for Defendant

77193
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 1 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: all charges
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ plus 20% fee: \$

days/hours Public Service Employment

Payment Terms:

Obtain GED ☐☐ Set by SCDPPPS

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114 (BUI Breath Test Fee)	\$50
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

☐ Appointed PD or appointed attorney
§ 47.12 requires \$500 be paid to the State during probation.

SCANNED
CERTIFIED TRUE COPY
OF ORIGINAL FILED
C.C. P.P.A.
RICHLAND COUNTY
21 SOUTH CAROLINA
Dec 4, 2015

ARREST WARRANT

2014A4010202677

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

THE STATE
against

1407017729-R4

Brandon Joseph Berry

Address:

Columbia, SC 29209-5037

Phone: _____ SSN: _____
Sex: M Race: B Height: 6 Weight: 160DL State: SC DL #: _____DOB: _____ Agency ORI #: SC0400000Prosecuting Agency: Richland County SheriffProsecuting Officer: B Pennington - 1395Offense: Unlawful Carry of HandgunOffense Code: 0044Code/Ordinance Sec: 16-23-0020This warrant is **CERTIFIED FOR SERVICE** in the☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Brandon Joseph Berry
on 7-29-14

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORI 1L

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Personally appeared before me the affiant B Penningtonbeing duly sworn deposes and says that defendant Brandon Joseph Berrydid within this county and state on or about 7/29/2014State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

Richland Bond Court

in the following particulars:

DESCRIPTION OF OFFENSE: Unlawful Carry of HandgunI further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That on or about 7/29/14 while at Springhouse Dr & Aylesford Pl in the Dutch Fork Magisterial District of Richland County, it is
believed that the def. did commit the crime of Unlawful Carry of Handgun because the def. did flee from a lawful traffic stop in a
2002 Toyota Camry. The def. did drive recklessly through an apartment complex almost striking a vehicle. The def. did flee with his
2yo child in the back seat without a car seat. The def. then ran from the vehicle on foot leaving the child in the car. The vehicle was
left in reverse & rolled through the parking lot, while the child was inside. While fleeing the def. discarded 2 bags, one bag
contained 2 masks, gloves, & zip ties. The other bag contained a glock 9mm handgun serial #TE259US. The def. is convicted felon
and prohibited from carrying a firearm. The def. is the father of the child. Affiant and others are witness to prove same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Affiant's Address 5623 Two Notch RoadColumbia, SC 29223-

Affiant's Telephone _____

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 7/29/2014defendant Brandon Joseph Berry

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

☒ County/ ☐ Municipality of Richland Bond Court

) as set forth below.

DESCRIPTION OF OFFENSE: Unlawful Carry of HandgunHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable

Sworn to and subscribed before me

on 7/29/2014

Signature of Issuing Judge

Mildred Rita Metts

Judge Code: 7221Judge's Address 201 John Mark Dial DriveColumbia, SC 29209-Judge's Telephone (803)576-3284Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORI 1L

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518CERTIFIED TRUE
COPIES OF ORIGINAL
FILED
2014 AUG 14 PM 3:00
JEANETTE WMCBRI
C.C.P. & S.S.
RICHLAND COUNTY
FILED

BAIL set by

WITNESSES

Judge

M.R. Melts

on

JUL 29 2014

Type and Amount:

\$50,000 cs/sb

Name of Surety:

PRELIMINARY HEARING held by

Judge

on

Defendant Attorney:

Decision:

DISPOSITION before

Judge

on

by

(Indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition:

Sentence:

JURORS

CODEFENDANTS

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:



RECEIVED

JUL 29 11 30 AM

CLERK

RECEIVED

737

WITNESSES

(S) B Pennington
- Richland County Sheriff

ARREST WARRANT NUMBER

2014A4010202677

ACTION OF GRAND JURY

TRUE BILL

Connie Lumpkin
Foreperson of Grand Jury

Date: FEB 11 2015

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2015GS40 00015

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

FEBRUARY, TERM 2015

42

THE STATE
vs.

Brandon Joseph Berry

Indictment for
WEAPONS / UNLAWFUL CARRYING OF
PISTOL

SC Code: 16-23-0020

CDR Code: 0044

After being fully advised of my legal rights, I hereby waive my right to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

VERIFIED TRUE COPY
OF ORIGINAL FILED
January 22, 2015
C.C.C.P.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on **FEBRUARY 11 2015**, the
Grand Jurors of Richland County present upon their oath:

UNLAWFUL CARRYING OF A PISTOL

That Brandon Joseph Berry did in Richland County on or about July 29,
2014, carry about the person a pistol, such carrying not being authorized
by law, in violation of Section 16-23-0020, S. C. Code of Laws, 1976, as
amended.

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



DAN JOHNSON, SOLICITOR

ARREST WARRANT

2014A4010202679

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

THE STATE

1407017729-R4

against

Brandon Joseph Berry

Address:

Columbia, SC 29209-5037

Phone: SSN: [REDACTED]

Sex: M Race: B Height: 6 Weight: 160

DL State: SC DL #: [REDACTED]

DOB: [REDACTED] Agency ORI #: SC0400000

Prosecuting Agency: Richland County Sheriff

Prosecuting Officer: B Pennington - 1395

Offense: Failure to Stop for A Blue Lights & Siren

Offense Code: 0065

Code/Ordinance Sec: 56-05-0750(B)(1)

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Brandon Joseph Berry
on 7-29-14

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Personally appeared before me the affiant B Pennington

being duly sworn deposes and says that defendant Brandon Joseph Berry

did within this county and state on or about 7/29/2014

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE: Failure to Stop for A Blue Lights & Siren

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on or about 7/29/14 while at Springhouse Dr & Aylesford Pl in the Dutch Fork Magisterial District of Richland County, it is believed that the def. did commit the crime of Failure to Stop for A Blue Lights & Siren because the def. did flee from a lawful traffic stop in a 2002 Toyota Camry. The def. did drive recklessly through an apartment complex almost striking a vehicle. The def. did flee with his 2yo child in the back seat without a car seat. The def. then ran from the vehicle on foot leaving the child in the car. The vehicle was left in reverse & rolled through the parking lot, while the child was inside. While fleeing the def. discarded 2 bags, one bag contained 2 masks, gloves, & zip ties. The other bag contained a glock 9mm handgun serial #TE259US. The def. is convicted felon and prohibited from carrying a firearm. The def. is the father of the child. Affiant and others are witness to prove same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 7/29/2014 defendant Brandon Joseph Berry

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

☒ County/ ☐ Municipality of Richland Bond Court

) as set forth below

DESCRIPTION OF OFFENSE: Failure to Stop for A Blue Lights & Siren

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me

on 7/29/2014

Signature of Issuing Judge

Mildred Rita Metts

Judge Code: 7221

Judge's Address 201 John Mark Dial Drive

Columbia, SC 29209-

Judge's Telephone (803)576-3284

Issuing Court: ☒ Magistrate ☐ Municipal ☐ CircuitORIGINAL Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518CERTIFIED COPY
OF COURT FILED
JANUARY 2, 2015
C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA2014 AUG 14 PM 3:04
JEANNETTE W. BRIDGE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

BAIL set by

WITN S

Judge M.F. Melts
on JUL 30 2018
Type and Amount: \$ 50,000 C514
Name of Surety: _____

Name: _____
Address: _____
Telephone: _____



PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____

Name: _____
Address: _____
Telephone: _____

Decision: _____

Name: _____
Address: _____
Telephone: _____

DISPOSITION before

Judge _____
on _____
by _____
(indicate jury trial, bench trial, plea, nol. pros., etc.)

Name: _____
Address: _____
Telephone: _____

Disposition: _____

Name: _____
Address: _____
Telephone: _____

Sentence: _____

Name: _____
Address: _____
Telephone: _____

JURORS

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

741

10:38 AM JUL 30 2018

WITNESSES

(S) B. Pennington
- Richland County Sheriff

ARREST WARRANT NUMBER

2014A4010202679

ACTION OF GRAND JURY

TRUE BILL

Connie Lumpkin
Foreperson of Grand Jury
Date: FEB 11 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS40 00016

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2015

42

THE STATE
vs.

Brandon Joseph Berry

Indictment for
TRAFFIC / FAILURE TO STOP FOR A BLUE
LIGHT, NO INJURY OR DEATH - 1ST
OFFENSE

SC Code: 56-05-0750(B)(1)
CDR Code: 0065

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Greenville, W. Carolina
C.C.C. PLS.
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

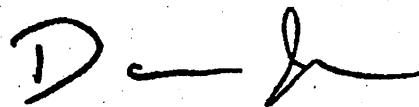
INDICTMENT

At a Court of General Sessions, convened on FEBRUARY 11 2015, the
Grand Jurors of Richland County present upon their oath:

FAILURE TO STOP FOR BLUE LIGHT/SIREN – 1ST OFFENSE

That Brandon Joseph Berry did in Richland County on or about July 29, 2014,
while operating a motor vehicle on a road, street, or highway of the State of South
Carolina, fail to stop his/her motor vehicle when signaled to do so by a law
enforcement vehicle, by means of a siren and/or flashing light, in violation of
Section 56-05-0750(B)(1), S. C. Code of Laws, 1976, as amended

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



DAN JOHNSON, SOLICITOR

15-0016



DISCHARGE FROM JAIL

SCREENING SHEET

1. Prepare this case for Grand Jury: _____
2. Name of Defendant: Brandon Berry
3. DP or Warrant Number: 2014A4010202679
4. Charge: FTBBL
5. Officer/Agency: _____
6. Please Subpoena: _____

2015 GS 40 0010
 OR
 Pending Unindicted

Reviewed by: _____
 Date: _____

ASOL # _____

DISPOSITION

☐ Dism.
 ☒ NP
 ☐ Remanded
 ☐ Dismissed at Prelim
 ☐ Failure to Appear
 ☐ Restore
 ☐ Judicial Dismissal

Explain: Convicted of other charges - 25 years

OR

Date of Failure to Appear: _____
 Date Bench Warrant Issued: _____

Solicitor: Kanji H
 SG Bar: 13009
 Date: 12/7/15

CERTIFIED TRUE COPY
 OF ORIGINAL FILED
Janetta W. 1/9/16
 C.C. CP&GS
 RICHLAND COUNTY
 SOUTH CAROLINA

ARREST WARRANT

2014A4010202680

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

THE STATE

1407017729-R4

against

Brandon Joseph Berry

Address:

Columbia, SC 29209-5037

Phone: _____ SSN: 2 _____
Sex: M Race: B Height: 6 Weight: 160

DL State: SC DL #: _____

DOB: _____ Agency ORI #: SC0400000

Prosecuting Agency: Richland County Sheriff

Prosecuting Officer: B Pennington - 1395

Offense: Unlawful Conduct towards A Child

Offense Code: 2481

Code/Ordinance Sec: 63-05-0070

This warrant is CERTIFIED FOR SERVICE in the

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

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant on Brandon Joseph Berry
7-29-14

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Personally appeared before me the affiant B Pennington

being duly sworn, deposes and says that defendant Brandon Joseph Berry

did within this county and state on or about 7/29/2014

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE: Unlawful Conduct towards A Child

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on or about 7/29/14 while at Springhouse Dr & Aylesford Pl in the Dutch Fork Magisterial District of Richland County, it is believed that the def. did commit the crime of Unlawful Conduct towards A Child because the def. did flee from a lawful traffic stop in a 2002 Toyota Camry. The def. did drive recklessly through an apartment complex almost striking a vehicle. The def. did flee with his 2yo child in the back seat without a car seat. The def. then ran from the vehicle on foot leaving the child in the car. The vehicle was left in reverse & rolled through the parking lot, while the child was inside. While fleeing the def. discarded 2 bags, one bag contained 2 masks, gloves, & zip ties. The other bag contained a Glock 9mm handgun serial #TE259US. The def. is convicted felon and prohibited from carrying a firearm. The def. is the father of the child. Affiant and others are witness to prove same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 7/29/2014 defendant Brandon Joseph Berry

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

☒ County/ ☐ Municipality of Richland Bond Court

) as set forth below:

DESCRIPTION OF OFFENSE: Unlawful Conduct towards A Child

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me

on 7/29/2014

Signature of Issuing Judge
Mildred Rita Metts

Judge Code: 7221

(L.S.)

Judge's Address 201 John Mark Dial Drive

Columbia, SC 29209-

Judge's Telephone (803)576-3284

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Approved by
S. J. Pennington
April 21, 2003
SCCA 518

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JUL 29 2014
C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA

2014 AUG 11 PM 3:05
JEANETTE W. MCBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

745

BAIL set by

M.R. Melts

Judge

on **JUL 29 2014**

Type and Amount: **\$50,000 cash**

Name of Surety:

PRELIMINARY HEARING held by

Judge

on

Defendant Attorney:

Decision:

DISPOSITION before

Judge

on

by

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition:

Sentence:

JURORS

WITNESSES

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

CODEFENDANTS



CLERK OF COURT
JUL 29 2014

2014 JUL 29 11:30 AM

CLERK OF COURT

WITNESSES

(S) B Pennington
- Richland County Sheriff

ARREST WARRANT NUMBER

2014A4010202680

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: FEB 11 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS40 00017

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2015

42

THE STATE
vs.

Brandon Joseph Berry

Indictment for
CHILDREN / LEGAL CUSTODIAN,
UNLAWFUL NEGLECT OF CHILD OR
HELPLESS PERSON

SC Code: 63-05-0070
CDR Code: 2481

After being fully advised of my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JANUARY 21 2015
C.C.C. PLS. AND G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on FEBRUARY 11, 2015, the
Grand Jurors of Richland County present upon their oath:

UNLAWFUL CONDUCT TOWARDS A CHILD

That Brandon Joseph Berry did in Richland County on or about July 29, 2014,
while having charge or custody, or being the parent or guardian, or being
responsible for the welfare of the minor child, age two years,
place the child at unreasonable risk of harm affecting the child's life, physical or
mental health, or safety; or did unlawfully or maliciously cause or cause to be
done bodily harm to the child so that the life or health of the child was endangered
or was likely to be endangered; or did willfully abandon the child, in violation of
Section 63-5-70, S. C. Code of Laws, 1976, as amended

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



DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
 STATE VS.
Brandon Joseph Berry

INDICTMENT/CASE#: 2015GS4000017A/W#: 2014A4010202680Date of Offense: 7/29/2014S.C. Code § : 63-05-0070CDR Code #: 2481

KA:

Race: BLACK Sex: M Age: 24DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Columbia, SC 29209-5037DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADSTO: Children / Legal custodian, unlawful neglect of child or helpless personin violation of § 63-05-0070of the S.C. Code of Laws, bearing CDR Code # 2481
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The pleas: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:

Campbell, Luck13007
SC Bar#

Defendant

[Signature]
Attorney for Defendant77713
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 5 ~~10~~ days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 2015-020 (H.H. Under) & 2015-5062 (Campbell)
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. concurrent with 2015-015 & 018
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$
3% to County (if paid in installments)		\$

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel
 § 47.12 requires \$500 be paid to Clerk during probation.

 CERTIFIED TRUE COPY
 OF ORIGINAL FILED

 RICHLAND
 SOUTH CAROLINA

Clerk of Court/ Deputy Clerk

Court Reporter: Johnson

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2107Sentence Date: Dec 4, 2015

AKKES1 WARRANT

2014A4010202681

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

THE STATE
against

1407017729-R4

Brandon Joseph Berry

Address:
Columbia, SC 29209-5037Phone:
Sex: M Race: B Height: 6 Weight: 160
DL State: SC DL #:
DOB:
Agency ORI #: SC0400000

Prosecuting Agency: Richland County Sheriff

Prosecuting Officer: B Pennington - 1395

Offense: Resisting Arrest

Offense Code: 0326

Code/Ordinance Sec: 16-09-0320(A)

This warrant is CERTIFIED FOR SERVICE in the

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

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Brandon Joseph Berry
on 7-29-14

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Personally appeared before me the affiant B Penningtonbeing duly sworn deposes and says that defendant Brandon Joseph Berrydid within this county and state on or about 7/29/2014State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE: Resisting Arrest

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on or about 7/29/14 while at Springhouse Dr & Aylesford Pl in the Dutch Fork Magisterial District of Richland County, it is believed that the def. did commit the crime of Unlawful Carry of Handgun because the def. did flee from a lawful traffic stop in a 2002 Toyota Camry. The def. did drive recklessly through an apartment complex almost striking a vehicle. The def. did flee with his 2yo child in the back seat without a car seat. The def. then ran from the vehicle on foot leaving the child in the car. The vehicle was left in reverse & rolled through the parking lot, while the child was inside. While fleeing the def. discarded 2 bags, one bag contained 2 masks, gloves, & zip ties. The other bag contained a glock 9mm handgun serial #TE259US. The def. is convicted felon and prohibited from carrying a firearm. The def. is the father of the child. The def. refused to comply with officers commands while attempting to make arrest. Affiant and others are witness to prove same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Affiant's Address 5623 Two Notch RoadColumbia, SC 29223-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 7/29/2014defendant Brandon Joseph Berry

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

☒ County/ ☐ Municipality of Richland Bond Court

) as set forth below.

DESCRIPTION OF OFFENSE: Resisting Arrest

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me

on 7/29/2014

Signature of Issuing Judge

Mildred Rita Metts

Judge Code: 7221Judge's Address 201 John Mark Dial DriveColumbia, SC 29209-Judge's Telephone (803)576-3284Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

AFFIDAVIT

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518CERTIFIED TRUE COPY
OF ORIGINAL FILE
2014 AUG 14 PM 3:05
JEANETTE MCBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
SOUTH CAROLINA
SCANNED

750

BAIL set by

WITH IS



Judge M.R. Melts
on JUL 29 2014

Type and Amount: \$50,000 cash

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

on _____

Defendant Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS

2014 JUL 29 11:00 AM
CLERK OF COURT
JUL 29 2014

WITNESSES

(S) B Pennington
- Richland County Sheriff

ARREST WARRANT NUMBER

2014A4010202681

ACTION OF GRAND JURY

TRUE BILL

Connie L. Luper
Foreperson of Grand Jury
Date: FEB 11 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS40 00018

The State of South Carolina

County of
Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2015
42

THE STATE
vs.

Brandon Joseph Berry

Indictment for
RESISTING / RESISTING ARREST;
OPPOSE, RESIST, OR ASSAULT LAW
ENFORCEMENT OFFICER SERVING
PROCESS

SC Code: 16-09-0320(A)
CDR Code: 0326

After being fully advised of my legal rights, I hereby waive my right to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jesse H. Berry
C.C.C. PLS. AND G.S.
RICHLAND COUNTY
SOUTH CAROLINA
CAN

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

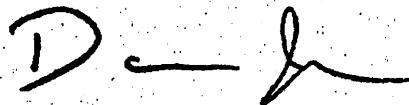
INDICTMENT

At a Court of General Sessions, convened on **FEBRUARY 11 2015**, the
Grand Jurors of Richland County present upon their oath:

RESISTING ARREST

That Brandon Joseph Berry did in Richland County on or about July 29, 2014,
knowingly and willfully oppose or resist an arrest being made by one whom the
defendant knew or reasonably should have known was a Law Enforcement
Officer, in violation of Section 16-09-0320(A), S. C. Code of Laws, 1976, as
amended.

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



DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
STATE VS.Brandon Joseph Berry

AKA:

Race: BLACK Sex: M Age: 24DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Columbia, SC 29209-5037DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADSTO: Resisting / Resisting Arrest; Oppose, resist, or assault law enforcement officer serving processin violation of § 16-09-0320(A) of the S.C. Code of Laws, bearing CDR Code # 0326☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Campbell Luck13009
SC Bar#

Defendant

[Signature]
Attorney for Defendant77193
SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 1 days/months/year, or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: all charges☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUPTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114(BUI Breath Test Fee)	\$50
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$

Clerk of Court/ Deputy Clerk

Court Reporter: Johnson

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2107Sentence Date: Dec 4, 2015

SENTENCE SHEET

INDICTMENT/CASE#: 2015GS4000018A/W#: 2014A4010202681Date of Offense: 7/29/2014S.C. Code § : 16-09-0320(A)CDR Code #: 0326

SCANNED
CERTIFIED TRUE COPY
OF ORIGINAL FILED
C.C.P. & C.S.
RICHLAND COUNTY
SOUTH CAROLINA

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to the State during probation.

ARREST WARRANT

2014A4010600848

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

THE STATE

#1407004629-R2

against

Brandon Joseph Travon Berry

Address:

Columbia, SC 29209-5037

Phone:

SSN:

Sex: M Race: B Height: 6 Weight: 160DL State: SC DL #: DOB: Agency ORI #: SC0400000Prosecuting Agency: Richland County SheriffProsecuting Officer: John Carwell, JR - 1227Offense: Murder / Attempted MurderOffense Code: 3410Code/Ordinance Sec: 16-03-0029This warrant is **CERTIFIED FOR SERVICE** in the☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant
on

Brandon J. T. Berry

7/26/14

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

Personally appeared before me the affiant John Carwell, JRbeing duly sworn deposes and says that defendant Brandon Joseph Travon Berrydid within this county and state on or about 7/29/2014State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Richland / Lykesland Magistrate)
in the following particulars:DESCRIPTION OF OFFENSE: Murder / Attempted MurderI further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That on or about JULY 29, 2014 while at 1460 OAKCREST DR in the DENTSVILLE Mag Dist of Richland County it is believed
that one BRANDON JOSEPH TRAVON BERRY did commit the crime of ATTEMPTED MURDER in that he did wilfully,
unlawfully & feloniously while armed with a deadly weapon, to wit: a Glock 9mm Serial #TE259US, place one Micheal Keith in
fear of his life & did hold up and rob him of his Black My Touch cell phone as he was exiting his vehicle. The defendant shot the
victim during the robbery on the right ankle during the robbery. The defendant was arrested hours later in possession of said pistol
& the shell casings from this incident were matched to the pistol. The defendant's black Levi jeans & Nike tennis shoes were located
after written consent to search in an apartment he changed in after the robbery. The victim's DNA (Blood) was located on said
clothing. RCSD Case #1407004629-R2. Affiant & others are witness to prove the same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland / Lykesland Magistrate

Affiant's Address 5623 Two Notch Road
Columbia, SC 29223-Affiant's Telephone (803)576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 7/29/2014defendant Brandon Joseph Travon Berry

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

☒ County/ ☐ Municipality of Richland / Lykesland Magistrate

) as set forth below:

DESCRIPTION OF OFFENSE: Murder / Attempted MurderHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me
on 7/31/2014

Signature of Issuing Judge

Michael Ronald Davis

Judge Code: 5458Judge's Address 1403 Caroline Road
Columbia, SC 29209-2609Judge's Telephone (803)576-2500Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL
CERTIFIED TRUE COPY
OF ORIGINAL FILE
JUL 29 2014
CLERK OF COURT
RICHLAND COUNTYForm Approved by
S.C. Attorney General
April 23, 2003
SCCA-5482014 AUG 18 PM 3:34
JEANNETTE W. M. BRIDE
C.P. & G.S.
RICHLAND COUNTY
FILED

BAIL set by

WITNESSES

Judge Brewer
on 7.31.14

Type and Amount: _____

Name of Surety: Set in GSC

PRELIMINARY HEARING held by

Judge _____

on _____

Defendant Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS



WITNESSES

(S) John Carwell JR
- Richland County Sheriff

ARREST WARRANT NUMBER

2014A4010600848

ACTION OF GRAND JURY

TRUE BILL

Connie Lumpkin
Foreperson of Grand Jury

Date:

JAN 14 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS40 00020

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2015

42

THE STATE
vs.

Brandon Joseph Travon Berry

Indictment for
ATTEMPTED MURDER

SC Code: 16-03-0029
CDR Code: 3410

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE
OF ORIGINAL
FILE
JAN 14 2015
C.C.C. PLS. AND G.S.
RICHLAND COUNTY
SOUTH CAROLINA
FILED

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

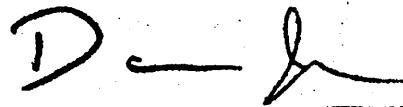
INDICTMENT

At a Court of General Sessions, convened on January 14 2015, the
Grand Jurors of Richland County present upon their oath:

ATTEMPTED MURDER

That Brandon Joseph Travon Berry did in Richland County on or about
July 29, 2014, did with the intent to kill, attempt to kill MICHAEL KEITH
with malice aforethought, either expressed or implied. All in violation of SC
Code of Laws § 16-3-29 (1976, as amended)

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



DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATE VS.Brandon Joseph Travon Berry

KA: _____

Race: BLACK Sex: M Age: 24DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Columbia, SC 29209-5037DL#: [REDACTED] SID#: _____*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Attempted Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2015GS4000020A/W#: 2014A4010600848Date of Offense: 7/29/2014S.C. Code §: 16-03-0029CDR Code #: 3410

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Campbell, Luck13009
SC Bar#

Defendant

[Signature]
Attorney for Defendant090913
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ -; provided that upon the service of - days/months/years and/or payment
of \$ -; plus costs and assessments as applicable*; the balance is suspended with probation for -months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: with attempted to
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$
3% to County (if paid in installments)		\$
TAL		\$

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed the Counselor
§ 47.12 requires \$500 be paid to Clerk during probation.SCANNED
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OF ORIGINAL FILEDC.C.C.P. & E.
RICHLAND
SOUTH CAROLINA

Clerk of Court/ Deputy Clerk

Court Reporter: Johnson

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2107Sentence Date: Dec 4, 2015

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County.

Howard P. King, Circuit Court Judge

RECEIVED

NOV 15 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

BRANDON J. BERRY,

APPELLANT

APPELLATE CASE NO. 2015-002557

FINAL BRIEF OF APPELLANT

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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Did the court err by finding Appellant did not have a reasonable expectation of privacy in the apartment leased by his girlfriend and the mother of his child to challenge the warrantless search of the home under the Fourth Amendment when Appellant frequently slept at the apartment, kept clothes and various belongings there, occasionally had a key, had the authority to exclude others from the apartment, engaged in domestic activities in the home, and had known and dated the owner for nearly five years?

2.

Did the court abuse its discretion by finding Appellant's girlfriend voluntarily consented to a search of her apartment when an investigator with the Richland County Sheriff's Department threatened to have the Department of Social Services (DSS) remove her minor child from her custody if she refused to consent and prove she could provide a safe home for the child?

STATEMENT OF THE CASE

A Richland County Grand Jury indicted Appellant at the February 11, 2015 term of the Court of General Sessions for attempted murder, resisting arrest, unlawful carrying of a pistol, and unlawful conduct towards a child, and at the September 9, 2015 term for attempted armed robbery. R. 629-638. His case was called to trial on November 30, 2015 before the Honorable Howard P. King, and a jury. R. 1. Assistant Solicitors K. Luck Campbell, Meghan Walker, and John W. Steadman represented the state, and Aimee J. Zmroczek represented Appellant. R. 1.

On December 4, 2015, the jury found Appellant guilty as indicted. R. 609, l. 25 – 610, l. 15. Judge King sentenced him to twenty years imprisonment for attempted murder, twenty years concurrent for attempted armed robbery, one year concurrent for resisting arrest, one year concurrent for the weapons offense, and five years consecutive for unlawful conduct towards a child. R. 627, l. 13 – 628, l. 18. The aggregate sentence was twenty five years imprisonment.

This appeal follows.

STATEMENT OF FACTS

On July 29, 2014, Michael Keith returned to his apartment around 4:00 am after hosting "Knuckle Up," a legal boxing event at a nightclub in Columbia. R. 148, l. 21 – 150, l. 9. Keith hosted events at various nightclubs throughout the Columbia area and often returned home during the early morning hours with a large amount of cash. R. 150, ll. 21-25.

After parking his car, Keith got out, retrieved his bag from inside, and shut the door. When he looked up, he saw "an individual standing behind him" who "looked like death because he had on black everything: black mask, black shoes, just black everything." The man pointed a gun at Keith and demanded, "Give me the keys and give me the money." When Keith did not respond, the man said, "I'm gonna count down. If you don't give me the money by the time I count down, I'm gonna kill you." R. 150, l. 10 – 151, l. 21.

As the man was counting down, Keith decided to run. Both men began to run around the car. As they were circling the car, the man jumped on top of the car and began walking towards Keith. Keith ran towards his apartment door, but fell before he reached the door. The man jumped on top of Keith and continued to demand his money and keys. When Keith still refused, the man hit him with the gun and then shot him in the leg. R. 151, l. 23 – 153, l. 14. As the man was pointing the gun at Keith's head, his girlfriend, who heard the commotion, came outside on the porch and yelled, "What are you doing?" R. 143, l. 18 – 145, l. 1; R. 153, l. 20 – 154, l. 8. While the man was distracted, Keith punched him in the stomach area and the man took off. R. 154, ll. 13-14.

With the help of his girlfriend, Keith was able to make it inside his apartment where he waited for law enforcement and EMS to arrive. R. 156, ll. 3-9. He was transported by ambulance to the hospital where he underwent surgery. The gunshot fractured his tibia and he needed surgery to stabilize the fracture. R. 257, ll. 1-22.

While processing the scene, law enforcement collected two nine millimeter shell casings. R. 190, ll. 19-24; R. 192, ll. 6-12; R. 193, ll. 20-22; R. 196, ll. 7-18; R. 198, ll. 14-18. Investigators also had Keith's vehicle towed to the "forensic garage" at the Richland County Sheriff's Department so they could process it in a "controlled environment." R. 199, ll. 3-24. While processing the vehicle, an investigator lifted five latent fingerprints and numerous footwear impressions that were on top of the vehicle. R. 315, l. 15 – 317, l. 20.

About six hours later, Deputy Pennington with the Richland County Sheriff's Department stopped a car on Zimalcrest Drive just off of Broad River Road after he observed the occupants driving without seatbelts. R. 219, ll. 2-19. Nickilous Wallace was the driver of this vehicle and Appellant was the front seat passenger. During the course of the traffic stop, Wallace was asked to get out of the car. R. 220, l. 24 – 221, l. 5. As Deputy Pennington was speaking with Wallace at the rear of the car, Appellant moved to the driver's seat and fled in the vehicle. He drove through an apartment complex until he eventually stopped the car and then continued to flee on foot. R. 221, l. 12 – 222, l. 1. Deputy Pennington ultimately apprehended Appellant as he was climbing over a fence. R. 222, l. 12 – 223, l. 8.

During the chase, Pennington allegedly saw Appellant toss an object. R. 222, ll. 22-25; R. 225, ll. 3-4. After Appellant was arrested, Pennington returned to the location where he thought he saw Appellant throw this object. He eventually discovered two black bags. Inside one of the bags were two black masks, gloves, zip ties, and various clothing items. Inside the other black bag were some diapers and a Glock nine millimeter handgun. R. 229, l. 6 – 231, l. 1.

When Wallace and Appellant were stopped, Appellant's two year old daughter was sitting in the backseat. She was not properly secured in a child car seat as required by law. R. 222, ll. 2-11; R. 289, ll. 7-11. When Appellant fled in the car, his daughter remained unsecured in the backseat. R.

222, ll. 12-19. The child's mother, Lourisa Katio, was notified at work of her daughter's involvement in the traffic stop. Katio left work and drove to the location of the stop to pick up her daughter. R. 266, l. 20 – 267, l. 4; R. 268, l. 3 – 269, l. 23.

When Katio arrived, she told officers Appellant was at her apartment the night before until around 9:00 or 10:00 pm and that he had returned to the apartment around 5:00 am that morning. R. 270, l. 14 – R. 271, l. 23. Investigator Carwell, who was investigating the attempted armed robbery of Michael Keith, threatened to call the Department of Social Services (DSS) if Katio could not prove she could provide a safe home for the child. Carwell claimed he wanted to search Katio's apartment for weapons since a gun was found in her daughter's diaper bag. Because he continued to threaten to call DSS, Katio ultimately consented to a search of her apartment and signed a consent to search form. R. 272, ll. 8-23; R. 275, l. 23 – 276, l. 23; R. 277, ll. 23-25.

During the search of Katio's apartment, Investigator Carwell asked Katio to identify all of Appellant's belongings that were inside the home. She pointed out a pair of black jeans in her bedroom closet and a pair of black shoes right outside the closet door and said they belonged to Appellant. R. 454, l. 17 – 456, l. 23. Carwell seized these items. R. 272, l. 24 – 274, l. 20.

There were "reddish-brown stains" on the jeans and shoes that were later confirmed to be blood. R. 457, ll. 3-5. An agent with the South Carolina Law Enforcement Division (SLED) performed DNA testing and determined the blood stains from the black jeans matched the DNA profile of Michael Keith. R. 359, l. 4 – 361, l. 4; R. 369, l. 9 – 370, l. 2.

Additionally, SLED concluded that the two nine millimeter shell casings collected from the scene outside Keith's apartment were fired by the Glock nine millimeter handgun discovered in the black bag Appellant allegedly tossed while he was fleeing from Deputy Pennington. R. 400, l. 4 – 402, l. 11. Also, while the results were "inconclusive" because there were no "individual

characteristics” to compare, the size, design, and shape along with the “wear characteristics” of the black shoes seized from Katio’s apartment were consistent with the footwear impressions lifted from Keith’s car. R. 335, l. 19 – 340, l. 5.

The jury ultimately found Appellant guilty of attempted murder, attempted armed robbery, unlawful conduct towards a child, resisting arrest, and unlawful carrying of a pistol. R. 609, l. 25 – 610, l. 15.

ARGUMENT

1.

The court erred by finding Appellant did not have a reasonable expectation of privacy in the apartment leased by his girlfriend and the mother of his child to challenge the warrantless search of the home under the Fourth Amendment when Appellant frequently slept at the apartment, kept clothes and various belongings there, occasionally had a key, had the authority to exclude others from the apartment, engaged in domestic activities in the home, and had known and dated the owner for nearly five years.

Motion to Suppress

Defense counsel moved pretrial to suppress the evidence seized from Lourisa Katio's apartment on grounds that her consent to search was involuntarily given due to the threats made by Investigator Carwell involving DSS. The court conducted a pretrial hearing on Appellant's motion. R. 16, ll. 1-7.

Before hearing testimony, the state argued Appellant did not have "standing to contest" the search of Katio's apartment because "[h]e didn't live there, it's not his house." R. 33, ll. 17-25. Defense counsel argued the testimony would show Appellant had a child in common with Katio, that he often spent the night at her apartment, and that he "had a multitude of his personal items there." R. 34, ll. 9-20.

Lourisa Katio testified *in camera* that Appellant lived at her apartment "on occasion" depending on the status of their relationship. The two were "in and out" of dating. However, Katio said that during the month immediately before the search, Appellant "was there [at her apartment] more than he wasn't there." She also testified that Appellant spent the night at her apartment the

night before the search and that he kept his personal items there. Also, Appellant “[s]ometimes” had a key. R. 82, l. 9 – 83, l. 4.

Katio later clarified that when Appellant spent the night at her apartment, he slept in her bedroom with her. This is where he slept the previous two nights before the search. She also explained that some of Appellant’s belongings were in her bedroom, “but mainly Brandon’s [Appellant’s] stuff was in the living room.” R. 84, l. 23 – 85, l. 9; R. 92, ll. 18-22. According to Katio, Appellant would “[s]ometimes” have friends spend the night at the apartment and “entertain” guests at the apartment, but “not regularly.” R. 92, l. 23 – 93, l. 7. However, whenever Appellant was at the apartment, he had the authority to invite people over and order people to leave. R. 93, ll. 18-21.

When questioned by the assistant solicitor, Katio said Appellant’s name was not on the lease to the apartment. The only people listed on the lease were Katio, her daughter, and her grandmother. However, Appellant still spent the night often. R. 90, ll. 1-18.

Destiny Katio, Lourisa Katio’s sister, testified that Appellant stayed at Katio’s apartment “off and on sometimes depending on the relationship.” She did not know whether Appellant kept his personal belongings there or whether he had a key, but she testified that he helped pay the bills for the apartment “[w]hen he could.” R. 96, ll. 5-21.

Arguments of Counsel

The solicitor argued “there was no testimony that he [Appellant] had a key at the time, there was no testimony that he was on the lease, there was no testimony that he stayed there on a regular

basis, just that he stayed there sometimes.” R. 105, ll. 20-24. The state maintained this evidence established Appellant did not have “standing” to challenge the search of Katio’s apartment.¹

Defense counsel argued Appellant was an overnight guest and thus had an expectation of privacy in the apartment. She maintained the testimony established Appellant: (1) slept at the apartment “on and off,” (2) stayed at the apartment the night before the search, (3) sometimes had a key, (4) had the right to exclude others from the apartment, (5) had known the owner for five years and they have a child together, (6) kept his belongings at the apartment, and (7) engaged in domestic activities in the home as opposed to commercial activities. Based on our Supreme Court’s holding in State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570 (2014), counsel argued these factors established Appellant had “standing” to challenge the search. R. 108, l. 25 – 110, l. 7.

Court’s Ruling

The court found Appellant had “no reasonable expectation of privacy in the property search[ed] as required to prove a violation of his Fourth Amendment rights.” R. 117, ll. 14-17. The court based this finding largely on the fact that Appellant was not listed on the lease and was not “the primary person in control” of the apartment. R. 116, l. 25 – 117, l. 5. The court stated:

He [Appellant] did spend some nights there, but much of his property was left in the front room. He may have had some dominion and control to exclude others, but clearly from the testimony the primary person in control was Lourisa Katio. At best he was the father of a child they had in common, but at the time he was a sometime or part-time boyfriend who spent some nights on the premises. There was no legal relationship between the parties, they were not married legally or even a common law marriage. There’s no evidence he paid rent, participated in domestic activities or claimed a proprietary or possessory interest in the property or to attempt to keep his activities in the home private.

¹ In State v. Missouri, 361 S.C. 107, 111 n.2, 603 S.E.2d 594, 595 n.2 (2004), our Supreme Court stated, “The United States Supreme Court has expressly rejected the application of an analysis based on the standing doctrine; instead, the analysis is based on substantive Fourth Amendment law. The use of the term ‘standing’ has created confusion in this context, and therefore ‘standing’ is no longer appropriate to ‘connote the legitimate expectation of privacy in the evidence seized or the premises searched.’” (internal citations omitted).

R. 117, ll. 1-13.

Discussion

The court erred by finding Appellant did not have a reasonable expectation of privacy in the apartment leased by Lourisa Katio, who was his girlfriend and the mother of his child, to challenge the warrantless search of the home under the Fourth Amendment since Appellant was clearly an overnight guest. Appellant frequently slept at the apartment, including the night before the search, kept clothes and other belongings there, occasionally had a key, had the authority to exclude others from the apartment, engaged in domestic activities in the home, and had known and dated Katio for nearly five years. It is obvious from the evidence that Katio chose to share the privacy of her apartment with Appellant on countless occasions and thus he had an actual and reasonable expectation of privacy in the apartment.

“The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures.” State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing U.S. Const. amend. IV and S.C. Const. art. I, § 10). To claim protection under the Fourth Amendment, a defendant must show he has a legitimate expectation of privacy in the place searched. Id. (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)). “A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable.” Id. (citing Oliver v. United States, 466 U.S. 170, 177 (1984)).

In Minnesota v. Olsen, 495 U.S. 91 (1990), the United States Supreme Court found an overnight guest had a reasonable expectation of privacy in another’s home. While the Court did not articulate what constituted an overnight guest, it stated generally, “From the overnight guest’s perspective, he seeks shelter in another’s home precisely because it provides him with privacy, a

place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside.” Id. at 99; Missouri, 361 S.C. at 113, 603 S.E.2d at 597.

In Missouri, our Supreme Court held the defendant had a reasonable expectation of privacy in the searched apartment when he (1) was good friends with the owner, (2) frequently visited the apartment, (3) occasionally spent the night, (4) at times had a key, and (5) kept a change of clothes there. Missouri, 361 S.C. at 115, 603 S.E.2d at 597-598. The Court held the defendant demonstrated a subjective expectation of privacy in the apartment and therefore was entitled to challenge the search under the Fourth Amendment. Id. at 115, 603 S.E.2d at 597-598.

In Kolle v. State, 386 S.C. 578, 590, 690 S.E.2d 73, 79 (2010), our Supreme Court held, “The fact that Kolle did not own or lease the apartment that was searched does not negate his standing to challenge the search and subsequent seizure.” The Court emphasized its previous holding “that an overnight guest has a reasonable expectation of privacy, the legal prerequisite to confer standing on an individual.” Id. (internal citations omitted). The Court concluded Kolle had a reasonable expectation of privacy in the searched apartment when the person who leased the apartment “befriended Kolle and permitted him to stay for an extended period of time at the residence.” Id.

In Minnesota v. Carter, 525 U.S. 83, 90 (1998), the United States Supreme Court “held that the defendants did not have a reasonable expectation of privacy in the home of another when the nature of the defendant’s visit was purely commercial, the visit was short, and there was no previous connection between the defendants and the lessee.” Missouri, 361 S.C. at 114, 603 S.E.2d at 597 (citing Carter, 525 U.S. at 90).

Recently, in State v. Robinson, 410 S.C. 519, 528-530, 765 S.E.2d 564, 569-570, (2014), our Supreme Court held the following factors may be considered when determining whether a

defendant has a reasonable expectation of privacy to challenge a search or seizure: (1) whether the defendant owned the home or had property rights to it; (2) whether he was an overnight guest at the home; (3) whether he kept a change of clothes at the home; (4) whether he had a key to the home; (5) whether he had dominion and control over the home and could exclude others from the home; (6) how long he had known the owner of the home; (7) how long he had been at the home; (8) whether he attempted to keep his activities in the home private; (9) whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment; (10) whether he alleged a propriety or possessory interest in the premises and property seized; and (11) whether he paid rent at the home.

Here, Katio testified she had known Appellant for nearly five years and throughout their “on again, off again” relationship, Appellant frequently slept at her apartment and kept his clothing and other belongings there. In the month prior to the contested search, Katio maintained Appellant “was there [at the apartment] more than he wasn’t there.” R. 83, ll. 1-4. Significantly, Appellant slept at the apartment the night before or the morning of the search. Moreover, Katio’s testimony established Appellant: (1) sometimes had a key, (2) invited friends over and could exclude others from the home, and (3) used the apartment for domestic activities, such as sleeping.

It is clear based on this testimony that Appellant was an overnight guest and that Katio chose to share the privacy of her home with Appellant on countless occasions over the course of several years. See Missouri, 361 S.C. at 115, 603 S.E.2d at 597-598. Thus, Appellant had an actual and reasonable expectation of privacy in the apartment and could challenge the search of the home pursuant to the Fourth Amendment. The trial court erred by finding otherwise.

When making its ruling, the trial court incorrectly emphasized the fact that Appellant was not listed on the lease, was not “the primary person in control” of the apartment, and had no legal

relationship to Katio, the lessee. However, these facts do not negate Appellant's legal right to challenge the search of the apartment and subsequent seizure. Kolle, 386 S.C. at 590, 690 S.E.2d at 79.

Respectfully, this Court should reverse the ruling of the trial court and hold Appellant had a reasonable expectation of privacy in the apartment and could challenge the search of the home pursuant to the Fourth Amendment.

The court abused its discretion by finding Appellant's girlfriend voluntarily consented to a search of her apartment when an investigator with the Richland County Sheriff's Department threatened to have the Department of Social Services (DSS) remove her minor child from her custody if she refused to consent and prove she could provide a safe home for the child.

Relevant Facts

Defense counsel moved pretrial to suppress the evidence seized from Lourisa Katio's apartment on grounds that her consent to search was involuntarily given due to the threats made by Investigator Carwell involving DSS. The court conducted a pretrial hearing on Appellant's motion. R. 16, ll. 1-7.

Katio testified that she received a telephone call while she was at work on the morning of July 29, 2014. The caller told her Appellant and her baby were "with the police." R. 79, ll. 17-25. When she arrived at the location of the traffic stop, all Katio saw were police officers. She eventually spoke with Investigator Carwell, who told her Appellant and her daughter "were in a serious situation." When Katio tried to get her daughter, Carwell said "he would have to get DSS involved if [Katio] couldn't provide . . . a safe place for her [the child]." R. 80, l. 5 – 81, l. 6. In response, Katio said, "[S]o I can't get my daughter without DSS, and he [Carwell] said no." R. 81, ll. 7-11. Carwell said, "I have to call DSS." R. 89, ll. 3-4.

Investigator Carwell then began to question Katio about Appellant. He asked where Katio lived and whether Appellant had any "stuff" at her apartment. When Katio told Carwell that Appellant did have belongings at her house, Carwell told her he would allow her to take her child home if she would consent to a search of her apartment to "prove it's a safe place." R. 81, ll. 7-19. Katio maintained that she was willing to allow the officers to search her home in order to avoid

Carwell calling DSS. She said, "I was willing to do anything to get my child back." R. 84, ll. 2-12. She ultimately signed a consent to search form. R. 89, ll. 11-16. However, again, she stated she signed the form "[t]o get my baby back." R. 94, ll. 15-16.

Destiny Katio, Lourisa Katio's sister, testified that her sister called her after she learned about the traffic stop. Destiny drove to the location of the stop to support her sister and make sure her niece was okay. When Destiny arrived, Katio was very upset. She was "frantic" and "worried about her child." Destiny testified that she was present when the police told Katio "if she wasn't gonna let him search the apartment, then DSS would get involved." R. 96, l. 22 – 97, l. 23.

According to Investigator Carwell, Katio "volunteered for [him] to come back to her apartment" after she told him Appellant had returned to her apartment that morning around 5:00 am after "being out with a friend of his, Nickilous Wallace." R. 19, ll. 14-19. Carwell admitted he wanted to search Katio's apartment to look for "[a]nything to help me connect this shooting [of Michael Keith] to the two guys [Appellant and Wallace] that were in this car." R. 20, ll. 1-5. Carwell further testified that Katio signed a consent to search form. R. 20, ll. 6-23. He claimed he did not threaten Katio in order to obtain her consent to search. R. 20, l. 24 – 21, l. 14.

Carwell denied ever telling Katio he wanted to search her apartment to make sure it was safe because her daughter was found with a gun. He further claimed he "never mentioned anything about DSS or the child" when he asked Katio for consent to search. He also denied threatening Katio that "if she didn't allow [him] in her house that she could pick up her baby from DSS." R. 26, l. 7 – 27, l. 15.

Arguments by Counsel

The state argued Katio freely and voluntarily consented to the search of her apartment. The solicitor maintained Katio said she gave law enforcement permission to search her home because

“she had nothing to hide” and “she was more than happy for them to search her area.” While the solicitor admitted DSS was “mentioned at the scene,” she argued Investigator Carwell did not make any threats but was merely performing his “duty to ensure the safety of the child before [she was] returned to an environment that may cause [her] harm.” R. 106, l. 12 – 108, l. 23.

Defense counsel argued Katio’s consent to search was involuntarily given due to the threats involving DSS made by Investigator Carwell. She maintained Katio “felt compelled to give consent because the police told her that if she didn’t give consent that they were gonna take the child or call DSS.” R. 111, ll. 10-24. Defense counsel stressed Katio’s testimony that before Carwell requested consent to search he asked Katio whether Appellant had any belongings at the apartment suggesting Carwell was not actually concerned about the child’s safety, but wanted to search for any incriminating evidence against Appellant. R. 114, ll. 8-15. She concluded that Katio’s consent was obtained through “coercion.” R. 115, ll. 4-5.

Court’s Ruling

The court found Lourisa Katio’s consent to search her apartment was “freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child.” In reaching this finding, the court found the testimony of Katio and her sister not credible. The court maintained the “law enforcement officers were simply trying to determine if the residence was safe to return the child. They were not using this fact as a threat to intimidate her into giving her consent.” Therefore, the court denied Appellant’s motion to suppress the evidence seized from Katio’s apartment. R. 117, l. 18 – 118, l. 15.

Discussion

The court erred by finding Katio voluntarily consented to a search of her apartment when Investigator Carwell threatened to have DSS remove her daughter from her custody if she refused to

consent and prove she could provide a safe home for the child. The testimony established that when Katio arrived at the location of the traffic stop and ultimately gave consent, she was surrounded by law enforcement officers and was “very frantic” and “worried about her child.” R. 96, l. 22 – 97, l. 23. This coercive atmosphere and the threats conveyed to Katio by Carwell regarding calling DSS rendered her consent to search involuntary. Because Katio’s consent to search was involuntarily given, the trial court should have granted Appellant’s motion to suppress the evidence seized from her apartment.

“Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.” State v. Greene, 330 S.C. 551, 557, 499 S.E.2d 817, 820 (Ct. App. 1997) (citing State v. Dorce, 320 S.C. 480, 465 S.E.2d 772 (Ct. App. 1995)). “*The State has the burden of showing voluntariness.*” Greene, 330 S.C. at 557, 499 S.E.2d at 820 (emphasis added). “The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial judge.” Id. “A trial judge’s conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion.” Id. (citing State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)).

Here, the court abused its discretion by finding Katio voluntarily consented to a search of her apartment. The court’s factual findings were not supported by the evidence and consequently were erroneous. When making its ruling, the court maintained the “law enforcement officers were simply trying to determine if the residence was safe to return the child. They were not using this fact as a threat to intimidate her into giving her consent.” R. 117, l. 18 – 118, l. 15.

However, Investigator Carwell’s testimony was that he sought consent to search Katio’s apartment not to ensure the safety of the child, but to look for “[a]nything to help me connect this

shooting [of Michael Keith] to the two guys [Appellant and Wallace] that were in this car.” Carwell, who was investigating the attempted armed robbery of Keith, admitted he only asked Katio for consent to search her apartment after she told him Appellant had returned to her apartment around 5:00 am that morning. R. 19, l. 14 – 20, l. 5; R. 27, ll. 1-4; R. 27, ll. 16-18. Based on his testimony, which the court found credible, Carwell was not “simply trying to determine if the residence was safe to return the child” as the court found. Instead, he was looking for incriminating evidence against Appellant. The court’s finding was in direct conflict with Carwell’s testimony.

Moreover, the court abused its discretion by finding Investigator Carwell’s testimony credible. Carwell claimed under oath that he “never mentioned anything about DSS or the child” when he asked Katio for consent to search. R. 27, ll. 13-15. His testimony is completely contradicted by both Katio and Destiny’s testimony. Even the solicitor indirectly admitted Carwell’s testimony was false. While making her argument to the court, the assistant solicitor stated, “Was DSS mentioned at the scene? *No doubt, Your Honor*, because the police have a duty to ensure the safety of the child before it’s [sic] returned to an environment that may cause it [sic] harm.” R. 108, ll. 2-5 (emphasis added). Even the solicitor did not believe her own witness that DSS was “never mentioned” when the investigator obtained Katio’s consent to search. She freely admitted Investigator Carwell told Katio he would have to contact DSS.

It is obvious from the evidence that Investigator Carwell was investigating the attempted armed robbery of Michael Keith, that he wanted to search Katio’s apartment to look for evidence related to this offense after Katio stated Appellant had returned to her apartment that morning, and that he falsely claimed he wanted to ensure the apartment was safe for the minor child when he obtained consent from Katio. The threats Carwell made to Katio that he would contact DSS and that she would not be able to take her child home if she did not consent to a search of her apartment,

along with the coercive atmosphere at the scene of the traffic stop, rendered Katio's ultimate consent involuntary.

In State v. Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992), this Court found the defendant's oral statements to law enforcement were involuntarily made when officers told Corns during several interviews that his wife could be arrested and their children taken by DSS. This Court found the officers' statements "amounted to an exertion of improper influence rendering Corns's statement involuntary" and remanded for a new trial. Id.

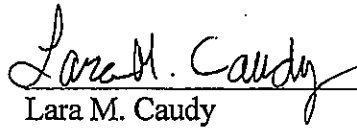
The threats in this case are very similar to threats made by the officers in Corns that this Court found rendered Corns' statements involuntary. This Court should likewise find the threats made by Investigator Carwell regarding contacting DSS rendered Katio's consent to search her apartment involuntary and suppress the evidence seized from within.

Because it is clear Investigator Carwell's testimony was not credible and that the factual findings made by the trial court in support of its ruling were erroneous, this Court should find the trial court abused its discretion by denying Appellant's motion to suppress the evidence seized from Katio's apartment and remand for a new trial given the threats made by Carwell when obtaining Katio's consent.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial. In the alternative, this Court should remand this case to the lower court for proper findings of fact and conclusions of law since Appellant had a reasonable expectation of privacy to challenge the search of Katio's apartment and the trial judge's factual findings related to the consent to search issue were incorrect.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

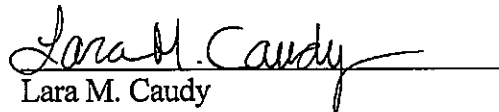
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This 15th day of November, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 15, 2016.


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SC Court of Appeals

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

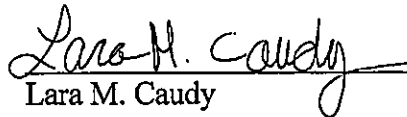
BRANDON J. BERRY,

APPELLANT

APPELLATE CASE NO. 2015-002557

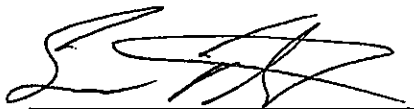
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case have been served upon Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 15th day of November, 2016.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 15th day of November, 2016.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Howard P. King, Circuit Court Judge

Appellate Case No. 2015-002557

THE STATE,

Respondent,

v.

BRANDON J. BERRY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The trial court committed no error in denying Appellant's suppression motion where Appellant had no reasonable expectation of privacy in Katio's apartment and Katio voluntarily consented to a search of her apartment.

STATEMENT OF THE CASE

On July 29, 2014, law enforcement officers with the Richland County Sheriff's Department arrested Appellant Brandon Berry following a traffic stop and subsequent car and foot chase between Appellant and officers. Following an investigation, the Richland County Grand Jury indicted Appellant for attempted murder, attempted armed robbery, unlawful conduct toward a child, resisting arrest, and unlawful carrying of a pistol. On November 30, 2015, Appellant proceeded to a jury trial in the Richland County Court of General Sessions with the Honorable Howard P. King, circuit court judge, presiding. On December 4, 2015, the jury convicted Appellant as indicted. The trial court sentenced Appellant to concurrent terms of imprisonment of twenty years for attempted murder, twenty years for attempted armed robbery, one year for resisting arrest, one year for unlawful carrying of a pistol, and a consecutive term of five years of imprisonment for unlawful conduct towards a child, for an aggregate term of imprisonment of twenty-five years. Thereafter, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

In the early morning hours of July 29, 2014, Michael Keith was returning home from an evening of working two jobs—first as a promoter of “Knuckle Up,” a local boxing event, and then as the host of an official after party for the event. (R. 143, 149). Keith, a lifelong resident of the Columbia area, worked a variety of jobs, including as a bus monitor for Richland 2 School District, an employee at a local shoe store, a disc jockey for a radio station, and a host and promoter at various local nightclubs and events. (R. 142, 148-49, 160-61). Keith was routinely paid in cash when hosting or promoting at events or clubs and therefore, often returned home late at night or early in the morning with large amounts of cash. (R. 148-50). Because of this, Keith had a heightened awareness of his surroundings when returning home from events and had a routine to ensure his safety. (R. 150).

In accordance with his routine, Keith backed his car into the parking lot of his apartment complex when returning home that morning. (R. 150). He exited his car and reached back into his car to retrieve a small bag. (R. 151). Keith then shut the car door and noticed a man dressed all in black, including in a black face mask, black shoes, and black clothing, standing behind him. (R. 151). The man pointed a gun at Keith and demanded Keith’s car keys and money. (R. 151). Keith tried to joke with the masked man to ease the tension, but the man again demanded money and threatened to kill Keith if he did not comply by the time he finished counting down. (R. 151). The man started counting, and upon reaching zero, Keith tried to run away. (R. 151-52). The masked man chased Keith and the two ran around Keith’s car in circles until the man jumped on top of the car. (R. 152). Keith threw a bottle of Minute Maid beverage at him and ran. (R. 152).

While Keith ran, the masked man fired his weapon in Keith's direction, narrowly missing him. (R. 152). Keith dropped to the ground and the man hovered over him, continuing to threaten him and demanding Keith's keys and money. (R. 152-53). The man tried to remove Keith's pants, and when Keith resisted, he shot Keith in the leg. (R. 153). The man then put the barrel of the gun against Keith's head. (R. 153). At that moment, Keith's girlfriend, awakened by the commotion, looked out the balcony and saw the man with a gun to Keith's head. (R. 144). She came out to the balcony and asked what was happening. (R. 144, 153-54). Keith yelled at her to go inside, and while the man was distracted, Keith punched him in the stomach. (R. 144, 153-54). The masked man fled, jumped over a fence, and got into a waiting car that sped off. (R. 178-79).

Keith and his girlfriend were able to get Keith into their apartment and called emergency services for assistance. (R. 146, 155-56). Several other neighbors also heard the commotion and shooting and called 911. (R. 177-82, 391, 446-47). Before medical care arrived, Keith and his girlfriend briefly spoke with responding officers and gave a description of the suspect. (R. 133-40). Keith was transported by ambulance to the hospital, where he underwent emergency surgery for his injuries, including a fractured tibia. (R. 146-47, 156, 172-76, 253-59).

While Keith was being treated, officers from the Richland County Sheriff's Department arrived and processed the scene. (R. 185-98). Officers collected two nine millimeter shell casings and documented the scene. (R. 190). Keith's car was towed to the Sheriff's Department forensic garage for processing, where investigators were able to lift numerous fingerprint and footprint impressions. (R. 199, 311-21). Investigators were later provided with a bullet that had punctured a neighbor's car during the incident. (R. 392-93)

Approximately six hours later, Richland County Sheriff's Deputy Brandon Pennington was patrolling the Broad River Road area of Columbia when he observed a vehicle with two occupants—driver Nickilous Wallace and passenger Appellant—without seatbelts fastened. (R. 217-19). Deputy Pennington activated his blue lights, initiated a traffic stop, and called dispatch to request back-up assistance. (R. 219). Deputy Pennington approached the vehicle and asked for Wallace and Appellant's driver's licenses; both Appellant and Wallace were visibly nervous and shaking. (R. 219-20). Additionally, Appellant's two-year-old daughter was unrestrained and freely moving around the backseat. (R. 222). Deputy Pennington took Wallace and Appellant's information and returned to his patrol car. (R. 220).

As Deputy Pennington checked for any outstanding warrants for Appellant and Wallace, Deputy Owens arrived to provide back-up support for Deputy Pennington. (R. 220). Deputy Owens spoke with Appellant and Wallace and similarly noted the extreme nervousness of both men. Deputy Owens also noticed possible marijuana residue and tweezers, which he recognized as a tool commonly used when smoking marijuana. (R. 233, 248, 289). Deputy Owen observed Appellant fidgeting with a black bag in the back seat. (R. 67). When Deputy Pennington returned to the car, he asked Wallace to step outside the vehicle and Wallace voluntarily exited the vehicle. (R. 220-21). Deputy Pennington asked for permission to search Wallace's person and the vehicle and Wallace gave consent. (R. 221). While Deputy Pennington was searching Wallace, Appellant moved from the passenger seat to the driver seat and fled into a nearby apartment complex with his two-year-old daughter still unrestrained in the backseat of the vehicle. (R. 221-222). Appellant drove a short distance before abandoning the car and fleeing on foot. (R. 222). During this commotion, Appellant's daughter was still in the vehicle, which Appellant did not place in park and which continued to move after he had exited. (R. 222).

Deputy Pennington pursued Appellant on foot throughout the apartment complex and was able to apprehend Appellant as he attempted to climb over a fence. (R. 222-23). Appellant resisted arrest and Deputy Pennington required assistance from several other officers to apprehend Appellant. (R. 228). During the foot pursuit, Appellant discarded two bags: a diaper bag containing a 9 millimeter Glock handgun and an additional bag containing two black masks, zip ties, gloves, and shirts. (R. 222, 229-31).

Appellant's girlfriend, Kayla, lived in the apartment complex where he fled and quickly arrived at the scene. (R. 268-70, 450-51). She tended to Appellant's daughter and called the child's mother, Lourisa Katio, to come retrieve the child. (R. 87, 268-70, 450-51). Katio immediately left work and arrived at the scene shortly thereafter. (R. 266-69). When Katio arrived, she spoke with Investigator Carwell from the Richland County Sheriff's Department. (R. 80-81). Investigator Carwell informed Katio that her daughter had been involved in a serious situation and that a loaded weapon was located in her daughter's diaper bag. (R. 80-81). Katio was upset about the dangerous conditions to which her child had been exposed, as well as the presence of Appellant's girlfriend. (R. 269-70, 451). Katio called several family members, including her stepfather and sister who arrived on the scene shortly thereafter to assist her. (R. 81, 96-97, 270).

Katio told Investigator Carwell that Appellant had come to her apartment that morning to watch their daughter while she was at work after spending the evening out with Wallace. (R. 19, 451). She told Investigator Carwell that Appellant did not live with her, but did spend some nights at her apartment. (R. 20-21, 82-83, 90). Investigator Carwell indicated he was concerned about the child's welfare and wanted to inspect the living conditions before releasing the child to Katio. (R. 81, 87, 97, 276, 451). Katio agreed to let officers inspect her home and signed a

written "Consent to Search" document. (R. 84, 89-90, 272, 276, 451-52, 644). Katio then drove herself and her daughter back to her apartment followed by Investigator Carwell. (R. 21, 82).

Once Katio let Investigator Carwell into the apartment, she identified the items in the apartment that belonged to Appellant, including black jeans in her bedroom closet, Nike shoes outside the closet, and a black zip tie similar to those found in Appellant's bag that Investigator Carwell seized; the jeans and shoes had reddish stains. (R. 21-24, 272-74, 454-57). Katio also gave a written statement describing Appellant's return to her apartment that morning and that the seized items belonged to Keith. (R. 23, 86-87, 270-71). Katio's grandmother, who was the only other person listed on her apartment lease, and other family members were at the home when Investigator Carwell searched the apartment. (R. 20, 83). Investigator Carwell did not find any weapons in the home and determined it was a safe environment for Katio's daughter. (R. 458).

Investigator Carwell requested rapid DNA testing on Appellant's jeans and shoes collected from Katio's apartment. (R. 359-61, 369-70, 547-61). DNA analysts from the Richland County Sheriff's Department DNA laboratory tested the items and established the reddish stain on both items was blood. (R. 351-52, 359-61, 369-70, 547-61). The blood sample on the shoes was too weak to determine a DNA profile, but the blood on the jeans matched Keith's DNA profile. (R. 359-61, 369-70, 547-61). Based on the results of the rapid DNA testing, Investigator Carwell obtained arrest warrants against Appellant. (R. 460-61).

Prior to trial, forensic examiners with the Richland County Sheriff's Department forensics laboratory tested the projectiles and shell casings collected from the scene and concluded Appellant's weapon fired the shots. (R. 394-405). Latent print analysts with the Richland County Sheriff's Department also analyzed the various fingerprint and footprint

impressions taken from Keith's vehicle. (R. 315-18, 415-21). Appellant's shoes were consistent in shape, size, and design of impressions found on Keith's car. (R. 340).

While in pre-trial detention at the Alvin S. Glenn Detention Center, Appellant made numerous phone calls to his girlfriend, Kayla, implicating himself in the crime. (R. 427-55). Additionally, Appellant called Wallace using another inmate's personal identification code (presumably to disguise his identity) and advised Wallace not to testify for the State. (R. 427-55).

At the outset of trial, defense counsel moved to suppress the items seized from Katio's apartment on the grounds that Katio's consent to search was involuntary due to alleged threats to call DSS purportedly made by Investigator Carwell. The trial court conducted an in limine hearing on the matter. (R. 16). During the hearing, the State presented testimony from Investigator Carwell, Deputy Pennington, and Deputy Owens. Investigator Carwell testified he arrived at the scene of the traffic stop at approximately 11:30 a.m. after receiving a call from Deputy Owens. (R. 17). He testified Katio was already present when he arrived and he made contact with her. (R. 18-19). He testified Katio informed him that Appellant had been out the previous evening with Wallace and had returned to her home around 5 a.m. that morning. (R. 19). Investigator Carwell testified Katio told him she lived at the apartment with her daughter, but that her grandmother's name was on the lease. (R. 20). He testified Katio volunteered to let him search the apartment and signed a consent form memorializing her consent. (R. 19-21). He testified he did not make any threats or promises to obtain Katio's consent. (R. 21, 26). Investigator Carwell testified Katio drove herself and her daughter to her apartment and he followed behind in his vehicle. (R. 21). Once at the apartment, Katio let Investigator Carwell inside and remained in the apartment while he searched it. (R. 21). Investigator Carwell testified that Katio provided a three page written statement following the search. (R. 23).

Following Carwell's testimony, the State argued Appellant did not have a reasonable expectation of privacy in Katio's home and therefore could not challenge the warrantless search of the apartment. (R. 33). Defense counsel responded that Appellant had a child-in-common with Katio and often stayed at the apartment, kept personal belongings there and paid apartment-related bills. (R. 34). In support of these arguments, defense counsel presented testimony from Katio and her sister Destiny.

Katio testified she received a call from Appellant's girlfriend Kayla that her daughter was with the police and she needed to come to get her. (R. 79, 87). She testified she immediately left work and drove to the scene. (R. 80). She testified she spoke with Investigator Carwell, who informed her that her daughter had been involved in a serious situation and a gun was found in her diaper bag. (R. 81, 89). She testified Investigator Carwell told her he needed to ensure that her daughter lived in a safe place before she could leave with her daughter or he would call DSS. (R. 81). Katio testified she called her sister and stepfather, who came to the scene. (R. 81). She testified Investigator Carwell asked where she lived, if Appellant lived with her, and if Appellant kept anything at her apartment. (R. 81). She testified Investigator Carwell told her that she could take her daughter once she established the home was safe. (R. 81). Katio testified she responded that she was willing to let officers inspect her home because she had nothing to hide. (R. 81, 83-84, 89-90). Katio testified Investigator Carwell let her drive herself and her daughter to the apartment. (R. 81-82).

Katio testified that Appellant "sometimes" stayed at her apartment depending upon their relationship status, which fluctuated. (R. 88, 93). Katio testified Appellant spent the evening and early morning of the shooting out with Wallace and did not return to her apartment until approximately 5 a.m. that morning. (R. 86-87). She testified Appellant occasionally had a key to

her apartment, but did not specify if he had one on the day of his arrest. (R. 82). She testified Appellant kept some personal items in her house, but was not on the lease. (R. 82-83, 89). She testified Appellant had his friends over to the apartment on rare occasions, but it was not a regular occurrence. (R. 92-93). Katio testified Investigator Carwell looked for additional weapons at the apartment and the search took approximately fifteen minutes. (R. 83-84). She stressed multiple times she was willing to let officers search her home. (R. 84, 89-90).

Katio's sister Destiny also testified at the hearing. She testified Appellant did not live at her sister's apartment, but would stay there depending on the status of their relationship. (R. 96). She testified Appellant helped pay bills "when he could." (R. 96). She testified she came to the scene to assist her sister, whom she described as "very frantic." (R. 97). Destiny testified law enforcement told Katio she would not get her daughter back unless she consented to a search of her apartment. (R. 97). She testified her sister calmed down significantly when she arrived on scene. (R. 100-01).

Thereafter, following the witnesses' testimony, the State argued Appellant did not reside at the apartment and did not have a reasonable expectation of privacy there. (R. 105-08). Furthermore, the State argued Katio voluntarily gave law enforcement consent to search the apartment. (R. 105-08). In response, defense counsel argued the incriminating evidence discovered in Katio's apartment should be suppressed because Katio's consent to search was coerced by threats of DSS involvement. In support of that contention, defense counsel asserted Appellant had a reasonable expectation of privacy in Katio's home and Katio's consent was involuntary. (R. 108-15).

After taking the matter under advisement and holding a recess, the trial court denied Appellant's motion to suppress. Specifically, the trial court found Appellant had no reasonable

expectation of privacy in Katio's apartment. (R. 116-17). Furthermore, the trial court found Appellant's argument that Katio's consent was due to coercion from law enforcement to be without merit, specifically finding the testimony of Katio and her sister was not credible as to purported threats of DSS involvement. (R. 117-18). In summation, the trial court noted it found "[Katio's] consent was freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child. Based on the above, the motion to suppress the evidence seized from the Defendant's apartment is denied." (R. 118).

Subsequently, at the conclusion of trial, the jury convicted Appellant as indicted. (R. 609-13). Following the verdict, the trial court sentenced Appellant to an aggregate twenty-five year term of imprisonment.

ARGUMENT

The trial court committed no error in denying Appellant's suppression motion where Appellant had no reasonable expectation of privacy in Katio's apartment and Katio voluntarily consented to a search of her apartment.

Appellant contends the trial court erred by denying his motion to suppress the items seized from Katio's apartment. In support of that contention, Appellant maintains the trial court erred in finding he lacked the requisite reasonable expectation of privacy in Katio's apartment to challenge the warrantless search of the residence when in denying the suppression motion. He further maintains the trial court abused its discretion in finding Katio's consent to search her residence was voluntary when officers threatened to remove her daughter from the home if she did not consent and prove she could provide a safe home. However, the trial court properly denied Appellant's suppression motion because Appellant had no legitimate expectation of privacy in Katio's apartment. Additionally, even Appellant had the requisite reasonable expectation of privacy in Katio's apartment, the trial court properly determined Katio's consent to search was voluntarily given. Accordingly, Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). The reviewing court may conduct its own review of the record to determine whether the trial court's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460

(2002). However, the appellate court must affirm the trial court if there is any evidence supporting the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005); see also State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) (“ ‘When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.’ ” (citation omitted)). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial court. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009); see Khingratsaiphon, 352 S.C. at 70, 572 S.E.2d at 459 (“In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge’s ultimate determination de novo but, rather, would apply a deferential standard of review.”).

ANALYSIS

A. Propriety of the Trial Court’s Finding Appellant Lacked a Reasonable Expectation of Privacy to Challenge the Search of Katio’s apartment

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. For purposes of the Fourth Amendment, a search occurs when “an expectation of privacy that society is prepared to consider reasonable is infringed.” United States v. Jacobsen, 466 U.S. 109, 113 (1984). Likewise, a seizure occurs when there is some meaningful interference with an individual’s possessory interest in property or with the individual’s freedom of movement. Id.; see Terry v. Ohio, 392 U.S. 1, 16, n. 16 (1968) (“Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”).

Importantly, before a criminal defendant can challenge the propriety of a search or seizure, the defendant seeking to raise such a challenge must establish that his own personal Fourth Amendment rights were violated by that search or seizure in order to be entitled to the

benefits of the exclusionary rule. State v. McKnight, 291 S.C. 110, 114, 352 S.E.2d 471, 473 (1987); see Rakas v. Illinois, 439 U.S. 128, 132, n. 1 (1978) (“The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.”). That is true because rights protected by the Fourth Amendment are personal rights and cannot be vicariously asserted. Alderman v. United States, 394 U.S. 165, 174 (1969).

Significantly, “capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” Rakas, 439 U.S. at 143 (citing Katz v. United States, 389 U.S. 347, 353 (1967)). A legitimate expectation of privacy is both subjective and objective in nature. State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004). In order to establish a legitimate expectation of privacy, an individual must show: (1) the individual had a subjective expectation that the area searched would remain free from intrusion; and (2) the individual’s subjective expectation is one that society recognizes as reasonable. Id.; see Minnesota v. Olsen, 495 U.S. 91, 95-96 (1990) (instructing a subjective expectation of privacy can be considered legitimate if it is one society accepts and recognizes as reasonable).

“[T]he Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy or unless the government commits a common-law trespass for the purpose of obtaining information.” State v. Brown, 414 S.C. 14, 23, 776 S.E.2d 917, 922 (Ct. App. 2015) (quoting State v. Robinson, 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014) (internal citations omitted)). In Robinson, our Supreme Court set forth factors courts may consider when determining whether the criminal defendant met his burden of proving a reasonable expectation

of privacy in the property that was searched, as required to prove a violation of his Fourth Amendment rights, such as:

- a) whether the defendant owned the home or had property rights to it;
- b) whether he was an overnight guest at the home;
- c) whether he kept a change of clothes at the home;
- d) whether he had a key to the home;
- e) whether he had dominion and control over the home and could exclude others from the home;
- f) how long he had known the owner of the home;
- g) how long he had been at the home;
- h) whether he attempted to keep his activities in the home private;
- i) whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment;
- j) whether he alleged a proprietary or possessory interest in the premises and property seized (even if only at a motion to suppress, where that admission cannot be used against him to determine his guilt); and
- k) whether he paid rent at the home.

Robinson, 410 S.C. at 528-30, 765 S.E.2d at 569-70 (internal citations omitted).

During a motion to suppress, the State bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement, including consent. State v. Gamble, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). "However, the criminal defendant retains the burden to establish that he is asserting his own Fourth Amendment rights, rather than vicariously asserting the rights of others; therefore, the defendant bears the burden to demonstrate that he had an actual and reasonable expectation of

privacy in the place illegally searched.” Robinson, 410 S.C. at 530, 765 S.E.2d at 570 (citing Rakas, 439 U.S. at 130 n. 1, 99 S.Ct. 421).

In the present case, the trial court properly determined Appellant had no reasonable expectation of privacy in Katio’s apartment after considering the proper factors as required under Robinson. (R. 116-18). In reaching its determination, the trial court noted evidence and testimony presented established the lease was not in Appellant’s name, he only spent the night occasionally, most of his belongings were not in the bedroom, Katio had primary dominion and control over the apartment, Appellant did not pay rent, Appellant did not participate in domestic activities in the home, Appellant had no proprietary or possessory interest in the apartment, and Appellant did not attempt to keep his activities in the home private. (R. 116-17). This ruling is supported by evidence in the record, and therefore, and must be affirmed on appellate review.

A review of the factors set forth by the Supreme Court in Robinson establishes there is evidence to support the trial court’s ruling. The evidence presented during the suppression hearing established Appellant had no property rights to the home. He was occasionally an overnight guest at the home, but crucially, did not spend the night prior to the search at the home. Appellant presented no testimony that he kept a change of clothing at the time. While there was testimony that Appellant did occasionally have a key to Katio’s apartment, it is unclear whether Appellant had a key to the apartment at the time of the search. Additionally, Katio’s testimony established that Appellant rarely had guests over to the apartment. There is no evidence that Appellant engaged in typical domestic activities in the home or paid rent at the time of the search. While Appellant and Katio had previously been in a tumultuous relationship for five years, the record establishes Appellant had another girlfriend at the time of the search and Katio was aware of this relationship. Perhaps Appellant had previously had a reasonable expectation of

privacy at Katio's apartment in the past, but he did not satisfy his burden of establishing one at the time of the search.

Despite the evidence and testimony in the record to support the trial court's determination that Appellant did not have a reasonable expectation of privacy in Katio's home, Appellant asserts he was an overnight guest and therefore shared the privacy of the apartment with Katio. However, it is important to note that Appellant did not spend the evening at Katio's apartment, but rather, was at the home until approximately 9 or 10 p.m. in the evening and did not return to the home until 5 or 6 a.m. the next morning to watch his daughter when Katio went to work.

Appellant could not properly challenge the propriety of the search of Katio's apartment in light of the fact he had no expectation of privacy in the apartment. See Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) ("Petitioner, of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse."); McKnight, 291 S.C. at 114, 352 S.E.2d at 473 ("One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated."). Therefore, Appellant could not properly object to the admission of the incriminating evidence discovered during the search of Katio's apartment, and the trial court properly denied Appellant's suppression motion. See United States v. Salvucci, 448 U.S. 83, 85 (1980) ("[D]efendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated."); Rakas, 439 U.S. at 134 ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."). Appellant's convictions should be affirmed.

B. Propriety of the Trial Court's Finding Katio's Consent to Search was Voluntary

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. For purposes of the Fourth Amendment, a search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." Jacobsen, 466 U.S. at 113. Generally speaking, any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). However, "warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement." Kentucky v. King, 563 U.S. 452, 462 (2011).

South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) the search incident to lawful arrest exception; (2) the hot pursuit exception; (3) the stop and frisk exception; (4) the automobile exception; (5) the plain view exception; (6) the consent exception; and (7) the abandonment exception. State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012). Pursuant to the various accepted exceptions to the warrant requirement, a warrantless search or seizure will generally withstand constitutional scrutiny so long as the circumstances establish the existence of an exception along with the existence of probable cause. State v. Bultron, 318 S.C. 323, 331-332, 457 S.E.2d 616, 621 (Ct. App. 1995).

One of the recognized exceptions to the warrant requirement is the consent exception. See Birchfield v. North Dakota, __ U.S. __, 136 S. Ct. 2160, 2185 (2016) ("It is well established that a search is reasonable when the subject consents[.]"). Pursuant to the consent exception, an officer can validly conduct a warrantless search of a constitutionally-protected area when he or

she receives consent from an individual with authority or apparent authority to grant such consent and the consent is provided freely and voluntarily. See State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008) (holding warrantless searches and seizures are constitutionally permissible when conducted under the authority of **voluntary** consent); see also State v. Laux, 344 S.C. 374, 377, 544 S.E.2d 276, 277 (2001) (recognizing consent may be valid if the person granting consent reasonably appeared to have the apparent authority to grant the consent). "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003) (citing State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct.App.2001); State v. Dorce, 320 S.C. 480, 465 S.E.2d 772 (Ct.App.1995); see also Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (existence of consent is determined from totality of circumstances)). Factors to consider when determining whether consent was validly provided include the characteristics of the individual providing consent, which include the individual's age, maturity, education, intelligence, and experience, and the conditions under which the consent was granted, which include the conduct of the officer asking for consent, the number of officers present, and the duration of the encounter. United States v. Boone, 245 F.3d 352, 361-362 (4th Cir. 2001). Significantly, the State bears the burden of establishing the voluntariness of consent, and the issue of whether consent was freely and voluntarily given is a question of fact to be determined from the totality of the circumstances. Boone, 245 F.3d at 361-362; Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Harris, 277 S.C. 274, 286 S.E.2d 137 (1982); Wallace, 269 S.C. at 550, 238 S.E.2d at 676; Brannon, 347 S.C. at

89-90, 552 S.E.2d at 775; Dorce, 320 S.C. at 482, 465 S.E.2d at 773; see also Palacio, 333 S.C. at 514, 511 S.E.2d at 66 (on motion to suppress, State has burden of proving validity of consent).

The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial court and a trial court's "conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion." Mattison, 352 S.C. at 584-85, 575 S.E.2d at 856 (internal citations omitted).

In Appellant's case, Katio provided verbal and written consent to search her apartment after Investigator Carwell expressed concerns over the safety of Katio's daughter. Investigator Carwell's concerns over Katio's ability to provide a safe environment for her daughter were valid and understandable—the two-year-old girl was found unrestrained in a vehicle, the girl then was a passenger during a car chase (while still unrestrained), and a loaded weapon was found in her diaper bag. Katio testified numerous times that while her daughter's safety was her paramount concern, she had no problem with officers searching her home. The trial court specifically found the testimony from Katio and her sister that Investigator Carwell threatened to take her daughter into DSS custody if she refused to consent to a search not credible. The trial court concluded "[Katio's] consent was freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child." (R. 118). These findings are supported by the record and do not amount to an abuse of discretion. The trial court properly determined Katio's consent to search was voluntarily given and denied Appellant's motion to suppress. See State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007) ("Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."); State v. Saltz, 346 S.C. 114,

136, 551 S.E.2d 240, 252 (2001) (“When reviewing a trial court’s ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court’s ruling is supported by any evidence.”); State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998) (“The trial judge’s determination of the voluntariness will not be disturbed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law.”). Appellant’s convictions should be affirmed.¹

¹ Moreover, even assuming the admission of the seized evidence was somehow improper, its admission was entirely harmless because the other evidence presented during trial, which included Appellant’s flight from law enforcement with his two-year-old daughter unrestrained in the backseat less than six hours after the attack on Keith, ballistic evidence matching Appellant’s hidden gun to projectiles found at the scene, similarities between Appellant’s footwear and impressions taken from Keith’s car, testimony establishing the bag Appellant discarded was filled with masks, zip ties, and gloves, and the phone calls Appellant made from pre-trial detention that implicated him in the shooting, all which overwhelmingly established Appellant was, in fact, the masked man who shot and attempted to rob Keith. See State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981) (“[Thompson]’s accomplice testified, subject to cross examination, against [Thompson] at trial and identified him in court. In light of the accomplice’s damaging testimony and other corroborative evidence linking [Thompson] to the crime, the improper in-court identification by the clerk was merely cumulative to independent and overwhelming evidence of guilt.”); see also State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (“[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result.”); cf. State v. Jenkins, 412 S.C. 643, 652, 773 S.E.2d 906, 910 (2015) (“Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found [Jenkins] guilty.”).

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment and conviction of the lower court.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

November 14, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Howard P. King, Circuit Court Judge

Appellate Case No. 2015-002557

THE STATE,

Respondent,

v.

BRANDON J. BERRY,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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November 14, 2016

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Appellate Case No. 2015-002557

THE STATE,

Respondent,

v.

BRANDON J. BERRY,

Appellant.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense - Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 14th day of November, 2016.

Keely Carter
Legal Assistant

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

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

The State, Respondent,

v.

Brandon Joseph Berry, Appellant.

Appellate Case No. 2015-002557

Appeal From Richland County
Howard P. King, Circuit Court Judge

Unpublished Opinion No. 2017-UP-380
Submitted September 1, 2017 – Filed October 18, 2017

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson, Senior
Assistant Deputy Attorney General Megan Harrigan
Jameson, and Solicitor Daniel Edward Johnson, all of
Columbia, for Respondent.

PER CURIAM: Brandon Joseph Berry appeals his convictions of attempted
murder, attempted armed robbery, resisting arrest, unlawful carrying of a pistol,

and unlawful conduct towards a child, arguing the trial court erred in finding (1) he did not have an actual and reasonable expectation of privacy in his girlfriend's apartment and (2) his girlfriend voluntarily consented to a search of her apartment. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether Berry had an actual and reasonable expectation of privacy in his girlfriend's apartment: *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) ("In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous."); *id.* ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error."); U.S. Const. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ."); *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) ("To claim protection under the Fourth Amendment of the U.S. Constitution, defendants must show that they have a legitimate expectation of privacy in the place searched."); *State v. Robinson*, 410 S.C. 519, 530, 765 S.E.2d 564, 570 (2014) ("[T]he criminal defendant retains the burden to establish that he is asserting his own Fourth Amendment rights, rather than vicariously asserting the rights of others; therefore, the defendant bears the burden to demonstrate that he had an actual and reasonable expectation of privacy in the place illegally searched."); *id.* at 528-30, 765 S.E.2d at 569-70 (providing factors the court may consider in determining whether the defendant demonstrated he had an actual and reasonable expectation of privacy in an area searched include: (1) "whether the defendant owned the home or had property rights to it"; (2) "whether he was an overnight guest at the home"; (3) "whether he kept a change of clothes at the home"; (4) "whether he had a key to the home"; (5) "whether he had dominion and control over the home and could exclude others from the home"; (6) "how long he had known the owner of the home"; (7) "how long he had been at the home"; (8) "whether he attempted to keep his activities in the home private"; (9) "whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment"; (10) "whether he alleged a proprietary or possessory interest in the premises and property seized"; and (11) "whether he paid rent at the home").

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

2. As to whether his girlfriend voluntarily consented to a search of her apartment: *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012) ("In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous."); *id.* ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error."); *State v. Provet*, 405 S.C. 101, 113, 747 S.E.2d 453, 460 (2013) ("A warrantless search is reasonable within the meaning of the Fourth Amendment when voluntary consent is given for the search."); *State v. Greene*, 330 S.C. 551, 557, 499 S.E.2d 817, 820 (Ct. App. 1997) ("The issue of voluntary consent, when contested by contradicting testimony, is an issue of credibility to be determined by the trial [court]. A trial [court's] conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion." (citation omitted)); *State v. Mattison*, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003) ("Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances."); *State v. Johnson*, 413 S.C. 458, 467, 776 S.E.2d 367, 371 (2015) ("Credibility findings are treated as factual findings, and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record.").

AFFIRMED.

LOCKEMY, C.J., and HUFF and HILL, JJ., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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November 03, 2017

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Brandon J. Berry
Lower Court Case No. 2015GS4000015, 2015GS4000017,
2015GS4000018, 2015GS4000020, 2015GS4005062
Appellate Case No. 2015-002557

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Lara Mary Caudy, Esquire
Megan Harrigan Jameson, Esquire
Daniel Edward Johnson, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Brandon J. Berry, 352671,
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2017CP4007548

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472
2. Name and location of Court which imposed sentence Richland County Court of General Sessions, 1701 Main Street, Columbia, SC 29201.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2015-GS-40-015: unlawful carrying of a pistol; 2015-GS-40-017: unlawful conduct towards a child
 - (b) 2015-GS-40-018: resisting arrest; 2015-GS-40-020: attempted murder
 - (c) 2015-GS-40-062: attempted armed robbery
5. The date upon which sentence was imposed and the terms of the sentence:

JEANETTE
C.C.P.

2017 DEC 14 AM 9:18

FILED
RICHLAND COUNTY

Revised 3/2003

- (a) December 4, 2015: 1 year, 5 years, 1 year, 20 years, and 20 years
- (b) All sentences run concurrent, but 5 years sentence run consecutive
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed.
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. October 18, 2017
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpub. Op. No. 2017-UP-380
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in

Revised 3/2003

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of trial counsel.
 - (b) Ineffective assistnace of appellate counsel.
 - (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Failure to properly prepare and investigate prior to trial.
 - (b) Failure to utilize evidence and witnesses for the defense.
 - (c) Failure to raise all meritorious issues on appeal.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No.
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
 - (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) PCR is the proper forum.

(b) PCR is the proper forum.

Revised 3/2003

(c) PCR is the proper forum.

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

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

i. Aimee Zmroczek, PO Box 11961, Columbia, SC 29211

ii. Laura M. Caudey, Office of Appellate Defense, PO Box 11589, Columbia, SC

29211

iii. _____

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

i. Trial.

ii. Direct appeal.

iii. _____

19. State clearly the relief you seek in filing this application:

A new trial.

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

No.

STATE OF SOUTH CAROLINA

County of Dorchester

VERIFICATION

I, Brandon J. Berry, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Brandon Berry

SWORN to and subscribed before me this 7
day of December, 2017.

[Signature] (L.S.)
Notary Public

My Commission Expires: 5/23/2026

FILED
2017 DEC 14 AM 7:48
JEANELLE W. MORRIS
C.C.P. & G.S.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Brandon J. Berry, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Brandon Berry
Applicant

SWORN or affirmed to and subscribed before me this
7 day of December, 2017.

[Signature]
Notary Public

My Commission Expires: 5/23/2026

JEANETTE W. HUBBARD
C.C.P. & G.S.

2017 DEC 14 AM 7:48

CLERK OF COURT
FILED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Brandon Berry, SCDC # 352671,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2017-CP-40-7548

RETURN AND MOTION FOR A
MORE DEFINITE STATEMENT OF
ALLEGATIONS

RICHLAND COUNTY
FILED
MAY 11 AM 8:27
JANETTE W. MCARDLE
C.C.P. & G.S.

The State (Respondent), making its Return to the application for Post-Conviction Relief filed on July 25, 2017, would respectfully show this Court:

I. Procedural History

Brandon Berry (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. On July 29, 2014, law enforcement officers with the Richland County Sheriff's Department arrested Applicant following traffic stop and subsequent car and foot chase between Applicant and officers. Following an investigation, the Richland County Grand Jury indicted Applicant for attempted murder, attempted armed robbery, unlawful conduct toward a child, resisting arrest, and unlawful carrying of a pistol. (2015-GS-40-015, -017, -018, -020, -062).

On November 30, 2015, Applicant proceeded to a jury trial in the Richland County Court of General Sessions with the Honorable Howard P. King, circuit court judge, presiding. On December 4, 2015, the jury convicted Applicant as indicted. The trial court sentenced Applicant to concurrent terms of imprisonment of twenty years for attempted murder, twenty years for attempted armed robbery, one year for resisting arrest, one year for unlawful carrying of a pistol,

and a consecutive term of five years of imprisonment for unlawful conduct towards a child, for an aggregate term of twenty-five years' imprisonment.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf. Appellate Defender Lara M. Caudy with South Carolina Commission on Indigent Defense-Office of Appellate Defense represented Applicant on appeal. The State was represented by Megan Harrigan Jameson of the South Carolina Attorney General's Office. On appeal, Applicant argued the following issues: first, whether the trial court erred by finding Applicant did not have a reasonable expectation of privacy in the apartment leased by his girlfriend and the mother of his child to challenge the warrantless search of the home; and second, where the trial court abused its discretion in finding Applicant's girlfriend voluntarily consented to a search of her apartment. Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion without oral argument. State v. Brandon Berry, Op. No. 2017-UP-380 (Ct. App. filed Oct. 18, 2017). The Remittitur was issued on November 3, 2017.

II. Facts Giving Rise to the Conviction

In the early morning hours of July 29, 2014, Michael Keith was returning home from an evening of working two jobs—first as a promoter of “Knuckle Up,” a local boxing event, and then as the host of an official after party for the event. (R. 143, 149). Keith, a lifelong resident of the Columbia area, worked a variety of jobs, including as a bus monitor for Richland 2 School District, an employee at a local shoe store, a disc jockey for a radio station, and a host and promoter at various local nightclubs and events. (R. 142, 148-49, 160-61). Keith was routinely paid in cash when hosting or promoting at events or clubs and therefore, often returned home late at night or early in the morning with large amounts of cash. (R. 148-50). Because of this, Keith

had a heightened awareness of his surroundings when returning home from events and had a routine to ensure his safety. (R. 150).

In accordance with his routine, Keith backed his car into the parking lot of his apartment complex when returning home that morning. (R. 150). He exited his car and reached back into his car to retrieve a small bag. (R. 151). Keith then shut the car door and noticed a man dressed all in black, including in a black face mask, black shoes, and black clothing, standing behind him. (R. 151). The man pointed a gun at Keith and demanded Keith's car keys and money. (R. 151). Keith tried to joke with the masked man to ease the tension, but the man again demanded money and threatened to kill Keith if he did not comply by the time he finished counting down. (R. 151). The man started counting, and upon reaching zero, Keith tried to run away. (R. 151-52). The masked man chased Keith and the two ran around Keith's car in circles until the man jumped on top of the car. (R. 152). Keith threw a bottle of Minute Maid beverage at him and ran. (R. 152).

While Keith ran, the masked man fired his weapon in Keith's direction, narrowly missing him. (R. 152). Keith dropped to the ground and the man hovered over him, continuing to threaten him and demanding Keith's keys and money. (R. 152-53). The man tried to remove Keith's pants, and when Keith resisted, he shot Keith in the leg. (R. 153). The man then put the barrel of the gun against Keith's head. (R. 153). At that moment, Keith's girlfriend, awakened by the commotion, looked out the balcony and saw the man with a gun to Keith's head. (R. 144). She came out to the balcony and asked what was happening. (R. 144, 153-54). Keith yelled at her to go inside, and while the man was distracted, Keith punched him in the stomach. (R. 144, 153-54). The masked man fled, jumped over a fence, and got into a waiting car that sped off. (R. 178-79).

Keith and his girlfriend were able to get Keith into their apartment and called emergency services for assistance. (R. 146, 155-56). Several other neighbors also heard the commotion and shooting and called 911. (R. 177-82, 391, 446-47). Before medical care arrived, Keith and his girlfriend briefly spoke with responding officers and gave a description of the suspect. (R. 133-40). Keith was transported by ambulance to the hospital, where he underwent emergency surgery for his injuries, including a fractured tibia. (R. 146-47, 156, 172-76, 253-59).

While Keith was being treated, officers from the Richland County Sheriff's Department arrived and processed the scene. (R. 185-98). Officers collected two nine millimeter shell casings and documented the scene. (R. 190). Keith's car was towed to the Sheriff's Department forensic garage for processing, where investigators were able to lift numerous fingerprint and footprint impressions. (R. 199, 311-21). Investigators were later provided with a bullet that had punctured a neighbor's car during the incident. (R. 392-93)

Approximately six hours later, Richland County Sheriff's Deputy Brandon Pennington was patrolling the Broad River Road area of Columbia when he observed a vehicle with two occupants—driver Nickilous Wallace and passenger Applicant—without seatbelts fastened. (R. 217-19). Deputy Pennington activated his blue lights, initiated a traffic stop, and called dispatch to request back-up assistance. (R. 219). Deputy Pennington approached the vehicle and asked for Wallace and Applicant's driver's licenses; both Applicant and Wallace were visibly nervous and shaking. (R. 219-20). Additionally, Applicant's two-year-old daughter was unrestrained and freely moving around the backseat. (R. 222). Deputy Pennington took Wallace and Applicant's information and returned to his patrol car. (R. 220).

As Deputy Pennington checked for any outstanding warrants for Applicant and Wallace, Deputy Owens arrived to provide back-up support for Deputy Pennington. (R. 220). Deputy

Owens spoke with Applicant and Wallace and similarly noted the extreme nervousness of both men. Deputy Owens also noticed possible marijuana residue and tweezers, which he recognized as a tool commonly used when smoking marijuana. (R. 233, 248, 289). Deputy Owen observed Applicant fidgeting with a black bag in the back seat. (R. 67). When Deputy Pennington returned to the car, he asked Wallace to step outside the vehicle and Wallace voluntarily exited the vehicle. (R. 220-21). Deputy Pennington asked for permission to search Wallace's person and the vehicle and Wallace gave consent. (R. 221). While Deputy Pennington was searching Wallace, Applicant moved from the passenger seat to the driver seat and fled into a nearby apartment complex with his two-year-old daughter still unrestrained in the backseat of the vehicle. (R. 221-222). Applicant drove a short distance before abandoning the car and fleeing on foot. (R. 222). During this commotion, Applicant's daughter was still in the vehicle, which Applicant did not place in park and which continued to move after he had exited. (R. 222). Deputy Pennington pursued Applicant on foot throughout the apartment complex and was able to apprehend Applicant as he attempted to climb over a fence. (R. 222-23). Applicant resisted arrest and Deputy Pennington required assistance from several other officers to apprehend Applicant. (R. 228). During the foot pursuit, Applicant discarded two bags: a diaper bag containing a 9 millimeter Glock handgun and an additional bag containing two black masks, zip ties, gloves, and shirts. (R. 222, 229-31).

Applicant's girlfriend, Kayla, lived in the apartment complex where he fled and quickly arrived at the scene. (R. 268-70, 450-51). She tended to Applicant's daughter and called the child's mother, Lourisa Katio, to come retrieve the child. (R. 87, 268-70, 450-51). Katio immediately left work and arrived at the scene shortly thereafter. (R. 266-69). When Katio arrived, she spoke with Investigator Carwell from the Richland County Sheriff's Department. (R.

80-81). Investigator Carwell informed Katio that her daughter had been involved in a serious situation and that a loaded weapon was located in her daughter's diaper bag. (R. 80-81). Katio was upset about the dangerous conditions to which her child had been exposed, as well as the presence of Applicant's girlfriend. (R. 269-70, 451). Katio called several family members, including her stepfather and sister who arrived on the scene shortly thereafter to assist her. (R. 81, 96-97, 270).

Katio told Investigator Carwell that Applicant had come to her apartment that morning to watch their daughter while she was at work after spending the evening out with Wallace. (R. 19, 451). She told Investigator Carwell that Applicant did not live with her, but did spend some nights at her apartment. (R.20-21, 82-83, 90). Investigator Carwell indicated he was concerned about the child's welfare and wanted to inspect the living conditions before releasing the child to Katio. (R. 81, 87, 97, 276, 451). Katio agreed to let officers inspect her home and signed a written "Consent to Search" document. (R. 84, 89-90, 272, 276, 451-52, 644). Katio then drove herself and her daughter back to her apartment followed by Investigator Carwell. (R. 21, 82).

Once Katio let Investigator Carwell into the apartment, she identified the items in the apartment that belonged to Applicant, including black jeans in her bedroom closet, Nike shoes outside the closet, and a black zip tie similar to those found in Applicant's bag that Investigator Carwell seized; the jeans and shoes had reddish stains. (R. 21-24, 272-74, 454-57). Katio also gave a written statement describing Applicant's return to her apartment that morning and that the seized items belonged to Keith. (R. 23, 86-87, 270-71). Katio's grandmother, who was the only other person listed on her apartment lease, and other family members were at the home when Investigator Carwell searched the apartment. (R. 20, 83). Investigator Carwell did not find any weapons in the home and determined it was a safe environment for Katio's daughter. (R. 458).

Investigator Carwell requested rapid DNA testing on Applicant's jeans and shoes collected from Katio's apartment. (R. 359-61, 369-70, 547-61). DNA analysts from the Richland County Sheriff's Department DNA laboratory tested the items and established the reddish stain on both items was blood. (R. 351-52, 359-61, 369-70, 547-61). The blood sample on the shoes was too weak to determine a DNA profile, but the blood on the jeans matched Keith's DNA profile. (R. 359-61, 369-70, 547-61). Based on the results of the rapid DNA testing, Investigator Carwell obtained arrest warrants against Applicant. (R. 460-61).

Prior to trial, forensic examiners with the Richland County Sheriff's Department forensics laboratory tested the projectiles and shell casings collected from the scene and concluded Applicant's weapon fired the shots. (R. 394-405). Latent print analysts with the Richland County Sheriff's Department also analyzed the various fingerprint and footprint impressions taken from Keith's vehicle. (R. 315-18, 415-21). Applicant's shoes were consistent in shape, size, and design of impressions found on Keith's car. (R. 340).

While in pre-trial detention at the Alvin S. Glenn Detention Center, Applicant made numerous phone calls to his girlfriend, Kayla, implicating himself in the crime. (R. 427-55).

★ Additionally, Applicant called Wallace using another inmate's personal identification code (presumably to disguise his identity) and advised Wallace not to testify for the State. (R. 427-55).

At the outset of trial, defense counsel moved to suppress the items seized from Katio's apartment on the grounds that Katio's consent to search was involuntary due to alleged threats to call DSS purportedly made by Investigator Carwell. The trial court conducted an in limine hearing on the matter. (R. 16). During the hearing, the State presented testimony from Investigator Carwell, Deputy Pennington, and Deputy Owens. Investigator Carwell testified he arrived at the scene of the traffic stop at approximately 11:30 a.m. after receiving a call from

Deputy Owens. (R. 17). He testified Katio was already present when he arrived and he made contact with her. (R. 18-19). He testified Katio informed him that Applicant had been out the previous evening with Wallace and had returned to her home around 5 a.m. that morning. (R. 19). Investigator Carwell testified Katio told him she lived at the apartment with her daughter, but that her grandmother's name was on the lease. (R. 20). He testified Katio volunteered to let him search the apartment and signed a consent form memorializing her consent. (R. 19-21). He testified he did not make any threats or promises to obtain Katio's consent. (R. 21, 26). Investigator Carwell testified Katio drove herself and her daughter to her apartment and he followed behind in his vehicle. (R. 21). Once at the apartment, Katio let Investigator Carwell inside and remained in the apartment while he searched it. (R. 21). Investigator Carwell testified that Katio provided a three page written statement following the search. (R. 23).

Following Carwell's testimony, the State argued Applicant did not have a reasonable expectation of privacy in Katio's home and therefore could not challenge the warrantless search of the apartment. (R. 33). Defense counsel responded that Applicant had a child-in-common with Katio and often stayed at the apartment, kept personal belongings there and paid apartment-related bills. (R. 34). In support of these arguments, defense counsel presented testimony from Katio and her sister Destiny.

Katio testified she received a call from Applicant's girlfriend Kayla that her daughter was with the police and she needed to come to get her. (R. 79, 87). She testified she immediately left work and drove to the scene. (R. 80). She testified she spoke with Investigator Carwell, who informed her that her daughter had been involved in a serious situation and a gun was found in her diaper bag. (R. 81, 89). She testified Investigator Carwell told her he needed to ensure that her daughter lived in a safe place before she could leave with her daughter or he would call DSS.

(R. 81). Katio testified she called her sister and stepfather, who came to the scene. (R. 81). She testified Investigator Carwell asked where she lived, if Applicant lived with her, and if Applicant kept anything at her apartment. (R. 81). She testified Investigator Carwell told her that she could take her daughter once she established the home was safe. (R. 81). Katio testified she responded that she was willing to let officers inspect her home because she had nothing to hide. (R. 81, 83-84, 89-90). Katio testified Investigator Carwell let her drive herself and her daughter to the apartment. (R. 81-82).

Katio testified that Applicant "sometimes" stayed at her apartment depending upon their relationship status, which fluctuated. (R. 88, 93). Katio testified Applicant spent the evening and early morning of the shooting out with Wallace and did not return to her apartment until approximately 5 a.m. that morning. (R. 86-87). She testified Applicant occasionally had a key to her apartment, but did not specify if he had one on the day of his arrest. (R. 82). She testified Applicant kept some personal items in her house, but was not on the lease. (R. 82-83, 89). She testified Applicant had his friends over to the apartment on rare occasions, but it was not a regular occurrence. (R. 92-93). Katio testified Investigator Carwell looked for additional weapons at the apartment and the search took approximately fifteen minutes. (R. 83-84). She stressed multiple times she was willing to let officers search her home. (R. 84, 89-90).

Katio's sister Destiny also testified at the hearing. She testified Applicant did not live at her sister's apartment, but would stay there depending on the status of their relationship. (R. 96). She testified Applicant helped pay bills "when he could." (R. 96). She testified she came to the scene to assist her sister, whom she described as "very frantic." (R. 97). Destiny testified law enforcement told Katio she would not get her daughter back unless she consented to a search of

her apartment. (R. 97). She testified her sister calmed down significantly when she arrived on scene. (R. 100-01).

Thereafter, following the witnesses' testimony, the State argued Applicant did not reside at the apartment and did not have a reasonable expectation of privacy there. (R. 105-08). Furthermore, the State argued Katio voluntarily gave law enforcement consent to search the apartment. (R. 105-08). In response, defense counsel argued the incriminating evidence discovered in Katio's apartment should be suppressed because Katio's consent to search was coerced by threats of DSS involvement. In support of that contention, defense counsel asserted Applicant had a reasonable expectation of privacy in Katio's home and Katio's consent was involuntary. (R. 108-15).

After taking the matter under advisement and holding a recess, the trial court denied Applicant's motion to suppress. Specifically, the trial court found Applicant had no reasonable expectation of privacy in Katio's apartment. (R. 116-17). Furthermore, the trial court found Applicant's argument that Katio's consent was due to coercion from law enforcement to be without merit, specifically finding the testimony of Katio and her sister was not credible as to purported threats of DSS involvement. (R. 117-18). In summation, the trial court noted it found "[Katio's] consent was freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child. Based on the above, the motion to suppress the evidence seized from the Defendant's apartment is denied." (R. 118).

Subsequently, at the conclusion of trial, the jury convicted Applicant as indicted. (R. 609-13). Following the verdict, the trial court sentenced Applicant to an aggregate twenty-five year term of imprisonment.

III. Allegations Raised in Application for Post-Conviction Relief

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

-Ineffective Assistance of Trial Counsel for:

-failure to properly prepare and investigate prior to trial

-failure to utilize evidence and witnesses for the defense

-Ineffective Assistance of Appellate Counsel for:

-failure to raise all meritorious issues on appeal

Attached to this Return and incorporated by reference are the records of the Richland County Clerk of Court regarding the subject convictions, the trial transcript, Applicant's appellate records (including the record on appeal and all pertinent filings before the Court of Appeals), Applicant's records from the South Carolina Department of Corrections, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

IV. Response to Allegations of Ineffective Assistance of Trial Counsel

Applicant alleges various grounds of ineffective assistance of trial counsel. Respondent submits Applicant's allegations of ineffective assistance of counsel are refuted by the record, and that these allegations are without merit.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the

application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test and cannot meet this requisite burden of proof necessary for relief. However, the allegations of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V. Response to Allegations of Ineffective Assistance of Appellate Counsel

Applicant also alleges he was provide ineffective assistance of counsel by his appellate counsel because she failed to raise all meritorious issues on appeal.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show appellate counsel's performance was deficient and he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test regarding either trial or appellate counsel. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute.

Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI. Motion for More Definite Statement

Applicant alleges he is being held in custody unlawfully based on vague allegations of ineffective assistance of trial and appellate counsel. However, Applicant fails to set forth with specificity the facts and circumstances upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must “. . . specifically set forth the grounds upon which the application is based.” Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965).

Applicant has failed to state with any specificity the specific facts giving rise to these allegations. Additionally, this allegation is not supported by any other additional information in the application. Respondent moves pursuant to Rule 12(e), SCRCF, to require Applicant to provide a more definite statement of her allegations of ineffective assistance of counsel. The Uniform Post-Conviction Procedure Act requires applicants to “specifically set forth the grounds upon which the application is based.” S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Furthermore, Rule 8(a), SCRCF, requires all civil pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.” Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the application.

VII. Any Future Amendments

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCPP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCPP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCPP.

VIII. All Other Claims

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

IX. Relief Requested

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial and appellate counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

_____, 2018

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

BRANDON BERRY, #352671,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2017-CP-40-7548

AFFIDAVIT OF SERVICE BY MAIL

RICHLAND COUNTY
FILED
MAY 11 AM 8:57
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion for a More Definite Statement of Allegations** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Leah B. Moody
Law Office of Leah B. Moody, LLC
Post Office Box 1015
Rock Hill, SC 29730

DATED this the 8th day of May, 2018.


Carmen A. Nord, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Brandon Berry, 352671,	)	2017-CP-40-7548
Applicant,	)	
v.	)	
	)	MOTION FOR DISCOVERY
State of South Carolina,	)	
<u>Respondent.</u>	)	

COMES NOW Applicant, by and through his undersigned attorney, and requests that this Court enter an Order for Production of Discovery pursuant to S.C. Code Ann. §17-27-150(a) (2008).

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on December 14, 2017. Tricia A. Blanchette, Esquire, was substituted in as Applicant's counsel via written Order dated October 4, 2018.

Following her substitution as counsel, the undersigned has reviewed a majority of the file maintained by trial counsel. At this juncture, counsel is concerned about whether she has been and/or trial counsel was furnished complete discovery prior to trial, so counsel finds it necessary to gain access and copies of the discoverable portions of the 5th Circuit Solicitor's file and Clerk of Court's file. Furthermore, Applicant has retained an investigator, and it is necessary that he, along with counsel, be provided the opportunity to review all evidence that was admitted and/or maintained by the investigative agency.

Therefore, to ensure that Applicant has the case materials needed to properly prepare his case for an evidentiary hearing, Applicant would respectfully request the opportunity to issue subpoenas to the appropriate people, offices or agencies for the production of the following case files/materials pursuant to S.C. Code Ann. §17-27-

150(a) (2008) limited to those files/materials that were subject to discovery during the underlying criminal proceeding:

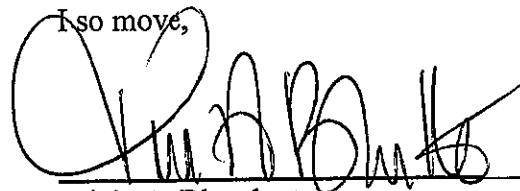
1. A complete copy of the discoverable portions of Applicant's file maintained by the Richland County Solicitor's Office, to include email communications and recordings. If not contained therein, a copy of the Richland County Sheriff's Department file and State Law Enforcement (SLED) file.
2. A complete copy of the Richland County Clerk's file.
3. The opportunity for Applicant's counsel, private investigator and potential experts to review the evidence maintained at the Richland County Clerk's Office, Sheriff's Department and SLED (if needed).

Applicant would further request the opportunity for his counsel, private investigator and/or experts to review any and all requested materials that cannot be copied or provided to counsel. Additionally, Applicant would ask the Court to find that if a party fails to comply or does not have a file or requested item to produce, a written explanation must be provided for the failure to produce said file or item to Applicant's counsel.

Applicant, through undersigned counsel, submits that the above listed requests are necessary for counsel, private investigator, and potential experts to properly prepare his case and to present his claims. Furthermore, the Applicant, through counsel, submits that this request is not being made as a fishing expedition, but it is only being submitted to the Court due to the importance of the requested materials in Applicant obtaining "one full bite of the apple." See Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000), Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

THEREFORE, based upon the foregoing the Applicant respectfully requests that this Court hold a hearing and/or enter an Order for Discovery, which allows counsel to

issue subpoenas to the appropriate parties, offices and agencies for the above requested case materials that are necessary for the presentation of Applicant's case.

I so move,


Tricia A. Blanchette
Attorney at Law
PO Box 2147
Leesville, SC 29070

January 16, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Brandon Berry, 352671,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2017-CP-40-7548

ORDER AUTHORIZING DISCOVERY

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on December 14, 2017. Tricia A. Blanchette, Esquire, was substituted in as Applicant's counsel via written Order dated October 4, 2018. On January 16, 2019, Applicant, through counsel, submitted a Motion for Discovery. On February 22, 2019, Applicant appeared for a motion hearing in front of the Honorable Kristi F. Curtis at the Richland County Courthouse. Applicant was represented by Tricia A. Blanchette, Esquire. Respondent was represented by Lindsey McCallister, Assistant Attorney General.

By way of the written motion and at the hearing, Applicant, through counsel, requested an Order Authorizing Discovery pursuant to S.C. Code Ann. §17-27-150(a) (2008). Counsel explained that she had been given the opportunity to review Applicant's file maintained by defense counsel. To ensure that Applicant had the complete discoverable file, Applicant was requesting the opportunity for counsel to review and copy the Clerk's file, the Solicitor's file and law enforcement files, if needed, and inspect any and all evidence that could not be copied. Respondent did not oppose Applicant's request, but requested that the parties be allowed to enter their own objections, if needed.

RICHLAND COUNTY
FILED
2019 MAR 19 AM 9:35
JEANETTE M. MCROIDE
CLERK OF COURT

To ensure that Applicant and his attorney have the case materials needed to properly prepare his case for an evidentiary hearing, this Court finds Applicant shall be allowed to issue written requests and/or subpoenas to the appropriate people, offices or or agencies for the production of the following case files/materials pursuant to S.C. Code Ann. §17-27-150(a) (2008) limited to those files/materials that were subject to discovery during the underlying criminal proceeding:

1. A complete copy of the discoverable portions of Applicant's file maintained by the Richland County Solicitor's Office, to include email communications and recordings. If not contained therein, a copy of the Richland County Sheriff's Department file and State Law Enforcement (SLED) file.
2. A complete copy of the Richland County Clerk's file.
3. The opportunity for Applicant's counsel, private investigator and potential experts to review the evidence maintained at the Richland County Clerk's Office, Sheriff's Department and SLED (if needed).

If copies cannot be made of items in the requested file(s), this Court grants the opportunity for counsel for both parties, a private investigator and/or expert(s) to review such items in person. This Court finds that if a person, office or agency does not have a file to provide, Applicant's counsel must be provided with a written response and explanation for the absence of such file. Applicant's counsel is to provide the Office of Attorney General with the opportunity to copy all discovery received pursuant to this Order.

IT IS THEREFORE ORDERED:

1. That Applicant's counsel is permitted to serve a subpoena and/or submit a request, along with a copy of this Order, upon the above listed people, offices or agencies for the above listed items.
2. That any party in receipt of a subpoena pursuant to this Order may file a timely objection with the Chief Administrative Judge for the Fifth Judicial Circuit.

AND, IT IS SO ORDERED.

March 6, 2019

Kristi F. Curtis
Honorable Kristi F. Curtis
Presiding Judge, Fifth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Brandon Berry, 352671,)
Applicant,)

2017-CP-40-7548

v.)

State of South Carolina,)
Respondent.)

AMENDMENT TO APPLICATION
FOR POST CONVICTION RELIEF

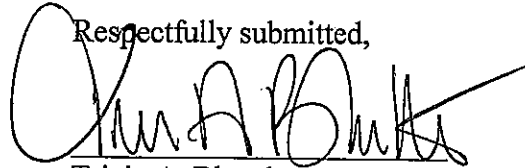
2019 OCT -9 PM 2:53
JEANNETTE W. MCBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on December 14, 2017. By and through his undersigned counsel, Applicant would move to amend his Application for Post Conviction Relief. In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Trial counsel rendered ineffective assistance for failing to properly handle witnesses and call necessary witnesses at trial.
2. Trial counsel rendered ineffective assistance for failing to ensure that Applicant was aware of the State's evidence prior to the on the record rejection of the plea offer. Transcript pp. 190-191.
3. Trial counsel rendered ineffective assistance for failing to move to continue, move to suppress and/or effectively object and argue regarding the recorded phone calls admitted at trial and the unavailability of witness Wallace. Ineffective assistance of appellate counsel for failing to raise issues related to the phone calls and availability of witness Wallace on appeal.

4. Trial counsel rendered ineffective assistance of for failing to object to the court's instruction to the jury to "search for the truth." Transcript p. 674.
5. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, to include the above stated issue(s).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

October 4, 2019

1 State of South Carolina Court of Common Pleas
2 County of Richland Fifth Judicial Circuit
3
4 Brandon J. Berry,) Transcript of Record
5 Applicant,)
6 vs.) 2017-CP-40-07548
7 State of South Carolina,)
8 Defendant.)

9
10 October 30, 2019
11 Columbia, South Carolina

12 B E F O R E:

13 The Honorable Brian M. Gibbons, Judge
14

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

16 Tricia A. Blanchette, Esquire

17 On behalf of the Applicant

18 Lindsey A. McCallister, Assistant Attorney General
19

20 On behalf of the State of South Carolina
21
22

23 Stacy S. Johnson
24 Circuit Court Reporter
25

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1 (The following proceedings were held October 30,
2 2019, beginning at 11:46 AM.)

3 THE COURT: All right. What do we got?

4 MS. McCALLISTER: Your Honor, we have Brandon Berry.
5 If Mr. Berry could come up.

6 Your Honor, this is Brandon Berry versus the State
7 of South Carolina, 2017-CP-40-7548. Your Honor, Mr. Berry
8 was indicted -- let me see. I'm sorry. On July 29, 2014
9 law enforcement officers with Richland County Sheriff's
10 Department arrested Mr. Berry following a traffic stop
11 and a subsequent car and foot chase.

12 Following an investigation, the Richland County
13 Grand Jury indicted him for attempted murder, attempted
14 armed -- I'm sorry, armed robbery, unlawful conduct
15 toward a child, resisting arrest and unlawful carrying
16 of a pistol. That armed robbery indictment was later
17 amended to attempted armed robbery.

18 On November 30, 2015, he proceeded to a jury trial
19 before the Honorable Howard P. King. On December 4, 2015,
20 the jury convicted him as indicted and he was sentenced to
21 concurrent terms of imprisonment for twenty years for the
22 attempted murder and attempted armed robbery, one year for
23 resisting arrest, one year for unlawful carrying of a
24 pistol and a consecutive term of five years for unlawful
25 conduct towards a child, so that's an aggregate term of

1 twenty-five years that Mr. Berry is currently serving.

2 He filed a timely notice of appeal and an appeal was
3 perfect by Lara Caudy with the South Carolina Commission
4 on Indigent Defense, Division of Appellate Defense. He
5 argued the following issues. First, that the trial court
6 erred by finding that he did not have a reasonable
7 expectation of privacy in an apartment leased by his
8 girlfriend or former girlfriend and mother of his child
9 in challenging the search -- the warrantless search of
10 that home, and that, second, the trial court abused its
11 discretion in finding that the girlfriend voluntary
12 consented to the search of the apartment. Following
13 briefing, the South Carolina Court of Appeals affirmed
14 in a unpublished opinion. The remittitur was returned on
15 November 3, 2017.

16 Your Honor, Mr. Berry is represented by Ms. Tricia
17 Blanchette. Both Ms. Blanchette and Mr. Berry are present
18 in the courtroom today. Ms. Blanchette filed an amended
19 application for post-conviction relief in this case, I
20 believe on October 4th, sometime around there. It's my
21 understanding that the allegations in the amendment are the
22 allegations that are going forward with the exception of
23 one, and I will ask Ms. Blanchette to sort of state the
24 allegations on the record at this time. And then I think
25 we also have some sort of factual things to kind of put on

1 the record before we get started.

2 THE COURT: All right. Thank you.

3 Ms. Blanchette.

4 MS. BLANCHETTE: Yes. May it please the Court?

5 THE COURT: Yes, ma'am.

6 MS. BLANCHETTE: Tricia Blanchette on behalf of
7 Brandon Berry. It's, Your Honor, my understanding,
8 Your Honor, that you may not have a copy of the amendment
9 in your packet.

10 THE COURT: I don't think I do. I was looking
11 through it.

12 MS. BLANCHETTE: Your Honor, may I approach with a
13 copy?

14 THE COURT: Please. Thanks.

15 MS. BLANCHETTE: You're welcome, Your Honor.

16 Your Honor, as the State correctly informed you, we
17 submitted this amendment on October 4th of 2019. By way
18 of this amendment there are five listed allegations. At
19 this time we are prepared to not go forward on Issue
20 Number 1, which is trial counsel rendered ineffective
21 assistance for failing to properly handle witnesses and
22 call necessary witnesses at trial. We are abandoning this
23 issue. It's not that we're just not properly prepared. At
24 the time of making the amendment --

25 THE COURT: Is this mine?

1 MS. BLANCHETTE: What was that, Your Honor?

2 THE COURT: Is this mine?

3 MS. BLANCHETTE: That is yours, Your Honor.

4 THE COURT: I can mark on it then?

5 MS. BLANCHETTE: You're welcome to, yes.

6 THE COURT: All right. Go ahead.

7 MS. BLANCHETTE: Your Honor, at the time that I
8 filed this amendment, I was trying to give the State ample
9 notice of the allegations. Mr. Pete Skidmore is in the
10 courtroom. He was retained to conduct an investigation in
11 this case that he has been doing for some time. As a
12 result of that investigation, we are not going forward on
13 Issue 1 today, and I just wanted to make a record of that
14 matter before the Court.

15 THE COURT: Okay.

16 MS. BLANCHETTE: We are going forward on Issues 2, 3,
17 4 and 5. Those issues are all intertwined and deal with
18 two matters that came up during the course of the trial;
19 one involving Mr. Berry's co-defendant, Mr. Wallace, and
20 whether or not he would testify or invoke the Fifth, and
21 then jail calls that were admitted. I have asked Jim
22 Truitt, the Deputy Clerk, to bring the trial exhibits, and
23 he was in here this morning. It's my understanding he'll
24 be back with those.

25 We have the three jail calls that were admitted as a

1 trial exhibit, as well as a jury note that I would like to
2 mark at the appropriate time as exhibits in this case as
3 well, and I have made a copy of the three jail calls that
4 are on the exhibit for the Court for you to review. I can
5 hand this up at this time or when I formally mark the trial
6 exhibits.

7 THE COURT: Well, let me ask you -- from the State,
8 is there gonna be any objection to that document -- that
9 CD coming in?

10 MS. McCALLISTER: No, Your Honor.

11 THE COURT: All right. So without objection then,
12 why don't we go ahead and mark -- do you want to go to
13 ahead and mark it?

14 MS. BLANCHETTE: Well, Your Honor, I was actually
15 going to mark the actual trial exhibits --

16 THE COURT: You can do it then.

17 MS. BLANCHETTE: -- to keep the record clear and
18 then this would be just be courtesy copy for Your Honor.

19 THE COURT: That will be for me. Just like the
20 trial packet, I'll have that included in my mind.

21 MS. BLANCHETTE: And, Your Honor, when I originally
22 tried to copy these for myself, it did not work, so if
23 for any reason there is an issue with this CD, please have
24 your clerk notify us.

25 THE COURT: I will. I'll do that. Our new laptops

1 don't have the ability to play these CD-ROMs, even though
2 they continue to weigh a ton, but I have one in my office.
3 I have another laptop in my office.

4 MS. BLANCHETTE: Okay.

5 MS. McCALLISTER: And I also -- I mean, I think
6 Ms. Blanchette may have them, too, but I have them. I
7 can e-mail them if you needed that as well.

8 THE COURT: Okay. All right.

9 MS. BLANCHETTE: Yes, Your Honor. I can transfer
10 those now in a box-type file and can attach those to an
11 e-mail.

12 THE COURT: All right.

13 MS. BLANCHETTE: So, Your Honor, as I stated, we
14 are not going forward on Issue 1. We are going forward
15 on the remaining issues and I'm telling you those involve
16 two matters that are interrelated throughout the course
17 of the trial transcript regarding his co-defendant,
18 Mr. Wallace, and through jail calls.

19 As I was preparing for today, I usually make an
20 outline of all the transcript cites so I can go through
21 that chronologically with the witnesses so that it assists
22 the Court in understanding the case. That outline turned
23 into a nine-page memorandum that I have prepared. I've
24 provided that to both attorney witnesses, as well to the
25 State ahead of time.

1 I would like to move and admit this as Applicant's
2 Number 1 or however the Court would prefer, just as a
3 point of reference. This isn't meant as evidence. I
4 didn't write this persuasively. It is just a summary
5 of these two issues as they come up in the transcript
6 throughout the course of the transcript itself with
7 citations to the record to be a point of reference for
8 the Court for the witnesses and to ease the presentation
9 of the case today.

10 THE COURT: All right. Any objection to that from
11 the State?

12 MS. McCALLISTER: Your Honor, I don't have an
13 objection to the memo. I just would sort of ask to kind
14 of verbally supplement it. It's focussed on one issue
15 and I think that if we sort of give you some additional
16 factual background, it may make some of this testimony
17 go easier and quicker.

18 THE COURT: What do you think about that?

19 MS. BLANCHETTE: Your Honor, I -- in the memo, I
20 actually say the State did a very detailed return and I
21 defer to that as a complete summary, so if they would
22 like to offer that at this time, I do not oppose that,
23 Your Honor.

24 MS. McCALLISTER: And you do have that in your --

25 THE COURT: I have the return.

1 MS. McCALLISTER: Yeah. I just don't want to bind
2 the State to Applicant's particular version of the facts
3 in any way.

4 THE COURT: Oh, I understand that. I mean, I'm
5 just -- I'm asking questions; not admissibility, not
6 credibility.

7 MS. McCALLISTER: Okay.

8 THE COURT: Do you have any problem with me looking
9 at it?

10 MS. McCALLISTER: No, I don't have any problem with
11 you looking at it.

12 THE COURT: You don't have any problem with me
13 marking it as a Court exhibit -- or they'll mark it? I
14 believe you wanted to mark it as a regular exhibit.

15 MS. BLANCHETTE: However you prefer, Your Honor.

16 THE COURT: I don't care. We'll call it -- let's
17 call it Court Exhibit 1. This is gonna be for me. Go
18 ahead and have my court reporter mark that and then you
19 can hand me a copy of it and I can hand you this.

20 (Court's Exhibit Number 1, a memorandum, was marked
21 for identification.)

22 THE COURT: All right. What else do you have?

23 MS. BLANCHETTE: Finally, Your Honor, I discussed
24 this matter with the assistant attorney general and I'll
25 discuss the matter with Mr. Berry when he takes the stand,

1 but by way of the application he stated the relief of a
2 new trial. Today I believe as a result of the evidence
3 and testimony that will be produced, we may ask for
4 alternative relief, so whatever the Court deems proper;
5 whether that be an opportunity to re-extend the plea offer
6 or whatever may come from the testimony today. I just
7 wanted to give the Court the notice that I gave the State
8 that there may be a request for alternative relief.

9 THE COURT: Okay.

10 MS. BLANCHETTE: With that, Your Honor, I am prepared
11 to call Mr. Berry to the stand.

12 THE COURT: Do you-all want to go ahead and do that
13 even though Ms. Zmroczek isn't here?

14 MS. McCALLISTER: I think that that would be fine,
15 Your Honor. The State's amenable to that.

16 THE COURT: Well, have you talked to her about that?

17 MS. McCALLISTER: I have not talked to Ms. Zmroczek
18 about that, no.

19 THE COURT: Out of deference to her, you know, since
20 she's the one being persecuted, in quotation marks, that's
21 what I mean, I'd rather her be here and see and hear what
22 he says and testifies to, you know, because -- I mean, this
23 isn't a criminal trial, but she does have a confrontation
24 issue and I don't want to prejudice her or the State in
25 that regard, so better safe than sorry. Let's wait for

1 her to be here and then that way we can go forward with
2 everything. I think I told you-all out in the hallway
3 when you-all told me that she wasn't gonna be available
4 until about one --

5 MS. McCALLISTER: Yes, sir. I think we --

6 THE COURT: -- we want to add thirty minutes onto
7 that, so we're gonna say we'll start back with this case
8 at 1:30, okay?

9 MS. McCALLISTER: Okay. Thank you.

10 THE COURT: All right. We'll be down for lunch
11 until then.

12 MS. BLANCHETTE: Thank you, Your Honor.

13 THE COURT: All right.

14 (Whereupon, a luncheon recess was taken at 11:58 AM.)

15 (Back on the record at 1:49 PM.)

16 BAILIFF: Order in the court. All rise.

17 THE COURT: Thank you very much. Be seated.

18 All right. Are you ready to proceed?

19 Ms. Blanchette, is your client here?

20 MS. BLANCHETTE: Yes, Your Honor. I think they're
21 bringing him over.

22 THE COURT: All right. Is he your first witness?

23 MS. BLANCHETTE: Your Honor, I'd actually prefer to
24 call Ms. Zmroczek first.

25 THE COURT: That's fine. I was just saying we can

1 save him the trip all the way over there instead of going
2 back over there.

3 MS. BLANCHETTE: Yes, Your Honor.

4 THE COURT: All right. Anything further from the
5 State before we proceed?

6 MS. McCALLISTER: No, Your Honor.

7 THE COURT: Ms. Blanchette, are you ready to
8 proceed?

9 MS. BLANCHETTE: We are, Your Honor, but the clerk
10 brought in the exhibits from the trial, so if we could
11 mark those at this time, that would be great.

12 THE COURT: Okay. Let's go ahead and do that then.

13 MS. BLANCHETTE: So, Your Honor, on behalf of the
14 Applicant, I would move the CD that was previously marked
15 as State's 163 from the trial in this case as Applicant's
16 Number 1.

17 THE COURT: All right. Without objection?

18 MS. McCALLISTER: Yes, sir.

19 (Applicant's Exhibit Number 1, CD of jail calls,
20 was marked and admitted into evidence.)

21 MS. BLANCHETTE: And then, Your Honor, the Applicant
22 would move as Exhibit Number 2 the jury note that was
23 previously marked as Court's Exhibit Number 7 from the
24 trial in this case.

25 THE COURT: Any objection to that?

1 MS. McCALLISTER: No objection.

2 THE COURT: All right.

3 (Applicant's Exhibit Number 2, a jury note, was
4 marked and admitted into evidence.)

5 THE COURT: Go ahead.

6 MS. BLANCHETTE: Your Honor, at this time I call
7 Aimee Zmroczek to the stand.

8 THE COURT: All right. Ms. Zmroczek.

9 (Whereupon, Aimee Zmroczek was duly sworn by the
10 Court.)

11 THE COURT: Thank you. You can have a seat over
12 there.

13 AIMEE ZMROCZEK,

14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MS. BLANCHETTE:

17 Q. Can you please state your name for the record and we
18 probably need your last name spelled.

19 A. It's Aimee Zmroczek, A-I-M-E-E. Last name,
20 Z-M-R-O-C-Z-E-K.

21 Q. And, Ms. Zmroczek, what is your current profession?

22 A. I am a member of the South Carolina Bar as a criminal
23 defense attorney.

24 Q. And how long have you been practicing as a criminal
25 defense attorney?

1 A. Since 2008.

2 Q. And do you recall your representation of Mr. Brandon
3 Berry here in Richland County on his criminal charges?

4 A. I do.

5 Q. And the State has already gone through the procedural
6 history, so I don't know that I need to go over that with
7 you, but in this case were you retained or appointed to
8 represent Mr. Berry?

9 A. I was supposed to be retained. I think he only
10 paid me not even an eighth of the fee, but, yes, I was
11 not appointed.

12 Q. Okay. And in this case we're gonna focus in on
13 some very narrow issues, and I've already provided to the
14 Court for his reference and it's been marked as a Court's
15 exhibit, a memorandum that's been provided to you as well
16 in advance of today; is that correct?

17 A. That's correct. I have it here.

18 Q. Okay. So I'm gonna go through just the issues raised
19 in the amendment and in the chronological order they appear
20 in the transcript and in the memorandum.

21 I first want to ask you though about discovery in this
22 case. Do you recall if the Richland County Solicitor's
23 Office provided you discovery piecemeal or you got it all
24 at one time or how was the discovery process conducted?

25 A. As -- as per typical with that regime of the Fifth

1 Circuit Solicitor's Office, it was piecemeal, if at all.
2 I never believe that I have full discovery when dealing
3 with the Fifth Circuit Solicitor's Office.

4 Q. And now we're gonna talk a lot today about calls that
5 were turned over. At two different times in the trial
6 the State had provided you additional jail calls. Prior
7 to that though were you provided over six hundred and
8 something jail calls in this case?

9 A. At some point I think right before the trial, I was
10 provided a CD with -- there were over six hundred phone
11 calls.

12 Q. And you reference at several times in the trial that
13 you received somewhere around 698 phone calls. Did you
14 have the opportunity to go over those phone calls with
15 Mr. Berry?

16 A. I did not.

17 Q. Okay. And was he in the detention center or was he
18 out on bond?

19 A. He was in the detention center.

20 Q. Okay. Now I want to talk with you a little bit
21 about plea offers. It's indicated in the trial transcript
22 beginning about page 188 you start talking about a plea
23 offer and during that discussion it comes up that there
24 was a thirty-year plea offer that was originally extended.
25 Is that what you recall before trial?

1 A. I couldn't remember. I know that there -- I couldn't
2 remember the exact number. It did refresh my recollection
3 to look at the transcript, but what I remember about the
4 plea offer is that it wasn't really a plea offer in so much
5 that -- I mean, he may as well have just gone to trial.

6 Q. Okay. And I'm gonna start about page 189. This would
7 also be page 2 of the memo. It appears that at the start
8 of the second day of the trial there about page 189 going
9 into page 190, the State indicates that you had approached
10 them about a potential additional plea offer. Can you
11 take us through what happened with that as far as you
12 approaching them about an additional plea offer?

13 A. I remember as the trial got closer -- for some reason
14 I don't have page 189. As the trial got closer, it --
15 there were discussions between myself and the client
16 about -- about him counter-offering their thirty years,
17 and so I remember approaching that. And I know that I put
18 everything on -- on the record, especially because -- so
19 I remember after the trial -- I think we had picked a
20 jury and then Meghan Walker started sending me e-mails with
21 jail calls attached to them that I didn't even have an
22 opportunity to listen to, but she indicated that those were
23 from another PIN number and that were not going to be
24 anything that was gonna be beneficial to my client, and so
25 I think at that point I started to try to negotiate a more

1 reasonable plea offer.

2 Q. Okay. And I'm gonna take you through the transcript
3 specifically. Beginning on 189 at the bottom on line 24,
4 that's Ms. Walker talking, and she's just saying there --
5 if you don't have page 189, maybe, again, explaining what
6 the offer is that goes into page 190.

7 A. I don't. Do you have it?

8 Q. Do you have page 190?

9 A. Mine goes from -- mine goes 187 to 197.

10 Q. Okay.

11 MS. BLANCHETTE: And, Your Honor, do you mind if I
12 inquire to make sure? I don't know if you are missing
13 pages. I just want to make sure everybody has the pages
14 they need.

15 THE COURT: Okay.

16 MS. BLANCHETTE: They're in my copy. The State
17 provide us all a copy.

18 MS. MCCALLISTER: They may not be in my copy. Yes,
19 they are. They are in this copy. I can give them to
20 Ms. Zmroczek.

21 MS. BLANCHETTE: Your Honor, may I approach the
22 witness? I'll provide her my copy of the transcript for
23 those questions.

24 THE WITNESS: I don't know why mine are missing.

25 MS. BLANCHETTE: (Handing.)

1 THE WITNESS: Thank you.

2 MS. BLANCHETTE: There are no notes written on them.

3 THE WITNESS: Okay.

4 BY MS. BLANCHETTE:

5 Q. All right. Ms. Zmroczek, beginning at the bottom of
6 page 189, the State's explaining that they have extended
7 an additional offer of fifteen to twenty years.

8 A. Yes.

9 Q. The State then on page 190, at the top of the page,
10 says it's my understanding that he has rejected that plea
11 offer. Then she immediately goes on to explain that after
12 verifying some other information, jail calls -- jail calls
13 made supposedly by Mr. Berry under another PIN number were
14 discovered about fifteen minutes ago --

15 A. Yes.

16 Q. -- and that those would be turned over to you that
17 afternoon.

18 A. (Nods head.)

19 Q. So would you agree that immediately after they
20 indicate he's rejecting the plea offer, they're telling
21 the Court there's additional jail calls or evidence that
22 they haven't even provided yet to you?

23 A. That's correct. And I -- I remember that this being
24 an issue, so I went back actually last night to look
25 because Meghan e-mailed me those calls at about 7:00 that

1 night.

2 Q. And then if you continue on through page 191, it
3 becomes a formal rejection of the plea offer on the record
4 and it was revoked. Is that what you -- I mean, it's in
5 the transcript, but you recall that happening?

6 A. Yes.

7 Q. Okay. Now at that point, would you agree Mr. Berry
8 hadn't had the chance to review those -- that additional
9 evidence? You even hadn't had the opportunity.

10 A. That's correct.

11 Q. Is there any reason why you didn't tell the Court we
12 need a continuance because the State is turning over
13 additional evidence?

14 A. I do not recall. I don't have any reason as to why I
15 didn't do that.

16 Q. Okay. And is there any reason that you didn't ask for
17 that plea offer that they said he rejected, but it wasn't
18 -- the revocation wasn't affirmed until after the jail
19 calls were disclosed. Is there any reason you didn't ask
20 for that to remain open until you could review the further
21 evidence?

22 A. Not that I recall.

23 Q. But you would agree that the plea rejection was
24 affirmed after the disclosure of this additional evidence?

25 A. Absolutely.

1 Q. Okay. Now jumping to the third day of trial, at the
2 beginning of the third day of trial, and this appears at
3 about page 193 of the transcript or page 3 of the memo that
4 I provided to you, before the State calls any witnesses
5 the State informs the Court, and I assume yourself, that
6 Applicant's co-defendant, Mr. Wallace, had said he was
7 going to testify and it was their understanding that he was
8 now gonna invoke the Fifth. Do you recall that happening?

9 A. I do.

10 Q. Did you have any notice more than what appears there
11 in the transcript at the beginning of the third day?

12 A. None.

13 Q. Now if you continue over to page 194, the State
14 explains that they discovered another phone call late last
15 night, so that would be the night of the second day if I'm
16 following this correctly --

17 A. Correct.

18 Q. -- between Applicant and Wallace whereby they say
19 Applicant is telling Wallace not to talk or to testify or
20 something to that effect.

21 A. Right.

22 Q. And so had you been provided that phone call at that
23 point?

24 A. No.

25 Q. So here you're getting notice of yet another phone

1 call that the State has in their possession that has not
2 been turned over to you?

3 A. Correct.

4 Q. And they're alleging at this juncture that that phone
5 call is the reason that Mr. Wallace is gonna invoke the
6 Fifth?

7 A. Right. I mean, they were basically accusing him of
8 witness intimidation.

9 Q. And that carries throughout the course, but my
10 question to you is at this point when there's this
11 disclosure of more new evidence that you just said yourself
12 may go to witness intimidation, why didn't you ask for a
13 continuance or raise discovery concerns to the Court?

14 A. I recall raising discovery concerns throughout this
15 case, even prior to trial. In fact, last night when I was
16 going back through my e-mails, I even recall writing out
17 specifically Dear Luck, this is what I still need. So
18 discovery -- I guess just being in that situation all the
19 time with the Fifth Circuit, like I said, I don't ever
20 think I ever get full discovery in a case.

21 Q. But can you point to somewhere in the transcript? I
22 know -- and I know that, you know, you really engage in the
23 adversarial process with the Solicitor's office, but can
24 you point to a place in the transcript where you made the
25 Court aware that you thought that the Solicitor's office

1 wasn't properly producing the discovery?

2 A. I don't believe it was in this trial. It would have
3 been prior to trial.

4 MS. McCALLISTER: Your Honor, I just want to put
5 on the record the Applicant has not pled any kind of
6 Brady or Rule 5 or discovery violations, and if that's
7 the road that we're going down, I'm gonna need additional
8 witnesses. So, I guess, that's just my objection to
9 sort of --

10 THE COURT: All right.

11 Well, Ms. Blanchette, what's your response to that?

12 MS. BLANCHETTE: Your Honor, we have pled that
13 counsel was ineffective for failing to ask for a
14 continuance in the way that she handled these matters.
15 I'm just merely going to her strategy and effectiveness
16 in handling when this evidence was disclosed. We have
17 not alleged a Brady violation. I didn't have any
18 information on which to make that claim because that is
19 a very serious claim to make.

20 THE COURT: All right. Well, objection noted.
21 Objection's overruled. I'm looking at her amended --
22 amended application and it is definitely here under
23 Number 3 right now, so she's pled it.

24 Go ahead.

25 BY MS. BLANCHETTE:

1 Q. Now, Ms. Zmroczek, after that, and I'm just kind of
2 marching through the transcript in order of, you know,
3 how this issue -- these two issues developed, and they're
4 very interrelated, but it appears on page 194 there was
5 an agreement made that essentially we're gonna put this
6 Wallace issue on hold, whether or not he's gonna invoke
7 the Fifth. We're gonna bring the jury in, the jury is
8 gonna be sworn, we're gonna do openings, but we're not
9 gonna mention Wallace.

10 A. Correct.

11 Q. Do you think that agreement in any way ended up being
12 harmful to the defense in this case to not mention Wallace
13 in opening?

14 A. I don't know that it was harmful to the defense to not
15 mention him in opening. Not that I recall.

16 Q. And I apologize if this is -- I didn't ask you before,
17 but I just kind of want to bring it all together at this
18 point. The jury's sworn at about page 196. At this point
19 the plea offer's been rejected and revoked. There's a
20 disclosure that calls have been found under another PIN,
21 there's a disclosure that Mr. Wallace wouldn't testify,
22 there's a disclosure of a call between Berry and Wallace,
23 Mr. Berry gets warned by the Court about intimidation of
24 witnesses, and if I've asked this before I apologize, but
25 why did you not make a specific motion at this point

1 regarding discovery or notice or ask for a continuance in
2 the case?

3 A. I -- the only thing -- I don't have any specific
4 reason. I know on page 195 I advised the Court that I do
5 want to address it at some point. It's just at that point
6 the jury was there and I -- I don't know why. I don't have
7 any specific reason why I didn't ask for a continuance.

8 Q. And if the jury wasn't sworn until about 196, no
9 jeopardy had attached at that point; is that correct?

10 A. That's correct.

11 Q. So in asking for a continuance, you might have had a
12 little more leeway at that point before the jury was sworn?

13 A. Right.

14 Q. Now the jury is sworn and the State calls six
15 witnesses and then the State asks for a proffer of Wallace
16 and they say that he's going to invoke the Fifth and
17 there's a discussion that starts about page 331, I believe,
18 where this issue of Wallace and the possibility of him
19 offering incriminating information and if he is gonna
20 invoke the Fifth, and it's just a back and forth and back
21 and forth. You say at one point it was your understanding
22 from counsel that Mr. Wallace had not been intimidated and
23 was not concerned about testifying. So we can all read
24 the transcript. What was kind of going on as far as the
25 information that you had and the arguments you were

1 developing regarding Mr. Wallace at that point?

2 A. Well, I remember at -- I think at that point I'd had
3 an opportunity to listen to the calls and there was no,
4 in my opinion and I think in the Court's opinion at some
5 point, there was no evidence of intimidation, but at that
6 point if he pled the Fifth I felt like there were gonna be
7 foundational issues with the jail calls.

8 Q. Okay. Can you explain that?

9 A. So there were two issues with the jail phone calls
10 aside from -- well, I guess three if you count the fact
11 that they were given to me late, but the other two were
12 that they said that they only found them because Mr. Berry
13 allegedly used somebody else's PIN number. So how it
14 works at the jail is when you get booked in, you get
15 assigned a PIN number and so when you make phone calls so
16 that they can charge, you have to type in your PIN number
17 and oftentimes people will trade canteen or -- or whatnot
18 to use somebody's minutes on their phone, but I guess the
19 State felt like that they were trying to do that to deceive
20 the State from listening in, which I take issue with too
21 because I don't -- I don't think that jail phone calls
22 should be a -- I understand they're a safety tool, but they
23 shouldn't be a discovery tool for the prosecution, so I
24 always take issue with that. But -- so I felt like they
25 were gonna have to show whose PIN number it was and then

1 also show who was talking on the phone, so those were the
2 issues I felt like with those.

3 Q. And I've read through the transcript, and we'll go,
4 you know, through it throughout of the course of this
5 hearing and questioning, but did you ever have an
6 opportunity to make that argument on the record regarding
7 the foundation issue you just discussed?

8 A. I believe I made the PIN number or maybe -- I believe
9 I was making a foundational argument about the jail phone
10 calls in general. I don't know that I specified those two
11 separate arguments.

12 Q. Okay. And if you want to -- we'll kind of jump ahead
13 to this issue since you went there. On page 539, the
14 Court says he understands that you have some questions
15 regarding authentication of the phone calls, and this is
16 after he's ruled they're admissible but we'll go back to
17 the admissibility issue, and you indicate that you do, but
18 your understanding is there's a witness to be present. Is
19 this what you were referencing just a minute ago?

20 A. Yes.

21 Q. Okay. So thereafter then they call Lieutenant
22 Friedley -- it's spelled F-R-I-E-D-L-E-Y from the Alvin S.
23 Glenn Detention Center, on page 540, so right after you
24 discussed that with the judge, and he or she testifies how
25 the calls are placed and recorded, explains how inmates use

1 other inmates' PIN numbers to disguise their calls. This
2 is 541 through 542, and please tell me if you need more
3 time to review it. Then she confirms that the three calls
4 that the State are moving to admit were made from the Alvin
5 S. Glenn Detention Center, they were kept in the regular
6 course of business, and then over your previous objections
7 they're admitted.

8 A. Right.

9 Q. But I didn't see anywhere in the transcript where you
10 make this authentication argument that you're alluding to
11 now in your testimony?

12 A. Yeah. I mean, I -- so I felt like there were, you
13 know, foundational issues, and the only thing I can think
14 of why I didn't make the identification issues is because
15 I was hoping maybe the jury wouldn't be able to identify
16 who they were. I -- I honestly can't remember though.

17 Q. So if the transcript doesn't reflect that you didn't
18 make a foundation argument regarding this issue of the
19 disguised PIN and whether really the --

20 A. The disguised voices, correct.

21 Q. -- disguised voices, they say disguised PIN, that
22 everybody's using somebody else's PIN, I just didn't see
23 in the transcript myself where they ever say we know that
24 Brandon Berry used Inmate Z's PIN, this is his PIN, we
25 have verified that through Inmate Z, therefore, that is

1 Brandon Berry on the phone call.

2 A. Right, and I don't -- I don't know that they did that.
3 At that point I feel like I had made the objection enough
4 to raise -- to hopefully raise that on further review if
5 that were needed. That's all I can think of at that point.

6 Q. And if it doesn't appear in the transcript, do you
7 think that's something that could have happened up at a
8 bunch conference or in chambers?

9 A. It's certainly possible. I don't -- I don't believe
10 Judge King took us back in chambers. I think it was always
11 a bench conference.

12 Q. Okay. Because then after Lieutenant Friedley
13 testified, they call Sergeant Carwell of the Richland
14 County Sheriff's Department. He also addresses the three
15 phone calls beginning on page -- about page 574. He
16 explains that he's familiar also with the call system and
17 he explains that the first two calls that the State
18 admitted, this is on page 575, were not made with the
19 number assigned to Mr. Berry and he used the PIN number
20 of another inmate trying to disguise his phone call and
21 then he's asked some further questions about which call
22 he's talking about, and it gets little confusing there,
23 but -- so they call Sergeant Carwell to say this happened,
24 but did they ever actually establish this happened and how
25 it happened?

1 A. No.

2 Q. Is there any reason you didn't object to the testimony
3 of either Lieutenant Friedley or Sergeant Carwell about
4 this assertion that the Applicant is disguising his phone
5 calls by using someone else's PIN if they did not properly
6 establish it?

7 A. At that point I felt like I had been objecting to the
8 phone calls the entire trial, so I didn't -- I just didn't
9 feel the need to make it again and I wasn't specific about
10 it.

11 Q. And jumping ahead to your closing argument on
12 page 657, you discuss how these phone calls allowed the
13 jury to hear from the Applicant. Would you agree at that
14 point even if the State hadn't established it was
15 Mr. Berry, you were conceding it was Mr. Berry?

16 A. I mean, I think it's -- I mean, obviously what we say
17 in closing isn't evidence. But, yes, I mean, I think at
18 that point I had conceded it and I think I was just, yeah,
19 trying to focus on the fact that they only used certain
20 ones and not all the jail phone calls.

21 Q. Okay. Now I'm gonna jump way back in the transcript,
22 and I hope you can track with me here, page 339. And you
23 say you've been objecting and making arguments, so we're
24 gonna go back and go through some of those regarding
25 Mr. Wallace and regarding the phone calls. At that point

1 you-all had been discussing Mr. Wallace, but it appears
2 that kind of everything shifts back to the phone calls, and
3 specifically the phone call -- alleged phone call between
4 Mr. Wallace and the Applicant. You argue there that the
5 State is providing an inaccurate reflection of the phone
6 calls, that's my summary of your argument, and you were in
7 possession of 698 additional calls. You also argued, you
8 know, in response to the State saying that the call was the
9 reason that Mr. Wallace was invoking the Fifth, and then
10 the Court goes on -- and I'm sorry I'm taking you through
11 the transcript, but on page 341 he says he identifies two
12 issues. This is at the bottom of 341 into 342. Whether or
13 not Wallace has the right to assert the Fifth Amendment in
14 regard to questions about where he was and who he was with
15 and who he lent his car to and whether or not he's been
16 intimidated or threatened by the Defendant in this case.
17 So it appears he's focussed solely on the Wallace issue,
18 correct?

19 A. Right.

20 Q. And then you interject that you think there's a third
21 issue saying whether the statements he said, and this is on
22 page 342, lines 8 through 17, would be admissible if he
23 chose not to testify?

24 A. Right.

25 Q. Just for point of clarification there, I went

1 through the file and didn't see any written statements
2 from Mr. Wallace. Would you agree there were no written
3 statements?

4 A. There were not.

5 Q. Were the statements you're referring to here the phone
6 calls and the statements in the phone calls?

7 A. Yes.

8 Q. And what was your concern regarding Mr. Wallace being
9 unavailable and the ability then to address the statements
10 in the phone calls?

11 A. So like -- like the argument reflects, they were
12 trying to say that on the phone calls Mr. Wallace was
13 talking about how he lent his car or something and that
14 wasn't going to be something that I was going to be able to
15 cross-examine Mr. Wallace about.

16 Q. And so you had a concern that you wouldn't have the
17 opportunity for meaningful cross-examination of Mr. Wallace
18 if just the phone calls were admitted?

19 A. Right.

20 Q. And the judge essentially at that point -- you talk
21 about meaningful cross-examination and the judge then
22 starts making a bunch of requests; that the State's
23 supposed to make a written list of questions, the calls
24 are to be transcribed and there'd be further -- then
25 you-all had further discussion and you offer your belief

1 that he had -- he wasn't threatened or coerced, the
2 jury's dismissed for the day, and then you-all start the
3 discussion again about Mr. Wallace.

4 And just to kind of sum it up, at that point you say
5 on page 450, you put it -- you say that I'll put it in a
6 brief for the Court but my concern is obviously that I'm
7 gonna be hamstring'd on what I can cross-examine on and it
8 would be our position that if he takes the Fifth on any
9 part of his testimony that he be unavailable for all of
10 his testimony. So there am I correct you're arguing about
11 partial availability; is that right?

12 A. Correct.

13 Q. And are you relating that back to the phone calls'
14 admissibility?

15 A. Yes.

16 Q. And can you better explain that than what appears
17 there for us?

18 A. I wish I could. No, I just -- I know that he was
19 gonna try to assert -- so in talking with Mr. Leonard, he
20 was gonna try to assert -- like he was only gonna answer
21 some questions and not other ones, and -- and so it was my
22 understanding that you can't pick and choose what you're
23 gonna answer, either you assert it or you don't assert it,
24 and so -- and I understand by arguing that he then becomes
25 unavailable, but I still think there was a -- I still think

1 there was an identification issue in there.

2 Q. And the identification issue being what? Just because
3 we have such a muddle in the transcript, I want to make
4 sure we're clear here today.

5 A. Who was on the phone call. And I don't know if I
6 developed that thoroughly because it looks like my
7 transcript is missing some pages, so I didn't see that
8 when I went through, but as I'm scanning now I don't know
9 that I specifically pointed that out.

10 Q. So as I mentioned in that very longwinded question,
11 you know, you-all were discussing Wallace primarily. It
12 appears in this section of the transcript the judge is
13 asking for a list of questions, then he starts asking that
14 the calls be transcribed. At the start of the next day,
15 page 454, as I saw it the only mention of Wallace or the
16 phone call matter occurred when you asked the Court if you
17 could make further arguments before the phone calls were
18 introduced.

19 So what happened from the judge making a list of
20 requests at the end of the prior day to no mention of it
21 the next morning? Do you recall what was done and what was
22 discussed?

23 A. I do. Let me -- hang on. I see at the beginning of
24 the next day I address on page 454, lines 14 through 19,
25 that I tell the Court that I have some arguments as well,

1 but I don't know why we didn't take it up first thing. I
2 don't know -- I don't think they went into it first thing,
3 so I think we were just moving the trial along.

4 Q. Okay. And you also mentioned at one point as you-all
5 were having discussions back and forth that you'd provide a
6 brief for the Court. Do you recall providing that brief?

7 I don't see where one was admitted or marked.

8 A. I don't. I tried to find one last night, but I turned
9 my whole file over to you, so I didn't -- I didn't have my
10 actual file, but I didn't see it in the scanned file that I
11 had. So I don't -- I have no independent recollection of
12 that.

13 Q. And just to be clear for the record -- well, I can't
14 testify. I'll move on, Your Honor.

15 THE COURT: That's all right. You've been testifying
16 all day so far. Go ahead and ask another question.

17 MS. BLANCHETTE: I'll move on, Your Honor.

18 THE WITNESS: If I did a brief -- if I did a memo, it
19 -- it wasn't one that was filed, it would have been one
20 that was handed up to the Court, but I don't recall doing
21 one.

22 THE COURT: This is off the record.

23 (Off the record discussion.)

24 BY MS. BLANCHETTE:

25 Q. I believe we were talking about the start of the

1 second day and where it doesn't appear that much was
2 discussed beyond that you're gonna make further objections.
3 It appears that your time to do that happens about page 531
4 of the transcript, if you could turn there.

5 A. Okay.

6 Q. From reading the transcript, the Court indicates that
7 it's his understanding that you have objections to two of
8 the three calls. Was there some type of bench conference
9 where you-all had discussed that and had you reduced it
10 down to those objections?

11 A. Yes. At 530 at line 24, it says proceedings held
12 at the bench, so I'm assuming that there was a bench
13 conference.

14 Q. And during that bench conference do you recall telling
15 him that you only had objections to two of the three calls?

16 A. I don't -- I don't remember what was discussed.

17 Q. And if you need time to review it, on page 532 through
18 533 you address your objections at that point, and I just
19 wanted you to explain that to us.

20 A. Okay. All right. So one of my objections is hearsay.
21 Yeah, I think that my objections were just to specific
22 conversations within those calls and that looks like all I
23 raised on that.

24 Q. Now in that discussion, the judge addresses an
25 apparent hearsay objection that you had.

1 A. Right.

2 Q. And it appears about 533 that there's some type of
3 agreement that the hearsay objection doesn't apply because
4 Wallace is unavailable.

5 A. Right, but I think -- and I think that's why it was
6 so convoluted because I think my objection was the other
7 caller, who was the girlfriend of my client, addresses the
8 co-defendant by first name and says his face -- so she
9 makes mention to that and I think that's the hearsay that
10 I was referencing.

11 Q. But it doesn't specifically reflect that in the
12 transcript?

13 A. Correct.

14 Q. Okay. So your hearsay objection was to some of the
15 contents of the calls?

16 A. Right. Right.

17 Q. And would that be the calls -- the two calls with the
18 female or the call -- the alleged call probably between
19 Mr. Wallace and Mr. Berry?

20 A. I think that was the two calls with the female after
21 he took the Fifth.

22 Q. Okay. But do you see anywhere in there where you're
23 making these foundation arguments that you've addressed
24 today?

25 A. I don't. And, like I said, I felt like that was

1 something that I had argued and lost earlier perhaps, so I
2 didn't renew it.

3 Q. Then the judge moves it appears -- well, you-all move
4 the two remaining calls, if I'm following this correct, on
5 page 533 and the State argues on page 535, lines 13 through
6 22, that the calls amount to an admission. In response, it
7 appears on page 536 you argue issues about him discussing
8 his need for a lawyer and that it's prejudicial and after
9 that the judge, you know, questioned you, you're changing
10 horses and asks what your real argument is. Can you kind
11 of take us through that and what you were trying to argue
12 about the need for a lawyer and prejudice?

13 A. Right. Well, I mean -- again, you know, when we're in
14 trial and all this is happening, I mean, I don't think I
15 have to be limited to picking one argument. I think that
16 if I find other issues that I can keep bringing them up and
17 I -- you know, I'd never tried a case in front of Judge
18 King and I know he was retired, but he maybe didn't agree
19 with me, I don't know, but I don't know that I felt like I
20 had to just pick one issue and I felt like I was battling
21 that issue on all fronts or at least trying to.

22 Q. Okay. And the argument he kind of hones in on is
23 relevance. Was that your primary argument?

24 A. Well, that was -- that was the first argument that I
25 made. I don't know that that was necessarily my primary

1 argument. I think that was the first argument I made that
2 day. I mean, I had made -- I felt like I had made previous
3 arguments and maybe they just weren't verbalized.

4 Q. Okay. And, like I said, on page 530 -- I'm sorry.
5 Let me look here. 536, line 5 is what I have, and you have
6 my transcript.

7 A. Uh-huh. I say Your Honor, I would object on two
8 grounds. One, I believe it's impermissible under Doyle v.
9 Ohio that he talks about why he needs a lawyer and they're
10 assuming that it's because he didn't get rid of the gun,
11 but he doesn't say it's because he didn't get rid of the
12 gun. Your Honor, I think that that -- any of that
13 testimony is more prejudicial, highly prejudicial, more
14 prejudicial than probative.

15 Q. Is that a separate ground you were trying to argue or
16 weighing the balancing test under 403?

17 A. I mean, I think I was trying to argue all of the
18 issues.

19 Q. Okay. And were you having to develop these issues
20 essentially on the fly because these phone calls are being
21 turned over to you during the course of the trial?

22 A. Yes.

23 Q. Okay.

24 A. And I honestly don't know what why I didn't ask for a
25 continuance.

1 Q. That was gonna be my next question. You see this
2 further developing and you say you're trying to make every
3 argument that you can, you know, in the course of this
4 trial. Do you think it would have been -- I hate to use
5 the term, but effective representation for you to ask for a
6 continuance in this case?

7 A. Well, yes, now that I know what was on this tape.
8 Like before I didn't know all of the things that were
9 on the calls because I didn't have them. So, yes, I
10 probably should have asked for a continuance, but then
11 once I get into it -- you know, I think I probably did need
12 a continuance, but I don't know why I didn't ask for one.

13 Q. The judge ultimately makes a ruling. At that point
14 did you think your arguments had been preserved for the
15 appellate record?

16 A. I felt like they had, yes.

17 Q. And specifically we talked about the fact that you
18 made an argument regarding relevance and hearsay. Were
19 there ever any -- any other major categories of arguments
20 that you felt were preserved on the record regarding the
21 phone calls?

22 A. Like I said, I felt -- I felt like foundation, but
23 it looks like on 539 I talk about authentication, I think
24 those are two different things, but, I mean, honestly I
25 talked about the phone calls for three days in a row, so I

1 honestly don't remember.

2 Q. Okay. Did you think you had preserved an issue as far
3 as confrontation rights concerned with the phone call being
4 utilized and Mr. Wallace not being called?

5 A. I do, but, again, I don't know if -- I don't know what
6 -- so I don't know what effect him taking the Fifth had on
7 that argument because that was something that kind of
8 changed in the middle of trial where he was just gonna take
9 the Fifth on some stuff and then ended up taking the Fifth
10 on that, so I don't -- I don't know if I properly preserved
11 that.

12 Q. Okay. So going into trial you didn't have the three
13 phone calls and you didn't know Mr. Wallace was gonna
14 invoke the Fifth; is that correct?

15 A. Correct.

16 Q. If you had known that and known the extent in which
17 the State was gonna utilize these phone calls, would you
18 have advised Mr. Berry to take the guilty plea in this
19 case or is that advice you usually don't provide to your
20 clients?

21 A. I mean, I never force a client to take a plea. My
22 client -- Mr. Berry was very specific about the plea that
23 he wanted, and I think that was on the jail calls as well,
24 but, you know, I certainly advise when I get new evidence,
25 you know, what I would suggest.

1 Q. And here you didn't have the opportunity because the
2 plea was revoked or, I'm sorry, was rejected --

3 A. And revoked, right.

4 Q. -- and revoked and in the same breath you're being
5 told you're gonna be provided additional phone calls?

6 A. Correct.

7 Q. Now jumping to right before closing arguments, on
8 page 616 there's a request made to talk about the amount of
9 time Mr. Berry would take, and this comes from the phone
10 calls as you just mentioned yourself. Why were you wanting
11 to include that in your argument?

12 A. Can you ask the question again?

13 Q. Yes. It appears you're requesting or asking for the
14 opportunity to discuss his statements in the call regarding
15 the plea offer and the amount of time he would take. I was
16 just wondering what your strategy behind wanting to inform
17 the -- or talk about that with the jury was?

18 A. Can you tell me what page it is again? I lost it.
19 I'm sorry.

20 Q. 616 is what I have.

21 A. Okay. Yesterday in the phone call that they put in,
22 he said I'll take ten years, but I'm not taking thirty
23 years, and I recall thirty was a plea offer at some point.
24 I understand that they're not to consider sentencing, but
25 I have to address what was put into evidence by them. I

1 think I'm allowed to, so I think -- I mean, I think at that
2 point I was trying to -- I mean, get that -- you know, get
3 that range into -- I mean, just into evidence. I think
4 that it was something that they, you know, had put in
5 through the phone call and that, you know, these -- but I
6 don't -- I mean, I think I was gonna probably try to tie
7 it to my argument with the 698 phone calls and them just
8 picking and choosing. I don't -- I mean, now that I think
9 about it -- I don't know that I was thinking about it then,
10 but now that I think about it, it's almost -- I should have
11 probably made like a bad character argument because they
12 picked three phone calls where I think he used bad words
13 and things like that, I think that's what I was essentially
14 trying to say in my closing when I said you only heard
15 these three, not the 698, but I certainly didn't frame it
16 that way at the time.

17 Q. Okay. Now let's talk about the closing arguments.
18 In the State's closing argument, specifically on page 642,
19 they make an argument to the effect that the phone calls
20 showed Berry was in charge of Wallace. 653, line 21, they
21 specifically say that the call amounted to a confession,
22 and on 654 to 655 I would summarize the argument is made
23 about him taking the plea because he's guilty. That's why
24 he was discussing taking the plea.

25 Now you've said you didn't have those phone calls

1 before trial, so you in no way could anticipate that that
2 was going to be the State's closing argument because they
3 didn't go into that in opening, did they?

4 A. No, not at all.

5 Q. And you-all had agreed that there would be no mention
6 of Wallace in opening?

7 A. Right.

8 Q. And was that argument damaging to your client based
9 on the phone calls that the jury got to hear?

10 A. Yes. I mean, as were the phone calls themselves,
11 but, yes.

12 Q. Okay. And we have -- Ms. Zmroczek, you weren't here
13 earlier, but the Court does have a copy of the phone calls
14 and is gonna listen to those at another time.

15 A. Okay.

16 Q. You also made, like you said, a ton of relevance
17 arguments regarding the language that was used in the phone
18 calls. When it gets to your closing argument as I already
19 asked you, it appears that you concede that the phone calls
20 were made by Mr. Berry. Were you intending to do that?

21 A. I -- I don't know. I think I was just trying to
22 lessen the blow of their closing. I don't -- I don't know
23 what my intention was.

24 Q. If you could look at 658, I believe it's line 16
25 through 20, it appears you're arguing there that the calls

1 are being used for the sole purpose of convincing the jury
2 to dislike or hate the Applicant.

3 A. Right. Bad character evidence.

4 Q. And was that a serious concern you had at that
5 juncture?

6 A. Absolutely.

7 Q. You go on then on page 661, specifically lines 15
8 through 24 of 661, to argue about the six hundred plus
9 calls that weren't played and you say that your greatest
10 fear is that the jury would only base your decision and
11 your opinion on those phone calls and who they want to show
12 Brandon Berry is.

13 A. Right.

14 Q. Why did you think it was so important to address that
15 with the jury in your closing argument?

16 A. Well, I mean, again, I think I felt like those phone
17 calls in particular just tried to paint him as -- I
18 remember at the beginning of the trial there was a motion
19 I made about -- a motion in limine about gang reference
20 and, you know, I think that it was just a way to kind of
21 back door in his bad character really.

22 Q. Okay. Did you ever make that bad character argument
23 on the record?

24 A. I mean, not specifically. I think I made it under a
25 relevance argument, but --

1 Q. Now the jury's sent out obviously after closing
2 arguments and they come back with a question on page 700,
3 lines 11 through 16, they want transcripts of the phone
4 calls or the recording and it appears the recording was
5 provided. Is that what you recall?

6 A. Right, because the transcripts were not in evidence.

7 Q. Okay. And we've already marked as Applicant's
8 Number 2 the actual jury note. Were you able to review
9 that jury note during the trial?

10 A. Yes.

11 Q. Okay.

12 A. Well, I mean, when they brought it out, yeah.

13 Q. Okay. And after the jury rehears that -- and asks
14 other questions, too, to be fair, they reached a guilty
15 verdict; is that correct?

16 A. Yes.

17 Q. And then you had the opportunity on page 722 to move
18 to have the verdict set aside and you say that you're
19 making that motion based upon all prior motions, but on
20 722, lines 13 through 22, it appears that the only ground
21 you elaborate on is that the jury asked to rehear the
22 phone calls. Why was that the only ground you wanted to
23 specifically point out or if that's incorrect, please --

24 A. I think that's incorrect. It says: All right. Your
25 motion to renew your previous motions and also judgment

1 in arrest of the verdict for the same reasons; is that
2 right? And I said yes, and then I go onto say but more
3 specifically, so I don't think I was abandoning my other
4 arguments. I think I was just trying to point out that one
5 in particular.

6 Q. And I think I worded that wrong. Was that issue so
7 important to you that you felt that was the one you needed
8 to address specifically at that point?

9 A. Yes. I mean, I think they were all important, but
10 that one in particular in light of the jury note
11 especially.

12 Q. Okay. And that's what I was gonna ask. Why did that
13 have special importance?

14 A. Right, in light of the jury note.

15 Q. If I can take you back just a little bit just as to
16 the other issues separately raised in the transcript. If
17 you could look to the Court's charge to the jury, page 674,
18 line 13.

19 A. Yes.

20 Q. Just let me know when you've had a chance to review
21 that.

22 A. Uh-huh. Yes.

23 Q. There the judge uses the words about searching for
24 the truth, I believe. Again, you have my transcript, so
25 please correct me if I'm wrong. In the reasonable doubt

1 instruction, did you find anything objectionable in that
2 instruction?

3 A. No. I -- I did not focus on the -- I mean, I should
4 have objected to search for the truth. Obviously it's been
5 litigated in Beaty numerous times. But, you know, I did
6 not preserve it at that time.

7 Q. Okay. So that is -- that language there you believe
8 is objectionable?

9 A. Yes.

10 Q. But you did not enter an objection. You don't have a
11 strategic reason for not doing so?

12 A. Correct.

13 MS. BLANCHETTE: Your Honor, if I could beg the
14 Court's indulgence to confer with my client?

15 THE COURT: Okay.

16 (Discussion between the Applicant and his counsel.)

17 BY MS. BLANCHETTE:

18 Q. Ms. Zmroczek, throughout the transcript that I just
19 had you -- walked through with you where you talk about the
20 phone calls and Mr. Wallace and in your closing argument,
21 are you trying to convince both the judge and the jury that
22 these phone calls are very prejudicial and that the State
23 was just using them to prejudice your client?

24 A. Yes.

25 Q. Okay. And would you stand by that assertion that

1 these phone calls and this issue with Mr. Wallace were
2 prejudicial to your client?

3 A. Yes.

4 MS. BLANCHETTE: Your Honor, I have no further
5 questions.

6 THE COURT: All right. Madam AG.

7 CROSS-EXAMINATION

8 BY MS. McCALLISTER:

9 Q. Ms. Zmroczek, let's just go back to the beginning.
10 In terms of -- we've talked a lot about these phone calls,
11 but in terms of the evidence that the State presented
12 against Mr. Berry, so there were two separate incidents
13 involved in this case, correct?

14 A. Correct.

15 Q. First, there was an attempted armed robbery and a
16 shooting, which is how the attempted armed robbery and
17 murder charge -- or attempted murder charges came about,
18 correct?

19 A. Right.

20 Q. And that occurred at some point like early in the
21 morning, 4:30 or 5:00 in the morning at an apartment
22 complex in Columbia, correct?

23 A. Correct.

24 Q. Okay. So there's investigators sent out to the scene
25 of that shooting and those crimes, correct?

1 A. Correct.

2 Q. And then at some point later in the morning another
3 deputy -- different deputies on patrol conduct a traffic
4 stop with the co-defendant, Mr. Wallace, and Mr. Berry?

5 A. Yes. Well, yes, but what was -- why that was so
6 interesting was because this was the first -- this is what
7 I remember specifically about those two incidences. So
8 that -- at the crime scene of the attempted armed robbery
9 and attempted murder, there was some blood and some DNA,
10 some items that were left, and Richland County had just
11 gotten this rapid hit machine that I didn't know anything
12 about and nobody knew anything about, it was the first time
13 they used it, but it allowed it to like basically run it
14 through CODIS in like thirty minutes and come back with a
15 hit, so it wasn't just that they happened to stop Mr. Berry
16 and Mr. Wallace, it's that they knew at that point because
17 of the DNA that --

18 Q. Okay. Let me get to that if I can. So there is this
19 traffic stop where Mr. Wallace and Mr. Berry are stopped
20 for a seatbelt violation, correct?

21 A. Correct.

22 Q. Okay. And then out of that traffic stop is how we get
23 to these others with the --

24 A. Unlawful negligent.

25 Q. -- unlawful negligent of a child in that Mr. Berry's

1 two-year-old was unrestrained in the back seat, correct?

2 A. Yes.

3 Q. Okay. And then during the course of this traffic
4 stop Mr. Berry, who actually was the passenger originally,
5 slides into the driver's seat and takes off in
6 Mr. Wallace's car, correct?

7 A. Yes.

8 Q. With his child in the backseat?

9 A. Yes, but I mean -- when you say take off, it's in a
10 parking --

11 Q. In the apartment complex.

12 A. Right, it's in parking lot.

13 Q. Okay. And he then leaves the car, leaves the child in
14 the car, and flees on foot?

15 A. Yes.

16 Q. And he's arrested and so that's where we get the
17 unlawful -- the child endangerment charges or unlawful
18 negligent charges and resisting arrest. Those charge come
19 from -- come out of the traffic stop?

20 A. Correct.

21 Q. Okay. And while Mr. Berry is fleeing on foot, the
22 testimony from the officers is that they see him discard
23 at least one object or objects?

24 A. Right.

25 Q. Those objects turn out to be two bags that are then

1 recovered. One bag contains zip ties, gloves, masks,
2 correct?

3 A. That was a diaper bag, yes.

4 Q. And then the diaper bag actually had the gun?

5 A. Oh, yeah, yeah. The diaper bag had the gun in it,
6 yes.

7 Q. Okay. And that -- that gun was collected and there
8 were bullets collected from the scene of the shooting or
9 shell casings --

10 A. Shell casings.

11 Q. -- collected from the scene of the shooting. The gun
12 and the shell casings were tested and found to be a match
13 and that's how the sheriff's department ties the two cases
14 together, correct?

15 A. Yes.

16 Q. Okay. Then in addition, the child's mother comes to
17 the scene of the traffic stop, gives permission to search
18 her home where she says Mr. Berry was the night before and
19 was that morning before she left for work, correct?

20 A. I maintain that she was coerced into giving that
21 permission, but, yes.

22 Q. And I completely understand that. That was the issue
23 on direct appeal, correct?

24 A. Right.

25 Q. Okay. That was preserved. The issue of whether she

1 was coerced into giving consent to that -- for that search
2 is what went up on appeal?

3 A. Right.

4 Q. Okay. And that was a merits appeal, there was some
5 briefing on that and the Court affirmed the opinion,
6 correct?

7 A. Correct.

8 Q. Okay. On the merits, not finding that you didn't
9 preserve it or anything like that.

10 A. Right. Right. Right.

11 Q. Okay. So that issue is done with whether you like it
12 or not, correct?

13 A. As usual, yes.

14 Q. Okay. So the evidence that came in at trial was that
15 the mother of the child gave permission to search her
16 apartment. In that apartment, there were clothes and shoes
17 collected that were tied back to Mr. Berry, that she said
18 was Mr. Berry's.

19 A. Right, and there was blood on --

20 Q. There was blood on those and that's the blood that was
21 rapid tested to be matched to the victim of the shooting?

22 A. Yes. Yes.

23 Q. Okay. And so they tied the shooting and the traffic
24 stop together through the gun that was recovered and the
25 fact that they recovered bloody clothes and shoes with the

1 victim's blood on them in the apartment of Mr. Berry's
2 girlfriend?

3 A. Right.

4 Q. The child's mother.

5 A. (Nods head.)

6 Q. Okay. And she came to testify that those were
7 Mr. Berry's clothes, that's what she saw him wearing, and
8 the victim testified that the attacker wore similar kind
9 of clothes --

10 A. Correct.

11 Q. -- and had similar kind of masks to what was found in
12 the bag?

13 A. Correct.

14 Q. Okay. And then those items were also DNA tested. I
15 think there was -- Mr. Berry's DNA was on the mask and on
16 the gloves that were recovered as well?

17 A. That's correct.

18 Q. Okay. And then there were also some shoe impressions
19 taken from the victim's car at the shooting. Do you recall
20 that?

21 A. Yes, like all on top of the car.

22 Q. Because they were sort of fighting around the car and
23 at one point he jumped up on the car or they both did and
24 there were some shoe marks left on the car?

25 A. Yes.

1 Q. And they compared those shoe marks to the bloody shoes
2 that were found in Mr. Berry's girlfriend's apartment and
3 found that the tread impressions -- like they were similar?

4 A. Consistent.

5 Q. Consistent.

6 A. Right.

7 Q. Okay. So in addition to these phone calls, there is
8 actually DNA evidence and bullets or bullet casings,
9 firearm evidence, that ties Mr. Berry to this attempted
10 murder and the attempted armed robbery?

11 A. Correct.

12 Q. Okay. And that evidence you challenged, but all of
13 that evidence came in?

14 A. Correct.

15 Q. Okay. So regardless of the phone calls, there's some
16 significant evidence against Mr. Berry on these charges?

17 A. Yes.

18 Q. Okay.

19 Okay. Let's just go back to the phone calls then. So
20 you -- you've seen -- you've seen in the transcript and
21 testified about it that this -- the issue of the second
22 plea offer, the fifteen to twenty-year range. I think you
23 testified on direct that you sort of knew that this phone
24 call issue was percolating and so you went back to the
25 State to see if there was anything else they would do other

1 than the thirty years?

2 A. Yeah. I know -- I know that they said that they had
3 found phone calls, but I hadn't heard them yet.

4 Q. Okay. So at the time that Mr. Berry rejects the plea
5 offer, he at least knows that the State is saying we have
6 phone calls that we're gonna use that aren't good for you?

7 A. Yes.

8 Q. Even if he doesn't know the specific content of the
9 calls?

10 A. Yeah, neither of us knew the content.

11 Q. Okay. Did Mr. Berry ever tell you I don't know what
12 they're talking about, I didn't make any phone calls like
13 that?

14 A. No.

15 Q. Okay. And in the rejection of the plea offer, the
16 State actually puts that on the record, that I've told
17 Ms. Zmroczek I have these phone calls, I'm gonna give them
18 to her, and then after that the judge goes through it with
19 Mr. Berry, are you sure you want to reject this plea offer,
20 it's gonna be revoked unless you accept it now. As of now
21 it's gonna be revoked if you say no.

22 A. Right.

23 Q. Okay. And so we've gone through this testimony about
24 there's three phone calls. It's a little bit confusing in
25 the transcript, but it's --

1 A. It was confusing in real life, too.

2 Q. Your understanding ultimately is that there's one
3 phone call between Mr. Berry and Mr. Wallace and two phone
4 calls between Mr. Berry and Kayla, who is another
5 girlfriend?

6 A. Right.

7 Q. Okay. Not the girlfriend from the search?

8 A. Right. Right. Right, a different one. Yeah, the
9 girlfriend from the search I think was the mother of the
10 child.

11 Q. Right. Okay. So two of those three phone calls were
12 actually -- were actually made from Mr. Berry's account,
13 is that your understanding, on Mr. Berry's PIN?

14 A. No -- I don't recall, but maybe. I don't know.

15 Q. Okay. At least -- we'll let the transcript speak
16 for itself.

17 MS. MCCALLISTER: I think that's page 575 or 576 that
18 I'm referring to, Your Honor, for that assertion.

19 BY MS. MCCALLISTER:

20 Q. I believe -- the testimony from the officer is a
21 little confusing, but I believe the testimony is that two
22 were from his account and the one to Wallace was not from
23 his account and I believe that's consistent with what you
24 testified to Ms. Blanchette, was that the one from Wallace
25 was one of one or maybe one of two that was not from his

1 account or not used his PIN number, correct?

2 A. I'm reading it. Okay. I'm on 575. Yeah, Kayla
3 Geiger, July 31st and August 1st -- no, it says on the top
4 of page 576 that -- at line 2, it says no, he used the PIN
5 number of another inmate if I'm reading that correctly.

6 If you look at 575, line 25, Question: And the first
7 two calls, were those made with the PIN number that was
8 assigned to this Defendant, and this is on 576, line 2,
9 no, he used the PIN number of another inmate.

10 Q. And then they say on that last phone call and he says
11 yes?

12 A. Okay. Yes, so --

13 Q. It's a little confusing about what they were --

14 A. It's a little -- yeah, it's a lot confusing.

15 Q. Her question is kind of a leading question. Like she
16 expected him to say those two were assigned to him and the
17 one was not, but he kind of gives the opposite answer.

18 MS. BLANCHETTE: Your Honor, at this point I have to
19 say speculation. She's saying what the Solicitor was
20 believing when she's asking the question.

21 THE COURT: All right. Just rephrase your question,
22 ma'am.

23 BY MS. MCCALLISTER:

24 Q. Okay. I'll just move on.

25 A. It reads how it reads, yeah.

1 Q. It appears that at least one of the phone calls was
2 made on his account?

3 A. I think.

4 Q. Okay. And, again, he never says to you that he didn't
5 make these phone calls or it wasn't him on these phone
6 calls?

7 A. That's correct.

8 Q. Okay. And from the context of the phone calls, it's
9 clear that he is talking to people who are involved in this
10 case, correct?

11 A. Correct.

12 Q. Okay. And it's clear that he's making admissions
13 about his conduct in this case is at issue in this case?

14 A. Right.

15 Q. Okay. So at least as to his statements on the phone
16 calls, when the State is arguing -- the State's -- the
17 State's position was that these are admissions of guilt or
18 acknowledgements of guilt, correct?

19 A. Right.

20 Q. And that's how they come in, it's his statement he's
21 acknowledging --

22 A. Well, I mean -- so the thing with the jail phone calls
23 is that -- yes. I mean, yes, but whenever -- I know they
24 do it -- I think -- I'm sure they did it in this trial too,
25 whenever they introduce a jail phone call they always go

1 through this, so I don't know if you've listened to jail
2 phone calls, but at the very beginning it says these calls
3 are recorded, so they're on notice.

4 Q. Okay. I was getting there, yes. So he's on notice
5 that these phone calls are being recorded when he makes
6 them?

7 A. Yes. But, again, I do not believe they should be used
8 as a discovery tool.

9 Q. Okay. But --

10 A. I understand, but they are, yes.

11 Q. -- they are and they were used in this case and that
12 was their argument for the -- for why they should come in,
13 that they were business records and that he was notified
14 that they were being recorded when he made them?

15 A. Correct.

16 Q. Okay. And then on the calls, the reason the State
17 wanted to use them is because he's making admissions?

18 A. Correct.

19 Q. Okay. And -- and you've talked a little bit about
20 the issue of Wallace, you know, invoking the Fifth and I
21 think you explained that your concern with that was that
22 he needed to invoke that privilege in terms of all of his
23 testimony and not just portions of his testimony, correct?

24 A. Correct.

25 Q. Okay. Because the State was proffering him because

1 allegedly his testimony was going to be that he and
2 Mr. Berry had been together the night before the armed
3 robbery, but at some point he gave Mr. Berry his car and
4 Mr. Berry went somewhere that he didn't know?

5 A. And he knew nothing after that.

6 Q. And he knew nothing after that. And then there was a
7 witness who could kind of give a description of a car that
8 was similar to Mr. Wallace's car, correct?

9 A. Correct.

10 Q. Okay. So the -- the testimony from Mr. Wallace was
11 not going to be helpful to your case?

12 A. I think it was gonna be vague. I think -- I mean, I
13 think that he was doing his best to not try to get his
14 friend in trouble.

15 Q. Okay.

16 A. But that was his choice, I mean.

17 Q. But it wasn't going to be exculpatory testimony?

18 A. Correct.

19 Q. Okay.

20 A. It was gonna be like I don't know what happened.

21 Q. And the State was -- the State, I think, made their
22 argument clear on the record, that they were gonna try to
23 tie -- that that's how they were gonna kind of tie the
24 car and --

25 A. And then the phone call.

1 Q. -- and Mr. Berry together?

2 A. Yes.

3 Q. Okay. And you've talked a little bit about the fact
4 that, you know, the State kind of says that they're
5 concerned about the intimidation and they sort of explain
6 that they -- they just found these phone calls and that
7 they -- the phone call, actually the one with Wallace, had
8 only been made a few days before the trial started,
9 correct?

10 A. Yes.

11 Q. Okay.

12 A. And I'm not -- I don't know -- I have no recollection
13 of what -- I never knew anything about Wallace. I didn't
14 talk to his attorney. I mean, we didn't have a joint
15 defense. I don't -- I don't know if he was telling the
16 State he was always gonna cooperate and then not cooperate
17 or -- I have no idea about any of that.

18 Q. Okay. And I know that you sort of dispute or you have
19 your own issues with the solicitors in this case, but at
20 least the record reflects that they're saying we found
21 these phone calls a few minutes ago and we're turning them
22 over, so they're saying that they didn't have them to turn
23 over to you any sooner than they did.

24 A. Well, so that's what they're saying, but here's the
25 thing, is that the solicitors have access to those phone

1 calls day and night, 24/7, just like anybody else, so it's
2 not like they had to wait for the jail to give them to them
3 or they had to find them. No, they could just go in and
4 listen to all jail phone calls all the time, so that's my
5 issue with it.

6 Q. Okay.

7 A. So do I -- I don't know when they discovered them, but
8 that's what they say.

9 Q. Okay. So on the record at least they said we only
10 discovered this and they say in the course of trying to
11 verify some events that happened yesterday, which is in
12 reference as to Wallace and him taking the Fifth --

13 A. Right.

14 Q. -- and this phone call with Wallace, the reason they
15 want to introduce it is because they claim that Mr. Berry
16 is talking about that, telling him to come down here and
17 take the Fifth?

18 A. Right.

19 Q. Okay. But the Solicitor at one point -- I don't --
20 maybe you don't remember, but if it reflects it in the
21 transcript, hopefully you will agree with me, the Solicitor
22 at one point does say I don't think it's coercive.

23 A. Right. Right. Yeah, I do remember that.

24 Q. It's more of an admission that something -- that he's
25 done something he doesn't want this witness to testify

1 about?

2 A. Right.

3 Q. So they back off the fact that it's witness
4 intimidation?

5 A. Right.

6 Q. Okay.

7 A. They didn't start that way, but, yeah.

8 Q. Okay. And all of these arguments and things are being
9 done in -- either in bench conferences or when the jury is
10 out?

11 A. Correct.

12 Q. These are not issues that the jury is hearing?

13 A. Correct.

14 Q. They hear the phone calls, but they don't hear this --
15 these issues?

16 A. Right. Right. Right. No.

17 Q. Okay. And I believe that you agree at some point at
18 least that -- that at least portions of the phone calls are
19 relevant and admissible?

20 A. I think that when he, Wallace, takes the Fifth, I
21 think that goes -- I think -- I mean, all my other
22 arguments -- I mean, I think he's unavailable at that
23 point --

24 Q. Okay.

25 A. -- but -- and I don't think that I preserved the

1 authentication of his voice though.

2 Q. Okay. So at that point I guess your testimony is the
3 only objection left for you to potentially have made is the
4 authentication of the voice?

5 A. Or the identification, yes.

6 Q. Okay. But, again, your client and your position was
7 not to challenge that that was him on the phone calls?

8 A. I ethically could not do that, no.

9 Q. Okay. I think you testified to Ms. Blanchette about
10 the search for the truth language and that maybe you should
11 have objected to that?

12 A. Yes.

13 Q. Have you reviewed the full charge, the full reasonable
14 doubt charge?

15 A. I did, yes.

16 Q. Okay. The judge is pretty clear in there that the
17 State's burden of proof is reasonable -- proof beyond a
18 reasonable doubt, correct?

19 A. That's correct.

20 Q. And he uses the standard language about, you know,
21 making an honest, you know, person hesitate to act and that
22 you have to be firmly convinced, correct?

23 A. Right.

24 Q. And he stays multiple times that the State's burden is
25 proof beyond a reasonable doubt?

1 A. He does.

2 Q. Okay. Do you believe that that -- you know, those few
3 words --

4 A. No, and I think --

5 Q. -- made a difference in the outcome?

6 A. Sorry. I didn't mean to cut you off. No, and I
7 think why -- why I missed it in that part of the charge
8 is typically the charge where the Court instructed the
9 judges to take that search for the truth out was -- it's
10 somewhere in the beginning of the charge and so I think he
11 took it out there and so when it was slipped in on the
12 reasonable doubt, I probably wasn't searching for it.

13 Q. Okay. And you mentioned Beaty, but this trial was
14 tried before the Beaty decision?

15 A. Right. Right.

16 MS. McCALLISTER: I beg the Court's indulgence,
17 Your Honor.

18 THE COURT: Yes.

19 BY MS. McCALLISTER:

20 Q. Okay. And you -- you'd mentioned to Ms. Blanchette
21 that maybe you should have made a bad character evidence
22 argument in terms of the phone calls, but you did argue to
23 the Court -- I'm not sure you used those -- that exact
24 phrase, but you did argue to the Court, you know, they're
25 just putting these in, it's full of profanity, they're

1 trying to make him look bad. You did argue that even if
2 you didn't use those exact words.

3 A. Right. Without saying the words, right.

4 Q. And in addition to the phone call with Mr. Wallace
5 about pleading the Fifth, there's two calls with the
6 girlfriend in which he basically says I F'd up, I did some
7 dumb stuff, right?

8 A. Yes.

9 Q. And she actually talks to him about throwing the bag
10 and she says well, I know why you did it, you were trying
11 to get rid of the stuff, and he says yeah.

12 A. Right.

13 Q. Okay. So that's a pretty clear admission to what
14 the facts of the case were that the State was alleging
15 happened?

16 A. Yes.

17 Q. Okay. And that's -- that's the phone call with Kayla,
18 correct?

19 A. Right.

20 Q. With the girlfriend?

21 A. Right.

22 Q. Not the phone call to Wallace where there's a
23 foundational issue?

24 A. Right.

25 Q. Okay. In your closing argument when you're discussing

1 the phone calls, did you feel that it would be beneficial
2 to Mr. Berry to try to contest whether that was actually
3 him on the calls?

4 A. I -- I couldn't make that argument.

5 Q. You mean ethically you couldn't make the argument?

6 A. Correct.

7 Q. Okay. So then at that point you felt like you sort
8 of had to acknowledge it and explain it some other way?

9 A. Yeah, at that point that was my only option or to just
10 not address them.

11 Q. Okay. And you chose to address it because you felt
12 that was a better strategy than not?

13 A. I -- I did. I felt like I could get one or two people
14 to maybe --

15 Q. Okay. And your point was that there were hundreds of
16 other calls that they didn't play for you that they could
17 have?

18 A. Correct.

19 Q. And they chose these specific calls because they make
20 him look the worst?

21 A. Correct.

22 Q. Okay. So you made this argument about sort of trying
23 to back door bad character evidence. You made that
24 argument to the jury?

25 A. Yes.

1 Q. Okay. And I think you testified that after the guilty
2 verdict you made sort of like the standard motion for a new
3 trial and you focussed on the phone calls because of the
4 jury note?

5 A. Right. I mean, I preserved all my issues, but then
6 wanted to make sure that that one was specifically
7 addressed because as we've discussed there were several
8 issues with these phone calls that came up during trial
9 and -- and I think that my arguments were a moving target
10 to what I could address at the time.

11 Q. Okay. And I don't know if you recall, if it will be
12 in the transcript or not, but the jury -- the jury asked
13 multiple questions. They had questions not just about the
14 phone calls.

15 A. Right. I do believe that there were -- I think that
16 I had asked for and was charged on at least one or two
17 lesser included offenses and so I think that there were
18 questions around a lesser included maybe from attempted
19 murder.

20 Q. Okay. I'm sorry. If I could have just a minute. I
21 think you said in hindsight that maybe you feel like you
22 should have moved for a continuance once the content of the
23 phone calls came out --

24 A. (Nods head.)

25 Q. -- but at the time in trial you felt like that was

1 something you could handle?

2 A. Honestly, I don't -- I don't -- no, I don't know that
3 I could handle -- I mean, I think I was trying to handle
4 it, but I think at -- at that point -- I don't know why I
5 didn't think about it once I had an opportunity to listen
6 to them. I have no idea.

7 Q. Okay. And the thing about the phone calls, you
8 testified to it multiple times, he never contested them so
9 theoretically he knew what was on those phone calls?

10 A. I can't -- I mean --

11 Q. You said ethically you couldn't challenge the
12 identification of him.

13 A. Ethically he -- ethically I couldn't challenge the
14 identification of him.

15 Q. Okay.

16 A. I don't know what he was thinking, but, yes.

17 Q. I'm not -- yeah, I'm not trying to ask you what he's
18 thinking, but if your concern was the content of the calls,
19 theoretically Mr. Berry knew the content of those calls?

20 A. Right.

21 Q. Okay.

22 A. He made those calls.

23 Q. He made those calls --

24 A. Right --

25 Q. -- so he knew what was on them?

1 A. Well, I don't know if he knew or remembered what was
2 on them, but I know he made the calls.

3 Q. Okay.

4 MS. McCALLISTER: I think that's all the questions
5 I have.

6 THE COURT: All right. Redirect.

7 MS. BLANCHETTE: Thank you, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. BLANCHETTE:

10 Q. Ms. Zmroczek, I'll kind of start where the State
11 ended. Even if Mr. Berry knew he made the calls, as we've
12 gone throughout this, and I believe you stated, that he did
13 not know nor could you advise him regarding the content of
14 the calls and what calls were going to be used; is that
15 correct?

16 A. That's correct.

17 Q. So at the beginning of your testimony the State went
18 through kind of a recitation of the facts as they were
19 introduced at trial. Those were the facts you-all knew
20 going into the trial that you could prepare for and on
21 which he rejected the plea offer; is that correct?

22 A. Right.

23 Q. But he did not know that these three phone calls
24 were gonna be used, the content of those phone calls, and
25 you were not able to advise him regarding that prior to

1 rejection of the plea offer; is that correct?

2 A. Right, and I think to -- to clarify, he -- I don't
3 know if he didn't know the content or -- I don't -- he
4 didn't know that they had found phone calls that he had
5 made under another PIN, so, yeah.

6 Q. And to be fair to him, you also didn't review the six
7 hundred plus phone calls you already had in this discussion
8 with him?

9 A. Right, not with him, but they weren't -- I reviewed
10 them, but not with him.

11 Q. Okay. And ultimately the State argued in their
12 closing that these phone calls were admissions, that he
13 discussed taking the guilty plea because he was guilty,
14 and it showed how he was in charge of Wallace, essentially
15 almost like making Wallace his victim?

16 A. Right.

17 Q. You did not have knowledge of that argument because it
18 wasn't made in opening; is that correct?

19 A. Correct. And it wasn't provided to me before.

20 Q. Okay. And you discussed in your cross-examination
21 this concern you have, one, regarding how jail phone calls
22 are used in discovery. Did you make that argument
23 regarding that being a possible abuse of discovery in this
24 case?

25 A. I don't recall if I did or not.

1 Q. Okay. You also discussed in your cross-examination
2 that you had concern about the timing of when these calls
3 were turned over versus when the calls were made and how
4 long they may have been in the State's possession. Do you
5 recall making that argument in the record of this case?

6 A. I don't recall.

7 Q. I think it's fair to say that there's somewhat of a
8 confusing record regarding this disguising the PIN and
9 which calls they're attributing to be disguised by the PIN.
10 The State asked you about the section of Sergeant Carwell's
11 testimony where he's asked about that by the State. Was it
12 ever made clear if the three phone calls that were admitted
13 were made via a disguised PIN or they were alleging they
14 were made via Mr. Berry's PIN?

15 A. I don't -- I still don't know if it's clear, so, no.

16 Q. And would you agree that that gives credence to why a
17 foundation argument should have been made regarding these
18 phone calls?

19 A. Yes. Or preserved. I remember making it, but then
20 not continuing to make it.

21 Q. And would you agree that it is your job as his counsel
22 to go over the evidence with him to help him make an
23 informed decision whether he should accept or reject the
24 plea offer?

25 A. Yes.

1 Q. And, finally, the State asked you about the Beaty
2 case and the timing of the Beaty case that you referred to
3 regarding the search for the truth instruction. Prior to
4 this case, were you aware of the Gregory Daniels case and
5 its progeny that also discussed the same issue?

6 A. I was.

7 Q. Okay. So you were aware of the concern and the
8 rulings that were coming down regarding that language prior
9 to this case?

10 A. Yes.

11 MS. BLANCHETTE: Your Honor, I have no further
12 questions.

13 THE COURT: Any cross based upon that?

14 MS. McCALLISTER: Just briefly.

15 RECROSS EXAMINATION

16 BY MS. McCALLISTER:

17 Q. Just to clarify, so you had -- you had six hundred
18 something phone calls that you reviewed ahead of time?

19 A. Right, and they weren't -- there was nothing bad on
20 those phone calls. There was nothing that could be used
21 against the Defendant on those phone calls. There was
22 nothing relevant to the trial of the case or any of the
23 facts of the case.

24 Q. So it's my understanding, and maybe I'm wrong and you
25 can correct me if that's not your understanding, but my

1 understanding from the reading of the record is that only
2 one, maybe two of these was made from a different account,
3 so you would have had at least one of the phone calls?

4 A. Right, and I don't -- I just don't remember. Even
5 reading this it makes it more confusing, so I don't
6 remember.

7 Q. Okay. And it seems to me that the State's -- the
8 phone call that comes up at the last minute is the phone
9 call from Wallace -- with Wallace, correct? That's the
10 one that they discover just prior to trial and e-mailed to
11 you.

12 A. See, I remember it differently because they -- I
13 remember them e-mailing multiple phone calls.

14 Q. Okay.

15 A. So -- so that's why -- but -- but it was more than
16 three. I think it was four or five, so I don't -- so I
17 don't remember which one in particular.

18 Q. Okay.

19 A. But, I mean, I feel like -- I know -- I don't feel
20 like, I know I listened to all of those phone calls over
21 the course of my representation that I had and if he had
22 said any of those things on those phone calls, then I would
23 have taken them to him and -- I mean, because I -- I recall
24 specifically, as I do with all my clients, cautioning them
25 to stay off the phones. Not that they listen.

1 Q. Okay. So he would have received that caution anyway?

2 A. Oh, absolutely.

3 Q. Okay. The phone call -- the Wallace phone call
4 though, that phone call was made maybe three or four days
5 prior to trial?

6 A. Right. And that's why they claimed they had just
7 found it because he had -- he, Wallace, had made some
8 change in his --

9 Q. He was corrobo -- cooperating --

10 A. I don't have knowledge of that, but that's what it
11 appears.

12 Q. There's -- that's from the record. That appears that
13 that was their argument, was that he was cooperating up
14 until that point and then he changed his mind and that's --

15 A. And that's their understanding. So a lot of times
16 though clients will just say they're cooperating so they
17 can get out on bond and then never intend to cooperate, so
18 I don't know what the thought was --

19 Q. Okay. But that was --

20 A. -- but that was the case.

21 Q. -- their understanding about what was happening?

22 A. Right.

23 MS. McCALLISTER: Okay. Thank you.

24 THE COURT: Thank you, ma'am. You can step down.

25 (Witness excused.)

1 THE COURT: We'll take about a ten minute quick
2 comfort recess -- about five minutes.

3 (Recess taken at 3:09 PM.)

4 (Back on the record at 3:14 PM.)

5 BAILIFF: All rise. Court's back in session.

6 THE COURT: Thank you. Be seated.

7 Are we ready?

8 MS. BLANCHETTE: Yes, sir.

9 THE COURT: Call your next witness.

10 MS. BLANCHETTE: Your Honor, I would call Lara
11 Caudy to the stand.

12 THE COURT: All right.

13 (Whereupon, Lara Caudy was duly sworn by the Court.)

14 THE COURT: All right.

15 LARA CAUDY,

16 having been duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MS. BLANCHETTE:

19 Q. Can you please state your name for the record?

20 A. It's Laura Caudy.

21 Q. And, Ms. Caudy, what is your profession?

22 A. I'm a criminal defense attorney.

23 Q. Okay. And where do you practice law currently?

24 A. I work for the Office of Appellate Defense.

25 Q. And how long have you been practicing law?

1 A. Since 2012, so seven years.

2 Q. And have you been at the Office of Appellate Defense
3 that entire time?

4 A. No, I briefly left. I law clerked for Bob Dudek when
5 I was in law school for two years and then initially out
6 of law school I got hired at the Anderson County Public
7 Defender's Office and I worked there for eleven months
8 until there was a position open at Appellate Defense and
9 then I started at Appellate Defense in August of 2013.

10 Q. Okay. And you are here to today because you were the
11 appellate defender that handled Mr. Berry's direct appeal;
12 is that correct?

13 A. That's correct.

14 Q. Okay. And you recall your representation of him?

15 A. I do.

16 Q. And if you could just kind of take me through, if you
17 want to be specific or generic, the process you utilized to
18 identify the issues in preparing an appellate brief?

19 A. So I read the transcript from front to back and I
20 summarize the transcript as I'm reading it. Occasionally
21 -- well, I used to when I first started make a separate
22 list of all the objections and motions that were raised.
23 It doesn't appear that I did so in this case, but I do have
24 a transcript summary.

25 Q. Okay. And as you're going through the transcript,

1 do you ref -- do you also notice or take notice if there's
2 exhibits that are introduced?

3 A. Of course, yes.

4 Q. Okay. And you typically try to review those exhibits
5 as well?

6 A. All of them.

7 Q. And do you recall doing that in this case?

8 A. Yes.

9 Q. Okay. So when you did the issue review in this case,
10 did you settle on the two issues that you raised in your
11 brief or did you have additional issues kind of as you were
12 mocking out your appellate brief?

13 A. That I actually considered raising?

14 Q. Yes.

15 A. I mean, my summary has a notation of all the motions
16 and objections that were raised, so I would have gone
17 through all of them and done legal research presumably on
18 Westlaw -- mostly on Westlaw to determine whether I thought
19 any of them had merit and then I came to the conclusion
20 that the issues I raised were the only issues that had
21 merit.

22 Q. Okay. And I'm gonna specifically ask you about kind
23 of these two interrelated issues we've been talking
24 about a lot today. And you've been in the courtroom for
25 Ms. Zmroczek's testimony; is that correct?

1 A. That's correct.

2 Q. Okay. One is the issue of his co-defendant proffered
3 -- testimony being proffered and invoking the Fifth. Is
4 that an issue you looked at and you considered raising on
5 appeal?

6 A. I'm not aware of there being an issue. There wasn't
7 any motion or objection related to that. I mean, it
8 appears on the record and I read it, but I'm not aware of
9 any motion or objection that was raised by trial counsel.

10 Q. Okay. And at one point, I believe page 342, and I
11 discussed with trial counsel when she was on the stand and
12 she begins arguing about the inability to have a meaningful
13 cross-examination. Was that issue developed in such a way
14 though that you could raise it on appeal?

15 A. No. Give me one second and I'll pull it up. You said
16 343?

17 Q. 342 at about line -- line 14 she's talking about her
18 cross-examination being hamstring'd under the Sixth and
19 Fourteenth amendment.

20 A. Well, she says that he chooses not to testify and
21 they try to get his statements. My understanding, and I
22 don't think it appears too well in the record, but -- is
23 that Mr. Wallace gave statements perhaps when he was
24 initially arrested that might have implicated Mr. Berry.
25 Perhaps she's talking about those statements, but I'm not

1 aware of the State ever trying to introduce Mr. Wallace's
2 statements.

3 Q. Okay. Did you ever see an issue developed regarding
4 as she says on line 11 no meaningful cross-examination that
5 you felt you could raise on appeal?

6 A. No, ma'am.

7 Q. Okay. Now the -- this issue regarding Mr. Wallace
8 appears to turn into an issue regarding the relevance of
9 some phone calls that were admitted.

10 A. (Nods head.)

11 Q. Did you analyze the relevance arguments made or just
12 the arguments generally made about the admissibility of
13 these phone calls?

14 A. I did, so -- I mean, obviously that would have been
15 one of the issues I would have considered raising on
16 appeal. Do you have the page numbers again?

17 Q. As far as -- it really is about over 300 pages of the
18 transcript as they continue back and forth regarding the
19 admissibility.

20 A. Uh-huh.

21 Q. I didn't know if there was anything specifically that
22 you identified regarding the admissibility and at the very
23 end the judge ruled on relevance and then does a balancing
24 test under 403 regarding probative versus prejudicial
25 value.

1 A. So where my notes -- where I have it picks up is on
2 page 531 is where it starts. It appears that -- let's see.
3 531, line 12, the judge says on the bench conference that
4 -- it appears that a large portion of this was discussed on
5 the bench conference and was not put on the record, so I'm
6 trying to figure out what happened during that bench
7 conference because it seems like Ms. Zmroczek, she waives
8 everything except for relevance and 403. It looks like
9 initially she made a hearsay objection related to what
10 other people said on the tapes, but it seems like she
11 waives it to Mr. Wallace. She says I don't have an issue
12 with that. That's page 532, line 13. And then she
13 mentions Kayla in the following line, but there's no
14 objection on the record as to a specific hearsay objection
15 related to the statements that Kayla made during the phone
16 conversations, so that wouldn't be preserved.

17 So then she goes on to say -- the judge asked her what
18 her additional objection is, she says relevance. Let's
19 see. It seems like she's only saying relevance to one --
20 the third phone call after four minutes and thirty-nine
21 seconds. So if you look at the top of 535, she says Your
22 Honor, after four-thirty-nine I fail to see any relevance.
23 So to me the only objection that I could tell that was
24 preserved for all of the phone conversations was the
25 objection to the third call for relevance and 403 prejudice

1 after four minutes and thirty-nine seconds.

2 Q. Okay. You mentioned bench conferences. Do bench
3 conferences and discussions off the record inhibit your
4 ability to raise the issues on appeal and, if so, how?

5 A. Of course. If the issue is not on the record, then I
6 don't know what was said and I can't raise it on appeal.

7 Q. And would you agree that the record is very confusing
8 regarding the phone calls and which phone call they're
9 talking about and what arguments are being made?

10 A. It's extremely confusing.

11 Q. Okay. And was that difficult for you then as an
12 appellate defender preparing your brief to try to go
13 through and assess these issues?

14 A. Yes. Largely the confusion to me had to do with what
15 the objections were and what was still preserved and not
16 waived, so it was kind of all over the place and it's not
17 clear what telephone conversation they're referring to or
18 what the actual objection is. So like I said, when it
19 came down to it the only objections that I felt that were
20 preserved were relevance and 403 only for that third phone
21 conversation.

22 Q. And, for instance, the State says at one point they
23 know -- that he knows Ms. Zmroczek has an issue regarding
24 authentication, she agrees, but then there's nothing on the
25 record regarding it so you can't raise anything regarding

1 that; is that correct?

2 A. That's correct.

3 Q. Okay. And I do want to ask you about page 674, the
4 search for the truth comment that's included in the Court's
5 reasonable doubt instruction.

6 A. Uh-huh.

7 Q. Does that have to be objected to before you could
8 raise that on appeal?

9 A. Of course.

10 Q. Okay. And then -- I'm sorry if I said finally. I do
11 have another question. If Ms. Zmroczek would have moved
12 for a continuance on the record and that would have been
13 ruled adversely against her, is that an issue you could
14 have raised on appeal?

15 A. It's an issue I could have raised, yes.

16 Q. Okay. And do you see anywhere in the record where
17 she did move for a continuance in this case or raise any
18 discovery concerns regarding the phone calls?

19 A. No.

20 MS. BLANCHETTE: Your Honor, I have no further
21 questions of this witness.

22 THE COURT: All right.

23 CROSS-EXAMINATION

24 BY MS. McCALLISTER:

25 Q. Okay. So you get assigned an appeal, you review the

1 transcript and try to figure out what issues are preserved
2 and what you think has merit, correct?

3 A. Correct. So when we first get assigned a case is when
4 I would order the exhibits. So my policy is to order any
5 physical exhibit I can get my hands on, so I would have
6 gotten all the exhibits initially and then when I got to
7 the case, I would read through the entire transcript,
8 summarize it like I said, including the -- all the
9 testimony and all the motions and objections, and then go
10 through each issue to see whether I thought any of them had
11 merit.

12 Q. Okay. And the issue that you ultimately ended up
13 raising was the issue of the consent to search, correct?

14 A. Correct.

15 Q. Okay. And you actually raised sort of two issues
16 because the judge made two separate but connected rulings
17 about whether Mr. Berry had standing and then whether the
18 consent was voluntary?

19 A. Correct. I mean, I think I probably could have raised
20 them as one, but it made more sense to me to keep them
21 separate since the law was somewhat separate.

22 Q. Okay. And you felt like that was a good issue?

23 A. Yes.

24 Q. And you felt like that issue and the arguments that
25 Ms. Zmroczek made on that issue had merit?

1 A. Of course. Yes.

2 Q. Okay. And you are not required to raise more than one
3 meritorious issue, correct?

4 A. I'm not required to raise all nonfrivolous issues,
5 that's correct.

6 Q. Okay. And so in this case, that was what you chose to
7 go with?

8 A. I thought that was the strongest issue, particularly
9 the Issue 1 regarding his expectation of privacy. I think
10 the trial judge was wrong in that respect. I think he
11 absolutely had an expectation of privacy to challenge the
12 search and I thought there was strong evidence that -- of
13 coercion as Ms. Zmroczek argued below, and it seemed like
14 the trial judge's ruling contradicted what the officer's
15 testimony was, so I thought that was significant as well.

16 Q. Okay. And there was sort of conflicting testimony
17 about that, correct? About whether she was coerced or
18 whether there was potential coercion from the police
19 officer?

20 A. Correct. The girlfriend and the -- and the
21 girlfriend's sister testified or -- yeah, testified about
22 statements made by the officer regarding DSS, but the
23 officer said he didn't make any statements like that. But
24 then when the trial judge was ruling, he seemed to -- he
25 seemed to be under the impression that the officer did make

1 those statements, but he still didn't think that it was
2 coercive.

3 Q. Okay. So in your opinion you had a pretty good
4 argument on whether this -- the consent was coerced?

5 A. I did. I thought the only real weakness was that this
6 trial judge made credibility findings that the girlfriend
7 and her sister were not credible and it's hard to challenge
8 those findings on appeal.

9 Q. Okay. And I think -- and you were asked about this
10 search for the truth and it had to be objected to. The
11 standard for that though is -- it sort of looks at the jury
12 instruction as a whole, correct?

13 A. That's correct.

14 Q. Okay. So even if that language is in there, it
15 doesn't mean that the jury instruction is bad and that's
16 gonna be a winning argument on appeal?

17 A. If that issue was preserved, I would have raised it.
18 I can answer it that way.

19 Q. Okay. And the issue about moving for a continuance,
20 you said you could have raised that. What's the standard
21 for that on appeal; do you know? Is it abuse of
22 discretion?

23 A. It is, and there's that phrase that's quoted in a lot
24 of South Carolina cases that basically says that granting a
25 continuance is extremely rare, so it's not really an issue

1 that I would have briefed.

2 Q. Okay.

3 MS. McCALLISTER: That's all the questions I have.

4 EXAMINATION

5 BY THE COURT:

6 Q. Let me ask you a question. In your experience as an
7 appellate attorney, how many appeals would you say you
8 handle?

9 A. How many I handle a year or --

10 Q. Yeah.

11 A. How many briefs do I file?

12 Q. Yeah.

13 A. At least once a week.

14 Q. In your experience as an appellate attorney, how many
15 times has the appellate courts overturned a trial judge's
16 decision to deny a continuance request?

17 A. Never. I don't even think that's an issue that we --
18 our office raises very often, if ever.

19 THE COURT: All right. Any additional questions
20 based upon the Court's questions?

21 MS. BLANCHETTE: No, Your Honor. I was just
22 nodding along.

23 THE COURT: All right. Thank you very much. You
24 may step down.

25 MS. BLANCHETTE: Your Honor, it's my understanding

1 this witness is here under the State's subpoena. I have
2 no objection to her being released.

3 MS. McCALLISTER: I have no objection.

4 THE COURT: See you later.

5 THE WITNESS: Okay. Thank you.

6 (Witness excused.)

7 THE COURT: All right. Call your next witness.

8 MS. BLANCHETTE: I call Brandon Berry to the stand.

9 (Whereupon, Brandon J. Berry was duly sworn by the
10 Court.)

11 THE COURT: Thank you, sir.

12 BRANDON J. BERRY,

13 having been duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MS. BLANCHETTE:

16 Q. Can you please state your name for the record?

17 A. Brandon Berry.

18 Q. And, Mr. Berry, we are here today because you filed a
19 PCR application in Richland County; is that correct?

20 A. Yes, ma'am.

21 Q. Okay. And you filed that application back in 2017; is
22 that correct?

23 A. Yes, ma'am.

24 Q. And you've retained my services to assist you with
25 that application?

1 A. Yes, ma'am.

2 Q. And during the course of my representation, we've
3 had the opportunity to meet a number of times at Lieber
4 Correctional Institution?

5 A. Yes, ma'am.

6 Q. And we have discussed the outcome of your trial, the
7 sentences you received. We've also discussed the risk of
8 going forward with the PCR; is that correct?

9 A. Yes, ma'am.

10 Q. Okay. And by way of your application, what was it
11 that you're asking the Court for?

12 A. Well, most importantly I was asking for a new trial
13 being that I feel I didn't have a fair one and/or if the
14 Court finds in favor for me to be able to go back on the
15 plea that I would have taken prior -- if I would have heard
16 the phone calls prior to that.

17 Q. Okay. So based upon the testimony that's been
18 presented today, the transcript and in preparation for this
19 case since you filed the original application, you now also
20 want to ask the Court to give you whatever relief he may
21 deem proper even potentially reextending the plea offer
22 that was rejected on the record; is that correct?

23 A. Correct.

24 Q. Okay. Now you do understand though that the primary
25 relief in a PCR application is a new trial?

1 A. Correct.

2 Q. And I've explained to you by asking for that relief,
3 that means that your current convictions and sentences are
4 set aside, you're put back in the position as if you'd
5 never gone to trial, so you're facing your original charges
6 all over again with no guarantee of less time. You
7 understand that and you still want to go forward today?

8 A. Correct.

9 Q. Okay. Now that we've established that, I want to talk
10 with you about the amendments in this case. Did you assist
11 me in putting together the amendment of the allegations?

12 A. Correct.

13 Q. And I earlier told the judge that we weren't going
14 forward on Issue Number 1. I just want to affirm for the
15 record that you're in agreement with abandoning Issue 1 on
16 the amendment?

17 A. Correct.

18 Q. Okay. Well, let's dive in and talk about just kind
19 of how this case came to be, how you got to trial and how
20 we're here today. You retained Ms. Zmroczek; is that
21 correct?

22 A. Yes, ma'am.

23 Q. And during the course of her representation, were you
24 able to be out on bond or were you at the county jail?

25 A. Eventually I bonded out.

1 Q. Okay. And the majority of your meetings though, were
2 those with her at the detention center?

3 A. I think two was at the detention center and maybe like
4 two when I was home.

5 Q. Okay. And she talked about in her testimony and it's
6 talked about in the transcript that she was provided over
7 six hundred phone calls in discovery. Did she ever go over
8 those phone calls with you?

9 A. No, ma'am.

10 Q. Do you remember her advising you or telling you about
11 the contents of those phone calls that she testified to
12 today that she reviewed on her own?

13 A. No, ma'am.

14 Q. Okay. Now in the record it reflects that there was a
15 thirty-year plea offer offered before trial. Do you recall
16 getting that plea offer?

17 A. I recall, yes, ma'am.

18 Q. Okay. And at that time based upon the evidence that
19 Ms. Zmroczek had explained to you, did you decide to reject
20 the thirty-year plea offer?

21 A. Correct.

22 Q. Now based upon the transcript, it appears about the
23 beginning of day two that Ms. Zmroczek had approached the
24 State asking them for another offer. Did you discuss that
25 with her before she did that?

1 A. Could you repeat that?

2 Q. Yeah. It appears in the transcript at the start of
3 the second day the State informs the Court on page 188 that
4 Ms. Zmroczek had approached them about an additional plea
5 offer.

6 A. Uh-huh.

7 Q. Did she talk with you about that, about approaching
8 the State and trying to get another plea offer?

9 A. Yes, ma'am.

10 Q. Okay. Now as they're discussing that, they say they
11 need to consult the victim and they'll reconvene and let
12 the Court know what happens. They come back and say they
13 extended a range of fifteen to twenty years and that you
14 had rejected that plea offer. They then almost in the next
15 breath say and we have found some additional phone calls
16 about fifteen minutes ago under a disguised PIN and we're
17 gonna turn those over to Ms. Zmroczek. When Ms. Zmroczek
18 came to you and said that there's a plea offer on the table
19 for fifteen to twenty years, did she tell you that the
20 State has some additional evidence that they haven't turned
21 over to us yet?

22 A. No, ma'am, she didn't tell me that.

23 Q. Okay. Now the State informs the judge you're gonna
24 reject the plea offer, then they mention that there's these
25 additional jail calls made by you under a different PIN and

1 then the Court affirms that you rejected the plea offer and
2 you say yes, sir. Did you know at that time that you could
3 have asked for more time to consider that plea offer or ask
4 for the opportunity to review this new evidence?

5 A. I didn't know. She didn't tell me. I thought that
6 maybe she would have let me know that and so I didn't know.

7 Q. Okay. Who were you relying upon to review the
8 evidence and to give you advice in this case?

9 A. Ms. Zmroczek.

10 Q. Okay. And it's clear from the transcript that she
11 hadn't even had the opportunity to review that evidence
12 yet; is that correct?

13 A. Correct.

14 Q. There you're getting information that there is some
15 new evidence. Would you have wanted her to request a
16 continuance on your behalf?

17 A. Correct.

18 Q. And would you have wanted her to ask that the plea
19 offer be extended until you-all could have the opportunity
20 to review that evidence?

21 A. Most definitely.

22 Q. And she talked about today and it's in the transcript
23 that that's the first time some additional jail calls are
24 provided, then later they say there's a call between you
25 and Mr. Wallace that has been provided. At both junctures

1 would you have wanted her to ask for the case to be
2 continued?

3 A. Most definitely.

4 Q. So as I asked her, before the jury was sworn you-all
5 get told about additional evidence, there's this issue that
6 comes up of some speculation of you possibly intimidating
7 Mr. Wallace and Mr. Wallace invoking the Fifth. Is this
8 all information you didn't have when you rejected that plea
9 offer?

10 A. When I rejected the plea offer, I was unaware of that.

11 Q. Okay. Mr. Berry, if you would have known about the
12 additional calls, if you would have known about this issue
13 that developed with Mr. Wallace, and essentially these
14 phone calls that your attorney argues were used to make the
15 jury hate you and the State argues were an admission, would
16 you have taken the plea of fifteen to twenty years?

17 A. I most definitely would have taken the plea. I would
18 have actually felt like I didn't have a chance had I known
19 that information, so I would have taken the plea.

20 Q. And from Ms. Zmroczek's testimony you could take that
21 she had the phone calls, but none of them were nearly as
22 damning as the three phone calls that were used. At what
23 point did you become aware of that?

24 A. Could you repeat that, please?

25 Q. I'll just rephrase that question for you. Actually

1 I'll move on, Mr. Berry. Are you asking the Court today to
2 find your attorney ineffective for not ensuring you were
3 aware of all the evidence before you rejected the plea
4 offer?

5 A. Correct.

6 Q. Now I also discussed with her a lot of matters related
7 to the calls. You're not an attorney, you don't know what
8 objections should have been made or arguments should have
9 been made or issues regarding admissibility, but are you
10 also asking the Court to find that your attorney was
11 ineffective for the ways that she handled the admission of
12 the phone calls?

13 A. Correct.

14 Q. And also as to Mr. Wallace, are you asking the Court
15 to find that she was ineffective in the handling of
16 Mr. Wallace?

17 A. Correct.

18 Q. Now, Mr. Berry, I assume the State will probably ask
19 you this question. We have provided the calls for the
20 judge to review. He has heard your voice here today.
21 Ethically I feel that I need to ask you, you're not
22 contesting that is your voice on the phone calls, are you,
23 today?

24 A. It was my voice.

25 Q. But you are still asserting that your attorney

1 should have properly advised you, addressed those phone
2 calls with you before you proceeded to your trial and, most
3 importantly, before you rejected that plea offer; is that
4 correct?

5 A. Correct.

6 Q. And, Mr. Berry, if you would have known about those
7 three phone calls and that evidence that the State intended
8 to use against you and argue was an admission, would you
9 have proceeded to trial or taken the guilty plea?

10 A. I would have taken the plea if I would have known
11 about the calls.

12 Q. Okay. And I didn't ask you about -- and, once again,
13 you're not an attorney, but we've raised that your attorney
14 should have objected to a certain portion of the State's
15 closing -- I'm sorry, the judge's charge to the jury where
16 he talks about a search for the truth. Would you wanted
17 her to make all available objections on your behalf?

18 A. Correct.

19 Q. Including that matter?

20 A. Correct.

21 Q. And, alternatively, if the Court finds that these
22 issues were preserved and that your -- and the rulings
23 were made, would you ask the Court then to find that
24 your appellate attorney was ineffective for not raising
25 meritorious issues on your appeal?

1 A. Correct.

2 MS. BLANCHETTE: Your Honor, if I could beg the
3 Court's indulgence for a moment?

4 THE COURT: Yes.

5 BY MS. BLANCHETTE:

6 Q. And I may not have asked this, Mr. Berry, but would
7 you have also wanted -- once the State says he's rejected
8 the plea offer, but we have these additional calls, would
9 you have also wanted her to ask about that plea offer
10 possibly remaining on the table, staying open while you
11 could assess this new evidence?

12 A. Most definitely.

13 Q. Okay.

14 MS. BLANCHETTE: Your Honor, I have no further
15 questions of Mr. Berry.

16 THE COURT: All right. Your witness.

17 CROSS-EXAMINATION

18 BY MS. McCALLISTER:

19 Q. Mr. Berry, you just admitted that that was you on
20 those phone calls, correct?

21 A. Correct.

22 Q. Okay. So when the State says that they have some
23 phone calls that they want to introduce to use against you,
24 you know what you said on the phone calls?

25 A. No, ma'am, I didn't remember. I mean, no, ma'am, I

1 didn't remember what I said on the phone calls.

2 Q. You don't -- you don't remember making an admission
3 saying you did some dumb shit and you -- you F'd up?

4 A. Well, I heard that today, but I've been on the phone
5 a lot. I don't really remember everything I've said.

6 Q. Okay. And you didn't remember talking to your
7 co-defendant about asking him come down here and plead the
8 Fifth?

9 MS. BLANCHETTE: Your Honor, I object as to that.
10 I believe she's asking for an admission on the witness
11 intimidation issue.

12 THE COURT: All right. Sustained. Move on.

13 BY MS. McCALLISTER:

14 Q. You -- you've said that you -- you talked to
15 Ms. Zmroczek about this fifteen to twenty-year plea offer.
16 You decided you were gonna reject it, correct?

17 A. Yes, ma'am.

18 Q. And you're saying that at that point you didn't know
19 about the phone calls, correct?

20 A. No, ma'am.

21 Q. But when you came back into court before you put that
22 issue on the record, the State told you -- or the State
23 informed your attorney, and you were there, it's clear on
24 the record that you were there, that they had these phone
25 calls that they were gonna use?

1 A. Yeah, well, I was told after I revoked the plea.

2 Q. Okay. You never asked the Court to give you a chance
3 to listen to those phone calls before you made a decision?

4 A. I don't recall, no, ma'am.

5 Q. Okay. And you never told the Court you didn't know
6 about the phone calls or you didn't remember what was on
7 them and you wanted to hear them before you made a
8 decision?

9 A. I don't recall, no, ma'am.

10 Q. And you're aware that it's the State's right to offer
11 you a plea offer and they can revoke that offer if they
12 want to?

13 A. Yes, ma'am.

14 Q. Okay.

15 MS. MCCALLISTER: I think that's all the questions
16 I have.

17 THE COURT: All right. Anything else?

18 MS. BLANCHETTE: No, Your Honor.

19 THE COURT: Thank you, ma'am.

20 Thank you, sir. You may step down.

21 (Witness excused.)

22 THE COURT: The Applicant can call its next witness.

23 MS. BLANCHETTE: Your Honor, the Applicant does
24 not have any further witnesses. I have pulled a number
25 of cases that I'd like to provide to the Court at

1 the appropriate time, but we do not have any further
2 witnesses.

3 THE COURT: Sure.

4 All right. The Applicant rests.

5 Anything from the State?

6 MS. McCALLISTER: Your Honor, can I ask for ten
7 minutes? I would like to consult with a witness and
8 decide whether I'm gonna call them or not.

9 THE COURT: Sure. We'll take a little break.

10 MS. McCALLISTER: Thank you.

11 (Recess taken at 3:40 PM.)

12 (Back on the record at 3:47 PM.)

13 BAILIFF: All rise. Court come back to order.

14 THE COURT: Thank you.

15 What's the news?

16 MS. McCALLISTER: I'm sorry, Your Honor. I'm
17 trying to decide about calling this witness. I was
18 speaking with one of the solicitors and he has to go to
19 a murder plea, so he's really not even available for me
20 to call right this second and I was just trying to think
21 if there was any way to work out --

22 THE COURT: What do you need him for? Just tell me
23 what he's gonna say.

24 MS. McCALLISTER: Well, I -- he's -- that's the
25 other thing, is that he doesn't know. I asked him about

1 the e-mails, the phone call and like the PIN number, and
2 if he could explain because I do think the record is a
3 little confusing about which one was under another
4 inmate's PIN and he -- he said he could find that out,
5 but he doesn't know the answer.

6 THE COURT: Why is that relevant in your case?

7 MS. McCALLISTER: I think they've argued quite a
8 lot that there was a foundational issue that she should
9 have made. My argument in my reading of the record is
10 that that would only apply to one phone call and not to
11 the other two phone calls.

12 THE COURT: But -- okay. I understand, but that
13 all goes back to the supposition, as well as the
14 understanding that the State does not have to allow him
15 to plead guilty, and what -- what did the State know at
16 the time they made the offer. Is he gonna be able to
17 testify about that? Is he gonna be able to say they
18 knew these phone calls existed and yet they still
19 offered fifteen to twenty?

20 MS. McCALLISTER: I --

21 THE COURT: Because if he can't say that, I don't
22 know what the State -- you see what I'm saying?

23 MS. McCALLISTER: I -- I didn't ask him that
24 question, Your Honor, so I don't know the answer to
25 that.

1 THE COURT: I mean, I don't -- I'm not gonna try
2 your case for you, but I just don't know what additional
3 testimony -- what his testimony would do.

4 MS. McCALLISTER: And he -- like I said, he's in a
5 murder plea, so --

6 THE COURT: That takes priority right now.

7 MS. McCALLISTER: Yeah, it takes priority right now
8 and it would take him some time to testify actually.

9 THE COURT: What other -- what other witnesses do
10 you have?

11 MS. McCALLISTER: I don't have any other witnesses,
12 Your Honor.

13 THE COURT: Well, that's great. Let's just do
14 argument and let's roll, all right?

15 Yes, ma'am.

16 MS. BLANCHETTE: Your Honor, it's been a long
17 afternoon, so, Your Honor, what I typically do is I pull
18 cases that I think are relevant to the issues of today.
19 I never have a complete preview of what the testimony is
20 going to be, but I try to pull cases that will aid the
21 Court in reviewing the case. I'm happy just to provide
22 you with these cases as I wanted to with an explanation
23 as to why I'm handing them up, then I can provide an
24 argument as well, but it's a long transcript, we've
25 presented a lot of testimony today, so I'm also happy to

1 do that via memo or a proposed order at the appropriate
2 time.

3 THE COURT: I've got the -- I've got the gist. I
4 know what you're wanting and why you're wanting it. Just
5 hand me up the caselaw and tell me why you think they're
6 applicable because I'm gonna have to take this under
7 advisement anyway and do all the reading and whenever I
8 do that, I always -- and if counsel asks, I give them
9 additional time to submit additional memoranda if they
10 want to, okay? You're not required to, but if you want
11 to certainly I'll let you do that.

12 MS. BLANCHETTE: Thank you. Your Honor, since we
13 don't encounter each other a lot, I'm also happy to
14 submit anything you need, but I'd like it to be when
15 the Court actually has a question instead of me just
16 sending you more paperwork to have to read.

17 THE COURT: I agree.

18 MS. BLANCHETTE: So if there's anything that you
19 need from me, I'm happy to supply it.

20 THE COURT: If I need something, I'll reach out to
21 you-all. If I can't make a decision based upon my notes
22 today and what I've heard and what I'm gonna read, if
23 for some unknown reason that I don't know yet I can't
24 make a decision from the record that I have now, I will
25 reach out to you-all.

1 MS. BLANCHETTE: And, Your Honor, I will also --

2 THE COURT: I think I -- I feel pretty good.

3 MS. BLANCHETTE: I will provide the State a list of
4 these cases. I was telling her -- the other assistant
5 attorney general, I finalized it about 10 PM last night.
6 I didn't want to send her an e-mail at 10 PM thinking I
7 had some crazy issue to raise, so I'll provide the list
8 so she has a copy of all the cases.

9 THE COURT: Come on up.

10 MS. BLANCHETTE: (Hanging.)

11 THE COURT: Thank you.

12 MS. BLANCHETTE: And, Your Honor, I will just flip
13 to the cases. Again, I'll just discuss each one of them
14 briefly.

15 THE COURT: All right.

16 MS. BLANCHETTE: I handed up the Davie case and,
17 Madam Court Reporter, I'm not gonna go through them and
18 spell the names unless anybody would like me to, but I
19 handed up the Davie case just for this issue that we were
20 discussing today about the possible re-extension of the
21 plea offer and the unique circumstances that require
22 different relief than a new trial. I will concede here
23 though he was convicted, so it's not similar to Davie in
24 that respect. Davie also discusses though, Your Honor,
25 the right to effective assistance during the plea

1 bargaining process, which I believe that is what we are
2 here discussing today, as well as the continuance issue.

3 I have provided Harris. It is cited to in Davie.
4 There the issue was whether counsel properly advised
5 regarding an offer that included jail time versus an
6 offer that did not include jail time. I thought that
7 was instructive for the Court and included it for that
8 reason.

9 I have provided Judge versus State, which has been
10 overruled by Jackson versus State, so the following case
11 would be Jackson. In Judge, they addressed whether
12 counsel was ineffective for advising his -- his client
13 to reject a plea offer before review of all the evidence.
14 The determinative issue there was they didn't show any
15 additional evidence that should have been reviewed. I
16 think that's distinct from this case.

17 As I said, I handed up Jackson that overrules Judge,
18 but just on the issue that you have to provide objective
19 evidence to meet the prejudice requirement in these type
20 of cases.

21 I've handed up the case of Skeen versus State.
22 That's a South Carolina case. It's the only South
23 Carolina case I could find where counsel was -- the
24 issue was addressed as to whether or not counsel was
25 ineffective for failing to move to continue. There

1 the Court found it was unclear as to how additional
2 time could have assisted in that case.

3 Your Honor, I've provided two Texas cases, which
4 is something I don't typically do. The first is the
5 case of Jody Alexander Kirby versus the State of Texas.
6 In Texas, they do a motion for new trial. In that you
7 can raise a claim of ineffective assistance of counsel.
8 There the issue developed was failure to move to continue
9 due to late receipt of evidence and failure to review
10 that evidence, which I thought was on point and I hoped
11 would be helpful for the Court.

12 Also Brenda Ann Johnson versus the State of Texas.
13 This, again, is a motion for a new trial dealing with
14 ineffective assistance of counsel. There, there was a
15 recording of the incident that the State did not produce
16 until trial, they argued it was a confession, and the
17 issue there was whether or not counsel was effective
18 in the way they turned over -- or the way they handled
19 that recording that was turned over late.

20 Your Honor, I also have included two cases that
21 are more recent decisions of the South Carolina Supreme
22 Court. State versus Raheem D. King. That goes to the
23 calls. This talks about the use of detention center
24 calls and officers' testimony and whether or not
25 officers' testimony is objectionable.

1 And then finally I've included the case of the
2 State versus James Bubba Patterson. It was decided in
3 2019. It's the most recent case we have on the search
4 for the truth issue that began with the Daniels case
5 as far as I know and the latest case that I could find
6 was the Patterson case, so I thought that would be
7 helpful to provide to the Court.

8 THE COURT: All right. Any additional argument
9 you wish to make?

10 MS. BLANCHETTE: Your Honor, just very briefly.
11 I think we have developed a record to support our
12 contention and I ask the Court to find that we've
13 developed a record that Ms. Zmroczek was ineffective
14 when she did not have all of the evidence, and I'm not
15 gonna go over how that evidence was described because
16 we've been talking about that all afternoon, but she
17 did not have all the evidence when she allowed her
18 client to reject that plea offer. She had notice at
19 that point there was additional evidence and I would
20 say that she was ineffective, as some of these cases
21 that I handed up discussed, in her assistance that she
22 provided him in the rejection of the plea offer. His
23 testimony was very clear and straight to the point, so
24 I won't go over that. I believe that we have met the
25 prejudice on that.

1 The other major issue I think that was developed
2 today is that she was ineffective when she didn't move
3 for a continuance. She testified about her concern
4 she had with how the State was turning over evidence,
5 possible abuses of discovery, all these different things.
6 They're not in the record. And what's most importantly
7 not in the record is her saying Judge, I have a problem
8 with this. You know, she didn't say it in the manner
9 of a continuance, she didn't say it in the manner of a
10 motion, she didn't say it in the manner of an objection.
11 She mostly just talked about relevance and foul language
12 and she talked about hearsay. She did not talk about a
13 majority of the things that she talked about today on
14 the record and that's when it would have mattered.

15 So I would just ask Your Honor to consider all the
16 testimony that was offered. Like I said, I'm not gonna
17 go on for twenty minutes. I could, but I won't. I
18 would be happy to provide anything that would further
19 assist you in reaching a decision in this case.

20 THE COURT: All right. Thank you, Ms. Blanchette.
21 From the State?

22 MS. MCCALLISTER: Thank you, Your Honor.

23 I will just start with the issue of the plea offer,
24 Your Honor. I think Ms. Blanchette has tried to sort
25 of make this into a discovery issue with Ms. Zmroczek

1 saying these things were turned over late, I didn't
2 know about them. The record reflects that the State
3 didn't know about them either. The record reflects
4 that the State found those phone calls about fifteen
5 minutes prior to going on the record about the plea
6 offer and that they had let Ms. Zmroczek know that
7 as soon as they found them and I think the record
8 establishes that those phone calls were made only a
9 few days prior to the start of trial, these aren't
10 phone calls that the State would have had even for
11 a long time, and that it wasn't an issue until the
12 co-defendant sort of changed his mind about whether
13 he was gonna cooperate or not.

14 Your Honor, I think it's also clear that that
15 phone call with Mr. Wallace is the phone call that is
16 made under another inmate's PIN, not the two phone
17 calls with the girlfriend, and there are significant
18 admissions by the Defendant on the phone calls with
19 the girlfriend and I don't believe that they have
20 established any meritorious or credible objection to
21 those two phone calls coming in.

22 Mr. Berry himself has admitted that it was him on
23 all of those phone calls. I think it is not credible
24 for him to say that he didn't remember them and he
25 didn't know what the State was talking about when they

1 said that they had phone calls that they were going to
2 use against him, specifically the phone call with the
3 co-defendant that was made maybe three days prior to
4 trial.

5 And I just don't see, you know, how he should be
6 rewarded for his bad behavior. He made phone calls,
7 he made admissions, he knew he was being recorded and
8 he rejected -- he chose to reject the plea offer, and
9 I think if you'll -- you'll hear the phone calls. He
10 says his -- you know, they talk about a plea offer on
11 there and the co-defendant says oh, I know if they
12 offer you fifteen, you're gonna take it and he says
13 no, I won't. So I don't think it's reasonable to think
14 he was ever going to accept this plea offer. He was
15 never going to accept it. And Ms. Zmroczek, I think,
16 testified that he had a very specific plea offer in mind
17 as to what he wanted, and this wasn't it.

18 In addition, Your Honor, the phone calls in the
19 State's opinion are irrelevant. We're here about
20 ineffective assistance of counsel, which is deficiency
21 and prejudice. Even if Ms. Zmroczek was deficient in
22 objecting to these phone calls, they make no difference
23 in terms of the overwhelming evidence against Mr. Berry.
24 There was still the gun found in the diaper bag, the
25 shotgun shells and the DNA found on his clothes in his

1 house.

2 There was an issue with the consent. That issue
3 was -- was briefed and went up to the Court of Appeals
4 and the Court of Appeals affirmed the trial court's
5 decision on that issue, so even if we're talking about
6 all these phone calls they don't make any difference
7 in terms of prejudice to the Applicant. They're his
8 words, he knew he was being recorded, and in any event
9 they had DNA evidence and bullet -- you know, firearm
10 evidence linking him to these two crimes that he
11 and Ms. Zmroczek -- no one has offered any sort of
12 explanation or defense for, and I submit he can't. If
13 you read the record, it's clear that Mr. Berry is the
14 one who did this.

15 Your Honor, as to the issue with the jury
16 instruction, I would ask you to look at State versus
17 Aleksey and State -- I think Ms. Zmroczek mentioned
18 Beaty. That lang -- the courts do say that that
19 language is disfavored. The issue is that -- is
20 whether, you know, telling a jury to search for the
21 truth or implying that that's their role can shift or
22 reduce the burden of proof and make it more like a
23 preponderance rather than a reasonable doubt. I
24 counted last night. The Court says reasonable doubt
25 at least ten times just in the reasonable doubt portion

1 of the charge alone. I don't think there's any -- any
2 way that that, you know, unconstitutionally reduced the
3 burden on the State.

4 THE COURT: You know, when I charge a jury in
5 criminal trials, I've stopped saying in an effort to
6 search for the truth and a true verdict, but, however,
7 that hasn't stopped all clerks of court all over the
8 state -- where I've tried cases all over the state,
9 when they swear in the trial jury, they always say and
10 a true verdict shall render. So until the appellate
11 courts talk about that, I kind of take that with a grain
12 of salt, okay, because -- when the record is voluminous.
13 I don't say it. He said it, it wasn't objected to. I'll
14 consider all that. I just don't know how much of a big
15 deal that particular thing is.

16 MS. McCALLISTER: Yes. And in the context of the
17 -- of the jury instructions as a whole, we would submit
18 that three words in, you know, fifteen pages of jury
19 instructions is not something that is going to make a
20 difference in terms of the outcome of the case.

21 I think -- I think that's all the argument that
22 I have.

23 THE COURT: All right. Anything in brief reply
24 before we close the record?

25 MS. BLANCHETTE: No, Your Honor. I'll stand by

1 my statement that if you have questions, I'll be happy
2 to answer them.

3 THE COURT: All right. Thank you. That concludes
4 the hearing in this case.

5 (Whereupon, the proceedings were concluded at
6 4:01 PM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter
for the Eleventh Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete transcript of record of all the
proceedings had and the evidence introduced in the hearing
of the captioned case in Circuit Court on the 30th day of
October, 2019.

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

January 27, 2020

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
Brandon Berry, 352671,)	
Applicant,)	2017-CP-40-7548
v.)	
State of South Carolina,)	MEMORANDUM
<u>Respondent.</u>)	

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on December 14, 2017. On or about May 8, 2018, Respondent filed a Return and Motion for More Definite Statement of Allegations. Tricia A. Blanchette, Esquire, was substituted in as Applicant's counsel via written Order dated October 4, 2018. On October 4, 2019, Applicant, through counsel, submitted an Amendment to Application for Post Conviction Relief, which set forth the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Trial counsel rendered ineffective assistance for failing to properly handle witnesses and call necessary witnesses at trial.
2. Trial counsel rendered ineffective assistance for failing to ensure that Applicant was aware of the State's evidence prior to the on the record rejection of the plea offer. Transcript pp. 190-191.
3. Trial counsel rendered ineffective assistance for failing to move to continue, move to suppress and/or effectively object and argue regarding the recorded phone calls admitted at trial and the unavailability of witness Wallace. Ineffective assistance of appellate counsel for failing to raise issues related to the phone calls and availability of witness Wallace on appeal.
4. Trial counsel rendered ineffective assistance of for failing to object to the court's instruction to the jury to "search for the truth." Transcript p. 674.
5. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, to include the above stated issue(s).

In further explanation of the issues listed above as two, three and five, Applicant, through counsel, would provide the following summation of the testimony, argument and rulings contained in the record of the trial and appeal.

As is addressed in Respondent's Return, Applicant proceeded to trial in front of the Honorable Howard P. King, and a jury, on November 30 – December 4, 2015 in Richland County. Applicant was represented by Aimee J. Zmroczek, Esquire (hereinafter "trial counsel"). The State was represented by Luck Campbell, Assistant Solicitor, Meghan Walker, Assistant Solicitor, and John W. Steadman, Assistant Solicitor (hereinafter "the State"). Applicant would direct the reviewing court's attention to the following portions of the trial transcript in regards to the above identified issues.

At the start of the second day, the State put on the record that trial counsel had approached the State regarding "a possible additional plea offer." Transcript p. 188, lns. 1-5. The State indicated that the victim would be consulted, and the trial court asked that the parties inform him that afternoon if the plea negotiations could result in the disposal of the case. Transcript p. 188.

After the lunch break, the State explained that the original plea offer was thirty years, but an offer "with a range of fifteen to twenty years" had been extended after consulting the victim during the break. Transcript p. 189, ln. 24 – p. 190, ln. 3. The State informed the court: "My understanding is that he has rejected that plea offer." Transcript p. 190, lns. 3-4. The State went on to explain that in the course of "verifying some other information" jail calls made by Applicant under another PIN number were discovered about "fifteen minutes ago" that would be emailed to trial counsel that afternoon. Transcript p. 190, lns. 5-21. Thereafter, the court inquired of the State, Applicant and trial

counsel as to whether it was correct that Applicant had rejected the plea offer. Transcript p. 191. All responded in the affirmative, and the offer was revoked on the record.

Transcript p. 191.

Prior to the calling of witnesses on the third day of trial, the State informed the court that Applicant's co-defendant (Nickilous O'Neal Wallace), through his attorney, initially "had indicated he wanted to testify" for the State. Transcript p. 193, lns. 22-25. Then, last night his counsel informed the State that Wallace would invoke the Fifth Amendment. Transcript p. 194, lns. 1-7. The State went onto explain that a phone call was also discovered late last night between Applicant and Wallace whereby Applicant "is telling him not to talk or not testify or something to that effect." Transcript p. 194, lns. 1-11. The State requested and all agreed that both parties should not mention Wallace in opening statements. Trial counsel requested that the matter of Wallace invoking the Fifth be addressed at a later juncture, which was also agreed upon. Transcript pp. 194-5. The court also asked counsel to remind Applicant that he was to have no direct contact with witnesses, and Applicant responded: Yes, sir." Transcript p. 195, lns. 4-11. Thereafter, the jury was sworn. Transcript p. 196.

After the State called six witnesses and a recess was taken, the State informed the court that Wallace, through counsel, had indicated he planned to invoke the Fifth Amendment, so the State requested the opportunity to proffer his testimony. Transcript p. 294. The court indicated that the proffer would be conducted prior to the jury returning from their lunch break. Transcript p. 295.

Following the lunch break, the State explained the involvement and charges assigned to Wallace, and Wallace's attorney provided his client's position and his

concern that taking the stand could open Wallace to the possibility of offering incriminating information. Transcript pp. 331-2. The court concluded that the best way to proceed was to call Wallace and proffer his testimony. Transcript p. 333. Wallace was called and invoked the Fifth, while being questioned. Transcript pp. 333-338. Then, his counsel and the State argued about whether he had waived the right to invoke the Fifth and addressed matters related to a probation revocation. Transcript pp. 333-338.

Without a clear ruling on that matter, the State began discussing the alleged phone call between Applicant and Wallace. Transcript p. 339. In response, trial counsel argued that the State had provided an inaccurate reflection of the phone call, and she was in possession of six hundred and ninety-eight calls, with over a hundred between Wallace and Applicant. Transcript p. 339. Trial counsel also asserted it was not “a recent communication or development.” Transcript p. 340, ln. 3-6. After the court began asking about the recording, the State argued that Wallace invoking the Fifth was the result of the phone call with Applicant. Transcript pp. 340-41.

Regarding Wallace, the court questioned whether there was two different issues in play. Transcript p. 341, ln. 24. The court identified the issues, as follows: 1) “whether or not he has the right to assert the Fifth Amendment in regard to questions about where he was and who he was with and who he lent his car to,” and 2) “whether or not he has been intimidated or threatened by the Defendant in this case.” Transcript p. 342, lns. 1-7. In addition, trial counsel stated that there was a third issue involving whether the use of Wallace’s “statements or what was said in...” would be admissible if he chose to not testify. Transcript p. 342, lns. 8-17. She asserted that if Wallace did not testify, Applicant would be denied meaningful cross examination, and she eluded to there being several

other challenges that she could make. Transcript p. 342, lns. 8-17. The State responded by asking for time to research the issue and asking the court to review the call. Transcript p. 342, lns. 18-24. The Court concluded that the State should prepare a written list of the questions they intended to ask Wallace and asked if it would be possible to obtain a transcript of the call. Transcript pp. 342-3. The State responded that it could be transcribed while they were in court during the afternoon. Transcript p. 343, lns. 24-5. Thereafter, further discussion was had regarding the court's requests and concerns. Transcript pp. 345-6. In response to his concerns about the phone call with Wallace, trial counsel offered her understanding that Wallace did not feel threatened or coerced. Transcript p. 346, lns. 2-8.

After the jury was dismissed for the day, the court summarized his understanding of the State's purpose for wanting to elicit testimony from Wallace and his understanding of the controlling case law. Transcript pp. 446-50. Trial counsel also expressed the following position: "I'll put it in a brief for the Court, but my concern is obviously that I'm gonna be hamstring'd on what I can cross-examine on and it would be our position that if he takes the Fifth on any part of his testimony that he would be unavailable for all of his testimony..." Transcript p. 450, lns. 17-22.

The State provided a copy of Wallace's probation terms. Transcript p. 451. The State also agreed to email the transcript of the call during the evening, and trial counsel explained why she would also like the court to listen to the call. Transcript pp. 452-3.

Prior to the jury coming in the next morning, the only mention of Wallace or the phone call matter occurred when counsel informed the court that prior to the calls being

introduced, she had relevance arguments to make. Transcript p. 454. Thereafter, the jury entered the courtroom, and the State called their next witness. Transcript p. 455.

At the conclusion of Tricia Collins Odom's testimony, the State informed the court there was an evidentiary matter that needed to be discussed, and the jury was excused. Transcript pp. 530-1. Following a bench conference, the court put on the record that it was his understanding that the State intended to call a witness to introduced three jail calls, and he questioned if he was correct that the defense objected to two of the three calls. Transcript p. 531. Trial counsel began addressing her objections and her understanding of the court's position and agreed that her hearsay objection regarding Wallace was not viable since he was unavailable. Transcript pp. 532-3. The court confirmed the call between Wallace and Applicant was admissible since the "hearsay objection is not applicable because Mr. Wallace is unavailable." Transcript p. 533, lns. 7-10.

Then, the court moved to the remaining two calls. Transcript p. 533. Trial counsel addressed her relevance arguments regarding those calls, and the State provided a response, which included the argument that the call amounted to an admission on the part of Applicant. Transcript pp. 534-535, p. 535, lns. 13-22. Counsel stated that she had two additional grounds, one being that it was impermissible since Applicant talked about his need for a lawyer and that it was prejudicial. Transcript p. 536, ln. 5. When questioned by the court if she was "changing horses," trial counsel responded that she maintained her relevance argument and she was simply moving onto the second test, that it was more prejudicial than probative. Transcript pp. 536-537. As part of her argument regarding the prejudicial impact, trial counsel argued that "it almost forces him to give up his Fifth

Amendment right to get up and explain” the calls. Transcript p. 537, lns. 15-22. She further asked for redactions. Transcript pp. 537-8. Thereafter, the court ruled that the entirety of the “tape” would be admitted and overruled the objection on the “grounds of 401, relevance, and also it would be overruled on the fact that the probative value is not substantially outweighed by the prejudicial effect.” Transcript p. 538, ln. 9 – p. 539, ln. 6.

Then, the court asked if Applicant had any question about the authentication, and counsel responded that there was a witness present to authenticate. Transcript p. 539, lns. 7-15. The court responded that they would move forward with authentication. Transcript p. 539, ln. 12-16.

After the jury returned, Lt. Friedly, from Alvin S. Glenn Detention Center, was called to authenticate the recordings. Transcript p. 540. Lt. Friedly explained how calls are placed and recorded, and she explained how inmates use other inmates PIN numbers to disguise their calls. Transcript p. 541-2. She confirmed that the three calls were made from Alvin S. Glenn Detention Center and were kept in the regular course of business. Transcript p. 542, lns. 6-14. Subject to the “previous objections,” the calls were admitted in to evidence and published to the jury. State’s Exhibit 163, Transcript 542, lns. 15-22.

When Sgt. Carwell, of the Richland County Sheriff’s Department, was on the stand he addressed the three calls, to include the timing of the calls and significance of the calls. Transcript p. 574-6. He testified that he was familiar with the call system at the jail. Transcript p. 575. He further testified that the first two calls were not made with the number assigned to Applicant since “he used the PIN number of another inmate trying to disguise his phone call.” Transcript p. 575, ln. 25 – p. 576, ln. 3. Then he was asked, “On the last phone call?,” to which he responded “yes.” Transcript p. 576, lns. 4-5.

Prior to closing arguments, several matters were discussed outside the presence of the jury. Transcript pp. 614-618. Specifically, counsel asked and was granted the opportunity to discuss in closing Applicant's statements in the call regarding a plea offer and the amount of time he would take. Transcript p. 616. Both parties also requested that the court instruct the jury that "they aren't to be concerned with any sentencing." Transcript p. 617, lns. 1-8.

During closing argument, the State referenced the phone call with Wallace to support their argument regarding Applicant being in charge of Wallace. Transcript p. 642. Thereafter, the State went into a detailed argument regarding the calls, which included the assertion that the calls amounted to a confession. Transcript pp. 652-655, p. 653, ln. 21. The State also argued that Applicant discussed taking a plea since he was guilty. Transcript pp. 654-55.

At the outset of her closing argument, trial counsel conceded that the phone calls allowed the jury to hear a little from Applicant, but she argued the calls were being used for the sole purpose of convincing the jury to dislike or hate Applicant. Transcript pp. 657-8, p. 658, lns. 16-20. When she referenced the calls next, she argued that the State did not play the six hundred plus available calls, and her greatest fear was that the jury would "only base your decision and your opinion on those phone calls and who they want to show Brandon Berry is." Transcript p. 661, lns. 15-24.

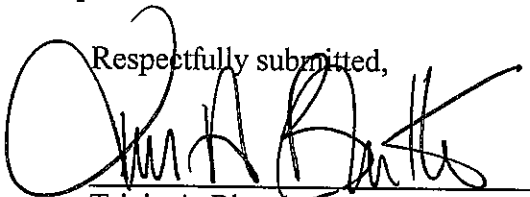
After the jury was sent out to deliberate, they sent out a question asking for the transcripts of the three calls or the recordings if the transcripts were not available. Transcript p. 700, lns. 11-16. The court acknowledged that the transcripts were not

admitted and asked the parties how they wanted to handle it. Transcript p. 700. All agreed the disc and a computer would be provided to the jury to listen to the recordings.

Transcript p. 700-701.

Following additional questions, the jury returned a guilty verdict. Transcript p. 713. Trial counsel moved to have the verdict set aside based upon prior motions. Transcript p. 722. The only specific ground she elaborated on was that the jury asked to rehear the three phone calls that she had objected to coming in. Transcript p. 722, lns. 13-22. The trial court responded and denied the motion. Transcript pp. 722-23. No issues were raised on appeal regarding Wallace or the telephone calls.

Respectfully submitted,

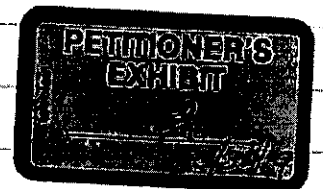
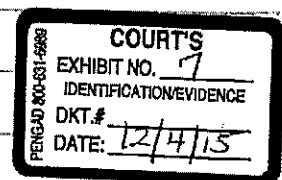
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Tricia A. Blanchette
Attorney at Law
PO Box 2147
Leesville, SC 29070

October 29, 2019

The jury respectfully requests the transcript (if any of the telephone recordings (3 of them) that were admitted into evidence. If a transcript is not available we request the three (3) recordings be played for us again.

Respectfully,
Kendall Buchanan
Juror #37



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Brandon J. Berry, SCDC # 352671,)

C. A. No. 2017-CP-40-7548

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

RICHLAND COUNTY
FILED
2021 MAY 10 AM 9:35
JEANETTE M. MOORE
C.C.P., G.S., & F.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 25, 2017, by Brandon J. Berry (Applicant). The State (Respondent) filed a Return on May 8, 2018, making a motion for a more definite statement and requesting an evidentiary hearing. Through counsel, Applicant filed an amended application on October 4, 2019. An evidentiary hearing into the matter convened October 30, 2019, at the Richland County Courthouse before the undersigned. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esquire. Assistant Deputy Attorney General Lindsey A. McCallister of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf. Aimee J. Zmrocek, Esquire, Applicant's trial counsel (Trial Counsel) and Lara M. Caudy, Esquire, Applicant's appellate counsel (Appellate Counsel), also testified. This Court had before it a copy of the records of the Richland County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's Return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof, denies relief, and dismisses this application with prejudice.



PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. On July 29, 2014, law enforcement officers with the Richland County Sheriff's Department arrested Applicant following traffic stop and subsequent car and foot chase between Applicant and officers. Following an investigation, the Richland County Grand Jury indicted Applicant for attempted murder, attempted armed robbery, unlawful conduct toward a child, resisting arrest, and unlawful carrying of a pistol (2015-GS-40-015, -017, -018, -020, -062).

On November 30, 2015, Applicant proceeded to a jury trial in the Richland County Court of General Sessions with the Honorable Howard P. King presiding. On December 4, 2015, the jury convicted Applicant as indicted. The trial court sentenced Applicant to concurrent terms of imprisonment of twenty years for attempted murder, twenty years for attempted armed robbery, one year for resisting arrest, one year for unlawful carrying of a pistol, and a consecutive term of five years of imprisonment for unlawful conduct towards a child, for an aggregate term of twenty-five years' imprisonment.

Applicant filed a timely notice of appeal, and an appeal was perfected on his behalf. Appellate Defender Lara M. Caudy with South Carolina Commission on Indigent Defense-Office of Appellate Defense represented Applicant on appeal. Megan Harrigan Jameson of the South Carolina Attorney General's Office represented the State. On appeal, Applicant argued the following issues: (1) whether the trial court erred by finding Applicant did not have a reasonable expectation of privacy in the apartment leased by his girlfriend and the mother of his child to challenge the warrantless search of the home; and (2), whether the trial court abused its discretion in finding Applicant's girlfriend voluntarily consented to a search of her apartment. Following

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briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion without oral argument. State v. Brandon Berry, Op. No. 2017-UP-380 (Ct. App. filed Oct. 18, 2017). The Remittitur was issued on November 3, 2017.

SUMMARY OF FACTS ADDUCED AT TRIAL

In the early morning hours of July 29, 2014, Michael Keith was returning home from an evening of working two jobs—first as a promoter of “Knuckle Up,” a local boxing event, and then as the host of an official after party for the event. Tr. pp. 221, 227. Keith, a lifelong resident of the Columbia area, worked a variety of jobs, including as a bus monitor for Richland 2 School District, an employee at a local shoe store, a disc jockey for a radio station, and a host and promoter at various local nightclubs and events. Tr. pp. 220, 226-27, 238-39. Keith was routinely paid in cash when hosting or promoting at events or clubs and therefore, often returned home late at night or early in the morning with large amounts of cash. Tr. p. 226-28. Because of this, Keith had a heightened awareness of his surroundings when returning home from events and had a routine to ensure his safety. Tr. p. 228.

In accordance with his routine, Keith backed his car into the parking lot of his apartment complex when returning home that morning. Tr. p. 228. He exited his car and reached back into his car to retrieve a small bag. Tr. p. 229. Keith then shut the car door and noticed a man dressed all in black, including in a black face mask, black shoes, and black clothing, standing behind him. Tr. p. 229. The man pointed a gun at Keith and demanded Keith's car keys and money. Tr. p. 229. Keith tried to joke with the masked man to ease the tension, but the man again demanded money and threatened to kill Keith if he did not comply by the time he finished counting down. Tr. p. 229. The man started counting, and upon reaching zero, Keith tried to run away. Tr. pp. 229-30. The



masked man chased Keith and the two ran around Keith's car in circles until the man jumped on top of the car. Tr. p. 230. Keith threw a bottle of Minute Maid beverage at him and ran. Tr. p. 230.

While Keith ran, the masked man fired his weapon in Keith's direction, narrowly missing him. Tr. p. 230. Keith dropped to the ground and the man hovered over him, continuing to threaten him and demanding Keith's keys and money. Tr. pp. 230-31. The man tried to remove Keith's pants, and when Keith resisted, he shot Keith in the leg. Tr. p. 231. The man then put the barrel of the gun against Keith's head. Tr. p. 231. At that moment, Keith's girlfriend, awakened by the commotion, looked out the balcony and saw the man with a gun to Keith's head. Tr. p. 222. She came out to the balcony and asked what was happening. Tr. pp. 221, 231-32. Keith yelled at her to go inside, and while the man was distracted, Keith punched him in the stomach. Tr. pp. 221, 231-32. The masked man fled, jumped over a fence, and got into a waiting car that sped off. Tr. pp. 256-57.

Keith and his girlfriend were able to get Keith into their apartment and called emergency services for assistance. Tr. pp. 224, 233-34. Several other neighbors also heard the commotion and shooting and called 911. Tr. pp. 255-60, 495, 546-47. Before medical care arrived, Keith and his girlfriend briefly spoke with responding officers and gave a description of the suspect. Tr. pp. 211-18. Keith was transported by ambulance to the hospital, where he underwent emergency surgery for his injuries, including a fractured tibia. Tr. pp. 224-25, 234, 250-54, 350-56.

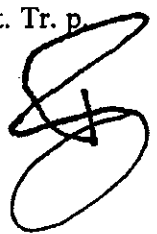
While Keith was being treated, officers from the Richland County Sheriff's Department arrived and processed the scene. Tr. pp. 263-76. Officers collected two nine millimeter shell casings and documented the scene. Tr. p. 268. Keith's car was towed to the Sheriff's Department forensic garage for processing, where investigators were able to lift numerous fingerprint and



footprint impressions. Tr. pp. 277, 408-18. Investigators were later provided with a bullet that had punctured a neighbor's car during the incident. Tr. pp. 496-97.

Approximately six hours later, Richland County Sheriff's Deputy Brandon Pennington was patrolling the Broad River Road area of Columbia when he observed a vehicle with two occupants—driver Nickilous Wallace and passenger Applicant—without seatbelts fastened. Tr. pp. 295-97. Deputy Pennington activated his blue lights, initiated a traffic stop, and called dispatch to request back-up assistance. Tr. p. 297. Deputy Pennington approached the vehicle and asked for Wallace and Applicant's driver's licenses; both Applicant and Wallace were visibly nervous and shaking. Tr. p. 297-98. Additionally, Applicant's two-year-old daughter was unrestrained and freely moving around the backseat. Tr. p. 300. Deputy Pennington took Wallace and Applicant's information and returned to his patrol car. Tr. p. 298.

As Deputy Pennington checked for any outstanding warrants for Applicant and Wallace, Deputy Owens arrived to provide back-up support for Deputy Pennington. Tr. p. 298. Deputy Owens spoke with Applicant and Wallace and similarly noted the extreme nervousness of both men. Deputy Owens also noticed possible marijuana residue and tweezers, which he recognized as a tool commonly used when smoking marijuana. Tr. pp. 311, 236, 386. Deputy Owen observed Applicant fidgeting with a black bag in the back seat. Tr. p. 121. When Deputy Pennington returned to the car, he asked Wallace to step outside the vehicle and Wallace voluntarily exited the vehicle. Tr. pp. 298-99. Deputy Pennington asked for permission to search Wallace's person and the vehicle and Wallace gave consent. Tr. p. 299. While Deputy Pennington was searching Wallace, Applicant moved from the passenger seat to the driver seat and fled into a nearby apartment complex with his two-year-old daughter still unrestrained in the backseat of the vehicle. Tr. pp. 299-300. Applicant drove a short distance before abandoning the car and fleeing on foot. Tr. p.

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300. During this commotion, Applicant's daughter was still in the vehicle, which Applicant did not place in park and which continued to move after he had exited. Tr. p. 300. Deputy Pennington pursued Applicant on foot throughout the apartment complex and was able to apprehend Applicant as he attempted to climb over a fence. Tr. pp. 300-01. Applicant resisted arrest and Deputy Pennington required assistance from several other officers to apprehend Applicant. Tr. p. 306. During the foot pursuit, Applicant discarded two bags: a diaper bag containing a 9 millimeter Glock handgun and an additional bag containing two black masks, zip ties, gloves, and shirts. Tr. pp. 300, 307-09.

Applicant's girlfriend, Kayla, lived in the apartment complex where he fled and quickly arrived at the scene. Tr. pp. 365-67, 554-55. She tended to Applicant's daughter and called the child's mother, Lourisa Katio, to come retrieve the child. Tr. pp. 141, 365-67, 554-55. Katio immediately left work and arrived at the scene shortly thereafter. Tr. pp. 363-67. When Katio arrived, she spoke with Investigator Carwell from the Richland County Sheriff's Department. Tr. pp. 134-35. Investigator Carwell informed Katio that her daughter had been involved in a serious situation and that a loaded weapon was located in her daughter's diaper bag. Tr. pp. 134-35. Katio was upset about the dangerous conditions to which her child had been exposed, as well as the presence of Applicant's girlfriend. Tr. pp. 366-67, 555. Katio called several family members, including her stepfather and sister who arrived on the scene shortly thereafter to assist her. Tr. pp. 135, 150-51, 367.

Katio told Investigator Carwell that Applicant had come to her apartment that morning to watch their daughter while she was at work after spending the evening out with Wallace. Tr. p. 555. She told Investigator Carwell that Applicant did not live with her, but did spend some nights at her apartment. Tr. pp. 364, 373. Investigator Carwell indicated he was concerned about the

child's welfare and wanted to inspect the living conditions before releasing the child to Katio. Tr. pp. 373, 555. Katio agreed to let officers inspect her home and signed a written "Consent to Search" document. Tr. pp. 369, 373, 555-56.

Once Katio let Investigator Carwell into the apartment, she identified the items in the apartment that belonged to Applicant, including black jeans in her bedroom closet, Nike shoes outside the closet, and a black zip tie similar to those found in Applicant's bag that Investigator Carwell seized; the jeans and shoes had reddish stains. Tr. pp. 369-71, 558-61. Katio also gave a written statement describing Applicant's return to her apartment that morning and that the seized items belonged to Keith. Tr. pp. 367-68. Katio's grandmother, who was the only other person listed on her apartment lease, was at the home when Investigator Carwell searched the apartment. Tr. p. 373. Investigator Carwell did not find any weapons in the home and determined it was a safe environment for Katio's daughter. Tr. p. 562.

Investigator Carwell requested rapid DNA testing on Applicant's jeans and shoes collected from Katio's apartment. Tr. pp. 463-65, 473-74, 651-55. DNA analysts from the Richland County Sheriff's Department DNA laboratory tested the items and established the reddish stain on both items was blood. Tr. pp. 455-56, 463-64, 473-74, 651-65. The blood sample on the shoes was too weak to determine a DNA profile, but the blood on the jeans matched Keith's DNA profile. Tr. pp. 463-65, 473-74, 651-65. Based on the results of the rapid DNA testing, Investigator Carwell obtained arrest warrants against Applicant. Tr. pp. 564-65.

Prior to trial, forensic examiners with the Richland County Sheriff's Department forensics laboratory tested the projectiles and shell casings collected from the scene and concluded Applicant's weapon fired the shots. Tr. pp. 498-509. Latent print analysts with the Richland County Sheriff's Department also analyzed the various fingerprint and footprint impressions taken

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from Keith's vehicle. Tr. pp. 412-15, 519-25. Applicant's shoes were consistent in shape, size, and design of impressions found on Keith's car. Tr. p. 437.

While in pre-trial detention at the Alvin S. Glenn Detention Center, Applicant made numerous phone calls to his girlfriend, Kayla, implicating himself in the crime. Tr. pp. 531-59. Additionally, Applicant called Wallace using another inmate's personal identification code (presumably to disguise his identity) and advised Wallace not to testify for the State. Tr. pp. 531-59.

At the outset of trial, Trial Counsel moved to suppress the items seized from Katio's apartment on the grounds that Katio's consent to search was involuntary due to alleged threats to call DSS purportedly made by Investigator Carwell. The trial court conducted an *in limine* hearing on the matter. Tr. p. 70. During the hearing, the State presented testimony from Investigator Carwell, Deputy Pennington, and Deputy Owens. Investigator Carwell testified he arrived at the scene of the traffic stop at approximately 11:30 a.m. after receiving a call from Deputy Owens. Tr. p. 71. He testified Katio was already present when he arrived and made contact with her. Tr. pp. 72-73. He testified Katio informed him Applicant had been out the previous evening with Wallace and had returned to her home around 5 a.m. that morning. Tr. p. 73. Investigator Carwell further testified Katio told him she lived at the apartment with her daughter, but her grandmother's name was on the lease. Tr. p. 74. He testified Katio volunteered to let him search the apartment and signed a consent form memorializing her consent. Tr. pp. 73-75. He stated he did not make any threats or promises to obtain Katio's consent. Tr. pp. 75, 80. Investigator Carwell testified Katio drove herself and her daughter to her apartment, and he followed behind in his vehicle. Tr. p. 75. Once at the apartment, Katio let Investigator Carwell inside and remained in the apartment while

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he searched it. Tr. p. 75. Investigator Carwell testified that Katio provided a three page written statement following the search. Tr. p. 77.

Following Carwell's testimony, the State argued Applicant did not have a reasonable expectation of privacy in Katio's home, and therefore could not challenge the warrantless search of the apartment. Tr. p. 87. Trial Counsel responded that Applicant had a child-in-common with Katio and often stayed at the apartment, kept personal belongings there, and paid apartment-related bills. Tr. p. 88. In support of these arguments, Trial Counsel presented testimony from Katio and Katio's sister Destiny.

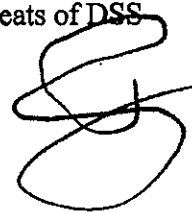
Katio testified she received a call from Applicant's girlfriend Kayla informing Katio that her daughter was with the police, and Katio needed to come to get her. Tr. pp. 133, 141. She testified she immediately left work and drove to the scene. Tr. p. 134. She explained she spoke with Investigator Carwell, who informed her that her daughter had been involved in a serious situation, and investigators found a gun in her diaper bag. Tr. pp. 135, 143. Katio further testified Investigator Carwell told her he needed to be sure her daughter lived in a safe place before she could leave with her daughter or he would call DSS. Tr. p. 135. Katio testified she called her sister and stepfather, who came to the scene. Tr. p. 135. She testified Investigator Carwell asked where she lived, if Applicant lived with her, and if Applicant kept anything at her apartment. Tr. p. 135. She stated Investigator Carwell told her she would be allowed to take her daughter once she established the home was safe. Tr. p. 135. Katio testified she told Carwell she was willing to let officers inspect her home because she had nothing to hide. Tr. pp. 135, 137-38, 143-44. Katio testified Investigator Carwell let her drive herself and her daughter to the apartment. Tr. pp. 135-36.

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Katio testified Applicant "sometimes" stayed at her apartment depending upon their relationship status, which fluctuated. Tr. pp. 142, 147. Katio further testified Applicant spent the evening and early morning of the shooting out with Wallace and did not return to her apartment until approximately 5 a.m. that morning. Tr. pp. 140-41. She testified Applicant occasionally had a key to her apartment, but she did not specify if he had one on the day of his arrest. Tr. p. 136. She explained Applicant kept some personal items in her house, but his name was not on the lease. Tr. pp. 136-37, 143. She testified Applicant had friends over at the apartment on rare occasions, but it was not a regular occurrence. Tr. p. 146-47. Katio testified Investigator Carwell looked for additional weapons at the apartment, and the search took approximately fifteen minutes. Tr. pp. 137-38. She stressed multiple times she was willing to let officers search her home. Tr. pp. 138, 141-42.

Katio's sister Destiny also testified at the hearing. She testified Applicant did not live at her sister's apartment, but he sometimes stayed there depending on their relationship status. Tr. p. 150. Destiny testified Applicant helped pay bills "when he could." Tr. p. 150. She also testified she went to the scene to assist her sister, who she described as "very frantic." Tr. p. 151. Destiny testified law enforcement told Katio she would be allowed to take her daughter unless she consented to a search of her apartment. Tr. p. 151. She testified her sister calmed down significantly when Destiny arrived on scene. Tr. pp. 154-55.

Following the witnesses' testimony, the State argued Applicant did not reside at the apartment and did not have a reasonable expectation of privacy there. Tr. pp. 159-62. The State further argued Katio voluntarily gave law enforcement consent to search the apartment. Tr. pp. 159-62. In response, Trial Counsel argued the incriminating evidence discovered in Katio's apartment should be suppressed because Katio's consent to search was coerced by threats of DSS



involvement and not being allowed to take her daughter home. In support of that contention, Trial Counsel asserted Applicant had a reasonable expectation of privacy in Katio's home, and Katio's consent was involuntary. Tr. pp. 162-69.

After taking the matter under advisement and holding a recess, the trial court denied Applicant's motion to suppress. Specifically, the trial court found Applicant had no reasonable expectation of privacy in Katio's apartment. Tr. pp. 185-86. Furthermore, the trial court found Applicant's argument that Katio's consent was coerced by law enforcement to be without merit, specifically finding the testimony of Katio and her sister was not credible as to purported threats of DSS involvement. Tr. pp. 186-87. In summation, the trial court noted it found "[Katio's] consent was freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child." The trial court therefore ruled the evidence seized from the Applicant's apartment would be admitted. Tr. p. 187.

Subsequently, at the conclusion of trial, the jury convicted Applicant as indicted. Tr. p. 713-17. Following the verdict, the trial court sentenced Applicant to an aggregate twenty-five-year term of imprisonment.

ALLEGATIONS

In his original application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
 - a. Failure to properly prepare and investigate prior to trial; and
 - b. Failure to utilize evidence and witnesses for the defense.
2. Ineffective Assistance of Appellate Counsel
 - a. Failure to raise all meritorious issues on appeal.

Through counsel, Applicant amended his application to include the following allegations:

1. Trial counsel rendered ineffective assistance for failing to properly handle witnesses and call necessary witnesses at trial;



2. Trial counsel rendered ineffective assistance for failing to ensure that Applicant was aware of the State's evidence prior to the on-the-record rejection of the plea offer;
3. Trial counsel rendered ineffective assistance for failing to move to continue, move to suppress and/or effectively object and argue the recorded phone calls admitted at trial and the unavailability of the witness Wallace;
 - a. Ineffective assistance of appellate counsel for failing to raise issues related to the phone calls and availability of witness Wallace on appeal;
4. Trial counsel rendered ineffective assistance for failing to object to the court's instruction to the jury to "search for the truth;"
5. Ineffective assistance of appellate counsel for failure to raise all meritorious issue on appeal, including the issue(s) listed above.

At the hearing, PCR counsel for Applicant stated Applicant wished to proceed on the issues raised in the amended application, with the exception of issue number one, which Applicant withdrew. Any relief as to that issue is therefore denied. Additionally, counsel for Applicant submitted to this Court a memo summarizing Applicant's arguments and case law (Court's Exhibit 1). Without objection, Applicant also entered into evidence a CD of jail phone calls (Applicant's Exhibit 1) and a copy of the jury note (Applicant's Exhibit 2).

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

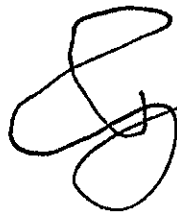
Counsel testified she has been a member of the bar practicing as a criminal defense attorney since 2008. Counsel testified she was retained to represent Applicant on these charges, and she recalled her representation of him. Counsel stated the Solicitor's Office provided discovery in this case in piecemeal fashion, as is normal.

Counsel explained the State originally extended a plea offer with a sentence of thirty years, which Applicant rejected. Counsel testified she approached the State again just before trial in an attempt to negotiate a more favorable plea offer. Counsel testified she and Applicant discussed making a counteroffer, particularly because the solicitors had informed her they had discovered additional jail calls made by Applicant using another inmates PIN, which were not beneficial to Applicant's case. Counsel testified, at some point right before trial, the solicitors provided a CD



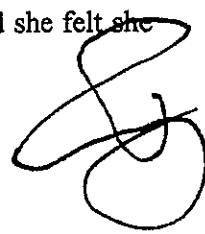
with over 600 of Applicant's phone calls from jail. Counsel stated she did not review the phone calls with Applicant because he was in the detention center.

Counsel testified the State then offered a sentence in the range of fifteen-to-twenty years, which Applicant rejected on the record before the trial judge. Counsel further testified one of the solicitors emailed her copies of the new jail call files later that evening, and when they returned to court the next morning, Applicant again declined the State's fifteen-to-twenty year plea offer, and the State revoked it. Counsel agreed she did not ask the trial court for a continuance or request to have the offer remain open until she had a chance to review the additional jail calls. Counsel testified, in hindsight, she felt she should have asked for a continuance once she had a chance to listen to the phone calls. Counsel also testified she usually speaks with clients about reevaluating a plea offer when she receives new evidence, but she did not have a chance to do so this time because she received the evidence at the same time the State withdrew its offer. However, Counsel testified Applicant rejected the offer knowing the State had the three phone calls it wanted to enter into evidence. Counsel testified although Applicant had not heard the calls, he knew of their existence, he was aware the State claimed the calls were not good for him, and he never told her he did not make those calls. Additionally, Counsel acknowledged that at least one of the phone calls was made directly from Applicant's account. Counsel explained all of the phone calls warned Applicant of the recording at the beginning of the call, but nevertheless, the statements Applicant made on the calls were admissions or acknowledgments of guilt. Counsel further testified although he did not know which calls were going to be used or that the State had found the calls made with someone else's PIN, theoretically, he knew the content of the calls because he had made them. Counsel stated she cannot force a client to accept a plea offer, and in this case, Applicant wanted a very specific offer.



Counsel testified after Applicant rejected the offer and the State withdrew it, the State then informed the trial court that one of its planned witnesses, Applicant's codefendant Wallace, was now planning to invoke his Fifth Amendment right against self-incrimination. Counsel explained the State informed the trial court it had recently discovered a phone call between Applicant and Wallace in which Applicant directed Wallace not to testify. Counsel stated she had not been provided with that phone call at that point, but she could not point to anywhere in the record where she informed the trial court she was lacking that discovery. Counsel explained the trial court deferred its ruling on the issue until later in the trial, and the parties agreed to proceed to opening statements without mentioning Wallace. Counsel testified she did not believe agreeing not to mention Wallace in opening statements hurt the defense case.

Counsel then explained the parties revisited the issue of Wallace's testimony later in the trial, and the State wanted to proffer Wallace's testimony. Counsel testified, by this point in the trial, she had been able to review the taped phone call between Applicant and Wallace, and, in her opinion, there was no evidence of witness intimidation during the call. Counsel stated she believed if Wallace invoked the Fifth Amendment, the State would then have foundational issues with the jail call recording. Counsel further testified she also believed and argued if Wallace invoked the Fifth Amendment on any issue, he had to invoke it as to all issues, or else she felt she would lose her ability to fully cross-examine him. Counsel explained she argued Wallace should not be allowed to pick and choose which questions he wanted to answer and invoke his right selectively, even though she knew that by arguing this, it might render Wallace totally unavailable as a witness. Counsel explained she felt there were two issues with the calls: (1) the discovery was turned over late in the process; and (2) because the call was made on another inmate's PIN, the State needed to prove whose PIN it was and who was talking on the recording. Counsel testified she felt she

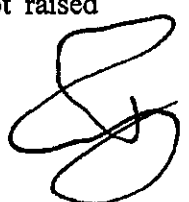


made an objection to the calls generally on the basis of a lack of foundation, although she may not have articulated it to the court as two separate issues.

Counsel testified the phone call between Wallace and Applicant occurred immediately before trial, which is partly why the State did not disclose it until shortly before the trial began. Counsel testified she did not know why she did not move for a continuance to review the calls, and now that she knows what is contained on the calls, she believed doing so would have been effective.

Counsel explained Wallace originally was cooperating with the State, and she expected him to testify he had loaned his car to Applicant on the night of the armed robbery. When Wallace changed his mind and indicated he was not going to cooperate, the State wanted to get the call into evidence to explain why he chose to invoke his Fifth Amendment rights. Counsel explained she felt Wallace had to invoke his Fifth Amendment rights as to his complete testimony or none at all, and that is what she argued. She stated Wallace's testimony, had he testified, was not exculpatory for Applicant, although she expected Wallace to be vague and for him to do his best to not to get Applicant in trouble.

Counsel explained that after the trial court ruled the calls were admissible, the parties addressed her "foundational issues." An officer from the detention center testified as to how calls are placed and recorded at the detention center and that inmates often use each other's PINs to place calls. The officer confirmed the three calls were placed from Alvin S. Glenn, and the recordings were made and kept in the regular course of business. The trial court then ruled the calls would be admitted over the defense's previous objections. Counsel testified she was hoping the jury would not be able to identify who was speaking on the calls, and she felt she had raised the authentication or foundation issue sufficiently to preserve it. She stated if it was not raised



explicitly on the record, then it could have been done in a bench conference. Counsel also testified although there is a reference in the transcript to her providing the trial court with a brief outlining her arguments, she could not recall if she had done that, as it would not have been filed, but simply handed up to the trial court.

Counsel stated when the State reached the point of wanting to admit the calls, the parties again made further arguments. Counsel testified part of the arguments took place in a bench conference, and ultimately, the parties only argued as to the admissibility of two out of the three phone calls. Counsel testified she argued hearsay as to the phone call between Wallace and Applicant's girlfriend, Kayla, because although Wallace's statements were admissible as he had invoked his Fifth Amendment rights, she believed Kayla's statements were not. Counsel explained she also made arguments regarding the prejudicial nature of the contents of one of the calls in which Applicant discussed speaking with a lawyer, based on Doyle v. Ohio. Counsel noted she also argued relevance. Counsel testified she was trying to argue anything she could think of, and she did not feel she had to limit herself to any particular argument. Counsel further testified she thought she had already sufficiently raised and argued the foundational issue, as well as the confrontation issue, although she did not know what effect Wallace invoking the Fifth Amendment had on her argument.

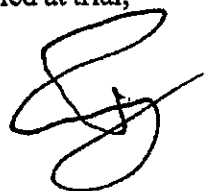
Counsel explained the State conceded the phone calls were not all made from Applicant's PIN and called the lead investigator to testify Applicant called Wallace the day before trial started. Counsel testified she did not object to this testimony because, at that point, she felt she had established her objection. Counsel also agreed at least portions of the phone calls were relevant and admissible; she testified she felt the only other objection she could have made was identification of the voice as Applicant's on the call not made from his account or PIN, and she

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did not believe she adequately preserved that argument. Counsel testified in the phone call between Applicant and his girlfriend, they discussed throwing the bags, and Applicant made statements clearly admitted to the State's version of the facts. Counsel further testified Applicant never claimed it was not him on the calls, and she did not feel she could ethically make that argument in closing.

Counsel testified, eventually, she conceded Applicant made the phone calls because she wanted to argue the State was only selecting calls they felt were helpful to them, when in reality, there were hundreds of calls not played for the jury. Counsel testified she intended to concede Applicant had made the phone calls because she wanted to lessen the blow of damaging evidence. Counsel explained she asked for the opportunity to discuss Applicant's statements in the phone calls about amount of time have agreed to accept in plea deal because she wanted to get that range into evidence and tie it to her argument regarding how selective the State was as to which calls were entered. Counsel further explained she was concerned the State put the call into evidence as back-door way of making Applicant look like a bad guy, since there was a significant amount of foul language on the calls. Counsel testified she did not specifically make a bad-character argument, but framed it as a relevance argument instead.

Counsel also explained there was substantial evidence against Applicant in addition to the phone calls. Counsel explained Applicant was originally stopped for a seat belt violation, but he fled from police, with his young daughter in the back seat. When Applicant bailed out of the car and ran, officers giving chase saw him discard two items which were a diaper bag, in which a gun was found, and a second bag which contained zip ties, masks, and gloves. Counsel stated these two bags were what first tied the traffic stop and car chase to the armed robbery, which had occurred earlier that morning. Counsel explained Applicant's child's mother, who testified at trial,

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eventually gave permission for officers to search her apartment, where investigators found shoes and bloody. Counsel stated the blood matched the armed robbery victim, and the shoes were consistent with prints taken from the hood of the robbery victim's car. Counsel further explained she challenged the admission of this evidence, including the consent to search the apartment which was raised on appeal, but the trial court admitted all of this evidence.

Counsel testified, after Applicant was convicted, she moved for a new trial based on all of her prior motions and objections. Counsel stated, however, she focused on the phone calls in particular because the jury had sent out a note asking for transcripts of the calls and ultimately re-listened to the recordings. Counsel testified she was not abandoning her other objections or motions, but she felt it was important to focus specifically on the phone calls.

Finally, Counsel testified she did not have a strategic reason for failing to object to the judge's use of "search for the truth" language in the jury charge. She stated she simply was not focused on it at the time, but she agreed the language is objectionable. Counsel testified the trial judge was clear, in the charge as a whole, as to the State's burden of proof, although he included seek the truth language in the reasonable doubt portion. Counsel acknowledged this trial took place before the Supreme Court decision in Beatty was published, although she stated she was aware of the concern with "speak the truth language" before that decision was issued.

Appellate Counsel testified she has practiced law since 2012 and has worked at the Office of Appellate Defense since August 2013. Appellate Counsel explained her process for selecting issues to include in her briefs. Appellate Counsel testified she reads and summarizes the transcript, looking for objections that were made. She also reviews all exhibits introduced. She testified she then conducts legal research on the issues and selects the arguments to raise.

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Appellate Counsel testified she reviewed the issue of Wallace's proffered testimony and his invocation of the Fifth Amendment, and she did not see any issue she could have raised. She further testified she also analyzed the issue of the phone calls, which was more complicated. Appellate Counsel stated the record is confusing and not always clear which call is being referred to or discussed. She also stated it appears some objections were raised during bench conferences, but since those are not on the record, it limits or prevents her from being able to raise those issues. Appellate Counsel stated she did not believe the authentication issue was preserved, but Counsel preserved relevance and prejudice, but Appellate Counsel did not think those were meritorious arguments.

Appellate Counsel testified she believed the search of the apartment was preserved and had merit. Appellate Counsel testified, in her opinion, Applicant had standing to challenge the search, and she believed the consent was not voluntary due to the officer's threat to involve the Department of Social Services.

Applicant testified he recalled receiving the State's first plea offer of thirty years, but he decided to reject it based on the evidence he knew about at the time. Applicant testified he was not aware the State had turned over 600+ phone calls, nor did Counsel give him a summary of the contents. Applicant testified if he had known the contents of the calls, he would have accepted the State's second plea offer before trial. Applicant testified he would have wanted Counsel to request a continuance to review the calls or extend the plea offer, so she could advise him whether to accept the plea offer. Applicant admitted he was the person speaking on the calls.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the evidence presented at the evidentiary hearing, observed the witnesses presented at the hearing, evaluated their credibility, and weighed the testimony and

