

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

Honorable Robert J. Bonds, Circuit Court Judge

App. Case No.: 2023-001429

Tyrone D. Ellison,

Petitioner,

vs.

State of South Carolina,

Respondent.

APPENDIX
VOLUME II OF III

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INDEX

Trial Transcript.....	1
Clerk Records.....	629
Pre-Trial Hearing Transcript (August 4, 2014).....	649
Brief of Appellant.....	685
Brief of Respondent.....	707
Opinion, South Carolina Court of Appeals	737
Remittitur.....	740
Plea Transcript.....	741
Clerk Records.....	765
Application for Post Conviction Relief (2016-CP-18-017).....	769
Pro-Se Amendment (2016).....	778
Return (2016).....	784
Motion for Consolidation and Discovery (2016).....	791
Amendment (2016).....	796
Order for Consolidation and Discovery (2016).....	800
Amendment (2016).....	803
Application for Post Conviction Relief (2018-CP-18-047).....	807
Return (2018).....	815
Motion for Consolidation and Discovery (2018).....	821
Order for Consolidation and Discovery (2018).....	825
Amendment (2018).....	828
Memorandum of Law.....	832

Evidentiary Hearing Transcript (May 20, 2022).....	839
Evidentiary Hearing Exhibits.....	998
Order of Dismissal (2016).....	1014
Oder of Dismissal (2018).....	1036
Rule 59, SCRCp, Motion (2016).....	1069
Rule 59, SCRCp, Motion (2018).....	1105
Rule 59, SCRCp, Hearing Transcript (December 8, 2022).....	1141
Order Denying Rule 59, SCRCp, Motion (2016).....	1170
Order Denying Rule 59, SCRCp, Motion (2018).....	1171

1 (The following was held in open court, in the hearing of
2 the jury.)

3 THE COURT: Okay. Ladies and gentlemen, the defense has
4 rested in the case. I have been advised by the State that
5 they are allowed to, under the rules and in certain
6 situations, to call what is termed as a rebuttal witness,
7 which I am going to allow.

8 I'm going to recognize the State at this time. Call
9 your witness.

10 MR. GIESE: State calls Sam Powers.

11 CLERK OF COURT: Place your left hand on the Bible,
12 raise your right hand and state your full name for the
13 record.

14 THE WITNESS: Samuel Jeffrey Powers.

15 SAMUEL POWERS,
16 being first duly sworn, testified as follows:

17 (State's Exhibits 49-50 marked for identification.)

18 MR. GIESE: May it please the Court, Your Honor.

19 DIRECT EXAMINATION BY MR. GIESE:

20 Q. Mr. Powers, where do you work?

21 A. I work for the Capital Restaurant Group.

22 Q. And how long have you worked there?

23 A. Since August of 2012.

24 Q. And what are your duties there?

25 A. I'm the IT manager, so I handle everything basically

1 that has electricity going through it, all the computers,
2 physical, actually fixing broken equipment at the
3 restaurants, administrative work, you name it --

4 Q. Let me stop you there. What is Capital Management
5 Group? What exactly do they do?

6 A. It's a Burger King franchisee, so it's -- the owner of
7 it basically is a franchisee of 27 restaurants, 27 Burger
8 Kings.

9 Q. Okay. Is one of those Burger Kings Burger King
10 Store 3262 on Dorchester Road?

11 A. Yes, it is.

12 Q. And is one of your duties at Capital Management Group
13 checking and keeping employment records for that store?

14 A. It is, yes. But we basically have -- the point-of-sale
15 company keeps all of our records, and we kind of, you know --

16 Q. Can you describe that relationship?

17 A. Yes, yes, definitely. So basically, they get employment
18 records basically downloaded every night. They have actually
19 all the records going back to the beginning of the Capital
20 Restaurant Group, which I believe has been five years now,
21 and, you know, they basically obviously provide us our
22 point-of-sale equipment and software and do data retention
23 for us also. That's pretty much the extent of it.

24 Q. Okay. And are those records, are they kept in the
25 ordinary course of business?

1 A. Yes, absolutely.

2 Q. At some point were you asked to pull the records for
3 April 1st of 2013 at that Burger King store I mentioned?

4 A. Yes.

5 Q. Did you pull those records?

6 A. Yes, I did.

7 MR. GIESE: May I approach the witness, Your Honor?

8 THE COURT: Yes.

9 MR. FALK: Your Honor, I object to where I believe this
10 testimony's going.

11 THE COURT: What's the grounds for your objection?

12 MR. FALK: Hearsay, best evidence rule and the
13 confrontation approach.

14 THE COURT: If you all will approach at sidebar.

15 (Judge and attorneys confer.)

16 THE COURT: Ladies and gentlemen, I have a matter of law
17 I need to take up outside of your presence. I'm going to ask
18 you to step to your jury room. Do not discuss the case.

19 I'll get you back out here as quickly as possible.

20 (The jury retires to the jury room at 3:49 p.m.)

21 THE COURT: Go ahead, Mr. Giese.

22 MR. GIESE: Thank you, Your Honor.

23 (The following was held in open court, out of the
24 presence of the jury.)

25 DIRECT EXAMINATION IN CAMERA BY MR. GIESE:

1 Q. Is one of your duties for the Capital Restaurant Group
2 when records are subpoenaed, are you required or is it one of
3 your duties to provide those records and to come to court and
4 testify about those records?

5 A. Yes, yes. I have -- this is the first time I've
6 testified, but I have provided, you know, employment records
7 for legal proceedings, yes.

8 Q. So you've received subpoenas for employment records
9 before?

10 A. Yes, yes.

11 Q. Approximately how many times, do you think?

12 A. Probably four times.

13 Q. Okay. But it's your job at Capital Management Group?
14 You're in charge of that?

15 A. Yes, I am. I'm in charge of that, all data.

16 Q. Okay. Are you involved in the relationship between the
17 point-of-sale system and Capital Management Group?

18 A. Yes, absolutely. I'm the liaison between the --

19 Q. So you contact them when you're asked to get records --

20 A. Yes.

21 Q. -- when records have been subpoenaed?

22 A. Basically, yes.

23 MR. GIESE: May I approach the witness, Your Honor?

24 THE COURT: Yes.

25 Q. Mr. Powers, I'm showing you what's premarked as State's

1 Exhibit 49. Do you recognize that?

2 A. Yes.

3 Q. Is that a "yes"?

4 A. Yes. That's correct, yes.

5 Q. Did you have the opportunity to view this disc?

6 A. I did, yes. I looked at it.

7 Q. And what is on this disc?

8 A. It's a spreadsheet of the time punches from that date at
9 that -- at Burger King 3262, and it's got, you know, employee
10 information, names, lots of details.

11 Q. Are these the records that you received from the
12 point-of-sale company?

13 A. Yes.

14 Q. Did you do anything to doctor those records in any way?

15 A. No, absolutely not, no.

16 Q. Okay. Is this a fair and accurate representation of
17 both the employees' information who worked at that Burger
18 King as well as the timecard information from April 1st of
19 2013?

20 A. You mean like details about --

21 Q. Is it a fair and accurate representation of those two
22 things?

23 A. Oh, yes, it is.

24 Q. Okay. Now let me show you what State's Exhibit --
25 premarked as State's Exhibit 50. Do you recognize that?

1 A. Yes.

2 Q. What is this?

3 A. That is basically a list of all the people that worked
4 that day, according to the system.

5 Q. Okay. And this is a list that Mr. Sorenson generated.
6 Did you check this list?

7 A. Yes, yes.

8 Q. And you made sure all the information on the list is
9 adequate?

10 A. Yes.

11 Q. Is correct?

12 A. Right. It is. It matches.

13 Q. Okay. And is that a fair and accurate representation of
14 the employees at the Burger King 3262, their timecard punch
15 in and punch out?

16 A. Yes.

17 Q. Okay. And the employee IDs that -- in this little sheet
18 have been connected with names. Are those the correct names?

19 A. Yes, absolutely.

20 Q. Okay. And you checked that beforehand?

21 A. I did, yes.

22 MR. GIESE: Okay. Actually, let me -- it would be at
23 this point, Your Honor, the State would ask that State's 49
24 and 50 be moved into evidence.

25 THE COURT: Have you got any questions of this witness?

1 MR. FALK: Well, Your Honor, I don't see any way that
2 we're going to put 50 into evidence because that's a document
3 that's prepared by the prosecution, and it certainly can't,
4 just that alone is not going to fit under the confrontation
5 clause.

6 That's not a business record. That's a document that
7 the prosecution prepared, and, therefore, it's not -- I don't
8 believe that it would be proper to admit under the
9 confrontation clause, because it's got testimonial hearsay in
10 it that was prepared in anticipation of this litigation.

11 THE COURT: My question was do you have any questions of
12 this witness?

13 MR. FALK: I'm sorry, Your Honor.

14 THE COURT: That's okay.

15 MR. FALK: I thought you asked me about the document.

16 THE COURT: Then I'm going to hear argument if you have
17 any questions of him. You may or may not, but I want to know
18 that first.

19 CROSS-EXAMINATION IN CAMERA BY MR. FALK:

20 Q. You prepared that spreadsheet; is that correct?

21 A. Yes, yes.

22 Q. When was that prepared?

23 A. When it was requested. I'm not sure of the exact date
24 off the top of my head. You know, I'm just not sure. I know
25 it's been a few months.

1 Q. So has it been in the last six months?

2 A. I believe so. It was a while ago. It was probably
3 about six months ago.

4 Q. Now, does that spreadsheet that you prepared six months
5 ago, does that have the actual timecard data on it?

6 A. Yes, yes, it does. It's the -- basically a poll from
7 the database of the point-of-sale system, so it has a lot of
8 unnecessary data in there, too, or just, you know, extra sort
9 of stuff just for the POS system.

10 Q. But those are not the actual timecard punches; is that
11 correct? It's a summary of the timecard punches?

12 A. Well, it's -- I mean, it's -- it's -- it's -- it's what
13 they -- yes, I mean, it's what the system recorded. I mean,
14 it's -- it's the -- it's what the point-of-sale system has in
15 its database. I mean, it's -- I don't really know. I mean,
16 that's --

17 Q. And you pulled that information out of the database six
18 months ago?

19 A. Yes, yes.

20 Q. Okay. What's the software program that the database
21 uses?

22 A. It's Micros is the point-of-sale company, and it's just
23 a Sequel database, SQL database server.

24 Q. Beg your pardon?

25 A. Sequel is just a database programming language

1 basically.

2 Q. Is it a software program? Is it like, you know,
3 PeopleSoft or something like that?

4 A. Yes, it's like a software.

5 Q. Who prepared it, who prepared that -- who prepared that
6 program to draw the information out of the database?

7 A. It was, it would be the point-of-sale company, not
8 myself.

9 Q. Okay. So do you have any information as to how that
10 information is drawn out of the database?

11 A. Um --

12 Q. Do you have any firsthand information?

13 A. Not really, no.

14 Q. Okay. Do you know what procedures the point-of-sale
15 company has to monitor the accuracy of the database?

16 A. No, not really, no.

17 Q. Do you know if it's ever monitored for accuracy?

18 A. I'm not sure. I assume it is. I hope it is, but, I
19 mean, I'm not sure.

20 Q. Do you know what kind of precautions that the database
21 company has to prevent loss of that information?

22 A. No, not really.

23 Q. What kind of procedures does the database company have
24 to verify the accuracy?

25 A. You know, that's a good question. I'm not sure.

1 Q. Now, this spreadsheet, is that something that's
2 prepared, that spreadsheet that you had prepared for the
3 prosecution, is that something that you prepare every day?

4 A. No, no, it's not. What it is is basically I have a
5 historical record going back to the beginning of the company
6 that was about a year ago, or not about a year ago. It
7 was -- it was within -- it was within the past year. And
8 it's basically got all the data from that point going back
9 four years from the point-of-sale company.

10 And now we actually have a new company which is storing
11 the data for us, which is a separate company, but that's all
12 happened within the past few months.

13 Q. Has it happened since you prepared this report?

14 A. No, it was before.

15 Q. So the data started with the point-of-sale company, and
16 now it's being maintained by another company?

17 A. Right. Well, we're basically -- just for storage, yes,
18 like just a backup, like a redundancy, like a -- you know, in
19 case we -- you know, the systems crash and we lose the data
20 basically.

21 Q. And I believe I said this earlier, there's not a daily
22 printout from this information, is there?

23 A. I do not do a daily printout, no.

24 Q. Do you know specifically how the information is entered
25 into the database?

1 A. There's different ways, so the way it's supposed to work
2 is people clock in and out on the actual point-of-sale
3 workstations, and that automatically takes it over to the
4 database. And then, you know, the manager of the restaurant,
5 the general manager can, you know, fix time punches if
6 somebody forgets to clock in or clock out.

7 Q. Do you know specific -- is that -- is your answer to my
8 question, is that how the data from this particular Burger
9 King that we're talking about gets entered into the database?

10 A. Yes.

11 Q. So it can be -- it can be entered in one of two ways,
12 either from timecard punches or the manager can make
13 adjustments?

14 A. Right, exactly.

15 Q. Is there any way by looking at that sheet that you can
16 tell which of those adjustments are made by the -- which of
17 those entries into the database are made by the manager and
18 which ones are made by the timecard punches?

19 A. Yes. There is a column where the -- if you make a
20 manual adjustment to it, where you have to specify why you
21 made the manual adjustment. So if it was, you know, an
22 administrative reason or forgot to clock out, but that's just
23 someone -- you know, that they will manually enter. If it's
24 blank, basically then you can tell that it was an automatic.

25 Q. Is there any effort to make a follow-up on those entries

1 in the database when they're done manually?

2 A. Sorry, can you repeat the question?

3 Q. Do you personally make any efforts to follow up on those
4 entries into the database that are done manually?

5 A. Oh, to verify, like, if they are accurate?

6 Q. Yes.

7 A. No. No, I don't. That's more of an operational thing.

8 MR. FALK: Your Honor, I have no further questions. I
9 have no further questions.

10 THE COURT: Anything else from the State?

11 MR. SORENSON: Beg the Court's indulgence.

12 Nothing further, Your Honor.

13 THE COURT: I'll be happy to hear from you, Mr. Falk, by
14 way of argument.

15 MR. FALK: Your Honor, I'd object to the entry of
16 this --

17 THE COURT: Which one? They are two separate exhibits.

18 MR. FALK: Yes. Exhibit No. 50 first. That was the one
19 sheet of paper; is that correct?

20 THE COURT: Prepared by the prosecution. All right.

21 MR. FALK: I would object to that because I believe that
22 has testimonial hearsay on it by a witness who's not going to
23 be able to testify. I don't believe we're going to put the
24 prosecutor on the stand. I think, therefore, there's a
25 confrontation clause issue that that is testimonial hearsay

1 that is being prepared in anticipation of litigation, and I
2 think that's disqualified under *Crawford v. Washington*.

3 I also make an objection to the database itself on the
4 basis that it is hearsay evidence, because I do not think
5 that this witness is a qualified custodian of records for
6 this database.

7 I cite the Court to *State v. McFarland* which, is 279
8 S.C.2d 327, 306 S.E.2d 611 (1983). I believe that's a South
9 Carolina Supreme Court case. And I'd also cite the Court to
10 review *State v. Rice*, which is a Court of Appeals case from
11 2007. That's 375 S.C. 302, 652 S.E.2d 409.

12 And finally I'll draw the Court's attention to the
13 *SCNB v. Jones*, 302 S.C. 154, 394 S.E.2d 323. That's a South
14 Carolina Supreme Court case from 1990, and if you read the
15 reviews of those cases in South Carolina, *State v. McFarland*,
16 the trial court properly refused to admit medical records
17 when there was no one who could testify to the identity,
18 mode, preparation or whether the report was made in the
19 regular course of business at or near the time of the
20 accident. Those were regarding medical records that were
21 maintained.

22 We have somebody here -- excuse me, then I'd also go on
23 to draw the Court's attention to, as I cited, *Rice*, where a
24 business record without evidence about the manner in which it
25 is prepared, the source of its information does not meet the

1 requirements of the Uniform Business Records As Evidence Act,
2 nor does it hit an exception to the business records
3 exception to the hearsay rule.

4 And, again, the SCNB court (sic) is going to draw you to
5 the same conclusion, that on the hearsay question, since this
6 is not a record itself that this gentleman prepared or is
7 keeping, what is being prepared and kept is a database, and
8 there is nobody -- and had this been a record somebody would
9 be there to testify as to the manner in which the data
10 actually went in, what methods are done in order to protect
11 the integrity of the data, the accuracy of the data.

12 I think this witness has testified that he is unaware
13 whether or not he can even testify to the fact that all the
14 data on that sheet came from a timecard punch or a manager.
15 And he certainly testified that any of the data on the sheet
16 that came from a manager he has not followed up on.

17 I think he's also testified that, yes, he doesn't know
18 that they have any type of procedure to -- that there's any
19 type of protocol for checking about loss of data. There
20 is -- he could not speak to whether or not there are any
21 measures taken to make sure that the data is accurate.

22 And I think most importantly, this printout was done six
23 months after the April 1st, 2013; therefore, it is not a
24 business record that is kept at or near the time. There is a
25 significant gap in time between April 1st, 2013 and when this

1 record was prepared. And, therefore, this printout he has is
2 not a contemporaneous business record.

3 And there was testimony that they do not print out every
4 day; there's no printout done daily, and this is a business
5 record that was prepared nine months later at the request of
6 the prosecution, so --

7 And finally, I think we have a best evidence question
8 here because these are copies. This is somehow a duplicate
9 of the actual data, the actual timecard data. I think he
10 said "timecard punches." But it's not actually a copy of the
11 timecard punches and there's no explanation why we don't have
12 the actual timecard punches.

13 So I think we have problems in this -- on this business
14 record because this witness is not qualified as a custodian;
15 therefore, the information contained in the business record
16 is hearsay. It is a duplicate of the actual information that
17 we are looking for; therefore it's a best evidence question.

18 And to the extent that he's not a records custodian and
19 that he printed out this data at the request of the
20 prosecution, I think that comes back around to being a
21 Sixth Amendment confrontation clause question, because now we
22 clearly have testimonial hearsay, and it was done at the
23 direction of the prosecution. In order -- excuse me, Your
24 Honor.

25 Crawford will not, a regular business record is not

1 included in Crawford because that is an exception to the
2 confrontation clause. The business records have never --
3 there are court decisions that say that business records were
4 never contemplated as being the type of hearsay that was
5 contemplated by the Crawford decision, but since I don't
6 think that these records constitute a business record, then
7 this is clearly hearsay testimony. This is clearly hearsay
8 evidence which is testimony.

9 And, for example, somebody could have made an entry.
10 They said the manager could have made entries into this
11 database, could have made daily entries into this database.
12 If there were, we don't know what they are.

13 And, two, if those types of entries were made, it would
14 be the person who made the entry that I would have an
15 opportunity to cross-examine. This gentleman has no
16 information regarding the accuracy of any information that
17 went in.

18 THE COURT: All right. Mr. Giese.

19 Mr. Sorenson.

20 MR. GIESE: Your Honor, although Mr. Powers doesn't call
21 himself the records custodian, I mean, he's the one for his
22 company who is designated to deal with these things, with
23 testifying, with subpoenas, if records are subpoenaed, and he
24 went through the proper channels. He got the point-of-sale
25 system. They gave him all those records.

1 And Mr. Falk's argument that it's not contemporaneous,
2 these records are immediately stored once you punch your
3 timecard. I mean, that's what that system is for. So
4 that Mr. Falk saying that these aren't contemporaneous, the
5 State would argue that that's just not right.

6 In regards to the summary that Mr. Sorenson prepared,
7 you know, Mr. Powers checked and verified on the Excel
8 spreadsheet that he got from the point-of-sale company that
9 all these numbers were correct, that all these names were
10 correct, and the State was just simply trying to, you know,
11 make it a more readable, more readable document.

12 But, Your Honor, the State would ask that -- would first
13 argue that Mr. Powers is the records custodian for Capital
14 Management Group in regards to not only employment
15 identification but timecard punch in and punch out.

16 THE COURT: What's on Exhibit 49?

17 MR. GIESE: Your Honor, it's the Excel spreadsheet that
18 Mr. Powers was testifying about. Basically it's three tabs.
19 One of the tabs is -- it kind of has an employment
20 identification number as well as employee information. For
21 example, Tyrone Ellison has a number assigned, his address,
22 his phone number, that sort of thing.

23 And then another tab is the timecard punch in and punch
24 out for April 1st of, 2013, and it's kind of got -- it's got
25 where they punched in and punched out, the employee ID, what

1 time they punched in, what time they punched out and then the
2 approximate amount of time they worked, kind of a decimal
3 figure.

4 The third one -- and then the third tab is just another
5 having to do with employee information, employee records.
6 But it's for everyone that is at that particular Burger King
7 that we've been discussing.

8 THE COURT: Mr. Falk.

9 MR. FALK: I mean --

10 THE COURT: You never did address 49. I think all your
11 argument was -- contained Exhibit 50; is that right?

12 MR. FALK: 49 is the spreadsheet.

13 THE COURT: 50 was what they prepared, which you have an
14 objection to.

15 MR. FALK: I have a -- I would renew my objections
16 regarding 49.

17 THE COURT: Okay.

18 MR. FALK: I think that 49, Exhibit 49, for the same
19 reasons I spoke about before, 49 is inadmissible hearsay.
20 It's not the best evidence of the information that they are
21 purporting to enter, and in that, this gentleman is not the
22 custodian, is not properly qualified as a custodian of these
23 records. It becomes testimonial hearsay, which is offered --
24 which was prepared in anticipation of this litigation, and
25 it's a violation of the confrontation clause as found in

1 *Crawford v. Washington.*

2 Let me reiterate the fact that this gentleman is not the
3 custodian nor has he represented himself to be the custodian
4 of the point-of-sale people, who is -- which I do believe he
5 has testified to is the entity that maintains these records
6 and then passes them along.

7 So at most, I should have the opportunity to
8 cross-examine the point-of-sale person, because it is
9 ultimately his business, that entity's business records,
10 which are being offered as evidence here.

11 THE COURT: Okay. Anything else from the State?

12 MR. GIESE: No, Your Honor.

13 THE COURT: Well, I don't believe it is testimonial
14 hearsay or testimonial as argued by defense counsel. I don't
15 believe it falls under exclusion pursuant to best evidence.
16 I'm going to step down for just a minute. I'll let you know
17 what my ruling is in just a second.

18 (Recess held.)

19 THE COURT: All right. What I am going to do, I will
20 not allow Exhibit No. 50 to be admitted into evidence;
21 however, I will allow Exhibit No. 49 to be admitted into
22 evidence.

23 In looking back at the rule on the hearsay exceptions
24 under records of regularly conducted activity, it talks
25 about it's shown by the testimony of the custodian or other

1 qualified witness. I believe that this witness has been
2 qualified as an other qualified witness to testify concerning
3 those records, but subject to defense counsel's objection,
4 I'm going to allow the testimony as well as Exhibit 49 into
5 evidence.

6 (State's Exhibit 49 admitted into evidence.)

7 THE COURT: Anything further at a time?

8 MR. FALK: Your Honor, how -- may I just ask how is the
9 jury going to -- is the jury going to look at the --

10 THE COURT: Spreadsheet?

11 MR. FALK: -- the spreadsheet?

12 THE COURT: On Exhibit 49? That's up to the State.
13 Now, how they are able to, I'm going to leave that up to
14 them.

15 Mr. Giese.

16 MR. GIESE: Your Honor, we would kind of just be linking
17 it with Mr. Powers' testimony that he reviewed the
18 spreadsheet and what he surmised from it. I don't know that
19 they have any way to view it that --

20 THE COURT: Can you pull up what's on that disc in here?

21 MR. GIESE: We can put it on the laptop --

22 MR. SORENSON: We can pull it up. I mean, I think
23 ultimately the question is going to be, "Have you reviewed
24 State's Exhibit No. 49 and does it show whether
25 Tyrone Ellison worked on April 1st of 2013?"

1 He's going to say "no."

2 THE COURT: Okay.

3 MR. SORENSON: I mean, at that point in time, and just
4 to get clarification, Your Honor, I understand that you're
5 not going to let us use State's Exhibit No. 50.

6 THE COURT: Which was prepared by you.

7 MR. SORENSON: Which was -- it was my intention that I
8 plan on using this as a demonstrative exhibit during my
9 closing argument then.

10 THE COURT: Okay.

11 MR. SORENSON: Because it's prepared from what the
12 jury's going to have in evidence, and obviously they want
13 access to a laptop to sit and review all those -- I mean,
14 they can do that as part of their deliberation.

15 MR. GIESE: Or we can even -- if we bring them back out
16 and show them if they're in the middle of their deliberation,
17 they want to see the disc.

18 THE COURT: Mr. Falk.

19 MR. FALK: I just have concerns that certainly the
20 information on the disc is not totally straightforward and it
21 takes some consideration about what the columns mean. I
22 mean, I've gone through the disc obviously. I know -- I
23 think there's 250 columns going this way (indicating).

24 THE COURT: Well, I mean, State needs to lay that
25 foundation.

1 MR. SORENSON: That was the purpose of me creating
2 Item 50 was it helped simplify what are some confusing
3 looking records.

4 THE COURT: That may just prolong the examination of
5 this witness in doing that.

6 MR. SORENSON: Yes, sir.

7 THE COURT: You know, in the rule, let me ask you this:
8 I mean, under Rule 1006, it deals with summaries of
9 information. Do you want to look at that rule real quick?

10 MR. FALK: Yes, Your Honor.

11 THE COURT: Mr. Falk.

12 MR. FALK: Well, obviously I think that the underlying
13 data is inadmissible, but I understand the Court's order, but
14 I still think you would have to go line by line, and this
15 person would have to check each entry in there to confirm
16 those entries on that summary.

17 THE COURT: Well, is that something that can be
18 clarified through direct examination?

19 MR. SORENSON: Which on direct I did ask that, Your
20 Honor.

21 MR. FALK: But he's linking up. I mean, it was
22 Mr. Sorenson that linked up this information, pulled it off
23 the spreadsheet, cut and pasted it together.

24 THE COURT: I understand.

25 MR. FALK: And I mean --

1 THE COURT: Well, under that rule, under the rule that I
2 just referred you to, does it matter who prepared it if he
3 can testify and substantiate that it's consistent with the
4 documentation and information that he prepared and that he
5 provided to the State? That's my question.

6 MR. FALK: I guess it would depend on the witness's
7 testimony.

8 MR. GIESE: I believe he testified to that. We gave
9 him -- I mean, we showed him that to make sure that he
10 checked that all the information on that was accurate, and I
11 asked him that, too, on the stand. He said, "Yes, sir."

12 MR. FALK: He was checking from his memory. He didn't
13 open up the database.

14 MR. SORENSON: He was given that.

15 MR. GIESE: Beforehand.

16 MR. SORENSON: He was given that four months ago to
17 double-check.

18 THE COURT: He what?

19 MR. SORENSON: He was given this. I mean, obviously we
20 can ask Mr. Powers. I gave this to him, a copy of this,
21 months ago when I met with him in anticipation of this trial
22 going in August, because obviously I wanted him to be able to
23 testify that this was accurate, so this was given to him when
24 I met with him, I mean, probably three months ago.

25 THE COURT: Anything else, Mr. Falk?

1 MR. FALK: No, Your Honor.

2 THE COURT: Anything else from the State?

3 MR. GIESE: No, Your Honor.

4 THE COURT: What I'm going to ask the State to do is,
5 and I hate to, but I am, if you can lay the foundation, and
6 maybe you did. I'm not going to go back and reread
7 everything that was already in the transcript as to what you
8 asked.

9 I think you did, but as a precautionary matter, if you
10 can lay the groundwork through direct examination of this
11 witness, I'll reserve my ruling on the admissibility of
12 No. 50 at this time, all right.

13 MR. GIESE: Yes, sir.

14 THE COURT: All right. Bring me the jury, please.

15 (The jury enters the courtroom at 4:35 p.m.)

16 THE COURT: Mr. Giese, you may continue, sir.

17 MR. GIESE: Thank you, Your Honor. And I may backtrack
18 here a little. May I approach the witness again?

19 THE COURT: Yes.

20 CONTINUED DIRECT EXAMINATION BY MR. GIESE:

21 Q. Mr. Powers, showing you again what's been premarked as
22 State's Exhibit 49. Do you recognize that?

23 A. Yes.

24 Q. And what is contained on this disc?

25 A. That is the actual data in its original form from the

1 point-of-sale company as far as the timecard punches for that
2 Burger King.

3 Q. Okay. Did you have the opportunity to review this disc
4 beforehand?

5 A. Yes.

6 Q. Is that a fair and accurate representation of the
7 timecard punches from that Burger King 3262 on Dorchester
8 Road from April 1st of 2013?

9 A. Yes. As far as I know, yes, yes.

10 MR. GIESE: At this time, Your Honor, the State would
11 move State's 49 into evidence.

12 THE COURT: Subject to defense counsel's objection, so
13 admitted.

14 (State's Exhibit 49 admitted into evidence.)

15 MR. GIESE: May I approach the witness again, Your
16 Honor?

17 THE COURT: Yes.

18 Q. All right. I'm now showing you what's been premarked as
19 State's Exhibit 50. Do you recognize that?

20 A. Yes.

21 Q. Okay. What is that?

22 A. This is the -- the data in the spreadsheet on the disc
23 there is -- has a bunch of different tabs and hundreds of
24 columns, and this is basically a summary of the time punches
25 from that, from that bigger spreadsheet. The bigger

1 spreadsheet is -- can be confusing. It's got all kinds of ID
2 numbers and different types of stuff.

3 Q. Okay. Did you check to make sure that all the items on
4 that piece of paper match correctly with the items from
5 State's Exhibit 49?

6 A. Yes, I did. Yes, yes.

7 Q. So all the information on that State's Exhibit 50 is
8 fair and accurate --

9 A. Yes.

10 Q. -- as to who worked on April the 1st of 2013?

11 A. Mm-hmm, yes.

12 Q. And that same information, that can be found in State's
13 Exhibit 49?

14 A. Correct, yes. We could double-check it, yes.

15 Q. Okay. And would you consider the evidence on State's
16 Exhibit 49 that's located on that disc, can you kind of
17 describe what that is?

18 A. Right. So it is basically a -- just a dump of the data
19 from the point-of-sale company, what they actually -- what
20 the system actually recorded. It's just -- it's just the
21 system records as they are. I mean, that's --

22 Q. Is it voluminous?

23 A. What do you mean?

24 Q. Is it a lot of information on the one spreadsheet?

25 A. Yes, it is. Yes, yes.

1 Q. What program is used on that?

2 A. The spreadsheet's actually just a Microsoft Excel
3 document.

4 Q. Okay. And on Microsoft Excel, how is the data on there
5 separated for the timecard punch? What's it look like?

6 A. Oh, okay. So it's basically a bunch of columns that
7 have different information, like employee ID and the -- you
8 know, the address of the restaurant, that type of stuff. And
9 then it has rows, I believe, that show the actual time
10 punches for a given day or basically lists all of the -- rows
11 of all of the employee IDs that -- and what time they punched
12 in, what time they punched out, and then a bunch of sort of
13 extra data.

14 And then it has another tab that has a list of all the
15 employees that work at that restaurant are, you know, that --
16 historically going back since the beginning of the company,
17 and it has their names and their employee ID.

18 So the way to verify it is to look at the -- on the
19 sheet that has the actual time punches, it has the employee
20 IDs, and you can go to the other tab and match the employee
21 ID to the name.

22 Q. Okay. So there's a lot of information on there?

23 A. Yes, there's quite a bit, yes.

24 Q. And it's your testimony that all the information that is
25 on State's Exhibit 50 was taken and verified from State's

1 Exhibit 49?

2 A. Yes, that's -- yes, yes, I did. I checked it, yes.

3 Q. And you verified yourself that that's correct?

4 A. Yes.

5 MR. GIESE: At this time, Your Honor, the State would
6 move to have State's Exhibit 50 entered into evidence.

7 MR. FALK: Your Honor, may I ask the witness some
8 questions about the exhibit?

9 THE COURT: Any objection?

10 MR. GIESE: No, Your Honor.

11 THE COURT: Go ahead.

12 MR. FALK: May I approach?

13 THE COURT: Yes, sir.

14 CROSS-EXAMINATION ON VOIR DIRE BY MR. FALK:

15 Q. When was that piece of paper prepared? Exhibit 50 that
16 you have there, when was that prepared?

17 A. I believe it was -- I'm not sure of the exact date, but
18 I believe it was -- it was months ago. It was probably -- it
19 was brought to me by the -- I guess the State, maybe three
20 months ago.

21 Q. Is there anything on that piece of paper by which you
22 can tell when it was prepared?

23 A. No, no, not at all.

24 Q. When you reviewed a summary that you received from the
25 solicitor's office, did you make any markings on that piece

1 of paper to indicate --

2 A. No.

3 Q. So do you have any firsthand knowledge that that is the
4 piece of paper that you reviewed?

5 A. I mean, I cannot be absolutely sure this is the exact
6 paper, no, that was -- that was shown to me.

7 Q. So if that's not the exact paper that was shown to you,
8 then you would need to reverify all the entries on there; is
9 that correct?

10 A. I mean, yes, probably, yes.

11 Q. If a typo, if an innocent typo was made on there, you
12 would have no way of knowing unless you knew for sure that
13 you looked at that piece of paper originally; is that
14 correct?

15 A. Yes, yes, absolutely. I mean, yes. I do not, like,
16 take a, you know, photo on my phone of the sheet and have
17 something to compare to, you know, that this is the original
18 sheet of paper. It looks identical to me.

19 Q. Well, it looks identical because it has columns and
20 names and ID numbers; is that correct?

21 A. And just looking at the names, you know, it just -- it
22 does look -- it looks familiar to me, but --

23 Q. Do you recall the name of every employee who's at that
24 store?

25 A. No.

1 Q. Do you recall the employee ID numbers of every employee
2 at that store?

3 A. No.

4 Q. The dates of hire?

5 A. No.

6 MR. FALK: Your Honor, I would object to the
7 introduction of this as a -- as a -- admissible as a summary
8 under 1006 without further verification that that is actually
9 the piece of paper that he reviewed.

10 THE COURT: Anything from the State?

11 MR. GIESE: Nothing further, Your Honor.

12 THE COURT: Objection sustained.

13 MR. GIESE: May I approach the witness?

14 THE COURT: Yes.

15 CONTINUED DIRECT EXAMINATION BY MR. GIESE:

16 Q. All right. Mr. Powers, I've already asked you this, but
17 you've reviewed all the information on the timecard
18 punch in/punch out from April 1st of 2013 at that Burger King
19 store?

20 A. Yes. I mean, from the original --

21 Q. On the Excel spreadsheet.

22 A. On the actual, yes, I did, yes.

23 Q. Did you also review the employee information for
24 Tyrone Ellison?

25 A. Yes.

1 Q. And based on your review of the employee information of
2 Mr. Ellison and the timecard punch in/punch out information
3 from April 1st, based on your review of that spreadsheet,
4 does it appear to you that Tyrone Ellison clocked in or
5 clocked out at any point on April 1st of 2013?

6 A. No. I did check that. There's no record of it.

7 MR. GIESE: Beg the Court's indulgence.

8 THE COURT: Yes, sir.

9 MR. GIESE: Nothing further, Your Honor.

10 THE COURT: Cross-examination. Anything further,
11 Mr. Falk?

12 MR. FALK: Yes, Your Honor.

13 THE COURT: Go ahead.

14 CROSS-EXAMINATION BY MR. FALK:

15 Q. You had testified that Exhibit No. -- I've got my
16 numbers confused.

17 THE COURT: 49.

18 Q. You testified that 49 is an Excel spreadsheet?

19 A. Mm-hmm.

20 THE COURT: Is that a "yes"?

21 THE WITNESS: Yes, it is.

22 THE COURT: Thank you.

23 THE WITNESS: Yes, sir.

24 Q. Is that the format in which the evidence is -- in which
25 the timecard swipes are originally collected by the

1 point-of-sale company?

2 A. 49?

3 Q. Is the Excel spreadsheet, does the point-of-sale company
4 which keeps and maintains all this data, is it originally
5 maintained as an Excel spreadsheet?

6 A. No, it's not.

7 Q. So that's a translation of the original data?

8 A. That's correct, yes.

9 Q. And has there ever been an opportunity when somebody has
10 made entries into, has made changes in that data which has
11 not been reflected by the timecard swipes?

12 A. Can you elaborate or repeat that question?

13 Q. I'm sorry, that was a poor question.

14 What is the way that the data can get into that, into
15 the database that's kept by the point-of-sale company?

16 A. There's only two ways, and that is by actually punching
17 in with a timecard number and that -- like you would at the
18 workstation, at the registers; or the manager, the general
19 manager can make manual adjustments.

20 Q. Is there any way to tell if the manager has made a
21 manual adjustment?

22 A. There is a way to tell, yes. There is a way if
23 something has been adjusted, yes. If something's been
24 adjusted, there is a way it can be audited, yes.

25 Q. Can you explain what that way is?

1 A. Well, if there is a -- if there is a change to
2 something, you have to specify why you changed it, so there's
3 a column. If you just delete something, that would be --
4 there is a -- you know, an audit history of all changes made.

5 Q. And when you reviewed that summary and when you provided
6 this Excel database, did you review the audit summaries for
7 that store for April 1st?

8 A. No, no, I didn't.

9 Q. So if the manager of that store made an adjustment
10 possibly in order to keep the total store hours down or keep
11 the employees under 40 and deleted somebody from the sheet,
12 that would not be reflected; you would not know that, would
13 you?

14 A. I don't think so, no.

15 Q. The Excel spreadsheet which is on that disc, would there
16 be any reason why you would prepare that? I mean, do you use
17 that spreadsheet in your ordinary course of business?

18 A. Well, yes. So yes, basically that spreadsheet was
19 directly from the point-of-sale company for that -- the day
20 and time asked for. We have another spreadsheet that has
21 everything in it. It has all restaurants, all dates for the
22 entire company history. And so I have -- yes, yes. I mean,
23 we've had this come up before, yes, where I've had to pull
24 the records, yes.

25 Q. Is that this -- does the point-of-sale company, are they

1 responsible for generating the payroll?

2 A. No, we have an accounting firm, like an accounting --
3 accountant.

4 Q. What data does the accounting firm use for generating
5 the payroll information?

6 A. They get it from the point-of-sale data.

7 Q. Do they use that spreadsheet?

8 A. I am not sure, actually. I don't know. I don't believe
9 so, but I don't know.

10 Q. They would use different data?

11 A. Yes, I think so, yes.

12 Q. So is really the only reason why you would generate a
13 spreadsheet like that is, for example, this situation where
14 somebody in a lawsuit has a question or if there's litigation
15 of some sort?

16 A. I mean, it's -- I mean, mostly -- it's mostly -- I mean,
17 yes, that's the main purpose, but generally to have a copy of
18 the historical records.

19 Q. But that spreadsheet that you prepared, the main purpose
20 for preparing a document like that is to prepare for some
21 type of litigation; is that correct?

22 A. Well, yes, sir. I was asked for it, yes. I was asked
23 for the employee, you know, time punches for that day at that
24 restaurant.

25 Q. But the company that makes the payroll, which is a

1 crucial daily function or weekly function of the business,
2 does not use that spreadsheet?

3 A. They don't use that, no. They don't get their data in
4 that format.

5 MR. FALK: Your Honor, of course I renew my objection
6 that this is --

7 THE COURT: So noted for the record. So noted for the
8 record.

9 Any redirect?

10 MR. GIESE: No, Your Honor.

11 THE COURT: Sir, you may step down. Thank you.

12 Anything further from the State?

13 MR. SORENSON: No, sir.

14 THE COURT: Can the lawyers approach for scheduling
15 purposes, please?

16 (Judge and attorneys confer.)

17 THE COURT: Ladies and gentlemen, what we're going to do
18 at this time, I am going to excuse you for the balance of
19 today and also going to excuse you for the balance of
20 tomorrow, okay? And I apologize for having to do this, but I
21 have a prior -- I have a prior engagement with regards to
22 work that I have to handle tomorrow. Therefore, I am going
23 to ask that you all be back here Friday morning, Friday
24 morning, at 9:30, at 9:30.

25 Now, you have heard all of the testimony that you are

1 going to hear in this case. The only thing that remains are
2 closing arguments by counsel and my charge on the law to you,
3 okay. That is all that remains.

4 During your break over the next day and a half, so to
5 speak, you know what my instructions are, and I'm going to
6 ask you Friday morning when you come back here whether or not
7 you abided by my instructions, okay? Please do not discuss
8 the case at all with anyone. Do not do any independent
9 investigation on your own.

10 You've heard all the facts in this case. You've heard
11 all the evidence. That which remains is only arguments of
12 counsel and my charge on the law and the case will be given
13 to you for you to make a decision on it at that point in
14 time. So please be back Friday morning at 9:30.

15 Anything further from the State before I release the
16 jury?

17 MR. SORENSON: No, sir.

18 THE COURT: Defense counsel?

19 MR. FALK: No, sir.

20 THE COURT: All right. Please be back at 9:30 Friday
21 morning, and we will continue and resume or finish this case
22 on Friday. Thank you.

23 (The jury retires to the jury room at 4:54 p.m.)

24 THE COURT: All right. It was discussed at sidebar that
25 Mr. Falk indicated that he had some proposed charges. I've

1 asked him to get those to my law clerk, as well as get a copy
2 of those to Mr. Sorenson.

3 Furthermore, I indicated to the lawyers at sidebar to be
4 back here Friday morning at 9:00, at 9:00 so we can have a
5 brief jury charge at that time.

6 It was previously discussed as far as whether or not --
7 I don't know if this was on the record or not. I know it was
8 discussed up here at sidebar about procedural -- from a
9 procedural standpoint whether or not Mr. Falk needed to make
10 any further motions.

11 I will want to note for the record that all prior
12 motions as made by Mr. Falk are so noted at this time, as
13 well for purposes of protecting his client and preserving any
14 issues that may be there for purposes of appellate issues. I
15 want to make sure that that is noted for the record and the
16 Court's rulings remain the same on that.

17 MR. FALK: I appreciate that we're reserving all motions
18 that I made; however, I think I have to renew a motion that
19 wasn't made on the record, so that the Court could reflect
20 that I renewed my motion for a directed verdict.

21 THE COURT: Absolutely. And that was what I meant as
22 well.

23 MR. FALK: Thank you.

24 THE COURT: So thank you for clarifying that.

25 All right. All prior motions and the renewal of such

1 motions are so noted, and the Court's rulings remain the
2 same.

3 Anything else?

4 MR. SORENSON: Just briefly. When you charge on armed
5 robbery, is part of your standard charge that the -- in the
6 case of if it's a gun that it doesn't need to be operable for
7 it to qualify as a deadly weapon? As long as that's part of
8 it. If not, I was going to get you something to say on that.

9 THE COURT: Yes, it's in there.

10 MR. SORENSON: Seems like I remember that being part of
11 the standard charge.

12 THE COURT: It's not within the perpetrator's purview,
13 so to speak. It's within the alleged victim's.

14 MR. SORENSON: Yes, sir.

15 THE COURT: Yes, it's in there.

16 MR. SORENSON: Thank you.

17 THE COURT: All right. 9:00 Friday morning. Thank you.

18 (Trial of the case adjourned for the day.)

19 (Trial of the case resumed on 10/24/14.)

20 THE COURT: The remainder of individuals that are not
21 involved in this case, I want them out of the courtroom right
22 now, there's a matter I need to take up, and it will be on
23 the record, but issue I need to take up.

24 If you'll put somebody by the back door to make sure
25 there's nobody else coming in. Are the jurors up here yet,

1 Mr. Moultrie?

2 MAJOR MOULTRIE: Yes, sir, they're all in their room.

3 THE COURT: Could you bring out Juror William -- and the
4 lawyers, I want the lawyers to approach. We're going to do
5 this at sidebar. Juror No. 151, Mr. William White.

6 (Juror enters the courtroom.)

7 (The following was held at sidebar.)

8 THE COURT: Hi, Mr. White, how are you doing this
9 morning?

10 THE JUROR: Pretty good.

11 THE COURT: Stand right here with your back facing that
12 way. Place your left hand on the Bible, raise your right
13 hand.

14 WILLIAM WHITE,
15 being first duly sworn, testified as follows:

16 THE COURT: Lawyers, you all can come up here. It's my
17 understanding -- I want you to face this way and look at me.
18 It's my understanding that somebody -- that you have conveyed
19 somebody had approached you about this case asking you to
20 vote a certain way; is that correct?

21 THE JUROR: Yes, sir.

22 THE COURT: Do you know who that individual was that
23 approached you?

24 THE JUROR: No, sir.

25 THE COURT: Was it somebody that's been a witness in the

1 trial of this case?

2 THE JUROR: No, sir. I believe it's somebody related to
3 the defendant. The discussion wasn't too long. I just told
4 them to leave from my front porch.

5 THE COURT: Excuse me, they came to your house?

6 THE JUROR: Yes.

7 THE COURT: When was this?

8 THE JUROR: This was yesterday before I went to work
9 last night. It was around maybe 4.

10 THE COURT: Did you get their name?

11 THE JUROR: No, but I know it was on behalf of the
12 defendant.

13 THE COURT: What were they driving?

14 THE JUROR: Nothing, sir, they just walked off my front
15 porch.

16 Let me ask you this: When you guys made us jurors, you
17 didn't set up blank guidelines what to do if something like
18 that happens, so I just went to work.

19 THE COURT: Say that again now.

20 THE JUROR: When you guys decided who would be jurors,
21 you didn't -- you didn't say, "Do this in case this happens,"
22 so I -- it was really no way for me to react to that.

23 THE COURT: You're okay. You did exactly what you were
24 supposed to do this morning.

25 Was it a white male, black male?

1 THE JUROR: Black male.

2 THE COURT: Approximate age?

3 THE JUROR: I want to say early 30s, about my height,
4 kind of stocky.

5 THE COURT: Do you have any questions, Mr. Sorenson?

6 MR. SORENSON: I don't believe so.

7 THE COURT: Mr. Falk?

8 MR. FALK: No.

9 THE COURT: Let me ask you this question: Do you know
10 whether or not anybody else in the jury has been approached
11 in this case?

12 THE JUROR: No, sir, but I wasn't sure if that fell
13 under your rules as don't speak about the case, but I did let
14 them know just because I'm a family man and, you know, I
15 think they would want to know to be careful, so I did let
16 them know.

17 THE COURT: Let me ask you this: If you were allowed to
18 remain on this jury, do you believe you could be fair and
19 impartial and decide the case based upon the evidence as
20 presented in this courtroom?

21 THE JUROR: No, sir, with my military background, I feel
22 like if somebody is desperate enough to approach me on behalf
23 of the defendant, then I believe they are guilty.

24 THE COURT: And you do not believe you can be fair and
25 impartial?

1 THE JUROR: To be honest with you, based on the evidence
2 that was presented to me and him approaching me, no, I've
3 already decided, Your Honor.

4 THE COURT: Mr. Sorenson?

5 MR. SORENSON: I don't have anything.

6 THE COURT: Excuse him.

7 MR. FALK: I would excuse him, but I have another
8 concern now.

9 THE COURT: And you haven't discussed it with the rest
10 of the jury?

11 THE JUROR: I just let them know that I was approached
12 and for them to be careful, you know.

13 THE COURT: Okay. I'm going to excuse you. I want
14 whoever you all need to get up here to investigate this
15 matter to talk to him, because that is a serious crime,
16 approaching a jury -- juror.

17 MR. SORENSON: Can I ask him one question?

18 THE COURT: Yes.

19 MR. SORENSON: I don't have the stuff in front of me.

20 Do you live in the town limits or in the county? I
21 mean, obviously you live in Dorchester County, but is it in
22 the town limits of Summerville or --

23 THE JUROR: I live right on Ladson Road, and that's
24 like, I want to say, ten minutes from Wescott.

25 THE COURT: Is that Dorchester County?

1 MR. SORENSON: It's Dorchester County. Do you know, are
2 you within the town limits of Summerville?

3 THE JUROR: Yes.

4 MR. SORENSON: You're within the town limits? I just
5 need to figure out what agency I need to contact.

6 THE COURT: Anything, Mr. Falk?

7 MR. FALK: Regarding this witness? No, Your Honor.

8 THE COURT: Regarding this juror. Have you got anything
9 else?

10 MR. SORENSON: I don't think so. I've got a pretty good
11 idea who it is, so it's just a matter of getting ahold of law
12 enforcement and having them put the person in a lineup to
13 come show him, most likely. I'm 95 percent sure who it is
14 based on some talking to my investigator from conversations
15 that they overheard at the jail yesterday.

16 THE COURT: Mr. White, I apologize this happened to you.
17 This is not something that should happen and not something
18 that ordinarily happens, but you did the absolute right thing
19 in letting the Court know what went on and what has happened,
20 and I hope that you will continue to cooperate in this
21 investigation, because this is something that cannot be
22 taking place in our society, in our judicial system.

23 So all right. I'm going to let you go. You're free to
24 go. You're done for the week. If anybody, if anybody else
25 tries to get in touch with you about this case, you contact

1 the solicitor's office or the sheriff's department
2 immediately.

3 MR. SORENSON: Contact law enforcement initially.

4 THE COURT: Immediately, okay?

5 Mr. Falk?

6 MR. FALK: Should we ask who was in the jury room when
7 he said this?

8 THE COURT: Was it said to all the jurors?

9 THE JUROR: Yes.

10 THE COURT: Now, what I'm going to do is I'm going to
11 pull the entire panel out and just ask them whether or not
12 they can be fair and impartial based upon what Mr. White has
13 conveyed to them, okay?

14 Thank you, Mr. White. Have a good weekend. All right.

15 Mr. Sorenson, can you come here a minute?

16 Mr. Falk, do you want him to remain here for the
17 investigator to get here?

18 Are you Dorchester County?

19 MR. SORENSON: He's North Charleston. If he can hang
20 out, that would be great, if you're off anyway, because that
21 may solve -- it's just going to take -- it's going to take me
22 a few minutes to obviously figure out what we're doing
23 next before I can get free to get ahold of somebody. I'll be
24 able to get an answer pretty quick.

25 THE COURT: They're going to take you to a jury room

1 back there. Thank you, Mr. White.

2 (Juror exits the courtroom.)

3 THE COURT: I'm going to bring the jury out here. I
4 don't mind if the people come back in here now. I just
5 didn't want him looking at them, that's why I had him turn
6 his back to the defendant for purposes of this discussion.

7 You can let whoever back in now.

8 (The following was held in open court.)

9 THE COURT: Anything, Mr. Sorenson, before I bring the
10 jury out?

11 MR. SORENSON: I don't believe so, Your Honor.

12 THE COURT: Mr. Falk?

13 MR. FALK: Not at this time, Your Honor.

14 THE COURT: Bring me the jury, please.

15 Can the lawyers approach while the jury's coming in the
16 courtroom?

17 (Judge and attorneys confer.)

18 THE COURT: Mr. Moultrie, clear the courtroom.

19 (Jury enters the courtroom at 9:52 a.m.)

20 THE COURT: Good morning, ladies and gentlemen.

21 Ma'am, if you'll slide over to this chair right here
22 (indicating).

23 I brought you out this morning because it was brought to
24 my attention by Mr. White, one of your fellow jurors, Juror
25 No. 151, that someone approached him yesterday about this

1 case. It's my understanding he conveyed that to you all; is
2 that correct?

3 THE JURY: (Indicating affirmatively.)

4 THE COURT: Now, I have excused Mr. White from
5 continuing to serve on this jury. He did -- and I say that
6 to say, he didn't do anything wrong, okay? He did absolutely
7 nothing wrong. In fact, he did exactly what he was supposed
8 to do, and that was to convey to someone up here about the
9 issue of someone approaching him.

10 Now, I brought you all out here to ask you this
11 question: Based upon your knowledge that someone approached
12 Mr. White about this case, asking him to vote in a certain
13 way, do you as jurors -- is there anybody on this jury panel
14 that does not believe that they can be -- continue to be fair
15 and impartial in this case and decide this case based solely
16 upon the evidence and the testimony that's been presented in
17 this courtroom?

18 Is there anybody on this jury panel that does not
19 believe that they can be fair and impartial to both the State
20 and the defendant and decide this case based solely upon the
21 evidence? If you do not believe you can be fair and
22 impartial, please raise your right hand.

23 (None raised.)

24 THE COURT: All right. Let me ask you this question:
25 Has anybody else on this jury been approached by anyone,

1 anyone in any way, shape or form, whether it was eye to eye,
2 person to person, social media or anything? If anybody on
3 this jury panel has been approached in any way, shape or form
4 and asked to vote a certain way concerning this particular
5 case, if so please raise your raise your right hand.

6 (None raised.)

7 THE COURT: Let the record reflect that no one has
8 raised their hand.

9 And I'm going to ask this question again: Do you still
10 believe that you can decide this case based solely upon the
11 evidence and testimony that's presented in this courtroom and
12 nowhere else, being fair and impartial to both the State and
13 the defendant? Anybody do not believe they can be fair and
14 impartial?

15 (None respond.)

16 THE COURT: I'm going to ask you to step to the jury
17 room for just a minute while I consult with the attorneys.
18 Please step back to the jury room.

19 (The jury retires to the jury room at 9:54 a.m.)

20 THE COURT: All right. Anything from the State,
21 Mr. Sorenson?

22 MR. SORENSON: Nothing from the State, no, sir. I think
23 they answered your question appropriately that they can still
24 be fair and impartial, and we're prepared to go forward.

25 THE COURT: Mr. Falk?

1 MR. FALK: Your Honor, at this time we would move for a
2 mistrial.

3 THE COURT: On the basis of what?

4 MR. FALK: Well, the first juror said and when he was --
5 had an opportunity to talk with you on a one-on-one and he
6 said that the first -- what came to his mind is that only --
7 that's something only a guilty man would do, and he said
8 based on his military background, but I certainly believe
9 that it's not military background, that would be a common
10 notion that anybody would have that somebody so desperate to
11 make that type of plea is sort of grasping at straws.

12 And although I appreciate the fact that Your Honor asked
13 each -- asked the jurors collectively in panel that question
14 twice, I'm still concerned about whether or not that thought
15 isn't still in the back of their mind somewhere and that they
16 have all -- they can't help but already believe that my
17 client is guilty of the crimes that he's charged because of
18 this act was done by somebody, apparently one of his agents.

19 THE COURT: Anything in response, Mr. Sorenson?

20 MR. SORENSON: Just it would be our position, Your
21 Honor, this basically would be rewarding him for -- I submit
22 to you -- what I believe is going to ultimately show to be
23 his complicit behavior in this.

24 THE COURT: Sir, I'm sorry.

25 MR. SORENSON: I think ultimately we're going to be able

1 to show that he was involved in this, just from what I'm --
2 little preliminary investigation that we've gathered, there
3 is -- there is a phone call yesterday afternoon between him
4 and another individual where they talk about and they
5 reference Margaret, which is the street that that juror lived
6 on is Margaret Street, and taking care of something on
7 Margaret, so I think --

8 THE COURT: I'm going to step off right now. I'm going
9 to look at a little bit of law on something. In the years
10 I've practiced law and the years that I have been on the
11 bench, hadn't had this happen before, but I am -- without
12 seeing some law at this point, I am not inclined to grant a
13 mistrial, because there is absolutely nothing that could
14 prohibit it from going on again and again and again and again
15 unless the entire jury panel, every time this young man's
16 tried, is sequestered and put up in a hotel room, and that's
17 not the way our system works. It's not supposed to work that
18 way on every occasion, only situations I've seen that take
19 place are in death penalty cases.

20 And it would -- I tend to agree with Mr. Sorenson. It
21 would be, in some sense, rewarding the defense for something
22 that you, Mr. Falk, certainly absolutely had no control over.

23 So I'm going to step down for just a minute. I'm going
24 to look at a couple things.

25 MR. FALK: Could I just respond to Mr. Sorenson's

1 comment on the record?

2 THE COURT: Yes, sir, you may.

3 MR. FALK: I would just like to say that if a mistrial
4 was granted, I don't think my client certainly had the
5 wherewithal to know that if this was found out, even if he
6 was part of it, that this would be the consequence that he
7 would have.

8 And I'm not sure that he's going to reap a benefit,
9 because I am sure that he's going to be reindicted, so I
10 don't think that this certainly could have been a calculated
11 move on his part to try and get a mistrial in this case.

12 MR. SORENSON: I think it's a calculated --

13 THE COURT: I'm going to stand down for just a minute.

14 MR. SORENSON: Wouldn't be a calculated move to get a
15 mistrial; it would be a calculated move to get a hung jury.

16 (Recess held.)

17 THE COURT: All right. After stepping off the bench and
18 going and looking at some law, and after Mr. Falk has made a
19 motion for a mistrial, the Court's position remains the same,
20 and that is the Court is denying the defendant's motion for a
21 mistrial under *State v. McDaniel*, 275 S.C. 222. Whether a
22 mistrial should be declared where there has been
23 communication between jurors and outsiders is a matter
24 resting within the sole or sound discretion of the trial
25 court.

1 Under *State v. Carrigan*, 284 S.C. 610, a defendant must
2 show prejudice resulting from the outside influence on the
3 jury in order to obtain a mistrial.

4 Under *State v. Kelly*, 331 S.C. 132, in a criminal
5 prosecution, the conduct of the juror should be free from all
6 extraneous or improper influences. Misconduct that does not
7 affect the jury's impartiality will not undermine the
8 verdict.

9 Relevant factors to be considered pursuant to *State v.*
10 *Kelly*, the number of jurors exposed. In this case, one juror
11 was approached. One juror was approached, according to the
12 juror that I brought in here, and I've already indicated on
13 the record who that juror was. I think it was Juror 151,
14 Mr. White. One juror was approached about voting in a
15 particular manner.

16 Having said that, it's abundantly clear that he conveyed
17 that issue or that fact to the remainder of the jury panel,
18 the fact that he was approached about voting a certain way,
19 so all of the jurors, in some sense, were exposed to it but
20 were not approached about voting a certain way.

21 Furthermore, the weight of the -- the additional -- an
22 additional factor the Court is to take into consideration is
23 the weight of the evidence properly before the jury. In this
24 particular case, in the Court's view, based upon what's been
25 presented in here, there is substantial evidence of his guilt

1 here. There is substantial evidence of his guilt here, from
2 the photographs of the bank robber to the wig to the hat to
3 the visor -- all of which include his -- to the glove, all of
4 which included his DNA.

5 Furthermore, the evidence tying him to the automobile
6 that was seen by him getting into the green Honda, numerous
7 factors adding up that I believe weigh in favor of the State
8 here.

9 And finally, the likelihood of the curative measures
10 were effective in reducing the prejudice. I have brought the
11 entire remainder of the jury panel, which we're down to 12
12 now. We're down to 12. Brought the entire panel out here,
13 asked them whether or not any of them individually have been
14 approached by any outside party concerning this case.

15 None of which indicated they had been. Further inquired
16 as to whether or not, on more than one occasion I asked the
17 question to them, giving them ample opportunity to respond to
18 me as to whether or not what had happened affected their
19 ability in any way, in any way to be fair and impartial to
20 both the State and the defendant and decide this case based
21 solely, based solely upon the evidence and testimony that's
22 been presented in this courtroom.

23 Not one juror, not one juror gave any indication in any
24 way, shape or form, that their ability to be fair and
25 impartial has been impaired.

1 Therefore, taking those factors into consideration, but
2 so noting Mr. Falk's motion for a mistrial for appellate
3 purposes -- if he's convicted, it will be there -- I am
4 respectfully denying your motion for a mistrial.

5 All right. Anything further from the State?

6 MR. SORENSON: No, sir.

7 THE COURT: Defense counsel?

8 MR. FALK: No, sir.

9 THE COURT: All right.

10 MR. FALK: And we're going to do the charges next?

11 THE COURT: Yes. We're fixing to bring them out and
12 finish this case, yes, sir.

13 MR. FALK: But the objections to the chart that's in
14 front -- I'm confused.

15 THE COURT: What I wanted to do, Mr. Falk, was wrap up
16 the issue pertaining to your motion for mistrial.

17 MR. FALK: Okay. All right.

18 THE COURT: That's what I was asking you about on that.

19 MR. FALK: All right. Thank you.

20 THE COURT: Now, it's my understanding there's nothing
21 further from the State or defense counsel concerning the
22 mistrial issue; is that right, Mr. Sorenson?

23 MR. SORENSON: That would be correct, Your Honor.

24 MR. FALK: That's correct, Your Honor.

25 THE COURT: Having said all that, prior to us having to

1 address this issue, there was a charging conference in my
2 chambers. Mr. Sorenson, Mr. Giese and Mr. Falk were in my
3 chambers and we went through the charge in its entirety.

4 Mr. Falk had requested a spoliation charge, which I can
5 only assume, and please correct me if I'm incorrect, a
6 spoliation charge related to the testing and the destruction,
7 so to speak, of items of evidence that were tested by the
8 State; is that right, Mr. Falk?

9 MR. FALK: That is correct, Your Honor.

10 THE COURT: Being the wig and the visor.

11 MR. FALK: That's correct, Your Honor.

12 THE COURT: Okay. I have respectfully, and I told
13 Mr. Falk back in chambers that I was not going to charge any
14 kind of spoliation. And I have -- I'm denying that request,
15 but his objection at this time is so noted for the record.

16 Furthermore, there was an issue that was brought up back
17 in chambers concerning fees pertaining to defense counsel's
18 expert. There was no -- and I told the lawyers back in
19 chambers there was no testimony whatsoever about his --
20 Dr. Bennett's fees.

21 And I was not charging anything pertaining to fees, that
22 I was going to give the standard charge as it relates to
23 expert testimony and for the jury to use such testimony as
24 they deem appropriate or they deem fit. But again, Mr.
25 Falk's objection to that is so noted for the record as well.

1 It's my understanding also, furthermore, that the
2 lawyers reviewed the verdict form. Are there any further
3 objections or anything that I have failed to put on the
4 record from the State?

5 MR. SORENSON: No, Your Honor.

6 THE COURT: Mr. Falk?

7 MR. FALK: No, Your Honor.

8 THE COURT: All right. The order of closing arguments.
9 Is the State going to open on the law?

10 MR. SORENSON: Yes, sir.

11 THE COURT: All right. State will open on the law,
12 followed by Mr. Falk's closing arguments, concluded by the
13 State. That's the order of arguments pursuant to defense
14 counsel or defendant putting up evidence in this case, all
15 right?

16 How long do you all expect on closing arguments,
17 Mr. Sorenson? I want your time estimation as it relates to
18 together of the law and closing.

19 MR. SORENSON: Together, together probably 45 minutes.

20 THE COURT: This case took two days to try. I mean,
21 let's try to narrow it a little bit more than 45 minutes.

22 All right. How about you, Mr. Falk?

23 MR. FALK: I think I'm probably closer to 25 minutes to
24 30.

25 THE COURT: Okay. I mean, I'm not going to sit here and

1 say, Mr. Sorenson, when it strikes such and such, you've got
2 to sit down, but I just don't want -- don't start repeating.

3 MR. SORENSON: Yes, sir.

4 THE COURT: You've done this plenty of times, I know.

5 MR. SORENSON: Yes, sir.

6 THE COURT: And Mr. Falk as well, but just kind of --

7 MR. SORENSON: Yes, sir.

8 THE COURT: I don't want to hear, and I doubt the jury
9 wants to hear everything that every witness said on that
10 witness stand. But anyway, if you start repeating yourself,
11 I may clear my throat a couple times, which means you need to
12 start wrapping it up, okay?

13 MR. SORENSON: Yes, sir.

14 THE COURT: Anything else before I bring the jury out
15 from the State?

16 MR. SORENSON: If we can just have a second, I guess, to
17 get everybody back in the courtroom.

18 THE COURT: Yes, you can bring everybody back in the
19 courtroom now.

20 And before they -- Mr. Giese, hold on just a second. I
21 want to put this on the record, that in handling all these
22 issues pertaining to concerns about outside influence on the
23 jury, I had everybody that was seated in the audience exit
24 the courtroom. Defendant has been in here with his lawyer
25 the entire time. I want that on the record.

1 But the purpose in me clearing the courtroom is, one,
2 not knowing exactly who may have approached Mr. White. The
3 defendant's family was in here, and I didn't want anybody
4 seated out in that audience that may have been involved in
5 some contact or possible contact with this jury, for anybody
6 on the jury to in any way feel that they were being
7 intimidated, so to speak, by anybody sitting in this
8 courtroom, and that was why I had everybody exit the
9 courtroom, okay?

10 MR. SORENSON: Yes, sir.

11 THE COURT: All right. You can let them in now.

12 All right. If you'll bring me in the jury, please.

13 (The jury enters the courtroom at 10:20 a.m.)

14 THE COURT: All right. Mr. Foreman, ladies and
15 gentlemen of the jury, as I told you when we left here
16 Wednesday afternoon, the only thing that remained was closing
17 arguments and my charge on the law to you. At this time the
18 order in which this will take place is I will recognize the
19 State, the State will open on the law, but ultimately I'm the
20 instruction of the law, okay? What I tell you the law is,
21 that's what the law is.

22 The State will open on it, followed by defense counsel,
23 closing argument, and then the State will conclude with
24 closing arguments, okay?

25 So at this time, Mr. Sorenson, you're recognized, sir,

1 on behalf of the State.

2 MR. SORENSON: Thank you. May it please the Court, Your
3 Honor.

4 THE COURT: Yes, sir.

5 MR. SORENSON: Mr. Falk.

6 Mr. Foreman, ladies and gentlemen of the jury, I want to
7 start off by thanking you, thanking you for the attention
8 that you've given to us the last couple days. As His Honor
9 told you, we've reached that part of the trial now where
10 we're getting ready to do closing arguments.

11 And as he told you, what I'm going to do is just take a
12 few minutes of your time and just kind of talk to you just
13 real briefly about some of the legal -- the legal matters
14 involved in the case, what Mr. Ellison's charged with, things
15 of that nature. It shouldn't be more than five to seven
16 minutes.

17 Then when I sit down, Mr. Falk will have an opportunity
18 to come before you. And then after he is done, I'm going to
19 have an opportunity to come once again before you and talk to
20 you about the facts in this case.

21 Now, as you've heard on multiple occasions, Mr. Ellison
22 is charged with two separate indictments, one charging him
23 with armed robbery and one charging him with entering a bank
24 with intent to steal, stemming out of the same incident from
25 the morning of April 1st, 2013.

1 And very simply, as you were told by Mr. Giese back
2 on -- back Tuesday morning, armed robbery is essentially the
3 taking of property or goods from another person or their
4 presence with the intent to permanently deprive them of those
5 goods or, in this case money, while armed with a deadly
6 weapon or the representation of a deadly weapon, in this case
7 a handgun.

8 You're going to hear from His Honor that the handgun in
9 the case does not even have to be operable. In this case it
10 may or may not have been loaded. When it was found in the
11 woods shortly afterward, it was unloaded. But the mere fact
12 that he presented a handgun that obviously Ms. Rustin and
13 Ms. Bass did not know whether it was loaded or not, that
14 would be armed robbery.

15 Entering a bank with intent to steal is exactly what it
16 sounds like. If you enter a bank or a financial institution
17 with the intent to steal money from that bank, through either
18 force, threats or intimidation, you're guilty of that charge.
19 You don't even actually have to get the money, just the mere
20 fact of going into a bank with intent to steal, in this case
21 armed with a deadly weapon, would make you guilty of entering
22 a bank with intent to steal.

23 As Mr. Giese told you, in this case, just like every
24 other case throughout our country, the burden of proof in
25 every criminal case is on the State. We have to prove the

1 defendant guilty beyond a reasonable doubt. Notice I didn't
2 say "beyond any doubt," "beyond a shadow of a doubt." Beyond
3 a reasonable doubt.

4 And very simply what that means, ladies and gentlemen,
5 is after you've considered all the testimony, all the
6 physical evidence that's been brought before you, after
7 you've considered all of that, if you're firmly convinced in
8 the defendant's guilt, then under the oath that you took
9 Tuesday morning, you must find Tyrone Ellison guilty of armed
10 robbery and entering a bank with intent to steal.

11 The flip side of that, if there's a real possibility in
12 your mind that he's not guilty, then under that same oath,
13 you must find him not guilty. You must find him not guilty.

14 If you noticed, when I said after considering all the
15 witnesses and all the evidence, because just like I told you,
16 just like you're going to hear from His Honor, the defense
17 has no burden in this case. You're going to hear that you
18 can't -- the fact that the defendant did not testify is not
19 something that can come into your deliberations at all. He
20 has that absolute right.

21 They don't have to ask questions. Mr. Falk didn't have
22 to ask a single question of a single witness in this
23 courtroom. They don't have to call witnesses to the witness
24 stand. They don't have to put evidence in. Could have done
25 none of that and the burden is still on us to prove to you on

1 April 1st of 2013, beyond a reasonable doubt, his guilt.

2 I submit to you, ladies and gentlemen, once they start
3 doing that, once they start calling witnesses to that witness
4 stand, they're subject to the same scrutiny as any other
5 witness that's called before you.

6 So you and you alone, ladies and gentlemen, ultimately,
7 as Judge Brown has told you, he's the judge of the law. He
8 determines what the law is in the case, and you're bound
9 under your oath to follow that, whether you agree with it,
10 disagree with it.

11 Just like he's the judge of the law, the 12 of you, when
12 you get back in that jury room, are the judges of the facts.
13 You and you alone can tell us, ultimately, through your
14 verdict, what happened on the morning of April 1st, 2013, and
15 the way you do that is by judging the credibility or, in
16 other words, the believability of the witnesses that have
17 testified before you, the credibility of the evidence that's
18 been presented here in court. And that's not only of the
19 State's witnesses but of the defense's witnesses also.

20 And you may ask yourself, "Well, how are we prepared to
21 do that job?" Well, obviously when you showed up here Monday
22 afternoon, the 12 of you, I imagine most of you were probably
23 kind of hoping you'd be back in your own lives right now and
24 not sitting here on a Friday morning listening to me.

25 At the same time, I submit to you the 12 of you have

1 been preparing for this, whether you know it or not, every
2 day of your lives. You judge the credibility and the
3 believability of people that you deal with all the time,
4 whether it's your spouses, your significant others, your
5 children, coworkers, family and friends. Every day you have
6 to do that.

7 What are some of the factors that go into determining
8 that credibility of a person when they're telling you
9 something? What is their demeanor? Are they hesitant? Are
10 they forthright about their -- are they wavering when they
11 tell you something? Are they evasive in their answers? Do
12 they have some bias or prejudice, some stake in the outcome
13 in what happens in court this week?

14 What they told you, is it corroborated by other
15 witnesses and by other evidence, or does other evidence
16 contradict what they told you? What was their opportunity to
17 observe what they came in and testified to you about?

18 Lastly you can consider, you've heard from several
19 witnesses that had a prior criminal history, and you get to
20 consider that also in determining their credibility.

21 At the end of the day, ladies and gentlemen, this whole
22 process is basically like putting together a jigsaw puzzle.
23 The witnesses that you've heard are pieces of that puzzle.
24 The evidence that's been presented are pieces of that puzzle.
25 And all I ask you, ladies and gentlemen, is to just please

1 keep an open mind when Mr. Falk comes up before you and give
2 me an opportunity when he's done to come back before you and
3 show you how the pieces of this puzzle fit together.

4 So I submit to you I've proved Tyrone Ellison is guilty
5 beyond a reasonable doubt. I submit to you in this case the
6 evidence proves him guilty beyond any doubt that he went into
7 that SunTrust Bank on the morning of April 1st of 2013, armed
8 with a handgun, and robbed those two young ladies of over
9 \$6,000. Thank you.

10 THE COURT: Mr. Falk.

11 MR. FALK: May it please the Court.

12 THE COURT: Yes, sir.

13 MR. FALK: Solicitors.

14 Good morning. There's no question that a crime was
15 committed at the SunTrust Bank on that morning on April 1st.
16 You saw the video. You saw the suspect walk in. You saw the
17 suspect walk out.

18 There's equally no question that no one, none of the
19 employees of the bank that day were able to identify my
20 client as being that suspect. You didn't hear from
21 Bonnie Weeks, you didn't hear from Roberta Bass, you didn't
22 hear from Quinn Rustin that they were able to identify my
23 client.

24 The only real witness, the only real eye witness in this
25 case was David Lewis. You'll recall he was the man who

1 followed the suspect out of the bank. He first followed him
2 out on foot and then he got to some point when he decided to
3 come back and get his car.

4 He said he saw the man coming out of the woods, and the
5 man he saw coming out of the woods was not wearing a wig, was
6 not wearing a visor, didn't have a handgun, and he got into a
7 green Honda. I think it's at this time that Mr. Lewis went
8 back and got his truck and started in pursuit after the green
9 Honda.

10 I think the only description Mr. Lewis was able to give
11 of the man who came out of the woods was he was an
12 African-American man, maybe about the same size as the
13 defendant. He really couldn't give any more description of
14 him. He probably gave a better description of the driver of
15 the green Honda.

16 But he did notice one thing about the green Honda, which
17 sort of struck me. He said that the car didn't fit that
18 neighborhood. He didn't think that sort of an older car with
19 two African-Americans in it was -- fit that neighborhood at
20 Wescott Plantation.

21 And there's also one other thing that he noticed or
22 maybe he didn't notice. He said that the person who came out
23 of the woods was not wearing a coat, was not wearing a
24 hoodie. Now, everybody who -- and you saw the -- you'll have
25 a chance, I'm sure, to see the video again. The person who

1 came out of the bank certainly had on a coat, certainly had
2 on a hoodie.

3 Now, you heard the testimony from the K-9 patrolman who
4 first saw the depression in the grass, and that maybe alerted
5 the dog, and then the dog went further. Maybe about 75 yards
6 later, 75 yards from this depression in the grass, they found
7 the wig. The dog alerted on the wig. The dog alerted on the
8 visor, the glove, and the dog found the gun. The dog did not
9 find the jacket, didn't find the hoodie.

10 Detective Malone testified that his men canvassed that
11 area for two hours trying to find the hoodie, trying to find
12 the jacket. They were unable to. You have to ask yourself,
13 "Where's the jacket? Where's the hoodie?" I submit to you
14 it's still possible that that was still being worn by the
15 person who was going the other way when somebody exited the
16 woods and got into the green car.

17 I think that's a big gap in this story, because the
18 thing that connects the suspect from the bank to the green
19 car is the testimony of Mr. Lewis seeing one man wearing a
20 hoodie, jacket and going into the woods and seeing another
21 man coming out of the woods.

22 Now, obviously if they found the -- if they found the
23 jacket, if they found the hoodie in the woods, I wouldn't be
24 up here talking about that, but they didn't. And certainly
25 there's no reason to think that the K-9 wouldn't have found

1 it. You certainly wouldn't think that if that was in that
2 area why police officers couldn't have found it.

3 Now, you heard some forensic evidence in this case. You
4 heard -- you heard about fingerprint evidence, but you didn't
5 hear anybody say that my client, Tyrone Ellison's
6 fingerprints were in the bank that day. Tyrone Ellison's
7 fingerprints were not found on that gun and they were not ,
8 found on the glove.

9 Excuse me for a minute, I'm sorry.

10 Now, I'm sure the State is going to argue that the
11 reason they didn't find any fingerprints is that the suspect
12 had a glove in his hand or had something in his hand, was in
13 between, you know, somehow blocked him from making contact
14 with any of the surfaces. And if you look at the video, it
15 probably does look like there was something in his hand.

16 And I'm sure you -- as I was saying, I'm sure you're
17 going to see this tape a couple more times. And if you look
18 at the tape, you'll also see that when the suspect was
19 leaving the bank, he dropped something when he was passing in
20 front of the tellers, and then he -- when that suspect got to
21 the front door, he dropped something maybe once or twice.
22 And actually, it looks like he kicks something.

23 I asked Detective Malone whether or not he thought that
24 the suspect had dropped the gun. He said he thought it was
25 maybe the glove that he dropped, but I submit it's probably

1 the gun, because that's the thing that's going to be kicked,
2 you know, if he tried to reach for it, and the glove isn't
3 going move like that.

4 Now, the prosecution's going to say, "Well, this is easy
5 to explain because he had the gloves and it was the gloves in
6 between. He had the gloves on there to protect his fingers
7 from touching any of the surfaces." But nobody says that he
8 was wearing the gloves. He said that the glove was some kind
9 of crunched up in his hand.

10 Now, first of all, Investigator Kubicsko testified that
11 prints could have been found from these latex gloves.
12 There's no reason why you couldn't have lifted a print from a
13 latex glove. And certainly, if the glove is between your
14 hand, and even if you had a gun in between here and you were
15 pressing down on that, that would certainly -- you would
16 expect that to leave a print, but there's no print found on
17 that glove.

18 But the -- I'm just trying to figure how this glove
19 could have completely covered his hand from touching any
20 surface, because it's not like it was on. If he was here,
21 and so this gentleman was reaching down to pick this up and
22 he's reaching down to pick something up again, but still,
23 each time he reached down to pick something up, there was
24 nothing -- he didn't -- there were no prints left. There
25 were no prints from Tyrone Ellison anywhere in the bank.

1 And you have to appreciate the fact that this whole
2 thing happens in about 73 seconds. So, I mean, it's not like
3 he was -- he could have carefully picked something up. I
4 mean, he was moving fast. You'll see the suspect was moving
5 fast, but there were still no fingerprints. There's no palm
6 prints on the glove.

7 Now, Investigator Kubicsko said that she looked on both
8 sides of this glove, but she couldn't find any fingerprints.
9 She checked one side, then didn't see any, then pulled it
10 inside out and checked the other side, and there's still no
11 fingerprints on the glove. And that's the item that's
12 supposedly between the suspect and the gun, the counter, the
13 door handles.

14 Now, there's also, you're going to hear some more about
15 DNA evidence, but there's no DNA evidence that was found on
16 the gun. And you heard testimony from Catherine Leisy that
17 even brief contact would be expected to possibly transfer
18 what they call epithelial cells, skin cells, from one area to
19 another.

20 Now, the amount of skin cells that can be transported or
21 moved back and forth is a very small amount. Catherine Leisy
22 testified that a mere micron of bodily matter is all that's
23 enough to be able to detect DNA, from just a micron. And I
24 went on Wikipedia last night to just find out how big a
25 micron is, and there's 25,000 microns in an inch, so that is

1 a very, very small piece.

2 And again, the State, I'm sure, is going to testify --
3 or the State will certainly argue that the reason why there
4 was no DNA on the gun is because of -- again, of the gloves.
5 But even a small, even the slightest contact is going to --
6 could leave epithelial levels.

7 And also, you heard from Ashley Bell that when she
8 tested the gun, when she swabbed the gun, she had a Q-tip
9 swab so it could get down into the crevices there, and she
10 still was not able to recover even a micron of Mr. Ellison's
11 DNA from the gun.

12 And again, when you're going to see that video and
13 you're going to see him leaving the front door, he's looking
14 frazzled, and to think that that person would be conscious
15 enough to, you know, make sure the glove was fully over his
16 hand when he picks -- when he tries to pick up the gun,
17 that's for you to decide.

18 Now, Catherine Leisy testified that there was more than
19 one person's DNA on the wig and on the visor, and she
20 testified that my client's was on it, but she also testified
21 that there was at least one other person's DNA on the glove,
22 on the wig and on the visor. And she certainly can't testify
23 whose DNA was on the wig or on the visor last.

24 Now, the glove was swabbed. You heard
25 Inspector Kubicko say that she swabbed the gun -- she

1 swabbed the glove on April 3rd. And when those swabs of the
2 gloves were analyzed, no DNA was found.

3 The explanation for that was that the -- when the --
4 Investigator Kubicsko swabbed the glove, she only looked on
5 one side of it, and possibly she must have had looked on the
6 wrong side of the glove, but you heard Investigator Kubicsko
7 say that she couldn't tell which was the right side of the
8 glove and which was the wrong side of the glove.

9 And when I showed her a picture of it, you couldn't
10 tell, and when you look at the glove on the ground, you can't
11 tell. It's a latex glove, and it's not like it's a larger
12 glove with a fleece lining on the inside. There is no inside
13 or outside.

14 But why would she only look on one side? She didn't try
15 to look on both surfaces, or maybe she did try to look on
16 both surfaces, but she said that she only looked on one
17 surface of the glove. Even though she looked on both
18 surfaces to look for fingerprints, she only looked on one
19 side -- she's testified that she only looked on one surface
20 when she was looking for the DNA evidence.

21 And you also heard that on May 13th, 2014, 13 months
22 later, Catherine Leisy, the State's -- SLED's DNA expert,
23 testified that she received a message, and it said, "Try and
24 obtain the suspect's DNA from the glove and try and obtain
25 the suspect's DNA from the gun."

1 It wasn't, "Let's retest this." It was try and obtain
2 the suspect's DNA from those two items. And as directed,
3 they reported that then DNA evidence was recovered from the
4 glove.

5 Now, this case, there were two times when some of the
6 evidence, some of the physical evidence was retested. You
7 have the retesting of the glove and you have Dr. Bennett's
8 retesting of the hat and the visor.

9 Now, you heard Dr. Bennett testify that he followed the
10 same protocols that SLED followed when they tried to remove
11 to see if there were any, what they said, epithelia cells,
12 skin cells, from the sweatband on the visor and on the hat.

13 Followed the same scraping, swabbing first, I guess, and
14 then scraping, but Dr. Bennett wasn't able to find any DNA,
15 certainly couldn't find my client's DNA on the wig and the
16 visor. He could not duplicate the State's testing from those
17 two items.

18 Now, I think the State is going to argue that, Well, the
19 reason why Dr. Bennett wasn't able to find any DNA was
20 because the State and Ms. Bennett [sic], when she was
21 scraping, she did such a thorough job there that they removed
22 any possibility that there be any additional skin cells, any
23 epithelial cells, any source for DNA from those two items.

24 And so on the one -- on the hand, the explanation why
25 Dr. Bennett couldn't find any DNA on the wig and on the visor

1 was because the State was -- had such a thorough protocol,
2 such a thorough procedure for removing it that there was none
3 left, that they got every single piece.

4 Now we're going to compare that protocol, then what must
5 have been followed, we're going to believe the testimony on
6 the first -- on the first attempt to find DNA on the glove to
7 Investigator Kubicsko, who said that she just swabbed it one
8 time, didn't find anything.

9 So you have this one real thorough examination on one
10 side and then just a cursory swabbing of the glove on the
11 other side, so it's hard to reconcile those two things. You
12 have, on one hand -- on one hand SLED is really thorough and
13 they're going to get everything, and on the one hand, "Well,
14 we're only going to maybe test half the item."

15 You can't even reconcile Investigator Kubicsko's attempt
16 to find DNA on the glove with her attempt to find
17 fingerprints on the glove. I mean, she looked on both sides
18 of the glove for fingerprints but only one side of the glove
19 for DNA.

20 Again, we weren't able to find any DNA on the visor and
21 on the wig. And also, Dr. Bennett testified that he went a
22 little step further, because he -- you heard him testify that
23 on something like a visor, something that's worn frequently,
24 you could expect to find a person's DNA so into that area,
25 sort of impregnated deep into there, so maybe just a scraping

1 of the outside surface, there would still be DNA that was
2 sort of, as I said, impregnated down into that surface.

3 And so he took a cutting from that, and he analyzed the
4 cutting, so he was looking at the entire -- on the section
5 that he cut, he was looking at the entire sweatband to see if
6 anything could have had dug into there. And he was unable to
7 find Tyrone Ellison's DNA after that second testing.

8 Again, so if this visor was worn by somebody on more
9 than one occasion, you would expect for there to be DNA into
10 the sweatband. There wasn't any. We couldn't find any.
11 SLED didn't look for any. SLED says they found my client's
12 DNA on the sweatband, found somebody else's DNA on the
13 sweatband.

14 Again, let's compare Investigator Kubicsko to Ms.
15 Butler, who said that when she swabbed -- look at the
16 thoroughness on there. She said that she swabbed down into
17 the crevices on this to look for DNA, but again, I just -- I
18 don't know the explanation why when they first looked at the
19 gloves, there was DNA on it, and when it came back a second
20 time, they found DNA on it.

21 The State was certainly trying to maximize their efforts
22 to recover anything from this sweatband of the wig and on the
23 visor. And really, their efforts were intent to maximize it
24 so that they couldn't repeat that and nobody else could look.

25 So, I mean, their efforts -- what they're saying is

1 their thoroughness in trying to extract the DNA from the
2 visor was really designed so that you couldn't really come
3 back and test it again. So we really had no opportunity. If
4 Tyrone Ellison's DNA was on the visor, we had no opportunity
5 to retest those results, because there was nothing left for
6 us to test.

7 And my client's story, my client has an alibi. Now, I'm
8 sure it would be great if he had an ironclad alibi, but he
9 got picked up three months later, but he remembered that on
10 April 1st, my client was working at the Burger King on
11 April 1st, 2013. It was a Monday. It was the first of the
12 month, and that's the day the trucks come in.

13 You heard Ms. Green testify, who is the manager of that
14 Burger King, that my client is the one that they looked to to
15 unload the trucks. The truck got unloaded that day. Now,
16 she wasn't there that day, but she knows that my client was
17 the guy who unloaded the trucks. The truck was unloaded that
18 day.

19 We also know from Ms. Candida. She testified that she
20 was with my client that day. That's April. Why does she
21 remember it was that day that the truck was there? Because
22 she remembers it was April Fool's Day. It was April 1st.
23 That's how she remembers that she was with my client at the
24 Burger King that day, that morning.

25 Now, you heard Ms. Green testify that there were times

1 that the employees wound up having to work at the Burger King
2 and they weren't on the books. You heard her testify about
3 getting too many hours, going over 40 hours.

4 Maybe some of you all have had that experience of
5 working someplace either, where your employer was trying to
6 keep you on a part-time rate or the -- or for whatever
7 reason, you weren't able to get any overtime, but still work
8 needed to be done, and some employees went in and did the
9 work even if they weren't going to get fully compensated for
10 it that day.

11 Now, the State, they called Sam Powers from the
12 corporate office of the company that owns that Burger King
13 franchise. I think they brought him in today to try and tell
14 you that they weren't on the books that day, that they
15 weren't working that day. I just don't believe that.
16 Regardless, Mr. Powers was the one to come in and testify
17 about -- to that matter.

18 You have the Burger King. You have the store. You have
19 the store level. That's where Ms. Green works. Then you
20 have this company that owns these Burger Kings and manages
21 them, but you also know that Mr. Powers testified that
22 somebody else is the one that keeps track of all the data
23 when the employees are working those days.

24 He talked about they -- they take care of that
25 information and they tell it to the corporate entity whether

1 or not the employees were there. So, I mean, he -- the
2 information that he had was a summary of some information
3 that somebody else gave him.

4 He also testified that he knew that there were times
5 when, whether or not somebody was working on a day and
6 whether it would show up on some kind of log, there are two
7 ways that that information could get put into their logs.

8 One way is from the information that they receive from
9 the company that took care of the swipes. The swipes
10 meaning, I guess, the employees have some kind of magnet card
11 or something, and they run it through a machine when they
12 come in and out.

13 And the other way is sometimes a manager, he recognizes
14 that the managers sometimes come in there, make adjustments
15 to that for whatever reason. Maybe it's for reasons to keep
16 them under 40 hours, maybe it's for reasons to keep
17 somebody -- some of the employees on a part-time rate.

18 Mr. Powers testified that if you look at his sheets, if
19 a manager had removed somebody from his list, he wouldn't be
20 able to tell. He wouldn't be able to tell by looking at that
21 sheet whether a manager removed somebody's name from that
22 list.

23 He said there is a way to do it. It's possibly to run
24 an audit report, do some kind of paper trail, electronic
25 paper trail to go back through there to see what happened,

1 but he testified that he didn't look at it that day.

2 So when Mr. Ellison went in and when Ms. Candy went in
3 on that April 1st, Ms. Green, conscious of either overtime
4 hours, conscious of 40 hours a week, conscious of whatever,
5 they weren't on the books that day.

6 Now, I'm sure we're going to hear a lot of evidence
7 about the car, the green Honda, green Honda Civic. My
8 client's mother bought him that car March 23rd, 2013. The
9 car was delivered that day. You heard from the man who sold
10 her the car. The car was delivered that day. I guess she
11 was going to try and help her son out, get him some
12 transportation back and forth.

13 And I think you'll probably see some more pictures of
14 the car. It's maybe not the car that a 24-year-old guy wants
15 to drive around in, a kind of beat-up paint job. My client
16 had his eye on another car. He was looking on Craigslist.
17 He had his eye on another car he wanted to buy. It was a
18 black SHO Taurus, you know, a bigger car, maybe a faster car.

19 So his mother gives him this car. He got rid of it. He
20 got rid of it that day. There's no question that he sold the
21 car to Terrance Bryant. What's interesting is
22 Terrance Bryant testified that Tyrone called him about 11:00
23 that morning, and it's Terrance Bryant who's initiating this
24 telephone call to my client.

25 And during the course of the telephone -- no, excuse me,

1 my client called. I misspoke. My client called
2 Terrance Bryant that day about 11:00. But what's interesting
3 is during the course of that conversation, it was Terrance
4 Bryant that brought up the subject that he was looking for a
5 car.

6 It's not my client, you know, trying to call some
7 people, trying to sell this car to him for some -- I mean, it
8 just came up. Terrance Bryant said he was looking for a car.
9 Mr. Ellison's got a car that he doesn't really want and maybe
10 he wants to make a little bit more money so he can buy the
11 Taurus that he was looking for, that SHO Taurus.

12 So, sure, he's going to sell it. I mean, he knew
13 Mr. Bryant. They were longtime friends. They knew each
14 other for a long time, so he got it to him. He sold it to
15 him.

16 You heard Terrance Bryant and Ms. Youmans testify that
17 the money for the car that they bought from Tyrone came from
18 the checks that they received from the Denmark Tech. I guess
19 it's student aid money. So they both testified that they got
20 checks around mid March and then they got checks around the
21 1st of April. They both testified that they used the checks
22 from the 1st of April to pay for this car.

23 I'm sure by the time that police are talking to
24 Terrance Bryant about the car, when he came in contact with
25 it, that it might have been somehow involved in a bank

1 robbery, Terrance Bryant, with a conviction for strong-arm
2 robbery, already probably didn't want any contact with the
3 car, but he certainly -- maybe that helped him remember that
4 the car was -- that they -- he bought the car on April 1st as
5 opposed to sometime earlier or later in the month of March.
6 I don't know.

7 I do know that the stories of the -- I do know that the
8 transaction, the transfer of the title of the car to one
9 person to the other was kind of sloppy. The car -- I think
10 there's testimony the car never got registered.

11 I'm sure it's a fact that the car was bought in North
12 Carolina. Mr. Bryant's trying to flip it quickly, so he just
13 thinks maybe he can sign over the title to -- that he can
14 just sign over the title to Mr. Bryant, but I guess you heard
15 testimony from somebody at the DMV that first it would have
16 to get titled -- Mr. Ellison first had to get the car titled
17 in his name before he could give it to Mr. Bryant.

18 But you heard testimony from two people that live with
19 Tyrone Ellison. You heard from Annette McKinney; you heard
20 from her husband that they didn't see the car after the 23rd,
21 the 23rd of March. The first time they knew that Tyrone had
22 sold the car was when they saw him being driven back to the
23 house by his girlfriend. And they both testified that was a
24 couple days later.

25 The car was -- showed up at their house on March 23rd, a

1 Saturday. This might have been Sunday or Monday when they
2 saw Tyrone being chauffeured around by somebody else, and
3 they knew that the car was no longer -- that he no longer had
4 the car.

5 You heard Dennis McKinney testify to that same thing.
6 He's Tyrone's stepfather. I think he said he was a police
7 officer with DOD, Department of Defense. He worked on the
8 base. He -- again, he says that the first time he knew that
9 Tyrone didn't have the car is when he saw his girlfriend
10 driving him a few days -- a couple days later, and he never
11 saw the car after March 23rd. Tyrone's living at the house
12 at the time, but he doesn't have the car after March 23rd.

13 Now, I'm sure you're going to hear a lot about the
14 testimony of Annette McKinney. I'm expecting the State to
15 talk a lot about the fact that when she was interviewed by
16 police officers, she said that she was 75 percent, ultimately
17 she said that maybe she's 75 percent sure that the picture,
18 the person in the photograph was her son.

19 Now, there's two things about that I want you to
20 consider. You heard her testify that when the police
21 officers come to the house, she's been alerted that there has
22 been an automobile accident, a lot of blood. Her son was
23 involved in the accident. She doesn't know where her son is.

24 Mothers, I think, are going -- the first thing that
25 they're going to be worried about is, "Where's my son?"

1 Where's my son? Where's my son?"

2 They never told them -- during the course of this
3 interview with them, never told them where her son was. They
4 just kept wanting her to answer questions, wanting her to
5 say, "Is this your son in the picture? Is this your son in
6 the picture?"

7 So she said, "Yeah, I guess. I'm 75 percent sure."

8 I think mothers, when they see their children in a
9 costume, they're never 75 percent sure. A mother is going to
10 be 100 percent sure that it's their son, I mean that it's
11 their child underneath that costume. I mean, if they see any
12 portion of the face, they're going to know it's their child.

13 A mother who's saying that she's 75 percent that's her
14 child is really not sure at all. I mean, mothers, they're
15 going to know it's their child.

16 And again, I think Annette McKinney was just going to
17 say what she had to say in order to get more information to
18 find out where her son was, if he was -- how badly he was
19 injured in this accident and what hospital he was in.

20 Now, this robbery, this robbery was brash. I mean, the
21 robber was in and out of the bank in about 73 seconds. And
22 when you consider the gaps in the State's proof and the
23 gap -- I think the biggest gap in the State's proof is the
24 fact that the person emerging from the woods that got into
25 the Civic didn't have on the two biggest items of this

1 disguise, didn't have on the hoodie, didn't have on the
2 jacket. There's no explanation where the hoodie and the
3 jacket is.

4 When you consider the fact that there are no
5 fingerprints left by my client in the bank and the fact that
6 he may have had a glove in his hand at some time, it still
7 meant that every time he pressed down on a surface, every
8 time he reached down to pick up the gun, every time he
9 grabbed the handle of the door, you'll see him pushing on the
10 door, every time he did that, that glove was so much
11 protecting his hand, every surface of his hand, not even to
12 leave a partial fingerprint.

13 I think when you consider the fact that after
14 March 23rd, he didn't have the Civic anymore. Somebody else
15 was driving him around. Eventually he got a Ford Taurus.

16 When you consider the fact that Mrs. Green was counting
17 on my client to unload the trucks every Monday, excuse me,
18 the first of every month. That was Tyrone's job. Regardless
19 of whether or not he was on the schedule, he went in to
20 unload the truck. She was counting on him to do it. The
21 truck was unloaded that day.

22 When you consider the fact that there's a witness here
23 who testified that she was with him that day. Now, granted
24 Ms. Candida has got a record, just like Terrance Bryant has a
25 record. You have to decide what's believable and whether or

1 not Ms. Candida's going to -- with her record, whether or not
2 she -- I mean, she knows that if she gives testimony before
3 you all today after she's put her hand on the Bible and sworn
4 that that testimony was going to be the truth, she knows that
5 if that testimony's not true that she's subjected to perjury.

6 She may have as good a reason -- she may have the best
7 reason to make sure she's not giving inaccurate testimony,
8 because she doesn't like -- she doesn't need any more
9 trouble. She's had her troubles in the past. She's trying
10 to put those behind her.

11 When you ask yourself to consider that my client has an
12 alibi, I mean, I'm sure he'd rather have a much better alibi.
13 I'm sure that three months, when he's trying to explain
14 what's going on three months later, I'm sure he much rather
15 would have been playing softball with his parish priest, but
16 he wasn't.

17 He was with somebody, Burger King employee. He was
18 doing the job that he was supposed to be doing. There's
19 probably not a great paper trail showing that he was at the
20 Burger King that day, but that's where he was. That's what
21 Ms. Candida said.

22 You just have to ask yourself, when you look at my
23 client, do you think he's the man who pulled off this
24 robbery, whether it makes sense that he was that guy that
25 would run in there, jump over the counter, screaming at the

1 employees, know that those bank tellers, there's a second
2 drawer to be looking at, knowing that there's money in more
3 than one drawer for each teller, whether that makes sense
4 that that's Mr. Ellison or whether it makes more sense that
5 Mr. Ellison was the guy unloading the Burger King truck that
6 Monday, April 1st.

7 I think when you consider all those facts, I think
8 you'll return a verdict of not guilty on both counts. Thank
9 you. For your time.

10 THE COURT: Mr. Sorenson.

11 MR. SORENSON: Thank you, may it please the Court, Your
12 Honor.

13 I agree with Mr. Falk on a few things. There's no doubt
14 the morning of April 1st, 2013, the SunTrust Bank on
15 Dorchester Road, Quinn Rustin, Roberta Bass were robbed at
16 gunpoint with this gun. No doubt about it. I agree with
17 Mr. Falk that the only real issue, ladies and gentlemen, that
18 you all have to decide back in your jury room is whether this
19 man in that bank holding that gun on Ms. Rustin and Ms. Bass
20 is this man, that man (indicating), Tyrone Ellison.

21 It's very simple, ladies and gentlemen. That's really
22 the only question before you when you get back into your jury
23 room. So that's what I want to take the next few minutes and
24 talk about. I'm going to kind of focus kind of my arguments
25 to you in four different categories.

1 I want to talk to you first about the video and the
2 stills. I want to briefly kind of go through that with you
3 real quick, then I want to look at the items that were
4 recovered in the woods near the bank, then I want to talk to
5 you about the vehicle, and then lastly about some of the
6 witnesses that they put on the stand.

7 I realize you all had an opportunity to watch this, but
8 it probably went kind of quick when we were playing it with
9 the witnesses, and I want to be able to go back through.

10 Your Honor, may I lift the televisions up? Thank you.

11 I want to kind of go back through, but there's kind of a
12 few things, ladies and gentlemen, to kind of talk to you
13 about before I go through with you the several different
14 camera angles that I submit to you ultimately this video and
15 the stills prove.

16 I mean, obviously they prove without any doubt that the
17 bank was robbed that morning. No question about that. But
18 the other things that I'm going to kind of point out to you
19 as we go through it, Mr. Falk makes a big deal about there
20 are no fingerprints belonging to Tyrone Ellison.

21 You're going to have an opportunity to go through this
22 and ultimately see that the person that robbed the bank that
23 morning never touched anything where they would leave a
24 fingerprint, got something in his hands when he opens the
25 door to come in, comes across and jumps over the counter.

1 And you're going to see where he's got something
2 consistent with a white latex glove wrapped around, wrapped
3 around the handle of the gun that he's holding. You're going
4 to see in his other hand how he has -- and it's never
5 recovered, but a black -- it almost looks like a bank pouch,
6 a little money pouch if you were going to make a deposit, if
7 you worked at a business or something, in his other hand.

8 And you're going to see how this individual, when he
9 hops the counter, he's got both of those items in his hand,
10 how when he's behind the counter, dealing with Ms. Rustin and
11 Ms. Bass, he's got that thing open having them -- having
12 Ms. Rustin put the money in there.

13 He never touches anything back behind the counter, and
14 how ultimately then he hops over using the chair to go back
15 over and ends up dropping an item on the floor. There's no
16 video. You can't see what that is. I submit to you it may
17 have been the gun based on what the witnesses said they
18 heard -- heard fall at that point in time.

19 But Mr. Falk's making a big deal that he should have
20 been leaving fingerprints when he's bending down to pick up
21 the gun off the floor. I mean, where is the -- I mean, on
22 the floor? I mean, maybe he left a fingerprint on the floor,
23 but, I'm sorry, that's not typically, when you're processing
24 a crime scene, where you're going to start dusting the floor
25 of the bank for fingerprints.

1 But then you're going to see ultimately when he comes
2 back to that door and goes out, you can clearly see what is
3 that white latex glove in his hand, that he is using that as
4 a barrier, pulling on repeatedly, almost yanking those doors
5 off the hinges trying to get out, pulling instead of pushing.

6 And you're going to see, and I'll submit to you you'll
7 see on the video, the witnesses were mistaken about this.
8 It's not the glove. I think the glove may have fallen also,
9 but it was his visor and the gun that fall. And you'll see
10 that when he reaches down and picks up the gun, tries to pick
11 up the visor and kicks it, reaches out and grabs it, and then
12 he's out the bank. And the door is open at this point in
13 time, so he's not -- yet again, not touching it anywhere.

14 I want to start with right as he's coming in. As you
15 see, he's got right there what appears to be -- I'll back it
16 up -- black item in his hand, in his left hand as he reaches
17 out and opens up that -- opens up the thing. He walks in.
18 We'll go over to Teller Station 3, and you're going to see
19 him running across the lobby.

20 As he comes up, you're going to see right there as he
21 goes to vault over, and I'm going to show you another camera
22 angle that shows his other hand, but in his right hand, he's
23 got that gun. You can see the silver part of the slide of
24 the gun and something white wrapped around it, which I submit
25 to you is that latex glove. So that hand is not -- he

1 doesn't have a finger to touch to leave a fingerprint.

2 All right. Then we go to Teller Station 2, back up a
3 couple steps here. You'll see him coming over. As he comes
4 to come over, right there. And what's important about this,
5 okay, because, yet again, you see he's got a black item,
6 which I submit to you when you see him back behind the teller
7 station, is that black bank pouch.

8 But what else do you see in that picture on his left
9 wrist? It's a bracelet. And I don't want to talk a whole
10 lot about Ms. McKinney right now, but, you know, I asked her.
11 I mean, ladies and gentlemen, you have got your own eyes, 12
12 collective sets of eyes right there. That's not part of that
13 person's skin that you're seeing. It's a gold bracelet.

14 And what did we ultimately learn through the stipulation
15 that we entered into? That the defendant, Tyrone Ellison,
16 has in the past worn a gold bracelet on his left wrist. Gold
17 bracelet on his left wrist.

18 Now we jump over to the teller observation. I'm going
19 to let this just play out, but the main thing about this is
20 to see that you don't at any point in time see him touch
21 anything back there. So where are we supposed to be finding
22 fingerprints of Tyrone Ellison's? He jumps down.

23 Now, the whole time, and something else to keep in mind,
24 and you had an opportunity to see Ms. Rustin and Ms. Bass
25 testify. I mean, they're not -- I mean, they're both fairly

1 petite women. He's basically about their size. Yet again,
2 the same physical build as Tyrone Ellison.

3 He comes back over, he still has items in both of his
4 hands. He's reached down and uses that hand to kind of brace
5 himself, drops something, but he's holding that gun as he
6 goes over.

7 And I'm going to go through, this is the front exit,
8 screen by screen. He comes into view. Those are the still
9 photos that you have.

10 I submit to you, ladies and gentlemen, if that's not
11 that man right there, then I'm sorry for wasting you all's
12 time. I'm sorry for wasting this week of your life.

13 And the last couple things, I want to come back to the
14 front door. And yet again, watch his right hand as he comes
15 up to the door. I submit he's put the gun back in his --
16 back in his hoodie where it was when he initially came in.
17 Watch him in his right hand. I mean, he's got the -- he's
18 got the glove there. There's the visor goes down, drops
19 either the gun or the -- the gun or the -- and out he goes.

20 Back it up real quick, because I know that went pretty
21 fast there. See, he drops something in the middle of the --
22 kind of right inside the door there. It's either -- it might
23 be the gun. I think it's the gun, but it could conceivably
24 be, because it looks like he still has the glove in his right
25 hand, and then the visor is on the floor. He ultimately

1 bends down, picks that up, kicks the visor, picks it up.

2 I mean, yet again, Mr. Falk is saying we didn't get any
3 fingerprints. Where are they supposed to be getting
4 fingerprints from when he drops those items and he's reaching
5 down and picking them up? I mean, he's not putting his hand
6 on the door.

7 Then the last thing, just kind of dealing with the video
8 that you -- I submit just kind of corroborates the witness's
9 testimony would be kind of the bank -- the back of the bank
10 showing that's Club Course Road or Drive where witnesses
11 described seeing the individual run.

12 And there you see him taking off down the road. And
13 ultimately you lose sight of him kind of right as he gets
14 past Steel City Pizza. And I submit to you shortly after
15 that, he cuts over into the woods.

16 70-some-odd seconds, I would agree with Mr. Falk, that's
17 about how long I submit to you Tyrone Ellison was in that
18 bank. I submit to you completely, 100 percent, not
19 75 percent, I submit to you it's 100 percent consistent with
20 the defendant, Tyrone Ellison. Consistent in his facial
21 features, from what you see. Consistent with the same little
22 pencil thin mustache that's on his driver's license photo
23 three months after the incident. He's still got it
24 sitting -- sitting in court today. Consistent with his
25 jawline. Consistent with his nose, his mouth.

1 Even consistent when you see, looking at State's Exhibit
2 No. 28, as he's walking out. You know, obviously, everybody,
3 when they have their mouth just kind of, you know, not
4 smiling, they're not doing anything, you know, a lot of
5 people, you don't see their teeth at all. Other people you
6 do. He's walking out, you see his front teeth. Just like
7 you see his front teeth in his driver's license photo. It's
8 the same mouth. Same mustache, same jawline.

9 That brings us to kind of, you know, it's 100 percent
10 consistent with -- except for everything but the disguise,
11 okay? So that's going to bring us to the items that are in
12 the woods, all right?

13 I submit to you there's no doubt that gun, this visor,
14 you see the emblem in the pictures, this wig, that these were
15 involved in that bank robbery, okay? So let's talk about
16 briefly about those items, all right?

17 The wig and the visor, they are processed on June the
18 5th of 2013, almost a month before North Charleston Police
19 Department, anybody has any idea who Tyrone Ellison is. A
20 month before, okay? Processed by Ms. Betty Butler, all
21 right?

22 Ultimately we get his DNA, Tyrone Ellison's DNA, off of
23 those swabs off of these items. One in 2.2 quintillion. And
24 I'm not -- I went to law school because I didn't like math,
25 but that's 17 zeros. 2.2 and then 17 zeros. I submit to you

1 there is no doubt, no doubt at some point in time,
2 Tyrone Ellison had this women's wig on and sometime had this
3 visor on. No doubt.

4 All right. What else did they find? State's Exhibit
5 No. 15 is a latex glove, and it was tested. I'm going to
6 talk to you about that, but it's -- I mean, it hasn't even
7 been opened. That just shows -- the reason why I didn't open
8 this, I wanted to basically be able to show Dr. Bennett
9 didn't touch this. Didn't want to do anything with this, all
10 right?

11 And that latex glove, that latex glove that just happens
12 to be consistent with the latex gloves that you can get
13 working at Burger King, the same type of latex gloves that
14 Tyrone Ellison had in his vehicle three months later, all
15 right? Let's talk about this latex glove.

16 You heard Investigator Kubicsko say when she first
17 collected it, and obviously in hindsight, I'm sure that -- to
18 be honest with you, in hindsight, I wish she had just sent
19 the entire glove initially to SLED along with the visor and
20 the wig.

21 But needless to say, when she collected it, you know,
22 she made the assumption that, you know, the person, the bank
23 robber, most times when a glove is involved in a crime, the
24 person is wearing the glove.

25 What did she testify to you that she did initially?

1 Swabbed it for DNA in the inside palm and up in the
2 fingertips, figuring that's where, if a person was wearing
3 the glove, they would be sweating and leaving skin cells.
4 That gets sent out to SLED and comes back negative. There's
5 no -- none of his DNA. I think there was maybe a minor
6 partial print there, but it did not match Tyrone Ellison.

7 But what do we know? And obviously when we start
8 looking at the glove, it's not being worn like a glove. It
9 is being used as a barrier, so he's not leaving fingerprints
10 on the gun, which is why we don't find his fingerprints. We
11 don't find his DNA. We basically find nobody's fingerprints,
12 nobody's DNA on the gun.

13 So it gets sent back out there for them to process now
14 the outside of the glove, what would be in contact with his
15 skin if he was holding onto that gun and using it to open the
16 door in the bank.

17 And what are the results when that's done? The same as
18 with the hat and the visor: He's the major contributor, 1 in
19 2.2 quintillion. No doubt about it, he was holding onto this
20 glove. It came in contact with his skin at some point in
21 time.

22 And as I said, that's the same reason why we don't find,
23 you know, if this was a grand conspiracy to get
24 Tyrone Ellison, wouldn't you think when they sent the glove
25 and the gun back up to SLED they would have said, "Oh, yes,

1 we found his DNA on the gun also."

2 If this was some grand conspiracy that SLED and the
3 North Charleston Police Department had somehow hatched this
4 grand conspiracy, first of all, they had to have hatched it
5 prior to even knowing who he was, because, as I said, these
6 items were collected the morning of the bank robbery. The
7 visor and the wig are swabbed and tested out at SLED a month
8 before he's even identified as a suspect.

9 Yet we're somehow supposed to believe this is some grand
10 conspiracy that not only involves one officer but has got to
11 involve, you know, crime scene with North Charleston,
12 investigator with North Charleston and the State Law
13 Enforcement Division, but somehow they are going to
14 jeopardize their careers to pin a bank robbery on him. Does
15 that appeal to your common sense?

16 Now, one witness of the defense's I do want to just
17 briefly talk about here as opposed to kind of at the end is
18 Dr. Bennett. What does Dr. Bennett ultimately tell us, I
19 mean, in the grand scheme of things, everything that he
20 testified about?

21 He told us that SLED did a very thorough job. He
22 couldn't find anything improper in any of the paperwork, any
23 of the testing they did. They were cooperative with him.
24 They answered whatever questions he had, provided their
25 entire case file to him. And that ultimately, at the end of

1 the day, there's nothing he could find that they did wrong.

2 He was allowed access to whatever piece of evidence that
3 we have that he wanted. He was given -- the only two he
4 chose to do anything with were these (indicating). He was
5 given the glove.

6 Additionally, he had access to whatever other evidence
7 North Charleston Police Department had, including the initial
8 swabs of these two items, the wig and the visor, that
9 Detective Kubicsko took that are still sitting in the North
10 Charleston evidence room. He didn't want them, because the
11 fact of the matter is he's not going to be useful as a
12 witness for them.

13 If he finds DNA, it's going to be Tyrone Ellison's. You
14 know, the best case for him is to not find anything. I
15 submit to you that's why the subsequent test he did is
16 something looking for DNA embedded in the wig, embedded in
17 the visor. I mean, even from his own testimony, he didn't
18 expect to find the bank robber's DNA there.

19 These items, I submit to you, are not -- a women's wig
20 and a women's visor -- being worn by, I submit to you,
21 Tyrone Ellison but being worn by a suspect as a disguise.
22 That suspect's DNA is not going to be embedded in these
23 items. Yet again, that's some additional testing he did
24 basically just to kind of make it look like he did something
25 and that the State did something improper.

1 The fact of the matter, what it boils down to, about all
2 he can say is that Betty Butler, the evidence technician who
3 works for SLED for I think she said 18 years, that she did
4 too thorough of a job. He can't come in and say she did
5 anything improper. He can't say that she tampered with
6 evidence, destroyed evidence. All he can come in here and
7 say is that she was too thorough in her job.

8 I've been doing this for 19 years, and I can honestly
9 say that's the first time I've ever had a defense counsel and
10 an expert criticize law enforcement for doing too thorough of
11 a job, but that's what it boils down to.

12 I submit to you, in the grand scheme of things, all he
13 really does is vouch for the results of SLED. They did
14 nothing improper. They followed their protocol. There was
15 nothing abnormal he could find in any of the paperwork that
16 was submitted.

17 Let's turn to the getaway vehicle. I submit to you back
18 on the morning of April 1st, Tyrone Ellison thought he had
19 the perfect getaway. He robbed this bank, ran down the road,
20 cut through the woods, got rid of the visor, the wig, the
21 gun, the glove, pops out in an apartment complex where his
22 getaway vehicle is waiting for him.

23 If somebody sees that vehicle with the two of them
24 sitting in there, no long hair, nobody's going to think twice
25 about stopping that vehicle.

1 Mr. Falk made a big deal about the hoodie and all.
2 Mr. Lewis testified that when he saw the guy, remember, he --
3 and he was, I think, wrong about something he said.

4 David Lewis got in his vehicle and drove down into the
5 apartment complex. He wasn't on foot and then went back to
6 get his vehicle.

7 He pulls in, sees a vehicle that he thought looked out
8 of place in there, turns around, and at that point in time
9 sees an individual that he said looked like the person that
10 he had seen run into the woods, just without the -- without
11 the wig and the hat and the hoodie.

12 Has he got that stuff balled up in his arm? Because
13 he's -- remember, he's just running out of the woods and
14 hopping in the passenger seat of the vehicle. If he's
15 holding it, yet again, changing how he looks, he thought he
16 had the perfect getaway. Unfortunately, David Lewis ruined
17 that and kind of set into motion the events that had to
18 follow with regard to that vehicle.

19 The way we know that vehicle was involved in the
20 robbery, the way we know that vehicle was involved in the
21 robbery is because of what it does when Mr. Lewis gets behind
22 it, runs a red light, reaches speeds of almost 100 miles an
23 hour, weaving in and out of traffic, to the point where he's
24 got to pull back and basically stop trying to follow it.

25 That's not just some vehicle that happens to be coming,

1 you know, wrong place, wrong time, pulling out of an
2 apartment complex while the real robber had taken off further
3 into the woods. A vehicle that I submit to you its getaway
4 path it's taking, you heard Mr. Lewis testify is going back
5 towards Wescott Plantation, where he lived, I submit to you
6 the same place where he lived.

7 But he didn't count on having somebody getting --
8 following that vehicle, obviously getting a description, an
9 old Honda, four-door Accord, green Honda four-door Accord and
10 a partial license tag. I'm going to get to that in a second.
11 South Carolina 153 or 193 is the first three, okay?

12 And notwithstanding what Annette McKinney tells you on
13 this witness stand. I submit to you there's no doubt, no
14 doubt that Tyrone Ellison, on the morning of April 1st of
15 2013, had a green, four-door, older Honda Civic in his
16 possession, in his possession.

17 I want to briefly kind of just sum all this up just to
18 make sure there's not any question about it. And we know
19 there's no doubt that on March 23rd, I think everybody's in
20 agreement, Tyrone Ellison bought a Honda Civic and that it
21 was green, just from all the testimony from everybody, 2000
22 Honda Civic. Yet again, matching the description of the
23 getaway vehicle, okay?

24 No doubt about it that that went on his insurance, his
25 GEICO insurance effective the following day, March the 24th.

1 Now, if you would believe them, he doesn't even have the
2 vehicle anymore and it's insured.

3 No doubt about it that his prior vehicle that he had
4 insured with GEICO was a Hyundai Elantra with the license tag
5 153 3FX, consistent with the license tag that David Lewis
6 described on the vehicle and that that license tag was not
7 turned into the Department of Motor Vehicles until April the
8 13th of 2013, almost two weeks after our robbery. No doubt
9 about it that he cancels -- that GEICO insurance is not
10 canceled until April the 10th of 2013, all right.

11 Now, Ms. McKinney wants you to believe that the reason
12 it didn't get canceled until then was because they thought
13 that it was still maybe in their -- because the registration
14 hadn't been -- hadn't been transferred.

15 Keep in mind, according to her testimony, he basically
16 didn't possess this vehicle at all. He got it and turned
17 around and sold it the same day, so I don't know why they're
18 insuring it to start with. But her explanation, you heard
19 the GEICO representative said that, no, I mean, if you sell a
20 vehicle, the minute you call us and tell us you don't have
21 insurance on it because you sold it, it's canceled.

22 I submit to you that's what's done on April the 10th,
23 because the registration, all that stuff, still has never to
24 this day been registered in his name. I ask you, does that
25 make any sense?

1 And then we know that ultimately on April 16th that he
2 registered a Ford Taurus, a 1996 Ford Taurus. And this is
3 supposedly the vehicle, you know -- the vehicle that's so
4 much better than the vehicle that his mother bought him, that
5 he had to turn around and sell that the same day to buy a
6 1996 Ford Taurus. Does that appeal to your common sense?

7 Let's talk about Terrance Bryant, who I submit to you
8 proves -- is another piece in this puzzle, all right?

9 Terrance Bryant came in and testified that he's known the
10 defendant for 12 years or so, friends with the defendant,
11 friends with the defendant's family. He has family members
12 that are friends with them.

13 So first of all, I mean, what possible motive does he
14 have to lie about this? Okay? He doesn't look anything like
15 the person on the -- on the video. If he's trying to look
16 out for his buddy, he's going to go along with what he's got
17 to say, but he's not. He's telling you the truth. And he's
18 got documentation to back that up. To back that up.

19 Remember what they told us, both he and his girlfriend,
20 Ms. Youmans, their daughter's birthday was on March the 29th,
21 so they have a day to relate this to, okay? That they didn't
22 have the vehicle at that time, that Tyrone Ellison knew that
23 he was looking for a vehicle, and that he gets a call on the
24 morning of April 1st, 2013 at 11:00, 11:00.

25 I wonder what he was doing at 11:00 on April 1st? Bank

1 robbery's at 10:30. 30 minutes later, he knows that he's
2 being chased, has been chased. Somebody may have gotten that
3 tag. There's a description. That vehicle needs to get out
4 of the low country.

5 He didn't register it in his name. It doesn't even have
6 a correct license plate on it. It's got a license plate from
7 a prior vehicle. We can get that up to Orangeburg County, up
8 to Norway, I'm home free.

9 He makes a call, meets Terrance Bryant later on that
10 afternoon, sells him that vehicle for 900 bucks, gets a ride
11 back with two people in a white van.

12 Ms. McKinney, I submit to you, the one thing I think
13 she's probably right about is, yes, she saw -- she saw her
14 son and found out for the first time on a Monday, on a
15 Monday -- now, she says it's March the 25th, and I'm going to
16 talk about that in a second.

17 It was on a Monday that she saw him get dropped off and
18 say that he had sold the car to Terrance Bryant. Yes, it was
19 a Monday, it was Monday, April the 1st, and he rolls back in
20 without that vehicle, thinking he's home free at that point
21 in time.

22 But how else do we know? How else do we know? As I
23 told you, they tried to go register the vehicle the end of
24 that week, on April the 5th, and have the documentation to
25 show where Ms. Youmans had to pay off some reinstatement fees

1 on her license to be able to attempt to do it.

2 And then I submit to you, just to kind of further the
3 cover-up that they were trying to put on you, the defendant
4 and his family, then they try to get him to sign this with
5 the wrong date on it, and he doesn't.

6 Now, yet again, if there's nothing fishy going on, I
7 mean, and this is accurate, why wouldn't Terrance Bryant have
8 just signed this as the buyer and gone and registered the
9 vehicle? I submit to you what kind of shows you that he knew
10 something fishy was going on was the fact that he still had
11 all this stuff months and months later to give to law
12 enforcement.

13 At that point in time, he's gotten rid of the vehicle.
14 It's not working. He sold it for scrap, basically took a
15 loss on the vehicle, but he's kept all this paperwork. And I
16 submit to you that's because he knew something was going on.
17 They were trying to pull something over on him.

18 That kind of goes with the text message that I asked
19 Ms. McKinney if she admitted to being -- to sending to
20 Mr. Bryant where basically they're trying to get him to give
21 the vehicle back to Moses, the guy that basically had
22 delivered the vehicle initially to Mr. Ellison. You know,
23 "He don't know nothing about Tyrone in jail, so just give him
24 the paperwork and take the money. LOL. His name is Moses."

25 Yet again, trying to, you know, if that vehicle now

1 disappears back up to -- back up to Hemingway or Lake City or
2 wherever it was, I believe it was Lake City, I mean, it's no
3 connection to the low country, no connection to
4 Tyrone Ellison, no connection to any friends of
5 Tyrone Ellison, it's never been registered.

6 So it ultimately boils down, ladies and gentlemen, I
7 submit to you what we have proven was that he received a
8 Honda Civic on March the 23rd, got the windows tinted, I
9 talked to you about that with Ms. McKinney, then turned
10 around and sold that car nine days later without having
11 another vehicle on April the 1st. Does that make sense?

12 Or does what makes sense, ladies and gentlemen, on the
13 morning of April the 1st, he used that as his getaway from
14 this bank robbery and things went wrong. They were followed
15 by a witness and had to get rid of that vehicle.

16 Because what she says actually makes even --
17 Ms. McKinney makes even less sense. You know, listening to
18 her testimony is he turned around -- I mean, got to be the
19 most ungrateful child in the world. You buy him a vehicle,
20 and it's her testimony that he promptly turns around and
21 sells it the following day or that day.

22 Does that make any sense when he doesn't -- you know,
23 the whole idea was getting him a vehicle to drive him back
24 and forth to work, and he doesn't have another vehicle. Oh,
25 yes, he had his eye on one, but we know he didn't buy this,

1 you know, '96 Ford Taurus until April the 16th.

2 Let's talk about Ms. McKinney. The gist of her
3 testimony, I think, kind of came down, her direct testimony,
4 when Mr. Falk had her up there, there's two things, that he
5 got the car on March the 23rd, got rid of it within a day or
6 two, and that she saw him getting dropped off saying that he
7 had sold it to Terrance Bryant on March the 25th, Monday,
8 March the 25th. That's the one thing. I'm going to talk
9 about that.

10 And then the other one was that he had \$20,000 in an
11 account, in an account. If you notice, Mr. Falk didn't say a
12 word about that. Didn't say a word about that. \$20,000 in
13 that account. Why is that relevant? Why would he even have
14 asked her about that up on the witness stand?

15 The reason he asked her about it is so that he could get
16 up before you in his closing argument and say, "Why would
17 Tyrone Ellison rob a bank? He had \$20,000 in the bank. Why
18 on earth would that young man rob a bank?" He didn't get up
19 here and tell you that because he can't. He can't after we
20 found out about her cross-examination. Kind of popped that
21 balloon.

22 Remember back what she finally, and yet again, this goes
23 to kind of the credibility of the witnesses, you know, how
24 hesitant, forthright, they're trying to dodge a question.
25 Ultimately she admitted. It took a little while to get

1 there, but ultimately we got to the point where she admitted
2 having multiple telephone conversations with both her son and
3 another inmates at the Dorchester County Detention Center
4 with her son where she told him, "There's \$20,000 in your
5 savings account that I had put there that you didn't know I
6 had put in there or not. I put it there last year in March,
7 money you didn't have access to. They don't know if you had
8 access to it or not. That was your own money. They don't
9 know if that was your money or not. I put that money in your
10 account to get it from my account. My name ain't on that
11 account at USA Bank. All they know is you got \$20,000 in
12 your account."

13 I mean, that is offensive that she was attempting to do
14 that to get over on you all. Offensive.

15 Then later on that same day, talking to another inmate
16 on the phone, tells him that "He also had \$20,000 in his
17 savings account that he didn't know about because it was just
18 money that I had transferred in there, you know, so I didn't
19 have it in a noninterest bearing account, so I just moved it
20 there. God works in mysterious ways. Last year I just
21 happened to put that money in his account. It was only in
22 his name, but he didn't know about it."

23 It's offensive. I submit to you that's what she tried
24 to get that lawyer, and I'm not blaming him at all, because I
25 give him credit for the fact that he didn't get up here and

1 argue that to you after finding out on cross-examination what
2 she had said in the past.

3 The Civic, and I've touched a little bit about this, but
4 let me just kind of -- you know, I submit to you the evidence
5 shows that he got rid of that car on April 1st, and I submit
6 to you her cross-examination corroborates that.

7 On July 2nd of 2013, when law enforcement's talking to
8 her, telling her her son is in an accident, "We're trying to
9 find him," and start talking to her about his prior vehicle,
10 she tells them at that point in time that she didn't know the
11 dates, didn't know when he got the vehicle, didn't know when
12 he sold it, maybe had been a few weeks but that she had
13 gotten the windows tinted. And shortly after, he said he
14 sold it to Terrance Bryant when she saw him getting dropped
15 off on April the 1st of 2013.

16 Now we're supposed to believe that this Honda Civic, not
17 only did they buy, they tinted the windows, then he's turning
18 around and selling it basically for a loss nine days later
19 and there's nothing hinky about that?

20 You know, that's her son. Go back to kind of
21 credibility issues I talked about earlier. There's some
22 stake in this outcome. Does she have some bias or prejudice?
23 Is her testimony corroborated, her direct testimony
24 corroborated by anything or is it basically struck down by
25 her own words, her own prior inconsistent statements to law

1 enforcement, her own son and to another inmate at the jail.

2 I'm not even going to -- I mean, you obviously have seen
3 the pictures. I mean, she -- you know, it's hard to believe
4 she could get up there in good conscience and look at you all
5 and tell you that that picture, that bank robbery picture
6 does not look anything like her son, but that's ultimately
7 your decision.

8 The last thing I want to talk about -- and I'm just
9 about done. I appreciate your patience -- is the alibi. You
10 know, the one thing we do know is that -- from those
11 witnesses or from Ms. Green, the manager, that he would have
12 had access back in April to latex gloves, to latex gloves at
13 Burger King.

14 The fact of the matter, when you look at this alibi, and
15 I submit to you there's absolutely no credible evidence that
16 Tyrone Ellison was working at Burger King the morning of
17 April 1st of 2013. If you look at the first witness they
18 called, the manager, Ms. Green. And again, remember when I
19 talked to you about judging credibility, your opportunity to
20 observe, her testimony was she never worked on Mondays, so
21 there's no way she can get in here and tell you that
22 Tyrone Ellison worked on the morning of Monday,
23 April 1st, 2013, because she wasn't there.

24 He could have worked every other Monday. That doesn't
25 matter. It doesn't matter if he worked March 25th,

1 March 18th, March 11th. It doesn't matter if he worked
2 April 8th, April 15th. That doesn't matter. What matters is
3 where he was on the morning of April 1st, and she cannot get
4 on that witness stand and tell you that he did because she
5 wasn't there.

6 So let's look at the other witness they called,
7 Ms. Candida Payne, all right? You know, on direct -- direct
8 examination, Mr. Falk asked her if she had been in any
9 trouble before. Yes, shoplifting. It's a little more than a
10 shoplifting. It's actually six shopliftings. That's in the
11 last ten years. Financial transaction card fraud, defrauding
12 a restaurant and then giving false statement to obtain some
13 sort of a license.

14 And that's who we're supposed to believe that
15 Tyrone Ellison was working that morning. And, you know, she
16 comes in, and it's real easy to look back, you know, a year
17 later when you're giving this affidavit to the defense
18 counsel. You know, you're not going to law enforcement and
19 telling them, "Oh, there's no way he could have done this
20 bank robbery. I was with him. He was working," but when you
21 give an affidavit to the defense counsel to sit and look at,
22 well, what's -- you know, what could be unique about
23 April the 1st? It's April Fool's Day. Put that in the
24 affidavit. That's how I know that he had to have been there.

25 I would give her a little more credit if she had come in

1 and, you know, told about some elaborate April Fool's joke
2 that Tyrone Ellison played on everybody at the Burger King,
3 but there are no specifics to that. It's just, "It was April
4 Fool's Day. That's how I know he was working there."

5 But how do we know that she doesn't actually remember
6 that day? You know, she gives this affidavit, as I said,
7 almost a year later, in March of 2014, okay, saying that,
8 "Oh, yes, he had to. He was working there. No doubt about
9 it, because it was April Fool's Day, and he gave me a ride
10 home. He gave me a ride home in his black Ford Taurus."

11 Well, the problem with that, ladies and gentlemen, is
12 that black Ford Taurus wasn't registered to Tyrone Ellison,
13 and according to his mother's statement, even, didn't get
14 that black Ford Taurus until April 16th. That's when it was
15 registered with the Department of Motor Vehicles. That's
16 when it was put on his GEICO insurance, the middle of April.
17 Shows right there that she does not know what she's talking
18 about. I submit to you no credible evidence.

19 The Burger King records, and I'm not going to go through
20 all of them. You have them. If you want to hunt through
21 them, you're welcome to. If you'll take my word for it, they
22 show that Tyrone Ellison was not clocked in, did not clock in
23 on April 1st.

24 They do show that Ms. Payne, his alibi witness, did work
25 that morning, did work that morning, and that there are two

1 other young men that worked that morning from 6 a.m. to
2 11 a.m. when this truck would have come in, a
3 Christopher Coburn and a Tyrone Bailey.

4 Yet according to the initial witness, Ms. Green -- he's
5 the only young man that worked at that Burger King basically
6 was kind of the gist I got out of it.

7 Ladies and gentlemen, I want to kind of conclude now,
8 and I'm sorry if I've been a little longwinded. As I said
9 when I first started and got up here at the beginning of the
10 closing arguments, I want to thank you. And I don't actually
11 want to thank you for your time, because I know that you
12 really didn't have a choice in the matter and that you were
13 told when to be here.

14 Unfortunately, when myself and Mr. Falk picked the 12 of
15 you to be fair and impartial jurors in this case, you really
16 didn't have a choice in the matter. You had to be back
17 whenever His Honor told you to be here, but what I want to
18 thank you for is not your time but your attention, because
19 I've paid attention to you this week, and you've been
20 attentive to the lawyers, to the witnesses and attentive to
21 myself and Mr. Falk in closing arguments. And it's that
22 attention that I'm sure you're going to continue to give in a
23 few minutes when you get back to your jury room and you
24 finally can begin deliberating.

25 Ladies and gentlemen, at this point in time, the

1 puzzle's put together. All the pieces are together, and I
2 submit to you and respectfully ask you on behalf of the State
3 of South Carolina, the people of Dorchester County, when you
4 go back and look at that puzzle, all those pieces put
5 together, I submit to you there's only one verdict, one
6 truthful, one just verdict in this case. That's a verdict
7 that answers that question I asked you at the beginning: Is
8 this Tyrone Ellison?

9 I submit to you it's a verdict that holds that man right
10 there guilty, holds him responsible, holds him accountable
11 for what he put those two young women through the morning of
12 April 1st of 2013. Thank you.

13 THE COURT: All right. Ladies and gentlemen, what I am
14 going to do at this time, before I give you the charge on the
15 law, I'm going to give you a brief break. Please step to the
16 jury room. Do not discuss the case. I'll get you back out
17 here in just a minute. I'll give you the charge on the law
18 and I will give it to you to deliberate. Please step to the
19 jury room.

20 (The jury retires to the jury room at 11:44 a.m.)

21 THE COURT: Stand down for just a minute.

22 (Recess held.)

23 THE COURT: All right. Anything from the State before
24 we bring the jury back out?

25 MR. SORENSON: No, Your Honor.

1 THE COURT: Defense counsel?

2 MR. FALK: No, Your Honor.

3 THE COURT: Bring me the jury, please.

4 While you all are sitting there, why don't the lawyers
5 come up here and look at the items of evidence and make sure
6 that's in order, so once I finish my charge, everything can
7 go on back and they're not sitting there for five minutes,
8 ten minutes, wondering whether or not they can begin
9 deliberating.

10 All right. When I start my charge, I want the door
11 locked. Nobody can come in and out of here once I start my
12 charge on the law. I don't want the jury distracted in any
13 way. So if you need to leave or if you so desire to leave,
14 now is your time to do so.

15 (Brief pause.)

16 THE COURT: Bring me the jury.

17 (The jury enters the courtroom at 11:58 a.m.)

18 THE COURT: All right. Ladies and gentlemen,
19 Mr. Foreman, it is now my duty as the trial judge under the
20 constitution of this State to charge and instruct you on the
21 law applicable to this case. It is your duty as jurors to
22 accept and apply the law as I will now state it to you.

23 Furthermore, it is your exclusive duty to decide all the
24 issues of fact in this case and to determine the effect,
25 value, weight and truth of the evidence. Both the State and

1 the defendant have a right to expect that you will carefully
2 consider and evaluate the evidence and apply the law of this
3 case to it so that in the end, both the State of South
4 Carolina and the defendant will receive a fair and impartial
5 trial.

6 I want you to understand that when I use the word
7 "defendant," I refer to Mr. Tyrone Darius Ellison. The
8 charges alleged in the indictment, ladies and gentlemen, are
9 Count 1 being armed robbery, and 2, entering a bank or
10 depository or building and loan association with intent to
11 steal.

12 To these charges the defendant has entered a plea of not
13 guilty. This plea of not guilty places the burden of proof
14 on the State to prove the guilt of the defendant to you, the
15 jury, beyond a reasonable doubt.

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

24 And as I mentioned above, the indictment in this case
25 alleges two separate and distinct offenses against the

1 defendant. You must decide each charge separately on the
2 evidence and the law applicable to it, uninfluenced by your
3 decision as to any other charge. The defendant may be
4 convicted or acquitted on any or all of the offenses charged.

5 As stated previously, you will be asked to write a
6 separate verdict of guilty or not guilty for each charge
7 alleged in the indictment. It is vital to understand that
8 the defendant, ladies and gentlemen, is presumed under the
9 law to be innocent of these charges. The defendant has no
10 obligation to prove his innocence.

11 It is a fundamental rule of our law that a defendant,
12 irrespective of the seriousness of the charges against him,
13 is always presumed innocent of the crimes for which he is
14 charged unless and until his guilt has been proven by
15 evidence that satisfies you, the jury, beyond a reasonable
16 doubt.

17 Now, the presumption of innocence is not a mere legal
18 theory or a legal phrase. The presumption of innocence is
19 very important, and you need to understand that this
20 presumption accompanies the defendant from the time of his
21 arrest and appearance in this Court and continues with the
22 defendant even after you retire to the jury room to
23 deliberate.

24 In other words, the defendant receives the benefit of
25 the presumption of innocence until the very end of this

1 trial, when you, the jury, will deliberate upon the evidence
2 and decide whether the State has proven his guilt beyond a
3 reasonable doubt.

4 Now, what is a reasonable doubt in the law? A
5 reasonable doubt is the kind of doubt that would cause a
6 reasonable person to hesitate to act. Proof beyond a
7 reasonable doubt is proof that leaves you firmly convinced of
8 the defendant's guilt.

9 Now, there are very few things in this world that we
10 know, ladies and gentlemen, with absolute certainty, so even
11 in criminal cases, the law does not require proof that
12 overcomes every possible doubt.

13 However, if, based on your consideration of the
14 evidence, you are firmly convinced that the defendant is
15 guilty of the crime charged, you must find him guilty. If,
16 on the other hand, you think there is a real possibility that
17 he is not guilty, you must give him the benefit of the doubt
18 and find him not guilty.

19 Jurors, please understand that reasonable doubt may
20 arise from evidence which has been presented in the case or
21 from the lack of evidence in the case. It is your
22 responsibility to determine whether or not reasonable doubt
23 exists as to the guilt of this defendant.

24 I charge you that the defendant is entitled to every
25 reasonable doubt arising in the whole case. If upon any

1 issues of fact essential to conviction and a verdict of
2 guilty you have a reasonable doubt as to how that issue
3 should be resolved, it would be your duty to resolve that
4 reasonable doubt in favor of the defendant.

5 Now, during this trial you and I have had separate
6 duties to perform. As the trial judge, it is my
7 responsibility to preside over this trial, and I also have
8 the duty to rule upon the admissibility of the evidence
9 offered during the process of this trial.

10 In that regard, you are to consider only the competent
11 evidence before you and you are to disregard from your mind
12 any testimony ordered stricken from the record of this case
13 during the progress of this trial if there was any, and you
14 are to consider only the testimony which has been presented
15 from this witness stand together with any exhibits admitted
16 into the record of this case and any stipulations of counsel
17 made into the record.

18 Furthermore, I have the additional duty to charge you on
19 the applicable law of this case and, in that regard, I am the
20 sole judge of the law of this case. It is your duty to
21 accept and apply the law as I state it to you.

22 If you have any preconceived ideas as to what the law is
23 or what the law ought to be and it does not agree with what I
24 tell you the law is, you are obligated under your oath to
25 abandon these preconceptions because you are sworn to accept

1 the law precisely as I state it to you.

2 In this trial, ladies and gentlemen, you are the sole
3 and exclusive judge of the facts and I am the judge of the
4 law. Do not infer that I have any opinion about the facts in
5 this case from anything I have said during the course of this
6 trial in ruling upon the admissibility of evidence or
7 otherwise or from anything that I say during the course of
8 this charge to you.

9 In this regard, the law simply does not permit me to
10 have an opinion about the facts. As jurors it is your duty
11 and your duty alone to determine the effect, value, weight
12 and truth of the evidence presented during the course of this
13 trial.

14 Now, in determining what the facts in this case are, you
15 must judge the credibility, which simply means the
16 believability, of the witnesses and the value of weight to be
17 given to their testimony. You alone must decide the force,
18 effect and truth of the testimony.

19 Now, in making this decision there are many things that
20 you may and should take into consideration: Such as the
21 appearance and manner of the witness on the witness stand, a
22 characteristic often referred to as the demeanor of the
23 witness; was the witness forthright or hesitant; was the
24 witness's testimony consistent or did it contain
25 discrepancies; what was the ability of the witness to know

1 the facts about which he or she testified; did the witness
2 have a cause or reason to be biased and prejudiced in favor
3 of the testimony he or she gave; was the testimony of the
4 witness corroborated or made stronger by other testimony and
5 evidence or was it made weaker or impeached by such other
6 testimony and evidence.

7 As jurors, please understand you have the right to
8 believe a small portion of a witness's testimony and discard
9 the larger portion or vice versa. You may believe all of a
10 witness's testimony or none. You may believe the testimony
11 of a single witness against that of many witnesses or the
12 other way around.

13 In exercising your mental processes and attempting to
14 decide the truth, the law simply requires that you exercise
15 your good judgment, your common sense, your sense of logic
16 and reason and your experiences in life. You then apply
17 these attributes to the evidence and apply the law as I state
18 it to you and thus arrive at a verdict.

19 Now, there are two types of evidence which are generally
20 presented during a trial: Direct evidence and circumstantial
21 evidence. Direct evidence directly proves the existence of a
22 fact and does not require deduction. Circumstantial evidence
23 is proof of a chain of facts and circumstances indicating the
24 existence of a fact.

25 Crimes may be proven by circumstantial evidence. The

1 law makes no distinction between the weight or value to be
2 given to either direct or circumstantial evidence; however,
3 to the extent the State relies on circumstantial evidence,
4 all of the circumstances must be consistent with each other
5 and, when taken together, point conclusively to the guilt of
6 the accused beyond a reasonable doubt.

7 If these circumstances merely portray the defendant's
8 behavior as suspicious, the proof has failed. The State has
9 the burden of proving the defendant guilty beyond a
10 reasonable doubt. This burden rests with the State
11 regardless of whether the State relies on direct evidence,
12 circumstantial evidence or some combination of the two.

13 There's been evidence presented during the course of
14 this trial, ladies and gentlemen, that witnesses have made
15 prior statements which are not consistent with the witness's
16 present testimony. You may use this evidence to decide
17 whether to believe the witness. You may also use evidence of
18 the earlier contradictory statements to determine the truth
19 of those statements. It is up to you to decide whether to
20 believe the earlier statements or the testimony given at
21 trial.

22 If a witness is shown to have knowingly testified
23 untruthfully concerning any material matter, you may consider
24 this in determining whether to trust the witness's testimony
25 as to other matters. You may reject all testimony of that

1 witness or give all or part of the testimony the weight you
2 think it deserves.

3 You have also heard testimony from individuals who had a
4 past criminal record. A person who has a past criminal
5 record is competent to testify during a trial. A past record
6 does not affect the ability of that witness to testify. The
7 past record may only be considered by you, if at all, in
8 determining the witness's believability.

9 Remember, you are the sole judge of the facts in this
10 case and of the believability of any and all of the
11 witnesses.

12 In this case you also heard the testimony of someone who
13 was qualified as an expert. The rules of evidence ordinarily
14 do not permit witnesses to testify to opinions or
15 conclusions. An exception to this rule exists for witnesses
16 we call expert witnesses. A witness who by education and
17 experience has become an expert in some art, science,
18 profession or calling may state an opinion as to a relevant
19 and material matter in which the witness claims to be an
20 expert and may also state the reasons for the opinion.

21 You should consider any expert opinion received in
22 evidence in this case and, like any other evidence, give it
23 the weight that you think it deserves. If you decide that
24 the opinion of an expert witness is not based on sufficient
25 education and experience or if you conclude that the reasons

1 given in support of the opinion are not sound or that the
2 opinion is outweighed by other evidence, you may disregard
3 the opinion entirely.

4 Furthermore, an expert witness's testimony is to be
5 given no greater weight than that of other witnesses simply
6 because the witness is an expert. Further, you are not
7 required to accept an expert's opinion even though it is not
8 contradicted.

9 Now, I instruct you, ladies and gentlemen, and I
10 emphasize that the fact that the defendant did not testify is
11 not a factor to be considered by you in any way in your
12 deliberations and in your consideration on the question of
13 the guilt or innocence of the defendant. It must not be
14 considered by you in any manner whatsoever. A defendant has
15 the constitutional right to remain silent and the assertion
16 of this right must not be considered by you in your
17 deliberations.

18 I repeat, under your oath, you are to draw no conclusion
19 whatsoever from the fact that the defendant in this case did
20 not testify. The fact that this defendant did not testify
21 should not even be discussed in the jury room.

22 The burden of proof, as I have stated to you, is on the
23 State. The defendant is not required to prove his innocence.
24 The burden of proof remains on the State to prove guilt
25 beyond a reasonable doubt.

1 Now, the defendant, ladies and gentlemen, has raised the
2 defense of alibi. Now, in order to establish an alibi, it
3 must be shown that the defendant was at another specified
4 place at the time the crime was committed and that it was,
5 therefore, impossible for the defendant to have been at the
6 scene of the crime. Mere denial of presence at the scene of
7 a crime does not constitute an alibi.

8 There is no burden on the defendant to prove an alibi.
9 The burden is on the State to prove beyond a reasonable doubt
10 that the defendant was actually present at the scene of the
11 crime, actually participated in it and was not somewhere
12 else. In other words, the State has the burden of disproving
13 the defendant's alibi defense.

14 Now, in order to establish criminal liability, criminal
15 intent is required. For example, the mental state required
16 to be proven by the State for a particular crime might be
17 purpose, intent, knowledge, recklessness or criminal
18 negligence.

19 Criminal intent must be proven by the State beyond a
20 reasonable doubt. Criminal intent is always a matter that
21 must be determined by the jury from the circumstances
22 surrounding the situation. There is no way to prove intent
23 to a mathematical certainty.

24 There is no way that medical science can dissect a
25 person's brain and determine what the person had in mind, so

1 the law says that criminal intent may be inferred from the
2 circumstances shown to have existed. This is how you make a
3 determination of whether or not the element requiring intent
4 was present.

5 It is not necessary to establish intent by direct and
6 positive evidence, but intent may be established by inference
7 in the same way as any other fact, by taking into
8 consideration the acts of the parties and all the facts and
9 circumstances of the case.

10 Criminal intent is a mental state, a conscious
11 wrongdoing. It is up to you to determine what the defendant
12 intended to do based on the circumstances shown to have
13 existed. Criminal intent can arise from action or a failure
14 to act. It may arise from negligence, recklessness or an
15 indifference to duty or to consequences that is considered by
16 the law to be the equivalent of criminal intent.

17 Now, the defendant, ladies and gentlemen, is charged
18 with armed robbery. In order to prove this offense, the
19 State must first prove beyond a reasonable doubt that the
20 defendant took personal property from the person or presence
21 of another person.

22 Property is in the presence of a person if it is within
23 the person's reach, inspection, observation or control so
24 that the person could, if not overcome with violence or
25 prevented by fear, keep possession of the property.

1 The State must also prove beyond a reasonable doubt that
2 the defendant carried the property away, intending to
3 permanently deprive the owner of the property and to keep the
4 property for the defendant's own use. The slightest removal
5 of the property or the complete possession of the property,
6 even for an instant by the defendant, is sufficient to show a
7 taking and carrying away of the property. The taking and
8 carrying away of the property must have been done with
9 violence or by putting the owner of the property in fear of
10 violence.

11 Finally, the State must prove beyond a reasonable doubt
12 that the defendant was either armed with a deadly weapon
13 during the robbery or that he alleged, either by action or
14 words, that he was armed while if using a representation of a
15 deadly weapon or any object which a person present during the
16 commission of the robbery reasonably believed to be a deadly
17 weapon.

18 A deadly weapon is any article, instrument or substance
19 which is likely to cause death or great bodily harm. Whether
20 an instrument has been used as a deadly weapon depends on the
21 facts and circumstances of each case. The following are
22 examples of instruments which may be deadly weapons: A
23 pistol, a shotgun, a rifle, a dirk, a dagger, a knife, metal
24 knuckles, a razor, gasoline, a firebomb or Molotov cocktail
25 and lighter fluid. A gun may be a deadly weapon even if it

1 is not operating.

2 The defendant is also, ladies and gentlemen, charged
3 with entering a bank depository or building and loan
4 association with the intent to steal. In order to prove this
5 offense, the State must prove beyond a reasonable doubt that
6 the defendant unlawfully entered a building or part of a
7 building occupied as a bank, depository or building and loan
8 association with the intent to steal money or securities for
9 money either by force, intimidation or threats.

10 Now, ladies and gentlemen, I am now drawing near the end
11 of my charge, and I want you to clearly understand that you
12 are not partisans or advocates for the State of South
13 Carolina or the defendant. It is your duties by your joint
14 deliberations to determine the truth in this case, giving to
15 the defendant the benefit of every reasonable doubt on each
16 and every issue. Then to the facts which you determine to be
17 true, you should take and apply the law which has been given
18 to you by this Court and thus arrive at a verdict which
19 speaks the truth in this case.

20 In fact, the word "verdict," which has a Latin
21 derivative, means a true saying. Thus when you have
22 accomplished these responsibilities, you will have satisfied
23 your oath as jurors and you will have discharged your duty to
24 this Court.

25 Now, once you retire to the jury room, the bailiff will

1 give the verdict form to the foreman. When you, the jury,
2 arrive at a verdict as to the offenses charged in this case,
3 the foreman will select the verdict as to the charge on the
4 verdict form.

5 If the State has failed to prove the guilt of the
6 defendant beyond a reasonable doubt, your verdict will be not
7 guilty. Likewise, if the State has proven the guilt of the
8 defendant beyond a reasonable doubt, your verdict will be
9 guilty.

10 Now, once a decision has been made, the foreman will
11 check whichever choices the verdict of the jury is as to each
12 charge. The verdict that you render in this case, ladies and
13 gentlemen, must be, must be the verdict of each and every
14 juror. It must be your unanimous verdict. All 12 of you
15 must agree on the verdict which you authorize the foreman to
16 write for the jury.

17 Now, ladies and gentlemen, I want you to further
18 understand that the order in which the choices of verdict
19 appear on the verdict form are not suggestive of any verdict
20 on the part of this Court. The verdict in this case is to be
21 determined by you, the jury, not the Court.

22 Furthermore, please understand that even though I will
23 give the verdict form to the foreman, it is not his verdict
24 alone. It is the verdict of all 12 of you, and I emphasize
25 again, it must be unanimous.

1 Now, I'm also going to give you a copy of these
2 instructions in written form. During your deliberations, you
3 may refer to the instructions to guide your decision-making.
4 You must consider the instructions as a whole and not follow
5 some and ignore others.

6 Mr. Foreman, please return these instructions to the
7 Court at the time that the jury's verdict is rendered.

8 What I am now going to do is ask you to retire to the
9 jury room, but do not begin your deliberations until you're
10 instructed to do so. The law, the law requires that I now
11 consult with the attorneys to make sure that I have not left
12 anything out of the these instructions.

13 Now, after I have spoken with the attorneys, the bailiff
14 will bring in a copy of these instructions along with the
15 items of evidence and instruct you to begin your
16 deliberations.

17 Now, during your deliberations, if you have any
18 questions, there will be pen and paper or pencil and paper in
19 the jury room. Mr. Foreman, it will be your added
20 responsibility, if the jury has any questions, to reduce such
21 question to writing, sign and date it, get it to the bailiff,
22 knock on the door, let the bailiff know you have a question,
23 give it to her. They will get it to me and I will respond
24 however the Court deems appropriate.

25 Furthermore, once you all have reached a verdict, again,

1 as to each charge, two questions. First question being as to
2 the charge of armed robbery. We, the jury, unanimously find
3 the defendant, Tyrone Ellison, guilty or not guilty, whatever
4 the jury's decision. You authorize the foreman to write for
5 the jury, which must be unanimous.

6 Then you move to Question 2, as to the charge of
7 entering a bank, depository or building and loan association
8 with the intent to steal, we, the jury, unanimously find the
9 defendant, Tyrone Ellison, either guilty or not guilty.

10 Once you answer both questions, Mr. Foreman, sign and
11 date the verdict form, knock on the door, let the bailiff
12 know that you all have reached a verdict and we will get you
13 back into the courtroom as quickly as possible.

14 Now, at this time I'm going to ask you to step to the
15 jury room, but do not, do not begin your deliberations until
16 you're instructed to do so. We'll let you know here in just
17 a minute.

18 (The jury retires to the jury room at 12:23 p.m.)

19 THE COURT: All right. Any exception, objection to the
20 charge by the State?

21 MR. SORENSON: No, Your Honor.

22 THE COURT: Defense counsel?

23 MR. FALK: Renew my former objection.

24 THE COURT: So noted for the record. Court's rulings,
25 however, remain the same, but they are so noted for the

1 record, okay?

2 All right. Each of you all went through the jury charge
3 as well as the verdict form. Didn't you see the verdict
4 form, Mr. Falk?

5 MR. FALK: Yes, Your Honor.

6 THE COURT: Mr. Sorenson?

7 MR. SORENSON: Yes, sir.

8 THE COURT: All right. If the bailiff can get these and
9 the items of evidence, which have already been reviewed by
10 each of the attorneys, placed into a box. Bailiff will take
11 that box, along with my instructions and the verdict form,
12 back to the jury, give it to them, tell them they can begin
13 their deliberations. All right. We'll stand at ease.

14 (Verdict form and evidence delivered to jury with
15 instruction to begin deliberating at 12:24 p.m.)

16 (Recess held.)

17 THE COURT: It's my understanding we have a verdict in
18 the case. Anything from the State before I bring the jury
19 out?

20 MR. SORENSON: No, Your Honor.

21 THE COURT: Defense counsel?

22 MR. FALK: No, Your Honor.

23 THE COURT: All right. I will remind everybody in this
24 courtroom, whatever the verdict may be, keep your emotions in
25 check. Your failure to do so could result in you being held

1 in contempt of court and being sentenced to a period of
2 incarceration. If you do not believe that you can hold your
3 emotions in check, regardless of what the verdict is, now is
4 your time to leave the courtroom.

5 All right. Bring me the jury, please.

6 (The jury enters the courtroom at 1:02 p.m.)

7 THE COURT: Madam Clerk.

8 Ladies and gentlemen of the jury, have you all reached a
9 verdict?

10 THE FOREPERSON: Yes, sir.

11 THE COURT: Could you hand the verdict to the clerk of
12 court, please.

13 All right. The verdict appears to be in order.

14 Madam Clerk, you may publish the verdict.

15 CLERK OF COURT: In the matter of the State of South
16 Carolina versus Tyrone Ellison, Indictment
17 Nos. 2014-GS-18-0325 and 2013-GS-18-1271, as to the charge of
18 armed robbery, we, the jury, unanimously find the defendant,
19 Tyrone Ellison, guilty.

20 As to the charge of entering a bank depository or
21 building and loan association with the intent to steal, we,
22 the jury, unanimously find the defendant, Tyrone Ellison,
23 guilty. Signed and dated by foreperson, October 24th, 2014.

24 THE COURT: All right. Mr. Falk, anything from the
25 defense counsel before I release the jury?

1 MR. FALK: Your Honor, we'd ask if we could poll the
2 jury to make sure the verdict was unanimous.

3 THE COURT: Madam Clerk, if you'd poll the jury, first
4 by stating the juror number, asking them whether or not this
5 is their verdict and whether or not it is still their
6 verdict. I think all of you should know your juror number.
7 If not, it's on your -- I've been told it's on your badge.

8 CLERK OF COURT: Juror No. 130, please stand.

9 THE COURT: Juror No. 130, would you please stand.

10 CLERK OF COURT: Was this your verdict in the jury room?

11 JUROR NO. 130: Yes, it was.

12 CLERK OF COURT: Is this still your verdict?

13 JUROR NO. 130: Yes.

14 CLERK OF COURT: Juror No. 75, was this your verdict in
15 the jury room?

16 JUROR NO. 75: Yes.

17 CLERK OF COURT: Is this still your verdict?

18 JUROR NO. 75: Yes.

19 CLERK OF COURT: Juror No. 24, was this your verdict in
20 the jury room?

21 JUROR NO. 24: Yes, it was.

22 CLERK OF COURT: And is this still your verdict?

23 JUROR NO. 24: It is.

24 CLERK OF COURT: Thank you.

25 Juror No. 125, was this your verdict in the jury room?

1 JUROR NO. 125: Yes.

2 CLERK OF COURT: Is it still your verdict?

3 JUROR NO. 125: Yes.

4 CLERK OF COURT: Juror No. 123, was this your verdict in
5 the jury room?

6 JUROR NO. 123: Yes, ma'am.

7 CLERK OF COURT: Is it still your verdict?

8 JUROR NO. 123: Yes, ma'am.

9 CLERK OF COURT: Juror No. 33, was this your verdict in
10 the jury room?

11 JUROR NO. 33: Yes, ma'am.

12 CLERK OF COURT: Is it still your verdict?

13 JUROR NO. 33: Yes, ma'am.

14 CLERK OF COURT: Juror No. 109, was this your verdict in
15 the jury room?

16 JUROR NO. 109: Yes, ma'am.

17 CLERK OF COURT: And is it still your verdict?

18 JUROR NO. 109: Yes, ma'am.

19 CLERK OF COURT: Juror No. 112, was this your verdict in
20 the jury room?

21 JUROR NO. 112: Yes, it was.

22 CLERK OF COURT: Is it still your verdict?

23 JUROR NO. 112: Yes, it is.

24 CLERK OF COURT: Juror No. 14, was this your verdict in
25 the jury room?

1 JUROR NO. 14: Yes, ma'am.

2 CLERK OF COURT: Is this still your verdict?

3 JUROR NO. 14: Yes, ma'am.

4 CLERK OF COURT: Juror No. 121, was this your verdict in
5 the jury room?

6 JUROR NO. 121: Yes, ma'am.

7 CLERK OF COURT: Is this still your verdict?

8 JUROR NO. 121: Yes, ma'am.

9 CLERK OF COURT: Juror No. 23, was this your verdict in
10 the jury room?

11 JUROR NO. 23: Yes, ma'am.

12 CLERK OF COURT: Is this still your verdict?

13 JUROR NO. 23: It is.

14 CLERK OF COURT: Juror No. 77, was this your verdict in
15 the jury room?

16 JUROR NO. 77: Yes.

17 CLERK OF COURT: Is this still your verdict?

18 JUROR NO. 77: Yes, ma'am.

19 CLERK OF COURT: Thank you.

20 THE COURT: Anything further at this time?

21 MR. FALK: Nothing further, Your Honor.

22 THE COURT: Ladies and gentlemen, you all have fulfilled
23 your responsibility as jurors this week. I want to thank you
24 for your service this week. It's not very often that you're
25 called to serve as jurors, but I appreciate your service to

1 this state, to this county and to this country.

2 Jury service -- and I tell jurors this quite often, jury
3 service is the only remaining service really that we have in
4 this country anymore. It's not a situation wherein you get
5 drafted into the military and have to go away for a couple
6 years like individuals in the past have had to do. I hope
7 that if you're summoned to jury duty again that you will
8 serve. I hope you all had a good experience up here this
9 week.

10 I've told you throughout the trial of this case not to
11 discuss it, not to discuss it with anyone. Now that a
12 verdict has been rendered in this case, you may discuss the
13 case; however, you are not -- nobody can make you discuss the
14 case, okay? If anybody approaches you to discuss this case
15 and you -- and you convey to them that you do not want to
16 discuss it and they will not leave you alone, you let the
17 clerk's office know here, the sheriff's office know and it
18 will be taken care of, okay?

19 As I've told you a second ago or a minute ago, you all
20 have fulfilled your responsibility as jurors. Now what will
21 take place is this court will carry out its responsibilities
22 and that is of sentencing. You all are free to stay here for
23 that or you are free to go. You're free to go. It's up to
24 you.

25 I will say this, if you wish, I know that you all have

1 not had lunch yet. Lunch was ordered for you and it was on
2 the way and it is here and you can step in the jury room and
3 eat lunch and then leave, but I will ask that law enforcement
4 make sure that these jurors get out of here when they get
5 ready to go. But if you want to stay, you may do so for
6 sentencing, but if you wish to leave and go out there and eat
7 and/or leave, just go ahead and leave. It's up to you. I'll
8 let you do that at this time if you so desire.

9 Do you have sentencing sheets, Mr. Sorenson?

10 MR. SORENSON: Yes, Your Honor. May I approach?

11 THE COURT: If you'll bring the defendant around for
12 sentencing, please.

13 Mr. Sorenson, I'll be happy to hear from you, sir.

14 MR. SORENSON: Thank you, may it please the Court, Your
15 Honor. First, I guess, as far as victim impact goes,
16 Ms. Rustin and Ms. Bass are both back in the courtroom. I do
17 not believe either one of them wish to address the court; is
18 that correct?

19 And obviously this has had a pretty profound effect on
20 the two of them. Obviously we're only dealing with one bank
21 robbery here today, but as Your Honor has heard a little bit,
22 they were robbed three months later by what the State alleges
23 is this same defendant being involved with two other
24 individuals in a separate bank robbery at that same bank
25 three months later, which led to the car crash that the jury

1 has heard reference to as a car chase that ensued after that
2 bank robbery, but -- and those charges are still pending
3 against Mr. Ellison and will be dealt with at a later date,
4 but both Ms. Rustin and Ms. Bass were both present for that
5 second bank robbery also, Your Honor.

6 We would, as far as sentencing on this case, Your Honor,
7 Mr. Ellison has a prior record. He's got a simple possession
8 of marijuana from 2008, but more relevant from 2007, a 2007
9 conviction. He has a criminal conspiracy and an assault and
10 battery with intent to kill. I do have a copy of that
11 assault and battery with intent to kill, the sentencing sheet
12 and the indictment. Pursuant to South Carolina laws, that is
13 classified as a most serious offense.

14 And subject to that, Your Honor, we did file with clerk
15 of court's office and had served on the defendant back on
16 May the 13th of this year our notice of intention to seek a
17 life without parole sentence should he be convicted of the
18 armed robbery for a second most serious offense pursuant to
19 Section 17-25-45.

20 That was filed in the clerk's office and served on this
21 defendant and his previous lawyer, Mr. Tommy Bolus, on
22 May the 13th of 2013.

23 May I approach.

24 THE COURT: Anything else from the State at this time,
25 Mr. Sorenson?

1 MR. SORENSON: Your Honor, we'd just respectfully ask
2 you under 17-25-45 to sentence him on the armed robbery
3 conviction to life in prison.

4 THE COURT: All right. Mr. Falk, be happy to hear from
5 you, sir. You can come around here with your client.

6 MR. FALK: Your Honor, when Mr. Ellison had the first
7 conviction, he was 18 years old at the time. He was younger
8 than that, obviously, when the offense was committed. He
9 stands before you, he's 25 years old now; therefore, a
10 sentence of life without parole was going to be a 60- or 55-,
11 60-year sentence.

12 I believe the last time that South Carolina Supreme
13 Court has entertained an argument that the two-strike
14 life-without-parole statutes was unconstitutional, as opposed
15 to a separation of powers argument, was in the case of
16 *State v. Standard*, which was heard in 2002. I could -- the
17 cite is 351 S.C. 1999.

18 My comment is is that that case preceded the Supreme
19 Court's decision in *Booker* of 2005 where they considered
20 whether or not the federal sentencing guidelines took away
21 the court's discretion in sentencing by making the sentencing
22 guidelines mandatory. And as you know in *Booker*, he gave the
23 sentencing judge -- the guidelines were determined a
24 recommendation but by no means lockstep discretionary.

25 Therefore, we'd ask the Court to consider the -- our

1 constitutional challenge to the LWOP sentencing requirement
2 and ask that the Court find a more suitable punishment in
3 light of his age.

4 THE COURT: What is the State's position on that,
5 Mr. Sorenson?

6 MR. SORENSON: State's position is I think our Supreme
7 Court has upheld the two-strike, three-strike law and, I
8 mean, I think it's pretty clear it's a mandatory life
9 sentence, Your Honor, would be our position.

10 THE COURT: Mr. Ellison, anything you wish to tell me,
11 sir?

12 THE DEFENDANT: No, sir.

13 THE COURT: Anything further from defense counsel?

14 MR. FALK: No, Your Honor.

15 THE COURT: Anything further from the State?

16 MR. SORENSON: No, sir.

17 THE COURT: All right. On Indictment 2013-GS-18-1271,
18 which is the entering the bank or depository with intent to
19 steal, defendant's committed to the State Department of
20 Corrections for a period of 30 years.

21 On Indictment 2014-GS-18-325, on the armed robbery and
22 pursuant to Section 17-25-45, Defendant's hereby sentenced to
23 the Department of Corrections for the balance of his natural
24 life. Those sentences will run concurrent. Thank you.

25 --- END OF TRANSCRIPT OF RECORD ---

1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA

3 COUNTY OF DORCHESTER

4
5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of the above-captioned case, relative to appeal,
10 in the 1st Judicial Circuit Court for Dorchester County,
11 South Carolina, on the 20th through the 20th of
12 October, 2014.

13 I further certify that I am neither related to nor
14 counsel for any party to the cause pending or interested in
15 the events thereof.

16 February 25, 2015

17
18 *Ruth L. Mott*

19 Official Court Reporter
20
21
22
23
24
25

COUNTY OF
STATE

Dorchester

VS.

Tyrone Darius Ellison

AKA:

Race: BLACK Sex: M Age: 25

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Armed Robbery

in violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☒ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Sorenson, Donald N.

9512
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of Life days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied

e State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2014GS180325

A/W#: 2014DOR05

Date of Offense: 4/1/2013

S.C. Code § : 16-11-330(A)

CDR Code #: 0139

CERTIFIED COPY

SENTENCE SHEET

☒ CONVICTED OF or☐ PLEADSClerk of Court
Dorchester County

Presiding Judge

Judge Code:

Sentence Date:

WITNESSES

JASON MONROE

North Charleston Police Department

**ARREST WARRANT NUMBER
2014DOR05**

Arrested: 0, 0

ACTION OF GRAND JURY

TRUE BILL

Rachel Gentry

Foreperson of Grand Jury

Date: April 3, 2014

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014GS180325

The State of South Carolina

County of DORCHESTER

COURT OF GENERAL SESSIONS

April 7, 2014 TERM

**THE STATE
vs.**

Tyrone Darius Ellison

**Indictment for
ARMED ROBBERY**

SC Code: 16-11-330(A)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

APR 3 2014
CLERK OF COURT
DORCHESTER COUNTY
APR 3 3 26 PM

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

INDICTMENT
2014GS180325

At a Court of General Sessions, convened on April 7, 2014 the Grand Jurors of
Dorchester County present upon their oath:

ARMED ROBBERY

That on or about April 1, 2013, in Dorchester County, the defendant, Tyrone Darius Ellison did by use of force, threats or intimidation and while armed with a deadly weapon or while alleging either by words or action that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, take and carry away goods and/or monies belonging to Sun Trust Bank from the person or presence of Roberta Bass and/or Quinn Rustin with the intent to permanently deprive the victim of possession of the goods or monies. Such weapon or alleged weapon described as a handgun. This offense in violation of Section 16-11-330 of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in
such case made and provided.


Donald N. Sorenson, Solicitor

STATE OF SOUTH CAROLINA

COUNTY OF Dorchester
 STATE VS.
Tyrone Darius Ellison

AKA:

Race: BLACK Sex: M Age: 25DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: SUMMERVILLE, SC 294830000DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Entering Bank, Depository or Bldg and Loan Association with intent to Steal

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS18-1271A/W#: 2013A1021001431Date of Offense: 4/1/2013S.C. Code §: 16-11-380CDR Code #: 0257

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-11-380 of the S.C. Code of Laws, bearing CDR Code # 0257

☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Sorenson, Donald N.9512
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk

Court Reporter: [Signature]

SCCA/217 (03/2011)

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Presiding Judge

Judge Code: 2400Sentence Date: 10-24-14

WITNESSES

JASON MONROE

North Charleston Police Department

2013-010958

ARREST WARRANT NUMBER

2013A1021001431

Arrested: July 3, 2013

ACTION OF GRAND JURY

Amie G. Chambers
Foreperson of Grand Jury

Date: December 5, 2013

VERDICT

TRUE BILL

Foreperson of Petit Jury

Date:

DOCKET NO. 2013GS18-1271

The State of South Carolina

County of DORCHESTER

COURT OF GENERAL SESSIONS

December 9, 2013 TERM

THE STATE

vs.

Tyrone Darius Ellison

Indictment for

**ENTERING BANK, DEPOSITORY OR
BLDG AND LOAN ASSOCIATION WITH
INTENT TO STEAL**

SC Code: 16-11-380

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED - RECORDED
2013 DEC -5 PM 4:10
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

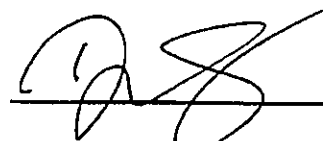
INDICTMENT
2013GS18-1271

At a Court of General Sessions, convened on December 9, 2013 the Grand Jurors of
Dorchester County present upon their oath:

**ENTERING BANK, DEPOSITORY OR BLDG AND LOAN ASSOCIATION WITH
INTENT TO STEAL**

That in Dorchester County, South Carolina, on or about April 1, 2013, the
Defendant, Tyrone Darius Ellison, unlawfully did enter the Sun Trust Bank, a
building or part of a building occupied as a bank, depository, or building and loan
association with the intent to steal money, securities for money, or property,
either by force, intimidation, or threats. This offense in violation of Section 16-11-
380, of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in
such case made and provided.


Donald N. Sorenson, Solicitor

ARREST WARRANT

2013A1021001431

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Dorchester County

2013010958

THE STATE
against

Tyrone Daruis Ellison

Address:

Summerville, SC 29485-

Phone:

SSN:

Sex: M Race: B Height: 5 9 Weight: 160DL State: SC DL #: DOB: Agency ORI #:

Prosecuting Agency: North Charleston Police Department

Prosecuting Officer: Jason Monroe # 128

Offense: Entering Financial Institution With Intent To Steal

Offense Code: 00257

Code/Ordinance Sec: 16-11-380

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Tyrone D. Ellison
on July 3 2013

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

North Charleston Municipal Court
2500 City Hall Lane
North Charleston, SC 29406

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Dorchester County

Personally appeared before me the affiant Abraham Montes-Altamirano # 251 whobeing duly sworn deposes and says that defendant Tyrone Daruis Ellisondid within this county and state on 04/01/2013State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Dorchester County)

in the following particulars:

DESCRIPTION OF OFFENSE:

Entering Financial Institution With Intent To Steal 16-11-380

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

OCA#2013010958

SEE ATTACHED AFFIDAVIT - DORCHESTER COUNTY G.S.C.

MEG

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Dorchester County

Affiant's Address 2500 City Hall LaneNorth Charleston, SC 29405-Affiant's Telephone (843)554-5700

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on 04/01/2013defendant Tyrone Daruis Ellison

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Dorchester County) as set forth below:

DESCRIPTION OF OFFENSE:

Entering Financial Institution With Intent To Steal 16-11-380

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable

Sworn to and subscribed before me

on 07/03/2013John J. Griffin, III (L.S.)

Signature of Issuing Judge

Judge Code: 015Judge's Address 2500 City Hall LaneNorth Charleston, SC 29406-Judge's Telephone (843)740-2601Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518

AFFIDAVIT

ORIGINAL
CERTIFIED COPY1/11/2018
Chief Graham
Clerk of Court
Dorchester County

635

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

CITY OF NORTH CHARLESTON

AFFIDAVIT

OCA# 2013010958

Det. J. Monroe

Personally appeared before me, a magistrate of this county, one A. Montes-Alfaro who first being duly sworn, deposes and says that Tyrone Darius Ellison, did within this county and state on April 1, 2013 violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE

Entering Financial Institution With Intent To Steal

16-11-380

The affiant states there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on April 1, 2013 at approximately 10:30 AM, while at 8610 Dorchester Road, Sun Trust Bank, located in the City of North Charleston, County of Dorchester and State of South Carolina the aforesaid, one Tyrone Darius Ellison, did commit the offense of Entering Financial Institution With Intent To Steal, in violation of section 16-11-380 of South Carolina Code of Laws of 1976, as amended. In that he did willfully, unlawfully, and feloniously enter into that institution with the intent to take, steal, or carry away either by threats, intimidation, or force money or securities for money entrusted to that institution.

Facts to establish the aforesaid are based on the following:

On April 1, 2013 the defendant, Tyrone Darius Ellison, entered into the Sun Trust Bank, located at 8610 Dorchester Road, wearing a dark in color wig, black sweat shirt, black visor, dark large frame sunglasses, a red t-shirt, and dark pants. The defendant approached the teller station and demanded money from the clerk stating "give me all the money" and all the while presenting a silver handgun. The clerk complied with the demand of the defendant and gave him and undisclosed amount of United States currency. The defendant then grabbed in the drawer of a second teller, and demanded her money while pointing the gun at her. The defendant then exited the location on foot and was observed by a bank patron running down Club Course Drive and into the wooded area near the entrance to Coosaw Commons. The defendant was then observed by the same bank patron upon emerging from the wooded area to enter a Green Honda Civic with a partial South Carolina license plate of 153. On July 1, 2013 officers from North Charleston Police responded to a Bank Robbery at the same location in which a Christopher Coburn was arrested as the driver of the vehicle used in the robbery. Coburn was advised of his constitutional rights, which he waived, and provided a video recorded statement in which he identified the defendant as previously owning a four door Green Honda Civic. It was learned through investigation that the defendant had owned a Hyundai which was registered with South Carolina license plate 1533FX. It was also learned that the defendant had placed the tag from the Hyundai onto the green Honda Civic when he purchased it. Additionally the defendant matches the physical description of the subject captured in the surveillance photos. At the onset of the investigation of the incident on July 1, 2013 one teller stated that the subject from the incident on this date was the same as the subject from the incident on April 1, 2013. All this done against the form of the statute and against the peace and dignity of the State of South Carolina. This is based on the investigation of Detective Jason Monroe. Sgt Mark Evans, Sgt Matt Hughes and witnesses to be named in court are witnesses to prove the same.

Sworn to and Subscribed before me
this 3rd day of July, 2013.

John L. Duff, III
Signature of Judge

(AFFIANT)

Address: 2500 City Hall Ln
North Charleston SC 29406
Phone: 843-740-2833

FILED-RECORDED

2013010958-2013A1021001430-31
CRIMINAL CHARGING DOCUMENT NO.2013 JUL -8 PM 12:59 BAIL PROCEEDING
FORM IISTATE OF SOUTH CAROLINA
COUNTY OF Dorchester
STATE OF SOUTH CAROLINA
CLERK OF COURT
DORCHESTER COUNTY

IN THE COURT OF GENERAL SESSIONS Dorchester County

ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE

Tyrone Billson
NAME OF DEFENDANT

Offense Charged: Possession of Weapon during a Commission of a Violent Crime, Entering a Financial Institution with the Intent to Steal

At a bail proceeding for the defendant named above, it was determined by the court (check one or both):

- ☒ The release of the defendant on recognizance will not reasonably assure his appearance as required.
- ☐ The release of the defendant on recognizance will result in an unreasonable danger to the community.

This determination was based upon the following findings of fact: History and Nature of Offense

[Consideration: Nature and circumstances of the offense charged, the defendant's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and any record of flight to avoid prosecution or failure to appear at other court proceedings.]

THEREFORE, IT IS HEREBY ORDERED:

1. That the above named defendant be released from custody on the condition that he will personally appear before the designated court at the place, date and time required to answer the charge made against him and do what shall be ordered by the court and not depart the State without the permission of the court and be of good behavior.
2. That the above named defendant be released from custody provided as follows (check all that apply):

CASH IN LIEU OF BOND

- ☐ The defendant, acknowledges himself to be indebted to the State of South Carolina in the sum of _____ to secure his release from custody. Should the defendant fail to comply with all terms and conditions of this Order, this sum of money is subject to being forfeited to the State.

CASH PERCENTAGE IN LIEU OF BOND

- ☐ The defendant, acknowledging himself to be indebted to the State of South Carolina in the full amount of _____, his release to be obtained by payment to the court of _____ % (not to exceed 10%) of the full amount of the bond, deposits _____ to secure his release from custody. Should the defendant fail to perform the conditions of this Order, the full amount shall be levied on his real and personal property for the use of the State.

APPEARANCE RECOGNIZANCE WITH SURETY

- ☒ The defendant will provide good and sufficient surety approved by the court, in the form hereinafter set forth in this Order, acknowledging indebtedness to the State in the amount of \$ 700,000

3. That the defendant shall appear at (check one):

- ☒ the term of COURT OF GENERAL SESSIONS beginning on September 6, 2013
at 900 o'clock, AM, at Dorchester County Court House, 5200 E. Jim Bilton Blvd. St George, SC
and remains there throughout that term of court. If no disposition is made during that term, the defendant shall appear and remain throughout each succeeding term of court until final disposition is made of his case, unless otherwise ordered by the court.

- ☐ the session of MUNICIPAL COURT OF North Charleston beginning on _____
at _____ o'clock, _____ at 2500 City Hall Lane, North Charleston, SC 29406
If no final disposition is made during that session, the defendant shall appear at such other times and places as ordered by the court.

INITIALS OF DEFENDANT Te

4. That the defendant will notify the court promptly if he changes his address from the one contained in this order and he will comply with those conditions described hereinafter in the Order.

JUDGE [Signature]
SIGNATURE OF JUDGEJuly 3, 2013
DATE

I CONSENT: _____

(ASST. SOLICITOR/ SOLICITOR)

ORIGINAL AND ONE COPY OF THIS FORM ARE TO BE COMPLETED IN EVERY BAIL PROCEEDING IN WHICH IT IS USED
Original Copy For The Trial Court - Copy For The Defendant

ACKNOWLEDGEMENT BY DEFENDANT

I understand that if I violate any condition of this Order, a warrant for my arrest will be issued.

I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence.

It has been explained to me that if I fail to appear before the court as required, a warrant for my arrest will be issued.

ADDRESS
Summerville / SC / 29485
CITY/STATE/ZIP

TELEPHONE

SIGNATURE OF DEFENDANT
7-3-2013
DATE

SOCIAL SECURITY NUMBER

DRIVER'S LICENSE OR ID NUMBER

ATTORNEY REPRESENTING ACCUSED (IF KNOWN)

SPECIAL CONDITIONS OF RELEASE

- a. ☐ Placement in custody. The defendant is placed in the custody of:

NAME OF PERSON OR ORGANIZATION

ADDRESS

CITY/STATE

ZIP

TELEPHONE
who agrees (1) to supervise the defendant as set forth by the court, (2) to use every effort to assure the appearance of the defendant at all scheduled hearings before the court, and (3) to notify the court immediately in the event the defendant violates any conditions of his release or disappears.

SIGNATURE OF CUSTODIAN (IF APPROVED)

DATE

- b. ☐ Restrictions on Travel, Association or Residence. The defendant will comply with each of the following conditions:

- c. ☐ Part-time Release. The defendant will be released from custody from _____ o'clock, _____ to _____ o'clock, _____
TIME AM/ PM TIME AM/ PM

on _____ on condition that he return to the custody of _____
DATE(S) NAME OF PERSON OR ORGANIZATION
at _____ as designated.
LOCATION

- d. ☐ Other Conditions. The defendant will comply with the following other conditions of release: If released from jail the defendant will be on house arrest and will wear an ankle monitor. He will be allowed to attend work, church, and school.

APPEARANCE RECOGNIZANCE WITH SURETY

On the _____ day of _____, personally appeared before the undersigned judge the surety named below who acknowledged himself indebted to the State of South Carolina, in the sum of _____, such sum to be levied on his real and personal property for the use of the State, should named defendant fail in performing the conditions of this Order.

The surety, being duly sworn, says that he is a resident and free holder within the State and is worth the sum acknowledged and underwritten herein, over all his debts and liabilities, and exclusive of property exempt from execution.

NAME OF SURETY BONDSMAN COMPANY

TELEPHONE

SIGNATURE OF SURETY BONDSMAN

ADDRESS OF SURETY BONDSMAN

CITY/STATE/ZIP

SIGNATURE OF JUDGE

NAME OF INSURANCE COMPANY

DATE

ADDRESS OF INSURANCE COMPANY

CITY/STATE/ZIP

State of South Carolina }

COUNTY OF DORCHESTER

ORDER OF CUSTODY

THE STATE

VS

Tyrone Ellison
Defendant

TO Keeper of the jail of Dorchester County.

ORDER You are commanded by this court to immediately receive into custody the following person, Tyrone Ellison

Case # 2013A1021001431 Charge Bank Robbery Bond 500,000

Case # 2013A1021001430 Charge Poss. of Weapon Bond 200,000

Case # _____ Charge _____ Bond _____

Case # _____ Charge _____ Bond _____

Comment Cash or Surety

FURTHER That you are commanded by this court to continue custody of the named person until the person in custody is ordered to be released by due course of law.

Dated T-3-2013

JUDGE Judge Duffy

Court of Magistrate, Dorchester County

SEAL Signature _____

Name of Defendant

Officer

Warrant/Ticket No.

County/Municipality of Dorchester

Charges: Possession of Weapon during a Commission of a Violent Crime,
entering a Financial Institution with the Intent to Steal

Trial Court:

Municipal

CHECKLIST FOR MAGISTRATES AND MUNICIPAL JUDGES

Sections: Magistrates and municipal court judges must use this checklist for ALL GENERAL SESSIONS and for ALL MAGISTRATE AND MUNICIPAL COURT CASES IN WHICH BOND HAS BEEN SET BY A JUDGE. The judge shall attach this checklist to the charging document (arrest warrant or uniform traffic ticket) when the defendant first appears before a judge for a bond hearing or first appearance, and complete the appropriate sections. Defendant must be provided a completed copy of this form.

☒ BAIL PROCEEDING/ ☐ FIRST APPEARANCE (NON-BAILABLE OFFENSES)

1. Form used at bail proceeding ☐ Bond Form I (personal recognizance) ☒ Bond Form II (surety, cash, percentage) ☐ None (Non-Bailable Offense)
BANK DEPOSIT - \$500,000
Pass money \$200,000
2. For cases in which bond was set, defendant was informed:
 - ☒ a. Warrant for arrest will be issued for violation of any condition of bail bond order.
 - ☒ b. His right and obligation to be present at trial and that trial will proceed in his absence if he fails to attend.
 - ☒ c. Failure to appear in court as required will result in institution of additional criminal charges. Failure to appear in connection with a felony, or while awaiting sentence after conviction, additional charge has penalty of not more than \$5,000 or imprisonment for not more than 5 years, or both. Failure to appear in connection with a charge for a misdemeanor for which the maximum possible sentence is at least one year, additional charge has penalty of not more than \$1,000 or imprisonment for not more than one year, or both. Failure to appear in court as required on any charge not specified above will result in the issuance of a warrant for defendant's arrest, as well as loss of any posted bond.
3. For cases to be tried in Court of General Sessions, defendant was informed of right to preliminary hearing if requested within ten (10) days:

☐ Orally ☐ In writing (NOTE: Defendant must be informed of right both orally and in writing.)
4. Defendant was informed of the right to trial by jury.
5. In all general sessions cases, in all criminal domestic violence cases, and in all magistrate or municipal cases in which a prison sentence is likely to be imposed, defendant was informed of the following:
 - ☒ a. Charges against defendant and nature of the charges.
 - ☒ b. Right to counsel and right to court-appointed counsel if financially unable to employ counsel.
 - ☒ c. Defendant was informed orally and provided a copy of this form advising him of his right to obtain court appointed counsel if indigent (must meet federal poverty guidelines) and instructions on how to obtain court appointed counsel. In order to apply for court appointed counsel, defendant is required to appear before Court Date located at 2500 City Hall Lane, North Charleston, SC 29406 for indigency screening. Defendant is responsible for a statutory fee of \$ 40.00 for indigency screening.
6. In all criminal domestic violence cases and any case where defendant is subject to an Order of Protection or Restraining Order, defendant signed and was provided a document explaining that entering the grounds or property of a domestic violence shelter in which the person's household member resides constitutes an additional misdemeanor charge and, if in possession of a dangerous weapon, an additional felony charge.
7. If the charges that have been brought against you are discharged, dismissed, or nolle prossed or if you are found not guilty, you may have your record expunged.

Appearance or
hearing Date:

July 3, 2013

John Duffy
Judge's Signature

NOTICE OF RIGHT TO PRELIMINARY HEARING

STATE OF SOUTH CAROLINA

) UNIFORM WARRANT NUMBERS:

) 1.

3.

5.

COUNTY OF Dorchester

) 2.

4.

6.

Mr. , you are charged with and you may be entitled to a Preliminary Hearing. You must request a Preliminary Hearing within ten (10) days of this notice or lose your right to such a hearing. You may request such hearing by completing the lower left section of this notice and returning it to the Court either in person or by mail to the following address:

2500 City Hall Lane North Charleston SC 29406

I request a Preliminary Hearing.

NOTICE GIVEN BY:

Defendant:

Address:

My Attorney is:

Judge

Date

FOR COURT USE ONLY

Date Request Received:

By:

DORCHESTER COUNTY PUBLIC DEFENDER'S OFFICE
107 West 6th North Street, Suite 100
Summerville, SC 29483
(843) 821-9800

IN ORDER TO APPLY FOR A DORCHESTER COUNTY PUBLIC DEFENDER, THE FOLLOWING MUST BE PRESENTED AT THE TIME OF APPLICATION:

1. \$40.00 application fee. Cash or money order only (correct change);
2. Affidavit of Indigency and Application for Counsel, completed and signed by the Applicant;
3. Charging Documents (warrants, bond paperwork, etc.);
4. Proof of Income:
 - Most recent pay stub.
 - W-2 from the previous year or Income Tax Return.
 - SSI, unemployment, or any other source of income voucher.
 - Signed, notarized statement from employer on company letterhead stating salary and pay frequency. Employer must sign, date, and provide a valid, working telephone number to be contacted for verification purposes.

Applicants must apply in person. Applications are taken Monday through Friday from 10:00 a.m. until 4:00 p.m. at our office located at 107 West 6th North Street, Summerville, South Carolina.

200.000

643

Defendant Data Sheet (Attach this sheet to the warrant)

Case Number: 2013010958

Officer: Detective Jason Monroe 128

Identifying Information for Defendant

Name of Defendant	Tyrone Darius Ellison
Date of Birth	
Sex	Male
Race	Black
Current or Last Known Address	Summerville SC 29485

Physical Description of Defendant

Height	507
Weight	150
Hair Color	Black
Eye Color	Brown
Other Information	SCDL SSN FBI# 902847LC8

Criminal Charges (Use an "X" to indicate GSC or City)

Offense	Statute	GSC	City	Warrant #
Entering a Financial Institution w/ Intent to Steal	16-11-380	X		
Possession of a Weapon During the Commission of a Violent Crime	16-23-490	X		

Other Information

Telephone numbers	
Work Information	
Other addresses	
Other Information	

This sheet is to be used when obtaining a warrant(s) on a named defendant. A copy of this information sheet will be kept with the warrant(s) until it is served. For GSC cases, a copy will be placed in the case file.

NORTH CHARLESTON POLICE
SC0100800

INCIDENT REPORT

INFORMATION
ONLY

CASE NUMBER

2013010958

NCIC

INQ. ENTD.
No

INCIDENT TYPE				COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
120 BANK ROBBERY				☒ YES ☐ NO	☐ YES ☒ NO	BANK/FINANCIAL INSTITUTION		☐ Individual ☒ Business ☐ Financial Inst. ☐ Government ☐ Relig. Orgn. ☐ Soc./Public ☐ Other ☐ Unknown ☐ Police Off.
2.				☐ YES ☐ NO	☐ YES ☐ NO			
3.				☐ YES ☐ NO	☐ YES ☐ NO			
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER) 8610 Dorchester RD, NORTH CHARLESTON, SC						ZIP CODE 29420-	WEAPON TYPE HANDGUN	
INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME	DISPATCH TIME	TIME ARRIVED	DEPART. TIME
04/01/2013	10:28		04/01/2013	10:29	04/01/2013	10:31	10:31	12:45
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE) SUN TRUST BANK				RELATIONSHIP TO SUBJECT #1 #2 #3	RESIDENT	RACE/SEX	AGE	ETH
ADDRESS 8610 DORCHESTER Road				CITY NORTH CHARLESTON	STATE SC	ZIP CODE 29483-	LOCATION NO.	
VICTIM'S NAME (LAST, FIRST, MIDDLE) SUN TRUST BANK				RELATIONSHIP TO SUBJECT #1 #2 #3	RESIDENT	RACE/SEX	AGE	ETH
ADDRESS 8610 DORCHESTER Road				CITY NORTH CHARLESTON	STATE SC	ZIP CODE 29483-	LOCATION NO.	
HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.				
	0							
ADDRESS 8610 DORCHESTER Road				CITY NORTH CHARLESTON	STATE SC	ZIP CODE 29483-	LOCATION NO.	
VISIBLE INJURY (VCT.1) ☐ YES ☐ NO ☐ EXPLAIN-								
VICTIM(S) USING: ALCOHOL ☐ YES ☐ NO ☐ UNK. ☐ DRUGS: ☐ YES ☐ NO ☐ UNK. ☐ TYPE:								
TWO MAN VEH. ☐ ONE MAN VEH. ☐ DETECTIVE/PLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐								
*J-This Jurisdiction. S-State. O-Out of State. U-Unknown.								
☒ SUSPECT	NAME (LAST, FIRST, MIDDLE) UNKNOWN				RACE	SEX	AGE	ETH
☐ RUNAWAY					B	M	25 / 30	N
☐ WANTED	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.				DATE OF BIRTH	HEIGHT	WEIGHT	HAIR
☐ WARRANT	11, 11 OTHER, BLACK VISOR HAT, BLACK JACKET, RED JACKET, BROWN PANTS, BLACK SHOES, NO SOCKS, BLACK SUNGLASSES							
☐ ARREST	ADDRESS				CITY	STATE	ZIP CODE	LOCATION NO.
☐ JAIL					SC			
☐ SUMMONS	SUBJECT(S) USING ALCOHOL ☐ YES ☐ NO ☐ UNK. ☐ DRUGS: ☐ YES ☐ NO ☐ UNK. ☐ TYPE				ARRESTED NEAR OFFENSE SCENE ☐ YES ☐ NO ☐	DATE/TIME OF OFFENSE 4/1/2013 10:28:00 AM		DATE/TIME OF ARREST
DAY OF THE WEEK				HOW REPORTED	A= OFFICER DISPATCHED ON CALL	D= COMPLAINT WRITTEN IN	DIFF. FACTOR	A= RESISTANCE/HOSTILITY
S M T W T F S UNK					B= REPORT TAKEN BY PHONE	E= OFFICER INITIATED		B= WEAPONS
					C= COMPLAINANT WALKED IN	F= OTHER		C= UNFOUNDED CALLS
								D= MENTAL SUBJECT
								E= COMPLAINANT FRE- QUENTLY INTOXICATED
								F= DOMESTIC
								N= NORMAL
ON 04/01/2013 AT 1030 HRS., OFFICER LEDFORD HEARD A CALL FOR SERVICE BEING DISPATCHED IN REFERENCE TO A POSSIBLE BANK ROBBERY LOCATED AT 8610 DORCHESTER ROAD, SUN TRUST BANK. OFFICER LEDFORD RESPONDED FROM THE INTERSECTION OF DORCHESTER ROAD AND PARK GATE DRIVE, UTILIZING EMERGENCY LIGHTS AND SIRENS. WHILE ENROUTE TO THE SCENE, FURTHER INFORMATION WAS ADVISED THAT THE SUSPECT FLED FROM THE BUSINESS BEING CHASED BY ANOTHER SUBJECT WEARING A BLUE SHIRT. OFFICER LEDFORD ARRIVED ON-SCENE AND TOOK A POSITION ON THE SOUTHWEST CORNER. OFFICER LEDFORD OBSERVED SEVERAL MARKED UNITS PATROLLING THE AREA OF THE WOODED AREA BEHIND THE BUSINESS DUE TO INFORMATION THAT THE SUBJECT FLED INTO THE WOOD LINE BEHIND THE BUSINESS.								
				JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY SC0100800			JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY	
TYPE(GROUP)	MONEY/CASH						TOTAL VALUE	
STOLEN	\$6,032.00						\$6,032.00	
DAMAGED	\$0.00						\$0.00	
BURNED	\$0.00						\$0.00	
RECOVERED	\$0.00						\$0.00	
SEIZED	\$0.00						\$0.00	
SUBJECT IDENTIFIED ☒ YES ☐ NO ☐		SUBJECT LOCATED ☐ YES ☐ NO ☐		S. F.	☒ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED	☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER		☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER
INFORMER/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	
LEDFORD, JEREMY MICHAEL		4/1/2013 10:29:49 AM	152	BLAIR, TIMOTHY			47	
SCHOOLFIELD, PAUL ALEXANDER		4/1/2013 10:29:00 AM	137	FOLLOWUP INVESTIGATION ☐ YES ☐ NO ☐		OFFICER		

ADDITIONAL NARRATIVE

Agency Name: NORTH CHARLESTON POLICE DEPARTMENT	ORI #: SC0100800	Report Date/Time: 04/01/2013 10:28	OCA #: 2013010958

OFFICER LEDFORD MOVED UP FROM THE SOUTH SIDE OF THE BANK WHILE OFFICER SCHOOLFIELD MOVED UP FROM THE NORTH SIDE OF THE BUSINESS. BOTH OFFICERS MET AT THE FRONT DOOR OF THE BANK WHICH WAS STILL LOCKED. BRANCH MANAGER BAKER UNLOCKED THE DOORS AND ALLOWED OFFICERS TO ENSURE NO OTHER PARTIES INVOLVED WERE INSIDE THE BANK. AFTER INITIAL CLEARING THE SCENE, OFFICER SCHOOLFIELD LEFT THE BANK TO ASSIST WHERE NEEDED. OFFICER LEDFORD MADE CONTACT WITH WITNESS/VICTIM BASS. BASS ADVISED THAT A BLACK MALE SUBJECT APPROXIMATELY 5'6-5'7, WEARING A BLACK HAT, SHINY BLACK WIG, BLACK JACKET WITH GREY HOOD, RED SHIRT, CHOCOLATE BROWN PANTS, BLACK SHOES, NO SOCKS, CARRYING A GREY IN COLOR SEMI-AUTOMATIC FRAMED HANDGUN ENTERED THROUGH THE FRONT DOORS OF THE BUSINESS AND IMMEDIATELY RAN TO THE FRONT CASHIERS COUNTER.

BASS STATED FURTHER THAT THE SUSPECT POINTED THE GUN AT THEM AND THEN JUMPED OVER THE COUNTER BETWEEN THE SECOND AND THIRD COMPUTER TELLER SYSTEMS AND ORDERED THEM TO GET THE MONEY. BASS AND RUSTIN STARTED TO GET THE MONEY WHEN HE TOLD THEM NOT TO MOVE OR HE WOULD KILL THEM. RUSTIN ATTEMPTED TO GIVE THE SUSPECT BAIT MONEY; HOWEVER, DURING THE INCIDENT GOT NERVOUS AND DROPPED IT ON THE FLOOR. SUSPECT STUFFED WHAT APPEARED TO BE A BLACK IN COLOR FANNY PACK, WITH NO STRAPS FULL OF THE CASH. SUSPECT THEN JUMPED BACK ACROSS THE COUNTER BETWEEN THE THIRD AND FOURTH TELLER COMPUTER SYSTEM. BASS STATED THAT WHEN HE WENT BACK ACROSS THE COUNTER TO LEAVE THE SUSPECT DROPPED HIS HANDGUN ON THE FLOOR. BASS STATED THAT THE SUSPECT PICKED UP HIS HANDGUN AND THEN RAN TO THE FRONT INNER DOOR. SUSPECT THEN ATTEMPTED TO PULL THE INNER DOOR OPEN, WHICH IT OPENS FROM PUSHING. SUSPECT DROPPED HIS HANDGUN AND POSSIBLY A CLEAR RUBBER GLOVE. INFORMATION OBTAINED LATER SHOWED THE SUSPECT POSSIBLY UTILIZING THE RUBBER GLOVE TO WIPE DOWN THE DOOR FROM ANY PRINTS HE MAY HAD LEFT. SUSPECT FLED FROM THE OUTER DOOR OF THE BANK AND TURNED RIGHT HEADING TOWARDS COOSAW CREEK BLVD. AT THIS TIME THE EMPLOYEES INSIDE NO LONGER HAD A VIEW OF WHERE THE SUSPECT FLED. OFFICER LEDFORD ADVISED THE WITNESSES TO NOT TOUCH ANY OF THE AREAS TO PRESERVE LATENT PRINT EVIDENCE FOR PROCESSING, AND REQUESTED A DOLLAR AMOUNT OF THE STOLEN FUNDS. TELLERS WERE UNABLE TO GIVE A NUMBER UNTIL A FULL INVENTORY WAS CONDUCTED.

SUSPECT INFORMATION WAS RELAYED TO RESPONDING UNITS WHILE THE CRIME SCENE WAS SECURED. CRIME SCENE WAS REQUESTED TO THE SCENE DUE TO VIABLE PRINTS POSSIBLY BEING ABLE TO BE LIFTED FROM THE DOORS AND TELLER COUNTER AREAS. OFFICER LEDFORD REQUESTED ABOUT DYE PACKS GIVEN TO THE SUSPECT. OFFICER LEDFORD WAS ADVISED THAT THIS BANK DOESN'T UTILIZE DYE PACKS. OFFICER LEDFORD INQUIRED ABOUT THE VIDEO SURVEILLANCE SYSTEM WITH THE BANK TO VIEW PHOTOGRAPHS OR VIDEO. MANAGER BAKER ADVISED THAT THEY HAD NOTHING ON-SCENE TO REVIEW THE VIDEO, AND HAD TO CALL THEIR SECURITY COMPANY TO GET THE VIDEO AND PHOTOGRAPHS SENT TO VIEW. UPON SCENE ARRIVAL OF DETECTIVES AND CRIME SCENE PERSONNEL, A FULL BRIEF OF THE SITUATION WAS GIVEN.

DETECTIVE ON-SCENE CONDUCTED AN INTERVIEW WITH A BANK PATRON WHOM GAVE CHASE AFTER THE SUSPECT IN HIS VEHICLE FROM THE SCENE, AND OBSERVED THE SUSPECT GET INTO A GREEN IN COLOR HONDA ACCORD AND LEFT DOWN COOSAW CREEK BLVD AND FLED DOWN PATRIOD BLVD TOWARDS LADSON ROAD. OFFICER LEDFORD POINTED OUT LOCATIONS TO CRIME SCENE PERSONNEL FOR PROCESSING. K-9 WAS REQUESTED TO THE SCENE TO INITIATE A TRACK OF THE SUSPECT. OFFICER LEDFORD THEN ASSISTED OFFICERS IN WALKING THROUGH THE WOOD LINE AREA BETWEEN THE COOSAW CREEK BLVD ROADWAY AND GRASSY OAK TRAIL DUE TO EVIDENCE BEING LOCATED BY K-9 DURING THE TRACK. A BLACK IN COLOR HAT, WIG, CLEAR RUBBER GLOVE, AND GREY IN COLOR HANDGUN WERE LOCATED. ALL EVIDENCE WERE LEFT IN THEIR NATURAL STATE FOR CRIME SCENE PERSONNEL WHOM LATER RECOVERED THE EVIDENCE FOR PROCESSING. NOTHING FURTHER AT THIS TIME.

AGENCY: NORTH CHARLESTON POLICE
 ORI #: SC0100800
 Report Date / Time: 04/01/2013 10:28
 Incident #: 2013010958

ADDITIONAL VEHICLES

STATUS:		RELATED TO:		VEHICLE TYPE: 2 OR 4 DOOR SEDAN (PASSENGER)	
VIN AND/OR LICENSE NO.			BOAT HULL NO. AND/OR REG. NO.		
SERIAL AND/OR OWNER APPLIED NO.			STATE SC		
YEAR OF REGISTRATION		YEAR OF EXPIRATION		YEAR	MAKE HONDA
MODEL ACCORD	STYLE SEDAN	COLOR GREEN		CID NO.	
COMMENTS					
STATUS:		RELATED TO:		VEHICLE TYPE:	
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		CID NO.	
COMMENTS					
STATUS:		RELATED TO:		VEHICLE TYPE:	
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		CID NO.	
COMMENTS					
STATUS:		RELATED TO:		VEHICLE TYPE:	
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		CID NO.	
COMMENTS					
STATUS:		RELATED TO:		VEHICLE TYPE:	
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		CID NO.	
COMMENTS					
STATUS:		RELATED TO:		VEHICLE TYPE:	
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		CID NO.	
COMMENTS					

AGENCY : NORTH CHARLESTON
 ORI # : SC0100800
 Report Date/Time : 04/01/2013 10:28
 Incident # : 2013010958

INCIDENT REPORT ADDITIONAL OTHERS

PERSON TYPE WITNESS	NAME (LAST, FIRST, MIDDLE) BASS, ROBERTA, ANN				RELATIONSHIP SUBJECT #1 #2 #3			RESIDENT S	RACE W	SEX F	AGE 48 /	D.O.B. [REDACTED]	ETH N
	HEIGHT 508	WEIGHT 130	HAIR BLN	EYES BRO	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
	ADDRESS 8610 DORCHESTER Road				CITY NORTH CHARLESTON	STATE SC	ZIP CODE 29483-	LOCATION NO.	DAYTIME PHONE 843-760-3410	EVENING PHONE [REDACTED]			
	COMPLAINT OF ANY NON-VIOLENCE INJURIES ☐ YES ☐ NO ☐ EXPLAIN-												
USING: ALCOHOL ☐ YES ☐ NO ☐ UNK. ☐ DRUGS: ☐ YES ☐ NO ☐ UNK. ☐ TYPE:													

PERSON TYPE WITNESS	NAME (LAST, FIRST, MIDDLE) RUSTIN, QUINN, MCCALL				RELATIONSHIP SUBJECT #1 #2 #3			RESIDENT S	RACE A	SEX F	AGE 31 /	D.O.B. [REDACTED]	ETH N
	HEIGHT 503	WEIGHT 115	HAIR BLK	EYES BRO	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
	ADDRESS 8610 DORCHESTER Road				CITY NORTH CHARLESTON	STATE SC	ZIP CODE 29483-	LOCATION NO.	DAYTIME PHONE 843-760-3410	EVENING PHONE [REDACTED]			
	COMPLAINT OF ANY NON-VIOLENCE INJURIES ☐ YES ☐ NO ☐ EXPLAIN-												
USING: ALCOHOL ☐ YES ☐ NO ☐ UNK. ☐ DRUGS: ☐ YES ☐ NO ☐ UNK. ☐ TYPE:													

PERSON TYPE WITNESS	NAME (LAST, FIRST, MIDDLE) BAKER, JOHN, CHARLES				RELATIONSHIP SUBJECT #1 #2 #3			RESIDENT S	RACE W	SEX M	AGE 62 /	D.O.B. [REDACTED]	ETH N
	HEIGHT 509	WEIGHT 180	HAIR GRY	EYES BRO	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC. .01, 01 CLEAN SHAVEN								
	ADDRESS 8610 DORCHESTER Road				CITY NORTH CHARLESTON	STATE SC	ZIP CODE 29483-	LOCATION NO.	DAYTIME PHONE 843-760-3413	EVENING PHONE [REDACTED]			
	COMPLAINT OF ANY NON-VIOLENCE INJURIES ☐ YES ☐ NO ☐ EXPLAIN-												
USING: ALCOHOL ☐ YES ☐ NO ☐ UNK. ☐ DRUGS: ☐ YES ☐ NO ☐ UNK. ☐ TYPE:													

PERSON TYPE VICTIM	NAME (LAST, FIRST, MIDDLE) BASS, ROBERTA, ANN				RELATIONSHIP SUBJECT #1 ST #2 ST #3			RESIDENT S	RACE W	SEX F	AGE 48 /	D.O.B. [REDACTED]	ETH N
	HEIGHT 508	WEIGHT 130	HAIR BLN	EYES BRO	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
	ADDRESS 8610 DORCHESTER Road				CITY NORTH CHARLESTON	STATE SC	ZIP CODE 29483-	LOCATION NO.	DAYTIME PHONE 843-760-3410	EVENING PHONE [REDACTED]			
	COMPLAINT OF ANY NON-VIOLENCE INJURIES ☐ YES ☐ NO ☐ EXPLAIN-												
USING: ALCOHOL ☐ YES ☐ NO ☐ UNK. ☐ DRUGS: ☐ YES ☐ NO ☐ UNK. ☐ TYPE:													

PERSON TYPE SUSPECT	NAME (LAST, FIRST, MIDDLE) UNKNOWN				RELATIONSHIP SUBJECT #1 #2 #3			RESIDENT U	RACE B	SEX M	AGE 25 / 35	D.O.B. [REDACTED]	ETH U
	HEIGHT	WEIGHT	HAIR BLK	EYES BRO	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC. .12, 12 UNKNOWN								
	ADDRESS				CITY	STATE SC	ZIP CODE	LOCATION NO.	DAYTIME PHONE	EVENING PHONE [REDACTED]			
	COMPLAINT OF ANY NON-VIOLENCE INJURIES ☐ YES ☐ NO ☐ EXPLAIN-												
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PERSON TYPE	NAME (LAST, FIRST, MIDDLE)				RELATIONSHIP SUBJECT #1 #2 #3			RESIDENT	RACE	SEX	AGE /	D.O.B. [REDACTED]	ETH
	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.								
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1 STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

2 COUNTY OF DORCHESTER

CASE NO. 2014-GS-18-325

CASE NO. 2013-GS-18-1271

3

4 STATE OF SOUTH CAROLINA)

5 vs.)

TRANSCRIPT OF RECORD

6 TYRONE ELLISON)

7

AUGUST 4, 2014

8

ST. GEORGE, SC

9

10 B E F O R E:

11 HONORABLE R. KNOX MCMAHON

12

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

13

DON SORENSON, ESQUIRE

14

PHIL GIESE, ESQUIRE

Attorneys for the State

15

MICHAEL TOMMY BOLUS, ESQUIRE

16

Attorney for the Defendant

17

Ruth L. Mott, RPR, CRR

18

Official Court Reporter

19

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I N D E X

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WITNESS

DIRECT

CROSS

REDIRECT

RECROSS

4

ROBERT BENNETT, PH.D.

MR. BOLUS

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MR. SORENSON

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CERTIFICATE OF REPORTER

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E X H I B I T S

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NO.

DESCRIPTION

ID

EVD

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(NONE MARKED)

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ROBERT BENNETT, PH.D.

1

2 being first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MR. BOLUS:

4 Q. Dr. Bennett?

5 A. Yes.

6 Q. You were retained by Mrs. McKinney to investigate DNA
7 analysis results from SLED pertaining to certain items that
8 were associated possibly with her son Tyrone Ellison?

9 A. Yes.

10 Q. In a bankruptcy case -- in a bank robbery case?

11 A. Yes.

12 Q. And what are your credentials? What are you exactly?
13 And kind of explain what you do and your education.

14 A. Sure. Sure.

15 I have a pharmacy degree, which was attained from the
16 Medical University of South Carolina in 1980. I did research
17 in drug sciences and then went back to school and obtained my
18 doctorate degree in pharmaceutical sciences, in drug sciences
19 and toxicology and have been performing that type of service
20 related to that degree ever since graduation in 1991.

21 Specifically, I perform toxicology consultation for
22 forensic cases. That has expanded over the years to include
23 DNA testing, which I've studied as well. In school we had
24 courses on genetics and related subjects pertaining to DNA.

25 I've been a full-time practicing forensic scientist for

1 over 20 years.

2 Q. In your course of your work, have you performed DNA
3 analysis ever before?

4 A. Yes. Through my office we've performed hundreds of DNA
5 tests for a variety of reasons: Paternity, siblingship
6 analysis, biological analysis, ancestry testing, grand
7 paternity, biological relationships, obtaining DNA from
8 nonhuman items, determine the presence of a biological
9 sample. And I've done that for hundreds of cases. I think
10 the last count was around 700.

11 Q. And how many times have you appeared in court regarding
12 your expertise or testimony pertaining to DNA results and
13 procedures and all that?

14 A. Many times. Don't know the exact amount. I've
15 testified in a variety of cases, but I have been qualified as
16 an expert in DNA testing in various criminal cases, including
17 homicides.

18 Q. And you've been qualified in the courts of South
19 Carolina in the General Sessions level?

20 A. Yes.

21 Q. Okay. How many times do you think you've been qualified
22 in that area?

23 A. I don't have an exact count. Multiple times.

24 Q. Okay. And you've been required to testify pertaining to
25 SLED results at times?

1 A. Many times.

2 Q. Okay. And generally, it would be pertaining to DNA
3 taken from objects of a crime or weapons or things off of
4 walls and floors and things like that?

5 A. Yes. Those are good examples.

6 MR. BOLUS: Okay. Judge, I'm not sure I need to qualify
7 him at this point in time. I mean, you know what I'm saying?
8 I think he's qualified to testify, at least at this point in
9 time, and I'd have to --

10 THE COURT: I think he's qualified. You don't have any
11 objection, do you, Solicitor?

12 MR. SORENSON: For purposes of this hearing, no, sir, I
13 don't.

14 THE COURT: All right. You may continue.

15 Q. Now, when did Ms. McKinney retain you? Was it a few
16 months ago?

17 A. Around mid-April.

18 Q. Okay. And she informed you that I was handling the
19 situation?

20 A. Yes.

21 Q. And when I found out -- well, after that happened, did I
22 send you certain reports, DNA analysis reports from SLED?

23 A. Yes.

24 Q. And you have those in your possession? You have them
25 now?

1 A. I believe I do, yes.

2 Q. Okay.

3 A. I grabbed the whole file as I ran out.

4 Q. And basically, they consisted of DNA results possibly
5 from either Tyrone Ellison, Ronald Lance, Christopher Coburn,
6 as they pertain to a black visor, a black wig, a .380 auto
7 handgun, latex glove, that type of thing?

8 A. Correct. Those items were listed in the report.

9 Q. And they -- at some point she had -- the SLED analysis
10 scientists had tied up my client, Tyrone Ellison, with, on
11 the first go-around, at least with the visor and the wig?

12 A. Yes.

13 Q. Okay. And then at a later time, they retested the
14 glove. I think you had a report that said that there was no
15 results on the first go-around with the glove?

16 A. Correct.

17 Q. But then there was another -- they did another testing
18 on the outside of the glove?

19 A. Correct.

20 Q. Okay. As a result of all this, what did you do to get
21 involved in the case?

22 A. Well, my goal was to independently verify the findings
23 of SLED on the DNA findings of the black visor and the black
24 wig. The procedure, as outlined in the report that I
25 submitted to you yesterday, details the procedures that SLED

1 performed in my studies of the SLED report and my
2 conversations with SLED to achieve the goal of trying to
3 mimic their process as close to exactly as they did as
4 possible.

5 The goal is to independently determine the findings of
6 SLED by repeating their procedure. So I had -- I reviewed
7 the file. I had several conversations with SLED scientists
8 and SLED technicians to get an understanding of exactly how
9 the evidence items were processed. I repeated that process
10 almost exactly as SLED did in order to try to independently
11 determine if the DNA analysis that I performed would achieve
12 the same results.

13 Q. And you took -- you tried to take scrapings from what?

14 A. Well, specifically, SLED informed me that they took
15 scrapings and then swabbings of the headband, the entire
16 headband of both the wig and the visor. And I repeated that
17 procedure in the same manner and mechanism that SLED did.

18 Q. And what did you -- were you able to accomplish
19 anything?

20 A. Well, the DNA analysis did not reveal sufficient DNA to
21 create a profile. And the procedure at this point is that I
22 do not have a profile from the wig or the visor.

23 Q. What would you need to get a profile from the wig or the
24 visor?

25 A. Well, I need viable cells. And to obtain that, I would

1 have to do some continued testing. For example, SLED did a
2 scraping of the headband and did a swabbing after that. It
3 is possible that the significant and very meticulous scraping
4 of the headband removed whatever DNA was available, whatever
5 cells were there. DNA -- excuse me, SLED was able to
6 effectively obtain a sufficient quantity of DNA to perform an
7 analysis.

8 Q. But that doesn't always mean the next person down the
9 block, like yourself, could do the same?

10 A. That's correct. DNA from epithelial cells is very
11 difficult to get to begin with.

12 Q. That's skin cells?

13 A. Skin cells, yes. It's not like we have blood or a cheek
14 swab where DNA is readily accessible.

15 Q. And on the wig and the visor, it's going to be a
16 combination of skin cells, maybe hair products or sweat?

17 A. Possible. Well, there's no -- there's no DNA in sweat
18 per se.

19 Q. Okay.

20 A. But there is -- in the skin cells, the nucleus is gone
21 in skin cells. However, there are fragments of DNA that have
22 been found to be on the surface of the skin, and it's these
23 partial fragments that can be used to create a profile. It's
24 an emerging science of DNA testing with a lot of promise.

25 Q. Okay. If I go to the beach, get a tan, and then the

1 next week how you start getting dry skin and you rub your
2 skin and sometimes flakes come off.

3 A. Yes.

4 Q. Would you be able to -- if flakes on my skin or maybe on
5 a glove or on my -- if I wore a hat, are you always going to
6 be able to get DNA out of that?

7 A. No, not at all. And, in fact, it's difficult to get DNA
8 from that.

9 Q. Okay.

10 A. Research that I've read is it's about a 50/50 chance of
11 getting DNA.

12 Q. Then how can SLED, in this instance -- I think you said
13 you talked to the young lady that performed the test?

14 A. Yes.

15 Q. What is her -- how does she get DNA to match up to
16 Mr. Ellison off of a wig and a visor and a glove, for
17 instance? What is she saying?

18 A. Well, she did a very thorough scraping and swabbing.
19 She told me that she went around the entire headband and
20 collected anything and everything on the entire headband from
21 the entire circumference. So her procedure was to be very
22 thorough in collecting the DNA.

23 An alternative would be just to take a portion of the
24 headband and scrape and swab, but she told me she did the
25 entire headband. So she was very thorough in gathering any

1 and all cells that might be there.

2 Q. But that would necessarily deplete the chances of
3 another scientist, such as yourself, from obtaining, by her
4 processes, enough skin material to get a DNA profile?

5 A. Correct.

6 Q. And is that the case in this situation?

7 A. Yes, it is.

8 Q. Is there any doubt in your mind that that's the case?

9 A. Well, all I can say is I was unable to retrieve
10 sufficient DNA to create a profile.

11 Q. Did she indicate to you that there was any blood
12 products, semen, anything that was really what we call bodily
13 fluids?

14 A. She did not.

15 Q. Okay. There was no saliva or anything on any of these
16 products: On the wig, the visor or the glove?

17 A. Not that I'm aware of.

18 Q. And she would have been able to match up, according to
19 her protocol, by getting the buccal swab from the mouth and
20 then doing what?

21 A. Well, she would create a profile from the buccal swab
22 and then compare the alleles found from the evidence item to
23 that of the reference item, the buccal swab, to see if
24 there's a match or not.

25 Q. Okay. Is that how protocol goes?

1 A. Standard protocol, yes.

2 Q. What did you do in this case?

3 A. Well, I scraped the headband of both items and then
4 swabbed the headband with the same swab that I used to do the
5 swabbing or the scraping. So the procedure is you scrape the
6 item onto a clean surface, and then you swab the headband to
7 pick up any possible remaining cells, and then you swab the
8 scrapings off the paper. So it's a very thorough way of
9 collecting anything that may be present on the items.

10 And then that swab is -- DNA's extracted from that swab
11 and analyzed using standard procedures. And then that DNA
12 profile is then compared to a reference sample, typically a
13 buccal swab from a person that you're trying to see if it
14 matches.

15 Q. Is that the reason why on Page 2 of this report I
16 received yesterday you say an insufficient amount of DNA
17 could be obtained to produce a DNA profile, partial profile
18 was unattainable, none of the loci produced a measurable --
19 what is an allele?

20 A. Well, an allele is the individual characteristic that is
21 unique to each person. The allele link determines the DNA
22 profile of that individual. Every person has different
23 allele links at different places, and it's measuring these
24 allele links that allows forensics to determine if the allele
25 links of the individual matches the allele links of the

1 evidence item.

2 Q. And you were unable to do any of this with what you had?

3 A. Correct.

4 Q. Now, you called me -- the first time you met with
5 Mr. Sorenson or either his investigator at North Charleston
6 to pick up the evidence to test, did you take the -- I assume
7 it's cotton. How do you collect the spittle from the mouth?
8 What is it on?

9 A. Well, it's a swab. It's very similar to a Q-tip.
10 There's either a cotton or polyester fiber that is attached
11 to a rigid stick to hold the cotton or fiber. And that's the
12 tool that's used to gather DNA from the items.

13 Q. Did you get those at that time, the first time almost
14 about four weeks ago?

15 A. Well, we were going through the evidence that existed,
16 and my goal was to obtain the wig and the visor. And at the
17 police department, we were looking at other evidence items
18 that were there, and one evidence item that was there was the
19 actual swabs that SLED used to scrape and swab the evidence
20 items. And I was asked if I needed that as well. And I said
21 yes.

22 And so it was a procedure where when evidence item was
23 offered, if I felt like I needed that item, then I would
24 obtain that item under chain of custody.

25 Q. Now, four weeks ago, did you get the actual swab though?

1 A. The swabs that SLED used to rub the visor and the wig, I
2 got those, yes.

3 Q. But you didn't get the buccal swab?

4 A. No.

5 Q. Okay. Did you think you needed it at that time?

6 A. Not at that time.

7 Q. Why not?

8 A. Well, I was just trying to repeat the work SLED was
9 doing at that time by seeing if there was DNA on the wig and
10 visor, see if it matched the reference profile that had
11 already been done.

12 Q. So you could have, if you had gotten enough whatever you
13 want -- DNA sample, you could have at some point, if they'd
14 done it right and you did it right, you could confirm -- you
15 could have confirmed whether their -- the DNA is Mr. Ellison
16 or not his DNA?

17 A. Yes. Since the referenced DNA had already been done,
18 Mr. Ellison's profile was already done, and I had that
19 profile.

20 Q. You had more than what they normally just send me. You
21 had the whole -- what do y'all call that, the background? I
22 get the reports, and then I get something else. What is the
23 background with all those little numbers and charts and
24 everything? What's that called?

25 A. That's call a pherogram, but the pherogram is used to

1 determine the links, the actual DNA map; and I had already
2 had, from the SLED report, the detailed DNA map of
3 Mr. Ellison, so I didn't need to repeat that at that time.

4 Q. Okay. Now, at some point, I believe it was last Monday,
5 you called me saying -- letting me know about what you were
6 unable to accomplish?

7 A. Yes. I informed you that there was insufficient DNA to
8 create a profile.

9 Q. And you asked me to call Mr. Sorenson and arrange either
10 you to go to the jail and get a buccal swab from
11 Tyrone Ellison or either get the actual buccal swabs that
12 they had used already?

13 A. Yes. And the purpose for that is my next plan was to
14 extend the number of loci tested. The standard loci that
15 were tested were 16 different segments of the DNA. And I had
16 the opportunity to expand that to approximately 40 loci; so
17 my next plan was to do extended DNA testing. But to do that,
18 I only had the SLED report of the 16 segments of DNA.

19 And, therefore, to extend that, I would either need the
20 swab that was originally collected from Mr. Ellison or simply
21 collect my own so I could do additional testing.

22 Q. Now, did you at some point this week get the SLED buccal
23 swabs?

24 A. No, I have not.

25 Q. And where are they? They would be at North Charleston

1 Police Department?

2 A. I'm not sure. I was never informed of the location of
3 that particular swab.

4 Q. But you didn't go up to the -- to St. George -- well,
5 the detention center down the street, did you?

6 A. No.

7 Q. What would have been the easier way? Is it one -- one
8 the same as the other?

9 A. Not necessarily. The swab that was used originally to
10 collect DNA from Mr. Ellison may or may not still contain
11 enough cotton or fiber tip to create a profile. I would have
12 to examine it to see. But I do know that actually getting a
13 swab myself would assure that I would have sufficient DNA to
14 create a profile, an extended profile.

15 Q. Okay. Right now the best way, in your opinion, is to
16 get a buccal swab from Mr. Ellison and examine it?

17 A. Yes.

18 Q. And is that the nature of your plan on Page 3 talking
19 about an extended DNA analysis to include 40 loci?

20 A. Yes.

21 Q. And what is -- "I propose to perform a cutting." A
22 cutting of what?

23 A. Well, the evidence items were scraped and swabbed. In
24 other words, the item itself was not damaged or destroyed or
25 used. There could be DNA embedded into the fabric that is

1 unable to be retrieved by scraping and swabbing. However,
2 taking a cutting of the actual item and extracting DNA
3 directly from the cutting would be a possible way to
4 determine if there are DNA on the item.

5 Q. But it would be a lot easier to get the buccal swab and
6 just compare it to the analysis reports and all the protocol
7 things that SLED has already done. Wouldn't that -- I mean,
8 because you were already going to get DNA if you'd got stuff
9 off the visor and the wig. You were going to compare it to
10 what they had. Do you have to do both? Do you have to do
11 the buccal swab and do a cutting of the evidence?

12 A. Not necessarily. If I do a cutting and we're able to
13 extract DNA, I can use the 16 loci of that DNA analysis and
14 compare it to the profile that's already been done.

15 Q. Now, if you don't do it that way, you need the buccal
16 swab?

17 A. If we're going to do the extended DNA testing, yes.

18 Q. In your opinion, what would be the way to -- at this
19 point in time, to determine the DNA of Mr. Ellison vis-à-vis
20 the possibility that it was on those three items that they
21 gave you: The glove, the visor and the wig?

22 A. Either take cuttings of the evidence items or do
23 extended DNA testing; one or the other.

24 Q. And you said that in your report that it would take -- I
25 thought I saw results are expected to be completed by

1 mid-August 2014. Is that if you got them today or --

2 A. No. Let me explain that.

3 The swabs that were originally used by SLED to swab the
4 evidence items, I retrieved that from the police department.
5 There was some fiber material still remaining on the swab
6 itself. So if -- so my goal is to actually test the swabs to
7 see if there is Mr. Ellison's DNA on the swabs that was used
8 by SLED. That's currently in process. That's expected to be
9 finished within the next ten days.

10 Q. Well, what is the difference between what you're doing
11 now and what you were planning on doing then, expanded versus
12 what?

13 A. Well, I'm looking at DNA analysis from every angle,
14 trying to provide forensic services in every way possible.
15 Testing the swab that SLED used would be able to allow me to
16 determine if there was any DNA remaining on the swab since
17 the DNA swabbing I performed myself on the evidence items
18 didn't retrieve any DNA.

19 Q. And you're talking about the swab they used on their
20 evidence or the swab out of his mouth?

21 A. Swab they used on the evidence.

22 Q. Would you still want the swab from his mouth?

23 A. Not necessarily. It's a stepwise process.

24 Q. But if you've got both of them, wouldn't it be better to
25 get both of them, or is it just you don't do it that way

1 until you determine that the one way isn't the way to go?

2 A. Well, I usually take the procedure stepwise and use the
3 information learned from the previous step to help steer the
4 course on what step would be next or appropriate.

5 Q. Now, how long would this process have taken even if you
6 had gotten the evidence? Would you have been able to handle
7 this all in eight weeks?

8 A. I --

9 Q. If you'd been able to get the evidence eight weeks ago?

10 A. Not necessarily. I have many cases I work on. Some are
11 just as important as this with trials and needs like any
12 other case. So I'm currently working ten or so hours a day
13 now trying to perform the services. So it does take time.

14 For example, SLED itself is in the same predicament.
15 They have a backlog, and they can take six months to a year
16 to do a DNA test.

17 Q. Well, what is the timeframe? August of -- middle of
18 August, what does that exact timeframe refer to then?

19 A. The DNA analysis on the swabs that SLED used to rub the
20 visor and the wig.

21 Q. And then if you -- you could get some analysis that's
22 reportable and confirming whether it is his DNA or not just
23 by that process?

24 A. Yes.

25 Q. If you weren't able to do that, you still have a chance

1 where -- what would happen? What would go wrong if you
2 couldn't do that? What would be possibly wrong with their
3 swab?

4 A. Well, if they -- when they did the swab cutting in
5 preparation for analysis, if they cut most of the swab and
6 cut the swab that contained most of the DNA, there may or may
7 not be sufficient DNA on the swab.

8 Q. Same thing as with the items of evidence, then?

9 A. Correct.

10 Q. Not enough?

11 A. Correct.

12 Q. Okay. So what I'm hearing as a layman, the safest thing
13 would be to get those swabs but also to get a buccal swab
14 from the client as a backup?

15 A. Well, what I would do is take this stepwise. The step
16 that is currently in process is I'm doing a DNA analysis on
17 the swab that SLED used to rub the visor and the wig. If I'm
18 able to achieve a profile from that, then I'll compare that
19 profile to the reference profile of Mr. Ellison and be able
20 to make a determination if the DNA is a match or not.

21 At that point I'll provide that information to the Court
22 for them to make a decision if this is sufficient or if
23 additional DNA testing is needed.

24 Q. Well, you'd be able to know if sufficient DNA testing is
25 needed. You'd be able to let me or somebody know other than

1 the Court, right?

2 A. Oh, yes. Everyone, all the parties to the case, yes.

3 Q. Okay. Now, there's been some conversation about --
4 because I received a call from Mr. Sorenson on Wednesday
5 afternoon, I believe, after I saw him. And he had said that
6 his investigator was trying to retrieve the evidence from you
7 Thursday morning, the visor and the wig and, I assume, the
8 glove?

9 A. Correct.

10 Q. And that there was some problem with August the 11th.
11 And I was concerned about that because I thought -- I know
12 that my stuff that I sent to you clearly stated
13 August the 4th on a couple occasions. I'm just -- that's a
14 concern of the Court, and I know it's a concern of everybody.
15 What is the problem there that happened? Do you know?

16 A. Well, Mr. O'Neil said, "Can I come by and pick up the
17 evidence item Thursday morning or Friday morning?"

18 I said, "Sure, you can. I've already completed
19 everything."

20 But he was very clear, "Now, if you need it for any
21 reason, I can just pick it up Monday morning on my way in."

22 Q. But would August the 4th trial week this week versus
23 next week impact upon any of this? Because what I'm hearing
24 from you and seeing in the report is that you still wouldn't
25 have been able to get it together by August the 11th, next

1 week, either?

2 A. That's correct.

3 Q. Okay. Are you prepared to do -- I mean, you're prepared
4 to go to do what you have to do if the Court directed you to
5 do it. What would be -- what's the outside timeframe, then?

6 A. If we include all the proposals that I outlined in the
7 letter and we discussed here, I'm anticipating 30 to 45 days.

8 Q. But if you just did the first one and you got enough off
9 of their swabs that they used to swab the evidence, it could
10 be 30 days, 15 days?

11 A. I'm anticipating mid-August to complete that.

12 Q. Okay. But possibility of 30 to 45 days?

13 A. It's possible. It's hard to predict exactly.

14 MR. BOLUS: Okay.

15 THE COURT: Thank you.

16 MR. BOLUS: Judge, could I be excused for just a second?

17 (Recess held.)

18 MR. BOLUS: Thank you, Your Honor.

19 THE COURT: All right. Mr. Sorenson.

20 MR. SORENSON: I guess just a couple brief things, Your
21 Honor.

22 CROSS-EXAMINATION BY MR. SORENSON:

23 Q. Dr. Bennett, to make sure I understand things correctly,
24 so you right now -- and you met with me and my investigator,
25 Investigator O'Neil, on July 11th over in North Charleston;

1 is that correct?

2 A. Correct.

3 Q. And turned over -- at that point in time was turned over
4 to you the wig, the visor, a glove and then also swabs that
5 had been taken either by some agency from some of those
6 items; is that correct?

7 A. Correct.

8 Q. And you had all -- on July 11th had all those items in
9 your possession to do whatever you wanted to do with them,
10 correct?

11 A. That's correct.

12 Q. And it's my understanding that you, at this point in
13 time, have not done anything, I guess, with the glove; is
14 that correct?

15 A. That's correct.

16 Q. All right. But on the wig and the visor, you basically
17 tried to imitate exactly what SLED had done as far as
18 processing those two items; is that correct?

19 A. That is correct.

20 Q. And you -- to make sure you were doing that accurately,
21 you have spoken to the DNA analyst, Catherine Leysi, and also
22 the evidence processing person, Betty Butler, the two of them
23 on multiple occasions; is that correct?

24 A. Correct.

25 Q. All right. And they basically laid out for you how they

1 went about, what items they used, and how they went about
2 processing both of those items. And you attempted in your
3 lab to basically recreate doing that; is that correct?

4 A. Correct.

5 Q. Okay. And from what I understand from this letter that
6 we've received is that basically after doing that, you were
7 unable to develop any DNA profile from what you attempted to
8 recreate; is that correct?

9 A. Correct.

10 Q. And you said that that didn't necessarily surprise you
11 because of the thorough job that they described to you having
12 done in processing those items; is that correct?

13 A. Correct.

14 Q. All right. So basically, what you're asking to do now
15 is potentially just test other parts of those items; is that
16 correct?

17 A. No. Test the same part but take a cutting of the actual
18 item.

19 Q. Okay.

20 A. But you're right. I could test other parts of the item.

21 Q. Okay.

22 A. There's nothing to prohibit that.

23 Q. But ultimately, that isn't going to shed any light on
24 whether SLED did a -- the reliability of their results; is
25 that correct? I mean, if you test another part of the item,

1 it's not going to have any effect necessarily on the results,
2 the tests and the results that SLED did in processing those
3 items; is that correct?

4 Because if you processed another part of the item, I
5 mean, clearly there could be somebody else's DNA on another
6 part of the item, and that would have absolutely no effect on
7 whether Tyrone Ellison's DNA was found on the headband of the
8 visor and the wig; is that correct?

9 A. That's correct.

10 Q. And you testified -- and you've had an opportunity to
11 review what was provided to you, basically all of their
12 background paperwork and everything that was involved in
13 processing all of those items; is that correct?

14 A. Correct.

15 Q. So you had a chance to review that even before you
16 talked to them; is that correct?

17 A. Correct.

18 Q. And it's your testimony that from talking to them and
19 reviewing them that they appeared to do a thorough job in
20 processing those items; is that correct?

21 A. That's correct.

22 Q. Nothing in there that suggests to you that they did
23 anything inappropriate?

24 A. That's correct.

25 Q. And let me just ask you, as far as the defendant's

1 buccal swabs, we actually had a conversation over at North
2 Charleston Police Department whether you wanted the
3 defendant's buccal swabs back on July 11th, and you had
4 indicated at that point in time you didn't think they were
5 necessary for you to have them; is that correct -- back on
6 July 11?

7 A. At that point in time, that's correct.

8 MR. SORENSON: That would be all I have, Your Honor.

9 THE COURT: Redirect?

10 MR. BOLUS: No, sir.

11 THE COURT: Why didn't you do anything with the glove?
12 Or at least I didn't see in the report.

13 THE WITNESS: Sure. Yes. My initial conversation with
14 the attorneys was to determine if there was DNA on the wig
15 and visor. The glove was an afterthought. Initially, it was
16 my understanding, and I may have misinformation on that, is
17 that no DNA was found on the glove; so based on that, I was
18 ~~not going to do any testing on an item that did not contain~~
19 any DNA.

20 THE COURT: And I don't have the SLED report. That
21 hasn't been provided to me; so that may be exactly correct.

22 MR. BOLUS: Your Honor, I think that if I'm wrong, I'm
23 wrong. The first reports I had, it was only the visor and
24 the wig, but then you sent me something on the glove. And I
25 can't remember if it came after we had the order for him to

1 get it, or at some point I know you said that they
2 retested --

3 MR. SORENSON: It came after, but it came prior to
4 Dr. Bennett picking up those items. That's why the glove was
5 given to him.

6 MR. BOLUS: Okay.

7 MR. SORENSON: And I was under the impression that he
8 knew that DNA had been found on that glove also.

9 MR. BOLUS: All right.

10 MR. SORENSON: That would be the only reason I would
11 turn it over to him; I mean, there's no reason otherwise.

12 MR. BOLUS: I just wanted to clarify that, because I
13 know that it wasn't --

14 THE COURT: DNA that matched the profile of Mr. Ellison?

15 MR. SORENSON: Yes, sir. On all three of those items:
16 Visor, wig, glove.

17 THE COURT: Any other DNA on any of those three items?

18 MR. SORENSON: He is the -- on all three of the items,
19 it is a mixture, with him matching the major contributor. 1
20 in 2.2 quintillion is the probability.

21 THE COURT: But it's a mixture?

22 MR. SORENSON: It is a mixture of multiple, but he is by
23 far the major contributor on all three of those items.

24 MR. BOLUS: And I would need to probably ask the
25 question since he brought up this 1 quintillion. That's

1 about 250 million times the population of the world. And I
2 just need to ask the doctor about that. If people hear 1 in
3 a quintillion, we need to hear something about that, if I
4 could. Because he just mentioned 1 in a quintillion, you
5 know.

6 THE COURT: Go ahead. You may ask.

7 REDIRECT EXAMINATION BY MR. BOLUS:

8 Q. Doctor, when they use these words, 1 quintillion, I did
9 my math. It would be about -- a quintillion, that's not a
10 trillion; it's not a quadrillion; it's a quintillion, right?

11 A. It's a very high number.

12 Q. Well, I did my math, and it's 250 million times the
13 population of the world presently at 6.5 billion.

14 How can -- does that mean anything when you say 1 in a
15 quintillion, you'd have to be talking about people from outer
16 space, wouldn't you?

17 A. Well, it's a statistical calculation rather than a
18 population calculation.

19 Q. That's right.

20 A. And based on that, the probability of the DNA found on
21 the item matching another person other than Mr. Ellison is
22 extremely remote, but it's not 100 percent. It's, at best,
23 99.99 something percent. So there's always the possibility
24 that there is one person that could exist.

25 I didn't say "does exist." I said "could exist" that

1 has the DNA that's similar enough for the specific DNA
2 segments that were analyzed to be the contributor of the DNA
3 on the evidence items. But statistically, the likelihood is
4 almost -- and I have to underline the word "almost" --
5 impossible.

6 Q. But a mixture of DNA on -- when they say it's a mixture,
7 because you saw the results. A mixture was, I think, on a
8 couple items. There was a mixture of two individuals, and
9 they just isolate him as more of the DNA belonging to him?

10 A. Correct. The higher quantity of DNA that was found on
11 the items matched the DNA profile of Mr. Ellison.

12 Q. And you understood that it was a .380 gun involved that
13 has no -- you didn't have to do anything because the DNA
14 wasn't on a .380 pistol that was used?

15 A. That's my understanding, yes.

16 Q. Okay. And the thing about the glove, is that kind of an
17 oversight? Because I understood the first report was that it
18 was not on the glove or in the glove. And then they did
19 something on the outside of the glove later and found some
20 evidence. Were you aware of that or --

21 A. Well, my understanding was that the -- initially, the
22 glove did not contain DNA.

23 Q. That's true.

24 A. Or DNA was not found.

25 Q. Right. There's a report on that. Yes, there is.

1 A. Yes. So based on that, I focused my attention on the
2 evidence items where DNA was found and took in -- took the
3 glove in case I had the opportunity to do further DNA testing
4 on the glove.

5 Q. Okay. Thank you.

6 MR. BOLUS: That would be all, Judge.

7 THE COURT: Doctor, under your plan, so to speak, you've
8 given an indication of a timeframe not less than 10 nor more
9 than 45 days; is that a fair statement?

10 THE WITNESS: That's my estimate, yes.

11 THE COURT: And I'm not a scientist. Tell me why that
12 is.

13 THE WITNESS: Well, number one is I have other cases
14 that I'm working on, obviously. No. 2 is when we do the DNA
15 analysis, we have some very strict quality control procedures
16 and parameters. And if any of those fall out of guidance --
17 out of guidelines, then we have to repeat the process.

18 So with any type of laboratory work, it can go very
19 smoothly and very quickly and no other analysis needs to be
20 done. However, if something needed to be repeated, then we
21 would need the time to do that. Now, in all honesty, I
22 actually anticipate it taking less time, but I need a little
23 bit of a cushion there just in case.

24 THE COURT: Let me make sure I understand this correct,
25 Mr. Bolus and Solicitor. SLED found or will testify that

1 they have Mr. Ellison's DNA profile on the wig, the visor and
2 the glove. And that's a mixture, but he's the major
3 contributor.

4 MR. SORENSON: Correct.

5 THE COURT: Correct?

6 MR. SORENSON: Correct.

7 MR. BOLUS: Yes, sir.

8 THE COURT: And Dr. Bennett could not reproduce SLED's
9 findings, correct?

10 MR. SORENSON: That is my understanding from this letter
11 and his testimony; that is correct.

12 THE COURT: There was no DNA. He was not able to
13 extract DNA; is that correct?

14 MR. SORENSON: That is my understanding from this letter
15 and his testimony, yes, sir.

16 THE COURT: So you already have a third party's DNA on
17 those items of evidence.

18 MR. SORENSON: Minor contributor, yes, sir.

19 THE COURT: But a contributor.

20 MR. SORENSON: Yes, sir.

21 THE COURT: Yes. But a contributor.

22 MR. SORENSON: Yes, sir.

23 THE COURT: Explain to me what further testing is there
24 to assist Mr. Ellison.

25 MR. SORENSON: That's what my line of questioning to him

1 was. I mean, he's already attempted to recreate what SLED
2 did and got nothing out of it. So testing some other part of
3 the evidence, I don't see how -- I mean, I don't see how that
4 does. That would be my position is that there's nothing more
5 that he's going to do that's going to assist him.

6 THE COURT: I mean, how does that assist Mr. Ellison
7 when you already have, even if it's minor, even if it's
8 minor, you still have another person's DNA on those items?
9 Is the minor contributor the same profile on all three?

10 MR. SORENSON: I don't think there's any way somebody
11 would be able to tell that, Your Honor, because it is a very
12 minor contributor. So, I mean, there's just a little bit on
13 a couple different alleles and on a couple different spots.
14 So I'm not too sure -- a couple different loci. So I'm not
15 too sure that there's any way to really say it's the same
16 minor contributor.

17 MR. BOLUS: Judge, I think Dr. Bennett motioned to me,
18 because I'm not the expert, he wanted to say something about
19 your question.

20 THE COURT: Sure. You're an expert in the law. That
21 was a legal question. And so is Mr. Sorenson and Mr. Giese
22 and many others in this courtroom.

23 Yes, sir, Doctor. Did you want to comment on that?

24 THE WITNESS: Yes. To answer your question, I could
25 actually look at the profiles of the minor contributors and

1 the profile of other persons whose DNA profiles was included
2 in the SLED report, and I could study the actual allele links
3 to determine if the minor contributors are all the same
4 person or not.

5 I could do that one of two ways: I could take that back
6 to my office and study it intently, or being that I have the
7 files here, I could take a quick glance and provide --
8 possibly provide some indication at this point in time.

9 MR. BOLUS: And also, Judge, I think we're still trying
10 to determine whether it's my client's DNA.

11 I mean, aren't we, Dr. Bennett?

12 THE WITNESS: Yes.

13 MR. BOLUS: I mean, the bottom line: You're still
14 trying to determine whether the DNA is really his.

15 THE COURT: Well, it's probabilities. It's statistical
16 probabilities.

17 MR. BOLUS: Well, that's --

18 THE WITNESS: Well, when I do the analysis --

19 THE COURT: To quote Chief Justice John Roberts in a
20 recent case, we're not looking for the proverbial martian.
21 It's probabilities.

22 MR. BOLUS: Well, that brings up the problem with my
23 client in terms of the other things in terms of he believes
24 certain things were -- like a glove was found at the second
25 robbery and put in the place of the first one. There's all

1 kind of little things going on like that with him, but that's
2 not his problem. That's not Dr. Bennett's problem.

3 THE COURT: That has nothing to do with the forensic
4 scientist. That's the O.J. glove. That's the Mark Fuhrman,
5 which don't get me wrong, I'm not saying that's right or
6 wrong. I'm saying, you know, that's other parts of his
7 defense. I understand that, and you don't have to tell me
8 his defense. I'm not mining for that.

9 MR. BOLUS: And one of the main situations that you saw
10 frustration with my client and his mother is that me trying
11 to negotiate certain situations without actual confirmation
12 from an independent scientist that it's his DNA. He's
13 denying it's his DNA. He wants to know. And we don't know
14 yet because we don't have enough for a DNA profile. And
15 that's the major problem I'm having with the whole case with
16 him and his mother and everything else.

17 THE COURT: And what are the probabilities that the
18 cuttings or swabs are going to produce any results?

19 THE WITNESS: And I can answer that. If SLED performed
20 their procedure accurately, then if I did extended testing,
21 or if I did a cutting, or if I did DNA testing on another
22 part of the items, then the probability is I'm going to find
23 the exact same results.

24 THE COURT: Yes, sir.

25 MR. SORENSON: And my question is, if Mr. Bolus says the

1 whole issue is whether what SLED found on those items is his
2 DNA, then why on earth did he not get his buccal swabs?
3 Because that, I would have thought, would have been what he
4 wanted to do DNA on to compare to SLED's results, but he
5 specifically told me he didn't want those items.

6 So if that's what Mr. Bolus is saying the whole issue
7 is, then I don't understand why those items were not taken,
8 and that's what the DNA testing should have been done on to
9 compare to SLED's results.

10 MR. BOLUS: Dr. Bennett said he would like to address
11 that because he --

12 THE WITNESS: Well --

13 THE COURT: Sure. We've got kind of a parallelogram
14 going on here.

15 Go right ahead, Doctor.

16 THE WITNESS: The DNA profile that was originally
17 obtained from Mr. Ellison was already done and mapped out.
18 So I was going to use that as the comparative reference. So
19 I didn't need to repeat that part. But now if I do testing
20 beyond what SLED had performed, then I would need a DNA
21 sample from him to do the extended DNA testing.

22 MR. SORENSON: So you were willing to assume that SLED
23 did everything right when they mapped out his DNA profile but
24 not necessarily that they did everything right on mapping out
25 the profile on the evidence?

1 THE WITNESS: I'm not assuming anything under any
2 circumstances. I'm taking it stepwise.

3 MR. SORENSON: Of course you knew that this case, I
4 mean, two months ago was scheduled to go this week back in
5 June.

6 THE WITNESS: Yes.

7 THE COURT: Dr. Bennett, how about step out and look at
8 those results real quick, if you don't mind.

9 THE WITNESS: Okay. Be glad to.

10 THE COURT: All right.

11 (Witness exits courtroom.)

12 --- END OF TRANSCRIPT OF RECORD ---

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1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER
4

5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of the above-captioned case, relative to appeal,
10 in the First Judicial Circuit Court for Dorchester County,
11 South Carolina, on the 4th of August, 2014.

12 I further certify that I am neither related to nor
13 counsel for any party to the cause pending or interested in
14 the events thereof.

15 September 27, 2014
16

17 /s/ Ruth L. Mott

18 Official Court Reporter
19
20
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25

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRONE DARIUS ELLISON,

APPELLANT

APPELLATE CASE NO. 2014-002337

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
ARGUMENT.....	3
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<u>Mattox v. United States</u> , 146 U.S. 140 (1892).....	14
<u>Mincey v. State</u> , 314 S.C.355, 444 S.E.2d 510 (1994)	14
<u>Remmer v. United States</u> , 347 U.S. 227 (1954).....	passim
<u>State v. Bruce</u> , 412 S.C. 504, 772 S.E.2d 753 (2015).....	15
<u>State v. Bryant</u> , 354 S.C. 390, 581 S.E.2d 157 (2003).....	12, 13
<u>State v. Carrigan</u> , 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985).....	8, 11
<u>State v. Hill</u> , 394 S.C. 312, 714 S.E.2d 879 (Ct. App. 2011)	9
<u>State v. Kelly</u> , 331 S.C. 132, 502 S.E.2d 99 (1998).	passim
<u>State v. McDaniel</u> , 275 S.C. 222, 268 S.E.2d 585 (1980)	8, 10
<u>United States v. Cheek</u> , 94 F.3d 136 (4 th Cir. 1996).....	10, 14, 15

Other Authorities

U.S. Const. amend. VI	9, 12, 14, 15
U.S. Const. amend. XIV	9, 12, 14

STATEMENT OF ISSUES ON APPEAL

1.

During an overnight recess, a juror was approached by a man he believed was related to appellant and asked to vote for appellant. The juror told the rest of the jury about the attempted influence and told them to be careful. Did the trial court err in refusing to grant appellant's motion for a mistrial because the appellant's right to a fair and impartial jury was violated after the communication to the entire jury about the attempted influence and that they needed to be careful?

2.

When determining whether to declare a mistrial because of outside influences on the jury, does the Sixth Amendment allow a trial judge to consider the weight of the evidence against a criminal defendant as a factor in his decision?

STATEMENT OF THE CASE

On April 7, 2014, appellant Tyrone Ellison was indicted by a Dorchester County grand jury for armed robbery and entering a bank with intent to steal. R. 565. On October 20, 2014, appellant was tried before the Honorable D. Craig Brown and a jury. R. 1. Don Sorenson and Phil Giese represented the State. R. 1. James Falk represented appellant. R. 1. The jury convicted appellant. R. 555, ll. 15 – 23. Judge Brown sentenced appellant to concurrent terms of thirty years' imprisonment on the bank charge and life imprisonment without the possibility of parole for armed robbery pursuant to South Carolina's recidivist statute. R. 562, l. 1 – 563, l. 24. This appeal follows.

ARGUMENT

1.

During an overnight recess, a juror was approached by a man he believed was related to appellant and asked to vote for appellant. The juror told rest of the jury about the attempted influence and told them to be careful. The trial court erred in refusing to grant appellant's motion for a mistrial because the appellant's right to a fair and impartial jury was violated after the communication to the entire jury about the attempted influence and that they needed to be careful.

Factual Background

On April Fool's Day, 2013, a man wearing a wig, visor, and dark glasses robbed a bank in Dorchester County. R. 42, l. 19 – 46, l. 23. None of the five people in the bank that morning were able to identify the robber. David Lewis ("Lewis"), a retiree, was a customer at the bank that morning. R. 89, ll. 16 – 90, l. 13. Lewis had "been in a couple robberies." R. 91, ll. 7 – 18. He was in one of the offices and was suspicious of the robber when he entered the bank. R. 91, ll. 7 – 23. The bank employee with Lewis called 911 when it became obvious that a robbery was happening. R. 91, ll. 7 – 92, l. 4. After taking cash from the tellers, the robber left the bank. R. 92, ll. 1 – 4. R. 45, l. 4 – 46, l. 23.

Lewis left the bank, got in his truck, and followed the robber. R. 92, l. 5 – 93, l. 15. The robber went into the woods. R. 93, ll. 16 – 94, l. 6. Lewis drove into an apartment complex bordering the woods. R. 94, ll. 3 – 19. He noticed "an older model, dark green Honda with another fellow in it" that, to Lewis, did not belong in the neighborhood. R. 94, ll. 9 – 19. He turned his truck around and followed the green

Honda. R. 94, ll. 16 – 19. A man that Lewis thought resembled the robber, but without the disguise, came out of the woods and got in the car. R. 95, ll. 1 – 13. R. 93, ll. 11 – 15.

Lewis followed in his truck. R. 95, ll. 14 – 21. The Honda ran a red light and Lewis continued to give chase at speeds approaching 100 miles per hour. R. 97, ll. 2 – 24. The Honda eventually lost Lewis in traffic. R. 97, l. 18 – 98, l. 5. The Honda had a South Carolina license tag that began with either a “153” or a “193.” R. 98, l. 13 – 99, l. 5. While it was undisputed that appellant at one point had a green Honda that his mother purchased for him, the State’s witnesses and the defense witnesses contradicted each other on whether appellant still had the Honda on the day of the robbery. R. 124, l. 1 – 129, l. 20. R. 142, ll. 10 – 23. R. 307, l. 14 – 313, l. 2. R. 423, l. 21 – 424, l. 7. According to appellant’s mother and stepfather, appellant sold the Honda a week before the robbery. R. 307, l. 14 – 313, l. 2. R. 423, l. 21 – 424, l. 7.

A K-9 unit responded to the bank. R. 108, ll. 8 – 17. The dog led police into the woods. R. 109, l. 23 – 111, l. 3. The police eventually found a black visor, the latex glove, a wig, and a pistol. R. 111, ll. 5 – 16. An expert from SLED testified that DNA found on the wig and visor contained a mixture of DNA from at least two individuals, one of whom was appellant. R. 229, l. 20 – 237, l. 11. DNA found on the pistol was a mixture of at least three people, but appellant was excluded as a contributor. R. 235, ll. 1 – 6. A defense DNA expert attempted to analyze the items, but could not because SLED’s testing removed all of the usable DNA from the evidence. R. 378, l. 4 – 386, l. 19.

Appellant worked at Burger King. R. 405, ll. 3 – 4. The shift manager testified that appellant was the only person in April 2013 who unloaded delivery trucks. R. 405, l. 11 – 407, l. 15. She testified that appellant would have been the person who unloaded the delivery truck on the day of the robbery. R. 406, l. 21 – 407, l. 21. Another Burger King employee testified she worked on April 1, 2013, and that appellant unloaded the delivery truck. R. 413, ll. 7 – 25.

Juror White

The parties finished presenting their evidence on Wednesday, October 22, 2014. R. 254, l. 20. R. 460, l. 7 – 461, l. 22. The trial judge had other business the next day – Thursday – so he dismissed the jury until Friday. R. 460, l. 17 – 461, l. 22. When court resumed on Friday morning, Judge Brown cleared the courtroom. R. 463, l. 19 – 464, l. 5. Judge Brown then had the bailiff bring in juror William White (“White”). After swearing Juror White, Judge Brown asked him about an encounter with someone during the break in the trial who asked the juror “to vote a certain way.” R. 464, ll. 8 – 21.

Juror White described someone coming to his house at around 4:00 PM the previous day (Thursday) “on behalf of the defendant.” R. 464, l. 22 – 465, l. 15. Juror White believed the person was “somebody related to the defendant.” R. 465, ll. 2 – 4. Juror White told the person to leave his front porch. R. 465, ll. 2 – 4.

Juror White told Judge Brown:

Let me ask you this: when you guys made us jurors, you didn’t set up blank guidelines what to do if something like that happens, so I just went to work.

THE COURT: Say that again now.

THE JUROR: When you guys decided who would be jurors, you didn't – you didn't say, "Do this in case this happens," so I – it was really no way for me to react to that.

THE COURT: You're okay. You did exactly what you were supposed to do this morning.

R. 465, ll. 16 – 24. After getting a description of the man who approached Juror White, Judge Brown asked him if he knew "whether or not anybody else in the jury has been approached in this case." R. 466, ll. 9 – 11. The following colloquy then occurred:

THE JUROR: No, sir, but I wasn't sure if that fell under your rules as don't speak about the case, but I did let them know just because I'm a family man and, you know, I think they would want to know to be careful, so I did let them know.

THE COURT: Let me ask you this: if you were allowed to remain on this jury, do you believe you could be fair and impartial and decide the case based upon the evidence as presented in this courtroom?

THE JUROR: No, sir, with my military background, I feel like if somebody is desperate enough to approach me on behalf of the defendant, then I believe they are guilty.

THE COURT: And you do not believe you can be fair and impartial?

THE JUROR: To be honest with you, based on the evidence that was presented to me and him approaching me, no, I've already decided, Your Honor.

THE COURT: Mr. Sorenson?

MR. SORENSON: I don't have anything.

THE COURT: Excuse him.

MR. FALK: I would excuse him, but I have another concern now.

THE COURT: And you haven't discussed it with the rest of the jury?

THE JUROR: I just let them know that I was approached and for them to be careful, you know.

R. 466, l. 12 – 531, l. 12 (emphasis added). Juror White's comments about the approach made by someone he believed was related to the defendant and warning to be careful was made to all the jurors. R. 469, ll. 6 – 9.

Judge Brown then brought the rest of the jury into the courtroom. R. 470, ll. 9 – 19. He asked the jury whether Juror White had conveyed to all of them "that someone approached him yesterday about this case." R. 470, l. 20 – 471, l. 2. The transcript notes that the jurors indicated affirmatively. R. 471, l. 3. The court failed to ask about Juror White's admonition to be careful. The trial judge then asked the jurors whether they could remain fair and impartial, "based upon your knowledge that someone approached Mr. White about this case, asking him to vote in a certain way." R. 471, ll. 10 – 22. The transcript notes that no jurors raised their hand to tell the judge they could not be fair and impartial. R. 471, ll. 18 – 23. The judge asked the jurors to raise their hands if they had been approached by anyone "in any way, shape or form." R. 471, l. 24 – 472, l. 5. No jurors raised their hands. R. 472, ll. 6 – 8. Judge Brown asked one more time whether anyone could not be fair and impartial. R. 472, ll. 9 – 15. No juror responded. R. 472, ll. 9 – 15. The jurors then returned to the jury room. R. 472, ll. 16 – 19.

Appellant moved for a mistrial. R. 472, l. 25 – 473, l. 18. Appellant argued that, despite their collective assent to the judge's question about whether they could still be fair, the jury had been tainted and would believe appellant guilty because of the attempted influence of Juror White. R. 473, ll. 4 – 18. The solicitor argued that granting a mistrial would "be rewarding" appellant because he believed that appellant was "complicit." R. 473, ll. 20 – 23. The solicitor told the trial judge that on a jail call,

appellant was overheard referencing "Margaret" and that Juror White lived on Margaret Street. R. 473, l. 25 – 474, l. 7. This jail call was not introduced into evidence.

Judge Brown took a recess to research the issue, stating before he left the bench that he was "not inclined to grant a mistrial, because there is absolutely nothing that could prohibit it from going on again and again and again unless the entire jury panel, every time this young man's tried, is sequestered and put up in a hotel room, and that's not the way our system works." R. 474, ll. 8 – 19. Judge Brown stated he agreed with the solicitor that granting a mistrial "would be, in some sense, rewarding the defense. . . ." R. 474, ll. 20 – 24.

When Judge Brown returned to the bench, he immediately ruled and denied the motion for a mistrial. R. 475, l. 17 – 478, l. 4. The court first cited State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (1980) for the proposition that the matter was within his discretion. R. 475, ll. 17 – 25. He then cited State v. Carrigan, 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985), for the proposition that a "defendant must show prejudice resulting from the outside influence on the jury to obtain a mistrial." R. 476, ll. 1 – 3. Finally, the judge cited several factors from State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). R. 476, l. 4 – 478, l. 4. The first factor considered was the "number of jurors exposed." R. 476, l. 4 – 478, l. 4. Judge Brown found that one juror, Juror White, was exposed. R. 476, l. 4 – 478, l. 4. He then stated that although it was "abundantly clear" that the jury learned of the attempt to influence Juror White, that only Juror White was actually exposed to someone trying to influence his vote. R. 476, l. 4 – 478, l. 4. The judge stated that none of the jurors indicated they could not be fair. R. 476, l. 4 – 478, l. 4.

The judge also interpreted Kelly as requiring him to assess the strength of the State's case. R. 476, l. 4 – 476, l. 4. Judge Brown stated there was "substantial evidence" of appellant's guilt which weighed in the State's favor. R. 476, l. 4 – 478, l. 4. After his ruling, the attorneys made their closing arguments and the trial judge gave his charge. R. 483, l. 2 – 553, l. 17. The jury returned a guilty verdict in thirty-eight minutes. R. 554, l. 14 – 555, l. 5.

Discussion

Once it became "abundantly clear" that Juror White told the other jurors about the attempt to influence his vote and that they should be afraid, the trial court was required to declare a mistrial. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend. VI. "The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors." State v. Hill, 394 S.C. 312, 320, 714 S.E.2d 879, 883 (Ct. App. 2011). "The integrity of jury proceedings must not be jeopardized by unauthorized invasions." Remmer v. United States, 347 U.S. 227, 229 (1954). "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." Id.

In Remmer, the defendant was convicted of income tax evasion. Id. at 228. After the verdict, the defendant learned that "a person unnamed" had communicated with the jury's foreman and "remarked to him that he could profit by bringing in a verdict favorable to the [defendant]." Id. The juror told the judge, who informed the prosecution

and the FBI, but did not tell the defendant. Id. The judge concluded the statement was made in jest. Id.

The United States Supreme Court reversed. Id. at 229-30. The defendant argued that had he known of the incident, he would have moved for a mistrial. Id. at 229. The Court concluded that a presumption of prejudice attaches when an outside party attempts to influence a juror. Id. at 229. "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." Id. The Fourth Circuit applies the Remmer presumption in such a way that shifts the burden to prove that "there exists no reasonable possibility that the jury's verdict was influenced by an improper communication." United States v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996) (internal quotations omitted).

In this case, the trial judge failed to recognize that prejudice was presumed. Instead, the trial judge assumed that granting a mistrial would reward the defendant. R. 474, ll. 8 – 22. The analysis used by the trial court to reach its conclusion was flawed. While McDaniel does say that mistrials are often within the trial judge's discretion, no motion for a mistrial was made in McDaniel. McDaniel at 223-24, 268 S.E.2d at 586. McDaniel dealt only with a juror making "improper remarks and gestures." Id. The juror was replaced by a qualified alternate and the defendant did not move for a mistrial. Id. The Court stated, "Admittedly, the appropriate remedy for improper communication between jurors and outsiders is the declaration of a mistrial." Id. The trial judge erred by ignoring this important statement of law and focusing on the abuse of discretion standard of review.

The trial judge also erred in his use of Carrigan. In Carrigan, a juror had a short conversation with a prosecution witness about the witness's sister having lost weight. Carrigan at 613, 328 S.E.2d at 120-21. The juror had no conversation with the witness about the trial. Id. The trial judge excused the juror and replaced him with an alternate. Id. This Court ruled that the "benign nature of the conversation" did not warrant a mistrial. Id. Far from any in-depth analysis of prejudice (because none was warranted), the Court observed that "the mere fact that some conversation occurs between a juror and a witness for the State does not necessarily prejudice a defendant." Id. The trial judge erred by focusing on this offhand comment concerning prejudice instead of the black letter law in the opinion that a criminal defendant is "constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence. Id. Once the jury had been influenced by Juror White's comments, the trial court was required to declare a mistrial.

The judge also erred in his analysis under Kelly. Kelly involved a pro-death penalty pamphlet that one juror attempted to circulate during the penalty phase of a capital trial. Kelly at 139-44, 502 S.E.2d at 103-05. Kelly did not involve a contact from one of the parties who attempted to influence or intimidate a juror. The trial judge in Kelly found that no jurors other than the one who possessed the pamphlet were sufficiently exposed for it to cause their impartiality to be questioned. Id. The juror who brought the pamphlet was dismissed. Id. The trial judge erred in this case by using the Kelly court's finding that the extraneous influence was confined to the juror who possessed the pamphlet as analogous to Juror White being the only juror exposed to outside influence.

The crucial difference between this case and Kelly is that Juror White transmitted the attempt to influence him to the entire jury. All of the jurors learned that somebody associated with the defendant attempted to influence Juror White. Even worse, Juror White told all of the jurors to be careful. R. 466, ll. 12 – 16. R. 467, ll. 11 – 12. Juror White essentially told the jurors they should be afraid of appellant because there is no reason to be careful unless someone is dangerous. Even though no juror chose to single themselves out and respond to the judge that they could not be fair, once this element was introduced into the jury, it could not be impartial and decide the case on the evidence. Juror White should have informed only the court of the improper contact. Instead, he disobeyed the trial court's instructions not to talk about the case and informed the other jurors.

This case is similar to State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003). In Bryant, after juror qualification, the police contacted jurors' families and associates to find out if they could vote for the death penalty. Id. at 392-94, 581 S.E.2d at 158-60. The jurors themselves were not contacted. Id. The jurors learned from family members, neighbors, and each other about the contacts. Id. The trial judge denied the defendant's motion for a new trial finding that the jury was fair and impartial. Id.

The Court reversed. Id. Citing Remmer, the Court held that the defendant's right to an impartial jury had been compromised. Id. at 395-96, 581 S.E.2d at 160-61. The Court held that the questioning "could have been perceived as an attempt to intimidate jurors." Id. The questioning resulted in a jury that "was not fair and impartial and, therefore, appellant's Sixth and Fourteenth Amendment rights were violated." Id. At no

point in Bryant did the Court discuss the weight of the evidence or the strength of the State's case against the defendant. The Court conducted no harmless error analysis.

Like in Bryant, the jurors in this case were aware of the attempt to influence one of their number. Nothing in the Bryant decision states that any juror expressly said it caused them not to be fair or impartial, although the jurors expressed concern and one felt it might be jury tampering. Consistent with Remmer, the Court in Bryant did not focus on whether the jurors said they could be fair or impartial, but instead assumed that such contacts would result in a tainted jury. The trial court in this case failed to recognize this crucial distinction between cases where jurors have innocuous conversations with witnesses or read the newspaper and cases where one of the parties attempts to influence jurors directly or indirectly.

The trial judge also erred in its assessment of the evidence against appellant. As will be shown in Issue 2, trial courts should not consider this as a factor and to that extent, Kelly and our cases that include this factor should either be overruled or limited to cases that do not involve intimidation or attempts at influence by a party. Even if the weight of the evidence can be constitutionally considered, the evidence against appellant was not overwhelming. The State's best evidence was the DNA on the items found in the woods. Witnesses contradicted each other on whether appellant had access to a green Honda. None of the people in the bank could identify appellant. Appellant never gave any incriminating statements. Witnesses testified on appellant's behalf that he was working at Burger King on the day of the robbery. This evidence is not sufficient to foreclose any possibility that appellant would have been acquitted.

Furthermore, the trial judge should not have considered appellant's possible complicity. No evidence—only the solicitor's proffer concerning jail calls—was admitted conclusively tying appellant to the person who approached Juror White. Without taking any evidence that conclusively connected appellant to the tampering attempt, it allowed the jurors to speculate about whether the defendant was responsible. See Mincey v. State, 314 S.C.355, 358, 444 S.E.2d 510, 511 (1994) ("References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats."). "It would be a 'prostitution of justice' to permit evidence that someone attempted to influence a witness by fear or fright without any evidence that connects the defendant with the tampering." Id. To a juror, an attempt to influence another juror would cause more fear and prejudice them against the defendant than the references to intimidation of a witness in Mincey. This Court should reverse and remand this matter for a new trial.

2.

When determining whether to declare a mistrial because of outside influences on the jury, the Sixth Amendment does not allow a trial judge to consider the weight of the evidence against a criminal defendant as a factor in his decision.

The trial court erred in considering the weight of the evidence against appellant. The Sixth and Fourteenth Amendments guarantee criminal defendants a fair trial by an impartial jury even if they are guilty beyond all doubt. U.S. Const. amends. VI, XIV. The federal cases interpreting the Sixth Amendment with respect to allegations of jury tampering do not consider the weight of the evidence. See, e.g., Remmer, Cheek. See also Mattox v. United States, 146 U.S. 140 (1892). The Sixth Amendment only allows

inquiry into the prejudice of the jury and whether the impartiality of the jury can be questioned.

The Fourth Circuit's discussion of the Sixth Amendment analysis in Cheek is instructive. Cheek, 94 F.3d at 140-44. The Fourth Circuit described a "three-step process" that does not include any assessment of the evidence of the underlying crime. Id. at 141. "The party who is attacking the verdict bears the initial burden of introducing competent evidence that the extrajudicial communications or contacts were more than innocuous interventions." Id. (internal quotations omitted). "If this minimal standard is satisfied, the *Remmer I* presumption is triggered automatically." Id. "The burden then shifts to the prevailing party to prove that there exists no reasonable possibility that the jury's verdict was influenced by an improper communication." Id. (internal quotations omitted).

Judge Brown used the factors listed in Kelly to make his decision. Kelly includes as a factor "the weight of the evidence properly before the jury." Kelly at 142, 502 S.E.2d at 104. This factor is incompatible with the Sixth Amendment. It unconstitutionally removes the fact finding function from the province of the jury and erroneously allocates it to the trial judge. It also amounts to a trial judge conducting a harmless error analysis—which is the function of an appellate court. State v. Bruce, 412 S.C. 504, 509, 772 S.E.2d 753, 755-56 (2015) ("As both parties agree, it is clearly improper for the trial court to perform a harmless error analysis on its own evidentiary ruling."). This Court should use this case to recognize that use of the weight of the evidence is unconstitutional and, to the extent necessary, limit or overrule this portion of

Kelly. Because the trial judge used an unconstitutional consideration, this case must be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and this matter remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

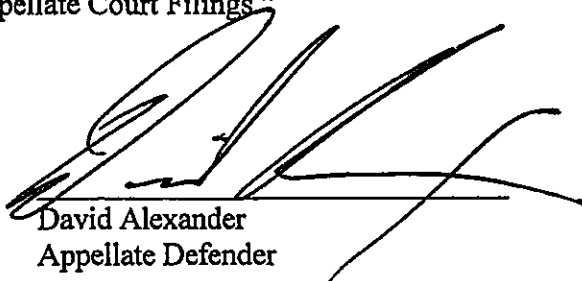
ATTORNEY FOR APPELLANT

This 23rd day of February, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 23, 2016



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

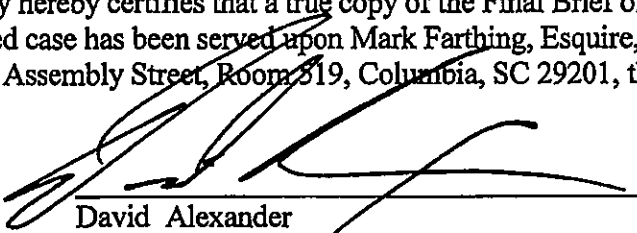
TYRONE DARIUS ELLISON,

APPELLANT

APPELLATE CASE NO. 2014-002337

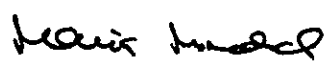
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 319, Columbia, SC 29201, this 23rd day of February, 2016.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of February 2016.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2014-002337

THE STATE,

Respondent,

vs.

TYRONE DARIUS ELLISON,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	2
ARGUMENT	11
Although the jury was exposed to misconduct after one of the jurors was improperly approached during a trial recess, the trial judge did not abuse his broad discretion by denying Appellant's mistrial motion in light of the fact he only declined to grant the motion after ensuring the misconduct had not affected the impartiality of the jury by removing and replacing a juror who could no longer remain impartial, questioning the remaining jurors to ensure they had not been impacted by the improper contact, and instructing the jurors they could only consider the evidence and testimony presented during trial when deciding the case.	11
CONCLUSION.....	23

TABLE OF AUTHORITIES

South Carolina Cases:

<u>DeLee v. Knight</u> , 266 S.C. 103, 221 S.E.2d 844 (1975).	14
<u>Foye v. State</u> , 335 S.C. 586, 518 S.E.2d 265 (1999).	20
<u>State v. Aldret</u> , 333 S.C. 307, 509 S.E.2d 811 (1999).	13, 16
<u>State v. Arther</u> , 290 S.C. 291, 350 S.E.2d 187 (1986).	21
<u>State v. Bailey</u> , 298 S.C. 1, 377 S.E.2d 581 (1989).	19
<u>State v. Bantan</u> , 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010).	21
<u>State v. Beckham</u> , 334 S.C. 302, 513 S.E.2d 606 (1999).	17
<u>State v. Bonneau</u> , 276 S.C. 122, 276 S.E.2d 300 (1981).	19
<u>State v. Bryant</u> , 354 S.C. 390, 581 S.E.2d 157 (2003).	13
<u>State v. Carrigan</u> , 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985).	22
<u>State v. Coaxum</u> , 410 S.C. 320, 764 S.E.2d 242 (2014).	12
<u>State v. Elders</u> , 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010).	12
<u>State v. Evins</u> , 373 S.C. 404, 645 S.E.2d 904 (2007).	15
<u>State v. Grovenstein</u> , 335 S.C. 347, 517 S.E.2d 216 (1999).	13, 21, 22
<u>State v. Harris</u> , 340 S.C. 59, 530 S.E.2d 626 (2000).	12, 14, 17, 20
<u>State v. Johnson</u> , 248 S.C. 153, 149 S.E.2d 348 (1966).	21
<u>State v. Kelly</u> , 331 S.C. 132, 502 S.E.2d 99 (1998).	12, 13, 14, 17, 18
<u>State v. Maxey</u> , 218 S.C. 106, 62 S.E.2d 100 (1950).	15
<u>State v. McDaniel</u> , 275 S.C. 222, 268 S.E.2d 585 (1980).	18
<u>State v. Parker</u> , 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008).	12
<u>State v. Patterson</u> , 324 S.C. 5, 482 S.E.2d 760 (1997).	20
<u>State v. Powers</u> , 331 S.C. 37, 501 S.E.2d 116 (1998).	13

<u>State v. Simpson</u> , 325 S.C. 37, 479 S.E.2d 57 (1996).	15
<u>State v. Thomason</u> , 355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003).	19
<u>State v. Walker</u> , 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005).	21
<u>State v. Wilson</u> , 345 S.C. 1, 545 S.E.2d 827 (2001).	12
<u>State v. Woods</u> , 345 S.C. 583, 550 S.E.2d 282 (2001).	12
<u>Thomasko v. Poole</u> , 349 S.C. 7, 561 S.E.2d 597 (2002).	13
<u>Thompson v. State</u> , 260 Ga. App. 253, 581 S.E.2d 596 (Ga. Ct. App. 2003).	22
<u>United States Supreme Court Cases:</u>	
<u>Calderon v. California</u> , 525 U.S. 141 (1998).	18
<u>Dennis v. United States</u> , 339 U.S. 162 (1950).	14, 19
<u>Irvin v. Dowd</u> , 366 U.S. 717 (1961).	14
<u>Murphy v. Florida</u> , 421 U.S. 794 (1975).	16
<u>Patton v. Yount</u> , 467 U.S. 1025 (1984).	15
<u>Remmer v. United States</u> , 347 U.S. 227 (1954).	14, 16
<u>Smith v. Phillips</u> , 455 U.S. 209 (1982).	13, 14, 17, 18
<u>Other State and Federal Cases:</u>	
<u>Dallago v. United States</u> , 427 F.2d 546 (D.C. Cir. 1969).	20
<u>People v. Hunter</u> , 43 Colo. App. 406, 607 P.2d 1026 (Colo. Ct. App. 1980).	16
<u>United States v. Basham</u> , 561 F.3d 302 (4th Cir. 2009).	14, 20
<u>United States v. Blackwell</u> , 459 F.3d 739 (6th Cir. 2006).	20
<u>United States v. Cheek</u> , 94 F.3d 136 (4th Cir. 1996).	16
<u>United States v. O'Neal</u> , 180 F.3d 115 (4th Cir. 1999).	20
<u>United States v. Pennell</u> , 737 F.2d 521 (6th Cir. 1984).	16

<u>United States v. Williams-Davis</u> , 90 F.3d 490 (D.C. Cir. 1996).	16
<u>Young v. Herring</u> , 938 F.2d 543 (5th Cir. 1991).	16

STATEMENT OF ISSUE ON APPEAL

Although the jury was exposed to misconduct after one of the jurors was improperly approached during a trial recess, the trial judge did not abuse his broad discretion by denying Appellant's mistrial motion in light of the fact he only declined to grant the motion after ensuring the misconduct had not affected the impartiality of the jury by removing and replacing a juror who could no longer remain impartial, questioning the remaining jurors to ensure they had not been impacted by the improper contact, and instructing the jurors they could only consider the evidence and testimony presented during trial when deciding the case.

STATEMENT OF THE CASE

In July of 2013, Appellant Tyrone Darius Ellison was arrested following an investigation into the armed robbery of a bank located in North Charleston, South Carolina. In December of 2013, the Dorchester County Grand Jury indicted Appellant for one count of entering a bank, depository, or building and loan association with the intent to steal. In April of 2014, the Dorchester County Grand Jury additionally indicted Appellant for one count of armed robbery. Prior to trial, the solicitor served timely notice on Appellant indicating the State would seek a sentence of life without parole upon conviction based on Appellant's prior conviction for the "most serious" offense of assault and battery with intent to kill. On October 20, 2014, a jury trial was commenced in the Dorchester County Court of General Sessions with the Honorable D. Craig Brown, circuit court judge, presiding. At the conclusion of the multi-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to life without parole pursuant to S.C. Code Ann. § 17-25-45 for armed robbery along with a concurrent term of imprisonment of thirty years for entering a bank, depository, or building and loan association with the intent to steal. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

Around 10:30 a.m. on the morning of Monday, April 1, 2013, a man wearing a long black wig, a black visor, and sunglasses entered the SunTrust Bank located on Dorchester Road in North Charleston, South Carolina, and quickly pulled a gun out of his pocket while holding it with a white latex glove. (R. pp. 42-44; pp. 55-57; pp. 63-65; p. 68; pp. 76-77; p. 79; pp. 90-91; p. 170). The man then demanded the bank's money at gunpoint and forced the tellers to give him the cash contained in the bank drawers. (R. pp. 44-45; pp. 57-58). After that, the robber rapidly fled from the bank with over \$6,000 in stolen funds before running into a nearby wooded area. (R. pp. 45-46; p. 58; p. 71; p. 83; p. 85).

Once the robber fled, David Lewis, a customer inside the bank during the robbery, quickly ran outside, got into his truck, and pursued the robber. (R. p. 72; p. 75; pp. 90-92). During his pursuit, Lewis noticed an older, green Honda vehicle that was in poor condition and "didn't fit the spot" driving in close proximity to the scene of the robbery. (R. pp. 93-94). Suspicious, Lewis followed the car to a nearby apartment complex and watched as the robber ran out of the wooded area he had fled into and jumped into the waiting Honda without his disguise. (R. pp. 92-95). After that, the suspicious car sped off, and Lewis chased after it until it began to weave in and out of traffic at speeds of nearly one-hundred miles per hour. (R. p. 93; pp. 97-98). At that point, Lewis decided to cease his pursuit and returned to the bank. (R. pp. 97-98).

Meanwhile, the bank's stunned employees alerted the authorities of the robbery, and officers from the North Charleston Police Department quickly responded to the bank, secured the scene, and spoke with the witnesses at that location. (R. p. 46; p. 59; p. 70; p. 84; pp. 100-103; p. 265). Through those actions, the officers obtained a description of

the suspect and learned he fled in an older, green Honda vehicle with a South Carolina license plate partially containing the numbers 1-5-3 or 1-9-3. (R. p. 98; p. 266).

Furthermore, the officers ascertained the direction in which the robber fled on foot and deployed a police tracking dog to follow his scent. (R. p. 103; p. 108). While tracking the scent, the police dog led the officers away from the bank into a wooded area. (R. pp. 103-105; pp. 108-111). In the wooded area, the police dog tracked the suspect's scent to a location where a black visor, a black wig, a latex glove, and a .380-caliber handgun had been abandoned, and that evidence was secured in light of the fact it was consistent with the items the robber had used during the bank robbery. (R. p. 111; p. 173; p. 177). The police dog then continued on the suspect's trail until it reached a location next to the apartment complex where the suspicious car had been observed by Lewis. (R. pp. 92-95; pp. 104-105; pp. 111-112).

As the investigation into the bank robbery continued, officers reviewed the bank's surveillance footage, observed the vehicle in which the robber had fled in that footage, and determined the vehicle was a 1999 to 2001 Honda Civic. (R. pp. 271-272). However, during a subsequent search, they were unable to locate a vehicle that fit the description of the robber's getaway car. (R. pp. 271-272). From that point on, the identity of the bank robber remained unknown until Appellant Tyrone Darius Ellison was apprehended in July of 2013 after he participated in another robbery of the same bank, led law enforcement officers on a high speed chase, and crashed his vehicle during that chase. (R. pp. 272-273; pp. 560-561).

After Appellant was captured, officers discovered his skin tone, physical build, and facial hair were wholly consistent with the skin tone, physical build, and facial hair of the robber who committed the armed robbery at the SunTrust Bank a few months

earlier. (R. pp. 274-275). As a result, the officers contacted Appellant's mother, Annette McKinney, and spoke with her about the earlier bank robbery. (R. p. 333). During the ensuing conversation, McKinney indicated she believed Appellant had owned a green Honda Civic for a few weeks, and she stated she was 75% certain Appellant was the robber depicted in footage from the April bank robbery. (R. pp. 335-337; p. 350).

Thereafter, a buccal swab was collected from Appellant and submitted for analysis along with the evidence recovered during the investigation into the robbery. (R. pp. 158-159; pp. 171-172; pp. 178-183; p. 185). Agent Catherine Leisy, a forensic scientist at S.L.E.D. and an expert in the field of D.N.A. analysis, then developed a D.N.A. profile for Appellant and compared it to D.N.A. profiles developed from the black wig, the black visor, the latex glove, and the gun. (R. pp. 219-220; pp. 227-228; p. 230; p. 232; pp. 234-235). Upon analysis, she conclusively determined Appellant was the major contributor of the D.N.A. located on the wig, visor, and glove but was not a contributor of the D.N.A. located on the gun. (R. p. 230; pp. 232-236).

Subsequently, Appellant was indicted for armed robbery and entering a bank, depository, or building and loan association with the intent to steal, and he proceeded to trial. (R. pp. 9-10; pp. 565-569). At the outset of trial, the trial judge presented preliminary instructions to the jurors and explained to them they were required to decide Appellant's case based on "the testimony [they] hear and the other evidence introduced in court." (R. pp. 26-34).

Thereafter, during trial, numerous witnesses testified for the State in regard to the evidence linking Appellant to the April bank robbery of the SunTrust Bank. (R. pp. 42-46; pp. 55-59; pp. 64-72; pp. 76-85; pp. 89-98; pp. 100-118; pp. 122-135; pp. 153-154; pp. 193-194; pp. 230-236; pp. 265-275; pp. 292-294). Specifically, the witnesses present

during the robbery discussed the physical characteristics of the bank robber, and those details were fully consistent with the physical characteristics of Appellant. (R. pp. 43-44; p. 57; p. 72; p. 92; pp. 274-275). Additionally, the investigating officers testified about their discovery of the items used by the robber during the bank robbery, and Agent Leisy confirmed she conclusively determined Appellant's D.N.A. was on the robber's wig, visor, and latex glove.¹ (R. p. 111; p. 173; p. 177; pp. 228-236). Furthermore, Lewis testified about his pursuit of the robber's getaway vehicle, which was an older, green Honda Civic with a South Carolina license plate partially containing the numbers 1-5-3 or 1-9-3, and testimony was presented establishing Appellant purchased and insured an older, green Honda Civic roughly a week before the robbery, also possessed a South Carolina license plate containing the numbers 1-5-3 at that time, and did not surrender the license plate or cancel his insurance on the Honda Civic until a few weeks after the robbery. (R. pp. 93-95; p. 98; pp. 153-154; pp. 193-194; p. 197; pp. 292-295). Notably, Terrance Bryant, an acquaintance of Appellant, also stated Appellant was in possession of a green Honda Civic on the day of the robbery, sold it to him on the evening of April 1, 2013, and subsequently provided him with an incorrect bill of sale that wholly omitted Appellant's name from the vehicle's purchase history. (R. pp. 122-135).

Following the presentation of that testimony and evidence, the State rested its case, and defense counsel offered the testimony of several witnesses in Appellant's defense. (R. pp. 306-364; pp. 370-400; pp. 404-410; pp. 412-419). Through that testimony, Appellant's mother, McKinney, indicated she purchased a Honda Civic for Appellant on March 23, 2013, but claimed he told her he sold it shortly thereafter and no

¹ During her testimony, Agent Leisy further explained the odds of randomly selecting an unrelated individual with a matching D.N.A. profile was one in over two quintillion. (R. p. 230; p. 232; p. 235).

longer had the vehicle on March 25, 2013.² (R. pp. 306-309; p. 331; p. 333). However, she conceded she told a detective investigating the robbery Appellant had the Honda Civic for a few weeks after he purchased it and she personally took the vehicle to get its windows tinted a few days after it was bought.³ (R. pp. 335-337; pp. 341-343).

Additionally, Dr. Robert Bennett, an expert in forensic science, testified he analyzed the items discovered after the robbery but was unable to obtain a sufficient D.N.A. profile to make a comparison because the S.L.E.D. analyst had done an "overly thorough" job in analyzing the items. (R. pp. 371-379; p. 393). However, he conceded the S.L.E.D. analyst did nothing wrong or improper in conducting her analysis. (R. pp. 399-400).

Furthermore, Chunte Green, a shift manager at the Burger King restaurant where Appellant worked, claimed Appellant had to have been working on April 1, 2013, and stated he was the only male that worked at the restaurant at the time. (R. pp. 404-407). However, Green acknowledged she was not personally present at work on April 1, 2013, conceded she had no firsthand knowledge in regard to whether Appellant actually worked that day, and indicated her testimony was based on the fact Appellant typically handled the restaurant's deliveries, which were made every Monday at some time between 6:00 a.m. and midnight, coupled with the fact a delivery was received on April 1, 2013.⁴ (R. pp. 405-407; p. 409). Similarly, Candida Payne, another Burger King employee, stated

² Subsequently, Appellant's stepfather, Dennis McKinney, offered similar testimony, stated Appellant's mother purchased a car for Appellant at some point in March of 2013, and indicated he no longer saw Appellant with that car a few days later. (R. pp. 423-424).

³ As part of her testimony, McKinney also stated she had deposited \$20,000 into Appellant's bank account several months before the bank robbery while claiming Appellant was still in possession of that money at the time of the robbery. (R. pp. 313-315; p. 323). However, she also acknowledged Appellant was not initially aware the money had been transferred into his account and admitted she told him about it for the first time after he had been arrested and incarcerated for the bank robbery. (R. pp. 323-235; pp. 327-329).

⁴ On cross-examination, Chunte further conceded several other male employees actually did work at the restaurant, including individuals named Tyrone Bailey and Christopher Coburn. (R. pp. 409-410).

she worked at the restaurant from 11:43 a.m. to 4:30 p.m. on April 1, 2013, and claimed she remembered Appellant working there that day.⁵ (R. pp. 412-413; p. 416). However, she could not remember the names of the other employees who worked on that date, and she alleged Appellant took her home from work in a vehicle he did not purchase or insure until several weeks later.⁶ (R. p. 195; p. 295; p. 413; pp. 416-417; p. 419).

Thereafter, at the conclusion of the evidentiary phase of trial, the trial judge adjourned court for the day, canceled the trial for the following day due to a prior engagement, and ordered the jurors to return for duty on the upcoming Friday. (R. pp. 460-461; p. 463). Subsequently, when the trial resumed on Friday morning, the trial judge cleared the courtroom and asked for Juror # 151, William White, to be brought out to discuss a matter that had been called to the trial judge's attention. (R. pp. 464-465). The trial judge then questioned White, and White revealed under oath he had been approached at his home on the preceding day by an individual he believed was related to Appellant who asked him to vote in a certain way during the trial. (R. pp. 464-465). White further revealed he quickly told the person to leave his property, and he indicated he did not believe he could remain impartial in light on that encounter. (R. pp. 464-467). The trial judge then inquired if White had mentioned the encounter to the other jurors, and White responded he simply let all the other jurors know he was approached while advising them to be careful. (R. pp. 466-467; p. 469).

⁵ Subsequently, Samuel Powers, an employee of the company that owned the Burger King franchise for which Appellant worked, offered rebuttal testimony and indicated the company had no record of Appellant working on April 1, 2013. (R. pp. 426-427; pp. 455-456).

⁶ During her testimony, Payne also acknowledged she had previously been convicted of numerous crimes, including defrauding a hotel or restaurant, financial transaction card fraud, making a false statement to obtain a license, and six counts of shoplifting. (R. pp. 414-416).

In response to White's statements, the trial judge excused White from further service in Appellant's case. (R. p. 467). Thereafter, he asked for the remaining jurors to be brought into the courtroom before asking them if White had advised them he had been approached about the case on the preceding day, and the jurors all responded affirmatively. (R. pp. 470-471). The trial judge then asked the jurors if any of them did not believe they could be fair and impartial or decide the case based solely upon the evidence presented during trial, and no juror responded. (R. p. 471). After that, the trial judge inquired if any of the remaining jurors had been approached or contacted in any way in regard to the case, and, again, no jurors responded. (R. pp. 471-472). The trial judge then asked the jurors for a second time if any of them could not be fair and impartial or decide the case based solely upon the evidence and testimony presented during trial, and, once again, none of the jurors responded. (R. p. 472).

Following the questioning of the jury panel, the jurors retired to the jury room, and defense counsel moved for a mistrial. (R. pp. 472-473). In support of that motion, defense counsel argued the remaining jurors might "in the back[s] of their mind[s] somewhere" believe Appellant was guilty based on the actions of one of his apparent agents despite the fact those jurors all responded they could remain fair and impartial under the circumstances. (R. p. 473). In response, the solicitor asserted the grant of a mistrial would simply reward Appellant's improper behavior while noting Appellant was recorded calling someone from the jail on the preceding day and asking them to "tak[e] care of something" on the street upon which the juror who was subsequently contacted on Appellant's behalf lived. (R. pp. 473-474). At that point, neither defense counsel nor Appellant disputed or challenged the solicitor's representations. (R. pp. 474-475). Instead, defense counsel simply asserted he did not personally believe Appellant "had

the wherewithal” to know his actions could have resulted in a mistrial if they were discovered while further contending the grant of mistrial would not actually be beneficial to Appellant. (R. p. 474).

After considering the issue, the trial judge denied the mistrial motion. (R. p. 475). In support of that decision, the trial judge noted all the jurors were exposed by White to the misconduct but determined a mistrial was nonetheless inappropriate under the circumstances in light of the fact all the jurors unequivocally indicated they could remain fair and impartial when he questioned them coupled with the fact the evidence establishing Appellant’s guilt was substantial. (R. pp. 476-478). The trial judge then inquired of the parties if they had any further arguments in regard to the mistrial motion, and both the solicitor and the defense counsel indicated they did not. (R. p. 478).

Subsequently, the trial proceeded forward, the parties presented their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. (R. pp. 483-553). During his jury instructions, the trial judge again reminded the jurors they could only consider the testimony and evidence presented during trial when determining whether the State had met its burden of proof. (R. p. 541). Thereafter, at the conclusion of trial, the jury convicted Appellant as indicted. (R. p. 555). The trial judge then sentenced Appellant to an aggregate sentence of life imprisonment without the possibility of parole based on Appellant’s prior conviction for a “most serious” offense. (R. p. 561; p. 563).

ARGUMENT

Although the jury was exposed to misconduct after one of the jurors was improperly approached during a trial recess, the trial judge did not abuse his broad discretion by denying Appellant's mistrial motion in light of the fact he only declined to grant the motion after ensuring the misconduct had not affected the impartiality of the jury by removing and replacing a juror who could no longer remain impartial, questioning the remaining jurors to ensure they had not been impacted by the improper contact, and instructing the jurors they could only consider the evidence and testimony presented during trial when deciding the case.

Appellant contends the trial judge erred by denying a mistrial motion that was raised after one of the jurors was approached during a trial recess by an apparent agent of Appellant, was asked to vote in a certain way, and subsequently informed the trial judge and his fellow jurors of the improper contact. In support of that contention, Appellant maintains the improper communication with White incurably tainted the entire juror panel and, as a result, the trial judge's failure to immediately abort the trial abridged his constitutional right to have his case decided by a fair and impartial jury. Contrary to Appellant's contentions, Appellant's right to a trial by a fair and impartial jury was not adversely impacted by the misconduct directed at one of the jurors because the trial judge employed a variety of curative measures to ensure the misconduct did not impact the impartiality of the jury. After employing those curative measures, the trial judge determined the impartiality of the jury was not impacted by the improper contact, and his determination in that regard was supported by the evidence presented during trial, including the unequivocal representations of the jurors who ultimately decided Appellant's case indicating they could remain fair and impartial despite the misconduct. Under those circumstances, the trial judge did not abuse his broad discretion in refusing to grant the extreme measure of a mistrial in Appellant's case. Appellant's convictions should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Significantly, a decision as to whether to grant or deny a motion for mistrial rests within the sound discretion of the trial judge, and a trial judge's ruling in regard to a mistrial motion will not be disturbed on appeal absent a prejudicial abuse of discretion. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000); see State v. Coaxum, 410 S.C. 320, 331, 764 S.E.2d 242, 247 (2014) (“[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion.”); State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) (“A mistrial should not be granted unless absolutely necessary. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice.” (citations omitted)). An abuse of discretion occurs where the trial court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ANALYSIS

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see Harris, 340 S.C. at 63, 530 S.E.2d at 627 (“The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.”). That right guarantees to a defendant a trial by a panel of impartial, indifferent jurors. State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008). Importantly, it is the duty of the trial judge to ensure a jury comprised solely of fair,

impartial, and unbiased jurors ultimately decides a defendant's case. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998).

In order to safeguard a defendant's right to a fair trial by an impartial jury, the jury must reach its verdict free from any outside or improper influence. Kelly, 331 S.C. at 141, 502 S.E.2d at 104. However, even if the jury is exposed to extraneous or outside influences, such an impropriety is not prejudicial unless it affects the jury's impartiality. Id. Significantly, in South Carolina, prejudice will not be presumed from improper influences on the jury and, instead, must be shown by the defendant in order to warrant the grant of a mistrial or the disqualification of any jurors. State v. Grovenstein, 335 S.C. 347, 351, 517 S.E.2d 216, 218 (1999); see State v. Aldret, 333 S.C. 307, 313-314, 509 S.E.2d 811, 814 (1999) ("Given that we have not found automatic reversal warranted even in cases of external influences on a jury's verdict, we decline to do so in the cases of internal misconduct consisting of premature deliberations. Our decision is consistent with the majority of jurisdictions which hold a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial." (citations omitted)).

When an allegation of juror partiality resulting from extraneous or outside influences is raised, the appropriate remedy is to conduct a hearing in which the defendant is provided with an opportunity to prove actual bias. See Smith v. Phillips, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); see also State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) ("In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias."); see generally Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well

established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice.”). “Preservation of the opportunity to prove **actual bias** is a guarantee of a defendant’s right to an impartial jury.” Dennis v. United States, 339 U.S. 162, 172 (1950) (emphasis added); see Remmer v. United States, 347 U.S. 227, 230 (1954) (**remanding** a case to the district court for a hearing to determine whether an attempt by an individual to bribe a juror during the course of Remmer’s trial “was harmful to [Remmer]”).

In assessing during such a hearing whether outside influences affected a jury, relevant factors to consider include: (1) the number of jurors exposed; (2) the weight of the evidence properly before the jury; and (3) the likelihood curative measures were effective in reducing any prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 627; see United States v. Basham, 561 F.3d 302, 320 (4th Cir. 2009) (“Courts look at a variety of factors in determining if this standard has been met, including the extent of the improper communication, the extent to which the communication was discussed and considered by the jury, the type of information communicated, the timing of the exposure, and the strength of the Government’s case.”). Generally, the determination of whether the exposure of the jury to extraneous matter was prejudicial must be left to the sound discretion of the trial judge, who is in the best position to assess the jurors’ impartiality and credibility. Kelly, 331 S.C. at 142, 502 S.E.2d at 104. However, in most hearings, the issue “will frequently turn upon the testimony” of the jurors themselves in regard to whether they were affected by the outside influence. Smith, 455 U.S. at 217, n. 7.

Critically, a trial judge’s determination of the neutrality or impartiality of a juror should not be disturbed on appeal absent manifest error. DeLee v. Knight, 266 S.C. 103, 111-112, 221 S.E.2d 844, 847 (1975) (citing Irvin v. Dowd, 366 U.S. 717 (1961)); see

State v. Simpson, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996) (“A juror’s competence is within the trial judge’s discretion and is not reviewable on appeal unless wholly unsupported by the evidence.”). Deference should be given to the trial judge’s decision regarding the qualification of the jury as the trial judge is able to actually see and hear the jurors in assessing their demeanor, credibility, and impartiality. State v. Evins, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007); see Patton v. Yount, 467 U.S. 1025, 1038 (1984) (instructing a trial judge’s determinations on the impartiality of a juror are presumed to be correct and are entitled to special deference on appeal). “The findings of the trial court on questions of fact relating to the fitness of a juror are conclusive, and will not be disturbed on review unless manifestly erroneous.” State v. Maxey, 218 S.C. 106, 110, 62 S.E.2d 100, 102 (1950). “This principle of law is so well established it hardly becomes necessary to cite authority to sustain it.” Id.

In the case sub judice, the jury panel was exposed to extraneous information when a fellow juror, White, advised all the other jurors to be careful in light of the fact he had been approached about the case and asked to vote in a certain way during a trial recess. In light of the jury’s exposure to extraneous information, the trial judge conducted a hearing to determine the extraneous information’s effect, if any, on the jury panel. During that hearing, the trial judge first spoke with White and, through speaking with him, ascertained the circumstances of the improper contact, the extent to which that information had been relayed to the jury panel as a whole, and the impact that contact had on White. In light of the fact White revealed he did not personally believe he could remain fair and impartial as a result of the improper contact, the trial judge removed White from the jury and replaced him with an alternate juror. Thereafter, the trial judge questioned the remaining jurors about their knowledge of the improper contact with

White, verified none of the remaining jurors had been personally approached by anyone in regard to Appellant's case, and questioned the jurors several times regarding whether they could remain fair, remain impartial, and decide the case solely upon the evidence and testimony presented during trial. In response to that questioning, the remaining jurors unequivocally confirmed they could remain fair and impartial in Appellant's case while doing nothing to make the trial judge question the sincerity of their responses in any way, shape, or form. Only then did the trial judge deny Appellant's mistrial motion.

Critically, by conducting a hearing to determine what impact the third-party contact with White had on the jury, the trial judge took the appropriate steps in response to discovering the jury misconduct, which did not automatically necessitate the abandonment of the trial.⁷ See Remmer, 347 U.S. at 229-230 ("The trial court . . . should

⁷ On appeal, Appellant contends the trial judge erred by not finding the improper contact to be presumptively prejudicial while further contending the trial judge incorrectly failed to apply the framework utilized by the federal courts in analyzing the effect of misconduct on a jury. Significantly though, courts in South Carolina do not presume prejudice when addressing matters of jury misconduct. See, e.g., Aldret, 333 S.C. at 314, 509 S.E.2d at 814 ("[A] defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial."). Furthermore, to the extent the federal courts do presume prejudice in situations involving jury misconduct, state courts are not required to draw such a presumption just as they are not required to analyze matters of misconduct using the same framework employed by the federal courts. See United States v. Cheek, 94 F.3d 136, 143 (4th Cir. 1996) ("None of these cases purports to modify the presumption of prejudice applicable to federal cases arising from 'any private communication, contact, or tampering' with a juror, which is explained in Remmer I." (emphasis added)); Young v. Herring, 938 F.2d 543, 558, n. 7 (5th Cir. 1991) ("In Remmer, . . . the Supreme Court was exercising its supervisory powers over the lower federal courts rather than ruling on the Constitution."); People v. Hunter, 43 Colo. App. 406, 408, 607 P.2d 1026, 1027 (Colo. Ct. App. 1980) ("Our reading of the Remmer decisions . . . convinces us that they arise as an exercise of the Supreme Court's supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts, and not as a matter of constitutional compulsion. Thus, they are not binding on the states."); see also United States v. Williams-Davis, 90 F.3d 490, 496 (D.C. Cir. 1996) (recognizing the Remmer decision's presumption of prejudice was subsequently substantially narrowed by the United States Supreme Court's decision in Smith); United States v. Pennell, 737 F.2d 521, 532-533 (6th Cir. 1984) (holding the Remmer decision's presumption of prejudice was eliminated by subsequent United States Supreme Court case law and instructing a defendant is now required to demonstrate actual prejudice resulted from improper contact with a juror in order to be entitled to a new trial); cf. Murphy v. Florida, 421 U.S. 794, 797-798 (1975) ("Noting that the jurors had been exposed to information with a high potential for prejudice, this Court [in Marshall v. United States, 360 U.S. 310, 311-312 (1959)] reversed the conviction. It did so, however, expressly '(i)n the exercise of (its) supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts,' and not as a matter of constitutional compulsion. In the face of so clear a statement, it cannot be maintained that Marshall was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States." (citation omitted)).

determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.”); see also Smith, 455 U.S. at 217 (“[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case.”). Furthermore, in light of the fact he employed a variety of curative measures to ensure Appellant suffered no prejudice as a result of the misconduct directed at White, the trial judge did not abuse his broad discretion in declining to grant the extreme remedy of a mistrial once he was assured the misconduct had not affected the jurors who ultimately decided Appellant’s case. See Harris, 340 S.C. at 63, 530 S.E.2d at 628 (“A mistrial should only be granted when absolutely necessary. The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court grants him broad deference on this issue.” (citations omitted)); see also State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (“The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.”).

Regarding the curative measures, the trial judge first and foremost removed and replaced White after he indicated he could not remain fair and impartial. Such a step substantially eliminated any potential for prejudice that could have resulted from the misconduct as White was the only juror directly exposed to any improper communications. See Kelly, 331 S.C. at 143, 502 S.E.2d at 105 (“In our opinion, the trial

judge did not abuse his discretion in denying appellant's motion for a mistrial. Instead, the trial judge took appropriate action by removing the tainted juror from the jury and replacing her with an alternate juror to ensure appellant received a fair and impartial verdict."); see also State v. McDaniel, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980) (finding the removal of a juror during the middle of trial was not prejudicial where the removed juror was replaced with a qualified alternate juror).

Additionally, beyond removing and replacing White, the trial judge questioned the remaining jurors to ensure they were unaffected by the misconduct, and, importantly, the jurors who ultimately decided Appellant's case unanimously and unequivocally indicated they were not impacted by the improper contact with White and could fairly and impartially decide the case based solely upon the evidence and testimony presented during trial. Significantly, in light of the fact those jurors had no incentives whatsoever to be anything but forthright in regard to whether they were unbiased as they had not committed any misconduct and had no stakes in the outcome of the trial, the trial judge properly relied upon the jurors' representations in determining their impartiality was not impaired as a result of the misconduct.⁸ See Smith, 455 U.S. at 255 (O'Connor, J.,

⁸ Consistent with the argument raised by defense counsel during trial, Appellant appears to suggest on appeal the jurors were influenced by White's comments despite their contentions to the contrary. Notably though, aside from pure speculation, the only evidence presented during trial in regard to the jurors' impartiality was their unequivocal representations to the trial judge they could remain fair and impartial, and the trial judge fully credited those representations in finding the jurors were not affected by the misconduct, which was a finding entitled to substantial weight on appeal. See Kelly, 331 S.C. at 143, 502 S.E.2d at 105 ("The trial judge did not find members of the jury were being untruthful. We respect this finding."). Critically, as the United States Supreme Court has made clear, the representations of jurors in regard to their impartiality often resolve questions as to the effect of misconduct on the impartiality of the jury, and such representations are in no way inherently suspect. See Smith, 455 U.S. at 217, n. 7 ("Respondent correctly notes that determinations made in Remmer-type hearings will frequently turn upon the testimony of the juror in question, but errs in contending that such evidence is inherently suspect." (emphasis added)). As a result, notwithstanding his base speculation the jurors were untruthful in his case, Appellant has wholly failed to meet his burden of establishing the jurors were influenced by the misconduct involving White. See Calderon v. California, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually

concurring) (explaining a hearing “could adequately determine whether or not the juror was biased” in a situation such as one involving a third-party attempt to bribe a juror because a juror in such a situation would not personally be involved in any misconduct, would not have an actual stake in the outcome of trial, and would have “no significant incentive to shield his biases”); see also Dennis, 339 U.S. at 170-171 (“We must credit [the jurors’] representations, and that is particularly so in the absence of any evidence which would indicate an opposite opinion among [the challenged jurors]. One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.”).

Furthermore, the trial judge considered the substantial evidence of Appellant’s guilt that had been presented during trial before the improper contact occurred, which included testimony that conclusively established Appellant’s D.N.A. was on the robber’s wig, visor, and glove, linked Appellant to the getaway car, showed Appellant sold the getaway car just hours after the bank robbery before subsequently trying to eliminate his name from the car’s purchase history, and demonstrated Appellant’s own mother was 75% certain Appellant, whose physical characteristics fully matched the physical characteristics of the robber, committed the robbery after seeing surveillance footage from the incident.⁹ In light of that overwhelming evidence, the misconduct’s ability to

prejudiced by the error.” (citations omitted)); see also State v. Bonneau, 276 S.C. 122, 126, 276 S.E.2d 300, 302 (1981) (“The defendant was entitled to a fair trial, but not necessarily one satisfactory to him. This he has had.”).

⁹ On appeal, Appellant contends the trial judge’s consideration of the strength of the evidence was improper and unconstitutional. However, Appellant did not raise such an argument to the trial judge during trial and is, therefore, precluded from raising such an argument for the first time on appeal. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at

have an affect or impact on the jury and the verdict was, at a minimum, substantially reduced. See Dallago v. United States, 427 F.2d 546, 558 (D.C. Cir. 1969) (“Certainly the weight of the prosecution’s evidence becomes relevant in estimating ‘what effect the error had or reasonably may be taken to have had upon the jury’s decision.’ ” (footnote omitted)); see also United States v. Blackwell, 459 F.3d 739, 769-770 (6th Cir. 2006) (concluding any error that resulted from jury misconduct was harmless and not prejudicial because the jury would have convicted Blackwell regardless of whether any misconduct had occurred in light of the evidence presented during trial); United States v. O’Neal, 180 F.3d 115, 118 (4th Cir. 1999) (concluding the district court judge did not abuse his discretion in denying O’Neal’s motion for a new trial based on jury misconduct where the district court judge determined the jurors’ professed fear of O’Neal caused by O’Neal’s actions during trial did not affect the verdict in light of the overwhelming evidence of guilt that had been presented).

Finally, both before and after the misconduct occurred, the trial judge instructed the jurors they could only consider the evidence and testimony presented during trial in deciding the case. Significantly, the jurors who decided Appellant’s guilt were presumed to follow those instructions, and nothing that occurred during trial even remotely suggested they failed to faithfully follow them. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (“The jury was instructed to determine petitioner’s guilt

trial and a different theory on appeal.”); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”). Moreover, as both our state courts and the Fourth Circuit Court of Appeals have recognized, consideration of the strength of the government’s case is wholly appropriate when attempting to ascertain the effect of misconduct on the jury. See Harris, 340 S.C. at 63, 530 S.E.2d at 627 (“In determining whether outside influences have affected the jury, relevant factors include (1) the number of jurors exposed, (2) the weight of the evidence properly before the jury, and (3) the likelihood that curative measures were effective in reducing the prejudice.”); see also Basham, 561 F.3d at 320 (explaining consideration of the strength of the government’s case is an appropriate consideration when determining whether misconduct impacted a jury). Therefore, the trial judge committed no error by considering the strength of the State’s case as part of his analysis of the misconduct that occurred in Appellant’s case.

based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded those instructions, this Court declines to presume prejudice.” (citations omitted)); Grovenstein, 335 S.C. at 353, 517 S.E.2d at 219 (“An instruction to disregard incompetent evidence is usually deemed to have cured the error. Moreover, jurors are presumed to follow the law as instructed to them.” (citations omitted)); State v. Arther, 290 S.C. 291, 295, 350 S.E.2d 187, 189 (1986) (“The trial judge did charge the jury not to consider anything heard outside the courtroom. This charge was adequate under the circumstances to ensure the jury would render a verdict based upon the evidence presented.”); see also State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005).

Critically, after employing those curative measures, the trial judge concluded the jurors he allowed to remain on the jury were not affected by the improper attempt to influence the jury in Appellant’s favor, and his determination in that regard was fully supported by the evidence and entitled to substantial deference on appeal. See State v. Bantan, 387 S.C. 412, 423, 692 S.E.2d 201, 207 (Ct. App. 2010) (“In any event, the trial court did not deny Bantan’s motion for mistrial until after determining the jury’s ability to proceed solely on the evidence presented at trial. We find no abuse of discretion.”); see also State v. Johnson, 248 S.C. 153, 164, 149 S.E.2d 348, 353 (1966) (“[B]oth jurors unequivocally stated, notwithstanding the fact that they had been contacted and communicated with, that they were not conscious of any bias or prejudice, that they could give both the State and respondents a fair and impartial trial and render a verdict according to the law and the evidence; therefore, it cannot be said that the ruling of the trial judge was without evidentiary support.”). Under those circumstances, a mistrial was not warranted, and Appellant failed to establish any actual prejudice that would have

justified a conclusion to the contrary. See Grovenstein, 335 S.C. at 351, 517 S.E.2d at 218 (“We have consistently required defendants to demonstrate prejudice due to improper jury influences.”); cf. Thompson v. State, 260 Ga. App. 253, 257, 581 S.E.2d 596, 599 (Ga. Ct. App. 2003) (“We cannot conclude that the bribery attempt of a juror on behalf of the defense, even if the other jurors learn of it, is such a fundamental violation of a defendant’s right to trial by a fair and impartial jury that the only available remedy is a mistrial. To find that a new trial was absolutely required under the circumstances here would encourage improper contact with jurors on behalf of defendants. We conclude that the trial court did not abuse its discretion in denying Thompson’s motions for a mistrial, to set aside the verdict, and for a new trial.”). Accordingly, the trial judge did not abuse his discretion by refusing to grant the extreme remedy of a mistrial in Appellant’s case. See State v. Carrigan, 284 S.C. 610, 614, 328 S.E.2d 119, 121 (Ct. App. 1985) (“The power to declare a mistrial is generally left to the sound discretion of the trial judge and ought to be exercised with the greatest of caution, only for plain and obvious causes.”). Appellant’s convictions should be affirmed.

CONCLUSION

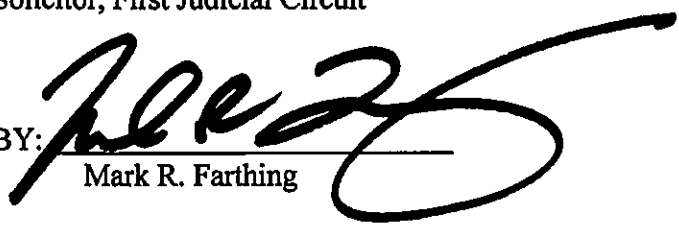
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

BY: 

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ATTORNEYS FOR RESPONDENT

February 12, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2014-002337

THE STATE,

Respondent,

vs.

TYRONE DARIUS ELLISON,

Appellant.

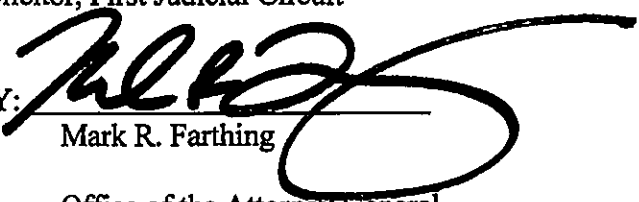
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

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Solicitor, First Judicial Circuit

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THE STATE,

Respondent,

vs.

TYRONE DARIUS ELLISON,

Appellant.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Final Brief of Respondent on Appellant by delivering two copies of the same to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 12th day of February, 2016.


ANNE A. MUELLER
Legal Assistant

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

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

The State, Respondent,

v.

Tyrone Darius Ellison, Appellant.

Appellate Case No. 2014-002337

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Appeal From Dorchester County
D. Craig Brown, Circuit Court Judge

Unpublished Opinion No. 2017-UP-014
Heard December 7, 2016 – Filed January 11, 2017

AFFIRMED

Appellate Defender David Alexander, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia; and Solicitor David Michael Pascoe, Jr., of
Orangeburg, for Respondent.

PER CURIAM: Tyrone Darius Ellison appeals his convictions for armed robbery and entering a bank with intent to steal. He argues the trial court erred in denying his motion for a mistrial because (1) his right to a fair and impartial jury was

violated and (2) the Sixth Amendment prohibits the trial court from considering the weight of the evidence in determining whether to declare a mistrial because of outside influences on the jury. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Issue 1: *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless an abuse of discretion amounting to an error of law occurs."); *State v. McBride*, 416 S.C. 379, 385, 786 S.E.2d 435, 438 (Ct. App. 2016) ("An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law."); *Kelly*, 331 S.C. at 141, 502 S.E.2d at 104 ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."); *id.* ("To safeguard these rights, 'it is required that the jury render its verdict free from outside influences of whatever kind and nature.'" (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993))); *id.* (holding the existence of outside influence will not automatically entitle the defendant to a mistrial, rather, "[u]nless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict."); *id.* at 141-42, 502 S.E.2d at 104 ("Relevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice."); *State v. Harris*, 340 S.C. 59, 62-65, 530 S.E.2d 626, 627-28 (2000) (finding a new trial was not necessary when a juror independently consulted a legal dictionary to clarify the meaning of malice aforethought and told the other members of the jury "what she had done and that it made her feel like she should choose murder"); *Kelly*, 331 S.C. at 142, 502 S.E.2d at 105 ("The trial [court] is in the best position to determine the credibility of the jurors and . . . [find] them credible and capable of rendering an impartial verdict based solely on the evidence."); *State v. Grovestein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (noting the jury is presumed to follow the law as instructed to them in the trial court's jury charge).

As to Issue 2: *Kelly*, 331 S.C. at 141-42, 502 S.E.2d at 104 ("Relevant factors to be considered in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice."); *Am. Fast Print Ltd. v. Design Prints of Hickory*, 288 S.C. 46, 47, 339 S.E.2d 516, 517 (Ct. App. 1986) (noting this court does not have the authority to modify or overrule decisions of our supreme court).

AFFIRMED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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February 07, 2017

The Honorable Cheryl L. Graham
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St George SC 29477-8020

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ATTORNEY GENERALS
OFFICE

REMITTITUR

Re: The State v. Tyrone D. Ellison
Lower Court Case No. 2013GS1801271, 2013GS1800325
Appellate Case No. 2014-002337

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
David Alexander, Esquire
Mark Reynolds Farthing, Esquire
David Michael Pascoe, Jr., Esquire
The Honorable D. Craig Brown

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF DORCHESTER

2013-GS-18-1267, 1268,
1354, 1355, 1833

2015-GS-18-0024, 0025, 0026

STATE OF SOUTH CAROLINA

TRANSCRIPT OF RECORD

VS.

TYRONE ELLISON

AUGUST 12, 2015
ST. GEORGE, SC

B E F O R E:

HONORABLE EDGAR W. DICKSON

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

DON SORENSON, ESQUIRE
Attorney for the State

JAMES FALK, ESQUIRE
Attorney for the Defendant

Ruth L. Mott, RPR, CRR
Certified Court Reporter

1 MR. SORENSON: May it please the Court, Your Honor.

2 THE COURT: Yes, sir.

3 MR. SORENSON: We're here I believe for a guilty plea on
4 several indictments. Before you is Tyrone Ellison. He's
5 represented by his attorney, Jim Falk. If I can just go
6 through the indictments, Your Honor, the first one is
7 2013-GS-18-1268, charging Mr. Ellison with one count of
8 entering a bank with intent to steal; 2013-GS-18-1267,
9 charging him with one count of failure to stop for a blue
10 light, first offense; 2013-GS-18-1355 and 1354 which both
11 charge him with one count of hit and run involving great
12 bodily injury; 2013-GS-18-1813, charging him with one count
13 of armed robbery; 2015-GS-18-0025, charging him with one
14 count of obstructing justice; 2015-GS-18-0026, charging him
15 with one count of criminal conspiracy; and 2015-GS-18-0024,
16 which was originally an indictment for intimidation of court
17 officials, jurors or witnesses. We're allowing him to plead
18 to attempting to influence a juror by written or oral
19 communication. This is all for a negotiated 30-year
20 sentence, Your Honor.

21 CLERK OF COURT: If you'll please raise your right hand.
22 State your full name for the record.

23 THE DEFENDANT: Tyrone Ellison.

24 TYRONE ELLISON,
25 being first duly sworn, was examined and testified as

1 follows:

2 MR. SORENSON: The first thing before we start, Your
3 Honor, I think that I would have to do, a part of this plea
4 would be on the armed robbery charge we had served him back
5 in December of last year, I'm sorry, of 2013, with our notice
6 of intention to seek a sentence of life without parole
7 pursuant to 17-25-45, so now as part of this plea we would be
8 withdrawing that notice.

9 THE COURT: Okay. These are eight different charges; is
10 that correct?

11 MR. SORENSON: Yes, sir.

12 THE COURT: All right. Mr. Falk, you represent Mr.
13 Ellison?

14 MR. FALK: Yes, I do, Your Honor.

15 THE COURT: And you've had an opportunity to meet with
16 Mr. Ellison and review with him all of the evidence that the
17 State has against him regarding all eight of these charges?

18 MR. FALK: I believe so, Your Honor.

19 THE COURT: Okay. And you have explained to him the law
20 that applies in each one of these fact situations?

21 MR. FALK: Yes, Your Honor.

22 THE COURT: And I'm just looking through the eight
23 charges. He'd be facing I guess well over 100 years if I get
24 this all totaled right.

25 MR. SORENSON: Technically, if he's convicted of the

1 armed robbery, he would be looking at a life sentence on
2 that, yes, sir.

3 THE COURT: All right. And you've explained to him his
4 constitutional rights?

5 MR. FALK: Yes.

6 THE COURT: And at some point in these discussions he
7 indicated to you that he would be willing to discuss some
8 plea options with the State?

9 MR. FALK: Yes, Your Honor.

10 THE COURT: And this is the result of those discussions?

11 MR. FALK: Yes, Your Honor.

12 THE COURT: You believe it's in his best interest to go
13 forward with the guilty plea?

14 MR. FALK: I do, Your Honor.

15 THE COURT: And you believe he understands what he's
16 doing?

17 MR. FALK: Yes, Your Honor.

18 THE COURT: Mr. Ellison, my sentencing sheet indicates
19 you're 25; is that correct?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. Mr. Ellison, a little bit of
22 background, if you don't mind. Before you were arrested,
23 were you working somewhere?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Where?

1 THE DEFENDANT: At Burger King and Red Lobster.

2 THE COURT: What were you doing at Burger King?

3 THE DEFENDANT: Cook, truck worker.

4 THE COURT: Sir?

5 THE DEFENDANT: I said I helped with the truck, unload
6 the truck, cooking, same thing at Red Lobster.

7 THE COURT: Same thing at Red Lobster? How long had you
8 been working for them?

9 THE DEFENDANT: Working at Burger King for couple years
10 and Red Lobster for about six month.

11 THE COURT: How far did you go in school?

12 THE DEFENDANT: I got my diploma, high school diploma.

13 THE COURT: Where did you graduate from?

14 THE DEFENDANT: In the state of Maryland.

15 THE COURT: Any education past high school?

16 THE DEFENDANT: No, sir.

17 THE COURT: Have you ever been treated for any mental
18 health issues?

19 THE DEFENDANT: No, sir.

20 THE COURT: Have you ever been treated for any drug or
21 alcohol abuse or dependency?

22 THE DEFENDANT: No, sir.

23 THE COURT: Today are you taking any kind of medication?

24 THE DEFENDANT: No, sir.

25 THE COURT: And this may seem like a silly question, but

1 I've got to ask you anyway, today are you under the influence
2 of any alcohol or illegal drugs?

3 THE DEFENDANT: No, sir.

4 THE COURT: So you are thinking clearly today; you know
5 exactly what you're doing. Is that correct?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Okay. Now, Mr. Falk indicated that he has
8 met with you and reviewed with you the evidence that the
9 State has against you regarding these eight charges; is that
10 correct?

11 THE DEFENDANT: Yes. I feel like I seen most of the
12 evidence, but I know there's some videos that haven't been
13 presented to me, but I'm still willing to go forward today.

14 THE COURT: Okay. And he made you aware of what kind of
15 sentences you would be facing if you went to trial and got
16 convicted; is that correct?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: The solicitor indicated that you were aware
19 that they were going to or they had served you with notice
20 that they were going to seek life without the possibility of
21 parole regarding the armed robbery charge. Is that correct?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And you understand as a condition of this
24 plea they're going to withdraw that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Now, Mr. Falk also explained to you your
2 constitutional rights; you agree with that?

3 THE DEFENDANT: As far as what, sir?

4 THE COURT: Well, he explained to you you have the right
5 to have a jury trial on these charges, any one of them or all
6 of them; you do know that, right?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: You have the right -- you understand if you
9 plead guilty, you give up your right to remain silent, you
10 give up your right to present any defenses you may have to
11 any of these charges, and you give up your right to require
12 that the State prove you're guilty of any of these charges
13 beyond a reasonable doubt; do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And you do give up those rights and you are
16 pleading guilty; is that correct?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Okay. Now, I'm told that this is a plea for
19 a negotiated 30-year sentence; you understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: That means the only thing I can do is either
22 turn the plea down or accept it; do you understand that as
23 well?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Has anybody promised you anything else to

1 get you to plead guilty?

2 THE DEFENDANT: No, sir.

3 THE COURT: Has anybody threatened you or forced you in
4 any way to get you to plead guilty?

5 THE DEFENDANT: No, sir.

6 THE COURT: You're doing this freely and voluntarily; is
7 that correct?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: You know exactly what you're doing?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you understood everything Mr. Falk's
12 told you?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Are you satisfied with his services as your
15 attorney?

16 THE DEFENDANT: No, not really.

17 THE COURT: Okay. Tell me why not.

18 THE DEFENDANT: Because today, I mean, today's the only
19 time we really talked about this case right here, and it's
20 really now or never for me, so I really feel like I'm just --
21 this the best option I got as far as me, know what I'm
22 saying, going over the -- I mean, they saying it's either
23 this or trial; so, I mean, I feel like this is the safest
24 option for me.

25 THE COURT: Well, I mean, from what I understand, they

1 are going to be ready to try these cases unless you plead
2 guilty. I mean, that's what just happens in life when you're
3 in a situation like you're in, you know. Mr. Falk has gone
4 over all these things with you, as I asked you; and when I
5 asked you if he reviewed the evidence, I know you said there
6 were some videos. But you know whether or not you're guilty
7 of these things, Mr. Ellison, do you not?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Are you in fact guilty of these things?

10 THE DEFENDANT: I'm pleading guilty here, yes, sir.

11 THE COURT: Well, okay. All right. Is anybody forcing
12 you to plead guilty?

13 THE DEFENDANT: No, sir.

14 THE COURT: Has anybody threatened you to get you to
15 plead guilty?

16 THE DEFENDANT: No, sir.

17 THE COURT: So you're doing this freely and
18 voluntarily --

19 THE DEFENDANT: Yes, sir, I am.

20 THE COURT: -- is that correct?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: You know exactly what you're doing?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Okay. You understand as a condition of this
25 the State is not going forward with any life without

1 possibility of parole sentence on your armed robbery charge;
2 you are aware of that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Okay. Do you want to go forward with the
5 plea?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Okay. All right. Mr. Sorenson?

8 MR. SORENSON: Thank you, may it please the Court, Your
9 Honor.

10 THE COURT: Yes, sir.

11 MR. SORENSON: The first handful of charges, the bank
12 robbery, the entering -- the armed robbery, the entering the
13 bank with intent to steal and then the failure to stop and
14 the two hit and runs, those five indictments all stem out of
15 basically the same set of facts. That would be on the
16 afternoon of July 1st of 2013, about 4:45 or so in the
17 evening, or afternoon, at 8610 Dorchester Road in North
18 Charleston, which is in Dorchester County, it's a Sun Trust
19 Bank, two individuals came in, had their faces covered, with
20 guns, ended up robbing the bank of several thousand dollars.
21 There was several employees and I believe a customer that
22 were in the bank at the time. The State would allege that,
23 as I said, there were two of them. The codefendant in this
24 case that came in the bank's a man by the name of Ronald
25 Lance. Mr. Lance basically held the bank manager, Mr. Baker,

1 on the floor at gunpoint, while Mr. Ellison took another
2 employee over to the teller counter and held her at gunpoint,
3 while making the teller behind -- they'd put up bullet proof
4 glass shortly before this, to provide the money.

5 The two of them end up fleeing the bank. During the
6 process of that Mr. Baker had run over to lock the door and
7 observed a white Hyundai Sonata that appeared to have just
8 pulled out of the bank parking lot and was actually behind a
9 car at a traffic light and saw the two robbers go and hop
10 into that car. They end up taking off. North Charleston
11 Police Department and Dorchester County Sheriff's Office
12 respond. They have a description, they have also gotten, in
13 the money that was provided they had put a GPS tracker which
14 they began tracking at that point in time. It was coming up
15 back in a nearby neighborhood, Wescott Plantation, kind of
16 the back part of that neighborhood.

17 As a result of that officers with North Charleston
18 started coming into that area. Ultimately a couple of the
19 officers came up behind a white Hyundai Sonata that was
20 stopped, was pulling up to a stop signs. The officers got
21 behind that vehicle. They had -- their cameras were on at
22 that point in time, when they observed an individual
23 basically come flying out of the driver's side, the driver's
24 seat of that vehicle, landing in the middle of the roadway.
25 He was taken into custody at that point in time. He was a

1 young man by the name of Christopher Coburn. At that point
2 in time you see somebody slide over, reach out and close the
3 driver's side door. And a chase then ensues which leads
4 ultimately out to Dorchester Road, down Dorchester Road,
5 takes a left onto Highway 17 and ultimately onto I believe
6 it's Highway 61, basically out into the Givhans area. That
7 chase is captured by several patrol car vehicles exceeding,
8 you know, I think almost close to 100 miles an hour down
9 Dorchester Road at rush hour, which is an area pretty close
10 to where I live, so I'm pretty familiar with the traffic; and
11 looking at the video, there are literally hundreds of
12 vehicles that this chase passes during the course of it.

13 It ultimately comes to -- they actually had lost sight
14 of the vehicle, and officers ultimately come upon where this
15 Hyundai Sonata has wrecked with a vehicle driven by a couple,
16 Mr. and Mrs. Campbell. They were pulling out and ultimately
17 ended up getting hit by this vehicle. By the time the patrol
18 cars got there, the two suspects that had been in that
19 vehicle still had fled on foot and ultimately had gotten
20 away. They attempted to bring K-9 units and other officers
21 out there, but unfortunately shortly after that wreck there
22 was a pretty heavy rainstorm that came through that area.
23 They ultimately found in the field nearby some money with I
24 believe some blood on it. They ultimately found some
25 clothing items, including the jacket that, looking at the

1 video it appears this defendant was wearing, in a field
2 nearby. But ultimately they did not locate either one of
3 them that evening.

4 Mr. Coburn, meanwhile, was brought back, was taken into
5 custody and ultimately gave a statement implicating the two
6 individuals involved, this Mr. Ellison and Mr. Lance, that
7 evening. The following morning then, July 2nd, fairly close
8 to where this accident occurred, a couple had gotten up and
9 were getting ready to do some stuff and ultimately came out,
10 I believe it was the wife, and discovered two individuals
11 pretty much passed out on her front porch. The codefendant,
12 Mr. Lance, I believe actually had suffered a broken arm, I
13 believe it was, and they were both fairly beat up looking,
14 consistent with having been involved in a fairly violent
15 accident.

16 They were taken into custody at that point in time by
17 law enforcement without any problems. At that point in time
18 Mr. Ellison -- Mr. Lance gave a statement admitting to his
19 involvement in the bank robbery, basically indicating he
20 wasn't going to say anything more about anybody else's
21 involvement but did admit his involvement in the bank
22 robbery. This defendant, Mr. Ellison, gave a statement
23 admitting he was the one actually driving the car at the time
24 of the accident through the chase and the accident, admitted
25 to that but denied any involvement in the bank robbery.

1 Mr. and Mrs. Campbell, the two of them both suffered
2 some pretty substantial injuries which led to the great
3 bodily injury charges. I think that would basically be the
4 facts, Your Honor. Mr. Lance plead guilty to this bank
5 robbery several months back and received a 30-year sentence.
6 Mr. Coburn, who had been the getaway driver, and that's what
7 he admitted to being was the driver, plead guilty to entering
8 a bank with intent to steal and I believe received an
9 eight-year sentence.

10 Additionally, Your Honor, and this hadn't really come
11 out yet in any of the colloquy, Mr. Ellison was subsequently,
12 kind of through this investigation of this bank robbery,
13 ultimately charged with a previous robbery of that same bank
14 that had occurred three months earlier on April 1st of 2013.
15 He was convicted of that armed robbery and entering a bank
16 with intent to steal back in October of last year and
17 ultimately received a life sentence, so he's currently, as
18 you can see, in the Department of Corrections serving that
19 sentence that is currently on appeal.

20 It was during the course of that trial, the week of
21 October 20th of last year, that the other series of
22 indictments came to rise. We tried that case, and Mr. Falk
23 was his lawyer for that trial. Put up all the evidence
24 Monday, Tuesday and Wednesday and ultimately had Thursday
25 where Judge Brown, who was presiding, had some other

1 engagement that he had scheduled, so we didn't have Court on
2 Thursday; and it's that Thursday afternoon that one of our
3 jurors, Mr. White, answered a knock at his door at his
4 residence about 4:00 or so in the afternoon, 4:30 in the
5 afternoon, and ultimately indicated that there was a young
6 black male at his door that ultimately offered him \$500 to
7 basically hang the jury.

8 He came in the following morning, unfortunately did not
9 contact law enforcement or anybody that night, came in the
10 following morning, ultimately told the rest of the jurors
11 about it and also the courtroom bailiffs about it. That
12 ultimately led to him being shown a lineup with a guy by the
13 name of David Jeter, who is a friend of Mr. Ellison's, who
14 was actually on his witness list, who we knew he had been
15 communicating with from the jail by way of telephone calls
16 pretty frequently, and Mr. White picked Mr. Jeter out of that
17 lineup.

18 Subsequent investigation showed multiple phone calls the
19 week of the trial culminating in a phone call that Thursday
20 afternoon, about two hours prior to the juror being
21 approached, from Mr. Ellison to Mr. Jeter, where through a
22 code he gives Mr. Jeter the juror's address and indicated
23 that he had gotten it from somebody at the jail that was
24 familiar with the juror and lived in that neighborhood.

25 There is a subsequent call then that Friday morning at

1 about 7:30 or so before court from another inmate on behalf
2 of this defendant to his mother, Mr. Ellison's mother,
3 basically where she verifies that that thing that he had
4 asked Little D, who's David Jeter, to do the evening before
5 had been taken care of and that everything should be good.
6 So that ultimately led to all three of them, David Jeter, Mr.
7 Ellison, and his mother, Ms. Annette McKinney, all being
8 charged with criminal conspiracy, obstructing justice, and
9 this charge dealing with tampering with a jury.

10 THE COURT: All right. Mr. Ellison, you heard what the
11 solicitor told me about the evidence that the State would
12 present at trial regarding all of these charges?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You heard everything that they're going to
15 present?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Okay. All right, sir. What I'm going to do
18 is I'm going to go through each one of these indictments. If
19 you'd bear with me, there are eight of them. The first
20 indictment I have is Indictment No. 2013-GS-18-1268. It is a
21 true-billed indictment for entering a bank with the intent to
22 steal. It carries up to 30 years in jail, and it is a
23 serious offense and counts as a strike against you. Do you
24 understand what strikes are?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Okay. And you are aware of what strikes are
2 because you were aware with the armed robbery charge you were
3 facing life without possibility of parole; is that correct?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: All right, sir. The indictment alleges that
6 you did, in Dorchester County, on or about July 1st, 2013,
7 unlawfully enter the Sun Trust Bank with intent to steal
8 money, securities, either by force, intimidation or threats,
9 in violation of the laws of this state. Do you understand
10 the allegations contained in this indictment?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: How do you plead to the charge of entering a
13 bank, depository or building and loan association with intent
14 to steal?

15 THE WITNESS: Plead guilty.

16 THE COURT: All right, sir. Indictment No.
17 2013-GS-18-1267 is a true-billed indictment for failure to
18 stop for a blue light, no injury or death, first offense.
19 The allegations are that you did, in Dorchester County, on or
20 about July 1st, 2013, while driving a motor vehicle on the
21 highways of this state, did unlawfully fail to stop for law
22 enforcement after being signaled to do so, again in violation
23 of the laws of this state. Do you understand the allegations
24 contained in this indictment?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: How do you plead to this charge of failure
2 to stop for a blue light, no injury or death, first offense?

3 THE DEFENDANT: Plead guilty.

4 THE COURT: Thank you, sir. Indictment No.
5 2013-GS-18-1355 is a true-billed indictment for hit and run
6 where great bodily injury occurs. The allegations are that
7 you did in Dorchester County, on or about July 1st, 2013, by
8 being the driver of a vehicle involved in an accident
9 resulting in great bodily injury to Lois Campbell, did fail
10 to stop and remain at the scene as required by law. Do you
11 understand the allegations contained in this indictment?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: How do you plead to this charge of hit and
14 run dealing with a driver involved in an accident with great
15 bodily injury?

16 THE DEFENDANT: Plead guilty.

17 THE COURT: Indictment No. 2013-GS-18-1354 is a
18 true-billed indictment for the same hit and run event, except
19 this involves the great bodily injury to Julius Campbell, the
20 other person in that car. Do you understand the allegations
21 contained in this indictment?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: How do you plead to this charge of hit and
24 run, duties of a driver involved in an accident with great
25 bodily injury?

1 THE DEFENDANT: I plead guilty.

2 THE COURT: All right. Indictment No. 2013-GS-18-1813
3 is a true-billed indictment for armed robbery. The
4 allegations are that you did, in Dorchester County, on or
5 about July 1st, 2013, by force, threats or intimidation and
6 while armed with a deadly weapon, did take and carry away
7 goods and moneys belonging to Sun Trust Bank with the intent
8 to permanently deprive the bank of possession of such goods
9 or moneys and that the weapon used was a handgun, all in
10 violation of the laws of this state. Do you understand the
11 allegations contained in this indictment?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: How do you plead to this charge of armed
14 robbery?

15 THE DEFENDANT: I plead guilty.

16 THE COURT: Indictment No. 2015-GS-18-25 is an
17 indictment for obstructing justice. The allegations are that
18 you did, in Dorchester County, on or about October 23rd,
19 2014, commit the crime of obstruction of justice by
20 interfering with the orderly administration of law or
21 obstructing the due course of justice in that the defendant
22 did willfully and unlawfully attempt to bribe a juror to vote
23 not guilty during his trial for armed robbery and entering a
24 bank with intent to steal in violation of the laws of this
25 state. Do you understand the allegations contained in this

1 indictment?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: How do you plead to this charge of
4 obstructing justice?

5 THE DEFENDANT: Plead guilty.

6 THE COURT: The next indictment I have is 2015-GS-18-26.
7 It is an indictment for criminal conspiracy, also true-billed
8 by the grand jury. Allegations are that you did, in
9 Dorchester County, on or about October 23rd, 2014, confide
10 and conspire with Annette McKinney and David Brandon Jeter
11 for the purposes of attempting to obstruct the administration
12 of justice through an attempt to bribe a juror sitting in
13 your trial, again, for armed robbery and entering a bank with
14 intent to steal in violation of the laws of this state. Do
15 you understand this indictment?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: How do you plead to this charge of criminal
18 conspiracy?

19 THE DEFENDANT: Plead guilty.

20 THE COURT: The final indictment I have, Mr. Ellison, is
21 Indictment No. 2015-GS-18-24. It is a true-billed indictment
22 for intimidation of court officials, jurors and witnesses.
23 This involves the same trial. The State's allowing you to
24 plead to attempt to influence a juror through written or oral
25 communications. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: How do you plead to that charge?

3 THE DEFENDANT: I plead guilty.

4 THE COURT: Mr. Ellison, you understand if I accept your
5 pleas to these eight charges, they will be eight convictions
6 on your record?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: You understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And I believe the armed robbery is a violent
11 and a most serious offense, and I already mentioned earlier
12 that the entering a bank with intent to steal is a serious
13 offense; you understand both of those are that way?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Do you want me to accept your guilty plea to
16 these eight charges?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Mr. Ellison, I find your decision to plead
19 guilty to these eight charges is freely, voluntarily and
20 intelligently made. I find you've had the advice and counsel
21 of a competent lawyer. I find that you have indicated that
22 you're not completely satisfied with Mr. Falk, so I'm going
23 to make the following findings as a result of that: Mr. Falk
24 has reviewed and explained the evidence with these charges
25 against you. He's explained the law to you and the possible

1 sentences you're facing. He has advised you of your
2 constitutional rights. He has negotiated a reasonable plea
3 offer from the State which I believe is in your best interest
4 to -- which he has indicated would be in your best interest
5 to plead to, and I concur with his opinion. When I consider
6 the number of convictions that you are pleading to, the
7 possibility of up to, according to my calculations, 104 years
8 in jail, or life without the possibility of parole, I believe
9 he's done a commendable job in representing you. He's acted
10 within professional norms of criminal defense and, again, has
11 negotiated a reasonable sentence under the circumstances,
12 particularly when you consider your codefendant, Mr. Lance,
13 also has received a 30-year sentence. Do you understand
14 that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Okay. I find that there is a factual basis
17 on which to base all eight of your guilty pleas, and I am
18 going to accept your guilty plea to all eight of these
19 charges.

20 Mr. Falk, anything you'd like to tell the Court?

21 MR. FALK: No, Your Honor.

22 THE COURT: Mr. Ellison, any comments you'd like to make
23 before sentencing?

24 THE DEFENDANT: No, sir.

25 THE COURT: Okay. If you all will bear with me, I've

1 got to go through this to complete these forms.

2 How long has he been in jail?

3 MR. SORENSON: He was arrested on July 2nd of 2013.
4 He's been continuously incarcerated since that point in time.

5 THE COURT: All right. Mr. Ellison, on the criminal
6 conspiracy charge, 2015-26 indictment, the sentence of this
7 Court is you're committed to the State Department of
8 Corrections for a period of 5 years. On the charges of
9 obstructing justice, 2015-25, hit and run, 2013-1355, and hit
10 and run, 2013-1354, the sentence of this Court in each one of
11 these is a 10-year sentence on each one. On the armed
12 robbery charge and the entering a bank with intent to steal,
13 which are 2013-1833 and 2013-1268, the sentence of this Court
14 in each one of these are you're committed to the State
15 Department of Corrections for a period of 30 years. Those
16 sentences are concurrent, and I will give you credit for the
17 time that you've served. On the attempt to influence a
18 juror, 2015-24, and failure to stop for a blue light, first
19 offense, 2013-1267, those sentences are time-served
20 sentences.

21 MR. SORENSON: Thank you.

22 MR. FALK: Thank you, Your Honor.

23 --- END OF TRANSCRIPT OF RECORD ---
24
25

1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA

3 COUNTY OF DORCHESTER

4
5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of the above-captioned case, relative to appeal,
10 in the 1st Judicial Circuit Court for Dorchester County,
11 South Carolina, on the 12th of August, 2015.

12 I further certify that I am neither related to nor
13 counsel for any party to the cause pending or interested in
14 the events thereof.

15 May 9, 2016

16
17 *Ruth L. Mott*

18 Official Court Reporter
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

10-304

COUNTY OF
STATE

Dorchester

VS.

Tyrone Darius Ellison

INDICTMENT/CASE#: 2013GS18-1813

W#: 2013DOR15

Date of Offense: 7/1/2013

S.C. Code §: 16-11-330(A)

CDR Code #: 0139

AKA:

Race: BLACK

Sex: M

Age: 25

DOB: [REDACTED]

SS#: [REDACTED]

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Armed Robbery☐ CONVICTED OF or ☒ PLEADS

SENTENCE SHEET

in violation of § 16-11-330(A)

of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS(CSC

w/minor 1st or Lewd Act)

☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State. (defendant's initials)

ATTEST:

Sorenson, Donald N.

9512
SC Bar#

Defendant

Attorney for Defendant

80125
SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 8/12/15☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

\$

§ 14-1-211(A)(1) (Conv. Surcharge)

\$100

\$

§ 14-1-211(A)(2) (DUI Surcharge)

\$100

\$

§ 56-5-2995 (DUI Assessment)

\$12

\$

§ 56-1-286 (DUI Breath Test)

\$25

\$

Proviso 47.9 (Public Def/Prob)

\$500

\$

§ 14-1-212 (Law Enforce. Funding)

\$25

\$

§ 14-1-213 (Drug Court Surcharge)

\$150

\$

§ 50-21-114 (BUI Breath Test Fee)

\$50

\$

§ 56-5-2942(J) (Vehicle Assessment)

\$40/ea

\$

Proviso 90.5 (SCCJA Surcharge)

\$5

\$

5% to County (if paid in installments)

\$

TOTAL

\$

\$133.90

PTUP

 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

Presiding Judge

Judge Code: 3153Sentence Date: 8/12/15

CERTIFIED COPY

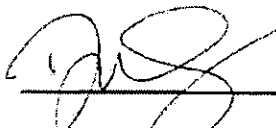
STATE OF SOUTH CAROLINA } 2016 JAN 12 AM 9:58
COUNTY OF DORCHESTER } *Cheryl K. Nelson* 2013GS18-1813
CLERK OF COURT
DORCHESTER COUNTY

At a Court of General Sessions, convened on December 9, 2013 the Grand Jurors of
Dorchester County present upon their oath:

ARMED ROBBERY

That on or about July 1, 2013, in Dorchester County, the defendant, Tyrone Darius Ellison did by use of force, threats or intimidation and while armed with a deadly weapon or while alleging either by words or action that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, take and carry away goods and/or monies belonging to Sun Trust Bank from the person or presence of Quinn Rustin, and/or Roberta Bass, and/or Kim DiMaggio with the intent to permanently deprive the victim of possession of the goods or monies. Such weapon or alleged weapon described as a handgun. This offense being in violation of Section 16-11-330 of the South Carolina Code of Laws, as amended.

Against the peace and dignity of the State, and contrary to the statute in
such case made and provided.


Donald N. Sorenson, Solicitor

WITNESSES

North Charleston Police Department

ARREST WARRANT NUMBER
2013DOR15

Arrested: 0, 0

ACTION OF GRAND JURY

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

DOCKET NO. 2013S18-1813

The State of South Carolina

County of DORCHESTER

COURT OF GENERAL SESSIONS

December 9, 2013 TERM

THE STATE
vs.

Tyrone Darius Ellison

Indictment for
ARMED ROBBERY

SC Code: 16-11-330(A)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED COPY
2016 JAN 12 AM 9:58
CLERK OF COURT
DORCHESTER COUNTY

FILED - RECORDED
2013 DEC -5 PM 4:10
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

General Sessions Tracking Sheet

Indictment # 2013GS1801813

Name: Ellison, Tyrone Darius

AKA:

Addr:

SSN# 000-00-0000

Sex: Race:

DOB: Unknown

DL#

2016 JAN 12 AM 9: 58

Cheryl Williams
CLERK OF COURT
DORCHESTER COUNTY

Warrant/Ticket #: 2013GS1801813

Date of Arrest: 12/05/2013

Date of Offense: 07/01/2013

Date Rev by Clerk: 03/16/2015

Magistrate: Clerk Of Court C P, G S, And Family Court

Counts: Code: 0139/Robbery / Armed Robbery,
robbery while armed or allegedly armed with a
deadly weapon

Indictment # 2013GS1801813

Disposition Information

1. Transmitted to SOL & SCCA:
2. Disp Received by Clerk:
3. Date of Disposition:

Disposition

1. ☒ Guilty plea
2. ☐ Trial -- guilty
3. ☐ Trial -- not guilty
4. ☐ Dism/Not Pros/Pros Ended
5. ☐ Judicial Commitment
6. ☐ Judicial Dismissal
7. ☐ Remanded
8. ☐ Dismissed at Prelim
9. ☐ No Bill
9. ☐ Failure to Appear
10. ☐ Other

Explain:

Explain:

Explain:

Explain:

Explain:

Judge:

Defense Atty:

Counts:

Code:

Sentence:

Court Reporter:

Solicitor:

)

VERIFIED

2

2016 JAN 12 AM 10:10

17

)

CLERK OF COURT
DORCHESTER COUNTY

1

)

1

2

1

1

2

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- S**

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 8, 2015 (30) years)(current)
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty x
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
no
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. N/A
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) I told counsel to appeal
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ~~Plea of guilty was not knowingly and intelligently~~
- (b) ~~made to the Court (2) ineffective assistance of~~
- (c) ~~for advising me to plead guilty.~~
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) ~~Counsel advised was wrong, and I should not have pled~~
- (b) ~~guilty. I preserved the right to amend this~~
- (c) ~~application once the transcript is received.~~
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. 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. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

Revised 3/2003

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Counsel did not appeal
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. JAMES FALK esq.
- ii. _____
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Guilty Plea and sentencing
- ii. _____
- iii. _____

Revised 3/2003

19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of McCormick)

VERIFICATION

I, Tyrone Ellison, 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.

Tyrone Ellison

SWORN to and subscribed before me this

day of

December

31st
2015.

Michael Caruane
Notary Public

Michael Caruane
(L.S.)

My Commission Expires: July 09, 2025

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, TYRONE ELLISON, hereby apply for leave to
proceed in this action without prepayment of fees or costs or security therefor. In support of my
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give
security thereof.

Tyrone Ellison
Applicant

SWORN or affirmed to and subscribed before me this

31st day of December, 2015
Michael Camano
Notary Public

FILED-RECORDED

1-7-16
Cheryl Graham
Clerk of Court
Dorchester County

My Commission Expires: July 09, 2025

CERTIFICATE OF SERVICE

2016-CP-18- 17

The undersigned hereby certify that he mail the foregoing PCR application to Dorchester County Clerk of Court address to Cheryl Graham, Clerk this 22nd day of December 2015 by depositing the same in the U.S. mail postage prepaid.

FILED-RECORDED

1-7-16

Cheryl Graham
Clerk of Court
Dorchester County

2016 JAN 12 AM 10:10
CERTIFIED COPY
Cheryl Graham
CLERK OF COURT
DORCHESTER COUNTY

Tyrone Ellison
Tyrone Ellison #324947

CERTIFIED COPY
2016 JAN 12 AM 10:10
Cheryl Graham
CLERK OF COURT
DORCHESTER COUNTY

Cheryl Graham, Clerk
Dorchester County
5200 East Jim Bilton Blvd.
St. George, S.C. 29477

FILED-RECORDED

1-17-16

Cheryl Graham
Clerk of Court
Dorchester County

RE: Post Conviction Application

Dear Ms Graham:

Enclosed please find PCR application for filing and
please return stamp filed copy to me.

Yours truly,

Tyrone Ellison
Tyrone Ellison #324947

STATE OF SOUTH CAROLINA IDENTIFIED COPY IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER 2016 MAR 10 PM 12:58 A No: 2016-CP-18-17

TYRONE ELLISON, #324947

Petitioner, CLERK OF COURT
DORCHESTER COUNTY

vs.

AMENDMENT TO PCR APPLICATION

STATE OF SOUTH CAROLINA,

Respondent.

This amendment to PCR application is made pursuant to rule 15 SCRPC and Petitioner present the following claims:

1. The Applicant guilty plea for armed robbery was not knowingly and intelligently made to the court.

MEMORANDUM OF LAW

Because the defendant waives several constitution right by pleading guilty, the due Process Clause requires that guilty pleas are entered into voluntary, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 524 S.E.2d 623 (1999). Boykin requires that a defendant be made aware of the right to a jury trial, privilege against self incrimination, and the right to confront one's accusers. Additionally, the South Carolina Supreme Court requires that a defendant entering a guilty plea be made aware of the nature and crucial elements of the offense, the maximum and any minimum

penalty, and the nature of the constitutional right being waived. Dover v. State 405 S.E.2d 391 (1991); State v. Hazel, 271 S.E.2d 602 (1980).

The knowing and voluntary waiver of the constitutional rights may be accomplished by colloquy between the Court and the defendant, between the court and defendant's counsel, or both. Pittman 524 S.E.2d at 625 (quoting State v. Ray, 427 S.E.2d 171, 174 (1993)). The record should indicate the defendant was fully aware of the consequences of his guilty plea.

CONCLUSION

Wherefore, the applicant request a hearing on this claim pursuant to §17-27-80 of the S.C. Code of Laws.

2. Counsel was ineffective before my guilty plea.

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 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudice the Applicant's such that, he would not have pled guilty but for counsel's unprofessional errors. Rule 11 FRCP, Boykins v. Alabama 395 U.S. 238 (1969).

FACTS

Although Mr. Falk was appointed to represent me about six months before trial, I did not speak to him before trial and really did

not speak to him before trial and really did not speak to him until the day of my guilty plea. Counsel told me I had to decide whether or not I'm going to plea guilty right now and he said that Christopher Coburn a sentenced convict was going to testify against me. Applicant was indictment by himself and was arrested by himself and pleaded guilty by himself. If I had known a convicted felon that has been sentenced could not testify against me I would not have plead guilty.

CONCLUSION

Applicant request a hearing on this claim pursuant to §17-27-80 of the S.C. Code of Law and he preserved the right to amend his PCR application

3. PROSECUTOR MISCONDUCT

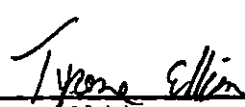
The prosecutor has no authority to negotiate for or secure a sentence that exceeds the statutory minimum for the offense of which a accused will be convicted. 23 CJS 365 (1989).

FACTS

The applicant received the maximum sentence for each charge in the indictment.

Dated

^{Feb}
January 5 2016


Tyrone Ellison

AMENDMENT FROM THE ORIGINAL APPLICATION:

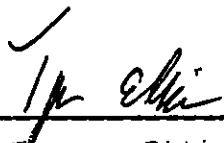
2016-CP-18-18

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed.

Entering a Financial Institution w/ Intent to Steal; 2 Counts of Hit and Run; Failure to Stop For Blue Lights; Obstruction of Justice, Intimidation of court officials, jurors, or witness; Criminal conspiracy.

Please send the indictment numbers for each offense.

Dated
Feb
January 5 2016


Tyrone Ellison

CERTIFIED COPY

2016 MAR 10 PM 12:58

CERTIFICATE OF SERVICE

The undersigned hereby certify that he mailed the foregoing Amendment to PCR Application to Cheryl Graham, Clerk of Court this 10th day of March 2016 by depositing same in the U.S. mail postage prepaid.

Tyrone Ellison
Tyrone Ellison

RECORDED
2016 MAR 10 PM 12:54
CLERK OF COURT
DORCHESTER COUNTY

RECORDED
CERTIFIED COPY
2016 MAR 10 PM 12:54
2016 MAR 10 PM 12:58
CLERK OF COURT
DORCHESTER COUNTY
CLERK OF COURT
DORCHESTER COUNTY

Cheryl Graham, Clerk
Dorchester County
5200 East Jim Bilton Blvd
St. George, SC 29477

RE: Amendment to PCR for filing

Dear Ms Graham:

Enclosed please find two amendment to PCR application for filing, please file on and return stamp filed copy to me.

Sincerely,

Thane Ellison

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Tyrone Ellison, #324947,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

2016-CP-18-0017

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on January 7, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Dorchester County. Applicant was indicted by a Grand Jury for one count of Entering a Bank With Intent to Steal (2013-GS-18-1268), one count of Failure to Stop For a Blue Light (2013-GS-18-1267), two counts of Hit and Run Involving Great Bodily Injury (2013-GS-18-1355, 2013-GS-18-1354), one count of Armed Robbery (2013-GS-18-1813), one count of Obstructing Justice (2015-GS-18-0025), one count of Criminal Conspiracy (2015-GS-18-0026), and one count of Intimidation of Court Officials, Jurors or Witnesses (2015-GS-18-0024). Applicant was represented by James Falk, Esquire. on August 12, 2015, Applicant pleaded guilty as indicted to all counts, with the exception of the Intimidation of Court Officials charge, which was plead down to Attempting to Influence a Juror by Written or Oral Communication and was sentenced by the Honorable Edgar W. Dickson as follows:

Indictment Number	Indictment	Sentence
2013-GS-18-1267	Failure to Stop For a Blue Light	Time Served
2013-GS-18-1268	Entering a Bank with Intent to Steal	30 Years
2013-GS-18-1354	Hit & Run Involving Great Bodily Injury	10 Years
2013-GS-18-1355	Hit & Run Involving Great Bodily Injury	10 Years
2013-GS-18-1813	Armed Robbery	30 Years
2015-GS-18-0025	Obstructing Justice	10 Years
2015-GS-18-0026	Criminal Conspiracy	5 Years
2015-GS-18-0024	Attempting to Influence a Juror	Time Served

All sentences are concurrent pursuant to Applicant's negotiated plea deal. Applicant did not appeal his plea or sentence.

II.

In his initial application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Counsel advised was wrong (sic) and I should not have pled guilty."
2. Involuntary Guilty Plea

On February 5, 2016, Applicant filed a PCR Application Amendment which, in addition to reasserting his initial two allegations, alleged:

3. Prosecutorial Misconduct
 - a. "Prosecutor has no authority to negotiate for or secure a sentence that exceeds the statutory minimum for the offense of which an accused will be convicted."

Respondent denies Applicant is entitled to relief on any of these claims and demands strict proof thereof. 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.

Attached herewith and incorporated herein by reference are the records of the Dorchester County Clerk of Court regarding the subject convictions, the transcript from Applicant's plea, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

III.

Applicant claims ineffective assistance of counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 386 S.E.2d at 625, (citing Strickland, 80 L.E.2d 674). Second, counsel's deficient performance must have prejudiced 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. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant further claims his plea was not entered knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a

solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985). The Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing.

An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

V.

The Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could

have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The Respondent submits the Applicant has not carried his burden of proving actual prosecutorial misconduct; therefore, this allegation should be summarily dismissed.

VI.

Each and every allegation contained within the application that is not expressly admitted, qualified, or explained is hereby denied.

VII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

JUSTIN J. HUNTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

July 12, 2016.

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Tyrone Ellison, #324947,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2016-CP-18-0017

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Rodney D. Davis, Esquire
Lowcountry Law Office
4000 Faber Place Drive Suite 300
Charleston, SC 29405

DATED this 12th day of July, 2016.



Ashley Haworth, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

Tyrone D. Ellison, 324947,

☒ Plaintiff

CERTIFIED COPY

2018 MAY -8 AM 8:57

CASE NO.

2016-CP-18-0017

v.

State Of South Carolina

☐ Defendant.

Cheryl Beahm
CLERK OF COURT
DORCHESTER COUNTY

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

Tricia A. Blanchette, Bar No. 74904

Address:

PO Box 12725

Columbia, SC 29211

phone: 803-988-0008 fax: 803-988-8070

e-mail: blanchettelaw@gmail.com other:

Defendant's Attorney:

Christian Saville, Bar No.

Address:

PO Box 11549

Columbia, SC 29211

phone: 803-734-3737 fax: 803-734-4113

e-mail: other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Discovery

Estimated Time Needed: 10 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

May 3, 2018

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Tyrone D. Ellison, #324947,

2018 MAY -8 AM 8:58

2016-CP-18-0017

Applicant

v.

State of South Carolina,

Respondent.

CLERK OF COURT
DORCHESTER COUNTY

APPLICATION FOR CONSOLIDATION
AND DISCOVERY

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 7, 2016. The State filed a Return on July 12, 2016. On February 27, 2018, undersigned was substituted in as Applicant's counsel.

On January 11, 2018, Applicant, through counsel, filed an Application docketed at 2018-CP-18-47 in Dorchester County. Counsel has entered her appearance on this Application stemming from Applicant's convictions on October 20, 2014 (2013-GS-18-1271, 2014-GS-18-325).

Applicant, through counsel, would move for the merger of this Application with the Application docketed at 2018-CP-18-47 for the purposes of motion and evidentiary hearings. Applicant would request that all pleadings and orders be separately issued and the two Applications remain separate civil actions but for consolidation of hearings. Applicant is making this request to better accommodate witnesses and in the interest of judicial economy.

Applicant, through counsel, would also requests that this Court enter an Order for Production of Discovery pursuant to S.C. Code Ann. §17-27-150(a) (2008). Counsel has requested and not received Applicant's file from James Falk, Esquire.

To ensure that Applicant and counsel have the case materials needed to properly prepare his case for an evidentiary hearing, Applicant would respectfully request the

opportunity to issue subpoenas to the appropriate people, offices or agencies for the production of the following case files/materials pursuant to S.C. Code Ann. §17-27-150(a) (2008) limited to those files/materials that were subject to discovery during the underlying criminal proceeding:

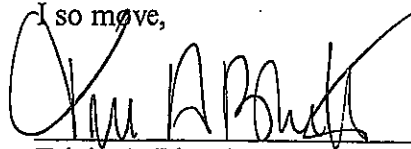
1. A complete copy of the file maintained by James Falk, Esquire, to include any reports or records generated by any and all investigators retained on Applicant's behalf.
2. A complete copy of the Dorchester County Solicitor's file. If not contained therein, a complete copy of the Dorchester County Sheriff's Department file.
3. A complete copy of the State Law Enforcement Agency (SLED) file.
4. A complete copy of all records maintained by the Dorchester County Clerk of Court.
5. The opportunity for Applicant's counsel, private investigator and potential expert(s) to review the evidence maintained with SLED, local law enforcement and/or the Dorchester County Clerk of Court.

Applicant would further request the opportunity for his counsel, private investigator and/or expert(s) to review any and all requested materials that cannot be copied or provided to counsel. Additionally, Applicant would ask the Court to find that if a party fails to comply or does not have a file or requested item to produce, a written explanation must be provided for the failure to produce said file or item to Applicant's counsel.

Applicant, through undersigned counsel, submits that the above listed requests are necessary for counsel, private investigator, and potential expert(s) to properly prepare his case and to present his claims. Furthermore, the Applicant, through counsel, submits that this request is not being made as a fishing expedition, but it is only being submitted to the Court due to the importance of the requested materials in Applicant obtaining "one full

bite of the apple.” See Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000), Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

THEREFORE, based upon the foregoing the Applicant respectfully requests that this Court hold a hearing and/or enter an Order for Discovery, which allows counsel to issue subpoenas to the appropriate parties, offices and agencies for the above requested case materials that are necessary for the presentation of Applicant’s case.

I so move,

Tricia A. Blanchette
Attorney at Law
PO Box 2147
Leesville, SC 29070

May 3, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Tyrone D. Ellison, #324947,)
Applicant,)

2016-CP-18-0017

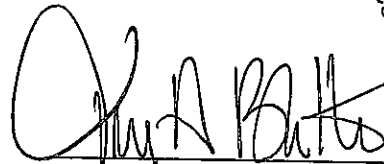
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I placed in the mail this 3rd day of May 2018, a copy of a Motion for Discovery, to Christian Saville of the Attorney General's Office, at:

Office of the Attorney General
Att: Christian Saville, Ast. AG
PO Box 11549
Columbia, SC 29211



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

CERTIFIED COPY
2018 MAY -8 AM 8:58
CLERK OF COURT
DORCHESTER COUNTY

May 3, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

✓ Tyrone D. Ellison, #324947,)
Applicant,)

2016-CP-18-0017

v.)

State of South Carolina,)
Respondent.)

AMENDMENT TO APPLICATION
FOR POST CONVICTION RELIEF

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

2021 JUL 26 PM 3:04

FILED-RECORDED

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 7, 2016. The State filed a Return on July 12, 2016. On February 27, 2018, Tricia A. Blanchette, Esquire, was substituted in as Applicant's counsel.

On January 11, 2018, Applicant, through counsel, filed an Application for Post Conviction Relief docketed at 2018-CP-18-47 in Dorchester County. This Application addresses Applicant's convictions on October 20, 2014 (Indictment No. 2013-GS-18-1271, 2014-GS-18-325).

On May 8, 2018, Applicant, through counsel, filed a Motion for Consolidation and Discovery. A motion hearing was conducted at the Dorchester County Courthouse on July 12, 2018 in front of the Honorable Robin B. Stilwell. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General. On July 23, 2018, an Order for Consolidation and Discovery was issued, which was filed on July 26, 2018.

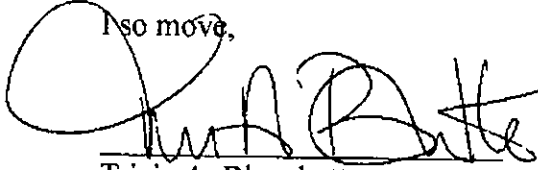
Applicant, through counsel, would move to amend his Application, as addressed below, to provide Respondent notice of his allegations as known at this time. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during counsel's representation that culminated in an involuntary guilty plea. Applicant would further amend his Application for Post Conviction Relief to contain the following specific allegations of ineffective assistance of counsel that rendered his guilty plea involuntary:

1. Failure to effectively represent Applicant at this prior trial, which rendered Applicant's plea involuntary as such ineffective representation was a primary contributing factor in the entry of Applicant's guilty plea.
2. Failure to properly prepare with Applicant for a trial prior to the entry of the plea, which rendered Applicant's guilty plea involuntary and let to the court convincing Applicant to plea after voicing his dissatisfaction with counsel.
3. Failure to effectively negotiate and ensure that there was a benefit from the plea bargain.

Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, applicant would not have pled guilty and insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985), *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). Additionally, Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show a complete breakdown in the adversarial process. *See United States v. Chronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

Also move,



Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

July 23, 2021

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

Tyrone D. Ellison, 324947,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2016-CP-18-0017

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency," as amended June 15, 2021, the undersigned hereby certifies a true copy of an Amendment to Application for Post Conviction Relief has been served on opposing counsel this 23rd day of July 2021 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Sammie Weidauer, Assistant Attorney General
sammieweidauer@scag.gov



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

July 23, 2021

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

2021 JUL 26 PM 3:04

FILED-RECORDED

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Tyrone D. Ellison, #324947,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2016-CP-18-0017

ORDER FOR CONSOLIDATION
AND AUTHORIZING DISCOVERY

DOCKETED
JUL 26 PM 4:12
CERTIFIED COPY

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 7, 2016. The State filed a Return on July 12, 2016. On February 27, 2018, undersigned was substituted in as Applicant's counsel.

On January 11, 2018, Applicant, through counsel, filed an Application docketed at 2018-CP-18-47 in Dorchester County. Counsel has entered her appearance on this Application stemming from Applicant's convictions on October 20, 2014 (2013-GS-18-1271, 2014-GS-18-325).

On May 8, 2018, Applicant, through counsel, filed a Motion for Consolidation and Discovery. A motion hearing was conducted at the Dorchester County Courthouse on July 12, 2018 in front of the Honorable Robin B. Stilwell. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General.

By way of the Motion and at the motion hearing, Applicant moved for consolidation of this Application with the Application docketed at 2018-CP-18-47 for the purposes of motion and evidentiary hearings. Applicant requested that all pleadings and orders be separately issued and the two Applications remain separate civil actions but for consolidation of hearings. Applicant made the request to better accommodate witnesses and in the interest of judicial economy.

Applicant, through counsel, also requested an Order for Production of Discovery pursuant to S.C. Code Ann. §17-27-150(a) (2008). Counsel explained she had requested and not received Applicant's file from James Falk, Esquire.

To ensure that Applicant and counsel have the case materials needed to properly prepare his case for an evidentiary hearing, this Court finds Applicant shall be allowed to issue written requests and/or subpoenas to the appropriate people, offices or agencies for the production of the following case files/materials pursuant to S.C. Code Ann. §17-27-150(a) (2008) **limited** to those files/materials that were subject to discovery during the underlying criminal proceeding:

1. A complete copy of the file maintained by James Falk, Esquire, to include any reports or records generated by any and all investigators retained on Applicant's behalf.
2. A complete copy of the Dorchester County Solicitor's file. If not contained therein, a complete copy of the Dorchester County Sheriff's Department file.
3. A complete copy of the State Law Enforcement Agency (SLED) file.
4. A complete copy of all records maintained by the Dorchester County Clerk of Court.
5. The opportunity for Applicant's counsel, private investigator and potential expert(s) to review the evidence maintained with SLED, local law enforcement and/or the Dorchester County Clerk of Court.

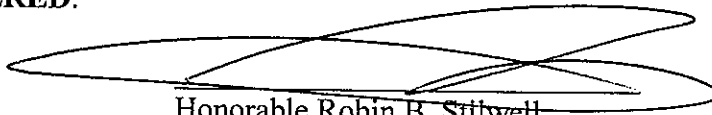
If copies cannot be made of items in the file, this Court grants the opportunity for counsel for both parties, a private investigator and/or expert(s) to review such items in person. This Court finds that if a person, office or agency does not have a file to provide, Applicant's counsel must be provided with a written response and explanation for the absence of such file. Applicant's counsel is to provide the Office of Attorney General with the opportunity to copy all discovery received pursuant to this Order.

This Court further finds that Applicant's request for consolidation is granted. Therefore, the parties should work to schedule the evidentiary hearings on Applicant's two pending PCR Applications in conjunction with each other, but the record will remain separate and separate rulings made on each Application.

IT IS THEREFORE ORDERED:

1. That the Applications docketed at 2018-CP-18-0047 and 2016-CP-18-0017 be consolidated for the purposes of an evidentiary hearing, but the records remain otherwise separate with separate rulings.
2. That Applicant's counsel is permitted to serve a subpoena and/or submit a request, along with a copy of this Order, upon the above listed people, offices or agencies for the above listed items.
3. That any party in receipt of a subpoena pursuant to this Order may file a timely objection with the Chief Administrative Judge for the First Judicial Circuit.

AND, IT IS SO ORDERED.



Honorable Robin B. Stilwell
Presiding Judge, First Judicial Circuit

23 July, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

✓ Tyrone D. Ellison, #324947,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2016-CP-18-0017

AMENDMENT TO APPLICATION
FOR POST CONVICTION RELIEF

CLERK OF COURT
DORCHESTER COUNTY
CHERYL GRAHAM

2021 JUL 26 PM 3:04

FILED

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 7, 2016. The State filed a Return on July 12, 2016. On February 27, 2018, Tricia A. Blanchette, Esquire, was substituted in as Applicant's counsel.

On January 11, 2018, Applicant, through counsel, filed an Application for Post Conviction Relief docketed at 2018-CP-18-47 in Dorchester County. This Application addresses Applicant's convictions on October 20, 2014 (Indictment No. 2013-GS-18-1271, 2014-GS-18-325).

On May 8, 2018, Applicant, through counsel, filed a Motion for Consolidation and Discovery. A motion hearing was conducted at the Dorchester County Courthouse on July 12, 2018 in front of the Honorable Robin B. Stilwell. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General. On July 23, 2018, an Order for Consolidation and Discovery was issued, which was filed on July 26, 2018.

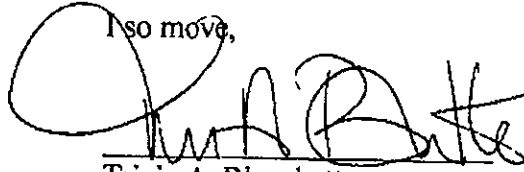
Applicant, through counsel, would move to amend his Application, as addressed below, to provide Respondent notice of his allegations as known at this time. Pursuant to Rule 15(b), SCRCF, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during counsel's representation that culminated in an involuntary guilty plea. Applicant would further amend his Application for Post Conviction Relief to contain the following specific allegations of ineffective assistance of counsel that rendered his guilty plea involuntary:

1. Failure to effectively represent Applicant at this prior trial, which rendered Applicant's plea involuntary as such ineffective representation was a primary contributing factor in the entry of Applicant's guilty plea.
2. Failure to properly prepare with Applicant for a trial prior to the entry of the plea, which rendered Applicant's guilty plea involuntary and let to the court convincing Applicant to plea after voicing his dissatisfaction with counsel.
3. Failure to effectively negotiate and ensure that there was a benefit from the plea bargain.

Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, applicant would not have pled guilty and insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985), *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926 (2000). Additionally, Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show a complete breakdown in the adversarial process. *See United States v. Chronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

I so move,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

July 23, 2021

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Tyrone D. Ellison, 324947,)
Applicant,)

2016-CP-18-0017

v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

Pursuant to the Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency," as amended June 15, 2021, the undersigned hereby certifies a true copy of an Amendment to Application for Post Conviction Relief has been served on opposing counsel this 23rd day of July 2021 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Sammie Weidauer, Assistant Attorney General
sammieweidauer@scag.gov



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

July 23, 2021

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

2021 JUL 26 PM 3:04

FILED-RECORDED

STATE OF SOUTH CAROLINA

2018 JAN 11 PM 2:26

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

2018-CP-18-

47

Tyrone D. Ellison, #324947,
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

CERTIFIED COPY

1/11/2018

Cheryl Graham
Clerk of Court
Dorchester County

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010

2. Name and location of Court which imposed sentence Dorchester County Court of General Sessions, 5200 E. Jim Bilton Blvd., St. George, SC 29477

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

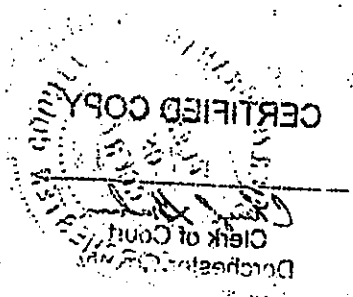
(a) 2014-GS-18-325: armed robbery

(b) 2013-GS-18-1271: entering a bank with intent to steal

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003



- (a) October 24, 2014: life
- (b) October 24, 2014: 30 years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed.
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. January 11, 2017, remittitur sent February 7, 2017
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpub. Op. No. 2017-UP-014
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in

Revised 3/2003

custody unlawfully:

- (a) Ineffective assistance of trial counsel.
- (b) Ineffective assistance of appellate counsel.
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Failure to properly communicate all plea offers.
- (b) Failure to properly prepare Applicant for trial.
- (c) Failure to raise all meritorious issues on appeal.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____

Revised 3/2003

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) PCR is the proper forum.

(b) PCR is the proper forum.

(c) PCR is the proper forum.

Revised 3/2003

17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes.
 - (b) your trial, if any? Yes.
 - (c) your sentencing? Yes.
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. James K. Falk, PO Box 1058, Charleston, SC 29402
 - ii. David Alexander, Office of Appellate Defense, PO Box 11589, Columbia, SC

29211

- iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Trial.
 - ii. Direct appeal.
 - iii. _____

19. State clearly the relief you seek in filing this application:

A new trial or whatever relief the Court deems proper.

20. Are you now under sentence from any other court that you have not challenged?

No.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

Tyrone Ellison

I, , 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.

Tyrone Ellison

SWORN to and subscribed before me this 21
day of December, 2017.

Kim A. Butler (L.S.)
Notary Public

My Commission Expires: 5/23/26

CERTIFIED COPY

1/11/2018

Cheryl Graham
Clerk of Court
Dorchester County

FILED - RECORDED
2018 JAN 11 PM 2:27
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

Revised 3/2003

CERTIFIED COPY

CLERK OF COURT
J. J. [Signature]
Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Tyrone Ellison, #324947,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE FIRST JUDICIAL CIRCUIT

Case No.: 2018-CP-18-0047

RETURN

Respondent, making its Return to the application for Post-Conviction Relief ("PCR") filed on January 11, 2018, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. In December 2013, the Dorchester County Grand Jury indicted Applicant for entering a bank, depository, or building and loan association with intent to steal (2010-GS-08-1724). In April 2014, the Dorchester County Grand Jury subsequently indicted Applicant for armed robbery (2014-GS-18-0325). The charges resulted from an April 2013 incident in which Applicant robbed a Suntrust bank. Tr. p. 99, ll. 1-11. Another individual in the store witnessed Applicant escape into a nearby wooded area, then reemerge from the wooded area after having removed his wig. Applicant then drove away in a green Honda Civic. Tr. p. 101, ll. 11-25. Applicant was linked to the green Honda Civic, and his DNA matched the wig, visor, and latex glove recovered from the woods. Tr. p. 102, ll. 2-21. James K. Falk, Esquire, represented Applicant. Assistant Solicitors Don Sorenson and Phil Giese prosecuted the case. On October 20, 2014, Applicant proceeded to trial before the Honorable D. Craig Brown. The jury found

Applicant guilty as indicted of both charges. On October 24, 2014, Judge Brown sentenced Applicant to life imprisonment for armed robbery and thirty years for entering a bank, depository or building and loan association with intent to steal, to be served concurrently.

Applicant filed a timely notice of appeal. Appellate Defender David Alexander, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed on January 11, 2017. State v. Ellison, Op. No. 2017-UP-014 (Ct. App. 2017). The remittitur was returned to the circuit court on February 7, 2017.

Attached to this Return and incorporated by reference are the records of the Dorchester County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
 - a. "Failure to properly communicate all plea offers."
 - b. "Failure to properly prepare Applicant for trial."
2. Ineffective assistance of appellate counsel.
 - a. "Failure to raise all meritorious issues on appeal."

III.

Respondent submits Applicant's allegations of ineffective assistance of trial counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges

ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges he received ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. Respondent therefore requests an evidentiary hearing on this allegation.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any

claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

VI.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[Signature block on following page]

VIII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial and appellate counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General

By: *Christian Saville*
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

4/13, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT

Tyrone D. Ellison, #324947, 2018 MAY -8 AM 8:58
Applicant, 2018-CP-18-0047

v.

State of South Carolina,)
Respondent.)
CLERK OF COURT FOR CONSOLIDATION
AND DISCOVERY
DORCHESTER COUNTY

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 11, 2018. The State submitted a Return on April 23, 2018.

Applicant, through counsel, would move for the merger of this Application with the Application docketed at 2016-CP-18-0017 for the purposes of motion and evidentiary hearings. Applicant would request that all pleadings and orders be separately issued and the two Applications remain separate civil actions but for consolidation of hearings. Applicant is making this request to better accommodate witnesses and in the interest of judicial economy.

Applicant, through counsel, would also requests that this Court enter an Order for Production of Discovery pursuant to S.C. Code Ann. §17-27-150(a) (2008). Counsel has requested and not received Applicant's file from James Falk, Esquire.

To ensure that Applicant and counsel have the case materials needed to properly prepare his case for an evidentiary hearing, Applicant would respectfully request the opportunity to issue subpoenas to the appropriate people, offices or agencies for the production of the following case files/materials pursuant to S.C. Code Ann. §17-27-150(a) (2008) limited to those files/materials that were subject to discovery during the underlying criminal proceeding:

1. A complete copy of the file maintained by James Falk, Esquire, to include any reports or records generated by any and all investigators retained on Applicant's behalf.
2. A complete copy of the Dorchester County Solicitor's file. If not contained therein, a complete copy of the Dorchester County Sheriff's Department file.
3. A complete copy of the State Law Enforcement Agency (SLED) file.
4. A complete copy of all records maintained by the Dorchester County Clerk of Court.
5. The opportunity for Applicant's counsel, private investigator and potential expert(s) to review the evidence maintained with SLED, local law enforcement and/or the Dorchester County Clerk of Court.

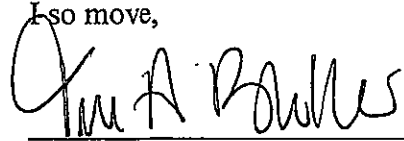
Applicant would further request the opportunity for his counsel, private investigator and/or expert(s) to review any and all requested materials that cannot be copied or provided to counsel. Additionally, Applicant would ask the Court to find that if a party fails to comply or does not have a file or requested item to produce, a written explanation must be provided for the failure to produce said file or item to Applicant's counsel.

Applicant, through undersigned counsel, submits that the above listed requests are necessary for counsel, private investigator, and potential expert(s) to properly prepare his case and to present his claims. Furthermore, the Applicant, through counsel, submits that this request is not being made as a fishing expedition, but it is only being submitted to the Court due to the importance of the requested materials in Applicant obtaining "one full bite of the apple." See Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000), Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

THEREFORE, based upon the foregoing the Applicant respectfully requests that this Court hold a hearing and/or enter an Order for Discovery, which allows counsel to

issue subpoenas to the appropriate parties, offices and agencies for the above requested case materials that are necessary for the presentation of Applicant's case.

I so move,



Tricia A. Blanchette
Attorney at Law
PO Box 2147
Leesville, SC 29070

May 3, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Tyrone D. Ellison, #324947,)
Applicant,)

2018-CP-18-0047

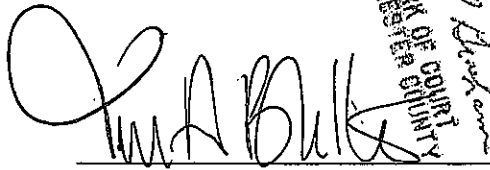
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Tricia A. Blanchette, Attorney at Law, hereby certify that I placed in the mail this 3rd day of May 2018, a copy of a Motion for Discovery, to Christian Saville of the Attorney General's Office, at:

Office of the Attorney General
Att: Christian Saville, Ast. AG
PO Box 11549
Columbia, SC 29211



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

CERTIFIED COPY
2018 MAY -8 AM 8:58
CLERK OF COURT
DORCHESTER COUNTY

May 3, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Tyrone D. Ellison, #324947,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2018-CP-18-0047

ORDER FOR CONSOLIDATION
AND DISCOVERY

CERTIFIED COPY
2018 JUL 26 PM 4:11

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 11, 2018. The State submitted a Return on April 23, 2018.

On May 8, 2018, Applicant, through counsel, filed a Motion for Consolidation and Discovery. A motion hearing was conducted at the Dorchester County Courthouse on July 12, 2018 in front of the Honorable Robin B. Stilwell. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General.

By way of the Motion and at the motion hearing, Applicant moved for consolidation of this Application with the Application docketed at 2016-CP-18-0017 for the purposes of motion and evidentiary hearings. Applicant requested that all pleadings and orders be separately issued and the two Applications remain separate civil actions but for consolidation of hearings. Applicant made the request to better accommodate witnesses and in the interest of judicial economy. Applicant, through counsel, also requested an Order for Production of Discovery pursuant to S.C. Code Ann. §17-27-150(a) (2008). Counsel explained she had requested and not received Applicant's file from James Falk, Esquire.

To ensure that Applicant and counsel have the case materials needed to properly prepare his case for an evidentiary hearing, this Court finds Applicant shall be allowed to issue written requests and/or subpoenas to the appropriate people, offices or agencies for

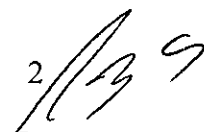
the production of the following case files/materials pursuant to S.C. Code Ann. §17-27-150(a) (2008) **limited** to those files/materials that were subject to discovery during the underlying criminal proceeding:

1. A complete copy of the file maintained by James Falk, Esquire, to include any reports or records generated by any and all investigators retained on Applicant's behalf.
2. A complete copy of the Dorchester County Solicitor's file. If not contained therein, a complete copy of the Dorchester County Sheriff's Department file.
3. A complete copy of the State Law Enforcement Agency (SLED) file.
4. A complete copy of all records maintained by the Dorchester County Clerk of Court.
5. The opportunity for Applicant's counsel, private investigator and potential expert(s) to review the evidence maintained with SLED, local law enforcement and/or the Dorchester County Clerk of Court.

If copies cannot be made of items in the file, this Court grants the opportunity for counsel for both parties, a private investigator and/or expert(s) to review such items in person. This Court finds that if a person, office or agency does not have a file to provide, Applicant's counsel must be provided with a written response and explanation for the absence of such file. Applicant's counsel is to provide the Office of Attorney General with the opportunity to copy all discovery received pursuant to this Order.

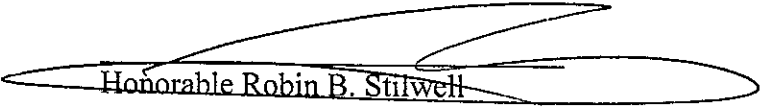
This Court further finds that Applicant's request for consolidation is granted. Therefore, the parties should work to schedule the evidentiary hearings on Applicant's two pending PCR Applications in conjunction with each other, but the record will remain separate and separate rulings made on each Application.

IT IS THEREFORE ORDERED:


826

1. That the Applications docketed at 2018-CP-18-0047 and 2016-CP-18-0017 be consolidated for the purposes of an evidentiary hearing, but the records remain otherwise separate with separate rulings.
2. That Applicant's counsel is permitted to serve a subpoena and/or submit a request, along with a copy of this Order, upon the above listed people, offices or agencies for the above listed items.
3. That any party in receipt of a subpoena pursuant to this Order may file a timely objection with the Chief Administrative Judge for the First Judicial Circuit.

AND, IT IS SO ORDERED.


Honorable Robin B. Stilwell
Presiding Judge, First Judicial Circuit

23 July, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

✓ Tyrone D. Ellison, #324947,)
Applicant,)

2018-CP-18-0047

v.)

State of South Carolina,)
Respondent.)

AMENDMENT TO APPLICATION
FOR POST CONVICTION RELIEF

CLERK OF COURT
DORCHESTER COUNTY
SOUTH CAROLINA

2021 JUL 26 PM 3:04

FILED-RECORDED

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on January 11, 2018. The State submitted a Return on April 23, 2018.

On May 8, 2018, Applicant, through counsel, filed a Motion for Consolidation and Discovery, which also addressed Applicant's Post Conviction Relief Application stemming from the entry of a guilty plea (Docket No. 2016-CP-18-0017). A motion hearing was conducted at the Dorchester County Courthouse on July 12, 2018 in front of the Honorable Robin B. Stilwell. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Christian Saville, Assistant Attorney General. On July 23, 2018, an Order for Consolidation and Discovery was issued, which was filed on July 26, 2018.

Applicant, through counsel, would move to amend his Application, as addressed below, to provide Respondent notice of his allegations as known at this time. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

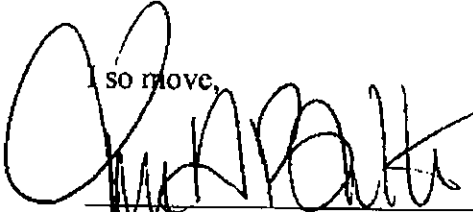
In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during counsel's

representation that culminated in trial, conviction and subsequent guilty plea. Applicant would further amend his Application for Post Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate:

1. Failure to properly prepare prior to trial and advise Applicant regarding strength of the State's evidence and the available defenses, which resulted in counsel's failure to effectively negotiate a guilty plea and the following matters that arose prior to and during trial:
 - a. Utilization of a defense strategy that had been fully discussed on recorded phone calls provided to the defense in discovery.
 - b. Utilization of Applicant's mother as a defense witness to support said defense, with knowledge that she was subject to questioning regarding her audio interview with law enforcement whereby she identified Applicant, in part, and her recorded phone calls regarding the defense offered.
 - c. Utilization of an expert that bolstered the State's case and failed to offer an opinion advantageous to Applicant.
 - d. Utilization of defense witnesses regarding Applicant's employment and/or alibi, when it was known that the State could refute said witnesses.
 - e. Failure to address with Applicant, make an argument and/or motion regarding double jeopardy.
2. Failure to address the following matters at trial:
 - a. The Court's prohibited and burden shifting statements to "search for the truth in an effort to make sure that justice is done between the parties" and that both the State and Defendant get a fair and impartial trial. Transcript p. 90, lns. 21-23, p. 601, ln. 25 - p. 602, ln. 5.
 - b. The Court's failure to question the jurors individually on the matters involving witness intimidation. Transcript pp. 534-536.
3. Ineffective assistance of Appellate Counsel for failure to raise the motion made ✓ regarding the suppression of the gloves.

Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficiency 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 v. State*, 300 S.C. 115, 117-18, *See Strickland v. Washington*, 466 U.S. 668 (1984). Additionally, Applicant submits that these allegations as addressed at a consolidated evidentiary hearing will show a complete breakdown in the adversarial process and a systematic failure whereby prejudice must be presumed. *See United States v. Chronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

Regarding the claim of ineffective assistance of appellate counsel, the South Carolina Supreme Court has held that the lower court must apply the two prong *Strickland* test just as it would be to a claim of ineffective assistance of trial counsel. *See Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). In *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 277 (2009), the South Carolina Supreme Court explained that the lower court should "ask 1) whether appellate counsel's performance was deficient, and 2) whether Petitioner was prejudiced by appellate counsel's deficient performance."

so move,


Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

July 23, 2021

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Tyrone D. Ellison, 324947,)
Applicant,)

2018-CP-18-0047

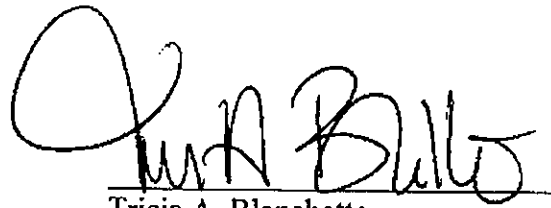
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

Pursuant to the Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency," as amended June 15, 2021, the undersigned hereby certifies a true copy of an Amendment to Application for Post Conviction Relief has been served on opposing counsel this 23rd day of July 2021 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Sammie Weidauer, Assistant Attorney General
sammieweidauer@scag.gov



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

July 23, 2021

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

2021 JUL 26 PM 3:04

FILED-RECORDED

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)	DOCKET NO.: 2016-CP-18-0017
TYRONE D. ELLISON, 324947,)	
Applicant,)	
v.)	MEMORANDUM OF LAW
)	
STATE OF SOUTH CAROLINA,)	
Respondent,)	
_____)	

It is well established that a guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). In South Carolina, the courts have consistently held that that a defendant must have a full understanding of the consequences of his plea and the charges against him. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), Simpson v. State, (317 S.C. 506, 455 S.E.2d 175 (1995). Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution.¹ See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v.

¹ The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Montejo v. Louisiana, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (quoting United States v. Wade, 388 U.S. 218, 227-228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Critical stages include arraignments, post-indictment interrogations, post-indictment lineups, and the entry of a guilty plea. See Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)(arraignment); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) (postindictment interrogation); Wade, supra (postindictment lineup); Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (guilty plea).

State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, applicant would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985), Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). In Hill, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369.

In Hill and Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea as was discussed in Missouri v. Frye, 132 S. Ct. 1399, 1405-06 (2012) (emphasis added), as follows:

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland. See Hill, supra, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of Strickland, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In Hill, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. Hill, supra, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.

In Padilla, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. Padilla held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea

bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298. **It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel.** Cf. Brief for Respondent in Padilla v. Kentucky, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

In South Carolina, a substantial number of cases have developed a body of case law that establish which consequences must be explained to a defendant by counsel prior to a plea. Generally speaking, a defense attorney must only inform a defendant of the direct consequences of his plea, and counsel has no obligation to inform his client of the collateral consequences of his plea. See Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983), Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (Finding that a defendant need not be informed of the collateral consequences of his sentence such as parole eligibility; however if an attorney undertakes to advise a defendant of the collateral consequences of his sentences, then the advice must be accurate); Hinson v. State, 377 S.E.2d 338, 297 S.C. 456 (1989) (Based upon the testimony of co-defendant's counsel, the court found counsel's advice regarding parole eligibility misstated the law, and prejudiced was established from "uncontravered testimony that Hinson entered the plea in expectation of receiving the lesser period for parole eligibility.").

Direct consequences have a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Paxtuent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973). If a criminal defendant does not properly understand the direct consequences of his plea, then the plea is invalid. State v. Hazel, 275 S.C. 392, 271

S.E.2d 602 (1980).² A defense counsel's failure to advise a client of the direct consequences of a guilty plea constitutes ineffective assistance counsel. Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). Additionally, constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

In Glover v. United States, 531 U.S. 198, 203 (2003), the Supreme Court of the United States held "any amount of [additional] jail time has Sixth Amendment significance." In Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009), the South Carolina Supreme Court reasoned that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (Rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry--prejudice--is shown by demonstrating through objective evidence . . . [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for

² On this direct appeal from the lower court's denial of motion to withdraw guilty plea, the South Carolina Supreme Court held that counsel's improper advice regarding the sentence for kidnapping rendered her guilty plea involuntary.

counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.") (citation omitted); See also Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."), Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (Holding that there was enough evidence to demonstrate that there was a reasonable probability that defendant would not have pled guilty even though defendant did not specifically testify that he would have insisted upon going to trial if he had known the solicitor was going to make a recommendation.).

Similarly, in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), counsel was found to be ineffective for erroneously advising the defendant regarding the sentence he could receive, thus inducing a guilty plea. On appeal, the State agreed that the advice given was erroneous but argued that the lack of prejudice required reversal. Ray, 303 S.C. at 376, 401 S.E.2d at 153. In addressing the difference between the sentence Ray was advised he could receive (life) versus the actual sentence he could receive (possible 75 years without parole) and the issue of prejudice the Court reasoned:

We hold this distinction is sufficient to satisfy prong two of the Hill v. Lockhart test. Ray's steadfast maintenance of his innocence; his uncontroverted testimony that he would not have pled guilty absent the erroneous advice of counsel; and the real distinction between the penalty Ray faces and the advice given him, convince us to *REVERSE* the lower court and *REMAND* for a new trial.

Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991).

More recently, in Frierson v. State, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court addressed the prejudice analysis in a case stemming from a guilty plea. The court explained and clarified:

In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would have not pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Id. In affirming as modified, the Court further held:

Because the prejudice inquiry in a case involving a guilty plea is so limited, it was error for the court of appeals to conduct an overwhelming evidence analysis in this case. See Smalls, 422 S.C. at ___, 810 S.E.2d at 843-47 (surveying cases that discuss overwhelming evidence - all of which involved a conviction obtained at trial).

Id. In conclusion, the court emphasized the following:

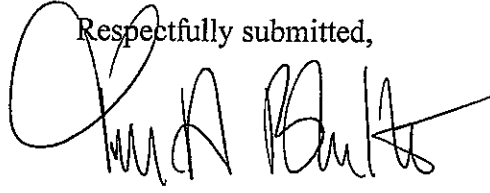
We reiterate the prejudice analysis is limited to the outcome of the plea process – whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial.

Id.

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007); See Moorehead v. State, 496 S.E.2d 415 (1998).³ "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

³ In Moorehead v. State, 496 S.E.2d 415 (1998), the South Carolina Supreme Court reversed the lower court's grant of PCR relief. At the evidentiary hearing, Moorehead testified that he entered his guilty plea because counsel advised him he would receive probation. Counsel did not agree with this assertion by Moorehead. Id. at 416. In reversing the lower court's finding that counsel misadvised Moorehead and relief was warranted, the Supreme Court reasoned that Moorehead's responses that he had not been promised anything and the plea judges statements regarding the plea negotiations did not support the granting of relief. Id. at 416-717.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

Tricia A. Blanchette
Post Office Box 2147
Leesville, SC 29070
Attorney for Applicant

STATE OF SOUTH CAROLINA) IN THE COURT OF
)
COUNTY OF DORCHESTER) COMMON PLEAS
)
TYRONE D. ELLISON) NO. 2016-CP-18-00017
) and 2018-CP-18-00047
)
 VS.) TRANSCRIPT OF RECORD
THE STATE OF SOUTH CAROLINA) Post Conviction Relief Hearing

B E F O R E:

The Honorable Robert J. Bonds, Judge
Orangeburg, South Carolina

DATE: Friday, May 20, 2022

9:39 a.m.

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

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Reported by: Cathy J. Provost, RMR

Official Court Reporter

INDEXPAGE:

Certificate of reporter 159

INDEX TO WITNESSESDIRECT: CROSS: REDIRECT: RECROSS:WITNESSES:**TYRONE D. ELLISON**

By Attorney Blanchette 27 -- 103 --

By Attorney Weidauer -- 74 -- --

JAMES FAULK

By Attorney Blanchette 104 -- 147 --

By Attorney Weidauer -- 123 -- --

INDEX TO EXHIBITSMARKED: RECEIVED:APPLICANT'S EXHIBITS:

1 - Motion for Bond Reduction 32 33

2 - Emails 35 36

3 - Consent Order for Substitution 38 39

4 - CD (Call from Mr. Keitt to Ms. McKinney) 42 42

5 - CD (Interview with Annette McKinney) 42 42

6 - Plea Offer 67 67

STATE'S EXHIBITS:

(No exhibits marked.)

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

2 THE COURT: I understand that today we're hearing the matter
3 involving Tyrone Ellison. Is that correct, Attorney General?

4 ATTORNEY WEIDAUER: Yes, Your Honor.

5 THE COURT: And it's my understanding that there was a 2016
6 PCR that was filed and a 2018 PCR that was filed. Is that
7 correct?

8 ATTORNEY WEIDAUER: That is correct.

9 THE COURT: So can you explain to me why two PCRs were
10 filed?

11 ATTORNEY WEIDAUER: I think that would be -- Ms. Blanchette
12 can probably explain it better.

13 THE COURT: I'm happy to hear from you. Yes, ma'am.

14 ATTORNEY BLANCHETTE: Yes, Your Honor. And I assume that
15 we're going to the issue of consolidation that I had sent an
16 email on earlier this week.

17 THE COURT: Well, I want to address that ---

18 ATTORNEY BLANCHETTE: Okay.

19 THE COURT: --- but I first want to make sure I understand
20 where we are ---

21 ATTORNEY BLANCHETTE: Absolutely, Your Honor.

22 THE COURT: --- and then we can get into that, okay.

23 ATTORNEY BLANCHETTE: And they're dated two years apart, so
24 that makes it a little strange. The easiest explanation is, this
25 stems from two sets of charges that come from two bank robberies.

1 One was the subject of a trial; one was the subject of a guilty
2 plea ---

3 (Defendant enters and is seated in the courtroom.)

4 ATTORNEY BLANCHETTE: --- so the guilty plea PCR was filed
5 first to be timely. The trial PCR was filed subsequent to the
6 completion of the direct appeal. That's how you get the time
7 gap.

8 THE COURT: So there's two bank robberies. I saw one bank
9 robbery was the one that Craig Brown presiding over, and that was
10 the one where he was provided ---

11 Good morning, sir.

12 THE DEFENDANT: Good morning.

13 THE COURT: And we hadn't really started here. We were
14 talking about a preliminary matter, okay. I'm sorry we started
15 that just for a second. But basically what I told them, sir,
16 just for your edification, is we've got two PCRs that were filed,
17 sir, and so I was first confirming that there were, in fact, two
18 PCRs. Then I began to ask your lawyer why there are two PCRs.
19 And that's what I'm trying to get to the bottom of. So that's
20 the two seconds that you missed before you walked in here. Okay,
21 sir?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Any questions about that?

24 THE DEFENDANT: No, sir.

25 ATTORNEY BLANCHETTE: I appreciate that, Your Honor.

1 THE COURT: Yes, ma'am.

2 ATTORNEY BLANCHETTE: I did not mean to start without him.
3 It may be better if I'm specific. There was an incident date of
4 April 1st, 2013. Those events allegedly occurred at the SunTrust
5 Bank. Those indictments were 2014-GS-18-0325 for armed robbery,
6 and 2014-GS-18-1271 for entering a bank with intent to steal.

7 They were the subject of a trial, as you indicated, heard by
8 Judge Brown on October 20th through 24th of 2014. And at that
9 trial he was represented by Jim Falk, who's in the courtroom
10 today.

11 Subsequent to that, there was a guilty plea on August 12th,
12 2015, in front of Judge Dickson, and he was again represented by
13 Jim Falk. The subject of that guilty plea was charges that stems
14 from an incident on July 1st of 2013 at a separate SunTrust
15 location. The indictments that were just ---

16 THE COURT: I'm sorry. When was the first SunTrust robbery?

17 ATTORNEY BLANCHETTE: April 1st, 2013.

18 THE COURT: All right, 4 of '13.

19 ATTORNEY BLANCHETTE: Yes.

20 THE COURT: And a second robbery was when?

21 ATTORNEY BLANCHETTE: July 1st of 2013.

22 THE COURT: 7 of '13, okay.

23 ATTORNEY BLANCHETTE: And there were a series of charges
24 that were resolved in that guilty plea. Do you want me to give
25 you indictment numbers, Your Honor?

1 THE COURT: No, that's all right.

2 ATTORNEY BLANCHETTE: Okay.

3 THE COURT: That's the one where the -- yeah, there was a
4 whole bunch, 10, 10, a 30, obstructing justice, criminal -- all
5 those ---

6 ATTORNEY BLANCHETTE: Everything that was left after the
7 trial essentially were resolved in that guilty plea.

8 THE COURT: That's all right. I understand.

9 ATTORNEY BLANCHETTE: So if you'd like me to keep going ---

10 THE COURT: Yes, ma'am.

11 ATTORNEY BLANCHETTE: --- procedurally what happened is, the
12 PCR for the guilty plea had to be filed within one year of the
13 date of the guilty plea because an appeal wasn't taken, so that's
14 why we have the 2016.

15 THE COURT: And he was given a life sentence at the end of
16 the trial with Craig Brown. Is that correct?

17 ATTORNEY BLANCHETTE: That's correct. And a direct appeal
18 was taken.

19 THE COURT: Is that the result because it was an LWOP?

20 ATTORNEY BLANCHETTE: It was an LWOP, Your Honor.

21 THE COURT: Okay.

22 ATTORNEY BLANCHETTE: I want to make sure I'm correct in
23 saying that.

24 THE COURT: I reviewed this, but it was just a little
25 confusing. You almost need a chart.

1 ATTORNEY BLANCHETTE: It was, Your Honor. To be honest with
2 you, when I brought this motion for consolidation and it was
3 heard by Judge Stilwell back in 2018, I did have a chart just
4 trying to keep it all straight for us all to understand. And as
5 a result of that hearing, we have the order for consolidation.

6 I'm not sure what else information you'd like, so I'll stop
7 there.

8 THE COURT: So the 7/13 plea was for multiple charges. I
9 guess really everything -- a 30-year, all running, everything
10 else, running concurrent, and then I guess running concurrent
11 with the life sentence?

12 ATTORNEY BLANCHETTE: Running concurrent to everything from
13 the trial, Your Honor.

14 THE COURT: Right. And so, yes, ma'am. You then went and
15 got -- I saw Judge Goodstein, in one order, maybe ordered some
16 discovery, and then Judge Stilwell ordered a consolidation.

17 ATTORNEY BLANCHETTE: He did, Your Honor. I provided by
18 email, and I have a copy today. There is an order for
19 consolidation and discovery in both cases, and those are both
20 signed by Judge Stilwell.

21 THE COURT: Okay.

22 ATTORNEY BLANCHETTE: With the hope of making today easier.

23 THE COURT: Because he ordered for purposes of motion and
24 evidentiary hearing.

25 ATTORNEY BLANCHETTE: He did, Your Honor. And I understand

1 that the state's argument deals with a discussion in what we
2 often call "dicta." What I'm focusing on is where it says, It is
3 therefore ordered, and in both orders it says, that the
4 application's docketed at 2018-CP-18-0047 and 2016-CP-18-0017 be
5 consolidated for the purposes of an evidentiary hearing. So it's
6 my position that we are to have a consolidated evidentiary
7 hearing on the two matters.

8 I intended to call Mr. Ellison; go from the time that he
9 retained -- well, a little bit before -- Mr. Falk, forward
10 through the plea hearing; and then do the same with Mr. Falk. I
11 had not intended to call them in two separate hearings.

12 THE COURT: So there would be PCR allegations that would be
13 raised as a result of the conviction, the two thousand -- the
14 trial, and then there would be separate PCR allegations raised as
15 to the 7/13 guilty plea. Is that what we're talking about?

16 ATTORNEY BLANCHETTE: Yes, Your Honor. So in my
17 understanding of this order -- I filed two separate amendments
18 with two separate sets of allegations. I was going to go through
19 both of those. But at the time that we did the consolidation in
20 front of Judge Stilwell, I don't even think my argument wasn't
21 intertwined as it is today, because the first allegation -- if
22 you don't mind me calling it the guilty plea PCR just to kind've
23 keep it straight -- but the first allegation in the guilty plea
24 PCR is failure to effectively represent applicant at this prior
25 trial -- because I had already referenced it already -- which

1 rendered applicant's plea involuntary and, as such, ineffective
2 representation was a primary contributing factor in the entry of
3 applicant's guilty plea.

4 And I don't think the state disagrees that in order for Your
5 Honor to make a complete and total ruling, if we are going to do
6 them separate, all of the proceedings and exhibits have to be
7 incorporated into each other, because these are companion cases.
8 That's the consolidation, one can't be decided without the other.

9 THE COURT: Well, it's a companion case because of the
10 allegation that you've made. That's what's making this a
11 companion case?

12 ATTORNEY BLANCHETTE: Yes, and because it's the same
13 attorney throughout; the same -- and I don't want to get into the
14 merits of the case if you don't want me to, but it begins with a
15 joint plea offer on all charges, is the very first thing I'm
16 going to discuss.

17 THE COURT: For both bank robberies?

18 ATTORNEY BLANCHETTE: For both bank robberies.

19 THE COURT: Okay.

20 ATTORNEY BLANCHETTE: And so when I had talked with the
21 state about this back in 2018 and ever since, up until this week,
22 my understanding was because they're so intertwined, thus, we
23 were going to have a consolidated hearing so we didn't have to
24 get up and march through the same things twice.

25 THE COURT: All right. Let me hear from the state.

1 ATTORNEY WEIDAUER: We would just argue that they're not
2 companion cases. They were called separately. There was a
3 trial, and then there was a subsequent guilty plea. Though
4 Mr. Falk was counsel in both matters, that's the connection that
5 we're trying to make based on applicant's allegations.

6 There is a different standard of review for a trial; there's
7 a different standard of review for a guilty plea.

8 And I think Your Honor is obviously intelligent enough to
9 decipher through the testimony should we call them together, I
10 think it makes it messy for appellate review, and I think that we
11 have honored Judge Stilwell's ruling by keeping the record remain
12 separate, with separate rulings. And I think that's the big
13 thing, is that the records should remain separate.

14 We don't object to Ms. Blanchette's suggestion that we
15 incorporate each of the records ---

16 THE COURT: Well, when you say the record shall remain
17 separate, what specifically do you mean by that?

18 ATTORNEY WEIDAUER: That they would be called separately, as
19 separate cases.

20 THE COURT: So we would call the first case; go through;
21 have witnesses testify; and then go, reach a conclusion; and then
22 call a separate case and move forward in that fashion?

23 ATTORNEY WEIDAUER: Yes, that would be my suggestion. And I
24 think, as Ms. Blanchette and I have discussed, I would have no
25 problem and no objection to her saying in testimony, In your PCR

1 regarding your trial earlier today was this. How does that
2 relate to your allegation in this guilty plea PCR? And we would
3 be able to do that if we did what Ms. Blanchette suggested, which
4 was incorporate each of the records as a court exhibit.

5 ATTORNEY BLANCHETTE: Your Honor, may I respond?

6 THE COURT: Yes.

7 ATTORNEY BLANCHETTE: That suggestion is only made as an
8 alternative. I want to be clear on the record that, under Enoree
9 Church and Rule 60(b), I think -- and I'm not, in any way, trying
10 to step on your discretion here -- it's my position that we would
11 be in violation of Judge Stilwell's order. That would just be
12 concession. So if this issue did go up on appeal as it did in
13 Enoree Church and got remanded back down, I want it to be clear
14 that it's the applicant's position that it is to be a
15 consolidated, as a single evidentiary hearing.

16 If the state had an issue with Judge Stilwell's ruling, as
17 is pointed out in Enoree Church -- and I have a copy if Your
18 Honor needs it. I also referenced it in my email -- a timely
19 Rule 60 motion should have been filed asking him to set it aside,
20 asking him to clarify. We are out of time for that. It is four
21 years later.

22 THE COURT: Right.

23 ATTORNEY BLANCHETTE: This case has been prepared under this
24 when it was scheduled before. I've dealt with, I believe, four
25 different assistant attorney generals since this order was

1 signed. It was being called ---

2 THE COURT: Well, let me ask you this.

3 ATTORNEY BLANCHETTE: Yes.

4 THE COURT: You've got specific allegations that you make in
5 each one. Why can't you just go through them all at one time,
6 and then I'm just going to rule? We can have one hearing. I
7 don't care.

8 ATTORNEY BLANCHETTE: That's what I want to do.

9 THE COURT: But what I know is, you're going to give me 1
10 through 6, or whatever it is, and I'm gonna listen. Then I'm
11 going to address 1, 2, 3, 4, 5, 6 in the first PCR. And you're
12 going to have five allegations in the second PCR, and I'm going
13 to address 1, 2, 3, 4, 5. I mean ---

14 ATTORNEY BLANCHETTE: I think the records ---

15 THE COURT: --- is that what you want?

16 ATTORNEY BLANCHETTE: The records and the orders need to be
17 separate, Your Honor. Yes, Your Honor, we need two separate
18 orders.

19 THE COURT: Right.

20 ATTORNEY BLANCHETTE: But the issue that we discussed with
21 Judge Stilwell, and where this order came from, is the example I
22 gave you of the joint guilty plea to all charges to begin with.

23 THE COURT: I understand. You're going to have one. I'm
24 going to rule on each one individually.

25 ATTORNEY BLANCHETTE: Correct, Your Honor.

1 THE COURT: What's the problem with that? I mean, every one
2 we've had this week, there's bullet points, these are five
3 things. I don't care if she wants to, I mean, mix them up. I'm
4 going to rule on each one individually; aren't I? I mean, I
5 would assume that's what I'm going to be doing.

6 I just want to make sure I understand, because basically, I
7 mean, it seems to me that this would go a little quicker. But,
8 I'm going to prepare two orders. I'm going to address the bullet
9 points, or whatever her causes of action are, in each one. As
10 far as I'm concerned, each of my -- each one will be standing on
11 the merits of its case.

12 Now, she can combine and say, Well, this leads us back to
13 the other one, and I may say I disagree, but I'm going address
14 each one. I'm just asking. I want to make sure I understand.

15 ATTORNEY WEIDAUER: So I think that, though we could have
16 filed a 60(b), I think there's just a fundamental difference in
17 what we believe that Judge Stilwell's order was stating/ordering.
18 And it doesn't order a merger of the matters. And like you said,
19 you'd address each case separately because these are two
20 different and separate PCR hearings, with different allegations.

21 I think that the biggest issue is that it muddies the water.
22 We have to -- you know, the questions that are going to be asked
23 regarding, for example, discovery, everything will have to be
24 very clear on the record. And, I mean, we can make that record,
25 if necessary, but I think that it's easier to address each, since

1 they are separate cases, they weren't companion cases,
2 separately.

3 THE COURT: What I'm going to do is, I'll allow them to be
4 addressed together.

5 ATTORNEY WEIDAUER: Okay.

6 THE COURT: But, counsel, as you go through this matter,
7 you're going to have to make it abundantly clear to the Court
8 what you're covering and what PCR it goes to, because I'm just
9 going to be taking notes. And so to that extent, I think that
10 allows the record to be clear, because I will also tell you if
11 she doesn't know or if you don't know, you can ask it during the
12 proceeding because, you know, if you say, Well, this applies to
13 both, you know, point A, okay.

14 But, a mean, I think as long as our record is clear, as
15 opposed to allowing her to just kind've roll through it, I think
16 that will address it. I think that will protect the record from
17 being muddled.

18 I think Judge Stilwell, when I read that, it says
19 evidentiary hearing. You know, I kind of think this is the
20 evidentiary hearing, evidentiary hearing. I think we can have
21 it. I think it will help move things along. But what I want to
22 make sure is that I know what PCR we're dealing with as we go
23 through. And if you don't know and there's a question, ask so we
24 can make certain.

25 ATTORNEY WEIDAUER: Yes, Your Honor.

1 THE COURT: Okay?

2 ATTORNEY WEIDAUER: Yes, Your Honor.

3 THE COURT: And so that's what I want to do. So I'm going
4 to grant your request to consolidate the hearing. There will be
5 two separate orders. But, also, counsel, you've got to
6 understand, you've got to make it clear as to, you know -- you
7 can't allow -- I'm not going to sit here and say, Whoa, I just
8 heard a bunch of stuff, I don't know if this is the first or the
9 second." That's what I'm not going to do.

10 ATTORNEY BLANCHETTE: Yes, Your Honor. I don't want to cut
11 you off but, in preparing for this, what I've done is, each
12 allegation, I'm going to state it, and then say we're discussing
13 that allegation. I thought that would be the best way to keep it
14 clear. And so I prepared an outline where I go through each
15 allegation as to each application, and then I'm going to elicit
16 the testimony, and move on to the next allegation. I didn't want
17 it to be confusing as to what I was talking about and when.

18 THE COURT: That's fine. That will help me, and that will
19 help the record, on appeal. It won't be a dump truck just
20 throwing the dirt onto the ground. We'll go and, basically,
21 we'll know that this shovelful is A, B, C. Okay?

22 ATTORNEY WEIDAUER: And just for the record ---

23 THE COURT: Yes, ma'am.

24 ATTORNEY WEIDAUER: This, in no way, merges the cases? They
25 will be kept separate and apart?

1 THE COURT: No, no, no. What I'm doing is, I'm
2 consolidating for the purpose of this record. It's not merging
3 the cases, and there's going to be two separate orders, two
4 separate findings, as it relates to each PCR. Okay?

5 ATTORNEY WEIDAUER: Yes, Your Honor.

6 THE COURT: Anything else that needs said on the record as
7 it relates to this?

8 ATTORNEY WEIDAUER: Not that I can think of.

9 THE COURT: All right. Anything else, ma'am?

10 ATTORNEY BLANCHETTE: No, Your Honor. And if, at any time,
11 I'm not clear, please let me know ---

12 THE COURT: Oh, I will.

13 ATTORNEY BLANCHETTE: --- if I cross that line of being
14 confusing.

15 THE COURT: We will.

16 ATTORNEY BLANCHETTE: Because it may make sense to me, but I
17 never know if it makes sense once it leaves my mouth.

18 THE COURT: No, no, no. That's fine, okay. So are we ready
19 to go ahead and move forward?

20 ATTORNEY BLANCHETTE: Yes, Your Honor.

21 THE COURT: Attorney General, how about call the 2016 case
22 first, and then also call the 2018 case, please.

23 ATTORNEY WEIDAUER: And I would ask that we be able to call
24 them -- as Ms. Blanchette stated, the trial was first, which is
25 actually the 2018 case, and I believe that she intends to address

1 the trial first.

2 ATTORNEY BLANCHETTE: I was going to go in chronological
3 order, which actually puts the PCRs in the reverse order, Your
4 Honor.

5 THE COURT: Y'all ain't making anything easy this morning,
6 okay.

7 ATTORNEY BLANCHETTE: Well, I can go from the end to the
8 beginning.

9 THE COURT: No, no, no. That's fine. That's fine. You can
10 swap them, announce them. I just want you to call both cases in
11 whatever order you'd like to.

12 ATTORNEY WEIDAUER: Okay. Thank you, Your Honor. So the
13 first matter is the post conviction relief matter of Tyrone
14 Ellison v. State, and that is case no. 2018-CP-18-00047, an
15 applicant's underlying General Sessions case. He was indicted
16 for entering a bank, depository, or building, and loan
17 association with intent to steal. Don Sorenson represented the
18 state in that case, and James Falk represented applicant.

19 On October 20th, 2014, applicant proceeded to trial before
20 The Honorable Craig Brown, and the jury found applicant guilty as
21 indicted of both charges. On October 24th, 2014, Judge Brown
22 sentenced applicant to life imprisonment for armed robbery, and
23 30 years for the entering-a-bank charge. Applicant filed a
24 timely notice of appeal, which appellate defender David Alexander
25 perfected. The South Carolina Court of Appeals affirmed

1 applicant's convictions in an unpublished opinion on January
2 11th, 2017, and a remittitur was returned to the Circuit Court on
3 February 7th, 2017.

4 As for the second case, which is case no. 2016-CP-18-00017,
5 and that deals with the plea, and that is Tyrone Ellison v. State
6 in his underlying General Sessions case, in that prior to that
7 plea, applicant was indicted for one count of entering a bank
8 with intent to steal, one count of failure to stop for a blue
9 light, two counts of hit and run involving great bodily injury,
10 one count of armed robbery, one count of obstructing justice, and
11 one count of criminal conspiracy. There was an additional count
12 of intimidation of court officials, jurors, or witnesses that
13 dealt with his previous trial. At that trial, Don Sorenson also
14 prosecuted the case and represented the state. James Falk, who
15 is present in the courtroom, represented applicant in that
16 subsequent plea as well.

17 On August 12th, 2015, applicant pleaded guilty before for
18 The Honorable Edgar Dickson. Judge Dickson sentenced applicant
19 to 30 years for entering a bank with intent to steal, and time
20 served for the failure to stop for a blue light charge, 10 years
21 for each of the hit and run involving great bodily injury
22 charges, 30 years for the armed robbery charge, 10 years for the
23 obstructing justice charge, five years for the conspiracy charge,
24 and time served for attempting to influence a juror.

25 Pursuant to a negotiated plea for a 30-year sentence, Judge

1 Dickson sentenced applicant to an aggregate sentence of 30 years,
2 with all charges running concurrently. Applicant did not appeal
3 from that plea. And he filed this post conviction relief
4 application on January 7th, 2016.

5 So, this hearing follows both of those. It's the state's
6 understanding that we will be proceeding with the allegations
7 enumerated in applicant's amended allegations, and those were
8 filed in July of 2021.

9 At this time we would just ask for counsel to place those
10 allegations on the record and clarify any that she intends not to
11 go forward on.

12 THE COURT: Counsel, I'm happy to hear from you.

13 ATTORNEY BLANCHETTE: Thank you, Your Honor. Tricia
14 Blanchette on behalf of the applicant, Tyrone D. Ellison. As the
15 state indicated, I filed separate amendments in each of these
16 cases. Does Your Honor have a copy of those, or would you need a
17 copy at this time?

18 THE COURT: In the 2018 case, I have an amendment to
19 application for post conviction relief that, on page 2, outlines,
20 I guess, one, two, three -- three different issues.

21 ATTORNEY BLANCHETTE: That is correct, Your Honor. And it
22 was filed on July 26th of 2021. I'm happy to read those into the
23 record but I believe it is part of the record in this case.

24 THE COURT: Hold on. I'm looking for the ---

25 ATTORNEY BLANCHETTE: The second one?

1 THE COURT: --- 2018. Or, 2016.

2 ATTORNEY BLANCHETTE: It's also dated July 26, 2021, on the
3 record stamp. If it's helpful to Your Honor, I do have an extra
4 copy.

5 THE COURT: Hold on one second.

6 ATTORNEY BLANCHETTE: Okay.

7 THE COURT: All right. And, I have that. That's 2016,
8 amendment to application for post conviction relief, and it has,
9 it looks like, three matters contained on page 2. Is that
10 correct?

11 ATTORNEY BLANCHETTE: That is correct, Your Honor.

12 THE COURT: While we're here, she's asked for -- and I've
13 agreed to consolidate it -- she's asked, for the purposes of the
14 hearing, not to consolidate into one case. She's requested that
15 you read those into the record, so I am going to ask you to do
16 that, okay.

17 ATTORNEY BLANCHETTE: Yes, Your Honor.

18 THE COURT: Yes, ma'am. Thank you.

19 ATTORNEY BLANCHETTE: Since she began with the 2018, I will
20 do, as well, and try to keep it in that order for Your Honor.

21 THE COURT: Yes, ma'am.

22 ATTORNEY BLANCHETTE: Obviously there is language in the
23 body of the amendment that I'd ask the Court to consider, but I
24 will stick to just the listed allegations at this time.

25 THE COURT: I understand that, but as it relates to a list,

1 if you'd go ahead and do that, yes, ma'am. Thank you.

2 ATTORNEY BLANCHETTE: I will be happy to do that, Your
3 Honor. The first allegation listed on the amendment on page 2
4 is, Failure to properly prepare prior to trial and advise
5 applicant regarding strength of the state's evidence and the
6 available defenses which resulted in counsel's failure to
7 effectively negotiate a guilty plea and the following matters
8 that arose prior to and during trial:

9 a) Utilization of a defense strategy that had been fully
10 discussed on recorded phone calls provided to the defense in
11 discovery;

12 b) Utilization of applicant's mother as a defense witness to
13 support said defense with knowledge that she was subject to
14 questioning regarding her audio interview with law enforcement
15 whereby she identified applicant, in part, and her recorded phone
16 calls regarding the defense offered;

17 c) Utilization of an expert that bolstered the state's case
18 and failed to offer an opinion advantageous to applicant;

19 d) Utilization of defense witnesses regarding applicant's
20 employment and/or alibi when it was known that the state could
21 refute said witnesses, and;

22 e) Failure to address with applicant, make an argument
23 and/or motion regarding double jeopardy.

24 Claim no. 2 is: Failure to address the following matters at
25 trial: a) The Court's prohibited and burden shifting statements

1 to search for the truth in an effort to make sure that justice is
2 done between the parties -- that's in quotes - and that both the
3 state and the defendant get a fair and impartial trial. Cited to
4 transcript page 90, lines 21 through 23; page 601, line 25
5 through page 602, line 5;

6 b) the Court's failure to question the jurors individually
7 on the matters involving witness intimidation.

8 Allegation 3, we will be abandoning today on the record.
9 That is, Ineffective assistance of appellate counsel for failure
10 to raise the motion made regarding the suppression of the gloves.
11 We will not be going forward on that today.

12 THE COURT: All right.

13 ATTORNEY BLANCHETTE: And, Your Honor, if it will be helpful
14 to madam court reporter, I have a copy for her since I just read
15 quite a bit. I don't know if that's something she would like.

16 THE COURT: Sure.

17 ATTORNEY BLANCHETTE: Your Honor, as to the 2016 amendment,
18 the three allegations contained therein, with reference to the
19 trial already, Failure to effectively represent applicant at this
20 prior trial which rendered applicant's plea involuntary, as such
21 ineffective representation was a primary contributing factor in
22 the entry of applicant's guilty plea;

23 2) Failure to properly prepare his applicant for a trial
24 prior to entry of the plea, which rendered applicant's guilty
25 plea involuntary and led -- it should say led to, I'm sorry,

1 instead of let -- led to the Court convincing applicant to plea
2 after voicing his dissatisfaction with counsel;

3 3) Failure to effectively negotiate and ensure that there
4 was a benefit from the plea bargain.

5 I would just like to note that, by way of the amendment,
6 *United States v. Chronic* is argued, which is a different standard
7 than *Strickland*, and I intend to argue that today as well. And I
8 put the state on notice of that.

9 THE COURT: All right. That's fine. Do you need some
10 water ---

11 ATTORNEY BLANCHETTE: I always have plenty. Thank you, Your
12 Honor.

13 THE COURT: --- after reading all that? All right. So are
14 you ready to move forward?

15 ATTORNEY BLANCHETTE: Your Honor, there's just one or two
16 matters. There's a preliminary hearing that was heard on
17 August 4th of 2014. I made copies, and the state indicated that
18 it may be in your packet. I just wanted to make sure it was and
19 it's part of the record today.

20 THE COURT: And that is what, ma'am?

21 ATTORNEY BLANCHETTE: It is a hearing. Actually, they were
22 calling it originally to trial, so on the front of it it's dated
23 August 4, 2014, and it was held by Judge McMahon. It's a 35-page
24 transcript.

25 THE COURT: What date was it?

1 ATTORNEY BLANCHETTE: August 4th, 2014. And under the date
2 it says Saint George, SC.

3 THE COURT: Yes, ma'am. I've got it right here.

4 ATTORNEY BLANCHETTE: I had planned to reference that, and I
5 did not want to be confusing the Court. And I have copies, if
6 needed.

7 THE COURT: All right. Yes, ma'am.

8 ATTORNEY BLANCHETTE: Your Honor, also, if the Court would
9 like, I can summarize what happened in that, or I can kind of
10 march through it with my client. Would you like a summary of
11 what happened at that -- it's not a preliminary, they were
12 actually calling the case for trial at that point, and it turned
13 into a motion hearing.

14 THE COURT: I'm happy to have you summarize that. I think
15 I've read it, but go ahead.

16 ATTORNEY BLANCHETTE: Your Honor, at that hearing, as I
17 said, it was in front of Judge McMahon. At that time Attorney
18 Michael Tommy Bolus represented the applicant. He's not here
19 with us today because he's deceased, and so that's the other
20 reason for making sure that you have the transcript, because he
21 will not be here to testify.

22 At that hearing, what comes up is, Dr. Bennett is a DNA
23 expert that was retained by Mr. Ellison. And, beginning on page
24 5 they take testimony from him, and he explains that the
25 applicant's mother had retained him a couple months ago to

1 independently determine the findings of SLED and look at their
2 procedure. He explains that he repeated what they did and found
3 no viable cells, and he explains that on page 15 and 16 where he
4 gets into extended loci in fine DNA details, Your Honor.

5 On cross, he indicates that he has a wig, a visor, a glove,
6 and swabs, but he's done nothing with the glove. He tried to
7 imitate the process done by SLED. And then on pages 23 through
8 24, he agrees that SLED did a thorough job in processing the
9 evidence. There's a conversation that then takes place over
10 pages 25 and 27 about this glove and testing of this glove. Then
11 there is very brief redirect where it comes out that Dr. Bennett
12 was unaware that there's DNA on the glove. Pages 29 through 31,
13 Judge McMahon summarizes what's been put in front of him, and
14 Mr. Bolus states their position that Mr. Ellison contested it's
15 his DNA, and he has an issue with the gloves being found in a
16 subsequent search. There's back-and-forth discussion. The Court
17 says Step in the back, and that's where our transcript ends, and
18 the case doesn't go forward on that day.

19 THE COURT: Wasn't this also talked about, the gloves being
20 from the Burger King?

21 ATTORNEY BLANCHETTE: Yes. There's an issue of where these
22 gloves are found.

23 THE COURT: Wasn't there also an issue in this hearing about
24 the fact that, as a result of the way the state tested one of
25 these items, the expert that, I guess, his mom hired was unable

1 to conduct a test because basically they had swabbed it away or
2 swabbed all of the wig, or one of these items? Am I recalling
3 that correctly?

4 ATTORNEY BLANCHETTE: Yes, Your Honor. And that's where we
5 pick up at trial, so that's why I wanted to make sure Your Honor
6 had this, because this is kind of the precursor to right at the
7 beginning of the trial they jump into discussing exactly what
8 you're talking about, and it doesn't make complete sense without
9 having the transcript that you have where Dr. Bennett originally
10 got involved. Jump McMahon, even though he doesn't come back on
11 the record, it can be inferred from what happened subsequent, he
12 continues the case for further DNA testing.

13 THE COURT: See, aren't y'all amazed that I actually read
14 this; that I can sit there and do that on Friday, I can sit here
15 and I read this case?

16 ATTORNEY BLANCHETTE: I am amazed, and I am a little
17 concerned when you know the details and I have to make sure I
18 know them as well.

19 THE COURT: Well, I think some of those details may be
20 important that I just brought up, but go ahead, all right.

21 ATTORNEY BLANCHETTE: Yes, Your Honor. So that's why I
22 wanted to make sure you had this transcript before I jumped in
23 and started talking about the transcript and the issue in the
24 amendment with Dr. Bennett, because I think the transcript kind
25 of lays the stage for then the things that happened later.

1 THE COURT: All right.

2 ATTORNEY BLANCHETTE: Your Honor, I believe that's
3 everything I had preliminarily. At this point I am prepared to
4 call Mr. Ellison as my first witness.

5 THE COURT: All right. Mr. Ellison, come on around, sir.

6 ATTORNEY BLANCHETTE: And if he could bring up his
7 transcripts with him.

8 THE COURT: Sure. Mr. Ellison, put your left hand on the
9 Bible, sir, and if you would raise your right hand, let me swear
10 you in, okay.

11 THE DEFENDANT: Yes, sir.

12 TYRONE D. ELLISON,
13 having first been duly sworn, was examined and testified as
14 follows:

15 THE COURT: Thank you, Mr. Ellison. Come on around and sit
16 down. And, Mr. Ellison, I'm going to need you to get close to
17 that microphone and speak up for me. Okay, sir?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Thank you.

20 **DIRECT EXAMINATION**

21 BY ATTORNEY BLANCHETTE:

22 Q Can you please state your name for the record.

23 A Tyrone Ellison.

24 Q And, Mr. Ellison, you've already heard us speaking a little
25 bit today about consolidation. What I'm going to go through is

1 each set of charges, each PCR application procedurally, and then
2 ask you questions about going forward today, and then we're going
3 to jump into the merits of the allegations in each of those
4 applications. Okay?

5 A Yes, ma'am.

6 Q If, at any time, I ask you a question that you don't
7 understand or I confused you, please communicate that back to me
8 and I'll try to ask you a better question. Okay?

9 A Yes, ma'am.

10 Q Mr. Ellison, first I'm going to talk with you about the
11 charges that led to your trial. Those are stemming from an
12 incident dated April 1st, 2013, at a SunTrust Bank. There were
13 two indictments, armed robbery and entering a bank with intent to
14 steal. You went to trial on those charges on October 20th
15 through 24th of 2014. Is that correct?

16 A Yes, ma'am.

17 Q And who represented you at that trial?

18 A James Falk.

19 Q And, as a result of that trial, you received a sentence of
20 life without parole, with a 30-year concurrent; is that correct?

21 A Yes, ma'am.

22 Q And did you take a direct appeal, or was a direct appeal
23 filed on your behalf after that?

24 A Yes, ma'am.

25 Q And do you know who handled that for you?

1 A I believe David Alexander.

2 Q And after Mr. Alexander filed a merits brief, did the court
3 give you relief, or did they uphold the rulings and sentence --
4 I'm sorry -- the conviction of the jury and the sentence of Judge
5 Brown?

6 A Yes, ma'am, they upheld it.

7 Q And then subsequent to that, you filed the PCR application
8 that's docketed at 2018-CP-18-0047 addressing that trial; is that
9 correct?

10 A Yes, ma'am.

11 Q And I have filed an amendment on your behalf, and that's
12 what we're going forward on today?

13 A Yes, ma'am.

14 Q What is the relief that you're asking the Court to give you
15 if you have proven those allegations today?

16 A I'm just asking just to have my sentence overturned, and be
17 relief.

18 Q So you're asking to have your conviction and sentences
19 vacated and for the opportunity to have a new trial if that's
20 fit?

21 A Yes, ma'am.

22 Q And you understand in doing that there's no guarantee that
23 you could get less time if everything's set aside? Obviously
24 you're serving a life sentence, so it doesn't seem like there's a
25 risk of getting more time, but you understand there's no

1 guarantee of getting less time if this were to be set aside?

2 A Yes, ma'am.

3 Q And knowing that, you want to go forward on that application
4 today?

5 A Yes, ma'am.

6 Q Now I'm going to ask you about the 2016 application that
7 involves the guilty plea, okay. That stems from an incident date
8 of July 1st of 2013, also at a SunTrust Bank. There are also a
9 number of other charges that didn't happen on that date that you
10 pled guilty to, as reflected in the transcript. And that guilty
11 plea was on August 12th of 2015. Who represented you at that
12 guilty plea?

13 A James Falk.

14 Q And after that guilty plea, you filed a PCR application on
15 January 7th of 2016; is that correct?

16 A Yes, ma'am.

17 Q Okay. And that PCR is docketed at 2016-CP-18-0017. By way
18 of amendment, we've made specific allegations. And if you are
19 able to prove those allegation through the record and the
20 testimony today, what is it that you're asking the Court to do?

21 A Just to be fair and impartial.

22 Q That's a very good request, but I should have worded that
23 differently. What is the relief you're asking? Are you asking
24 to have that guilty plea set aside?

25 A Yes, ma'am.

1 Q And you understand in doing that, in your guilty plea you
2 got a negotiated 30 years. With the charges that you pled to,
3 there's a risk of getting more time if we set aside that guilty
4 plea. Knowing that, you still want to go forward with that
5 application today?

6 A Yes, ma'am.

7 Q Okay. And there's one other matter I just want to make sure
8 we make a record of. You heard us discussing at the beginning,
9 you were at the hearing in 2018 where we had filed a motion
10 asking Judge Stilwell to consolidate and have one evidentiary
11 hearing on both cases.

12 You understand that is what we're going to do today, and
13 you're in agreement with that; is that correct?

14 A Yes, ma'am.

15 Q Thank you, Mr. Ellison. Now let's start at the very
16 beginning of all of this. Once you received these charges but
17 for the charges that stemmed from the trial itself, did you
18 retain or were you appointed an attorney?

19 A I appointed my own attorney.

20 Q Okay, you got your own attorney. And who was that?

21 A Michael Bolus.

22 Q Okay. And when you retained Mr. Bolus, did you also retain
23 an expert to assist you with the case?

24 A Yes, ma'am.

25 Q And who was that expert?

1 A Dr. Bennett.

2 Q Okay. And what was the purpose in retaining him? What type
3 of expert was it your understanding that he was?

4 A A DNA expert.

5 Q And I'm going to show you a document. And it's actually
6 been filed in your General Sessions case.

7 ATTORNEY BLANCHETTE: Your Honor, may I approach the
8 witness?

9 THE COURT: Yes, ma'am.

10 ATTORNEY BLANCHETTE: Your Honor, would you like me to ask
11 every time I approach the witness?

12 THE COURT: No. I mean, no, you don't have to ask.

13 BY ATTORNEY BLANCHETTE:

14 Q Mr. Ellison, can you identify what that ---

15 THE COURT: Feel free to move about the courtroom.

16 ATTORNEY BLANCHETTE: Thank you, Your Honor. I appreciate
17 that.

18 THE COURT: That goes for the Attorney General also.

19 ATTORNEY WEIDAUER: Thank you, Your Honor.

20 (Applicant's Exhibit 1 is marked for identification.)

21 BY ATTORNEY BLANCHETTE:

22 Q Mr. Ellison, can you just give us the heading of that
23 document that I gave you? What does it state on it?

24 A Motion for bond reduction.

25 Q And this was filed on your behalf; is that correct?

1 A Yes, ma'am.

2 Q And this is a document that you're familiar with?

3 A Yes, ma'am.

4 ATTORNEY BLANCHETTE: Your Honor, at this time we would
5 introduce the motion for bond reduction as Applicant's No. 1.

6 THE COURT: Any objection?

7 ATTORNEY WEIDAUER: No objection.

8 THE COURT: All right. Admitted, without objection.

9 (Applicant's Exhibit 1 is received in the record.)

10 ATTORNEY BLANCHETTE: Your Honor, would you like a courtesy
11 copy of the exhibits?

12 THE COURT: Sure. Thank you.

13 BY ATTORNEY BLANCHETTE:

14 Q Now, attached to this motion for bond reduction, as the
15 Court can see, are affidavits and information. What was
16 discussed with you before filing this motion for bond reduction
17 and turning over this information?

18 A You said what was discussed with me?

19 Q Yes.

20 A You talking about my attorney?

21 Q Yes. Did you guys discuss, We're going to attach these
22 documents to try to get you a bond reduction? What was the
23 purpose? Were you involved in that process at all?

24 A Yes. My only -- the only thing I knew was, I was trying to
25 get a decent bond.

1 Q Okay.

2 A That's the only thing I know.

3 Q And was your bond reduced?

4 THE COURT: Hold on one second.

5 ATTORNEY BLANCHETTE: I'm sorry.

6 THE COURT: That's all right. Sir, you've got to speak up
7 for me.

8 THE WITNESS: Yes, sir.

9 THE COURT: It's an important day. I want to make sure I'm
10 hearing you, and we want to make sure we're got a good record,
11 okay, so I just need you to speak up. You may need to be closer
12 to the microphone, okay.

13 THE DEFENDANT: Yes, sir, I gotcha.

14 THE COURT: All right. Thank you. Go ahead.

15 BY ATTORNEY BLANCHETTE:

16 Q Tyrone, you're a quiet talker, and I'm a loud talker, so I
17 make it even harder. It may help if you're comfortable taking
18 that off, your mask off, so you can move your mouth a little more
19 freely, then maybe you can speak a little more clearly for us.

20 Okay. So the motion for bond reduction was filed, and
21 that's part of our record here. I also want to show you -- let
22 me ask you this first. Were you aware of any plea offers that
23 were extended by the state?

24 A No, ma'am. Well, I had a plea deal from Tommy Bolus one
25 time.

1 Q And, Mr. Ellison -- I can take that document away from you.
2 Mr. Ellison, as part of the PCR process, we have obtained orders
3 authorizing discovery, and as part of that we'd have to get a
4 complete of the solicitor's file. And are you aware of
5 everything I've gone over with you that was turned over by the
6 solicitor's office?

7 A Yes, ma'am.

8 Q To include emails that now-retired Solicitor Don Sorenson
9 provided to us regarding his communications with Mr. Bolus?

10 A Yes, ma'am.

11 Q And specifically regarding the plea offer that was extended?

12 A Yes, ma'am.

13 (Applicant's Exhibit 2 is marked for identification.)

14 BY ATTORNEY BLANCHETTE:

15 Q I'm going to show you this document here. If you can just
16 look over it, and then I'm just going to ask you some questions
17 about it. Are you ready, Mr. Ellison?

18 A Yes, ma'am.

19 Q On the first page -- and it's just three pages, because I
20 wanted to make sure we properly represented the complete email
21 chain. On the first page dated Thursday, May 15, 2014, it's
22 written to Tommy and it's signed by Don. Do you see there where
23 it indicates that he's offering a 25 to 30 years on two counts of
24 entering a bank with intent to steal, failure to stop for a blue
25 light, and two counts of leaving scene with GBI. He says, I will

1 dismiss the two counts of armed robbery. If you twist my arm,
2 I'd probably do a negotiated 27. Was that offer communicated to
3 you?

4 A It was communicated through the email.

5 Q So you were aware of this offer?

6 A Yes, ma'am.

7 Q And what did you tell Mr. Bolus about your position on this
8 offer?

9 A I told him I wanted to see the results from Dr. Bennett.

10 Q Before you took any type of plea offer?

11 A Yes, ma'am.

12 ATTORNEY BLANCHETTE: Your Honor, at this time I would move
13 this email chain that I have just referenced with Mr. Ellison in
14 as Applicant's No. 2.

15 THE COURT: Any objection?

16 ATTORNEY WEIDAUER: No objection.

17 THE COURT: Admitted, without objection.

18 (Applicant's Exhibit 2 is received in the record.)

19 BY ATTORNEY BLANCHETTE:

20 Q Now, I've already spoken with the Judge, and we have a
21 transcript where you appeared on August 4th of 2014 in front of
22 Judge McMahon, and you appear with Attorney Tommy Bolus. What
23 was your understanding of what was going to occur that day?

24 A I know I was supposed to go to trial that day, but then
25 there was a motion for the DNA about inclusive results from

1 Dr. Bennett.

2 Q And you didn't end up going to trial that day; is that
3 correct?

4 A Yes, ma'am.

5 Q What was your understanding, when that hearing ended, what
6 was going to happen next?

7 A Dr. Bennett was going to do further testing to see whether
8 DNA was going to be admitted into evidence or not.

9 Q And after that hearing, what action did you take regarding
10 your representation by Mr. Bolus?

11 A I fired him that day.

12 Q And who did you retain in his stead?

13 A James Falk.

14 Q Okay.

15 ATTORNEY WEIDAUER: Your Honor, can you ask applicant just
16 to speak up a little bit?

17 THE COURT: Yes. Sir, you've really got to speak up.
18 You're going to have to speak up. We've got to be able to hear
19 you, okay.

20 ATTORNEY BLANCHETTE: I think he's the quietest client I
21 have.

22 THE DEFENDANT: Is that better?

23 THE COURT: That is better. Literally, you get up on that
24 microphone and talk the same, talk like you've been talking, we
25 can hear you. But the minute you back away from that microphone,

1 it's not very sensitive and so you've got to be right up on it.

2 Okay, buddy?

3 THE DEFENDANT: All right. I apologize.

4 THE COURT: You're okay, sir. It's just it's important. We
5 want to make sure we can hear you. We've got to make sure the
6 court reporter gets an accurate record. Okay?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Thank you.

9 BY ATTORNEY BLANCHETTE:

10 Q And, Mr. Ellison, you just said that you had decided to hire
11 Mr. Jim Falk. Is that correct?

12 A Yes, ma'am.

13 (Applicant's Exhibit 3 is marked for identification.)

14 BY ATTORNEY BLANCHETTE:

15 Q And I'm just going to show you this document that's already
16 part of the record. It's from the clerk's records. And I keep
17 making you move. Let me take that back. Can you identify what
18 that appears to be for the record?

19 A This is consent order for substitution of counsel.

20 Q Okay. And it's dated by Judge Goodstein on September 5th of
21 2014?

22 A Yes, ma'am.

23 Q And by this order, officially Jim Falk became your attorney;
24 is that correct?

25 A Yes, ma'am.

1 ATTORNEY BLANCHETTE: Your Honor, at this time I would move
2 the order for substitution as Applicant's Exhibit 3.

3 THE COURT: Any objection?

4 ATTORNEY WEIDAUER: No objection.

5 THE COURT: All right. Admitted, without objection.

6 (Applicant's Exhibit 3 is received in the record.)

7 BY ATTORNEY BLANCHETTE:

8 Q Now, after you retained Mr. Falk and prior to your trial
9 that took place in October -- and that order's actually not even
10 filed until the date of your trial -- what preparations did you
11 do with him to get ready for trial?

12 A I believe we spoke one time when I was in the detention
13 center waiting for trial.

14 Q And I want to specifically ask you ---

15 ATTORNEY BLANCHETTE: And, Your Honor, at this time I would
16 be going directly to issue no. 1 in the PCR application, Failure
17 to properly prepare prior to trial and advise applicant regarding
18 the strength of the state's evidence and the available defenses
19 which resulted in counsel's failure to negotiate a guilty plea
20 and the following matters that arose at trial. I'll kind've be
21 taking those one at a time as they're listed in the amendment.

22 THE COURT: You're talking about 1(a) through (e)?

23 ATTORNEY BLANCHETTE: Yes, Your Honor.

24 THE COURT: All right. Yes, ma'am.

1 BY ATTORNEY BLANCHETTE:

2 Q Now let's talk first about the plea negotiations. We
3 already put in the record that Mr. Bolus was communicated by the
4 solicitor's office an offer of 25 to 30, or possibly a negotiated
5 27.

6 What discussions did you have with Mr. Falk after he was
7 substituted regarding the plea negotiations?

8 A We had no conversation about that.

9 Q Okay. Now, we've already admitted into record the motion
10 for bond reduction. And by way of that motion, there are
11 affidavits attached which essentially set up your alibi. What,
12 if anything, did you all discuss about that already being on file
13 and the state being noticed of that?

14 A Nothing.

15 Q So he never raised to you any concerns that that may have
16 already shown the hand of your defense, that motion for bond
17 reduction?

18 A No, ma'am.

19 Q Did you ever discuss with Mr. Falk the strength and the
20 weaknesses of your defense?

21 A No, ma'am.

22 Q Did you ever discuss with him the strength and the
23 weaknesses of the state's case?

24 A No, ma'am.

25 Q Now I am going to, as set out in the amendment, kind've go

1 through some of the specific issues. First, the utilization of a
2 defense strategy that had been fully discussed on recorded phone
3 calls provided to the defense in discovery; utilization of
4 applicant's mother as a defense witness to support said defense
5 with knowledge that she was subject to questioning regarding her
6 audio with law enforcement whereby she identified applicant, in
7 part, and her recorded phone calls regarding the defense offered.

8 Regarding that, I'd like to ask you, Did you review any of
9 the CDs, or digital, or audio evidence with Mr. Falk prior to
10 your trial?

11 A No, ma'am.

12 Q Have you had the opportunity now, as a result of the
13 discovery process, to review some of those with me?

14 A Yes, ma'am.

15 Q Okay. Now, specifically I want to ask you about two.

16 ATTORNEY BLANCHETTE: And, Your Honor, I'm sorry. I should
17 have addressed this at the beginning. If I may, there are two
18 CDs that are referenced during his mother's cross-examination
19 that I intend to reference and ask him questions about. I have
20 copies of each of those as they were provided to me from the
21 state.

22 I also have a USB device that has both of those on it for
23 Your Honor to listen to unless Your Honor would like for me to
24 play those in court.

25 THE COURT: I will listen to them.

1 (Applicant's Exhibit 4 is marked for identification.)

2 ATTORNEY BLANCHETTE: Okay. Your Honor, at this time, as
3 previously discussed with the state then, I would like to move a
4 CD, as I received it, it's marked 7/28/14, a via-cam phone call
5 from Shawn Keitt, K-e-i-t-t, to Annette McKinney. I numbered it
6 as CD no. 57 that I received. I would like to move that into
7 evidence as Applicant's No. 4.

8 THE COURT: Any objection?

9 ATTORNEY WEIDAUER: No objection.

10 THE COURT: All right. Admitted, without objection.

11 (Applicant's Exhibit 4 is received in the record.)

12 (Applicant's Exhibit 5 is marked for identification.)

13 ATTORNEY BLANCHETTE: Your Honor, at this time I would move,
14 as Applicant's No. 5, a CD marked 2013-01-0958, bank robbery
15 interview of Annette McKinney at HOM. I have marked it as CD no.
16 22. I would like move that in as Applicant's No. 5.

17 THE COURT: Any objection?

18 ATTORNEY WEIDAUER: No objection.

19 THE COURT: All right. Admitted, without objection.

20 (Applicant's Exhibit 5 is received in the record.)

21 THE COURT: And these are CDs of conversations that the mom
22 had?

23 ATTORNEY BLANCHETTE: The first one is recorded jail calls
24 between the mom and an inmate. The other one is Investigator
25 Repman interviewing the mother at her home.

1 THE COURT: All right.

2 ATTORNEY BLANCHETTE: Your Honor, as stated, I have a USB
3 device here that has both of the CDs copied onto it. If, for any
4 reason, it does not work, please let me know.

5 THE COURT: Yes, ma'am. This contains both?

6 ATTORNEY BLANCHETTE: It does, Your Honor.

7 THE COURT: All right.

8 BY ATTORNEY BLANCHETTE:

9 Q Let me first ask you, Mr. Ellison, about what I have marked
10 for my reference as CD no. 22 of the CDs that were received. It
11 is an interview by Detective Repman of your mother at her home.
12 Have you had the opportunity to listen through that with me?

13 A Yes, ma'am.

14 Q Are you specifically aware of where she is shown images from
15 the robbery and states and identifies both your mouth and nose?

16 A Yes, ma'am.

17 Q Is that something that Mr. Falk went over with you prior to
18 going to trial in this case?

19 A No, ma'am.

20 Q Now let me ask you about CD no. 57, the recorded jail call
21 between your mother and Inmate Shawn Keitt. Is that something
22 that Mr. Falk reviewed with you prior to trial?

23 A No, ma'am.

24 Q Now, in that phone call -- and this is my summary, and it's
25 been marked, and the Court also has a copy -- but they discuss

1 how she's been going over the case and there's reasonable doubt.
 2 She discusses with him there's credit card statements with plenty
 3 of money on those credit cards that could make you essentially
 4 look good; that there's \$20,000 in a savings account that you did
 5 not know about; and, essentially, that she thinks the closing
 6 argument should be no stress because you had money, and that
 7 could create a reasonable doubt.

8 So did you know about the contents of that conversation
 9 prior to you proceeding to your trial?

10 A No, ma'am.

11 Q And who were you relying upon to make sure you were aware of
 12 all the evidence that the state had?

13 A My attorney.

14 Q Okay. She also discusses in there with him that the DNA is
 15 all jacked up; that the state wouldn't expect her to get an
 16 expert; and the expert's testimony is going to be like a bomb
 17 drop.

18 Did your attorney advise you that they had this recording
 19 where your mom's discussing the DNA evidence in your case?

20 A No, ma'am.

21 Q Now, at your trial when your mom's called as a witness, what
 22 discussion was had about whether or not your mother should be
 23 called as a witness, or why was she called as a witness, as far
 24 as you understood?

25 THE COURT: Who called her as a witness?

1 ATTORNEY BLANCHETTE: I'm sorry. The defense. The defense
2 called her as a witness.

3 THE COURT: All right.

4 BY ATTORNEY BLANCHETTE:

5 Q Go ahead, Mr. Ellison.

6 A No. There was no conversation on that.

7 Q Okay. Now, on direct, on pages 377 through 380 of your
8 transcript, she testifies about what she had essentially told
9 Mr. Keitt, that you had \$20,000 in an account from her. And then
10 on pages 282 through 283, she testifies that you had credit cards
11 with money available on them. Is that what you recall?

12 A Yes, ma'am.

13 Q And you have a copy of your transcript there that you can
14 flip through with me; right?

15 A Yes, ma'am.

16 Q Let me grab mine as well. Now, if you don't mind looking at
17 page 390, beginning on line 22. Leading into that, she had been
18 asked about talking to you, but then beginning on line 22
19 Solicitor Sorenson asked her about talking to other inmates at
20 the jail.

21 On page 391, he specifically says, On July 28th of this
22 year, 2014, about 5:00 in the afternoon -- and he references a
23 conversation -- and it's spelled here as Shawn Kitt, and begins
24 asking her about that. When this gets brought up at trial, were
25 you aware that there was this recording that we've been

1 discussing?

2 A No, ma'am.

3 Q Okay. And then she is cross-examined on the specific things
4 she said in that recording. Were you aware that she was going to
5 be subject to cross-examination on the specific things she said
6 in that recording?

7 A No, ma'am.

8 Q Specifically, on page 391, line 15, she's asked about her
9 statement that you didn't know about 20,000 being in your
10 account, and that's in contradiction to what she said on direct
11 that you did know. Is that correct?

12 A Yes, ma'am.

13 Q Okay. And then she's asked -- I'm sorry. He continues to
14 question her, and she says that she doesn't deny it if he has the
15 tape. But that's not a tape that you had reviewed with your
16 attorney; is that correct?

17 A Yes, ma'am.

18 Q Now, if you turn to page 401, beginning on page 401 she
19 begins getting questions on cross-examination about her interview
20 with Detective Repman, questions about the car that you had and
21 about the information that she had testified to about the car,
22 and whether that contradicted what she told Investigator Repman.

23 Again, were you aware of that recording with that interview
24 of Investigator Repman before your mother took the stand in your
25 defense?

1 A No, ma'am.

2 Q Now, if we turn to page 410 -- and I want to do that just to
3 make sure I'm correct here -- there it's referenced that when
4 Detective Repman came to her house, he showed her photographs
5 from the bank robbery, and he asks her about that, and she gets
6 asked about a statement that it was -- whether or not she
7 identified you in those photographs. And there's a
8 back-and-forth, essentially from 412 to 415, where she's
9 questioned on that. Again, had you reviewed that interview?

10 A No, ma'am.

11 Q Were you aware that that, potentially the information in
12 that interview, would come out in the cross-examination of your
13 mother?

14 A No, ma'am.

15 Q If your attorney had reviewed just those two CDs -- there's
16 many CDs, but these are two referenced by the state in the
17 cross-examination of one of your defense witnesses -- what would
18 you have discussed with your attorney? What would your concerns
19 have been?

20 A We would be talking about a plea deal.

21 Q And why is that?

22 A It would be in my best interest.

23 Q So if you had been aware that the state has this evidence
24 that they could cross-examine your mother with, would you have
25 wanted her put on the stand?

1 A No, ma'am.

2 Q Would you have wanted to proceed with your trial?

3 A No, ma'am.

4 Q Now let's turn to the allegations regarding the utilization
5 of Dr. Bennett. We've talked a little bit about it, but what did
6 you understand the purpose of calling Dr. Bennett was going to be
7 at your trial?

8 A Well, I thought he was going -- he was basically going to go
9 against what SLED was saying because he didn't get the same
10 results.

11 Q Nad you are such a quiet talker, I think I even had trouble
12 that time because I was wrestling some papers. Go ahead, if you
13 don't mind.

14 A I thought Dr. Bennett was going to go against what SLED was
15 saying because he got different results from SLED.

16 Q And just to kind've be really simplistic, did you think he
17 was going to be a positive witness for you?

18 A Yes, ma'am.

19 Q And we've already talked a little bit about that August 4th,
20 2014, hearing in front of Judge McMahon where you essentially
21 believed you were being called to trial but it was stopped so
22 Dr. Bennett could do more testing, was your understanding; right?

23 A Yes, ma'am.

24 Q Now, at the start of your trial on October 20th of 2014 --
25 and you have your transcript there -- beginning on page 10, I

1 believe it's line 6, Mr. Sorenson essentially brings to the
2 Court's attention -- and I'm just summarizing. Obviously always
3 the transcript is the best resource here. But he brings to the
4 Court's attention that he has no motion from the defense, and no
5 report from an expert -- and this is line 6 through 11, I'm going
6 to quote him where he says, And I don't know exactly what the
7 issue is. Did you know what the issue was at that point?

8 A From my understanding, I thought -- I thought it had been
9 inconclusive results, and that there was going to be a
10 continuance of why it was inconclusive. Like, I thought there
11 was going to be a battle between DNA.

12 Q So did you think he had reached results that were going to
13 be favorable for this evidence not being able to be used?

14 A Yes, ma'am.

15 Q And some questions are asked of Dr. Bennett. And then if we
16 jump forward to page 11, lines 9 through 10, he says to the
17 Court, The item was testable, but no DNA was found. Was that
18 clear understanding of what he did made known to you?

19 A Yes, ma'am.

20 Q Okay. But what did you take that to mean?

21 A I thought there was no DNA evidence on the item that he
22 tested, so I thought -- I thought that was the correct result.

23 Q And then as we go through page 11 and 12, they discuss that
24 they had a meeting in chambers, and the Court there begins
25 discussing what the standard is to show that the state destroyed

1 evidence in bad faith and, therefore, that evidence must be
2 suppressed.

3 Were those standards in that kind've posture of a motion
4 discussed with you before trial?

5 A No, ma'am. No, ma'am.

6 Q Okay. Now, if we flip over to page 12, line 22,
7 Mr. Sorenson states, I think, to be honest with you, from their
8 expert's prior testimony in a hearing here, I mean, I think he
9 would almost be able to answer those questions in the state's
10 favor from his prior testimony.

11 So you and Mr. Falk didn't discuss, We're going to make this
12 motion; I anticipate this to be the state's position; we've had
13 this prior hearing -- you didn't discuss any of those issues that
14 they're discussing here?

15 A No, ma'am.

16 Q And at that point it turns into, it appears just from my
17 understanding, and you and I have gone through this, a
18 suppression hearing, and Dr. Bennett, is called. Is that
19 correct?

20 A Yes, ma'am.

21 Q And during that, his testimony that begins online 14. The
22 state does point out that Dr. Bennett's name was not on the
23 witness list. Was it your understanding he was going to be
24 called as one of your witnesses?

25 A Yes, ma'am.

1 Q Okay. He goes then, beginning on page 16, the process that
2 he went through. He talked to SLED. There's an introduction of
3 a SLED report. He explains that he attempted to repeat the
4 procedures -- and this is on page 23 -- and he was unable to find
5 any DNA.

6 You understood that, but you understood that to be favorable
7 to you; is that correct?

8 A Yes, ma'am.

9 Q Then he explains some further testing that he did with
10 cuttings that appears to have occurred after that first court
11 proceeding. And on page 25, beginning on line 6, he gives his
12 findings from that. And he's asked, When you conducted that
13 experiment, did you yield any results? And he says, The results
14 of that DNA testing was there was no DNA found.

15 And I'm sorry if I'm being redundant, but did you understand
16 that finding and believe that to be favorable to you?

17 A Yes, ma'am.

18 Q On cross-examination, specifically if we look at page 28,
19 line 19, the solicitor questions him regarding the process, that,
20 essentially the procedures, done by SLED. And the solicitor
21 says, that they did, in your testimony, I believe your
22 description, a very thorough job of processing those two items;
23 is that correct? He says, Yes. The procedure was to maximize
24 DNA extraction from the items.

25 Was that conveyed to you that he believed that SLED did a

1 very thorough job and had extracted all the DNA?

2 A No, ma'am.

3 Q On page 30, lines 8 through 10, he's asked, So you may have
4 conceivably ended up doing exactly what they did also; is that
5 correct. And he says, Yes.

6 Did you know that he was going to answer a question like
7 that in the affirmative?

8 A No, ma'am.

9 Q On page 34, when asked, he explains that he did receive the
10 glove but he did nothing with it. Was that something you were
11 aware of prior to trial?

12 A No, ma'am.

13 Q If we could turn to page 37, line 14. He's asked on cross,
14 So it's your testimony, that in your review of these items from
15 everything that state law enforcement did, that they appeared to
16 do a thorough job in processing the items? His response: From
17 my conversations with SLED in the recording, I had no evidence to
18 believe that they did not do a thorough job.

19 Let me ask you this. This motion's being couched as a
20 motion to suppress because the evidence was mishandled or
21 destroyed. Did you understand that was your expert's opinion on
22 how the evidence was handled?

23 A No, ma'am.

24 Q We can turn to page 38. I'm sorry. If we keep going from
25 there, he indicates at the bottom of the page, I have no evidence

1 they did anything inappropriate. He's asked him proper. He says
2 No evidence.

3 So essentially your expert could not
4 corroborate/substantiate/assist in the basis of the motion that
5 your attorney was making; is that correct?

6 A Yes, ma'am.

7 ATTORNEY BLANCHETTE: If I can beg the Court's indulgence
8 one moment.

9 THE COURT: Uh-huh.

10 BY ATTORNEY BLANCHETTE:

11 Q Now, Ellison, if we continue on, 38 through 39, he's asked a
12 little bit more about the procedures utilized by Ms. Butler. And
13 at the bottom page, he's essentially asked if Ms. Butler would
14 have known, if it would have been readily apparent to her, that
15 she removed all the DNA. And he responds, She would not be. It
16 would not be readily apparent to her where the DNA would be on an
17 item. So he even admits that it's not something she would have
18 purposely done; is that correct?

19 A Yes, ma'am.

20 Q And again, was that conveyed to you that that was
21 Dr. Bennett's finding regarding the testing done by SLED?

22 A Yes, ma'am.

23 Q I'm sorry, let me reword that. This information here that
24 he doesn't even believe they knew that they were removing
25 everything so that then he couldn't test it, did you know that?

1 A No, ma'am.

2 Q Okay. Now, in summation, on page 44 your attorney
3 essentially concedes that there wasn't any bad faith and they
4 weren't trying to destroy the evidence but the procedure they
5 used didn't allow for further testing. Did you know that that
6 was his argument?

7 A No, ma'am.

8 Q The state responds, on pages 45 through 47, and in sum, that
9 the only complaint appears to be that SLED was too thorough, and
10 then the Court rules against that motion.

11 If you had understood that, would that have changed your
12 outlook in going forward with your trial, if you understood
13 everything we just kind've marched through?

14 A Yes, ma'am, it would change the outcome.

15 Q Can you explain that?

16 A Yes. If he wasn't going to be in my defense, then I knew
17 the DNA, it would kill me in trial, so it would be no point of
18 going to trial without a defense with the DNA.

19 Q But that wasn't conveyed to you?

20 A No, ma'am.

21 Q And you didn't have the opportunity to evaluate the true
22 strength of the state's case and what your expert was essentially
23 going to say about that evidence?

24 A Yes, ma'am.

25 Q Now I kind've need your help understanding this. Y'all turn

1 around then and call Dr. Bennett as a defense witness. Was there
2 discussion had that, Hey, this motion did not go well. We may
3 want to reevaluate going this route with Dr. Bennett, or, He said
4 these things on the record. We don't want the jury to hear these
5 things. Did y'all have that discussion before he was called?

6 A No, ma'am.

7 Q And he is called. He's called on -- it's reflected on page
8 443. I'd like you to look at line 9. He's asked -- I'm sorry.
9 On page 8, Why did you not get any results? And he gives his
10 explanation there, and he essentially says, SLED was successful.
11 I know you heard his pretrial testimony but -- so I assume you
12 knew that he was going to repeat the same things, but was that
13 really a viable defense for you?

14 A No, ma'am.

15 Q And if you could look at page 462 through 463 -- we reviewed
16 this quite a bit -- and then page 465, this is his
17 cross-examination. And essentially where he lands is that SLED
18 was too thorough; he has no issues with the report; he discussed
19 everything with our analyst; there's no discrepancies brought to
20 light; and based, essentially, on their report, that you came in
21 contact with these items.

22 Why in the world did you call an expert in your defense to
23 essentially corroborate/bolster/substantiate the state's
24 witnesses regarding this DNA evidence?

25 A I wouldn't have done it if that's what I known.

1 ATTORNEY BLANCHETTE: If I can beg the Court's indulgence
2 one moment.

3 THE COURT: Yes, ma'am.

4 BY ATTORNEY BLANCHETTE:

5 Q Now let's turn to the allegations regarding the other
6 witnesses called, regarding your employment, and your alibi.

7 THE COURT: All right. Let's take a ten-minute break, and
8 we'll come back and pick it up there. Okay.

9 ATTORNEY BLANCHETTE: Thank you, Your Honor.

10 THE COURT: All right, great. Thank you.

11 ATTORNEY BLANCHETTE: May Mr. Ellison step down as long as I
12 don't speak to him?

13 THE COURT: Yes, sir. You can't talk to your lawyer about
14 your testimony while taking a break. Okay, sir?

15 THE WITNESS: Yes, sir.

16 ATTORNEY BLANCHETTE:

17 (Court recessed at 10:52 a.m. and reconvened at 11:10 a.m.,
18 with defendant present.)

19 THE COURT: All right. Is the state ready to proceed?

20 ATTORNEY WEIDAUER: Yes, Your Honor.

21 THE COURT: Counsel for defense ready to proceed?

22 ATTORNEY BLANCHETTE: Yes, Your Honor.

23 THE COURT: All right, sir. Come on back around and sit
24 down for us.

25 (Defendant retakes the witness stand.)

1 THE COURT: All right. Go ahead.

2 BY ATTORNEY BLANCHETTE:

3 Q Mr. Ellison, I want to turn to the allegations in your
4 amendment regarding additional witnesses that were called
5 regarding your employment and/or alibi, and what you knew about
6 those witnesses before they were called to trial. Specifically,
7 Chuntee Green testified on page 467, and Candida Payne testified
8 on page 476. Now, an affidavit provided by Ms. Payne was in that
9 motion for bond reduction that we had discussed before.

10 With all that said, I'd like to ask you, what did you and
11 Mr. Falk talk about calling these witnesses? What were your
12 discussions leading up to trial?

13 A Only thing I recall was him saying that, Be sure they get a
14 ride up here.

15 Q Okay. And how did they actually get to court?

16 A My mother brought them.

17 Q And that actually came out in their testimony; is that
18 correct?

19 A Yes, ma'am.

20 Q Okay. And specifically, Chuntee Green testified that she
21 was your shift manager. She testified that you were the only one
22 working, the only male working. She goes through your schedule
23 and discusses that. But on cross-examination she's asked if you
24 would have access to latex gloves, which were part of the
25 evidence in this case, and she responds that you would.

1 Was that anticipated, that the state could get into
2 testimony with her regarding latex gloves?

3 A No, ma'am.

4 Q And then she's asked about corporate records that show that
5 a Mr. Bailey and Mr. Coburn were the only ones working, and she
6 indicates that that's inaccurate. Did Mr. Falk talk with you
7 about those corporate records and how those could be used to
8 impeach this witness prior to calling her as a defense witness at
9 trial?

10 A No, ma'am.

11 Q Now, Candita Payne also testified on page 476, testifies
12 that the system was down, and on page 477, and so the hours were
13 written down that you were there and helped somebody else unload
14 the truck. And then on direct your attorney does ask her about a
15 brush with law enforcement on page 478, and that she says that
16 she has a felony conviction.

17 Did he make you aware of her prior conviction before y'all
18 called her to the stand?

19 A No, ma'am.

20 Q Then on page 479, the state actually goes through her full
21 criminal history. So you're saying you weren't aware of any
22 criminal history?

23 A No, ma'am.

24 Q And she's the one who says that your mom brought her to
25 court. So it became your mom's responsibility to get these

1 people to court?

2 A Yes, ma'am.

3 Q Now, in reply, the state called Samuel Powers, an IT manager
4 from the Capital Restaurant Group, and your attorney did object
5 on the basis of hearsay and other grounds such as best evidence,
6 and confrontation, when he's called on page 490. His testimony's
7 proffered. And then after that, he's allowed to introduce
8 records that essentially refute what these witnesses said.

9 Did he make you aware of those records and that the state
10 would have the opportunity to call this reply witness if you
11 called these other two witnesses?

12 A No, ma'am.

13 Q And based upon those records, he testified that you did not
14 clock in or out on April 1st of 2013. Were you aware of that
15 information before you proceeded to trial?

16 A No, ma'am.

17 Q Now, in his closing argument, if you look at page 572,
18 specifically line 11, he says, When you ask yourself to consider
19 that my client has an alibi, I mean, I'm sure he'd rather have a
20 much better alibi.

21 Was his position that he argued to the jury there conveyed
22 to you before you proceeded with your alibi defense regarding
23 working at Burger King?

24 A No, ma'am.

25 Q If that had conveyed to you, how would that have factored

1 into your decision to proceed to trial, and specifically to
2 proceed with these defense witnesses?

3 A I wouldn't want to proceed with them.

4 Q Can you explain that just to make sure we have a complete
5 record?

6 A Yes, ma'am. I wouldn't want to bring the alibi witnesses
7 forward knowing what I know now.

8 Q And, Mr. Ellison, overall on each of these issues that we
9 discussed regarding your defense that was put up and what was
10 discussed with you about your defense, do you feel that you had
11 proper representation prior to and during trial in putting up a
12 defense?

13 A No, ma'am.

14 Q And if Mr. Falk had completely advised you regarding these
15 things that we discussed, would you have considered a guilty plea
16 instead of going to trial?

17 A Yes, ma'am.

18 Q And who were you relying upon to make sure that you were
19 properly prepared and aware of the strength of your defense and
20 the weight of the evidence against you? Who were you relying
21 upon for that?

22 A My attorney.

23 Q Now I want to speak with you a little bit about some more
24 legal issues, the first one being failure to make an argument or
25 a motion regarding double jeopardy. If you could just explain

1 what it is that you think your attorney should have argued in
2 that regard.

3 A That that's kind've punishing me twice for the same crime.

4 Q Can you explain that specifically? Here you were charged
5 with armed robbery and entering a bank. Did he ever discuss with
6 you whether those, indeed, appeared to be two separate offenses
7 or two separate acts?

8 A No, ma'am.

9 Q Did he discuss with you if you were tried on one and found
10 guilty if the state could subsequently try you on the other?

11 A No, ma'am.

12 Q Now, is this something that, while you've been in prison,
13 you've been researching yourself?

14 A Yes, ma'am.

15 Q And it's something you brought to my attention; correct?

16 A Yes, ma'am.

17 Q So I just want you to explain for the record exactly what
18 your position is that Mr. Falk should have discussed with you or
19 brought to the Court's attention regarding these two charges.

20 A Well, I think -- I think he should have told the judge that
21 they should be able to select one one or the other instead of
22 trying me for both of them.

23 Q And this is a matter, as you see it, as a matter of double
24 jeopardy. They shouldn't have been allowed to proceed under both
25 against you. Is that correct?

1 A Yes, ma'am.

2 Q And that is not an argument you ever discussed with
3 Mr. Falk?

4 A No, ma'am.

5 Q And that is not an argument he made on your behalf?

6 A No, ma'am.

7 THE COURT: And those are in regard to what charges? I'm
8 sorry.

9 ATTORNEY BLANCHETTE: The armed robbery, the 0325, and the
10 entering the bank.

11 THE COURT: Thank you.

12 ATTORNEY BLANCHETTE: And, Your Honor, if helpful, I do have
13 the statute pulled with just both of those that I can give at the
14 end of the case.

15 THE COURT: Okay.

16 BY ATTORNEY BLANCHETTE:

17 Q Now, Mr. Ellison, so far we have gone through issue no. 1
18 and subparts (a), (b), (c), (d), and (e). I'm getting ready to
19 turn my attention to you issue 2. Is there anything further
20 regarding the issues we've discussed so far that you would like
21 to offer to the Court?

22 A Well, just one thing about that double jeopardy case. It
23 was -- it wasn't Sorenson, it was the other solicitor that -- it
24 was the other solicitor that said that armed robbery was, in
25 order to find someone guilty of armed robbery, it has to be the

1 person being robbed and not the property. I just wanted to bring
2 that up as far as the double jeopardy rules.

3 Q And so that is a point that you think that Mr. Falk should
4 have raised on your behalf as well?

5 A Yes, ma'am.

6 Q Now let's turn then to issue to 2, the failure to address
7 the following matters at trial. By way of your amendment, you've
8 alleged that your attorney was ineffective for not objecting to
9 statements made to search for the truth in an effort to make sure
10 that justice is done between the parties, and statements made in
11 closing that both the state and defendant get a fair and
12 impartial trial.

13 I've reviewed with you the case of *State v. Daniels* and all
14 the cases that followed. And, so are you alleging today that
15 there's an objection your attorney should have made?

16 A Yes, ma'am.

17 Q And based upon those cases you've reviewed with me, there's
18 an argument that can be made there that it's shifting the burden
19 away from the state and making things equal. Is that your
20 understanding?

21 A Yes, ma'am.

22 Q Is there anything else you'd like to offer regarding your
23 attorney's failure to object to those?

24 A No, ma'am.

25 Q Okay. And then let's turn then to the allegation regarding

1 his failure to question, or ask for the jurors be questioned
2 individually, regarding this issue of intimidation. If you look
3 to the end of your transcript, on page 527, the judge left the
4 courtroom and holds, essentially, a hearing regarding juror 151,
5 a man by the name of William White, who tells the Court that he
6 was approached on his porch by someone for the defendant asking
7 him to vote a certain way, and the Court hears from him regarding
8 that.

9 After he hears from them, if you go to page 534, he exits
10 the courtroom and the remainder of the jury is brought in in open
11 court. And when that is done, thereafter the whole jury is
12 questioned, they're asked collectively, for 535 through 536, if
13 they can be fair and impartial. Do you remember sitting through
14 all of that?

15 A Yes, ma'am.

16 Q What are you alleging that Mr. Falk should have done
17 differently regarding the questioning of the jury and the
18 handling of that matter?

19 A Well, once Juror White told the judge that he told the rest
20 of the jury that he had been approached and to be careful, I felt
21 Mr. Falk should have told the judge that he wants to pull the
22 jurors out individually to get a clear answer instead of them
23 collectively raising their hand and agreeing with the Judge. I
24 felt he should have pulled them out individually to get asked.

25 Q And this issue involving his failure to grant a mistrial was

1 raised on appeal, and on appeal the Court cited the *State v.*
2 *Kelly*, the appellate court, much like the judge did here, but
3 their individual responses was not something that could be a part
4 of your appeal. Is that correct?

5 A Yes, ma'am.

6 Q And that's because Mr. Falk didn't ask for each of them to
7 be questioned on this?

8 A Yes, ma'am.

9 ATTORNEY BLANCHETTE: Your Honor, if I could beg the Court's
10 indulgence for one moment.

11 THE COURT: Yes, ma'am. Take your time.

12 ATTORNEY BLANCHETTE: I need more than a moment. I
13 apologize.

14 THE COURT: That's okay.

15 BY ATTORNEY BLANCHETTE:

16 Q Mr. Ellison, I've never done this before where we're talking
17 about two separate PCRs, so I'm just trying to make sure I'm very
18 careful on how I do that. But, we have run through the
19 allegations with our amendment with the PCR related to the issues
20 at true. Is there anything further that you would like to offer
21 as far as testimony that I have not covered with you in support
22 of your application for the trial?

23 Now, the Court's going to consider -- there's a weird
24 consolidation here, so I want to make sure I'm asking this
25 question correctly. But, as far as the allegations set forth in

1 your amendment, is there anything else that you would like to
2 testify to?

3 A No, ma'am.

4 ATTORNEY BLANCHETTE: Your Honor, at this time, then I'm
5 prepared to move into the other application.

6 THE COURT: That's fine.

7 ATTORNEY BLANCHETTE: All right.

8 BY ATTORNEY BLANCHETTE:

9 Q Now, Mr. Ellison, the very first allegation is a failure to
10 effectively represent you at your prior trial, which rendered
11 your plea involuntary, and your prior trial was a contributing
12 factor, the allegation says, to the entry of your plea. Can you
13 kind've unpack that for us and explain it, please?

14 A Tell how the plea agreement went?

15 Q Yeah, as far as the plea itself. No, let me take that back.
16 Let me make it a little easier on you. You went to trial
17 October 20th through 24th, 2014. And then after the trial, what,
18 if any, discussion did you and Mr. Falk have about the remaining
19 charges?

20 A None.

21 Q Okay. Did you meet? Did you get together?

22 A No, ma'am.

23 Q Okay. Now, I'm going to show you this document and see if
24 you can identify it for the record.

25 A Yes, ma'am, I remember this.

1 Q Can you speak up a little bit. I lost you there.

2 A Yes, ma'am. I remember it. I don't think the microphone is
3 on.

4 (Court bailiff installs batteries in microphone.)

5 THE BAILIFF: Apologize, Your Honor.

6 THE COURT: That's okay.

7 (Applicant's Exhibit 6 is marked for identification.)

8 BY ATTORNEY BLANCHETTE:

9 Q All right. Mr. Ellison, can you identify that document I
10 gave you?

11 A Yes, ma'am. This is the plea offer.

12 Q Okay. And what's the date on there?

13 A July 16, 2015.

14 Q And it's a plea offer for a negotiated 30 years. Do you
15 remember Mr. Falk telling you about this plea offer?

16 A Yes, ma'am.

17 ATTORNEY BLANCHETTE: Your Honor, at this time I would move
18 the plea offer sheet as Applicant's No. 6, I believe.

19 THE COURT: Any objection?

20 ATTORNEY WEIDAUER: No objection, Your Honor.

21 THE COURT: Okay. It's admitted, without objection.

22 (Applicant's Exhibit 6 is received in the record.)

23 BY ATTORNEY BLANCHETTE:

24 Q Now, at the time between your trial and your plea, where
25 were you housed?

1 A At McCormick.

2 Q And did he come to you and convey this offer to you at
3 McCormick, or how did you find out about it?

4 A When I got transferred to Dorchester County that day, that's
5 the time we talked.

6 Q And when you say "that day," do you mean August 12th, 2015,
7 when you entered the plea?

8 A July 16th, 2015.

9 Q Okay. You spoke with him on that day about it?

10 A Yes, ma'am.

11 Q And what was his advice to you about the plea offer?

12 A He was advising me to take the 30 years.

13 Q And what was the feedback that you gave him?

14 A I told him that I didn't see any video from the bank. We
15 haven't went over any arguments or evidence, or anything like
16 that.

17 Q And did you raise any concerns to him about his
18 representation since everything had happened the way it had at
19 your trial?

20 A Well, we really didn't even get that far in the
21 conversation.

22 Q Can you explain what you mean by that?

23 A I really felt like I was under duress during that time
24 because we haven't talked about anything, and he just -- he's
25 basically telling me to take this plea, and he hadn't even went

1 over the evidence with me or anything. And that's basically just
2 where the conversation was, at a standstill.

3 Q And then from there you went ahead and entered the plea?

4 A Yes, ma'am.

5 Q Did you have any further meetings?

6 A No, ma'am.

7 Q Now, in the transcript, on page 3, Mr. Falk says he met with
8 you and reviewed the charges, and he believes it's in your best
9 interest. There on page 6, lines 11 through 13 -- I'm sorry. In
10 response, on page 6, lines 11 through 13, you tell the Court
11 essentially what you're saying today, that you haven't reviewed
12 some of the videos but you're willing to go forward.

13 You go on to say, on pages 8 and 9, that you're not
14 satisfied. Were you trying to communicate your concerns at that
15 juncture?

16 A Yes, ma'am.

17 Q Okay. Did you feel like you had any options at that point
18 but to go forward with the guilty plea?

19 A No, ma'am.

20 ATTORNEY WEIDAUER: Objection. Leading.

21 THE COURT: Rephrase that question, please. I'll sustain
22 that objection.

23 BY ATTORNEY BLANCHETTE:

24 Q We can look at the transcript and see what you're saying on
25 pages 6 through 8. What was your mindset as to whether or not

1 you had an option about going forward with the guilty plea?

2 A I felt I had no choice because this was -- my lawyer was
3 advising me, and the judge wasn't trying to hear what I was
4 saying at that time.

5 Q Did what happen at the trial factor into your decision that
6 day to plead guilty?

7 A Yes, ma'am.

8 Q Can you explain that for us.

9 A I mean, I felt I wasn't fairly represented. And if he
10 wanted me to take a plea agreement, it should have been before
11 trial.

12 Q And when you say "before trial," you mean such as the offer
13 that was extended to Mr. Bolus of the 25 to 30 years on all
14 charges?

15 A Yes, ma'am.

16 Q Did Mr. Falk ever advise you that a joint guilty plea on all
17 charges was in your best interest?

18 A Well, that day, he did.

19 Q With the remaining charges and then the new charges that
20 stemmed; is that correct?

21 A Yes, ma'am.

22 Q Okay. After you expressed your concerns to Judge Dickson,
23 he asks you if you are, in fact guilty, and you answered his
24 question in the affirmative, and then he asked you if anyone's
25 forcing you to plead guilty, and you say no. Is that a correct

1 answer?

2 A No, it wasn't at the time. I was just trying to proceed
3 because I felt that the judge was just being blind to what I was
4 trying to say to him, so I just -- I just said no.

5 Q And who were you expecting to be looking out for your best
6 interest, to be essentially representing you in that courtroom
7 that day?

8 A My attorney at the time.

9 Q Okay. But you did try to convey your concerns to the Court;
10 is that correct?

11 A Yes, ma'am.

12 Q Now, I just want to kind've jump back to the negotiations a
13 little bit. The state says it was a negotiated 30 years. We've
14 introduced the plea sheet. They say as part of the agreement
15 they have withdrawn the life without parole and you were facing
16 up to 100 years. Let me ask the obvious question. You had
17 already received a life sentence; correct?

18 A Yes, ma'am.

19 Q So was there truly any benefit to this plea for you?

20 A No, ma'am.

21 Q Can you explain that?

22 A There was nothing more they could really do to me, having a
23 life sentence, so there wasn't no benefit in the plea.

24 Q So the damage essentially was done from the trial?

25 A Yes, ma'am.

1 ATTORNEY BLANCHETTE: Your Honor, if I could beg the Court's
2 indulge.

3 THE COURT: Yes, ma'am.

4 BY ATTORNEY BLANCHETTE:

5 Q Mr. Ellison, is there anything further regarding the guilty
6 plea allegations that you would like to testify to today?

7 A No, ma'am.

8 THE COURT: Before -- follow up on one thing for me. I've
9 taken some notes -- and I'm going to give you plenty of time to
10 cross-examine -- but he indicated he told the Court he had not
11 viewed the evidence. And was there something else that he told
12 the Court? Were there two things?

13 ATTORNEY BLANCHETTE: Let me get to that.

14 THE COURT: I'm writing my notes down, and I just was not
15 fast enough.

16 ATTORNEY BLANCHETTE: Yes, Your Honor. On page 6, beginning
17 on line 11.

18 THE COURT: Uh-huh (yes).

19 ATTORNEY BLANCHETTE: He says Yes, I feel like I've seen
20 most of the evidence, but I know there are some videos that
21 haven't been presented to me, but I'm still willing to go forward
22 today.

23 THE COURT: Right.

24 ATTORNEY BLANCHETTE: And then maybe the separate thing that
25 you're thinking about is on page 8, beginning on line 14. He

1 says -- the judge says Are you satisfied with your attorney
2 services? He says No, not really.

3 THE COURT: Okay.

4 ATTORNEY BLANCHETTE: And then the judge allows him to
5 explain why he's not satisfied.

6 THE COURT: Okay. Thank you. That was ---

7 ATTORNEY BLANCHETTE: Does that clarify?

8 THE COURT: Yes, ma'am. I just didn't -- my pen wasn't
9 moving fast enough.

10 BY ATTORNEY BLANCHETTE:

11 Q Mr. Ellison, is there something further you would like to
12 offer in response to the Judge's question?

13 A Yes, ma'am. Just to add on, the day before I took that
14 30-year plea, when I was telling James Falk that I haven't seen
15 the video or nothing, he hadn't seen it either that day, and he
16 even went and told the solicitor. The solicitor came back and
17 brought James Falk's laptop, and we sat there and watched the
18 video of the bank that day before I took the plea. And I asked
19 him -- he even said it doesn't even look like me, that's not my
20 height or anything, but he still advised me to take the plea.
21 And that is all I wanted to add there.

22 Q So when you say we reviewed some evidence, are you referring
23 to, We just sat right here and looked at some of the evidence?

24 A Exactly.

25 Q And that happened the day before or immediately before? I'm

1 sorry. I wasn't tracking.

2 A The same day.

3 Q Okay, the same day.

4 ATTORNEY BLANCHETTE: Your Honor, I have no further
5 questions of this witness.

6 THE COURT: All right. Thank you. Cross-examination.

7 ATTORNEY WEIDAUER: Yes, Your Honor.

8 THE COURT: Yes, ma'am.

9 CROSS-EXAMINATION

10 BY ATTORNEY WEIDAUER:

11 Q Good -- looks like it's -- afternoon, Mr. Ellison. How are
12 you?

13 A I'm fine. How are you doing?

14 Q I am well. I'm going to try to approach the questions in
15 the same order that Ms. Blanchette, your counsel, did, if that
16 works for you. So I'm going to start with the trial. That's
17 labeled as allegation no. 1, and that's failure to properly
18 prepare prior to trial and advise applicant regarding the
19 strength of the state's evidence and the available defense. And
20 subpart 1, subpart (a), utilization of a defense strategy that
21 had been fully discussed on recorded phone calls prior to the
22 defense in discovery.

23 And your understanding of that allegation is those were
24 discussions between your mother and another inmate?

25 A Yes, ma'am.

1 Q Can you summarize your understanding of what that phone call
2 includes?

3 A I guess it includes my defensive strategy.

4 Q Okay. And what was your defensive strategy at that time?

5 A From her phone call, she was just saying that there was
6 already money in my bank account, and basically saying there's no
7 one to identify me or anything like that.

8 Q And did you agree, based on what she represented in that
9 phone call, is that your understanding that that was the defense
10 strategy of Mr. Falk?

11 A Well, that's the defensive strategy that my mother was
12 coming up with.

13 Q Okay. So, in your own words, what was the defense strategy
14 that you and Mr. Falk had discussed?

15 A We didn't discuss a defensive strategy.

16 Q But he had discussed it with your mother?

17 A No.

18 Q He hadn't discussed it with your mother?

19 A No, ma'am.

20 Q So your mother's statements on those phone calls do not
21 represent Mr. Falk's defensive strategy or any defensive strategy
22 that you had discussed with Mr. Falk?

23 A No, ma'am.

24 Q Had you and your mother discussed a defensive strategy?

25 A No, ma'am.

1 Q Okay. And your testimony here today was that Mr. Falk did
2 not bring those phone calls to your attention prior to trial; is
3 that correct?

4 A Yes, ma'am.

5 Q Okay. Let's back up a little bit. So you testified earlier
6 that Michael Bolus was -- Tommy Bolus -- was your original
7 counsel. Right?

8 A Yes, ma'am.

9 Q Okay. And on the bond hearing that we've been discussing,
10 that happened in August 2014 where Dr. Bennett testified, do you
11 remember that hearing.

12 A Yes, ma'am.

13 Q Okay. And Mr. Bolus still represented you at that time?

14 A Yes, ma'am.

15 Q And it was your testimony that you were ready to proceed to
16 trial that day but that that hearing, or motions hearing, took
17 place instead?

18 A Yes, ma'am.

19 Q So how did Mr. Falk come to be your attorney at trial? Can
20 you explain to the Court how that happened? How did you get from
21 Mr. Bolus representing you, you being ready to go forward with
22 the trial, to Mr. Falk representing you at trial?

23 A It was -- had a lot of conflict going on between Tommy Bolus
24 and my mother that I had no awareness about. We just decided to
25 fire him that day and hire a new attorney, because they were

1 bumping heads about other things that I had no knowledge about.

2 Q And do you still have no knowledge about what they were --
3 what their disagreement was? You said they were bumping heads.
4 What were they bumping heads about? What's your understanding
5 today that they were bumping heads?

6 A It was basically about -- about what we gonna do at trial,
7 what we gonna do with this plea, like what we gonna do? I guess
8 it was just a lot going on.

9 Q And so you were ready to go to trial when that bond hearing
10 happened; correct?

11 A Yes.

12 Q Okay. And you knew that your trial would be called very
13 soon, as it was already docketed, but the motions hearing took
14 place instead?

15 A Yes.

16 Q So you knew there wasn't a lot of time between the time that
17 you decided to fire counsel, there wasn't a lot of time between
18 that and your trial probably getting recalled and being heard;
19 correct?

20 A I'm not sure.

21 Q So what was your belief at the time? How long did you think
22 that the Court would wait to call your case again for trial?

23 A I didn't know.

24 Q You didn't know, okay. Did you have any discussions with
25 Mr. Bolus or Mr. Falk on an anticipated length of time between

1 the first time they had called the trial but the bond hearing
2 happened and when your trial was actually called?

3 A No.

4 Q Okay. Explain to me what your first initial kind've
5 conversations with Mr. Falk entailed after you hired him?

6 A Well, my mother hired him, so after they talked he came to
7 see me one time in the detention center. And only thing we
8 discussed was preparing for trial.

9 Q Okay. And what did that discussion entail?

10 A He just named my witnesses and told me to get them here.
11 And I really don't know. Like, we didn't break down any
12 defensive strategy or anything like that. It was just, These are
13 your witnesses; get them here. That's the only thing I knew.

14 Q Okay. Had you had an opportunity prior to Mr. Falk being
15 hired to review discovery with Mr. Bolus at any point in time?

16 A No, ma'am.

17 Q So prior to the bond hearing where you say you were ready to
18 go to trial, you still had never reviewed discovery? That's your
19 assertion today?

20 A As far as my motion for discovery, yes, I reviewed that.
21 But the recordings, the audio recordings, I hadn't seen none of
22 them.

23 Q And so when Mr. Falk came to visit you for the first time
24 and discuss your case with you, what did you tell him your case
25 involved? What was your pitch? Because he was new to the case;

1 right? You had just fired Mr. Bolus, and he was new to the case,
2 so what did you tell him about your case?

3 A I told him the only thing I could advise him, was no one
4 identified. I showed him the statements from the banks and
5 things like that, that no one could identify me, and it wasn't
6 me. I mean, I was waiting. I was looking up to him for his
7 representation.

8 Q Okay. And how did you come to know that there was no
9 identification of you and that there were statements from the
10 bank into play, I believe is what you're referring to?

11 A Yes.

12 Q How did you come to know that?

13 A From my motion for discovery.

14 Q And which motion for discovery? I want to make sure the
15 record is clear. Which motion for discovery are you referring
16 to, the one that -- the Rule 5 that you had received from the
17 solicitor's office?

18 A Yes, ma'am.

19 Q And that was the materials that Mr. Bolus received and then
20 you would have discussed with Mr. Bolus; is that correct?

21 A Yes, ma'am.

22 Q And that's how you would have known that there was nobody to
23 identify you?

24 A Yes, ma'am.

25 Q Okay. And that's also how you would have known about the

1 bank statements; is that correct?

2 A Yes, ma'am.

3 Q So you did, in fact, discuss discovery and materials that
4 the solicitor had provided with Mr. Bolus?

5 A Things that I brought up, yes.

6 Q Okay. Regarding the defense strategy of -- and I believe --
7 I apologize if Ms. Blanchette asked you about it earlier. Was
8 there a defense strategy involving some sort of money in an
9 account? Were you ever aware of any defense strategy involving
10 that?

11 A Not till the day of trial.

12 Q Not till the day of trial, okay. And on the date of trial,
13 what did you believe that defense strategy involved?

14 A That's the strategy that my mother was coming up with on her
15 own or with James Falk. It wasn't brought up to me until she was
16 already on the stand.

17 Q Let's move on to defendant's allegation 1, part (b), okay.
18 It's utilization of applicant's mother as a defense witness to
19 support said defense with knowledge that she was subject to
20 questioning regarding her audio interview with law enforcement,
21 whereby she identified applicant. Okay.

22 Were you aware that there was any interviews between your
23 mother and law enforcement prior to your trial?

24 A Yes, ma'am.

25 Q Okay. What did you think those interviews involved?

1 A Just them trying to get her to identify me.

2 Q And was it your understanding that she did identify you or
3 didn't identify you?

4 A That's a conversation that me and my mother went back and
5 forth about my whole time in the county jail, okay.

6 Q Give us an example. What would that conversation look like?
7 If you were going back and forth about it, what were you going
8 back and forth about?

9 A That it says that she said that the nose and the side of my
10 face looked similar, so -- but she denied it to me. I mean, my
11 attorney was not bringing it to me. With me and her go back and
12 forth bit all the time, so I'm not sure. I really -- I don't
13 know what was going on in the recording, because I didn't hear
14 them.

15 Q Okay.

16 A I'm just going --

17 Q But you were aware that there was a statement she made to
18 law enforcement, as you just testified?

19 A Yeah.

20 Q Okay. I believe what you're stating, or testifying to, is
21 that she told you that she didn't say that to law enforcement?

22 A Yes.

23 Q Okay. So how did you come to know that there was a
24 statement between your mother and law enforcement that did
25 identify you?

1 A When Don Sorenson had her on the stand and brought it to her
2 attention that he can play it right now in court.

3 Q So how would you have had those conversations prior to trial
4 if you only became aware of it when she was on the stand?

5 A Because it's in the paperwork inside my Rule 5. It's a
6 short sentence that says that she said -- what she said about the
7 identity.

8 Q And that was more discovery that you were able to review?

9 A That's the same discovery that I reviewed. That's the same
10 one.

11 Q Did you ever bring up any concerns about your mother
12 testifying to Mr. Falk, knowing that you had been going back and
13 forth about this and knowing that she had previously stated this
14 to law enforcement?

15 A We haven't talked about any witnesses, and I didn't know
16 what was on the recordings to even tell him anything about it.

17 Q Okay. So your testimony is you didn't know about the
18 recordings, but you were able to have conversations prior to
19 trial with your mother. Correct?

20 A Yes, ma'am.

21 Q About what she possibly said in those recordings?

22 A No, not about the recording. It was about just the fact,
23 what she said about the identity. That's the only thing me and
24 her went back and forth about. About the recordings, I had no
25 knowledge.

1 Q Okay. And when Mr. Falk told you that he intended to call
2 your mother as a witness, did you see any issue with that?

3 A No. I mean, she was going to be there for my behalf, so I
4 didn't see how it was going to hurt me.

5 Q So even though she may have made statements in the past that
6 hurt you, you thought that her testimony at trial would help you?

7 A As far as -- I mean, if he was going to use her as a
8 witness, I don't see how it wouldn't help.

9 Q Was it your understanding your mother also represented to
10 Mr. Falk that she did not identify you?

11 A That she did not identify me?

12 Q Correct.

13 A I'm not sure.

14 Q Okay. And when you hired Mr. Falk, did you hire him with
15 the intention of going to trial?

16 A I just hired him to get some good reputation --
17 representation.

18 Q Okay. Did you tell him when you hired him that you wanted
19 to go to trial, you were ready to go to trial but that you needed
20 different representation than Mr. Bolus?

21 A I didn't talk to him about getting hired. He was already --
22 my mother already appointed him after Bolus was fired.

23 Q Okay, that's fair. But you didn't hire him because you were
24 ready to plea; you were ready to go to trial? That's my
25 question. Your mother didn't hire him on your behalf because you

1 were ready to plea?

2 ATTORNEY BLANCHETTE: Your Honor, at this point, I'd have to
3 object. These questions are going to what his mother said, why
4 his mother hired Mr. Falk. I don't think this is within ---

5 THE COURT: I'll sustain the objection as to that last
6 question, because I think you're asking him about what his mother
7 may have said. I think you can rephrase that question, though,
8 and I might allow it.

9 BY ATTORNEY WEIDAUER:

10 Q Why did you believe your mother hired Mr. Falk?

11 A We really didn't have a choice. She was having problems
12 with Bolus, so we had to get another attorney.

13 Q Were you having problems with Mr. Bolus?

14 A If my mother is, then I am.

15 Q Can you repeat that one more time?

16 A I said, If my mother's having problem with him, then so am
17 I.

18 Q But your mother wasn't on trial; correct? You were on
19 trial?

20 A I'm on trial.

21 Q And you had to work with counsel to craft your defense;
22 correct?

23 A Yes.

24 Q Okay. And you understood that, that this was your trial,
25 this was not your mother's trial?

1 A Yes, I understood.

2 Q Okay. Regarding the plea offer, there is a sticky note on
3 this exhibit that was passed up earlier. Do you remember
4 Ms. Blanchette passing that up to you?

5 A Yes, ma'am.

6 Q And that sticky note says, Tommy's response to this was that
7 client wouldn't be interested without Dr. Bennett having
8 completed his testing. Is that a true statement? You weren't
9 willing to plea without having Mr. Bennett's testing complete?

10 A Yes, ma'am.

11 Q Okay. And you testified earlier that you thought that
12 Mr. Bennett's testing would help you at trial?

13 A Yes, ma'am.

14 Q Okay. Can you explain why you believed that Mr. Bennett's
15 testing would be helpful.

16 A Well, first SLED, he said they did a thorough job, but they
17 tested some of the items more than one time, but the one time he
18 got to test them they came back inconclusive. So from my
19 understanding, it's a different result. It's not saying that my
20 that DNA was mine. And that's where the August 4th trial came
21 from, the continuance, was because he had different results and,
22 from my understanding, it was in my favor.

23 Q And would you say it's fair to say that because no one else
24 could have tested it but SLED -- Mr. Bennett testified to that,
25 that there was not enough DNA to test -- only SLED was able to

1 test that, correct, so that may shed some doubt on SLED's
2 results, as they were the only ones that were able to test it,
3 there was no independent test that was able to be done?

4 A Yes. I don't know how, but, yes.

5 Q And you don't know how what? And I can rephrase my question
6 if you're confused.

7 A I don't know SLED was the only one that tested, like,
8 when -- like, it's noted that the fiber of the glove was tested
9 more than one time by SLED. They had two different answers for
10 the glove. First, I was excluded. And then I'm the mixture of
11 individuals, two other individuals.

12 So I felt -- I feel that Dr. Bennett -- without
13 Dr. Bennett's testimony, that their results was kind've
14 contradicting theirselves. That's why it made me want to get
15 independent testing, because I didn't believe the results.

16 Q Okay. And would you agree that without calling Dr. Bennett,
17 the jury would only have SLED's results to assess? The jury
18 wouldn't have known that there was testing that had tried to have
19 been done but was unsuccessful because SLED was the only one that
20 could test?

21 A Yes. I believe they didn't think I was gonna get
22 independent testing.

23 Q Okay. Do you recall that the SLED report found the odds of
24 randomly selecting an unrelated individual to you were 1 in 2.2
25 quintillion?

1 A Yes.

2 Q And I can tell the Court, I don't even know how big a number
3 that is, I can't even imagine it, but it's a big number, right, 1
4 in 2.2 quintillion?

5 A Yes.

6 Q So their testimony, or SLED's findings, rather, that the
7 odds of randomly selecting an unrelated individual to you were 1
8 in 2.2 quintillion, that was pretty important to the state's
9 case; right?

10 A Yes, ma'am.

11 Q So by calling Mr. Bennett, you were trying to shed some
12 doubt on that. Would you believe that's a fair assessment ---

13 A Yes, ma'am.

14 Q --- of why Mr. Bennett was called?

15 A Yes, ma'am.

16 Q Okay. There was some testimony regarding showing your hand
17 in the motion for a bond reduction. So there were a couple of
18 individuals that had affidavits in that motion for bond
19 reduction. Do you remember that? And I can pass you up the
20 document, if you would like.

21 A You mean a couple individuals ...

22 Q They had affidavits filed in conjunction with your motion
23 for a bond reduction. Do you remember that?

24 A Yes, ma'am, I remember the bond reduction.

25 Q Do you remember that there were affidavits attached to that

1 motion?

2 A I don't know which affidavits you're speaking about. I
3 would have to see.

4 ATTORNEY WEIDAUER: May I approach?

5 BY ATTORNEY WEIDAUER:

6 Q So if you could review that for a moment and just look over
7 those affidavits to refresh your memory.

8 A Okay.

9 Q Do you ever remember discussing with Mr. Falk this motion
10 for a bond reduction and the subsequent hearing?

11 A No, ma'am.

12 Q And do you ever remember discussing with Mr. Bolus that you
13 had, quote-unquote, shown your hand ---

14 A No, ma'am.

15 Q --- in any way? Okay.

16 ATTORNEY WEIDAUER: Beg the Court's indulgence for one
17 moment.

18 THE COURT: Uh-huh (yes).

19 BY ATTORNEY WEIDAUER:

20 Q I am just going to move on to -- it's allegation no. 1,
21 Subsection (c), and that says, Utilization of defense witnesses
22 regarding applicant's employment and/or alibi when it was known
23 that the state could refute said witnesses.

24 So Ms. Blanchette questioned you about the witnesses, and
25 that is a Ms. Green and a Mr. Payne, I believe, and they

1 testified that you were the only male working; that you had
2 helped unload the truck, et cetera, at your trial. Correct?

3 A Yes, ma'am.

4 Q And were those the only witnesses that you had that you
5 believe could establish where you were?

6 A Yes, ma'am.

7 Q And did you ever discuss that there were no records that you
8 were working that night?

9 A No, ma'am.

10 Q Never discussed that with Mr. Bolus?

11 A No, ma'am.

12 Q Never discussed that with Mr. Falk?

13 A No, ma'am.

14 Q So why do you believe that there weren't records?

15 A Why I believe what?

16 Q Why weren't there records of you working that night?

17 A I don't know.

18 Q Okay. So you stated before if you knew that they could be
19 impeached through these records, that you wouldn't have called
20 them. Is that a fair assessment of your testimony?

21 A By Ms. Payne, with her record, I know she wasn't credible,
22 so I wouldn't want to use Ms. Payne.

23 Q And who told you that prior to trial that that was a
24 possibility that she could be found not credible? How did you
25 come to understand that that was possible?

1 A I didn't.

2 Q You didn't that prior to trial, okay. You understand that
3 now, though, that she -- her criminal history, when she's called
4 as a witness, could be brought into question ---

5 A Yes, ma'am.

6 Q --- and that she could be impeached? It's a possibility?

7 A Yes, ma'am.

8 Q And, as you stated, those were the only two witnesses you
9 could call to establish where you were?

10 A Yes, ma'am, being in the detention center. Yes.

11 Q So do you believe it was worth the risk to call them and
12 give you some sort of leg to stand on or some sort of alibi
13 during the time of this incident?

14 A I would believe so.

15 Q You believe that they were beneficial? Even though there
16 were some things presented to the jury, like criminal history, as
17 we discussed, that could impeach them, you were still able to get
18 that testimony before the jury that they believed you were
19 somewhere else when the incident occurred?

20 A Yes, ma'am.

21 Q Okay. And do you believe that helped shed doubt on the
22 state's case in the state alleging that you had committed this
23 crime?

24 A No, I don't believe that it drew doubt.

25 Q Why not?

1 A Because the DNA was the main factor. I mean, like, if 10
2 people from SLED is going to say that's my DNA, then 12 jurors is
3 going to say I'm guilty.

4 Q Okay. So when you testified that if you would have known
5 that they could have been impeached, you would have pled, that
6 wasn't really a consideration? You're saying that DNA was the
7 consideration for you?

8 A It was all that.

9 Q Okay.

10 A It was all that.

11 Q Okay. And, as I mentioned, Samuel Powers was called as a
12 rebuttal witness; correct?

13 A Yes, ma'am.

14 Q Okay. And Mr. Falk did make an objection to the record
15 being entered in?

16 A Yes, ma'am.

17 Q Regarding your allegation for failure to address or make an
18 argument and motion regarding double jeopardy, I just want to
19 make sure I understand this. Your allegation is that at trial
20 Mr. Falk should have made an argument or motion regarding double
21 jeopardy in what way? Can you kind've just explain that to me a
22 little bit.

23 A Well, since being incarcerated, I seen there's a case, *State*
24 *v. Green*, where she has been -- her sentence was overturned
25 because they had -- the judge ruled that they needed to elect

1 which charge they were going to go forward with. In her
2 instance, she had a murder, and the child -- a child by -- a
3 murder-homicide case, or something like that, and they decided to
4 drop one and leave one because they felt it was double jeopardy.

5 And the same case as mine, the armed robbery, entering a
6 financial institution with intent to steal, carries the same
7 elements. There's no elements apart from either one.

8 Q Okay. And that's your testimony, that you believe that even
9 though they were charged as separate crimes, that they're the
10 same crime?

11 A Yes, ma'am.

12 Q Okay. What is your understanding about the juror's issue
13 involve witness intimidation at trial?

14 A Can you repeat that?

15 Q What was your understanding at trial of the juror's
16 involvement in witness intimidation? At trial, what did you
17 believe happened?

18 A The juror said he was approached about voting a certain way;
19 that he said under oath, that he told the rest of the jury that
20 he was approached, and he told them to be careful. And James
21 Falk felt that that was enough to put a motion in for a mistrial.

22 Q And he did move for a mistrial on that basis. You do
23 remember that?

24 A Yes, he did.

25 Q He did move for a mistrial, okay. And today you're

1 asserting what else should he have done at that point in time?

2 What are you asserting he should have done?

3 A I felt he should have pulled the jury out individually
4 instead of letting the judge take control. I know it's a
5 four-day trial; we had been in trial all week; people trying to
6 get it over with. I know the jury feel the same way. So the
7 judge is going to ask them if they can be fair and impartial,
8 everybody's gonna raise their hand and say, Yes; yes; yes; yes,
9 and continue with the trial.

10 He should have, I felt as an attorney, he should have Well,
11 Your Honor, I don't think that's enough. Because the jurors, he
12 told them, he told them to be careful. I need to talk to them
13 individually, I need to put them on the stand and get an answer
14 instead of a hand raise.

15 Q Okay. Let's move on to your guilty plea allegations. And
16 bear with me for a moment. So this is in regards to ---

17 THE COURT: Counsel, before you go forward ---

18 ATTORNEY WEIDAUER: Yes, Your Honor.

19 THE COURT: --- are you going to address the burden-shifting
20 allegation?

21 ATTORNEY WEIDAUER: I feel like that's a legal issue, and I
22 was just planning on addressing it with Mr. Falk.

23 THE COURT: That's fine. I was just bringing that up,
24 because we've got a little bit of a complication here moving from
25 one to the other. I want to make sure that everything is

1 addressed. Thank you.

2 BY ATTORNEY WEIDAUER:

3 Q So regarding your plea -- and for the record, that is PCR
4 case no. 2016-CP-18-00017 -- I believe you testified to this
5 earlier, but you do understand that the state could re-serve you
6 with a notice of their intention to seek a sentence of life
7 without parole should you be successful today?

8 A Yes, ma'am.

9 Q And you are, in fact, aware that at the time of the plea the
10 state had issued a notice of life without parole?

11 A Yes, ma'am.

12 Q And, as part of your plea, the state withdrew that notice;
13 is that correct?

14 A Yes, ma'am.

15 Q Let's talk a little bit about what happened prior to the
16 plea. Can you remind me, how many times did you meet with
17 Mr. Falk prior to pleading guilty to these charges, specifically
18 for the plea?

19 A Nothing but that one time, the same day that I took the
20 plea. That's the only time we talked.

21 Q And that day, what did you discuss?

22 A Well, he wanted me to sign the plea, and I told him that,
23 Why I be signing the plea if I havne't seen the evidence and you
24 haven't gone over the evidence with me? And that's when he
25 talked to the solicitor and came back with the laptop, showed me

1 the video from the bank. He told me how he didn't think it was
2 me; they would have to prove that's me. But he still wanted me
3 to go with the plea.

4 Q Okay. And you said he wanted you to go with the plea. Did
5 you testify earlier that after trial you were mistrustful of
6 Mr. Falk's ability to represent you?

7 A Yes.

8 Q So after trial you had some doubts about his ability to
9 represent you in your subsequent cases?

10 A Yes.

11 Q So why did you trust his advice prior to taking the plea on
12 what you should do if you already didn't trust him?

13 A I felt I didn't have another choice.

14 Q Were you up for trial that day? Was it go time, was it
15 trial, or plea, got to make a decision now?

16 A That's what it was.

17 Q It was?

18 A Yes, ma'am.

19 Q Okay. During your plea, you indicated that you felt as
20 though you'd seen most of the evidence but knew there were some
21 videos that hadn't been presented to you.

22 A Yes, ma'am.

23 Q And even after the video that was presented to you the day
24 of the plea, as you allege, were there more pieces of evidence
25 you thought you hadn't seen, or did Mr. Falk show that you video

1 and that was it, you had seen everything?

2 A No. That's the only video. There was videos of the
3 high-speed chase that took place, I didn't see them. There was
4 plenty of evidence I hadn't seen yet.

5 Q Okay. And from what you did see, you decided to plead
6 guilty because you believed that there was enough that the state
7 could make a case?

8 A It wasn't from what I saw. It was his advisement.

9 Q Okay. And do you remember stating that you were willing to
10 go forward with your plea that day despite not seeing some of the
11 evidence?

12 A Yes, ma'am.

13 Q And why did you state that? Why did you testify to that at
14 your plea?

15 A I was trying to speak up for myself, but the judge wasn't
16 hearing me. He kept on running questions. So ... I mean, I just
17 felt like, like you said, it was either trial or plea that day.
18 I had no choice.

19 Q And that's what you testified to, actually, is it was a
20 trial or plea that day; correct?

21 A Yes, ma'am.

22 Q That was my question?

23 A Yes, ma'am.

24 Q Okay. Prior to the plea and, as you allege, the day of, did
25 you discuss the elements of each of those eight offenses that you

1 were indicted with and ultimately pled to?

2 A You said did we discuss the evidence?

3 Q Yes.

4 A No, ma'am.

5 Q Did you discuss any possible defenses to those?

6 A No, ma'am.

7 Q And did you believe there was any possible defense to those?

8 A I had a witness. I had an alibi witness in there. I'm not
9 sure if he talked to him.

10 Q And when did you tell Mr. Falk that you had an alibi
11 witness? And this is specifically for the allegations that you
12 pled to.

13 A We didn't. It should have been in his file, though. We
14 didn't discuss it.

15 Q You didn't tell him that you had an alibi witness?

16 A No, we didn't discuss that.

17 Q Do you remember the Court telling you that you did have the
18 right to a trial, and you had the right to present testimony and
19 alibi witnesses, and all of that?

20 A Yeah, I understand what the judge was saying. Yes.

21 Q You did understand what the judge was saying, because you
22 already had a trial ---

23 A Yes.

24 Q --- so you were familiar with that ---

25 A Yes.

1 Q --- and what your rights were?

2 A Yes, ma'am.

3 Q And you understood that, by pleading guilty, you were
4 waiving those rights?

5 A Yes, ma'am.

6 Q So you knew that you wouldn't be able to put up any
7 witnesses even though, as you allege, you did have an alibi
8 witness? You were pleading guilty; you were waiving that?

9 A Yes, ma'am.

10 Q Okay. And you testified at the plea no one had threatened
11 you or forced you to plead guilty; is that correct?

12 A Yeah, that's what I said.

13 Q Okay. Why did you say that?

14 A I mean, it was a court proceeding. Like, I didn't want to
15 sound crazy in the courtroom. I already said -- I already felt
16 like I said enough and I wasn't being heard, so I wasn't going to
17 beat a dead horse.

18 Q But that was your time, right, the plea was your time to
19 speak up?

20 A I did speak up but, like I said, I wasn't being heard.

21 Q And the Court was asking you these questions under oath,
22 right, and you understand the importance of that, of testifying
23 truthfully; right?

24 A Yes, ma'am.

25 Q So was there a reason you would have testified untruthfully

1 that day?

2 A It's the same answer. Like, I told the judge what was going
3 on. I told him we didn't discuss anything; the evidence wasn't
4 brought to me. I didn't know what else to say.

5 Q But you also told the judge you didn't want a trial; right?

6 A Yes, after I told him everything else, I told him -- that's
7 what I said.

8 Q Okay. And you wanted to plead guilty that day?

9 A Yes.

10 Q Did you ever tell Mr. Falk that you wanted to go to trial
11 instead of pleading guilty?

12 A We didn't have time to talk about it. We only talked ---

13 Q So ---

14 A --- about ten minutes.

15 Q I'm sorry for interrupting you. We talked for about ten
16 minutes. That's what you just said; right?

17 A Yes, ma'am.

18 Q So it was a one-way conversation. He was just talking at
19 you; you didn't say anything back to him?

20 A I told him that I didn't see any evidence, why I need to
21 take a plea? I haven't seen the video from the bank. I hadn't
22 seen no main evidence in the case, and you want me to take a
23 plea. That's what I told him after he talked to the solicitor
24 and brought the video back for me to see, and he still advised me
25 to take the plea.

1 Q And, again, sorry. Not to beat a dead horse but, you did
2 testify that he didn't threaten you in any way that you had to
3 take the plea?

4 A No, he didn't threaten me.

5 Q And he didn't force you to give your answers to the Court?

6 A No.

7 Q Those were your answers?

8 A Yes, ma'am.

9 Q And you understood that you had a right to a jury trial?

10 A Yes, ma'am, I understand all that.

11 Q And you didn't tell Mr. Falk that you wanted to proceed to a
12 jury trial?

13 A No. I didn't have a chance to.

14 Q Okay. Do you recall telling the Court that you believed
15 pleading was your best option?

16 A Yes.

17 Q And why did you state that?

18 A Because I felt like I didn't really have an attorney on my
19 side. It was me against the whole courthouse.

20 Q And do you remember stating that it was either this,
21 referring to pleading guilty, or a trial? Do you remember
22 telling the Court that?

23 A Yes, ma'am.

24 Q And do you remember testifying that this was the safest
25 option for you?

1 A Yes, ma'am.

2 Q And what does that mean, the safest option?

3 A Again, I didn't have proper counsel. I felt like I wasn't
4 being advised right, and I just had to -- I just had to take the
5 book.

6 Q And with the knowledge that you could be, if you're
7 successful, you could be reindicted, could be reinserted that
8 LWOP notice, do you still believe pleading guilty was the best
9 and safest option for you?

10 A Uhm -- I felt -- I felt I should have pleaded before trial.
11 If I was going to take a plea regardless, I should have before
12 trial. Before I went to the first trial, I felt like ---

13 Q We're just dealing with the second plea. So you feel like
14 you missed your chance to plea before? Is that your testimony?

15 A Yes, ma'am.

16 Q Okay. But you knew prior to going to trial that you could
17 have pled? You were aware of that plea offer?

18 A Yes, ma'am.

19 Q And I believe it's your prior testimony -- and this is
20 regarding the PCR action with the trial -- it's your testimony
21 that prior to trial -- prior to trial you knew about that plea
22 offer; correct?

23 A Yes, ma'am.

24 Q And your decision was that you wanted Dr. Bennett to analyze
25 the DNA prior to taking the plea?

1 A Yes, ma'am, but he was already in motion of testing those
2 items.

3 THE COURT REPORTER: I'm sorry. Repeat that.

4 THE WITNESS: I said Dr. Bennett was already in the motion
5 of testing those items when the plea agreement came about.

6 BY ATTORNEY WEIDAUER:

7 Q So you missed the boat on the original plea offer?

8 A Yes.

9 Q So when you pled here, you knew -- you knew what that was
10 all about, you had already previously considered it, you're
11 saying, and you pled here, and knowing what that would mean?

12 A I didn't even know what I was being transferred for until I
13 got there and talked to James Falk, so ---

14 Q Okay.

15 A --- I just took the plea.

16 ATTORNEY WEIDAUER: Beg the Court's indulgence for one
17 moment.

18 THE COURT: Yes, ma'am.

19 ATTORNEY WEIDAUER: Thank, you Your Honor. Nothing further.

20 THE COURT: Redirect?

21 ATTORNEY BLANCHETTE: Very briefly, Your Honor. These two
22 questions will relate to the trial PCR case.

23 THE COURT: I'm sorry?

24 ATTORNEY BLANCHETTE: I said, these two questions relate to
25 the trial PCR case.

1 THE COURT: Yes, ma'am.

2 ATTORNEY BLANCHETTE: To be clear for record.

3 REDIRECT EXAMINATION

4 BY ATTORNEY BLANCHETTE:

5 Q Prior to the PCR proceeding we're doing here today, you
6 listened to the two audios: One, the interview of your mother;
7 the other, the phone call between her and an inmate. If you
8 would have listened to the two, just the two that were introduced
9 today that were used in cross-examination, would you have wanted
10 to proceed to a trial?

11 A No, ma'am.

12 Q And in the state's questioning, I believe they were asking
13 you if the purpose in calling Dr. Bennett was to call into
14 question SLED's findings, and she quoted SLED's finding with a
15 quintillion number. Did you have any idea Dr. Bennett was going
16 to get on the stand and say, I talked to them. Everything they
17 did was proper. They were too thorough. I don't have any
18 discrepancy with what they did. Did you have any idea he was
19 going to do that?

20 A No ma'am, not at all.

21 Q Did you have any idea that those were his ultimate findings
22 when you rejected the plea offer that the state's been asking you
23 about?

24 A No, ma'am.

25 Q If you had known that, would you have considered that plea

1 offer differently?

2 A Yes, ma'am?

3 ATTORNEY BLANCHETTE: Your Honor, I have no further
4 questions.

5 THE COURT: All right. Thank you. Anything else?

6 ATTORNEY WEIDAUER: Nothing further, Your Honor.

7 THE COURT: All right, great. Thank you, sir. You can step
8 down. Thank you very much. All right. Counsel, you can call
9 your next witness.

10 ATTORNEY BLANCHETTE: Your Honor, I would call Attorney
11 James Falk to the stand.

12 THE COURT: Come on over, Mr. Falk. All right. Thank you.
13 Mr. Falk, put your left hand on the Bible, and raise your right
14 hand.

15 JAMES K. FALK,

16 having first been duly sworn, was examined and testified as
17 follows:

18 THE COURT: Come on around and be seated. It's your
19 witness, counsel.

20 **DIRECT EXAMINATION**

21 BY ATTORNEY BLANCHETTE:

22 Q Can you please state your name for the record.

23 A James Falk.

24 Q Mr. Falk, what's your current profession?

25 A I'm an attorney.

1 Q How long have you been an attorney?

2 A Licensed in 1984.

3 Q Since 1984, have you had, like, one area of focus in your
4 practice, or has that shifted an around?

5 A I was mostly dealing with criminal cases probably since
6 about 1996.

7 Q So it's fair to say that at this time, at the time that you
8 represented Mr. Ellison, you were focused on criminal cases?

9 A That's correct.

10 Q Do you recall your retainer in this case and how you came on
11 board?

12 A The retainer agreement or how ---

13 Q How you were retained; how you came on board on represent
14 him?

15 A His mother reached out to me.

16 Q And after she reached out to you, what happened?

17 A I was retained. Yeah.

18 Q And so we've already admitted into the record a copy of a
19 consent order signed by Judge Goodstein on September 5th. It
20 wasn't filed until the date of trial, but can you tell us
21 approximately how long you had to work on this case before it
22 went to trial?

23 A About five weeks.

24 Q And was that a concern that you had discussed with either
25 Mr. Ellison or his mother when you were retained?

1 A Yes. And I think it was all an understanding that this case
2 was set for trial.

3 Q And with that in mind then, did you set up meetings with him
4 to go over the evidence? What were the steps that you took then
5 to get ready for trial that quickly?

6 A I went and got the file from Mr. Bolus and reviewed the
7 testimony. I mean -- excuse me -- reviewed the Rule 5 materials.

8 Q And when you say you reviewed the Rule 5 materials, in this
9 case -- and the solicitor has provided us as part of discovery a
10 ridiculous amount of CDs, and today we introduced going up into
11 the 50s, did you receive all of that audio video evidence as
12 well?

13 A I did not review all the jail tapes.

14 Q And so specifically let me ask you about the ones that were
15 introduced today. Did you review the phone call between the
16 applicant's mother and the inmate Keitt that was then used in
17 cross-examination of her at trial?

18 A No, I didn't.

19 Q Is there a reason that you did not review that?

20 A I wasn't aware of it. I only had so much time to prepare
21 for the trial. I just did not think that his mother would have
22 been telling me one thing and then telling her son something
23 else.

24 Q And then also telling another inmate; is that correct?

25 A Yes.

1 Q And did you review the audio interview of her and Detective
2 Repman?

3 A I believe I did. Yes.

4 Q Okay. Was that something that you discussed with both of
5 them in regard to the strength of the state's case and whether or
6 not she should be called as a witness?

7 A I believe that I did.

8 Q And what were those discussions?

9 A Well, I think we needed Ms. McKinney for some other issues,
10 too. I mean, think I needed to call her regarding the car,
11 because the one witness identified the car leaving and they could
12 tag the car to him. And I think I needed her to kind've help us
13 walk out of that, that he had sold the car the same day, or
14 whatever. I remember that I needed her for some other reasons,
15 and so we needed to call her as a witness.

16 Q But based upon your admission here today, you didn't have a
17 full understanding, essentially, of the evidence the state had
18 essentially involving her?

19 A Not the telephone call about the information that she was
20 not accurate to me about.

21 Q If you had listened to that call, would you have done
22 anything differently in this case?

23 A I would have gone down that path with the lack of financial
24 incentive.

25 Q Would you have called her as a witness?

1 A Yeah, I probably could have still called her as a witness.
2 I'm not sure I could have gotten into that. I don't think they
3 could have gotten into the stuff about the financial incentive
4 had I not brought it up.

5 Q So would you concede today, you know, essentially you
6 possibly opened the door to that, and if you would have listened
7 to it you would not have opened that door?

8 A I said from the beginning that that was a problem.

9 Q Now I want to jump back a little bit because, in discussing
10 the discovery, we started talking about these audios. Did you
11 hire an investigator to assist you in putting this case together
12 that quickly?

13 A No. I just looked at the materials that Tommy Bolus had
14 pulled together.

15 Q Did you have the opportunity to formulate and discuss with
16 Mr. Ellison what your defense was going to be for this upcoming
17 trial?

18 A Yes.

19 Q And what was that?

20 A We were going to talk about the alibi, and then the basic
21 lack of any kind of evidence, any kind of forensic evidence, at
22 the scene. You know, there were no fingerprints in there. You
23 know, the lack of identity. We were going to use his alibi. And
24 I think I talked to him about the financial thing. That came
25 together pretty close to trial.

1 Q What was your evaluation of the likelihood of success at
2 this trial?

3 A I thought there was room for doubt. I mean, they clearly
4 wanted to go to trial. They were not looking for somebody else
5 to come in to get another plea agreement. I mean, they hired me
6 to take the case to trial. That's why they hired -- you know, if
7 they wanted to, they would have kept with Tommy Bolus. They
8 wouldn't have hired a lawyer. I mean, I was brought in to try to
9 prepare the case for trial in the short period of time that we
10 had.

11 Q So that leads to the obvious question. Did you engage in
12 any plea negotiations in this case?

13 A No.

14 Q And I apologize. Because we're doing this consolidated, let
15 me be clear. Prior to trial, did you engage in any plea
16 negotiations in this case?

17 A I assumed that's what you meant. Yeah.

18 Q Now, you mentioned that they hired you to go to trial. But,
19 you admit today you had not reviewed all the evidence before that
20 trial?

21 A That's right.

22 Q Let's talk a little bit about Dr. Bennett. Before the trial
23 had you had a chance to review the prior transcript where he was
24 put on the stand by Attorney Bolus?

25 A I don't think I had a transcript of that. I mean, I had the

1 motion that was filed, but I don't think a transcript was made of
2 that hearing prior to that time. I mean -- so I was just going
3 on what Dr. Bennett advised me of, the status.

4 Q And that's my next question. What was your understanding
5 from Dr. Bennett and how had you planned to utilize him at trial?

6 A I guess I was trying to, at some level, put the state on
7 trial with the idea that, you know, we didn't have an opportunity
8 to confirm the DNA evidence since the process that the state used
9 consumed all potential DNA evidence, and so the results weren't
10 repeatable.

11 And you know, I think Dr. Bennett's testimony also was that,
12 you know, characterizing in saying that they were thorough,
13 therefore, they did a good job, I think, at least the testimony I
14 established was that they did not have to take the entire --
15 scrape the entire band away that they did; you know, that they
16 could have used a smaller portion of it and possibly leave other
17 DNA; or, they could have gone back had they not gotten it and go
18 forward. I think that's what I established with Dr. Bennett's
19 testimony.

20 Q So speaking of Dr. Bennett, at the beginning of the trial is
21 it proper to characterize that you were making a motion to
22 exclude the evidence because of destruction of the evidence, or
23 is it some question about what the nature of the motion was
24 because one had not been filed?

25 A I was really planning to try and get a spoliation charge.

1 Q So the purpose of that, essentially, before the trial, if
2 you want to call it pretrial hearing, was to set the stage for a
3 spoilation charge?

4 A Yeah.

5 Q Did you think that suppression was possible at that point?

6 A No, I don't think so. I was trying to put -- I was trying
7 to get the jury mad at the state's investigation.

8 Q But would you agree at that point the jury's not there?

9 This is, you've made a motion; Dr. Bennett's called before the
10 jury even comes in.

11 A I'm sorry. Maybe I misunderstood your question.

12 Q At the beginning of the trial, when the state says they
13 believe you have some type of motion, they're not sure because an
14 actual motion hasn't been filed. Then Dr. Bennett's called to
15 the stand. He offers testimony. The judge addresses the prongs.
16 And then, on page 44, after his testimony, you say, I don't think
17 there was any bad faith on the part of purposely trying to
18 destroy the evidence, but my point is that I believe the SLED
19 procedure's designed, whether by purpose or not, the results of
20 the SLED procedures is not to -- it's to be so, entirely thorough
21 as not to leave any opportunity for any further analysis of that
22 same piece of evidence. And then the state responds, you know,
23 essentially that your only argument is they're too thorough.

24 So my question where I'm trying to get with this is, what
25 was the point of that motion? You were just talking about I'm

1 trying to put a question in the mind to the jury. I'm trying to
2 get a spoliation charge, but here you're have a pretrial motion
3 hearing where you're talking about suppression. Did you actually
4 think it could get expressed?

5 A Honestly, you're going to have to remind me better about
6 this pretrial hearing. I reviewed the transcript. I'm not sure
7 I reviewed that part of it. So if I made that motion, then I
8 must have thought at the time that I thought I could get it
9 suppressed.

10 Q What did you advise Mr. Ellison regarding the likelihood of
11 getting that evidence suppressed?

12 A I don't recall.

13 Q Did you discuss with him that your goal was to try to get a
14 spoliation charge?

15 A I guess since I filed a suppression motion, then that would
16 be the fallback position, would be to get a spoliation charge.

17 Q Do you know, though, if that was discussed with him?

18 A No, I don't.

19 Q And why I'm being a little gray is, what you stated to the
20 Court beginning on line 9, is, Yes, Your Honor. It's going to be
21 our motion to ask the Court that the Court suppress the
22 introduction of that evidence. And you go on to say, And the
23 basis of our motion -- and then the Court begins asking
24 questions. And, so it's just a little vague. I mean, and the
25 motion proceeds. There's also reference to discussion in

1 chambers.

2 But my concern is, What did Mr. Ellison know? Did you think
3 that was going to be a favorable outcome with that motion at the
4 outset of trial?

5 A I either thought it was going to be a favorable motion at
6 the outset of the trial, or I thought I at least wanted to make a
7 record.

8 Q Did you advise him that -- well, let me step back and say,
9 Did you go through with him kind of the pros and cons, the yes or
10 no, of whether or not he should go to trial and what defenses you
11 should proceed with?

12 A As I said, the plan was that we were going to trial. That's
13 why they hired another lawyer, to take the case to trial, knowing
14 that we had a -- my recollection was -- the date was set. There
15 was no surprise that the trial was going to be called on the day
16 that it was called.

17 Q Did you ever move for a continuance or discuss with the
18 solicitor or anyone about not being properly prepared?

19 A No.

20 Q Did you feel that you weren't properly prepared?

21 A Well, with the exception of the jail calls, I was properly
22 prepared.

23 Q So you were prepared as to Dr. Bennett, as to his mother but
24 for the jail calls, and for all the other witnesses, and,
25 obviously, the state's evidence?

1 A I believe so.

2 Q Okay. Do you think it's fair to say that Dr. Bennett,
3 essentially, bolstered the testimony? Did he effectively raise
4 that doubt, or that question, that you were trying to get in the
5 jury's mind that you referenced earlier?

6 A Well, in that they convicted him, I guess he didn't, but it
7 still was my point, was to try to raise some kind of doubt with
8 the DNA evidence. I thought the jury was going to convict him on
9 the DNA evidence unless I put up some type of response. I needed
10 to do something.

11 Q What type of interaction did you have with Dr. Bennett? Did
12 you guys thoroughly discuss his testimony?

13 A Yes.

14 Q And you knew what he was going to testify to?

15 A (Nods head.)

16 Q Did you convey all of that to Mr. Ellison?

17 A I believe I did.

18 Q I want to talk with you about the additional witnesses and
19 the Burger King records. Did you have the opportunity to
20 interview those witnesses before you put them on the stand?

21 A I spoke to them on the phone.

22 Q And what was the advice you offered him about putting those
23 witnesses on the stand?

24 A That I thought an alibi witness would be helpful. If a jury
25 would want to believe the two witnesses, the two alibi witnesses,

1 I thought they would be helpful. I thought it would create
2 doubt.

3 Q Had you reviewed the affidavit of Witness Payne that was a
4 attached to the prior motion?

5 A I believe I had. Yes.

6 Q Did you raise any concern with him about calling either of
7 those witnesses?

8 A I was under the impression that he definitely wanted to call
9 those witnesses, and that was the way we were going to establish
10 the alibi defense.

11 Q But, as the attorney, did you advise him regarding any
12 concerns such as prior record, impeachment witnesses, the things
13 that unfolded at trial? Did you give him advice regarding those
14 matters prior to calling them to the stand?

15 A We all knew about the record. And I thought as far as the
16 data, the time card swipes, whatever we were talking about, I
17 thought I could at least raise doubt in the jury's mind as to the
18 accuracy of what that testimony was going to be, or I thought I
19 had a reasonable shot of keeping that testimony out, the rebuttal
20 witness out.

21 Q So you were aware of the corporate records and that the
22 state intended to call that reply witness?

23 A Yes.

24 Q And you discussed that with Mr. Ellison?

25 A I believe I did.

1 Q And you all waived that against the option of not calling
2 these two witnesses?

3 A I thought we needed an alibi. Yes.

4 Q Mr. Ellison testified today about an argument that should
5 have been made regarding double jeopardy. Did you see an issue
6 there?

7 A Man, I'm embarrassed. No, I did not see that issue.

8 Q And is that an issue you would have raised?

9 A I don't have enough research on it to know whether or not
10 that's valid. I mean, that's a different fact pattern that he
11 was talking about there. I'm kind've learning about that for the
12 first time right now, whether or not that would be an issue.

13 Q You know, if you can't answer this question, it's fine, but
14 would you classify these? They are obviously charged as two
15 separate offenses, but do they appear to be two separate acts?

16 A I don't know if, you know, all the elements are the same on
17 both of them or not, so I can't tell you right now. I'm not
18 prepared to answer that question.

19 Q If we did a basic elements test, they have different
20 elements, but essentially would you agree they're the same act,
21 the state was alleging he did the same act but charged him with
22 an armed robbery and entering the bank with intent to steal?

23 A Yeah, I guess so.

24 Q If he would have been found guilty, if they would have just
25 tried him on an armed robbery, and in your representation of him

1 then they tried to bring the charge of entering the bank, do you
2 think you would have raised a double jeopardy concern then?

3 A Yeah, I would think yes. I would have at least looked at
4 the issue.

5 Q Now, in the transcript, the judge made -- since *Daniel*, and
6 there's been a line of cases since, made very prohibitive
7 statements such as, They need to search for the truth in an
8 effort to make sure that justice is done between the parties and,
9 in closing, that both the state and defendant get a fair and
10 impartial trial. The transcript reflects you did not object to
11 those statements. Why didn't you object?

12 A Well, that was before that one case. Didn't this come up
13 before *Beaty*? Wasn't *Beaty*, like, in 2017 where they really came
14 down on the search-for-the-truth language? Because's prior to
15 that it's my understanding that language was, like, in the
16 judge's desk book as the standard charge. I guess until I've
17 read that opinion, whenever that was. Can you pull it out?
18 What's the date?

19 ATTORNEY BLANCHETTE: Your Honor, I won't answer his
20 question, but I'll ask another question.

21 THE COURT: Okay.

22 BY ATTORNEY BLANCHETTE:

23 Q Were you aware of the *State v. Daniels* case decided in 2012?

24 A No.

25 Q But you are aware of the *Beaty* case that came out subsequent

1 to the trial in this case?

2 A Exactly.

3 Q And so you didn't research the *Daniels* case prior to this
4 case?

5 A No.

6 Q Okay. So is it fair to say you didn't make an objection
7 because you didn't think there was a basis?

8 A Yeah. Right. I mean, that had been the standard language
9 for so long.

10 Q Okay. But it's not something you evaluated?

11 A I did not evaluate.

12 Q Now, you've heard Mr. Ellison talk about the transcript
13 reflects, that there was an issue that you came up at the end of
14 trial regarding juror intimidation?

15 A Yes.

16 Q And there was a hearing held on that, and you moved for a
17 mistrial; is that correct?

18 A Yes, I did.

19 Q And during that, the individual juror was questioned, and
20 then all the jurors were brought back in, and the judge asked if
21 they could be fair and impartial. Did you see any issue with
22 that procedure?

23 A You know, the question was asked. None of the jurors raised
24 their hand. I was certainly a little taken aback by this
25 information that came in that a juror was approached, and so I

1 probably didn't have adequate time to totally research what all
2 the options would have been there, so at the time I thought
3 moving for the mistrial had to be done. And I thought that, you
4 know, he polled the jury. None of the jurors raised their hand.
5 I kind've equated that in my mind with the amount of times that I
6 individually polled the jury after a guilty verdict in either a
7 SVP case or criminal case. Nobody ever changes their mind. You
8 know. I wasn't anticipating that another juror would then,
9 individually -- because it's not just that they knew about it;
10 that that would have affected their decision, and none of them
11 said so. I mean, the one guy readily said so, so.

12 ATTORNEY BLANCHETTE: Your Honor, if I can beg the Court's
13 indulgence.

14 THE COURT: Uh-huh (yes).

15 BY ATTORNEY BLANCHETTE:

16 Q Mr. Falk, after Mr. Ellison was found guilty and was
17 sentenced, you continued represent him; is that correct?

18 A No.

19 Q Okay. Clarify that for us then.

20 A I only was appointed to represent him on the plea.

21 Q Okay. And so we've already introduced Applicant's No. 6.
22 Are you familiar with this plea offer sheet?

23 A Yes.

24 Q Do you recall receiving that?

25 A Yes.

1 Q Okay. And was that the only plea offer communicated, as far
2 as you know?

3 A Yes.

4 Q Okay. And so you said you were appointed to represent him.
5 Did you go out and meet with him then at the institution where he
6 was at, or what interaction did y'all have following the trial?

7 A I think my appointment was pretty close to when they brought
8 him in here to see if he wanted to accept the plea.

9 Q So you met here at the courthouse?

10 A Well, there at the courthouse.

11 Q Okay, there at the courthouse. And there, being Dorchester;
12 is that correct?

13 A Right.

14 Q All right, just to be clear for the record. So you met at
15 the courthouse. What all did y'all discuss?

16 A You know, he had a -- obviously Sorenson was concerned about
17 this case coming back on appeal because of the jury issue, the
18 juror issue, the intimidation issue. And Sorenson was looking
19 for some kind of backstop so that if it did get turned back, they
20 would have a 30-year plea.

21 From my point of view, I thought another -- I thought it
22 would come to -- I thought if his appeal was successful, they
23 could come back and try to LWOP him again on another trial, so
24 that's why I thought it made sense.

25 Q And did you explain that to him?

1 A Yes.

2 Q And you felt that he understood that?

3 A Yes.

4 Q And so you advised him to enter the guilty plea; is that
5 correct?

6 A I never advise anybody to enter the guilty plea. I just
7 explain what I think the benefit would be for entering it.

8 Q Did you have the opportunity to review the evidence with him
9 as it pertained to these charges?

10 A Again, you know, I think he knew his cases, both cases,
11 pretty well, because he spent a lot of -- I mean, Tommy Bolus was
12 representing him for a significant period of time, and the case
13 was called for trial at one time, so I know Mr. Ellison knew the
14 evidence in the case.

15 Q Do you recall, as he stated, y'all having the opportunity to
16 review a video together in the courtroom?

17 A When you said that, I did remember that.

18 Q So at that point you hadn't reviewed any of the videos or
19 audios with him?

20 A I had reviewed -- no, not with him. I had reviewed some of
21 the videos, all the police reports.

22 Q Would you agree with the assessment, though, that the trial
23 essentially tied your hands, tied his hands, into this track of a
24 plea for this case?

25 A Say that one more time.

1 Q Were the options limited by what happened with the trial?
2 Was the plea the best track because of the trial?

3 A Yes.

4 Q In getting that offer, was there any negotiation back and
5 forth?

6 A Obviously I had tried to go under, but it was pretty clear
7 that it was going to be the 30. I mean, that's what the deal
8 was. And if he wanted to take it, it was fine.

9 And we were not on -- that case was not set for trial that
10 day. That's absolutely not true. They just brought him in there
11 to see if he wanted to take this plea. We were not going to
12 trial that day.

13 Q So when he says that he's reviewed most of the evidence but
14 hasn't reviewed some of the videos, and he also says, on page 8,
15 that he is not satisfied with the representation offered, at that
16 point did you have concerns about him going forward if you were
17 up against a trial? Were you concerned?

18 A That he could not plea? I mean, he could just say, No, I
19 don't want to plea. I mean, he was not being forced.

20 Q And, did you convey that to him? Did you guys have -- it
21 doesn't appear from the transcript you took a break and had time
22 to talk.

23 A I can't recall. I mean, it's happened sometimes; it hasn't
24 happened others. I don't know if it did happen this time, if we
25 did have a conversation. But he wasn't coerced. He understood

1 what he would get for pleading. If he didn't want to plea, he
2 wouldn't have pled.

3 ATTORNEY BLANCHETTE: Your Honor, if I can beg the Court's
4 indulgence.

5 THE COURT: Yes, ma'am.

6 ATTORNEY BLANCHETTE: Your Honor, no further questions.
7 Thank you, Mr. Falk.

8 CROSS-EXAMINATION

9 BY ATTORNEY WEIDAUER:

10 Q Good afternoon, Mr. Falk. So, as I did with Mr. Ellison, I
11 am going to attempt to go through this in a strategic way by
12 addressing the trial, the PCR allegations as they relate to the
13 trial, first.

14 Allegation no. 1 is failure to -- let me backtrack for a
15 minute. So we've talked about how long you've been practicing
16 law; how you came to be involved in this case. I want to expound
17 a little bit on the situation surrounding the decision to go to
18 trial, the decision not to plead, and how that all kind've
19 happened, how we got from Bolus to you.

20 So what's your understanding of why you were substituted in
21 as counsel, why Mr. Bolus was fired?

22 A Because they wanted to go to trial.

23 Q And Mr. Bolus was not willing to go to trial?

24 A I don't know, but they weren't satisfied and they wanted to
25 go to trial.

1 Q And they never represented to you that they fired him
2 because he didn't want to try the case?

3 A No. They obviously paid money to him, and they were going
4 to pay more money for another lawyer. But, I didn't delve into
5 that.

6 Q Can we expound a little bit on the initial conversations --
7 and I believe you said you had them with his mother?

8 A Yes.

9 Q Expound on them a little bit and what you advised her
10 regarding the timeline and the turnaround, and what would be
11 needed to prepare this case for trial?

12 A I told her -- I mean, at the time I had the time, and we all
13 knew how much time there was. I'm almost 100 percent sure that
14 the date was set, and I'm almost sure that he was not going to be
15 able to get a continuance for, you know -- getting a continuance
16 on the eve of firing new counsel. It was clear that this case
17 had to get done in whatever it was, five weeks.

18 Q And you took on this case knowing that trial date?

19 A Yes.

20 Q And you would have told applicant and applicant's mother,
21 and/or applicant's mother, the possible pitfalls of trying to
22 prep a case in five weeks?

23 A Of course.

24 Q What information, if any, did -- let's start with --
25 applicant's mother give you to kind of "T" you up and get you

1 acquainted with where Mr. Bolus and Mr. Ellison were at in his
2 case?

3 A Well, I mean, we talked about the possibility of alibi
4 witnesses. And at least we had some kind of argument because,
5 you know, they had spent the money to hire Bennett; and, you
6 know, we'd have something to try to counteract the DNA evidence
7 if Bennett testified.

8 And then I think she was aware that there wasn't a lot of
9 identification testimony -- I mean, a lot of identification
10 evidence. Nobody identified him. There were no fingerprints.
11 There wasn't a lot of -- other than the DNA on the cap, I guess
12 there wasn't that much forensic evidence.

13 Q And do you remember ---

14 A So I thought this was a good identity case.

15 Q Do you remember the conversations you would have had with
16 Mr. Ellison when you first got appointed? What was that first
17 meeting looking like?

18 A Similar to this is what the case is. You know, I know that
19 he knew -- I knew he knew some of the facts about the case that
20 his mother didn't know. And, you know, we were going trial
21 because he wanted to go to trial.

22 Q Okay. So in opposition to what his testimony was earlier,
23 you had the understanding that he had reviewed discovery in some
24 capacity?

25 A Yes.

1 Q And he was familiar with the state's case ---

2 A Yes.

3 Q --- and what they ---

4 A Maybe he didn't review every single video, but he was
5 familiar with the state's case.

6 Q Okay. And you mentioned that you had time to meet with
7 Mr. Tommy Bolus regarding this case?

8 A I got the file, and we had a conversation.

9 Q Did you meet with the solicitor in any capacity?

10 A I sat down with him for an afternoon, making sure that the
11 state's discovery -- I mean, the state's Rule 5 material -- was
12 the same as what I had.

13 Q Okay. So you were ensuring that you had everything even
14 though, as you have admitted and have testified to today, you did
15 not watch the two videos that have been entered into evidence?

16 A I don't think I ever -- I'm not sure where the -- I don't
17 know if the videos were ever provided to Bolus, because I don't
18 remember, when I see the stack of videos that's there, I do not
19 remember ever seeing those in the Redwell that I picked up from
20 Tommy Bolus. I don't know if he ever had them.

21 Q So you don't know to if Mr. Bolus ever had them but, as you
22 testified, you would have received those from the solicitor?

23 A They weren't shown to me. I mean, I'm sure I would have
24 recognized a stack of videos that high. I mean, I remember
25 sitting with Don Sorenson, and we were going through the book.

1 It might have been a summary. I don't know. I just don't
2 have -- I'm not saying they weren't there. I just don't have a
3 recollection. I do not remember seeing a stack of videos that
4 tall.

5 Q Okay. How much of your time in that five weeks do you think
6 this case took up?

7 A 80 percent.

8 Q 80 percent of your practice during those five weeks?

9 A Yeah.

10 Q And how many times do you think you met with applicant in
11 those five weeks?

12 A A small handful. Not that many.

13 Q Okay.

14 A I mean, a lot of my communications about the case was
15 between he and his mother.

16 Q So she was a pretty involved mother?

17 A Absolutely.

18 Q Okay. And is that your normal practice, to meet that few
19 times prior to trial, or was it the circumstances that led to ---

20 A Well, this is not a normal case. This is a case where he
21 already had a lawyer. They had gotten ready for trial. They
22 fired that lawyer at the last minute, hired another lawyer. I
23 mean, I guess there is some expectation that he's not learning
24 everything for the first time from me in this five-week period.

25 Q Okay.

1 A No, that's not my normal practice.

2 Q And, as you stated, he was familiar with details of the case
3 that he would have had to learn through discovery?

4 A Yes.

5 Q Can you briefly verify the state's case, or the state's
6 evidence in the case?

7 A Well, they had some photographs. And whether or not it was
8 him or wasn't him, you know, it was going to be up to the jury to
9 decide, based on those photographs and the videos of him jumping
10 over the camera -- of somebody jumping over the camera. I mean,
11 there were videos, but certainly you could raise doubt about
12 whether or not the image shown on the video was him.

13 The state's case was going to rely a lot on the car, because
14 the one guy, the one witness, followed him out and identified the
15 car, and they could tie the car back to the mother. So, I mean,
16 they're kind've doing the identification through the car. That's
17 why I thought it was important that we had to try and rebut that.

18 Q And that witness actually testified that he followed him out
19 and followed the car.

20 A I think on foot, or something -- maybe they had to do a loop
21 or something. And then there was some, you know, Are we talking
22 about the strengths of the case or the weakness of the case? I
23 mean, I thought there was an issue, the fact of some kind of
24 disagreement, between the witnesses on what he was wearing,
25 because there was a hoodie. Supposedly the person who had robbed

1 the bank left the bank wearing a hoodie, and then the person that
2 came out of the woods didn't have the hoodie on. And, the hoodie
3 was never found. So that was another issue.

4 Q Okay. So it's fair to characterize, what you just said, his
5 strongest argument was that this was an identity case; that the
6 only way they could prove his identity was through the chain of
7 witnesses and the DNA found?

8 A And the DNA, yeah. I mean, it was a DNA case.

9 Q So I'm going to try to, backtrack for clarity of the record,
10 to go through these allegations a little more clearly.

11 Regarding that phone call where applicant's mother discussed
12 the defense with Shawn Keitt -- or, Kitt?

13 A Uh-huh.

14 Q You said that you had reviewed that. And do you recall what
15 her -- at trial, do you recall what the state presented was in
16 that phone call?

17 A Yeah. That he -- you know, I told -- I told the lawyer that
18 you had this money set aside, but you didn't even -- something to
19 the effect that, I told the lawyer you had -- he had this money
20 and, you know, and I never told him that you didn't know that you
21 didn't have the money.

22 Q Okay. So it's fair that that was not great for the case?

23 A It was not great.

24 Q And ineffectiveness as to the utilization of applicant's
25 mother's defense to support said defense with the knowledge that

1 her -- that she was subject to questioning regarding her audio
2 interview with law enforcement where she identified applicant.
3 Can you expound a little bit on that?

4 A Well, you know, I think she said that, you know, she was
5 75 percent sure it was her, but then I think I addressed that
6 with, you know, the police weren't really being fair with her
7 because there's this automobile accident; mother's worried about
8 her son being hurt; Is this your kid?, Is there your kid kind of
9 thing. And I tried to explain why she might have been flustered
10 and made a bad identification. And I think my point was mothers
11 don't say I'm 75 percent sure that's my kid. They're either,
12 Yeah, that's my kid, is what I'm saying. They don't say, It kind
13 of looks like his nose.

14 Q Let's talk about Dr. Bennett for a second. So it's your
15 testimony here today that that was one of your defense
16 strategies, was presenting Dr. Bennett's testimony to kind've
17 shed some doubt, as you testified, on the DNA?

18 A I said that if you have a case with forensic evidence, if
19 you've got anything that you can put up against -- not rebutting
20 any forensic evidence with any other kind of expert, I think
21 those cases are always hard, you know, because I think juries
22 love that evidence. So I think the fact that we had something to
23 question it -- I mean, I knew I didn't have to prove that he was
24 innocent. I was just trying to prove that -- I just was going to
25 make a case that the state can't prove his guilt beyond a

1 reasonable doubt. I was just trying to create doubt. I thought
2 that created doubt.

3 Q Mr. Ellison testified earlier that if he would have known
4 that Dr. Bennett was going to testify the way he did, that he
5 would not have proceeded to trial.

6 A I think he was aware of how Dr. Bennett was going to
7 testify.

8 Q What else could you have put up to refute the SLED report
9 that he was a 1 in -- I think it was -- 2.2 quintillion match,
10 that DNA?

11 A We would have just had to rely on the lack of any other kind
12 of corroborating forensic evidence. No fingerprints, et cetera.
13 You still had the discrepancy in the witnesses of the hoodie, you
14 know.

15 Q And was that a stronger or weaker argument, in your mind,
16 than Dr. Bennett's testimony?

17 A I don't know if I can say one's stronger. I just was trying
18 to put as many balls up in the air, you know, bullets up in the
19 air, however you want to say it. I was just trying to put as
20 many things up there that I thought a juror could have an
21 opportunity to grab hold of.

22 Q Plant as many seeds of doubt in the juror's mind ---

23 A That's a better way to say it.

24 Q --- as possible? Were you able to ever track down, other
25 than Dr. Bennett, as this allegation says, failed to offer an

1 opinion advantageous to applicant. Did you have an opinion
2 advantageous to applicant's ---

3 A You mean DNA evidence?

4 Q Yes.

5 A That was never realistic. I mean, there was never an
6 expectation that we were going to hire another DNA expert. I
7 mean, they were scrapping together funds to retain a lawyer, and
8 they were scrapping together funds to pay Dr. Bennett the rest of
9 the money there. It was never -- there was never any idea that
10 there was going to be another DNA expert. We had to go with the
11 one that we had.

12 Q So you didn't have an opinion advantageous to him other than
13 Dr. Bennett's? That was the most advantageous thing you could
14 find ---

15 A Right.

16 Q --- or could formulate? As to allegation 1(d), Utilization
17 of defense witnesses regarding applicant's employment and/or
18 alibi when it was known that the state could refute said
19 witnesses. So you testified that you knew about the business
20 records, and you -- you've got to verbally respond.

21 A Oh, I'm sorry. Yes.

22 Q And you knew that those business records would be most
23 likely presented by the state to refute those alibi witnesses
24 that you chose to call?

25 A I still had two eyewitnesses that said he was there. And it

1 was kind've understandable why they remembered, because it was
2 April 1st, it was April Fools Day, and there was something else
3 there, because of the day of the week, that's the date that the
4 truck came in. There was some reason. A lot of times I was
5 given an alibi witness that said, Oh, I remember it was May 16th.
6 You know, they had no reason to know what was going on on that
7 day. They had some testimony that I felt was credible as to why
8 they remembered he was there at work that day.

9 Q And you had telephone conversations with them prior to
10 trial?

11 A Yes.

12 Q And they told you those things on the phone?

13 A Yes.

14 Q And they represented to the jury the same information ---

15 A Yes.

16 Q --- the same way that they had discussed with you prior to
17 trial? Okay.

18 And it was suggested that you shouldn't have called them
19 because the state could refute them, so how could you call them.
20 Were they -- as you stated with the DNA testified, were they
21 another piece to kind've plant seeds of doubt in the jury's mind?

22 A Yes.

23 Q Okay.

24 A And I didn't think -- first of all, I still don't think the
25 Court was correct in letting in 49 -- Exhibit 49 and 50. I was

1 frustrated that the judge did not agree with my argument. I
2 think that that report -- I think it's -- one was the thing that
3 Sorenson put together as kind of a summary; and the other thing
4 was the evidence that came from the corporate owner of the Burger
5 King. And I didn't think that was going to be admissible. I
6 mean, I couldn't really move in limine because it doesn't -- you
7 know, it doesn't come in until -- well, I didn't think it made
8 sense to try to move in limine at the beginning. It doesn't come
9 in until I call my witnesses and they're going to bring in
10 rebuttal, so I made the argument when I made it. I still think
11 that that was testimonial hearsay.

12 The fact that they tried to say that that was a business
13 record is absurd because, you know, it was not kept in the
14 ordinary course of business, and it was prepared in preparation
15 for trial. I mean, that's testimonial hearsay, the fact that --
16 sorry, got a little animated there. But I really think the
17 judge -- and I really think had this case not blown up with --
18 well, I'm not going to say that.

19 Q And so you believe that you had a strong argument to keep
20 out this business records?

21 A Absolutely.

22 Q Can you clarify for the record. You said that Solicitor
23 Sorenson had made some sort of summary. What did that summary
24 include?

25 A I just remember that from reading the thing last night. I

1 think he -- I think it was like a big Excel spreadsheet that they
2 originally got pages and pages and pages of stuff, and he made
3 some kind summary of it. I don't have a copy of 49 and 50 in
4 front of me, but Sorenson clearly made the lot. I mean, that's
5 what he testified to.

6 ATTORNEY WEIDAUER: Beg the Court's indulgence for one
7 moment.

8 THE COURT: Yes, ma'am.

9 THE WITNESS: And I may have those numbers backwards, but I
10 thought 49 was like the database dump, and 50 was the summary
11 that Sorenson made.

12 BY ATTORNEY WEIDAUER:

13 Q So I believe that State's 49, which you just referred to, is
14 the timecard punches from Burger King, 3262 on Dorchester Road,
15 for April 1st, 2013. That sounds right?

16 A Yeah. I remember that was a big spreadsheet kind've thing.

17 Q As for Exhibit No. 50 -- All right.

18 ATTORNEY WEIDAUER: Can I pass up this transcript, Your
19 Honor?

20 THE COURT: Sure.

21 BY ATTORNEY WEIDAUER:

22 Q I'm going to let you read, roughly, page 515 through 517,
23 just to refresh your recollection. Excuse me. For the court
24 reporter, 515 through 517.

25 A Yeah.

1 Q So now that you refreshed your recollection, what is State's
2 Evidence No. 50?

3 A 50's the spreadsheet, and 49 is the disk.

4 Q Yes. And that was a Microsoft Excel Spreadsheet; correct?

5 A It was large.

6 Q And on 516 it's represented, it's basically a bunch of
7 columns that have different information like employee ID and the,
8 you know, address at the restaurant, that type of stuff, and then
9 it has rows that show actual -- the actual, time punches for a
10 given day, or basically lists all of the rows of all the employee
11 IDs, what time they punched in, what time they punched out, and
12 then a bunch of sort of extra data.

13 A As I recall, obviously I looked at it the night before. As
14 I recall, it needed somebody to tell you what you were looking
15 at, the spreadsheet. You know what I'm saying? You had to
16 decode some of the things, because it would maybe the store code
17 numbers or employee code numbers, and you needed somebody to
18 say ---

19 Q What they were looking at?

20 A --- what they were. It didn't say the Burger King store on
21 Dorchester Road; it had a store number. You needed an
22 explanation as to that.

23 Q For example, it would be store no. 123, but it wouldn't ---

24 A That's my recollection.

25 Q Okay. Let's move on to allegation 1(e), failure to address

1 with applicant, or make an argument or motion regarding double
2 jeopardy. Did you ever consider ---

3 A No. I missed it. I mean, that's true. I missed -- didn't
4 see it.

5 Q Okay.

6 A And I'm not admitting that it exists. I'm just saying I did
7 not consider it.

8 Q Understood. Have you ever made a motion similar to ...

9 A Well, yeah. I mean, that comes up a lot. When you get
10 somebody, when they're trying to move forward on a theft and
11 possession of stolen goods cases at the same time. I mean, you
12 know, I know sometimes it exists, yeah. And usually -- and I
13 have made, in other times, an election. I just can't come up
14 with some other examples. The most obvious, the most common, one
15 is when they try to arrest somebody for receiving stolen goods
16 and theft of the same stolen goods.

17 Q Okay. As to allegation no. 2, failure to address the
18 following matters at trial. And this is the allegation regarding
19 the search-for-the-truth language. The Court's prohibited and
20 burden shifting statements to search for the truth in an effort
21 to make sure that justice is done between the parties, and that
22 both the state and the defendant get a fair and impartial trial.

23 Can you expound on your earlier testimony regarding *State v.*
24 *Beaty*?

25 A Well, I do PCR cases, and I've raised that numerous times

1 since *Beaty*. And actually, it was -- never mind, I won't go into
2 that. Yeah. No, I raised it before. I mean, I know the
3 argument's there, and I look for it now. I did not know it then.
4 You know, it came out before *Beaty*. And I think even *Beaty*
5 wasn't -- I think there's two decision on his *Beaty*, right,
6 because *Beaty* came out and then it was -- the opinion was
7 withdrawn and reargued, and then it came out again. Something
8 like that.

9 Q But your understanding is that *Beaty* came out after this?

10 A From what I have been told by judges -- and also, I think it
11 was in the bench book that the Court has, you know, as far as an
12 opening charge to the jury. And, I mean, one of those cases even
13 talks about the fact that it was used a lot. I mean, it was
14 kind've standard practice, that language ---

15 Q Okay. And you ---

16 A --- prior to *Beaty*.

17 Q --- testified that you weren't aware of the *State v. Daniels*
18 case that Ms. Blanchette referred to?

19 A That's right.

20 Q Okay. And in both of those instances -- and I can pass up
21 the transcript again -- page 90, lines 21 through 23, I'll just
22 read those for you. It is a fundamental part of our democracy to
23 search for the truth in an effort to make sure that justice is
24 done between the parties. Did you see any reason that you should
25 have objected to that or followed up with the Court?

1 A No.

2 Q And the next is page 601, and that's line 25, through page
3 602, line 5. Both the state and the defendant have a right to
4 expect that you will carefully consider and evaluate evidence and
5 apply the law of this case to it so that, in the end, both the
6 State of South Carolina and the defendant will receive a fair and
7 impartial trial. Did you see any reason to object or bring the
8 Court's attention to that?

9 A No.

10 Q I believe there's sufficient testimony on 2(b) regarding
11 your failure to question the jurors individually on the matters.
12 I just want to clarify, you weren't aware that this was coming
13 before the juror walked in ---

14 A No.

15 Q --- and you had the issue?

16 A No. I was just as surprised as the judge was. Yeah.

17 Q And would you agree that it's in the judge's discretion on
18 how they would like to conduct voir dire and, that while you
19 could have requested that, the judge found that the jurors could
20 proceed?

21 A Honestly, I don't know what the case law is on it right now.
22 I mean, I haven't looked it up since. I just assumed that you're
23 going to have a situation, just like polling the jury, or when
24 the Court asks a witness that obviously has some kind of bias,
25 and they still ask them whether or not they can be fair in the

1 trial, I mean, they say yes. I mean, they usually think that's
2 going to carry the day.

3 Q Okay. Let's move on to the PCR regarding the plea. That's
4 case no. 2016-CP-18-00017.

5 THE COURT: All right. Let me tell you what we're going to
6 do. We're moving to the other PCR?

7 ATTORNEY WEIDAUER: Yes, Your Honor.

8 THE COURT: All right. Folks, I was -- you know, I felt
9 good, and I felt like we were going to move a little quicker.
10 Then all of a sudden, it seemed like we started slowing down.
11 Let's take 10 minutes. Do you think we can finish this up within
12 30 minutes?

13 ATTORNEY BLANCHETTE: Your Honor, as of right now, I have
14 one further question if I were to redirect. And then I just --
15 the end of the applicant's case is, I have some case law to hand
16 up. We have no further witnesses.

17 THE COURT: Are y'all going to have any other witnesses?

18 ATTORNEY WEIDAUER: No. No other witnesses.

19 THE COURT: Do you think you can -- I would imagine the
20 second one might move faster?

21 ATTORNEY WEIDAUER: Very short.

22 THE COURT: Okay. But I don't want you to have to speed up.
23 I don't want to put any pressure on you there, okay.

24 ATTORNEY WEIDAUER: I won't.

25 THE COURT: So just say, okay, 15 minutes, and we'll start.