

13261

VOLUME 3 OF 4

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

ROBERT ANTHONY JAMES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

AMENDED APPENDIX

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STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Costa M. Pleicones, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENNETH JAMES AND
ROBERT ANTHONY JAMES,

APPELLANTS.

RECORD ON APPEAL

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1 LANE, KNOWN LANE AND AN EVIDENCE LANE. I'M NOT DEALING WITH
2 ANY PARTICULAR PROBE HERE. YOU'RE GOING TO HAVE, ASSUMING
3 TWO BANDS EACH, YOU'LL HAVE TWO BANDS AND TWO BANDS AND
4 EVIDENCE. THIS IS GOING TO BE -- WE'LL DO EVIDENCE MALE AND
5 EVIDENCE FEMALE. AND YOU'RE LOOKING FOR SOMETHING LIKE THIS
6 IDEALLY, WHERE YOU GET A REFLECTION OF KENNETH JAMES'S
7 PROFILE IN THE EVIDENCE MALE AND A REFLECTION OF [REDACTED]
8 PROFILE IN THE EVIDENCE FEMALE?

9 A IDEALLY, THAT WOULD BE WHAT YOU WOULD EXPECT TO FIND OR HOPE
10 TO FIND.

11 Q OKAY. AND THESE ARE THESE DARK BANDS THAT YOU CAN SEE IN THE
12 APPROPRIATE LANES IN THESE AUTO -- LUMOGRAPHS?

13 A CORRECT. THE BANDS REPRESENT PIECES OF DNA, FRAGMENTS OF
14 DNA.

15 Q THAT HAVE TRAVELED THE DIFFERENT LENGTHS AS YOU'VE DESCRIBED
16 THEM, RIGHT?

17 A CORRECT.

18 Q OKAY. YOU'VE GOT THESE LADDERS OF KNOWN SIZE. SO THEN YOU
19 GO IN AND YOU'VE GOT A COMPUTER AND YOU FIND THE MID POINT OF
20 THIS BAND AND THE MID POINT OF THAT BAND AND THE COMPUTER
21 TELLS YOU HOW BIG THEY ARE, HOW MUCH THEY WEIGH?

22 A IT MEASURES LENGTH.

23 Q RIGHT. LENGTH CORRESPONDS DIRECTLY TO WEIGHT?

24 A YES, SIR.

25 Q IT WILL GIVE YOU AN ESTIMATE OF SIZE OF SO MANY BASE PAIRS?

1 A THAT'S CORRECT.

2 Q OKAY. ALL RIGHT. AND THEN I WANT TO GET TO THIS TERM THAT
3 YOU USE, "MATCH". OKAY? YOU'VE GOT A RULE AT SLED THAT SAYS
4 IF YOU'VE GOT A BAND HERE AND YOU'VE GOT A BAND HERE AND THIS
5 BAND IS WITHIN -- IF THESE TWO BANDS ARE WITHIN PLUS OR MINUS
6 2.8 PERCENT OF EACH OTHER, THEN THEY ARE A MATCH. IS THAT
7 CORRECT?

8 A IF TWO BANDS WHEN MEASURED ARE WITHIN 2.8 PERCENT OF EACH
9 OTHER, THEY ARE CONSIDERED A MATCH.

10 Q OKAY. NOW, I CAN'T DEAL WITH MUCH MORE THAN -- LET'S GO WITH
11 A THOUSAND. THAT WAY WE CAN GET TO POINT "A". IF YOU'VE GOT
12 THIS BAND HERE, THAT'S A SIZE OF 1,000.

13 A OKAY.

14 Q OKAY? AND THIS BAND HERE IS A SIZE OF, LET'S SEE, 99, THAT
15 WOULD BE WITHIN 2.8 PERCENT, CORRECT?

16 A IT WOULD, SIR.

17 Q 2.8 PERCENT OF A THOUSAND IS GOING TO BE 28, RIGHT?

18 A CORRECT.

19 Q OKAY. THEN YOU HAVE TO DO 2.8 PERCENT OF THIS ALSO, RIGHT?

20 A CORRECT, SIR.

21 Q WELL, LET'S JUST DO SOMETHING I CAN DEAL WITH AGAIN HERE. WE
22 HAVE A BAND THAT'S 950. OKAY? 2.8 PERCENT IS 18, IS 19.8.
23 OKAY. THE LOW END OF A THOUSAND WOULD BE THEN 972 AND THE
24 HIGH END WOULD BE 1028. IS THAT CORRECT?

25 A THAT LOOKS ACCURATE TO ME. THAT'S CORRECT.

1 Q AND THEN YOU'RE GOING TO HAVE ANOTHER SAMPLE THAT CAN BE --
2 IF THE HIGH END OF THE LOWER SAMPLE OVERLAPS THE LOW END OF
3 THE LARGER SAMPLE, THEN THAT'S A MATCH?

4 A THAT WOULD BE CALLED A MATCH BECAUSE TWO SAMPLES AGREE WITHIN
5 PLUS OR MINUS 2.8 PERCENT OF EACH OTHER, THEN WE CALL THAT A
6 MATCH. THAT'S CORRECT.

7 Q AND WHEN WE LOOKED AT THESE LANES HERE THAT THESE SAMPLES ARE
8 RUN IN AND YOU JUST SEE ONE BAND OR TWO BANDS OR THREE OR
9 HOWEVER MANY BANDS YOU SEE, THERE IS NOT ACTUALLY JUST ONE OR
10 TWO SPOTS ON THAT LANE THAT IS DNA. THERE IS A CONTINUOUS
11 DISTRIBUTION OF PIECES OF DNA THROUGHOUT THE ENTIRE LENGTH OF
12 THAT LANE, ISN'T THERE?

13 A THAT LANE IS FILLED WITH DNA. THAT'S CORRECT, SIR.

14 Q FILLED WITH DNA THAT'S ALL DIFFERENT SIZES?

15 A ABSOLUTELY CORRECT, SIR.

16 Q AND THEORETICALLY, SINCE WE DON'T KNOW HOW MANY -- WELL, WE
17 DON'T KNOW HOW MANY VARIATIONS THERE ARE AT ANY ONE
18 PARTICULAR SITE, RIGHT, THAT'S WHAT YOU'RE LOOKING AT, IS
19 VARIATIONS IN SIZES, RIGHT?

20 A RIGHT.

21 Q THOSE ARE CALLED A VARIATION IN SIZE. THAT'S CALLED AN
22 ALLELE. IS THAT CORRECT?

23 A EACH BAND IS REFERRED TO AS AN ALLELE. THAT'S CORRECT.

24 Q ALL RIGHT.

25 A AN ALLELE IS AN ALTERNATIVE FORM OF A GENE.

1 Q OKAY.

2 A THAT'S THE DEFINITION FOR AN ALLELE.

3 Q SO WHEN WE LOOK, FOR EXAMPLE, AT THIS HYPOTHETICAL SITUATION,
4 WE HAVE SOMETHING THAT'S 1,000 IN SIZE, YOU HAVE POTENTIALLY
5 28 PLUS 28 WHICH IS 56 SEPARATE DIFFERENT ALLELES IN THAT
6 RANGE, CORRECT?

7 A IT COULD FALL WITHIN 56 DIFFERENT SIZES. THAT'S CORRECT.

8 Q OKAY. AND WHAT YOU'RE SAYING -- AND WE'VE GOT SOMETHING
9 BELOW HERE. AND MY MATH IS NOT GOOD ENOUGH. IT'S GOING TO
10 BE SMALLER THAN 972. WE CAN EXTEND THIS DOWN A WAYS. I
11 DON'T KNOW IF YOU CAN GO DOWN TO 950. YOU HAVE POTENTIALLY
12 MORE THAN 56 ALLELES BETWEEN ONE LANE COMPARED WITH ANOTHER?

13 A THEORETICALLY IT COULD HAVE OVERLAPPING BANDS, BINS THAT DO
14 ENLARGE YOUR FACTOR.

15 Q THE POINT IS THAT YOU ALL DON'T KNOW, AND THERE'S NOTHING
16 SPECIFIC AT SLED ON THIS, AND SCIENCE JUST DOESN'T KNOW HOW
17 MANY SEPARATE VARIATIONS THERE ARE, RIGHT?

18 A THAT'S CORRECT, SIR.

19 Q SO WHAT YOU ALL DO IS LUMP THEM TOGETHER IN GROUPS. AND I
20 DON'T HAVE ENOUGH GROUPS. NOW I FORGET. WHAT ARE THEY? 26?
21 SOMETHING LIKE THAT?

22 A BE IN DIFFERENT BINS. THAT'S CORRECT.

23 Q 26 DIFFERENCE BINS?

24 A WELL, THE BINS VARY, BUT THAT'S ALSO RIGHT.

25 Q YES, SIR. ALL RIGHT. SO YOU LUMP THEM TOGETHER, RIGHT?

1 A BASED ON SIZE. THAT'S CORRECT.

2 Q BASED ON SIZE. AND WHEN YOU SAY SOMETHING MATCHES, WHEN YOU
3 DECLARE A MATCH BETWEEN TWO BANDS ---

4 A MM-HMM (AFFIRMATIVE).

5 Q --- BETWEEN THE KNOWN SAMPLE OF KENNETH JAMES AND THE PART OF
6 THE MALE FRACTION THAT YOU SAY IS HIS, YOU'RE NOT SAYING
7 THEY'RE THE SAME SIZE, ARE YOU?

8 A WE'RE SAYING THAT THEY MATCH EITHER OTHER WITHIN ---

9 Q WITHIN THAT 2.8?

10 A --- THAT WINDOW OF 2.8 PERCENT. THAT'S CORRECT.

11 Q OKAY. SO WE'RE DEALING HERE NOW WITH FOUR PROBES? RIGHT.
12 D2S44. IS THAT CORRECT?

13 A CORRECT, SIR.

14 Q OKAY. DO YOU HAVE YOUR CALCULATED FRAGMENT LENGTHS LOG
15 MODEL?

16 A I'M SURE I DO SOMEWHERE HERE, SIR.

17 Q FOR THE FIRST RUN.

18 A LET ME FIND THE RIGHT SHEET, SIR. I'VE GOT THEM. WHICH ONE
19 DO YOU NEED?

20 Q I JUST DON'T WANT TO GRAB ONE OF THE ONES THAT WERE NOT USED.
21 WE'VE ONLY GOT FOUR. D4, D1 AND D10 ARE NOT USED, CORRECT?

22 A THAT'S CORRECT.

23 Q THEY WERE INCONCLUSIVE?

24 A CORRECT.

25 Q ALL RIGHT. LET'S ASK YOU TO GRAB THEN D5S110. THIS IS THE

1 ONE THAT I'M LOOKING FOR RIGHT THERE.

2 A ALL RIGHT, SIR.

3 Q ALL RIGHT. NOW, YOU'VE GOT A COMPUTER AND YOU SIZE THESE
4 THINGS. AND WHEN YOU DO THE SIZING, DOES THE COMPUTER
5 AUTOMATICALLY DETERMINE THE EXISTENCE OF A BAND AND THE SIZE
6 OF THE BAND?

7 A YES. WE TELL THE COMPUTER HOW MANY BANDS ARE IN THAT LANE,
8 AND IT PICKS OUT THE BANDS AND MEASURES THEM.

9 Q AND WHAT CAN THE OPERATOR DO?

10 A THE OPERATOR HAS TO CONFIRM THAT WHAT THE COMPUTER PICKED OUT
11 WAS INDEED A BAND. THE COMPUTER SEES DENSITY, SEES COLOR
12 CHANGE OR DENSITY OF A -- IN OTHER WORDS, YOU CAN HAVE
13 SOMETHING ON THE FILM WHICH IS REALLY NOT EVEN A BAND; IT'S
14 JUST A SMUDGE THAT IT COULD MISIDENTIFY AS A BAND. YOU HAVE
15 TO CONFIRM THAT IT DID INDEED PICK OUT BANDS VERSUS SMUDGES.

16 Q OKAY. HOW ABOUT LOCATING THE CENTER OF THE BAND?

17 A THE COMPUTER LOCATES THE CENTER OF THE BAND.

18 Q THERE'S NO ABILITY TO MANUALLY OVERRIDE THAT?

19 A YES. YOU CAN MANUALLY OVERRIDE IT. THAT'S CORRECT, SIR.

20 Q SO YOU CAN MANUALLY OVERRIDE THE EXISTENCE OF A BAND; AND AS,
21 WHEN I SAY THE CENTER OF THE BAND, THAT DETERMINES THE SIZE
22 OF THE BAND, CORRECT?

23 A YOU CAN DO THAT, SIR. BUT WHEN WE COMPLETE OUR ANALYSIS, WE
24 HAVE A VIDEO REPRESENTATION OF WHERE WE MADE OUR MARKS WHICH
25 SHOWS THAT WE MADE THE MARKS IN THE CENTER OF THE BANDS AND

1 EVERYTHING WE MARKED WAS A BAND.

2 Q YES, SIR. REFERRING TO YOUR SIZING DATA HERE FOR D5S110, WE
3 HAVE IN LANE 5, WHICH WE'VE IDENTIFIED AS THE LANE ASSOCIATED
4 WITH KENNETH JAMES?

5 A CORRECT.

6 Q RIGHT? YOU'VE GOT A BAND 2694 BASE PAIRS IN SIZE AND YOU'VE
7 GOT A BAND 1596 BASE PAIRS IN SIZE. IS THAT CORRECT?

8 A THAT'S CORRECT.

9 Q OKAY. AND THEN ON THE MALE FRACTION, YOU'RE INDICATING THREE
10 BANDS. BUT THE TWO THAT ARE ASSOCIATED, THERE ARE THREE
11 BANDS REFLECTED ON THE MALE FRACTION, RIGHT?

12 A CORRECT, SIR.

13 Q NOT FOUR, BUT THREE. RIGHT?

14 A THAT I IMAGED. THAT'S CORRECT, SIR.

15 Q ALL RIGHT. SO YOU HAVE TWO THAT I ASSUME YOU'D ASSOCIATE
16 WITH KENNETH JAMES, ONE 2747 IN SIZE AND THE OTHER 1606 IN
17 SIZE. IS THAT RIGHT?

18 A WELL, THAT'S THE NUMBERS WE HAVE; YES, SIR.

19 Q THOSE WOULD BE THE TWO ASSOCIATED WITH KENNETH JAMES?

20 A MM-HMM (AFFIRMATIVE).

21 Q NOW, YOU SAY THAT THOSE -- THAT THIS IS A MATCH. OKAY?
22 CLEARLY THESE NUMBERS AREN'T THE SAME. RIGHT?

23 A OBVIOUSLY.

24 Q OBVIOUSLY. BUT THIS IS THIS PLUS OR MINUS 2.8 PERCENT,
25 RIGHT?

1 A RIGHT.

2 Q 2.8 PERCENT ABOVE THIS AND 2.8 PERCENT BELOW THAT, IF THEY
3 OVERLAP, IF THOSE NUMBERS OVERLAP IN THAT MATCH, THEN IT'S A
4 MATCH UNDER YOUR RULES?

5 A YES. OUR MATCH WINDOW IS PLUS OR MINUS 2.8 PERCENT, AND
6 THAT'S WHAT WE APPLY TO ALL OF OUR MATCHES.

7 Q OKAY. NOW, YOU WOULD AGREE WITH ME THAT BETWEEN 2694 AND
8 2747 THERE ARE 53 POSSIBLE SEPARATE ALLELES?

9 A THERE ARE OTHER —

10 Q ACTUALLY 55.

11 A — POSSIBLE COMBINATIONS. THAT'S CORRECT.

12 Q OKAY. 55. AND YOU WOULD FURTHER AGREE WITH ME, OKAY,
13 REGARDLESS OF WHETHER YOU DECLARE THEM A MATCH OR NOT, IF THE
14 ALLELE SIZE IS NOT IN ACTUALITY THE SAME AS THE ALLELE SIZE
15 IN THE KNOWN SAMPLE, IF THE ALLELE SIZE FOR THE SUSPECT
16 QUESTION SAMPLE IS NOT THE SAME SIZE IN ACTUALITY AS THE
17 KNOWN SAMPLE, THEN IT'S NOT THE SAME PERSON? THERE ARE NO
18 DIFFERENCE IN THE GENES THAT ARE PRESENT IN THE QUESTION
19 SAMPLE AND THE KNOWN SAMPLE, IS THERE?

20 A YOU HAVE TO REPEAT THAT AGAIN. I'M CONFUSED. I APOLOGIZE.

21 Q I'LL BE HAPPY TO REPEAT THAT AGAIN, SIR. THERE IS NO
22 DIFFERENCE IN THE GENES THAT YOU CLAIM ARE KENNETH JAMES IN
23 THE PIECE OF EVIDENCE THAT YOU'RE LOOKING AT THAN THERE ARE
24 IN THE KNOWN SAMPLE YOU GET FROM HIS BLOOD?

25 A THERE ARE NO DIFFERENCES?

1 Q THERE IS NO DIFFERENCE. THEY'RE THE SAME GENES, RIGHT?

2 A THEY'RE THE SAME PIECE OF DNA. THAT'S CORRECT, SIR.

3 Q ALL RIGHT. AND WHEN YOU'RE LOOKING AT THE SAME SPOT ON THE
4 SAME PIECE OF DNA, YOU'RE GOING TO GET A SAMPLE THAT IS, IF
5 WE COULD JUST MEASURE IT, THE SAME SIZE?

6 A YES, SIR. BUT YOU CAN'T MEASURE IT THE SAME SIZE. WE DON'T
7 HAVE THAT QUITE PRECISION OF MEASURING EXACTLY THE SAME.
8 THAT'S WHY WE'VE GOT THE WINDOW.

9 Q THAT'S WHY IT -- IT DOESN'T MATTER IF IT'S WITHIN PLUS OR
10 MINUS 2.8 PERCENT, EITHER OF THESE THINGS; WE CALL IT A
11 MATCH, RIGHT?

12 A BASED ON RESEARCH THAT WE'VE DONE IN OUR LABORATORY, THAT'S
13 CORRECT, SIR.

14 Q OKAY. YOU DON'T SAY IT'S THE SAME, RIGHT? YOU SAY IT'S A
15 MATCH?

16 A WE SAY IT'S A MATCH.

17 Q OKAY. AND THE POINT IS, IF IT IS -- WHETHER IT'S A MATCH OR
18 NOT, IF IT IS NOT IN ACTUALITY THE SAME, THEN IT IS NOT
19 KENNETH JAMES? I CAN'T HELP IT IF YOU CAN'T MEASURE IT.
20 OKAY?

21 A YES, SIR. WE COULD USE THE TERM "THE SAME". WE COULD USE
22 THE TERM "THE MATCH". IT'S AN INTERCHANGEABLE TERM. WE
23 CHOOSE TO USE THE TERM "MATCH" IN OUR PARTICULAR LABORATORY.

24 Q SIR, YOUR PROTOCOL SAYS THAT YOU CAN USE THE TERM "MATCH",
25 RIGHT?

1 A YES, SIR.

2 Q RIGHT? YOU WROTE THE RULES THAT SAID THAT YOU CAN -- NOT YOU
3 PERSONALLY. SLED WROTE THE RULES THAT SAYS YOU CAN CALL IT A
4 MATCH. RIGHT, SIR?

5 A CORRECT, SIR.

6 Q ALL RIGHT. YOU CAN'T SAY IT'S THE SAME BECAUSE YOUR
7 INSTRUMENTS CAN'T MEASURE WHETHER IT'S THE SAME OR NOT.
8 THAT'S TRUE. IS IT OR IS IT NOT CORRECT?

9 A WE CAN MEASURE IT AND SHOW THAT THEY AGREE WITHIN 2.8 PERCENT
10 OF EACH OTHER.

11 Q ALL RIGHT. LET ME ASK YOU THIS. FOR THIS LOCATION, D5S110,
12 WHAT SIZE IS THE UPPER OR LARGER ALLELE FOR KENNETH JAMES?

13 A 2694.

14 Q WHAT SIZE IS THE UPPER OR LARGER ALLELE IN THE EVIDENCE?

15 A 2747.

16 Q OKAY.

17 A THEY ARE THE SAME.

18 Q THEY ARE THE SAME?

19 A BASED ON OUR MATCH CRITERIA, THEY'RE THE SAME.

20 Q BASED ON YOUR MATCH CRITERIA THEY'RE THE SAME. THEY'RE A
21 MATCH, AREN'T THEY?

22 A ABSOLUTELY, SIR.

23 Q OKAY. THEN LET'S FORGET ABOUT YOUR MEASUREMENTS HERE. WHAT
24 SIZE IS IT REALLY? YOU KNOW IT'S NOT 2694 BECAUSE YOUR
25 INSTRUMENTS CAN'T MEASURE THAT, RIGHT?

1 A NOT THAT PRECISELY.

2 Q THEY CAN'T MEASURE IT THAT PRECISELY. AND YOU KNOW IT'S NOT
3 2747, DON'T YOU, IN THE OTHER SAMPLE, BECAUSE YOUR
4 INSTRUMENTS CAN'T MEASURE IT THAT PRECISELY? THE ACTUAL
5 SIZE.

6 A THE ACTUAL SIZE OF THE SAMPLE FROM MR. KENNETH JAMES IS 2694.
7 THE ACTUAL SIZE AS MEASURED BY COMPUTER FROM THE EVIDENCE IS
8 2747.

9 Q OKAY. WHAT'S THE REAL SIZE? THIS IS THE NUMBER OF BASE
10 PAIRS THAT YOU'RE MEASURING, RIGHT?

11 A YES, SIR.

12 Q YOU CANNOT SAY THAT KENNETH JAMES'S KNOWN SAMPLE IS 2694 BASE
13 PAIRS IN SIZE. THAT'S THE SIZE YOU MEASURED IT AT, RIGHT?

14 A AND THAT'S ALL I HAVE TO BASE IT ON, BASED ON THE MEASUREMENT
15 THAT WE HAVE THAT THAT BASE PAIR IS 2694, THAT HAS A SIZE OF
16 THAT FRAGMENT, 2694.

17 Q 2694. THAT'S THE SIZE YOU MEASURED IT AT?

18 A THAT'S CORRECT, SIR.

19 Q IS THE REAL SIZE OF IT 2692?

20 A THE REAL SIZE IS -- ALL I CAN TELL YOU IS THE 2694. I MEAN,
21 IF WE MEASURED AGAIN, IT MIGHT BE A 2692.

22 Q OKAY. WELL, WHICH ONE -- IT DOES HAVE A REAL SIZE, DOESN'T
23 IT? IT IS A CERTAIN LENGTH, ISN'T IT?

24 A YES, SIR.

25 Q WHAT LENGTH IS IT?

1 A 2694.

2 Q NO. THAT'S YOUR MEASURED LENGTH. WHAT IS ITS REAL LENGTH?

3 A ALL I HAVE TO BASE IT ON IS WHAT THE MEASURED LENGTH IS,
4 2694.

5 Q SO, IN SHORT, YOU DON'T KNOW WHAT IT'S REAL LENGTH IS?

6 A I KNOW IT'S 2694 PLUS OR MINUS 2.8 PERCENT. I DON'T KNOW THE
7 EXACT BASE PAIR, BUT IT'S NOT IMPORTANT TO KNOW THE EXACT
8 BASE PAIR SIZE; ONLY THAT WE KNOW -- WE COMPARE THE TWO SIZES
9 AND MEASURE IT AND THEY AGREE WITHIN 2.8 PERCENT OF EACH
10 OTHER.

11 Q IT'S NOT IMPORTANT THAT YOU KNOW THE EXACT SIZE OF IT?

12 A EXACTLY, SIR.

13 Q IT'S NOT IMPORTANT THAT YOU KNOW THE EXACT SIZE OF A KNOWN
14 SAMPLE AND A QUESTION SAMPLE, RIGHT?

15 A NOT IN THIS PARTICULAR TEST. THAT'S CORRECT, SIR.

16 Q IT DOESN'T MATTER. BECAUSE IF IT'S WITHIN PLUS OR MINUS 2.8
17 PERCENT, THEN IT'S A MATCH?

18 A THAT'S CORRECT, SIR. PLUS OR MINUS 2.8 PERCENT.

19 Q RIGHT. RIGHT. EVEN THOUGH IF THEY ARE NOT ACTUALLY THE SAME
20 SIZE, THEY'RE NOT THE SAME PERSON?

21 A THERE CAN BE -- YOU COULD TAKE THE SAME PERSON -- YOU COULD
22 TAKE MY DNA RIGHT NOW AND MEASURE IT TEN TIMES AND GET TEN
23 DIFFERENT NUMBERS. BUT I GUARANTEE YOU THAT ALL TEN NUMBERS
24 WILL BE WITHIN A FEW PERCENTAGE POINTS OF EACH OTHER. IT
25 COULD BE 2694 ONE TIME, 2695 THE NEXT, 2696 THE NEXT. IT'S

1 ALL BASED ON THE ABILITY OF THE EQUIPMENT TO MEASURE THE
2 PARTICULAR BAND.

3 Q RIGHT. AND YOUR -- AND I DON'T WANT TO BE PERSONAL. ONE
4 PERSON'S SAMPLE COULD BE 1,000 IN SIZE AND ONE PERSON'S
5 SAMPLE COULD BE 1,010 IN SIZE; ACTUAL SIZE, NOT MEASURED
6 SIZE, ACTUAL SIZE. AND THOSE WOULD BE TWO DIFFERENT ALLELE
7 SIZES, RIGHT?

8 A TWO DIFFERENT SIZES.

9 Q THOSE WOULD BE TWO DIFFERENT GENES?

10 A YES, SIR.

11 Q THOSE WOULD NOT BE THE SAME PERSON. RIGHT?

12 A THEY WOULD MATCH EACH OTHER.

13 Q THEY WOULD MATCH EACH OTHER?

14 A YES, SIR.

15 Q RIGHT? AND YOU CAN'T SAY THAT THEY'RE THE SAME PERSON. AND,
16 INDEED, IF THEY ARE NOT, IF IT AIN'T A THOUSAND AND A
17 THOUSAND, ACTUAL AS OPPOSED TO MEASURED, IT IS NOT THE SAME
18 PERSON. CORRECT?

19 A I CAN'T SAY THAT IT'S NOT THE SAME PERSON. IT COULD BE THE
20 SAME PERSON.

21 Q ACTUAL SIZE, SIR. NOT MEASURED SIZE.

22 A I DON'T HAVE ANY WAY TO MEASURE ACTUAL SIZE.

23 Q ARE YOU TELLING ME THAT THE SAME PERSON COULD HAVE A
24 DIFFERENT ACTUAL SIZED GENE IN TWO DIFFERENT SAMPLES? IT
25 WOULD HAVE TO BE THE SAME SIZE. ACTUAL.

1 A IT WOULD HAVE TO BE. BUT WE CANNOT -- BASED ON THE PRECISION
2 WE CAN MEASURE THESE BANDS WITH, THAT'S ALL -- THAT'S THE
3 BEST WE CAN DO.

4 Q YES, SIR. I UNDERSTAND THAT.

5 A YES, SIR.

6 Q YES, SIR. AND YOU SAY IF IT'S WITHIN 2.8 PERCENT THAT IT'S A
7 MATCH. AND THAT'S WHAT YOU'VE SAID HERE FOUR TIMES. AND
8 LET'S SEE. PLUS OR MINUS 2.8 PERCENT, THAT'S A CRITERIA THAT
9 WAS COME UP WITH BY SLED, RIGHT?

10 A EVERY FORENSIC LABORATORY THAT DOES FORENSIC DNA TESTING
11 DEVELOPS THEIR OWN MATCH WINDOW. WE -- IN OUR LABORATORY,
12 PLUS OR MINUS 2.8 PERCENT. EVERY --

13 Q WHAT'S -- GO AHEAD, SIR.

14 A EVERY STATE HAS THEIR OWN MATCH WINDOW FOR FORENSIC DNA
15 R.F.L.P. TESTING.

16 Q RIGHT. AND SOUTH CAROLINA HAS EITHER THE LARGEST OR ONE OF
17 THE LARGEST MATCH WINDOWS?

18 A WE HAVE ONE OF THE LARGEST. THAT'S CORRECT, SIR.

19 Q IN THE COUNTRY?

20 A WELL, THEY'RE ALL RIGHT AROUND TWO AND A HALF, 2.8 PERCENT.
21 AND THEN YOU MOVE POINT --

22 Q RIGHT. AND THE LARGE -- GO AHEAD. I'M SORRY.

23 A NO, SIR. THAT'S FINE. YOU'RE OKAY. KEEP GOING.

24 Q AND THE LARGER YOU MAKE IT, THE MORE PEOPLE GET INCLUDED FROM
25 THIS OVERLAP, OR CAN BE INCLUDED?

1 A THAT WOULD BE CORRECT. TO CROSS ALL SEVEN LOCI. THAT'S
2 CORRECT, SIR.

3 Q WELL, FOUR LOCI HERE. I WANT TO TALK WITH YOU ABOUT YOUR
4 DATABASE. HOW MANY PEOPLE IN YOUR DATABASE?

5 A 250 APPROXIMATELY.

6 Q 250? THIS IS ---

7 A IT VARIES BETWEEN DATABASES. BUT APPROXIMATELY 200, 250 IN
8 ALL OF OUR DATABASES.

9 Q I WAS GOING TO JUST GO AHEAD AND RESTRICT IT NOW BECAUSE
10 WE'RE TALKING ABOUT --- I'M INTERESTED IN RATHER --- THE
11 AFRICAN-AMERICAN DATABASE. OKAY? BECAUSE I UNDERSTAND YOU
12 HAVE DIFFERENT DATABASES FOR DIFFERENT RACIAL GROUPS.
13 CORRECT?

14 A GOT A TOTAL OF 14 DIFFERENT DATABASES.

15 Q RACIAL AND THEN THE ---

16 A BY LOCI AND BY RACE.

17 Q NOW, 250 PEOPLE?

18 A THAT'S CORRECT, SIR.

19 Q OKAY. SO MY UNDERSTANDING IS YOU TOOK SAMPLES FROM 250
20 PEOPLE AND YOU RAN THESE FOUR OR THESE SEVEN TESTS ON THE 250
21 PEOPLE?

22 A CORRECT.

23 Q RIGHT? FOUND OUT HOW OFTEN A SAMPLE OF ONE PARTICULAR SIZE
24 OCCURRED. YOU'VE GOT 26 BINS, RIGHT?

25 A THE BINS VARY, BUT THAT'S 26 BINS. IT DEPENDS ON LOCI. BUT

1 26 IS A GOOD NUMBER.

2 Q 26 IS A GOOD NUMBER?

3 A YES, SIR.

4 Q AND YOU COUNT HOW OFTEN YOU GET A GENE OCCURRING IN ONE OF
5 THOSE BINS?

6 A HOW MANY DIFFERENT BANDS OCCUR WITHIN EACH BIN. THAT'S
7 CORRECT, SIR.

8 Q SORRY. BANDS OCCURRING IN EACH BIN. SO, FROM 250 PEOPLE
9 YOU'VE GOT ENOUGH TESTING -- YOUR TESTIMONY IS THAT YOU CAN
10 EXTRAPOLATE AND MAKE A CONCLUSION AS TO THE POPULATION OF THE
11 UNITED STATES OR THE WORLD?

12 A CORRECT, SIR.

13 Q FROM 250 PEOPLE?

14 A FROM 250 INDIVIDUALS.

15 Q 250 PEOPLE?

16 A 250 PEOPLE, EACH ONE HAVING 200 ALLELES. SO WE'VE GOT 500
17 POINTS IN OUR DATABASE.

18 Q 500 POINTS IN YOUR DATABASE?

19 A THAT'S CORRECT, SIR.

20 Q AND THEY'RE SPREAD OUT. IT WOULD BE EASIER IF IT WERE 25
21 RATHER THAN 26 JUST FOR DIVISION PURPOSES. YOU'VE GOT 500
22 POINTS IN YOUR DATABASE AND YOU'VE GOT IT BROKEN DOWN INTO
23 ROUGHLY 26 DIFFERENT GROUPINGS, BINS IS WHAT YOU CALL THEM?

24 A YEAH, BINS, MAILBOXES; WHATEVER YOU WANT TO CALL THEM.

25 Q AND EACH BIN HAS -- FROM THESE 500 POINTS YOU'RE GOING TO SAY

1 IS -- I'M NOT SAYING THIS HAPPENED. IF 50 OF THESE BANDS
2 THAT YOU MEASURED OCCURRED IN ONE OF THESE AREAS, YOU WOULD
3 SAY THAT TEN PERCENT OF THE POPULATION WOULD BE IN THAT BIN,
4 RIGHT?

5 A THAT'S OUR FREQUENCY TO ESTABLISH. THAT'S CORRECT.

6 Q I'M NOT SAYING THAT'S THE ACTUAL CASE IN ANY PARTICULAR BIN.
7 I'M JUST ROUNDING NUMBERS. ALL RIGHT. SO YOU DO THAT FOR
8 EACH OF THE 26 BINS, RIGHT? YOU DO YOUR MEASUREMENTS AND YOU
9 FIND WHERE THE POINTS YOU CLAIM ARE KENNETH JAMES'S WHAT BIN
10 THEY FALL IN. AND YOU TAKE THESE FREQUENCIES THAT YOU'VE
11 ESTABLISHED IN YOUR DATABASE, AND YOU APPLY A FORMULA TO
12 THEM, RIGHT?

13 A THAT'S HOW FREQUENCIES ARE ESTABLISHED. THAT'S CORRECT, SIR.

14 Q AND IN THIS CASE YOU HAVE COME UP WITH 1 IN 15 MILLION.
15 THAT'S BASED ON MATCHES IN FOUR PROBES, RIGHT?

16 A THAT'S BASED ON FINDING MATCHES IN FOUR PROBES. THAT'S
17 CORRECT.

18 Q OKAY. AND THEN YOU RUN -- HERE WE GO. OKAY. AND THE FOUR
19 PROBES YOU USED -- AND WE'RE JUST ABOUT DONE. THE FOUR
20 PROBES USED, AFTER YOU GOT DONE WITH THE THREE THAT WERE
21 INCONCLUSIVE WITH D2S44, D4S139, D17S79 -- OOPS. STRIKE
22 THAT. D5S110, D7S467. CORRECT?

23 A CORRECT.

24 Q OKAY. YOU'VE GOT TWO BANDS FOR WHO YOU CLAIM TO BE KENNETH
25 JAMES. OKAY. AND THE FREQUENCY OF OCCURRENCE FOR ONE OF

1 THESE BANDS IN THIS D2 IS .086 PERCENT OF THE POPULATION. IS
2 THAT CORRECT?

3 A BASED ON THE DATABASE I HAVE, THAT'S CORRECT, SIR.

4 Q OKAY. THIS D17S79 IS KIND OF AN INTERESTING AREA BECAUSE IT
5 IS A SINGLE BAND, RIGHT?

6 A SINGLE. IT WOULD BE CLASSIFIED AS A SINGLE BANDING PATTERN.
7 THAT'S CORRECT.

8 Q AND THAT OCCURS IN .227?

9 A CORRECT.

10 Q THAT BAND, THAT PATTERN AT THAT SITE OCCURS IN OVER 22
11 PERCENT OF THE POPULATION?

12 A THAT'S A VERY COMMON PATTERN THERE.

13 Q OKAY.

14 A CORRECT.

15 Q AND THEN THE D5 IS .062 AND .026, CORRECT?

16 A CORRECT.

17 Q I'M WRITING DOWN TWO NUMBERS BECAUSE THESE PLACES HAVE TWO
18 BANDS, RIGHT?

19 A ABSOLUTELY.

20 Q EACH ONE OF WHICH YOU GENERATE A FREQUENCY FROM THIS DATABASE
21 THAT YOU HAVE OF 250 PEOPLE, RIGHT, SIR.

22 A YES, SIR. YES, SIR.

23 Q AND D7 IS .034 AND .054. IS THAT CORRECT?

24 A THOSE ARE THE CORRECT NUMBERS.

25 Q OKAY. NOW, TO COME UP WITH THIS 1 IN 15 MILLION, THE FIRST

1 THING YOU DO IS WHEN YOU HAVE A TWO-BANDED GENERATED PATTERN,
2 OKAY, WHAT DO YOU DO? MULTIPLY THEM TOGETHER?

3 A IT'S 2 P Q, 2 TIMES .086 TIMES .07.

4 Q OKAY. SO YOU MULTIPLY THOSE TOGETHER?

5 A RIGHT.

6 Q WHEN YOU HAVE A SINGLE BAND, THE FORMULA IS ...?

7 A IT'S 2 P OR 2 TIMES .227.

8 Q OKAY. SO YOU MULTIPLY THESE TOGETHER, YOU MULTIPLY THESE
9 TOGETHER, YOU MULTIPLY THESE TOGETHER, RIGHT?

10 A AND DOUBLE THEM.

11 Q AND DOUBLE THEM IN THESE CIRCUMSTANCES. THEN YOU TAKE THE
12 PRODUCT OF ALL THAT AND YOU MULTIPLY THIS TIMES THIS TIMES
13 THIS TIMES THIS, RIGHT?

14 A THAT'S REFERRED TO AS THE PRODUCT RULE. THAT'S CORRECT, SIR.

15 Q AND YOU END UP WITH 1 IN 15 MILLION?

16 A THAT'S HOW WE GET THE NUMBERS. THAT'S CORRECT, SIR.

17 Q WELL, LET ME ASK YOU ABOUT ONE OTHER SET OF NUMBERS. BECAUSE
18 IF D5S110, IF THERE ARE NOT FOUR BANDS IN D5S110 AND THERE
19 ARE NOT FOUR BANDS IN D2S44, OKAY, THEN WHAT YOU'RE GOING TO
20 DO IS MULTIPLY THIS TIMES THIS AND DOUBLE IT, RIGHT?

21 A CORRECT, SIR.

22 Q DOUBLE THAT?

23 A CORRECT, SIR.

24 Q AND MULTIPLY THESE TOGETHER?

25 A CORRECT, SIR.

1 Q SO WHEN YOU DOUBLE THIS 44, 45.4, YOU GET 45.4 PERCENT OF THE
2 POPULATION OR 45.4, RIGHT?

3 A THAT'S CORRECT.

4 Q THAT'S DOUBLED, RIGHT?

5 A YEAH.

6 Q OKAY.

7 A THAT'S RIGHT.

8 Q OKAY. SO WE'RE GOING TO TAKE 45.4 AND THEN YOU'RE GOING TO
9 MULTIPLY THESE TWO TOGETHER. AND I DON'T HAVE A CALCULATOR.
10 I'M GOING TO DO IT THE EASY WAY. DID YOU FOLLOW MY MATH
11 RIGHT THERE?

12 A I WASN'T FOLLOWING IT. THAT LOOKS ACCURATE. YES, SIR.

13 Q OKAY. 44, 45.4 TIMES 003672. WE'LL ROUND THIS OFF AND MAKE
14 IT A LITTLE EASIER. LET'S GO .45 BY .0036. GET .37. WE'LL
15 ROUND UP. ALL RIGHT. MULTIPLYING .45 BY .0037, ALL RIGHT,
16 YOU GET 001665. HOW DO YOU CONVERT THAT INTO —

17 A PERCENT?

18 Q — 1 IN THE NUMBER OF A MILLION? YEAH.

19 A ACTUALLY, THAT'S LESS THAN 1. THAT'S .16 PERCENT IS WHAT
20 THAT BOILS DOWN TO. AND YOU WOULD TAKE THE INVERSE OF THAT,
21 DIVIDE IT BY 1. 1 INTO THAT.

22 Q OKAY.

23 A I THINK THAT'S RIGHT. I DON'T KNOW THE NUMBER. YOU'D HAVE
24 TO GIVE ME THE NUMBER.

25 Q OKAY. 1.16 PERCENT IS?

1 A .16. LESS THAN ONE PERCENT.

2 Q OKAY. LESS THAN ONE PERCENT?

3 A THAT'S ONE-TENTH BY TWO-TENTHS OF A PERCENT, WHICH WOULD BE
4 ONE IN -- I DON'T KNOW THE NUMBER OFF THE TOP OF MY HEAD.

5 Q 1 IN 660?

6 A THAT COULD BE. MATH IS NOT MY STRONG POINT WITHOUT A
7 CALCULATOR.

8 THE COURT: I WILL JUDICIALLY NOTE THAT THAT IS CORRECT.

9 A OKAY.

10 Q 1 IN 660. SO THE ONLY POINT BEING, SIR, THAT IF INDEED, YOU
11 KNOW, THE BANDS THAT YOU CLAIM YOU SEE IN THESE TWO PROBES,
12 OKAY, OF THE FOUR, INDEED ARE NOT; THEN THE LIKELIHOOD GOES
13 FROM 1 CHANCE IN 15 MILLION TO 1 CHANCE IN 660?

14 A EACH TIME YOU ELIMINATE A PROBE, YOU REDUCE THE STATISTICS.
15 THAT'S CORRECT, SIR.

16 Q RIGHT. 1 CHANCE IN 660. THANK YOU, SIR.

17 THE COURT: ALL RIGHT. REDIRECT. EXCUSE ME. MR.
18 SHUPPER, DO YOU HAVE ANYTHING?

19 MR. SHUPPER: ROBERT JAMES HAS NO QUESTIONS OF THIS
20 WITNESS, YOUR HONOR.

21 THE COURT: MR. GASSER, REDIRECT?

22 MR. GASSER: BRIEFLY, YOUR HONOR.

23 REDIRECT EXAMINATION BY MR. GASSER:

24 Q 1 IN 660 ELIMINATES WHAT PERCENTAGE OF THE POPULATION?

25 A WELL OVER 99 PERCENT OF THE POPULATION.

1 Q OVER 99 PERCENT OF THE POPULATION?

2 A WELL OVER 99 PERCENT OF THE POPULATION IS ELIMINATED EVEN ON
3 THAT NUMBER.

4 Q MR. STRICKLER ASKED YOU ABOUT THE STATE LAW ENFORCEMENT
5 DIVISION'S MATCH WINDOW BEING 2.8 PERCENT. IS THAT CORRECT?

6 A THAT'S CORRECT.

7 Q AND HOW ARE THESE PROBES -- MATCHING PROBES LIKE THAT, THAT
8 YOU WERE ABLE TO GET A MATCH THAT KENNETH JAMES WAS THE
9 DEPOSITOR OF THE SEMEN FOUND IN 'S VAGINAL VAULT,
10 THE HIGHEST ONE WAS WHAT?

11 A LET ME GET MY NOTES. HOLD ONE SECOND, SIR. I KNOW WHAT
12 YOU'RE LOOKING FOR. EVERYTHING HERE IS ALL SPREAD OUT.

13 THE COURT: WHILE MR. JEFFCOAT IS LOOKING FOR THAT
14 DOCUMENT, I TELL YOU, WHEN I JUDICIALLY NOTE SOMETHING,
15 FOLKS, I AM ALLOWED TO NOTE CALCULATIONS. AND I HAVE A
16 CALCULATOR UP HERE. I CAN JUDICIALLY NOTE SUCH THINGS IF
17 THEY ARE CAPABLE OF FINITE MEASUREMENT. THAT IS ALL I WAS
18 SAYING WHEN I SAY SAID I WOULD JUDICIALLY NOTE THAT THE
19 CALCULATION IS CORRECT. THANK YOU. PLEASE CONTINUE.

20 A OKAY. WHAT HE WAS REFERRING TO THERE IS WE DID THE
21 CALCULATIONS ON THE FOUR LOCI THAT WE SAY MATCHED MR. KENNETH
22 JAMES. AND OUR WINDOW IS PLUS OR MINUS 2.8 PERCENT, WHICH IS
23 A WINDOW ESTABLISHED IN OUR LABORATORY FOR OUR LABORATORY.
24 IT'S A COMMON THING THAT'S DONE THROUGHOUT ALL OVER THE
25 UNITED STATES. EVERY LAB THAT DOES R.F.L.P. TESTING HAS

1 THEIR OWN MATCH WINDOW. OURS IS PLUS OR MINUS 2.8 PERCENT.

2 BUT I DID THE COMPARISONS ON ALL THE SAMPLES THAT WE SAY
3 MATCHES. AND FOR THE D2, THE CHROMOSOME NUMBER 2, THE
4 SAMPLES MATCHED MR. JAMES. THE DIFFERENCE WAS .4 PERCENT.
5 AND THE OTHER, 1 ALLELE AND .26 PERCENT FOR THE OTHER ALLELE,
6 WELL WITHIN OUR 2.8 PERCENT MATCH WINDOW.

7 FOR THE D17, MR. KENNETH JAMES MATCHED RIGHT AT 1
8 PERCENT, WAS THE DIFFERENCE IN THE TWO BANDS.

9 FOR THE D5 FOR MR. KENNETH JAMES, THE FIRST ALLELE
10 MATCHED — THE TWO ALLELES MATCHED WITHIN .1 PERCENT OF EACH
11 OTHER AND THE SECOND ALLELE WITHIN .69 PERCENT OF EACH OTHER,
12 WHICH IS WELL WITHIN 2.8 PERCENT.

13 FOR THE D7S467, THE LAST LOCI THAT WE TESTED, MR.
14 KENNETH JAMES'S TWO BANDS MATCHED THE STAINS FROM THE VAGINAL
15 SWAB OF MRS. (). THE MATCHES THERE WERE ONE BAND
16 MATCHED WITHIN .85 PERCENT OF THE OTHER BAND, AND THE SECOND
17 BAND MATCHED WITHIN 1.2 PERCENT OF THE STANDARD BAND.

18 Q SO BASED ON WHAT YOUR TESTIMONY JUST WAS IN FRONT OF THIS
19 JURY, YOU INDICATED THAT SLED HAS A MATCH WINDOW, MATCH
20 WINDOW OF PLUS OR MINUS 2 PERCENT. IS THAT CORRECT?

21 A 2.8 PERCENT. THAT'S CORRECT.

22 Q 2.8 PERCENT. IS THAT CORRECT?

23 A THAT'S CORRECT.

24 Q AND BASED ON THE FIGURES I BELIEVE, IF I HEARD YOU RIGHT, ALL
25 OF THE MATCHES WITH KENNETH JAMES WERE LESS THAN 1.6 PERCENT,

1 WITHIN THAT MATCH WINDOW, CORRECT?

2 A THAT WAS THE HIGHEST DIFFERENCE THAT WE HAD. THAT'S CORRECT,
3 SIR.

4 Q AND NOW, YOU -- SO THE MATCHES, THE FOUR-PROBE MATCH OF
5 KENNETH JAMES, IS THAT -- ACCORDING TO YOUR READING OF THE
6 LITERATURE OF SCIENTIFIC LABS IN THE UNITED STATES, IS THAT
7 WITHIN VIRTUALLY EVERY SINGLE MATCH WINDOW OF EVERY
8 LABORATORY, CRIMINAL LAB, SCIENTIFIC LABORATORY, MAJOR
9 UNIVERSITY LABORATORY, IS THAT WITHIN EVERY MATCH WINDOW THAT
10 YOU KNOW OF?

11 A THAT'S CORRECT, SIR. THE ONLY WINDOW I KNOW THAT THAT -- 1.8
12 PERCENT IS THE FBI'S WINDOW. THAT'S WELL WITHIN THEIR WINDOW
13 AS WELL.

14 Q SO DO YOU KNOW OF A MATCH WINDOW OF ANY MAJOR RESEARCH
15 UNIVERSITY, UNITED STATES ARMED FORCES, PATHOLOGY DEPARTMENT,
16 ANY MEDICAL EXAMINER'S OFFICE IN THE ENTIRE UNITED STATES OR
17 IN ANY OTHER COUNTRY THAT THAT IS NOT WITHIN ITS MATCH
18 WINDOW?

19 A I KNOW OF NO LABORATORY, ANYONE THAT HAS A MATCH WINDOW THAT
20 WOULD NOT HAVE CALLED THESE SAMPLES MATCHES.

21 Q AND THE FACT THAT -- WHEN YOU DO THE SEVEN PROBES, ARE YOU
22 LOOKING FOR A MATCH ON EACH PROBE FOR PURPOSES OF -- FOR TWO
23 PURPOSES; MEANING A MATCH FOR YOUR PARTICULAR EXPERTISE AS A
24 DNA EXPERT AND THEN A MATCH FOR PURPOSES OF YOUR STATISTICAL
25 FREQUENCY?

1 A THAT'S CORRECT. WE HAVE TO HAVE A MATCH FOR THE -- THE TWO
2 SAMPLES MATCH EACH OTHER. AND THEN WE HAVE TO HAVE A MATCH
3 TO BE ABLE TO GENERATE A STATISTIC.

4 Q OKAY. SO OF THE SEVEN PROBES THAT YOU DID WITH KENNETH
5 JAMES, FIRST OF ALL, FOR YOUR INITIAL PURPOSES OF WHETHER OR
6 NOT IT WAS A -- THAT HIS DNA WAS A MATCH FOR YOUR -- FOR JUST
7 SPECIFICALLY SEROLOGICAL DNA PURPOSES, HOW MANY OF THOSE
8 SEVEN PROBES WERE A MATCH? TAKING OUT USING IT FOR YOUR
9 PROTOCOL FOR THE STATISTICAL PURPOSE.

10 A RIGHT. WITHOUT REGARD TO FREQUENCY, ALL SEVEN PROBES THAT WE
11 TESTED HAD A PROFILE THAT MATCHED MR. KENNETH JAMES.

12 Q SO SEVEN OF SEVEN?

13 A CORRECT, SIR.

14 Q NOW, DO YOU USE INTERNAL PROTOCOLS, INTERNAL QUALITY --
15 MR. STRICKLER: I OBJECT TO THAT.

16 THE COURT: EXCUSE ME.

17 MR. STRICKLER: I OBJECT TO DETERMINING SEVEN MATCHES
18 WITH HIM. HIS OWN RULES SAY THEY CAN'T SAY THAT.

19 THE COURT: WELL, FORGIVE ME, MR. STRICKLER. I DON'T
20 KNOW AND I CANNOT SAY WHAT THE TESTIMONY IS OR WHAT HIS
21 PROTOCOL SAYS. YOU HAVE A DIFFERENCE AS TO WHAT HAS BEEN
22 SAID AND WHAT HAS BEEN TESTIFIED TO.

23 MR. STRICKLER: THANK YOU, SIR.

24 THE COURT: AND IT WILL BE UP TO YOU TO ARGUE THAT TO
25 THE JURY. THANK YOU.

1 MR. STRICKLER: THANK YOU.

2 Q NOW, IN ORDER TO -- WHEN YOU GO DOWN TO BREAK IT DOWN, ONCE
3 YOU'VE DONE YOUR PROBES, WHEN YOU BREAK IT DOWN FOR YOUR
4 STATISTICAL TESTIMONY, YOUR STATISTICAL ANALYSIS FOR THIS
5 JURY, DO YOU HAVE INTERNAL QUALITY CONTROLS THAT YOU USE AS
6 TO WHETHER OR NOT TO CALL A PROBE A MATCH FOR THAT PURPOSE?

7 A YOU HAVE TO ASK THAT AGAIN. I'M NOT QUITE SURE I UNDERSTAND
8 YOUR QUESTION.

9 Q YOU'VE INDICATED THAT IT'S A SEVEN-PROBE MATCH. IS THAT
10 CORRECT?

11 A ON ALL SEVEN PROBES, WE DEVELOPED A PRINT FROM ALL SEVEN
12 PROBES FROM THE EVIDENCE STANDARD, THE VAGINAL SWABS OF MRS.
13 VICTIM.... THE DNA PRINT DEVELOPED ON ALL SEVEN PROBES
14 MATCHED THE DNA PRINT OF MR. KENNETH JAMES.

15 Q NOW, ONCE YOU'VE MADE THAT DETERMINATION, MR. STRICKLER HAD
16 THIS BOOK UP HERE HE WAS REFERRING TO AND WAS TALKING ABOUT
17 INCONCLUSIVE. DO YOU REMEMBER THAT LINE OF QUESTIONING?

18 A (WITNESS NODS HEAD AFFIRMATIVELY)

19 Q DO YOU HAVE AN INTERNAL PROTOCOL THAT YOU USE WHEN YOU GO TO
20 PUT IT INTO STATISTICS, INTO THE STATISTICAL ANALYSIS, THE 1
21 IN 15 MILLION AFRICAN-AMERICANS, THE 1 IN 90 MILLION
22 CAUCASIANS; DO YOU HAVE A DIFFERENT QUALITY CONTROL BEFORE
23 YOU CAN USE IT FOR THAT ANALYSIS?

24 A THAT'S CORRECT, SIR. THOSE THREE THAT WE CALLED INCONCLUSIVE
25 BASED ON OUR PROTOCOL WERE NOT USABLE FOR THE PURPOSE OF

1 GENERATING A FREQUENCY. I COULD NOT USE THOSE THREE LOCI TO
2 HELP GENERATE THE FREQUENCY.

3 Q AND WHO MAKES THAT DETERMINATION?

4 A THE LABORATORY DOES. WE HAVE WRITTEN PROTOCOL THAT
5 ESTABLISHES THAT AND THE ANALYSTS.

6 Q AND WHY DO YOU HAVE IT? WHY DO YOU HAVE A DIFFERENT PROTOCOL
7 FOR YOUR STATISTICAL -- USING THE PROBE AS A POSITIVE -- AS A
8 MATCH FOR YOUR STATISTICAL ANALYSIS AS OPPOSED TO YOUR OTHER
9 ANALYSIS?

10 A BECAUSE WE CAN'T -- WELL, WE CAN'T DO THE FREQUENCY BECAUSE
11 WE WEREN'T ABLE TO MEASURE -- SOME OF THESE BANDS WERE IN A
12 PART OF THE GEL WE COULDN'T MEASURE ACCURATELY. SO WE DIDN'T
13 USE IT FOR FREQUENCY DETERMINATIONS.

14 Q NOW, COULD YOU GET A MATCH WITH JUST ONE PROBE OR A ONE-PROBE
15 MATCH?

16 A YES, SIR. YOU CAN HAVE A ONE-PROBE MATCH.

17 Q AND THE MORE PROBES THAT YOU MATCH TO KENNETH JAMES, WHAT
18 DOES THAT DO?

19 A THAT INCREASES THE LIKELIHOOD THAT IT IS INDEED HIS -- HE IS
20 THE DONOR.

21 Q AND IN THIS CASE, FOR THE PURPOSES OF YOUR STATISTICAL
22 FREQUENCY THAT YOU GENERATED FOR THE JURY, IT WAS A HOW MANY
23 PROBE MATCH?

24 A FOUR.

25 Q NOW, THE FACT THAT YOU COULDN'T USE THOSE THREE OTHER DNA

1 PRINT MATCHES YOU DETERMINED TO BE INCONCLUSIVE, CORRECT?

2 A FOR THE PURPOSE OF FREQUENCY ESTABLISHMENT. THAT'S CORRECT.

3 Q FOR THE PURPOSE OF FREQUENCY ESTABLISHMENT. WHAT DO YOU MEAN
4 BY THAT?

5 A GENERATING A STATISTIC AS TO WHAT THE PROBABILITY WOULD BE
6 THAT SOMEONE WOULD HAVE THE SAME PATTERN.

7 Q SO THE FACT THAT THEY WERE INCONCLUSIVE FOR YOU TO USE THOSE
8 IN GENERATING YOUR STATISTICAL TESTIMONY, DOES THAT EXCLUDE
9 KENNETH JAMES AS THE DONOR OF THAT SEMEN?

10 A ABSOLUTELY NOT.

11 Q MR. STRICKLER -- I BELIEVE I GOT THE RIGHT DOCUMENTS HERE OFF
12 THE FLOOR. NOW, YOU REMEMBER WHEN HE WAS ASKING YOU
13 QUESTIONS ABOUT THE ALLELE? I THINK THAT'S THE TERM,
14 ALLELES. DO YOU RECALL THAT?

15 A THAT'S CORRECT, SIR.

16 Q AND IS SLED -- DOES EVERY LABORATORY, BOTH CRIMINAL
17 LABORATORIES SUCH AS THE STATE LAW ENFORCEMENT DIVISION OR
18 ANY OTHER LAW ENFORCEMENT LABORATORY, THE UNITED STATES ARMED
19 FORCES, MAJOR MEDICAL UNIVERSITIES, MEDICAL EXAMINERS, DOES
20 EVERY LABORATORY HAVE TO HAVE A MATCH WINDOW?

21 A ANY LAB THAT'S GOING TO TRY TO DETERMINE MATCHES WOULD HAVE
22 TO HAVE A MATCH WINDOW.

23 Q BECAUSE IS THERE AN INSTRUMENT, IS THERE AN INSTRUMENT RIGHT
24 NOW, TODAY, SCIENCE IN 1999, IS THERE AN INSTRUMENT OR A
25 COMPUTER THAT WOULD ALLEVIATE THE NEED TO HAVE A MATCH

1 WINDOW?

2 A NOT USING THIS TYPE TECHNOLOGY, NO.

3 Q SO SLED IS NOT THE ONLY LABORATORY THAT HAS TO HAVE A MATCH
4 WINDOW. IS THAT CORRECT?

5 A NO. ANY FORENSIC DNA LAB THAT ATTEMPTS TO IDENTIFY MATCHES
6 HAS TO HAVE A MATCH WINDOW IN USING R.F.L.P. TECHNOLOGY.

7 Q AND IF IT WASN'T FOR THE FACT THAT YOU NEEDED A MATCH WINDOW,
8 SINCE THERE'S NO INSTRUMENT USING THIS PROCEDURE, COULD ANY
9 LABORATORY, UNDER MR. STRICKLER'S THEORY, ANY LABORATORY, LAW
10 ENFORCEMENT, U.S. ARMED FORCES, MAJOR MEDICAL UNIVERSITY,
11 EVER USE THIS PROCEDURE AND SAY THAT THERE WAS A DNA MATCH IF
12 YOU HAD TO BE COMPLETELY EXACT?

13 A RIGHT. NOT USING R.F.L.P. TECHNOLOGY. THERE'S NO WAY YOU
14 CAN ACCURATELY MEASURE THOSE BANDS TO GET A PRECISE NUMBER OF
15 THE BASE PAIRS.

16 Q AND IS THIS PROCEDURE USED AGAIN WITHIN THE SPECIFIC ---

17 MR. STRICKLER: ASKED AND ANSWERED BOTH ON DIRECT AND ON
18 CROSS AS TO WHO'S USING THIS PROCEDURE.

19 THE COURT: WELL, MR. GASSER IS ABOUT TO WRAP IT UP.
20 YES, SIR.

21 MR. GASSER: YES, SIR, I AM.

22 Q (BY MR. GASSER) SO WHAT I'M SAYING IS, HAS THIS PROCEDURE
23 BEEN USED TO IDENTIFY --- MR. STRICKLER IS THE ONE THAT WENT
24 THROUGH AND TALKED ABOUT THESE NUMBERS. THAT'S WHY I PUT
25 THIS UP HERE. DO YOU REMEMBER HIM GOING THROUGH AND TALKING

1 ABOUT —

2 THE COURT: MR. GASSER, ASK HIM A QUESTION, PLEASE, SIR.

3 Q DO YOU REMEMBER WHEN MR. STRICKLER WAS ASKING YOU ABOUT 2694,
4 2747, 1596, 1606? DO YOU REMEMBER HIM DOING THAT?

5 A I DO, SIR.

6 Q AND THAT DO YOU RECALL 1,000 DOESN'T EQUAL 1,000? DO YOU
7 RECALL THAT?

8 A CORRECT, SIR.

9 Q NOW, UNDER THAT THEORY, THAT 1,000 HAD TO EQUAL 1,000, COULD
10 THIS PROCEDURE BE USED BY ANY CRIMINAL LABORATORY IN THE
11 UNITED STATES?

12 A NO, SIR, IT COULD NOT.

13 Q BY THE UNITED STATES ARMED FORCES?

14 A NOT USING THIS TECHNOLOGY. THAT'S CORRECT, SIR.

15 Q AND, LASTLY, DO YOU RECALL WHEN YOU WERE BEING QUESTIONED
16 ABOUT I BELIEVE MULTIPLE FLUIDS AND HAVING TO SEPARATE OUT
17 THE MULTIPLE FLUIDS? DO YOU RECALL THAT LINE OF QUESTIONING?

18 A I DO, SIR.

19 Q ONCE YOU SEPARATE OUT THE FLUIDS, THE FACT THAT I BELIEVE YOU
20 INDICATED ON CROSS EXAMINATION THAT YOU WERE ABLE TO
21 DETERMINE THAT THERE WAS JUST ONE DONOR OF THE SPERM. IS
22 THAT CORRECT?

23 A THAT'S CORRECT.

24 MR. GASSER: THAT'S ALL I HAVE, YOUR HONOR.

25 THE COURT: OKAY. THANK YOU. THANK YOU, MR. JEFFCOAT.

1 YOU CAN STEP DOWN, SIR.

2 FOLKS, I'M GOING TO ASK YOU TO GO BACK TO YOUR JURY ROOM
3 FOR A BIT. LET ME EXPLAIN THIS TO YOU. IT MAY WELL BE THAT
4 WE'RE GOING TO BE HERE JUST A TOUCH LATE THIS EVENING BECAUSE
5 THERE IS ANOTHER WITNESS WHO WILL NOT BE AS LENGTHY AS THIS
6 WITNESS'S PRESENTATION BUT WILL BE OF SOME LENGTH. I'M NOT
7 GOING TO KEEP YOU HERE UNTIL 7:00 OR ANYTHING LIKE THAT. BUT
8 MAYBE YOU MIGHT NEED TO MAKE SOME ARRANGEMENTS. OKAY? AND
9 THANK YOU. AND PLEASE GO BACK TO THE JURY ROOM. DON'T
10 DISCUSS THE CASE AMONG YOURSELVES.

11 (JURY OUT AT 4:30 P.M.)

12 THE COURT: BOTH OF YOU TOO CHICKEN TO —

13 (COURT CUTS ON LIGHT BOX)

14 MR. STRICKLER: IT DOESN'T WORK VERY WELL, YOUR HONOR,
15 ACTUALLY.

16 THE COURT: OH, IT DOESN'T?

17 MR. STRICKLER: NO. NOT FOR THESE PURPOSES. BEEN
18 THERE, DONE THAT.

19 THE COURT: OKAY. ALL RIGHT. I JUST WONDERED. I'LL
20 PUT IT BACK. OKAY. WE'VE GOT THE DOG HANDLER NOW, DON'T WE?
21 IS THAT RIGHT? OR IS THERE SOMETHING ELSE? THE DOG HANDLER
22 NOW?

23 MR. GASSER: YES, SIR.

24 THE COURT: OKAY. AND ABOUT HOW LONG IS THAT GOING TO
25 TAKE? ABOUT AS LONG AS IT TOOK PRE-TRIAL?

1 MR. GASSER: I DON'T BELIEVE SO. NOW THAT WE'VE DONE IT
2 ONE TIME, IT SHOULD BE QUICKER THE SECOND TIME.

3 THE COURT: YEAH.

4 MR. STRICKLER: I CAN SAY FOR US THAT OUR CROSS ON HIM
5 WILL BE, AS TO MR. KENNETH JAMES, WILL BE FOCUSED AND VERY
6 NARROW. AND WE DISCUSSED THAT.

7 THE COURT: OKAY. WE'LL TAKE A FEW MINUTES.

8 (WHEREUPON, A BREAK IS TAKEN)

9 THE COURT: WE NEED TO WAIT FOR MR. STRICKLER. MR.
10 GASSER, DO YOU WISH TO WAIT FOR MS. FRYAR?

11 MR. GASSER: THAT'S OKAY.

12 THE COURT: OKAY.

13 MR. STRICKLER: SORRY, SIR.

14 THE COURT: YES, SIR. BRING THEM IN.

15 (JURY IN AT 4:45 P.M.)

16 THE COURT: OKAY, FOLKS. OKAY, MR. GASSER. I'M SORRY.
17 I THOUGHT EVERYONE WAS IN.

18 THE BAILIFF: THE JURY IS ALL PRESENT, YOUR HONOR.

19 THE COURT: THANKS, MR. BARROW AND MR. HOLLIS. THANK
20 YOU, FOLKS. MR. GASSER, YOUR NEXT WITNESS, SIR.

21 MR. GASSER: THANK YOU, SIR. AT THIS TIME THE STATE
22 WOULD CALL SERGEANT RANDY BLACKWELL.

23 THE COURT: SERGEANT BLACKWELL, PLEASE COME FORWARD TO
24 MR. BARROW.

25 ERNEST R. BLACKWELL, BEING FIRST

1 DULY SWORN, TESTIFIES AS FOLLOWS:

2 THE CLERK: PLEASE HAVE A SEAT. STATE YOUR FULL NAME
3 FOR THE RECORD.

4 MR. BLACKWELL: MY FULL NAME IS ERNEST RANDALL
5 BLACKWELL.

6 DIRECT EXAMINATION BY MR. GASSER:

7 Q SERGEANT BLACKWELL, YOU ARE OBVIOUSLY EMPLOYED BY THE
8 COLUMBIA POLICE DEPARTMENT?

9 A YES, SIR, I AM.

10 Q HOW LONG HAVE YOU BEEN WITH THE POLICE DEPARTMENT?

11 A I HAVE BEEN EMPLOYED DURING THIS TERM FOR TEN YEARS, JUST
12 OVER TEN YEARS.

13 Q IS THIS YOUR SECOND EMPLOYMENT AT THE POLICE DEPARTMENT?

14 A YES, SIR, IT IS.

15 Q AND YOUR FIRST PERIOD OF TIME WAS FOR HOW MANY YEARS?

16 A IT WAS FOR RIGHT AT THREE YEARS. THEN I RECEIVED A
17 DEBILITATING INJURY WHICH KEPT ME OUT OF POLICE WORK FOR
18 ABOUT THREE YEARS UNTIL I WAS REHABILITATED AND WAS ABLE TO
19 GO BACK, COME BACK TO THE CITY.

20 Q WHAT ARE YOUR CURRENT DUTIES AND RESPONSIBILITIES WITH THE
21 POLICE DEPARTMENT?

22 A I'M A SERGEANT. I AM IN CHARGE OF A DISTRICT, A DAY SHIFT
23 OPERATION, AND MY PRIMARY DUTIES AS BEING THE ADMINISTRATOR
24 AND SUPERVISOR AND TRAINER FOR THE COLUMBIA POLICE
25 DEPARTMENT'S CANINE UNIT.

1 Q WHEN DID YOU BEGIN YOUR TRAINING IN THE AREA OF CANINE
2 TRACKING? OR SOME PEOPLE REFER IT TO AS DOG HANDLING OR DOG
3 TRACKING. WHERE AND WHEN DID YOU BEGIN YOUR TRAINING IN THAT
4 AREA, SERGEANT BLACKWELL?

5 A IN 1981, WHILE SERVING AS A MILITARY POLICE OFFICER IN THE
6 UNITED STATES ARMY RESERVES ON ACTIVE DUTY, I RECEIVED 480
7 HOURS OF TRAINING DURING THE MILITARY WORKING A DOG HANDLER
8 COURSE AT LACKLAND AIR FORCE BASE.

9 Q AND WHAT EXPERIENCE DID YOU HAVE THEN AFTER RECEIVING THAT
10 TRAINING IN THE ARMY?

11 A I SERVED FOR THE FOLLOWING FOUR YEARS AS A CANINE HANDLER
12 WITH THE UNITED STATES ARMY RESERVES.

13 Q AND FROM 1981 TO 1989, WHAT TYPE OF TRAINING OR WHAT
14 INVOLVEMENT DID YOU HAVE IN THE AREA OF CANINE TRAFFICKING OR
15 DOG HANDLING?

16 A AFTER GETTING OUT OF THE MILITARY I CONTINUED WORKING WITH
17 DOGS IN THE ASPECT OF TRAINING, DOING BOTH OBEDIENCE TRAINING
18 AND TRACKING TRAINING FOR PRIVATE INDIVIDUALS WHO WISHED TO
19 COMPETE. THE AMERICAN KENNEL CLUB HAS A COMPETITION STYLE
20 TRACKING WHERE THEY TAKE OUT DOGS OF ANY BREED. THEY TAKE
21 THEM OUT INTO A FIELD AND THEY -- A TRACK LAYER, A JUDGE HAS
22 GONE OUT AND LAID OUT A TRACK. AND THEY COME OUT AND COMPETE
23 FOR CERTIFICATION. AND I TRAINED INDIVIDUALS TO TRACK WITH
24 THEIR DOGS AND HELP THEM CERTIFY, GET THEIR DOGS CERTIFIED IN
25 TRACKING.

1 Q NOW, IN 1989, DID YOU RE-JOIN THE COLUMBIA POLICE DEPARTMENT
2 AT THAT TIME?

3 A YES, SIR. IN JULY OF 1989 I WAS RE-EMPLOYED AT THE CITY OF
4 COLUMBIA.

5 Q AND WHAT SPECIALIZED UNIT WAS ESTABLISHED IN THAT YEAR?

6 A WE STARTED THE CANINE -- I ESTABLISHED THE CANINE UNIT FOR
7 THE COLUMBIA POLICE DEPARTMENT IN 1989.

8 Q SO YOU ACTUALLY WERE THE FOUNDING DIRECTOR, I GUESS IS THE
9 PROPER TERMINOLOGY?

10 A I WAS THE GUINEA PIG. YES, SIR.

11 Q OKAY. AND TO THIS DATE, OVER THE LAST TEN YEARS, YOUR UNIT
12 HAS HOW MANY HANDLERS?

13 A TO THIS DATE WE HAVE -- WE CURRENTLY HAVE, INCLUDING MYSELF,
14 EIGHT HANDLERS. RIGHT NOW I HAVE ELEVEN DOGS AND EIGHT
15 HANDLERS.

16 Q NOW, WHAT TRAINING DID YOU RECEIVE IN THE AREA FROM A LAW
17 ENFORCEMENT PERSPECTIVE, NOT NECESSARILY AMERICAN KENNEL
18 CLUB, BUT FROM THE LAW ENFORCEMENT PERSPECTIVE, TELL US,
19 PLEASE, WHAT TRAINING YOU HAVE RECEIVED IN THE AREA OF MAN
20 TRACKING?

21 A IN ADDITION TO THE BASIC INFORMATION THAT YOU'RE TRAINED IN
22 SCOUTING IN THE MILITARY, WHICH COVERS BASIC TRACKING
23 TECHNIQUES, MAN TRACKING TECHNIQUES, IN 1989, I BELIEVE '89
24 OR '90, I ATTENDED A COURSE THAT WAS PUT ON BY THE SOUTH
25 CAROLINA LAW ENFORCEMENT DIVISION AND THE CRIMINAL JUSTICE

1 ACADEMY WHICH WAS 40 HOURS OF TRACKING, BLOODHOUND TRACKING
2 WHICH WAS PRIMARILY MAN TRACKING AND TRACKING OPERATIONS.

3 Q DID YOU HAVE AN OPPORTUNITY THEN AFTER TAKING THAT COURSE
4 WITH THE SOUTH CAROLINA CRIMINAL JUSTICE ACADEMY TO ATTEND AN
5 ADVANCED TRACKING SEMINAR WITH A PARTICULAR ASSOCIATION HERE
6 IN THE UNITED STATES?

7 A YES, SIR. I'VE ATTENDED A 40-HOUR COURSE FROM THE -- THAT
8 WAS PUT ON BY THE UNITED STATES POLICE CANINE ASSOCIATION,
9 WHICH IS A NATIONAL ORGANIZATION THAT PROVIDES TRAINING AND
10 CERTIFICATION FOR LAW ENFORCEMENT CANINES.

11 Q DID YOU HAVE AN OPPORTUNITY TO TAKE A SPECIALIZED COURSE IN
12 THE AREA OF URBAN TRACKING, WITHIN THE CITY LIMITS OF
13 TRACKING PEOPLE USING DOGS?

14 A YES, SIR, I DID. I ATTENDED A 40-HOUR COURSE PUT ON BY THE
15 AMERICAN SOCIETY OF CANINE TRAINERS, WHICH AGAIN ANOTHER ONE
16 OF THE FEW NATIONAL ORGANIZATIONS THAT SPECIFICALLY IS SET UP
17 TO PROVIDE TRAINING AND ASSISTANCE TO CANINE DEPARTEMENTS.

18 Q AND HAVE YOU YOURSELF HAD OPPORTUNITY TO, YOU YOURSELF TO
19 PRESENT, TO TEACH OR TRAIN IN THE AREA OF TRACKING WITHIN THE
20 CITY LIMITS USING DOGS?

21 A YES, SIR. I TAUGHT A -- I GAVE A SEMINAR, AND I WANT TO SAY
22 I BELIEVE IT WAS 1992, TO APPROXIMATELY 30 OFFICERS FROM
23 NORTH CAROLINA, GEORGIA AND SOUTH CAROLINA ON TRACKING
24 TECHNIQUES FOR INNER CITY TYPE TRACKING. WHICH THAT'S
25 PRIMARILY WHAT WE DO. WHICH WAS A -- I BELIEVE THAT WAS A

1 32-HOUR COURSE THAT I TAUGHT AND INSTRUCTED.

2 Q AND ARE YOU A MEMBER -- ARE YOU CERTIFIED IN CERTAIN AREAS?
3 YOU YOURSELF.

4 A I AM. I AM CERTIFIED AS AN INSTRUCTOR AND A MASTER TRAINER
5 BY THE AMERICAN SOCIETY OF CANINE TRAINERS.

6 Q ARE YOU PRESIDENT OF ANY ORGANIZATION HERE IN SOUTH CAROLINA?

7 A I AM. I'M THE PRESIDENT OF THE -- THE ELECTED PRESIDENT OF
8 THE SOUTH CAROLINA POLICE CANINE ASSOCIATION AND HAVE BEEN
9 SINCE 1983. I'M SORRY. '93.

10 Q HAVE YOU BEEN QUALIFIED AS AN EXPERT IN THE AREA OF MAN
11 TRACKING, CANINE TRACKING AND PARTICULARLY IN THE AREA OF MAN
12 TRACKING IN COURTS IN GENERAL SESSIONS IN SOUTH CAROLINA ON
13 PREVIOUS OCCASIONS?

14 A YES, SIR, I HAVE; ON SEVERAL OCCASIONS.

15 Q AND IN FEDERAL COURT?

16 A AND IN THE FEDERAL COURT AS WELL, IN CANINE TRAINING.

17 Q NOW, THE DOG THAT WAS USED IN THIS PARTICULAR CASE, WHAT IS
18 THE DOG'S NAME?

19 A THE DOG'S NAME IS GATOR.

20 Q AND WHAT BREED?

21 A HE'S A FULL-BLOODED GERMAN SHEPHERD.

22 Q AND HOW DID YOU ACQUIRE GATOR?

23 A GATOR WAS -- OUR PROGRAM WAS SET UP ORIGINALLY TO ACQUIRE
24 DOGS THROUGH DONATIONS EITHER PURCHASED BY MEMBERS OF THE
25 COMMUNITY OR DONATED BY MEMBERS OF THE COMMUNITY. WE WOULD

1 GO OUT AND EVALUATE DOGS WHEN PEOPLE WOULD LET US KNOW THEY
2 HAD ONE THAT WAS EITHER TOO MUCH FOR THEM TO HANDLE. GATOR
3 WAS DONATED TO US BY A BREEDER OF SHOW GERMAN SHEPHERDS IN
4 AUGUSTA, GEORGIA, AFTER I HAD GONE UP AND EVALUATED HIM AND
5 FOUND HIM TO BE VERY SUITABLE FOR OUR PROGRAM.

6 Q AND WHEN WAS THAT?

7 A THIS WAS IN -- LET'S SEE. GATOR WAS DONATED TO US IN 19 --
8 OCTOBER OF 1992.

9 Q WHAT TRAINING DID GATOR THEN RECEIVE AT YOUR HANDS, YOUR
10 PERSONAL HANDS? WHAT TRAINING DID GATOR RECEIVE IN THE AREA
11 OF TRACKING MEN?

12 A ALL OF OUR DOGS ARE TRAINED. ONCE WE GET THEM, THEY'RE
13 ACQUIRED, I PERSONALLY TRAIN THEM AND THEIR POTENTIAL
14 HANDLERS FOR 12 TO 14 WEEKS OR UNTIL THEY'RE ABLE TO
15 SUCCESSFULLY COMPLETE THE MINIMUM REQUIREMENTS SET FORTH BY
16 THE COLUMBIA POLICE DEPARTMENT IN CERTAIN AREAS SUCH AS
17 OBEDIENCE, AGILITY, HANDLER PROTECTION, BUILDING SEARCH,
18 ARTICLE SEARCH, AND THEIR PRIMARY JOB, WHICH IS TRACKING.
19 THAT'S THEIR PRIMARY FUNCTION.

20 Q AND --

21 A GATOR RECEIVED THIS TRAINING.

22 Q I'M SORRY. AND GATOR COMPLETED HIS TRAINING IN THOSE AREAS
23 IN WHAT YEAR?

24 A IN FEBRUARY OF 1993 GATOR WAS CERTIFIED BY THE DEPARTMENT AND
25 COMPLETED THE TRAINING AND SUCCESSFULLY DEMONSTRATED THE

1 SKILLS NECESSARY TO PERFORM THE JOB.

2 Q SINCE FEBRUARY OF 1993, OVER THE LAST SIX-AND-A-HALF YEARS,
3 HAS GATOR UNDERGONE WEEKLY OR MONTHLY TRAINING, IF YOU WILL?

4 A YES, SIR, HE HAS. OUR PROGRAM IS SET UP SO THAT IF A HANDLER
5 -- IT SO HAPPENS THAT GATOR ENDED UP -- WAS SUPPOSED TO GO TO
6 ANOTHER HANDLER. BUT HE ENDED UP BEING TOO HYPER FOR A YOUNG
7 HANDLER, ANY OF MY YOUNG HANDLERS TO HANDLE; A VERY FRIENDLY
8 DOG, BUT TOO HYPER. SO I ENDED UP WITH -- AT THE TIME I FELT
9 LIKE I WAS THE ONLY ONE THAT COULD HANDLE HIM. SO I ENDED UP
10 WITH GATOR. AND ALL OF OUR DOGS ARE -- HAVE TO GO THROUGH
11 RIGOROUS RETRAINING ON A WEEKLY BASIS, A MINIMUM OF EIGHT
12 HOURS PER WEEK, AND MOST OFTEN MORE THAN THAT. ANY TIME A
13 HANDLER, INCLUDING MYSELF, IS NOT INVOLVED IN A CALL OR DOING
14 SOME TYPE OF ADMINISTRATIVE WORK, WE'RE GENERALLY TRAINING.
15 SO, YES, SIR. HE HAS A MINIMUM OF EIGHT HOURS OF TRAINING
16 EVERY WEEK.

17 Q AND WHO IS THE SUPERVISOR OVER THE TRAINING OF GATOR AS WELL
18 AS ALL THE OTHER DOGS AND DOG HANDLERS WITH THE COLUMBIA
19 POLICE DEPARTMENT?

20 A I AM.

21 Q IS GATOR CERTIFIED BY ANY SOCIETY?

22 A YES, SIR. GATOR HAS BEEN CERTIFIED BY THE AMERICAN SOCIETIES
23 OF CANINE TRAINERS IN THE AREAS OF ABILITY -- I'M SORRY --
24 OBEDIENCE, AGILITY, HANDLER PROTECTION AND TRACKING.

25 Q AND HAS GATOR BEEN CERTIFIED AS FAR AS IN GENERAL SESSIONS

1 COURT WHEN A HANDLER SUCH AS YOURSELF HAS BEEN USED AND BEEN
2 QUALIFIED IN GENERAL SESSIONS COURT?

3 A GATOR HAS BEEN QUALIFIED IN THE COURT OF GENERAL SESSIONS ON
4 MORE THAN ONE OCCASION AS BEING AN EXPERT TRACKING DOG.

5 Q AND HAS GATOR RECEIVED -- IN FACT, RECENTLY, WITHIN 1997, HAS
6 GATOR RECEIVED A SPECIAL AWARD BY A SOCIETY AS A RESULT OF
7 HIS ACCOMPLISHMENTS IN THE AREA OF TRACKING AND OTHER AREAS
8 OF LAW ENFORCEMENT?

9 A YES, SIR. IN 1993 GATOR WAS RECOGNIZED FOR HIS ACHIEVEMENTS
10 WITH AN HONORABLE MENTION BY THE AUGUSTA GERMAN SHEPHERD DOG
11 CLUB WHO GIVES AN AWARD FOR SERVICE DOGS IN GEORGIA, NORTH
12 CAROLINA, AND SOUTH CAROLINA. THEY REVIEW DOGS AND THEIR
13 RECORDS THAT ARE EITHER IN LAW ENFORCEMENT, MILITARY,
14 WORKING, OR IN THOSE DOGS THAT SERVE PEOPLE WHO HAVE A
15 DISABILITY AND ARE UTILIZED, BOTH SEEING EYE DOGS AND HELPER
16 DOGS. HE RECEIVED AN HONORABLE MENTION FOR HIS
17 ACCOMPLISHMENTS THAT YEAR. AND IN 1997 HE WAS AWARDED THE
18 SERVICE DOG OF THE YEAR AWARD FOR HIS ACCOMPLISHMENTS.

19 Q IF YOU HAD TO ESTIMATE IN THE LAST TEN YEARS SINCE YOU'VE
20 BEEN AT THE COLUMBIA POLICE DEPARTMENT, WITH ANY DOG, NOT
21 JUST GATOR, BUT ANY DOG; COULD YOU ESTIMATE THE NUMBER OF
22 TRACKINGS THAT YOU'VE BEEN INVOLVED IN, SERGEANT BLACKWELL,
23 OVER THE LAST TEN YEARS?

24 A I HAVE PERSONALLY -- TRACKS WHICH ARE A RESULT OF AN ACTUAL
25 CRIME OR A MISSING PERSON, I HAVE PERSONALLY BEEN INVOLVED

1 WITH WELL OVER A THOUSAND. BUT IN TRAINING TRACKS, I COULD
2 EASILY SAY FIVE TIMES THAT MANY.

3 Q AND IN USING GATOR, DO YOU KEEP RECORDS OF ALL OF THE DOGS,
4 ALL OF THE DOGS' ACCOMPLISHMENTS AND ALL THE CALLS THAT DOGS
5 GO OUT ON WITHIN THE CITY OF COLUMBIA?

6 A WE KEEP TRACK OF -- WE KEEP TRACK ON A YEARLY -- MONTHLY
7 BASIS. AND THEN EACH YEAR, AT THE END OF THE YEAR, WE
8 COMPILE TOTALS OF THEIR STATISTICS AND THEIR ACCOMPLISHMENTS
9 AND THE NUMBER OF TRACKS AND SEARCHES THAT THEY DO. YES,
10 SIR.

11 Q AND, FOR INSTANCE, IN GATOR'S FIRST YEAR, IN 1993,
12 APPROXIMATELY HOW MANY TRACKINGS WAS GATOR USED ON BY THE
13 COLUMBIA POLICE DEPARTMENT CANINE UNIT?

14 A I BELIEVE THE NUMBER IS 119. IT WAS THE MOST THAT WE'D EVER
15 HAD.

16 Q SO IN THE LAST SIX-AND-A-HALF YEARS, COULD YOU ESTIMATE THE
17 NUMBER OF TRACKINGS GATOR HAS BEEN USED ON?

18 A GATOR AVERAGES -- WE AVERAGE APPROXIMATELY 60 A YEAR. SO,
19 EASILY, PROBABLY 500 OR SO.

20 MR. GASSER: YOUR HONOR, AT THIS TIME WE WOULD MOVE TO
21 HAVE THIS WITNESS QUALIFIED AS AN EXPERT IN THE AREA OF
22 CANINE HANDLING, PARTICULARLY IN THE AREA OF MAN TRACKING.

23 MR. SNEED: NO OBJECTION FOR KENNETH JAMES, YOUR HONOR.

24 MR. SHUPPER: NOR ROBERT JAMES, YOUR HONOR.

25 THE COURT: THANK YOU. YES, SIR. GO AHEAD, PLEASE,

1 SIR, MR. GASSER.

2 MR. GASSER: THANK YOU, YOUR HONOR.

3 Q (BY MR. GASSER) NOW, AS PART OF WHAT YOU'RE DOING, SERGEANT
4 BLACKWELL, IS IT INTERPRETING GATOR, THE DOG'S RESPONSES? IS
5 THAT PART OF WHAT YOU DO WHEN YOU TRACK, SAY, A SUSPECT OR
6 SUSPECTS?

7 A YES, SIR. WHEN THE DOG IS TRAINED FOR TRACKING SPECIFICALLY,
8 THE HANDLER HAS -- EACH DOG IS DIFFERENT. EVEN THOUGH
9 THEY'RE TRAINED IN A VERY SIMILAR WAY, A VERY RIGID PROGRAM,
10 EACH DOG IS DIFFERENT IN THEIR RESPONSE TO DIFFERENT STIMULI,
11 DIFFERENT SMELLS, DIFFERENT ENVIRONMENTS. SO, WE ARE TRAINED
12 -- WE TRAIN OUR HANDLERS TO ADAPT THEMSELVES TO THEIR DOG AND
13 READ THEIR RESPONSES. YES, SIR.

14 Q NOW, YOU INDICATED GATOR WAS WHAT BREED?

15 A HE IS A FULL-BLOODED GERMAN SHEPHERD.

16 Q NOW, THE TERM "BLOODHOUND" I BELIEVE WAS USED BY YOU DURING
17 YOUR PREVIOUS EXPLANATIONS TO THE JURY IN RESPONSE TO ONE OF
18 MY QUESTIONS. IS THAT A BREED OF DOG, TOO, A BLOODHOUND?

19 A YES, SIR. BLOODHOUNDS ARE ALSO A BREED OF DOG.

20 Q AND GERMAN SHEPHERDS, HOW LONG HAVE GERMAN SHEPHERDS THAT YOU
21 KNOW OF, HAVE GERMAN SHEPHERDS BEEN BEING USED AS TRACKING,
22 PARTICULARLY IN THE CITY LIMITS, IN THE CITY AREA?

23 A WELL, I KNOW THAT IN THE UNITED STATES AND GERMANY THEY'VE
24 BEEN USED FOR LONGER. BUT I KNOW THAT IN THE UNITED STATES
25 THAT THE WASHINGTON, D.C. POLICE DEPARTMENT, WHICH WAS ONE OF

1 THE FIRST TO FOUND A WORKING CANINE UNIT, HAS BEEN USING THEM
2 FOR OVER 50 YEARS.

3 Q ARE GERMAN SHEPHERDS AND BLOODHOUNDS THE ONLY TWO BREEDS OF
4 ANIMALS THAT ARE USED FOR TRACKING?

5 A OH, NO, SIR. THERE IS A NUMBER OF THE DIFFERENT BREEDS THAT
6 ARE USED THROUGHOUT THE UNITED STATES. BELGIAN MALINOIS,
7 THEY'RE REAL FREQUENTLY USED BY THE MILITARY AND POLICE. WE
8 HAVE ONE OF THOSE. DUTCH SHEPHERDS, GERMAN SHEPHERDS
9 ROTWEILLERS, DOBERMANS, JUST WORKING-CLASS DOGS THAT FALL
10 WITHIN THE HERDING OR WORKING-CLASS DOGS.

11 Q NOW, HOW MANY DIFFERENT TYPES OF SCENTS ARE YOUR DOGS, AND IN
12 PARTICULAR GATOR, HOW MANY DIFFERENT TYPES OF SCENTS ARE THEY
13 TRAINED TO PICK UP ON?

14 A AS IT APPLIES TO TRACKING, OUR DOGS, THERE ARE -- WE'VE FOUND
15 THAT THERE ARE THREE PRIMARY SCENTS THAT A DOG WILL USE TO
16 FOLLOW A TRAIL. THOSE THREE PRIMARY SCENTS ARE CRUSHED
17 VEGETATION, WHICH IS -- WHAT HAPPENS WHEN YOU STEP ON GRASS
18 IS YOU BREAK DOWN THE GRASS, YOU KICK UP THE DIRT UNDERNEATH
19 THE GRASS, AND IT CHANGES THE SMELL OF THE GROUND RIGHT THERE
20 IN THAT AREA. THEN THERE IS TRANSFERENCE. SAY IF I WERE TO
21 WALK THROUGH MUD AND WALK ACROSS A PIECE OF CONCRETE YOU
22 WOULD SEE -- OR ONTO PAVEMENT -- YOU WOULD SEE THAT
23 TRANSFERENCE. EVEN THOUGH WE DON'T SEE IT, WHEN WE WALK
24 ACROSS THE GRASS, WE ALSO GET THOSE PARTICLES IN OUR SHOES
25 AND WE TRANSFER THAT SMELL ONTO PAVEMENT; OR THAT IS,

1 PARTICLES ONTO PAVEMENT. AND THEN THERE IS HUMAN SCENT. AND
2 OUR DOGS ARE TRAINED TO TRACK ONLY HUMAN SCENT.

3 Q AND IS THAT THE TYPE OF TRACKING THAT WAS DONE IN THIS
4 PARTICULAR CASE, THE HUMAN SCENT TRACKING?

5 A YES, SIR, IT IS.

6 Q SERGEANT BLACKWELL, I WANT TO DRAW YOUR ATTENTION TO THE
7 EARLY MORNING HOURS OF WEDNESDAY, MAY THE 29TH, 1996. DID
8 YOU HAVE AN OPPORTUNITY TO BE CALLED OUT OR TO RESPOND TO
9 THIS PARTICULAR SCENE THAT WE'VE BEEN TALKING ABOUT THE LAST
10 SEVERAL DAYS, AT T. S. MARTIN PARK?

11 A YES, SIR, I WAS.

12 Q AND WOULD YOU DESCRIBE HOW THAT CAME ABOUT TO THE JURY?

13 A I WAS WORKING THE MIDNIGHT SHIFT AT THE TIME AND WAS ON DUTY
14 WITH MY CANINE. I RECEIVED A CALL FROM DISPATCH TO RESPOND
15 TO T. S. MARTIN PARK TO SOME TYPE OF ROBBERY. I RESPONDED
16 FROM THERE. THEY SAID THEY WANTED -- THE OFFICERS ON THE
17 SCENE WANTED A CANINE TO SEE IF THEY COULD ASSIST. UPON MY
18 ARRIVAL ON THE SCENE I WAS MET BY SEVERAL OFFICERS WHO
19 BRIEFED ME ON WHAT HAD HAPPENED.

20 MR. GASSER: MAY THE WITNESS LEAVE THE WITNESS BOX, YOUR
21 HONOR?

22 THE COURT: CERTAINLY.

23 Q (BY MR. GASSER) SERGEANT BLACKWELL, I'M GOING TO BE SHOWING
24 YOU SEVERAL DIAGRAMS. AND SO I THINK THE BEST THING FOR TO
25 YOU DO IS TO STAND HERE SO THE COURT REPORTER CAN SEE YOU AND

1 YOU'RE CLOSE TO THIS MICROPHONE. DO YOU NEED A GLASS OF
2 WATER?

3 A THANK YOU VERY MUCH.

4 Q FIRST LET ME SHOW YOU STATE'S EXHIBIT NO. 1. STATE'S EXHIBIT
5 NO. 1, DO YOU RECOGNIZE THAT DIAGRAM, SERGEANT BLACKWELL?

6 A YES, SIR. IT APPEARS TO BE A DIAGRAM OF THE GENERAL VICINITY
7 OF T. S. MARTIN PARK, CRESCENT HILL CEMETERY, A GENERAL
8 DIAGRAM OF THAT AREA.

9 Q AND WOULD YOU POINT OUT -- JUST TO REFRESH THE JURY'S MIND,
10 WOULD YOU POINT OUT WHERE YOU WENT? WHEN YOU ARRIVED WHERE
11 DID YOU PARK AND WHAT DID YOU DO FIRST?

12 A THE -- I WAS KIND OF LOST IN THIS AREA. I DON'T PATROL THIS
13 AREA. SO THE OFFICERS HAD TO DIRECT ME IN. I WASN'T REAL
14 FAMILIAR WITH THIS PARK. SO I WAS DIRECTED TO COME TO THIS
15 PARKING AREA RIGHT HERE, IS WHERE I DROVE MY VEHICLE TO. THE
16 OFFICERS WERE IN THIS PLAYGROUND AREA, AND THAT'S WHERE THEY
17 MET ME.

18 Q WHAT DID YOU DO? AFTER YOU ARRIVED ON THE SCENE, WHAT DID
19 YOU DO?

20 A ONCE I ARRIVED ON THE SCENE, I GOT OUT OF MY VEHICLE AND WENT
21 AND TALKED TO THE OFFICERS. THEY ADVISED ME THAT -- I WAS
22 INFORMED THAT THERE HAD BEEN A ROBBERY AND A RAPE AT THE
23 SCENE HERE AT THE PARK, WAS GIVEN VERY FEW DETAILS EXCEPT FOR
24 THAT THERE WERE NUMEROUS SUBJECTS. FOUR OR FIVE I BELIEVE IS
25 WHAT I WAS TOLD.

1 AND THEN ONE OF THE OFFICERS TOOK ME AND SHOWED ME AN
2 AREA RIGHT ON THE OTHER SIDE OF THIS PLAYGROUND AREA WHERE
3 THEY HAD BEEN ADVISED THE ACTUAL RAPE HAD TAKEN PLACE. AT
4 THAT TIME I LOOKED AROUND THE AREA A LITTLE BIT. THERE WAS
5 SOME TYPE OF UNDERWEAR -- I DIDN'T GET TOO CLOSE TO IT
6 BECAUSE I DIDN'T WANT TO DESTROY ANY POTENTIAL EVIDENCE --
7 THAT WAS SITTING RIGHT HERE NEXT TO THIS WOOD LINE. AND
8 ALONG WITH IT WAS WHAT APPEARED TO BE AN OPENED CONDOM.

9 AT THAT TIME I HAD STARTED CIRCLING AROUND IT UNTIL I
10 WAS ABLE TO FIND WHAT LOOKED LIKE -- I WAS ADVISED THAT THE
11 SUSPECTS MAY HAVE FLED ACROSS THE CEMETERY. I WASN'T GIVEN A
12 SPECIFIC DIRECTION OF TRAVEL. SO I STARTED LOOKING FOR SOME
13 SIGNS OF PEOPLE WALKING OR RUNNING FROM THE SCENE. I FOUND
14 WHAT APPEARED TO ME TO BE SOME PARTIAL INDICATION OF WHAT I
15 REFER TO AS A TOE DIG OR A HEEL DIG WHERE SOMEONE HAD RUN AND
16 DUG THEIR TOE INTO THE DIRT MOVING AWAY FROM THIS AREA,
17 PROBABLY FOUR TO SIX FEET AWAY FROM WHERE THE UNDERWEAR WAS
18 FOUND.

19 Q LET ME STOP YOU THERE. PART OF YOUR TRAINING WHEN YOU WERE
20 IN THE MILITARY M.P. CANINE UNIT AS WELL AS U.S. CANINE
21 ASSOCIATION AND WITH THE COLUMBIA POLICE DEPARTMENT, DOES
22 THAT INCLUDE IDENTIFYING CERTAIN THINGS ON THE GROUND WHICH
23 YOU'VE JUST DESCRIBED TO THE JURY?

24 A IT INCLUDES LOOKING FOR AND IDENTIFYING SIGNS OF PEOPLE
25 WALKING OR RUNNING, TO BE ABLE TO TELL THE DIFFERENCE BETWEEN

1 A WALKING SHOE PRINT, A RUNNING SHOE PRINT AND TO BE ABLE TO
2 DISTINGUISH WHAT ONE MADE -- ONE FOOTPRINT MAY LOOK LIKE AS
3 OPPOSED TO ANOTHER ONE, ONE SHOE PRINT MAY LOOK LIKE AS
4 OPPOSED TO ANOTHER ON THE GROUND, DIFFERENT TERRAINS.

5 Q WHERE WAS GATOR AT THIS TIME?

6 A GATOR WAS STILL SITTING IN THE CAR BACK HERE.

7 Q NOW, CAN YOU DESCRIBE THE LIGHTING, FIRST OF ALL IN THE
8 PLAYGROUND AREA WHEN YOU FIRST GOT THERE?

9 A THE PLAYGROUND WAS VERY WELL LIT. I DIDN'T HAVE TO USE MY
10 FLASHLIGHT AT ALL TO BE -- TO SEE ALL OF THE PLAYGROUND
11 EQUIPMENT IN HERE. AND I WAS -- IT WAS POINTED OUT TO ME
12 WHERE ONE OF THE VICTIMS HAD REPORTEDLY BEEN ROBBED AND SOME
13 OF HIS CLOTHES TAKEN FROM HIM. THE MALE VICTIM, HIS CLOTHES
14 HAD BEEN TAKEN OFF OF HIM. AND ONE OF THE OFFICERS POINTED
15 OUT SOME -- I BELIEVE SOME SHOES OR FLIP-FLOPS OR SOMETHING
16 LIKE THAT THAT WERE ON THE GROUND, SOME KIND OF SLIPPERS AND
17 A PAIR OF PANTS THAT WERE OVER HERE. AND I WAS ABLE TO SEE
18 THOSE WITHOUT SHINING MY FLASHLIGHT ON THEM. SO IT WAS
19 FAIRLY WELL LIT.

20 Q AS YOU CROSSED THE FENCE LINE INTO THE MORE WOODED AREA BY
21 THE FENCE LINE OR BUSHY AREA OF THE CEMETERY, WHAT DID THAT
22 THEN REQUIRE YOU TO DO IN ORDER TO ASSIST YOU?

23 A I WAS ABLE TO TRAVEL THROUGH HERE REAL WELL WITHOUT -- AND I
24 CAN'T RECALL WHERE THE SOURCE OF LIGHT CAME FROM. BUT I DO
25 RECALL THAT IT WAS LIT ENOUGH THAT I DIDN'T HAVE TO UTILIZE

1 MY FLASHLIGHT TO SEE THE UNDERWEAR OR THE UNDERGARMENT THAT
2 WAS ON THE GROUND THERE AND THE CONDOM. I DIDN'T HAVE TO
3 UTILIZE MY FLASHLIGHT UNTIL I ACTUALLY STARTED LOOKING FOR
4 FOOTPRINTS. I WAS ABLE TO NAVIGATE MY WAY AROUND HERE REAL
5 WELL BECAUSE IT WAS FAIRLY WELL LIT UNTIL I STARTED LOOKING
6 REAL CLOSELY FOR FOOTPRINTS.

7 Q SHOWING YOU STATE'S EXHIBIT NO. 13, DO YOU RECOGNIZE THAT
8 PARTICULAR DIAGRAM?

9 A YES, SIR. IT APPEARS TO BE A BLOWN UP DIAGRAM OF THE
10 PLAYGROUND AREA WHICH ENCOMPASSES THIS PARKING LOT AND TENNIS
11 COURT. THIS IS THE PARKING LOT WHERE I WAS PARKED. THIS IS
12 THE TENNIS COURT ADJACENT TO THE PLAYGROUND AREA.

13 Q SHOWING YOU WHAT'S BEEN MARKED STATE'S EXHIBIT NO. 7 AND
14 STATE'S EXHIBIT 17, DO YOU RECOGNIZE THOSE PHOTOGRAPHS?

15 A YES, SIR. THAT'S THE SAME AREA. THAT'S THE PARK AREA, THE
16 PLAYGROUND AREA.

17 Q STATE'S EXHIBIT NO. 9, DO YOU RECOGNIZE THAT PHOTOGRAPH?

18 A THAT APPEARS TO BE A VIEW OF THE PLAYGROUND AREA FROM THE
19 PARKING LOT I BELIEVE. BUT, YES, SIR. IT'S A VIEW OF THE
20 SAME PLAYGROUND AREA. THIS IS THE WOODED AREA HERE THAT RUNS
21 ALONG HERE. AND YOU CAN SEE EVEN -- I BELIEVE YOU CAN SEE
22 BITS AND PIECES OF THE FENCE LINE HERE.

23 Q IN YOUR EXPERIENCE IN THE MILITARY OR CANINE UNIT, HAVE YOU
24 EVER HAD OPPORTUNITIES TO BE -- TO GO INTO A VERY THICK,
25 DENSELY CANOPIED, WOODED AREA ON PREVIOUS OCCASIONS AND USING

1 THE DOGS OR JUST FOR WHATEVER REASON? HAVE YOU HAD THAT
2 EXPERIENCE BEFORE?

3 A WELL, BETWEEN MY DUTIES HERE AND IN THE MILITARY, I'VE BEEN
4 THROUGH SOME PRETTY ALMOST UNNAVIGABLE DENSE WOODS. YES,
5 SIR.

6 Q AND ARE YOU FAMILIAR WITH THE TERM "PITCH DARK" OUT OR "PITCH
7 BLACK"? ARE YOU FAMILIAR WITH THAT PHRASE?

8 A I AM FAMILIAR WITH THAT PHRASE.

9 Q AND WHEN YOU WERE IN THE OPEN AREA, OPEN AREA OF THE CEMETERY
10 OR THE AREA ADJACENT TO THE PARKING LOT AREA OF THE -- WHERE
11 THE PLAYGROUND EQUIPMENT WAS, HOW WOULD YOU DESCRIBE THE
12 LIGHTING IN THAT AREA?

13 MR. SNEED: OBJECTION. ASKED AND ANSWERED.

14 THE COURT: WELL, --

15 MR. SNEED: IF HE'D JUST PHRASE IT ANOTHER WAY, YOUR
16 HONOR.

17 THE COURT: OKAY. THANK YOU, MR. SNEED. I APPRECIATE
18 YOUR OBJECTION. BUT I'M GOING TO ALLOW THE WITNESS TO ANSWER
19 THE QUESTION. AND PLEASE JUST TRY NOT TO BE REPETITIVE.
20 OKAY? THANK YOU. EITHER -- ANY ONE. OKAY. THANKS.

21 A SPECIFICALLY IN THE PLAYGROUND AREA, IT WAS VERY WELL LIT.
22 AGAIN, I DON'T RECALL WHAT THE SOURCE OF LIGHT WAS, BUT THERE
23 WAS AN OBVIOUS CLOSE SOURCE OF LIGHT THAT ILLUMINATED THIS
24 PLAYGROUND AREA. AND EVEN ONCE YOU CAME OUT, ONCE YOU CAME
25 THROUGH THIS, THIS LITTLE THIN AREA OF SHRUBS THAT BORDERED

1 THIS FENCE LINE, IT WAS FAIRLY WELL LIT. EVERYTHING WAS
2 VISIBLE FROM HERE. YOU COULD SEE THERE WAS A MAUSOLEUM IN
3 THE MIDDLE OF THE -- A WHITE BUILDING IN THE MIDDLE OF THIS
4 CEMETERY DOWN HERE. YOU COULD SEE IT CLEARLY. YOU COULD SEE
5 -- IF I -- TO THE BEST OF MY RECOLLECTION, I BELIEVE I COULD
6 SEE ALL THE WAY ACROSS THE CEMETERY.

7 Q NOW, AFTER -- TELL US, PLEASE, WHAT YOU DID AFTER YOU
8 OBSERVED WHAT YOU'VE PREVIOUSLY DESCRIBED TO THE JURY, THE
9 FOOT MARKS OR THE TOE MARKS YOU OBSERVED, WHAT DID YOU DO
10 RELATIVE TO GATOR?

11 A WHAT I DID AFTER I FOUND THAT MARK, I ASKED THE OFFICERS IF
12 ANY OF THEM HAD BEEN OVER THAT FAR. THEY INDICATED TO ME
13 THAT THEY HAD NOT. AND I ASKED THEM NOT TO GO THERE, TO
14 STAND HERE AND BACK OUT OF THE WAY AWAY FROM WHERE I FOUND
15 THOSE FOOTPRINTS OR SHOE PRINTS. AND I WENT BACK TO MY CAR.
16 I PUT A HARNESS ON GATOR WHICH TELLS HIM, THAT MEANS THAT
17 WE'RE GOING TO TRACK, AS OPPOSED TO A COLLAR. I GOT MY LEASH
18 AND I BROUGHT HIM BACK TO THIS AREA. ONCE I GOT BACK TO THIS
19 AREA, I BROUGHT HIM TO THE AREA WHERE I HAD FOUND -- I
20 RELOCATED THE AREA WHERE I'D FOUND WHAT I CONSIDERED TO BE,
21 WHAT APPEARED TO ME TO BE WHERE SOMEONE HAD RUN FROM THERE.
22 AND I TOOK GATOR AND I PUT HIM IN THE DOWN POSITION,
23 PRESENTED THE GROUND TO HIM AND GAVE HIM THE COMMAND TO
24 TRACK, WHICH IS THE WAY WE BEGIN A TRACK.

25 Q WHY DID YOU WANT TO MAKE SURE YOU INQUIRED FROM THE OTHER

1 OFFICERS WHETHER OR NOT THEY HAD BEEN IN THAT AREA WHERE YOU
2 DESCRIBED TO THE JURY WHERE THE TRAMPING AND THE TOE MARKS
3 WERE?

4 A BECAUSE, UNFORTUNATELY, PROBABLY AS OFTEN AS I TRACK BAD GUYS
5 I TRACK POLICE OFFICERS. WE HAVE GONE TO MANY A POLICE CAR.

6 THE COURT: OKAY. IF WE WOULD GO OBJECTION -- THERE IS
7 AN OBJECTION THAT WAS UNSTATED BY THE DEFENDANTS. BOTH
8 GRIMACED BY THE CHARACTERIZATION "BAD GUYS". AND, QUITE
9 FRANKLY, FOLKS, EXCISE THAT CHARACTERIZATION FROM YOUR
10 CONSIDERATION OF THIS CASE. OKAY? USE THE TERM "SUSPECTS"
11 IN THE FUTURE. OKAY?

12 A I STAND CORRECTED, YOUR HONOR.

13 THE COURT: OKAY.

14 Q AFTER YOU GAVE THE COMMAND TO GATOR, TELL US, PLEASE, WHAT
15 OCCURRED?

16 A WELL, THE PURPOSE OF PLACING MY HAND DOWN TO THE GROUND IS TO
17 BRING HIS NOSE THERE. HE BRINGS HIS NOSE DOWN TO WHERE MY
18 HAND IS. HE THEN -- AND PRIOR TO GIVING HIM THE COMMAND, HE
19 STARTS SNIFFING THE GROUND. I GIVE HIM THE COMMAND TO TRACK.
20 HE STANDS UP. HIS NOSE STAYS TO THE GROUND. AND HE BEGINS
21 TO SEARCH THE GROUND AND BEGINS TO TRACK. HE BEGINS TO
22 INDICATE TO ME THAT THERE IS A SPECIFIC SCENT THAT HE IS
23 PICKING UP, AND HE BEGINS TO FOLLOW THAT ACROSS THE CEMETERY.

24 Q DID YOU, SERGEANT BLACKWELL, SUBSEQUENTLY DO A REPORT IN THIS
25 PARTICULAR CASE?

1 A YES, SIR. I FILLED OUT A TRACKING REPORT.

2 Q AND DID THAT INCLUDE A DIAGRAM, A MAPPED DIAGRAM OF WHERE
3 GATOR LED YOU?

4 A YES, SIR. MY TRACKING REPORT HAS A NARRATIVE WHERE I CAN
5 DESCRIBE WHAT I MAY HAVE FOUND ALONG THE TRACK, WHAT THE DOG
6 DID, AND IT ALSO HAS A DIAGRAM ON IT WHERE I CAN DRAW TO
7 REFRESH MY MEMORY AT TIMES LIKE THIS EXACTLY WHERE THE DOG
8 WENT AND HOW THE DOG TRACKED.

9 Q I SHOW YOU WHAT'S BEEN MARKED STATE'S EXHIBIT NO. 6 FOR
10 IDENTIFICATION. DO YOU RECOGNIZE THE BLOW-UP, THIS BLOW-UP?

11 A YES, SIR. THAT'S MY -- THAT'S A BLOW-UP OF MY -- OR APPEARS
12 TO BE A BLOW-UP OF MY TRACKING DIAGRAM.

13 Q OKAY. ON STATE'S EXHIBIT 6 FOR I.D., DOWN HERE WHERE IT SAYS
14 WOODED AREA T. S. MARTIN PARK, WHERE IS THAT IN RELATIONSHIP
15 TO STATE'S EXHIBIT 30?

16 A THIS WOULD BE -- IF THIS WERE TURNED UPSIDE DOWN ACTUALLY,
17 THIS WOULD BE THIS. IT WOULD BE FACING THIS WAY. THIS WOULD
18 BE THE -- ON THIS SIDE OF THE FENCE, THE PARK AREA, THE
19 PLAYGROUND AREA. AND THIS WOULD BE A BETTER DRAWN DIAGRAM OF
20 THE WOODED AREA THAT I HAVE HERE.

21 Q OKAY. SO TELL US, PLEASE; WOULD YOU PLEASE INTERPRET GATOR'S
22 RESPONSES AS HE BEGAN TO TRACK? AND USE STATE'S EXHIBIT NO.
23 6 FOR IDENTIFICATION FOR YOUR TESTIMONY.

24 A YES, SIR. THIS IS -- THE STAR HERE IS -- WAS AN INDICATION
25 OF WHERE I STARTED THE TRACK. I NORMALLY USE A STAR THAT

1 INDICATES THE START AND AN "X" TO INDICATE THE ENDING OF THE
2 TRACK AND DOTTED LINES TO INDICATE THE PATH THAT THE DOG
3 TRAVELS. THE STAR WAS ABOUT THIS -- I ALSO PUT A COMPASS ON
4 HERE SO I KNOW WHICH DIRECTION I'M TRAVELING IN OR I TRAVELED
5 IN FOR MY NARRATIVE. THIS STAR WAS APPROXIMATELY FOUR TO SIX
6 FEET AWAY FROM THE UNDERGARMENT WHICH I FOUND -- WE LOCATED
7 TO BE RIGHT HERE BY THE WOOD LINE. IT'S ACTUALLY IN THE
8 CEMETERY AREA KIND OF ON THE GRASSY AREA, NOT IN THE WOODS,
9 AROUND THE OUTSIDE.

10 THIS IS WHERE WE STARTED. GATOR STARTED TRAVELING AT A
11 FAIRLY STRONG PACE, APPEARED TO HAVE A STRONG SCENT, ACROSS
12 ALMOST IN A BEE LINE ACROSS THE CEMETERY IN A SOUTH,
13 SOUTHERNLY DIRECTION TO A WHITE BUILDING WHICH I NOW KNOW IS
14 A MAUSOLEUM IN THE MIDDLE OF CRESCENT HILL CEMETERY. WE
15 TRACKED ALONG THE GRASSY AREAS.

16 WHEN WE GOT TO THE FRONT CORNER OF THE MAUSOLEUM UP
17 HERE, I OBSERVED AN AREA WHERE THERE WAS SPARSE GRASS AND
18 SOME SAND. SO I STOPPED THE DOG ABOUT RIGHT HERE, WHICH IS
19 FAIRLY COMMON PRACTICE IN ORDER TO LOOK IN THE SAND TO SEE IF
20 I COULD SEE ANY IDENTIFIABLE OR DISTINGUISHABLE SHOE PRINTS
21 IN THAT SAND, SOMETHING THAT I COULD USE AS A REFERENCE
22 FURTHER IN THE TRACK OR EVEN MAY PROVIDE SOME EVIDENTIARY
23 VALUE LATER ON.

24 ANYWAY, I STOPPED THE DOG HERE. AND I WALKED UP ABOUT A
25 FOOT TO TWO FEET IN FRONT OF HIM. AND I CHECKED THIS SAND

1 HERE. I FOUND PARTIAL BITS AND PIECES OF SHOE PRINTS,
2 IMPRINTATIONS IN THAT SAND. AND I MADE A MENTAL NOTE AT THAT
3 TIME KIND OF WHAT THE BASIC PATTERN ON THOSE SHOES WERE. AND
4 I CONTINUED -- I STARTED THE DOG AND CONTINUED ALONG THE
5 TRACK.

6 Q YOU USED THE TERM "FAIRLY STRONG SCENT". HOW DO YOU -- AS A
7 DOG HANDLER, AS A TRAINED EXPERT IN THIS AREA, HOW CAN YOU
8 MAKE THAT DETERMINATION? WHAT BEHAVIORAL CHARACTERISTICS IS
9 THE DOG GIVING OFF THAT ALLOWS YOU AS AN EXPERT TO MAKE THAT
10 DETERMINATION?

11 A SINCE -- DIFFERENT AGED SCENTS OR DIFFERENT STRENGTH OF
12 SCENTS, THE DOGS BEHAVE DIFFERENTLY. THEY -- FOR AN OLD
13 SCENT, SOMETHING THAT IS OLD, IN MY EXPERIENCE, WHEN WE'RE
14 TRAINED OR WHEN I'M TRACKING, I'VE FOUND THAT MY DOG WILL NOT
15 PULL QUITE AS HARD. HE WILL KEEP HIS NOSE ALMOST IN THE
16 GRASS OR IN THE DIRT IF IT'S AN OLD SCENT BECAUSE -- ANYWAY,
17 HE'LL KEEP HIS NOSE RIGHT IN THE DIRT AND MOVE VERY SLOWLY
18 AND METHODICALLY BECAUSE HE HAS TO ACTUALLY SEARCH FOR THE
19 SCENT.

20 ON STRONG SCENT, SOMETHING THAT IS STRONG OR REAL FRESH,
21 THE DOG'S HEAD WILL BE MAYBE SIX -- HIS NOSE WILL BE ABOUT
22 SIX INCHES OFF THE GROUND OR SO AND HE WILL PULL SO HARD THAT
23 I HAVE TO LEAN BACK ON THE LEASH TO KEEP FROM GOING AT A FAST
24 PACE. I DON'T ALLOW THE DOG TO GO ANY FASTER THAN A FAST
25 WALK TO MAKE SURE THAT WE DON'T MISS ANYTHING.

1 Q AND IN THIS CASE, WHAT WAS THE AMOUNT OF PULL? OR HOW WOULD
2 YOU DESCRIBE THE AMOUNT OF PULL?

3 A HE WAS DRAGGING ME ACROSS THE CEMETERY. I WAS CONFIDENT THAT
4 HE HAD -- WHOEVER HE WAS TRACKING HE HAD A VERY STRONG SCENT.

5 Q NOW, YOU JUST USED THE WORD "WHOEVER". HYPOTHETICALLY
6 SPEAKING, IF FIVE OR SEVEN; FIVE, SIX OR SEVEN PEOPLE, SAY,
7 HYPOTHETICALLY SPEAKING, TWO VICTIMS AND FIVE ASSAILANTS HAD
8 GONE ACROSS THIS AREA OF THE CEMETERY, HOW MANY SCENTS IS
9 GATOR TRACKING?

10 A ONE.

11 Q AND EXPLAIN THAT, PLEASE.

12 A IN OUR TRAINING WE DO WHAT WE CALL PROOFING IN THEIR
13 TRACKING. AND WE WOULD TEACH THE DOGS OR INSURE THAT THE DOG
14 USES THE CAPABILITY THEY HAVE CALLED SCENT DISCRIMINATION.
15 DOGS ARE CAPABLE OF DISCRIMINATING ONE SCENT FROM ANOTHER.
16 AND IN ORDER TO INSURE THIS IN OUR TRAINING, WE TEACH THE
17 DOGS TO NOT ONLY TRACK OFF OF A SCENT OFF THE GROUND BUT
18 TRACK FROM AN ARTICLE. SAY, AN ARTICLE OF CLOTHING, IF
19 SOMEONE IS LOST OR MISSING, THEY CAN TRACK FROM THAT
20 CLOTHING.

21 SO WHAT WE DO IS PERIODICALLY WE PROOF OUR DOGS TO MAKE
22 SURE THAT THEY'RE ONLY IDENTIFYING ONE SCENT. AND THAT IS,
23 WE WILL TAKE, IN TRAINING WE WILL HAVE FOUR OR FIVE PEOPLE
24 RUN A TRACK IN A SINGLE LINE. SAY THIS LINE, THEY WOULD ALL
25 RUN OFF IT, START OUT IN THE SAME LINE. WHICH TO YOU AND I

1 WOULD BE ONE TRAIL. BUT TO A DOG THERE IS ONLY GOING TO BE
2 ONE SCENT THAT THAT DOG IS GOING TO KEY ON.

3 AND AT DIFFERENT POINTS DIFFERENT PEOPLE ON THIS TRACK
4 WOULD PEEL OFF AND GO IN DIFFERENT DIRECTIONS. SO THEN THE
5 DOG IS PRESENTED WITH AN ARTICLE. AND THE HANDLER, MYSELF OR
6 WHOEVER THE HANDLER IS, DOESN'T KNOW WHICH OF THESE PEOPLE
7 THAT ARTICLE BELONGS TO, WHICH OF OUR TRACK LAYERS THAT
8 ARTICLE BELONGS TO. AND THE DOG IS REQUIRED TO TAKE THAT
9 ARTICLE, SNIFF IT; WE ALLOW THEM TO PLAY WITH IT, SHAKE IT IN
10 THEIR MOUTH; THEY CAN GET A TASTE OF IT, WHICH GIVES THEM THE
11 ABILITY TO REMEMBER THAT SCENT. AND THEN WE START THEM ON
12 THAT TRACK. AND WE INSURE THAT EVERY TIME THE DOG FOLLOWS
13 THE PROPER PERSON.

14 Q HAS GATOR GONE THROUGH THAT TRAINING?

15 A REPEATEDLY.

16 Q WHAT IS THE PROFICIENCY RATE PERCENTAGE-WISE OF GATOR?

17 A A HUNDRED PERCENT.

18 Q CONTINUE ON AFTER -- WHAT HAPPENED AFTER THE SECTION OF THE
19 MAUSOLEUM? CONTINUE ON, PLEASE.

20 A GATOR CONTINUED. HE CAME AROUND THE FRONT SIDE OF THIS
21 MAUSOLEUM AND THEN -- JUST AT AN ANGLE -- AND THEN CONTINUED
22 AGAIN IN A SOUTHERN DIRECTION ACROSS THE CEMETERY. WHEN --
23 EXCUSE ME. WHEN YOU GET TO THE EDGE OF THE CEMETERY, THERE'S
24 A ROW OF SHRUBS OR HEDGES. THEY'RE NOT ACTUALLY HEDGES
25 THOUGH. THEY'RE JUST GROWN UP SHRUBS. THERE MAY EVEN BE

1 SOME TREES IN THERE. BUT THERE WAS A CUT OR AN OPENING
2 BETWEEN SOME OF THE HEDGES THAT INDICATES OR LOOKS AS IF IT'S
3 WELL TRAVELED THERE. PEOPLE USE IT AS A CUT THROUGH.

4 AND WE CONTINUED SOUTH THROUGH THAT CUT. AND INBETWEEN
5 -- THIS IS MAEBELLE COURT, IS THE NAME OF THIS STREET. THERE
6 ARE A ROW OF HOUSES HERE. WE CONTINUED THROUGH AND CAME OUT
7 BEHIND NUMBER 6 MAEBELLE COURT AND WENT THROUGH THE YARDS
8 BETWEEN 6 AND 7. ONCE WE GOT TO THE STREET, THE ACTUAL
9 STREET ON MAEBELLE COURT, AS THIS POORLY INDICATES, THIS IS A
10 CIRCLE. AND THERE ARE HOUSES THAT GO AROUND THIS CIRCLE.
11 AND WE CAME OUT ONTO THE STREET.

12 AND THEN GATOR FOLLOWED THE SCENT AND TURNED LEFT ON THE
13 PAVEMENT. AND WE FOLLOWED THAT ABOUT THE LENGTH OF TWO
14 HOUSES, TWO OR THREE HOUSES THERE. AND THEN WE -- GATOR
15 TURNED BACK TO THE RIGHT AND STARTED SOUTH AGAIN BETWEEN THE
16 CORNER HOUSE AND THE NEXT HOUSE ON MAEBELLE COURT AND WENT
17 AROUND THE SIDE, TRACKED THROUGH THE BACK YARDS AND BACK OUT
18 ONTO WHERE MAEBELLE COURT COMES BACK AROUND TO GERMANY
19 STREET.

20 EXCUSE ME. WE CAME OUT ONTO THE PAVEMENT. WHEN WE GOT
21 TO THE PAVEMENT, WE STARTED TRACKING SOUTH ON THIS PORTION OF
22 MAEBELLE COURT AND UNTIL WE GOT TO GERMANY STREET. WHEN WE
23 GOT TO GERMANY STREET, I NOTICED AHEAD OF ME THAT THERE WAS
24 SAND ON THIS CORNER ON THE ROADWAY BUILT UP ON THE ROADWAY.
25 AND I STOPPED GATOR AGAIN. AND I WALKED UP A COUPLE OF FEET

1 AHEAD OF HIM. AND I LOOKED DOWN AT THE SAND TO SEE IF I
2 COULD SEE ANY REALLY GOOD FOOTPRINTS. AND I WAS ABLE TO SEE
3 -- EXCUSE ME -- SHOE PRINTS. I WAS ABLE TO SEE SEVERAL
4 PARTIAL SHOE PRINTS, TELL THAT IT APPEARED THERE'D BEEN A
5 GOOD BIT OF TRAFFIC THROUGH THERE. BUT SOME PART OF A SHOE
6 PRINT LOOKED TO BE SIMILAR, LOOKED LIKE THE SHOE PRINT THAT I
7 SAW OR THE PART OF THE SHOE PRINT THAT I SAW OVER HERE.

8 Q AND LET ME JUST STOP YOU. YOU'RE NOT AN EXPERT IN THE AREA
9 OF SHOE PRINT ANALYSIS. IS THAT CORRECT?

10 A NO, SIR, I'M NOT.

11 Q OKAY.

12 A I'M JUST LOOKING FOR SIMILAR PATTERNS. AND I GOT TO -- WHEN
13 I GOT -- AFTER I NOTICED THOSE, I MADE A MENTAL NOTE OF THOSE
14 SHOE PRINTS. I ALLOWED GATOR TO CONTINUE, COMMANDED HIM TO
15 TRACK. GATOR CONTINUED ALONG THE TRACK ACROSS -- STRAIGHT
16 ACROSS GERMANY STREET, STILL TRACKING, PULLING VERY HARD,
17 TRACKING AS IF HE'S GOT A STRONG SCENT ALONG THE LEFT SIDE OF
18 THE ROAD -- THIS IS ORR STREET HERE -- ALONG THE LEFT SIDE OF
19 THE ROAD UNTIL WE GOT TO THE FOURTH HOUSE ON THE LEFT.

20 WHEN WE GOT TO THAT YARD, THE YARD WAS KIND OF OPEN AND
21 SANDY IN FRONT. GATOR TURNED INTO THE YARD AND TRACKED UP TO
22 THE FRONT. IT'S GOT A SMALL FRONT PORCH ON IT. HE TRACKED
23 UP TO THE FRONT PORCH, UP THE STEPS AND UP ONTO THE FRONT
24 PORCH. WHEN WE GOT UP ON THE FRONT PORCH OF THIS HOUSE,
25 GATOR'S HEAD CAME UP AND HE CHANGED HIS BEHAVIOR TO GO INTO

1 WHAT I REFER TO AS A SEARCH MODE. HE IS TRAINED TO NOT ALLOW
2 US TO WALK UP ON A SUSPECT. WHEN HE GETS CLOSE TO WHAT HE
3 BELIEVES TO BE HIS QUARRY, FOR LACK OF A BETTER WORD, THE
4 PERSON THAT HE IS TRACKING, HE IS TRAINED TO ALERT TO ME,
5 PULL HIS HEAD UP AND LOOK FOR THAT PERSON SO THAT WE DON'T
6 GET AMBUSHED.

7 SO THAT'S THE BEHAVIOR THAT I SAW WHEN WE GOT UP ON THE
8 PORCH. HE BEGAN CIRCLING ON THE PORCH, SEARCHING THE AIR
9 MORE, AS MUCH AS THE GROUND, AROUND THE FRONT OF THE DOOR.
10 AT THAT TIME I SIGNED TO THE OFFICERS OR THE OFFICER THAT
11 WAS WITH ME THAT GATOR WAS INDICATING A STRONG PRESENCE OF
12 SCENT IN THIS AREA OF THE SUSPECT THAT HE WAS TRACKING AND
13 THAT WE NEEDED TO USE CAUTION.

14 AT THAT TIME I BACKED UP OFF THE PORCH. THE OFFICER
15 WENT AROUND BACK, INDICATED THERE WAS NO LIGHTS ON. THERE
16 DIDN'T APPEAR TO BE ANYBODY PRESENT AT THE HOUSE, NO OBVIOUS
17 SIGNS OF ANYBODY BEING UP AND ABOUT IN THE HOUSE.

18 Q AND APPROXIMATELY WHAT TIME DID YOU START THIS AND WAS THIS
19 GOING ON?

20 A WE STARTED THE TRACK BETWEEN 1, 1:15 IN THE MORNING AND ABOUT
21 1:25. SOMEWHERE IN THAT TIMEFRAME IS WHEN WE STARTED THE
22 TRACK.

23 Q YOU INDICATED WHEN YOU GOT TO THIS INTERSECTION OF MAEBELLE
24 COURT AND GERMANY STREET, WHO HAD TO STOP THE DOG?

25 A I STOPPED THE DOG. I STOPPED THE DOG.

1 Q AND SHOWING YOU STATE'S EXHIBIT 1, I GUESS WOULD THAT BE
2 CONSISTENT, BY FLIPPING IT OVER, SERGEANT BLACKWELL, FROM THE
3 WOODED AREA DOWN HERE?

4 A YES, SIR. THAT'S THE WAY MINE IS DRAWN, SOUTH BEING AT THE
5 TOP UP HERE AND NORTH BEING AT THE BOTTOM.

6 Q SO ON STATE'S EXHIBIT NO. 6 FOR I.D., ON YOUR MAP, THE ROUTE
7 THAT YOU'VE JUST DESCRIBED TO THE JURY, CAN YOU JUST USE THE
8 POINTER ON STATE'S EXHIBIT NO. 1?

9 A I CAN.

10 Q THIS IS THE MAUSOLEUM?

11 A OKAY. THIS WOULD BE THE -- INDICATE THE WOODED AREA ON THIS
12 MAP. WE TOOK PRETTY MUCH A BEE LINE STRAIGHT TO THE FRONT
13 CORNER OF THE MAUSOLEUM, AROUND THE FRONT, ACROSS THE
14 CEMETERY, BETWEEN NUMBERS 6 AND 7. THESE AREN'T NUMBERED.
15 BUT BETWEEN TWO HOUSES HERE, THERE'S A LITTLE CUT BETWEEN TWO
16 HOUSES; ONTO MAEBELLE COURT, UP MAEBELLE COURT, THEN BEHIND
17 THIS HOUSE ON THE CORNER, CUT CATTY-CORNER ACROSS ONTO THE
18 PAVEMENT HERE, ACROSS GERMANY STREET AND TO 2528 ORR STREET.

19 Q NOW, AT THE TIME THAT THIS TRACKING WAS GOING ON, WHAT
20 INFORMATION DID YOU HAVE -- OR LET ME REPHRASE THAT. STRIKE
21 THAT QUESTION. HAD YOU HAD AN OPPORTUNITY TO INTERVIEW A
22 PERSON BY THE NAME OF WINFRED BULL BEFORE YOU STARTED THIS
23 TRACKING?

24 A NO, I HAD NOT.

25 Q DID YOU EVEN KNOW WHO THAT IS?

1 A DO I NOW, OR DID I THEN?

2 Q DID YOU THEN?

3 A NO, I DID NOT.

4 Q DID YOU HAVE AN OPPORTUNITY TO INTERVIEW A PERSON BY THE NAME
5 OF CHARLES MURRAY OR A YVETTE (SIC) YEADON?

6 A NO, I DID NOT.

7 Q DO YOU EVEN KNOW WHO THEY ARE?

8 A NO.

9 Q DO YOU EVEN KNOW WHERE THEY LIVE?

10 A NO.

11 Q OKAY. YOU CAN TAKE YOUR SEAT AT THIS TIME. JUST A FEW MORE
12 QUESTIONS. ONCE GATOR WAS UP ON THE PORCH OF 2528 ORR
13 STREET, AFTER YOU MADE THE PRECAUTIONS THAT YOU'VE DESCRIBED
14 TO THE JURY, WHAT DID YOU DO THEN IN REFERENCE TO THE TERM
15 "SWEEPING TECHNIQUE"?

16 A I -- AFTER WE CAME TO THE -- OR DETERMINED THAT WE DIDN'T
17 BELIEVE ANYBODY WAS AT THE RESIDENCE -- AND I BELIEVE -- I'M
18 NOT SURE, BUT I BELIEVE THE OTHER OFFICER MAY HAVE KNOCKED ON
19 THE DOOR AND NOT GOTTEN A RESPONSE -- AT THAT TIME I SEARCHED
20 THE YARD, THE SAND AREA IN THE YARD LOOKING FOR FOOTPRINTS,
21 SHOE PRINTS, SOMETHING THAT MIGHT INDICATE THAT THE SUBJECT
22 EITHER -- THAT EITHER CAME INTO THE YARD OR SOMETHING THAT
23 MAY PROVIDE EVIDENTIARY VALUE LATER IF A SHOE WAS FOUND. AND
24 I FOUND A LARGE NUMBER OF VERY SIMILAR SHOE PRINTS IN THE
25 YARD. A NUMBER OF THOSE SHOE PRINTS LOOKED LIKE THE

1 PORTIONS, THE PATTERNS OF THE SHOE PRINTS THAT I SAW ALONG
2 THE TRACK.

3 WHEN I DID THAT, AFTER I HAD DONE THAT, I DID WHAT I
4 NORMALLY REFER TO AS A SWEEP. I TOOK GATOR PAST THE HOUSE, A
5 LITTLE BIT ON ORR STREET, AROUND THE YARD, AND I SWEPT HIM IN
6 AN ATTEMPT TO SEE IF I COULD PICK UP A TRACK LEADING AWAY
7 FROM THAT HOUSE IN CASE THE SUBJECT THAT I WAS TRACKING HAD
8 MAYBE GONE TO THE DOOR AND THEN LEFT, AND WAS UNABLE -- OR
9 GATOR KEPT PULLING ME BACK TO THE PORCH OF THE HOUSE.

10 Q LET ME GET -- HYPOTHETICALLY SPEAKING, BASED ON YOUR AREA OF
11 EXPERTISE, SHOWING YOU STATE'S EXHIBIT NO. 1; NOW, AT THE
12 TIME OF THE TRACKING, SERGEANT BLACKWELL, WERE YOU AWARE OF
13 ANY INFORMATION THAT OFFICER TOWNSEND WAS GATHERING AT AN
14 AMOCO STATION ON TWO NOTCH ROAD? WERE YOU AWARE OF ANY OF
15 THAT AT THAT TIME?

16 A I DIDN'T HAVE ANY INFORMATION OTHER THAN WHAT I ADVISED WHEN
17 I FIRST GOT THERE. I WAS TOLD WHAT THE CRIME WAS AND WHAT
18 LITTLE BIT OF INFORMATION ABOUT THE FOUR OR FIVE -- THERE
19 BEING FOUR OR FIVE SUBJECTS.

20 Q HYPOTHETICALLY SPEAKING, IF IN FACT YOU TRACKED A SUSPECT TO
21 2528 ORR STREET AND THAT SUSPECT WERE TO HAVE LEFT THAT
22 LOCATION IN WHATEVER DIRECTION AND GONE TO AN AMOCO STATION
23 THERE ON TWO NOTCH ROAD, AGAIN, HYPOTHETICALLY SPEAKING,
24 SHOULD GATOR HAVE BEEN ABLE --

25 MR. SNEED: YOUR HONOR.

1 THE COURT: YES, SIR. WHAT'S THE OBJECTION?

2 MR. SNEED: IT'S AN INSUFFICIENT BASIS, THE WAY HE'S
3 POSED THE HYPOTHETICAL.

4 THE COURT: WELL, LET HIM FINISH THE WHOLE THING. AND
5 IT MAY WELL BE THAT IT IS -- MAY ASSUME FACTS NOT IN
6 EVIDENCE, OR IT MAY BE AN IMPROPER HYPOTHETICAL. I'LL LET
7 HIM FINISH IT. GO AHEAD.

8 MR. SNEED: THANK YOU.

9 Q HYPOTHETICALLY SPEAKING, IF GATOR HAD TRACKED A SUSPECT TO
10 2528 ORR STREET AND THAT SUSPECT WOULD HAVE LEFT THE
11 RESIDENCE AND GONE OVER TOWARDS THE TWO NOTCH ROAD AREA,
12 HYPOTHETICALLY SPEAKING NOW, WHEN YOU TOOK GATOR INTO HIS
13 SEARCH MODE AWAY FROM THE PORCH, SHOULD GATOR HAVE BEEN ABLE
14 TO PICK UP ON THAT SCENT?

15 THE COURT: BEFORE YOU ANSWER THE QUESTION, THE
16 OBJECTION IS ...?

17 MR. SNEED: IT ASSUMES FACTS NOT IN EVIDENCE.

18 THE COURT: IT IS AN IMPROPER HYPOTHETICAL AND I WON'T
19 ALLOW IT. PLEASE GO AHEAD AND CONTINUE. THERE'S A MIDDLE
20 STEP. I DON'T WANT TO ALERT TO WHAT IT IS. I'M SIMPLY NOT
21 GOING TO INDULGE IN THAT.

22 MR. GASSER: I UNDERSTAND.

23 THE COURT: GO AHEAD.

24 Q (BY MR. GASSER) WHEN YOU DID THE SWEEPING TECHNIQUE WITH
25 GATOR, WHERE WAS IT THAT GATOR -- WHAT DID GATOR KEEP ON

1 COMING BACK TO?

2 A HE KEPT GOING BACK TO THE FRONT PORCH OF THE RESIDENCE.

3 Q AND IF A PERSON WERE TO LIVE IN THAT RESIDENCE, HAVE CLOTHES
4 IN THAT RESIDENCE, WATCH TELEVISION IN THAT RESIDENCE, SLEEP,
5 EAT IN THAT RESIDENCE; AS AN EXPERT IN THE AREA OF YOU OF DOG
6 TRACKING AND DOG HANDLING, WHERE WOULD YOU -- WOULD YOU
7 EXPECT THERE TO BE A STRONG SCENT OF THAT PERSON IN THAT
8 RESIDENCE?

9 A I WOULD.

10 MR. GASSER: BEG THE COURT'S INDULGENCE.

11 THE COURT: YES, SIR.

12 MR. GASSER: THAT'S ALL I HAVE, YOUR HONOR.

13 THE COURT: OKAY. MR. SNEED.

14 MR. SNEED: MAY IT PLEASE THE COURT.

15 THE COURT: YES, SIR.

16 CROSS EXAMINATION BY MR. SNEED:

17 Q SERGEANT, I'M ROB SNEED. I HAVE JUST A FEW QUESTIONS FOR
18 YOU.

19 A YES, SIR.

20 Q WHEN YOU'RE TALKING ABOUT A DOG PICKING UP A SCENT, THE DOG
21 CAN'T TELL YOU THE AGE OF THE SCENT, RIGHT?

22 A NO, SIR, HE CANNOT.

23 Q AND IT CAN'T TELL YOU WHO LEFT THE SCENT?

24 A NO, SIR, IT CANNOT.

25 Q AND GATOR HAS PICKED UP IN AT LEAST REAL LIFE SITUATIONS OR

1 A I WAS NOT.

2 Q OKAY. SO YOU'D NEVER BEEN THERE BEFORE?

3 A I'D BEEN TO THE CEMETERY, BUT I'VE NEVER BEEN TO THE PARK,
4 WHICH IS KIND OF BEHIND THE STADIUM AND THE SCHOOL.

5 Q AND WHEN THE SOLICITOR WAS ASKING YOU ABOUT THE LIGHTING
6 CONDITIONS OUT THERE -- OKAY?

7 A YES, SIR.

8 Q YOUR REPORT DOESN'T SAY ANYTHING AT ALL ABOUT LIGHTING, DOES
9 IT?

10 A I BELIEVE IT DOESN'T. NO, SIR.

11 Q OKAY. AND YOUR REPORT DOESN'T SAY ANYTHING ABOUT THE CLOUD
12 COVER THAT EVENING, DOES IT?

13 A NO, SIR, IT DOESN'T.

14 Q AND IT DOESN'T SAY ANYTHING ABOUT RECEIVING OVER A HALF INCH
15 OF RAIN IN COLUMBIA THAT DAY, DOES IT?

16 A NO, SIR, IT DOES NOT.

17 Q OKAY. AND LET'S SEE. NOW, YOU'RE AWARE IN THE PARK -- IT
18 MAY NOT SHOW UP ON THIS DIAGRAM -- THAT THERE'S SEVERAL LARGE
19 PINE TREES IN THIS AREA? DO YOU RECALL THAT?

20 A THERE ARE SEVERAL PINE TREES IN THAT AREA. YES, SIR.

21 Q WOULD IT BE FAIR TO SAY TEN TO FIFTEEN PINE TREES ALL
22 THROUGHOUT THIS PARK AREA?

23 A I COULDN'T TELL YOU THE NUMBER OF PINE TREES.

24 Q BUT IT IS SEVERAL?

25 A THERE ARE SEVERAL.

1 Q OKAY. AND THEY'RE TALL PINE TREES?

2 A YES, SIR, THEY ARE.

3 Q OKAY. NOW, YOU INDICATED YOU DON'T RECALL WHAT THE LIGHTING
4 SOURCE WAS FOR THE PARK AREA, RIGHT?

5 A THAT'S CORRECT.

6 Q OKAY. YOU WOULD AGREE WITH ME THAT THERE'S NO LIGHTS IN THE
7 CEMETERY?

8 A I CAN'T SAY THAT THERE IS AND I CAN'T SAY THERE ISN'T.

9 Q OKAY. FINE. LET ME TALK ABOUT THE ROUTE THAT GATOR TOOK.
10 NOW, YOU SAID YOU STOPPED AT THE SAND BY THE MAUSOLEUM,
11 RIGHT?

12 A THAT'S CORRECT.

13 Q OKAY. THAT'S BECAUSE YOU'RE TRYING TO SEE IF THERE'S PERHAPS
14 SHOE PRINT MARKS IN THE GROUND?

15 A THAT'S CORRECT.

16 Q OKAY. SO YOU STOPPED THERE AND SO YOU COULD CHECK OUT SHOE
17 PRINT MARKS?

18 A THAT IS CORRECT.

19 Q AND THEN WHEN YOU WERE DONE LOOKING AT THEM, GATOR CONTINUED
20 TO PULL FORWARD?

21 A THAT'S CORRECT.

22 Q GATOR DIDN'T GO IN THE MAUSOLEUM?

23 A NO, SIR, HE DID NOT.

24 Q OKAY. LET'S SEE. NOW, WHEN YOU GET TO YOUR -- THIS IS THE
25 PLACE ON ORR STREET. ABOUT WHAT TIME WAS THAT?

1 A IT PROBABLY TOOK ME TEN MINUTES OR LESS TO COMPLETE THE WHOLE
2 TRACK. SO, SOMEWHERE IN THE VICINITY OF 1:30 IN THE MORNING.

3 Q OKAY. BECAUSE YOU STARTED 1:10, 1:15 OR THEREABOUTS?

4 A THAT'S CORRECT.

5 Q AND SO YOU'RE HERE 1:30'ISH?

6 A ABOUT. YES, SIR.

7 Q OKAY. AND GATOR STOPS HERE ON THE FRONT PORCH?

8 A THAT'S CORRECT.

9 Q OKAY. AND GATOR, HE CAN TRACK SCENTS ON PAVEMENT, RIGHT?

10 A OH, YES, SIR.

11 Q ON ASPHALT OR SIDEWALK OR OTHER -- OR HARD SURFACES, RIGHT?

12 A YES, SIR.

13 Q OKAY. HE --

14 A A YES, SIR, HE CAN.

15 Q OKAY. NOW, LET'S SEE. NOW, WHEN YOU SAID YOU TRIED TO PULL
16 GATOR AWAY, I DON'T WANT TO -- I WANT TO MAKE SURE I HAVE THE
17 RIGHT TERMS. IS IT SEARCH MODE? IS THAT WHAT YOU SAID?

18 A HE -- THAT'S RIGHT. HE INDICATED THAT HE HAD GONE INTO A
19 SEARCH MODE. YES, SIR.

20 Q AND FOR YOU, IS IT SWEEP MODE?

21 A SWEEP.

22 Q OKAY. AND SO WHEN YOU TRIED TO LEAVE ORR STREET TO SEE IF
23 GATOR MIGHT PICK UP A SCENT?

24 A YES, SIR.

25 Q AND YOU TRIED TO DO THAT, AND HE KEPT GOING BACK TO ORR

1 STREET?

2 A HE DID.

3 Q OKAY. SO GATOR NEVER LED YOU TO OGDEN STREET?

4 A NO, SIR. I NEVER WENT TO OGDEN STREET.

5 Q AND GATOR NEVER LED YOU TO OGDEN STREET?

6 A NO, SIR, HE DID NOT.

7 Q GATOR NEVER LED YOU TO THE AMOCO?

8 A NO, SIR.

9 MR. SNEED: BEG THE COURT'S INDULGENCE, YOUR HONOR.

10 THE COURT: YES, SIR.

11 MR. SNEED: NO FURTHER QUESTIONS, YOUR HONOR.

12 THE COURT: MR. SHUPPER.

13 MR. SHUPPER: BEG THE COURT'S INDULGENCE, YOUR HONOR.

14 THE COURT: OH, YES, SIR. CERTAINLY.

15 MR. SHUPPER: NO QUESTIONS OF THIS WITNESS, YOUR HONOR.

16 THE COURT: REDIRECT, MR. GASSER?

17 MR. GASSER: BRIEFLY, YOUR HONOR.

18 REDIRECT EXAMINATION BY MR. GASSER:

19 Q GATOR NEVER LED YOU TO THE AMOCO. DO YOU RECALL THAT
20 QUESTION BY MR. SNEED?

21 A I DO.

22 Q NOW THAT YOU SIT THERE IN THE JURY OR IN THE WITNESS BOX;
23 PRIOR TO COMING TO COURT THIS WEEK, HAD YOU HAD AN
24 OPPORTUNITY TO BECOME FAMILIAR WITH SOME OF THE EVIDENCE THAT
25 THE STATE INTENDED ON INTRODUCING?

1 A I DID.

2 Q DID YOU KNOW ABOUT THAT EVIDENCE WHEN YOU WERE UP ON THE
3 PORCH AND DOING YOUR SWEEPING TECHNIQUES WITH GATOR?

4 A NO, SIR, I DID NOT.

5 Q AS AN EXPERT IN THIS AREA NOW, BASED ON YOUR RESPONSE TO MR.
6 SNEED'S QUESTION, THE FACT THAT GATOR DID NOT LEAD YOU TO THE
7 AMOCO STATION AFTER HE WAS ON THE PORCH AT 2528 ORR STREET
8 AND YOU DID YOUR SWEEPING TECHNIQUES, AS AN EXPERT IN THIS
9 AREA, DOES THAT TELL YOU THAT THE SCENT THAT THE PERSON THAT
10 GATOR WAS TRACKING COULD NOT HAVE GONE TO THE AMOCO STATION?

11 MR. SNEED: OBJECTION.

12 THE COURT: NO. LET HIM ANSWER IT.

13 A NO, SIR. IT DOES NOT TELL ME THAT HE DIDN'T GO SOMEWHERE
14 ELSE.

15 Q AND WHY IS THAT?

16 A WELL, I HAVE TO ADMIT THAT HAD I HAD THIS INFORMATION THEN, I
17 WOULD HAVE TAKEN GATOR FURTHER FROM THE PORCH OR FROM THE
18 FRONT OF THE RESIDENCE TO SWEEP HIM. BUT I WAS -- I WAS
19 FOCUSED ON THAT AREA, GENERAL AREA, AND GATOR KEPT GOING BACK
20 TO WHERE THE STRONGEST SCENT WAS AT THAT TIME. I DIDN'T TAKE
21 HIM FAR ENOUGH AWAY FROM THE FRONT OF THE HOUSE IN MY OPINION
22 TO GET HIM AWAY FROM THAT STRONG SCENT THAT WAS COMING FROM
23 THE HOUSE OF WHAT I BELIEVE TO BE THE PERSON, THE SCENT THAT
24 HE WAS TRACKING.

25 MR. GASSER: THAT'S ALL I HAVE, YOUR HONOR.

1 STIPULATION NUMBER 2. ROBERT ANTHONY JAMES WAS ENROLLED
2 IN C. A. JOHNSON HIGH SCHOOL IN THE 1990/91 SCHOOL YEAR AND
3 THE 1991/92 SCHOOL YEAR.

4 STIPULATION NUMBER 3. KENNETH JAMES ATTENDED SIXTH
5 GRADE 1988/1989; SEVENTH GRADE, 1989/1990 AT W. A. PERRY
6 MIDDLE SCHOOL.

7 STIPULATION NUMBER 4, KENNETH JAMES HAS NEVER ATTENDED
8 C. A. JOHNSON HIGH SCHOOL.

9 THE COURT: OKAY.

10 MR. GASSER: WOULD YOU INDULGE ME ONE MOMENT, TOO?

11 THE COURT: CERTAINLY. MR. STRICKLER OR MR. SNEED AND
12 MR. SHUPPER, YOU AGREE WITH WHAT MR. GASSER JUST SAID, DON'T
13 YOU?

14 MR. STRICKLER: YES, YOUR HONOR.

15 MR. SHUPPER: YES, SIR.

16 MR. SNEED: YES, SIR.

17 THE COURT: OKAY.

18 MR. STRICKLER: AND, YOUR HONOR, FOR KENNETH JAMES, —

19 THE COURT: YES, SIR.

20 MR. STRICKLER: — WE WOULD STIPULATE THAT HE HAS A
21 TATTOO ON HIS LEFT ARM THAT SAYS "K" AND UNDERNEATH IT THE
22 WORD "DOG", D-O-G.

23 THE COURT: ALL RIGHT. THANK YOU. AND, AGAIN, THAT'S
24 AN AGREEMENT BETWEEN THE PARTIES. OKAY. ANYTHING FURTHER
25 FOR TODAY? NOT HOLDING YOU TO ANYTHING. I MEAN, OBVIOUSLY

1 THE COURT: OKAY. YES, SIR. MR. GASSER, YOU HAD
2 INDICATED WE NEEDED TO DO SOMETHING ON THE RECORD AT THIS
3 TIME, I THOUGHT.

4 MR. GASSER: OH. I JUST WANTED TO MAKE SURE THAT I -- I
5 ALWAYS TRY AND GET WITH THE COURT REPORTER TO MAKE SURE WE'VE
6 MOVED WHATEVER WE WANT TO MOVE INTO EVIDENCE.

7 THE COURT: YOU ALL CAN DO THAT. AND MAKE SURE THAT
8 EVERYTHING IS DONE TOMORROW OR TONIGHT OR WHENEVER YOU WANT
9 TO. YOU CAN GO OVER IT TONIGHT AND SEE. JENNY CAN TELL YOU
10 WHAT IT IS. ANYTHING FROM THE DEFENDANTS, EITHER OF THE
11 DEFENDANTS?

12 MR. STRICKLER: NOT FOR KENNETH JAMES, YOUR HONOR.

13 MR. SHUPPER: YOUR HONOR, IF I UNDERSTOOD YOU, YOU WOULD
14 ALLOW ME TO HAND THOSE COURT EXHIBITS TO --

15 THE COURT: I WANT YOU TO -- YOU MAY HAND EN MASSE ALL
16 OF THE DOCUMENTS THAT YOU HAVE PRESENTED TO ME. AND PROBABLY
17 PUT THEM IN A FOLDER.

18 MR. SHUPPER: YES, SIR.

19 THE COURT: ONE FOLDER, IN SUPPORT OF YOUR MOTIONS. AND
20 I WILL SPECIFICALLY STATE FOR THE RECORD THAT I HAVE
21 CONSIDERED THOSE THINGS. THEY'RE THE SAME THINGS THAT YOU
22 HAD PROVIDED PREVIOUSLY TO COUNSEL FOR THE STATE, TO MS.
23 FRYAR AND MR. GASSER.

24 MR. SHUPPER: YES, SIR.

25 THE COURT: AND I'VE CONSIDERED THOSE. AND TO THE

1 EXTENT THAT YOUR MOTIONS WERE DENIED, OBVIOUSLY YOUR
2 ARGUMENTS WERE REJECTED. SO PLEASE DO THAT. AND YOU CAN PUT
3 THAT ON THE RECORD NOW.

4 MR. SHUPPER: THANK YOU.

5 MR. STRICKLER: AND I'M SORRY, YOUR HONOR. I MISSPOKE
6 MYSELF. I'VE JUST ASKED MR. SNEED TO RUN UPSTAIRS. I DON'T
7 KNOW WHAT'S GOING TO HAPPEN FIRST THING TOMORROW MORNING
8 MYSELF AT THIS PARTICULAR POINT.

9 THE COURT: SURE.

10 MR. STRICKLER: BUT IN AN ATTEMPT TO BE OF ASSISTANCE TO
11 THE COURT AND IN CASE WE MOVE ALONG FASTER THAN EVEN I
12 ANTICIPATE, HE'S GONE UP TO GRAB REQUESTS TO CHARGE WHICH
13 WE'LL DELIVER TO YOU AT THIS POINT IN TIME JUST SO YOU'LL
14 HAVE —

15 THE COURT: OH. I'LL PROBABLY CURL UP WITH THEM TONIGHT
16 SINCE THERE'S NO BASEBALL GAME.

17 MR. STRICKLER: I KNOW. THERE WAS A BASEBALL GAME.

18 (OFF THE RECORD)

19 THE COURT: YOU ALL COME UP HERE, TOO. THAT'S IT FOR
20 THE RECORD FOR THE DAY.

21 (OFF THE RECORD)

22 (COURT'S EXHIBIT NO. 29, ROBERT JAMES'S SUPPORTING DOCUMENTS
23 FOR MOTIONS, MARKED FOR IDENTIFICATION ONLY)

24 (WHEREUPON, THE PROCEEDINGS ARE CONCLUDED FOR THE DAY, TO BE
25 RECONVENED TOMORROW MORNING)

1 FRIDAY, SEPTEMBER 24, 1999

2 THE COURT: I THINK THE JURY IS STILL ORDERING LUNCH.
3 SO MAYBE WE'VE GOT A SECOND OR TWO TO TALK. WHAT ARE WE
4 LOOKING LIKE TODAY HERE?

5 MR. GASSER: YOUR HONOR, BEFORE WE REST WE WERE GOING TO
6 MOVE IN EVIDENCE STATE'S EXHIBIT 1, 13 AND 6 AS WELL AS THE
7 T-SHIRT AND THE CONDOM PACKAGES.

8 THE COURT: OKAY. 1, 13, AND 6, T-SHIRT, AND THE CONDOM
9 PACKAGES. GOING TO BEING ANY OBJECTION TO ANY OF THOSE OTHER
10 THAN AS PREVIOUSLY URGED?

11 MR. STRICKLER: NOT FROM KENNETH JAMES.

12 THE COURT: I AM SORRY. I DON'T EVEN HAVE THOSE -- THE
13 FELLOWS IN HERE. OKAY.

14 MR. STRICKLER: YOUR HONOR.

15 THE COURT: HUH?

16 MR. STRICKLER: MAY I STICK MY HEAD OUT AND MAKE SURE
17 THEY'RE ON THE WAY?

18 THE COURT: YEAH. ASK JOE TO BRING THEM IN.

19 (PAUSE)

20 MR. STRICKLER: THEY ARE EN ROUTE FROM THE DOWNSTAIRS
21 I'M INFORMED.

22 THE COURT: I DIDN'T KNOW YOU SPOKE FRENCH, MR.
23 STRICKLER.

24 MR. STRICKLER: IF THAT WAS FRENCH, I WOULDN'T RECOGNIZE
25 IT. BUT THEN, THERE ARE THOSE WHO WON'T RECOGNIZE ENGLISH AS

1 A LANGUAGE I SPEAK.

2 THE COURT: I LOVE IT WHEN YOU SPEAK FRENCH, GOMEZ.

3 REMEMBER THAT? EIFFEL TOWER, CHAMPS ELYSEE'.

4 (STATE'S EXHIBIT NOS. 1, 6, 13, 16 AND 26 RECEIVED IN
5 EVIDENCE)

6 THE COURT: THEN YOU'RE GOING TO REST, MR. GASSER?

7 MR. GASSER: YES, SIR.

8 THE COURT: MR. STRICKLER, DO YOU THEN INTEND TO HAVE
9 ANY EVIDENCE PRESENTED?

10 MR. STRICKLER: UNLESS MY CLIENT HAS CHANGED HIS MIND

11 —

12 THE COURT: STILL WAITING?

13 MR. STRICKLER: — BETWEEN YESTERDAY AND TODAY, THEN
14 THE ANSWER WOULD BE NO.

15 THE COURT: OKAY.

16 MR. STRICKLER: SUBJECT TO YOUR HONOR —

17 THE COURT: CHATTING WITH HIM?

18 MR. STRICKLER: — CONFIRMING THAT ON THE RECORD, THE
19 ANSWER IS NO.

20 THE COURT: OKAY. AND, MR. SHUPPER, I'D BE SURPRISED IF
21 YOU DIDN'T BECAUSE YOU'VE INDICATED THAT YOU'VE GOT SOME
22 PHYSICIAN OR SOME —

23 MR. SHUPPER: I HAVE THREE WITNESSES, YOUR HONOR.

24 THE COURT: THUS DEPRIVING THE DEFENSE OF THE LAST
25 ARGUMENT.

1 (PAUSE)

2 MR. SHUPPER: OF COURSE THAT IS SUBJECT TO THE RULING ON
3 THE MOTION IN LIMINE ON THE ---

4 THE COURT: SAY IT LOUD SO THAT SHE ---

5 MR. SHUPPER: --- ON THE PRIOR CONVICTION OF MY CLIENT
6 AND OF COURSE HIS CONCURRENCE.

7 THE COURT: OKAY. WELL, WAIT UNTIL EVERYBODY GETS
8 SEATED AND WE'LL FIGURE ALL THIS STUFF OUT. OKAY. NOW THAT
9 MR. KENNETH JAMES AND MR. ROBERT JAMES ARE IN THE COURTROOM,
10 I BELIEVE YOU'D INDICATED, MR. GASSER, THAT THE STATE HAS NO
11 FURTHER WITNESSES TO PRESENT BUT THAT YOU MOVE THE ADMISSION
12 OF I BELIEVE SEVERAL EXHIBITS. AND PLEASE RESTATE THEM.

13 MR. GASSER: YES, SIR, YOUR HONOR. I'LL STATE THEM FOR
14 -- STATE'S EXHIBIT 1 PREVIOUSLY IDENTIFIED AS A DIAGRAM OF
15 THE WHOLE SCENE AREA, STATE'S EXHIBIT 13 PREVIOUSLY
16 IDENTIFIED AS A DIAGRAM OF THE PLAYGROUND AREA, STATE'S
17 EXHIBIT 6, THE DIAGRAM OF THE DOG TRACKING, AS WELL AS ---

18 COURT REPORTER: 16 AND 26.

19 MR. GASSER: AS WELL AS 16 AND 26 WHICH ARE THE T-SHIRT
20 AND THE OPEN OR THE TORN CONDOM PACKAGES.

21 THE COURT: OKAY. AND I BELIEVE THAT THAT IS WITHOUT
22 OBJECTION FROM KENNETH JAMES. IS THAT CORRECT?

23 MR. STRICKLER: THAT'S CORRECT, SIR.

24 THE COURT: AND FROM ROBERT JAMES AS WELL. IS THAT
25 CORRECT, MR. SHUPPER?

1 MR. SHUPPER: YES, YOUR HONOR.

2 THE COURT: OKAY. SO THOSE ITEMS NOW HAVE BEEN MOVED
3 INTO THE RECORD AND ARE ACCEPTED. BEYOND THAT, IT'S MY
4 UNDERSTANDING THAT YOU INTEND TO REST WHEN THE JURY COMES
5 BACK INTO THE COURTROOM. IS THAT CORRECT, MR. GASSER?

6 MR. GASSER: YES, SIR, YOUR HONOR.

7 THE COURT: ASSUMING THAT THAT IS THE CASE, I HATE TO
8 KEEP THEM WAITING IN THERE. I'D LIKE FOR THEM TO DO
9 SOMETHING. MR. STRICKLER, DOES YOUR CLIENT INTEND TO TAKE
10 THE STAND IN HIS DEFENSE, OR DOES HE INTEND TO PRESENT
11 EVIDENCE?

12 MR. STRICKLER: MAY I HAVE JUST ONE MOMENT?

13 THE COURT: SURE.

14 (PAUSE)

15 MR. STRICKLER: THANK YOU, YOUR HONOR. I'M INFORMED BY
16 MR. JAMES, WE'VE DISCUSSED THIS BEFORE, I JUST VERIFIED IT
17 WITH HIM HERE IN COURT, HE DOES NOT DESIRE TO TAKE THE STAND.
18 AND I'D ASK YOUR HONOR TO CONDUCT SOME COLLOQUY WITH HIM IN
19 THAT REGARD FOR PURPOSES OF THE RECORD. I THINK I'VE FULLY
20 INFORMED HIM.

21 THE COURT: SURE.

22 MR. STRICKLER: AND ABSENT HIS TESTIMONY, DEFENSE FOR
23 HIM WOULD NOT PRESENT ANY OTHER WITNESSES.

24 THE COURT: OKAY. MR. JAMES, YOU CAN — NO. YOU CAN
25 REMAIN SEATED. I JUST MAKE THE LAWYERS STAND UP. THAT'S

1 FINE. MR. STRICKLER HAS TOLD ME THAT YOU'VE TALKED WITH HIM
2 AND MR. SNEED AND IT'S YOUR DECISION TO EXERCISE YOUR
3 CONSTITUTIONAL RIGHT NOT TO TAKE THE WITNESS STAND. IS THAT
4 CORRECT?

5 MR. KENNETH JAMES: YES, SIR.

6 THE COURT: OKAY. NOW, UNDERSTAND THIS. YOU HAVE A
7 RIGHT, AN ABSOLUTE RIGHT TO TAKE THE WITNESS STAND, BE SWORN,
8 AND TO PRESENT YOUR VERSION OF THE FACTS TO THIS JURY, TO
9 TESTIFY IN YOUR OWN BEHALF AND PRESENT WHATEVER EVIDENCE YOU
10 CHOOSE. SUBJECT ONLY TO CROSS EXAMINATION OF COURSE. AND
11 ARE THERE ANY IMPEACHABLE OFFENSES?

12 MR. STRICKLER: NOT THAT I'M AWARE OF, YOUR HONOR.

13 MR. GASSER: NO, SIR, YOUR HONOR.

14 THE COURT: SO THEY WOULDN'T EVEN HAVE AN IMPEACHABLE
15 OFFENSE. I'M NOT TRYING TO TALK YOU INTO ANYTHING OR OUT OF
16 ANYTHING. THEY WOULD NOT HAVE ANY CRIMES THAT YOU'VE
17 COMMITTED IN THE PAST THAT THEY COULD BRING UP TO WEAKEN THE
18 CREDIBILITY OF YOUR TESTIMONY.

19 YOU ALSO HAVE AN ABSOLUTE CONSTITUTIONAL RIGHT NOT TO
20 TAKE THE WITNESS STAND, IN WHICH CASE OF COURSE YOU ARE NOT
21 SUBJECT TO ANY CROSS EXAMINATION. AND OF COURSE ALSO THAT
22 ENTITLES YOU TO A CHARGE, AS I TOLD THE JURY ON A NUMBER OF
23 OCCASIONS ALREADY, THAT YOU DON'T HAVE ANYTHING TO PROVE AND
24 THAT I WOULD CHARGE THEM THAT YOUR FAILURE TO TAKE THE
25 WITNESS STAND IS SOMETHING THEY CAN'T EVEN TAKE INTO

1 CONSIDERATION WHEN THEY GO BACK AND BEGIN DELIBERATING. DO
2 YOU UNDERSTAND THAT?

3 MR. KENNETH JAMES: YES, SIR.

4 THE COURT: THE ONLY THING I REALLY I GUESS WANT TO KNOW
5 FROM YOU AT THIS POINT IN TIME, BECAUSE IT ISN'T MY BUSINESS
6 WHAT YOU DO, WHAT I'D LIKE TO KNOW IS, HAVE YOU HAD ENOUGH
7 TIME TO DISCUSS THIS IMPORTANT DECISION WITH YOUR ATTORNEYS?

8 MR. KENNETH JAMES: YES, SIR.

9 THE COURT: AND DO YOU FEEL COMFORTABLE WITH THAT
10 DECISION?

11 MR. KENNETH JAMES: YES, SIR.

12 THE COURT: AND THAT DECISION IS, YOU CHOOSE NOT TO TAKE
13 THE WITNESS STAND. IS THAT CORRECT?

14 MR. KENNETH JAMES: YES, SIR.

15 THE COURT: OKAY. THANK YOU. MR. SHUPPER, ASSUMING
16 THAT WE'RE AT THAT STAGE, I UNDERSTAND YOU INTEND TO PRESENT
17 THE TESTIMONY OF AT LEAST THREE WITNESSES. IS THAT CORRECT?

18 MR. SHUPPER: THAT'S CORRECT, YOUR HONOR.

19 THE COURT: AND THEY WOULD BE -- WOULD THAT INCLUDE MR.
20 ROBERT JAMES?

21 MR. SHUPPER: NO, YOUR HONOR.

22 THE COURT: OKAY. MR. ROBERT JAMES, LET ME SIMPLY ASK
23 YOU THIS. HAVE YOU HAD ENOUGH TIME TO DISCUSS THE DECISION
24 OF WHETHER OR NOT TO TAKE THE WITNESS STAND WITH YOUR
25 ATTORNEY?

1 MR. ROBERT JAMES: YES, SIR.

2 THE COURT: OKAY.

3 MR. ROBERT JAMES: YES, YOUR HONOR.

4 THE COURT: DO YOU FEEL COMFORTABLE WITH THAT DECISION?

5 MR. ROBERT JAMES: YES, YOUR HONOR.

6 THE COURT: YOU UNDERSTAND -- IS THERE ANY CRIME
7 PUNISHABLE BY MORE THAN A YEAR OR IMPORTING DISHONESTY THAT
8 THE STATE COULD POTENTIALLY USE TO IMPEACH MR. JAMES?

9 MR. GASSER: A CITY LEVEL RECEIVING STOLEN GOODS.

10 THE COURT: OKAY. SO THAT WOULD BE IT. THE ONLY THING
11 THEY COULD BRING UP AS IMPEACHMENT, MR. JAMES, WOULD BE A
12 CITY COURT CONVICTION FOR RECEIVING STOLEN GOODS. DO YOU
13 UNDERSTAND THAT?

14 MR. ROBERT JAMES: (NODS HEAD AFFIRMATIVELY)

15 THE COURT: AND I WOULD TELL -- YOU'VE GOT TO ANSWER
16 VERBALLY BECAUSE SHE'S GOT TO TAKE IT DOWN.

17 MR. ROBERT JAMES: YES, YOUR HONOR.

18 THE COURT: OKAY. I WOULD TELL THE JURY WHEN THAT CAME
19 UP THAT THEY COULD ONLY CONSIDER THAT IN IMPEACHING YOUR
20 CREDIBILITY OR IN DETERMINING YOUR CREDIBILITY AND NOT MAKING
21 IT MORE PROBABLE THAT YOU COMMITTED THIS OFFENSE. DO YOU
22 UNDERSTAND THAT?

23 MR. ROBERT JAMES: YES, YOUR HONOR.

24 THE COURT: OKAY. THAT BEING THE CASE, IF YOU'RE
25 COMFORTABLE WITH THE DECISION NOT TO TAKE THE WITNESS STAND

1 — YOU HAVE CHOSEN NOT TO TAKE THE WITNESS STAND. IS THAT
2 CORRECT?

3 MR. ROBERT JAMES: THAT'S CORRECT.

4 THE COURT: OKAY. IF YOU'RE COMFORTABLE WITH THAT, IF
5 YOU CHANGE YOUR MIND, YOU CAN OF COURSE LET ME KNOW AT ANY
6 TIME BEFORE THE CASE CLOSES. AND I APPRECIATE TALKING TO
7 BOTH YOU AND YOUR BROTHER IN THAT REGARD. MR. GASSER.

8 MR. GASSER: YOUR HONOR, JUST THAT IF MR. SHUPPER IS
9 CALLING ANY LAY WITNESSES, IF HE CALLS HIS PRIVATE
10 INVESTIGATOR, WE HAVE NO CONCERN ABOUT THAT WITH REGARDS TO
11 CRIMES OF MORAL TURPTITUDE NOR ANY EXPERT. BUT WE WOULD IF
12 THERE IS A LAY WITNESS ASK FOR HIS OR HER DATE OF BIRTH.

13 MR. SHUPPER: MR. MANIGO WHOSE DATE OF BIRTH I DON'T
14 KNOW AND —

15 THE COURT: IS THAT MR. MANIGO BACK THERE?

16 MR. SHUPPER: NO. MR. MANIGO IS OUTSIDE. THIS IS DR.
17 ALLEY. AND I HAVE A COPY OF HIS C.V.

18 THE COURT: MR. MANIGO IS A DOCTOR?

19 MR. SHUPPER: NO. MR. MANIGO WORKS FOR THE PARKS AND
20 RECREATION DEPARTMENT. HE'S OUTSIDE.

21 MR. GASSER: I'M NOT CONCERNED ABOUT THAT. THANK YOU.

22 THE COURT: OKAY.

23 MR. SHUPPER: MAY IT PLEASE THE COURT. MAY I APPROACH,
24 YOUR HONOR?

25 THE COURT: SURE. YES, SIR. THANKS. DON'T TALK TO ME

1 PRIVATELY NOW. I'M SORRY. I DON'T WANT TO BE RUDE TO YOU,
2 BUT —

3 MR. SHUPPER: I HAVE SUBMITTED TO THE COURT REPORTER
4 COPIES OF DR. ALLEY'S CURRICULUM VITAE AND THE REQUESTS TO
5 CHARGE ON BEHALF OF ROBERT JAMES.

6 THE COURT: OKAY.
7 (COURT'S EXHIBIT NO. 30, CURRICULUM VITAE OF DR. ALLEY,
8 MARKED FOR IDENTIFICATION ONLY)

9 THE COURT: WHAT DO YOU ANTICIPATE THE PROJECTED LENGTH
10 OF YOUR CASE TO BE, MR. SHUPPER, IF YOU CAN TELL ME?

11 MR. SHUPPER: PERHAPS TWO HOURS, YOUR HONOR. DEPENDING
12 ON CROSS, MAYBE AN HOUR AND A HALF.

13 THE COURT: OKAY. WELL, ONCE AGAIN, I'VE BLOWN IT,
14 GIVEN THE JURY, I HAVE THEIR LUNCH ARRIVING AT 1:15. SO
15 MAYBE WE'LL —

16 MR. SHUPPER: WELL, YOUR HONOR, IT COULD TAKE LONGER.

17 THE COURT: MAY WE'LL CHANGE THAT ANYWAY. I DON'T KNOW.
18 I DON'T KNOW. OKAY. MAYBE WE'LL BREAK WITH THE JURY AT
19 NOON. WHERE IS BETSY?

20 MR. GASSER: YOUR HONOR, DO YOU NOT THINK THAT WE
21 WOULDN'T BE ABLE TO GET THE TESTIMONY IN AND ALL THE CLOSING
22 ARGUMENTS IN AND BREAK FOR LUNCH AND YOU COME BACK AND CHARGE
23 THEM?

24 THE COURT: OH, I DON'T THINK SO. NOT THE WAY YOU ALL
25 MOVE. I DON'T MEAN THAT DERISIVELY. I JUST THINK THAT YOU

1 ALL ARE THOROUGH AND I THINK YOU'LL TAKE A LONG TIME ARGUING
2 THE CASE, TOO. BUT MAYBE WE WILL. WE'LL JUST SEE, KIND OF
3 SEE WHERE WE ARE. SHE DOESN'T HAVE TO ORDER IT RIGHT NOW
4 ANYWAY. OKAY. MR. BARROW, IF YOU WOULD, PLEASE, BRING THE
5 JURY IN.

6 (COURT'S EXHIBIT NO. 31, DEFENDANT ROBERT JAMES'S REQUESTS TO
7 CHARGE, MARKED FOR IDENTIFICATION ONLY)

8 (COURT'S EXHIBIT NO. 32, STATE'S REQUESTS TO CHARGE, MARKED
9 FOR IDENTIFICATION ONLY)

10 (JURY IN AT 9:22 A.M.)

11 THE BAILIFF: THE JURY IS ALL PRESENT, YOUR HONOR.

12 THE COURT: THANK YOU, MR. BARROW AND MR. HOLLIS. AND
13 THANK YOU, FOLKS, FOR YOUR PATIENCE. I'M ASSUMING THAT MS.
14 NOBLE HAS TAKEN YOUR LUNCH ORDERS. AND I DON'T KNOW WHEN
15 EXACTLY IT'S GOING TO ARRIVE. I MAY HAVE TO VARY THE TIME
16 DEPENDING UPON WHERE WE ARE WITH THE TRIAL TODAY. BUT AT
17 THIS POINT IN TIME, WE ARE READY TO RESUME. MR. GASSER, GO
18 AHEAD, PLEASE, SIR.

19 MR. GASSER: YOUR HONOR, SUBJECT TO MOVING THE ITEMS OF
20 EVIDENCE WE DISCUSSED ON THE RECORD INTO EVIDENCE, AT THIS
21 TIME THE STATE WOULD REST.

22 THE COURT: OKAY. AND THOSE ITEMS HAVE BEEN MOVED INTO
23 EVIDENCE —

24 MR. GASSER: I BELIEVE SO, YOUR HONOR.

25 THE COURT: — ON THE RECORD ALREADY WITHOUT OBJECTION

1 FROM EITHER DEFENSE COUNSEL. AT THIS POINT IN TIME WE WOULD
2 ORDINARILY DISMISS THE JURY AND TAKE UP MATTERS OF LAW. I'M
3 GOING TO ASK THE LAWYERS TO COME UP HERE AND LET'S DISCUSS
4 SOME THINGS HERE.

5 (WHEREUPON, THE FOLLOWING SIDE BAR CONFERENCE IS HAD)

6 THE COURT: MR. STRICKLER AND MR. SHUPPER, DO YOU HAVE
7 MOTIONS FOR DIRECTED VERDICT?

8 MR. STRICKLER: YES, SIR.

9 THE COURT: OKAY. AND ARE THEY OF SOME LENGTH?

10 MR. SNEED: I WOULD ESTIMATE TEN MINUTES OR LESS, YOUR
11 HONOR.

12 THE COURT: THEN I HAVE MADE A SERIOUSLY STUPID ERROR BY
13 BRINGING THESE FOLKS BACK IN HERE. OKAY.

14 MR. GASSER: IF YOU NEED THE STATE TO STIPULATE THAT
15 WHEN THEY MAKE THEIR MOTIONS IT WOULD BE AT THIS TIME OF THE
16 PROCEEDINGS, I AM WILLING TO DO THAT FOR ANY RECORD OF
17 APPEAL.

18 MR. STRICKLER: I DON'T HAVE A PROBLEM WITH THAT.

19 MR. SHUPPER: I'M JUST GOING TO RENEW MY MOTIONS MADE
20 PREVIOUSLY.

21 THE COURT: AND I WILL STATE FOR THE RECORD THAT I DO
22 NOT BELIEVE THAT THAT WOULD BE A PROCEDURAL DEFAULT UNDER ANY
23 PREVIOUS PRONOUNCEMENT OF THE SOUTH CAROLINA SUPREME COURT.

24 MR. STRICKLER: WITH PERMISSION OF THE COURT, I NEED TO
25 STATE ON THE RECORD THAT I AS LEAD COUNSEL FOR KENNETH JAMES

1 DO NOT BELIEVE, AND AM PROCEEDING ON THAT BELIEF, THAT THERE
2 WOULD BE ANY PROCEDURAL FAULT FROM PROCEEDING IN THAT
3 FASHION.

4 THE COURT: AND YOU FEEL THE SAME WAY, MR. SHUPPER?

5 MR. SHUPPER: YES, YOUR HONOR.

6 MR. SNEED: YOUR HONOR, JUST TO -- THIS IS A LIST OF --

7 MR. STRICKLER: DO IT LATER.

8 MR. SNEED: I'LL DO IT LATER.

9 (WHEREUPON, THE SIDE BAR CONFERENCE IS CONCLUDED)

10 THE COURT: ALL RIGHT, FOLKS. THANK YOU. WE'RE GOING
11 TO NOW PROCEED. MR. STRICKLER, IS THERE ANYTHING FROM
12 DEFENDANT KENNETH JAMES?

13 MR. STRICKLER: DEFENDANT KENNETH JAMES RESTS, YOUR
14 HONOR.

15 THE COURT: OKAY. AND, MR. SHUPPER, FROM DEFENDANT
16 ROBERT JAMES?

17 MR. SHUPPER: YES, YOUR HONOR. IF I'M NOT --

18 THE COURT: PLEASE BEGIN. CALL YOUR FIRST WITNESS.

19 MR. SHUPPER: YES, SIR. ROBERT JAMES CALLS MR. SCOTT
20 PARKER.

21 WINFIELD S. PARKER, BEING FIRST DULY
22 SWORN, TESTIFIES AS FOLLOWS:

23 THE COURT: THANK YOU. PLEASE TAKE THE WITNESS STAND,
24 SIR, AND STATE YOUR NAME. AND IF IT'S BARKER (SIC), IF IT'S
25 SPELLED AS IT TYPICALLY IS SPELLED, YOU DON'T HAVE TO SPELL

1 IT.

2 MR. PARKER: MY NAME IS NAME IS WINFIELD SCOTT PARKER.

3 I AM A PRIVATE INVESTIGATOR. THAT'S P-A-R-K-E-R.

4 THE COURT: PARKER. I'M SORRY.

5 DIRECT EXAMINATION BY MR. SHUPPER:

6 Q GOOD MORNING, MR. PARKER.

7 A GOOD MORNING.

8 Q MR. PARKER, COULD YOU TELL THE JURY WHERE YOU'RE CURRENTLY
9 EMPLOYED, PLEASE?

10 A YES. I'M A LICENSED PRIVATE INVESTIGATOR IN NORTH AND SOUTH
11 CAROLINA. I AM ON CONTRACT LEASE WITH B. J. JOHNS,
12 INVESTIGATIVE SERVICE HERE IN COLUMBIA.

13 Q AND HAVE YOU HAD THE OCCASION TO CONFER WITH ME AND
14 INVESTIGATE CERTAIN ASPECTS OF THIS INCIDENT ON BEHALF OF
15 ROBERT JAMES?

16 A YES, I HAVE.

17 Q AND DO YOU HAVE ANY PRIOR EMPLOYMENT IN THE AREA -- PRIOR
18 WORK EXPERIENCE IN THE AREA OF SKETCHING OR POLICE OR
19 INVESTIGATIVE WORK ASIDE FROM YOUR EMPLOYMENT WITH MR. (SIC)
20 JOHNS?

21 A YES, I DO. I HAVE -- WAS PREVIOUSLY EMPLOYED BY MECKLENBERG
22 COUNTY SHERIFF'S DEPARTMENT IN CHARLOTTE. I WAS EMPLOYED FOR
23 A PERIOD OF EIGHT YEARS. AND I ATTENDED BASIC POLICE ACADEMY
24 AT CHARLOTTE POLICE ACADEMY IN CHARLOTTE, NORTH CAROLINA.

25 Q AND DO YOU HAVE ANY SPECIAL TRAINING IN OTHER AREAS ASIDE

1 FROM POLICE WORK?

2 A YES. IN OTHER AREAS OTHER THAN POLICE WORK?

3 Q YES, SIR.

4 A I HAD CONTINUED EDUCATION WITH THE COMMUNITY COLLEGE IN
5 CHARLOTTE, CENTRAL PIEDMONT COMMUNITY COLLEGE.

6 Q AND WHAT AREA WAS THAT?

7 A THAT WAS ALSO IN ADVANCED POLICE TRAINING AND ADVANCED LAW
8 ENFORCEMENT TRAINING.

9 Q DID YOU TAKE CERTAIN COURSES REGARDING POLICE SKETCHING,
10 CRIME SCENE SKETCHING AND THINGS OF THAT NATURE?

11 A YES, I DID. THAT'S PART OF THE BASIC TRAINING. AND THEN I
12 TOOK ADVANCED TRAINING AND WAS ALSO ON A SWAT TEAM IN
13 CHARLOTTE, ON THE MECKLENBERG COUNTY SHERIFF'S DEPARTMENT
14 SWAT TEAM.

15 Q HAVE YOU BEEN TO THE AREA KNOWN AS T. S. MARTIN PARK WHERE
16 THIS INCIDENT OCCURRED?

17 A YES, I HAVE.

18 Q AND PURSUANT TO MY INSTRUCTIONS, DID YOU SKETCH AND DETAIL
19 SOME OF THE ASPECTS OF THE LOCATION?

20 A YES, I DID.

21 Q AND ...

22 (PAUSE)

23 MR. GASSER: YOUR HONOR, IF HE'S MOVING THESE OBJECTS
24 INTO EVIDENCE, ---

25 MR. SHUPPER: I ---

1 MR. GASSER: --- I HAVE NO OBJECTION TO HIM PROCEDURALLY
2 MOVING THEM INTO EVIDENCE. BUT I DON'T WANT THE COURT TO
3 THINK BECAUSE I HAVE NO OBJECTION TO HIM MOVING THEM INTO
4 EVIDENCE THAT WE AGREE WITH WHAT'S ON THE EVIDENCE.

5 THE COURT: SURE. I'LL ALSO -- I'LL TAKE THIS OCCASION
6 TO TELL THE JURY THAT WHEN EVIDENCE IS ADMITTED WITHOUT
7 OBJECTION OF THE OTHER SIDE, THE OTHER SIDE IS SAYING MERELY
8 THIS: WE AGREE THAT THIS EVIDENCE IS LAWFULLY ADMISSIBLE.
9 THEY'RE NOT SAYING WE AGREE WITH WHAT THE PARTY OFFERING IT
10 SAYS IT MEANS. OKAY? YOU UNDERSTAND WHAT I'M SAYING? THAT
11 IT DOES NOT HAVE THE EFFECT THAT THE PARTY OFFERING SAYS IT
12 HAS. WE'RE SIMPLY SAYING THAT IT'S -- AND THAT GOES FOR
13 EVERYTHING THAT THE DEFENSE HAS ADMITTED WITHOUT OBJECTION,
14 AND IT GOES FOR EVERYTHING THAT MR. GASSER IS ALLOWING TO BE
15 ADMITTED WITHOUT OBJECTION. SO PLEASE GO AHEAD, MR. SHUPPER.

16 MR. STRICKLER: I'M SORRY. EXCUSE ME. COULD I TAKE A
17 LOOK AT THEM FIRST?

18 THE COURT: OH. I'M SORRY.

19 MR. SHUPPER: YES. AND I'M REFERRING TO EXHIBITS
20 PREVIOUSLY MARKED DEFENDANT'S EXHIBITS 1 AND 2.

21 THE COURT: OKAY.

22 MR. SHUPPER: THESE ARE POSTER BOARD, SLIGHT
23 ENLARGEMENTS OF THOSE EXHIBITS. AND I WAS ---

24 MR. STRICKLER: IT WOULD ALSO BE WITHOUT OBJECTION FROM
25 KENNETH JAMES.

1 THE COURT: SURE.

2 MR. STRICKLER: THANK YOU.

3 Q (BY MR. SHUPPER) MR. PARKER, THESE ARE TWO SKETCHES MARKED
4 ROBERT JAMES EXHIBITS 1 AND 2. DO YOU RECOGNIZE THEM?

5 A YES, I DO.

6 Q AND DID YOU IN FACT DRAW THOSE DIAGRAMS?

7 A YES, I DID.

8 Q AND WERE THEY BASED UPON YOUR INVESTIGATION AND MEASUREMENTS
9 AT THE SCENE?

10 A YES, THEY WERE.

11 Q DO THEY ACCURATELY DEPICT THE AREA THAT YOU VISITED?

12 A YES, THEY DO.

13 Q AND THESE TWO ENLARGEMENTS, DO THEY ACCURATELY REFLECT THE
14 SCENE? IN FACT, ARE THEY NOT COPIES OF —

15 A YES.

16 Q — DEFENDANT'S EXHIBITS 1 AND 2?

17 A THEY ARE.

18 MR. SHUPPER: AT THIS POINT, YOUR HONOR, I'D LIKE TO
19 MOVE THE ENLARGEMENTS INTO EVIDENCE AS DEFENDANT'S EXHIBITS 1
20 AND 2.

21 MR. GASSER: NO OBJECTION.

22 THE COURT: WELL, OF COURSE THEY WOULDN'T BE 1 AND 2.

23 MR. SHUPPER: WELL, 3 AND 4.

24 THE COURT: THEY'D BE RENUMBERED. AND, MS. WILLIAMS,
25 RENUMBER THEM. RENUMBER THEM CORRECTLY. AND THEN LET HER

1 NUMBER THEM, MR. SHUPPER. AND THEN YOU CAN RESUME YOUR
2 EXAMINATION. DON'T SAY ANYTHING UNTIL SHE NUMBERS THEM.
3 OKAY?

4 (DEFENDANT ROBERT JAMES'S EXHIBIT NOS. 5 AND 6, ENLARGEMENTS,
5 MARKED AND RECEIVED IN EVIDENCE)

6 THE COURT: OKAY. 5 AND 6 NOW IN EVIDENCE WITHOUT
7 OBJECTION.

8 Q (BY MR. SHUPPER) AS YOU LOOK AT DEFENDANT'S EXHIBITS 5 AND 6
9 — MAY THE WITNESS COME DOWN AND PRESENT THESE FOR THE JURY'S
10 VIEW?

11 THE COURT: SURE. YES, SIR.

12 Q IF YOU COULD — IF YOU COULD COME OVER HERE, MR. PARKER, AND
13 AS FAR AS — AND SHOW THESE TO THE JURY. THE FIRST EXHIBIT,
14 DEFENSE NO. 5, DOES THAT REFLECT WHAT WE'LL DESCRIBE AS A
15 BROAD VIEW OF THE T. S. MARTIN PARK AND SURROUNDING AREA?

16 A YES, IT DOES.

17 Q AND DO YOU RECALL THE DATE THAT YOU MADE THAT PHOTOGRAPH,
18 THAT SKETCH?

19 A THAT SKETCH WAS ON OCTOBER THE 8TH. I DID ALL THE
20 PRELIMINARY MEASUREMENTS, DID THE BASIC SKETCH, WENT BACK,
21 DOUBLE CHECKED FOR ACCURACY TO MAKE SURE I HAD IT RIGHT. AND
22 THEN THE FINAL DRAFT WAS SUBMITTED ON OCTOBER THE 12TH OF
23 1998.

24 Q THANK YOU. AND DID YOU HAVE — DID YOU MARK THE AREA
25 INCLUDING ELEVATIONS AND RISES AS THEY APPEARED TO YOU?

1 A YES, I DID.

2 Q AND AS FAR AS ---

3 A DID YOU WANT THIS?

4 Q NO. WHAT I WANTED WAS THE EASEL, IF I MIGHT.

5 MR. SHUPPER: YOUR HONOR, I HAVE STATE'S EXHIBIT NO. 13.

6 THE COURT: MM-HMM (AFFIRMATIVE).

7 Q (BY MR. SHUPPER) AND AS YOU LOOK AT STATE'S EXHIBIT NO. 13,
8 MR. PARKER, DO YOU SEE SIMILARITIES BETWEEN THAT VIEW AND
9 STATE'S -- DEFENDANT'S EXHIBIT NO. 5?

10 A YES, I DO. IT'S NO. 6.

11 Q NO. 6 IS THE LARGE VIEW. I MEAN THE NARROW VIEW. PARDON ME.
12 NO. 6 IS SIMILAR TO STATE'S EXHIBIT NO. 13. AND WHEN YOU
13 WENT TO THE AREA, WOULD YOU SAY THAT BOTH STATE'S EXHIBIT NO.
14 6 -- I MEAN, DEFENDANT'S EXHIBIT NO. 6 AND STATE'S EXHIBIT
15 NO. 13 BOTH DEPICT THIS PICNIC TABLE AS BEING IN THIS
16 LOCATION IN RELATIONSHIP TO THIS SHED HERE?

17 A THAT'S CORRECT.

18 Q AND ON DEFENDANT'S EXHIBIT NO. 6, DID YOU ALSO HAVE OCCASION
19 TO MAKE MEASUREMENTS OF THE DISTANCE BETWEEN THE EXISTING
20 LIGHTING OR THE LIGHTS THAT STAND OUT IN THE PARKING LOT
21 AREA?

22 A YES, I DID.

23 Q AND WHAT IS THE DISTANCE FROM THE LIGHT -- DO YOU NOTE THE
24 DIRECTION THAT THESE LIGHTS SHINE?

25 A YES. THEY -- THEY WERE AIMED UP AND DIRECTLY AT EACH OTHER.

1 Q AND HOW HIGH WERE THESE LIGHT POLES?

2 A THE LIGHT POLES THEMSELVES WERE IN EXCESS OF 70 FEET.

3 Q AND WHAT IS THE DISTANCE FROM THE BENCH NOTED ON DEFENDANT'S
4 EXHIBIT NO. 6 TO THE LIGHT POLE POINTING IN THAT DIRECTION?

5 A IT WOULD BE 400 FEET.

6 Q AND THE NEARER LIGHT POLE, WHAT DIRECTION DOES THAT LIGHT
7 POINT?

8 A DIRECTLY OPPOSITE INTO THE LIGHT THAT'S -- THEY'RE FACING
9 EACH OTHER AND THEY FACE AT THE SAME HEIGHT DIRECTLY INTO
10 EACH OTHER. SO THEY TECHNICALLY WASH INTO EACH OTHER.

11 Q DO THEY POINT IN A DOWNWARD DIRECTION?

12 A NO, THEY DO NOT.

13 Q DO THEY HAVE WHAT I WOULD CALL DIRECTIONAL CONES?

14 A THEY HAVE DIRECTIONAL CONES, BUT THEY FACE DIRECTLY IN ONE
15 DIRECTION ONLY AND DIRECTLY AT EACH OTHER.

16 Q THESE AREN'T UNEXPOSED LIGHTS JUST CASTING LIGHT IN EVERY
17 DIRECTION?

18 A NO. NO.

19 Q OKAY. AND THESE LINES HERE ON DEFENDANT'S EXHIBIT NO. 6, DO
20 THEY SHOW AN ELEVATION?

21 A THEY DO.

22 Q AND WHAT WOULD BE YOUR ESTIMATE OF THE ELEVATION THERE?

23 A THE ELEVATION IS WHAT IN CONSTRUCTION TERMS IS CALLED BERMS
24 WHERE THEY BUILD UP DIRT THAT IS JUST NOT USABLE IN A
25 CONSTRUCTION SITE OR IN USED DIRT AND THEY BUILD IT UP OVER

1 ON THE SIDE. AND IT RISES TO ALMOST 18 FEET. IT JUST GOES
2 STRAIGHT UP AND THEN IT'S COMPLETELY IN SHRUBS JUST LIKE IT
3 IS INDICATED HERE, BUT IT RISES WAY, WAY UP.

4 Q AND DID YOU NOTE AN INDENTATION HERE WHERE THE FENCE WAS DOWN
5 WHEN YOU WENT THERE?

6 A THERE WAS A PATHWAY THROUGH THERE. I COULD NOT OBSERVE A
7 FENCE. EVERYTHING WAS SO OVERGROWN.

8 Q BUT THAT'S WHEN YOU WENT THERE ABOUT YEAR AGO?

9 A THAT'S CORRECT.

10 Q OKAY. AND TURNING NOW TO DEFENDANT'S EXHIBIT NO. 5, DOES
11 THAT SHOW A BROADER VIEW OF THE AREA IN QUESTION?

12 A YES, IT DOES.

13 Q AND DO YOU NOTE WHERE THE BALL PARKS ARE?

14 A YES. THE BALL PARKS ARE, AS IT'S DEPICTED HERE, ALSO JUST
15 COMPLETELY UP AND ABOVE, SITUATED -- IT ACTUALLY ENCOMPASSES
16 PART OF THE PARKING AREA AND BEHIND THE FOLIAGE HERE BEHIND
17 THIS AREA WHICH IS OVER HERE.

18 Q OKAY. AND AS YOU LOOK AT THE BALL PARKS, THEY'RE BEHIND IN
19 TERMS OF THE PICNIC AREA AND THE CEMETERY, CORRECT?

20 A YES.

21 Q FROM THIS VIEW?

22 A YES. IT WOULD BE IN THE NORTHERN QUADRANT OF THE PARK, AND
23 THE CEMETERY SITS TO THE SOUTHEASTERN SIDE.

24 Q AND DOES THIS AREA OVER HERE REFLECT PERRY MIDDLE SCHOOL AND
25 A LARGE FIELD?

1 A YES, IT DOES.

2 Q AND COULD YOU DESCRIBE WHAT YOU FOUND ALONG THIS DRIVEWAY
3 FROM GERMANY STREET DOWN TO THE PARKING AREA?

4 A THERE'S SMALL LIGHTS, BASICALLY COURTESY LIGHTS, THAT PROVIDE
5 SO NOBODY HITS THEIR FEET OR WHAT HAVE YOU ALONG THE WAY,
6 ALONG THE SMALL HEDGEROW THAT DOTS RIGHT ALONG THE ROAD
7 COMING IN THIS SAME ROAD YOU CAN SEE RIGHT HERE.

8 Q AND WHAT IS THE DISTANCE FROM THE GERMANY STREET ENTRANCE TO
9 THE PARKING AREA DOWN THERE?

10 A TWO-TENTHS OF A MILE.

11 Q YOU MEASURED THAT?

12 A I MEASURED FROM THIS POINT TO THIS POINT. IT'S TWO-TENTHS OF
13 A MILE.

14 Q OKAY. AND AS YOU LOOK AT THAT EXHIBIT, YOU'VE GOT SOME LINES
15 AND SUCH GOING UP TO THE AREA OF THE MAUSOLEUM, RIGHT?

16 A THAT'S CORRECT.

17 Q AND YOU'VE GOT SOME WHAT APPEAR TO BE SHRUB MARKINGS ALONG
18 THAT DRIVE AREA. COULD YOU DESCRIBE HOW THAT APPEARED TO YOU
19 WHEN YOU INSPECTED THE AREA?

20 A VERY SPARSE TYPE OF SHRUBBERY THAT IS, BUT IT'S LIKE A
21 HEDGEROW. IT RUNS ALONG THE EDGE OF THE ROAD DIVIDING THE
22 ROAD ITSELF FROM THE CEMETERY ITSELF. THERE IS NOTHING MORE
23 THAN MAYBE THREE FEET HIGH AT THE MOST.

24 Q OKAY. AND AS FAR AS THIS AREA BETWEEN THE TENNIS COURTS AND
25 THE SHED, WHAT DID THAT -- YOU'VE GOT DENSE FOLIAGE. COULD

1 YOU DESCRIBE HOW YOU FIND THAT AREA?

2 A SURE. THAT'S THIS AREA OVER HERE WHICH IS COMPLETELY FILLED
3 WITH PINE TREES, CONIFER, BASIC CONIFER TREES. AND THEY'RE
4 ALL PROBABLY IN EXCESS OF 80 FEET IN HEIGHT, VERY, VERY TALL.
5 AND THEY COMPLETELY -- YOU CAN STAND AT ANY POINT HERE AND
6 NOT SEE THE APARTMENTS BEHIND -- EXCUSE ME -- BEHIND OVER IN
7 HERE, AND JUST BARELY SEE THE TENNIS COURT OVER HERE.

8 Q AND THE AREA FROM THE -- ON DEFENSE EXHIBIT 5, FROM WHAT YOU
9 DESCRIBED AS A BERM GOING AROUND IN A CIRCULAR MOTION, CAN
10 YOU DESCRIBE THAT?

11 A NO. THAT'S MUCH LOWER, MUCH MORE DENSE IN LENGTH. IT'S A
12 VERY THICK SHRUBBERY. YOU CAN'T SEE THROUGH IT. YOU CAN'T
13 WALK THROUGH IT. THE ONLY PLACE YOU CAN WALK THROUGH IS THAT
14 LITTLE NARROW INDENTATION WHERE SOMEBODY HAS MADE A PATHWAY
15 THROUGH THERE.

16 Q SO THERE ARE SIMILARITIES BETWEEN THIS DRAWING, STATE'S
17 EXHIBIT 13 AND YOURS?

18 A YES, SIR.

19 Q BUT THERE ARE SOME --

20 MR. GASSER: OBJECTION, YOUR HONOR.

21 THE COURT: WHAT? AND THE OBJECTION IS HE'S TESTIFYING?

22 MR. GASSER: YES, SIR.

23 THE COURT: OKAY. YES.

24 Q ARE THERE SIMILARITIES BETWEEN --

25 MR. GASSER: THE SAME OBJECTION.

1 THE COURT: YEAH, MR. SHUPPER.

2 MR. SHUPPER: I'LL WITHDRAW.

3 THE COURT: I DON'T KNOW. WHY IS THAT THE SAME
4 OBJECTION?

5 MR. SHUPPER: I'LL WITHDRAW, YOUR HONOR.

6 THE COURT: THAT'S A LEADING QUESTION.

7 MR. SHUPPER: I'LL WITHDRAW, YOUR HONOR.

8 THE COURT: OKAY. THANK YOU.

9 Q (BY MR. SHUPPER) LOOKING AT STATE'S EXHIBIT NO. 13, DO YOU
10 NOTE ANY TREES IN THIS DRAWING HERE AS DEPICTED ON YOUR
11 DRAWING?

12 A I SHOW MORE TREES. I TRIED TO BE PRECISE AS TO EXACTLY WHERE
13 EACH TREE WAS IN LOCATIONS STRICTLY TO THIS PLAYGROUND AREA,
14 PICNIC TABLE AND THE BENCH, AND EACH TREE IS PRETTY MUCH
15 EXACTLY WHERE IT FALLS IN LINE WITH THESE.

16 Q SO YOU NOTED -- IS THIS CORRECT? DID YOU NOTE TREES HERE?

17 A I DID.

18 Q THESE LITTLE CIRCLES WITH THE CROSSES REPRESENT TREES?

19 A YES, THEY DO.

20 Q AND ON STATE'S EXHIBIT 13, HOW MANY TREES ARE IN THAT AREA
21 NEXT TO THE LITTLE JUNGLE GYM?

22 A JUST ONE.

23 Q OKAY. AND BACK HERE BETWEEN THE BENCH AND THE TENNIS COURT,
24 HOW MANY TREES -- YOU'VE WRITTEN DENSE TREE CANOPY, TALL
25 PINES. HOW MANY TREES DO YOU COUNT THERE?

1 A OKAY. THIS IS WHERE IT GETS VERY DENSE HERE AS FAR AS THE
2 ACTUAL TALL PINES. AND THIS IS KIND OF A CLEARED AREA
3 UNDERNEATH THE TREES, BUT IT IS DENSE TO WHERE YOU CAN JUST
4 BARELY SEE THE FRONT OF THIS TENNIS COURT. AND IT'S PROBABLY
5 AT LEAST SOMEWHERE IN THE NEIGHBORHOOD OF ABOUT 60, 70 FEET
6 FROM THIS POINT BACK TO THE TENNIS COURTS. YOU CAN SEE ON
7 THIS ONE -- IT'S A LITTLE MORE CLEAR THAN THIS ONE OR THE
8 OTHER. YOU SEE THIS LARGE DISTANCE BETWEEN THE TENNIS COURT
9 AND THIS, BUT IT'S ALL DENSE FOLIAGE FROM THAT POINT BACK.

10 Q OKAY, MR. PARKER. I HAVE NO FURTHER QUESTIONS, YOUR HONOR.
11 THANK YOU VERY MUCH, MR. PARKER. IF YOU'D RETURN TO THE
12 STAND.

13 THE COURT: MR. GASSER.

14 CROSS EXAMINATION BY MR. GASSER:

15 Q GOOD MORNING, MR. PARKER.

16 A GOOD MORNING, MR. GASSER.

17 Q ON DEFENDANT'S EXHIBIT 5 ---

18 A OKAY.

19 Q AND LET ME ---

20 A I'VE GOT A COPY OF IT HERE.

21 Q OH. YOU DO HAVE A COPY?

22 A YEAH. I DO HAVE A COPY.

23 Q ON DEFENDANT'S EXHIBIT 5, DO YOU SEE HERE WHERE YOU'D
24 INDICATED TO THE JURY THAT RIGHT ALONG THIS CORNER RIGHT HERE
25 IS EXTREME DENSE FOLIAGE WHERE YOU CAN'T EVEN SEE THROUGH IT

1 AND YOU CAN WALK THROUGH IT? IS THAT CORRECT?

2 A THAT'S CORRECT.

3 Q AND SHOWING YOU STATE'S EXHIBIT NO. 9, I'LL LET YOU TAKE A
4 LOOK AT THAT.

5 A THAT'S FINE.

6 Q OKAY. AND THAT WOULD BE STARTING ABOUT OVER IN THIS CORNER.
7 IS THAT CORRECT? WOULD THAT BE A FAIR STATEMENT?

8 A YES.

9 Q OKAY. AND YOU INDICATED THAT THAT -- ON YOUR DIAGRAM THAT
10 THAT IS DENSE FOLIAGE. IS THAT CORRECT?

11 A THAT'S CORRECT.

12 Q NOW, YOU ALSO -- ON DEFENSE EXHIBIT NO. 5 YOU REFER TO THIS
13 AREA WHERE ALL THE PARK EQUIPMENT IS AS DENSE FOLIAGE AS
14 WELL, CORRECT? I MEAN, DON'T YOU PUT THAT ON YOUR DIAGRAM?

15 A OKAY. THE CANOPY. THAT'S THE CANOPY OF THE PINE TREES.

16 Q OKAY. THAT'S WHAT I WANTED TO CLARIFY.

17 A YEAH. OKAY. THAT'S WHY I SAID IT'S LOW FOLIAGE THERE ON THE
18 EDGE. IT'S DENSE, VERY DENSE.

19 Q IN FACT, SHOWING YOU STATE'S EXHIBIT 7 AND 17 WHICH HAVE BEEN
20 IDENTIFIED AS BEING TAKEN THAT NIGHT OR THE EARLY MORNING
21 HOURS OF MAY 29TH, 1996, I MEAN, THERE IS NO FOLIAGE AROUND
22 THOSE PICNIC TABLES, THE BENCHES, ALL THE CHILDREN'S
23 PLAYGROUND EQUIPMENT. I MEAN, THERE'S NO FOLIAGE AROUND ALL
24 THAT MATERIAL AT ALL, IS THERE?

25 A NOT LOW FOLIAGE.

1 Q SO ON YOUR DEFENSE EXHIBIT THAT THE JURY WILL HAVE BACK IN
2 THEIR JURY ROOM, THIS PART OF THE DEFENDANT'S EXHIBIT 5, WHEN
3 IT SAYS DENSE FOLIAGE, YOU'RE TALKING ABOUT 80 FEET UP IN THE
4 AIR, CORRECT?

5 A THAT'S CORRECT. THAT'S ALL PINE TREES, UP, WITH THE
6 EXCEPTION OF THE BACK SIDE WHERE YOU POINTED OUT.

7 Q AND THE LIGHT THAT YOU'VE DESCRIBED TO THE JURY, THAT'S
8 COMING FROM THIS PARKING LOT AREA, CORRECT?

9 A THAT'S CORRECT.

10 Q AND THAT'S HIGH UP ON A POLE. I BELIEVE YOU TOOK THE --
11 WELL, I KNOW YOU COULDN'T CLIMB UP THERE AND MEASURE THE
12 LIGHT POLES. BUT IT'S HIGH UP ON THE POLES?

13 A APPROXIMATELY ABOUT 70 FEET.

14 Q THOSE ARE PRETTY POWERFUL LIGHTS. YOU'VE BEEN THERE AT
15 NIGHT, CORRECT?

16 A YES.

17 Q AND THEN THERE IS LIGHTS ON THE ROAD LEADING FROM GERMANY
18 STREET -- SHOWN ON STATE'S EXHIBIT NO. 1, MADAM COURT
19 REPORTER. FROM GERMANY STREET ALL THE WAY DOWN TO THE PARK,
20 THERE IS LOW LEVEL LIGHTS ON THAT ROAD, CORRECT?

21 A THERE ARE THREE.

22 Q OKAY. AND THEN TWO OVER HERE?

23 A THERE'S TWO ON THAT SIDE.

24 Q SO A TOTAL OF FIVE. IS THAT CORRECT?

25 A THAT'S CORRECT.

1 Q AND IT'S VERY EASY TO WALK FROM THIS ROADWAY RIGHT HERE IN
2 THE CEMETERY -- THIS ROAD ON THE CEMETERY, YOU CAN WALK RIGHT
3 ON THE -- TO THE PATHWAY OF THE ROAD THAT LEADS DOWN TO THE
4 PARKING AREA, CORRECT? IT'S VERY EASY TO DO?

5 A YOU WOULD WALK THROUGH A HEDGEWAY; BUT, YES.

6 Q IT'S A VERY LOW LYING HEDGEROW?

7 A THAT'S CORRECT.

8 Q AND THIS WHOLE CEMETERY AREA, THAT'S COMPLETELY OPEN, IS IT
9 NOT?

10 A THAT IS.

11 Q SO, COMPLETELY OPEN TO THE NIGHT SKY?

12 A THAT'S CORRECT.

13 Q OKAY. AND HAVE YOU BEEN OUT IN THAT CEMETERY AT NIGHTTIME?

14 A NOT ON THE CEMETERY; NO, SIR.

15 Q OKAY. DID YOU DRIVE OUT IN THAT AREA AT NIGHT?

16 A YES. OR -- YES.

17 Q YOU WERE IN THAT AREA AT NIGHT?

18 A YES.

19 Q AND YOU WOULD AGREE THAT TWO NOTCH ROAD IS A PRETTY HEAVILY
20 COMMERCIALIZED ROAD IN THAT AREA, IS IT NOT?

21 A TWO NOTCH ROAD IS, YES.

22 Q AND THERE ARE STREET LIGHTS ON TWO NOTCH ROAD, CORRECT?

23 A YES.

24 Q AND THERE ARE LIGHTING IN THE APARIMENT COMPLEX PARK, LIKE
25 MOST APARIMENT COMPLEXES HAVE LIGHTING AT NIGHT FOR SECURITY

1 PURPOSES, CORRECT?

2 A I CAN'T TESTIFY TO THAT. I HAVE BEEN IN THOSE APARTMENTS AT
3 NIGHT ON ANOTHER CASE AND THERE ARE LIGHTS OVER THERE. BUT
4 WITH A CANOPY BEING AS DENSE AS IT IS, I DON'T KNOW THAT THAT
5 WOULD AFFECT ANYTHING INTO THE CEMETERY BECAUSE IT'S
6 COMPLETELY SURROUNDED BY TREES.

7 Q AND THERE'S A LITTLE HOUSING DEVELOPMENT OVER HERE ON
8 MAEBELLE COURT?

9 A THAT'S COMPLETELY SURROUNDED BY TREES. BUT, YES, THERE IS.

10 Q SO WHEN YOU WERE OUT THERE AT NIGHT, YOU GET SOME AMBIENT
11 LIGHTING COMING FROM THE TWO NOTCH ROAD, W. A. PERRY MIDDLE
12 SCHOOL, THE PARKING LOT AREA WITH THE LIGHTS ON. IS THAT
13 CORRECT? IS THAT A FAIR STATEMENT?

14 A YOU SEE AN AURA, PUT IT THAT WAY, OF LIGHTING OVER THE — IN
15 THE SKY, BUT NOT DIRECTLY.

16 Q BUT AS FAR AS WHERE THE MAUSOLEUM IS IN THAT CEMETERY, IT IS
17 A COMPLETELY WIDE OPEN AREA WITH NO TREES AND NO BUSHES AND
18 NO CANOPY. IS THAT CORRECT?

19 A THAT'S CORRECT.

20 MR. GASSER: THAT'S ALL I HAVE, YOUR HONOR.

21 THE COURT: MR. STRICKLER.

22 MR. STRICKLER: I HAVE TWO THINGS.

23 CROSS EXAMINATION BY MR. STRICKLER:

24 Q AS FAR AS THE CEMETERY GOES, IT'S A COMPLETELY WIDE OPEN AREA
25 WITH NO TREES, NO BUSHES AND NO LIGHTS?

1 A NO LIGHTS.

2 Q RIGHT.

3 A NONE.

4 Q OKAY. AND, SECONDLY, JUST REGARDING -- AND I'M LOOKING AT
5 DEFENDANT'S EXHIBIT 5 HERE. YOU TESTIFIED REGARDING THESE
6 LIGHTS ON THE POLES, THE PARKING LOT?

7 A THAT'S RIGHT.

8 Q OKAY. AND YOU TESTIFIED THAT THEY WERE DIRECTIONAL IN NATURE
9 AND POINTED AT EACH OTHER, CORRECT?

10 A THAT'S CORRECT.

11 Q SO THE ONE ON -- AS I'M HOLDING THIS DIAGRAM, THE ONE ON THE
12 RIGHT IS POINTING IN THIS DIRECTION?

13 A YES, SIR.

14 Q AND THE ONE MOUNTED ON THE LEFT IS POINTING DIRECTLY AT THIS
15 ONE ON THE RIGHT?

16 A THAT'S CORRECT.

17 Q IT'S POINTING THIS DIRECTION. SO IT WOULD BE FAIR TO SAY I
18 TAKE IT THAT AS FAR AS LIGHT DIRECTED TOWARDS THE PARK AREA,
19 THE ONLY LIGHT THAT IS DIRECTED TOWARDS THE PARK AREA IS THIS
20 LIGHT MOUNTED APPROXIMATELY 70 FEET UP THIS POLE IN THE
21 PARKING AREA. IS THAT CORRECT?

22 A THAT'S CORRECT.

23 Q OKAY. AND IT'S POINTING TOWARDS THE PARK AREA. AND I
24 BELIEVE THE MEASUREMENT YOU HAVE REFLECTED ON DEFENDANT'S
25 EXHIBITS 6 IS THAT FROM THE BASE OF THIS LIGHT POLE TO THIS

1 BENCH IN THE PARK AREA IS 400 FEET?

2 A THAT'S CORRECT.

3 Q OKAY. AND THAT WOULD BE LIKE FURTHER AWAY THAN A FOOTBALL
4 FIELD, RIGHT?

5 A YES.

6 Q 100 YARDS, 4300 FEET. SO 400 FEET IS FURTHER AWAY FROM A
7 FOOTBALL FIELD. SO I TAKE IT YOUR TESTIMONY IS THAT THE ONLY
8 LIGHT DIRECTED TOWARDS THE PARK AREA IS LOCATED IN EXCESS OF
9 100 YARDS FROM THE PARK AREA, RIGHT? AND IS THIS LIGHT
10 MOUNTED UP ON TOP OF THE POLE?

11 A THAT'S CORRECT.

12 Q AND THAT DIRECTION THAT THE LIGHT IS POINTED IS NOT DIRECTLY
13 TOWARDS THE PARK AREA. IT'S OUT IN THE DIRECTION OF THE PARK
14 AREA?

15 A IN THE DIRECTION DIRECTLY FACING THE OTHER LIGHT.

16 Q OKAY. DIRECTLY FACING THE OTHER LIGHT. AND THERE IS NO
17 OTHER LIGHT, DIRECT LIGHT, THAT WOULD BE CAST TOWARDS THE
18 PARK AREA. CORRECT?

19 A NO. THAT'S CORRECT.

20 Q AND THERE IS NO LIGHT WHATSOEVER IN THE CEMETERY AREA?

21 A NONE WHATSOEVER.

22 Q THANK YOU, SIR. THAT'S ALL I HAVE.

23 THE COURT: OKAY. REDIRECT, IF ANY, MR. SHUPPER.

24 REDIRECT EXAMINATION BY MR. SHUPPER:

25 Q MR. PARKER, DEFENDANT'S EXHIBIT NO. 5, WHAT VIEW DOES THAT

1 REPRESENT?

2 A YOU'LL HAVE TO SHOW ME 5. I'M CONFUSED. I DON'T HAVE THAT
3 ONE.

4 MR. STRICKLER: ASKED AND ANSWERED, YOUR HONOR.
5 OBJECTION.

6 THE COURT: OKAY. THANK YOU.

7 A OKAY. I'VE GOT IT. I'VE GOT IT.

8 Q AS COMPARED TO NO. 6?

9 A OKAY.

10 Q DO THEY REPRESENT DIFFERENT VIEWS?

11 A WELL, THE ONE THAT YOU'RE HOLDING IN YOUR LEFT HAND IS AN
12 ENLARGEMENT OF THE AREA WHICH IS BASICALLY IN THE CENTER OF
13 THIS ONE.

14 Q IN TERMS OF THE FOLIAGE YOU'VE LISTED, HAVE YOU MARKED THE
15 TREES HERE?

16 A YES.

17 Q AND HOW ARE THEY MARKED?

18 A THEY'RE MARKED WITH WHAT LOOKS LIKE A LITTLE ASTERISK IN A
19 CIRCLE.

20 Q AND DEFENDANT'S NO. 5, WHAT VIEW DOES THAT REPRESENT?

21 A WELL, AGAIN, IT'S THAT -- THAT ONE IS AN ENLARGEMENT OF THE
22 AREA OVER THERE WHERE THE PARKING AREA AND THE BALL FIELDS --
23 THAT LITTLE AREA RIGHT THERE.

24 Q OKAY. AS YOU LOOK AT STATE'S NO. 7 AND 17, YOU SEE THE
25 TREES, CORRECT?

1 A I DO.

2 Q ON STATE'S 7 AND 17. BUT IN RELATIONSHIP TO DEFENDANT'S NO.
3 5, WHAT IS REPRESENTED IN THIS SHADED AREA?

4 A WHERE THE LITTLE CIRCULAR AREA IS ON THE PARKING LOT, THAT
5 LITTLE CIRCULAR AREA OF THE PARKING LOT, IF YOU WERE FACING
6 THE PARK AREA, YOU WOULD BE SEEING THAT VIEW RIGHT FROM THAT
7 LITTLE BOW THAT'S IN THE PARKING LOT.

8 Q IS THIS DENSE FOLIAGE ON THE GROUND?

9 A NO. THEY ARE TREES. EXCEPT WHERE THOSE LINES ARE, JUST
10 BEHIND IT, IT'S LIKE THAT'S THE BERM. NO.

11 Q BACK HERE?

12 A YES. THAT'S THE BERM.

13 Q SO WHERE YOU HAVE THESE LINES HERE, WHAT DOES THAT REPRESENT?

14 A THAT'S EXTREMELY DENSE FOLIAGE. THAT'S THE LOW SHRUBBERY AND
15 TALL TREES THAT -- THE TREES THEMSELF, THE BERM ITSELF RAISES
16 18 FEET FROM THE GROUND, AND THE SHRUBBERY THAT'S ON THAT
17 BERM, THAT LITTLE RIDGE THERE WHERE THOSE LITTLE LINES GO
18 AROUND LIKE THIS, MEASURE FROM 40 TO 60 FEET IN HEIGHT.

19 Q OKAY. NOTHING FURTHER, YOUR HONOR.

20 THE COURT: THANK YOU. THANK YOU, MR. PARKER. YOU CAN
21 STEP DOWN, SIR. IS THERE ANY NECESSITY TO RETAIN MR. PARKER,
22 OR DO YOU WISH HIM TO BE EXCUSED, MR. SHUPPER?

23 MR. SHUPPER: YES, YOUR HONOR.

24 MR. GASSER: NO OBJECTION, YOUR HONOR.

25 MR. STRICKLER: WITHOUT OBJECTION, YOUR HONOR.

1 THE COURT: THANK YOU, MR. PARKER.

2 MR. SHUPPER: THE DEFENDANT WOULD NEXT CALL MR. MANIGO.
3 HE HAS BEEN SITTING OUTSIDE THE COURTROOM, YOUR HONOR. FRANK
4 MANIGO.

5 FRANK MANIGO, BEING FIRST DULY
6 SWORN, TESTIFIES AS FOLLOWS:

7 THE CLERK: PLEASE BE SEATED. STATE YOUR FULL NAME.
8 SPELL YOUR LAST NAME.

9 DIRECT EXAMINATION BY MR. SHUPPER:

10 Q GOOD MORNING, MR. MANIGO. WILL YOU TELL THE JURY PLEASE
11 WHERE YOU'RE EMPLOYED?

12 THE CLERK: YES, SIR. WOULD YOU STATE YOUR FULL NAME.

13 MR. MANIGO: MY NAME IS FRANK MANIGO, M-A-N-I-G-O.

14 THE CLERK: THANK YOU.

15 Q (BY MR. SHUPPER) PARDON ME. MR. MANIGO, COULD YOU TELL THE
16 JURY WHERE YOU'RE EMPLOYED?

17 A I'M EMPLOYED WITH THE CITY OF COLUMBIA PARKS AND RECREATION.

18 Q AND HOW LONG HAVE YOU BEEN EMPLOYED THERE?

19 A ABOUT 12 YEARS.

20 Q AND WHAT IS YOUR CAPACITY AT PARKS AND RECREATION?

21 A I'M IN CHARGE OF PARK FACILITIES WHICH TAKES CARE OF ALL THE
22 ATHLETIC FIELDS AND THAT KIND OF THING.

23 Q AND HOW LONG HAVE YOU BEEN IN THAT CAPACITY?

24 A I HAVE JUST MOVED INTO THAT CAPACITY. I WAS ON THE BALL
25 FIELD AS A FOREMAN FOR ABOUT FIVE YEARS. I JUST MOVED INTO

1 THE SUPERVISORY POSITION THE LAST TWO YEARS.

2 Q ON MAY 28TH, 1996, WHAT WAS YOUR CAPACITY WITH THE CITY OF
3 COLUMBIA PARKS AND RECREATION DEPARTMENT?

4 A I WAS THE FORMAL ONE IN CHARGE OF ATHLETIC FIELDS.

5 Q OKAY. IN YOUR ROLE AS FOREMAN OF THE PARKS AND ATHLETIC
6 FIELDS, DID YOU HAVE OCCASION TO VISIT T. S. MARTIN PARK?

7 A BASICALLY EVERY DAY.

8 Q EVERY DAY. AND ARE YOU TOTALLY FAMILIAR WITH THE AREA?

9 A YES, I AM.

10 Q HAVE YOU BEEN THERE IN THE NIGHTTIME?

11 A YES, I HAVE.

12 Q DO YOU KNOW HOW THE LIGHTING SYSTEM WORKS?

13 A YES. WE HAVE THEM ON AUTOMATIC TIMERS.

14 Q OKAY. AND ARE YOU IN FACT RESPONSIBLE FOR THAT?

15 A YES, I AM.

16 Q OKAY. I'M GOING TO ASK YOU TO LOOK AT SOME SKETCHES OF THE
17 AREA AND ASK YOU IN LOOKING AT DEFENDANT'S EXHIBIT 5 HERE,
18 DOES THIS -- DOES THAT ACCURATELY DEPICT THE PARK AREA AND
19 SURROUNDING AREA?

20 A YES. I WOULD SAY SO.

21 Q AND WHERE IT SHOWS THE -- IS THE LOCATION OF THE BALL FIELDS
22 CORRECT IN THE BACK?

23 A YES.

24 Q WHERE IS THE CONTROL FOR THE LIGHTS?

25 A THE CONTROLS FOR THE LIGHTS ARE BASICALLY IN THIS LITTLE

1 HOUSE HERE AS YOU COME INTO THE PARKWAY.

2 MR. SHUPPER: YOUR HONOR, MAY I ASK THE WITNESS TO STAND
3 DOWN, PLEASE?

4 THE COURT: CERTAINLY.

5 Q (BY MR. SHUPPER) MR. MANIGO, COME DOWN HERE, IF YOU COULD.
6 AND PLEASE SHOW THE JURY THE LIGHT AREA, WHERE THE LIGHTS ARE
7 CONTROLLED FROM?

8 A THE LIGHTS ARE CONTROLLED FROM THIS LITTLE AREA RIGHT HERE.
9 IT'S A HOUSE RIGHT HERE.

10 Q AND WHAT'S RIGHT HERE NEXT TO THAT?

11 A THAT IS A PICNIC TABLE AND SOME PLAYGROUND EQUIPMENT AND
12 STUFF.

13 Q OKAY. IS THIS LITTLE BUILDING LOCKED?

14 A YES. I LOCK IT.

15 Q AND CAN YOU DESCRIBE THE METHOD OF CONTROLLING THE LIGHTS IN
16 THE PARK FOR THE BALL GAMES?

17 A ALL RIGHT. WHAT WE DO, WE GET A SCHEDULE ON A MONDAY FROM
18 THE ATHLETIC DIRECTOR WHICH IS BOBBY BILTON. HE GIVES ME A
19 SCHEDULE ON MONDAY, AND I GO THROUGH, CREWS ON MONDAY, AND WE
20 GO THROUGH AND SET THE LIGHTS DEPENDING ON THE TIME OF YEAR.
21 SO IF IT'S LIGHTER EARLIER, WE CAN PUT THEM ON LATE AND VICE
22 VERSA.

23 Q SO, IN THE END OF MAY, WHAT TIME WOULD THE LIGHTS GO ON?

24 A THE LIGHTS WOULD PROBABLY COME ON AROUND 7, SOMEWHERE IN THAT
25 TIME.

1 Q AND WHAT TIME WOULD THE LIGHTS GO OFF?

2 A ELEVEN. AROUND ELEVEN. AT ELEVEN RATHER. BECAUSE WE'VE HAD
3 SEVERAL OCCASIONS WHERE WE'VE HAD BALL GAMES GOING ON, AND
4 11:00 THEY RAN A LITTLE LONGER AND THE LIGHTS WERE OFF AND IT
5 HAD TO BE RESCHEDULED.

6 Q OKAY. IS THERE ANY WAY THAT SOMEONE COULD WALK UP TO ONE OF
7 THESE TELEPHONE POLES OR POLES IN THE AREA AND TURN OFF THE
8 LIGHTS MANUALLY?

9 A I DON'T THINK SO. NO, SIR.

10 Q HAVE YOU BEEN IN THE AREA REPRESENTED BY DEFENDANT'S EXHIBIT
11 NO. 6 HERE?

12 A YES, SIR.

13 Q AND WHAT DOES THIS SHOW?

14 A THAT SHOWS THE LITTLE UTILITY SHED THERE. AND THAT'S SOME
15 TREES. AND BACK IN HERE IS A LITTLE BENCH AND THE LITTLE
16 PICNIC TABLES AND THAT KIND OF THING.

17 Q HAVE YOU BEEN THERE AT NIGHT?

18 A YES, SIR.

19 Q HAVE YOU BEEN THERE AFTER 11:00?

20 A YES, SIR.

21 Q CAN YOU DESCRIBE WHAT IT'S LIKE IN THIS AREA?

22 A IT'S VERY DARK. I MEAN, YOU KNOW, THAT'S JUST BASICALLY IT.
23 I'VE COME IN SOMETIME TO GO IN THERE DOING SOMETHING IF I
24 WANTED TO DO IT THE NIGHT BEFORE, AND IT'S VERY DARK IN THIS
25 AREA. YOU CAN -- BASICALLY NOT ANY LIGHT GOING TO THE PARK.

1 I MEAN, IF YOU DON'T HAVE YOUR HEADLIGHTS ON, IT'S NOT THE
2 PLACE TO BE.

3 Q OKAY. AND DO THESE LIGHTS IN THE PARKING LOT CAST ANY
4 ILLUMINATION ON THIS PICNIC TABLE?

5 A NO, SIR.

6 Q DO THEY CAST ANY LIGHT OVER HERE IN THIS AREA?

7 A NO, SIR.

8 Q LOOKING NOW AT DEFENDANT'S EXHIBIT NO. 5 AGAIN, DO THESE
9 LIGHTS ON THE ROADWAY FROM GERMANY STREET TO THE PARKING AREA
10 CAST ANY LIGHT BACK IN THIS AREA?

11 A I DON'T THINK SO. NO, SIR.

12 Q AND DO THESE LIGHTS ILLUMINATE THIS AREA?

13 A NO, SIR.

14 Q THANK YOU. I HAVE NO FURTHER QUESTIONS. YOU MAY RETURN TO
15 THE STAND.

16 THE COURT: MR. GASSER.

17 CROSS EXAMINATION BY MR. GASSER:

18 Q GOOD MORNING MR. MANIGO. MY NAME IS JOHNNY GASSER.

19 A YES, SIR.

20 Q HOW YOU DOING?

21 A GREAT.

22 Q ALL RIGHT. THE LIGHTS YOU'RE TALKING ABOUT THAT ARE ON
23 AUTOMATIC TIMERS, YOU'RE TALKING ABOUT THE BALL FIELD LIGHTS,
24 CORRECT?

25 A THAT'S CORRECT.

1 MR. GASSER: THAT'S ALL I HAVE, YOUR HONOR.

2 THE COURT: MR. STRICKLER?

3 MR. STRICKLER: I HAVE NO QUESTIONS, SIR.

4 THE COURT: THANK YOU. THANK YOU, MR. MANIGO, FOR YOUR
5 ATTENDANCE, SIR. YOU'RE FREE TO GO. YES, SIR, MR. SHUPPER.

6 MR. SHUPPER: AT THIS TIME MR. JAMES WOULD CALL DR.
7 THOMAS ALLEY.

8 THE COURT: OKAY. DR. ALLEY.

9 DR. THOMAS R. ALLEY, BEING FIRST
10 DULY SWORN, TESTIFIES AS FOLLOWS:

11 THE CLERK: PLEASE BE SEATED. STATE YOUR FULL NAME.
12 SPELL YOUR LAST NAME.

13 DR. ALLEY: MY NAME IS THOMAS R. ALLEY, A-L-L-E-Y.

14 DIRECT EXAMINATION BY MR. SHUPPER:

15 Q DR. ALLEY, CAN YOU TELL ME WHERE YOU ARE CURRENTLY EMPLOYED?

16 A YES. I'M EMPLOYED IN THE DEPARTMENT OF PSYCHOLOGY AT CLEMSON
17 UNIVERSITY. I'D JUST LIKE TO ADD THAT I'M NOT OF COURSE
18 REPRESENTING UNIVERSITY VIEWPOINTS ON ANY MATTERS.

19 Q AND HAVE YOU ANY SPECIAL TRAINING IN THE AREA OF HUMAN
20 MEMORY?

21 A YES, I DO. I HAVE A BACHELOR OF SCIENCE DEGREE IN
22 PSYCHOLOGY, A MASTER'S DEGREE AND A PH.D IN EXPERIMENTAL
23 PSYCHOLOGY WITH AN EMPHASIS ON HUMAN COGNITION. HUMAN
24 COGNITION IS MEMORY, DECISION MAKING, JUDGMENT AND PERCEPTION
25 PRIMARILY. I ALSO HAVE THREE YEARS EXPERIENCE AS A

1 POSTDOCTORAL FELLOW STUDYING THE GROWTH, DEVELOPMENT AND
2 OTHER ASPECTS OF THE APPEARANCE OF HUMAN FACES.

3 Q COULD YOU DESCRIBE YOUR EDUCATIONAL BACKGROUND?

4 A WELL, I PRETTY MUCH JUST DID THAT.

5 Q AND IN ADDITION TO THAT, ANY ACADEMIC APPOINTMENTS OTHER THAN
6 YOUR CURRENT POSITION WITH CLEMSON UNIVERSITY?

7 A I'VE ALSO WORKED AT THE UNIVERSITY OF CONNECTICUT AND MORE
8 RECENTLY AT EMORY UNIVERSITY.

9 Q AND COULD YOU DESCRIBE ANY SPECIAL RECOGNITIONS YOU'VE
10 RECEIVED?

11 A I'M LISTED AS A MEMBER OF WHO'S WHOS. I AM A MEMBER OF SOME,
12 SOMEWHAT SELECTIVE AT LEAST, SCIENTIFIC SOCIETIES.

13 Q AND YOUR PROFESSIONAL AFFILIATIONS?

14 A PROFESSIONAL AFFILIATIONS WOULD INCLUDE THE AMERICAN
15 PSYCHOLOGICAL SOCIETY, THE PSYCHONOMIC SOCIETY, THE EASTERN
16 PSYCHOLOGICAL ASSOCIATION, INTERNATIONAL SOCIETY FOR
17 ECOLOGICAL SOCIETY AND A COUPLE OF OTHERS.

18 Q AND HAVE YOU ATTENDED ANY CONFERENCES OR SPECIAL MEETINGS
19 RELATED TO THE FIELD THAT YOU'RE INVOLVED IN DEALING WITH
20 HUMAN MEMORY?

21 A YES. AS AN AVERAGE, I ATTEND AT LEAST ONE CONFERENCE A YEAR,
22 FOR THE PAST 20 YEARS PROBABLY, WHERE AT LEAST SOME OF THE
23 CONTENTS OF THE CONFERENCE IS CONCERNED WITH HUMAN MEMORY OR
24 EVEN SPECIFICALLY WITH EYE WITNESS ISSUES.

25 Q AND HAVE YOU GIVEN PRESENTATIONS AT ANY SPECIAL CONFERENCES

1 OR UNIVERSITIES REGARDING THE SUBJECT, HUMAN MEMORY?

2 A YES. I'VE GIVEN PRESENTATIONS OVER 40 TIMES, PROBABLY
3 ANOTHER NEARLY 50 OR -- WELL, PROBABLY MORE THAN THAT. AND
4 THOSE HAVE BEEN BOTH IN THE U.S. AND SEVERAL FOREIGN
5 COUNTRIES.

6 Q ARE YOU INVOLVED IN THE REVIEW OR CONTRIBUTIONS TO ANY
7 SPECIAL JOURNALS ON THE SUBJECT OF HUMAN MEMORY?

8 A YES. I'M ON THE EDITORIAL BOARDS OF A COUPLE OF PSYCHOLOGY
9 OR PSYCHOLOGY RELATED JOURNALS. AND I REGULARLY REVIEW FOR A
10 FAIRLY LARGE NUMBER OF OTHER JOURNALS IN THE FIELD.

11 Q HAVE YOU EVER TESTIFIED AS AN EXPERT IN THE AREA OF HUMAN
12 MEMORY IN ANY COURTS OF THIS STATE OR FEDERAL COURTS?

13 A YES, I HAVE. BOTH FEDERAL AND STATE COURTS.

14 Q CAN YOU DESCRIBE THE LOCATIONS WHERE YOU'VE TESTIFIED AND
15 BEEN QUALIFIED AS AN EXPERT?

16 A A NUMBER OF COUNTIES IN SOUTH CAROLINA, INCLUDING RICHLAND
17 COUNTY, BEAUFORT COUNTY, WILLIAMSBURG, ANDERSON, PICKENS.

18 Q HOW ABOUT FEDERAL COURT?

19 A FEDERAL COURT IN BOTH ANDERSON, SOUTH CAROLINA, AND IN
20 COLUMBIA.

21 MR. SHUPPER: AT THIS POINT I'D LIKE TO MOVE TO QUALIFY
22 DR. ALLEY AS AN EXPERT IN THE AREA OF HUMAN MEMORY.

23 THE COURT: WOULD MR. GASSER CARE TO VOIR DIRE AS TO
24 QUALIFICATIONS?

25 MR. GASSER: NO, SIR, YOUR HONOR.

1 THE COURT: MR. STRICKLER?

2 MR. STRICKLER: BRIEFLY, SIR, IF I COULD, PLEASE.

3 THE COURT: ALL RIGHT.

4 MR. STRICKLER: IF I COULD HAVE A COPY OF HIS C.V.,
5 PLEASE. THANK YOU.

6 CROSS EXAMINATION ON QUALIFICATIONS BY MR. STRICKLER:

7 Q DR. ALLEY, MY NAME IS DOUG STRICKLER. I'M HERE REPRESENTING
8 KENNETH JAMES. I'D JUST LIKE TO ASK YOU A COUPLE OF
9 QUESTIONS, IF I COULD, PLEASE, REGARDING YOUR QUALIFICATIONS.
10 MY UNDERSTANDING IS THAT YOU GOT YOUR BACHELOR OF SCIENCE IN
11 PSYCHOLOGY?

12 A YES.

13 Q AND WHEN DID YOU GET THAT, SIR? I'M SORRY.

14 A 19 -- YOU'RE TESTING MY MEMORY HERE. 1975.

15 Q 1975. AND AT WHAT SCHOOL DID YOU GET THAT FROM?

16 A THAT'S FROM PENN STATE UNIVERSITY.

17 Q PENN STATE? IS THAT A COLLEGE PARK? NO.

18 A STATE COLLEGE.

19 THE COURT: A COLLEGE IN --

20 Q STATE COLLEGE. RIGHT. IN '75. AND THEN YOU HAD A -- YOU
21 GOT YOUR MASTER'S IN PSYCHOLOGY. IS THAT CORRECT?

22 A YES.

23 Q AND THEN A PH.D?

24 A YES.

25 Q ALSO IN PSYCHOLOGY, WITH AN EMPHASIS ON HUMAN COGNITION?

1 A YES.

2 Q AND FROM WHERE DID YOU GET YOUR MASTER'S DEGREE?

3 A BOTH THE MASTER'S AND THE PH.D ARE FROM THE UNIVERSITY OF
4 CONNECTICUT.

5 Q AND WHEN DID YOU RECEIVE YOUR PH.D?

6 A 1981.

7 Q IN 1981. SO YOU HAVE BEEN A DOCTOR OF PSYCHOLOGY SINCE 1981,
8 CORRECT?

9 A CORRECT.

10 Q OKAY. FOR SOME 18 YEARS NOW?

11 A YES.

12 Q AND YOU'RE TEACHING PSYCHOLOGY AT CLEMSON UNIVERSITY?

13 A YES, I DO.

14 Q AND FOR HOW LONG HAVE YOU BEEN TEACHING THERE, SIR?

15 A EXCEPT FOR TWO YEARS WHEN I WAS ON LEAVE, 15 YEARS.

16 Q FIFTEEN YEARS. SO YOU'VE BEEN A DOCTOR OF PSYCHOLOGY FOR 18
17 YEARS, AND YOU'VE BEEN PASSING ON YOUR KNOWLEDGE IN THE FIELD
18 OF PSYCHOLOGY TO OTHER PEOPLE FOR AT LEAST 15 YEARS AT
19 CLEMSON, AND I BELIEVE YOU SPENT SOME TIME AT THE UNIVERSITY
20 OF CONNECTICUT AND EMORY PRIOR TO CLEMSON. IS THAT CORRECT?

21 A EMORY ACTUALLY HAS BEEN SINCE I'VE COME TO CLEMSON. I'VE
22 SPENT TWO YEARS THERE. UNIVERSITY OF CONNECTICUT, CORRECT.
23 FOUR.

24 Q AND I TAKE IT HUMAN COGNITION, CAN YOU DEFINE WHAT THAT FIELD
25 IS? THAT'S WHERE YOUR EMPHASIS IS. WHAT'S HUMAN COGNITION?

1 A IT'S BASICALLY THE STUDY OF ACQUIRING AND DEALING WITH
2 INFORMATION. SO IT INCLUDES PERCEPTION, MEMORY, JUDGMENT,
3 DECISION MAKING PRIMARILY.

4 Q OKAY. HOW WE GET INFORMATION, HOW WE STORE INFORMATION, HOW
5 WE RECALL INFORMATION?

6 A YES, SIR.

7 Q IS THAT CORRECT? AND THAT'S A RECOGNIZED AREA OF STUDY OR A
8 SUB AREA OF STUDY IN THE FIELD OF PSYCHOLOGY, RIGHT?

9 A THAT'S PROBABLY THE LARGEST AREA WITHIN EXPERIMENTAL
10 PSYCHOLOGY.

11 Q SO IF YOU WANT TO TALK WITH SOMEONE ABOUT HOW THAT WORKS, IT
12 WOULD BE SOMEONE IN THE FIELD OF PSYCHOLOGY THAT YOU WOULD
13 TALK WITH. AM I CORRECT?

14 A I WOULD RECOMMEND THAT, YES.

15 Q OKAY. AND IF I UNDERSTAND YOUR TESTIMONY IN EARLIER VOIR
16 DIRE, YOU ATTEND AT LEAST A CONFERENCE A YEAR AND THE
17 CONFERENCES DEAL WITH HUMAN MEMORY AND SPECIFICALLY OFTEN
18 DEAL WITH THE ISSUE OF EYE WITNESS IDENTIFICATION. IS THAT
19 CORRECT?

20 A YES. THE CONFERENCES ARE ACTUALLY MORE GENERAL THAN JUST ON
21 MEMORY. THEY'RE OFTEN IN FACT GENERAL PSYCHOLOGY CONFERENCES
22 WHERE THERE WILL BE LARGE NUMBERS OF PRESENTATIONS. SO OFTEN
23 A GOOD MANY OF THOSE WILL DEAL WITH MEMORY, BUT CERTAINLY NOT
24 ALL OF THEM.

25 Q AND OVER THE PAST PERIOD OF TIME YOU'VE BEEN A DOCTOR OF

1 PSYCHOLOGY, YOU'VE HAD OCCASION TO BE ASKED TO PRESENT
2 INFORMATION TO YOUR COLLEAGUES ON THE ISSUE OF MEMORY,
3 CORRECT?

4 A YES.

5 Q AND THIS IS I THINK YOU SAID 40, 50, PERHAPS MORE TIMES THAN
6 THAT?

7 A NOT ALL THOSE ARE ON MEMORY. BUT, YES.

8 Q AND THAT'S NOT SOMETHING WHERE YOU COME IN AND VOLUNTEER.
9 YOU'RE REQUESTED TO DO THAT?

10 A THERE'S USUALLY TWO WAYS THAT THAT HAPPENS. ONE IS THAT
11 YOU'RE ASKED. THAT'S ACTUALLY FAR RARER. THE OTHER IS THAT
12 YOU SUBMIT A PROPOSAL FOR A PRESENTATION WHICH THEN GETS
13 REVIEWED AND EITHER ACCEPTED OR REJECTED.

14 Q OKAY. SO YOU'VE EITHER BEEN ASKED TO GO AHEAD AND HELP
15 EDUCATE YOUR COLLEAGUES ON THE SUBJECT, OR YOU'VE SUBMITTED
16 INFORMATION THAT YOU THOUGHT WARRANTED PRESENTATION TO YOUR
17 COLLEAGUES, AND SOME -- A GROUP OF YOUR COLLEAGUES HAS
18 REVIEWED IT AND AGREED WITH YOU AND HAD YOU COME IN AND
19 PRESENT IT, CORRECT?

20 A CORRECT.

21 Q OKAY. AND THAT'S ALL I HAVE. THANK YOU, SIR.

22 THE COURT: OKAY. THANK YOU.

23 MR. STRICKLER: AND WITHOUT OBJECTION, SIR.

24 THE COURT: ALL RIGHT. FINE. DR. ALLEY WILL TESTIFY
25 BEFORE YOU, LADIES AND GENTLEMEN, AS AN EXPERT WITNESS IN THE

1 AREA OFFERED; THAT IS, REGARDING MEMORY. AGAIN, THE
2 TESTIMONY OF AN EXPERT WITNESS IS TO BE ASSESSED IN THE SAME
3 FASHION FOR CREDIBILITY AS YOU WOULD ASSESS THE TESTIMONY OF
4 ANY OTHER WITNESS. I WILL CHARGE YOU MORE FULLY AT THE
5 APPROPRIATE TIME. BUT AT THIS POINT IN TIME UNDERSTAND THAT
6 DR. ALLEY WILL TESTIFY BEFORE YOU AS AN EXPERT IN THE AREA
7 OFFERED. PLEASE CONTINUE, MR. SHUPPER.

8 MR. SHUPPER: THANK YOU, YOUR HONOR.

9 DIRECT EXAMINATION RESUMED BY MR. SHUPPER:

10 Q DR. ALLEY, ARE EXPERTS IN MEMORY IN GENERAL AGREEMENT ON THE
11 BASIC PROCESS INVOLVED IN HUMAN MEMORY, SUCH AS EYE WITNESS
12 TESTIMONY?

13 A YES, THEY ARE. THEY WOULD AGREE, FOR INSTANCE, THAT FOR
14 SUCCESSFUL MEMORY TO OCCUR YOU HAVE TO GET THROUGH THREE
15 STEPS. IT'S CERTAINLY NOT A SIMPLE PROCESS. THOSE THREE
16 STEPS QUICKLY WOULD BE, FIRST, YOU HAVE TO TAKE IN THE
17 INFORMATION IN THE FIRST PLACE WHICH WOULD INVOLVE USING YOUR
18 SENSES, PAYING ATTENTION, HAVING THE RIGHT CONDITIONS FOR
19 DOING THAT. YOU HAVE TO -- THIS IS THE MOST OBVIOUS ONE
20 PROBABLY -- HOLD THE INFORMATION, RETAIN IT OR STORE IT OVER
21 SOME PERIOD OF TIME. AND THEN IF YOU DO THOSE TWO, YOU STILL
22 TO SHOW REMEMBERING HAVE TO RETRIEVE THE INFORMATION, GET IT
23 BACK OUT AT SOME LATER TIME.

24 Q AND CAN YOU TELL US A LITTLE MORE ABOUT HOW MEMORY IS
25 AFFECTED IN THE ACQUISITION PHASE THAT YOU MENTIONED?

1 A YES. THE ACQUISITION PHASE AGAIN IS CRUCIAL. THERE IS A
2 NUMBER OF VARIABLES TO CONSIDER WHENEVER YOU'RE WONDERING
3 ABOUT SOME PARTICULAR PERSON'S MEMORY OF SOME EVENT. IF WE
4 LOOK AT, SAY, AN EYE WITNESS IDENTIFICATION, AT LEAST THREE
5 AREAS OF CONCERN WOULD BE, WHO IS THE WITNESS. SOME
6 WITNESSES ARE GOING TO BE BETTER AT THIS THAN OTHERS. FOR
7 INSTANCE, VERY YOUNG CHILDREN ARE NOT THAT GOOD. WITNESSES
8 WHO ARE SUPPOSED TO BE OBSERVING SOMETHING VISUALLY BUT HAVE
9 POOR VISION AND AREN'T WEARING THEIR GLASSES AT THE TIME
10 MIGHT MAKE A POOR WITNESS. THEY WON'T BE ABLE TO TAKE IN
11 DETAILS OF APPEARANCE AND SO ON. DRUG INTOXICATION. ALL
12 SORTS OF FACTORS LIKE THAT THAT MIGHT AFFECT THE WITNESS,
13 HIMSELF OR HERSELF.

14 SECONDLY, YOU SHOULD WONDER ABOUT THE TARGET, WHAT IT IS
15 THEY'RE OBSERVING. AGAIN, IN THE CASE OF AN EYE WITNESS
16 IDENTIFICATION, THE PERSON BEING OBSERVED IS IMPORTANT. FOR
17 INSTANCE, A MAJOR FACTOR IS WHETHER THEY'RE, SAY, A FAMILIAR
18 PERSON OR NOT. WE'RE NOT JUST A LITTLE BETTER; WE ARE A LOT
19 BETTER AT BEING ABLE TO IDENTIFY FAMILIAR PEOPLE THAN
20 UNFAMILIAR PEOPLE.

21 A SECOND MAJOR FACTOR THERE THAT REALLY HELPS IS THE
22 DISTINCTIVENESS OF THE TARGET. SO SOME PEOPLE FOR ONE REASON
23 OR ANOTHER HAVE A VERY DISTINCTIVE APPEARANCE, AND EYE
24 WITNESS IDENTIFICATION IS MUCH BETTER IN THOSE CASES. FOR
25 INSTANCE, PEOPLE WITH UNUSUAL BIRTH MARKS OR TATTOOS OR SCARS

1 AND SO ON.

2 Q WOULD CERTAIN CLOTHING OR OBVIOUS CHARACTERISTICS MAKE IT
3 EASIER FOR SOMEONE TO RETAIN AN IMAGE?

4 A YEAH. THE PROBLEM WITH CLOTHING AND SOME OTHER FACTORS THAT
5 ARE READILY CHANGED ---

6 Q THAT ---

7 A --- IS THAT THAT MIGHT NOT ACTUALLY TURN OUT TO BE VERY
8 HELPFUL.

9 Q IN OTHER WORDS, THAT DOESN'T REMAIN A CONSTANT. BUT OTHER
10 FEATURES OF THE PERSON'S APPEARANCE DOES?

11 A YES. SO THAT MIGHT WELL HELP YOU REMEMBER WHAT THE PERSON
12 LOOKED LIKE AT THE TIME BUT NOT PARTICULARLY HELPFUL IN
13 IDENTIFYING THEM LATER ON AS THEY CHANGE CLOTHES; OR, FOR
14 INSTANCE, IF THEY HAVE SOME WEIRD KIND OF GOATEE AND THEN
15 SHAVED IT OFF, THAT'S GOING TO MAKE MATTERS WORSE AND NOT
16 BETTER.

17 Q WHAT SITUATIONAL FACTORS AFFECT THE ACQUISITION PHASE?

18 A WELL, LOTS. SO, THERE'S A LOT OF THINGS THAT NEED TO BE
19 PRESENT TYPICALLY IN ORDER FOR AN EYE WITNESS TO HAVE MUCH
20 CHANCE OF BEING HELPFUL. THE LIGHTING HAS TO BE ADEQUATE.
21 THE AMOUNT OF TIME TO OBSERVE WHAT'S GOING ON NEEDS TO BE
22 ADEQUATE. THE PERSON'S ATTENTION, AS YOU'RE PROBABLY AWARE,
23 IS A LIMITED ABILITY TO ATTEND TO THINGS GOING ON AROUND YOU.
24 YOU CAN'T, FOR INSTANCE, YOU KNOW, TAKE IN THE APPEARANCE OF
25 EVERYBODY IN THE COURTROOM SIMULTANEOUSLY. YOU NEED TO LOOK

1 AND PAUSE AT LEAST FOR SEVERAL MOMENTS ON EACH PERSON IN
2 ORDER TO HAVE ANY CHANCE OF RECOGNIZING WHAT THEY LOOK LIKE
3 LATER ON.

4 Q IS DISTANCE A FACTOR?

5 A YES. PRETTY MUCH ANYTHING THAT'S GOING TO AFFECT HOW WELL
6 YOU CAN USE YOUR SENSES. SO, UP TO A POINT, VARIABLE
7 DISTANCE. THE CLOSER YOU ARE TO SOMETHING, THE BETTER; UP TO
8 A POINT OF SEVERAL MINUTES, THE LONGER YOU HAVE TO OBSERVE,
9 THE BETTER. AGAIN, LIGHTING AND A PERSON'S EYESIGHT IS ALSO
10 FACTORS.

11 Q WHAT ABOUT PSYCHOLOGICAL FACTORS? ARE THERE PSYCHOLOGICAL
12 FACTORS THAT COULD IMPACT ON A PERSON'S MEMORY?

13 A YEAH. PARTICULARLY IT CAN IMPACT ON THEIR REPORT. SO, IN
14 ADDITION TO VARIOUS KINDS OF DISTURBANCES CREATED POSSIBLY
15 BY, YOU KNOW, INGESTING DRUGS OR BEING VERY TIRED OR SO ON, A
16 PERSON'S CONFIDENCE IN GENERAL AND HOW MUCH CONFIDENCE THEY
17 NEED IN ORDER TO FEEL COMFORTABLE REPORTING SOMETHING IS
18 IMPORTANT.

19 Q WHAT OTHER FACTORS, PSYCHOLOGICAL FACTORS MIGHT AFFECT
20 MEMORY?

21 A WELL, THERE'S A NUMBER OF THINGS THAT CAN HAPPEN AFTER AN
22 EVENT OCCURS THAT WILL, FOR INSTANCE, INCREASE OR DECREASE
23 THE PERSON'S CONFIDENCE IN THEIR ABILITY. SO, FOR EXAMPLE,
24 IF YOU BELIEVE THAT YOU KNOW WHO HAS MUGGED YOU AND YOU FIND
25 OUT THAT THE PERSON HAS BASICALLY AN AIRTIGHT ALIBI, FOR MOST

1 PEOPLE THIS IS GOING TO CAUSE A DRAMATIC DECLINE IN THEIR
2 CONFIDENCE. ON THE OTHER HAND, IF YOU LEARN THAT THE POLICE
3 FOUND YOUR WALLET IN THIS PERSON'S CAR, THIS IS GOING TO
4 INCREASE YOUR CONFIDENCE.

5 Q AND HOW ABOUT THE RETENTION PHASE? CAN YOU DESCRIBE HOW THE
6 MEMORY IS AFFECTED DURING THE RETENTION PHASE THAT YOU
7 DESCRIBED EARLIER?

8 A MM-HMM (AFFIRMATIVE). IN GENERAL WHAT HAPPENS DURING
9 RETENTION IS THAT YOUR MEMORY TENDS TO GET WORSE THE MORE
10 TIME THAT PASSES, IN ADDITION TO THE MOST OBVIOUS MEMORY
11 AFFECT THAT WE'RE ALL QUITE FAMILIAR WITH; THAT IS, WE TEND
12 TO FORGET THINGS AS TIME PASSES. SO WE TEND TO HAVE A
13 SUBTRACTIVE EFFECT BASICALLY UPON OUR MEMORIES.

14 IT'S ALSO FAIRLY COMMONPLACE FOR OUR MEMORIES TO BE
15 SUBJECT TO VARIOUS KINDS OF DISTORTION. SO WE MIGHT REMEMBER
16 SOMEBODY OVER TIME AS BEING TALLER OR SHORTER OR DARKER OR
17 LIGHTER OR SO ON THAN THEY ACTUALLY WERE OR THAT WE WOULD
18 HAVE ACTUALLY RECORDED AT SOME EARLIER TIME.

19 IT'S ALSO POSSIBLE FOR YOU TO ADD INFORMATION TO YOUR
20 MEMORIES. THIS IS PARTICULARLY LIKELY IF THERE ARE LIKE GAPS
21 IN YOUR MEMORY. SAY, YOU KNOW, YOU REMEMBER IF YOU OBSERVED
22 A BANK ROBBER THAT THEY WERE STANDING IN FRONT OF THE CASHIER
23 ALL THE WAY TO THE RIGHT AND THEN, YOU KNOW, YOU ALSO KNOW
24 THAT THEY HAD A GUN AND THEY WERE OVER BY THE DOOR, BUT YOU
25 DON'T ACTUALLY REMEMBER THEM MOVING. AS TIME PASSES, THAT

1 MIGHT BE INCORPORATED INTO YOUR MEMORY SO THAT YOU THEN
2 REMEMBER SOME SORT OF TRANSITION AS THE PERSON MOVED FROM ONE
3 PLACE TO THE OTHER. THIS COULD OCCUR EVEN IF YOU NEVER SAW
4 IT IN THE FIRST PLACE.

5 Q HOW CAN MEMORY BE AFFECTED IN THE RETRIEVAL PHASE?

6 A RETRIEVAL PHASE, THERE'S A COUPLE OF IMPORTANT EVENTS. THESE
7 INCLUDE THE CONTEXT OR SITUATION IN WHICH YOU TRY TO
8 REPRODUCE YOUR MEMORY. AND THERE'S LOTS OF EVIDENCE SHOWING
9 THE FOLLOWING, THAT YOUR MEMORY TENDS TO BE BEST WHEN THE
10 CONTEXT OR SITUATION IN WHICH YOU'RE TRYING TO RECALL
11 SOMETHING IS MOST LIKE, HOPEFULLY IDENTICAL TO, THE CONTEXT
12 IN WHICH YOU SAW IT IN THE FIRST PLACE. SO, IF YOU WITNESSED
13 A CRIME AND IT'S OUTSIDE ON A COLD NIGHT WITH THE WIND
14 BLOWING, ACTUALLY YOU WILL PROBABLY HAVE THE BEST RECALL FOR
15 THAT IF YOU TRY TO DO IT WHILE YOU'RE AGAIN OUTSIDE AT NIGHT
16 WITH THE WIND BLOWING.

17 Q AND ARE THERE ANY NEGATIVE FACTORS THAT CAN AFFECT THE MEMORY
18 IN THE RETRIEVAL PHASE?

19 A YES. WELL, IT'S SORT OF THE OPPOSITE OF WHAT I SAID, IS TO
20 THE EXTENT THAT YOU GET INTO A DIFFERENT CONTEXT, WHICH IN
21 CRIMINAL CASES UNFORTUNATELY OFTEN OCCURS. SO, LIKE I SAID,
22 IF YOU OBSERVED A BANK ROBBERY, THE ODDS ARE YOU'RE NOT GOING
23 TO BE TESTED FOR YOUR MEMORY IN A BANK AGAIN. ALTHOUGH IT IS
24 ON OCCASION SOMETIMES A TECHNIQUE THAT'S USED TO TAKE
25 WITNESSES BACK TO THE CRIME SCENE AND HELP ASSIST IN THEIR

1 MEMORY.

2 THE OTHER THING THAT CAN HAPPEN IS YOU CAN GET
3 INFORMATION THAT MAY BE ACCURATE, IT MAY NOT BE ACCURATE; BUT
4 YOU CAN GET INFORMATION THAT APPEARS TO BEAR ON WHAT YOU'VE
5 OBSERVED AFTER THE EVENT HAS ALREADY ENDED. SO AFTER THE
6 BANK ROBBERY, YOU KNOW, OVERHEARING OTHER DISCUSSIONS, FOR
7 INSTANCE, YOU MAY GET INFORMATION THAT YOU DIDN'T GET IN THE
8 FIRST PLACE. UNFORTUNATELY, WHAT CAN HAPPEN IS THAT
9 INFORMATION CAN BECOME PART OF YOUR MEMORY. THAT IS, YOU
10 WON'T REALIZE AT A LATER TIME THAT YOU DIDN'T OBSERVE THAT IN
11 THE FIRST PLACE; BUT, RATHER, THAT THAT WAS SUGGESTED TO YOU
12 AFTERWARDS. AND THIS OF COURSE IS PARTICULARLY A PROBLEM IF
13 THE INFORMATION HAPPENS TO BE INACCURATE.

14 Q YOU'RE TALKING ABOUT BASICALLY YOUR MEMORY PLAYING TRICKS ON
15 YOU, AREN'T YOU?

16 A TO SOME EXTENT, YES. YOUR MEMORY BASICALLY CAN DO AND
17 COMMONLY DOES DO TO SOME EXTENT EVERYTHING WRONG THAT IT
18 MIGHT DO. SO, WHAT COULD IT DO WRONG? WELL, YOU CAN LOSE
19 INFORMATION. OBVIOUSLY WE DO THAT. YOU CAN ADD STUFF TO
20 MEMORY. AS I MENTIONED, THAT CAN HAPPEN AS WELL. AND WHAT
21 YOU DO KEEP IN MEMORY CAN BE DISTORTED OR MODIFIED IN VARIOUS
22 WAYS. AND THAT, TOO, IS A FAIRLY NORMAL OCCURRENCE.

23 Q IS OUR MEMORY LIKE A CAMCORDER OR A TAPE RECORDER? DO WE SEE
24 SOMETHING AND LOCK IT IN?

25 A NO. IN FACT, FOR THE THREE REASONS I JUST GAVE, IT IS REALLY

1 VERY MUCH NOT LIKE THAT. AND THAT'S A VERY POOR WAY TO THINK
2 ABOUT MEMORY, IS REALLY MUCH OF ALL LIKE ANY SORT OF STANDARD
3 SYSTEM THAT WILL CAPTURE, SAY, AN IMAGE AND RETAIN IT
4 UNALTERED OVER LONG PERIODS OF TIME. MEMORIES SHOULD BE
5 EXPECTED REALLY TO CHANGE IN VARIOUS WAYS AS TIME PASSES.

6 Q CAN YOU SAY THAT AGAIN, PLEASE?

7 A MEMORIES SHOULD BE EXPECTED TO CHANGE AS TIME PASSES.

8 Q AND WHAT WOULD BE THE TIME PERIOD OVER WHICH ONE'S MEMORY
9 MIGHT BE EXPECTED TO CHANGE?

10 A MEMORIES WILL CHANGE. UNLESS WE'RE TALKING ABOUT SOMETHING
11 VERY SIMPLE, LIKE, YOU KNOW, SHOW YOU A CARD AND ON THE CARD
12 ARE TWO LETTERS, YOU'LL BE ABLE TO REMEMBER AT LEAST WHAT
13 THOSE LETTERS WERE FOR A LONG PERIOD OF TIME. BUT IF WE SHOW
14 YOU SOMETHING MORE COMPLICATED, LET'S SAY YOU GET A GLANCE AT
15 A PHOTOGRAPH OF A PERSON, WE CAN SEE THAT YOUR MEMORY FOR
16 DETAILS OF WHAT THAT PERSON LOOKED LIKE AND THE ACCURACY AND
17 SO ON WILL START TO DECLINE AS QUICK AS A FEW SECONDS
18 AFTERWARDS. NOT TO SAY YOU WON'T, YOU KNOW, REMEMBER THAT
19 PERSON TEN SECONDS LATER, BUT YOU WON'T REMEMBER QUITE AS
20 MANY DETAILS AS YOU WOULD MAYBE AFTER FIVE SECONDS AND SO ON
21 AS TIME PASSES. THE TENDENCY IS THAT THE ACCURACY AND DETAIL
22 OF YOUR MEMORY TEND TO DECLINE.

23 Q ARE THERE STUDIES ON THE FALLIBILITY OF HUMAN MEMORY AND EYE
24 WITNESS TESTIMONY?

25 A YES. THERE IS ACTUALLY A LARGE NUMBER OF STUDIES.

1 Q AND ARE YOU FAMILIAR WITH THEM?

2 A I AM MOST ASSUREDLY NOT FAMILIAR WITH ALL OF THEM BECAUSE
3 THERE ARE SO MANY, BUT I'M FAMILIAR WITH LOTS OF THEM AND I
4 TRY TO KEEP UP WITH THEM.

5 Q IS THIS AN AREA OF YOUR PARTICULAR EXPERTISE AND INTEREST?

6 A YES, IT IS.

7 Q COULD YOU DESCRIBE SOME OF THE STUDIES OR RESEARCH DESIGNS OR
8 METHODS USED TO STUDY EYE WITNESS TESTIMONY THAT YOU'RE
9 FAMILIAR WITH?

10 A YEAH. THERE'S ACTUALLY A LOT OF DIFFERENT DESIGNS, SO LET ME
11 GIVE YOU I THINK SORT OF A GENERAL DESCRIPTION FAIRLY
12 QUICKLY, THE THREE TYPES THAT CAPTURE MOST OF IT. ONE THING
13 YOU CAN DO IS ACTUALLY LOOK AT REAL CRIMINAL CASES. SO, FOR
14 INSTANCE, YOU CAN GO LOOK AT EYE WITNESS REPORTS AND YOU CAN
15 FIND OUT THINGS, LIKE FOR A TYPICAL WITNESS WHO HAS HAD A
16 CHANCE TO OBSERVE SOMEBODY, ABOUT HOW MANY CHARACTERISTICS
17 ARE THEY ABLE TO MENTION WHEN THEY LATER GIVE A VERBAL
18 DESCRIPTION OF WHAT THE PERSON LOOKED LIKE. SHOULD YOU
19 EXPECT THEM TO BE ABLE TO, YOU KNOW, GIVE A THOUSAND WORD
20 ESSAY ON THE APPEARANCE OR MAYBE, AS TURNS OUT TO BE THE
21 CASE, SOMETHING LIKE 12 TO 20 CHARACTERISTICS AT BEST. SO,
22 ACTUALLY, THERE'S LOTS OF THINGS YOU CAN GET AGAIN BY LOOKING
23 AT ACTUAL CASES.

24 SORT AT THE OTHER EXTREME, THERE ARE HUNDREDS OF
25 LABORATORY STUDIES WHICH HAVE THE BENEFIT OF YOU CAN KNOW

1 EXACTLY WHAT PEOPLE ARE SEEING, YOU CAN CAREFULLY CONTROL IT,
2 AND YOU CAN TEST THEIR MEMORY LATER ON TO SEE, FOR INSTANCE,
3 WHAT HAPPENS IF A FACE HAS, INSTEAD OF A FAIRLY NORMAL
4 APPEARANCE, HAS SOME SORT OF DISTINCTIVE FEATURE ADDED TO IT
5 WHICH AS I MENTIONED WILL HELP YOU REMEMBER IT.

6 SORT OF INBETWEEN THOSE TWO YOU CAN TRY AND MORE CLOSELY
7 APPROXIMATE REAL WORLD CRIMINAL CASES AND STILL HAVE SOME OF
8 THE CONTROL OVER WHAT'S GOING ON. THIS IS TYPICALLY DONE
9 USING VIDEOTAPES, VIDEOTAPES OFTEN OF STAGED CRIMES THAT LOOK
10 LIKE THEY'RE REAL. OR IN A NUMBER OF CASES YOU CAN DO REAL
11 LIFE ENACTMENTS, HAVE PEOPLE COME IN AND THERE IS APPARENTLY
12 SOMETHING LIKE A PURSE SNATCHING THAT TAKES PLACE IN FRONT OF
13 THEM. AND THEN YOU CAN LOOK AT HOW THEIR MEMORY IS EITHER
14 ACCURATE OR NOT FOR VARIOUS ASPECTS OF THAT.

15 Q WHAT GENERAL CONCLUSIONS DO SCIENTISTS REACH ON THE BASIS OF
16 THIS RESEARCH?

17 A WELL, A FEW OF THE MAJOR CONCLUSIONS ARE FIRST OFF THAT THE
18 ABILITY OF EYE WITNESSES TO IDENTIFY PERSONS EVEN UNDER
19 RATHER GOOD CIRCUMSTANCES IS NOT ALL THAT GREAT. THAT IS,
20 IT'S USUAL IF YOU PRESENT SOMEBODY WITH ONE OF THESE TYPES OF
21 MEMORY TESTS FOR YOU TO SEE MISTAKES MADE.

22 A SECOND VERY CONSISTENT FINDING CONNECTS WITH A
23 QUESTION THAT'S OFTEN ASKED IN THESE CASES. PEOPLE ARE OFTEN
24 ASKED NOT JUST WHAT THEY REMEMBER BUT HOW SURE THEY ARE OF
25 IT, OR USUALLY THE WORD IS HOW CONFIDENT PEOPLE ARE. AND

1 THAT PRODUCES THE FOLLOWING VERY CONSISTENT FINDING THAT THE
2 CONFIDENCE OF PEOPLE IN THEIR MEMORIES IS VERY LOOSELY,
3 FAIRLY POORLY RELATED TO HOW ACCURATE THEY ARE, MEANING
4 SOMEBODY WHO IS VERY CONFIDENT ABOUT THEIR MEMORIES IS NOT
5 NECESSARILY GOING TO BE ANY MORE ACCURATE THAN SOMEBODY WHO
6 REALLY SEEMS TO BE QUITE UNSURE OF THEMSELVES.

7 Q THAT SEEMS -- WOULD THAT SEEM STRANGE TO THE LAYMAN?

8 A I THINK YES. IN FACT, THERE ARE SOME STUDIES ABOUT WHAT SORT
9 OF EVERY DAY ADULTS BELIEVE ABOUT THINGS LIKE CONFIDENCE AND
10 ACCURACY. AND, YES. THOSE SUGGEST THAT PEOPLE THINK THE
11 RELATIONSHIP BETWEEN CONFIDENCE AND ACCURACY IS MUCH HIGHER
12 THAN IT IS, UNLESS OF COURSE THEY'VE BEEN THROUGH A CLASS OF
13 COGNIZANT PSYCHOLOGY OR SOMETHING ELSE WHERE THEY'VE LEARNED
14 ABOUT THE STUDIES.

15 Q SO, SPECIAL -- WOULD SPECIAL TRAINING IN YOUR FIELD MAYBE
16 MAKE SOMEONE BETTER AT DETERMINING MEMORY AND INCREASING
17 THEIR RELIABILITY? IS THAT WHAT YOU'RE SAYING BY THAT?

18 A NO. WHAT I'M SAYING IS THAT WITH SOME TRAINING YOU CAN LEARN
19 PRETTY EASILY. HOPEFULLY MAYBE THE JURY HAS JUST LEARNED
20 THAT CONFIDENCE IS NOT SUCH A GOOD GUIDE TO JUDGING THE
21 ACCURACY OR RELIABILITY OF SOMEBODY'S MEMORY REPORTS AS YOU
22 MIGHT THINK.

23 Q AND ARE YOU AWARE OF STUDIES REGARDING EYE WITNESS
24 MISIDENTIFICATION?

25 A YES. THERE ARE -- THE PRIMARY WAY TO HAVE ANY IDEA ON THAT

1 BESIDES THE LABORATORY STUDIES IS THERE ARE ACTUAL -- AGAIN,
2 LOOKING AT ACTUAL CASE RECORDS. THERE IS UNFORTUNATELY A
3 NUMBER OF CASES EVERY YEAR WHERE THERE IS A CLEAR CASE OF
4 WRONGFUL CONVICTION. THIS CAN OCCUR OBVIOUSLY FOR A LARGE
5 NUMBER OF REASONS. AND THESE DAYS YOU ALL CAN FIND OUT ABOUT
6 IT TYPICALLY BECAUSE, YOU KNOW, SOMEBODY ELSE CONFESSES
7 AFTERWARDS OR THERE IS SOME SORT OF SCIENTIFIC EVIDENCE THAT
8 EXONERATES A PERSON. ANYWAY, IF YOU LOOK AT THOSE CASES AND
9 LOOK FOR WHAT WENT WRONG AT THE TRIAL, THE MOST FREQUENT
10 PROBLEM APPEARS TO BE EYE WITNESS IDENTIFICATIONS.

11 Q ARE THERE ANY PERCENTAGES THAT CAN BE GLEANED FROM THESE
12 CASES?

13 A YEAH. THERE'S A COUPLE OF STUDIES THAT ARE ACTUALLY FAIRLY
14 CONSISTENT. BUT IN THE BEST, THE LARGEST OF THESE STUDIES,
15 THE ESTIMATE IS IT'S A LITTLE BIT OVER HALF OF ALL CASES ARE
16 WRONGFUL CONVICTIONS, THE PRIMARY PROBLEMS WITH EYE WITNESS
17 IDENTIFICATION OR EYE WITNESS TESTIMONY OF SOME SORT.

18 Q BASED ON YOUR KNOWLEDGE OF THESE RESEARCH STUDIES, ARE THERE
19 COMMONLY HELD MISTAKES, MISTAKEN BELIEFS ABOUT EYE WITNESS
20 TESTIMONY?

21 A YES. IT APPEARS THAT IN GENERAL ADULTS AT LEAST IN THE U.S.
22 PLACE PROBABLY MORE WEIGHT ON EYE WITNESS REPORTS MAYBE THAN
23 THEY OUGHT TO. THAT IS, IT APPEARS THAT THEY HAVE TOO MUCH
24 FAITH IN THE ABILITY OF PEOPLE TO IDENTIFY OTHERS, AT LEAST
25 IN THE CASE WHEN THE OTHER PEOPLE ARE UNFAMILIAR TO THEM AND

1 NOT FAMILIAR PEOPLE. AGAIN, IT ALSO APPEARS THAT CONFIDENCE
2 IS -- THAT TOO MUCH ATTENTION IS PAID TO CONFIDENCE IN
3 JUDGING WHETHER SOMEBODY IS ACCURATE IN THEIR MEMORY.

4 Q HOW ABOUT STRESS AND MEMORY?

5 A THERE'S SOME INDICATION -- AGAIN, IF WE'RE TALKING ALONG THE
6 SAME LINES, THERE'S SOME INDICATION THAT A LOT OF PEOPLE TEND
7 TO BELIEVE THAT IF YOU'RE UNDER HIGH STRESS THINGS WILL BE
8 BURNED IN YOUR MEMORY OR OTHERWISE SOMEHOW OR OTHER YOUR
9 MEMORY WILL BE BETTER. THE EVIDENCE OF WHAT STRESS DOES,
10 PARTICULARLY HIGH LEVELS OF STRESS THAT YOU SEE IN CASES
11 WHERE THERE'S AN ASSAULT OR THERE IS A DEADLY WEAPON
12 BRANDISHED, THE EVIDENCE THERE IS BY NO MEANS CLEAR CUT I
13 WOULD SAY. BUT WHAT EVIDENCE THERE IS INDICATES THAT STRESS
14 IS MORE LIKELY TO IMPAIR MEMORY AND NOT LIKELY TO HELP IT.

15 Q HOW ABOUT DETAILING INCREASING ACCURACY?

16 A YEAH. THAT KIND OF PARALLELS WHAT I SAID ABOUT CONFIDENCE.
17 I BELIEVE A LOT OF PEOPLE THINK THAT IF ONE PERSON CAN GIVE
18 OR AT LEAST APPEAR TO BE GIVING A BUNCH OF DETAILS THAT
19 ANOTHER WITNESS IS NOT, FOR INSTANCE, DETAILS ABOUT, YOU
20 KNOW, THEIR PANTS WERE NOT ONLY GRAY BUT THEY LOOKED LIKE
21 THEY HAD BEEN RECENTLY PRESSED AND HE HAD A SMALL SPOT ON THE
22 CUFF OR SOMETHING, WHEN YOU START HEARING DETAILS LIKE THIS,
23 THAT LEADS PEOPLE TO BELIEVE THAT THAT WITNESS IS MUCH BETTER
24 THAN SOMEBODY ELSE WHO IS NOT PROVIDING ANY DETAILS. BUT,
25 AGAIN, THE RESEARCH INDICATES THAT THE LEVEL OF DETAIL IN THE

1 REPORT IS NOT A TERRIBLY GOOD GUIDE TO WHETHER OR NOT YOU
2 SHOULD BELIEVE WHAT THE PERSON'S SAYING, WHETHER OR NOT THEIR
3 MEMORY IS ACCURATE.

4 Q DO MEMORIES GET CLEARER OVER TIME?

5 A THAT'S SOMETHING THAT RARELY OCCURS. IT IS -- IT DOES OCCUR
6 THAT OCCASIONALLY PEOPLE WILL REMEMBER SOMETHING AT A LATER
7 TIME THAT THEY COULD NOT AT AN EARLIER TIME, A SINGLE ITEM
8 BEING RECALLED. I'M SURE YOU'VE ALL EXPERIENCED REMEMBERING
9 SOMEBODY'S NAME AFTER MAYBE YOU'VE RUN INTO THEM AND COULDN'T
10 REMEMBER IT RIGHT AT THE MOMENT. THAT'S NOT UNUSUAL. BUT
11 HAVING AS A WHOLE YOUR MEMORY FOR, SAY, AN EVENT IMPROVE OVER
12 TIME IS NOT SOMETHING THAT OCCURS AT LEAST WITH ANY
13 FREQUENCY.

14 Q SURELY EYE WITNESSES ARE ACCURATE IN SOME INSTANCES. AND ARE
15 THERE FACTORS THAT RESEARCH SHOW IMPROVE THE RELIABILITY OF
16 EYE WITNESS IDENTIFICATION?

17 A YES, THERE ARE. IF WE JUST QUICKLY SUMMARIZE THEM, SAYING
18 THAT THE ACQUISITION CONDITIONS IN THESE CASES ARE TYPICALLY
19 GOING TO BE GOOD. SO IF IT'S LIKE, YOU KNOW, BROAD DAYLIGHT,
20 A GOOD TIME TO LOOK, NOT HIGH LEVELS OF STRESS MAYBE AND SO
21 ON. IN ADDITION, AGAIN, IF YOU HAVE A PERSON YOU'RE
22 OBSERVING WHO IS VERY DISTINCTIVE, EASY TO PICK OUT FROM
23 OTHERS, THAT'S GOING TO HELP. AND A VERY CRITICAL FACTOR IS
24 FAMILIARITY. IF YOU RUN INTO SOMEBODY THAT'S VERY FAMILIAR
25 TO YOU, THAT'S GOING TO MAKE YOUR MEMORY MUCH MORE ACCURATE,

1 MUCH MORE LIKELY TO BE RELIABLE THAN WHEN WE'RE DEALING WITH
2 UNFAMILIAR PERSONS.

3 Q HOW ABOUT THE TIME OF EXPOSURE?

4 A YES. UP TO A POINT. WELL, EVENTUALLY THE MORE TIME THE
5 BETTER. BUT PARTICULARLY AS YOU'RE TALKING ABOUT SEVERAL
6 MINUTES, ONCE YOU GET UP TO SEVERAL MINUTES, AGAIN, NOT JUST
7 BEING IN THE PRESENCE OF SOMEBODY OR BEING IN A BANK WHILE
8 IT'S BEING ROBBED, BUT TO BE PAYING ATTENTION TO THE RIGHT
9 THINGS OF COURSE.

10 Q WELL, YOU'VE DESCRIBED A NUMBER OF THINGS THAT COULD AFFECT
11 ONE'S MEMORY. HOW COME WE'RE ABLE TO REMEMBER SO MUCH IN OUR
12 DAILY LIFE?

13 A YEAH. I THINK THIS IS WHY PEOPLE HAVE TOO MUCH CONFIDENCE IN
14 OUR MEMORY. BECAUSE IT SEEMS TO WORK PRETTY DARN WELL
15 THROUGH EVERYDAY LIFE. BUT WE HAVE A LOT MORE GOING ON THERE
16 TYPICALLY THAN YOU DO IN A CRIMINAL SITUATION. SO, MUCH OF
17 OUR -- IN OUR EVERYDAY LIFE THE IDENTIFICATIONS WE DO OF
18 PEOPLE IS OF FAMILIAR PEOPLE. AND IT'S PEOPLE THAT WE'RE
19 RECOGNIZING WITH ALL SORTS OF INFORMATION AVAILABLE THAT YOU
20 WOULDN'T HAVE FOR STRANGERS.

21 FOR INSTANCE, YOU LEARN TO RECOGNIZE SOME OF THE
22 CLOTHING THAT PEOPLE -- YOU KNOW, EVERY THREE WEEKS MAYBE ONE
23 OF YOUR OFFICE MATES COMES UP WITH THE SAME DRESS ON. THAT'S
24 GOING TO HELP. YOU ALSO HAVE OTHER SORTS OF INFORMATION THAT
25 YOU WON'T HAVE IF YOU'RE LOOKING AT A POLICE LINE-UP. FOR

1 INSTANCE, YOU'LL HAVE INFORMATION ABOUT THE WAY THEY MOVE,
2 THEIR GAIT PATTERNS, THEIR VOICE. YOU HAVE A LOT OF CONTEXT
3 OFTEN. SO IF I WALK DOWN THE HALL IN SOMEBODY'S OFFICE, I
4 KNOW WHO TO EXPECT TO FIND IN THERE. AND I'M NOT LIKELY TO
5 BE FOOLED UNLESS SOMEBODY IN THERE LOOKS JUST REMARKABLY LIKE
6 THE PERSON WHO USUALLY OCCUPIES THAT OFFICE. SO THERE'S ALL
7 SORTS OF FACTORS IN EVERYDAY LIFE THAT ARE NOT OFTEN PRESENT
8 IN CRIMINAL CASES.

9 Q HAVE YOU HAD OCCASION TO REVIEW SOME OF THE DIAGRAMS OF THE
10 CRIME SCENE AREA IN THIS CASE?

11 A YES. I'VE SEEN A COUPLE OF DIAGRAMS.

12 Q AND HAVE WE SPOKEN ABOUT THE FACTORS INVOLVED IN THIS CASE?

13 A YES.

14 Q AND YOU'VE TOLD US ABOUT SOME OF THE DIFFERENT PHASES AND
15 PROBLEMS WITH MEMORY AND THEN SOME OF THE ORDINARY ASPECTS OF
16 MEMORY. COULD YOU SUMMARIZE SOME OF THE THINGS THAT YOU'VE
17 TOLD US ABOUT CONFIDENCE IN A WITNESS'S MEMORY AND ITS
18 RELATIONSHIP TO ACCURACY?

19 A WELL, THE TWO MAIN POINTS I'VE MADE ARE THAT IN GENERAL
20 CONFIDENCE IS NOT A VERY GOOD GUIDE TO ACCURACY.

21 MR. GASSER: YOUR HONOR, I HATE TO OBJECT, BUT I THINK
22 THIS HAS BEEN ASKED AND ANSWERED, GONE OVER.

23 THE COURT: I THINK YOU ARE CORRECT, MR. GASSER, BECAUSE
24 THE QUESTION WAS POSED AS A SUMMARIZATION. SO, RESPECTFULLY,
25 MR. SHUPPER, UNLESS IT'S SOMETHING DIFFERENT, I'M GOING TO

1 ASK YOU TO MOVE ON, SIR.

2 Q ALL RIGHT.

3 THE COURT: UNLESS -- WELL, I'M NOT GOING TO SAY THAT.
4 GO AHEAD, PLEASE, SIR.

5 Q COULD US TELL US ABOUT MISLEADING POST EVENT INFORMATION?

6 A YES. I'LL START AT THE END OF THAT. POST EVENT MEANS AFTER
7 THE EVENT OF COURSE. SO WHAT WE'RE TALKING ABOUT HERE IS
8 INFORMATION THAT COMES TO YOU AFTER YOU HAVE OBSERVED AN
9 EVENT. IT WOULD BE MISLEADING CASES WHERE IT'S INACCURATE.
10 AND THIS IS A SITUATION THAT WHERE AFTER YOU'VE OBSERVED
11 SOMETHING, BY IMPLICATION OR BY OVERHEARING SOMEBODY, BY
12 LEADING QUESTIONS, YOU GET THE IMPRESSION OF SOME ADDITIONAL
13 INFORMATION THAT WAS NOT IN YOUR MEMORY. THIS CAN THEN ALTER
14 YOUR MEMORY.

15 I'LL GIVE YOU A QUICK EXAMPLE I USE AS A DEMONSTRATION
16 IN CLASS. I HAVE A VIDEOTAPE. I INTRODUCE IT TO THE
17 STUDENTS BY TELLING THEM THAT THEY'RE ABOUT TO SEE THE MOST
18 FAMOUS EXPERT ON EYE WITNESS TESTIMONY GIVING A LECTURE ABOUT
19 MEMORY. AND YOU SEE HER START TO GIVE A LECTURE UNTIL YOU
20 GET TO ABOUT TEN SECONDS INTO THIS LECTURE, A STRANGER COMES
21 IN THE FRONT DOOR, PART OF THE VIDEOTAPE, FRONT DOOR, GRABS
22 HER PURSE AND RUNS OUT.

23 ANYWAY, THAT THEN QUICKLY TURNS INTO A QUESTION ABOUT
24 WHETHER THE PEOPLE IN THE CLASS AND OF COURSE THE PEOPLE IN
25 MY CLASS AS WELL CAN IDENTIFY THIS PERSON. BUT BEFORE THAT

1 HAPPENS, THIS PROMINENT PSYCHOLOGIST OR PROFESSOR LOFTIS
2 SUGGESTS THAT, YOU KNOW, SHE DOESN'T REMEMBER MUCH ABOUT THIS
3 PERSON BUT IT WAS ABOUT A MEDIUM SIZED MALE WITH A MUSTACHE.
4 WELL, SURE ENOUGH, A NUMBER OF PEOPLE IN THE CLASS AND IN MY
5 CLASS TYPICALLY THEN ALSO REPORT THAT THE GUY HAD A MUSTACHE.
6 WELL, HE DOESN'T. AND THAT WAS A MEMORY, IF YOU LIKE, THAT
7 WAS SORT OF PLANTED THERE BY AN OBVIOUS SUGGESTION.

8 Q CAN YOU TELL ME WHAT THE WEAPONS FOCUS AFFECT IS?

9 A YES. THE WEAPON FOCUS AFFECT IS AGAIN THE AFFECT OF HAVING A
10 DEADLY WEAPON TYPICALLY AT A CRIME SCENE, BUT ANY SORT OF
11 EVENT. THE POINT IS I THINK WHAT YOU WOULD EXPECT. SO IF
12 YOU'RE SOMEPLACE AND SOMEBODY IS BRANDISHING A LARGE KNIFE OR
13 A GUN, THAT WILL TEND TO ATTRACT YOUR ATTENTION. IF YOU
14 THINK ABOUT IT, IF YOU'RE PAYING ATTENTION TO THE GUN, YOU
15 ARE OBVIOUSLY NOT PAYING ATTENTION TO OTHER THINGS LIKE, FOR
16 INSTANCE, THE FACIAL APPEARANCE OF THE PERSON WHO IS HOLDING
17 THE GUN. SO, INDEED, PSYCHOLOGISTS HAVE EXAMINED THE
18 QUESTION OF WHETHER IF THERE'S A WEAPON PRESENT, WILL THIS
19 IMPAIR YOUR MEMORY FOR THINGS LIKE THE IDENTITY OF THE PEOPLE
20 INVOLVED AND THE RESULTS INDICATED, AND INDEED THAT IT DOES.

21 Q WHAT ABOUT ANY UNCONSCIOUS TRANSFERENCE? HAVE THERE BEEN
22 STUDIES IN THAT AREA? CAN YOU DESCRIBE WHAT THAT PHENOMENA
23 IS?

24 A YEAH. UNCONSCIOUS TRANSFERENCE REFERS TO HAVING SOMEBODY WHO
25 IS FAMILIAR TO YOU FROM ONE PLACE BEING SHIFTED OVER TO

1 ANOTHER. SO, THIS I'M AFRAID HAPPENS TO ME KIND OF
2 FREQUENTLY. NOT A BIG SHIFT. BUT PARTICULARLY IF I START
3 THE SEMESTER, YOU KNOW, SEVERAL CLASSES OF NEW STUDENTS
4 ALMOST ALL UNFAMILIAR. YOU KNOW, I WILL RUN ACROSS ONE OF
5 THEM IN THE HALLWAY, AND I WILL RECOGNIZE THEY'RE FAMILIAR.
6 I'LL KNOW THEY'RE IN MY CLASS THIS SEMESTER. BUT I WILL
7 SOMETIMES MAKE A MISTAKE ABOUT WHICH CLASS THEY'RE IN.

8 SO IN A CRIMINAL CASE A MORE SERIOUS PROBLEM MIGHT BE IF
9 YOU WERE WITNESSING A BANK ROBBERY AND YOU LATER SEE AS
10 FAMILIAR AND BELIEVE A PERSON TO BE ONE OF THE ROBBERS WHO IN
11 FACT WAS JUST ANOTHER PERSON WHO HAPPENED TO BE IN THE BANK
12 AT THE TIME. SO THEY WOULD BE FAMILIAR. IN FACT, IN THIS
13 CASE YOU'D ACTUALLY HAVE THEM IN THE RIGHT LOCATION. THAT'S
14 NOT NECESSARILY TRUE. BUT THEIR ROLE WOULD BE MISTAKEN.

15 Q WE'VE ALL HEARD ABOUT DEJA VU. CAN YOU DESCRIBE THAT
16 PHENOMENA AS IT APPLIES TO MAYBE EXPOSURE TO A FACE YOU'VE
17 SEEN BEFORE AND HAVING SOME FAMILIARITY WITH IT BUT NOT BEING
18 ABLE TO PUT IT IN THE RIGHT CONTEXT?

19 A YEAH. DEJA VU OF COURSE IS THE FEELING OF FAMILIARITY BUT
20 YOU'RE NOT SURE WHERE IT'S COMING FROM. THIS GENERAL PROBLEM
21 IS IN FACT A WELL RECOGNIZED, MORE GENERIC, IF YOU LIKE,
22 MEMORY PROBLEM CALLED SOURCE ERROR OFTEN. AND IT'S AGAIN A
23 CASE WHERE YOU MAY REMEMBER SOMETHING BUT YOU ARE NOT SURE OR
24 YOU MIGHT BE INCORRECT ABOUT THE SOURCE OF THAT MEMORY,
25 INCORRECT, FOR INSTANCE, ABOUT WHERE IT IS YOU'VE SEEN

1 SOMEBODY BEFORE.

2 Q YOU'VE TESTIFIED THAT MEMORY OF WITNESSES CAN BE CONTAMINATED
3 BY EVENTS AND EXPERIENCES THAT OCCUR AFTER THAT TEND TO BE
4 REMEMBERED AT. CAN WITNESSES TELL IF THEIR MEMORY HAS BEEN
5 CONTAMINATED?

6 A NO. TYPICALLY, AS YOUR MEMORY CHANGES OVER TIME, EVEN IF IT
7 INCLUDES ADDING IN, YOU KNOW, NEW THINGS BECAUSE SOMEBODY HAS
8 SUGGESTED SOMETHING TO YOU, TYPICALLY THERE IS NO INDICATION
9 THAT PEOPLE ARE GOING TO BE AWARE THAT THAT'S OCCURRED.

10 Q IS THERE ANY WAY TO RETRIEVE ORIGINAL UNCONTAMINATED MEMORY
11 ONCE MEMORY HAS BEEN ALTERED?

12 A NO. YOU CAN OF COURSE CORRECT PEOPLE'S BELIEFS. FOR
13 INSTANCE, IF THEY, YOU KNOW, IDENTIFY SOMEBODY IN ONE PLACE
14 AND YOU POINT OUT, YOU KNOW, NO, YOU DON'T KNOW THEM FROM
15 THERE, THAT'S THE GUY THAT WORKS AT THE GROCERY STORE, NOT
16 THE GUY THAT WORKS AT THE BANK. AND THEN THEY'LL BELIEVE
17 THAT. AND THAT MIGHT IMPOSE A CORRECTION IN THEIR MEMORY.
18 BUT THAT'S NOT THE SAME AS GETTING BACK, SOMEHOW UNCOVERING
19 THE ORIGINAL MEMORY.

20 Q IS THERE A CHANCE THAT WHERE TWO PEOPLE IDENTIFY THE SAME
21 PERSON THAT THERE COULD BE A MISTAKE?

22 A YES. IN FACT, THE EXAMPLE I GAVE ABOUT THE STAGED PURSE
23 SNATCHING, YOU CAN SEE A NUMBER OF PEOPLE USUALLY WILL SORT
24 OF BITE ON THE SUGGESTION OF THE PROFESSOR AND INCORPORATE A
25 MUSTACHE INTO THEIR MEMORY OF THE PERSON. THEN THERE'S,

1 AGAIN LOOKING AT ACTUAL CRIMINAL CASES, THERE ARE CASES WHERE
2 THERE HAVE BEEN MORE THAN ONE EYE WITNESS AND THEY HAVE NOT
3 BEEN CORRECT.

4 Q ARE THERE ANY CORRELATIONS BETWEEN THE DETAILS THAT A PERSON
5 MAY GIVE AT THE TIME OF THE EVENT AND THEIR ULTIMATE
6 SELECTION OF A SUSPECT, SAY, FROM A PHOTOGRAPH OR ---

7 A CAN YOU MAYBE REPHRASE THAT? I'M NOT EXACTLY SURE WHAT
8 YOU'RE ASKING ME.

9 Q LET ME TRY IT LIKE THIS. IF SOMEONE EXPERIENCES A TRAUMATIC
10 EVENT, A STRESSFUL EVENT, BUT IS UNABLE TO RECALL SPECIFIC
11 FEATURES AND THEIR DESCRIPTION IS VAGUE AND THEN THEY'RE
12 LATER ON SHOWN A PHOTOGRAPH OF A GROUP OF SUSPECTS AND THEY
13 CAN SELECT SOMEONE AND BE CERTAIN OF IT, IS THAT NECESSARILY
14 RELIABLE?

15 A IS THAT NECESSARILY --- NO. OF COURSE THAT'S NOT NECESSARILY
16 RELIABLE. NO.

17 Q OKAY. SO THE FACT THAT ONE WOULD REPORT A DESCRIPTION OF
18 VAGUE PROPORTIONS AND THEN SUDDENLY SAY, "I KNOW THIS PERSON"
19 AND BE CERTAIN ABOUT IT DOESN'T NECESSARILY REFLECT ACCURACY?

20 A NO.

21 Q AND YOU'RE AWARE OF THE LOCATION OF THIS FROM THE DIAGRAMS
22 I'VE SHOWN YOU. AND I'LL REFER TO DEFENDANT'S EXHIBIT NO. 5.
23 HAVE YOU SEEN THIS BEFORE?

24 A I'VE SEEN A COPY OF THAT, YES.

25 Q YES. AND IF THE INCIDENT ---

1 MR. GASSER: I'M GOING TO OBJECT AT THIS POINT.

2 THE COURT: DON'T KNOW YET, MR. GASSER. YOU ALL COME UP
3 HERE JUST A SECOND, BECAUSE I DON'T KNOW IF IT'S
4 OBJECTIONABLE YET OR NOT. MIGHT BE; MIGHT NOT BE.

5 (WHEREUPON, THE FOLLOWING SIDE BAR CONFERENCE IS HAD)

6 THE COURT: OKAY. I'M GOING TO LET YOU FINISH YOUR
7 QUESTION. BUT WHAT GENERALLY AM I LOOKING FOR ON YOUR
8 OBJECTION?

9 MR. GASSER: GENERALLY, I THINK HE'S MOVING OUTSIDE THE
10 SCOPE OF HIS -- AS AN EXPERT IN THE AREA OF MEMORY AND ASKING
11 HIM TO COMMENT ON SPECIFIC FACTS OF THIS CASE.

12 THE COURT: SPECIFIC FACTUAL SITUATION. WHICH IS NOT
13 NECESSARILY IMPROPER FOR AN EXPERT WITNESS TO DO. WHAT ARE
14 YOU GOING TO ASK HIM, JOHN?

15 MR. SHUPPER: IF THE FACTORS PRESENT IN THIS DIAGRAM, IF
16 THE TIME OF EXPOSURE OCCURRED HERE IN AN AREA THAT MAY HAVE
17 BEEN DARK AND A BRIEF EXPOSURE IN THE LIGHTED AREA --

18 THE COURT: OKAY. HE HAS NOT EXAMINED THE SCENE. I'LL
19 ALLOW YOU TO ASK HIM THAT THE TOPOGRAPHICAL AND LIGHTING
20 FEATURES CAN AFFECT THE ABILITY OF A PERSON TO RECOGNIZE, YOU
21 KNOW, GENERALLY SPEAKING. BUT I'M NOT GOING TO ALLOW YOU TO,
22 HIS NOT HAVING SEEN THIS SCENE, RENDER A SPECIFIC OPINION
23 RELATIVE TO THIS SCENE UNDER THE SAME CIRCUMSTANCES AS
24 IDENTIFICATION WAS PURPORTEDLY MADE. OKAY. THANK YOU.

25 (WHEREUPON, THE SIDE BAR CONFERENCE IS CONCLUDED)

1 Q (BY MR. SHUPPER) LET ME ASK YOU IN A GENERAL SENSE. CAN
2 TOPOGRAPHICAL FACTORS AFFECT IDENTIFICATION IN AN AREA, IN AN
3 EYE WITNESS IDENTIFICATION CASE?

4 A YOU'RE REFERRING TO LIKE THE LAYOUT OF THE ENVIRONMENT?

5 Q YES.

6 A CERTAINLY. YES.

7 Q DOES LIGHTING OF COURSE AFFECT IT?

8 A LIGHTING IS VERY IMPORTANT.

9 Q DO YOUR STUDIES REFLECT THAT THERE ARE CERTAIN FACTORS THAT
10 MAY DECREASE RELIABILITY EVEN UPON CLOSE CONTACT, SUCH AS --
11 OTHER THAN LIGHTING?

12 A YEAH. CERTAINLY. ANYTHING THAT WOULD IMPAIR A PERSON'S
13 PERCEPTION; FOR INSTANCE, BAD EYESIGHT OR THINGS THAT MIGHT
14 -- MAY OR MAY NOT AFFECT PERCEPTION BUT WOULD AFFECT MEMORY;
15 FOR INSTANCE, VARIOUS KINDS OF DRUG EVENTS. SO THERE'S A
16 NUMBER OF THINGS THAT COULD BE INVOLVED.

17 Q AND CAN YOU TELL ME ABOUT THE RELIABILITY OF ACCURACY OR
18 ACCURACY OF IDENTIFICATION THAT OCCURS AT A DISTANCE AS
19 OPPOSED TO CLOSE PROXIMITY? ARE THERE ANY CORRELATIONS IN
20 THAT RELATIONSHIP?

21 A WELL, THE MAIN THING OF COURSE THAT OCCURS IS YOUR ABILITY TO
22 SEE DETAILS DECREASES AS A FUNCTION OF DISTANCE. AGAIN,
23 ASSUMING SOMEBODY WITH NORMAL VISION, IT SHOULD BE TRUE. SO
24 THE FURTHER AWAY SOMEBODY IS, THE FEWER DETAILS. THE DETAILS
25 OF SOMEBODY'S APPEARANCE ARE CRITICAL FOR BEING ABLE TO

1 SPECIFICALLY IDENTIFY A PERSON. SO, YOU MAY WELL BE ABLE TO
2 CHARACTERIZE A PERSON AND GIVE A DESCRIPTION WITHOUT BEING
3 ABLE TO IDENTIFY THEM; LIKE, FOR INSTANCE, KNOWING THAT IT'S
4 A LARGE WHITE MALE WITH A BEARD AND NOT GO MUCH FURTHER. OF
5 COURSE, IF THAT'S REALLY ALL THAT YOU SAW, WAS A LARGE WHITE
6 MALE WITH A BEARD, THAT'S NOT ANYWHERE NEAR SUFFICIENT
7 INFORMATION TO SPECIFICALLY IDENTIFY A PARTICULAR WHITE MALE
8 WITH A BEARD.

9 Q HOW ABOUT LINE-UP PROCEDURES? ARE YOU FAMILIAR WITH LINE-UP
10 PROCEDURES?

11 A YES, I AM.

12 Q IS THERE ANY DIFFERENCE BETWEEN PHOTOGRAPHIC LINE-UP
13 PROCEDURES OR LIVE LINE-UP PROCEDURES FROM YOUR STUDIES?

14 A YES. THERE IS REASON TO BELIEVE, GOOD REASON TO BELIEVE,
15 THAT AN IN-PERSON LINE-UP WILL HAVE SOME ADVANTAGES. THAT
16 IS, A WITNESS WOULD HAVE AN EASIER TIME WITH EACH PERSON IN
17 THE LINE-UP DECIDING WHETHER THEY WERE OR WERE NOT A PERSON
18 THAT WAS IN THEIR MEMORY.

19 Q AND OVER PHOTOGRAPHIC LINE-UPS?

20 A OVER PHOTOGRAPHS. PARTICULARLY IF THE PEOPLE LIKE ARE
21 ALLOWED TO MOVE ABOUT OR THEY TALK OR DO OTHER THINGS THAT
22 MAY HAVE BEEN OBSERVED ORIGINALLY.

23 Q ARE YOU SUGGESTING THAT THOSE OTHER FACTORS, VOICE, MOVEMENT
24 AND SUCH, MIGHT INCREASE RELIABILITY OVER ---

25 A YES.

1 Q — THE STATUS?

2 A THERE IS GOOD REASON TO BELIEVE THAT'S TRUE.

3 Q AND WHAT ABOUT THE CHANCES OF A SUGGESTION FOR A LINE-UP
4 BEING CONTAMINATED BY ANYTHING THAT THE WITNESS IS VIEWING?

5 A YEAH. UNFORTUNATELY, I THINK THAT THAT IS A FAIRLY FREQUENT
6 PROBLEM, AT LEAST SOME ASPECTS OF THAT. SO ONE OF THE
7 PROBLEMS THAT IS LIKELY TO OCCUR IF YOU ARE A WITNESS IN A
8 CASE AND ARE GOING TO BE SHOWN A LINE-UP IS THAT YOU AS AN
9 EYE WITNESS BEFORE YOU LOOK AT ANYTHING ARE SOMEWHAT LIKELY
10 TO THINK THAT THERE'S SOME REASON THAT I'M BEING SHOWN THIS
11 LINE-UP; THAT IS, THE POLICE HAVE SOME REASON TO SUSPECT
12 SOMEBODY WHO IS IN HERE.

13 IN OTHER WORDS, THE TASK MIGHT BECOME ONE OF INSTEAD OF
14 TRYING TO SEE IF THERE IS A CLEAR AND COMFORTABLE MATCH
15 BETWEEN YOUR MEMORY FOR WHAT A PERSON LOOKS LIKE AND SOMEBODY
16 IN THE LINE-UP, YOU MAY SEE YOUR TASK MORE AS PICKING OUT
17 WHICH PERSON IN THE LINE-UP BEST FITS MY MEMORY UNDER THE
18 ASSUMPTION THAT THE CULPRIT IS IN FACT IN THE LINE-UP.

19 AND THAT'S WHY PSYCHOLOGISTS WHO HAVE STUDIED LINE-UP
20 PROCEDURES WILL GENERALLY RECOMMEND THAT YOU MAKE CLEAR
21 WHENEVER YOU PRESENT A LINE-UP TO THE WITNESS THAT THE PERSON
22 OR AN ACTUAL CULPRIT MAY OR NOT BE IN THE LINE-UP.

23 IT'S ALSO A GOOD IDEA TO HAVE SOMEBODY PRESENT THE
24 LINE-UP WHO DOESN'T KNOW WHICH PERSON IN THE LINE-UP IS A
25 SUSPECT. AND THAT'S BECAUSE IT'S ALL TOO EASY FOR THEM TO

1 INADVERTENTLY PROVIDE SOME HINT ABOUT WHICH PERSON THE POLICE
2 HAVE AS A SUSPECT. IT COULD BE OBVIOUS BY SAYING SOMETHING
3 TO THE PERSON WHO IS LOOKING AT IT LIKE, "YOU SEEM TO BE
4 LOOKING AT NO. 3 A LOT." BUT IT NEED NOT BE ANYTHING SO
5 OBVIOUS. IT COULD JUST BE THAT THE WITNESS MAY OBSERVE THAT
6 THE INVESTIGATOR PERHAPS UNCONSCIOUSLY HAPPENS TO BE LOOKING
7 AT ONE OF THE PICTURES AS THEY'RE STANDING BY.

8 Q WHAT ABOUT IDENTIFICATION AND THE BEST MATCH CRITERION?

9 A YEAH. THE BEST MATCH CRITERIA IS AGAIN WHAT MIGHT HAPPEN
10 PARTICULARLY IF YOU, YOU KNOW, HAVE SOME REASON TO BELIEVE
11 THAT THE SUSPECT, OR THE CULPRIT I SHOULD SAY, IS IN A
12 LINE-UP. THEN EYE WITNESSES GENERALLY MAY WANT TO SEE
13 CRIMINALS CAUGHT AND WOULD BE MOTIVATED TO TRY AND PICK OUT
14 — YOU KNOW, THEY WOULDN'T WANT TO MISS THEM. SO YOU MIGHT
15 BE MOTIVATED TO PICK OUT THE PERSON WHO BEST MATCHES YOUR
16 MEMORY AGAIN INSTEAD OF TRYING TO MAKE A JUDGMENT AS TO
17 WHETHER ANY OF THESE PEOPLE PROVIDE A SUFFICIENTLY CLOSE
18 MATCH FOR YOU TO BE TRULY CONFIDENT THAT YOU'VE GOT THE RIGHT
19 PERSON.

20 Q TELL ME ABOUT A BLIND TESTER FOR LINE-UPS.

21 A THE NOTION OF A BLIND TESTER IS NOT ONE WHO IS LITERALLY
22 BLIND BUT ONE WHO DOES NOT KNOW WHO THE PEOPLE ARE IN THE
23 LINE-UP OR WHICH ONE OF THEM IS A SUSPECT. I SHOULD MAYBE
24 ADD TO THIS THAT IT'S ALSO WELL RECOGNIZED THAT WHENEVER YOU
25 SHOW A LINE-UP YOU SHOULD ONLY HAVE ONE SUSPECT IN IT. IF

1 YOU HAVE -- FOR INSTANCE, YOU SHOW PEOPLE FOUR PICTURES AND
2 ALL FOUR OF THEM ARE SUSPECTS, THERE'S NO WAY SOMEBODY COULD
3 MISS PICKING A SUSPECT OUT. BUT THAT'S USUALLY NOT A
4 PROBLEM.

5 Q PROFESSOR, YOU WEREN'T PRESENT AT THIS CRIME SCENE, WERE YOU?

6 A NO, I WASN'T.

7 Q AND HAVE YOU HAD THE OPPORTUNITY TO TEST OR SPEAK WITH ANY OF
8 THE WITNESSES IN THIS CASE?

9 A NO, I HAVEN'T.

10 Q IF AN EYE WITNESS GIVES FALSE OR INACCURATE TESTIMONY, DOES
11 THIS MEAN THEY'RE INTENTIONALLY LYING?

12 A NO. IN FACT JUST THE OPPOSITE. I WOULD SAY NORMALLY I WOULD
13 BELIEVE THAT THEY'RE NOT INTENTIONALLY LYING BUT ARE SORT OF
14 A VICTIM OF SOME OF THESE MEMORY PROBLEMS THAT I'VE TALKED
15 ABOUT.

16 MR. SHUPPER: BEG THE COURT'S INDULGENCE, YOUR HONOR.

17 THE COURT: CERTAINLY.

18 Q (BY MR. SHUPPER) WOULD AN IDENTIFICATION MADE FROM YOUR
19 STUDIES TWENTY DAYS AFTER AN EVENT PERHAPS BE LESS RELIABLE
20 THAN ONE MADE TWO DAYS AFTER THE EVENT OR A DAY AFTER?

21 A YES. IN GENERAL, THE SOONER AN IDENTIFICATION IS MADE THE
22 MORE LIKELY YOU'LL HAVE AN ACCURATE, RELIABLE ONE.

23 Q DOES 20 DAYS MAKE A SIGNIFICANT DIFFERENCE BETWEEN YOUR
24 STUDIES AS OPPOSED TO, SAY, THE CASES YOU MENTIONED WHERE YOU
25 HAD THE STUDENTS DO THE FAKE ROBBERY IN YOUR CLASS?

1 A YEAH. I CAN'T SAY THAT I KNOW OF ANY STUDIES OFF THE TOP OF
2 MY HEAD THAT HAVE LOOKED EXACTLY AT A 20-DAY INTERVAL. BUT
3 CERTAINLY THERE HAVE BEEN STUDIES THAT HAVE LOOKED AT, FOR
4 INSTANCE, VIRTUALLY IMMEDIATE IDENTIFICATION VERSUS AN HOUR
5 LATER OR VERSUS A WEEK LATER OR THREE WEEKS AND VARIOUS
6 INTERVALS. AND THE OVERALL PATTERN OF RESULTS IS VERY CLEAR,
7 THAT THE MORE TIME THAT PASSES THE MORE PROBLEMS THERE ARE;
8 THAT IS, THE MORE TIMES THAT WE WILL MISIDENTIFY SOMEBODY WHO
9 ACTUALLY WAS THERE THAT YOU HAD SEEN AND THE MORE TIMES THAT
10 YOU WILL MISIDENTIFY SOMEBODY WHO WASN'T THERE BELIEVING THAT
11 YOU HAVE SEEN THEM.

12 Q WHAT ABOUT IF ONE IDENTIFIES A PERSON AT ONE POINT AND THEN
13 YEARS LATER IS ASKED TO CONFIRM THAT IDENTIFICATION AND DOES
14 SO VERY CONFIDENTLY?

15 A WELL, AS SOON AS AN IDENTIFICATION IS MADE, THAT CHANGES WHAT
16 IS LIKELY TO HAPPEN THEREAFTER IN WAYS THAT HAVE NOTHING TO
17 DO NECESSARILY WITH THE ORIGINAL MEMORY. SO AFTER SOMEBODY
18 HAS IDENTIFIED, WHAT MOST PEOPLE REMEMBER IS THAT THEY HAVE
19 MADE AN IDENTIFICATION, THEY REMEMBERED EARLIER THAT THIS WAS
20 THE PERSON AND THEY'LL, IF NOTHING ELSE HAPPENS, WILL
21 CONTINUE TO BELIEVE THAT THEY'VE MADE THE RIGHT DECISION.

22 Q AND I TAKE IT THAT THAT CONFIRMATION DOESN'T RELATE TO
23 RELIABILITY. WOULD YOU SAY THAT?

24 A YES.

25 Q THE CONFIRMATION, I THINK THAT'S WHAT YOU JUST SAID. ANOTHER

1 WAY OF SAYING IT, THAT THE FACT THAT THERE WAS A CONFIRMATION
2 IN THE FIRST PLACE, THERE WAS AN IDENTIFICATION AND LATER
3 CONFIRMED DOESN'T INCREASE THE RELIABILITY OF THE SELECTION?

4 A RIGHT. IF YOU WERE IN ONE OF MY STUDIES AND YOU IDENTIFIED
5 SOMEBODY TODAY AND I CAME BACK AND ASKED YOU AGAIN TOMORROW,
6 "WHO WAS IT" AND YOU PICK THE SAME PERSON, THAT DOESN'T TELL
7 ME VERY MUCH MORE THAN I ALREADY KNOW. IT CERTAINLY DOESN'T
8 TELL ME AS MUCH AS IT WOULD IF TODAY WAS THE FIRST TIME I'D
9 ASKED YOU.

10 Q IF AN EYE WITNESS IS NOT LYING AND IS CONFIDENT OF HIS OR HER
11 TESTIMONY, IS THERE A SIGNIFICANT CHANCE HE OR SHE CAN BE
12 MISTAKEN?

13 A WELL, AGAIN, IT VARIES GREATLY DEPENDING ON THE
14 CIRCUMSTANCES. BUT IN GENERAL, THERE IS DEFINITELY A CHANCE
15 THAT THEY COULD BE MISTAKEN. YES.

16 MR. SHUPPER: IF THE COURT WOULD INDULGE ME JUST A
17 MOMENT.

18 THE COURT: YES, SIR.

19 Q (BY MR. SHUPPER) BASED ON YOUR STUDIES AND YOUR EXPERIENCE
20 IN THIS FIELD, ARE THERE SOME OTHER ASPECTS THAT AFFECT
21 MEMORY THAT MIGHT BE SIGNIFICANT IN A CRIMINAL CASE THAT
22 MAYBE WE HAVEN'T TALKED ABOUT?

23 A CERTAINLY. THERE IS A LOT OF THINGS. FOR INSTANCE, THERE
24 ARE INDIVIDUAL DIFFERENCES FROM ONE PERSON TO ANOTHER AND HOW
25 GOOD THEIR MEMORY IS. THERE IS IN ADDITION TO THE SPECIFIC

1 THINGS I MENTIONED A NUMBER OF THINGS THAT MIGHT HAPPEN
2 DURING THE RETENTION THAT COULD LEAD TO MEMORY IMPAIRMENTS.

3 Q IS THERE ANY WAY TO EXPLAIN WHAT THE PROCESS IS IN TERMS OF
4 THE RELIABILITY? OR LET ME RESTATE THAT. ARE THERE SPECIFIC
5 FACTORS THAT YOU HAVEN'T MENTIONED NOW THAT MIGHT APPLY IN AN
6 EYE WITNESS CASE?

7 A YES. DO YOU WANT ME TO TALK ABOUT SOME OF THOSE?

8 Q YES, SIR. YEAH.

9 A ONE FACTOR I DIDN'T MENTION WOULD BE THE MATTER OF CROSS
10 RACIAL IDENTIFICATION WHERE AS IS I THINK COMMONLY BELIEVED
11 IN THIS CASE, IT IS INDEED CONSIDERABLY MORE DIFFICULT TO
12 IDENTIFY PEOPLE WHO ARE NOT OF THE SAME RACIAL GROUP AS YOU.
13 FOR INSTANCE, BLACKS HAVE MORE DIFFICULTY IDENTIFYING WHITES
14 THAN OTHER BLACKS AND VICE VERSA. BOTH WHITES AND BLACKS
15 HAVE MORE TROUBLE IDENTIFYING ASIANS THAN ASIANS HAVE WITH
16 EACH OTHER AND THE LIKE.

17 Q IF A WITNESS MAKES AN IDENTIFICATION AND SHOWS CONFIDENCE, IN
18 YOUR OPINION, WHAT WOULD BE THE CORRELATION IN YOUR
19 PROFESSIONAL OPINION BASED ON MEMORY AND YOUR STUDIES OF
20 INACCURACY?

21 A BETWEEN WHAT? BETWEEN ---

22 Q BETWEEN IDENTIFICATIONS MADE IMMEDIATELY AFTER AND
23 IDENTIFICATIONS MADE AT A TIME SEVERAL WEEKS LATER.

24 A OKAY. THIS IS FORCING ME, OBLIGATING ME TO GIVE A NUMBER
25 HERE. BUT I WOULD SAY THAT THERE WOULD BE A SIGNIFICANT

1 DECREASE OVER A PERIOD FROM ALMOST IMMEDIATE TO SEVERAL WEEKS
2 LATER AND THE RELIABILITY, EXCEPT PERHAPS IN AGAIN SORT OF AN
3 IDEAL CASE, ONE WHERE YOU'VE GOT A GOOD LOOK AT SOMEBODY THAT
4 YOU KNOW VERY WELL WHO HAS A DISTINCTIVE APPEARANCE, THAT'S
5 LIKELY TO HOLD UP QUITE WELL. OR, YOU KNOW, A FAMOUS PERSON.
6 SO IF, YOU KNOW, YOU WERE MUGGED BY HILLARY CLINTON, AND, YOU
7 KNOW, SHE'S VERY FAMILIAR, YOU WOULD, THAT MEMORY WOULD HOLD
8 UP PRETTY WELL. BUT HERE AGAIN, IF WE'RE TALKING ABOUT
9 UNFAMILIAR PEOPLE, IT'S A DIFFERENT SITUATION.

10 Q DR. ALLEY, I'D LIKE TO THANK YOU VERY MUCH FOR GIVING US A
11 SUMMARY OF THOSE FACTORS THAT AFFECT THE HUMAN MEMORY AND ASK
12 YOU IF THERE IS ANY EXPLANATION FROM YOUR STUDIES THAT WOULD
13 EXPLAIN THE 50 PERCENT MISIDENTIFICATION RATE THAT YOU'VE
14 MENTIONED EARLIER?

15 MR. GASSER: I OBJECT TO THAT. I OBJECT TO THAT.
16 THAT'S MISLEADING.

17 THE COURT: WELL, I DON'T KNOW. AND I'M NOT GOING TO
18 SAY. I DON'T RECALL RESPECTFULLY ANY EMPIRICAL DATA THAT WAS
19 STATED CORRELATING A 50 PERCENT OR A NUMERICAL ERROR OF
20 IDENTIFICATION RATE WITH ANY PARTICULAR STUDY, PARTICULARLY
21 THAT IS GERMANE TO THIS SITUATION. TO THAT EXTENT I'M GOING
22 TO SUSTAIN HIS OBJECTION, MR. SHUPPER. AND PLEASE ASK
23 ANOTHER QUESTION IF YOU CHOOSE TO ASK ONE.

24 MR. SHUPPER: WELL, I WOULDN'T WANT TO MISREPRESENT WHAT
25 —

1 THE COURT: I KNOW YOU WOULDN'T. OKAY, SIR. I KNOW
2 THAT.

3 MR. SHUPPER: AND I WAS -- DR. ALLEY, FORGIVE ME. AND,
4 YOUR HONOR.

5 Q (BY MR. SHUPPER) YOU TESTIFIED THAT THERE WAS -- THAT IN
6 STUDIES OF WRONGFUL CONVICTIONS, COULD YOU CLARIFY THAT SINCE
7 I MAY HAVE AWKWARDLY PRESENTED THE QUESTION, THAT WHEN YOU
8 TALKED ABOUT GENERAL CONCLUSIONS OF SCIENTISTS HAS REACHED
9 REGARDING THE BASIS OF THE RESEARCH ON MISIDENTIFICATION?

10 A YEAH. WELL, THE FUNDAMENTAL PROBLEM I THINK IS THAT MEMORY
11 IS AGAIN NOT LIKE A VIDEO CAMERA. PEOPLE ARE NOT TAKING
12 CLEAR IMAGES, HOLDING ONTO THEM INDEFINITELY. AND THEY WILL
13 USE THEM TO, YOU KNOW, TRY AND MATCH UP LATER ON WHEN THEY
14 SEE A PERSON OR SEE A PHOTOGRAPH. INSTEAD THERE'S ALL THESE
15 OTHER FACTORS GOING ON, NOT INSIGNIFICANTLY OF COURSE,
16 INCLUDING THE LOSS OF INFORMATION, FORGETTING DETAILS ABOUT
17 APPEARANCE. AS YOU FORGET MORE AND MORE DETAILS, YOUR
18 PARTICULAR MEMORY OF A FACE WILL TEND TO MATCH, YOU KNOW, NOT
19 JUST ONE PERSON IN THE POPULATION, BUT MORE AND MORE PEOPLE.

20 SO, YOU KNOW, IF WE TALK ABOUT SOMEBODY WHO HAS
21 WITNESSED A CRIME YEARS AGO MAYBE AND NOW, YOU KNOW, THAT ALL
22 THEY CAN REALLY TELL YOU IS THAT IT WAS A MEDIUM BUILD,
23 MEDIUM HEIGHT, MEDIUM AGED BLACK MALE, THAT IS SOMETHING THAT
24 WILL MATCH A LARGE PORTION OF PEOPLE.

25 SO PUT THAT TOGETHER I THINK WITH SOME OTHER THINGS,

1 PARTICULARLY WITNESSES ARE USUALLY MOTIVATED TO SEE CRIMINALS
2 CAUGHT, PARTICULARLY ONES THAT MAYBE HAVE DONE THEM PERSONAL
3 HARM OR ENDANGERED THEM, AND THEY OF COURSE WANT TO DO THE
4 RIGHT THING, GET THE RIGHT PERSON. BUT THAT MOTIVATION CAN
5 PERHAPS PROVIDE SOME PROBLEMS WHEN THEY'RE EXPOSED TO, SAY, A
6 LINE-UP THAT HAS SOMEBODY THAT BEARS A RESEMBLANCE TO A
7 SOMEWHAT VAGUE OR INACCURATE MEMORY. SO THAT'S PROBABLY THE
8 CRUX OF THE PROBLEM RIGHT THERE.

9 Q WELL, THANK YOU AGAIN, DR. ALLEY.

10 MR. SHUPPER: NO FURTHER QUESTIONS, YOUR HONOR.

11 THE COURT: THANK YOU. MR. GASSER.

12 CROSS EXAMINATION BY MR. GASSER:

13 Q GOOD MORNING, DR. ALLEY. MY NAME IS JOHNNY GASSER. I WORK
14 IN THE SOLICITOR'S OFFICE. YOU AND I HAVE NEVER MET, HAVE
15 WE, SIR?

16 A NO, WE HAVEN'T, I DON'T BELIEVE.

17 Q JUST TO CLARIFY ONE POINT. I KNOW THAT NEITHER YOU NOR MR.
18 SHUPPER WOULD -- I WANT TO CLARIFY ONE POINT THAT MIGHT HAVE
19 BEEN MISUNDERSTOOD. I BELIEVE ONE OF THE STUDIES THAT YOU
20 CITED EARLIER TO THE JURY WAS; IN THE VERY, VERY SMALL NUMBER
21 OF CASES OF WHICH SOMEBODY MAY HAVE BEEN WRONGFULLY
22 CONVICTED, YOU WOULD AGREE WITH ME THAT'S A VERY SMALL NUMBER
23 OF CASES THAT THIS STUDY DEALT WITH?

24 A I WOULD SAY IT'S A VERY -- MORE ACCURATELY SAY IT'S A VERY
25 SMALL PERCENTAGE OF CASES.

1 Q AND THAT VERY, VERY SMALL PERCENTAGE OF CASES IN WHICH
2 SOMEBODY MAY HAVE BEEN WRONGFULLY CONVICTED ACCORDING TO THIS
3 STUDY YOU'RE TALKING ABOUT, IN OVER 50 PERCENT OF THAT VERY
4 SMALL NUMBER EYE WITNESS IDENTIFICATION HAD SOMETHING TO DO
5 WITH IT?

6 A IT WAS BELIEVED TO BE THE MAIN PROBLEM, YES.

7 Q YOU AND MR. -- YOU WEREN'T TRYING TO INDICATE TO THIS JURY
8 THAT IN OVER 50 PERCENT OF ALL CRIMINAL CASES WHERE THERE'S
9 EYE WITNESS TESTIMONY SOME --

10 A NO. CERTAINLY NOT.

11 Q OKAY. AND I DIDN'T THINK YOU WERE. AND I JUST WANTED TO
12 CLARIFY THAT FOR THE JURY. NOW, YOU INDICATED, DR. ALLEY,
13 THAT DEPENDING ON THE CIRCUMSTANCES THERE IS A -- DEPENDING
14 ON THE CIRCUMSTANCES AND THE FACTORS INVOLVED IN ANY
15 PARTICULAR CASE, IF AN EYE WITNESS MAKES AN IDENTIFICATION,
16 THERE IS A CHANCE THAT THAT IDENTIFICATION MIGHT BE
17 INACCURATE. IS THAT CORRECT?

18 A YES.

19 Q NOW, THE REVERSE OF THAT IS, DEPENDING ON CERTAIN FACTS OR
20 CIRCUMSTANCES OF ANY PARTICULAR CASE, THERE'S ALSO A VERY,
21 VERY GOOD CHANCE THAT THAT PERSON'S IDENTIFICATION IS
22 ABSOLUTELY ACCURATE, CORRECT?

23 A IN SOME CASES THERE'S A GOOD CHANCE, YES.

24 Q AND THAT DEPENDS ON THE FACTS AND CIRCUMSTANCES OF EACH CASE?

25 A YES, IT DOES.

1 Q AND I BELIEVE YOU DISCUSSED SOME OF THE FACTORS THAT YOU
2 BELIEVE THAT YOUR STUDIES SHOW IN YOUR CLASSROOM THAT
3 ENHANCES THE INTEGRITY OF AN ACCURATE IDENTIFICATION. YOU
4 DISCUSSED THOSE FACTORS WITH THE JURY?

5 A YES. WELL, I MIGHT JUST CLARIFY. MY STUDIES AND MORE
6 PROBABLY BECAUSE THERE'S SO MANY OF THEM, STUDIES OF OTHER
7 RESEARCHERS.

8 Q AND ONE OF THOSE FACTORS I BELIEVE WAS THE SOONER THAT AN
9 IDENTIFICATION CAN BE MADE, THE MORE RELIABLE THAT
10 IDENTIFICATION IS?

11 A IN GENERAL, YES.

12 Q ARE YOU AWARE IN THIS PARTICULAR CASE THAT THERE'S BEEN
13 EVIDENCE PRESENTED TO THIS JURY THAT ONE OF THE
14 IDENTIFICATIONS OF ONE OF THE SUSPECTS WAS MADE WITHIN 11
15 HOURS AFTER THE VICTIM SPENT 30 TO 35 TO 40 MINUTES WITH THAT
16 PERSON?

17 A NO, I'M NOT.

18 Q BUT IT IS YOUR OPINION THAT THE SOONER THAT AN IDENTIFICATION
19 CAN BE MADE THE MORE RELIABLE THAT IDENTIFICATION IS?

20 A YES.

21 Q AND YOU ALSO INDICATED AS ONE OF THE FACTORS THAT THE AMOUNT
22 OF TIME THAT AN INDIVIDUAL HAS TO LOOK INTO THE FACE OF
23 SOMEBODY WHO MAY BE ROBBING HER OR RAPING HER, THE AMOUNT OF
24 TIME IS A FACTOR. IS THAT CORRECT?

25 A YES.

1 Q AND YOU WOULD AGREE WITH ME THEN THAT THE MORE TIME THAT A
2 VICTIM OR AN EYE WITNESS HAS TO LOOK AT SOMEBODY'S FACE THE
3 GREATER THE RELIABILITY OF THAT PERSON'S ABILITY TO IDENTIFY
4 THEM, CORRECT?

5 A NOT EXACTLY. I WOULD AGREE THAT THE MORE TIME THEY SPEND
6 LOOKING AT THEM, WHICH IS DIFFERENT FROM THE MORE TIME THEY
7 MIGHT BE LOOKING AT THEM OR HAVE AVAILABLE.

8 Q AND THE DISTANCE, THE CLOSENESS THAT SOMEBODY IS TO AN
9 INDIVIDUAL IS A MAJOR FACTOR IN DETERMINING WHETHER OR NOT
10 THAT INDIVIDUAL RECORDS THAT PERSON'S FACE IN THEIR MIND.
11 WOULD YOU AGREE WITH ME?

12 A PARTICULARLY, YEAH, RECORDING THINGS LIKE THE DETAILS OF THE
13 APPEARANCE, THAT WOULD BE VERY IMPORTANT.

14 Q FOR INSTANCE, IF I WAS AT THIS DISTANCE FROM YOU FOR A PERIOD
15 OF 15 OR 20 OR 30 MINUTES, THE RELIABILITY THAT I WOULD BE
16 ABLE TO RECORD YOUR FACE WOULD NOT BE AS ACCURATE, WOULD IT,
17 IF I WAS THIS CLOSE TO YOU?

18 A THAT IS LIKELY TO BE TRUE, YES.

19 Q IN VERBAL DISCUSSIONS BETWEEN THE PARTIES, DO NOT YOUR
20 STUDIES INDICATE, DOES NOT RESEARCH IN YOUR AREA INDICATE
21 THAT IF COMMUNICATION IS GOING ON BETWEEN THE PARTIES THAT
22 IT ENHANCES THE RELIABILITY OF A SUBSEQUENT IDENTIFICATION?

23 A NOT NECESSARILY. IT DEPENDS ON WHAT'S -- THE INFORMATION
24 CONTENT OF THE EXCHANGE.

25 Q LET ME GIVE YOU AN EXAMPLE. IF I WERE WALKING DOWN THE

1 STREET LATER ON THIS AFTERNOON DOWN MAIN STREET HERE IN
2 COLUMBIA AND WALKED PAST SOMEBODY AND JUST SAID, "HEY, HOW
3 YOU DOING", AND THEY RESPONDED LIKEWISE AND BOTH OF US KEPT
4 ON WALKING, BOTH OF US WOULD BE LESS LIKELY TO RECALL EACH
5 OTHERS' FACES THAN IF WE STOPPED AND HAD A CONVERSATION,
6 CORRECT?

7 A YES. I MIGHT HAVE MISUNDERSTOOD YOUR PREVIOUS QUESTION. I
8 THOUGHT YOU WERE TALKING ABOUT COMMUNICATION BETWEEN TWO OR
9 MORE WITNESSES.

10 Q AND ALONG WITH THE EARLIER TESTIMONY, IS THAT THE LENGTH OF
11 THAT CONVERSATION THAT WAS GOING ON, THE LONGER IT IS, THE
12 MORE LIKELY OR THE MORE OPPORTUNITY YOU HAVE TO RECORD THAT
13 PERSON'S FACE?

14 A I ACTUALLY CAN'T SPECIFICALLY SAY THAT A PERIOD OF, LONGER
15 PERIOD OF TIME PERIOD DURING WHICH COMMUNICATION IS GOING ON
16 IS LIKELY TO IMPROVE THINGS. ALTHOUGH THERE IS EVERY REASON
17 TO BELIEVE THAT'S TRUE, BECAUSE AGAIN THAT'S MORE TIME TO
18 OBSERVE THE PERSON'S BEHAVIOR, AND THAT IS GENERALLY GOING TO
19 INCREASE RELIABILITY OF IDENTIFICATIONS.

20 Q AND MUCH OF WHAT YOU'RE TALKING ABOUT, LIKE JUST YOUR
21 RESPONSE RIGHT NOW, IS REALLY BASED ON COMMON SENSE, ISN'T
22 IT? YOU DON'T HAVE TO BE A PSYCHOLOGIST TO COME UP WITH THE
23 IDEA THAT THE MORE TIME YOU SPEND AROUND SOMEBODY THE MORE
24 LIKELY YOU ARE TO BE ABLE TO IDENTIFY THEM LATER ON. THAT'S
25 COMMON SENSE, ISN'T IT?

1 A I WOULD SAY THAT PROBABLY IS COMMON SENSE, YES.

2 Q AND YOU HAVE TALKED ABOUT THE LIGHTING CONDITIONS. YOUR
3 RESEARCH INDICATES AS WELL THAT -- DOESN'T YOUR RESEARCH
4 INDICATE OR YOUR CASE STUDIES OR IN YOUR EVERYDAY LIFE THAT
5 INDIVIDUALS THAT ARE OUT IN THE DARK FOR A PERIOD OF TIME CAN
6 ADJUST THEIR EYESIGHT TO THAT ENVIRONMENT? YOU WOULD AGREE
7 WITH THAT STATEMENT, WOULD YOU NOT?

8 A YES.

9 Q SO IF YOU'RE IN A PARTICULAR AREA AT NIGHT FOR A PERIOD OF
10 TIME BEFORE AN EVENT OCCURS, DEPENDING ON HOW LONG YOU'VE
11 BEEN THERE AND DEPENDING ON HOW LONG YOU'VE HAD THE
12 OPPORTUNITY TO VIEW THE ASSAILANTS, YOUR MIND AND YOUR
13 EYESIGHT MIGHT HAVE HAD AN OPPORTUNITY TO ADJUST TO YOUR
14 ENVIRONMENT, CORRECT?

15 A YES. IT TAKES 25 MINUTES APPROXIMATELY.

16 Q SO IF AN INDIVIDUAL WAS AT A PARTICULAR AREA IN EXCESS OF 25
17 MINUTES AT NIGHT BEING ABLE TO ADJUST TO THE LIGHTING AROUND
18 THEM BEFORE ANY EVENT OCCURRED IN WHICH THEY WOULD LATER BE
19 ASKED TO IDENTIFY SOMEONE, THAT WOULD ENHANCE THE RELIABILITY
20 OF ANY IDENTIFICATION PROCESS?

21 A WELL, IT DEPENDS ON WHAT HAPPENS IN THAT PERIOD OF TIME.
22 THERE'S ONE FACTOR THAT CREATES TROUBLE OFTENTIMES, WHICH IS
23 IF THERE ARE LIGHTS, FOR INSTANCE, OF PASSING CARS OR
24 ARTIFICIAL LIGHTS AND YOU LOOK AT THEM, THAT WOULD SORT OF
25 RESET YOUR EYES. IT WOULD -- IN TECHNICAL TERMS, IT WOULD

1 UNDO THE DARK LIMITATION. AND, AGAIN, IT WOULD TAKE SOME
2 PERIOD OF TIME TO READJUST TO THE DARKNESS. BUT, YES. IF
3 YOU'RE IN A UNIFORMLY LIT AREA AND DO NOT LOOK AT ANY LIGHTS,
4 AFTER A PERIOD OF 25 MINUTES, YOU'RE AS ADAPTED AS YOU'RE
5 GOING TO GET.

6 Q NOW, THERE'S OTHER WAYS FOR A GROUP OF FACT FINDERS TO GAUGE
7 OR TO MEASURE THE RELIABILITY OF A PERSON'S IDENTIFICATION
8 OTHER THAN JUST THE LIGHTING AND THE OPPORTUNITY THAT
9 INDIVIDUAL HAD TO OBSERVE AND THE LENGTH OF TIME. THERE'S
10 OTHER FACTORS AS WELL YOU CAN CONSIDER. IS THAT CORRECT? IN
11 ANY PARTICULAR CASE?

12 A YES.

13 Q AND ONE OF THE MAJOR FACTORS THAT A GROUP OF FACT FINDERS MAY
14 USE TO DETERMINE THE RELIABILITY OF ANY IDENTIFICATION IS
15 WHETHER OR NOT THE PERSON MAKING THE IDENTIFICATION, WHETHER
16 OR NOT THERE IS OTHER CORROBORATING EVIDENCE THAT WOULD
17 SUPPORT THAT IDENTIFICATION?

18 MR. STRICKLER: I'LL OBJECT TO THAT. I THINK THAT'S
19 OUTSIDE HIS AREA OF EXPERTISE AND IS AN AREA OF LAW.

20 THE COURT: OKAY. IT VERY LIKELY IS. BUT, MR. GASSER,
21 IF YOU WANT TO EXPLORE THAT AREA, REPHRASE IT AND MAKE IT AN
22 ACCEPTABLE QUESTION, IF YOU COULD, PLEASE, SIR.

23 Q I BELIEVE ONE OF THE THINGS THAT YOU WERE DISCUSSING IN
24 RESPONSE TO YOUR DIRECT EXAMINATION WITH MR. SHUPPER WAS WAYS
25 TO MEASURE THE ACCURACY OF SOMEBODY'S IDENTIFICATION. IS

1 THAT CORRECT?

2 A YES.

3 Q AND I BELIEVE THE EXAMPLE YOU USED, THAT IF IT WAS LATER ON
4 DETERMINED THAT THE PERSON HAD AN AIRTIGHT ALIBI, THEN THAT
5 PERSON'S RELIABILITY OR CONFIDENCE IN THEIR IDENTIFICATION
6 WOULD BE LESSENER, CORRECT?

7 A I DID NOT TESTIFY TO RELIABILITY BUT JUST TO CONFIDENCE.

8 Q CONFIDENCE. AND THEN OF COURSE IF IT'S LATER ON DETERMINED
9 THAT, I BELIEVE THE EXAMPLE YOU USED, IF IT'S LATER ON
10 DETERMINED THAT THAT PERSON'S PROPERTY IS FOUND IN THE
11 POSSESSION OF THE INDIVIDUAL THAT HE OR SHE IDENTIFIED, THAT
12 INCREASES THE CONFIDENCE, CORRECT?

13 A THAT IS LIKELY TO HAPPEN. YES, SIR.

14 Q SO OUTSIDE -- OTHER PIECES OF INFORMATION CAN BE USED TO
15 DETERMINE OR MEASURE OR WEIGH THE RELIABILITY OF AN
16 IDENTIFICATION?

17 MR. STRICKLER: AND I'LL OBJECT. THAT MISSTATES HIS
18 TESTIMONY, SIR.

19 THE COURT: I'M NOT SURE. I DON'T KNOW IF IT DOES OR IT
20 DOES NOT. AND I WOULD ASK DR. ALLEY TO SAY WHETHER IT
21 MISSTATES HIS TESTIMONY OR NOT. I'LL LEAVE THE ANSWER TO
22 YOU.

23 A I'M NOT SURE HOW TO ANSWER THAT QUESTION ACTUALLY.

24 Q LET ME REPHRASE IT. I APOLOGIZE. I TRULY APOLOGIZE IF I'M
25 NOT BEING CLEAR. PART OF THE REASON WHY -- YOU'VE TESTIFIED

1 ABOUT AND WERE ASKED QUESTIONS ABOUT HOW TO DETERMINE THE
2 ACCURACY OR THE RELIABILITY OF AN IDENTIFICATION, CORRECT?

3 A YES, SIR.

4 Q AND YOU WOULD AGREE WITH ME THAT AS AN EXPERT IN THIS FIELD
5 THAT YOU JUST WOULDN'T WANT TO LOOK AT THE OPPORTUNITY THAT
6 AN INDIVIDUAL HAD TO SEE SOMEONE, THE TIME THAT AN INDIVIDUAL
7 HAD TO SEE SOMEONE. YOU'D WANT TO LOOK AT ALL OF THE FACTORS
8 INVOLVED AND ALL THE FACTS INVOLVED BEFORE WEIGHING THE
9 CREDIBILITY OF THAT?

10 MR. STRICKLER: I'LL OBJECT. HE'S POINTING DIRECTLY AT
11 ONE OF THE WITNESSES WHO'S TESTIFIED IN THIS PARTICULAR CASE.

12 THE COURT: WELL, YOU KNOW, OF COURSE, LET ME EXPLAIN
13 THIS TO YOU. I KNOW THAT NEITHER OF YOU GENTLEMEN IS DOING
14 ANYTHING THAT IS CONSCIOUSLY SEEKING TO VIOLATE ANY PROVINCE
15 OF THE COURT OR ANY RULE. BUT I THINK WHAT WE'RE GETTING
16 DANGEROUSLY CLOSE TO, AND I'M NOT GOING TO CAST ANY
17 ASPERSIONS ON ANYBODY, I THINK WHAT WE MAY BE GETTING
18 DANGEROUSLY CLOSE TO IS INVADING THE PROVINCE OF THE COURT AS
19 OPPOSED TO THAT OF THE JURY. NOW, I DON'T HAVE ANY PROBLEM
20 WITH MATTERS BEING THE ULTIMATE ISSUE WHEN WE'RE TALKING
21 ABOUT EXPERT TESTIMONY, BUT I THINK THAT PERHAPS THIS
22 PARTICULAR AREA HAS BEEN EXPLORED ENOUGH. OKAY?

23 MR. GASSER: OKAY. I'LL MOVE ON, YOUR HONOR. THANK
24 YOU.

25 THE COURT: THANK YOU.

1 Q (BY MR. GASSER) YOU INDICATED MEMORY SHOULD BE EXPECTED TO
2 CHANGE AS TIME PASSES. IS THAT CORRECT? IS THAT A FAIR
3 STATEMENT?

4 A YES.

5 Q ESPECIALLY IF CERTAIN DETAILS, THE MINUTE DETAILS OF A
6 PARTICULAR LOCATION OR A PARTICULAR EVENT THAT MAY NOT APPEAR
7 TO BE IMPORTANT -- AT THE TIME YOU MAY HAVE A DIFFICULT -- A
8 PERSON MIGHT HAVE A GREATER DIFFICULTY IN RECALLING THE MINOR
9 DETAILS SOME THREE YEARS LATER. WOULD YOU AGREE WITH THAT
10 STATEMENT?

11 A YES. I SURELY WOULD.

12 Q DO YOU AGREE WITH THE STATEMENT THAT TRAUMATIC EVENTS CAUSE
13 YOU TO REMEMBER BETTER?

14 A NO.

15 Q OKAY. SO WOULD YOU AGREE OR DISAGREE WITH THE FOLLOWING
16 STATEMENTS: THAT A PERSON IN FEAR OF HIS OR HER LIFE
17 PRESUMABLY HAS A MORE ACUTE DEGREE OF ATTENTION TO HIS OR HER
18 SURROUNDINGS THAN A MERE PASSERBY?

19 A OH. I'D AGREE WITH THAT.

20 Q YOU WOULD AGREE WITH THAT. SO, AN INDIVIDUAL WHOSE LIFE IS
21 BEING THREATENED IS MORE ACUTE, MORE AWARE OF HIS OR HER
22 SURROUNDINGS AND WHAT IS GOING ON UNDER THOSE PARTICULAR
23 CIRCUMSTANCES?

24 A THEY'RE LIKELY TO BE. THE PASSERBY, FOR INSTANCE, CAN BE
25 DAYDREAMING.

1 Q BUT THERE ARE CERTAIN EVENTS IN PEOPLE'S LIVES THAT THEY WILL
2 REMEMBER FOR THE REST OF THEIR LIVES. WOULD YOU AGREE WITH
3 THAT? FOR INSTANCE, DEPENDING ON GENERATIONAL, SOME PEOPLE
4 FOR 50 YEARS LATER REMEMBER WHERE THEY WERE WHEN PEARL HARBOR
5 WAS BOMBED. WOULD YOU AGREE WITH THAT? BECAUSE OF THE
6 SIGNIFICANCE OF THE EVENT?

7 A YES.

8 Q GOING ALONG GENERATION LINES, MANY PEOPLE WILL HAVE
9 REMEMBERED 40 YEARS AGO OR 38 YEARS AGO WHERE THEY WERE WHEN
10 KENNEDY WAS ASSASSINATED? DO YOU AGREE WITH THAT STATEMENT
11 BECAUSE OF THE SIGNIFICANCE OF THE EVENT?

12 A WELL, I SHOULD CLARIFY WHAT I AGREE WITH. I AGREE THAT THEY
13 WILL HAVE A MEMORY FOR WHERE THEY WERE. THAT DOES NOT
14 NECESSARILY MEAN IT'S ACCURATE HOWEVER.

15 Q BUT THE STUDIES DO SHOW THAT WHEN A SIGNIFICANT TRAUMATIC
16 EVENT IS OCCURRING THAT THAT INFORMATION IS STORED AND IS
17 ABLE TO BE RECALLED MORE THAN IN JUST TRIVIAL, OLD, EVERYDAY
18 EVENTS?

19 A YES. IN FACT, PSYCHOLOGISTS HAVE STUDIED EVENTS LIKE THIS
20 AND THAT VERY SORT OF QUESTION, ASKING PEOPLE, FOR INSTANCE,
21 WHERE WERE YOU OR WHEN DID YOU LEARN ABOUT THE CHALLENGER
22 EXPLOSION OR J.F.K. BEING SHOT.

23 Q AND NOT TO POINT OUT THE OBVIOUS, BUT JUST FOR THE RECORD,
24 DR. ALLEY, YOU WOULD AGREE WITH ME THAT BEING ROBBED AT
25 GUNPOINT IS A SIGNIFICANT EVENT?

1 A YES.

2 Q BEING RAPED IS A SIGNIFICANT EVENT?

3 A YES.

4 Q HAVING YOUR LIFE THREATENED BY AN INDIVIDUAL THIS CLOSE TO
5 YOU IS A SIGNIFICANT EVENT?

6 A YES, SIR.

7 Q ARE YOU FAMILIAR WITH A PAPER THAT WAS PUBLISHED BY I BELIEVE
8 THREE OF YOUR COLLEAGUES BACK IN 1978, DR. GARY WELLS, DR.
9 MALCOLM OIPEE AND DR. THOMAS OSTRUM ON CRIME SERIOUSNESS AS A
10 DETRIMENT OF ACCURACY IN EYE WITNESS IDENTIFICATION? ARE YOU
11 FAMILIAR WITH THAT ARTICLE?

12 A I MAY HAVE READ THAT, BUT IT'S BEEN A LONG TIME. SO ...

13 Q LET ME HAND YOU A COPY, SEE IF YOU'RE FAMILIAR WITH IT.

14 A I CAN'T SAY AS I REMEMBER READING THIS PARTICULAR ARTICLE,
15 NO.

16 Q WOULD YOU ---

17 MR. STRICKLER: THEN I WOULD OBJECT, YOUR HONOR.

18 THE COURT: IF HE DOES NOT REMEMBER READING THAT
19 PARTICULAR ARTICLE, YOU ALL CAN COME UP HERE AND TALK ABOUT
20 IT, BUT I THINK HE'S RIGHT. ISN'T HE, MR. GASSER?

21 MR. GASSER: WELL, DEPENDING ON THE LINE OF QUESTIONING.

22 (WHEREUPON, A BENCH CONFERENCE WAS HAD)

23 Q (BY MR. GASSER) FIRST OF YOU'LL, DO YOU RECOGNIZE THE
24 AUTHORS OF THIS PARTICULAR ARTICLE?

25 A TWO OF THEM.

1 Q AND WHICH TWO ARE THEY?

2 A WELLS AND OSTRUM.

3 Q SO THEY ARE COLLEAGUES OF YOURS?

4 A THEY ARE FELLOW EXPERIMENTAL PSYCHOLOGISTS WHO DO WORK ON
5 MEMORY. IF THAT'S WHAT YOU MEAN BY COLLEAGUES, YES.

6 Q AND ALSO AS WELL AS DEALING WITH EYE WITNESS IDENTIFICATION.
7 IS THAT CORRECT?

8 A OSTRUM'S NAME IS MORE FAMOUSLY KNOWN TO ME AS A MEMORY
9 RESEARCHER. WELLS IS A WELL KNOWN RESEARCHER ON MEMORY EYE
10 WITNESS ISSUES.

11 Q AND DOES RESEARCH IN THE SAME AREA THAT YOU'VE JUST DESCRIBED
12 TO THE JURY IN YOUR DIRECT EXAMINATION, CORRECT?

13 A YES, SIR.

14 Q AND THE JOURNAL OF APPLIED PSYCHOLOGY, THAT IS A RECOGNIZED
15 COMPENDIUM JOURNAL IN THE FIELD OF PSYCHOLOGY, IS IT NOT?

16 A THAT IS IN FACT A WELL RESPECTED JOURNAL. YES, SIR.

17 Q VERY WELL RESPECTED, CORRECT?

18 A YES.

19 Q AND IT IS ARTICLES AND MATERIALS SUCH AS THIS THAT PEOPLE IN
20 YOUR LINE OF WORK USE TO DEVELOP THEORIES IN THE AREA OF IN
21 THIS PARTICULAR CASE EYE WITNESS IDENTIFICATION —

22 A YES.

23 Q — THAT YOU SUPPLIED YOUR TESTIMONY IN?

24 A YES.

25 Q AND LET ME ASK YOU THIS. IF YOU HAVEN'T HAD AN OPPORTUNITY

1 TO READ THIS PARTICULAR ARTICLE, DURING YOUR DIRECT
2 EXAMINATION YOU MADE I BELIEVE -- CORRECT ME IF I'M WRONG --
3 BUT YOU INDICATED THAT IN HIGH STRESS SITUATIONS MEMORY IS
4 NOT NECESSARILY -- YOUR MEMORY IS NOT NECESSARILY BETTER. IS
5 THAT WHAT YOUR TESTIMONY WAS ON DIRECT EXAMINATION?

6 A YES.

7 Q NOW, WOULD YOU AGREE WITH ME THAT COLLEAGUES IN YOUR FIELD
8 HAVE DONE STUDIES THAT --

9 MR. STRICKLER: YOUR HONOR.

10 THE COURT: YES, SIR.

11 MR. STRICKLER: I'M SORRY. I WOULD OBJECT. HE
12 MISSTATES HIS TESTIMONY ON DIRECT EXAMINATION TESTIMONY.

13 THE COURT: I'M SORRY. YOU KNOW, THAT OBJECTION IS ONE
14 THAT I'M REALLY NOT PRONE TO LISTEN TO, --

15 MR. STRICKLER: YES, SIR.

16 THE COURT: -- MR. STRICKLER, BECAUSE FRANKLY -- LADIES
17 AND GENTLEMEN, I DON'T MEAN MR. STRICKLER IS DOING ANYTHING
18 IMPROPER. NOR AM I IMPLYING THAT MR. GASSER IS DOING
19 ANYTHING PROPER OR IMPROPER. IT'S SIMPLY, IT'S THE JURY'S
20 RECOLLECTION OF WHAT THE TESTIMONY WAS THAT'S IMPORTANT; NOT
21 MINE, NOT MR. GASSER'S, NOT MR. STRICKLER'S, NOT MR.
22 SHUPPER'S. SO WHEN AN OBJECTION IS MADE TO THE EFFECT THAT
23 IT MISCHARACTERIZES TESTIMONY, YOU RELY UPON YOUR OWN
24 RECOLLECTION OF WHAT THE TESTIMONY WAS, AND THEN SUBSEQUENT
25 EXAMINATION CAN BE HAD BY EITHER SIDE TO DEVELOP AND

1 DETERMINE WHAT THAT PARTICULAR TESTIMONY MAY HAVE BEEN
2 THROUGH THE WITNESS.

3 MR. STRICKLER: THANK YOU, SIR.

4 THE COURT: OKAY. THANK YOU. PLEASE CONTINUE.

5 MR. GASSER: YOUR HONOR, I'M SORRY.

6 Q (BY MR. GASSER) BUT I THOUGHT YOUR LAST RESPONSE TO MY
7 QUESTION WAS YES, YOU AGREE WITH ME THAT THAT WAS YOUR
8 TESTIMONY?

9 A COULD YOU REPEAT THAT AGAIN?

10 Q OKAY.

11 A WE'LL CLARIFY THIS.

12 Q OKAY. ON CROSS EXAMINATION I BELIEVE YOU INDICATED THAT HIGH
13 STRESS SITUATIONS DOES NOT NECESSARILY MAKE SOMEBODY'S MEMORY
14 BETTER. I BELIEVE YOU INDICATED THAT?

15 A YES. I DID.

16 Q SO THAT'S AN ACCURATE QUESTION, IS IT NOT?

17 A I BELIEVE IT IS. YES.

18 Q NOW, HAVE THERE NOT BEEN STUDIES DONE THAT YOU ARE AWARE OF,
19 THAT YOU'VE READ OR THAT YOU IN YOUR FIELD, IN YOUR AREA OF
20 EXPERTISE, IN WHICH THE RESULTS OF THOSE STUDIES DISAGREED
21 WITH YOU ON THAT POINT?

22 A THAT HIGH STRESS HELPS MEMORY?

23 Q THAT THE MORE SERIOUS THE CRIME IS, THE MORE SERIOUS THE
24 CRIME IS, THE HIGHER THE RELIABILITY OF ANY SUBSEQUENT
25 IDENTIFICATION IS?

1 A OKAY. THAT IS A DIFFERENT ISSUE. IN FACT, A QUICK LOOK AT
2 THIS ARTICLE DOESN'T REALLY BEAR ON STRESS. IT'S AN
3 ADJUSTMENT OF SERIOUSNESS BY EVALUATION OF STOLEN GOODS. AND
4 THE STRESS LEVELS IN THIS STUDY ARE PROBABLY EQUIVALENT
5 ACROSS THE TWO GROUPS.

6 Q WELL, YOU WOULD AGREE WITH ME THAT THE MORE SERIOUS THE
7 CRIME, THE MORE LIKELY THE HIGHER STRESS LEVEL THE PERSON IS
8 PLACED IN? YOU WOULDN'T AGREE WITH THAT STATEMENT?

9 A NO. NOT NECESSARILY. SO IF I'M IN THE MIDDLE OF A BANK
10 ROBBERY AND THE GUY IS GETTING AWAY WITH \$172, THAT'S
11 PROBABLY NOT GOING TO MAKE IT ANY LESS STRESSFUL FOR ME THAN
12 IF THEY HAPPENED TO BE GETTING AWAY WITH \$10,000. SO THE
13 SECOND CRIME OBVIOUSLY WOULD BE MORE SERIOUS BUT I DON'T
14 THINK IT'S MORE STRESSFUL. AND THAT'S I THINK WHAT'S --
15 THAT'S WHAT I THINK THAT'S REPRESENTING IN THIS PAPER.

16 Q WELL, LET ME ASK IT THIS WAY HYPOTHETICALLY. SOMEBODY
17 STEALING A CANDY BAR FROM YOUR PRESENCE IS A HECK OF A LOT
18 LESS STRESSFUL THAN SOMEBODY WALKING UP AND STICKING A GUN TO
19 YOUR HEAD AND DEMANDING YOUR WALLET, IS IT NOT?

20 A YES.

21 Q AND SO YOU WOULD AGREE ALSO THAT STUDIES SHOW THE MORE
22 SERIOUS A CRIME IS, THE MORE SERIOUS THAT CRIME IS, THE
23 HIGHER THE RELIABILITY OF SOMEBODY'S ABILITY TO MAKE AN
24 IDENTIFICATION LATER ON?

25 A WELL, I'M NOT TERRIBLY FAMILIAR WITH THE -- I THINK VERY

1 LITTLE ABOUT RESEARCH ON SERIOUSNESS OF CRIME. BUT THERE IS
2 INDICATIONS THAT IF IT SEEMED TO BE MORE IMPORTANT OR
3 SERIOUS, PEOPLE WILL ATTEND MORE CAREFULLY. THEREFORE, THEIR
4 MEMORY IS LIKELY TO BE BETTER.

5 Q AND I BELIEVE YOU STATED IN RESPONSE TO MR. SHUPPER THAT
6 PERCEPTION IS UNIQUE TO EACH OF US, TO EACH INDIVIDUAL, OUR
7 ABILITY TO PERCEIVE EVENTS OCCURRING AND THEN RECALLING
8 EVENTS?

9 A YES.

10 Q AND YOU HAVE NOT MET VICTIM ?

11 A NEVER. NO.

12 Q SO HAVE YOU NO WAY OF DETERMINING HER ABILITY TO COLLECT —

13 THE COURT: EXCUSE ME, SIR.

14 MR. STRICKLER: I OBJECT.

15 THE COURT: AND YOU OBJECT ON WHAT BASIS?

16 MR. STRICKLER: YOUR HONOR, I'LL WITHDRAW THE OBJECTION.

17 THE COURT: THANK YOU. . OKAY.

18 Q YOU RECALL MR. SHUPPER ASKING YOU THE SAME QUESTIONS, LINE OF
19 QUESTIONING, IF YOU'VE MET ANY OF THE WITNESSES IN THIS CASE?

20 A SIMILAR QUESTIONS, YES.

21 Q YOU HAVE NO WAY TO GAUGE, YOU YOURSELF THERE TO GAUGE OR
22 PROVIDE US WITH ANY EXPERT TESTIMONY WITH REGARDS TO HER
23 ABILITY TO PERCEIVE EVENTS TRANSPIRING. YOU HAVE NO WAY OF
24 DOING THAT?

25 A THAT'S TRUE.

1 Q AND YOU'VE NOT BEEN TO THE SCENE OF THIS CASE, THIS CRIME,
2 CORRECT?

3 A NOT DURING THE DAY, NO; AND CERTAINLY NOT AT NIGHT.

4 Q AND IF I HEARD YOU CORRECTLY, YOU INDICATED THAT IT'S MORE
5 DIFFICULT FOR AN INDIVIDUAL OF DIFFERENT RACE TO IDENTIFY
6 SOMEBODY THAN IT IS OF INDIVIDUALS IN THE SAME RACE TO MAKE
7 AN IDENTIFICATION. WAS THAT WHAT YOU WERE —

8 A THAT'S TRUE FOR MOST PEOPLE, YES.

9 Q SO IT'S EASIER FOR, SAY, AN ORIENTAL TO IDENTIFY AN ORIENTAL?

10 A YES.

11 Q A CAUCASIAN TO IDENTIFY A CAUCASIAN? AN AFRICAN-AMERICAN TO
12 IDENTIFY AN AFRICAN-AMERICAN. CORRECT?

13 A THAT FOLLOWS. YES.

14 Q AND LASTLY, DR. ALLEY, THE LAST AREA OF QUESTIONING. AFTER
15 AN EVENT, AFTER A CRIME HAS BEEN COMMITTED AND A VICTIM OR AN
16 EYE WITNESS TO THAT CRIME IS ELEVEN HOURS OR THREE WEEKS OR
17 HOWEVER LONG LATER ON ASKED TO MAKE AN IDENTIFICATION OF A
18 PHOTO LINE-UP, I BELIEVE YOU TESTIFIED THAT THE LEAST — THE
19 LESSER AMOUNT OF INFORMATION ABOUT THE CASE THAT THE PERSON
20 KNOWS, THE HIGHER THE ENHANCED RELIABILITY OF THE PICK,
21 CORRECT?

22 A NO. THAT DOESN'T SOUND LIKE SOMETHING I SAID.

23 Q OKAY. I THOUGHT YOU INDICATED THAT IT WAS REALLY IMPORTANT
24 — IT'S IMPORTANT — OR FROM A RELIABILITY STANDPOINT, IT'S
25 MORE RELIABLE IF THE PERSON ISN'T TOLD THAT THE PERSON IS

1 EVEN IN THE LINE-UP. DO YOU REMEMBER MAKING THAT ---

2 A YES.

3 Q OKAY. AND THAT THE MORE PEOPLE IN THE LINE-UP, THE PHOTO
4 SPREAD OF COURSE ENHANCES THE RELIABILITY OF THE PICK. IF
5 THERE'S JUST TWO PEOPLE, THAT'S NOT AS RELIABLE AS IF
6 THERE'S, SAY, SIX PEOPLE IN THE PHOTO LINE-UP?

7 A YEAH. UP TO A LIMIT. THE RECOMMENDATION OF EXPERTS ON
8 LINE-UP'S WOULD BE PRETTY CONSISTENT, WE SAY YOU NEED AT
9 LEAST FOUR.

10 Q AND FAMILIARITY IS ONE OF THE CRITICAL FACTORS, FAMILIARITY
11 IS A CRITICAL FACTOR IN DETERMINING RELIABILITY OF SOMEBODY
12 COMING INTO A COURTROOM AND SAYING I SAW THAT PERSON AT THIS
13 PARTICULAR SPOT AT THIS PARTICULAR TIME?

14 A YES.

15 Q SO IF AN INDIVIDUAL HAS KNOWN SOMEBODY FOR FOUR, FIVE, SIX
16 YEARS, KNEW THEM FROM THE NEIGHBORHOOD, KNEW THEM FROM THE
17 SCHOOL YARDS, THAT INCREASES OR ENHANCES THEIR RELIABILITY OF
18 COMING IN AND IDENTIFYING SOMEBODY?

19 A EVERYTHING ELSE BEING EQUAL, YES, IT DOES.

20 MR. GASSER: THAT'S ALL I HAVE, YOUR HONOR. THANK YOU.

21 THE COURT: MR. STRICKLER. GO AHEAD, PLEASE, MR.
22 STRICKLER.

23 MR. STRICKLER: THANK YOU, YOUR HONOR. MAY IT PLEASE
24 THE COURT.

25 CROSS EXAMINATION BY MR. STRICKLER:

1 Q MR. ALLEY, I HAVE A FEW QUESTIONS FOR YOU, IF I COULD,
2 PLEASE. FIRST A PRACTICE DEMONSTRATION PERHAPS ON MEMORY.
3 WOULD YOU AGREE WITH MY MEMORY THAT YOUR TESTIMONY REGARDING
4 STRESS AND THE IMPACT OF STRESS ON MEMORY WAS TO THE EFFECT
5 THAT THE STUDIES ARE ANYTHING BUT UNIFORM IN THAT REGARD BUT
6 WHATEVER EVIDENCE THERE IS TENDS TO SAY STRESS IMPAIRS RATHER
7 THAN ENHANCES MEMORY?

8 A YES.

9 Q OKAY. SO YOUR TESTIMONY WAS THAT THERE ARE VARIOUS STUDIES
10 IN THAT REGARD, BUT YOUR PROFESSIONAL OPINION IS THAT THE
11 BODY, THE WEIGHT OF THE EVIDENCE, THE TESTING DONE AS TO THE
12 EFFECTS OF STRESS ON RELIABILITY OF MEMORY IS THAT IT IMPAIRS
13 RATHER THAN ENHANCES?

14 A YES. WHICH I MIGHT ADD IS CONSISTENT WITH A LOT OF WORK MORE
15 GENERALLY ON STRESS WHERE IT TENDS TO -- EXCEPT AT VERY LOW
16 LEVELS -- TO IMPAIR PSYCHOLOGICAL PERFORMANCE.

17 Q OKAY. AND MR. GASSER MADE A POINT THAT A LOT OF WHAT YOU
18 HAVE TO SAY AND WHAT YOU'VE TESTIFIED ABOUT AS TO THE THINGS
19 THAT AFFECT ONE'S MEMORY AS A RESULT IS COMMON SENSE,
20 CORRECT?

21 A I WOULD AGREE THAT SOME OF IT IS, AND SOME OF THEM IN FACT GO
22 DIRECTLY AGAINST COMMON SENSE.

23 Q WELL, THAT'S EXACTLY THE POINT. THAT SOME OF IT, SUCH AS IF
24 YOU'VE GOT GOOD LIGHTING YOU CAN SEE SOMEONE BETTER, COMMON
25 SENSE; IF YOU'RE CLOSER TO SOMEONE THAN YOU ARE FAR AWAY,

1 COMMON SENSE; LONGER TIME TO LOOK AT SOMEONE, COMMON SENSE;
2 SOME OF IT IS WHAT COULD BE TERMED AS COUNTERINTUITIVE. THE
3 INTUITIVE FEELING OF PEOPLE IS THAT AT STRESSFUL EVENTS
4 THINGS ARE BURNED IN YOUR MEMORY AND YOU NEVER FORGET THEM
5 BECAUSE OF THE STRESS. THAT WOULD BE THE INTUITIVE FEELING.
6 YOUR TESTIMONY IS THAT THE WEIGHT OF THE EVIDENCE IN YOUR
7 OPINION IS THAT INDEED THAT IS NOT THE CASE, CORRECT?

8 A CORRECT.

9 Q OKAY. AND THAT'S SOMEWHAT COUNTERINTUITIVE. IT'S SOMEWHAT
10 NOT COMMON SENSE?

11 A I BELIEVE IT IS. YES.

12 Q AND YOU MENTIONED SOMETHING, YOU REFERENCED CONSTANTLY MADE
13 TO YOUR STUDIES. YOU'VE CERTAINLY DONE SOME STUDIES
14 YOURSELF. I DON'T MEAN TO DEMEAN THOSE AT ALL.

15 A MM-HMM (AFFIRMATIVE).

16 Q BUT WHEN YOU TALK ABOUT STUDIES, YOU'RE TALKING ABOUT STUDIES
17 DONE BY A WIDE VARIETY OF PRACTICING EXPERIMENTAL
18 PSYCHOLOGISTS IN THIS AREA, CORRECT?

19 A YES, I AM. AND I TRIED TO CLARIFY THAT AT ONE POINT.

20 Q YES, SIR. I THINK YOU DID. I JUST WANTED TO MAKE SURE
21 MYSELF. AND WHEN WE SAY EXPERIMENTAL PSYCHOLOGISTS, THERE IS
22 A COUPLE -- AND THERE MAY VERY WELL BE MORE THAN A COUPLE --
23 OF VARIETY OF PSYCHOLOGISTS. YOU HAVE CLINICAL
24 PSYCHOLOGISTS?

25 A CORRECT.

1 Q THEY SIT DOWN AND DEAL WITH PATIENTS AND ---

2 A THEY DEAL WITH MENTAL DISORDERS, EITHER DIRECTLY WITH THE
3 PATIENTS OR STUDY DISORDERS FOR TREATMENT AND SO ON. YES.

4 Q AND THEN AN EXPERIMENTAL PSYCHOLOGIST DOES WHAT?

5 A IS DOING RESEARCH, TYPICALLY EXPERIMENTAL RESEARCH, WHICH
6 MEANS THE SEARCH IN WHICH YOU TRY TO CONTROL A LOT OF
7 DIFFERENT VARIABLES WHILE YOU EXAMINE THE EFFECTS OF JUST ONE
8 OR TWO.

9 Q OKAY. AND THAT WOULD BE FUNCTIONING BASICALLY AS A SCIENTIST
10 IN THIS FIELD, CORRECT?

11 A CORRECT.

12 Q AND AS A SCIENTIST, WHICH I TAKE IT YOU WOULD REGARD YOURSELF
13 AS?

14 A YES.

15 Q AS A SCIENTIST, YOU'RE ACQUAINTED WITH A CONCEPT CALLED THE
16 SCIENTIFIC METHOD?

17 A CERTAINLY.

18 Q OKAY. SCIENTIFIC METHOD IS A GENERALLY AGREED UPON PROCEDURE
19 THAT'S BEEN AGREED ON FOR CENTURIES PROBABLY FOR EVALUATING A
20 QUESTION AND TESTING A QUESTION AND SORTING OUT THE ANSWERS
21 TO THE QUESTION, RIGHT?

22 A YES, SIR.

23 Q OKAY. AND IT INVOLVES TESTING, CORRECT?

24 A YES.

25 Q OKAY. AND PUBLICATION OF THE RESULTS OF YOUR TESTING,

1 CORRECT?

2 A THE OCCASION THAT I'VE HEARD, "THE STATEMENT IS NOT SCIENCE
3 UNTIL IT'S PUBLISHED."

4 Q AND THEN REVIEWED BY OTHER PEERS, BY OTHER PEOPLE PRACTICING
5 IN THE SAME SCIENTIFIC AREA OF THE PUBLISHED RESULTS,
6 CORRECT?

7 A ACTUALLY, A KEY PART OF THE REVIEW PROCESS IS BEFORE
8 PUBLICATION IN THE SCIENTIFIC LITERATURE. SO IT'S DIFFICULT
9 ACTUALLY TO GET, SOMEWHAT DIFFICULT, TO GET STUDIES PUBLISHED
10 BECAUSE THEY HAVE TO GO THROUGH A PEER REVIEW PROCESS.

11 Q RIGHT. INDEED, I BELIEVE YOU TESTIFIED BACK WHEN YOU WERE
12 BEING QUALIFIED AS AN EXPERT THAT YOU'RE ON THE BOARD OF A
13 COUPLE OF PSYCHOLOGICAL JOURNALS AND REGULARLY REVIEW
14 ARTICLES FOR OTHER JOURNALS. IS THAT CORRECT?

15 A YES, SIR.

16 Q OKAY. SO WHEN THERE'S SOME QUESTION THAT SOMEONE IN THE
17 FIELD HAS AND A TEST IS CONSTRUCTED AND CONDUCTED, THE
18 RESULTS ARE SUBMITTED THROUGH A SCIENTIFIC JOURNAL, OTHER
19 PEOPLE IN THE FIELD REVIEW THE RESULTS. SO THERE SEEMS TO
20 BE, THIS IS INTERESTING; THEY PUBLISH THEM. ONCE THEY'RE
21 PUBLISHED THEY'RE OPEN FOR REVIEW BY THE OTHER PEOPLE IN THE
22 FIELD IN GENERAL. WHOEVER READS THAT JOURNAL CAN COMMENT OR
23 SUBMIT COMMENTS ON THE RESULTS TO THE JOURNAL, CORRECT?

4 A YES. OR DO FURTHER RESEARCH THAT IS INTENDED TO DISPROVE OR
6 COLLABORATE WHAT THEY'VE SAID.

1 Q OKAY. NOW, IN CONSTRUCTING TESTS, A TESTING SITUATION IN A
2 SCIENTIFIC SITUATION, YOU'RE ACQUAINTED WITH THE CONCEPT OF
3 HAVING A CONTROL FOR A TEST?

4 A YES.

5 Q IS THAT CORRECT? OKAY. AND A CONTROL, WHAT'S THE FUNCTION
6 OF A CONTROL IN A TEST?

7 A THE GENERAL FUNCTION IS TO RULE OUT THE INFLUENCE OF USUALLY
8 A HOST OF OTHER VARIABLES THAT MIGHT HAVE AN INFLUENCE.

9 Q OKAY. AN ATTEMPT TO INSURE THE ACCURACY OF A TEST THAT'S
10 BEING RUN. IS THAT CORRECT?

11 A IT'S BASICALLY AN ATTEMPT TO MAKE SURE THAT WHEN YOU GET SOME
12 RESULTS, IF YOU GET THEM, THAT YOU KNOW WHY THEY OCCURRED.

13 Q OKAY. AND LET ME ASK YOU THIS. IN CONDUCTING A SCIENTIFIC
14 TEST PURSUANT TO SCIENTIFIC METHOD, IF THE CONTROLS FOR A
15 TEST FAIL, WHAT DOES THAT SAY ABOUT THE VALIDITY OF THE
16 RESULTS YOU GET ON THE TEST? YOU CAN'T USE IT, CAN YOU?

17 A NO. IF THE CONTROLS ARE NO GOOD, WHAT THAT ACTUALLY WILL
18 TELL YOU IS THAT IT'S HARD TO INTERPRET THE RESULTS.

19 Q OKAY. SO YOU NEED TO GO BACK, REDESIGN YOUR TEST, RERUN YOUR
20 TEST, DO WHATEVER. THE CONTROL HAS FAILED?

21 A YEAH.

22 Q YOU'RE NOT GOING TO PUBLISH THAT KIND OF DATA, RIGHT?

23 A I WISH THEY DID STUDIES SOMETIMES TO GET PUBLISHED, BUT NOT
24 BY THEMSELVES. SO OFTENTIMES YOU'LL NEED SEVERAL STUDIES,
25 EACH CONTROLLING DIFFERENT THINGS, IN ORDER TO ULTIMATELY BE

1 ABLE TO HAVE A STRONG CASE FOR A PARTICULAR CONCLUSION.

2 Q OKAY. IF I UNDERSTAND YOU CORRECTLY, WHAT WE TAKE IN AS FAR
3 AS PERCEPTION IS AFFECTED BY WHO THE PERSON IS THAT'S
4 PERCEIVING THE EVENTS. IS THAT CORRECT?

5 A MM-HMM (AFFIRMATIVE).

6 Q OKAY. AND TAKE IT THAT MY EYESIGHT IS EXTREMELY POOR. I
7 TAKE MY EYEGLASSES OFF. MY OBSERVATIONS OF YOU WOULD NOT BE
8 NOT AS GOOD AS, ONE, WHEN THEY'RE ON OR, TWO, THOSE OF
9 SOMEONE WITH 20/20 VISION, CORRECT?

10 A CORRECT.

11 Q AND, SECONDLY, WHAT THE NATURE OF THE PERSON OR THE THING
12 THAT IS BEING OBSERVED IS, WHETHER IT'S SOMETHING FAMILIAR OR
13 SOMETHING UNUSUAL?

14 A LOTS OF VARIABLES AFFECT THAT, BUT THAT'S ONE OF THEM.

15 Q AND THEN SITUATIONAL FACTORS, WHICH WOULD INCLUDE I THINK THE
16 STRESS OF THE SITUATION. IS THAT CORRECT?

17 A SURE. YEAH.

18 Q AND YOU'VE INDICATED LIGHTING, AMOUNT OF TIME, FOCUS OF
19 ATTENTION, FOR INSTANCE. CORRECT?

20 A YES, SIR.

21 Q AND, INDEED, AS HAS BEEN BROUGHT OUT, I MEAN, YOU CERTAINLY
22 WEREN'T AT THE SCENE AT THE TIME OF THE INCIDENT AND HAVEN'T
23 GONE TO EXAMINE THE SCENE, CORRECT?

24 A CORRECT.

Q OKAY. YOU CAN TELL US THAT REACTION TO STRESS IN YOUR

1 OPINION DOESN'T HEIGHTEN ACCURACY OF IDENTIFICATION. AND I
2 BELIEVE YOU TESTIFIED —

3 MR. GASSER: YOUR HONOR, I JUST HAVE TO OBJECT. WAS
4 THAT A QUESTION? I DON'T KNOW WHETHER THAT WAS A QUESTION OR
5 WHETHER HE'S GIVING US —

6 THE COURT: WELL, I HONESTLY DON'T KNOW. WAS IT A
7 QUESTION?

8 MR. STRICKLER: YES, SIR.

9 THE COURT: I BELIEVE YOU TESTIFIED? DID YOU TESTIFY?
10 OR IS IT YOUR OPINION? ASK HIM THAT WAY. OKAY? INSTEAD OF
11 SAYING —

12 MR. STRICKLER: OKAY.

13 THE COURT: SINCE WE'RE ALL GETTING — OKAY. LET'S GO
14 AHEAD.

15 MR. STRICKLER: YES, SIR.

16 Q (BY MR. STRICKLER) LET ME ASK YOU THIS. WAS IT YOUR
17 TESTIMONY THAT DETAILS IN A DESCRIPTION DO NOT RELATE TO
18 RELIABILITY OF IDENTIFICATION?

19 A THEY DO NOT RELATE WELL. THAT IS, THE MORE DETAILS SOMEBODY
20 IS PROVIDING AT BEST GIVES YOU KIND OF A VAGUE HINT ABOUT
21 WHETHER THEY'RE ACCURATE. IT CERTAINLY DOES NOT TELL YOU,
22 DOES NOT AS WE SAY CORRELATE VERY WELL WITH THEIR ACCURACY OR
23 THEIR RELIABILITY.

24 Q WHAT ABOUT A COMPLETE LACK OF ANY DETAIL? HOW DOES THAT
25 CORRELATE?

1 A A COMPLETE LACK OF ANY DETAIL?

2 Q MM-HMM (AFFIRMATIVE).

3 A USUALLY INDICATES -- WELL, THERE COULD BE A NUMBER OF REASONS
4 FOR THAT. BUT IN THE CASE OF A COMPETENT, ADULT OBSERVER, IT
5 PROBABLY INDICATES THAT THEIR MEMORY IS FAIRLY VAGUE.

6 Q OKAY. AND AS A PREDICATE TO MY QUESTION, WE'RE NOT DEALING
7 WITH INCOMPETENT, YOUTHFUL OBSERVERS. SO MY QUESTIONS AREN'T
8 DIRECTED TOWARDS THAT CLASS OF PEOPLE. OKAY? AND SO I
9 QUALIFY IT. WHEN THE DETAIL THAT YOU GET CONSISTS OF RACE,
10 SEX AND A GENERAL AGE RANGE, WHAT LEVEL OF DETAIL IS THAT?

11 A WELL, THAT'S --

12 Q I MEAN, IF YOU CAN QUALIFY IT?

13 A THAT'S I THINK PRETTY CLEARLY A LOW LEVEL OF DETAIL.

14 Q BY THAT I MEAN NO DESCRIPTION OF FACIAL FEATURES DESPITE AN
15 ABILITY TO HAVE OBSERVED SOMEONE FROM THIS DISTANCE FOR HALF
16 AN HOUR TO 45 MINUTES. OKAY. NO DESCRIPTION OF FACIAL
17 FEATURES AND NO DESCRIPTION OF CLOTHING FEATURES. SO WHEN
18 THOSE -- WOULD ONE EXPECT, ABSENT SOMETHING INTERFERING WITH
19 MEMORY AFTER OBSERVATION OF ANOTHER AT THE DISTANCE THAT
20 WE'RE AT OR CLOSER FOR A PERIOD OF 30 TO 45 MINUTES, AN
21 ABILITY TO CONVEY SOME DETAIL AS TO FACIAL FEATURES?

22 A WELL, AGAIN, IT DEPENDS ON WHERE ATTENTION IS DIRECTED AND
23 WHAT SORT OF LIGHTING CONDITIONS AND SO ON YOU HAVE.

Q OKAY. IF ONE WERE THEN TO FIND A LACK OF DETAIL IN THAT
REGARD, WOULD IT BE LOGICAL THEN TO LOOK TO A DEFICIENCY IN

1 EITHER ATTENTION, LIGHTING, LEVEL OF -- SOMETHING CAUSED BY
2 LEVEL OF STRESS? WOULD IT BE LOGICAL TO EXAMINE WHY ONE
3 MIGHT NOT HAVE DETAIL IN A DESCRIPTION?

4 A YES. I WOULD SAY IT BECOMES AS DETAILED -- AS YOU HAVE LESS
5 AND LESS DETAIL, THERE IS MORE AND MORE CAUSE FOR CONCERN
6 ABOUT THE PERSON'S MEMORY TO SOME EXTENT.

7 Q OKAY. AND DO I UNDERSTAND YOUR PREVIOUS TESTIMONY TO BE THAT
8 THERE IS LITTLE IF ANY CORRELATION TO THE CONFIDENCE
9 EXPRESSED BY A WITNESS IN AN IDENTIFICATION AND THE ACTUAL
10 ACCURACY OF THAT WITNESS?

11 A THAT IS A CONSISTENT FINDING ACROSS ALL SORTS OF DIFFERENT
12 RESEARCH ON MEMORY, AND IN PARTICULAR A RECOGNITION
13 CONFIDENCE IS POORLY RELATED TO ACCURACY.

14 Q OKAY. SO, IT DOESN'T SAY ANYTHING ABOUT TRUTHFULNESS AT ALL.
15 IT JUST SAYS IF YOU'RE CONFIDENT, IT DOESN'T MEAN YOU'RE
16 ACCURATE. NO CORRELATION?

17 A AND VICE VERSA. IF YOU'VE GOT A WITNESS WHO IS NOT VERY
18 CONFIDENT, THEY MAY INDEED BE QUITE ACCURATE.

19 Q OKAY. THAT'S SOMETHING WHICH IS ALSO AS OPPOSED TO COMMON
20 SENSE A LITTLE COUNTERINTUITIVE, RUNS AGAINST COMMON SENSE?

21 A I BELIEVE SO, YES.

22 Q OKAY. BUT ONCE AGAIN, THAT IS SOMETHING WHICH HAS BEEN THE
23 SUBJECT OF, WOULD NUMEROUS BE OVERSTATING THE NUMBER OF TEST
24 THAT CONFIRM THAT?

25 A I'M SURE THERE'S OVER 100 STUDIES, PROBABLY WEIGH OVER 100

1 STUDIES THAT HAVE LOOKED AT CONFIDENCE AND ACCURACY. AND,
2 AGAIN, IT'S VERY CONSISTENT THAT YOU FIND EITHER SOME SORT OF
3 WEAK RELATIONSHIP, OCCASIONALLY NO RELATIONSHIP WHATSOEVER.

4 Q AND YOU SPOKE OF A PHENOMENON KNOWN AS THE WEAPONS FOCUS
5 AFFECT, WHICH AS I UNDERSTAND YOUR TESTIMONY, IS THAT A
6 WEAPON BEING DISPLAYED DURING AN EVENT, ONE'S FOCUS TENDS TO
7 CONCENTRATE ON THE WEAPON AS OPPOSED TO OTHER ELEMENTS. IS
8 THAT CORRECT?

9 A WELL, THE WEAPON, YEAH, TENDS TO CAPTURE ATTENTION, MEANING
10 THEIR ATTENTION DURING THAT PERIOD OF TIME IS NOT GOING
11 ELSEWHERE.

12 Q AND THAT'S A PRETTY COMMON SENSE SORT OF THING AS OPPOSED TO
13 SOMETHING THAT'S COUNTERINTUITIVE, RIGHT?

14 A I THINK IT'S SORT OF INBETWEEN. IT'S ONE OF THOSE THINGS
15 THAT YOU MIGHT NOT THINK OF, BUT IT MAKES SENSE ONCE YOU HEAR
16 IT.

17 Q OKAY. NOW, ONE THING THAT YOU WEREN'T ASKED ABOUT I'D LIKE
18 TO ASK YOU JUST BRIEFLY. I THINK IT'S IN THE SAME AREA
19 YOU'VE TALKED ABOUT. TIME. HOW GOOD ARE WE AT ESTIMATING
20 TIME? WE AS A SPECIES?

21 A NOT TERRIBLY GOOD.

22 Q OKAY. DOES STRESS, A STRESSFUL EVENT HAVE AN IMPACT ON OUR
23 ABILITY TO MEASURE TIME?

24 A YES. YOU TEND TO INCREASE TIME ESTIMATES WHEN YOU'RE UNDER
25 STRESS.

1 Q NOW, AM I RIGHT IN PRESUMING THAT THIS IS AN AREA WHICH ALSO
2 IS INVOLVED IN YOUR STUDIES?

3 A I HAVE NOT DONE PERSONALLY ANY STUDIES ON TIME PERCEPTION.

4 Q IN THE FIELD OF PSYCHOLOGY AND THE WAY THE HUMAN MIND
5 FUNCTIONS?

6 A YES. IT COMES IN FACT WITHIN COGNIZANT PSYCHOLOGY WHICH IS
7 MAINLY MY AREA.

8 Q SO UNDER STRESS, OUR ESTIMATES OF TIME GET LONGER?

9 A THEY TEND TO.

10 Q TEND TO? AND THIS IS SOMETHING ALSO THAT THERE HAVE BEEN
11 STUDIES DONE ON NOT NECESSARILY BY YOU -- DEFINITELY NOT BY
12 YOU, YOU JUST TESTIFIED TO -- BUT BY MANY OTHER PEOPLE IN THE
13 FIELD?

14 A YES.

15 Q AND YOU TESTIFIED THAT TO THE EXTENT -- TO AN EXTENT THE
16 SOONER AN IDENTIFICATION IS MADE IN RELATION TO THE
17 PERCEPTION, THE MORE LIKELY THE ACCURACY IS, IT'S A FACTOR TO
18 CONSIDER IN ASSESSING THE ACCURACY OF THE IDENTIFICATION?

19 A YES, IT IS.

20 Q OKAY. AND THAT IN GENERAL IT COULD BE -- IN GENERAL,
21 ACCURACY DECLINES OVER TIME. IS THAT CORRECT?

22 A YES.

23 Q OKAY. CAN YOU QUANTIFY, OR DOES THE LITERATURE IN THE FIELD
24 QUANTIFY, HOW ACCURACY DECLINES OVER TIME? IF NOT, THAT'S
25 FINE.

1 A WELL, IT'S ACTUALLY VERY EASY TO DO THAT FOR ONE SPECIFIC
2 SITUATION. SO IF YOU HAVE ONE SPECIFIC STUDY, FOR INSTANCE,
3 WHERE EVERYBODY IS, YOU KNOW, VIEWING A SET OF PHOTOGRAPHS
4 FOR A FIXED AMOUNT OF TIME, IT'S EASY TO LOOK AT THAT AND
5 SEE, WELL, HOW MUCH LOSS IS THERE AS MORE AND MORE TIME IS
6 ADDED TO THE ATTENTION LEVEL. IT'S NOT POSSIBLE, HOWEVER, TO
7 GIVE A QUANTITATIVE ANSWER GENERALLY BECAUSE THERE ARE SO
8 MANY THINGS THAT AFFECT IT.

9 Q SO YOU CAN SAY IN A GENERAL SENSE THAT ACCURACY DECLINES OVER
10 TIME TO ATTACH A PARTICULAR NUMBER TO SAY THAT IT BECOMES
11 INACCURATE AFTER AN HOUR OR LESS ACCURATE AFTER AN HOUR; IN A
12 GENERAL SENSE I GUESS YOU COULD MAKE THAT STATEMENT, CORRECT?

13 A IT'S LIKELY TO BECOME LESS ACCURATE -- IT DEPENDS ON WHERE
14 THAT HOUR IS, IF THAT HOUR IS VERY CLOSE TO THE EVENT. IF
15 WE'RE TALKING ABOUT THREE DAYS LATER AND YOU ADD ANOTHER
16 HOUR, THAT WILL HAVE VERY LITTLE OR NO EFFECT.

17 Q AND, LASTLY, I BELIEVE YOUR TESTIMONY WAS ON CROSS BY MR.
18 GASSER THAT YOU WOULD AGREE TRAUMATIC EVENTS MAKE YOU MORE
19 AWARE OF THE SURROUNDINGS? WAS THAT YOUR TESTIMONY?

20 A WELL, I GUESS WHAT I'D WANT TO SAY IS THAT IF THERE'S
21 TRAUMATIC EVENTS GOING ON, THAT IS PRETTY MUCH GOING TO
22 ASSURE THAT YOU'RE PAYING VERY THOROUGH ATTENTION TO
23 SOMETHING, SOME PART OF THOSE EVENTS. WHEREAS IF YOU SEE
24 PART OF THAT JUST AS A PASSERBY, I'D POINT OUT YOU MIGHT NOT
25 BE REALLY ATTENDING TO YOUR SURROUNDINGS AT ALL.

1 Q OKAY. BUT IF YOUR SURROUNDINGS INCLUDE AN EXTREMELY
2 STRESSFUL SITUATION WHILE POOR LIGHTING, A DEMONSTRATED LACK
3 OF DETAIL IN DESCRIBING AN INDIVIDUAL, A QUESTIONABLE AMOUNT
4 OF TIME INVOLVED IN THE EVENT; I MEAN, THOSE ARE ALL
5 VARIABLES THAT HAVE TO BE TAKEN INTO CONSIDERATION IN
6 ASSESSING THE RELIABILITY OF SOMEONE'S IDENTIFICATION,
7 CORRECT?

8 A YEAH. YOU STARTED WITH SITUATION VARIABLES AND THEN PUT SOME
9 OTHER THINGS IN THERE. BUT THEY'RE ALL VARIABLES THAT ARE
10 GOING TO EFFECT MEMORY, YES.

11 Q THE FACT THAT YOU'RE MORE AWARE OF YOUR SURROUNDINGS DOESN'T
12 MEAN YOU HAVE A BETTER MEMORY OF THE SPECIFIC PART OF THE
13 SURROUNDINGS, THAT BEING IN THIS CASE THE IDENTIFICATION OF
14 AN INDIVIDUAL, CORRECT?

15 A YEAH. I WOULD SAY THE FACT THAT YOU'VE GOT THIS HEIGHTENED
16 AWARENESS PROBABLY MEANS YOU'LL HAVE -- IT PROBABLY ASSURES
17 YOU, YOU KNOW, YOU'LL HAVE SOME MEMORY FOR SOME THINGS. WHAT
18 IN PARTICULAR YOU'RE ATTENDING TO, WHAT IN PARTICULAR YOU
19 REMEMBER, AS YOU SAID, IS NOT AS SURE.

20 MR. STRICKLER: THANK YOU, SIR.

21 THE COURT: ALL RIGHT, FOLKS. YOU ALL HAVE BEEN IN HERE
22 FOR TWO HOURS AND FORTY MINUTES. WE'VE BEEN IN HERE FOR
23 THREE HOURS. WE'RE GOING TO TAKE A BIT OF BREAK NOW. THERE
24 MAY BE SOME REDIRECT TESTIMONY OF THIS WITNESS WHEN WE COME
25 BACK. BUT IN ANY EVENT, I'M GOING TO ASK YOU TO GO BACK TO

1 YOUR JURY ROOM. DON'T DISCUSS THE CASE AMONG YOURSELVES. I
2 MAY HAVE MISCALCULATED AS TO THE TIME OF BRINGING YOUR LUNCH.
3 I'M WORKING ON THAT RIGHT NOW, AMONG OTHER THINGS.

4 BUT AT THIS POINT IN TIME I'M GOING TO ASK YOU TO GO
5 BACK TO YOUR JURY ROOM. DON'T DISCUSS THE CASE. WHEN YOU
6 COME BACK TO THE COURTROOM, YOU MAY BE HERE ONLY FOR A VERY
7 BRIEF PERIOD OF TIME BEFORE YOU ARE SENT BACK OUT BECAUSE
8 THERE IS ANOTHER PHASE THAT WE HAVE TO TAKE UP; THAT IS, THE
9 LAWYERS AND MYSELF, PRIOR TO EVEN BEGINNING TO DISCUSS THIS
10 CASE WITH YOU ALL. SO I DON'T WANT YOU TO BE SURPRISED IF
11 THAT HAPPENS. BUT RIGHT NOW GO TO THE JURY ROOM. DON'T
12 DISCUSS THE CASE. EVERYONE REMAIN SEATED WHILE THE JURORS
13 LEAVE.

14 (JURY OUT AT 12:00 P.M.)

15 THE COURT: OKAY. DR. ALLEY, YOU CAN STEP DOWN WHILE
16 WE'RE ON THIS BREAK. LET'S JUST TAKE A BREAK, AND IF THERE
17 IS ANY REDIRECT OR ANY REQUESTED RECROSS, WE WILL DISCUSS
18 THAT WHEN WE COME BACK FROM THE BREAK. LET'S TAKE ABOUT TEN
19 MINUTES.

20 (WHEREUPON, A BREAK IS TAKEN)

21 THE COURT: OKAY, FOLKS. SIT DOWN, PLEASE. I'M SORRY.
22 I'M TRYING TO ACTUALLY DRAG IT OUT AS MUCH AS I CAN WITH THE
23 LUNCH. JOE IS GOING TO GO AT 12:30 TO PICK UP THE LUNCH AND
24 HOPEFULLY BE BACK IN HERE ABOUT QUARTER OF ONE. DOES ANYBODY
25 WANT TO REDIRECT DR. ALLEY?

1 MR. SHUPPER: I HAVE TWO QUESTIONS, YOUR HONOR.

2 THE COURT: DR. ALLEY, PLEASE RESUME YOUR PLACE ON THE
3 WITNESS STAND. BEFORE WE SAY ANYTHING IN FRONT OF THE JURY
4 AND BEFORE I HAVE TO SAY SOMETHING IN MY USUAL ACERBIC
5 FASHION IN FRONT OF THE JURY, IS ANYBODY LIKELY TO ASK FOR
6 RECROSS EXAMINATION?

7 MR. GASSER: I WILL NOT, YOUR HONOR.

8 THE COURT: GOOD, GOOD. AND YOU'RE NOT?

9 MR. STRICKLER: ABSOLUTELY NOT.

10 THE COURT: GREAT. MR. BARROW, PLEASE BRING THE JURY
11 IN.

12 (JURY IN AT 12:24 P.M.)

13 THE BAILIFF: THE JURY IS ALL PRESENT, YOUR HONOR.

14 THE COURT: THANKS, MR. BARROW. THANKS, MR. HOLLIS.

15 THANK YOU, FOLKS, FOR YOUR PATIENCE. LET ME EXPLAIN TO YOU
16 WHAT WE'RE GOING TO DO NOW. DR. ALLEY IS GOING TO BE ASKED
17 SOME QUESTIONS ON REDIRECT EXAMINATION, AND THEN IT'S LIKELY;
18 I'M NOT CERTAIN, BUT IT'S LIKELY THAT WE WILL THEREAFTER HAVE
19 NO FURTHER EVIDENCE TO PRESENT TO YOU IN THIS TRIAL. THUS,
20 THE PRESENTATION OF THE EVIDENCE WILL BE CONCLUDED. AND
21 WE'LL TAKE A PROTRACTED BREAK AFTER THAT. AND I'LL EXPLAIN
22 THAT TO YOU IN GREATER DETAIL. BUT RIGHT NOW, MR. SHUPPER,
23 PLEASE REDIRECT DR. ALLEY, IF YOU WOULD.

24 MR. SHUPPER: MAY IT PLEASE THE COURT, YOUR HONOR.

25 THANK YOU.

1 THE COURT: YES, SIR.

2 REDIRECT EXAMINATION BY MR. SHUPPER:

3 Q DR. ALLEY, WITH REGARD TO MR. GASSER'S QUESTIONS ABOUT
4 FAMILIARITY OF A WITNESS TO A SUBJECT, AND THAT WOULD -- THE
5 GREATER DEGREE OF RELIABILITY YOU HAD MENTIONED MIGHT ATTACH
6 TO -- AS FAMILIARITY BEING ONE OF THE FACTORS FOR A GREATER
7 DEGREE OF RELIABILITY; THE FAMILIARITY AND THE RELIABILITY OF
8 THAT IDENTIFICATION WOULD STILL BE SUBJECTED TO THOSE OTHER
9 FACTORS THAT YOU MENTIONED SUCH AS WHETHER IT'S DAY OR NIGHT?

10 A YES.

11 Q AND THE DISTANCE BETWEEN THE SUBJECTS?

12 A YES.

13 Q SO THAT IF THE SUBJECT VIEWED -- A SUSPECT WAS VIEWED BY A
14 WITNESS AT A DISTANCE, SAY, TEN FEET BEYOND THAT LADY IN THE
15 ORANGE DRESS, THAT MIGHT MAKE IT LESS RELIABLE THAN A CONTACT
16 THIS CLOSE?

17 A YES.

18 Q AND THE DURATION OF THE EXPOSURE?

19 A YES.

20 Q AND EYESIGHT?

21 A YEAH. BASICALLY ALL THESE --

22 Q OTHER FACTORS YOU MENTIONED?

23 A RIGHT.

24 Q AND AS FAR AS THE RELIABILITY AND THE STUDIES THAT MR. GASSER
25 HAD MENTIONED ABOUT A TRAUMATIC OR SIGNIFICANT EVENT SUCH AS

1 HAVING ONE'S LIFE THREATENED OR BEING ROBBED, WOULD THAT ALSO
2 BE SUBJECT TO THE OTHER FACTORS SUCH AS WHETHER IT WAS
3 DAYTIME OR NIGHTTIME?

4 A YES.

5 Q AND DRUG USE OR PSYCHOLOGICAL STATE?

6 A YES. IN GENERAL, THE POINT I WAS HOPING TO MAKE IS THAT ALL
7 THESE FACTORS I HAVE LISTED, SOME OF WHICH CAN HELP AND SOME
8 OF WHICH IMPAIR THE ABILITY TO RECOGNIZE PEOPLE, NEED TO BE
9 TAKEN INTO ACCOUNT. SOME OF THEM ARE MORE IMPORTANT THAN
10 OTHERS, BUT YOU NEED TO THINK ABOUT QUITE A FEW FACTORS
11 BEFORE YOU MAKE A JUDGMENT ON THE LIKELIHOOD OF SOMEBODY
12 BEING ACCURATE OR INACCURATE.

13 Q SO IF SOMEONE'S LIFE WERE THREATENED WITHOUT A WEAPON, IT
14 MIGHT NOT BE AS -- IT MIGHT BE MORE RELIABLE THAN IF SOMEONE
15 -- BECAUSE OF THE WEAPONS FOCUS AFFECT THAT YOU MENTIONED
16 THAN IF SOMEONE IS THREATENED WITH A WEAPON. IS THAT --

17 A EXACTLY. YEAH.

18 Q OKAY. SO ALL OF THE FACTORS THAT CAN DECREASE OR IMPACT UPON
19 RELIABILITY WOULD BE PRESENT WHETHER OR NOT IT'S A CLOSE
20 CONTACT OR A SIGNIFICANT CONTACT OR ONE WHERE FAMILIARITY IS
21 INVOLVED?

22 A YES.

23 Q THANK YOU.

24 MR. SHUPPER: I HAVE NOTHING FURTHER, YOUR HONOR.

25 THE COURT: OKAY. ANYTHING BASED ON THOSE QUESTIONS?

1 ANY REQUESTS FROM EITHER SIDE?

2 MR. GASSER: NO, SIR, YOUR HONOR.

3 MR. STRICKLER: NO, YOUR HONOR.

4 THE COURT: THANK YOU. OKAY. ANYTHING FURTHER? PLEASE
5 STEP DOWN, DR. ALLEY. FORGIVE ME.

6 MR. SHUPPER: MAY DR. ALLEY BE EXCUSED, YOUR HONOR?

7 THE COURT: ANY PROBLEM WITH THAT FROM EITHER SIDE?

8 MR. GASSER: NO OBJECTION.

9 MR. STRICKLER: WITHOUT OBJECTION.

10 THE COURT: THANK YOU. THANK YOU FOR YOUR ATTENDANCE,
11 DR. ALLEY. YOU'RE FREE TO GO AT THIS TIME. ANYTHING
12 FURTHER, MR. SHUPPER?

13 MR. SHUPPER: NO, YOUR HONOR.

14 THE COURT: ANY REPLY, MR. GASSER?

15 MR. GASSER: NO, SIR, YOUR HONOR.

16 THE COURT: OKAY. AT THIS POINT IN TIME, AS I
17 ANTICIPATED, THE EVIDENCE IS CLOSED IN THE CASE. AND I AGAIN
18 WANTED YOU TO BE AWARE OF THE FACT THAT THIS WILL BE A VERY
19 QUICK TURN-AROUND ON THIS. I HAD INITIALLY SCHEDULED YOUR
20 LUNCH TO ARRIVE HERE THAT 1:15, BUT GIVEN THE ABYSMALLY POOR
21 TIME MANAGER THAT I AM, THAT'S NOT GOING TO WORK. SO WHAT
22 I'VE DONE IS, AS WE SPEAK, I HAVE A DEPUTY SHERIFF STANDING,
23 LOOKING IMPATIENTLY AT SCHLOTSKY'S DELI PATTING HIS FOOT,
24 HOPING THAT THEY WILL GET THE ORDER UP AND RUNNING REAL QUICK
25 AND BE HERE AT QUARTER OF ONE.

1 IN ANY EVENT, I NOW HAVE TO EXCLUDE YOU FROM THE
2 COURTROOM BECAUSE WE HAVE TO TAKE UP MATTERS OF LAW. MATTERS
3 OF LAW MUST BE TAKEN UP BETWEEN THE COURT; THAT'S ME, AND THE
4 LAWYERS AT THE CLOSE OF ALL THE EVIDENCE IN THE CASE. AND
5 THAT'S WHAT WE'RE GOING TO DO. AND WE'RE GOING TO TAKE UP
6 THOSE MATTERS OF LAW. AND I'LL EXPLAIN IT TO YOU IN MORE
7 DETAIL AT A LATER TIME. NOTHING MYSTERIOUS ABOUT IT.

8 AND WE'RE ALSO GOING TO DISCUSS, WE'RE GOING TO HAVE
9 WHAT'S KNOWN AS A CHARGE CONFERENCE, BECAUSE ALL SIDES HAVE
10 SUBMITTED TO ME PROPOSED REQUESTS TO CHARGE; THAT IS, THINGS
11 TO TELL YOU ABOUT THE LAW THAT GOVERNS YOUR DELIBERATIONS IN
12 THIS CASE. AND I'M GOING TO DISCUSS THAT WITH THEM AT THIS
13 TIME.

14 SO IT'S GOING TO TAKE A LITTLE WHILE TO DO THAT. AND
15 I'M SORRY AGAIN THAT YOU'RE GOING TO BE IN THAT JURY ROOM.
16 HOWEVER, HOPEFULLY, IN ABOUT 15 MINUTES THE LUNCH WILL
17 ARRIVE. YOU CAN BEGIN EATING YOUR LUNCH. WE WILL -- THEN I
18 HAVE TO DO TWO HEARINGS AT 1:00 WE HAVE SCHEDULED ON MATTERS
19 FROM ANOTHER COUNTY THAT PEOPLE ARE BRINGING IN HERE. MS.
20 WILLIAMS, YOU DIDN'T KNOW ABOUT THAT. BUT YOU DO HAVE TO DO
21 THAT.

22 AND THEN A NUMBER OF OTHER FOLKS HAVE REQUESTED
23 HEARINGS, AND I'LL BE PROBABLY DOING THOSE AT THE SAME TIME
24 WE WILL BE CONTEMPLATING THE CLOSING ARGUMENTS TO YOU AND THE
25 CHARGE. AFTER YOU DO RETURN TO THE COURTROOM, AT WHATEVER

1 TIME THAT IS, WHETHER IT BE 1:30 OR SO, THAT WOULD PROBABLY
2 BE MY GUESS AS TO WHEN YOU'D BE COMING BACK, WE WILL THEN
3 HAVE THE LAWYERS STAND BEFORE YOU IN TURN, PRESENT TO YOU
4 THEIR CLOSING ARGUMENTS; THAT IS, THE ATTEMPT TO PERSUADE YOU
5 TO THE POINT OF VIEW WHICH THEY ADVOCATE.

6 AFTER THAT I WILL CHARGE YOU AS TO THE LAW. AS AFTER
7 THAT AND ONLY AFTER THAT WILL YOU BEGIN YOUR DELIBERATIONS.
8 AND THAT WOULD BE SOMETIME IN MID TO LATE AFTERNOON QUITE
9 FRANKLY BEFORE THAT'LL HAPPEN. BUT IN ANY EVENT, BE PATIENT
10 WITH US. HOPEFULLY, THE FOOD WILL BE HERE SHORTLY. THE
11 FOOD'S HERE. GREAT. ALL RIGHT. GO BACK TO THE JURY ROOM.
12 WE'LL BE WITH YOU SHORTLY. OKAY.

13 (JURY OUT AT 12:32 P.M.)

14 THE COURT: OKAY. JOE, YOU CAN TAKE IT BACK THERE ANY
15 TIME YOU FEEL READY TO. THE FOOD'S HERE?

16 DEPUTY: YES, SIR.

17 THE COURT: YOU CAN TAKE IT BACK THERE TO THEM ANY TIME
18 YOU WANT TO.

19 DEPUTY: IT'S BACK THERE.

20 THE COURT: IT'S ALREADY BACK THERE? OKAY. LET'S GET
21 INTO MOTIONS AT THIS TIME AND AT LEAST GET THAT OUT OF THE
22 WAY. AND THEN, IF NECESSARY, WE'LL DISCUSS CHARGES IF I
23 DON'T GRANT DIRECTED VERDICTS. SO, MR. STRICKLER, MR. SNEED.

24 MR. SNEED: MAY IT PLEASE THE COURT.

25 THE COURT: YEAH.

1 MR. SNEED: YOUR HONOR, FIRSTLY, I'D LIKE TO RENEW ALL
2 OF OUR PRIOR MOTIONS AND OBJECTIONS. I'VE PREPARED A LISTING
3 SUMMARIZING THEM. I'VE GIVEN A COPY TO THE SOLICITOR.

4 THE COURT: PRACTICE TIP: NEVER USE THE WORD "FIRST" IN
5 AN ADVERBIAL SENSE. OKAY?

6 MR. SNEED: YES, SIR.

7 THE COURT: FIRST. OKAY.

8 MR. SNEED: AS AN INITIAL MATTER, YOUR HONOR, I'D JUST
9 LIKE TO REQUEST THAT BE MADE A COURT'S EXHIBIT.

10 THE COURT: SURE.

11 MR. SNEED: IF THE COURT DESIRES, I COULD REVISIT SOME
12 OF THESE IN DETAIL IF THE COURT —

13 THE COURT: NO. IF THEY ARE MATTERS THAT HAVE
14 PREVIOUSLY BEEN URGED TO THE COURT AND NOTHING HAS CHANGED
15 DURING THE PRESENTATION OF THE EVIDENCE, YOU NEED NOT DO
16 THAT, BECAUSE MY RULING WOULD BE THE SAME. IF, HOWEVER, YOU
17 FEEL THAT YOU SHOULD FLESH SOMETHING OUT AND STATE SOMETHING
18 ANEW; NOT ANEW, BUT SOMETHING THAT HAS BEEN EITHER BORNE OUT
19 BY THE EVIDENCE OR ALTERED BY THE EVIDENCE, THEN YOU SHOULD
20 DO THAT. SO I'M LISTENING.

21 MR. SNEED: YOUR HONOR, AS FAR AS THE EVIDENTIARY
22 ISSUES, THE ANSWER IS NO, NOTHING TO ADD. THERE WERE
23 ACTUALLY TWO PRE-TRIAL RULINGS THAT IF I COULD JUST SPEND
24 JUST A MOMENT CLARIFYING.

25 THE COURT: YEAH.

1 MR. SNEED: AS YOU GO DOWN MY LIST, ON MY FIRST MOTION
2 FOR THE QUASH UNDER RULE 3 AND SEPARATION OF POWERS, I JUST
3 — I WISH TO EMPHASIZE, I REQUEST THAT PREJUDICE BE PRESUMED.
4 I CAN ANTICIPATE THE ANALYSIS FROM THE APPELLATE COURTS.
5 THAT WAS MY POSITION THERE. MOVING FURTHER DOWN, —

6 THE COURT: DON'T EVER SAY THAT. OKAY. OKAY. KEEP
7 GOING.

8 MR. SNEED: YES, SIR. THANK YOU. MOVING DOWN UNDER
9 5(B), MY MOTION TO ATTACK THE SEARCH WARRANT, I DO OPPOSE THE
10 JOHNSON HEARING. I BELIEVE THAT MCKNIGHT, INASMUCH AS I LIKE
11 THAT DECISION TO THE THIRD PARTY STANDING, I THINK MCKNIGHT
12 IS WRONG. IT DOES CONTRAVENE LEGISLATIVE INTENT I BELIEVE TO
13 PERMIT A JOHNSON HEARING BECAUSE IF YOU ALLOW THE ORAL
14 SUPPLEMENTATION BEFORE THE MAGISTRATE, I THINK THAT DOES —
15 IT WATERS DOWN THE AFFIDAVIT REQUIREMENT. OF COURSE I HAVE
16 TO ASK YOU — I'M NOT —

17 THE COURT: IT MAY. BUT I ONLY WORK HERE, REMEMBER.
18 OKAY?

19 MR. SNEED: YES, SIR.

20 THE COURT: ALL RIGHT.

21 MR. SNEED: I JUST WANTED TO CLARIFY THAT. I'D ALSO
22 ATTACK THE INDICTMENT BASED UPON AN ENCROACHMENT UPON THE
23 JUDICIAL BRANCH. I SUBMITTED A BRIEF. I DIDN'T ORALLY ARGUE
24 THAT. BUT MY UNDERSTANDING IS I STAND BY THE BRIEF AND THE
25 COURT HAS OVERRULED MY MOTION THERE. AND THAT'S IT, YOUR

1 HONOR.

2 THE COURT: OKAY. AND, MR. SHUPPER THE RECORD WILL
3 REFLECT JOINS IN THOSE MOTIONS ON BEHALF OF ROBERT JAMES AS
4 WELL. IS THAT CORRECT?

5 MR. SHUPPER: ABSOLUTELY, YOUR HONOR.

6 THE COURT: OKAY.

7 MR. SHUPPER: AND I RENEW ALL PREVIOUS MOTIONS AND
8 OBJECTIONS.

9 THE COURT: OKAY.

10 MR. SHUPPER: I HAVE ONE THING IF ---

11 THE COURT: I DON'T KNOW THAT MR. SNEED WAS FINISHED.

12 MR. SHUPPER: I'M SORRY.

13 MR. SNEED: I DID HAVE SOME DIRECTED VERDICT MOTIONS. I
14 DIDN'T KNOW IF ---

15 THE COURT: WELL, LET ME HEAR THEM.

16 MR. SNEED: THANK YOU, SIR. YOUR HONOR, THE ARMED
17 ROBBERY INDICTMENT AGAINST [REDACTED], THAT'S NUMBER 19108,
18 THE EVIDENCE PRESENTED DOES NOT SATISFY THE ALLEGATIONS IN
19 THE INDICTMENT. SPECIFICALLY, ---

20 THE COURT: IN OTHER WORDS, IT WAS NOT TAKEN FROM HER
21 PRESENCE.

22 MR. SNEED: THAT'S EXACTLY IT, YOUR HONOR.

23 THE COURT: THAT'S WHAT YOUR ARGUMENT IS?

24 MR. SNEED: YES, SIR.

25 THE COURT: OKAY. YOU CAN FLESH IT OUT IF YOU WANT TO.

1 MR. SNEED: THANK YOU. YOUR HONOR, THE INDICTMENT SAYS
2 "FROM HER PRESENCE". IT WAS CLOTHING, PURSES AND MONEY,
3 CURRENCY. I BELIEVE THE EVIDENCE PRESENTED IS THOSE ITEMS
4 WERE TAKEN FROM HER VEHICLE. THE ONLY THING TAKEN FROM HER
5 PERSON WERE CAR KEYS.

6 THE COURT: MM-HMM (AFFIRMATIVE).

7 MR. SNEED: AND SO, YOU MAY HAVE HAD A LARCENY, ASSUMING
8 THAT HER TESTIMONY, THAT THE JURY COULD BELIEVE IT, YOU MAY
9 HAVE HAD A LARCENY FROM HER VEHICLE, BUT CERTAINLY IT WASN'T
10 IN HER PRESENCE.

11 THE COURT: LET ME ASK YOU THIS. ARE YOU TELLING ME
12 THAT THE LARCENY -- EXCUSE ME -- THAT THE TAKING OF THE CAR
13 KEYS WOULD NOT SUFFICE TO SATISFY AN ARMED ROBBERY?

14 MR. SNEED: NOT UNDER THIS INDICTMENT.

15 THE COURT: OKAY.

16 MR. SNEED: WE DON'T KNOW THAT THE GRAND JURY PASSED
17 UPON WHETHER THE CAR KEYS WERE TAKEN FROM HER PERSON.

18 THE COURT: SURE.

19 MR. SNEED: IF THE KEYS LANGUAGE WAS IN THE INDICTMENT,
20 THEN PERHAPS THAT WOULD BE SO. BUT HERE THE INDICTMENT
21 DOESN'T SAY ANYTHING ABOUT CAR KEYS. WE DON'T KNOW IF THE
22 GRAND JURY PASSED ON THAT.

23 THE COURT: ALL RIGHT. I DON'T KNOW WHAT MR. GASSER'S
24 REJOINDER IS GOING TO BE TO THIS, BUT LET ME HEAR IT NOW SO
25 THAT WE CAN DEAL WITH THESE ONE AT TIME. HE'S SAYING -- AND

1 I RECALL THE EVIDENCE BEING THAT WAY -- THAT NOTHING THAT IS
2 SET FORTH IN THE INDICTMENT WAS TAKEN FROM THE PERSONAL
3 PRESENCE OF . AND I DON'T KNOW, AT THIS POINT IN
4 TIME, HAVEN'T HAD A CHANCE TO LOOK AS TO WHETHER OR NOT THAT
5 MAKES A DIFFERENCE ANYWAY, SAYING THAT THE ONLY THINGS THAT
6 WERE TAKEN WERE THOSE THAT WERE TAKEN FROM THE VEHICLE
7 SEPARATE AND APART FROM THE CAR KEYS. SO ANYTHING YOU WANT
8 TO SAY ON THAT?

9 MR. GASSER: YES, SIR. I THINK TO MAKE MY ARGUMENT, MY
10 RESPONSE EASIER IS THE FACT THAT THEY DID TAKE CLOTHING FROM
11 HER PRESENCE. HER SHIRT AND HER SHIRT (SIC) NEVER WERE
12 FOUND. YOU NOTICE THAT FROM THE TESTIMONY FROM THE --

13 THE COURT: MY RECOLLECTION WAS IS THAT THEY WERE
14 UNDRESSING HER. IS THAT CORRECT?

15 MR. GASSER: THAT'S CORRECT. AND THEY WERE NEVER FOUND.

16 THE COURT: RIPPING CLOTHES FROM HER.

17 MR. GASSER: TOOK HER CLOTHES FROM HER AND NEVER -- THE
18 ONLY CLOTHING THAT WAS FOUND AT THE SCENE WAS THE BRA. AND
19 SO THAT'S WHY THE CLOTHING ASPECT OF IT WAS IN THE
20 INDICIMENT. AND THEN MY -- SO THAT'S PHYSICALLY TAKING FROM
21 HER BODY. AND THEN TO WITHSTAND THE OTHER PORTIONS OF THE
22 INDICIMENT, OF COURSE I THINK THAT SATISFIES IT RIGHT THERE.
23 HOWEVER, THE PURSE WAS TAKEN FROM HER PRESENCE. SHE WAS
24 THERE. THE CAR WAS RIGHT THERE. THAT'S WHY WE PRESENTED
25 TESTIMONY THAT THE VEHICLE WAS RIGHT THERE ADJACENT TO THE

1 PARK IN THE PARKING LOT. AND SO SHE WAS PRESENT. IT IS FROM
2 HER PRESENCE THAT THEY ARMED WITH A GUN REMOVED HER PURSES
3 FROM THE TRUNK IN HER PRESENCE WHILE ARMED WITH A DEADLY
4 WEAPON.

5 THE COURT: OKAY. MR. SNEED, REJOINDER, PLEASE?

6 MR. SNEED: THANK YOU, SIR. YOUR HONOR, THE PRESENCE
7 REQUIREMENT I ALREADY ADDRESSED. I THINK THAT IT'S NOT
8 ANALOGOUS TO POSSESSION. YOU KNOW, SOME CASES POSSESSION IS
9 FACTUAL OR CONSTRUCTIVE. I BELIEVE THE IN PRESENCE
10 REQUIREMENT IS MUCH, MUCH TIGHTER. THAT'S HOW HE ADDRESSES
11 IN THE PRESENCE ARGUMENT.

12 AS FAR AS THE CLOTHING, NOW, THE CLOTHING THAT WAS ON
13 THE GROUND NEAR THE INCIDENT SCENE, THERE IS NO ASPORTATION.
14 OF COURSE IF IT WERE THE ROBBER OF THE CLOTHING, THAT
15 CLOTHING WOULD HAVE TO BE TAKEN AWAY. JUST AS ANY OLD
16 LARCENY, THE PROPERTY HAS TO BE TAKEN AWAY WITH INTENT TO
17 DEPRIVE PERMANENTLY.

18 NOW, MR. GASSER MENTIONED SOME ARTICLES OF CLOTHING THAT
19 WERE NEVER RECOVERED. I DON'T -- MY RECOLLECTION OF HER
20 TESTIMONY, I ADMIT I'M UNCLEAR. I DON'T RECALL THAT BEING
21 HER TESTIMONY, THAT SOME ARTICLES WERE NOT RECOVERED. AND
22 ALSO, I STILL BELIEVE THAT IN THIS RECORD THERE IS AN
23 INSUFFICIENT BASIS THAT -- LET'S SAY THERE ARE A FEW ARTICLES
24 OF CLOTHING THAT WEREN'T RECOVERED, THAT THAT'S NOT ENOUGH TO
25 SHOW THAT THEY WERE TAKEN WITH THE INTENT TO DEPRIVE

1 PERMANENTLY.

2 THE COURT: ANY ASPORTATION, HOWEVER SLIGHT, SUFFICES TO
3 SATISFY THE ASPORTATION PRONG. AND, MR. STRICKLER, YOU KNOW
4 THAT I'VE GOT TO SUBMIT THIS TO THE JURY ON ARMED ROBBERY
5 BECAUSE YOU KNOW WHAT I AM STUCK WITH AT THIS STAGE AND THE
6 STANDARD TO WHICH I MUST ADHERE; THE EXISTENCE OF EVIDENCE,
7 NOT ITS WEIGHT.

8 MR. STRICKLER: YES, SIR. I UNDERSTAND. I JUST WANTED
9 TO ADD — I JUST WANTED TO ADD ONE THING.

10 THE COURT: UH-HUH (AFFIRMATIVE).

11 MR. STRICKLER: TO THEORIZE THAT THE REMOVAL OF CLOTHING
12 DURING THE COURSE OF A CRIMINAL SEXUAL CONDUCT BECOMES ARMED
13 ROBBERY MAKES — MAYBE THIS IS THE INTENT OF THE LEGISLATURE
14 — EVERY CRIMINAL SEXUAL CONDUCT —

15 THE COURT: GIVEN THIS PARTICULAR LEGISLATURE?

16 MR. STRICKLER: YES, SIR. I HESITATE TO DELVE INTO
17 THAT. BUT MY POINT MERELY IS EVERY CSC BECOMES AN ARMED
18 ROBBERY.

19 THE COURT: I APPRECIATE WHAT YOU'RE SAYING.

20 MR. STRICKLER: THAT'S ALL I HAVE TO ADD.

21 THE COURT: MR. SHUPPER OF COURSE JOINS IN THAT MOTION
22 AS WELL. I HAVE TO DENY THE MOTION BECAUSE I FEEL THAT I AM
23 COMPELLED TO DO SO UNDER WHAT I BELIEVE TO BE THE LAW OF THIS
24 STATE THAT EXISTS IN THE FORM THAT IT EXISTS AT THIS TIME.
25 SO, DENIED.

1 AND LET ME EXPLAIN THIS. I THINK IT'S GOING TO SPAWN A
2 PROBLEM WITH THE JURY. I ANTICIPATE THAT WE WILL HAVE
3 QUESTIONS ABOUT THAT. I WILL ATTEMPT TO MAKE THE CHARGE AS
4 LUCID AS POSSIBLE. OKAY. YES, SIR.

5 MR. SNEED: THANK YOU, YOUR HONOR. YOUR HONOR, NOW I
6 MOVE FOR A DIRECTED VERDICT ON THE ASSAULT WITH INTENT TO
7 KILL AGAINST MR. BULL. THAT'S NUMBER 19109.

8 THE COURT: OKAY.

9 MR. SNEED: TO SUMMARIZE, MY RECOLLECTION OF THE
10 EVIDENCE IS MS. WAS EMPHATIC THAT IT WAS INDEED NOT
11 KENNETH JAMES WHO WAS THE TRIGGERMAN.

12 THE COURT: RIGHT.

13 MR. SNEED: THAT'S ONE. OF COURSE —

14 THE COURT: THAT KENNETH JAMES NEVER HAD THE GUN?

15 MR. SNEED: RIGHT. YES, SIR.

16 THE COURT: RIGHT.

17 MR. SNEED: THAT MR. BULL WAS UNCLEAR ON THE
18 IDENTIFICATION OF ANY OF HIS ASSAILANTS, THAT IF YOU'RE TO
19 BELIEVE MS. 'S TESTIMONY, SHE WAS NOWHERE NEAR WHERE THE
20 GUN WAS FIRED.

21 THE COURT: MM-HMM (AFFIRMATIVE).

22 MR. SNEED: AND I'M AWARE OF THE LAW CONCERNING PARTIES
23 TO A CRIME, BUT HERE THE NEXUS IS TOO ATTENUATED. THERE
24 MIGHT HAVE BEEN AN INTENT TO — LET'S SAY IF THERE WAS AN
25 INTENT TO DO AN ARMED ROBBERY, CSC AGAINST MS. , DOES

1 NOT AUTOMATICALLY MEAN THERE WAS THIS SAME INTENT FOR THE
2 A.B.I.K. AGAINST MR. BULL.

3 THE COURT: SURE. I MEAN, I UNDERSTAND THAT. BUT, YOU
4 KNOW, ANYBODY WHO COMMITS AN ACT IN THE COURSE OF CRIMINAL
5 ENTERPRISE, THE NATURAL AND PROBABLE CONSEQUENCE OF WHICH
6 COULD BE ANTICIPATED, YOU KNOW, I'M SORRY. YOU'RE GOING TO
7 LOSE ON THAT ONE. OKAY? I APPRECIATE WHAT YOU'RE SAYING.

8 MR. SNEED: YES, SIR.

9 THE COURT: AND I DON'T THINK IT'S AN UNFAIR ARGUMENT.
10 BUT I'M SORRY. YOUR MENTOR CONTINUES TO -- YOU CAN ARGUE,
11 MENTOR.

12 MR. STRICKLER: I'M SORRY, SIR. AS TO THE A.I.K., I
13 WOULD SUBMIT THAT THE EVIDENCE REFLECTS NO SHOOTING AT MR.
14 BULL. YOU'VE GOT TESTIMONY HEARD SHOTS FIRED FROM MS. *victim*.

15 THE COURT: WHAT ABOUT THAT, MR. GASSER? I DON'T
16 REMEMBER THAT.

17 MR. GASSER: MS. *victim* SAID SHE INDICATED SHE SAW THEM,
18 THEY WERE SHOOTING IN THE DIRECTION OF --

19 THE COURT: WELL, MS. *victim* -- WAIT A MINUTE. SHE JUST
20 TOLD YOU THAT?

21 MR. GASSER: NO.

22 THE COURT: OH. WHEN SHE TESTIFIED SHE SAID IT.

23 MR. GASSER: SHE TESTIFIED.

24 THE COURT: THEY FIRED IN THE DIRECTION OF MR. BULL?

25 MR. GASSER: YEAH. AND THAT SHE THOUGHT THAT HE HAD

1 BEEN SHOT. SHE DIDN'T KNOW WHETHER HE HAD BEEN HIT OR NOT
2 HIT. AND SHE ALSO TESTIFIED, MS. FRYAR IS REMINDING ME, THAT
3 ONE OF THE INDIVIDUALS OF THE PARTIES OF THIS CRIMINAL
4 ENTERPRISE INDICATED, I TRIED TO SHOOT HIM OR I DON'T WHETHER
5 I HIT HIM OR NOT AND THAT SORT OF THING AND THAT HE MAY BE
6 ABLE TO GET OUT AND CALL THE POLICE, WE NEED TO GET GOING, WE
7 NEED TO LEAVE. SO, —

8 THE COURT: OKAY.

9 MR. GASSER: — IN A LIGHT MOST FAVORABLE TO THE STATE,
10 WE WOULD FEEL —

11 THE COURT: YEAH. I MEAN, THAT'S THE PROBLEM WITH ALL
12 OF THIS STUFF, IS THAT, YOU KNOW — YEAH, MR. STRICKLER.

13 MR. STRICKLER: I'M SORRY. NO, SIR. NOTHING IN
14 ADDITION. SIMPLY THAT I WAS VERY SPECIFIC WITH MS. VICTIM IN
15 MY QUESTIONING OF HER ESTABLISHING SHE WAS ON THE GROUND, DID
16 NOT SEE THE SHOTS FIRED. THAT WAS VERY SPECIFIC IN MY CROSS
17 OF HER.

18 THE COURT: THEN WHEN YOU ARGUE THAT TO THE JURY, AGAIN
19 THAT WILL SPAWN YET ANOTHER REQUEST FOR TESTIMONY. WE'LL
20 DEAL WITH THAT WHEN WE HAVE TO DEAL WITH IT.

21 MR. GASSER: THANK YOU, SIR.

22 MR. STRICKLER: AGAIN, MR. SNEED.

23 MR. GASSER: JUDGE, JUST FOR —

24 THE COURT: I'M LEAVING IN TWO MINUTES TO GO EAT. OKAY.
25 YES, SIR, MR. SNEED. BUT I'LL COME BACK AND HEAR THE REST OF

1 IT. YEAH.

2 MR. SNEED: THANK YOU, SIR. YOUR HONOR, NEXT ON THE —

3 THE COURT: YOU WON THAT ONE, MR. GASSER.

4 MR. GASSER: I KNOW. BUT JUST SO THE RECORD SUPPORTS
5 YOUR RULING IN CASE SOMEBODY ELSE IS LOOKING, MS. FRYAR ALSO
6 REMINDED ME THAT IT IS IN THE RECORD THAT MS. *victim* TESTIFIED
7 THAT KENNETH JAMES TOLD THE SHOOTER TO SHOOT AT MR. BULL —

8 THE COURT: OKAY.

9 MR. GASSER: — AT THAT TIME.

10 MR. SNEED: YOUR HONOR, NEXT, ON THE POSSESSION OF THE
11 WEAPON DURING THE COMMISSION OF A VIOLENT OFFENSE AS AGAINST
12 MR. BULL, I WOULD HAVE A SIMILAR, SAME MOTION FOR PRETTY MUCH
13 THE SAME FACTUAL BASIS ON THAT, IS MS. *victim* WAS CLEAR — AND
14 THIS WOULD HOLD TRUE, THE POSSESSION OF A WEAPON AGAINST MS.

15 FOR THE TWO POSSESSION CHARGES, THAT KENNETH JAMES WAS
16 NEVER IN POSSESSION OF THE WEAPON; HE DIDN'T FIRE IT; SHE
17 DIDN'T SEE IT FIRED; SHE WAS CLEAR IT WASN'T HIM.

18 THE COURT: OKAY. I APPRECIATE IT, AND I AGREE WITH YOU
19 THAT THE EVIDENCE DOES NOT SHOW KENNETH JAMES TO HAVE BEEN IN
20 ACTUAL POSSESSION OF THE WEAPON AT ANY TIME. MR. STRICKLER.

21 MR. STRICKLER: YES, SIR. AND I WOULD MERELY ADD, I
22 UNDERSTAND CONSTRUCTIVE POSSESSION, I ASSUME THAT'S HOW THE
23 STATE'S GOING TO PROCEED.

24 THE COURT: NO. I DON'T THINK THAT'S HOW THEY'RE GOING
25 TO PROCEED. I THINK THAT WILL BE PART OF THE THEORY. BUT

1 IT'S GOING TO BE THAT THEY'RE ALL OUT THERE, THAT IF ONE HAS
2 GOT IT, THE OTHERS HAVE GOT IT.

3 MR. STRICKLER: MY ONLY POINT WOULD BE THAT THIS
4 POSSESSION OF A WEAPON DURING A CRIME OF VIOLENCE IS AN
5 ENHANCEMENT STATUTE WHICH IS SPECIFICALLY REQUIRED TO BE
6 CHARGED AGAINST AN INDIVIDUAL ANY TIME THEY'RE CHARGED WITH A
7 SET OF PARTICULAR CRIMES; AND THAT AS SUCH, IT MUST BE PLACED
8 WITH THAT PERSON BECAUSE IT RELATES TO PERSONAL CONDUCT
9 ENTIRELY DISASSOCIATED FROM ANY OTHER CONCEPTS.

10 THE COURT: THAT'S A GOOD THOUGHT. I'LL LOOK AT THAT
11 BEFORE I FINALLY RULE.

12 MR. STRICKLER: THANK YOU, SIR.

13 MR. SNEED: YOUR HONOR, AND RELATED TO DEFECT ON THE TWO
14 POSSESSION THINGS IS FOR CONSTRUCTIVE WE KNOW IT'S DOMINION
15 OR CONTROL. BUT HERE IT'S —

16 THE COURT: MR. SNEED, AT THIS POINT IN TIME WE'RE GOING
17 TO BREAK. WE'LL BE BACK IN HERE AT 1:00, MS. WILLIAMS AND I
18 WILL BE HERE, TO HEAR YOUR FAIRFIELD COUNTY PROBATION
19 REVOCATIONS. AND THEN WE'LL BE BACK IN HERE WHENEVER WE
20 FINISH TO GET THE REST OF THE STUFF. OKAY? THANK YOU.

21 (WHEREUPON, A BREAK IS TAKEN)

22 (COURT'S EXHIBIT NO. 33, PARTIAL LISTING OF DEFENDANT KENNETH
23 JAMES'S TRIAL OBJECTIONS AND MOTIONS, MARKED FOR
24 IDENTIFICATION ONLY)

25 THE COURT: THE DEFENDANTS ARE IN THE COURTROOM. MR.

1 SNEED, I HAD CUT YOU OFF. YOU WERE MOVING, MAKING A MOTION
2 FOR DIRECTED VERDICT WHEN LAST WE MET. AND PLEASE CONTINUE.

3 MR. SNEED: THANK YOU, SIR. YOUR HONOR, I'M JUST ABOUT
4 DONE. I JUST, ON THE TWO POSSESSION OFFENSES, THE STATE
5 WOULD HAVE TO GO INTO SOME KIND OF CONSTRUCTIVE POSSESSION.
6 I BELIEVE THERE IS INSUFFICIENT EVIDENCE FOR DOMINION AND
7 CONTROL FOR VARIOUS ELEMENTS OF CONSTRUCTIVE POSSESSION.

8 THE COURT: MR. GASSER, YOUR THEORY IS WHAT ON THAT?

9 MR. GASSER: YOUR HONOR, MY SIMPLE THEORY ON SEVERAL OF
10 THE OTHER CHARGES IS THAT I DON'T BELIEVE THAT THAT'S WHAT
11 THE STATUTE SAYS, THE INTERPRETATION OF MR. STRICKLER AND
12 THAT ACCOMPLICE LIABILITY IS THE REQUISITE LAW IN THIS STATE
13 AND THAT THE HAND OF ONE IS THE HAND OF ALL.

14 THE COURT: SO YOUR THEORY IS, IS THAT THIS IS UNDER THE
15 TYPICAL PRESENT AIDING AND ABETTING SITUATION AND ALL FOLKS
16 THERE WITH THE SHARED PURPOSE OR COMMON SCHEME OR PLAN ARE
17 RESPONSIBLE FOR THE ACTS COMMITTED BY OTHERS IN FURTHERANCE
18 OF THAT SCHEME OR DESIGN, WHETHER THEY COULD HAVE BEEN
19 ANTICIPATED OR NOT.

20 MR. GASSER: YES, SIR; THAT THEORY, AND THE FALL-BACK
21 CONSTRUCTIVE POSSESSION THEORY THAT YOU JUST PRESCRIBED IS
22 OUR MAIN THEORY.

23 THE COURT: OKAY. YEAH. I'M GOING TO DENY THAT MOTION
24 FOR DIRECTED ---

25 MR. SNEED: THANK YOU, YOUR HONOR. YOUR HONOR, NEXT ON

1 THE KIDNAPPING AGAINST MR. BULL, THE 11910 AND THE ARMED
2 ROBBERY AGAINST MR. BULL, JUST KEEP THAT BRIEF, I BELIEVE
3 THERE'S INSUFFICIENT EVIDENCE OF THE INTENT ON MR. KENNETH
4 JAMES'S PART.

5 THE COURT: WAIT. LET ME JUST -- BEFORE YOU GET MISLEAD
6 NOW. YOU AND MR. SHUPPER BOTH SUBMITTED CHARGES INDICATING
7 THAT NAPPING REQUIRES A PURPOSEFUL INTENT, WHICH IS NOT THE
8 CASE. BECAUSE STATE V. JEFFRIES REQUIRES ONLY THE ELEMENT OF
9 KNOWLEDGE THAT YOU'RE COMMITTING AN ACT, THAT THE MENS REA
10 REQUIRED FOR COMMITTING A KIDNAPPING IS NOT THE PURPOSE TO
11 INVEIGLE, DECOY, CONFINED OR WHATEVER, BUT IS KNOWLEDGE THAT
12 YOU ARE COMMITTING SOME ACT THE EFFECT OF WHICH IS TO DO
13 THAT. SO, BEAR IN MIND THAT THERE'S NO -- I'M NOT GOING TO
14 CHARGE THAT CHARGE YOU ALL HAVE GIVEN ME ON PURPOSE, THAT YOU
15 MUST PURPOSELY DO THIS THING. YOU UNDERSTAND WHAT I'M
16 SAYING?

17 MR. SNEED: YES, SIR.

18 THE COURT: AND STATE V. JEFFRIES I THINK BEARS THAT
19 OUT.

20 MR. SNEED: BUT I'M NOT SURE IN THIS RECORD THERE WOULD
21 BE SUFFICIENT EVIDENCE OF THAT MENS REA OF KNOWLEDGE.

22 THE COURT: WELL, MAYBE NOT.

23 MR. SNEED: YES, SIR.

24 THE COURT: YEAH. THAT'S GOING TO BE UP TO THEM.

25 MR. SNEED: YES, SIR. AND THEN ON THE KIDNAPPING OF MS.

1 (victim) -- THAT'S NUMBER 19023, YOUR HONOR, I BELIEVE UNDER
2 THESE FACTS THAT THE KIDNAPPING WAS -- THE ALLEGED
3 KIDNAPPING, IT'S ASSUMED BY THE ALLEGED ARMED ROBBERY AGAINST
4 HER, AND THEY'RE PART AND PARCEL THE SAME. THAT'S MY BASIS
5 ON THE KIDNAPPING ONE.

6 THE COURT: OKAY.

7 MR. SNEED: AND FOR THE CSC AS WELL, YOUR HONOR.

8 THE COURT: ALL RIGHT. AND I WOULD DENY THOSE DIRECTED
9 VERDICT MOTIONS AS WELL. MR. SHUPPER, ANYTHING DIFFERENT
10 FROM WHAT MR. SNEED HAS SAID, OR DO YOU JOIN IN THESE MOTIONS
11 THAT HE'S MADE?

12 MR. SHUPPER: NOTHING TO ADD. I DO JOIN IN, YOUR HONOR.
13 I DO HAVE ONE MATTER AS FAR AS THE PREVIOUS MOTIONS I HAVE
14 MADE ON THE MOTION TO SEVERE. NOTWITHSTANDING SOLICITOR
15 GASSER'S EXCUSING OR WITHDRAWING OF MS. RHONDA HENRY AS A
16 WITNESS, THAT WAS A FACTOR THAT I HAD RAISED AS A POTENTIAL
17 AND AS A BASIS FOR SEVERING ORIGINALLY. AND WHEN WE
18 DISCUSSED THIS PREVIOUSLY, THERE WAS NO BRUTON ISSUE ON MY
19 BASIS FOR A SEVERANCE, BUT THERE WAS THE POTENTIAL. AND, IN
20 FACT, THAT DID RISE.

21 AGAIN, NOTING THAT MR. GASSER WITHDREW THE OFFER OF MS.
22 HENRY'S TESTIMONY, THE FACT THAT WE EXPECTED TO HAVE IT AND
23 THAT IT WOULD BE INDICATIVE OF GUILT OF THE CO-DEFENDANT AND
24 THAT MR. -- THE WITHDRAWAL OF THAT PROPOSED TESTIMONY DOES IN
25 FACT DENY MR. ROBERT JAMES WHAT WOULD HAVE BEEN ANOTHER

1 FACTOR TO SUGGEST THAT HE WAS NOT INVOLVED.

2 THE COURT: I UNDERSTAND. AND I APPRECIATE THAT. AND
3 THANK YOU FOR MAKING THAT MOTION ON BEHALF OF YOUR CLIENT.
4 AND I WOULD RESPECTFULLY DECLINE TO ACT FAVORABLY ON THAT AS
5 WELL.

6 MR. SHUPPER: THANK YOU. NOTHING FURTHER, YOUR HONOR.

7 THE COURT: OKAY. MR. HOLLIS, WOULD YOU DO ME A FAVOR?
8 PLEASE TAKE THESE INTO SHEILA AND TELL HER THAT I NEED THESE
9 TWO ALTERED RIGHT THERE. AND AS FOR THE OTHER THREE, IF SHE
10 WOULD MAKE -- WHEN SHE FINISHES THOSE, TOO, WHEN SHE FINISHES
11 MAKING THOSE CHANGES, MAKE ME 17 COPIES.

12 THE BAILIFF: OF ALL OF THESE?

13 THE COURT: OF EACH ONE OF THOSE. OKAY?

14 THE BAILIFF: I'LL BE GLAD TO, YOUR HONOR.

15 THE COURT: OKAY. NOW LET'S GET INTO PROPOSED CHARGES
16 TO THE JURY. MR. SNEED, ON BEHALF OF KENNETH JAMES, YOU'VE
17 SUBMITTED 23 REQUESTS TO CHARGE. MR. GASSER, YOU AND MS.
18 FRYAR HAVE NO DOUBT LOOKED AT THOSE. THEY HAVE BEEN APPENDED
19 TO THE RECORD, A PACKAGE, AS COURT'S EXHIBIT ...

20 COURT REPORTER: NO. 33, YOUR HONOR.

21 THE COURT: 33. AND TO THE EXTENT THAT I DO NOT CHARGE
22 THEM PRECISELY IN CONSONANCE WITH YOUR WRITTEN REQUEST, YOU
23 MAY EXCEPT AT THE END OF THE CHARGE.

24 COURT REPORTER: OH. I'M SORRY, YOUR HONOR. I HAVEN'T
25 MARKED THOSE YET.

1 THE COURT: YOU HAVE NOT? IT'S ON THE WAY.

2 MR. STRICKLER: WE HAVE ONE NOW. HE HAS THE ONLY COPY.

3 THE COURT: IT WILL BE NEXT IN ORDER, WHICH WILL BE
4 WHAT?

5 COURT REPORTER: 34.

6 THE COURT: 34. MR. SHUPPER'S HAVE BEEN MARKED, HAVE
7 THEY NOT?

8 COURT REPORTER: YES, SIR.

9 MR. SHUPPER: I'D OFFER MY COPY OF MR. SNEED'S FOR
10 CONVENIENCE OF THE COURT.

11 THE COURT: ALL RIGHT. GREAT. WELL, THAT GETS RID OF
12 THAT. SO YOURS ARE 34. AND MR. SHUPPER'S ARE 33. OKAY.
13 GOING THROUGH THEM VERY QUICKLY, REASONABLE DOUBT CHARGE IS
14 APPROPRIATE.

15 (COURT'S EXHIBIT NO. 34, DEFENDANT KENNETH JAMES'S REQUESTS
16 TO CHARGE, MARKED FOR IDENTIFICATION ONLY)

17 THE COURT: MR. GASSER, STOP ME ANY TIME YOU WANT TO.
18 OKAY?

19 MR. GASSER: YES, SIR.

20 THE COURT: REASONABLE DOUBT CHARGE IS APPROPRIATE.

21 IT'S THE LAW OF OUR STATE. NO. 2 PRESENTS AN ACCURATE
22 STATEMENT OF THE LAW, BUT IT IS NOT NECESSARILY GOING TO BE,
23 YOU KNOW, CHARGED IN PRECISELY THOSE WORDS. THE NEXT TIME
24 YOU CITE A CASE, MAKE SURE YOU FIND OUT WHO LOST IT OR WON
25 IT. I WAS MR. MOTES'S LAWYER AND TOLD HIM THERE'S NO WAY HE

1 COULD GET CONVICTED BECAUSE HIS WIFE COULDN'T TESTIFY AGAINST
2 HIM IN A MURDER TRIAL. THAT'S THE CASE THAT DID AWAY WITH
3 THE HUSBAND AND WIFE PRIVILEGE. OKAY.

4 NO. 3 IS THE PART OF THE WITNESS CREDIBILITY THING. SO
5 THE SUBSTANCE IS OKAY. NO. 4 IS AGAIN PART OF THE WITNESS
6 CREDIBILITY THING. TO THE EXTENT THAT THERE ARE
7 DISCREPANCIES AND PRIOR INCONSISTENCIES, INCONSISTENCIES
8 BETWEEN PREVIOUS TESTIMONY AND THIS TESTIMONY, THEN, YEAH,
9 THAT'S OKAY.

10 NO. 5, 6 AND 7 ALL RELATE TO AN EYE WITNESS
11 IDENTIFICATION, ONE BEING THE -- NO. 5 AND 6 BOTH RELATE TO
12 EYE WITNESS IDENTIFICATION; 6 BEING THE TELFAIR INSTRUCTION.
13 THE FIRST TIME IT WAS EVER SOUGHT TO BE CHARGED IN THIS STATE
14 WAS AGAIN IN STATE V. MOTES, AND I LOST THAT ONE AT THAT
15 TIME. MR. SNEED, YOU'RE GOING TO LOSE IT THIS TIME, TOO.
16 OKAY? BECAUSE IT AIN'T GOING TO BE CHARGED LIKE THAT. BUT
17 THE ESSENTIALS OF IT WILL IN FACT BE CHARGED. THAT IS, ALL
18 THOSE MATTERS RELATING TO EYE WITNESS TESTIMONY THAT ARE
19 TRADITIONALLY CHARGED IN THIS STATE WILL IN FACT BE CHARGED.

20 OKAY. NO. 7 IS ONE OF THOSE MATTERS THAT RELATES TO THE
21 CREDIBILITY OF WITNESSES AND OF COURSE WILL BE CHARGED BUT
22 NOT IN PRECISELY THOSE WORDS. 8 IS A BIAS OF THE WITNESS.
23 YOU STOP ME IF YOU DON'T THINK I'M DOING RIGHT, TOO. 8 IS ON
24 BIAS. AND CERTAINLY THEY GET CHARGED ON WHETHER OR NOT A
25 WITNESS IS BIASED. THEY CAN TAKE THAT INTO ACCOUNT. NO. 9,

1 NO. AND THAT IS, YOU WANT ME TO COMMENT ON THE STATE'S
2 FAILURE TO BRING FORH EXPERT EVIDENCE CONCERNING RAPE
3 TRAUMA?

4 MR. SNEED: YES, SIR.

5 THE COURT: AND YOU EXCEPT TO THAT.

6 MR. GASSER: I OBJECT TO THAT, CERTAINLY.

7 THE COURT: OKAY. AND I WOULD NOT CHARGE IT. DIRECT
8 AND CIRCUMSTANTIAL EVIDENCE, I THINK THAT -- I'LL HEAR YOU ON
9 THAT, MR. GASSER, BUT I THINK THAT THERE IS CERTAINLY
10 CIRCUMSTANTIAL EVIDENCE IN THIS CASE.

11 MR. GASSER: I AGREE.

12 THE COURT: LOTS OF IT. OKAY. AND I'LL GIVE THE USUAL
13 AND CUSTOMARY CHARGE ON CIRCUMSTANTIAL EVIDENCE, NOT THE
14 GRIPPON CHARGE. MY THOUGHT IS, IS THAT IT MAY NOT BE EXACTLY
15 THE WORDS YOU'VE GOT THERE, MR. SNEED, WITH ALL THAT EMPHASIS
16 ON PERFECTLY AND WHOLLY CONSISTENT AND ALL THAT KIND OF
17 STUFF, BUT IT'LL BE DONE WITHOUT INFLECTION AND IN A WELL
18 MODULATED TONE, NOT TO TRY TO TIP ANYBODY OFF IN ANY WAY.

19 I DON'T UNDERSTAND IN TOTO NO. 12. BUT I WILL TELL YOU
20 THAT I'M GOING TO CHARGE THAT GENERAL STUFF. I GIVE THE
21 PRETTY SIMPLE CHARGE, ONE OF WHICH IS WHAT MR. GASSER HAS
22 SUBMITTED ON PRESENT AIDING AND ABETTING AND ALL THE MERE
23 PRESENCE AT THE SCENE OF THE CRIME CHARGES AND DEFINE WHAT AN
24 AIDER AND ABETTOR IS.

25 AND WHILE I WILL NOT SAY THE EXACT EXAMPLE THAT MR.

1 GASSER WANTS ME TO CHARGE; THAT IS, TWO PEOPLE CAN BE GUILTY
2 OF MURDER IF ONLY ONE FIRES THE GUN, I WILL SAY SOMETHING TO
3 THE EFFECT OF TWO OR MORE PEOPLE CAN BE GUILTY OF A CRIMINAL
4 ACT EVEN WHEN ONLY ONE COMMITTED, ACTUALLY COMMITTED THE ACT
5 THAT CAUSED THE -- THAT CONSTITUTED THE CRIME IF THEY ARE
6 THERE PRESENT AIDING AND ABETTING ONE ANOTHER IN THE
7 COMMISSION OF THE CRIME WITH THAT SHARED PURPOSE, COMMON
8 SCHEME OR DESIGN.

9 IS THAT ESSENTIALLY WHAT ALL OF YOU UNDERSTAND THE LAW
10 TO BE?

11 MR. GASSER: YES, SIR.

12 MR. STRICKLER: YES, SIR.

13 THE COURT: YEAH. OKAY.

14 MR. SHUPPER: YES, YOUR HONOR.

15 THE COURT: MERE PRESENCE AND MERE ASSOCIATION,
16 OBVIOUSLY I DON'T KNOW THAT I WOULD CHARGE IT IN PRECISELY
17 THE LANGUAGE YOU'VE GOT HERE. BUT MERE PRESENCE GETS
18 CHARGED. MERE KNOWLEDGE THAT OTHER PERSONS INTEND TO ENGAGE
19 IN A CRIMINAL ACT, I DON'T THINK I CHARGE THAT BECAUSE I
20 DON'T THINK IT'S IMPLICATED BY THE EVIDENCE, MR. SNEED.
21 BECAUSE I DON'T THINK THERE'S ANYBODY WHO HAS TOLD ME OR SAID
22 ANYTHING ABOUT, YEAH, I KNEW THAT THEY WERE GOING TO DO
23 SOMETHING, I DIDN'T KNOW WHAT IT WAS OR ANYTHING LIKE THAT.
24 SO IT'S AGAIN PART AND PARCEL OF THE REGULAR CHARGE, MERE
25 PRESENCE.

1 KIDNAPPING, I'M GOING TO CHARGE THEM KIDNAPPING IN
2 CONSONANCE WITH STATE V. JEFFRIES, WHICH REQUIRES THAT THERE
3 BE KNOWLEDGE OF THE ACT, THAT THE ACT IS BEING COMMITTED AND
4 THAT THERE BE SOME AFFIRMATIVE ACT. THAT IS WHAT JUDGE LONG
5 WAS REVERSED FOR IN THAT CASE, BY NOT GIVING -- BY GIVING A
6 MISLEADING CHARGE. I WILL TELL THEM THAT THE ACT OF
7 CONFINING, OR WHATEVER IT IS, INVEIGLING, IT REQUIRES SOME
8 AFFIRMATIVE ACT SEPARATE AND DISTINCT FROM THE OTHER CONDUCT.
9 ALTHOUGH THERE IS NO PROBLEM WITH -- I KNOW THAT YOU ALL
10 THINK THERE IS, BUT THERE'S NO PROBLEM WITH THEM BEING
11 CONVICTED OF BOTH KIDNAPPING AND RAPE, EVEN THOUGH YOU'VE GOT
12 A CHARGE ON THAT.

13 MENTAL STATE, KIDNAPPING, NO. 17, I THINK IS INCORRECT,
14 AND I'M NOT GOING TO CHARGE IT. I THINK IT'S INCORRECT
15 STANDING ALONE. OKAY? AND I THINK THIS NO. 18, THE
16 INTENTIONAL ACT, I DON'T HAVE ANY REAL PROBLEM WITH THAT. I
17 JUST DON'T KNOW EXACTLY WHAT IT RELATES TO, AS ON 19. I'LL
18 HOLD THOSE OUT. NO. 20, I'M NOT GOING TO CHARGE ON THE FACTS
19 ABOUT DOG CASES. AND ----

20 MR. SNEED: YOUR HONOR, WE WILL WITHDRAW 21 THROUGH 23.

21 THE COURT: OKAY. THANKS. SO 21 THROUGH 23 ARE
22 WITHDRAWN. AND THE REST OF THEM, UNLESS OTHERWISE NOTED, I
23 THINK DO STATE APPROPRIATE PROPOSITIONS OF LAW AND WILL GET
24 CHARGED IN SUBSTANCE IN ANY EVENT.

25 MR. SHUPPER, YOUR CHARGES WERE IN LARGE PART DUPLICATIVE

1 OF THE CHARGES SUBMITTED BY THE DEFENDANT KENNETH JAMES;
2 ALTHOUGH THERE WERE SOME 30 IN NUMBER, AND I'M TRYING TO
3 THINK OF WHAT THE ESSENTIAL DIFFERENCES WERE. WHAT WERE
4 THEY? DO YOU REMEMBER?

5 MR. SHUPPER: YOUR HONOR, I TRIED TO PREPARE A
6 CORRELATION LIST FOR YOU, AND TIME DID NOT PERMIT ME TO
7 COMPLETE IT. AND SO I BELIEVE THERE WAS -- ONE OF THE
8 DIFFERENCES WERE POLICE POSSESSION OF PHOTOGRAPHS. I THINK
9 THERE'S SOME DUPLICATES IN THERE AS I LEFT TO GET THOSE
10 COPIED AFTER THAT.

11 THE COURT: YOUR 2 IS DIFFERENT, AND IT'S A CORRECT
12 PROPOSITION OF LAW. AND 3 IS DIFFERENT, AND IT'S A CORRECT
13 PROPOSITION OF LAW.

14 MR. SHUPPER: THE IDENTIFICATION IS THE SAME, YOUR
15 HONOR. NO. 6, CO-DEFENDANT'S GENERAL CHARGE.

16 THE COURT: WELL, I WILL TELL THEM THAT EACH DEFENDANT
17 IS ENTITLED TO AN INDIVIDUALIZED CONSIDERATION OF THE
18 EVIDENCE ARRAYED AGAINST HIM AND THAT THEY ARE NOT TO BE HELD
19 GUILTY MERELY BECAUSE -- WELL, I DON'T WANT TO SAY THAT
20 BECAUSE I'M GETTING INTO COMMENTING ON THE FACTS. I'LL JUST
21 SAY THAT THEY'RE ENTITLED TO AN INDIVIDUALIZED SENTENCING. I
22 MEAN, A FINDING.

23 MR. SHUPPER: FINDINGS. THANK YOU, YOUR HONOR.

24 THE COURT: OKAY. POLICE POSSESSION OF PHOTOGRAPHS, I
25 DON'T KNOW THAT I WANT TO CHARGE THAT. I MEAN, BECAUSE IF I

1 CHARGE THAT, I THINK IT MIGHT BE A PROBLEM FOR YOUR CLIENTS.
2 YOU KNOW, DRAWING ATTENTION TO THE FACT OF HOW THEY GOT
3 PHOTOGRAPHS OF THESE GUYS.

4 MR. SHUPPER: I HAD IT IN AND OUT A COUPLE OF TIMES,
5 YOUR HONOR. THAT SAYS THAT -- THAT CHARGE REFERS TO THEM
6 BEING AVAILABLE FROM A NUMBER OF SOURCES.

7 THE COURT: YEAH. WELL, INADMISSIBLE EVIDENCE AND
8 EVIDENCE SUBMITTED FOR A LIMITED PURPOSE, WITHOUT THINKING
9 ABOUT IT, I DON'T WANT TO -- I'LL PROBABLY CHARGE SOMETHING
10 TO THAT EFFECT, ALTHOUGH I THINK THAT FAILURE TO CHARGE THAT
11 IS NOT NECESSARILY A REAL PROBLEM.

12 MR. SHUPPER: YOUR HONOR, I WILL --

13 THE COURT: TESTIMONY OF A POLICE OFFICER I'M NOT GOING
14 TO CHARGE. OKAY?

15 MR. SHUPPER: ALL RIGHT.

16 THE COURT: THAT'S PRETTY MUCH IT. AND, MR. GASSER,
17 ANYTHING, COMMENTS ON MR. GASSER'S CHARGES WHICH ARE CORRECT
18 AS FAR AS THEY GO AND MAY BE FLESHED OUT OR SUPPLEMENTED?
19 MR. SNEED.

20 MR. SNEED: THANK YOU. MAY IT PLEASE THE COURT. YOUR
21 HONOR, ON MR. GASSER'S CHARGE NO. 1, MY OBJECTION IS THAT THE
22 FIRST PARAGRAPH, LIKE THE STATUTE, IT HAS AN EXCLUSIVE LIST
23 OF PROHIBITED CONDUCT WHICH I BELIEVE IS AN EITHER/OR
24 PROPOSITION FOR EACH OF THOSE SPECIFIC ACTS. AND I THINK IT
25 COULD BE POTENTIALLY CONFUSING TO THE JURY TO DECIDE WHICH OF

1 THOSE POSSIBLE MULTIPLE ACTS WERE COMMITTED. AND I THINK THE

2 —

3 THE COURT: I THINK THAT THERE ARE -- AND WE DISCUSSED
4 THIS EARLIER. THEY ARE GOING TO GO ON SEIZING, CONFINING,
5 ABDUCTING OR CARRYING AWAY. OKAY? AND THAT'S HOW I'VE GOT
6 THE ELEMENTS PRINTED OUT ON THIS PRINTOUT CHARGE.

7 MR. SNEED: MY REQUEST THAT MAYBE, IF I UNDERSTAND THE
8 COURT, WAS TO DELETE THOSE EXTRANEIOUS ONES.

9 THE COURT: AND THEY WILL BE. AND AS A MATTER OF FACT,
10 COME UP HERE AND GET, EACH ONE OF YOU GET A LITTLE PACKAGE OF
11 THESE ELEMENTS THAT I'M DOING. AND I'M GOING TO HAND ONE
12 PACKET OF EACH, ONE OF THESE TO EACH JUROR, TOO; BUT SUBJECT
13 TO YOU ALL'S EITHER APPROVAL OR MY REJECTION OF YOUR
14 DISAPPROVAL.

15 MR. SNEED: YOUR HONOR, MY OBJECTION TO STATE'S NO. 2.

16 THE COURT: 2? OKAY.

17 MR. SNEED: I DIDN'T MEAN TO CUT THE COURT OFF.

18 THE COURT: NO. GO AHEAD.

19 MR. SNEED: WAS THAT THIS IS MALICE AND CLEARLY THAT
20 WOULD GO TO THE A.W.I.K. BUT MY UNDERSTANDING OF THE MENS
21 REA IS DIFFERENT FOR KIDNAPPING, C.S.C. AND ARMED ROBBERY
22 THAN IT IS FOR THE A.W.I.K.

23 THE COURT: OH, I THINK THAT YOU'RE PROBABLY RIGHT.

24 MR. SNEED: IN THAT THIS COULD ---

25 THE COURT: NO, NO. SEE, THE ONLY CRIME THAT HAS THE

1 ELEMENT OF MALICE, THE REQUIRED ELEMENT OF MALICE, IS THE
2 A.W.I.K. AND I'VE SPECIFICALLY GOT THAT IN THE A.W.I.K.
3 WHEN YOU LOOK AT THE ELEMENTS, THAT'S THE ONLY ONE THAT
4 CONTAINS AN ELEMENT RELATING TO MALICE.

5 MR. SNEED: YES, SIR. THEN I GUESS THAT WOULD PREVENT
6 CONFUSION.

7 THEN, FINALLY, YOUR HONOR, ON MY OBJECTION TO STATE'S 3
8 IS THIS. THAT, GRANTED, MR. GASSER'S PROPOSED CHARGE DOESN'T
9 HAVE THE WORD "PRESUMPTION", BUT IT SAYS "THE LAW SAYS", YOU
10 KNOW, I BELIEVE THAT THAT IS —

11 THE COURT: I DON'T STATE STUFF LIKE "THE LAW SAYS".
12 OKAY? DON'T WORRY ABOUT IT.

13 MR. SNEED: AND THE OTHER PROBLEM WITH HAND OF ONE, HAND
14 OF ALL, YOUR HONOR, I THINK THAT THAT IS AN
15 OVERSIMPLIFICATION OF LIABILITY AMONG THE PARTIES. THERE OF
16 COURSE IS CLEAR DISTINCTIONS BETWEEN, YOU KNOW, PRINCIPAL AND
17 AIDER AND ABETTOR. AND TO SAY THE HAND OF ONE, HAND OF ALL,
18 I REALIZE IT'S A MANTRA AMONG PROSECUTORS, BUT THERE IS A
19 REASONED ANALYSIS WHEN YOU TALK ABOUT A PRINCIPAL OR AN AIDER
20 AND ABETTOR. AND TO BLITHELY SAY HAND OF ONE, HAND OF ALL,
21 YOU KIND OF DIVORCE YOURSELF FROM THAT ANALYSIS AND THE STATE
22 DOESN'T HAVE TO PROVE THE VARIOUS ELEMENTS. THEY SHOULD HAVE
23 TO.

24 THE COURT: WELL, NO. THEY HAVE TO PROVE THE ELEMENTS.

25 MR. SNEED: BUT JUST TO SAY HAND OF ONE, HAND OF ALL, I

1 THINK THAT ---

2 THE COURT: AND THEN THEY ALSO HAVE TO PROVE THAT THE
3 FELLOW WAS THERE PRESENT AIDING AND ABETTING AND WAS THERE,
4 YOU KNOW, SHARING THE PURPOSE UNDER COMMON SCHEME AND DESIGN.
5 YES, SIR, MR. STRICKLER.

6 MR. STRICKLER: YES, SIR. THE ONLY OBJECTION MR. SNEED
7 HAS IS TO THE EMPLOYMENT OF THE USE OF THE TERMS "HAND OF ONE
8 IS THE HAND OF ALL".

9 THE COURT: I UNDERSTAND THAT. AND YOU OF COURSE
10 REMEMBER MY FAMOUS TEACHING ARGUMENT ON THAT PARTICULAR THING
11 WHICH WE WON'T GET INTO AT THIS POINT IN TIME.

12 MR. STRICKLER: THANK YOU, SIR. THAT'S IT FROM MR.
13 SNEED. JUST A COUPLE OF THINGS VERY BRIEFLY, YOUR HONOR.
14 SIMPLY BECAUSE I WANT TO BE CLEAR. WE SUBMITTED 11,
15 INSTRUCTION 11 ON CIRCUMSTANTIAL EVIDENCE. THE END OF THE
16 FIRST PARAGRAPH INDICATES THE CONSIDERATION OF CIRCUMSTANTIAL
17 EVIDENCE, "YOU SHOULD SEEK AN EXPLANATION OTHER THAN".

18 THE COURT: AND YOU THINK THAT'S BURDEN SHIFTING?

19 MR. STRICKLER: NO. MY UNDERSTANDING ---

20 THE COURT: SOME PEOPLE DO.

21 MR. STRICKLER: --- IS THAT THE LAW OF THIS STATE, IT'S
22 ---

23 THE COURT: SAYS IT'S NOT BURDEN SHIFTING.

24 MR. STRICKLER: WELL, I THINK THE LAW OF THIS STATE SAYS
25 YOU'RE NOT SUPPOSED TO CHARGE THAT.

1 THE COURT: NO. THE LAW OF THIS STATE SAYS THAT WHEN
2 JUDGE RUSHING FAILED TO CHARGE THAT BECAUSE HE FELT IT WAS
3 BURDEN SHIFTING THAT HE WAS WRONG IN SAYING THAT AND THAT
4 THAT'S OKAY.

5 MR. STRICKLER: IT'S ONE OF THE FEW TIMES I —

6 THE COURT: BECAUSE IT DOESN'T SHIFT THE BURDEN. BUT
7 I'M NOT GOING TO SAY IT ANYWAY BECAUSE I DON'T LIKE IT.
8 OKAY?

9 MR. STRICKLER: THANK YOU, SIR. THE OTHER THING IS,
10 WHILE NOT REQUESTED, I'M SURE YOUR HONOR IS GOING TO CHANT —
11 CHARGE —

12 THE COURT: CHANT?

13 MR. STRICKLER: CHARGE. I'M SORRY, SIR. — THE JURY
14 REGARDING NON-TESTIMONY ON THE PART OF THE DEFENDANTS.

15 THE COURT: OH, SURE. YEAH.

16 MR. STRICKLER: I WOULD JUST ASK THAT YOUR HONOR NOT USE
17 THE PHRASE "FAILURE TO TESTIFY" IN CHARGING THE JURY; RATHER,
18 USE THE PHRASE "THE FACT THAT THE DEFENDANT DID NOT TESTIFY."

19 THE COURT: EXERCISED THEIR CONSTITUTIONAL RIGHT NOT TO
20 TESTIFY. IS THAT WHAT YOU WANT ME TO SAY?

21 MR. STRICKLER: YES, SIR. THE IMPLICATIONS FROM
22 "FAILURE" I HAVE PROBLEMS WITH. THAT'S ALL.

23 THE COURT: OKAY. ALL RIGHT. MR. GASSER, I HAVE NOT
24 LET YOU COMMENT MUCH ON ANY OF THESE THINGS. SO, IS THERE
25 ANYTHING YOU'D LIKE TO SAY AT THIS TIME?

1 MR. GASSER: THE ONLY THING I'D LIKE TO INQUIRE OF THE
2 COURT IS, ARE YOU GOING TO CHARGE THE FACT THAT A KIDNAPPING
3 COMMENCES WHEN ONE IS WRONGFULLY DEPRIVED?

4 THE COURT: YES.

5 MR. GASSER: I JUST WANTED TO MAKE SURE OF THAT.

6 THE COURT: AND TERMINATES WHEN THE PERSON IS RELEASED.

7 MR. GASSER: THANK YOU.

8 THE COURT: YEAH. I CERTAINLY INTEND TO DO THAT. I
9 THINK THAT'S APPROPRIATE AND CORRECT. OKAY. IF ANYBODY
10 WANTS TO GO TO THE BATHROOM BEFORE WE START THIS STUFF, LET'S
11 GO DO IT NOW. ABOUT TWO MINUTES. AND BE BACK IN HERE. I'M
12 THE ONLY ONE? WELL, I'M GOING.

13 (WHEREUPON, A BREAK IS TAKEN)

14 THE COURT: I THINK WE'RE NOW READY FOR THE JURY. AND,
15 IF YOU WOULD, MR. BARROW, PLEASE ASK THEM TO COME IN. OH.
16 THERE'S NO LESSER-INCLUDED OFFENSES AS I SEE IT.

17 MR. STRICKLER: NONE THAT I SEE, YOUR HONOR.

18 MR. SHUPPER: UNDERSTOOD, YOUR HONOR.

19 THE COURT: ALL RIGHT.

20 (JURY IN AT 1:57 P.M.)

21 THE BAILIFF: THE JURY IS ALL PRESENT, YOUR HONOR.

22 THE COURT: FOLKS, THANK YOU. APPRECIATE THAT. AND
23 THANK YOU FOR YOUR PATIENCE, FOLKS. AND I HOPE YOU SOMEWHAT
24 ENJOYED YOUR MEAL.

25 WE'RE NOW AT THE STAGE OF THE TRIAL WHERE WE HAVE TO --

1 WELL, WE DON'T HAVE TO -- IT IS APPROPRIATE AT THIS POINT IN
2 TIME THAT YOU ARE PRESENTED WITH THE CLOSING ARGUMENTS OF
3 COUNSEL. THAT IS, COUNSEL WILL STAND BEFORE YOU IN TURN AND
4 THEY WILL ATTEMPT TO PERSUADE YOU TO THEIR POINT OF VIEW WITH
5 REGARD TO WHAT THE EVIDENCE HAS SHOWN.

6 BEAR IN MIND THAT YOU WILL DECIDE THIS CASE SOLELY ON
7 THE EVIDENCE PRESENTED AND THE LAW AS I GIVE IT TO YOU.
8 THOSE MATTERS WHICH I HAVE TOLD YOU TO EXCLUDE FROM YOUR
9 CONSIDERATION ARE NOT EVIDENCE. THOSE MATTERS UPON WHICH I
10 HAVE RULED UPON OBJECTIONS FAVORABLY ARE NOT IN EVIDENCE.
11 AND WHAT LAWYERS TELL YOU IS NOT EVIDENCE IN THE CASE.

12 HOWEVER, WHAT THEY TELL YOU -- AND I KNOW THESE LAWYERS
13 TO BE ETHICAL LAWYERS. THEY WILL TELL YOU AND ARGUE
14 APPROPRIATELY TO YOU THE EVIDENCE THAT HAS BEEN PRESENTED TO
15 YOU AND THE INFERENCES TO BE DRAWN FROM THAT EVIDENCE. EACH
16 WILL ON DOUBT ATTEMPT TO PLACE WHAT IS KNOWN AS THE MOST
17 FAVORABLE SPIN ON THAT EVIDENCE, TO USE A CURRENTLY POPULAR
18 TERM. AND THAT IS WHAT THEY'RE SUPPOSED TO DO. ARGUMENT IS
19 MEANT TO BE ARGUMENTATIVE OR PERSUASIVE IN FORM. THIS IS
20 AFTER ALL AN ADVERSARIAL SYSTEM. BUT, NONETHELESS, THIS WILL
21 BE DONE WITHIN THE CONFINES OF THE RULES AS I SAY BECAUSE I
22 KNOW THESE LAWYERS AND I KNOW THEM TO STRICTLY ADHERE TO
23 ETHICAL STANDARDS.

24 THE ARGUMENTS MAY BE USED BY YOU IN EVALUATING THE
25 EVIDENCE WHILE NOT BEING TAKEN AS EVIDENCE THEMSELVES.

1 THEY'RE TOOLS THAT YOU CAN USE TO EVALUATE EVIDENCE.
2 FOLLOWING THEIR ARGUMENTS BEFORE YOU, I WILL THEN CHARGE YOU;
3 THAT IS, TELL YOU WHAT THE GOVERNING LAW OF THE STATE IS WITH
4 RELATION TO THE EVENTS THAT YOU WILL HAVE FOR YOUR
5 CONSIDERATION. THEN AND ONLY THEN WILL YOU BE IN ANY
6 POSITION TO BEGIN YOUR DELIBERATIONS.

7 WITH THAT, MR. GASSER, IF YOU'RE READY, SIR.

8 MR. GASSER: MAY IT PLEASE THE COURT, YOUR HONOR.

9 THE COURT: YES, SIR. AND I'M GOING TO SIT DOWN IN A
10 SECOND.

11 MR. GASSER: MADAM FORELADY, LADIES AND GENTLEMEN OF THE
12 JURY, GOOD AFTERNOON. AS JUDGE PLEICONES JUST INDICATED TO
13 YOU, WE HAVE REACHED THAT STAGE OF THESE PROCEEDINGS IN WHICH
14 THE LAWYERS HAVE AN OPPORTUNITY TO COME BEFORE YOU AND GIVE
15 WHAT IS KNOWN AS CLOSING ARGUMENTS. BECAUSE THE BURDEN OF
16 PROOF IN THIS STATE IS THE SAME AS IT IS IN EVERY STATE IN
17 OUR COUNTRY, WE GET TO GO FIRST AND WE GET TO GO LAST,
18 BECAUSE THE BURDEN OF PROOF LIES WITH THE STATE OF SOUTH
19 CAROLINA. NEITHER MR. KENNETH JAMES NOR HIS LAWYERS NOR MR.
20 ROBERT JAMES NOR HIS LAWYER HAS A BURDEN. THE BURDEN LIES
21 WITH THE STATE. AND BECAUSE OF THAT, PROCEDURALLY WE GET TO
22 OPEN DURING THIS STAGE AND WE ALSO GET TO CLOSE. I WILL BE
23 THE LAST ONE ALSO SPEAKING TO YOU LATER ON THIS AFTERNOON.

24 IN THIS FIRST PORTION I'D JUST LIKE TO BRIEFLY DISCUSS
25 WITH YOU THE LAW IN THIS STATE AS IT APPLIES TO THIS

1 PARTICULAR CASE. NOW, JUDGE PLEICONES IS GOING TO CHARGE YOU
2 THE LAW. HE IS GOING TO CHARGE YOU ALL THE APPLICABLE AREAS
3 OF THE LAW THAT'S RELEVANT TO THE FACTS AND CIRCUMSTANCES OF
4 THE CASE THAT YOU'VE HEARD THROUGH THE WITNESS STAND, THROUGH
5 THE EVIDENCE AND OF COURSE THE CHARGING PAPERS, THE
6 INDICTMENTS.

7 SUFFICE IT TO SAY, I WANT TO JUST BRIEFLY GO OVER WITH
8 YOU AGAIN CERTAIN ASPECTS OF THE LAW BECAUSE I SUBMIT TO YOU
9 AND THE STATE SUBMITS TO YOU THAT IT IS IMPORTANT FOR YOU TO
10 HAVE SOME SORT OF UNDERSTANDING OF THE BASIC ELEMENTS OF
11 THESE OFFENSES WHEN YOU ARE BEING ARGUED TO BY THE LAWYERS.
12 AND SO I'M GOING TO BRIEFLY HAVE AN OPPORTUNITY TO JUST
13 DISCUSS CERTAIN ASPECTS OF THE CRIMES CHARGED AND OTHER AREAS
14 OF THE LAW, AND THEN AT WHICH TIME MR. STRICKLER OR MR. SNEED
15 WILL HAVE AN OPPORTUNITY TO COME BEFORE YOU AND MAKE THEIR
16 ARGUMENT ON BEHALF OF MR. KENNETH JAMES. THEN MR. SHUPPER
17 WILL HAVE HIS OPPORTUNITY TO COME BEFORE YOU AND MAKE HIS
18 ARGUMENT ON BEHALF OF ROBERT JAMES.

19 IT WAS INSTRUCTED TO YOU AT THE BEGINNING OF THESE
20 PROCEEDINGS SEVERAL DAYS AGO, ON TUESDAY I BELIEVE, WHAT THE
21 INDICTMENTS WERE. I'M NOT GOING TO READ THROUGH THE
22 INDICTMENTS OR PUBLISH THE INDICTMENTS AS I DID DURING MY
23 OPENING.

24 SUFFICE IT TO SAY, JUST FOR YOUR MEMORY PURPOSES, YOU
25 RECALL THAT BOTH KENNETH JAMES AND ROBERT JAMES ARE CHARGED

1 WITH EIGHT OFFENSES. THERE ARE EIGHT INDICTMENTS, EIGHT
2 AGAINST KENNETH JAMES AND EIGHT AGAINST ROBERT JAMES. EACH
3 ONE OF THEM ARE CHARGED WITH TWO COUNTS OF KIDNAPPING, TWO
4 COUNTS OF ARMED ROBBERY, TWO COUNTS OF POSSESSION OF A
5 FIREARM DURING THE COMMISSION OF A VIOLENT CRIME, ONE COUNT
6 OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND ONE COUNT
7 OF ASSAULT WITH INTENT TO KILL.

8 NOW, UPON YOUR CONSIDERATION OF THE GUILT OR INNOCENCE
9 OF EACH OF THESE DEFENDANTS YOU MUST NOT ONLY CONSIDER THE
10 EVIDENCE SEPARATELY AGAINST KENNETH JAMES AND ROBERT JAMES;
11 YOU MUST CONSIDER EACH AND EVERY CHARGE, EACH INDICTMENT
12 SEPARATELY WHEN YOU'RE CONSIDERING WHETHER OR NOT THE STATE
13 HAS MET ITS BURDEN OF PROOF.

14 KIDNAPPING. WHAT IS KIDNAPPING? THE JUDGE WILL CHARGE
15 YOU AND WILL DEFINE TO YOU THERE'S A SPECIFIC DEFINITION THAT
16 OUR LEGISLATURE HAS PROVIDED FOR THE OFFENSE OF KIDNAPPING.
17 KIDNAPPING IS WHEN A PERSON UNLAWFULLY SEIZES, ABDUCTS,
18 CONFINES OR CARRIES AWAY ANOTHER PERSON WITHOUT AUTHORITY OF
19 LAW. THAT'S THE DEFINITION OF KIDNAPPING; WHEN A PERSON
20 ABDUCTS, SEIZES, CONFINES OR CARRIES AWAY, NO MATTER WHAT
21 DISTANCE, ANOTHER PERSON WITHOUT AUTHORITY OF LAW.

22 AND THE LENGTH OF TIME IS IRRELEVANT. THE KIDNAPPING
23 COMMENCES AT THE MOMENT THAT THAT PERSON'S FREEDOM OF
24 MOVEMENT IS BARRED. AND IT LASTS AS LONG AS THAT FREEDOM IS
25 RESTORED. IT COULD BE FIVE MINUTES. IT COULD BE FIFTEEN

1 MINUTES. IT COULD BE THIRTY MINUTES. IT COULD BE AN HOUR.
2 IT COULD BE A DAY. IT COULD BE A WEEK. IT COULD BE A MONTH.
3 BUT AS LONG AS FOR A PERIOD OF TIME, NO MATTER HOW SMALL A
4 PERIOD OF TIME, A PERSON'S FREEDOM OF MOVEMENT IS CONFINED,
5 THEN THAT IS A KIDNAPPING.

6 ARMED ROBBERY. ARMED ROBBERY AS I INDICATED IN MY
7 OPENING STATEMENT IS VERY SIMPLE. IT IS STEALING. LARCENY
8 IS THE FANCY WORD. IT'S THE WORD THAT OUR LEGISLATURE USES,
9 IS ONE OF THE ELEMENTS OF ARMED ROBBERY. LARCENY AND THEN
10 ROBBERY AND THEN ARMED ROBBERY. BUT BASICALLY WHAT ARMED
11 ROBBERY IS, IT'S STEALING FROM THE PERSON, PHYSICALLY FROM
12 THE PERSON OR FROM THEIR PRESENCE.

13 SO THE JUDGE WILL CHARGE YOU AND GIVE YOU THE ELEMENTS
14 OF ARMED ROBBERY. IT'S LARCENY. IT'S THE TAKING AWAY OF THE
15 PERSONAL PROPERTY OF ANOTHER PERSON WITH THE INTENT TO
16 PERMANENTLY DEPRIVE THEM OF THAT PROPERTY. AND YOU ARE
17 PUTTING — YOU ARE EITHER USING FORCE OR INTIMIDATION AND
18 YOU'RE ARMED WITH A DEADLY WEAPON.

19 AND, AGAIN, IT IS EITHER TAKING AWAY PHYSICALLY FROM THE
20 PERSON, SUCH AS IN THIS CASE REMOVING WINFRED BULL'S PANTS
21 AND GOING THROUGH HIS POCKETS; OR FROM THEIR PRESENCE, SUCH
22 AS WHEN THEY HELD () AGAINST HER WILL AND TOOK HER
23 KEYS FROM HER AND WENT IN HER PRESENCE WITH THAT CAR FROM HER
24 PRESENCE WITH THAT GUN AT WINFRED BULL'S HEAD AND RIFLED
25 THROUGH THE TRUNK OF HER CAR.

1 SO THE ARMED ROBBERY DOESN'T NECESSARILY HAVE TO BE
2 REMOVING IT FROM YOUR PERSON IF IT'S COMMITTED IN YOUR
3 PRESENCE. UNDER THE LAW IN SOUTH CAROLINA IT'S SUFFICIENT.
4 SO THAT'S WHAT ARMED ROBBERY IS.

5 POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE.
6 THAT IS PROBABLY THE MOST SIMPLISTIC CHARGE THAT YOU'LL
7 RECEIVE. IT IS SIMPLY POSSESSION. IF YOU POSSESS A FIREARM,
8 EITHER ACTUAL POSSESSION OR CONSTRUCTIVE POSSESSION -- AND
9 THE JUDGE WILL EXPLAIN TO YOU WHAT CONSTRUCTIVE POSSESSION IS
10 -- A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME. AND
11 THE JUDGE WILL CHARGE YOU THAT ARMED ROBBERY, KIDNAPPING,
12 CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE IN SOUTH CAROLINA
13 HAVE BEEN DEFINED BY OUR LEGISLATURE AS VIOLENT CRIMES.

14 CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE IS -- WHEN
15 YOU COMMIT CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE IS
16 WHEN YOU COMMIT A SEXUAL BATTERY AGAINST A PERSON; IN THIS
17 CASE A WOMAN. A SEXUAL BATTERY IS ANY INTRUSION, NO MATTER
18 HOW SLIGHT, INTO THE BODY CAVITIES OF A PERSON; IN THIS CASE
19 A WOMAN. ORAL, VAGINAL. ANY INTRUSION, NO MATTER HOW
20 SLIGHT, WITHOUT THAT PERSON'S CONSENT IS DEFINED AS A SEXUAL
21 BATTERY.

22 SO CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE, WHAT
23 MAKES IT A FIRST DEGREE IS THAT A SEXUAL BATTERY, ANY
24 INTRUSION INTO THE WOMAN'S BODY WITHOUT THAT WOMAN'S CONSENT,
25 AND IF IT'S ACCOMPLISHED BY AGGRAVATED FORCE. THE JUDGE WILL

1 DEFINE TO YOU WHAT AGGRAVATED FORCE IS. AND YOU COULD FIND
2 AGGRAVATED FORCE IN A NUMBER OF DIFFERENT WAYS. IF THE WOMAN
3 IS SUBJECTED TO A BATTERY OF A HIGH AND AGGRAVATED NATURE,
4 PHYSICAL ASSAULT OF A HIGH AND AGGRAVATED NATURE, OR IF THEY
5 THREATEN THE USE OF A PISTOL, AS YOU'VE HEARD IN THIS CASE,
6 THAT IS SUFFICIENT FOR YOU TO FIND THESE DEFENDANTS GUILTY OF
7 CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE.

8 IF YOU FIND A SEXUAL BATTERY WITHOUT THE CONSENT OF THE
9 VICTIM AND THEY THREATEN THE USE OF A PISTOL OR THEY USE
10 AGGRAVATED FORCE TO ACCOMPLISH THE BATTERY, PHYSICALLY HELD
11 HER AGAINST HER WILL, PHYSICALLY HELD HER DOWN, THREATENED TO
12 DO BODILY HARM, THOSE ARE ALL ELEMENTS, THOSE ARE ALL
13 DEFINITIONS OF AGGRAVATED FORCE IN WHICH YOU THEN CAN CONVICT
14 OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE.

15 ASSAULT WITH INTENT TO KILL. ASSAULT WITH INTENT TO
16 KILL HAS SEVERAL ELEMENTS AS WELL. FIRST AN ASSAULT. THE
17 JUDGE WILL DEFINE TO YOU WHAT THE LEGAL DEFINITION OF ASSAULT
18 IS. ASSAULT IS WHEN YOU THREATEN TO DO BODILY HARM. YOU'RE
19 THREATENING. YOU DON'T ACTUALLY CARRY OUT THAT THREAT. IN
20 ESSENCE, YOU DON'T ACTUALLY PHYSICALLY STRIKE SOMEONE,
21 BECAUSE THAT WOULD BE A BATTERY. YOU ALL ARE FAMILIAR WITH
22 THE TERM "ASSAULT AND BATTERY".

23 BUT AN ASSAULT IS WHEN YOU THREATEN TO DO BODILY HARM
24 AND YOU HAVE THE PRESENT CAPABILITY OF CARRYING OUT THAT
25 THREAT. SO ASSAULT WITH INTENT TO KILL, WHEN A FIREARM IS

1 DISCHARGED AT SOMEBODY, IF IT'S HITS THEM, THEN IT'S AN
2 ASSAULT AND BATTERY. IF THEY SURVIVE, IT'S AN ASSAULT AND
3 BATTERY WITH INTENT TO KILL.

4 BUT IF YOU SHOOT AT SOMEONE AND THEY'RE NOT HIT AND YOU
5 HAVE THE REQUIRED MENTAL INTENT, WHICH I'LL GET TO IN A
6 MOMENT, THEN THAT IS AN ASSAULT WITH INTENT IF KILL. IF
7 YOU'RE COMMITTING AN ASSAULT AND YOU DON'T ACTUALLY
8 PHYSICALLY STRIKE THEM AND IF YOU HAVE THE REQUISITE MENTAL
9 INTENT, WHICH IN THIS CASE IS MALICE.

10 SO THE JUDGE WILL CHARGE YOU THAT ASSAULT WITH INTENT TO
11 KILL, HE'LL DEFINE ASSAULT AND HE'LL DEFINE FOR YOU THAT THE
12 ASSAULT MUST HAVE BEEN WITH MALICE AFORETHOUGHT. AND THOSE
13 ARE LEGAL TERMS. MALICE SPRINGS FROM WICKEDNESS. HE WILL
14 DEFINE MALICE. ONE ACTS MALICIOUSLY WHEN ONE DOES SOMETHING
15 TO ANOTHER HUMAN BEING WITH NO JUST CAUSE, NO EXCUSE, NO
16 LEGAL EXCUSE. IT SPRINGS FROM WICKEDNESS. IT'S WHEN A
17 PERSON OR PERSONS ARE ACTING WITH A HEART, A DARK HEART, AN
18 EVIL HEART. DOING SOMETHING BAD TO SOMEBODY FOR NO REASON IS
19 AN ACT OF MALICE.

20 AFORETHOUGHT SIMPLY MEANS THAT THE MALICE, THE PERSON'S
21 DARKNESS, THE EVIL INTENT IN THAT PERSON'S HEART, IN THAT
22 PERSON'S MIND MUST OCCUR AT THE MOMENT THAT THE SHOTS ARE
23 BEING FIRED IN THIS CASE AND NOT AFTERWARDS. THAT'S WHY THEY
24 TERM IT MALICE AFORETHOUGHT. THE MALICE MUST — THE
25 DARKNESS, THE EVILNESS, THE UNLAWFUL ACT MUST OCCUR AT THE

1 TIME THAT IN THIS CASE THE GUN IS BEING FIRED AND NOT
2 DEVELOPED AFTERWARDS. SO THAT'S WHAT ASSAULT WITH INTENT TO
3 KILL IS.

4 AND I JUST HAVE TWO OTHER AREAS OF THE LAW THAT I'M
5 GOING TO BRIEFLY DISCUSS WITH YOU. THEN I WILL TAKE MY SEAT
6 AND ALLOW THE DEFENSE ATTORNEYS TO COME BEFORE YOU. IN SOME
7 CASES WHEN THERE ARE A NUMBER OF CHARGES LIKE THIS, SOMETIMES
8 YOU MAY ACTUALLY PHYSICALLY RECEIVE THE ELEMENTS; YOU WILL
9 HAVE THE ELEMENTS OF THE CRIMES I JUST DISCUSSED WITH YOU
10 DURING YOUR DELIBERATIONS. BUT THE JUDGE IS GOING TO GIVE
11 YOU A VERY LENGTHY CHARGE, A VERY THOROUGH CHARGE. HE'S A
12 VERY THOROUGH JUDGE WHEN IT COMES TO INSTRUCTING THE JURORS.

13 AND PART OF HIS CHARGE IS GOING TO TALK ABOUT A THEORY
14 IN SOUTH CAROLINA -- NOT A THEORY -- THE LAW IN SOUTH
15 CAROLINA. I'M SORRY. THE LAW IN SOUTH CAROLINA. AND EACH
16 AND EVERY ONE OF YOU, LADIES AND GENTLEMEN, BACK ON TUESDAY
17 MORNING WHEN THE CLERK OR WHEN THE JUDGE ASKED YOU TO STAND
18 AND THE CLERK I BELIEVE OR THE JUDGE -- I CAN'T REMEMBER --
19 ASKED YOU TO RAISE YOUR RIGHT HAND AND TO SWEAR OR AFFIRM
20 THAT YOU WOULD WELL AND TRULY TRY BETWEEN THE STATE OF SOUTH
21 CAROLINA AND THE DEFENDANTS WHO WERE PUT AT BAR, AND THAT YOU
22 WOULD ACCEPT THE LAW; EVEN IF YOU DISAGREE, YOU HAVE TAKEN AN
23 OATH, EVEN IF YOU DISAGREED WITH THE LAW IN SOUTH CAROLINA,
24 YOU MUST, YOUR OATH REQUIRES YOU TO ACCEPT THAT LAW AND TO
25 APPLY THAT LAW TO THE FACTS OF THIS CASE, BECAUSE THE LAW IN

1 SOUTH CAROLINA INCLUDES ACCOMPLICE LIABILITY, SOMETIMES
2 REFERRED TO AS AIDING AND ABETTING.

3 IN SOUTH CAROLINA, WHEN TWO OR MORE PEOPLE, TWO, THREE,
4 FOUR OR FIVE PEOPLE, TWO OR MORE PEOPLE, COMBINE TOGETHER TO
5 COMMIT A CRIME AND THEY ARE ALL PRESENT ACTIVELY INVOLVED IN
6 THAT CRIME, AIDING AND ABETTING ONE ANOTHER, ACTIVELY
7 INVOLVED; IN SOUTH CAROLINA, THE ACT OF ONE BECOMES THE ACT
8 OF ALL; THE HAND OF ONE BECOMES THE HAND OF ALL.

9 SO WITH EACH ACT THAT ONE PERSON MIGHT COMMIT, EVEN IF
10 THE OTHER FOUR INDIVIDUALS DON'T COMMIT IT, OR IF TWO PEOPLE
11 MIGHT COMMIT IT, EVEN IF THE OTHER THREE INDIVIDUALS DON'T
12 COMMIT IT, IF ALL OF THEM ARE THERE AIDING AND ABETTING ONE
13 ANOTHER, ALL ACTIVELY PRESENT PARTICIPATING IN A CRIME, THE
14 HAND OF ONE IS THE HAND OF ALL. THEY ARE ALL GUILTY OF THE
15 ACTS OF EACH AND EVERY ONE OF THEM. AND THAT IS THE LAW IN
16 SOUTH CAROLINA. IT IS THE LAW IN SOUTH CAROLINA.

17 BY WAY OF ILLUSTRATIONS I WILL GIVE YOU ONE OR TWO
18 EXAMPLES. IF THREE PEOPLE DECIDED TO GO TO A CONVENIENCE
19 STORE, A CIRCLE K HERE IN COLUMBIA TO ROB THAT CONVENIENCE
20 STORE AND THEY AGREE, THEY ARE ALL THERE PRESENT AT THE
21 CONVENIENCE STORE, AN AGREED UPON PLAN TO ROB THAT
22 CONVENIENCE STORE, AND ONE PERSON IS ACTING AS THE GET-AWAY
23 DRIVER AND ANOTHER PERSON IS STANDING AT THE FRONT DOOR
24 ACTING AS THE LOOK-OUT AND THERE'S ONLY ONE GUN INVOLVED AND
25 ONLY ONE PERSON WALKS IN AND PUTS THE GUN TO THE CLERK'S HEAD

1 AND ROBS THE CASH REGISTER, IN SOUTH CAROLINA, THE HAND OF
2 ONE IS THE HAND OF ALL. THE MAN DRIVING THE CAR IS GUILTY OF
3 ARMED ROBBERY. THE MAN HOLDING THE DOOR OPEN IS GUILTY OF
4 ARMED ROBBERY. EVEN THOUGH NEITHER ONE OF THEM TOUCHED THE
5 GUN, IF ALL THREE OF THEM ARE THERE, PRESENT, AIDING AND
6 ABETTING ONE ANOTHER IN THE COMMISSION OF A CRIME, THE HAND
7 OF ONE IS THE HAND OF ALL.

8 AND THAT IS CRITICAL IN THIS PARTICULAR CASE AS YOU'RE
9 LISTENING TO THE LAWYERS, AS YOU'RE LISTENING TO THE OTHER
10 LAWYERS. BECAUSE THERE IS NO EVIDENCE THAT KENNETH JAMES
11 EVER HAD THE GUN IN HIS HAND. BUT IN SOUTH CAROLINA THE HAND
12 OF ONE IS THE HAND OF ALL. ALL FIVE OF THOSE INDIVIDUALS,
13 EVEN THOUGH THERE WAS JUST ONE GUN, IF YOU FIND, LADIES AND
14 GENTLEMEN, IF YOU FIND THAT ALL FIVE, PARTICULARLY THESE TWO,
15 BUT YOU KNOW YOU'VE HEARD TESTIMONY ABOUT THREE UNKNOWN
16 PEOPLE, BUT IF YOU FIND THAT THEY WERE ALL PRESENT, ALL
17 ACTING IN CONCERT WITH ONE ANOTHER, ALL AIDING AND ABETTING
18 ONE ANOTHER, THEN THE ACT OF ONE IS THE ACT OF ALL.

19 EVEN IF THE PERSON IS NOT IN THIS COURTROOM BEING TRIED
20 THAT ACTUALLY FIRED THE SHOTS AT WINFRED BULL, IN SOUTH
21 CAROLINA THE LAW IS THE HAND OF ONE IS THE HAND OF ALL. SO
22 IF YOU FIND THAT THESE TWO GENTLEMEN WERE THERE, PRESENT,
23 ACTIVELY AIDING AND ABETTING IN THIS SERIES OF CRIMES, THEN
24 THEY ARE GUILTY OF POSSESSION OF A FIREARM EVEN THOUGH THEY
25 NEVER PHYSICALLY HELD THE GUN; THEY'RE GUILTY OF ARMED

1 ROBBERY EVEN THOUGH THEY NEVER PHYSICALLY HELD A GUN, BECAUSE
2 IN SOUTH CAROLINA THE HAND OF ONE IS THE HAND OF ALL.

3 AND THE SAME THING WITH CRIMINAL SEXUAL CONDUCT. BY WAY
4 OF EXAMPLE, IF SOMEBODY WERE TO GO INTO A HOME OR AN
5 APARTMENT OF A WOMAN WHO LIVED BY HERSELF, AND THE SAME
6 EXAMPLE: THREE PEOPLE, ONE PERSON IS THE LOOK-OUT AND THE
7 OTHER ONE IS HOLDING THE WOMAN DOWN AND ONLY ONE PERSON
8 PENETRATES THAT WOMAN, COMMITS A SEXUAL BATTERY AGAINST THAT
9 WOMAN, IF ALL THREE ARE ACTIVELY AIDING AND ABETTING ONE
10 ANOTHER IN THAT CRIME, THE FACT THAT ONLY ONE PERSON ACTUALLY
11 PENETRATED THAT WOMAN IS IRRELEVANT. THE HAND OF ONE, THE
12 ACT OF ONE IS THE ACT OF ALL. ALL THREE ARE GUILTY OF
13 CRIMINAL SEXUAL CONDUCT IF YOU FIND THAT ALL THREE ARE AIDING
14 AND ABETTING EACH OTHER. THAT IS ABSOLUTELY CRITICAL. AND
15 WHEN YOU LISTEN TO THE ARGUMENTS, WHEN YOU LISTEN TO THE
16 JUDGE'S CHARGE, I ASK EACH AND EVERY ONE OF YOU TO REMEMBER
17 THAT PRINCIPLE OF LAW THAT YOU'VE SWORN TO UPHOLD.

18 LASTLY, CREDIBILITY. I BRIEFLY MENTIONED THIS IN MY
19 OPENING STATEMENT. AND JUDGE PLEICONES WILL DISCUSS THIS
20 WITH YOU AS WELL IN HIS CHARGE. AS JUDGE PLEICONES IS THE
21 SOLE AND ONLY JUDGE OF THE LAW AND AS HE HAS INSTRUCTED YOU,
22 MADAM FORELADY AND LADIES AND GENTLEMEN, YOU 12, 13 ACTUALLY,
23 BUT SOON TO BE 12 JURORS ARE THE SOLE JUDGES OF THE FACTS.
24 YOU, IN ESSENCE, WEAR YOUR OWN BLACK ROBES, EACH AND EVERY
25 ONE OF YOU INDIVIDUALLY AND COLLECTIVELY; NOT THE

1 PROSECUTORS, NOT THE POLICE, NOT THE DEFENDANTS, NOT THE
2 DEFENSE ATTORNEYS. YOU ARE THE SOLE JUDGES OF THE FACTS.

3 AND WITH THAT COMES THE RESPONSIBILITY OF JUDGING THE
4 CREDIBILITY OF EACH AND EVERY WITNESS THAT HAS TAKEN THIS
5 WITNESS STAND. AND THE JUDGE WILL GIVE YOU CERTAIN FACTORS
6 OR CERTAIN TOOLS HE WILL DISCUSS WITH YOU THAT YOU CAN USE,
7 THAT YOU CAN CONSIDER. DID THE WITNESS HAVE A BIAS FOR OR
8 AGAINST A PARTY INVOLVED IN THIS CASE? IS WHAT THE WITNESS
9 TOLD YOU, HAS IT BEEN CORROBORATED BY OTHER EYE WITNESS
10 TESTIMONY OR CORROBORATED BY PHYSICAL EVIDENCE? WHAT WAS THE
11 WITNESS'S DEemeanOR LIKE WHEN HE OR SHE TESTIFIED BEFORE YOU
12 JURORS? YOU CAN JUDGE THE WITNESS'S CREDIBILITY BY LOOKING
13 AT THEIR BODY LANGUAGE, THEIR DEemeanOR, THEIR PRESENCE.

14 DID THAT WITNESS HAVE AN OPPORTUNITY TO SEE WHAT HE OR
15 SHE SAID THEY SAW OR HE OR SHE SAID THEY DID AND THEN COME IN
16 AND TESTIFY? DID THAT WITNESS HAVE A STAKE IN THE OUTCOME?
17 THOSE ARE SOME OF THE FACTORS THE STATE SUBMITS TO YOU THAT
18 YOU CAN CONSIDER.

19 BUT THE MOST IMPORTANT FACTOR AS I INDICATED IN MY
20 OPENING STATEMENT IS YOUR GOD-GIVEN COMMON SENSE THAT EACH
21 AND EVERY ONE OF YOU BROUGHT WITH YOU. BECAUSE, MADAM
22 FORELADY AND LADIES AND GENTLEMEN, EVER SINCE EACH AND EVERY
23 ONE OF YOU WERE A CHILD, EACH AND EVERY ONE OF YOU EVERY DAY
24 OF YOUR LIVES HAVE BEEN JUDGING PEOPLE'S CREDIBILITY, YOUR
25 CO-WORKERS, YOUR CLASSMATES WHEN YOU WERE IN SCHOOL. WHEN

1 YOU GO TO BUY A HOUSE OR RENT AN APARTMENT, WHEN YOU GO TO
2 BUY A CAR OR LEASE A CAR, YOU'VE BEEN JUDGING PEOPLE'S
3 CREDIBILITY EACH AND EVERY DAY. AND YOU BRING WITH YOU YOUR
4 OWN PERSONAL OBSERVATIONS AND YOUR OWN PERSONAL TALENTS.

5 NOW, I'M GOING TO SIT DOWN AND I'M GOING TO ALLOW THE
6 DEFENSE ATTORNEYS -- OR IT WILL BE TIME FOR THE DEFENSE
7 ATTORNEYS TO COME BEFORE YOU. I ONLY ASK THIS OF YOU OVER
8 THE NEXT HOUR AND A HALF OR SO. THE BURDEN OF PROOF LIES
9 WITH THE STATE. AND I IN REPRESENTING THE STATE, MEANING
10 MYSELF AND MS. FRYAR IN THIS CASE, I ASK YOU TO KEEP AN OPEN
11 MIND DURING THE PRESENTATION OF DEFENSE COUNSEL. KEEP AN
12 OPEN MIND AND ALLOW ME THE OPPORTUNITY TO COME BACK BEFORE
13 YOU, LADIES AND GENTLEMEN, AND DISCUSS WITH YOU THE EVIDENCE
14 THAT THE STATE HAS, BECAUSE THAT BURDEN DOES LIE WITH THE
15 STATE. THANK YOU.

16 THE COURT: THANK YOU, MR. GASSER. MR. STRICKLER OR MR.
17 SNEED.

18 MR. STRICKLER: MAY IT PLEASE THE COURT.

19 THE COURT: YES, SIR.

20 MR. STRICKLER: MADAM FOREMAN, LADIES AND GENTLEMEN OF
21 THE JURY, I TALKED WITH YOU AT THE BEGINNING OF THE CASE
22 ABOUT OPINION. I ASKED YOU AT THE BEGINNING OF THE CASE TO
23 LISTEN TO ALL THE TESTIMONY, LISTEN TO THE TESTIMONY AS
24 ELICITED BY THE STATE AND LISTEN TO THE QUESTIONS I ASKED YOU
25 THAT WILL BE ASKED WITNESSES BY THE DEFENSE BECAUSE WE WILL

1 ATTEMPT TO THROUGH OUR QUESTIONING ASSIST YOU IN ARRIVING AT
2 YOUR ULTIMATE OPINIONS IN THIS CASE. I'D LIKE TO TALK WITH
3 YOU ALL A LITTLE BIT ABOUT OPINION NOW.

4 NOW, IN A SENSE, YOU KNOW, IN A SENSE THIS CASE IS --
5 THE ISSUES ARE REALLY ILLUSTRATED BY A COUPLE OF SEEMINGLY
6 SILLY QUESTIONS THAT I ASKED. WE TALKED WITH MR. BULL. THIS
7 WAS IN HIS DIRECT TESTIMONY. AND HE WAS ASKED ABOUT WHAT
8 HAPPENED THAT NIGHT AND ENDED UP TALKING ABOUT COMING UP TO
9 MR. MURRAY'S HOUSE AND SEEING MR. MURRAY ON A BICYCLE.

10 I ASKED WHAT SEEMED LIKE A STUPID QUESTION TO MR.
11 MURRAY'S MOTHER. OKAY. WHERE WAS MR. MURRAY WHEN MR. BULL
12 CAME UP? HER TESTIMONY IS HE WAS ON THE PORCH. OKAY. WHAT
13 HAS THAT GOT TO DO WITH ANYTHING? WELL, REALLY IT'S GOT
14 NOTHING TO DO WITH WHAT HAPPENED AND HOW IT HAPPENED AT THE
15 PARK.

16 THE QUESTION IS FOR ONE REASON AND ONE REASON ALONE. IF
17 THAT WERE THE ISSUE IN THIS CASE, WAS MR. MURRAY ON A BIKE OR
18 NOT, HAVE YOU BEEN PERSUADED BEYOND A REASONABLE DOUBT THAT
19 HE WAS? IF THAT WERE THE QUESTION, MIGHT HAVE BEEN, MIGHT
20 NOT HAVE BEEN, THEN THE VERDICT IS NOT GUILTY. BECAUSE IF
21 THAT WERE THE QUESTION, THAT WOULD HAVE TO HAVE BEEN PROVEN
22 TO YOU BEYOND A REASONABLE DOUBT AND YOU WOULD HAVE NO REASON
23 TO KNOW WHETHER OR NOT HE WAS.

24 THE SECOND THING, MR. MCREYNOLDS TESTIFIED REGARDING THE
25 VIDEOTAPE THAT'S IN EVIDENCE. AND AT THE END OF HIS DIRECT

1 TESTIMONY, YEP, THE SAME CONDITION NOW AS IT WAS WHEN I GAVE
2 TO IT THE POLICE. WELL, I ASKED A STUPID QUESTION OF HIM,
3 TOO. DID YOU EVER LOOK AT IT, THE CONTENTS OF IT BEFORE YOU
4 GAVE IT TO THE POLICE? NO. WELL, SO HE HAS NO IDEA WHETHER
5 IT'S IN THE SAME CONDITION NOW AS WHAT IT WAS WHEN IT WAS
6 GIVEN TO THE POLICE.

7 NOW, AS A MATTER OF FACT, YOU GET LATER WITNESSES WHO
8 TESTIFY, MR. BENSON I BELIEVE IT WAS, TOOK IT INTO CUSTODY,
9 LOOKED AT IT THEN, LOOKED AT IT NOW; IT'S IN THE SAME
10 CONDITION. THAT'S FINE. NO ONE IS SAYING IT'S NOT IN THE
11 SAME CONDITION. HERE'S THE POINT. IF YOU ACCEPT EVERYTHING
12 THAT'S SAID JUST BECAUSE IT'S SAID, THEN YOU DON'T SEE THE
13 TRUTH. THAT'S THE ONLY POINT OF THOSE COUPLE OF STUPID
14 QUESTIONS I ASKED.

15 I'D LIKE TO TALK WITH YOU ABOUT OPINION. I REALLY WANT
16 TO TALK WITH YOU ABOUT THE OPINIONS OF JUST FOUR OTHER
17 WITNESSES, FOUR OTHER WITNESSES: MR. MURRAY, MS.
18 SERGEANT BLACKWELL OR GATOR AND MR. JEFFCOAT, LIEUTENANT
19 JEFFCOAT. AND I WANT TO TALK WITH YOU ABOUT THE ISSUE OF
20 CREDIBILITY, BECAUSE THAT IS WHAT YOU HAVE TO DECIDE.
21 CREDIBILITY IS JUST BELIEVABILITY. DO YOU BELIEVE WHAT THEY
22 TOLD YOU?

23 CHARLES MURRAY WHO SAYS HE SAW THESE TWO GROUPS OF GUYS
24 WALKING DOWN THE STREET SHORTLY AFTER MR. BULL GOT THERE. OR
25 ACTUALLY IT WAS A NUMBER OF MINUTES AFTER MR. BULL GOT THERE,

1 WALKING DOWN THE STREET. OKAY? AND IN THOSE TWO GROUPS WAS
2 OR WERE THE TWO DEFENDANTS ON TRIAL HERE, KENNETH JAMES AND
3 ROBERT JAMES. THAT'S HIS TESTIMONY. OKAY? IS THAT CREDIBLE
4 TESTIMONY? IS IT BELIEVABLE TESTIMONY?

5 WELL, WHEN THE POLICE CAME AND TALKED WITH HIM RIGHT
6 AFTER THIS, HE DIDN'T SAY THAT TO THEM. WHEN THE POLICE CAME
7 AND PRESENTED WHAT'S MARKED AS STATE'S 2, THIS LINE-UP WITH
8 KENNETH'S PICTURE IN IT, I BELIEVE IT WAS A COUPLE OF DAYS
9 AFTER THE INCIDENT, HE DIDN'T SAY, YEAH, HE WAS ONE OF THE
10 PEOPLE WALKING DOWN THE STREET.

11 THE FACT IS HE SAYS THEY WERE WALKING DOWN THE STREET
12 SUNDAY PAST, SUNDAY, THE 22ND. SUNDAY THE 19TH. EXCUSE ME.
13 OF SEPTEMBER 1999, NOT MAY 31ST, 1996. OKAY? DID HE SEE
14 THEM? IS THAT CREDIBLE? WHEN MR. THOMAS, INVESTIGATOR
15 THOMAS COMES TO SEE HIM ON THE 31ST, NOT ONLY DOES HE NOT
16 SAY, YEAH, KENNETH JAMES WAS ONE OF THE PEOPLE IN THESE
17 GROUPS; HE SAYS, I SAW TWO LINE-UPS. WELL, YOU KNOW WHAT,
18 FOLKS? AND THIS IS FROM MR. THOMAS. THERE WEREN'T TWO
19 LINE-UPS AT THAT TIME. THEY HAD ONLY DEVELOPED AND PUT
20 TOGETHER THIS LINE-UP RELATING TO KENNETH JAMES.

21 IT DOESN'T MATTER WHETHER HE THINKS HE SAW THIS LINE-UP
22 IN IT WITH ROBERT JAMES OR SOMETHING ELSE. THE POINT OF FACT
23 IS, THERE WAS ONLY ONE. SO ONE COULD SAY ON THE 31ST OR ANY
24 OTHER TIME BESIDES A SUNDAY THAT THEY WERE IN THE GROUPS.
25 TWO, HE CLAIMS TO HAVE SEEN A LINE-UP THAT DOESN'T EXIST.

1 THREE -- THESE ARE THINGS TO THINK ABOUT IN EVALUATING
2 WHETHER HE'S CREDIBLE OR BELIEVABLE. THREE, THERE WAS A
3 THIRD PERSON IN THE GROUP THAT HE RECOGNIZED. WELL, WHAT'S
4 HIS NAME? YOU ALL DON'T KNOW. ANOTHER PERSON THAT HE KNOWS
5 WELL AND CAN IDENTIFY. I DON'T KNOW. WELL, HE EITHER
6 DOESN'T KNOW, DIDN'T SEE OR WON'T TELL; ALL OF WHICH YOU ALL
7 ARE ENTITLED TO CONSIDER IN JUDGING HIS CREDIBILITY.

8 NOW, HE ALSO SAYS, YOU'LL SEE IN STATE'S 29, 28, 27,
9 THESE BLOW-UPS FROM THE VIDEOTAPE AT THE STORE, AND HE
10 IDENTIFIES THIS INDIVIDUAL AS KENNETH JAMES, ALSO SHOWN HERE
11 AS KENNETH JAMES. NOW, YOU ALL NOT ONLY DON'T CHECK YOUR
12 COMMON SENSE AT THE DOOR; YOU DON'T CHECK YOUR EYES AT THE
13 DOOR. YOU ALL WILL HAVE THESE BACK IN THE JURY ROOM. TAKE A
14 LOOK AT THEM. KENNETH JAMES. THIS IS KENNETH JAMES?

15 YOU'LL NOTICE THE PERSON IN THE COURTROOM, MS. COAXUM,
16 THE CLERK AT THE STORE WHO WAS HERE WHEN THEY SHOWED THE
17 VIDEOTAPE, NOTICE WHO SHE PICKED OUT IN THIS COURTROOM AS THE
18 PEOPLE IN THE VIDEOTAPE? WELL, YOU WON'T NOTICE THAT,
19 BECAUSE SHE DIDN'T. SHE DIDN'T. SHE DIDN'T SAY, YEAH, I'VE
20 LOOKED AT THE TAPE AND, YEAH, THIS FELLOW IN STATE'S 29 RIGHT
21 THERE, THAT'S HIM SITTING RIGHT OVER THERE. SHE DIDN'T SAY
22 THAT.

23 MR. MURRAY. THIS IS KENNETH JAMES? YOU ALL WILL HAVE
24 THIS BACK IN THE JURY ROOM. YOU ALL DECIDE. I SUBMIT TO YOU
25 YOU HAVE EYES. SO, MR. MURRAY. NOW, I SUBMIT TO YOU MR.

1 MURRAY'S TESTIMONY IS NOT CREDIBLE. IT IS THE OPPOSITE OF
2 CREDIBLE. IT IS INCREDIBLE. IT FLIES IN THE FACE OF COMMON
3 SENSE.

4 VICTIM . AGAIN, I HAVE TO SAY NO ONE, I WON'T SPEAK
5 FOR ANYONE ELSE, I'M NOT STANDING HERE SPEAKING THROUGH HER
6 SAYING NOTHING HAPPENED TO A. THAT'S NOT THE CASE. WE
7 ARE NOT HERE TO TALK ABOUT THAT. I DON'T KNOW WHETHER ANYONE
8 ELSE IS GOING TO SAY NOTHING HAPPENED. CERTAINLY NOT. OKAY.
9 THE QUESTION IS, WHAT AND WHO? WHAT'S IMPORTANT FROM A LEGAL
10 STANDPOINT AS TO THE CHARGES? WHO IS THE QUESTION. WHO IS
11 INVOLVED, IS THE QUESTION.

12 I'M NOT GOING TO DISCUSS A BUNCH OF LAW MR. GASSER HAS
13 GONE THROUGH. WHO IS THE QUESTION. WHO IS THE QUESTION.
14 OKAY. WHAT? I'LL SUBMIT, YOU KNOW, IF YOU ANSWER WHO, WHAT
15 FLOWS REAL EASILY FROM THE EVIDENCE. WHAT IS OF IMPORTANCE
16 IN DECIDING WHO? AND HERE IS WHERE YOUR COMMON SENSE COMES
17 IN AGAIN.

18 YOU HAD TESTIMONY, AND IT'S UNCLEAR ABOUT HOW DARK IT
19 WAS IN THAT PARK THAT NIGHT. IT'S CLEAR IT WAS AT NIGHT. IT
20 WAS LATE AT NIGHT. 11:00, 12:00, LIGHTS OFF IN THE BALL
21 FIELD. THE LAST WITNESS FROM THE STATE, MR. SERGEANT
22 BLACKWELL, COMES IN, SAYS, PRETTY EASY TO WANDER AROUND OUT
23 THERE. WELL, YOU KNOW WHAT? HERE IS THE SINGLE MOST
24 CREDIBLE WITNESS IN THIS CASE. HE CAME IN TODAY. MR.
25 MANIGO. DOESN'T WORK FOR THE POLICE. HE'S NOT SOMEONE

1 INVOLVED WITH THE JAMESES, KENNETH JAMES OR ROBERT JAMES. HE
2 HAS GOT NO INVOLVEMENT. HE -- YOU KNOW, HE WORKS WITH THE
3 PARK.

4 WHAT'S THAT PARK LIKE AT NIGHT? IT'S DARK. WELL, YOU
5 KNOW WHAT? THAT MAKES SENSE. THAT MAKES GOOD SENSE. THERE
6 IS NO DISPUTE ABOUT THIS EVIDENCE. THE ONLY LIGHT THAT COULD
7 BE SHINING ON THAT PARK IS FROM A TELEPHONE POLE THAT'S 400
8 FEET AWAY FROM THAT PARK. THAT'S THE ONLY AVAILABLE LIGHT.
9 NOW, YOU KNOW WHAT? GOOD COMMON SENSE SAYS IT'S DARK THEN.

10 YOU'VE GOT SOME PHOTOGRAPHS. I ASKED THE OFFICERS ABOUT
11 THE LIGHTING IN THE PHOTOGRAPHS. THAT'S NOT FROM ANY OTHER
12 LIGHT. THAT'S LIGHT FROM THE CAMERA IN EACH AND EVERY ONE OF
13 THESE PHOTOGRAPHS. BECAUSE IT'S DARK THERE. WHY IS THAT
14 IMPORTANT? WELL, WE ESTABLISHED YOU DON'T NEED DR. ALLEY TO
15 TELL YOU THIS. IF IT'S DARK OUT, IT'S HARD TO SEE SOMEONE.
16 OKAY.

17 HERE IS SOME OTHER THINGS DR. ALLEY TALKED ABOUT THAT
18 ALSO MAKE GOOD COMMON SENSE. IF YOU DON'T HAVE A CHANCE TO
19 SEE PEOPLE FOR BUT A SHORT PERIOD OF TIME, IT'S HARDER TO
20 REMEMBER WHAT THEY LOOK LIKE. WELL, AT THE END OF MS.

21 ...S TESTIMONY, AFTER BEING EXAMINED BY THE STATE, YOU
22 KNOW, SHE LOOKED; WHAT I WAS HEARING, STARED AT THE PEOPLE
23 INVOLVED WITH HER FOR 30 TO 45 MINUTES....

24 WELL, FOLKS, HERE IS WHAT HAPPENED. CAN I HAVE A LIGHT?
25 BOOM. PEOPLE ON HER IMMEDIATELY, AND SHE'S DRAGGED OFF.

1 SHE'S DRAGGED OFF INTO AN EVEN DARKER AREA. DON'T TAKE
2 ANYONE'S WORD FOR IT. TAKE MR. MANIGO'S WORD FOR IT. IT'S
3 DARK OUT THERE. OKAY? AND IT'S NOT A MATTER OF STANDING
4 AROUND IN SOME PLACE THAT'S A LITTLE CLOSER TO THESE LIGHTS
5 AND CARRYING ON A CHIT-CHAT. IT'S A MATTER OF SOME PEOPLE
6 COMING ON YOU AND DOING VIOLENCE TO YOU. THERE'S NO QUESTION
7 ABOUT THAT. I USED THE TERM "TERRORIZED". THERE'S NO
8 QUESTION ABOUT THAT. OKAY. YOU KNOW, THERE'S NO QUESTION
9 ABOUT THAT.

10 AND THAT'S UNCONSCIONABLE FOR THAT TO HAPPEN TO MS.
11 . IT ALSO IS A SITUATION THAT DOESN'T BURN ANYTHING
12 INTO YOUR HEAD. IF YOU THINK SHE WAS STARING AT THE PEOPLE'S
13 FACES, I SUBMIT TO YOU YOU'RE LEAVING YOUR COMMON SENSE AT
14 THE DOOR. THAT'S WHAT'S GOING ON IF YOU THINK THAT. PEOPLE
15 CAME UP, JUMPED HER AND MR. BULL, DRAGGED THEM AWAY, AND SHE
16 WAS ASSAULTED.

17 NOW, WAS SHE LOOKING AT THE PEOPLE WHILE SHE WAS BEING
18 ASSAULTED? WELL, FIRST OF ALL, IT'S DARK. SECONDLY, SHE'S
19 NOT LOOKING IN ANYONE'S FACE WHILE SHE'S PERFORMING ORAL SEX
20 ON ANYONE. THAT'S ONE OF THE ALLEGATIONS AGAINST HER, EVEN
21 IF SHE COULD SEE THE FACE, THAT'S NOT HAPPENING. OKAY. THE
22 ASSAULT'S GOING ON.

23 I SUBMIT SHE DOESN'T HAVE A GOOD RECOLLECTION OF THE
24 ASSAULTS ITSELF. WHY? I ONLY HAD A FEW QUESTIONS FOR THE
25 DOCTOR THAT EXAMINED HER. ONE OF THE QUESTIONS I HAD IS, DID

1 YOU NOTICE ANYTHING AT ALL TO HER BACK? BECAUSE HER
2 TESTIMONY TO THIS JURY WAS THAT THE ASSAULTS, BOTH VAGINAL
3 PENETRATION AND THE ORAL SEX, SHE WAS ON HER BACK THE ENTIRE
4 TIME. IF SHE'S ON HER BACK IN THE GRASS, IN GRASS, DIRT,
5 WHATEVER, ANY INDICATIONS OF ANYTHING TO HER BACK? INJURIES?
6 NO. NO NOTATION OF DIRT STAINS, GRASS STAINS, ANYTHING LIKE
7 THAT. NO. NOT EVEN LITTLE SCRATCHES. NO. OKAY?

8 NOW, WHAT AM I SAYING? I'M SAYING IT DIDN'T HAPPEN THE
9 WAY SHE SAID IT. OKAY. WHY MIGHT SHE SAY IT DIFFERENTLY
10 THAN THE WAY IT HAPPENED? BECAUSE SHE DOESN'T REMEMBER HOW
11 IT HAPPENED. AND, FRANKLY, I SUBMIT TO YOU YOUR COMMON SENSE
12 SAYS, WELL, I CAN UNDERSTAND THAT. WHO'D WANT TO REMEMBER
13 HOW THAT IS? WELL, THAT MAKES SENSE. SHE ALSO DOESN'T
14 REMEMBER WHO DID IT, PERIOD.

15 NOW, HOW DO YOU THINK ABOUT THAT? WELL, WHAT KIND OF
16 DESCRIPTION DID SHE PROVIDE? I TALKED WITH MR. THOMAS AT
17 SOME LENGTH. I MEAN, IT'S IMPORTANT TO GET DESCRIPTIONS OF
18 PEOPLE. AND IF SOMEONE IS IN YOUR FACE CLOSE ENOUGH TO SEE
19 THEM, YOU CAN GET BETTER THAN A BLACK MALE AROUND 20 YEARS
20 OLD. OKAY?

21 AND, YOU KNOW, EVIDENTLY SHE DID AT ONE POINT BECAUSE IN
22 TALKING WITH THE DOCTOR SHE DESCRIBED SOMEONE WITH BRAIDS
23 WITH BROWN HAIR. BROWN HAIR? I SUBMIT TO YOU THIS AIN'T
24 HIM. BUT BROWN HAIR? BROWN HAIR?

25 THIS RED JERSEY SHIRT THAT WAS NEVER DESCRIBED TO ANYONE

1 AT THE TIME OF THE INCIDENT. IT HAD BEEN DESCRIBED TO
2 ANYONE, THE SEARCH WOULD HAVE INCLUDED A SEARCH FOR CLOTHING
3 WORN BY SOMEONE WHO PARTICIPATED IN THE ATTACK. IT DIDN'T.
4 I TALKED TO MR. THOMAS ABOUT THAT. YOU KNOW, IT'S AN EXAMPLE
5 OF MEMORIES GETTING BETTER OVER TIME, NOT WORSE. IT'S AN
6 EXAMPLE OF THINGS ARISING LATER ON.

7 NOW, I AM NOT DISRESPECTING HER AT ALL, BECAUSE
8 SOMETHING HAPPENED TO HER. ALL RIGHT. THE FACT THAT
9 SOMETHING HAPPENED TO HER DOES NOT MAKE SOMETHING HAPPENING
10 TO KENNETH JAMES HERE TODAY.

11 YOU KNOW, THE OTHER THING IS OF COURSE, IF SHE'S RIGHT,
12 IF KENNETH JAMES WAS ASSAULTING HER, GATOR'S WRONG. OKAY?
13 BECAUSE IF GATOR WAS TRACKING KENNETH JAMES, HE GOES INTO
14 THIS MAUSOLEUM. BECAUSE REMEMBER? ACCORDING TO HER
15 TESTIMONY, SHE'S TAKEN FROM THIS AREA INTO THE MAUSOLEUM AND
16 THEN ASSAULTED AGAIN BY KENNETH JAMES. OKAY?

17 SO I'M NOW MOVING TO SERGEANT BLACKWELL AND GATOR, IF I
18 COULD TALK WITH YOU. GATOR, I'M SURE HE'S A GOOD DOG. I'M
19 SURE HE WAS FOLLOWING A SCENT. I'LL TELL YOU ONE THING. IF
20 MS. ~~Orch~~ IS CORRECT, OKAY, THEN HE WASN'T FOLLOWING ANY
21 SCENT OF KENNETH JAMES, BECAUSE HE WAS GOING INTO THE
22 MAUSOLEUM. HE DIDN'T.

23 AND IF GATOR IS CORRECT AND HE GOES TO THIS ADDRESS ON
24 ORR STREET, OKAY, THEN HE WASN'T FOLLOWING KENNETH JAMES TO
25 THAT ADDRESS EITHER. WE DON'T KNOW WHO WAS LIVING AT ORR

1 STREET. THE STATE'S GOT SOME EVIDENCE THAT SHOWS KENNETH
2 JAMES WAS LIVING THERE. WE DON'T KNOW WHO ELSE WAS LIVING
3 THERE. AND YOU KNOW WHAT? HE WASN'T THERE WHEN GATOR WAS
4 THERE AND GATOR DIDN'T PICK UP ANY TRAIL OF HIS LEAVING
5 THERE. WHERE WAS KENNETH JAMES? OKAY.

6 IF THE STATE'S EVIDENCE, IF THIS IS KENNETH JAMES — I
7 SUBMIT IT'S NOT. BUT IF THIS IS KENNETH JAMES AT 1:12 IN THE
8 MORNING, HE'S AT THE AMOCO STATION. ALL RIGHT. THE AMOCO
9 STATION AT 1:12. WHEN WAS SERGEANT BLACKWELL AND GATOR AT
10 THE HOUSE ON ORR STREET? RIGHT ABOUT THAT TIME. YOU WANT TO
11 TALK ABOUT A FRESH TRAIL? THERE'S A FRESH TRAIL GOING FROM
12 ORR STREET TO THE AMOCO STATION IF THIS IS KENNETH JAMES.

13 BLACKWELL TOOK HIM DOWN ORR STREET. HE KEPT COMING BACK
14 TO THE ADDRESS. THERE'S A FRESH TRAIL OF KENNETH JAMES FROM
15 ORR STREET TO THE AMOCO STATION IF THIS IS KENNETH JAMES,
16 UNLESS KENNETH JAMES LEVITATED FROM 2528 ORR STREET AND
17 DROPPED DOWN IN THE PARKING LOT OF THE AMOCO STATION.

18 NOW, WAS HE AT THE AMOCO STATION? SURE. AT SOME LATER
19 POINT, TWO SOMETHING, OFFICER GIBSON DID THAT FIELD
20 INTERROGATION ON HIM. OKAY? HE'S THERE THEN. HE TALKED
21 WITH THE OFFICER AT THAT TIME.

22 BUT, YOU KNOW, WHAT'S THE FRESHEST TRAIL GATOR WOULD
23 HAVE HAD IF HE'S FOLLOWING KENNETH JAMES? WELL, IT'S ON ITS
24 WAY TO THE AMOCO. BECAUSE IF THIS IS KENNETH JAMES IN THESE
25 PHOTOGRAPHS FROM THE AMOCO, THEN THAT'S RIGHT AT THE SAME

1 TIME SERGEANT BLACKWELL AND GATOR ARE RIGHT THERE. THE
2 FRESHEST TRAIL THERE IS IS GOING TO BE GOING TO THE AMOCO.

3 I DON'T KNOW WHO GATOR WAS FOLLOWING, BUT IT WASN'T
4 KENNETH JAMES. HE DIDN'T GO AROUND THERE -- IF HE WAS
5 INVOLVED IN THIS ASSAULT, THEN HE WOULD HAVE GONE IN THE
6 MAUSOLEUM. IF HE WAS FOLLOWING KENNETH JAMES, HE WOULD HAVE
7 GONE TO THE AMOCO STATION, AGAIN UNLESS KENNETH JAMES JUST
8 LEVITATED FROM ORR STREET TO THE AMOCO STATION.

9 THERE IS NO DESCRIPTION GIVEN TO THE POLICE BEYOND IN
10 ESSENCE A YOUNG, BLACK MALE. NOW, THERE ARE TWO POSSIBLE
11 EXPLANATIONS FOR THAT. ONE, INVESTIGATOR THOMAS AND THE REST
12 OF THE CITY OF COLUMBIA POLICE DEPARTMENT ARE JUST THE MOST
13 INEPT PEOPLE AROUND; OR, TWO, THEY DIDN'T GET ONE BECAUSE SHE
14 COULDN'T GIVE ONE. SHE'D GONE THROUGH AN EXTREMELY TRAUMATIC
15 EVENT AND SHE COULDN'T GIVE ONE.

16 I'D LIKE TO TALK WITH YOU ABOUT IRA JEFFCOAT AND DNA.
17 THEN I'D LIKE TO TALK WITH YOU ABOUT CREDIBILITY. I'D LIKE
18 TO TALK WITH YOU ABOUT DEMEANOR, AND I'D LIKE TO TALK WITH
19 YOU ABOUT CANDOR IN ANSWERING QUESTIONS, BEING
20 STRAIGHTFORWARD IN ANSWERING QUESTIONS.

21 IS THERE ANYONE IN THIS COURTROOM THAT DOESN'T KNOW WHAT
22 THE WORD "SAME" MEANS, TO BE THE SAME? WELL, THERE WAS ONE
23 PERSON HERE YESTERDAY WHO DIDN'T, AND THAT'S MR. JEFFCOAT.
24 IS ONE THE SAME AS ONE? IT'S A HARD QUESTION TO ANSWER IF
25 YOU'RE IRA JEFFCOAT.

1 WELL, THE POINT IS REAL SIMPLE. THE POINT IS REAL
2 SIMPLE. YOU CAN SAY THINGS MATCH UNTIL THE COWS COME HOME.
3 YOU CAN DEFINE MATCH WHATEVER WAY YOU WANT TO, WHICH IS
4 EXACTLY WHAT SLED DID. MATCH MEANS THAT IT'S PLUS OR MINUS
5 2.8 PERCENT. OKAY? THE POINT IS, IF THEY ARE NOT THE SAME
6 AS OPPOSED TO A MATCH, IF THEY ARE NOT SAME, THEN IT'S NOT
7 THE SAME PERSON. YOU CAN CALL IT A MATCH.

8 THEIR SYSTEM CAN'T DIFFERENTIATE SIZES. I MEAN, YOU CAN
9 LOOK AT THESE AUTORADIOGRAMS. I MEAN, A LOT OF THEM LOOK
10 SIMILAR IN SIZE. NONE OF THEM ARE THE SAME SIZE. THAT'S WHY
11 YOU'VE GOT THIS 2.8 PERCENT. WELL, HERE'S CANDOR. YES, MR.
12 STRICKLER, I KNOW WHAT "SAME" MEANS. IT MEANS THAT THEY'RE
13 EXACTLY THE SAME. WE CAN'T TELL YOU THAT. WE CAN TELL YOU
14 THAT THEY MATCH. THAT'S THE BEST WE CAN DO. FINE. WHAT'S
15 SO HARD ABOUT SAYING THAT? THAT'S CANDOR. THAT'S BEING
16 RESPONSIVE TO A QUESTION.

17 WHAT'S SO HARD ABOUT BRINGING THESE THINGS, THESE
18 LUMOGRAPHS IN AND SHOWING THEM TO YOU AND POINTING OUT WHAT
19 YOU'RE TALKING ABOUT? YOU KNOW, WHAT YOU GET IS A SLIDE
20 SLOW. YOU KNOW, JUST COME ON HIM, LINE THEM UP, BOOM, BOOM,
21 HERE, HERE, AND THAT'S ONE CHANCE IN 15 MILLION. AND THEN
22 SOMEONE LIKE ME HAS TO SPEND AN HOUR AND A HALF, AN HOUR AND
23 40 MINUTES ON NOT THE MOST EXCITING STUFF IN THE WORLD TO TRY
24 TO EXPLAIN THE FACT THAT THIS IS JUST NOT QUITE THAT SIMPLE
25 AND THAT WHEN YOU SAY IT'S A MATCH YOU'RE NOT SAYING IT'S THE

1 SAME. YOU'RE SAYING THAT BASED ON SAMPLES FROM 250 PEOPLE,
2 250 PEOPLE, WE CAN SAY THERE'S ONE CHANCE IN 15 MILLION WHEN
3 THREE OUT OF THE SEVEN TESTS WE DID FAILED.

4 MR. GASSER: OBJECTION. THAT IS NOT THE TESTIMONY. MR.
5 STRICKLER KNOWS IT, YOUR HONOR. I OBJECT TO THAT.

6 THE COURT: FORGIVE ME. FORGIVE ME. THERE WAS
7 TESTIMONY CONCERNING THESE TESTS THAT BOTH YOU AND MR.
8 STRICKLER ELICITED. I'M SORRY. YOU KNOW, BOTH OF YOU KNOW
9 THAT I CANNOT BE THE ARBITER OF WHAT WAS SAID OR WAS NOT
10 SAID, AND EACH OF YOU IS FREE TO ARGUE THE FACTS IN
11 ACCORDANCE WITH YOUR OWN RECOLLECTION, ASSUMING YOU DO NOT
12 CONSCIOUSLY MISSTATE THOSE. AND THE JURY MUST USE ITS OWN
13 RECOLLECTION WITH REGARD TO WHAT THE FACTS ACTUALLY WERE.
14 THANK YOU FOR THE OBJECTION THOUGH. PLEASE CONTINUE, MR.
15 STRICKLER.

16 MR. STRICKLER: THANK YOU, SIR. I ASKED A COUPLE OF
17 QUESTIONS OF DR. ALLEY TODAY THAT DIDN'T HAVE ANYTHING TO DO
18 WITH HIS TESTIMONY JUST BECAUSE I HAD A SCIENTIST ON THE
19 STAND. ONE OF THEM RELATED TO, YOU KNOW, WHEN YOU RUN A
20 TEST, YOU'VE GOT CONTROLS IN IT, RIGHT? WHEN A CONTROL
21 FAILS, WHICH MR. JEFFCOAT WOULD FINALLY ADMIT A CONTROL
22 FAILED IN ONE OF THE TESTS THAT THEY DIDN'T USE, WELL, YOU
23 CAN'T USE THOSE. AND YOU KNOW WHAT? THEIR OWN RULES SAY YOU
24 CAN'T USE TWO OF THE OTHER ONES. SO THREE OUT OF THE SEVEN
25 COULD NOT BE USED. NOW, YOU DIDN'T HEAR THAT WHEN HE

1 TESTIFIED TO YOU ON DIRECT. YOU HEARD IT WHEN HE TESTIFIED
2 ON CROSS.

3 THEY'VE BEEN RUNNING THE SAME PROCEDURE SINCE 1991.
4 WELL, NOT REALLY. PROVISION 11 POINT
5 DA-DA-DA-DA-DA-DA-DA-DA. THEY HAVEN'T RUN THE SAME
6 PROCEDURE. THEY'RE CONSTANTLY CHANGING IT. THERE WAS
7 NOTHING WRONG WITH THAT. JUST UP FRONT ME WITH IT. TELL ME
8 THAT. TELL ME THAT ONE EQUALS ONE AND THAT'S THE SAME, AND
9 TEN AND TWENTY ARE NOT THE SAME BUT WE WILL SAY THEY'RE A
10 MATCH BECAUSE THAT'S AS CLOSE AS WE CAN GET WITH THIS
11 TECHNOLOGY. ALL RIGHT?

12 WELL, THE PLAIN FACT OF THE MATTER IS, I'M CERTAINLY NOT
13 GOING TO DO ANY MORE MATH TODAY, THAT IF INDEED YOU DON'T SEE
14 -- HE RAN EACH OF THESE THINGS TWICE. NOW, LET ME ASK YOU
15 THIS. THESE ARE TWO OF THE FOUR THAT WERE NOT INTRODUCED.
16 IF THE TESTS WORKED SO WELL, WHY DO YOU HAVE TO RUN IT TWICE?
17 IF YOU CAN SEE WHAT MR. JEFFCOAT CLAIMED TO SEE THE FIRST
18 TIME, WHY DO YOU NEED TO RUN IT A SECOND TIME? YOU ALL HAVE
19 THEM. YOU TAKE THEM BACK WITH YOU. YOU DON'T NEED ANYTHING
20 SPECIAL. YOU CAN HOLD THEM UP TO THE LIGHT. YOU CAN SEE
21 PERFECTLY.

22 IF SO GOOD, WHY DON'T THEY SLAP THEM UP THERE FOR YOU TO
23 SEE? BECAUSE, YOU SEE, IF THESE TWO, WHICH ARE TWO OF THE
24 FOUR THAT THEY USED TO COMPUTE THIS ONE CHANCE IN 15 MILLION,
25 IF THOSE TWO AREN'T RIGHT, THEN IT'S ONE CHANCE IN 660. ALL

1 RIGHT? THAT'S STILL A SMALL CHANCE ACCORDING TO MR.

2 JEFFCOAT. SURE. SURE. THAT MEANS THAT ONE OUT OF EVERY 660
3 PEOPLE IN THE AFRICAN-AMERICAN POPULATION WOULD QUALIFY. AND
4 YOU ALL CAN DO THE MATH AGAIN.

5 SO, I WANTED TO TALK WITH YOU ABOUT OPINION. AND THAT'S
6 WHAT YOU'VE RECEIVED, HAS BEEN OPINION. WHAT WE'VE TRIED TO
7 DO IN QUESTIONING EACH OF THESE WITNESSES IS TO SHOW YOU THAT
8 MR. MURRAY DIDN'T HAVE AN OPINION IN 1996. HE DOES NOW. MR.
9 MURRAY HAD AN OPINION AS TO WHO THESE PEOPLE ARE IN THIS
10 PHOTOGRAPH AS THE PERSON WHO WAS THERE. HE DIDN'T HAVE THAT
11 OPINION. MR. MURRAY HAS AN OPINION AS TO WHO WAS WALKING
12 DOWN THE STREET BUT CAN'T TELL YOU WHAT GROUP WHICH OF THESE
13 PEOPLE WERE IN, GROUP ONE OR GROUP TWO; IF THERE WAS ONE IN
14 ONE AND ONE IN THE OTHER. YOU CAN USE THAT IN DECIDING
15 WHETHER YOU BELIEVE WHAT HE SAYS. IF YOU DON'T BELIEVE HIM,
16 GET RID OF THAT.

17 VICTIM, WITHOUT DENIAL AN AWFUL THING HAPPENED TO
18 HER, DIDN'T HAVE THE OPPORTUNITY TO SEE WHAT SHE CLAIMS TO
19 HAVE SEEN. MR. MANIGO, IF NO ONE ELSE, MR. MANIGO IN AND OF
20 HIMSELF SAY'S MS. VICTIM WOULD SEE THAT.

21 MR. GASSER: OBJECTION, YOUR HONOR.

22 THE COURT: EXCUSE ME?

23 MR. GASSER: MR. MANIGO SAID THAT MS. VICTIM DIDN'T SEE
24 THAT?

25 THE COURT: THE ARGUMENT WAS IN AND OF HIMSELF DID NOT

1 SAY THAT. I DO NOT KNOW WHAT MR. STRICKLER MEANS BY THAT. I
2 APPRECIATE YOUR ZEALOUSNESS, BOTH OF YOU. AGAIN, THE JURY
3 WILL CONFINE ITS RECOLLECTION OF FACTS TO ITS OWN
4 RECOLLECTION AND NOT THAT TO WHICH SOMEONE ELSE RECITES YOU.
5 PLEASE CONTINUE.

6 MR. STRICKLER: THANK YOU, SIR. OBVIOUSLY I'M NOT
7 SAYING MR. MANIGO SAYS SHE DIDN'T SEE THAT. I'M USING A
8 LITTLE BIT OF POETIC LICENSE IN SPEAKING WITH YOU. AND I'M
9 SORRY. IT'S NOT MY INTENT TO CONFUSE ANYONE. MR. MANIGO
10 SAYS IT'S SO DARK OUT THERE. IN ESSENCE, THAT'S HIS
11 TESTIMONY. TAKE IT. YOU HEARD IT. INTERPRET IT YOURSELF.
12 IT'S SO DARK SHE DID NOT SEE WHAT SHE CLAIMS TO HAVE SEEN.
13 SHE COULDN'T HAVE.

14 AND YOU KNOW WHAT? THAT IS SUPPORTED. THAT IS
15 CORROBORATED. I'D ASK YOU TO LISTEN TO THAT TERM IN THE
16 CHARGE ON DECIDING THINGS. THAT IS CORROBORATED BY THE
17 UNCONTRADICTED TESTIMONY REGARDING WHERE THE NEAREST LIGHT
18 IS. THAT MAKES SENSE. IT WAS DARK OUT THERE. SHE DIDN'T
19 HAVE A CHANCE TO SEE WHAT SHE CLAIMED TO SEE. I'M SORRY.
20 BUT SHE DIDN'T. OKAY?

21 NOW I'M GOING TO SIT DOWN. YOU HAVE HERE RIGHT NOW WHAT
22 YOU HAD TO START WITH. YOU HAVE A SERIES OF OPINIONS. WE
23 NOW KNOW WHAT THE OPINIONS ARE. BUT I HOPE YOU NOW HAVE AN
24 IDEA OF WHY YOU SHOULD BE LESS THAN COMFORTABLE IN ACCEPTING
25 THOSE OPINIONS.

1 THE LAW SAYS TO FIND KENNETH JAMES GUILTY OF WHAT HE'S
2 CHARGED WITH YOU MUST FIND THAT HE DID THESE THINGS, THAT HE,
3 KENNETH JAMES, DID THESE THINGS BEYOND A REASONABLE DOUBT,
4 BEYOND A DOUBT TO WHICH YOU CAN ATTACH A REASON. OKAY. I
5 WOULD SUBMIT TO YOU THE TESTIMONY OF CHARLES MURRAY,
6 — , OF GATOR, SERGEANT BLACKWELL, MR. JEFFCOAT IS CHOCKED
7 FULL OF REASONS TO DOUBT. IF YOU HAVE A REASON TO DOUBT IT,
8 YOU CAN'T RELY ON IT. YOU MUST RESOLVE THAT DOUBT IN FAVOR
9 OF KENNETH JAMES. THAT'S YOUR OATH.

10 YOUR OPINION AT THE BEGINNING OF THIS CASE WAS THAT HE'S
11 NOT GUILTY. THAT'S WHAT THE LAW SAYS. THAT'S THE
12 PRESUMPTION OF INNOCENCE. YOUR OPINION NOW, BECAUSE YOU
13 HAVEN'T STARTED CONSIDERING THE EVIDENCE IN THIS CASE, AS HIS
14 HONOR HAS INSTRUCTED YOU NOT TO, YOUR OPINION NOW IS THAT
15 HE'S NOT GUILTY. AND UNLESS THE STATE RESOLVES THE DOUBTS IN
16 THIS EVIDENCE, THEN YOUR OPINION MUST REMAIN THAT HE'S NOT
17 GUILTY.

18 YOU'RE NOT HERE TO PUNISH ANYONE OR REWARD ANYONE.
19 YOU'RE NOT HERE TO ACT ON YOUR GUT INSTINCT. YOU ARE HERE TO
20 JUDGE THE FACTS UNDER THE LAW AS HIS HONOR WILL CHARGE YOU.
21 I SUBMIT TO YOU THE FACTS AND THE LAW IN THIS CASE SUPPORT
22 ONE VERDICT AND ONE VERDICT ALONE AS FAR AS KENNETH JAMES.
23 I'M NOT GOING TO GO THROUGH ALL THE CHARGES, BECAUSE FIRST OF
24 ALL IT'S GOT TO BE HIM.

25 NOW, I'M NOT GOING TO BE ABLE TO TALK WITH YOU. AS MR.

1 GASSER TOLD YOU, HE'S GOING TO TALK LAST. BUT I WON'T BE
2 ABLE TO RESPOND TO HIM. AND I'M SURE HE WILL RAISE MANY
3 POINTS THAT I'D LOVE TO RESPOND TO. I'D ASK EACH AND EVERY
4 ONE OF YOU TO REMEMBER THE BURDEN OF PROOF AND TO HOLD THE
5 STATE TO THE BURDEN OF PROOF IN THIS CASE, TO RESPOND TO HIM
6 IN YOUR DELIBERATIONS WHEN YOU HAVE A CHANCE TO AND TO RETURN
7 A VERDICT IS THAT SPEAKS THE TRUTH BEYOND A REASONABLE DOUBT,
8 BEYOND A REASONABLE DOUBT. IF YOU DO THAT, YOUR VERDICT WILL
9 BE NOT GUILTY. THANK YOU.

10 THE COURT: THANK YOU, MR. STRICKLER. MR. SHUPPER.

11 MR. SHUPPER: THANK YOU, YOUR HONOR.

12 THE COURT: THANK YOU, SIR.

13 MR. SHUPPER: LADIES AND GENTLEMEN OF THE JURY, ON
14 BEHALF OF ROBERT JAMES I'D LIKE TO THANK YOU FOR YOUR
15 ATTENTION DURING THE COURSE OF THIS TRIAL. IT'S A MATTER OF
16 GRAVE IMPORT. WHAT MS. AND WHAT MR. BULL DESCRIBED,
17 EXPERIENCED AND WENT THROUGH IN MAY OF 1996 IS HORRIBLE AND
18 TERRIFYING, FRIGHTENING. BUT YOU ARE ASKED TO USE YOUR
19 COMMON EXPERIENCES, YOUR RECOLLECTION OF THE EVIDENCE AND THE
20 TESTIMONY AND CONSIDER THOSE PRINCIPLES THAT WE DESCRIBED,
21 THAT I DESCRIBED IN OPENING STATEMENT WHEN THIS CASE FIRST
22 BEGAN.

23 WE'VE ALL HAD COMMON EXPERIENCES. YOU KNOW, THIS ISN'T
24 A MATTER OF A CHILD GETTING CAUGHT WITH HIS HAND IN THE
25 COOKIE JAR. THIS IS A VERY SERIOUS SET OF CHARGES AGAINST

1 ROBERT ANTHONY JAMES. I ASKED YOU IN OPENING STATEMENT TO
2 CONSIDER THE PRINCIPLES OF OUR JURISPRUDENCE SYSTEM BEGINNING
3 WITH THE CLOAK OF INNOCENCE, THE STATE HAVING THE BURDEN OF
4 PROOF, PROOF BEYOND A REASONABLE DOUBT, PROOF THAT SATISFIES
5 EACH AND EVERY ONE OF YOU THAT BEYOND A REASONABLE DOUBT THE
6 CHARGES OF THE STATE ARE TRUE.

7 I MENTIONED THAT THIS WAS A CASE OF IDENTIFICATION, THE
8 IDENTITY OF THE PERSONS WHO DID THIS. AND IN ROBERT ANTHONY
9 JAMES'S CASE, ONLY ROBERT ANTHONY JAMES AM I ASKING YOU TO
10 CONSIDER. AS THE COURT WILL INSTRUCT YOU AND AS I MENTIONED
11 BEFORE, INDIVIDUALIZE THE CHARGES AGAINST ROBERT ANTHONY
12 JAMES. GIVE HIM SEPARATE CONSIDERATION. DON'T JUDGE HIM
13 JUST BECAUSE HIS BROTHER IS ALSO HERE. EVALUATE THE EVIDENCE
14 AND APPLY WHAT APPLIES TO ROBERT JAMES TO ROBERT JAMES AND
15 DISREGARD WHAT YOU'VE HEARD UP HERE FROM THE STAND THAT
16 DOESN'T APPLY TO ROBERT JAMES.

17 THERE ARE CERTAIN THINGS THAT ARE CONSISTENT THROUGH
18 THIS TRIAL THAT WERE SAID BY CERTAIN WITNESSES. LET'S BEGIN
19 BY LOOKING AT THE LOCATION OF THE INITIAL CONTACT. NO DOUBT
20 *William* AND WINFRED BULL SAY THAT THE FIRST CONTACT WAS
21 HERE ON THE PICNIC TABLE BEHIND THE SHED. AND WHEN YOU
22 CONSIDER WHERE THE LIGHTS SHINE FROM, WHERE THE LIGHTING IS,
23 BEHIND THE SHED, ONE OF THE LEAST LIT AREAS OF THE PARK.

24 THE TESTIMONY OF THE POLICE OFFICERS THAT WERE INVOLVED,
25 THAT'S QUITE INTERESTING. AND I WONDERED IF YOU NOTED THE

1 DIFFERENCE BETWEEN WHAT OFFICER WALKER, THE FIRST OFFICER ON
2 THE SCENE, SAID TALKING ABOUT IT, HAVING TO USE HIS
3 FLASHLIGHT, TALKING ABOUT IT BEING DARK. SERGEANT CRONIN
4 USING HIS FLASHLIGHT. IF IT'S SO WELL LIT, YOU'RE NOT USING
5 YOUR FLASHLIGHT, ARE YOU?

6 AND THEN, THAT WAS EARLY IN THE COURSE OF THIS TRIAL.
7 OTHER WITNESSES, EVEN *victim* SAYS, IT'S DARK IN THE
8 CEMETERY. IT'S DARK HERE. IT'S DARK THERE. MR. BULL, THE
9 LIGHTS AT THE BALLPARK WENT OUT. MR. PARKER SHOWING YOU
10 WHERE THE LIGHTS ARE. MR. MANIGO DOESN'T HAVE A THING TO DO
11 WITH EITHER SIDE. HE WORKS THERE. IT'S HIS JOB TO MAKE SURE
12 THE LIGHTS WORK. WHAT DOES HE TELL US? THE LIGHTS ARE ON A
13 TIMER. THEY GO OFF AT 11:00. AND WHEN THE LIGHTS GO OFF
14 IT'S DARK.

15 THE LAST WITNESS FOR THE STATE, SERGEANT BLACKWELL,
16 WHAT'S HE SAY? IT'S REALLY WELL LIT. I DIDN'T NEED MY
17 FLASHLIGHT. THE LIGHTS FROM DOWN HERE, THEY DON'T SHOW YOU
18 DOWN HERE. THEY DON'T ILLUMINATE THIS AREA.

19 THESE ARE TREES HERE ON STATE'S EXHIBIT 5. EXCUSE ME.
20 DEFENDANT'S EXHIBIT 5. ON DEFENDANT'S EXHIBIT 6 YOU SEE THE
21 TREES IN A DIFFERENT WAY, LITTLE CIRCLES WITH CROSSES ON THEM
22 BETWEEN THE PICNIC TABLE AND SHED. YOU ALL KNOW WHAT A TREE
23 LOOKS LIKE, AND YOU CAN SEE HOW LOW THE BRANCHES ARE FROM
24 THESE PHOTOGRAPHS OF THESE TREES. I SUBMIT TO YOU THAT'S WHY
25 IT'S SO DARK IN THE PARK. THESE LIGHTS ARE HIGH UP IN THE

1 TREES, MAYBE 70 FEET HIGH FROM MR. PARKER'S TESTIMONY.
2 THEY'RE NOT SHINING DOWN INTO THE PARK OVER HERE. AND
3 THEY'RE 400 FEET AWAY FROM THIS ONE. THIS ONE IS SHINING IN
4 THE OTHER DIRECTION.

5 CONSIDER, CONSIDER THE RELIABILITY OF THE WITNESSES AND
6 THE IDENTIFICATIONS THAT WERE MADE UNDER THE CIRCUMSTANCES IN
7 THE PARK WHERE THIS OCCURRED. CONSIDER THE TESTIMONY OF DR.
8 ALLEY WHO TELLS US ABOUT THE IMPACT OF EVENTS UPON HUMAN
9 MEMORY, WHO TELLS US THE FACTORS THAT CAN AFFECT RELIABILITY
10 AND ACCURACY OF AN IDENTIFICATION. IS IT DAYTIME OR IS IT
11 NIGHT? LIGHTING. WAS THERE A TRAUMATIC EVENT? WAS THERE
12 WEAPONS FOCUS AFFECT? WAS SOMEONE UNDER THE INFLUENCE OF
13 DRUGS? PSYCHOLOGICAL FACTORS.

14 MS. BULL (SIC) ON HER APPLICATION FOR BOJANGLE'S TELLS
15 US -- MS. -- TELLS US THAT SHE WAS WORKING AT
16 MCDONALD'S WHEN THIS EVENT OCCURRED. ON HER APPLICATION AT
17 BOJANGLE'S SHE SAID SHE WORKED FOR MCDONALD'S FROM FEBRUARY
18 '95 TO MARCH OF '96. SHE LEFT FOR PERSONAL PROBLEMS. THEN,
19 WHEN HER MEMORY IS REFRESHED ABOUT THIS, OH, I WORKED AT
20 MCDONALD'S, ANOTHER MCDONALD'S. SHE DIDN'T SEEM TO CONSIDER
21 IT IMPORTANT TO PUT I LEFT MCDONALD'S A COUPLE OF MONTHS
22 LATER ON THAT APPLICATION IN 1997. THINK ABOUT THESE THINGS.

23 MR. BULL, HE DOESN'T MENTION RECOGNIZING ANYBODY
24 DIRECTLY. HE DOESN'T POINT TO MR. JAMES OR PICK ANYONE OUT
25 OF A LINE-UP. MS. DOES. I WOULD ASK YOU TO LOOK AT

1 THIS LINE-UP CLOSELY THAT WAS SHOWN TO HER ON JUNE 18TH,
2 ALMOST THREE WEEKS FROM THIS INCIDENT. CONSIDER DR. ALLEY'S
3 TESTIMONY SAYING THE MEMORY DECREASES WITH TIME. AND I ASKED
4 INVESTIGATOR THOMAS ABOUT, DOES THIS MAN IN THE CENTER SEEM
5 TO HAVE A THIN NECK COMPARED TO THESE THREE MEN ON THE
6 BOTTOM? HE SAID NO. YOU JUDGE FOR YOURSELF. LOOK AT THIS
7 CLOSELY.

8 MR. BULL'S STATEMENT ON THE LAST PAGE, DESCRIBE ONE OF
9 THE SUSPECTS. BLACK MALE, FIVE-SIX, THIN, AGE 18 OR 19.
10 DESCRIBE THE SECOND SUSPECT. BLACK MALE, FIVE-EIGHT,
11 FIVE-NINE, 19 TO 21. DESCRIBE THREE, FOUR AND FIVE. MALE,
12 BLACK, HEAVY. THIS IS THIN, HIS DESCRIPTION OF THE FIRST
13 SUSPECT.

14 MR. BULL MENTIONS BEING IN FRONT OF THE GERMANY STREET
15 ADDRESS STANDING THERE WAITING FOR THE POLICE AND TALKING TO
16 CHARLES MURRAY. HIS MOTHER HAD COME OUT. HIS STEPFATHER HAD
17 BEEN OUT THERE. AND THEN SEEING A GROUP OF FIVE COME TO THE
18 INTERSECTION. HIS DESCRIPTION OF THE MOVEMENT, ACROSS THE
19 STREET IN A FEW SECONDS. MR. MURRAY, WALKING AND TALKING,
20 NOT ACTING SUSPICIOUSLY. MR. BULL STILL SAYS, THAT'S THEM.
21 AND WHEN HE SEES THE PEOPLE THAT HE BELIEVES WERE INVOLVED IN
22 FIGHTING AND STRUGGLING WITH HIM, PUTTING A GUN TO HIM AND
23 RAPING HIS LADY, WHEN HE SEES THEM WALK OFF, DOES HE RUN BACK
24 TO RESCUE HER? HE WAITS LONGER. HOW MUCH TIME? YOU RECALL
25 HIS TESTIMONY. HE SAID, I WAS MAD AND I WAS COLD. I HAD MY

1 UNDERWEAR ON AND A T-SHIRT. AND BEFORE THIS HAPPENED I HAD
2 ON A PAIR OF SHORTS. DOES ALL OF THIS FIT TOGETHER?

3 CHARLES MURRAY TELLS US, I KNEW THESE GUYS. WHEN THE
4 POLICEMAN, WHEN MR. THOMAS, INVESTIGATOR THOMAS SHOWED ME THE
5 LINE-UPS, PLURAL, THE TWO SETS OF PHOTOGRAPHS, ON THE 31ST OF
6 MAY, I RECOGNIZED EVERYONE. BUT THIS EXISTED ON -- HE SAW
7 THIS ON THE 31ST OF MAY. HE DIDN'T SAY IT WAS KENNETH JAMES,
8 BUT HE SAYS, I KNEW ALL THESE GUYS. HE DOESN'T IDENTIFY
9 ANYONE.

10 AND, INTERESTINGLY ENOUGH, HE CLAIMS TO HAVE SEEN AND
11 RECOGNIZED ROBERT JAMES ON THE 31ST. ACCORDING TO
12 INVESTIGATOR THOMAS'S TESTIMONY, HE CREATED THIS LINE-UP ON
13 THE 6TH OF JUNE. AND BECAUSE MS. ~~Victim~~ WAS WORKING AT
14 MCDONALD'S, HE DIDN'T SHOW IT TO HER UNTIL THE 18TH. THE
15 MCDONALD'S THAT SHE SAID SHE LEFT IN MARCH FOR PERSONAL
16 PROBLEMS. HOW DOES THAT FIT? HOW DOES MR. MURRAY SEE A
17 LINE-UP ON THE 31ST THAT INVESTIGATOR THOMAS DIDN'T CREATE
18 UNTIL A WEEK LATER? SO WHEN I ASK YOU TO USE YOUR COMMON
19 SENSE AND YOUR EXPERIENCES, CONSIDER THAT TESTIMONY AND
20 CONSIDER THESE DISCREPANCIES.

21 MR. MURRAY ON THE 31ST TELLS US, I RECOGNIZED THOSE
22 GUYS. BUT HE CAN'T SAY WHICH GROUP OF THE FIVE WHICH HE
23 DESCRIBED AS BEING TWO OR THREE ROBERT JAMES WAS IN. I DON'T
24 KNOW. NOR KENNETH JAMES. I DON'T KNOW. AND, MORE
25 INTERESTING, HE DOESN'T SAY ANYTHING, DOESN'T IDENTIFY ANYONE

1 OR SAY ANYTHING ABOUT WHO HE KNEW WAS THERE UNTIL SUNDAY, THE
2 19TH, THREE AND ALMOST A HALF YEARS LATER.

3 HIS MAMA IS OUT THERE. SHE DIDN'T RECOGNIZE THEM. SHE
4 DIDN'T IDENTIFY THEM. SHE WAS SHOWN THE LINE-UP. SHE CAN'T
5 IDENTIFY ANYONE.

6 DID ANYBODY DESCRIBE ONE OF THE ASSAILANTS AS HAVING A
7 HAT OR WEARING THIS TYPE T-SHIRT IF THIS IS ROBERT JAMES AT
8 1:12? YOU THINK THAT MIGHT HAVE STOOD OUT IN SOMEONE'S
9 MEMORY? MS. YEADON OR MS. COAXUM, SHE DOESN'T SAY THAT'S THE
10 FELLOW THAT CAME IN IN A HAT. SHE DOESN'T IDENTIFY ROBERT
11 JAMES. THE ONE PERSON WHO WAS RIGHT THERE UNDER THE KIND OF
12 FACTORS AND CONDITIONS THAT DR. ALLEY TESTIFIES AREN'T THAT
13 RELIABLE IS MS. *victim*. AND, AGAIN, WHAT SHE WENT THROUGH WAS
14 AWFUL. BUT THERE IS A SUBSTANTIAL QUESTION ABOUT THE
15 RELIABILITY OF HER IDENTIFICATION OF ROBERT JAMES I SUBMIT TO
16 YOU, SUBSTANTIAL DOUBT.

17 INVESTIGATOR THOMAS, HE WORKED HARD ON THIS CASE. HE
18 WAS INVOLVED IN COORDINATING EFFORTS AND PUTTING IT TOGETHER.
19 HE WORKED ALL NIGHT LONG THAT NIGHT. HE GETS OUT OF BED AND
20 WORKS ALL NIGHT LONG. THE INFORMATION THAT HE GATHERED
21 THROUGH THE OTHER OFFICERS DOESN'T POINT INITIALLY TO ROBERT
22 JAMES. HE GETS INFORMATION ABOUT A \$100 BILL. AND THE
23 PERSON THAT PRESENTED IT WAS QUESTIONED BY AN OFFICER IN THE
24 PARKING LOT AND IDENTIFIES HIMSELF AS NOT ROBERT JAMES BUT
25 KENNETH JAMES.

1 HE EXECUTES A SEARCH WARRANT AND HE GOES INTO THE ORR
2 STREET ADDRESS. THE PHONE BILL ISN'T IN ROBERT JAMES'S NAME.
3 THE ELECTRIC BILL ISN'T IN ROBERT JAMES'S NAME. THE STATE'S
4 PRODUCED NO LEASE TYING ROBERT JAMES THERE. STATE'S EXHIBIT
5 NO. 36, AN ENVELOPE WITH ROBERT ANTHONY JAMES'S ADDRESS, JOB
6 CORPS CENTER, BRUNSWICK, GEORGIA, WHAT DOES THAT SHOW? DOES
7 IT SHOW HE'S BEEN IN THE NEIGHBORHOOD FOR THE LAST FOUR OR
8 FIVE OR SIX YEARS, AS MR. CHARLES MURRAY SAYS?

9 ON THE CONTRARY, WHAT DO THEY FIND? HIS G.E.D. DIPLOMA
10 FROM GEORGIA FROM THE 21ST OF DECEMBER 1994, AND COPIES, THE
11 ORIGINAL DIPLOMA AND COPIES; A CERTIFICATE FROM THE HOME
12 BUILDERS INSTITUTE CERTIFYING THAT ROBERT JAMES HAS
13 SUCCESSFULLY COMPLETED A PRE APPRENTICESHIP, CONSTRUCTION AND
14 CARPENTRY. IS THIS EVIDENCE OF HIS INVOLVEMENT IN THE CRIME?
15 A CERTIFICATE OF ACHIEVEMENT, HAS SATISFACTORILY COMPLETED
16 THE JOB CORPS ORIENTATION ON THE 11TH OF AUGUST 1994. HIS
17 HOME BUILDERS INSTITUTE IS FEBRUARY '95, A MATH COMPLETION
18 CERTIFICATE, A VOUCHER, A HOPE VOUCHER, HELP OUTSTANDING
19 PUPILS EDUCATIONALLY FROM GEORGIA.

20 HE'S IN GEORGIA IN 1994 AND 1995. HE'S NOT HANGING OUT
21 IN CRESCENT MANOR OR ON ORR STREET. HE WENT TO W. A. PERRY
22 FROM '88 TO '90, AND HE WENT TO C. A. JOHNSON IN '92. BUT
23 HE'S IN GEORGIA IN '94 AND '95.

24 WHAT ELSE IS IN THERE? A JOB CORPS FILED UPDATE REQUEST
25 FROM SOMEBODY ELSE, SOMEBODY ELSE'S NAME, BRYAN AL BENJAMIN

1 IT LOOKS LIKE. THAT'S NOT ROBERT JAMES. THEY DIDN'T GO
2 ARREST THIS FELLOW. NOW, USE YOUR COMMON SENSE AND YOUR
3 EXPERIENCES. A DRAWING. WHAT DOES THIS TELL US? ROBERT
4 JAMES IS A TALENTED YOUNG MAN. HE'S A GOOD ARTIST. HE'S
5 INDUSTRIOUS. HE HAS AN OUTSTANDING PUPIL VOUCHER THAT HE'S
6 EARNED THROUGH THE GEORGIA DEPARTMENT AND TECHNICAL ADULT
7 EDUCATION. CONGRATULATIONS IT SAYS. CERTIFICATE OF
8 COMPLETION IN MATH, HOME BUILDERS CERTIFICATE, G.E.D. THAT
9 SUGGESTS HE'S A NICE YOUNG MAN, WORKING HARD, NOT THAT HE'S
10 INVOLVED IN A CRIME.

11 NOW, THE LEAP FROM FINDING THIS IN THERE TO SAY THAT HE
12 LIVED THERE AND THAT HE WAS INVOLVED IN THE ASSAULT OF MS.

13 AND MR. BULL IS A GIANT LEAP. THAT'S LIKE GOING TO THE
14 MOON. HOW DO YOU GET THERE? HOW MANY OF YOU WHEN I SAY YOU
15 USE YOUR COMMON EXPERIENCE HAVE LEFT AN ARTICLE OF CLOTHING
16 OR A PIECE OF MAIL OR A MAGAZINE AT A RELATIVE'S HOUSE? YOU
17 GET A MAGAZINE SUBSCRIPTION AND IT'S GOT YOUR ADDRESS ON IT,
18 AND YOU LEAVE IT THERE OR YOU LEAVE IT AT SOMEBODY ELSE'S
19 HOUSE. AND THE POLICE COME IN WITH A SEARCH WARRANT, GOD
20 FORBID, AND THEN COME AND TRY TO MAKE YOU A SUSPECT IN A
21 CRIME. THIS ISN'T EVIDENCE THAT HE DID ANYTHING. HE
22 GRADUATES. HE GOT A HIGH SCHOOL CERTIFICATE.

23 I TALKED TO YOU ABOUT IDENTIFICATION IN THE BEGINNING OF
24 THIS TRIAL OR WHAT I'LL SAY IS A CASE OF MISIDENTIFICATION,
25 MY THEORY BEING SUPPORTED BY THE TESTIMONY OF AN EXPERT, DR.

1 ALLEY, WHO TELLS US JUST BECAUSE SOMEONE IS CERTAIN DOESN'T
2 MEAN THAT THEIR IDENTIFICATION IS MORE RELIABLE; AND, IN
3 FACT, TELLS US ABOUT STUDIES SUGGESTING THAT THAT MIGHT NOT
4 BE TRUE, THAT THEIR CONFIDENCE DOESN'T HAVE THAT GREAT A
5 CORRELATION TO ACCURACY.

6 YOU REMEMBER THE DESCRIPTION HE SAID ABOUT HIS STUDENTS,
7 THE COLLEGE STUDENTS WHERE THEY STAGE A FAKE PURSE SNATCHING
8 OR SOME EVENT IN HIS CLASSROOM. AND SOMEONE WILL COME IN AND
9 DO THIS AND LEAVE AND PEOPLE WILL ATTRIBUTE FEATURES TO THEM,
10 MUSTACHES WHEN THERE WAS NO MUSTACHE. THAT DOESN'T MEAN THAT
11 WHEN PEOPLE MAKE MISTAKES ARE BAD OR ARE LYING OR ARE
12 INTENTIONALLY DECEIVING. IT MEANS PEOPLE MAKE MISTAKES.

13 AND SOME REASONS WHEN THE JUDGE INSTRUCTS YOU ON
14 REASONABLE DOUBT SHOULD COME TO MIND FROM THE TESTIMONY
15 YOU'VE HEARD. WHEN YOU APPLY THE FACTS AND THE EVIDENCE
16 YOU'VE HEARD HERE, APPLYING THE TESTIMONY AND THE EVIDENCE,
17 DIFFERENT KINDS OF EVIDENCE, DIRECT AND CIRCUMSTANTIAL, TO
18 THE FACTS AND CONSIDER WHETHER ALL THE PIECES FIT TO THIS
19 PUZZLE, I SUBMIT YOU'LL CONCLUDE THAT THEY DON'T FIT.
20 THERE'S SOMETHING WRONG.

21 AGAIN, THAT DOESN'T MEAN THAT THE PEOPLE WHO ARE
22 MISTAKEN IN THEIR IDENTIFICATION, MR. MURRAY OR MS. — ,
23 ARE INTENTIONALLY LYING. IT MEANS THEY'RE MISTAKEN. IT WAS
24 DARK. THE WEAPONS FOCUS AFFECT, THE DRUG USE, THE NUMBER OF
25 PEOPLE INVOLVED, THE TIME OF EXPOSURE, THE DURATION OF THE

1 EVENT, THE LENGTH OF TIME BETWEEN THE EVENT AND THE
2 IDENTIFICATION, WHICH I SUBMIT TO YOU IS A VERY SUGGESTIVE
3 LINE-UP, FACTORS FOR YOU TO CONSIDER.

4 WHEN YOU LOOK AND TAKE ALL THIS EVIDENCE BACK THERE,
5 CONSIDER CAREFULLY NO FINGERPRINTS. WE HAD SERGEANT CRONIN
6 SAY NO GUN WAS FOUND, NO SHELL CASINGS. THERE WERE NO BULLET
7 HOLES IN ANYTHING OR ANYONE.

8 NOW, BASED ON WHAT I'VE TOLD YOU NOW THERE I HOPE ARE
9 GRAVE DOUBTS ABOUT THE RELIABILITY AND CREDIBILITY OF THOSE
10 PIECES OF EVIDENCE THAT POINTS TOWARD MR. JAMES IN A
11 CIRCUMSTANTIAL WAY. THERE IS MS.) 'S IDENTIFICATION AND
12 THEN THERE IS MR. MURRAY'S AND THEN THE BROADER THINGS THAT
13 MAY HAVE BEEN -- THAT HAVE BEEN SUGGESTED BY THE STATE LEAD
14 TO HIM. BUT CONSIDER IT USING YOUR EXPERIENCES. WHAT DOES
15 IT REALLY MEAN? LIKE I SAID, THIS MEANS HE GOT A HIGH SCHOOL
16 DIPLOMA.

17 NOW, GATOR, THE DOG, SERGEANT BLACKWELL, AGAIN, IF
18 THEY'RE RIGHT AND MS. WHO SAYS MR. KENNETH JAMES AND I
19 THINK HIS BROTHER TRYING TO PERSUADE THEM TO GO AFTER THE
20 THREE OTHER GUYS RAN OFF WHEN THE SHOTS WERE FIRED AND THEY
21 WERE IN THE CRYPT, GATOR DOESN'T GO IN THERE. AND IF GATOR
22 IS ON THE RIGHT TRACK AND HE GETS TO ORR STREET AND HE ALERTS
23 AND THERE'S NO ONE IN THERE AND SERGEANT BLACKWELL TAKES HIM
24 UP ORR STREET FURTHER AND HE CIRCLES BACK, WHY DOESN'T HE GO
25 DOWN TO THE AMOCO IF THAT'S WHERE ACCORDING TO THE STATE'S

1 THEORY THESE FOLKS WENT? IT DOESN'T FIT. THERE'S A
2 QUESTION.

3 NOW, I'VE TRIED TO TALK ABOUT THOSE THINGS THAT I FEEL
4 THE STATE HAS USED TO MAKE A CASE AGAINST ROBERT JAMES. THE
5 ONE THING THAT THE STATE REVEALED THROUGH IRA JEFFCOAT WAS
6 THAT THE BLOOD SAMPLE HE USED TO GET THE DNA EVIDENCE THAT
7 WAS DELIVERED BY THE OTHER POLICE OFFICERS WHEN COMPARED WITH
8 THE SWAB FROM THE VAGINA OF THE SAMPLE FROM MS.
9 EXCLUDES ROBERT JAMES AS THE DONOR, EXCLUDES ROBERT JAMES AS
10 THE DONOR.

11 THIS YOUNG MAN OVER HERE SHOWS EVIDENCE OF SUBSTANTIAL
12 ACHIEVEMENT IN '74 AND '75 (SIC). AND THE FACT THAT THESE
13 RECORDS WERE FOUND IN HIS BROTHER'S HOME DOESN'T MEAN THAT
14 MS. IS RIGHT.

15 WHEN YOU ARE DELIBERATING AND CONSIDERING THIS EVIDENCE,
16 YOU'RE ALLOWED TO CONSIDER THE CREDIBILITY OF THE WITNESSES.
17 AND BOTH WITNESSES, THE VICTIMS IN THIS CASE, HAVE PRIOR
18 CRIMINAL RECORDS. (SIC) — MS. HAD A
19 CONVICTION FOR FRAUDULENT CHECKS IN '91 AND IN APRIL OF 1996,
20 A MONTH BEFORE THIS EVENT. IN FACT, ON MAY 28TH AND LATER ON
21 IN AUGUST A NUMBER OF COUNTS. THE EVIDENCE SHOWS THAT SHE
22 WAS HAVING A DIFFICULT TIME IN LIFE BEFORE THIS EVENT IN THE
23 PARK.

24 WINFRED BULL TELLS US IN ANSWER TO MS. FRYAR'S QUESTIONS
25 NO DRUGS OR ALCOHOL. I DON'T DRINK. MS. SAYS WINFRED

1 DOESN'T DRINK. WINFRED WAS CONVICTED OF SHOPLIFTING IN 1997
2 AND POSSESSION WITH INTENT TO DISTRIBUTE COCAINE IN 1986.
3 THESE ARE FACTORS THAT YOU CAN USE TO JUDGE THE CREDIBILITY
4 OF THE WITNESSES.

5 NOW, HIS HONOR WILL INSTRUCT YOU ON THE LAW AND ALLOW
6 YOU TO DELIBERATE IN ACCORDANCE WITH HIS INSTRUCTIONS.
7 THAT'S YOUR DUTY. YOUR DUTY IS TO BE THE JUDGES OF THE
8 TRUTHFULNESS OF THE WITNESSES AND MAKE THE ULTIMATE
9 DETERMINATION.

10 WHEN I SPOKE TO YOU ABOUT A CASE OF IDENTIFICATION,
11 THERE WAS ALREADY KNOWN THAT THE DNA EVIDENCE EXCLUDES ROBERT
12 JAMES. I SUGGEST TO YOU THAT THAT IS A SUBSTANTIAL BASIS FOR
13 REJECTING THESE CLAIMS AND RESOLVING ANY QUESTIONS IN ROBERT
14 JAMES'S FAVOR, NOTWITHSTANDING THE IDENTIFICATION BY MS.

15 AND CHARLES MURRAY.

16 THE STATE HAS THE BURDEN OF PROOF. IT'S A HEAVY BURDEN.
17 IT'S NOT A LIGHT BURDEN. IT'S NOT ONE THAT'S SATISFIED BY IT
18 SORT OF LOOKS LIKE IT, AND LET'S JUST SORT OF BRING CLOSURE
19 BY CONVICTING. IT'S A HEAVY BURDEN THAT MUST PENETRATE AND
20 DISINTEGRATE THE CLOAK OF INNOCENCE THAT ROBERT JAMES HAS
21 AROUND HIM AND HAS HAD AROUND HIM.

22 THE UNQUESTIONED FACT IS THAT THE LIGHTS WENT OFF AT 11.
23 YOU JUST CAN'T WALK UP AND FLIP THE SWITCH LIKE MR. BULL
24 CLAIMED. THEY'RE LOCKED IN THAT SHED THERE. 11:00 THE
25 LIGHTS GO OUT. REASONABLE DOUBT? CONSIDER THE FACTS AS YOU

1 HEARD THEM IN THE TESTIMONY, THAT IT WAS DARK, PEOPLE MAKE
2 MISTAKES, THE LIGHTS WERE OUT, AND ALL THOSE OTHER FACTORS
3 THAT GO TO THE CREDIBILITY AND RELIABILITY. IF ALL OF THE
4 PIECES DON'T FIT TOGETHER, THEN YOUR VERDICT SHALL BE NOT
5 GUILTY.

6 AND IN VIEW OF THE DISCREPANCIES IN THE WITNESS'S
7 TESTIMONY FROM THE POLICE OFFICERS THAT SAY IT WAS DARK AND I
8 USED FLASHLIGHTS COMPARED TO SERGEANT BLACKWELL WHO SAYS IT
9 WAS REALLY LIGHT AND I DIDN'T NEED A FLASHLIGHT, AND EVEN THE
10 VICTIM'S TESTIMONY IT WAS DARK, AND THE DNA EVIDENCE THAT
11 SCREAMS ROBERT JAMES AS INNOCENT, I'M EXCLUDED AS THE DONOR,
12 IT SAYS, HIS BLOOD SAMPLE; I TRUST THAT WHEN YOU DELIBERATE
13 THIS MATTER THAT YOU WILL SEPARATE ROBERT JAMES FROM THE
14 BROTHER THAT CAME FROM THE SAME WOMB BUT ARE SEPARATE PEOPLE
15 AND UNDER THE LAW ARE ENTITLED TO SEPARATE CONSIDERATION AS
16 FAR AS THESE CHARGES.

17 I TRUST THE EVIDENCE IN YOUR VIEW WILL SHOW THAT THERE'S
18 MORE THAN A REASONABLE DOUBT AND THAT YOUR VERDICT SHALL BE
19 NOT GUILTY. THANK YOU.

20 THE COURT: THANK YOU, MR. SHUPPER. MR. GASSER, BEFORE
21 YOU REJOIN, FOLKS, STAND UP AND TAKE A LITTLE STRETCH BREAK
22 RIGHT NOW. AND I'M GOING TO GIVE YOU A BREAK BETWEEN THE
23 FINAL ARGUMENT. IF YOU WANT TO. IF YOU DON'T WANT TO, YOU
24 DON'T HAVE TO. OKAY. JUST TAKE A LITTLE BREAK IN PLACE.
25 WE'VE BEEN HERE A LONG TIME. WE DEMAND SOMETIMES SUPERHUMAN

1 ENDURANCE FROM YOU. BUT, AGAIN, I DON'T WANT YOU DISCUSSING
2 ANYTHING RIGHT NOW EITHER. I SAID STAND UP AND TAKE A
3 STRETCH BREAK, PLEASE, MA'AM. MA'AM, IS THERE SOMETHING ---
4 I DON'T KNOW WHAT IT IS YOU WANT TO TELL ME, AND YOU CAN ONLY
5 COMMUNICATE WITH ME THROUGH A NOTE. SO I DON'T KNOW WHAT IT
6 IS YOU WANT TO TELL ME. GO TO YOUR JURY ROOM. DON'T DISCUSS
7 THE CASE. WRITE ME A NOTE, PLEASE. OKAY.

8 FORELADY: OKAY.

9 (JURY OUT AT 3:35 P.M.)

10 THE COURT: OKAY. HOLD IT RIGHT HERE. LET'S JUST SEE
11 IF SHE WRITES ME A NOTE. MAYBE IT'S SOMEBODY HAD TO GO TO
12 THE BATHROOM. I'M ALWAYS FEARFUL THAT THEY'RE GOING TO SAY
13 SOMETHING THAT'S JUST COMPLETELY AND TOTALLY IMPROPER,
14 INAPPROPRIATE.

15 (PAUSE)

16 THE COURT: "I JUST NEEDED TO USE THE RESTROOM." I KIND
17 OF THOUGHT THAT'S WHAT THAT WAS.

18 (COURT'S EXHIBIT NO. 35, NOTE FROM JUROR, MARKED FOR
19 IDENTIFICATION ONLY)

20 (WHEREUPON, A BREAK IS TAKEN)

21 THE COURT: OKAY. MR. GASSER, YOU'RE NEXT. AND I'LL
22 APOLOGIZE TO MS. DAVIS FOR ASSAULTING HER. AND BRING THE
23 JURY IN, PLEASE, JIM.

24 (JURY IN AT 3:45 P.M.)

25 THE COURT: OKAY, SIR. I DIDN'T MEAN TO JUMP YOU, MADAM

1 PRESIDING JUROR, BUT I NEVER KNOW WHAT'S GOING TO BE SAID.

2 SO I HAVE TO —

3 FORELADY: OKAY.

4 THE COURT: I DID, TOO, BY THE WAY.

5 THE BAILIFF: THE JURY IS ALL PRESENT, YOUR HONOR.

6 THE COURT: THANK YOU, MR. BARROW, MR. HOLLIS. AND
7 THANK YOU, FOLKS. MR. GASSER, PLEASE REJOIN ON BEHALF OF THE
8 STATE, IF YOU WOULD.

9 MR. GASSER: THANK YOU, YOUR HONOR. MAY IT PLEASE THE
10 COURT.

11 THE COURT: YES, SIR.

12 MR. GASSER: MADAM FORELADY AND LADIES AND GENTLEMEN OF
13 THE JURY, I'M GOING TO TRY TO BE AS BRIEF AS POSSIBLE. I
14 KNOW YOU'VE BEEN HERE QUITE SOME TIME THIS AFTERNOON. I'M
15 GOING TO START OFF BY TALKING ABOUT THE EVIDENCE. I'M GOING
16 TO START OFF WITH WINFRED BULL'S TESTIMONY AND *victim*'S
17 TESTIMONY. BUT BEFORE I DO THAT I WANT TO TALK ABOUT THE
18 ISSUE OF THE LIGHTING.

19 LIGHTING, THE QUESTION OF LIGHTING, IF YOU REMEMBER, WAS
20 ASKED OF WINFRED BULL AND WAS ASKED OF *victim* AND WAS
21 ASKED OF OFFICER WALKER. IF YOU REMEMBER, OFFICER WALKER, HE
22 WAS THE VERY FIRST OFFICER THAT ARRIVED ON THE SCENE. AND IT
23 WAS ASKED OF OFFICER CRONIN, AND IT WAS ASKED OF SERGEANT
24 BLACKWELL, AND IT WAS ASKED OF MR. MANIGO THAT CAME IN HERE.
25 AND EVERY ONE OF THOSE WITNESSES TOLD YOU THE SAME THING, AT

1 LEAST IN ONE AREA; AND THAT IS, IT WAS DARK OUT.

2 BUT, LADIES AND GENTLEMEN, EVERYONE AGREES, THE STATE
3 SUBMITS TO YOU, THE STATE STIPULATES IT WAS DARK OUT. NO ONE
4 HAS EVER TRIED TO SAY THAT THIS CRIME HAPPENED WHEN IT WASN'T
5 DARK OUT. BUT DARKNESS AND THE TERM "IT'S DARK OUT" IS A
6 SUBJECTIVE TERM. THAT'S WHY I WAS ASKING PROFESSOR ALLEY,
7 PEOPLE'S PERCEPTIONS AND PERCEIVE THINGS DIFFERENTLY. AND
8 PEOPLE, DARKNESS, THE TERM "DARKNESS" IS RELATIVE. HOW DARK
9 IS DARK? HOW LIGHT IS LIGHT?

10 I MEAN, IF YOU'RE A WITNESS TO A TRAFFIC ACCIDENT AND
11 YOU'RE SITTING THERE AND YOU GET TO SEE THE LIGHT, THE LIGHT
12 IS EITHER GREEN OR IT'S YELLOW OR IT'S RED. IT HAS TO BE ONE
13 OF THOSE THREE COLORS OR IT'S CHANGING. BUT HOW DARK IS DARK
14 AND HOW LIGHT IS LIGHT? IT'S A SUBJECTIVE TERM TO EACH AND
15 EVERY ONE OF US.

16 AND ONE OF THE REASONS WHY THE STATE ASKED THOSE
17 QUESTIONS, IF YOU REMEMBER, FROM THE STATE'S WITNESSES, EACH
18 AND EVERY ONE OF THEM HAD A DIFFERENT RESPONSE, BECAUSE TO
19 EACH AND EVERY ONE OF THEM, THEIR SUBJECTIVE DESCRIPTION OF
20 HOW DARK IT WAS VARIED.

21 FOR INSTANCE, OFFICER WALKER, THE FIRST PERSON ON THE
22 SCENE, HE SAID, IF YOU REMEMBER HIS RESPONSE, I BELIEVE TO
23 ALMOST ALL OF THE LAWYERS' QUESTIONS WAS, IN THIS AREA IT WAS
24 PRETTY WELL LIT. HE COULD SEE IN THE PLAYGROUND AREA. WHEN
25 HE WAS LOOKING FOR EVIDENCE ON THE GROUND HE NEEDED A

1 FLASHLIGHT. THAT WAS THE VERY FIRST POLICE OFFICER. THAT
2 WAS HIS ABILITY, HIS PERCEPTION WAS HE HAD NO PROBLEM WITH
3 THE LIGHT COMING FROM THE PARKING LOT OR FROM W. A. PERRY AND
4 THE AMBIENT LIGHT COMING FROM TWO NOTCH ROAD NOT TOO FAR
5 AWAY. HE COULD SEE AROUND HERE. IT'S WHEN HE WAS LOOKING
6 FOR EVIDENCE ON THE GROUND BY THE PICNIC TABLE THAT HE NEEDED
7 HIS FLASHLIGHT. HE DIDN'T NEED HIS FLASHLIGHT AROUND THE
8 PICNIC TABLE OR AROUND HERE. IT'S WHEN HE WAS LOOKING FOR
9 EVIDENCE ON THE GROUND IS WHEN HE NEEDED IT. THAT'S WHAT HIS
10 ABILITY TO SEE IN THAT ENVIRONMENT.

11 WE CAN'T RECREATE THE ENVIRONMENT SO EACH OFF YOU 12 OR
12 EACH OF YOU 13, SOME OF YOU MIGHT BE ABLE TO SEE BETTER THAN
13 SOME OTHERS. OFFICER WALKER WAS ABLE TO SEE WITHOUT A
14 FLASHLIGHT FINE EXCEPT FOR WHEN HE WAS LOOKING FOR EVIDENCE.

15 SERGEANT CRONIN, HE INDICATED THAT HE -- AND OF COURSE,
16 WHAT IS SERGEANT CRONIN'S JOB? HE'S THE EVIDENCE CUSTODIAN.
17 HE'S THE ONE THAT COLLECTS THE EVIDENCE. HE NEEDED A
18 FLASHLIGHT. SERGEANT BLACKWELL, HE TESTIFIED HE DIDN'T NEED
19 LIGHTS. LIKE OFFICER WALKER, HE DIDN'T NEED A FLASHLIGHT.
20 IT WAS DARK OUT, BUT AROUND IN THESE AREAS, IT WASN'T UNTIL
21 HE GOT OVER ACROSS THE FENCE LINE THAT HE NEEDED HIS
22 FLASHLIGHT TO LOOK FOR THE FOOTPRINTS THAT HE TALKED ABOUT OR
23 THE TOE MARKS. BUT HE, LIKE OFFICER WALKER, HAD NO PROBLEMS
24 SEEING IN THIS GENERAL AREA RIGHT HERE.

25 SO EVERYBODY'S ABILITY, THE PEOPLE THAT WERE AT THE

1 SCENE, FROM VICTIM TO WINFRED BULL TO THE OFFICERS, ALL
2 HAVE A DIFFERENT ABILITY AND A DIFFERENT PERCEPTION TO SEE
3 DEPENDING ON HOW LONG THEY'RE THERE. THAT'S WHY I ASKED
4 PROFESSOR ALLEY THAT QUESTION.

5 THE PEOPLE THAT HAD THE BEST OPPORTUNITY TO SEE I SUBMIT
6 YOU IS VICTIM. SHE WAS OUT THERE FOR WAY OVER 25
7 MINUTES. AND I BELIEVE 25 MINUTES WAS THE TIME THAT THE
8 DEFENSE EXPERT SAID WHERE YOUR EYES GET USED TO DARKNESS, THE
9 AREA. YOUR EYES GET USED TO, ADJUSTS TO A PARTICULAR AREA.
10 AND OF COURSE IT'S IN THE OPEN SKY AS WELL. YOU'RE NOT IN
11 YOUR HOME AT TIMES WHERE YOU CAN COMPLETELY CLOSE THE BLINDS
12 AND CUT OUT ALL THE LIGHTS AND YOU HAVE, EVEN AT NIGHT YOU
13 HAVE NO LIGHT COMING IN. BUT IF YOU OPEN THE BLINDS, EVEN AT
14 NIGHT YOU CAN SEE. YOU'RE NOT RUNNING INTO YOUR DRESSER,
15 RUNNING INTO YOUR BED, UNLESS EVERYTHING IS COMPLETELY SHUT
16 OUT.

17 BUT THERE WERE OFFICERS THAT DIDN'T NEED THE ASSISTANCE
18 OF FLASHLIGHTS, AND THEY COULD HAVE NO PROBLEM SEEING HERE.
19 AND THIS IS WHERE THE EVENT FIRST OCCURRED, INCLUDING THE
20 FIRST TIME KENNETH JAMES SEXUALLY ASSAULTED VICTIM, WAS
21 RIGHT HERE AT THIS BENCH BEFORE THEY CROSSED INTO THE TREE
22 LINE.

23 AND, YOU KNOW, AND I AGREE WITH MR. MANIGO. THE LIGHTS
24 WERE OFF IN THE BALLPARK. EVERYONE AGREES THAT THE LIGHTS
25 WERE OFF IN THE BALLPARKS. THAT'S WHERE HE SAYS THE LIGHTS

1 WERE OFF. NOT THE LIGHTS FROM THE PARKING LOT, BUT THE
2 LIGHTS IN THE BALLPARKS GO OFF AT 11:00. AND HE SAID IT WAS
3 DARK OUT THERE AT NIGHT. HE'S BEEN OUT THERE AT NIGHT.

4 BUT, YOU KNOW, ONE QUESTION THAT NEITHER DEFENSE
5 ATTORNEY ASKED HIM WAS, I MEAN, WOULD YOU HAVE ANY PROBLEM
6 SEEING SOMEBODY THIS CLOSE TO YOU? HE NEVER SAID THAT YOU
7 WOULD NOT HAVE ANY PROBLEM SEEING PEOPLE. HE JUST SAID IT
8 WAS DARK OUT THERE, NOT THAT YOU COULDN'T SEE PEOPLE WHEN
9 THEY WERE THIS CLOSE TO YOU OR CLOSE.

10 AND YOU'VE SEEN THE TESTIMONY. I'M NOT GOING TO CLIMB
11 UP INTO THE WITNESS BOX, I MEAN, IN THE JURY BOX. I'M
12 FORBIDDEN TO DO THAT. BUT YOU SAW HOW CLOSE MS. FRYAR GOT TO
13 WINFRED BULL -- OR I'M SORRY -- TO I. YOU SAW HOW
14 CLOSE SHE GOT, HOW CLOSE ROBERT JAMES WAS TO HER. ROBERT
15 JAMES IT THE FIRST PERSON THAT CAME UPON HER. THE FIRST
16 PERSON. AND SHE SEES -- IT CERTAINLY WASN'T DARK ENOUGH TO
17 SEE A SMALL OBJECT LIKE A GUN. IF THEY CAN SEE SOMETHING AS
18 SMALL AS A GUN HERE, WHY DON'T YOU THINK THEY CAN SEE
19 SOMEBODY'S FACE?

20 BUT DARKNESS IS RELATIVE TO EACH AND EVERY ONE OF US,
21 JUST LIKE IT WAS RELATIVE TO THE WITNESSES THAT TESTIFIED
22 BEFORE YOU. THAT'S WHY I ASKED SERGEANT BLACKWELL, WE'RE ALL
23 KIND OF FAMILIAR WITH PITCH DARK. YOU KNOW, PITCH DARK OUT.
24 IT WAS SO DARK THAT WHEN YOU'RE IN THE WOODS OR IF YOU'RE
25 CAMPING OR FISHING OR HUNTING OR CAMPING WITH YOUR FAMILY OR

1 IN THE WOODS AND THERE'S THIS HUGE TREE CANOPY AND YOU CAN'T
2 SEE THE STARS AND THE SKY AND THERE'S NO LIGHTS FOR WHO KNOWS
3 HOW FAR. SOME PEOPLE REFER TO THAT AS PITCH DARK. AND YOU
4 DIDN'T HEAR ANY TESTIMONY FROM ANY OF THE WITNESSES,
5 INCLUDING MR. MANIGO, THAT IT'S PITCH DARK OUT THERE, YOU
6 CAN'T SEE YOUR HAND IF YOU PUT IT UP IN FRONT OF YOUR FACE.
7 THAT'S NOT THE TESTIMONY. IN FACT, IT'S COMPLETELY OPPOSITE
8 FROM THAT.

9 NOW, WINFRED BULL. WHAT DOES WINFRED BULL TESTIFY TO?
10 WINFRED BULL TESTIFIES THEY'RE SITTING AT THE PICNIC TABLE
11 WHEN THESE TWO FELLOWS COME UP AND ONE OF THEM ASKS HIM FOR A
12 LIGHT. HE GETS DOWN. AND IT'S NOT LIKE HE'S LIKE -- YOU
13 DIDN'T HEAR THE TESTIMONY GOING, BOY, I CAN'T SEE YOU. WHERE
14 ARE YOU? I MEAN, ONE OF THEM ASKED HIM FOR A LIGHT. HE
15 REACHES IN HIS POCKET TO PULL OUT HIS LIGHTER, TO PULL OUT
16 HIS LIGHTER. AND THAT'S WHEN THE GUN COMES AND THAT'S WHEN
17 IT'S PUT TO HIS HEAD.

18 NOW WINFRED BULL, HE USED THE WORD "TUSSLING". AND I
19 THINK THE EVIDENCE SPEAKS FOR ITSELF. HE WAS FIGHTING. HE
20 HAD AT LEAST TWO GUYS ON HIM, SOMETIMES THREE GUYS ON HIM AT
21 ALL TIMES. AND HE AIN'T A BIG MAN. HE AIN'T A HEAVY MAN.
22 BUT HE WAS FIGHTING. AND I SUBMIT TO YOU THAT HIS T-SHIRT
23 SHOWS THAT. THEY HAD HIM DOWN. THEY HAD HIM ON THE GROUND.
24 THEY WERE KICKING HIM. HE SAID THEY WERE TUSSLING HIM. THEY
25 HAD HIM DOWN. SURE, THEY LET HIM LIFT HIS HEAD UP TO MAKE

1 SURE THEY SAW WHAT THEY -- THEY WANTED TO MAKE SURE HE SAW
2 WHAT THEY WERE DOING TO HIS WOMAN.

3 BUT HIS EYES WERE FIXED ON *victim* AS SHE'S BEING
4 ABUSED. AND HE FULLY ACKNOWLEDGED THAT TO YOU ALL. HE CAN'T
5 BE SURE. HE DIDN'T GET A GOOD LOOK AT THE PEOPLE. HE WAS
6 FIGHTING AND TUSSLING WITH HIS HEAD DOWN, AND THEY WERE
7 KICKING HIM. AND THE EVIDENCE SUGGESTS THAT.

8 BUT DO YOU REMEMBER WHAT HE TOLD YOU, LADIES AND
9 GENTLEMEN? DO YOU REMEMBER WHAT HE SAID HE HEARD ONE OF THEM
10 SAYING? WHEN THEY WERE KICKING AND FIGHTING, WHEN THEY'RE
11 GETTING READY TO LEAVE? "HEY, DOG", OR SOMETHING DOING. NOW
12 I GUESS THAT'S JUST A COINCIDENCE. AND IF THAT WAS THE ONLY
13 EVIDENCE, I'M NOT SUGGESTING TO YOU, MADAM FORELADY AND
14 LADIES AND GENTLEMEN, THAT YOU SHOULD TAKE THAT EVIDENCE
15 ALONE AND GO BACK AND CONVICT KENNETH JAMES. ABSOLUTELY NOT.
16 I'M JUST STARTING OUT WITH THAT ONE PIECE OF EVIDENCE, AND
17 I'M GOING TO DISCUSS WITH YOU A SERIES OF PIECES OF EVIDENCE
18 THAT OVERWHELMINGLY PROVE THE GUILT OF THESE TWO GENTLEMEN.

19 NO ONE SHOWED HIM THAT BOOKING REPORT, THE BOOKING
20 REPORT WHERE THE DEFENDANT KENNETH JAMES HIMSELF ADMITTED
21 WHEN HE WAS ARRESTED ON THESE CHARGES THAT HIS NICKNAME WAS
22 "K-DOG", THAT A TATTOO ON HIS ARM HAS BEEN STIPULATED TO THAT
23 SAYS "K-DOG".

24 TOMMY THOMAS SAID HE DIDN'T EVEN SEE IT FOR THE FIRST
25 TIME IN OVER THREE YEARS WHEN I SHOWED IT TO HIM ON THE

1 WITNESS STAND. BUT WINFRED BULL, I MEAN, HOW DOES HE THINK?
2 HOW DOES HE KNOW? AND IF HE'S GOING TO MAKE THAT UP, IF HE
3 HEARD IT OFF THE STREET, HE'S GOING TO COME IN HERE AND TELL
4 YOU, I HEARD SOMEBODY SAY "K-DOG". BUT DID HE TELL YOU THAT?
5 HE JUST SAYS HE REMEMBERS WHEN EVERYTHING WAS GOING ON AND
6 THEY WERE GETTING READY TO LEAVE, HE REMEMBERS SOMEBODY
7 SAYING SOMETHING DOG OR "HEY, DOG." WELL, DONE "HEY" AND "K"
8 SOUND FAMILIAR? THAT'S JUST ONE PIECE OF EVIDENCE YOU CAN
9 CONSIDER.

10 AND I SUBMIT TO YOU THAT IS SO CREDIBLE. BECAUSE, YOU
11 KNOW, WHERE DOES WINFRED BULL COME UP WITH THAT? IT'S JUST
12 SOMETHING THAT HE'S REMEMBERING. THEY DIDN'T USE ANY
13 PEOPLE'S FIRST NAMES. HE'S REMEMBERING SOME PEOPLE REFERRING
14 TO SOMEBODY AS "HEY, DOG" OR SOMETHING DOG. AND IT JUST SO
15 HAPPENS THAT KENNETH JAMES'S NICKNAME IS "K-DOG". I GUESS
16 THAT'S JUST ANOTHER COINCIDENCE THAT I'M GOING TO GET TO.

17 AND WHAT DO THEY TAKE FROM HIM, LADIES AND GENTLEMEN?
18 THEY TAKE SOME MONEY FROM HIM, BUT THEY DEFINITELY TAKE A
19 \$100 BILL FROM HIM. HE'S ABSOLUTELY POSITIVE ABOUT THAT.
20 AND I SUBMIT THAT'S UNCONTRADICTED. THERE'S NO EVIDENCE IN
21 THE RECORD THAT SUGGESTS THAT A 100 DENOMINATION DOLLAR BILL
22 WAS NOT TAKEN FROM HIM.

23 AND VICTIM . AND I'M GOING TO GET TO WHERE WINFRED
24 BULL RUNS. BUT WINFRED BULL RUNS, TAKES OFF RUNNING AND
25 SOMEBODY TAKES A SHOT AT HIM. AND YOU REMEMBER THE HAND OF

1 ONE IS THE HAND OF ALL. WE DON'T HAVE TO PROVE WHO TOOK A
2 SHOT AT HIM. WE JUST HAVE TO PROVE THAT ONE OF THESE FIVE
3 INDIVIDUALS, ONE OF THE FIVE, EVEN IF IT'S ONE OF THE THREE
4 THAT WE'VE NEVER CAUGHT, TOOK A SHOT AT HIM WITH A HANDGUN.
5 THE HAND OF ONE IS THE HAND OF ALL.

6 AND HE TAKES OFF RUNNING, AND THEY TAKE A SHOT AT HIM.
7 AND HE'S ZIG-ZAGGING. YOU REMEMBER THAT? HE'S ZIG-ZAGGING
8 AND HE'S ZIG-ZAGGING UP TRYING TO GET HELP. AND ALL HE'S
9 WEARING IS HIS UNDERSHORTS, HIS SLIPPERS AND HIS SOCKS. HE'S
10 GOT HIS T-SHIRT ON, TOO. BUT HIS SLIPPERS AND HIS SOCKS AND
11 HIS PANTS ARE ALL BACK AT THE SCENE. AND HE'S ZIG-ZAGGING.
12 HE TAKES OFF RUNNING. AND HE COMES UP TO 1726 GERMANY STREET
13 AND HE CALLS 911.

14 AND WHAT'S HAPPENING TO VICTIM? VICTIM TESTIFIED
15 THAT SHE'S AT THIS PICNIC TABLE, LADIES AND GENTLEMEN. AND
16 THE TWO FELLOWS COME UP, ASK FOR A LIGHT. AND SHE SEES THE
17 MAN DRAW THAT GUN. HE HAD THE GUN THE WHOLE TIME. HE JUST
18 LIFTED IT UP AND STUCK IT TO THE HEAD, STUCK IT TO THE HEAD.
19 AND YOU SAW WINFRED BULL, HOW CLOSE, YOU SAW HOW CLOSE ROBERT
20 JAMES GOT TO WINFRED BULL. SO, YEAH, SHE'S STARING AT THE
21 GUN AND SHE'S STARING AT ROBERT JAMES AT THIS PICNIC TABLE
22 WHERE OFFICER WALKER EVEN SAID YOU DIDN'T NEED A FLASHLIGHT
23 TO SEE.

24 AND SHE'S STARING INTO THE FACE, THIS FAR AWAY, WHEN SHE
25 WAS ON THE WITNESS STAND, THIS FAR AWAY AT THAT PICNIC TABLE

1 WHERE YOU DON'T NEED A FLASHLIGHT TO SEE, INTO THE FACE OF
2 THE MAN HOLDING THE GUN TO WINFRED WHO'S JUST RIGHT NEXT TO
3 HER. AND SHE'S LOOKING AT THAT MAN AT THAT PICNIC TABLE.
4 BUT THAT'S NOT THE ONLY THE TIME SHE HAD A CHANCE TO TAKE A
5 LOOK AT HIM, LADIES AND GENTLEMEN. AND I'LL GET BACK TO THE
6 SECOND OPPORTUNITY UNFORTUNATELY FOR HER WHERE SHE SAW HIS
7 FACE THAT CLOSE.

8 BUT THE NEXT THING IS THE THREE INDIVIDUALS COME OUT OF
9 THAT CUT. AND THE LEADER OF THE GANG, THE LEADER OF THE
10 GROUP SEIZES HER, SEIZES HER AT THAT PICNIC TABLE, SEIZES HER
11 AND STAYS WITH HER FOR WHO KNOWS HOW LONG DOES IT TAKE FOR
12 FIVE PEOPLE TO HAVE THEIR WAY WITH . SHE CAN'T
13 REMEMBER. YOU THINK SHE WAS LOOKING AT A WATCH? YOU THINK
14 SHE WAS TIMING THESE MEN AS THEY TOOK TURNS STRADDLING HER?

15 SHE KNOWS, WHAT DID SHE SAY? 15 MINUTES? 20 MINUTES?
16 25 MINUTES? 30 MINUTES? BUT IT TOOK A WHILE. IT TOOK
17 ENOUGH TIME TO GET HER PURSE. IT TOOK ENOUGH TIME TO MAKE
18 SURE ALL FIVE OF THEM HAD THEIR WAY WITH HER. IT TOOK TIME.

19 AND THE ONE THING THAT IS UNCONTRADICTED, LADIES AND
20 GENTLEMEN, IS THAT THE ENTIRE TIME ONE PERSON STAYED WITH
21 HER. ONE PERSON STAYED WITH HER THE ENTIRE TIME OUT THERE.
22 AND IT WAS KENNETH JAMES. HE NEVER LEFT HER SIDE. YOU
23 REMEMBER THAT? HE WAS THE FIRST ONE TO SEIZE HER RIGHT AT
24 THAT PICNIC TABLE WHERE EVEN OFFICER WALKER AND OFFICER
25 BLACKWELL SAYS YOU DON'T NEED, YOU DON'T NEED LIGHT, YOU CAN

1 SEE. AND HE CAME THIS CLOSE TO HER.

2 DO YOU THINK FOR ONE MINUTE, DO YOU THINK FOR ONE MINUTE
3 IN THE TIME THAT SHE SPENT WITH KENNETH JAMES AT THAT PICNIC
4 TABLE AND THEN WHEN HE BROUGHT HER OVER AND BENT HER OVER
5 THAT BENCH AND THEN DRAGGED HER IN HERE AND THEN WALKING HER
6 THROUGH THAT OPEN CEMETERY THIS CLOSE, THIS CLOSE FOR 15, 20,
7 25 MINUTES, WHEN HE'S TELLING HER — PARDON MY LANGUAGE,
8 LADIES — "DON'T LOOK AT ME, BITCH. QUIT LOOKING AT ME,
9 BITCH, DON'T LOOK AT ME, BITCH." NOT MY WORDS, NOT
10 NIGHTY'S WORDS; KENNETH JAMES'S WORDS. THIS CLOSE TO HER. DO
11 YOU THINK SHE'S EVER GOING TO FORGET THE FACE OF KENNETH
12 JAMES?

13 IT DOESN'T MATTER WHAT YOU DO HERE TODAY. THE FACE OF
14 KENNETH JAMES IS FOREVER, FOREVER, FOREVER TATTOOED INTO THE
15 MIND OF VICTIM. BECAUSE SHE SPENT 15, 20, 25, 30
16 MINUTES OF TERROR WITH THAT MAN IN A WELL-LIT AREA, IN A
17 WELL-LIT AREA, ENOUGH FOR SEVERAL OF THE WITNESSES THAT HAVE
18 TESTIFIED TO YOU, AND THEN WALKING ACROSS THAT CEMETERY WHERE
19 THERE ARE NO TREES, WITH THE OPEN LIGHT OF THE NIGHT.

20 THEIR OWN EXPERT SAID THE DISTANCE THAT SOMEBODY IS, IF
21 SOMEBODY IS 30 FEET AWAY OR IF SOMEBODY IS THIS CLOSE, THE
22 CLOSER YOU ARE, THE BETTER CHANCE YOU HAVE AN OPPORTUNITY TO
23 LOOK AT SOMEBODY'S FACE AND REMEMBER THEIR FACE. AND SHE WAS
24 CLOSER TO KENNETH JAMES THAN I AM TO YOU THREE LADIES IN THE
25 FRONT ROW.

1 AND THE AMOUNT OF TIME YOU SPEND. THIS ISN'T A
2 TEN-SECOND ROBBERY WHERE SOMEBODY RUNS INTO A CONVENIENCE
3 STORE AND ASKS FOR THE MONEY AND RUNS OUT, WHAT ONLY TAKES 20
4 OR 30 SECONDS. THIS TOOK A SIGNIFICANT AMOUNT OF TIME AND HE
5 NEVER LEFT HER SIDE.

6 AND THE STUDIES THAT SHOW THE MORE SERIOUS THE CRIME,
7 THE GREATER RELIABILITY OF THE EYE WITNESS IDENTIFICATION.
8 DOES IT GET -- SHORT OF DEATH, IS THERE ANY MORE SERIOUS
9 CRIME FOR A WOMAN THAN TO BE SEXUALLY ABUSED, STRIPPED NAKED
10 AND ROBBED OF YOUR POSSESSIONS?

11 THEY QUESTIONED HER BECAUSE SHE DIDN'T GIVE A CLOTHING
12 DESCRIPTION. AND EVEN TOMMY THOMAS SAID HE DIDN'T ASK. THAT
13 DOESN'T MEAN SHE DOESN'T REMEMBER THE CLOTHES THAT HE WAS
14 WEARING. SHE DIDN'T GIVE -- SHE TOLD THE POLICE WHAT THEY
15 ASKED. HE DIDN'T ASK HER FOR A CLOTHING DESCRIPTION. IT
16 DOESN'T MEAN SHE DOESN'T REMEMBER A CLOTHING DESCRIPTION. HE
17 DIDN'T ASK FOR SPECIFIC FACIAL FEATURES. IT DOESN'T MEAN SHE
18 DOESN'T REMEMBER HIS FACE.

19 YOU HEARD THE TESTIMONY OF OFFICER WALKER. WHEN HE
20 FOUND HER WALKING ALONG THIS ROAD COMPLETELY NAKED,
21 HYSTERICAL, SHAKING; HIS FIRST THOUGHT WAS HE HAD TO GET
22 E.M.S. TO GET HER TO THE HOSPITAL.

23 YOU KNOW, SHE GOES TO THE HOSPITAL AND SHE'S THERE FOR
24 SEVERAL HOURS AND THEN IS SUBJECTED TO THIS SEXUAL ASSAULT
25 PROTOCOL WHERE A PHYSICIAN OBSTETRIC AND GYNECOLOGIST, BUT

1 NOT HERS. AND I DON'T KNOW. BEING A MAN, I DON'T KNOW. I
2 CAN ONLY IMAGINE THAT THE BOND BETWEEN A WOMAN AND HER
3 GYNECOLOGIST IS OBVIOUSLY A TRUSTING BOND.

4 BUT SOME PERSON THAT SHE DOESN'T KNOW COMES IN. A
5 PELVIC EXAM IS PERFORMED. SHE GOES HOME AND TRIES TO REST,
6 GOES BACK DOWN TO THE POLICE DEPARTMENT TO GIVE HER
7 STATEMENT. SHE'S NOT A PROFESSIONAL WITNESS, LADIES AND
8 GENTLEMEN. SHE DID THE BEST SHE COULD. SHE DID THE BEST SHE
9 COULD UNDER THE CIRCUMSTANCES.

10 AND YOU THINK THIS WAS EASY FOR HER? MR. STRICKLER SAYS
11 HE DOESN'T WANT TO SHOW ANY DISRESPECT. BUT IT DIDN'T HAPPEN
12 THE WAY VICTIM SAYS IT HAPPENED? IT DIDN'T HAPPEN THE
13 WAY VICTIM, THE WAY THIS LADY SAYS IT HAPPENED? WHO IS
14 ANYONE TO QUESTION A WOMAN WHO'S BEEN RAPED? IF ANYONE KNOWS
15 HOW IT HAPPENED, VICTIM KNOWS HOW IT HAPPENED. YOU
16 THINK VICTIM 'S GOING TO FORGET THE NIGHT SHE WAS RAPED
17 BY FIVE MEN? WHO IS ANYONE TO QUESTION HER AS TO HOW IT
18 HAPPENED?

19 IT TOOK COURAGE FOR HER TO GO TO THE POLICE DEPARTMENT.
20 IT TOOK COURAGE FOR HER TO BE SHOWN THESE PHOTOGRAPHS, WITHIN
21 11 HOURS TO RELIVE THIS EVENT, TO LOOK INTO THE FACE OF ONE
22 OF THE MEN WHO TERRORIZED HER. IT TOOK COURAGE FOR HER TO
23 LOOK AT THE PHOTO LINE-UP. IT TOOK COURAGE FOR HER TO COME
24 INTO THIS COURTROOM THREE YEARS LATER AND FACE YOU PEOPLE WHO
25 SHE DOESN'T EVEN KNOW, COURAGE TO TAKE THAT WITNESS STAND TO

1 TELL YOU SOMETHING THAT IS SO HORRIFIC, SOMETHING THAT SHE
2 WISHES SHE COULD JUST ERASE LIKE A VCR TAPE. I SUBMIT TO YOU
3 IT TOOK COURAGE FOR HER TO COME IN HERE IN THE FACE OF TWO OF
4 THE MEN WHO TERRORIZED HER AND WHO RAPED HER AND WHO ROBBED
5 HER. COURAGE. DON'T REJECT THAT, LADIES AND GENTLEMEN.
6 EMBRACE IT.

7 SHE NEVER TOLD ANYBODY ABOUT THE RED JERSEY THAT KENNETH
8 OR THE RED SHIRT OF KENNETH JAMES. SO THE POLICE WHEN THEY
9 WERE SEARCHING, THEY DIDN'T LOOK FOR A RED SHIRT. THEY
10 DIDN'T KNOW WHETHER IT WAS A RED SHIRT OR NOT. WE KNOW THEY
11 HAD PLENTY OF TIME TO GO BACK TO THE HOUSE AT 2528 AND CHANGE
12 CLOTHES. THAT'S WHY HE'S NOT WEARING A RED SHIRT IN THE
13 VIDEO. AND TO PUT ON A HAT. THEY HAD PLENTY OF TIME TO DO
14 THAT. AND I'LL GET TO THE TIMES.

15 BUT THAT'S THE TESTIMONY OF WINFRED AND *Victim*. I SUBMIT
16 TO YOU THAT THE TESTIMONY OF *Victim* ALONE IS SUFFICIENT
17 TO CONVICT KENNETH JAMES AND ROBERT JAMES. I TOLD YOU I'D
18 GET BACK TO ROBERT JAMES. IT WASN'T JUST WHEN HE PULLED THAT
19 PISTOL OUT WHEN HE WAS THIS CLOSE TO HER. BECAUSE WHO WAS
20 THE SECOND PERSON? WHO WAS THE SECOND PERSON AFTER KENNETH
21 JAMES HAD HIS WAY WITH HER ON THAT BENCH? WHO WAS THE SECOND
22 PERSON WHEN SHE WAS TAKEN BACK THERE AND THROWN ON HER BACK?
23 THE SECOND PERSON TO HAVE HIS WAY WITH HER WAS THE SAME ONE
24 THAT SHE REMEMBERED WITH THE GUN, ROBERT JAMES. TWO
25 OPPORTUNITIES AS SHE IS ON HER BACK AND HE IS PENETRATING

1 HER. IMAGINE HOW CLOSE. AND I DON'T WANT TO BE GRAPHIC.
2 I'M SORRY. BUT THE LAW REQUIRES US TO PROVE CERTAIN
3 ELEMENTS. BUT IMAGINE HOW CLOSE HER FACE IS TO HIS FACE WHEN
4 HE IS ENTERING HER.

5 DOES IT STOP THERE? DOES THE EVIDENCE STOP THERE? NO,
6 MA'AM. NO, SIR. BECAUSE THE POLICE EARLY THAT MORNING BEGIN
7 TO INVESTIGATE. AND OFFICER TOWNSEND GOES TO THE AMOCO
8 STATION ON TWO NOTCH ROAD. THE AMOCO STATION ONE, TWO,
9 THREE, FOUR BLOCKS, IF YOU WILL, FROM THE INCIDENT. THE
10 AMOCO STATION A BLOCK AND A HALF FROM THE DEFENDANT'S
11 RESIDENCE.

12 SHE GOES THERE, UP AND DOWN TWO NOTCH ROAD AT THE
13 CONVENIENCE STORES, INCLUDING THIS AMOCO STATION AT 1:23.
14 NOW, ACCORDING TO AND WINFRED THE LIGHTS WENT OUT, AND
15 WE KNOW THEY WENT OUT AT 11:00. AND IT WAS SOMETIME AFTER
16 THAT THEY WERE SITTING AROUND TALKING AND THE EVENT STARTED
17 AND IT WENT A WHILE, AND THE POLICE DIDN'T START RESPONDING
18 TO THE SCENE UNTIL ABOUT A QUARTER TO ONE. AND OFFICER
19 BLACKWELL WHO WROTE DOWN ON HIS REPORT, HE HAD IT WRITTEN
20 DOWN, HE STARTED HIS DOG RUNNING ABOUT 1:15 TO 1:20, AND IT
21 TOOK ABOUT 10 MINUTES, 15 MINUTES. I CAN'T EXACTLY RECALL
22 HIS TESTIMONY. BUT AROUND 1:30.

23 BUT CLEARLY THESE PEOPLE HAD ENOUGH TIME TO LEAVE THE
24 SCENE, BY MS. YEADON AND WINFRED -- AND I'LL GET TO THAT --
25 AND GET TO THE HOUSE AND CHANGE CLOTHES AND GO ON THEIR WAY

1 TO THE AMOCO STATION. SO SHE IS GOING UP AND DOWN THE AMOCO
2 STATION. AND WE SEE HER AT 1:23. I MEAN, THAT'S
3 UNCONTRADICTED. AT 1:23 OFFICER TOWNSEND, THE POLICE
4 OFFICER, IS IN THE STORE. AND YOU SAW HER ON THAT TAPE,
5 1:23, TALKING TO SANGETTA COAXUM ASKING HER IF -- THERE HAS
6 BEEN A RAPE AND A ROBBERY -- IF ANYBODY IS TRYING TO CASH OR
7 CHANGE A \$100 BILL, YOU NEED TO BE SUSPICIOUS OF THAT. OR
8 HAS ANYBODY BEEN IN HERE? WELL, YEAH, ABOUT TEN OR FIFTEEN
9 MINUTES BEFORE.

10 WELL, LO AND BEHOLD, LADIES AND GENTLEMEN, TEN OR
11 FIFTEEN MINUTES BEFORE, TWO GENTLEMEN -- AND THEY WERE ON
12 THAT TAPE. YOU SAW THEM ON THE TAPE. THEY WALK IN TOGETHER.
13 A THIRD PERSON -- UNFORTUNATELY, WE CAN'T MAKE OUT HIS FACE
14 -- WAITS OUTSIDE. THEY WALK IN. THEY GO UP. NOTHING IS
15 PURCHASED. NOTHING'S PURCHASED. AND THEY WALK BACK OUT
16 AGAIN AFTER WHATEVER CONVERSATION OCCURS. AND SANGETTA
17 COAXUM, SHE DOESN'T KNOW ROBERT AND KENNETH JAMES. THAT'S
18 THE REASON WHY SHE'S NOT GOING TO SIT HERE. SHE DOESN'T KNOW
19 THEM. SHE'S A CONVENIENCE STORE CLERK.

20 NOW, THEY WANT TO SAY THAT -- NOW, THESE PICTURES ARE
21 TAKEN OF COURSE OVER THREE YEARS AGO. YOU'VE HAD AN
22 OPPORTUNITY TO SIT DOWN AND LOOK AT KENNETH JAMES FOR FIVE
23 DAYS AND ROBERT JAMES -- THAT THIS IS NOT KENNETH JAMES AND
24 THIS IS NOT ROBERT JAMES. AND I SUBMIT TO YOU THAT THAT'S
25 GOING TO BE UP TO YOU 12 JURORS TO DECIDE, THAT WITHIN A

1 BLOCK AND A HALF OF THEIR HOUSE, I GUESS THERE ARE TWO
2 FRIENDS OR BROTHERS THAT JUST HAPPEN TO HAVE THE SAME HAIR
3 STYLES AS ROBERT JAMES AND KENNETH JAMES AND JUST HAPPEN TO
4 LOOK ALMOST EXACTLY LIKE THEM I GUESS IF THAT'S NOT THEM.

5 I GUESS THAT'S JUST GOING TO BE YOUR DECISION TO DECIDE
6 WHETHER THAT'S ROBERT JAMES AND THAT'S KENNETH JAMES. I
7 SUBMIT TO YOU THAT IS ROBERT JAMES AND THAT IS KENNETH JAMES.
8 AND IT'S GOING TO BE UP TO YOU TO DECIDE WHETHER IT IS OR IT
9 ISN'T.

10 BUT IT JUST DIDN'T FINISH THEN. BECAUSE AN HOUR LATER
11 OFFICER GIBSON RIGHT AT THE SAME AMOCO STATION WALKING DOWN
12 THE STREET STOPS KENNETH JAMES. NO QUESTION IT'S KENNETH
13 JAMES. I MEAN, HE STOPS KENNETH JAMES WHO'S OUTSIDE OF
14 COURSE, ISN'T AT HOME IN BED. HE'S OUT THERE. NOW, ISN'T IT
15 LOGICAL TO ASSUME THAT AFTER THEY LEFT, THEY HAD A HUNDRED —
16 I GUESS IT'S JUST — I GUESS IT'S JUST A COINCIDENCE, LADIES
17 AND GENTLEMEN, THAT THESE TWO INDIVIDUALS THAT JUST HAPPENED
18 TO LOOK SO MUCH LIKE ROBERT AND KENNETH JAMES A BLOCK AND A
19 HALF FROM ROBERT AND KENNETH JAMES'S HOUSE JUST HAPPENS TO AT
20 1:12, WITHIN AN HOUR AFTER THIS INCIDENT, IT'S JUST A
21 COINCIDENCE THAT THESE TWO PEOPLE WHO LOOK SO MUCH LIKE THEM,
22 BUT ACCORDING TO THE DEFENSE ATTORNEYS AREN'T THEM, JUST
23 HAPPEN TO BE ASKING FOR CHANGE FOR A HUNDRED FOR FIVE
24 TWENTIES. IS THAT JUST ANOTHER COINCIDENCE, LADIES AND
25 GENTLEMEN?

1 FIVE PEOPLE WERE THE ASSAILANTS. THEY GET A \$100 BILL,
2 AND TWO PEOPLE THAT JUST, THAT AREN'T THEM BUT THEY JUST
3 HAPPEN TO LOOK LIKE THEM ARE WITHIN A BLOCK AND A HALF OF
4 THEIR HOUSE ASKING FOR FIVE TWENTIES. JUST ANOTHER
5 COINCIDENCE JUST LIKE ONE OF THE INDIVIDUALS INVOLVED HAD THE
6 NICKNAME SOMETHING DOG AND KENNETH JAMES'S NICKNAME IS
7 "K-DOG".

8 BUT IT DOESN'T END THERE. BECAUSE THEN THEY GET THE
9 DOGS OUT BECAUSE THEY KNEW IT WAS A RECENT CRIME. AND
10 SERGEANT BLACKWELL BRINGS GATOR OUT. AND YOU HEARD ME; I
11 SPENT 20 MINUTES I BET, AND THERE WAS REASON FOR THAT, I
12 SPENT 20 MINUTES GOING OVER THE QUALIFICATIONS OF SERGEANT
13 RANDY BLACKWELL, HIS M.P., HIS ARMY SERVES AND HIS C.P.D.,
14 HIS ADVANCED URBAN TRACKING AND HIS DOG, GATOR. BECAUSE I
15 SUBMIT TO YOU THIS EVIDENCE IS INCREDIBLE. IT DOESN'T GET
16 ANY STRONGER THAN THIS, LADIES AND GENTLEMEN.

17 IF WE WOULD HAVE HAD A VIDEO CAMERA CREW FOLLOWING THE
18 JAMES BROTHERS AND KENNETH AND ROBERT AND THEIR FRIENDS UP TO
19 ORR STREET, IF WE WOULD HAVE HAD A VIDEO CAMERA FOLLOWING
20 THEM WOULD HAVE BEEN THE ONLY WAY WE WOULD HAVE BEEN ANY
21 STRONGER THAN WHAT HAPPENED HERE.

22 IT STARTS HERE. AND GATOR WITH A 100 PERCENT
23 PROFICIENCY TESTING IN THAT AREA WHERE YOU HAVE -- YOU
24 REMEMBER HIM TESTIFYING TO THIS? IF THE HANDLER OR THE DOG
25 DOESN'T KNOW IS GIVEN A PIECE OF CLOTHING FROM ONE OF FIVE OR

1 SIX PEOPLE AND YOU DON'T KNOW WHICH ONE AND ALL FIVE OR SIX
2 START OFF AND THEY START BREAKING AWAY, START BREAKING AWAY;
3 AND IN ALL OF HIS TESTING, IN ALL OF THE YEARS THAT HE'S BEEN
4 A TRACKING DOG, 100 PERCENT OF THE TIME HE HAS TRACKED HE HAS
5 NOT BEEN LED ASTRAY AND HE HAS TRACKED WHEN HE PICKS UP ON
6 THE ONE SCENT. AND THAT'S ALL HE'S PICKING UP ON, IS ONE
7 HUMAN SCENT.

8 AND HE TRACKS FROM WHERE THIS HAPPENED, THE INCIDENT
9 WHERE *victim*'S BRA IS, WHERE TWO USED CONDOMS ARE, NOT
10 FIVE USED CONDOMS, NOT FOUR USED CONDOMS, FOUR CONDOM
11 PACKAGES, ALL THE SAME BY THE WAY, GRAY; TWO USED CONDOMS, HE
12 TRACKS, JUST HAPPENS TO TRACK RIGHT ALONG THE SAME WAY THE
13 PATH OF WHERE THE SUSPECTS ARE GOING. JUST HAPPENS. AND HE
14 COMES UP ON THE MAUSOLEUM.

15 NOW, YOU REMEMBER THE TESTIMONY OF *victim*. KENNETH
16 JAMES NEVER LEFT HER SIDE. AND KENNETH JAMES AND ANOTHER
17 PERSON, POSSIBLY ROBERT JAMES — SHE'S NOT SURE. SHE WAS
18 BEING HONEST WITH YOU. IT COULD HAVE BEEN ROBERT JAMES. BUT
19 TWO PEOPLE WENT IN. ONLY ONE PERSON WENT INTO THE MAUSOLEUM
20 AND HAD HIS WAY WITH HER. AND THAT WAS KENNETH JAMES. WENT
21 INTO THE MAUSOLEUM AND HAD HIS WAY WITH HER.

22 AND YOU NOTICE THEY DIDN'T FIND ANY USED CONDOMS IN THE
23 MAUSOLEUM? AND IT JUST SO HAPPENS THAT THE LAST PERSON TO
24 SEXUALLY ASSAULT *victim* IS KENNETH JAMES IN THAT
25 MAUSOLEUM, AND THEY FIND NO USED CONDOMS, AND THE SPERM DONOR

1 ON THE SWAB FROM THE VAGINAL VAULT OF A VICTIM JUST
2 HAPPENS TO MATCH THE DNA OF KENNETH BROWN (SIC). OF KENNETH
3 JAMES. I'M SORRY. I GUESS THAT'S JUST ANOTHER COINCIDENCE?

4 AND THEN THEY MADE HER STAY THERE. AND THEN THE TWO OF
5 THEM WALKED OFF. GATOR IS ON ONE SCENT. WE CAN'T TELL YOU
6 WHOSE SCENT IT IS. WE CAN TELL YOU IT WAS ONE OF THE
7 PARTICIPANTS INVOLVED IN THIS. AND GATOR GOES UP HERE AND
8 CONTINUES ON AND CONTINUES ON HIS WAY. AND YOU'VE GOT TO
9 REMEMBER RANDY BLACKWELL KNEW NOTHING OF THE FACTS WHEN HE'S
10 OUT THERE. HE HAD NO IDEA WHAT WINFRED BULL HAD SAID. HE
11 HADN'T INTERVIEWED WINFRED BULL. HE HADN'T INTERVIEWED
12 CHARLES MURRAY OR MS. YEADON, CHARLES MURRAY'S MOTHER. HE
13 KNEW NOTHING. HE WAS LETTING THE DOG LEAD HIM. AND IT JUST,
14 IT LEADS HIM RIGHT ACROSS THIS PATH RIGHT ACROSS THE STREET,
15 RIGHT ACROSS THE STREET, UP ORR STREET, RIGHT INTO 2528 ORR
16 STREET. AND IT GOES FROM A TRACKING MODE TO HIS HEAD COMES
17 UP TO A SEARCH MODE.

18 NOW, LADIES AND GENTLEMEN, AT THAT POINT IN TIME THEY'RE
19 MAKING THIS BIG DEAL ABOUT THE FACT, WELL, WHY IS IT WHEN HE
20 PULLED HIM OFF OF THAT PORCH AND HE WALKED HIM AROUND, WHY IS
21 IT THAT HE DIDN'T PICK UP ON THE TRACK TO THE AMOCO? WELL,
22 YOU REMEMBER THE LAST QUESTION I ASKED SERGEANT BLACKWELL ON
23 REDIRECT. IT'S AFTER I WAS FINISHED WITH DIRECT; THE DEFENSE
24 LAWYERS HAD AN OPPORTUNITY TO CROSS HIM. THE LAST QUESTION I
25 ASKED HIM ON REDIRECT WHEN I CAME UP AGAIN, CAN YOU EXPLAIN

1 THAT? AS AN EXPERT, YEAH, HE HAD THE ONLY LOGICAL
2 EXPLANATION FOR THAT.

3 WHEN HE'S TRACKING, WHEN GATOR IS TRACKING, HE IS ON A
4 STRONG SCENT. AND HE TRACKS TO 2528 ORR STREET A STRONG
5 SCENT. AND THAT SCENT IS -- HE'S GOING -- HE'S GOING FROM
6 THE SEARCH MODE THERE BECAUSE HE'S UP ON THE PORCH OF WHERE
7 PEOPLE LIVE. AND YOU REMEMBER ME ASKING HIM, WHAT KIND OF A
8 SCENT WOULD YOU EXPECT TO BE EMANATING FROM THAT HOUSE WHERE
9 YOU SHOWER, WHERE YOU SLEEP, WHERE YOU EAT, WHERE YOU WATCH
10 T.V., WHERE YOUR CLOTHES ARE?

11 THAT'S WHY. HE DIDN'T KNOW ABOUT THE AMOCO. IF HE
12 WOULD HAVE KNOWN ABOUT THE AMOCO, HE SAID, I WOULD HAVE TAKEN
13 GATOR FAR ENOUGH AWAY FROM THAT PORCH WITH THAT STRONG SCENT,
14 FAR ENOUGH AWAY TO TRY AND PICK UP ON ANOTHER SCENT. BUT IF
15 THERE IS A SCENT LEAVING THE HOUSE TO THE AMOCO STATION, IF
16 HE DOESN'T GET GATOR FAR ENOUGH AWAY, GATOR IS GOING TO GO
17 RIGHT BACK TO WHERE THAT STRONG SCENT IS AT THE PORCH BECAUSE
18 THAT'S WHAT GATOR IS TRAINED TO DO. AND THAT'S WHAT GATOR
19 DID.

20 BUT I GUESS IT'S JUST ANOTHER COINCIDENCE THAT GATOR
21 STARTS, GATOR STARTS UP HERE. I KNOW THIS ONE IS UPSIDE
22 DOWN. UP HERE BY THE BUSHES AND GOES ACROSS THE CEMETERY.
23 ALL THESE HOUSES HERE ON MAEBELLE COURT, DOES GATOR GO TO THE
24 HOUSES ON MAEBELLE COURT? IS IT SOMEBODY THAT LIVES IN THESE
25 HOUSES OR VISITING THESE HOUSES? DOES HE GO TO THESE HOUSES

1 AROUND MAEBELLE COURT? DOES HE GO TO GERMANY STREET? DOES
2 GATOR TRACK UP TO WHERE VICTIM WAS PLACED IN THE CAR?
3 WE KNOW GATOR IS NOT ON VICTIM 'S SCENT OR ELSE GATOR
4 WOULD HAVE GONE UP TO WHERE VICTIM IS PLACED IN THE CAR
5 BY OFFICER WALKER.

6 WE KNOW GATOR IS NOT ON WINFRED BULL'S SCENT BECAUSE HE
7 WOULD HAVE WALKED DOWN THIS WAY, COME UP HERE AND THEN WALKED
8 RIGHT -- COME UP TO THE GERMANY STREET RESIDENCE. WE KNOW
9 GATOR IS ON THE SCENT OF ONE OF THE FIVE ASSAILANTS THAT
10 WALKED UP TO THE MAUSOLEUM AND THEN CAME UP.

11 ALL THESE HOUSES, LADIES AND GENTLEMEN, UP AND DOWN
12 GERMANY STREET, YOU HAVE KENDALL COURT APARTMENTS HERE, ALL
13 THESE HOUSES ON ORR STREET, ALL THESE HOUSES ON ORR STREET,
14 ALL THESE HOUSES ON OGDEN STREET; AND I GUESS IT'S JUST
15 ANOTHER COINCIDENCE THAT THE TRAINED 100 PERCENT PROFICIENCY
16 TESTING DOG GATOR GOES TO THE HOUSE THAT KENNETH JAMES AND
17 ROBERT JAMES ARE LIVING IN? IS THAT JUST ANOTHER
18 COINCIDENCE? AND THE SAME HOUSE THAT'S JUST A BLOCK AND A
19 HALF AWAY OF THESE PEOPLE THAT REALLY ARE THERE TRYING TO
20 CASH FIVE TWENTIES OR CHANGE FIVE TWENTIES?

21 AND I'M NOT TRYING TO BE FLIPPANT. I'M TRYING TO SHOW
22 YOU HOW OVERPOWERING THIS EVIDENCE IS. BUT DOES IT STOP
23 THERE? IT DOESN'T STOP THERE, LADIES AND GENTLEMEN. IT DOES
24 NOT STOP THERE. RANDY BLACKWELL HAD NO IDEA AND YET GOES TO
25 THE HOUSE ON ORR STREET, 2528, THAT'S GOT THE PHONE RECORDS.

1 THAT'S WHY I BROUGHT IN THE SCE&G LADY. FROM MARCH OF '96
2 THROUGH JULY OF '96, UNTIL IT WAS TERMINATED, KENNETH JAMES'S
3 NAME, KENNETH JAMES'S HOUSE. AND IN ONE OF THE TWO BEDROOMS,
4 ROBERT JAMES'S PERSONAL PAPERS. AND THAT DOG IS LEADING
5 RIGHT UP TO THE FRONT PORCH RIGHT THERE.

6 NOW, LATER ON THAT MORNING GOES TO THE
7 POLICE DEPARTMENT. SHE'S NOT TOLD THAT THEY HAVE ANY
8 SUSPECTS. SHE GIVES US A STATEMENT. TOMMY THOMAS ASKED HER
9 TO LOOK AT SIX PICTURES. TAKE YOUR TIME AND SEE IF YOU CAN
10 IDENTIFY ANY OF THE INDIVIDUALS INVOLVED.

11 SO SHE LOOKS AT SIX PICTURES EXACTLY LIKE THEY ARE BEING
12 SHOWN TO YOU RIGHT NOW, STATE'S EXHIBIT 2. AND ON MAY 29TH,
13 WITHIN 11 HOURS OF THIS INCIDENT, AFTER BEING THIS CLOSE TO A
14 PERSON FOR 20 TO 30 TO 35 MINUTES, TELLING HER NOT TO LOOK AT
15 HIM, THIS CLOSE, HAVING HIS WAY WITH HER IN AN AREA THAT YOU
16 COULD SEE, SHE LOOKS AT IT AND TAKES HER TIME AND IDENTIFIES
17 KENNETH JAMES.

18 SHE HAS NO IDEA, LADIES AND GENTLEMEN. IS THAT JUST
19 ANOTHER COINCIDENCE? SHE HAS NO IDEA THAT THE DOG TRACKED
20 ALL THE WAY TO THIS HOUSE. SHE HAS NO IDEA OF THE AMOCO
21 PICTURES. SHE HAS NO IDEA OF OFFICER GIBSON STOPPING KENNETH
22 JAMES RIGHT THERE A COUPLE OF BLOCKS AWAY FROM WHERE THE
23 INCIDENT HAPPENED.

24 SHE SEES SIX PEOPLE WITH SIMILAR HAIR STYLES. SHE
25 HAPPENS TO PICK OUT KENNETH JAMES. AND SHE IS POSITIVE. AND

1 SHE TOLD YOU THAT. SHE WILL TAKE THAT TO HER GRAVE, I
2 BELIEVE IS WHAT HER TESTIMONY WAS.

3 AND THEN THREE WEEKS LATER SHE GOES DOWN. IT'S BEEN
4 THREE WEEKS, AND SHE'S SHOWN ANOTHER LINE-UP OF SIX MALES,
5 SAME GENERAL FEATURES. AND SHE PICKS OUT NUMBER 2 AS THE GUY
6 WITH THE GUN, THE ONE THAT HAD HIS WAY WITH ME THE SECOND
7 TIME. SHE DOESN'T KNOW ANY OF THEIR NAMES.

8 NOW, I WANT YOU TO THINK ABOUT THIS, LADIES AND
9 GENTLEMEN. WHAT ARE THE STATISTICAL ODDS, WHAT ARE THE ODDS
10 THAT , THE VICTIM IN THIS CASE, , AFTER
11 LOOKING AT ALL OF HER ASSAILANTS, WHAT ARE THE ODDS WHEN
12 SHOWN SIX PICTURES SHE PICKS OUT NUMBER 6 AND WHEN SHOWN SIX
13 MORE SHE JUST HAPPENS TO PICK OUT ROBERT JAMES, THE BROTHER
14 OF NUMBER 6 WHO I SUBMIT TO YOU DON'T LOOK ANYTHING ALIKE?

15 I MEAN, WHAT ARE THE ODDS BEING SHOWN 12 PICTURES THREE
16 WEEKS APART FROM EACH OTHER THAT IS JUST GOING TO
17 HAPPEN TO PICK NUMBER 6, KENNETH JAMES, AND NUMBER 2, ROBERT
18 JAMES, AND THAT THEY JUST HAPPEN TO HAVE PEOPLE IN THE
19 NEIGHBORHOOD THAT JUST HAPPEN TO LOOK ALMOST EXACTLY LIKE
20 THEM AND THEY JUST HAPPEN TO WITHIN AN HOUR HAPPEN TO BE IN
21 THE AMOCO STATION A BLOCK AND A HALF AWAY FROM THEIR HOUSE
22 AFTER THEIR CRIME TRYING TO CHANGE A HUNDRED DOLLAR BILL INTO
23 TWENTIES?

24 BECAUSE IF THIS ISN'T GOOD ENOUGH EVIDENCE TO CONVICT, I
25 ASK YOU, WHAT IS? IMAGINE THAT. 12 PICTURES. 12 PICTURES

1 HAVE BEEN -- AND SHE TAKES HER TIME. AND WHAT ARE THE
2 STATISTICAL ODDS OF WHEN YOU SIT THERE AND SAY, WELL, IT
3 COULD HAVE BEEN 1 AND IT COULD HAVE BEEN 6. THINK ABOUT ALL
4 THE DIFFERENT PAIRINGS IT COULD HAVE BEEN. AND SHE JUST
5 HAPPENS TO PICK OUT NUMBER 2, ROBERT JAMES, AND NUMBER 6,
6 KENNETH JAMES, KNOWING NOTHING ELSE ABOUT THE FACTS OF THIS
7 CASE. AND LO AND BEHOLD, GATOR TAKES THAT DOG TO THE HOUSE
8 OF ROBERT JAMES AND KENNETH JAMES. AND LO AND BEHOLD KENNETH
9 JAMES'S DNA IS INSIDE OF 'S VAGINAL VAULT.

10 AND CHARLES MURRAY? LADIES AND GENTLEMEN, WE DO KNOW
11 THIS. THIS ADDS TO THE STATISTICAL ODDS ARGUMENT THAT I'M
12 TRYING TO MAKE. WE DO KNOW -- I MEAN MS. YEADON HAS NO -- I
13 MEAN, DO YOU NOT BELIEVE MS. YEADON? MS. YEADON IS JUST A
14 CITIZEN OF THIS COMMUNITY THAT HAPPENED TO BE NICE ENOUGH TO
15 LET SOMEBODY WHO COMES WALKING UP IN HIS UNDERSHORTS AND HIS
16 T-SHIRT BEATEN UP, BLEEDING, CALLS 911 FOR HIM. I MEAN, SHE
17 HAS NO REASON -- SHE DOESN'T KNOW ANY OF THE PARTIES INVOLVED
18 IN THIS.

19 SHE TELLS YOU THAT WHEN SHE'S SITTING OUT HERE SHE SEES
20 FIVE PEOPLE, A GROUP OF THREE AND A GROUP OF TWO. I MEAN, IS
21 THERE ANY REASON TO DOUBT HER? SHE CAN'T IDENTIFY THEM. BUT
22 IS THERE ANY REASON TO DOUBT THAT TESTIMONY FROM MS. YEADON?

23 WELL, THAT'S EXACTLY WHAT WINFRED BULL SAYS. I SAW
24 THREE AND TWO OR TWO AND THREE, BUT THERE WERE FIVE OF THEM.
25 AND WINFRED CAN'T IDENTIFY THEM. HE'S HONEST WITH YOU. BUT

1 IT'S THE SAME FIVE, HE KNOWS FROM THEIR GENERAL APPEARANCE,
2 THE SAME FIVE GUYS THAT WAS KICKING HIM AND BEATING HIM AND
3 HAVING THEIR WAY WITH .. HE CAN'T IDENTIFY THEIR FACES,
4 BUT KNOWS FROM THE WAY THEY ARE IT'S THE SAME FIVE PEOPLE.

5 AND HE EVEN SAYS, THERE GOES THE FIVE DUDES ACROSS
6 GERMANY STREET UP ORR STREET. MS. YEADON EVEN TOLD YOU ALL
7 THAT. YEAH, WINFRED SAID THAT. AND HER SON IS EVEN CLOSER
8 THAN THAT.

9 NOW, CHARLES MURRAY. WHY SHOULD YOU BELIEVE CHARLES
10 MURRAY? IF IT WAS JUST CHARLES MURRAY'S TESTIMONY, THE BEAR
11 TESTIMONY OF CHARLES MURRAY, I AGREE WITH THE DEFENSE THAT
12 EACH AND EVERY ONE OF YOU SHOULD SAY TO YOURSELF, WAIT A
13 MINUTE, WAIT A MINUTE. WE NEED TO QUESTION THIS TESTIMONY.
14 BUT IS IT JUST CHARLES MURRAY?

15 WHEN I TOLD YOU ABOUT WEIGHING THE CREDIBILITY OF
16 TESTIMONY, YOU NEED TO LOOK AT OTHER EVIDENCE THAT
17 CORROBORATES, THAT SUPPORTS THAT. WELL, CHARLES MURRAY'S
18 TESTIMONY IS SUPPORTED BY HIS MOTHER. THERE WERE FIVE GUYS
19 GOING UP THERE. SHE CAN'T IDENTIFY THEM. IT'S SUPPORTED BY
20 WINFRED BULL. IT WAS THE FIVE GUYS THAT WERE DOING THAT TO
21 US.

22 BUT DO YOU KNOW WHO ELSE IT'S SUPPORTED BY? DO YOU KNOW
23 WHO CHARLES MURRAY'S TESTIMONY IS SUPPORTED BY? THE
24 UNCONTRADICTED EVIDENCE OF A TRACKING DOG, SEVEN YEARS, 100
25 PERCENT PROFICIENCY RIGHT UP TO KENNETH JAMES'S AND ROBERT

1 JAMES'S HOUSE. CHARLES MURRAY'S TESTIMONY IS 100 PERCENT
2 CORROBORATED BY THE TRACKING DOG IN THIS CASE.

3 AND OF ALL THESE HOUSES AROUND HERE, GATOR TRACKS HIM TO
4 THE SAME HOUSE THAT CHARLES MURRAY SAYS THAT THEY WERE
5 WALKING TOWARDS, THAT HIS MOTHER SAYS THEY WERE WALKING
6 TOWARDS UP ORR STREET AND THAT WINFRED BULL SAYS THEY WERE
7 WALKING TOWARDS UP ORR STREET.

8 AND HE KNOWS THEM FROM SCHOOL. AND LO AND BEHOLD,
9 ROBERT JAMES WENT TO W. A. PERRY, WENT TO C. A. JOHNSON.
10 KENNETH JAMES WENT TO W. A. PERRY. LO AND BEHOLD. HE KNOWS
11 THEM FROM THE APARTMENT COMPLEXES, AND WE PUT IN THEY LIVED
12 IN THESE APARTMENT COMPLEXES. HE KNOWS THEM WHEN THEY LIVED
13 IN OGDEN STREET. AND GUESS WHAT? WE PUT IN THE EVIDENCE TO
14 YOU THAT HE LIVED ON OGDEN STREET, KENNETH JAMES DID. AND HE
15 LIVED ON ORR STREET. EVERYTHING CHARLES MURRAY TOLD YOU IS
16 CORROBORATED BY GATOR, BY HIS MOTHER, BY WINFRED BULL AND BY
17 ALL THE RECORDS OF WHERE, SCHOOL RECORDS AND ADDRESSES OF
18 WHERE KENNETH JAMES LIVED.

19 NOW, SO YOU ASK YOURSELVES, WHY DIDN'T CHARLES SAY THAT
20 BEFORE? IS IT TOO HARD TO IMAGINE, IS IT TOO HARD TO IMAGINE
21 THAT MAYBE HE JUST DIDN'T WANT TO GET INVOLVED? DO YOU
22 REMEMBER TOMMY THOMAS WHO WENT TO HIM? HE DIDN'T SAY HE
23 COULDN'T PICK ANYBODY. HE SAID HE WOULDN'T. IS THAT SO HARD
24 TO GRASP, THAT PEOPLE, THAT CITIZENS DON'T WANT TO GET
25 INVOLVED? YOU'VE SEEN THIS PROCESS.

1 CHARLES MURRAY ISN'T THE ONLY EVIDENCE AND TESTIMONY WE
2 OFFERED, LADIES AND GENTLEMEN. THE LAST PIECE OF EVIDENCE
3 I'M GOING TO TALK TO YOU ABOUT IS THE DNA, IS THE DNA
4 EVIDENCE. YOU KNOW, IT'S INTERESTING. DNA HAS BEEN USED NOW
5 APPROXIMATELY THE LAST TEN YEARS IN THIS COUNTRY. AND I
6 ASKED AGENT JEFFCOAT -- AND LET ME REMIND YOU OF THIS. JUDGE
7 PLEICONES SAID THAT WHAT THE LAWYERS, WHEN WE ARGUE TO YOU,
8 WHAT WE TELL YOU IS NOT EVIDENCE. WE'RE MAKING ARGUMENT.
9 WHAT WE TELL YOU IS NOT EVIDENCE.

10 IRA JEFFCOAT IS THE EXPERT THAT YOU HEARD FROM ON DNA.
11 MR. STRICKLER'S OPINION OF THIS IS NOT EVIDENCE. HE'S A
12 LAWYER ADVOCATING A POSITION FOR KENNETH JAMES WHO IS
13 CHARGED. IRA JEFFCOAT IS THE EXPERT. YOU CAN ONLY BASE YOUR
14 VERDICT ON THE TESTIMONY THAT'S IN THE RECORD.

15 AND WHAT DID HE TELL YOU? THIS DNA PROCESS THAT SLED
16 USES IS THE SAME PROCESS THAT'S USED, THE PROCESS THAT'S USED
17 BY THE MAJOR TEACHING RESEARCH HOSPITALS IN THIS COUNTRY.
18 THOSE AREN'T LAW ENFORCEMENT OFFICIALS. THESE ARE PEOPLE
19 THAT DO DNA RESEARCH TO HELP ASSIST IN DISEASE AND GENETIC
20 PROBLEMS; THE SAME PROCEDURE USED BY THE UNITED STATES ARMED
21 FORCES; THE SAME PROCEDURES USED BY MEDICAL EXAMINERS FOR THE
22 STATE WHERE THERE'S CATASTROPHIC EVENTS LIKE EARTHQUAKES OR
23 TORNADOES OR HURRICANES OR JUMBO JETS CRASHING; THE SAME
24 PROCEDURE.

25 AND EACH AND EVERY ONE OF THOSE, EACH AND EVERY ONE OF

1 THOSE ENTITIES HAS A MATCH WINDOW. BECAUSE, LADIES AND
2 GENTLEMEN, SCIENCE TECHNOLOGY HASN'T DEVELOPED A COMPUTER OR
3 A MACHINE THAT CAN STRING IT OUT AND GET IT EXACTLY. THAT
4 EVERY ONE OF THEM HAS A MATCH WINDOW. AND THE MOST STRICTEST
5 MATCH WINDOW IS THE FBI'S, WHICH IS PLUS OR MINUS 1.8
6 PERCENT. THEY'RE STRICTER THAN ALL THESE MAJOR UNIVERSITIES
7 AND THE MILITARY, THE MILITARY.

8 AND EVERY ONE OF THE FOUR-PROBE MATCHES, EVERY ONE OF
9 THEM ON KENNETH JAMES IS LESS THAN 1.6 PLUS OR MINUS, MEANING
10 THAT THE MATCHES, THE FOUR-PROBE DNA MATCHES ON KENNETH JAMES
11 ARE WITHIN THE MATCH WINDOW OF EVERY MAJOR TEACHING
12 UNIVERSITY THAT USES THIS DNA PROCESS; THE UNITED STATES
13 ARMED FORCES THAT IDENTIFY MEN AND WOMEN WHO ARE KILLED,
14 SOLDIERS THAT HAVE DIED IN WARS LONG GONE WHERE ALL YOU HAVE
15 IS PIECES.

16 YOU SEE, I GUESS DNA IS OKAY, IT'S OKAY FOR THE MILITARY
17 TO IDENTIFY PEOPLE; IT'S OKAY WHEN YOU'RE USING IT FOR THAT
18 PROCEDURE, THIS SAME PROCESS. IT'S OKAY WHEN THEY'RE DOING
19 THAT. IT'S OKAY FOR MEDICAL EXAMINERS TO IDENTIFY HUMAN
20 REMAINS AND NATURAL DISASTERS. IT'S OKAY — EVEN THE DEFENSE
21 WITNESS THAT TESTIFIED UP HERE, IT'S OKAY, DNA IS THE
22 GREATEST THING SINCE SLICED BREAD WHEN IT EXCLUDES SOMEBODY,
23 WHEN IT'S BEEN USED TO SHOW THAT A PERSON HAS BEEN WRONGLY
24 CONVICTED YEARS AGO BEFORE WE HAD DNA. OH, DEFENSE ATTORNEYS
25 LOVE DNA WHEN IT'S USED TO PULL SOMEBODY OUT OF JAIL.

1 MR. STRICKLER: I OBJECT, YOUR HONOR.

2 THE COURT: YES, SIR. AND YOUR OBJECTION IS WHAT? THAT
3 A PEJORATIVE CAST —

4 MR. STRICKLER: WHICH DEFENSE ATTORNEY?

5 THE COURT: EXCUSE ME. A PEJORATIVE CAST ON DEFENSE
6 ATTORNEYS?

7 MR. STRICKLER: AND SPECIFICALLY WHICH DEFENSE ATTORNEY?

8 THE COURT: YEAH. DON'T TALK ABOUT DEFENSE ATTORNEYS,
9 MR. GASSER. PLEASE CONTINUE. ALL RIGHT.

10 MR. GASSER: ADVOCATES. WHEN DNA IS ON YOUR SIDE, THE
11 SCIENCE IS THERE. AND IT IS UNCONTRADICTED THAT THE
12 PROCEDURE WAS FOLLOWED. BECAUSE THE ONLY TESTIMONY, LADIES
13 AND GENTLEMEN, WAS FROM IRA JEFFCOAT. SO IT'S UNCONTRADICTED
14 THAT THE PROCEDURES WERE FOLLOWED.

15 AND GET THIS ABOUT DNA. ON THE ONE HAND THEY WANT YOU
16 TO BELIEVE THAT THIS DNA PROCEDURE WAS ACCURATE BECAUSE IT
17 EXCLUDED ROBERT JAMES. IT DID. IT EXCLUDED ROBERT JAMES AS
18 THE PERSON WHOSE SPERM IT WAS INSIDE victim 'S VAGINAL
19 VAULT. IT DOESN'T MEAN HE WASN'T THERE. IT DOESN'T MEAN HE
20 DIDN'T RAPE HER. IF HE WAS USING A CONDOM, THEY ONLY FOUND
21 TWO USED CONDOMS AT THE SCENE, THERE WERE FOUR CONDOM
22 WRAPPERS. SO MAYBE THEY CARRIED TWO OF THEM AWAY STILL ON
23 THEIR BODIES. IF HE DIDN'T EJACULATE.

24 AND OF COURSE UNDER THE HAND OF ONE IS THE HAND OF ALL,
25 IT DOESN'T MATTER. BUT THE POINT IS, ON THE ONE HAND DNA IS

1 ADEQUATE SCIENCE IN THIS CASE BECAUSE IT EXCLUDES ROBERT
2 JAMES. THEN HOW CAN YOU SAY IT'S INADEQUATE OR FLAWED
3 BECAUSE IT INCLUDES KENNETH JAMES? WHERE IS THE LOGIC BEHIND
4 THAT, LADIES AND GENTLEMEN? IT IS 100 PERCENT, IT IS
5 GREATEST THING SINCE SLICED BREAD BECAUSE IT EXCLUDES ROBERT
6 JAMES AS THE DEPOSITOR OF THAT SEMEN.

7 WELL, LADIES AND GENTLEMEN, IF THE SCIENCE, THE SAME
8 TESTS WERE BEING RUN, IF IT'S GOOD TO EXCLUDE ROBERT JAMES,
9 THEN WHY ISN'T IT WHEN THE SAME TESTING IS RUN AS GOOD
10 AGAINST KENNETH JAMES? BECAUSE THAT'S WHAT THE RESULTS WERE.

11 AND AS FAR AS THREE FAILED, ABSOLUTELY NOT. AND I KNOW
12 MR. STRICKLER WOULD NEVER INTENTIONALLY MISLEAD YOU. THAT'S
13 NOT THE TESTIMONY. I CAME BACK UP ON REDIRECT. THERE WERE
14 TWO PURPOSES OF THE PROBES. HE TESTS IT. ALL SEVEN PROBES
15 MATCHED. IT WAS A DNA MATCH, A PRINT OF KENNETH JAMES. ALL
16 SEVEN OF THEM WAS A MATCH OF KENNETH JAMES.

17 BUT THEIR OWN INTERNAL PROTOCOL, THEY COULD ONLY USE
18 FOUR OF THE MATCHES FOR THE STATISTICAL TESTIMONY HE GAVE,
19 THE ONE IN 15 MILLION. BECAUSE FOUR OF THEM WERE REALLY
20 GOOD, EVEN THOUGH THE OTHER THREE WERE MACHINES, THEIR OWN
21 INTERNAL PROTOCOL WHICH IS USED TO BENEFIT THE SUSPECT.

22 SO HERE SLED IS BEING ATTACKED BECAUSE THEIR INTERNAL
23 PROTOCOL -- YOU KNOW, OTHER PEOPLE'S INTERNAL PROTOCOL MAY
24 NOT BE THAT WAY. I DON'T KNOW. THERE IS NO TESTIMONY TO
25 THAT. BUT HERE SLED SETS UP A PROTOCOL THAT SAYS EVEN IF

1 IT'S A MATCH, IF IT ISN'T SOLID, WE'RE GOING TO, TO THE
2 BENEFIT OF THE SUSPECT, WE'RE NOT GOING TO INCLUDE IT WHEN WE
3 DO OUR STATISTICAL.

4 THERE IS NO EVIDENCE, IT IS WRONG FOR ANYONE TO SUGGEST
5 TO YOU THAT THERE WAS THREE FAILURES. THE WORD WAS
6 INCONCLUSIVE FOR THE PURPOSE OF THE STATISTICAL ANALYSIS.
7 ONE IN 15 MILLION. THE CHANCES ARE ONE IN 15 MILLION. EVEN
8 MR. STRICKLER, MR. STRICKLER SAYS IF YOU THROW OUT TWO OF THE
9 PROBES, OF WHICH IRA JOSEPH BAREFOOT IS UNWILLING TO DO --
10 AND HE IS THE EXPERT; MR. STRICKLER IS THE LAWYER -- BUT EVEN
11 IF YOU THROW OUT TWO OF THE PROBES, IT'S GREATER THAN 99
12 PERCENT.

13 BUT I SUBMIT TO YOU THAT WHY THROW OUT TWO OF THE
14 PROBES? THEY GAVE THEM THREE OF THE PROBES BECAUSE OF THEIR
15 OWN INTERNAL PROTOCOL WITH A FOUR-PROBE MATCH. FOUR-PROBE
16 MATCH. ONE PROBE IS A MATCH. THE MORE PROBES THAT YOU MATCH
17 THE GREATER POSSIBILITY THAT IT COULD POSSIBLY BE SOMEONE
18 ELSE. AND IT WAS JUST BASIC STATISTICS THEY USE.

19 THE CHANCE OF SOMEBODY ELSE DEPOSITING THAT SEMEN WAS
20 ONE IN 15 MILLION AFRICAN-AMERICANS, ONE IN 90 MILLION
21 CAUCASIANS. THERE'S ONLY 4 MILLION SOUTH CAROLINIANS 30
22 PERCENT OF WHICH APPROXIMATELY ARE AFRICAN-AMERICANS. THAT
23 IS 1.2 AFRICAN-AMERICANS IN THE STATE OF SOUTH CAROLINA.

24 AND THE CHANCE THAT ANOTHER -- THERE'S NO QUESTION

25 AND WINFRED BULL SAID ALL THESE INDIVIDUALS THAT WERE

1 OUT THERE WERE AFRICAN-AMERICAN MALES. BUT IS THAT ALL WE
2 HAVE? YOU'VE GOT -- JUST THINK ABOUT IT. SO NOW THE DNA,
3 ADD THAT TO THE EQUATION. ADD THE EQUATION THAT SHE JUST
4 HAPPENS TO PICK OUT TWO BROTHERS, KENNETH JAMES AND ROBERT
5 JAMES THREE WEEKS APART AND THE 12 PHOTOGRAPHS SHE JUST
6 LOOKED AT OVER THREE WEEKS, SHE JUST HAPPENS TO PICK OUT
7 KENNETH JAMES; SHE JUST HAPPENS TO PICK OUT ROBERT JAMES.

8 AND IRA JEFF WHO KNOWS NOTHING ABOUT THE FACTS OF THIS
9 CASE JUST HAPPENS TO GET A FOUR-PROBE MATCH AGAINST KENNETH
10 JAMES WHO JUST HAPPENS TO LIVE AT 2528 ORR STREET AND WHICH
11 GATOR JUST HAPPENS TO FOLLOW THE SCENT TO. AND HIS NICKNAME
12 JUST HAPPENS TO BE "K-DOG".

13 NOW, LADIES AND GENTLEMEN, IF YOU THINK THAT ALL THIS
14 EVIDENCE IS JUST THIS MERE COINCIDENCE, THEN FINE. ACQUIT
15 THEM. BUT I SUBMIT TO YOU THAT THE EVIDENCE IN THIS CASE
16 GOES FAR BEYOND BEYOND A REASONABLE DOUBT. ABSENT CATCHING
17 KENNETH AND ROBERT JAMES AT THE SCENE IN THE ACT, THE STATE
18 SUBMITS WE DO NOT KNOW ANYTHING ELSE, BETTER EVIDENCE WE
19 COULD HAVE PROVIDED TO YOU. I MEAN, OBVIOUSLY, EVEN WHEN
20 YOU'VE GOT THEM ON VIDEOTAPE THE DEFENSE SAYS THAT AIN'T GOOD
21 ENOUGH.

22 RAPE. RAPE IS NOT A CRIME OF PASSION, LADIES AND
23 GENTLEMEN. RAPE IS CRIME OF PUNISHMENT. AND ON THE MORNING
24 OF MAY THE 29TH, 1996, KENNETH JAMES, ROBERT JAMES AND THREE
25 OTHER INDIVIDUALS, THEY DECIDED TO PUNISH . AND

1 YOU CAN'T DO A THING ABOUT THAT. NONE OF YOU CAN DO A THING
2 ABOUT THAT. YOU CAN'T CHANGE TIME.

3 BUT I SUBMIT TO YOU THERE'S ONE THING YOU CAN DO. YOU
4 CAN GO BACK IN YOUR JURY ROOM AFTER YOU'VE LISTENED TO JUDGE
5 PLEICONES CHARGE YOU THE LAW, YOU CAN EVALUATE THIS EVIDENCE,
6 AND WHEN YOU SEE HOW STRONG THIS EVIDENCE IS, YOU CAN AGREE
7 THE STATE HAS MET ITS BURDEN.

8 AND ONCE YOU HAVE MADE THAT DECISION, LADIES AND
9 GENTLEMEN, YOU HAVE A POWER, A POWER TO SEND KENNETH JAMES
10 AND ROBERT JAMES A MESSAGE. YOU WILL NOT ASSAULT, STRIP,
11 ROB, RAPE CITIZENS IN THIS COMMUNITY AND NOT BE HELD
12 ACCOUNTABLE. YOU HAVE THE POWER TO DO JUSTICE FOR

13 AND JUSTICE FOR WINFRED BULL. I ENCOURAGE YOU, MADAM
14 FORELADY AND LADIES AND GENTLEMEN, PLEASE USE THAT POWER.
15 THANK YOU.

16 THE COURT: FOLKS, THANK YOU FOR YOUR ATTENTION. I KNOW
17 THAT IT'S LATE IN THE DAY OBVIOUSLY AND YOU'RE GOING TO HAVE
18 TO LISTEN TO ME TALK FOR A WHILE. BUT ALL OF THIS IS
19 NECESSARY TO YOUR MISSION. I MEAN, OBVIOUSLY WE COULD HAVE
20 COME BACK MONDAY OR SATURDAY AND THAT KIND OF THING AND YOU'D
21 HAVE BEEN FRESHER, BUT I DIDN'T WANT TO INCONVENIENCE YOU.

22 I ALSO DON'T WANT YOU TO THINK THAT BECAUSE IT'S LATE IN
23 THE DAY THAT YOU ARE UNDER ANY KIND OF TIME CONSTRAINTS OR
24 ANYTHING LIKE THAT. CERTAINLY THAT WOULD NOT DO JUSTICE
25 EITHER TO THE STATE OR TO THE DEFENDANTS. BECAUSE YOU'RE

1 REASONABLE, FAIR MINDED PEOPLE ARE ACCUSTOMED TO EMPLOYING IN
2 YOUR DAY-TO-DAY LIVES.

3 AMONG THESE TESTS WOULD BE THE APPEARANCE OR Demeanor OF
4 THE WITNESS AS HE OR SHE TESTIFIED FROM THE WITNESS STAND.
5 WAS THE WITNESS FORTHRIGHT OR WAS THE WITNESS HESITANT? DID
6 THE WITNESS'S TESTIMONY CONTAIN DISCREPANCIES EITHER WHILE
7 SHE OR HE WAS TESTIFYING, OR DID IT CONTAIN DISCREPANCIES
8 WITH PREVIOUS TESTIMONY OR STATEMENTS GIVEN BY THAT PERSON?
9 IF IT CONTAINED SOME DISCREPANCIES, WERE THOSE DISCREPANCIES
10 ABOUT MATTERS OF SUBSTANCE AND IMPORTANCE, OR WERE THEY ABOUT
11 MINOR, UNIMPORTANT DETAILS THAT MIGHT BEST BE EXPLAINED AWAY
12 UPON HUMAN FRAILTY THAT BESETS EVERYBODY IN THIS COURTROOM?

13 WHAT POSITION WAS THE PERSON IN TO KNOW THE FACTS ABOUT
14 WHICH HE OR SHE TESTIFIED? AND I CALL THAT VANTAGE POINT.
15 WHERE WAS THE PERSON WHEN THEY SAW OR HEARD THE FACT THAT
16 THEY CAME INTO THIS COURTROOM AND REPORT TO YOU AS HAVING
17 SEEN OR HEARD? WHAT POSITION WERE THEY IN TO KNOW? WHAT WAS
18 THEIR VANTAGE POINT?

19 WHAT REASON, IF ANY, DOES A WITNESS HAVE TO BE BIASED OR
20 PREJUDICED IN FAVOR OF THE TESTIMONY THAT HE OR SHE GAVE?
21 WHAT REASON -- EXCUSE ME. WAS THE TESTIMONY OF THE WITNESS
22 CORROBORATED OR SUPPORTED; THAT IS, WAS IT STRENGTHENED BY
23 OTHER TESTIMONY AND EVIDENCE IN THE CASE, OR WAS IT NOT
24 CORROBORATED, NOT SUPPORTED; WAS IT WEAKENED BY OTHER
25 TESTIMONY AND EVIDENCE IN THE CASE? ALL OF THOSE SORTS OF

1 COMMONSENSE EVALUATIONS ARE THE KIND OF THINGS THAT YOU CAN
2 PUT ON THE ASSESSMENT OF THE CREDIBILITY OF WITNESSES.

3 NOW, WITH REGARD TO WITNESSES, YOU CAN BELIEVE
4 ABSOLUTELY EVERYTHING THAT A GIVEN WITNESS TELLS YOU,
5 DISREGARDING NOTHING OF THAT PERSON'S TESTIMONY. ON THE
6 OTHER HAND, YOU CAN BELIEVE NOTHING OF WHAT A WITNESS TELLS
7 YOU, DISREGARDING THAT TESTIMONY IN ITS TOTALITY.

8 YOU CAN BELIEVE A SMALL PORTION OF WHAT A WITNESS TELLS
9 YOU, DISREGARDING THE MAJOR PORTION, OR VICE VERSA. YOU'RE
10 GOING TO TELL ME, WELL, YOU KNOW, THAT SOUNDS LIKE SELECTIVE
11 BELIEF. AND, YOU KNOW, IT IS. BUT IT'S SELECTIVE BELIEF
12 BASED ON THAT OATH YOU'VE TAKEN TO WELL AND TRULY TRY THIS
13 CASE AND TO APPLY THESE CRITERIA THAT I'M GIVING YOU RIGHT
14 NOW. SO, YEAH. YOU CAN SELECTIVELY BELIEVE AS LONG AS YOU
15 STICK TO THAT OATH YOU TOOK AND APPLY THE LAW AS I AM NOW
16 GIVING IT TO YOU.

17 NOW, AMONG OTHER THINGS YOU CAN TAKE INTO ACCOUNT WHEN
18 ASSESSING THE BELIEVABILITY OF A WITNESS IS WHETHER OR NOT
19 THAT PERSON HAS BEEN CONVICTED OF A CRIME PUNISHABLE BY MORE
20 THAN A YEAR OR A CRIME IMPORTING DISHONESTY. AND THAT IS THE
21 SOLE PURPOSE FOR WHICH SUCH EVIDENCE IS INTRODUCED, AS IT MAY
22 BEAR, IF AT ALL, ON CREDIBILITY. AND YOU MAY UTILIZE IT FOR
23 THAT PURPOSE SHOULD YOU FIND IT TO BE APPROPRIATE FOR THAT
24 PURPOSE.

25 YOU HAVE HAD A TYPE OF TESTIMONY IN THIS CASE CALLED

1. EXPERT TESTIMONY WHERE A PERSON WHO IS QUALIFIED BY REASON OF
2. BACKGROUND, TRAINING, EDUCATION OR EXPERTISE HAS BEEN
3. QUALIFIED TO ASSIST YOU IN A TECHNICAL AREA WHICH YOU AS A
4. LAY PERSON MAY NEED ASSISTANCE.

5. THAT PERSON MORE FREQUENTLY THAN NOT TESTIFIES BY THE
6. MEANS OF OPINION TESTIMONY. BUT IT'S BEEN SAID UNDER OUR LAW
7. THAT AN EXPERT'S OPINION IS NOT GIVEN TO YOU TO MAKE YOUR
8. OPINION FOR YOU, BUT IT IS GIVEN TO YOU TO ASSIST YOU IN A
9. TECHNICAL AREA IN WHICH YOU MAY NEED ASSISTANCE. YOU MAY
10. ACCORD IT SUCH WEIGHT AND PROBATIVE VALUE YOU DEEM IT TO BE
11. ENTITLED TO, TAKING INTO ACCOUNT THE EXPERT'S QUALIFICATIONS
12. AND HIS MANNER OF TESTIFYING AND ALL OF THE OTHER FACTORS
13. THAT RELATE TO THE CREDIBILITY OR BELIEVABILITY OF A WITNESS.

14. YOU HAVE HAD A TYPE OF TESTIMONY IN THIS CASE CALLED
15. IDENTIFICATION TESTIMONY. AND I'M GOING TO TELL YOU ABOUT
16. THAT IN JUST A SECOND. BUT YOU MUST UNDERSTAND THAT
17. EVERYTHING I'M TELLING YOU RIGHT NOW -- AND I HAVEN'T GOTTEN
18. TO THIS PORTION YET -- IS AGAINST THE BACK DROP OF WHY WE'RE
19. HAVING THIS TRIAL. BECAUSE TO ALL 16 OF THESE INDICTMENTS
20. KENNETH JAMES AND ROBERT JAMES HAVE EACH ENTERED PLEAS OF NOT
21. GUILTY.

22. THOSE PLEAS OF NOT GUILTY PLACE UPON THE STATE THE
23. BURDEN OF PROVING THEIR GUILT, IF THEY CAN, BY COMPETENT
24. EVIDENCE BEYOND A REASONABLE DOUBT. THEY HAVE NO OBLIGATION
25. TO PROVE THEIR FREEDOM FROM GUILT FOR ABSENCE FROM GUILT.

1 AND UNDERSTAND EVERYTHING THAT I'M TELLING YOU AGAINST THAT
2 BACK DROP. BUT I AM GOING TO TELL YOU ABOUT THESE OTHER
3 THINGS BECAUSE I THINK IT LOGICALLY FLOWS BETTER FOR ME TO
4 TELL YOU ABOUT SOME OF THESE THINGS BEFORE I GET INTO BURDEN
5 OF PROOF AND STANDARDS OF PROOF.

6 AN ISSUE IN THIS CASE OR ONE OF THE ISSUES IN THIS CASE
7 IS THE IDENTIFICATION OF THE DEFENDANT OR DEFENDANTS AS THE
8 PERPETRATORS OF THE CRIME. THE STATE HAS THE BURDEN OF
9 PROVING IDENTIFICATION BY THE SAME STANDARD, BEYOND A
10 REASONABLE DOUBT. YOU, THE JURY, MUST BE SATISFIED BEYOND A
11 REASONABLE DOUBT OF THE ACCURACY OF THE IDENTIFICATION BEFORE
12 YOU MAY ACCEPT THAT IDENTIFICATION.

13 IF YOU ARE NOT CONVINCED BEYOND A REASONABLE DOUBT THAT
14 THE PERSON WAS THE PERSON WHO COMMITTED THE CRIME, THEN YOU
15 WOULD FIND THE DEFENDANT NOT GUILTY. WHAT I'M SAYING ABOUT
16 EYE WITNESS IDENTIFICATION, IF YOU ARE NOT SATISFIED THAT THE
17 IDENTIFICATION HAS BEEN PROVED BEYOND A REASONABLE DOUBT BY
18 THAT PARTICULAR WITNESS, YOU MAY REJECT THAT AND MUST RELY,
19 IF AT ALL, ON ANY OTHER PROOF THAT MAY BE PUT FORWARD BY THE
20 PROSECUTION THAT DOES IN FACT SATISFY ITS BURDEN OF PROOF.

21 IDENTIFICATION TESTIMONY YOU SEE IS AN EXPRESSION OF
22 BELIEF OR IMPRESSION BY THE WITNESS. ITS VALUE DEPENDS ON
23 THE OPPORTUNITY THAT A WITNESS HAD TO OBSERVE THE OFFENDER OR
24 OFFENDERS AT THE TIME OF THE OFFENSE AND TO MAKE RELIABLE
25 IDENTIFICATIONS LATER.

1 IN APPRAISING OR ASSESSING THE IDENTIFICATION TESTIMONY
2 OF A WITNESS, YOU MAY CONSIDER THE FOLLOWING THINGS AMONG
3 OTHERS. ARE YOU CONVINCED THAT THE WITNESS HAD THE CAPACITY
4 AND AN ADEQUATE OPPORTUNITY TO OBSERVE THE OFFENDER? WHETHER
5 THE WITNESS HAD AN ADEQUATE OPPORTUNITY TO OBSERVE THE
6 OFFENDER AT THE TIME OF THE OFFENSE WILL BE AFFECTED BY SUCH
7 MATTERS AS HOW LONG OR HOW SHORT A TIME WAS AVAILABLE, HOW
8 CLOSE OR HOW FAR AWAY THE WITNESS WAS, HOW GOOD WERE THE
9 LIGHTING CONDITIONS, WHETHER THE WITNESS HAD HAD OCCASION TO
10 SEE OR TO KNOW THE PERSON IN THE PAST.

11 ARE YOU SATISFIED THAT THE IDENTIFICATION MADE BY THE
12 WITNESS AFTER THE OFFENSE WAS THE PRODUCT OF HIS OR HER OWN
13 RECOLLECTION? YOU MAY TAKE INTO ACCOUNT BOTH THE STRENGTH OF
14 THE IDENTIFICATION AND THE CIRCUMSTANCES UNDER WHICH THE
15 IDENTIFICATION WAS MADE.

16 IF THE IDENTIFICATION BY THE WITNESS MAY HAVE BEEN
17 INFLUENCED BY THE CIRCUMSTANCES UNDER WHICH THE DEFENDANT WAS
18 PRESENTED TO HER OR HIM FOR IDENTIFICATION, YOU SHOULD
19 SCRUTINIZE THE IDENTIFICATION WITH CARE.

20 YOU MAY ALSO CONSIDER THE LENGTH OF TIME THAT LAPSED
21 BETWEEN THE OCCURRENCE OF THE CRIMES AND THE NEXT OPPORTUNITY
22 THAT THE WITNESS HAD TO OBSERVE THE DEFENDANT AS A FACTOR
23 BEARING ON THE RELIABILITY OF THE IDENTIFICATION.

24 YOU MAY TAKE INTO ACCOUNT ANY OCCASIONS ON WHICH THE
25 WITNESS FAILED TO MAKE AN IDENTIFICATION OF THE DEFENDANT OR

1 MADE AN IDENTIFICATION THAT WAS EITHER CONSISTENT OR
2 INCONSISTENT WITH HIS OR HER IDENTIFICATION AT THE TRIAL.

3 FINALLY, YOU CONSIDER THE CREDIBILITY OR BELIEVABILITY
4 OF AN I.D. WITNESS, AN IDENTIFICATION WITNESS, IN THE SAME
5 WAY AS YOU CONSIDER THAT OF ANY OTHER WITNESS; THAT IS,
6 WHETHER HE IS TRUTHFUL, OR SHE IS TRUTHFUL, HAD THE CAPACITY
7 AND OPPORTUNITY TO MAKE A RELIABLE OBSERVATION ON THE MATTER
8 COVERED IN HER TESTIMONY OR IN HIS TESTIMONY.

9 AGAIN, THE BURDEN OF PROOF IS ALWAYS ON THE STATE TO
10 PROVE THE IDENTITY OF THE ACCUSED WHETHER THROUGH
11 IDENTIFICATION TESTIMONY OR OTHER TESTIMONY BEYOND A
12 REASONABLE DOUBT.

13 NOW, YOU'VE GOT TWO TYPES OF TESTIMONY OR EVIDENCE THAT
14 YOU TYPICALLY DEAL WITH. AND ONE OF THOSE IS DIRECT EVIDENCE
15 WHEREIN A PERSON COMES INTO COURT AND TELLS YOU WHAT THEY
16 OBSERVED OR SENSED WITH ONE OF THEIR FIVE SENSES. AND
17 USUALLY IT'S SIGHT OR IT'S HEARING. SO YOU'VE GOT TO
18 UNDERSTAND THAT THAT'S DIRECT TESTIMONY. SOMEBODY COMES IN
19 AND TELLS YOU WHAT THEY SAW OR WHAT THEY HEARD.

20 NOW, THERE'S ANOTHER KIND OF TESTIMONY, AND THAT'S
21 CALLED CIRCUMSTANTIAL EVIDENCE. EITHER TYPE OF THESE
22 EVIDENCE, CIRCUMSTANTIAL OR DIRECT EVIDENCE, IS APPROPRIATE
23 KIND OF EVIDENCE TO BE INTRODUCED IN A COURT AND EITHER MAY
24 FORM THE BASIS, WHETHER ALONE OR IN COMBINATION, WITH OTHER
25 TYPES OF EVIDENCE OR WITH EACH OTHER AS SUFFICING TO PROVE AN

1 EVENT.

2 BUT CIRCUMSTANTIAL EVIDENCE IS SUBJECT TO A KIND OF TEST
3 THAT WE HAVE TO GIVE IT BEFORE YOU MAY CONSIDER IT.
4 CIRCUMSTANTIAL EVIDENCE, UNLIKE DIRECT EVIDENCE, IS THE PROOF
5 OF PERHAPS -- EXCUSE ME -- THE PROOF OF A SERIES OF CONNECTED
6 FACTS OR CERTAIN FACTS FROM WHICH YOU MAY INFER OR DEDUCE THE
7 EXISTENCE OF ANOTHER FACT. IT DOESN'T SAY THAT SOMEBODY
8 DIRECTLY SAW SOMETHING, BUT IT SAYS THAT SOMEBODY DIRECTLY
9 OBSERVED A CERTAIN THING AND PERHAPS IN A CHAIN OR SEQUENCE
10 OF EVENTS THAT CAUSES YOU TO BE ABLE TO CONCLUDE AT THE END
11 OF THIS SEQUENCE OF EVENTS THAT ANOTHER FACT EXISTS.

12 I'LL GIVE YOU AN EXAMPLE -- AND I'M NOT TRYING TO BE
13 FUNNY OR FLIPPANT -- FROM MY OWN EXPERIENCE. I'VE GOT TWO
14 DAUGHTERS. ONE IS NOW 27 AND ONE IS ALMOST 30. WHEN THEY
15 WERE EIGHT AND FIVE, THE EIGHT-YEAR-OLD WENT TO SCHOOL AND
16 THE FIVE-YEAR-OLD STAYED AT HOME ALL DAY.

17 ONE DAY THE EIGHT-YEAR-OLD GOES TO SCHOOL. SHE TURNS TO
18 HER SISTER WHO IS THERE WITH A CARETAKER DURING THE DAY AND
19 SAYS, "THERE'S ONE BANANA IN THE KITCHEN. THE BANANA IS
20 MINE. DO NOT EAT IT."

21 THE EIGHT-YEAR-OLD IS GONE TO SCHOOL ALL DAY. THE
22 FIVE-YEAR-OLD IS THERE WITH THE CARETAKER ALL DAY. THE
23 EIGHT-YEAR-OLD GETS BACK FROM SCHOOL. THE BANANA IS GONE
24 FROM THE KITCHEN. THERE IS A BANANA PEEL IN THE TRASHCAN IN
25 THE FIVE-YEAR-OLD'S ROOM. THE FIVE-YEAR-OLD'S BREATH SMELLS

1 LIKE A BANANA.

2 FROM THIS SERIES OF CONNECTED FACTS THE EIGHT-YEAR-OLD
3 DEDUCED OR INFERRED THAT THE FIVE-YEAR-OLD HAD TAKEN AND
4 EATEN HER BANANA. WHETHER SHE WAS JUSTIFIED IN DRAWING THAT
5 CONCLUSION IS THE TYPE OF EXERCISE THAT YOU AS A JURY HAVE TO
6 GO THROUGH. IN SHORT, THERE MAY BE OTHER FACTS THAT AFFECTED
7 THAT PARTICULAR CHAIN. MAYBE IT WAS THE CARETAKER. WHO
8 KNOWS? BUT THERE ARE — THAT IS THE SORT OF THING, THE
9 EXERCISE THAT YOU HAVE TO GO THROUGH IN EVALUATING
10 CIRCUMSTANTIAL EVIDENCE.

11 NOW, BEFORE YOU — WHEN AND TO THE EXTENT THAT THE STATE
12 RELIES UPON CIRCUMSTANTIAL EVIDENCE IN ORDER TO PROVE A FACT
13 AT ISSUE, THE CIRCUMSTANTIAL EVIDENCE MUST MEASURE UP TO THE
14 REQUIREMENTS OF THE LAW. THE CIRCUMSTANCES NOT ONLY MUST BE
15 PROVED, BUT THEY MUST POINT CONCLUSIVELY TO THE GUILT OF THE
16 ACCUSED AND NOT BE CONSISTENT WITH ANY OTHER REASONABLE
17 HYPOTHESIS.

18 THEY MUST BE WHOLLY CONSISTENT WITH EACH OTHER, AND IN
19 EVERY PARTICULAR RESPECT, THEY MUST BE ABSOLUTELY
20 INCONSISTENT WITH ANY OTHER THEORY OTHER THAN THE GUILT OF
21 THE ACCUSED. AND IF THEY ARE NOT PERFECTLY CONSISTENT WITH
22 EACH OTHER AND DO NOT POINT WHOLLY AND CONCLUSIVELY TO THE
23 GUILT OF THE ACCUSED AND TO NO OTHER REASONABLE HYPOTHESIS,
24 YOU MUST REJECT THE CIRCUMSTANTIAL EVIDENCE ON THAT GIVEN
25 POINT. BUT YOU MAY RELY UPON OTHER DIRECT EVIDENCE BEARING

1 ON THAT POINT OR OTHER CIRCUMSTANTIAL EVIDENCE MEETING THIS
2 TEST THAT I'VE JUST GIVEN YOU AS BEARING ON THAT POINT. BUT
3 IF IT DOESN'T MEASURE UP TO THAT TEST, YOU MUST REJECT THAT
4 PARTICULAR PIECE OF CIRCUMSTANTIAL EVIDENCE.

5 AND OF COURSE THE REASON FOR THE PRECEDING PRINCIPLE IS
6 THAT ALL PRESUMPTIONS OF LAW INDEPENDENT OF EVIDENCE ARE IN
7 FAVOR OF INNOCENCE, AND EVERY PERSON IS PRESUMED INNOCENT
8 UNTIL HE IS PROVED TO BE GUILTY BEYOND A REASONABLE DOUBT.
9 AND A PERSON CAN'T BE CONVICTED ON CONJECTURE, SPECULATION,
10 SUSPICION OR SURMISE NO MATTER HOW STRONG THAT SUSPICION MAY
11 BE.

12 AND THAT BRINGS US TO THE BURDEN OF PROOF. THE STATE
13 MUST PROVE THE GUILT OF EACH DEFENDANT BECAUSE EACH IS
14 ENTITLED TO YOUR INDIVIDUALIZED CONSIDERATION OF HIS CHARGES
15 AGAINST HIM. AND THEY MUST PROVE; THAT IS, THE STATE HAVING
16 THE BURDEN OF PROOF, MUST PROVE GUILT OF EACH AND EVERY
17 ELEMENT OF EACH AND EVERY OFFENSE CHARGED BEYOND A REASONABLE
18 DOUBT.

19 AGAIN, INDEED, THE STATE IS THE ONLY ENTITY THAT'S GOT
20 THE BURDEN OF PROOF. DEFENDANTS HAVE NO BURDEN OF PROOF.
21 THEY DON'T HAVE TO PROVE THEIR FREEDOM FROM GUILT OR ABSENCE
22 FROM GUILT. IN MANY SITUATIONS THAT MIGHT BE IMPOSSIBLE TO
23 DO. AND THAT IS WHY WE ALWAYS PLACE UPON THE STATE, THE
24 GOVERNMENTAL ENTITY PROSECUTING A CASE, THE BURDEN OF PROVING
25 GUILT.

1 AND THAT BURDEN OF PROOF, YOU'VE HEARD THE TERM BEFORE.
2 IT'S BEYOND A REASONABLE DOUBT. THAT IS THE BURDEN OF PROOF
3 IN THE CRIMINAL LAW. THE STANDARD OF PROOF BEYOND A
4 REASONABLE DOUBT MEANS THIS. A REASONABLE DOUBT BEYOND WHICH
5 GUILT MUST BE PROVED, A REASONABLE DOUBT IS THAT SORT OF
6 DOUBT AS WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

7 SO IF A REASONABLE PERSON, WHO IS REASONABLE PEOPLE?
8 WELL, YOU ARE. YOU WERE SELECTED AS REASONABLE PEOPLE. SO
9 IF A REASONABLE PERSON WOULD HESITATE TO ACT ON THAT BODY OF
10 INFORMATION BEFORE HER OR HIM, THEN THAT PERSON HAS A
11 REASONABLE DOUBT. IF THAT SAME REASONABLE PERSON WOULD NOT
12 HESITATE TO ACT BASED UPON THE INFORMATION BEFORE HER OR HIM,
13 THAT PERSON HAS NO REASONABLE DOUBT. AND THE STATE'S BURDEN
14 IS TO PROVE GUILT OF EACH OFFENSE BEYOND A REASONABLE DOUBT.

15 NOW, ANOTHER THING THAT GOES ALONG OR HAND-IN-HAND WITH
16 THE BURDEN OF PROOF PLACED ON THE STATE AND THE STANDARD OF
17 PROOF IS WHAT'S KNOWN AS THE PRESUMPTION OF INNOCENCE,
18 BECAUSE EACH DEFENDANT WHO COMES INTO OUR COURT IS PRESUMED
19 TO BE INNOCENT OF THE CHARGES LODGED AGAINST HIM OR HER.

20 AND THAT PRESUMPTION OF INNOCENCE REMAINS WITH THE
21 DEFENDANT, IT ATTACHES, NUMBER ONE, AT THE MOMENT THAT THE
22 ARREST IS MADE, AND IT REMAINS WITH A DEFENDANT THROUGHOUT
23 ALL PRE-TRIAL PHASES OF A PROCEEDING. IT REMAINS ABOUT THESE
24 DEFENDANTS AT THIS TIME, AND IT GOES INTO YOUR JURY ROOM WITH
25 EACH OF THESE DEFENDANTS.

1 IN SHORT, WHEN YOU WALK INTO THIS JURY ROOM, THAT JURY
2 ROOM, THESE DEFENDANTS WILL STILL BE PRESUMED TO BE INNOCENT.
3 WHAT WILL OVERCOME, IF ANYTHING, THAT PRESUMPTION OF
4 INNOCENCE? THAT IS A COLLECTIVE AND UNANIMOUS FINDING BY THE
5 12 OF YOU WHO ACTUALLY DECIDE THIS CASE. AND IT MAY BE ANY
6 12 OF THE 13 WHO CURRENTLY SIT HERE. BUT A COLLECTIVE AND
7 UNANIMOUS FINDING BY THE 12 OF YOU WHO DECIDE THIS CASE THAT
8 THE STATE HAS BORNE ITS BURDEN OF PROOF; THAT IS, BY PROVING
9 GUILT OF ONE OR MORE OF THESE OFFENSES BEYOND A REASONABLE
10 DOUBT.

11 NOW, IF THEY PROVE ONE OFFENSE, IT DOESN'T MEAN THEY'VE
12 PROVED ALL BECAUSE, AGAIN, EACH CRIME MUST BE CONSIDERED BY
13 YOU INDIVIDUALLY. SO YOU MUST CONSIDER EACH CRIME AGAINST
14 EACH DEFENDANT INDIVIDUALLY AND DETERMINE WHETHER OR NOT THE
15 STATE HAS BORNE ITS BURDEN OF PROOF. IF IT HAS, THEN YOU
16 WOULD ENTER -- YOU WOULD REMOVE THAT PRESUMPTION OF INNOCENCE
17 AS TO THAT OFFENSE, AND YOU WOULD ENTER A FINDING OF GUILTY
18 AGAINST THE DEFENDANT AGAINST WHOM YOU HAVE SO FOUND. IF THE
19 PROOF DOESN'T MEASURE UP TO THAT STANDARD, THEN YOU WOULD
20 ENTER A FINDING OF NOT GUILTY AS TO THAT DEFENDANT AND THAT
21 CHARGE.

22 NOW, THE DEFENDANTS IN THIS CASE ALONG WITH THE
23 PRESUMPTION OF INNOCENCE HAVE EXERCISED THE CONSTITUTIONAL
24 RIGHT THAT THEY HAVE NOT TO TAKE THE WITNESS STAND. THAT
25 GOES HAND-IN-HAND WITH THE PRESUMPTION OF THE INNOCENCE AND

1 THE ABSENCE OF A BURDEN OF PROOF BY A DEFENDANT. A DEFENDANT
2 UNDER OUR SYSTEM HAS ABSOLUTELY NO OBLIGATION TO TAKE THE
3 WITNESS STAND AND TO TESTIFY. IN SHORT, A DEFENDANT MAY AT
4 ALL TIMES, SHOULD HE OR SHE CHOOSE, RELY UPON THE STATE'S
5 PROVING GUILT BEYOND A REASONABLE DOUBT. AND IF THE STATE
6 FAILS TO DO THAT, THEN THAT DEFENDANT IS ENTITLED TO A
7 FINDING OF NOT GUILTY.

8 THIS IS NOT ONLY SOMETHING THAT YOU CANNOT CONSIDER IN
9 ARRIVING AT A VERDICT, IT IS SOMETHING THAT YOU CAN'T EVEN
10 TALK ABOUT WHEN YOU GO BACK INTO THE JURY ROOM. IT CAN'T
11 ENTER INTO YOUR DELIBERATIONS. IN SHORT, IT WOULD BE AN
12 IMPROPER DELIBERATION FOR YOU TO COMMENT ON THE FAILURE OF
13 THE ACCUSED OR EITHER OF THEM TO TAKE THE STAND IN THEIR OWN
14 BEHALF, BECAUSE THEY ARE NOT REQUIRED TO DO SO. END OF THAT
15 PARTICULAR ANALYSIS.

16 NOW, THE STATE HAS CHARGED EIGHT DIFFERENT CRIMES
17 AGAINST EACH OF THESE FOLKS. NOW, A THEORY RELIED UPON BY
18 THE STATE IS SOMETHING KNOWN AS PRESENT, AIDING AND ABETTING.
19 IT'S SOMETIMES CALLED THE HAND OF ONE IS THE HAND OF ALL.
20 AND IN ORDER FOR A PERSON TO BE GUILTY AS AN AIDER OR
21 ABETTOR, THE PERSON MUST BE CHARGEABLE WITH KNOWLEDGE OF THE
22 PRINCIPAL. THAT IS, THE PERSON WHO ACTUALLY DOES THE THING
23 THAT CONSTITUTES THE CRIME, MUST BE CHARGED WITH KNOWLEDGE OF
24 THE PRINCIPAL'S CRIMINAL CONDUCT.

25 MERELY BEING PRESENT AT THE SCENE WHERE A CRIME OCCURS

1 IS NOT SUFFICIENT TO ESTABLISH GUILT AS AN AIDER OR ABETTOR.
2 BUT ALL PERSONS WHO ARE PRESENT, AIDING AND ABETTING,
3 ENCOURAGING AND INCITING ONE ANOTHER TO COMMIT A CRIMINAL ACT
4 ARE EQUALLY GUILTY WITH THE ONE WHO DOES THE ACT. MERE
5 PRESENCE AT THE SCENE OF THE CRIME AGAIN DOES NOT MAKE ONE AN
6 AIDER AND ABETTOR. AND AN AIDER AND ABETTOR IS ONE WHO
7 ADVISES, ASSISTS, ENCOURAGES, PROCURES, COUNSELS
8 ANOTHER TO COMMIT A CRIME.

9 IF A CRIME IS COMMITTED BY TWO OR MORE PERSONS WHO ARE
10 ACTING TOGETHER IN THE COMMISSION OF THAT OFFENSE, THE ACT OF
11 ONE IS THE ACT OF ALL. THIS IS TRUE EVEN IF THERE ARE TWO
12 PEOPLE OR MORE THAN TWO INVOLVED IN THE ACT. TWO OR MORE
13 THAN TWO PEOPLE CAN BE GUILTY OF AN OFFENSE EVEN IF ONLY ONE
14 OF THE PERSONS COMMITTED THE POSITIVE ACT OR THE ACT THAT
15 CONSTITUTES THE CRIME.

16 IF TWO OR MORE PEOPLE ARE TOGETHER, ACTING TOGETHER,
17 ASSISTING EACH OTHER IN THE COMMISSION OF AN OFFENSE, THE LAW
18 SAYS THAT UNDER — EXCUSE ME. IT IS THE LAW OF OUR STATE
19 THAT UNDER THESE CIRCUMSTANCES THE ACT OF ONE IS THE ACT OF
20 ALL AND THE HAND OF ONE IS THE HAND OF ALL. AND YOU'RE NOT
21 LIABLE FOR THE ACTS OF ONE OF YOUR AIDERS AND ABETTERS UNLESS
22 THE ACT IS A NATURAL AND PROBABLE CONSEQUENCE OF THE SHARED
23 MIND-SET THAT THE FOLKS HAVE WHO ARE PRESENT ENCOURAGING,
24 AIDING AND ABETTING ONE ANOTHER IN THE COMMISSION OF THE
25 OFFENSE.

1 SO, THAT IS THE HAND OF ONE IS THE HAND OF ALL. THE ACT
2 OF ONE IS THE ACT OF ALL.

3 NOW, THERE ARE A NUMBER OF OFFENSES CHARGED AGAINST
4 THESE FOLKS. AND IN ORDER TO ASSIST YOU — AND, MR. HOLLIS,
5 WOULD YOU PLEASE COME FORWARD, SIR, AND PASS OUT ONE OF THESE
6 TO EACH OF THE MEMBERS OF THE JURY SO THEY CAN FOLLOW ALONG
7 WITH ME?

8 EACH OF THE DEFENDANTS IS CHARGED WITH THE CRIME OF
9 ARMED ROBBERY. EACH DEFENDANT IS ALLEGED, WHETHER
10 INDIVIDUALLY OR UNDER THE HAND OF ONE IS THE HAND OF ALL
11 THEORY, IS ALLEGED AS TO ALL OF THESE CRIMES; THAT IS THE
12 CONTENTION OF THE STATE, EACH OF THEM IS ALLEGED TO HAVE
13 ROBBED WINFRED BULL AND EACH IS ALLEGED TO HAVE ROBBED

14 . AND THAT WILL BE ONE OF THE RESOLUTIONS THAT YOU WILL
15 HAVE TO MAKE ON A VERDICT FORM.

16 BUT THE ELEMENTS OF ARMED ROBBERY — AND LOOK AT THE
17 NOTE BEFORE WE BEGIN AT THE BOTTOM OF THIS. THESE SHEETS SET
18 FORTH THE ELEMENTS OF THIS OFFENSE. THIS SHEET SAYS "IT IS
19 INTENDED TO ASSIST YOU WHEN CONSIDERED ALONG WITH ALL OTHER
20 WRITTEN AND VERBAL INSTRUCTIONS GIVEN TO YOU BY THE JUDGE."
21 THAT'S ME.

22 NOW, I'M GOING TO GIVE YOU — I'M GOING TO TELL YOU A
23 LITTLE BIT ABOUT ARMED ROBBERY, BUT I'M GOING TO SUPPLEMENT
24 WHAT I'M SAYING HERE. SO YOU'VE GOT TO LISTEN AND PAY
25 ATTENTION TO WHAT I'M TELLING YOU IN ADDITION TO WHAT'S HERE.

1 ARMED ROBBERY, ANY ROBBERY INCLUDES A LARCENY. A
2 LARCENY IS THE TAKING AND CARRYING AWAY OF THE PROPERTY OF
3 ANOTHER. SEE THE FIRST ELEMENT? TAKING AND CARRYING AWAY OF
4 THE PERSONAL PROPERTY OF ANOTHER. THAT'S A LARCENY. WITH
5 THE INTENT TO DEPRIVE HIM OR HER OF POSSESSION OF THAT
6 PROPERTY. NOW, THAT'S — UP UNTIL THEN IT WOULD BE A
7 LARCENY. BUT IF IT'S DONE BY MEANS OF FORCE, INTIMIDATION OR
8 THREATS AND WHILE ARMED WITH A DEADLY WEAPON, IT IS AN ARMED
9 ROBBERY.

10 SO IN ORDER TO BE GUILTY OF AN ARMED ROBBERY, THERE MUST
11 BE A TAKING AND CARRYING AWAY OF PERSONAL PROPERTY OF ANOTHER
12 WITH THE INTENT TO DEPRIVE HER OR HIM OF POSSESSION BY MEANS
13 OF FORCE, INTIMIDATION OR THREATS WHILE ARMED WITH A DEADLY
14 WEAPON. THIS TAKING WOULD BE OF COURSE FROM THE PERSON OR
15 PRESENCE OF THE ALLEGED VICTIM BECAUSE OTHERWISE IT COULD NOT
16 HAVE BEEN ACCOMPLISHED BY MEANS OF FORCE, INTIMIDATION OR
17 THREATS WHILE ARMED WITH A DEADLY WEAPON.

18 SO IT MUST BE TAKEN FROM THE PERSON OR PRESENCE; THAT
19 IS, THE IMMEDIATE PRESENCE OR SURROUNDINGS OF THE PERSON, IN
20 ORDER FOR IT TO BE AN ARMED ROBBERY. TAKING AND CARRYING
21 AWAY OF THE PERSONAL PROPERTY OF ANOTHER WITH THE INTENT TO
22 DEPRIVE HER OR HIM OF POSSESSION BY MEANS OF FORCE,
23 INTIMIDATION, THREATS WHILE ARMED WITH A DEADLY WEAPON.

24 UNDERSTAND THOSE TERMS, FORCE, INTIMIDATION OR THREATS.
25 TO INTIMIDATE SOMEBODY, YOU SCARE SOMEBODY. THAT'S WHAT IS

1 THERE. THE MENS REA, THE GUILTY STATE OF MIND THAT IS
2 INVOLVED HERE, IS THE PURPOSE TO DO THAT. THAT IS, THAT YOU
3 INTEND TO DO THAT ACT, THAT YOU INTEND TO TAKE THIS PROPERTY
4 BY MEANS OF FORCE, VIOLENCE OR PUTTING THAT PERSON IN FEAR
5 WHILE ARMED WITH A DEADLY WEAPON AND YOU DO IT FROM THEIR
6 PRESENCE. THAT'S ARMED ROBBERY.

7 KIDNAPPING. KIDNAPPING IS THE NEXT ONE. AND IT IS NOT
8 AS YOU MIGHT HAVE TRADITIONALLY UNDERSTOOD IT, A CLASSIC
9 EVENT OF ABDUCTING SOMEBODY AND TAKING THEM AND HOLDING THEM
10 FOR RANSOM. KIDNAPPING IS THE SEIZING; THAT IS, GRABBING,
11 CONFINING; THAT IS, RESTRICTING A PERSON'S LIBERTY; ABDUCTING
12 OR CARRYING AWAY, EVEN IF IT'S A SHORT DISTANCE, CARRYING
13 SOMEBODY AWAY, OF A PERSON BY ANY MEANS, WHETHER IT BE
14 FORCEFUL OR NOT, WITHOUT THE AUTHORITY OF LAW.

15 IF YOU'RE NOT AUTHORIZED BY LAW TO CONFINE, AS IN AN
16 ARREST, AS IN SEIZING, CONFINING, ABDUCTING OR CARRYING AWAY
17 A PERSON BY ANY MEANS WHATSOEVER WITHOUT AUTHORITY OF LAW,
18 THEN THAT IS KIDNAPPING. KIDNAPPING BEGINS -- THE OFFENSE OF
19 KIDNAPPING BEGINS AT THE MOMENT A PERSON'S FREEDOM IS
20 DEPRIVED, AND IT CONTINUES UNTIL THAT PERSON'S FREEDOM IS
21 RESTORED.

22 AND CONFINEMENT COULD BE TO CONFINE A PERSON PHYSICALLY
23 TO AN AREA, TO RESTRICT THEIR FREEDOM OF MOTION TO AN AREA,
24 TO HOLD THEM, SEIZE THEM, CONFINED THEM, CARRY THEM AWAY BY
25 ANY MEANS WITHOUT THE AUTHORITY OF LAW. THAT WOULD BE

1 KIDNAPPING.

2 AND EACH OF THEM IS CHARGED WITH KIDNAPPING (I,
3 AND EACH IS CHARGED WITH KIDNAPPING WINFRED BULL.

4 EACH IS CHARGED WITH THE OFFENSE OF CRIMINAL SEXUAL
5 CONDUCT IN THE FIRST DEGREE. AND LET'S GO TO THAT ONE.
6 THAT'S THE NEXT ONE THAT YOU HAVE THERE. THE GUILTY STATE OF
7 MIND THAT'S NECESSARY TO COMPLETE A KIDNAPPING, BY THE WAY,
8 IS KNOWLEDGE THAT YOU ARE DOING THE ACT. YOU DO AN ACT, YOU
9 KNOW THAT YOU ARE DOING IT, AND IT HAS THE EFFECT OF
10 CONFINING THAT PERSON, RESTRICTING HIS OR HER LIBERTY OR
11 SEIZING OR ABDUCTING THAT PERSON.

12 CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE WHICH IS
13 CHARGED AGAINST BOTH OF THESE DEFENDANTS AGAINST
14 IS DEFINED AS THE COMMISSION OF A SEXUAL BATTERY — AND I'M
15 GOING TO DEFINE THAT FOR YOU IN A MINUTE. BUT IT IS THE
16 COMMISSION OF A SEXUAL BATTERY BY MEANS OF AGGRAVATED FORCE.
17 AND I'M GOING TO DEFINE THAT FOR YOU IN A MINUTE. IT'S
18 EITHER GOT TO BE ACCOMPLISHED BY MEANS OF AGGRAVATED FORCE,
19 OR IF THE VICTIM SUBMITS WITHOUT ANY KIND OF FORCE TO A
20 SEXUAL BATTERY WHILE SHE IS ALSO THE VICTIM OF A KIDNAPPING
21 OR ARMED ROBBERY.

22 OKAY? SEXUAL BATTERY. WHAT IS A SEXUAL BATTERY? THAT
23 MEANS SEXUAL INTERCOURSE, FELLATIO OR ANY INTRUSION, HOWEVER
24 SLIGHT, OF ANY PART OF A PERSON'S BODY OR OF ANY OBJECT INTO
25 THE GENITAL OR ANAL OPENING OF ANOTHER PERSON'S BODY EXCEPT

1 WHEN SUCH INTRUSION IS ACCOMPLISHED FOR MEDICALLY RECOGNIZED
2 TREATMENT OR DIAGNOSTIC PURPOSES.

3 SO SEXUAL BATTERY MEANS SEXUAL INTERCOURSE OR FELLATIO,
4 WHICH IS ORAL SEX; OR INTRUSION, HOWEVER SLIGHT, OF ANY PART
5 OF ANY PERSON'S BODY OR ANY OBJECT INTO THE GENITAL OR ANAL
6 OPENINGS OF ANOTHER PERSON'S BODY, HOWEVER SLIGHT THAT
7 PENETRATION MAY BE, EXCEPT WHEN THAT INTRUSION IS
8 ACCOMPLISHED FOR MEDICALLY RECOGNIZED TREATMENT OR DIAGNOSTIC
9 PURPOSES.

10 AGGRAVATED FORCE AS MEANT IN THIS PARTICULAR OFFENSE
11 MEANS THAT THE PERSON WHO IS ALLEGED TO HAVE COMMITTED THIS
12 OFFENSE USES PHYSICAL FORCE OR PHYSICAL VIOLENCE OF A HIGH
13 AND AGGRAVATED NATURE TO OVERCOME THE VICTIM, INCLUDING THE
14 THREAT OF THE USE OF A DEADLY WEAPON. AND THAT WOULD BE
15 AGGRAVATED FORCE. AND REMEMBER IT HAS TO BE ACCOMPLISHED BY
16 MEANS EITHER OF AGGRAVATED FORCE OR SUBMISSION BY THE VICTIM
17 IF SHE IS ALSO THE VICTIM OF A KIDNAPPING OR ARMED ROBBERY AT
18 THE TIME THAT THIS ALLEGED OFFENSE IS COMMITTED.

19 NOW, THE NEXT OFFENSE CHARGED IS ASSAULT WITH INTENT TO
20 KILL. AND IN THIS CASE EACH OF THESE DEFENDANTS IS CHARGED
21 WITH HAVING COMMITTED THE OFFENSE OF ASSAULT WITH INTENT TO
22 KILL AGAINST WINFRED BULL. AN ASSAULT WITH INTENT TO KILL IS
23 AN ATTEMPT TO COMMIT A VIOLENT INJURY TO ANOTHER PERSON WITH
24 MALICE ACCOMPANIED BY THE PRESENT ABILITY TO COMPLETE THE
25 ATTEMPT.

1 IN OTHER WORDS, YOU HAVE AT YOUR DISPOSAL THE MEANS TO
2 CARRY OUT THAT PARTICULAR TRY OR ATTEMPT. AN ATTEMPT, THAT'S
3 A TRY. AN ATTEMPT IS YOU'RE TRYING TO. YOU VENTURE A TRY AT
4 COMMITTING VIOLENT INJURY TO ANOTHER WITH MALICE. AND MALICE
5 MEANS, THE STATE OF MIND THAT IS REQUISITE FOR COMMITTING
6 THIS OFFENSE IS MALICE.

7 MALICE HAS BEEN DEFINED AS AN EVIL STATE OF MIND, A
8 HEART FATALLY BENT ON MISCHIEF. IT IS AN EVIL INTENT. IT IS
9 A MALIGNANT PURPOSE TO COMMIT HARM, NOT MERELY TO THE PERSON
10 AGAINST WHOM THE ALLEGED ASSAULT HAS BEEN ALLEGED TO HAVE
11 BEEN COMMITTED UPON, BUT A GENERALLY MEAN-SPIRITED, EVIL,
12 MALIGNANT HEART FATALLY BENT ON MISCHIEF. AND THAT IS THE
13 ABSENCE OR PRESENCE OF MALICE.

14 MALICE MAY BE EXPRESSED AS WHEN IT'S EXPRESSED IN WORDS,
15 OR IT MAY BE INFERRED FROM CIRCUMSTANCES, SUCH AS THE USE OF
16 A DEADLY WEAPON IN THE ATTEMPT OR TRY. IT MAY BE INFERRED;
17 IT NEED NOT BE INFERRED FROM THAT USE OF A DEADLY WEAPON, AND
18 THAT IS BUT ONE INFERENCE ALONG WITH ALL OTHER EVIDENTIARY
19 FACTS THAT YOU MUST TAKE INTO CONSIDERATION IN DETERMINING
20 WHETHER OR NOT YOU THINK YOU ARE APPROPRIATE IN DRAWING THE
21 INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON, IF YOU
22 FIND A DEADLY WEAPON TO HAVE BEEN USED IN THE ASSAULT, IF
23 THERE WERE AN ASSAULT.

24 OKAY. FINALLY, THE DEFENDANTS ARE EACH CHARGED WITH THE
25 COMMISSION OR ATTEMPTED COMMISSION OF A VIOLENT CRIME. AND I

1 WOULD CHARGE YOU THAT VIOLENT CRIMES ARE ARMED ROBBERY,
2 KIDNAPPING, CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE, AN
3 ASSAULT WITH INTENT TO KILL, THAT THESE OFFENSES WERE
4 COMMITTED OR ATTEMPTED TO BE COMMITTED BY THE DEFENDANTS OR
5 EACH OF THEM, WHETHER INDIVIDUALLY OR UNDER THE HAND OF ONE
6 IS THE HAND OF ALL THEORY, WHILE IN POSSESSION OF A FIREARM
7 OR WHILE VISIBLY DISPLAYING WHAT APPEARS TO BE A FIREARM. SO
8 THAT WOULD BE THE ELEMENTS OF THAT OFFENSE.

9 NOW, WHAT DO YOU HAVE TO DO HERE? YOU HAVE TO HAVE
10 CONVICTED THEM OF ONE OR MORE OF THESE VIOLENT OFFENSES
11 BEFORE YOU COULD EVEN BEGIN TO CONSIDER THIS OFFENSE, BECAUSE
12 UNLESS THEY ARE CONVICTED BY YOU OF HAVING COMMITTED ONE OR
13 MORE OF THE PREVIOUS VIOLENT OFFENSES, THEY OF COURSE WOULD
14 NOT BE GUILTY OF COMMISSION OF OR ATTEMPTED COMMISSION OF A
15 VIOLENT CRIME WHILE IN POSSESSION OF A FIREARM OR WHILE
16 VISIBLY DISPLAYING WHAT APPEARS TO BE A FIREARM.

17 NOW, THOSE ARE THE CHARGES AGAINST THE DEFENDANTS.

18 YOU WILL BE REQUIRED SHORTLY TO BEGIN YOUR CONSIDERATION
19 OF THESE OFFENSES. AND YOU WILL EMBODY YOUR DECISION OF THE
20 FACTS IN THIS CASE GOVERNED BY THE LAW AS I'VE GIVEN IT TO
21 YOU ON THESE VERDICT FORMS. I HAVE PREPARED EIGHT VERDICT
22 FORMS COVERING THE OFFENSES ALLEGED AGAINST KENNETH JAMES AND
23 EIGHT VERDICT FORMS COVERING THE OFFENSES ALLEGED AGAINST
24 ROBERT JAMES. AGAIN, EACH OF THESE DEFENDANTS IS ENTITLED TO
25 AN INDIVIDUALIZED CONSIDERATION, AND YOU WILL DO SO.

1 NOW, I HAVE PREPARED THESE FOR THE ENTIRE JURY'S
2 UTILIZATION; BUT, MADAM PRESIDING JUROR, YOU WILL BE THE ONE
3 WHO WILL ACTUALLY SIGN AND DATE THESE FORMS. AS TO EACH OF
4 THESE VERDICTS, AND I'M GOING TO GO THROUGH EACH ONE OF THEM,
5 IT IS THE SAME AS TO EACH OF THE DEFENDANTS, THE
6 POSSIBILITIES ON THE VERDICTS. BECAUSE SOMETIMES WE HAVE
7 MULTIPLE POSSIBILITIES, YOU CAN COME UP WITH THREE OR FOUR OR
8 FIVE DIFFERENT ANSWERS, SOMETIMES WE ASK YOU VARYING
9 QUESTIONS.

10 BUT ON ASSAULT WITH INTENT TO KILL UPON WINFRED BULL. —
11 THESE ARE IN NO PARTICULAR ORDER, ONLY DONE BECAUSE BY
12 SECRETARY PUT THEM IN THIS ORDER WHEN I ASKED HER TO PREPARE
13 THESE FOR YOU. THE CHOICES HERE ARE THAT THE DEFENDANT,
14 EITHER KENNETH OR ROBERT JAMES, IS EITHER NOT GUILTY OF THIS
15 OFFENSE OR GUILTY. ALL RIGHT?

16 AS TO CRIMINAL SEXUAL CONDUCT UPON CARLA BROWN, THE
17 DEFENDANTS ARE EITHER NOT GUILTY OR GUILTY. NOW, ONE CAN BE
18 GUILTY; ONE CAN BE NOT GUILTY. AGAIN, I CAUTION YOU BY
19 TELLING YOU THAT YOUR VERDICTS DO NOT HAVE TO BE THE SAME FOR
20 EACH ONE OF THESE DEFENDANTS. THEY MAY BE THE SAME. THEY
21 DON'T HAVE TO BE, BECAUSE EACH DEFENDANT IS ENTITLED TO AN
22 INDIVIDUALIZED CONSIDERATION AGAIN.

23 YOUR CHOICES WITH REGARD TO KIDNAPPING OF WINFRED BULL
24 IS EITHER NOT GUILTY OR GUILTY. YOUR CHOICES AS TO THE ARMED
25 ROBBERY OF IS EITHER NOT GUILTY OR GUILTY. THE

1 CHOICES AS TO THE ARMED ROBBERY OF WINFRED BULL IS EITHER NOT
2 GUILTY OR GUILTY. KIDNAPPING OF (, EITHER NOT
3 GUILTY OR GUILTY. POSSESSION OF A FIREARM DURING THE
4 COMMISSION OF VIOLENT CRIME OR CRIMES AGAINST
5 IT'S EITHER NOT GUILTY OR GUILTY. POSSESSION OF A FIREARM
6 DURING THE COMMISSION OR ATTEMPTED COMMISSION OF VIOLENT
7 CRIMES AGAINST WINFRED BULL, CRIME OR CRIMES AGAINST WINFRED
8 BULL, EITHER NOT GUILTY OR GUILTY. THOSE ARE YOUR POTENTIAL
9 VERDICT FORMS AS TO EACH OF THESE DEFENDANTS ON EACH OF THESE
10 CHARGES.

11 I HOPE THAT I HAVE MADE THIS CHARGE UNDERSTANDABLE. IT
12 HAS BEEN MY AIM TO DO SO. YOU SHOULD UNDERSTAND EVERYTHING
13 THAT I HAVE TOLD YOU IN ITS PLAIN, ORDINARY, COMMONSENSE
14 MEANING. AND WHERE I HAVE NOT SPECIFICALLY DEFINED A
15 CONCEPT, A WORD OR A PHRASE TO YOUR EXACT LIKING, YOU MUST
16 UNDERSTAND THAT CONCEPT, WORD OR PHRASE IN ITS PLAIN,
17 ORDINARY, COMMONSENSE MEANING.

18 NOW, YOUR VERDICTS MUST BE UNANIMOUS. THAT MAY
19 INITIALLY SEEM LIKE TO YOU TO BE A DAUNTING TASK, BUT I CAN
20 ASSURE YOU THAT YOU'RE INTELLIGENT PEOPLE. YOU WERE SELECTED
21 AS SUCH, WINNOWNED DOWN FROM A MUCH LARGER LIST OF FOLKS, AND
22 YOU WILL EVENTUALLY ARRIVE AT UNANIMOUS VERDICTS.

23 VERDICT MEANS TO SPEAK OR TO SAY THE TRUTH, AND THAT'S
24 WHAT YOUR VERDICT SHOULD DO. YOUR VERDICT SHOULD SPEAK THE
25 TRUTH OF THIS CONTROVERSY OR THESE CONTROVERSIES AS YOU 12

1 FOLKS DEEM THAT TRUTH TO BE.

2 YOU ARE NOT TO BE ACTUATED OR MOTIVATED IN THIS CASE BY
3 ANY CONSIDERATION OF SYMPATHY, PASSION OR PREJUDICE EITHER
4 WAY; SIMPLY BY THE EVIDENCE THAT HAS BEEN PRESENTED AND THE
5 LAW AS I HAVE GIVEN IT TO YOU, INCLUDING THE SHEETS THAT I
6 HAVE HANDED TO YOU.

7 I'M GOING TO ASK YOU WHEN YOU GO BACK TO YOUR JURY ROOM
8 IN JUST A SECOND TO LEAVE THOSE SHEETS IN YOUR SEAT FOR JUST
9 A SECOND. AND ALL OF YOU ARE GOING TO GO BACK TO THE JURY
10 ROOM IN JUST MOMENT, INCLUDING THE ALTERNATE; BUT NONE OF
11 YOU, INCLUDING THE ALTERNATE, MAY BEGIN DISCUSSING THIS CASE.

12 THAT IS BECAUSE I'M GOING TO HAVE TO TURN AROUND TO THE
13 LAWYERS IN THIS CASE, AND I'M GOING TO SAY, "ARE THERE ANY
14 EXCEPTIONS OR ADDITIONAL REQUESTS?" I'M ASKING THEM, DID I
15 LEAVE SOMETHING OUT, OR DID I SAY SOMETHING WRONG? IF THEY
16 THINK I DID, THEY'LL TELL ME. IF I AGREE WITH THEM, I'LL
17 BRING YOU BACK. AND I WILL PROBABLY TELL YOU ONE LITTLE
18 SENTENCE OR ONE LITTLE PARAGRAPH IN CONTRAST TO THIS LENGTHY
19 CHARGE THAT I HAVE JUST GIVEN YOU.

20 THE REASON I AM TELLING YOU THIS NOW IS BECAUSE WHEN I
21 STARTED PRACTICING LAW MANY YEARS AGO JUDGES DIDN'T TELL
22 JURORS THIS. AND INVARIABLY THEY WOULD BRING THE JURY BACK
23 AND THE JURY WOULD SEEM TO BE PERPLEXED. WELL, THAT DIDN'T
24 BOTHER ME SO MUCH AS A LAWYER, THE JUROR WHO SEEMED TO BE
25 PERPLEXED BECAUSE HE OR SHE WAS NOT PREPARED FOR THIS

1 EVENTUALITY.

2 THE JUROR THAT ALWAYS BOTHERED ME IS THE ONE THAT WOULD
3 SIT THERE AND NOD KNOWINGLY AND SAY, YEAH, OKAY; I KNOW WHY
4 HE BROUGHT US BACK. HE BROUGHT US BACK BECAUSE HE'S TRYING
5 TO GET US TO DECIDE THIS CASE A CERTAIN WAY AND HE'S
6 HIGHLIGHTING THIS CHARGE IN ISOLATION. WELL, IT WILL SEEM
7 LIKE THAT BECAUSE IT WILL SEEM TO FAVOR ONE SIDE OR THE
8 OTHER. BUT IT'S NOT THE REASON I'LL BRING YOU BACK.

9 THE REASON THAT I'LL BRING YOU BACK IS THE SAME REASON
10 THAT JUDGE 30 YEARS AGO BROUGHT JURIES BACK, AND THAT'S
11 BECAUSE WE ARE BOTH FALLIBLE HUMAN BEINGS. BEFORE OUR
12 MISTAKE, OUR ERROR COULD AFFECT YOUR JURY VERDICT AND MAKE
13 THIS VERDICT APPEALABLE, THE ERROR WAS RECTIFIED,
14 SELF-CORRECTED; YOU THEN ARE RETIRING TO BEGIN DELIBERATING
15 WITH ALL OF THE CORRECT AND APPROPRIATE LAW.

16 NOW, ARE ALL 12 OF YOU ON THE MAIN -- ARE ALL 13 OF YOU
17 FEELING ALL RIGHT RIGHT NOW OTHER THAN OBVIOUSLY BEING TIRED?
18 ARE YOU FEELING OKAY PHYSICALLY? OKAY. NOW, I WANT YOU TO
19 GO BACK, AND IT IS IMPERATIVE THAT YOU NOT BEGIN DISCUSSING
20 THIS CASE OR ANY ASPECT OF IT.

21 IF THERE ARE NO ADDITIONAL REQUESTS THAT I GRANT, YOU
22 WILL RECEIVE A KNOCK ON THE DOOR AND YOU'LL BE TOLD TO BEGIN
23 DELIBERATING AFTER ONE OF YOU IS EXTRACTED FROM THE JURY
24 ROOM. OKAY? DO NOT BEGIN DELIBERATING UNTIL THERE ARE ONLY
25 12 OF YOU IN THAT JURY ROOM. IT'S MOST LIKELY TO BE THE

1 ALTERNATE, BUT IT COULD BE UNDER OUR LAW ANY OF THE 12 OF
2 YOU; ANY OF THE 13 OF YOU.

3 SO DON'T BEGIN DELIBERATING UNTIL YOU ARE TOLD TO BEGIN
4 DELIBERATING. AND YOU WILL BE GIVEN EVERYTHING THAT HAS A
5 STICKER ON IT. YOU WILL BE GIVEN THE VERDICT FORMS THAT I
6 HAVE SHOWED YOU, AND YOU WILL BE TOLD TO BEGIN DELIBERATING.
7 BUT RIGHT NOW LEAVE YOUR SHEETS IN YOUR CHAIRS, GO TO YOUR
8 JURY ROOM. DON'T DISCUSS THE CASE AMONG YOURSELVES.

9 (JURY OUT AT 5:18 P.M.)

10 THE COURT: OKAY. MR. GASSER.

11 MR. GASSER: NOTHING, YOUR HONOR.

12 THE COURT: MR. STRICKLER, MR. SNEED, ANYTHING THAT
13 MAKES A DIFFERENCE?

14 MR. STRICKLER: WELL, OF COURSE, YOUR HONOR.

15 THE COURT: OKAY.

16 MR. STRICKLER: YOUR HONOR, I WOULD NOTE AT THIS POINT
17 IN TIME I TAKE EXCEPTION TO YOUR HONOR WHEN YOU WERE CHARGING
18 RELATIVE TO THE EXERCISE OF THE CONSTITUTIONAL RIGHT ON THE
19 PART OF THE DEFENDANTS. YOU INCLUDED LANGUAGE AT ONE POINT
20 REGARDING THE FAILURE OF THE DEFENDANTS TO TESTIFY.

21 THE COURT: I'M SORRY IF I DID. I DON'T THINK IT -- I
22 APOLOGIZE IF I DID. I DIDN'T INTEND TO.

23 MR. STRICKLER: YES, SIR. AND, ADDITIONALLY, CONSISTENT
24 WITH OUR REQUEST REGARDING ACCOMPLICE AIDING AND ABETTING,
25 JUST NOTE MR. SNEED, FAR MORE ASSIDUOUS AND DILIGENT THAN I,

1 NOTES MENTION OF THE HAND OF ONE IS HAND OF ALL HE INDICATES
2 AT LEAST FOUR TIMES.

3 THE COURT: FOUR TIMES?

4 MR. STRICKLER: AT LEAST FOUR TIMES. SO —

5 THE COURT: I WOULD ACCEPT SERVICE ON THE FIRST PART OF
6 ASSIDUOUS.

7 MR. STRICKLER: YES, SIR.

8 THE COURT: I'M KIDDING YOU, MR. SNEED. I MEAN, I
9 APPRECIATE THAT. AND I THANK YOU FOR THAT, FOR POINTING THAT
10 OUT TO ME. I DIDN'T MEAN TO EMPHASIZE ANY PARTICULAR PORTION
11 OF THE CHARGE.

12 MR. STRICKLER: AND, LASTLY, WHILE WE NOTE YOUR SPECIFIC
13 INSTRUCTION TO THE JURY AS TO ARMED ROBBERY, KIDNAPPING,
14 ASSAULT WITH INTENT TO KILL RELATIVE TO THE MENS REA, MR.
15 SNEED MAKES NOTE OF NO MENTION AS TO THE MENS REA RELATIVE TO
16 CRIMINAL SEXUAL CONDUCT OR POSSESSION OF A FIREARM.

17 THE COURT: OKAY.

18 MR. STRICKLER: AND I WOULD —

19 THE COURT: I APPRECIATE THAT. AND I DON'T THINK THAT
20 IT'S NECESSARY QUITE FRANKLY. AND I APPRECIATE YOUR
21 THOUGHTS. I THINK THAT THE JURY WAS ADEQUATELY ADVISED OF
22 THOSE ELEMENTS. MR. SHUPPER, ANYTHING, SIR, OTHER THAN
23 JOINING IN ON THOSE?

24 MR. SHUPPER: WITH ALL DUE RESPECT, YOUR HONOR, AS FAR
25 AS YOUR ANALOGY AND EXAMPLE ON THE CIRCUMSTANTIAL EVIDENCE

1 CHARGE, I BELIEVE THE COURT SAID, MAYBE IT WAS THE CARETAKER
2 WHO TOOK IT, WHO KNOWS, WHILE YOU MENTIONED THE
3 CIRCUMSTANCES, THE BANANA WAS GONE, IT WAS FOUND IN THE WASTE
4 BASKET, SHE HAD BANANA ON HER BREATH; I BELIEVE THE COMMENT
5 "WHO KNOWS" ALMOST SEEMS TO DISMISS OTHER ALTERNATIVES LIKE
6 MAYBE HER MOTHER HAD GIVEN IT TO HER OR SOMETHING ELSE. THE
7 COMMENT "WHO KNOWS" SEEMS TO DISMISS MORE THAN ONE
8 ALTERNATIVE.

9 THE COURT: I APPRECIATE THAT. AND I THANK YOU FOR
10 POINTING THAT OUT, BUT I DON'T THINK IT RENDERS THE CHARGE
11 INFIRM. AND I DO APPRECIATE IT. I'M NOT GOING TO BRING THEM
12 IN FOR THAT. I TOLD THEM THAT THEY MUST EVALUATE THE -- THAT
13 THAT WAS THE SORT OF FUNCTION OR EXERCISE THAT THEY HAD TO GO
14 THROUGH AND DETERMINE WHETHER THE EVIDENCE MET THAT TEST.
15 AND I WILL NOTE THAT MR. SNEED AND MR. STRICKLER JOIN IN THAT
16 EXCEPTION AS WELL.

17 I WOULD ALSO NOTE THAT THAT ACTUALLY HAPPENED AND THAT
18 THE FIVE-YEAR-OLD'S REJOINDER WAS "PROVE IT." THE
19 FIVE-YEAR-OLD IS NOW A THIRD-YEAR LAW STUDENT. SO ANYWAY.

20 NOW, THE REASON I SENT ALL 13 OF THEM BACK IS BECAUSE I
21 NOTICED ONE OF THE JURORS HAD DOZED A TIME OR TWO. I DO NOT
22 THINK THAT THAT JUROR -- IT DID NOT AMOUNT TO A STATE V. HERD
23 INQUIRY AS FAR AS I AM CONCERNED. I THINK THAT -- I DON'T
24 THINK THAT HE WAS DOZING. I THINK IT MAY HAVE BEEN A CLASSIC
25 CASE OF RESTING HIS EYES. BUT I'M HERE FOR COMMENT IF

1 ANYBODY WANTS TO MAKE COMMENT ON THAT. MR. GASSER.

2 MR. GASSER: WE'D LEAVE IT IN THIS COURT'S DISCRETION.

3 THE COURT: MR. STRICKLER.

4 MR. STRICKLER: I'VE BEEN RESTING MY EYES OFF AND ON
5 THIS ENTIRE WEEK, YOUR HONOR.

6 THE COURT: OKAY. MR. SHUPPER.

7 MR. SHUPPER: NO OBJECTION, YOUR HONOR.

8 THE COURT: OKAY. THANKS. HERE'S WHAT WE'RE GOING TO
9 DO. YOU ALL NEED TO GET WITH JENNY AND DETERMINE WHAT GOES
10 IN AND WHAT STAYS BACK HERE. SO LET'S GET THAT DONE, GET IT
11 ALL GATHERED UP. AND HERE ARE THE VERDICT FORMS WHICH WILL
12 GO ON THE TOP. AND I'M GOING TO ASK ONE OF OUR BAILIFFS,
13 I'LL ASK BILLY TO DO THAT, I'M GOING TO ASK MR. HOLLIS TO
14 EXTRACT THE ALTERNATE JUROR FROM THE JURY ROOM RIGHT NOW JUST
15 IN CASE HE IS IN THERE WHEN THEY'RE BRINGING IN THE EXHIBITS.
16 (OFF THE RECORD)

17 THE COURT: DOES ANYBODY OBJECT TO THEM HAVING THE
18 ELEMENTS BACK THERE?

19 MR. GASSER: NO.

20 MR. STRICKLER: NO. I THOUGHT THAT WAS THE PURPOSE OF
21 DOING IT.

22 THE COURT: OKAY.

23 (WHEREUPON, THE JURY BEGAN DELIBERATING AT APPROXIMATELY 5:25
24 P.M.)

25 THE COURT: I DON'T KNOW WHAT THIS VERDICT IS GOING TO

1 BE. BUT IF THE VERDICT IS GUILTY, I DON'T THINK I'M GOING TO
2 PROCEED TO SENTENCE THESE FELLOWS UNTIL MONDAY. UNLESS THAT
3 POSES SOME PROBLEM FOR THE JAIL, WHICH I DON'T THINK IT DOES.

4 MR. STRICKLER: THAT'S FINE.

5 THE COURT: BECAUSE I'LL HAVE TO HEAR FULLY FROM THEM.

6 (OFF THE RECORD)

7 THE COURT: I THINK WE HAVE MOST OF THE PARTICIPANTS IN
8 HERE. WE'RE GOING TO WAIT FOR MR. SHUPPER UNTIL WE SAY
9 ANYTHING THAT MUST BE SAID IN HIS PRESENCE OR THAT AFFECTS
10 HIS CLIENT. BUT I WOULD JUST NOTE THAT THE JURY HAS
11 INDICATED THAT THEY'VE ARRIVED AT VERDICTS IN THIS CASE. AT
12 LEAST THAT'S OUR INFORMATION. I HAVE BEEN AROUND LONG ENOUGH
13 TO KNOW THAT THAT IS NOT ALWAYS THE CASE WHEN THEY COME BACK
14 INTO THE COURTROOM. AS SOON AS MR. SHUPPER COMES IN WE WILL
15 BRING THE JURY IN, DETERMINE IF THEY HAVE IN FACT ARRIVED AT
16 VERDICTS. IF THEY HAVE, WE'LL THEREAFTER PUBLISH THE
17 VERDICTS.

18 I WOULD CAUTION EVERY ONE IN THE COURTROOM, RECOGNIZING
19 THAT THIS HAS BEEN A HARD FOUGHT, EMOTIONALLY WRENCHING CASE,
20 TO PLEASE NOT HAVE ANY REACTIONS ON THE RECORD TO WHATEVER
21 THESE EVENTS HAPPEN TO BE.

22 WITH THAT, MR. SHUPPER, IS NOW IN THE COURTROOM. MR.
23 SHUPPER, WE ARE ADVISED THAT THE JURY HAS ARRIVED AT
24 VERDICTS. SO LET'S ASK THEM TO COME IN, MS. PENDERGRASS.

25 MR. SHUPPER: MY APOLOGIES TO THE COURT. I MISPLACED MY

1 KEYS AND HAVE BEEN LOOKING FOR THEM FOR ABOUT 15 MINUTES.

2 THE COURT: OKAY. THAT'S OKAY. I DO IT ALL THE TIME.
3 I'LL LOAN YOU MINE.

4 (JURY IN AT 6:34 P.M.)

5 THE BAILIFF: THE JURY IS ALL PRESENT, YOUR HONOR.

6 THE COURT: THANK YOU, MR. BARROW AND MR. HOLLIS. MS.
7 PENDERGRASS, IF YOU WOULD, PLEASE, MA'AM.

8 THE CLERK: MADAM FOREPERSON, WITHOUT ANNOUNCING THEM,
9 HAVE YOU ARRIVED AT VERDICTS ON ALL CHARGES?

10 FORELADY: YES.

11 THE CLERK: WILL YOU PLEASE HAND THEM TO ME?

12 (FORELADY COMPLIES)

13 THE COURT: ALL RIGHT. PUBLISHING THE VERDICTS AS TO
14 KENNETH JAMES: ON INDICTMENT 99-19104 FOR POSSESSION OF A
15 FIREARM DURING THE COMMISSION OF A VIOLENT CRIME OR CRIMES
16 AGAINST WINFRED BULL, THE VERDICT IS GUILTY. IT'S DATED AND
17 SIGNED BY THE PRESIDING JUROR.

18 THE VERDICT IS THE SAME, GUILTY AS TO 99-19103 FOR
19 POSSESSION OF A FIREARM DURING COMMISSION OF VIOLENT CRIME OR
20 CRIMES AGAINST

21 AS TO VERDICT NUMBER -- INDICTMENT NO. 99-19023,
22 KIDNAPPING OF THE VERDICT IS GUILTY, DATED AND
23 SIGNED AND IN PROPER FORM BY THE PRESIDING JUROR.

24 AS TO ARMED ROBBERY OF WINFRED BULL, THE FINDING IS
25 AGAINST KENNETH JAMES GUILTY, SIGNED AND DATED BY THE

1 PRESIDING JUROR.

2 AS TO THE ARMED ROBBERY OF , THE FINDING WITH
3 REGARD TO KENNETH JAMES IS GUILTY, DATED AND SIGNED BY THE
4 PRESIDING JUROR.

5 AS TO THE KIDNAPPING OF WINFRED BULL, THE FINDING BY THE
6 JURY IS GUILTY, DATED AND SIGNED BY THE PRESIDING JUROR.
7 THAT IS INDICTMENT 99-19110.

8 AS TO CRIMINAL SEXUAL CONDUCT FIRST DEGREE AGAINST
9 THE FINDING AGAINST KENNETH JAMES IS GUILTY, DATED AND
10 SIGNED BY THE PRESIDING JUROR.

11 AS TO ASSAULT AND BATTERY -- EXCUSE ME -- ASSAULT WITH
12 INTENT TO KILL UPON WINFRED BULL, THE VERDICT IS GUILTY,
13 DATED AND SIGNED APPROPRIATELY THIS DATE. I WOULD NOTE THAT
14 EACH VERDICT IS IN PROPER FORM, AND EACH HAS BEEN DATED AND
15 SIGNED BY THE PRESIDING JUROR.

16 THOSE VERDICTS AS TO ROBERT JAMES -- AND THEN WE WILL
17 HEAR ANY MOTIONS THAT MIGHT BE HEARD -- AS TO POSSESSION OF
18 FIREARM DURING THE COMMISSION OF VIOLENT CRIMES OR CRIMES
19 AGAINST BOTH WINFRED BULL AND , THE FINDING AS TO
20 EACH IS GUILTY, DATED AND SIGNED BY THE PRESIDING JUROR THIS
21 DATE.

22 AS TO THE KIDNAPPING OF , THE FINDING AGAINST
23 ROBERT JAMES IS GUILTY, DATED AND SIGNED BY THE PRESIDING
24 JUROR THIS DATE.

25 AS TO ARMED ROBBERY OF WINFRED BULL, THE VERDICT IS AS

1 TO ROBERT JAMES GUILTY. IT'S DATED AND SIGNED BY THE
2 PRESIDING JUROR THIS DATE.

3 AS TO ARMED ROBBERY OF , THE VERDICT IS
4 GUILTY AS TO ROBERT JAMES, DATED AND SIGNED BY THE PRESIDING
5 JUROR THIS DATE.

6 THE CHARGE OF KIDNAPPING OF WINFRED BULL, THE VERDICT AS
7 TO ROBERT JAMES IS GUILTY, DATED AND SIGNED BY THE PRESIDING
8 JUROR THIS DATE.

9 AND AS TO CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE
10 AGAINST , THE FINDING AS TO ROBERT BROWN (SIC) IS
11 GUILTY, DATED AND SIGNED BY THE PRESIDING JUROR THIS DATE.

12 AS TO ASSAULT WITH INTENT TO KILL UPON WINFRED BULL, AS
13 TO ROBERT JAMES, THE FINDING IS GUILTY, DATED AND SIGNED BY
14 THE PRESIDING JUROR THIS DATE. EACH OF THE EIGHT VERDICTS
15 JUST PUBLISHED RELATED TO ROBERT BROWN (SIC). EXCUSE ME.
16 ROBERT JAMES. AND EACH WAS GUILTY AND EACH IS IN PROPER AND
17 APPROPRIATE FORM, WHICH I NOW PRESENT FOR THE EXAMINATION OF
18 ALL THE PARTIES.

19 PRIOR TO THE DISCHARGE OF THE JURY, IS THERE ANYTHING
20 FOR THE JURY PRIOR TO THEIR DISCHARGE, MR. GASSER?

21 MR. GASSER: NO, SIR, YOUR HONOR.

22 THE COURT: ON BEHALF OF KENNETH JAMES, MR. STRICKLER?

23 MR. STRICKLER: WE REQUEST POLLING OF THE JURY, SIR.

24 THE COURT: YES. AS TO ROBERT JAMES?

25 MR. SHUPPER: LIKEWISE, YOUR HONOR.

1 THE COURT: OKAY. NOW, I'M GOING TO DO THIS, FOLKS.
2 AND LET ME TELL YOU WHAT I'M GOING TO DO. I'M GOING TO DO IT
3 ONCE AS TO EACH DEFENDANT. BECAUSE WE'RE GOING TO GO THROUGH
4 THIS — EACH OF YOU IS GOING TO HAVE TO ANSWER THESE
5 QUESTIONS. THIS IS ROUTINE UPON A FINDING OF GUILTY THAT THE
6 QUESTION IS ASKED.

7 I'M GOING TO ASK YOU TO STAND. AND, MS. PENDERGRASS, IF
8 YOU WOULD HAND ME A JURY LIST. WHEN I CALL YOUR NAME, I'M
9 GOING TO ASK YOU TO STAND. I'M GOING TO ASK YOU A TWO-PART
10 QUESTION: WERE THE VERDICTS JUST PUBLISHED YOUR VERDICTS,
11 AND ARE THEY STILL YOUR VERDICTS? YOU WILL ANSWER EACH
12 QUESTION THAT I POSE TO YOU. AND THIS IS AS TO KENNETH JAMES
13 ONLY.

14 MADAM PRESIDING JUROR, SUSAN (SIC) DAVIS, WOULD YOU
15 PLEASE STAND?

16 JUROR DAVIS: TRACY DAVIS.

17 THE COURT: WERE THE VERDICTS JUST PUBLISHED YOUR
18 VERDICTS?

19 JUROR DAVIS: YES.

20 THE COURT: ARE THEY STILL YOUR VERDICTS?

21 JUROR DAVIS: YES.

22 THE COURT: ALL RIGHT. AND THAT'S JUST AS TO KENNETH
23 JAMES ONLY AGAIN, FOLKS. SO THANK YOU, MA'AM. BE SEATED.
24 I'M SORRY. WILLIAM WATTS. MR. WATTS, WERE THE VERDICTS JUST
25 PUBLISHED WITH REGARD TO KENNETH JAMES GUILTY — EXCUSE ME —

1 YOUR VERDICTS?

2 JUROR WATTS: GUILTY.

3 THE COURT: ARE THEY STILL YOUR VERDICTS?

4 JUROR WATTS: YES.

5 THE COURT: THANK YOU. YOU CAN BE SEATED. LILLIAN
6 WALKER. MS. WALKER, WERE THE VERDICTS JUST PUBLISHED AS
7 RELATED TO KENNETH JAMES YOUR VERDICTS?

8 JUROR WALKER: YES.

9 THE COURT: ARE THEY STILL YOUR VERDICTS?

10 JUROR WALKER: YES.

11 THE COURT: THANK YOU. DEBORAH ANDERSON. MS. ANDERSON,
12 AS TO KENNETH JAMES, WERE THE EIGHT VERDICTS JUST PUBLISHED
13 YOUR VERDICTS?

14 JUROR ANDERSON: YES.

15 THE COURT: ARE THEY STILL YOUR VERDICTS?

16 JUROR ANDERSON: YES.

17 THE COURT: THANK YOU. ROBERT SPANN. MR. SPANN, WERE
18 THE VERDICTS JUST PUBLISHED WITH REGARD TO KENNETH JAMES YOUR
19 VERDICTS?

20 JUROR SPANN: YES, SIR.

21 THE COURT: ARE THEY STILL YOUR VERDICTS?

22 JUROR SPANN: YES, SIR.

23 THE COURT: THANK YOU. IDA REAVES. MS. REAVES, WERE
24 THE VERDICTS JUST PUBLISHED WITH REGARD TO KENNETH JAMES YOUR
25 VERDICTS?

1 JUROR REAVES: YES, SIR.

2 THE COURT: ARE THEY STILL YOUR VERDICTS?

3 JUROR REAVES: YES, SIR.

4 THE COURT: THANK YOU. JOHN CHOWANIEC?

5 JUROR CHOWANIEC: YES, YOUR HONOR.

6 THE COURT: MR. CHOWANIEC, WERE THE VERDICTS JUST
7 PUBLISHED WITH REGARD TO KENNETH JAMES YOUR VERDICTS?

8 JUROR CHOWANIEC: YES, SIR.

9 THE COURT: ARE THEY STILL YOUR VERDICTS?

10 JUROR CHOWANIEC: YES, YOUR HONOR.

11 THE COURT: THANK YOU. ARNOLD DAVIS. MR. DAVIS, WERE
12 THE VERDICTS JUST PUBLISHED WITH REGARD TO KENNETH JAMES YOUR
13 VERDICTS?

14 JUROR DAVIS: YES.

15 THE COURT: ARE THEY STILL YOUR VERDICTS?

16 JUROR DAVIS: YES.

17 THE COURT: THANK YOU. HERMAN BENJAMIN. MR. BENJAMIN,
18 WERE THE VERDICTS WITH RELATION TO KENNETH JAMES THAT WERE
19 JUST PUBLISHED YOUR VERDICTS?

20 JUROR BENJAMIN: YES, SIR.

21 THE COURT: ARE THEY STILL YOUR VERDICTS?

22 JUROR BENJAMIN: YES, SIR.

23 THE COURT: ALL RIGHT. THANK YOU. JOSEPH RICHARDSON.
24 MR. RICHARDSON, WERE THE VERDICTS JUST PUBLISHED WITH REGARD
25 TO KENNETH JAMES YOUR VERDICTS?

1 JUROR RICHARDSON: YES.

2 THE COURT: ARE THEY STILL YOUR VERDICTS?

3 JUROR RICHARDSON: YES.

4 THE COURT: THANK YOU. JASON CURVIN. MR. CURVIN, WERE
5 THE VERDICTS JUST PUBLISHED WITH REGARD TO KENNETH JAMES YOUR
6 VERDICTS?

7 JUROR CURVIN: YES.

8 THE COURT: ARE THEY STILL YOUR VERDICTS?

9 JUROR CURVIN: YES.

10 THE COURT: THANK YOU. GAYLE ALLEN. MS. ALLEN, WERE
11 THE VERDICTS JUST PUBLISHED RELATING TO KENNETH JAMES YOUR
12 VERDICTS?

13 JUROR ALLEN: YES, SIR.

14 THE COURT: ARE THEY STILL YOUR VERDICTS?

15 JUROR ALLEN: YES, SIR.

16 THE COURT: THANK YOU. YOU MAY BE SEATED. NOW, I WILL
17 ASK YOU THE SAME QUESTION, EACH INDIVIDUALLY, AND IN NO DOUBT
18 THE SAME ORDER RELATING TO ROBERT JAMES. THESE ARE THE
19 QUESTIONS THAT I AM PUTTING TO YOU RELATING TO THE VERDICTS
20 JUST PUBLISHED, THOSE EIGHT VERDICTS REGARDING ROBERT JAMES.
21 TRACY DAVIS, WERE THE VERDICTS JUST PUBLISHED RELATING TO
22 ROBERT JAMES YOUR VERDICTS?

23 JUROR DAVIS: YES.

24 THE COURT: ARE THEY STILL YOUR VERDICTS?

25 JUROR DAVIS: YES.

1 THE COURT: THANK YOU. LILLIAN WALKER. MS. WALKER,
2 WERE THE VERDICTS JUST PUBLISHED RELATING TO ROBERT JAMES
3 YOUR VERDICTS?

4 JUROR WALKER: YES.

5 THE COURT: ARE THEY STILL YOUR VERDICTS?

6 JUROR WALKER: YES.

7 THE COURT: THANK YOU. DEBORAH ANDERSON. MS. ANDERSON,
8 WERE THE VERDICTS JUST PUBLISHED RELATING TO ROBERT JAMES
9 YOUR VERDICTS?

10 JUROR ANDERSON: YES.

11 THE COURT: ARE THEY STILL YOUR VERDICTS?

12 JUROR ANDERSON: YES, SIR.

13 THE COURT: THANK YOU. ROBERT SPANN. MR. SPANN, WERE
14 THE VERDICTS JUST PUBLISHED RELATING TO ROBERT JAMES YOUR
15 VERDICTS?

16 JUROR SPANN: YES, SIR.

17 THE COURT: ARE THEY STILL YOUR VERDICTS?

18 JUROR SPANN: YES, SIR.

19 THE COURT: THANK YOU. IDA REAVES. MS. REAVES, WERE
20 THE VERDICTS JUST PUBLISHED RELATING TO ROBERT JAMES YOUR
21 VERDICTS?

22 JUROR REAVES: YES, SIR.

23 THE COURT: ARE THEY STILL YOUR VERDICTS?

24 JUROR REAVES: YES, SIR.

25 THE COURT: THANK YOU. JOHN CHOWANIEC. MR. CHOWANIEC,

1 WERE THE VERDICTS JUST PUBLISHED WITH REGARD TO ROBERT JAMES
2 YOUR VERDICTS?

3 JUROR CHOWANIEC: YES, SIR.

4 THE COURT: ARE THEY STILL YOUR VERDICTS?

5 JUROR CHOWANIEC: YES, SIR.

6 THE COURT: THANK YOU. ARNOLD DAVIS. MR. DAVIS, WERE
7 THE VERDICTS JUST PUBLISHED RELATING TO ROBERT JAMES YOUR
8 VERDICTS?

9 JUROR DAVIS: YES, SIR.

10 THE COURT: ARE THEY STILL YOUR VERDICTS?

11 JUROR DAVIS: YES.

12 THE COURT: THANK YOU. HERMAN BENJAMIN. MR. BENJAMIN,
13 WERE THE VERDICTS JUST PUBLISHED RELATING TO ROBERT JAMES
14 YOUR VERDICTS?

15 JUROR BENJAMIN: YES, SIR.

16 THE COURT: ARE THEY STILL YOUR VERDICTS?

17 JUROR BENJAMIN: YES, SIR.

18 THE COURT: THANK YOU. JOSEPH RICHARDSON. MR.
19 RICHARDSON, WERE THE VERDICTS JUST PUBLISHED RELATING TO
20 ROBERT JAMES YOUR VERDICTS?

21 JUROR RICHARDSON: YES, SIR.

22 THE COURT: ARE THEY STILL YOUR VERDICTS?

23 JUROR RICHARDSON: YES, SIR.

24 THE COURT: THANK YOU. JASON CURVIN. MR. CURVIN, WERE
25 THE VERDICTS JUST PUBLISHED RELATING TO ROBERT JAMES YOUR

1 VERDICTS?

2 JUROR CURVIN: YES.

3 THE COURT: ARE THEY STILL YOUR VERDICTS?

4 JUROR CURVIN: YES.

5 THE COURT: THANK YOU. GAYLE ALLEN. MS. ALLEN, WERE
6 THE VERDICTS JUST PUBLISHED RELATING TO ROBERT JAMES YOUR
7 VERDICTS?

8 JUROR ALLEN: YES, SIR.

9 THE COURT: ARE THEY STILL YOUR VERDICTS?

10 JUROR ALLEN: YES, SIR.

11 THE COURT: THANK YOU. ANYTHING FURTHER FOR THE JURY
12 PRIOR TO ITS DISCHARGE FROM EITHER DEFENDANT?

13 MR. STRICKLER: NO, YOUR HONOR.

14 MR. SHUPPER: NO, YOUR HONOR.

15 THE COURT: OKAY. THANK YOU. FOLKS, YOU ARE AT THIS
16 TIME FREE TO GO. YOU MAY STAY. IT'S A PUBLIC COURTROOM.
17 YOU MAY BE ASKED BY ONE OR MORE OF THE PARTICIPANTS IN THIS
18 CASE, USUALLY THE LAWYERS, SOMETIMES LAWYERS LIKE TO BE
19 CRITIQUED ON PERFORMANCE. THEY LIKE TO KNOW WHAT THE
20 SITUATION WAS. THEY LIKE TO TALK TO FOLKS ABOUT THESE CASES.
21 THE BEAUTY FROM YOUR STANDPOINT IS, IS THAT YOU MAY CHOOSE TO
22 TALK TO THEM OR YOU MAY CHOOSE NOT TO TALK TO THEM. IT IS
23 ENTIRELY UP TO YOU. IF YOU WISH TO TALK TO THE LAWYERS OR
24 ANY OF THE OTHER PARTICIPANTS, AGAIN YOU MAY.

25 NOW, IF IT GETS TO BE BURDENSOME, ONEROUS OR OPPRESSIVE,

1 IF ANYONE INSISTS ON TALKING TO AFTER YOU TELL THEM THAT YOU
2 DON'T WANT TO TALK TO THEM OR IF IT GETS TO BE BOTHERSOME FOR
3 YOU AND YOU DO NOT WISH TO TALK TO ANY OF THESE PEOPLE ABOUT
4 ANYTHING, YOU NEED NOT DO SO. SHOULD IT BECOME A PROBLEM,
5 YOU WOULD REPORT IT TO ME THROUGH ONE OF THE COURT STAFF.

6 THANK YOU. AGAIN, YOU'RE ---

7 MR. GASSER: YOUR HONOR, MAY WE APPROACH REAL QUICKLY
8 BEFORE YOU ---

9 THE COURT: SURE.

10 (WHEREUPON, A BENCH CONFERENCE IS HAD)

11 THE COURT: I MISSED ONE. I'M SORRY. THANKS FOR
12 BRINGING THAT TO MY ATTENTION. THAT WOULD BE MR. WHO?

13 JUROR WATTS: WATTS.

14 THE COURT: MR. WATTS. I'M SORRY. THE FIRST ONE ON THE
15 THING. MR. WATTS, WERE THE VERDICTS JUST PUBLISHED RELATING
16 TO ROBERT JAMES YOUR VERDICTS?

17 JUROR WATTS: YES, SIR.

18 THE COURT: ARE THEY STILL YOUR VERDICTS?

19 JUROR WATTS: YES, SIR.

20 THE COURT: THANK YOU. AND I APOLOGIZE. THANK YOU FOR
21 BRINGING THAT TO MY ATTENTION. ANYTHING ELSE FOR THE JURY?

22 MR. GASSER: NOTHING FROM THE STATE, YOUR HONOR.

23 MR. STRICKLER: NO, SIR.

24 MR. SHUPPER: NOTHING, YOUR HONOR.

25 THE COURT: OKAY. AGAIN, AT THIS TIME, IS THERE

1 ANYTHING -- YOU'RE FREE TO GO. OR YOU CAN STAY IN THE BOX.
2 YOU CAN SIT BACK OUT THERE. I MEAN, EXCUSE ME. YOU DON'T
3 HAVE TO STAY IN THE BOX. I WOULD PREFER YOU NOT TO STAY IN
4 THE BOX. JACKIE, DO YOU HAVE ANYTHING TO TELL THEM?

5 THE CLERK: YES, SIR.

6 THE COURT: OKAY. YOU CAN GO ON OUT THERE WITH MS.
7 PENDERGRASS, AND THEN YOU CAN COME BACK IN THE COURTROOM IF
8 YOU CHOOSE. ALL RIGHT?

9 (WHEREUPON, THE JURY IS EXCUSED FROM THE TRIAL)

10 THE COURT: AT THIS TIME IS THERE ANYTHING FROM THE
11 STATE OR FROM EITHER DEFENDANT? IT IS MY PLAN NOT TO IMPOSE
12 SENTENCE ON EITHER OF THESE DEFENDANTS UNTIL MONDAY WHEN
13 EVERYONE HAS A FRESH OPPORTUNITY TO MAKE WHATEVER
14 PRESENTATION THEY WOULD LIKE TO MAKE WITH REGARD TO
15 SENTENCING. ASSUMING THAT THAT DOES NOT IMPACT UNFAIRLY UPON
16 THE DICTATES OR REQUIREMENTS OF THE DETENTION CENTER. CAN
17 THEY REMAIN AT THE DETENTION CENTER?

18 DEPUTY GRAVELIN: YES, SIR.

19 MR. GASSER: YES, SIR. THEY WOULD NOT BE TRANSPORTED
20 UNTIL NEXT THURSDAY ANYHOW.

21 THE COURT: OKAY.

22 MR. GASSER: NOW, THE ONLY PROBLEM WOULD BE IS THAT THE
23 JAIL LIST HAS ALREADY GONE DOWN. SO WHOEVER TRANSPORTS NEEDS
24 TO MAKE SURE THAT THEY'RE ON THE MONDAY MORNING JAIL LIST.

25 THE COURT: OKAY. WELL, THAT WILL HAPPEN. YEAH. WON'T

1 IT, JOE?

2 DEPUTY GRAVELIN: WE'LL TRY, JUDGE. BUT THEY MIGHT WANT
3 TO CALL, TOO.

4 MR. GASSER: I'LL CALL, TOO.

5 DEPUTY GRAVELIN: THEY'LL BE UP HERE, JUDGE.

6 THE COURT: YEAH. I WANT TO MAKE CERTAIN THAT THEY'RE
7 HERE.

8 DEPUTY GRAVELIN: YES, SIR. IF WE HAVE TO, I'LL BE
9 HERE.

10 THE COURT: WELL, I CAN -- QUITE FRANKLY, IT'S NOT
11 ROCKET SCIENCE. I CAN PROCEED NOW. ANY OBJECTION TO
12 PROCEEDING NOW?

13 MR. STRICKLER: I HAVE NO OBJECTION TO PROCEEDING.

14 THE COURT: MR. SHUPPER?

15 MR. SHUPPER: NO OBJECTION, YOUR HONOR.

16 THE COURT: ALL RIGHT. MS. PENDERGRASS NEEDS TO GET ME
17 SOME SENTENCING SHEETS, WHICH I AM ASSUMING THEY HAVE NOT YET
18 BEEN PREPARED. SO WHY DON'T WE PROCEED NOW.

19 MR. STRICKLER: IF I COULD, YOUR HONOR, PRIOR TO
20 SENTENCING, YOU HAD ASKED IF THERE WAS ANYTHING ELSE AT THIS
21 TIME.

22 THE COURT: YEAH.

23 MR. STRICKLER: OF COURSE AT THIS TIME, YOUR HONOR, I
24 WOULD RENEW THE MOTIONS WHICH ARE FILED WITH MADAM COURT
25 REPORTER WHICH YOUR HONOR HAS RULED ON BOTH PRE-TRIAL AND AT

1 THE DIRECTED VERDICT STAGE; SPECIFICALLY RENEWING EACH AND
2 EVERY OTHER GROUNDS ENUMERATED, WHICH I'LL BE HAPPY TO GO
3 INTO INDIVIDUALLY SHOULD YOUR HONOR -- I HAVE NOTHING TO ADD
4 AS FAR AS ARGUMENT ON ANY OF THOSE GROUNDS, BUT I WOULD RENEW
5 THOSE MOTIONS, RENEW THE MOTION FOR DIRECTED VERDICT ON THE
6 BASES ELABORATED ON BY MR. SNEED AND ASK YOUR HONOR TO IN
7 THAT REGARD GRANT A NEW TRIAL IN THIS MATTER, REVISITING
8 PREVIOUS ISSUES.

9 THE COURT: THANK YOU. AND I APPRECIATE THAT, MR.
10 STRICKLER.

11 MR. STRICKLER: YES, SIR.

12 THE COURT: AND I WOULD DECLINE TO DO SO. MR. SHUPPER.

13 MR. SHUPPER: AND I JOIN IN THAT MOTION AND --

14 THE COURT: AND YOUR MOTION WOULD LIKE --

15 MR. SHUPPER: -- AS TO ALL MOTIONS THAT I HAD --

16 THE COURT: I'M SORRY. FORGIVE ME.

17 MR. SHUPPER: I WOULD JOIN MR. STRICKLER IN THAT MOTION
18 AS IT APPLIES TO ALL MOTIONS THAT I HAD MADE ON BEHALF OF MR.
19 ROBERT JAMES AND REQUEST A NEW TRIAL ON THE BASIS OF THOSE
20 PREVIOUSLY STATED MOTIONS.

21 THE COURT: THANK YOU.

22 MR. SHUPPER: FILED MOTIONS.

23 THE COURT: AND THOSE MOTIONS WOULD BE DENIED. MS.
24 PENDERGRASS, I DON'T KNOW IF YOU HAD HAD THE OPPORTUNITY.
25 DID YOU PREPARE SENTENCING SHEETS?

1 THE CLERK: I DID.

2 THE COURT: YOU HAVE?

3 THE CLERK: THEY JUST HAVEN'T BEEN SIGNED.

4 THE COURT: OKAY. I ALSO NEED TO MAKE CERTAIN THAT
5 EVERYONE UNDERSTANDS THAT WE'VE GOTTEN A DIRECTIVE FROM THE
6 CHIEF JUSTICE OR FROM COURT ADMINISTRATION INDICATING THAT
7 FREQUENTLY THE -- WHATEVER THEY CALL THEM -- C.D.R.'S ARE
8 INCORRECT. AND THAT IS THE SOLICITOR'S RESPONSIBILITY. SO,
9 MR. SOLICITOR, YOU DO WHAT YOU NEED TO DO NOW. AND WE CAN --
10 I KNOW YOU'VE GOT A BUNCH OF THEM TO GO THROUGH. SO LET'S GO
11 AHEAD. AND I'VE GOT NINE, TEN, FIFTEEN PCR'S SCHEDULED FOR
12 MONDAY, SO WE MAY AS WELL AS GO AHEAD AND GET THIS DONE
13 TONIGHT. WHILE YOU'RE GOING THROUGH THAT, I'M GOING TO GO
14 BACK HERE. LET ME KNOW WHEN YOU GET THE SENTENCING SHEETS
15 PREPARED.

16 (WHEREUPON, A BREAK IS TAKEN)

17 THE COURT: OKAY. READY TO PROCEED TO SENTENCING, MR.
18 GASSER?

19 MR. GASSER: YES, SIR.

20 THE COURT: MR. STRICKLER?

21 MR. STRICKLER: YES, SIR.

22 THE COURT: MR. SHUPPER?

23 MR. SHUPPER: YES, SIR.

24 THE COURT: ALL RIGHT. PLEASE COME FORWARD. WHILE
25 WE'RE DOING THAT, MY UNDERSTANDING -- SOMEBODY TELL ME IF I'M

1 WRONG — ON THESE MAXIMUM PUNISHMENTS, POSSESSION OF A
2 FIREARM DURING THE COMMISSION OF A VIOLENT CRIME OR CRIMES IS
3 A FIVE-YEAR SENTENCE ON WHICH THERE IS NO PAROLE, IT MUST BE
4 SERVED IN TOTO, AND IT MAY BE EITHER CONSECUTIVE OR
5 CONCURRENT. IS THAT CORRECT?

6 MR. GASSER: THAT'S MY UNDERSTANDING.

7 MR. STRICKLER: YES, SIR. THAT'S MY UNDERSTANDING. I
8 MEAN, —

9 THE COURT: YEAH. I'M PRETTY SURE IT CAN BE EITHER
10 CONSECUTIVE OR CONCURRENT. LET ME JUST TAKE A LOOK.
11 17-23-490. HE MUST BE IMPRISONED FOR FIVE YEARS IN ADDITION
12 TO THE PUNISHMENT PROVIDED FOR THE PRINCIPAL CRIME. A
13 FIVE-YEAR SENTENCE IS NOT A — DA-DA-DA-DA-DA-DA —
14 SERVICE OF A FIVE-YEAR SENTENCE IS MANDATORY UNLESS A
15 MANDATORY MINIMUM TERM OF IMPRISONMENT IS PROVIDED FOR THE
16 VIOLENT CRIME. AND OF COURSE VIOLENT CRIMES COULD BE EITHER
17 CSC FIRST, ARMED ROBBERY, IN WHICH CASE THERE IS A MANDATORY
18 MINIMUM SENTENCE OF TEN YEARS. IS THAT NOT CORRECT?

19 MR. GASSER: CORRECT.

20 MR. STRICKLER: THAT'S CORRECT.

21 THE COURT: AND THE COURT MAY IMPOSE ITS MANDATORY
22 FIVE-YEAR SENTENCE TO RUN CONSECUTIVELY OR CONCURRENTLY. AND
23 THERE COULD BE A SAFE SIDE TO THAT. SO WE KNOW WHAT THAT IS.
24 IT COULD BE FIVE YEARS CONCURRENT OR CONSECUTIVE. KIDNAPPING
25 IS A 30-YEAR MAXIMUM. IT IS A MOST SERIOUS OFFENSE. AND

1 IT'S AN 85 PERCENT CRIME. IS THAT RIGHT?

2 MR. STRICKLER: CORRECT, SIR.

3 MR. SHUPPER: YES, YOUR HONOR.

4 THE COURT: IN OTHER WORDS, WHATEVER THEY'RE SENTENCED
5 TO, THEY MUST SERVE 85 PERCENT OF IT. SO IF IT WERE 30
6 YEARS, THEORETICALLY IT WOULD BE 25.5 YEARS. ARMED ROBBERY
7 AGAIN IS A MINIMUM OF TEN YEAR, MAXIMUM THIRTY YEAR. AND,
8 AGAIN, IT'S AN 85 PERCENT MOST SERIOUS. SO ASSUMING A
9 MAXIMUM PUNISHMENT, IT WOULD BE 25.5 YEARS TO SERVE. CSC
10 FIRST IS A 30-YEAR MAXIMUM SENTENCE, AGAIN A MOST SERIOUS
11 OFFENSE, CARRIES WITH IT 85 PERCENT. SO YOU MUST SERVE AT
12 LEAST 85 PERCENT OF THE SENTENCE, POSSIBLY MORE, POSSIBLY THE
13 WHOLE THING. AND ASSAULT WITH INTENT TO KILL IS A 20 YEAR.

14 MR. STRICKLER: TEN YEARS. IT'S A COMMON LAW
15 MISDEMEANOR.

16 THE COURT: COMMON LAW MISDEMEANOR?

17 MR. STRICKLER: YES, SIR.

18 THE COURT: OKAY. WITH NO MANDATORY FEATURE AND NO MOST
19 SERIOUS FEATURE. AM I CORRECT ON THE LENGTH OF THE
20 SENTENCES?

21 MR. GASSER: YES, SIR.

22 MR. SHUPPER: YES, YOUR HONOR.

23 MR. STRICKLER: THAT IS MY UNDERSTANDING. YES, SIR.

24 THE COURT: OKAY. THANK YOU. MR. GASSER, BEARING IN
25 MIND THAT I HAVE HEARD ALL OF THE EVIDENCE THAT EVERYONE ELSE

1 HAS HEARD, IS THERE ANYTHING YOU WISH TO SAY OR THAT EITHER
2 VICTIM WOULD LIKE TO SAY PRIOR TO THE IMPOSITION OF
3 PUNISHMENT?

4 MR. GASSER: NO, SIR, YOUR HONOR. I UNDERSTAND YOU HAVE
5 HEARD THE EVIDENCE AND YOU RECOGNIZE THE AGGRAVATED NATURE OF
6 THIS PARTICULAR CASE. I'VE SPOKEN WITH MR. WINFRED BULL AND
7 WITH VICTIM, EXPLAINED TO THEM THEIR RIGHTS UNDER THE
8 CONSTITUTIONAL AMENDMENT. THEY ARE ALSO WILLING -- DECLINE
9 TO SPEAK AND ARE GOING TO LEAVE IT WITHIN YOUR JUDGMENT.
10 I'VE ALSO SPOKEN WITH INVESTIGATOR THOMAS. WITH THAT, THAT'S
11 ALL THE STATE WOULD HAVE.

12 THE COURT: OKAY. MR. STRICKLER, ON BEHALF OF KENNETH
13 JAMES, WHAT WOULD YOU LIKE TO TELL ME?

14 MR. STRICKLER: I'D LIKE TO TELL YOUR HONOR THAT HE'S
15 23, THAT HE'S BEEN IN JAIL SINCE HIS ARREST ON THESE CHARGES,
16 THAT HE'S IN ESSENCE RAISED IN THE COLUMBIA AREA, THAT HE HAS
17 NO PRIOR CRIMINAL RECORD. HE HAS NOT COMPLETED HIGH SCHOOL
18 YET, OR HE HAD NOT AT THE TIME OF HIS ARREST ON THESE
19 CHARGES.

20 I UNDERSTAND THE NATURE OF THE OFFENSES, TOO, YOUR
21 HONOR. I WOULD, AT THE RISK OF BELABORING THE OBVIOUS, JUST
22 ECHO WHAT YOU'VE ALREADY STATED, WHICH IS THE NATURE OF THE
23 PUNISHMENT, THE NATURE OF THE SENTENCES, SPECIFICALLY THE 85
24 PERCENT SERVICE ON EACH, AND ASK YOUR HONOR CONSIDER THAT.

25 I'D ASK ALSO JUST DIRECT YOUR HONOR'S, WITH ALL DUE

1 RESPECT, ATTENTION TO WHAT IS COMMON KNOWLEDGE IN THE
2 SOCIOLOGICAL FIELD THAT FOR WHATEVER REASON THOSE WHO ARE
3 PRONE TO VIOLENCE IN THEIR YOUTH APPEAR TO MAGICALLY — AND
4 THIS IS CONSISTENT THROUGHOUT NUMEROUS STUDIES — HAVE A
5 MARKED DECREASE IN THOSE TYPES OF PROBLEMS SIMPLY AS A RESULT
6 OF THE AGING PROCESS, IN THAT BY MID-FORTIES THOSE WHO MAY
7 HAVE HAD VIOLENT TENDENCIES IN THEIR YOUNGER DAYS — AND THIS
8 IS EMPIRICALLY ESTABLISHED I WOULD SUBMIT — ARE NO LONGER
9 PRONE TO THOSE TENDENCIES. I JUST ASK YOUR HONOR TO TAKE
10 INTO CONSIDERATION THE FACT THAT HE WAS 20 YEARS OLD
11 APPROXIMATELY AT THE TIME OF THIS INCIDENT. HE'S NOW —

12 THE COURT: 20?

13 MR. STRICKLER: YES, SIR. HE'S NOW 23. CORRECT? AND
14 WHILE I REALIZE YOUR HONOR APPRECIATES THE SERIOUSNESS AND
15 THE NATURE OF THE OFFENSES HERE, I WOULD ASK THAT YOU
16 EXERCISE SUCH LENIENCY AS YOU CAN. THANK YOU VERY MUCH.

17 THE COURT: THANKS, MR. STRICKLER. MR. KENNETH JAMES,
18 IS THERE ANYTHING YOU'D LIKE TO TELL ME, SIR?

19 MR. KENNETH JAMES: NO, SIR.

20 THE COURT: OKAY. MR. SHUPPER, ON BEHALF OF ROBERT
21 JAMES.

22 MR. SHUPPER: YOUR HONOR, MR. ROBERT JAMES IS 24 YEARS
23 OLD AT THIS POINT. THE JURY HAS SPOKEN. AND THE NATURE AND
24 SERIOUSNESS OF THE OFFENSES WERE QUITE APPARENT. YOUR HONOR
25 IS AWARE OF THE ACHIEVEMENTS OF MR. ROBERT JAMES WHILE HE WAS

1 IN THE JOB CORPS AS THAT WAS EVIDENCE THAT WAS PRESENTED
2 WHILE YOU PRESIDED OVER THIS TRIAL: THE CERTIFICATES, THE
3 G.E.D., THE VOUCHER THAT HE EARNED BY HIS ACHIEVEMENTS.

4 MR. JAMES HAS INDICATED THAT HE IS TRUSTING IN THE LORD
5 AND THAT HE HAS BEEN. AND I SAY THIS WITH THE SERIOUS
6 CONVICTION THAT DURING THE COURSE OF MY REPRESENTATION HE HAS
7 SHOWN ME SOME GENUINE FAITH THAT I HOPE SERVES HIM. I SAY
8 THIS AGAIN MOST SERIOUSLY IN THAT IT IS MY CONVICTION THAT
9 IT'S NOT A PLOY ON HIS PART, NOR IS IT ON MINE.

10 I'VE ATTEMPTED THROUGHOUT THE COURSE OF THE TRIAL TO
11 DRAW DISTINCTIONS, AND I CAN SHOW, THE ONLY EVIDENCE IS THE
12 CERTIFICATES THAT HE'S EARNED. AGAIN, I WOULD ASK THAT YOU
13 CONSIDER THE AGE OF THE OFFENDER AND THE FACT THAT THE
14 SENTENCES ARE NON-PAROLABLE, THEY ARE 85 PERCENT REQUIRED
15 SERVICE; AND THAT YOUR HONOR EXERCISE ANY DISCRETION AND
16 MERCY THAT YOU MIGHT SEE FIT TO UNDER THESE CIRCUMSTANCES.

17 AS YOUR HONOR KNOWS, I HAD WORKED WITH THE PRISON SYSTEM
18 WITH THE AUSTIN-WILKES SOCIETY AND THE PRISON OVERCROWDING
19 CASE MONITORING THE STATE DEPARTMENT OF CORRECTIONS FOR 12
20 YEARS. I HAVE AND CAN PERSONALLY ATTEST TO MY EXPERIENCES
21 THAT WOULD CONFIRM WHAT MR. STRICKLER MENTIONED ABOUT THE
22 REHABILITATION THAT IS POSSIBLE AND THAT THERE IS A POINT,
23 AND I'M SURE YOUR HONOR KNOWS AS A FORMER CRIMINAL DEFENSE
24 ATTORNEY, THAT THERE IS SOME -- THAT PEOPLE WHO HAVE
25 COMMITTED VERY BRUTAL AND SERIOUS CRIMES WHO CAN CHANGE THEIR

1 DISPOSITION AND SHOW A GENUINE REFORMING DISPOSITION TO LEAD
2 A LAWFUL LIFE. AND WITH THAT, YOUR HONOR, I HAVE NO MORE TO
3 SAY.

4 THE COURT: OKAY. MR. ROBERT JAMES, IS THERE ANYTHING
5 YOU'D LIKE TO TELL ME, SIR?

6 MR. ROBERT JAMES: YES, YOUR HONOR. I STILL TESTIFY TO
7 MY INNOCENCE. I DIDN'T DO ANY OF THESE THINGS THAT I HAVE
8 BEEN FOUND GUILTY OF, AND I STILL BELIEVE MY BROTHER IS
9 INNOCENT. BUT AS I SAY, BEFORE ALL THIS HAPPENED, I LEAVE MY
10 FAITH IN THE LORD. EVERYTHING HAPPENS FOR A REASON. AND I
11 TRUST HIM AND I'LL BE GLAD FOR HIM TO TAKE CARE OF ME FROM
12 NOW ON, WHATEVER MATTER IS HANDLED.

13 BUT I'D JUST LIKE TO SAY, MOSTLY ON BEHALF OF MY
14 BROTHER, THIS IS MY BABY BROTHER, HE'S THE ONLY YOUNGER
15 BROTHER I'VE GOT, IT'S HARD FOR US BOTH TO BE GOING TO PRISON
16 RIGHT NOW. BUT ALTHOUGH HE AIN'T SAYING NOTHING, HE IS
17 BASICALLY A STRAIGHT-UP GUY AND HE'S ALL RIGHT.

18 AND I JUST PRAY THE LORD -- I MEAN, I JUST PRAY TO THE
19 LORD THAT HE'LL TOUCH YOUR HEART AND BE LENIENT TOWARDS US;
20 AND NOT US, JUST MOSTLY HIM, YOUR HONOR. BUT LIKE I SAY, IF
21 IT WAS UP TO ME, I WOULD DO ALL OF IT FOR BOTH OF US EVEN
22 THOUGH WE'RE INNOCENT.

23 AND 'CAUSE ALL I EVER WANTED TO BE WAS HAPPY. AND THE
24 ONLY THING OUR FATHER BACK THERE EVER ASKED OF ME OUR WHOLE
25 LIFE WAS TO JUST KEEP OUR NAME GOING ON BECAUSE WE'VE GOT THE

1 SAME NAME, AND JUST GET AN EDUCATION. HE AIN'T NEVER ASKED
2 TOO MUCH OF ME. WITH ALL THIS TIME I'M FACING, IT SEEMS LIKE
3 I'LL NEVER BE ABLE TO FULFILL WHAT HE ASKED ME. BUT AS I
4 SAID, I LEAVE IT IN THE LORD'S HANDS. EVERYTHING HAPPEN FOR
5 A REASON. AND I TRUST EVERYTHING GOING TO BE ALL RIGHT IN
6 THE END AND EVENTUALLY WE WILL OVERCOME. I JUST PRAY THAT
7 YOU SHOW LENIENCY TO BOTH OF US; IF NOT BOTH, AT LEAST TO MY
8 BROTHER, YOUR HONOR.

9 THE COURT: THANK YOU, MR. JAMES. ANYTHING ELSE ON
10 BEHALF OF EITHER DEFENDANT?

11 MR. STRICKLER: NO, SIR.

12 THE COURT: OKAY. OR ANY OTHER PRESENTATION ON BEHALF
13 OF EITHER DEFENDANT?

14 MR. SHUPPER: NOTHING FURTHER, YOUR HONOR.

15 THE COURT: OKAY. I DON'T KNOW HOW YOU ALL THINK THIS
16 MAKES ME FEEL. YOU KNOW, I DON'T KNOW IF YOU PEOPLE THINK
17 THAT I'M HAPPY ABOUT DOING STUFF LIKE I'VE GOT TO DO HERE.
18 BECAUSE I'M NOT. I AGONIZE EVERY DAY ABOUT HAVING TO — IT
19 SEEMS LIKE I HAVE SENTENCED HALF THE YOUTHFUL
20 AFRICAN-AMERICAN MALES IN SOUTH CAROLINA TO SOME LENGTHY TERM
21 OF IMPRISONMENT. AND THAT DOES NOT MAKE ME HAPPY. THAT
22 MAKES ME DESPAIR FOR OUR FUTURE. I AM CONCERNED ABOUT THAT.

23 THIS, HOWEVER, WAS A BRUTAL CRIME IN THE FACT THAT THE
24 EVIDENCE AGAINST EACH OF YOU IT SEEMS TO ME WAS OVERWHELMING.
25 NOW, I WOULD CHIDE YOUR LAWYERS IF YOUR LAWYERS ARGUED

1 AGAINST YOUR GUILT IN THIS CASE. I'M NOT GOING TO DO THAT
2 WITH YOU ALL BECAUSE YOU ALL ARE GOING TO SUFFER ENOUGH AS A
3 RESULT OF THIS. BUT THE JURY HAS SPOKEN. THE JURY'S VERDICT
4 IS CONCLUSIVE. AND THE JURY'S VERDICT WAS BASED UPON WHAT
5 THEY FELT TO BE OVERWHELMING EVIDENCE NO DOUBT IN THIS CASE.
6 I CAN'T COMMENT ON IT BEYOND THAT.

7 IT IS NOT MY PRACTICE, AS THESE LAWYERS KNOW, TO
8 PENALIZE PEOPLE FOR EXERCISING THEIR RIGHT TO GO TO TRIAL. I
9 DO THAT PROBABLY — IN FACT, I NEVER HAVE DONE THAT. I DO,
10 HOWEVER, TELL YOU THAT YOU CAN'T GET THE BENEFIT OF THE
11 MITIGATION THAT YOU MIGHT HAVE GOTTEN HAD THERE BEEN A PLEA
12 OF GUILTY, WHICH CAN HAPPEN. I TOLD YOU, I THINK IT WAS ON
13 THE RECORD AT THE BEGINNING OF THIS TRIAL, THAT I HAD
14 APPROVED OR WOULD ACCEPT THE PLEA BARGAIN WHICH WOULD HAVE
15 BEEN A 20-YEAR SENTENCE FOR KENNETH JAMES AND A 15-YEAR
16 SENTENCE FOR ROBERT JAMES, IF I RECALL CORRECTLY.

17 I AM SIMPLY NOT GOING TO TELL YOU THAT I'M NOT IMPOSING
18 THESE SENTENCES MERELY TO EXTRACT SOME SORT OF PUNISHMENT OR
19 INFLICT SOME SORT OF PUNISHMENT ON EACH OF YOU ABOVE AND
20 BEYOND THAT WHICH I THINK IS APPROPRIATE IN THE CASE.

21 I COULD GIVE YOU, TOTALING THESE CHARGES, WHAT
22 ESSENTIALLY AMOUNTS TO LIFE IN PRISON. I COULD GIVE YOU —
23 GIVEN THE MAXIMUM PUNISHMENTS FOR THESE OFFENSES, IN FACT,
24 THEY'RE 85 PERCENT OFFENSES, I COULD STRUCTURE THIS SO THAT
25 YOU WOULD NEVER GET OUT, AND HAVE GIVEN SOME THOUGHT TO DOING

1 THAT.

2 SIXTY-YEAR SENTENCES ON EACH OF YOU WOULD MEAN THAT YOU
3 WOULD NOT POSSIBLY BE GETTING OUT FOR 51 YEARS. SO YOU'D BE
4 FAR, FAR OLDER THAN I AM RIGHT NOW ON THAT. AND I DON'T
5 THINK THAT THAT WOULD BE INAPPROPRIATE FRANKLY, GIVEN THE
6 BRUTALITY OF THIS ASSAULT.

7 I THINK THAT WHAT'S HAPPENED HERE IS THAT PERHAPS YOU
8 FELT THAT BECAUSE THE PEOPLE AGAINST WHOM THESE CRIMES WERE
9 PERPETRATED WERE OF HUMBLE ORIGIN OR HUMBLE STATUS THAT YOU
10 MIGHT, IT'S SOMETHING THAT YOU MIGHT HAVE GOTTEN AWAY WITH.
11 BUT I CAN'T ABIDE THAT. I CAN'T LET THAT GO.

12 I SEE NO REASON FRANKLY TO DIFFERENTIATE BETWEEN THE
13 SENTENCE THAT I'M GOING TO GIVE TO EACH OF YOU. IT IS GOING
14 TO BE THE SAME THING AS TO EACH OF YOU. AND IT'S GOING TO
15 TAKE ME A MOMENT TO WRITE THESE OUT.

16 (PAUSE)

17 THE COURT: THE THING I REGRET IS THAT THE MOTHER IS
18 LOSING BOTH OF HER SONS HERE TODAY FOR WHAT WILL AMOUNT TO A
19 SUBSTANTIAL PERIOD OF TIME, CERTAINLY HER LIFETIME.

20 ALL RIGHT. AS TO KENNETH JAMES, THE SENTENCE OF THE
21 COURT ON INDICTMENT 99-19105 FOR CRIMINAL SEXUAL CONDUCT, THE
22 SENTENCE IS THAT YOU, KENNETH JAMES, BE CONFINED TO THE STATE
23 DEPARTMENT OF CORRECTIONS FOR A TERM OF 30 YEARS. AS TO
24 INDICTMENT 99-GS-40-19108 FOR ARMED ROBBERY, THE SENTENCE IS
25 THAT YOU BE CONFINED IN THE STATE DEPARTMENT OF CORRECTIONS

1 FOR A TERM OF TEN YEARS CONSECUTIVE TO 99-GS-105.

2 AS TO INDICTMENT 99-19107 FOR ARMED ROBBERY, THE
3 SENTENCE IS 30 YEARS CONCURRENT WITH ALL SENTENCES. AS TO
4 INDICTMENT 99-19110 FOR KIDNAPPING, THE SENTENCE IS 30 YEARS
5 CONCURRENT WITH ALL SENTENCES. AS TO INDICTMENT 99-19023 FOR
6 KIDNAPPING, THE SENTENCE IS 30 YEARS CONCURRENT WITH ALL
7 SENTENCES. AS TO INDICTMENT 99-19109 FOR ASSAULT WITH INTENT
8 TO KILL, THE SENTENCE IS TEN YEARS CONCURRENT WITH ALL
9 SENTENCES. AND AS TO EACH OF THE POSSESSION OF A FIREARM
10 DURING THE COMMISSION OF A VIOLENT CRIME, THE SENTENCE IS
11 FIVE YEARS CONCURRENT WITH ALL SENTENCES.

12 THE UPSHOT IS THAT YOU'VE GOT 40 YEARS, AN ACTIVE
13 SENTENCE. THAT MEANS IT WILL BE 34 YEARS BEFORE YOU CAN
14 POSSIBLY EVER GET OUT. AT WHICH TIME YOU WILL BE WHAT? 57
15 YEARS OF AGE AND HOPEFULLY HAVE SOME LIFE LEFT.

16 ROBERT JAMES, THE SENTENCE IS THE SAME ON EACH OF THESE
17 CHARGES. 30 YEARS FOR CRIMINAL SEXUAL CONDUCT, TEN YEARS
18 CONSECUTIVE FOR ARMED ROBBERY ON INDICTMENT 19300; 30 YEARS
19 FOR ARMED ROBBERY ON INDICTMENT 99-22846 CONCURRENT WITH ALL
20 SENTENCES; 99-19301 FOR KIDNAPPING, 30 YEARS CONCURRENT WITH
21 ALL SENTENCES; 99-44040 FOR KIDNAPPING, 30 YEARS CONCURRENT
22 WITH ALL SENTENCES; 99-22845 FOR ASSAULT WITH INTENT TO KILL,
23 THE SENTENCE IS TEN YEARS CONCURRENT WITH ALL SENTENCES. AND
24 AS TO EACH OF THE POSSESSION OF FIREARMS DURING THE
25 COMMISSION OF A VIOLENT CRIME, THE SENTENCE IS FIVE YEARS ON

1 EACH CONCURRENT WITH ALL SENTENCES.

2 AGAIN, THAT AMOUNTS TO A 40-YEAR SENTENCE OF WHICH YOU
3 MUST SERVE THE MINIMUM OF 34 YEARS. QUITE FRANKLY, A MORE
4 SEVERE PENALTY COULD HAVE BEEN IN ORDER, BUT THE ONLY THING
5 THAT I CONSIDERED THERE WAS THE YOUTH AND THE FACT THAT
6 NEITHER OF YOU HAD EVER BEEN CONVICTED OF A CRIME IN THE
7 PAST. THAT'S THE ONLY THING THAT MILITATED IN YOUR BEHALF.
8 OTHERWISE, THESE CRIMES WERE SIMPLY BRUTAL AND INEXCUSABLE.
9 THANK YOU. AND YOU'RE FREE TO GO.

10 MR. GASSER: THANK YOU, YOUR HONOR.

11 MR. STRICKLER: THANK YOU, YOUR HONOR.

12 MR. SHUPPER: THANK YOU, YOUR HONOR.

13 THE COURT: OKAY.
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1 I, THE UNDERSIGNED JENNY H. WILLIAMS, OFFICIAL COURT REPORTER
2 FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
3 HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE
4 TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE
5 INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL,
6 IN THE CRIMINAL COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE
7 20TH, 21ST, 22ND, 23RD AND 24TH DAYS OF SEPTEMBER, 1999.

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

10
11 NOVEMBER 29, 1999

12 *Jenny H. Williams*

13 JENNY H. WILLIAMS
14 CIRCUIT COURT REPORTER
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Costa M. Pleicones, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT ANTHONY JAMES,

APPELLANT.

FINAL ANDERS BRIEF OF APPELLANT

WANDA H. HAILE
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The lower court erred in denying appellant's motion for a severance.

STATEMENT OF THE CASE

Appellant Robert Anthony James was found guilty of first degree criminal sexual conduct, assault with intent to kill, two counts of kidnapping, two counts of armed robbery, and two counts of possession of a firearm during the commission of a violent crime during the September, 1999 term of the Richland County General Sessions Court before the Honorable Costa M. Pleicones Judge. Appellant was sentenced to imprisonment for a period of forty years. Appellant appealed. This brief follows.

ARGUMENT

The lower court erred in denying appellant's motion for a severance.

Victim testified that on May 29, 1996, she and Winfred Bull were at T.S. Martin Park around midnight after having watched a baseball game when two men appeared before them. One of the men asked Bull for a light and as Bull went into his pocket, the man pulled out a gun and the other male came around and grabbed Bull. Bull was instructed to give up the money. Then, three other men came running out. One grabbed her and started removing her clothes and moved her to an area of the park by the bench. Two of the fellows went over to her car. Victim stated she was sexually assaulted by a man whom she later identified as appellant. Victim also stated that she was ultimately sexually assaulted by all of the men (they took turns). Victim stated that one of the men who sexually assaulted her was a man whom she later identified as Robert James. After the men finished, Kenneth James removed her to a building at the cemetery near the park and sexually assaulted her again. At some point during the assault Bull managed to break free. When this happened, Kenneth James ordered the men to shoot. Next, Victim heard gunshots being fired three times. ROA 564, l. 7 – p. 595, l. 18.

Winfred Bull escaped and fled to Germany Street where he stopped at the residence of Charles Murray. The police were called. The police responded accordingly by taking Bull back to the crime scene. ROA 480, l. 11 – p. 482, l. 13. Murray testified that he waited outside the residence afterwards and saw five men in two groups walking up Orr Street, which was also nearby. Murray stated that he recognized Kenneth James and Robert James in the group. Murray stated that he believed the two men resided on Orr Street at that time. ROA 661, l. 20 – p. 676, l. 5.

The police investigation within the area began after the crimes were reported by Bull. Police Officer Ron Gibson went to an Amoco Station in the vicinity on Two Notch Road and learned from cashier Sangetta Coaxum that around 1:13 a.m., two men came in asking her to cash a one hundred dollar bill. ROA 737, l. 14 – p. 748, l. 24. Bull testified that a hundred-dollar bill was taken from him during the robbery. ROA 486, lines 13–21. When Gibson left the Amoco store shortly thereafter, he stopped an individual standing around in the area and learned that the individual's name was Ken James (appellant) who lived at 2528 Orr Street. ROA 751, l. 15 – p. 756, l. 23; ROA 759, l. 9 – p. 764, l. 4. Also, while the police investigation was going on, dog handler Ernest Blackwell had his canine sniff around the area of the crime scene and found that the trail ran to 2528 Orr Street. ROA 1032, l. 25 – p. 1059, l. 25.

On May 29, 1996, around 9:00 a photographic lay out was shown to *Victim* during which time she picked Kenneth James' picture from the lineup as the perpetrator. ROA 823, l. 14 – p. 826, l. 24. A search warrant was subsequently obtained and executed at 2528 Orr Street, where Kenneth James resided. It was apparent from the search that both Kenneth James and Robert James resided there. ROA 826, l. 4 – p. 828, l. 21; ROA 831, l. 17 – p. 834, l. 25. On June 18, 1996, *Victim* picked Robert James' picture from a photographic layout fingering him as one of the perpetrators. ROA 840, l. 5 – p. 842, l. 3. Kenneth James and Robert James were ultimately arrested and charged in the case.

The DNA comparison of the semen collected from *Victim* during the rape protocol was matched to Kenneth James. ROA 956, lines 1–22.

Prior to trial, defense attorneys for Kenneth James and Robert James moved for a severance of the cases for the two men because of the different levels of culpability attached

to the men. ROA 10, l. 14 – p. 29, l. 24. The court denied the motion. ROA 29, l. 25 – p. 31, l. 14.

DISCUSSION

Severance motions are addressed to the discretion of the trial court and will not be disturbed absent a showing of abuse of that discretion. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997); State v. Boys, 302 S.C. 545, 397 S.E.2d 529 (1990).

According to Vickary's testimony it appears that Kenneth James might have twice sexually assaulted Vickary whereas Robert James committed such an assault only once. Also, the DNA match from the semen collected from Vickary after the assault matched Kenneth James only. In addition, Kenneth James was the one who gave the order to shoot as Bull attempted to escape. Thus, Kenneth James' level of culpability was greater, which differed from the lesser role Robert James played in the incidents. Robert James was prejudiced because guilt was most probably imputed to him via the case against Kenneth James. Kenneth James was prejudiced because as defense counsel argued: a severance would have allowed Kenneth James and counsel to "be masters of [their] own destiny as far as the selection of the jury, presentation of evidence and/or ..." ROA 19, lines 4–10.

The lower court erred in denying appellant's motion for a severance in violation of appellant's right to a fair trial guaranteed under the fourteenth amendment to the United States Constitution and article 1, §3 of the South Carolina State Constitution.

CONCLUSION

Based on the foregoing argument, appellant's convictions should be reversed and his case remanded to the Richland County General Sessions Court for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Wanda H. Haile", is written over a horizontal line.

Wanda H. Haile
Senior Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of September, 2000.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

Costa M. Pleicones, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT ANTHONY JAMES,

APPELLANT.

PETITION TO BE RELIEVED AS APPELLATE COUNSEL
PURSUANT TO ANDERS v. CALIFORNIA

Wanda H. Haile, of the South Carolina Office of Appellate Defense, was appointed to represent appellant in this appeal and states:

1. Counsel has thoroughly reviewed appellant's lower court records in an effort to discover all arguable errors for presentation to the Court on appellant's behalf. In counsel's opinion, the record fails to demonstrate either preserved errors or other legally substantial issues to present to the Court within the context of this direct appeal.
2. In an effort to protect appellant's right to review, however, counsel has submitted a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). It is counsel's understanding that this brief will prompt a full and thorough review of the record by the Court to determine errors independent of counsel's opinion of the merits of appellant's appeal. Counsel is required under Anders to submit a petition to be relieved as counsel, and

The State v. Robert Anthony James
Petition to be Relieved
Page 2

attaches this petition in compliance with that procedure.

3. This office has served appellant with a copy of the Anders brief. Counsel understands that appellant will also be contacted directly by the Court and given forty-five days in which to submit any additional materials which appellant wishes the Court to consider, either by letter, document, or pro-se brief.

WHEREFORE, counsel respectfully asks the Court to accept the foregoing Anders brief and grant the petition to be relieved as appellate counsel.

Respectfully submitted,



Wanda H. Haile
Senior Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of September, 2000.

CERTIFICATE OF COUNSEL

1369

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.

September 13, 2000

A handwritten signature in dark ink, appearing to read "Wanda H. Haile", is written over a horizontal line.

Wanda H. Haile
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Costa M. Pleicones, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT ANTHONY JAMES,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Charles H. Richardson, Esquire, this 13th day of September, 2000.


Wanda H. Haile

Senior Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 13th day of September, 2000.

Karen D. Elliott (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.

1371

01 CP403299

STATE OF SOUTH CAROLINA

County of Richland

In the Court of Common Pleas

Robert Anthony James #261393
Full name and prison number (if any) of Applicant,

vs.

State Of South Carolina
Name of Respondent.

Charlie Condon, Atty Gen.

APPLICATION FOR
POST-CONVICTION RELIEF

DAVID A. SCOTT
C.C. & G.S.

01 AUG - 8 AM 10:31

FILED

INSTRUCTIONS — READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

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

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Kershaw Correctional Institution, 4848 Goldmine Hwy.,
Kershaw S.C. 29067
2. Name and location of Court which imposed sentence Fifth Circuit Columbia, S.C. 29202,
Richland County Court Of General Sessions.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 99-GS-40-44040; 22846, 22845, 22844, 22843, 19301, 19300, 19299
 - (b) Kidnapping, Armed Robbery, Assault With Intent To Kill, Possession Of
 - (c) A Firearm During Commission Of A Violent Crime, and C.S.C.
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 24, 1999, 40 YEARS CONSECUTIVE SENTENCES.
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty ✓
 - (c) after a plea of nolo contendere _____

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

7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
 - i. SOUTH CAROLINA COURT OF APPEALS
 - ii. _____
 - iii. _____

- (b) the result in each such Court to which you appealed:
 - i. DIRECT APPEAL DENIED.
 - ii. _____
 - iii. _____

- (c) the date of each such result:
 - i. MARCH 21, 2001
 - ii. _____
 - iii. _____

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. UNPUBLISHED OPINION NO. 2001-UP-082
 - ii. _____
 - iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) NO APPLICABLE
 - (b) _____
 - (c) _____

- State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) INEFFECTIVE ASSISTANCE OF COUNSEL
 - (b) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL
 - (c) VIOLATION OF DUE PROCESS: SPEEDY TRIAL

- State concisely and in the same order the facts which support each of the grounds set out in (9):
- a) SEE ATTACHMENT
 - b) _____
 - c) _____

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? Ab
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A

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

(a) the specific nature thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

YES

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

(a) which grounds have been presented:

- i. Speedy Trial Motions
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. Trial
- ii. _____
- iii. _____

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

- (a) SEE ATTACHMENT
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? N/A
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

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

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

- i. Nathial Robinson (Address Not Known)
- ii. John B. Shupper, 1922 MAIN STREET, SUITE 300,
Columbia S.C. 29201
- iii. Wanda H. Haile, 1122 Lady Street, Suite 940,
Columbia S.C. 29201-3243

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

- i. Nathial Robinson - Bond Hearing
- ii. John B. Shupper - Trial
- iii. Wanda H. Haile - Appeal

18. State clearly the relief you seek in filing this application.

CONVICTION AND SENTENCE REVERSED AND VACATED AND/OR A
NEW TRIAL

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

NO

STATE OF SOUTH CAROLINA

County of Richland

VERIFICATION

I, Robert A. JAMES #261393, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Robert A. James

SWORN to and subscribed before me this 6th
day of August, 19 2001
Penny F. West (L.S.)
Notary Public

My Commission Expires: 12-27-10

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

I, Robert A. JAMES #261393, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Robert A. James
Applicant

SWORN or affirmed to and subscribed before me this
6th day of August, 19 2001
Penny F. West
Notary Public

My Commission Expires 12-27-10

Ineffective Assistance of Counsel

Trial Counsel failure to adequately prepare for the case, to do a legal and factual investigation to exercise due diligence in the preparation of the defense's case and to the circumstances of it deprived Applicant of the right to effective assistance of counsel in violation of Art. 1 § 3, 14 of the State Constitution as well as the Fifth, Sixth, and Fourteenth Amendments of the United State Constitution.

Fact 10(A)

- (A) Trial Counsel failed to obtain assistance of experts who were available prior to the time of the trial. (1) Investigator to do independent investigation. (2) Identification expert to discredit State's identification testimony, and (3) D.N.A. expert to discredit State's D.N.A. testimony.
- (B) Trial Counsel was ineffective for erroneously informing Applicant not to take the stand because he would be cross-examined on prior conviction of disorderly conduct and disturbing the peace. Charges which were dismissed upon completion of Job Corps Program.
- (C) Trial Counsel failed to file a motion to quash the indictments due to an officer of the State appearing before the grand jury as the sole witness.
- (D) Trial Counsel was ineffective in failing to object to Trial Court's error in giving instruction to the jury which unconstitutionally diluted the State's burden of proof by instructing the jury on the Elements of Aiding and Abetting when the Applicant was charged as the Principal of the alleged offence.

Fact 10(b)

Appellate Counsel was ineffective in failing to raise issues preserved below, which would have entitled Applicant to reversal on appeal. A defendant is constitutionally entitled to the effective assistance:

of Counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387,
105 S.Ct. 830, 83 L.Ed.2d 821 (1985); SEE ALSO, *JONE v. BARNES*,
463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).
(Appellate Counsel's duty to raise issues on appeal.)

Appellate Counsel was ineffective in failing to raise issues preserved below, which would have entitled Applicant to reversal on appeal. A defendant is constitutionally entitled to the effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); See also, Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (Appellate Counsel's duty to raise issues on appeal.)

- A) The Appellate Counsel was ineffective for failing to advise the applicant of the right to request a rehearing of the appellate court's ruling and of the right to have the Supreme Court review the appellate's court decision. Violation Of Due Process.
- B) Appellate counsel was ineffective for failing to adequately raise the preserved issue of severance. While the law doesn't recognize severance as a matter of right, when there is merely the possibility of Antagonistic Defenses, as we all know in trial often times when that comes to light it's too late to undo.
Transcript of trial proceedings and facts contained therein will confirm the same.
- C) Appellate counsel was ineffective for failing to raise the preserved issue of the Right To A Speedy Trial.
Transcript of trial proceeding and facts contained therein will confirm the same. Violation Of Due Process.
- D) Appellate counsel was ineffective for failing to raise the preserved issue of, Direct Verdict. Because there was no direct evidence, applicant was deemed guilty because of association.
Transcript of trial proceeding and facts contained therein will confirm the same. Violation Of Due Process.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

1379

ROBERT T ANTHONY JAMES, 261393,)
Applicant,)

01-CP-40-3299

v.)
THE STATE,)
Respondent.)

AMENDED APPLICATION
FOR POST-CONVICTON RELIEF

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

1. Trial Judge erred in denying defense's motion to quash indictment and dismiss charges due to State's failure to timely act on arrest warrants, violation of Rule 3 (c), SCR CrimP. The Solicitor failed to file the indictments with the Clerk of Court (see indictments, they have no clock stamp). Also, State lacked Subject Matter Jurisdiction by State's failure to comply.

2. Trial Counsel was ineffective for failing to object to "sleeping jurors" not being removed or questioned.

3. Trial counsel was ineffective in failing to object to trial Court's erroneous instructions. The Court instructed the jury on the elements of accomplice liability, referred to as aiding and abetting, (or, the hand of one is the hand of all), when the Applicant was charged as the principal. This instruction impermissibly dilutes the presumption of innocence. State v. LaBarge, 275 S.C. 168, 268 S.E.2d 281 (1980).

4. Trial Court lacked Subject Matter Jurisdiction due to prohibited practice of prosecutors appearing as sole witness before Grand Jury.

5. Trial Counsel was ineffective for allowing the violation of the Applicant's Due Process Right to a Speedy Trial as Applicant awaited trial for two years and nine months. The delay

in bringing the case to trial undoubtedly prejudiced Applicant because of forgotten facts and confused and incomplete recollections. Applicant's alibi witness could not rely on her memory and the Applicant himself could not remember with certainty what had occurred seven months prior to his arrest. Further, the memories and whereabouts of defense witnesses were compromised and lost. There were no continuance orders that mention exceptional circumstances, and the State has never offered any justification for the significant delay.

6. Trial Counsel failed to adequately prepare for case...by failing to obtain the assistance of experts.

7. Appellate Counsel was ineffective in failing to sufficiently raise any arguable issues in brief on Appeal. Ms. Haile filed an Anders Brief. Arguable issues included needed severance and imputed guilt of Applicant because of being tried with his co-defendant. Applicant contends that the transcript amply documents significant preserved errors and Applicant's trial counsel provided a six page letter to Ms. Haile that detailed many arguable, preserved issues.

8. Trial counsel failed to call witnesses that could dispute the State's theory that Applicant lived at 2528 Orr St. If the landlord had been asked to testify he would have said that Applicant did not live there and was not even allowed on the property. Also, Henrietta Jordan (former girlfriend) could have been an effective alibi witness if she had been called to testify nearer to the time of the incident - but, because it took so long to get to trial, she could no longer state with certainty how long she and Applicant were together on that day. Trial Counsel was informed about all this and said he would look into it, but never talked about it again. State's witness and victim, Ms. frequently stated that she was "not sure" and "I honestly can't say who did what - it happened so fast." The delay in bringing the case to trial undoubtedly prejudiced Applicant because of forgotten facts and confused and incomplete recollections.

9. Trial counsel was ineffective for failing to object when the State pushed to try

Applicant under the *new* Armed Robbery Statute. The State pushed to [] Applicant under the *new* Armed Robbery Statute, because where under the old statute, a main element is that the suspect had to actually be armed and the offense predated the new statute.

1381

10. Indictments should have been quashed instead of amended. Trial Counsel erred in not objecting to the Judge deleting from the indictments with his own pen. (See indictments in the back of the transcript-they still read out completely -Tr. pp. 1362 & 1363)

11. Trial counsel was ineffective for failing to impeach State's witness Dr. Stacey Smithson (Tr. pp.889-903). The State described the attack on the victim as "vicious." Dr Smithson corroborated these claims by stating that he found redness, abrasions, and lacerations, etc. However, Dr. Smithson's written examination report states that there were no signs of trauma on any part of the victim's body. (p. 3, and 6 of his notes/report)

The Applicant asserts that the combined effect of the errors alleged in his original Application for Post-Conviction Relief as well as the amendments contained herein, establish that he received ineffective assistance of counsel both prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 14 of the South Carolina Constitution.

Respectfully submitted,

fa Angel Warren

Tara Dawn Shurling

Attorney and Counselor at Law

3614 Landmark Dr., Ste. D

803-738-8622

803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 7th day of January, 2005.
Columbia, SC

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Robert Anthony James, 261393,)
)
 Applicant,)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

Certificate of Service

01-CP-40-3299

BARBARA A. SCOTT
 C.C.C. & G.S.

2005 JAN - 7 PM 4:27

FILED

The undersigned attorney hereby certifies that one copy of the Applicant's Amendment to Application for Post-Conviction Relief in the above-entitled cause has been served upon opposing counsel, Arie D. Bax, by hand delivery this 7th day of January, 2005.

Tara Dawn Shurling
 TARA DAWN SHURLING
 Attorney and Counselor at Law

3614 Landmark Drive, Suite D
 Columbia, S.C. 29204
 (803) 738-8622
 (803) 738-1600 Fax
 690-4170 Digital Pager

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 7th day of
January, 2005

Leonard L. Bradley
 Notary Public for South Carolina

My Commission Expires: January 4, 2010

(L.S.)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. NO. 01-CP-40-3299
COUNTY OF RICHLAND	)	
	)	
Robert Anthony James,	)	
S.C.D.C. No., 261393	)	
	)	
Applicant,	)	RETURN
	)	
VS.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed August 8, 2001, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. During the August 1999 term of General Sessions, the Richland County Grand Jury indicted the Applicant for two counts of armed robbery, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, criminal sexual conduct in the first degree, and assault with intent to kill. Applicant was tried before a jury and found guilty as charged. Applicant was sentenced to thirty years imprisonment for criminal sexual conduct, and a consecutive sentence of ten years imprisonment for one count of armed robbery. All other sentences were run concurrent to these charges. Applicant was represented by John B. Shupper, Esquire.

Applicant appealed his conviction and sentence. The conviction was affirmed and the appeal dismissed by the South Carolina Court of Appeals on March 21, 2001. (Op. No. 2001-

UP-082).

For the purpose of this Return, the Respondent attaches and incorporates the Clerk of Court's records by reference. The Respondent will furnish and attach a copy of the trial transcript when it becomes available. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. ineffective assistance of counsel;
2. ineffective assistance of appellate counsel;
3. violation of due process: speedy trial.

III.

The State submits that the Applicant's first allegation that he received ineffective assistance of counsel is without merit. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for

employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). The State submits that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, supra; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Nevertheless, the allegation probably raises a question of fact which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

In his second allegation, the Applicant contends his appointed appellate attorney was ineffective for failing to raise certain issues in his direct appeal. The State submits this allegation is without merit. Appellate counsel appointed to represent an indigent defendant in his appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983). Indeed, an indigent defendant has no constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgement, decides not to present those points. Id. Appellate counsel's representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgement not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Furthermore, under the two part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an Applicant must show not only that counsel's performance was deficient, but that this deficiency prejudiced

his defense.

The State submits that the Applicant's appellate attorney's performance was not deficient and that the Applicant was not prejudiced in any way by his appellate attorney's performance.

V.

The Applicant's third allegation concerns issues that could or should have been raised at trial or on appeal. Thus, it is not a proper matter for PCR. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). Therefore, it should be summarily dismissed.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code §17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VIII.

WHEREFORE, having made Return, the Respondent requests that this Court hold an evidentiary hearing.

Respectfully submitted,

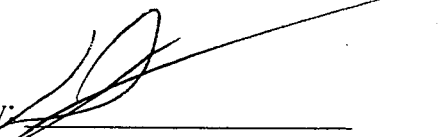
CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

B. ALLEN BULLARD
Assistant Deputy Attorney General

DAVE SPENCER
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211

By: 
Attorneys for the Respondents

March 26, 2002

STATE OF SOUTH CAROLINA
IN THE CIRCUIT COURT

Case No. 2001-CP-40-3299

ROBERT ANTHONY JAMES,

Applicant,

v.

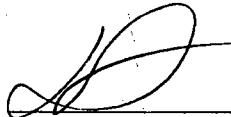
STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Return of the Respondent been served upon opposing counsel, Tara D. Shurling, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 26th day of March, 2002, to the below address:

Tara D. Shurling, Esquire
LAW OFFICES OF TARA DAWN SHURLING, P. A.
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204



DAVID A. SPENCER
ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

2001-CP-40-3299

ROBERT ANTHONY JAMES

:

-VS-

:

TRANSCRIPT OF RECORD

:

THE STATE OF SOUTH CAROLINA

:

JANUARY 14, 2005

COLUMBIA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ALISON R. LEE, JUDGE.

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

TARA D. SHURLING, ESQUIRE
ATTORNEY FOR THE APPLICANT

ARIE BAX, ESQUIRE
ATTORNEY FOR THE STATE

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

I N D E XWITNESSJOHN B. SHUPPER

DIRECT EXAMINATION BY MS. SHURLING.....	16
CROSS-EXAMINATION BY MR. BAX.....	40
REDIRECT EXAMINATION BY MS. SHURLING.....	47

ROBERT ANTHONY JAMES

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
P-1	MEDICAL RECORDS O. <i>VICTIM</i>		51
P-2	RETURN		56
P-3	STATEMENT OF <i>VICTIM</i> AND INCIDENT REPORT		64
P-4	NOTES OF ROBERT ANTHONY JAMES		75

1 **MR. BAX:** THE NEXT CASE THAT THE STATE WOULD CALL IS
2 ROBERT JAMES VERSUS THE STATE. THIS CASE IS DOCKETED AT
3 2001-CP-40-3299. IF I COULD GIVE A BRIEF PROCEDURAL HISTORY
4 BEFORE WE BEGIN, YOUR HONOR.

5 **THE COURT:** YES, SIR.

6 **MR. BAX:** WE'RE HERE ON A POST-CONVICTION RELIEF
7 APPLICATION FILED AUGUST 8TH, 2001. THE APPLICANT WAS
8 INDICTED DURING THE AUGUST 1999 TERM OF GENERAL SESSIONS BY
9 THE RICHLAND COUNTY GRAND JURY. HE WAS INDICTED FOR TWO
10 COUNTS OF ARMED ROBBERY, TWO COUNTS OF POSSESSION OF A WEAPON
11 DURING THE COMMISSION OF A VIOLENT CRIME, TWO COUNTS OF
12 KIDNAPPING, CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE, AND
13 ASSAULT WITH INTENT TO KILL.

14 THE APPLICANT WAS TRIED BEFORE A JURY, FOUND GUILTY AS
15 CHARGED. THE APPLICANT AT THAT TIME WAS SENTENCED TO 30
16 YEARS IMPRISONMENT FOR C.S.C. AND A CONSECUTIVE 10 YEARS
17 IMPRISONMENT FOR ONE COUNT OF ARMED ROBBERY. ALL OTHER
18 SENTENCES WERE TO RUN CONCURRENT TO THESE CHARGES.

19 THE APPLICANT WAS REPRESENTED BY MR. SHUPPER WHO IS
20 PRESENT HERE IN THE COURTROOM TODAY, YOUR HONOR. I BELIEVE
21 THE JUDGE ON THAT CASE, JUST FOR YOUR HONOR'S INFORMATION,
22 WAS JUDGE PLEICONES, I BELIEVE. IS THAT CORRECT?

23 **MS. SHURLING:** YES, SIR.

24 **MR. BAX:** THE TRIAL JUDGE? AND THAT BRINGS US TO
25 THIS -- WELL, EXCUSE ME, YOUR HONOR. THERE WAS AN APPEAL IN

1 THIS CASE. THE CONVICTION WAS AFFIRMED AND THE APPEAL
2 DISMISSED BY THE SOUTH CAROLINA COURT OF APPEALS ON
3 MARCH 21ST, 2001. THAT'S OPINION NUMBER 2001-UP-082. THAT
4 BRINGS US TO THIS APPLICATION, AND I WOULD YIELD TO OPPOSING
5 COUNSEL AT THIS TIME.

6 MS. SHURLING: THANK YOU, YOUR HONOR. FOR THE RECORD, I
7 AM TARA SHURLING. I WAS COURT-APPOINTED TO REPRESENT MR.
8 ROBERT ANTHONY JAMES. YOUR HONOR, I WOULD NOTE FOR THE
9 RECORD THAT I WAS ORIGINALLY COURT-APPOINTED TO REPRESENT MR.
10 JAMES AND ON ANOTHER DATE APPOINTED TO REPRESENT KENNETH
11 JAMES, HIS BROTHER. THANKS TO THE ASTUTE OBSERVATIONS OF MY
12 INVESTIGATOR, LEONARD BRADLEY, I PICKED UP ON THE FACT THAT I
13 HAD CO-DEFENDANTS PRETTY QUICKLY.

14 I WENT TO THE CORRECTIONAL INSTITUTION AND HAD THE
15 OPPORTUNITY TO VISIT WITH MR. KENNETH JAMES AND ROBERT
16 ANTHONY JAMES AND EXPLAINED TO THEM THAT I COULD NOT
17 REPRESENT THEM BOTH, THAT BEFORE I BEGAN WORKING ON THE CASE
18 IN EARNEST IT WAS APPROPRIATE THAT I ASK TO BE RELIEVED AS
19 COUNSEL IN ONE OF THE TWO CASES AND THAT I WAS GOING TO
20 EMPLOY WHAT I ALWAYS DO AS MY METHOD FOR SELECTION IN SUCH
21 CASES WHICH IS KEEP THE ONE THAT I WAS COURT-APPOINTED TO
22 FIRST AND ASK TO BE RELIEVED AS COUNSEL ON THE ONE THAT CAME
23 TO MY OFFICE AT A SUBSEQUENT DATE. I BELIEVE THAT THEY
24 UNDERSTOOD THAT, AND I SUBSEQUENTLY DID ASK TO BE RELIEVED AS
25 COUNSEL FOR MR. JAMES AND WAS RELIEVED AS COUNSEL FOR MR.

1 JAMES. I DID NOT---

2 THE COURT: KENNETH JAMES.

3 MS. SHURLING: SORRY. PARDON ME. MR. KENNETH JAMES. I
4 DID NOT ENGAGE IN ANY SUBSTANTIVE CONVERSATIONS WITH KENNETH
5 JAMES ABOUT THE CASE PRIOR TO BEING RELIEVED AS COUNSEL, AND
6 BY THAT I MEAN I DID NOT ENGAGE IN ANY DISCUSSIONS WITH HIM
7 OF A CONFIDENTIAL NATURE NOR DID I ENGAGE IN DISCUSSIONS WITH
8 HIM CONCERNING STRATEGIES TO BE EMPLOYED ON COLLATERAL
9 REVIEW. AND I BELIEVE THAT MR. ROBERT JAMES IS COMFORTABLE
10 WITH GOING FORWARD WITH ME AS HIS ATTORNEY NOW THAT I HAVE
11 SEVERED THE TIE WITH HIS BROTHER'S CASE.

12 YOUR HONOR, IN HIS APPLICATION FOR POST-CONVICTION
13 RELIEF, HIS PRO SE APPLICATION, MR. JAMES HAS ALLEGED
14 INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHICH, OF COURSE, IS
15 A CLAIM THAT HE DID NOT RECEIVE EFFECTIVE ASSISTANCE OF
16 COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS
17 TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE 1,
18 SECTION 14 OF OUR STATE CONSTITUTION BUT ALSO THAT UNDER
19 EVITTS VERSUS LUCY AND SIMILAR CASES THAT HE RECEIVED
20 INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

21 I HAVE EXPLAINED TO MR. JAMES THAT HIS ATTORNEY FILED A
22 BRIEF UNDER THE AUTHORITY OF ANDERS VERSUS CALIFORNIA. I
23 EXPLAINED WHAT THE ANDERS VERSUS CALIFORNIA PROCEDURE IS. I
24 MADE IT CLEAR TO HIM THAT UNDER THE PROCEDURE ANNOUNCED IN
25 ANDERS VERSUS CALIFORNIA AN APPOINTED LAWYER HANDLING AN

1 APPEAL WHO REACHES THE CONCLUSION THAT A CASE HAS NO MERIT IS
2 STILL REQUIRED TO BRIEF ONE OR MORE POTENTIAL LEGAL ISSUES IN
3 THE CASE BUT THAT HE OR SHE IS THEN ALLOWED TO APPEND TO THAT
4 BRIEF A PETITION TO BE RELIEVED AS COUNSEL BASED ON THE
5 ATTORNEY'S SENTIMENT THAT THE CASE LACKS MERIT.

6 I FURTHER EXPLAINED THAT THE REQUIREMENT THAT COUNSEL
7 BRIEF A CASE, EVEN ONE THAT HE BELIEVES TO BE -- HE OR SHE
8 BELIEVES TO BE MERITLESS IS -- IS ROOTED IN THE NOTION THAT
9 IF SOMEONE HAD RETAINED COUNSEL THAT A PAID LAWYER MIGHT BE
10 WILLING TO DIG A LITTLE DEEPER TO FIND SOMETHING TO ARGUE
11 THAN A COURT-APPOINTED LAWYER. I ALSO EXPLAINED TO HIM THAT
12 THE SECOND PRONG OF THE ANDERS VERSUS CALIFORNIA PROCEDURE,
13 IF YOU WILL, IS THAT ONCE A LAWYER FILES AN ANDERS BRIEF, THE
14 ENTIRE RECORD FROM COVER TO COVER IS FILED WITH THE REVIEWING
15 APPELLATE COURT UNLIKE A MERIT BRIEF WHERE ONLY THOSE
16 PORTIONS OF THE RECORD THAT ARE GERMANE TO THE ISSUES RAISED
17 BY COUNSEL ARE PUT FORTH IN A VOLUME CALLED "RECORD ON
18 APPEAL" AND PRESENTED TO THE COURT FOR REVIEW AND THAT THE
19 REASON THE ENTIRE RECORD IS PRESENTED IN AN ANDERS CASE IS
20 THAT THE BURDEN THEN SHIFTS TO THE REVIEWING COURT TO REVIEW
21 THE RECORD FROM BEGINNING TO END AND TO DETERMINE WHETHER IN
22 THE VIEW OF THE COURT APPELLATE COUNSEL IS CORRECT IN
23 ASCERTAINING THAT THERE ARE NO MERITORIOUS ISSUES IN THE
24 CASE.

25 TO AID THE COURT IN THAT REVIEW, A LETTER IS SENT TO THE

1 CLIENT ADVISING HIM THAT THE APPELLATE LAWYER HAS FILED AN
2 ANDERS BRIEF, HAS REQUESTED TO BE RELIEVED AS COUNSEL, AND
3 THE CLIENT IS THEN GIVEN THE OPPORTUNITY TO FILE A PRO SE
4 APPELLATE BRIEF RAISING ANY ADDITIONAL ISSUES THAT HE OR SHE
5 FEELS HAVE MERIT AND ALSO EXPRESSING THEIR VIEW IN OPPOSITION
6 TO APPELLATE COUNSEL'S POSITION THAT THE APPEAL LACKS MERIT.

7 IN THIS CASE MR. ROBERTS - PARDON ME - MR. JAMES DID
8 TAKE ADVANTAGE OF THAT OPPORTUNITY AND FILED A PRO SE BRIEF
9 WITH THE COURT OF APPEALS ON OCTOBER 30TH, 2000. I'VE ALSO
10 EXPLAINED TO HIM THAT THE REASON THERE IS NO RESPONDENT'S
11 BRIEF IN THE MATERIALS HE RECEIVED IS THAT IN THE ANDERS
12 PROCEDURE THE RESPONDENT IS NOT REQUIRED TO FILE RESPONSIVE
13 PLEADINGS TO APPELLATE COUNSEL'S ANDERS BRIEF. THEY MAY IF
14 THEY WISH, BUT THE STANDARD PRACTICE IN SOUTH CAROLINA IS
15 THAT THE SOUTH CAROLINA OFFICE OF THE ATTORNEY GENERAL DOES
16 NOT FILE RESPONDENTS' BRIEFS IN ANDERS CASES, AND THAT'S WHY
17 THERE WAS NO APPEARANCE PUT IN BY THE STATE IN HIS APPEAL.

18 I EXPLAINED TO HIM, YOUR HONOR, THAT IN A CIRCUMSTANCE
19 LIKE THIS THE LAWYER'S PETITION TO BE RELIEVED AS COUNSEL IS
20 NOT GRANTED BY THE COURT UNTIL SUCH TIME AS THE COURT CONCURS
21 IN THE JUDGMENT OF THE APPELLATE LAWYER THAT THERE ARE NO
22 MERITORIOUS PRESERVED ISSUES WHICH WOULD BE LIKELY TO PROVIDE
23 A BASIS FOR A SUCCESSFUL APPEAL AND THAT FOR THAT BASIS A
24 COLLATERAL REVIEW OF AN ALLEGATION OF INEFFECTIVE ASSISTANCE
25 OF APPELLATE COUNSEL IS VERY SELDOM WORTH THE PAPER IT'S

1 WRITTEN ON IF AN ANDERS BRIEF HAS BEEN FILED BECAUSE, IN
2 EFFECT, YOU'RE ASKING A CIRCUIT COURT TO FIND THAT THE COURT
3 OF APPEALS MISSED AN ISSUE, NOT JUST THAT APPELLATE COUNSEL
4 MISSED AN ISSUE, BUT THAT THE APPELLATE COURT MISSED AN ISSUE
5 IN DECIDING TO CONCUR WITH THE VIEW OF APPELLATE COUNSEL AND
6 GRANT THE PETITION TO BE RELIEVED AS COUNSEL.

7 HE HAS A SLIGHTLY UNUSUAL TWIST ON THIS ISSUE THAT I
8 HAVE SEEN PRESENTED BEFORE, AND THAT'S THAT IN THE PAST
9 ANDERS BRIEFS ALWAYS WENT TO OUR SUPREME COURT, AND WITH A
10 RULING BY THE SUPREME COURT ON A PETITION TO BE RELIEVED AS
11 COUNSEL YOU HAD A FINDING BY THE HIGHEST COURT IN THE LAND
12 THAT THEY AGREED WITH THE VIEW OF APPELLATE COUNSEL THAT THE
13 CASE LACKED MERIT. IN THIS CASE, IN MORE RECENT HISTORY
14 WHAT'S HAPPENED IS THE COURT OF APPEALS IS NOW HEARING
15 CRIMINAL MATTERS AND, THEREFORE, THE COURT OF APPEALS IS
16 ENTERTAINING PETITIONS TO BE RELIEVED AS COUNSEL IN ANDERS
17 MATTERS.

18 WHAT HAPPENS, YOUR HONOR, IS THAT IF YOU LOSE AN APPEAL
19 IN THE COURT OF APPEALS ON A MERIT CASE AND YOU'RE
20 REPRESENTED BY THE OFFICE OF APPELLATE DEFENSE, THEY MAKE A
21 DECISION WHETHER THEY BELIEVE THERE IS A BASIS FOR ASKING THE
22 SUPREME COURT OF SOUTH CAROLINA TO REVIEW THE JUDGMENT OF THE
23 COURT OF APPEALS IN THAT CASE, AND I KNOW FROM MY 15 AND A
24 HALF YEARS EXPERIENCE AT APPELLATE DEFENSE THAT IF THE LAWYER
25 IN HIS JUDGMENT FEELS THAT THERE'S NO POINT IN PETITIONING

1 FOR WRIT OF CERTIORARI, THERE IS A LETTER THAT GOES OUT -
2 QUITE FRANKLY, IT'S THE FORM LETTER THAT I WROTE WHEN I WAS
3 THERE 15 AND A HALF YEARS AGO - THAT STATES THAT THE
4 APPELLANT NEEDS TO UNDERSTAND THAT HE OR SHE WOULD HAVE THE
5 RIGHT TO PETITION THE SUPREME COURT OF SOUTH CAROLINA FOR
6 CERTIORARI, THAT EVEN THOUGH THE APPELLATE ATTORNEY IS NOT
7 GOING TO DO IT THAT WOULD NOT OBVIATE THE FACT THAT THE
8 CLIENT COULD DO IT IF HE CHOSE TO DO SO.

9 WHAT HAPPENS IN THE ANDERS BRIEF SETTING IS SOMEWHAT
10 UNIQUE BECAUSE WHEN THE COURT OF APPEALS RULES AND GRANTS THE
11 PETITION TO BE RELIEVED AS COUNSEL, THE SOUTH CAROLINA OFFICE
12 OF APPELLATE DEFENSE DEEMS THAT THEY ARE NO LONGER COUNSEL OF
13 RECORD WHICH IS ACCURATE, AND THEY -- THE CLIENT IS NOTIFIED
14 THAT THE PETITION TO BE RELIEVED AS COUNSEL HAS BEEN GRANTED
15 AND THAT'S THE END OF IT, AND IT DOES NOT RESULT IN ANY
16 ADVICE OR COUNSEL FROM THE OFFICE OF APPELLATE DEFENSE
17 CONCERNING HIS RIGHT POTENTIALLY TO HAVE THE SUPREME COURT OF
18 SOUTH CAROLINA REVIEW THE FINDING OF THE COURT OF APPEALS.

19 SO THERE COULD POTENTIALLY BE CASES WHERE THE COURT OF
20 APPEALS CONCURRED IN THE JUDGMENT OF APPELLATE COUNSEL THAT
21 THE CASE LACKED MERIT BUT THAT IF IT WERE TAKEN TO THE
22 SUPREME COURT OF SOUTH CAROLINA, THE SUPREME COURT MIGHT, AS
23 THEY DO IN A NUMBER OF CASES A YEAR, DISAGREE WITH THE
24 JUDGMENT OF THE COURT OF APPEALS AND FIND THAT RELIEVING
25 COUNSEL WAS INAPPROPRIATE.

1 I CAN STATE AS AN OFFICER OF THE COURT IN MY 15 AND A
2 HALF YEARS AT APPELLATE DEFENSE THAT FREQUENTLY WHEN ANDERS
3 BRIEFS WERE FILED -- PERHAPS FREQUENTLY IS THE WRONG
4 ADJECTIVE, BUT CERTAINLY IT WAS NOT RARELY THE HIGH COURT
5 WOULD SEND A CASE BACK. WE CALLED IT AN ANDERS BUCK. IF YOU
6 HAD FILED AN ANDERS BRIEF AND THE COURT DID NOT AGREE WITH
7 YOU THAT THERE WERE NO MERITORIOUS ISSUES, THEY WOULD SEND
8 BACK A LETTER, AN ORDER RATHER, SAYING THAT YOUR PETITION TO
9 BE RELIEVED WAS DENIED AND THAT THE COURT WAS INSTRUCTING
10 THAT YOU FILE A SUPPLEMENTAL BRIEF ON THE ISSUE OF, AND THEY
11 WOULD EITHER ASK FOR FURTHER BRIEFING ON THE ISSUE THAT YOU
12 HAD GIVEN SORT OF SHORT SHRIFT IN AN ANDERS BRIEF OR THEY
13 WOULD ACTUALLY DIRECT YOU TO BRIEF AN ISSUE THAT YOU HAD NOT
14 EVEN TOUCHED ON IN YOUR ANDERS BRIEF.

15 SO IT'S HIS POSITION, YOUR HONOR, THAT THERE WAS AN
16 OBLIGATION ON THE PART OF THE OFFICE OF APPELLATE DEFENSE,
17 NOTWITHSTANDING THE FACT THAT THEY HAD BEEN RELIEVED AS
18 COUNSEL BY THE COURT OF APPEALS, TO ADVISE HIM THAT HE HAD AT
19 LEAST THE RIGHT TO PETITION THE SUPREME COURT OF SOUTH
20 CAROLINA TO REVIEW THE JUDGMENT AND FINDINGS OF THE COURT OF
21 APPEALS, AND THAT WOULD BE HIS APPELLATE COUNSEL ISSUE.

22 MOVING ON TO THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
23 ISSUES, YOUR HONOR, HE HAS ALLEGED IN HIS ORIGINAL
24 APPLICATION FOR POST-CONVICTION RELIEF - AND I'M GOING TO
25 SUMMARIZE THESE BECAUSE THEY'RE WRITTEN IN WHAT I BELIEVE TO

1 BE A CLEAR HAND IN HIS PRO SE PLEADINGS - THAT COUNSEL WAS
2 INEFFECTIVE FOR FAILING TO OBTAIN THE ASSISTANCE OF EXPERT
3 WITNESSES, THAT TRIAL COUNSEL WAS INEFFECTIVE FOR ERRONEOUSLY
4 INFORMING HIM NOT TO TAKE THE STAND BECAUSE HE COULD BE
5 CROSS-EXAMINED CONCERNING A PRIOR CONVICTION FOR DISORDERLY
6 CONDUCT AND DISTURBING THE PEACE, CHARGES WHICH HAD BEEN
7 DISMISSED UPON COMPLETION OF THE JOB CORPS PROGRAM.

8 IN ADDITION, HE ALLEGES TRIAL COUNSEL FAILED TO FILE A
9 MOTION TO QUASH THE INDICTMENTS WHERE AN OFFICER OF THE STATE
10 APPEARED BEFORE THE GRAND JURY AS THE SOLE WITNESS, THAT
11 TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO
12 TRIAL -- THE TRIAL COURT'S ERROR IN GIVING AN INSTRUCTION TO
13 THE JURY WHICH UNCONSTITUTIONALLY DILUTED THE STATE'S BURDEN OF
14 PROOF BY INSTRUCTING THE JURY ON THE ELEMENTS OF AIDING AND
15 ABETTING WHEN THE APPLICANT WAS, IN FACT, CHARGED AS A
16 PRINCIPAL TO THE ALLEGED OFFENSE.

17 IN DISCUSSING THAT ISSUE WITH THE CLIENT, YOUR HONOR, I
18 WOULD EXTRAPOLATE SOMEWHAT AND SAY THAT IT'S HIS VIEW THAT
19 THE LAW OF ACCOMPLICE LIABILITY SHOULD NOT HAVE BEEN CHARGED
20 TO THE JURY ON THE FACTS OF THIS CASE WHERE HE WAS, UNDER THE
21 STATE'S THEORY OF THE CASE, NOT AN ACCOMPLICE BUT A PRINCIPAL
22 TO THIS OFFENSE. THAT'S HIS UNDERSTANDING OF THE LAW, YOUR
23 HONOR, NOT MINE, BUT THAT IS HIS POSITION.

24 YOUR HONOR, HE SUBSEQUENTLY FILED OR I FILED AT HIS
25 INSTRUCTION AN AMENDED APPLICATION FOR POST-CONVICTION RELIEF

1 IN WHICH HE ALLEGES THE FOLLOWING: THAT THE TRIAL JUDGE
2 ERRED IN DENYING THE DEFENDANT'S MOTION TO QUASH THE
3 INDICTMENT AND DISMISS THE CHARGES. THAT WOULD BE
4 INDICTMENTS, PLURAL. I APOLOGIZE FOR THE TYPOGRAPHICAL
5 ERROR. FOR THE STATE'S FAILURE TO ACT TIMELY ON THE ARREST
6 WARRANTS, IN VIOLATION OF RULE 3(C) OF THE SOUTH CAROLINA
7 RULES OF CRIMINAL PROCEDURE. IT'S HIS POSITION THAT THE
8 SOLICITOR FAILED TO FILE THE INDICTMENTS WITH THE CLERK OF
9 COURT BEFORE THEY WERE SUBMITTED TO THE GRAND JURY AND THAT
10 FOR THE FAILURE OF THE STATE TO COMPLY WITH THIS REQUIREMENT
11 THE INDICTMENTS BECAME NULL AND VOID AS A MATTER OF LAW AND
12 THAT THERE WAS A LACK OF SUBJECT MATTER JURISDICTION.

13 HE ALSO FEELS THAT TRIAL COUNSEL WAS INEFFECTIVE FOR
14 FAILING TO OBJECT TO SLEEPING JURORS NOT BEING REMOVED OR
15 QUESTIONED. IT'S HIS POSITION THAT DURING THE TRIAL OF THIS
16 CASE THERE WERE A NUMBER OF JUROR -- THERE WAS ONE OR MORE
17 JURORS THAT -- THERE WERE ONE OR MORE JURORS WHO WERE NODDING
18 OFF AT VARIOUS JUNCTURES DURING THE TRIAL, THAT HE POINTED
19 THAT FACT OUT TO HIS ATTORNEY AND THAT HIS ATTORNEY DID
20 NOTHING TO REQUEST A MISTRIAL OR TAKE ANY OTHER APPROPRIATE
21 ACTION IN RESPONSE TO THESE SLEEPING JURORS.

22 IT'S ALSO HIS POSITION, YOUR HONOR, THAT THE TRIAL COURT
23 LACKED SUBJECT MATTER JURISDICTION BECAUSE OF THE PROHIBITED
24 PRACTICE OF HAVING PROSECUTORS APPEAR AS THE SOLE WITNESS
25 BEFORE THE GRAND JURY. THAT'S A DIFFERENT VERSION OF THE ONE

1 ALREADY STATED IN HIS PRO SE PLEADINGS.

2 HE FURTHER ALLEGES THAT TRIAL COUNSEL WAS INEFFECTIVE
3 FOR ALLOWING A VIOLATION OF HIS DUE PROCESS RIGHT TO SPEEDY
4 TRIAL INASMUCH AS HE WAITED FOR SOME TWO YEARS AND NINE
5 MONTHS TO GO TO COURT. IT'S HIS POSITION THAT, FOR INSTANCE,
6 THE VAGUENESS OF HIS ALIBI WITNESS'S MEMORY WOULD BE ONE
7 FACTOR THAT CAN BE POINTED TO AS PREJUDICE ARISING FROM THE
8 FAILURE OF THE STATE TO BRING THIS CASE TO TRIAL IN AN
9 EXPEDITIOUS MANNER, THAT AFTER THE PASSAGE OF SO MUCH TIME
10 SHE WAS UNABLE TO TESTIFY WITH CERTITUDE CONCERNING HER
11 RECOLLECTIONS OF THAT EVENING.

12 HE ALSO ALLEGES THAT TRIAL COUNSEL FAILED TO ADEQUATELY
13 PREPARE FOR THIS CASE. YOUR HONOR, HE FEELS THAT TRIAL
14 COUNSEL FAILED TO CALL WITNESSES THAT COULD HAVE DISPUTED THE
15 STATE'S THEORY THAT THE APPLICANT LIVED AT 2528 ORR
16 (PHONETIC) STREET. HE BELIEVES THAT THE ASSERTION THAT HE
17 LIVED WITH HIS BROTHER, KENNETH, WAS HIGHLY PREJUDICIAL TO
18 HIM AND THAT IT FURTHER TIED HIM TO THE CASE AGAINST HIS
19 BROTHER AND THAT THIS WAS EXTRAORDINARILY SIGNIFICANT BECAUSE
20 OF THE FACT THAT THE ONLY FORENSIC SCIENTIFIC EVIDENCE
21 OFFERED IN THIS CASE WAS D.N.A. EVIDENCE MATCHING A SPERM
22 SAMPLE TAKEN FROM THE VICTIM TO HIS BROTHER, KENNETH.

23 HE FEELS, YOUR HONOR, THAT TRIAL COUNSEL WAS INEFFECTIVE
24 FOR FAILING TO OBJECT WHEN THE STATE TRIED TO PUSH FOR HIS
25 PROSECUTION UNDER THE NEW ARMED ROBBERY STATUTE WHICH MADE

1 THE STATE'S BURDEN OF PROOF LESSEN TO THE DEGREE THAT UNDER
2 THE OLD STATUTE YOU HAD TO DEMONSTRATE THAT THE PARTY WAS
3 ARMED WHEREAS UNDER THE NEW STATUTE YOU ONLY HAVE TO
4 DEMONSTRATE THAT THE PARTY IS EITHER ARMED OR REPRESENTS
5 HIMSELF TO BE ARMED. I WOULD NOTE, HOWEVER, THAT A REVIEW OF
6 THE RECORD IN MY VIEW APPEARS TO DEMONSTRATE THAT THE JURY
7 WAS, IN FACT, CHARGED UNDER THE OLD LAW, NOT THE NEW LAW.

8 ADDITIONALLY, HE FEELS THAT THE INDICTMENTS SHOULD HAVE
9 BEEN QUASHED RATHER THAN AMENDED, THAT TRIAL COUNSEL ERRED IN
10 FAILING TO OBJECT WHEN THE TRIAL JUDGE DELETED WITH HIS OWN
11 PEN PORTIONS OF THE INDICTMENTS. YOUR HONOR, IF YOU LOOK AT
12 THE INDICTMENTS YOU WILL SEE THAT THERE IS LANGUAGE IN THE
13 INDICTMENT WHICH IS STRUCK AND INITIALED.

14 YOUR HONOR, I BELIEVE THAT THE ONLY ADDITIONAL ISSUE IS
15 THAT THE APPLICANT FEELS THAT TRIAL COUNSEL WAS INEFFECTIVE
16 FOR FAILING TO ADEQUATELY IMPEACH THE TESTIMONY OF DR. STACY
17 SMITHSON WHOSE TESTIMONY IS FOUND AT PAGE 889 THROUGH 903
18 CONCERNING THE ASSERTION THAT THE ATTACK ON THE VICTIM WAS
19 VICIOUS. DR. SMITHSON CORROBORATED -- PARDON ME. THE STATE
20 CLAIMED THAT THE ATTACKS ON THE VICTIMS -- THE VICTIM WAS
21 VICIOUS AND DR. SMITHSON'S TESTIMONY TENDED TO CORROBORATE
22 THESE CLAIMS BY STATING THAT HE FOUND REDNESS, ABRASIONS,
23 LACERATIONS, ET CETERA.

24 HOWEVER, HIS WRITTEN REPORT STATED THAT THERE WERE NO
25 GENERAL SIGNS OF TRAUMA, AND HE WOULD SUBMIT THAT DEFENSE

1 COUNSEL WAS INEFFECTIVE FOR FAILING TO USE THAT REPORT TO
2 SUFFICIENTLY IMPEACH THIS DOCTOR CONCERNING THE ASSERTION
3 AND, MORE IMPORTANTLY, FOR FAILING TO CHALLENGE THE STATE'S
4 ASSERTION THAT THIS WAS A VICIOUS ATTACK WHEN, IN FACT, THE
5 VICTIM'S INJURIES WERE RELATIVELY MINOR AND, IN FACT, THE
6 TESTIMONY OF THE GOOD DOCTOR INDICATES THAT EVEN THE VAGINAL
7 INJURIES INDICATED WERE RELATIVELY MINOR, THAT THEY WERE
8 CONSISTENT WITH SEXUAL INTERCOURSE, AND THAT THE MINOR
9 TEARING WAS THOUGHT TO BE SOMEWHAT CONSISTENT WITH A NON-
10 CONSENSUAL SEXUAL EPISODE TO THE DEGREE THAT THEY WOULD BE
11 CONSISTENT WITH SOMEONE HAVING INTERCOURSE WHEN THEY WERE NOT
12 SUFFICIENTLY LUBRICATED.

13 HOWEVER, THERE WAS NO CROSS-EXAMINATION ON THE FACT THAT
14 CERTAINLY RAPE WOULD NOT BE THE ONLY CIRCUMSTANCE UNDER WHICH
15 THAT SET OF FACTORS COULD BE PRESENT. AND I BELIEVE THAT I
16 HAVE ACCURATELY SUMMARIZED THE ISSUES THAT MY CLIENT WISHES
17 FOR ME TO RAISE. YOUR HONOR, MAY I HAVE A MOMENT'S
18 INDULGENCE?

19 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MS.
20 SHURLING AND MR. JAMES.)

21 MS. SHURLING: YOUR HONOR, AT THIS TIME I WOULD CALL
22 JOHN SHUPPER TO THE STAND, PLEASE.

23 THE COURT: YOU MAY STEP FORWARD TO BE SWORN.

24 JOHN B. SHUPPER, AFTER BEING DULY SWORN, TESTIFIED
25 AS FOLLOWS:

1 **THE COURT:** IF YOU WOULD PLEASE HAVE A SEAT AND STATE
2 YOUR FULL NAME FOR THE RECORD.

3 **THE WITNESS:** JOHN BURTON SHUPPER. S-H-U-P-P-E-R.

4 DIRECT EXAMINATION

5 BY MS. SHURLING:

6 Q. GOOD MORNING. DO YOU RECALL REPRESENTING MR. JAMES?

7 A. I DO.

8 Q. DO YOU HAVE A PRETTY GOOD MEMORY OF THIS TRIAL?

9 A. FAIR. IT'S BEEN FIVE YEARS.

10 Q. HAVE YOU HAD A CHANCE TO REVIEW THE TRIAL TRANSCRIPT IN
11 PREPARING FOR THIS HEARING TODAY?

12 A. I HAVE REVIEWED -- I'VE HAD -- PREVIOUSLY BEEN
13 PREPARED -- PROVIDED VOLUMES TWO AND THREE, AND VOLUME ONE I
14 HAVE JUST OBTAINED---

15 Q. OKAY.

16 A. ---AND I WAS REVIEWING PARTS OF THAT.

17 Q. WELL, WE'LL BE SURE AND HAND YOU UP A COPY OF VOLUME ONE
18 IF YOU NEED IT DURING YOUR TESTIMONY. DID YOU CONSIDER
19 HIRING ANY ADDITIONAL EXPERTS IN THIS CASE THAT YOU DID NOT
20 PRESENT AS WITNESSES?

21 A. I KNEW -- FRANKLY, NO. I DID HIRE EXPERTS, AN
22 IDENTIFICATION EXPERT, BUT OTHER THAN THE IDENTIFICATION
23 EXPERT, MY VIEW OF THE EVIDENCE THAT WOULD HAVE -- THAT WAS
24 EXPECTED TO BE PRESENTED WAS D.N.A. EVIDENCE AGAINST MR.
25 JAMES -- AGAINST ROBERT'S BROTHER, KENNETH. THE D.N.A.

1 EVIDENCE MATCHING FROM KENNETH JAMES' SAMPLE MATCHED THE
2 SWABS FROM THE VICTIM. THEY DID TAKE SAMPLES FROM ROBERT
3 JAMES; THERE WAS NO MATCH. SO MY VIEW WAS: IN THE ABSENCE
4 OF ANYTHING LINKING ROBERT TO THE D.N.A. EVIDENCE THAT THAT,
5 IN FACT, SPOKE FOR ITSELF. HAD THEY ALLEGED THAT THERE WAS
6 D.N.A. EVIDENCE MATCHING ROBERT, I MIGHT HAVE COME TO A
7 DIFFERENT CONCLUSION.

8 Q. DID YOU WORK TO ANY DEGREE WITH COUNSEL FOR KENNETH IN
9 PREPARING THIS CASE FOR TRIAL?

10 A. I HAD SOME CONVERSATIONS PERIODICALLY DURING THE COURSE
11 OF MY REPRESENTATION OF ROBERT. I MUST MENTION, I THINK,
12 THAT I WAS PROBABLY THE THIRD COUNSEL ON MR. ROBERT JAMES'
13 CASE. AS I RECALL, HE WAS ORIGINALLY PROVIDED PUBLIC
14 DEFENDER COUNSEL THAT WAS CONFLICTED OUT TO MR. NATHANIEL
15 ROBERSON WHO REPRESENTED HIM FOR SOME TIME. I BELIEVE OF THE
16 -- THAT I WAS HIS COUNSEL FOR ABOUT A YEAR AND A HALF OF THE
17 ALMOST THREE YEARS THAT PASSED FROM HIS -- FROM THIS INCIDENT
18 TO THE TRIAL.

19 Q. OKAY. NOW, YOU DID HIRE DR. THOMAS ALLEY TO BE YOUR
20 EYEWITNESS IDENTIFICATION EXPERT.

21 A. YES, MA'AM.

22 Q. BUT YOU CONSIDERED THAT A D.N.A. EXPERT WAS NOT
23 NECESSARY OR APPROPRIATE SINCE IT WAS KENNETH WHO WAS TIED
24 FORENSICALLY TO THE VICTIM, NOT HIS BROTHER.

25 A. CORRECT.

1 Q. DID IT OCCUR TO YOU, MR. SHUPPER, THAT THE FACT THAT
2 THESE GENTLEMEN WERE BROTHERS MADE THE FORENSIC EVIDENCE
3 AGAINST KENNETH MORE PREJUDICIAL AGAINST ROBERT THAN IT WOULD
4 HAVE BEEN IF THEY WERE NOT FAMILIAL CO-DEFENDANTS?

5 A. FRANKLY I -- I DIDN'T.

6 Q. IN OTHER WORDS, I GUESS MY QUESTION IS: WASN'T THE
7 GREAT RISK THAT THE JURY WOULD CONCLUDE THAT THE D.N.A.
8 EVIDENCE TIED KENNETH JAMES TO THE SCENE AND THEY WERE
9 BROTHERS AND THEY WERE ALLEGED TO LIVE TOGETHER AND THAT THAT
10 MADE MORE PROBABLE THAN NOT THE STATE'S THEORY OF THE CASE
11 THAT IT WAS YOUR CLIENT WHO WAS WITH KENNETH JAMES ON THE
12 NIGHT OF THE INCIDENT?

13 A. FRANKLY, I THOUGHT THAT THE -- THE FORENSIC EVIDENCE
14 SIMPLY LINKED KENNETH TO THE VICTIM AND NOT ROBERT. I DID
15 NOT PURSUE ANYTHING ALONG THE LINES OF THE THEORY THAT YOU
16 ARE ASKING ABOUT IN TERMS OF WAS I FEARFUL THAT THE JURY
17 MIGHT FOR SOME REASON CONSIDER THAT THE D.N.A. EVIDENCE
18 LINKING KENNETH TO THE VICTIM WOULD SOMEHOW LINK HIM TO IT.
19 IN FACT, MY CONCLUSION WAS ALMOST THE OPPOSITE, THAT THE
20 ABSENCE OF ANY D.N.A. LINK WAS FAVORABLE TO ROBERT, NOT
21 HARMFUL.

22 Q. OKAY.

23 A. AND IF I RECALL, THE D.N.A. EVIDENCE PRESENTED BY THE
24 STATE AND THE EXPERT TESTIMONY FOR THE STATE SUGGESTED THAT
25 THIS WAS DIRECTED SPECIFICALLY AT KENNETH, DID NOT MAKE BROAD

1 ALLEGATIONS THAT IT COULD LINK ROBERT---

2 Q. AND I'M NOT SUGGESTING OTHERWISE. HERE'S MY QUESTION:
3 IF KENNETH JAMES HAD BEEN JOHN SMITH AND NOT RELATED BY BLOOD
4 TO ROBERT, OKAY, THE PROOF THAT SEMEN MATCHING JOHN SMITH WAS
5 FOUND ON THE VICTIM WOULD IN NO WAY SUGGEST THE PRESENCE OR
6 INVOLVEMENT OF ROBERT JAMES; CORRECT?

7 A. CERTAINLY.

8 Q. OKAY. NOW, WHERE THERE ARE BROTHERS AND THE STATE
9 ALLEGES THAT THEY HANG OUT TOGETHER AND THEY LIVE TOGETHER,
10 IF YOU HAVE SOME CONCRETE PHYSICAL EVIDENCE TYING KENNETH
11 JAMES TO THE VICTIM, DOESN'T THAT INDIRECTLY STRENGTHEN THEIR
12 CASE AGAINST ROBERT?

13 A. I DIDN'T SEE IT THAT WAY.

14 Q. OKAY. I UNDERSTAND. I'LL MOVE ON. THIS IS A QUESTION
15 THAT COMES UP PRETTY FREQUENTLY IN THESE PROCEEDINGS AND
16 THAT'S THAT THE COURT RULES TECHNICALLY REQUIRE THAT THE
17 SOLICITOR'S OFFICE FILE AN INDICTMENT WITH THE CLERK OF
18 COURT'S OFFICE BEFORE THEY PRESENT IT TO THE GRAND JURY TO BE
19 TRUE-BILLED OR NO-BILLED. IN THE FIFTH CIRCUIT THAT PRACTICE
20 IS NOT FOLLOWED. IN FACT, THERE IS NO EVIDENCE IN THE CLERK
21 OF COURT'S FILE THAT A COPY OF THIS INDICTMENT WAS FILED WITH
22 THE CLERK OF COURT PRIOR TO BEING SUBMITTED TO THE GRAND
23 JURY. DID YOU CONSIDER CHALLENGING THE VALIDITY OF THESE
24 INDICTMENTS ON THAT BASIS?

25 A. NO.

1 Q. DO YOU RECALL DISCUSSIONS WITH YOUR CLIENT ABOUT WHETHER
2 OR NOT HE SHOULD TAKE THE STAND?

3 A. YES.

4 Q. AND IS IT TRUE THAT HIS ONLY PRIOR RECORD WAS THE
5 CONVICTION FOR DISORDERLY CONDUCT? PARDON ME? OH, I'M
6 SORRY. THAT WAS -- I THOUGHT IT WAS COMING FROM THIS
7 DIRECTION. I APOLOGIZE. NOISES -- FOR THE RECORD, THERE WAS
8 NOISE IN THE BACK OF THE COURTROOM WHEN I WAS LOOKING DOWN.
9 YOUR CLIENT HAD A RECORD FOR DISORDERLY CONDUCT AND
10 DISTURBING THE PEACE; CORRECT?

11 A. HE ADVISED ME OF THAT. I BELIEVE THERE WAS ALSO A
12 RECORD FOR RECEIVING STOLEN GOODS.

13 Q. OKAY.

14 A. WHICH WAS THE SUBJECT OF A MOTION IN LIMINE AT TRIAL.

15 Q. THAT -- YOU ANTICIPATE MY NEXT QUESTION. ADDRESSED IN
16 LIMINE WAS THE ISSUE OF RECEIVING STOLEN GOODS, AND YOU WERE
17 CLEAR THAT THAT COULD COME UP AS A CRIME INVOLVING MORAL
18 TURPITUDE; RIGHT?

19 A. DURING MY CONSULTATIONS WITH MR. JAMES IN THE JAIL, WE
20 TALKED ABOUT WHAT MIGHT HAPPEN IF HE TOOK THE STAND. WE
21 DISCUSSED WHETHER HE SHOULD OR SHOULDN'T TAKE THE STAND AND
22 WHAT WOULD BE INVOLVED IN -- IN MAKING THAT DECISION.

23 Q. THAT DECISION. AND HE TOLD YOU THAT HE HAD A COUPLE OF
24 OTHER ARRESTS THAT HAD NOT RESULTED IN CONVICTIONS BECAUSE
25 THEY HAD BEEN DISMISSED ONCE HE COMPLETED A JOB CORPS

1 PROGRAM.

2 A. I BELIEVE THAT'S CORRECT.

3 Q. AND THOSE -- THOSE CHARGES WERE DISORDERLY CONDUCT AND
4 DISTURBING THE PEACE.

5 A. I BELIEVE THAT'S CORRECT.

6 Q. OKAY.

7 A. I REMEMBER HIM MENTIONING SOMETHING TO THAT EFFECT. I'M
8 NOT CERTAIN OF THE EXACTITUDE OF THE CHARGE, BUT I DO
9 REMEMBER HAVING DISCUSSIONS ABOUT THINGS THAT I DIDN'T RECALL
10 FINDING IN THE RECORD.

11 Q. AND DID YOU CAUTION HIM THAT IF HE ELECTED TO TAKE THE
12 STAND THAT THOSE PRIOR ARRESTS COULD BE BROUGHT UP AS PRIOR
13 BAD ACTS THAT HE COULD BE IMPEACHED WITH?

14 A. I -- I RECALL CAUTIONING HIM THAT IF HE TOOK THE STAND
15 ANY PRIOR CONVICTIONS COULD COME UP IF THEY MET THE TEST AND
16 THAT THAT'S WHY I FILED THE MOTION IN LIMINE, BUT I DO NOT
17 RECALL THAT SOMETHING LIKE DISORDERLY CONDUCT OR -- WOULD
18 HAVE BEEN AN IMPEACHABLE OFFENSE. MY -- AS I RECALL, MY
19 CONCERN WAS ABOUT THE RECEIVING STOLEN GOODS WHICH SUGGESTED
20 MORAL TURPITUDE AND WHICH IS WHY I SOUGHT CLARIFICATION FROM
21 THE COURT.

22 Q. OKAY. DID YOU HAVE DISCUSSIONS WITH YOUR CLIENT WHERE
23 YOU ADVISED HIM OF THE NATURE OF ACCOMPLICE LIABILITY LAW IN
24 SOUTH CAROLINA, THE HAND OF ONE BEING THE HAND OF ALL?

25 A. FRANKLY I -- I -- I DON'T RECALL THOSE DISCUSSIONS

1 SPECIFICALLY. TYPICALLY WHEN I ADVISE A CLIENT ACCUSED OF A
2 SERIOUS FELONY, I GENERALLY TRY TO ADVISE HIM OF ASSOCIATED
3 THEORIES. IN OTHER WORDS, YOU DON'T -- IF ONE IS SITTING IN
4 THE CAR WHILE SOMEONE GOES IN AND COMMITS AN ARMED ROBBERY, I
5 WOULD ADVISE HIM ON THE HAND OF ONE AND THE HAND OF ALL AND
6 THE THEORY OF ACCOMPLICE LIABILITY OR MERE PRESENCE. ON THE
7 OTHER HAND, MERE PRESENCE DOESN'T MEAN THAT YOU COMMITTED THE
8 CRIME. I DON'T HAVE SPECIFIC RECOLLECTIONS ABOUT ACCOMPLICE
9 LIABILITY IN THIS -- THIS CASE WITH ROBERT.

10 Q. AND ULTIMATELY THE JURY WAS CHARGED ON ACCOMPLICE
11 LIABILITY IN THIS CASE, WEREN'T THEY?

12 A. AS I -- I BELIEVE SO.

13 Q. DO YOU HAVE ANY SPECIFIC RECOLLECTION OF EVER ADVISING
14 YOUR CLIENT THAT IF HE DIDN'T TAKE THE PLEA BARGAIN THAT HAD
15 BEEN PUT FORTH AND HE WENT TO TRIAL THAT THERE WOULD BE
16 ACCOMPLICE LIABILITY, THAT THE HAND OF ONE WOULD BE THE HAND
17 OF ALL WITH REGARD TO ANY ACTS THAT THEY WERE -- WERE DEEMED
18 TO BE REASONABLE, FORESEEABLE CONSEQUENCES OF THE ACTS
19 MUTUALLY AGREED UPON BY THE PARTIES?

20 A. I DON'T RECALL. I -- I RECALL WE HAD SOME DISCUSSIONS
21 ABOUT WHETHER HE SHOULD TAKE THE STAND OR NOT. I DON'T
22 RECALL ACCOMPLICE LIABILITY COMING IN AS BEING IN THE
23 CALCULUS OF WHETHER HE SHOULD HAVE TAKEN THE STAND, AS I HAD
24 OTHER CONCERNS---

25 Q. I UNDERSTAND---

1 A. ---ABOUT THAT PUTTING HIM ON THE STAND.

2 Q. MY APOLOGIES, MADAM COURT REPORTER. I'M MOVING ON TO A
3 DIFFERENT LINE OF QUESTIONING NOW, AND I'M SORRY I DIDN'T
4 MAKE THE DEMARCATION CLEARER. THERE WERE PLEA NEGOTIATIONS
5 IN THIS CASE, WEREN'T THERE?

6 A. VERY CLOSE TO THE TRIAL---

7 Q. AND ALL---

8 A. ---DATE. THERE WERE -- I HAD ASKED WHETHER THEY WOULD
9 -- THE PROSECUTION WHETHER THEY WOULD OFFER A PLEA. MY
10 RECOLLECTION IS THEY HAD OFFERED KENNETH A PLEA WELL, WELL IN
11 ADVANCE OF ANY OFFER TO ME AND WE -- WE WERE PROCEEDING UNDER
12 A THEORY THAT -- UNDER A PLAN THAT WHERE THE STATE HAD
13 ANNOUNCED INTENTIONS FROM THE TIME OF MY INVOLVEMENT THAT
14 THEY WERE GOING TO PLEAD KENNETH -- THEY WERE GOING TO TRY
15 KENNETH FIRST AND ROBERT SECOND. IT CERTAINLY WAS MY VIEW
16 THEY HAD A MUCH STRONGER CASE AGAINST KENNETH THAN ROBERT,
17 AND I FELT THAT WAS TO OUR ADVANTAGE. BUT THEY HAD ASKED --
18 THEY HAD -- I HAD BEEN ADVISED THAT THEY OFFERED KENNETH A
19 PLEA FOR I BELIEVE 28 YEARS OR A CONSIDERABLE AMOUNT OF TIME
20 PRIOR TO TRIAL.

21 WHEN I APPROACHED MS. FRYAR ABOUT WHETHER THERE WAS AN
22 OFFER FOR ROBERT, NONE -- NO OFFER HAD BEEN MADE. I HAD BEEN
23 ADVISED AN OFFER HAD BEEN MADE TO KENNETH AND HAD NOT BEEN
24 ACCEPTED. IT WAS A MONTH OR SO BEFORE TRIAL THAT I WAS
25 ADVISED THAT THE STATE INTENDED TO PROCEED JOINTLY AGAINST

1 BOTH BROTHERS, BOTH DEFENDANTS, AND AGAIN THE PLEA HAD BEEN
2 OFFERED TO KENNETH. I BELIEVE KENNETH HAD BEEN OFFERED 28
3 YEARS, AND NO OFFER WAS MADE TO ROBERT UNTIL I THINK IT WAS
4 SHORTLY BEFORE THE TRIAL BUT MAY -- MAYBE JUST A WEEK BEFORE
5 TRIAL, AND IF I'M NOT MISTAKEN IT WAS SOMETHING ABOUT 21
6 YEARS OR SOMETHING LESS THAN WHAT THEY HAD OFFERED TO KENNETH
7 BUT A SUBSTANTIAL SENTENCE.

8 AT SOME POINT I THINK THE OFFER MAY HAVE COME DOWN TO 18
9 YEARS FOR ROBERT, AND THEN DURING THE COURSE OF THE TRIAL I
10 WAS ADVISED THAT IT WAS A FINAL OFFER, THAT AS TO ROBERT IT
11 WOULD HAVE BEEN 15 YEARS. ROBERT WAS ADVISED OF THAT OFFER
12 AND TOLD THAT THE CONSEQUENCES WERE THAT IF THE OFFER WASN'T
13 TAKEN, IT WOULD BE REMOVED FROM THE TABLE ONCE MS. BROWN TOOK
14 THE STAND TO TESTIFY, AND AT THAT POINT I WAS VERY, VERY
15 CONCERNED BECAUSE MY EFFORTS TO GET THE TRIAL SEVERED HAD
16 FAILED.

17 I FELT THE WEIGHT OF THE EVIDENCE, THE GREATER WEIGHT,
18 THE QUALITY AND THE QUANTITY OF EVIDENCE, WAS DIRECTED TO
19 KENNETH AND THAT THERE WAS CIRCUMSTANTIAL EVIDENCE LINKING
20 ROBERT TO KENNETH, THE PAPERS FOUND IN KENNETH'S APARTMENT
21 THAT WERE ADDRESSED TO ROBERT AT THAT ADDRESS, BUT THAT THE
22 D.N.A. EVIDENCE, IN MY VIEW, CLEARED ROBERT. IT DIDN'T
23 INCULPATE HIM BECAUSE THERE WAS NO ALLEGATION THAT THERE WAS
24 A LINK AND THAT THE -- BUT THAT THE -- THERE WAS A PHOTOGRAPH
25 OF -- FROM THE AMOCO STATION THAT WAS DATED SHORTLY AFTER THE

1 ALLEGED INCIDENT WHERE IT WAS REPORTED THAT A COUPLE OF YOUNG
2 MEN WENT INTO THE STORE SEEKING TO CHANGE A HUNDRED-DOLLAR
3 BILL. A HUNDRED-DOLLAR BILL HAD BEEN ALLEGED TO HAVE BEEN
4 TAKEN DURING THE CRIME, THAT THE POLICE WERE SOMEHOW SUMMONED
5 TO THE AMOCO, AND THAT KENNETH JAMES WAS IDENTIFIED AND
6 PRESENTED IDENTIFICATION AS -- AND WAS THE ONE THAT WAS
7 DEEMED TO HAVE ATTEMPTED TO CASH THE HUNDRED-DOLLAR BILL
8 SHORTLY AFTER THE CRIME OCCURRED WHICH WAS AROUND THE CORNER
9 FROM HIS HOUSE.

10 MY CONCERNS WERE - AND I HAD OBTAINED THE PHOTOGRAPHS
11 FROM THE AMOCO STATION THAT -- THAT -- AND SHARED THEM WITH
12 ROBERT - THAT IT APPEARED THAT HE WAS ONE OF THE PEOPLE IN
13 THE PHOTOGRAPHS AT THE AMOCO STATION, ALTHOUGH HE DIDN'T FEEL
14 IT WAS HIM, AN ACCURATE REPRESENTATION OF HIM, THAT I WAS
15 FEARFUL THAT THE CIRCUMSTANTIAL CASE IF WE WENT FORWARD WHEN
16 VIEWED IN CONJUNCTION WITH THE EVIDENCE LINKING HIS BROTHER
17 TO THE CRIME COULD RESULT IN A CONVICTION AND THAT---

18 Q. OKAY. THAT'S -- I'M GOING TO STOP YOU RIGHT THERE
19 BECAUSE YOU'RE GETTING TO WHAT IS THE CRUX OF MY QUESTION
20 THAT I PERHAPS WAS NOT ARTICULATE ENOUGH IN POSING AND THAT
21 IS: HAVE YOU -- PRIOR TO THE TIME WHEN YOUR CLIENT HAD TO
22 MAKE THE DECISION ABOUT WHETHER OR NOT TO TAKE THE GUILTY
23 PLEA OR NOT, HAD YOU EXPLAINED TO HIM THE CONCEPTS OF
24 ACCOMPLICE LIABILITY, THE FACT THAT HE COULD BE HELD
25 RESPONSIBLE FOR CRIMES THAT THE JURY BELIEVED HIS BROTHER

1 COMMITTED IF THEY BELIEVED THAT THEY WERE CRIMES THAT WERE
2 REASONABLY FORESEEABLE TO HIM AS SOMEONE WHO HAD ENGAGED IN A
3 MUTUALLY-AGREED-UPON COURSE OF ACTIVITY WITH HIS BROTHER AND
4 OTHERS?

5 A. I DON'T RECALL SPECIFIC CONVERSATIONS ABOUT THAT, BUT AS
6 I SAID, TYPICALLY I ADVISE CLIENTS OF -- OF RAMIFICATIONS OF
7 BEING ACCUSED WITH SOMEONE ELSE. I JUST DON'T HAVE A
8 SPECIFIC RECOLLECTION.

9 Q. SO IN YOUR DISCUSSIONS WITH HIM, THERE WAS TALK ABOUT
10 THE FACT, WAS THERE NOT, THAT THE D.N.A. TIES KENNETH TO THE
11 CRIME, NOT YOU?

12 A. YES.

13 Q. OKAY. AND THE PEOPLE AT THE CONVENIENCE STORE HAVE
14 SPECIFICALLY IDENTIFIED KENNETH WITH THE HUNDRED-DOLLAR BILL,
15 NOT YOU.

16 A. NO. NO, BECAUSE THE -- WHEN I OBTAINED THE PHOTOGRAPH,
17 IT APPEARED TO ME TO BE ROBERT.

18 Q. OKAY.

19 A. AND TOLD HIM THAT -- THAT IF IT WAS PRESENTED THAT IT
20 COULD, IN FACT, LINK HIM AND BE SOMETHING INDEPENDENT THAT
21 COULD LINK HIM, AS I CALL IT, TO CIRCUMSTANTIAL EVIDENCE
22 AFTER THE FACT OF THE CRIME.

23 Q. SURE. BUT THERE WAS ACTUALLY AN EYEWITNESS AT THE STORE
24 THAT HAD PHYSICALLY IDENTIFIED KENNETH.

25 A. I BELIEVE SO.

1 Q. OKAY. AND MY QUESTION TO YOU---

2 A. I BELIEVE KENNETH WAS MENTIONED IN THE POLICE REPORT AS
3 HAVING PROVIDED IDENTIFICATION.

4 Q. AND MY QUESTION IS: DID YOU EVER EXPLAIN TO ROBERT THAT
5 EVIDENCE THAT TENDED TO PROVE KENNETH WAS GUILTY COULD, IN
6 FACT, BE EVIDENCE THAT COULD BE USED TO FIND HIM GUILTY IF
7 THE JURY CONCLUDED UNDER THEORIES OF ACCOMPLICE LIABILITY
8 THAT HE SHOULD BE RESPONSIBLE FOR THE ACTIONS OF HIS BROTHER?

9 A. AND, AGAIN, I DON'T HAVE A SPECIFIC RECOLLECTION OF THAT
10 ADMONITION.

11 Q. OKAY. OKAY.

12 A. THERE WERE -- I JUST DON'T HAVE A SPECIFIC RECOLLECTION
13 OF THAT PARTICULAR ADMONITION.

14 Q. A MOMENT'S INDULGENCE, YOUR HONOR. DID YOU REVIEW THE
15 INDICTMENTS IN THIS CASE IN PREPARING FOR TRIAL?

16 A. YES.

17 Q. AND DO YOU RECALL NOTICING WHETHER OR NOT THERE WAS MORE
18 THAN ONE WITNESS PRESENTED TO THE GRAND JURY?

19 A. I DON'T HAVE A RECOLLECTION, NO.

20 Q. AS A PRACTICAL MATTER, IS THERE A PROBLEM IF THE ONLY
21 WITNESS BEFORE THE GRAND JURY IS A SINGLE MEMBER OF LAW
22 ENFORCEMENT?

23 A. WELL, I RECALL THAT -- THAT THERE HAS -- THE PRACTICE IN
24 RICHLAND COUNTY HAS CHANGED FROM SOLICITORS PRESENTING CASES
25 TO NOW LAW ENFORCEMENT OFFICERS, AND OTHER WITNESSES ARE

1 BROUGHT FORWARD.

2 Q. SO, IN OTHER WORDS, THE PROBLEM COMES IN IF THE
3 SOLICITOR'S THE ONLY ONE TO APPEAR, NOT IF A SINGLE LAW
4 ENFORCEMENT OFFICER APPEARS.

5 A. I -- FRANKLY, I DON'T RECALL THAT STRIKING ME---

6 Q. OKAY.

7 A. ---AT THAT TIME.

8 Q. THIS CASE TOOK AN AWFUL LONG TIME TO COME TO TRIAL.

9 A. ABSOLUTELY.

10 Q. AND YOU'VE POINTED OUT THAT YOU WERE NOT HIS FIRST
11 LAWYER BUT THAT THERE WAS AN HOUR - PARDON ME - A YEAR AND A
12 HALF YOU SAY APPROXIMATELY EVEN AFTER YOU CAME ON BOARD
13 BEFORE THE CASE WENT TO COURT.

14 A. YES.

15 Q. DID YOU FILE A MOTION FOR A SPEEDY TRIAL IN THIS CASE?

16 A. MY CLIENT HAD FILED ONE PRO SE WHICH I WAS NOT ADVISED
17 OF UNTIL SOMETIME AFTER HE HAD DONE IT, AND I -- WE HAD
18 TALKED ABOUT IT AS I HAD -- I HAD CONCERNS ABOUT THE TIME
19 THAT HE HAD BEEN IN JAIL WITHOUT BEING CALLED TO TRIAL, AND
20 THE -- WHAT I FOUND FROM THE -- IN MY INVESTIGATION OF THE
21 FACTS AND CIRCUMSTANCES RELATED TO THESE ACCUSATIONS WERE
22 THAT THE VICTIMS HAD -- BOTH HAD CRIMINAL HISTORIES, AND A
23 LOT OF THE FOCUS OF THE INVESTIGATION WAS ON THE VICTIM'S
24 BACKGROUND, WAS ALSO I BELIEVE -- TALKED TO MR. ROBERSON AND
25 WAS TOLD THAT AT SOME POINT THERE HAD BEEN A -- THERE MAY

1 HAVE BEEN A MOTION AND I DON'T RECALL WHETHER IT WAS ON A
2 SPEEDY TRIAL OR A BOND REDUCTION MOTION BUT THAT I RECALL
3 THAT THERE WAS SOME DISCUSSION THAT SHOULD THE CASE NOT COME
4 TO TRIAL SOON THAT A BOND REDUCTION MOTION WOULD BE
5 APPROPRIATE AND THAT I'M NOT ABSOLUTELY CERTAIN BUT I THINK
6 THAT IT WAS SOMETHING TO THE EFFECT THAT THE JUDGE SAID IF
7 THE CASE ISN'T BROUGHT TO TRIAL IN SUCH AND SUCH A PERIOD,
8 THEN WE'LL REVISIT THE ISSUE OF REDUCTION IN BOND.

9 Q. AND DID YOU EVER FILE SUCH A MOTION?

10 A. I BELIEVE I DID.

11 Q. OKAY. AND DID YOU FILE A MOTION FOR YOUR CLIENT TO BE
12 RELEASED FROM CUSTODY ON THE GROUND THAT THE CASE HAD NOT
13 BEEN TRIED WITHIN THE PROPER TIME LIMITS?

14 A. I'LL HAVE TO LOOK THROUGH THE DOCUMENTS TO SEE WHAT THE
15 MOTION SPECIFICALLY -- IT WAS IN APRIL OF '99, THE MOTION FOR
16 BOND REDUCTION FILED WITH THE CLERK OF COURT. MOVED FOR A
17 REDUCTION OF BOND. HE HAS REMAINED IN CUSTODY SINCE
18 DECEMBER 30TH OF 1996. WE LISTED THE CHARGES, NOTED WHAT I
19 THOUGHT WERE PROBLEMS WITH THE CASE THAT -- THAT WEAKENED THE
20 ALLEGATIONS AGAINST THE DEFENDANT, FOCUSED ON HIS TIES TO THE
21 COMMUNITY, STATED WHERE HE WOULD RESIDE SHOULD HE BE GRANTED
22 BOND, THAT HE HAD NO CONVICTIONS PRIOR TO THE INCIDENT BUT
23 DID PLEAD GUILTY -- OTHER THAN PLEADING GUILTY TO A MUNICIPAL
24 LEVEL OF RECEIVING STOLEN GOODS FOR WHICH HE SERVED 30 DAYS,
25 THAT HE WAS GOING TO ABIDE BY ANY CONDITIONS THE COURT DEEMED

1 NECESSARY TO INSURE THAT HE WILL APPEAR AT HIS TRIAL,
2 INCLUDING HOUSE ARREST, AND ASKED THE COURT TO RELEASE HIM ON
3 HIS RECOGNIZANCE OR IN THE ALTERNATIVE TO REDUCE THE BOND FOR
4 THE PROVISION THAT 10 PERCENT BE FILED AND POSTED WITH THE
5 CLERK OF COURT.

6 Q. THE OFFENSE ALLEGEDLY OCCURRED ON MAY 29TH, 1996, AND
7 YOUR CLIENT WASN'T INDICTED UNTIL AUGUST OF '99.

8 A. IN FACT, I DON'T THINK HE WAS ARRESTED FOR SOME SIX
9 MONTHS AFTER THE TIME IT OCCURRED.

10 Q. DID YOU -- AND IF I'M BEING REDUNDANT, I APOLOGIZE. I'M
11 JUST TRYING TO NARROW MY QUESTION. DID YOU CONSIDER FILING A
12 MOTION FOR THE CHARGES TO BE DISMISSED OR FOR YOUR CLIENT TO
13 BE RELEASED BASED ON THE FAILURE OF THE PROSECUTION TO INDICT
14 HIM WITHIN THE APPROPRIATE TIME PERIOD AFTER HIS ARREST?

15 A. I DIDN'T FILE SUCH A MOTION. WHETHER IT CROSSED MY
16 MIND, I CAN'T SAY SIX OR SEVEN YEARS LATER. I JUST DON'T
17 RECALL.

18 Q. WHAT'S THE SO-CALLED 180-DAY RULE?

19 A. I'M STILL WONDERING ABOUT THAT.

20 Q. OKAY. IS IT NOT TRUE THAT WHEN SOMEONE IS ARRESTED THAT
21 THEY ARE TO BE BROUGHT BEFORE THE GRAND JURY WITHIN A CERTAIN
22 PERIOD OF TIME, AND IF THEY ARE NOT, THEY ARE TO BE RELEASED
23 UNTIL THEY'RE PROPERLY CHARGED?

24 A. THERE WAS A MOTION FILED WITH REGARD TO THE SPEEDY TRIAL
25 MOTION, A FOLLOW-UP TO THE PRO SE MOTION THAT THE DEFENDANT

1 FILED AND -- AND ATTACHED THERETO WERE COPIES OF THE ORDERS
2 GOING BACK FROM THE CHIEF JUSTICE I THINK BACK TO 1984 AND
3 SOME SUBSEQUENT ORDERS, BUT I COULD NEVER FIND ANY CASES OR
4 EVIDENCE THAT -- THAT THAT WAS OF SUBSTANCE THAT WOULD
5 REQUIRE DISMISSAL OF THE CHARGES.

6 Q. WELL, IN ACTUALITY, ISN'T THE REMEDY THAT THEY CAN NO
7 LONGER DETAIN YOUR CLIENT WITHOUT PROPER INDICTMENT IF THEY
8 DON'T INDICT WITHIN A PROPER PERIOD OF TIME?

9 A. I DID NOT -- I CAN'T SAY THAT. I DON'T KNOW THAT.

10 Q. OKAY. LET'S MOVE ON TO SOMETHING ELSE FOR A MINUTE.
11 YOU READ THE MEDICAL REPORT FROM THE RAPE KIT IN THIS CASE IN
12 PREPARATION FOR THIS TRIAL, DID YOU NOT?

13 A. I READ IT FOR TRIAL; YES, MA'AM.

14 Q. YOUR CLIENT HAS ALLEGED THAT YOU FAILED TO MAKE ADEQUATE
15 USE OF THAT TO IMPEACH THE STATE'S ASSERTION THAT THIS WAS A
16 VICIOUS CRIME. IT IS TRUE, IS IT NOT, THAT THE ACTUAL REPORT
17 NOTED THAT THERE WAS NO APPARENT TRAUMA TO THE VICTIM?

18 A. I BELIEVE THAT'S CORRECT.

19 Q. AND YET THE STATE WAS REPEATEDLY CHARACTERIZING THIS AS
20 A VICIOUS ATTACK, BRUTAL ATTACK.

21 A. THE STATE ALLEGED A VICIOUS AND BRUTAL ATTACK AT
22 GUNPOINT, A GANG RAPE, FORCED FELLATIO, SEXUAL ASSAULT, AND
23 AN ATTEMPT TO SHOOT MR. BULL. THERE'S NO QUESTION ABOUT
24 THAT.

25 Q. DID YOU CONSIDER USING THIS REPORT TO EMPHASIZE TO THE

1 JURY THAT THERE WAS NO EVIDENCE THAT THE VICTIM HAD, IN FACT,
2 BEEN PHYSICALLY HARMED AND THAT THAT IN AND OF ITSELF WAS
3 INCONSISTENT WITH THE ASSERTION THAT THIS WOMAN HAD BEEN
4 GANG-RAPED BY SEVERAL MEN?

5 A. I -- I DIDN'T -- FIRST, I DID NOT KNOW THAT THAT WAS AN
6 ALLEGATION UNTIL I WAS PROVIDED THE TYPED AMENDED COMPLAINT
7 JUST PRIOR TO THIS HEARING AT THE BEGINNING, AND I HAD NOT
8 HAD AN OPPORTUNITY TO READ THAT TESTIMONY OF THE DOCTOR WHO
9 WAS THE AUTHOR OF THAT REPORT. I WAS ATTEMPTING TO DO SO
10 JUST PRIOR TO THIS HEARING BEING CALLED TO -- TO---

11 Q. UH -- GO AHEAD. I'M SORRY.

12 A. ---TO DETERMINE WHETHER I HAD CONSIDERED AT THE TIME
13 CROSS-EXAMINING DOCTOR -- THE DOCTOR THAT TESTIFIED. I'D
14 REALLY HAVE TO HAVE AN OPPORTUNITY TO LOOK AT THAT. IF YOU
15 COULD REFERENCE SPECIFIC PORTIONS OF THE TESTIMONY, IT MIGHT
16 HELP ME, BUT I HAVE NOT RECENTLY REVIEWED THAT TESTIMONY AND,
17 AGAIN, NOT HAVING BEEN ON NOTICE OF THAT PARTICULAR
18 ALLEGATION, THAT WASN'T SOMETHING I FOCUSED ON IN MY
19 PREPARATION FOR THIS HEARING.

20 Q. WOULD YOU DISAGREE THAT, FOR INSTANCE, THE CLOSING
21 ARGUMENT OF THE STATE IN GENERAL TERMS PORTRAYED THIS AS A
22 VICIOUS OR BRUTAL - NOT NECESSARILY THOSE SPECIFIC ADJECTIVES
23 - BUT A VICIOUS OR BRUTAL ATTACK?

24 A. OH, YEAH, I WOULD NOT CHALLENGE THAT---

25 Q. OKAY.

1 A. ---CHARACTERIZATION, NO.

2 Q. OKAY. AND THERE AGAIN -- I'LL STRIKE THAT, YOUR HONOR.
3 YOUR HONOR, I WOULD ASK AT THIS TIME TO -- WELL, LET ME
4 REPHRASE THAT AND ASK ONE MORE QUESTION. IN ADDITION TO THE
5 ACTUAL MEDICAL REPORT FROM RICHLAND MEMORIAL HOSPITAL, DID
6 YOU ALSO REVIEW THE SEXUAL ASSAULT REPORT, WHAT'S KNOWN AS
7 THE RAPE PROTOCOL REPORT, OF VICTIM ?

8 A. I BELIEVE SO, YES. IN FACT, I THINK THAT MAY HAVE BEEN
9 WHERE I WAS INFORMED THAT THE VICTIM HAD SMOKED MARIJUANA
10 PRIOR TO THE INCIDENT.

11 Q. MR. SHUPPER, I'M HANDING YOU A COPY OF THE DOCUMENTS
12 I'VE BEEN REFERRING TO AND ASK IF YOU RECOGNIZE THEM.

13 A. ONE IS IDENTIFIED AS CODE 40 PROTOCOL DICTATED BY STACY
14 SMITHSON, M.D., DATED MAY 29TH, 1996, ABOUT A SUSPECTED
15 SEXUAL ASSAULT. HIGHLIGHTED IS, "PATIENT HAS NO OBVIOUS
16 TRAUMA IN THE GENERAL FINDINGS UPON THE PHYSICAL
17 EXAMINATION," AND ADDITIONALLY THERE IS A PROTOCOL REPORT
18 ON -- BEARING THE S.L.E.D. IDENTIFICATION AT THE TOP,
19 INFORMATION EXAMINATION FORM ABOUT AN ADULT VICTIM, AND I
20 BELIEVE THESE WERE PROVIDED IN THE RECORD. THESE WERE PART
21 OF THE RECORD THAT WAS PROVIDED IN DISCOVERY AND REVIEWED BY
22 ME PRIOR TO TRIAL.

23 Q. THANK YOU. LET ME SEE... A MOMENT'S INDULGENCE, YOUR
24 HONOR. YOUR HONOR, I WOULD MOVE TO INTRODUCE THESE RECORDS.
25 I WOULD NOTE THAT THERE ARE SOME NOTES ON THE BACK OF ONE OF

1 THE PAGES THAT APPEAR TO BE NOTES MY CLIENT TOOK. SO I WOULD
2 ASK THAT WE MAKE A SUBSTITUTE COPY SHOWING ONLY THE FRONTS OF
3 THE PAGES TO BE USED AS MY EXHIBIT. I'LL ASK THAT MY
4 INVESTIGATOR WHEN HE RETURNS TO THE COURTROOM DO THAT. OKAY.

5 MR. BAX: NO OBJECTION, YOUR HONOR.

6 THE COURT: WITHOUT OBJECTION. DO YOU WANT TO GO AHEAD
7 AND HAVE THEM MARKED OR DO YOU WANT TO WAIT?

8 MS. SHURLING: WE'LL WAIT AND MARK THE COPY WHEN MR.
9 BRADLEY HAS HAD A CHANCE TO HAVE IT MADE FOR ME. YOUR HONOR,
10 THERE'S AN ISSUE THAT I PUT RESPONDENT ON NOTICE I INTENDED
11 TO RAISE THAT I NEGLECTED TO MENTION IN MY SUMMARY, AND I
12 APOLOGIZE FOR THAT. THERE WERE ALLEGEDLY FIVE PEOPLE
13 INVOLVED IN THIS ASSAULT. KENNETH JAMES AND ROBERT JAMES
14 WERE ARRESTED. THERE WAS APPARENTLY A PHONE CALL MADE TO LAW
15 ENFORCEMENT THAT PURPORTED TO IDENTIFY THE OTHER THREE
16 PERPETRATORS, BUT FOR SOME REASON THEY WERE NEVER CHARGED IN
17 THIS CRIME. IT IS THE APPLICANT'S POSITION THAT IN DEALING
18 WITH PLEA NEGOTIATIONS HE WAS CONSISTENTLY HIT WITH PLEA
19 NEGOTIATIONS THAT WOULD INVOLVE COOPERATING WITH THE LAW
20 ENFORCEMENT AUTHORITIES AND TESTIFYING AGAINST HIS BROTHER,
21 KENNETH, BUT THAT DEFENSE COUNSEL NEVER ADEQUATELY EXPLORED
22 THE POSSIBILITY THAT HE COULD NEGOTIATE A MORE FAVORABLE PLEA
23 BARGAIN IN EXCHANGE FOR HIS WILLINGNESS TO TESTIFY AGAINST
24 THE OTHER THREE PERPETRATORS IN THIS CASE AND IN EXCHANGE FOR
25 HIS WILLINGNESS TO TELL WHAT, IF ANYTHING, HE KNEW ABOUT THE

1 OTHER THREE. AND SO THAT WOULD BE AN ADDITIONAL ALLEGATION
2 IN ADDITION TO THOSE THAT WERE OUTLINED AT THE BEGINNING OF
3 THIS PROCEEDING.

4 BY MS. SHURLING:

5 Q. CAN YOU EXPLAIN TO US HOW IT CAME ABOUT THAT FIVE PEOPLE
6 WERE ALLEGED TO HAVE BEEN INVOLVED IN THIS CASE, THAT THE
7 VICTIM SPECIFICALLY SAID SHE WAS RAPED BY ALL FIVE AND THE
8 IDENTITIES OF THE OTHER THREE WERE SUPPOSEDLY DISCLOSED TO
9 LAW ENFORCEMENT AND YET KENNETH AND ROBERT JAMES WERE THE
10 ONLY PEOPLE EVER PROSECUTED FOR THIS ASSAULT? HOW DID THAT
11 HAPPEN?

12 A. THAT'S A QUESTION I KEPT DIRECTING TO MS. FRYAR, THE
13 PROSECUTOR. I -- THE EARLY REPORTS SUGGESTED THERE WERE FIVE
14 PEOPLE INVOLVED, AND THE FIRST PERSON ARRESTED WAS KENNETH.
15 SOME SIX MONTHS LATER I BELIEVE ROBERT WAS ARRESTED. IF I'M
16 NOT MISTAKEN, WHEN ROBERT WAS GETTING OUT OF BEING RELEASED
17 FROM THE 30-DAY SENTENCE FOR THE RECEIVING STOLEN GOODS, HE
18 WAS SERVED AN ARREST WARRANT AND TAKEN INTO CUSTODY OR VERY
19 CLOSELY THEREABOUT TO THAT DATE AND THEN BASED ON A PURPORTED
20 PHOTO I.D. IDENTIFICATION FROM MS. , THE VICTIM.

21 AS I GOT INVOLVED IN DISCOVERY AND INVESTIGATION OF THIS
22 CASE, I FOUND SOMETHING WHERE THERE HAD -- I BELIEVE FROM THE
23 OFFICERS' CASE NOTES THAT -- WHEN THEY WERE FINALLY PROVIDED
24 THAT SAID RECEIVED INFORMATION THAT THERE WERE FIVE PEOPLE
25 INVOLVED. I QUESTIONED THE PROSECUTOR, "WHAT ABOUT THESE

1 OTHER GUYS?" I WAS NOT GIVEN ANYTHING THAT SHOWED ME THAT
2 THERE HAD BEEN A VIGOROUS ATTEMPT TO ROUND THEM UP AND
3 PROSECUTE THEM. MY RECOLLECTIONS ABOUT WHETHER THEY HAD
4 BEEN -- IF THEY HAD PRESENTED I.D. -- PHOTO I.D.'S TO THE
5 VICTIMS ARE HAZY. THERE MAY HAVE BEEN SOME EXPLANATION THAT
6 NOBODY IDENTIFIED THEM BUT THAT KENNETH AND ROBERT HAD BEEN
7 IDENTIFIED. AND IN DISCUSSING -- ONE, THE ABSENCE OF A PLEA
8 OFFER TO ROBERT WITH THE PROSECUTOR, MS. FRYAR, I REMEMBER
9 BRINGING THAT SUBJECT UP: YOU KNOW, WHY NO PLEA? WHAT --
10 YOU KNOW, WHAT -- WOULD YOU CONSIDER A PLEA? I CAN'T -- I
11 DON'T REALLY HAVE ANYTHING TO DISCUSS WITH MY CLIENT OTHER
12 THAN THAT THERE'S NO PLEA, AND THIS WHOLE -- WHEN I LOOK AT
13 THE TOTALITY OF THE CIRCUMSTANCES WITH THE -- THE MALE VICTIM
14 HAVING A LENGTHY CRIMINAL HISTORY DATING BACK TO SHOOTING
15 SOMEBODY IN 1968 AND BEING IN PRISON FOR SOME KIND OF DRUG
16 OFFENSE WITHIN THE 10 YEARS OF THIS OCCURRENCE AND HAVING A
17 SERIOUS CRIMINAL HISTORY THAT INCLUDED VIOLENCE AND A POLICE
18 REPORT OF THE VICTIM THAT SHOWED THAT SHE HAD MADE A SIMILAR
19 CLAIM OF BEING KIDNAPPED AND SEXUALLY ASSAULTED, HER
20 CONVICTION FOR BAD CHECKS AND, YOU KNOW, THE WHOLE SET OF
21 CIRCUMSTANCES, THE POLICE REPORT SHOWING THAT SHE HAD BEEN
22 SMOKING MARIJUANA WITH A KNOWN DRUG DEALER WITH A HISTORY OF
23 VIOLENCE IN THE PARK THAT THEY ALLEGED WAS SOMETIME AROUND
24 MIDNIGHT OR SOMETHING LIKE THAT AND THE LIGHTS WERE ON AND --
25 AND ALL THE THINGS THAT I FOUND TO -- TO SUGGEST THERE WAS

1 SOMETHING GOING ON OTHER THAN JUST THIS RANDOM GANG ASSAULT
2 AND ROBBERY...

3 AT SOME POINT MS. FRYAR, AND I DON'T REMEMBER WHERE - AS
4 I HAD FREQUENT DISCUSSIONS WITH HER DURING THE TIME OF MY
5 INVOLVEMENT ON THIS CASE - SHE SAID, WELL, IF -- IF WE CAN
6 GET SOMETHING ON THESE OTHER GUYS, THAT MIGHT OPEN THE DOOR
7 FOR A PLEA OFFER. AND I DO HAVE SOME RECOLLECTION OF TALKING
8 TO ROBERT ABOUT THAT. I DON'T THINK THERE WAS EVER ANY -- I
9 DON'T THINK ROBERT WAS EVER APPROACHED ABOUT TESTIFYING
10 AGAINST HIS BROTHER. I MEAN, I DON'T -- I DON'T RECALL THAT.
11 I DO RECALL HAVING A CONVERSATION WHERE I SAID THE SOLICITOR
12 SAYS THAT IF -- YOU KNOW, I DIDN'T KNOW WHAT HAPPENED. I
13 WASN'T GETTING ANY INFORMATION THAT LED ME -- GAVE ME MUCH TO
14 GO ON OTHER THAN TO TRY TO ATTACK THE -- TO OBTAIN THE
15 BACKGROUND INFORMATION AND TRY TO PREPARE AN ATTACK AND A
16 DEFENSE BASED ON THAT.

17 I HAD INFORMED ROBERT THAT IF THE SOLICITOR HAD
18 INTIMATED IF THERE COULD BE EVIDENCE PROVIDED TO IDENTIFY OR
19 CORROBORATE THIS ANONYMOUS TIP ABOUT THESE OTHER FELLOWS
20 BEING INVOLVED THAT THAT MIGHT GO WELL TOWARD HELPING HIM IN
21 TERMS OF NEGOTIATING A PLEA. AND I -- THERE WAS -- I DON'T
22 REMEMBER EXACTLY WHAT HE SAID. I DO REMEMBER SAYING THE
23 SOLICITOR SAID IF HE COULD HELP GET THESE OTHER GUYS THAT IT
24 COULD HELP YOU. MY RECOLLECTION IS THAT ROBERT NEVER
25 INDICATED HE WAS AROUND, THAT HE WAS INVOLVED, THAT HE WAS A

1 PART OF IT. HE, IN FACT, MAINTAINED HIS INNOCENCE: "IT
2 WASN'T ME," WHETHER HE SAID IT EXPLICITLY OR IMPLIEDLY BY NOT
3 OFFERING ANYTHING TO WHAT I KEPT TAKING TO HIM. BUT I WAS
4 OPERATING UNDER THE THEORY THAT ROBERT WASN'T THERE AND --
5 AND -- BUT THAT DID NOT PREVENT ME FROM TALKING TO THE
6 SOLICITOR AND THEN TELLING HIM THAT THE SOLICITOR SAID, "IF
7 YOU CAN HELP WITH THE OTHER GUYS, GET THE OTHER GUYS, THAT IT
8 COULD HELP YOU."

9 I WAS SUGGESTING IF YOU KNOW ANYTHING AND I KNOW YOU
10 HAVEN'T INDICATED YOU WERE THERE OR ANYTHING, BUT IF -- IF
11 PER CHANCE IF THERE'S ANY INFORMATION YOU HAVE, WHETHER IT'S
12 FROM STREET INFORMATION, LIVING IN THE NEIGHBORHOOD OR ANY
13 OTHER SOURCES, TELL ME ANYTHING YOU MIGHT KNOW THAT -- THAT
14 CAN -- THAT MIGHT LEAD TO EVIDENCE AGAINST THESE OTHER GUYS,
15 AND IF YOU ARE THE SOURCE OF IT, THEN YOU MIGHT GET CREDIT
16 FOR IT AND IT MIGHT HELP US NEGOTIATE. I JUST DON'T RECALL
17 GETTING ANY -- ANY KIND OF POSITIVE FEEDBACK.

18 MS. SHURLING: YOUR HONOR, MAY I HAVE A MOMENT'S
19 INDULGENCE?

20 THE COURT: YES, MA'AM.

21 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MS.
22 SHURLING AND MR. JAMES.)

23 BY MS. SHURLING:

24 Q. JOHN, THE APPLICANT HAS ALLEGED THAT THE STATE WAS
25 TRYING TO PUSH TO PROSECUTE HIM UNDER THE NEW ARMED ROBBERY

1 LAW WHEN, IN FACT, THE OLD ARMED ROBBERY LAW WOULD HAVE BEEN
2 IN EFFECT ON THE DATE OF THIS OFFENSE. THAT'S SORT OF A NO-
3 HARM/NO-FOUL SITUATION, ISN'T IT?

4 A. WELL, THE ALLEGATION WAS CLEARLY THAT HE WAS ARMED WITH
5 A WEAPON, AND I BELIEVE THE -- THAT THERE WERE A COUPLE OF
6 CHANGES TO THE ARMED ROBBERY LAW I THINK IN '93 AND THEN
7 AGAIN IN '96 AND---

8 Q. I GUESS MY POINT IS: IT DOESN'T MATTER FOR TWO REASONS.
9 ONE, THERE WAS AN ALLEGATION THAT HE PERSONALLY WAS ARMED
10 AND, NUMBER TWO, IN THE FINAL ANALYSIS HIS HONOR DECIDED TO
11 CHARGE THE OLD LAW, NOT THE NEW LAW ANYWAY.

12 A. RIGHT.

13 Q. SO REGARDLESS OF WHAT THE STATE'S POSITION WAS, JUDGE
14 PLEICONES DIDN'T ALLOW THEM TO GET AWAY WITH IT EVEN IF THAT
15 WAS SOMETHING THEY WERE TRYING TO DO.

16 A. THAT'S CORRECT.

17 **MS. SHURLING:** A MOMENT, YOUR HONOR.

18 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MS.
19 SHURLING AND MR. JAMES.)

20 **MS. SHURLING:** YOUR HONOR, IF I COULD HAVE A MOMENT TO
21 SHOW A DOCUMENT TO MY CLIENT.

22 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MS.
23 SHURLING AND MR. JAMES.)

24 **MS. SHURLING:** YOUR HONOR, I HAVE NO FURTHER QUESTIONS
25 FOR MR. SHUPPER.

1 THE COURT: ANY CROSS?

2 MR. BAX: BRIEFLY, YOUR HONOR.

3 CROSS-EXAMINATION

4 BY MR. BAX:

5 Q. MR. SHUPPER -- AND I THINK WE'VE REALLY -- MS. SHURLING
6 HAS COVERED EVERYTHING PRETTY THOROUGHLY. JUST A FEW
7 QUESTIONS TO WRAP UP. WERE YOU APPOINTED OR RETAINED IN THIS
8 CASE?

9 A. APPOINTED.

10 Q. OKAY. THIS WAS, AS YOU -- I THINK YOU'VE ALREADY STATED
11 THAT WAS AFTER A FEW OTHER ATTORNEYS HAD HAD REPRESENTATION
12 OF THIS PARTICULAR CLIENT.

13 A. YES. I'M SPECIFICALLY AWARE OF NATHANIEL ROBERSON
14 HAVING BEEN APPOINTED AND INVOLVED FOR SOMETIME, AND SOME
15 CONFLICT AROSE BETWEEN THE DEFENDANT AND MR. ROBERSON, AND
16 MR. ROBERSON WAS RELIEVED AND I WAS APPOINTED. I BELIEVE THE
17 PUBLIC DEFENDER HAD ORIGINALLY BEEN APPOINTED, AND IT WAS
18 CONFLICTED OUT TO MR. ROBERSON.

19 Q. OKAY. AND HAD THERE BEEN RULE 5 AND BRADY MOTIONS FILED
20 IN THE CASE OR WERE YOU THE ONE WHO FILED THOSE?

21 A. WELL, I BELIEVE THERE WERE -- WAS AN ORIGINAL ONE FILED
22 FROM THE PUBLIC DEFENDER'S OFFICE BY JEFFREY BLOOM AND -- AND
23 IF I'M NOT MISTAKEN, I MAY HAVE FILED A SUPPLEMENTAL RULE 5,
24 AND I BELIEVE I WAS STILL LOOKING FOR THINGS AT THE TIME OF
25 TRIAL.

1 Q. AND YOU RECEIVED THE FILE OR AT LEAST YOU RECEIVED
2 DISCOVERY IN THAT MATTER, EITHER FROM THE SOLICITOR OR FROM
3 PRIOR ATTORNEYS?

4 A. I HAD A SUBSTANTIAL FILE, YES---

5 Q. WAS THERE---

6 A. ---MOST OF WHICH I BELIEVE I OBTAINED FROM -- FROM -- I
7 THINK FROM ALL THREE SOURCES AS WELL AS MY OWN EFFORTS TO
8 PRESS ON THE SOLICITOR TO GIVE ME MORE. I HIRED
9 INVESTIGATORS TO OBTAIN -- SERVE SUBPOENAS AND GET RECORDS
10 THAT WEREN'T IN ANY OF THE FILES THAT I HAD OBTAINED FROM THE
11 OTHER ATTORNEYS AND -- AND -- AND AS YOU CAN SEE, I HAVE TWO
12 FILE BOXES OF DOCUMENTS.

13 Q. AND THAT WAS -- THAT WAS GOING TO BE MY FOLLOW-UP
14 QUESTION. YOU WERE ABLE TO DO INVESTIGATION ON YOUR OWN
15 INDEPENDENT OF THE DISCOVERY FILE FROM THE SOLICITOR;
16 CORRECT?

17 A. YES, SIR.

18 Q. NOW, YOU WERE ABLE TO -- LET ME ASK YOU THIS: DID YOU
19 HAVE THE OPPORTUNITY TO GO OVER THE DISCOVERY, WHAT YOUR
20 INVESTIGATORS HAD PRODUCED, AND SOME OF THE DECISIONS THAT
21 NEEDED TO BE MADE WITH THE APPLICANT? DID YOU HAVE
22 DISCUSSIONS WITH HIM ON THOSE SUBJECTS THAT YOU RECALL?

23 A. YES, SIR.

24 Q. YOU WERE ABLE TO MEET WITH HIM MORE THAN ONCE BEFORE
25 THE...

1 A. I WENT DOWN TO THE JAIL TO SEE ROBERT FAIRLY FREQUENTLY,
2 AND HE COMMUNICATED WITH ME I BELIEVE BY TELEPHONE. I CAN
3 RECALL HAVING FREQUENT DISCUSSIONS WITH HIM ABOUT MANY
4 ASPECTS OF THE CASE INCLUDING -- A LOT OF WHICH FOCUSED ON
5 VICTIM BACKGROUND INFORMATION AND -- AND, OF COURSE, WE
6 HAD -- WE -- I HAD AN ILLUSTRATOR DRAW A SKETCHING OF THE
7 CRIME AREA AND BROUGHT IN ONE OF THE PEOPLE -- THIS HAPPENED
8 AT A CITY PARK AND BROUGHT IN ONE OF THE PARK SUPERVISORS WHO
9 PROVIDED TESTIMONY THAT THE LIGHTS WENT OFF AT SUCH AND SUCH
10 A TIME WHICH WAS PRIOR TO THE TIME ALLEGED BECAUSE, AS I
11 RECALL, THE VICTIM'S ALLEGED LIGHTS WERE ON WHEN THIS
12 OCCURRED AND -- BUT FROM THE TIME FRAMES AND THE TESTIMONY OF
13 THE PARK EMPLOYEE THAT THE LIGHTS WERE NOT OFF. SO THERE
14 WERE -- I WOULD PERIODICALLY RELAY TO ROBERT THE INFORMATION
15 THAT I WAS GETTING FROM MY INVESTIGATORS AND IN REVIEW OF THE
16 DOCUMENTS.

17 Q. THERE WAS SOMETHING THAT WAS -- THAT WAS DISCUSSED ON
18 DIRECT BY OPPOSING COUNSEL, THE 180-DAY RULE AS FAR AS, YOU
19 KNOW, THE TIME PERIOD BETWEEN ARREST AND INDICTMENT WAS
20 RAISED. I BELIEVE YOU STATED THAT YOU HAD TRIED TO LOOK INTO
21 THAT TO SEE IF THERE WAS ANY CASE LAW OR ANYTHING TO THAT
22 SORT THAT WOULD SUPPORT ANY TYPE OF MOTION IN THAT REGARD.
23 IS THAT CORRECT?

24 A. YES.

25 Q. WERE YOU ABLE TO OBTAIN ANY CASE LAW THAT SHOWED

1 SUCCESSFUL MOTIONS TO ENFORCE THE 180-DAY -- 180-DAY RULE?

2 EXCUSE ME, YOUR HONOR.

3 A. NO, SIR, I WAS UNSUCCESSFUL IN FINDING ANYTHING THAT --
4 THAT -- AND I BELIEVE THAT WAS, AS I SAID, RAISED IN A
5 PRETRIAL MOTION AND WAS FOUND OF NO CONSEQUENCE.

6 Q. IN ADDITION, IN YOUR EXPERIENCE -- AND LET ME ASK YOU
7 THIS. PRIOR TO THIS -- THIS WAS -- I BELIEVE THIS TRIAL WAS,
8 I GUESS YOU STATED, ABOUT FIVE OR SIX YEARS AGO. LET'S SEE.
9 THAT WAS HELD ON SEPTEMBER 20TH OF 1999 OR AT LEAST BEGINNING
10 AROUND THAT DATE. AT THAT TIME HOW MUCH TIME HAD YOU
11 PRACTICED CRIMINAL LAW?

12 A. I WAS ADMITTED TO THE BAR IN NOVEMBER OF 1995.

13 Q. HOW MUCH OF YOUR PRACTICE FROM THAT POINT TO '99 HAD
14 BEEN CRIMINAL LAW?

15 A. MOST OF MY PRACTICE WAS IN---

16 Q. OKAY.

17 A. ---CRIMINAL DEFENSE.

18 Q. IN YOUR EXPERIENCE HAVE YOU EVER RUN ACROSS THE FACT
19 THAT SOLICITORS CAN RE -- OR CAN DIRECT INDICT?

20 A. YES.

21 Q. OKAY. THAT WAS A FACT THAT YOU KNEW AT THE TIME?

22 A. A FACT I'M AWARE OF NOW AND I -- THAT FREQUENTLY CAME UP
23 IN TERMS OF WHEN CASES MIGHT HAVE BEEN DISMISSED IN PRELIMS.
24 THAT'S ONE THING THE SOLICITORS WOULD SOMETIMES ADMONISH YOU
25 AS WELL: WE CAN DIRECTLY PRESENT THIS CASE. I BELIEVE I WAS

1 AWARE OF IT AT THE TIME.

2 Q. AND I BELIEVE ONE OTHER MATTER THAT WAS NOT RAISED ON
3 DIRECT IS THE MATTER OF SEVERANCE. WAS THAT A MOTION THAT
4 YOU MADE, A MOTION TO SEVER, IN ORDER TO GET A SEPARATE TRIAL
5 FOR ROBERT JAMES FROM HIS BROTHER, KENNETH JAMES?

6 A. YES, SIR.

7 Q. IS THAT CORRECT?

8 A. YES, SIR.

9 Q. WAS THAT A MOTION THAT YOU BELIEVE SHOULD HAVE BEEN
10 SUCCESSFUL?

11 A. YES, SIR. I -- AND I STILL BELIEVE THAT THE OUTCOME
12 MIGHT HAVE BEEN DIFFERENT HAD THERE BEEN SEPARATE TRIALS. I
13 JUST THINK THAT THE -- ASIDE FROM THE PHOTO I.D. WHICH I
14 MOVED TO SUPPRESS AS SUGGESTIVE AS THE PHOTOS -- AS I RECALL,
15 THE VICTIM'S TESTIMONY HAD DESCRIBED THE PERSON WHO WAS LATER
16 CLAIMED TO BE ROBERT JAMES AS BEING THIN. IF I RECALL THE
17 PHOTO I.D., THERE WAS ONE PERSON WITH A VERY OBVIOUS THIN
18 NECK, AND THE OTHER FELLOWS JUST DIDN'T SHOW UP AS BEING
19 THIN. AND I -- AND I THOUGHT IT WAS A SUGGESTIVE I.D., PHOTO
20 LINE-UP, AND THE FACT THAT SOME SEVERAL MONTHS HAD LAPSED
21 FROM THE TIME OF THE CRIME TO THE TIME OF THE CHARGE AGAINST
22 ROBERT I THOUGHT WAS SIGNIFICANT. THAT'S WHY I HIRED AN
23 EXPERT ON THE EYEWITNESS IDENTIFICATION. I THOUGHT THAT
24 MIGHT HAVE BEEN -- BEEN HELPFUL.

25 Q. ONE LAST THING, MR. SHUPPER. THERE WAS SOME DISCUSSION

1 ON DIRECT ABOUT THE DECISION TO TESTIFY ON THE PART OF THE
2 APPLICANT, AND THERE WAS TESTIMONY ON DIRECT BY YOURSELF THAT
3 THE IMPLICATIONS OF WHAT CAN COME ABOUT AS A DECISION TO
4 TESTIFY WAS DISCUSSED WITH THE APPLICANT - IS THAT CORRECT -
5 HIS PRIOR CRIMINAL HISTORY, SO ON AND SO FORTH?

6 A. WE -- WE DISCUSSED WHETHER HE WOULD TAKE THE STAND, BOTH
7 WHEN HE WAS IN THE JAIL SOMETIME BEFORE TRIAL BECAUSE I -- MY
8 CONCERNS WERE, ONE, IS WHAT CAN YOU TESTIFY TO WHEN THE STATE
9 HAS THE BURDEN OF PROOF AND -- AND THAT WOULD BE HELPFUL TO
10 THE DEFENDANT? TWO, IF HE DECIDED TO TESTIFY, WAS HE GOING
11 TO BE IMPEACHED BASED ON THE PRIOR CRIMINAL CONVICTION
12 INVOLVING MORAL TURPITUDE? AND, THREE, WHAT WOULD BE THE
13 SUBSTANCE OF HIS TESTIMONY?

14 IF -- IF ROBERT -- I DON'T RECALL -- AND I DO RECALL
15 DOING SOME KIND OF ROLE-PLAYING WHERE IF YOU'RE ON THE STAND,
16 YOU KNOW, THESE ARE THE QUESTIONS I WOULD ASK YOU ON DIRECT.
17 IN ORDER TO TRY TO REFUTE THE ALLEGATIONS OF THE STATE OR THE
18 IMPLICATIONS OF THE CIRCUMSTANTIAL EVIDENCE BEING THE
19 CERTIFICATE THAT WAS FOUND IN HIS BROTHER'S APARTMENT ON ORR
20 STREET THAT HE RESIDED THERE, I TRIED TO ESTABLISH: WHERE
21 WITH CERTAINTY DID YOU RESIDE AT THAT TIME? I WAS VERY
22 FEARFUL THAT THE -- PUTTING HIM ON THE STAND TO TESTIFY THAT
23 HE DID NOT LIVE THERE MIGHT NOT WORK BECAUSE, AS I RECALL, HE
24 WASN'T CERTAIN ON THE NIGHT IN QUESTION WHERE HE WAS ON THE
25 NIGHT IN QUESTION. AND I BELIEVE THAT THERE WAS SOME -- I

1 BELIEVE THAT IT WOULD HAVE COME OUT THROUGH EITHER DIRECT OR
2 CROSS THAT ROBERT HAD SPENT TIME AT SEVERAL DIFFERENT
3 RESIDENCES DURING THIS TIME, AT HIS MAMA'S HOUSE WHICH I
4 TALKED TO HIS MAMA ABOUT. HE HAD A GIRLFRIEND. HE HAD
5 ANOTHER BROTHER IN ANOTHER PART OF COLUMBIA. AND SO PUTTING
6 HIM ON THE STAND TO SAY I DIDN'T LIVE AT OR WASN'T AT MY
7 BROTHER KENNETH'S HOUSE ON THAT NIGHT, I JUST DIDN'T SEE
8 WHERE THAT WOULD BE HELPFUL AND TO OPEN HIM UP FOR CROSS-
9 EXAMINATION.

10 AGAIN, THE STATE HAD THE BURDEN, AND I HAD NOTHING THAT
11 I WAS -- COULD BE CERTAIN OF AS TO WHERE HE WAS ON THE NIGHT
12 IN QUESTION AND, YOU KNOW, ROBERT TRIED TO HELP. I MEAN,
13 THERE WERE -- BUT WE DID HAVE DISCUSSIONS ABOUT IF HE GOT ON
14 THE STAND WHAT WOULD -- WHAT COULD HAPPEN AND WE -- WE
15 DISCUSSED IT DOWN AT THE JAIL. WE DID SOME ROLE-PLAYING AND
16 I -- I ASKED QUESTIONS ABOUT WHAT HIS TESTIMONY WOULD HAVE
17 BEEN HAD WE PUT HIM ON THE STAND AND SOME PARTICULAR
18 QUESTIONS ABOUT, "MS. HAS IDENTIFIED YOU." AND IF I --
19 I THINK ROBERT SAID SOMETHING TO THE EFFECT THAT, "SHE CAN'T
20 IDENTIFY ME." THAT WAS THE ONLY -- AND THAT KIND OF STICKS
21 AS SOMETHING THAT HE SAID, AND SO HE WOULD BE IN DIRECT
22 CONFLICT WITH THE ACCUSER'S TESTIMONY BUT THAT HE WOULDN'T BE
23 ABLE TO STATE WHERE HE WAS. IT WOULD JUST, IN FACT, BE A
24 DENIAL: SHE'S WRONG; I WASN'T THERE. BUT HE COULDN'T
25 ESTABLISH AND NONE OF THE OTHER WITNESSES, THE MAMA OR THE

1 GIRLFRIEND OR ANYONE ELSE, COULD ESTABLISH WHERE HE DID
2 RESIDE OR HAVE A RECOLLECTION OF WHERE HE WAS ON THAT
3 PARTICULAR NIGHT.

4 AND I FELT ALSO DAMAGING WAS THE PHOTO FROM THE AMOCO
5 THAT -- THAT BORE A STRONG RESEMBLANCE TO HIM IN MY MIND
6 WHICH HE DIDN'T FEEL WAS HIM. SO WE -- WE DID DISCUSS THE
7 POSSIBILITY OF HIS TESTIFYING. EVEN DURING TRIAL I THINK
8 THAT WE TALKED ABOUT IT. WE HAD HAD DISCUSSIONS. THE JUDGE
9 ADVISED HIM, IF I'M NOT MISTAKEN, OF THE RIGHT AND THE
10 CONSEQUENCES OF BOTH TESTIFYING AND THE FACT THAT THE -- IF
11 HE DIDN'T TESTIFY, THE STATE HAD THE BURDEN AND IT COULD NOT
12 BE HELD AGAINST HIM. SO I BELIEVE THE TESTIMONY -- THAT THE
13 SUBJECT WAS COVERED ON NUMEROUS OCCASIONS.

14 Q. WELL, IT SOUNDS LIKE THERE WAS VERY EXTENSIVE
15 DISCUSSIONS ABOUT THE RIGHT TO TESTIFY. THIS MAY SOUND
16 REDUNDANT, BUT I JUST WANT TO ASK THIS QUESTION FOR THE
17 RECORD. DESPITE YOUR RECOMMENDATIONS, WHOSE ULTIMATE
18 DECISION WAS IT WHETHER OR NOT TO TESTIFY IN THIS CASE?

19 A. ROBERT'S.

20 MR. BAX: NO FURTHER QUESTIONS AT THIS TIME, YOUR HONOR.

21 THE COURT: ANY CROSS -- ANY REDIRECT?

22 REDIRECT EXAMINATION

23 BY MS. SHURLING:

24 Q. JOHN, I DO NOTE IN THE BEGINNING OF THE TRIAL WHERE YOU
25 MADE A MOTION TO DISMISS THE INDICTMENT BASED ON THE CHIEF

1 JUSTICE'S PREVIOUS ORDER CONCERNING INDICTMENTS WITHIN A
2 CERTAIN PERIOD OF TIME. BUT MY ACTUAL QUESTION WAS: BY THE
3 TIME YOU BECAME INVOLVED IN THE CASE, YOUR CLIENT HAD ALREADY
4 BEEN IN JAIL FOR ALMOST A YEAR AND A HALF, AND IT WAS CLEAR
5 OR SHOULD HAVE BEEN CLEAR THAT HE HAD BEEN IN JAIL FOR A VERY
6 LONG TIME WITHOUT BEING INDICTED.

7 A. CORRECT.

8 Q. OKAY. DID YOU CONSIDER AT THAT TIME, WHICH WAS, LIKE
9 YOU SAID, ABOUT A YEAR AND A HALF BEFORE YOU WENT TO TRIAL,
10 GOING TO COURT AND ASKING THAT YOUR CLIENT -- MAKING A DEMAND
11 THAT YOUR CLIENT BE RELEASED FROM CUSTODY BASED ON THE FACT
12 THAT HE HAD NOT BEEN INDICTED?

13 A. NO.

14 Q. AND IN YOUR EXPERIENCE, WOULD NOT SUCH A MOTION HAVE
15 BEEN LIKELY TO HAVE PROMPTED A SPEEDY TRIAL?

16 A. IT MAY HAVE.

17 Q. AND WASN'T THE LAPSE OF TIME BETWEEN THE EVENTS OF THIS
18 EVENING AND THE TRIAL PART OF THE PROBLEM WITH PEOPLE LIKE
19 YOUR CLIENT AND HIS GIRLFRIEND'S RECOLLECTIONS ABOUT
20 SPECIFICALLY WHAT HAD HAPPENED ON THE EVENING IN QUESTION?

21 A. I THINK THEY WERE LAPSING -- THERE WERE CERTAINLY LAPSSES
22 IN RECOLLECTIONS WHEN I GOT INVOLVED IN THE CASE. I DON'T
23 KNOW THAT -- WELL, BY THE TIME I GOT TO GET TO KNOW ROBERT
24 AND GET TO ANALYZE THE EVIDENCE THAT I HAD IN THE DOCUMENTS
25 AND DISCOVERY AND SUCH -- BUT I WOULD SAY THAT THE LAPSE OF

1 SIX MONTHS FROM THE TIME OF THE INCIDENT TO HIS ARREST AND
2 THE IDENTIFICATION BY THE VICTIM AFFECTED THAT.

3 Q. PRECISELY. AT THE TIME YOU WERE COURT-APPOINTED, IN
4 YOUR JUDGMENT, THE PASSAGE OF TIME HAD ALREADY RESULTED IN
5 THE DETERIORATION OF RECOLLECTIONS AND LAPSES OF MEMORY.
6 CORRECT?

7 A. I THINK THAT THAT -- THAT WAS ONE OF THE -- I THINK THAT
8 WAS A LINE OF -- THAT I WAS PURSUING ABOUT THE VALIDITY OF
9 THE EYEWITNESS IDENTIFICATION.

10 Q. AND WOULD THAT NOT HAVE BEEN A BASIS FOR YOU TO MAKE A
11 MOTION TO DISMISS THESE CHARGES WHEN YOU WERE FIRST APPOINTED
12 A YEAR AND A HALF BEFORE THIS CASE WENT TO TRIAL?

13 A. IT MAY WELL HAVE BEEN A BASIS FOR THAT, AND I DID NOT
14 MAKE THE MOTION. THERE'S NO QUESTION ABOUT THAT.

15 MS. SHURLING: THANK YOU. NO FURTHER QUESTIONS.

16 MR. BAX: NO FURTHER QUESTIONS FROM THE STATE, YOUR
17 HONOR.

18 THE COURT: YOU MAY STEP DOWN.

19 THE WITNESS: THANK YOU, YOUR HONOR.

20 THE COURT: LET'S TAKE A BRIEF BREAK.

21 MS. SHURLING: THANK YOU, YOUR HONOR.

22 MR. BAX: YOUR HONOR, I DON'T BELIEVE I NEED MR.
23 SHUPPER'S TESTIMONY FOR ANYTHING ELSE. I'D ASK THAT HE BE
24 RELIEVED.

25 MS. SHURLING: NEITHER DO I, YOUR HONOR. THANK YOU FOR

1 COMING.

2 THE COURT: YOU MAY BE EXCUSED. THANK YOU VERY MUCH.

3 THE WITNESS: THANK YOU, YOUR HONOR.

4 THE COURT: LET'S TAKE A BRIEF BREAK, AND WE'LL COME
5 BACK AND CONTINUE ON WITH THIS HEARING.

6 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

7 THE COURT: BE SEATED, PLEASE.

8 MR. BAX: THANK YOU, YOUR HONOR.

9 MS. SHURLING: YOUR HONOR, THE APPLICANT WOULD HAVE NO
10 FURTHER WITNESSES.

11 THE COURT: YES, SIR, MR. BAX.

12 MR. BAX: THANK YOU, YOUR HONOR. I BELIEVE THE STATE --
13 THE STATE WOULD SUBMIT THAT THE WITNESS CALLED BY THE
14 APPLICANT SATISFIED ALL THE TESTIMONY THAT WE WISH TO
15 PRESENT, SO WE WOULD CALL NO WITNESSES, YOUR HONOR.

16 MS. SHURLING: YOUR HONOR, A MOMENT'S INDULGENCE,
17 PLEASE.

18 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MS.
19 SHURLING AND MR. JAMES.)

20 MS. SHURLING: YOUR HONOR, I APOLOGIZE. THE APPLICANT
21 WISHES FOR ME TO CALL HIM TO THE STAND. SO AT THIS TIME I'D
22 PRESENT MR. ROBERT ANTHONY JAMES.

23 THE COURT: IF YOU'D STEP FORWARD, PLEASE, TO BE SWORN.

24 MS. SHURLING: TAKE ANY PAPERS WITH YOU THAT YOU NEED.
25 YOUR HONOR, WHILE HE'S APPROACHING, I WOULD HAVE THE COPY OF

1 victim 'S MEDICAL RECORDS AND RAPE PROTOCOL MARKED AS AN
2 APPLICANT'S EXHIBIT.

3 (PLAINTIFF'S EXHIBIT 1 WAS RECEIVED IN EVIDENCE.)

4 ROBERT ANTHONY JAMES, AFTER BEING DULY SWORN,
5 TESTIFIED AS FOLLOWS:

6 **THE COURT:** IF YOU'D PLEASE HAVE A SEAT AND STATE YOUR
7 FULL NAME.

8 **THE WITNESS:** MY NAME IS ROBERT ANTHONY JAMES.

9 DIRECT EXAMINATION

10 BY MS. SHURLING:

11 Q. MR. JAMES, I KNOW YOU WERE PAYING CLOSE ATTENTION WHEN I
12 WAS OUTLINING THE ISSUES THAT YOU WISHED FOR ME TO PRESENT ON
13 YOUR BEHALF IN THE POST-CONVICTION RELIEF CASE. DID I
14 ARTICULATE THOSE ISSUES CORRECTLY?

15 A. YES, MA'AM, TO A POINT.

16 Q. OKAY. JUST THE BASIC ISSUES, DID I STATE THEM FOR THE
17 RECORD?

18 A. THE BASIC ISSUES? YES, MA'AM.

19 Q. OKAY. NOW, WHAT I'M TRYING TO FIND OUT HERE IS IF -- I
20 UNDERSTAND THAT YOU BELIEVE THAT THERE'S SOME ASPECTS OF YOUR
21 ALLEGATIONS THAT NEED TO BE FLESHED OUT, THAT THERE'S SOME
22 AUTHORITY THAT YOU WANT TO ASK THE COURT TO CONSIDER, AND
23 WE'RE GOING TO GET TO THAT IN JUST A SECOND. BUT FIRST I
24 NEED TO ESTABLISH THAT YOU BELIEVE THAT I HAVE LISTED
25 CORRECTLY ALL OF THE ALLEGATIONS YOU WANTED ME TO RAISE

1 INCLUDING THE ONE THAT I ADDED SORT OF IN THE MIDDLE OF YOUR
2 TRIAL LAWYER'S TESTIMONY.

3 A. YES, MA'AM.

4 Q. OKAY. NOW, WHICH ISSUES DO YOU FEEL THAT YOU NEED TO
5 ADD TO WHAT I'VE HAD TO SAY ON?

6 A. THE ONE OF TRIAL COURT LACKED SUBJECT MATTER
7 JURISDICTION DUE TO THE PROHIBITED PRACTICE OF THE
8 PROSECUTOR'S OPINION AS THE SOLE WITNESS BEFORE THE GRAND
9 JURY.

10 Q. YES, SIR.

11 A. I JUST WANT TO EMPHASIZE ON THAT THAT Y'ALL -- WHEN
12 Y'ALL -- WHEN YOU WERE SPEAKING, IT SAYS SOLICITORS -- Y'ALL
13 WAS GOING ON THE LINE OF SOLICITOR, BUT IT SAYS PROSECUTORS
14 WHICH ADDS MORE PEOPLE INTO THAT CATEGORY WHICH, TAKING THE
15 SUPREME COURT'S CHARACTERIZATION OF PROSECUTOR, IT DID NOT
16 BASE HIS DECISION SOLELY UPON THE REFERENCE OF A SOLICITOR.
17 IT SPECIFICALLY HELD PROSECUTORS. BLACK'S LAW DICTIONARY,
18 SEVENTH EDITION, DEFINES A PROSECUTOR AS A LEGAL OFFICER WHO
19 REPRESENTS THE GOVERNMENT IN A CRIMINAL PROCEEDING AND A
20 PRIVATE PERSON WHO INSTITUTES AND CARRIES ON A LEGAL ACTION,
21 ESPECIALLY A CRIMINAL ACTION.

22 Q. OKAY. SO LET ME -- LET ME CLARIFY. IT IS YOUR BELIEF
23 THAT WHEN THE SUPREME COURT HAS ADMONISHED THE BENCH AND BAR
24 AGAINST HAVING A SOLE WITNESS APPEAR BEFORE THE GRAND JURY BE
25 A PROSECUTOR THAT THAT ADMONITION SHOULD INCLUDE LAW

1 ENFORCEMENT OFFICERS AND, THEREFORE, THAT THE SOLE WITNESS
2 APPEARING BEFORE THE GRAND JURY MAY ALSO NOT BE A SINGLE LAW
3 ENFORCEMENT OFFICER.

4 A. BY BLACK'S LAW DICTIONARY, YES, MA'AM, THAT'S WHAT I
5 SAID.

6 Q. OKAY. WHAT OTHER ISSUES DO YOU FEEL LIKE I NEED TO
7 FLESH OUT A LITTLE MORE?

8 A. COUNSEL FAILED TO ADEQUATELY PREPARE FOR THE CASE TO DO
9 A LEGAL AND FACTUAL INVESTIGATION TO THE EXERCISE OF DUE
10 DILIGENT---

11 COURT REPORTER: WHOA, WHOA, WHOA. WAIT. CAN YOU SLOW
12 DOWN, PLEASE?

13 THE WITNESS: YES, MA'AM.

14 BY MS. SHURLING:

15 Q. MR. JAMES, YOU HAVE TO REMEMBER THAT THE LADY SITTING
16 BESIDE YOU HAS TO WRITE DOWN EVERY WORD YOU SAY, AND ALTHOUGH
17 SHE'S VERY GOOD AT DOING SO QUICKLY, IF YOU SPEAK TOO QUICKLY
18 AND IF YOU SLUR YOUR WORDS TOGETHER, YOU MAKE HER JOB ALMOST
19 IMPOSSIBLE AND FRANKLY IT'S NOT IN YOUR BEST INTEREST EITHER
20 BECAUSE HER HONOR CANNOT HEAR YOU EFFECTIVELY WHEN YOU DO
21 THAT EITHER.

22 A. YES, MA'AM.

23 Q. OKAY. PROCEED.

24 A. TRIAL COUNSEL FAILED TO ADEQUATELY PREPARE FOR THE CASE
25 TO DO A LEGAL AND FACTUAL INVESTIGATION TO EXERCISE DUE

1 DILIGENCE IN THE PREPARATION IN THE DEFENDANT'S CASE BY
2 FAILING TO OBTAIN ASSISTANCE OF EXPERTS PRIOR TO TRIAL.
3 SPECIFICALLY---

4 Q. NOW, I'M GOING TO INTERRUPT YOU FOR A MOMENT, MR. JAMES.
5 YOU ARE, IN FACT, READING YOUR ALLEGATIONS FROM YOUR
6 APPLICATION FOR POST-CONVICTION RELIEF, ARE YOU NOT?

7 A. THE NOTES I MADE, YES, MA'AM.

8 Q. SO FAR WHAT YOU HAVE STATED FROM THE STAND IS
9 INFORMATION CONTAINED WITHIN THE TEXT OF YOUR ALLEGATIONS IN
10 YOUR APPLICATION FOR POST-CONVICTION RELIEF. CORRECT?

11 A. YES, MA'AM.

12 Q. OKAY. I WANT YOU TO UNDERSTAND THAT THE PLEADINGS IN
13 THIS CASE ARE PART OF WHAT JUDGE LEE HAS TO REVIEW AND
14 CONSIDER IN DECIDING THE MERITS OF YOUR CASE. SHE'S READ
15 YOUR APPLICATION. SHE'S READ THE AMENDED APPLICATION. SO --
16 AND WE ARE ASKING THAT SHE INCORPORATE BY REFERENCE AND
17 CONSIDER ALL OF THE ARGUMENTS MADE IN THE PLEADINGS IN
18 REACHING HER DECISION. SO AT THE RISK OF SOUNDING LIKE I'M
19 BEING SARCASTIC - I DON'T MEAN TO BE - JUDGE LEE CAN READ.
20 SO YOU DO NOT NEED TO READ HER YOUR APPLICATION. IF THERE'S
21 ANYTHING THAT YOU WANT TO ASK HER TO CONSIDER IN ADDITION TO
22 WHAT YOU'VE STATED IN YOUR APPLICATION, I BELIEVE SHE'LL BE
23 HAPPY TO HEAR YOU, BUT PLEASE DON'T READ YOUR APPLICATION TO
24 HER.

25 A. YES, MA'AM.

1 Q. OKAY.

2 A. I ONLY DO THAT TO TRY TO STAY FOCUSED BECAUSE I RAMBLE
3 ON, AND I DON'T WANT TO RAMBLE AND WASTE MORE TIME.

4 Q. I UNDERSTAND, BUT IF IN THE PROCESS OF WHAT YOU'RE DOING
5 IS READING YOUR APPLICATION TO THE JUDGE, THAT -- THAT IS
6 DISRESPECTFUL TO THE COURT AND A WASTE OF THE COURT'S TIME
7 BECAUSE JUDGE LEE'S READ YOUR APPLICATION, AND WE NEED TO BE
8 RESPECTFUL OF HER TIME AND ALLOW HER TO READ THAT AND ABSORB
9 IT AND REFER TO IT IN MAKING HER DECISION IN YOUR CASE.

10 NOW, IF THERE'S INFORMATION, IF THERE ARE ARGUMENTS IN
11 ADDITION TO WHAT YOU HAVE IN YOUR APPLICATION AND IN ADDITION
12 TO WHAT I'VE ARTICULATED FOR YOU TODAY, THIS IS YOUR
13 OPPORTUNITY TO TELL HER. NOW, YOU'RE FREE TO USE -- YOU CAN
14 USE THOSE PLEADINGS AND GO DOWN THE LIST, MR. JAMES, AND USE
15 THEM TO REFRESH YOUR RECOLLECTION ABOUT WHAT THE ISSUES ARE
16 AND REFRESH YOUR RECOLLECTION ABOUT WHICH ISSUES YOU WISH TO
17 HIGHLIGHT FOR HER HONOR, BUT JUST PLEASE TRY TO REFRAIN FROM
18 READING THEM TO HER.

19 A. YES, MA'AM.

20 Q. OKAY.

21 A. RETURNING TO THAT ISSUE I SPOKE ON, THE INVESTIGATOR --
22 THAT HE COULD HAVE OBTAINED -- COULD HAVE POINTED OUT MORE
23 ISSUES AND MATTERS THAT WOULD HAVE HELPED ME OUT, LIKE THE
24 LEAD INVESTIGATOR ON FOR THE STATE AT THE TIME OF THE SEARCH
25 WARRANT HE SAID THAT HE MADE ME A SUSPECT BECAUSE THERE WAS

1 FIVE OTHER INDIVIDUALS ASSOCIATED WITH THIS CRIME, THAT THE
2 ONLY REASON HE TOOK MY NAME AND PAPERS OUT OF THE HOUSE WAS
3 TO TRY TO SEE WAS I ONE OF THE FIVE. AND HE WAS ASKED WAS
4 THERE ANY OTHER MATERIAL WITH THEM, ANYONE ELSE'S NAME ON IT
5 AT THE ADDRESSES. HE TESTIFIED NO. BUT THIS -- I GOT A COPY
6 OF AN INVENTORY WHERE THEY TOOK FROM THE HOUSE AND THEY GOT A
7 BELLSOUTH PHONE BILL AND A CHECK WITH THE NAME MARK A.
8 WINBURN ON IT, BUT HE TESTIFIED HE FOUND NOTHING ELSE IN THE
9 HOUSE, BUT FOR SOME OTHER REASON HE TOOK MY NAME AND ADDED TO
10 IT OTHER THAN WHAT HE WAS SAYING IT WAS FOR.

11 MS. SHURLING: MAY I APPROACH, YOUR HONOR?

12 THE COURT: YES, MA'AM.

13 MS. SHURLING: SHOW ME. YOUR HONOR, I WOULD INTRODUCE
14 THE RETURN, THE TWO-PAGE RETURN TO THE SEARCH WARRANT, AS AN
15 APPLICANT'S EXHIBIT AND NOTE THAT THE PORTION REFERRING TO
16 THE PHONE BILL WITH SOMEONE ELSE'S NAME OTHER THAN THE
17 APPLICANT AND OTHER THAN THAT OF HIS BROTHER, KENNETH, HAS
18 BEEN HIGHLIGHTED.

19 MR. BAX: NO OBJECTION FROM THE STATE, YOUR HONOR.

20 (PLAINTIFF'S EXHIBIT 2 WAS RECEIVED IN EVIDENCE.)

21 BY MS. SHURLING:

22 Q. ANYTHING ELSE?

23 A. ALSO -- ALSO, PATROL THE AREA FOR SUSPECTS AT THE TIME.
24 HE WAS TOLD THAT THERE WAS TWO SUSPECTS WHEN BOTH VICTIMS IN
25 THE CASE TOLD -- SAID THERE WAS FIVE JUST BEFORE ANYONE MADE

1 ANY IDENTIFICATIONS OR THIS WAS RIGHT DURING -- RIGHT AFTER
2 THE INCIDENT. THIS OFFICER PATROLLING THE AREA LOOKED FOR
3 SUSPECTS. HE WAS ONLY TOLD THERE WAS TWO SUSPECTS WHEN THE
4 VICTIM SAID THERE WAS FIVE, AND THE INVESTIGATOR COULD HAVE
5 LOOKED THAT UP TO FIND OUT WHY HE WAS ONLY TOLD TWO SUSPECTS
6 IN ADDITION TO THE PAPER THAT THEY HAD TAKEN FROM THE HOUSE
7 AND SAYING THAT THERE -- THAT NO OTHER INFORMATION WAS FOUND
8 IN THE HOUSE WITH ANYBODY ELSE'S NAME ON IT.

9 Q. AND WHERE DO YOU GET THE FACT THAT HE WAS ONLY TOLD TWO
10 SUSPECTS?

11 A. HE ADMITS THIS IN THE TRANSCRIPT ON PAGE 735, LINES 15
12 THROUGH 23, AND PAGE 755, LINES 4 THROUGH 8. OFFICER RON
13 GIBSON.

14 Q. OKAY. SO THE JURY HEARD THE FACT THAT HIS INITIAL
15 INVESTIGATION ONLY ENCOMPASSED TWO SUSPECTS, AND IT WAS
16 SUBSEQUENTLY EXPANDED TO FIVE.

17 A. I DON'T KNOW IF THIS OFFICER WAS TOLD THAT IT WAS FIVE
18 AT THE TIME OR HE SAID IN HIS TESTIMONY THAT IT WAS JUST --
19 HE WAS TOLD ONLY TWO.

20 Q. OKAY.

21 A. AND MR. SHUPPER AT THE TIME OF THE TRIAL DIDN'T
22 EMPHASIZE OR POINT THIS OUT MORE CLEARLY, I FELT, TO THE JURY
23 BECAUSE THEY -- EVERYTHING I FEEL IN THE CASE THEY WAS USING
24 TO LINK ME TO IT WAS -- LINKED ME TO MY CO-DEFENDANT TO GET A
25 STRONGER CASE. THAT'S WHERE THEY WERE LEADING TO THE HOUSE

1 AND I STAYED THERE AND THEN TO THE AMOCO STATION. ALL THESE
2 THINGS HE WAS TELLING ME DURING THE TIME, WELL, IT REALLY
3 AIN'T NO BIG DEAL IF YOU DIDN'T STAY THERE. NOTHING HAPPENED
4 AT THE STORE WHERE THEY SAY YOU -- THEY SEEN SOMEONE COME
5 THERE FOR A HUNDRED-DOLLAR BILL. HE SAID---

6 Q. OKAY. SO YOU BELIEVE---

7 A. ---THIS STUFF---

8 Q. AGAIN, MADAM COURT REPORTER, I APOLOGIZE. YOU BELIEVE
9 THAT YOUR LAWYER WAS INEFFECTIVE FOR FAILING TO ADEQUATELY
10 HIGHLIGHT THAT THIS INVESTIGATOR WAS TRYING TO SAY THAT THERE
11 WERE ONLY TWO SUSPECTS?

12 A. YES, MA'AM.

13 Q. AND YOU BELIEVE THAT THEY WERE SAYING THERE WERE ONLY
14 TWO SUSPECTS BECAUSE THEY WERE TRYING TO NARROW THE FOCUS TO
15 YOU AND YOUR BROTHER.

16 A. YES, MA'AM.

17 Q. OKAY. ANYTHING ELSE?

18 A. OTHER THAN WITH THE INDICTMENTS THAT -- THAT THEY WASN'T
19 FILED. YOU WENT OVER THAT. I JUST WANT TO STATE THE STATE'S
20 FAILURE TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF STATE
21 STATUTE CONSTITUTES A FUNDAMENTAL DEFECT WHICH INHERENTLY
22 RESULTS IN A COMPLETE MISCARRIAGE OF JUSTICE WHICH THE CASE
23 HAYLEY VERSUS DORSEY (PHONETIC) -- I DON'T KNOW THE RIGHT
24 WORD TO SAY FOR IT, BUT THAT CASE POINTS THAT OUT.

25 Q. MR. JAMES, YOU'RE LAPSING INTO -- I'M -- I REALLY DON'T

1 WANT TO OFFEND YOU; YOU'RE MY CLIENT. BUT YOU CANNOT LAPSE
2 INTO SLURRING YOUR SPEECH OR ALMOST TALKING TO YOURSELF. WE
3 HAVE TO HEAR YOU, AND THE COURT REPORTER HAS TO HEAR YOU. SO
4 PLEASE TRY TO REMEMBER THAT. AND I KNOW THIS IS -- YOU'RE
5 NOT A LAWYER. THIS IS AN ANXIETY-PROVOKING SITUATION AND
6 WE'RE ALL SYMPATHETIC WITH THAT, I PROMISE, BUT YOU JUST NEED
7 TO TRY TO REMEMBER TO SPEAK CLEARLY AND REMEMBER THAT WE HAVE
8 TO HEAR YOU. OKAY?

9 A. YES, MA'AM.

10 Q. OKAY.

11 A. I WILL TRY TO KEEP THAT IN MIND. IT'S JUST FROM WHERE
12 I'M SITTING AT, THIS IS ALL INTIMIDATING. I GOT THE -- I'M
13 TRYING TO GET MY POINT ACROSS WITHOUT OFFENDING ANYONE AND
14 WITHOUT...

15 Q. WE UNDERSTAND THAT. EVERYBODY HERE UNDERSTANDS THAT,
16 AND NOBODY IS TRYING TO RUSH YOU OR INSULT YOU OR HURT YOUR
17 FEELINGS, I ASSURE YOU. JUST TAKE YOUR TIME AND DECIDE WHAT
18 IT IS THAT YOU THINK HER HONOR NEEDS TO HEAR TO AID HER IN
19 DECIDING WHETHER OR NOT YOU'VE MET YOUR BURDEN OF PROOF ON
20 YOUR CLAIM THAT YOU SHOULD GET A NEW TRIAL AND THEN JUST SAY
21 IT AS CLEARLY AND SIMPLY AS YOU CAN AND WE'LL ALL BE PATIENT
22 WITH YOU.

23 A. YES, MA'AM.

24 Q. I SHOULD REPHRASE THAT. I WILL BE AS PATIENT WITH YOU
25 AS HER HONOR WILL ALLOW ME TO BE. HOW'S THAT?

1 A. YES, MA'AM.

2 Q. ALL RIGHT.

3 A. I GUESS THAT'S ALL.

4 Q. BE SURE IT'S ALL. NOW, THIS IS YOUR ONLY POST-

5 CONVICTION RELIEF HEARING. YOU WILL NOT GET ANOTHER ONE. SO

6 I DON'T WANT YOU TO GET BACK TO YOUR CORRECTIONAL INSTITUTION

7 AND SAY MS. SHURLING DIDN'T GIVE ME A CHANCE TO RAISE THIS OR

8 FEEL IN YOUR HEART THAT YOU WERE NOT GIVEN AN OPPORTUNITY TO

9 SAY WHAT YOU NEED TO SAY. SO LOOK AT YOUR NOTES, THINK ABOUT

10 WHAT WE'VE ALREADY SAID HERE TODAY, AND BE SURE THAT WE'VE

11 COVERED EVERYTHING.

12 A. YES, MA'AM. YES, MA'AM. BUT THE ERRONEOUS JURY CHARGE

13 WITH AIDING AND ABETTING---

14 Q. UH-HUH.

15 A. ---WE WENT OVER THAT. I JUST WANT TO EMPHASIZE THAT

16 DURING THE TRIAL THEY PUT AS MUCH -- A LOT OF EMPHASIS ON

17 THIS, AND I FEEL BECAUSE OF LACK OF EVIDENCE THEY ONLY HAD

18 CIRCUMSTANTIAL AGAINST ME. AND THEY REPEATED THIS PHRASE

19 "THE HANDS OF ONE/HANDS OF ALL, AIDING AND ABETTING" 16 TIMES

20 DURING THE TRIAL, AND THEY KEPT DRILLING THIS TO THE JURY'S

21 HEAD WHICH I WASN'T INDICTED OR CHARGED WITH AIDING AND

22 ABETTING UNDER THE HANDS OF ONE/HANDS OF ALL, AND I FEEL THAT

23 GIVING THAT INSTRUCTION TO THE JURY MAY HAVE CONFUSED THEM

24 SINCE I WASN'T CHARGED WITH THIS OFFENSE BUT AS A PRINCIPAL.

25 Q. OKAY.

1 A. AND WITH THE SPEEDY TRIAL I -- DURING THE TIME AT TRIAL
2 MR. SHUPPER NEVER ASKED IF THEY WAS CONFUSED ABOUT THE 180-
3 DAY THING AND THE SPEEDY TRIAL RIGHT WHICH I FEEL WERE TWO
4 DIFFERENT THINGS. WITH THE 180 DAYS I FEEL JUST GIVES YOU
5 THE SAME RELIEF AS THE SPEEDY TRIAL ALTHOUGH IT'S NOT THE
6 SAME THING. THAT'S WHY HE MIXED THE TWO TOGETHER AND
7 EVERYONE WAS GETTING CONFUSED AT THE TIME BECAUSE I WASN'T
8 INDICTED UNTIL TWO YEARS AND EIGHT MONTHS AFTER I WAS
9 ARRESTED. AND JUST THINGS THAT WAS ARGUED I FIGURED HE
10 SHOULD HAVE EMPHASIZED MORE BECAUSE THE JUDGE LEFT IT OPEN AT
11 TRIAL. HE SAID, WELL, AT THIS POINT SO FAR I DON'T KNOW IF I
12 CAN RULE IN Y'ALL'S FAVOR, NOT THEM WORDS I DON'T KNOW IF I
13 CAN RULE IN Y'ALL'S FAVOR, BECAUSE YOU HAVEN'T GIVEN ME
14 ENOUGH, BUT HE SAID WE COULD COME BACK TO THIS. AND I FIGURE
15 IF HE'S A LAWYER HE SHOULD KNOW WHICH ONE TO POINT OUT. I
16 DIDN'T KNOW THIS UNTIL AFTER I GOT LOCKED UP AND STUDIED
17 MYSELF.

18 Q. OKAY. LET ME INTERRUPT YOU FOR A SECOND. I'M GOING TO
19 MAKE SURE I CAN DELINEATE THIS. YOU'RE SAYING THAT THE 180-
20 DAY RULE IS SUBJECT TO RULE OF THE COURT AND INVOLVES A SET
21 OF GUIDELINES THAT OUR SUPREME COURT HAS SET DOWN BUT THAT
22 THAT IS SEPARATE AND APART FROM YOUR FUNDAMENTAL
23 CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

24 A. YES, MA'AM.

25 Q. AND THAT ON THE BASIS OF A CLAIM OF VIOLATION OF YOUR

1 RIGHT TO SPEEDY TRIAL YOUR LAWYER SHOULD HAVE BEEN MOVING FOR
2 THE CHARGES TO DISMISS BASED ON A SHOWING OF PREJUDICE TO
3 YOU---

4 A. YES, MA'AM.

5 Q. ---AT TRIAL.

6 A. YES, MA'AM.

7 Q. AND THAT HIS HONOR AT TRIAL INDICATED THAT HE DIDN'T
8 FEEL LIKE HE COULD MAKE A RULING BASED ON WHAT HE'D HEARD SO
9 FAR BECAUSE THEY COULD BRING IT UP LATER AND -- AND
10 EXTRAPOLATE AND ADD TO THEIR ARGUMENTS AT A LATER DATE.

11 A. YES, MA'AM.

12 Q. AND THAT AFTER, FOR EXAMPLE, THE TESTIMONY OF YOUR
13 GIRLFRIEND WHEN IT BECAME CLEAR THAT WITH THE PASSAGE OF TIME
14 HER MEMORY HAD FADED AND SHE WAS NO LONGER ABLE TO TESTIFY
15 WITH CERTITUDE ABOUT THE EVENTS OF THE EVENING IN QUESTION,
16 DEFENSE COUNSEL SHOULD HAVE USED THAT OPPORTUNITY TO RENEW
17 THE MOTION TO QUASH BASED ON THE VIOLATION OF YOUR RIGHT TO
18 SPEEDY TRIAL.

19 A. YES, MA'AM.

20 Q. DID I SAY IT RIGHT?

21 A. YES, MA'AM.

22 Q. OKAY. IS THERE ANYTHING ELSE?

23 A. NO, JUST THAT THEY -- WITH THE SPEEDY TRIAL HE SHOULD
24 HAVE POINTED TO A LOT OF STUFF THAT WITNESSES MADE IN
25 PREVIOUS STATEMENTS CONTRADICT WHAT THEY WAS NOW SAYING IN

1 THEIR TESTIMONY, AND HE DIDN'T POINT ANY OF THE ISSUES OUT.
2 I JUST FELT HE SHOULD HAVE.

3 Q. CAN YOU GIVE US SOME EXAMPLES?

4 A. LIKE, FOR EXAMPLE, THE WITNESS, MS. , PAINTED
5 SUSPECT NUMBER ONE REFERRED TO AS BIG DADDY IN HER SECOND
6 STATEMENT AS BEING HER MAIN ATTACKER, THE LEADER, BUT THEN AT
7 TRIAL SHE CHANGED THAT AND SAYS THAT HE WAS NOT THE MAIN
8 ATTACKER, THAT SHE NEVER SEEN THIS PERSON CALLED BIG DADDY,
9 THINGS LIKE THAT.

10 Q. DO YOU HAVE A COPY OF HER STATEMENT THAT YOU'RE
11 REFERRING TO?

12 A. YES, MA'AM.

13 Q. MAY I SEE IT?

14 A. (THE WITNESS HANDS A DOCUMENT TO MS. SHURLING.)

15 Q. AND CAN YOU DIRECT MY ATTENTION TO THE PORTION WHERE SHE
16 REFERS TO BIG DADDY AS HER PRIMARY ATTACKER?

17 A. (THE WITNESS COMPLIES.)

18 MS. SHURLING: YOUR HONOR, AT THIS TIME I WOULD
19 INTRODUCE A COPY OF THE STATEMENT OF VICTIM , HER FIRST
20 STATEMENT, AND HER SECOND STATEMENT WHICH WAS PART AND PARCEL
21 OF THE SUPPLEMENTAL INCIDENT REPORT. IN THAT STATEMENT SHE
22 REFERS TO BEING FORCED... A MOMENT'S INDULGENCE.

23 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MS.
24 SHURLING AND MR. BAX.)
25

1 BY MS. SHURLING:

2 Q. SO IN THIS STATEMENT SHE REFERS TO OBSERVING SUSPECT
3 ONE, IDENTIFIED AS BIG DADDY, REMOVE \$140 FROM HER BOYFRIEND.
4 CORRECT?

5 A. CORRECT.

6 Q. AND AT TRIAL SHE TESTIFIES THAT SHE NEVER SAW BIG DADDY.

7 A. YES, MA'AM.

8 MS. SHURLING: ALL RIGHT. I WOULD MOVE TO INTRODUCE HER
9 STATEMENT, I BELIEVE WITHOUT OBJECTION.

10 MR. BAX: NO OBJECTION, YOUR HONOR.

11 (PLAINTIFF'S EXHIBIT 3 WAS RECEIVED IN EVIDENCE.)

12 BY MS. SHURLING:

13 Q. AND YOU WERE GOING TO DIRECT OUR ATTENTION TO WHERE IN
14 THE TRANSCRIPT SHE SAYS SHE NEVER SAW HIM?

15 A. YES, MA'AM. THERE'S OTHER THINGS BUT AS -- I'LL TRY TO
16 SPEAK UP. SORRY. WITH THAT, THERE WAS OTHER THINGS BECAUSE
17 I GOT -- I GOT---

18 Q. STOP.

19 A. YES, MA'AM.

20 Q. OKAY. FIGURE OUT WHERE YOU'RE LOOKING. SAY THE PAGE IN
21 THE TRANSCRIPT AND THE LINES AND THEN YOU CAN READ IT.

22 A. OKAY. WELL, I HAVE MANU -- TRANSCRIPT PAGES DOWN. I
23 DON'T KNOW EXACTLY WHICH ONE IT IS BECAUSE IT ALL REFERS TO
24 THE PARAGRAPH THAT I'M SPEAKING ON.

25 Q. YOUR HONOR, I'M GOING TO TRY TO HELP HIM FIGURE THIS

1 OUT. LET ME SEE. YOUR HONOR, AT THIS TIME IT'S NOT CLEAR
2 WHICH PAGE REFERENCE HE'S MAKING. WE WOULD SIMPLY LEAVE THE
3 ALLEGATION THAT IN THE -- SOMEWHERE IN *victim* S
4 TESTIMONY SHE STATES THAT SHE NEVER SAW THE PERSON IDENTIFIED
5 AS BIG DADDY. IS THAT ACCURATE?

6 A. YES, MA'AM.

7 Q. ANYTHING ELSE? HE'S ALMOST DONE, YOUR HONOR.

8 A. ABOUT THE CLAIMS SHE MADE THAT SHE CHANGED -- LIKE THAT
9 ALL FIVE SUSPECTS SEXUALLY ASSAULTED HER AND THAT SHE DOES
10 NOT KNOW IF THE SUSPECTS WORE CONDOMS. THAT WAS IN STATEMENT
11 THREE THAT SHE MADE TO THE MEDICAL PERSONNEL AT THE RAPE
12 PROTOCOL KIT.

13 Q. OKAY. STOP FOR JUST A SECOND. WE'RE IDENTIFYING
14 STATEMENT NUMBER ONE AND TWO AS THOSE THAT I'VE ALREADY
15 INTRODUCED AS AN EXHIBIT AND STATEMENT NUMBER THREE AS THE
16 STATEMENT GIVEN IN THE CONTEXT OF THE RAPE PROTOCOL REPORT
17 WHICH I HAVE ALREADY INTRODUCED AS AN EXHIBIT.

18 A. YES, MA'AM.

19 Q. AND IN THAT STATEMENT SHE SAYS SHE WAS SEXUALLY
20 ASSAULTED BY ALL FIVE SUSPECTS AND THAT SHE DOES NOT KNOW HOW
21 MANY, IF ANY OF THEM, USED A CONDOM.

22 A. YES, MA'AM.

23 Q. OKAY. AND WHERE IN THE TRANSCRIPT DID SHE TESTIFY
24 INCONSISTENTLY WITH THAT?

25 A. THAT WOULD BE -- IT WOULD PROBABLY HELP SPEED THIS ALONG

1 IF I COULD JUST READ PART OF IT TO KEEP...

2 Q. PARDON?

3 A. I WOULD -- IT WOULD GO MORE SMOOTHLY IF I COULD JUST
4 READ PART OF IT TO KEEP IN TRACK WITH EACH PAGE.

5 Q. YOU HAVE TO BE ABLE TO TELL US WHERE IN THE RECORD IT'S
6 FOUND, MR. JAMES. OTHERWISE, WE CAN DO IT THIS WAY. YOU
7 TELL ME WHAT SHE SAID AT TRIAL, AND WE WILL SIMPLY RELY ON
8 THE FACT THAT IT'S CONTAINED SOMEWHERE WITHIN HER TESTIMONY.
9 IS THAT THE WAY YOU WANT TO DO IT? TELL ME WHAT SHE SAID AT
10 TRIAL THAT YOU BELIEVE IS INCONSISTENT WITH THE STATEMENT.
11 GO AHEAD AND DO IT.

12 A. BECAUSE, SEE, IF I COULD READ, I COULD---

13 Q. THAT'S FINE. READ IT.

14 A. ---TELL YOU WHAT SHE SAID, THEN TELL YOU WHERE TO FIND
15 IT AT IN THE STATEMENT, THEN TELL YOU WHERE TO FIND IT AT IN
16 THE TRANSCRIPT BECAUSE I GOT IT ALL AS IT GOES ALONG.

17 Q. SO YOU CAN'T GIVE ME THE PAGE REFERENCE TO THE
18 TRANSCRIPT FIRST?

19 A. BECAUSE, LIKE I SAY, I NAMED THREE THINGS THAT SHE SAID
20 AND I HAVE ALL THREE OF THEM TRANSCRIPT PAGES.

21 Q. OKAY. DO IT YOUR WAY. GO AHEAD AND TELL US WHAT SHE
22 SAID AT TRIAL. I'M NOT TRYING TO BE DIFFICULT, MR. JAMES.
23 TRADITIONALLY WHAT WE LIKE TO DO IS KNOW WHERE YOU'RE LOOKING
24 SO THAT WE CAN FIND IT IN THE TRANSCRIPT AND READ IT ALONG
25 WITH YOU IS WHY I WAS TRYING TO GET YOU TO GIVE US THE PAGE

1 NUMBERS. BUT GO AHEAD AND DO IT YOUR WAY AND TELL US WHAT IT
2 IS THAT SHE SAID THAT WAS INCONSISTENT WITH HER STATEMENT.

3 A. OKAY. IN HER STATEMENT SHE STATED THE EXACT ROLE OF
4 EACH SUSPECT WHICH IS IN THE STATEMENT TWO THAT WHILE SHE AND
5 THE VICTIM NUMBER TWO, WINFRED BULL, WERE SITTING AT A TABLE,
6 TWO---

7 Q. MR. JAMES, PLEASE -- I AM SO SORRY AND I KNOW YOU'RE
8 GETTING AGGRAVATED WITH ME---

9 A. IT'S STILL TOO FAST?

10 Q. ---BUT I CAN TELL BY THE FACE THE COURT REPORTER IS
11 MAKING THAT SHE CAN BARELY UNDERSTAND YOU.

12 THE COURT: JUST PULL -- JUST PULL THE MICROPHONE IN
13 FRONT OF HIS MOUTH.
14 BY MS. SHURLING:

15 Q. OKAY. AND SIT UP A LITTLE BIT CLOSER TO IT AND JUST TRY
16 TO SPEAK A LITTLE MORE CLEARLY, PLEASE. CONTINUE.

17 A. THAT SHE AND VICTIM NUMBER TWO, WINFRED BULL, WERE
18 SITTING AT A TABLE. TWO OF THE SUSPECTS CAME WALKING THROUGH
19 THE PARKING LOT TOWARDS THEM, BUT ONLY ONE ACTUALLY WALKED UP
20 TO THEM. AND AFTER THE SUSPECT PULLED OUT A PISTOL, THAT IS
21 WHEN THE OTHER SUSPECT CAME UP TO THEM AND THEN THE OTHER
22 THREE SUSPECTS CAME RUNNING UP TO THEM FROM OUT OF THE DARK.
23 SHE FEARS SUSPECT NUMBER ONE, REFERRED TO AS BIG DADDY, NOT
24 ONLY AS HER ATTACKER -- ONE OF HER ATTACKERS BUT HER MAIN
25 ATTACKER AND THE LEADER, AS EVIDENCED BY HER SECOND

1 STATEMENT. SHE STATES THAT SUSPECTS NUMBER THREE, FOUR, AND
2 FIVE INITIATED THE SEXUAL ASSAULT ON HER, THAT ALL FIVE
3 SUSPECTS SEXUALLY ASSAULTED HER AND THAT SHE DOES NOT KNOW IF
4 THE SUSPECTS WORE A CONDOM WHICH IS IN STATEMENT THREE, PAGE
5 2, LINES 4 AND 5, AND THAT SHE DID NOT SEE WHO MADE THE SHOTS
6 AS MR. BULL RAN OFF AND THAT AFTER THE SHOTS WERE FIRED TWO
7 OF THE SUSPECTS RAN OFF WHILE THE OTHER THREE TOOK HER OUT
8 INTO THE GRAVEYARD AND PLACED HER INSIDE AN EMPTY CRYPT,
9 MAUSOLEUM. THEN THEY LEFT, WHICH IS IN STATEMENT ONE.

10 HOWEVER, AT TRIAL MS. CHANGES MANY OF THESE MAIN
11 FACTS ABOUT HER STORY, THE EVENT, WHICH GREATLY DIFFERS FROM
12 THE PREVIOUS STATEMENT. SHE NOW TESTIFIES THAT SHE DOES NOT
13 KNOW THE EXACT ROLE OF EACH SUSPECT, TRANSCRIPT PAGE 176,
14 LINE 12. THAT WHEN THE GUN WAS PRODUCED, BOTH OF THE FIRST
15 TWO SUSPECTS WERE RIGHT THERE TOGETHER, TRANSCRIPT PAGE 618,
16 LINES 6 THROUGH 10. THEN THE OTHER THREE SUSPECTS CAME
17 RUNNING UP TO THEM. THAT HER MAIN ATTACKER INITIATED THE
18 SEXUAL ASSAULT ON HER, NOT ONE OF THE OTHERS, TRANSCRIPT PAGE
19 623, LINES 14 THROUGH 23. THAT AFTER SHE HEARD THE SHOTS
20 FIRED, SHE TESTIFIES THAT THREE, NOT TWO, OF THE SUSPECTS RAN
21 OFF FIRST, TRANSCRIPT PAGE 592, LINES 1 THROUGH 5. THAT SHE
22 NEVER SAW THE SUSPECT REFERRED TO AS BIG DADDY, TRANSCRIPT
23 PAGE 176, LINES 13 THROUGH 16. AND THAT ONLY THREE OR FOUR
24 OF THE FIVE SUSPECTS ACTUALLY SEXUALLY ASSAULTED HER AND THAT
25 SHE IS NOW CERTAIN THAT THE SUSPECTS WORE A CONDOM,

1 TRANSCRIPT PAGE 556, LINES 11 THROUGH 15, PAGES 176, LINES 12
2 THROUGH 16, PAGE 590, LINES 15 THROUGH 19.

3 IN ADDITION TO THESE CLAIMS, MENTIONED THAT THE
4 SUSPECT DESCRIBED AS THE PUSHY ONE WAS HER MAIN ATTACKER.

5 COURT REPORTER: THE WHAT ONE?

6 MS. SHURLING: THE PUSHY ONE.

7 THE WITNESS: THE PUSHY ONE WAS HER MAIN ATTACKER, NOT
8 BIG DADDY, THAT HE NEVER LEFT HER SIDE, THAT HE HAD ON A RED
9 JERSEY SHIRT AND THAT HE GAVE ORDERS TO ANOTHER SUSPECT TO
10 SHOOT AT THE OTHER VICTIM AND THAT SHE -- AND THAT HE
11 SEXUALLY ASSAULTED HER A SECOND TIME IN THE MAUSOLEUM,
12 TRANSCRIPT PAGE 623, LINES 10 THROUGH PAGE 628, LINE 13, PAGE
13 587, LINES 13 THROUGH 16, PAGE 588, LINES 1 THROUGH 8, PAGE
14 157, LINES 8 THROUGH 11, AND PAGE 593, LINES 9 THROUGH 19.
15 BUT NOWHERE IN ANY OF HER STATEMENTS DOES SHE MENTION ANY OF
16 THESE SEEMINGLY VERY IMPORTANT CLAIMS.

17 THIS WITNESS ALSO TESTIFIED THAT SHE DID NOT GIVE ANY
18 TYPE OF DESCRIPTIONS OF ANY OF THE SUSPECTS OTHER THAN
19 HEIGHT, WEIGHT, RANGE OF AGE, AND THAT THEY WERE BLACK MALES,
20 TRANSCRIPT PAGE 179, LINE 1 THROUGH PAGE 180, LINE 19.
21 NEVERTHELESS, MS. AGAIN CHANGES HER TESTIMONY. SHE NOW
22 ALLEGES THAT SHE IS VERY SURE OF THE IDENTITY OF TWO OF HER
23 ATTACKERS BECAUSE SHE WOULD NEVER FORGET ABOUT ONE OF THE TWO
24 IN HIS RED JERSEY SHIRT AND THAT SHE DID GIVE A PHYSICAL AND
25 CLOTHING DESCRIPTION. HOWEVER -- OH, EXCUSE ME. TRANSCRIPT

1 PAGE 156, LINE 19 THROUGH PAGE 157, LINE 11, PAGE 607, LINES
2 7 THROUGH 24.

3 HOWEVER, STATE'S WITNESS INVESTIGATOR THOMAS THOMAS, THE
4 INVESTIGATING OFFICER ON THE CASE, ALSO TESTIFIED THAT MS.
5 BROWN NEVER GAVE ANY DESCRIPTIONS OF THE SUSPECTS, TRANSCRIPT
6 PAGE 207, LINE 3 THROUGH PAGE 208, LINE 10, PAGE 212---

7 MR. BAX: YOUR HONOR, I HATE TO INTERRUPT, BUT I'D JUST
8 LIKE TO OBJECT ON THE BASIS OF THE FACT THAT I DON'T KNOW IF
9 THIS IS BEING COUCHED IN THE TERMS OF INEFFECTIVE ASSISTANCE
10 OF COUNSEL OR NOT. BUT AS HE'S READING IT, I BELIEVE THESE
11 ARE DIRECT APPEAL ISSUES OR ISSUES THAT SHOULD BE RAISED IN
12 LIGHT OF: WAS COUNSEL INEFFECTIVE FOR FAILING TO IMPEACH ON
13 THIS INFORMATION OR NOT? THE FACT THAT -- YOU KNOW, READING
14 ALL THESE INCONSISTENCIES OUT FOR THE PURPOSES OF TIME SEEMS
15 LIKE IT'S NOT REALLY RELEVANT AND IT'S TAKING UP A LOT OF
16 TIME.

17 MS. SHURLING: YOUR HONOR, I CAN CLARIFY, I THINK.
18 BY MS. SHURLING:

19 Q. MR. JAMES, LET ME STOP AND LET ME GET THIS CLEAR. YOU
20 ARE ALLEGING THAT EACH OF THESE INCONSISTENCIES ARE
21 INCONSISTENCIES THAT WERE EITHER NOT TOUCHED ON AT ALL BY
22 YOUR DEFENSE ATTORNEY OR WERE NOT ADEQUATELY USED FOR CROSS-
23 EXAMINATION PURPOSES.

24 A. I'M TRYING TO USE IT TO SHOW THAT -- HOW I WAS FURTHER
25 PREJUDICED BY VIOLATION OF MY SPEEDY TRIAL. THE STATE'S

1 WITNESS STATEMENT AND TESTIMONY AT TRIAL CONTRADICTS EACH
2 OTHER.

3 Q. I UNDERSTAND THAT, MR. JAMES, BUT THE POINT IN YOUR
4 P.C.R. HAS TO BE -- AND YOU AND I HAVE TALKED ABOUT THIS.

5 A. UH-HUH.

6 Q. ERRORS AND OMISSIONS. WHAT DID YOUR LAWYER DO THAT HE
7 DID WRONG? WHAT DIDN'T HE DO THAT HE SHOULD HAVE DONE? AND
8 IN THIS CASE WHAT YOU'RE SAYING HE DIDN'T DO THAT HE SHOULD
9 HAVE DONE WAS POINT OUT ALL THESE MANY WAYS THAT THE VICTIM'S
10 STATEMENT CHANGED BETWEEN HER THREE DIFFERENT STATEMENTS AND
11 HER TESTIMONY AT TRIAL; CORRECT?

12 A. YES, MA'AM.

13 Q. OKAY. NOW, IT APPEARS TO ME THAT YOU NOW HAVE THIS --
14 ALL THESE INCONSISTENCIES WRITTEN OUT IN SOME FORM.

15 A. YES, MA'AM.

16 Q. WOULD YOU LIKE TO INTRODUCE THESE ARGUMENTS ALONG WITH
17 THE PAGE CITATIONS AS AN EXHIBIT FOR HER HONOR TO CONSIDER IN
18 THIS CASE?

19 A. YES, MA'AM.

20 Q. CAN YOU PUT THEM IN THE CORRECT ORDER? ARE YOUR PAGES
21 NUMBERED?

22 A. NO, MA'AM.

23 MS. SHURLING: YOUR HONOR, I WOULD PROPOSE AT THIS TIME,
24 GIVEN THE DETAILED NATURE OF THIS PARTICULAR SET OF
25 INFORMATION, THE NUMEROUS REFERENCES TO THE TRANSCRIPT, THAT

1 IT WOULD BE BEST IF YOUR HONOR WOULD BE WILLING TO CONSIDER
2 THE ARGUMENTS AS PUT FORTH IN HIS PRO SE -- I'LL CALL IT A
3 MEMORANDUM. I CAN REPRESENT AS AN OFFICER OF THE COURT THAT
4 HIS HANDWRITING IS VERY CLEAR AND THAT HIS CASE CITATION FORM
5 IS PRETTY GOOD, INCLUDING HIS TRANSCRIPT REFERENCES WHICH I
6 HAVE TAUGHT HIM HOW TO MAKE CORRECTLY. IF YOUR HONOR WOULD
7 BE WILLING TO CONSIDER THIS MATERIAL IN TOTO AS AN EXHIBIT IN
8 MAKING YOUR FINAL DECISION...

9 **THE COURT:** IS THERE ANY OBJECTION FROM THE STATE?

10 **MR. BAX:** IN THE INTEREST OF, YOU KNOW, JUDICIAL ECONOMY
11 AND GETTING THIS ALL SETTLED, I HAVE NO OBJECTION TO THAT,
12 YOUR HONOR.

13 **THE COURT:** AND WHAT I'LL DO IS ONCE WE CONCLUDE, I'LL
14 GIVE YOU AN OPPORTUNITY TO MAKE ORDERS THAT WOULD BE ABLE TO
15 ADDRESS THOSE ALLEGATIONS AS WELL.

16 **MS. SHURLING:** THANK YOU. YOUR HONOR, I WOULD JUST LIKE
17 TO NOTE THAT MY CLIENT, ALTHOUGH HE'S DONE A VERY THOROUGH
18 JOB OF THIS, APPEARS TO BE CONFUSING AN ARGUMENT FOR
19 DEMONSTRATING THE PREJUDICE HE SUFFERED AS A RESULT OF A
20 VIOLATION OF HIS RIGHT TO SPEEDY TRIAL WITH THE ALLEGATION OF
21 SIXTH AMENDMENT DEPRIVATION. I WOULD ASSERT THAT ISSUE
22 TWOFOLD. ONE IS THAT HE IS CORRECT IN FORMULATING AN
23 ALLEGATION THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO
24 SUFFICIENTLY ARTICULATE THE BASIS FOR DEMONSTRATING PREJUDICE
25 RESULTANT FROM THE VIOLATION OF HIS RIGHT TO SPEEDY TRIAL,

1 BUT HE ALSO HAS A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL
2 FOR FAILING TO SUFFICIENTLY ARTICULATE CONTRADICTIONS BETWEEN
3 THE VICTIM'S PREVIOUS STATEMENTS AND HER TRIAL TESTIMONY
4 WHICH WOULD BE A SEPARATE ALLEGATION OF INEFFECTIVE
5 ASSISTANCE OF COUNSEL. AND, YOUR HONOR, WE'LL HAVE THIS
6 MARKED AS AN EXHIBIT, BUT BEFORE WE LEAVE THE COURTROOM I'LL
7 HAVE MY INVESTIGATOR GO AND MAKE ALL OF US COPIES, INCLUDING
8 MR. JAMES SINCE I'M TAKING HIS ORIGINAL.

9 COURT REPORTER: I'LL JUST MARK IT AFTERWARDS.

10 MS. SHURLING: OKAY.

11 BY MS. SHURLING:

12 Q. NOW, KNOWING THAT JUDGE LEE IS GOING TO READ VERY
13 CAREFULLY ALL OF THIS MATERIAL THAT YOU HAVE JUST HANDED ME
14 AND BEFORE MR. BRADLEY LEAVES THE COURTROOM, ARE THERE ANY
15 PAGES OF IT YOU'VE LEFT OUT? IS THAT ALL OF IT?

16 A. YES, MA'AM.

17 Q. OKAY. KNOWING THAT JUDGE LEE HAS AGREED GRACIOUSLY AND
18 THE RESPONDENT HAS NOT OBJECTED TO HER READING THAT VERY
19 CAREFULLY AND INCLUDING THAT IN HER ANALYSIS OF WHETHER
20 YOU'VE MET YOUR BURDEN OF PROOF, ARE YOU SATISFIED THAT WITH
21 THE ADDITION OF THAT MATERIAL THAT WE'VE COVERED ALL OF YOUR
22 ISSUES?

23 A. YES, MA'AM.

24 Q. ARE YOU SURE?

25 A. UH-HUH.

1 MS. SHURLING: OKAY. THANK YOU. NO FURTHER QUESTIONS.

2 THE COURT: ANY CROSS?

3 MR. BAX: NO CROSS, YOUR HONOR.

4 THE COURT: YOU MAY STEP DOWN. THANK YOU.

5 MS. SHURLING: NOTHING FURTHER, YOUR HONOR.

6 THE COURT: IN LIEU OF ARGUMENTS, I'D LIKE FOR YOU ALL
7 TO SUBMIT PROPOSED ORDERS. I HAVE NOT HAD A CHANCE TO REVIEW
8 THE ENTIRE TRANSCRIPT. OBVIOUSLY, HE'S POINTED OUT SOME
9 THINGS THAT I DO NEED TO GO BACK AND LOOK AT. LET'S TALK
10 ABOUT A TIME FOR PROPOSED ORDERS. I KNOW THAT YOU ALL HAVE A
11 NUMBER OF PROPOSED ORDERS TO DO FROM THE CASES THIS WEEK. I
12 THINK THE LAST THING I ASKED FOR WAS TO BE DUE ON FEBRUARY
13 THE 4TH. IS THAT STILL A GOOD TIME PERIOD OR DO YOU NEED
14 ADDITIONAL TIME?

15 MR. BAX: I BELIEVE THAT'S ALL RIGHT WITH THE STATE,
16 YOUR HONOR.

17 MS. SHURLING: YOUR HONOR, DID YOU SAY THE LAST THING
18 WAS FEBRUARY 4TH?

19 THE COURT: YES, MA'AM, AND I'M TRYING TO SEE WHAT THAT
20 WAS.

21 MR. BAX: I BELIEVE THAT WAS MANDY GLADNEY VERSUS THE
22 STATE, YOUR HONOR.

23 THE COURT: MAYBE I'LL GIVE Y'ALL A LITTLE BIT MORE TIME
24 THEN. HOW ABOUT THE FOLLOWING -- TO THE FOLLOWING WEEK WHICH
25 WOULD BE FEBRUARY THE 11TH?

1 **MR. BAX:** THAT WOULD BE GOOD, YOUR HONOR. I HAVE A TERM
2 OF COURT THROUGH THE 7TH IN THE ELEVENTH CIRCUIT, SO I MAY
3 GET IT IN EARLY, BUT THAT WILL GIVE ME TIME. THANK YOU.

4 **MS. SHURLING:** FEBRUARY 11TH, YOUR HONOR?

5 **THE COURT:** YES, MA'AM.

6 **MS. SHURLING:** WE'LL DO OUR BEST, YOUR HONOR. IF
7 THERE'S ANY PROBLEM WITH THAT, I'LL NOTIFY THE COURT.

8 **THE COURT:** SOONER THAN LATER, PLEASE.

9 **MS. SHURLING:** MA'AM?

10 **THE COURT:** YOU JUST LET ME KNOW SOONER THAN LATER.

11 **MS. SHURLING:** OH, I WILL.

12 **THE COURT:** AND I UNDERSTAND THAT MR. GLADNEY'S MAY TAKE
13 SOME TIME WHICH IS WHY I EXTENDED IT OUT.

14 **MS. SHURLING:** THANK YOU, MA'AM.

15 **MR. BAX:** JUST FOR CLARIFICATION, MAY I ALSO E-MAIL WORD
16 FORMAT?

17 **THE COURT:** YES, SAME -- SAME GENERAL FORMAT, PLEASE.

18 **MR. BAX:** ALL RIGHT. THANK YOU.

19 **MS. SHURLING:** CERTAINLY, YOUR HONOR.

20 (PLAINTIFF'S EXHIBIT 4 WAS RECEIVED IN EVIDENCE.)

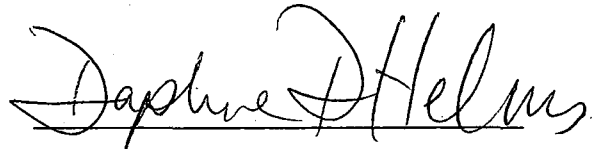
21 **MR. BAX:** THANK YOU, YOUR HONOR.

22 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)
23
24
25

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 14TH OF JANUARY, 2005.

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

SEPTEMBER 24, 2007

A handwritten signature in cursive script, reading "Daphne D. Helms". The signature is written in dark ink and is positioned above the printed name.

DAPHNE D. HELMS, COURT REPORTER

**Richland
Memorial Hospital**

CODE 40 PROTOCOL

PATIENT: VICTIM
UNIT RECORD #:
ADMITTED:
DISCHARGED:
DICTATED: 05/29/96
TRANSCRIBED: 05/30/96

DICT: Stacy Smithson, MD
ATT:

TIME OF ADMISSION: 1 A.M.

DOB: July 4, 1969.

SEX: Female.

RACE: Afro-American

MARITAL STATUS: Single.

SSN:

ADDRESS:

TELEPHONE:

CHIEF COMPLAINT: Suspected sexual assault.

**PLAINTIFF'S
EXHIBIT**

1
DH

HISTORY OF PRESENT ILLNESS: Ms. VICTIM presents tonight on May 29, 1996, and is a 26-year-old gravida III, para III, who presents with the complaint of suspected sexual assault. She reports that she and a friend by the name of Windifer were sitting in Perry Park after a baseball game. While they were sitting on a picnic table, two guys approached them and asked for a light. When Windifer handed the person a light, they presented firearms and began threatening the male patient as well as the female victim in an effort to obtain money and their car keys. Eventually, five young men came to the crime scene and subsequently stripped and searched the male friend for his car keys. At one point, a lookout person associated with the five guys said that someone was coming and they subsequently dragged both the male and female victim around to some nearby woods out of site. There they proceeded to perform sexual intercourse as well as fellatio with Ms. VICTIM. She reports that all five men did rape her. Subsequently, they found the car keys and the assailant described as the "cocky, pushy one" by the victim said to take the keys to "Big Daddy." Subsequently during the sexual assault, Windifer was able to escape and he ran. The guys took the victim up to a small building in a nearby graveyard and put her in it and subsequently fled. At the time of Windifer running from the crime scene, they evidently did fire 3-4 shots into the air from their handgun. Subsequently after placing the

Richland Memorial Hospital

Code 40 Protocol
Page Two

victim into the small building at the graveyard site, they ran and the police eventually found her.

Since the assault, the patient has not performed any personal hygiene, such as bathing, showering, defecation, urination, or other acts. During the assault, she reports their penis did penetrate her mouth and vulva, but it is not known if ejaculation was accomplished or if any of the assailants wore condoms. No social drugs, medications, or alcohol were used during this time by the victim. Many types of coercion were using including fists, a gun, and verbal threats as well as the 3-4 shots fired at the time of her associated male friend running from the scene. She reports that there were 5 assailants all in 20-year-old range, all Afro-American. She describes one as having the name of "Big Daddy" as well as one as the "pushy one." The pushy one was noted to have braided hair that was brownish in nature. However, all 5 assailants were strangers to the victim.

PAST MEDICAL HISTORY: The patient reports a last menstrual period of May 16, 1996, which was a normal period, lasting 4 days with medium flow and mild cramps noted. She underwent menarche at age 13 with first intercourse at age 14. The patient is gravida III, para III, with last child born in 1991, and the patient underwent bilateral tubal ligation at that time. The patient also underwent cone biopsy of the uterine cervix in 1986 secondary to dysplasia. She reports she has had sexual relations in the last 7 days, the last being on May 24, 1996, with Windifer, her boyfriend. No condoms were used.

The patient's clothing was obtained. The patient is alert and oriented.

DESCRIPTION OF EMOTIONAL STATE: The patient is crying and frightened, but very coherent and cooperative and descriptive about the crime scene. Appropriate materials were then obtained including clothing, miscellaneous materials, saliva, blood standard, fingernail scrapings, pubic hair combings, and head hairs and pubic hairs.

PHYSICAL EXAMINATION:

Vital Signs: Upon admission, temp. 97.7, pulse 94, resp. 20, BP 149/67.

General: The patient is alert and oriented times 3. The patient has no obvious trauma.

HEENT: Head atraumatic, normocephalic without lymphadenopathy. No thyromegaly noted.

Lungs: Clear to auscultation.

SEXUAL ASSAULT EXAMINATION PROTOCOL
STATE OF SOUTH CAROLINA
LAW ENFORCEMENT DIVISION
SOUTH CAROLINA HOSPITAL ASSOCIATION

02/04/69 F EHS
9615000025 01
E/R

Page 1

ADULT VICTIM SEXUAL ASSAULT INFORMATION AND EXAMINATION FORM

NOTE

If you should have any questions concerning the use of this kit, please call the Department of Forensic Serology and DNA Analysis, SLED Forensic Services Laboratory, at 896-7300 or after 5 p.m. 737-9000.

NAME OF HOSPITAL: RMH DATE: 5/24/96 TIME ADMITTED: 2:00
NAME OF VICTIM: VICTIM DATE OF BIRTH: 7/10/67
SEX: F RACE: AA MARITAL STATUS: Single SSN NO: _____
ADDRESS: _____ TELEPHONE NO: _____
HOSPITAL CASE NO: _____ LAW ENFORCEMENT AGENCY NO: _____
LAW ENFORCEMENT OFFICER: _____ BADGE NO: _____
AGENCY: _____

BRIEF SUMMARY OF ASSAULT — (Include Date, Time, Location; i.e. on bed in victim's or suspect's bedroom. Include, if possible, color of carpet in suspect's home or vehicle; and make/model of the vehicle and its interior/exterior colors.)

Victim & victim's sister in room. After 3:00 am - 5 guns str. med & searched male friend -
bring both behind woods & proceeded to rape victim - found keys & said "take them to Big Daddy"
Went back then PM & guy took victim to small building in yard & put her in

SINCE ALLEGED ASSAULT, HAS VICTIM:

☐ Douched	☐ Defecated	☐ Brushed Teeth
☐ Bathed/Showered	☐ Vomited	☐ Used Mouthwash
☐ Urinated	☐ Drank/Eaten	☐ Changed Clothes

DURING ALLEGED ASSAULT:

- Did penis penetrate? ☒ Vulva ☒ Mouth ☐ Anus ☐ No ☐ Not Known
Did assailant experience ejaculation? ☐ Yes ☐ No ☒ Not Known
Did assailant wear condom? ☐ Yes ☐ No ☒ Not Known
During alleged assault did subject state anything to indicate he had any sexually transmitted diseases?
☐ Yes ☒ No If yes, identify: _____

WERE ANY MEDICATIONS, SOCIAL DRUGS OR ALCOHOL TAKEN PRIOR TO OR AFTER ALLEGED ASSAULT?

- ☐ Yes ☒ No ☐ Not Known

Type: _____

Amount: _____

Time: _____

Date: _____

WAS ANY COERCION USED?

- ☐ Knife ☒ Gun ☐ Choke ☐ Fists
☒ Verbal Threats ☐ Other Armed Subject (3-0) L.O.C.

ASSAILANT(S): Number: 5 Age(s): 20ish Race: AA "Big Daddy" Boasted

ASSAILANT(S) — RELATIONSHIP TO VICTIM:

- ☒ Stranger ☐ Acquaintance ☐ Friend
☐ Relative (Specify): _____

If Relative, Address of Relative: _____

MEDICAL HISTORY:

- Date of Last Menses: May 16th Normal — ☒ Yes ☐ No 4 hrs. machine food with cramps
Victim known to be pregnant? ☐ Yes ☒ No ☐ Gravid ☐ Parity 3
Duration of pregnancy: slp BTL 1992
Has victim had any past pelvic surgical procedures? ☐ Yes ☐ No
If yes, date and reason: 1991 BTL / Conc. B. use of C-Section 1986
Has victim had sexual relations within the last 7 days? ☒ Yes ☐ No
If yes, date: 5/24/96 - with friend
Condom used? ☐ Yes ☒ No
Other type of contraception used? _____

RE-55C 7/95

GENERAL EXAMINATION

07/04/69 FENS

9615000025 01

VICTIM'S NAME

DESCRIPTION OF OUTWARD APPEARANCE — (i.e. clothes obtained, torn or glass particles present from broken glass at scene):

→ Alone - clothes obtained -

DESCRIPTION OF EMOTIONAL STATE — (i.e. crying, agitated, lethargic, frightened, shocked, depressed, etc.)

Crying, frightened But very calm at scene

☐ **OUTER CLOTHING, UNDERPANTS AND DEBRIS COLLECTION**

- Note:
1. Wet or damp clothing should be air dried before packaging.
 2. If victim is not wearing the clothing worn at the time of the alleged assault, collect only the items that are in direct contact with victim's genital area.
 3. If victim changed clothing after assault, inform officer in charge so that the clothing worn at the time of the assault may be collected by the police.
 4. Do not cut through any existing holes, rips or stains in victim's clothing.
 5. Do not shake out victim's clothing or microscopic evidence will be lost.
 6. If additional clothing bags are required, use only new, paper (grocery-type) bags.

Unfold and place a clean hospital bed sheet on floor. Remove paper sheet from Debris Collection bag, unfold and place over bed sheet. Instruct victim to stand in center of paper sheet and carefully disrobe. Collect each item of clothing as removed and place in the Outer Clothing bag. Collect victim's underpants and place in Underpants bag. Refold paper sheet on which victim stood in manner to retain any debris present and return to Debris Collection bag. Fill out all information requested on bag labels. Seal Debris Collection bag and place in the Outer Clothing bag, then seal Outer Clothing bag. Seal Underpants bag with a police evidence seal and return bag to kit box. Return bed sheet to hospital laundry.

☒ **MISCELLANEOUS MATERIALS** — (For comparison with debris found at crime scene or on assailant's body)

Collect any debris found on victim's body (leaves, fibers, hair, etc.) and place in the Miscellaneous Materials envelope. Note location from which miscellaneous material(s) was taken on anatomical drawings on back of envelope. Seal and fill out all information requested on envelope.

☐ **KNOWN SALIVA** — (For secretor status)

Without touching inner circle with your fingers, remove folded filter paper disk from envelope and place inner circle in victim's mouth. Instruct victim to thoroughly saturate inner circle with saliva. Allow disk to air dry, then return to Saliva Sample envelope. Seal and fill out all information requested on envelope. (Caution: Unless sample is completely air dried, the results of the analysis may be erroneous or inconclusive.)

☒ **KNOWN BLOOD STANDARD** — (For SLED Toxicology and Serology/DNA)

Using normal hospital/lab procedure and the blood collection tubes provided in this kit, draw samples from the victim. Immediately after collection, write the victim's name, date and time collected and your initials on the blood tube labels. Return filled blood tubes to the bubble-pack blood tube protector, then place in ziplock bag. Seal bag and fill out all information requested on bag label.

Note: Any blood samples required by the hospital should be drawn using hospital-supplied blood tubes.

☒ **FINGERNAIL SCRAPINGS** — (Collect only if victim scratched assailant's skin)

Left Hand: Remove folded paper labeled "L" and fingernail scraper provided in Fingernail Scrapings envelope, and unfold and place on flat surface. Hold victim's left hand over paper and scrape under all five fingernails, allowing any debris present to fall onto paper. Place used scraper in center of paper, refold paper to retain debris and scraper, tape closed and return to Fingernail Scrapings envelope.

Right Hand: Follow same procedure for right hand using folded paper labeled "R". Then, seal and fill out all information requested on envelope.

GENERAL EXAMINATION (cont.)

- ☐ **SUSPECTED SEMEN** — (It is recommended that a Wood's (UV) lamp be used in the following procedure.)

Examine victim's body for crusted area(s). If found, moisten swab(s) with a saline solution. Then thoroughly swab the suspected area(s). Allow swab(s) to *thoroughly air dry*, then return swab(s) to the Suspected Semen envelope. Note location from which sample(s) was taken on the anatomical drawings on back of envelope. Seal and fill out all information requested on envelope.

- ☒ **PUBIC HAIR COMBINGS** — (To obtain pubic hairs shed by the assailant during the assault)

Remove paper towel and comb provided in Pubic Hair Combing envelope. Place towel under victim's buttocks. Using comb provided, comb pubic hair in downward strokes so that any loose hairs and/or debris will fall onto paper towel. Refold towel in manner to retain both comb and any evidence present. Return to Pubic Hair Combing envelope. Seal and fill out all information requested on envelope.

- ☐ **KNOWN PUBIC HAIRS** — (For comparison with hairs found at crime scene or on assailant's body)

Pull, do not cut, 15-20 full-length pubic hairs from various locations and place in Known Pubic Hairs envelope. Seal and fill out all information requested on envelope.

- ☒ **KNOWN HEAD HAIRS** — (For comparison with hairs found at crime scene or on assailant's body)

Remove folded paper bindles from envelope. Pull, do not cut, 3-5 full-length hairs from each of the following scalp locations: center, back, front, left side and right side and place in appropriate paper bindle. Place folded paper bindles in Known Head Hairs envelope, seal and fill out all information requested on envelope.

- ☒ **BITE MARKS** *E. 100612*

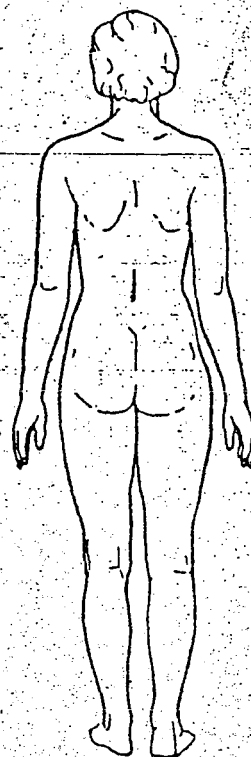
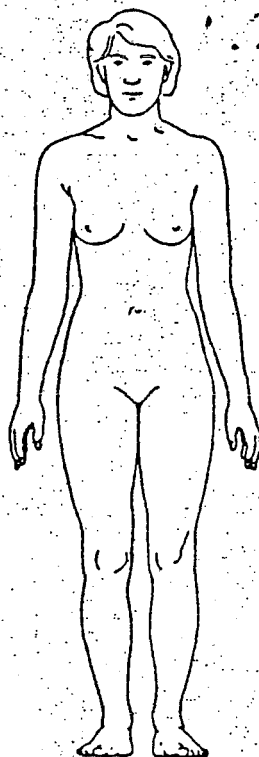
Using one (1) swab per collection site, moisten swab(s) with a saline solution. Then thoroughly swab the bite mark. Allow swab(s) to *thoroughly air dry*, then return swabs to envelope. Seal and fill out all information requested on envelope.

PHYSICAL EXAMINATION:

Describe all signs of trauma i.e. bruises, scratches, bite or suck marks or redness on any part of the victim's body.

No obvious signs of trauma

Indicate location of trauma described above on appropriate anatomical drawing(s).



Photographs taken?

☐ Yes

☒ No

Forensic Odontologist consulted?

☐ Yes

☒ No

RE-5SC 7/95

TREATMENT RECORD

Was general surgical/laceration repair required?

Describe in detail: _____

E/R

☐ Yes☒ No

Was pelvic surgical/laceration repair required?

Was victim given Tetanus Toxoid?

Was victim given prophylactic antibiotic therapy?
(i.e. For venereal disease)Specify drug and dosage: 3.4h. amox + 800 Po / 1st dose 1000 Po / 1st dose 1000 Po

Was victim given a pregnancy prevention drug?

If No, why not? O.P.H. 150 - 7 gills and 7 gills in 120

Was victim given any other medication?

If Yes, explain why: _____

DISPOSITION AND FOLLOW-UP:

The victim was referred to:

PHYSICIAN: Stacy Smith MDDATE: 8-17-85

TIME: _____

am

pm

COUNSELOR: _____

DATE: _____

TIME: _____

am

pm

Follow-up appointment should be made with examining physician. Victim should be seen within 4-6 weeks for a repeat GC and VDRL; and in one month for repeat HIV.

Signature of Nurse: B. Smith MDRequests report sent for follow-up to: Stacy Smith MD

(Physician)

(Examining Physician)

M.D.

(Address)

Columbia, SC 29703

FINAL INSTRUCTIONS

1. Make sure information on forms and evidence containers has been completely filled out and that the attending physician has signed and dated the forms where requested.
2. Separate forms.
3. Retain white copies of forms for hospital records, place yellow copies in kit box, hand investigating officer pink copies, and forward green copies to SOVA/Victim Compensation.
4. Place the following sealed evidence containers (used or unused) in the **SEROLOGY SECTION** Evidence Distribution Envelope, then seal envelope with an evidence seal: A) Known Saliva Envelope; B) Known Blood Ziplock Bag containing Lavender-Stoppered Blood Collection Tube; C) Suspected Semen Envelope; D) Bite Marks Envelope; E) Vaginal and Oral/Rectal Slide Holder; F) Vaginal Swabs Envelope; G) Oral Swabs Envelope; H) Rectal Swabs Envelope; I) Fingernail Scrapings Envelope.
5. Place the following sealed evidence containers (used or unused) in the **TRACE SECTION** Evidence Distribution Envelope, then seal envelope with an evidence seal: A) Miscellaneous Materials Envelope; B) Pubic Hair Combing Envelope; C) Known Pubic Hairs Envelope; D) Known Head Hairs Envelope.
6. Place the following sealed evidence container (used or unused) in the **TOXICOLOGY SECTION** Evidence Distribution Envelope, then seal envelope with an evidence seal: A) Known Blood Ziplock Bag containing Gray-Stoppered Blood Collection Tube.
7. Place all sealed Evidence Distribution Envelopes in kit box along with the sealed Underpants Bag.
8. Fill out all information requested on kit box top, then affix biohazard label where indicated.
9. Initial police evidence seals and affix where indicated on sides of box.
10. Make first entry on Chain of Custody label on bottom of kit box.
11. Transfer sealed kit and sealed Outer Clothing bag to investigating officer.

NOTE: If officer is not present at this time, place sealed kit and sealed Outer Clothing bag in secure and refrigerated area, and hold for pick up by investigating officer.

NOTE TO INVESTIGATING OFFICER

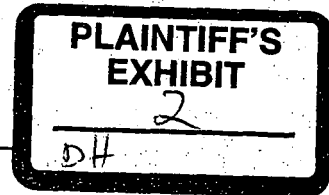
IF POSSIBLE, STORE KIT BOX IN REFRIGERATED AREA.
TRANSPORT EVIDENCE TO SLED FORENSIC SCIENCE LABORATORY.

RE-5SC 7/95

RETURN

I received the attached Search Warrant 596-72 5-30, 19 96, and have executed it as follows:
 On May 30, 19 96 at 1130 o'clock A M, I searched
 (the person) described in the warrant and (the premises)

I left a copy of the warrant with IN RESIDENCE
 Name of person searched or "at the place of search" with.
 Together with a receipt for the items seized.



The following is an inventory of property taken pursuant to the warrant: 1-BellSouth calling card
FOUND IN BEDROOM NIGHT STAND BY INV BENSON ALONG WITH BellSouth
PHONE BILL AND A CHECK W/ THE NAME "MARK A. WINBURN" PRINTED ON CHECK
ALSO VARIOUS PAPERWORK WITH THE NAME "ROBERT A. JAMES" PRINTED ON
SAME. 1-PLASTIC SMALL BAG WITH UNKNOWN WHITE SUBSTANCE FOUND BY
INV THOMAS ON BEDROOM CLOSET SHELF, 1-SMALL PLASTIC BAG WITH UNKNOW
BROWN SEEDS FOUND BY INV THOMAS ON CLOSET SHELF, 1-FOOT LOCKER,
BROWN BRIEF CASE AND BROWN SUITCASE FOUND IN BEDROOM BY
INV BENSON, 1 BLACK EAGLE RIFLE (B.B. GUN) AND 1 BLACK TEE 9 (PUMP
GUN FOUND IN BEDROOM CLOSET FLOOR BY INV BENSON, 1 BOX OF REMING
TON BULLETS, 32 CAL (14 ROUNDS) IN A REMINGTON GREEN BOX FOUND BY
INV THOMAS. IN BED ROOM CLOSET, 1 EMPTY BOX OF REMINGTON GAME LOAD
UNDER BED IN BED ROOM FOUND BY INV BENSON, 1 SHOT GUN SHELL FOUND
UNDER BED BY INV BENSON, IN BED ROOM, 1 GREEN AMMO BOX CONTAINING
VARIOUS TOOLS AND GUN CLEANING ITEMS AND ROUNDS FOUND BY INV
BENSON UNDER BED IN BEDROOM, 1-CONDOM PACKAGE TURN OPEN-FOAM

This inventory was made in the presence of INV. T.N. THOMAS, INV. R.J. BENSON AND
AND INV. J. PHILLIP SMITH

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 30th
 day of May, 19 96
Upland E. White (U.S.)
 Signature of Judge

INV J. Phillip Smith
 (Signature of Officer Executing Warrant)

RETURN

I received the attached Search Warrant 596-72 5-30, 19 96, and have executed it as follows:
 On May 30, 19 96 at 1130 hrs o'clock A M, I searched
 (the person) described in the warrant and (the premises)

I left a copy of the warrant with IN RESIDENCE
 Name of person searched or "at the place of search" with.
 Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: BY INV THOMAS IN DET.
1 SMALL PLASTIC BAG CONTAINING GREEN PLANT LIKE MATERIAL ON
WINDOW SEEL IN KITCHEN (NORTH WINDOW) FOUND BY INV BENSON,
CHECKBOOK (2) BELONGING TO "MARK A. VINSON" FOUND BY INV. THOMAS
IN THE KITCHEN DRAWER, 1 TAXI LICENSE (RICHMOND COUNTY "50")
FOUND IN KITCHEN DRAWER. 1 PAIR OF WHITE PANTIES FOUND WITH IN
SUITCASE BY INV. BENSON, 1 PLASTIC BAG WITH UNKNOWN GREEN
PLANT LIKE MATERIAL.

This inventory was made in the presence of INV. T. N. THOMAS, INV R. J. BENSON AND
 AND INV J. PHILIP SMITH

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this 30th
 day of May, 19 96
Yvonne E White (L.S.)
 Recorder

INV J. Philip Smith
 (Signature of Officer Executing Warrant)

Date: 5-29-96 Time: 11:20 Place: 1409 LINCOLN ST.I am Victim. My birthday is 7-4-69 AGE 26

My address and phone number are. _____

I am giving this statement concerning CRIMINAL SEXUAL ASSAULTto T. N. THOMAS who has identified himself as A DETECTIVE

ME + WENFRED HAD BEEN DOWN AT THE BALL PARK WATCHING
THE BALLGAME. WE LEFT FOR A WHILE AND WE
WENT TO BUNGER KING TO GET SOMETHING TO DRINK.
WHEN WE RETURNED THE GAME WAS OVER AND EVERY
ONE WAS LEAVING, WE DECIDED TO STAY FOR A
LITTLE WHILE ANYWAY. WE WENT AND SAT ON
ONE OF THE TABLES AND WE WERE JUST
TALKING. SEVERAL TIMES I TOLD WENFRED THAT
I THOUGHT I HEARD SOMEONE WALKING THROUGH
THE GRASS BUT WE DID NOT SEE ANYONE. AT
THAT TIME WE SAW TWO MEN WALKING THROUGH
THE PARKING LOT. KIND OF TOWARDS US. THEY
WALKED AROUND THE LITTLE BUILDING AND ONE
OF THEM WALKED OVER TOWARDS US AND HE
ASK WENFRED IF HE HAD A LIGHT. WENFRED
SAYD YES AND GOT HIS LITER. ALL AT ONCE
HE PULLED OUT A PISTOL AND POINTED IT
AT US, WHEN HE DID THE OTHER GUY CAME
UP, AND THEN THREE MORE GUYS CAME OUT OF

Sworn and subscribed to me this

29 day of MAY 19 96Thomas D. Thomas

NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES: 03-11-01ISI x Victim's Signature _____

ISI _____

_____ received a copy of this statement consisting of _____ pages

from _____ ISI _____

PLAINTIFF'S
EXHIBIT304

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

THE DARK. TWO OF THEM GRABBED LINDA AND THREW
HER OVER NEXT TO THE BUSHES. THEY WERE PULLING
AND TEARING AT HER CLOTHES. THE GUY WITH THE
GUN WAS POINTING IT AT ME AND HE TOLD THE
OTHER MEN "GET HERE GET HERE GET HERE AND
TAKE HER OVER THERE IN THE DARK. THEY
DROVE ME OVER BEHIND SOME BUSHES AND ONE
OF THEM TOOK MY KEYS. THEY KEPT ASKING
ME WHERE MY MONEY WAS AND I TOLD THEM
I DIDN'T HAVE ANY. I DON'T EVEN HAVE ANY
POCKETS. ONE OF THE MEN GAVE MY KEYS TO
ONE OF THE OTHERS AND TOLD HIM TO "TAKE
THESE TO BIG DADDY" AT THAT TIME THE
MEN BEGAN TO TEAR MY CLOTHES OFF OF ME AND
THEY BEGAN TO RAPE ME. WHILE THEY WERE
RAPEING ME THE OTHERS BROUGHT WINFRED AROUND
WHERE HE COULD SEE WHAT WAS HAPPENING TO ME.
AND ONE OF THEM LAUGHED AND SAID "WHATS
WRONG YOU DON'T LIKE TO SEE YOUR ~~BITCH~~^{SND} BITCH
GETTING FUCKED" THIS ALL CONTINUED FOR A
WHILE AND FINALLY WINFRED BROKE AWAY
AND STARTED RUNNING AND ONE OF THE MEN
SHOT AT HIM 3 OR 4 TIMES.

Sworn and subscribed to me this

29 day of MAY 1996
Sharon W. Jones

NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES: 03-11-01ISI 

ISI _____

_____ received a copy of this statement consisting of _____ pages
 from _____ ISI _____

**COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION**

I WAS BEING ATTACKED SO MUCH I COULD NOT SEE WHAT HAD HAPPENED I THOUGHT THEY HAD KILLED ME. A LITTLE MORE TIME WENT BY AND ONE OF THE GUYS CAME BACK TO WHERE I WAS STILL BEING ATTACKED. AND HE SAID "THAT ONE HAS ESCAPED WE BETTER GET OUT OF HERE IN CASE SOMEONE CALLS ^{SO} ~~THE~~ THE POLICE DEPT ABOUT THE SHOTS I FEARED TAKING TO KILL THEM." AT THAT TIME TWO OF THE MEN TOOK OFF RUNNING. THE OTHER THREE TOOK ME OUT INTO THE GRAVEYARD AND THEY MADE ME GO INSIDE AN EMPTY GRAVE TOMB. AND THE MAN WITH THE GUN TOLD ME IF I CAME OUT HE WOULD KILL ME. I WAITED FOR A LONG TIME UNTILL I THOUGHT IT WAS SAFE. I DONT HAVE ANY CLOTHES ON SO I WALKED BACK NAKED TO WHERE I THOUGHT THE POLICE WOULD COME AND I JUST WAITED.

Sworn and subscribed to me this

29 day of MAY 19 96

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 03-11-01

ISI

ISI

_____ received a copy of this statement consisting of _____ pages
from _____ ISI _____

☐ ORIGINAL REPORT
☐ MODIFIES ORIGINAL
☐ SUPPLEMENTAL REPORT
☐ CASE STATUS CHANGE
☐ ADDITIONAL VICTIMS
☐ ADDITIONAL OFFENDERS
☐ ADDITIONAL STOLEN PROPERTY
☐ ADDITIONAL RECOVERED PROPERTY

PAGE 2 of 4 PAGE:

☒ COMPLAINT ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS	NAME (LAST, FIRST, MIDDLE) <u>[REDACTED]</u>		VICTIM RELATIONSHIP TO SUBJECT: ☒ STRANGER ☒ STRANGER ☒ STRANGER			RESIDENT ☒ S ☒ O ☒ U	RACE ☒ BIK	SEX ☒ M	AGE <u>14</u>	D.O.B. <u>[REDACTED]</u>	E <u>[REDACTED]</u>
	HEIGHT <u>509</u>	WEIGHT <u>135</u>	HAIR <u>BLK</u>	EYES <u>BRO</u>	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
ADDRESS <u>[REDACTED]</u>		CITY <u>COLUMBIA</u>		STATE <u>SC</u>	ZIP CODE <u>29204</u>	LOCATION NO. <u>311</u>	DAY PHONE <u>[REDACTED]</u>		EVENING PHONE <u>UNKNOW</u>		
☐ VICTIM NO. <u>2</u> VISIBLE INJURY: ☐ NO ☐ YES EXPLAIN: <u>CUTS AND BRUISES ON NECK</u>		COMPLAINT OF NON-VISIBLE INJURIES: ☐ NO ☐ YES		VICTIM USING ALCOHOL ☐ NO ☐ YES ☐ UNK		☐ TWO-MAN VEHICLE ☐ DETECTIVE/PLASMT. ☐ ONE-MAN VEHICLE ☐ OTHER		☐ ALONE ☐ ASSIST			
☐ SUBJECT NO. _____ USING ALCOHOL: ☐ NO ☐ YES USING DRUGS: ☐ NO ☐ YES ☐ TYPE: _____ ☐ UNK											

☐ COMPLAINT ☒ VICTIM # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS	NAME (LAST, FIRST, MIDDLE) <u>[REDACTED]</u>		VICTIM RELATIONSHIP TO SUBJECT: ☒ STRANGER ☒ STRANGER ☒ STRANGER			RESIDENT ☒ S ☒ O ☒ U	RACE ☒ B	SEX ☒ F	AGE <u>26</u>	D.O.B. <u>[REDACTED]</u>	E <u>[REDACTED]</u>
	HEIGHT <u>505</u>	WEIGHT <u>135</u>	HAIR <u>BLK</u>	EYES <u>BLK</u>	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
ADDRESS <u>[REDACTED]</u>		CITY <u>COLUMBIA</u>		STATE <u>SC</u>	ZIP CODE <u>29206</u>	LOCATION NO. <u>299</u>	DAY PHONE <u>[REDACTED]</u>		EVENING PHONE <u>[REDACTED]</u>		
☒ VICTIM NO. <u>1</u> VISIBLE INJURY: ☒ NO ☐ YES EXPLAIN: _____		COMPLAINT OF NON-VISIBLE INJURIES: ☐ NO ☒ YES		VICTIM USING ALCOHOL ☒ NO ☐ YES ☐ UNK		☐ TWO-MAN VEHICLE ☒ DETECTIVE/PLASMT. ☐ ONE-MAN VEHICLE ☐ OTHER		☐ ALONE ☒ ASSIST			
☐ SUBJECT NO. _____ USING ALCOHOL: ☐ NO ☐ YES USING DRUGS: ☐ NO ☐ YES ☐ TYPE: _____ ☐ UNK											

VICTIMS ONE AND TWO WERE SITTING AT A TABLE AT INCIDENT LOCATION. WHEN THE SUSPECTS APPROACHED THE VICTIMS. SUSPECT #1 ASK VICTIM #2 FOR A LIGHT. AT THAT TIME SUSPECT #1 PRODUCED A HANDGUN. THE SUSPECTS THEN FORCED THE VICTIMS TO WALK TO THE END OF THE PARK NEXT TO CRESENT HILL CEMENTARY WHERE BOTH VICTIMS WERE STRIPPED OF THERE CLOTHES.

STATUS ☐ STOLEN ☐ RECOVERED ☐ FOUND ☐ TOWED ☐ SUSPECT ☐ VICTIM		TYPE ☐ VEHICLE ☐ GUN ☐ BOAT ☐ LICENSE PLATE ☐ SECURITIES/BONDS, STOCKS ☐ ARTICLE		VIN AND/OR LICENSE NO.		BOAT HULL NO. AND/OR REG. NO.	
				SERIAL AND/OR OWNER APPLIED NO.		STATE	
YEAR OF REGISTRATION		YEAR OF EXPIRATION		YEAR		MAKE	
MODEL		STYLE		COLOR		BRAND NAME	
NIC NO.		DENOMINATION		ISSUER		SECURITIES DATE	
MISCELLANEOUS							

(GROUP)							TOTAL VALUE
EN							
AGED							
ED							
VERED							
D							

SUBJECT IDENTIFIED ☐ YES ☒ NO		SUBJECT LOCATED ☐ YES ☒ NO		S.F. <u>AN</u>	☒ ACTIVE ☐ UNFOUNDED	☐ ADM. CLOSED ☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER	☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

ON FOR EXCEPTIONAL CLEARANCE 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION. 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
DMAS THOMAS	05-29-96	2726			
FOLLOW-UP INVESTIGATION			OFFICER	DATE	UNIT NUMBER
☒ YES ☐ NO			THOMAS	5-29-96	2726

☒ ORIGINAL REPORT
☐ MODIFIES ORIGINAL

☐ SUPPLEMENTAL REPORT
☐ CASE STATUS CHANGE

☐ ADDITIONAL VICTIMS
☐ ADDITIONAL OFFENDERS

☐ ADDITIONAL STOLEN PROPERTY
☐ ADDITIONAL RECOVERED PROPERTY

PAGE 3 of 4

ORIGINAL INCIDENT TYPE
ORIGINAL INCIDENT
DATE
TIME
LOCATION NO.

ORIGINAL INCIDENT LOCATION
NAME OF COMPLAINANT

SUSPECTS NAME
RACE
SEX
DATE OF BIRTH
AGE

SUSPECTS ADDRESS
HEIGHT
WEIGHT
HAIR
EYES

SUSPECT #2 / M/B	AGE 20-25	509	165	BLK	BLK
SUSPECT #3 / M/B	AGE 22	509	180	BLK	BLK
SUSPECT #4 / M/B	AGE 25	508	175	BRN	BRN
SUSPECT #5 / M/B	AGE 17	510	105	BRN	BRN

SUSPECT #1 AND #2 HELD THE GUN ON COMPLAINANTS HEAD WHILE SUSPECT 3-4-5 FORCED VICTIM #1 TO HAVE BOTH VAGINAL SEX AND ORAL SEX. SUSPECT #2 THEN FORCED VICTIM #1 TO HAVE SEX WITH HIM WHILE SUSPECT #5 HELD THE GUN ON VICTIM #2. SUSPECT #1 THEN REMOVED APPROXIMATELY \$140.00 FROM VICTIM #2 PANTS. SUSPECT #1 (THE OTHER SUSPECTS REFERRED TO AS 'BIG DADDY') TOOK VICTIM #1 CAR KEYS WHILE THE OTHER SUSPECTS CONTINUED TO RAPE HER. AND HE REMOVED TWO POCKETBOOKS FROM THE TRUNK OF HER CAR. SUSPECT #1 THEN CAME BACK AND THE SUSPECTS 2-3-4 HELD VICTIM #1 FOR SUSPECT #1 WHILE HE RAPED VICTIM #1. AT THIS TIME VICTIM #2 JUMPED UP AND STARTED RUNNING ACROSS THE GRAVEYARD. SUSPECT #5 THEN FIRED THREE SHOTS AT THE VICTIM #2.

SUBJECT IDENTIFIED
☐ YES
☒ NO

SUBJECT LOCATED
☐ YES
☒ NO

S.F. AN

☐ ACTIVE
☐ UNFOUNDED

☐ ADM. CLOSED
☐ ARRESTED 18 AND OVER

☐ ARRESTED UNDER 18
☐ EX-CLEAR UNDER 18

☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)
DATE
UNIT NUMBER

APPROVING OFFICER
DATE
UNIT NUMBER

FOLLOW-UP INVESTIGATION
YES NO

OFFICER
DATE
UNIT NUMBER

INVESTIGATIVE REPORT

INFORMATION
ONLY

CASE NUMBER

96-30124

1479

☒ ORIGINAL
REPORT☐ MODIFIES
ORIGINAL☐ SUPPLEMENTAL
REPORT☐ CASE STATUS
CHANGE☐ ADDITIONAL
VICTIMS☐ ADDITIONAL
OFFENDERS☐ ADDITIONAL
STOLEN PROPERTY☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 4 of 4

ORIGINAL INCIDENT TYPE

CRIMINAL SEXUAL ASSAULT
AWIX
ARMED ROBBERY OF INDIVIDUAL

ORIGINAL INCIDENT

DATE 05-29-96

TIME 1215

LOCATION NO.

334

ORIGINAL INCIDENT LOCATION

1800 GERMANY

NAME OF COMPLAINANT

SUSPECTS NAME

KENNETH JAMES

RACE

SEX

DATE OF BIRTH

AGE

B

M

3-5-76

20

SUSPECTS ADDRESS

2528 ORR ST.

HEIGHT

WEIGHT

HAIR

EYES

510

150

BLK

BLK

SUSPECT #1 THEN WALKED VICTIM #1 INTO THE GRAVE-YARD WHERE HE PUT HER INTO THE EMPTY CREEPS. HE THEN TOLD VICTIM #1 IF SHE CAME OUT HE WOULD KILL HER. VICTIM #2 THEN KNOCKED ON THE DOOR OF CHARLES MURRY 1726 GERMANY ST. AND HE CALLED 911 FOR THE VICTIMS. VICTIM #2 THEN WAITED FOR POLICE ON GERMANY ST. VICTIM #1 WAS TAKEN TO RICHLAND MEMORIAL HOSPITAL BY RICHLAND EMS FOR RAPE PROTECTAL.

SUBJECT IDENTIFIED

☐ YES ☒ NO

SUBJECT LOCATED

☐ YES ☒ NO

S.F. AN

☐ ACTIVE ☐ ADM. CLOSED☐ UNFOUNDED☐ ARRESTED UNDER 18☐ ARRESTED 18 AND OVER☐ EX-CLEAR UNDER 18☐ EX-CLEAR 18 AND OVERREASON FOR EXCEPTIONAL CLEARANCE 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION. 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)

DATE

UNIT
NUMBER

APPROVING OFFICER

DATE

UNIT
NUMBER

THOMAS THOMAS

5-29-96

2726

FOLLOW-UP
INVESTIGATIONYES NO ☐

OFFICER

T. Brown

5-29-96

2726

**Richland
Memorial Hospital**

CODE 40 PROTOCOL

PATIENT: DICT: Stacy Smithson, MD
UNIT RECORD #: ATT:
ADMITTED:
DISCHARGED:
DICTATED: 05/29/96
TRANSCRIBED: 05/30/96

TIME OF ADMISSION: 1 A.M.

DOB: July 4, 1969.

SEX: Female.

RACE: Afro-American

MARITAL STATUS: Single.

SSN:

ADDRESS: 1 Columbia, SC

TELEPHONE: (803) 733-1111

CHIEF COMPLAINT: Suspected sexual assault.

HISTORY OF PRESENT ILLNESS: Ms. presents tonight on May 29, 1996, and is a 26-year-old gravida III, para III, who presents with the complaint of suspected sexual assault. She reports that she and a friend by the name of Windifer were sitting in Perry Park after a baseball game. While they were sitting on a picnic table, two guys approached them and asked for a light. When Windifer handed the person a light, they presented firearms and began threatening the male patient as well as the female victim in an effort to obtain money and their car keys. Eventually, five young men came to the crime scene and subsequently stripped and searched the male friend for his car keys. At one point, a lookout person associated with the five guys said that someone was coming and they subsequently dragged both the male and female victim around to some nearby woods out of site. There they proceeded to perform sexual intercourse as well as fellatio with Ms. She reports that all five men did rape her. Subsequently, they found the car keys and the assailant described as the "cocky, pushy one" by the victim said to take the keys to "Big Daddy." Subsequently during the sexual assault, Windifer was able to escape and he ran. The guys took the victim up to a small building in a nearby graveyard and put her in it and subsequently fled. At the time of Windifer running from the crime scene, they evidently did fire 3-4 shots into the air from their handgun. Subsequently after placing the

Richland Memorial Hospital

Code 40 Protocol
Page Two

victim into the small building at the graveyard site, they ran and the police eventually found her.

Since the assault, the patient has not performed any personal hygiene, such as bathing, showering, defecation, urination, or other acts. During the assault, she reports their penis did penetrate her mouth and vulva, but it is not known if ejaculation was accomplished or if any of the assailants wore condoms. No social drugs, medications, or alcohol were used during this time by the victim. Many types of coercion were used including fists, a gun, and verbal threats as well as the 3-4 shots fired at the time of her associated male friend running from the scene. She reports that there were 5 assailants all in 20-year-old range, all Afro-American. She describes one as having the name of "Big Daddy" as well as one as the "pushy one." The pushy one was noted to have braided hair that was brownish in nature. However, all 5 assailants were strangers to the victim.

PAST MEDICAL HISTORY: The patient reports a last menstrual period of May 16, 1996, which was a normal period, lasting 4 days with medium flow and mild cramps noted. She underwent menarche at age 13 with first intercourse at age 14. The patient is gravida III, para III, with last child born in 1991, and the patient underwent bilateral tubal ligation at that time. The patient also underwent cone biopsy of the uterine cervix in 1986 secondary to dysplasia. She reports she has had sexual relations in the last 7 days, the last being on May 24, 1996, with Windifer, her boyfriend. No condoms were used.

The patient's clothing was obtained. The patient is alert and oriented.

DESCRIPTION OF EMOTIONAL STATE: The patient is crying and frightened, but very coherent and cooperative and descriptive about the crime scene. Appropriate materials were then obtained including clothing, miscellaneous materials, saliva, blood standard, fingernail scrapings, pubic hair combings, and head hairs and pubic hairs.

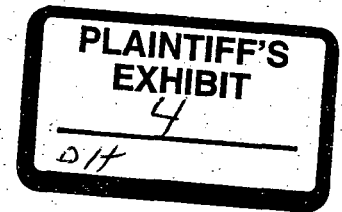
PHYSICAL EXAMINATION:

Vital Signs: Upon admission, temp. 97.7, pulse 94, resp. 20, BP 149/67.

General: The patient is alert and oriented times 3. The patient has no obvious trauma.

HEENT: Head atraumatic, normocephalic without lymphadenopathy. No thyromegaly noted.

Lungs: Clear to auscultation.

SPEEDY TRIAL

"The right to [a] speedy trial is a more vague concept than other procedural rights [under the Constitution]. It is... impossible to determine with precision when the right has been denied." Barker v. Wingo, 407 U.S. 514, 521, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101 (1972).¹ The determination of whether an accused has been denied the constitutional right to a speedy trial requires "a difficult and sensitive balancing process" in which the court examines on an ad hoc basis the conduct of both the State and the accused which led to a delay in prosecution. *Id.* at 530, 533, 92 S.Ct. at 2192, 2194; Fowlkes v. Commonwealth, 218 Va. 763, 766, 240 S.E.2d 662, 664 (1978); Holliday v. Commonwealth, 3 Va. App. 612, 616, 352 S.E.2d 362, 364 (1987). Under this balancing test, four factors are to be considered in evaluating a speedy trial claim: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right [to a speedy trial]; and (4) prejudice to the defendant." *Holliday*, 3 Va. App. at 616, 352 S.E.2d at 364. None of the four factors is either a necessary or sufficient predicate to the finding of a constitutional violation; they are related factors that "must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533, 92 S.Ct. at 2193; *Holliday*, 3 Va. App. at 616, 352 S.E.2d at 364.

LENGTH OF THE DELAY

The length of the delay is the "triggering mechanism" for speedy trial analysis. *Barker*, 407 U.S. at 530, 92 S.Ct. at 2192. Unless there is sufficient delay to be "presumptively prejudicial, there is no necessity

1483

FOR INQUIRY INTO THE OTHER FACTORS THAT GO INTO THE BALANCE". *Id.*; SEE ALSO *FOWLKES*, 218 VA. AT 766, 240 S.E.2d AT 664. "[T]HE LENGTH OF [THE] DELAY THAT WILL PROVOKE SUCH AN INQUIRY IS NECESSARILY DEPENDENT UPON THE PECULIAR CIRCUMSTANCES OF [EACH] CASE." *BARKER*, 407 U.S. AT 530-31, 92 S.Ct. AT 2192 (FOOTNOTE OMITTED). A DEFENDANT MUST ESTABLISH THAT, UNDER THE PARTICULAR CIRCUMSTANCES OF HIS CASE, THE LENGTH OF THE DELAY PRESUMPTIVELY "WAS SO DETRIMENTAL AS TO HAVE ENDANGERED HIS RIGHT TO A FAIR TRIAL." *BEACHEM V. COMMONWEALTH*, 10 VA.App. 124, 131, 390 S.E.2d 517, 520 (1990).

Applicant WAS ARRESTED ON FELONY CHARGES ON DECEMBER 30, 1996. HIS TRIAL IN GENERAL SESSIONS COURT WASN'T SCHEDULED UNTIL SEPTEMBER 20, 1999... TWO YEARS, NINE MONTHS AND TWENTY DAYS AFTER Applicant WAS ARRESTED AND CHARGED.

REASON FOR THE DELAY

WHEN A DEFENDANT RAISES THE PRESUMPTION OF PREJUDICIAL DELAY, THE BURDEN SHIFTS TO THE "COMMONWEALTH TO SHOW, FIRST, WHAT [PART OF THE] DELAY WAS ATTRIBUTABLE TO THE DEFENDANT AND, ... SECOND, WHAT PART OF ANY DELAY ATTRIBUTABLE TO THE [COMMONWEALTH] WAS JUSTIFIABLE." *FOWLKES*, 218 VA. AT 767, 240 S.E.2d 664; *HOLLIDAY*, 3 VA.App. AT 617, 352 S.E.2d AT 365. THE WEIGHT GIVEN TO THE LENGTH OF THE DELAY DEPENDS UPON THE REASON FOR THE DELAY. *BARKER*, 407 U.S. AT 531, 92 S.Ct. AT 2192. FOR EXAMPLE, A DELIBERATE ATTEMPT TO DELAY BY THE PROSECUTOR IN ORDER TO HAMPER THE DEFENSE SHOULD BE GIVEN GREATER WEIGHT THAN A MORE NEUTRAL REASON, SUCH AS NEGLIGENCE OR OVERCROWDED COURTROOMS. *Id.* ON THE OTHER HAND, ANY PERIOD OF DELAY IN BRINGING THE DEFENDANT TO TRIAL THAT IS ATTRIBUTABLE TO THE DEFENDANT CANNOT BE COUNTED AGAINST THE STATE IN DETERMINING WHETHER THE DELAY WAS UNREASONABLE. *Id.*; *TAYLOR V. COMMONWEALTH*, 12 VA.App. 425, 428, 404 S.E.2d 86, 87-88 (1991); *SHEARER V. COMMONWEALTH*, 9 VA.App. 394, 399, 388 S.E.2d 828, 830 (1990).

HERE, NO PART OF THE DELAY IS ATTRIBUTABLE TO THE APPLICANT, AS THE RECORD REFLECTS AND THE STATE GIVES NO JUSTIFICATION FOR THE DELAY, EVEN AFTER THE APPLICANT FILED MOTION FOR RIGHT TO A SPEEDY TRIAL. THE PROSECUTION SIMPLY STATED; "YOUR HONOR, I GUESS IT'S OUR POSITION THEY [THE DEFENSE] WANTED A SPEEDY TRIAL; WE'RE READY TO GIVE THEM THEIR SPEEDY TRIAL RIGHT NOW, TODAY. AND I GUESS, THEREFORE, THEY'RE MAKING A MOTION TO DISMISS BECAUSE THIS SPEEDY TRIAL MOTION WASN'T GRANTED ANY TIME BEFORE." (SEE Tr.p. 39 line 23 - p. 40 line 2). THE STATE GOES ON TO STATE THAT; "DEFENSE COUNSEL NEVER INDICATED THAT THEY WANTED TO SET A DATE FOR TRIAL." BUT DEFENSE COUNSEL STATED, FOR THE RECORD, THAT HE HAD INDEED SPOKEN TO THE PROSECUTOR, REPEATEDLY, ABOUT BRINGING THE CASE TO TRIAL. (SEE Tr.p. 37 LINES 8-17). THE BURDEN RESTS UPON THE PROSECUTION TO BRING A PERSON CHARGED WITH A CRIME TO TRIAL WITHIN A REASONABLE TIME.

ASSERTION OF THE RIGHT

ALTHOUGH THE DEFENDANT'S FAILURE TO RAISE A SPEEDY TRIAL CLAIM DOES NOT CONSTITUTE A WAIVER, THE FACT THAT THE DEFENDANT ASSERTED OR FAILED TO ASSERT HIS RIGHT TO A SPEEDY TRIAL IS ONE FACTOR TO BE CONSIDERED. FOWLKES, 218 VA. AT 768-69, 240 S.E.2D AT 665. THE FACT THAT A DEFENDANT ASSERTS HIS SPEEDY TRIAL RIGHT IS ENTITLED TO "STRONG EVIDENTIARY WEIGHT" IN DETERMINING WHETHER HE WAS DEPRIVED OF THE RIGHT. BARKER, 407 U.S. AT 521-22, 532-33, 92 S.Ct. AT 2188, 2192.

HERE, APPLICANT DID ASSERT HIS SIXTH AMENDMENT RIGHT BY A MOTION AND DEMAND FOR SPEEDY TRIAL AND MOTION TO DISMISS IN THE COURT OF GENERAL SESSIONS, WHICH THE RECORD REFLECTS. (SEE, Tr.p. 33 - p. 44).

PREJUDICE

THE FOURTH FACTOR TO BE CONSIDERED IN BALANCING THE SPEEDY TRIAL CONCERNS IS PREJUDICE TO THE DEFENDANT. IN CONSIDERING

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FOR INQUIRY INTO THE OTHER FACTORS THAT GO INTO THE BALANCE." *Id.*; SEE ALSO *Fowlkes*, 218 Va. at 766, 240 S.E.2d at 664. "[T]he length of [the] delay that will PROVOKE SUCH AN INQUIRY IS NECESSARILY DEPENDENT UPON THE PECULIAR CIRCUMSTANCES OF [EACH] CASE." *BARKER*, 407 U.S. at 530-31, 92 S.Ct. at 2192 (footnote omitted). A defendant must establish that, under the PARTICULAR CIRCUMSTANCES OF HIS CASE, the length of the delay PRESUMPTIVELY "WAS SO DETRIMENTAL AS TO HAVE ENDANGERED HIS RIGHT TO A FAIR TRIAL." *BEACHEM V. COMMONWEALTH*, 10 Va.App. 124, 131, 390 S.E.2d 517, 520 (1990).

Applicant WAS ARRESTED ON FELONY CHARGES ON DECEMBER 30, 1996. HIS TRIAL IN GENERAL SESSIONS COURT WASN'T SCHEDULED UNTIL SEPTEMBER 20, 1999... TWO YEARS, NINE MONTHS AND TWENTY DAYS AFTER Applicant WAS ARRESTED AND CHARGED.

REASON FOR THE DELAY

When a defendant RAISES the presumption of prejudicial delay, the burden shifts to the "COMMONWEALTH to show, first, what [part of the] delay WAS ATTRIBUTABLE TO THE DEFENDANT AND, ... SECOND, what part of any delay ATTRIBUTABLE TO THE [COMMONWEALTH] WAS JUSTIFIABLE." *Fowlkes*, 218 Va. at 767, 240 S.E.2d 664; *Holliday*, 3 Va.App. at 617, 352 S.E.2d at 365. The weight given to the length of the delay DEPENDS UPON THE REASON FOR THE DELAY. *BARKER*, 407 U.S. at 531, 92 S.Ct. at 2192. For example, a DELIBERATE attempt to delay by the PROSECUTOR in order to hamper the defense should be given GREATER weight than a MORE NEUTRAL reason, such as NEGLIGENCE OR OVERCROWDED COURTROOMS. *Id.* On the other hand, any period of delay in bringing the defendant to trial that is ATTRIBUTABLE TO THE DEFENDANT CANNOT BE COUNTED AGAINST THE STATE IN DETERMINING WHETHER THE DELAY WAS UNREASONABLE. *Id.*; *Taylor v. Commonwealth*, 12 Va.App. 425, 428, 404 S.E.2d 86, 87-88 (1991); *SHEARER v. Commonwealth*, 9 Va.App. 394, 399, 388 S.E.2d 828, 830 (1990).

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PREJUDICE to a defendant, the Supreme Court has identified three INTERESTS protected by the Sixth Amendment Speedy Trial Right: (1) PREVENTING OPPRESSIVE PRETRIAL INCARCERATION; (2) MINIMIZING THE ACCUSED'S ANXIETY; AND (3) LIMITING THE POSSIBILITY THAT THE DEFENSE WILL BE IMPAIRED. *Id.*, 407 U.S. at 532; 92 S.Ct. at 2193.

CONSIDERING THE FIRST INTEREST, Applicant WAS INCARCERATED DURING THE ENTIRE PERIOD OF DELAY. AS TO THE SECOND CONCERN, Applicant contends that HE SUFFERED AN ABNORMAL DEGREE OF ANXIETY WHILE AWAITING TRIAL. AND ALTHOUGH ANYONE WHO IS SUBJECT TO A CRIMINAL PROSECUTION WILL COMMONLY SUFFER ANXIETY AND CONCERN ABOUT THE OUTCOME, THE TRAVAILS ASSOCIATED WITH AWAITING TRIAL WERE OVERLY STRESSFUL, DISRUPTIVE AND EXTREMELY INTENSIFIED BY THE HORENDOUS DELAY. Applicant REPEATEDLY informed trial COUNSEL of his distress. AND DURING ONE OF THEIR CONVERSATIONS, COUNSEL ADMITTED THAT HE WAS CLEARLY AWARE OF Applicant's ABNORMAL DISTRESS, IN WHICH COUNSEL STATED; "I CAN TELL THAT YOU ARE REALLY STRESSED OUT AND I HATE THAT I STILL DONT HAVE ANYTHING TO TELL YOU, OTHER THAN TO CONTINUE TO BE PATIENT. AND I'LL SPEAK WITH MR. GLASSER [THE PROSECUTOR] AGAIN ABOUT BRINGING THIS CASE TO TRIAL."

IN REGARD TO THE THIRD INTEREST, Applicant contends that his ability to defend himself WAS SUBSTANTIALLY IMPAIRED AND THAT HE WAS SEVERELY PREJUDICE IN NUMEROUS WAYS, ONE BEING BY THE STATE'S PRIMARY WITNESS, VICTIM'S inability to RECALL MOST OF THE FACTS SURROUNDING THE CASE, (SEE Tr. p.152-p.185; p.564-p.651). AND THAT THE HORENDOUS DELAY CAUSED OR AT THE VERY LEAST, ATTRIBUTED TO HER MEMORY LOST. BUT FIRST, Applicant DOES AGREE THAT [D]ELAY IS A TWO-EDGE SWORD. IT IS THE STATE THAT BEARS THE BURDEN OF PROVING IT'S CASE BEYOND A REASONABLE DOUBT. THE PASSAGE OF TIME MAY MAKE IT DIFFICULT FOR THE STATE TO CARRY THIS BURDEN. HOWEVER, A DEFENDANT MAY ALSO BE PREJUDICED BY A PROSECUTION WITNESS'S LOST OF MEMORY. THE WITNESS MAY BE UNABLE TO RECALL ON CROSS-EXAMINATION FACTS FAVORABLE TO THE DEFENDANT'S THEORY OF THE CASE

which had the witness been able to recall them, would have supported the defense. As here. In addition, a witness's lack of memory may effectively thwart impeachment. 486

Ms. ...'s testimony at trial prejudiced the Applicant in that, in her written statements (she gave three, see statements), the original memorandums made at or near the time of the event and while the witness had a present and accurate memory of it, she states the exact role of each suspect, (2nd statement) that while she and victim number two, Wintred Bull, were sitting at a table, "two" of the suspects came walking through the parking lot towards them, but only one actually walked up to them. And after this suspect pulled out a pistol, that is when the other suspect came up to them and then the other three suspects came running up to them from out of the dark. She fingers suspect number one, referred to as "Big Daddy," not only as one of her attackers, but her main attacker and the leader, (as evident by her 2nd statement). She states that suspects numbers 3, 4 and 5 initiated the sexual assault on her. That all five suspects sexually assaulted her and that she does not know if the suspects were condoms, (3rd statement p 2 lines 4-5). And that she did not see who made the shots as Mr. Bull ran off, and that after the shots were fired, two of the suspects ran off while the other three took her out into the graveyard and placed her inside an empty crypt (mausoleum) then they left. (1st statement p 3)

However, at trial Ms. ... changes many of these main facts about her story, the event, which greatly differs from her previous statements.

She now testifies that, she does not know the exact role of each suspect (Tr. p 176 line 12), that when the gun was

"produced," both of the first two suspects were right there 1487
together, (Tr.p. 618 lines 6-10) then the other three suspects
came running up to them. That her main attacker initiated the
sexual assault on her, not one of the others, (Tr.p. 623 lines 14-23),
that after she heard the shots fired, she testifies that, "three"
not two, of the suspects ran off first (Tr.p. 592 lines 1-5). That she
never saw the suspect referred to as, "Big Daddy", (Tr.p. 176 lines
13-16). And that only three or four of the five suspects actually
sexually assaulted her, and that she is (now) certain that the
suspects wore condoms, (Tr.p. 586 lines 11-15; p. 176 lines 12-16; p. 590
lines 15-19).

In addition to these claims, Ms. [redacted] alleges that
the suspect described as, "the pushy one", was her main attacker not
"Big Daddy", that he never left her side, that he had on a red
jersey shirt, that he gave orders to another suspect to shoot at
the other victim. And that he sexually assaulted her, a second
time, in the male room. (Tr.p. 623 line 10 - p. 625 line 13; p. 587 lines
13-16; p. 588 lines 1-8; p. 157 lines 8-11; p. 593 lines 9-19).

But, nowhere in any of her statements, does she
mention any of these seemingly very important claims.

This witness also testified that she did not give
any type of descriptions of any of the suspects, other than, height,
weight, range of ages, and that they were all black males. (Tr.p.
179 line 1 - p. 180 line 19).

Nevertheless, Ms. [redacted] again changes her testimony. She
now alleges that she is, "very sure", of the identity of two(2) of
her attackers, [because], she will never forget about, one of the two in
his red jersey shirt, and that she did give physical and clothing descrip-

HOWEVER, STATE'S WITNESS, INVESTIGATOR THOMAS THOMAS, THE INVESTIGATIVE OFFICER ON THE CASE, ALSO TESTIFIED THAT MS. NEVER GAVE ANY DESCRIPTIONS OF THE SUSPECTS. (Tr p. 207 line 3-p. 208 line 10; p. 212 lines 3-6; p. 612 lines 7-15).

STATE'S WITNESS, VICTIM'S STATEMENTS AND TESTIMONY AT TRIAL CLEARLY CONTRADICTS EACH OTHER. THE APPLICANT ARGUES THAT THE WITNESS'S STATEMENTS, ORIGINAL MEMORANDUMS, MADE WITHIN HOURS OF THE EVENT AND WHICH AT THE TIME OF THE EVENT AND AT TRIAL, THE WITNESS VOUCH FOR THE ACCURACY OF, SHOULD BE GIVEN MORE WEIGHT AND BELIEVABILITY, THAN HER TESTIMONY AT TRIAL GIVEN NEARLY THREE YEARS AFTER THE EVENT.

AND TO FURTHER SHOW THAT IT IS MORE LIKELY THAT THE DELAY CAUSED THE PROSECUTION'S WITNESS'S MEMORY LOSS OR AT THE VERY LEAST ATTRIBUTED TO IT, [WHEN SHE WAS PREVIOUSLY SO CERTAIN ABOUT THE FACTS AND DETAILS OF THE EVENT, THAT SHE GAVE NOT JUST ONE, BUT THREE ALMOST IDENTICAL STATEMENTS], IS ALSO SEEN IN HER TESTIMONY.

ON DIRECT AND CROSS, MS. VICTIM STATES THAT SHE'S "NOT SURE", WHEN ASKED ABOUT MANY OF THE FACTS AND DETAILS OF THE EVENT. AND SHE ALSO REPEATEDLY TESTIFIED THAT; "I HONESTLY CANT SAY WHO DID WHAT AT WHAT TIME. IT HAPPEND FAST." OR SHE WOULD USE PHRASES LIKE, "I THINK IT WAS..." OR "I WANT TO SAY..." (Tr p. 155 lines 17-22; p. 160 lines 3-4; p. 174 line 24-p. 175 line 16; p. 176 line 8-12; p. 177 lines 7-9, 22-24; p. 586 lines 22-24; p. 591 lines 11-13; p. 592 lines 4-9; p. 614 lines 12-14; p. 616 lines 5-20). AND WHEN TRIAL COUNSEL POINTS OUT TO THE WITNESS THAT MANY OF THE FACTS THAT SHE WAS NOW ALLEGING, CONTRADICTS OR WAS NOT IN HER ORIGINAL STATEMENTS, SHE SIMPLY REPLIED; "I DONT FEEL LIKE I HAVE TO LOOK AT THIS (HER) STATEMENT. I FEEL

LIKE MY WORD IS GOOD ENOUGH AND I KNOW WHAT HAPPEND. 1489
(Tr. p. 625 lines 11-16). The witness states that, "HER WORD" IS GOOD
ENOUGH... BUT, THE APPLICANT ASKS; IS NOT HER ORIGINAL STATEMENTS ALSO
"HER WORDS"?

THIS WAS A TRAUMATIC AND STRESSFUL EVENT FOR THIS
WITNESS, THAT ACCURED IN A TERRIFYING PLACE. THE WITNESS WAS VIOLENT-
LY OVERPOWERED, BY FIVE (5) INDIVIDUALS, IN AN AREA WHICH THE WITNESS
ADMITTED HAD; "ABSOLUTELY NO LIGHTING, IN THE DARK WHERE NO ONE COULD
SEE, THAT IT HAPPEND QUICK." (Tr. p. 632 lines 13-15; p. 635 lines 4-20;
p. 155 lines 16-22). AND THE APPLICANT POINTS OUT THESE FACTS TO SHOW
THAT, BY THE WITNESS'S OWN TESTIMONY AND BECAUSE OF THE CIRCUM-
STANCES OF THE EVENT, ANY OPPORTUNITY THE WITNESS MAY HAVE HAD
TO ACCURATELY VIEW THE OFFENDERS, THE QUALITY OF ANY DESCRIPTIONS
WOULD HAVE BEEN "EXTREMELY POOR." AND MOST IMPORTANTLY, THIS EVENT
ACCURED NEARLY THREE (3) YEARS PRIOR TO TRIAL, WHICH THE APPLICANT
CONTENDS WOULD GO TO WEAKENING THE WITNESS'S POWERS OF RECOLLECTION
AND MEMORY RATHER THAN STRENGTHENING THEM.

AND SO TAKING ALL OF THESE FACTS INTO CONSIDERATION,
WHEN STATE'S WITNESS, VICTIM'S TESTIMONY IS COMPARED TO HER
STATEMENTS, IT IS CLEAR THAT AT TRIAL, THIS WITNESS WAS INDEED
CONFUSED ABOUT THE FACTS OF THE EVENT AND LACKED AN ACCURATE AND
PRESENT RECOLLECTION OF THE EVENT, AND WAS LEFT ONLY TO SPECULATE
AS TO THE FACTS.

THE APPLICANT CONTENDS THAT IT IS MORE THAN A POSSIBILITY
THAT, FACTS AND/OR EVIDENCE FAVORABLE TO HIM EXISTED, WHICH WITNESS
VICTIM HAD FORGOTTEN OR COULD NOT RECALL, BUT FOR THE DELAY. AND
THAT THIS EVIDENCE, AT THE LEAST, SHOWS A FACTUAL BASIS FOR BELIEVING
THAT THE PROSECUTION'S WITNESS'S LOSS OF MEMORY, MAY HAVE ADVERSELY
AFFECTED, IMPAIRED AND PREJUDICED THE DEFENSE.

FURTHERMORE, the delay also impaired and prejudiced the Applicant in that, the memories and whereabouts of the defense's witnesses were diminished and no longer known. The prosecution presented the theory that the Applicant lived at 2528 Orr Street, (see Tr. p.1286 lines 3-4; p.1287 lines 11-17) an address reportedly where a Columbia Police Department officer had a tracking dog follow a scent trail from the crime scene to. (Tr. p. 252-p.308; p.1033-p.1069 Sergeant Ernest R. Blackwell). However, the landlord of that address, (a potential witness for the defense who could no longer be located) would have been able to testify that the Applicant did not live at that residence, and most importantly, that the Applicant was not even allowed on that property during the time of the event in question.

In addition to this, because the case took so long to come to trial, the Applicant's alibi witness, Henrietta Jordan, was no longer one hundred percent certain of the exact time or how long she and the Applicant was together on the date of the event. And on top of this, the fact that the date of the event held no personal interest for the Applicant and the very fact that he was not aware of or questioned about the event until the day of his arrest, which was seven months after fact, the Applicant himself could not say with certainty where and what he was doing on this date.

The Applicant contends that had the case been brought to trial much sooner, there would have been a greater probability that his alibi witness would have most likely remembered exactly where and what he was doing on the date of the event, since the majority of his time was spent with her.

With such a huge passage of time before trial the Applicant's potential alibi witness could no longer accurately recall facts favorable to the defense but for the delay.

And although the effect of this loss on the Applicant's case must be demonstrated before prejudice may be found. MILLER v. COMMONWEALTH, 217 Va. 929, 937, 234 S.E.2d 269, 274 (1977), cert. denied, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1978). However, the extent, to which this prejudice must be shown is tempered, of course, by recognition of the fact that "what has been forgotten can rarely be shown." BARKER v. WINGO, 407 U.S. at 532, 92 S.Ct. at 2193.

HERE, THERE WAS NO ORDERS BY THE COURT CONTINUING THIS CASE FOR EXCEPTIONAL CIRCUMSTANCES. AND THE PROSECUTION PROVIDES NO JUSTIFICATION FOR FAILING TO COMPLY WITH THE STATUTORY AND DECISIONAL LAW OF THIS STATE.

THE APPLICANT CONTENDS THAT HE WAS SEVERELY IMPAIRED AND PREJUDICED BY THE VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL. AND THAT UNDER THE PARTICULAR CIRCUMSTANCES OF HIS CASE, THE LENGTH OF THE DELAY WAS SO DETRIMENTAL AS TO HAVE ENDANGERED HIS RIGHT TO A FAIR TRIAL.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 01 -CP-40-3299

Robert A. James 261393

State of SC

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41, SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

MAR 19 2007

RICHLAND COUNTY
FILED
05 AUG 22 PM 2:33
BARBARA A. SCOTT
C.C.E. & G.S.

Dated at _____, South Carolina, this _____ day of _____, 20____.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of Aug, 2005 to attorneys of record or to parties (when appearing pro se) as follows:

For Plaintiff To [Signature]

David A Spences

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

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ended

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Robert Anthony James, No. 261393

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DOCKET NO. 01-CP-40-3299

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ORDER OF DISMISSAL

05 AUG 22 PM 2:33
BARBARA A. SCOT
C.C.C. & G.S.

RICHLAND COUNTY
FILED

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 8, 2001. The Respondent made its Return on March 26, 2002. An evidentiary hearing into the matter was convened on January 14, 2005, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Tara Shurling, Esquire. The Respondent was represented by Arie D. Bax of the South Carolina Attorney General's Office.

At the hearing, John B. Shupper, Esquire, as well as the Applicant, testified on behalf of the Applicant. This Court also had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. During the August 1999 term of General Sessions, the Richland County Grand Jury indicted the Applicant for two counts of armed robbery, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, criminal sexual conduct in the first degree, and assault with intent to kill. Applicant was tried before a jury and found guilty as charged. Applicant was sentenced to thirty years imprisonment for criminal sexual conduct, and a consecutive sentence of ten years imprisonment for one count of armed robbery. All other sentences were run concurrent to these charges. Applicant was represented by John B. Shupper, Esquire.

Applicant appealed his conviction and sentence. The conviction was affirmed and the appeal dismissed by the South Carolina Court of Appeals on March 21, 2001. (Op. No. 2001-UP-082).

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Applicant alleges in his PCR application and amended application that:

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1. Trial counsel failed to obtain the assistance of experts who were available prior to the time of trial.
2. Trial counsel was ineffective for erroneously informing Applicant not to take the stand because he would be cross-examined on a prior conviction of disorderly conduct and disturbing the peace.
3. Trial counsel was ineffective for failing to object to the jury instruction on aiding and abetting that unconstitutionally diluted the State's burden of proof when Applicant was charged as a principal of the alleged offense.
4. Trial court erred in denying defense's motion to quash the indictment and dismiss the charges because of the State's failure to timely act on arrest warrants in violation of Rule 3(c), SCRCrimP. The Solicitor failed to file the indictments with the Clerk of Court and therefore the Court lacked subject matter jurisdiction.
5. Trial counsel failed to file a motion to quash indictments because an officer of the State appeared before the grand jury as the sole witness in favor of the indictment.
6. Trial counsel was ineffective for failing to object to the State's attempt to try Applicant under the current Armed Robbery statute instead of the statute that was in effect at the time the incident occurred, as the current statute adds elements not in effect at the time of the offense occurred.
7. Trial counsel was ineffective for allowing a violation of the Applicant's due process right to a speedy trial as Applicant waited over two years for trial.
8. Trial counsel was ineffective in failing to object to sleeping jurors not being removed or questioned.
9. Trial counsel was ineffective in failing to call witnesses that could dispute the State's theory that Applicant lived at 2528 Orr Street.
10. Trial counsel was ineffective in failing to impeach State's witness, Dr. Stacy Smithson relating to the characterization of the attack on the victim and the results of the physical examination performed on the victim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

At the evidentiary hearing, the Applicant first called John B. Shupper, Esquire, who represented the Applicant at trial. Mr. Shupper testified that he obtained discovery in this case and fully prepared for trial, including hiring an identification expert to testify at trial. Mr. Shupper testified that he did not hire a DNA expert because he did not believe he needed one since the DNA evidence did not link to his client, only to the co-defendant. Mr. Shupper testified that he did not

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think that the fact that his client and the co-defendant were brothers impacted the fact that the DNA only implicated the co-defendant. He did discuss with the Applicant his right to testify or not testify and that the Applicant's prior record and the fact that it could be used to impeach him if he chose to testify was a part of that discussion. That prior record included a conviction for receiving stolen goods that could be used to impeach Applicant. Trial counsel further testified that he did not attempt to quash the indictment based on the various problems alleged by the Applicant because he did not believe such an attempt would have been successful or helpful to his client and because even if it was successful, the solicitor could then just directly indict his client. Mr. Shupper testified that he did not object to the trial judge's instructions to the jury because he believed, and still believes, that the instructions were correct.

The Applicant reiterated his allegations from his application and the hand written supplement to the application during his testimony. The Applicant stressed in particular the inconsistencies in the testimony at trial. No other witnesses testified.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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Through the application for post-conviction relief and the arguments made at the evidentiary hearing, the Applicant has alleged that his trial counsel was ineffective for failing to adequately investigate and prepare for trial, failing to hire a DNA expert, failing to quash the indictments in this case, and failing to object to the trial judge's jury instructions. Trial counsel articulated that he did adequately prepare for this case. Counsel investigated this case, interviewed potential witnesses, and hired an identification expert. Trial counsel did not consider hiring a DNA expert because he felt it was unnecessary.

Further, the trial transcript reveals that Dr. Smithson did testify in a manner consistent with the report. The report revealed there was "no obvious trauma" to the victim. Dr. Smithson's testimony was consistent with this finding. Although the testimony revealed that the doctor observed redness, bruising, and scratches, Dr. Smithson testified that these findings were consistent with sexual intercourse. Dr. Smithson would expect to find these conditions after any sexual intercourse whether consensual or not. There was no need to impeach the doctor's testimony since it was consistent with his report.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). The Applicant has not shown that counsel was deficient in his choice of tactics. A defense counsel is not ineffective for making valid trial strategy decisions. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). The Applicant did not carry his burden to show a reasonable probability that the result at trial would have been different had trial counsel done what the applicant alleges he should or should not have done. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). This Court finds these allegations of ineffective assistance of trial counsel to be without merit.

Applicant claims that trial counsel failed to object to sleeping jurors. He also claims that counsel failed to call witnesses to dispel allegations by the State that the Applicant lived at the same address as his brother. Other than argument on these issues, he has failed to set forth any evidence to support these claims. There was no testimony to support the allegations. The claims are without merit.

Additionally, Applicant asserts the Court lacked jurisdiction because the sole witness before the grand jury was a prosecutor. The face of indictment indicates that the prosecuting witness was the police investigator. In State v. Anderson, 312 S.C. 185, 439 S.E.2d 835 (1993), the Supreme

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Court explicitly prohibited the practice of prosecutors appearing as the sole witness before the grand jury. This prohibition does not extend to investigating police officers. No evidence was presented to demonstrate that the person who appeared before the grand jury was not the proper person. Therefore, this claim is also without merit.

The trial transcript reveals that the attorney for the co-defendant made a motion to quash the indictment. Mr. Shupper was not present in court at the time the motion was initially made. The basis for the motion was the indictment contained the language of the armed robbery statute as amended in 1996. Both the applicant and his co-defendant state they should have been charged under the armed robbery statute in existence at the time of the offense.¹ Once made, the trial court stated, "And of course Mr. Shupper would join in that motion for his client, too." Mr. Shupper responded, "Yes, your Honor." The record clearly reveals that the Court considered the motion as to Applicant and that his attorney joined in the motion to quash the indictment. The Court refused to quash the indictments but allowed the State to move to amend the indictment to reflect the elements of the offense as they existed before the amendment. Both defendants, through their attorneys, objected to the amendment. The Court allowed the amendment and specifically stated that without the attorneys conceding the amendments, the Court would physically mark the indictments to reflect the amendment. Based upon the record, the issues were raised by trial counsel and objections were preserved by the Court. There is no merit to the claim of ineffective assistance of counsel.

Trial counsel also stated that, under his understanding of the law, the judge's jury instructions were correct. The Applicant did not present adequate legal authority to contradict trial counsel's assessment of these instructions. Applicant claims that it was improper to charge the jury based upon accomplice liability of "the hand of one is the hand of all" when the indictment charges him as a principal. He argues that this charge diluted the State's burden of proof. It is well settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) and cases cited therein. Applicant cites the case of State v. LaBarge, 275 S.C. 168, 268 S.E.2d 281 (1980). The offending jury instruction in that case contained the following language, "all are presumed to be present and guilty". The Court held that this language impermissibly diluted the

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¹ In 1996, the General Assembly amended the armed robbery statute, 1996 Act No. 362. The Act states that the amendments take effect upon approval by the Governor. The act was approved on May 29, 1996. This date is the same date the offense was committed. It is the view of this Court that the crime was committed under the amended statute and

presumption of innocence and warranted reversal. Such language was not at issue in this case. Therefore, this argument is without merit.

The record also reflects that the applicant filed a pro se motion for a speedy trial approximately four to six months before the trial. Counsel was not aware of the motion until after Applicant filed it. The record does not reflect that Applicant discussed the motion with his attorney before he filed it. Once filed, trial counsel argued the motion on behalf of his client articulating all the issues of concern to his client. There is no evidence of any concern about a speedy trial until Applicant filed the motion himself. There is no evidence that Applicant discussed any concerns about the timeliness of the trial with his attorney before filing the motion.

In addition to ineffective assistance of counsel, the Applicant has claimed that the trial court lacked subject matter jurisdiction due to defects in his indictment that were improperly amended and due to the time between the service of the arrest warrant and the true bill of the indictment. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, supra; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

Likewise, the failure of the State to follow the provisions of Rule 3, SCRCrimP, does not deprive the court of subject matter jurisdiction. The filing of the indictment with the Clerk of Court is a procedural requirement for the Solicitor. The filing of the indictment allows the document to be maintained in the central repository for court records, it does not affect the power of the court to hear and determine the case. Applicant's claim that the court lacked jurisdiction to hear the case because the indictment was not filed, is without merit.

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

the indictments in this case properly cited the elements of the offense.

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17-27-45 and -90 (2003). While the procedural bars do not apply to the Applicant in this case, this Court, as discussed above, finds that the allegation of ineffective assistance of counsel is without merit. Therefore, this Court finds that the application must be denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

August 19, 2005
Columbia, South Carolina.

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WITNESSES

T. N. Thomas, CPD

T. N. Thomas

ARREST WARRANT NO. F251497

ACTION OF GRAND JURY

TRUE BILL

Lee E. Bower
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 99-65-40-19300

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

#04 AUGUST TERM 1999

THE STATE

vs.

ROBERT JAMES

Indictment for

ARMED ROBBERY

S. C. Code Section 16-11-330(A) Class A-Felony
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