

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEMETRUS LAWON MCCLARY,

APPELLANT.

APPELLATE CASE NO. 2022-000688

RECORD ON APPEAL

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1 (The jury exited the courtroom at 4:35 p.m.)

2 THE COURT: Mr. Fox, I'm sure you have some motions, but
3 before we get into that, let's talk, if we can, about
4 scheduling. And certainly you're going to have the
5 opportunity -- I'm going to have to ask your client about his
6 right to testify, and certainly, you'll have the opportunity
7 to talk with him about that as well.

8 But do you anticipate or can you tell me how long you
9 anticipate the defense's case to be?

10 MR. FOX: I don't think it will be extremely long, Your
11 Honor. I have Mr. -- of course Dr. Rudin's testimony will be
12 taken, and we have timed that out as right about 1 hour and 40
13 minutes completely.

14 And I'll go ahead and address, Your Honor: We would
15 request a similar charge that we did with the -- although hers
16 is not redacted, just pointing out, because of availability
17 and different issues, she's being taken by video testimony and
18 that that -- that was recorded prior to trial. Although this
19 was done outside the presence of the jury, it should be
20 treated the same as any other testimony, whatever weight they
21 choose to give it.

22 THE COURT: Sure. I mean, if there's no objections, I'll
23 just explain to the jury exactly what we did and why we did
24 that and that that's what -- and we know it's going to take an
25 hour and 40 minutes.

1 MR. FOX: Yes, sir.

2 THE COURT: And that sort of stuff.

3 MR. FOX: And it is -- I think Your Honor will recall --
4 and Ms. Walter, of course -- we had the glitch on my part. So
5 it's in two little segments. There's a very short segment at
6 the beginning. We had to stop and recalibrate. And then
7 there's another. But I think that will be pretty obvious
8 what's going on when it's played.

9 So we know an hour and 40 minutes. I have another
10 witness, potentially Detective Amos, who is under subpoena. I
11 don't anticipate he would be extremely long but probably maybe
12 another hour, including cross-examination. Maybe not even
13 that long. But that, I think, would be generous.

14 And then, of course, Mr. McClary's determination. So,
15 you know, I think, if we were to start up early in the
16 morning, we would, I believe, finish in the morning, by
17 lunchtime with the defense case, and maybe well before
18 lunchtime. I think plenty of time to argue and charge in the
19 afternoon.

20 MS. WALTER: And I'm sorry -- Mr. Fox, I didn't hear the
21 name of the second witness.

22 MR. FOX: Detective Amos.

23 MS. WALTER: Okay. Thank you. I'm sorry.

24 THE COURT: All right. What time is not too early for
25 everybody? I'm just going to -- you know, and I don't know

1 what the jury's plans are, but if this deliberation goes too
2 far into tomorrow night, I'm not going to be able to be here
3 all night tomorrow night. Certainly we can come back Monday
4 morning if that's what we need to do. I'm going to be here
5 anyway, but I certainly don't want to inconvenience anybody or
6 the jury. But, I mean -- and I think today is pretty well
7 over with as far as testimony goes.

8 I mean, I always have to be careful about what time we'll
9 start, but what would not offend -- I mean, I guess we can
10 start at 9:00. Is that fair?

11 MS. WALTER: I have been here by 7:30, 8:00 every
12 morning, so you're not going to offend no matter what time you
13 want to start.

14 MR. FOX: Same. I think it's really a matter for the
15 jury. I live five blocks away. I can be here whenever Your
16 Honor needs me to.

17 MS. WALTER: I do not live five blocks from here though.

18 THE CLERK: We can -- whatever you order, we're here.

19 THE COURT: All right. Is there any objection to me
20 bringing the jury back out and telling them about how long we
21 think?

22 MR. FOX: No.

23 MS. WALTER: No, that's fine.

24 THE COURT: And what the plan is?

25 MR. FOX: Yes, sir. That's fine.

1 THE COURT: We'll have the jury, please.

2 MR. FOX: Judge --

3 THE COURT: Do you need to approach?

4 MR. FOX: No, probably overcaution on my part. In fact,
5 I trust Your Honor to address the jury. I would request that
6 you not say anything about availability tomorrow night. I
7 don't want them to feel like they need to rush to a verdict
8 tomorrow. I know you're not going to say anything like we
9 have to get an answer. I know you won't say that. But I
10 would request you not suggest that there's any kind of time
11 limit on their deliberations.

12 THE COURT: No, I'm certainly not going to do that.

13 MR. FOX: Thank you. Just trying to be overly cautious
14 on my end, Judge. Thank you.

15 (The jury entered the courtroom at 4:41 p.m.)

16 THE COURT: All right, ladies and gentlemen. Thank you
17 again for your attention this week, your service, your
18 patience, and your time. As you know, it's about 20 minutes
19 to 5:00 at this point. The State has presented all the
20 evidence that they're going to present in this case, and
21 certainly, there's some matters of law that we have to take up
22 at this point in time, as there are in most every criminal
23 trial.

24 What we understand is that there's -- and, certainly, we
25 can't know for sure, but we know there's one witness that's

1 going to be presented by video recording and we did that
2 Monday afternoon. The witness, I believe, is from California.
3 And just for scheduling purposes and for convenience of that
4 witness, that testimony was taken here by Zoom on Monday
5 afternoon. It's going to be played for you tomorrow in the
6 morning. And we know that it lasts an hour and 40 minutes.
7 Okay? And there may be another witness or two. We don't
8 think they're going to be extremely long, but certainly, we
9 can't know that for certain.

10 So I'm just giving you that, you know, that time on that
11 basis. The general idea is that what we have left here, and
12 then certainly we would have closing arguments and then charge
13 on the law and then deliberations. So that's what the plan is
14 from here on out.

15 Being that it's this time of the day and what we have
16 left to do requires that we do that outside of your presence,
17 we're going to go ahead and allow you to retire for the day.

18 What I was going to ask you, certainly, I know everybody
19 has different obligations, but we'd like to start as early as
20 we can tomorrow. Does it offend anybody to have to be here
21 about 8:30? I mean, is that a problem for anyone?

22 (No response given.)

23 All right. I'm going to ask you to be here at 8:30, and
24 we're going to try to get started shortly thereafter, maybe
25 about 8:45, and try to just get as far as we can to reach a

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1 conclusion. Okay? All right. So is that -- any objection to
2 that.

3 MS. WALTER: No, Your Honor.

4 MR. FOX: No, Your Honor.

5 THE COURT: All right. So, again, thank you, for your
6 attention and your patience and your time. Please don't
7 discuss this case. As I said, after this case is over, you
8 can talk with anyone you want to about it or nobody at all.
9 But, until that time, please don't discuss this case, do any
10 research or anything of the like, and we'll see you back in
11 the morning. Thank you so much.

12 (The jury exited the courtroom at 4:44 p.m.)

13 THE COURT: All right. And, Mr. Fox, did you want to
14 make your motions?

15 MR. FOX: I do, Your Honor.

16 MOTIONS/MATTERS OF LAW

17 MR. FOX: At this time, the defense would move for a
18 directed verdict on each indictment: ABHAN, kidnapping,
19 assault and battery with intent to commit criminal sexual
20 conduct, and burglary first.

21 Judge, with regard to assault and battery of a high and
22 aggravated nature, I believe the State has not proven beyond a
23 reasonable doubt that great bodily injury has resulted.
24 There's been no medical testimony whatsoever. There has been
25 photographs of her swollen eyes and some blood -- a lot of

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1 blood, but great bodily injury is defined by the legislature
2 in 16-3-600, "Bodily injury which causes substantial risk of
3 death or which causes serious permanent disfigurement or
4 protracted loss or impairment of a function of a bodily member
5 or organ." There's been no testimony that these things
6 happened.

7 As harrowing as it may have been, Ms. Hernandez's fear
8 that she was about to die, she did testify to that, is not an
9 injury -- a bodily injury. So her fear that she was in danger
10 is not testimony or evidence that she had great bodily injury.
11 There's been no testimony from doctors or EMS or anybody on
12 that point.

13 There were some -- as kind of an aside -- and it was
14 opening argument, not evidence or testimony, but Ms. Walter
15 referred to aggravating circumstances such as differences in
16 sex or size, physical condition, so forth. Those are the old
17 common law aggravating circumstances that South Carolina just
18 simply doesn't use anymore. So 16-3-600 supplanted to common
19 law when it was adopted, so I think that has not been proven
20 beyond a reasonable doubt.

21 Again, we make the motion with regard to kidnapping. As
22 far as with assault with intent to meet criminal -- the State
23 has not met all the elements of kidnapping.

24 With regard to assault with intent to commit criminal
25 sexual conduct, I think there's not been, until this week, any

1 mention of words from the defendant of his intent, and I think
2 that was striking. So we would argue that there has not been
3 evidence beyond a reasonable doubt that there was an assault
4 with the intent to commit criminal sexual conduct.

5 One moment, I want to cite them. That would be assault
6 and battery with the intent to commit a sexual battery, which
7 "means sexual intercourse, cunnilingus, fellatio, anal
8 intercourse, or any intrusion, however slight." So there's
9 certainly been a description of an assault and her
10 interpretation Ms. Hernandez fears, but, again, no indication
11 that an assault with the intent to commit a sexual battery as
12 denied in 16-3-651.

13 Judge, with regards to burg. first -- burglary in the
14 first degree, the preliminary threshold determination would
15 have to be that this be a dwelling. It is certainly not --
16 and I know the indictment is not evidence. The indictment
17 refers to Ms. Hernandez's dwelling. It certainly is not her
18 dwelling. It's a hotel.

19 The case law is clear that an unoccupied apartment
20 building is not a dwelling for purposes of the burglary
21 statute. There are cases, and I believe it's *State vs.*
22 *Ferebee* -- I may have to look up, but there is a case in South
23 Carolina where a duplex, one side occupied and the other not,
24 and the person going into the unoccupied duplex, you know, one
25 building but a duplex -- and I'm having Ms. Caldwell verify if

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1 Ferebee is the right one. That was determined not to be a
2 dwelling.

3 There is case law analogous that an occupied hotel room
4 is a dwelling, but we have an entire floor that's unoccupied,
5 and if it were the intent of the legislature that any building
6 that could be used as a dwelling were to be a dwelling, in
7 other words, that once you build a hotel, because people could
8 turn it into a dwelling, then they would have said so and we
9 would not have case law stating that unoccupied premises are
10 not dwellings.

11 So I don't think the State has satisfied the first and
12 most important determination of a burglary in the first
13 degree, which is that the premises involved meet the
14 definition of a dwelling.

15 And, Judge, I will -- further, Ms. Caldwell quickly and
16 amply, *Ferebee* is the case that talks about a duplex. That's
17 at 273 S.C. 403, South Carolina Supreme Court from 1976. And
18 a dwelling house is defined in 16-11-10, "Any house, outhouse,
19 apartment, building, erection, shed or box in which there
20 sleeps a proprietor, tenant, watchman, clerk, laborer or
21 person who lodges there with a view to the protection of the
22 property." None of those things apply in this case.

23 THE COURT: All right. Did you -- and I don't mean to
24 make your motion for you, but what about the kidnapping
25 charge?

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1 MR. FOX: I made the motion that I believe the State has
2 not, beyond a reasonable doubt, satisfied all the elements of
3 kidnapping.

4 THE COURT: Okay. I'm sorry; I might have missed that.

5 MS. WALTER: Well, first, I want to set the correct
6 standard, because we are not at beyond a reasonable doubt
7 here. There would have to be -- in order for Your Honor to
8 grant a directed verdict on any of these charges, there would
9 have to be a failure of competent evidence. And, at this
10 point, all evidence is viewed in the light most favorable to
11 the State. We are certainly not at beyond a reasonable doubt
12 at this point.

13 The State will argue in the order that the charges were
14 read at the beginning.

15 For assault and battery of a high and aggravated nature,
16 it certainly can be accomplished if it is committed with means
17 which could cause death or great bodily injury. Well, we have
18 Ms. Hernandez-Diaz's testimony that the defendant was on top
19 of her, choking her -- that could certainly cause death, great
20 bodily injury; that, as she hid under the bathroom vanity, he
21 held onto the sink and kicked her head repeatedly -- that
22 could certainly cause death or great bodily injury.

23 And, in fact, Your Honor, the State would argue
24 Ms. Hernandez-Diaz testified that she has a scar on her
25 forehead, she has a lump on her head, she made repeated visits

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1 to neurologists, an orthopedist for her knee. There is more
2 than competent evidence at this point that the defendant did,
3 in fact, commit ABHAN, and that should go to the jury.

4 For burglary, first, number one, the indictment was
5 amended. It no longer reads "the dwelling of Liliana
6 Hernandez-Diaz." It reads "a dwelling."

7 No. 2, I would point Your Honor to *State v. White*, which
8 is cited at 349 S.C. 33. It's from 2002. And I can pass this
9 up to Your Honor once I have highlighted the portions that I
10 think are relevant.

11 So on page 39 --

12 THE COURT: All right. 349 S.C. what?

13 MS. WALTER: 33, Your Honor.

14 THE COURT: And this is prior to *Ferebee*; right?

15 MS. WALTER: It's after.

16 MR. FOX: Subsequent to *Ferebee*, Your Honor.

17 MS. WALTER: This is 2002.

18 MS. ANDREW: *Fereee* is in the '70s.

19 MS. WALTER: And *Ferebee* was in the '70s.

20 THE COURT: I thought there was an '09 case. Okay.

21 MS. WALTER: No, it was decided April 1st of 2002, Your
22 Honor.

23 THE COURT: Thank you.

24 MS. WALTER: You're welcome.

25 So, on page 39, there is a paragraph that begins,

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1 "Finally," and then a parenthetical there, Your Honor, it
2 says, "For purposes of burglary statute, dwelling also means
3 living quarters of a building used or normally used for
4 sleeping, living, or lodging by a person."

5 Then, after accord *State v. Hobgood*, H-o-b-g-o-o-d,
6 there's a parenthetical, "Motel room regularly and usually
7 occupied by travelers for the purpose of sleeping is
8 considered a sleeping apartment." See also *State v. Hussain*,
9 H-u-s-s-a-i-n, "Motel room qualifies as a residential
10 structure within burglary statute."

11 And then, at the end of that paragraph, see also *State v.*
12 *Steadman*, S-t-e-a-d-m-a-n. Upholding jury charge to the
13 effect that it is not necessary an entire building be devoted
14 to dwelling purposes nor that the dwelling area entered be
15 constantly inhabited.

16 And, Your Honor, I would note that the purpose of the
17 statute distinguishing between a dwelling and a building is
18 because the law and society wants to offer more protection to
19 a person, and dwellings, typically, are and are expected to be
20 occupied. And, in fact, the dwelling that this defendant
21 chose was occupied by Liliana Hernandez-Diaz, and he chose it
22 specifically because she was in there and caused harm to her.
23 That is exactly what the burglary first statute was meant to
24 address.

25 As to the kidnapping, certainly, one way that you can

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1 accomplish kidnapping is by confining someone.

2 Ms. Hernandez-Diaz testified that the defendant, on two
3 separate occasions, tried to shut the door of the room,
4 presumably to keep her in the room. Certainly, he confined
5 her in that room by beating her repeatedly, punching her, and
6 kicking her. So we believe that there's more than competent
7 evidence for the kidnapping.

8 And as for the assault with intent to commit CSC, it
9 doesn't matter whether she said it once or 10,000 times. The
10 jury is to judge and Your Honor is to rule on this motion
11 based on the evidence that was adduced in court during the
12 course of this trial. And the evidence was clear from
13 Ms. Hernandez-Diaz that the first thing that the defendant
14 said to her is, "Have you ever been raped? If you don't want
15 it the good way, you're going to get it the bad way," and that
16 he continually pulled at her clothing. That certainly would
17 lead a reasonable person to believe that he was assaulting her
18 with the intent to sexually assault her. So we believe, at
19 this point, that there's more than competent evidence to bring
20 all four charges to the jury.

21 THE COURT: All right. Mr. Fox, did you want to respond?

22 MR. FOX: No, Your Honor. I have made the argument for
23 directed verdict.

24 THE COURT: All right. As to assault and battery of a
25 high and aggravated nature, I certainly find that there is

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1 evidence in this record that exists that would go to
2 disfigurement; also, the intent to commit serious bodily
3 injury or even death. I'm going to deny that motion.

4 With regards to directed verdict for assault with intent
5 to commit criminal sexual conduct in the first degree, I
6 certainly, again, find there's evidence in this record from
7 the victim, from the victim's fiancé, that would support, you
8 know, and it's just the existence of evidence at this point
9 for the directed verdict. So, certainly, what she testified
10 to, that this defendant said, is now a question of fact for
11 the jury to determine, and, as such, directed verdict cannot
12 be granted.

13 As to kidnapping, I certainly find that there's evidence
14 in this record that she was held without -- against her will
15 and confined into an area for a certain amount of time and
16 that there, again, the existence of that evidence would
17 prevent the Court from granting a directed verdict motion on
18 the kidnapping.

19 As far as burglary first charge, certainly the question
20 becomes whether or not the hotel room can be considered a
21 dwelling. I certainly know that that can be a question that
22 could be argued before the jury, certainly, but I'm going to
23 take that under advisement. I want to read these cases
24 tonight. I'll let you know when I get here in the morning as
25 far as that charge is concerned.

DEFENDANT'S RIGHTS

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1 All right. So I think that addresses those.

2 I'd like to talk to your client about his right to
3 testify.

4 MR. FOX: Yes, sir.

5 THE COURT: All right.

6 MR. FOX: The judge needs to talk to you so you need to
7 stand up, out of respect for the judge, and answer the judge's
8 questions. Okay?

9 DEFENDANT'S RIGHTS

10 THE COURT: All right, sir. You're Mr. McClary; is that
11 right?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right, sir. You also -- do you
14 understand that you have been -- we have been going through
15 your trial here this week. You have been here this entire
16 week. Do you understand the State has the burden of proof in
17 this case to prove to this jury beyond a reasonable doubt your
18 guilt of the charges that ultimately go to the jury? Do you
19 understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. And you also understand that
22 you're not required to prove your innocence. And I'll tell
23 the jury that. Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right. And you also understand that your

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1 innocence is presumed until you're proven guilty beyond a
2 reasonable doubt --

3 THE DEFENDANT: Yes, sir.

4 THE COURT: -- by the State, and that's a decision for
5 the jury to make? Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. And you also understand also --
8 you have the right to remain silent. You don't have to
9 testify here, and nobody can make you testify here. Do you
10 understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: But, also, you have the absolute right, if
13 you wish to, to testify here. You can take the stand, and if
14 you take the stand, you'll be treated just as any other
15 witness, but you'll have the opportunity to testify on your
16 own behalf during this trial. Do you understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right, sir. And you can talk to your
19 attorneys on this issue regarding your right to testify and
20 whether you should or you shouldn't testify, and you can take
21 their advice as to whether or not you should or you should not
22 testify, but, ultimately, the decision as to whether or not
23 that you do testify or you do not testify has to be your
24 decision. Do you understand that?

25 THE DEFENDANT: Yes, sir.

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1 THE COURT: All right, sir. Do you also understand --
2 and I'm not sure if you have a criminal history.

3 MS. WALTER: Yes, Your Honor, that's what I just reached
4 back to get. Your Honor, the defendant pleaded guilty on May
5 31st of 2016 to common law robbery or strong armed robbery,
6 and on January 23rd of 2017, pleaded guilty to trespassing,
7 unlawful entry into enclosed places.

8 THE COURT: And what's the State's position? Would both
9 of those crimes be admissible?

10 MS. WALTER: Certainly the strong armed robbery would.
11 If you can just give me a minute to look up unlawful entry --
12 trespassing.

13 THE COURT: All right.

14 (Pause in the proceedings.)

15 MS. WALTER: I apologize, Your Honor.

16 THE COURT: No problem.

17 MS. WALTER: Actually, Your Honor, that looks like it's a
18 misdemeanor.

19 THE COURT: All right. So, Mr. McClary, if you did
20 decide to testify, then your burglary convictions would be
21 able to be brought out in court before the jury. Do you
22 understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: If you did not chose to testify, then they
25 would not hear that evidence. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: All right, sir. Having said all of that, I'm
3 going to give you an opportunity to discuss with your
4 attorneys and, also, you don't have to tell us this afternoon.
5 When we get here in the morning, you can let us know if you
6 decide not to exercise your right to testify.

7 THE DEFENDANT: I would not like to testify.

8 THE COURT: I understand. All right. But if you change
9 your mind between now and tomorrow morning, you can certainly
10 do that. Okay?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Is there anything further that we need to
13 address before we --

14 MS. WALTER: No, Your Honor.

15 MR. FOX: No, sir.

16 THE COURT: Okay. All right. Well, we'll try to start
17 by 8:45.

18 MS. WALTER: That's fine, Your Honor.

19 MR. FOX: Yes, sir.

20 THE COURT: Thank y'all.

21 MR. FOX: Thank you.

22 (The above matter concluded at 5:04 p.m.)
23
24
25

CERTIFICATE OF COURT REPORTER

State of South Carolina }
 }
County of Horry)

RE: *State v. Demetrius McClary (Volume 3)*

I, Bobbi J. Fisher, Registered Professional Reporter
(RPR) and Official Court Reporter III for the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the proceedings
had and evidence introduced in the trial of the captioned case
in the *Court of General Sessions for Horry County, South*
Carolina, on the 12th of May, 2022.

Submitted: *August 8, 2022*

Bobbi Fisher

/s/ Bobbi Fisher

Bobbi J. Fisher, RPR

Official Court Reporter III

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1 STATE OF SOUTH CAROLINA) GENERAL SESSIONS
2 COUNTY OF HORRY) TRANSCRIPT OF RECORD

3 -----X
4 STATE OF SOUTH CAROLINA,)
5 Plaintiff,)
6 vs.) Case No. 2018-GS-26-04177
7 DEMETRIUS LAWON McCLARY,) 2018-GS-26-04178
8 Defendant.) 2018-GS-26-04179
9 -----X

Friday, May 13, 2022

10 JURY TRIAL - VOLUME 4 of 4

11
12 B E F O R E:

13 The Honorable H. Steven DeBerry, IV, Presiding Judge;
14 and a jury.

15 A P P E A R A N C E S:

16 Mary-Ellen Walter, Esq.
17 C. Leigh Andrew, Esq.
18 Assistant Solicitors for the State

19 Eric Fox, Esq.
20 Caitlyn Caldwell, Esq.
21 Attorneys for the Defendant

22
23
24 Court Reporter: Bobbi Fisher, RPR
25 SC Official Court Reporter III

1 P R O C E E D I N G S

2 (The following proceedings commenced at 9:34 a.m.)

3 THE COURT: All right. Should we wait on the defendant
4 before we discuss the motions?

5 MR. FOX: Yeah, I think he's got a right. I think it
6 would be best if he were here, Judge.

7 THE COURT: All right.

8 (Pause in the proceedings.)

9 THE COURT: Are any of the defense exhibits into
10 evidence?

11 MR. FOX: No, Your Honor.

12 THE COURT: Okay.

13 (Pause in the proceedings.)

14 MR. FOX: Judge, we're going to put this, a copy of the
15 testimony, as a Court's exhibit and labeled.

16 THE COURT: All right.

17 COURT REPORTER: That will be Court's 6.

18 (Court's Exhibit No. CT-6, Rudin Testimony, was received
19 into evidence.)

20 (Pause in the proceedings.)

21 THE COURT: Mr. Fox, will you need to talk to him?

22 MR. FOX: Just a few minutes. Nothing specific.

23 THE COURT: I'll step off the bench. I don't know what
24 the problem is.

25 (A brief recess was taken at 9:21 a.m. to 9:27 a.m.)

1 THE COURT: Mr. Fox, did you have an opportunity to speak
2 with your client?

3 MR. FOX: I did. We're ready to proceed.

4 THE COURT: And has your client had the opportunity to
5 make his decision as to whether or not he's going to testify?

6 MR. FOX: I believe so.

7 THE COURT: Mr. McClary?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Is it still your decision that you wish not
10 to testify?

11 THE DEFENDANT: I wish not to testify, sir.

12 THE COURT: All right, sir. I understand. Thank you,
13 sir.

14 I was going to say, with regards to the outstanding
15 motion for a directed verdict, with respect to the burglary in
16 the first degree charge, you know, according to *State vs.*
17 *White*, which is 349 S.C. 33, a 2002 case, there's certainly
18 language in here that indicates that a hotel room is a
19 dwelling. Straight from the case, it says, "A dwelling also
20 means living quarters of a building used or ordinarily used
21 for sleeping, living, or lodging by a person. Also, motel
22 room regularly and usually occupied by travelers for the
23 purpose of sleeping is considered a sleeping apartment. Motel
24 room qualifies as a residential structure within the purview
25 of the statute."

1 So, according to this case, it certainly seems that the
2 room in question could be found as a dwelling by the finders
3 of fact, and, as such, then I'll deny that motion. Be happy
4 to hear from you, though.

5 MR. FOX: I would like to, Judge. I also looked at it,
6 in a little more detail overnight. I think *White* is factually
7 distinguishable.

8 THE COURT: I understand that.

9 MR. FOX: I think it has some language, just as *Ferebee*
10 does, generally speaking, but in *White*, the room in question
11 was rented. The people that -- the persons had simply gone
12 down to the pool, so they were very temporarily out of the
13 room and with the full intent to come back. And I think *White*
14 and *Ferebee* and *Evans*, which is 376 S.C. 421, which I believe
15 is a 2008 case, Your Honor, I was thinking of yesterday,
16 indicates that burglary and dwelling is a crime that's
17 targeted towards occupancy, not to the structure itself. So
18 that's why, you know, empty duplexes or potentially empty
19 hotel rooms -- our argument is that was an unoccupied 4th
20 floor not just for the moment and not just even for the day.
21 In fact, I think the head of H.R. testified that only 16
22 percent of the entire hotel was occupied in March of 2018.

23 So this was not a temporary situation as in *White*, and on
24 that basis, I would argue, Judge, this should be -- a directed
25 verdict motion should be granted because it's not a dwelling.

1 Thank you.

2 THE COURT: And I certainly understand your argument and
3 I have thought about that and I've considered that, but the
4 language in *White* goes beyond -- and I understand that our
5 facts are distinguishable. I certainly understand that. But
6 I also understand what the Court wrote in *White*, and it seems
7 to be that, you know, they use the language "used or normally
8 used for sleeping, living, or lodging by a person." So if you
9 read that or the way I read that, it tends to prove or it
10 tends to show that our Supreme Court's intent is that a
11 dwelling can be a hotel room that's ordinarily used as a place
12 for somebody to sleep.

13 MR. FOX: Yes, sir. I understand.

14 THE COURT: All right. Is there any -- and I know we're
15 not quite there yet, and I guess we'll just wait until after
16 defense's case to have a charge conference, but it's pretty
17 straightforward as to what I have so far. So if there's
18 anything that you think you want charged that you think I
19 might not charge anyway, just let me know.

20 MR. FOX: Yes, sir.

21 THE COURT: And we'll have the charge conference at the
22 appropriate time.

23 Is there anything further before we have the jury?

24 MS. WALTER: Nothing from the State, Your Honor.

25 MR. FOX: No, Your Honor.

1 THE COURT: All right. We'll have the jury.

2 (The jury entered the courtroom at 9:33 a.m.)

3 THE COURT: All right. Ladies and gentlemen, I apologize
4 for the delay. As you know, there's lots of moving parts and
5 pieces to this situation, and everything has to be in place
6 before we can move forward. Thank you for being here. Thank
7 you for your attention this week and your service. At this
8 time, we're going to recognize Mr. Fox for defense's case.

9 MR. FOX: Thank you, Your Honor. At this time, the
10 defense would call Dr. Nora Rudin. And this is testimony that
11 was taken previously, because of her location and situation,
12 and has been recorded in its entirety for the jury to hear.

13 THE COURT: And, ladies and gentlemen, I'll just remind
14 you again, as I did before when we had the other audio played:
15 There may be some glitches or whatnot, but that's just what
16 happens when we try to do things like this. And so please
17 don't consider anything that you think may, should be, or
18 should not be there. Okay? Thank you so much.

19 NORAH RUDIN,
20 after having been previously duly sworn, was examined and
21 testified to as follows:

22 (Court's No. 6, DVD of Norah Rudin, plays.)

23 THE COURT: All right, sir. Can we stop it for just a
24 minute and turn the volume up? Is the volume okay for
25 everybody? I'm just making sure everybody can hear.

1 JUROR: Yep.

2 THE COURT: Okay.

3 (Court's No. 6, DVD of Norah Rudin, video continues
4 plays.)

5 MR. FOX: Your Honor -- I believe it resolved itself. We
6 were going to skip forward.

7 (Video plays.)

8 MR. FOX: Your Honor, by agreement, we'll just stop it
9 here. There's nothing on this segment other than fiddling
10 with getting a new connection, and then we'll go to the rest
11 of the testimony.

12 THE COURT: All right.

13 (Video continues to play from 9:45 to 11:16.)

14 THE COURT: All right. Ladies and gentlemen, at this
15 time, we're going to take a short break. We'll have you right
16 back out when you get ready.

17 Please don't discuss this case.

18 (The jury exited the courtroom at 11:16 a.m.)

19 THE COURT: Is there anything before we take a break?

20 MR. FOX: No, we can take a break. And then, before the
21 jury comes out, I believe the defense will rest. I believe we
22 can do that on the record.

23 THE COURT: Sure. We'll take about ten minutes. Be back
24 about 11:30.

25 (A brief recess was taken at 11:29 a.m.)

1 CHARGE CONFERENCE

2 THE COURT: All right. I'd like to take this opportunity
3 to go ahead and talk about the charges and kind of what we
4 plan to do here. So I'll just go through my charges.

5 Just a general post-trial charge. Charge: Arrest or
6 indictment, not evidence. Presumption of innocence.
7 Reasonable doubt. Direct and circumstantial evidence.
8 Credibility of witnesses. Expert witnesses. Failure of the
9 defendant to testify. Criminal intent. And then the four;
10 burg. first; ABHAN; kidnapping; and --

11 MS. WALTER: Assault with intent.

12 THE COURT: Assault with intent to commit CSC first.

13 MS. WALTER: And, Your Honor, the State would just ask
14 that you also charge on burglary second, violent, as a lesser
15 included.

16 THE COURT: What's your position on that?

17 MR. FOX: Well, yes, I would like the lesser included for
18 burglary. I think it would be a factual issue as to whether
19 or not this is a dwelling at this point. The jury would
20 always have to find the elements of the crime charged, and
21 conceivably, they could determine, as a matter of fact, that
22 they do not believe this was a dwelling. So it's a little bit
23 different analysis than a directed verdict motion, so we would
24 ask that.

25 And I would ask for the lesser includeds on the assault

1 and battery of a high and aggravated nature because, again,
2 whether there's great bodily injury would be a factual
3 determination as defined in the statute, and I think they may,
4 depending on their determination of the facts, settle on
5 assault and battery of the first degree or even assault and
6 battery of the second degree. So I'd ask for both of those.

7 THE COURT: Ms. Walter?

8 MS. WALTER: I think I can arguably see assault and
9 battery first, more so than assault and battery second.

10 MR. FOX: Assault and battery second, Judge, which
11 absolutely is a lesser included, but if the person unlawfully
12 injures another person or offers or attempts to injure another
13 person, with the ability to do so, and moderate bodily injury
14 to another results or could have resulted or the act involves
15 non-consensual touching of the private parts of a person
16 either above or underneath the clothing, I think both
17 sections, from the testimony that was given, again, the degree
18 of injury, if the jury, first of all, believes that, in fact,
19 an assault occurred and that Mr. McClary was the perpetrator,
20 then the degree of injury becomes relevant, and they, in their
21 own determination, may decide that it was, in fact, moderate
22 bodily injury rather than a serious bodily injury. So I think
23 it's an option. It's a factual determination that the jury
24 should be able to make or have the option to make.

25 THE COURT: Ms. Walter, did you have anything further?

1 MS. WALTER: No, Your Honor. I mean, I wasn't arguing
2 that it's not a lesser included offense. It certainly is. I
3 don't think that it's supported by the facts, but I don't --
4 it doesn't really matter at this point.

5 THE COURT: All right. I'll charge it then. So we'll
6 charge ABHAN, A&B first, second.

7 MR. FOX: Yes, sir.

8 THE COURT: And burglary second.

9 MS. WALTER: Yes, Your Honor. And I did want to make
10 sure that you included the redacted exhibit instruction again.
11 And I have another copy if you need it.

12 THE COURT: I have got it.

13 MS. WALTER: Okay.

14 THE COURT: I'm just trying to make sure I have got the
15 right portions of the burglary second. And I'll just take
16 this opportunity to go over the first degree. I'm only
17 charging the No. 2 and the No. 3, and it's basically:
18 "Finally, the State must prove beyond a reasonable doubt that,
19 when entering, while in the dwelling, or when fleeing, the
20 defendant or an accomplice caused physical injury to anyone
21 not participating in the crime."

22 And then No. 3 is, "When entering, while in the dwelling
23 or when fleeing, the defendant or accomplice used or
24 threatened to use a dangerous object, being the rag."

25 MS. WALTER: Yes, Your Honor.

1 MR. FOX: I would object to that, Your Honor. I don't
2 think there's been any testimony -- testimony that he
3 attempted to put the rag over her mouth, but there's no
4 testimony that, although it had an odor, of what that was. It
5 couldn't be tested because of the way it was packaged.
6 There's no evidence introduced that it was, in fact, a
7 dangerous instrument. I mean, anything might be a dangerous
8 instrument in that. I mean, this pen could be a dangerous
9 instrument. If I ran with a pen, prepared to stab somebody --
10 I just think it's not supported by the evidence as well.
11 There's been no testimony that, in fact, it was dangerous in
12 any way.

13 MS. WALTER: Well, yes. Anything can, in fact, be a
14 dangerous instrument depending on the way it's used, and if
15 you are using a rag, regardless of what's on it, to cover a
16 person's only method of breathing, that can become a dangerous
17 instrument, coupled with the fact that both Ms. Hernandez-Diaz
18 and Crime Scene Investigator Bailey testified that there was
19 some sort of odd smell to it. It wouldn't matter if it was an
20 illegal substance; it would be a cleaning fluid. That still
21 could translate it into a dangerous instrument.

22 MR. FOX: That's just conjecture. What the substance is,
23 the odor, it might just be a sour rag. And I think the
24 testimony was from Ms. Hernandez was that he tried to put this
25 cloth over her but that he did not succeed and no cover --

1 preventing breathing.

2 THE COURT: Well -- and the charge says "use or
3 threatening to use." I mean, I think certainly there's
4 evidence that a fact-finder could deduce that he attempted to
5 use. Certainly, whatever the substance was on the rag is not
6 in and of itself the basis for my ruling, but it's certainly
7 evidence that the jury could consider however they wish to.
8 So I think I'll stand on that ruling.

9 I will -- we'll revisit this when I have a chance to go
10 through the burglary second charge and make sure we have
11 pertinent parts to that.

12 Are you-all ready? We'll bring the jury out, rest, and
13 go straight into arguments?

14 MR. FOX: My preference, Judge, given that -- I know
15 lunch -- are we ordering lunch in again for the jury?

16 THE COURT: Yes, sir.

17 MR. FOX: My preference would be, since it is almost
18 lunchtime, to rest and then take whatever length of break Your
19 Honor -- I have don't want a hungry jury, and since I'll also
20 be going second -- once we start, we'll have to go through
21 both. And I'm expecting my portion will probably be a good 30
22 minutes or so down the road. I don't want a hungry jury
23 during my argument, if I can help it.

24 MS. WALTER: And, Your Honor, this may also be a good
25 time to address that the State will get rebuttal close because

1 the defense introduced evidence.

2 THE COURT: All right. So give me your understanding of
3 the law. We must make sure we're on the same page as far as
4 that goes.

5 MR. FOX: Well, my understanding is Ms. Walter, she will
6 open fully on the law, I will close in full, and then she has
7 the opportunity to respond to new matters that I have raised,
8 not, you know, had a whole new argument, but basically respond
9 to matters that I raised as well.

10 THE COURT: Is that your understanding, Ms. Walter?

11 MS. WALTER: Yes. I summarize the facts and how they
12 apply to the law.

13 MR. FOX: That's right.

14 MS. WALTER: Mr. Fox can argue whatever he wants, and I
15 then I respond to points he brings up in his closing but
16 nothing else.

17 MR. FOX: Yes.

18 THE COURT: And I always like to have this conversation
19 because, during the arguments, I don't get time to have a
20 disagreement about this, so...

21 And I like for everybody to understand, so...

22 MS. WALTER: Yes.

23 MR. FOX: Yes, sir.

24 THE COURT: So that's my understanding as well, and
25 that's what we'll follow.

1 MS. WALTER: Okay.

2 THE COURT: All right. Okay. So they say lunch will be
3 here at 12:00. Presumably that goes in 10 minutes or so
4 probably before they get their food. Give me a proposed time
5 to start your closing.

6 MR. FOX: Well, if they come right out -- 12:30? How
7 long have they been needing to eat?

8 THE COURT: We'll give them until 12:40.

9 MR. FOX: 12:40, okay. Yes.

10 MS. WALTER: I mean, I think 12:45 or 1:00. Because I
11 think, also, a lot of them also smoke, I believe, so we want
12 to give them time to do that.

13 THE COURT: Let's give them until 12:45.

14 MS. WALTER: Perfect, Your Honor.

15 MR. FOX: Yep.

16 THE COURT: All right. So can we have the jury, please?

17 MS. WALTER: Thank you, Your Honor.

18 (The jury entered the courtroom at 11:42 a.m.)

19 THE COURT: All right. Mr. Fox?

20 MR. FOX: Thank you, Your Honor. At this time, the
21 defense rests.

22 THE COURT: All right. Ladies and gentlemen, at this
23 point in time, you have heard all the evidence that you're
24 going to hear in this case. Both sides have rested. For
25 planning purposes, just to let you know, we have ordered lunch

1 for you. It will be here at 12:00. Right now, it's a quarter
2 till. We're going to give you until 12:45 to eat lunch, to
3 take whatever break you need, and then, at that point in time,
4 we'll hear closing arguments from each side, and then I'm
5 going to charge you on the law. Okay? And, then, at that
6 point in time, it will be your opportunity to finally discuss
7 this case, deliberate, and reach a verdict. Okay?

8 So I appreciate your time, your patience, your service.
9 And we're going to have lunch here just as soon as we can for
10 you, and then we'll bring you out after that to conclude this
11 trial. Thank you so much.

12 (The jury exited the courtroom at 11:44 a.m.)

13 MR. FOX: And, Judge, at the close of all the evidence,
14 I'd renew previous motions for directed verdicts on all
15 indictments for the same reasons as previously stated, as well
16 as renewing all previous objections made during the trial.

17 THE COURT: All right, Mr. Fox. And I understand your
18 position and your arguments, and I respectfully am going to
19 make the same rulings and deny those.

20 We're working on the verdict form at this time, and we'll
21 get the remainder of the charge together and have it available
22 for you as soon as we have it.

23 MS. WALTER: Thank you, Your Honor.

24 MR. FOX: Thank you, Your Honor.

25 (A brief recess was taken at 11:45 a.m. until 12:47 p.m.)

1 THE COURT: All right. Did y'all have an opportunity to
2 look at the verdict form?

3 MS. WALTER: We did, Your Honor. No objection from the
4 State.

5 MR. FOX: None from the defense, Your Honor.

6 THE COURT: All right. So I have the assault and battery
7 first and second. I don't think there's anything that needs
8 to be not charged in these. All right.

9 And I redacted from the assault and battery -- I mean,
10 the second-degree burglary the parts that aren't pertinent.

11 All right. Is there anything further before we have
12 closing arguments?

13 MS. WALTER: Eric, did you want to put that on the
14 record?

15 MR. FOX: Judge, just for the record, I don't know that
16 it's a big deal or just so the Court's aware. As we left for
17 lunch and walking out in the lobby or here outside the
18 courtroom, most of the jurors -- I didn't see how many, but at
19 least seven or eight of them were on their way downstairs, I
20 assume, to smoke.

21 One of them -- and I don't have the juror number -- but a
22 female juror kind of, at the last second, broke off and got on
23 the elevator. On the elevator were Ms. Hernandez and now, I
24 believe, Ms. Andrew and Ms. Lindo (ph) from the solicitor's
25 office. According to Ms. Andrew -- and I have no reason to

1 doubt it -- nothing was said.

2 So, initially, I was going to ask Your Honor to at least
3 inquire of Ms. Hernandez and the juror, however, again, as an
4 officer of the court, I have no doubt from Ms. Andrew and in
5 my dealings with her over the years, but I think it's probably
6 best if I place that on the record just in case it's an issue
7 later.

8 THE COURT: I understand.

9 MS. WALTER: Your Honor, I would present, as an officer
10 to the Court, we had a silent ride down. The only person who
11 commented was an unrelated third party who asked us what floor
12 we were getting off on.

13 THE COURT: Okay. All right. And I don't think that
14 warrants any further questioning, but I appreciate you
15 bringing it that to the Court's attention.

16 All right. So are we ready for the jury?

17 MR. FOX: Yes, sir.

18 MS. WALTER: Yes, sir.

19 THE COURT: All right. If we can have the jury.

20 (The jury entered the courtroom at 12:54 p.m.)

21 THE COURT: All right. Ladies and gentlemen, the parties
22 have presented their evidence in this case, and it's now time
23 for the attorneys to make their closing arguments. The
24 arguments of the attorneys are not evidence in this. Their
25 statements and arguments are meant to help you understand what

1 the evidence is and apply the law to the evidence. You should
2 disregard any remark, statement, or argument which is not
3 supported by the evidence presented during this trial or the
4 law that I will explain to you after the arguments.

5 So, at this time, we'll ask Ms. Walter -- recognize
6 Ms. Walter for her closing argument.

7 MS. WALTER: Thank you, Your Honor. May it please the
8 Court?

9 CLOSING ARGUMENT ON BEHALF OF THE STATE

10 MS. WALTER: The defendant's attack on Liliana
11 Hernandez-Diaz began, as I told you, on March 20th of 2018,
12 and it will end only when you find him guilty of all charges.

13 As I told you at the beginning, he's charged with four
14 different crimes, and you'll hear something about lesser
15 included offenses as well, but he's charged with assault and
16 battery of a high and aggravated nature, burglary in the first
17 degree, kidnapping, and assault with intent to commit criminal
18 sexual conduct in the first degree. And now, rather than just
19 what I told you in the opening, you have evidence, both
20 testimonial evidence and physical evidence, to show you that
21 not only is he guilty but that the State has proven him guilty
22 beyond a reasonable doubt.

23 So we have the testimony of Ms. Hernandez-Diaz, Liliana,
24 and I think you can see that, to this day, that attack still
25 affects her. And, yet, she had the strength to come up and

1 sit there, and it was a struggle for her, but she was able to
2 tell you exactly what happened.

3 She showed up at work on March 20th of 2018, as she had
4 for over 10 years. You heard her co-workers describe her as
5 quiet, kind, a hard worker. She gathered all her cleaning
6 supplies. She went up to the 4th floor where she was working
7 alone. And it was then, after she finished cleaning the room,
8 that the defendant pounced, came up behind her, and said,
9 "Have you ever been raped?" places that rag over her mouth,
10 and then she began to fight for her life in the fight of her
11 life.

12 She tried to get his hands and that rag with the foul
13 smell away from her mouth. And it is likely then that she got
14 his DNA under her fingernails. As soon as she started to
15 fight, "Shut up; if you don't want it the good way, it will be
16 the bad way."

17 He turned her around and punched her. She falls. He
18 goes to shut the door to make sure that he can keep her in
19 that room until he's done, but, luckily, the door had been
20 propped open with a door stop, and he couldn't shut the door.

21 Liliana takes this opportunity and wants to lock herself
22 in the bathroom, protect herself, get away from him, but, as
23 she told you, the cord from the vacuum cleaner had wrapped
24 around her leg, and she couldn't do it.

25 The defendant comes up behind her and grabs her by the

1 hair, and starts dragging her back to the bedroom part of the
2 hotel room. She keeps fighting. She falls down. He gets on
3 top of her, starts ripping at her clothes. What do you think
4 his intent was there?

5 Again, she's trying to fight him off. She manages to
6 push him, and that just makes him angrier. Keeps punching
7 her. Keeps punching her. Tries to shut the door again, again
8 to confine her. She, again, runs to the bathroom, still
9 trying to get herself to safety. He keeps punching her. She
10 falls. They struggle again. This time, he puts his hands
11 around her neck and chokes her.

12 And you heard Sergio, when he saw her in the hospital,
13 she still had marks around the neck from where the defendant
14 tried to choke her. Well, he did choke her. I would suggest
15 that that was an intent to either kill her, subdue her, do
16 something to further his attack.

17 She manages to get him off her again. She falls between
18 the tub and the toilet. He's still attacking her. She has
19 the presence of mind -- I have no idea how -- to grab, as she
20 calls it, his intimate parts. And she's holding on, just to
21 get him to stop.

22 Somehow, he breaks away. She, again, tries to hide under
23 the bathroom counter, and he starts kicking her in the head.
24 Holding onto the sink, just kicking her in the head. Again,
25 that is designed to cause great bodily injury or even death.

1 Imagine cowering under a sink and having someone standing
2 over you, kicking you in the head repeatedly.

3 Finally, Liliana decides, okay, I'm just going to pretend
4 that I'm unconscious, and it was only then that the defendant
5 ran out of the room. And, again, somehow, she has the
6 presence of mind to be able to get up and shut the door so
7 that she is now finally safe from the defendant.

8 Luckily, people reacted quickly. Liliana was able to get
9 in touch with Sergio, starts the chain of events, and help is
10 given to her. But you heard the testimony of the people who
11 had worked with her for over 10 years, that, when they first
12 saw her, they couldn't tell who she was.

13 Now, Sharon Jones was clearly -- and you can see, I
14 think, the compassion and empathy on her face. She knew her
15 worker. She knew Liliana. She had worked with her on a daily
16 basis for over 10 years, but it was more Liliana's size and
17 basic physical features that allowed her to identify her,
18 because she said it was horrific.

19 Grown men almost lost their composure when trying to
20 recount the injuries that Liliana suffered at the hands of
21 Demetrius McClary.

22 But, again, the chain of events went quickly. The
23 defendant was arrested that night. And, then, although,
24 during the first interview with police, we know he really
25 didn't say much. Then he has this conversation with God and

1 decides, okay, it's time to tell the truth, or as much truth
2 as he wanted to tell. But what he does say corroborates most
3 of what Liliana told you.

4 He told Detective -- Lieutenant Morrell now, "Yep, I put
5 a rag over her mouth. Yep, I beat her. I ripped at her
6 clothes," but he's saying, oh, it was just for the card -- it
7 was just for the key card, because it's easier to admit to
8 trying to steal a key card than to admit that you are going to
9 forcibly rape a woman.

10 He admits, "I just started punching her like this" --
11 actually, it was his left hand. Remember? He's like, "I just
12 started doing this, I just started doing this." He admits he
13 was wearing the sneakers, white tank top, blue jacket,
14 acknowledges that's him in the surveillance stills from the
15 stairwell. He even tells us, "Well, there are no cameras. It
16 has to be below the third floor because there are no cameras
17 above that." That tells you that he knew what was going on at
18 that hotel, what he was doing.

19 He tells you, "I was wearing dark glasses. I was wearing
20 a wig." He corroborates a lot of what Liliana tells you.

21 But, even more than that, we have physical evidence. So
22 the police collected the rag that he said he used. Yellow
23 rag. Liliana told you it was a yellow rag. They collected
24 the glasses. They collected the wig. They collected, through
25 the search warrant at Sea Haven, the defendant's shoes. They

1 collected a fingerprint on the tub, and, again, we have that
2 confession.

3 So let's go through some of that physical evidence. The
4 fingerprint on the tub in the bathroom where a majority of
5 this attack took place. And you'll have all the exhibits back
6 with you, and you look at those pictures of the bathroom and
7 the blood bath that it became. And the defendant's print?
8 Right in the middle of it.

9 The wig that the defendant admits wearing, that Liliana
10 describes, again, in the bathroom. She testified she ripped
11 it off of him. Right there where she said it would be.

12 The shoes -- and you heard from Nate Howitt that, when he
13 was doing that Luminol -- they call it Luminol test on the
14 shoes, which, remember, that left shoe lit up as a presumptive
15 for blood. And if you look, there are photos of the shoes,
16 but you'll also have the shoes. If you look at the soles of
17 the shoes and then you look at the prints, the shoe
18 impressions from the crime scene, they're nearly identical, if
19 not identical, but we don't have a shoe expert to tell you
20 that. But you can look. You can see, as plain as day, with
21 your own eyes. If you look at the sole of the shoe and the
22 shoe impressions from the crime scene, it's a match. Plus
23 the defendant told you he was wearing those shoes.

24 Now, maybe they'll tell you, "Well, why weren't the shoes
25 tested?" And I'm going to get to some of that in a little

1 bit.

2 You have the DNA. You guys are probably sick and tired
3 of hearing about the DNA now. I do not blame you. But there
4 are two different pieces of evidence that are connected to
5 this crime by DNA. So let's first deal with these glasses.

6 Yes, two pairs of glasses. One was Liliana's; one, the
7 defendant was wearing. Yes, ideally, they should have been
8 packaged separately. In 29 years, I have yet to have a case
9 where everything was done perfectly.

10 Is this a fatal error? No. It's one I wish hadn't
11 happened, but when you boil down all that evidence that you
12 heard, all that testimony that you heard about these glasses,
13 the only thing that their commingling did was meant that
14 science cannot say that the defendant was wearing the
15 sunglasses and Liliana was wearing the reading glasses, but
16 they can tell you that the defendant's DNA was in that mixture
17 of the two glasses.

18 And do you need science to tell you specifically that
19 Liliana was wearing the glasses that she identified as hers
20 and that the defendant was wearing the glasses that he
21 admitted wearing? So that's what I call, like, a red herring.

22 I have dogs. You know, you're walking the dog, and
23 they're like, squirrel, there's a plane, there's a bird in the
24 sky. Focus on what's important. Focus on the purpose. Don't
25 get distracted by the fact that the glasses were packaged

1 together, because, in the end, it doesn't matter. The
2 defendant's DNA is still there. He still admits that he wore
3 those glasses. Liliana still told you that he wore those
4 glasses.

5 And you may have noticed, when questioning Dr. Rudin, I
6 made sure it was clear that she is not there, she never
7 offered any sort of opinion on the DNA that was under
8 Liliana's fingernails. How do you explain that away?

9 You know how it got there? It got there because Liliana
10 was fighting for her life, trying to get the defendant's hands
11 and that rag away from her mouth.

12 So there are a number of things that all line up,
13 corroborate Liliana's tale of what happened to her, that tale
14 of terror, that also corroborate the defendant's confession.
15 And all of that leads up to him being guilty.

16 So let's talk about the law a little bit. The defendant
17 is first charged with assault and battery of a high and
18 aggravated nature. I'm going to refer to my notes. And,
19 again, judge of the law. If I say anything that contradicts
20 what he tells you, listen to him.

21 So, in order to prove him guilty, which the State has
22 done, we would have to show that the defendant injured
23 Liliana. And I just want to -- the State has proven that the
24 defendant injured Liliana.

25 We have to prove that either great bodily injury resulted

1 or that the means used could have produced death or great
2 bodily injury. So the law is always this series of
3 definitions and explanations. So great bodily injury is
4 bodily injury which causes a substantial risk of death or
5 which causes disfigurement or protracted loss of a part of the
6 body.

7 Well, number one, as I said, the way that the defendant
8 attacked Liliana certainly, but thankfully, did not cause her
9 death. If you are choking someone, cutting off their air
10 supply, you are likely to kill them. It would be reasonable
11 to believe that that would cause death.

12 If you repeatedly kicked someone in the face and in the
13 head, that is reasonably connected to causing death.
14 Certainly great bodily injury. She was in the hospital for
15 four days. You can see from the photo all the stitches she
16 had. She had repeated visits to the neurologist, to the
17 orthopedist, and she testified that she still has a scar, as
18 if she would ever forget this attack anyway, but she still has
19 a scar in the middle of her head and a lump over her left eye.
20 Permanent disfigurement. So no matter which way you look at
21 it, the defendant is guilty of assault and battery of a high
22 and aggravated nature.

23 Now, you will be given instructions on what we call
24 lesser included offenses, meaning, if you think that that
25 attack on Liliana did not amount to being a high and

1 aggravated nature, then you can consider assault and battery,
2 first degree or second degree. And I'll leave those
3 explanations to the judge because, quite frankly, it is the
4 State's firm belief that, when you get to assault and battery
5 of a high and aggravated nature, guilty, move on to the next
6 charge.

7 The defendant is also charged with burglary in the first
8 degree, and it requires that the defendant entered a dwelling
9 without consent, with the intent to commit a crime while in
10 that dwelling, and -- there are sort of two ways that it can
11 be proven -- that injury was caused to a nonparticipant or
12 that there was a use or a threat of use of a deadly
13 instrument.

14 Okay. So be a little psychic here. I'm going to guess
15 that Mr. Fox will tell you the hotel room is not a dwelling.
16 This is a factual determination for you to make. When you
17 think of a dwelling, it is a place to sleep, a place to stay.
18 What is the exact intent, the specific design of a hotel? It
19 is a place for visitors and travelers to sleep. The purpose
20 behind this requirement that it be in a dwelling is because
21 the law wants to give extra protection to individuals versus
22 property. And a dwelling, you expect someone to be in a
23 dwelling, so we make that crime more serious.

24 Well, this hotel room, which is specifically adapted to
25 be a dwelling was, in fact, occupied. And, in fact, it was

1 specifically chosen by the defendant because it was occupied
2 by Liliana Hernandez-Diaz. He wasn't trying to break into a
3 hotel room to steal a phone or a duvet. He burglarized that
4 hotel room specifically so he could get Liliana alone. And
5 what do you think he wanted to do when he got her alone?

6 "Have you ever been raped?" That's what he wanted to do.

7 So we would suggest that the defendant is guilty and has
8 been proven guilty of burglary in the first degree because the
9 hotel room is a dwelling. Again, you'll have a lesser
10 included offense of burglary in the second degree, which
11 really, if you find, for some reason, that the hotel room is
12 not a dwelling, then it would be burglary in the second degree
13 which merely requires a building. But, again, the State
14 suggests that the proof is there that the hotel room is a
15 dwelling. It is specifically adapted to be a dwelling for
16 visitors and travelers.

17 The defendant is also charged with kidnapping. And,
18 again, there are always a number of ways -- sorry; let me back
19 up. Burglary in the first degree. The other way is with the
20 use or threatened use of a deadly instrument. Now,
21 anything -- most things can be converted into a deadly
22 instrument, depending on how they're used.

23 So I have a pen. Making notes during trial. But if, all
24 of a sudden, I come at someone and use it more like a knife or
25 a poker, it can be a deadly instrument.

1 Well, here, you have that yellow rag with the odd odor.
2 And if it had just been, you know, used to wrap around her
3 hands, maybe that wouldn't be a deadly instrument. But when
4 it's used to cover her airways and whether or not you find
5 that there was some sort of other chemical on there, but the
6 way it was used, it is a deadly instrument.

7 Kidnapping. So I was saying that most crimes have a
8 number of different ways that they can be committed, and the
9 judge will list these for you, but the one I want you to
10 concentrate on is confinement. As I said in my opening, a lot
11 of times, people think of kidnapping as, you know, getting
12 pulled by her throat at gunpoint or knifepoint and take her
13 away. But kidnapping can also be committed by confining
14 someone.

15 Well, what do you think the defendant was doing when,
16 twice during this attack, he went to the door of the hotel
17 room and tried to shut -- I mean, Liliana was confined anyway
18 because he was standing between her and the safety of the
19 hallway, but he took it a step further and tried to shut her
20 into the room with the door completely closed so no one would
21 be able to get in either. So the defendant is guilty of
22 kidnapping.

23 And, then, the last crime is the assault with intent to
24 commit criminal sexual conduct in the first degree. And it's
25 sort of a hybrid of crimes, as you can tell from the title.

1 It's got an assault aspect and then a criminal sexual conduct
2 aspect.

3 Well, I would suggest to you that, as I have said, we
4 have proven the assault. The defendant is clearly guilty of
5 assault of a high and aggravated nature. So then it's left
6 that we have to prove that the intent behind that assault was,
7 in more common terms, to rape Liliana. What evidence is there
8 of that? The defendant's own words: "Have you ever been
9 raped? If you don't want it the good way, it will be the bad
10 way." And Liliana's choice words: "He mounted me, he was on
11 top of me, and he was ripping at my clothes." Not because he
12 liked her cleaning uniform, but he was trying to get them off
13 for a specific purpose: To rape her. The level of the
14 assaulted, coupled with that, the intent to rape is assault
15 with intent to commit criminal sexual conduct in the first
16 degree.

17 So I'll get to come back and talk to you again, but I
18 wanted to give you this -- sometimes I view trials as puzzles.
19 So you have got the facts and the law, and you have to put
20 them together to come up with that final picture. And I
21 submit to you that, if you put the facts as you heard them
22 from the stand and through the exhibits, together with the
23 law, that the picture is clear; that that attack on Liliana,
24 that began March 20th of 2018, can and should end when you
25 convict the defendant of all charges. Thank you.

1 THE COURT: Mr. Fox?

2 MR. FOX: May it please the Court?

3 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

4 MR. FOX: Mark Twain said, "It's a very horrible death to
5 be talked to death." You have listened to an awful lot of
6 talking this week, and I will try not to belabor, delay, or
7 extend this any longer, but it's very, very important,
8 obviously, what we're doing here this week, and we have rules
9 that operate in the courtroom. As you have seen at different
10 times, you have needed to be sent out so we could discuss
11 matters outside your presence. And one of the rules is,
12 because the way this trial played out, Ms. Walter gets to get
13 up and speak about the law, and then I get my turn, and then
14 she has a chance to rebut. So this is my one time, and I do
15 have to, to some degree, anticipate further what Ms. Walter
16 may say.

17 Now, it is sometimes -- I have heard even from people
18 that know what I do for a living that, "Ah, defendants have
19 all the rights." Well, I have got a standing challenge to
20 every person that's ever said that to me and every person that
21 might think to, to name me one single right that
22 Demetrius McClary has that none -- that the rest of us don't
23 have. You can't do it. He's not endowed with special rights.
24 He has the same rights that every citizen of this state and
25 this country has. He's simply in a position where, having

1 been accused by the government of committing these crimes, he
2 needs to exercise these rights: His right to a trial. His
3 right to have a lawyer assist in his defense. His right to
4 serve as a process, which means subpoena witnesses if he needs
5 to. He has no rights that none of the rest of us do not also
6 have.

7 I think these are not red hearings what I'm about to
8 mention. These are real and important issues and items that I
9 think you absolutely have to consider. It is not as
10 straightforward as the State would have you believe.
11 Hopefully, you'd have gotten a sense of that from the
12 questions I have had and the evidence that's been presented.
13 I'm not going to go through, I promise you, line by line and
14 item by item, but there are some definite things I think are
15 problematic, that should give you pause, and I think
16 ultimately lead you to conclude that the State has not carried
17 its burden of proof and that Mr. McClary should be found not
18 guilty.

19 So, the things that the police did -- there is no such
20 things -- more accurate, what they didn't do. Perfection is
21 not a thing for human beings. However, we can rightfully
22 expect law enforcement, when they are attempting to accuse
23 someone of a very serious crime and ultimately lock them away
24 in prison for many, many years -- that we can hold them to a
25 higher standard. It's literally their job, and to say, "Well,

1 we tried, our intentions were good," or "we didn't mean for
2 this to happen" is no excuse. I'm not suggesting for a minute
3 that any person we have heard this week, any law enforcement
4 officer has it out for Mr. McClary, that they are mean, that
5 they are trying to mess with him, that they don't have the
6 best of intentions. But, again, that's not the standard, and
7 you should demand more.

8 The glasses. The glasses are very important. And I
9 hope -- I know that it was long, and I know that it was,
10 complicated, but I hope there's certain things you caught from
11 Dr. Rudin. Okay?

12 With the glasses -- and, for that matter, from Agent
13 Hefney yesterday. With the glasses, one of the most important
14 things with any of the DNA is nobody -- not Agent Hefney, who
15 clearly knows what she's talking about, not Dr. Norah Rudin,
16 who clearly knows what she is talking about -- nobody can tell
17 you when and how any DNA ever gets anywhere because of the
18 thing called a transfer.

19 These are in my hand, these glasses. You may well expect
20 them to my have DNA. It's not automatic, depending on how
21 much I hold them, you know, handle them, and how frequently.
22 But it's also true that, if I leave them here and any one of
23 you happens to -- and, again, not just graze them but to
24 handle them, have contact with them, etc., you may well have
25 somebody else's DNA.

1 It is also true that I may touch this with, say,
2 Ms. Caldwell's DNA and then carry it somewhere else. And now
3 Ms. Caldwell's DNA is over here. Possibly. Is it automatic?
4 It's not. But this is how transfer DNA works.

5 So the fact that Mr. McClary maybe has his DNA on these
6 glasses doesn't mean that he had his DNA -- that he was
7 present and wearing those glasses in Room 405. It simply
8 means, at some point, he or someone that he has contact with
9 had contact with those glasses. And so the way they are
10 packaged is very important.

11 And it is literally Officer Bailey's job. Very nice man.
12 Okay? Anyone can make mistakes, but it's literally his job to
13 do this and to do it right. And job one to collect the
14 evidence in the proper way, package it in the proper way so
15 that SLED can consider it, without it being contaminated. How
16 many times did you hear -- and from Mr. Bailey but from other
17 officers, "Oh, yes, contamination is bad." Officer Warren
18 said, "Contamination can ruin a case because you cannot rely
19 on the results of any examination you do afterward," whether
20 it's DNA or testing for blood or anything else.

21 And that was one of the main points of Dr. Rudin's
22 testimony with the glasses is, because of the way that it was
23 collected, because of the way it was swabbed -- one swab for
24 two items -- you cannot trust any results. You have an
25 unreliable result. Period.

1 Can you possibly pull DNA off of that? Sure. Can you
2 trust the results and the calculations therefrom? No. That's
3 not a red herring.

4 There are several things -- it's not just one or two. So
5 the glasses have two of their own. There's the fact that they
6 were gathered together, packaged together, taken to SLED
7 together, and then swabbed with one swab, and the agent tried
8 to -- Ms. Herrera would say, well, you know, once they were
9 contaminated, nothing I can do. I just went ahead and swabbed
10 them both with one swab.

11 The yellow towel, we don't know anything about the yellow
12 towel. It was there from the pictures. The officer, I
13 believe Mr. Bailey said, that it certainly appeared to have
14 blood, especially considering where it was. We don't know
15 anything about the yellow towel. It had an odor. No testing,
16 no evidence about what that was. It's been suggested that
17 somehow that was something that was going to help knock out or
18 incapacitate Ms. Hernandez. But we don't know because, once
19 again, not collected properly or at least not secured
20 properly. And then, so, when it gets to SLED, SLED can't do
21 anything with it. They can't test it. It's a worthless piece
22 of evidence at this point.

23 And Officer Bailey says, "Well, I followed our
24 protocols." Well, that's wonderful, but, again, Job 1 --
25 maybe Job 1-A -- is to make sure you satisfy SLED protocols.

1 You know where it's going. They're not just taking it to the
2 Myrtle Beach Police Department and putting it in the evidence
3 locker. He knows it's going to SLED. He should know what
4 SLED's protocols are. That's just a blatant failure. That's
5 a piece of evidence that you don't have.

6 What if they tested it and there was somebody else's
7 blood, not Ms. Hernandez and not Mr. McClary's? It would
8 change your view of this case, wouldn't it? We'll never know
9 and we can't know.

10 It's been in the air that maybe the defendant could
11 contest that or he could get Ms. Hefney's help to be referred
12 to a lab. I can imagine that phone call from Mr. McClary to
13 Agent Hefney, asking for a referral. But that is a red
14 herring or, more appropriately, that's what my dad would call
15 a non sequitur, which is one of the few Latin phrases I know,
16 which means it doesn't follow. You say this and say that, and
17 one doesn't logically follow from the other, and here's why.

18 Mr. McClary has no obligation to prove his innocence.
19 The State has the entire burden of proof beyond a reasonable
20 doubt to prove him guilty and to say, "Well, you can test that
21 yourself. We're not going to bother. We didn't do it right."
22 Or "we got an artificial limit of five items that we're going
23 to test. So, good luck, Mr. McClary. You're transient, you
24 live at Sea Haven, you have got no money. You go ahead and
25 get that test. You find yourself an expert."

1 The Constitution says he's got no burden of proof. He
2 doesn't have to a test a thing, and, frankly, has no resources
3 or means to really do that. So it is not an answer to say,
4 "Well, we just couldn't do it."

5 Case numbers. Again, in the end, you can sort it out.
6 SLED issues two case numbers, for no good reason that I can
7 see. Does it mean you can't ultimately follow the trial? You
8 can. But, again, it's just more evidence of the kind of
9 slapdash nature of some of this. Does it mean everything is
10 bad that they did? Of course not. But it's a casual
11 approach.

12 It's very important to know, when an item comes in, where
13 it goes. A lot of the testimony you've heard this week has
14 been what we call chain of custody testimony, which is, "I had
15 this item. I had it secured. I took it to this person. It
16 hadn't changed until it came into the courtroom." Right?
17 That's why numbers matter. By itself, it doesn't mean much of
18 anything, but in the context of everything else that was going
19 on or not going on, it's just emblematic to me of all the
20 problems.

21 The biggest one of those are the fingerprints. You have
22 got no reliable evidence if there was a fingerprint that
23 matches Demetrius McClary in Room 405.

24 Nathan Howitt testified he tried to clean it up. He
25 said, Well, there's this other room, 715, but we know that

1 this print on the bathtub came from 405 because, you see, the
2 fellow in 715, he took pictures of the fingerprints, and the
3 fellow down in 405, he used the latent cards. He lifted them
4 with tape and put them on a card. And we know, even though
5 the report says 715, our own report that people will rely on,
6 you know -- and I'm telling you -- that, oh, you know because
7 one room has cards and one room has photographs.

8 But I got him to admit, when I showed him the actual
9 documents, that, in fact, both rooms -- the crime scene
10 officers in both rooms used both photographs and cards.
11 There's no way for them to distinguish now, four years
12 later -- no way for them to distinguish which was which. All
13 right? It's very important.

14 For four years, they didn't notice that. Nobody noticed
15 that. Not the police, not the solicitors. Nobody caught
16 that. And Nathan Howitt had to admit, when I asked him, that
17 yep, in fact, cards and photographs from both, and the report
18 only mentions Room 715. There is no way in the world, from
19 the evidence that you have been presented, that you can
20 conclude that fingerprint came from Room 405.

21 Shoes was never tested. In your own experience, I
22 imagine most of you have at least heard of Michael Jordan and
23 you have at least heard of Air Jordans, and if there's a more
24 common shoe in the world, I'd be hard-pressed to know what it
25 is. Black Nikes.

1 Anyway, Nathan Howitt told you that the most he could do
2 with that magic wand is spray something on it, wave and magic
3 wand, and it's, quote, "presumptive for blood." But he can't
4 tell you it's blood without doing something further. Okay?
5 Presumptive has no quantitative value. Right? Is presumptive
6 enough? I don't know, but I know it's not enough for him to
7 come to court and say, "There's blood on those shoes."

8 You have got the pictures of them, on the soles and
9 around. See blood? How hard would that have been? Agent
10 Herrera, I believe, said very easy to detect blood, for them
11 to test for blood. You need -- what was it -- the size of a
12 pinhead amount to test for DNA. You don't need a lot. Did
13 they do that? No. Did they offer you any explanation? No,
14 other than the mythical five-item limit at SLED.

15 What did Agent Hefney tell you? Did you catch that? She
16 said that's an unwritten rule. There's no guideline. There's
17 no rule that says you can only have submit five. And guess
18 what? How many did they submit? Wig, yellow cloth. Glasses,
19 they got a two-for-one there. Fingernail scrapings. Count
20 four. Even under their own rule, they could have put both the
21 shoes in one package because, apparently, that's a thing, and
22 send them off. Maybe you didn't like the answer. Again, what
23 if there is no blood? What if it's blood not connected to
24 this scene?

25 The white cloth on the 8th floor that just disappeared.

1 Officer Ward said -- he wasn't here, but Corey Knight, one of
2 the -- there was Mr. Steven, there was Mr. Lee, and there was
3 a Corey Knight you heard about, who was another hotel
4 employee, who all kind of at the same time responded, and
5 Officer Warren told you that Corey Knight apparently found, in
6 the stairwell on the same side where those low-end numbers,
7 the same stairwell where Mr. McClary was seen, find a white
8 cloth or rag, a towel. Appeared to have something on it he
9 took to be blood. Didn't test it. Don't know. Maybe it
10 wasn't blood.

11 Maybe the person that attacked Ms. Hernandez went up. A
12 hide in plain sight, so to speak, in a hotel that's almost
13 empty, and won't do the obvious thing and immediately go down.
14 Can't tell if he went up anyway because there's no cameras up.

15 That towel disappeared. It's gone. It's mentioned.
16 It's talked about. It's brought down -- by the testimony, you
17 heard it's brought down to Room 405 where all the police are,
18 where Bailey is. No rag.

19 What if that rag had Ms. Hernandez's blood on it? Very
20 different scenario. We know pretty clearly, if McClary was
21 around, that he went down. No video evidence -- no cameras in
22 the hallway. How easy would this have been if they had
23 cameras in the hallway?

24 I'm going to jump back to the DNA for a second -- well,
25 I'm going to continue with the DNA. So let's get to the DNA

1 and get it out of the way. I'm going to start with Dr. Rudin.
2 Yes, of course she was paid. You know, that's her job. Agent
3 Hefney was paid. Every officer who has testified this week
4 was paid. I'm paid to be here. The judge is paid, the
5 solicitor is paid. Dr. Rudin is getting paid out of the same
6 funds that the solicitor's office is. But, regardless, of
7 course she's paid, but that's a very different thing from
8 being hired for her opinion.

9 So the thing I want you to take away from Dr. Rudin's
10 testimony is this: I know these numbers are confusing. I
11 know that this talk of analytical thresholds and all these
12 different things are baffling. You saw me struggle with Agent
13 Hefney to try to -- not even keep up, to just stay in the same
14 ballpark with her. Not a fair fight there. So I needed help,
15 and that's where Dr. Rudin comes in.

16 And what she points out, it's not just a matter of
17 calling, Look, there's a mountain or a peak, and we're going
18 to stick a number to it; that the DNA at these locations, that
19 these samples can have multiple contributors, multiple people,
20 and that you can't consider each one in isolation. So it's
21 very misleading. And that's Dr. Rudin's phrase. It's
22 misleading to say, "Well, doesn't Mr. McClary have a 19 here?"
23 And Agent Hefney actually did him a favor by not calling that
24 19.

25 No, Dr. Rudin said you have got to consider all of the

1 material in that location. Okay? So you have got the
2 different bands, different colors, different numbers that
3 refer to that location, and then, within that, you see
4 different peaks, some bigger, some smaller. Usually clustered
5 together. So sometimes that indicates more than one person.
6 Okay? And that's important for this reason. Agent Hefney
7 agreed with me that the more contributors there are, the less
8 precise the findings. Doesn't mean they're not good, doesn't
9 mean they don't have any value. It just means, if you have
10 one contributor, it's a lot easier to be precise. If you have
11 two, that gets more difficult. If you have three, it gets a
12 lot more difficult. So these things don't occur in isolation.
13 Okay?

14 The other point of that is, again, I don't think SLED --
15 they have a level. If it's above the level, we say yes. If
16 it's below the level, we say no. I don't think anyone
17 contests that that's a legitimate thing to do, but it has
18 consequences. So when you set a level, if it's too low or,
19 rather, too high, as Dr. Rudin believes, you might miss
20 things, and that's important because whereas you might call
21 one contributor, which seems to be more definite, there might
22 actually be two or three. And that's okay. It's that simple.
23 There might actually be more material there than is being
24 called. Not because anyone is trying to deliberately mess
25 with anybody, not because they're not competent, but because

1 it's just actions have consequences. All right? And the
2 consequence of setting that level too high is that you're
3 maybe missing material, and that's important because those
4 calculations, those numbers that you get, right, that 1 in
5 9,700, the number that's got more zeros than I can name, those
6 numbers, then, are accurate. Okay?

7 So that's why it's important, if you don't consider all
8 the material you should, number one, you might miss material,
9 you might miss something that's favorable to a person, but you
10 may also -- again, Dr. Rudin's opinion was, at least a couple
11 of these locations, there were three male contributors.
12 That's a very different scenario for this event than just
13 little old Demetrius. So that's why it's important. It's
14 complicated as can be. I hope that makes some sense.

15 Ms. Hernandez's interview. This week, we heard her say
16 the person who came up behind her said, "Have you ever been
17 raped?" And then, at another point, you know, "Either you're
18 going to get it the good way or you're going to get it the bad
19 way" or something like that. And it took some doing, and we
20 needed to take a break and give her a chance to refresh her
21 memory, but, eventually, I got her to agree that she had never
22 said that when she was interviewed in the hospital.

23 And that's important because it sure changes or at least
24 it amplifies her description of this attack. The attack is
25 horrific enough, but to get to that criminal sexual conduct,

1 the assault with intent to commit, it gets a lot harder
2 without something like that. Right? Because we can't read
3 anybody's mind. And so those words sure do paint a graphic
4 picture of intent.

5 It's not any question that she was beaten, she was in the
6 hospital, but she was also able to fully participate in this
7 interview. She was conscious. She was able to speak and, at
8 times, even correct the people helping her when they had
9 trouble agreeing on a word. She provided details very
10 consistently with what she testified to this week. So she was
11 a full participant. She was conscious. She wasn't loopy from
12 pain medication, but she sure didn't say anything about that.

13 She didn't say anything about her hair being pulled.
14 And, in fact, if you pay close attention, she kind of
15 acknowledged, "Well, I think he must have pulled it," because
16 I asked her about that: "He didn't pull your hair, did he?
17 You didn't tell anybody that." And, at some point, then she
18 finally said, "Well, he must have because it was askew."
19 Well, okay, but that's very different than being grabbed and
20 drug by the hair. She had been in a struggle, okay, but -- so
21 those things are very different.

22 Back to some of the blood, how does Demetrius McClary --
23 I agree with the woman from HR; the amount of blood is
24 horrific. "Shocking" is the word she used. You've seen the
25 pictures. You'll have them with you, if you need them. How

1 in the world did Demetrius McClary not have any on his white
2 shirt?

3 All right. I mean, it's all over. It's on the door.
4 It's on the floor. He's -- whoever it is, close contact with
5 Ms. Hernandez, they would likely believe he had it on his
6 shoes. And it stops at his ankles? You've got the picture.
7 Even Joe Steven, who didn't recognize her, when he worked for
8 so long -- Joe Steven, the security guard, designed the camera
9 system and all -- even he agreed with me, when we showed him
10 the picture, Demetrius, from, apparently, the stairwell, that,
11 "Nope, I don't see anything on it." That's another missing
12 piece of something.

13 Bag 25 had a white tank top from Sea Haven, and then it
14 was just gone. Guarantee you, if there's any blood on the
15 item in Bag 25, it would be up here. But how in the world
16 does Demetrius McClary not have -- you know, it was suggested
17 that, "Oh, he could have wiped this off." Well, not from Room
18 405, the stairwell he didn't. Not -- what was it? 12 feet
19 from here to the witness chair? He managed to get out of his
20 bloody clothes? I don't think so.

21 And, again, forgive me for jumping around a little bit;
22 I'm getting almost done. Back to DNA, those numbers that
23 sound so impressive. I hope you take this to heart. Agent
24 Hefney said, when I asked her very specifically, those numbers
25 are not probability of guilt. Okay? So I certainly hope

1 you're not sitting here thinking, 1 in 9700, those are the
2 odds that Mr. McClary is guilty of these crimes.

3 Let me talk a little bit about Demetrius's statement to
4 Officer Morrell. 19 years old. Clearly young and scared, and
5 I think, previously, Detective Intern Warren, who was in the
6 interview -- the first interview -- remember there's two.
7 There's one the day he's arrested for trespassing, allegedly,
8 and, then, the next day with Detective Morrell.

9 In the first one, Officer Warren told you, yeah, you
10 know, denial across the board. And we may hear the phrase --
11 I don't know if we will, but self-serving. Well, I don't know
12 what a person is supposed to do if you're accused of a crime,
13 and you say, "I didn't do it." And you say, "Well, that's
14 self-serving." Well, maybe.

15 But Officer Warren did say that a lot of the specifics in
16 the interview were provided by Detective Amos. Again, not to
17 trap, not to frame anybody, just tell me about the wig, tell
18 me about this, tell me about that. Several things that then
19 get regurgitated the next day. Okay?

20 You saw Demetrius's interview the second day. Did he
21 look like a pretty fragile, suggestible young man at that
22 point? I know we don't like to think that people ever confess
23 to something they didn't do, but it's a real thing. It is a
24 real thing. And if that's all we're looking at in this case,
25 then I don't know if that's much, but combine it with the

1 other things, the doubt about a lot of this evidence, physical
2 evidence, then I think it's a real thing.

3 This is very hard to do. So I have to talk a little bit
4 about the law and these injuries. Listen very carefully to
5 what the judge tells you about the assault and battery of a
6 high and aggravated nature. Great bodily injury is very
7 specifically defined. I told you that on Wednesday. It's a
8 term of art which simply means it maybe carries a different
9 meaning from what you might think of in your everyday life.
10 Okay?

11 So, as I told you, great bodily injury doesn't mean,
12 yeah, that's gross, yeah, that's bad. It's very specific.
13 It's an injury, first, and that injury -- that injury has a
14 substantial likelihood of death. I might not be phrasing that
15 exactly right, but the judge will tell you exactly what it is.
16 But it's not that you have an injury and the instrument
17 involved might have caused the death. It's that this injury
18 that you suffered, okay -- that's the way I read it -- is
19 life-threatening.

20 You heard no testimony from any medical personnel. You
21 didn't have anybody from EMS, you had nobody from Grand
22 Strand. We didn't hear from -- different issues, but the
23 neurologist and these other people. No testimony that she had
24 a life-threatening injury.

25 I have no doubt that she feared for very serious

1 consequences during all this, but that's not the standard.
2 Sympathy for Ms. Hernandez is not the same as evidence of
3 great bodily injury. That's the difficult part of your job,
4 okay, because you have sworn an oath and you have to set aside
5 emotion to the best of your ability. I don't expect you to
6 ignore these pictures, but set aside the emotion of it and
7 apply the law that the judge gives you. And I think, truly,
8 this is more correctly -- although it sounds so much less
9 serious -- moderate bodily injury, which is the assault and
10 battery of the first degree. I'm not going to belabor this; I
11 just want you to listen, please, very carefully to how the
12 judge defines it for you. Okay? It's a lot more than just
13 "that's a nasty picture."

14 In terms of -- I think it also talks about permanent
15 impairment. It doesn't mean a permanent scar, in my reading
16 of it. Ms. Hernandez did say she had been to a neurologist,
17 but it wasn't clear at all to me whether she had been
18 referred, understandably while she was in the hospital, or if
19 she needed continuing follow-up treatment. No indication that
20 she did. No testimony like that.

21 She's back to work, thank goodness, and apparently fully
22 mobile and able. I do not believe, despite the scar, that she
23 has been permanently disfigured or had loss of a limb or
24 organ.

25 The identification. I'm almost done. Certainly on the

1 day of the assault, Ms. Hernandez was in no condition to
2 identify anyone, but she told the officer that day, "Yeah, I
3 can identify this person," and never went back. In four
4 years. Happens all the time. Is it nice to have an
5 identification the same day? Absolutely. But it can be done
6 at any time. There's nothing magic about it. And it's
7 frequently done -- and I will tell you, in my own experience,
8 that it's frequently done for different reasons sometimes
9 afterwards. You don't want to wait certainly one year, two
10 years, three years. And she was not in the hospital with
11 swollen eyes that long. She seems to have -- claims she had
12 the ability, absolutely, to identify this person.

13 But like the other towel and like other things the police
14 didn't do, they didn't do that, I think, because they're
15 afraid they might not get the answer you want.

16 This is a bigger argument. I am highly -- she was
17 permitted to do it under the rules of court in South Carolina.
18 A person can come into court and make an identification for
19 the first time. The only thing I can say about that is who do
20 you think? I mean, you don't have to be a lawyer to know,
21 when you walk in the courtroom, this is the judge in the robe.
22 And after listening just a couple of minutes, these are the
23 prosecutors, and over there are the defense attorneys, and
24 that person next to the defense attorney is the defendant.

25 So I'd ask you just to treat that with a little bit of

1 certainty. Unfortunately, with the human mind, that does not
2 make it more likely. People are certain and wrong all the
3 time. So it is what it is. I hope you will not put
4 overemphasis on that.

5 The last thing I will talk about is the burglary charge.
6 Again, listen very carefully to what the judge tells you.
7 "Dwelling" is very specific. It is a term of art. It is not
8 maybe how you would define it in your everyday life, and I
9 would say it is a lot more than just a place where you put
10 your head sometimes or can put your head. It seems to turn
11 very much on and does turn very much on whether a person is
12 going to be returning there to that location. It is a crime
13 of occupancy.

14 In other words, if I walk out -- now, I'm not at home,
15 but I'm absolutely going back home this afternoon, and I
16 intend to return, and that is still my home. And so, if
17 someone goes into my house without permission, with the intent
18 to commit a crime even though I'm not there, yes, that is a
19 burglary, and depending on other circumstances, in the first
20 degree.

21 However, if my next-door neighbor, who owns the house but
22 is never there, has left it unoccupied for 15 years, no one
23 lives there, he doesn't rent it out, it's not a second home,
24 it's just an abandoned property, that is not. Could it be
25 used as a home? Of course it could.

1 A hotel is the same way. There was no one in Room 405.
2 No one was renting that room. No one was on the entire floor.
3 There was no unexpected to come back. The statute doesn't
4 contemplate "could." It contemplates "is." It's in the
5 moment. It's not, "Well, it's a hotel, and it can be used,
6 so, therefore, the whole hotel is a dwelling." No.

7 You look room by room. And there is no doubt that Room
8 405 and the entire 4th floor was unoccupied. In fact, the HR
9 director told you that she checked back, and, at that time, in
10 March of 2018, there was only 16 percent occupancy in the
11 whole hotel.

12 So, again, it's just not a dwelling. You may well
13 believe it's a burglary, but, if so, it's a second-degree
14 burglary and not a first.

15 As far as -- and, clearly, "occupied" doesn't mean
16 someone standing in there. It means with right of ownership.
17 And, certainly, if you rent a hotel room, you have temporary
18 right of ownership. All right? Just walking through it does
19 not give you right of ownership. It doesn't magically turn
20 that room into an occupied dwelling.

21 So I thank you for your time, and I know you have paid
22 very close attention because I have paid attention watching
23 you, and I'd ask you simply to listen very carefully to what
24 the judge instructs you on the law. As best you can, set
25 emotion aside, and decide this case on the law and the facts.

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1 Thank you.

2 THE COURT: Ms. Walter?

3 MS. WALTER: Thank you, Your Honor.

4 FINAL CLOSING ARGUMENT ON BEHALF OF THE STATE

5 MS. WALTER: And this is quite literally a response to
6 Mr. Fox's argument, so I sort of followed along with what he
7 said.

8 And he started -- one of the first things he said was
9 defendants have -- that people say defendants have all the
10 rights and, yet, everyone has these rights. And he's
11 absolutely right. We do. But do you want to know why we
12 never exercise them? Because we don't commit crimes. We
13 don't attack defensive women. We don't burglarize hotel rooms
14 and assault women and attempt to rape them. But if anyone
15 did, then, yes, they get those rights. But you exercise them
16 -- the defendant is exercising them because he committed the
17 crimes.

18 Yes, this should give you pause. You should pause as you
19 consider this case. Do you want to know why? You should
20 pause to consider how someone can do this to another human
21 being absolutely without provocation. That should give you
22 pause.

23 The glasses. But don't look at them in a void. And Lord
24 knows there's been plenty of testimony about the glasses. But
25 don't just say, "Well, the glasses, yep, throw them out."

1 Look at them in context with all of the rest of the evidence.

2 It is not that there is DNA on those glasses that
3 implicates someone who has no other connection to the crime
4 scene. There is plenty to connect the defendant to this crime
5 scene, not the least of which is the testimony of Liliana
6 Hernandez-Diaz, of the defendant himself.

7 So, yeah, they should have been packaged separately, but
8 again, all that did was say something that we didn't need
9 science to prove; that Liliana wore the white reading glasses,
10 and the defendant wore the sunglasses. You don't need signs
11 to tell you that. Liliana told you that. The defendant told
12 the police that.

13 And don't confuse contamination with transfer, because
14 contamination, you know, you think of the introduction of
15 something bad, you know, something is, like, spoiled. This
16 isn't an introduction of different DNA. All it is -- and I
17 don't mean to minimize it, but what it is is that there was a
18 transfer, potentially, of DNA between the defendant's glasses
19 and Liliana's glasses. Not contamination. Transfer. And
20 there is a difference.

21 Mr. Fox said that the rag was a worthless piece of
22 evidence. I don't know if many pieces of evidence that I
23 would call worthless, especially when both Liliana and the
24 defendant said that that's the rag he put over her mouth. How
25 is that worthless? It not only corroborates what Liliana told

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1 you happened to her but corroborates what the defendant said
2 he did to her. Not worthless at all.

3 The print. How do we connect the print? Here's exactly
4 how we connect the print. Crime Scene Investigator Bailey. I
5 showed him this picture. Exhibit 34, I think it is. "Is this
6 a photo of the latent print from the tub in Room 405?" "Yes,
7 it is."

8 Nate Howitt. Exhibit 34. "Is this the print that you
9 examined that came back as a match to the defendant?" "Yes,
10 it is."

11 There's the chain.

12 And, again, don't look at the print in a void because we
13 know that the defendant was there because Liliana has told us
14 he was there, and he has told us he was there.

15 If I had a dollar -- let's even go a dime. If I had a
16 dime for every trial where someone said not every piece of
17 evidence was tested, I could probably buy the state a crime
18 lab that could handle the workload of 46 different counties,
19 testing every piece of forensic, every piece of evidence for
20 all 46 counties.

21 Yes, the five is an unwritten rule, because I'm sure
22 that, if the first five pieces of evidence -- two pairs of
23 glasses, a wig, a rag, and the buccal swabs -- I'm probably
24 forgetting one. If those had all come back with no result or
25 no interpretation, SLED would probably say, "Sure, submit

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1 something else." But when you're picking and choosing of all
2 of the evidence what to submit for analysis, what are you
3 going to do? You look for the most probative pieces of
4 evidence. If you're going to be limited to five, pick wisely
5 that first time.

6 So you have DNA standards from the defendant and from the
7 victim. You absolutely have to have those; otherwise, why
8 even bother. And then you pick things from the crime scene
9 because it is clear that those are directly tied to what
10 happened.

11 And, lo and behold, one of those most probative pieces of
12 evidence was the defendant's DNA under Liliana's nails. So,
13 quite frankly, who cares if they sent the shoes for testing or
14 not? Because you can't come up with any explanation for the
15 defendant's DNA being under her nails other than the truth of
16 what happened: That he assaulted her and tried to rape her.

17 I guarantee you, if we had tested the shoes that it will
18 be, "Well, prove he was wearing them at the time. Maybe
19 someone else did it." But not the DNA under the nails. You
20 can't get away from that.

21 The white rag. What if it was the victim's blood? I'll
22 tell you what, it probably was. Here's my hypothesis of what
23 happened. And I'll tell you how the evidence supports that.

24 If you recall, Liliana told you that she had put the cart
25 in front of the door; right? And we know that the defendant

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1 must have moved the cart to get into the door to go in and
2 assault her. We know that, after he beat her to a bloody
3 pulp, he left the room. And, by the way, in his statement, he
4 even said, "I didn't have that much blood on me." And
5 Liliana, I think, testified that her nails were so short, she
6 couldn't really do much damage, but she was able to get some
7 DNA.

8 But if you look -- and this is Exhibit 2 -- if you look,
9 there is blood on some of the towels on the cart. Okay? It
10 doesn't take a rocket scientist. Defendant has blood on his
11 hands, pushes the cart out of the way, grabs a white rag, runs
12 upstairs. Remember from his statement to Lieutenant Morrell,
13 he told Lieutenant Morrell that there was two buddies, Jamario
14 (ph) and Gray, who were with him. They had been standing
15 outside the room when he first went in, but then they heard
16 Liliana screaming, and they took off.

17 He also, during that interview, I believe, said he had
18 been on the 7th floor. Hypothesizing, but I think it's
19 logical, let me grab a rag so that I can wipe the victim's
20 blood off my hands. I'm going to try and find my two buddies.
21 We had been up on the 7th floor. Crap, they're not here. And
22 then he runs down.

23 Because we don't have anything that says for sure that
24 those surveillance stills were taken the second he left 405.
25 We know that it was within a short period of time after

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1 Liliana was able to call for help, but it doesn't take long to
2 run up a couple of flights of stairs and come back down.

3 And, also, how hard would it be to -- number one, he had
4 a jacket on. Maybe there was blood on the jacket or the
5 shirt. He changed his shirt. We know for sure that he
6 changed his outfit as soon as he got back to Sea Haven.

7 So the white rag, yeah, it probably was the victim's
8 blood. But, again, why would you send that to SLED when you
9 already picked the probative evidence, the evidence that, for
10 sure, is tied to the crime scene?

11 Dr. Rudin. She -- and, believe me, this is all I'm going
12 to say about the DNA. Agent Hefney testified that their
13 analytical standard is 125 RFU. Dr. Rudin had to more than
14 cut that in half to be able to call a peak. Cut it in half.

15 So let's equate the analytical threshold, excuse me, to,
16 like, a C, a passing grade. Right? What's that? Usually
17 about 75? Well, now, if we use Dr. Rudin's science, now, if
18 you get a 30 in a class, you're going to get a C instead of
19 the F that you deserve.

20 She had to cut Agent Hefney's threshold more than in half
21 to be able to pick up and name other peaks that should not
22 have been called.

23 The victim's interview. Okay. Well, first of all, I
24 challenge anyone in this room to be beaten to this extent, be
25 in a hospital, in a trauma room, having been given pain

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1 medication, being treated for these injuries, being spoken to,
2 when you can't see who is talking to you, in a language you
3 don't understand, translated by someone who is not a
4 court-certified interpreter, and you know what, you better
5 remember every single detail. So let's tell everyone who
6 might be victimized in their lifetime: Excuse me, can you
7 stop assaulting me for a second? I need to take some notes.
8 Okay. It's 2:05. At 2:05, the defendant entered the room and
9 said this to me. At 2:08, Defendant grabbed my hair with his
10 left hand. It's ridiculous. We don't expect victims to do
11 that, nor should we. She told what happened to her to the
12 best of her ability at the time, and she said in her
13 testimony, "I did say that; I just didn't use those words."

14 But even beyond that, if you think about it, just as
15 there is it's easier for a defendant to admit to trying to
16 steal a key card instead of admitting raping someone, women do
17 not like to shout from the rooftops, "Hey, someone tried to
18 rape me, isn't that great?" No. It's something that carries,
19 unfortunately, in our society, a great deal of shame for the
20 woman, undeservedly so.

21 But women aren't always going to make that the first
22 thing they say. And, in fact, it took her months before she
23 admitted to her fiancé what happened. So, number one, she
24 testified that she did say it in that initial interview, but
25 even if she didn't, who cares?

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1 This is what matters. This trial is what matters. What
2 she says on this stand matters, and she told you, in a
3 compelling and credible way, that the defendant said to her:
4 "Have you ever been raped? If you don't want it the good way,
5 you're going to get it the bad way."

6 And the defendant. 19, young and scared? He may be 19.
7 Maybe that qualifies as young. I guess, at my age, it
8 probably does, looking back. But he is not some scared little
9 boy who is being intimidated by Lieutenant Morrell, who, quite
10 frankly, I kind of always knew him as like a teddy bear. He
11 is like a gentle giant. He was not even remotely intimidating
12 in that interview. He's telling the defendant, "Listen, let's
13 get you back on the right track."

14 The defendant wasn't young and scared. Those are
15 crocodile tears. He's admitting what he figures they can
16 prove but keeping back that he was going to rape Lilliana.

17 And I wasn't going to say self-serving, excuse me, but
18 since Mr. Fox did, I will. It is self-serving when you say,
19 "I didn't do it" when you did. If you didn't do it and you
20 say, "I didn't do it," that's not self-serving. That's the
21 truth. That's not what we have here. It was self-serving
22 because he refused to admit what he had done at first.

23 This idea that the defendant got the details of the
24 assault from that first interview, as Mr. Fox suggesting that,
25 in that first interview, the police said, Well, did you know

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1 that the only place that there were cameras are once you get
2 past the 3rd floor? Because I specifically remember the
3 defendant saying that in his interview with Lieutenant
4 Morrell. How many of us, when we are in a hotel, start
5 looking around, "hmm, let me see where the surveillance camera
6 is so I know where to avoid"?

7 He testified about the presence of Jamarion and Gray. The
8 police would have no way of knowing that Jamarion Stephenson
9 and Gray and Devion Slater were outside of the room when the
10 attacked occurred and that then they left. No way of knowing,
11 but the defendant did. That's a detail he gave.

12 The detectives also would have no way of knowing that
13 Liliana grabbed the defendant's penis. You know who knew
14 that? Liliana and the defendant. So that's a detail that the
15 defendant gave you that we know is true that did not come from
16 that first interview.

17 And I'm about to speak in my shorthand: ABHAN. Sorry;
18 we get into these short little acronyms. Assault and battery
19 of a high and aggravated nature. And, again, Judge DeBerry is
20 the judge of the law. Everything that he says goes. However,
21 my recollection of the instruction that you will receive is
22 that the injury is accomplished by means likely to produce
23 death or great bodily injury.

24 So you can find great bodily injury without medical
25 testimony. You can find, as I think most of us would, that a

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1 scar on your forehead is permanent disfigurement. I mean,
2 that's kind of the exact definition of what a scar is.

3 But even if you don't find Liliana suffered great bodily
4 injury, you can find that the defendant choking her, punching
5 her with a closed fist repeatedly in the head, and kicking her
6 repeatedly in the head is a means likely to produce death or
7 great bodily injury. It doesn't have to result in death or
8 great bodily injury. It just has to be able to result in
9 death or great bodily injury. And you don't need a doctor to
10 tell you that.

11 The identification. I specifically asked Liliana, "When
12 you saw him in court at an earlier date, did you identify him
13 because of where he was, or did you identify him from the
14 assault?"

15 "I identified him from the assault."

16 "Can you ever forget his face?"

17 "No."

18 "Have you tried?"

19 "Yes."

20 You know what's even more telling? Remember when she
21 made her identification, while he's hiding his face in his
22 hands, why do you do that? To prevent her from identifying
23 you because you know she can identify you.

24 And then burglary -- and I said that in my first close --
25 it's a crime of occupancy, but this is not -- and then Mr. Fox

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1 talked about an abandoned property. This is certainly not
2 equivalent to an abandoned property. It is a place where
3 guests are intended to go. They are intended to dwell there
4 for however short or long a period of time. And it was, in
5 fact, occupied by Liliana. And, as I said before, the
6 defendant chose that room specifically because it was occupied
7 by Liliana.

8 Mr. Fox said that the only Latin he really remembers is
9 "non sequitur." Well, the law and many of the phrases that we
10 use are based on Latin. And the one that I remember is
11 "verdict," which loosely translated back to the Latin, is
12 veredictum. Speak the truth.

13 So when you go back and deliberate and you fill out those
14 verdict forms, speak the truth, and that truth is that
15 Demetrius McClary is guilty of each crime. Thank you.

16 THE COURT: All right, ladies and gentlemen. The
17 attorneys have made their closing arguments, and it's time for
18 me to charge you on the law. Before I will do so, I will tell
19 you that I think this is going to last about 30 minutes, maybe
20 a little less.

21 Is everybody in a position to be able to pay attention
22 for that long? Do we need a short break?

23 Okay. We're going to take about a ten-minute break.
24 We'll bring you right back out to charge you on the law and
25 begin your chance to deliberate.

JURY CHARGE

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1 Please don't discuss this case yet. Thank you.

2 (The jury exited the courtroom at 2:12 p.m.)

3 THE COURT: All right. As soon as they're ready, we'll
4 go.

5 (A brief recess was taken at 2:13 p.m. to 2:23 p.m.)

6 THE COURT: Are we ready for the jury?

7 MS. WALTER: Yes, Your Honor.

8 MR. FOX: Yes.

9 (The jury entered the courtroom at 2:23 p.m.)

10 JURY CHARGE

11 THE COURT: All right. I remind you that, during this
12 trial, you and I have had certain duties to perform, and as
13 the trial judge, it's my responsibility to preside over the
14 trial of this case, and I also have the duty to rule on the
15 admissibility of evidence that's been offered during this
16 trial.

17 You are to consider only the evidence that's been offered
18 and that's before you. If there was any testimony ordered
19 stricken from the record during this trial, you must disregard
20 that testimony. You are to consider only the testimony which
21 has been presented from this witness stand and exhibits which
22 have been made part of the record in this case and any
23 stipulations of counsel.

24 I have the additional duty to charge you the law
25 applicable to this case. It's your duty as jurors to accept

JURY CHARGE

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1 and apply the law as I now state it to you. If you think you
2 have any idea as to what the law is or what the law should be
3 and it does not agree with what I tell you the law is, you
4 must forget that idea because you were sworn to accept the law
5 and apply the law exactly as I state it to you now.

6 In every case tried in this court before a jury, the jury
7 becomes the sole and exclusive judges of the facts. A trial
8 judge cannot comment or make any statement about the facts in
9 a case, and since you're the sole judges of the facts, do not
10 think, by anything that I have said during the trial, that I
11 have any opinion about the facts in this case. The law does
12 not allow me to have an opinion about the facts in this case.

13 I remind you that the fact that the defendant was
14 arrested, charged, and indicted in this case is not evidence
15 in this case and cannot be considered by you as evidence of
16 guilt in this case, nor does it create any presumption or
17 inference of guilt. This document is simply the formal
18 written instrument which contains the charges made against the
19 defendant. It's the formal document by which this case is
20 brought into this court.

21 The defendant has pled not guilty to these indictments,
22 and that plea puts the burden on the State to prove the
23 defendant guilty. A person charged with committing a criminal
24 offense in South Carolina is never required to prove himself
25 innocent. I charge you that it's an important rule of the law

JURY CHARGE

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1 that the defendant in a criminal trial, no matter what the
2 seriousness of the charge may be, will always be presumed to
3 be innocent of the crime for which the indictment was issued
4 unless guilt has been proven by evidence satisfying you of
5 that guilt beyond a reasonable doubt. This presumption of
6 innocence does not end when you begin your deliberations but
7 it accompanies the defendant throughout the trial until you
8 reach a verdict of guilt based on evidence satisfying you of
9 that guilt beyond a reasonable doubt.

10 The presumption of innocence is like a robe of
11 righteousness placed about the shoulders of the defendant,
12 which remains with the defendant until it has been stripped
13 from the defendant by evidence satisfying you of the
14 defendant's guilt beyond a reasonable doubt.

15 The presumption of innocence is not a mere legal theory.
16 It is not just a legal phrase. It's a substantial right to
17 which every defendant is entitled unless you, the jury, are
18 satisfied from the evidence of the defendant's guilt beyond a
19 reasonable doubt.

20 So what is reasonable doubt in the law? A reasonable
21 doubt is the kind of doubt that would cause a reasonable
22 person to hesitate to act. The State has the burden of
23 proving the defendant guilty beyond a reasonable doubt. Some
24 of you may have served as jurors in civil cases where you were
25 told that it's only necessary to prove a fact that's more

JURY CHARGE

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1 likely true than not true, such as by the greater weight or
2 the preponderance of the evidence. In criminal cases, the
3 State's proof must be more powerful than that. It must be
4 beyond a reasonable doubt.

5 Proof beyond a reasonable doubt is proof that leaves you
6 firmly convinced of the defendant's guilt. There are very few
7 things in this world that we know with absolute certainty, and
8 in criminal cases, the law does not require proof that
9 overcomes every possible doubt. If, based on your
10 consideration of the evidence, you are firmly convinced that
11 the defendant is guilty of the crime charged, you must find
12 the defendant guilty. If, on the other hand, you think there
13 is a real possibility that the defendant is not guilty, you
14 must give the defendant the benefit of that doubt and find him
15 not guilty.

16 There are two types of evidence which are generally
17 presented during the trial. We have direct evidence. We have
18 circumstantial evidence. Direct evidence is the testimony of
19 a person who claims to have actual knowledge of a fact, such
20 as an eyewitness. Circumstantial evidence is proof of a chain
21 of facts and circumstances indicating the existence of a fact.

22 The law makes absolutely no distinction between the
23 weight or value given to either direct or circumstantial
24 evidence nor is a greater degree of certainty required of you
25 of circumstantial evidence than of direct evidence. You

JURY CHARGE

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1 should weigh all the evidence in this case, and after weighing
2 all the evidence, if you are not convinced of the guilt of the
3 defendant beyond a reasonable doubt, you must find the
4 defendant not guilty.

5 Necessarily, you must determine the credibility of the
6 witnesses who have testified in this case. Credibility simply
7 means the witness's believability. It becomes your duty as
8 jurors to analyze and to evaluate the evidence and determine
9 which evidence convinces you of its truth.

10 In determining the believability of witnesses who have
11 testified in this case, you can believe one witness over
12 several witnesses or several witnesses over one witness, you
13 may believe a part of a testimony of a witness and reject the
14 remaining part of that testimony of that same witness, you may
15 believe the testimony of a witness in its entirety, or reject
16 the testimony of a witness in its entirety.

17 You may consider whether any witness has exhibited to you
18 any interest, bias, prejudice, or other motive in this case.
19 You may also consider the appearance and manner of a witness
20 while on the witness stand.

21 The Rules of Evidence ordinarily do not permit witnesses
22 to testify to opinions or conclusions. An exception to this
23 rule exists for witnesses we call expert witnesses, a witness
24 who, by education and experience, has become expert in some
25 art, science, profession, or calling may state an opinion as

JURY CHARGE

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1 to the relevant and material matter in which the witness
2 claims to be an expert and may also state the reasons for the
3 opinion.

4 You should consider any expert opinion received in
5 evidence in this case, and like any other evidence, give it
6 the weight you think it deserves. If you decide that the
7 opinion of an expert is not based upon sufficient education
8 and experience, or if you conclude that the reasons given in
9 support of the opinion are not sound or that the opinion is
10 outweighed by other evidence, you can disregard that opinion
11 entirely.

12 An expert witness's testimony is to be given no greater
13 weight than that of other witnesses simply because the witness
14 is an expert. Further, you're not required to accept an
15 expert's opinion even though it might be uncontradicted.

16 I instruct you and emphasize that the fact that the
17 defendant did not testify is not a factor to be considered by
18 you in any way in your deliberations and in your consideration
19 on the question of the guilt or innocence of this defendant.
20 It must not be considered by you in any manner whatsoever.
21 The defendant has the constitutional right to remain silent,
22 and the assertion of this right must be not considered by you
23 in your deliberations. I repeat: Under your oath, you are to
24 draw no conclusion whatsoever from the fact that the defendant
25 in this case did not testify. The fact that this defendant

JURY CHARGE

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1 did not testify should not even be discussed in the jury room.
2 The burden of proof, as I have stated it, is on the State.
3 The defendant is not required to prove his innocence. The
4 burden of proof remains on the State to prove guilt beyond a
5 reasonable doubt.

6 In order to establish criminal liability, criminal intent
7 is required. For example, the mental state required to be
8 proven by the State for a particular crime might be purpose,
9 intent, knowledge, recklessness, or criminal negligence.
10 Criminal intent must be proven by the State beyond a
11 reasonable doubt.

12 Criminal intent is always a matter that must be
13 determined by the jury from the circumstances surrounding the
14 situation. There is no way to prove intent to a mathematical
15 certainty. There is no way medical science can dissect the
16 person's brain and determine what the person had in mind. So
17 the law says that criminal intent may be inferred from the
18 circumstances shown to have existed. This is how you make a
19 determination of whether or not the element requiring intent
20 was present. It is not necessary to establish intent by
21 directly positive evidence, but intent may be established by
22 inference in the same way as any other fact by taking into
23 consideration the acts of the parties and all the facts and
24 circumstances of this case.

25 Criminal intent is a mental state, a conscious

JURY CHARGE

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1 wrongdoing. It is up to you to determine what the defendant
2 intended to do based on the circumstances shown to have
3 existed. Criminal intent can arise from an action or failure
4 to act. It may arise from negligence, recklessness, or an
5 indifference to duty or consequences that is considered by the
6 law to be the equivalent of criminal intent.

7 Ladies and gentlemen, I remind you that some of the
8 exhibits that have been admitted into evidence have had
9 portions deleted from them for legal purposes and legal
10 reasons, so please do not concern yourselves with the reasons
11 why some portions of the exhibits have been deleted. Please
12 do not speculate upon what the deleted portions might or might
13 not have contained or revealed.

14 The defendant is charged with burglary in the first
15 degree. The State must prove first, beyond a reasonable
16 doubt, that the defendant entered a dwelling without consent.
17 A dwelling is a building -- is any building or portion of a
18 building in which a person ordinarily sleeps. A building
19 constructed as a dwelling that has never been occupied cannot
20 be considered a dwelling for purposes of burglary, but a
21 building is a dwelling even if the residents are temporarily
22 absent from the building.

23 In order to prove that the defendant entered the
24 dwelling, the State does not have to show that the defendant's
25 entire body entered the dwelling. The smallest entry is

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1 sufficient. It may be any part of the body such as a hand or
2 foot or even an instrument, such as a hook or other
3 instrument.

4 In addition, the State does not have to prove that force
5 was used to gain entry. If a person enters a building by
6 using deception, artifice, trick, or misrepresentation to get
7 consent to enter, this is an entry without consent.

8 Next, the State must prove beyond a reasonable doubt that
9 the defendant intended to commit a crime, either a felony or a
10 misdemeanor, at the time of the entry. The mere entry into a
11 dwelling without consent is not burglary. If the intent to
12 commit a crime was formed after the entry, it is not burglary.

13 On the other hand, if the defendant intended to commit a
14 crime at the time of the entry, it is a burglary, even if the
15 intent was abandoned after the entry. It does not matter that
16 the intended crime was not completed.

17 Intent may be shown by acts and conduct of the defendant
18 and other circumstances from which you may naturally and
19 reasonably infer intent.

20 Finally, the State must prove beyond a reasonable doubt
21 that when entering, while in the dwelling or when fleeing, the
22 defendant or an accomplice caused physical injury to anyone
23 not participating in the crime or when entering, while in the
24 dwelling or when fleeing, the defendant or an accomplice used
25 or threatened to use a dangerous object.

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1 If you decline to find the defendant guilty of burglary
2 in the first degree, then you would consider whether or not
3 the defendant would be guilty of burglary in the second
4 degree. So if you find that the State has failed to prove
5 beyond a reasonable doubt that the defendant committed
6 first-degree burglary, you may consider whether the State has
7 proved beyond a reasonable doubt that the defendant committed
8 second-degree burglary.

9 Second-degree burglary includes all the elements of
10 first-degree burglary except that the entry was into a
11 building and not a dwelling. To prove second-degree burglary,
12 the State must prove beyond a reasonable doubt that the
13 defendant entered a building without consent with the intent
14 to commit a crime inside the building. A building is any
15 structure, vehicle, watercraft, or aircraft where any person
16 lodges or lives or where people assemble for the purpose of
17 business, government, education, religion, entertainment,
18 public transportation, or public use or where goods are
19 stored.

20 Finally, the State must prove beyond a reasonable doubt
21 that, when entering or while in the building or when fleeing
22 the building, the defendant or an accomplice caused physical
23 injury to anyone not participating in the crime or, when
24 entering, while in the building, or when fleeing the building,
25 the defendant or an accomplice used or threatened to use a

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1 dangerous object.

2 The defendant is also charged with assault and battery of
3 a high and aggravated nature. A person commits the offense of
4 assault and battery of a high and aggravated nature if the
5 person unlawfully injures another person and great bodily
6 injury to another person results or the act is accomplished by
7 means likely to produce death or great bodily injury.

8 Great bodily injury means bodily injury which causes a
9 substantial risk of death or which causes serious permanent
10 disfigurement or protracted loss of impairment of the function
11 of a bodily member or organ.

12 If you decline to find the defendant guilty of assault
13 and battery of a high and aggravated nature, then you can
14 consider whether the defendant is guilty or not guilty of
15 assault and battery in the first degree. A person commits the
16 offense of assault and battery in the first degree if the
17 person unlawfully injures another person and the act either
18 involves nonconsensual touching of the private parts of an
19 adult, either under or above the clothing, with lewd and
20 lascivious intent, or occurred during the commission of a
21 robbery, burglary, kidnapping, or theft. And "private parts"
22 means the genital area or buttocks of the male or female or
23 the breasts of a female; or a person may also commit the
24 offense of assault and battery in the first degree if the
25 person unlawfully offers or attempts to injure another person,

JURY CHARGE

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1 with the present ability to do so, and the act either is
2 accomplished by means likely to produce death or great bodily
3 injury or occurred during the commission of the robbery,
4 burglary, kidnapping, or theft.

5 "Great bodily injury" means bodily injury which causes a
6 substantial risk of death or which causes serious permanent
7 disfigurement or protracted loss or impairment of the function
8 of a bodily member or organ.

9 If you fail to find the defendant is guilty of assault
10 and battery in the first degree, then you're permitted to
11 consider the defendant's guilt as it relates to assault and
12 battery in the second degree. A person commits the offense of
13 assault and battery in the second degree if the person
14 unlawfully injures another person or offers or attempts to
15 injure another person with the present ability to do so and
16 either moderate bodily injury to another person results or
17 moderate bodily injury to another person could have resulted
18 or the act involves nonconsensual touching of the private
19 parts of an adult, either under or above the clothing.

20 "Moderate bodily injury" means physical injury that
21 involves prolonged loss of consciousness or that causes
22 temporary or moderate disfigurement or temporary loss of the
23 function of a bodily member or organ or injury that requires
24 medical treatment when the treatment requires the use of
25 regional or general anesthesia, or injury that results in a

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1 fracture or dislocation.

2 Moderate bodily injury does not include one-time
3 treatment and subsequent observation of scratches, cuts,
4 abrasions, bruises, burns, splinters, or any other minor
5 injuries that do not ordinarily require extensive medical
6 care.

7 "Private parts" means the genital area or buttocks of a
8 male or female or the breasts of a female.

9 The defendant is also charged with kidnapping. The State
10 must prove beyond a reasonable doubt that the defendant
11 knowingly and unlawfully seized, confined, inveigled, decoyed,
12 kidnapped, abducted, or carried away another person without
13 authority of the law. To do a thing unlawfully is to do it
14 willfully against the law.

15 "Knowingly" means knowledge, consciously, not
16 accidentally.

17 "Seize" means to take hold of, suddenly or forcibly.

18 "Confined" means to limit, restrict, or enclose within
19 bounds, imprison, or shut or keep in.

20 "Inveigle" means lure, entice, or lead astray, by false
21 representations, promises, or other deceitful means.

22 "Decoy" means to lure, by -- or as if by decoy. A decoy
23 is something to entice a person into a trap.

24 "Kidnap" is to remove a person against his will by
25 unlawful force or by fraud.

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1 "Abduct" means to carry off secretly or by force for an
2 illegal purpose.

3 "To carry away" means to remove.

4 The State does not have to prove that the defendant did
5 all these things. Instead, if you find, beyond a reasonable
6 doubt, that the defendant did any of these things, you may
7 find the defendant guilty of kidnapping.

8 Something done without authority of law is something in
9 which the law does not sanction, permit, allow, condone, or
10 provide justification for. The kidnapping does not have to be
11 for any personal or monetary gain, for any illegal purpose,
12 but may be for any reason whatsoever.

13 The defendant is also charged with assault with intent to
14 commit first degree criminal sexual conduct. The State must
15 prove beyond a reasonable doubt that the defendant committed
16 an assault on the victim with the intent to commit
17 first-degree criminal sexual conduct.

18 The first element which the State must prove beyond a
19 reasonable doubt is that the defendant committed an assault.
20 An assault occurs when a person violently or forcefully
21 attempts to hurt or injure another person and has the present
22 ability to complete the attempted injured.

23 An assault is the intentional creation of fear of
24 immediate bodily harm.

25 Next, the State must prove beyond a reasonable doubt that

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1 the defendant intended to engage in a sexual battery with the
2 victim.

3 "Intent" means intending the result which actually
4 occurs, not accidentally, not involuntary. Intent may be
5 shown by acts and contact of the defendant and other
6 circumstances from which you may naturally and reasonably
7 infer intent.

8 A sexual battery is sexual intercourse, cunnilingus,
9 fellatio, anal intercourse, or any intrusion, however slight,
10 of any person of a person's body or any object into the
11 genital or anal openings of another person's body except when
12 the intrusion is accomplished for medically recognized
13 treatment or diagnostic purposes.

14 The State must also prove beyond a reasonable doubt that
15 the defendant intended to use aggravated force to accomplish
16 the sexual battery. "Aggravated force" means the use of
17 physical force or physical violence of a high and aggravated
18 nature to overcome the victim. The defendant -- and that the
19 defendant intended for the victim to be submitted to sexual
20 battery while the victim was also the victim of forcible
21 confinement, kidnapping, robbery, extortion, burglary,
22 housebreaking, or any other similar act or offense.

23 All right. And, Ms. Watts, so you'll be the person as
24 the foreperson of the jury who will preside over the
25 deliberations. In just a moment, I'll ask the attorneys if

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1 they have any objections to the charge on the law, and if not,
2 then we'll send you to your jury room. We'll gather all the
3 evidence and the verdict form, and we'll send it back there.

4 Please don't start discussing this case. Don't talk
5 about this case. No deliberations until the bailiff brings
6 you the evidence and this verdict form.

7 Now, the verdict form is in no particular order. Please
8 don't infer anything from the fact that "guilty" comes before
9 "not guilty" or vice versa; they have to come in some order.

10 There are seven total questions on the verdict form, but
11 there's also instructions. Okay? And the reason there are so
12 many, there's four charges, but two of them -- the first one
13 being burglary, if you don't find the defendant guilty of the
14 burglary in the first degree, then you would consider whether
15 or not he will be guilty of burglary in the second degree.

16 If you do find him guilty of burglary in the first
17 degree, then you wouldn't answer the second degree.

18 And it would be the same for the assault and battery of a
19 high and aggravated nature charge. But those instructions are
20 clearly stated on this verdict form, and if you have any
21 questions, then you'll just send the question out by the
22 bailiff, and we'll help you get that answered. Okay? All
23 right.

24 So, at this time, is there any objections to the charge
25 from the State?

JURY CHARGE

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1 MS. WALTER: None from the State.

2 THE COURT: Any from the defense?

3 MR. FOX: None, Your Honor.

4 THE COURT: All right.

5 All right, ladies and gentlemen. Again, thank you for
6 your patience and your attention and your service this week.
7 It appears that the 12 jurors seem to be healthy enough to
8 continue at this point, and so, at this time, if there's no
9 objection, we're going to ask that the two alternates just
10 remain. Well, if you have anything in the jury room, you can
11 get that, but you're free to leave or you're free to hang
12 around, but you're not going to be allowed to deliberate. All
13 right?

14 And let me just make sure -- we don't need to mess this
15 part up. Brian Lewis?

16 JUROR: Yes.

17 THE COURT: All right. That's the first alternate.

18 And the second alternate is Roger Reinisch.

19 JUROR: Very good. Thank you.

20 THE COURT: All right. Well, thank y'all so much for
21 your service this week. Don't worry about calling back
22 tonight. Okay?

23 JUROR: Don't worry.

24 THE COURT: All right. Is there anything further?

25 MS. WALTER: Not from the State, Your Honor.

JURY CHARGE

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1 MR. FOX: No, Your Honor.

2 THE COURT: All right. Please wait until we deliver the
3 evidence. Okay? All right. Thank you.

4 (The jury exited the courtroom at 2:48 p.m.)

5 MS. WALTER: And, Your Honor, we have already reviewed
6 the evidence and agreed to what was admitted. There were only
7 two exhibits from the State that were not. They are not going
8 back to the jury, and none of the defense exhibits were
9 admitted. So those are all ready to go back.

10 THE COURT: All right. And, for the record, I have
11 everything but is it 36 --

12 MS. WALTER: 36 and 60, I believe it was.

13 THE COURT: -- and 60.

14 MS. WALTER: No, 35 --

15 THE COURT: And 46.

16 MS. WALTER: 35 and 60. 35 is the Miranda form from
17 Cooper and Amos. 36 was the consent to search which went in
18 the first day.

19 THE COURT: All right. So I have 35.

20 MS. WALTER: 35 and 60 were not admitted.

21 THE COURT: All right. And 46 is the redacted interview;
22 right?

23 MS. WALTER: Correct.

24 And, Your Honor, we have the court laptop in case they
25 want to view the interview.

JURY QUESTION

600

1 THE COURT: All right. And this is the verdict form.

2 MS. WALTER: Oh, we have it. I'm sure you didn't change
3 it. Oh, for her.

4 (Clerks exited the courtroom at 2:52 p.m. with exhibits
5 for the jury.)

6 (2:57 p.m.)

7 JURY QUESTION

8 THE COURT: Can we have the definition to the charges?

9 MS. WALTER: Isn't that what we just did?

10 MR. FOX: I think what they're requesting -- we might
11 need clarification. I think what they're requesting is maybe
12 a printed version.

13 MS. WALTER: Oh, a printed copy.

14 MR. FOX: That's what I'm guessing.

15 BAILIFF ROPP: That is what -- that's what they asked me,
16 but they didn't write it the way they asked me.

17 MS. WALTER: The State never has any opposition to that.

18 MR. FOX: I'd just defer to the Court on those. Some
19 judges do, some don't. I don't specifically have an objection
20 to it.

21 THE COURT: I mean, the only issue I have right away is
22 that -- I have marked on some of these.

23 MS. WALTER: I have Wite-out and then we can photocopy
24 it.

25 (Clerk and Court confer off the record.)

JURY QUESTION

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1 MR. FOX: Or you can tell them that you can recharge
2 anything you need to.

3 THE COURT: Yeah, I understand. We can tell them no
4 also. I'll just get this straight real quick, and we'll give
5 it to them, if that suits...

6 MR. FOX: Yes, sir.

7 (A brief recess was taken at 2:59 p.m., awaiting the
8 verdict.)

9 THE COURT: All right. So I'm just going to place this
10 on the record. Question from the jury is: Can we have the
11 definitions to the charges? So I'm not sending the entire
12 jury charge, just the criminal offenses that were charged.

13 MR. FOX: Yes.

14 THE COURT: And I have printed a new copy with no -- all
15 the deletions were done on the computer at this point, so it's
16 only what I charged to the jury.

17 The second question is: Can we have speakers? And we're
18 going to send the speakers.

19 MR. FOX: Yes.

20 MS. WALTER: Thank you.

21 MR. FOX: Sounds good, Your Honor. Thanks.

22 THE COURT: And I'm going to make these notes Court's
23 exhibits.

24 MS. WALTER: Yes.

25 THE COURT: 7 and 8.

VERDICT

602

1 (Court's Exhibit No. CT-7, Jury Question/Note, was
2 received into evidence.)

3 (Court's Exhibit No. CT-8, Jury Question/Note, was
4 received into evidence.)

5 (A brief recess was taken from 3:07 p.m. to 4:14 p.m.)

6 THE COURT: All right. Are we ready for the jury?

7 MR. FOX: Yes, Your Honor.

8 (The jury entered the courtroom at 4:25 p.m.)

9 VERDICT

10 THE COURT: All right. Ms. Watts, has the jury reached a
11 verdict?

12 MADAM FORELADY: Yes, we have, Your Honor.

13 THE COURT: And is the verdict unanimous? Did all 12
14 agree?

15 MADAM FORELADY: Yes.

16 THE COURT: All right. Madam Clerk?

17 (Court reviews the verdict.)

18 THE COURT: All right. Madam Clerk, if you'll publish
19 the verdict.

20 THE CLERK: Indictment Nos. 2018-GS-26-4177,
21 2018-GS-26-4178, 2018-GS-26-4179, and 2018-GS-26-4180, State
22 of South Carolina, County of Horry, versus Demetrius Lawon
23 McClary, as to the charge of assault and battery of a high and
24 aggravated nature, we, the jury, unanimously find the
25 defendant guilty.

VERDICT

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1 As to the charge of burglary in the first degree, we, the
2 jury, unanimously find the defendant not guilty.

3 As to the charge of burglary in the second degree, we,
4 the jury, unanimously find the defendant guilty.

5 As to the charge of kidnapping, we, the jury, unanimously
6 find the defendant guilty.

7 As to the charge of assault with intent to commit
8 criminal sexual conduct, we, the jury, unanimously find the
9 defendant not guilty.

10 Signed by the foreperson, Gwen Watts, dated May 13th,
11 2022.

12 Ladies and gentlemen of the jury, if this is your
13 verdict, so signify by raising your right hand.

14 (Jurors comply.)

15 THE CLERK: Thank you.

16 THE COURT: All right. Is there anything from the State?

17 MR. FOX: No, Your Honor.

18 THE COURT: All right. Anything from the defense?

19 MR. FOX: Yes, Judge. At this time, I would renew
20 previous motions and objections and request the Court to set
21 aside the guilty verdicts as being against the clear weight of
22 the evidence and move for a new trial on those charges, Your
23 Honor.

24 THE COURT: All right, sir. Is there anything before we
25 release the jury?

VERDICT

604

1 MR. FOX: No, sir.

2 THE COURT: From the State?

3 MS. WALTER: No, Your Honor.

4 THE COURT: All right, ladies and gentlemen. Again,
5 thank you so much for your time, your service, your patience,
6 your attention. These matters couldn't have been resolved
7 this week without you here and working on behalf of the
8 citizens of Horry County and our system of justice. I can
9 only thank you for that.

10 As I have told you this whole week, at this time, you're
11 welcome to do whatever it is that you need to do. You're free
12 from jury service. You're welcome to leave. You're welcome
13 to stay for sentencing, and you're also welcome to talk to
14 anybody you'd like to about this case, but, also, you have the
15 absolute right not to talk to anybody at all. If you have any
16 trouble whatsoever regarding your jury service, you can let us
17 know or let law enforcement know, and it will be handled. I
18 promise you that. Okay?

19 Again, thank you for your service. And I don't know --
20 we're going to take up sentencing here in the next few
21 minutes, so you're welcome to either get your things out of
22 the jury room and come back around in the courtroom or you can
23 stay here. You're free to go. Anything you'd like to do.

24 But thank you again for your service. And when you get
25 the check that they send you for this week, don't blame it on

SENTENCING

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1 me; I don't have anything to do with that. Okay? But thank
2 you again for your patience and your service and your
3 dedication.

4 MS. WALTER: We're just waiting on the sentencing sheets,
5 Your Honor.

6 THE COURT: So that will be a few minutes. You're
7 welcome to -- I don't know if y'all have anything back there.
8 If you want to stay or go, that's up to y'all.

9 (Pause in the proceedings.)

10 THE COURT: Mr. Bailiff, if I could ask you to bring the
11 evidence back in the courtroom. Will you bring the evidence
12 back in the courtroom?

13 (Pause in the proceedings.)

14 MS. WALTER: Your Honor, we just have to use the printer
15 downstairs.

16 THE COURT: That's fine.

17 (Pause in the proceedings.)

18 THE COURT: Ms. Walter, if you will hand me the pictures.

19 MS. WALTER: Absolutely. There might be a couple of
20 documents mixed in.

21 THE COURT: All right. Thank you.

22 (Pause in the proceedings while the Court reviews
23 documents. Sentencing sheets handed to the judge.)

24 SENTENCING

25 THE COURT: All right. Ms. Walter, I'll be happy to hear

SENTENCING

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1 from you.

2 MS. WALTER: Thank you, Your Honor.

3 Obviously, Your Honor has presided over the trial, has
4 heard all of the evidence, saw Ms. Hernandez-Diaz's testimony.
5 She does not wish to address the Court. I think you can tell
6 from her testimony that this still deeply affects her and is
7 very difficult for her to talk about.

8 The defendant does have prior convictions for strong
9 armed robbery and for trespassing. I'd also like to note one
10 piece of evidence that we were not permitted to bring into
11 trial because of a violation of policy at the jail was that,
12 while the defendant was in jail, he sent a letter out saying,
13 if you can just get that Mexican I beat up not to show -- that
14 victim I beat up not to show, I'll be fine; I have got some
15 Mexicans in here working on it.

16 So I think that that, coupled with the sheer violence of
17 this attack, goes to show his true nature. The fact he is a
18 continuing threat -- I will also note that, since he has been
19 in custody, he recently picked up charges for indecent
20 exposure because he was masturbating in front a female
21 detention officer, despite being told to stop and stand down.

22 He also has been charged with causing damage to the jail
23 because he then, at some point, had a fit and kicked the door
24 and caused damage to the cell door.

25 My information is that, as recently as Friday, he was

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1 still engaging in indecent exposure behavior. We believe, at
2 this point, that the defendant has earned the full weight of
3 the sentences, and we would ask that you sentence to -- 30
4 years, I believe, is max on the kidnapping.

5 THE COURT: Mr. Fox?

6 MR. FOX: Well, I'll start with the last first. I'd ask
7 Your Honor not to consider charges that are not even served
8 warrants and certainly nothing that he's been convicted of.
9 So anything at the jail. I think if you take any person,
10 certainly a young man -- not to justify behavior; there are
11 rules at the jail and it is detention, but take a young man at
12 19 and put him away for four years, you know, when you cage a
13 person, you sometimes get animalist behavior. I'd ask Your
14 Honor to consider only his previous convictions.

15 Judge, he's 23 years old now. He has been in jail since
16 his arrest in March of 2018. That's 1,514 days. We would ask
17 that he be given credit for his pre-sentencing detention.

18 Judge, no need to belabor or go back over what we heard
19 this week. There's no justification. There's no explanation.
20 I'm simply asking, in mitigation, for Your Honor to show, even
21 if you believe he's not deserving, mercy. Mercy at hardest
22 and best given I believe when it is maybe least deserved. I
23 had to memorize the Shakespeare Merchant of Venice speech:
24 The quality of mercy is not strained, and it's twice blessed:
25 It blesses the person who gives and the person who receives.

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1 Demetrius, I think, he's here answering for the very
2 worst thing that he has done and one of the worst things that
3 can be done. This is not his whole life, however. He's
4 answering for his worst. I believe that there is still
5 something worthy in him because I believe that about all of
6 us.

7 I think the interview you saw with Detective Morrell
8 comes closest to who he is, which is recognizing exactly what
9 he had done and being genuinely remorseful. Yes, sorry, that
10 he was going to be punished. And I think Your Honor has had a
11 chance to watch him this week. He has been quiet and meek,
12 and I believe it is more than just "I'm afraid I'm about to go
13 to jail." He is genuinely remorseful. He cannot undo what he
14 has done.

15 And I would just say, in context, that if Mr. McClary --
16 there's always plea negotiations, as Your Honor knows. And I
17 won't get into details about that, and that's certainly
18 conditioned in part on not making the State and Ms. Hernandez
19 come to trial, but that considering everything that was known
20 about this case at the time and his background, the offer was
21 in the range of about half of his maximum exposure. We
22 understand circumstances have changed because now he had a
23 trial, and he did not take advantage of that opportunity, but
24 I do think it's important for the Court to have some sense of
25 where we were, knowing everything that we know about this

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1 case.

2 The last thing I'll say, Judge, again, this is no
3 justification, but I have not had this case for four years,
4 but our office has, so I'm very familiar with it. I'm not
5 aware, in that entire time, that any family members or friends
6 or anyone has been there to support Mr. McClary. He,
7 unfortunately, does not seem to have that in his life. Again,
8 that does not justify what has happened, but I think it gives
9 some insight into how we ended up here. I do not know if he
10 wishes to addresses Your Honor.

11 Do you wish to say anything?

12 THE DEFENDANT: Yes, Your Honor. I'd like to say I'm
13 sorry for what happened and everything, and I just wish
14 everybody have a blessed day before we leave. That's all I
15 have to say. Bless everybody's family and everything. Just
16 watch over our kids and everything. And just want to keep it
17 silent, sir. That's it.

18 THE COURT: All right, sir.

19 THE DEFENDANT: Sorry.

20 THE COURT: All' right. Is there anything further?

21 MS. WALTER: No, Your Honor.

22 MR. FOX: No Your Honor.

23 THE COURT: You know, the evidence speaks for itself.
24 It's inexcusable, the worst situation. There's worse things
25 that could happen, but the complete randomness of this attack

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1 really troubles me, to be honest with you.

2 Mr. McClary, the sentence of the Court on Indictment No.
3 2018-GS-26-04177 for assault and battery of a high and
4 aggravated nature, sentence of the Court is that you're
5 committed to the State Department of Corrections for a term of
6 20 years, given credit for the time that you have served. And
7 that's to run concurrent with Indictment No. 2018-GS-26-04179
8 for kidnapping. Sentence of the Court is that you're
9 sentenced to the State Department of Corrections for a term of
10 30 years, given credit for the time that you have served.

11 And on Indictment No. 2018-GS-26-04178 for burglary in
12 the second degree, violent, the sentence of the Court is that
13 you're committed to the State Department of Corrections for a
14 term of five years, and that that will run consecutive to the
15 kidnapping.

16 Good luck to you, sir.

17 THE DEFENDANT: Yes, sir. Appreciate it, sir.

18 THE COURT: Mr. Fox, I'm going to go ahead and deny your
19 motions. I think there's evidence in the record that supports
20 the jury's findings and their verdicts. For that reason, I'll
21 deny your motions.

22 MR. FOX: Understood.

23 MS. WALTER: Thank you, Your Honor.

24 THE COURT: All right.

25 (Court's Exhibit No. 9, Charges, was marked for

SENTENCING

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1 identification.)

2 (At 4:54 p.m., the above trial concluded.)

3 - end of transcript -

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1 CERTIFICATE OF COURT REPORTER

2
3 State of South Carolina)
4 County of Horry)

5 RE: State v. Demetrius McClary (Volume 4)
6

7 I, Bobbi J. Fisher, Registered Professional Reporter
8 (RPR) and Official Court Reporter III for the State of South
9 Carolina, do hereby certify that the foregoing is a true,
10 accurate and complete Transcript of Record of the proceedings
11 had and evidence introduced in the trial of the captioned case
12 in the Court of General Sessions for Horry County, South
13 Carolina, on the 13th of May, 2022.

14
15 Submitted: August 8, 2022
16

17 

18 /s/ Bobbi Fisher

19 Bobbi J. Fisher, RPR

20 Official Court Reporter III
21

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1 State of South Carolina) **TRANSCRIPT OF RECORD**
2 COUNTY OF HORRY) CASE NO. : 2018-GS-26-04177
3 4179, 4180
4 EVIDENTIARY HEARING

5 -----

6 February 23, 2022

7 **BEFORE:** The Honorable Frank Addy

8 -----

9
10 State of South Carolina,
11 vs.
12 Demetrus McClary,
13 Defendant.

14 -----

15 **APPEARANCES:**

16 Mary-Ellen Walter and Leigh Andrew,
17 Assistant Solicitor,
18 For the State.

19 Eric Fox, Assistant Public Defender,
20 For the Defendant.

21 Julie A. Kevish
22 Official Court Reporter

23

24

25

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1 **P-R-O-C-E-E-D-I-N-G-S**

2 MR. ADDY: We're going to go on the record, if we
3 may, and I believe this is involving the State versus Demetrus
4 McClary, I think the warrant numbers are 2018A2620600812
5 through 815. The record, of course, will reflect that Mr.
6 McClary is present with Mr. Fox.

7 MS. WALTER: Your Honor, I can put the indictment
8 numbers on the record, if you'd like.

9 THE COURT: Sure, if you got those go ahead, please.

10 MS. WALTER: Sure. These are true billed
11 indictments.

12 2018-GS-26-04177 charging ABHAN 4178 charging burglary in the
13 first degree, 4179 charging kidnapping and 4180 charging
14 assault with intent to commit CSC in the first degree.
15 Your Honor, this is my trial partner, Leigh Andrew.

16 THE COURT: Mr. McClary, my name is Frank Addy, I'm a
17 judge from Greenwood. They've sent me down here to hold court
18 this week and we're going to address several motions that were
19 filed on behalf of your attorney and your previous attorney,
20 but before we go there I had heard yesterday, and I just want
21 to have a brief conversation with you about this, I heard
22 yesterday that there was some hesitancy on your part to attend
23 these proceedings. I had asked your attorney to talk to you
24 about that and to encourage you to be here, and obviously, you
25 are here today. I'll tell you that I've had your lawyer's job,

1 I've had Ms. Walker's job, I've had this job for about 12 years
2 now, and it's in the position that your lawyer is in, you're
3 going to be at a very bad disadvantage when this case is tried
4 in a couple of weeks, you're going to be at an extreme
5 disadvantage if you decide that you're not going to show up,
6 okay.

7 THE DEFENDANT: I'm gonna show up, sir.

8 THE COURT: You're gonna show up? Okay.

9 THE DEFENDANT: I just was paranoid yesterday
10 about -- I was just thinking too hard about something. I
11 haven't been in a car for, like, four years and everything.

12 THE COURT: Sure. And I do know that this case has
13 got some age on it, Mr. McClary, but thankfully, you know,
14 resolution in some fashion is going to happen in a couple of
15 weeks and obviously you've got a good lawyer there who's going
16 to be in a position to defend you on this thing and obviously
17 you need to be present and work with him and work with
18 everybody else, okay, that would definitely be in your benefit.
19 There was also some talk about possibly wanting to represent
20 yourself. Have you did decided against that?

21 THE DEFENDANT: No, me and Eric Fox, we just got in a
22 little debate and everything, so.

23 THE COURT: Okay, but you're comfortable going
24 forward with his representation? I just don't want this issue
25 to arise two weeks from now when the case is called for trial

1 and have some other judge have to address that.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Okay. So you're comfortable with him
4 continuing to represent you and that's your final answer,
5 right?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Good enough, fair enough. You can have a
8 seat, Mr. McClary. We've got a couple of motions that we have
9 to address. I'm more than happy to take them in whatever order
10 y'all want to go in but I do note that there's a couple of
11 interviews that were taken of Mr. McClary with law enforcement.
12 There's the DNA thing. Solicitor, how do you want to proceed?
13 Mr. Fox, how do you all want to proceed?

14 MS. WALTER: I want to make sure we're all on the
15 same page. So taking care of the Faretta Hearing. So my
16 understanding, the motion to suppress the DNA. Related to that
17 is the motion to suppress the buccal swab taken from the
18 defendant, a motion to suppress, and it was never clarified but
19 I'm imagining the second statement that the defendant gave, a
20 motion to suppress any in court identification and then a
21 motion to suppress a letter that the defendant sent out of the
22 jail but then was returned through the jail.

23 So my preference, so that we don't have witnesses
24 jumping up and down, and also to accommodate my forensic DNA
25 analyst who came from Columbia, is to do the motion to suppress

1 the DNA. The buccal swab was taken during the first interview,
2 and Your Honor will see that when we do the Jackson V. Denno
3 hearing. So I would prefer to do the DNA motion first, but if
4 Your Honor wants me to put up the detective simply to say he
5 consented, here's the form, and then he'd get back on the stand
6 for the statement, that's fine.

7 THE COURT: Mr. Fox, do you have any preference? Are
8 we okay to do the DNA?

9 MR. FOX: Judge, not a strong one. I think logically
10 it makes sense to deal with the threshold issue if Your Honor
11 were to rule that the consent for the swab was not voluntary,
12 then the rest is unnecessary because there would be no swabs
13 and no tests, but I don't have a strong objection because Ms.
14 Walter is correct, that was done through his interview with
15 Detective Amos which we'll be dealing with in the Jackson V.
16 Denno hearing, so Your Honor's preference.

17 THE COURT: I have no preference whatsoever,
18 whatever's easiest and I'll defer to you then, Ms. Walker.

19 THE DEFENDANT: Excuse me, sir, may I say one thing?

20 THE COURT: Speak to the him if you could real quick
21 before you say anything.

22 THE DEFENDANT: So I can't speak for myself right now
23 about something, just one thing?

24 THE COURT: Tell your lawyer first what you're gonna
25 speak about and then I'll hear you out, okay, but everything is

1 being written down here and if you say something --

2 THE DEFENDANT: So if I say something it won't be
3 written down?

4 THE COURT: It will. If you say it to him it won't
5 be written down but if you say it out in open court it will be
6 written down by this lady and that can be used against you at
7 trial.

8 THE DEFENDANT: I wanna say something real quick.

9 THE COURT: Just tell him first what you want to say
10 and then he'll give you the okay to say it or suggest that you
11 not, okay?

12 THE DEFENDANT: I'm gonna say it out loud so you'll
13 be able to hear it too.

14 THE COURT: Let me just caution you just stay away, I
15 would caution --

16 THE DEFENDANT: It won't be anything crazy, you know
17 what I'm sayin', but speaking of the DNA and everything, they
18 have pictures of my shoes, supposedly.

19 MR. FOX: Stop. Now you're talking about evidence
20 and I would advise you not to comment on anything.

21 THE DEFENDANT: There's blood stains on my shoes.

22 THE COURT: You don't need to be talking.

23 THE DEFENDANT: They never DNA tested it, they never
24 DNA tested it. They accused me of beating up this woman, you
25 feel what I'm sayin', stomping this woman and hitting this

1 woman but they never tested these the shoes to see if there was
2 really blood on these shoes. For some reason I got mud stains
3 on these shoes, you feel what I'm sayin', and a little bit of
4 smears on these shoes, but they never DNA tested it so how
5 could they bring it up in trial, do you feel what I'm saying?

6 THE COURT: Your lawyer, I'm sure will be addressing
7 that at some point in time by way of argument. It's best if
8 you let him do it, okay?

9 THE DEFENDANT: Well, he needs to DNA test these
10 shoes to see if this is positive blood or whatever it is but he
11 never DNA tested it.

12 MR. ADDY: Fair enough. Let him deal with that and
13 before any witness gets off the stand, if you want to tell him
14 something you can tell him something if you feel like he hadn't
15 covered anything, okay, but you don't need to be talking right
16 now. Alright? That's just friendly advice. Call your first
17 witness, Solicitor.

18 MS. WALTER: I will, and Your Honor, and I would also
19 just ask that the Court instruct the defendant to face forward
20 and not turn back towards the gallery which is filled with our
21 witnesses.

22 THE COURT: I understand.

23 MR. FOX: Your Honor, the motion to suppress any
24 identification, there has not been -- that was a motion that
25 was filed before my representation, I'm not aware of any out of

1 court identification that would lead to that motion. I don't
2 know what the witness would do in court in trial, but I don't
3 believe that's an issue that needs to be addressed so I'm
4 withdrawing the motion as far as any out of court
5 identification.

6 THE COURT: Very good.

7 MS. WALTER: Your Honor, I have a Form 4 for that.

8 THE COURT: You can get it to me later, I think we'll
9 be alright.

10 MS. WALTER: Thank you, Your Honor.

11 THE COURT: And just to let you know, I've got Norah
12 Rudin, R-u-d-i-n who has joined us on Webex.

13 MS. WALTER: I did want to put one other thing on the
14 record. The defendant has already been arraigned on a plea
15 offer of ABHAN of a recommended sentence of 10 to 15 years. So
16 clearly he rejected and indicated the desire to go forward at
17 Mr. Fox's request and in an effort to resolve his case that is
18 almost four years old the state agreed to re-extend that offer.
19 Originally the deadline had been yesterday. As we know, the
20 defendant refused to participate yesterday so I would like to
21 put on the record that that plea offer, unless it is accepted
22 right now is off the table forever, there will no more plea
23 offers.

24 THE COURT: You've discussed, Mr. Fox, that offer
25 with Mr. McClary, I assume?

1 MR. FOX: I have, Your Honor.

2 THE COURT: And he's declining to accept it?

3 MR. FOX: Unless he's changed his mind, yes, I
4 believe so, he can correct me if I'm wrong. Yes, I believe he
5 has declined it.

6 THE COURT: Mr. McClary, you understand they've got
7 an offer on the table of 10 to 15 years to wrap up everything.
8 It would be ABHAN charge, of course, you get credit for the
9 four years that you've been in jail against that 10 to 15 year
10 sentence. It is your desire to reject that offer, though, and
11 proceed to trial?

12 MR. FOX: Talk to the judge.

13 THE DEFENDANT: So even though I said I did it, which
14 I didn't do, I just was paranoid at the time, you feel what I'm
15 sayin', but I didn't do anything. I just took the charge for
16 somebody but you said 10 years, 10 to 15 years, right?

17 THE COURT: It would be 10 to 15 years, do you need a
18 moment to talk to your lawyer about it at this point? I mean,
19 if you want 10 minutes I'm more than happy to give you ten
20 minutes, just you and he can huddle up and y'all can discuss
21 whether you're interested in accepting that.

22 THE DEFENDANT: If I take 10 to 15 right now how much
23 would you give me?

24 THE COURT: I'd really have to --

25 THE DEFENDANT: I mean, I didn't do anything. What

1 kind of plea would I take?

2 MS. WALTER: The state would not oppose an offered
3 plea.

4 THE DEFENDANT: So you wouldn't drop it down to 10 on
5 assault battery first degree?

6 MS. WALTER: No, the state is not willing to offer
7 assault and battery first but just so that the record is clear
8 and this was clear on the arraignment, as he is currently
9 charged, if convicted on all charges then if a judge runs the
10 sentences consecutively he would face life in prison and
11 lifetime sex offender registry. The ABHAN charge, we are
12 limiting his exposure by a recommended sentence, obviously Your
13 Honor could choose not to follow it, to 10 to 15 years and it
14 would not require sex offender registry.

15 THE COURT: Mr. McClary, let me try and explain this
16 to you, then I'm gonna take a break and I'll let you talk to
17 your lawyer, okay?

18 THE DEFENDANT: Alright.

19 THE COURT: As a matter of policy I accept
20 recommended sentences. Okay? So your total exposure on this
21 would be no more than 15 years but no less than 10 years, so I
22 could give you 10 years, I could give you 12, 11, 13, 14, 15, I
23 would have to before I decided how much time to give you, I
24 would have to hear from the solicitor, I would have to hear
25 from the person who was assaulted, I would then hear from you,

1 your family, your attorney and I would simply make a decision,
2 but my range would be 10 to 15 years, so I would not go over
3 more than 15 years. Okay?

4 THE DEFENDANT: Alright.

5 THE COURT: Let's assume worse case scenario, if I
6 gave you 15 years, and I'm just throwing this out there because
7 that's worst case scenario because that's what you'd be looking
8 at, alright? You'd be entitled to the four years that you
9 spent in jail off the top of that, so generally speaking, you'd
10 be looking at 11 years in terms of calculating your
11 eligibility, alright? ABHAN is an 85 percent, so you'd be
12 looking at 85 percent of 10, 15 years, minus that time. And
13 the way I understand that they do it at SCDC that sometimes it
14 gets crazy with them, the way I understand they do it at SCDC
15 is they take the four years off, like the 15 year sentence, and
16 then calculate the 85 percent against the 11 years that you'd
17 be looking at serving, so quick math, around nine years, maybe.
18 Okay? That's kind of how it would play out if, worst case
19 scenario you got the full ten, alright? So what we're going to
20 do is I'm going to go off the record because I have not heard a
21 yes or I have not heard a no but if there is a way that we can
22 resolve this to everyone's satisfaction and it gets resolved
23 then I think that's a good use of time. An offered plea, Mr.
24 McClary, is basically a plea whereby the state is making you an
25 offer and you feel like even though you're maintaining your

1 innocence, you feel like the offer is so darn good that you'd
2 be a fool to pass it up and you agree that there is sufficient
3 evidence out there that would warrant possibly a conviction by
4 a trial jury. Okay, so you basically agree that there's
5 evidence out there that could be used against you and it is
6 sufficient to convict you and you'd simply rather take the
7 state's offer than risk going to trial, that's kind of how an
8 offered plea works, alright?

9 THE DEFENDANT: Alright.

10 THE COURT: So I'll let you and your attorney have
11 about ten minutes to chat about this and I'm assuming they can
12 either do that out here or in the holding area in the back or
13 somewhere private, but y'all talk for about ten minutes and
14 I'll be back on the record, we'll say at about 10:00, okay?

15 MR. FOX: Okay. Thank you.

16 THE COURT: We'll be at ease.

17 (Recess taken.)

18 THE COURT: Mr. Fox, where do we stand?

19 MR. FOX: I think, Your Honor will need to talk to
20 Mr. McClary and get that final answer.

21 THE COURT: Sure, Mr. McClary, what are your
22 thoughts?

23 THE DEFENDANT: Well, I'm sorry, but they have to DNA
24 test them shoes first, they have to. I can't take no plea
25 right now. Once they DNA test them and everything then --

1 THE COURT: Sure.

2 THE DEFENDANT: Is it too late for DNA testing, you
3 think, give me some time to DNA test the shoes? They never DNA
4 tested it.

5 THE COURT: Mr. McClary, I really can't speak to
6 that. What I do know is two things. First of all, understand
7 that the state is not obliged to extend any kind of offer to
8 anyone. Okay? There is no obligation for them to make any
9 kind of offer on any case. The only thing a defendant can do
10 is either plead straight up or go to trial, and there's no
11 requirement, again, that the state extend to you any kind of an
12 offer. The offer that they've extended expires momentarily if
13 you don't take it. So if we move forward with the motions to
14 suppress that your lawyer is going to argue here shortly then
15 the offer is off the table and you will not be able to accept
16 it later. I can't speak to the DNA testing of the shoes, Mr.
17 McClary, I don't know how long that would take. I have viewed
18 the video, the statement that you gave to the police and
19 everything else, and honestly, you know, if the jury hears that
20 video, my personal opinion, and I imagine Mr. Fox may have
21 explained this to you --

22 THE DEFENDANT: Yes, sir.

23 THE COURT: -- but if the jury hears what you told
24 the officer, that's probably going to be the primary argument
25 that the solicitor uses at trial in their effort to convict

1 you, alright, and I'm just putting it out there for you.

2 THE DEFENDANT: May I ask you --

3 THE COURT: Sure.

4 THE DEFENDANT: I don't know your name.

5 THE COURT: Frank Addy.

6 THE DEFENDANT: Mr. Frank Addy, well, during the
7 first interview, right, I didn't have any cuts or anything on
8 my hand and anything, due to the pictures that were shown to me
9 I would have had blood and everything on my clothes and
10 everything, you feel what I'm saying?

11 THE COURT: I understand.

12 THE DEFENDANT: That's one of the reasons why I'm not
13 taking the plea because it's more to the story. There's really
14 more to the story.

15 THE COURT: That's fine.

16 THE DEFENDANT: It's something I knew about but I
17 didn't do anything, I just took the charges for someone and I
18 was 19 years old at the time and just --

19 THE COURT: Mr. McClary, if you're not guilty of this
20 charge I'm going to tell you what I tell everybody, if you're
21 not guilty of this charge then you should go to trial, that is
22 my personal belief, but at the same time, if there is evidence
23 out there, understand, you know, that there is evidence out
24 there that's damning or otherwise hurts you a lot, you need to
25 give the offer some serious consideration and perhaps accept

1 it, and again, whether you choose to take it under an offered
2 plea or not, that's entirely your decision. Your lawyer
3 doesn't have to do the time, I don't have to do the time,
4 solicitor doesn't have to do the time, you're the one that's
5 going to have to do the time. So if you want to accept the
6 offer I need: Yeah, I want to accept it, or: No, I don't want
7 to accept it, from you pretty much right now. I mean, that's
8 where we are.

9 THE DEFENDANT: I can't, you know what I'm saying?

10 THE COURT: Alright, fair enough.

11 THE DEFENDANT: I don't want to be in here anymore,
12 sir.

13 THE COURT: I'm sorry?

14 THE DEFENDANT: I don't want to be here anymore.

15 THE COURT: In the courtroom?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Do you want to return to the jail?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you understand the hearing will go
20 forward in your absence and you might have information that you
21 can convey to your attorney. If you're not here in the
22 courtroom you won't be able to talk to him or convey it to him.
23 Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: May I ask why you don't want to be here?

1 THE DEFENDANT: Well --

2 THE COURT: Your lawyer would prefer to have you
3 here. I'd prefer to have you here. I think it would be best
4 for you. All you have to do is be a bump on a log and it's got
5 to be more comfortable. That chair has got to be more
6 comfortable than the detention center, okay?

7 THE DEFENDANT: Right.

8 THE COURT: I think it would be in your best interest
9 because you have a right to be present and I think it would be
10 in your best interest to get an idea of what evidence could be
11 possibly be coming forward at trial so you can help your lawyer
12 down the road deal with that evidence. I really think it's in
13 your best interest to stay here.

14 THE DEFENDANT: Well, you see, Mr. Frank Addy, I
15 mean, there's nothing that I can say to you about it because
16 those shoes have not been DNA tested, that's automatically,
17 boom, I don't want to continue with something I didn't do, you
18 know what I'm sayin'?

19 THE COURT: I understand.

20 THE DEFENDANT: On my shoes, they got like little
21 marks and everything on them, little mud stains and stuff like
22 on them. I mean, the jury's gonna convict me regardless but if
23 the results come back negative, boom.

24 THE COURT: We're not talking about the shoes.

25 THE DEFENDANT: Well, that's the only -- that's

1 what's going to get me convicted because they didn't DNA test
2 it. If it comes back negative then I'll be able to go to my
3 trial but --

4 THE COURT: We're talking about whether you stick
5 around --

6 THE DEFENDANT: This victim that has been assaulted
7 says she's been stomped, kicked, punched, all types of stuff so
8 I don't have any cuts on my hands, I didn't have nothin', I
9 didn't have anything, like no blood or anything.

10 THE COURT: Let me speak for just a moment. We're
11 not talking about that, we're not talking about the shoes at
12 this point. We're talking about whether you remain here in the
13 courtroom or whether you return to the detention center. Okay?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Will you please stay here?

16 THE DEFENDANT: I can't, sir.

17 THE COURT: You really don't want to stay here?

18 THE DEFENDANT: No, sir.

19 THE COURT: You understand that you've got the right
20 to be here, it's to your benefit to be here, you need to be
21 here, you need to hear the testimony. That's going to help you
22 down the line. If you choose not to come to court and listen
23 to this testimony that puts your attorney at a disadvantage, it
24 puts your case at a disadvantage. I don't know why you would
25 want to hurt your own case.

1 THE DEFENDANT: I'm not trying to hurt my own case.

2 THE COURT: Well, then will you please stay?

3 THE DEFENDANT: I have one more thing to say, sir.

4 THE COURT: Well, let's handle this first and then
5 we'll hear that other thing. Are you willing to stay here?

6 THE DEFENDANT: No, sir.

7 THE COURT: What's the last thing you want to say
8 before you go?

9 THE DEFENDANT: Can you check to see what those true
10 bill indictments are on? Did they go in front of a grand jury?

11 THE COURT: Sure, I'll be happy to check.
12 do you have those indictments, Madam Clerk?

13 MS. WALTER: They're downstairs, but Your Honor, I
14 can give you my copies that are stamped true bill.

15 THE DEFENDANT: I don't believe they're official.

16 THE CLERK: I can get the originals brought up here.

17 MS. WALTER: Do you want to look at them first, Your
18 Honor?

19 THE COURT: Yes. Mr. McClary, according to this, the
20 indictments were presented to the grand jury on, it looks like
21 July 25th of 2018, and it looks like the foreperson of the
22 grand jury did issue a true bill on all four of them.

23 THE DEFENDANT: Is Drew Verson (phonetic), the
24 signature at the bottom, is that the same person who wrote the
25 name Justin Amos on top as a witness?

1 THE COURT: I can't speak to that but if you feel
2 like there's some problem or there's some defect in the
3 indictments then prior to the jury being sworn your lawyer
4 would file a motion to quash the indictments, and that would
5 simply be heard by the trial judge. Okay?

6 THE DEFENDANT: What would a federal judge say about
7 that right there?

8 THE COURT: Federal judge? They would probably say
9 the same thing I'm saying, but I'm not a federal judge, nor do
10 I want to be. Do you want to stay or do you want to go?

11 THE DEFENDANT: I want to go, sir.

12 THE COURT: Have a nice day.

13 THE DEFENDANT: You too, sir.

14 THE COURT: Yes, sir. The record will reflect that
15 Mr. McClary has decided not to participate in these
16 proceedings, as is his right. He does have the right to waive
17 his appearance and he has done so despite my pleas and requests
18 that he remain with us, and therefore, Solicitor, if you'll
19 call your first witness.

20 MS. WALTER: Your Honor, the state calls David
21 Bailey.

22 THE COURT: The record will reflect that because I'm
23 on Webex I think I'm supposed to record this so I went ahead
24 and hit record even though, of course, we have the court
25 reporter present, so we are being recorded on Webex and we

1 still have Eric Fox and Norah Rudin present.

2 MS. WALTER: Your Honor, I apologize, before we
3 begin, I did speak with Mr. Fox before court started this
4 morning and he agreed that we did not need to present the
5 actual physical evidence as in the scrapings, the wig, the
6 glasses, et cetera. Just if you're wondering why we're not
7 doing that.

8 THE COURT: No, not at all.

9 THE CLERK: Please state your name for the Court.

10 THE WITNESS: David Bailey.

11 MS. WALTER: May I, Your Honor?

12 **DAVID BAILEY WAS DULY SWORN AT THIS TIME AND**

13 **TESTIFIED AS FOLLOWS:**

14 **DIRECT EXAMINATION**

15 BY MS. WALTER:

16 Q. Where do you work?

17 A. Myrtle Beach Police Department.

18 Q. How long have you been there?

19 A. Twenty-two years.

20 Q. Did you have any prior law enforcement experience?

21 A. Yes, ma'am, in West Virginia.

22 Q. How many years in West Virginia?

23 A. Approximately five years there.

24 Q. What is your current assignment at Myrtle Beach?

25 A. Crime scene investigations.

1 Q. How long have you been in crime scene investigations?

2 A. A little over 14 years.

3 Q. What are some of your duties and responsibilities as a
4 crime scene investigator?

5 A. Process crime scene for any evidence, physical evidence,
6 photographs of the scenes, document the scene.

7 Q. And I won't go into detail on the training since this is
8 just a pretrial motion, but have you had training specific to
9 some of the duties of that of a crime scene investigator?

10 A. Yes, ma'am, I have, quite a lot.

11 Q. Were you called to the scene of an assault at the
12 Sheraton in Myrtle Beach in Horry County on March 20th, 2018?

13 A. Yes, I was.

14 Q. And what was your assignment when you were called to the
15 scene?

16 A. To process the scene for any and all physical evidence,
17 photograph and document the scene.

18 Q. What did you see when you got there? Where did you go
19 in the hotel, first of all?

20 A. It was on -- when I got to the room there was I guess
21 like a janitorial cart in front of the room and I noticed when
22 I was walking towards the room the door was open to the room
23 and officers had secured the area and I walked up, I saw the
24 cart, there was a little blood on one of the towels on the cart
25 and from there I started documenting, photographing the scene.

1 I photographed the cart, entered the room, took overall
2 photographs of the entire room and then backed out and got
3 ready for the initial processing of the scene.

4 Q. So you've described that there was like a janitorial
5 cart outside of the room with blood on one of the towels.

6 A. Yes.

7 Q. Can you describe the condition of the room when you
8 walked in?

9 A. When I walked in the front door there was like a vacuum
10 cleaner hooked up. It was partially in the bathroom. The cord
11 was all sort of pulled out of it. The closet door when you
12 walk in the bathroom, it was the first door on the left,
13 there's a closet door that was partially opened. There was a
14 piece of an, I don't know if it was an ironing board that had
15 fallen down. It looked to have been a struggle, and then the
16 bathroom was, you know, covered with blood all over the floor
17 also.

18 MR. FOX: Your Honor, before we get too far with many
19 potentially hours and hours of motions, I'm not sure that we
20 need to go through the collection on the objection as to the
21 testing and science and what was done at SLED. Obviously,
22 these will be trial issues as far as chain of custody and
23 everything but I'm not challenging the chain at this point,
24 we're just strictly on issue about what SLED did, how they did
25 it and interpretation, so I don't know that we need to try this

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1 case twice and go through collection of all of the evidence and
2 photographs and all of those things.

3 THE COURT: So you'll stipulate as to the collection
4 of it for purposes of this hearing and this hearing alone and
5 the issues of chain and things like that that can be handled at
6 trial is what you're basically saying, if you do in fact
7 interpose an objection at trial?

8 MR. FOX: Yes.

9 MS. WALTER: And just so that I'm clear, then the
10 defense expert is not going to make any sort of issue over how
11 evidence was collected, because if she is --

12 THE COURT: Well, were they going to testify in this
13 hearing?

14 MR. FOX: Yes, Your Honor.

15 MS. WALTER: That's Dr. Rudin who's on the Webex.

16 MR. FOX: It would be with one specific item. I
17 mean, we'll just stay with there were two pairs of glasses
18 recovered on the scene that were tested and they yielded what
19 SLED says the positive result for DNA and potentially for Mr.
20 McClary.

21 THE COURT: But that would be the only item that you
22 have issue with?

23 MR. FOX: Yes.

24 THE COURT: Why don't we limit it to the glasses
25 then, two pairs of glasses.

1 MS. WALTER: Okay. I'll trim it down but I still
2 think we need to actually establish that he collected certain
3 items of evidence.

4 BY MS. WALTER:

5 Q. So after you took the overall photographs and you went
6 back into the room did you notice anything that you considered
7 to be of evidentiary value?

8 A. Yes, mainly in the bathroom. When you look in standing
9 at the door looking in the bathroom there was a real small
10 yellow towel on the floor and there was two pair of glasses,
11 one next to the tub like a bigger pair and another set next to
12 the commode and the glasses, the lenses had popped out of them
13 and were on the floor.

14 Q. Had the lens been popped out of both sets of glasses or
15 just the one?

16 A. Just the one I recall.

17 Q. So you talked about a yellow cloth and two sets of
18 glasses, was there anything else that caught your interest?

19 A. Just shoe impressions and blood on the floor.

20 Q. If I showed you a crime scene photograph would that
21 refresh your recollection as to anything else that might have
22 been recovered?

23 A. Yes, ma'am.

24 Q. So now I'm going to take that away. Does that refresh
25 your recollection as to another item that was recovered that

1 day?

2 A. Yes, ma'am.

3 Q. What else was recovered that day?

4 A. It was a rainbow colored wig out of the bathtub.

5 Q. Why did the wig and the two pairs of glasses catch your
6 interest?

7 A. They looked like they didn't belong. It's just not
8 something you would see in the bathroom.

9 Q. Did you in fact collect the wig and the two pairs of
10 glasses?

11 A. Yes, ma'am, I did.

12 Q. When you collected the two pairs of glasses how did you
13 collect them?

14 A. I placed them in a paper bag.

15 Q. Did you place them in separate bags or in one bag?

16 A. I placed them in one bag.

17 Q. Thinking back, if you had to do this again would you
18 place them in one bag again?

19 A. Yes, ma'am, I would have.

20 Q. Why would you place them both in one bag?

21 A. Just to conserve any type of DNA on each pair of glasses
22 you so it wouldn't get mixed up or contaminate a result.

23 Q. You put both pairs of glasses in one bag?

24 A. Yes, ma'am.

25 Q. Would it have made more sense looking back to put each

1 pair of glasses in its own separate bag?

2 A. Oh, yes, of course.

3 Q. But at the time you put them both in the same bag?

4 A. Yes.

5 MS. WALTER: Nothing further for this witness then.

6 THE COURT: Mr. Fox?

7 MR. FOX: Thank you.

8 **CROSS-EXAMINATION**

9 BY MR. FOX:

10 Q. Mr. Bailey, specifically, why would it have been better
11 to put each pair of glasses in its own bag?

12 A. To keep whatever evidence was on each pair of glasses
13 separate from the other pair of glasses.

14 Q. And what is the danger if they're not separated?

15 A. Just multiple contributors, contaminated evidence.

16 Q. Contaminated evidence, okay. And when you say multiple
17 contributors, in other words, more than one person may have
18 left DNA?

19 A. Yes.

20 Q. And if you put two items, in this case, glasses in the
21 same, there might be transfer contamination between the items?

22 A. Yes.

23 Q. Thank you.

24 THE COURT: Thanks, you can step down.

25 MS. WALTER: Is there not going to be any objection

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1 to the collection of the victim's standard and the fingernail
2 scrapings?

3 MR. FOX: Not at this time, no.

4 MS. WALTER: And you'll stipulate that they were
5 submitted to SLED, I forgot to ask you that?

6 MR. FOX: Yes.

7 MS. WALTER: The state calls Adrienne Hefney, Your
8 Honor.

9 MR. FOX: Your Honor, I'm told that Ms. Dr. Rudin is
10 still unable to hear, and she will need to be able to hear
11 Adrienne Hefney's testimony.

12 THE COURT: Dr. Rudin, are you able to hear?

13 DR. RUDIN: Yes, sir.

14 **ADRIENNE HEFNEY WAS DULY SWORN AT THIS TIME AND**
15 **TESTIFIED AS FOLLOWS:**

16 THE COURT: State your name and spell your last name
17 for the Court.

18 THE WITNESS: Adrienne Hefney.

19 THE COURT: Go ahead, Solicitor.

20 MS. WALTER: Thank you, Your Honor.

21 **VOIR DIRE**

22 BY MS. WALTER:

23 Q. Adrienne Hefney, where do you work?

24 A. With the South Carolina Law Enforcement Division, more
25 commonly known as SLED.

1 Q. How long have you worked there?

2 A. In November it will be 25 years.

3 Q. Well almost congratulations. And what is your current
4 assignment at SLED?

5 A. I'm a SLED Forensic DNA Analyst.

6 Q. What does a Forensic DNA Analyst do?

7 A. We analyze biological evidence that was left behind at a
8 crime scene and we make comparisons to known standards that
9 were received from the people involved in the case.

10 Q. Can you just go into a little bit more detail about what
11 is a known standard?

12 A. Usually it's a buccal swab which is a swab taken from
13 the inside of your cheek but we can also use blood taken
14 directly from your vein known as a known blood standard.

15 Q. What is the purpose of having that DNA standard?

16 A. That is what we use to compare to the evidence to see
17 who contributed the evidence left behind.

18 Q. What is your educational background?

19 A. I have a bachelor of science degree in biology from the
20 University of South Carolina. I also have a master's of
21 business administration degree from Winthrop University. I've
22 taken post-graduate courses in the field of molecular biology
23 and population genetics. Each year we go to attend a
24 conference or have to have at least eight hours of continuing
25 education to stay abreast of any changes in the field of DNA

1 analysis.

2 Q. Did you receive any training when you first became a
3 forensic DNA analyst for SLED?

4 A. I did. I was trained by a court qualified analyst.

5 Q. Can you describe the training program that you were
6 required to go through?

7 A. Yes. I actually trained way back when when we were
8 doing what's known as RFLP analysis and I got all the way
9 through that training and then we switched to PCR analysis, and
10 what that is, you're trained to, one, identify a stain, so we
11 would do serology testing, and then to isolate the stain which
12 would be cutting it out, and then subsequently extracting DNA
13 evidence from it, or DNA profile from it, and then running the
14 profile and then interpretation of it.

15 Q. So when you first started as forensic DNA analyst did
16 they just say, you're a DNA analyst?

17 A. No.

18 Q. So what type of testing or double checking, checks and
19 balances, did you have to go through?

20 A. It's about two years worth of training. One is
21 shadowing court qualified analyst and they give you when you
22 work samples on your own but supervised with that same court
23 qualified analyst, and then from there you take competency
24 tests and written tests to understand everything that goes on
25 in the field of DNA analysis, and also, since being trained

1 once we come online we are required to take proficiency tests
2 twice a year doing all the tests that we normally do in case
3 work.

4 Q. So at the end of that initial two-year training program
5 was there a competency exam given?

6 A. Yes, there was.

7 Q. Did you pass that competency exam?

8 A. I did.

9 Q. And the tests that you take twice a year, have you
10 always passed those?

11 A. I have.

12 Q. In your almost 25 years as a forensic DNA analyst can
13 you estimate how many times you have examined DNA? And if you
14 can't, that's just a ballpark.

15 A. It's over thousands and thousands of samples at this
16 point.

17 Q. So let's talk a little about DNA.

18 MS. WALTER: Your Honor, some of this I'm doing just
19 for the record. I'm sure that Your Honor is well familiar with
20 some of this.

21 Q. Can you just describe briefly what DNA is?

22 A. Sure. DNA stands for Deoxyribonucleic acid and what it
23 is is a chemical found in the cells of our bodies that
24 basically make us who we are. Now, a lot of us, we have the
25 same DNA, the DNA that comes from us being human, such as two

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1 arms, two legs, two eyes, but of course, you look around this
2 courtroom, everyone looks different, so we each have a unique
3 DNA profile. The only two people that would have the same DNA
4 profile would be identical twins. We get the DNA that we have
5 in ourselves half from our mother and half from our father, and
6 that's what makes us unique.

7 Q. Does a person's DNA remain constant throughout their
8 life?

9 A. Yes.

10 Q. Is there any way to change it if you wanted to? Like,
11 if I wanted to change my DNA profile could I do that?

12 A. No. In certain instances if you receive like a blood
13 transfusion your DNA may change there but it will be a mixture
14 in certain cases, but for the most part it remains stable
15 throughout your lifetime.

16 Q. When you are able to identify that there is DNA on an
17 object or on an item of evidence are you able to tell when it
18 was placed there?

19 A. No.

20 Q. And what types of fluids or substances can be tested for
21 DNA?

22 A. We normally test for blood, semen, saliva, hair, skin
23 cells, bone, teeth, you know, anything with biological
24 material.

25 Q. Are you familiar with the term, touch DNA, or trace DNA?

1 A. I am.

2 Q. What does that refer to?

3 A. That's typically skin cells that have been slothed off
4 and you usually find it on like ownership DNA, what we say,
5 with someone that's wearing something. Like, I'm wearing my
6 glasses so if someone were to come and swab the nose area of
7 the glasses you should expect to find my DNA. Same as my coat
8 jacket, if you swab around the neck of it or the sleeves where
9 my skin has been in constant contact with the material, you
10 should expect to find my DNA. That's known as ownership DNA as
11 well as touch DNA. Now, a more example of touch DNA in some
12 cases where, say, I'm sitting here and I touch this and I may
13 rub it or something like that, I'm doing something with the
14 wood on this stand. If someone was to come behind me, swab the
15 exact area that I touched they may find my skin cells. They
16 may not because it depends on if I'm moisturized or if I have
17 dry skin or if I'm slothing skin cells, how hard I rubbed it,
18 all of that depends when you're talking about touch DNA.

19 Q. So if you are testing an actual, I'll use the term
20 "substance," from a body, so blood, hair, teeth, saliva, you
21 are pretty sure you'll be able to develop a DNA profile?

22 A. Fairly confident, I mean, if there's enough sample
23 there.

24 Q. But now, if you are testing for ownership DNA or the
25 touch DNA, like you touched the witness stand, are you

1 guaranteed that you will be able to extract the DNA profile?

2 A. No, because again, it just depends on how well if you're
3 slothing off skin cells, how hard you rubbed it, you know,
4 whether you left skin cells behind or not.

5 Q. And you had said that we get half of our DNA profile
6 from our mother and half from our father. Is there a way to
7 isolate those two halves of DNA?

8 A. There is. It's known as Y-STR testing. We use that a
9 lot of times in sexual assault cases where you have an over
10 abundance of female DNA and a trace amount of male DNA. With
11 Y-STR testing it strictly targets the male lineage in the DNA.

12 Q. So as a female, I would not have a Y-STR DNA profile?

13 A. No, Y's are a male.

14 Q. Can you describe the processes that SLED uses first to
15 extract any potential DNA profile?

16 A. Yes. We add chemicals to it that will release a DNA
17 into solution. At this point we have automated extraction
18 procedures that purify the DNA so it removes any extra cell or
19 material from there and you have a purified DNA profile or DNA
20 in the two. From there we'll quantitate it and that just means
21 we'll see how much DNA that we're working with. If it's a lot
22 we may dilute it to get a DNA profile that's not overblown. If
23 it's a low DNA profile we may concentrate it to see if we can
24 bring up the yield of DNA and then we will put in what you call
25 a Thermal Cycler. That's like, if you think of a xerox copier

1 for DNA, you theoretically, a PCR we could have a pinhead size
2 stain, so say we put that pinhead size stain in terms of a
3 copier, one piece of paper on there, and it's a glorified heat
4 block, basically, that heats up and cools down and extends to
5 DNA and makes multiple copies of it. Just like the xerox copy
6 makes multiple copies of a page, it doesn't change the page,
7 you just have more copies of it so you can have a book, say.
8 Same with DNA, it makes excessive copies of it so we'll be able
9 to get a DNA profile.

10 Q. And you have used the term PCR, what do you mean?

11 A. Polymerase chain reaction, that is the type of DNA
12 testing that we use now.

13 Q. Is that type of DNA testing new?

14 A. Not anymore. We've been using it at SLED now since
15 about 1999 or so, roughly 1999, 2000 or so.

16 Q. Had it been used in places other than SLED prior to
17 1999?

18 A. I'm sure it was.

19 Q. Has it been subjected to I guess verification testing to
20 ensure that it's reliable?

21 A. Yes.

22 Q. Has the process itself ever been deemed not reliable
23 that you know of?

24 A. Not that I know of, no.

25 Q. Has SLED's method of analysis gained acceptance in the

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1 scientific community?

2 A. Absolutely.

3 Q. Has it been found scientifically reliable?

4 A. Yes.

5 Q. And is SLED accredited by any organizations?

6 A. We are.

7 Q. Can you tell us about those accreditations?

8 A. We are an accredited -- well, the ANAB accredits SLED
9 forensic laboratory as a whole. We're also accredited by CALEA
10 as the law enforcement side of the agency, and as far as a DNA
11 lab we are also accredited by the quality assurance standard
12 set forth by the FBI, and so that is where we have certain
13 standards that we have to meet as a DNA laboratory before we
14 can ever release a report, because I'm actually an auditor for
15 FBI QAS standards, so we travel, you know, periodically to
16 other labs in the nation to make sure that they are following
17 the standards when they're doing the DNA analysis.

18 Q. So you've actually been selected by the FBI to, I guess,
19 double check other labs?

20 A. Yes. I'm a qualified DNA DAB auditor.

21 Q. And I just want to make sure the court reporter is
22 getting it. You said that SLED as a whole or SLED DNA lab is
23 accredited by ANAB?

24 A. Yes, ANAB, I forget what it stands for, American
25 National Accreditation Board, and it's on each one of our

1 reports at the bottom and they accredit the lab as a whole
2 including DNA case work or DNA laboratory, and then also we are
3 accredited further by the FBI quality assurance standards, DNA
4 advisory board.

5 Q. And you also mentioned CALEA which is the acronym of
6 C-A-L-E-A, that's more of a law enforcement accreditation
7 process?

8 A. Yes, but also touches on the forensic lab. Just as a
9 whole the law enforcement agency is accredited.

10 Q. Has SLED ever failed to maintain accreditation?

11 A. No, not to my knowledge, not since I've been there.

12 Q. Are there quality assurance processes in place when a
13 forensic DNA analyst is conducting their work?

14 A. Yes. We have what's known as controls that we use. We
15 have an extraction control which is known as reagent blank that
16 we do everything to it that we do to the samples and it should
17 be a clean sample once its gone through the process. We also
18 have amplification controls. That's when we're adding reagents
19 that we're going to use to copy it multiple times. It's known
20 as a positive control and a negative control. The negative
21 should be clear, the positive controls is a set genotype or DNA
22 profile that we know a known DNA profile that we can look and
23 make sure that it is what it is supposed to be as well.

24 Q. And so that's the machinery, and maybe machinery is not
25 quite a sophisticated enough word, but the machinery is tested

1 using those different checks and balances?

2 A. Well, we put the chemical in the actual tubes that we
3 put on the instrument that makes the xerox copies and that is
4 done with all our controls, as well, starting from extraction
5 all the way through the amplification.

6 Q. Is that done every time you conduct an analysis?

7 A. Every time.

8 Q. What, if any, procedures do you do to guard against
9 cross-contamination?

10 A. Cross-contamination, we make sure that we're not opening
11 evidence and standards at the same time, so we separate those
12 by time and space, if you cut evidence first and you cut
13 standards later. We double check our run to make sure to make
14 sure nothing has interfered with each other. When we use
15 STRmix software we have a database that's run to see if any
16 contamination could have occurred as well between staff and the
17 sample. Those are just -- and analysts also look at their work
18 to make sure nothing happened. And our controls, because we
19 know the negative should be negative and the positive should
20 have a specific DNA profile, we can tell if anything happened
21 with the procedure there as well.

22 Q. Now, you said that you separate evidence and standards
23 by time and space. Do you also separate different items of
24 evidence by time and space?

25 A. Yes. We open one case at a time, make sure instruments,

1 I mean what we use in the cut and everything is cleaned in
2 between and decontaminated. So we do those procedures when
3 we're DNA testing as well.

4 Q. And generally speaking, when you receive evidence to be
5 tested do you take any sort of precautions before opening up a
6 particular piece of evidence?

7 A. Yes. We have personal protective equipment on, we
8 decontaminate our work space, we're, again, opening one package
9 one case at a time.

10 Q. Is there anything about a particular package that you
11 look at to make sure that it hasn't been tampered with?

12 A. Yes. We make sure it's sealed. It should be sealed
13 with the initials and date of the person that sealed it.

14 Q. Have you ever been certified as an expert in forensic
15 DNA analysis?

16 A. I have.

17 Q. And again, if you're not able to give us an exact
18 amount, approximately how many times?

19 A. It's getting close to 90 times, about 88, 89 times at
20 this point.

21 Q. Have any times been in general sessions court?

22 A. General sessions, federal, civil, all.

23 MS. WALTER: Your Honor, at this time we would
24 proffer Agent Hefney as an expert in forensic DNA analysis and
25 for a finding that the processes that she uses are reliable.

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1 THE COURT: No objection?

2 MR. FOX: Not to her qualifications and whether the
3 processes are reliable at the entire point of --

4 THE COURT: Right, I'll acknowledge that they're --
5 the defense arguments are going to be garbage in, garbage out,
6 the manner in which it was collected is problematic, I'm
7 assuming that you're not taking issue at this point with
8 internal procedure that they use to analyze the evidence?

9 MR. FOX: That is correct.

10 MS. WALTER: Right.

11 THE COURT: We have an understanding to where we are
12 then.

13 MR. FOX: Yes, sir.

14 **DIRECT EXAMINATION**

15 BY MS. WALTER:

16 Q. So now, moving directly to this case, were you assigned
17 to perform DNA analysis on items related to this case?

18 A. I was.

19 Q. Did that have two SLED lab ID numbers, L18-09696 and
20 L19-17807?

21 A. That's correct.

22 Q. Can you tell us why there were two lab numbers assigned
23 to this case?

24 A. Apparently the L18-09696 came in first, and then
25 additional evidence was submitted and somehow not connected to

1 the previous case. So typically when a local agency submits
2 evidence, if they have to do two separate submissions they will
3 submit it under the same lab number as before, or our evidence
4 control technicians will check the names to make sure something
5 that has been submitted before is linked to what's being
6 submitted now, but that didn't happen in this case, so when
7 that doesn't happen we're still able to link the two cases by
8 that information.

9 Q. So does the assigning of lab numbers happen at intake
10 then?

11 A. Yes.

12 Q. And so let's jump ahead. After your examinations do you
13 create a report?

14 A. That's correct.

15 Q. And did you reduce your findings to a report?

16 A. I did.

17 MS. WALTER: And Your Honor, I believe you had a copy
18 of this attached to the state response. It was e-mailed and
19 placed in your box on August 13th of 2021.

20 MR. FOX: And Judge, I don't doubt the solicitor has
21 said this was an amended report. She's given us the dates
22 when, I do not see it. My expert is telling me that she
23 doesn't have a copy of this so I'm looking in our database,
24 everything should be scanned in, they're usually very diligent
25 about that, but I'm looking to see because it's not in my trial

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1 notebook which I could have easily overlooked it, but I do not
2 recall seeing any amended report. Ms. Crawford who was the
3 previous attorney does not, so if we could have just a couple
4 of minutes to see.

5 THE COURT: Sure.

6 MS. WALTER: Your Honor, I think I just said this to
7 Mr. Fox and Agent Hefney can certainly explain it. On page
8 three of our report dated August 12, 2021, she simply added the
9 phrase: The major contributor to. It's like the second line
10 on the page. So none of the findings changed, she simply added
11 the words: The major contributor.

12 THE WITNESS: That's correct.

13 MR. FOX: That's the only thing?

14 MS. WALTER: That's the only thing that's changed.

15 MR. FOX: Okay.

16 (State's Exhibit No. 1 was marked for identification.)

17 Q. I'm showing you what has been marked as State's Exhibit
18 1 which is a DNA Report dated August 12, 2021. Is that a copy
19 of your final report?

20 A. It is.

21 Q. And you have a copy for yourself that you're referring
22 to?

23 A. I have a copy as well.

24 MS. WALTER: Your Honor, I would ask that State's
25 Exhibit 1 be admitted into evidence.

1 THE COURT: No objection?

2 MR. FOX: Well, Judge, I do. I have not verified
3 that I have it. I don't doubt that it was documented on their
4 end. The error might be on my end but the error also might be
5 on the solicitor's end. I do not that I can find a copy of
6 that report. I see that's it's only a word or two but my --
7 and so Your Honor understands, Dr. Rudin is listening in and
8 texting us with certain questions or observations and one of
9 the communications we just received was, look, obviously she
10 needs to see this herself and any supporting documentation or
11 notes that underlie that addition, change amendment.

12 MS. WALTER: Well, I can certainly put on Ms. Hardy
13 who is right in the courtroom who is the one who prepared the
14 supplemental discovery who placed it into the Public Defender's
15 box and who e-mailed it to Scott Graustein who was representing
16 the defendant at the time.

17 THE COURT: Let's do this. Let's go ahead and get
18 this transmitted to their expert. Is it possible to just send
19 this as a single item in an e-mail to defense counsel and they
20 can forward it right now?

21 MR. FOX: Judge, it's how it's labeled, so again, I
22 wasn't disputing that it was, in fact, sent, just had to
23 verify. So I do, in fact, see it and we can get it to Dr.
24 Rudin. okay?

25 THE COURT: You can go ahead and transmit it to her

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1 and then wait for confirmation that she's gotten it before we
2 move forward with more testimony.

3 MR. FOX: Yes, sir.

4 THE COURT: Doctor, they are going to transmit this
5 to you here shortly and you should be getting it. Okay?

6 DR. RUDIN: Yes. I will look for it on my e-mail.
7 Thank you.

8 THE COURT: No worries. I'm just going to leave you
9 un-muted, or un-mute yourself when you get it and we'll move
10 forward. Okay?

11 DR. RUDIN: Yes.

12 THE COURT: Let us know.

13 DR. RUDIN: So Judge, the e-mail has come through. I
14 haven't had a chance to read it yet but I do see the document.

15 THE COURT: You do have it then?

16 MR. FOX: Yes.

17 THE COURT: Good enough. The doctor has received it,
18 so if you want to continue.

19 MS. WALTER: Again, I'm moving for admission of
20 State's Exhibit 1.

21 THE COURT: It is in evidence.

22 MS. WALTER: Thank you.

23 (State's Exhibit No. 1 was admitted into evidence.)

24 MS. WALTER: Thank you.

25 Q. So can you talk specifically about this case, what did

1 you do when the case was first assigned to you?

2 A. I examined the evidence and did DNA extraction from
3 there.

4 Q. When you first examined the evidence did you go through
5 all of the protocol that you previously described looking at
6 each piece of evidence ensuring that it was sealed --

7 A. Yes.

8 Q. Cleansing your area --

9 A. Absolutely.

10 Q. -- and guarding against cross-contamination?

11 A. Yes.

12 Q. Did you fail to follow any of the protocol that you have
13 previously described?

14 A. I did not.

15 Q. Had you failed to follow one of the protocols or if on
16 peer review someone had determined that you failed to follow
17 protocol, would that have been noted some place?

18 A. Yes.

19 Q. So when you were first assigned this case are you given
20 any information about the case?

21 A. We are provided most times with an incident report that
22 we read sometimes and then most times we don't, we just start
23 extracting to find out, we have an analysis request here that
24 determines what the submitting agency is requesting to be done
25 to this evidence. So for example, in this case they submitted

1 a buccal swab from Demetrus McClary, in exam request column it
2 says: DNA known standard; fingernail scrapings, it just says
3 DNA fingernail scrapings/clippings. And so that just
4 determines what type of tests, what we're going to do when we
5 get the actual piece of evidence.

6 Q. And again, jumping ahead a little bit, what conclusions
7 are you able to make after you do your analysis and
8 examination?

9 A. I can determine whether or not, one, I got a DNA profile
10 from the items, and two, who may have contributed the DNA
11 profile to those items.

12 Q. So are all DNA profiles suitable for comparison?

13 A. No.

14 Q. So is that a conclusion that you might draw that you
15 have a DNA profile and either it is suitable or is not suitable
16 for comparison?

17 A. That's correct.

18 Q. If it is suitable for comparison is that the point at
19 which you would compare it to a known standard?

20 A. That's correct.

21 Q. And then once you compare it to a known standard do you
22 assign any sort of -- are you required to assign any sort of
23 statistical weight to it?

24 A. We are.

25 Q. You mentioned a software program earlier in your

1 testimony, STRmix, can you tell us what STRmix is?

2 A. Absolutely. STRmix is a software program that we
3 recently started using, maybe about two or three years ago,
4 that enables us to better interpret complex mixtures. So
5 before, there was strict criteria of what we could and could
6 not interpret. It had to meet a certain level before we were
7 able to use that statistically. STRmix allows us to use low
8 level profiles and that helps us because in forensics we often
9 get low level profiles and low level mixtures, and we were
10 throwing away a lot of valuable evidence because the criteria
11 was so strict that we couldn't call certain things if it was
12 below a certain level or not. STRmix allows us to do that and
13 it allows us to provide a statistical weight to it known as a
14 likelihood ratio.

15 Q. I want to pick apart a couple things you said there.
16 You said that you guys were throwing away a lot of useful
17 evidence. Were you using that as a figure of speech or
18 actually throwing away the evidence?

19 A. Absolutely a figure of speech.

20 Q. Okay, meaning that you were --

21 A. It was uninterpretable.

22 Q. You weren't able to report any sort of findings on it
23 other than you can't report a finding?

24 A. Correct.

25 Q. And you were talking about levels of DNA and low levels

1 of DNA. What do you mean when you use those terms?

2 A. Low level DNA is when you have, and it's usually found
3 in mixtures but some single -- samples can be low level where
4 you have very little DNA. You have enough to get maybe a
5 partial profile but not a complete full profile of DNA that
6 rises above the set threshold.

7 Q. So when you talk about a partial DNA profile do you have
8 to have a particular amount of a partial profile? That's
9 probably not the best way to phrase it, but do you have to have
10 a certain amount of DNA before you're even able to --

11 A. We do. As far as STRmix itself we do not use any
12 profile below eight loci or eight chromosomal locations that we
13 look at.

14 Q. And with STRmix, is STRmix -- let me rephrase that. Can
15 you talk about proposition sets as used with STRmix?

16 A. Yes. So proposition sets, each standard that we have
17 generates a proposition set and the proposition sets are broken
18 down into what we say "HP," and just that means prosecution
19 hypothesis, it doesn't by any means mean that we even know what
20 the prosecutor's hypotheses will be. It's just a term that in
21 general in any court case you're going to say that the person
22 on trial is in this sample, whereas the defense is going to say
23 anybody else other than my client is in this sample, and that's
24 known as the "HD". So each proposition set has an "HP," or a
25 prosecutor's hypotheses, and an "HD," defense hypotheses. The

1 HP, again, will say, if it's a mixture of two people it will
2 say the person on trial and an unidentified unrelated person is
3 in this mixture of two people. And then the defense hypotheses
4 will say two unidentified unrelated people are in this mixture,
5 it has nothing to do with my client. That is just how we set
6 up each individual proposition set. And again, as I said
7 before, each standard, so in this case we've got a buccal swab
8 from Demetrus McClary and buccal swabs from Liliana
9 Hernandez-Diaz. That was set up a proposition set each.

10 Q. So in other words, you'd have one proposition set for
11 the defendant and one proposition set for Liliana
12 Hernandez-Diaz?

13 A. That's correct.

14 Q. And then with those proposition sets how do the results
15 come out? In other words, in days past it used to be, you know
16 there's a one in quadruple gabillion chance that this DNA
17 profile matches a particular person. How does STRmix, or how
18 do you report the reports of the STRmix?

19 A. STRmix is what's known as a likelihood ratio. So that
20 means that given the evidence which is the DNA profile, this is
21 more likely to have happened. If you think about, a lot of
22 times I use as an example, if you have two children in a house,
23 one is under the age of one and not walking yet, one is over
24 the age of three, walking climbing on everything and you have a
25 plate of cookies on the counter, all the cookies are eaten and

1 the kids are pointing to, of course, the three-year-old saying,
2 well, the baby must have eaten it. Well, what's the
3 likelihood? The one that could walk and climb up to the
4 counter to get the cookies or the one that's not even walking
5 yet that's crawling on the floor, how could they get up there
6 to get the cookies? That's just how we phrase what a
7 likelihood ratio is. Given that the cookies are eaten, that's
8 your evidence, what's more likely to have happened? The three
9 year old ate them or the one who's not walking yet ate them?

10 Q. Okay. And then are you able to assign any level of
11 support if one hypothesis is more likely than the other?

12 A. Yes. That's known as our verbal scale and we put a
13 verbal scale on each report that contains STRmix results and
14 it's used on the last page on the notes section, and it just
15 gives given if you have a likelihood ratio over a million,
16 that's very strong support. You can have a likelihood ratio of
17 one and that's just uninformative, we can't say whether that
18 person is in there or not. Two to 99, you have very weak
19 support, so it's just a verbal scale that goes to that. And
20 even if the defense's hypothesis comes to be the primary one
21 there is a verbal scale to support that as well.

22 Q. And am I correct when I say that STRmix is kind of like
23 a calculator. I'm using kind of layman's terms for this, but
24 STRmix is used to calculate the likelihood ratio, correct?

25 A. That's correct.

1 Q. Is that something that if you were given as much time as
2 you wanted that you could do without using STRmix?

3 A. Yes, if I was given a whole lot of time, yes.

4 Q. And then SLED would be even more backed up, right?

5 A. Yes.

6 Q. So then for this case did you, in fact, examine a number
7 of items?

8 A. I did.

9 Q. So let me direct you first to, you said, I believe, that
10 you received two standards, one from the defendant to be
11 Demetrus McClary and one from the victim, Liliana
12 Hernandez-Diaz?

13 A. Yes.

14 Q. Were you, in fact, able to develop DNA profiles from
15 those two items that were suitable to use as known standards?

16 A. I was.

17 Q. Are those the standards that you used to compare to the
18 evidence in this case?

19 A. They were.

20 Q. And I know normally I'm showing you all of your
21 evidence. We're going to do it a little bit differently here
22 today. Did you examine or analyze swabs that had been taken
23 from two pairs of glasses that had been submitted to SLED?

24 A. I did.

25 Q. Now, if you have the magic wand and were able to tell

1 how things were collected, should the two glasses had been
2 collected together?

3 A. No.

4 Q. And why not?

5 A. Because you could have a transfer of DNA. It's just
6 good practice to package evidence separately. Just like you
7 wouldn't package standards with evidence, you shouldn't package
8 evidence together either, especially if you don't know the
9 origin of where they came from.

10 Q. So were those swabs, were those swabs taken from both
11 glasses combined or were they swabbed separately?

12 A. It was one swab from the entire two pair of glasses.

13 Q. As a result of the fact that they had been collected
14 together?

15 A. Well, not one swab but swabs from entire two pairs of
16 glasses because they were packaged together.

17 Q. So you're not trying to say DNA came from one pair of
18 glasses versus another, you're just talking about the glasses
19 combined, the two pairs.

20 A. Combined, correct.

21 Q. So directing your attention specifically to the swabs
22 from the entire two pairs of glasses, would that be your item
23 number under the L18 lab number, 2.1?

24 A. Yes.

25 Q. Can you tell us, first of all, were you able to develop

1 a DNA profile suitable for comparison from those swabs?

2 A. I was.

3 Q. Did you or did STRmix generate two different proposition
4 sets for those swabs?

5 A. Yes. I set up the proposition sets myself and analysts
6 also determine how many contributors they feel like are
7 contributing to the profile based on the number of peaks that
8 we have in the DNA profile. So in this instance, I determined
9 that this mixture was originating from two individuals. So my
10 proposition set one, the prosecutor's hypothesis is Liliana
11 Hernandez-Diaz, an unidentified unrelated individual
12 contributor to the mixture and the defense's hypothesis is two
13 unidentified unrelated individuals contributed to the mixture.
14 Then we generate a likelihood ratio from that and I'll read
15 directly from my report: The DNA profile was approximately 266
16 billion times more likely if Liliana Hernandez-Diaz an
17 unidentified unrelated individual contributed to the mixture
18 than if two unidentified unrelated individuals contributed to
19 the mixture. So in this case the prosecutor's hypothesis was
20 more favored, so to speak, than the defense hypothesis, the
21 same unidentified individuals contributed.

22 Q. So it is more likely that Liliana Hernandez-Diaz
23 contributed to this mixture of two than that she did not?

24 A. That's correct.

25 Q. And you assigned, I think you gave us a likelihood ratio

1 of 260 sextillion times more likely. First of all, how many
2 zeros is that?

3 A. That's 23 zeros.

4 Q. How does that translate on your verbal support scale?

5 A. It's very strong support, it's well over a million.

6 Q. Did you create a second proposition set to address
7 whether or not it was likely that the defendant's DNA was one
8 of those two contributors?

9 A. I did, and I can read directly from our report again.
10 So again, the DNA profile was interpreted as a mixture
11 originated from two individuals. Demetrus McClary and an
12 unidentified unrelated individual contributed to the mixture,
13 and the defense hypothesis two unidentified unrelated
14 individuals contributed to the mixture. In this case, and
15 there was an uninformative statistical result obtained. So no
16 conclusion can be made regarding Demetrus McClary as a possible
17 contributor to the mixture under the listed propositions. So
18 that means I had an LR of one or likelihood ratio of one.

19 Q. So when you say, uninformative statistic, it's there
20 wasn't enough support for you to be able to report that?

21 A. That's correct.

22 Q. So does that then enter analysis?

23 A. No. In this case it did not because, again, when I was
24 saying about the Y-STR testing when we have an over abundance
25 of female DNA but we see traces of Y or male DNA, we can use

1 Y-STR testing to isolate the male that's contributing to this,
2 or males that's contributing to this. So in this case I did
3 that, I ran Y-STR's on that extracted example from the glasses,
4 and I'll read again from my report: The Y-STR profile
5 developed is a mixture of at least two male individuals, the
6 partial Y-STR profile of the major contributors to this mixture
7 matches the Y-STR profile of Demetrus McClary. Paternal male
8 relatives of Demetrus McClary may not be excluded as the major
9 contributor of this profile, and let me explain that. So when
10 we're talking about male lineage DNA, all males on the father's
11 side of the family will have the same DNA profile. So say, for
12 example, my father: My father, my brother, my grandfather, all
13 will have the same Y-STR profile because it's passed down from
14 generation to generation. That's what determines male lineage,
15 Y-STR's. So we cannot exclude a paternal male relative of
16 Demetrus McClary as the major contributor of this profile. And
17 then I went on to do a statistic as we normally do, and this
18 just names what I use to do the statistic.

19 Q. And what did you use to do the statistic?

20 A. It's called the YHRD or the Y-Chromosome Haplotype
21 Reference Database, it's just a widely known database that we
22 use to generate our statistic.

23 Q. Let me just stop you there for a minute. So where do
24 you get that database, or how is that database generated?

25 A. It's an internet database that DNA labs across the

1 country use. It's validated by us as well as by the people who
2 man the database, and in fact we just did new validation of it
3 last week and I took a competency on it yesterday because they
4 updated their database recently and because it was an update
5 and a major update we have to revalidate it again, and so that
6 was done, but in this case the probability, a generated
7 statistic, a probability of randomly selecting an unrelated
8 individual having the Y-STR profile matching the major
9 contributor to this item is one in 9,700. So that is a far cry
10 from the sextillion that you normally see, but again, it's only
11 taking male DNA into respect. And so it's a DNA database of
12 single lineage DNA, so Haplotype DNA, whereas most times you
13 have two alleles, one from your mom, one from your dad that
14 helps to generate the frequencies for a statistic, this one is
15 only one from your male side, from your father's side, that
16 generates the statistic. So typically we're going to see a lot
17 less statistical numbers with Y-STR DNA.

18 Q. So with Y-STR DNA, what is the, if there is, the highest
19 number that you might see, one in what?

20 A. 9,700 has been the highest I've seen. I may have seen
21 12,000 but that's rare, the typical number I see is 9,700, and
22 even when I did my competency with the new database or with the
23 updated database, it was still 9,700.

24 Q. So do you have a verbal scale similar to what you had
25 for the regular hypothesis? Is there a verbal scale or can you

1 give us a verbal equivalent of what one in 9,700 is?

2 A. It just means that if you looked at one in 9,700 males,
3 and again, this is our -- we also give the most conservative
4 statistic, too. If you look at 9,700 males you should only
5 expect to see this profile once, but again, it could be also
6 all the male relatives on that lineage.

7 Q. And then you talked about, I think the major
8 contributor, what do you mean when you say "major contributor"?

9 A. That means there's two DNA, two male DNA profiles
10 present there, but I see one that stands out more than the
11 other and so in looking across the whole profile we'll see
12 which one, we'll do a percentage of inbounds to determine, it
13 has to meet a certain criteria, I think it's 45 percent when
14 it's a two-person pattern, and we'll see which one stands out
15 more, and I can visually see that that matches Demetrus
16 McClary, but I can also apply that statistical weight to it as
17 well.

18 Q. And so again, kind of trying to go into layman's terms.
19 A major contributor just means that there is more DNA from that
20 contributor than from the second contributor?

21 A. That's correct.

22 Q. And you talked about that the database was just
23 validated and that you, in fact, did a competency exam on that.
24 Had that database been validated prior to your examination in
25 this case?

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1 A. Absolutely.

2 Q. And had you been deemed competent on using that database
3 prior to this examination?

4 A. Yes.

5 Q. Now turning to, did you also examine, I guess this would
6 be under your L19 lab number, item 2.1, which would be swabs
7 from the right fingernail scrapings of Liliana Hernandez-Diaz?

8 A. Yes, I did.

9 Q. Can you tell us what, if anything, you were able to
10 find?

11 A. Sure. So a DNA profile was developed, but due to the
12 inability to determine the number of contributors, no part of
13 interpretation was offered for the STRmix portion or the
14 autosomal DNA portion of that.

15 Q. Meaning the full DNA profile of mom and dad together?

16 A. Yes.

17 Q. And what does it mean that you are not able to determine
18 the number of contributors?

19 A. That means I see for STRmix we are able to look also
20 below the threshold to see if there's possibly minor
21 contribution from someone else in there. In this case I
22 looked, it may have looked like two, three, four, you can't
23 tell, and so if you can't because in some places it may have
24 been a lot and others there may have been a little built, if
25 it's a partial profile I may have seen degradation or something

1 like that. I could not tell how many people were contributing
2 so with that we don't make a determination. We'll just say no
3 further interpretation will be offered to that.

4 Q. Did you in this case also try to the look at Y-STR?

5 A. I did.

6 Q. And what did you find there?

7 A. The Y-STR profile developed matches to Y-STR profile of
8 Demetrus McClary. Paternal male relatives of Demetrus McClary
9 not be excluded as to contributor of this profile. Again, I
10 used Yfiler Plus statistics calculated using the YHRD database
11 and in this case the probability of randomly selecting an
12 unrelated individual having a Y-STR profile matching this item
13 is approximately one in 9,700.

14 Q. So the same statistical weight?

15 A. Yes.

16 Q. Did you also examine your item 3.1 from the L19 lab
17 number, the swabs from the left fingernail scrapings of Liliana
18 Hernandez-Diaz?

19 A. I did.

20 Q. And what did you find there?

21 A. So the DNA profile developed was attributable to Liliana
22 Hernandez-Diaz. There was a presence of a minor male
23 contributor indicated, however it was insufficient for
24 interpretation and the partial Y-STR profile is also
25 insufficient for interpretation.

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1 Q. So there just wasn't enough evidence there for you to do
2 anything with it?

3 A. There was not enough male contribution there for us to
4 do anything with it.

5 MS. WALTER: Court's indulgence. I have no further
6 questions for Agent Hefney, if you'll just answer any questions
7 from Mr. Fox.

8 CROSS-EXAMINATION

9 BY MR. FOX:

10 Q. The DNA samples that you testified to were submitted to
11 SLED in 2018; is that correct?

12 A. I believe that's correct, let me check. Yes.

13 Q. And they were not tested until two years later?

14 A. They were tested, yes, let's see -- no, October 17,
15 2019.

16 Q. So a little over a year?

17 A. Yes.

18 Q. From, I think it was August of 2018?

19 A. It was around July, looks like when they brought it to
20 SLED, in '19, I mean, '18.

21 Q. Now, what did you say? You indicated that it's a
22 problem that the two pairs of glasses, there were a pair of
23 what I think are reading glasses or appear to be like my
24 cheaters and a pair of sunglasses, correct, two pairs of
25 glasses?

1 A. Two pairs of glasses, yes, sir.

2 Q. Packaged in the same say envelope, bag, however it
3 arrived at SLED it was in the one package?

4 A. That's correct.

5 Q. And tell us again, what's the problem with that?

6 A. Typically we like to package, just as a general
7 practice, them separate, because had they been packaged
8 separately they would have been swabbed separately as well and
9 you do this to find out whose DNA is on this pair of glasses
10 and whose DNA is on this pair of glasses, but when they are
11 packaged together it could be transferred DNA because they are
12 around in the bag together and so our evidence processor would
13 swab them together because they are packaged together. So that
14 way where it could have been single source DNA, it is making it
15 a mixture.

16 Q. And by mixture you mean more of, you've also talked
17 about contributors. So if you have a mixture you have more
18 than one contributor to that DNA sample profile?

19 A. That's correct.

20 Q. And it's difficult, isn't it, to determine the exact
21 number of contributors in any given --

22 A. Sometimes it is, yes, sir.

23 Q. Now, you mentioned transfer of DNA, how does that work?
24 You've talked about touch DNA, literally touching an object
25 leaving your skin cells typically behind. How does transfer

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1 work or factor into that?

2 A. If say, and we'll use these glasses, I don't know what
3 was on these glasses other than the skin cells, but say sweat
4 from one person were on the glasses as well as skin cells and
5 then you put them in the bag together, it could be transferred
6 that way, you know, some type of moisture that ended up on both
7 pairs of glasses, so in turn, the swabs that were taken from
8 them, so that's how transfer can occur. Say you put, like when
9 you're doing laundry in your house and you have something
10 you've played ball in and you throw it in the hamper with other
11 clothes from other family members, that could be transfer, that
12 transfer could happen. It's not guaranteed but it definitely
13 could happen.

14 Q. And I assume if it does, using your laundry example, it
15 goes from one item to another if then that second item were to
16 be worn by, before it's cleaned, is worn by another individual
17 or taken to another place in theory and that may continue the
18 transfer, is that possible?

19 A. That's possible, and it should be a lesser amount,
20 though, each time because, again, you put that sweaty on in
21 there with it so that transferring a lot to a little and then
22 you're taking the little out and going somewhere else, so it
23 shouldn't transfer as much as that sweaty object would have.

24 Q. I understand. And that's why, I think you said early on
25 you can't tell when DNA got on an object?

1 A. That's correct.

2 Q. Or when DNA might degrade but typically it's there so it
3 might be an hour, a week, a month, depending on the
4 circumstances it could be --

5 A. That's correct, sir, we can't tell when it was
6 deposited.

7 Q. Now, with the combined glasses swab you received two
8 pairs of glasses, correct?

9 A. SLED received two pairs of glasses, I received swabs
10 from those two pairs, yes, sir.

11 Q. That was actually a swab by another agent before in
12 serology before it comes to you?

13 A. Yes, sir.

14 Q. Correct? Agent Herrera?

15 A. She was one of our forensic technicians, yes, sir.

16 Q. Once they are packaged together, in this case two pairs
17 of glasses, would it have been better to use separate swabs on
18 each pair of glasses?

19 A. Ideally, yes, but once they are packaged together you
20 can't tell, so she chose to swab them together.

21 Q. But the better practice would be one swab for one pair
22 of glasses and one swab for the other and those swabs
23 separated?

24 A. And that be put into two separate bags, correct.

25 Q. And that would have been a choice made by agent Herrera

Adrienne Hepney-Cross by Mr. Fox

1 at the time that she did that?

2 A. Well, if they had come in two separate bags she would
3 have swabbed them separately and then I would have gotten two
4 separate swabs, one from each pair of glasses.

5 Q. But wouldn't you agree that conflating the two pairs of
6 glasses means that it becomes almost impossible to tell which
7 DNA profile comes from which pair of glasses?

8 A. That's correct.

9 Q. Because swabbing multiple items increases the chances of
10 collecting multiple DNA profiles?

11 A. It increases, yes.

12 Q. And the more DNA profiles that you collect from the
13 particular item the greater of the potential difficulty in
14 interpreting who the contributors are, it complicates things?

15 A. When it deals with the minor contributors, yes.

16 Q. It complicates things, right?

17 A. It does.

18 Q. And when you say major and minor contributors, that
19 refers more to the amount of DNA?

20 A. It does. Like, if you had like the person, if we go
21 back to the laundry hamper example, the person that was the
22 sweaty one that put that, say, shirt in there and then you take
23 one of the, say, the dry shirts out of whatever, it's probably
24 going to be the one that had the sweat and that transferred
25 onto there more, and especially if you swabbed the sweaty

1 shirt you're going to automatically see the person who has worn
2 that shirt DNA profile.

3 Q. But being a major contributor versus a minor contributor
4 had nothing to do with -- the major contributor is no more
5 likely to have, well, in the context of crime to have committed
6 the crime, the minor contributor if they're identified is
7 there, there's no way to determine between the two which is
8 more likely to have done whatever?

9 A. No. If you think about it with the glasses perspective,
10 say if like I have my glasses on now and I swabbed it, and say
11 I wore these glasses every now and then and you swabbed it,
12 you're expecting to get the glasses that I wear all more DNA on
13 those than you are the ones that I may periodically put on.

14 Q. So if another person would have -- again, they're
15 readers and someone else puts them on, and issue becomes -- and
16 they're a minor contributor because they under the
17 circumstances just didn't leave as much material behind and the
18 issue becomes, alright, who was wearing these glasses that were
19 left at the crime scene? There's no distinction between major
20 and minor, the minor person may well have been just as likely
21 to have been the one at that time as the major contributor,
22 correct?

23 A. I would say that's correct.

24 Q. So the major contributor simply left more behind?

25 A. They contributed more of DNA, yes.

Adrienne Hepney-Cross by Mr. Fox

1 Q. Right. Now, let's talk about the conclusions you reach,
2 and the autosomal testing is the complete profile, right,
3 female and male, correct?

4 A. Yes, mother and father.

5 Q. Mother and father. So when we say, autosomal, that
6 refers to, I use the word, complete profile, but --

7 A. That's fine as long as you're talking about the mother
8 and the father DNA.

9 Q. Could you please just remind me what the main difference
10 is between that and the Y-STR?

11 A. Y-STR is strictly looking at the male inherited DNA.

12 Q. And you identified the autosomal profile, and again,
13 we're talking about the glasses now --

14 A. Okay.

15 Q. -- you identified the autosomal profile as two
16 contributors, correct?

17 A. Yes, sir.

18 Q. And again, it's difficult to know the true number of
19 contributors, correct?

20 A. Yes, sir, but in looking at it I saw evidence of two
21 contributors, and I looked down below, as well, to see, so I
22 would feel confident in saying two contributors contributed to
23 this profile.

24 Q. And it appears you interpreted the profile in at least
25 one hypothesis as being from the victim and from an

1 unidentified individual?

2 A. That's correct. That's for one proposition set.

3 Q. But then the profile, the Y-STR profile was interpreted
4 as a mixture of two males?

5 A. That's correct.

6 Q. So the entire profile must include one female being the
7 victim and at least two males for a total of three
8 contributors; is that right?

9 A. That's correct.

10 Q. So the assumption when you're doing a hypothesis with
11 two contributors, that doesn't match -- you've got this
12 hypothesis, two contributors, but actually the data says there
13 were three.

14 A. Because with the autosomal maybe I only saw two
15 contributors with that and the minor male contributor, because
16 remember the male contributor, the partial Y-STR profile from
17 my contributor, it was insufficient for interpretation. So he
18 may not even have showed up in the autosomal profile because
19 the Y-STR profiles are very sensitive and it's just targeting
20 male lineage DNA.

21 Q. And the STRmix program that you used to generate these
22 numbers or these interpretations, it's a manual input, correct,
23 with a number of contributors? In other words, you, whether
24 it's one, two, three, that's something that you put in
25 manually?

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1 A. That's correct.

2 Q. Okay. And different numbers of contributors could lead
3 to a different STRmix output, right? If you have one it's
4 going to be a different result than if you have two or three,
5 correct?

6 A. That's correct.

7 Q. But you could not present, you were not able to produce
8 any support for the presence of Mr. McClary in the autosomal
9 results in the full profile results?

10 A. Yes. The result for him was uninformative. So
11 basically, I can't make a conclusion one way or the other
12 regarding Demetrus McClary as a possible contributor to the
13 mixture on the propositions for the autosomal.

14 Q. I understand. So at least as far as that part of your
15 analysis, the autosomal interpretation, you cannot infer Mr.
16 McClary's presence from that?

17 A. That's correct, I could not draw a conclusion there.

18 Q. Okay. Generally speaking, autosomal results are more
19 definitive than Y-STR results; is that correct, because there's
20 a profile --

21 A. I wouldn't say more definitive, I would say, I mean, you
22 are dealing with mother and father DNA versus just father's
23 lineage DNA and then while you have contributors with the Y-STR
24 that can be anyone from the male's side of that family versus
25 with autosomal you have mother/father DNA and it's also unique

1 to the individual with the exception of identical twins.

2 Q. Now, look at the Y-STR results from the combined swab in
3 the glasses.

4 A. Okay.

5 Q. Do you have your lab reports with you and the
6 documentation with it?

7 A. I do.

8 Q. Okay. I'm going to look at the Yfiler Plus Table which
9 is page 70, at least how it came to me it's page 70. I have
10 numbers circled at the bottom of each page.

11 A. Yes.

12 Q. Do you have the same?

13 A. Yes.

14 Q. This (indicating.)

15 A. Yes, that is the one.

16 Q. Thank you. So across the top you've got item numbers
17 listed, correct?

18 A. That's correct.

19 Q. Okay. And then we've got item L19-17807 1, is the
20 reference sample for Mr. McClary?

21 A. That's correct.

22 Q. And item L18-09606, 2.1 is the combined glasses sample?

23 A. That's correct.

24 Q. Okay. In that first column you've listed the location,
25 and I apologize, it is loci? Is that how you pronounce it?

Adrienne Hepney-Cross by Mr. Fox

1 A. That's how you say it.

2 Q. You've listed the locations or loci on the Y
3 chromosome --

4 A. That's correct.

5 Q. -- being the male chromosome, correct?

6 A. Yes.

7 Q. Okay. And then in subsequent columns you've listed the
8 DNA alleles that you detected from each sample?

9 A. That's correct.

10 Q. And that's call a profile?

11 A. That's correct.

12 Q. In the column underneath Demetrus McClary you list one
13 number for each locus; is that correct?

14 A. Yes.

15 Q. And there's only one number because the Y chromosome
16 exists as a single chromosome?

17 A. Yes.

18 Q. And so again, to reiterate, it doesn't commonly appear
19 of light, the autosomal, which one from the mother and one from
20 the father?

21 A. That is correct.

22 Q. So in a column under, and the 09606, which again, the
23 glasses?

24 A. Yes.

25 Q. Okay. You list one number for some loci and two numbers

1 for others?

2 A. Right, that indicates there's a mixture.

3 Q. Exactly. You anticipated my next question. So there's
4 at least two contributors in that in those that have two
5 numbers; is that right?

6 A. That's correct.

7 Q. It could be more than two?

8 A. It could be, but it's at least two.

9 Q. And in fact, males might then in particular loci, even
10 unrelated males might share a same number?

11 A. They might share a same number at certain locations, but
12 typically unless they are related on the father's side, not
13 with the whole profile, correct.

14 Q. Now, if I understand, the numbers that are indicated in
15 parenthesis, those mean you detected them in lower number or
16 lower amount; is that right?

17 A. That is correct. Those are areas that we interpret with
18 precaution because they are below a certain threshold that we
19 use.

20 Q. And the numbers that are in bold, some of the numbers
21 are obviously in bold, those would be a major contributor?

22 A. That's correct?

23 Q. Now, let's look at the DYS627 locus, do you see that,
24 those little tiny numbers?

25 A. DYS what?

Adrienne Hepney-Cross by Mr. Fox

1 Q. 627.

2 A. 627, okay.

3 Q. Mr. McClary has what number at that locus?

4 A. He had a 19.

5 Q. But the combined glasses sample show the 22 at that
6 locus, right?

7 A. Yes.

8 Q. Okay. And you did not detect a 19?

9 A. That's correct, or the 19 was so low it wasn't called.

10 Q. But you did not designate the 22 as part of the major
11 profile?

12 A. No, because it's in parentheses, so that means it's also
13 a low-level profile.

14 Q. So if 22 were a part of the major profile would that
15 mean it could not be Mr. McClary, him being 19?

16 A. If it were part of the major, yes, but it wasn't.

17 Q. What criteria do you use when you do your report and a
18 number is going to be entered as bold, what criteria do you use
19 for that?

20 A. We do a percentage, so I'll have my electropherograms
21 here where we calculate the percentage of peak height and
22 balance for each. If it's below a certain level, I want to say
23 it's 35 percent for a two-person contributor, then we're able
24 to use that as a part of the major contributor profile. And
25 then that in some cases, like on this alleged electropherogram

1 you'll see where only the 19 shows up, so we know that's the
2 major profile because the minor didn't even show up.

3 Q. And that criteria is in the SLED's DNA casework
4 operations manual?

5 A. That's correct.

6 Q. I'm going to refer you to, and Ms. Crawford will give
7 you, because I'm sure you didn't bring the entire manual, pages
8 211 to 213, and so I'll give you a moment to quickly review
9 that. Again, we're talking about making the determination that
10 there's a major contributor, and that's determined by
11 distinct difference resolvable and clearly distinguishable
12 contrast, correct?

13 A. We'll go down here to, halfway start on page 212 where
14 it talks about multiple contributors and mixtures with major
15 minor contributors between 212 and 213.

16 Q. What's the criteria to determine if there's a distinct
17 difference?

18 A. So if you have like in this paragraph here which is the
19 bulky paragraph on page 213: A major contributor can be
20 identified from a mixture sample if there a resolvable (clearly
21 distinguishable) contrast in allele peak heights. When
22 evaluating a sample from major/minor contributors, the full
23 profile must be taken into account. Inhibition, degradation,
24 and low levels of DNA can result in false disparity, leading to
25 the incorrect designation of a major contributor. In order to

1 identify a major contributor in a mixture the ratio of RFUs
2 which are relative fluorescent units, which is how intense the
3 profile is which is the peak height of it, of the highest minor
4 allele to the RFUs of the major allele should be 45 percent or
5 less, so I said 35, it's 45 percent or less for two person
6 mixtures and 35 for three person mixtures.

7 Q. So is that number, the 45 and 35 percent that you're
8 referring to, is that what sets the standard for what is a
9 distinct difference?

10 A. Yes.

11 Q. How is it determined then if there is a resolvable
12 contrast in peak heights?

13 A. By looking at the profile I can clearly see that I have
14 a major contributor and then there are minor alleles also
15 present. So in the locations where there are minor alleles I
16 did the calculation. I put numerator as 133, like, for
17 example, in DYS3891. It's 133 and I divided that by 476 which
18 is a relative fluorescence units of both of those alleles, so I
19 have 27.9 percent. So if I'm saying this is a two person
20 mixture it would have to be less than 45 percent, and that is.

21 Q. Who determines those numbers, the 35 and 45 percent?

22 A. That was done during our validation and so the technical
23 leader and those leading the validation team will determine
24 that.

25 Q. So it's subjective?

1 A. Well, it's validated so it's written in our protocol
2 that we go by.

3 Q. Because you have to in making the determination if
4 there's a presence of DNA on a particular loci you get, they're
5 basically graphs, correct? I mean, you see -- they're called
6 peaks, but you see a little --

7 A. (Indicating.)

8 Q. Like that, exactly. And so determining what is or
9 isn't, because you don't want to have, I've heard the term
10 noise, you don't want things to call something as the DNA that
11 might be in backgrounds noise?

12 A. True.

13 Q. So you have to set a threshold?

14 A. Correct.

15 Q. And how is that threshold determined?

16 A. The threshold is, again, based on the validation, so
17 they ran several samples during the validation, it will
18 determine what they will call as our threshold. And it can be
19 different numbers for the different dyes, so the green dye
20 could have a certain number or the blue dye or the yellow one,
21 could have a certain number, or the red could have a certain
22 number.

23 Q. But where that threshold is set could affect what the
24 interpretation is later, correct?

25 A. Yes.

1 Q. Because if you were to set it higher then some peaks may
2 not meet that threshold and therefore you would not call that
3 as DNA material, correct?

4 A. That's correct. It wouldn't be called so it would be
5 below our --

6 Q. So in other words you may, by doing it, by setting it at
7 a certain level, you may be -- put it this way, not you may be
8 but certain DNA profiles may be excluded. In other words, if
9 the profile is, I'm just going to use a random number that has
10 no relation to anything, if you set the threshold at 50 and you
11 had a bunch of 48's, right, they come close but you're not
12 quite there. Well, your protocol says, I can't call that --

13 A. Right.

14 Q. -- because it doesn't meet my threshold, and we've got
15 to have some standards, right, we can't just -- you could, I
16 guess, do each and every one, but so that some may be excluded,
17 doesn't mean there's not DNA at those peaks, it just means my
18 protocols, my standard for this interpretation, right, doesn't
19 allow me to call that, but if you were to have a lower
20 threshold, right, say at 30, then those that are at 48 -- so
21 it's the same material, it's the same number, right, the peak
22 is the same, but where you set that line can be all the
23 difference between this person might be a contributor or not
24 calling it at all, not present at all?

25 A. Well, you can look at it that way, I guess, but if you

1 look at it when we do our validation, like you mentioned
2 earlier, noise. So we're going to run several, sometimes
3 hundreds of samples to do this validation by, and when we know
4 that there are peaks below a certain threshold it could be in
5 the noise level that we will not call. So you set your
6 analytical threshold based on your validation and based on what
7 you saw until the actual alleles that's called.

8 Q. And you may have this in color, page 68 of your lab
9 report?

10 A. Yes, that's what I held up before.

11 Q. Well, then I'll let you just refer to that. And this is
12 referred to as an electropherogram?

13 A. It is.

14 Q. Okay, I used the right term, good. So this is called an
15 EPG, that documents your interpretation of the data, is that a
16 fair characterization?

17 A. That's right.

18 Q. And it's printed at a scale that compromises the larger
19 peaks, in other words, that makes them a little more obvious;
20 is that right?

21 A. Yes.

22 Q. Visually.

23 A. The major contributor is going to be stronger or have
24 larger peaks than the minor contributor.

25 Q. Right. And we can see some clear peaks are not labeled

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1 with any number, correct?

2 A. Correct, because that is typically -- when I did the
3 calculations it was based on if I had two alleles present at
4 that location.

5 Q. I understand. And there may be other peaks that are not
6 visible on this printed copy because of the scale that it's
7 printed at?

8 A. Because of our analytical threshold, is that what you're
9 asking?

10 Q. Well, in other words, in order to make it more visible
11 how you choose to print this may affect what's visible, for
12 someone looking at it, right, so there may be peaks that aren't
13 apparent looking at this?

14 A. It's printed based on the highest RFU in that range,
15 because you'll notice on the left-hand side it caps at 700 and
16 the highest peak in that channel is 700.

17 MR. FOX: One moment, Your Honor.

18 Q. You may be able to see, my copy isn't as good so let's
19 see if you're on page, again, on page 68, the DYS449.

20 A. Let me find it on here.

21 Q. I identified it as the last on the page. Do you see
22 that?

23 A. There's nothing called there.

24 Q. Okay, right, and there's three peaks that are visible at
25 that location, aren't there?

1 A. Well, that could be part of our -- because with
2 capillary electrophoresis, which is how we generate these
3 profiles, we already know there are certain noise levels,
4 that's why we set the threshold.

5 Q. But again, the threshold --

6 A. And so none of these met that threshold, correct.

7 Q. I got you. But would you agree there are three peaks
8 visible?

9 A. I wouldn't say they were peaks, I would say I can see
10 three markings there.

11 Q. Okay.

12 A. I wouldn't say they were peaks, though. That can be
13 part of the noise because they didn't reach a certain level to
14 be called.

15 Q. But they could also be three males, correct? And I
16 understand why you had to make what -- you have a threshold and
17 it's set, but again, the threshold, correct me if I'm wrong,
18 the threshold, you've got to draw it somewhere, and I
19 understand that's based on your validation study, but I think
20 you agree that if the threshold is different you might make
21 different calls. In other words, if the threshold out of
22 caution was set lower that perhaps these three might be called.
23 If they were called then they would be three male contributors?

24 A. If they were called -- it would have to be a lot of ifs.
25 If they were called, because our threshold's been low enough to

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1 pick up the major and minor in this thus far. It's just that
2 when you get down to that one channel or that one locus it's
3 not there. So that lets me know that that is probably noise.

4 Q. Well, doesn't looking at the protocol, the DNA case lab
5 manual that we looked at before, specifically bullet point two
6 on page 212, does that not allow you to call peaks that are
7 near or below the threshold for the purpose of them determining
8 the number of contributors?

9 MS. WALTER: Which bullet point?

10 MR. FOX: Bullet point two, page 212.

11 A. Multiple contributors, is that --

12 Q. Yes.

13 A. Or peak height ratios at DYS385a/b, is that what you're
14 saying, the last bullet point?

15 Q. That entire thing. Does it not allow you, in fact,
16 directs you to consider peaks below the analytical threshold
17 for the purpose of determining the number of contributors?

18 A. Bullet point two doesn't say that. Bullet point two is
19 addressing DYS385a/b: Should typically be within the expected
20 values for heterozygote individuals. That's the one location,
21 one of two locations that have two alleles for the Y-STRs
22 versus one even for a single source person.

23 Q. But there's no inherent way to know how many
24 contributors are present in any one peak, correct?

25 A. In one peak?

1 Q. Yes.

2 A. In one peak, it's typically one, but if you see two
3 peaks at a location and then it could be more than one.

4 Q. I'm sorry, I didn't mean to cut off the end of your
5 answer.

6 A. I was just saying if you see two peaks at a location
7 then it may be more than one if they rise above a certain
8 threshold.

9 Q. Because you often see peaks very close together, is that
10 correct, on the same location? Let me see if that's correct.
11 On any given loci, and I don't know, do you see more than one
12 peak that indicates more than one contributor, is that how that
13 works?

14 A. Yes. And then on those two that I mentioned on 385 a
15 and b, 385 and 387 are the ones that have it. So with this
16 385, only one was called right here, that's the one next to the
17 one that's -- right. And with 387, I think that's the other
18 one that has to have two peaks where it could still be a single
19 contributor but have two.

20 Q. I appreciate your indulgence, I don't obviously speak
21 the language or have the same understanding that you do, so I
22 appreciate you letting me wander around this a little bit.
23 Let's look again at DYS627. Do you see that?

24 A. Yes, sir.

25 Q. Okay. And we talked about this before we looked at the

Adrienne Hepney-Cross by Mr. Fox

1 Yfiler Plus Table, right?

2 A. Yes.

3 Q. That's the one I was asking you about.

4 A. Yes, with the 22, you're asking about the 22 in
5 parentheses --

6 Q. Right -- I'm sorry, go ahead.

7 A. And you were saying that that 22 does not match Demetrus
8 McClary's 19, correct?

9 Q. Yes.

10 A. But then if you look at the -- that 22 is a low level
11 peak, that's why it's in parentheses, and if you were to look
12 at the E-gram you can see right here where the 19 bin is, there
13 is another peak there, and it's just below what we would call,
14 so it didn't get called.

15 Q. Okay, didn't get called. So there are two peaks visible
16 but one was labeled, correct?

17 A. Correct. One reached above the analytical threshold.

18 Q. And again, just to reiterate what you just said, one was
19 above the threshold, one was just below?

20 A. Right.

21 Q. And we could see the 22 peak is clearly larger than the
22 unlabeled peak, however, right?

23 A. Not by much. They look by the naked eye almost equal,
24 but, of course, it wasn't called so there's one below.

25 MR. FOX: One moment, please.

1 Q. I'm going to revisit the multiple contributors in the
2 case manual, operation manual, in a moment. Dr. Rudin has
3 pointed me to the correct page that I meant to ask you about.
4 So to go back, do you have your entire operations manual, or do
5 you need a copy of the page number I'm referring to?

6 A. The entire operations manual?

7 Q. I wouldn't think you would, but let me draw you to -- I
8 have the page number. So what I meant to ask you about, I gave
9 you the wrong page, so this is page 144 and number two which is
10 multiple contributors, and we're looking at those first couple
11 of paragraphs, but you can review as much of that, obviously,
12 as you need. I'll go back to that line of questions.

13 A. Now, we can't do this because this is talking about
14 GlobalFiler, this is not Yfiler.

15 Q. So that's the difference, that's GlobalFiler and not
16 Yfiler?

17 A. Right, that's autosomal, this is Yfiler.

18 Q. Yes, ma'am.

19 MR. FOX: Just one moment, Your Honor, to check and
20 see if there's anything further. I believe I'm about to wrap
21 up. Thank you, Your Honor. That's all the questions I have.

22 THE COURT: Any brief redirect?

23 MS. WALTER: Just very briefly, Your Honor.

24

25

1 REDIRECT EXAMINATION

2 BY MS. WALTER:

3 Q. Let me just go back, first of all, to the way, I'm going
4 to steer clear of the graphs for just a minute, let's give our
5 eyes a break.

6 A. Okay.

7 Q. So let's go back to the way the glasses were packaged.

8 A. Okay.

9 Q. So the two pairs of glasses are packaged in the same
10 evidence bag. So if Agent Herrera had done one swab from one
11 pair of glasses and one swab from another pair of glasses,
12 wouldn't the fact that they had been packaged together still
13 affect your ability to say DNA was on the first pair of glasses
14 versus the second?

15 A. That's correct.

16 Q. So once they are packaged together, the fact that they
17 are swabbed together is not that significant as opposed to if
18 they came in packaged separately, and then one swab was used to
19 swab them both?

20 A. Right.

21 Q. And the fact that they were packaged together wouldn't
22 introduce DNA that didn't exist on one of them to begin with,
23 would it?

24 A. No, unless there's DNA in the bag, which it shouldn't
25 be.

1 Q. Right, because there are several bags, okay.

2 A. Yes.

3 Q. And I think you said this on Cross, but this
4 electropherogram, that shows all the peaks, right, because it
5 actually starts at zero?

6 A. Yes.

7 Q. But then I think you said it caps at whatever the
8 highest peak is?

9 A. Typically, yeah, around there, so I can show you the
10 scale.

11 Q. So the threshold would be how far above zero it would
12 need to be before you can call it, a peak versus --

13 A. The software will not even call anything below our
14 threshold.

15 Q. And where the level is set doesn't affect, for instance,
16 that on the, and I'm going to try and be very simple about
17 this, you have page 68 a circled page 102, that first top level
18 chart, there is one peak that is significantly higher than
19 anything else that might be there, correct?

20 A. Correct.

21 Q. And where you set or where SLED sets the threshold
22 doesn't affect that there is clearly one peak that is
23 substantially higher than all of the others?

24 A. Correct.

25 Q. It just affects what might be called a peak versus being

Adrienne Hepney-Redirect by Ms. Walter

1 considered noise?

2 A. Right.

3 Q. And I think you said that SLED tends to set conservative
4 thresholds?

5 A. No, I said we send to get when we -- statistics, we
6 quote conservative statistics.

7 Q. Conservative statistics.

8 A. Right, the most conservative statistics.

9 Q. Meaning that you are seeking stronger support before
10 saying that it is possible that a particular person contributed
11 to a DNA profile? Let me rephrase that. The fact that you are
12 using a conservative ratio means that you want to be sort of
13 double sure before you say it's possible that Demetrus McClary
14 or Liliana Hernandez-Diaz contributed to that mixture?

15 A. That's correct.

16 MS. WALTER: I have nothing further for Agent Hefney,
17 Your Honor.

18 MR. FOX: No further questions, Your Honor.

19 THE COURT: Agent, thank you very much for coming.
20 You can step down, you're free to go, you're free to stay.

21 We're at 12:00 and I know that your expert is still
22 with us online so I want to go ahead and address her testimony.
23 I indicated to the deputy earlier that we would be able to take
24 those pleas at 1:00, I assume they're jail pleas and I assume
25 we need to push that back so we can grab a bite for ourselves

1 sometime around 1:00, but if you could communicate that with
2 them and then we'll be at ease for a few moments and then we'll
3 take your witness testimony, okay?

4 MR. FOX: Thank you.

5 THE COURT: Doctor, we'll be with you in just a
6 moment, we're going to take a brief break. Okay?

7 DR. RUDIN: Yes, sir.

8 (Recess taken)

9 THE COURT: We're going back on the record. The next
10 witness is Dr. Rudin, R-u-d-i-n. Doctor, if you could, please
11 raise your right hand, I'm going to put you under oath.

12 **DR. NORAH RUDIN WAS DULY SWORN AT THIS TIME AND**
13 **TESTIFIED AS FOLLOWS:**

14 MR. FOX: Doctor, can you hear me?

15 DR. RUDIN: I can hear you and see you.

16 MR. FOX: If you have any problems while we're
17 talking this morning just raise your hand or let us know.

18 DR. RUDIN: Thank you.

19 **VOIR DIRE**

20 BY MR. FOX:

21 Q. Dr. Rudin, would you please state your name and spell
22 your last name for the record?

23 A. Norah, N-o-r-a-h, Rudin, R-u-d-i-n.

24 Q. Where are you appearing with us from today, Dr. Rudin?

25 A. I'm in Mountain View, California.

Dr. Norah Rudin-Voir Dire by Mr. Fox

1 Q. Would you please give us your educational background?

2 A. Yes. I have a PhD from the Department of Biology at
3 Brandeis University with a thesis concentration in molecular
4 biology and genetics. After that did a post-doctoral
5 fellowship at Lawrence Berkeley Laboratory. That's the extent
6 of the education.

7 Q. Do you have any training in the area of DNA analysis?

8 A. Mostly I'm the one giving the training. Way long ago
9 when we first started I did take an FBI course and a couple of
10 other things but I was involved in the very inception of
11 instituting forensic DNA analysis in the California Department
12 of Justice Laboratory that involved doing validation, doing
13 some research, writing protocols, doing some training, et
14 cetera. I did that same thing as a consultant for a couple of
15 other laboratories, Idaho Department of Law Enforcement, San
16 Diego Sheriff's Department and briefly for the San Francisco
17 Department of city and county of San Francisco Laboratory.

18 Q. Do you have any licenses regarding your qualifications?

19 A. Well, there is no licensing for any forensic discipline.
20 I do have what actually is a certification from the American
21 Board of criminalistics as a general certification, and of
22 course, I am a member of a number of professional
23 organizations, as well.

24 Q. Are you a published author in your field?

25 A. I am. I have published both books and peer reviewed

1 articles.

2 Q. Have you ever been qualified as an expert in a court of
3 law?

4 A. Greater than 75 times at this point.

5 Q. And that's at a state, federal level, both?

6 A. On state federal, military, yes.

7 Q. Have you ever been qualified in the State of South
8 Carolina?

9 A. Yes.

10 Q. Do you recall how many times?

11 A. I believe once, one that I can recall.

12 Q. And that was as a forensic DNA analyst, something of
13 that nature?

14 A. Right. I don't remember the exact qualification, but
15 generally, yes.

16 MR. FOX: Your Honor, at this time I'd move to
17 qualify Dr. Rudin as an expert in DNA forensic analysis.

18 THE COURT: No objection?

19 MS. WALTER: Actually, I have some questions, Your
20 Honor.

21 THE COURT: Okay, go ahead.

22 VOIR DIRE

23 BY MS. WALTER:

24 Q. You said that you had a PhD, but clearly there was some
25 education that came before that, what was your education before

1 you obtained your PhD?

2 A. So I had a bachelor's in zoology from Ponom College,
3 zoology being one half of biology.

4 Q. When did you get your bachelor's?

5 A. The bachelor's was in 1979.

6 Q. When did you get your PhD?

7 A. 1987, I think, yeah.

8 Q. And you said that there is no licensing, are you
9 subjected to any proficiency or competency exams on a regular
10 basis?

11 A. So because I don't work in a laboratory that is not
12 required of me. I have on my own on a couple of occasions
13 taken proficiency tests for the interpretation of various kinds
14 of DNA data and I got the appropriate results.

15 Q. So that was a test you gave yourself, not one that's
16 administered by, say, the FBI or another accrediting agency?

17 A. Not exactly. I initially did this when I was working as
18 a consulting tech lead in San Diego and I took, I don't know if
19 you call that a competency or proficiency in that lab, it was
20 graded by somebody in that lab, and then I recently when they
21 only made it available -- the CTS exam with the laboratory
22 typically takes -- they have to give them to different
23 organizations, they have made it available to people not
24 working in labs and I went ahead and took one and got the
25 appropriate results. They don't decide if you pass/fail, in

1 the lab it's the quality assurance person based on consensus
2 results. I did take it and I got the consensus results.

3 Q. You said that you had proficiency testing when you were
4 a consultant for San Diego, and that ended in 2002, correct?

5 A. That's right.

6 Q. And you said that you're a member of a number of
7 professional organizations. Do those professional
8 organizations require any level of proficiency in forensic DNA
9 testing for membership?

10 A. No.

11 Q. Of your published work, I think you said you have books
12 and peer reviewed journaled articles. What percentage of them
13 deal with STRmix?

14 A. Oh, I haven't published on STRmix, I have published on
15 Probabilistic Genotyping but STRmix is a proprietary program,
16 and just to let you know, it's an extremely expensive program.
17 I wouldn't be able to afford it and even if I could afford it I
18 would not be allowed to purchase it considering myself and
19 others in my group competitors, so, although, there was a paper
20 long ago that John Buffleton published comparing one of his
21 programs to one of our programs, we are not published on
22 STRmix, per say, but on Probabilistic Genotyping which is the
23 basis of STRmix and other programs I am co-author of publish,
24 yes.

25 Q. On what percentage of the work that you've published?

Dr. Norah Rudin-Voir Dire by Ms. Walter

1 A. I'm sorry, what?

2 Q. On what percentage of all of the work that you have
3 published were you dealing with Probabilistic Genotyping?

4 A. I've never did that calculation, I'm sorry.

5 Q. And in your publications what percentage have you
6 published on Y-STR DNA profiling?

7 A. I think on presentations, I don't think I have any peer
8 reviewed published papers on Y-STRs.

9 Q. When is the last time that you, yourself did any actual
10 DNA analysis?

11 A. If you're asking me about wet work, it was a very, very
12 long time ago. I obviously moved on in my career, and just to
13 let you know, I will not be commenting on or complaining about
14 any of the laboratory work in this case, the comments have all
15 to do with the interpretation.

16 Q. So when is the last time that you did any actual DNA
17 analysis?

18 A. It was probably mid '90s or so, and just to be clear,
19 that's laboratory wet work. I do case work on a daily basis.

20 Q. And what is your distinction between wet work and case
21 work?

22 A. Well, case work is often -- first of all, it's reviewing
23 the laboratory work but also doing interpretation and
24 statistics, and in fact, I don't know about this laboratory,
25 many labs will actually have the distinction and people in

1 their lab that only do the interpretation and statistical part
2 and they consider the lab work technicians work.

3 MS. WALTER: Court's indulgence for one moment. Your
4 Honor, I have no more questions on her qualifications.

5 THE COURT: I don't hear an objection to her
6 qualifications. I will find her qualified in the field of DNA
7 analysis if that is the area of expertise you intend to proffer
8 her testimony.

9 MR. FOX: I do, Your Honor. Thank you.

10 **DIRECT EXAMINATION**

11 BY MR. FOX:

12 Q. Dr. Rudin, so you have been qualified to testify as an
13 expert and if called upon offer your opinion, but to be clear,
14 in your present point in your career you consult with law
15 enforcement as well as defense attorneys such as myself,
16 correct?

17 A. I will consult with anybody who wishes to retain me.
18 Obviously, the majority of work I get is either defense or work
19 or innocence work based on just how our system works, it's not
20 based on ideology. Usually the prosecution or law enforcement
21 will consult with the lab and a defense attorney will consult
22 with me, but I do have a number of cases in which I have
23 consulted for and testified for in law enforcement, and of
24 course, I am available for that.

25 Q. Thank you. Now, specifically with regard to the Y-STR

1 testing in this case, which is we're talking about Demetrus
2 McClary, correct?

3 A. Correct.

4 Q. What materials did you review?

5 A. So I received all of the reports and notes and raw
6 electronic data from the laboratory, and that's generally the
7 basis of my opinions.

8 Q. And what were you asked to do?

9 A. I was asked to review that material and comment on the
10 work outside.

11 Q. Were you asked to perform any additional testing or
12 statistical calculations?

13 A. No.

14 Q. We have some feedback. Can you still hear me?

15 A. I can hear you.

16 Q. We had a little feedback. So again, you were not asked
17 to perform any additional testing or calculations?

18 A. I was not.

19 Q. Did you review the Y-STR validation document provided by
20 SLED in discovery?

21 A. I did.

22 Q. Can you explain what a validation document is?

23 A. Yes. So validation is done both by the manufacturer
24 which is considered developmental validation and my laboratory
25 is considered internal validation. Validation should determine

1 the capabilities and limits of the system and it should inform
2 specifically the interpretation guidelines of a laboratory. It
3 is done or performed using known samples, samples of known
4 provenance and then ideally it should be tested on another
5 group of samples.

6 Q. And is analytical thresholds one of the parameters that
7 would be addressed in the validation document?

8 A. It is.

9 Q. And what is analytical threshold?

10 A. The analytical threshold is the threshold that separates
11 noise and signal. Now, of course it's not perfect, it's an
12 analog-type scale, so we know that there is always going to be
13 some percentage of false positives or false negatives, the idea
14 is to maximize calling signal and minimize calling noise,
15 however, signals should not be compromised just on the basis of
16 not wanting to call something noise or artifacts.

17 Q. Could you define for us what "signal" is and what
18 "noise" is?

19 A. Sure. You can easily analogize it to something like a
20 radio signal where you can hear a voice or music. The radio
21 signal might be better, or worse you might have static
22 background and at some point the static might overwhelm the
23 voice or the music which is the signal and then at some point
24 you might be able to make out the signal even in the phase of
25 static. Does that help or do you want me to do something more

1 different?

2 Q. I understand. So noise is -- again, "static" might be
3 another word in your analogy, correct?

4 A. Correct. And there is also difference between noise and
5 artifacts, but that might be more than we need to get into at
6 this point.

7 Q. I think so. So we were talking about the threshold, the
8 analytical threshold. What's the consequence setting an
9 analytical threshold?

10 A. So the consequence, depending on where you set it, if
11 it's too high you could be missing real peaks, that could
12 affect inclusions, exclusions, number of contributors. The
13 consequence of setting it too low is not nearly as costly and
14 certainly not as costly as maybe you might think. Most analyst
15 are really pretty good at setting out signal from noise because
16 obviously you don't want to be too much in the weeds but also
17 should be set not just as a convenience but to be the most
18 accurate and capture the most actual accurate DNA data
19 available.

20 Q. So again, to summarize it, it's ideally the threshold
21 would maximize the distinction between signal and noise, it
22 would make it more obvious; is that correct?

23 A. That's correct.

24 Q. Did the analytical threshold picked by SLED, in your
25 opinion, accomplish this goal, and if not why not?

1 A. It did not. It was too high and it's not color
2 specific.

3 Q. Could you explain that for us?

4 A. Sure. So you heard the DNA analyst actually mention
5 that the different colors, if you will, had different
6 sensitivities and that's absolutely true. The colors are a
7 consequence of the fluorescent signal attached to the DNA
8 molecules during that PCR DNA amplification and allows the
9 instrument to detect them and the fluorescent signals have
10 different strength and sensitivities. So first of all, a
11 proper analytical threshold should be different for each color,
12 SLED did not do that, and it again, should be based
13 specifically on the validation data and not sort of on a
14 comfort or policy. What they did was they put the absolute
15 highest number for one of the colors but then they didn't
16 modify the other colors to maximize the signal on those colors,
17 so they're going to be losing actual real data.

18 Q. So you think the best practice is for each different
19 color there should be a different threshold, do I understand
20 that right?

21 A. Correct.

22 Q. So what are the consequences of picking a threshold
23 higher than the data indicates?

24 A. So again, you are going to lose real peaks, real
25 accurate authentic DNA peaks, and that can affect depending on

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1 the situation of the particular profile, you could have a false
2 inclusion, you could have a false exclusion and you risk -- you
3 have a higher risk of underestimating the number of
4 contributors by not looking at those peaks.

5 Q. I think you said you could possibly lose inclusionary or
6 exclusionary information?

7 A. That's correct.

8 Q. In other words, some people who should be identified
9 aren't and some people who shouldn't are; is that right?

10 A. Correct.

11 Q. And again, what is the threshold that was picked by
12 SLED?

13 A. 125 RFU relative fluorescent units.

14 Q. Do you agree with the statement that picking a higher
15 threshold indicated by the data is conservative?

16 A. First of all, a conservative is in the eye of the
17 beholder. You know, way back a long time ago at the beginning
18 people used to talk about quote, unquote "conservative" in the
19 favor of the defendant. That's not really a good standard.
20 Sometimes you might be looking at an alternate suspect or a
21 witness or an exclusion. I think the best approach is to be
22 scientifically the most accurate.

23 Q. Moving on, were mixtures another perimeter that was
24 addressed in the validation document, mixtures?

25 A. Yes.

1 Q. What analytical threshold was used to interpret mixtures
2 in the validation study?

3 A. Well, they used that analytical threshold that they
4 predetermined, 125, to then apply to their mixture study.

5 Q. And what's the consequence of that choice?

6 A. So again, in particular, because you might lose number
7 of contributors if that affects your entire mixture study if
8 you are detecting fewer contributors that are actually there.

9 Q. And did you note where, again, in that validation study
10 where the total number of alleles detected are used as a
11 measure of the ability to detect a mixture?

12 A. Yes.

13 Q. How does that tie in with the threshold?

14 A. So again, if the threshold is too high you're going to
15 detect fewer contributors and you will be discarding more
16 information from your mixture and your mixture study and
17 possibly your case work mixtures, as well.

18 Q. So it's exactly the same issue as with a non-mixture if
19 there's just one, it's the same issue; is that right in terms
20 of calling it?

21 A. Yes, yes, it is.

22 Q. Did any of the analyses directly address the
23 requirements to deconvolve the profile in individual
24 contributors and could you please tell us what deconvolve
25 means?

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1 A. So deconvolve means to try to separate a mixture into
2 its individual contributors. There were certainly discussions
3 of it but there's no specific criteria. There's specific
4 criteria listed in the interpretations I did, but those
5 specific criteria do not derive from the validation and not
6 backed up by the validation.

7 Q. Again, what would be the consequence of failing to
8 deconvolve, not doing that?

9 A. Well, it's not so much the failure to deconvolve as to
10 have reliable criteria for trying to separate out separate
11 contributor, for example, a major and a minor, and if those
12 criteria do not have specific scientific support based on
13 validation, validation using samples of known provenance then
14 there's a higher risk of misinterpreting the mixture of a case
15 work sample.

16 Q. And did any of the analyses directly address the
17 requirements to separate a profile into major and minor
18 components?

19 A. Not so much in the validation. They certainly didn't
20 come up with specific percentages to use as is listed in the
21 protocol, those don't seem to have any basis in the validation.

22 Q. Did you note the statement in the validation study or
23 the approximate ratios of contributors can be determined based
24 on average peak height ratios?

25 A. I did see that.

1 Q. And that caution should be taken with mixtures of
2 multiple contributors and where mixtures where the ratio is
3 very unequal, in other words, the ratio of contributors is not
4 balanced? Could you explain that?

5 A. You're reading from the interpretation protocol.

6 Q. I'm am. It is on page 32, I believe.

7 A. So, yes. It is true, especially when we're talking
8 about Y-STR mixtures, first of all, peak heights in Y-STRs
9 are less reliable generally than in autosomal for a variety of
10 different reasons having to do with the specifics of the
11 chemistry and also the genetics. Mixtures in Y-STRs become
12 problematic almost immediately. We know that mixtures are
13 problematic historically even for autosomal profiles, that has
14 been more recently addressed by use of Probabilistic
15 Genotyping, it doesn't completely address it but it is the
16 correct approach. No such approach is available for Y-STRs so
17 laboratories and analysts are still using sort of manual, what
18 we used to call manual and binary methods to try to separate
19 out mixtures, that makes it even more critical that the
20 interpretation guidelines are supported by validation and very
21 specifically. There are other aspects of Y-STR profiles that
22 make them more difficult to separate out and interpret the
23 autosomal profiles mixtures in particular.

24 Q. Did you also review the Y-STR interpretation protocol?

25 A. I did.

1 Q. And I believe there's an instruction, you've noted page
2 211 that, quote, peak height imbalance, and what is peak height
3 imbalance?

4 A. So peak height imbalance is if you have in Y-STRs more
5 than one contributor and you're looking at the generally two
6 peaks or more at a locus and they're imbalanced and you're
7 looking to determine if you can determine a major or connect
8 that peak with another peak and the profile is coming from the
9 single contributor.

10 Q. Okay. So again, the instruction notes that peak height
11 imbalance, which you've just defined, and allelic dropout have
12 been shown to occur. What's that dropout refer to?

13 A. The allelic dropout is the presence of missing
14 information. So obviously we never know when information is
15 truly missing but you can have some information about that
16 based on peak heights in the mixture and that dropout is
17 directly affected by the analytical thresholds, and by that I
18 mean, for example, if your threshold is 50 and there is a peak
19 at 48 you're not going to be calling it, it's going to be
20 effectively called as dropout even though the peak is really
21 there so you can see how critical having an accurate analytical
22 threshold is to truly accurately call all of that DNA data.

23 Q. And in the same instruction they say that all locus
24 should be considered during interpretation for that reason
25 because of the dropout and peak height imbalance issues?

1 A. All loci should be considered for those issues as well
2 as just generally. The profile should be carefully inspected,
3 and again, this is still using a manual binary approach in
4 Y-STRs to make sure that the interpretation has considered all
5 of the information as it's based on all of the information, not
6 loci that have been discarded for various reasons.

7 Q. Now, on your review, and I'm referring to the combined
8 swab from glasses, right, you recall that. And your review
9 with the instruction we've just been talking about, was that
10 followed in the interpretation of the Y-STR profile obtained
11 from that sample, again, the glasses?

12 A. It wasn't. Once the analyst determined what she
13 believed to be the major profile the other loci were just
14 apparently not considered or looked at again.

15 Q. Did you also note in instruction that alleles below the
16 analytical threshold may be considered as a possible mixture?

17 A. Yes, I did, and there was some confusion about that in
18 the direct testimony and the original cite that we discussed is
19 the correct cite on that in the case work operations manual, so
20 this is going to be on page, it starts as PDF, they are both
21 the same, so 211. And if you look at one single contributor,
22 that first bullet does talk about the duplicated locus DYS385
23 and DYS387S1, however the bullet underneath that onto the next
24 page does not refer to the duplicated, it stands by itself and
25 it says that profiles exhibiting possible allelic activity

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1 below the analytical threshold may need to be considered as a
2 possible mixture, and then the peak heights of the called
3 allele must be considered when evaluating such profiles. And
4 so that instruction is in there, not just for GlobalFiler and
5 it's not just for DYS385 --

6 Q. And that's, again, in the instruction in the SLED
7 operations manual, correct?

8 A. Correct.

9 Q. Which analysts at SLED should follow when performing
10 their analyses, correct?

11 A. Correct.

12 Q. So based on that what we've just discussed were alleles
13 below the analytical threshold set by SLED of 125 RFU, were
14 they considered at all in the Y-STR profile from that sample,
15 the combined glasses sample?

16 A. Well, I was going to say, apparently not at all, except
17 I heard the analyst point to an allele that was not called and
18 she said that allele was from Mr. McClary. I found that rather
19 disturbing to not call it and then say we know it's there
20 because we know he's there, so that was a little bit
21 disturbing, but more globally a number of alleles were not
22 called in that profile which as we've discussed how the risk of
23 underestimating the number of contributors in fact did.

24 Q. You received the actual data files from my office as
25 part of the discovery we received from the solicitor's office,

1 correct?

2 A. Yes, I did.

3 Q. And you, yourself, did you re-analyze them using the
4 same software as SLED used?

5 A. Yes, I did.

6 Q. Did you detect more real DNA peaks than acknowledged by
7 the analyst for that profile?

8 A. Yes, I did. The ones that you pointed to that were
9 clearly visible on the electropherogram even printed on scale
10 that SLED printed out were clearly peaks and I was able to
11 analyze them and labeled them as two males, yes.

12 Q. So based on your analysis of the SLED data, how many
13 males contributed to this mixture which, again, is the combined
14 glasses swab?

15 A. I saw over evidence of three males, and that's always a
16 minimum with these difficult samples.

17 Q. And we can see these at several locations, correct?
18 These are the DYS576, 570 and 449?

19 A. That's correct.

20 Q. Did you also note in the DNA operations manual and
21 instruction that, quote, distinct differences in contribution
22 will often allow the major profile to be extrapolated and be
23 considered as a single source?

24 A. I did.

25 Q. Explain that, if you would, what that means.

1 A. So any instruction like distinct difference or the peak
2 is higher or any qualitative instruction like that, by
3 definition then becomes subjective and subjective is kind of a
4 nemesis of all forensic interpretations. We want them to be as
5 objective as possible, as it's never 100 percent human beings
6 are doing this but that kind of wording leads to more decisions
7 being made by the analyst that are not necessarily based on
8 scientific data.

9 Q. So that term, distinct difference, is it defined
10 anywhere the in the operations manual?

11 A. Well, it's defined kind of sort of later on as
12 resolvable, clearly distinguishable, but that doesn't really
13 help, those all mean the same thing.

14 Q. So does that basically let the analyst, they could mean
15 whatever the analyst wants them to mean, in your opinion?

16 A. For those words, yes.

17 Q. And again, returning to the operations manual, did you
18 see an instruction that, quote, no mixture interpretation will
19 be offered for mixtures where a major contributor cannot be
20 identified?

21 A. I think I did see that and I realized later that was for
22 four contributors, so while I agree with it in the operations
23 manual that it specifies only for four so it probably wouldn't
24 apply to this the one which it looks to me like three.

25 Q. So finally, I'd like to talk to you about some of the

1 specific loci that were dropped from the interpretation and
2 then the subsequent estimate, on the DYS627 which is the blue
3 panel, do you have that?

4 A. Yes.

5 Q. That was one of the loci that was dropped?

6 A. Yes.

7 Q. And you were here, you heard testimony of Agent Hefney
8 that only one of the two peaks present at that location was
9 identified by a number, correct?

10 A. Correct, and when I say, dropped, I mean dropped for the
11 purpose of both comparing to Mr. McClary's reference sample and
12 for searching in the database.

13 Q. And then which number was that, specifically?

14 A. I'm sorry, what is the question?

15 Q. Was that the 22 that was dropped?

16 A. I see, yes. So the only allele that SLED called or
17 labeled at that locus was a 22. Now, obviously, Mr. McClary is
18 not a 22 and then that locus was brought both for the
19 interpretation and for the database search.

20 Q. So it was the 22 was just above the threshold, correct,
21 the 125 threshold?

22 A. That's right, that's right.

23 Q. And the 19 was just below, correct?

24 A. Yeah, there's a good bit that the lab did not call. I
25 know that it's a 19 and I think the analyst does too, but the

1 problem is you can't sort of pick one to call and say I like it
2 or don't like it, you have to follow your protocol and protocol
3 has to be informed by the validation. She is correct in that
4 that locus and peaks are a very similar height, the only reason
5 that one wasn't called is because it fell just below the
6 threshold and the other one fell just above. That's an example
7 of how a threshold can create problems and how having a
8 threshold that's too high can create problems. It also
9 highlights that that locus and because of that locus this
10 entire profile, not just that locus, but it's an example of how
11 this profile is quite ambiguous and calling a major without
12 acknowledging the ambiguity and the mixture and the fact that
13 there's probably three males, at least, oversimplifies the
14 profile and caused me to question the final interpretation.

15 Q. Now, speaking about DYS449 which is the red panel, is
16 that another locus that was not considered?

17 A. Correct. You pointed out those three peaks when looked
18 at appropriate magnification it's quite obvious those three
19 peaks are real and they can be called and three peaks of that
20 locus is clear indication of at least three males and an
21 example of where the protocol says you can and should look
22 below the analytical threshold, but at least for the purpose of
23 determining the number of contributors and that is an example
24 of that.

25 Q. And in fact, with those three peaks you had one was a

1 30, that was the highest, the next was a 35 and the next 29?

2 A. Correct.

3 Q. And Mr. McClary, does he have a 30 in his profile?

4 A. He does not.

5 Q. Is it possible to determine an unambiguous major
6 contributor at that locus?

7 A. No, not at that locus, not at the previous one, which
8 again, means that the entire profile is ambiguous and needed to
9 be interpreted as a mixture, as an indistinguishable mixture,
10 not picking certain loci and determining and deciding that
11 there is an unambiguous major.

12 Q. And so what is the ultimate consequence of dropping
13 those two loci?

14 A. Well, the first consequence is that only one possibility
15 was reported. The ambiguity was not reported and that's
16 important, but that also affected then the search in the
17 database to get a statistic.

18 Q. So in other words, the statistics then are based on the
19 peaks that happened to match Mr. McClary?

20 A. Correct. So what happened in that database search is
21 the locus, that DYS627 small on my screen where the 22 that was
22 not Mr. McClary was dropped as was the DYS439, and the problem
23 with that is if you are searching what SWGDAM calls, sorry, we
24 haven't defined SWGDAM: Scientific Working Group ON DNA
25 Analysis Methods, it's a group that issues guidelines that have

1 specific Y-STR guidelines and what those guidelines say is if
2 you're going to do a reduced locus search of that database that
3 the analyst mentioned, if there is even one locus that doesn't
4 quote, unquote match, then you can't do that search.

5 Q. Did SLED do that search in this case, did they do it
6 that way?

7 A. They did it that way.

8 Q. And to go back, so the consequence of dropping those two
9 loci is, again, the statistics end up being based only those
10 that are called for Mr. McClary or match Mr. McClary. In your
11 opinion, is that a fair or scientifically reliable
12 interpretation?

13 A. It is not. It is prejudicial against Mr. McClary and
14 it's not scientific because as stated in the SLED manual it
15 does not consider the whole profile and as stated in the SWGDAM
16 guidelines it should not have been searched because there was
17 at least one locus, according to how SLED called this, that
18 didn't match.

19 Q. So even if all the typing and interpretation were
20 correct is that final statistic of one in 9,700 reliable in
21 your opinion?

22 A. It's not, and there's a variety of reasons why it's not,
23 some are more technical, but for the reasons we have discussed
24 as well as others, it is not.

25 MR. FOX: Thank you. Please answer any questions the

1 Solicitor has for you.

2 MS. WALTER: Court's indulgence for one moment.

3 Thank you, Your Honor.

4 **CROSS-EXAMINATION**

5 BY MS. WALTER:

6 Q. So I might jump around a little because, obviously, I'm
7 not privy to what you're testimony will be. I think at one
8 point you said that one of the issues was that SLED should have
9 set different thresholds for different colors?

10 A. That's correct.

11 Q. So if they used an average then it's possible that some
12 thresholds would be higher than you think they should have been
13 and some thresholds would have been lower than you think they
14 should have been?

15 A. Well, they didn't use an average but your statement is
16 nonetheless correct.

17 Q. And how are you saying that they didn't use an average?

18 A. Well, it would had appeared to me what they did was pick
19 the absolute highest one for one color and slightly increased
20 that, and that's what they used, it didn't look like an
21 average.

22 Q. Well, is there anything in anything that you reviewed
23 where you can definitively say they did not use an average?

24 A. Yes, let me pull that up.

25 Q. Because you're just saying it didn't look like an

1 average?

2 A. Well, let me pull it up and we can clarify that. So if
3 you look at page 8042 of the validation document --

4 Q. Okay.

5 A. Make sure I'm in the right place, sorry. Let me make
6 sure I've got the right thing. I'm not finding what I'm
7 looking for here.

8 Q. Okay, that's fine, we can move on. You can't find
9 anything right now.

10 A. No, hang on one moment, please. I thought I had seen
11 something. Well, let's just -- it is the page I'm looking at.
12 Well, let's just take your statement that it is an average,
13 that would be incorrect.

14 Q. Well, actually my question was what are you seeing in
15 the validation that says it is not an average, and your
16 response was, it didn't look like an average, did I mishear
17 you?

18 A. Well, what I was looking for -- I can't find what I was
19 looking for, to be honest, so I believed they had taken the
20 highest, but if you are presenting that they took the average,
21 that would also be incorrect.

22 Q. What would be incorrect? You're saying that they didn't
23 take an average but you can't tell me why that is? I'm trying
24 to understand what you're saying.

25 A. Sure. Taking an average would be incorrect, and you

1 just told me that's what they did, and that would be incorrect.

2 Q. How many different labs work have you re-examined?

3 A. Oh, I couldn't even begin to tell you, all over the
4 country for 30 years, many, many, many, many.

5 Q. And do each of those labs set their own thresholds?

6 A. They do.

7 Q. And of those many, many, many, many, many, many labs you
8 have looked at, how many have you agreed with the thresholds
9 that they set?

10 A. Some I have, some I haven't.

11 Q. Have you disagreed with more than you have agreed with?

12 A. I don't keep those kind of statistics.

13 Q. Now, you've talked, and I think what you said is if
14 peaks are missed that you run the risk of including someone in
15 error or not including someone in error?

16 A. What I said was you can have a false inclusion, a false
17 exclusion and possibly misidentify the number of contributors.

18 Q. So if you miss a peak, which means that you are looking
19 at less information because you're not including that peak, how
20 does that lead to the inclusion of someone that's not really
21 there?

22 A. Well, you have this case as an example. You are missing
23 information, there are peaks that are not called, there are
24 peaks that were called that were discarded, and we don't know
25 if we got the right person based on how that's done. Looking

1 at the profile as a whole, if there is a peak that is required
2 to exclude somebody and it is not called then that would be a
3 false exclusion, that's how that works.

4 Q. What peak are you saying was discarded that would
5 exclude Demetrus McClary as being a contributor?

6 A. Well, what I'm saying in this case is the laboratory
7 called to 22 at that 627 -- I'm sorry, I can't read it,
8 whatever that locus is at the end of the first panel.

9 Q. Right.

10 A. It is not possible in this particular case to make an
11 absolute exclusion or an absolute inclusion, the data are
12 ambiguous, they must be interpreted as mixture. The laboratory
13 called the 22. The 22 is larger than the peak that they did
14 not call. If in fact the 22 is the major, we don't know if it
15 is or not, and the whole profile is listed with that 22 along
16 with the 30 at the DYS649, then that is not his profile. Now,
17 it is not possible in this case, as I said, to make an absolute
18 exclusion or inclusion because the data are ambiguous. That
19 ambiguity has not been acknowledged.

20 Q. So let's look at that DYS627, that peak that you're
21 saying was dropped, that's a 19, correct?

22 A. I know it's a 19, the laboratory did not call it.

23 Q. So it is a 19?

24 A. Yes, it is.

25 Q. And if we look at the defendant's standard DYS627 he is

1 a 19?

2 A. He is a 19 but we don't know if the 19 or the 22 goes
3 with the other peaks. The laboratory said there's at least two
4 contributors, I'm telling you there's at least three
5 contributors. Because of the way Y-STR profiles work all of
6 the peaks, all of the loci must be connected to determine the
7 profile of a single individual and that cannot be done in this
8 profile. You can't just say, oh, my gosh, there's a 19 there
9 that the lab didn't call that Dr. Rudin called, then oh my god,
10 it must be Mr. McClary, that's not how it works.

11 Q. No, but the point is that you're saying that the lab did
12 not call a peak that would actually lend strength to the
13 inclusion of the defendant?

14 A. It would not necessarily lend strength, what it lends
15 strength to is that this profile is ambiguous, we can not call
16 a major and there's no way of doing a mixture analysis, that's
17 what it lends strength to. I think it would be quite
18 misleading to say it lends strength to Mr. McClary's inclusion
19 and, of course, this sample, as we all know was problematic
20 from way back as even the packaging and swabbing, but no, I
21 think that would be quite misleading, but what it supports is
22 the fact that this profile is ambiguous and can't be
23 interpreted as SLED did it, so overly simplistic
24 interpretation.

25 Q. You said that mixtures are problematic immediately and

1 it is more difficult to separate out and interpret, but it is
2 not impossible, correct?

3 A. It depends on the profile.

4 Q. Is it impossible meaning it could never happen, is it
5 impossible?

6 A. As I said, it depends on the profile.

7 Q. You also said that the subjectiveness is the nemesis of
8 all forensic interpretation, but determining the number of
9 possible contributors is always going to be a subjective
10 determination, correct?

11 A. Not -- yes and no. We can certainly do an objective
12 determination of a minimum number of contributors, past that
13 it's not so much subjectivity as issues with people sharing
14 peaks and types that doesn't allow us to determine an absolute
15 number of contributors, but it can be objectively determined a
16 minimum number of contributors.

17 Q. And two is, you said at least two that includes the
18 possibility that there would be more contributors?

19 A. It does, the problem with that, though, is that you have
20 to go back to the validation and interpretation guidelines and
21 both validation and interpretation become much more difficult
22 especially with Y-STRs. The difference between two and three
23 is significant and so you are formally correct, I think it
24 doesn't capture the complexity of the issue.

25 Q. Now, you're saying that there are at least three

1 contributors, correct?

2 A. Correct.

3 Q. So then with the percentage that's used as sort of the
4 cut off, and I'm looking at the electropherogram, if there are
5 at least three contributors then the cut off would have to be
6 below 35 percent, right, according to SLED's protocol?

7 A. According to SLED's protocol for which there is no
8 support in their validation, yes.

9 Q. Well, did you look at Y-STR validation?

10 A. Yes.

11 Q. And so based on their protocol, whether or not you agree
12 with it, the only allele that would be lost, so to speak, would
13 be DYS570 because that percentage is at 35.8? All the other
14 percentages would be below.

15 A. I didn't do the calculation myself, it's possible.

16 Q. What were your results? You said you did this analysis
17 yourself, so what were your results? Give me your likelihood
18 ratio.

19 A. I'm sorry, I did not do any ratios, what I did as you
20 heard on direct, I was not asked to provide any conclusions or
21 do any statistics. What I did was analyze the raw data at what
22 I believed to be an impairable threshold and called them,
23 that's the extent of what I did.

24 Q. So you can tell us that in your opinion it is wrong but
25 you cannot tell us what the correct analysis would be?

1 A. Well, I told you what the correct analysis should be,
2 that this profile is ambiguous, it's not possible to call the
3 major and it was incorrectly searched.

4 MS. WALTER: Court's indulgence. I have nothing
5 further, Your Honor.

6 THE COURT: Redirect?

7 MR. FOX: No, Your Honor.

8 THE COURT: Doctor, are you still there?

9 THE WITNESS: I'm here.

10 THE COURT: Doctor, this is going to be a little
11 awkward, I'm going to try to ask a question and you'll hear it
12 twice because of the echo.

13 As it relates to the defendant involved in this case
14 are you saying in summary that these results cannot be relied
15 upon to identify him as a contributor, period, or that the
16 statistics of one in 9,700 is faulty?

17 THE WITNESS: I'm actually saying both of those
18 things, the first issue is calling a definitive major
19 contributor, I don't believe that can be done with this profile
20 and it's not supported by the lab's validation as -- and their
21 interpretation is not formed by their validation, so in
22 attempting to separate major and minor the validation has no
23 basis for that 35 percent or 45 percent difference between the
24 peaks, and as well, loci were discarded that showed ambiguous
25 or different results, so I think it is problematic. I'm not

1 saying that I can definitively exclude him, I'm saying that
2 selecting locations at which a major contributor is called is
3 not supported and so it's problematic and ambiguous. That then
4 also leads to the statistic being problematic, has a very
5 specific instruction which I agree that if there is any locus
6 that does not match you can't use other locations to search the
7 database without using that locus, that gives an incorrect or
8 misleading statistic. Did I answer your question or shall I
9 add more?

10 THE COURT: You did, I got that and maybe I
11 understand that part from your initial testimony. Let me go at
12 it this way. How do you define ambiguous in your line of work
13 because, you know, everything is pretty ambiguous that I deal
14 with and that's common layman's understanding of ambiguity.
15 When you're saying something is ambiguous, I'm assuming you're
16 using that as a term of art, how do you define that?

17 THE WITNESS: There are multiple explanations for a
18 profile and it is not possible to definitively decide between
19 them.

20 THE COURT: So essentially unreliable?

21 THE WITNESS: Yes, that's one way to put it, yes.

22 THE COURT: To a reasonable degree of scientific
23 certainty you feel that these results are unreliable?

24 THE WITNESS: Yes.

25 THE COURT: But at the same time you cannot exclude

1 the possibility that the defendant was the contributor of the Y
2 DNA?

3 THE WITNESS: What I can tell you is that all of his
4 alleles are present but they are present in a mixture and it's
5 the interpretation of the mixture that's problematic. I'm
6 simply saying most or all of his types or alleles are present,
7 the way the Y-STR mixtures work doesn't necessarily mean that
8 he's present that it could be one explanation. The problem
9 with the mixture, also, is we don't have a good way to give a
10 statistic and without a statistic we're not allowed to present
11 that in court because you can't give that an appropriate
12 weight. So there are multiple explanations, his presence is
13 one of them but there are other explanations. It's not
14 possible to weight the different explanations nor is it
15 possible to weight that proposition of his inclusion. I can't
16 definitively exclude him, no.

17 THE COURT: And obviously this problem would not have
18 presented itself had the glasses been bagged separately,
19 perhaps?

20 THE WITNESS: It certainly added to the problem,
21 perhaps, I mean, we've heard it.

22 THE COURT: Got it. Thank you. Let me see if they
23 have other questions for you based on what I've asked.

24 MR. FOX: No, the Your Honor.

25 MS. WALTER: I just wanted to follow up on the

1 judge's last question.

2 CROSS-EXAMINATION (continued)

3 BY MS. WALTER:

4 Q. So you cannot definitively say that the way the glasses
5 were packaged is affecting your opinion on the reliability of
6 the analysis?

7 A. What I can say is that obviously the glasses being
8 packaged together introduced the possibility of
9 cross-contamination one with the other, that increased the risk
10 of certainly multiple contributors and of contributors being
11 confused and then using one swab to swab both of them
12 compounded the error and made the profile more difficult to
13 interpret, it is possible and of course you can't go back in
14 time and can't guess but if they were packaged separately and
15 swabbed separately we might not have had this complex mixture,
16 it might have been possible to better sort out this profile,
17 but that is the situation that we have.

18 Q. But also if either one of those pairs of glasses had
19 been come into contact with both Liliana Hernandez-Diaz and
20 Demetrus McClary, let's put aside all of the packaging issues
21 and the swabbing issues, if either one of those pairs had come
22 into contact with both of those people you potentially would
23 still have a mixture?

24 A. Of a hypothetical, yes, that would be a mixture of two
25 people, a male and a female, we probably wouldn't be dealing

1 with Y-STRs, only two people is easier to deal with and
2 autosomal is easier to deal with, so I mean, it's a
3 hypothetical but it didn't happen, so I don't know what to say
4 to you.

5 Q. Well, you can't tell us whether or not the packaging
6 did, in fact, cause cross-contamination between the glasses,
7 you're saying that is possible?

8 A. Nobody can tell you that.

9 Q. Right.

10 MS. WALTER: Nothing further.

11 THE COURT: Doctor, thank you for joining us. I
12 realize you probably woke up earlier than you otherwise would
13 have in California. Take care of yourself.

14 THE WITNESS: Thank you.

15 THE COURT: I'm going to stop recording. We're going
16 to take lunch in a moment and then we're going to reconvene
17 with this. Just some food for thought while ya'll are eating
18 food. Just a few thoughts that are occurring to me. We're
19 talking about the eye glasses, that's all that's being
20 challenged here. I'm assuming that based upon the reports I've
21 looked at, clearly one set of glasses belongs to the victim in
22 the case, I assume she's identified it. Glasses are,
23 obviously, personal items. You don't typically walk around
24 handing, especially if they're prescription sunglasses, maybe.
25 The question I'm going to ask when we get back, is there

1 anything else linking or any other evidence that would tend to
2 link the defendant to one of those pairs of glasses, and I'm
3 assuming that the victim will testify that one set belonged to
4 her, what kind of glasses are they, are they reading glasses,
5 are they prescription glasses, are they sunglasses? Reading
6 glasses and sunglasses you might be able to switch between
7 people, that could be relevant here, but we'll reconvene in
8 about an hour and I'll take those pleas and then we will see
9 where we are and argue this, I'll make a ruling on it and I
10 guess then we will move onto the Jackson v. Denno, which
11 hopefully should not take very much time.

12 THE COURT: What else did we have on deck with this
13 today, was that it?

14 MR. FOX: There was a letter from the jail and I
15 believe there's an officer here that will testify about that,
16 but, again, that won't be anywhere near as long what we've just
17 done.

18 THE COURT: Sure.

19 MR. FOX: And then objection to the collection of the
20 swab from the defendant, and that could be addressed, actually,
21 during his testimony during the Jackson v. Denno.

22 THE COURT: That's what I was assuming.

23 MS. WALTER: And, Your Honor, we also have, and I can
24 give you, if I can find it now, let me see if I can find it.
25 The State had transcribed, and I don't know whether I gave it

1 to you, but had transcribed both of the defendant's statements.
2 At this point the State intends to introduce the second
3 inculpatory statement. I had gone through and made proposed
4 redactions which I gave to defense, probably a year ago. There
5 are some that they agree to, some that they do not, some that
6 they have requested that the State does not agree to. So I
7 have done a color-coded transcript.

8 MR. FOX: I've got, like -- because it's changed
9 several times so can I see that before we start reviewing that?

10 THE COURT: Sure.

11 MR. FOX: You know, what's been proposed and then
12 it's been through several attorneys, I've got several different
13 versions of this.

14 MS. WALTER: It's the version that I gave Ms.
15 Crawford and photocopied for her.

16 MR. FOX: I understand, I'd just like to see it.

17 THE COURT: I'll let you all take a look at that.
18 I'm intending to deal with the issue of whether the Jackson v.
19 Denno was just the issue as far as Jackson v. Denno, whether
20 the rights were offered. I do not intend to, at this point in
21 time, and I think it would be very, very premature to parse the
22 statement or to cut that up, that's for the trial judge. I
23 don't know what evidence is going to be presented. It don't
24 have enough of a feel for that. The stuff that's in red that
25 you all agreed definitely needs to stay out, you know, okay,

1 you agree to that. That's something that you all are probably
2 going to have to handle at trial because I don't have an
3 intimate understanding at this point in time of the facts
4 sufficient to rule that, hey, yeah, this is coming out and this
5 is staying in.

6 MR. FOX: Yes, sir.

7 THE COURT: But I'll deal with the threshold question
8 of the Jackson v. Denno, which, obviously, should not take very
9 much time at all. I'll be back at 2:30. Let the pleas know
10 that we're going to do those at 2:30 so I can get those lawyers
11 out of here and then we will reconvene with this. I'm also
12 going to make the different exhibits, which were handed up to
13 me while the last witnesses were testifying, I've marked those
14 at the top as "JA," in the upper right-hand corner, and I'm
15 going to be making those a Court's Exhibit at some point during
16 the hearing today so that there's an appellate record of a
17 record of exactly what was handed to me, what I was considering
18 and what the witnesses were referring to, so somebody hit me if
19 I fail to do that. Okay? See you all in about an hour.
20 Thanks.

21 (Recess taken.)

22 THE COURT: I left a few things hanging out there
23 about the glasses and things of that nature. Obviously, Mr.
24 Fox, I'm assuming that 702, your argument is not so much
25 concerning the science of forensic DNA, more goes to the

1 particular procedure employed by SLED here as opposed to the
2 fact that you can identify somebody from DNA, but the question
3 about the glasses, what kind of glasses were these?

4 MS. WALTER: I can show you a picture, Your Honor.

5 THE COURT: And the victim's not here? Did she have
6 to leave?

7 MS. WALTER: She gets very upset and it was all I
8 could do to bring her in for a little bit but this still
9 affects her quite deeply.

10 THE COURT: Okay.

11 MR. FOX: Mr. Walter will correct me, she has
12 pictures, I believe, one was a set of reading glasses and the
13 other was a set of sunglasses.

14 MS. WALTER: That's correct, but I'm just going to
15 show Your Honor.

16 THE COURT: Which belonged to the victim in the case?

17 MR. FOX: The reading glasses.

18 MS. WALTER: The reading glasses, because she was a
19 cleaning woman at the Sheraton Convention Center. You can see,
20 those are where the lenses are broken out (indicating.)

21 (Off the record discussion was held at the
22 bench by Court and counsel.)

23 THE COURT: Mr. Fox, it's your motion so I'll let you
24 go first.

25 MR. FOX: Thank you, Your Honor. And, Judge, you are

1 correct. Of course, I think, under counsel the Court has to
2 perform its gatekeeping function and make a determination under
3 Rule 702, but the nature of my challenge is really with the
4 admissibility under Rule 403, and I think under all the
5 circumstances the prejudicial effect greatly outweighs the
6 probative value because, starting with the way they were
7 collected. Agent Hefney, in fact, Officer Bailey, who
8 collected them, the crime scene person, acknowledged it would
9 have been better to put these in two different packages, two
10 different envelopes because you want to keep them separate.
11 The reason to put them in an envelope or container, whatever it
12 is they use, is so that they don't get contaminated down the
13 road, obviously, and that putting them together, any two pieces
14 of evidence, that's a problem. Agent Hefney said, yeah, that's
15 not the way we would prefer to do it, and then that's
16 compounded when it gets to SLED because now, I guess you've got
17 these two, I don't know if it would have undone the error, but
18 now you've got two items in one package. They compound it by
19 using one swab on both items, and again, Agent Hefney
20 acknowledged that would not be her preference, but that was
21 done before she ever got to it. So there's contamination
22 issues, issues about possible transfer of DNA, before we ever
23 get to the analytics, the science of what was done. Dr. Rudin
24 testified about the problems, number one, with contamination,
25 but as well, with the way SLED set their perimeters.

1 Obviously, they do have to set them in some manner, these
2 thresholds that we talked about, there has to be some sort of
3 procedure. However, it does have consequences, where they
4 choose to set those thresholds does have consequences, and Dr.
5 Rudin testified in this particular case, specifically, that it
6 may have missed, and I'm not going to use the proper language,
7 but it may have missed information, DNA, that, potentially, and
8 she can't say for sure, that might have helped Mr. McClary,
9 might also not have gone in his favor, but it makes the entire
10 conclusion inherently unreliable, particularly when you combine
11 it with the mishandling of the evidence on the front end. So
12 we've got a problem, it doesn't mean that they can't possibly
13 extract DNA, it doesn't mean they can't reach some kind of
14 conclusion, but we're trying to decide if this is material
15 that's going to be helpful to the finders of fact, if it's
16 going to be something that's not confusing. It's going to be
17 confusing on some level for anybody who's a layman, myself, you
18 watched me struggle with the language and framing questions
19 this morning, that doesn't mean a jury can't sit through it,
20 but it's inherently confusing, and when you couple that with,
21 again, with respect to the glasses, the way they were
22 collected, the way they were dealt with, and with what Dr.
23 Rudin classifies as an artificially high threshold, what we're
24 left with is, in her opinion, something that is not supported
25 in the science, that is not reliable, and to the best of her

1 ability -- or knowledge and opinion, would not be something
2 that is supported by the data or by the underlying science.
3 The science itself, I feel confident Your Honor will find is
4 fine, but I think as was applied with respect to those two
5 items, it's a real problem, and she questioned not so much that
6 there were calculations made but what value they actually had.
7 And we can tell a jury, this isn't probability of guilt, you
8 know, one in 9700 doesn't mean that's his probability of guilt
9 or being innocent, but it sure sounds like it. Alright? One
10 in 9700, they didn't give anyone else, and I think under the
11 circumstances, again, under the Rule 403 analysis, they should
12 be excluded.

13 THE COURT: Let me go ahead and jump to what they are
14 going to argue and let you address that, and then I'll turn it
15 over to the Solicitor for anything I may not have thought of.
16 Obviously, I understand your expert's opinion on this. The
17 argument could be made that, perhaps, the proper remedy in this
18 case would be an independent run of the DNA and someone taking
19 a second look at this with the proper markers or the proper
20 levels set for the varying colors and simply, you know, get a
21 second opinion on the DNA. I understand her statement that the
22 results were ambiguous and perhaps should not be relied upon,
23 but I'm assuming that at some point they're going to argue that
24 that goes more to the weight as opposed to the admissibility
25 even under a 403 analysis, that the Court also has to concern

1 itself with the totality of the evidence in a 403 analysis, and
2 my understanding is that, and I realize we haven't gotten there
3 yet, but the statement that your client, I think, may have
4 given to the police was essentially that there were two other
5 guys outside or something like that and they were gone by the
6 time the whole thing had happened, and he didn't really deny
7 his presence or his involvement that much. What are your --
8 and I think that there are other items. Wasn't there DNA
9 recovered off the wig? I'm trying to remember.

10 MR. FOX: No.

11 THE COURT: There was no DNA on the wig?

12 MS. WALTER: No, Your Honor, the other DNA was from
13 her fingernail scrapings.

14 THE COURT: Okay. Maybe that's what I was thinking
15 about. I know you had gotten some other DNA evidence from
16 somewhere else, but do you want to hit those before I turn it
17 over to them?

18 MR. FOX: I will try. Yes. So to clarify, Judge,
19 there was, and I'm going to not get which hand, one hand they
20 were able to develop a profile that purports to match McClary,
21 or you know, includes him as a possible contributor, the other
22 they could not. The wig they could not develop a profile, and
23 there was another item submitted, a rag that was in the
24 bathroom that, again, because of packaging, they refused to
25 even test, didn't even make an effort to test that, so that's

1 another concern.

2 MS. WALTER: But not for DNA.

3 MR. FOX: Well, they didn't do anything, couldn't do
4 anything with it. They just basically didn't do anything, said
5 due to improper packaging we could make no analysis of this.

6 THE COURT: Got you.

7 MR. FOX: Judge, I don't know that having, under
8 these circumstances, having a third party or an independent
9 neutral person or facility test this would undo the problems
10 with the collection of it. You know, I think we'd still be
11 back here debating that, so they may have, and it's not so much
12 that setting a threshold itself is inherently wrong, you've got
13 to set the parameter somewhere, but the testimony from the
14 agent was, well, we're conservative with this, and you know,
15 we're very careful, and we're just trying to look out for the
16 defendant. But as Dr. Rudin testified, where you set that
17 could have a very important real world consequences, and so she
18 felt that, number one, it was kind of across the board, and she
19 explained better than I can why that's a problem, you know,
20 with the different colors --

21 THE COURT: Same value for each of the colors.

22 MR. FOX: Yeah, the same value for each, that that
23 really shouldn't be, and she gave very specific examples of why
24 that could. She couldn't reach the ultimate conclusion of
25 whether it did, in fact, impact the call or the declaration

1 that Mr. McClary was a major contributor to the glasses, but
2 she indicated how that could be a problem, in her opinion, that
3 there are three male contributors, three male contributors, not
4 a female and a male, not two males, but three, but the report
5 indicates that there were only two contributors, one of them
6 being a female, and part of that is because the way the
7 threshold was determined. So I certainly not mean to suggest
8 in any way that this was done deliberately, that it was done to
9 ensnare Mr. McClary, that it was a frame up or a setup, no
10 indication of that at all, but again, Dr. Rudin explained very
11 well why setting the threshold, she believes too high, too
12 artificially high, has real world consequences and, she gave a
13 very specific, and I won't recall off the top of my head which
14 allele, but, you know, she specifically discussed the one
15 allele where, you know, there's a 22 and he's a 19, and why,
16 even though the 19 was close, why it would be a, I think her
17 characterization was, grossly misleading to suggest that Mr.
18 McClary was even the 19, because again, she says there's three
19 contributors, not just two.

20 THE COURT: Right, and that was 627.

21 MR. FOX: Yes, sir.

22 THE COURT: Alright. I understand your position.
23 Solicitor, obviously, I think the primary issue in this case,
24 it sounds like, is going to be identity. Obviously, you're
25 going to argue that in terms of a 403 analysis with identity

1 being an issue the value of the evidence, even though it was
2 imperfectly gathered and perhaps a different DNA analyst would
3 analyze it in a more, I'll just say generous way, still, it is
4 good evidence of identity, especially in light of the other
5 evidence, the statement the defendant gave, the second
6 statement he gave, the fingernail scraping results, the
7 identification, et cetera, but what am I missing?

8 MS. WALTER: Well, Your Honor, what I would point out
9 is that, number one, Dr. Rudin said she could not exclude the
10 defendant. This is the typical battle of the experts, and if
11 we are going to say we can't introduce anything that might
12 confuse the jury then DNA is out the window because DNA
13 confuses everyone no matter how straight forward it is unless
14 you are practiced at it or are tortured with it on such a
15 regular basis as I am, but it is still a confusing issue and it
16 will be for the jury, but it is simply going to the weight of
17 the evidence, not to whether it is admissible. Dr. Rudin did
18 not say that she couldn't reach a conclusion, she said
19 specifically she was not asked to reach a conclusion, and as to
20 that one allele, 627, quite frankly, the State's position is
21 that her answer did not make sense because she is saying, well,
22 see they dropped that 19 which makes Agent Hefney's
23 interpretation unreliable, but actually, that 19 would have
24 bolstered an identification of the defendant, so quite frankly,
25 the fact that they set their threshold so high, actually made

1 it so that he only matched 21 out of 25 alleles versus 22 out
2 of 25, and I'm just focusing on that one allele because that's
3 what she did. So I think, really, all this to goes to is the
4 weight that a jury will accord the evidence, but there is
5 absolutely nothing that goes to say it should be suppressed,
6 and the testimony about -- yes, the glasses were packaged
7 incorrectly. However, I think it was also made clear, both
8 through Agent Hefney and Dr. Rudin, that you can't say that
9 simply because they were packaged together -- all that really
10 does is, you couldn't say -- if you got a DNA profile on one,
11 you could say, well, this belongs to the reading glasses, this
12 one belongs to the sunglasses.

13 THE COURT: You're explaining that it's substantial
14 that you've got one pair of glasses that the victim says were
15 hers, the readers, and then, obviously, even though they were
16 mixed together in the same bag you'd expect to find her DNA on
17 her glasses just like you'd expect to find them on mine and the
18 very fact that his DNA was in that -- you exclude the
19 impossible, whatever remains, however improbable, has to be the
20 truth, so, he obviously had to be the contributor on the
21 sunglasses.

22 MS. WALTER: Because no matter how Dr. Rudin answered
23 the question, the fact that they were packaged together and
24 maybe they should not have been, does not introduce a DNA that
25 wasn't already there. So I think that the packaging is sort of

1 a non-starter, so that we just get to, well, Dr. Rudin would
2 use a different threshold. Well, we would all use different
3 thresholds, jurors probably use different thresholds of each
4 one of them for what's a reasonable doubt, who do they believe.
5 That's just the life of the justice system, and quite frankly,
6 life in general. This all goes to the weight that should be
7 given to the evidence, not whether it should be admissible or
8 not.

9 THE COURT: Any last thoughts, Mr. Fox?

10 MR. FOX: Well, again, I think that my understanding,
11 again, talking about the 1922 at the one allele, again, Dr.
12 Rudin's opinion was very clear that there were three
13 contributors, not two, and that there was no way to call under
14 the circumstances, couldn't exclude Mr. McClary, but there was
15 no way to include in any hypothesis in her opinion. That was
16 my understanding of her testimony on that issue. And Judge,
17 I've been trying to find it, I thought it was in Phillips, it
18 might be in another, it might be in counsel, but honestly, I
19 haven't been able to lay my hands on it. There is discussion
20 from our Supreme Court about, with this specific issue about,
21 they looked a little sideways at the idea of, well, that's just
22 a weight issue, that just goes to the weight. It's admissible
23 or it's not, and you know, if it is the weight of the evidence
24 is always -- any evidence that's in front of a jury, the weight
25 of it and what they give to it was important.

1 THE COURT: It's more of a Frye type standard than a
2 Daubert type of a thing.

3 MR. FOX: Yes, and I remember the language, again, as
4 I sit here today, I can't put my finger on it but --

5 THE COURT: I know what you're talking about, it's in
6 there somewhere.

7 MR. FOX: So in other words they say, not that it's
8 not any issue, but the analysis that we need to do under 702
9 Rule 403, that's not really the proper analysis, that's not the
10 proper framework. That that's sort of the old, oh, well, we'll
11 just throw it and let the jury decide what it's worth, and it's
12 not to be that. Again, if it is in front of the jury, of
13 course that's what they'll do, but --

14 THE COURT: And I think that, you know, and I'm
15 relying on memory, but I think that the Supreme Court has made
16 it clear that the Court's in this state aren't to permit junk
17 science, for lack of a better word. Obviously, the testing
18 that was conducted by SLED, the testimony is that they
19 basically followed their standards, they followed their
20 internal controls, and there is no doubt that, of course, DNA
21 and processing DNA, it's a science, it is reliable, it's
22 accepted, and it's been introduced into the Courts of this and
23 every other state, probably every other country on the planet.
24 So there's no real 702 issue with that. To the extent that the
25 Court needs to employ a 403 analysis, of course, what I

1 mentioned a few moments ago is germane. We have two sets of
2 glasses in this case and one of them, the testimony is going to
3 be that those are my glasses, those are my readers, so I
4 presume that she's not going to take responsibility for the
5 sunglasses, that creates the question of, okay, well, where did
6 to those come from? She was cleaning a room in a hotel, so
7 they could either come from a guest or they could've come from
8 the defendant, and in this case, obviously, the glasses were
9 mixed when they shouldn't have been put in the same bag, but
10 they were, and obviously, it's substantial, or it's
11 interesting, that the SLED results indicate, of course, her DNA
12 present as well as the defendant's DNA being present, as
13 opposed to simply some major source that was unidentifiable
14 either from CODIS or some other mechanism. So I tend to agree
15 with the State that the fact that the glasses were not
16 separately bagged, although that is not ideal, although that's
17 not what should have happened, under the particular facts of
18 this case that mishandling of the evidence is not fatal to the
19 State's effort to introduce the DNA results that were conducted
20 by SLED. I certainly appreciate the defense expert's opinion.
21 In her opinion, obviously, she would not have set the
22 thresholds so high in order to determine major and minor
23 contributors and things of that nature, but the Court is not in
24 a position to say that her preference and her opinion on where
25 those levels should be set necessarily warrants the Court

1 excluding the results that were provided by SLED excluding
2 those at trial. The quite essential question is, is this about
3 battle of the experts, well, yes, and I think that she can
4 educate the jury. If there's a desire for her to testify she
5 can certainly educate the jury on that particular point. And
6 again, this is not a situation where this is the sole piece of
7 evidence that was located at the scene that's being used to
8 identify the defendant. So under a 403 analysis, I think it's
9 appropriate to take a look at the totality of the facts and
10 circumstances to determine whether it warrants exclusion, and,
11 obviously, based upon the other evidence I don't think there's
12 going to be jury confusion, I don't think that there is going
13 to be duplication or excessive delay or prejudice to the
14 defendant which is outweighed by the probative value of this
15 identification expert -- or evidence. So for that reason I'm
16 going to deny your motion, but obviously, I appreciate your
17 position and certainly understand the need to fight this
18 battle, so that will be my ruling on that.

19 MR. FOX: Yes, sir.

20 THE COURT: I know that we're still running behind,
21 but I do need to take just a very brief break and then we can
22 be back up with, I guess, Jackson v. Denno and the letter and
23 whatever else and whatever plea we got after that. Okay?

24 MR. FOX: Much quicker. Thank you.

25 THE COURT: Very good. Before going off the record,

1 I mentioned I was going to make all these Court's Exhibits, so
2 I'm simply going to let the court reporter figure out how to
3 label which, what, one through five, and it can be, I got a
4 Curriculum Vitae here, I got the pages 211 from the SLED thing,
5 I've got the SLED report that was handed up today, the Y Filer
6 table, which is also the final table on the Applied Biosystems
7 Gene Mapper ID-X 1.5. We'll be at ease. I'll be back in a
8 minute. Thanks.

9 (Recess taken.)

10 **JACKSON V. DENNO**

11 THE COURT: Jackson v. Denno next?

12 MS. WALTER: Yes, Your Honor, and at Your Honor's
13 request, the State, and I made sure that Mr. Fox knew, the
14 State had sent you the two statements prior to today's hearing,
15 so if Your Honor has viewed them then I guess we would not need
16 to play them in court, but if --

17 THE COURT: If you want to summarize them for the
18 record, my recollection, and my clerk has also seen them, but
19 my recollection was the Miranda was basically given both of
20 those times. I think there was some language along the lines
21 of you need to tell the truth, or truth will set you free, or
22 words to that effect, maybe not truth will set you free, but
23 basically encouraging -- precisely encouraging that the
24 defendant, that perhaps the right thing to do would be to
25 explain what went down. Any other additional facts that you

1 find significant from that interview, and obviously we do need
2 to make it part of the record at some point.

3 MS. WALTER: Right. So I have ones that --

4 THE COURT: We could use ours.

5 MS. WALTER: Yeah, I thought we should yours since
6 those are the ones that you reviewed.

7 THE COURT: Sure. We can use ours.

8 MS. WALTER: So Your Honor, so that it's clear, the
9 first statement was taken by Detective Amos, and now Detective
10 Warren, and that's the statement where the Defendant admits to
11 being at the hotel but denies involvement in the attack. And
12 then in the second statement, apparently, overnight the
13 defendant spoke to God and decided that he should speak with
14 the detectives, and that's when Detective Morrell who had
15 previously been uninvolved with the case but just happened to
16 be the next detective in, he and Logan Cooper interviewed the
17 defendant the second time, that's when it came, you know,
18 you're doing the right thing, tell the truth, and the defendant
19 finally admitted what had happened in that hotel room. I do
20 have copies of both Miranda Forms that have previously been
21 provided.

22 MR. FOX: They have. I have seen those.

23 MS. WALTER: So Your Honor, we can, with the Court's
24 permission, I'll have these marked, I guess it would be State's
25 Exhibit 2 and 3.

1 (States's Exhibit Nos. 2 & 3 were marked for identification.)

2 So 2 would be the Miranda Warnings from the first
3 interview, and 3 would be the Miranda Warnings from the second
4 interview.

5 THE COURT: And while you're at it, we can mark those
6 4 & 5.

7 (State's Exhibit Nos. 4 & 5 were marked for identification.)

8 MS. WALTER: I have Detective Amos and now Lieutenant
9 Morrell here if Your Honor needs to hear from them, and I think
10 you would have to hear from Detective Amos regarding what has
11 been sent for the buccal swab, although that was contained in
12 that first interview. It's actually at the very beginning of
13 that interview.

14 THE COURT: Sure. We can go ahead and call him and
15 we can get that out of the way, if you feel the need to.

16 MS. WALTER: Okay. Detective Amos.

17 THE COURT: The record will also reflect that the two
18 Miranda Rights Forms have been marked as State's 2 and 3. The
19 CDs containing the interviews have been marked as 4 & 5.

20 MS. WALTER: And I would ask that they be admitted,
21 Your Honor.

22 THE COURT: And they are admitted.

23 (State's Exhibit Nos. 2, 3, 4 & 5 were admitted into evidence.)

24

25

Detective Justin Amos-Direct by Ms. Walter

1 DETECTIVE JUSTIN AMOS WAS DULY SWORN AT THIS TIME AND
2 TESTIFIED AS FOLLOWS:

3 THE CLERK: Please state your name and spell your
4 last name for the Court.

5 THE WITNESS: Justin Amos, A-m-o-s.

6 DIRECT EXAMINATION

7 BY MS. WALTER:

8 Q. Detective Amos, where do you work?

9 A. I'm with Myrtle Beach Police Department.

10 Q. How long have you been there?

11 A. About 15 years.

12 Q. What is your current position?

13 A. I'm a sergeant over investigations. I supervise about
14 17 various officers and detectives.

15 Q. What was your position back in March of 2018?

16 A. I was a detective in our violent crimes unit.

17 Q. As part of that assignment were you called out to
18 investigate an assault that occurred at the Sheraton Convention
19 Center in the Myrtle Beach section of Horry County on that day?

20 A. I was.

21 Q. As part of your duties as the assigned investigator, at
22 some point were you made aware that the Defendant, Demetrus
23 McClary had been arrested?

24 A. I was.

25 Q. And did you see him here earlier in court before he

1 left?

2 A. I did.

3 Q. Shortly after he was arrested did you have an
4 opportunity to speak with him?

5 A. I did.

6 Q. Was anyone with you during that interview?

7 A. Yes, Detective Warren, Cameron Warren.

8 Q. Was that interview audio and video recorded?

9 A. It was.

10 Q. And you've reviewed a copy of that recording, correct?

11 A. Yes, ma'am.

12 Q. Is that a fair and accurate recording of the entire
13 interaction you had with the defendant on that day?

14 A. Yes, ma'am.

15 Q. As part of the initial interaction, did you and/or
16 Detective Warren ask the defendant if he would be willing to
17 provide a buccal swab to be used as a DNA standard?

18 A. Yes, ma'am.

19 Q. Is there any sort of paperwork that's filled out as part
20 of you asking or consent to get a buccal swab?

21 A. We have a standard written Consent Form, and we did go
22 over that, and he did also provide verbal consent.

23 Q. Is that captured on the video/audio recording?

24 A. It is.

25 MS. WALTER: Your Honor, if I may approach, and I'd

Detective Justin Amos-Direct by Ms. Walter

1 ask that this be marked as Exhibit No. 6.

2 (State's Exhibit No. 6 was marked for identification.)

3 Q. I'm showing you State's Exhibit 6. Is that a copy of
4 the Consent to Search Form that was used?

5 A. It is.

6 Q. Is the defendant's signature on that?

7 A. It is.

8 Q. Is Detective Warren's signature on that?

9 A. It is.

10 Q. Were you present when the defendant and Detective Warren
11 went over that and signed it?

12 A. Yes, ma'am, I was there.

13 Q. Is that a true and accurate copy of the Consent to
14 Search Form?

15 A. It is.

16 MS. WALTER: I'd ask that that be admitted, Your
17 Honor.

18 THE COURT: No objection to State's 6?

19 MR. FOX: No, Your Honor.

20 (State's Exhibit No. 6 was admitted into evidence.)

21 THE COURT: It's in evidence.

22 BY MS. WALTER:

23 Q. Did you or Detective Warren threaten the defendant in
24 any way to get him to consent to providing the DNA sample?

25 A. No, ma'am.

1 Q. Did you promise him anything to get him to provide a DNA
2 sample?

3 A. No, I didn't.

4 Q. Did you assault him mentally or physically in order to
5 get him to consent to providing a DNA sample?

6 A. No, ma'am.

7 Q. And I think I asked this, but the recording that has
8 already been viewed by the Court and is admitted as evidence,
9 does that capture your entire interaction with the defendant
10 including at the beginning, the taking of the DNA standard?

11 A. Yes, ma'am, it does.

12 MS. WALTER: Nothing further at this time.

13 THE COURT: Mr. Fox?

14 MR. FOX: Thank you, Your Honor.

15 **CROSS-EXAMINATION**

16 BY MR. FOX:

17 Q. Officer, the form that was signed, the Consent Form,
18 that's sort of a general consent, it says the person, but it
19 also covers premises, property, that sort of thing, so it's
20 sort of a general Consent to Search Form?

21 A. That's right.

22 Q. Does Myrtle Beach Police Department have a specific one
23 for DNA search for buccal swabs?

24 A. Not that I've ever seen, I believe that's what is used
25 for all consent.

Detective Justin Amos-Cross by Mr. Fox

1 Q. Okay. Now, in listening to and reading back over the
2 transcript of your interview, pretty quick that you asked Mr.
3 McClary about his consent to give a swab, correct? I mean, it
4 was within the first couple of minutes?

5 A. Sure. It was early on.

6 Q. Okay. And at the time, the only discussion about it,
7 you had said, we're here to talk about your trespassing charge,
8 correct?

9 A. That's right.

10 Q. So in fact, Mr. McClary and two other people were picked
11 up by the old, they call it the colored school, there right off
12 Joe White Avenue in Myrtle Beach, correct?

13 A. That's right.

14 Q. So they were stopped, taken into custody, because they
15 were on the premises, I think walking down the path that goes
16 along there, but it's posted, correct?

17 A. That's right.

18 Q. So, but you said, hey, we're gonna talk to you about the
19 trespassing. You did ask him, and you described what it was,
20 what a buccal swab would be, and the only conversation you had
21 with Mr. McClary about the consent, about the form, was to say,
22 he's going to get you, and I suppose you're talking to Officer
23 Warren: He's gonna get you to sign a release for us. Correct?
24 Do you have a copy of the transcript?

25 A. I do. I'm looking over it real quick.

1 Q. I think we all agree it's an accurate --

2 A. Yes.

3 Q. -- version of the videos that are in evidence. I'm
4 specifically looking at page four, around line 30.

5 A. I see it here, yes, sir.

6 Q. A couple before that.

7 A. We'll get you to sign a release for us and we'll just
8 get your DNA.

9 Q. Okay. So, and watching the video, it's kind of -- was
10 it already filled out before you slid it across the table to
11 Mr. McClary, do you remember?

12 A. I'm not sure. I actually didn't fill that out,
13 Detective Warren did that.

14 Q. I mean, it just has an incident number and his name and
15 then a place for signature, there really wasn't much to fill
16 out.

17 A. That's right.

18 Q. But in other words, when you do a Miranda waiver, at the
19 same time that you're producing that form you generally read
20 off of it to a defendant, correct? In other words, you have
21 them sometimes read along with what's on that form: You have
22 the right to remain silent, anything you say can and will be --

23 A. Sure.

24 Q. So those things are spelled out and you sort of read
25 along, typically, with the form; is that correct?

Detective Justin Amos-Cross by Mr. Fox

1 A. With the Miranda, yes, sir.

2 Q. And depending, I don't know if you did in this case, but
3 quite often officers will have the defendant, the individual,
4 initial after each sentence, after each right?

5 A. Some do. When it's audio and video recorded with me in
6 there, I generally check it as we go over.

7 Q. Sure. Because, again, it's all recorded.

8 A. Sure.

9 Q. But in this case isn't it fair to say that Mr. McClary,
10 you asked him, this is what we want to do, we're here to talk
11 about your trespassing, would you give us a buccal swab, here's
12 a form to sign, and he just signed, correct?

13 A. He signed it.

14 Q. Okay. Was he given any kind of meaningful chance to
15 actually read through it?

16 A. The offer was there for him to read through it. I don't
17 know that he read it or if he didn't read it or what parts he
18 read.

19 Q. Well, there doesn't seem to be any pause, you know, as
20 we go through or watch the video or read the transcript, there
21 doesn't seem to be any pause while you wait for him to read it,
22 does there?

23 A. Not a long time, no.

24 Q. Okay. And no mention, whatsoever, at that point, at
25 that point of your interview, no mention about any incident at

1 the Sheraton, any assault or attempted rape or anything like
2 that?

3 A. Nothing like that.

4 MR. FOX: Thank you. That's all the questions I
5 have.

6 THE COURT: No Redirect?

7 MS. WALTER: No, Your Honor.

8 THE COURT: Thank you. You can step down.

9 Solicitor, anybody else you wanted to call on these issues?

10 MS. WALTER: No, Your Honor.

11 THE COURT: Anything you wanted to present?

12 MR. FOX: No, not in terms of evidence, Your Honor.

13 THE COURT: I'm happy to hear any argument on these
14 questions.

15 MR. FOX: Well, Judge, I'm going to start with the,
16 I'll let Your Honor make the finding on the statements. You,
17 of course, had a chance to review those, they speak for
18 themselves in terms of what's in there and I'll let Your Honor
19 make those findings. In terms of the consent to search, there
20 is a form signed, however, when you watch -- my recollection of
21 watching those videos, and certainly when you read the
22 transcript, they ask him about it, and I know police don't have
23 to be completely forthcoming in terms of statements defendants
24 give, or even consent to search, but at the moment when they're
25 asking him he thinks he's there for, what they say is, we've

1 got you on this trespassing, and they talk about the street,
2 you know, the trespassing unit, or whatever, and you know, hey,
3 can we get a swab, and we'll just get you to sign this release,
4 and there's no discussion, no -- as you typically would have in
5 a Miranda situation where there is a specific recitation of the
6 rights that you'll be waiving by speaking to law enforcement,
7 there's none of that. And so I acknowledge, the form speaks
8 for itself, it does say, I've been informed that I have the
9 right to say no, and then you'll have to get a search warrant.
10 But I think in, as a practical matter, it was, hey, can we get
11 a swab, here's a form, sign it, and then jumped right along,
12 and I don't recall any kind of meaningful or even Mr. McClary
13 taking the time to read that. The interview continued right
14 along, they passed the form across, he signs it, so basically,
15 I don't believe that this was a knowing waiver of his right to
16 search. I think at that point they certainly, they have
17 started to collect evidence, I think they could have gotten a
18 search warrant, would have been given a search warrant if they
19 would have asked for one, it's not a real high or burdensome
20 thing to do, but there is a process, there is a way to do it,
21 and so we would object to -- would say that the consent was not
22 knowingly given, and therefore, the swab shouldn't have been
23 collected, and therefore, any evidence resulting from the swab
24 from Mr. McClary should be excluded.

25 THE COURT: Solicitor?

1 MS. WALTER: Thank you, Your Honor. First of all,
2 the signing of the Consent to Search for the buccal swabs comes
3 after the Miranda Warnings where the defendant clearly
4 indicates that he understands the questions, he understands
5 what's being said to him, he had a sufficient education to
6 understand what was happening at that time, he was not under
7 the influence of any alcohol or drugs, he knew he had the right
8 to ask any questions if he didn't understand anything. Whether
9 or not he chose to take the time to read every word on that
10 consent form is irrelevant. The standard would be whether the
11 consent was given voluntarily, and I would submit at this point
12 there is no indication that it was not given voluntarily, and
13 as to -- the police are not required to get a search warrant if
14 they have valid consent, which they did. Even if Your Honor
15 felt, which the State believes would be unjustified that the
16 consent was not voluntarily given, certainly they could have
17 simply gone out to get a search warrant and then it would be
18 inevitable discovery, but the State would submit that there was
19 absolutely no basis to find that this consent was not freely
20 and voluntarily given.

21 THE COURT: Well, we'll take these in order.
22 As it relates to the Miranda statements and the Jackson v.
23 Denno, the Court having reviewed the evidence in this case and
24 having reviewed the forms that were signed by the defendant,
25 the Court does find that Miranda was provided, he was warned on

1 both occasions of the risks of speaking to the police and the
2 right to remain silent, that he could get a lawyer if he
3 wanted, but the fact, obviously, that the consent for the
4 buccal swab came after the Miranda Rights, that, obviously, the
5 fact that he could have asked for a lawyer or could have asked
6 for legal representation to be advised on the buccal swab,
7 certainly he was made aware of that by the police at the time
8 that they requested the buccal swab, but of course, having
9 reviewed everything, it would appear to the Court that there
10 were no threats, there was no intimidation, there was no rubber
11 hose used, promises of leniency, things of that nature, which
12 would otherwise affect the validity of the confession, and
13 again, Miranda Rights were read. Obviously, it will be up to
14 the jury to determine, if the defense intends to make this
15 argument, it will be up to the jury to determine whether the
16 statement was freely and voluntarily given, but for purposes of
17 this threshold inquiry, the Court finds that the statements
18 should not be suppressed as it relates to the consent to search
19 and the DNA that was taken. The Court also finds that that
20 consent was properly and voluntarily given by the defendant in
21 this case, the form speaks for itself. Whether this was a wise
22 decision on Mr. McClary's part is not to question, whether it
23 was made after the advice of counsel, that's not the standard,
24 that's not the question, the Court finds that his willingness
25 to give a DNA sample was not affected by any kind of coercion

1 or any sort of trickery which would warrant excluding the
2 evidence, and quite the contrary, he voluntarily gave it, even
3 though, perhaps, it was not terribly wise of him to do so. So
4 that will be the Court's ruling on those two issues.

5 MR. FOX: Yes, sir.

6 THE COURT: I think that leaves us with the letter.

7 MR. FOX: Yes, sir.

8 THE COURT: The letter, what does the letter say? I
9 have not seen the letter.

10 MR. FOX: I have it right here, Your Honor.

11 THE COURT: And this was a letter sent, purported by
12 the defendant to whom?

13 MS. ANDREW: Well, it was sent to him as some
14 acquaintance of his, Your Honor. We have an officer here from
15 the jail who can testify about how it was collected and what
16 happened.

17 THE COURT: Sure. I'm curious. Why don't we go
18 ahead and call him or her.

19 **STEPHEN DONAHUE WAS DULY SWORN AT THIS TIME AND**
20 **TESTIFIED AS FOLLOWS:**

21 THE CLERK: Please state your name and spell your
22 name for the Court.

23 THE WITNESS: My name is Stephen Donahue,
24 S-t-e-p-h-e-n, last name, D-o-n-a-h-u-e.

25

1 **DIRECT EXAMINATION**

2 BY MS. ANDREW:

3 Q. Officer Donahue, what's your occupation?

4 A. I'm a corrections officer with the Horry County
5 Sheriff's Office out of J. Reuben Long Detention Center.

6 Q. How long have you been employed by the Horry County
7 Sheriff's Office?

8 A. Approximately fourteen years.

9 Q. What's your present duty assignment there?

10 A. The gang intelligence officer.

11 Q. Do you have other duties relating to the opening of
12 inmate mail or security of the facility?

13 A. Yes, ma'am. Other duties that I do deal with is our
14 mail at the time that came in, both incoming and outgoing mail.

15 Q. And were your duties that you just described relating to
16 the mail at J. Reuben Long the same duties you had back in July
17 of 2019?

18 A. Yes, ma'am.

19 Q. Why does J. Reuben Long have a policy relating to inmate
20 mail?

21 A. A lot of it is for the safety and security of the
22 facility and others. We check for contraband, make sure no
23 narcotics or anything is either being brought into the facility
24 or any type of contraband being placed out, possibly any
25 threats of violence or anything that could be geared towards

1 anybody, individuals.

2 Q. Okay. And as part of those security measures do you
3 examine incoming and outgoing mail?

4 A. We examine the incoming mail by thoroughly checking the
5 envelope. We will open every piece of them up. We will
6 examine through and look for certain words or phrases that
7 could be issues with the safety and security. The outgoing
8 mail, we generally do not open unless there is a need to. A
9 lot of it is sealed up ahead of time and a lot that is because
10 the detention facility is a controlled environment. We have a
11 lot more control of how things go out compared to them coming
12 in.

13 Q. So that's the reason you treat incoming mail and
14 outgoing mail differently?

15 A. Yes, ma'am.

16 Q. Because of where it originated?

17 A. Yes, ma'am.

18 Q. You gave me a lot of your answer all at once so I'm just
19 going to back up a little bit.

20 A. Yes, ma'am.

21 Q. So what I heard was, the main purpose of examining the
22 mail is basically for the security of the detention center?

23 A. Yes, ma'am.

24 Q. And the reason that you examine them differently is
25 because incoming mail originates outside of the detention

Stephen Donahue-Direct by Ms. Andrew

1 facility?

2 A. Yes, ma'am. We don't know where it's exactly coming
3 from so --

4 Q. Okay. Are inmates advised of J. Reuben Long Detention
5 Center's mail policy?

6 A. Yes, ma'am.

7 Q. Did you have an occasion to examine inmate mail for the
8 defendant we're here today, Demetrus McClary?

9 A. I'm sorry, can you repeat that?

10 Q. Did you have an occasion to examine the mail of the
11 defendant that we're here for today, Demetrus McClary?

12 A. Not before, ma'am. No, that was the first time I've
13 ever known anything of him.

14 Q. Okay. That's what I'm asking you. Then what brought
15 you into court today is that you examined a piece of mail of
16 Demetrus McClary?

17 A. Yes, ma'am.

18 Q. And before you examined this mail had you ever heard of
19 Demetrus McClary?

20 A. No, ma'am.

21 Q. Did anyone ask you to target his mail or to specifically
22 look for anything relating to Demetrus McClary's mail?

23 A. No, ma'am.

24 MS. ANDREW: If I may approach, Your Honor?

25 (State's Exhibit No. 7 was marked for identification.)

1 Q. First I'm going to show you what has been marked as
2 State's Exhibit Number 7. I'm going to hand you that. Can you
3 identify what that is?

4 A. That's the envelope that is generally issued through the
5 facility for inmates to write mail for outgoing.

6 Q. Is that a true and accurate copy? That's a photocopy of
7 the envelope you actually examined the day you examined this
8 piece of mail?

9 A. Yes, ma'am.

10 MS. ANDREW: Your Honor, the State would move to
11 admit this into evidence.

12 Q. Is this a record kept in the regular course of business
13 at J. Reuben Long Detention Center?

14 A. Yes, ma'am.

15 MS. ANDREW: The State would move to admit this into
16 evidence for the purpose of this hearing.

17 THE COURT: Without objection.

18 MR. FOX: That's the copy of the letter?

19 MS. ANDREW: That's the envelope, I marked it
20 separate.

21 MR. FOX: No objection.

22 (State's Exhibit No. 7 was admitted into evidence.)

23 Q. So what did you first notice about this piece of mail
24 when you saw it?

25 A. That it was a return mail. Typically the post office,

Stephen Donahue-Direct by Ms. Andrew

1 if an inmate sends mail out, I guess if it doesn't -- for
2 whatever reason if it doesn't make the location, or whatever,
3 the post office will put a yellow sticker on the envelope that
4 it's being returned and they'll return it back to the facility.

5 Q. So it's like a return to sender is what we would all be
6 familiar with?

7 A. Yes, ma'am.

8 Q. Did you classify that as incoming or outgoing mail when
9 you received it?

10 A. Incoming mail.

11 Q. Why is that?

12 A. Because any time that the mail is at the facility as the
13 control that we do have for inmates ready to go out, but once
14 the mail goes out of the facility, we don't know where it went
15 to. We're not sure if anybody could have done anything to that
16 mail while it was out. We've also had inmates that are very
17 good at trying to have mail go from them to other inmates that
18 they are not allowed to correspond with because they may be
19 co-defendants, that they'll take those envelopes, they'll open
20 them up, put the letter they want in there from another inmate
21 that sends out and have it returned that way.

22 Q. So it sounds like inmates have gotten pretty wily about
23 figuring out ways to circumvent the security at J. Reuben Long?

24 A. Yes, ma'am.

25 Q. So that's part of the reason you're classifying that as

1 an incoming letter even though originally it originated at the
2 jail?

3 A. Correct.

4 Q. But it went out into the world and came back to you?

5 A. Yes, ma'am.

6 Q. So after you identified it as such, what did you do?

7 A. I did my usual visual inspection of the envelope, make
8 sure that it had the proper information that was needed on it
9 for it to be accepted, I feel for the envelope to make sure
10 there was nothing that could possibly be placed in there
11 besides the letter itself. Then I'll proceed to open it up. I
12 will expand the envelope out to kind of do a visual inspection
13 of the side to make sure there's no type of narcotic, powdered
14 substance, or anything that could possibly harm me, and then
15 I'll go ahead and remove the piece of mail out and I will open
16 it up and do a quick examination of the letter itself.

17 Q. Okay. So you opened this particular piece of mail; is
18 that correct?

19 A. Yes, ma'am.

20 Q. Do you open all incoming mail that comes into the
21 detention facility?

22 A. Yes, ma'am.

23 Q. Is that your standard policy?

24 A. Yes, ma'am.

25 Q. Was it back in July of 2019?

Stephen Donahue-Direct by Ms. Andrew

1 A. It was then, yes.

2 Q. So you just said that you scanned the letter for violent
3 language?

4 A. When I scan through the letter I look for certain words
5 or phrases that could be either safety or security issues of
6 the facility or somebody else. Typically if it's some kind of
7 threatening violence or anything like that, that would kind of
8 stick out there for me, generally.

9 (State's Exhibit No. 8 was marked for identification.)

10 Q. I'm going to show you what's been marked as State's
11 Exhibit No. 8. Look at that and tell me what that is.

12 A. It's the letter that was sent out and then returned
13 back.

14 Q. And that's a photocopy of the letter. Is that a true
15 and accurate copy of the letter you actually reviewed that day?

16 A. Yes, ma'am.

17 Q. Do you still have the original?

18 A. Yes, ma'am, I do.

19 MS. ANDREW: Your Honor, the State moves to enter
20 this into evidence for the purposes of this hearing.

21 THE COURT: For the purposes of this hearing, no
22 objection.

23 MR. FOX: That's correct.

24 MS. ANDREW: Thank you.

25 (State's Exhibit No. 8 was admitted into evidence.)

1 BY MS. ANDREW:

2 Q. So after you opened the letter and scanned it did you
3 see some phrases that caught your attention?

4 A. The first thing that really caught me when I opened it
5 up, like I said, as I do a visual examination, I caught the
6 words: I beat up.

7 Q. And so once you saw those words, what did you do with
8 the letter?

9 A. That's when I started to actually fully read the letter
10 to see what kind of -- if there was any kind of violence or
11 anything going on. As I got a little bit further down in the
12 letter that's when I started noticing another phrase that was
13 put out there which was: I need you all to stop the victims
14 from showing up.

15 Q. So after you read the letter you determined that it had
16 some threats of violence in it, as you said earlier --

17 A. Correct.

18 Q. -- as one of the things you were looking for. Did you
19 determine at that point that you should confiscate that letter?

20 A. Yes, ma'am.

21 Q. So once you made that determination did you contact your
22 supervisor?

23 A. Yes, ma'am.

24 Q. Did you also write a report?

25 A. Yes, ma'am.

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1 (State's Exhibit No. 9 was marked for identification.)

2 Q. I'm going to show you what's been marked as State's
3 Exhibit Number 9. Is that a copy of your report?

4 A. Yes, ma'am.

5 Q. Is that a true and accurate copy of your report that you
6 wrote and filed?

7 A. Yes, ma'am.

8 MS. ANDREW: Your Honor, the State would move to
9 enter the report into evidence for the purposes of this
10 hearing, it's number nine.

11 MR. FOX: No objection.

12 THE COURT: State's 9 will be in evidence as well.

13 MS. ANDREW: Thank you.

14 (State's Exhibit No. 9 was admitted into evidence.)

15 Q. So what did you do with that original letter after you
16 determined it should be confiscated?

17 A. What I do is I'll secure it in one of our evidence bags.
18 I notified my sergeant at the time what the situation was and
19 it was determined to go ahead and contact the solicitor's
20 office based off the fact that if it is dealing with victims,
21 depending on, you know, if he had charges that related to
22 victims, that needs to be turned over to them.

23 Q. Do you remember which solicitor you turned it over to?

24 A. Mary Ellen.

25 Q. Did you know Ms. Mary-Ellen Walter before you turned it

1 over to her?

2 A. No. That was the first time I --

3 Q. Had she instructed you to target Demetrus McClary's mail
4 or read his mail or anything like that?

5 A. No, ma'am.

6 Q. You just described the procedure that you used to
7 examine this mail. Is this the procedure that was in place
8 back in July of 2019?

9 A. Yes, ma'am.

10 Q. Did J. Reuben Long have a written policy outlining that
11 procedure back in July of 2019?

12 A. Yes, ma'am.

13 MS. WALTER: Eric, you can have that if you'd like.

14 MS. ANDREW: That's your copy.

15 MR. FOX: Thank you.

16 MS. ANDREW: Would you like a copy?

17 MR. FOX: You can go ahead, I'll look at it if you
18 want to proceed.

19 MS. ANDREW: Okay.

20 (State's Exhibit No. 10 was marked for identification.)

21 Q. I'm going to show you what's been marked as State's
22 Exhibit No. 10, and I'm sorry, I marked the highlighted copy, I
23 apologize. Can you tell me what this is.

24 A. That is our policy for the mail at J. Reuben Long.

25 Q. Is that a true and accurate copy of the policy that was

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1 in place back in July 2019?

2 A. Yes, ma'am.

3 MS. ANDREW: Your Honor, the State would ask that
4 this policy be admitted for the purposes of this hearing.

5 THE COURT: State's 10 will be in evidence then
6 without objection.

7 MR. FOX: Yes, sir.

8 MS. WALTER: And we'd just like the record to reflect
9 that we have provided it to defense today.

10 (State's Exhibit No. 10 was admitted into evidence.)

11 Q. And directing your attention to that document, is there
12 a portion of that document that specifically deals with inmate
13 mail?

14 A. Yes, ma'am.

15 Q. Can you tell me what number it is?

16 A. Page number -- excuse me, I'm sorry. Start on page six,
17 I believe -- I'm sorry, page number four, number two, mail
18 inspection.

19 Q. And is that to portion, page number four, section number
20 two, is that the procedure you followed when you examined the
21 letter that's at issue today?

22 A. Yes, ma'am.

23 MS. ANDREW: I have no further questions at this
24 time, Your Honor.

25

CROSS-EXAMINATION

1

2 BY MR. FOX:

3 Q. If I understood, Mr. Donahue, all incoming mail, every
4 piece of incoming mail is reviewed?

5 A. Yes, sir.

6 Q. And it's all opened? Every piece of mail is opened?

7 A. Correct.

8 Q. And that's for jail security?

9 A. Yes, sir.

10 Q. You say Mr. McClary was not on your radar in any way?

11 A. I never met him, knew him or anything of him.

12 Q. So one of the justifications you had for opening mail
13 coming in was so that -- because you have some inmates at the
14 jail who are co-defendants of other inmates and they should not
15 be corresponding with each other, correct?

16 A. Yes, sir.

17 Q. So you're not aware, if you don't know Mr. McClary, was
18 he under any such restriction?

19 A. None that I was aware of.

20 Q. Okay.

21 MR. FOX: And I'd like the Court to know, he was not.
22 There are no co-defendants in this case and certainly none at
23 that time.

24 Q. It was stamped with. It was addressed to Javarious
25 (phonetic) McClary, the letter that we're talking about?

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- 1 A. Yes, sir.
- 2 Q. Same last name, anyway, as Mr. Demetrus McClary?
- 3 A. Yes, sir.
- 4 Q. And there was an address on the envelope going out?
- 5 A. Correct.
- 6 Q. And obviously, Demetrus McClary return address was the
- 7 detention facility, J. Reuben?
- 8 A. Yes, sir.
- 9 Q. And the post office put their sticker on there that
- 10 said: Undeliverable, either no such street or no such address?
- 11 A. Yeah. It was a return to sender. I didn't look into
- 12 it.
- 13 Q. But it was clearly, in your opinion or in your
- 14 experience, it was an official sticker, in other words, no one
- 15 wrote on there, return to sender?
- 16 A. No, sir.
- 17 Q. We've all sometimes at home had misdelivered mail and we
- 18 might scratch on there for the --
- 19 A. Yes, yeah.
- 20 Q. -- you know, for the mailman, but in this case it was
- 21 the post office that put that sticker on there?
- 22 A. Correct, yes, sir.
- 23 Q. And Mr. McClary couldn't have had no control over that?
- 24 A. No, sir.
- 25 Q. So it did not appear, and then it still had, when mail

1 goes out there's a stamp, I call it the backside, but the side
2 that you seal, from the detention center, correct?

3 A. Correct, yes.

4 Q. And that hadn't been disturbed, correct?

5 A. No, sir.

6 MR. FOX: Thank you. That's all the questions I have
7 of this witness, Your Honor.

8 THE COURT: Nothing further?

9 MS. ANDREW: Nothing further.

10 THE COURT: You can step down. Thanks. And just
11 make sure you leave those exhibits up here or give them to the
12 court reporter, if you could.

13 THE WITNESS: Yes, sir.

14 THE COURT: Mr. Fox, I realize you're still reading
15 that policy. If you need to finish it before you give me your
16 thoughts then --

17 MR. FOX: I'm prepared to argue, Your Honor.

18 THE COURT: Sure, go ahead.

19 MR. FOX: Are you prepared? Do you need to continue
20 to review?

21 THE COURT: No. I've glanced over it. Mr. Fox, let
22 me hear from you. Having reviewed the policy, it looks like
23 the policy of Horry County may actually be more generous than
24 what at least federal constitutional law affords an
25 incarcerated person. I can't speak to South Carolina law which

1 does, of course, include an explicit right to privacy, and
2 there was a recent article that I was reading as late as last
3 week concerning inmate telephone calls, and that article might
4 be in my briefcase in the back, I think it's a law review
5 article that came out sometime recently that got printed off,
6 and for the life of me I cannot remember the author or the law
7 review or anything and it's either in my briefcase in the back,
8 but it's more likely in that pile over by my desk back in
9 Greenwood, so let me hear your thoughts on that.

10 MR. FOX: Your Honor, so I think we have to start,
11 with any searches you start with the idea that the starting
12 point is that any warrantless search starts with, is per say,
13 impermissible, but with exceptions well noted, and there are
14 many we just dealt with, the consent to search. So there
15 certainly are exceptions, but the starting point is the fourth
16 amendment requires a warrant. Certainly, your papers, no
17 matter where they originate, you know, the person's right to be
18 secure and the sanctity of their personal papers, their
19 personal effects, is the basis of the fourth amendment. As
20 Your Honor very correctly pointed out, South Carolina
21 recognizes an explicit right to privacy, which I don't believe
22 the federal constitution does, although, it doesn't get
23 implicated. Judge, I think there's a case that's very much on
24 point, although its got some age to it, which is Ellefson.
25 It's a South Carolina Supreme Court case, Justice Ness from

1 1976, but it specifically deals with this issue, and there is
2 some very, very strong language about the fact that justifying
3 a search of an inmate's mail on jail security really isn't
4 enough without something, you know, that's sort of a general,
5 we've got to be careful, and for jail security purposes,
6 examine, and the testimony was, every single piece of mail that
7 comes in, so it's indiscriminate, alright? I don't have to
8 show that this was targeted to Mr. McClary. It's an overbroad
9 policy, in my opinion. They search every single piece of mail
10 without any justification, without any indication that there's
11 a co-defendant, for example, to use the example that they
12 cited, that, hey, there's a co-defendant, we think he's
13 corresponding with this person. There's no indication that
14 this letter was opened at any point when it left. We know it
15 left J. Reuben Long because it's stamped with their stamp.
16 Hey, we don't read this mail. That was undisturbed. There was
17 no indication that anything had happened to alter the contents
18 of the letter at the time that it came back to the detention
19 center. On its face, the official mail delivery system, the
20 United States Postal Service, put a sticker on there that said
21 it's undeliverable. I think it said no such street, but at
22 least it said return to sender, we can't deliver it as
23 addressed, no indication, no testimony that it has been opened.
24 So I know Your Honor can read for himself, but you know, some
25 of the language that really stands out to me that they discuss

1 in Ellefson, that the main reason that a person -- the main
2 purpose of pretrial custody is to make sure that the person is
3 going to be available to show up for trial, and that when that
4 happens he still retains all of the rights of an ordinary
5 citizen. Here, there are no exigent circumstances that have
6 been alleged other than a generalized jail policy that
7 encompasses all mail that comes in.

8 THE COURT: And I think this case was actually cited
9 in that law review article that I, and if we Shepardize this
10 case I bet you the article would pop up.

11 MR. FOX: It has been in slightly different context.
12 There's a more recent case that treats it more unfavorably, but
13 it's distinguishable, and I couldn't off the top of my head
14 tell you the name of that case, but I was very careful given
15 its age, it is still good law. It talks about being
16 incarcerated, that you are, while waiting trial that you're at
17 something of a disadvantage in your preparation and if you also
18 limit your ability to communicate with the outside world, not
19 just your lawyer, that that's further hamstringing your
20 constitutional rights to prepare a defense. So I mean, Judge,
21 the language, again, is very strong to allow an independent
22 prosecution team to write to indiscriminately -- and again, for
23 purposes of this motion, I understand Ms. Walter did not direct
24 anyone to open this mail, but the State certainly includes the
25 officers at the detention center for purposes of this

1 evaluation, so to allow the prosecution team to write to
2 indiscriminately inspect letters, which is exactly what they
3 say they do, written by the accused at the hack of the roots of
4 any defense. That's very, very strong language. And they take
5 note at the end to say, this gives us no pleasure. These
6 letters in Ellefson are really incriminating, I think there's
7 three of them. These are really bad and the letters that we're
8 going to exclude confirm the jury's correct verdict. So they
9 were not happy to do so, but they felt strongly enough about
10 the defendants and they talk about first amendment rights as
11 well as six amendment rights to prepare a defense. The
12 language really couldn't be any stronger and I think it's on
13 all fours with the present situation. The fact that he wrote
14 incriminating things, and there will be, for Your Honor to
15 know, there will be someone from SLED to say we're sure that
16 this is Mr. McClary's handwriting, but the fact that it is
17 incriminating is not a way to bootstrap it into evidence.

18 THE COURT: State's position on this?

19 MS. ANDREW: Your Honor, I actually researched the
20 issue and agree with Mr. Fox that State v. Ellefson is the only
21 case that I could find in South Carolina, even though it's a
22 little bit older, that was kind of on point regarding inmate
23 mail. If you'll restate the Ellefson it cites to some US
24 Supreme Court cases, Stroud versus United States, in
25 particular, which is a case from the beginning of the last

1 entry which stood for the proposition that the sistership of
2 inmate mail was not an unreasonable search and seizure under
3 the fourth amendment. If you read Ellefson you'll see, and
4 it's on page 498, the main distinguishing factor between
5 Ellefson, the thing that the Court in that case had an issue
6 with was not that the prison was opening mail, because they
7 actually found in the case that that's a reasonable thing to do
8 for the security of the detention center. What they had issue
9 with was the fact that the letters were obtained by the state
10 through the efforts of the detective who was not connected with
11 the operation of the jail, his efforts were entirely
12 investigatory and in pursuit of securing a conviction, and so
13 the issue in this case was simply that. My reading of the case
14 is, if it was simply a matter of the jail reading the mail
15 because of a security issue, they wouldn't have taken issue
16 with it. I think that's also in line with federal
17 jurisprudence. If you look at Turner versus Safley, it
18 includes a four-part test to determine if that's a reasonable
19 thing to do. I pulled just of ALR kind of survey of all of the
20 law in the whole country and you'll find numerous cases in here
21 which say that as long as there's a valid rational connection
22 between the prisoner regulation and there's a legitimate
23 governmental interest then it's okay. Some of the language
24 that I found says if it's properly calculated to maintain a
25 prisoner's jail or security, if it comes into the possession

1 under an established practice designed to promote the
2 discipline of security of the institution, if it's not used
3 solely for evidence or targeted specifically for investigation
4 then it should be fine. If jail security justifies their
5 surveillance of mail then jail officials can open the mail to
6 achieve the legitimate governmental purpose. The State
7 contends that in this case they were following a written policy
8 that dealt with the safety and security of the jail. They
9 followed that policy, they were not targeting Mr. McClary in
10 any way. Even though the mail originated at the jail, it went
11 out into the world and came back. You can say that it didn't
12 appear to be tampered with, but you have no way to know that
13 unless you open the mail. Another point is if you ask someone
14 to just make a judgment call if it originated originally in the
15 mail and goes out and comes back, do you have to open it? They
16 are never going to know which letters were tampered with and
17 which ones weren't so their policy is just to open everything.
18 As the officer testified, the prisoners have, what I
19 characterize as wily methods of getting around security. It
20 wouldn't be unheard of for a letter to go out and get something
21 else put it and then be sent back but then maybe think they
22 weren't gonna be opened because it was a return to sender
23 letter. There's just no way for anybody to know what happens
24 to the mail when it leaves the custody or security of the
25 detention center.

1 THE COURT: And that's a valid point, but what he's
2 about to argue is that, and incidentally, my Law Clerk found
3 the thing and it's the South Carolina Law Review, 70 SC LR 977,
4 and it's long, fair warning, that's why I haven't finished it,
5 but written by Hope Demer, D-E-M-E-R that maybe might have
6 analogies-type arguments and it does discuss the right to
7 privacy in South Carolina, but back to this actual question. I
8 mean, I acknowledge that we are dealing with a secure
9 institution, and to that end, if you're inspecting the mail for
10 something that, for drugs or joint, you know, a tactile
11 inspection to see if there are any lumps or maybe baggies or
12 something like that, is clearly reasonable. Where I'm thinking
13 maybe this could be problematic is to the extent that the
14 officer is actually reading the material, and I'm looking at
15 the guidelines, and if the purpose here is kind of security, it
16 says, generally, the guidelines say that you really shouldn't
17 be reading mail that's going out.

18 MS. ANDREW: Your Honor, too, I think part of what
19 they do is they read mail for threats of violence, which we
20 would argue is a reasonable thing to do for the safety and
21 security of not only the corrections officers, the inmates, or
22 anyone that may be threatened by something in those letters,
23 that's why they're scanning for those words, because as you
24 know the detention center has a lot of violence. It's
25 reasonable, in my opinion, for them to read or scan letters the

1 way they do, to look for those threats of violence and those
2 violent words for the safety and security of that facility,
3 because if there are letters coming in that contain those kind
4 of threats or direct someone in the facility to do those kinds
5 of actions or make threats against others, that's certainly
6 related to the operation and security of the jail. In this
7 case when he's performing that duty which relates to the
8 security of the jail in, which I think is permissible under the
9 law, and he sees a threat of violence and he reads the letter
10 and determines there's a threat against a victim, I think he
11 took the reasonable action, and he wasn't looking for that, but
12 he found it.

13 THE COURT: This is a little different, though, than
14 Joe Blow writing a letter to the defendant and it arriving in
15 the detention center, in the sense that this is a letter that,
16 you know, from the face of the letter it shows that it was
17 mailed from the detention center and it was returned to the
18 detention center, and again, the defendant has no co-defendants
19 in this case. I realize that the officer who, Mr. Donahue, when
20 he read the letter, he wasn't privy to any of the specifics of
21 Mr. McClary's case, but this is a little bit different from
22 communications, and if that's the position, if the position of
23 the State is that it's necessary to review these letters to
24 determine if there are threats to people in the jail or there
25 are threats to individuals outside the jail, then it stands to

1 reason that the policy should be to inspect all outgoing mail
2 for content, am I correct?

3 MS. ANDREW: Well, Your Honor, I don't think that --
4 I think that's a different situation because that originated in
5 the jail. Part of the issue with this letter, the reason --
6 part of the reason that they open letters that come in and not
7 that go out is because once it goes out into the world they
8 don't know what happens to it. So a prisoner could conceivably
9 send a letter to someone on the outside, they could put
10 something in it or change the letter in it, that was his point,
11 more than the fact that they're co-defendants, the point is
12 once it leaves the jail you could switch letters out, you could
13 do any kind of thing to put something different in there that
14 would circumvent the security measures that keep the jail safe,
15 because it went out and came back and anybody could do anything
16 with it while it's out, so that's just the reasoning behind it.
17 It's not just because of co-defendants. He was using that, I
18 think, as an example of ways that inmates get around security
19 measures, and that's why they don't -- it's not a judgment
20 call, it's every piece of mail that comes in is opened. So
21 they're not saying, oh, this one looks okay, this one doesn't.
22 Their policy is we open all mail, and that's the safest policy
23 they could have, and I don't think it's unreasonable at all
24 because they don't know what happened to it, they don't know
25 what's in it, they don't know who touched it, all they know is

1 it went out and came back.

2 MR. FOX: And I think, Judge, I would say that's part
3 of the problem, is it is indiscriminate. And as Your Honor
4 pointed out, if the one, certainly one valid objective of a
5 mail policy for a detention center would be to keep out
6 contraband, as a threshold that's very easy. Does there appear
7 to be anything in there beyond just paper, and that would
8 probably justify opening if you find something in there that's
9 more than paper, but I think just to say, we're going to open
10 everything on the possibility that maybe something happened
11 when it was outside of our eyes, I think absolutely violates
12 every persons privacy rights. There's no articulated suspicion
13 there, it's just, you know, it's just random.

14 THE COURT: Is there a distinction, or does the State
15 see a distinction -- in the case that was cited, Chief Justice
16 Ness was very strong about, or one of the central points that
17 he made was that the defendant in that case at the time had not
18 been convicted, he was simply in pretrial detention. I just
19 scanned this, but it seemed like he was kind of hanging his hat
20 on the fact that there had been no finding of guilt. The
21 defendant was presumed innocent. That presumption entitled him
22 to the same constitutional protections under the fourth
23 amendment that any citizen enjoys.

24 MR. FOX: Judge, there is, to pick up on that, when I
25 was looking at Ellefson and Shepardizing it, there is a later

1 case where it was the search was after someone had been
2 convicted. I believe it might have been a death penalty case,
3 but it was a murder and they went in and searched his cell and
4 his effects but the South Carolina Court distinguished that,
5 that this is post-conviction, and you know, it wasn't pretrial
6 intention and there's a different state interest at that point.

7 THE COURT: And that was a letter that they found in
8 that case? I'm not familiar.

9 MR. FOX: They were dockets, I'm not sure if it was a
10 letter, but it was his personal effects, so they went into the
11 cell and there were personal effects but the distinguished --
12 because when I first saw that, I said, uh-oh, this
13 distinguishes, appears to distinguish Ellefson, or restrict it,
14 but they very much picked up on Justice Ness' theme of pretrial
15 versus post-conviction --

16 MS. ANDREW: Your Honor, when I read that, I know
17 what you're talking about, that thing he says about he's an
18 unconvicted, the purpose is so he doesn't run off and shows up
19 for trial, basically. That's just kind of one line in this
20 case, and I didn't read a whole lot of discussion about that,
21 but what I do read in this case is everything I've highlighted,
22 a whole lot of discussion about the fact that the US Supreme
23 Court has said that these policies are okay. For example, this
24 is just a quote from Ellefson. It says: Stroud has found a
25 host of decisions of holding introduction of evidence resulting

1 from prison inspections. In each instance the search was
2 either explicitly or implicitly conceived as being properly
3 calculated to maintain prison or jail security. And it says,
4 see cases cataloged in ALR. This is that site. It's 50 pages
5 long. The title of the article is censorship and evidentiary
6 use of unconvicted prisoner's mail. There's a whole lot of
7 jurisprudence on this point. It's not a lot in South Carolina.
8 The Court has also articulated this test, and I can pass this
9 up if you want. This is a Fourth Circuit case, it didn't deal
10 specifically with mail, it dealt with attorney mail and opening
11 attorney legal correspondence in an inmate's presence, and in
12 this case the Court said that was even okay, that they could
13 even open attorney mail, which I don't think our jail even does
14 that, but the Fourth Circuit said it was okay. They applied
15 the Turner test, which I mentioned earlier. The Turner test
16 requires assessment of four factors where there's a valid
17 rational connection between the prisoner regulation and the
18 legitimate governmental interest put forward to justify it,
19 number two, whether there are alternative means of exercising
20 the right that must remain open to prison inmates. Number
21 three, the impact and combination of the asserted
22 constitutional right will have on guards and other inmates, and
23 the allocation of prison resources, generally, and whether
24 there are ready alternatives. As I said, J. Reuben Long has a
25 policy of opening all inmate mail, unlike this case, they don't

1 open legal mail, and I can pass this up if you'd like to read
2 it.

3 THE COURT: I think the practice in that case is that
4 they open the mail in the presence of the inmate, they do not
5 actually read the letter, though. That's generally the policy
6 that I think has been accepted and adopted.

7 MS. ANDREW: Well, let me see, Your Honor, because I
8 don't recall. I read a lot of cases relating to this, and
9 honestly --

10 THE COURT: I would be very surprised that if any
11 Court has ever held that it's okay for a detention officer to
12 peruse legal mail coming from a defendant's attorney.

13 MS. ANDREW: This says they interfered with his legal
14 mail on at least 15 occasions. Prison officials opened and
15 copied his outgoing legal mail and sent it to the district
16 attorney's office. All of these were labeled, legal mail. On
17 three occasions they either read his incoming mail or opened it
18 outside his presence.

19 THE COURT: And they said that was alright?

20 MS. ANDREW: Yes.

21 THE COURT: Well, there's a clear reason I am not on
22 the Supreme Court of the United States.

23 MS. ANDREW: There's a lot of federal jurisprudence
24 out there. As I said, this is the article, I'm happy to pass
25 this up, as well. It has my highlights in it, but there is a

1 plethora of federal law on this issue.

2 THE COURT: But by that standard you could listen to
3 the phone calls that are placed, because I know with most of
4 the phone systems you've got an exception for the lawyers and
5 they're not going to be listening in on lawyer phone calls if
6 the number is logged as belonging to the attorney, but under
7 that logic you would be at liberty to listen to an attorney --

8 MS. ANDREW: We certainly don't do that here.

9 THE COURT: I know, but I'm saying that your
10 argument, the logical extension of your argument is that it
11 would be perfectly valid to do exactly that, which I don't
12 see --

13 MS. ANDREW: I'm not really arguing that, Your Honor,
14 I'm just bringing your attention to a case from 2020 that
15 applied the Turner factors in a federal situation dealing with
16 inmate mail. It's more to deal with censorship, and I think
17 part of the reason for that ruling is because they are arguing
18 about whether or not there's a cause of action against the jail
19 for doing this stuff, too, so maybe that's the distinction,
20 that they're saying there's no private cause of action by a
21 prisoner against a prison for doing this, maybe there are other
22 remedies for him, so I'm not trying to mislead you in that way,
23 I'm just trying to recollect, I've got a whole stack of stuff
24 here we've been reading.

25 MR. FOX: Judge, I would just -- I'm sorry, I'm not

1 trying to cut you off.

2 MS. ANDREW: No, but I do think if you read Ellefson
3 you'll see a lot of language in this case which actually
4 supports the fact that jails can adopt these procedures and
5 that as long as they are following policy and procedure they
6 are not doing it for a purely investigatory reason to generate
7 evidence against someone in that evidence, if they find
8 something like they found here, which is a specific threat
9 against the victim for the crime against he's incarcerated for
10 then that's a problem, and they're allowed, we can use that.

11 THE COURT: I hear you, but I'm looking at the
12 policy, page four, general mail, mail inspection: All inmates
13 are advised upon their admission to the detention center that
14 all incoming general mail is subject to inspection for
15 contraband as follows. First point, I don't see where
16 contraband is necessarily defined, but we know what it is, so
17 that's really not a problem, but you're looking for contraband.
18 "A," general mail: The designated officer will visually
19 inspect all incoming general mail for contraband and/or money
20 orders -- I'm sorry, and/or money, checks, or money orders. As
21 a general rule the officers should not read incoming general
22 mail unless he/she has reasonable suspicion to believe that the
23 mail may pose a threat to the security of the facility. Skip
24 over to page 7, 8A, other general provisions regarding mail:
25 The center will handle all incoming and outgoing mail without

1 undue delay. The director or designee may authorize the
2 reading of incoming or outgoing inmate mail when there is,
3 quote, reasonable suspicion to believe a particular piece of
4 mail threatens the safety/security of the center, a public
5 official, and any other person, or its content aids in the
6 furtherance of illegal activities. Any such authorization must
7 be done in written format. Well, in policy, one problem that
8 you've got is it sounds like the reading of this particular
9 letter may not have complied with those provisions.

10 MS. ANDREW: Well, he said that he read the letter
11 because it contained language of violence, which is one of the
12 things they're trained to scan for. So once he saw the words
13 "beat up" in the letter --

14 THE COURT: But that's not what the policy says. It
15 says, as a general rule the officer should not read incoming
16 general mail unless he or she has reasonable suspicion to
17 believe that the mail may pose a threat to the security of the
18 facility.

19 MR. FOX: And there must be written authorization.

20 THE COURT: And there has to be written
21 authorization.

22 MS. ANDREW: Well, what they would say, and I talked
23 to them about this issue, is that they don't read the mail,
24 they scan it for words of violence, and they distinguish that
25 between reading the mail.

1 THE COURT: If I'm scanning the newspaper, I'm
2 reading the newspaper. I mean, you can't scan something and
3 then say it's not reading. Okay? Maybe not all reading is
4 scanning, but certainly all scanning is reading.

5 MS. ANDREW: That's the way they do it at the jail
6 and that's their policy. I mean, Your Honor, I understand what
7 you're saying, if you're reading words, I get it, but that's
8 what their policy is. They say they don't read it, they just
9 look at it, and if any words jump out to them, then that's when
10 he notified his supervisor and that's when he read the mail.
11 That was his testimony, that's what they tell me they do.

12 THE COURT: Mr. Fox, I would love to deny your motion
13 because it would give the Supreme Court, perhaps, an
14 opportunity to clarify this issue. Did you have any other
15 thoughts, and I've gone Don Quixote several times in cases of
16 this similar, shall we say, procedural posture in evidentiary
17 strength in an effort to put matters squarely before the
18 Supreme Court.

19 MR. FOX: On behalf of Mr. McClary in this particular
20 case, please don't do us any favors in that regard, we'll take
21 our chances that, perhaps, this will be clarified in another
22 situation that's not detrimental in the immediate to Mr.
23 McClary --

24 THE COURT: Certainly.

25 MR. FOX: However, and I know Your Honor will rule as

1 you believe the law directs you, I have no worry about that.
2 Judge, I think maybe, I mean, I think Ellefson is on all fours,
3 we can go back and forth with Ms. Andrew. Stroud,
4 particularly, there's language in there about a later Supreme
5 Court case where Stroud's over 100 years old and there's a case
6 later that Justice Ness addresses saying we believe Stroud had
7 been greatly qualified.

8 MS. ANDREW: That case is overturned.

9 MR. FOX: Okay. Thank you.

10 MS. ANDREW: The one cited in Ellefson is overturned.

11 THE COURT: Okay.

12 MR. FOX: Okay. But again, I think the language from
13 Justice Ness speaks for itself, and I think he clearly does go
14 on a good bit about, you know, the rights of a defendant, you
15 know, pretrial, pretrial custody. I think it's more than just
16 a line or two there. That being said, Judge, I think their own
17 policy says as a general rule we're not going to do this unless
18 there's a reasonable suspicion to believe that the mail may
19 pose a threat to security. So I don't think they mean any
20 mail, I think they mean each piece as it comes in, does this
21 piece of mail raise a suspicion that there may be a threat to
22 the security of the jail, and they specifically talk about
23 contraband. I mean, number two on page four, the sentence is,
24 all incoming mail is subject to the inspection for contraband.
25 So clearly, that's the overarching concern, is contraband,

1 which can have an effect on jail security. You don't need
2 razor blades coming in the mail, you don't need illicit drugs
3 coming in the mail, but they specifically address contraband,
4 and again, as Your Honor pointed out, they've got to get
5 authorization to open the mail, and that authorization has got
6 to be in writing. I mean, that's in their own written policy,
7 they didn't follow that policy in this case.

8 THE COURT: Okay. I'm now playing devil's advocate,
9 because, generally, and what I'm going to do is I'm going to
10 take this under advisement, and certainly get you a ruling in
11 the coming days, but I don't want to just shoot from the hip on
12 this one. I want to look at that law review article that I was
13 looking at again, it might be somewhat persuasive. I want to
14 take a harder look at some of these cases.

15 MR. FOX: Yes, sir.

16 THE COURT: Devil's advocate here, you've got a guy
17 who is in jail, he knows his case is coming up in two weeks in
18 front of Judge Addy and so he writes his good friend, you know,
19 Lefty Broken Nose, that he wants Judge Addy whacked so that the
20 trial will get delayed. Okay? He writes him a letter, forget
21 jail phone calls, but you know, good old-fashioned letter
22 explicitly mentioned in the constitution of both South Carolina
23 and the federal constitution correspondence papers possessions
24 and sends it, and I could see where there would be not only a
25 selfish interest but also, perhaps, a law enforcement interest

1 to know that, you know, John Smith is now wanting Frank Addy
2 whacked, okay? To what extent should law enforcement be able
3 to in some way, shape or form sensor that or interdict that
4 letter or inspect that letter prior to leaving, and what kind
5 of safeguards could be put in place so that, perhaps, Frank
6 Addy is not whacked. What's the solution here, because I mean,
7 they got a legitimate kind of a concern. We don't want
8 communication. On the one hand you can't restrict
9 communication unreasonably or in violation of the constitution,
10 but at the same time you don't want someone to be able to
11 continue a criminal enterprise from inside a detention center.
12 I'll give you prison's a different animal, but let's just go
13 with detention center, what do you do?

14 MR. FOX: Well, security is certainly -- I don't
15 know, and I don't know that I have to -- I'm not trying to
16 dodge your question, I don't know that I have to come up with a
17 solution. If the client either, if he has the right, that's
18 uncontroverted, he's got the right under our constitution and
19 the federal constitution is absolutely clear, it is a
20 warrantless search. I don't know that he can ever -- you know,
21 if the burden is he's got to propose, you know, an alternative
22 to be able to exercise his constitutional rights, I don't think
23 that's the proper framework, quite honestly. Is it a concern?
24 Of course it is. Of course, one concern it is he, himself is
25 in detention so his ability to whack Judge Addy is very

1 limited, it's supposing -- and the thing is at the time the
2 jail is looking at these things they don't know that that's --
3 I mean, we're looking at after the fact which is why we're
4 here. We know what's in there now, but at the time they are
5 opening these letters, and this one specifically, there's
6 nothing about it, there's nothing about the letter itself,
7 there's nothing about the circumstances surrounding, other than
8 a general, hey, he might try to contact and harm a witness.
9 Well, that would be in every case. That's in every potential
10 case, not just --

11 THE COURT: And that's what Bubba Ness was referring
12 to, hey, this sucks, but this is what the rule is.

13 MR. FOX: Yes. I think -- and again, I don't think a
14 defendant has to suggest a solution to a legitimate problem in
15 order to take advantage of his constitutional rights.

16 MS. ANDREW: Your Honor, just for clarification, when
17 you're reading Ellefson, one thing that Chief Justice Ness
18 talks about is, he says a recent case of Perkenia versus Martez
19 (phonetic), that has been overturned, that was a Supreme Court
20 case. The Turner standard is the correct standard in its
21 progeny, so the correct is Turner versus Safley, S-A-F-L-E-Y.
22 That's 482 US 78, and if you Shepard it, you'll find the case.
23 That's not the case that overturned the one discussed by Ness,
24 but it's what we've be using since then.

25 THE COURT: And again, I have not really read the

1 Ellefson case, I've scanned it to the extent there is that
2 distinction, but was there any reference to -- well, this was
3 1976, the most recent South Carolina constitution was '76, but
4 there was an explicit right to privacy in the previous
5 constitution, wasn't there?

6 MR. FOX: I believe so, Your Honor.

7 THE COURT: It doesn't talk about the South Carolina
8 constitutional --

9 MR. FOX: It does not, Your Honor.

10 THE COURT: -- basis for this. Okay, interesting,
11 interesting. You all are trying this case when?

12 MS. WALTER: Two weeks, Your Honor, March 7th, so
13 actually a week and a half.

14 THE COURT: You'll have a ruling from me in some way,
15 shape or form Monday or Tuesday of next week.

16 MR. FOX: Yes, sir.

17

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CERTIFICATE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

I, Julie A. Kevish, Official Court Reporter for the
State of South Carolina, do hereby certify that the foregoing
is a true, accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the Court of General
Sessions for Horry County, South Carolina, on the 23rd of
February, 2022.

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

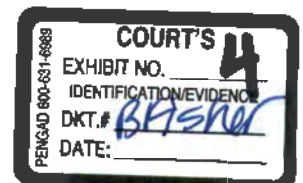
February 23, 2022

Julie Kevish
JULIE A. KEVISH
OFFICIAL COURT REPORTER

Red: Consent
 Yellow: State
 Pink: Δ

STATEMENT OF DEMETRIUS MCCLARY (Det. Morrell)

1
 2
 3
 4 Det. Morrell: You okay?
 5
 6 McClary: Yes, sir.
 7
 8 Det. Morrell: You a little cold?
 9
 10 McClary: Yes, sir.
 11
 12 Det. Morrell: You have a blanket in there or no? Um, my name is Paul Morrell, I'm a detective with
 13 Myrtle Beach. This is Logan Cooper. Everything I understand is, um, you got, you got a
 14 pretty good understanding of why you're in here. Alright...Um, and we've been working
 15 on that case, pretty much since you got brought in yesterday. So, we've actually
 16 developed a bunch of evidence, um, and the officers also told me, that um, they spoke
 17 to you last night, is that true?
 18
 19 McClary: (unintelligible)
 20
 21 Det. Morrell: But, what we're, what do you go by?
 22
 23 McClary: Demetrius.
 24
 25 Det. Morrell: Demetrius? You don't have a nickname or anything? You just want me to call you
 26 Demetrius? Is that fine? Um, so what we're going to do is, we have, I gotta read you
 27 your rights again, okay, because you're afforded certain rights before you can answer
 28 any questions for me if you like. Um, and then there's a bunch of questions that I have
 29 for you, because we have a lot of pieces, and I want to put the pieces together and find
 30 the truth. Does that make sense?
 31
 32 McClary: Yes sir.
 33
 34 Det. Morrell: Ok, so... Um, we're going to start the recording. Everything is being recorded, ok?
 35 That's for, that's for me when I get done today, when Logan gets done today, we're
 36 both going to write a report, that's just so we don't miss anything, so, if you said
 37 something that I may not have taken note on, I can go back and listen to it, like, 'Oh,
 38 yeah, Demetrius did say that.' That's right. Um, and it gives transparency to the
 39 investigation, so, there's no... I'm not here to pull any tricks, to sugar coat anything, to
 40 hoodwink you or however you want to call it, and I don't come in here to make deals
 41 either. Ok? Detectives are fact finders. Ok. Have you ever been in trouble before, son?
 42
 43 McClary: Not really.
 44
 45 Det. Morrell: Not really. So that's kind of sort of, yeah, I've been in trouble but... You ever sat across
 46 the table from a detective?
 47
 48 McClary: No, Sir.



1
2 Det. Morrell: Ok. We're fact finders. That's all we're doing, we're looking for the truth. Ok. We got
3 this, this big puzzle to put together and we're, we're looking for, to put the puzzle back
4 together, ok. So, um, what I'll do is I'm going to read you your rights, explain 'em to
5 you, if you have any questions, we'll go over everything, then we'll get in, um...we'll get
6 into everything.
7
8 Det. Morrell: Ok. It... Today's date is March 21, 2018, it's 12:18 pm. This is Detective Paul Morrell,
9 Logan Cooper, City of Myrtle Beach, present at the Myrtle Beach City Jail and we're
10 present with... Your first name?
11
12 McClary: Demetrius.
13
14 Det. Morrell: You need to speak up just a little bit.
15
16 McClary: Demetrius.
17
18 Det. Morrell: Ok. Can you spell it for me?
19
20 McClary: D.E.M.E.T.R.I.U.S.
21
22 Det. Morrell: D.E.M.E.T...?
23
24 McClary: R.I.U.S.
25
26 Det. Morrell: I.U.S. And your last name Demetrius?
27
28 McClary: McClary. M.C.C.L.A.R.Y.
29
30 Det. Morrell: L.A.R... Just one 'R'?
31
32 McClary: And 'Y'.
33
34 Det. Morrell: M... M.C.C.L.A.R.Y.? Ok. What you have for date of birth, man?
35
36 McClary: [REDACTED]
37
38 Det. Morrell: So that makes you 19? You'll be 20, you'll be 20 this year?
39
40 McClary: Yes, Sir.
41
42 Det. Morrell: Ok. How about social security number? Do you know it?
43
44 McClary: No, Sir.
45
46 Det. Morrell: Ok. Ok. Are you currently under the influence of any drugs or alcohol?
47
48 McClary: No, Sir.

1
2 Det. Morrell: No. Ok. (cough) Excuse me. What is your primary language?
3
4 McClary: English.
5
6 Det. Morrell: Ok. What's the highest grade level you completed in school?
7
8 McClary: Eleventh.
9
10 Det. Morrell: Eleventh grade? So you're a senior in high school?
11
12 McClary: Was.
13
14 Det. Morrell: Was a senior? Ok. Ok. Would you know enough to ask me a question if you did not
15 understand something?
16
17 McClary: Yes, Sir.
18
19 Det. Morrell: Ok. Alright. You have the right to remain silent and refuse to answer any questions. Do
20 you understand that?
21
22 McClary: Yes, Sir.
23
24 Det. Morrell: Ok. Anything you say can be used against you in the court of law. Do you understand
25 that?
26
27 McClary: Yes, Sir.
28
29 Det. Morrell: You have the right to talk to an attorney and have him present while you're being
30 questioned. Do you understand that?
31
32 McClary: Yes, Sir.
33
34 Det. Morrell: If you cannot afford an attorney, one will be provided at government expense before
35 any questioning if you wish. Do you understand that?
36
37 McClary: Yes, Sir.
38
39 Det. Morrell: If you desire to make a statement or answer any questions, you have the right to stop at
40 any time. Do you understand that?
41
42 McClary: Yes, Sir.
43
44 Det. Morrell: Ok. Alright, Demetrius, let me get your signature here on the bottom, by this x. Before
45 you sign this, let me tell you what you're signing for. 'Cause I have read all of these to
46 you and that you understand them, ok?
47
48 McClary: Yes, Sir.

1
2 Det. Morrell: And I'll, um, we're gonna get you a blanket when you get out of here, ok? It'll be a little
3 bit warmer in your cell. I know it's not the best conditions but we try to make it a little
4 more accommodating for you, ok.
5
6 McClary: Yes, Sir.
7
8 Det. Morrell: Where'd you grow up at?
9
10 McClary: What's the what?
11
12 Det. Morrell: Where'd you grow up?
13
14 McClary: Mobile, Alabama.
15
16 Det. Morrell: Mobile?
17
18 McClary: Ah, ha.
19
20 Det. Morrell: How long have you been here in Myrtle Beach?
21
22 McClary: Ten years.
23
24 Det. Morrell: Ten years?
25
26 McClary: Ah, not in Myrtle Beach. I moved from Alabama to Kingstree.
27
28 Det. Morrell: Ok.
29
30 McClary: Mobile Alabama, foster home, to foster home really. I don't know my parents, ah...
31
32 Det. Morrell: Man. I, I'm glad you told me that. I really am. Um, and it's, I'm not going to sit here
33 and, and tell you I understand what it's like to grow up without parents because I, I
34 don't know. Ok, but I can just, from everything I know and what I've read, that's got to
35 be a tough life, right?
36
37 McClary: Yeah. Um...
38
39 Det. Morrell: And I, I would not, mean I, I mean I hate that I'm sitting across the table from you here
40 but um...
41
42 McClary: I just made a bad decision.
43
44 Det. Morrell: You made a bad decision?
45
46 McClary: Yes, Sir.
47

1 Det. Morrell: Ok. That's what we're going to talk about, man. You know since, since all this happened
2 yesterday, we've gone through, um, the hotel, the hotel has all kinds of video
3 everywhere, ok. We also have, um, outside city cameras.
4
5 McClary: Ok.
6
7 Det. Morrell: Like on the streets. So we've got, you know a video of you running, running from the
8 hotel across the street down, I think it's Carver Street or something, um, you know
9 we've been to, um, Sea Haven House, talked to staff there, so I mean, we kind of know,
10 we, we know pretty much everything that went on, ok? But the thing is that what we're
11 missing is Demetrius' story. Ok? That's what we're missing. So it's just like, you know,
12 just like your rights explain, you don't have to talk to us. I would love for you to talk to
13 us, ok. Um. And like I told you before we got going, I, I'm not in here to make a deal
14 with you, ok. I'm not here, 'Hey, if you do this for me, I'll do this for you.' We won't do
15 that, ok. But if you are inclined to help yourself the best way to do that is to tell the
16 truth, ok. Um, and, and I want you to help yourself, ok. I've been here, hang on, take
17 your time. I've been here for 5 minutes talking... Listen to me. Look at me. Look at me,
18 son. Ok. We have to work past this. Ok.
19
20 McClary: Yes, Sir.
21
22 Det. Morrell: We can't undo what's done. Ok.
23
24 McClary: Yes, Sir.
25
26 Det. Morrell: I need, I need you to look at me. Do not hang your head. Ok. Ok. I want you to...
27 You're, you're young, but I'm going to show you the respect, so I need you to listen to
28 me, ok.
29
30 McClary: Ok.
31
32 Det. Morrell: And you, you told me you grew up without a father, ok, and you know...
33
34 McClary: (Indecipherable)
35
36 Det. Morrell: Listen to me. Just, just hear me out, man. Ok. Just hear me out. I will give you as much
37 respect as I can, ok. You've shown me no disrespect so I owe you the same thing, ok.
38
39 McClary: Yes, Sir.
40
41 Det. Morrell: And, you know, part of my job is this. Yeah. This is part of my job. The other part of my
42 job is getting you back on track. Ok. So I'm sure somewhere you had a plan for your
43 life, right?
44
45 McClary: Yeah.
46
47 Det. Morrell: You wanted to stay in school? Ok.
48

1 McClary: I have a daughter and everything.

2

3 Det. Morrell: You have a daughter? What's her name?

4

5 McClary: K

6

7 Det. Morrell: K

8

9 McClary: No, man... Man, I got...

10

11 Det. Morrell: Listen to me...

12

13 McClary: I suffer from, um, PTSD and all that. That's just a... I got anxiety, depression and all that stuff. I just don't take my medication and...

14

15

16 Det. Morrell: Just listen. Just hear me out, ok. I, I promise I will listen to everything you have to say but I want to get some stuff out here first.

17

18

19 McClary: Yes, Sir.

20

21 Det. Morrell: The other part of my job is to get you back on track. Ok. So I'm sure somewhere in life, with your daughter, K you had a plan for you, for her, ok and somehow you and your plan parted ways, ok. Part of my job is to get you back on your, your track. Ok.

23

24

25 McClary: Yes, Sir.

26

27 Det. Morrell: And I mean you're young. You're 19 years old. Ok. You've got a lot of life ahead of you, ok. I want...

28

29

30 McClary: I'm about to get some years, bro.

31

32 Det. Morrell: Man, listen to me. Listen to me. You are putting the cart before the horse. You're putting the cart before the horse. We don't know what's going to happen down the road, ok. We're baby steps. Ok. This is a step, this is the step 1. Ok,

34

35

36 McClary: Yes, Sir.

37

38 Det. Morrell: This is the step 1. Ok, you're putting the cart before the horse. You don't even know what's going to happen down the road, do you? I don't know what's going to happen down the road, ok but a lot of that depends on, if you're going to tell me the truth.

40

41

42 McClary: I am.

43

44 Det. Morrell: Ok. What we're dealing with, ok... We have, a young lady, who was just doing her job, cleaning hotel rooms and she's laid up in a hotel. Ok, so we have, I have people to answer to, ok? And the victims are one of those people. Ok. We have to answer to her and her family. Ok. She's hurt. All she was doing was cleaning the room.

47

48

1 McClary: How bad is she hurt?
2
3 Det. Morrell: Don't worry about that. Ok. Don't worry about it, ok. So... Demetrius, look at me stop,
4 stop. Hey, we have to deal with this, look at me. I am told...
5
6 McClary: I didn't, I didn't mean....
7
8 Det. Morrell: Like...
9
10 McClary: I think something's wrong with me!
11
12 Det. Morrell: So you're in the hotel yesterday, right?
13
14 McClary: Yes, Sir.
15
16 Det. Morrell: Ok. And you had on, you had on the black Nike sneakers?
17
18 McClary: Yes, Sir.
19
20 Det. Morrell: A white tank top?
21
22 McClary: Yes, Sir.
23
24 Det. Morrell: A blue, a blue sweatshirt...I think it was a zip up with a hood?
25
26 McClary: Yes, Sir.
27
28 Det. Morrell: Ok. Um, so you're in the hotel yesterday, alright and we know that. We agree on that,
29 right?
30
31 McClary: Yes, Sir.
32
33 Det. Morrell: Ok. Walk me through what happened. Tell me what happened.
34
35 McClary: Um, it was, it... I was, um, planning on taking her, her card off her neck...
36
37 Det. Morrell: Her card off her neck?
38
39 McClary: Yes so I could go to, so I could find a room and go there to sleep, but I was, I was, I had
40 the rag
41
42 Det. Morrell: Take your time. Take your time. Take your time.
43
44 McClary: When I had, when I first... When I had put on the clown hat then I put the glasses on
45 that's how I was going to spark up a conversation with her, but... I was trying to cover
46 her mouth with the rag so she wouldn't scream and try to grab her, um, ID off her neck,
47 and then she, she had grabbed my dick, that's why I started, fightin' her. I wasn't trying

1 to beat her up. I didn't know why I was... I don't know, I don't know, I was just trying to
2 grab her, um, the thing off her neck....
3
4 Det. Morrell: (to Detective Cooper) Find a box of tissues....Close that door back.
5
6 McClary: I was trying to grab the thing on her neck so I can have somewhere to sleep every night.
7 Every time I saw the card, that was it. I didn't mean to beat her up like that.
8
9 Det. Morrell: Ok. So before you went in, you had the clown, the clown wig on?
10
11 McClary: Yes, Sir.
12
13 Det. Morrell: That's, that's the same one that we found in the bathtub, right? That's the same clown
14 wig, right?
15
16 Det. Cooper: Here you go.
17
18 Det. Morrell: And just, just, just put them on the table there. Ok. Alright. Let's see. Ok. So you go
19 in, you're...
20
21 McClary: I had the rag.
22
23 Det. Morrell: You had a rag.
24
25 McClary: Something so she wouldn't scream. That's when I tried to do like this but I fell down
26 with her and she grabbed, I was trying to get her off of me like that...
27
28 Det. Morrell: Ok.
29
30 McClary: I tried to get away and then, I got up and then I just was like, I was panicking. I was like,
31 what did I do to you, what did I do (Indecipherable) look what you done did, I just ran. I
32 just ran.
33
34 Det. Morrell: You got in a panic mode. You know it's, it's, that, that's understandable, Ok. You, you
35 go in to get her ID because you're looking for a room to stay in.
36
37 McClary: Every night.
38
39 Det. Morrell: You're, you're, is, is a common thing, at that Sheraton or you just find different hotels
40 that have rooms that you can get into?
41
42 McClary: Every room.
43
44 Det. Morrell: You just stick to the Sheraton, right?
45
46 McClary: I came to the Sheraton 'cause I felt like, you know, it was easy and I'm going to get the
47 ID and...
48

1 Det. Morrell: Ok. So... How, how did you...? What floor was this on?
2
3 McClary: Fourth. The 4th floor.
4
5 Det. Morrell: The 4th floor. Ok. Were you by yourself?
6
7 McClary: I have... Yes, Sir. I was by myself doing that.
8
9 Det. Morrell: Ok. Who else was with you?
10
11 McClary: Don't...
12
13 Det. Morrell: Tell me. Tell me. I know a lot of the answers to the questions I'm asking you, ok, 'cause
14 we've watched all the videos, ok.
15
16 McClary: They was, they was...
17
18 Det. Morrell: Who was with you at the beach, at the hotel?
19
20 McClary: Jamario and um, Grey. They was waiting on me to, um, um do that, they was waiting on
21 me the whole... They was waiting outside. They won't, they didn't have anything to do
22 with it.
23
24 Det. Morrell: Were they on the 4th floor with you?
25
26 McClary: Yes.
27
28 Det. Morrell: They're on the 4th floor with you. Did they know you were going in there to get the
29 card?
30
31 McClary: Yes.
32
33 Det. Morrell: Ok. Did they know that, ah, you had an altercation with the lady?
34
35 McClary: Well they did, they did hear her, she... They heard her and they ran off.
36
37 Det. Morrell: Ok.
38
39 McClary: They heard us and then, they ran off.
40
41 Det. Morrell: Ok. So how, where... Did you guys link back up?
42
43 McClary: At Sea Haven.
44
45 Det. Morrell: At Sea Haven. So there was 4 of you total?
46
47 McClary: Three of us.
48

1 Det. Morrell: Three of you. Ok. Um, so it was Jamario and who else?
2
3 McClary: Grey, Grey.
4
5 Det. Morrell: Grey?
6
7 McClary: I call him Grey, 'cause it's his Facebook name.
8
9 Det. Morrell: Do you know his Government name?
10
11 McClary: Uh-huh.
12
13 Det. Morrell: Ok. Um, and, and they're here with you. Two guys are here with you.
14
15 McClary: Mm-hm.
16
17 Det. Morrell: Ok. So, they're on, they're on the 4th floor with you.
18
19 McClary: Mm-hm. But they was – they was in a staircase.
20
21 Det. Morrell: They're in the staircase. But they knew what you were going to do. Did you guys come
22 up with a plan before you went in there?
23
24 McClary: No we.... No. We didn't talk with no plan. I was just like, I might as well just find some,
25 so I can have somewhere to sleep every night 'cause I don't, um, the shelter, I know that
26 I don't want to stay at that shelter because people be, people be back there stealing
27 from each other and doing all that stuff in the shelter and I don't want nobody know
28 that I was homeless anyway.
29
30 Det. Morrell: Ok.
31
32 McClary: Like I'm the type of person I don't want nobody to know that I'm homeless, you know
33 what I mean, because it's embarrassing.
34
35 Det. Morrell: Ok. You have a locker at the Sea Haven?
36
37 McClary: Yes, Sir.
38
39 Det. Morrell: Ok. And that's, and that's... Let me ask you that, is that where the blue sweatshirt is? Is
40 it in your locker?
41
42 McClary: It's supposed to be.
43
44 Det. Morrell: It's supposed to be.
45
46 McClary: Mm-hm.
47
48 Det. Cooper: How about your black Nike sneakers?

1
2 McClary: They, they're there.
3
4 Det. Morrell: In the same locker?
5
6 McClary: Yeah.
7
8 Det. Morrell: Do you know your locker number?
9
10 McClary: Five.
11
12 Det. Morrell: It's locker number 5. Ok.
13
14 McClary: Oh my God, man.
15
16 Det. Morrell: Listen to me. Listen to me. You, you're doing, you're doing the right thing and I can tell
17 just by looking at you a couple of minutes, you feel a whole big weight has been lifted of
18 your shoulders. Am I right?
19
20 McClary: Yes.
21
22 Det. Morrell: Ok. You, you're doing the right thing. And, and what's important is that you're telling
23 the truth. Ok. So, let's go back, so before you went in to get the ID card, what, what
24 was the conversation like, what were you guys talking about before you decided to go in
25 and get the ID card?
26
27 McClary: I was like, man, I might as well just go in there and just take the ID card, and they was
28 like, for real? I was like, yeah.
29
30 Det. Morrell: So they were in agreeance with it?
31
32 McClary: They was like, they was like, um, aight, they just let me go like...
33
34 Det. Morrell: Did they try to talk you out of it?
35
36 McClary: No.
37
38 Det. Morrell: Ok. So they knew that you're going in there to get the ID card and that you know,
39 some... A lot of times the person, 'Oh, ok, here you go.' That's not going to happen,
40 they, they would know that. So they know you probably have a little bit of a struggle or
41 something, right? Um, so, they, when they started, when they heard...
42
43 McClary: When they heard um, the, da dum, dum, dum.... 'Cause she was, she was grabbing my
44 dick. She was grabbing, she was twisting. I was like, 'Ok. Ok. Ok.' I was like, "Let go.
45 Let go." Then I start, like doing this right here.
46
47 Det. Morrell: Right.
48

1 McClary: For her to let go and I just took off.
2
3 Det. Morrell: Ok. Are you left or right handed?
4
5 McClary: Left handed.
6
7 Det. Morrell: You're left handed? Ok. So you're hitting her with your left hand? And did she have the
8 cloth over her face still or was she just bare skinned?
9
10 McClary: She was bare skinned 'cause the cloth was sitting on the side.
11
12 Det. Morrell: Ok. And you're, you were hitting her with a closed fist? You had your fist closed like
13 that?
14
15 McClary: Mm-hm.
16
17 Det. Morrell: Did, did you have, did you have any injuries, did you get hurt at all, I mean, did you have
18 any marks? Turn your left hand over.
19
20 McClary: Uh-huh.
21
22 Det. Morrell: So you don't have any marks or anything on your hands? Ok. But you mean, you hit her
23 all in the face?
24
25 McClary: Yeah...
26
27 Det. Morrell: And then...
28
29 McClary: I didn't, I didn't want to man, it just that junk was hurting, man, she...
30
31 Det. Morrell: Yeah.
32
33 McClary: She had the right to try to stop me from doing what I was trying to take the thing off her
34 neck. She had a right for that, so I understand that.
35
36 Det. Morrell: Ok. Now did she, um, at any time did she get up and try to leave and you were holding
37 her down or?
38
39 McClary: Uh-huh.
40
41 Det. Morrell: Then, I mean, so, I mean, did she try to run for the door at all?
42
43 McClary: Uh-huh.
44
45 Det. Morrell: No. She just stayed in the room...
46
47 McClary: She just stayed there...
48

1 Det. Morrell: I mean...

2

3 McClary: When I got up, when I got up and ran, I did hear the door close behind me.

4

5 Det. Morrell: Right.

6

7 McClary: Yeah, after that.

8

9 Det. Morrell: Ok.

10

11 McClary: And then she didn't try to go nowhere, she's just like, she was just like trying to fight me

12 'cause I guess she thought I was trying to hurt her but I really wasn't. I was trying to get

13 the...

14

15 Det. Morrell: Ok.

16

17 McClary: Thing off her neck. 'Cause we was... Every day I find a hotel with a room open, some

18 days I don't, so I had to sleep outside.

19

20 Det. Morrell: Mm-hm.

21

22 McClary: So I was like, I'm tired of sleeping outside and everything. So I got to go find me a room

23 key that go to every door.

24

25 Det. Morrell: Mm-hm.

26

27 McClary: I hate...

28

29 Det. Morrell: So I mean for the... Um, man, I, like I told you before I'm not going to say I understand

30 what you're going through. Yeah, I mean, I've not, I've never been in your shoes.

31

32 McClary: Yeah right.

33

34 Det. Morrell: Um... Yeah so, I mean, you know, des-, desperate times, desperate measures, people do

35 desperate things, you know, um, but one thing is we, we can't, we can't undo what's

36 happened. Ok.

37

38 McClary: Right. Right.

39

40 Det. Morrell: So... Well the important thing is, is, you know we, we need to move forward from, deal

41 with this so now we need to move for-... We have to deal with it, ok. There's no way

42 around that. We have to deal with it and, and I told you when I came in here, we're not

43 going to cut any... I don't cut deals. Ok.

44

45 McClary: Yes, Sir.

46

1 Det. Morrell: I'm a fact finder but, you know, if, if you, it seems like you want to help yourself. I
2 mean, I can tell just by, you know, we've been in here 18, 19 minutes talking with you.
3 You want to help yourself. Am I correct?
4

5 McClary: Right.
6

7 Det. Morrell: The best way to do that is to tell the truth. Alright. And I feel like you're doing that
8 'cause a lot of what you're telling us matches up to the evidence that we have. So I
9 mean, and I told you I would give you respect, you're showing me respect and, and now
10 that I know you're telling me the truth, I mean, I appreciate you doing that for me, ok.
11 That means a lot to me. It's, you know, this is, this is my job, I have to do this but, you
12 know, a part of my job also is, you know, I want to get you back on track. We have to
13 deal with this. We can't undo it, but you know, you're 19 years old, Demetrius. You,
14 you got a life ahead of you to, you know, we got to deal with this, there's no way around
15 it, you have to deal with it. But then we're going to move on after that. Ok. If you
16 know, whatever the outcome of this is. I, I don't, like I said, I don't know what it is.
17 Logan doesn't know what it is. You don't know what it is. Ok. That would be us putting
18 the cart before the horse.
19

20 McClary: Right.
21

22 Det. Morrell: Um, but the important thing is that this, however it turns out, is a turning point in your
23 life, ok.
24

25 McClary: What's that?
26

27 Det. Morrell: A turning point. Ok. For you to say, I don't want this lifestyle anymore.
28

29 McClary: I do not.
30

31 Det. Morrell: Ok. So this, that's what's important about this...
32

33 McClary: I regret every moment of everything I did. I just, I got, I got to take my medication.
34 Man, I feel way better when I take my medicine. I got PTSD real bad.
35

36 Det. Morrell: Ok.
37

38 McClary: ADHD real bad. And I haven't been taking my medication.
39

40 Det. Morrell: Ok.
41

42 McClary: The dude that, um, at Sea Haven, Mr. John.
43

44 Det. Morrell: Mm-hm.
45

46 McClary: He wants me to, he keeps telling me to go down and take my medication but...
47

48 Det. Morrell: Where do you have to go to take it?

1
2 McClary: Take my medication?
3
4 Det. Morrell: Yeah.
5
6 McClary: Go to Waccamaw Mental Health.
7
8 Det. Morrell: Ok. Where did um, you mentioned you have PTSD. What's...?
9
10 McClary: Post Traumatic...
11
12 Det. Morrell: I know what it is but what's... Just from your childhood, everything that's kind of been
13 building up? Is that what it's from or...?
14
15 McClary: No. It just, I was diagnosed with it. I know it was on file on my papers and everything.
16 My papers... I lost all my papers. I only have...
17
18 Det. Morrell: I understand.
19
20 McClary: I'm not... I had them recently but I can get my papers from Mobile, Alabama and
21 everything my doctors and everything. I know I still have it 'cause I just be sitting some,
22 I don't be thinking clearly, man, without my medication.
23
24 Det. Morrell: I, I believe you, I'm trying to pinpoint the specific traumatic event that made...
25
26 McClary: Yeah.
27
28 Det. Morrell: That triggered that, or something that, you know, maybe we can help you with in the
29 future.
30
31 McClary: I mean, I used to get abused and beat and...
32
33 Det. Morrell: Ok.
34
35 McClary: And all that stuff and it was bad, it was bad.
36
37 Det. Morrell: And again, you're not going to hear me say, I understand because I, I don't. I have not,
38 I've not been through that, ok. So I mean, I've got to take you at your word and I can,
39 just from what you're saying I can tell that, I mean that is a traumatic event and I can
40 see, you know, how's that possible. I've never been through that, ok.
41
42 McClary: Yes, Sir.
43
44 Det. Morrell: But you know, what's important is, it, you know, I think you're doing the right thing, I
45 mean, you're 19 years... To me, you're a young kid but you're, you're a man. At 19
46 you're an adult. Ok.
47
48 McClary: Yes, Sir.

1
2 Det. Morrell: Um, and we're responsible for our actions.
3
4 McClary: Right.
5
6 Det. Morrell: Ok. Like I said, we have to, we can't undo this. Ok. We have to deal with it. Ok. Um,
7 so, after, um, did... Let me ask you this, did the, the lady say anything to you during the
8 altercation?
9
10 McClary: No.
11
12 Det. Morrell: She didn't say anything?
13
14 McClary: She was just like, she just wasn't saying nothing, she was just like, we was just doing all
15 that. We was trying, she was holding on to my penis. I'm trying to still get away but she
16 had a lock on in it. I'm still trying to get away, I'm like, man, forget the card, I'm outta
17 here, forget this card, I'm trying to go, forget this.
18
19 Det. Morrell: Right. Alright so, you come out of the room and where's Jamario and Grey when you
20 come out of the room?
21
22 McClary: Gone.
23
24 Det. Morrell: Gone. Ok. Um, so and then you just linked up with them back at ...
25
26 McClary: At Sea Haven.
27
28 Det. Morrell: At Sea Haven.
29
30 McClary: 'Cause I know they was going to be there.
31
32 Det. Morrell: Ok. Um, and they, they've been staying there too.
33
34 McClary: Where?
35
36 Det. Morrell: ...at Sea Haven?
37
38 McClary: Yeah.
39
40 Det. Morrell: Do they have, do they have lockers there?
41
42 McClary: Yeah but I don't know what locker?
43
44 Det. Morrell: Ok. So and you said you were wearing, what, yesterday during the thing? The
45 altercation?
46
47 McClary: Jogger pants, tank top...
48

1 Det. Morrell: Alright so...
2
3 McClary: The day I had on the blue jacket, I stayed the night there.
4
5 Det. Morrell: So that's you?
6
7 McClary: That's me.
8
9 Det. Morrell: Ok. What floor is this here?
10
11 McClary: Ah, it has to be, it has to be below 4. It has to be below the 4th floor because the 4th
12 floor didn't have any cameras.
13
14 Det. Morrell: Ok. There's cameras in the stairwell, um, and who's that?
15
16 McClary: That's me, that's like on the, like on the bottom, bottom floor before, under the 4th
17 floor.
18
19 Det. Morrell: And who's that?
20
21 McClary: Me.
22
23 Det. Morrell: Ok. And who's that?
24
25 McClary: Me.
26
27 Det. Morrell: Ok. And these black Nike sneakers are in your locker at Sea Haven? And this blue
28 sweatshirt? And this is your clown wig that you, that you brought in there with you and
29 put it on, right? Now did you have any glasses on?
30
31 McClary: Mm, yes.
32
33 Det. Morrell: What, what color glasses were they?
34
35 McClary: They was black.
36
37 Det. Morrell: Black glasses. What color... what kind of lenses did they have on them?
38
39 McClary: Looked like brownish lenses.
40
41 Det. Morrell: Were they multicolor lenses or just brown lenses?
42
43 McClary: It just looked like some shades lenses.
44
45 Det. Morrell: Like brown, brown lenses? Ah, what's Jamario look like, what was he wearing
46 yesterday?
47
48 McClary: Jamario... Mmm... That's Grey right there.

1
2 Det. Morrell: This? That's Grey? But you don't know his government name right? Ok.
3
4 McClary: They didn't touch the lady though.
5
6 Det. Morrell: Alright. That's fine. Um, so with the headband, that's Grey?
7
8 McClary: Mm-huh.
9
10 Det. Morrell: Alright. Does Jamario have dreads? I mean... they're not long, but they're.... Who's
11 that?
12
13 McClary: Jamario.
14
15 Det. Morrell: That's Jamario. Now what kind of jacket did Jamario have?
16
17 McClary: Um, long green jacket.
18
19 Det. Morrell: That one?
20
21 McClary: Yes, Sir.
22
23 Det. Morrell: So these are, these are both Jamario.
24
25 McClary: Yes, Sir.
26
27 Det. Morrell: Ok.
28
29 McClary: They um, that night, that night right there, we came there during the, you know, we was
30 there the night before I did the incident, we found a room on the 7th floor and slept
31 there. Like most of the homeless people do, we find rooms and sleep in there and...
32
33 Det. Morrell: Do you know, is it J.A.M.A.R.I.O.? Is that how you spell Jamario?
34
35 McClary: Mm-hm.
36
37 Det. Morrell: Alright. So, when you get back to Sea Haven, what did, what did you tell them?
38
39 McClary: Tell Sea Haven?
40
41 Det. Morrell: No. No. No. What did you tell Jamario and Grey?
42
43 McClary: I was like, 'Darn, Bro.' I was like, they was though, I was like, 'Dang, I knew y'all was
44 going to be here.' Then they was like, um, they was like, "What happened? What
45 happened?" And I was like, "Bro, I ain't..." Nothing.
46
47 Det. Morrell: Ok. Um, I think in your picture you have a, a cell phone. Where's your cell phone at
48 now?

1
2 McClary: Ah...
3
4 Det. Morrell: It's in here? Does it have a password on it?
5
6 McClary: Yeah.
7
8 Det. Morrell: What's that password?
9
10 McClary: Ahh... 1123.
11
12 Det. Morrell: 1123?
13
14 McClary: Yeah.
15
16 Det. Morrell: Are you sure?
17
18 McClary: Yeah. Why? Are y'all going to look through my phone?
19
20 Det. Morrell: That's probably gonna be part of the investigation.
21
22 McClary: Wait.
23
24 Det. Morrell: Why? What's up?
25
26 McClary: I'm trying to think if I have any ... pictures. I'm good.
27
28 Det. Morrell: 1123, you're telling me the truth?
29
30 McClary: Yes, Sir.
31
32 Det. Morrell: Ok. Now talking with the Sea Haven staff...
33
34 McClary: Um, hum.
35
36 Det. Morrell: ... um, I mean they said that that they've seen you guys with the wig. Is that true? Like
37 making a music video or something?
38
39 McClary: You talked to (indecipherable)?
40
41 Det. Morrell: Another detective has.
42
43 McClary: Word.
44
45 Det. Morrell: Um, um, alright, so, and, and then, where did you, yesterday, where did you finally run
46 into, into us, the police? At Sea Haven? 'Cause I don't know where you guys were
47 picked up, where were you picked up at?
48

1 McClary: Right down, right there at the um police station. I was walking pass the police station
2 and it's a gate, there's a – walking, going straight - you know where the all, where they
3 make all the beer at?
4
5 Det. Morrell: Mm-hm.
6
7 McClary: There, right across the street from there.
8
9 Det. Morrell: Ok. The walk you had on the, the blue...
10
11 McClary: I had on this.
12
13 Det. Morrell: That right there? Ok. And then you had changed by then you'd gone back to...
14
15 McClary: To Sea Haven to change my clothes.
16
17 Det. Morrell: Ok. Did they change?
18
19 McClary: I don't think so. I didn't pay attention.
20
21 Det. Morrell: Yeah but you changed. I mean, you, I'm not gonna put words in your mouth, but why
22 did you change?
23
24 McClary: I changed because I had on the same clothes when I did the incident.
25
26 Det. Morrell: Ok. Um, did you see, um, did you see a lot of blood there?
27
28 McClary: Uh-huh.
29
30 Det. Morrell: You didn't see a lot of blood?
31
32 McClary: Uh-huh.
33
34 Det. Morrell: Did you get any blood on you?
35
36 McClary: Mmm... Uh-huh.
37
38 Det. Morrell: No.
39
40 McClary: Uh-huh. She probably started bleeding after I left.
41
42 Det. Morrell: Yeah. I mean, she, she bled a lot.
43
44 McClary: She bled a lot-lot? Did she almost die?
45
46 Det. Morrell: Ah that, I'm not a doctor, I don't know. I wasn't one of the detectives that went to the
47 hospital but I have seen the, the pictures.
48

1 McClary: Ok.
2
3 Det. Morrell: Um, but you know, this, this is, this is a tough spot, man. Um, you know, like I say, I
4 mean you, you are 19 years old.
5
6 McClary: Yes, Sir.
7
8 Det. Morrell: Yeah, man. It's like I said, we can't undo it right now...
9
10 McClary: Yeah.
11
12 Det. Morrell: Um, and...
13
14 McClary: The reason, the only reason I didn't talk yesterday because I just, I just felt
15 uncomfortable, man, 'cause it happened that same day. When I talked to God last
16 night...
17
18 Det. Morrell: Ok.
19
20 McClary: And um, he, I just felt like I needed to tell him (Indecipherable) this time so I know
21 detectives was going to come to me today and talk to me so I had just open my mouth
22 about it 'cause the Lord would rather take the truth than a lie, you know, so...
23
24 Det. Morrell: Absolutely right. I mean that's, that's probably the best course of action you could have
25 taken. You know. So now, you know we have, you know we have a complete, we have
26 the complete story. I mean, we have your story. Um, you know when we get in to talk
27 to Jamarion and Grey, I mean, what're they going to tell us.
28
29 McClary: They're going to tell just exactly what I'm going to tell you. They going to tell you that
30 they wasn't with me on the, um, the 4th floor. They're going to tell you that they was on
31 the second floor. They're going to tell you that they left me. They going to tell me that,
32 they're going to tell you that Demetrius went somewhere else and they left me and
33 went to McDonald's. Like they said, 'cause the investigators told me. I already know
34 they talked but they was right there with me. But they didn't, they didn't see me do
35 anything. But they was right there with the door closed on the staircase. 'Cause when I,
36 if I would have gotten that key, I would have just, they would've been with me with the,
37 um, with the rooms and everything, but they didn't touch the lady. They didn't have the
38 intentions to go around there. They didn't have the intentions to go in there and try to
39 snatch a thing off her. They ain't offering to do that. They wasn't going to...
40
41 Det. Morrell: But yeah, here, the thing, the thing is, you know they, they knew you were going in
42 there to do that.
43
44 McClary: Right.
45
46 Det. Morrell: The.... And did either of one them say, 'Demetrius, don't, don't do it.' Did either one of
47 them say that?
48

1 McClary: No.
2
3 Det. Morrell: No?
4
5 McClary: No.
6
7 Det. Morrell: So, you know what, I mean, you may have been one that, you know that, that punched
8 her but this, it is all 3 of you. Unfortunately. You know it's the hand of one, the hand of
9 all.
10
11 McClary: Yeah in South Carolina. So I'll face up to 15? Do I face up to 15?
12
13 Det. Morrell: What'd you say?
14
15 McClary: Fifteen.
16
17 Det. Morrell: Fifteen what?
18
19 McClary: Years.
20
21 Det. Morrell: I mean, I, I don't know. I can't tell you that. I mean, you're, like I told you before, you're
22 putting the cart before the horse.
23
24 McClary: Yeah, I'm just...
25
26 Det. Morrell: You're going to worry yourself sick if you start thinking about that now. Ok. This is, you
27 talking to me getting this evidence this, this interview, this is, this is step one. It's ok
28
29 McClary: Yes, Sir.
30
31 Det. Morrell: ... this... What you're talking about these 15 years or whatever, I mean, that's like step
32 60 or 100. Ok. We're, we're a ways from that, so...
33
34 McClary: Right. Right. I was thinking I was going to get released today for some reason.
35
36 Det. Morrell: Um, I, I don't know, you will have a bond hearing. What time is it?
37
38 McClary: They told me 4 o'clock.
39
40 Det. Morrell: Yeah, it should be 4 o'clock, ok. Once again, have you ever been through a bond
41 hearing?
42
43 McClary: Yeah.
44
45 Det. Morrell: Ok. So you pretty much know what the deal is. The judge is going to weigh your
46 charges and then we're going to move forward from there. Ok. Um, but um, like I say, I
47 mean, we can't undo this, ok and we have to deal with it and move on but this is, this is

1 a bump, this is a bump, in the road of your life, ok, make this be the turning point, when,
 2 when all of this gets resolved.
 3
 4 McClary: Yes, Sir.
 5
 6 Det. Morrell: Make this be the turning point for you to say, you know, 'The hell with that life that I
 7 had. I want this life.' Ok.
 8
 9 McClary: Alright. I, I swear, man...
 10
 11 Det. Morrell: Alright, listen to me. Listen to me. Alright, when, when this is all done, ok. I want you
 12 to start looking for a job.
 13
 14 McClary: Yes, Sir.
 15
 16 Det. Morrell: Ok. Where's your daughter at now?
 17
 18 McClary: My daughter is with her grandma, she's 9 months.
 19
 20 Det. Morrell: She's 9 months.
 21
 22 McClary: Her grandma and her...
 23
 24 Det. Morrell: Where at?
 25
 26 McClary: In, um, Kingtree.
 27
 28 Det. Morrell: Kingtree. Do you miss her?
 29
 30 McClary: I miss her. I love her and I'll do anything. I, I had a job and everything but I was just
 31 trying... I was just moving too fast, you know, I was moving too fast.
 32
 33 Det. Morrell: You're answering your own questions. I don't have, I don't need to sit here and tell you
 34 how (Indecipherable) you know. You're a smart kid, man. You're a smart kid. One thing
 35 I want you to do, ok... I'm going to give you my card and I want you, um, you seem to be
 36 a faithful man because you talked to God last night...
 37
 38 McClary: Yeah.
 39
 40 Det. Morrell: Ok. I want you to give me your word, when all this is done, that you will get your GED or
 41 finish high school.
 42
 43 McClary: Yes, Sir.
 44
 45 Det. Morrell: Ok. That's what I want you to do. And I want you to, whatever, do whatever you need
 46 to do legally to look after your daughter.
 47
 48 McClary: Yes, Sir.

1
2 Det. Morrell: Understand me?
3
4 McClary: Yes, Sir.
5
6 Det. Morrell: That's what I want from, from Demetrius.
7
8 McClary: Yes, Sir.
9
10 Det. Morrell: Ok. If that's a job. If that's, you know, bailing hay, if it's working in McDonald's, if it's
11 laying brick, if it's cutting grass, but you, I need you, I want you to get your GED or your
12 high school diploma. That's what I want from Demetrius.
13
14 McClary: Yes, Sir.
15
16 Det. Morrell: And then I want you to get your life back on track. Is that fair?
17
18 McClary: Yes, Sir.
19
20 Det. Morrell: Ok. We can't undo this. We have to deal with this. This is life. Ok. You're an adult.
21 You're, you're a young man but you're an adult. You have to deal with this.
22
23 McClary: Yes, Sir.
24
25 Det. Morrell: The important thing is how you learn from this. Ok.
26
27 McClary: Yes, Sir.
28
29 Det. Morrell: Will you make me that promise?
30
31 McClary: Yes, Sir.
32
33 Det. Morrell: Ok. And, and if you just gotta call the police department, you give them, you know...If
34 need another box we can get you some more, ok?... If you got to call the police
35 department, you say, I need, I need Detective Morrell, call me, ok. Whether it's, in 6
36 months, in a year, or 2 years, whatever, I want you to call here. Ok. I want to know that
37 you got a high school diploma or your GED. I want to know you got a job and you're
38 looking after K
39
40 McClary: Yes, Sir.
41
42 Det. Morrell: You make me that promise?
43
44 McClary: Yes, Sir.
45
46 Det. Morrell: Ok. Do you have any questions for me?
47
48 McClary: Um, yeah, what all would I be charged with?

1
2 Det. Morrell: That, I, I can't answer right now. 'Cause, 'cause there's a few different detectives
3 working on this case, um, I'm, I'm with the one that come in and talk to you. That was,
4 that's, that's my function in this, 'cause I mean, another detective that's going to bring
5 in your warrants as to the exact, it's going to be an assault charge of some kind. Ok.
6
7 McClary: How much can that carry up?
8
9 Det. Morrell: I, I that's step 60 like we talked about, ok. Um, but there's going to be another detective
10 who is going to have the actual, the, the exact charge that you're going to get, ok.
11
12 McClary: Yes, Sir.
13
14 Det. Morrell: Ok. Do you have any other questions for me?
15
16 McClary: Um, ohh, I'm trying to think. 'Cause you know how you, whenever they leave that's
17 when the pro-... 'questions just pop in your head. I'm trying to think now before y'all
18 leave.
19
20 Det. Morrell: That's fine. You got a lot on your plate right now. Ok. I, I've, I've never, I've never sat
21 where you're sitting, ok, so I'm not going to tell you, I understand what you're going
22 through but I'm going to give you my card, ok. If you have questions, whatever, you,
23 you let, you somehow find me or if you're still in jail, here or in the county, say I, I need
24 to talk to this detective and someone will get me a message.
25
26 McClary: Yes, Sir.
27
28 Det. Morrell: Ok. Um, I'm proud of you for telling me the truth, ok. I, and I don't want you to hang
29 your head, ok.
30
31 McClary: Yes, Sir.
32
33 Det. Morrell: You have to deal with what's happened. Ok. Um, if, not, now, now I have more respect
34 for you than I did when you walked in. I had, the respect that you were showing me
35 when you walked in. I have more respect for now, because you told me the truth, ok.
36
37 McClary: Yes, Sir. Yes, Sir.
38
39 Det. Morrell: And any person that tells the truth is a man. Ok. You stood up for what you did and,
40 and I appreciate you doing that for me.
41
42 McClary: Yes, Sir.
43
44 Det. Morrell: Ok. That's what I mean it's, we can't undo it but that's important. Ok. It's very
45 important and that goes a long way with me and it goes a long way with the judicial
46 system, ok.
47
48 McClary: Yes, Sir.

1
2 Det. Morrell: Any other questions for me and Logan?
3
4 McClary: No, Sir.
5
6 Det. Morrell: (to Detective Cooper) You got any questions, Logan?
7
8 Det. Cooper: I think we're good to go. I think we got it.
9
10 Det. Morrell: All I can tell you is good luck, Sir.
11
12 McClary: Yes, Sir.
13
14 Det. Morrell: Ok. So we'll get you back to your cell.
15
16 McClary: Yes, Sir.

830

WITNESSES

Justin E Amos Myrtle Beach Police Department

Justin Amos

ARREST WARRANT NUMBER

2018A2620600814

CDR: 0095 16-03-0910

DOA: 3/22/2018

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: JUL 25 2018

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2018GS2604179

The State of South Carolina

County of Horry

Mary-Ellen Walter

18H02009

COURT OF GENERAL SESSIONS

JULY, 2018 TERM

THE STATE

vs.

Demetrus Lawon McClary

B/ M

Homeless St

Myrtle Beach, SC 29577

DOB:

SSN:

ATTORNEY: Martin D. Spratlin

Indictment for

KIDNAPPING

Jimmy A. Richardson, II, Solicitor

ORIGINAL

DATE RECEIVED FROM
GRAND JURY

RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

2018 JUL 26 AM 9:58

FILED
HORRY COUNTY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

INDICTMENT

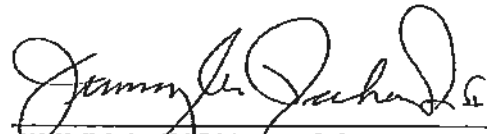
At a Court of General Sessions, convened on JULY 25, 2018, the Grand Jurors of Horry County present upon their oath:

KIDNAPPING

CDR: 0095 16-03-0910

That Demetrus Lawon McClary did, in Horry County on or about March 20, 2018, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away one Liliana Hernandez-Diaz, without authority of law, in violation of Section 16-03-0910, 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.



JIMMY A. RICHARDSON, II
 FIFTEENTH CIRCUIT SOLICITOR

ORIGINAL

832

WITNESSES

Justin E Amos Myrtle Beach Police Department

Justin Amos

ARREST WARRANT NUMBER

2018A2620600813

CDR: 0079 16-11-0311

DOA: 3/22/2018

ACTION OF GRAND JURY

TRUE BILL

Drew Case

Foreperson of Grand Jury

Date: JUL 25 2018

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2018GS2604178

The State of South Carolina

County of Horry

Mary-Ellen Walter

18H02009

COURT OF GENERAL SESSIONS

JULY, 2018 TERM

THE STATE

vs.

Demetrus Lawon McClary

B/ M

Homeless St

Myrtle Beach, SC 29577

DOB:

SSN:

ATTORNEY: Martin D. Spratlin

Indictment for

BURGLARY, FIRST DEGREE

Jimmy A. Richardson, II, Solicitor

ORIGINAL

DATE RECEIVED FROM
GRAND JURY

FILED
Horry County
2018 JUL 26 AM 9:58
JENNIFER N. ELYS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

INDICTMENT

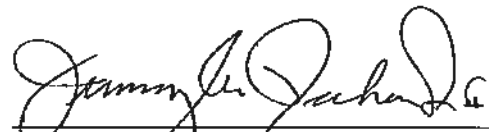
At a Court of General Sessions, convened on JULY 25, 2018, the Grand Jurors of Horry County present upon their oath:

BURGLARY, FIRST DEGREE

CDR: 0079 16-11-0311

That Demetrus Lawon McClary did in Horry County, on or about March 20, 2018 enter the dwelling of Liliana Hernandez-Diaz without consent and with the intent to commit a crime therein and when in effecting entry or while in the dwelling or in immediate flight therefrom, causes physical injury to a non-participant in the crime, in violation of Section 16-11-0311(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.



JIMMY A. RICHARDSON, II
 FIFTEENTH CIRCUIT SOLICITOR

ORIGINAL

2018 JUL 26 9 04:20

834

WITNESSES

Justin E Amos Myrtle Beach Police Department

Justin Amos

ARREST WARRANT NUMBER

2018A2620600812

CDR: 3411 16-03-0600(B)(1)

DOA: 3/22/2018

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: JUL 25 2018

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2018GS2604177

The State of South Carolina

County of Horry

Mary-Ellen Waller

18H02009

COURT OF GENERAL SESSIONS

JULY, 2018 TERM

THE STATE

vs.

Demetrus Lawon McClary

B/ M

Homeless St

Myrtle Beach, SC 29577

DOB:

SSN:

ATTORNEY: Martin D. Spratlin

Indictment for

ASSAULT AND BATTERY, HIGH AND
AGGRAVATED NATURE

Jimmy A. Richardson, II, Solicitor

ORIGINAL

FILED
HORRY COUNTY
2018 JUL 26 AM 9:58
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC
DATE RECEIVED FROM
GRAND JURY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)



At a Court of General Sessions, convened on JULY 25, 2018, the Grand Jurors of Horry County present upon their oath:

(INCIDENT DATE 6/1/2010 OR AFTER)

ASSAULT AND BATTERY
OF A HIGH AND AGGRAVATED NATURE

CDR: 3411 16-3-600(B)

That Demetrus Lawon McClary did, in Horry County on or about March 20, 2018, commit an unlawful act of injury to Liliana Hernandez-Diaz, which resulted in great bodily injury or the act was accomplished by means likely to produce death or great bodily injury to the victim in violation of Section 16-3-600(B), 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.

A handwritten signature in black ink, which appears to read "Jimmy A. Richardson, II".

JIMMY A. RICHARDSON, II
 FIFTEENTH CIRCUIT SOLICITOR

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF Horry

STATE

VS.

Demetrus Lawon McClary

AKA: _____
 Race: BLACK Sex: M Age: 23
 DOB: [REDACTED] SS#: [REDACTED]
 Address: Homeless St
 City, State, Zip: Myrtle Beach, SC 29577
 DL#: [REDACTED] SID#: SC02243794

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2018GS2604179AW#: 2018A2620600814Date of Offense: 3/20/2018S.C. Code §: 16-03-0910CDR Code #: 0095

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the above indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: KidnappingUp to 30 yrsin violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
 (CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
 ATTEST:

Walter, Mary-Ellen SC103036
 Walter, Mary-Ellen SC Bar # Defendant

Fox, J. Eric
 Attorney for Defendant

SCB15123

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Correction, ☐ County Detention Center,for a determinate term of 30 days/months/years/Time Served ☐ Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years/Time Served 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.

The sentence shall run

☒ CONCURRENT or ☒ CONSECUTIVE to sentence on: 2018GS2604178

→ 2018GS2604177
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SCDoc.
1514 days/months

☐ To include time spent on monitored house arrest prior to trial and sentencing.☐ The Defendant Shall be Released from County Detention Center.

Pursuant to 18 U.S.C. § 922 and § 16-25-30 it is unlawful for a person convicted of a violation of § 16-25-20 or § 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

STATE VS. Demetrus Lawon McClary INDICTMENT/CASE#: 2018GS2604179

SPECIAL CONDITIONS:

☐ PTUP after _____ months/years

And Other Terms Listed Below:

- ☐ Substance Abuse Counseling ☐ Completion of GED ☐ Random Drug/Alcohol Testing
- ☐ Attend Voc. Rehab. or Job Corp ☐ No Contact with Victim ☐ Domestic Violence Intervention Program
- ☐ Mental Health Counseling ☐ May serve W/E beginning: _____
- ☐ Sex Offender Registry pursuant to S.C. Code § 23-3-430 ☐ Public Service Employment 0 _____ days/hours
- ☐ Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.
- ☐ Other: _____

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____ ☐ Set by SCDPPPS

Recipient: _____

*Fine:

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 25.00 Beginning 6/13/2022

§14-1-206 (Assessments 107.5 %)	\$	
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$100.00
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§56-1-286 (DUI Breath Test)	\$25	\$
§14-1-212 (Law Enforce. Funding)	\$25	\$25.00
§14-1-213 (Drug Court Surcharge)	\$150	\$
§34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)	\$41	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	TBD	\$3.75
☐ Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.	\$500	\$
☐ § 17-3-30(B) Unpaid Application Fee to be paid to the Public Defender Fund	TBD	\$
TOTAL		\$128.75

Clerk of Court/ Deputy Clerk: Renée N. Elvis
Court Reporter: Bobbi FisherPresiding Judge: X 87 DOR 5
Judge Code: 2771
Sentence Date: 5/13/2022

STATE OF SOUTH CAROLINA

COUNTY OF Horry

STATE

VS.

Demetrus Lawon McClary

AKA:

Race: BLACK Sex: M Age: 23DOB: [REDACTED] SS#: [REDACTED]Address: Homeless StCity, State, Zip: Myrtle Beach, SC 29577DL#: [REDACTED] SID#: SC02243794

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2018GS2604178A/W#: 2018A2620600813Date of Offense: 3/20/2018S.C. Code §: 16-11-0312(B)CDR Code #: 0086

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the above indictment comes now the Defendant who was ☒ CONVICTED or ☐ PLEADEDTO: Burglary, 2nd Degree, Violent (after 06/20/85)Up to 15 yearsin violation of § 16-11-0312(B) of the S.C. Code of Laws, bearing CDR Code # 0086
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
 (CSC w/minor 1st or CSC w/minor 3rd)

 The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
 ATTEST:

Walter, Mary-Ellen SC103036
 SC Bar # Defendant

SCB15123

Fox, J. Eric
 Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Correction, ☐ County Detention Center,for a determinate term of 5 days/months/years Time Served ☐ Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years/Time Served 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.

The sentence shall run

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 2018GS 2604179☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SCDOC.1514 days/months☐ To include time spent on monitored house arrest prior to trial and sentencing.☐ The Defendant Shall be Released from County Detention Center.

Pursuant to 18 U.S.C. § 922 and § 16-25-30 it is unlawful for a person convicted of a violation of § 16-25-20 or § 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

STATE VS. Demetrus Lawon McClary INDICTMENT/CASE#: 2018GS2604178**SPECIAL CONDITIONS:**☐ **PTUP** after _____ months/years**And Other Terms Listed Below:**

- ☐ Substance Abuse Counseling ☐ Completion of GED ☐ Random Drug/Alcohol Testing
- ☐ Attend Voc. Rehab. or Job Corp ☐ No Contact with Victim ☐ Domestic Violence Intervention Program
- ☐ Mental Health Counseling ☐ May serve W/E beginning: _____
- ☐ Sex Offender Registry pursuant to S.C. Code § 23-3-430 ☐ Public Service Employment 0 _____ days/hours
- ☐ Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.
- ☐ Other: _____

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total: \$ _____ plus 20% fee: _____ \$ _____

Payment Terms: _____ ☐ Set by SCDPPPS

Recipient: _____

***Fine:**Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$25.00 Beginning 6/13/2022

§14-1-206 (Assessments 107.5 %)		\$	
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$	\$100.00
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$	
§56-5-2995 (DUI Assessment)	\$12	\$	
§56-1-286 (DUI Breath Test)	\$25	\$	
§14-1-212 (Law Enforce. Funding)	\$25	\$	\$25.00
§14-1-213 (Drug Court Surcharge)	\$150	\$	
§34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)	\$41	\$	
§50-21-114(BUI Breath Test Fee)	\$50	\$	
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	
3% to County (if paid in installments)	TBD	\$	\$3.75
☐ Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.	\$500	\$	
☐ § 17-3-30(B) Unpaid Application Fee to be paid to the Public Defender Fund	TBD	\$	
TOTAL		\$	\$128.75

Clerk of Court/ Deputy Clerk: Renee N. Elvis
Court Reporter: Bobbi FisherPresiding Judge: _____
Judge Code: _____
Sentence Date: 5/13/2022

STATE OF SOUTH CAROLINA

COUNTY OF Horry

STATE

VS.

Demetrus Lawon McClary

AKA:

Race: BLACK Sex: M Age: 23DOB: [REDACTED] SS#: [REDACTED]Address: Homeless StCity, State, Zip: Myrtle Beach, SC 29577DL#: [REDACTED] SID#: SC02243794

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2018GS2604177A/W#: 2018A2620600812Date of Offense: 3/20/2018S.C. Code §: 16-03-0600(B)(1)CDR Code #: 3411

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the above indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Assault / Assault & Battery of a High & Aggravated NatureUp to 20 yrsin violation of § 16-03-0600(B)(1) of the S.C. Code of Laws, bearing CDR Code # 3411☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury (def.'s initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature] SC103036

Walter, Mary-Ellen SC Bar # Defendant

Fox, J. Fox
Attorney for Defendant

SCB15123

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Correction, ☐ County Detention Center,for a determinate term of 20 days/months/years/Time Served ☐ Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years/Time Served 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.

The sentence shall run

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: ☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SCDOC.☐ To include time spent on monitored house arrest prior to trial and sentencing.☐ The Defendant Shall be Released from County Detention Center.

Pursuant to 18 U.S.C. § 922 and § 16-25-30 it is unlawful for a person convicted of a violation of § 16-25-20 or § 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

STATE VS. Demetrus Lawon McClary INDICTMENT/CASE#: 2018GS2604177**SPECIAL CONDITIONS:**☐ **PTUP** after _____ months/years**And Other Terms Listed Below:**

- ☐ Substance Abuse Counseling ☐ Completion of GED ☐ Random Drug/Alcohol Testing
- ☐ Attend Voc. Rehab. or Job Corp ☐ No Contact with Victim ☐ Domestic Violence Intervention Program
- ☐ Mental Health Counseling ☐ May serve W/E beginning: _____
- ☐ Sex Offender Registry pursuant to S.C. Code § 23-3-430 ☐ Public Service Employment 0 days/hours
- ☐ Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.
- ☐ Other: _____

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

***Fine:**Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 25.00 Beginning 5/13/2022

- §14-1-206 (Assessments 107.5 %)
- §14-1-211(A)(1) (Conv. Surcharge)
- §14-1-211(A)(2) (DUI Surcharge)
- §56-5-2995 (DUI Assessment)
- §56-1-286 (DUI Breath Test)
- §14-1-212 (Law Enforce. Funding)
- §14-1-213 (Drug Court Surcharge)
- §34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)
- §50-21-114(BUI Breath Test Fee)
- §56-5-2942(J) (Vehicle Assessment)
- 3% to County (if paid in installments)

☐ Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.☒ § 17-3-30(B) Unpaid Application Fee to be paid to the Public Defender Fund

FILED	2022 MAY 13 6 24	
Horry County		
RENEE N. ELVIS		
CLERK OF COURT		
Horry County, SC		
\$100	\$	100.00
\$100	\$	
\$12	\$	
\$25	\$	
\$25	\$	25.00
\$150	\$	
\$41	\$	
\$50	\$	
\$40/ea	\$	
TBD	\$	3.75
\$500	\$	
TBD	\$	40.00
TOTAL		\$168.75

Clerk of Court/ Deputy Clerk:

Renée N. ELVIS
Bobbi Fisher

Court Reporter:

Presiding Judge:

Judge Code:

Sentence Date:

N. Steven DeBary
2771
5/13/2022

CERTIFICATE OF COUNSEL FOR APPELLANT

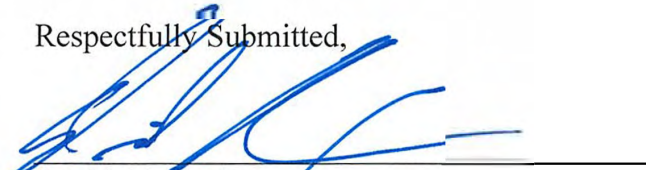
Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

RECEIVED

Apr 27 2023

SC Court of Appeals

Respectfully Submitted,



David Alexander
Appellate Defender

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

ATTORNEY FOR APPELLANT

This 27th day of April, 2023.