

VOLUME I OF II

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM THE COURT OF APPEALS

Appellate Case No.: 2018-001674

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Opinion No. 6049, Heard 12/7/23 – Filed 1/31/24)

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JOHN UPSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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APPENDIX

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**Apr 01 2024**

**S.C. SUPREME COURT**

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1 STATE OF SOUTH CAROLINA  
2 COUNTY OF AIKEN

CIRCUIT COURT  
2014-GS-02-0074, -79, -80

3 STATE OF SOUTH CAROLINA,

4 -vs-

TRANSCRIPT OF RECORD

5 JOHN LYNDON UPSON,  
6 Defendant.

7  
8 HEARD ON TUESDAY, APRIL 15, 2014

9 & WEDNESDAY, APRIL 16, 2014

10 BEFORE:

11 THE HONORABLE DONALD B. HOCKER

12 AND A JURY

13  
14  
15 APPEARANCES:

16 Counsel on behalf of the State:  
17 Jeffrey Alan Slocum, Jr., Esq.  
18 Kevin R. Molony, Esq.

19 Counsel on behalf of the Defendant:  
20 Andrew Smith, Esq.  
21 De Grant Gibbons, Esq.

22  
23 Cheri L. Young, RPR  
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25 P O Box 5232  
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1 ON TUESDAY, APRIL 15, 2014 AT 10:53 A.M.:

2 THE COURT: The State of South Carolina versus John  
3 Lyndon Upson, U-P-S-O-N.

4 Have him come up.

5 (Defendant takes seat at counsel table.)

6 This is the Defendant, Mr. Upson.

7 And he has been indicted on three charges. Now let  
8 me just tell you, I'm holding these indictments. They're  
9 not evidence of guilt whatsoever. They're just the  
10 charging papers, the mechanism in order to get a criminal  
11 case into court for trial.

12 But, and I'll tell you this again when I give you  
13 some preliminary comments later on, the indictment is not  
14 evidence whatsoever of the guilt or innocence of the  
15 Defendant.

16 But he is charged with armed robbery and two counts  
17 of kidnapping. And the details of that will be further  
18 explained to you as we go along. At this time, I'm going  
19 to ask the solicitor and the defense counsel and anybody  
20 that you have with you at your respective tables to  
21 introduce yourselves to the jury panel. Solicitor?

22 MR. SLOCUM: Thank you, Your Honor.

23 My name is Jay Slocum. I'm an assistant solicitor  
24 here in Aiken County, and Assistant Solicitor Kevin Molony  
25 and I will be trying this case.

APP'X 6

1 MR. SMITH: My name's Andy Smith and this is Grant  
2 Gibbons. And we're -- and Mr. Upson.

3 THE COURT: Is any member of the jury panel related  
4 by blood or marriage to the Defendant, John Lyndon Upson?  
5 If so, please stand.

6 (No response.)

7 THE COURT: Does anyone have a close personal or  
8 social relationship with the Defendant, John Lyndon  
9 Upson? If so, please stand.

10 (No response.)

11 THE COURT: I'm going to publish a list of possible  
12 or potential witnesses in this case. And then after I do  
13 that, if anyone is related by blood or marriage to any of  
14 those potential witnesses, then you will -- or if you have  
15 a close personal or social relationship with any of those  
16 people, you will need to stand.

17 The possible witnesses in the case are as follows:  
18 Detective Billy Royster with the Aiken Department of  
19 Public Safety; Chad Cathcart with the Aiken Department of  
20 Public Safety.

21 Jameshia J-A-M-E-S-H-I-A, Alston.

22 Scott Hall, Jr.

23 Devin Johnson.

24 Desra Fraser with the Federal Bureau of Alcohol,  
25 Tobacco and Firearms.)

1 Karen Milbrodt, that's M-I-L-B-R-O-D-T, with  
2 Verizon Wireless.  
3 Vernon Wright.  
4 Janet Williams.  
5 Serena Walker.  
6 William Keels.  
7 Ernie Folks.  
8 Ivory Corley.  
9 Investigator Robert Anderson. Investigator Steve  
10 Miano.  
11 Cassandra Keels.  
12 Detective William Royster.  
13 And Sean Corley.  
14 Anyone related by blood or marriage or have a close  
15 personal or social relationship with any of those  
16 individuals? If that applies to you, please stand.  
17 Yes, ma'am, your number and your name?  
18 THE JUROR: Juror Number 32, Leslie Council.  
19 Vernon Wright.  
20 THE COURT: Okay. Which witness?  
21 THE JUROR: Vernon Wright.  
22 THE COURT: Vernon Wright. Are you related or know  
23 or what?  
24 THE JUROR: Marriage.  
25 THE COURT: Excuse me?

1 THE JUROR: By marriage.

2 THE COURT: You're related by marriage. All right.  
3 So the fact that you are related by marriage to a  
4 potential witness, Vernon Wright, would that prevent you  
5 from being fair and impartial to both the State and the  
6 defense in this case?

7 THE JUROR: Yes -- no, not really.

8 THE COURT: Ma'am?

9 THE JUROR: No.

10 THE COURT: You can be fair and impartial to both  
11 the State and the defense?

12 THE JUROR: Yes. Uh-huh.

13 THE COURT: Okay. Thank you, ma'am.

14 All right. The attorneys have represented  
15 themselves to you, but I'm required to ask: Is there any  
16 member of the jury panel that's ever been represented by  
17 any of the attorneys in this case or their respective  
18 offices? If so, please stand.

19 (No response.)

20 THE COURT: Is anyone related by blood or marriage  
21 or have a close personal or social relationship with the  
22 attorneys involved in this case? If so, please stand.

23 (No response.)

24 THE COURT: Now I'm sure most, if not all of you,  
25 really don't know anything about this case. But I am

1 required to ask if there's any member of the jury panel  
2 who's already formed or expressed an opinion about any  
3 issue or matter or anything involved in this case. If  
4 that applies to you, please stand.

5 (No response.)

6 THE COURT: Is any member of the jury panel aware  
7 of any bias or prejudice towards either the State or the  
8 Defendant in this case? If so, please stand.

9 (No response.)

10 THE COURT: This next question, I don't think this  
11 applies but I need to ask it anyways. Is there any member  
12 of the jury panel that was a member of the grand jury  
13 which issued the three indictments in this case? If that  
14 applies to you, please stand.

15 (No response.)

16 THE COURT: Is there any member of the jury panel  
17 who is a member of or a contributor to any group which has  
18 as its primary concern the promotion of law enforcement or  
19 victim's rights? And some of these groups, certainly not  
20 limiting it to these groups, but some of these groups are  
21 MADD, SADD, or Citizens Against Violent Crime. If that  
22 applies to you, please stand.

23 (No response.)

24 THE COURT: Has any member of the jury panel or  
25 anybody in your family or any of your close personal

1 friends been a victim of a crime involving kidnapping? If  
2 that applies to you, please stand.

3 (No response.)

4 THE COURT: Let me just mention too, and I should  
5 have mentioned this. Again, if any of these questions  
6 that I'm asking you concerning this particular case, if  
7 you're hesitant to respond in public and wish to come down  
8 and talk with me privately, then I will again give you  
9 that opportunity to do so.

10 Any member of the jury panel or any of your family  
11 members or any close personal friends been a victim of a  
12 crime involving robbery? If that applies to you, please  
13 stand.

14 I'm sorry. Yes, ma'am, your number and your name?

15 THE JUROR: One-eighteen. My sister worked at  
16 Security Federal in North Augusta and she was robbed.

17 THE COURT: Okay. The fact that your sister was  
18 robbed at her place of employment, would that prevent you  
19 from being fair and impartial to both the State and the  
20 defense in this case?

21 THE JUROR: No.

22 THE COURT: Thank you, ma'am.

23 Is there any member -- yes, sir. Your name and  
24 number?

25 THE JUROR: Juror Number 18, Ted Cain. My mother

1 was a bank teller at Farmers and Merchant Bank, Mitchell  
2 Shopping Center, in the '70s and a robbery occurred.

3 THE COURT: The fact that your mother was robbed at  
4 her place of employment, would that prevent from you being  
5 fair and impartial to both the State and the defense in  
6 this case?

7 THE JUROR: No, sir.

8 THE COURT: Thank you, sir.

9 Yes, ma'am, your number and name?

10 THE JUROR: Juror Number 83, Rhonda Hatcher. You  
11 asked about family members who were victims of kidnapping,  
12 and I did have a cousin who was kidnapped.

13 THE COURT: Okay. All right. Would that prevent  
14 you from being fair and impartial to both the State and  
15 the defense in this case?

16 THE JUROR: No, sir.

17 THE COURT: Thank you. Could I see the lawyers for  
18 just one second, please?

19 (Off-the-record discussion.)

20 THE COURT: All right. Any member of the jury  
21 panel or any of your family members or close personal  
22 friends ever been a victim of a crime of violence? If  
23 that applies to you, please stand.

24 Yes, ma'am, your number and name?

25 THE JUROR: One-thirty, Cheryl Murphy. The murder

1 of Master Public Safety Officer Scotty Richardson.

2 THE COURT: Would that prevent you from being fair  
3 and impartial to both the State and the defense?

4 THE JUROR: I don't know if I can do it.

5 THE COURT: Okay. I tell you what. Let's do this,  
6 ma'am.

7 When I invite members to come down to the front,  
8 you come down. We'll talk about it further. Okay?

9 Yes, ma'am. Your number and name?

10 THE JUROR: I'm Juror 79, Kimberley Hardy. My  
11 uncle -- do you want his name?

12 THE COURT: No.

13 THE JUROR: No? Okay. He was killed in the line  
14 of duty in Augusta.

15 THE COURT: Okay. Would that prevent you from  
16 being fair and impartial to both the State and the  
17 defense?

18 THE JUROR: No, sir.

19 THE COURT: Thank you, ma'am. Yes, ma'am, your  
20 number and name?

21 THE JUROR: Juror 67, Annette Frazier. I had a  
22 close cousin that was murdered.

23 THE COURT: Okay. Would that prevent you from  
24 being fair and impartial to both the State and the defense  
25 in this case?

1 THE JUROR: No.

2 THE COURT: Okay. Thank you, ma'am.

3 Even though those who have responded to having  
4 family members or close friends involved in kidnapping and  
5 robbery, I think everybody has indicated that they could  
6 be fair and impartial.

7 I will ask this: Would that -- the existence of  
8 that, would that create any bias or prejudice in favor of  
9 or against either the State or the defense? The fact that  
10 you had a family member or a close friend be the victim of  
11 the crime of kidnapping or robbery, would that create any  
12 bias or prejudice?

13 (No response.)

14 THE COURT: Does any member of the jury panel know  
15 of any bias that you may have against either the State or  
16 the Defendant in this case?

17 (No response.)

18 THE COURT: Any member of the jury panel or any of  
19 your family members, close personal friends, relatives of  
20 police officers, State Law Enforcement Division Officers,  
21 any employee with the Solicitor's Office of the Second  
22 Judicial Circuit, Attorney General's Office, federal law  
23 enforcement agencies, law enforcement agencies of any  
24 other state, or any prosecutor's office in the State of  
25 South Carolina or any other state or, will add, the Public

1 Defenders Office for the Second Judicial Circuit? Close  
2 friends, or know of any of those individuals.

3 I know that was kind of a lengthy-type question.  
4 If anybody needs me repeating that, I'll be glad to.

5 Yes, ma'am, your number and name?

6 THE JUROR: Thirty-three, Lisa Count. My husband  
7 is Captain of Investigations for North Augusta Public  
8 Safety.

9 THE COURT: Okay. The fact that your husband is  
10 involved in law enforcement, would that prevent you from  
11 being fair and impartial to both the State and the defense  
12 in this case?

13 THE JUROR: No.

14 THE COURT: Thank you, ma'am.

15 Yes, ma'am?

16 THE JUROR: Number 118, Linda McDonald. My nephew  
17 is an investigator at North Augusta Police.

18 THE COURT: Okay. Would that prevent you from  
19 being fair and impartial to both the State and the defense  
20 in this case?

21 THE JUROR: No.

22 THE COURT: Thank you, ma'am.

23 THE JUROR: One thirty-four. My twin sister works  
24 for the solicitor's office here in Aiken County.

25 THE COURT: Okay. Would that prevent you from

1 being fair and impartial to both the State and the defense  
2 in this case?

3 THE JUROR: No, sir.

4 THE COURT: Yes, sir?

5 THE JUROR: Juror 126. I don't know what -- my  
6 previous employment; you know, is considered with  
7 Wackenhut Services. Prior to that I served as United  
8 States Secret service Officer, three years.

9 THE COURT: Would that prevent you from being fair  
10 and impartial to both the State and the defense?

11 THE JUROR: No, sir.

12 THE COURT: Thank you, sir.

13 Yes, ma'am?

14 THE JUROR: Juror 130, Cheryl Murphy. I have a  
15 cousin who is employed with the Aiken County Sheriff's  
16 Department.

17 THE COURT: Would that prevent you from being fair  
18 and impartial to both the State and the defense in this  
19 case?

20 THE JUROR: That would not.

21 THE COURT: Okay. Thank you.

22 Any member of the jury panel have this case  
23 discussed with you or been approached by anyone regarding  
24 this case?

25 (No response.)

1 THE COURT: Has any member of the jury panel or any  
2 of your family members or close personal friends, ever now  
3 or in the past, worked at Captain D's on Whiskey Road here  
4 in Aiken?

5 If that applies to you, please stand.

6 (No response.)

7 THE COURT: Has any member of jury panel read  
8 anything in the newspaper, seen anything on television, or  
9 heard anything about this case on the radio? If so,  
10 please stand.

11 Yes, ma'am, your name and number?

12 THE JUROR: Juror Number 43.

13 THE COURT: Name?

14 THE JUROR: Cara Day.

15 THE COURT: Okay. Yes, ma'am?

16 THE JUROR: I work at the newspaper place.

17 THE COURT: You work at the newspaper?

18 THE JUROR: Aiken Standard. So I read everything  
19 in the newspaper.

20 THE COURT: Okay. Have you -- by virtue of you  
21 working at the newspaper, do you know anything about this  
22 case?

23 THE JUROR: (Nods head.)

24 THE COURT: Okay. All right. You're excused from  
25 the trial of this case, ma'am.

1 THE JUROR: Thank you.

2 THE COURT: Be sure to call back after six o'clock.

3 THE JUROR: Okay.

4 THE COURT: Yes, ma'am?

5 THE JUROR: Juror 14, Shanquita Brown. I know one  
6 of the workers that was working at Captain D's

7 THE COURT: You know what now?

8 THE JUROR: I knew one of the workers that was  
9 working there.

10 THE COURT: All right. During the period of time  
11 in question?

12 THE JUROR: Yes, sir.

13 THE COURT: You're excused from the trial of this  
14 case. Call back after six o'clock.

15 THE CLERK: What was her number?

16 THE COURT: Give us your number again, ma'am.

17 THE JUROR: Fourteen.

18 THE CLERK: Fourteen.

19 THE COURT: Any exceptions or additional voir  
20 dire -- exceptions to or additional voir dire from the  
21 State?

22 MR. SLOCUM: None from the State, Your Honor.

23 THE COURT: Okay. Any exceptions to the voir dire  
24 or any additional voir dire from the defense?

25 MR. SMITH: None, Your Honor.

1 THE COURT: Okay. Thank you very much.

2 All right. Now, ladies and gentlemen of the jury  
3 panel, we are now going to start the actual trial jury  
4 selection. What you will be asked to do, if your name is  
5 called out, you'll be asked to come down to the front,  
6 turn, face the attorneys. And they will make a  
7 determination whether or not they want to select you on  
8 the trial jury or not.

9 If you're not selected, please do not take any  
10 offense to not being selected. (Laughter.)

11 These lawyers, and I'll tell you, these are  
12 excellent attorneys who will be prosecuting and defending  
13 this case. And they have certain reasons for wanting  
14 someone to serve on the jury or someone not to serve on  
15 their jury. But it's not personal. Don't take it as  
16 personal. Don't take offense to it. Okay?

17 So we will start the selection process in due  
18 course.

19 MR. SMITH: Your Honor, could we approach?

20 THE COURT: Sure.

21 (Off-the-record discussion.)

22 THE COURT: Before we do that, there's one lady  
23 that might need to come down and there might be some  
24 others. I apologize for that.

25 All right. Anybody want to come down to the front

1 and meet with me privately, do so at this time.

2 (Jurors approach. The following was heard  
3 privately by the Judge and the attorneys.)

4 THE COURT: Number and name?

5 THE JUROR: 130, Cheryl Murphy. (Crying,  
6 inaudible.)

7 THE COURT: It's going to be really difficult for  
8 you to sit on the jury, I understand.

9 THE JUROR: I thought I could do it but I can't do  
10 it in this room.

11 THE COURT: I know, I know. I'm going to go ahead  
12 and excuse you for the week. Even though I think we're  
13 only going to have one trial, I'm going to go ahead and  
14 excuse you for the balance of the week. Okay?

15 THE JUROR: Okay. All right. Thank you very much.

16 THE COURT: Is that it?

17 THE BAILIFF: Your Honor, we have some jurors that  
18 need to use the restroom.

19 THE COURT: Okay. Let's do this then. Let's take  
20 about a 10-minute break and then be back in the jury room  
21 promptly in about 10 minutes and we'll start the selection  
22 process then.

23 (Break taken at 12:12 P.M.)

24 THE COURT: Let me see the lawyers for just a  
25 second, Solicitor.

1 (Off-the-record discussion.)

2 (At 12:25 P.M., the trial resumed:)

3 THE COURT: It's my understanding all the members  
4 are back in the courtroom. We'll now proceed with the  
5 selection of the trial of the jury.

6 Madam Clerk?

7 THE COURT: Stand, give us your name and number,  
8 sir.

9 THE JUROR: Ted Cain, Juror Number 18. A situation  
10 occurred kind of during the break I probably need to talk  
11 to you about.

12 THE COURT: Okay. Come down front.

13 (Juror approaches to converse with Judge and  
14 attorneys.)

15 THE COURT: Yes, sir.

16 THE JUROR: I'm a teacher at South Aiken High  
17 School. During the break one of my students shook my  
18 hand, said -- he said, "My sister was involved in this  
19 case."

20 THE COURT: Okay. Well, inadvertent contact but I  
21 probably need to excuse you from the trial of this case.  
22 Any objection from the State?

23 MR. SLOCUM: No, sir.

24 THE COURT: Defense?

25 MR. SMITH: No, sir.

1 THE COURT: You're excused from the trial. Just  
2 call back after six o'clock.

3 THE JUROR: Okay.

4 THE BAILIFF: Got one more.

5 THE COURT: Your number and name, sir?

6 THE JUROR: I thought I knew the Defendant. Yes,  
7 sir.

8 THE COURT: All right. The fact that you know the  
9 Defendant, would that prevent you from being fair and  
10 impartial to both the State and the defense?

11 THE JUROR: No.

12 THE COURT: Can you be fair and impartial --

13 THE JUROR: Yeah.

14 THE COURT: -- even though you know him?

15 Your number again?

16 THE JUROR: One-0-eight.

17 MR. SLOCUM: One-0-eight.

18 THE COURT: Okay. All right. Have a seat back  
19 there.

20 THE JUROR: Okay.

21 THE COURT: All right. Madam Clerk?

22 THE CLERK: When I call your juror number, please  
23 come to the front and turn around and face the audience,  
24 please.

25 Number 90, Michael Hillman.

1 (White male comes forward.)

2 THE CLERK: What say you for the State?

3 MR. SLOCUM: Please present Mr. Hillman.

4 THE CLERK: What say you for the defense?

5 MR. SMITH: Please seat the juror.

6 THE CLERK: Please have a seat in the jury box.

7 THE BAILIFF: Right here, sir.

8 THE CLERK: 161, Curtis Schofield.

9 (Black male comes forward.)

10 THE CLERK: What say you for the State?

11 MR. SLOCUM: Please present Mr. Schofield.

12 THE CLERK: What say you for the defense?

13 MR. SMITH: Please seat Mr. Schofield.

14 THE CLERK: Please have a seat in the jury box.

15 Fifty-one, Suzanne Dyke.

16 (White female comes forward.)

17 THE CLERK: What say you for the State?

18 MR. SLOCUM: Please present Ms. Dyke.

19 THE CLERK: What say you for the defense?

20 MR. SMITH: Please seat Ms. Dyke.

21 THE CLERK: Please have a seat in the jury box.

22 One-fourteen, Paige Mathis.

23 (Black female comes forward.)

24 THE CLERK: What you for the State?

25 MR. SLOCUM: Please present Ms. Mathis.

1 THE CLERK: What say you for the defense?  
2 MR. SMITH: Please seat Ms. Mathis.  
3 THE CLERK: Please have a seat in the jury box.  
4 One thirty-six, Julie Orillion-Gunter.  
5 (White female comes forward.)  
6 THE CLERK: What say you for the State?  
7 MR. SLOCUM: Please present Ms. Orillion-Gunter.  
8 THE CLERK: What say you for the defense?  
9 MR. SMITH: Please seat Ms. Gunter.  
10 THE CLERK: Please have a seat in the jury box.  
11 One fifty-six, Stanley Rzonca.  
12 (White male comes forward.)  
13 THE CLERK: What say you for the State?  
14 MR. SLOCUM: Please excuse Mr. Rzonca from this  
15 case.  
16 THE CLERK: Please return to your seat.  
17 One seventy-nine, Kris Usry.  
18 (White male comes forward.)  
19 THE CLERK: What say you for the State?  
20 MR. SLOCUM: Please present Mr. Usry.  
21 THE CLERK: What say you for the defense?  
22 MR. SMITH: Please seat Mr. Usry.  
23 THE CLERK: Please have a seat in the jury box.  
24 Seventy-seven, Deloris Gunnells.  
25 (White female comes forward.)

1 THE CLERK: What say you for the State?

2 MR. SLOCUM: Please excuse Ms. Gunnells from this  
3 case.

4 THE CLERK: Please return to your seat.

5 One ten, Julie Long..

6 (White female comes forward.)

7 THE CLERK: What say you for the State?

8 MR. SLOCUM: Please present Ms. Long.

9 THE CLERK: What say you for the defense?

10 MR. SMITH: Please seat Ms. Long.

11 THE CLERK: Have a seat in the jury box.

12 Seventy-nine, Kimberley Hardy.

13 (White female comes forward.)

14 THE CLERK: What say you for the State?

15 MR. SLOCUM: Please present Ms. Hardy.

16 THE CLERK: What say you for the defense?

17 MR. SMITH: Please excuse Ms. Hardy.

18 THE CLERK: Please return to your seat...

19 Number 11, Tiffany Bodie.

20 (White female comes forward.)

21 THE CLERK: What say you for the State?

22 MR. SLOCUM: Please present Ms. Bodie.

23 THE CLERK: What say you for the defense?

24 MR. SMITH: Please seat Ms. Bodie.

25 THE CLERK: Please have a seat in the jury box.

1 One ninety-seven, David Wood.  
2 (White male comes forward.)  
3 THE CLERK: What say you for the State?  
4 MR. SLOCUM: Please present Mr. Wood.  
5 THE CLERK: What say you for the defense?  
6 MR. SMITH: Please seat Mr. Wood.  
7 THE CLERK: Please have a seat in the jury box.  
8 Number 26, Velvet Champagne.  
9 (White female comes forward.)  
10 THE CLERK: What say you for the State?  
11 MR. SLOCUM: Please present Ms. Champagne.  
12 THE CLERK: What say you for the defense?  
13 MR. SMITH: Please seat Ms. Champagne.  
14 THE CLERK: Please have a seat in the jury box.  
15 One fifty-four, Michael Rushton.  
16 (White male comes forward.)  
17 THE CLERK: What say you for the State?  
18 MR. SLOCUM: Please present Mr. Rushton.  
19 THE CLERK: What say you for the defense?  
20 MR. SMITH: Please excuse Mr. Rushton.  
21 THE CLERK: Please return to your seat.  
22 Sixty-seven, Annette Frazier.  
23 (Black female comes forward.)  
24 THE CLERK: What say you for the State?  
25 MR. SLOCUM: Please excuse Ms. Frazier from this

1 case.

2 THE CLERK: Please return to your seat.

3 One-eleven, Juan Lopez.

4 (Hispanic male comes forward,)

5 THE CLERK: What say you for the State?

6 MR. SLOCUM: Please present Mr. Lopez.

7 THE CLERK: What say you for the defense?

8 MR. SMITH: Please seat Mr. Lopez.

9 THE CLERK: Have a seat in the jury box.

10 One seventy-four, Conrad Starke.

11 (White male comes forward.)

12 THE CLERK: What say you for the State?

13 MR. SLOCUM: Please present Mr. Starke.

14 THE CLERK: What say you for the defense?

15 MR. SMITH: Please seat Mr. Starke.

16 THE CLERK: Please have a seat in the jury box.

17 THE COURT: All right. We agreed to two

18 alternates.

19 THE CLERK: One-sixty, Charmaine Schoellkopf.

20 (White female comes forward.)

21 THE CLERK: What say you for the State?

22 MR. SLOCUM: Please present Ms. Schoellkopf.

23 THE CLERK: What say you for the defense?

24 MR. SMITH: Please seat Ms. Schoellkopf.

25 THE COURT: Alternate one.

1 THE CLERK: One ninety-two, David Williams.

2 (White male comes forward.)

3 THE CLERK: What say you for the State?

4 MR. SLOCUM: Please present Mr. Williams.

5 THE CLERK: What say you for the defense?

6 MR. SMITH: Please seat Mr. Williams.

7 THE COURT: Alternate two.

8 Ladies and gentlemen of the jury, congratulations.

9 I'm going to ask that you go to your jury room. The  
10 bailiffs will escort you to the jury room so you can get  
11 kind of acclimated of where you'll be spending some time  
12 this week. And then they'll provide you with some  
13 instructions. I'll bring you back out in just a few  
14 minutes. So if you'll retire to your jury room at this  
15 time. Thank you.

16 (Jury exits courtroom at 11:38 A.M.)

17 THE COURT: Any objections or exceptions to the  
18 selection of the jury from the State?

19 MR. SLOCUM: None from the State, Your Honor.

20 THE COURT: From the defense?

21 MR. SMITH: None, Your Honor.

22 THE COURT: Thank you very much. All right.

23 The remaining members of the jury panel, I know  
24 some of you may be disappointed for not getting selected.  
25 Some of you maybe are very excited that you were not

1 selected. But nonetheless, we appreciate you being here.

2 As I indicated to you, it's very, very likely that  
3 we will not need you back but, again, things can change.

4 So I remind you to be sure to call that number  
5 after six o'clock tonight for further instructions. And  
6 you'll need to do that so you'll need to know what to do  
7 as far as tomorrow and then of course the remainder the  
8 week. They may instruct you to call back in after six the  
9 following day, but we'll see.

10 Nonetheless, it's great seeing everybody. If I  
11 don't have an opportunity to see your smiling faces again,  
12 I hope you have just a great afternoon, evening and a  
13 great rest of the week.

14 Thank you. You're now excused.

15 (Jury panel exits courtroom at 11:40 A.M.)

16 THE COURT: I think we can probably get done  
17 everything we need to do, also -- and have some lunch and  
18 start back at two o'clock.

19 Suit you guys?

20 MR. SMITH: Yes, Your Honor. I'm fine.

21 MR. SLOCUM: Your Honor, may we approach for a  
22 second, please?

23 THE COURT: Sure.

24 (Off-the-record discussion.)

25 THE COURT: If the jury is ready you can bring them

1 back out. If they're ready.

2 THE BAILIFF: All right.

3 (Jury enters courtroom at 11:44 A.M.)

4 THE COURT: All right. Ladies and gentlemen of the  
5 jury, as I indicated to you we're going to not start the  
6 case until this afternoon.

7 And so we're going to be in recess until 2:30. So  
8 you'll have a little longer lunch break than what I would  
9 normally give you. But, again -- and I'll tell you this  
10 throughout the course of this whole trial -- don't talk  
11 about the case among yourselves. Don't talk about the  
12 case with people that you may come into contact with, over  
13 the lunch break or even in the evening when we adjourn for  
14 the day. It's so very, very important that you follow  
15 that instruction from the Court.

16 So with that said, have a good lunch. And we'll  
17 see you back at 2:30. You've been instructed on where to  
18 report back to.

19 So we'll see you -- or you have not? So you can  
20 let them know exactly where they need to come when they  
21 come back at 2:30. Okay? Have a good lunch.

22 (Jury exits courtroom at 11:46 A.M. Thereafter,  
23 other matters were heard. The luncheon recess was taken  
24 and the trial of this matter resumed at 2:32 P.M.:)

25 THE COURT: All right. We're back on the record.

1 Anything from the State or the defense before we bring the  
2 jury out and have them sworn?

3 MR. SLOCUM: Nothing from the State.

4 MR. SMITH: Yes, Your Honor. I would just ask to  
5 have the State's fact witnesses be sequestered only during  
6 the period of time that the other fact witnesses will be  
7 testifying.

8 THE COURT: And the position of the State?

9 MR. SLOCUM: Your Honor, our fact witnesses are  
10 Jameshia Alston, Scott Hall, and Detective Billy Royster.

11 Under 16-3-1550(b) a person must not be sequestered  
12 from a proceeding adjudicating an offense of which he was  
13 a victim. Both Jameshia and Scott are victims. And  
14 Detective Royster will be assisting the prosecution as the  
15 lead case agent. And we would argue their presence is  
16 allowed.

17 THE COURT: Typically victims are allowed to remain  
18 in. Do you want to address that point?

19 MR. SMITH: Yes, sir. I'm not asking to have  
20 Jameshia or Scott sequestered for the duration of the  
21 trial, merely for the testimony of the other fact  
22 witnesses just to ensure that there's no contamination of  
23 testimony or chance to correct or --

24 THE COURT: Let me take a look at that. What's  
25 that section again, Solicitor?

1 MR. SLOCUM: 16-3-1550(b).

2 THE COURT: Okay.

3 Mr. Smith, the statute, I think, would not allow me  
4 to sequester just for a brief period of time as you are  
5 requesting. It says: A person must not be sequestered  
6 from a proceeding adjudicating an offense of which he was  
7 a victim.

8 So that sounds pretty much non-discretionary with  
9 me.

10 I'll be glad to hear any further argument you'd  
11 like to make, or from the State, but that's the way I'm  
12 reading it. Certainly I've always -- you know, it's  
13 pretty commonplace to keep victims in, but I don't think  
14 this would let me carve out anything.

15 MR. SMITH: Yes, sir. I would just like to protect  
16 the record.

17 This case is primarily based on the identification  
18 by the witnesses that were there that night. And just to  
19 avoid any -- just to maintain the process, the due process  
20 that's to be afforded to Mr. Upson as the Defendant in  
21 this case --

22 THE COURT: Right.

23 MR. SMITH: -- under the constitution, I would ask  
24 to be protected on that basis.

25 THE COURT: Right. And you are protected on the

1 record. I trust that you don't dispute the fact that they  
2 would be classified as victims; correct?

3 MR. SMITH: I do not dispute that.

4 THE COURT: Your motion is so noted and denied.  
5 Thank you.

6 Anything further before we bring the jury out?

7 MR. SLOCUM: Nothing from the State.

8 THE COURT: And from the defense, Mr. Smith?

9 MR. SMITH: No, Your Honor.

10 THE COURT: Okay. Bring the jury out, please.

11 (Jury enters courtroom at 2:37 P.M.)

12 THE COURT: Okay. Let the record reflect that the  
13 jury is back in. And -- good afternoon, and hopefully you  
14 folks have had a good lunch and are ready to get to work  
15 this afternoon.

16 Madam Clerk, would you swear this trial jury in,  
17 please, ma'am?

18 THE CLERK: Yes.

19 (Jury impaneled.)

20 THE CLERK: You may be seated.

21 THE COURT: Ladies and gentlemen of the jury, we  
22 need to pick a foreperson, foreman, or if it's a female,  
23 forelady of the jury. I'm going to do that in just a  
24 moment.

25 I'm going to explain to you the role of the

1 foreperson of the jury. First of all, their vote counts  
2 no more than everybody else's vote. But we have to have  
3 a spokesperson for the jury to -- if there's any  
4 communication that's needed between the jury and the Court  
5 then we need to have someone to handle that line of  
6 communication.

7 Secondly, we need to have someone just to make sure  
8 that whatever instructions that are given to the jury --  
9 for example, my continuous instruction will be that you  
10 not begin your deliberations or discuss anything about  
11 this case among yourselves or with anybody else until you  
12 are instructed to do so -- I need to ask someone to  
13 oversee, oversee that.

14 And, thirdly, once you get the case to begin your  
15 deliberations, then we have to have someone to oversee  
16 those deliberations and to make sure that they begin and  
17 that they are handled properly.

18 So, but other than that, the foreperson's no more  
19 important than everybody else that's on this jury.

20 I'm going to appoint Suzanne Dyke. Ms. Dyke, I'm  
21 going to appoint you as the Foreperson of the Jury. Now  
22 you stay in that seat for right now but the next time you  
23 come in, you will maintain that first seat at all times.  
24 Okay?

25 And our two alternates. Raise your hands. Okay?

1 You are seated in the right seats. You maintain those two  
2 seats at all times.

3           Everybody else, you can sit where you like. Now  
4 it's been my experience that juries are kind of like  
5 attending church. You sit in the same pew every Sunday.  
6 Most jurors like to sit in the same seat. You don't have  
7 to but, you know, if that's the collective desire of the  
8 jury then certainly you can do that. But as far as the  
9 Forelady of the Jury and your two alternates, you retain  
10 those same seats all the time. Okay?

11           I appreciate everybody being prompt in their return  
12 from lunch. That is so vitally necessary that you always  
13 be prompt when you return back, either from a lunch break  
14 or return in the morning after breaking for the evening,  
15 because if you're not prompt and if you're not back here  
16 in time we can't do anything. Our hands are tied. And,  
17 so it's very important, as you've already done, to be  
18 prompt.

19           Now, what we're going to do to start off with is  
20 I'm going to give you a, what we call a preliminary  
21 instruction just to kind of give you some things, some  
22 guidelines to follow. And then once that is done the  
23 lawyers will make some opening arguments to you.

24           So we're going to start the case of the State of  
25 South Carolina versus John Lyndon Upson.

1 Now, Mr. Upson has been indicted on three charges.  
2 And I'm going to publish those to you in just a second.  
3 Again, I want to emphasize, and as I told you earlier,  
4 that the indictments are not evidence of guilt. They are  
5 just merely the mechanism in which we get a case in to  
6 court for purposes of disposition, trial or otherwise.  
7 But the indictments serve no further purpose other than  
8 that, and of course to put the Defendant on notice of  
9 actually what he is being tried on.

10 And I give these in no significant order, just  
11 whatever first on the stack is. The kidnapping  
12 indictment is 2014-GS-02-00080, the State versus John  
13 Lyndon Upson. And it states as follows: -- these are  
14 merely allegations made by the State -- that John Lyndon  
15 Upson did in Aiken County on or about November 27, 2013,  
16 unlawfully seize, confine, inveigle, decoy, kidnap,  
17 abduct, or carry away Scott Hall, without authority of  
18 law, all in violation of 16-3-910, Code of Laws of South  
19 Carolina as amended.

20 The second indictment is 2014-GS-02-00079, the  
21 State of South Carolina versus John Lyndon Upson which  
22 states as follows: John Lyndon Upson did in Aiken County  
23 on or about November 27, 2013, unlawfully seize, confine,  
24 inveigle, decoy, kidnap, abduct, carry away Jameshia  
25 Alston, without authority of law, all in violation of

1 Section 16-3-910, Code of Laws of South Carolina as  
2 amended.

3 And the third indictment is 2014-GS-02-00074, the  
4 State of South Carolina versus John Lyndon Upson. And  
5 it's for armed robbery. And it states as follows: That  
6 John Lyndon Upson along with another did in Aiken County  
7 on or about November 27, 2013, while armed with a deadly  
8 weapon or while alleging either by action or words that he  
9 was armed while using a representation of a deadly weapon  
10 or an object which a person present during the commission  
11 of the robbery reasonably believed to be a deadly weapon,  
12 to wit, a handgun, feloniously take away the person or  
13 presence of Devin Johnson by means of force or  
14 intimidation, goods or moneys of Captain D's, such goods  
15 or moneys being described as follows, US currency, all in  
16 violation of Section 16-11-330, Code of Laws of South  
17 Carolina as amended.

18 Now, Madam Forelady, and ladies and gentlemen of  
19 the jury, before we begin this trial, I want to tell you  
20 that this trial probably will be different from what you  
21 might expect.

22 I'm having a computer issue here. Bear with me  
23 just a second.

24 ...be different from what you might expect. Many  
25 people do not have a chance to attend actual court

1 sessions as you're doing now and may think from watching  
2 television or movies or reading books that trials are  
3 always full of high drama, intense, action and riveting  
4 circumstances.

5 While all of these things may be true at times,  
6 this trial is not for entertainment. It is a fundamental  
7 part of our democracy, a search for the truth in an effort  
8 to make sure that justice is done between the parties  
9 before the Court.

10 Searching for the truth and making sure that  
11 justice is done is often slow, deliberate and repetitive,  
12 the opposite of what you may have seen on television,  
13 movies or have read in books.

14 This courtroom is a place of honor, dedicated to  
15 the protection and preservation of citizen's rights  
16 through -- and I stated this earlier to you -- what many  
17 have called to be the greatest justice system ever  
18 created.

19 The attorneys appearing before you are advocates  
20 for the parties they represent. First and foremost  
21 they're officers of the Court, sworn to uphold the  
22 integrity and fairness of our judicial system and to help  
23 you in the search for the truth. You should expect them  
24 to be professional, competent and ethical in the  
25 representation of their client's interests which I'm sure

1 that they will be. I have no question about that.

2 And you are also expected to be professional,  
3 reasonable and ethical as well.

4 I want to thank you, once again, for accepting the  
5 important responsibility of jury service and for your  
6 contribution today to our justice system.

7 What I will now say is intended to serve as an  
8 introduction to the trial of the case. These remarks are  
9 not a charge on the law in the case. I will instruct you  
10 on the law applicable to this case at the end of the trial  
11 before you retire to consider and deliberate your verdict.

12 This is merely an explanation of the procedure that  
13 we will follow in the trial of the case so that you may  
14 better understand what may be happening here today.

15 And I will tell you, Madam Forelady and ladies and  
16 gentlemen of the jury, I will not permit you to take any  
17 notes during the trial. Consequently you will need to be  
18 very attentive throughout this entire trial.

19 Your purpose as jurors on this trial jury is to  
20 find and determine the facts. You are the sole judge of  
21 the facts. If at any time I make any comment regarding  
22 the facts, you must disregard that comment. You are to  
23 determine the facts from the testimony you hear and other  
24 evidence introduced in court. It is up to you to  
25 determine the inferences which you feel may properly be

1 drawn from the evidence.

2 It is especially important that you perform your  
3 duty of determining the facts diligently and  
4 conscientiously because ordinarily there is no way to  
5 correct an erroneous determination of the facts by a jury.

6 And on the other hand and with equal emphasis, the  
7 same law that makes you the judges of the facts make me  
8 the judge of the law. The law as given by the Court is  
9 the only law that you may consider. You must accept and  
10 follow it even though you may disagree with it.

11 I cannot tell you what the facts are, and you  
12 cannot disagree with me about what the law is or should  
13 be. Your job is to take the law as I give it to you and  
14 apply it to the facts as you find them from the testimony  
15 of the witnesses and any other evidence that is  
16 introduced. After doing that, then you will render your  
17 verdict, a verdict under your solemn oath that you just  
18 took moments ago.

19 And, again, you'll hear me say this so many times  
20 but it's so, so important. You cannot begin your  
21 deliberations until you are instructed to. Consequently  
22 you cannot discuss this case among yourselves until I tell  
23 you to. And you cannot discuss this case with anyone,  
24 friends, family members, anyone that you may come into  
25 contact with, until this case is concluded.

1           You must decide this case based solely on the  
2 evidence presented here in this courtroom. This means  
3 that during the course of this trial you must not conduct  
4 any independent research about this case on your own.

5           The facts of the case, the evidence presented in  
6 the case, and the people, organizations involved in any  
7 way in this case, please do not try to find out  
8 information from any source outside this courtroom. In  
9 other words, you can't go online to do any research, you  
10 can't go to any reference materials, anything whatsoever,  
11 you cannot do. You're strictly prohibited from doing so.  
12 If that is done and you find out that a fellow juror has  
13 done that, then, Madam Forelady, that would need to  
14 brought to the attention of the Court.

15           And, likewise, I don't know if there's going to be  
16 any media account or reports of this particular case, I  
17 would have no way of knowing that, but if it does appear  
18 in the newspapers or on the radio or television, you are  
19 instructed not to consider that or pay any attention to  
20 such media reports.

21           It's very important that you keep an open mind and  
22 not decide any issue in the case until all of the evidence  
23 has been presented, the parties have made their closing  
24 arguments to you, and I have instructed you on the law in  
25 this case.

1           It is your solemn responsibility to determine the  
2 guilt or innocence of the Defendant.   And your verdict  
3 must be based solely on the evidence as it is presented to  
4 you in this trial and on the law as I instruct you during  
5 and at the close of the trial.

6           Now there will be times during the course of this  
7 trial that one of the lawyers may say, "Judge, I've got an  
8 objection," or "Judge, I have a matter of law that we need  
9 to take up with the Court."

10          That may require from time to time to have you  
11 retire to the jury room.   And the reason for that is that  
12 on ruling on a particular matter that one of the attorneys  
13 brings up, it may require me to make some comment or  
14 discussion on the facts.   Consequently, I don't want to  
15 influence you at all concerning your determination of what  
16 the facts are in this case.   So that's why it may be  
17 necessary from time to time to have you retire to your  
18 jury room in order for me to discuss those matters with  
19 the lawyers.

20          And, again, as I told you, because I'm not allowing  
21 you to take any notes, it's so vitally important for you  
22 to pay very close attention to everything that goes on,  
23 testimony from the witnesses, the evidence as presented,  
24 anything that the attorneys may do or say, and whatever  
25 the Court says.   It's very important for you to be very

1 attentive to what goes on.

2 At this time I'm going to ask: Is there any  
3 exceptions or objections to the preliminary charge from  
4 the Court, from the State?

5 MR. SLOCUM: None from the State, Your Honor.

6 THE COURT: From the defense?

7 MR. SMITH: Nothing, Your Honor.

8 THE COURT: Okay. Thank you very much.

9 Now the lawyers will make their opening arguments  
10 to you. And they're not evidence in the case. It's just  
11 their statement of what they believe their respective  
12 positions to be, and what they believe the evidence shall  
13 be during the course of this trial.

14 But it is not evidence. It's just an opening  
15 statement as it is called. So we'll hear from the State  
16 first. Solicitor?

17 MR. SLOCUM: Thank you, Your Honor. May it please  
18 the Court.

19 THE COURT: Yes, sir.

20 MR. SLOCUM: Mr. Smith, Mr. Gibbons, ladies and  
21 gentlemen.

22 November 27th, 2013. Last November. The day  
23 before Thanksgiving, it was a Wednesday, around 10  
24 o'clock, two men arm robbed the Captain D's here on  
25 Whiskey Road, a couple miles down the road.

1           The State's about to show you evidence that one of  
2 those individuals was John Upson. This is John Upson's  
3 day in court. And I don't want you to lose sight of that  
4 throughout the case. We're here for John Upson and John  
5 Upson alone.

6           You're going to hear evidence that's going to show  
7 that these two men armed with a handgun, used that handgun  
8 to force the employees inside Captain D's to give them  
9 money. You're going to hear how that handgun was used,  
10 how it was put to the back of one of those individual's  
11 head.

12           You're going to hear, evidence is going to show  
13 you, of how law enforcement came to understand, to know it  
14 was John Upson that did this.

15           Mr. Upson is represented by Mr. Andy Smith. And he  
16 is a fine defense attorney. And it's his job to advocate  
17 for his client, just as it is my job to advocate for the  
18 State.

19           I ask you to stay focused on John Upson in this  
20 case. As I just said earlier, this is John Upson's day in  
21 court. These witnesses that I just discussed, that I  
22 just brought up, are going to tell you their story of what  
23 happened that night a little after 10 o'clock on the 27th  
24 of November. They're going to sit right up there and tell  
25 you what all happened. I want you to listen to their

1 testimony. Pay attention. I ask you as jurors to pay  
2 attention.

3 And your job is to judge the facts in this case.  
4 My job is to put up the evidence. It's your job to be the  
5 judge of the facts. It's the Judge's job to give you the  
6 law.

7 Now in being the judges of the facts, I ask you to  
8 use your common sense. You do it everyday, at the store,  
9 at work, at home, using your common sense to judge the  
10 credibility and the believability of what you hear and  
11 what you see.

12 An example of that would be one of your young'uns  
13 at home coming up with chocolate on their hands, on their  
14 face. And, did you get in the cookie jar? Did you get in  
15 the chocolate? No. Well, right then you can judge that  
16 young'un right in front of you. And although you didn't  
17 see them eating chocolate, you can surmise that they got  
18 into the chocolate.

19 And we call that circumstantial evidence. It's  
20 one type of evidence. Circumstantial and direct. Direct  
21 evidence is something you see, touch. You feel it, you  
22 hear it.

23 Circumstantial is something that based on what you  
24 know you can piece together to get you to a certain  
25 ending. We're in a room right now. No windows. Can't

1 see outside. We don't know what's going on outside.  
2 Three people walk in that back door. The first two are  
3 holding wet umbrellas. The third one is soaking wet.  
4 Now, we don't know what's happening outside. We don't see  
5 that it's raining outside, but based on those two wet  
6 umbrellas and the third person being soaking wet, you can  
7 piece it all together to know that it's raining outside  
8 even though you don't see it direct, touch it, smell it,  
9 hear it, feel it. You can use your common sense and your  
10 ability to judge the credibility and the believability of  
11 a witness to put those pieces together.

12 The State's going to show you how all these pieces  
13 fit together, how John Upson along with another  
14 individual -- now that other individual, it's not his day  
15 in court today. This is John Upson's day. But on  
16 November 27, 2013, John Upson along with another  
17 individual by use of force and intimidation took personal  
18 property away from Captain D's, that being money, while  
19 being armed with a deadly weapon, with a gun.

20 That's armed robbery. It's simple. It's robbing  
21 someone while being armed with a deadly weapon.

22 We're also going to show you how John Upson along  
23 with another individual -- again, I ask you not to lose  
24 sight of John Upson. This is his day in court. How John  
25 Upson seized or confined Jameshia Alston and Scott Hall

1 without legal authority to do so. Kidnapping. That's  
2 what kidnapping is.

3 Now the Judge just told you, he's the one that  
4 gives you the law. And what I just told you, if the  
5 Judge's law differs in any way, shape or form, I ask you  
6 to go with what he tells you to do.

7 Now the first sentence of those charges are "John  
8 Upson along with another." Another portion of our law in  
9 South Carolina we have the hand of one is the hand of all.  
10 That means that if one person does something, the second  
11 person is just as guilty as the other person. They both  
12 acted together. They both did it together. Just  
13 because one person, say, had the gun, the other person did  
14 not doesn't mean they're not both guilty of armed  
15 robbery.

16 You're going to hear testimony-John Upson didn't  
17 have a gun. It doesn't mean he's not guilty of armed  
18 robbery because of our law, the hand of one is the hand of  
19 all. If one person does something the other person's just  
20 as guilty.

21 Thank you all for being here, for your time. I  
22 ask you to pay attention. I ask you to, at the end of  
23 the day once you see all this evidence, once you hear all  
24 of the testimony, that you will be firmly convinced in the  
25 Defendant's guilt.

1           And the State has the burden of proving that. We  
2 have the burden to present you evidence to prove to you  
3 beyond a reasonable doubt the Defendant's guilt. Not all  
4 doubt, but what's reasonable, what makes sense. Using  
5 your common sense, what is reasonable. And all that is is  
6 being firmly convinced in the Defendant's guilt.

7           Thank you. And I ask at the end of this trial you  
8 return a verdict of guilty.

9           THE COURT: Thank you, Solicitor. Mr. Smith?

10          MR. SMITH: Thank you, Your Honor. May it please  
11 the Court.

12          Mr. Solicitor, Mr. Molony.

13          Good afternoon. You're here today as a jury for  
14 12, 14 individuals here, and you're in a tough situation.  
15 I don't envy your spot. You're where the rubber meets the  
16 road in our republic. Okay.

17          This is where it happens. This is where, as the  
18 Judge explained, you have the power to prevent  
19 governmental overreach, government abuses. And on the  
20 other end of that spectrum you have the power to prevent  
21 mistakes that come from miscommunications,  
22 misunderstandings, mistakes. In this room a mistake means  
23 a man goes to prison. A mistake is a big deal in this  
24 room. You have the power as a jury to prevent that  
25 mistake.

1           In this case the State just spent a few minutes  
2 talking about how there are going to be holes in their  
3 case and how you're going to have to try to fill in the  
4 holes of the case for the State.    Okay.

5           What I want you to worry about is what you think  
6 about the evidence you're going to hear.  You're going to  
7 hear a lot of evidence.  Some of it may sound complex.  
8 Some of it's going to be real simple.  This isn't a really  
9 difficult case.  Some of it's going to be very simple.  
10 There's a little bit of nuances to it.

11          We've had our heads dug real deep into it for a  
12 while.  We're going to try to help make sure that you  
13 understand everything clearly.  Okay?

14          The State is going to try to show, like they just  
15 said, that John Upson, the man sitting right there, the  
16 man that is presumed innocent in your eyes and the eyes of  
17 the Court, in the eyes of the State, that man is presumed  
18 innocent.  They're going to try to prove that he was  
19 involved with an armed robbery and a kidnapping.

20          Now that's a difficult burden for them to carry.  
21 They have to convince you beyond a reasonable doubt.  
22 Right now if you're looking at the scales of justice, this  
23 is John Upson, in favor of John Upson.  It would tip like  
24 this.  It would tip really heavy because he's got this  
25 heavy presumption of innocence.  Okay?

1           For this -- for you to return a verdict of guilty,  
2 the State has to convince you beyond a reasonable doubt to  
3 bring up the scales, not to be even, but to outweigh,  
4 it's not to be -- you have to be convinced beyond a  
5 reasonable doubt.    Each of you.

6           We always talk about a verdict being, the meaning  
7 of the word being "to speak the truth."    Okay?   And for a  
8 true verdict to come out of this jury, it has to be the  
9 truth of what you believe individually.

10          It has to be the truth of what you believe.   What  
11 you believe.   What you believe.   It has to be the truth of  
12 what you believe individually for it to be a true verdict  
13 of the jury.

14          You're also going to hear some other things that  
15 we're going to talk about, that John Upson wasn't there,  
16 that he was elsewhere and among others.   You'll get to  
17 hear about that.   We just want you to be considerate of  
18 the people you're going to listen to, pay attention.  
19 You're going to hear things that are going to stick out to  
20 you.

21          What I want you to do is, those things are for  
22 particular a reason.   They may mean something to you but  
23 not mean something to somebody else.   You're going to hear  
24 these things.   And when you hear them, just take them and  
25 set them aside.   Put them in a little bag that you can

1 take with you back into the jury room. You're going to  
2 hear things that are beneficial to John Upson. You take  
3 those and put them in a bag. You may hear things that are  
4 beneficial to the State. You take those and put them in a  
5 bag. Some things are going to be good for the State, some  
6 things may be beneficial for John Upson. You're going to  
7 take that back with you and you're all going to compare.

8 Okay.

9 But you need to take note of those things so when  
10 you go back into that jury room that you've done, you've  
11 honored your oath, that you've honored the system, that  
12 you've honored what we're here to do, and that you have  
13 something to talk about, that you paid attention, that you  
14 held onto these things and considered them.

15 When it all comes down to the end, I'm going to ask  
16 you to just come back in with a true verdict, a verdict  
17 that represents what each of you individuals believe, what  
18 each of you individually is convinced of or not convinced  
19 of.

20 And I hope that that verdict will be a verdict of  
21 not guilty.

22 Thank you.

23 THE COURT: Thank you, Mr. Smith. The State ready  
24 to proceed?

25 MR. SLOCUM: We are, Your Honor.

## JAMESHIA ALSTON - DIRECT BY SLOCUM

1 THE COURT: Call your first witness, please.

2 MR. SLOCUM: The State calls Jameshia Alston.

3 JAMESHIA ALSTON, having been duly sworn, was  
4 examined and testified as follows:

5 THE CLERK: Have a seat in the witness box. State  
6 your full name for the Court and spell your last, please.

7 THE WITNESS: Jameshia Brenae Alston, A-L-S-T-O-N.

8 DIRECT EXAMINATION

9 BY MR. SLOCUM:

10 Q. Ms. Alston, good afternoon.

11 A. Good afternoon.

12 Q. Please tell the jury where you are from.

13 A. Aiken, South Carolina.

14 Q. And how long have you lived in Aiken?

15 A. All my life, basically.

16 Q. Are you in school?

17 A. Yes, sir.

18 Q. Where are you in school?

19 A. Twelfth grade at South Aiken High School.

20 Q. And will you graduate in May?

21 A. Yes, sir.

22 Q. What are your plans after school?

23 A. To join the Army.

24 Q. When are you going to do that?

25 A. July 15th.

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 Q. And any secondary school after that?

2 A. I want to go to Lander University to take up  
3 nursing, night classes.

4 Q. Where do you work?

5 A. Captain D's.

6 Q. And where is Captain D's located?

7 A. In Aiken, South Carolina, on Whiskey Road.

8 Q. Is that Aiken County?

9 A. Yes, sir.

10 Q. And did you work at Captain D's on November 27,  
11 2013?

12 A. Yes, sir.

13 Q. Let's go back to that day, if you would. Where  
14 were you on November 27th, 2013, around ten o'clock?

15 A. I was counting my money at the back of the store at  
16 a desk. At first I didn't really pay it attention that  
17 someone was coming into the store with an armed robbery,  
18 like, whatever. And I stood up and my reaction was, "Oh  
19 my God, I'm going to die."

20 Q. Now you said you were counting your money. What  
21 does that mean?

22 A. I was counting my drawer down to 150. I do this  
23 every night after I close or after my shift was over. I  
24 count my drawer down to 150 and I set my drawer to the  
25 printer and I count my deposit out.

APP'X 53

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 Q. When you say "your drawer," is that a cashier  
2 drawer?

3 A. Yes, sir.

4 Q. You're a cashier up front?

5 A. Yes, sir.

6 Q. Had you all closed for the day?

7 A. Yes, sir.

8 Q. I'm sorry. I didn't mean to cut you off. What  
9 happened next?

10 A. Okay. After that I was counting my money whenever  
11 they came and I said, "Oh my God, I'm going to --

12 THE COURT: You need to speak up, ma'am, a little  
13 louder, please.

14 THE WITNESS: The first boy asked Scott to walk him  
15 to the safe. And the other boy, he told me to stay in the  
16 back, and he told me not to go anywhere. And I was just,  
17 like, "I want to go home." And he was, like, "No, stay  
18 right there."

19 So I stayed there, whatever. And I didn't hear  
20 what else was going on in the front.

21 So he walked me over to the, by the cooler and I  
22 stood there for a minute. And then he said, "Get inside  
23 the cooler." So I got inside the cooler. And then they  
24 brought the other two boys back, but before that they  
25 searched our pockets and stuff for cell phones and

APP'X 54

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 anything else that we had.

2 Q. Okay. Back you up just a little bit. Right when  
3 they first came in the door --

4 A. Yes, sir.

5 Q. -- did one of them have a gun?

6 A. Yes, sir.

7 Q. What did that -- what was that individual doing  
8 with the gun?

9 A. He had it to the back of Scott's head.

10 Q. Who was Scott?

11 A. My fellow employee.

12 Q. He was working with you that night?

13 A. Yes, sir.

14 Q. Okay. And the individual who had the gun to the  
15 back of Scott's head, where did they go?

16 A. To the front of Captain D's.

17 Q. Where were you?

18 A. I was -- stayed in the back by the file cabinet at  
19 the time.

20 Q. Were you alone?

21 A. Yes, sir. With John Upson.

22 Q. With who?

23 A. John Upson.

24 Q. Could you please point him out?

25 A. Right here. The blue shirt with the red tie.

APP'X 55

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 MR. SLOCUM: Your Honor, please let the record  
2 reflect that she pointed to the Defendant.

3 THE COURT: Okay. So noted for the record.

4 BY MR. SLOCUM:

5 Q. Now you said you were in the back with John Upson.  
6 Did you know it was John Upson at this time?

7 A. No, sir. I didn't.

8 Q. Okay. When did you come to learn it was John  
9 Upson?

10 A. I went home that night after the robbery and I was  
11 just, like, on the Internet doing some research. And one  
12 of my co-workers that worked with me is friends with him  
13 because I had saw him two days before the robbery, he came  
14 inside of Captain D's.

15 Q. The Defendant. You had seen the Defendant two days  
16 before the robbery?

17 A. Yes, sir.

18 Q. Okay.

19 A. So, and it's my job to remember my customers if I  
20 take their order to remember their faces. And so I  
21 remembered his face, but I didn't know his name at the  
22 time.

23 Q. Did he order anything that night?

24 A. He ordered a Sprite, a large Sprite to drink, the  
25 two days before the robbery.

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 Q. And you were the cashier?

2 A. Yes, sir. And I looked and I saw his face and I  
3 looked at him and, like I said, it's my job to remember my  
4 customers. So that's what I did. And I remembered the  
5 face.

6 So I got home and I was looking on the Internet and  
7 I saw pictures of him on one of my co-worker's page and I  
8 jumped up from the computer because I knew I had saw this  
9 person and I knew that's who it was with me in the back  
10 when the robbery happened.

11 Q. Okay. When they first came in, the two  
12 individuals that were doing the robbery, what were they  
13 wearing?

14 A. All black. Like, they had on black hoodies, black  
15 pants. They had, like, surgical gloves on, and bandanas.

16 Q. Bandanas where?

17 A. Right here (indicating), below their nose down.

18 Q. Was there a portion of their face exposed?

19 A. Only their eyes. Well, I only saw the second  
20 boy's. Only his eyes and his nose were showing.

21 Q. When you saw the second boy, who are you referring  
22 to?

23 A. John Upson.

24 Q. How did you know it was John Upson?

25 A. Because, like I say, it's my, you know, job to

APP'X 57

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 remember my customers. So, and I remember his eye. Like,  
2 that's the thing that caught me, his eye and his bald  
3 head. And I was, like, I know this person, but I don't  
4 know his name.

5 Q. So you weren't aware of his name at the time of the  
6 incident?

7 A. No, sir.

8 Q. You did discover it later, though; right?

9 A. Yes, sir. I went home and I looked it up.

10 Q. About what time did this all happen?

11 A. At 10:15.

12 Q. Well, why do you say 10:15?

13 A. Because I was counting my money right after we  
14 close, and then it felt like about 10:15. That's how  
15 long.

16 Q. Do you close at 10?

17 A. Yes, sir.

18 Q. And do you always count your money after you close?

19 A. Yes, sir.

20 Q. And what do you do with that money?

21 A. I put it in the safe in the front, but I didn't get  
22 a chance to get it to the safe fast enough.

23 Q. Do you count your money each night?

24 A. Yes, sir. Every night that I work I count my  
25 register down to 150.

APP'X 58

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 Q. And when you mean -- "count it down to 150," what  
2 does that mean?

3 A. I take my change and I count. Like, I add it all  
4 up and I stop at 150. Then I take the rest of the money  
5 out and I make out my deposit.

6 Q. Okay.

7 A. And I count that money and put it in the drop box.  
8 But, like I said, I didn't get that far that night.

9 Q. Okay. Now, you put the deposit -- you said you,  
10 have a deposit and a cash drawer. Where does each money  
11 go?

12 A. In the safe.

13 Q. They both go in the safe?

14 A. Yes, sir.

15 Q. Did the man who was in back with you say anything  
16 to you?

17 A. He was -- I was, like, "Can I go home?" And he  
18 was, like, "No. Stand right here. Don't move." And I  
19 was just, I was scared for my life.

20 Q. Did you feel like you could leave at any time?

21 A. No, sir.

22 Q. Let's go back to the gun. Did you see what color  
23 the gun was?

24 A. It was black.

25 Q. Did it appear to be a real gun to you?

APP'X 59

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 A. Yes, sir.

2 Q. Why do you say that?

3 A. Because the first boy -- it was heavy to hold up.  
4 Like, you could tell there was weight to the gun.

5 Q. The individuals, what, if anything, did you notice  
6 about their demeanor when they walked in?

7 A. They were forceful.

8 Q. Were they yelling?

9 A. Not yelling, but their voice was more demanding  
10 than calm.

11 Q. Were you afraid?

12 A. Yes, sir.

13 Q. Who put you in the freezer, stand-up refrigerator?

14 A. John Upson.

15 Q. About how long were you in the refrigerator?

16 A. It felt like 30 minutes to me.

17 Q. Were you upset at this time?

18 A. Yes, sir.

19 Q. Did you ever get out of the refrigerator?

20 A. No, sir. I came by after the robbery was over.

21 Q. Not during the robbery?

22 A. No, sir.

23 Q. About how long after that you said?

24 A. Thirty minutes.

25 Q. Did you speak to law enforcement when they showed

APP'X 60

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 up that night?

2 A. Yes, sir.

3 Q. What did you tell them?

4 A. I told them everything that happened at the store.  
5 And they asked me to give my statement, and I wrote it  
6 down for them or whatever. And I told them that I had  
7 recognized one of the guy's faces but I didn't know his  
8 name at the time.

9 Q. You're referring to the Defendant?

10 A. Yes, sir.

11 Q. About how long after the robbery did you discover  
12 -- did you see that picture and discover it was John  
13 Upson?

14 A. About an hour after I was at home. And I was  
15 looking on the Internet and then I jumped up because I saw  
16 his face and I knew that was him, like.

17 Q. Is there any doubt in your mind who it was?

18 A. It was him.

19 Q. Who did you send -- or, what did you do with those  
20 pictures?

21 A. I e-mailed them to Detective Royster.

22 Q. The police officer?

23 A. A detective. Yes, sir.

24 Q. How long have you been at Captain D's working?

25 A. For two years.

APP'X 61

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 Q. Do you know the phone number at Captain D's?

2 A. 803-641-6476.

3 MR. SLOCUM: Permission to approach, Your Honor?

4 THE COURT: Certainly.

5 BY MR. SLOCUM:

6 Q. Ms. Alston, I'm handing you what's been previously  
7 marked as State's Exhibits Six, Seven, Eight, Nine, 13,  
8 and 14. Would you please take a look at these?

9 A. Yes, sir.

10 Q. Do you recognize those pictures?

11 A. Yes, sir.

12 Q. How do you recognize them?

13 A. That's where I work. That's my job.

14 Q. And have these pictures -- what about 13 and 14,  
15 how do you recognize those?

16 A. That's the guy that I saw in the back of the store  
17 with me that day we got robbed.

18 Q. Do these pictures accurately depict and reflect the  
19 store you work at in the two pictures you sent law  
20 enforcement on November 27th, 2013?

21 A. It is.

22 Q. Have they been changed or altered in any way,  
23 shape, or form?

24 A. No, sir.

25 MR. SLOCUM: Your Honor, at this time the State

APP'X 62

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 moves to admit Exhibit Six, Seven, Eight, Nine, 13 and 14  
2 into evidence.

3 THE COURT: What says the defense?

4 MR. SMITH: Without objection, Your Honor.

5 MR. SLOCUM: Your Honor, at this time may the  
6 witness step down so that we may publish these to the  
7 jury?

8 THE COURT: Sure.

9 (State's Exhibit Nos. 6, 7, 8, 9, 13 and 14,  
10 photographs, received into evidence.)

11 THE COURT: Madam Witness, I'm going to ask you to  
12 speak up very loud. You're going to be facing away from  
13 the court reporter, and she'll need to take down  
14 everything you say.

15 THE WITNESS: Yes, sir.

16 THE COURT: Thank you.

17 THE WITNESS: You're welcome.

18 BY MR. SLOCUM:

19 Q. This is State's Exhibit Six. Can you please tell  
20 the jury what this is we're looking at?

21 A. This is my work station where I count my money down  
22 every night.

23 Q. Is this where you were when the robbery occurred?

24 A. Yes, sir.

25 Q. State's Exhibit Seven, what are we looking at here?

APP'X 63

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 A. This is the cooler in the back of Captain D's.

2 Q. Is this where you were --

3 A. That's where I --

4 Q. -- forced to go into?

5 A. Yes, sir.

6 Q. State's Exhibit Eight, what are we looking at  
7 here?

8 A. That's the inside of the cooler in the back of  
9 Captain D's.

10 Q. State's Exhibit Nine?

11 A. And that's how it was when they closed the door.

12 Q. The same cooler?

13 A. Yes, sir.

14 Q. With the door closed?

15 A. Yes, sir.

16 Q. State's Exhibit, next, 11 -- 13. State's Exhibit,  
17 13, Jameshia, what is that?

18 A. The guy that was in the back with me the day of the  
19 robbery.

20 Q. The man that told you you couldn't leave?

21 A. Yes, sir.

22 Q. The man that put you in the cooler?

23 A. Yes, sir.

24 Q. Fourteen?

25 A. This is the same guy.

APP'X 64

JAMESHIA ALSTON - DIRECT BY SLOCUM

1 Q. Are those two pictures, 13 and 14, the ones you  
2 sent to law enforcement?

3 A. Yes, sir.

4 Q. That's all. You can have a seat back up there.

5 A. (Returns to witness stand.)

6 Q. Jameshia, a few more questions. What time did the  
7 store close?

8 A. At 10 o'clock.

9 Q. You testified earlier that you were in the back  
10 with a boy. When you say "boy", do you mean a man or a  
11 child?

12 A. A man.

13 Q. The Monday before when the Defendant was in  
14 there --

15 A. Yes, sir.

16 Q. -- did he do anything unusual while he was there?  
17 Did you notice anything?

18 A. He took a picture of one of my co-workers, and I  
19 thought that was real weird.

20 Q. And who was that co-worker?

21 A. William Keels.

22 Q. Whose Facebook page did you see the Defendant on?

23 A. William Keels'.

24 Q. Did you recognize the man that had the gun?

25 A. No, sir.

APP'X 65

## JAMESHIA ALSTON - CROSS BY SMITH

1 Q. Only the man who was in the back with you?

2 A. Yes, sir.

3 Q. Only the Defendant?

4 A. Yes, sir.

5 MR. SLOCUM: Beg the Court's indulgence, Your  
6 Honor.

7 THE COURT: Yes, sir.

8 (Pause.)

9 MR. SLOCUM: Jameshia, thank you. Please answer  
10 any questions Mr. Smith has for you.

11 THE WITNESS: You're welcome. Yes, sir.

12 THE COURT: Mr. Smith, cross-examination?

13 CROSS-EXAMINATION

14 BY MR. SMITH:

15 Q. Good afternoon, Jameshia.

16 A. Hello.

17 Q. Thanks for coming today.

18 A. You're welcome.

19 Q. Jameshia, I understand that night you were pretty  
20 shook up, weren't you?

21 A. Yes, sir.

22 Q. And you were scared?

23 A. Yes, sir.

24 Q. You really wanted to catch -- you wanted to help  
25 the police who had come in and robbed the place?

APP'X 66

## JAMESHIA ALSTON - CROSS BY SMITH

1 A. Yes, sir.

2 Q. You really wanted to help them out?

3 A. Yes, sir.

4 Q. So you told them everything you knew about who came  
5 in that night?

6 A. Yes, sir.

7 Q. You told them what color hair they had?

8 A. I didn't say what color hair they had.

9 Q. No, you didn't. Did you talk about any facial  
10 hair?

11 A. No, sir.

12 Q. Eyes?

13 A. Yes, sir.

14 Q. Height?

15 A. No, sir.

16 Q. Weight?

17 A. Yes, sir.

18 Q. Clothing?

19 A. Yes, sir.

20 Q. And did you tell them that this person had been in  
21 Captain D's before?

22 A. Yes, sir.

23 Q. And you put all that stuff in your statement;  
24 right?

25 A. Yes, sir.

APP'X 67

JAMESHIA ALSTON - CROSS BY SMITH

1 Q. Let me show you something.

2 (Defendant's Exhibit No. 1, statement of 11-27-13,  
3 marked for identification.)

4 BY MR. SMITH:

5 Q. Jameshia, I'm going to show you what's been marked  
6 Defendant's Exhibit One.

7 A. Okay.

8 Q. I want you to take a look at that. Do you know  
9 what that is?

10 A. A statement.

11 Q. A statement?

12 A. Yes, sir.

13 Q. Is that the statement you gave police that night?

14 A. Yes, sir.

15 Q. Okay. Does it say anything about that -- in that  
16 statement about what the suspects were wearing?

17 A. No, sir. It just states his weight, their weight.

18 Q. What did it say about their weight?

19 A. The heavysset boy stayed in the back with me and the  
20 skinny boy walked Devin and Scott to the front after  
21 retrieving their --

22 Q. Okay. What does it say about what clothes they  
23 were wearing?

24 A. It doesn't say that, but I told that to the cops.

25 Q. And I'm just asking about your statement.

APP'X 68

## JAMESHIA ALSTON - CROSS BY SMITH

1 A. Yes, sir.

2 Q. Does it say anything in your statement, about seeing  
3 them in the store before?

4 A. No, sir.

5 Q. But you just told me that all of that stuff was in  
6 your statement; didn't you?

7 A. I told that to the police, sir.

8 Q. But just a second ago you told me all that stuff I  
9 was asking you about, you put in your statement to the  
10 police?

11 A. Can you rephrase that?

12 Q. Just a second ago I asked you a series of  
13 questions. Did you tell the police about height, weight,  
14 hair color, clothing, if the man had been in the store  
15 before. And you answered the questions. And I asked you  
16 if you had put that in your statement to the police and  
17 you told me yes.

18 A. I put the height and the size in there.

19 Q. You put the height?

20 A. The size and the weights.

21 Q. Skinny and?

22 A. Skinny and heavy.

23 Q. Skinny and heavy. That's height and weight.

24 Your Honor, I'd move to introduce into evidence  
25 Defendant's Exhibit One as witness Jameshia Alston's

## JAMESHIA ALSTON - CROSS BY SMITH

1 statement to the police that night.

2 THE COURT: What says the State?

3 MR. SLOCUM: Without objection.

4 THE COURT: All right. Without objection, will be  
5 Defense Exhibit Number One.

6 (Defendant's Exhibit No. 1, Alston statement of  
7 11-27-13, received into evidence.)

8 BY MR. SMITH:

9 Q. Now, Jameshia, the night that -- the night that you  
10 say that John Upson was in the store --

11 A. Yes, sir.

12 Q. -- on a Monday?

13 A. Yes, sir.

14 Q. Was it a Monday?

15 A. Yes, sir.

16 Q. Was he with anybody else?

17 A. He was.

18 Q. Okay. Who was he with?

19 A. I can't identify the other person.

20 Q. You don't know his name?

21 A. No, sir.

22 Q. Okay. But you'd recognize him if you saw him?

23 A. Sir?

24 Q. You'd recognize him if you saw him?

25 A. I just know the Defendant. That's all I

JAMESHIA ALSTON - CROSS BY SMITH

1 recognized. I didn't know the other person at all.

2 Q. Didn't you just say your job is to remember your  
3 customers?

4 A. But he wasn't one of my customers. He didn't come  
5 talk to me personally at my register, so.

6 Q. Do you remember me?

7 A. No, sir. You're not one of my customers.

8 Q. Okay. Now when the people came in the back door  
9 and when you were in the back of the store, the subject  
10 that was back there with you, was he standing behind you?

11 A. No, sir.

12 Q. Did he have his hood on?

13 A. He did have his hood on.

14 Q. He had a hood on, and he had a bandana?

15 A. Yes, sir. Over his nose.

16 Q. Covering his mouth?

17 A. Yes, sir.

18 Q. Okay. Did you describe the other person?

19 A. No, sir. Not at all.

20 Q. Did you remember what the other, the appearance of  
21 the other person?

22 A. I just know they both had on black, and they had  
23 on, like, surgical gloves.

24 Q. Do you remember any distinguishing characteristics  
25 of that person?

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JAMESHIA ALSTON - CROSS BY SMITH

1 A. No, sir.

2 Q. Okay. Did they act -- when they came in, did they  
3 act like they knew where they were going?

4 A. The first boy he was, like, "Take me to the safe in  
5 the front." That's what he said.

6 Q. Okay. Now when you left there that night, when  
7 you went home, did Detective Royster tell you to go home  
8 and go look on Facebook?

9 A. No, sir. I just decided to take it to my own and  
10 do it myself.

11 Q. Did you call him and tell him what you had found?

12 A. Yes, sir. I did.

13 Q. And he asked you to send him the photos?

14 A. Yes, sir.

15 Q. Do you remember what time it was that you called  
16 him?

17 A. I know I got home and I did that about an hour  
18 after everything had happened at Captain D's. So I don't  
19 know exact timing.

20 Q. Okay. Do you know what time you got home?

21 A. Not exactly. Like, an hour later and some minutes,  
22 but not exact time.

23 Q. Okay. Now when you went and looked on Facebook --  
24 that's where you looked; right?

25 A. Yes, sir.

APP'X 72

## JAMESHIA ALSTON - CROSS BY SMITH

1 Q. You scrolled down through the pictures?

2 A. Yes, sir. I did.

3 Q. Or, did you type in John Upson's name?

4 A. No, I went on William Keels' page and I found his  
5 name. And when I saw his picture I jumped up because I  
6 knew that was him. And then I, like, clicked on his name  
7 and I was scrolling through his pictures. As I was  
8 looking I jumped up again. I told my mom that was him.

9 Q. How many pictures do you think you looked at before  
10 you found his?

11 A. Two pictures.

12 Q. Two?

13 A. Yes, sir. I found those two.

14 Q. How many pictures on William Keels' Facebook did  
15 you look through --

16 A. Oh, I just saw one picture. It's, like, when you  
17 look on somebody else page, it's only one profile picture.

18 Q. Does he have a lot of pictures of other people on  
19 his --

20 A. I didn't look at that.

21 Q. You didn't look at anybody else's picture?

22 A. No, sir. I just looked at his name, who I was  
23 looking for.

24 Q. You were just looking for John Upson?

25 A. Yes, sir.

JAMESHIA ALSTON - CROSS BY SMITH

1 Q. And you looked for his name?

2 A. No. I was looking at pictures while I was  
3 scrolling -- I was on William Keels' page.

4 Q. Yes.

5 A. And you can scroll through a friend list. And I  
6 saw his picture and I clicked on his name. I didn't know  
7 his name at the time but I clicked on it because I knew  
8 his face. I saw the picture and I jumped up. I told my  
9 mom that's him.

10 Q. I guess my question wasn't clear. When you were  
11 looking through William Keels' pictures --

12 A. I didn't go through his pictures. I was just  
13 looking at his friends' list.

14 Q. That's what I'm saying. You were looking through  
15 his friends' list and looking at pictures on the friends'  
16 list; right?

17 A. Yes, sir.

18 Q. That's how you found this picture --

19 A. Yes, sir.

20 Q. -- that you used to identify John Upson?

21 A. Yes, sir.

22 Q. About how many of those pictures had you gone  
23 through before you found John Upson?

24 A. I don't know exactly.

25 Q. And you didn't look any more before -- after you

## JAMESHIA ALSTON - CROSS BY SMITH

1 found that picture?

2 A. No, sir.

3 Q. So you don't know if there's anybody else on that  
4 Facebook page --

5 A. No, sir.

6 Q. -- that would resemble the person that was in the  
7 store with you?

8 A. No, sir.

9 Q. You don't know?

10 A. No, sir.

11 Q. And William Keels has a lot of friends; doesn't he?

12 A. Yes, sir.

13 MR. SMITH: Beg the Court's indulgence.

14 THE COURT: Sure.

15 (Pause.)

16 BY MR. SMITH:

17 Q. Jameshia, do you know a guy named Ishmael Norid-  
18 Deen?

19 A. No, sir.

20 Q. Were you ever shown a police lineup? Were you  
21 shown a lineup of six people?

22 A. A list of names.

23 Q. You were shown names?

24 A. Yes, sir.

25 Q. The police never showed you a lineup of anybody?

APP'X 75

## JAMESHIA ALSTON - REDIRECT BY SLOCUM

1 A. Not people, like, pictures; no, sir.

2 Q. Okay.

3 MR. SMITH: No further, Your Honor.

4 THE COURT: Anything on redirect?

5 MR. SLOCUM: Briefly, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. SLOCUM:

8 Q. Jameshia, Mr. Smith just showed you your written  
9 statement --

10 A. Yes, sir.

11 Q. -- to the police that night?

12 A. Yes, sir.

13 Q. Did you also give a verbal statement to the police  
14 that night?

15 A. Yes, sir; I did.

16 Q. Is everything in your written statement the same in  
17 verbal and vice versa or do they, are they different?

18 A. In the statement it just states the weight and what  
19 they were -- like, it just states the weight of the skinny  
20 boy and heavysset boy. But I told the police verbally what  
21 they wore and stuff like that.

22 Q. Told them everything you told us today?

23 A. Yes, sir.

24 Q. In regards to these Facebook pictures --

25 A. Yes, sir.

1 Q. -- why did you stop looking after you found John  
2 Upson?

3 A. Because I knew this was the person that was in the  
4 back with me on the day of the robbery.

5 Q. The same person that forced you into the --

6 A. Cooler.

7 Q. -- refrigerator?

8 A. Yes, sir.

9 Q. The same person that wouldn't let you leave?

10 A. Yes, sir.

11 Q. The same person that came in with another  
12 individual who had a handgun?

13 A. Yes, sir.

14 Q. Real quick. You mentioned telling law  
15 enforcement -- Mr. Smith asked you about the eyes. What  
16 was it about Mr. Upson's eyes that you remember?

17 A. He has a lazy eye. It's kind of droopy, like that.

18 MR. SLOCUM: Beg the Court's indulgence?

19 THE COURT: Sure.

20 (Pause.)

21 MR. SLOCUM: Nothing further, Your Honor.

22 THE COURT: Okay. Anything on recross?

23 MR. SMITH: No, Your Honor.

24 THE COURT: Okay. Thank you for your testimony,  
25 ma'am. You can step down.

## SCOTT AARON HALL - DIRECT BY SLOCUM

1 THE WITNESS: You're welcome.

2 MR. SLOCUM: Your Honor, the State calls Scott  
3 Hall.

4 SCOTT AARON HALL, having been duly sworn, was  
5 examined and testified as follows:

6 THE CLERK: Have a seat in the witness box. State  
7 your full name for the Court.

8 THE WITNESS: Scott Aaron Hall, H-A-L-L.

9 DIRECT EXAMINATION

10 BY MR. SLOCUM:

11 Q. Mr. Hall, good afternoon.

12 A. Good afternoon.

13 Q. Mr. Hall, how old are you?

14 A. I'm 21.

15 Q. And where are you from?

16 A. Ridge Spring, South Carolina.

17 Q. And where do you live now?

18 A. In Aiken, South Carolina.

19 Q. How long have you been in Aiken?

20 A. Just about 10 years now.

21 Q. Are you married?

22 A. No, sir.

23 Q. Have any kids?

24 A. Yes, sir.

25 Q. How old are your kids?

SCOTT AARON HALL - DIRECT BY SLOCUM

1 A. Nine months.

2 Q. Do you provide for this child?

3 A. Yes, sir.

4 Q. Where were you on November 27, 2013?

5 A. Out back, taking the trash out at Captain D's where  
6 I work.

7 Q. You were working at Captain D's?

8 A. Yes, sir.

9 Q. And what did you do for Captain D's that November  
10 of last year?

11 A. I was a cook.

12 Q. And how long had you been working as a cook up  
13 until November 27th?

14 A. Just about 11 months.

15 Q. What were you doing around 10 o'clock?

16 A. Finishing up, closing up, taking the trash out to  
17 the trash cans and bringing them back inside.

18 Q. Had business closed down for the day?

19 A. Yes, sir.

20 Q. What happened to you that night while you were  
21 taking the trash it?

22 A. I was approached by two black males who, the first  
23 one he placed a gun to the back of my head before I could  
24 get the trash cans into the store.

25 Q. Please show us where.

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SCOTT AARON HALL - DIRECT BY SLOCUM

1 A. Oh. Right below my right ear. Right there. He  
2 placed the gun right there. And he ordered me to take him  
3 up front to where the safe was.

4 Q. Did you happen to see a gun?

5 A. Yes, sir.

6 Q. Did you see what color it was?

7 A. Yes, sir. Black.

8 Q. Did it appear to be a real gun to you?

9 A. Yes, sir. I could feel the heaviness and the  
10 coldness on my ear as he was holding it there. I could  
11 feel the coldness to it.

12 Q. Did you see what these individuals were wearing?

13 A. Yes, sir. Black sweat pants and black hoodies with  
14 black hoods over them and had bandanas as well.

15 Q. About how far from the back door were you when  
16 approached by the two men?

17 A. I'd say two or three feet from the back door.

18 Q. Was the door open or closed?

19 A. Yes, sir. It was open. It was propped with a  
20 stick because if it closes it locks on its own. So we  
21 wouldn't have had a way back inside. So I had it propped  
22 open with a stick.

23 Q. Is that what you normally do when you take the  
24 trash out?

25 A. Yes, sir. Yes, sir.

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1 Q. At this time that, did you recognize any of the  
2 men?

3 A. No, sir.

4 Q. When you were forced up front, please tell us what  
5 happened next.

6 A. When -- after I was forced up front he still had  
7 the gun to the back of my head. He told me to get on all  
8 fours and keep my head down between my legs so I wouldn't  
9 look up and see anything.

10 Q. Were you afraid?

11 A. Yes, sir. Very.

12 Q. What happened next?

13 A. I could hear him demanding Devin, which is our  
14 other employee, to give him money and to keep the change  
15 because he didn't, he wasn't fooling with the change.

16 MR. SMITH: Objection, Your Honor. It's hearsay.

17 MR. SLOCUM: Your Honor, it's a statement by a  
18 co-conspirator in furtherance of a conspiracy. It's  
19 allowed.

20 THE COURT: Okay. Let, let's do this, Madam  
21 Forelady and ladies and gentlemen of the jury. It's one  
22 of these times that a matter of law needs to be addressed  
23 with the attorneys so, and it's probably, maybe a good  
24 time to take a little short break.

25 So if you'll retire to your jury room. I caution

1 you and remind you not to discuss anything about this case  
2 among yourselves.

3 Get you back out shortly.

4 (Jury exits courtroom at 3:39 P.M.)

5 THE COURT: Mr. Smith, the basis for your  
6 objection, is that it is hearsay?

7 MR. SMITH: Yes, sir.

8 THE COURT: Now, I'm looking at Rule 801(d)(2).  
9 Statements which are not hearsay and Subsection E, a  
10 statement by a co-conspirator of a party during the course  
11 and furtherance of the conspiracy.

12 Now, I realize that one of the charges -- he's not  
13 charged with conspiracy, but would not that be a  
14 conspiracy or alleged conspiracy by virtue of what is  
15 being claimed that the Defendant and the other person  
16 did?

17 Be glad to hear from you on this point.

18 MR. SMITH: Your Honor, at this point there's been  
19 no evidence presented that there is a conspiracy. Up  
20 until a conspiracy has been established, there's --  
21 letting in evidence that would be -- a statement of a  
22 co-conspirator would be in the hopes that in the future  
23 conspiracy is shown. At this point there haven't even  
24 been allegations that there's a co-conspirator.

25 THE COURT: Okay.

1 MR. SMITH: There haven't been allegations that one  
2 of the employees is a co-conspirator.

3 THE COURT: Now, this statement that this witness  
4 gave, he's repeating what person number one said, correct,  
5 not an employee? My understanding -- is that correct,  
6 Solicitor? Or, correct me if I'm wrong.

7 MR. SLOCUM: Your Honor, the statement that he's  
8 being addressed -- that Mr. Hall is testifying to is a  
9 statement made by the gunman, the second individual.  
10 There's no tie to anyone at this point. It's just being a  
11 second individual with Mr. Upson who entered the Captain  
12 D's.

13 THE COURT: Well, just by virtue of the testimony  
14 thus far, allegedly that, that the gunman and Mr., and the  
15 Defendant came in and did what has been testified that  
16 they did, would that not in and of itself make it a  
17 conspiracy?

18 MR. SMITH: Your Honor, I'm objecting to any  
19 statement from a co-worker --

20 THE COURT: Okay.

21 MR. SMITH: -- in this case. I think they were  
22 getting ready to ask him about a statement from a  
23 co-worker. I believe they were getting ready to ask that  
24 question.

25 THE COURT: Well, so far, this last statement that

1 was objected to, it's my understanding and I think agreed  
2 to by the Solicitor that it was a statement of person  
3 number one or the gunman. I think this witness over here  
4 called it boy number one and boy number two.

5 MR. SLOCUM: That's correct.

6 THE COURT: The gunman.

7 MR. SLOCUM: That's correct.

8 THE COURT: Right. Okay. And I don't think,  
9 Solicitor, you were planning to get into any statements by  
10 any employees; correct?

11 MR. SLOCUM: That is correct, Your Honor.

12 THE COURT: Okay. All right. So I think -- I  
13 think your concern is resolved.

14 MR. SMITH: Yes, sir.

15 THE COURT: Okay. So that objection would be  
16 withdrawn?

17 MR. SMITH: Yes, sir.

18 THE COURT: Okay. Thank you very much, Mr. Smith.  
19 Let's take a five-minute break before we start  
20 back.

21 MR. SLOCUM: Yes, sir.

22 (Break taken at 3:49 P.M., until 3:53 P.M., and the  
23 trial resumed:)

24 THE COURT: Bring the jury out, please, sir

25 (Jury enters courtroom at 3:53 P.M.)

SCOTT AARON HALL - DIRECT BY SLOCUM

1 THE COURT: Let the record reflect that the jury is  
2 back in.

3 I will just remind and caution the jury that it's  
4 very important that all of you be very attentive and be  
5 very alert because otherwise then you're not going to be  
6 able to properly make a determination in this case. So I  
7 just remind everybody, all 14 of you, to be very alert, be  
8 very attentive during the course of this trial.

9 Thank you.

10 BY MR. SLOCUM:

11 Q. Mr. Hall, what happened after you were forced up  
12 front with a gun to your head?

13 A. He -- after he had gotten the money and everything,  
14 he had issued us -- he had issued me to get up off the  
15 ground, still with my hands raised.

16 Q. He is who?

17 A. The gunman.

18 Q. What did he do in terms of getting money?

19 A. I -- he received it from Devin, after Devin fumbled  
20 with it a couple times to get the safe open.

21 Q. Did he -- how did he ask to take the money?

22 A. He said, "Give me the money, I don't want the damn  
23 coins," -- "the damn change" is his exact words.

24 Q. Did he put it in a bag?

25 A. Yes, sir. He snatched a takeout bag from one of

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SCOTT AARON HALL - DIRECT BY SLOCUM

1 our takeout bags from the front counter.

2 Q. After he received the money, what happened?

3 A. He issued me to get up off the ground, still to  
4 keep my hands above my head. And this whole time he still  
5 had the gun to the back of my head. He issued us to walk  
6 into the cooler.

7 Q. Did you at any time feel free to leave?

8 A. No, sir.

9 Q. Were you afraid?

10 A. Yes, sir.

11 Q. You said earlier it was a black gun?

12 A. Yes, sir.

13 Q. Handgun?

14 A. Yes, sir.

15 Q. Do you know what type of handgun?

16 A. It looked similar to a nine millimeter, but I'm not  
17 sure if that was what it was.

18 Q. Was it semiautomatic?

19 A. Yes, sir.

20 Q. It was?

21 A. Yes, sir.

22 Q. Okay. Did you speak to law enforcement that night?

23 A. Yes, sir.

24 Q. And were you able to give them any descriptions of  
25 the suspects?

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SCOTT AARON HALL - DIRECT BY SLOCUM

1 A. Just the facial features.

2 Q. Any of their clothing? Outer wear?

3 A. Yes, sir. Their weight and their height as well.

4 Q. What did you tell them?

5 A. That they were about six foot, and the gunman was a  
6 little but shorter. He was a little bit taller than me,  
7 probably about five-eleven. They were both black males.  
8 And the gunman had a, somewhat of a teardrop tattoo or a  
9 birthmark under his left eye. And that's all I could see  
10 from his nose down.

11 Q. About how quick was the time frame did you have to  
12 get a look at these folks?

13 A. Just a few seconds.

14 Q. It happened pretty fast?

15 A. Yes, sir.

16 Q. Did you ever turn around to look at the gunman?

17 A. No, sir. He just approached me. Whenever he was  
18 running up, that's the only time I seen his face.

19 Q. Did you ever give law enforcement a name of who it  
20 was?

21 A. No, sir.

22 MR. SLOCUM: Permission to approach, Your Honor?

23 THE COURT: Certainly.

24 BY MR. SLOCUM:

25 Q. Mr. Hall, I'm handing you what's previously --

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SCOTT AARON HALL - DIRECT BY SLOCUM

1 excuse me, Your Honor.

2 Mr. Hall, I'm handing you what's previously marked  
3 for identification purposes as State's Exhibit One through  
4 Five, and State's Exhibit 10, 11 and 12.

5 Would you please take a look at these, please, sir?

6 A. Yes, sir.

7 Q. And I ask you: Do you recognize those photos?

8 A. Yes, sir. This is Captain D's where I work.

9 Q. And that goes for all the photos I just handed you?

10 A. Yes, sir.

11 Q. Do those photos fairly and accurately depict  
12 Captain D's as it was on November 27th of 2013?

13 A. Yes, sir.

14 Q. Have they been changed, altered or deleted in any  
15 form or fashion?

16 A. No, sir.

17 MR. SLOCUM: Your Honor, at this time the State  
18 moves to enter Exhibits One through Five, 10, 11 and 12  
19 into evidence.

20 THE COURT: Okay. What says the defense?

21 MR. SMITH: Without objection, Your Honor.

22 THE COURT: Without objection, State's Exhibits One  
23 through Five, 10 through 12 into evidence.

24 (State's Exhibit Nos. 1, 2, 3, 4, 5, 10, 11, 12,  
25 photographs, received into evidence.)

SCOTT AARON HALL - DIRECT BY SLOCUM

1 MR. SLOCUM: Your Honor, at this time may the  
2 witness step down so we can publish to the jury?

3 THE COURT: Sure. I would ask the witness to speak  
4 up loud since you're facing away from the court reporter.

5 BY MR. SLOCUM:

6 Q. Mr. Hall, this is State's Exhibit One. Can you  
7 please tell the jury what that is?

8 A. That's a picture of the front of Captain D's  
9 Restaurant.

10 Q. The Captain D's where you work?

11 A. Yes, sir.

12 Q. Where is that Captain D's located?

13 A. Whiskey Road.

14 Q. In the City limits of Aiken?

15 A. Yes, sir.

16 Q. Aiken County?

17 A. Yes, sir.

18 Q. State's Exhibit Two, what is that?

19 A. Those are the trash -- those are the trash, where  
20 we have to take the trash cans back there. That is the  
21 back of, I believe, Dunkin' Donuts and Five Guys which is  
22 directly right beside our restaurant.

23 Q. Do you use those trash cans?

24 A. Yes, sir.

25 Q. Can you please point out Captain D's?

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SCOTT AARON HALL - DIRECT BY SLOCUM

1 A. That's ours right there, those cans.

2 Q. And State's Exhibit Three, what is this we're  
3 looking at?

4 A. That's a little bit past the trash cans, just a  
5 little bit in front of it. And that's the back door in  
6 which we come. This is the direction we come to take the  
7 trash back there.

8 Q. State's Exhibit Four, what are we looking at here?

9 A. That's the direction in which I was approached by  
10 the two black males. They ran up over our sidewalk, right  
11 here, and then they came up, right there, exactly where  
12 that trash can is.

13 Q. That's where you were?

14 A. Yes, sir.

15 Q. State's Exhibit Five?

16 A. That's, once again, the trash can. That exact  
17 general area, right where I was located. I was right  
18 there at the door.

19 Q. Where did they put the gun to your head?

20 A. Just about right, like, right there. It was a  
21 camera, like, literally focused right down there so about  
22 right there. It was right -- as soon as I turned around  
23 to grab the trash can, they already had it to my head.

24 Q. And State's Exhibit 10, what are we looking at  
25 here?

APP'X 90

SCOTT AARON HALL - DIRECT BY SLOCUM

1 A. That's the front of the Captain D's Restaurant.  
2 That's the registers. And right in here, right down  
3 here -- which you might not be able to see this -- this is  
4 where they asked me to place my head down and get down on  
5 all fours.

6 Q. Was this the location where the money was taken?

7 A. Yes, sir. That's the safe as well. Yes, sir.

8 Q. State's Exhibit 11?

9 A. This is the -- that's the exact spot to where I was  
10 forced to lay down. And that's where Devin was and the  
11 gunman was right here demanding money out of the safe.  
12 Right there.

13 Q. Okay. And 12?

14 A. And that's the same thing. That's where he  
15 actually got the bag from to get the money from, little  
16 plastic bag right there.

17 Q. Okay. You can have a seat.

18 A. (Complying.)

19 Q. About how long did this robbery take? How long did  
20 it occur?

21 A. Two to three minutes.

22 Q. And how long were you in the freezer?

23 A. For about five minutes.

24 Q. What did you do after you got out of the freezer?

25 A. We eased our way out of the cooler, well, the

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SCOTT AARON HALL - CROSS BY SMITH

1 freezer. And we just made our way to the front of the  
2 store because that's where the phone was and everything.  
3 And then Devin called 9-1-1. I just followed behind him.

4 Q. Did you talk to law enforcement when they showed  
5 up?

6 A. Yes, sir.

7 Q. Did you tell them what you told us here today?

8 A. Yes, sir.

9 Q. Did you give a written and a verbal statement?

10 A. Yes, sir.

11 MR. SLOCUM: Beg the Court's indulgence, Your  
12 Honor.

13 THE COURT: Sure.

14 (Pause.)

15 BY MR. SLOCUM:

16 Q. Did you feel free to leave at any time?

17 A. No, sir.

18 MR. SLOCUM: Please answer any questions Mr. Smith  
19 has for you. Thank you.

20 THE WITNESS: Yes, sir.

21 THE COURT: Cross-examination?

22 MR. SMITH: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. SMITH:

25 Q. Mr. Hall, thanks for coming today.

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## SCOTT AARON HALL - CROSS BY SMITH

- 1 A. You're welcome.
- 2 Q. Do you know John Upson?
- 3 A. No, sir.
- 4 Q. Did you ever identify John Upson?
- 5 A. No, sir.
- 6 Q. Were you ever shown a photo lineup?
- 7 A. No, sir.
- 8 Q. Did you ever see anybody like that in the store  
9 before?
- 10 A. No, sir.
- 11 Q. Now, when you went -- when you were brought to the  
12 front of the store --
- 13 A. Uh-huh.
- 14 Q. -- who was at the front of the store?
- 15 A. Devin.
- 16 Q. Devin?
- 17 A. Yes, sir.
- 18 Q. And who's he?
- 19 A. He was one our employees as well.
- 20 Q. Was he the manager that night?
- 21 A. Yes, sir.
- 22 Q. Okay. Is he the only one that had access to the  
23 safe?
- 24 A. Yes, sir.
- 25 Q. Okay. Did you ever see the face of the guy who

## SCOTT AARON HALL - CROSS BY SMITH

1 stayed in the back of the store?

2 A. No, sir.

3 Q. Okay. But the guy that escorted you to the front  
4 of the store, you had a first split-second or a few  
5 seconds or whatever, you could tell that he had a mark on  
6 his eye?

7 A. Yes, sir.

8 Q. Either a teardrop tattoo or a birthmark or  
9 something?

10 A. Yes, sir.

11 Q. Anything else that you saw about him?

12 A. No, sir. Just that he had dreads as well.

13 Q. Okay. Now, when you were face down on the ground,  
14 were you laying on the ground?

15 A. Yes, sir. My knees were on the ground, and my  
16 hands. He told me to get on all fours.

17 Q. Was your belly on the ground?

18 A. No, sir. Kind of like on all fours. Like, a  
19 crawling position as well with my head, like, down.

20 Q. Your head was tucked down?

21 A. Yes, sir.

22 Q. Okay. The way your head was, you couldn't see the  
23 safe --

24 A. No, sir.

25 Q. -- right? Okay. And you couldn't see the cash

SCOTT AARON HALL - CROSS BY SMITH

- 1 register?
- 2 A. No, sir.
- 3 Q. And you didn't see any of the money?
- 4 A. Huh-uh.
- 5 Q. Okay. When you were taken -- after you stood up  
6 and went to the back -- when you went to the back, was the  
7 freezer open or closed?
- 8 A. It was open. I was waiting, really, for them to  
9 put us in there. Jameshia was already in there as well.
- 10 Q. Could you tell if it had been closed and they  
11 opened it when you came back, or was it just open?
- 12 A. It was just open.
- 13 Q. It was just open. You said that they had, that  
14 both of them had bandanas on their faces?
- 15 A. Yes, sir.
- 16 Q. When was the first time that you told somebody  
17 that?
- 18 A. It should've been the night that we got robbed.  
19 That night I told officers that.
- 20 Q. Okay. Do you remember the heights? How tall they  
21 were?
- 22 A. The man with the dreads, the gunman, he was a  
23 little bit shorter than John.
- 24 Q. You say John, but you don't know who --
- 25 A. No.

APP'X 95

SCOTT AARON HALL - CROSS BY SMITH

1 Q. -- the other guy was?

2 A. No, sir.

3 Q. So the gunman was shorter than the guy that was  
4 standing in the back?

5 A. Yes, sir.

6 Q. Now -- beg the Court's indulgence.

7 THE COURT: Sure. (Pause.)

8 BY MR. SMITH:

9 Q. Scott, could you tell us -- could you tell us  
10 exactly what each of them had on? Start with the guy with  
11 the gun.

12 A. The gunman had on a hooded sweatshirt and black, it  
13 was black sleeves and surgical gloves, and black  
14 sweat pants, and black shoes as well.

15 Q. Okay. Did he have a bandana on?

16 A. Yes, sir. Black bandana.

17 Q. And he had a hood over his head?

18 A. Yes, sir.

19 Q. How much of his face could you see?

20 A. Just about that much (indicating). Just from,  
21 like, the bottom of his nose to about his forehead and his  
22 hair. His dreads were already out. I saw those as well.

23 Q. Was the bandana covering his mouth or was --

24 A. Yes, sir. It was teetering, covering half his nose  
25 and covering the remainder of his mouth as well.

APP'X 96

## SCOTT AARON HALL - REDIRECT BY SLOCUM

1 Q. So it was perched on there?

2 A. Yes, sir.

3 Q. The other guy, the guy that was in the back --

4 A. Uh-huh.

5 Q. -- what was he wearing?

6 A. A black hoody, black hooded-sweatshirt, black  
7 pants, and a big, like, bulky black sweatshirt as well.

8 He had -- a lot bigger than the gunman.

9 Q. Okay. Did he have his hood up?

10 A. Yes, sir.

11 Q. And he had a bandana on?

12 A. Yes, sir.

13 Q. And how much of his face could you see?

14 A. Not really any at all.

15 MR. SMITH: Nothing further, Your Honor.

16 THE COURT: Okay. Any redirect?

17 MR. SLOCUM: Briefly, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. SLOCUM:

20 Q. Scott, do you ever work up front?

21 A. No, sir.

22 Q. Where do you work at Captain D's?

23 A. I work in the back, in the cooking.

24 Q. Were you working two days prior to the --

25 A. No, sir. I don't believe so.

SCOTT AARON HALL - RECROSS BY SMITH

1 Q. -- robbery? Was there money missing from the safe?

2 A. Yes, sir. That night.

3 Q. Were you paying more attention to the gunman or the  
4 guy behind the gunman?

5 A. The gunman.

6 Q. And about how long did it, did it take when they  
7 approached you, took you back inside?

8 A. Two, three minutes.

9 Q. The whole thing?

10 A. Yes, sir.

11 Q. I believe you testified earlier it was a matter of  
12 seconds before the gun was --

13 A. Yes, sir.

14 Q. -- to your head? About how much time did you have  
15 to look at both suspects?

16 A. Just a few seconds.

17 Q. It happened pretty quick?

18 A. Yes, sir.

19 MR. SLOCUM: That's all the questions I have, Your  
20 Honor.

21 THE COURT: Recross?

22 MR. SMITH: Briefly, Your Honor.

23 RECROSS-EXAMINATION

24 BY MR. SMITH:

25 Q. When you were up front and you were face down, you

APP'X 98

## SCOTT AARON HALL - RECROSS BY SMITH

1 couldn't see the safe?

2 A. No, sir.

3 Q. You couldn't see the registers?

4 A. No, sir.

5 Q. You don't handle the registers, do you?

6 A. No, sir.

7 Q. So you don't know for sure if money was taken?

8 A. No, sir. I had to count the money, whatever was  
9 left over that we had in the store after the money was  
10 taken.

11 Q. But you don't know if money was taken?

12 A. No, sir. I just had to count the money that was  
13 left in the drawers. Yes, sir.

14 MR. SLOCUM: Thank you.

15 THE COURT: Thank you for your testimony, sir. You  
16 can step down.

17 THE WITNESS: Yes, sir.

18 THE COURT: Solicitor?

19 MR. MOLONY: Thank you, Your Honor. The State  
20 calls Detective Billy Royster.

21 WILLIAM ROYSTER, having been duly sworn, was  
22 examined and testified as follows:

23 THE CLERK: Have a seat in the witness box.

24 State your full name for the Court and spell your  
25 last, please.

WILLIAM ROYSTER - DIRECT BY MOLONY

1 THE WITNESS: William Royster, R-O-Y-S-T-E-R.

2 DIRECT EXAMINATION

3 BY MR. MOLONY:

4 Q. Detective Royster, where are you employed at?

5 A. Aiken Department of Public Safety.

6 Q. And what are your duties there now?

7 A. I'm a criminal investigator.

8 Q. Prior to becoming an investigator there, what if  
9 anything did you do?

10 A. I've been working there for 22 years. I've spent  
11 time in patrol, worked my way up to a sergeant in the  
12 patrol division until I was promoted into the criminal  
13 investigative division eight years ago.

14 Q. Were you working as a criminal investigator on the  
15 night of November 27th, 2013?

16 A. Yes, sir. I was the on-call detective for that  
17 night.

18 Q. And explain to the jury how you became involved  
19 initially in this case.

20 A. Since we don't -- detectives don't work 24 hours a  
21 day. We have somebody on call. That was my week to be on  
22 call for any major crime that the patrol division would  
23 need help investigating.

24 So shortly after the crime was reported, they  
25 called me and I responded.

APP'X 100

WILLIAM ROYSTER - DIRECT BY MOLONY

1 Q. Describe what the scene looked like when you  
2 arrived at Captain D's that night.

3 A. There was several officers there. The employees  
4 were there. They were writing statements and we were  
5 trying to determine what happened. I looked around to see  
6 what was in the restaurant at that time, took some  
7 photographs of the safe, where it was, and the condition  
8 it was in at the time.

9 Q. You said "employees." Throughout your  
10 investigation, were you able to determine how many actual  
11 employees were working at the time of this armed robbery?

12 A. There was three at the establishment when it was  
13 robbed.

14 Q. All right. Other than the two we've heard from  
15 today, who was the third employee that was working that  
16 night?

17 A. Devin Johnson.

18 Q. Devin Johnson?

19 A. Yes.

20 Q. He was the one the defense referred to earlier as  
21 the manager?

22 A. Yes. He was the person in charge that night.

23 Q. That night. Okay. Now, throughout your  
24 investigation, were you able to determine if any video  
25 surveillance images were able to be taken from the Captain

APP'X 101

WILLIAM ROYSTER - DIRECT BY MOLONY

1 D's that night?

2 A. They had one but the recording device was broken  
3 and did not work.

4 Q. Did you try to get it?

5 A. They tried to get it, yes. It would -- there was  
6 nothing there.

7 Q. What about any of the surrounding businesses?

8 A. The camera angles that they showed did not show us  
9 anything.

10 Q. What about fingerprints? Did you -- were  
11 fingerprints lifted from the scene?

12 A. No. They were talking about how the, both subjects  
13 that came in were wearing gloves.

14 Q. Now, did you receive an e-mail from one of the  
15 employees in this case that night?

16 A. Yes, I did.

17 Q. And who did you receive an e-mail from?

18 A. From Ms. Alston.

19 Q. At what point in your investigation did the  
20 Defendant become a suspect in this case?

21 A. When I received the e-mail about 11:30, 12 o'clock  
22 that night.

23 Q. When were the arrest warrants acquired for the  
24 Defendant?

25 A. That Thursday morning.

APP'X 102

WILLIAM ROYSTER - DIRECT BY MOLONY

1 Q. Thursday, the next morning?

2 A. Yes.

3 Q. Now after these arrest warrants were acquired, did  
4 you have the opportunity to speak with the Defendant?

5 A. Yes, I did. By phone.

6 Q. And when was that?

7 A. Thanksgiving afternoon about five o'clock. He  
8 called my cell phone.

9 Q. Okay. And what's your cell phone number?

10 A. 803-270-1759.

11 Q. And were you able to look at your cell phone when  
12 he called to see what number he was calling from?

13 A. Yes.

14 Q. And what number was that?

15 A. 803-646-6125.

16 Q. Did you have a conversation with the Defendant at  
17 that time?

18 A. Yes, we did.

19 Q. Did you inform the Defendant that he was wanted --

20 A. Yes, I did.

21 Q. -- for this crime at that time?

22 A. I told him I had a warrant for his arrest.

23 Q. What did the Defendant -- what, if anything, did he  
24 tell you on the phone at that time?

25 MR. SMITH: Objection, Your Honor.

APP'X 103

WILLIAM ROYSTER - DIRECT BY MOLONY

1 THE COURT: Okay.

2 MR. SMITH: Statement of hearsay.

3 THE COURT: Okay. Let -- have the lawyers  
4 approach for just a second.

5 (Off-the-record discussion.)

6 THE COURT: Mr. Smith, concerning that objection?

7 MR. SMITH: Your Honor, I withdraw my objection.

8 THE COURT: Withdraw it at this time. Thank you  
9 very much.

10 All right. Will you repeat your question,  
11 Solicitor, so we can kind of, you know, see where we are?

12 MR. MOLONY: I'll do it, Your Honor.

13 Q. Detective Royster, after you were able to determine  
14 that there was a cell phone call coming in on your phone,  
15 did you answer the phone at that time?

16 A. Yes, I did.

17 Q. And who was on the other end of the phone?

18 A. John Upson.

19 Q. What did the Defendant tell you at that time?

20 A. Told me that he was downtown that evening at a  
21 comedy show.

22 Q. Did he tell you -- what, if anything, did he say he  
23 did after the comedy show?

24 A. That it was -- he was at a bar afterwards.

25 Q. Did he mention anything in regards to his phone

WILLIAM ROYSTER - DIRECT BY MOLONY

1 records?

2 A. He told me to get his cell phone records to find  
3 out where he was.

4 Q. Okay. Again, what time about, roughly, was this  
5 conversation?

6 A. Five o'clock Thanksgiving Day.

7 Q. When was the Defendant ultimately arrested?

8 A. The next Monday, the 2nd of December.

9 Q. And what, if anything, did you do in regards to the  
10 Defendant's cell phone records on that same day?

11 A. I obtained a search warrant for Verizon to obtain  
12 his phone records for the time period around the robbery.

13 Q. Now, were these records from the same number you  
14 had just spoken with him?

15 A. Yes, they were.

16 Q. Did you actually receive these records from  
17 Verizon?

18 A. Yes, I did.

19 Q. Throughout your investigation, were you able to  
20 determine whether or not there was actually a comedy show  
21 in Aiken that night?

22 A. Yes, there was.

23 Q. And where was this comedy show located?

24 A. Aiken Center of the Arts.

25 Q. Were you able to determine approximately what time

## WILLIAM ROYSTER - DIRECT BY MOLONY

- 1 that show was supposed to start?
- 2 A. It was scheduled to start at eight P.M. that night.
- 3 Q. And what time, roughly, was it supposed to end?
- 4 A. It was supposedly an after-party at a bar near  
5 there starting around 11.
- 6 Q. And where was this bar?
- 7 A. Hotel Aiken.
- 8 Q. Is that also downtown?
- 9 A. Yes it.
- 10 Q. Where was this comedy show actually held?
- 11 A. Aiken Center of the Arts is located at  
12 South..
- 13 Q. Were you able to determine the phone number for  
14 Aiken Center of the Arts?
- 15 A. Yes, sir. It's 803-641-9064.
- 16 Q. What about the phone number for Captain D's, the  
17 one on Whiskey Road here in Aiken?
- 18 A. Yeah, it's 803-641-6476.
- 19 Q. Now in regards to this gunman, what, if any,  
20 suspects do you have at this time as to who the gunman  
21 was?
- 22 A. I don't have a suspect as to who the gunman was.
- 23 Q. You don't know who he was at this time?
- 24 A. No, I do not. It's still an ongoing investigation.
- 25 Q. What about in regards to any other individuals, not

WILLIAM ROYSTER - DIRECT BY MOLONY

1 the gunman, but that may have been involved in this crime  
2 that night?

3 A. Yes, sir. Other suspects have been developed.

4 Q. At this time in regards to that night, have any  
5 other arrests been made?

6 A. One other arrest was made, a person named Cassandra  
7 Ellis on a charge of misprision of a felony.

8 Q. But in regards to the actual planning and the  
9 robbery actually being carried out, have any other charges  
10 actually been brought at this time?

11 A. No, nobody, no, sir.

12 Q. And what's the status of the investigation today?

13 A. It's ongoing.

14 Q. Now Cassandra Ellis, who is she?

15 A. She is an employee there and a friend of John  
16 Upson's.

17 Q. Okay. And who is Cassandra Ellis's son?

18 A. William Keels.

19 Q. Devin Johnson, the third suspect -- I mean, the  
20 third witness that was actually an employee and in the  
21 store at the time of the armed robbery, has he been  
22 charged with anything?

23 A. No, no.

24 Q. At this time, is he a suspect?

25 A. No, not at all.

APP'X 107

## WILLIAM ROYSTER - CROSS BY SMITH

1 Q. Now the defense brought up a name "Norid-Deen."

2 Does that name ring a bell?

3 A. Yes, it does. Ishmael Norid-Deen.

4 Q. Why does his name ring a bell in this case?

5 A. Through the course of the investigation he's known  
6 to John Upson. And through Mr. Norid-Deen's cell phone  
7 records I was able to make a connection between the two,  
8 particularly on the night in question.

9 Q. At this time again, no charges have been brought --

10 A. Oh, no.

11 Q. -- against Norid-Deen?

12 A. No.

13 MR. MOLONY: Beg the Court's indulgence, Your  
14 Honor.

15 (Pause.)

16 MR. MOLONY: Thank you. Please answer any  
17 questions the defense has, Detective.

18 THE COURT: Cross-examination?

19 MR. SMITH: Yes, sir.

20 CROSS-EXAMINATION

21 BY MR. SMITH:

22 Q. Good afternoon, Detective Royster.

23 You said you had checked for video surveillance at  
24 Captain D's?

25 A. Yes.

## WILLIAM ROYSTER - CROSS BY SMITH

1 Q. They've got video cameras?

2 A. They got cameras but their hard drive is broken.  
3 They didn't know how long it had been down.

4 Q. Okay. How did you determine that the hard drive  
5 was broken?

6 A. They had it examined and they told me that they  
7 sent it off to get it, see what could be found on it. And  
8 they said there was nothing that they could retrieve from  
9 it.

10 Q. Did you ever examine it?

11 A. No.

12 Q. Did you ever refer to -- send it to anybody that --

13 A. No.

14 Q. -- the information, taking it to people to check it  
15 out?

16 A. No, sir.

17 Q. Okay. Now, this case is a, basically an eyewitness  
18 identification case; isn't it?

19 A. Yes.

20 Q. And in an identification case, eyewitness  
21 identification case it's very important to get  
22 descriptions of the suspects?

23 A. Yes.

24 Q. And so that night when you got descriptions from  
25 the employees that were there, you encouraged them to be

## WILLIAM ROYSTER - CROSS BY SMITH

1 detailed?

2 A. It's hard to get details from somebody who's that  
3 scared.

4 Q. Yes, sir.

5 A. They were quite upset. Mr. Hall was still  
6 shaking. He was visibly shaking.

7 Q. You made suggestions to them of maybe writing about  
8 what they were wearing or maybe --

9 A. I asked them questions. Ms. Alston kept telling me  
10 that she had seen -- he had been in the store, that he had  
11 talked to another employee just a couple days before.

12 Q. But none of that's reflected in any of their  
13 statements, is it?

14 A. It was not in their written statement, no.

15 Q. In verbal statements?

16 A. Yes.

17 Q. Did you record any of those statements?

18 A. No, I did not.

19 Q. Okay. So in your report I imagine you wrote down  
20 what they told you?

21 A. I wrote a lot of it down. Yes, sir.

22 Q. Okay. Can you show me in your report -- do you  
23 have your report with you?

24 A. No, sir. I don't.

25 Q. Would you like to see a copy?

WILLIAM ROYSTER - CROSS BY SMITH

1 A. Yeah.

2 MR. SMITH: What I'm about to show Detective  
3 Royster is a case notes and summary. I'd like if I could  
4 have this marked as Defendant's Exhibit Two.

5 (Defendant's Exhibit No. 2, case notes and summary,  
6 marked for identification.)

7 BY MR. SMITH:

8 Q. If you'd take a look at that. Tell me if that's a  
9 copy of your case notes summary.

10 A. Just, this is the case notes. This part is the  
11 affidavit to the warrant.

12 Q. Okay. In your case notes that you have there, can  
13 you point out where you wrote down where they told you  
14 about the bandana?

15 A. I didn't. I wrote down that I went and talked to  
16 Mr. Keels.

17 Q. Okay. Can you tell me in your case notes, show me  
18 in your case notes where you wrote down anything about  
19 surgical gloves?

20 A. No, I didn't.

21 Q. You didn't write that down?

22 A. No.

23 Q. Wouldn't that be important to put in a report?

24 A. It's -- somebody wearing gloves committing a crime  
25 is kind of standard nowadays.

APP'X 111

## WILLIAM ROYSTER - CROSS BY SMITH

1 Q. So it wouldn't be important to write down?

2 A. It's not critical, no.

3 Q. That they were wearing bandanas?

4 A. Not really. I mean, I go by what -- what I need to  
5 make my case. What I had was Ms. Alston telling me that  
6 she had seen him. He was in the store two days prior. I  
7 talked to a fellow employee named Williams Keels. I left  
8 the restaurant and went to Mr. Keels' house to talk with  
9 him to see who was in there talking with him that two days  
10 before.

11 Q. You talked about videotapes at surrounding  
12 businesses and didn't you check with any surrounding  
13 businesses to see if --

14 A. I went in to Baskin Robbins. I asked them. They  
15 didn't have anything. And Five Guys, which is part of the  
16 same building as the Baskin Robbins, didn't have anything.

17 Q. And on the other side there's a Pizza Hut.

18 A. The other side is a Pizza Hut but from what I was  
19 being told, they had probably come -- from what Mr. Hall  
20 was saying, he thought they came from behind the Staples  
21 store. But being dark at night, nothing shows.

22 Q. Did you get a description of a vehicle from  
23 Mr. Hall?

24 A. No.

25 Q. Okay.

## WILLIAM ROYSTER - CROSS BY SMITH

1 A. No vehicle was seen.

2 Q. Okay.

3 (Defendant's Exhibit No. 3, 4, and 5, photographs,  
4 marked for identification.)

5 BY MR. SMITH:

6 Q. I'm going to hand you what's been marked as  
7 Defendant's Exhibit Number Three. Can you tell the jury  
8 what that picture shows?

9 A. It's the front part of Captain D's on Whiskey Road.

10 Q. Okay. And I'm going to show you Number Four,  
11 Defendant's Exhibit Four.. What does that show?

12 A. It looks like the -- looking towards the rear of, I  
13 assume it's Staples because it has Staples on the door  
14 there.

15 Q. Yes, sir. Let me show you Defendant's Exhibit  
16 Number Five. Can you tell me what that shows?

17 A. Same as the second picture, just closer.

18 Q. It's the back corner of Staples?

19 A. Yes.

20 Q. This is Staples. You said Scott Hall told you they  
21 probably came from back behind Staples?

22 A. He said he thought they did.

23 Q. Okay. Do these pictures fairly and accurately  
24 represent Captain D's?

25 A. Yes, sir.

## WILLIAM ROYSTER - CROSS BY SMITH

1 Q. And the back side of Staples?

2 A. Yes, sir.

3 MR. SMITH: Your Honor, at this time I move to admit  
4 into evidence Defendant's Exhibits Three, Four and Five.

5 THE COURT: What says the State?

6 MR. MOLONY: No objection, Your Honor.

7 THE COURT: Without objection Three, Four and Five  
8 on behalf of the State (verbatim).

9 Mr. Smith, what are your intentions concerning  
10 Two? Is that just for identification only?

11 MR. SMITH: Yes, sir.

12 THE COURT: Case notes. I want to make sure.  
13 Thank you.

14 (Defendant's Exhibit Nos. 3, 4, and 5, photographs,  
15 received into evidence.)

16 BY MR. SMITH:

17 Q. In State's (verbatim) Five, can you tell me what  
18 that looks like on the top back corner of the building of  
19 Staples?

20 A. It could be a camera.

21 Q. Looks like a video camera?

22 A. Could be.

23 Q. Surveillance camera. Did you talk to Staples about  
24 that camera?

25 A. No, sir. I did not.

## WILLIAM ROYSTER - CROSS BY SMITH

1 Q. It's possible that if there's a camera shining  
2 there that it would have seen the entry of these two  
3 fellows?

4 A. From that distance at night in that dark --

5 Q. You're not sure?

6 A. -- I would be very doubtful of it.

7 Q. But it's possible?

8 A. Oh, it's possible.

9 Q. But you didn't check?

10 A. No.

11 Q. Are there any, any other source of video cameras in  
12 the area? Traffic cameras?

13 A. They don't record.

14 Q. The traffic cameras --

15 A. No, sir.

16 Q. -- in Aiken don't record?

17 A. No, sir. Those do not record.

18 Q. Okay. Now you had a report of the guy with the gun  
19 had a teardrop tattoo and dreads?

20 A. Yes. That's the way they described him.

21 Q. Did you check to see if anybody had been booked at  
22 the Aiken County Detention Center --

23 A. Yes, I did.

24 Q. -- to see if anybody had a teardrop tattoo?

25 A. I went through the whole jail system online with

WILLIAM ROYSTER - CROSS BY SMITH

1 the general description that they gave. I found one  
2 person who matched that description, and when I checked on  
3 their name I found out they were incarcerated in the  
4 Department of Corrections at the time of the robbery.

5 Q. How many people came up in your search of people  
6 with teardrop tattoos?

7 A. One.

8 Q. One with a teardrop tattoo?

9 A. Oh, the tattoo? There was probably several with a  
10 tattoo, but only one with long dreads.

11 Q. Long dreads and a tattoo?

12 A. Yeah.

13 Q. Now, you didn't check for any fingerprints; right?

14 A. That's correct.

15 Q. Because they were wearing gloves?

16 A. Yes.

17 Q. You didn't check for any DNA?

18 A. No, sir.

19 Q. You didn't get any description of a vehicle?

20 A. No vehicle was seen.

21 Q. And the description that you had of the suspects  
22 that night when you left Captain D's was a very -- it  
23 wasn't a very full description, was it?

24 A. Oh, no, no.

25 Q. Did you send Jameshia Alston home to look on

APP'X 116

## WILLIAM ROYSTER - CROSS BY SMITH

1 Facebook?

2 A. No, I didn't. I wouldn't want her to do that,  
3 really. I'd much rather develop a suspect and show a  
4 lineup.

5 Q. Now you talked about phone numbers for -- that  
6 you've found that were connected with John Upson. You  
7 said Ishmael Norid-Deen was a phone number that had been  
8 in contact with John Upson?

9 A. Yes.

10 Q. Okay. Did you ever run a photo lineup of John  
11 Upson or -- excuse me. Oh, answer that.

12 A. No, I did not.

13 Q. Did you ever run one of Ishmael Norid-Deen?

14 A. I did. It was a long shot because he really didn't  
15 meet the physical description, but just to make sure I  
16 did. And I showed it to Devin Johnson.

17 Q. You didn't show it to anybody else, did you?

18 A. No, I didn't. Devin was the one that told me he  
19 would know that person if he saw him again. He said, "I  
20 got a good look at his eyes. I would know that person if  
21 I saw him again."

22 Q. Now, Ishmael Norid-Deen used to work at Captain  
23 D's, didn't he?

24 A. I recently learned that, yes.

25 Q. Okay. And did you ever find the phone number for

## WILLIAM ROYSTER - CROSS BY SMITH

1 Devin Johnson?

2 A. No, I did not. His phone was stolen that night.

3 And I have -- when I needed to talk to him, I just went by  
4 the restaurant to talk with him.

5 Q. You never learned what his phone number was?

6 A. He did give me the number of the phone that was  
7 stolen.

8 Q. Okay. Didn't you pull the phone records for that  
9 phone number?

10 A. Yeah, I did. It was mixed up in my notes with  
11 everything else I had. And in checking on them, trying to  
12 find out which carrier it was, yeah, I did include that  
13 number to a warrant for AT&T for another phone number.

14 Q. Okay. Did you notice any connection of phone calls  
15 with Ishmael Norid-Deen?

16 A. Yes, I did.

17 Q. That night?

18 A. Yes, sir. I did.

19 Q. The night of the robbery?

20 A. Yes, sir. There was, I believe, four attempts but  
21 it appeared that no connection was made.

22 Q. Okay. And in your opinion Devin Johnson had  
23 something to do with this robbery, didn't he?

24 A. No, not at all. It wouldn't make sense.

25 Q. Didn't you tell Devin Johnson that you know he was

## WILLIAM ROYSTER - CROSS BY SMITH

1 involved with this?

2 A. No, I did not.

3 Q. You didn't interview Devin Johnson yesterday  
4 morning?

5 A. Yes, we did. Myself and Steve Miano.

6 Q. And in that interview didn't you tell Devin Johnson  
7 that you know he had something to do with this?

8 A. No, I did not.

9 Q. Okay.

10 A. I never really -- it didn't make sense for Devin to  
11 be involved. He left a lot of money in the safe. If he  
12 was involved, why wouldn't he give them all the money?

13 Q. Do you have any other warrants pending in this  
14 case?

15 A. No, I do not.

16 Q. You don't have anybody else out there?

17 A. No.

18 Q. But you have other suspects; right?

19 A. Oh, yes.

20 Q. Ishmael Norid-Deen's one of them?

21 A. As a person who could be involved, yes.

22 Q. Did you run anybody else's phone records that  
23 night?

24 A. Anybody else's?

25 Q. Yeah. Did you run --

## WILLIAM ROYSTER - CROSS BY SMITH

1 A. William Keels'.

2 Q. You did William Keels'. Did you do Jameshia  
3 Alston's.

4 A. Whose?

5 Q. Jameshia Alston's?

6 A. No.

7 Q. Did you run Scott Hall's phone records?

8 A. No.

9 Q. Do you admit or deny telling Devin Johnson that you  
10 were going to help him remember what we need to know?

11 A. I don't recall ever saying that to Devin Johnson.

12 Q. You don't remember or you deny saying that?

13 A. No, I did not say that, no.

14 Q. You're going to help him?

15 A. No.

16 Q. Who gave you the description -- since it's not in  
17 your report, do you remember who gave you the description  
18 of the teardrop tattoo and dreads?

19 A. That was Devin.

20 Q. Devin told you that?

21 A. Yeah.

22 MR. SMITH: Beg the Court's indulgence.

23 (Pause.)

24 BY MR. SMITH:

25 Q. Now there was -- we're here today for, for charges

## WILLIAM ROYSTER - CROSS BY SMITH

1 against John Upson for armed robbery and two counts of  
2 kidnapping; right?

3 A. Yes.

4 Q. But there were three people inside of the store?

5 A. That's correct.

6 Q. And wasn't there another indictment for kidnapping?

7 A. As far as I know there was.

8 Q. And it's not part of this case?

9 A. Apparently not, no.

10 Q. Do you know why that indictment was pulled?

11 A. No, I don't.

12 Q. Okay. Judge, can I request a sidebar?

13 THE COURT: Sure.

14 (Off-the-record discussion.)

15 BY MR. SMITH:

16 Q. Detective Royster, isn't it true that there is a  
17 video of your interview with Devin Johnson from yesterday?

18 A. Yes.

19 Q. Okay. And isn't it true that on that video you  
20 have accused him of playing a part in this?

21 A. Steve Miano and I kept talking with him about it.

22 I didn't accuse him. It was Steve Miano that kept  
23 badgering, good cop-bad cop, and talking with him just to  
24 make sure.

25 I don't remember ever saying that to him during

WILLIAM ROYSTER - REDIRECT BY MOLONY

1 that interview.

2 Q. You deny saying that?

3 A. Yeah. I don't -- I don't recall saying that.

4 Q. Do you think that Devin was truthful or do you  
5 think he's part of this case?

6 A. I think he was being truthful. There was a good  
7 bit of money left behind and his cell phone got stolen. I  
8 mean, it wouldn't make sense for him to be a part of it.

9 Q. Okay.

10 THE COURT: All right. We'll put on the record  
11 what we discussed sidebar in just a little bit.

12 MR. SMITH: Okay.

13 THE COURT: So you're good.

14 MR. SMITH: Thank you, Your Honor.

15 THE COURT: Redirect?

16 MR. MOLONY: Thank you, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. MOLONY:

19 Q. Detective Royster, why was Devin Johnson being  
20 interviewed yesterday?

21 A. When we got to looking at phone records we saw that  
22 he called Mr. Norid-Deen that evening several times from  
23 his cell phone. And we learned that Mr. Norid-Deen  
24 received a phone call from Captain D's that night also.  
25 All those calls taking place at about the same time,

## WILLIAM ROYSTER - REDIRECT BY MOLONY

1 roughly 10 P.M.

2 We got him in to talk to him about that. He was  
3 telling us, and he stuck with his story, that he knows  
4 Mr. Norid-Deen and he does not have a car. He lives in  
5 New Ellenton, and he was trying to get a ride home after  
6 work.

7 MR. SMITH: Objection, Your Honor. Hearsay.

8 THE COURT: I believe it would be hearsay. And  
9 I'll sustain the objection and strike it from the record.  
10 And caution or instruct the jury, rather, to disregard  
11 that last bit of testimony concerning what Devin Johnson  
12 allegedly told this officer.

13 You may proceed.

14 BY MR. MOLONY:

15 Q. Don't tell me what anybody said. But subsequent to  
16 the interview with Devin Johnson, was he arrested for  
17 anything involved in this case?

18 A. Not at all, no.

19 Q. Now, had you known or after that interview had you  
20 thought that he was involved, would you have brought  
21 charges against him?

22 A. Yes, I would have, if I could prove it. But, no,  
23 he is not a suspect. He has not been a suspect.

24 Q. Was he under subpoena to be here today?

25 A. As far as I know, he was.

1 Q. Again, who did you say that he was calling?

2 A. Norid-Deen.

3 Q. And what makes Norid-Deen, what raised the red flag  
4 as to Norid-Deen?

5 A. Phone records and his connection to John Upson.

6 Q. So since the day of the armed robbery, November  
7 27th, that night, later that night when you actually  
8 received the e-mail and able to get a name from Jameshia  
9 and everything else, since that day and John Upson became  
10 a suspect and arrest warrants were drawn, has anything  
11 changed as to John Upson's involvement in this case?

12 A. Absolutely none.

13 MR. MOLONY: No further questions, Your Honor.

14 THE COURT: Okay. Thank you for your testimony,  
15 Officer. You can step down.

16 Madam Forelady, and ladies and gentlemen of the  
17 jury, we're going to go ahead and recess now for the  
18 evening.

19 I understand that there will be potentially a  
20 couple more witnesses for the State and if they are called  
21 we'll do those in the morning.

22 We're going to start back at nine o'clock in the  
23 morning, a little bit earlier than we normally do but I  
24 want to start back at nine. So please be prompt in  
25 getting to your jury room by nine o'clock. If you're not

1 prompt, then we can't start any business.

2 So please allow yourself plenty of time, make sure  
3 everything is taken care of and in order with your  
4 personal affairs before you come.

5 I remind you, there may be some curiosity as far as  
6 what you've been doing today with friends and family  
7 members. And, I mean, there's nothing wrong in saying  
8 that you're on a trial jury but leave it at that. Don't  
9 discuss with anybody you come into contact with anything  
10 about this case and certainly not, no discussion among  
11 yourselves.

12 And we'll see you back promptly at nine o'clock in  
13 the morning. Hope you have a great evening.

14 (Jury exits courtroom at 4:52 P.M.)

15 THE COURT: Okay. Gentlemen, we discussed at a  
16 sidebar conference, first, the defense wants to play while  
17 the officer's on the stand -- I understand, and you  
18 correct me, Mr. Smith, if I'm misstating anything.

19 MR. SMITH: Yes, sir.

20 THE COURT: You wanted to play a redacted version  
21 of this video that was testified to. And that's going to  
22 be done in the morning. Give you a chance to do your  
23 redaction specifically related to the issue of what may or  
24 may not have been said by the officer to Devin Johnson;  
25 correct?

1 MR. SMITH: Yes, sir.

2 THE COURT: Okay. So, the officer will be subject  
3 to being recalled to the stand.

4 Officer, since we're still in the middle of your  
5 testimony you can't -- even though you are the lead  
6 investigator in this case, you really are now kind of  
7 prevented from discussing your testimony with the  
8 solicitors because we are in the middle of your testimony.

9 Now with that said, then, the -- Solicitor, you  
10 indicated that you want the right to recall the officer as  
11 it relates to cell phone records. You have someone from  
12 Verizon coming in the morning to testify and you may find  
13 a need to recall the officer concerning cell phone  
14 records; correct?

15 MR. MOLONY: That's correct, Your Honor.

16 THE COURT: Okay. And you'll have the right to do  
17 that if that's a decision that you make in the morning.

18 MR. MOLONY: Yes, sir.

19 THE COURT: So as I understand you got two more  
20 witnesses from the State. And then of course certainly  
21 the defense will inform us what they plan to do as far as  
22 a case or not and any testimony related to that.

23 Anything further we need to put on the record  
24 before we adjourn for this afternoon?

25 MR. SLOCUM: Your Honor, the State would request

1 since we've started the trial that the Defendant be taken  
2 into custody until the end of the trial.

3 THE COURT: Okay. And what says the defense?

4 MR. SMITH: Your Honor, the Defendant is out on,  
5 he's on home arrest. He's got an ankle monitor on. I  
6 don't think there's any danger that he flees. His  
7 whereabouts is monitored --

8 THE COURT: Okay.

9 MR. SMITH: -- by the detention center.

10 THE COURT: Okay. Mr. Upson, I'm going to allow --  
11 I'm not going to revoke your bond.

12 THE DEFENDANT: Thank you, Your Honor.

13 THE COURT: I'm going to allow you to remain out,  
14 not to suggest that I'm thinking you're not going to show  
15 up tomorrow and whatever other days we have of your  
16 trial. But understand that if you fail to appear then  
17 that will be, constitute a revocation of your bond and a  
18 bench warrant will be issued for your arrest.

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Whatever your lawyers say for you to be  
21 back in the courthouse, you be back in the courthouse.  
22 Okay?

23 THE DEFENDANT: Yes, sir, Your Honor. Thank you  
24 very much.

25 THE COURT: Anything else from the State?

1 MR. SLOCUM: Nothing from the State, Judge.

2 THE COURT: Defense?

3 MR. SMITH: Nothing from the defense, Your Honor.

4 THE COURT: We'll be in recess until nine o'clock  
5 tomorrow morning. Everybody have a great evening. We're  
6 going to try to do a few pleas before we finish up for  
7 today.

8 END OF DAY'S PROCEEDINGS: 4:56 P.M.

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## WILLIAM ROYSTER - RE-CROSS BY SMITH

1 ON WEDNESDAY, APRIL 16, 2014 AT 9:20 A.M.:

2 THE COURT: Thank you very much. Have a seat.

3 Gentlemen, are we ready for the jury?

4 MR. SLOCUM: We are, Your Honor.

5 MR. SMITH: Yes, sir.

6 THE COURT: Very good. Bring the jury out, please.

7 THE BAILIFF: Okay.

8 (Jury enters courtroom at 9:20 A.M.)

9 THE COURT: Let the record reflect the jury's all  
10 in. Good morning.

11 THE JURY (COLLECTIVELY): Good morning.

12 THE COURT: Hope everyone's doing well, you had a  
13 good, restful evening and you're ready to start back to  
14 work this morning.

15 Solicitor?

16 MR. MOLONY: Detective Billy Royster, Your Honor,  
17 back on the stand.

18 THE COURT: All right. I just remind you that  
19 you're still under oath from yesterday, sir.

20 THE WITNESS: Yes, sir.

21 RE-CROSS-EXAMINATION

22 BY MR. SMITH:

23 Q. Good morning, Detective Royster.

24 Just, I got a quick question before we get into  
25 what we were into yesterday. How tall is John Upson?

## WILLIAM ROYSTER - RE-CROSS BY SMITH

1 A. I'd say around five-seven, five-eight.

2 Q. Would it help you to look at your incident report  
3 to remind you?

4 A. It's not my incident -- I didn't write that report.

5 Q. Is that your name at the bottom of that report?

6 A. That's me as part of it. Chad Cathcart wrote that  
7 report.

8 Q. And does it have John Upson's name and biographical  
9 information on that report?

10 A. Yes, it does.

11 Q. How tall does it say he is?

12 A. Five-seven.

13 Q. Thank you.

14 Detective Royster, yesterday we talked about a  
15 video interview that you did with Devin Johnson on Monday  
16 of this week.

17 A. Yes, sir.

18 Q. I'm going to ask you a few questions about that  
19 video, about statements that you made on the video.

20 A. Okay.

21 Q. Do you admit that during that video, during that  
22 interview you told Devin Johnson that someone that you  
23 thought was involved or something that led you to believe  
24 that he was involved, that he was having a lot of contact  
25 with Devin Johnson (verbatim) and you asked him what was

WILLIAM ROYSTER - RE-CROSS BY SMITH

1 running through your mind?

2 A. I made mention to him about the contact that we  
3 found between him and Norid-Deen that night on his cell  
4 phone, and on the phone for the restaurant itself. I did  
5 question him about that.

6 Q. Okay. And you think, you think that Ishmael  
7 Norid-Deen was involved with this robbery?

8 A. I would consider him a person of interest, yes.

9 Q. Not a prime suspect?

10 A. He does not match the description of the second  
11 person who went in. I think he's involved, but I do not  
12 think he went in.

13 Q. That's -- well, the question I'm asking you is: Do  
14 you think he's a prime suspect of somebody who's  
15 involved? I'm not saying who went in.

16 A. Yeah. I think he's a person of interest of someone  
17 involved in this robbery.

18 Q. Okay. But you wouldn't go so far as to say he was  
19 a suspect?

20 A. I'm getting close to that point.

21 Q. Okay. Do you admit saying the words to Devin  
22 Johnson during that interview, "I'm hoping that what we  
23 talk about will help you remember what we need to know"?

24 A. I don't recall those exact words, but if I said  
25 something to him in that nature, it would be our

## WILLIAM ROYSTER - RECROSS BY SMITH

1 conversation with him about what happened that night would  
2 help him remember things that happened that night, that  
3 may help us.

4 Q. Okay. So you don't admit it but you --

5 A. I may have said it. That was an hour-and-a-half  
6 long interview.

7 Q. Okay. Do you admit telling Devin Johnson that  
8 when he made the phone calls to Ishmael Norid-Deen that  
9 Ishmael Norid-Deen was a stone's throw from Captain D's?

10 A. Yeah, I told him that.

11 Q. That he was probably looking at it?

12 A. Yes, sir.

13 Q. Do you admit that towards the end of the interview  
14 you tell him, you're talking to him about how you think it  
15 might be an inside job. You tell him, "You can understand  
16 how we're thinking that somebody has to let them know when  
17 it's time to come in"?

18 A. Yeah. It's logical the way the establishment is  
19 set up and built.

20 MR. SMITH: Thank you. Beg the Court's  
21 indulgence.

22 THE COURT: Sure.

23 BY MR. SMITH:

24 Q. And when you were talking with him about an inside  
25 job and that somebody had to let him in, do you think it

## WILLIAM ROYSTER - REDIRECT BY MOLONY

1 was Devin Johnson that was the one who was the inside guy?

2 A. We were thinking that since we had the phone calls  
3 from his cell phone to Norid-Deen's cell phone, and then  
4 there was a phone call from the restaurant itself to  
5 Norid-Deen's phone, the idea did cross my mind that he's  
6 the one telling them it's time to come in; yes.

7 Q. Okay. Thank you.

8 THE COURT: Anything on redirect, Solicitor?

9 MR. MOLONY: Briefly, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. MOLONY:

12 Q. Detective Royster, this interview with Devin  
13 Johnson you said it was an hour and a half long?

14 A. Yes.

15 Q. And what was the purpose of the interview at this  
16 time?

17 A. With those phone records, seeing that the calls  
18 made from his cell phone to Norid-Deen's cell phone, and  
19 then right after those calls were made, a call was made  
20 from the restaurant to Norid-Deen's phone. He never made  
21 connection to Norid-Deen's cell phone because he ran out  
22 of minutes. He told us he was asking for a ride home. He  
23 lives in New Ellenton. He did not have a car. He said,  
24 "Sometimes I walk home after work."

25 MR. SMITH: Objection, Your Honor. This is hearsay.

## WILLIAM ROYSTER - REDIRECT BY MOLONY

1 THE COURT: Okay. Sustained.

2 BY MR. MOLONY:

3 Q. After the interview with Devin Johnson, did -- at  
4 that time was he still a suspect in this case?

5 A. No. After that interview, at the end of that  
6 interview I told him, "I always thought you were straight  
7 with us."

8 Q. Up until you became aware of these phone calls from  
9 Devin Johnson to Norid-Deen, was he a suspect in this  
10 case?

11 A. No, he was not.

12 Q. So when you found out you brought him in to talk to  
13 him about it?

14 A. That's correct.

15 Q. Now, these calls to Norid-Deen, did -- was a search  
16 warrant done for Norid-Deen's cell phone records?

17 A. Yes, it was.

18 Q. Do you remember Norid-Deen's cell phone number?

19 A. His cell phone number is 803-508-1571. He has  
20 since changed his number. That's the number he had at  
21 that time.

22 Q. The 508 number, that's the number that Devin  
23 Johnson attempted to call?

24 A. That's correct.

25 Q. That's the number that the Defendant was in

## WILLIAM ROYSTER - RECROSS BY SMITH

1 constant contact with?

2 A. That's correct.

3 Q. And Norid-Deen is a suspect in this case?

4 A. That's correct.

5 MR. MOLONY: No further questions, Your Honor.

6 THE COURT: Recross?

7 RECROSS-EXAMINATION

8 BY MR. SMITH:

9 Q. Did you make a photo lineup of Ishmael Norid-Deen?

10 A. Yes, I did.

11 Q. Did you show that to anybody other than Devin  
12 Johnson?

13 A. No, I did not.

14 Q. Okay. Were there any phone calls between Devin  
15 Johnson and John Upson that night?

16 A. No, there was not.

17 MR. SMITH: Okay. Nothing further, Your Honor.

18 THE COURT: Thank you, sir, for your testimony.

19 You can step down.

20 THE WITNESS: Thank you, sir.

21 THE COURT: Call your next witness, Solicitor.

22 MR. SLOCUM: Your Honor, the State calls Ms. Karen  
23 Milbrodt.

24 KAREN MILBRODT, having been duly sworn, was  
25 examined and testified as follows:

KAREN MILBRODT - DIRECT BY SLOCUM

1 THE CLERK: Have a seat in the witness box. State  
2 your full name for the Court and spell your last, please.

3 THE WITNESS: My name is Karen Milbrodt. And  
4 Milbrodt is spelled M-I-L-B-R-O-D-T.

5 DIRECT EXAMINATION

6 BY MR. SLOCUM:

7 Q. Ms. Milbrodt, good morning.

8 A. Good morning.

9 Q. Who do you work for?

10 A. I work for Verizon Wireless.

11 Q. And what do you do for Verizon Wireless?

12 A. I'm a records custodian for Verizon.

13 Q. What does that mean?

14 A. That means if our records are ever needed to go to  
15 court, I would either bring the records or they're already  
16 here and I just explain how to interpret our business  
17 records.

18 Q. And how long have you been doing this?

19 A. I've been doing records custodial work since 2011.

20 Q. And how long have you been employed with Verizon?

21 A. Fifteen years.

22 Q. I'm sorry?

23 A. Fifteen years.

24 Q. What did you do before being a records custodian?

25 A. Well, I've worked in the executive relations office

KAREN MILBRODT - DIRECT BY SLOCUM

1 since 2005. And that's an office where we handle  
2 complaints that are either filed to, like, the president's  
3 seal or government agencies like FCC, attorney general.  
4 So I manage -- I investigate these and try to work that  
5 out with our customer.

6 Q. How do the records get from an individual cell  
7 phone to Verizon?

8 A. Well, we have a billing system called MARS. And  
9 the records will, the cell towers would convey this  
10 information to a switch and the switch dumps it into MARS  
11 and then we turn that into a billing record.

12 Q. So is it done automatically?

13 A. It's electronically.

14 Q. Okay. And who is Cellco?

15 A. Cellco Partnership is our legal entity name.  
16 Verizon Wireless is a company of several merger companies  
17 so that's the umbrella name. And then we are Cellco  
18 Partnership doing business as Verizon Wireless.

19 Q. The cell phone records, do you have access to those  
20 or who has access to those records?

21 A. Anyone in our business that would have a need to  
22 use those records, either our billing department or  
23 customer service, our engineers have access to them, our  
24 law enforcement resource group which is the group that  
25 compiled the records in this situation.

APP'X 137

KAREN MILBRODT - DIRECT BY SLOCUM

1 Q. Are you aware of a search warrant that was sent to  
2 Verizon Wireless in this case?

3 A. I am.

4 Q. And are you aware that cell phone records were  
5 obtained?

6 A. They were.

7 MR. SLOCUM: Permission to approach, Your Honor?

8 THE COURT: Certainly.

9 BY MR. SLOCUM:

10 Q. I'm handing -- Ms. Milbrodt, I'm handing you what's  
11 been previously marked as State's Exhibit 16. Would you  
12 flip through that and tell me if you recognize it?

13 A. Yes, I recognize these records.

14 Q. And what are they?

15 A. These are business records that are the incoming  
16 and outgoing call information for a particular phone  
17 number.

18 Q. And what phone number is that?

19 A. 803-646-6125 is the target number.

20 Q. Are these Verizon Wireless cell phone records?

21 A. They are.

22 Q. Are they a complete and accurate depiction of cell  
23 phone records for that number you just told the Court?

24 A. Yes, sir.

25 Q. Have they been changed, altered or deleted in any

KAREN MILBRODT - DIRECT BY SLOCUM

1 way, shape or form from, incoming from Verizon parent  
2 company?

3 A. No, sir.

4 MR. SLOCUM: Beg the Court's indulgence, Your  
5 Honor.

6 THE COURT: Sure.

7 MR. SLOCUM: Your Honor, at this time the State  
8 would move to enter into evidence State's Exhibit 16.

9 THE COURT: Okay. What says the defense?

10 MR. SMITH: Without objection.

11 THE COURT: All right. Into evidence, State's  
12 Number 16.

13 MR. SLOCUM: Thank you, Judge.

14 (State's Exhibit No. 16, Verizon Wireless records,  
15 received into evidence.)

16 BY MR. SLOCUM:

17 Q. Ms. Milbrodt, could you flip through those records  
18 and turn to November 27th, 2013?

19 A. Yes, sir.

20 Q. In fact, could you please tell the Court, when do  
21 those records begin and when do they end?

22 A. November 27, 2013, at 10 seconds -- oh, this is in  
23 military time. So 12:10 in the morning through December  
24 1st, 2013, at 2026 military time. So that would be 8:26  
25 in the evening.

KAREN MILBRODT - DIRECT BY SLOCUM

1 Q. Okay. And if you could turn to about nine o'clock  
2 on 11-27?

3 A. A.M. or P.M.?

4 Q. P.M. Sorry. The calls beginning at nine o'clock,  
5 are there cell phone towers on those records showing where  
6 the calls were made?

7 A. Yes, sir.

8 Q. And how does that work when you make a call? How  
9 does it know what tower to go to?

10 A. Well, our switch is the part of our network that  
11 determines how to route a call. It will find or locate  
12 where the call, or customer is with that phone number and  
13 determine what cell tower is best able to connect the  
14 call.

15 Q. Okay.

16 A. So the switch does the thinking of our network.

17 Q. Okay. At nine o'clock, how many cell towers  
18 picked up from phone calls made during that hour?

19 A. There were three cell sites.

20 Q. And how many at 10 o'clock?

21 A. There were none at 10 o'clock.

22 Q. And how many at 11 o'clock?

23 A. Four.

24 Q. And this is -- cell sites, how are they categorized  
25 in Verizon?

KAREN MILBRODT - CROSS BY SMITH

1 A. By number codes.

2 Q. Okay. Are the number codes for those cell sites  
3 you just gave me on those records?

4 A. They are.

5 Q. From the three cell sites at nine o'clock, what are  
6 their numbers?

7 A. 1625 and 1630, 877.

8 Q. And the others from 11 o'clock?

9 A. We have a 920, 1630, 1600, 877.

10 Q. Thank you.

11 Beg the Court's indulgence, Your Honor?

12 THE COURT: Sure.

13 MR. SLOCUM: Ms. Milbrodt, that's all the questions  
14 I have for you at this time. Please answer any Mr. Smith  
15 has for you.

16 THE WITNESS: Certainly.

17 THE COURT: Cross-examination?

18 CROSS-EXAMINATION

19 BY MR. SMITH:

20 Q. Good morning, Ms. Milbrodt.

21 A. Good morning.

22 Q. Thanks for coming down.

23 A. Sure.

24 Q. These phone records that you provided, do they --  
25 do you record the actual conversation?

KAREN MILBRODT - CROSS BY SMITH

1 A. No.

2 Q. You just record the phone number it comes from and  
3 the phone number it goes to, how long it lasts, which  
4 towers it's used on, that sort of thing; right?

5 A. Correct.

6 Q. No contents recorded --

7 A. No.

8 Q. -- on these phone calls? And there's no way to  
9 tell who's actually making the phone call; is there?

10 A. No.

11 Q. Were you asked to check phone records for a period  
12 of time prior to November 27th in this case for that phone  
13 number?

14 A. I would have to look at the subpoena again. I  
15 personally was not asked. We have a group in New Jersey  
16 that produces records.

17 Q. The records that you have start on November 27th?

18 A. Correct.

19 Q. And they end on what date?

20 A. December 1st, 2013.

21 Q. Okay. Now were you asked to provide phone records  
22 for anybody else in this case?

23 A. Not that I'm aware of.

24 Q. Ms. Milbrodt, I'm going to show to you...

25 (Defendant's Exhibit Six, Verizon Wireless records,

KAREN MILBRODT - CROSS BY SMITH

1 marked for identification.)

2 BY MR. SMITH:

3 Q. I'm going to show you what's been marked as Defense  
4 Exhibit Number Six. Would you take look at that? Does  
5 that look like a Verizon record?

6 A. It does.

7 Q. Okay. Can you tell me the phone number that that  
8 record belongs to?

9 A. 803-508-1571.

10 Q. Okay. Could you also tell me the date that these  
11 phone records covered?

12 A. November 27, 2013, again at midnight and 10  
13 seconds, through November 28, 2013 at 9:15.

14 Q. Thank you.

15 Beg the Court's indulgence.

16 THE COURT: Okay.

17 BY MR. SMITH:

18 Q. Ma'am, I'm going to ask you to do the same thing  
19 that you did just a second ago --

20 A. Uh-huh.

21 Q. -- and read off the cell towers where calls were  
22 made from, between the hours of nine and 10, between 10  
23 and 11, 11 to 12.

24 A. So from nine to 12 midnight?

25 Q. Initial section, between nine and 10, which cell

KAREN MILBRODT - CROSS BY SMITH

1 towers were used.

2 A. P.M. or A.M.?

3 Q. Nine P.M. Sorry.

4 A. 27th?

5 Q. Yes, ma'am.

6 A. These are all off the Atlanta switch cell tower 54,  
7 cell tower 30, cell tower 71, 100, 91, 9, 16, 94, 26, 20,  
8 39, 18.

9 Q. Now these are all between nine and ten o'clock?

10 A. Nine and?

11 Q. Nine and 10 P.M.

12 A. Twenty-six, 18, 20 and 39 are all after 10 P.M., so  
13 those are later.

14 Q. Okay.

15 A. Forgive me. I have to retract that. The calling  
16 number was different. So the cell sites are different.  
17 Forgive me.

18 Cell tower 877, cell tower 1630, cell tower 902.

19 Those are the cell sites.

20 Q. And that's between nine and 10 P.M.?

21 A. Correct.

22 Q. Now, between 10 and 11 P.M.?

23 A. Cell tower 649. Cell tower 862, 1658, 1640, 887.  
24 There's one at 11. Do you want me to include that?

25 Q. Yes, ma'am. Between 11 and 12 P.M.?

KAREN MILBRODT - REDIRECT BY SLOCUM

1 A. Okay. Between 11 and 12 is cell tower 920, 1628.  
2 I'm now on November 28th. Do you want me to  
3 continue?

4 Q. No, that's fine. Just up until midnight on the  
5 27th.

6 A. That was 1628.

7 Q. Thank you.

8 Court's indulgence one more time. (Pause.)

9 MR. SMITH: Your Honor, I move to introduce into  
10 evidence phone records, Defendant's Exhibit Six.

11 THE COURT: And what says the State?

12 MR. SLOCUM: No objection.

13 THE COURT: All right. Without objection the  
14 Defendant's Exhibit Number Six into evidence.

15 (Defendant's Exhibit No. 6, Verizon Wireless  
16 records, received into evidence.)

17 MR. SMITH: No further questions, Your Honor.

18 THE COURT: Anything on redirect?

19 MR. SLOCUM: Real brief, Your Honor.

20 THE COURT: Okay.

21 REDIRECT EXAMINATION

22 BY MR. SLOCUM:

23 Q. Ms. Milbrodt, you just testified that Defense  
24 Exhibit Six on November 27, 2013, at 11 o'clock, what  
25 tower was that phone pinging off of? Specifically, let

KAREN MILBRODT - REDIRECT BY SLOCUM

1 me -- at 11 o'clock on the dot, what tower is that phone  
2 pinging off of?

3 A. Cell tower 920.

4 Q. Thank you. State's Exhibit 16, at 11:01, what cell  
5 tower is that phone number pinging off of?

6 A. Cell tower 920.

7 MR. SLOCUM: No further questions, Judge.

8 THE COURT: Okay. Any direct -- I mean, recross?

9 MR. SMITH: None, Your Honor.

10 THE COURT: Okay. You can step down, ma'am. Thank  
11 you for your testimony.

12 THE WITNESS: Thank you, Your Honor.

13 THE COURT: Any objections to this witness being  
14 excused from the courthouse?

15 MR. SLOCUM: None from the State.

16 THE COURT: From the defense?

17 MR. SMITH: None from the defense, Your Honor.

18 THE COURT: Ma'am, you're excused. You're welcome  
19 to remain with us if you'd like or if you need to leave  
20 that's fine too.

21 THE WITNESS: Thank you.

22 THE COURT: Solicitor?

23 MR. SLOCUM: Your Honor, the State calls Desra  
24 Fraser with Alcohol, Tobacco and Firearms.

25 DESRA SHERYL FRASER, having been duly sworn, was

DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 examined and testified as follows:

2 THE CLERK: Having a seat in the witness box.  
3 State your full name and spell your last for the Court,  
4 please.

5 THE WITNESS: My full name is Desra Sheryl Fraser.  
6 Fraser is F-R-A-Z-E-R.

7 DIRECT EXAMINATION

8 BY MR. SLOCUM:

9 Q. Ms. Frazer, who do you work for?

10 A. The Bureau of Alcohol, Tobacco, Firearms and  
11 Explosives.

12 Q. And how long have you been there?

13 A. Seven years.

14 Q. What do you do for ATF?

15 A. I'm an intelligence research specialist. So I work  
16 along with the criminal -- with the special agents and  
17 basically provide intel for their cases.

18 Q. And what all does that encompass?

19 A. Depending on the case, it can be call detail  
20 records, tracking of phone, bank records, international  
21 travel, identifying people, photographs, criminal  
22 histories, looking into business records.

23 Q. Were you asked to help on this case?

24 A. Yes, sir.

25 Q. And how did you become involved?

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DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 A. I currently work with the ATF Task Force located  
2 here in Aiken. And since I have worked on other cases  
3 with them, they know that I have the ability to use  
4 Pen-Link on call-detail records and I was brought in.

5 Q. What is Pen-Link?

6 A. Pen-Link is a database that takes the raw data  
7 provided from the phone companies, we upload it and it  
8 allows you to do -- you can extract data from those  
9 records however you need them.

10 Q. Were you provided records from the phone companies  
11 in this case?

12 A. Yes, sir.

13 Q. Who gave those to you?

14 A. Aiken Department of Public Safety e-mailed me the  
15 raw data from Verizon Wireless.

16 MR. SLOCUM: Permission to approach, Judge?

17 THE COURT: Sure.

18 BY MR. SLOCUM:

19 Q. Ms. Fraser, I'm asking you to look at State's  
20 Exhibit 16 that's been admitted into evidence. Do you  
21 recognize those?

22 A. Yes, I do.

23 Q. What are these?

24 A. These are the call detail records in the original  
25 format that we received from Verizon Wireless.

DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 Q. From Detective Royster in this case?

2 A. Yes. Yes, sir, from his search warrant.

3 Q. Okay. And as a result of receiving those records,  
4 what did you do?

5 A. This information was uploaded into Pen-Link so that  
6 I can map the phone calls, and the location of where he  
7 was when he made the phone calls.

8 Q. And based on your involvement and your work in this  
9 case, what, if anything, did you make for the detective?

10 A. I was asked specifically to do a specific time  
11 frame. And in that time frame I was able to locate where  
12 the phone was, but I was also able to show that the call  
13 was blocked when he called Captain D's, when the phone  
14 called Captain D's.

15 Q. Okay. We'll get to that in just a minute.

16 A. Okay.

17 Q. I'm showing you what's been previously marked for  
18 identification as State's Exhibit 15.

19 A. Yes.

20 Q. Do you recognize that, Ms. Fraser?

21 A. Yes, I do.

22 Q. What is that?

23 A. This is a report that is generated from the  
24 Pen-Link system.

25 Q. That's your report --

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DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 A. Yes, sir.

2 Q. -- that you made as a result of receiving those  
3 records?

4 A. Yes, sir.

5 Q. Has that report been altered, changed, deleted in  
6 any way, shape or form?

7 A. No, sir.

8 Q. Does it fairly and accurately depict your report  
9 that you derived from those records?

10 A. Yes, sir.

11 MR. SLOCUM: Your Honor, at this time the State  
12 wishes to move State's Exhibit 15 into evidence.

13 THE COURT: And what says the defense?

14 MR. SMITH: Your Honor, I'd like to see it.

15 THE COURT: Sure.

16 MR. SLOCUM: My apologies.

17 (Document handed to defense counsel.)

18 MR. SMITH: No objection, Your Honor.

19 THE COURT: Without objection, it will be State's  
20 Exhibit 15 into evidence.

21 (State's Exhibit No. 15, Pen-Link report, received  
22 into evidence.)

23 BY MR. SLOCUM:

24 Q. Ms. Fraser, can you please look at those records  
25 and specifically the time frame starting at nine o'clock?

DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 A. Yes, sir.

2 Q. And what do those records indicate that you made?  
3 Please tell the jury what you discovered.

4 A. The time frame that I was asked to focus on started  
5 at 2137. And at that time I see an incoming phone call  
6 from this telephone to Captain D's.

7 Q. What else does -- is in that time frame?

8 A. Then after that phone call, there was a phone call  
9 that was blocked back to Captain D's. And then at 2147, a  
10 gentleman by the name --

11 THE COURT: Madam Witness, it would be helpful for  
12 the jury if you'd convert to military time from regular  
13 time.

14 THE WITNESS: Okay.

15 THE COURT: It may be helpful to them. You can't  
16 do that?

17 THE WITNESS: I have to subtract. So 9:47. I'm  
18 sorry.

19 BY MR. SLOCUM:

20 Q. Okay.

21 A. 9:47. I'll redo them again. I'm sorry.

22 At 9:37 there's an outgoing phone call from this  
23 cell phone to Captain D's.

24 Q. Did that phone make any calls prior to that 9:47  
25 and 9:37 you just testified to?

DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 A. Yes, sir.

2 Q. From nine o'clock forward, tell us if it made any  
3 other calls --

4 A. Yes, sir.

5 Q. -- in that nine o'clock time frame? I'm sorry.

6 A. In the entire hour or just before that time?

7 Q. Just that hour.

8 A. Okay. Ten.

9 Q. And were you asked to make any maps of those phone  
10 calls?

11 A. Yes, sir. I was.

12 Q. And did you make maps?

13 A. Yes, sir.

14 MR. SLOCUM: Permission to approach, Your Honor?

15 THE COURT: Certainly.

16 BY MR. SLOCUM:

17 Q. Ms. Fraser, I'm handing you State's Exhibit for  
18 identification only 17, 18, 19, 20, 21, 22, 23, 24, 25,  
19 and 26. Could you, please take a look at these?

20 A. Yes, sir.

21 Q. And what are they?

22 A. This is -- each map represents a phone call that  
23 was made on this phone and which cell towers it hit off  
24 of.

25 Q. Now were those maps derived from your work in this

DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 case?

2 A. Yes, sir.

3 Q. Derived from cell phones records that you were  
4 sent?

5 A. Yes, sir.

6 Q. Have those maps been changed, altered, or deleted  
7 in any way, shape or form from when you made them?

8 A. No.

9 Q. Do they fairly and accurately depict the map you  
10 made in reference to this case?

11 A. Yes, sir.

12 MR. SLOCUM: Your Honor, at this time the State  
13 moves to enter into evidence State's Exhibit 17 through  
14 26.

15 THE COURT: All right. Sixteen is already into  
16 evidence. On the other exhibits, any objection to it?

17 MR. SMITH: Without objection, Your Honor.

18 THE COURT: Okay. Without objection 17 through 26  
19 with the exception of 16 which is already in evidence will  
20 be into evidence on behalf the State.

21 MR. SLOCUM: Thank you, Your Honor.

22 (Thereupon, State's Exhibit Nos. 17, 18, 19, 20,  
23 21, 22, 23, 24, 25 and 26, maps, were received into  
24 evidence.)

25 BY MR. SLOCUM:

DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 Q. Ms. Fraser, what phone numbers are related -- what  
2 number is related to that map?

3 A. This map is phone calls. 803-646-6125.

4 Q. And were you given any information at all as to who  
5 owned that number, who belonged to that number?

6 A. No, sir.

7 Q. If you take a look at State's 17, what does this  
8 map depict?

9 A. This map is actually depicting two different, three  
10 different phone calls. And it shows the cell towers that  
11 they hit off of.

12 Q. Okay. And what are the numbers associated with  
13 that cell tower?

14 A. The tower numbers?

15 Q. That's correct?

16 A. 1600, 877, and 920.

17 Q. And what do these arcs depict?

18 A. Cell towers have three different sides and what  
19 these are --

20 MR. SLOCUM: Your Honor, may the juror (verbatim)  
21 step down and show the jury what she's testifying to?

22 THE COURT: Sure.

23 BY MR. SLOCUM:

24 Q. Could you please tell the jury what you're  
25 testifying to?

DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 A. Yes. The towers are three sided so what this is  
2 showing you is the side of the tower and location of where  
3 the cell phone was. So basically the call was made within  
4 the colored pie shape, or in -- it depends on what the  
5 function is, but that's what this is indicating.

6 Q. This map shows where a call either began or ended?

7 A. Or if he was stationary, or both. It could be in  
8 the same tower.

9 Q. Do you know how far apart those towers are?

10 A. Yes, sir. They're 14.7 miles.

11 Q. And where did you get that information?

12 A. Google Earth.

13 Q. I want to show you State's Exhibits 18 through 26  
14 that are already in evidence. And what do these maps  
15 depict?

16 A. They all depict phone calls but some actually  
17 depict that there was possible movement when a cell phone  
18 was made, when the call was made.

19 Q. How are you able to tell that?

20 A. The green indicates the cell tower the call began  
21 off of, and the red indicates the cell that was used when  
22 the phone call ended.

23 Q. Can you show the jury that on the remainder of the  
24 exhibits?

25 A. This cell phone basically was stationary so there's

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DESRA SHERYL FRASER - DIRECT BY SLOCUM

1 only one pie shape. Once again, the green was at the  
2 beginning of the cell phone call, the red is at the end.

3 This cell phone was stationary.

4 And another stationary phone call.

5 Once again, a stationary phone call.

6 Another one.

7 Another one.

8 And, once again, a moving. Green showing the  
9 beginning, red showing the end.

10 Q. What time was that call made?

11 A. This call was at 9:48.

12 Q. Ms. Fraser, is it possible to start a phone call in  
13 one area -- show the jury these two that overlap -- in  
14 that overlapped area, for it to jump towers; can that  
15 happen?

16 A. It's possible but in my experience this shows the  
17 movement of a cell phone call.

18 Q. And you testified earlier that the triangulation or  
19 triangle --

20 A. Yes.

21 Q. -- is that, again, arcs that are shown?

22 A. Yes. Basically the phone call, he was in this  
23 location when the phone call was made, and he ended in  
24 this location. So it's within the pies.

25 Q. And again, if you know, how would it jump from one

DESRA SHERYL FRASER - CROSS BY SMITH

1 tower to another if you were stationary in that  
2 overlapping?

3 A. The only time I have seen that is when it would  
4 jump to another phone carrier's tower.

5 Q. Okay.

6 A. But on Verizon, that doesn't usually happen.

7 Q. Verizon tower?

8 A. Yes, sir.

9 Q. Ms. Fraser, thank you. That's all the questions I  
10 have. Please answer any Mr. Smith has for you.

11 THE COURT: Cross-examination, Mr. Smith?

12 MR. SMITH: Yes, sir.

13 CROSS-EXAMINATION

14 BY MR. SMITH:

15 Q. Good morning, Ms. Fraser.

16 A. Good morning.

17 Q. Again, there's no way to say who was holding the  
18 telephone --

19 A. No, sir.

20 Q. -- when it made the phone call? You keep saying  
21 "he" but you don't know who was on the phone?

22 A. No, sir; I do not.

23 Q. When you say "he" you mean the phone?

24 A. Yes.

25 Q. Okay. Again, there's no way to know what the

APP'X 157

DESRA SHERYL FRASER - CROSS BY SMITH

1 content of the phone conversation is?  
2 A. No, sir.  
3 Q. Okay. Now these maps that you're showing, they  
4 cover a broad area --  
5 A. Yes.  
6 Q. -- don't they?  
7 A. Yes, they do.  
8 Q. And they overlap. What would happen if, say, I  
9 start on this tower --  
10 A. Uh-huh.  
11 Q. -- and I move and go to this tower, and before the  
12 call is over I'm back into this area? Does it show  
13 beginning and ending call here?  
14 A. Since it's one call, all it will show is the  
15 beginning cell tower and the ending cell tower.  
16 Q. So you don't know if movement occurred?  
17 A. No.  
18 Q. So these where you say it's stationary --  
19 A. Correct.  
20 Q. -- the phone could be moving anywhere within that  
21 cell tower area?  
22 A. Yes, yes.  
23 Q. And the phone could leave this area, go into a  
24 different area and come back and it would still show just  
25 that pie chart?

DESRA SHERYL FRASER - CROSS BY SMITH

1 A. No, sir. If it leaves outside that pie, it will  
2 show a different pie even if it's on the same cell tower.  
3 Each pie represents one side of it. So it would show a  
4 different, either cell tower or a different side of that  
5 one tower.

6 Q. If the call started in this tower and in this --

7 A. And moved.

8 Q. -- and moved --

9 A. Yeah.

10 Q. -- and came back and ended in that?

11 A. No, sir.

12 Q. So, it's possible for me to start a phone call in  
13 this segment --

14 A. Uh-huh.

15 Q. -- leave to a different segment, come back to this  
16 segment, and it would look like it was stationary?

17 A. Possible. Yes, sir.

18 Q. Okay. Now you provided various maps. Have you  
19 provided any other maps? You provided other maps to the  
20 solicitor's office, didn't you, other than these?

21 A. In this case?

22 Q. Yes.

23 A. I had one with all the calls.

24 (Defendant's No. 7, ATF map, marked for  
25 identification.)

APP'X 159

DESRA SHERYL FRASER - CROSS BY SMITH

1 BY MR. SMITH:

2 Q. I'm going to show you what's been marked as  
3 Defendant's Exhibit Seven. Can you tell me what that is?

4 A. Yes, sir. It is a phone call showing the beginning  
5 location of the cell tower was 1600 and the ending cell  
6 tower was 877.

7 Q. Okay. Is that the same towers that are shown on  
8 State's Exhibit 20?

9 A. Yes, sir. It looks to be the same.

10 Q. Okay. Did you prepare Defendant's Exhibit Seven?

11 A. Yes, I did.

12 Q. Okay. So these are, these are the same thing.  
13 They're just, one's in color and one's black and white?

14 A. Yes, sir.

15 Q. They represent the same towers?

16 A. And information that -- the cell tower's specific  
17 information was removed so it was a clear map.

18 Q. Okay. Could you explain to us why the coverage  
19 area of the pie sections are different from one map to the  
20 other?

21 A. Without me having the map -- I mean, the cell tower  
22 location actually on this map, it would be hard. I can't  
23 specifically say that it's the same tower. So, I wouldn't  
24 feel comfortable. It looks to be the same but without  
25 that information, I don't know. And I would really --

APP'X 160

DESRA SHERYL FRASER - CROSS BY SMITH

1 Q. Well, you've got the information right here, don't  
2 you?

3 A. Well, you're saying that they're different. So  
4 without having these cell towers actually listed on there.

5 Q. This is State's Exhibit 20.

6 A. Yes.

7 Q. And it's the call from 907; correct?

8 A. Yes, it is.

9 Q. It's from phone number that ends in 6125?

10 A. Yes, sir. But this one, I do not know what time  
11 the phone call ended. That was a working copy.

12 Q. But you can tell which tower it was made from;  
13 right?

14 A. The difference in the mapping would have to be a  
15 Verizon. I can't answer that question.

16 Q. You don't know the answer to that question?

17 A. No, that's more of a technical question.

18 Q. Okay. But you prepared both of these?

19 A. Yes, sir, I did.

20 MR. SMITH: Beg the Court's indulgence. (Pause.)

21 Your Honor, at this time I'd move the Court to  
22 admit into evidence Defendant's Exhibit Seven.

23 MR. SLOCUM: May I see it?

24 (Shown to State's Attorney.) )

25 MR. SLOCUM: Yeah. Without objection.

1 THE COURT: All right. Without objection it will  
2 be Defendant's Exhibit Number Seven into evidence.

3 (Defendant's Exhibit No. 7, ATF map, received into  
4 evidence.)

5 MR. SMITH: Thank you. No further questions.

6 THE COURT: Anything on redirect, solicitor?

7 MR. SLOCUM: Yes. Briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. SLOCUM:

10 Q. You testified earlier about star 67?

11 A. Yes, sir.

12 Q. What did you mean by that?

13 A. Coming from Verizon Wireless they send us --

14 MR. SMITH: Objection, Your Honor. I didn't ask  
15 anything on cross-examination about star 67.

16 THE COURT: Solicitor?

17 MR. SLOCUM: I withdraw the question.

18 THE COURT: Okay. Thank you for your testimony,  
19 ma'am. You can step down.

20 Any objection to this witness being excused?

21 MR. SLOCUM: No sir.

22 MR. SMITH: No, Your Honor.

23 THE COURT: You're welcome to stay with us or  
24 you're free to leave.

25 Anything further from the State?

1 MR. SLOCUM: The State rests at this time, Judge.

2 THE COURT: All right.

3 Madam Forelady and ladies and gentlemen of the  
4 jury, we're going to take a break. And I'm going to ask  
5 that you retire to your jury room.

6 And, again, as I've stated previously, don't talk  
7 about this case among yourselves. Certainly don't start  
8 your deliberations yet. We'll get you back out here  
9 shortly. Thank you.

10 (Jury exits courtroom at 10:10 A.M.)

11 THE COURT: Okay. Mr. Smith, anything from you,  
12 sir?

13 MR. SMITH: Yes, Your Honor.

14 Your Honor, at this time the defense would move for  
15 a directed verdict with regards to the kidnapping charges,  
16 both kidnapping charges, as well as the armed robbery  
17 charge but specifically towards the armed robbery charge.

18 The State has presented no credible evidence upon  
19 which a jury would be able to base a decision of guilt. I  
20 say that for all of them, but specifically, Your Honor,  
21 with regard to the armed robbery. There's been no  
22 testimony of money that was taken, and no testimony of any  
23 property that was taken that wasn't stricken from the  
24 record as hearsay.

25 Your Honor, they had a witness that they could have

1 called, Devin Johnson. He was on subpoena to be here.  
2 They moved forward without him. On the indictment that  
3 was presented on the armed robbery it lists him as the  
4 person from whom goods or money were taken.

5 THE COURT: Okay. Solicitor, let me hear from you  
6 on this.

7 MR. SLOCUM: Your Honor, I'm not exactly sure what  
8 Mr. Smith is referring to. I believe at sidebar we  
9 discussed the statement made by co-conspirator in  
10 furtherance of a conspiracy which was ultimately allowed  
11 in. That testimony came through Scott Hall, the  
12 individual who had the gun to the back of his head. That  
13 statement was, "Put the money in the bag, I don't care  
14 about the change."

15 It was further testimony that there was money kept  
16 in the safe each night by Jameshia Alston, the cash  
17 drawers. There's testimony that Scott Hall again about,  
18 "Put the money in the bag, I don't want change."

19 There's evidence of -- pictures of empty cash  
20 drawers and change lying on the ground which would  
21 circumstantially and directly show that money was taken  
22 out of the safe, all derived from testimony on behalf of  
23 the State.

24 THE COURT: The testimony, if I remember correctly,  
25 that necessitated a sidebar conference, I think,

1 Mr. Smith, you initially thought that Devin Johnson was  
2 being quoted by the witness.

3 And then after we talked at sidebar, I think then  
4 it was realized that they were quoting the, the other guy  
5 with the gun. And I think as a result of that then you  
6 withdrew your objection.

7 MR. SMITH: I withdrew my --

8 THE COURT: Just -- I just want to make sure we  
9 clear that up. All right.

10 I have had some concern with the issue of the  
11 money. Now according to my notes, and that's not  
12 necessarily to suggest that I'm going to agree with the  
13 defense, but we need to really air this out completely  
14 because I've had some concern with the evidence related to  
15 the issue of money. Okay?

16 Now Jameshia Alston's testimony was that she was in  
17 the process, and I'm paraphrasing now. I'm not  
18 necessarily directly quoting verbatim these witnesses.  
19 She was in the process of counting her money when the two  
20 fellows came in, and she did not get as far as she  
21 normally does by putting the money into the, on deposit  
22 into the lock box or wherever the money goes. Okay.

23 But she did not necessarily say what happened to  
24 the money. She just did not get through the whole  
25 process of counting money.

1           And that was, that was all that I remember her  
2 stating concerning anything about money.

3           Now, first I'm going to say: Do you agree or  
4 disagree with the Court's memory on her testimony?

5           MR. SLOCUM: Yes, Your Honor.

6           However, there's more that I would request that we  
7 discuss in reference to her testimony.

8           THE COURT: Okay. That's what I want to do. I  
9 want to go through each witness.

10          MR. SLOCUM: That particular night, that is  
11 correct, she was in the process of counting her money.  
12 However, I asked her if -- she had been working at Captain  
13 D's for two years and her normal practice each night, once  
14 she finishes counting down that money is to put that money  
15 in a change drawer and put it into the safe for the next  
16 day. That's been her practice for two years. She did it  
17 every night.

18          Circumstantially money in the cash drawer goes into  
19 the safe. Now in reference to her testimony and money,  
20 that's where we would take the position for her.

21          And, further, it's corroborated by Scott Hall's  
22 testimony which we --

23          THE COURT: We'll get to Scott in a minute.

24          MR. SLOCUM: Yes, sir.

25          THE COURT: All right. Mr. Smith, related to

1 Ms. Alston's testimony, what is your recollection?

2 MR. SMITH: Your Honor, I recall that she was asked  
3 what she was doing. She said that she was counting her  
4 drawer down to 150 and that she usually takes it from  
5 there to the safe. But she never made it that far.

6 I don't recall her saying anything about any money  
7 being taken from her or any money missing from her drawer.

8 THE COURT: All right. Okay.

9 Then we move over to Scott Hall. And in direct  
10 examination he said the gunman got the money from the safe  
11 and put it in a bag that they used for carry-out orders.  
12 He says that on direct.

13 But then he comes around on recross and stated he  
14 did not know if the money had been taken because he was on  
15 all fours not looking in the direction of the safe or the  
16 cash registers.

17 Solicitor, what do you remember concerning Scott  
18 Hall?

19 MR. SLOCUM: Your Honor, that he did testify and  
20 even showed the jury on a picture the bag that the gunman  
21 grabbed. The statement he said, "Put the money in the  
22 bag, I don't want the change" which was further  
23 corroborated by the empty cash drawers and the change on  
24 the ground.

25 The other issue in terms of what he said on cross

1 is an issue for the jury to determine via credibility,  
2 believability of the witness. We feel it survives a  
3 directed verdict motion.

4 THE COURT: Mr. Smith, concerning Scott Hall?

5 MR. SMITH: Your Honor, I did ask him directly if  
6 he saw them take any money from the safe or the cash  
7 registers. And he said, no, he did not see them. He says  
8 he heard a demand for money, but a demand for money is not  
9 taking the money.

10 There was testimony that there was money still left  
11 in the safe.

12 Your Honor, he told us specifically that he could  
13 not have seen it from the way that he was looking.

14 THE COURT: Right. Well, as you fellows know, in  
15 determining or making a ruling on a motion for directed  
16 verdict of course the Court looks at any direct evidence  
17 and any substantial circumstantial evidence is the  
18 standard, which you guys know.

19 So what I've got to make a determination is this  
20 circumstantial evidence. I guess the gunman's statement,  
21 "Put the money in the bag," and that was done according to  
22 Scott Hall, that probably would be direct evidence.

23 But the empty cash drawers, change on the floor,  
24 Ms. Alston's testimony that she was prevented from  
25 finishing the counting of the money, is that enough

1 circumstantial evidence, to survive a motion for directed  
2 verdict? Again, I'm not concerned with the weight. All  
3 I'm concerned with is the existence of any direct  
4 substantial circumstantial evidence.

5 And the fact that Scott Hall may have contradicted  
6 himself, I don't know if that -- that would probably go to  
7 the weight, which I'm not concerned with, and not  
8 necessarily to the existence.

9 It's a close case. And, like I said, I've had  
10 concerns. I mentioned this to Lyon early on. I had  
11 concerns with the State's presentation of the issue of the  
12 money in the armed robbery.

13 Viewing that, viewing the evidence in the light  
14 most favorable to the State, I'm going to deny. And,  
15 again, I recognize it's a close call, Mr. Smith, but I'm  
16 going to deny your motion for a directed verdict. I think  
17 there's enough there to send it to the jury.

18 Now anything specifically as it relates to the  
19 kidnapping charge? I know you've made a motion for  
20 directed verdict. And certainly you're protected on the  
21 record on that. Is there anything else specifically on  
22 that?

23 MR. SMITH: Your Honor, just one thing further just  
24 to protect the record --

25 THE COURT: Sure.

1 MR. SMITH: -- on the armed robbery. They could  
2 have called Devin Johnson. He could have provided an  
3 accounting. He was under subpoena. They chose to go  
4 forward without him. That would just be another ground  
5 for the armed robbery.

6 THE COURT: Right.

7 MR. SMITH: With regard to the kidnapping, no  
8 additional grounds.

9 THE COURT: Okay. You know, of course, you want  
10 to renew this motion at the conclusion of the case, I may  
11 have some epiphany and something may just go off in my  
12 head and I may change positions. But right now I'm  
13 denying the motion, but you're protected on the record.

14 MR. SMITH: Thank you.

15 THE COURT: Okay. You had indicated in chambers,  
16 Mr. Smith, that it was your plan at least this morning,  
17 earlier this morning, that you were going to call some  
18 witnesses in your case?

19 MR. SMITH: Yes, sir.

20 THE COURT: All right. Let me go ahead and give  
21 the standard instruction to your client. You may want to  
22 explain to him what I'm going to do because it will take  
23 me just a minute to pull up my script.

24 MR. SMITH: Yes, sir. Could we have a minute?

25 THE COURT: Yes, sir. Do y'all want to take about

1 a five-minute break?

2 MR. SLOCUM: Can we approach, Judge?

3 THE COURT: Yeah.

4 (Off-the-record discussion.)

5 (A recess was taken from 10:27 A.M., until 10:49  
6 A.M., and the trial resumed:)

7 THE COURT: Thank you very much. Have a seat.  
8 We're back on the record.

9 And since the State has rested, I need to -- before  
10 I examine the Defendant, you wanted to put some additional  
11 matters on the record, Solicitor, as it relates to the  
12 defense motion for directed verdict?

13 MR. SLOCUM: Yes, sir. Just on the existence of  
14 circumstantial evidence.

15 THE COURT: Right.

16 MR. SLOCUM: Detective Royster in his testimony  
17 discussed his knowledge of some of the money taken. And  
18 again, I'm paraphrasing, that they didn't even take all of  
19 the money in the safe, was --

20 THE COURT: Right.

21 MR. SLOCUM: -- came out in his testimony. That  
22 along with testimony of Scott and Jameshia corroborated by  
23 the pictures, we feel adds to the existence of  
24 circumstantial evidence. And we just wanted to put that  
25 on the record.

1 THE COURT: Thank you very much.

2 Okay. Mr. Upson, would you please stand? And  
3 Madam Clerk, would you swear this Defendant in, please?

4 (Defendant placed under oath.)

5 THE COURT: Mr. Upson, at this time I'm going to  
6 explain to you certain of your rights. If you do not  
7 understand anything I say, please let me know. If you  
8 want me to explain anything in more detail, please let me  
9 know that as well.

10 Do you understand so far?

11 THE DEFENDANT: Yes, sir, Your Honor.

12 THE COURT: We've now reached the stage of the  
13 trial where you may present your defense. You have the  
14 right to claim the protections given to you by the Fifth  
15 Amendment to the Constitution of the United States. This  
16 amendment states in part: No person shall be compelled in  
17 any criminal case to be a witness against himself.

18 This means that you cannot be required to testify  
19 in this case. You have the right to testify on your own  
20 behalf, however no one can make you testify. This is a  
21 personal right and no one can waive this right except  
22 you. If you decide to testify you will be subject to the  
23 same rules that govern other witnesses and you may be  
24 examined and cross-examined on any relevant issue in this  
25 case.

1           In addition, if you have any convictions involving  
2 dishonesty or false statement or for crimes punishable by  
3 imprisonment for more than one year and this Court  
4 determines that the probative value of admitting this  
5 evidence outweighs its prejudicial effect to you, the  
6 solicitor will be able to introduce your record to attack  
7 your credibility.

8           If you decide to testify, this decision is on your  
9 part. And it must be freely, voluntarily, and  
10 intelligently made, with knowledge of the protections  
11 given to you by the Fifth Amendment and the consequences  
12 of your decision to testify.

13           If you decide not to testify, I will instruct the  
14 jurors that they cannot give the fact that you did not  
15 testify any consideration whatsoever, and that there is to  
16 be absolutely no prejudice to you because you did not  
17 testify.

18           It is left entirely up to you whether or not you  
19 testify. You certainly have the right to talk with your  
20 attorneys, your family members, friends, anyone else. But  
21 the final decision will be left entirely up to you.

22           Have you understood exactly what I have explained  
23 to you thus far?

24           THE DEFENDANT: Yes, sir, I have.

25           THE COURT: Okay. And do you have any questions

1 about what I've explained to you thus far?

2 THE DEFENDANT: No, sir. I do not, Your Honor.

3 THE COURT: Have you had sufficient time to talk  
4 with your attorneys and anybody else whether or not you  
5 should testify?

6 THE DEFENDANT: Yes, sir. I have, Your Honor.

7 THE COURT: Okay. And do you need any more time  
8 to talk with your attorneys on this particular issue?

9 THE DEFENDANT: Concerning me testifying, Your  
10 Honor?

11 THE COURT: Right. Concerning whether or not you  
12 testify or not.

13 THE DEFENDANT: No, sir, Your Honor.

14 THE COURT: Okay. And have you made a decision  
15 whether or not you're going to testify?

16 THE DEFENDANT: Yes, sir. We have, Your Honor.

17 THE COURT: And what is that decision?

18 THE DEFENDANT: No, sir. We're not going.

19 THE COURT: You're not going to testify. Okay.  
20 And have you made that decision freely, voluntarily, and  
21 intelligently?

22 THE DEFENDANT: Yes, sir. I have, Your Honor.

23 THE COURT: Thank you very much, sir.

24 THE DEFENDANT: Thank you, sir, Your Honor.

25 THE COURT: Let the record reflect that the Court

PHILLIP STEPHEN MIANO III - DIRECT BY SMITH

1 does find that Mr. Upson has made the decision not to  
2 testify in this case. He has done so freely, voluntarily,  
3 and intelligently, having received competent counsel and  
4 advice from his attorneys in this matter.

5 Anything else before we bring the jury out?

6 MR. SLOCUM: Not from the State.

7 MR. SMITH: Nothing from the defense.

8 THE COURT: Thank you very much. Bring the jury  
9 out, please, sir.

10 (Jury enters courtroom at 10:55 A.M.)

11 THE COURT: Let the record reflect the jury's back  
12 in. Mr. Smith?

13 MR. SMITH: Thank you, Your Honor. The defense  
14 calls Investigator Steve Miano.

15 PHILLIP STEPHEN MIANO, III, having been duly sworn,  
16 was examined and testified as follows:

17 THE CLERK: Have a seat in the witness box. State  
18 your full name for the Court and spell your last, please.

19 THE WITNESS: My name is Phillip Stephen Miano the  
20 Third, M-I-A-N-O.

21 DIRECT EXAMINATION

22 BY MR. SMITH:

23 Q. Investigator Miano, is it okay if I call you Steve?

24 A. That's perfectly fine.

25 Q. Is that what you go by?

PHILLIP STEPHEN MIANO III - DIRECT BY SMITH

1 A. Yes, sir.

2 Q. Okay. Can you tell the jury where you work?

3 A. I'm currently employed by the Second Judicial  
4 Circuit Solicitor's Office in the capacity of chief  
5 investigator.

6 Q. Okay. How long have you worked there?

7 A. I've worked in the solicitor's office since the end  
8 of October, I couldn't give you a direct date, 2013.

9 Q. Last year?

10 A. Yes, sir.

11 Q. Okay. And where did you work before that?

12 A. Prior to that I was employed at Aiken Public  
13 Safety.

14 Q. Okay. What are the roles -- what is your role as  
15 an investigator at the solicitor's office?

16 A. My role as an investigator at the solicitor's  
17 office is, once a case is made by a jurisdiction within  
18 the Second Judicial Circuit that case is then forwarded to  
19 the solicitor's office for prosecution.

20 During that time period before it goes to trial or  
21 a resolution is made, myself and other investigators will  
22 take those cases and kind of find things inside those  
23 cases that we might need further information on, such as  
24 if a video wasn't turned over.

25 And we also provide subpoenas to witnesses and

PHILLIP STEPHEN MIANO III - DIRECT BY SMITH

1 other folks.

2 Q. Basically you prepare a case for trial?

3 A. Yes, sir.

4 Q. Okay. How is what you do at the solicitor's  
5 office different than, like, the police department role?

6 A. I think it probably would be hard to kind of put a  
7 specific, I guess, attachment on the difference. I mean,  
8 we're all investigators. The only difference is that  
9 we're not the charging agency.

10 Q. Okay. Now, you have an opinion about robberies  
11 that occur at restaurants?

12 A. Do I have an opinion?

13 Q. Yeah. What -- can you answer that? Have you  
14 formed an opinion about how robberies that occur at  
15 restaurants come about?

16 A. As a whole, no, sir, I haven't.

17 Q. Do you believe that restaurant robberies are  
18 primarily inside jobs?

19 A. I would say there's a percentage of them that are.  
20 And I would -- I wouldn't be able to put a percentage on  
21 those. I mean, it's like the majority of crimes.  
22 Oftentimes there are people on the inside that do assist  
23 with them.

24 Q. Okay. Do you recall an interview that you had  
25 with Devin Johnson on Monday this week?

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PHILLIP STEPHEN MIANO III - DIRECT BY SMITH

1 A. Yes, sir. I do.

2 Q. And do you recall in that interview that you told  
3 him that on restaurant robberies there's usually an inside  
4 element?

5 A. I don't remember specifically.

6 Q. Do you recall a statement to Devin Johnson where  
7 you told him that Ishmael Norid-Deen is a prime suspect?

8 A. I don't know if I used the word "prime". I did say  
9 that he was a suspect.

10 Q. Okay. Do you remember the statement you made to  
11 Devin Johnson that Ishmael Norid-Deen is wanted for  
12 robbery?

13 A. I did allude that he was wanted. I don't know if  
14 I said armed robbery, robbery. I don't know the specific  
15 charge I said, but I did allude that he was wanted.

16 Q. Okay. Now do you think -- do you remember your  
17 statement to Devin Johnson during that interview that you  
18 thought that he had something to do with this armed  
19 robbery at Captain D's?

20 A. Yes, sir.

21 Q. Do you remember telling him that the hammer's going  
22 to fall hard?

23 A. I believe I did use that language.

24 Q. Do you remember the statement you made to him, you  
25 said, "I don't think you'd pass a polygraph," with regard

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PHILLIP STEPHEN MIANO III - DIRECT BY SMITH

1 to his phone conversations to Ishmael Norid-Deen?

2 A. I don't know. I know that I did have mention of a  
3 polygraph while we were doing the interview, but I don't  
4 know the specific verbiage that I used with him.

5 Q. Okay. Do you recall a statement that you made to  
6 Devin Johnson during that interview where you talked to  
7 him about calling somebody five times before the robbery,  
8 and how he had access to the safe, and that it looks like  
9 it's an inside job?

10 A. I don't know the specific number of phone calls but  
11 we did, during the course of that interview, present some  
12 of those facts to him.

13 MR. SMITH: Beg the Court's indulgence.

14 (Pause.)

15 BY MR. SMITH:

16 Q. Do you think that Devin Johnson is involved with  
17 this case?

18 A. After my interview that I sat in with Detective  
19 Royster, I do not believe that Devin Johnson is involved  
20 in this case.

21 Q. Do you believe that Ishmael Norid-Deen is involved  
22 in this case?

23 A. I do not know enough of the specifics of the case  
24 to determine one way or the other about his involvement  
25 within the case.

## PHILLIP STEPHEN MIANO III - CROSS BY MOLONY

1 Q. You helped investigate this case, didn't you, or  
2 helped prepare it for court?

3 A. No, sir. Actually not completely. I did not.  
4 There's another investigator that helped prepare the case  
5 for Court. That investigator was out of town on Monday,  
6 and I assisted with the interview.

7 Q. So Monday is when you got involved?

8 A. Yes, sir.

9 Q. Okay. But from your impression on Monday, the  
10 interview on Monday, do you believe that Ishmael Norid-  
11 Deen may have a role in this robbery?

12 A. From -- I can't make a statement one way or the  
13 other whether he does or doesn't.

14 MR. SMITH: Okay. Thank you.

15 THE COURT? Cross-examination?

16 MR. MOLONY: Thank you, Judge.

17 CROSS-EXAMINATION

18 BY MR. MOLONY:

19 Q. Investigator Miano, you were present at this  
20 interview on Monday; right?

21 A. Yes, sir.

22 Q. And this is the one that the defense has spoken in  
23 great detail to Detective Royster about in this case.  
24 What -- explain to the jury briefly what the purpose of  
25 that interview was.

## PHILLIP STEPHEN MIANO III - CROSS BY MOLONY

1 A. The purpose of that interview is really to not  
2 leave any stone unturned. Oftentimes -- and, like I  
3 said, I can't really put a percentage mark on it, whether  
4 it's a robbery or other violent crimes. You want to make  
5 sure that there's -- that you've examined all leads. And  
6 that's pretty much what we were doing on Monday was trying  
7 to really eliminate, if not confirm, that Mr. Johnson was  
8 involved or was not involved in the robbery.

9 Q. You would agree with me that at the time of the  
10 interview we had just, as the State, had just basically  
11 learned some evidence that he had been in contact with  
12 Norid-Deen, moments before the armed robbery; is that  
13 right?

14 A. Yes, sir.

15 Q. Okay. And we knew that Norid-Deen's cell phone  
16 number -- you at that time knew that his cell phone number  
17 had been on the Defendant's records a whole bunch that  
18 night; isn't that right?

19 A. Yes -- well, yes, sir.

20 Q. Norid-Deen's cell phone number. Norid-Deen, the  
21 name that he's bringing up that you stated is, I guess you  
22 really didn't have enough information to make a judgment  
23 one way or the other, but ultimately were you doing your  
24 job to try to further investigate this case?

25 A. Absolutely.

PHILLIP STEPHEN MIANO III - REDIRECT BY SMITH

1 Q. And if something would have come up at that time  
2 that would have given you or any other investigator enough  
3 to arrest Devin Johnson, would you have done that at that  
4 time?

5 A. Yes, sir.

6 Q. That was the purpose of the interview, wasn't it?

7 A. Yes, sir.

8 Q. To see if he was actually involved; is that right?

9 A. Right. Yeah.

10 Q. That's your job as an investigator; isn't it?

11 A. Correct.

12 MR. MOLONY: No further questions, Your Honor.

13 THE COURT: Redirect?

14 MR. SMITH: Briefly.

15 REDIRECT EXAMINATION

16 BY MR. SMITH:

17 Q. Devin Johnson is a victim in this case; right? He  
18 was an important witness. Do you know why your office  
19 didn't call him as a witness?

20 A. Do I know why we didn't call him as a witness?

21 THE COURT: Speak up, sir.

22 THE WITNESS: Okay. I'm sorry.

23 THE COURT: That's all right.

24 BY MR. SMITH:

25 Q. Yes, sir. His name is listed on the indictment.

## SERENA GREEN WALKER - DIRECT BY SMITH

1 He wasn't called as a witness. Do you know why?

2 A. I don't know why. I haven't -- I've had limited  
3 interaction with the case. From my understanding I think  
4 he was subpoenaed for the trial.

5 Q. Okay.

6 MR. SMITH: Thank you, Your Honor.

7 THE COURT: Thank you for your testimony,  
8 Investigator. You can step down.

9 MR. SMITH: Defense calls Serena Walker.

10 THE COURT: Okay.

11 SERENA GREEN WALKER, having been duly sworn, was  
12 examined and testified as follows:

13 THE CLERK: Have a seat in the witness box. State  
14 your full name for the Court and spell your last.

15 THE WITNESS: My name is Serena Green Walker,  
16 W-A-L-K-E-R.

17 DIRECT EXAMINATION

18 BY MR. SMITH:

19 Q. Good morning, Ms. Walker.

20 A. Good morning.

21 Q. Thanks for coming today. Ms. Walker, can you tell  
22 the jury where you're from and what you do for a living?

23 A. I'm from Aiken, South Carolina. And I work at  
24 Sprint Gas Station.

25 Q. Okay. Now, do you remember the night of November

SERENA GREEN WALKER - DIRECT BY SMITH

1 27th?

2 A. Yes, I do.

3 Q. Okay. Why do you remember that night?

4 A. Because my brother put on a comedy show downtown.

5 Q. Who is your brother?

6 A. Ivory Corley.

7 Q. Were you involved with setting up that show?

8 A. Yes, I was.

9 Q. Okay. Who else was involved with that show?

10 A. As far as setting up?

11 Q. Yes, ma'am.

12 A. My son and a couple other people that were already

13 there.

14 Q. Okay. Do you know John Upson?

15 A. Yes, I do.

16 Q. Was John Upson involved with setting up that show?

17 A. Yes, he was. He helped my son bring my food

18 upstairs.

19 Q. Okay. Do you know when that show was supposed to

20 start?

21 A. It was supposed to start at nine.

22 Q. Okay. And when did it start?

23 A. It started after nine. I'm not sure exactly how

24 late, but it was after nine.

25 Q. When did you get to this benefit?

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## SERENA GREEN WALKER - DIRECT BY SMITH

1 A. About eight o'clock.

2 Q. Okay. And what did you do when you got there?

3 A. I sat and waited for my son to come upstairs, and  
4 when he came upstairs it was him and John together. And  
5 they were bringing my food. And John had set my food in  
6 the wrong spot and I made him move it.

7 Q. Okay. That's John Upson?

8 A. John Upson, yes.

9 Q. Okay. And that was around eight o'clock?

10 A. Uh-huh. Yes, it was.

11 Q. Was that the first time that you saw John at the  
12 benefit?

13 A. That night?

14 Q. Yes.

15 A. Yes.

16 Q. Okay. And what was your role at this benefit?

17 A. Just attending. Because my brother put on this  
18 show, we were able to have our own table in VIP.

19 Q. Okay. Did you help set up for the show?

20 A. I set up my table, yes.

21 Q. Did you -- and were you there for the duration of  
22 the show?

23 A. Yes, I was.

24 Q. What did you do after the show?

25 A. We all walked down towards the club, and I went

SERENA GREEN WALKER - DIRECT BY SMITH

- 1 home because I had to go to work the next morning.
- 2 Q. When you say "the club", where are you talking  
3 about?
- 4 A. On the corner of , the hotel.
- 5 Q. Hotel Aiken?
- 6 A. Uh-huh, yes.
- 7 Q. Do you know about what time the show ended?
- 8 A. No, I don't.
- 9 Q. When you left this benefit, who was with you?
- 10 A. My sister, a couple other women, my son, John  
11 Upson; it was just a whole group of us walking and playing  
12 and cutting up together.
- 13 Q. Okay. How was John acting that night?
- 14 A. Like he always act; funny, you know, telling jokes,  
15 playing around. He was acting no different than any  
16 other time I see him.
- 17 Q. Okay.
- 18 MR. SMITH: I beg the Court's indulgence. (Pause.)
- 19 Q. Could you estimate about what time the show ended  
20 and y'all walked over to the Hotel Aiken?
- 21 A. Not really because I really wasn't paying attention  
22 to the time.
- 23 Q. You said the show started late?
- 24 A. Yes.
- 25 Q. Do you remember about what time it ended up

## SERENA GREEN WALKER - CROSS BY MOLONY

1 starting?

2 A. No, I don't.

3 Q. Okay. You said it was supposed to start at nine?

4 A. Yes.

5 Q. Okay. What was this benefit for?

6 A. What was the benefit for?

7 Q. Yes, ma'am.

8 A. He usually put on a comedy show every year, but  
9 this year they were also raising money for some kids for  
10 Christmas.

11 Q. Okay. And do you know about how many people were  
12 there?

13 A. The room was full. So, whatever the capacity of  
14 the room was, I'm sure it was at capacity. But I really  
15 don't know what the capacity was.

16 Q. Okay. Where was this benefit held?

17 A. At the Arts Center downtown on

18 MR. SMITH: Okay. Thank you very much.

19 THE WITNESS: You're welcome.

20 THE COURT: Cross-examination?

21 CROSS-EXAMINATION

22 BY MR. MOLONY:

23 Q. Hey, Ms. Walker, how are you doing?

24 A. I'm okay.

25 Q. You stated that your brother is Ivory Corley?

## SERENA GREEN WALKER - CROSS BY MOLONY

1 A. Yes.

2 Q. And he's a comedian, isn't he?

3 A. Yes.

4 Q. And he put on the show that night?

5 A. Yes.

6 Q. Now you testified that the show was supposed to  
7 start at eight o'clock; is that right?

8 A. No. Nine o'clock.

9 Q. At nine o'clock?

10 A. I got there at eight o'clock.

11 Q. Okay. This show -- I'm going to show you -- can I  
12 mark this?

13 (State's Exhibit Number 27, ACR poster, marked for  
14 identification.)

15 MR. MOLONY: May I approach, Your Honor?

16 THE COURT: Sure.

17 BY MR. MOLONY:

18 Q. All right. Ms. Walker, I'm going to show you  
19 what's been marked for identification as State's Exhibit  
20 27, and ask you if you recognize this.

21 A. Yes.

22 Q. Who is this first picture of, right here?

23 A. My brother, Ivory.

24 Q. Okay. And is this the show you're referring to at  
25 the Aiken Center of the Arts?

## SERENA GREEN WALKER - CROSS BY MOLONY

1 A. Yes.

2 Q. Was this a flyer for it?

3 A. Yes.

4 MR. MOLONY: Your Honor, at this time the State  
5 would move to introduce state's Exhibit 27.

6 THE COURT: What says the defense?

7 MR. SMITH: Without objection.

8 THE COURT: Okay. Without objection, Number 27 for  
9 the State into evidence.

10 MR. MOLONY: Thank you.

11 (State's Exhibit No. 27, ACR poster, received into  
12 evidence.)

13 BY MR. MOLONY:

14 Q. Now, Ms. Walker, you would agree that this flyer  
15 for the show with your brother on it states that it was  
16 supposed to start at eight o'clock; isn't that right?

17 A. Yes.

18 Q. So you're just confused about it actually suppose  
19 to start at nine?

20 A. I guess. You know, like I said, I thought it  
21 started at nine o'clock instead of eight.

22 Q. Yes, ma'am. And this after-party, you're not sure  
23 exactly what time it was going to be starting; right?

24 A. No.

25 Q. So, if the show started at eight, and it was -- say

## SERENA GREEN WALKER - REDIRECT BY SMITH

1 it was late starting, you said?

2 A. Yes, it was.

3 Q. Okay. You saw him before the show, and then you  
4 saw him after the show; is that right?

5 A. Correct.

6 Q. You didn't see him during the show, did you?

7 A. No. I don't remember seeing him during the show.

8 Q. So you're not sure where he was during the hour  
9 before you -- or from the first time you saw him until the  
10 last time you saw him?

11 A. Correct.

12 MR. MOLONY: Thank you, Ms. Walker.

13 THE WITNESS: You're welcome.

14 THE COURT: Anything on redirect?

15 REDIRECT EXAMINATION

16 BY MR. SMITH:

17 Q. Ms. Walker, you were a little confused about the  
18 time this show started. Are you confused about seeing  
19 John Upson there that night?

20 A. No. I may have the times confused, but I'm not  
21 confused about seeing him that night.

22 Q. Okay. And you saw him -- when exactly did you see  
23 him again?

24 A. An hour before the show started because I got there  
25 an hour before to set up my food on my table.

## JANET LAVERNE WILLIAMS - DIRECT BY SMITH

1 Q. And then?

2 A. I saw him after the show.

3 MR. SMITH: Okay. Thank you.

4 THE WITNESS: Uh-huh.

5 THE COURT: Thank you for your testimony, ma'am.

6 You can step down.

7 With no objection, you are excused or you're  
8 certainly welcome to remain with us.

9 THE WITNESS: All right. Thank you.

10 MR. SMITH: No objection, Your Honor.

11 MR. MOLONY: No, objection.

12 MR. SMITH: The defense calls Janet Williams.

13 JANET LAVERNE WILLIAMS, having been duly sworn, was  
14 examined and testified as follows:

15 THE CLERK: Have a seat in the witness box. State  
16 your full name for the Court and spell your last, please.

17 THE WITNESS: My name is Janet Laverne Williams.

18 W-I-L-L-I-A-M-S.

19 DIRECT EXAMINATION

20 BY MR. SMITH:

21 Q. Good morning, Ms. Williams.

22 A. Good morning.

23 Q. Thanks for coming. Can you tell the jury where  
24 you're from and what you do for a living?

25 A. I'm from Aiken, South Carolina. And I'm employed

JANET LAVERNE WILLIAMS - DIRECT BY SMITH

1 by Aiken County Department of Social Services. I'm an  
2 eligibility worker.

3 Q. Okay. Now do you remember the night of November  
4 27th?

5 A. I do.

6 Q. Okay. Why would you remember that night?

7 A. Because I don't normally go out. And I was invited  
8 to go to this comedy show. And the comedy show was on,  
9 at the Art Center which I didn't even know  
10 they had little rooms to, I guess, to rent out for  
11 events.

12 So, got dressed and met my cousin up there and we  
13 went to this comedy show.

14 Q. Who's your cousin?

15 A. Her name's Marty Williams.

16 Q. Okay. Do you know John Upson?

17 A. I do, yes.

18 Q. How do you know him?

19 A. We were actually raised in the same neighborhood.  
20 He's older than me but, you know, me being the little  
21 young, aggravating child, I would see him from time to  
22 time.

23 Q. Okay. Now did you see John Upson that night?

24 A. I did. Yes, sir.

25 Q. Okay. Where were you seated?

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## JANET LAVERNE WILLIAMS - DIRECT BY SMITH

1 A. Right directly in front of the stage. I was in,  
2 they had a VIP section. And when I say "directly in front  
3 of the stage," I was, like, looking up like this  
4 (indicating). So, you know.

5 Q. Okay. Do you remember seeing John Upson that  
6 night?

7 A. I do. Uh-huh.

8 Q. Okay. When did you see him?

9 A. Well, actually I saw him when, I guess my nerves  
10 calmed down and the show was pretty much over because I  
11 wouldn't look back. It was so many people. It was very  
12 crowded in there.

13 When I was getting ready to leave out, I pretty  
14 much ran into everybody I knew. I was a little emotional  
15 because during the show they brought up two family members  
16 that I had lost, like, a month apart.

17 So, you know, he was trying to console me and, you  
18 know, things of that nature. We talked about it because  
19 of course he knew my cousins. So we, we talked and  
20 walked and, you know.

21 Q. Did you go to the after-party?

22 A. I did. I didn't know that was a part of the VIP  
23 section so they kind of forced me into 100 Laurens which  
24 is where it's located.

25 Q. Did you see John Upson there?

JANET LAVERNE WILLIAMS - DIRECT BY SMITH

1 A. I did. He actually walked me down there. We were  
2 all walking down. I had on my cousin's shoes and I came  
3 out of there, I was kind of walking without my shoes on.  
4 It was -- kind of calmed me down because I was a little  
5 emotional, like I stated. You know, I was very teary-eyed  
6 because I hadn't dealt with the deaths of my family  
7 members.

8 Q. How was John acting that night when you saw him?

9 A. Like she stated, like John. I mean, like I said, I  
10 was emotional. And, you know, I mean, he can be a bit of  
11 a jokester but at the time that's what's needed, you know,  
12 because I was supposed to have been out enjoying myself.  
13 So, he was just being John.

14 Q. Do you remember at the show about how many people  
15 were there?

16 A. When I was young they used to say "filled to the  
17 rim with brim". I mean, it was packed. It was a lot of  
18 people. The few times that I attempted to look back, you  
19 know, it was so many people. So I realized all I needed  
20 to do was to look up, so --

21 Q. Okay.

22 A. -- it was a lot of people.

23 MR. SMITH: Thank you. Beg the Court's indulgence.

24 (Pause. Conferring with Defendant.)

25 BY MR. SMITH:

## JANET LAVERNE WILLIAMS - CROSS BY MOLONY

1 Q. Do you remember about what time the show ended?

2 A. It was probably around -- because it started late,  
3 I want to say, like, it wasn't 11. I'm just guessing  
4 maybe, like, 10:30, quarter to 11.

5 Because I know by the time I made it down to the  
6 club it was, it was, like, almost 11 o'clock. And we  
7 were in the club and, like I stated, I was just in an  
8 emotional, you know, state. And I was standing in the  
9 corner trying to, you know, just uplift my spirits. And  
10 actually John saw that I was so emotional. He actually  
11 pulled me outside and that's when I broke down, so.

12 Q. Okay. Thank you. Nothing further.

13 THE WITNESS: Uh-huh.

14 THE COURT: Cross-examination?

15 CROSS-EXAMINATION

16 BY MR. MOLONY:

17 Q. Hey, Ms. Williams. How are you?

18 A. Hello. How are you?

19 Q. Doing well. So you just testified that the  
20 Defendant, you saw him at the very end of the show?

21 A. Yes, uh-huh.

22 Q. Okay. And you were sitting right up front?

23 A. Yeah. I was right, right there by the stairs and  
24 right there on the stage almost but not, you know,  
25 standing on the stage. I was -- my table was right there.

## JANET LAVERNE WILLIAMS - CROSS BY MOLONY

1 Q. Okay. Where, where did you see him? Where was  
2 he?

3 A. When I was getting ready to leave, you know, like,  
4 I sat there for a while after everybody was trying to  
5 leave. I don't like crowds, so I was waiting for the room  
6 to kind of get a little thin. When I was walking out I  
7 had to go to the restroom, so my cousin showed me where  
8 the restroom was and I was coming back out looking for  
9 her.

10 So before I got to the elevators -- I had never  
11 been in this building before. I guess once you come out  
12 of the room, this is where they had the table where you  
13 showed your, your tickets or whatever. And I want to say  
14 I was about to get on the elevator and when I looked over  
15 he was walking towards me. He was asking me, was I okay.  
16 I said, you know, "I'm all right."

17 Q. Yes, ma'am.

18 A. Right there by the elevator when I was getting  
19 ready to leave out.

20 Q. Yes, ma'am. So, this was -- the show was done,  
21 lights were on?

22 A. Oh, yeah. Uh-huh. They were actually getting rid  
23 of tables and everything because when I stated I was  
24 waiting for the room to kind of thin out, I was waiting.

25 Q. Yes, ma'am. And so when you actually saw him it

## JANET LAVERNE WILLIAMS - CROSS BY MOLONY

1 wasn't actually in the room where the comedy show was  
2 being held, it was basically towards where the elevator  
3 was?

4 A. Yes, uh-huh.

5 Q. The elevator wasn't in the room where the comedy  
6 show was being held, was it?

7 A. No, sir.

8 Q. Okay. How long have you known the Defendant?

9 A. I've known him, I would say, all of my life of  
10 remembering, I guess. Childhood friends, I guess.

11 Q. Yes, ma'am. Now, this after-party at Hunter and  
12 Laurens?

13 A. Uh-huh.

14 Q. You testified, you were kind of guessing time?

15 A. Yes.

16 Q. Did you ever look at your watch when you got to  
17 Hunter and Laurens?

18 A. Watches don't work on me.

19 Q. So you're not exactly sure of the time?

20 A. I'm not. No, sir. Huh-uh.

21 Q. As to --

22 A. But I know it wasn't 11 o'clock.

23 Q. Okay.

24 A. I do know because once I got into the club and got  
25 very emotional, I actually text somebody to come get me

## JANET LAVERNE WILLIAMS - CROSS BY MOLONY

1 because I was just too emotional to drive. And that's  
2 when he saw me getting upset. Everybody was kind of  
3 consoling me. They're not used to seeing me out in clubs,  
4 so. And I actually had a couple people come over. John  
5 was one of them, "Janet, let's walk outside and get some  
6 air." You know, "Thank you," and I walked outside.

7 Q. How do you know it wasn't 11 o'clock?

8 A. Because when I started texting --

9 Q. Yes, ma'am.

10 A. -- the person I started texting him, probably it  
11 was a little bit after 11. I had been in the club for a  
12 little while.

13 Q. When you say a "little while", couple minutes? Ten  
14 minutes?

15 A. Maybe 10, 15 minutes. Uh-huh. Yes.

16 Q. Okay. You've known the Defendant your whole life.  
17 You're aware of his cell phone number?

18 A. No.

19 Q. 646-6125?

20 A. I moved away. I lived in Charlotte for 15 years  
21 and I've only been back for five years to take care of my  
22 grandmother, so.

23 Q. Okay. You've known him for a long time --

24 A. I've known him -- exactly.

25 Q. -- but you're not real close with him?

## JANET LAVERNE WILLIAMS - CROSS BY MOLONY

1 A. No, sir.

2 Q. And you weren't with him that --

3 A. No.

4 Q. -- night because you didn't see him until after?

5 A. No, sir.

6 MR. MOLONY: Thank you, Your Honor.

7 THE COURT: Redirect?

8 MR. SMITH: Nothing further.

9 THE COURT: Thank you for your testimony, ma'am.

10 You may step down. Any objection to this witness being  
11 excused?

12 MR. MOLONY: No, sir, Judge.

13 THE COURT: You're free to leave or you're welcome  
14 to stay with us.

15 MR. SMITH: Your Honor, the defense calls Vernon  
16 Wright.

17 THE COURT: Okay.

18 VERNON LEE WRIGHT, having been duly sworn, was  
19 examined and testified as follows:

20 THE CLERK: Have a seat in the witness box.

21 State your full name for the Court and spell your  
22 last.

23 THE WITNESS: Vernon Lee Wright, W-R-I-G-H-T.  
24  
25

VERNON LEE WRIGHT - DIRECT BY SMITH

DIRECT EXAMINATION

BY MR. SMITH:

Q. Good morning, Vernon.

A. Good morning.

Q. Thanks for coming this morning.

Could you tell the jury just a little bit about yourself, where you grew up and what you do for a living?

A. Yes, sir. I'm from here. I'm originally from here in Aiken, South Carolina. I served Aiken County Sheriff's Office under the Detention Division for 11 years. And I currently work for Augusta Technical College as a college professor.

Q. Thank you. Do you remember the night of November 27th?

A. Yes, sir.

Q. Okay. Why do you remember that day?

A. Because there was a special event and I had reserved a table for my business.

Q. Okay. What business is that?

A. I own a barber shop here in town.

Q. Okay. Do you know John Upson?

A. Yes, sir. I do.

Q. How do you know John?

A. I know John Upson from school.

Q. Okay. Did you see John Upson the night of this

VERNON LEE WRIGHT - DIRECT BY SMITH

1 benefit?

2 A. Yes, sir.

3 Q. When did you see him?

4 A. I can't exactly tell you the time. I do know that  
5 the show was supposed to start at eight and it was  
6 extremely late. I've seen Mr. Upson when I was on my way  
7 to the restroom, and we actually spoke to one another.

8 Q. Okay.

9 A. And when I went back into the room, he was still  
10 pretty much standing in the same spot.

11 Q. Now when you had a chance to speak with him, had  
12 the show already started?

13 A. No, sir. Ivory had been on the stage, but the  
14 actual show aspect of it hadn't started yet.

15 Q. So it was just getting to the point of starting?

16 A. Right. At least we were under the impression that  
17 it was about to start but then there was a pause there, I  
18 don't know, for maybe 10, 15 minutes before the acts  
19 actually got on the stage.

20 Q. Did you go to that after-party?

21 A. Yes, I did.

22 Q. Okay. Did you see John Upson there?

23 A. I don't recall seeing John at the after-party.

24 Q. Okay. Do you remember when you spoke with John  
25 that time, that evening, do you remember how he was

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VERNON LEE WRIGHT - CROSS BY SLOCUM

1 acting?

2 A. He was -- actually we were surprised to see one  
3 another. I hadn't seen him in several years.

4 Q. Okay. Was he acting normal?

5 A. Yes.

6 Q. Okay. Not nervous or upset or anything?

7 A. No, sir.

8 Q. Okay.

9 MR. SMITH: Beg the Court's indulgence. (Pause.)

10 Nothing further, Your Honor.

11 THE COURT: Cross-examination?

12 CROSS-EXAMINATION

13 BY MR. SLOCUM:

14 Q. Mr. Wright --

15 A. Yes, sir.

16 Q. -- you know Mr. Upson from school; is that correct?

17 A. Yes, sir.

18 Q. What school?

19 A. I know John from when I was in middle school at  
20 Kennedy B. (verbatim) Middle School, here in Aiken.

21 Q. So he was a buddy of yours?

22 A. No, we're not buddies but we know each other.

23 Q. And you said you couldn't tell exactly when the  
24 show started. It was extremely late. Is that your  
25 testimony?

APP'X 202

1 A. Yes, sir.

2 Q. How long did the show last?

3 A. I do know that the show was supposed to end --  
4 well, we were supposed to be out of the building by  
5 midnight and if I'm not mistaken the show actually ended  
6 before midnight.

7 Q. Okay. And then it ended just before midnight, then  
8 you went to the bar, right, the after-party?

9 A. Yes, sir.

10 Q. Where was the after-party?

11 A. It was

12 Q. And you didn't see Mr. Upson at that?

13 A. There were several people there, sir, I -- you  
14 know; I can't recall.

15 Q. Do you know Ishmael Norid-Deen?

16 A. No, I don't.

17 Q. You don't?

18 MR SLOCUM: Beg the Court's indulgence. (Pause.)

19 Nothing further, Judge.

20 THE COURT: Redirect?

21 MR. SMITH: Nothing.

22 THE COURT: Thank you for your testimony, sir. You  
23 can step down. If there's no objection to being excused,  
24 you are free to leave or you're welcome to remain with us.

25 MR. SMITH: Judge, can we approach?

1 THE COURT: Sure.

2 (Off-the-record discussion.)

3 THE COURT: Any further witnesses on behalf of the  
4 defense?

5 MR. SMITH: Nothing further, Your Honor. The  
6 defense rests.

7 THE COURT: Okay. And any reply case on behalf of  
8 the State?

9 MR. SLOCUM: None from the State, Your Honor.

10 THE COURT: Okay. that concludes the evidentiary  
11 record in this case.

12 Madam Forelady and ladies and gentlemen of the  
13 jury, what we have left to do is the lawyers will make  
14 their closing arguments to you, and the Court will give  
15 you the final charge on the law in the case.

16 But, we're going to wait and do that after the  
17 lunch break. And I'm going to give you -- I may have  
18 given you a little longer lunch break yesterday, I can't  
19 remember, and I'm going to do it again today. So we're  
20 going to be in recess until 1:30. So you got two hours  
21 to have lunch and tend to whatever other business you may  
22 need to tend to.

23 So I ask that you promptly be back in your jury  
24 room at 1:30. And then we'll proceed at that time with  
25 the closing arguments and the final charge on the law.

1           Okay? Again, I remind you, don't discuss this case  
2 amongst yourselves or anybody you come in contact with  
3 over lunch break. Don't discuss anything about this case.  
4 We'll see you back at 1:30. Have a good lunch.

5           (Jury exits courtroom at 11:34 A.M.)

6           THE COURT: Okay. Anything for the record before  
7 we take our lunch break, from the State?

8           MR. SLOCUM: Nothing from the State.

9           THE COURT: From the defense?

10          MR. SMITH: Your Honor, I'd just like to renew my  
11 motion for directed verdict on the armed robbery as well  
12 as for the kidnapping.

13          THE COURT: Okay.

14          MR. SMITH: For the same reasons stated previously  
15 for the armed robbery.

16          THE COURT: Okay. Thank you very much. The motion  
17 is denied.

18          All right. We'll be in recess until 1:30. As I  
19 indicated to you at our sidebar we had a moment ago, we'll  
20 provide you with a draft of the final charge for you to  
21 look at. We'll probably -- and the verdict form too.

22          If y'all want to hang around for just a little bit  
23 before you take off for lunch, we can probably get you a  
24 copy before you break for lunch. So if you'd just hang  
25 around for a little bit, please.

1 MR. SLOCUM: Yes, sir.

2 MR. MOLONY: Yes, sir.

3 (Lunch break taken at 11:36 A.M. At 1:44 P.M., the  
4 trial resumed:)

5 THE COURT: All right. Let's go back on the  
6 record -- oh, we're missing --

7 MR. GRIMES: We can do the preliminary stuff, Your  
8 Honor. He's on the way in, but we can start.

9 THE COURT: Well, I don't mind waiting.

10 MR. GRIMES: That's all right. We talked about  
11 stuff.

12 THE COURT: All right. The proposed charge, does  
13 the State have any objections, changes, amendments?

14 MR. SLOCUM: Yes, sir, Your Honor. Just to the --  
15 amendment to the charge of armed robbery. We actually  
16 dealt with this here recently in this circuit about the  
17 armed robbery. During the commission of attempted  
18 robbery, one reasonably believes the item used to be a  
19 deadly weapon, those words "reasonably believed" are not  
20 in the charges that we reviewed earlier.

21 And we would just ask that that be amended to  
22 include the new language.

23 THE COURT: Okay. Let me look here.

24 Solicitor, help me out a little bit more. What  
25 specifically -- which page are we referring to?

1 MR. SLOCUM: On page, I believe it begins on page  
2 10, the last paragraph --

3 THE COURT: Okay.

4 MR. SLOCUM: -- of the charges that were provided  
5 to us.

6 THE COURT: Right.

7 MR. SLOCUM: Finally, the State must prove beyond a  
8 reasonable doubt that the Defendant was armed with a  
9 deadly weapon during the robbery. A deadly weapon is any  
10 article, instrument, or substance which is likely to cause  
11 death or great bodily harm. Whether an instrument has  
12 been used as a deadly weapon depends on the facts and  
13 circumstances of each case. The following are examples of  
14 instruments which may be deadly weapons; pistol, shotgun,  
15 rifle, dirk, dagger, knife, slingshot, metal knuckles,  
16 razor, gasoline, fire bomb, Molotov cocktail. A gun may  
17 be a deadly weapon even if it's not operating.

18 The Statute 16-11-330 on armed robbery is as  
19 follows: A person who commits a robbery while armed with  
20 a pistol, dirk, slingshot, metal knuckles, razor, or other  
21 deadly weapon, or while alleging either by actions or  
22 words he was armed while using a representation of a  
23 deadly weapon, or any object which a person present during  
24 the commission of a robbery reasonably believes to be a  
25 deadly weapon --

1 THE COURT: Do you want to just hand me what you're  
2 reading?

3 MR. SLOCUM: Yes, sir. It's 16-11-330 Section A.  
4 The bottom of that page, Your Honor.

5 THE COURT: Okay. All right. So what --

6 MR. SLOCUM: The only thing we would like to  
7 include is that the -- someone could reasonably believe  
8 the object being used is a deadly weapon.

9 THE COURT: I'm just trying to figure out how I  
10 want to fit it in. So just give me a moment, please.

11 MR. SLOCUM: Yes, sir.

12 THE COURT: What I will do, I will charge -- I will  
13 say -- I'll just do that at the very end of the proposed  
14 charge.

15 I will charge: A person who commits robbery while  
16 armed with a deadly weapon -- I will not define that  
17 again -- or while alleging either by action or words he  
18 was armed while using a representation of a deadly weapon,  
19 or any object which a person present during the commission  
20 of a robbery reasonably believed to be a deadly weapon,  
21 period.

22 Satisfactory?

23 MR. SLOCUM: It is, Your Honor. Thank you.

24 THE COURT: Okay. All right. Anything else from  
25 the State as to charges?

1 MR. SLOCUM: No, sir. Nothing from the State.

2 THE COURT: And the proposed verdict form is  
3 satisfactory?

4 MR. SLOCUM: It is, Your Honor.

5 THE COURT: Now from the defense. Any changes to  
6 the charge?

7 MR. SMITH: Nothing, Your Honor.

8 THE COURT: Okay. And the verdict form is  
9 satisfactory to the defense?

10 MR. SMITH: Yes, sir.

11 THE COURT: All right.

12 Is the -- does the State intend to open on the law  
13 and close or close in full?

14 MR. SLOCUM: We would waive opening on the law.

15 THE COURT: Very good. Anything else we need to  
16 take up before we bring the jury out?

17 MR. SLOCUM: Nothing from the State, Your Honor.

18 MR. SMITH: Nothing from the defense.

19 THE COURT: Okay. All right. Thank you very  
20 much.

21 Let's bring the jury out, please.

22 THE BAILIFF: Okay.

23 (Jury enters courtroom at 1:50 P.M.)

24 THE COURT: Let the record reflect the jury is back  
25 in.

1           Madam Forelady and ladies and gentlemen of the  
2 jury, we are now at the stage, as I had mentioned to you  
3 before we broke for lunch, that the lawyers will give  
4 their closing arguments to you. And I will then, after  
5 that is done, I will give you the charge on the law and  
6 your final instructions.

7           So if you will pay very close attention. Give your  
8 undivided attention to the lawyers as they present their  
9 closing arguments. Okay?

10          Mr. Smith?

11          MR. SMITH: Thank you, Your Honor. May it please  
12 the Court.

13          THE COURT: Yes, sir.

14          MR. SMITH: Mr. Slocum, Mr. Molony.

15          Good afternoon, ladies and gentlemen of the jury.  
16 Thank you for your service.

17          We know that this is an imposition on your time and  
18 your lives and we truly value your service. It's  
19 something to remember for the rest of your lives.

20          We talked about -- before this all got started, we  
21 kind of gave you an idea what was going to happen. We  
22 told you you were going to hear all this evidence and now  
23 you've heard it. I talked about you having two different  
24 bags, a bag of good stuff, a bag of bad stuff, stuff that  
25 you didn't want to hear. The stuff that you don't

1 consider important, you just throw it away.

2 Now you all paid good attention the whole time.  
3 You've all remembered things you've heard. Some things  
4 mean a lot to you. Some things don't.

5 What we're going to do now is go through some  
6 things you heard. We're going to review it.

7 The night this happened, John Upson was involved  
8 with a benefit, a comedy show that was a benefit. He was  
9 there ahead of time. He was helping set up. He was  
10 involved with the setup of the show. He was seen at the  
11 show, you heard, right up until the point of the start.  
12 Okay.

13 You also heard testimony that he was seen right  
14 there when it ended. A lady who was sitting right up  
15 front, she was sitting right up front, and she was  
16 watching the show. She wasn't paying attention to what's  
17 going on behind her, beside her.

18 She was watching the show. She didn't see John  
19 Upson during the show but when it was over, she got up and  
20 she walked back and as she went back she saw John Upson.  
21 What time was that? She says about 10:30, 10:45.

22 What time did this robbery occur? Did you hear  
23 that? Do you remember that?

24 He would have had to jumped into his car, sped back  
25 downtown, parked, jumped out, ran upstairs, see his good

1 friend and say, Oh, how are you doing? Are you okay? I  
2 notice you've been crying. I'm going to comfort you.

3 Are those the actions of a man who just arm robbed  
4 a Captain D's? A man who the State is trying to say goes  
5 in with a bandana over his mouth, a hoody on, gloves on,  
6 rushes in there, rushes out, and then he's cool as a  
7 cucumber? That doesn't make sense. That doesn't make  
8 sense.

9 Why does this man leave the show if he's so  
10 invested in it? He's there before, he's there after.  
11 He's there at the after-show, the show where his childhood  
12 friends are attending, his childhood friends are putting  
13 on. The State's asking you to believe that he's going to  
14 leave there.

15 I got an idea. Why don't we go and rob the Captain  
16 D's? That's cool. I'd much rather do that than watch  
17 this show. It doesn't make any sense.

18 You heard good evidence. You heard good testimony  
19 from witnesses putting him there. Okay. That's  
20 important for you to consider.

21 What else did you hear about? Well, you heard  
22 about phone records.

23 And all of this stuff has been admitted. You're  
24 going to get to take this all back with you into the jury  
25 room. And you can flip through anything that you want.

1 There's a lot here. There are pages and pages of small  
2 typed phone records, cell tower records, maps, all this  
3 stuff that's been printed out for you, all this stuff.

4 What does it show? What is the State hoping to  
5 show from this? I know what it doesn't show. It doesn't  
6 show that John Upson was at Captain D's robbing the place.  
7 It doesn't show that. It can't show through any of this  
8 phone stuff that John Upson was at Captain D's.

9 This doesn't help you one bit in making your  
10 decision. It's for you to consider. You can spend your  
11 time. I encourage you, if you want to look into it, look  
12 into it. There's good information in there.

13 But ultimately what you're not going to find in  
14 there, you're not going to find anything that tells you  
15 that John Upson was at Captain D's at the time of the  
16 robbery. It's not there. Okay.

17 We're going to play a little game. Okay? You're  
18 going to like this. What I'm showing you is a picture of  
19 a bunch of people's noses and eyes. Okay. These are  
20 people that you all have seen. These are people that you  
21 would know and recognize them. These are pictures that  
22 show maybe about what was shown to Jameshia when she got  
23 put in the freezer by the guy with the mask, with a  
24 bandana over his face and hoody on.

25 I'm going to ask you guys who some of these people

1 are because you know who they are. You've seen them. You  
2 didn't see them for just a split second a few days ago.  
3 You didn't see them for a few minutes a few days ago.  
4 These are people you've seen repetitively for a long time,  
5 for years. Let me see if you know these people. Don't  
6 answer me out loud. Okay. I want you to look at them. I  
7 want you to think. Let's start with this one. Let's  
8 start with this one.

9 I want y'all to look at it. Get a good look.  
10 Think in your mind who you might think that is. If you  
11 need any more time to look at it, let me know. I'll give  
12 you more time.

13 This one right here. Okay. Are you guys ready  
14 for the great reveal? See how many of you got this right.  
15 Brad Pitt. You guys have seen him before; right? It's  
16 just an exercise to get you guys to know what she saw.  
17 What are we expecting her to do? The State is trying to  
18 -- they're resting their entire case on this. Okay.  
19 They're resting their whole case on that (indicating).

20 You heard from the investigators. You heard  
21 Investigator Royster tell you that there are no other  
22 suspects in this case. And you heard Investigator Miano  
23 talk about how he thinks that the guy named Ishmael Norid-  
24 Deen was a suspect in this case.

25 You heard about photo lineups. But did you hear

1 about a photo lineup of John Upson? No, you didn't. You  
2 didn't hear about a photo lineup of John Upson because  
3 none was ever done. None was ever done. They didn't show  
4 his picture to anybody. They took what Jameshia Alston  
5 found on Facebook, said, all right, we got our guy.

6 That's good enough for us. Let's go to court with it.

7 They didn't investigate. I mean, they -- they had  
8 an opportunity to look for video footage. They checked at  
9 Captain D's. Their system was out. Isn't it convenient  
10 that the guy that they were interrogating at the last  
11 minute on Monday morning is a manager at Captain D's who  
12 they thought might be involved with this? Isn't it  
13 convenient that there's no video footage? That the hard  
14 drive wasn't functioning properly? It just seems a little  
15 convenient.

16 What about the camera at Staples? You heard from  
17 Scott that he thought they had come up from behind  
18 Staples. Well, there, sitting perched like an eagle on  
19 the back corner of Staples, right up to -- right up to the  
20 back corner of Captain D's we see this. Do you see  
21 that? A big old thing sticking right up there in the back  
22 corner looking right at the back door of Captain D's. Did  
23 anybody even ask about that? They didn't even go talk to  
24 Staples about that.

25 Round two. Round two.

1           Let's do another one. Let's try the big one.

2   Okay. It may be a little more difficult. Take a good  
3   look. Enough time? Who do you think that is? It's  
4   Jay-Z. Got Jay-Z on there. Okay.

5           Let's talk about what Scott Hall said. Scott Hall  
6   was there. He was in a bad position. He had a gun put  
7   to the back of his head. He sees these guys. Right? He  
8   sees them wearing their bandanas over their faces, hoodies  
9   over their heads. They order him to the front. They put  
10   him down, a gun to his head. What does he say about  
11   those guys? He doesn't get a real good look. He can't  
12   identify them. But what can he tell you? He can tell you  
13   how tall they were. That was about the best description  
14   we got of anybody was out of Scott Hall. Black male, two  
15   black males, one about five-eleven, one taller than that.

16           Do you remember how tall Scott Hall was? He wasn't  
17   that tall. He's not five-eleven. Five-eleven. Taller  
18   than that.

19           Now, do you remember, I asked Detective Royster:  
20   How tall is John Upson? John Upson's not very tall. He's  
21   five-seven. And we're talking about the difference  
22   between me and Michael Jordan. If Michael Jordan's in  
23   here, you're going to be able to say, that's Michael  
24   Jordan. That's Andy Smith. That's a big difference  
25   there. It's a big difference. And what's more than the

1 four or five inches. What's more than that.

2 When people who are a certain height -- how do you  
3 judge people's heights? You look at somebody and say he's  
4 six-two, she's five-three. They don't do that. A lot of  
5 times what they do is they say, hey, the guy's taller than  
6 me. That guy's shorter than me. Scott Hall, John Upson,  
7 about the same height.

8 Why would he say that? Why would he say that this  
9 guy's five-eleven and the other guys over five-eleven, six  
10 foot or more if it's John Upson? Well, the answer to that  
11 is because it wasn't John Upson. He wasn't there. He's  
12 downtown at the benefit, spending the evening with his  
13 friends and his family.

14 We'll go to round three with the pictures. Who  
15 should we do? How about we do this one. This big one  
16 right here.

17 All right. Do you have in your mind who you think  
18 it is? Let me show you. Michael Jordan. It's hard to  
19 tell from those little, that little view of him; isn't  
20 it?

21 Now, we've got Jameshia Alston. She's scared. I  
22 feel bad for Jameshia Alston. She's counting down her  
23 money, just like she does every night. It's every other  
24 night for her. She's counting down her till, closing up,  
25 getting ready to go home, enjoy Thanksgiving break and

1 somebody rushes in the door with a gun.

2           And she sees the gun and she is freaked out. She  
3 told you that she was afraid that she was going to die.  
4 When someone's afraid that they're going to die and they  
5 see somebody running around the store, are they gazing  
6 into somebody's eyes? Are they staring at their face?  
7 Guess what? The guy who's she's saying is John Upson  
8 isn't the guy with the gun.

9           Two guys coming in and one's got a gun, who are you  
10 watching? The guy with the gun. You don't care so much  
11 about the other guy. You're concerned about the guy with  
12 the gun. The other guy's got a mask over his face and a  
13 hoody on, marches you to a freezer, puts you in the  
14 freezer, closes the door. And this freezer doesn't have a  
15 window on it. She's in a windowless freezer, telling you  
16 what a man who has his face covered and hoody on, telling  
17 you who that is.

18           Now she doesn't know John Upson. She wasn't  
19 raised with John Upson. She's never spent a day with  
20 John Upson's family. She doesn't know him.

21           She knows him as a customer from two days prior.  
22 She doesn't know me as a customer. She knows John Upson  
23 from two days prior as a customer.

24           The people who are up here in this stand -- Janet  
25 Williams, Vernon Wright, Serena Walker -- they know John

1 Upson. And guess what? When they're with John Upson, he  
2 didn't have his face covered. He didn't have a hoody on.  
3 That's easy for them to say, yeah, I'm with John Upson, a  
4 guy I know, a guy who's not trying to hide himself.

5 And what did they tell you about John? Did they  
6 tell you that he was acting nervous? That he was  
7 fidgety? Did they tell you that he was sweaty, acting  
8 weird? No. Remember? They all said he was being John  
9 Upson. He was being gregarious. He was trying to comfort  
10 me. He was making me laugh. He was walking with me  
11 across the street. We were going to go spend some time at  
12 the after-party together. That's the John Upson they  
13 saw. They didn't see a guy who had just robbed Captain  
14 D's. Okay.

15 I don't know that we're going to do all of these.  
16 I know you want to. Let's do this one. This bottom big  
17 one here. Take a good look. Think in your mind who it  
18 might be. Ready? Here goes.

19 Barry White. Barry White. If I was given a  
20 description of a guy who robbed me that night and that guy  
21 happened to be John Upson, that's an easy thing to say. I  
22 want you to remember. You listened to all of this stuff.

23 The State brought this case against John Upson.  
24 They decided when was enough investigation. Did they  
25 investigate this enough? We're ready to come to court.

1 We're ready to present it to the jury.

2 But there's some stuff that's missing, isn't  
3 there? Okay. You got stuff that's missing. What  
4 happened to Devin Johnson? You heard this guy's name a  
5 lot during the trial.

6 Devin Johnson never sat up there. Why didn't he  
7 sit up here? Devin Johnson's name is on one of the  
8 indictments. He's a victim. He's a victim. He's an  
9 important witness. The State didn't get him up here.  
10 They chose to go forward with this case. They chose what  
11 evidence to present.

12 And remember who's burden this is. Who has the  
13 burden here? Remember the scales at the beginning? We  
14 talked about the scales. John Upson, it's all in his  
15 favor when we start. The State is the one who has to tip  
16 the scales. Not just so they're even. They got to tip  
17 them all in the other direction.

18 You have to be convinced beyond a reasonable  
19 doubt. The State decides, hey, what evidence can we  
20 present to the jury to convince them beyond a reasonable  
21 doubt? Do we need to gather more evidence? Do we have  
22 enough? They decided they had enough, and they didn't  
23 need to investigate this any more.

24 They didn't need to call all these witnesses.  
25 They didn't call Devin Johnson. They didn't call William

1 Keels. They didn't call Cassandra Ellis. They didn't  
2 call these 'people, these people who were mentioned in the  
3 story. You don't know anything about these people. And  
4 the reason you don't know anything about them is because  
5 the State didn't present that evidence to you.

6 But you deserve to hear all of the evidence. Is  
7 it too much to ask a panel of 12 people to make a decision  
8 on somebody's life to decide whether to take away  
9 somebody's liberty with just some of the information?  
10 Just a little bit? You deserve it all. Okay. You  
11 deserve it all.

12 And, remember, it's not John Upson's job to defend  
13 himself. It's the government's job to prove to you  
14 beyond a reasonable doubt that he's guilty. And they  
15 decide how they're going to do it.

16 Remember what they didn't give you. We don't have  
17 any videos. You don't have any photo lineups. We're  
18 missing witnesses.

19 Now, remember, when you go back into this room  
20 you're going to be asked to discuss the case. You're  
21 going to be asked to render a verdict. And I'll tell you  
22 what a verdict means. A verdict means to speak the truth.  
23 Remember, we talked about this at the beginning; speak the  
24 truth.

25 The truth of the verdict, a jury's verdict has to

1 be your truth. It has to be your truth. And your  
2 truth. And your truth. It has to be every individual's  
3 truth. We don't have a decision from a jury until we  
4 have a unanimous decision from all 12 members of the  
5 jury. All 12 of you have to agree.

6 And guess what? There may be differences of  
7 opinion. You may -- some may be stronger in favor of  
8 guilty. Some may be firmly convinced the State didn't  
9 prove guilt. Because, remember, we don't have to prove  
10 him innocent. You just have to be convinced beyond a  
11 reasonable doubt by the State that he's guilty. The  
12 other side is, they -- did they meet that burden. Not  
13 that he's innocent, because they didn't meet that burden.  
14 Some of you guys are going to be convinced of that.

15 It's not your job to bully each other. It's not  
16 your job to strong arm each other, to beat each other to  
17 fall into line. We got to get back out there and get a  
18 verdict. You don't have to do that. It's okay for  
19 people to have different opinions. If you all have the  
20 same opinion, you got a verdict. Okay. If you don't all  
21 have the same opinion, you don't have a verdict. Keep  
22 that in mind. It's got to be your decision.

23 Now when you go back there and vote, I want you to  
24 pay attention to how you do it. You're going to discuss  
25 things. And you're going to be asked to vote and when it

1 comes time to vote you're going to have to commit to  
2 something, one way or another. Commitment's a big thing.  
3 You got to ask yourself you how do you feel. What does my  
4 body do when it's time to step across the line for guilty  
5 or step across the line for not guilty?

6 When you're asked if you are firmly convinced  
7 beyond a reasonable doubt that the State has proven him  
8 guilty, if you find yourself leaning back in your chair,  
9 folding your arms, taking a deep breath before you cast  
10 your vote, guess what that is? That's reasonable doubt.

11 That hesitation that you have to act, that shows  
12 something. That shows you that you're not firmly  
13 convinced. Some people have -- respond different ways.  
14 I raise my eyebrows. I do it all the time. All in  
15 favor of guilty, raise eyebrows, lean back, take a deep  
16 breath. That's reasonable doubt right there. Pay  
17 attention to those feelings. Okay. They inform you what  
18 you really believe.

19 We really do appreciate your time. A lot of  
20 people get up here and they ask you, they ask you to come  
21 back with something. They ask you to find somebody  
22 guilty. They ask you to find somebody not guilty.

23 I think it's disingenuous. I'm going to ask you to  
24 vote what you're firmly convinced of. I'm going to ask  
25 you -- or not convinced of, as it may be. If you're not

1 convinced, if you're not convinced that the State has  
2 proved him guilty beyond a reasonable doubt, that's easy;  
3 that's not guilty.

4 If you're not convinced, if you have questions, if  
5 you have doubts; that's easy.

6 I'm going to ask you to vote your truth. To  
7 return a true verdict, not a bullied verdict, not a  
8 strong-arm verdict; your truth. So that when you come  
9 back out here and you tell the Court either, "Sorry, we  
10 can't come up with a verdict," or "This is our verdict,"  
11 that whatever you say reflects what you truly believe. I  
12 know you will.

13 I appreciate your time. Thank you.

14 THE COURT: Thank you, Mr. Smith. Solicitor?

15 MR. SLOCUM: Thank you, Your Honor. May it please  
16 the Court.

17 THE COURT: Certainly.

18 MR. SLOCUM: Mr. Gibbons. Mr. Smith.

19 Ladies and gentlemen, good afternoon.

20 I want to address a few things that Mr. Smith just  
21 told you. I told you in my opening that he's a fine  
22 attorney and it's his job to advocate for Mr. Upson. He's  
23 done a great job of doing that.

24 But what he's done is ask you to look over here;  
25 look at what's going on down here; check out this camera;

1 or what about this fellow; what about what's going on over  
2 here. He doesn't want you to look at what has actually  
3 been shown to you and what actually happened that night.  
4 He doesn't want you to look at the truth from that night.

5 He said to you about your job. It's not your job  
6 to punish someone. It's not your job to punish someone,  
7 to take away their liberty. It's not your job to reward  
8 someone either. You took an oath and that's why we chose  
9 you; to be fair and impartial and to be the finders of the  
10 fact. That is it. That is all we want you to do today.

11 Mr. Smith wants you to think there's no way John  
12 Upson could have been involved because he was downtown the  
13 entire time at this comedy show. But all three people  
14 that got up there that testified for the Defendant gave  
15 you times of 10:45, 11 o'clock, just before midnight. One  
16 didn't even know the time, didn't know when the show  
17 started or when the show ended. No one could give you a  
18 concrete time.

19 But cell phone records do. And I ask you to look  
20 at those. Mr. Smith said if you want to look at them,  
21 please look at them. They're in evidence. Check them  
22 out. See for yourself.

23 Mr. Smith wants you to think there's some  
24 conspiracy, some reason they didn't check the camera. He  
25 said that law enforcement didn't check the camera. The

1 reason we interviewed this person, the reason law  
2 enforcement did this has nothing to do with John Upson.  
3 Nothing to do with John Upson and what happened on  
4 November 27th, 2013. Nothing at all.

5 The date this all happened, November 27th, 2013,  
6 was when two people went into that Captain D's and robbed,  
7 with a gun, Captain D's. Forced Jameshia Alston and Scott  
8 Hall into a cooler and left. One of those persons was  
9 Mr. Upson, the Defendant in this case.

10 However, this whole story really starts on November  
11 25th, 2013, two days before that. Ms. Alston was  
12 working. She said that the Defendant came in that night,  
13 on the 25th, ordered a large Sprite and took a picture of  
14 William Keels who was a co-worker with her that night on  
15 the 25th.

16 The details, ladies and gentlemen. She remembers  
17 the details. If you're going to make up something, make  
18 up a whopper of a story. But she doesn't. She tells you  
19 exactly what happened because that's what happened. She's  
20 not making it up. A large Sprite and took a picture of  
21 William Keels. And we'll get to William Keels a little  
22 more in a minute.

23 But on November 27th, those two people come in the  
24 back door in all black with a hood on and bandanas up here  
25 (indicating). She makes eye contact with that person in

1 the back with her. She sees the gun. The gun -- the  
2 gunman goes up to the front, puts it to the back of Scott  
3 Hall's head. She doesn't see that. She's in the back  
4 with John Upson by herself. And she sees those eyes.

5 The same eyes that she saw the two nights before that  
6 ordering a Sprite, took a picture of William Keels. She  
7 says she remembered it because of his lazy eye. She  
8 didn't make that up. She told you that because that's  
9 what happened.

10 This area we were just talking about in the back  
11 with Jameshia. She was there. Right here. She said she  
12 was at this desk when it happened. They'd come in that  
13 back door. She is with Upson by herself, no one else.

14 She's not -- the gun's gone. She's not  
15 concentrating on the gun. She said when she saw his eyes  
16 she knew him, but she didn't know a name. So she didn't  
17 tell law enforcement a name. If you're going to make it  
18 up, let's give him a name and go with it that night. She  
19 didn't because she wasn't sure. She just knew that she  
20 knew him.

21 And so what's she do? She thinks back, all right,  
22 two days earlier William Keels, the picture. So she goes  
23 to William Keels' Facebook page. She didn't know the  
24 guy. She just remembered him two days before. And what  
25 does she see? John Upson. And she stops. She stops

1 looking because -- what'd she say -- "I almost jumped out  
2 of my chair."

3 She knew. She sat up there and told you. She  
4 knew. No doubt in her mind that's who it was. She had  
5 the time back then. She's not making this up.

6 Mr. Hall, Scott Hall, who was working with  
7 Ms. Alston that night; has a gun, a black gun, pistol --  
8 she told you it was black, Ms. Alston told you it was  
9 black -- put to the back of his head and he could tell it  
10 was real by how cold it was. He's forced up front.  
11 Forced on his hands and knees with the gun still to the  
12 back of his head. Says, "The gunman grabbed the bag."  
13 Showed you the bag he grabbed off of this little rack they  
14 got there where they give the food. Grabbed a bag, said,  
15 "Put the money in the bag; I don't want the change."

16 Ladies and gentlemen, we have empty cash registers  
17 and change. This corroborates his story. He's not  
18 making it up. He couldn't give you a great description.  
19 He had a few seconds. He told you that, "I had a few  
20 seconds, that's all I could see."

21 I imagine with a gun to your head and a few  
22 seconds, I'm surprised anything at all was remembered. I  
23 submit to you that what he's telling you happened  
24 happened. He's not making it up. If he were going to  
25 make it up, let's get a name. Let's go looking for

1 everybody. As a matter of fact who will make it up, let's  
2 get a second name. Let's make it up for a second name, a  
3 second suspect, the gunman. Law enforcement didn't, she  
4 didn't, Scott didn't, because they didn't know.

5 But Jameshia knew. She knew.

6 And when she saw him, when she saw this portion of  
7 his eyes she knew (snaps fingers). Now she told you that  
8 when this all happened she was afraid. She felt like she  
9 was going to die. She was back there held against her  
10 will. She told you she did not feel free to leave.  
11 Scott told you he did not feel free to leave. He had a  
12 gun to his head. She's scared to death. Upson takes her  
13 and puts her in the freezer.

14 And then when the gunman comes back with Scott and  
15 the other fellow, Mr. Johnson who we'll talk about just a  
16 little bit more, puts them all in the freezer. Upson  
17 helps with that. They had just taken the money out of the  
18 safe, out of the registers, those drawers.

19 You heard Jameshia talk about it. She counts it  
20 down every night she works and puts the money in the  
21 safe. We got an empty safe. We've got money gone. We've  
22 got, "Give me the money, don't give me the change."

23 Well, the change is still there. We don't know how  
24 much money because they don't know. Law enforcement  
25 didn't know. They didn't make up a number, some arbitrary

1 number. Money was taken.

2 "Give me the money, I don't want the change," and  
3 then they throw them in the freezer.

4 After all of that happens, Jameshia tells you she  
5 talks to law enforcement. Scott talks to law enforcement.  
6 Jameshia says she knows the guy, "Saw him in here two days  
7 earlier but I don't know his name." She didn't give law  
8 enforcement his name because she didn't know.

9 But when she got home, she's going through  
10 Facebook, pictures of William Keels, the same guy that she  
11 saw John Upson take a picture of two days before. She  
12 sees this picture and about jumped out of her chair.

13 So what's she do? She got those two pictures, sent  
14 them to Detective Royster. There's John Upson. That's  
15 the Defendant. She didn't make up a name. It wasn't  
16 until after she saw his picture, "This is him." She sat  
17 up there on the stand, "This is him." No doubt. She  
18 knew.

19 That's all you need. That's all the law requires  
20 for a verdict of guilty.

21 That is direct evidence. That's what she saw.  
22 It's what she felt.

23 Circumstantial evidence with Scott. Snatching the  
24 bag, "Give me the money. Leave the change." Well, empty  
25 cash register and change. You put it together. It's just

1 what I asked you to do in opening. Please use your common  
2 sense. You can put things together. The law makes no  
3 distinction between direct evidence and circumstantial  
4 evidence. You only need one. You only need direct -- you  
5 only need what Jameshia told us during this trial. That's  
6 all you need.

7 But look at everything. Look at all of it.

8 The next day, the 28th, after Detective Royster  
9 told you he went to John Upson's house looking for him, he  
10 wasn't there. The Defendant calls him on the phone.  
11 Calls him from 803-646-6125. You'll see it here in just a  
12 minute. Talks to Detective Royster, tells him he's got a  
13 warrant for him. John Upson said, "I was downtown at the  
14 comedy show, check my phone. I was down there the whole  
15 time. Check my phone."

16 Well, Detective Royster did just that. Here's the  
17 phone call I was telling you about. Detective Royster  
18 told you his number was 803-270-1759. You can check all  
19 of this on your own in the cell records. I urge you to  
20 please look at these.

21 Calls him on the 28th, 5:02. Detective Royster  
22 calls him right back at this 646-6125. Calls from the  
23 same phone, the exact same number. We'll get into the  
24 Defendant's cell phone records now.

25 And I'm going to show you what happened here. I

1 want you to look when you go back there as well. You can  
2 see on the 27th, 2013, these are phone calls that the  
3 Defendant makes to this Ishmael Norid-Deen, the fellow  
4 that you've heard his name. The funny thing about it  
5 here, the name Ishmael Norid-Deen, Williams Keels and  
6 Devin Johnson that Detective Royster told you about, and  
7 Devin Johnson was one of the fellows on the inside of the  
8 store, the one that was there with Scott Hall in the  
9 front, Scott Hall said took the money, is they're all tied  
10 into John Upson. That's the common denominator in all of  
11 this.

12 But you look here, 8:12, Ishmael Norid-Deen calls  
13 John Upson. 8:17, John Upson makes a phone call. Someone  
14 calls up. Defendant called. Defendant called. Norid-  
15 Deen. Norid-Deen. 8:12, 8:17, 8:18, 9:02, 9:05, 9:07,  
16 9:27. All while he's at the show, watching the show  
17 supposedly. He ain't watching the show. He's on his  
18 phone. We're not saying he's not downtown because the map  
19 will show you, he's downtown at this time. His phone is  
20 pinging off towers that are downtown. We're not arguing  
21 that. The State is not arguing that.

22 But you look here. At 9:37, a phone call was made  
23 to Captain D's from the Defendant's cell phone. Two  
24 minutes later, oops, let's star 67 before we call Captain  
25 D's.

1 Desra Fraser, she didn't get into it much but she  
2 said, brought it up about the Defendant dialing star 67 to  
3 block his call right before he called Captain D's. We all  
4 know what star 67 is. What do we have here at 9:47? A  
5 call to William Keels. He's back in the picture. John  
6 Upson went up there to see him on Monday, took a picture  
7 of him. That's how Jameshia knew him, through William  
8 Keels. He calls William Keels right before the armed  
9 robbery happens, but at 9:48 he makes one last call to  
10 Captain D's through star 67 and then silence. Not a  
11 peep.

12 The armed robbery happened, Jameshia told you,  
13 about 10:15 she said. At 11:01, the police check the  
14 records, this 864 number, calls the Defendant's cell phone  
15 at 11:01. Pinging off tower 920. Right down here.  
16 There's downtown. Here's tower 920. At 11:01. Please  
17 look at this. Please look at those records.

18 He wasn't downtown. The cell phone's pinging  
19 downtown all before that. We're not denying that. 11:01,  
20 he wasn't downtown. Let's take a look at what's in  
21 between downtown and where this phone pings. Captain  
22 D's.

23 Now Mr. Upson got to be the most unlucky man in the  
24 planet to just have called Captain D's three times before  
25 it's robbed and the person he was seeing two days before,

1 before it's robbed. It's got be the worst luck ever.

2 Ladies and gentlemen, Mr. Upson went in that night  
3 with another fellow, We don't know. We didn't make it  
4 up. She didn't make it up. That was Jameshia against her  
5 will. Put her in the freezer. Was there when the other  
6 gunman had a gun to the back of Scott Hall's head, took  
7 money out of that safe and they left.

8 Now you'll see phone calls that are made after the  
9 armed robbery. These are two days later. Please look at  
10 them. You heard Detective Royster testify about the  
11 numbers to Aiken Center of the Arts. And you can see it  
12 in there. It's in the records.

13 He calls Captain D's again at 11:29, two days after  
14 at 9:30 A.M. However he leaves a number out. You can see  
15 that on the records, a number is missing. Then he gets it  
16 right, he calls Captain D's without star 67. And then  
17 calls the Aiken Center of the Arts, star 67, the same  
18 place where the comedy show was, the same exact place.

19 Now, what are the odds of all of that? This has  
20 just got to be bad luck; right? The worst day ever. The  
21 worst day ever.

22 Ladies and gentlemen, circumstantially this all  
23 adds up. Common sense will tell you. Jameshia told you  
24 direct. Her story has not changed since day one. She has  
25 not wavered one iota from the start of all of this.

1           Please look at these. Look at what we've showed  
2 you, what the State has presented to you.

3           Now, the State is alleging that John Upson along  
4 with another committed armed robbery and two counts of  
5 kidnapping.

6           And I want to address something really quick about  
7 Devin Johnson. He was a third individual there that  
8 night. He was the one that was also put in the freezer.  
9 However you heard Detective Royster talk about how they  
10 wanted to uncover every stone. Detective Miano uncovered  
11 every stone, and they did their due diligence. They  
12 thought he might be involved in connection to Norid-Deen.  
13 So they went and checked on him. They did their job,  
14 exactly what they wanted to do.

15           I submit that if they hadn't done it it would be  
16 brought up as well but it doesn't matter because it's all  
17 smoke and mirrors. It has nothing to do with John Upson  
18 and what he did that night.

19           The armed robbery was the Defendant, John Upson,  
20 along with the another. We don't know the other, but we  
21 know that he used a gun and that they took personal  
22 property of another person, another individual at Captain  
23 D's. That money did not belong to them when they went in  
24 there. They took it by force or intimidation. By force  
25 with a gun to the back of Scott Hall's head. And that

1 they used a deadly weapon, a pistol or what appeared to be  
2 a deadly weapon. Scott told you he felt the coldness of  
3 the steel. He knew it was real. Jameshia saw him holding  
4 it up against the back of his head. She thought it was  
5 real.

6 That's all armed robbery is. Like I told you in  
7 opening. Robbing somebody with a gun. Kidnapping,  
8 knowingly, unlawfully seizing or confining only for a  
9 moment another person without authority of law.  
10 Kidnapping can happen (snaps fingers) like that.

11 "Can I leave? No, stay right here." She was  
12 afraid for her life. She was put in the freezer. She  
13 told you that. Scott told you that. They did not feel  
14 free to leave. Kidnapping. That's all it takes (snaps  
15 fingers) just that.

16 Now here in South Carolina and on these two things,  
17 armed robbery and kidnapping, the Judge is going to direct  
18 you on the law. As I told you in opening, whatever he  
19 says, please go with it.

20 The hand of one, hand of all means that two people  
21 acting together for the common plan or intent. Here we  
22 have John Upson and an unknown individual entered the  
23 Captain D's with a gun with the intent of robbing it.

24 Now, during this crime he helped. He held  
25 Jameshia in the back. He helped put them in the freezer.

1 He assisted. He aided. He abetted in the crime. So he  
2 is just as guilty as the person with the gun. It doesn't  
3 matter who actually had the gun, all are guilty. The hand  
4 of one is the hand of all.

5 Ladies and gentlemen, I told you in opening that I  
6 want you to use your common sense to weigh the  
7 believability and credibility of the witnesses. I ask  
8 you that when you go back there to do just that.

9 Jameshia, 18 years old; about to graduate high  
10 school. What reason does she have to lie, to making this  
11 up? If she was going to lie, let's blow it up. Let's  
12 blow it out of the water. Let's pick the other guy and go  
13 after him, but she didn't. She told law enforcement that  
14 night she didn't know who it was but she had seen him  
15 before two days earlier. She recognized his lazy eye she  
16 saw that picture and (snaps fingers) about jumped out of  
17 her chair. The story hasn't changed since November 27th,  
18 2013.

19 Please look at the phone records. Look at the  
20 maps. You can put it all together. Please use your  
21 common sense.

22 I thank you for your time and your service. And I  
23 think that once you get back there, see all of this, the  
24 only verdict reasonable, and the only verdict which you  
25 will be firmly convinced for armed robbery and two counts

1 of kidnapping is that Mr. John Upson is guilty.

2 Thank you.

3 THE COURT: Thank you, Solicitor.

4 Madam Forelady, ladies and gentlemen of the jury,  
5 I'm going to take about a five-minute break before we  
6 start the final charge on the law by the Court, give  
7 everybody a chance to kind of catch their breath. So just  
8 retire back to your jury room and we'll bring you out  
9 shortly.

10 Again, don't start your deliberations. Don't  
11 discuss this case among yourselves.

12 (Jury exits courtroom at 2:39 P.M.)

13 THE COURT: One matter on the record. Jameshia's  
14 last name is not spelled correctly on the indictment.  
15 Would you -- it's missing the S on Alston.

16 MR. SLOCUM: Does it have an S or it doesn't have  
17 an S?

18 THE COURT: It does not have an S.

19 MR. SLOCUM: We would move to amend it, Judge.

20 THE COURT: If you have any objections to letting  
21 the solicitor just pen through it and leaving it in?

22 MR. SMITH: None, Your Honor.

23 THE COURT: We'll take about a five-minute break.

24 MR. SLOCUM: Thank you, Your Honor.

25 (Break taken at 2:39 P.M. At 2:52 P.M., the trial

1 resumed:)

2 THE COURT: All right. Bring the jury out,  
3 please.

4 (Jury enters courtroom at 2:52 P.M.)

5 JUDGE'S CHARGE TO THE JURY

6 THE COURT: Let the record reflect the jury's back  
7 in.

8 Madam Forelady and ladies and gentlemen of the  
9 jury, I now will charge you on the law applicable to this  
10 case. And you must consider the charge as a whole and  
11 not focus on some portions to the exclusion of other  
12 portions.

13 The indictments charge the Defendant with armed  
14 robbery, kidnapping of Jameshia Alston, and kidnapping of  
15 Scott Hall.

16 And, again, I remind you, the fact that the  
17 Defendant was arrested, charged and indicted in this case  
18 is not evidence in this case and cannot be considered by  
19 you as evidence of guilt in this case, nor does it create  
20 any presumption or inference of guilt.

21 These documents, as I told you at the outset of  
22 this case, are simply the formal written instruments which  
23 contain the charges made against the Defendant. These  
24 are the formal documents by which this case is brought  
25 into this court.

1           The indictments in this case allege several  
2 different offenses against the Defendant. The charges  
3 are: In Indictment 2014-GS-02-74, armed robbery;  
4 Indictment 2014-GS-02-79, kidnapping of Jameshia Alston;  
5 and Indictment 2014-GS-02-80, kidnapping of Scott Hall.

6           Each indictment charges a separate and distinct  
7 offense. You must decide each indictment separately on  
8 the evidence and the law applicable to it, uninfluenced by  
9 your decision as to any other indictment.

10           The Defendant may be convicted or acquitted on any  
11 or all of the offenses charged. You'll be asked to write  
12 a separate verdict of guilty or not-guilty for each  
13 indictment.

14           Now, Madam Forelady and ladies and gentlemen of the  
15 jury, I remind you that during this trial you and I have  
16 had certain duties to perform. As the Trial Judge, it  
17 has been my responsibility to preside over the trial of  
18 this case and I also have the duty to rule or have had the  
19 duty to rule on the admissibility of the evidence offered  
20 during this trial.

21           You are to consider only the competent evidence  
22 before you. If there was any testimony ordered stricken  
23 from the record in this case during this trial, then you  
24 must disregard that testimony. You are to consider only  
25 the testimony which has been presented from the witness

1 stand, any exhibits which have been made a part of the  
2 record, in this case, and any stipulations of counsel.

3 I have the additional duty to charge you the law  
4 applicable to this case. As the Presiding Judge, I'm the  
5 sole judge of the law of this case. And it's your duty  
6 as jurors to accept and apply the law as I now state it to  
7 you.

8 As I told you at the outset, if you already have an  
9 idea as to what the law is or what the law ought to be and  
10 it does not agree with what I now tell you the law is, you  
11 must abandon that idea because you are sworn to accept the  
12 law and apply the law exactly as I state it to you.

13 In every case tried in this court before a jury,  
14 the jury becomes the sole and exclusive judge of the facts  
15 in the case. A Trial Judge cannot intimate, state,  
16 comment on, or make any statement to a trial jury about  
17 the facts in the case.

18 Since you, the jury, are the sole judge of the  
19 facts in this case, you are not to infer from what I have  
20 said during the progress of this trial, in ruling upon  
21 admissibility of evidence or otherwise, or anything that I  
22 say now during the course of this instruction to you that  
23 I have any opinion about the facts in this case.

24 I do not have an opinion. The law does not allow  
25 me to have an opinion about the facts in this case. This

1 is a matter solely for you, the jury, to determine.

2 As jurors it is your duty to determine the effect,  
3 value, weight, and truth of the evidence presented during  
4 this trial.

5 The Defendant has pled not guilty to the three  
6 indictments. And that plea of not guilty puts the burden  
7 on the State to prove the Defendant guilty. A person  
8 charged with committing a criminal offense in South  
9 Carolina is never required to prove himself or herself  
10 innocent.

11 I charge you that it is an important rule of the  
12 law that a Defendant in a criminal trial, no matter what  
13 the seriousness of the charge may be, will always be  
14 presumed to be innocent of the crime for which the  
15 indictment was issued unless guilt has been proven by  
16 evidence satisfying you of that guilt beyond a reasonable  
17 doubt.

18 This presumption of innocence does not end when you  
19 begin your deliberations but it accompanies the Defendant  
20 throughout the trial unless you reach a verdict of guilt  
21 based on evidence satisfying you of that guilt beyond a  
22 reasonable doubt.

23 The presumption of innocence is like a robe of  
24 righteousness placed upon the shoulders of the Defendant  
25 which remains with the Defendant unless it has been

1 stripped from the Defendant by evidence satisfying you of  
2 the Defendant's guilt beyond a reasonable doubt.

3 Now, Madam Forelady and ladies and gentlemen of  
4 this jury, the presumption of innocence is not mere legal  
5 theory. It is not just a legal phrase. It is a  
6 substantial right to which every defendant is entitled  
7 unless you, the jury, are satisfied from the evidence of  
8 the Defendant's guilt beyond a reasonable doubt.

9 Once again, the State has the burden of proving the  
10 Defendant guilty beyond a reasonable doubt as to each  
11 indictment.

12 Some of you may have served as jurors in civil  
13 cases where you were told that it is only necessary to  
14 prove that a fact is more likely true than not true such  
15 as by the greater weight or preponderance of the evidence.  
16 In criminal cases the State's proof must be more powerful  
17 than that. It must be beyond a reasonable doubt. Proof  
18 beyond a reasonable doubt is proof that leaves you firmly  
19 convinced of the Defendant's guilt.

20 There are very few things in this world that we  
21 know with absolute certainty. And in criminal cases the  
22 law does not require proof that overcomes every possible  
23 doubt. If, based on your consideration of the evidence,  
24 you are firmly convinced that the Defendant is guilty of  
25 the crime charged, you must find the Defendant guilty.

1           If, on the other hand, you think that there is a  
2 real possibility that the Defendant is not guilty, you  
3 must give the Defendant the benefit of the doubt and find  
4 him not guilty.

5           Necessarily, you must determine the credibility of  
6 the witnesses who have testified in this case.  
7 Credibility simply means believability.

8           It becomes your duty as jurors to analyze -- it  
9 becomes your duty as jurors to analyze and to evaluate the  
10 evidence and determine which evidence convinces you of its  
11 truth. In determining the believability of witnesses who  
12 have testified in this case you may believe one witness  
13 over several witnesses, or several witnesses over one  
14 witness. You may believe a part of the testimony of a  
15 witness and reject the remaining part of the testimony of  
16 that same witness. You may believe the testimony of a  
17 witness in its entirety or reject the testimony of a  
18 witness in its entirety.

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

23           An issue in this case is the identification of the  
24 Defendant as the person who committed the crimes charged.  
25 The State has the burden of proving identity beyond a

1 reasonable doubt. You must be satisfied beyond a  
2 reasonable doubt of the accuracy of the identification of  
3 the Defendant before you may convict the Defendant.

4 Identification testimony is an expression of belief  
5 or impression by a witness. You must determine the  
6 accuracy of the identification of the Defendant. You  
7 must consider the believability of each identification  
8 witness in the same way as any other witness.

9 You may consider whether the witness had an  
10 adequate opportunity to observe the offender at the time  
11 of the offense. This will be affected by things like how  
12 long or short of time was available, how far or close the  
13 witness was, the lighting conditions, whether the witness  
14 had a chance to see or know the person in the past.

15 Once again, I instruct you, the burden of proof on  
16 the State extends to every element of the crime charged.  
17 And this specifically includes the burden of proving  
18 beyond a reasonable doubt the identity of the Defendant as  
19 the person who committed the crimes.

20 If after examining the testimony you have a  
21 reasonable doubt as to the accuracy of the identification,  
22 you must find the Defendant not guilty.

23 Now, Madam Forelady and ladies and gentlemen of the  
24 jury, I instruct you and emphasize that the fact that the  
25 Defendant did not testify is not a factor to be considered

1 by you in any way in your deliberation and in your  
2 consideration on the question of the guilt or the  
3 innocence of the Defendant. It must not be considered by  
4 you in any manner whatsoever.

5 A defendant has the constitutional right to remain  
6 silent. And the assertion of this right must not be  
7 considered by you in your deliberations. I repeat, under  
8 your oath you are to draw no conclusion whatsoever from  
9 the fact that the Defendant in this case did not testify.

10 The fact that this Defendant did not testify should  
11 not even be discussed in the jury room. The burden of  
12 proof, as I have stated to you, is on the State. The  
13 Defendant is not required to prove his innocence. The  
14 burden of proof remains on the State to prove guilt beyond  
15 a reasonable doubt.

16 Now, Madam Forelady and ladies and gentlemen of the  
17 jury, as already stated, the Defendant is charged with  
18 several crimes. One is armed robbery. That is found in  
19 Section 16-11-330, Code of Laws of South Carolina.

20 In order to prove this offense, the State must  
21 first prove beyond a reasonable doubt that the Defendant  
22 took personal property or money from the person or  
23 presence of another person. Property is in the presence  
24 of a person if it is within the person's reach,  
25 inspection, observation, or control so that the person

1 could, if not overcome with violence or prevented by fear,  
2 keep possession of the property.

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

13 Finally, the State must prove beyond a reasonable  
14 doubt that the Defendant was armed with a deadly weapon  
15 during the robbery. A deadly weapon is any article,  
16 instrument, or substance which is likely to cause death or  
17 great bodily harm. Whether an instrument has been used  
18 as a deadly weapon depends on the facts and circumstances  
19 of each case.

20 And the law provides examples of instruments which  
21 may be considered deadly weapons. And I'm going to give  
22 you all of those various examples that the law gives. A  
23 pistol, shotgun, rifle, a dirk, a dagger, a knife, a  
24 slingshot, metal knuckles, a razor, gasoline, fire bomb,  
25 or Molotov cocktail, and lighter fluid.

1           A gun may be a deadly weapon even if it is not  
2 operating.

3           I would further charge you concerning the offense  
4 of armed robbery, a person who commits robbery while armed  
5 with a deadly weapon or while alleging either by actions  
6 or words he was armed while using a representation of a  
7 deadly weapon or any object which a person present during  
8 the commission of the robbery reasonably believed to be a  
9 deadly weapon.

10           Madam Forelady, ladies and gentlemen of the jury,  
11 the other offenses that the Defendant is charged with is  
12 two counts of kidnapping. That's found in Section  
13 16-3-910, Code of Laws of South Carolina. The Defendant  
14 is charged with kidnapping. The State must prove beyond a  
15 reasonable doubt that the Defendant knowingly and  
16 unlawfully seized, confined, inveigled, decoyed,  
17 kidnapped, abducted, or carried away another person  
18 without authority of law.

19           To do a thing unlawfully is to do it willfully  
20 against the law.

21           Knowingly means with knowledge, consciously, not  
22 accidentally.

23           Seize means to take hold of suddenly or forcibly.

24           Confine means to limit, restrict, or enclose within  
25 bounds, imprison, or shut or keep in.

1           Inveigle means to lure, entice, or lead astray by  
2 false representations, promises, or other deceitful  
3 means.

4           Decoy means to lure by or as if by decoy. A decoy  
5 is something to entice a person into a trap.

6           Kidnap is to remove a person against his will by  
7 unlawful force or by fraud.

8           Abduct means to carry off secretly or by force for  
9 an illegal purpose.

10          Carry away means to remove.

11          The State does not have to prove that the Defendant,  
12 did all of these things. Instead, if you find beyond a  
13 reasonable doubt that the Defendant did any of these  
14 things, you may find the Defendant guilty of kidnapping.

15          Something done without authority of law is  
16 something which the law does not sanction, permit, allow,  
17 condone, or provide justification for.

18          The kidnapping does not have to be for any personal  
19 or monetary gain, for any illegal purpose, but may be for  
20 any reason whatsoever.

21          Now, Madam Forelady, ladies and gentlemen of the  
22 jury, if a crime is committed by two or more people who  
23 are acting together in committing a crime, the act is  
24 one -- the act of one is the act of all. A person who  
25 joins with another to commit an unlawful act is criminally

1 responsible for everything done by the other person which  
2 happens as a probable or natural consequence of the acts  
3 done in carrying out the common plan and purpose.

4         Just to give you an example. Two people can be  
5 guilty of killing another person when only one of the two  
6 had a gun, there was only one bullet, and only one of the  
7 two fired a shot that caused the death. If two or more  
8 people are together, acting together, assisting each other  
9 in committing the offense, the act of one is the act of  
10 all, or as it sometimes is said, the hand of one is the  
11 hand of all.

12         Prior knowledge that a crime is going to be  
13 committed without more is not sufficient to make a person  
14 guilty of that crime. Mere knowledge that another person  
15 is going to commit a crime, even if the Defendant is  
16 present when the crime is committed, is not sufficient to  
17 convict the Defendant as a principal.

18         Guilt as a principal is shown by actual or  
19 constructive presence at the scene as a result of a prior  
20 arrangement.

21         Therefore, finding of a prior arranged plan or  
22 common scheme is necessary for a finding of guilt as a  
23 principal. The State must prove beyond a reasonable doubt  
24 with competent evidence the theory of the hand of one is  
25 the hand of all.

1           A principal in a crime is one who either actually  
2 commits the crime or who is present, aiding, abetting, or  
3 assisting in committing the crime.

4           When a person does an act in the presence of and  
5 with the assistance of another, the act is done by both.  
6 Where two or more, acting with a common plan or intent are  
7 present at the commission of a crime, it does not matter  
8 who actually commits the crime, all are guilty. The hand  
9 of one is the hand of all.

10           Present at the commission of a crime means to be  
11 sufficiently near to aid and abet and assist in the  
12 commission of the crime. However, mere presence at the  
13 scene of a crime is not sufficient to convict one as a  
14 principal on the theory of aiding and abetting.

15           Intent is also a necessary element for there must  
16 have been a common design or intent to commit the crime,  
17 and the crime must have been committed pursuant thereto  
18 with the person aiding and abetting by some overt act.

19           Intent means intending the result which actually  
20 occurs, not accidentally or involuntarily. Intent may be  
21 shown by acts and conduct of the Defendant and other  
22 circumstances from which you may naturally and reasonably  
23 infer intent.

24           The State must prove these elements beyond a  
25 reasonable doubt.

1 Now the Defendant has raised a defense of alibi.  
2 In order to establish an alibi, it must be shown that the  
3 Defendant was at another specified place at the time the  
4 crime was committed and that it was therefore impossible  
5 for the Defendant to have been at the scene of the crime.

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

14 Now in the course of giving you this instruction I  
15 have realized that there's one other particular part that  
16 I need to instruct you. So everybody be at ease for just  
17 a moment.

18 Lawyers want to approach?

19 (Off-the-record discussion.)

20 THE COURT: Madam Forelady, ladies and gentlemen of  
21 the jury, there are two types of evidence which are  
22 generally presented during a trial; that being direct  
23 evidence and the other evidence is circumstantial  
24 evidence.

25 Direct evidence directly proves the existence of a

1 fact and does not require deduction. Circumstantial  
2 evidence, however, is proof of a chain of facts and  
3 circumstances indicating the existence of a fact.

4 Crimes may be proven by circumstantial evidence.  
5 The law makes no distinction between the weight or value  
6 to be given to either direct or circumstantial evidence.  
7 However, to the extent the State relies on circumstantial  
8 evidence, all of the circumstances must be consistent with  
9 the other and, when taken together, point conclusively to  
10 the guilt of the accused beyond a reasonable doubt.

11 If these circumstances merely portray the  
12 Defendant's behavior as suspicious, the proof has failed.

13 The State has the burden of proving the Defendant  
14 guilty beyond a reasonable doubt. This burden rests with  
15 the State regardless of whether the State relies on direct  
16 evidence, circumstantial evidence, or a combination of the  
17 two.

18 Now, Madam Forelady and ladies and gentlemen of the  
19 jury, your verdict must be unanimous as to each  
20 indictment. And I'm going to step down now and show you  
21 what we call a verdict form, and instruct you on how it  
22 needs to be completed.

23 The top part is just the indication of the case,  
24 the State of South Carolina versus the Defendant. These  
25 are the indictment numbers. And there are three

1 sections, two possible verdicts for each section. All  
2 right.

3 As to the first Indictment 74, concerning armed  
4 robbery, we, the jury, find the Defendant guilty, or not  
5 guilty.

6 Now the order that "guilty" or "not guilty" have  
7 been placed has no significance whatsoever. One has to  
8 go before the other, but it has no significance to it.

9 So you would mark as to the armed robbery charge  
10 either guilty or not guilty depending upon what your  
11 unanimous verdict is.

12 And then you'll go to the next indictment which is  
13 the kidnapping charge concerning Jameshia Alston. The  
14 same thing, you will mark guilty or not guilty, depending  
15 on what your unanimous verdict is.

16 And, lastly, the kidnapping indictment concerning  
17 Scott Hall. Again you will mark guilty or not guilty  
18 depending upon what the unanimous verdict is.

19 And then, Madam Forelady, you will sign where it  
20 has "Foreperson". You'll sign that and when you have  
21 finished your deliberations and reached a unanimous  
22 verdict on each of the three indictments, then you'll  
23 inform the bailiffs who will be positioned outside the  
24 jury room that you have reached a verdict. Okay?

25 Now, what I'm going to ask you to do is to retire

1 to the jury room. Do not yet begin your deliberations.  
2 When the bailiff brings you the verdict form, the three  
3 indictments, and all of the evidence, the physical  
4 evidence, that is, the exhibits that have been put into  
5 evidence, once that is done two things will happen.

6 One, the two alternates will then leave the jury  
7 room. You'll be free to go at that time or if you would  
8 like to stay with us you're free to stay with us. That's  
9 purely your call.

10 And the second thing that will happen is that then  
11 you'll be allowed to start your deliberations. Okay?

12 So, but I'm going to ask that you go back to your  
13 jury room. Don't start your deliberations yet until the  
14 documents are brought to you. You may retire to your jury  
15 room.

16 (Jury exits courtroom at 3:18 P.M.)

17 THE COURT: Okay. Any exceptions or challenges to  
18 the Court's final charge from the State?

19 MR. SLOCUM: Nothing from the State, Judge.

20 THE COURT: From the defense?

21 MR. SMITH: No, Your Honor.

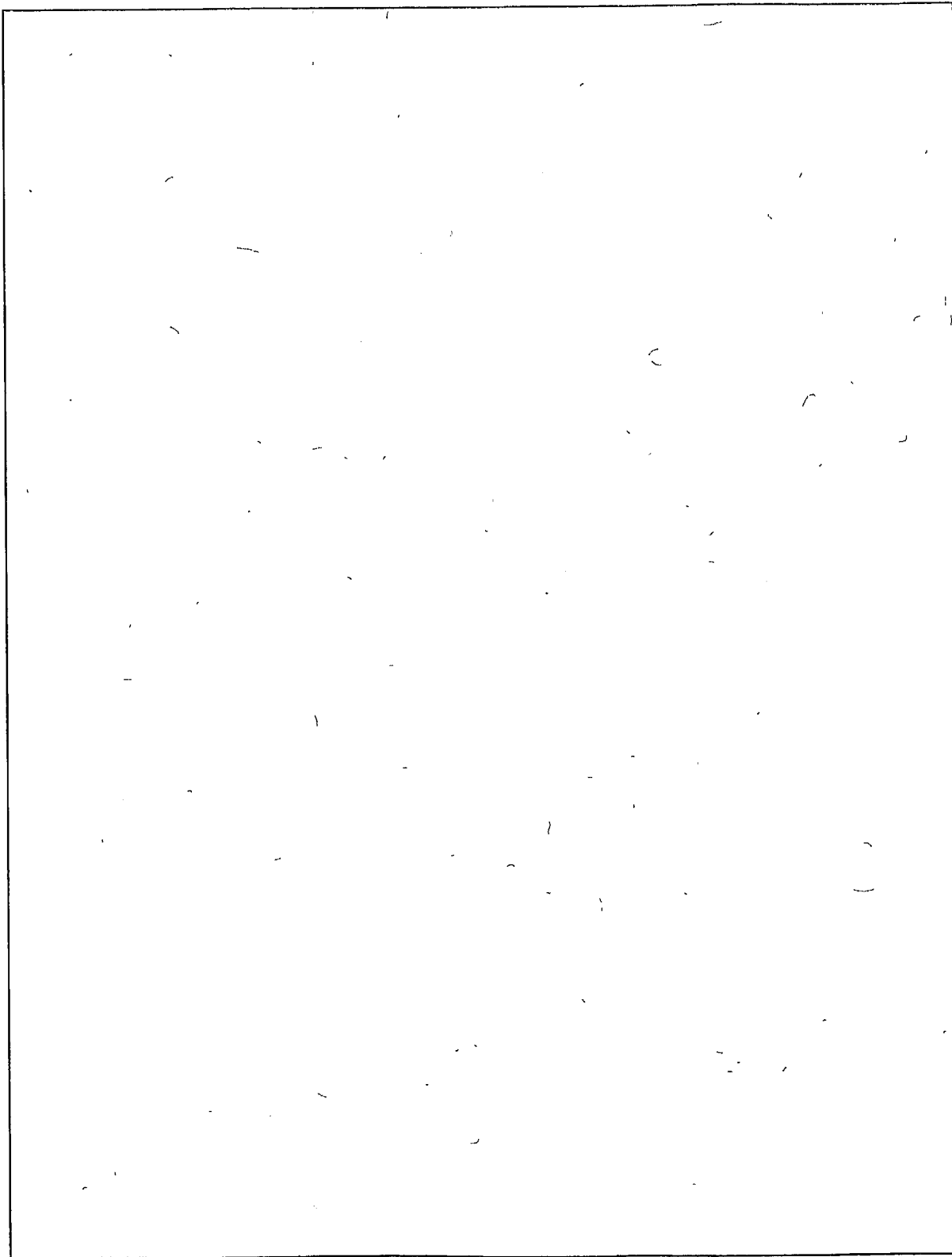
22 THE COURT: Thank you very much.

23 (Off-the-record discussion.)

24 (Deliberations commence at 3:20 P.M.)

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APP'X 256

1 (At 4:42 P.M.):

2 THE COURT: All right. Gentlemen, I understand  
3 that the jury has, just a few moments ago, reached a  
4 verdict.

5 Anything we need to discuss or take up on the  
6 record before we bring the jury out and receive the  
7 verdict?

8 MR. SLOCUM: Nothing further from the State, Your  
9 Honor.

10 MR. SMITH: Nothing, Your Honor.

11 THE COURT: All right. Not that I anticipate that  
12 there's anyone here who may feel compelled to make some  
13 sort of outward sign of emotion or reaction to the verdict  
14 of whatever the verdict may be, if you feel like you're  
15 going to be able unable to hold that in, your emotions or  
16 your expressions, then I'm going to ask that you leave the  
17 courtroom at this time.

18 If you do make some indication once the verdict is  
19 read, then the Court will have to deal with that  
20 particular matter.

21 Okay. Bring the jury out, please.

22 THE BAILIFF: Okay.

23 (Jury enters courtroom 4:43 P.M.)

24 THE COURT: So used to seeing 14 people, I had to  
25 count them to make sure.

1 Let the record reflect that the jury's in.

2 Madam Forelady, I have been informed that you have  
3 reached a verdict in this case.

4 FOREPERSON OF THE JURY: Yes, sir.

5 THE COURT: And was the verdict reached  
6 unanimously?

7 FOREPERSON OF THE JURY: Yes, sir.

8 THE COURT: As to each indictment?

9 FOREPERSON OF THE JURY: Yes, sir.

10 THE COURT: The verdict form, would you hand that  
11 to the bailiff please, sir -- please, ma'am. Sorry.

12 FOREPERSON OF THE JURY: (Complying.)

13 THE COURT: Madam Clerk, if you will publish the  
14 verdict, please?

15 And if the Defendant would please stand.

16 THE CLERK: Your Honor, we have the State of South  
17 Carolina versus John Lyndon Upson. As to Indictment  
18 2014-GS-02-00074, the charge of armed robbery, we, the  
19 jury, find the Defendant guilty.

20 As to Indictment 2014-GS-02-00079, the charge of  
21 kidnapping of Jameshia Alston, we, the jury, find the  
22 Defendant guilty.

23 As to Indictment 2014-GS-02-00080, the charge of  
24 kidnapping of Scott Hall, we, the jury, find the Defendant  
25 guilty.

1 Signed April 16th, 2014, by Forelady Suzanne Dyke.

2 Ladies and gentlemen of the petit jury, is this  
3 your verdict and do you still agree?

4 THE JURY (COLLECTIVELY): Yes.

5 THE COURT: Okay. Does the defense want  
6 individual polling of the members of the trial jury?

7 MR. SMITH: No, Your Honor.

8 THE COURT: Okay. You can have a seat. Thank  
9 you.

10 Madam Forelady and ladies and gentlemen of the  
11 jury, let me thank you for your jury service. As I  
12 discussed with you on Monday it's -- serving on a jury is  
13 a very high, very important civic responsibility that we  
14 all have.

15 And our system of justice that we have in this  
16 state and in this country certainly could not operate in  
17 any way without a jury such as yourselves and we  
18 appreciate your jury service very much.

19 Now, so I don't forget, Madam Forelady, you'll need  
20 to sign the indictments. And just when I release you,  
21 you'll just need to get with the clerk to sign that  
22 paperwork.

23 You are free, if you so choose, to discuss this  
24 matter with anyone that you would like to talk with.  
25 Sometimes the lawyers like to contact a person on a jury

1 or several persons on a jury just to see what they thought  
2 of their representation of their respective client.  
3 That's certainly permissible. And you are free to talk  
4 with anybody if you want to.

5 Now, just take that one step further. If  
6 somebody -- and I'm not suggesting this is going to  
7 happen, but if someone were to contact you and wanted to  
8 discuss this case with you and you didn't want to, and  
9 they continued to insist, then you have every right to  
10 contact the Court and certainly I will deal with that.

11 And, again, I'm not suggesting that's going to  
12 happen. But we like to protect our jurors. And so,  
13 again, if someone wants to talk to you and discuss this  
14 case and get your individual thoughts, it's usually not a  
15 good idea to disclose what has taken place back in the  
16 jury room, but to get your individual thoughts about the  
17 case, the lawyer's performance, their representation, that  
18 certainly is permissible and entirely left up to you.

19 Finally, ladies and gentlemen, we have no further  
20 need for any further jurors for this week. We will be  
21 concluding matters. We're going to be working this  
22 afternoon and into tomorrow pretty hard, but we're not  
23 going to have any other trials.

24 And of course the courthouse is closed on Friday  
25 because of Good Friday. So, you are excused for the

1 remainder of the week. I wish you a good evening and I  
2 wish you just a great and happy and blessed Easter. You  
3 are free to go at this time.

4 And, again, Madam Forelady, if you would just get  
5 with the clerk so you can sign the backs of the  
6 indictments.

7 Good evening.

8 (Jury exits courtroom at 4:49 P.M.)

9 THE COURT: In order to give everyone kind of time  
10 to collect their thoughts before we proceed into the  
11 sentencing phase, I'll give you 10 or 15 minutes if you  
12 need to do that, if you need some private consultation  
13 with -- Mr. Smith, with your client, law enforcement can  
14 assist in that. And we'll deal with some other things we  
15 need to do and we can handle the sentencing. Okay?

16 Any post-trial motions that need to be noted on the  
17 record before we conclude this case?

18 MR. SMITH: Yes, sir, Your Honor.

19 I would like to renew my previous motions for a  
20 directed verdict based on the previous grounds that I made  
21 as well as make another motion for a mistrial -- or to  
22 make another motion for a new trial based on the previous  
23 grounds that I have, and objections that I've made.

24 THE COURT: All right. Thank you very much,  
25 Mr. Smith.

1 Your three motions are respectfully denied but so  
2 noted on the record.

3 MR. SMITH: Thank you.

4 (Thereafter, other matters were heard by the Court.  
5 At 5:06 P.M., the trial resumed:)

6 THE COURT: Okay. We're in the sentencing phase of  
7 the case of the State of South Carolina versus John Lyndon  
8 Upson. And what I typically do in this situation is allow  
9 the State to make its presentation as to sentencing, put  
10 up anybody that wants to speak, and then turn it over to  
11 the defense and allow your presentation to be offered into  
12 the record.

13 So, Solicitor, I'll be glad to hear from you, sir.

14 MR. SLOCUM: Thank you, Judge.

15 First we'd like to go over the Defendant's prior  
16 conviction record.

17 THE COURT: Yes, please.

18 MR. SLOCUM: From 1993, two counts of forgery and a  
19 possession of crack cocaine.

20 From 1994, five counts of forgery.

21 From 1995, a strong-arm robbery.

22 From 2000, a petty larceny.

23 From 2001, two counts of federal counterfeiting.

24 2004, two counts of forgery.

25 2005, a grand larceny.

1           In 2012, a petty larceny and a fraudulent check.

2           Your Honor, Ms. Jameshia Alston, who was present in  
3 the courtroom throughout the trial and testified, does not  
4 wish to address the Court. Mr. Hall who was the victim  
5 was not able to attend this afternoon. Detective Royster  
6 I do not believe wants to address the Court at this time.

7           The last two things the State would like to bring  
8 to the Court's attention is that even after the verdict  
9 was rendered, we approached the Defendant's attorney and,  
10 seeing if he was willing to cooperate as to the name of  
11 the gunman and provide a statement. However, it is our  
12 understanding that he has declined to do so.

13           Secondly, that we would -- I'm requesting a finding  
14 on the record as to the kidnapping not being sexual in  
15 nature and not requiring the mandatory sex offender  
16 registry.

17           THE COURT: Right. Right. The Court is unaware  
18 of any evidence that was put into the record at the trial  
19 of the case that would necessitate such a placement with  
20 the sexual predator registry.

21           So the Court will specifically note on the  
22 sentencing sheet that that should not be done

23           MR. SLOCUM: Thank you, Judge. That's all from the  
24 State.

25           THE COURT: Thank you very much, Mr. Solicitor.

1 Mr. Smith, be glad to hear from you, be glad to  
2 hear from the Defendant, and be glad to hear from anybody  
3 that wants to speak on his behalf. It's up to you.

4 MR. SMITH: Yes, sir. Thank you. May it please  
5 the Court.

6 Judge, Mr. Upson is 42 years old. He grew up here  
7 in Aiken. He graduated from South Aiken High School  
8 here. He's been a barber, Your Honor. He attended  
9 Southern Barber College as well as Aiken Tech. And that's  
10 primarily the work that he's done. Your Honor, he's  
11 single. He doesn't have any kids, but he's got his family  
12 here with him.

13 Your Honor, John Upson maintains his innocence. He  
14 understands that he's been found guilty by a jury but he  
15 maintains that he was not involved with this incident.

16 His brother, Charlie, would like to address the  
17 Court at this time.

18 THE COURT: Okay. You'll need to be sworn and then  
19 I'll be glad to hear from you.

20 (Oath administered.)

21 THE COURT: Would you please state your name for  
22 the record?

23 MR. CHARLIE UPSON: Okay. My name is Charlie  
24 Upson.

25 THE COURT: Okay. Be glad to hear from you,

1 Mr. Upson.

2 MR. CHARLIE UPSON: Thank you, Judge. Just a  
3 moment.

4 THE COURT: Take your time, sir.

5 MR. CHARLIE UPSON: This is a bit overwhelming for  
6 my family and me, given the gravity of the situation.

7 We can only ask and implore the Court for mercy.  
8 My brother is 42 years old. I am five years his senior.  
9 I ask for mercy not primarily for him but for my parents  
10 who are elderly and, as you've heard, have endured the  
11 lifelong situation such as this, not as serious but,  
12 still.

13 Again, given the gravity of the situation and what  
14 he's faced with, and the age of my parents, my father who  
15 will be 84 this year, Your Honor, and, and I would hate  
16 for him to pass while my brother's incarcerated.

17 So, again, I just implore the Court to keep that in  
18 mind. And I realize that you have to take everything into  
19 account. You have to take into account the nature of the  
20 crime, and the victims. I'm not unaware of that. I'm  
21 not insensitive to that, but just would ask that you take  
22 that into account, please.

23 THE COURT: Thank you very much, Mr. Upson.

24 MR. CHARLIE UPSON: Thank you.

25 THE COURT: Okay. Mr. Smith, was there another

1 gentleman that wanted to speak?

2 MR. SMITH: It appears that his father would like  
3 to speak also.

4 THE DEFENDANT: No, I'd like to say something, Your  
5 Honor.

6 THE COURT: Just consult with your attorney.

7 MR. SMITH: Yes, sir. It's --

8 THE COURT: I'll be glad to hear from you. Okay?  
9 Yes, sir.

10 THE DEFENDANT: Your Honor, I said I didn't do  
11 this. Any time they came to me with a plea for a lesser  
12 sentence, I turned it down.

13 My father's 84 years old. My mother's 73.

14 Prior to me coming back home I was working in North  
15 Dakota in the oil fields. I came back because of my  
16 father's age to help him with his property and my mother.

17 To the victims of the crime, I'm sorry that it  
18 happened to them but I had no part in this.

19 Again, the State came to me just now again asking  
20 if there was anything that I could do to lessen my  
21 sentence to give information I would have, but I didn't  
22 because I know no information about this robbery. I did  
23 not participate in this robbery.

24 To my daddy, my brother, friends. To my father,  
25 don't never think anything negative. Best childhood I

1 ever had. Unfortunately what most know, most black kids  
2 never get. I had done some things more or less paper  
3 hanging and I was wrong for that.

4 As far as the strong-arm robbery going to the cash  
5 register and dealing with the counterfeit money, but I  
6 ain't never robbed nobody. I never put a gun on nobody.  
7 I'm not a violent individual.

8 And, again, I apologize to the victims for what  
9 they went through but to my father and my family, I ask  
10 they forgive for whatever's going on now with this here  
11 because they don't -- my father provided the best for me.  
12 He provided the best for me. I didn't want for nothing.

13 Robbing somebody is something that I did not do.  
14 Saying I'm a six feet tall individual. I ain't six feet.

15 What is done is done. The evidence and then of  
16 course the jury's made their decision, Your Honor.

17 I'm just asking that you have mercy on me. I may  
18 never get to see my family. I may not be able to see ever  
19 my father on the other side of the gate again, attend his  
20 funeral or my mother's, for that matter. God forbid that  
21 it comes to it. I would rather see my demise before  
22 theirs.

23 But, again, I throw myself at the mercy of the  
24 Court and thank you for listening to me, Your Honor.

25 THE COURT: Thank you, sir.

1 Mr. Smith, anything/further from you?

2 MR. SMITH: Nothing, Your Honor.

3 THE COURT: Anything further from the State?

4 MR. SLOCUM: Not from the State, Judge.

5 THE COURT: Give me just a few moments. You can  
6 stand down. Be with you shortly.

7 (Pause from 5:18 P.M., until 5:22 P.M.:)

8 THE COURT: All right. We're back on the record in  
9 the sentencing phase of the State versus John Lyndon  
10 Upson.

11 And, Mr. Upson, you know, regardless of however I  
12 view the case from the factual standpoint or from a guilt  
13 or sentence standpoint, I must and do accept the verdict  
14 of the jury. And they considered the evidence and made a  
15 determination that you were guilty of all three.

16 And it certainly goes without saying that these are  
17 serious charges, extremely serious charges. They carry a  
18 maximum sentence of 30 years in prison. Armed robbery  
19 carries a mandatory minimum of 10 years. Not a whole lot  
20 of offenses that carry that mandatory minimum. So they  
21 are very serious.

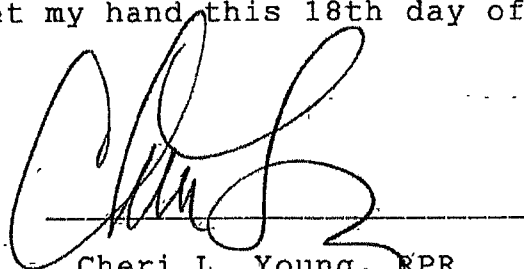
22 And I've considered everything. I considered  
23 everything that was said. I would commend all four  
24 attorneys for an excellent presentation of their  
25 respective cases.



1 case, relative to appeal, in the Court of General Sessions  
2 for Aiken County, on the 15th and 16th days of April,  
3 2014.

4 I do further certify that I am neither of kin,  
5 counsel, nor interest to any party hereto.

6 I have hereunder set my hand this 18th day of  
7 September, 2014.



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10 Cheri L. Young, RPR  
11 Official Court Reporter  
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APP'X 271

ARREST WARRANT

2013A0220101013

STATE OF SOUTH CAROLINA

County/ Municipality of

City of Aiken

14-14864

THE STATE against

John Lyndon Upson

Address: 324 Newberry St. Nw Aiken, SC 29801-

Phone: SSN: Sex: M Race: B Height: 5 8 Weight: 250 DL State: SC DL #: DOB: 1971 Agency Org #: SC0020100 Prosecuting Agency: Aiken Public Safety Prosecuting Officer: William Royster Offense: ROBBERY/ WHILE ARMED W/DEADLY WEA Offense Code: 139 Code/Ordinance Sec: 16-11-0330(A)

This warrant is CERTIFIED FOR SERVICE in the County/ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant on 12-2-2013

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Aiken Municipal Court 251 Laurens St., N.W. Aiken, SC 29801

STATE OF SOUTH CAROLINA

County/ Municipality of

City of Aiken

Personally appeared before me the affiant William Royster who being duly sworn, depose and says that defendant John Lyndon Upson did within this county and state on 11/27/2013 violate the criminal laws of the State of South Carolina (or ordinance of County/ Municipality of City of Aiken) in the following particulars:

DESCRIPTION OF OFFENSE: ROBBERY/ WHILE ARMED W/DEADLY WEAP0

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:

Upon information and belief one John L. Upson did commit the offense of Armed Robbery. That on 11-27-13 at 22:25 hours he along with one other person entered the Capt. D's restaurant 1907 Whiskey Rd and forced the manager to open the safe and hand over the money. The second subject was armed with a semi auto pistol. Upson has been in the restaurant in the past and is known to several of the employees. This act being in violation of South Carolina Code of Laws and did take place in the city of Aiken SC.

Signature of Affiant

STATE OF SOUTH CAROLINA

County/ Municipality of

City of Aiken

Affiant's Address: 251 LAURENS ST NW AIKEN, SC 29801- Affiant's Telephone: (803)642-7620 x 0000

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 11/27/2013 defendant John Lyndon Upson did violate the criminal laws of the State of South Carolina (or ordinance of County/ Municipality of City of Aiken) as set forth below:

DESCRIPTION OF OFFENSE: ROBBERY/ WHILE ARMED W/DEADLY WEAP0

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 11/28/2013 Judge's Address: Judge's Telephone: Issuing Court: Magistrate Municipal Circuit

ORIGINAL

Form Approved by S.C. Attorney General

AFFIDAVIT

FILED 12-2-2013 Deputy Clerk

RAILED by:  
Judge G. Fallow  
on 12-2-13  
Type and Amount: DENIED  
Name of Surety: \_\_\_\_\_

PRELIMINARY HEARING held by

Judge \_\_\_\_\_  
on \_\_\_\_\_  
Defendant Attorney: \_\_\_\_\_  
Decision: \_\_\_\_\_

DISPOSITION before

Judge \_\_\_\_\_  
on \_\_\_\_\_  
by \_\_\_\_\_  
(indicate jury trial, bench trial, plea, nol. prosc., etc.)

Disposition: \_\_\_\_\_  
Sentence: \_\_\_\_\_

JURORS

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

WITNESSES

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CODEFENDANTS

\_\_\_\_\_  
\_\_\_\_\_

**WITNESSES**

Aiken Department Of Public Safety

William R Royster

Law Enforcement Case #: 14-14864

JAS

ARREST WARRANT NUMBER:

2013A0220101013

FILED January 9 2014  
*Shannon D. Rosen*  
S.C.P.&G.S.  
Deputy Clerk

**ACTION OF GRAND JURY**

True Bill

*(Signature)*

Robert Wade

Foreperson of Grand Jury  
Date: January 9, 2014

**VERDICT**

Foreperson of Petit Jury  
Date:

DOCKET NO. 2014GS0200074

**The State of South Carolina**

County of Aiken

**COURT OF GENERAL SESSIONS**

**JANUARY TERM 2014**

**THE STATE  
vs.**

**JOHN LYNDON UPSON**

CDR #: 0139

**Indictment for**

**ARMED ROBBERY**

**§ 16-11-0330(A)**

**J. STROM THURMOND, SOLICITOR**

APP'X 273

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )  
 )

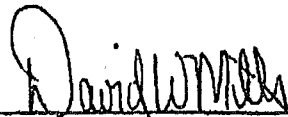
INDICTMENT FOR  
ARMED ROBBERY

§ 16-11-0330(A)

At a Court of General Sessions, convened on January 13, 2014, the Grand Jurors of Aiken County present upon their oath:

That JOHN LYNDON UPSON along with another, did in Aiken County on or about November 27, 2013, while armed with a deadly weapon or while alleging either by action or words that he was armed while using a representation of a deadly weapon or an object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a handgun, feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captian D's, such goods or monies being described as follows: U.S. currency, all in violation of §16-11-330, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



J. STROM THURMOND, SOLICITOR

**WITNESSES**

Aiken Department Of Public Safety

William R Royster

Law Enforcement Case #: 14-14864

JAS

**ARREST WARRANT NUMBER**


13-DI02-0105

FILED *January 9, 2014*

*Lee Godard, SA*  
C.C.P. & G.S.  
*Shannon D. Rose (Granty)*  
Deputy Clerk

**ACTION OF GRAND JURY**

*True Bill*



*Robert Wade*

Foreperson of Grand Jury  
Date: January 9, 2014

**VERDICT**

Foreperson of Petit Jury  
Date:

**DOCKET NO. 2014GS0200079**

**The State of South Carolina**

**County of Aiken**

**COURT OF GENERAL SESSIONS**

**JANUARY TERM 2014**

**THE STATE  
vs.**

**JOHN LYNDON UPSON**

**CDR #: 0095**

**Indictment for**

**KIDNAPPING**

**§ 16-03-0910**

**J. STROM THURMOND, SOLICITOR**

APP'X 275

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )

INDICTMENT FOR  
KIDNAPPING

§ 16-03-0910

At a Court of General Sessions, convened on January 13, 2014, the Grand Jurors of Aiken County present upon their oath:

That JOHN LYNDON UPSON did in Aiken County on or about November 27, 2013, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away Jameshia Alton without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
\_\_\_\_\_  
J. STROM THURMOND, SOLICITOR

**WITNESSES**

Aiken Department Of Public Safety

William R Royster

Law Enforcement Case #: 14-14864

JAS

**ARREST WARRANT NUMBER**

13-DI02-0106

FILED January 9 2014

*Shannon D. Rosen*  
S.C.P.&G.S.  
Deputy Clerk

**ACTION OF GRAND JURY**

True Bill



Robert Wade

Foreperson of Grand Jury  
Date: January 9, 2014

**VERDICT**

Foreperson of Petit Jury  
Date:

**DOCKET NO. 2014GS0200080**

**The State of South Carolina**

**County of Aiken**

**COURT OF GENERAL SESSIONS**

**JANUARY TERM 2014**

**THE STATE  
vs.**

**JOHN LYNDON UPSON**

**CDR #: 0095**

**Indictment for**

**KIDNAPPING**

**§ 16-03-0910**

**J. STROM THURMOND, SOLICITOR**

APP'X 277

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )

INDICTMENT FOR  
KIDNAPPING

§ 16-03-0910

At a Court of General Sessions, convened on January 13, 2014, the Grand Jurors of Aiken County present upon their oath:

That JOHN LYNDON UPSON did in Aiken County on or about November 27, 2013, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away Scott Hall without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
\_\_\_\_\_  
J. STROM THURMOND, SOLICITOR

APP'X 278

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )

IN THE COURT OF GENERAL SESSIONS  
CASE NUMBERS: 2014-GS-02-074,  
2014-GS-02-079, & 2014-GS-02-080

STATE OF SOUTH CAROLINA, )  
 )  
vs. )  
 )  
JOHN LYNDON UPSON, )  
 )  
DEFENDANT. )

VERDICT FORM

1. As to indictment 2014-GS-02-074, the charge of Armed Robbery, we the Jury find the Defendant:

Guilty.

Not Guilty.

2. As to indictment 2014-GS-02-079, the charge of Kidnapping of [REDACTED] we the Jury find the Defendant:

Guilty.

Not Guilty.

3. As to indictment 2014-GS-02-080, the charge of Kidnapping of [REDACTED] we the Jury find the Defendant:

Guilty.

Not Guilty.

FILED April 16 2014

*Liz Anderson*  
CLERK

*Shannon W. Robinson*  
Deputy Clerk

PLEASE NOTIFY THE BAILIFF WHEN YOU HAVE COMPLETED THIS FORM.

I certify this decision was the unanimous decision of the jury.

*Dugan J. Dyke*  
Foreperson  
April 16, 2014

**PLEASE NOTIFY THE BAILIFF WHEN YOU HAVE COMPLETED THIS FORM.**

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Aiken
STATE VS. John Lyndon Upson

INDICTMENT/CASE#: 2014GS0200079
A/W#: 13-DI02-0105
Date of Offense: 11/24/2013
S.C. Code §: 16-03-0910
CDR Code #: 0095

AKA:
Race: Black Sex: M Age: 42
DOB: SS#
Address:
City, State, Zip:
DL#: SID#

SENTENCE SHEET

0-30 years

CONVICTED-OF or PLEADS

\*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was TO: Kidnapping / Kidnapping

in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The 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.

ATTEST:
Stocum, Jeffrey Alan "Jay" SC Bar# 100236 Defendant
Attorney for Defendant SC Bar# 80294

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 20 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 2014-65-0274
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

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 pmts. of \$ beginning
\$ paid to Public Defense
Other:

Recipient:

Table with 3 columns: Description, Amount, Total. Includes items like § 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 (DUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/cv, Proviso 90.5 (SCCA Surcharge) \$5, 3% to County (if paid in installments) \$3.90, TOTAL \$133.90

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
Liz Dukes, Clerk of Court
16 day of April 2014
C.C. Pate, U.S. Aiken County S.C.
Deputy Clerk

Clerk of Court/ Deputy Clerk: Angel Miles
Court Reporter: Cheri Young
SCCA/217 (03/2011)

Presiding Judge: [Signature]
Judge Code: APP X 281
Sentence Date: 4/16/14

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Aiken VS. STATE

INDICTMENT/CASE#: 2014GS0200080

John Lyndon Upson

A/W#: 13-DI02-0106

AKA:

Date of Offense: 11/27/2013

Race: Black Sex: M Age: 42

S.C. Code §: 16-03-0910

DOB: SS#:

CDR Code #: 0095

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: Kidnapping / Kidnapping

SENTENCE SHEET

0-30 years

CONVICTED OF or PLEADS

in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The 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.

ATTORNEY: Secum, Jeffrey Alan "Jay" SC Bar# 100236 Defendant Andy Smith SC Bar# 80294 Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 20 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 2014-GS-02-0074 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. Under 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP Total: \$ plus 20% fee: \$ Payment Terms: Set by SCDPPPS

Recipient:

Table with 2 columns: Description and Amount. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$2.90, TOTAL \$133.90

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 monthly pmts. of \$ beginning \$ paid to Public Defense Other: 16 days of Public Service 11/27/2013

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk Angel Miles Court Reporter: Cheri Young SCCA/217 (03/2011)

Presiding Judge Judge Code: APPX 282 Sentence Date: 4/16/14

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Aiken
STATE VS.

John Lyndon Upson

AKA:

Race: Black Sex: M Age: 42

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#: SC00926172

\*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

INDICTMENT/CASE#: 2014GS0200074

A/W#: 2013A0220101013

Date of Offense: 11/27/2013

S.C. Code § : 16-11-0330(A)

CDR Code #: 0139

SENTENCE SHEET

10-30 years

CONVICTED OF or PLEADS

in violation of § 16-11-0330(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 Lowd Act) §17-25-45

The 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.

ATTEST: Storum, Jeffrey Alan "Jay" SC Bar# 100236 Defendant; Andy Smith SC Bar# 80294 Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 20 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 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

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 pmts. of \$ beginning \$ paid to Public Defender Other:

Recipient:

Table with 2 columns: Description and Amount. Includes items like § 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 (DUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/cn, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$3.90, TOTAL \$133.90

STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this 16 day of April 2014. Deputy Clerk

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Angel Miles Court Reporter: Cheri Young

Presiding Judge APPX 283 Judge Code: 2167 Sentence Date: 4/16/14

10:43:27 Wednesday, April 12, 2017

CMTI330D  
OMCOMITA

SCDC OFFENDER MANAGEMENT SYSTEM  
RELEASE DATE SCREEN

04/12/17  
C056427

SCDC# > 229134

LOC: MCCORMICK

UPSON, JOHN L

SCDC CLASSIFICATION...: VIOLENT

OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE

SEXUAL REGISTRY...: N

SEXUAL PREDATOR...: NOT APP

DNA STATUS...: COMPLETED

GPS REQUIREMENT...: N

PREA DECISION...:

PREA PERP...:

PREA VICTIM...:

CURRENT SENTENCE: 020-00-000

CONSECUTIVE SENTENCE ...: N

020-00-000

CURRENT SENT START DATE: 12/02/2013

PROJECTED COMPLETION DATES

MAXOUT DATE .....: 11/28/2030

CURRENT EWC ..: 2 F 5

YOA SIX YEAR DATE: / /

CURRENT EEC ..: B7

INITIAL PAROLE DATE: 00/00/0000

NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED .....: 000000

LABOR CREW/WORK PROG DATE: 99/99/9999

TOTAL EARNED WORK CREDITS ..: 000432

LABOR CREW DISQ REASON:

TOTAL EDUCATION CREDITS ....: 000172

CATEGORY 4 OR 5 OFFENSE

TOTAL EXTRA EARNED CREDITS ..: 000

SUPERVISED REENTRY DATE...: 00/00/00

TOTAL SERVICE TIME EARNED ..: 001210

ISS.....:

PFKEYS: 5:HISTORY OF DATE CHANGES

South Carolina Department of Corrections  
Classification Summary Reports

Date: Wednesday, April 12, 2017

Classification Summary Reports

Inmate Number

Classification Summary Report for UPSON, JOHN L :

CLASSIFICATION SUMMARY REPORT DATED 04/12/2017

SCDC# 00229134

UPSON, JOHN L

FBI# 33298VA2

OFFENDER TYPE: ADULT-STRAIGHT SENTENCE

INSTITUTION: MCCORMICK

SECURITY/CUST: 3 MINIMUM IN

CURR INCARC SENT: 20 YRS 0 MOS 0 DAYS

VICTIM WITNESS:  SEPREQ:Y

MED CLASS: 

INST RESTRICT: DAILY NURSING COVERAGE

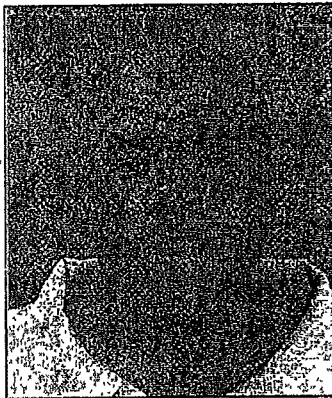
MENTAL CLASS: NMH (NO MENTAL HEALTH TRE

CURRENT PROGRAM: NO CURRENT PROGRAM

SEX REGISTRY: N

DNA: C

AGE: 45



RESIDENT STABILITY: NA

DORMROOMBUNK\_CODE: F4 0278 B

PROJ MAXOUT DATE: 11/28/2030

PROJ PAROLE DATE: --

EWC JOB: FOOD SERVICE AIDE

ASSIGNMENT: CAFETERIA

EWC LEVEL: 2F5 EEC LEVEL:

EDUC PGM: CARPENTRY (ABE)

PREVIOUS NUMBERS:

00210225

CURRENT OFFENSES	SENTENCE				SENTENCE			
	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
KIDNAPPING	20	0	0	AIKEN	12/02/2013	V	5	14GS0200079
ARMED ROBBERY	20	0	0	AIKEN	12/02/2013	V	4	14GS0200074
COMPLETED OFFENSES	SENTENCE				SENTENCE			
	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
GRAND LARCENY	4	7	0	AIKEN	11/08/2004	N	2	02GS021314

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FORGERY	5	0	0	AIKEN	11/08/2004	N	2	03GS02-1915+
FINANCL TRANS CARD FRAUD	1	0	0	AIKEN	04/12/2002	N	2	01GS02273
GRAND LARCENY	0	5	0	AIKEN	04/09/2002	N	2	02GS021314
FORGERY	1	0	0	AIKEN	12/05/1995	N	2	94GS02443
CRACK POSSESS	5	0	0	AIKEN	12/05/1995	N	2	94GS02445
COMMON LAW ROBBERY	8	0	0	AIKEN	12/05/1995	N	3	95GS021064
FORGERY	5	0	0	AIKEN	12/05/1995	N	2	95GS021520
FORGERY	0	8	0	AIKEN	08/12/1995	N	2	000000000

PRIOR COMMITMENTS OVER 90 DAYS:

03/29/2004 ARMED ROBBERY  
 02/26/2001 COUNTERFEITING ID OBJECT

PREVIOUS OFFENSES	PREVSCDCID	SENTENCE			COUNTY	START	SENTENCE		
		YRS	MOS	DYS			V/NV	CAT	INDICT
FORGERY	00210225	0	8	0	AIKEN	03/03/1994	N	2	000000000

DETAINERS (HOLD,WANTED,NOTIFY):

\*NO DETAINERS\*

ESCAPES:

\*NO ESCAPE HISTORY\*

CRIMINAL CHARGES:

\*NO CRIMINAL CHARGES HISTORY\*

ASSAULTIVE DISCIPLINARIES:

\*NO ASSAULTIVE DISCIPLINARY HISTORY\*

PREVIOUS ASSAULTIVE DISCIPLINARIES:

\*NO PREVIOUS ASSAULTIVE DISCIPLINARY HISTORY\*

NON-ASSAULTIVE DISCIPLINARIES:

04/13/2016	EXHIBITIONISM AND PUBLIC MASTURBATION	DISMISSED	MAJOR DISC. HEARING
08/06/2015	DISRESPECT	CONVICTED	ADMINISTRATIVE RESOLUTION
02/08/2015	OUT OF PLACE	CLOSED	OTHER ACTION TAKEN/INFORM
10/16/2014	REFUSING OR FAILING OBEY ORDERS	DISMISSED	OTHER ACTION TAKEN/INFORM
08/02/2014	STEALING	DISMISSED	OTHER ACTION TAKEN/INFORM
07/21/2005	THREATENING TO INFLICT HARM ON EMPLOYEE	DISMISSED	MAJOR DISC. HEARING
07/21/1999	USE OBSCENE,VULGAR,PROFANE LANG/GESTURES	CONVICTED	MAJOR DISC. HEARING
06/03/1999	REFUSING OR FAILING OBEY ORDERS	DISMISSED	MAJOR DISC. HEARING
12/30/1998	REFUSING OR FAILING OBEY ORDERS	NOT GUILTY	MINOR DISC. HEARING
11/15/1998	REFUSING OR FAILING OBEY ORDERS	CONVICTED	MAJOR DISC. HEARING
10/29/1998	REFUSING OR FAILING OBEY ORDERS	CLOSED	OTHER ACTION TAKEN/INFORM
07/13/1998	REFUSING OR FAILING OBEY ORDERS	DISMISSED	MAJOR DISC. HEARING
07/13/1998	INCITING/CREATING A DISTURBANCE	DISMISSED	MAJOR DISC. HEARING
03/02/1998	INCITING/CREATING A DISTURBANCE	DISMISSED	MINOR DISC. HEARING
01/25/1998	FALSE STATEMENT TO HARM ANOTHER PERSON	CONVICTED	MAJOR DISC. HEARING
01/21/1998	USE,POSS NARC,MARIJ,UNAUTH DRUG,INHALANT	CONVICTED	MAJOR DISC. HEARING
12/03/1997	FALSE STATEMENT TO HARM ANOTHER PERSON	CONVICTED	MAJOR DISC. HEARING
12/03/1997	OUT OF PLACE	CONVICTED	MINOR DISC. HEARING

PREVIOUS NON-ASSAULTIVE DISCIPLINARIES:

\*NO PREVIOUS NON-ASSAULTIVE DISCIPLINARIES HISTORY\*

HISTORY OF MOVEMENTS:

APP'X 286

03/13/2017	MCCORMICK	INCARCERATED	ADMINISTRATIVE
03/13/2017	KIRKLAND	INCARCERATED	MEDICAL
11/02/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
11/02/2016	KIRKLAND	INCARCERATED	MEDICAL
10/03/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
10/03/2016	KIRKLAND	INCARCERATED	MEDICAL
08/31/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/30/2016	KIRKLAND	INCARCERATED	MEDICAL
08/01/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/01/2016	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
06/01/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
06/01/2016	KIRKLAND	INCARCERATED	MEDICAL
05/20/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
05/20/2016	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
04/27/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
04/26/2016	KIRKLAND	INCARCERATED	MEDICAL
04/13/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
04/13/2016	KIRKLAND	INCARCERATED	MEDICAL
03/24/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
03/24/2016	KIRKLAND	INCARCERATED	MEDICAL
03/21/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
03/21/2016	KIRKLAND	INCARCERATED	MEDICAL
03/10/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
03/10/2016	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
01/06/2016	MCCORMICK	INCARCERATED	ADMINISTRATIVE
01/06/2016	KIRKLAND	INCARCERATED	MEDICAL
11/04/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
11/04/2015	KIRKLAND	INCARCERATED	MEDICAL
09/29/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
09/28/2015	KIRKLAND	INCARCERATED	MEDICAL
09/08/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
09/08/2015	KIRKLAND	INCARCERATED	MEDICAL
09/01/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
09/01/2015	KIRKLAND	INCARCERATED	MEDICAL
08/13/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/13/2015	KIRKLAND	INCARCERATED	MEDICAL
08/05/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/05/2015	KIRKLAND	INCARCERATED	MEDICAL
06/10/2015	MCCORMICK	INCARCERATED	ADMINISTRATIVE
06/03/2015	PERRY	INCARCERATED	ADMINISTRATIVE
06/02/2015	KIRKLAND	INCARCERATED	MEDICAL
04/23/2015	PERRY	INCARCERATED	ADMINISTRATIVE
04/23/2015	KIRKLAND	INCARCERATED	MEDICAL
04/01/2015	PERRY	INCARCERATED	ADMINISTRATIVE
04/01/2015	KIRKLAND	INCARCERATED	MEDICAL
01/15/2015	PERRY	INCARCERATED	ADMINISTRATIVE
01/15/2015	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
12/17/2014	PERRY	INCARCERATED	ADMINISTRATIVE
12/17/2014	KIRKLAND	INCARCERATED	MEDICAL
12/03/2014	PERRY	INCARCERATED	ADMINISTRATIVE
12/02/2014	KIRKLAND	INCARCERATED	MEDICAL
10/07/2014	PERRY	INCARCERATED	ADMINISTRATIVE

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10/07/2014	KIRKLAND	INCARCERATED	MEDICAL
06/02/2014	PERRY	INCARCERATED	ADMINISTRATIVE
04/25/2014	KIRKLAND	INCARCERATED	NEW ADMISSION
06/29/2007	UNK	RELEASE	EXPIRATION OF SENTENCE
04/25/2007	MANNING	INCARCERATED	ADMINISTRATIVE
04/25/2007	BROAD RIVER	INCARCERATED	COURT/PAROLE HEARING VIA
03/21/2007	MANNING	INCARCERATED	ADMINISTRATIVE
03/21/2007	PALMETTO RCHLAND	AUTH ABSENCE (AWL)	MEDICAL
03/20/2007	KIRKLAND INFRM	INCARCERATED	MEDICAL
01/17/2007	MANNING	INCARCERATED	ADMINISTRATIVE
08/25/2005	EVANS	INCARCERATED	LOCKUP-ADJUSTMENT COMM.
06/30/2005	KIRKLAND	INCARCERATED	ADMINISTRATIVE
11/08/2004	FEDERAL INST.	AUTH ABSENCE (AWL)	SERVING SC SENT IN OJ
11/23/2002	AIKEN CO	PROBATION	RELEASED TO PROBATION
09/23/2002	FEDERAL INST.	AUTH ABSENCE (AWL)	SERVING SC SENT IN OJ
09/23/1999	AIKEN CO	PAROLE	PAROLE BOARD ACTION
08/02/1996	RIDGELAND	INCARCERATED	ADMINISTRATIVE
12/27/1995	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
12/05/1995	BROAD RIVER	INCARCERATED	RETURN FROM COURT
12/04/1995	AIKEN CO	AUTH ABSENCE (AWL)	TO COURT
09/22/1995	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
08/28/1995	BROAD RIVER R&E	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
FOOD SERVICE AIDE	02/23/2017	-		2F5
BARBER	07/21/2015	02/22/2017	INMATE REQUEST	2F5
GENERAL WORKER	07/20/2015	07/20/2015	INMATE REQUEST	2F5
BARBER	06/24/2015	07/19/2015	INMATE REQUEST	2F5
GENERAL WORKER	06/16/2015	06/23/2015	INMATE REQUEST	2F5
WARDKEEPER ASSISTANT	05/21/2015	06/10/2015	INSTIT TRANSFER	2F5
WARDKEEPER ASSISTANT	03/20/2015	05/20/2015	INMATE REQUEST	2P5
GENERAL WORKER	11/05/2014	03/03/2015	LATERAL TRANSFER	2F5
WARDKEEPER ASSISTANT	09/04/2014	11/04/2014	INMATE REQUEST	2P5
FOOD SERVICE AIDE	06/26/2014	09/03/2014	LATERAL TRANSFER	2F5
WARDKEEPER ASSISTANT	06/03/2014	06/25/2014	LATERAL TRANSFER	2P5
GENERAL WORKER	01/23/2007	06/29/2007	RELEASED/PAROLED	2F5
CUSTODIAL WORKER	01/20/2006	01/17/2007	INSTIT TRANSFER	2F5
CUSTODIAL WORKER	11/18/2005	01/19/2006	MI ELIGIBLE FOR LEVEL 2	3F5
SENIOR GROUNDSKEEPER	02/02/1999	09/23/1999	RELEASED/PAROLED	5F5
LANDSCAPE GARDENER	10/30/1998	11/05/1998	UNSAT JOB PERFORM	2F5
LANDSCAPE GARDENER	10/29/1998	10/29/1998	CUSTODY REVIEW	3F5
SR TRAY LINE OPERATOR	02/12/1998	05/20/1998	UNSAT JOB PERFORM	3F5
RECREATION ASSISTANT	07/25/1997	12/10/1997	UNSAT JOB PERFORM	2F5
RECREATION ASSISTANT	07/02/1997	07/24/1997	MI ELIGIBLE FOR LEVEL 2	3F5
BARBER	11/15/1996	05/23/1997	UNSAT JOB PERFORM	2F6
BARBER	10/09/1996	11/14/1996	CUSTODY REVIEW	3F6
BARBER	08/26/1996	09/30/1996	REDUCTION IN FORCE	3F6
BARBER	08/09/1996	08/25/1996	PROMOTION	3F6
BARBER	05/07/1996	08/02/1996	INSTIT TRANSFER	3F5
GENERAL WORKER	03/05/1996	05/06/1996	LATERAL TRANSFER	7F7
FOOD SERVICE AIDE	10/04/1995	11/03/1995	UNSAT JOB PERFORM	5F7

APP'X 288

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APP'X 289

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Aiken County

Donald B. Hocker, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JOHN LYNDON UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

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FINAL BRIEF OF APPELLANT

---

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**STATEMENT OF ISSUE ON APPEAL**

**I.**

Did the trial err by refusing to grant a directed verdict acquitting Appellant of armed robbery where there was no substantial circumstantial evidence that money was stolen from the restaurant and where there was no substantial circumstantial evidence that money belonging to the restaurant was forcibly taken from Devin Johnson as alleged in the armed robbery indictment?

**II.**

Did the trial court err by refusing to grant a directed verdict on Appellant's indictments for kidnapping Scott Hall and Jameshia Alston because the kidnappings were incidental to the employees' confinement during the armed robbery; such that an acquittal on the armed robbery charge, necessitates an acquittal on the kidnapping charges?

**STATEMENT OF THE CASE**

On January 9, 2014, the Aiken County Grand Jury indicted Appellant, John Upson, for one count of armed robbery and two counts of kidnapping. R. 189. On April 15, 2014, Appellant proceeded to trial before the Honorable Donald B. Hocker and a jury.

Andrew Smith and De Grant Gibbons represented Appellant. Assistant Solicitors Jeffery Alan Slocum and Kevin R. Molony represented the State. The jury found Appellant guilty as charged. R. 181, ll. 16 – R. 182, ll. 3. The trial court sentenced Appellant to twenty years imprisonment with all three counts to run concurrent. R. 188, ll. 1-5.

### STATEMENT OF FACTS

On November 27, 2013 at 10 p.m., Scott Hall was taking out the trash at the rear entrance of the Captain D's Seafood restaurant in Aiken, South Carolina when two masked men approached him. R. 37, ll. 4-24. One of the men held a gun to his head and forced him back into the restaurant. R. 38, ll. 1-25.

Two other employees, manager Devin Johnson and cashier Jameshia Alston, were also at the restaurant during the incident. Alston was counting a cash drawer when the masked men entered and ordered her into the walk-in refrigerator. R. 12, ll. 14-23. Hall led the gunman to the cash register area while the second masked man stood at the door of the refrigerator. R. 39, ll. 1-15. Hall was then told to lay face down on the ground by the safe. R. 43, ll. 11-23.

Amazingly, Johnson was near the restaurant safe during the incident, but, his actions during this time are unknown as he was not called to testify at trial. Hall allegedly overheard the gunman telling Johnson to "give me the money, I don't want the damn coins." R. 43, ll. 19-23. Hall and Johnson were then taken to the refrigerator and the two masked men fled. Alston and Hall believed the incident lasted about two to three minutes. R. 49, ll. 19-23. Johnson called 911 once he left the refrigerator. R. 50, ll. 1-10.

#### Armed Robbery Indictment

Appellant was indicted for armed robbery on January 9, 2014. The indictment specifically alleged that Appellant "along with another, did . . . while armed with a deadly weapon . . . feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's, such goods of monies being described as follows: U.S. currency. . ." R. 189.

Devin Johnson

Despite being named as the individual who had money “feloniously taken from” him by force in the armed robbery indictment and being subpoenaed by the State, Johnson was never called to testify. In addition, the State withdrew Appellant’s kidnapping indictment for Johnson before trial. R. 77, ll. 3-8. Johnson was the only employee who claimed that he had a good look at the gunman and the only employee who believed that he would be able to identify the gunman. R. 75, ll. 5-24.

During the investigation of the robbery, Johnson was questioned concerning an individual named Ishmael Norid-Deen, whom the police identified was a mutual acquaintance of Appellant and Johnson. R. 66, ll. 4-8. Norid-Deen had worked at that Captain D’s location. R. 75, ll. 22-25. Johnson was shown a photograph of Norid-Deen. Unsurprisingly, Johnson denied that Norid-Deen was the gunman. *Id.* at ll. 14-21. A subsequent police search of Johnson’s phone records divulged that Johnson called Norid-Deen several times on the night of the incident from his cell phone and from the restaurant phone. R. 80, ll. 21 – R. 81, ll. 6. Johnson allegedly explained to law enforcement that he was simply calling Norid-Deen to get a ride home from work as they both lived in the same neighborhood. *Id.* For reasons unknown, Johnson was the only employee shown Norid-Deen’s photograph. R. 75, ll. 14-21.

At trial, lead detective William Royster reluctantly exposed on cross-examination that Johnson was interviewed by law enforcement as recently as the day before Appellant’s trial about his suspected role in the incident. R. 80, ll. 19-24. Nevertheless, Royster adamantly denied that he thought Johnson may have been involved in the alleged robbery. R. 79, ll. 16 – R. 80, ll. 8. Curiously, despite rigorously investigating and interrogating Johnson, Royster was never able to determine whether any money was taken from the restaurant. *Id.* This is especially odd given that

Johnson was the manager and presumably responsible for making final count of receipts and reconciling sales with revenue.

Jameshia Alston

At trial, Alston testified that she feared for her life during the alleged robbery. R. 17, ll. 17-19. Alston claimed that after the robbery, on her own initiative, she visited co-worker William Keel's Facebook account and looked through his "friends list." R. 15, ll. 2-10. Keels was not working the night of the robbery. From that list she allegedly recognized Appellant as the masked and hooded suspect who guarded the refrigerator door during the two and an half minute robbery. R. 19, ll. 4-21.

Alston claimed that she began her investigation because she believed that she had previously seen Appellant in Captain D's the week before the robbery. During this alleged visit, Appellant ordered a Sprite and took a photograph of Keels. R. 14, ll. 15-24; R. 23, ll. 18-23. When questioned on her remarkable memory on cross-examination, Alston assured the court it was her job to "remember by my customers." R. 16, ll. 1-4. She also identified Appellant's bald head and his alleged lazy eye with the masked suspect's appearance. *Id.*

Alston initially denied that she had been shown a photographic lineup by police. R. 33, ll. 20 – R. 33, ll. 1. However, when pressed, she admitted that the police had provided her with a list of names, which included Appellant's, during the course of the investigation. *Id.* When asked about the alleged robbery, Alston also conceded that she never completed her count of the cash drawer and never deposited the money in the safe. R. 17, ll. 1-14. Alston testified that she did not know if any money was taken from the restaurant. *Id.* Like Johnson, Keels was never called to testify. R. 161, ll. 18 – R. 162, ll. 5.

With respect to Alston's identification, William Royster conceded on cross-examination, that it was made while she was still upset by the robbery and that he did not like having witnesses do independent work. R. 68, ll. 2 - R. 69, ll. 20; R. 75, ll. 2-4. Royster admitted that her identification was the key to his investigation. R. 67, ll. 6 - R. 68, ll. 6.

Scott Hall

On direct examination Hall testified that he was led to the front of the store by the gunman and asked him to lie on the ground. R. 49, ll. 1-12. Hall alleged that that he saw Johnson open the safe and the gunman grab a carry-out bag. R. 43, ll. 19-25. When prompted Hall claims that a photograph of the area around the restaurant safe is "where the money was taken." R. 49, ll. 6-7. However, Hall also claimed that he kept his head down, which prevented him from seeing the interaction between Johnson and the gunman. R. 39, ll. 4-15.

Under cross-examination, Hall conceded that he did not see any money change hands and that he could not see the safe during the alleged robbery. R. 52, ll. 13 - R. 53, ll. 25. Further, Hall admits that he did not know if any money had in fact been taken from the restaurant and that the safe was simply open when he left the refrigerator. *Id.* Hall confirmed that it was his responsibility to make a nightly count of the money left over at the end of the day, but that he simply did not know if any money had been taken that night. R. 57, ll. 2-14.

Hall was never shown a photographic lineup and did not believe that he would be able to recognize either of the masked men if he saw them again. *Id.* When addressing the relative sizes of the men, he believed that the gunman was shorter than the individual alleged to be Appellant. R. 45, ll. 5-10. Hall also believed that the suspect identified by Alston as Appellant was around six feet tall, as he recalled that the man was taller than he was. *Id.* Appellant is five feet seven inches tall.

*Id.*

William Keels

As detailed above, Keels was a restaurant employee, but was not working when the robbery occurred. Keels did not testify. However, Keels' mother was a friend with Appellant's and Keels and Appellant were Facebook friends. R. 31, ll. 4 – R. 32, ll. 24. According to Alston, Keels was working several weeks prior to the incident when Alston claimed that Appellant allegedly visited the restaurant to buy a Sprite and took a picture of Keels. R. 14, ll. 15 – R. 15, ll. 10. During the course of the investigation Keels' mother was arrested on a charge of misprision of a felony. R. 65, ll. 3-18.

William Royster

As Johnson was never called to testify by the State, instead William Royster testified extensively on his investigation and the potential role Johnson may have played in the incident. R. 58, ll. 7-23. At trial, Royster testified that the Captain D's had no working video surveillance and that none of the surrounding buildings had cameras that captured the alleged robbery. R. 59, ll. 23 – R. 60, ll. 9. Both masked men were believed to be wearing gloves and no fingerprints of interest were recovered from the restaurant. R. 60, ll. 10-13.

Royster issued an arrest warrant for Appellant after receiving an email from Alston about her investigation on Facebook. *Id.* at ll. 14-25. Royster recalled speaking with Appellant over the phone, where Appellant stated that he was at a comedy show in downtown Aiken during at the time of the robbery. R. 62, ll.13-24. At Appellant's suggestion, Royster obtained Appellant's phone records and also confirmed that there was a comedy show on the night in question. R. 63, ll. 9 – R. 64, ll. 15. The comedy show was scheduled to end around 11 p.m. with an after-party at the Hotel Aiken. R. 64, ll. 2-18.

Royster admitted that the State had no suspects as to who the actual gunman might have been. *Id.* at ll. 19-24. Incongruously, Royster emphatically denied that Johnson, the Captain D's manager who did not testify at trial, but was listed as the victim on the indictment, was a suspect. *Id.* at ll. 19-25. Royster testified that there was a substantial amount of money left in the safe after the masked men fled. *Id.* at ll. 10-12. Royster admitted that as late as the day before Appellant's trial, he and other detectives had been interviewing Johnson about his possible involvement; including accusing him of having planned the robbery. R. 79, ll. 16 – R. 80, ll. 8.

Nevertheless, when confronted on cross-examination Royster maintained that he was absolutely sure Johnson was not involved. R. 76, ll. 22-24. In support of his determination of Johnson's innocence, Royster repeatedly stated that the safe at the restaurant had a lot of money in it after the robbery. R. 77, ll. 10-12; R. 80, ll. 6-8. Royster never testified that any of the employees told him money was missing from the register or the safe and there was never an accounting done to determine if any money was actually taken. Finally, Royster was unable to explain why the indictment for kidnapping Johnson had been pulled. *Id.*

#### Directed Verdict Motion

At the close of the State's case, the defense moved for a directed verdict on the grounds that the State presented no credible evidence that Appellant was guilty of either the kidnapping or the robbery. R. 110, ll. 14-24. With regards to the armed robbery, the defense argued that there was no testimony that money had been taken from the restaurant. *Id.* The defense emphasized that the State never called Devin Johnson to testify, despite the armed robbery indictment alleging Appellant "along with another did . . . feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's". R. 111, ll. 1-4; R. 189.

The State countered that Hall's testimony about the gunman saying "put the money in the bag," was sufficient evidence of the robbery. *Id.* at ll. 11-14. The court noted that it "had some concern with the evidence related to the issue of money." R. 112, ll. 10-15. The court stated that Alston testified that she was in the process of counting her register, but that she did not say what happened to the money; simply that she did not count it. *Id.* at ll. 16-25.

The court continued, "*circumstantially money in the cash drawer goes into the safe. . . . [I]t's corroborated by Scott Hall's testimony.*" R. 113, ll. 18-22 (*emphasis added*). The defense interposed that Alston never stated that any money was missing from her drawer. R. 114, ll. 2-7. Turning to Hall's testimony the court noted that he initially stated that he saw the gunman taking money out of the safe, but on cross-examination, he corrected his story and stated that he was face down on the floor and did not see the gunman take any money. *Id.* at ll. 9-24. The State then interjected that there was also testimony that the cash drawer from the register was on the floor after the robbery. *Id.*

The court concluded that sufficient circumstantial evidence of the robbery existed based on the gunman's alleged statement and the empty cash drawers to survive the directed verdict motion for armed robbery. R. 115, ll. 14 – R. 116, ll. 12. The court believed it was a close case, but the any contradictions went to the weight of Hall's testimony not whether any substantial circumstantial evidence of the armed robbery existed. R. 116, ll. 2-8.

#### Defense Alibi Witnesses

In its case in chief, the defense presented a series of witnesses that all testified that Appellant was at the comedy show and the after party. The witnesses ranged from family friends of the Appellant to an DSS employee and a veteran correctional officer who was also a criminal justice instructor at a community college. R.136, ll. 20 – R. 137, ll. 2; R. 145, ll. 5-24. All the witnesses

testified that the show was supposed to start at eight, but that it did not start until nine. R. 129, ll. 2- R. 131, ll.16. The show also ran late, lasting until about ten thirty or quarter to eleven. R. 140, ll. 1-11. The robbery took place around ten p.m. R. 11, ll. 9-21.

All of the witnesses testified that Appellant was acting normally. Appellant helped prepare the venue for the show and was in a good humor before and after the comedy show. R. 129, ll. 2- R. 131, ll. 16. Specifically, Janet Williams, who had recently lost a relative, recalled that Appellant had comforted her and made jokes after the show in an attempt to lift her spirits. R. 143, ll. 1-3. On cross-examination, none of the witnesses could recall seeing Appellant during the show, but the overhead lights were off during the performances and the venue was at or over capacity. R. 139, ll. 14 -- R. 141, ll. 21.

At the close of the case, the defense renewed its directed verdict motions, which were denied. R. 149, ll. 10-17. The jury was only charged on armed robbery, the trial court did not provide a jury instruction on attempted armed robbery. R. 180, ll. 1-20. Once the jury returned guilty verdicts on all the indictments, the defense again renewed its directed verdict and made a motion for a mistrial. All three motions were denied.

## ARGUMENT

### I.

The trial court committed reversible error in refusing to grant a directed verdict of acquittal where: the evidence failed to prove an element of armed robbery as alleged in the Indictment; the evidence presented merely raised the suspicion of Appellant's guilt; and the State failed to present substantial circumstantial evidence that Appellant's was guilty of committing an armed robbery.

#### Discussion

Appellant was entitled to a directed verdict on the indictment for armed robbery as the State failed to present evidence any substantial circumstantial evidence that money or goods belonging to Captain D's were forcibly taken by Appellant from the person or presence of Devin Johnson.

Our Supreme Court has held that when reviewing a trial judge's refusal of a defendant's motion for a directed verdict, that it is required to consider "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627, 632 (1982), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). See, also, *State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997). The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. See *State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); see also *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395. "When the State fails to produce *substantial circumstantial evidence* that the defendant committed a particular crime, the defendant is entitled to a directed verdict." *State v. Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) (*emphasis added*). In *Odems*, the Court cited *State*

v. *Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001) as “jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence.” *Id.* Specifically, the trial court “should grant a directed verdict motion when the evidence *merely raises a suspicion* that the accused is guilty.” *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

“Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” See *State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *Lollis*, 343 S.C. 580, 541 S.E.2d 254). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only “if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.” *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (citing *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Appellant was indicted for armed robbery under S.C. Code Ann. § 16-11-330. South Carolina's statutory scheme specifies that the definition of robbery is to be provided by common law. See S.C. Code Ann. § 16-11-325 (2003). At common law, robbery is defined as larceny with force. *State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003) citing *Broom v. State*, 351 S.C. 219, 220-211, 569 S.E.2d 336, 337 (2002). Larceny is the felonious taking and carrying away of good of another against the owner's will and without the owner's consent. *Id.* The requisite elements of larceny are met at the point *when a thief possesses an item of stolen property*. See *State v. Keith*, 283 S.C. 597, 598, 325 S.E.2d 325, 326 (1985) (“asportation is an element of robbery and armed robbery.”)(*emphasis added*).

Accordingly, “[t]he gravamen of a robbery charge is a *taking from the person or immediate presence of another by violence or intimidation*.” *State v. Rosemond*, 356 S.C. 426, 430, 589

S.E.2d 757, 758–59 (2003) (citing *State v. Hiott*, 276 S.C. 72, 276 S.E.2d 163 (1981))(*emphasis added*). It is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery, and the employment of force or threat of force that differentiates a robbery from a larceny. *See Scipio* 283 S.C. at 126, 322 S.E.2d at 16.

“When determining whether the robbery was committed with intimidation, the trial court should determine whether an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts.” *Rosemond*, 356 S.C. at 430, 589 S.E.2d at 759 (*emphasis added*). Therefore, in order to survive a directed verdict motion, the State must present direct or substantial circumstantial evidence that Appellant carried away the money or goods of another against the owner's will while armed or while alleging to be armed. *State v. Parker*, 351 S.C. 567, 571 S.E.2d 288 (2002).

The evidence presented by the State merely raised the suspicion of Appellant's guilt, as the State failed to present evidence any substantial circumstantial evidence that money or goods belonging to Captain D's were forcibly taken by Appellant from Devin Johnson. The indictment for armed robbery specifically stated:

[Appellant] along with another, did in Aiken County on or about November 27, 2013, while armed with a deadly weapon or while alleging either by action or words that he was armed while using a representation of a deadly weapon or an object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a handgun, *feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's....*

R.189. Devin Johnson never testified as to whether money or goods were taken from him by force because the State never called him to testify. He was subpoenaed to testify and had even been interviewed by Royster and his partner the day before trial. R. 77, ll. 2-19. Instead of Johnson,

Detective Royster had to explain his investigation of Johnson and to try to justify why the individual named as the victim in the armed robbery indictment was not testifying. R. 75, ll. 5 – R. 78, ll. 21.

While adamantly affirming that Johnson was not suspected of involvement in the alleged robbery, Royster admitted that the kidnapping indictment related to Johnson had been withdrawn and that police had interrogated Johnson as recently as the day before Appellant's trial. R. 77, ll. 3-8. Royster also claimed that he did not consider Johnson a suspect because the gunman had left a substantial amount of money in the safe. *Id.* at ll. 10-12. Royster did not elaborate on why he thought this particular detail was important or how it led him to determine that Johnson was not involved in the robbery. Royster was unable to state whether any money was taken from the restaurant and there was no testimony as to whether any money was forcibly taken from Johnson or in his presence.

With respect to Scott Hall's testimony, the trial court overstated the discrepancy in his testimony. On direct examination Hall testified that he saw Johnson open the safe and the gunman grab a carry-out bag. R. 43, ll. 19-25. However, Hall also stated that he was ordered to keep his head down, which prevented him from seeing the interaction between Johnson and the gunman. R. 39, ll. 4-15. On cross-examination, Hall simply clarified the contradiction in his earlier testimony by affirming that he was "on all fours. *Like [in] a crawling position as well with my head, like, down*" R. 52, ll. 18-19 (*emphasis added*).

When asked by defense counsel if his head was "tucked down", Hall responded affirmatively. *Id.* at ll. 20-21. When asked if he could not see the safe, Hall responded that he could not. *Id.* at ll. When asked if he saw any of the money supposedly being taken from Johnson, he said that he did not. R. 52, ll. 22 – R. 53, ll. 4. On re-direct examination, Hall affirmed that the incident happened in two to three minutes and that he only had a few seconds to view the two masked men.

R. 56, ll. 2-18. Moreover, whether on direct or cross-examination, Hall never testified that he saw money forcibly taken from Johnson. Finally, the only other witness to the alleged armed robbery, Jameshia Alston, testified that she never saw the gunman take any money and never claimed that she knew any money was missing after the masked suspects fled. R. 17, ll. 1-14.

Accordingly, the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777. Therefore, the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery where the evidence merely raised the suspicion of Appellant's guilt, and the State failed to present substantial circumstantial evidence that money or goods from Captain D's restaurant were taken by force from or in the presence of store manager Devin Johnson.

## II.

**The trial court erred by refusing to grant a directed verdict on Appellant's indictments for kidnapping Scott Hall and Jameshia Alston because the kidnappings were incidental to the employees' confinement during the armed robbery; such that an acquittal on the armed robbery charge, necessitates an acquittal on the kidnapping charges.**

Appellant was indicted by the Aiken County Grand Jury two counts of kidnapping. R. 191.

The body of the kidnapping indictments are identical:

That [Appellant] did in Aiken County on or about November 27, 2013, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away [ Jameshia Alston/ Scott Hall] without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

*Id.* As previously discussed, the evidence presented by the State at trial alleged that Appellant along with an unknown gunman committed an armed robbery at a restaurant while Alston, Hall, and Johnson were working. R. 37, ll. 4-24.

In the course of the armed robbery, the gunman restrained Alston and Hall at gunpoint and directed them into the standup refrigerator. R. 12, ll. 14-23. The entire incident lasted only a few minutes. R. 49, ll. 19-23. Alston's implausible identification of Appellant, when viewed in a light most favorable to the State, placed Appellant unarmed at the door of the refrigerator. R. 39, ll. 1-15A. As detailed at length, Johnson's behavior and actions during the alleged robbery are unknown and the indictment charging Appellant in his kidnapping, was withdrawn by the State. . R. 7, ll. 3-8.

The joinder of Appellant's charges into a single trial was proper *State v. Carter*, 324 S.C. 383, 386, 478 S.E.2d 86, 88 (Ct. App. 1996) (joinder of offenses in one trial is "proper if the offenses (1) are of the same general nature or character and spring from the same series of transactions, (2) are committed by the same offender, and (3) require the same or similar proof"). However, as Appellant is entitled to direct verdict with respect to the armed robbery indictment

based on the State's failure to present substantial circumstantial evidence that money belonging to Captain D's was forcibly taken from Devan Johnson; Appellant is likewise entitled to a directed verdict on the kidnapping indictments as the force used to confine Hall and Alston was incidental to the alleged armed robbery of their employer.

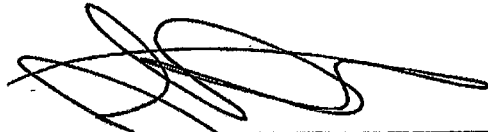
This case is distinguishable from *State v. Porter*, 389 S.C. 27, 698 S.E.2d 237 (Ct. App. 2010), as Hall and Alston were employees of Captain D's, who were confined in the course of their employment. Consequently, the force used to confine Hall and Alston is inextricably tied to the force used to feloniously take money belonging to Captain D's. In *Porter* several of the indictments involved the confinement of customers. 389 S.C. at 40, 698 S.E.2d at 224. This Court concluded, the "act of confining the customers would support the kidnapping conviction independently of the confinement required to commit the armed robbery." *Id.*

Accordingly, as the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery, Appellant is also entitled to directed verdict on the kidnapping indictments because the confinement of Hall and Alston was incidental to the armed robbery of their employer.

**CONCLUSION**

Based on the foregoing reasons, Appellant John Upson respectfully requests that this Court issue an Order of Acquittal on his convictions.

Respectfully submitted,



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John H. Strom  
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of August, 2015.

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."

August 11<sup>th</sup>, 2015



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County  
Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN LYNDON UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

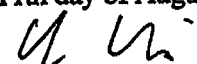
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of August, 2015.

  
\_\_\_\_\_  
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SUBSCRIBED AND SWORN TO before me  
this 11th day of August, 2015.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2025.

APP'X 312

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Donald B. Hocker, Circuit Court Judge

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Appellate Case No. 2014-000852

THE STATE, .....RESPONDENT

v.

JOHN LYNDON UPSON, .....APPELLANT.

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**FINAL BRIEF OF RESPONDENT**

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## RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

### I.

Did the trial court properly deny Appellant's motion for a directed verdict on the armed robbery charge when testimony of witnesses present during the incident and other evidence constituted substantial circumstantial evidence establishing that the assailants took money during the armed robbery and when the motion advanced by Appellant required the trial court to improperly weigh the evidence rather than consider the existence of the evidence?

### II.

May this Court consider the issue Appellant presents of trial court error in the denial of his motion for a directed verdict respecting the kidnapping charges when the ground advanced on appeal was not presented to or ruled upon by the trial court; nevertheless, the trial court properly denied Appellant's motion for directed verdict on both kidnapping charges based upon direct, eyewitness testimony of the victims.

## STATEMENT OF THE CASE

Appellant was indicted on January 9, 2014, by the Aiken County Grand Jury, for one count of armed robbery (2014-GS-02-74) and two counts of kidnapping (2014-GS-02-79 and 2014-GS-02-80). He was represented by Andrew Smith and De Grant Gibbons, and the State was represented by Assistant Solicitors Jeffery Alan Slocum and Kevin R. Molony. On April 15-16, 2014, Appellant proceeded to trial by jury pursuant to which Appellant was found guilty as charged. He was sentenced by the Honorable Donald B. Hocker to twenty years' imprisonment with all three sentences to run concurrently.

Appellant timely filed a notice of appeal and subsequently submitted a brief. This brief of Respondent follows.

## STATEMENT OF FACTS

On November 27, 2013, Scott Hall, a cook employed at Captain D's restaurant, was taking out the trash at the rear entrance of the restaurant when two masked men approached dressed in black and wearing bandanas and surgical gloves. One of the two men had a gun and pressed the gun against Hall's head before Hall could get inside. The two men directed Hall inside and told Hall to take them to the front of the restaurant to the safe. Hall complied with the demands. (R. pp. 15; 37 - 38). Hall testified that he was forced "up front" by the gunman while the gun was still held against Hall's head. (R. 39). Hall was very frightened. (R. p. 39). Manager Devin Johnson was at the front of the restaurant at the time. (R. p. 51). Johnson was the only person with access to the safe. (R. p. 51). After forcing Hall to the front of the restaurant with the gun to Hall's head, the gunman instructed Hall to get on all fours, and look down. (R. p. 39; 52). Hall heard the gunman demanding that the manager Devin Johnson give the gunman money. (R. p. 39). Hall heard Johnson fumble a couple of times getting the safe open. (R. p. 43). During the exchange between the gunman and Johnson, Hall heard the gunman tell Johnson to give him the cash but not the coins. (R. 39; 49). Specifically, the gunman said, "Give me the money, I don't want the damn coins." (R. 43). Hall also stated that the gunman put the money in one of the restaurant "take-out" bags that the gunman grabbed as he walked to the front of the restaurant. (R. 43; 94). Hall described that after the gunman "had gotten the money and everything," the gunman directed Hall to stand with his arms over his head. (R. 43 - 44). Hall specifically testified that the gunman received money from Johnson after Johnson "fumbled with it a couple times to get the safe open." (R. 43). Hall stated that after taking the money and while holding the gun to the back of Hall's head, the gunman directed Hall into the "cooler" where employee Jameshia Alston already

stood. (R. p. 44; 49; 53). Hall did not feel free to leave. (R. p. 44). The assailants searched Alston, Hall and Johnson's pockets for anything they had and took Johnson's cell phone. (R. p. 12; 76; 80). Hall remained in the cooler for approximately five minutes. (R. p. 44; 49; 53). Hall was frightened and did not feel he was free to leave. (R. 44). Hall said the robbery lasted a few minutes. (R. 49; 56). Hall testified that money was missing from the safe that night and he had to count the money left in the drawers. (R. p. 56 – 57; 77). When the assailants were gone, Johnson called the police. (R. pp. 49 – 50). Hall provided descriptions of the assailants, including the fact that the gunman had a teardrop tattoo or birthmark under his eye. (R. 45). The police arrived shortly thereafter, took statements and began their investigation. Photographs were introduced of the cash drawers, coins, and areas involved. (State's exhibits 1-12 on file).

Two other employees, manager Devin Johnson and cashier Jameshia Alston were inside the restaurant when the two assailants entered with Hall at gunpoint at around 10:15 p.m. (R. p. 11). Alston was located at the back of the restaurant counting her cashier's drawer down to one hundred and fifty dollars before placing the money and cashier's drawer in the safe as she did every evening she worked. (R. p. 11 – 12; 16 - 17). Alston started that process at around 10:00 p.m. when the restaurant closed. (R. 11; 23). Alston observed the armed assailant enter the restaurant holding a gun held to Hall's head and heard the assailant direct Hall to go to the safe. (R. 12). A second, unarmed assailant who entered with the armed assailant went to Alston's location and told her to "stand right here. Don't move." Alston asked to go home and the assailant responded, "No, stay right here." (R. 12). Alston was fearful of the two assailants and described them as forceful and demanding. (R. 18). She did as she was told. (R. p. 12). Alston recognized

the unarmed assailant standing with her as the person she saw at the restaurant two days earlier with another employee. Alston recalled the order the unarmed assailant placed for a large drink as well as the fact that he and another employee took a photograph together. (R. pp. 14- 16; 23; 28). After making Alston remain at the back of the restaurant, the unarmed assailant whom Alston identified as Appellant during the trial then walked Alston to a location near the "stand-up refrigerator" – or "cooler" - where he kept her for a minute before forcing her inside. (R. pp. 12, 18; 22). Alston complied. (R. p. 12). Alston believed she could not leave and she feared for her life. (R. p. 16). Alston remained in the cooler until after the armed robbery. (R. p. 18). Alston informed the officers who responded to the scene that she recognized Appellant but did not know his name. (R. pp. 19; 25). Within one hour of leaving the restaurant after the incident, Alston researched Facebook photographs and found the photograph taken at the restaurant. Alston called officers with the name she discovered and forwarded the photographs. (R. pp. 19 – 20; 30 – 32; 35; [State's Exhibits 1 – 12]).

Officer Royster testified that Johnson was not a suspect because he left some money in the safe during the armed robbery, had a sufficient explanation for suspicious calls, and had his cell phone stolen during the armed robbery. (R. p. 65; 76-77; 80-81; 91-92). Photographs introduced depict the scene, coins and safe. (R. p. 59; State's exhibits 1 – 12).

## ARGUMENTS

### I.

The trial court properly denied Appellant's motion for a directed verdict respecting the armed robbery charge when testimony of witnesses present during the incident and other evidence introduced constituted substantial circumstantial evidence establishing that the assailants took money during the armed robbery and when the motion advanced by Appellant required the trial court to improperly weigh the evidence rather than consider the existence of the evidence.

Appellant argues the trial court erred in denying his motion for directed verdict respecting the armed robbery charge arguing the State failed to present evidence establishing that money or goods belonging to Captain D's was forcibly taken from the manager, Devin Johnson, because Johnson was not called as a witness at trial. The State submits that a review of the evidence presented and the reasonable inferences arising from that evidence taken in the light most favorable to the State reveals the trial court properly declined to direct a verdict of acquittal in Appellant's favor.

"When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of the evidence, not its weight. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McCombs, 368 S.C. 489, 493, 629 S.E.2d 361, 362 - 63 (2006). However, the trial judge should deny a directed verdict motion and submit the case to the jury if there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be

fairly or logically deduced. State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) (emphasis added); State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976). “[A] trial [court] is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.” State v. Zeigler, 364 S.C. 94, 102 – 03, 610 S.E.2d 859, 863 (Ct. App. 2005). In State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004), the Court described circumstantial evidence and direct evidence as follows:

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

Where the State relies exclusively on circumstantial evidence, the trial court must submit the case to the jury if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). A case is considered a direct evidence case, rather than circumstantial, when the State relies upon direct evidence to prove the acts of the crime and the identity of the perpetrator, and circumstantial evidence was merely corroborative or offered to demonstrate intent. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) (stating the officers’ personal observations and opinions of the defendant’s actions, appearance, and condition constitute direct evidence of DUI because it is based on the officers’ actual knowledge of the situation and requires no inference from the jury).

On appeal from the denial of a directed verdict, an appellate court must view the evidence and all reasonable inferences in light most favorable to the State. State v.

Weston, 367 S.C. 279, 625 S.E.2d 641 (2006). If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.” State v. Cherry, 361 S.C. at 588, 593 – 94, 606 S.E.2d 475, 478. “[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge’s ruling upon a motion for a directed verdict must stand absent an error of law.” State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

Appellant was charged with armed robbery in violation of S.C. Code Ann. § 16-16-11-330 (A) (2003), which provides that “[a] person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, 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, is guilty of a felony.” S.C. Code Ann. § 16-11-330 (A). “Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear. The crime is ‘armed robbery’ when a person commits a robbery while armed with a deadly weapon.” State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007), citing State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995); see also State v. Nix, at 492, 343 S.E.2d at 627. “Under the ‘hand of one is the hand of all’ theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and

purpose.” State v. Thompson, at 261, 647 S.E.2d at 704, citing Sate v. Condrey, 349 S.C. 184, 195, 562 S.E.2d 320, 324 (Ct. App. 2002).

The record before this Court reflects that Appellant moved for a directed verdict as to the armed robbery charge at the close of the State’s case arguing the State failed to present any testimony that money or property was taken because the restaurant manager Devin Johnson was not called as a witness at trial. (R. pp. 110 – 111). The discussion about Appellant’s motion verifies that the sole ground offered was the State’s failure to establish that money or property was taken. (R. p. 110-116). The trial court denied the motion, finding the evidence was sufficient to submit the charge to the jury and that Appellant was improperly asking it to consider the weight rather than existence of evidence. (R. pp. 111 - 117). The motion was renewed at the close of Appellant’s case and was again denied. (R. p. 149).

The only argument Appellant presented at trial to support his request for a directed verdict of acquittal as to the armed robbery charge was the lack of evidence to establish that money or property was taken during the armed robbery based upon the fact that restaurant manager Johnson did not testify at trial.<sup>1</sup> The State submits the evidence

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<sup>1</sup> There is no question that a gun was present and used by Appellant and his companion to put the employees of Captain D’s in fear of their lives in order to gain entry into the closed restaurant and to secure compliance with their demands for the contents of the safe. Scott Hall and Jameshia Alston testified to seeing the gun, which looked and felt to be real. Hall testified that when it touched his skin, the gun was cold and had the feel and weight of a real gun. Hall testified that the gun was held to his head as he was forced inside the restaurant by the perpetrators and as the gunman demanded to be taken to the safe. Alston reported seeing the gun being held against Hall’s head, of the demands made by the perpetrators to accomplish the armed robbery, and compliance by Hall, Alston, and Devin Johnson with those demands in the face of the gun and forceful demands and actions of the perpetrators. Alston was also in fear for her life. It is also uncontested that, while using the gun, Appellant’s accomplice in the armed robbery demanded access to the restaurant safe and that restaurant manager Devin Johnson was

and the reasonable inferences arising from the evidence were sufficient to support the denial of the directed verdict motions. As set forth in Respondent's Statement of Facts herein, Alston testified that she was counting down her cashier's drawer to one-hundred and fifty dollars to thereafter place it the safe where the restaurant cash is stored. However, Alston was interrupted in this process by the arrival of the armed perpetrators and heard and observed Hall being held at gunpoint and Hall being forced to take the gunman to the location of the restaurant safe. Alston's response was "Oh my God, I'm going to die" and compliance with the demands of the perpetrators. (R. p. 11).

Scott Hall testified that he was forced into the restaurant at gunpoint and complied with the gunman's demand to be taken to the safe. Hall observed the gunman pick up a "take-out" bag as they walked toward the safe. Hall was in the presence of the gunman and Johnson but was forced down on his hands and knees by the gunman at the location of the safe. Hall heard the gunman demand money from restaurant manager Johnson and heard Johnson fumbling as he tried to open the safe. Johnson was the only person present in the restaurant with access to the safe. During the interaction between the gunman and Johnson, Hall heard the gunman direct Johnson to leave the coins and only give him the cash. "Give me the money, I don't want the damn coins." (R. pp. 39; 49). Hall testified that the gunman put the money in the "take-out" bag. Hall also testified that the gunman "had gotten the money and everything." After this exchange between the gunman and

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heard as he fumbled in his efforts to comply with the gunman's demands. Appellant does not contested the evidence presented establishing that Alston knew Appellant from an earlier encounter at the restaurant and identified him in court as one of the perpetrators of the armed robbery. U.S. v. Kochel, 416 F.2d 370 (4th Cir. 1969) (where four bank employees positively identified the defendant as one of two perpetrators). While Appellant was not the person with the gun, he clearly joined and acted in concert with and aided in the commission of the armed robbery. See State v. Thompson, at 257, 647 S.E.2d at 702.

Johnson, Hall was directed by the gunman to stand with his arms above his head. Hall further testified that money was missing from the safe that night and he had to count the money left in the drawers. Hall testified that he and Johnson were taken into the "cooler" while the gun was still being held against Hall's head. Before leaving, the perpetrators searched Hall, Alston, and Johnson for "cell phones and anything else that they had." (R. pp. 12 – 13). Johnson's cell phone was taken. (R. p. 76).

Officer Royster testified that Johnson was questioned but was not a suspect in the armed robbery because Johnson explained suspicious telephone calls, left some money in the safe during the armed robbery, and had his cell phone stolen by the perpetrators. (R. p. 65; 76-77; 80-81; 91-92). Photographs also depict the scene, coins and safe. (R. p. 59; State's exhibits 1 – 12).

Contrary to Appellant's argument to the trial court, the evidence presented at Appellant's trial and inferences arising from the evidence taken in the light most favorable to the State were sufficient to establish that money or property was taken to withstand the motion as to the armed robbery charge. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989) (stating testimony indicating \$87.00 was unaccounted for after the murder of the victim is sufficient to establish that money was taken from the person or in the presence of the victim). The State submits that the trial court properly determined that the weight of the evidence, credibility of the witnesses and conflicts in the evidence as advanced by Appellant are matters that must be left to the jury as the finder of fact. McDill v. Mark's Auto Sales, Inc., 367 S.C. 486, 626 S.E.2d 52 (2006). Assessing the weight of the evidence is not a task undertaken by the trial judge when ruling on a motion for directed verdict. State v. Thompson, at 257, 647 S.E.2d at 702. Hall's later answers

during cross-examination do not negate the existence of that evidence. Instead, any discrepancies in later answers are matters related to the weight of the evidence which is solely a matter for the jury. See State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (stating that while the evidence supporting the burglary charge is disputed, testimony of a witness was sufficient to submit the issue of burglary to the jury); State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001) (stating that while it is contradicted by other evidence, a witness' statement that the victim was crying during a car ride constitutes direct evidence that that the victim was alive and reasonably tends to prove the defendant participated in an on-going kidnapping such to withstand a directed verdict motion.). Appellant's apparent suggestion that it is reasonable to believe the perpetrators left the restaurant without taking any money is simply not supported by the evidence.

As to Appellant's reliance on the fact that the manager Devin Johnson did not testify despite being there on the night in question and having the close contact with the gunman, the State submits this fact is immaterial to the findings of guilt and issues raised on appeal. Evidence presented at trial concerning the actual robbery and Johnson's involvement was illustrated by the testimony of fellow employees, Hall and Alston, as well as that of Detective Royster. See State v. East, 353 S.C. 634, 638, 578 S.E.2d 748, 751 (Ct. App. 2003) (stating that the failure of the State to call a victim as a witness does not require a directed verdict when other "employees that [said victim] was present when they were confined in the hallway."); see also State v. Charping, 333 S.C. 124, 129, 508 S.E.2d 851, 854 (1998) (stating that "an adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material

facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses).

The State also submits that, to the extent Appellant is advancing any other ground in support of his argument that a directed verdict should have been granted, it is clear from the record that nothing else was presented by Appellant to the trial court for its consideration and is, therefore, not preserved for appellate review. Pursuant to the error preservation rules in South Carolina, this Court may not reverse a trial court for error in a ruling when the trial court was not presented with the argument at trial and never ruled on the specific ground offered as error on appeal. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997); see also Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. 348, 384 S.E.2d 738 (1989). Our error preservation rules require objections or motions to be made on specific grounds by Appellant and subsequent responsive rulings by the trial court. A motion or objection without a specific ground or without a ruling fails to preserve an issue for appellate review. Busillo v. City of North Charleston, 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013); State v. Jennings, 394 S.C. 473, 481-482, 716 S.E.2d 91, 95 (2011); State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004); State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) overruled on other grounds by State v. Collins, 320 S.C. 23, 495 S.E.2d 202 (1998); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991). An issue may not be raised for the first time on appeal, but must have been raised to the trial court to be preserved for appellate review. State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005). Appellant's argument on appeal is without merit and the ruling of the trial court must be affirmed.

II.

**The issue Appellant presents of trial court error in the denial of his motion for a directed verdict respecting the kidnapping charges cannot be considered on appeal when the ground advanced on appeal was not presented to or ruled upon by the trial court; nevertheless, the trial court properly denied Appellant's motion for directed verdict on both kidnapping charges based upon direct, eyewitness testimony of the victims.**

Appellant argues to this Court on appeal that the trial court erred by refusing to grant directed verdict motions on the kidnapping charges related to Jameshia Alston and Scott Hall contending the kidnappings were incidental to the confinement during the armed robbery and the State's failure to present substantial circumstantial evidence that money forcibly taken from manager Devin Johnson entitled him to a directed verdict on kidnapping. He claims that acquittal on the armed robbery charge requires acquittal of kidnapping.

First, that State submits that this argument was not made to the trial court in support of Appellant's motions for directed verdict as to the kidnapping charges and, therefore, cannot be considered by this Court on appeal. The State also submits that Appellant's argument that the kidnapping charges merged into the armed robbery charge and could not stand if Appellant was acquitted of armed robbery is simply contrary to established precedent and is not logical. Moreover, for the reasons stated in Respondent's Argument I herein, the motion for directed verdict of acquittal as to armed robbery was properly denied. Additionally, the record before this Court reveals more than sufficient evidence to support the trial court's decision to submit the kidnapping charges to the jury.

At the close of the State's case, Appellant moved for directed verdicts of acquittal respecting the two kidnapping charges in question arguing solely that "[t]he State has presented no credible evidence upon which a jury would be able to base a decision of guilt." (R. p. 110). Appellant offered nothing further to support his request even when specifically asked by the trial court. (R. p. 116 - 117). The directed verdict motion on the kidnapping charges was later renewed without a stated ground. The motions were denied. (R. pp. 116-117; 149). On appeal, Appellant urges this Court to reverse the trial court's ruling arguing the trial court erred in denying his motions. However, the error advanced by Appellant on appeal is based on a ground Appellant failed to present to the trial court for consideration and upon which he failed to secure a ruling. Pursuant to the error preservation rules in South Carolina, this Court may not reverse a trial court for error in a ruling when the trial court was not presented with the argument at trial and never ruled on the specific ground offered as error. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. at 24, 491 S.E.2d at 571; see also Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. at 348, 384 S.E.2d at 738. Error preservation rules require an objection or motion to be made on specific grounds by Appellant and a subsequent responsive ruling by the trial court. A motion or objection without a specific ground or without a ruling fails to preserve an issue for appellate review. Busillo v. City of North Charleston, 404 S.C. at 604, 745 S.E.2d at 142; State v. Jennings, 394 S.C. at 481-482, 716 S.E.2d at 95; State v. Rogers, 361 S.C. at 178, 603 S.E.2d at 910; State v. Hudgins, 319 S.C. at 233, 460 S.E.2d at 388 overruled on other grounds by State v. Collins, 320 S.C. 23, 495 S.E.2d 202 1998); State v. Morris, 307 S.C. at 480, 415 S.E.2d at 819. An issue may not be raised for the first time on appeal, but

must have been raised to the trial court to be preserved for appellate review. State v. Carlson, 363 S.C. at 586, 611 S.E.2d at 283. “In order to preserve for review, an alleged error[,] an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonable understood by the [circuit court].” State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); see also State v. Dunbar, 356 S.C. 138, 587 S.E. 2d 691 (2003) (stating that in order to properly preserve an issue for review on appeal, the defendant must present the argument to the trial court and receive a ruling); State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct.App. 1998) (stating that arguments not presented to the trial court in support of directed verdict are not preserved for review on appeal).

The record simply fails to establish that the issue and ground Appellant now raises on appeal were presented first to the trial court to enable the trial court to consider Appellant’s position and make a ruling responsive to Appellant’s requests. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) (“The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues before an appellate court will review those arguments.”). Accordingly, this Court should not consider the merits of Appellant’s argument respecting the trial court’s erroneous ruling when the trial court was never given an opportunity to consider the matter.

Nevertheless and assuming *arguendo* the issue is properly presented, the State submits that the trial court properly denied the motion in response to the ground advanced

by Appellant at trial. Pursuant to South Carolina Code Ann. § 16-3-910 (2003), kidnapping occurs when one “unlawfully seize[s], confine[s], inveigle[s], decoy[s], kidnap[s], abduct[s] or carr[ies] away any other person by any means whatsoever without authority of law . . . .” “South Carolina’s kidnapping statute requires proof of an unlawful act taking one of several alternative forms” and merely requires that at least one of these acts to accomplish kidnapping is satisfied. State v. East, 353 S.C. 634, 636 - 637, 578 S.E.2d 748, 749-750 (Ct. App. 2003). Kidnapping is a continuing offense which commences when a person is wrongfully deprived of freedom and continues until freedom is restored. State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001); see also State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986).

In this case, the Captain D’s employee Jameshia Alston testified that she saw Scott Hall with a gun held to his head and being directed inside by the perpetrators. She also saw that Hall was being forced to take the gunman to the location of the safe. Alston said that Appellant stood at the back of the restaurant with her. Alston asked Appellant if she could go home. In response, Appellant demanded that Alston stay where she was. Alston was fearful, thought she was going to die, and complied with Appellant’s demands. Alston testified that Appellant held her at the back of the restaurant and then walked her to an area outside the “cooler” where he made her stand. Alston testified that Appellant thereafter forced Alston inside the “cooler” where she was held until Appellant and the gunman left.

Scott Hall also presented testimony establishing that he was forced into the restaurant at gunpoint by Appellant and the gunman and that he was forced to take the gunman to the safe at the front of the restaurant. Hall was also directed by the gunman to

get onto his hands and knees on the floor. Hall was fearful for his life and did as the gunman demanded. Later, the gunman forced Hall to stand with his arms over his head and to walk to the "cooler." Hall was then ordered inside the "cooler" with Alston where they remained until Appellant and the gunman left.

It is clear that Hall and Alston were held at gunpoint, were directed where to stand, kneel and walk, were placed in fear for their lives and were unlawfully deprived of their freedom by the concerted action of Appellant and his accomplice. It is abundantly clear that neither was free to leave or move as they desired. This evidence was sufficient to establish kidnapping. State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999) (stating that kidnapping is an offense which "commences when one is wrongfully deprived of freedom and continues until freedom is restored."). The motion made to the trial court was properly denied. State v. Cherry, 361 S.C. at 588, 606 S.E.2d at 475.

As to Appellant's unpreserved argument that the kidnapping offense merged into the armed robbery offense, the State submits that this argument has been considered and rejected. Our supreme court and this Court have held that a defendant cannot escape a kidnapping conviction by claiming that the kidnapping was incidental to the offense of armed robbery or another offense in which confinement is an integral matter. See State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983) (holding that the restraint of the victim constituted kidnapping despite the fact that the taking was to facilitate the commission of sexual battery); State v. Owens, 309 S.C. 402, 424 S.E.2d 473 (1992) (stating prosecution for murder after a kidnapping conviction for the murder victim is not barred by double jeopardy even though a majority of the evidence linking the defendant to the murder could have been discovered at the time of the kidnapping trial); State v. Tucker, 334 S.C.

1, 512 S.E.2d 99 (1998) (stating that restraint constitutes kidnapping regardless of the fact that the purpose of the seizure was to facilitate the commission of burglary and robbery); State v. East, 353 S.C. 634, 578 S.E.2d 748 (Ct. App. 2003)(same). In State v. Porter, this Court acknowledged that “[l]ogically, in order to commit armed robbery, an assailant must constrain his victim’s activities in some way; otherwise the victim could simply walk away,” but determined that confining bank employees and customers while robbery was taking place could support a finding of kidnapping regardless of whether it was incidental to an armed robbery. State v. Porter, 389 S.C. 27, 39, 698 S.E.2d 237, 243 (Ct. App. 2010). This Court’s conclusion was based on a determination by our supreme court that “when a single act combines the requisite ingredients of two distinct offenses, the defendant may be severally indicted and punished for each.” State v. Steadman, 216 S.C. 579, 589, 59 S.E.2d 168, 171 (1950). Moreover, this Court noted in Porter that similar to Alston and Hall, people in the bank were being confined against their will but were not being robbed which also supported kidnapping independent of armed robbery. Porter, 389 S.C. 27, 40, 698 S.E.2d 327, 244.

In rejecting Appellant’s argument, this Court should consider that it and our supreme court have concluded the charge of armed robbery has no bearing on the viability of the kidnapping charges. Further, relevant to this case is the fact that Alston and Hall themselves were not being robbed; rather, Captain D’s restaurant was the victim. Pursuant to Porter, this fact further supports an independent finding of kidnapping. Additionally, this Court should also consider that the trial court charged the jury that each indictment is a separate and distinct offense and must be decided separately. (R. p. 180). State v. East, 353 S.C. at 634, 578 S.E.2d 748.

**The ruling of the trial court must be affirmed.**

**CONCLUSION**

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

SALLEY W. ELLIOTT  
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BY:



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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina  
August 26, 2015

STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM AIKEN COUNTY  
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-000852

THE STATE,.....RESPONDENT

v.

JOHN LYNDON UPSON,.....APPELLANT.

**CERTIFICATE OF COUNSEL**

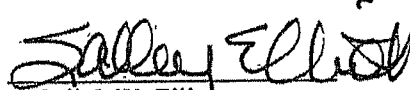
The undersigned hereby certifies the Final Brief of Respondent complies with Rule  
211(b), SCACR.

ALAN WILSON  
Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

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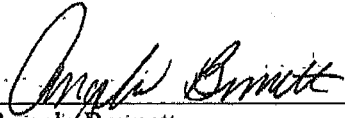
**PROOF OF SERVICE**

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I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated August 26, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

John H. Strom, Appellate Defender  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.  
This 26<sup>th</sup>, day of August, 2015.

  
\_\_\_\_\_  
Angela Bennett  
Administrative Assistant

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APP'X 339

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Aiken County

Donald B. Hocker, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

JOHN LYNDON UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

---

FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

### I.

**The trial court erred in denying Petitioner's directed verdict motion where the evidence presented at Appellant's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson.**

The State argues that Scott Hall's testimony provided substantial circumstantial evidence that money was forcibly taken in Devin Johnson's presence. Respondent's Brief at p. 10. Specifically, the State noted that Hall claimed the gunman left after he, "had gotten the money and everything." *Id.* Understandably, the State dismisses Hall's later clarification on cross-examination that: he could not see the safe, he could not see Johnson interact with the gunman, he could not see the registers, and he did not know if any money was taken. R. 52, ll. 17 – R. 53, ll. 4; R. 56, ll. 25 – R. 57, ll. 14.

Likewise Hall also explained that, while he counted the registers after the incident, he had no idea if any money had been taken because he did not know how much money was in the registers before the alleged robbery. *Id.* When looking at Hall's testimony as a cohesive whole, the only reasonable inference is that his reference to the gunman having "gotten the money and everything," was simply an assumption unsupported by his observations at the time of the incident. Hall unequivocally stated on cross and re-cross examination that he did not, in fact, witness any money being taken from the store safe. R. 52, ll. 17 – R. 53, ll. 4; R. 56, ll. 25 – R. 57, ll. 14; *see Roper v. Dynamique Concepts, Inc.*, 316 S.C. 131, 447 S.E.2d 218 (Ct. App. 1994)(no jury issue is created where the evidence, as a whole, is susceptible of only one reasonable inference).

The State further contends that Jameshia Alston's recalling that she did not complete her drawer count was relevant to proving that money was forcibly taken from the person or in the

presence of Devin Johnson. Respondent's Brief at p. 10. In actuality, her testimony had no bearing on the asportation element of robbery. Alston testified that she was counting down her draw in the restaurant's back office and that she was immediately led into the freezer. R. 17, ll. 1-14. She never finished counting her drawer and there is no evidence that her drawer was ever taken to the restaurant's safe located in the front of the service area. *Id.*

Alston never testified that any money was missing from her drawer – presumably still located in the back office – and she could not have seen Johnson's interactions with the gunman at the store safe. The State's comparison to *State v. Childs* is inapt. 299 S.C. 471, 385 S.E.2d 839 (1989); Respondent's Brief at p. 11. In *Childs*, the convenience store manager conducted a post-robbery accounting and determined that about one hundred dollars was missing. *Id.* at 478, 385 S.E.2d at 479. In the present case, neither Hall nor Alston conducted such a count, whether Johnson made a post-incident count, in his capacity as restaurant manager, is unknown because the State did not call him at trial.

Finally, the State contends that Devin Johnson's absence at trial is "immaterial". Respondent's Brief at p. 12. On the contrary, Johnson's failure to testify is material to whether the State presented substantial circumstantial evidence that Appellant did "feloniously take from the person or presence of Devin Johnson by means of force or intimidation goods or monies of Captain D's...." R. 190.

For this reason, the State's reliance on *State v. East*, is misplaced. 353 S.C. 634, 638, 578 S.E.2d 748, 751 (Ct. App. 2003). In *East*, this Court affirmed the denial of a directed verdict motion on a kidnapping charge because there was testimony from other employees that the non-testifying employee was confined against his will in the hallway with them. *Id.* In the present case, there is no equivalent testimony. Hall stated that he did not see any money belonging to Captain D's being

forcibly taken from Johnson; neither did Alston. R. 52, ll. 17 – R. 53, ll. 4; R. 56, ll. 25 – R. 57, ll. 14.

Moreover, given the ambiguity of his involvement and the unexplained withdrawal of the indictment for his kidnapping, Johnson's participation in the incident was not adequately "illustrated" by his co-workers' testimony. Respondent's Brief at p. 12. Therefore, it cannot be assumed from Hall's, Alston's, or even Detective Royster's testimony that money was forcibly taken from Devin Johnson.

Accordingly, the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced and the trial court erred in refusing to grant a directed verdict on Appellant's indictment for armed robbery. *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

## II.

**Whether the trial court erred by refusing to grant a directed verdict on Appellant's indictments for the alleged, incidental kidnappings of Scott Hall and Jameshia Alston is preserved for appellate review.**

Alston and Hall were restrained in the course of performing their duties as Captain D's employees. Any force used to restrain them was incidental to the force used to attempt the alleged armed robbery. The majority view in other jurisdictions is that kidnapping statutes do not apply to unlawful confinements or movements *incidental to the commission of other felonies*. *State v. White*, 362 S.W.2d 559 (Tn. 2012); *see also Hurd v. State*, 22 P.3d 12 (Alas.App.2001); *People v. Powell*, 716 P.2d 1096 (Co. 1986); *Tyre v. State*, 412 A.2d 326 (Del.1980); *Delgado v. State*, 71 So.3d 54 (Fla.2011); *State v. Robinson*, 859 N.W.2d 464 (Ia. 2015) ; *State v. Cabral*, 619 P.2d 1163 (Kan. 1980); *State v. Estes*, 418 A.2d 1108 (Me.1980); *People v. Wesley*, 365 N.W.2d 692 (Mich. 1984); *Cuevas v. State*, 338 So.2d 1236 (Miss.1976); *Wright v. State*, 581 P.2d 442 (Nv.1978); *State v. Masino*, 466 A.2d 955 (N.J. 1983); *State v. Fulcher*, 243 S.E.2d 338 (N.C. 1978); *State v. Parker*, 768 S.E.2d 1 (NC Ct. App. 2014); *State v. Logan*, 397 N.E.2d 1345 (Oh. 1979); *State v. Garcia*, 605 P.2d 671 (Or. 1980); *State v. Innis*, 433 A.2d 646 (R.I. 1980); *State v. Curtis*, 298 N.W.2d 807 (S.D.1980); *State v. Green*, 616 P.2d 628 (Wa. 1980); *State v. Miller*, 336 S.E.2d 910 (W.Va.1985); *see also Model Penal Code § 212.1* (1980) (requiring movement over a substantial distance or confinement for a substantial period of time).

Further, the directed verdict motion on both kidnapping charges was sufficiently presented so as to be preserved for appellate review. Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004) With respect to criminal cases, appellate

courts should reach the merits when error preservation is doubtful. *See Atl. Coast Builders & Contractors v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

At the close of the State's case, defense counsel, "moved for a directed verdict with regards to the kidnapping charges, both kidnapping charges, as well as the armed robbery." R. 110, ll. 13-17. The parties argued at length about Alston's and Hall's testimony regarding the events of the incident, including, whether Alston was able to put the money from her cash register drawer in the safe before the two masked men forced her into the restaurant's cooler. R. 110, ll. 18 – R. 117, ll. 18.

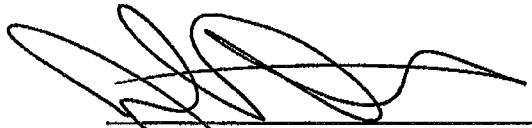
Before ruling, the trial court stated to defense counsel, "[n]ow anything specifically as it relates to the kidnapping charge? *I know you've made a motion for directed verdict. And certainly you're protected on the record on that.* Is there anything else specifically on that?" R. 116, ll. 13-22 (*emphasis added*). After again noting that Johnson was not called by the state and no post-incident accounting was conducted, the defense concluded its argument. R. 117, ll. 1-19. After the defense rested, counsel renewed his directed verdict motion with respect to both kidnapping charges and the armed robbery charge. R. 149, ll. 9-17.

In the present case, the trial court clearly stated that he considered the directed verdict motions on kidnapping charges and the armed robbery charge to have been sufficiently presented. R. 116, ll. 13-22. The court's decision was logical given that the alleged kidnappings were incidental to the alleged armed robbery. The court –exercising its discretion – felt that defense counsel's arguments were sufficiently presented to enable it to rule on all three indictments. Accordingly, this issue is preserved for appellate review. *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) *citing Williams v. Bordon's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980) (trial judge has broad discretion and inherent power to control the conduct of a trial).

**CONCLUSION**

For the reasons previously stated in Appellant's brief and for these additional reasons, Appellant John Upson respectfully requests that this Court issue an Order of Acquittal on his convictions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John H. Strom', is written over a horizontal line.

John H. Strom  
Appellate Defender

ATTORNEY FOR APPELLANT.

This 11<sup>th</sup> day of August, 2015.

**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."

August 11, 2015



---

**John Harrison Strom**  
Appellate Defender

South Carolina Commission on Indigent Defense  
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(803) 734-1330

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Aiken County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

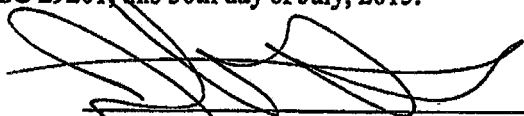
JOHN LYNDON UPSON,

APPELLANT

APPELLATE CASE NO. 2014-000852

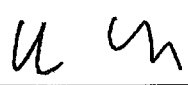
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of July, 2015.

  
\_\_\_\_\_  
John H. Strom  
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 11th day of August, 2015.

  
\_\_\_\_\_  
Notary Public for South Carolina

(L.S.)

My Commission Expires: May 12, 2025.

APP'X 351

**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.

John Lyndon Upson, Appellant.

Appellate Case No. 2014-000852

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Appeal From Aiken County  
Donald B. Hocker, Circuit Court Judge

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Unpublished Opinion No. 2016-UP-237  
Submitted January 1, 2016 – Filed June 1, 2016

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**AFFIRMED**

---

Appellate Defender John Harrison Strom, of Columbia,  
for Appellant.

Attorney General Alan McCrory Wilson, and Senior  
Assistant Deputy John Benjamin Aplin, both of  
Columbia; and Solicitor James Strom Thurmond, Jr., of  
Aiken, for Respondent.

---

**PER CURIAM:** John Lyndon Upson appeals his convictions for one count of armed robbery and two counts of kidnapping. We affirm<sup>1</sup> pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying Upson's motion for a directed verdict on the armed robbery charge: *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *State v. Gilliland*, 402 S.C. 389, 397, 741 S.E.2d 521, 525 (Ct. App. 2012) ("An appellate court reviews the denial of a directed verdict by viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State."); *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 477 (2004) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."); *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) ("Robbery is defined as the felonious or unlawful taking of money, goods or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear."); S.C. Code Ann. § 16-11-330(A) (2015) (stating armed robbery occurs when a person commits robbery while armed with a deadly weapon); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002) ("Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose."); *State v. Hale*, 284 S.C. 348, 356, 326 S.E.2d 418, 423 (Ct. App. 1985) ("It is the function of the jury, not an appellate court, to judge the credibility of witnesses and the weight to be given to their testimony."); *State v. Charping*, 333 S.C. 124, 129, 508 S.E.2d 851, 854 (1998) ("[A]n adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses.").

2. As to whether the trial court properly denied Upson's motions for a directed verdict on the kidnapping charges: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."); *id.* at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground

---

<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

on appeal."); *State v. Kennerly*, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review.").

**AFFIRMED.**

**HUFF, A.C.J., and WILLIAMS and THOMAS, JJ., concur.**



RECEIVED  
JUN 20 2016

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ATTORNEY GENERALS

## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1220 SENATE STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
www.sccourts.org

June 17, 2016

The Honorable Liz Godard  
PO Box 583  
Aiken SC 29802-0583

### REMITTITUR

Re: The State v. John L. Upson  
Lower Court Case No. 2014GS0200074, 2014GS0200079, 2014GS0200080  
Appellate Case No. 2014-000852

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.

The following exhibits filed in this case are being returned to you:

State's Exhibit #1-14 - Photographs

Please sign and return the enclosed copy of this letter acknowledging receipt of these items.

### Exhibit Receipt Acknowledgment

Name: \_\_\_\_\_ (Date: \_\_\_\_\_)

APP'X 355

Very truly yours,

*V. Clair Allen, Deputy*

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire  
John Harrison Strom, Esquire  
James Strom Thurmond, Jr., Esquire  
John Benjamin Aplin, Esquire

FORM 5

2013A0220101013  
2014GS0200079  
2014GS0200080  
IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA

County of Aiken

Full name and prison number (if any) of Applicant

John Lyndon Upson v.  
#229134

State of South Carolina

2017CP0200129

APPLICATION FOR

POST-CONVICTION RELIEF

**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution  
396 Redemption Way, McCormick SC 29899
2. Name and location of Court which imposed sentence Aiken County  
Court House Aiken SC
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-02-0074
  - (b) 2014-GS-02-0079

FILED

1-24-17

Abby White  
Clerk of Court  
Anita Knoepfle 1230  
Deputy Clerk

(c) 2014-GS-02-0080

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) April 16, 2014 20 years ran concurrent
- (b) April 16, 2014, 20 years ran concurrent
- (c) April 16 2014, 20 years ran concurrent

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty @ trial
- (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. June 1, 2016
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. \_\_\_\_\_
- 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 custody unlawfully:
- (a) Ineffective assistance of trial counsel
- (b) Ineffective assistance of trial counsel
- (c) Ineffective assistance of trial counsel
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Failure to fully cross-examine Jamechia Alston
- (b) Failure to act for Neils-V. Bingers hearing
- (c) Continue on attached page.
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. \_\_\_\_\_

- (D) Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright, and Brenda Smith
- (E) Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to applicant.
- (F) Failure to object to applicant being charged and standing trial for armed robbery. When 14<sup>th</sup> and 6<sup>th</sup> amendment were violated by the confrontation clause
- (G) Failure to object to in-court identification
- (H) Failure to object to bolstering by the State during closing arguments

(c) the disposition thereof:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(d) the date of each such disposition:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? \_\_\_\_\_
- (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?  
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. Andrew Smith, Aiken County Public Defenders Office
  - ii. John H. Strom SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589 Columbia SC 29211-1589
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. (Andrew Smith) attorney @ trial and sentencing
  - ii. (John H. Strom) attorney @ appeal
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

20. Are you now under sentence from any other court that you have not challenged?

No  
\_\_\_\_\_  
\_\_\_\_\_

STATE OF SOUTH CAROLINA )

County of Aiken )

VERIFICATION

I, John Lyndon Upson, 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.

John Lyndon Upson

SWORN to and subscribed before me this 13<sup>th</sup> day of January, 2017.

Michael Carraway  
(L.S.)  
Notary Public

My Commission Expires: July 09, 2026

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF

I, John Lyndon Upson, 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.

John Lyndon Upson  
Applicant

SWORN or affirmed to and subscribed before me this  
23<sup>rd</sup> day of January, 2017.

Michael Canine  
Notary Public

My Commission Expires: July 09, 2026



STATE OF SOUTH CAROLINA )  
 COUNTY OF AIKEN )  
 )  
 John Lyndon Upson, #229134, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SECOND JUDICIAL CIRCUIT

2017-CP-02-0129

**RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on January 24, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. In January 2014, the Aiken County Grand Jury indicted Applicant for armed robbery (2017-GS-02-0074) and two counts of kidnapping (2014-GS-02-0079, -0080). Andrew Smith, Esquire represented Applicant. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker. The jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for concurrent terms of twenty years each for armed robbery and kidnapping.

Applicant filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the circuit court on June 17, 2016.

Attached to this Return and incorporated by reference are the records of the Aiken 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 fully cross-examine Jameshia Alston."
  - b. "Failure to ask for Neils v. Biggers hearing."
  - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright, and Brenda Smith."
  - d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
  - e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14<sup>th</sup> and 6<sup>th</sup> Amendments were violated by the confrontation clause."
  - f. "Failure to object to in-court identification."
  - g. "Failure to object to bolstering by the State during closing arguments."

## III.

Respondent submits Applicant's allegations of ineffective assistance of 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. 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 (1985).

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).

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.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

*[signature page to follow]*

Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT BOLCHOZ  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JULIE A. COLEMAN  
Assistant Attorney General

By: Julie Coleman  
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-3737

May 16, 2017

STATE OF SOUTH CAROLINA )

COUNTY OF AIKEN )

JOHN L. UPSON, #229134 )

Applicant, )

vs )

STATE OF SOUTH CAROLINA, )

Respondent. )

IN THE COURT OF COMMON PLEAS

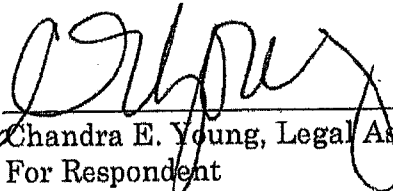
2017-CP-02-0129

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 in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Arthur K. Aiken, Esquire  
2231 Devine St., Ste 203  
Columbia, SC 29205

DATED this 16<sup>TH</sup> day of May, 2017.

  
Chandra E. Young, Legal Assistant  
For Respondent

APP'X 371

State of South Carolina ) In the Court of Common Pleas  
County of Aiken ) First Judicial Circuit  
2017-CP-02-00129

John Lyndon Upson, )  
Plaintiff, )  
vs. )  
The State of South Carolina, )  
Defendant. )

May 5, 2018

Aiken, South Carolina

B e f o r e:

The Honorable R. Scott Sprouse, Judge

A p p e a r a n c e s:

Tommy A. Thomas, Esquire,  
Attorney for the Plaintiff

Julie Coleman,  
Attorney for the Defendant

Bonnie H. Kelly, CVR  
Circuit Court Reporter

APP'X 372

I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
Case Called/Ms. Coleman	4
Motion/Ms. Coleman	5
Response/Mr. Thomas	6
Decision by the Court	6
DIRECT CROSS REDIRECT RECROSS	
THOMAS SOLVENSKI	
Mr. Thomas	9 38
Ms. Coleman	30
JOHN UPSON	
Mr. Thomas	42
GRANT GIBBONS	
Ms. Coleman	67
Mr. Thomas	74
Closing Argument/Ms. Coleman	85
Closing Argument/Mr. Thomas	89
Decision by the Court	95
Certificate Page	96

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>
A-1	Map		21
A-1 (a)	Map		21
A-1 (b)	Map		21
A-2	Map		24
A-2 (a)	Map		24
A-3	Map		27
A-3 (a)	Map		27

1 (On the record at 11:27 a.m.)

2 MS. COLEMAN: May it please the Court?

3 THE COURT: Yes, ma'am.

4 MS. COLEMAN: This is *John Lyndon Upson v the State of*  
5 *South Carolina*, docket No. 2017-CP-02-129. Applicant is  
6 presently confined in the South Carolina Department of  
7 Corrections pursuant to orders of commitment of the Aiken  
8 County Clerk of Court.

9 In January, 2014, the Aiken County Grand Jury indicted  
10 Applicant for armed robbery and two counts of kidnaping.  
11 Andrew Smith, Esquire, represented the Applicant. Jay  
12 Slocum and Kevin Maloney, Esquire, prosecuted the case.

13 On April 15 through the 16, 2014, Applicant proceeded  
14 to a jury trial before the Honorable Donald B. Hocker. The  
15 jury found Applicant guilty as indicted. Judge Hocker  
16 sentenced Applicant to imprisonment for concurrent terms of  
17 20 years each for armed robbery and kidnaping.

18 Applicant filed a timely notice of appeal. John H.  
19 Strom, Esquire, of the Office of Appellate Courts,  
20 perfected the appeal. The South -- the South Carolina  
21 Court of Appeals affirmed Applicant's conviction on June 1,  
22 2016. The remittitur was issued on June 17, 2016.

23 Applicant filed a timely application for post  
24 conviction relief on January 24, 2017, alleging that he was  
25 being held in custody unlawfully based on several

1       allegations of ineffective assistance of counsel. The  
2       State filed its return on May 16, 2017, and the Applicant  
3       is present today and is represented by Mr. Tommy Thomas.

4             And if I may, I've got a couple of issues I'd like to  
5       put on the record. The State has a witness today, Mr. Andy  
6       Smith, who represented the Applicant in this trial. He is  
7       not available to testify today. He has moved to Colorado  
8       and is employed there and will not be returning to South  
9       Carolina. So we can't get him here to testify today.

10            Mr. Smith is on standby and is ready to testify by  
11       telephone if Your Honor will allow it, but I believe the  
12       Applicant objects to that -- to his telephone testimony.

13            So if Your Honor should not allow his testimony, we  
14       would just ask to -- for the opportunity to leave the  
15       record open at the conclusion of the hearing if some issue  
16       comes up that should require his testimony on an issue, and  
17       we can conduct a telephone deposition or obtain an  
18       affidavit or some other way to get his testimony in.

19            I've also contacted Public Defender Grant Gibbons who  
20       sat second chair on this trial. He is on his way over. He  
21       was not at the courthouse today, but he said he could be  
22       here in about an hour. So if some issue comes up, he might  
23       be able to testify in response to it as well. He -- he  
24       said he had a vague recollection of the case and -- and  
25       might be able to answer some questions if that becomes

1 necessary at the end of the hearing. Thank you.

2 THE COURT: Mr. Thomas?

3 MR. THOMAS: Your Honor, if -- if it please the Court.  
4 We would object. I've had some -- I have had some of the  
5 -- the telephone testimony before. It went smoothly until  
6 the last one, and we've had problems with being able to  
7 show them documents and those types of things. So we would  
8 object to that. I have no problem with the record being  
9 held open should that become necessary, Your Honor.

10 THE COURT: What -- and -- and I will note, we -- we  
11 had a conference with the attorneys ---

12 MR. THOMAS: Yeah.

13 THE COURT: --- prior -- prior to the hearing, and  
14 that's what we'll do. We'll leave the record open and that  
15 will allow each side to make the necessary arrangements.  
16 And Mr. Thomas, you just let the Court know when ---

17 MR. THOMAS: Yes, sir.

18 THE COURT: --- you're able to. What I -- what I'll  
19 do is hold it -- hold it open for 30 days, and -- and that  
20 -- Mr. Thomas, will that give you enough time to make the  
21 ---

22 MR. THOMAS: Yes, sir.

23 THE COURT: --- the arrangements?

24 MR. THOMAS: Yes. That'd be perfect.

25 THE COURT: Okay. So we -- we'll just hold the record

APP'X 377

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open for 30 days and ---

MS. COLEMAN: Thank you, Your Honor.

THE COURT: --- and you can inform the Court of your progress at that time.

MR. THOMAS: Your Honor, if it'd please the Court as well, just for a housekeeping measure, I have a tendency, when I've asked testimony or asking questions, I'll also cite to pages and lines in the transcript. I found that's easier than have my client or have someone read that, and so I wanted just to do that for the Court's information to maybe try to help.

THE COURT: Thank you, Mr. Thomas.

MR. THOMAS: Your Honor, if I may beg the Court's indulgence just for a second.

(Brief pause.)

MR. THOMAS: Your Honor, also my client had asked -- he's been very active in -- in helping me with this case.

THE COURT: Uh-huh.

MR. THOMAS: He'd like to ask if it's -- if he could have one arm free or one hand free? I don't know what the policy is in the courtroom. It would make it easier for him to be able to -- he's got his information to sort through and -- and also to make any notes.

THE COURT: Let me ask our -- would that be a -- would that be a logistical problem?

1 CLERK OF COURT: What was the ...

2 THE COURT: He wants one arm free. Would that be a  
3 logistical ---.

4 THE BAILIFF: He's -- actually, he's -- we would  
5 prefer not, but he's in the custody of the Department of  
6 Corrections.

7 THE COURT: All right. Let me ask the Department of  
8 Corrections.

9 (The Court confers with Department of Corrections  
10 officer briefly.)

11 THE COURT: Okay. I -- let's -- we're going to --  
12 we're going to let him stay like he is.

13 MS. THOMAS: Thank you, Your Honor. Your Honor, if it  
14 please the Court, we're going to take one witness who is  
15 here. He is a cell phone expert, Mr. Thomas Slovenski. I  
16 want to take him kinda out of turn so we can get his  
17 testimony, and then he may be able to -- to leave earlier,  
18 Your Honor.

19 THE COURT: Okay.

20 MR. THOMAS: So if it please the Court, we would call  
21 Mr. Thomas Slovenski to the stand.

22 THOMAS SLOVENSKI, having been  
23 first duly sworn, testifies as follows:

24 MR. THOMAS: If it would please the Court, Your Honor.

25 THE COURT: Yes, sir.

1 THE COURT REPORTER: I need him to spell his name.

2 THE WITNESS: Thomas Slovenski.

3 THE COURT REPORTER: Spell the last name.

4 THE WITNESS: S-l-o-v-e-n-s-k-i.

5 MR. THOMAS: And Your Honor, if it please the Court,  
6 we will be looking at pages 136 through 163, which is the  
7 Verizon Wireless information, and ATF also testified, and  
8 that is 147 to 163, Your Honor. So I guess Verizon is 136  
9 through 147, and it continues from 147 to 163.

10 DIRECT EXAMINATION

11 BY MR. THOMAS:

12 Q Mr. Slovenski, you -- what is -- what is your  
13 business?

14 A The name of my business is "Cellular Forensics, LLC."

15 Q All right, sir. And how did you get into that  
16 business?

17 A I was a police officer for 15 years. Most of my time  
18 served here in South Carolina before I retired and went  
19 into private practice.

20 In 2007, I saw the need of phone forensics, mobile  
21 phone forensics in South Carolina. I proceeded to receive  
22 the certification and training. Out of my own pocket, went  
23 to -- up to Perdue University, met with Dr. Rick Mislán who  
24 instructed me and certified me in mobile phone forensics.

25 From then I proceeded, in 2009, to become certified in

1 cell tower mapping and forensics and then I also was re-  
2 certified in 2011 and then was certified last year as a  
3 subject matter expert by the ZetX Corporation.

4 Q All right, sir.

5 THE COURT REPORTER: I'm sorry. What corporation?

6 THE WITNESS: ZetX, Z-e-t-x.

7 Q And as a result, do you -- you continue an educational  
8 process in regards to cell phone technology?

9 A Yes, sir. All the time.

10 Q And -- and what type of continuing education are you  
11 doing?

12 A Just last year alone I had over 90 hours of continuing  
13 education specifically in cell towers and the reading of  
14 their data and the mapping techniques. This year I am  
15 repeating that. Actually next week I'm going to be in  
16 Boston, Massachusetts, and at that time I'll receive 40  
17 hours training for my re-certification as a subject matter  
18 expert with ZetX.

19 Q All right, sir. And you live in South Carolina?

20 A Yes, sir.

21 Q Have you testified before as an expert in the courts  
22 of South Carolina?

23 A Yes, sir.

24 Q And do you know off hand how many times?

25 A As an expert witness I've been certified four times.

1 Q All right, sir.

2 MR. THOMAS: And Your Honor, at this point in time, we  
3 would like to ask the Court to qualify Mr. Slovenski as an  
4 expert in the field of mobile phone forensic ...

5 THE COURT: Any objection?

6 MS. COLEMAN: I have no objection.

7 THE COURT: The witness will be admitted as an expert  
8 in mobile phone forensics without objection.

9 MR. THOMAS: Thank you, Your Honor.

10 Q Mr. Slovenski, you've had an opportunity to look at  
11 the transcript in this case of Mr. John Upson?

12 A Yes, sir, I have.

13 Q All right, sir. And the testimony in this case was  
14 basically from Verizon Wireless and also ATF?

15 A Correct.

16 Q And why was ATF involved?

17 A It is my understanding that the arresting agency, the  
18 local arresting agency, requested ATF to do the cell tower  
19 examinations.

20 Q All right, sir. And there is testimony in the -- in --  
21 -- in the transcript regarding the ATF and their  
22 conclusions; is that correct?

23 A Correct.

24 Q All right, sir. And you have looked at all of that?

25 A Yes, sir.

1 Q And addition, were you able to obtain data from ATF or  
2 from the County in regards to this case?

3 A Yes. I received directly from ATF Agent Frasier, the  
4 call detail records needed in this case.

5 Q Were you able to determine if that information that  
6 you received was the same information that the -- the State  
7 had in their trial of Mr. Upson?

8 A Yes, sir.

9 Q And it was the same information?

10 A Same data.

11 Q Okay. Now, as a result of obtaining that information,  
12 what did you do?

13 A Well, in my analyzation of it, I make sure, first of  
14 all, that it is verified as being from Verizon itself.

15 Q Yes, sir.

16 A I then take the records, and using a proprietary  
17 software produced by the ZetX company, of which I'm an  
18 expert in, I then converted the call detail records from  
19 Verizon into a mapping data plot of every tower that was  
20 transacted on the Verizon system between the dates and  
21 times that were given to me.

22 Q All right. And what are you looking for?

23 A Basically, what I was doing was I took the incident  
24 location and I plotted that. I then did my own independent  
25 investigation using my mapping system -- which, by the way,

1 has passed numerous Daubert and Frye standards in courts in  
2 America -- and I took my data and looked to see if any of  
3 it -- the -- the cell towers, the readings, the radio  
4 frequency coverage encompassed the incident location.

5 Q All right. Let me ask you this, since we're taking  
6 you a little bit out of turn, just for the Court's  
7 information, what incident location were you looking at?

8 A It was the Captain D's located on 1907 Whiskey Road.

9 Q All right. And what time frame are we talking about  
10 as far as this data?

11 A From my understanding, the incident location -- or at  
12 the incident location, the incident took place around --  
13 correct me please, it was around 22:40/22:47 I -- I -- I  
14 may believe.

15 Q And this was -- and this was the time frame that you  
16 were looking for the cell phone data?

17 A Right. And I looked at the calls before and after the  
18 incident.

19 Q All right, sir. And in looking at that information,  
20 what were your conclusions? What were you able to  
21 determine?

22 A Well, I can tell you that there were no registered  
23 calls made that encompassed the incident location at the  
24 incident date and time.

25 Q Right. Which means what?

1 A Well, that the phone was not in use at a time of the  
2 incident location that would show it in the area --  
3 specific area of the Captain D's.

4 Q So we're not -- so what we're saying is that the --  
5 the phone that was allegedly used by Mr. Upson, we're  
6 talking about the -- the location of that phone.

7 A Correct.

8 Q Okay.

9 A The approximate location.

10 Q All right. And in the -- the testimony that you have  
11 reviewed that was presented by Verizon Wireless -- Wireless  
12 and the ATF, is that information confusing?

13 A Yes, depending on the map. They produced -- ATF  
14 produced numerous maps --

15 Q Yes, sir.

16 A -- and I have some professional problems with some of  
17 the mapping that they did of the data.

18 Q Okay. And -- and the purpose of their presentation  
19 was to show Mr. Upson was in that area where the Captain  
20 D's location --

21 A I believe so.

22 Q Okay. All right. And I apologize, I'm not a cell  
23 phone expert. I can turn mine on and turn it off, but you  
24 certainly know more about this than -- than I do.

25 Now, what kind of process did ATF go through in

1 regards to analyzing the cell phone data? Did they use a  
2 software program?

3 A Yes, they did. They used one that's called PenLink,  
4 P-e-n-l-i-n-k. PenLink is a good system in and of itself;  
5 however, I have, in my experience, in analyzing PenLink  
6 cases, in -- we've found where PenLink is dependant a good  
7 bit -- it's accuracy a good bit is dependant on the person  
8 who's actually using PenLink.

9 Q Right. And is there a better software?

10 A Oh, yes, sir. There is.

11 Q And what software is that?

12 A That is from the ZetX Corporation. It's called TraX,  
13 T-r-a-x. I've been using that software now for a couple of  
14 years. It's the one that I'm certified in.

15 What happened is in my own professional career, the  
16 old methodology of plotting towers was not serving those of  
17 us in the independent -- and -- and in law enforcement  
18 community proficiently and so I went on my own expedition  
19 to find the better mousetrap. And out of all of the ones  
20 that are offered out there, even to law enforcement, state,  
21 federal, and local, the best one that I found for accuracy,  
22 ease of use, and ease of explanation in the court of law  
23 and that passes Frye and Dauberts's standards is the TraX  
24 software produced by the ZetX Corporation.

25 Q So when you took the same data that the State had --

1 A Yes.

2 Q -- and you ran it through your software --

3 A Yes.

4 Q -- was your conclusion different than what was  
5 presented at court by ATF?

6 A It depended on the map. On a couple of the maps they  
7 look like they got it correct, but then, like, there's one  
8 here that I can show you that it's an anomaly. I ---

9 Q Well -- well, why don't you ---

10 A --- don't know what they're trying to say.

11 Q --- walk us through it 'cause -- 'cause you know --  
12 'cause again, I'm not a cell phone expert.

13 A Sure. Okay.

14 Q Tell us what you did.

15 A Okay. In -- after doing my own independent  
16 examination, all right, I then compared apples to apples.  
17 I took their maps and I took my maps, okay?

18 What I first noted about their maps -- now, in the  
19 digital forensics community, there is a national standard  
20 which is purported by the National Institute of Standards  
21 and Technology, that's NIST. NIST says it, we go by it.  
22 NIST said, in 20 -- in 2002, that data has to be verified,  
23 digital data has to be verified. Whether it's computer  
24 data, cellular data, tower data it has to be verified.

25 I did not see any testimony where the ATF nor the

1 county agency that arrested Mr. Upson did any verification  
2 of their data. In fact, the maps that were produced by ATF  
3 lacked several things that are known as "best practices" in  
4 the forensic community such as no names on the -- on most  
5 of the maps. In other words, who produced this map? What  
6 date did you produce it? What's -- number is it in  
7 reference to? There's no telephone number showing it was  
8 the phone that was supposedly linked to Mr. Upson.

9 So what we're looking at are maps that are very  
10 general in nature, but in the forensic community, you got  
11 to be very specific, okay?

12 Q Especially if you're trying to show that he was at the  
13 incident location.

14 A Exactly. Yes. I was hoping there would've been an  
15 overhead projector because then I could show you -- I could  
16 compare and show you ---

17 Q You've got the written maps ---

18 A Yes, sir. I -- I sure -- yeah. I ---

19 Q These are the same maps that you provided me and also  
20 provided Ms. Coleman.

21 A Exactly.

22 Q All right.

23 A Yes.

24 Q Would you -- maybe the best way to do it is could you  
25 take your maps, tell us what you found in your maps, and

1 then we can take them and introduce those and show them to  
2 the Court.

3 A Fantastic. Okay.

4 Q All right.

5 A I have these three maps. These are the ones from ATF,  
6 the State, okay? And I have labeled them 1, 1(a), and 1(b)  
7 because they're all related to what I'm trying to say. And  
8 that is, like, in this instance here, and in the one behind  
9 it in 1(a), the Captain D's will be noted with one point.  
10 Well, instead of the description of the Captain D's ---

11 Q So the Court can see them.

12 A So in -- I can show Your Honor. May I stand?

13 THE COURT: Yes, sir. Go ahead.

14 A Okay. (Indicating) Right here, Your Honor, we have  
15 the point of Captain D's, okay? Then they put that all the  
16 way up there. Now, if you're a layman, you're going to  
17 assume that the Captain D's is closer than what it actually  
18 is. Same thing on 1(a), Your Honor. You'll see where  
19 there is the location of Captain D's, but now they're  
20 saying, "Okay. His phone was in this area," and it appears  
21 that it's in the area of Captain D's. If a layperson were  
22 to look at that -- 'cause there's, like, no arrow or  
23 anything going, "Hey, this is really where Captain D's is.  
24 It's not up here."

25 (Indicating) Then here's another one, Your Honor, I

1 have it labeled as 1(b), where I took their map and now  
2 this is my map. You'll notice that it's not in a pie  
3 shape, but in a circular-like format. This is the template  
4 that we use because this is more accurate in how a cell  
5 tower actually emanates the radio frequencies from that  
6 tower. It doesn't go in straight lines, Your Honor, and it  
7 doesn't end in a half circle.

8 What it does is you have, actually, rear lobes, side  
9 lobes, and front lobes to the radio frequency. Radio  
10 frequency isn't very, like, direct, so to say. It emanates  
11 and goes out in waves, and that's why we use the term  
12 "estimate" because could he have been a little bit out of  
13 here here? Yes. Could he have been more in toward the  
14 area -- this area here? Of course. But of course, his  
15 phone could have been anywhere in here (indicates.)

16 Now, how did we get this particular area of coverage?  
17 That is because in our databases, we have 3.5 million  
18 towers and their metadata. Every time an examiner, whether  
19 it's the police or a private one like myself, submits our  
20 data to the ZetX Corporation and there's accompanying tower  
21 location sheets, we submit that also and ZetX, with their  
22 program, will continually verify their data to make sure  
23 that it would be accurate.

24 (Indicating) So in 2013, this tower was emanating into  
25 this type of direction, and it'll stop or end near a

1 particular area because of other towers that would be in  
2 the area. Cell towers work just like their name says.  
3 They have coverage one over the other. So if you're  
4 proceeding down I-20, as you're moving, your phone is  
5 looking for three to four additional towers because the  
6 last thing that the cell tower company or the -- the  
7 provider wants is for you to drop a call. You drop a call,  
8 you're going to be looking for another company and that's  
9 losing customers.

10 So what they do is they will put their towers,  
11 especially in an urban area, where they are prolific and  
12 can compliment each other so that as someone is moving with  
13 their phone, the coverage is not broken.

14 Q So let me ask -- so those -- those are the maps, the  
15 cell phone maps, that were obtained from the State?

16 A Yes. Uh-huh.

17 Q All right. And are they -- are they accurate after  
18 you had an opportunity to review them?

19 A No.

20 Q Okay. All right.

21 A I ---

22 MR. THOMAS: Your Honor, if it please the Court, we'd  
23 like to go ahead and just move those in as Applicant's 1,  
24 and I guess we will mark them as he referred to them as  
25 being -- was it "A, A1, and A2?"

1 A 1, 1(a), and 1(b).

2 Q All right.

3 THE COURT: All right. Let Ms. Coleman look at them.

4 MS. COLEMAN: Are these just the maps that the State  
5 created ---

6 MR. THOMAS: Yes, they are.

7 MS. COLEMAN: --- that they presented at trial?

8 MR. THOMAS: Yeah.

9 THE WITNESS: Then that map that I sent you is on --  
10 is 1(b).

11 MS. COLEMAN: Okay. Thank you. No objection.

12 THE COURT: All right. So this is Applicant's No. 1.  
13 Is that ---

14 MR. THOMAS: Yes, sir. I think there are ---

15 THE COURT REPORTER: You said 1, 1(a), and 1(b).

16 MR. THOMAS: 1, 1(a), and 1(b).

17 THE COURT: 1, 1(a), and 1(b) would be admitted  
18 without objection.

19 MR. THOMAS: Yes, sir. Thank you, Your Honor.

20 (Applicant's Exhibit Nos. 1, 1(a), and 1(b), maps, in  
21 evidence.)

22 MR. THOMAS: And I have learned, over the years, to  
23 wait for the Court Reporter, Your Honor, rather than just  
24 starting off again.

25 Q Mr. Slovenski, did you have an opportunity to produce

1 your own maps?

2 A Yes. -I -- I have another one here.

3 Q Okay. And what difference were you -- what  
4 difference, if any, were you able to determine between the  
5 State's evidence and what you were able to -- to find?

6 A Well, like I mentioned, there's the ambiguity in what  
7 the State produced ---

8 Q Yes.

9 A --- in that you -- if it didn't have Mr. Upson's name  
10 at the top, you wouldn't have known what it was referring  
11 to because there was no number to which it was referring  
12 to or necessarily the date and time. Such is an example  
13 right here, if I may?

14 Q Yeah -- yes, sir.

15 A Okay. (Indicating) This I have labeled as 2 and 2(a)  
16 because they're related to each other.

17 Q And these are copies that you -- this -- these are the  
18 same that you sent me and sent ---

19 A Right.

20 Q --- and the Solicitor?

21 A Exactly. Yes.

22 Q Okay.

23 A You and Ms. Coleman got a copy of this. If I may,  
24 Your Honor?

25 THE COURT: Yes, sir.

1 A Okay. (Indicating) What we have here, Your Honor, is  
2 this is the State's, okay? And now they don't have it  
3 marked, but we're going to assume that that's Captain D's,  
4 okay? So there again, we've got some ambiguity.

5 Also you can't tell here which sector they're  
6 referring to. Like, if you look at this here (as read):  
7 "Call starts here/Call ends here."

8 (Indicating) Now, if you look at the map I produced,  
9 Your Honor, right here, there's Captain D's, I have it  
10 marked; but you'll notice that how their coverage comes  
11 down here, we find ours to be more accurate and it shows  
12 less coverage in this lower region where they're showing,  
13 you know, basically him on the -- or I'm sorry, his device  
14 very near the Captain D's. And the -- this was where they  
15 did it from 11/27 of '13 from 21:07 to 21:47. I did the  
16 exact same thing, Your Honor, and I'm seeing an inaccuracy  
17 there.

18 THE COURT: Okay.

19 THE WITNESS: Okay.

20 MR. THOMAS: Your Honor, and I guess at -- at this  
21 point, we would move to introduce those -- let me ask --  
22 Applicant's 2 and they're marked as what? I'm sorry, Mr.  
23 Slovenski.

24 A 2 and 2(a), sir.

25 MR. THOMAS: 2 and 2(a)?

1 A Uh-huh.

2 MS. COLEMAN: No objections.

3 THE COURT: All right. Applicant's 2 and 2(a) would  
4 be admitted without objection.

5 (Applicant's Exhibit Nos. 2 and 2(a), maps, in  
6 evidence.)

7 DIRECT EXAMINATION

8 BY MR. THOMAS:

9 Q Now, Mr. Slovenski, make sure I understand this  
10 correctly. What you're saying is that the map that was  
11 produced by the State, or for the State, shows Mr. Upson  
12 potentially closer or at Captain D's when your analysis of  
13 it does not show him as close as that other map does?

14 A That is correct.

15 Q All right, sir. Now, is that -- are those all the  
16 maps that you have as far as your analysis or ---

17 A No. If I may, I have one more that I would like to --

18 Q Okay.

19 A -- produce for Your Honor.

20 (Indicating) What this one shows, Your Honor, is I  
21 took the very last call that -- or as we call it "traffic."  
22 Verizon will only give you the calls. They won't give you  
23 the texts, they won't give you the data. They'll only tell  
24 you, okay, either sent or received a call.

25 Now, you'll notice, sir, that that call happened at --

1 excuse me, sir. Let me get my glasses on here -- 21:49.  
2 I'm sorry. 21:48, Your Honor. Okay? It starts here on  
3 this tower which is labeled "87." 87 is the line -- the  
4 specific line of the Verizon data. That's how we map it so  
5 that if we come into court, we can take the actual CDR  
6 Verizon and we can say, "Your Honor, right here, line 87.  
7 And then you can go right across and it'll say "Date/Time"  
8 and you could see how we're plotting. We're actually  
9 apples to apples, okay?

10 (Indicating) Now, you'll notice that it starts in this  
11 area and it ends in this area. What I want to point out to  
12 Your Honor, is right here. Do you see where it overlaps?  
13 It leads me to believe, in my education and experience of  
14 over a decade of doing this, that his phone was most likely  
15 in this area here because he's progressing, okay?

16 The fact that he was on this tower, yes, this is the  
17 coverage of that tower, but where it now is overlapping  
18 each other, it is my experience that his phone most likely  
19 was in there at that date and time, and that's the last  
20 call registered before the incident.

21 (Indicating) Now, here's the State's, and there's  
22 ambiguity again. We don't know, "Okay. What's it  
23 referring to?" And they don't account for this area here  
24 of overlap, and that's what's one of problems that we  
25 found.

1 This is an old system that we all started out with,  
2 but now it's making its way out of the courts because it  
3 has not been shown scientifically viable to pass Daubert  
4 and Frye where this new method has.

5 And by the way, this new method here of radio  
6 frequency density is taking law enforcement by force. Many  
7 of them throughout the Upstate are already using this  
8 system, and I'm sure you're going to start seeing it more  
9 and more coming into your courtrooms, where this is being  
10 avoided. ATF, Secret Service, IRS they all use this same  
11 software now. And I'm -- I'm a trainer for ZetX, and we  
12 are seeing a great number of major police departments --  
13 Miami Dade, LAPD -- who are using the same software and  
14 it's because this is outdated and inaccurate. We have  
15 areas that it's missing.

16 MR. THOMAS: Your Honor, it if would please the Court,  
17 we'd like to introduce that as Applicant's 3. It's just --

18 -

19 THE WITNESS: 3 and 3.(a).

20 MR. THOMAS: 3 and 3(a), yes, sir, Your Honor.

21 THE WITNESS: Yes.

22 THE COURT: Okay.

23 Q And this is one of the documents that you provided  
24 earlier to Ms. Coleman?

25 A Yes.

1 Q Okay.

2 A Uh-huh.

3 MS. COLEMAN: No objection.

4 THE COURT: So Applicant's 3 and 3(a) would be  
5 admitted without objection.

6 MR. THOMAS: Thank you, Your Honor.

7 (Applicant's Exhibit Nos. 3 and 3(a), maps, in  
8 evidence.)

9 Q All right. Mr. Slovenski, let's -- let me ask you  
10 this question -- your opinion about this. You've read the  
11 transcript, and you've seen -- you've read the testimony of  
12 Verizon and -- and the individual from ATF. Actually,  
13 that's the same person that you got the information -- got  
14 your data from --

15 A Yes, Agent Frazier.

16 Q --- who testified.

17 Now, was there a cell phone expert hired by the  
18 Defense in this case?

19 A Not that I could see in any of the documentation  
20 provided to me.

21 Q And do you think it would have benefitted Mr. Upson  
22 for the State to have hired a cell phone expert?

23 A Yes, sir.

24 Q And why do you believe that?

25 A Well, there again there was no verification until I

1 came along and started taking their maps and -- and taking  
2 my maps, and trying to verify the data and you could see in  
3 adequacies of their data. And hiring an outside expert,  
4 one that does that for a living -- which Agent Frazier,  
5 now, she assists other agencies and while she's assigned to  
6 do so, but it's -- you always want to have, as -- as we  
7 teach, peer verification. Get peer reviews, get another  
8 examiner to look at what you've done, and to verify your  
9 data to make sure that you did it just right. You've got  
10 your times right, the time zones, the -- the conversion  
11 from UTC to Eastern Standard Time that sort of thing, and  
12 then the actual mapping itself.

13 Q Okay. And without an attorney actually having  
14 knowledge of cell phone technology, would that prevent them  
15 from being able to ask the appropriate questions --

16 A Oh, of course.

17 Q -- to show these irregularities or ---

18 A Of course. That's why my agency has been providing  
19 free training for attorneys throughout South Carolina, and  
20 we continue to do so.

21 Q And see if I can format -- format this question  
22 properly: In your opinion, the way that the cell phone  
23 information was presented to the jury by ATF and by Verizon  
24 --

25 A Uh-huh.

1 Q -- would it have been persuasive in regards to showing  
2 that Mr. Upson was at Captain D's?

3 A Yes.

4 Q Okay. And is that in fact true?

5 A I cannot confirm any data that shows Mr. Upson's  
6 cellular device being used at or in the immediate area of  
7 Captain D's at the time of the incident.

8 Q Right. And I have one further question. I think in  
9 our conversation, you mentioned to me that there was  
10 actually another cell phone tower that you found.

11 A Well, there's towers all around that incident  
12 location.

13 Q Okay. And there was one, I think, that you had said  
14 was closer to Captain D's?

15 A Yes. What I did is I took -- I have the ability to  
16 take the incident location's address and to proceed to plot  
17 all the cell towers in a 20-mile radius of that location:  
18 Verizon, AT&T, T-Mobile, Sprint.

19 And what I did was just take the Verizon towers and  
20 plot them on a map and showed where they were in regards to  
21 the proximity of the Captain D's.

22 Q Right. Then were you able to determine if Mr. Upson's  
23 phone ever pinged off of that tower?

24 A There is no data to support it pinging off that closer  
25 tower.

## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 Q All right.

2 MR. THOMAS: Your Honor, if I can beg the Court's  
3 indulgence just for a second.

4 (Brief pause.)

5 MR. THOMAS: Your Honor, I have no further questions.

6 THE COURT: All right. Ms. Coleman?

7 MS. COLEMAN: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. COLEMAN:

10 Q Mr. Solvenski, how are you?

11 A I'm fine.

12 Q Good. You're obviously well-versed in the newest  
13 technology on cell phone records and -- and forensics and  
14 everything you've testified to today; is that right, in  
15 your opinion?

16 A I try to stay up as much as possible.

17 Q Right.

18 A It's vast.

19 Q And you've been doing this for several years, right?

20 A Yes, ma'am.

21 Q Okay. Are you familiar with what this technology  
22 would've looked like in 2013?

23 A In 2013, the methodology that was used at that time  
24 would have been very close to what ATF used.

25 Q Okay. And is that the PenLink system?

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## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 A Yes.

2 Q Okay. So if you had been running this -- the -- the  
3 same data back then, you would've used the PenLink system?

4 A No

5 Q Okay. Would you have used TraX or a different  
6 program?

7 A TraX never hit the market until January 1, 2015.

8 Q Okay. What would you have used in 2013?

9 A I would have used a manual system of plotting. It is  
10 very lengthy, but what we would do is we would have to  
11 resort to basically the pie method because that was all  
12 that was available at that time.

13 But in reviewing the data that I've done here and  
14 shown to the Honor -- Your Honor and provided to you all,  
15 there still would have been questions over the coverage on  
16 some of the -- of the towers that were done.

17 PenLink is not in and of itself infallible. That's  
18 why you have to always verify your data.

19 Q Was it common for -- for PenLink to be used by law  
20 enforcement agencies in 2013?

21 A The Federal, yes.

22 Q Okay. And you testified that they typically received  
23 training on using that program?

24 A Yeah. They would.

25 Q Okay..

## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

- 1 A I can't confirm that Ms. Frazier did ---
- 2 Q Right.
- 3 A --- but I would've hoped that they would've.
- 4 Q Right. Did the State -- to your knowledge, based on
- 5 your review of the transcript and the testimony, did the
- 6 State ever say that the records showed that he was at
- 7 Captain D's at the time of the crime?
- 8 A I'm trying to think. There was a -- and I'd have to
- 9 get the entire transcript out.
- 10 Q But do you recall off the top of your head?
- 11 A Nothing saying he was at Captain D's.
- 12 Q Okay. Do your records now show that he was somewhere
- 13 else at the time of the crime?
- 14 A I can only show what the data shows. The data shows
- 15 him, prior to the incident location, in another area than
- 16 the immediate vicinity of Captain D's.
- 17 Q Okay. But there were no phone calls made at the time
- 18 of the crime; is that right?
- 19 A Not that were reported by Verizon.
- 20 Q Okay. Now, the phone -- tell us a little bit about
- 21 how the phone works. You can only collect data from when
- 22 the phone is in use; is that right?
- 23 A After ---
- 24 Q Or from -- from this data that was collected?
- 25 A Right. The CDR's, Call Detail Records, that are

## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 supplied to law enforcement when a warrant is issued --  
2 like the gentleman here that issued the -- the warrant to  
3 AT&T that I have a copy of, okay, William Royster III, oka  
4 -- they will only produce for you what you request, and  
5 you have to request it in the particular format that it  
6 normally comes in and every provider is different, okay?

7 I did note that Mr. -- I want to make sure I pronounce  
8 his name right -- Royster did not ask for what we call  
9 "PCMD" records, which is Per Call Measurement Data. That  
10 was not asked for nor was it produced to me. So therefore  
11 I would assume that they never got it. That is one of the  
12 things that we try to verify ---

13 Q Uh-huh.

14 A --- because PCMD is -- and -- and I'm getting to your  
15 -- to answer your question.

16 Your phone is continually talking to a tower. I've  
17 been asked by many individuals, "Can you get that  
18 information? Where was it on this second?" No. Because  
19 the cell tower -- or the cell service providers do not keep  
20 that data. When we've asked them why they don't, they say,  
21 "It's due to lack of data storage." It would be immense  
22 data farms to keep every minuscule data about that phone  
23 and its location.

24 However, your phone, during the course of, say, 15  
25 minutes, will be pinged whether you're using it or not as

## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 long as it's turned on by your cell service. That's the  
2 PCMD hits. So what we ask as professionals when we get a  
3 case is, "Was there PCMD data?" Why? Because if you  
4 analyze it, it is a slew of data, but if you know what  
5 you're looking for, you can find accurate pinpoints where  
6 you can come down in the -- from the stratosphere, so to  
7 speak, with the program and look at the actual road that  
8 the person was traveling on --

9 Q Uh-huh.

10 A -- and what mile marker they were at. I've had cases  
11 involving that, and so has law enforcement all the time.  
12 That's why we're encouraging them to get the PCMD data --

13 Q Uh-huh.

14 A -- because it's a very accurate show of pinpoint  
15 locations.

16 However, when it comes to call detail records that law  
17 enforcement has for years been asking for, all Verizon will  
18 give you are the calls, whether received or sent, and that  
19 is it with the time, date, tower used, sector of the tower,  
20 the middle angle or the azimuth of that tower; and then  
21 sometimes, depending on the provider, you'll get other  
22 additional metadata that we feed into the system and then  
23 utilize.

24 Q Okay. So the PCMD data you were just talking about  
25 that tracks every 15 minutes or so, you testified that the

## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 companies do not store that data? Or they -- how long a  
2 period of time do they store it?

3 A (Coughs) Excuse me.

4 Q Uh-huh.

5 A PCMD data is kept, depending on the cell phone  
6 company, upwards to seven days.

7 Q Okay.

8 A Now, what I did check is I checked the date of the  
9 warrant that Mr. Royster did in regards to the seven days,  
10 and it appears to me he had sufficient time; however, he  
11 many not have known it existed either.

12 Q Okay. Are you aware specifically of Verizon's policy  
13 on how long they keep their records?

14 A Yes. They will keep call detail records seven years.

15 Q Okay. What about the PCMD thing?

16 A PCMD's? No more than seven.

17 Q Okay.

18 THE COURT REPORTER: No more than ...?

19 THE WITNESS: Seven. Yes, ma'am.

20 Q So in this case, the data that they collected from  
21 Verizon included just the call detail records, right?

22 A That is correct.

23 Q Do you have any -- are you disputing any of the  
24 accuracy of the -- the call details of the numbers  
25 themselves as far as the telephone numbers that called

## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 this phone or the numbers that he called -- that someone  
2 called from this phone?

3 A I did not look at each specific number and figure out  
4 who was who. You know, who's this number, who's that  
5 number. I looked at the actual activity.

6 Q Okay. Was there any reason for your to dispute or --  
7 or try to verify the accuracy of the numbers themselves?

8 A No. I ---

9 Q Okay.

10 A I wasn't ---

11 Q You were just looking at the cell phone towers?

12 A Yes. I was not requested to do that.

13 Q Okay. So again, the cell -- the -- the data that  
14 you're talking about here, the call detail records, they  
15 show the exact tower that's in use when -- when the phone  
16 is making a phone call in this data; is that right?

17 A Yes, ma'am.

18 Q Okay. And there is -- there was no data in here that  
19 was made at the time of the crime showing a certain cell  
20 tower?

21 A Not on the voice side.

22 Q Okay. Now, this -- this data just shows the phone,  
23 right? It shows what the phone is doing, not Mr. Upson,  
24 right?

25 A That is correct.

## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 Q So you -- you don't know who has his phone, if he has  
2 it or where he is, if he's with a friend ---

3 A No, ma'am. And that is why we always ask -- in the  
4 verification process, we encourage law enforcement  
5 agencies go out and look for verifying data. Whether it's  
6 cameras in a -- I'm sorry -- like a QT or a civilian that  
7 might have a security camera outside their house. If  
8 there's an alibi, you need to check the alibi to see if  
9 it's truthful or not because a lot of -- because all the  
10 cell towers are going to tell you is the activity of that  
11 phone.

12 Q Uh-huh.

13 A And if you're trying to put the phone in someone's  
14 hand, you're going to have to have other data --

15 Q Uh-huh.

16 A -- many times.

17 Q Okay. Now, in this case, you mentioned alibi. Mr.  
18 Upson presented an alibi defense at trial claiming that he  
19 was at a comedy show and at a club -- a nightclub after  
20 the show.

21 A Uh-huh.

22 Q From somewhere -- and the testimony showed somewhere  
23 maybe from 10:30 to 11 p.m. and later. Do your maps show  
24 him at a particular location after the time of the crime

25 A After the time of the crime, the -- I -- I didn't

## CROSS-EXAMINATION BY MS. COLEMAN - THOMAS SOLVENSKI

1 bring it with me nor did I produce for you, but from my  
2 recollection, there was activity southwest from the  
3 Captain D's.

4 Q Okay. And did you plot the location of the nightclub  
5 in your analyzation?

6 A I wasn't asked to, but yesterday, for fun -- I  
7 shouldn't say, "For the fun of it." But no, just -- just  
8 -- you know, I'm always thinking.

9 Q Uh-huh.

10 A I went ahead an plotted it.

11 Q Okay.

12 A And it appears that his phone was -- the tower he  
13 used, the coverage encompassed the nightclub.

14 Q Okay. But it could have been elsewhere, right,  
15 within that vicinity?

16 A Correct. Yes.

17 Q Nothing further. Thank you.

18 MR. THOMAS: Your -- Your Honor, if I may. Just a  
19 couple questions.

## 20 REDIRECT EXAMINATION

21 BY MR. THOMAS:

22 Q Counsel asked you about the technology back in 2013.

23 A Uh-huh.

24 Q And I think you said that PenLink was -- was used --

25 A Uh-huh.

1 Q -- but that there were known problems with the  
2 accuracy of PenLink?

3 A PenLink's accuracy depends on the analyst. I have --  
4 I had one case in particular out of Missouri. I won't go  
5 into detail other than PenLink had been used in the case  
6 by the prosecution, and I found numerous problems where  
7 data was either added or missing, depending on the -- the  
8 time frame. And you know, in my analysis, I was able to  
9 show inaccuracies.

10 Q All right. So had you done this back in 2013, you  
11 would've -- if you had used PenLink, you would've manually  
12 checked it?

13 A You have to.

14 Q Have to.

15 A You have to do that with any program.

16 Q Okay. All right. And counsel asked you, too, about  
17 -- well, in the testimony at trial, there wasn't -- there  
18 may not have been testimony that the phone showed Mr.  
19 Upson at Captain D's, but the -- what was -- the purpose  
20 of introducing the cell phone data -- the purpose had to  
21 be to show that he was in the area of Captain D's.

22 A I believe that's what they were trying to do.

23 Q Okay. All right. And they were using this phone --  
24 she -- Counsel asked you a question, "Well, that shows  
25 where the phone is, not necessarily where the person is."

1 but again, in the State's presentation of this case, would  
2 they not have been trying to use the phone to show that  
3 Mr. Upson was in the area of Captain D's?

4 A I would think so.

5 Q Okay. Now, with a cell phone, it can potentially  
6 show you movement when it's just in essence pinging off of  
7 different towers?

8 A Correct.

9 Q And that is because of why?

10 A That is because the towers will overlap each other in  
11 their coverage so as to provide a uniform sense of  
12 coverage to the user as they're traversing through the  
13 neighborhood, on the road, highways, etc.

14 Q All right. Doesn't necessarily mean that your phone  
15 moved anywhere.

16 A Well, depending on the provider, you could be at this  
17 side of the courtroom on one tower and then go to that  
18 side of the courtroom and hit another tower.

19 Q Okay.

20 A But there again, depends on the provider.

21 Q So it's based upon availability of -- of ---

22 A Of the towers.

23 Q --- of the towers.

24 A Yes. If a tower is down because of updates or it got  
25 hit by lightening, something knocked out that tower, then

1 the cell tower -- or the cell phone provider has got to  
2 then shift you onto other towers.

3 Q Okay.

4 MR. THOMAS: I have no further questions, Your Honor.

5 THE COURT: Anything further from this witness?

6 MS. COLEMAN: Nothing further.

7 THE COURT: All right. Any objection to this witness  
8 being excused?

9 MR. THOMAS: I have no objection, Your Honor.

10 MS. COLEMAN: No objection.

11 THE COURT: All right. Thank you, sir. You are  
12 excused.

13 THE WITNESS: Thank you, Your Honor.

14 (The witness exits the stand.)

15 MR. THOMAS: Your Honor, if it please the Court. We  
16 could go back to the beginning now, and call Mr. Upson to  
17 the stand.

18 THE COURT: Okay. Mr. Upson, come on up.

19 And Mr. Thomas, if he needs any assistance with the  
20 paperwork, I know you mentioned that earlier, I'll allow  
21 you to come up and assist ---

22 MR. THOMAS: Okay.

23 THE COURT: --- assist your client.

24 MR. THOMAS: All right. Thank you, Your Honor.

25 JOHN LYDON UPSON, having been

## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 first duly sworn, testifies as follows:

2 THE WITNESS: John Lyndon Upson. L-y-n-d-o-n U-p-s-  
3 o-n.

4 MR. THOMAS: Your Honor, if it please the Court?

5 THE COURT: Yes, sir.

6 DIRECT EXAMINATION

7 BY MR. THOMAS:

8 Q Mr. Upson, you're currently incarcerated in the South  
9 Carolina Department of Corrections?

10 A Yes, sir, I am.

11 Q Okay. And what are you serving time for?

12 A Three counts of kidnaping, one count of armed  
13 robbery.

14 Q Okay. Now, how much time are you serving?

15 A Twenty years consecutive for all three -- for all  
16 three offenses. Excuse me ---

17 Q Concurrent?

18 A --- that's two counts of kidnaping. I said three,  
19 but the one indictment was dropped.

20 Q All right. So what's your total sentence?

21 A Twenty years ---

22 Q Twenty years.

23 A --- sir.

24 Q Okay. And are you 85 percent?

25 A Yes, sir, I am.

## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 Q What's your max-out date?

2 A Sometime in 2030, I believe it is.

3 Q Okay. How old will you be when you get out?

4 A About 59 years old.

5 Q All right, sir. Now, you understand that you're here  
6 today asking for the Court to grant you a post conviction?

7 A Yes, sir. I am.

8 Q And you and I've discussed that you understand that  
9 you have certain exposure should that be granted, that you  
10 will get a new trial -- you could get a new trial?

11 A Yes, sir.

12 Q And should you go back to trial, that it's possible  
13 that you could get more time than 20 years?

14 A Yes, sir.

15 Q You understand that?

16 A Yes, sir, I do.

17 Q And you wish to go forward today?

18 A Yes, sir, I do.

19 Q Okay. Now, Mr. Upson, since Counsel is not here, let  
20 me ask you if you would very briefly just tell us what did  
21 they say that you did?

22 A They claim that I robbed Captain D's and in the  
23 process of the robbery, they said that it's kidnaping  
24 involved with the employees of Captain D's.

25 Q And how did they say you kid -- you would --

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1 allegedly kidnaped the employees?

2 A From my understanding the law in the State of South  
3 Carolina, all you have to do is tell someone not to move  
4 and that's kidnaping.

5 Q All right. And your -- you had a defense by saying  
6 that you were not at Captain D's?

7 A Yes, sir. I had a alibi -- alibi defense. I had  
8 three witnesses to come to court to testify on my behalf.  
9 Vernon Wright, Jeanene Williams and Ms. Walker came to  
10 testify.

11 Mr. Vernon Wright is -- Vernon Wright is a 15-year  
12 veteran of Aiken -- Aiken County as a lieutenant at the  
13 detention center. Ms. Walker, she works at a convenience  
14 store. Also Ms. Jeanene Williams, she works with the  
15 Department of Social Services.

16 Q All right. And supposedly, what was -- well, what  
17 was your activities that night? What did you do that  
18 night?

19 A My activities that night, I left my mother's home,  
20 went to help set up -- I have a friend, Ivory Renard  
21 Corely, for the past six years, he throws a comedy show --  
22 a comedy event for alumni of South Aiken and Aiken High  
23 that's coming home for the Thanksgiving weekend. This  
24 particular year, it was held at the Aiken Center of the  
25 Arts -- or Aiken Art Center, right next to Lionel Smith on

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## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 Richland -- (clears throat) excuse me -- on Laurens  
2 Street.

3 And that's where the comedy show was held, and I -- I  
4 helped prepare the show that evening. Also, Ms. Walker  
5 testified that I helped her set up her table before the  
6 show.

7 Q All right. So you were at the comedy show --

8 A Yes, sir.

9 Q -- from when to when?

10 A From eight 'til it was over. It started rather late,  
11 so the exact time I won't say for sure at what time it  
12 ended, but I know it was around maybe quarter to eleven.

13 We -- then we proceeded from there down to 100  
14 Laurens Street is where we had the after party, and I was  
15 there until it closed down.

16 Q Right. And do you know -- do you remember when they  
17 said that this Captain D's was robbed?

18 A If I'm not mistaken, memory serves me correct, I do  
19 believe that he said that the call came in -- I looked at  
20 the call, the 9-1-1 call. I think they said around 10:30  
21 or something like that of that nature, if I'm not  
22 mistaken.

23 Q All right. And would it have been possible for you  
24 to be at Mr. -- at Captain D's?

25 A No, sir.

DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 Q Okay. And that's why you were concerned about cell  
2 phone data?

3 A Yes, sir.

4 Q Okay. Okay. Now, John, you were arrested and then  
5 you were taken to the Detention Center. Were you ever  
6 released on bond?

7 A Yes, sir, I was. First bond hearing I was denied.  
8 90 days later I received bond.

9 Q All right. And did you retain counsel or was an  
10 attorney appointed to represent you?

11 A Attorney was appointed to me.

12 Q Who ---

13 A Mr. ---

14 Q --- who was -- who was appointed?

15 A --- Mr. -- Mr. Andrew pSmith.

16 Q All right. And how 'bout Grant Gibbons? Was he ---

17 A Mr. Gibbons was, like, second chair. The only time  
18 that I had -- well, when appointed with Mr. Smith, in that  
19 back room there, Mr. Smith had told me that it was  
20 conflict of interest and I asked him what was the conflict  
21 of interest? He stated that he loves Captain D's.

22 So then I proceeded -- I wrote a letter, put on RE  
23 Motion for refusal -- excuse me. RE for motion to dismiss  
24 my attorney, Mr. Smith, as my counsel because he said it  
25 was a -- excuse me, Your Honor. He said that it was a

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1 conflict of interest in the matter.

2 Mailed the letter off, Clerk of Court sent a copy of  
3 the letter back also stating that she gave copy to my  
4 attorney, Mr. Smith; the Solicitors Office; and to Judge  
5 Early. Nothing was never heard back from that.

6 Q All right.

7 A And that ---

8 Q So ---

9 A --- is on file with the Clerk of Court.

10 Q So you continued with Mr. Smith?

11 A I had no choice. I spoke with -- I had called to the  
12 Appellate -- excuse me -- I had called to the Public  
13 Defender's Office and spoken with Mr. Gibbons. At least  
14 the person said they was [sic] Mr. Gibbons. So I don't  
15 know if it was him or not, but they informed me that  
16 either I -- I was not getting another attorney. Either I  
17 took Andy Smith, or I could damn well represent myself.

18 Q All right. Now, the -- in preparation of this case,  
19 you were preparing the case for a plea or a trial?

20 A Trial. Every since this -- again, the first meeting,  
21 Mr. Smith words after that telling me about the conflict  
22 of interest, he says that, "We're going to plea." And I  
23 let him know then that we're not pleading to nothing.

24 Q Why not?

25 A Why? 'Cause it's a crime that I did not commit. I

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## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 plead my innocence from day one, and I plead my innocence  
2 right now today even though that I was convicted of this  
3 crime.

4 Q Now, what did you do? What did your attorney do as  
5 far as preparing your case for trial?

6 A We met once -- several times -- a couple times on the  
7 phone from the county jail we talked. When I made bond, I  
8 would have my brother, whose passed -- he's -- he was a  
9 paralegal. I would have him -- I would have him to come  
10 with me so that I could understand terms and things that  
11 the lawyers were talking with me. That's 'bout it that  
12 was prepared for trial. I spoke to Mr. Smith about  
13 witnesses --

14 Q Right.

15 A -- to -- who to go speak to about that. I also  
16 explained to him about *The Jail Report* had posted on  
17 Facebook a picture of me concerning the -- the crime, and  
18 I had several people to comment and was stating that they  
19 seen me at the time that this crime was allegedly  
20 committed, that they seen me at the comedy show, and they  
21 seen me at the after party. During, before, and -- during  
22 and before the after party and ---

23 Q You had ---

24 A --- during the comedy show.

25 Q You had those -- those people actually showed up to

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1 testify.

2 A Three did, three did. He claimed that he couldn't  
3 find the Facebook report I was telling him about with -  
4 with -- with the people, witness -- or with the other  
5 people that was verifying that they did see me. So he  
6 never really got in touch with those other than the three:  
7 Mr. Wright, Ms. Walker, and Ms. Williams.

8 Q Now, John, I know that in looking at your transcript  
9 -- this is page 32 -- Mr. Smith basically opens and says  
10 that that this is a case of identification.

11 A Yes, sir.

12 Q That this case revolves around identification.

13 A Yes, sir.

14 Q And why is that?

15 A Right here, Your Honor, it's where I have -- I says;  
16 (as read): "Ineffective Assistance of Counsel. That  
17 counsel failed to motion for *Neil v Biggers* hearing when  
18 there was evidence at trial that the in-court  
19 identification was based on law enforcement assistance  
20 with out-of-court identification. This deficient -- this  
21 -- his -- this deficient performance fell below  
22 professional norms and led to a violation of Applicant's  
23 due process right under State and Federal constitution.  
24 Fifth and Fourteenth amendment. *State v Dino*, *Manson v*  
25 *Birthright*, *Simpson v United States*, *State v Stewart*,

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1 Carver v Alabama and State v Washington. This prejudice  
2 Applicant in that only -- in that the only witness against  
3 Applicant is witness Jamisha Aliston. Her ---

4 Q All right.

5 A --- identification of the Applicant in the courtroom  
6 swayed the minds of the jury."

7 Q All right.

8 A This girl baseded [sic] her whole identification upon  
9 me of a lazy eye.

10 Q All right. John, we'll -- we'll get there. Let's  
11 take it a step at a time, okay?

12 MR. THOMAS: Your Honor, and just for the Court's  
13 information, on 32, it's lines 17 and 18.

14 Q Now, in preparing this case for -- for trial, what  
15 was the theory of defense? Do you understand what I mean  
16 about "theory of defense"?

17 A My alibi witnesses. That was it. That's all that I  
18 had.

19 Q Okay.

20 A 'Cause I got -- that's -- that was where my  
21 whereabouts were on the night that this crime was  
22 committed, that Thanksgiving eve.

23 Q But you were not there.

24 A No, sir. I was not.

25 Q Okay. Now, did -- did you go over the discovery with

## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 your attorney?

2 A I went over the discovery. We didn't go over  
3 anything ---

4 Q Okay.

5 A --- far as the discovery.

6 Q Did y'all talk about the cell phone information at  
7 all?

8 A He -- on the day of -- three days I was at the county  
9 jail, and he had me brought here to the courthouse and he  
10 showed me some maps, pointed out different things, which  
11 was, like, kinda Spanish towards -- to me. I did not  
12 understand it ---

13 Q Yes.

14 A --- I looked at it. And then just showing different  
15 geographical locations: Pie shapes, pins showing downtown  
16 Aiken, Captain D's, things of that nature.

17 Q All right. Was he -- was he concerned about that  
18 cell phone data?

19 A I really can't say he was concerned about it. I  
20 remember him showing me and he was saying that these  
21 particular towers that they show you pinging off of,  
22 that's downtown Aiken. It was in the vicinity of down --  
23 I don't know if you familiar with Aiken or not, but these  
24 towers was in the vicinity of downtown Aiken.

25 One tower was Crossopal, the other one was Shiloh

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1 Heights, and another one was -- I -- it's right there off  
2 of 19. Those -- he show -- he was like, "Well, those are  
3 showing that you was pinging off downtown," and that was  
4 basically about it.

5 Q All right. And did he discuss with you, or did you  
6 discuss with him, getting an expert to either advise him  
7 or to testify in regards to that data?

8 A No, sir, none whatsoever.

9 Q Okay. And were you concerned about that, or did you  
10 know enough to be concerned even one way or another?

11 A Well, yes, 'cause he was -- he was saying that the  
12 State -- he was saying that the State was getting --  
13 getting it looked at by a expert. And I was like, "What  
14 about us getting a expert?" And he was like, "Well, we  
15 don't need one."

16 Q Okay. Do you believe that today ---

17 A No ---

18 Q --- that you didn't need one?

19 A No, sir, I do not.

20 Q Okay.

21 A Didn't believe it during trial after the ATF agent  
22 got on stand and testified the way she testified to. I  
23 wish I had one then.

24 Q You think that helped to convict you?

25 A Yes, sir. The -- with the mapping and what she was

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1 explaining, which was scientifically unsound, as the  
2 expert got up here today and said that -- that in itself  
3 also I have for ineffective assistance of counsel (as  
4 read): "For failing to investigate material facts around  
5 the Applicant's cell phone in associating with the  
6 vicinity of the crime. Counsel's failure to investigate  
7 calls and to be ill prepared to properly cross-examine  
8 State witness and object to inaccurate testimony. Had  
9 Counsel investigated the cell phone towers or got a expert  
10 to -- to -- for protocols, he would've been able to  
11 properly dispel the inaccurate, scientifically unsound  
12 testimony made by State witness or at the very least  
13 properly objected and preserved Applicant's right to )  
14 appellate review. Also failing to object to inaccurate  
15 testimony of fact."

16 And that prejudiced me in that the State witness's  
17 scientifically unsound testimony at trial was used to  
18 undermine my alibi. The Applicant was moving, and the  
19 Applicant was not attending the comedy show and after  
20 party at the time of this crime, Your Honor.

21 Q So -- so you're talking about a two prong, basically.  
22 Not only that he didn't hire an expert, but he didn't hire  
23 an expert to advise -- or get an expert to advise him  
24 about what questions to ask.

25 A Not only to advise him, but again, I'm just a layman,

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DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 Your Honor. I've been incarcerated since 2014. I spent a  
2 couple a hours -- several hours inside the law library  
3 trying to understand the law. It's the -- my  
4 understanding, again, if I'm wrong, forgive me, that  
5 something's not rebutted in law it's pretty much fact.  
6 And when this man did not sit there and was able to rebut  
7 anything that the ATF agent said, that became true. That  
8 swayed them 12 people in that box that convicted me.

9 Q All right. John, let me ask you about -- you talked  
10 a little bit about the identification, and there was a  
11 witness, James Cheatham; is that right? Am I pronouncing  
12 that correctly?

13 A Jameshia Allistor.

14 Q Jameshia. Okay.

15 (Brief pause.)

16 THE WITNESS: Can I have a ---

17 MR. THOMAS: Jameshia Alston.

18 THE WITNESS: Can I get one second.

19 THE COURT: Yes.

20 THE WITNESS: Thank you.

21 MR. THOMAS: Your Honor, may I approach?

22 THE COURT: Yes, sir. Assist you -- you can assist  
23 your client.

24 (Brief pause.)

25 Q John, who is Jameshia?

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## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 A She was a clerk/cashier.

2 Q She worked at Captain D's?

3 A Yes, sir.

4 Q And what kind of part did she play in this case?

5 A Her -- her identification weighed heavily 'cause  
6 that's all that they had ---

7 Q All right.

8 A --- for this case was her identification and the cell  
9 towers -- cell -- cell -- cell information.

10 Q Okay. And did she know you personally?

11 A No, sir. She did not.

12 Q So how did she find you or say that you were the guy?

13 A She went on Facebook.

14 Q Right. And William Keels, who is he?

15 A William Keels, I used to date his sister. He also  
16 work on -- he also works at Captain D's.

17 MR. THOMAS: All right. Your Honor, this -- William  
18 Keels is on page 65, lines 13 through 25.

19 Q So Keels was a -- was a co-worker?

20 A Yes, sir.

21 Q All right. And did she go through Keels somehow or  
22 another to find you?

23 A If you'll go to the transcript ---

24 Q Well, just tell us, John, because I -- I think I've  
25 got the pages that I can look for.

DIRECT EXAMINATION, BY MR. THOMAS - JOHN LYNDON UPSON

1 A All right. Your Honor, she goes to William Keels'  
2 Facebook page. I was in the restaurant on a Monday before  
3 three -- two/three days before this happened. Came in, we  
4 ordered some fish, and I used to date William Keels'  
5 sister. Hadn't seen William since he was a teenager.  
6 Long story short, he came out, we talked, we left the  
7 restaurant.

8 She told -- according to transcripts, the record, and  
9 also some of my motion she told investigators looked like  
10 the guy that was up here talking with William Keels. She  
11 went to William Keels Facebook page and she -- according  
12 to her testimony, she saw my name and from my name, she  
13 went to my picture. That's how she got two pictures of me  
14 off of Mr. Keels' Facebook page.

15 Q All right. She said that -- I think she says that,  
16 she saw your name.

17 A No. Actually, this is what she says. She says (as  
18 read): "So ... and I remember his eye. Like, that's the  
19 thing that caught me. His eye and his bald head." And  
20 this is transcript page 58. He says (as read): "So ...  
21 "Question: So you weren't aware of his name at the time  
22 -- time of he incident?" "No, sir." "You did discover it  
23 later, though, right?" "Yes, sir. I did. I went home  
24 and looked it up."

25 She said she went home and looked up my name. That's

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1 on page -- that's -- that's line 5 through 9, on page 58,

2 And if you will go and look on -- if you will go to  
3 transcript page 72, line 23, my lawyer asks her, says (as  
4 read): "Okay. When you looked on Facebook, that's where  
5 you looked, right?" She said, "Yes, sir." "You scrolled  
6 down through the pictures?" "Yes, sir. I did." "Or did  
7 you type in John Upson's name?" She said, "No. I went on  
8 William Keels' page and I found his name, and when I saw  
9 his picture, I jumped up because I knew that was him."

10 Q Now, what page is that on the transcript?

11 A That's -- that's transcript page 73, lines 1 through  
12 5. If you going on some -- Your Honor, if you going to  
13 look for a individual, to ID them on Facebook -- I don't  
14 know if you familiar with Facebook or not, but you looking  
15 for -- you don't know my name, so you looking for my  
16 picture. The record reflects that she said, "I went and  
17 found his name, and then when I saw his picture ..." So  
18 she went name hunting.

19 Lawyer goes down and he asks her, on line 22 -- I  
20 like to go through the whole thing. Says (as read):  
21 "Jumped up because I knew that was him, and then I clicked  
22 on his name and I was scrolling through his pictures. As  
23 I was looking, I jumped up again. I told my mom that was  
24 him." "How many pictures do you think you looked at  
25 before you found those?" She says, "Two pictures." She

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DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 referring -- she's referring to the two pictures that she  
2 submitted to law enforcement.

3 He says (as read): "Two?" She says, "Yes, sir. I  
4 found those two." "How many pictures on William Keels'  
5 Facebook did you look through?" "Oh, I just saw one  
6 picture. It's like when you look on someone else's page,  
7 it's only one profile picture." "Does he have a lot of  
8 pictures of other people on his?" "I didn't look at  
9 that."

10 So if you didn't look at that and you got to scroll  
11 down through somebody pictures on Facebook, how could you  
12 not look at nobody else's picture?

13 Q But John, let me ask you this. You know, you have  
14 cited to the page of the transcript where you said that  
15 she looked for ---

16 A My name.

17 Q --- John Upson, for your name.

18 A Yes, sir.

19 Q Now, in the transcript, is there any indication that  
20 she was given some names to look at?

21 A Yes, sir, it was.

22 Q And where is that?

23 A Okay.

24 Q It's a couple of pages prior to where you are.

25 A I have -- I have it here. My lawyer asked Jameisha

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## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 Alliston, on transcript page 75 (as read): "Jameisha, do  
2 you know a guy named 'Ishmael NoridDeen'?" She says, "No,  
3 sir." He said, "Were you ever shown a police -- he said,  
4 "Were you ever shown a police line-up? Were you ever  
5 shown a line-up of six people?" She said, "A list of  
6 names." He said, "Well you -- you were shown names?"  
7 "Yes, sir." "The police never showed you a line-up of  
8 anybody?" She said, "Not people, like pictures. No,  
9 sir." "Okay. No further questions."

10 Q So John, if it's your testimony that she went to  
11 Facebook and found you from William Keels' -- Keels'  
12 Facebook page --

13 A The investigate -- the investigator -- yes, sir. She  
14 did.

15 Q Okay.

16 A Okay. According to -- according to the investigative  
17 report, the investigator said that he went to talk to Mr.  
18 Keels and asked Mr. Keels who was he up here talking to.  
19 And he said that he had some names and he ---

20 MS. COLEMAN: Objection. This is all hearsay.

21 Q All right. Can't tell us what someone else said.

22 A Okay.

23 Q Okay. But is it your opinion that Ms. Jameisha  
24 Allston had names that she was looking for on Facebook?

25 A Yes, sir. The record reflects that.

## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

- 1 Q Okay.
- 2 A Even her -- even her testimony reflects that.
- 3 Q And where would she have gotten those names to look  
4 for?
- 5 A From law enforcement.
- 6 Q Okay. And this was an out-of-court identification?
- 7 A Yes, sir. During that time, it was.
- 8 Q All right. And was there ever any objection to her  
9 making the identification on Facebook?
- 10 A No, sir.
- 11 Q All right. Was there ever any motion to suppress the  
12 out-of-court identification as a result of either  
13 suggestiveness from law enforcement or the actual process  
14 of discovering you on Facebook?
- 15 A No, sir, it was not.
- 16 Q And do you believe that Counsel should've done that?
- 17 A Yes, sir. I do believe he should've done that. Your  
18 Honor, 'cause it had -- had he done that, objected to  
19 that, once he found out that it was unduly suggestive  
20 police procedure by getting those lists of names showed  
21 involvement of law enforcement and this young lady going  
22 to Facebook when she testified and said, "I went and  
23 looked for his name of the person I was looking for", that  
24 I would never been -- that -- that the *Neil v Biggers*  
25 factor would've had come into play.

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DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1           And out of those five factors of *Neil v Biggers*, the  
2 prior opportunity of the witness to observe the criminal,  
3 she had an obscured view. She said these people came in  
4 this restaurant with hoods and bandanas on. She testified  
5 that -- if I -- if you go to trial -- trial transcript  
6 page -- trial transcript page 77, line 14, Mr. Slocolm, I  
7 believe it is, says (as read): "Real quick. You  
8 mentioned telling law enforcement -- Mr. Smith asked you  
9 about the eyes. What was it about Mr. Upson's eyes that  
10 you remember?" "He has a lazy eye. It's kinda droopy,  
11 like that."

12           Also, one of the factors is the Defendant is --  
13 excuse me, is the victims be able to give a description of  
14 this person. She rested her whole identification, Your  
15 Honor, that I have a lazy eye. That's something that I do  
16 not have.

17           Further testimony by witness Scott Hall on direct,  
18 they asked Scott -- they asked Scott Hall about the people  
19 that robbed the place. Scott Hall said that the people  
20 that came in was 5'11 and taller than that. I don't have  
21 those transcript pages handy, sir, but it's the testimony  
22 of Scott Hall. He said that the people was 5'11" or  
23 taller than that.

24           But back to the *Neil v Bigger* factor, it's ---

25           Q       That's one -- I'm sorry, John.

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DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 That's page 130, lines 11 through 12, Your Honor.

2 Go ahead, go ahead, John.

3 A And it's one that's -- the fact -- this is the prior  
4 opportunity of the witness to be able to observe the  
5 alleged criminal act, the existence of any discrepancies  
6 between any prior line-up description and the Defendant's  
7 actual description, any identification prior to the line-  
8 up of another person, failure to identify the Defendant on  
9 prior occasions, and the lapse of time between the alleged  
10 act and the line-up. Had -- he's a -- had he asked for a  
11 *Biggers* hearing, again, I'm just a layman, but I got  
12 common sense. All five of those factors wasn't met.

13 This woman's description of me alone, of a lazy eye,  
14 that's something I do not have, Your Honor. That's what  
15 she based her whole description on throughout her  
16 testimony (as read): "He has a lazy eye. It kinda droop.  
17 That's the thing that caught my eye. His bald head and  
18 his lazy eye." The two pictures that she showed didn't  
19 even depict that.

20 Q John ---

21 A Yes, sir.

22 Q --- let me ask you while you're talking about that,  
23 if you'll look again at page 77 that you were quoting and  
24 beginning on line 19 through 23, it appears that there is  
25 testimony on 15 through 17 of that page about the lazy

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## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 eye.

2 A Yes, sir.

3 Q Okay.

4 A Fourteen. That's why I was testifying to the judge.

5 Q 14 through 17 about the lazy eye. Now, the Court  
6 asked Mr. Smith on line 22 (as read): "Anything on re-  
7 cross?"

8 A He said -- he said (as read): "No, Your Honor."

9 I mean, even his -- in his question alone shows how  
10 he was ineffective. Once -- once she was -- she told him  
11 that she was shown a list of names, he said, "No further  
12 questions." He didn't even bother to go any further with  
13 that.

14 Q Did he ask about anything about the lazy eye?

15 A Only thing he asked about her was about her prior  
16 statement, and that was in --

17 Q Page 61.

18 (Brief pause.)

19 A You said "61"?

20 Q I think it's 61, 4 through 8.

21 A It's 67.

22 Q 67. Okay.

23 A 67 lines -- lines 9, he says (as read): "Did you  
24 talk about any facial hair?" She says, "No, sir."

25 Twelve, he asked her, "Eyes?" She says, "Yes, sir."

## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1           So she said that -- also, her testimony she said that  
2 she told law enforcement that, amongst other things. So  
3 she also told law enforcement that she knew it was me  
4 because of a lazy eye.

5           Again, she had an obscure view of people with hoods  
6 and bandanas on. She gives more account -- detail account  
7 about a pistol that was involved in this crime. But  
8 again, she based her whole identification of me on a lazy  
9 eye and that's not part of my description, Your Honor.

10           And had he asked for the *Neil v Biggers* hearing, that  
11 would've come out, and those five factors wouldn't have  
12 been met to prove the reliability of her identification  
13 against me. She had a obscured view, the detail that she  
14 put for my eye that's not part of my description. And  
15 then, by her going on Facebook and getting names from law  
16 enforcement.

17           Q       John, was there any objection about -- if you take  
18 the suggestiveness out in regards to her being given the  
19 names potentially, was there any objection to the use of  
20 Facebook as an identification process at all?

21           A       No, sir, it was not.

22           Q       Okay. And was she ever shown a photo line-up?

23           A       According to her testimony, she said she wasn't.

24           Q       Okay. And was a photo line-up presented at court?

25           A       Sir?

## DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 Q Was a -- was a photo line-up presented at court? Did  
2 they have a picture of one?

3 A Not to my recollection. No, sir.

4 Q Okay. So to the best of your knowledge, there was no  
5 other identification other than her out-of-court  
6 identification on Facebook?

7 A Yeah. When she sat on the stand and pointed to me.

8 Q Okay. All right. John, I know that you've been very  
9 active in preparing this case --

10 A Yes, sir.

11 Q -- the whole presentation today. You've been  
12 waiting. I'm not suggesting anything by this, but I  
13 wanted to -- to ask you is there anything else that you  
14 would like to present to the Court, anything else that you  
15 feel that's of importance that I might have overlooked?

16 A Yes, sir, there is. And again, I know you know the  
17 law, Your Honor, 'cause you wouldn't be a judge if you  
18 didn't.

19 In *State v Tisdale*, it's a bank robbery. Unlike in  
20 *Tisdale's* case, in my case there was law enforcements  
21 [sic] with the suggestiveness. Also in *Tisdale*, the bank  
22 tellers gave -- they said he had a distinctive chin  
23 structure. That was something that they reported to  
24 police, that that also lined up with his description.

25 Her whole description was based off a lazy eye.

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DIRECT EXAMINATION BY MR. THOMAS - JOHN LYNDON UPSON

1 That's all she kept talking about is that she knew it was  
2 me because of a lazy eye. Solicitor came back and asked  
3 her, "What was it about Mr. Upson's eye?" "Oh, he has a  
4 lazy eye, it droops."

5 Your Honor, you're lookin' me dead in my face. Do I  
6 have a lazy eye?

7 THE COURT: (No response.)

8 THE WITNESS: This is what I'm saying. But had he  
9 done that, had he asked for the *Biggers* hearing when the  
10 suggestiveness came up and further questioned her about  
11 that or objected to the in-court identification, which  
12 prejudiced me 'cause that swayed the mind of the jury.  
13 But had he objected to that -- to that unduly suggestive  
14 suggestiveness by police law enforcement, that we would've  
15 had to had that *Biggers* hearing and I don't believe I'd be  
16 sitting here today.

17 Q John, is there anything else?

18 A Not that I can think of at this time. No, sir.

19 Q Okay. All right.

20 MR. THOMAS: Your Honor, I have no further questions.

21 THE COURT: Ms. Coleman?

22 MS. COLEMAN: I have no questions of this witness.

23 Thank you.

24 THE COURT: Okay. Thank you, Mr. Upson. You can  
25 step down.

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1 THE APPLICANT: Thank you, sir.

2 (The Applicant exits the stand.)

3 MR. THOMAS: Your Honor, if it please the Court.  
4 that's the Applicant's case.

5 THE COURT: Okay. Thank you, Mr. Thomas.

6 MR. THOMAS: Yes, sir. Thank you.

7 MS. COLEMAN: State calls Public Defender Grant  
8 Gibbons.

9 GRANT GIBBONS, having been first  
10 duly sworn, testifies as follows:

11 THE WITNESS: My full name is Dee, D-e; my middle  
12 name is Grant; last name Gibbons, G-i-b-b-o-n-s.

13 DIRECT EXAMINATION

14 BY MS. COLEMAN:

15 Q Hi, Mr. Gibbons. Where are you currently employed?

16 A I am the Circuit Defender here in the Second Circuit.

17 Q How long have you been practicing law?

18 A Since 1991.

19 Q How were you involved in the representation of Mr.  
20 Upson?

21 A In my office we are split into teams, and I have one  
22 attorney on my team and I was his supervising attorney. I  
23 was the -- I took second chair in this case.

24 Q Okay. And is Mr. Smith currently employed with the  
25 office?

1 A He is not. He's currently a member of the Bar in  
2 Colorado and has moved on.

3 Q Okay. How much involvement do you have -- did you  
4 have in the preparation of this case?

5 A They would come to me with small questions here or  
6 there throughout the case. There was a investigator that  
7 worked pretty -- Robert Anderson, that worked pretty  
8 steadily on the case with Mr. Smith; and then when it go  
9 time for trial, I -- I did sit in on the prep.

10 Q Did you ever meet with Mr. Upson?

11 A I think we -- we met maybe day before trial, day of  
12 trial. I'm not sure. It's been a long time.

13 Q All right. Were you aware of the defense strategy --  
14 or trial strategy that Mr. Smith was planning to take and  
15 took in this case?

16 A Yes, I was.

17 Q How would you describe that defense?

18 A It was an alibi case.

19 Q Okay. What kind of an alibi was Mr. Upson  
20 suggesting?

21 A Mr. Upson indicated that he had been at a comedy club  
22 event for the whole -- whole period of time that the crime  
23 was committed.

24 Q Did you have any alibi witnesses that would account  
25 for his presence at the comedy club the entire evening?

1 A We did have the three witnesses. I saw in the notes  
2 where the investigator had been trying to find a few other  
3 folks and had not found them, but we did have some  
4 witnesses. I don't recall that anybody could say they sat  
5 right next to Mr. Upson and had eyes on him the whole  
6 night, but they had seen him at different points during  
7 the evening.

8 Q Okay. Did the testimony presented by the State and  
9 by the alibi witnesses leave the opportunity for the  
10 Applicant to have left the comedy club at any point?

11 A Well, like I said, we couldn't -- nobody said they  
12 saw him every minute of the whole time.

13 Q Uh-huh.

14 A And there's no way to -- to account for every minute.  
15 And the State's theory was that even if he was there, he  
16 had time to have left and come back or -- or left early or  
17 something like that; and -- and that was just going to be  
18 a jury issue.

19 Q Okay. In your opinion, was this a good alibi or had  
20 you seen better or worse in other cases?

21 A I've seen a whole lot worse. It wasn't a bad alibi.

22 Q Okay. What's your recollection of -- (clears throat)  
23 excuse me -- of the cell phone records and data that was  
24 presented by the State at trial?

25 A I remember that they had come to me several times

1 getting ready for the case in the months before, and they  
2 were having to continuously remind or request records from  
3 the State. The State said they didn't have them yet.  
4 They were being looked at by this agency, that agency.

5 As I recall, we didn't know the ATF was involved in  
6 the records until I want to say a couple days before court  
7 if that early. But we did have the charts that they had,  
8 and we did have the raw data..

9 We had a -- a phone -- a heavy phone record case a  
10 short time before this happened, and there was another  
11 attorney in the office that was -- was pretty savvy about  
12 how those reports were used by law enforcement and we did  
13 meet with him and go over the reports.

14 Q Was there ever any discussion about your requesting a  
15 continuance to consult with an expert on this cell phone  
16 data?

17 A I don't recall if we did that or not. Our biggest  
18 thing we were worried about was not them using the reports  
19 to show that Mr. Upson was at the incident location. Our  
20 biggest worry was since we were trying for an alibi  
21 defense, any phone record that showed him away from the  
22 comedy club area would've been the biggest thing we were  
23 worried about 'cause ---

24 Q Uh-huh. Did ---

25 A --- you can call -- they can call Captain D's from,

1 you know, Guam if they wanted to, but what we were  
2 concerned about is the phone they attributed to Mr. Upson  
3 being away from the comedy club that night.

4 Q Did any of the State's evidence show that he was away  
5 from the comedy club to your recollection?

6 A I don't recall.

7 Q Okay. Did the cell phone data include evidence of  
8 Mr. Upson's phone receiving calls from and placing calls  
9 to the Captain D's that night?

10 A I don't recall exactly what the record said. I know  
11 Mr. Upson told us that he had called there earlier that  
12 night.

13 Q Okay. What was his explanation for that?

14 A I think he knew somebody that worked there, an old-  
15 friend, and he just wanted to talk to him.

16 Q Okay. And was this during the time or -- or around  
17 the time of the crime?

18 A I -- I don't recall.

19 Q Okay.

20 A Sorry.

21 Q Okay. The witness, Jameisha, who identified the  
22 Applicant as the person who had kidnaped her, how would  
23 you describe her identification?

24 A It's -- well, it was -- it was kind of a strange  
25 situation. As I recall it -- and of course it's been a

1 long time and I didn't know about this hearing today, as I  
2 recall what happened she independently, on her own,  
3 thought she had seen the person that robbed the store  
4 before come in earlier with another gentlemen. So she did  
5 her own little investigation on Facebook looking for that  
6 person; and then once she found the picture, looking for  
7 that name.

8 So it was kind of a strange situation. All the  
9 identification was done prior to her calling law  
10 enforcement is what I recollect.

11 Q Uh-huh.

12 A That she did an independent investigation, and once  
13 she had her -- already made up her mind who it was, then  
14 she called law enforcement.

15 Q Okay. Do you have any recollection of a list of  
16 names being given by law enforcement to this witness?

17 A No, I don't.

18 Q Okay.

19 A I -- I -- I seem to recall that she was looking for a  
20 picture so she could hook a name to it is what I recall  
21 her saying, but you know, things can be -- come out  
22 different ways in a transcript. So ...

23 Q So that was the -- the -- the gist of her testimony  
24 that you recall from the trial?

25 A Yes, ma'am.

1 Q Okay. Do you have any recollection of any kind of  
2 overly suggestive government interference with her  
3 identification of the witness?

4 A Well, my -- my thoughts of the matter was that the  
5 identification all took place before she called law  
6 enforcement is what my understanding was. She had a name  
7 and a picture before she even talked to them --

8 Q Uh-huh. Do you recall ---

9 A --- as I recall.

10 Q --- what trial counsel's closing argument was to the  
11 jury?

12 A Defense counsel?

13 Q Yeah.

14 A He did a demonstration where he had taken some  
15 celebrities and covered up their face except for their  
16 eyes, and -- and was showing the jury how hard it is to  
17 identify somebody just from their eyes.

18 Q Uh-huh.

19 A And I thought it was really effective. And that was  
20 his -- his method of attacking the -- the eyewitness  
21 identification of Mr. Upson.

22 Q Do you recall what other evidence the State presented  
23 if any? I can see Mr. Upson -- and I know it's been a  
24 long time.

25 A It's been a long time. I know they had the phone

1 records, which I -- I didn't think -- I thought they got  
2 so technical that nobody knew exactly what they were  
3 trying to say.

4 Q Uh-huh.

5 A Then they -- they had the eyewitness folks, and then  
6 they focused on the fact that no -- that nobody had eyes  
7 on Mr. Upson the whole time at the club and he would've  
8 had a window to rush across town and rush back.

9 And Mr. Smith, I thought effectively, tried to deal  
10 with that in the closing remarks, too, that it would've  
11 been really strange for someone to run off to the -- do  
12 this crime, come back, and then console a friend at the  
13 comedy club that was having a hard time. He -- and he  
14 made an argument how inconsistent that would seem to be.

15 Q How would you characterize the State's evidence in  
16 this case, was it a strong case?

17 A It's one of those that's right in the middle that  
18 ends up going to trial. Not the strongest case, not the  
19 - not the weakest case.

20 Q No further questions. Thank you.

21 THE COURT: Mr. Thomas?

22 MR. THOMAS: Your Honor, if it please the Court.

23 CROSS-EXAMINATION

24 BY MR. THOMAS:

25 Q Mr. Gibbons, good to see you.

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1 A Good to see you too, sir.

2 Q Haven't seen you in a number of years.

3 Just a couple of questions, if I may. Your  
4 involvement, you said you were second chair and you were --  
5 -- could answer some of the questions that they had.

6 A Procedural stuff. Yes, sir.

7 Q Procedural stuff. Yes, sir.

8 A Uh-huh.

9 Q So you weren't really involved in -- in the -- the  
10 heavy lifting, I guess, in ---

11 A No, sir.

12 Q --- this case? Okay. Now, you had stated that this  
13 was an alibi defense?

14 A Yes, sir.

15 Q And so the identification of the Defendant would've  
16 been important --

17 A Yes, sir.

18 Q -- from of the State's standpoint?

19 A Yes, sir.

20 Q Okay. And also, if it was an alibi case and the  
21 identification was a significant issue, the cell phone  
22 data would've played a important part in this case as  
23 well.

24 A Well, if -- if it would've been meaningful.

25 Q Okay.

1 A If it would've shown him at the scene ---

2 Q Is it fair ---

3 A --- it would've.

4 Q --- to say the State was using this evidence, cell  
5 phone evidence, to try to show that he could've committed  
6 this crime?

7 A I think they were trying to show he was away from the  
8 club during the night sometime when he said he was there  
9 the whole night. I ---

10 Q All right. And ---

11 A --- think was ---

12 Q And ---

13 A --- that was the ---

14 Q --- in essence, had been at the Captain -- well, the  
15 next step would've been if he was away, he would've been  
16 at Captain D's and been able to commit ---

17 A I think they wanted to -- to make -- leave that  
18 assertion. I don't think they ever went as far as to  
19 claim that that I recall.

20 Q Okay. And now you said that you were getting the  
21 cell phone data in kind of sporadically and got it even  
22 actually right up to trial?

23 A Not saying the data.

24 Q Okay.

25 A They didn't tell us who they were going to use to

1 testify at trial until right before trial. We had no idea  
2 ATF -- ATF was coming in until the very last minute.

3 Q That makes me ask -- ask the question: Was there a  
4 discovery problem?

5 A Well, we had the data --

6 Q Right.

7 A -- and that's what they were going to use. We  
8 claimed that we should've been able to have a chance to  
9 interview or -- or work with the guy who was going to  
10 interpret the data before -- before trial, but I don't  
11 think the judge was going to go along with that or -- or  
12 that ended up happening.

13 Q Do you ---

14 A We had that data, we just didn't know what they were  
15 doing with ATF.

16 Q Right. Then do you know if a motion was made prior -  
17 -

18 A I do not.

19 Q -- to trial to -- for a continuance or for the actual  
20 production of that information?

21 A I don't recall it, sir. I'm sorry.

22 Q Okay.

23 A I don't have the file in front of me.

24 Q Do you think that there was a potential *Brady*  
25 violation in essence of them not providing you that

1 information prior to trial?

2 A Well, it's hard to say. I don't know what -- I don't  
3 know that the -- there was anything exculpatory in it or  
4 not 'cause I didn't --

5 Q Yes, sir.

6 A -- we didn't have access to it until he got up on  
7 the stand.

8 Q Do you know whether or not there were any written  
9 statements by ATF or by anybody that had looked at that in  
10 regards to what their conclusions and -- to the cell phone  
11 data was?

12 A I think the answer we got was, "There was no report  
13 made," which is what we get when the ---

14 Q Yeah.

15 A --- there have been conversations, but they didn't  
16 make a report.

17 Q Didn't make a report. Okay.

18 Now, when I read the transcript and I talked to Mr.  
19 Upson, the thing that jumped out at me -- which I thought  
20 was odd and I'm not sure that I know the answer to -- is  
21 this thing about a Facebook identification, how someone  
22 can kind of go outside of the system, use Facebook on  
23 their own investigative process, and make an  
24 identification that way. Do you think there was anything  
25 objectionable in that?

1 A Well, we talked about that, and -- and most of the  
2 objections that I've made to identifications have been law  
3 enforcement was guiding them, law enforcement was setting  
4 it up, law enforcement was doing it incorrectly. And as I  
5 recall it, she'd already done it all before she even  
6 called law enforcement, and so I didn't know there was any  
7 State action we could object to. But you know, I'm -- I'm  
8 going off of recollection.

9 Q But -- but it is correct to say that there was no  
10 pretrial motion made to try to prevent any of this  
11 identification from coming in?

12 A I wasn't sure exactly what motion to make to have  
13 someone that relied on themselves to make the  
14 identification.

15 Q Yes, sir.

16 A I don't -- I'm not sure of that motion.

17 Q And I -- and I know hindsight's always 20/20, but --

18 A Yeah.

19 MR. THOMAS: May I approach, Your Honor?

20 THE COURT: Yes, sir. Sure.

21 MR. THOMAS: Okay.

22 Q And I'm going to show you ---

23 (Brief pause.)

24 Q Mr. Gibbons, I want to show you -- and I apologize,  
25 my -- my transcript was numbered a little differently --

1 page 73, lines 20 through 25; and 75, basically lines 20  
2 through 25. If you would just look at that ---

3

4 A Okay.

5 Q --- look at that, please.

6 (Brief pause.)

7 A Okay.

8 Q All right. And that's the -- the identification  
9 witness, the Jameshia ---

10 A Right.

11 Q --- testifying.

12 A Right.

13 Q Doesn't that ---

14 (Brief pause.)

15 MR. THOMAS: Your Honor, if it would please the  
16 Court?

17 (Brief pause.)

18 THE COURT: Yes, sir.

19 MR. THOMAS: Yes, Your Honor.

20 Q Mr. Gibbons, in reading those two pages --

21 A Yes, sir.

22 Q -- doesn't it appear to say, one, that she had a name  
23 that she was looking for on Facebook?

24 A All right. Here's what I see that you show me. She  
25 was on his -- his Facebook, she looked at pictures and

1 found the pictures. And then, if you look on page 74 says  
2 (as read): "Then she scrolled down a friend list and  
3 clicked on his name."

4 Q All right.

5 A And there was ---

6 Q So ---

7 A --- and so she's talking about a list on Facebook is  
8 what I'm seeing.

9 Q Okay. But then, if you go to the next page, they  
10 asked her about the photo line-up, and they asked her if  
11 she was shown a photo line-up. It appears that she says,  
12 "No."

13 A Right.

14 Q And she says a list of names.

15 A Right. That's talking about (as read): "Jameshia,  
16 do you know a guy named 'Norid Deen'?" "No." "Were you  
17 shown a line-up?" "No. Was I -- shown a list of names."

18 Q All right.

19 A Right.

20 Q Couldn't that have been used in a pretrial motion --  
21 couldn't that have been used in a pretrial motion to try  
22 to suppress the identification?

23 A Well, that's a -- that's talking about Mr. Norid  
24 Deen. Everything I see here, she got pictures, she went  
25 to the friend list, and picked Mr. Upson's name off the

1 friend list and ---

2 Q Right.

3 A --- then called law enforcement.

4 Q Okay.

5 A And then that's when Norid Deen came in with the list  
6 the cops gave her is -- is what I remember.

7 THE COURT REPORTER: Norid Deen?

8 THE WITNESS: Want me to spell it? Ishmael Norid  
9 Deen. N-o-r-i-d D-e-e-n is how they spelled it in the  
10 transcript.

11 THE COURT REPORTER: And Ishmael's spelled how?

12 THE WITNESS: I-s-h-m-a-e-l.

13 THE COURT REPORTER: Thank you.

14 A That's what I recall.

15 Q Okay. All right. But wouldn't that be inconsistent  
16 with the position that she, on her own, went to Facebook  
17 and looked at pictures only and found Mr. Upson through  
18 pictures?

19 A What I read just there was she went and found the  
20 picture and then scrolled down to a list of names is what  
21 it says --

22 Q Right.

23 A -- and found Upson's name is what -- what I just  
24 read.

25 Q Okay. But -- but my -- my problem with it is -- and

1 maybe I'm wrong, but my problem with it is that she had a  
2 name. She doesn't say she found a picture and then found  
3 the name. She basically says she scrolled down through a  
4 list of names --

5 A A friend list.

6 Q -- friend list, and then found a picture. Based ---

7 A I think it's backwards.

8 Q --- upon finding that name.

9 A I think you said -- I think you said that backwards  
10 from what the transcript said.

11 MR. THOMAS: And I apologize, Your Honor.

12 Q Well, it says at 22 (as read): "No, sir. I just  
13 looked at his name who I was looking for." And then the  
14 question (as read): "You were looking for John Upson?"  
15 And she says, "Yes."

16 A But before that, she's looking at pictures I think.

17 Q Okay.

18 A Maybe I -- can I look at it again?

19 Q Sure. Yeah.

20 THE COURT: Counsel, I -- I'm going to read the  
21 transcript.

22 MR. THOMAS: Okay. That's fine.

23 THE WITNESS: Okay.

24 THE COURT: I'm going to read the -- the transcript  
25 will speak for itself.

1 MR. THOMAS: Okay. Thank you, Your Honor. I have no  
2 further questions, Your Honor.

3 THE COURT: Okay. Anything?

4 MS. COLEMAN: Nothing further.

5 THE COURT: All right. Thank you sir.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: You can step down.

8 THE WITNESS: Your Honor, can I -- can I put  
9 something on the record about the conflict of interest?  
10 Just for ...

11 THE COURT: Yes, sir. I'll allow you to do it.

12 THE WITNESS: Is that all right?

13 MR. THOMAS: I -- I have no objection.

14 THE COURT: Okay.

15 THE WITNESS: Mr. Smith was trying to be funny and  
16 lighten the mood and said the thing about, "Well, we may  
17 have a conflict of interest 'cause I like to eat at  
18 Captain D's." I told him that was not the right thing to  
19 say and I know that a lot got made of that, but for the  
20 record, that's -- it was a joke.

21 THE COURT: Noted for the record.

22 THE WITNESS: Thank you.

23 (The witness exits the stand.)

24 MS. COLEMAN: Thank you, Mr. Gibbons. And the State  
25 has no further witnesses, although we would request a -- a

1 brief closing argument, if Your Honor will allow.

2 THE COURT: All right. I'll -- I'll hear from you  
3 first, Ms. Coleman, then I'll turn it over to Mr. Thomas  
4 since he's the moving party.

5 MR. THOMAS: Your Honor --

6 THE COURT: Well, let -- hold on. Let me hear from  
7 you ---

8 MR. THOMAS: I -- I was actually going to say, Your  
9 Honor, I don't necessarily have a closing.

10 THE COURT: Okay.

11 MR. THOMAS: We're not in front of a jury ---

12 THE COURT: I was going to give you last argument, so  
13 ...

14 MR. THOMAS: Okay. All right. I'll take it then.

15 THE COURT: All right.

16 MR. THOMAS: Thank you.

17 THE COURT: Okay.

18 MS. COLEMAN: Thank you, Your Honor. And this will  
19 be brief. Just looking at the issues that the applicant  
20 has raised, his first issue, the -- the identification, I  
21 guess, and the *Neil v Biggers* hearing, my argument is  
22 there is -- there's no motion he could've made. This is  
23 not improper -- there's no improper, overly-suggestive  
24 photo line-up, or anything by the government on this part  
25 as Mr. Gibbons testified and I -- as the record shows.

1           She did the research on her own. She recognized this  
2 man from -- and -- and he admitted today on the stand he  
3 had been in the Captain D's a few days earlier. He had  
4 visited with a friend, he had placed an order, and she  
5 remembered him and then she went back after the robbery.

6           She went back that night, went on Facebook herself,  
7 and looked up a picture of the man who was friends with  
8 her co-worker; and she recognized him as the man that had  
9 been there a few days earlier, and as the man that had  
10 been part of the robbery that evening. She recognized a  
11 picture, she saw his name, and she sent it, on her own to  
12 law enforcement.

13           The government -- there's no proof today that law  
14 enforcement provided her with anything. The testimony  
15 about the list of names that she received, their  
16 accusation today is just speculation based on this  
17 testimony from the trial transcript. We have no real  
18 evidence that law enforcement gave her a list of names and  
19 told her to look for the person who did it. All that the  
20 testimony shows that she looked him up on her own and sent  
21 the pictures of the man she recognized as the guy who --  
22 who held her hostage to law enforcement.

23           THE COURT: So you -- you're interpreting page 75  
24 where it says (as read): "Were you shown -- were you ever  
25 shown a police line-up? Were you shown a line-up of six

1 people?" And she says (as read): "A list of names."

2 "You were shown names?" She said, "Yes, sir."

3 So what -- how -- how are you interpreting that?

4 MS. COLEMAN: Now, that -- and -- and I don't dispute  
5 that, of course. That is her testimony, but we don't know  
6 when that -- when she was shown a list of names. You  
7 know, if they -- and -- and obviously they didn't show her  
8 a line-up, and they may well have shown her a list of  
9 names afterwards; but her testimony shows that she  
10 immediately went home, she didn't mention a list of names  
11 at the beginning. She went home, she looked on Facebook,  
12 and she found a picture of the guy that she recognized as  
13 the -- the kidnapper, and she sent it to law enforcement.

14 The cell phone expert that we presented today, first  
15 of all, I don't believe that trial counsel was deficient  
16 for failing to consult with a cell phone expert because he  
17 said he -- they had the -- the data all along. They --  
18 there was some question about how the State was going to  
19 present it and who they could -- who was going to present  
20 it at trial at the very last minute there.

21 I don't think it was unreasonable for him not to  
22 consult with his own expert, especially in a case where  
23 the State was not using the dat -- the data to show that  
24 he was at the Captain D's at this time and -- and he's the  
25 one who did it. Mr. Gibbons -- and -- and the transcript

1 shows that the State was really just presenting it to show  
2 that he wasn't at the comedy club, he could've been  
3 elsewhere, which does not match up with his alibi.

4 The evidence also -- also showed that he had made  
5 phone calls to Captain D's, and there were phone calls  
6 from Captain D's to his phone -- or whoever had his phone  
7 -- immediately before the robbery. I don't think a cell  
8 phone expert of his own could contradict that evidence,  
9 regardless of what tower it was bouncing off of.

10 And I would also argue that his trial counsel's  
11 closing argument properly addressed the identification  
12 issue. He -- he cross-examined and impeached each of  
13 these witnesses, and his entire closing argument was  
14 trying to attack the -- the reliability of the  
15 identification by arguing that this -- he was wearing a  
16 hood and a bandana, half of his face was covered, and it's  
17 really difficult to identify someone when you can only see  
18 their eyes and part of the nose. I believe that was a --  
19 an adequate attack on the identification there, along with  
20 his cross-examination of the witness who identified him.

21 So overall, I don't believe there was any deficiency  
22 by trial counsel on any part, but there's especially no  
23 prejudice based on the identification of the witness who  
24 was absolutely certain, per her own investigation, that  
25 this was the man who kidnaped her, as well as the cell

1 phone records showing his calls to Captain D's from his  
2 cell phone immediately before the robbery.

3 I think this is a close case. I don't think it's  
4 overwhelming evidence case, but I think it's a situation  
5 where they went to trial, the jury was presented with both  
6 sides, and they made their decision based on the evidence.  
7 So thank you.

8 THE COURT: Thank you, Ms. Coleman.

9 All right. Mr. Thomas, give you the last word.

10 MR. THOMAS: Your Honor, if it please the Court. I  
11 think that this -- this is an important case of  
12 identification. I mean, without the one lady who was  
13 working there, Mr. Upson wouldn't be sitting here today.  
14 So I think the issues of identification are paramount in  
15 this case. And I think the phone records are -- also fall  
16 directly behind her identification because the cell phone  
17 records were also used as an identification method to say,  
18 you know, Mr. Upson was -- was there or close by or  
19 could've been there.

20 The testimony is that these guys come in and they're  
21 wearing bandanas. All they could see -- and they're  
22 wearing hoods, from what I remember. So all they can see  
23 are their eyes, and she's saying that, "I saw him because  
24 of the lazy eye."

25 Well, Counsel was sitting right there with Mr. Upson,

1 and if you look at the transcript, he doesn't ask her  
2 anything about it. He says, "I have nothing further."

3 So if that was -- a key issue of identification was a  
4 lazy eye, "That's why I know it's him because of the lazy  
5 eye," why not ask her a question about it? "You see Mr.  
6 Upson sitting right here? Show me the lazy eye." I -- I  
7 think that's extremely prejudicial.

8 And then you go to the fact of the Facebook. And  
9 technology's amazing. It just -- it moves faster than we  
10 can keep up with in the law sometime. When I read it,  
11 something struck me. I just think it's something weird  
12 about a witness going online and searching out Facebook to  
13 find the potential perpetrator of a crime.

14 Now, she does that based solely on the fact that --  
15 well, from what she says, from the fact that he has --  
16 there's a co-defendant there.

17 All right. I don't know how she places that Mr.  
18 Upson and that co-defendant are friends. How does she --  
19 and there's nothing in -- in the transcript that really  
20 leads you there other than she says, "Well, he's a friend  
21 of this..." -- well, not co-defendant, but "this co-  
22 worker." So she goes from there and goes to facebook.

23 And I think that if you look at the transcript, it  
24 says, "I was looking for a name." Well, if you don't know  
25 who he is, how are you looking for a name? And then the

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1 second part of it is, "Well, no, I never was shown a photo  
2 line-up, but I was given a list of names." Well, if it's  
3 unclear about Norid Deen, the way I read it it doesn't  
4 appear to me that they're talking about Norid Deen, that  
5 they're talking about John Upson.

6 Now, should he had filed -- done a pretrial motion to  
7 suppress the identification? I think you could have on  
8 the - on the Facebook issue. Now, it's a new technology.  
9 Is there any case law that would support that? Maybe not.  
10 But I think it's at least an issue that it should've been  
11 brought to the Court's attention.

12 THE COURT: How -- how do you address the State's  
13 contention that the identification was -- of the photo was  
14 made entirely on the witness's own before going to law  
15 enforcement? How do you address that argument?

16 MR. THOMAS: Well, I think that -- well, I think that  
17 is that -- and I concede that's a problem. If you just  
18 say that the witness did nothing but go on her own and  
19 made the determination pre -- you know, to -- to address  
20 that pretrial, but I think that information didn't come  
21 out until trial.

22 So is it then that you make a motion to -- to object  
23 to the identification or at that point in time, can you  
24 suppress that identification? Because that that point in  
25 time, the Defense knew. She said that there was a list of

1 names, and she said that, "I was looking for a name." So  
2 at that point in time, maybe it takes it out of the realm  
3 of just saying, "Well, the witness went to Facebook and  
4 identified this potential perpetrator of the crime on her  
5 own," to where you then have a situation where now you're  
6 saying, "Well, maybe there was some suggestiveness of law  
7 enforcement."

8 So maybe it's -- you can't be -- predict the future,  
9 so it would've been more difficult to have made that  
10 objection pretrial. Although it -- I don't think -- I  
11 would've still made an objection about the Facebook  
12 identification. Might've lost it, but I would've at least  
13 preserved it for the record.

14 But then, I think, clearly when this issue comes up,  
15 they should've objected to it and they didn't. And it  
16 goes straight to -- in -- but it all fits in. You know,  
17 you talk about the misidentification of the lazy eye,  
18 which not -- was not objected to it -- falls right into,  
19 "Well, I went on Facebook. I was looking for a name."  
20 Maybe there was -- she was -- some suggestiveness of these  
21 names.

22 And then, the kind of -- the third peg in that, which  
23 nobody seems to think is that important, are the cell  
24 phone [sic]. Now, I read the transcript. I'm not a cell  
25 phone expert, that's why we got Mr. Slovenski to come in

1 here. When I read it, my first impression of reading it  
2 was that -- that was -- you know, this is damaging. This  
3 cell phone data shows, to me, that Mr. Upson was at  
4 Captain D's. And a common sense approach to that is why  
5 would you -- why wouldn't the State use it? They're not  
6 using it to say Mr. Upson was talking on the phone. And  
7 -- and my memory may serve me wrong, I don't remember  
8 there being a cell phone call to Captain D's immediately  
9 prior to this robbery. I -- and I may have missed that,  
10 but I just don't remember that.

11 And so the State was using that to show, one, that he  
12 was either at Captain D's or he was near Captain D's. And  
13 if you look at those original maps with those pie shapes,  
14 low and behold, Captain D's is in -- within one of the  
15 pies.

16 So I think that Counsel was extremely deficient in  
17 not obtaining -- if they didn't obtain an expert, why  
18 didn't they get somebody to look at it so they could ask  
19 the appropriate questions from the testimony of ATF?

20 And ATF is impressive. I mean, you got somebody from  
21 Alcohol, Tobacco, and Firearms from a federal agency who's  
22 going to come in and say, "We've looked at the cell phone  
23 records, and this is what they show."

24 And I think the layperson, just as I did when I first  
25 read the transcript, would say, "They got him. There it  
26 is." So -- and -- and it fits like the third cog behind

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1 the identification issues, and it kind of seals the fate.

2 And when I sent it to Mr. Slovenski, I didn't know  
3 what he was going to say. You know, I -- we talked to the  
4 Sheriff's Department, we got the data. They had some  
5 problems with getting it to him. So eventually, it came  
6 directly from the ATF, from the lady who testified.

7 And he called me and he said, "There's a problem.  
8 This data doesn't necessarily show that he was at Captain  
9 D's. And the data that they have is flawed in that it  
10 doesn't show what they have purported it to be in the  
11 testimony."

12 So I think that Counsel was deficient in not doing  
13 something. I mean, you can't get an attorney in your  
14 office who has some cell phone experience to -- to look at  
15 this data and -- and assist you. I think you need  
16 somebody more than that, and I just think they were  
17 deficient in doing that. I think they build on each  
18 other.

19 Just in closing, and I won't go on any further, I  
20 think that the lazy eye, they didn't do a thing about it.  
21 The question about whether or not there was some  
22 suggestiveness in the Facebook issue, they didn't do  
23 anything about it. Just let it slide. Whether or not the  
24 objection should've been made to the Facebook  
25 identification prior to trial, I don't know. Just seems

1 odd to me. And then you compound that with just letting  
2 this ATF expert testify that, for no other reason, has got  
3 to be used by the State to say Mr. Upson was there.

4 I think it's a case of ineffective assistance of  
5 counsel; and I think as a result, he was extremely  
6 prejudiced and is serving 20 years as a result. Thank  
7 you, Your Honor.

8 THE COURT: Thank you, Mr. Thomas.

9 MR. THOMAS: Yes, sir.

10 THE COURT: I'm going to take this under advisement;  
11 however, I will leave the record open for 30 days to allow  
12 the attorney's to make their -- the arrangements to get a  
13 deposition of -- of trial counsel out of state.

14 MR. THOMAS: Thank you, Your Honor.

15 MS. COLEMAN: Thank you, Your Honor.

16

17 -- END OF TRANSCRIPT OF RECORD --

18

19

20

21

22

23

24

25

**CERTIFICATE**

1  
2 I, the undersigned Bonnie H. Kelly, Official Court  
3 Reporter for the Fifth Judicial Circuit of the State of  
4 South Carolina, do hereby certify that the foregoing is a  
5 true, accurate, and complete transcript of record of all  
6 the proceedings had and evidence introduced in the hearing  
7 of the captioned cause, relative to appeal, in the Second  
8 Circuit Court for Aiken County, South Carolina, on the 8th  
9 day of May, 2018.

10 I do further certify that I am neither of kin,  
11 counsel, nor interest in any party hereto.

12  
13  
14 e/ BONNIE H. KELLY

15 Bonnie H. Kelly, CVR

16 Official Court Reporter

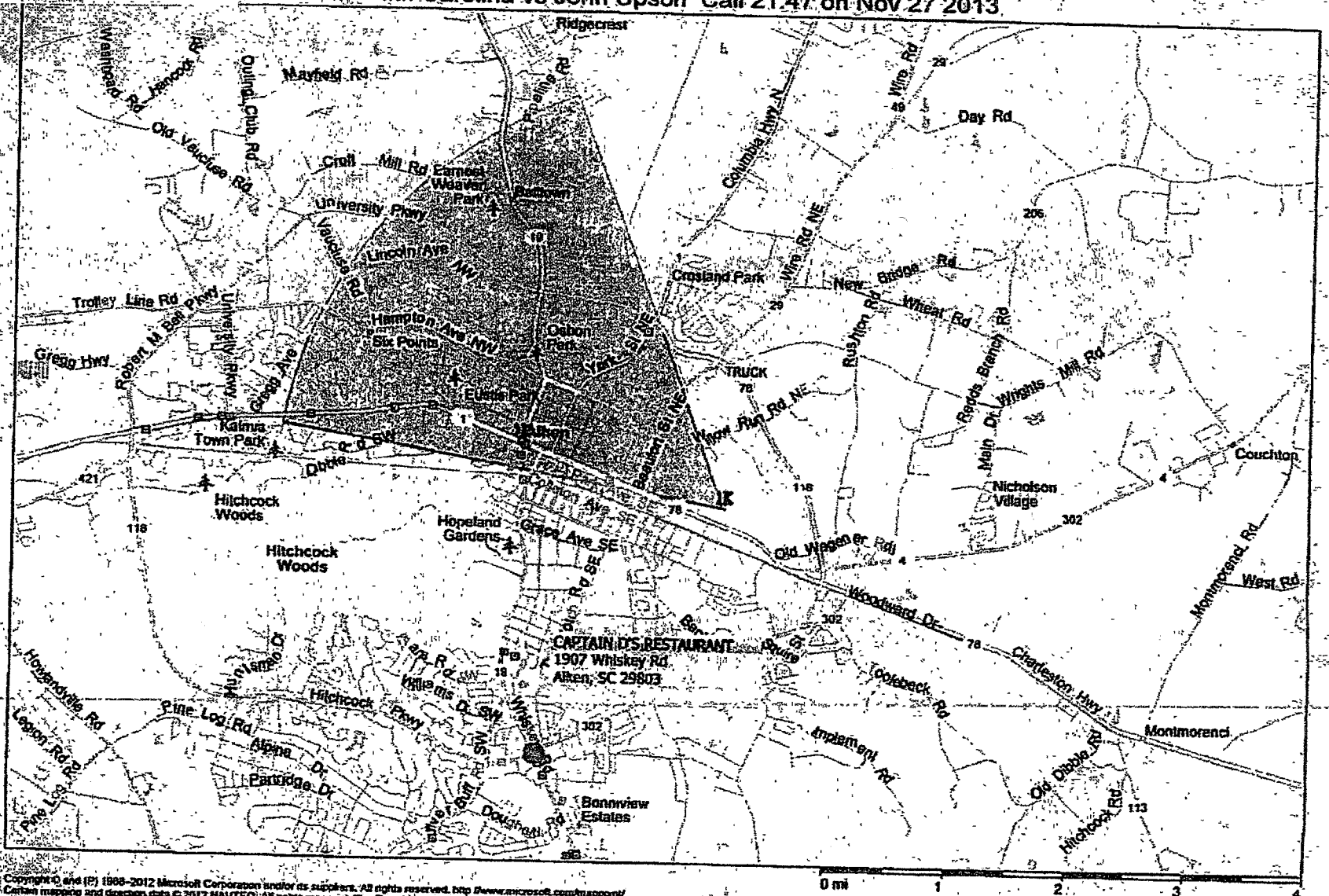
17  
18 Columbia, South Carolina

19 January 22, 2018  
20  
21  
22  
23  
24  
25

**APP'X 467**

MISREPRESENTATION  
OF ACTUAL INCIDENT  
LOCATION

### South Carolina vs John Upson Call 21.47 on Nov 27 2013

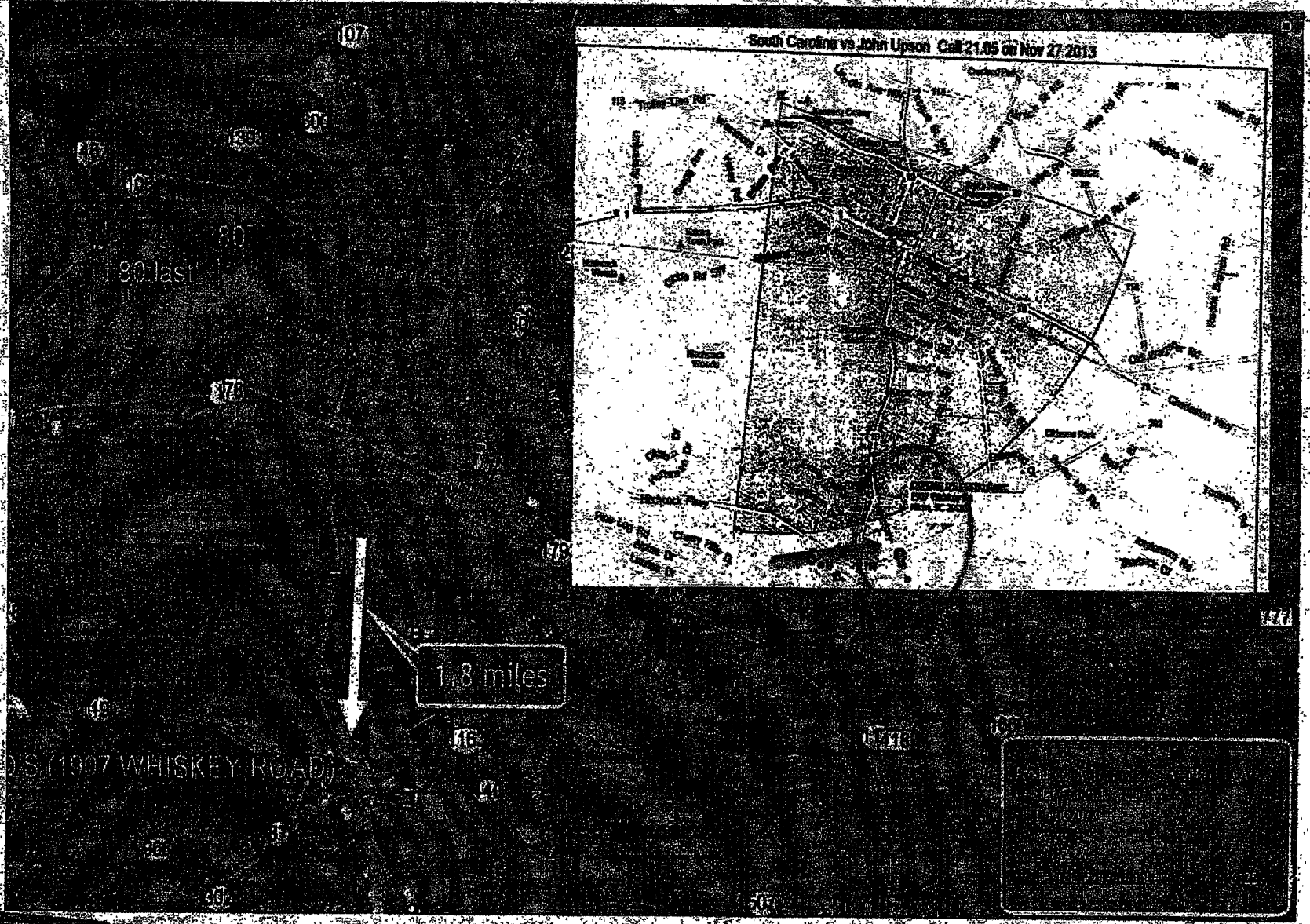


APP'X 468

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1113 Representation

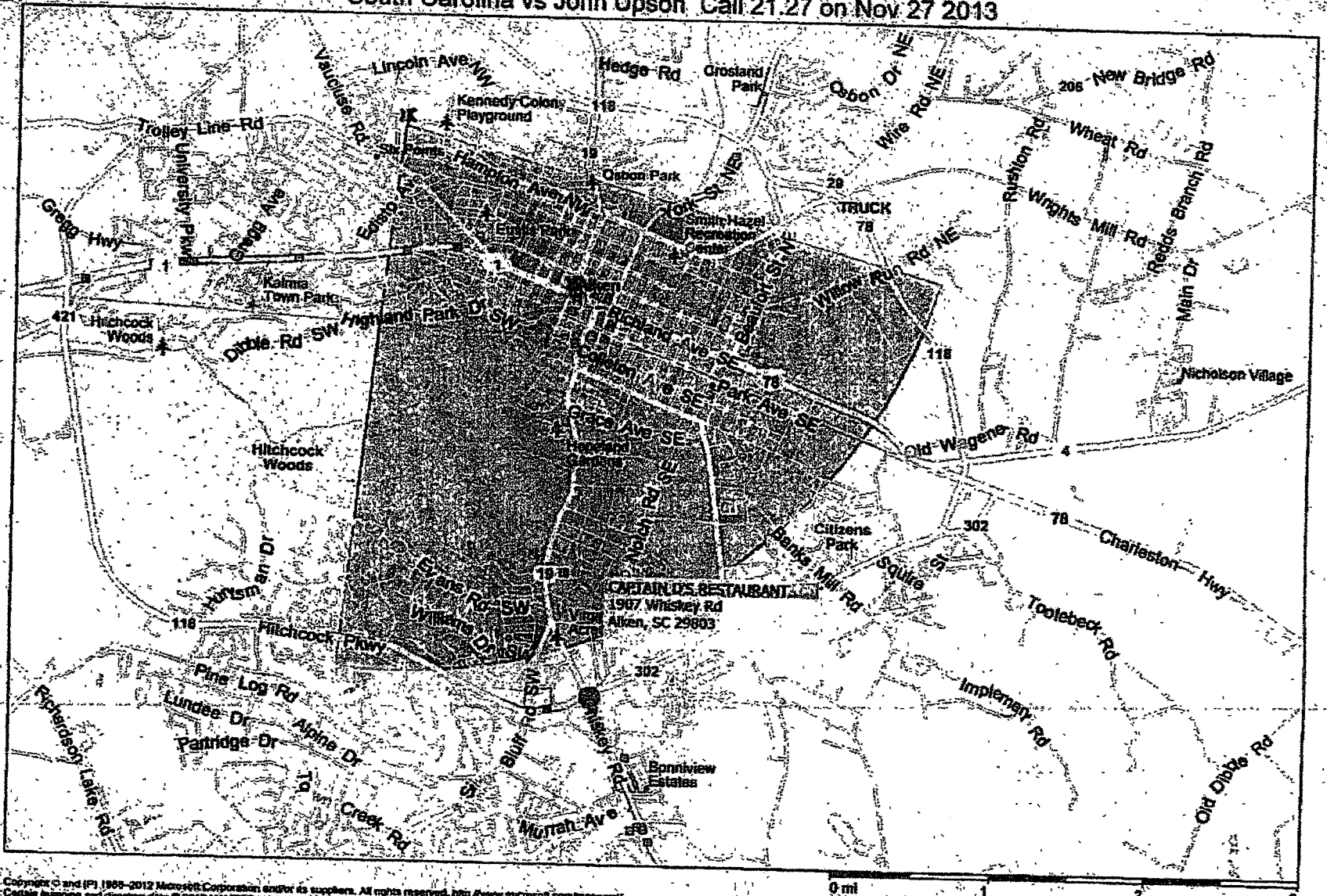
1b



APP'X 469

Glass Misrepresentation  
of Incident  
Location

South Carolina vs John Upson, Call 21.27 on Nov 27 2013

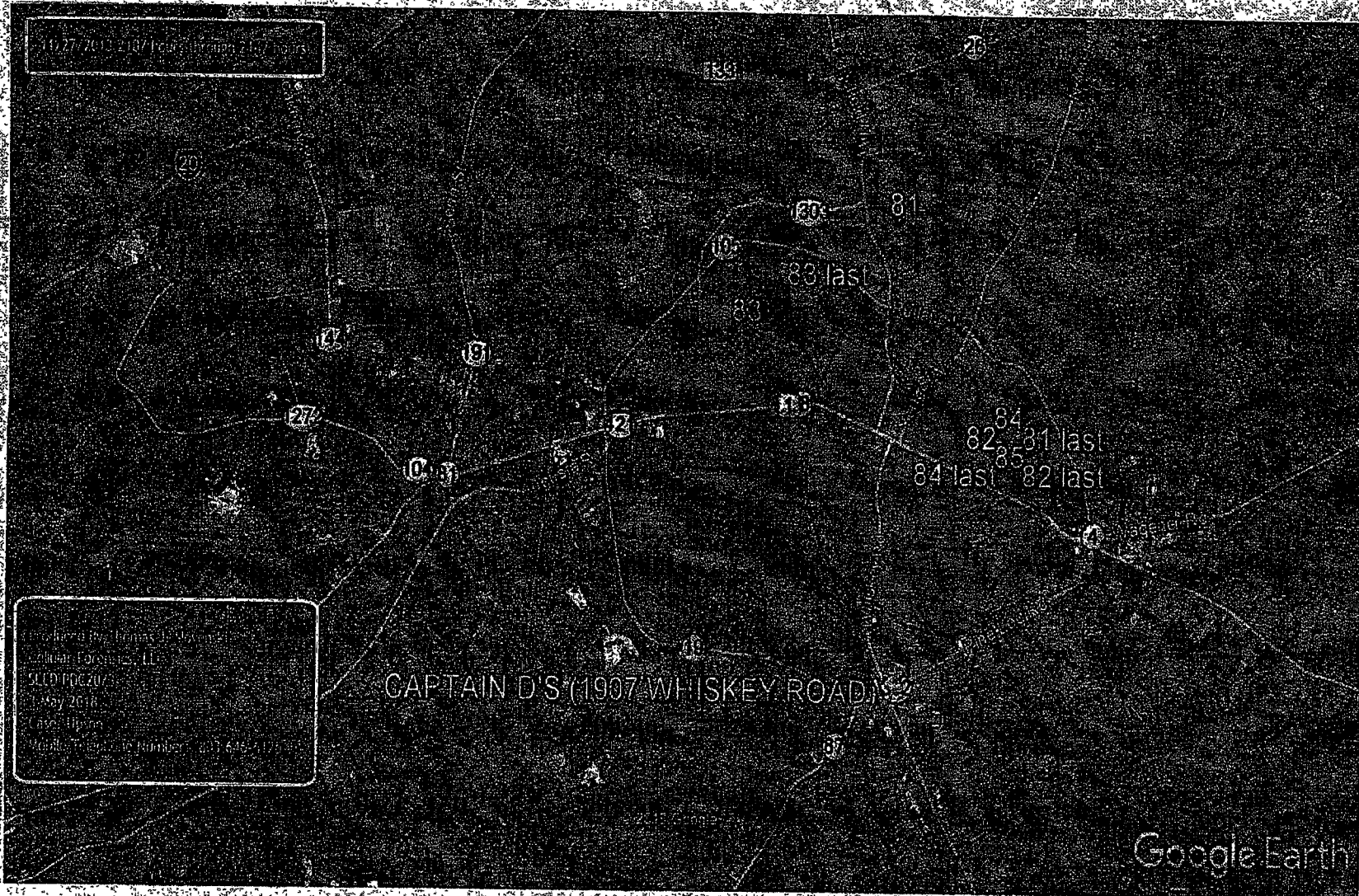


APP'X 470

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11/27/13  
2107-2147  
INACGRATE (STAR)

2



11/27/2013 2107-2147  
11/27/2013 2107-2147  
11/27/2013 2107-2147  
11/27/2013 2107-2147  
11/27/2013 2107-2147  
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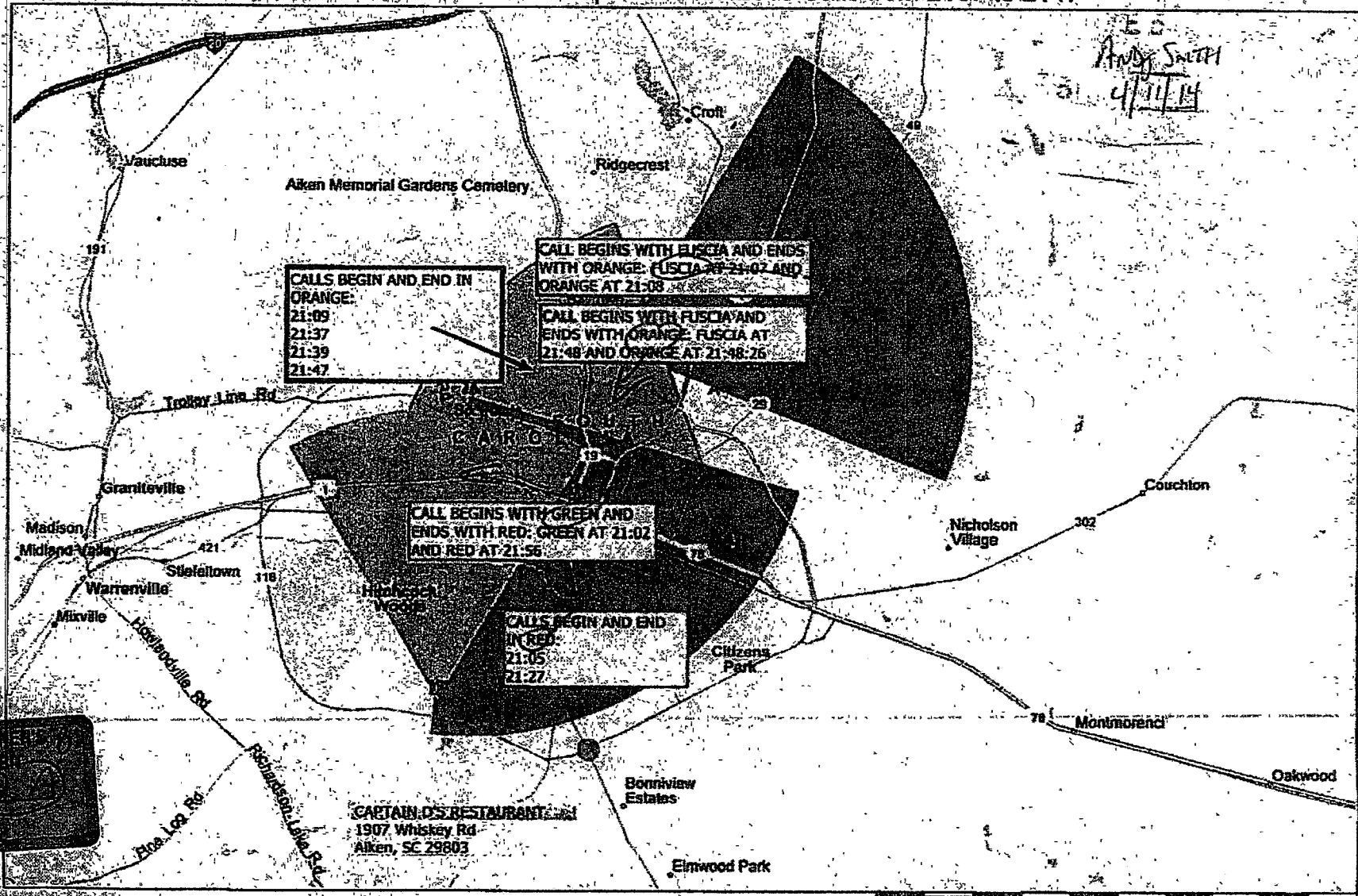
APPX 477



20

# South Carolina vs John Upson 11.27.2013 Calls from 2107 to 2147

ES  
ANDY SMITH  
4/11/14

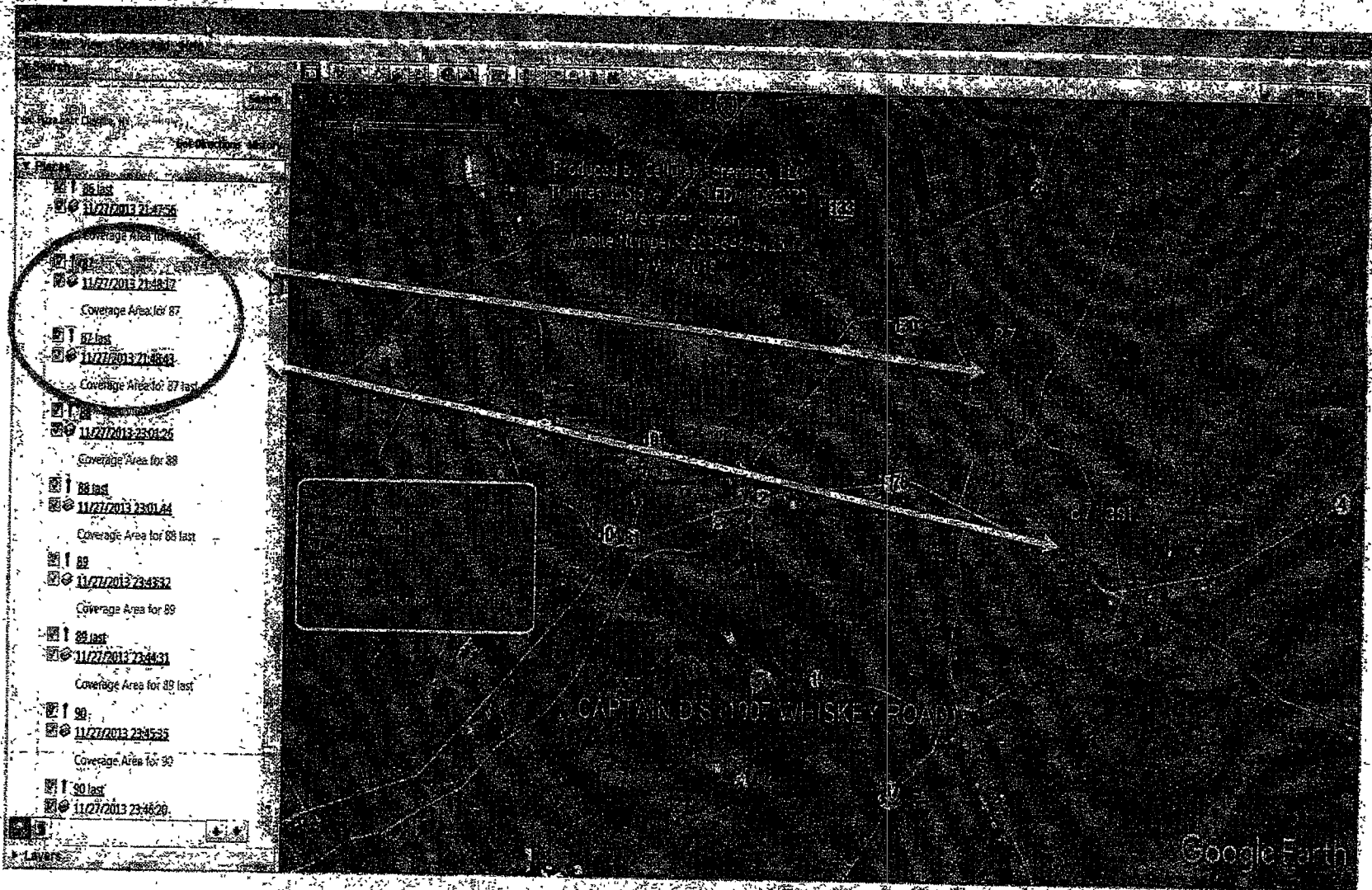


**CAPTAIN'S RESTAURANT**  
1907 Whiskey Rd  
Aiken, SC 29803

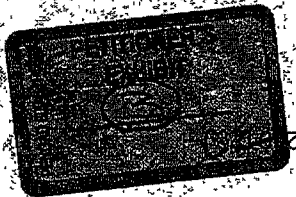


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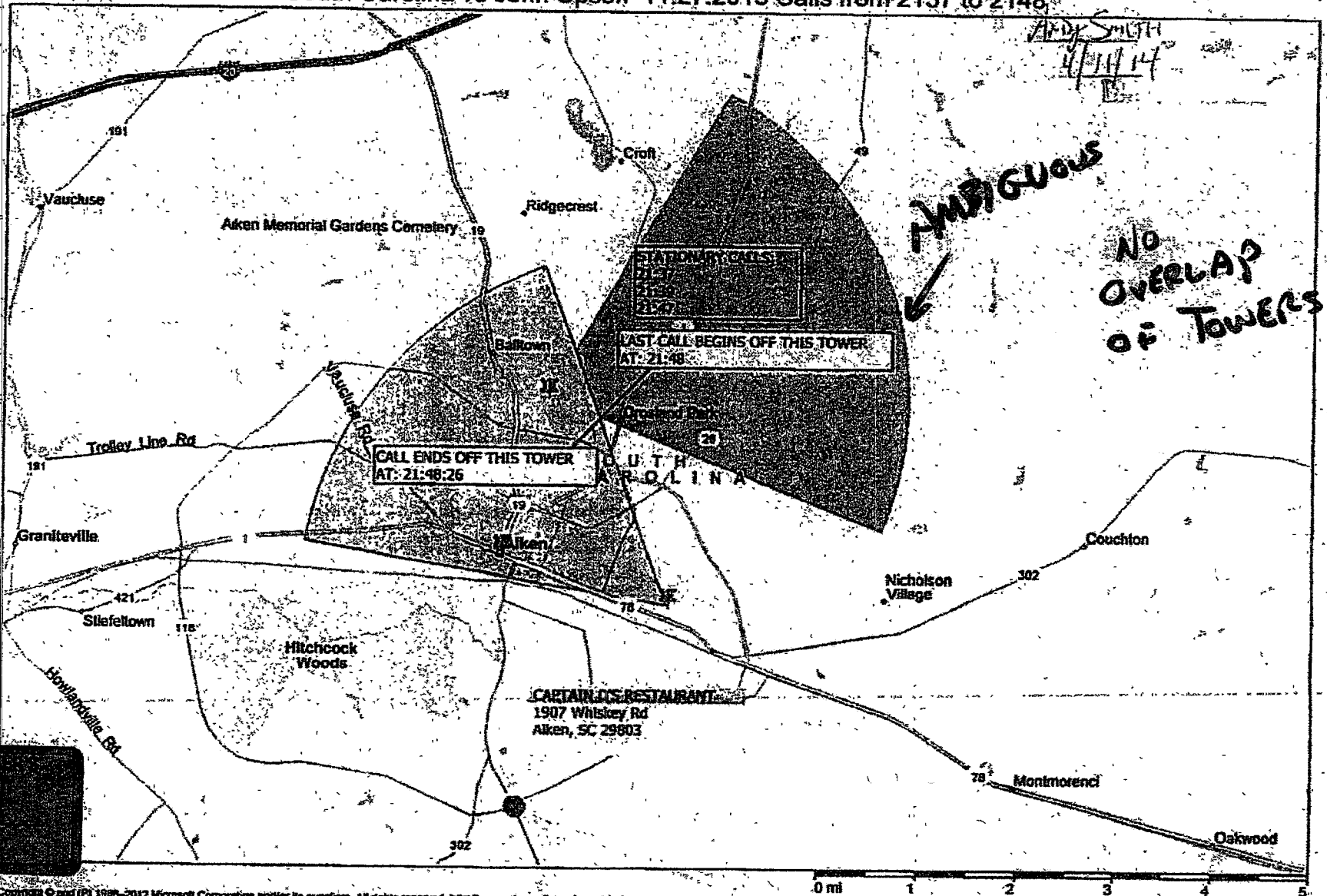
APPENDIX 2



APPX 473



South Carolina vs John Upson 11.27.2013 Calls from 2137 to 2148



Andy Smith  
11/14/14

AMBIGUOUS

NO OVERLAP OF TOWERS

CALL ENDS OFF THIS TOWER AT: 21:48:26

LAST CALL BEGINS OFF THIS TOWER AT: 21:48

STATIONARY CALLS  
21:37  
21:38  
21:40  
21:41  
21:42  
21:43  
21:44  
21:45  
21:46  
21:47

CAPTAIN'S RESTAURANT  
1907 Whiskey Rd  
Aiken, SC 29803

APP

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STATE OF SOUTH CAROLINA )  
COUNTY OF AIKEN )

IN THE COURT OF COMMON PLEAS  
DOCKET NO.: 2017-CP-02-0129

JOHN UPSON #229134 )  
Applicant, )

**ORDER GRANTING POST-  
CONVICTION RELIEF**

v. )

STATE OF SOUTH CAROLINA, )  
Respondent.)

THIS MATTER is now before the Court pursuant to an Application for Post-Conviction Relief filed on January 23, 2017. The State filed their Return on May 16, 2017. Present before the Court is Julie Coleman, Esq. from the Office of the Attorney General representing the Respondent. The Applicant was present represented by his attorney Tommy A. Thomas. Witnesses for the Applicant, Tom Slovenski and for the Respondent, Second Circuit Public Defender De Grant Gibbons were also present.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Aiken County. In January 2014, the Aiken County Grand Jury indicted Applicant for Armed Robbery (2017-GS-02-0074) and two counts of Kidnapping (2014-GS-02-0079, 0080). Andrew Smith, Esquire represented Applicant. Solicitor James Strom Thurmond, Jr., Esquire prosecuted the case. On April 15-16, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker. The jury found Applicant guilty as indicted. Judge Hocker-sentenced Applicant to imprisonment for concurrent terms of twenty years each for Armed Robbery and Kidnapping.

1 *RSS*

APP'X 475

Applicant filed a timely notice of appeal. John H. Strom, Esq., of the Office of Appellate Defense perfected the appeal. The issue raised on Appeal was the trial court erred in denying Petitioner's directed verdict motion where the evidence presented at Appellant's trial and inferences arising therefrom were not sufficient to establish that money or property belonging to Captain D's Seafood was forcibly taken from the person or in the presence of Devin Johnson. The South Carolina Court of Appeals affirmed Applicant's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the Circuit Court on June 17, 2016.

In the 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 fully cross-examine Jameshia Alston."
  - b. "Failure to ask for Neils v. Biggers hearing."
  - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright and Brenda Smith."
  - d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
  - e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14<sup>th</sup> and 6<sup>th</sup> Amendments were violated by the confrontation clause."
  - f. "Failure to object to in-court identification."
  - g. "Failure to object to bolstering by the State during closing arguments."

#### TESTIMONY

##### John Upson

The Applicant, John Upson, took the stand and testified that he was serving time for Armed Robbery and two counts of Kidnapping. That he received a twenty (20) year

concurrent sentence for two counts of kidnapping and one count of Armed Robbery. The Applicant testified that he did not commit this crime and that his theory of defense in this case was an alibi. That he was not present at the scene of the incident. The Applicant further testified that this case revolved around a misidentification. That he was identified by the witness, Jameshia Austin, who was in the back of the restaurant at the time. That she found him on the internet after she left work and identified him as one of the individuals involved in the Robbery. (Trial Tr. p. 56, lines 5-25). That Ms. Austin testified at Trial that one of the things that helped her to identify the applicant was that he had a "lazy eye". (Trial Tr. p. 58, lines 1-3) He stated that he felt there was confusion and confliction in statements she had given to the police. That she recognized one of the individuals involved in the Robbery but didn't know his name. (Trial Tr. p. 64, lines 4-8) She discovered the name of this individual after she got home and looked on Facebook. (Trial Tr. p. 61, lines 11-21). Ms. Austin testified that she was shown a list of names. (Trial Tr. p. 33, lines 22-24) and that the Applicant believed that this was suggested by the Police. Ms. Austin found the name of the Applicant through one of her co-workers, William Keels and that she found the Applicant through Mr. Keel's friends on Facebook. (Trial Tr. p. 65, lines 13-25) The Applicant pointed out that the police did not conduct a photo lineup. The Applicant testified that trial counsel did not file a Pre-Trial Motion to Suppress the identification and that there was no cross-examination of the testimony of this witness regarding the identification of the "lazy eye". (Trial Tr. p. 77, lines 14-17)

In addition, the Applicant testified that there was a discrepancy in the described height of the suspect. The Applicant is 5 feet 7 inches tall. The witness testified that the suspect was 6 feet tall. (Trial Tr. p. 87, lines 5-7)

Regarding the alibi defense, the Applicant testified that he was at a comedy show at the Aiken Center for the Arts and the show was scheduled to start at 8:00 p.m. After the show, he attended a party at a local bar that started at 11:00 p.m.

The Applicant stated that the State attempted to place him at the scene of the Robbery through the use of his cell phone data. He believed that the testimony given by ATF (alcohol, tobacco and firearms) regarding cell phone information was misleading. (Trial Tr. p. 136-163) The Applicant testified that he thought that his Defense Attorney was ineffective for no cross examination to point out discrepancies in this cell phone information. That had counsel conducted a proper investigation, it could have shown that the State's evidence did not place him at the location at the time of the incident.

The Applicant also stated that the Directed Verdict Motion was raised and that the issue was that there was no testimony that any money was taken from the scene. The Applicant finally testified that he thought it was important that Devin Johnson did not come to Court and that he did not testify (Trial Tr. p. 170, lines 1-5, p. 175-179)

Tom Slovenski

Testimony was then presented from Tom Slovenski, of Cellular Forensics. Mr. Slovenski was qualified by the Court as an expert in the field of mobile phone forensics. Mr. Slovenski testified that he had obtained copies of the raw data that was provided to ATF by Verizon Wireless. That this was the same data that had been provided to the Aiken County Sheriff's Department and that this was the same data that had been testified to in Court. Mr. Slovenski stated that he had examined the data and the maps that were given to him from Aiken County. That one peculiarity that he noticed in the data and maps was that there were no reference point, creating concerns and question

*PSS*

with the data. That these maps had been generated by an older software product called Pin Link and that there are certain problems that can be associated with the use of Pin Link. One problem is that they are very susceptible to human error. Mr. Slovenski testified that as a result the data did not match the testimony in Mr. Upson's case. It appeared that there was an over estimate of coverage regarding the cell phone towers in question.

He was able to accomplish a more accurate coverage identification than the older use of Pin Link. Upon running his data, none of the data encompassed the location of Captain D's. That contrary to the testimony and presentation at Mr. Upson's trial, there was no data that showed him in the specific area of Captain D's. In fact, he identified a cell phone tower that was closer to the location in question than that used by the ATF expert. That the data revealed no pings off that tower. Mr. Slovenski testified that had he been called as a witness in this trial, that he could have raised serious doubt and question as to the validity of the State's cell tower evidence.

Mr. Slovenski further testified that a cell phone tower operate more like a cloud, rather than directional wedges aka Pie method. That it is inaccurate to draw a wedge from a cell phone tower that would potentially encompass a location. Data received or sent from a certain tower, does not necessarily mean that it is being sent or received from the side of the tower from which the wedge is drawn. This is all a matter of capacity and not just location. That the only way to have been able to exactly locate where a cell phone is, would be through PCMD (Per Call Measurement Data) records and that these are kept only for a short period of time. This data was never obtained by law enforcement in this case.

**Trial Counsel**

Trial Counsel was unable to testify as he has relocated out of state. He was unable to travel back to South Carolina for testimony. The State made a Motion to allow testimony by trial counsel by telephone. Counsel for the Applicant objected to this on the basis that the telephone would not allow him to show counsel documents and effectively cross-examine counsel. This matter was brought before the Court and the Court ruled that testimony would not be allowed in this case by telephone. However, the record was left open for thirty (30) days to add Trial Counsel's testimony if necessary. The State elected not to submit additional testimony.

**De Grant Gibbons**

Second Circuit Public Defender De Grant Gibbons was co-chair in the trial of this case. Mr. Gibbons testified that he met with the Applicant the day before trial. That Mr. Smith met with the Applicant on other occasions. That the theory of defense was alibi. Also that identification was an important issue. That there was a question as to whether Mr. Upson could have left the club at any given time and could have been involved in the robbery. He testified that that is why the cell phone records were important. He testified that it was not a bad Alibi Defense. That he did have another attorney in his office who had knowledge of cell phone data. This attorney reviewed this information as it was received from the State.

**DISCUSSION OF LAW**

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that 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, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E 2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. At 117, 386 S.E. 2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. At 117-18, 386 S.E.2d at 625.

#### CONCLUSIONS OF LAW

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon his or her credibility. This Court has

7 *RSS*

APP'X 481

weighed the testimony accordingly. Further, the Court has reviewed the Clerk of Court's records regarding the subject's convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the Application for Post Conviction Relief and the legal arguments made by counsel.

Therefore, this Court makes the following findings of fact based upon all of the evidence presented.

The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the Applicant's claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.

Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the Applicant was a key issue at trial.
2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the Applicant's name. Counsel for the Applicant failed to challenge this by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial.
3. The Court is particularly concerned with the testimony regarding Applicant's "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the Applicant failed to challenge this on cross-examination.
  - a. The Court observed the Applicant at the evidentiary hearing and had the opportunity to personally study the Applicant's facial features. The

Court found that the Applicant clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the Applicant's conviction.

4. The Applicant also asserted an alibi defense that the State discredited through expert testimony that Counsel for the Applicant failed to challenge.

a. At the evidentiary hearing, the Applicant presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."


This Court specifically finds and concludes that both prongs of Strickland have been met by the Applicant. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the Applicant.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be granted and that the Applicant's sentence be vacated; and
2. That the Applicant be released from the custody of SCDC and transferred to the custody of Aiken County pending the disposition of his case.
3. That any and all allegations not specifically addressed in this order are dismissed.

AND IT IS SO ORDRED this 13 day of July, 2018.

*Wallulla, SC*  
Aiken County

  
The Honorable R. Scott Sprouse  
Judge of the Second Judicial Circuit

STATE OF SOUTH CAROLINA )  
COUNTY OF AIKEN )  
JOHN UPSON #229134 )  
Applicant, )  
v. )  
STATE OF SOUTH CAROLINA, )  
Respondent.)

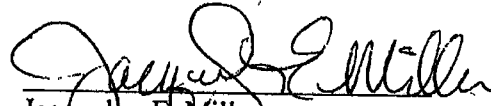
IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2017-CP-02-0129

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Esq., certify that I have served a copy of an Order Granting Post-Conviction Relief by depositing a copy of it in the United States Mail, postage prepaid and the return address clearly shown on said envelope to:

Julie Coleman, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549



Jacquelyn E. Miller  
Tommy A. Thomas, Esq.  
Attorney at Law  
7588 Woodrow Street  
P.O. Box 88  
Irmo, S.C. 29063  
(803) 732-5507

July 18, 2018

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )  
 )  
JOHN UPSON #229134 )  
 )  
Applicant, )  
 )  
v. )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Respondent.)

IN THE COURT OF COMMON PLEAS  
DOCKET NO.: 2014-CP-02-0129  
2017CP02 00129

**AMENDED  
ORDER GRANTING POST-  
CONVICTION RELIEF**

THIS MATTER is now before the Court pursuant to an Application for Post-Conviction Relief filed on January 23, 2017. The State filed their Return on May 16, 2017. Present before the Court is Julie Coleman, Esq. from the Office of the Attorney General representing the Respondent. The Applicant was present represented by his attorney Tommy A. Thomas. Witnesses for the Applicant, Tom Slovenski and for the Respondent, Second Circuit Public Defender De Grant Gibbons were also present.

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*RCS*

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**TESTIMONY**

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Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that 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, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. At 117, 386 S.E. 2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. At 117-18, 386 S.E.2d at 625.

**CONCLUSIONS OF LAW**

This Court has had the opportunity to review the entire record and has heard the testimony and arguments as presented at the hearing. This Court has also had the opportunity to observe each witness and pass upon his or her credibility. This Court has

weighed the testimony accordingly. Further, the Court has reviewed the Clerk of Court's records regarding the subject's convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the Application for Post Conviction Relief and the legal arguments made by counsel.

Therefore, this Court makes the following findings of fact based upon all of the evidence presented.

The Court finds and concludes that pursuant to §17-27-20, S.C. Code of Laws (1976 as amended), this Court has the authority and jurisdiction to hear the Applicant's claim and make a ruling pursuant to the Uniform Post-Conviction Procedure Act.

Therefore, based upon the foregoing, the Court finds and concludes:

1. The identification of the Applicant was a key issue at trial.
2. In making the identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook before speaking with law enforcement. When she did speak with law enforcement, she was presented with a list of names that included the Applicant's name. Counsel for the Applicant failed to challenge this by either requesting a *Neil v. Biggers* hearing or by objecting to its admission at trial.
3. The Court is particularly concerned with the testimony regarding Applicant's "lazy eye." The testimony provided a significant basis upon which the State's witness relied in making her identification. Once elicited at trial, Counsel for the Applicant failed to challenge this on cross-examination.
  - a. The Court observed the Applicant at the evidentiary hearing and had the opportunity to personally study the Applicant's facial features. The

Court found that the Applicant clearly did not have a "lazy eye." The Court is concerned that this evidences a misidentification that led to the Applicant's conviction.

4. The Applicant also asserted an alibi defense that the State discredited through expert testimony that Counsel for the Applicant failed to challenge.

a. At the evidentiary hearing, the Applicant presented an expert witness whose testimony created significant doubt regarding the accuracy of the unchallenged testimony of the State's expert witness and the usage of the "pie method."

This Court specifically finds and concludes that both prongs of Strickland have been met by the Applicant. Trial Counsel's performance is deficient for the reasons as set forth above and that trial counsel's deficient performance has prejudiced the Applicant.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be granted and that the Applicant's sentence be vacated; and
2. That the Applicant be released from the custody of SCDC and transferred to the custody of Aiken County pending the disposition of his case.
3. That any and all allegations not specifically addressed in this order are dismissed.

AND IT IS SO ORDERED this 7 day of August, 2018.

  
The Honorable R. Scott Sprouse  
Judge of the Second Judicial Circuit

Aiken County

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN

John Lyndon Upton, #229134,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

2017-CP-02-0129

**MOTION TO ALTER OR AMEND  
PURSUANT TO RULE 59(e)**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 24, 2017. Respondent made its Return on May 16, 2017. An evidentiary hearing was held on May 8, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and represented by Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman, Esquire, of the South Carolina Attorney General's Office. This Court issued an order granting post-conviction relief, which was amended by an order signed August 7, 2018, filed August 10, 2018, and served on Respondent August 10, 2018. Respondent now respectfully moves for the Court to reconsider its order granting PCR based on the following:

**I. PROCEDURAL HISTORY AND ALLEGATIONS**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. In January 2014, the Aiken County Grand Jury indicted Applicant for armed robbery (2017-GS-02-0074) and two counts of kidnapping (2014-GS-02-0079, -0080). Andrew Smith, Esquire represented Applicant. Assistant Solicitors Jeffrey A. Slocum, Jr., Esquire, and Kevin Molony, Esquire, prosecuted the case. On April 15-16, 2014, Applicant proceeded to trial before the Honorable Donald B. Hocker. The

jury found Applicant guilty as indicted. Judge Hocker sentenced Applicant to imprisonment for concurrent terms of twenty years each for armed robbery and kidnapping.

Applicant filed a timely notice of appeal. John H. Strom, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 1, 2016. State v. Upson, Op. No. 2016-UP-237 (S.C. Ct. App. filed June 1, 2016). The remittitur was returned to the circuit court on June 17, 2016.

Applicant filed his timely application for post-conviction relief on January 24, 2017, alleging that he was being held unconstitutionally based on the following allegations:

1. Ineffective assistance of trial counsel
  - a. "Failure to fully cross-examine Jameshia Alston."
  - b. "Failure to ask for Neils v. Biggers hearing."
  - c. "Failure to subpoena alibi witnesses Ivory Corley, Nicole Bright, and Brenda Smith."
  - d. "Failure to fully put the State's case to the test/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant."
  - e. "Failure to object to Applicant being charged and standing trial for armed robbery when the 14<sup>th</sup> and 6<sup>th</sup> Amendments were violated by the confrontation clause."
  - f. "Failure to object to in-court identification."
  - g. "Failure to object to bolstering by the State during closing arguments."

## II. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

### III. ARGUMENT

Respondent respectfully moves this Court to alter or amend the final order granting post-conviction relief based on the following reasons:

*Failure to request a Neil v. Biggers hearing to challenge Victim's identification of Applicant*

Respondent submits the Court erred in finding Trial Counsel ineffective for failing to request a Neil v. Biggers hearing to challenge the Victim's identification of Applicant because the Victim's identification of Applicant as the robber was made after her own, independent investigation and could not have been influenced by law enforcement.

Neil v. Biggers, 409 U.S. 188 (1972) allows criminal defendants to suppress testimony concerning an out-of-court identification if it resulted from a confrontation procedure by law enforcement that was unduly suggestive, resulting in a substantial likelihood of misidentification.

“When a defendant challenges the admissibility of a witness's identification, trial courts employ a two-pronged inquiry to determine whether due process requires suppression.” State v. Wyatt, 421 S.C. 306, 310–11, 806 S.E.2d 708, 710 (2017) (citing Biggers, 409 U.S. at 198-200; State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012)). “First, the court must determine whether the identification resulted from ‘unnecessarily suggestive’ police identification procedures.” Id. (citing Biggers, 409 U.S. at 198-99; Liverman, 398 S.C. at 138, 727 S.E.2d at 426). “The Supreme Court of the United States has repeatedly emphasized ‘that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary.’” Id. (citing Perry v. New Hampshire, 565 U.S. 228 (2012); Manson v. Brathwaite, 432 U.S. 98, 107, 109 (1977); Biggers, 409 U.S. at 198); see also Liverman, 398 S.C. at 138, 727 S.E.2d at 426 (describing the trial court's task under the first prong as determining “whether the identification resulted from unnecessary and unduly suggestive police procedures”). “If the court finds the police procedures were not suggestive, or that suggestive procedures were necessary under the circumstances, the inquiry ends there and the court need not consider the second prong.” Id.; See United States v. Sanders, 708 F.3d 976, 984 (7th Cir. 2013) (citing Perry for the proposition that “courts will only consider the second prong if a challenged procedure does not pass muster under the first”); State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013) (same).

In Applicant's case, however, Biggers does not even apply, because the identification was not made after any sort of law enforcement confrontation procedure. In fact, law enforcement was not involved in any way in the Victim's identification of the robber until *after* the Victim made her identification. Therefore, the identification process could not possibly be unduly suggestive. This Court even found in the Order Granting PCR that “In making the

identification, the State relied upon the testimony of a witness who pulled a photograph from Facebook *before speaking with law enforcement.*" Order at 8 (emphasis added). It is undisputed that the Victim's identification was made based on her own independent investigation on Facebook without any assistance from law enforcement. Her trial testimony showed she found a photograph of the robber on Facebook, matched the photograph to his name, and then provided the photograph and name to law enforcement herself. Accordingly, because law enforcement was not even involved with the identification, it cannot be suppressed as an unduly suggestive police procedure.

Because the facts of this particular identification do not qualify as a police procedure, the first prong of the Biggers test need not even be analyzed. Regardless, in analyzing the first prong, because the police procedures were not suggestive, the Court's inquiry must end there without turning to the second prong or suppressing the evidence under Biggers.

Accordingly, Trial Counsel cannot be deficient for failing to request a Biggers hearing to move to suppress the Victim's identification, because this request would be completely unnecessary, as Biggers does not even apply to this situation. Similarly, there can be no resulting prejudice from Trial Counsel's failure to make this motion because the motion would not have been successful. The Victim's identification of Applicant as the robber was completely admissible, and Trial Counsel cannot be ineffective for failing to move to suppress it. Accordingly, this Court should deny post-conviction relief.

*Failure to challenge Victim's testimony about Applicant's "lazy eye"*

Respondent submits the Court erred as a matter of law in finding Trial Counsel was ineffective for failing to challenge the Victim's testimony about Applicant's "lazy eye" because Trial Counsel made an adequate challenge to the accuracy of her identification at trial, and his

failure to emphasize the potential non-existence of a "lazy eye" does not rise to the level of deficiency.

At trial, the Victim made an in-court identification of Applicant as the robber of the store. Tr. 55-56. She also testified that she saw the robber's eyes and nose during the robbery while she was being held hostage, and she recognized him as a customer who had been in the store two days before the robbery, when he ordered a large Sprite and took a picture with his friend, who worked there. Tr. 56. She testified she went home immediately after the robbery and did her own independent research on the internet. Tr. 56-57. The Victim testified that she found pictures of the man she recognized as the robber on her co-worker's Facebook page, and she made a note of his name and sent his name to law enforcement. Trp. 57. She testified that she knew it was him because it's her job to remember her customers, and she remembered his eye. "Like, that's the thing that caught me, his eye and his bald head." Tr. 58, line 1-3. She testified "He has a lazy eye. It's kind of droopy, like that." Tr. 77, line 17.

This Court granted post-conviction relief, finding Trial Counsel was ineffective for failing to challenge the Victim's testimony about his "lazy eye," because the Court had the opportunity to observe Applicant and found he did not have a lazy eye. However, Trial Counsel was not deficient because he did extensively challenge the Victim's identification of the robber, and there was no resulting prejudice.

First, Trial Counsel was not deficient. He cross-examined the Victim at trial about her identification of the robber, and how he was wearing a hood and a bandana around his face. Tr. 68 - 76. In his closing argument, Trial Counsel extensively challenged the Victim's identification of the robber. Tr. 210 - 224. He pointed out that the robbers had their faces partially covered, and all that was visible was their nose and eyes. Tr. 213. Trial Counsel played

a “game” with the jury throughout his closing argument, which De Grant Gibbons opined at the evidentiary hearing was very effective, where he covered up everything but the nose and eyes on pictures of celebrities and asked the jury to figure out who they were. He compared this exercise to the Victim’s experience, except he pointed out that the Victim did not know Applicant other than a brief interaction with him as a customer two days before the robbery.

Trial Counsel clearly challenged the Victim’s identification of the robber very thoroughly. Just because he did not specifically challenge her description of a “lazy eye” does not mean his cross-examination and closing argument rise to the level of deficiency. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Respondent submits Trial Counsel was not deficient on this ground.

Secondly, there is no resulting prejudice from Trial Counsel’s failure to emphasize the lack of a “lazy eye” because the jury was able to view Applicant from a close distance and judge for themselves whether or not he had a “lazy eye” even without Trial Counsel’s instruction to do so. The jury was present in the courtroom and undoubtedly examined Applicant for themselves to develop their own opinion. And, regardless of whether or not Applicant had a proper “lazy eye,” the Victim made a clear, independent identification of Applicant as the robber because she recognized him as a customer from two days prior. The testimony also showed Applicant was