

VOLUME II OF III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Lexington County

S.C. SUPREME COURT

Honorable Perry H. Gravely, Circuit Court Judge

RICKY ESAW,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001407

APPENDIX

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1 Q. Okay. And what was the purpose of that?

2 A. We had been out on scene for a while, and we
3 just wanted to get him back to sit down and have
4 something to eat, a drink, and continue with our
5 conversation.

6 Q. And what was -- based on the conversation that
7 you and Andaloro were having with Mr. Pitts, what
8 was Mr. Sowards doing, if you know?

9 A. Mr. Pitts gave me his events of that afternoon
10 on Sunday of the homicide, and I followed up on his
11 events by calling Detective Sowards to follow his
12 alibi, and we went to his alibi witnesses to
13 confront them.

14 Q. And did Mr. Pitts' alibi check out?

15 A. No, it did not check out. I don't believe
16 that -- because as late at night it was, he thought
17 we wouldn't go and check -- wake people up and check
18 on his alibi, and we did.

19 Q. And are you aware if Mr. Pitts' cooperation
20 changed?

21 A. He did. Once we checked out his alibi and
22 found out that he was absolutely not telling the
23 truth about this, his whole demeanor changed.

24 Q. Was there a decision made to place him under
25 arrest? And I'm talking about Mr. Pitts.

1 A. Yes.

2 Q. And what was he arrested for?

3 A. Obstruction of justice.

4 Q. And what was the basis for that?

5 A. Giving a false statement to law enforcement.

6 Q. And any other conversations with Mr. Pitts that
7 evening that led you out of the county again?

8 A. Yes.

9 Q. Can you tell us about that?

10 A. He made the statement to us that he was there
11 and said that Mr. Esaw was there with him and that
12 if I -- if he could talk to his mother, he'd feel
13 better and want to continue on.

14 Q. And after he asked for his mom, what did you
15 do?

16 A. It was real early in the morning at that time,
17 I'm thinking 6:00 -- 5:30, 6:00 a.m. And I went out
18 and discussed this with Detective Sowards and I said
19 I think we need to get his mother.

20 Q. Is that common practice or uncommon practice?

21 A. I normally don't go get somebody's mother to
22 come and talk to them. But I felt at this time he
23 wanted his mother, he trusts his mother's decision,
24 and he was involved in a violent crime. I wanted --
25 if it made him feel better, I wanted him to have his

1 mother to talk to.

2 Q. And did y'all go get his mom?

3 A. I did.

4 Q. Okay. And do you remember who was with you?

5 A. Went to get his mother that morning. I know it
6 was Creech and I.

7 Q. Okay. And --

8 A. Detective Creech. I'm sorry.

9 Q. -- did you get -- did you allow his mom to meet
10 with Mr. Pitts?

11 A. I allowed his mom and Mr. Pitts to talk in a
12 private room.

13 Q. And after that conversation between them, did
14 you take any other statements from Mr. Pitts at that
15 time?

16 A. His mother came out -- and I already explained
17 to the mother that he was involved in something that
18 night of August 9th and I wanted him to tell her
19 what his involvement is. And when she came out of
20 that room, she looked at me and said, Detective
21 Moore, I think my son needs a lawyer.

22 Q. And did you cease the interview at that time?

23 A. I stopped the interview at that time.

24 Q. All right. After this, I think that brings us
25 maybe to Thursday. Do you recall if you had another

1 occasion to meet with Christy and Franklin?

2 A. I did.

3 Q. Can you tell us what was the purpose of this
4 meeting?

5 A. I had our Intel unit to do up a six-man lineup
6 photograph of Ricky Esaw and Wilfred Akiem Pitts,
7 and threw me up a lineup and I was going to go back
8 to the family and show them that lineup that
9 Thursday morning.

10 Q. Okay. Can you tell us how a lineup procedure
11 is done and how it was done in this case?

12 A. Yes. Our procedure with lineups is we do a
13 six-man lineup. And I think we already showed it to
14 the jury, it's of -- this particular six-man lineup
15 of Esaw, it's a black male about his size in height
16 and weight, about the haircut in parts and beard.
17 And we do them in black and white so there's no
18 color or anything that would change up of anybody.

19 We produce it. And this particular lineup, I
20 knew I wanted to be absolutely correct, so one of
21 the supervisors at the sheriff's office came in
22 Intel and asked me how the case was going. I told
23 him doing pretty good, I wanted him to look at the
24 lineup, and with his eyes is there any problems with
25 the lineup, and he said, no, everything looked good

1 with both sets of lineups.

2 Q. And when you went to meet Christy and Franklin,
3 do you remember where y'all were?

4 A. We went to Aiken County on Wagon Wheel Road --
5 School -- Wagon Wheel Road. And I believe it's the
6 uncle's house.

7 Q. And who was with you?

8 A. That particular morning it was Detective
9 Creech, myself, and Barry Sowards.

10 Q. Okay.

11 A. And Detective Creech -- I'd like to make out a
12 point here: Detective Creech went with us. We
13 carried the mama back, Pitts' mother back, who lived
14 in Newberry, and then we went over to the family's
15 house.

16 Q. Okay. And when you met with Christy and
17 Franklin, do you remember who showed the lineups
18 first to?

19 A. Yes. I showed the lineup first to Franklin.

20 Q. Okay. And is there some reason you picked
21 Franklin over Christy or --

22 A. No. No.

23 Q. And what instructions did you give Franklin?

24 A. Usually, I try to keep everything routine. I
25 try to do everything routine when it comes to

1 showing photo lineups, taking statements.

2 Everything I do is routine so I know when I come to
3 court or if I have to tell somebody, it's exactly
4 right and the same every time.

5 On victims, I like to talk to them just for a
6 minute. And then before I show them the lineup, I
7 want to tell them a couple things, is take your
8 time, close your eyes, picture the incident, and
9 then when you're ready, open them and point at -- or
10 see the lineup, and that your defendant may -- or
11 suspect may or may not be on this lineup.

12 Q. Are those the instructions you gave Franklin?

13 A. I did.

14 Q. If I can show you State's 4 that's in evidence,
15 do you recognize that?

16 A. I do. This is the lineup of Ricky Esaw.

17 Q. And is that -- was that shown to Franklin?

18 A. It was.

19 Q. And did Franklin pick anyone?

20 A. Once he opened his eyes, he immediately went to
21 number 2 and picked Ricky Esaw.

22 Q. And did he sign in writing on that?

23 A. Signed it, dated it, and he turned it back to
24 me.

25 Q. If I can show you State's 5, do you recognize

1 that?

2 A. I do.

3 Q. And what is that?

4 A. This is the lineup with King Pitts in it. And
5 this lineup is a little bit -- we got bigger males
6 in it because he was a lot bigger than Esaw.

7 Q. And did Franklin pick anyone out of that
8 lineup?

9 A. He could not recognize anybody out of that
10 lineup.

11 Q. And if I can show you State's 9, do you
12 recognize that?

13 A. Yes.

14 Q. What is that?

15 A. Another picture of lineup with Ricky Esaw in it
16 that we showed Christy, the mom.

17 MS. MARTIN: And, Your Honor, I think we've
18 neglected to put this is, but we would put in
19 State's 9.

20 THE COURT: Any objection?

21 MR. CHEHOSKI: Your Honor, if it's -- subject
22 to prior objections.

23 THE COURT: Yes. I understand. Subject to
24 prior objections, State's 9 in evidence.

25 (State's Exhibit No. 9 admitted into evidence.)

1 BY MS. MARTIN:

2 Q. And was Christy ever able to pick anyone out?

3 A. No. She wasn't sure.

4 Q. And what was her demeanor?

5 A. Once again, every time I met with Christy, she
6 was just upset, and rightfully so. She just lost
7 her husband and she has four children --

8 MR. CHEHOSKI: Objection to the commentary.

9 THE COURT: I'll sustain the objection. The
10 question was --

11 THE WITNESS: Okay.

12 THE COURT: -- her demeanor. He said she was
13 upset, that answers the question.

14 MS. MARTIN: Yes. Thank you.

15 BY MS. MARTIN:

16 Q. Was there any interaction between Christy and
17 Franklin during their each viewing of the lineup?

18 A. No. I separated them both because I didn't
19 want one to overhear the other one or overhear the
20 instructions I was giving.

21 Q. And at any point did you tell the family any
22 other information in regards to people being in
23 custody?

24 A. After we done our photo lineup and the family
25 was coming back out -- because I made Christy go in

1 the house during Franklin's lineup and we done it
2 outside underneath the carport and then vice versa.
3 Once they came back out, I told them -- in fact,
4 they told me that -- I believe that that day, if my
5 memory served me correct, that they was burying
6 their father and that they was getting ready to go.

7 And I said, well, I have both of your suspects
8 in custody and I was getting warrants on them for
9 the murder of their dad and their husband.

10 Q. Okay. Is there a reason you told them that at
11 that particular time?

12 A. Because they was -- on lineups, when we show
13 lineup, it's kind of a policy -- it is a policy that
14 we don't give them any information that they do
15 right, wrong, or indifferent. And the reason that
16 we do that is because we don't want victims going to
17 hunt their perpetrator or looking for their guy or
18 might even know their guy.

19 But this particular case, I already have them
20 in jail, and because they're victims of violent
21 crime, I had to tell them that their perpetrators
22 are locked up and that we're getting warrants on
23 them and when is the bond hearing, because they have
24 the right to attend bond hearings on these people.

25 Q. On Friday -- if I can direct your attention to

1 Friday, August 14th, what, in regards to this case,
2 was done on that day?

3 A. On August 14th, the warrants was being served
4 on Mr. Pitts and Mr. Esaw.

5 Q. Okay. And when you say warrants served on
6 Mr. Esaw, were you involved in that process?

7 A. I was.

8 Q. And was anyone else with you during the --

9 A. Detective Sowards was with me.

10 Q. And we've heard some talk about two different
11 sets of warrants. Are you aware of that situation?

12 A. I am. I am.

13 Q. And is there an explanation?

14 A. Yes, ma'am, there is.

15 Q. Can you tell us why Mr. Esaw had two different
16 sets of warrants?

17 A. When the first original warrants was signed on
18 both Esaw and Pitts, they was served on them at the
19 jail. And the jail runs the original copies to the
20 magistrate's office and magistrate's office, once
21 they're done with them, transmit them to the clerk
22 of court here in this courthouse and sends the hard
23 copies or the original through mail, whether it's
24 inhouse mail or through the US Postal Office, I'm
25 not sure which way. And Clerk of Court notified us

1 that they did not receive those warrants -- those
2 particular warrants.

3 Q. So were an additional set of warrants served on
4 Mr. Esaw sometime in September?

5 A. It was. And I made up the same exact warrant
6 for each charge and we served those, the second set,
7 on both him and Pitts.

8 Q. Okay. On that Friday, where were warrants
9 served on Mr. Esaw?

10 A. On Mr. Esaw, the warrants were served at the
11 jail, Lexington County.

12 Q. Okay. And how are warrants served?

13 A. Warrants are served basically that we identify
14 ourselves to whoever we're serving the warrants to, we
15 make sure that the identifier is on the warrants,
16 name, date of birth, address, social security
17 number, is all the same --

18 Q. And --

19 A. -- then we read the top charge, what's on the
20 warrant at the top, and then the body of the
21 warrant, the affidavit. We read the affidavit to
22 them.

23 Q. And was this done in your presence with
24 Mr. Esaw?

25 A. It was.

1 Q. And what, if any, reaction did Mr. Esaw have?

2 A. Mr. Esaw was very upset during --

3 MR. CHEHOSKI: Renewing our prior objections.

4 THE COURT: Okay. I'll overrule the objection
5 to the extent he talks about Mr. Esaw's response in
6 this particular case. I think we've dealt with this
7 in several other hearings.

8 MS. MARTIN: Yes, sir.

9 THE COURT: So I'll allow that. Go ahead.

10 MS. MARTIN: Thank you.

11 BY MS. MARTIN:

12 Q. What was Mr. Esaw saying, if anything?

13 A. Like I said, he would not calm down to get the
14 warrants read to him. Had finally calmed him down,
15 and once we got the warrants read to him, he said
16 that wasn't me, I was just the driver, hell no you
17 ain't got nothing on me, okay, at the best, I may be
18 an accessory, I'm not going to let them put this rap
19 on me.

20 Q. Was that in response to any questioning by you
21 and Detective Sowards?

22 A. No.

23 Q. And after the warrants were read, what happened
24 next?

25 A. I asked him did he want to tell his side of the

1 story.

2 Q. And what was his response?

3 A. Yes, I do.

4 Q. And based on that, what did you do?

5 A. We had to sign him out of the jail, so I got
6 Detective Sowards to start the process of signing
7 him out and his process of handcuffing him,
8 restraining him. And I called Detective Creech to
9 get me an interview room so we can have an interview
10 room to take him to.

11 Q. And where is the interview room located?

12 A. It's at the sheriff's office, which is -- the
13 jail and the sheriff's office is connected;
14 sheriff's office at front, jail at rear.

15 Q. And was Detective Sowards involved in the
16 interview process in any way?

17 A. No. He helped me transport him. With that
18 type of charges, we try to run two detectives to
19 transport him to the interview room.

20 Q. And --

21 A. And I asked Adam Creech, Detective Creech, to
22 set up with me in the interview room.

23 Q. Okay. The interview room at the sheriff's
24 department is it formatted for videotaping or
25 audiotaping?

1 A. No, ma'am, it's not set up for that.

2 Q. And was any interview with Mr. Esaw videotaped
3 or audiotaped?

4 A. No, ma'am.

5 Q. Okay. And whose decision was that to not do
6 that?

7 A. The decision normally goes with the detective
8 that's running the case, which would have been me.
9 And I normally have a recorder that I put in on the
10 table for this, but since I was off on vacation and
11 I was running, I come back to that recorder at my
12 desk and it's not charged, not working.

13 Q. Was that recorder sheriff's department or
14 personal?

15 A. That's my personal recorder.

16 Q. Okay. And what was the first thing you did in
17 the interview room?

18 A. It's basically the same thing I do to every
19 suspect that I interview, is I read a statement of
20 rights to them. And, basically, I get their name,
21 identifying myself to them, getting their address,
22 their cell phone number, their age, whether they can
23 read and write. And some people think that's silly,
24 why would you have something read or write on, but
25 you want to know their education level and if they

1 can read and write. And then I read them their
2 Miranda rights.

3 Q. If I may approach you and show you State's 1
4 that's been marked for identification.

5 A. Yes, ma'am.

6 Q. Do you recognize this?

7 A. Yes, ma'am. This is Ricky Lamont Esaw's
8 statement that he gave to me on August 14th.

9 Q. Does it contain the rights that you read to
10 him?

11 A. It does.

12 Q. And how do you know that you read them off that
13 sheet?

14 A. Right here where it gives the Miranda rights --

15 MR. CHEHOSKI: Objection, Your Honor; this is
16 not in evidence.

17 BY MS. MARTIN:

18 Q. Right. Don't hold it up yet.

19 THE COURT: Thank you.

20 A. Okay. When I give him his Miranda -- excuse
21 me. When I give him his Miranda rights, I go with,
22 number 1, you have the right to remain silent. And
23 there's a blank next to it and he initials it and I
24 sign it at the number 1. That's standard practice
25 what I do. Other detectives might not do that, but

1 I always want to know that I read him his rights.

2 Two, anything I say can and will be used
3 against you in a court of law. Do you understand
4 that, Mr. Esaw? He initialed it. I initialed by 2.
5 Three, you have the right to talk to a lawyer for
6 advice before any questions and have him or her
7 present with you during any questions. Do you
8 understand that? He indicated yes. I signed beside
9 him.

10 If you have no money for lawyer fees, the court
11 will appoint one to represent you without cost. Do
12 you understand that? He did, and I initialed. If I
13 decide to answer questions at any time now without a
14 lawyer present, I will still have the right to stop
15 answering questions at any time. I also have the
16 right to stop answering questions at any time until
17 I talk to a lawyer. Do you understand that? He did
18 and did.

19 I said, at this time, after reading your
20 statement of my rights, do you understand what my
21 rights are? He did. I said, would you like to make
22 a statement to me? At this point, he's going to
23 tell me yes or no. I put the paper down and I put
24 my pen down, and I sit back and I want to hear what
25 he's got to say.

1 Q. And did he appear to understand the rights as
2 you read them to him?

3 A. Oh, yes, ma'am.

4 Q. And did he appear to be impaired in any way on
5 that Friday?

6 A. No, ma'am. That was two days after
7 incarceration. No.

8 Q. And did he indicate that he wanted to talk?

9 A. He wanted to tell his side of the story.

10 Q. Did he ever ask for an attorney like Mr. Pitts?

11 A. No.

12 Q. Were you ever alone with him in the interview
13 room?

14 A. No. Every interview, no matter who it is, we
15 always have two major crime detectives.

16 Q. And who was the one in there with y'all?

17 A. Detective Adam Creech.

18 Q. Okay. Did you make any threats to him?

19 A. No.

20 Q. Did you make threats to his family or loved
21 ones?

22 A. No.

23 Q. Did you promise him any leniency if he would
24 give a statement?

25 A. None.

1 Q. And did he, in fact, give a statement to you?

2 A. He did.

3 Q. And did he give an oral statement or a written
4 statement?

5 A. He gave both, oral and written.

6 Q. Can you tell us about his oral statement?

7 A. His oral statement is that he was telling us
8 about going to the party and that he met up with AJ
9 there at the party and Pitts, and that AJ wanted to
10 go rob, what he said, some Mexicans over at a
11 trailer park in West Columbia.

12 Q. Okay. Do you recall anything else he may have
13 said?

14 A. That -- during his oral statement, he said that
15 AJ sold marijuana to Mexicans and the Mexicans had
16 money and he wanted to go get them with their money.

17 Q. Did he express any concern that he may be
18 recognized?

19 A. He said he was recognized by the street lamp
20 that night.

21 Q. After he made an oral statement, did he give
22 any other statements?

23 A. He just gave the oral statement that he was the
24 driver and he gave me a written statement to that
25 fact that he was driving the car.

1 Q. Okay. And on State's 1 that's for ID only, is
2 that a record of the written statement Mr. Esaw
3 gave?

4 A. It is.

5 Q. And how many pages is it?

6 A. It is 1 through 7, I believe.

7 MS. MARTIN: Your Honor, at this point, we'd
8 move State's 1 into evidence.

9 THE COURT: Subject to previous objection,
10 State's 1 in evidence.

11 MS. MARTIN: I beg the Court's indulgence one
12 moment.

13 Your Honor, may we approach?

14 THE COURT: Yes, ma'am.

15 (Sidebar conference.)

16 THE COURT: Madam Court Reporter, please note a
17 sidebar and we'll memorialize our conversation
18 outside of the presence of the jury.

19 (State's Exhibit No. 34 marked for
20 identification.)

21 MS. MARTIN: Your Honor, may I approach the
22 witness?

23 THE COURT: Yes, ma'am.

24 BY MS. MARTIN:

25 Q. If I can show you State's 34, can you take a

1 moment, Detective Moore, and flip through this
2 chart?

3 THE COURT: This is State's 34 for ID only;
4 right?

5 MS. MARTIN: ID only, yes, sir.

6 THE COURT: All right.

7 BY MS. MARTIN:

8 Q. What is this document?

9 A. This is Ricky Lamont Esaw, his statement.

10 Q. And is it similar or dissimilar to State's 1
11 that is now in evidence?

12 A. It's exact.

13 MS. MARTIN: Your Honor, I'd ask that this
14 witness be allowed to come down.

15 THE COURT: All right. This is, of course,
16 subject to objection by defense counsel. And,
17 Detective Moore, step down and if you'll stand on
18 the other side of the easel and face in the
19 direction of the court reporter when you're
20 testifying about that, please.

21 THE WITNESS: Okay.

22 THE COURT: Thank you.

23 BY MS. MARTIN:

24 Q. If you could, explain to us the top part of
25 that document.

1 A. This is the date -- the Lexington County
2 Sheriff's Department Statement Form. This is that
3 date, the place is the Lexington County Sheriff's
4 Department, and the time of 12:56 p.m.

5 Q. And are your initials on that statement?

6 A. They are.

7 Q. And where are they? If you could, point them
8 out to us.

9 A. Right here. (Indicating)

10 Q. And that's a laser pointer?

11 A. Oh, I'm sorry. There you go.

12 Q. And did Ricky Esaw write on that document?

13 A. He did. That's his initials and that's his
14 writing. (Indicating)

15 Q. Detective Moore, can you please tell us or read
16 to us the that is statement written there -- and
17 who's writing is that, first of all?

18 A. This is Ricky Esaw's writing.

19 Q. Okay.

20 A. And he said: They came to get me from my mom's
21 house telling me they need a driver, so I drove the
22 Nissan black headed to Rolling Meadows because they
23 had some Mexicans to get. So I drive them down
24 there and when they got out there, they pulled their
25 guns out on the Mexican. Pitts was fighting with

1 one, then he shot him. When they got into the car,
2 AJ asked him why did he shoot him. He said that he
3 was coming at the gun, so he shot him. When Pitts
4 did that, he came back to West Columbia and I went
5 back to my mom's house. This is page 2 of the
6 statement.

7 Q. What are the Q and As?

8 A. Q is the question I'm writing.

9 Q. And what is the A?

10 A. A is his answer --

11 Q. That he --

12 A. -- with his initials.

13 Q. Okay.

14 A. Each one is initialed by him.

15 Q. Can you read it to us, please.

16 A. Sure.

17 Question: Who is AJ?

18 Answer: I just know him -- well, I just know
19 he because in West Columbia at his girl's house
20 three doors down from the last house was shot up
21 before.

22 What he was telling me was AJ's house was shot
23 up before and his door had bullet holes in it.

24 Question: What type of vehicle does AJ drive?

25 Answer: Black Nissan Sentra.

1 Question: Who came up with the plan to rob the
2 Mexicans?

3 Answer: AJ because he just sold them some weed
4 and he came back to West Columbia and said they had
5 a lot of money.

6 Q. Question?

7 A. Question: Who asked you to go?

8 Answer: Pitts and AJ.

9 Whose car did you drive?

10 Black Nissan Sentra.

11 When you pulled into the trailer park, give me
12 directions.

13 We made a right at the stop sign and the
14 trailer was, made the next right, that's when AJ
15 said there they are -- or there they go.

16 Q. If I can interrupt you for one second here,
17 those directions, would those be accurate as to what
18 you learned as to --

19 A. Rolling Meadows, right.

20 Q. And where the victims were?

21 A. Yes, ma'am.

22 Q. Question on page 3.

23 A. Page 3 is: What type of gun was in their
24 possession?

25 His answer: Semi-pistol .9 and .40.

1 Who had the .9 and who had the .40?

2 AJ had the .9, Pitts had the .40.

3 How did they carry the weapons -- or how did
4 they -- and I was getting tired, I put care instead
5 of carry.

6 AJ told me to stop the car and they jumped out
7 with the guns.

8 Who was the Mexicans fighting with when the gun
9 went off?

10 Pitts.

11 How many times did Pitts fire the weapon?

12 Three times. His answer is three times. Just
13 before the shots, he was fighting with the man, then
14 I heard the shot and then the man fell to the ground
15 and his son came over and Pitts shot him.

16 Question: Did Pitts tell the second man
17 anything before he shot him?

18 Answer: The young man came in to help the
19 older man -- I'm trying to keep this on -- when he
20 told him he would shoot him.

21 Question: What happened after he told him
22 that?

23 Answer: I heard two more gun shots.

24 Did you get out of the car? Never.

25 Was anyone hurt? And I'm talking any one of

1 them.

2 No.

3 Question: When you left, where did you go?

4 Woodbine Apartments, 49.

5 How much money did you receive for the robbery?

6 Pitts gave me \$50.

7 Question: Was there any cell phones taken?

8 Yes -- answer: Yes, but AJ threw them out the
9 window.

10 What did AJ and Pitts say once they got back
11 into the car with you?

12 Q. Page 5.

13 A. Page 5. Question: Nothing. It's actually
14 answer.

15 What did they do with the guns?

16 Don't know.

17 Did AJ and Pitts drive off together?

18 Yes.

19 Did you see any brass casings on the ground or
20 in your car?

21 His answer: No.

22 Did Pitts have any blood on him? And describe
23 the clothes they were wearing.

24 Don't know. They had on black pants and a
25 white T-shirt.

1 What was you wearing?

2 Blue shorts and blue and white polo.

3 Did AJ get out of the car? Where was he
4 standing?

5 I don't think. I just saw Pitts and the guy.

6 Q. Page 6.

7 A. Have you talked to Pitts or AJ about the
8 shooting since it happened?

9 Answer: Yes. He said that the police was
10 looking for him and that he came to my house.

11 And I like -- and this is always -- I'm trying
12 to keep this pointer going -- to my house.

13 Have you told anyone else about what happened?

14 No.

15 Did you hear anything on the news?

16 Yeah. Y'all crazy ass shot them. And I told
17 them the only thing I did was drive.

18 This jewelry that I'm showing you, who owns it?

19 Pitts owns it, told me he just got it Friday.

20 Is this your statement and complete truth?

21 Yes.

22 Are you willing to take a polygraph?

23 Yes.

24 Q. Page 7.

25 A. Tell me what Pitts said about the gold

1 bracelet.

2 He lost it and I told him that's on him.

3 Q. You can have a seat.

4 After the written statement, what, if anything,
5 did Mr. Esaw say or do?

6 A. He fully expected to go home.

7 Q. And did y'all release him?

8 A. No.

9 Q. Okay. Did law enforcement ever search for an
10 AJ?

11 A. Yes.

12 Q. And did you ever find one?

13 A. At that point we search our database for the
14 information that we have for AJ, which is a male,
15 mixed Caucasian-black, light tone. And we had
16 nothing of an AJ of that nature and no tattoos that
17 we could find that he knew of or anything of that
18 nature.

19 Q. And since that time, are you aware if we found
20 an AJ?

21 A. We have.

22 Q. Okay. And does this person fit the
23 description -- physical description given by
24 Franklin?

25 A. No.

1 Q. Can you tell us, during the course of your
2 investigation, what the heights, weights, and skin
3 tones of the individuals are?

4 A. King Pitts is six foot, 250 pounds. He's a
5 bulky, heavier-set guy. Ricky Esaw is probably
6 five-ten, 175, and AJ that we discovered is
7 five-six, 150.

8 Q. Okay. And are you aware of any other forensic
9 evidence that has yielded any results that we can
10 bring into court today?

11 A. No. We -- the glass, I think, was mentioned on
12 the scene, the broken beer bottles and stuff, we
13 sent off to have tested and have not had positive
14 results for DNA.

15 Q. In your 34 years of law enforcement, is it
16 common or uncommon to use one defendant to testify
17 against a co-defendant?

18 A. Most of our trials we do have another
19 co-defendant testify against a defendant.

20 Q. And are you aware of any plea bargains that
21 have been made with Mr. Pitts?

22 A. None.

23 Q. Do you think you would know if there were any?

24 A. Being it the case agent, I would.

25 Q. Did you or anybody from law enforcement ever go

1 back and re-interview Mr. Pitts and get a written
2 statement from him?

3 A. No, ma'am. He asked -- his mom asked for an
4 attorney for him, and we've never went back to
5 question him or never ask him anything.

6 Q. And do you know when he received an attorney?

7 A. That night -- or that day. Should have been
8 early morning. And his mom had a family attorney
9 that she was going to make contact with.

10 Q. And during the course of this investigation,
11 did you meet with Net Grayson?

12 A. Yes.

13 Q. And did she give you a written statement as to
14 what was happening on that Sunday of the event?

15 A. Luenetta Grayson, she gave me a -- I met with
16 her after the arrest. Our arrest was on the 12th,
17 Wednesday the 12th, and we met with her on Monday
18 morning -- I'm sorry, Monday afternoon on August
19 17th.

20 Q. And did you have an occasion to meet with her
21 again?

22 A. I did. I met with her again on September 2nd.

23 Q. And what was the purpose of that meeting?

24 A. Because we learned about the tapes between her
25 and Ricky Esaw about the bags. I want ed to know

1 more about what she knew about the green and white
2 Nike bag and what was contained in it.

3 Q. And did you ever learn any more through her
4 about the green Nike bag?

5 A. No. She said she didn't know at that point.

6 Q. And can you identify Ricky Esaw, the man you
7 interviewed and the man wrote that statement?

8 A. Him, sitting right over there with his
9 counselors. (Indicating)

10 MS. MARTIN: One moment, Your Honor.

11 BY MS. MARTIN:

12 Q. Just for clarification purposes, I think you
13 said that Mr. Esaw had said he wasn't going to let
14 them put all this on him. Can you check your notes,
15 please, and see what the exact quote was?

16 A. He said I'm innocent -- wait a minute. I'm
17 sorry. That's the statement one. Let me go to the
18 jail one.

19 At the jail, yes. He said: That was not me, I
20 was just driving, hell no you ain't got me on
21 nothing, okay, at best you got me as accessory. And
22 then at the end of the statement it says -- I asked
23 him did he want to talk to me. He said: Yeah. I'm
24 not taking that rap.

25 Q. Anything else at the conclusion of the oral or

1 written statement?

2 A. Only thing in that as his statement part of it,
3 he once again said to us at the interview that I'm
4 innocent, at best I'm accessory, and then he
5 followed right back with that saying I know I'm an
6 accessory.

7 Q. Please answer any questions of the Defense.

8 THE COURT: Ladies and gentlemen, we're going
9 to take our morning recess. We try not to interrupt
10 the direct and cross-examination of a single
11 witness, but, obviously, we have to be guided by
12 common sense and human tolerance, and you-all have
13 been sitting there for a while. We're going to take
14 the morning recess. We'll get you back out here at
15 20 of the hour and we'll resume the
16 cross-examination of Detective Moore at that time.
17 Please remember not to talk about this case among
18 yourselves while you're in the jury room. Thank
19 you.

20 (The jury exits the courtroom at 11:19 a.m.)

21 THE COURT: Detective Moore, of course you can
22 step down during your recess, but, as you know,
23 you're not allowed to discuss your testimony while
24 you're off the stand. Thank you.

25 All right. Folks, we do have the matter of the

1 sidebar conference regarding the State's 34 for ID,
2 the blowup of the statement form and so forth, which
3 has been offered for demonstrative purposes only,
4 will not go to the jury.

5 Defense counsel objected to the use of it as a
6 demonstrative exhibit stating that the size of it
7 would place undue emphasis on the statement as an
8 item of evidence against others of normal size.
9 Mr. Chehoski, I'll be glad for you to discuss that
10 any more in detail if you'd like.

11 MR. CHEHOSKI: Yes, Your Honor. And
12 specifically relating to Rule 403 in the South
13 Carolina Rules of Evidence that publishing the --
14 publishing the enlarged version of the statement,
15 and the enlarged statement is not in evidence, does
16 enhance the danger of undue prejudice compared to
17 other evidence that is given in the case. And for
18 that reason, we make the objection.

19 THE COURT: All right. The Court, of course,
20 has the discretion to allow demonstrative exhibits
21 in if they will assist the jury in its understanding
22 and dissimulation of the evidence that's being
23 presented.

24 In this particular case, as I understand it,
25 the Elmo, or whatever it is, was not operating, or

1 even if it were, the Elmo would simply be a larger
2 exhibit on a screen that the jury could review.

3 I note the objection but find the
4 demonstrative -- the limitations on the use of
5 demonstrative exhibits; that is, that they do not go
6 to the jury and the original will go to the jury in
7 its normal size does not violate the 403 and 404
8 concerns.

9 All right. Folks, we'll start back at 20 of
10 the hour.

11 MS. MARTIN: Thank you, Your Honor.

12 (Brief recess 11:22 AM - 11:40 AM.)

13 THE COURT: Is everybody ready for the jury?

14 MS. PATTERSON: Your Honor, it's been brought
15 to our attention that defense counsel has subpoenaed
16 CSI Keith Sprinkle --

17 THE COURT: Yeah.

18 MS. PATTERSON: For -- they subpoenaed him
19 today. However, he has a preplanned paid vacation
20 tomorrow, airline tickets and all. We had released
21 him from our subpoena because we didn't need him.
22 And he also informed me that he -- since he was no
23 longer under our subpoena and hadn't yet gotten
24 their subpoena, he was sitting in court this morning
25 during some of the testimony of Detective Moore.

1 THE COURT: All right. Well, that can be
2 avoided as long as he can -- is he available to
3 testify this afternoon?

4 MS. PATTERSON: Yes, sir.

5 THE COURT: Okay.

6 MR. CHEHOSKI: And, again, depending on how
7 this goes, we might be able to reach him this
8 afternoon.

9 THE COURT: I'm sorry?

10 MR. CHEHOSKI: I said depending on how this
11 goes, we might be able to reach him this afternoon
12 and it be no problem.

13 Your Honor, the reason we've subpoenaed him is
14 there is -- you know, just for any possible chain of
15 custody issues between the work that Investigator
16 Sprinkle has done and then -- and making that
17 chain, connecting to some of the Richland County and
18 the SLED lab officials and the work they've done,
19 connect those two.

20 THE COURT: All right.

21 MR. CHEHOSKI: If the State will stipulate that
22 Sprinkle collect that and -- I mean, that's really
23 the only reason we need him -- then we won't need to
24 call him.

25 THE COURT: All right. I'll allow you-all to

1 work on that during the lunch hour and see if you
2 can't come up with a stipulation. Otherwise --

3 MS. FULLWOOD: Your Honor, I just -- I'm sorry,
4 Your Honor.

5 THE COURT: No. Go ahead. If you can --

6 MS. FULLWOOD: Can I try to -- he has already
7 testified to some of the results of the things that
8 we want to talk about.

9 THE COURT: Right.

10 MS. FULLWOOD: And if he continues -- we can
11 maybe let him go pretty quick, you know.

12 THE COURT: Okay. Well, we will -- if he's --
13 I'm sure he would like to get packing as quick as he
14 can, so let's --

15 MS. FULLWOOD: Yes, sir.

16 THE COURT: Let's try to get him in this
17 afternoon. If -- during the lunch hour you-all
18 might talk about that thing and see if you can't
19 work out a stipulation. If you can, fine.

20 MS. FULLWOOD: Yes, sir.

21 THE COURT: If you can't, I'm not going to make
22 him miss his trip.

23 MS. FULLWOOD: I understand.

24 THE COURT: So if he's going to testify, he's
25 going to have to testify today.

1 And also, scheduling matter, I have
2 scheduled -- somebody has scheduled for me a guilty
3 plea this afternoon immediately after lunch and
4 before we begin. So I'm going to take an hour and a
5 half for lunch, but the last 30 minutes of that will
6 be that guilty plea. So I will not cut into this
7 trial any more, so you can kind of factor that into
8 your planning, everybody.

9 MS. MARTIN: Yes, sir.

10 MR. CHEHOSKI: And I guess one more scheduling
11 issue, Your Honor: My expert, Dr. McQuiston, is
12 also not available tomorrow, so if we can -- again,
13 however long we have to go, if we can work -- if we
14 need Investigator Sprinkle, and we do need
15 Dr. McQuiston, we'd like to make sure that they get
16 seen today.

17 THE COURT: Okay. We'll try to accommodate
18 those witnesses out of turn. If -- you know,
19 Dr. McQuiston has to testify either today or Friday,
20 is that right, because she's not going to be here
21 tomorrow. Is that right?

22 MR. CHEHOSKI: Correct. And I would imagine
23 that our case would last longer -- would last all
24 through the day tomorrow, assuming the State rests
25 today.

1 THE COURT: All right. Okay. We'll put that
2 in the mix. We'll just work until we get all those
3 people who have testify in.

4 All right. Bring the jury in, please.

5 (The jury enters the courtroom at 11:44 AM.)

6 THE COURT: Ladies and gentlemen, we continue
7 now with the cross-examination of Detective Moore.

8 Mr. Chehoski?

9 MR. CHEHOSKI: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. CHEHOSKI:

12 Q. I want to start, Investigator Moore, with the
13 anonymous tip that came in that really put you on
14 the track with this investigation. That tip came in
15 approximately 2:29; is that right?

16 A. Yes, sir. It came in about 2:29 Wednesday
17 morning.

18 Q. And the tip only identified Mr. Pitts and
19 Mr. Esaw by their Facebook names?

20 A. That's right.

21 Q. They didn't know -- actually, the tip said they
22 didn't know their real names; right?

23 A. Right.

24 Q. And the tip said the crime that -- the crime
25 occurred on -- on August 11th?

1 A. The date was a little off.

2 Q. The date was a little off. It didn't say it
3 happened at Rolling Meadows apartment?

4 A. No.

5 Q. Or Rolling Meadows mobile home park.

6 A. Mobile home park.

7 Q. And it also said the victim's name was Alonzo;
8 correct?

9 A. Correct.

10 Q. So the only thing -- I just want to, again,
11 make sure that's what we're starting with.

12 And prior to that, you're trying to gather as
13 much information as you can.

14 A. Yes, sir. That's correct.

15 Q. And in doing so, you're going to any place that
16 might have information?

17 A. Following leads, whichever way they come in.

18 Q. Either following leads or possibly, by your own
19 hard-work initiative, developing your own leads?

20 A. Right.

21 Q. And one of the places that you went was the
22 Rolling Meadows convenience Pitt Stop?

23 A. Right.

24 Q. And through working with them, you were able to
25 obtain some surveillance footage?

1 A. Yes, sir.

2 Q. And in that surveillance footage, you looked at
3 the footage of August 9th?

4 A. Seen before the actual -- I was looking for any
5 car coming in there might be getting something, gas
6 or something, that particular type of car, and
7 individuals that might have been driving the car or
8 passengers in the car.

9 Q. Right. And anything that, again, might match
10 the information you already had?

11 A. Correct.

12 Q. Right. And in your reports, you did indicate
13 that you saw a black Toyota Corolla or a car that
14 might be a Toyota Corolla?

15 A. Might be, because you really couldn't -- their
16 video just wouldn't show clearly the type of
17 vehicle.

18 Q. Again, by the color and the size of the car, it
19 fit that description?

20 A. Looked like it. Yes, sir.

21 Q. And you said this particular car was seen -- or
22 particular car like it was seen frequently?

23 A. Right.

24 Q. And possibly even circling it?

25 A. That sometimes we saw cars circling.

1 Q. Right. And, again, you looked at this -- and
2 this car was circling beginning on October 9th at
3 4:36 in the afternoon?

4 A. I believe so.

5 Q. And continuing all the way up until 9:09. And,
6 again, that's right around the time of the incident;
7 correct?

8 A. Yes, sir.

9 Q. All right. And even at one point the car did
10 beside the store and two individuals got out of it?

11 A. That's correct.

12 Q. And those two individuals generally fit the
13 description of what you were looking for?

14 A. It's a general description.

15 Q. Right. Again -- and that's all you had at the
16 time; right? You were never able to identify the
17 occupants of the vehicle?

18 A. Never.

19 Q. You were never able to identify the tag of that
20 vehicle?

21 A. No.

22 Q. All right. And, in fact, you did take photos
23 of those individuals to Mr. Vasquez; right?

24 A. Just looking for anything that might --
25 anything that they might recognize that could lead

1 us into a direction.

2 Q. All right. And you did take pictures to
3 Mr. Vasquez?

4 A. Yes.

5 Q. And he was not able to make an identification?

6 A. No, sir.

7 Q. All right. I want to move on now to the day of
8 August 12th and your initial encounter with
9 Christopher Esaw.

10 A. Yes, sir.

11 Q. And you met him on the 12th?

12 A. Yes, sir.

13 Q. You met him at Woodbine Apartments?

14 A. Yes, sir.

15 Q. At Apartment 49; right?

16 A. Yes, sir.

17 Q. And that is the same address that you had on
18 file for Mr. Esaw?

19 A. Same address. They're brothers.

20 Q. They're brothers. And actually, again, you
21 testified earlier that Mr. Esaw actually identified
22 himself as Ricky Esaw.

23 A. As Ricky.

24 Q. Okay. That --

25 A. And I detained him at that point. But he just

1 seemed a little bigger. And from the driver's
2 license photograph I had of him, it didn't seem like
3 the same fellow to me.

4 Q. Okay. And do you know what Christopher Esaw's
5 height and weight is?

6 A. He was -- he seemed to be a little taller than
7 Ricky and a little bit heavier. And I don't
8 remember what his actual -- when we ran it, what his
9 actual height and weight was.

10 Q. And it looked like, according to his records,
11 it was about five-eight was his height.

12 A. No. I was thinking a little bit taller.
13 But --

14 Q. All right. A little bit taller?

15 A. Because I'm five-ten and I'm looking at him at
16 height -- or just a little bit above me.

17 Q. All right. I want to kind of get back in --
18 because this kind of leads into one of things
19 that -- when you spoke with Mr. Vasquez, you said
20 that the assailant was about the same size as his
21 father.

22 A. Yes. That's --

23 Q. And his father was described as about
24 five-seven and about 160.

25 A. Right.

1 Q. And you testified earlier that Ricky was about
2 five-ten and 175.

3 A. Correct.

4 Q. I just want to make sure of that.

5 So moving along now and moving along to later
6 in the day when you first encountered Mr. Esaw,
7 you -- what was the address of where you encountered
8 him?

9 A. Mr. Esaw?

10 Q. Yes.

11 A. We was at the apartments, 100 -- I got the
12 address on him. Just give me a second, please.

13 Q. Take your time.

14 A. 100 Fair Forest Drive, Apartment G3.

15 Q. And I think you testified on direct that the --
16 that was the apartment complex -- was that Cross
17 Meadow? Is that what you said?

18 A. Say that again.

19 Q. I think you testified on direct that the name
20 of the apartment complex was Cross Meadow.

21 A. No.

22 Q. That's not correct?

23 A. No.

24 Q. All right. What's the name of the apartment
25 complex?

1 A. Water Edge, I believe it is.

2 Q. Waters Edge?

3 A. Right.

4 Q. Right.

5 A. I believe it is Waters Edge. I'm not real

6 familiar because that's Richland County stuff.

7 Q. And I understand it's not -- outside your
8 general jurisdiction.

9 A. That's right.

10 Q. But that wasn't the Lakes at Harbison; you sure
11 about that?

12 A. It might be Lakes at Harbison.

13 Q. I gotcha now.

14 And in -- as I was preparing for this moment, I
15 looked through your reports. And as I've spoken
16 with other officers, you've seen that, we make sure
17 that when you do your reports, you're documenting
18 all the information that you're gathering.

19 A. That's right.

20 Q. For several reasons; one of which is you --
21 several months or years later, you may have to come
22 back and --

23 A. We might be here on like this day.

24 Q. Might be here on like this day.

25 A. Right.

1 Q. So you want your reports to be as complete as
2 possible; correct? You don't want to -- you don't
3 want to leave anything out?

4 A. Try not to.

5 Q. Yeah, exactly. You want to cover all your
6 bases?

7 A. And get all the facts.

8 Q. And you want to be as accurate as possible,
9 which means you don't want to get -- you want to get
10 everything correct; correct?

11 A. We try. Everything -- the notes, the
12 dictation, everything is done at the best of our
13 ability. Yes, sir.

14 Q. And you want to be as thorough as possible. So
15 if there's stuff that needs to be probed further,
16 you want to get down to that; correct?

17 A. Try to, yes, sir.

18 Q. Now, when you initially -- when you met with
19 Esaw the first time, was he armed with a weapon?

20 A. No.

21 Q. In fact, no gun -- no gun has ever been
22 recovered for this incident?

23 A. No gun has ever been recovered, any gun.

24 Q. No gun. And there's not going to be any gun in
25 evidence on this table?

1 A. Right.

2 Q. In your report you also -- there's no
3 indication in your reports that you noticed any
4 bruises on Mr. Esaw --

5 A. Uh-huh.

6 Q. -- correct? There's no indication that you
7 noticed scars on Mr. Esaw?

8 A. Right.

9 Q. Or any scratches?

10 A. Right.

11 Q. Or any injuries whatsoever?

12 A. It looked like the side of his face was swollen
13 when I glanced at him.

14 Q. Again, but that's also not up in your report as
15 well; right?

16 A. Okay. That's fair.

17 Q. There's no indication of any swelling.

18 A. That's fair. I'm just giving you my personal
19 observations.

20 Q. And I'm, again, trying to remind you that
21 that's not in the report.

22 A. Okay. I'm fair with that.

23 Q. This is --

24 A. That's why we take photographs and stuff like
25 that.

1 Q. Exactly. And you also testified that one of
2 your -- one of your goals in dealing with Mr. Pitts
3 was to get a buccal swab.

4 A. When I was at their apartments that night, I
5 had a lot of movement and working parts; one is the
6 arrest team, one is recovery team, one is the
7 interview. My goal was to interview King Pitts that
8 night.

9 Q. And, if possible, to get a swab from him?

10 A. And that's one of my goals. Yes.

11 Q. Right. And at no point did you get a swab from
12 Mr. Esaw?

13 A. No, sir.

14 Q. All right.

15 A. When I took them and separated them apart, I
16 put Mr. Pitts in my car. I uncuffed him in the
17 parking lot and put him in my car.

18 Q. All right. But at no point between August 12th
19 of 2015 --

20 A. Did I ever go --

21 THE COURT: Let him finish, please, sir.

22 Q. At no point between then and today did you ever
23 get a swab from Mr. Esaw?

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

25 Q. Because I want to kind of go in that direction

1 now --

2 A. Okay.

3 Q. -- and in talking about some of the evidence
4 that was processed. And you talked about meeting
5 with CSI Sprinkle to process that evidence?

6 A. Right.

7 Q. And that evidence included some broken glass?

8 A. Yes, sir.

9 Q. Some cans of soda?

10 A. Yes, sir.

11 Q. And some beer bottles?

12 A. And the bracelet.

13 Q. And the bracelet?

14 A. Yes, sir.

15 Q. All right. And also there were swabs taken at
16 the scene to look for -- again, for possible DNA;
17 right? And also later on, when Ms. Green's car was
18 impounded, you processed that as well?

19 A. Yes, sir.

20 Q. Okay. We've already seen that you took
21 pictures of it. And you also did swabs on that car?

22 A. Yes, sir.

23 Q. All right. And to your -- and did Investigator
24 Sprinkle give that evidence to you?

25 A. It was -- everything is turned in. He

1 maintains evidence and where it's shipped to for
2 what type of analysis for --

3 Q. And also -- I'm sorry to interrupt. But, also,
4 you were involved in discussions of where to send
5 the evidence?

6 A. Right.

7 Q. Okay.

8 A. I had to get -- for cases where we're going to
9 send evidence and I need the return on it quickly, I
10 got to get permission from my upper command, because
11 when we send it to the Richland County lab, it's a
12 charge on how quick to get it back and the money
13 involved in it.

14 Q. Okay. So in order to send something to
15 Richland County, you need to get authorization from
16 your superiors?

17 A. Yes, sir.

18 Q. And in this case, you actually had information
19 sent to -- or evidence sent to Richland County?

20 A. Yes, sir.

21 Q. And you received the reports back from that?

22 A. I did.

23 Q. And you received reports that there was DNA
24 collected from the bracelet?

25 A. Right.

1 Q. And there was DNA collected from the beer
2 bottles?

3 A. Right.

4 Q. And there was DNA collected from the soda cans?

5 A. Right.

6 Q. And there was DNA collected from the broken
7 glass?

8 A. They attempted to get the DNA on all those
9 items.

10 Q. Right. And there was actually DNA collected?

11 A. Actually positive on the bracelet and the cell
12 phone that was thrown out the window.

13 Q. Yes. But that DNA that was collected did not
14 come back to Mr. Esaw?

15 A. No.

16 Q. Okay. And that --

17 A. Came back to King Pitts.

18 Q. Right. Only to King Pitts but not to Mr. Esaw?

19 A. That's correct.

20 Q. Now, you're aware that there is a DNA database
21 that exists in this country and in this state?

22 A. Right.

23 Q. And there are people who are required by law to
24 submit samples to that database?

25 A. Right.

1 MR. CHEHOSKI: Your Honor, may I have one
2 moment?

3 THE COURT: Yes, sir.

4 BY MR. CHEHOSKI:

5 Q. Before I go back into that database, you did
6 receive a report from Richland County?

7 A. Yes, sir.

8 MS. MARTIN: Your Honor, I'd object at this
9 point. May we have a sidebar?

10 (Sidebar conference.)

11 THE COURT: You folks are having a hard time
12 believing we're saving time over there; right?

13 All right. You may continue. Thank you.

14 BY MR. CHEHOSKI:

15 Q. All right. And you say that you're aware of
16 the items that were submitted?

17 A. Yes, sir.

18 Q. And you did receive a report back?

19 A. Yes, sir, I did.

20 Q. And you did receive -- and there was nothing
21 that indicated to you that there was a -- a match to
22 Mr. Esaw?

23 A. No match to Mr. Esaw.

24 Q. Or in any known DNA database that you're aware
25 of?

1 A. That I'm aware of. There was no match to
2 Mr. Esaw with the items that I sent in.

3 Q. All right. Now you -- you did recover a --
4 you're aware that a projectile was recovered from
5 the scene?

6 A. Yes.

7 Q. All right. And there's been -- but that has
8 not been submitted for any analysis?

9 A. The projectile from which part?

10 Q. The one that was located in the tire of the
11 truck.

12 A. No. No.

13 Q. Okay. Now, you already mentioned, regarding
14 Mr. Pitts, that he willingly gave a DNA sample.

15 A. Yes, he did.

16 Q. He consented to your department getting a
17 sample from him?

18 A. That's correct. Yes, sir, Counselor.

19 Q. And in your initial interview -- and reminding
20 you that you were -- your primary goal on that night
21 was to speak with Mr. Pitts; correct?

22 A. Yes, sir.

23 Q. And he spoke to you -- was that in your car?

24 A. Yes, sir.

25 Q. And that was alongside Detective Andaloro?

1 A. Yes, sir.

2 Q. All right. And --

3 A. Once again with that, I put Andaloro in charge
4 with him, getting statements started up because I
5 had an active scene I was still working.

6 Q. Active scene you were still working. And,
7 again, it's the policy of the major crime units to
8 have two major crime detectives taking statements?

9 A. Yes, sir.

10 Q. And that was -- it was at that moment that he
11 had given an alibi?

12 A. Right.

13 Q. All right. And as the lead investigator, you
14 directed Detective Sowards to go check that out?

15 A. Yes, sir.

16 Q. All right. And as your investigation
17 continued, Mr. Pitts accompanied you back to the
18 sheriff's department?

19 A. He did. He did.

20 Q. Okay. And at that point you confronted him
21 with a picture of him from Facebook?

22 A. Yes, sir.

23 Q. And it was a picture of him wearing a bracelet?

24 A. The gold bracelet. Yep.

25 Q. And you -- your belief that it was the same

1 bracelet that is now State's Exhibit No. 21?

2 A. My belief is that he wears gold bracelets --

3 Q. Right.

4 A. -- and that's what we found on the scene.

5 Q. You found a gold bracelet on the scene --

6 A. Right.

7 Q. -- you saw a picture of him wearing a gold

8 bracelet --

9 A. Right.

10 Q. -- and you confronted him with those two pieces
11 of information?

12 A. Right.

13 Q. And you told him that the bracelet itself is
14 being processed for DNA and it was being
15 fingerprints and that it would back to him; correct?

16 A. I told him that we was processing fingerprints
17 and DNA to that bracelet.

18 Q. And you told him that it was going to come back
19 to him?

20 A. I refer to my notes with him.

21 MR. CHEHOSKI: May I approach?

22 THE COURT: Sure.

23 BY MR. CHEHOSKI:

24 Q. Have you found it yet?

25 A. Yes, I just found it. Yes. I told him in the

1 room that that DNA will come back to you.

2 Q. And, actually, what's interesting about that is
3 you use an exclamation point on that.

4 A. Yeah.

5 Q. That was a forceful point.

6 A. I told him it would.

7 Q. And to the extent you felt it appropriate to
8 use an exclamation point; not to be a grammar Natzi,
9 just using what the common term is. Right?

10 All right. Moving along now, I want to go to
11 the photo lineup procedure. All right. And you did
12 not actually compile the photo lineup; is that
13 correct?

14 A. No. I have our intel unit.

15 Q. The intel unit. Fair enough. And your -- you
16 tell them what the -- which suspect you want, and
17 they compile the lineup based off that?

18 A. Off the photograph of the suspect. Right.

19 Q. Right. And you got the -- you got the lineups
20 back and then you cleared it with your supervisor;
21 correct?

22 A. I showed him to get a second set of eyes to
23 make sure everything looked good to him.

24 Q. All right. And you did that prior to going to
25 see --

1 A. Yes.

2 Q. -- Mr. Vasquez and Ms. Vasquez?

3 A. Yes.

4 Q. Okay. Pointing you to State's Exhibit 4 now,
5 this was the lineup that you gave Mr. Vasquez;
6 correct?

7 A. That is, yes, sir.

8 Q. And he's in Position No. 2?

9 A. Yes.

10 Q. And Position No. 2 is on the top row in this --

11 A. Yes, sir.

12 Q. -- in the center?

13 A. Yes.

14 Q. And you did not notice that Mr. Esaw's skin
15 tone is lighter than the other five pictures?

16 A. I don't -- no, sir. I don't see that. Like I
17 said, number 5 looks -- is light.

18 Q. I'm talking about the skin tone, not the
19 background.

20 A. They're black-and-white pictures.

21 Q. Right.

22 A. So I -- to me, it doesn't.

23 Q. All right. In that black-and-white there's
24 also a million shades of gray.

25 A. I'm just telling you I don't see it, sir.

1 Q. All right. All right. And you were the one
2 who presented these lineups?

3 A. Yes, sir.

4 Q. And you were aware of where Mr. Esaw was in
5 each of the lineups?

6 A. Yes, sir.

7 Q. This wasn't a double-blind proceeding --
8 procedure?

9 A. Excuse me? Say that again.

10 Q. Do you know what a double-blind procedure is?

11 A. No. Fill me in on that.

12 Q. All right. That's where the tester and the
13 tested are both on equal footing as to the contents
14 of the test.

15 A. Okay. I see where you're going.

16 Q. So in this case, if you -- this is your case
17 and you're developing the suspects and you're
18 presenting the lineup. You did have an investigator
19 who was not involved -- not involved in the
20 investigation present the lineup; correct?

21 A. Right.

22 Q. And you did not have an investigator who was
23 not aware of the suspects and their position in a
24 lineup; correct?

25 A. Right.

1 Q. All right. And -- because sometimes you don't
2 want to give away what your intentions are; correct?

3 MS. MARTIN: Your Honor, is there a question?

4 THE COURT: I think it was a question.

5 Mr. Chehoski raises his eyebrows when he has a
6 question, same as a question mark.

7 BY MR. CHEHOSKI:

8 Q. All right. And -- all right. But in
9 presenting -- you need to be careful that you're not
10 giving any tells as to who you want them to pick?

11 A. I am very careful of that.

12 Q. Right. But to go even further, you can use
13 somebody who doesn't know who the suspect is?

14 A. This particular case, it was limited at this
15 point with the detectives because of all of the
16 hours we were working at the time. I know --
17 obviously I know who the defendant is. I set up the
18 lineup and I set up the pictures. Everybody that
19 was with me working this case could go on there.
20 And I do the deliverance of the photograph to the
21 witnesses all the same.

22 Q. And I understand that. And, again, it's just
23 one extra level of precaution to keep you from
24 inadvertently showing your hand, if you will,
25 correct, that this would be --

1 A. I disagree with that. I mean, I show somebody
2 photographs and I don't give any indications. I
3 give the exact same order each and every time.

4 Q. I believe you do. And, again, what I -- but
5 in -- when you present it with someone who doesn't
6 know what the contents are, that adds one layer of
7 protection; correct?

8 A. I just think what you're trying to tell me is
9 that getting somebody off the street to deliver this
10 is not good for me --

11 Q. Or somebody --

12 A. -- at that point. You know what I'm saying --

13 Q. Or somebody else --

14 A. I need somebody in law enforcement to give this
15 photograph. On this particular day, everybody that
16 was there was on the case we're working.

17 Q. I mean, there are hundreds of people who work
18 in the sheriff's department; correct?

19 A. There's hundreds of people that are assigned to
20 every different walk of life in that department.

21 Could I get somebody to go to Aiken, South Carolina
22 out of Lexington to produce a photo lineup? No,
23 sir. I couldn't get a traffic unit -- I wouldn't be
24 able to get a patrol unit, nothing of that nature.

25 I had detectives only that went with me to go out of

1 our jurisdiction on that to Aiken.

2 Q. Thank you. Moving on to Mr. Esaw's statement,
3 when trying to get a statement, you want the truth;
4 right?

5 A. Yes. I seek for the truth on every statement.

6 Q. The whole truth; correct?

7 A. Yes, sir.

8 Q. And nothing but the truth; correct?

9 A. Yes, sir.

10 Q. All right. And there's -- in Mr. -- now, you
11 stated before that you wanted to record this
12 statement?

13 A. I want to record it?

14 Q. You wanted to record --

15 A. Oh, record, yes. Yes. I wanted -- as a rule
16 with me on cases that's huge -- and we get assigned
17 a lot of cases. But a huge case, I'd like to have
18 my recorder involved. And because I was on vacation
19 a week before -- and when I checked my desk, the
20 recorder was dead.

21 Q. Okay. And there's no other recorder --

22 A. It plugs up and recharges. And you mentioned
23 about batteries. I don't even know if the thing
24 takes a battery. I know it does the charging part
25 of it.

1 Q. And you don't know how long the charging takes?

2 A. It usually takes a while.

3 Q. All right. And there's no other recorders in
4 the entirety of the Lexington County Sheriff's
5 Department?

6 A. I asked Detective Creech did he have his
7 recorder with him and he didn't either.

8 Q. Thank you. And you said you wanted to get
9 the -- you said you wanted to get the truth and the
10 whole truth and nothing but the truth --

11 A. Every time I go to get a statement from a
12 witness, that's my goal. Yes, sir.

13 Q. All right. There is nothing in his statement
14 about how he got to the -- how he got to the mobile
15 home park; correct?

16 A. Nothing in his statement.

17 Q. Correct.

18 A. Said they used a -- what he said was a black
19 Nissan.

20 Q. Okay. Yeah. But he didn't give you the
21 directions of which roads he took to get there?
22 That's not in the statement.

23 A. He said he made a right at the stop sign in
24 the -- turned into the trailer park, made a right at
25 the stop sign, then made the next right when OJ

1 said -- excuse me, AJ said there -- said there they
2 go right there.

3 Q. All right. And there's nothing in his
4 statement about the victim's wife coming out of the
5 trailer?

6 A. Nothing in his statement, no.

7 Q. Nothing in his statement about Pitts
8 threatening to shoot the wife?

9 A. He said Pitts was telling a younger man that he
10 would shoot him.

11 Q. And there's nothing in the statement about the
12 younger man throwing a can of soda in his face or
13 throwing a can in his face?

14 A. No.

15 Q. Nothing in his statement about him getting
16 kicked in the face?

17 A. Nothing from him. He was just the driver,
18 according to his statement.

19 Q. All right. And you just heard that Pitts only
20 made the threat to the younger man?

21 A. Yes.

22 Q. All right. All right.

23 A. And that he received \$50 cash for being the
24 driver of the car.

25 Q. And that \$50 was never recovered; right?

1 A. No, sir.

2 MR. CHEHOSKI: One moment, please, Your Honor.

3 THE COURT: Yes, sir.

4 MR. CHEHOSKI: Thank you. That's all the
5 questions I have at this time.

6 THE COURT: Redirect?

7 MS. MARTIN: Two questions, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. MARTIN:

10 Q. As far as the projectile that was recovered
11 from the tire, is there a reason that was not
12 submitted for testing?

13 A. I was looking for touch DNA, and I'm thinking
14 it hit a tire and I didn't realize that -- I didn't
15 believe that it would go to any touch DNA.

16 Q. And if a gun had been recovered in regards to
17 this case, would that have changed or influenced
18 your decision?

19 A. If a gun was recovered that I can match with
20 ballistics to that gun, that would have changed the
21 whole outlook on the evidence.

22 Q. And in your 34 years' experience, do you have
23 any idea how many photo lineup procedures you've
24 done?

25 A. A lot. A lot.

1 Q. And in regards to this particular procedure
2 done with Franklin and Christy, did you follow
3 Lexington County Sheriff's Department procedure?

4 A. I did.

5 Q. Okay. Do you feel like you gave any tells to
6 Franklin or --

7 A. Absolutely not. Absolutely not.

8 MS. MARTIN: Your Honor, that's all we have.

9 THE COURT: All right. Thank you.

10 You can step down, Mr. Moore.

11 THE WITNESS: Thank you.

12 THE COURT: How long will your next witness
13 take?

14 MS. MARTIN: Ten minutes.

15 THE COURT: All right. You got ten.

16 MS. MARTIN: Thank you, Judge.

17 The State calls Arthur Gene Evans.

18 THE COURT: Mr. Evans, come forward, please,
19 and be sworn.

20 (State's Exhibit No. 35 marked for
21 identification.)

22 ARTHUR GENE EVANS, JR.

23 being first duly sworn, testified as follows:

24 THE WITNESS: Yes, ma'am.

25 THE CLERK: Be seated, sir. Once you're

1 seated, state your full name spelling your last.

2 THE WITNESS: My name is Arthur Gene Evans, Jr.

3 Evans is E-V-A-N-S.

4 DIRECT EXAMINATION

5 BY MS. MARTIN:

6 Q. And, Mr. Evans, do you have a nickname?

7 A. AJ.

8 Q. Okay. And where are you living now?

9 A. In Allendale.

10 Q. Are you locked up?

11 A. Yes, ma'am.

12 Q. And are you a convicted felon?

13 A. Yes, ma'am.

14 Q. And you've been convicted of drugs; is that
15 accurate?

16 A. Yes, ma'am.

17 Q. Do you know this defendant, Ricky Esaw?

18 A. Yes, ma'am.

19 Q. And how do you know him?

20 A. We used to stay in the same neighborhood.

21 Q. And what neighborhood was that?

22 A. Woodbine Apartments.

23 Q. Is that in West Columbia?

24 A. Yes, ma'am.

25 Q. How long did you know Ricky?

1 A. Roughly a year, year and a half.

2 Q. And did he have a nickname?

3 A. Yes, ma'am.

4 Q. What did you know him by?

5 A. Silk.

6 Q. And did you know someone named King Pitts?

7 A. Yes, ma'am.

8 Q. And how did you know him?

9 A. I met him through Silk.

10 Q. And if you had to say you knew one better than
11 the other, which one would that have been?

12 A. Silk.

13 Q. And how did you -- you met Kiem through Silk?

14 A. Yes, ma'am.

15 Q. And back in 2015, where were you living?

16 A. In Woodbine Apartments.

17 Q. And who did you live with?

18 A. My girlfriend.

19 Q. What is her name?

20 A. Courtney Sutton.

21 Q. Did you have a car back then?

22 A. No, ma'am.

23 Q. Did she have a car back then?

24 A. Yes, ma'am.

25 Q. What kind of car was it?

1 A. Suzuki Reno.

2 Q. If I can show you what's been marked as State's
3 35, does this car look familiar?

4 A. Yes, ma'am.

5 Q. And how is it familiar to you?

6 A. That's exactly what Courtney car looked like.

7 Q. And did you drive that car?

8 A. Yes, ma'am.

9 MS. MARTIN: Your Honor, I'd move State's 35
10 into evidence.

11 THE COURT: Any objection?

12 MR. CHEHOSKI: Your Honor, I object because
13 it's -- can we have quick sidebar?

14 THE COURT: How about we just do this right
15 across the rail right here?

16 MR. CHEHOSKI: Okay. May we approach?

17 THE COURT: Yes, sir. Come on up.

18 (Sidebar conference.)

19 (State's Exhibit No. 35 admitted into
20 evidence.)

21 BY MR. CHEHOSKI:

22 Q. And to be clear, is State's 35 a picture of
23 Courtney's car or a picture of the kind of car she
24 had?

25 A. It's a -- it's the same kind of car.

1 Q. Okay. Same make and model?

2 A. Yes, ma'am.

3 Q. Okay. In August of 2015 did you become aware
4 that Ricky Esaw had been arrested for these crimes?

5 A. Yes, ma'am.

6 Q. And can you tell us how you became aware of
7 that and what you did during that time period?

8 A. Well, his brother told me that he was arrested.

9 Q. Okay.

10 A. And, you know, I later seen it on the news.
11 But, you know, the day -- the day that I believe
12 that he was arrested for these crimes, I -- you
13 know, as I said before, we stayed in the same
14 neighborhood. So, you know, I was in the house and
15 I seen a whole lot of activity going on, like the
16 cars passing by, and it was the police. So, you
17 know, I peeked out and I went out to look, see what
18 was going on, and --

19 Q. What did you see out there in the apartment
20 complex?

21 A. I seen the police by his mama house. So, you
22 know, quite naturally, you know, I called him and I
23 asked him, I was like, what's -- you know, the
24 police around your house, what's going on? And he
25 was like -- he told me --

1 MR. CHEHOSKI: Objection; hearsay.

2 THE COURT: This is not being offered for the
3 truth of the matter asserted. I think it's just to
4 show the state of things at the time, not
5 necessarily the truth of what he's saying. Go
6 ahead.

7 BY MS. MARTIN:

8 Q. You may answer.

9 A. Yeah.

10 Q. Why did you call -- why did you call Mr. Esaw?

11 A. Because I seen the police at his mama house.

12 Q. Okay. And did you make him aware law
13 enforcement was there?

14 A. Yes, ma'am.

15 Q. Okay. And are you aware of any type of DNA
16 national database?

17 A. I've heard of it.

18 Q. Okay. Do you think your DNA is in this
19 database?

20 A. I'm a convicted felon, you know. I've been to
21 SCDC, so...

22 Q. So what does that mean to you?

23 A. It should be. Yes, ma'am.

24 Q. Okay.

25 MS. MARTIN: Beg the Court's indulgence one

1 moment.

2 THE COURT: Okay.

3 MS. MARTIN: I'm looking for State's 1, Your
4 Honor.

5 BY MS. MARTIN:

6 Q. If I can show you what's in evidence as State's
7 1. Can you read okay?

8 A. Yes, ma'am.

9 Q. And can you take a glance at that document?

10 A. You want me to look at everything?

11 Q. You can just flip through it. Do you recognize
12 it?

13 A. Yes, ma'am.

14 Q. Have you ever seen it before?

15 A. Yeah. You showed it to me last week.

16 Q. Okay. And it says that you're involved in an
17 armed robbery and a murder; is that true?

18 A. Yes, ma'am.

19 MR. CHEHOSKI: Objection, Your Honor.

20 THE COURT: Regarding?

21 MR. CHEHOSKI: Your Honor, I object to -- this
22 is outside his personal knowledge. He only knows it
23 because he's seen it before. This is --

24 THE COURT: I think the question is -- of
25 course he can look at it to see -- I think the

1 question, ultimately, is not going to be what it
2 says so much. That's in evidence. Everybody knows
3 that by now.

4 MS. MARTIN: Right.

5 THE COURT: The question is whether or not it's
6 a true statement. That's what she's getting at.
7 Okay.

8 BY MS. MARTIN:

9 Q. And --

10 MR. CHEHOSKI: Your Honor, may we approach?

11 THE COURT: Okay.

12 (Sidebar conference.)

13 BY MS. MARTIN:

14 Q. Mr. Felder, after reviewing that statement --
15 I'm sorry. Mr. Evans, after reviewing that
16 statement that says you're involved in something at
17 Rolling Meadows, is that true?

18 A. No, ma'am.

19 Q. Were you at Rolling Meadows on August 9th of
20 2015?

21 A. No, ma'am.

22 Q. Had you gone there with King Pitts and Ricky
23 Esaw?

24 A. No, ma'am.

25 Q. And did you ever go off with Ricky Esaw and

1 King Pitts?

2 A. No, ma'am.

3 Q. What is your height?

4 A. Roughly five-six.

5 Q. And about how much do you weigh?

6 A. At the current time I weigh 150.

7 Q. Okay. And as far as your skin tone, would you
8 say it's light? dark? medium?

9 A. Light skin.

10 MS. MARTIN: I beg the Court's indulgence one
11 moment.

12 THE COURT: Okay.

13 MS. MARTIN: Please answer any questions the
14 Defense may have.

15 THE COURT: Mr. Chehoski, cross-examine?

16 CROSS-EXAMINATION

17 BY MR. CHEHOSKI:

18 Q. In August of 2015, how much did you weigh?

19 A. Probably about 135.

20 Q. 135. And just -- I hate to do this to you.
21 But in 2015, you were convicted of a felony
22 involving drugs?

23 A. Yes, sir.

24 Q. All right. And in 2011 you were convicted of a
25 misdemeanor involving stolen goods?

1 A. Yes, sir.

2 MR. CHEHOSKI: Nothing further.

3 THE COURT: Thank you.

4 Redirect?

5 MS. MARTIN: No, sir. We ask that the witness
6 be excused, Your Honor.

7 THE COURT: Thank you.

8 Mr. Evans, you can step down. Thank you.

9 Ladies, is this a good time to take a break,
10 given what our afternoon schedule will be like?

11 MS. MARTIN: Yes, Your Honor, perfect time.

12 THE COURT: Ladies and gentlemen, we're going
13 to take our lunch recess at this time. I ask that
14 you be back in the jury room at 2:00. I have
15 another matter that has been assigned to me to
16 dispose of early this afternoon that is not related
17 to this case in any way whatsoever, and they've
18 scheduled that for 1:30 and we'll finish 2:00.

19 But that's the reason why you'll get an hour
20 and a half and we'll get not quite an hour, to
21 dispose of that. I just wanted to let you know what
22 our schedule is. We'll be prepared to resume the
23 trial of this case at 2:00. Please remember not to
24 talk about this case among yourselves or with
25 anybody else during the lunch hour. Thank you.

1 (The jury exits the courtroom at 12:36 AM.)

2 THE COURT: Anything else before we break until
3 2:00 this afternoon?

4 MR. CHEHOSKI: Your Honor, just to memorialize
5 our objection from sidebar, we objected to Mr. Evans
6 testifying from the statement as, again, being
7 outside of the witness' knowledge and also Rule 403
8 as well, being unduly prejudicial.

9 THE COURT: All right. There were parts that
10 were clearly outside of his knowledge. And I ruled
11 and, of course, the State never intended to go
12 beyond what was his knowledge. The question wasn't
13 whether or not the statement in its entirety was
14 true or whether parts of it were true or not.

15 The questions were limited to what the
16 statement alleged to be Mr. Evans' involvement.
17 And, of course, that was obviously uniquely within
18 the realm of his knowledge and he had a right to
19 answer those questions. So I note your objection,
20 and the record is respectfully preserved in that
21 regard.

22 During the lunch hour, if y'all can talk about
23 the Sprinkle issue and see what we need to do about
24 his testimony this afternoon, and then among you,
25 you can agree how we can work in Dr. McQuiston's

1 testimony, given her schedule. And I understand
2 that Mr. Pitts is going to testify this afternoon.
3 Obviously, I would make allowance for all of that.
4 Is that right?

5 MS. MARTIN: Yes, sir.

6 THE COURT: I'm going to see if you might can
7 come to some agreements as to how those things can
8 be disposed of. We'll be in recess until 2:00.

9 (Luncheon recess 12:38 PM - 2:03 PM.)

10 THE COURT: All right. Folks, are we ready for
11 the jury? Is the State ready?

12 MS. PATTERSON: The State is ready, Your Honor.

13 THE COURT: Is the Defense ready?

14 MR. CHEHOSKI: Thank you, Judge. I guess a
15 couple matters that we want to bring to the Court's
16 attention: I think at this time the State and
17 Defense have agreed to stipulate to the chain of
18 custody through Investigator Sprinkle. And if
19 that's the case, then we will not need to call him
20 and he can be released from our subpoena.

21 MS. MARTIN: That's correct, Your Honor.

22 THE COURT: Thank y'all so much.

23 MR. CHEHOSKI: Another matter that we wanted to
24 bring to the Court's attention, Your Honor: I know
25 that Patricia Reid is on our witness list and wanted

1 to -- and because of that she's not been allowed to
2 be in the courtroom even though she's been here the
3 whole time.

4 We wanted to ask, if it's okay with the Court,
5 that we either withdraw, either -- you know, again,
6 stipulate to the Court that we will not call her so
7 she can watch the proceedings.

8 THE COURT: If you're not going to call her,
9 she's not subject to sequestration.

10 MR. CHEHOSKI: Right. That's what we're
11 requesting.

12 THE COURT: All right. Ms. Reid is withdrawn
13 as a potential witness for the defendant. She is no
14 longer subject to sequestration and no longer
15 subject to being called as a witness. Okay?

16 MR. CHEHOSKI: Thank you. That's all, Your
17 Honor.

18 THE COURT: All right. Other than that, folks,
19 are both sides ready for the jury?

20 MS. PATTERSON: The State is ready, Your Honor.

21 MR. CHEHOSKI: The Defense is ready, Your
22 Honor.

23 (The jury enters the courtroom at 2:06 PM.)

24 THE COURT: Good afternoon, ladies and
25 gentlemen. We continue now as the State is

1 continuing to offer testimony and evidence.

2 MS. PATTERSON: At this time, Your Honor, the
3 State calls Wilfred Pitts, Jr.

4 THE COURT: Mr. Pitts, come around, please, to
5 be sworn.

6 WILFRED PITTS, JR.

7 being first duly sworn, testified as follows:

8 THE WITNESS: Yes, ma'am.

9 THE CLERK: Have a seat. Once you're seated,
10 state your full name spelling your last on the
11 record.

12 DIRECT EXAMINATION

13 BY MS. PATTERSON:

14 Q. Please state your full name and spell your last
15 name for the record.

16 A. Wilfred Pitts, P-I-T-T-S.

17 Q. And, Mr. Pitts, how old are you?

18 A. Twenty-seven.

19 Q. And, Mr. Pitts, you're charged with some
20 serious crimes, aren't you?

21 A. Yes, ma'am.

22 Q. What are you charged with?

23 A. Murder, attempted murder, three armed
24 robberies, obstruction of justice.

25 Q. Do you also have a possession of a weapon

1 charge?

2 A. Yes, ma'am.

3 Q. And you'll admit you're facing a lot of time;
4 correct?

5 A. Yes, ma'am.

6 Q. And you're represented by an attorney on your
7 charges?

8 A. Yes, ma'am.

9 Q. Is your attorney John Shupper?

10 A. Yes, ma'am.

11 Q. Is he sitting here in the courtroom with you?

12 A. Yes, ma'am.

13 Q. And also in the courtroom, is your family here?

14 A. Yes, ma'am.

15 Q. And who is here?

16 A. My brother, my mother, my father, and my uncle.

17 Q. And they're sitting back here in the courtroom.

18 And have you and your attorney met with me and
19 Ms. Martin in my office?

20 A. Yes, ma'am.

21 Q. And did we threaten you to be here to testify
22 today?

23 A. No, ma'am.

24 Q. Did we offer you any promises, any leniency --

25 A. No, ma'am.

1 Q. -- any offers?

2 A. No, ma'am.

3 Q. And what do you intend on doing with your
4 charges?

5 A. Plead guilty.

6 Q. And why do you intend on pleading guilty?

7 A. It's the right thing to do.

8 Q. Do you know the defendant, Ricky Esaw?

9 A. Yes, ma'am.

10 Q. Think he has a nickname. What do you call him?

11 A. Silk.

12 Q. And how long have you known Ricky?

13 A. About three years.

14 Q. And how did y'all meet?

15 A. Woodbine Apartments in West Columbia.

16 Q. Did you live in Woodbine Apartments?

17 A. Yes, ma'am, on and off.

18 Q. And when you weren't living in Woodbine, where
19 did you live?

20 A. In Newberry.

21 Q. And in 2015, would you have considered him a
22 friend?

23 A. Yes, ma'am.

24 Q. As a matter of fact, you were close with Ricky
25 and his family; correct?

1 A. Yes, ma'am.

2 Q. You hung out with him often?

3 A. Yes, ma'am.

4 Q. I think you even told me that sometimes you
5 would call his mom Mom, wouldn't you?

6 A. Yes, ma'am.

7 Q. Now let's go back to Sunday, August 9th of
8 2015. Were you with Ricky Esaw that day?

9 A. Yes, ma'am.

10 Q. And about what time did you get with Ricky?

11 A. Like 12:00 or 1:00.

12 Q. And where did you get with Ricky?

13 A. He came to pick me up from Newberry.

14 Q. And where did y'all go?

15 A. To Danitra's cousin house.

16 Q. And who is Danitra?

17 A. His cousin.

18 Q. And did y'all go anywhere else on that day?

19 A. We went and took Danitra to work and then we
20 went to his mother's house.

21 Q. And who went to Ricky's mom's house with y'all?

22 A. Me, him, Net, and his son.

23 Q. And what's his son's name?

24 A. Jeremy.

25 Q. And where did Ricky's mom live?

1 A. West Columbia, Woodbine Apartments.

2 Q. And how did y'all get there?

3 A. Net's car.

4 Q. What kind of car did Net have?

5 A. A Toyota.

6 Q. What color was the car?

7 A. Black.

8 Q. What were y'all going to Ricky's mom's house
9 for?

10 A. His niece birthday party.

11 Q. And who was at the party?

12 A. Ricky, me, his brother Bam, his mother, his
13 sister and her kids, Net, a girl named Patricia,
14 Skip, DJ, and Jeremy, my brother and his kids and
15 his wife.

16 Q. And at any point did you leave Ricky's mom's
17 house?

18 A. Yes, ma'am.

19 Q. And who did you leave with?

20 A. Ricky.

21 Q. And how many times did you and Ricky leave the
22 house that day?

23 A. Maybe three.

24 Q. And the first time y'all left, who left with
25 you and Ricky, if anyone?

1 A. The first time was just me and him.

2 Q. And where did y'all go?

3 A. To Danitra's job to get her food stamp card to
4 put some more meat on the grill.

5 Q. And after y'all got her card, what did y'all
6 do?

7 A. We took it back and came back to Woodbine
8 Apartments.

9 Q. Did y'all go to the store?

10 A. Yes.

11 Q. When y'all got back to the apartment, did y'all
12 ever leave again?

13 A. Yes, ma'am. We went to the store and got some
14 beer.

15 Q. And who left with you that time?

16 A. Ricky and Rashad.

17 Q. And how are y'all -- what are y'all riding in?

18 A. Net's car.

19 Q. And who is driving?

20 A. Ricky.

21 Q. And after y'all went to the store with Rashad,
22 where did y'all go?

23 A. We came back to the apartment.

24 Q. And do you recall about what time of the day it
25 was at this point?

1 A. No, ma'am.

2 Q. And did you ever leave again? Did you leave
3 Ricky's mom's house again?

4 A. Yes, ma'am.

5 Q. And who did you leave with?

6 A. Ricky.

7 Q. And where were you and Ricky going?

8 A. Supposed to been going to get some beer.

9 Q. Did y'all go to the store to get the beer?

10 A. No, ma'am.

11 Q. Where did y'all go instead?

12 A. To the -- a trailer park past the dog food
13 plant.

14 Q. Did y'all go anywhere else?

15 A. Yeah. We went to Rolling Meadows.

16 Q. Now, were you familiar with Rolling Meadows?

17 A. No, ma'am.

18 Q. And when y'all went to Rolling Meadows, can you
19 tell us how y'all entered?

20 A. We made a left into Rolling Meadows, we kept
21 straight, and made the second right, then we made
22 another right.

23 Q. Did y'all talk to anybody in Rolling Meadows or
24 anything?

25 A. Ricky did.

1 Q. Do you know who he talked to?

2 A. No, ma'am.

3 Q. Did you get out the car?

4 A. No, ma'am -- well, yes, ma'am. I got out the
5 car to use the bathroom and he told me to get back
6 in the car, we was going to go by the store.

7 Q. Did y'all make it to the store?

8 A. No, ma'am.

9 Q. Can you tell us what happened next?

10 A. We turned left on this road and we seen the
11 family out there having a party. And then we rode
12 around and Ricky say he was going to get they ass
13 and I told him to take me back to Woodbine.

14 Q. Now, when Ricky said he was going to get their
15 ass, did you know what he was talking about?

16 A. I guess he was talking about robbing them.

17 Q. And what was your reaction?

18 A. Take me -- I told him take me back to woodbine.

19 Q. And what did he say?

20 A. Basically he wasn't going to take me back,
21 would I help him.

22 Q. So what did you do next or what happened next?

23 A. He pulled a gun from up under the seat and he
24 reached in the backseat and pulled out another gun
25 and gave it to me.

1 Q. And had you seen Ricky with guns before?

2 A. Yes, ma'am.

3 Q. When?

4 A. Like, two weeks before.

5 Q. And where were y'all at?

6 A. In Woodbine.

7 Q. And do you know what type of guns these were?

8 A. Not really, no, ma'am. Automatics.

9 Q. And what had y'all been doing with those guns
10 at Woodbine?

11 A. We went on a back road and shot one of them.

12 Q. And where did Ricky keep those guns?

13 A. In a black and green Nike bag.

14 Q. Now, when Ricky handed you the gun on August
15 9th of 2015, what, if anything, did he say to you?

16 A. Say again.

17 Q. Did he say anything to you as he was passing
18 you the gun?

19 A. He told me to get the man farthest to the left
20 and he had the other ones.

21 Q. Now, can you tell us how -- how did y'all
22 approach these people? How was the car positioned?

23 A. The car was positioned like it was exiting back
24 out and he jumped out the car first and then I
25 jumped out and went around the car and went to the

1 other man.

2 Q. And so did y'all leave the doors open?

3 A. Yes, ma'am.

4 Q. Now, when you say you went around the car, did
5 you -- what part of the car were you around, the
6 front or the back?

7 A. The back.

8 Q. And do you go and rob the man?

9 A. Yes, ma'am.

10 Q. Do you point your gun at the man?

11 A. Yes, ma'am.

12 Q. And what, if anything, you say to the man?

13 A. I said nothing.

14 Q. Which hand are you holding your gun in?

15 A. Right.

16 Q. And what are you doing with the other hand?

17 A. Grabbing at his wallet and his phone.

18 Q. When you're robbing that -- do you like to wear
19 jewelry?

20 A. Yes, ma'am.

21 Q. Did you have on jewelry this day?

22 A. Yes, ma'am.

23 Q. And as you're robbing this man, does anything
24 happen to any of your jewelry?

25 A. My jewelry fell off.

1 Q. What kind of jewelry?

2 A. My bracelet.

3 Q. Can you kind of describe that bracelet?

4 A. Yes, ma'am.

5 Q. I'm going to show you what's been entered into
6 evidence and ask you if you recognize it.

7 A. Yes, ma'am.

8 Q. What is that?

9 A. My bracelet.

10 Q. Is that the bracelet you were wearing on August
11 9th of 2015 --

12 A. Yes, ma'am.

13 Q. -- when you were robbing that man with Ricky
14 Esaw?

15 A. Yes, ma'am.

16 Q. Did you realize that bracelet had fell off?

17 A. Yes, ma'am.

18 Q. Did you try to pick it up?

19 A. No, ma'am.

20 Q. Why not?

21 A. Because I heard a gunshot.

22 Q. And when you heard the gunshot, what did you
23 do?

24 A. I turned and ran to the car and jumped in the
25 passenger seat.

1 Q. Is that where you'd been sitting all along?

2 A. Yes, ma'am.

3 Q. And when you got back in the passenger seat,
4 what, if anything, did you see Ricky doing?

5 A. I seen him crouched down at the back -- the
6 back where -- the driver back seat, I seen him
7 crouched down.

8 Q. And what were you thinking at this point?

9 A. That he was hurt.

10 Q. So what did you do as a result?

11 A. I fired a warning shot into the truck and then
12 I fired at the young man.

13 Q. Now, other firing that gun towards them, did
14 you have any contact with that young man?

15 A. No, ma'am.

16 Q. And why did you, again, fire that shot?

17 A. Because I was scared that Ricky was hurt.

18 Q. So after you fired that shot, what happened --
19 or those two shots, what happened?

20 A. Ricky got up and got in the car and we left.

21 Q. Now, when Ricky got in the car, did you notice
22 he was bleeding or anything?

23 A. No, ma'am. But I noticed that his face was
24 swollen.

25 Q. And as y'all are -- how did y'all exit the

1 Rolling Meadows mobile home park?

2 A. We drove straight, we made a right, and then
3 made a left out.

4 Q. And as y'all are leaving out of the mobile home
5 park, what, if anything, did you do with anything
6 you took from the man?

7 A. I threw a cell phone out the window.

8 Q. And what happened to the guns?

9 A. I put the gun in the middle console and I don't
10 know exactly what happened to them after that.

11 Q. So you never saw the guns again after that?

12 A. No, ma'am.

13 Q. Did you say anything to Ricky as y'all are
14 leaving?

15 A. No, ma'am.

16 Q. Did he say anything to you?

17 A. No, ma'am.

18 Q. Why did you agree to participate in this with
19 Ricky?

20 A. I was scared.

21 Q. And where did y'all go next?

22 A. We went to Woodbine Apartments.

23 Q. And when y'all got to Woodbine, what did y'all
24 do?

25 A. We took off our white T-shirts and threw it in

1 the dumpster.

2 Q. And whose idea was this?

3 A. Ricky's.

4 Q. Did Ricky ask you to do anything else?

5 A. Told me to go in my brother house and get a
6 razor to take the sticker off the gas tank of Net's
7 car off.

8 Q. And did you do that?

9 A. Yes, ma'am.

10 Q. Why did you agree to do that?

11 A. Because I was scared.

12 Q. And did y'all, in fact, get the sticker off the
13 car?

14 A. Yes, ma'am.

15 Q. And what happened next?

16 A. He drove around to the back of his mother's
17 house and Net and Jeremy came out the house, and we
18 left and went to his house.

19 Q. And when you say his house, where was he
20 living?

21 A. Net's house.

22 Q. And do you know where Net's house was located?

23 A. Harbison Lakes.

24 Q. When y'all got back to Net's house, what did
25 y'all do?

1 A. We washed our hands with ammonia and bleach to
2 get the gunpowder residue off.

3 Q. And whose idea was that?

4 A. Ricky's.

5 Q. What did y'all do for the rest of the evening?

6 A. I laid in the living room and went to sleep.

7 Q. Did y'all ever discuss what happened?

8 A. No, ma'am.

9 Q. So the next day, where did you go?

10 A. We went to go get haircuts.

11 Q. So are you still with Ricky on the next day?

12 A. Yes, ma'am.

13 Q. And y'all went and got haircuts?

14 A. Yes, ma'am.

15 Q. And who paid for the haircuts?

16 A. Ricky.

17 Q. Does Ricky typically pay for your haircut?

18 A. No, ma'am.

19 Q. Did you ever try to leave Ricky's sight or go
20 anywhere without Ricky?

21 A. No, ma'am.

22 Q. Why not?

23 A. I was scared.

24 Q. And what was you scared of?

25 A. He would have did something to me or my family

1 that stayed in Woodbine.

2 Q. And at some point you found out that the man in
3 the robbery had died?

4 A. Yes, ma'am.

5 Q. And when did you find that out?

6 A. I found out everything when they went to my
7 mom's house and his mom's house at the same time on
8 Wednesday.

9 Q. And what was your reaction when you found this
10 out?

11 A. Devastated.

12 Q. Did you ever download something on Ricky's
13 phone?

14 A. Yeah, the WLTX app.

15 Q. And why did you do this?

16 A. So we can find out if anyone died or anyone got
17 hurt that night.

18 Q. And did you do that voluntarily or did he ask
19 you to?

20 A. He asked me.

21 Q. And at some point y'all found out -- you found
22 out that the police had went to Ricky's mom's house,
23 didn't you?

24 A. Yes, ma'am.

25 Q. Do you remember where you were when you found

1 this out?

2 A. Shericka's house.

3 Q. And who was with you at Shericka's house?

4 A. Shericka, Ricky, Net, Shericka two kids, his
5 Aunt Debbie, Danitra, and me.

6 Q. And how did you find out that they were at
7 Ricky's mom's house?

8 A. AJ called and told him and then his mother
9 called and told him.

10 Q. And what was Ricky's reaction when he found
11 this out?

12 A. He went around the house and threw up.

13 Q. Where did y'all go after leaving Shericka's
14 house?

15 A. We went to Net's house.

16 Q. Do you remember when the police came to Net's
17 house?

18 A. Yes, ma'am.

19 Q. What were y'all doing?

20 A. They was about to go get something to eat and I
21 was about to use the bathroom.

22 Q. And when you say they, who was all there?

23 A. Danitra, Net, and Ricky.

24 Q. And do you remember speaking to John Moore on
25 that night?

1 A. Yes, ma'am.

2 Q. And I think there was another detective, Joe
3 Andalaro, with him.

4 A. Yes, ma'am.

5 Q. In fact, I think you wrote a statement for
6 them, didn't you?

7 A. Yes, ma'am.

8 Q. And was everything in that statement true?

9 A. No, ma'am.

10 Q. And what did you lie about in that statement?

11 A. Almost everything.

12 Q. Did you tell them about an alibi?

13 A. Yes, ma'am.

14 Q. Was that a lie?

15 A. Yes, ma'am.

16 Q. Did you -- what did you tell them about the
17 bracelet?

18 A. I told them that I let Ricky hold it.

19 Q. And was that a lie?

20 A. Yes, ma'am.

21 Q. And what did you tell them about seeing Ricky
22 with a gun, if anything?

23 A. I told them I never seen him with a gun.

24 Q. Was that a lie?

25 A. Yes, ma'am.

1 Q. And what did you tell them about you having
2 access to a gun or handling a gun?

3 A. I told them I didn't have one.

4 Q. Was that a lie?

5 A. Yes, ma'am.

6 Q. In fact, what did you tell them about where you
7 were or who you were with?

8 A. I told them I was at my brother house.

9 Q. And why did you say you were with your brother?

10 A. Because I didn't want to tell on Ricky.

11 Q. So you thought to involve your brother?

12 A. Yes, ma'am, so it can be an alibi for me. I
13 thought he was going to lie for me.

14 Q. Now, at any time that night did you want to
15 tell law enforcement anything different?

16 A. Yes, ma'am.

17 Q. And what did you want to tell them?

18 A. I wanted to tell them the truth, but I was
19 scared.

20 Q. And did you let them know about you and Ricky's
21 involvement in the crime that night?

22 A. Yeah.

23 Q. But did you give them a lot of details?

24 A. No, ma'am.

25 Q. Why not?

1 A. Because I was scared for my family.

2 Q. Did you ever ask to speak to anybody in your
3 family?

4 A. Yes, ma'am.

5 Q. Who did you ask to speak to?

6 A. My mother.

7 Q. Did they allow you to speak to your mother?

8 A. Yes, ma'am, the next day.

9 Q. And after you spoke to your mom, did you give
10 them any more details?

11 A. No, ma'am.

12 Q. Why not?

13 A. Because we wanted to get a lawyer.

14 Q. Now, on that night, you did agree to give them
15 your DNA sample, didn't you?

16 A. Yes, ma'am.

17 Q. And why did you agree to give them that?

18 A. Because I knew they were going to find out that
19 the bracelet was mine.

20 Q. And how -- because you remember you left the
21 bracelet there?

22 A. Yes, ma'am.

23 (State's Exhibit Nos. 36 and 37 marked for
24 identification)

25 Q. I'm going to show you a couple pictures. First

1 of all, I'm going to show you what's been marked as
2 State's Exhibit 36 and 37 and ask you to take a look
3 at those photographs and ask you if you recognize
4 what's --

5 MR. CHEHOSKI: Your Honor, there's no
6 objection.

7 THE COURT: Thank you. Without objection, 36
8 and 37.

9 (State's Exhibit Nos. 36 and 37 admitted into
10 evidence.)

11 BY MS. PATTERSON:

12 Q. And, Mr. Pitts, what's in this photograph?

13 THE COURT: What number is that, please?

14 MS. PATTERSON: State's Exhibit 30.

15 A. Danitra -- not Danitra. Net's car.

16 Q. And is that the car that you and Ricky were
17 riding in that night when y'all committed these
18 crimes?

19 A. Yes, ma'am.

20 Q. And do you see where the decal may have been
21 that y'all scraped off?

22 A. Yes, ma'am.

23 Q. Can you use the pointer and point to it?

24 A. Right there. (Indicating)

25 Q. Who is that in that photograph?

1 A. That's me.

2 Q. And is that the way you looked the night that
3 you were arrested when law enforcement came to Net's
4 house --

5 A. Yes, ma'am.

6 Q. -- when you were taken into custody?

7 A. Yes, ma'am.

8 THE COURT: What number, please, ma'am?

9 MS. PATTERSON: State's Exhibit 32. I
10 apologize.

11 BY MS. PATTERSON:

12 Q. Are you a little bigger in that picture?

13 A. Yes, ma'am.

14 Q. You've lost some weight?

15 A. Yes, ma'am.

16 Q. How much weight have you lost?

17 A. About 20, 30 pounds.

18 Q. I'm going to show you State's Exhibit 31. Do
19 you recognize who is in that photograph?

20 A. Yes, ma'am.

21 Q. Who is that?

22 A. Ricky.

23 Q. And is that the way Ricky appeared that night
24 law enforcement came to Net's house?

25 A. Yes, ma'am.

1 Q. And you stated earlier you noticed some
2 swelling on his face. Do you remember which side of
3 his face?

4 A. Left side.

5 Q. And this was three or four days after the
6 robbery?

7 A. Yes, ma'am.

8 Q. And I'm going to show you State's Exhibit 36.
9 Do you recognize what's in that photograph?

10 A. Yes, ma'am.

11 Q. And what's in that photograph that you
12 recognize?

13 A. The Woodbine Apartments.

14 Q. And can you see in this photograph where your
15 brother lived?

16 A. Yes, ma'am.

17 Q. Can you point it out?

18 A. Right there. (Indicting)

19 Q. And is that the residence that you went in to
20 get the razor that night?

21 A. Yes, ma'am.

22 Q. And where was Ricky parked when y'all pulled
23 in?

24 A. Right there. (Indicating)

25 Q. And where were y'all when y'all scraped off

1 that decal?

2 A. In the same spot.

3 Q. And does that photograph show where y'all may
4 have dumped your shirts?

5 A. In that dumpster.

6 Q. And whose idea again was that?

7 A. Ricky's.

8 Q. And I'm going to show you State's Exhibit 37.
9 Do you see the dumpster in that photograph?

10 A. Yes, ma'am.

11 Q. And after y'all got rid of your clothing, where
12 did you go?

13 A. He went around the apartment area in the car
14 and I jumped over this fence and that fence and went
15 right here to the back door to the house and got in
16 the car. (Indicating)

17 Q. And why did you jump over those fences?

18 A. Because I was smoking a cigarette.

19 Q. Did you know how old Ricky was?

20 A. Yes, ma'am.

21 Q. How old was Ricky back in 2015?

22 A. Forty.

23 Q. And how old were you?

24 A. Twenty-five.

25 Q. Now, through your attorney Mr. Shupper, have

1 you had the opportunity to look at Ricky Esaw's
2 written statement?

3 A. Yes, ma'am.

4 Q. And I'm just going to hand this up to you.

5 THE COURT: State's No. 1?

6 MS. PATTERSON: Yes, sir, Your Honor.

7 THE COURT: Thank you.

8 BY MS. PATTERSON:

9 Q. And since you were there and had knowledge of
10 all this, I'm just going to ask you about Mr. Esaw's
11 statement just a little bit. On page 1 of his
12 statement, Mr. Esaw said: They came to get me from
13 my mom's house telling me they needed a driver, so I
14 drove the Nissan black headed to Rolling Meadows
15 because they had some Mexicans to get. So I drive
16 them down there and when they got out they pulled
17 their guns out on the Mexicans. Pitts was fighting
18 with one and he shot him. When they got in the car
19 AJ asked him why he shot him.

20 Do you know an AJ?

21 A. Yes, ma'am.

22 Q. And how do you know AJ?

23 A. From Woodbine Apartments.

24 Q. And would you have considered AJ a friend?

25 A. No, ma'am.

1 Q. Did you get along with AJ?

2 A. No, ma'am.

3 Q. Was AJ with you and Ricky Esaw on August 9th,
4 2015?

5 A. No, ma'am.

6 Q. Can you take your attention to page 2 of
7 Mr. Esaw's statement: Who came up with the plan to
8 rob the Mexicans?

9 AJ.

10 Is that true?

11 A. False.

12 Q. Who came up with the plan to rob these people?

13 A. Ricky.

14 Q. And can you take your attention to page 3 of
15 Mr. Esaw's statement. Third question: How did they
16 carry the weapons?

17 AJ told me to stop the car.

18 Again, who had the weapons?

19 A. Ricky.

20 Q. And the next question: Who was Mexican
21 fighting with when gun went off?

22 A. Ricky.

23 Q. How many times did Pitts fire the weapon?

24 He says three times; is that true?

25 A. False.

1 Q. How many times did you fire the weapon?

2 A. Twice.

3 Q. And how many times did Esaw fire the weapon?

4 A. Once.

5 Q. Let me take your attention to page 4 of his
6 statement. When it was asked, did you get out of
7 the car, he said never, is that true?

8 A. False.

9 Q. Did he get out of the car?

10 A. Yes, ma'am.

11 Q. Last -- were there any cell phones taken?

12 Yes. But AJ threw it out the window.

13 Is that true?

14 A. False.

15 Q. Who threw it out the window?

16 A. I did.

17 Q. And what did AJ or Pitts -- excuse me. Take
18 your attention to page 5 of the statement: Did AJ
19 and Pitts drive off together?

20 Yes.

21 Is that true?

22 A. False.

23 Q. Who did you leave Woodbine Apartments with that
24 night?

25 A. Net, Ricky, and Jeremy.

1 Q. Akiem, who shot the man in the leg at Rolling
2 Meadows on August 9th, 2016 [sic]?

3 A. I did.

4 Q. Who was with you?

5 A. Ricky.

6 Q. Who shot the man who died?

7 A. Ricky.

8 Q. Is Ricky Esaw in this court today?

9 A. Yes, ma'am.

10 Q. Can you point him out?

11 A. Right there. (Indicating)

12 Q. What does he have on?

13 A. A suit.

14 MS. PATTERSON: Your Honor, let the record
15 reflect he's pointed out the defendant, Ricky Esaw.

16 THE COURT: Yes, ma'am.

17 BY MS. PATTERSON:

18 Q. Are you scared of Ricky?

19 A. Yes, ma'am.

20 Q. Were you scared then?

21 A. Yes, ma'am.

22 Q. Are you scared today?

23 A. Yes, ma'am.

24 Q. Then why are you here?

25 A. To give the family some closure to what really

1 happened.

2 Q. Whose family?

3 A. The Vasquez family and my family.

4 MS. PATTERSON: I beg the Court's indulgence.

5 Thank you, Akiem. Please answer any questions
6 the Defense may have.

7 THE COURT: Mr. Chehoski, cross-examine?

8 MR. CHEHOSKI: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. CHEHOSKI:

11 Q. Mr. Pitts, you testified that you haven't been
12 offered anything in exchange for your testimony
13 today; is that correct?

14 A. Yes, sir.

15 Q. And you've also testified that you're facing
16 charges of murder and attempted murder, and armed
17 robbery --

18 A. Yes, sir.

19 Q. -- and a gun charge --

20 A. Yes, sir.

21 Q. -- and obstruction of justice charge. Correct?

22 A. Yes, sir.

23 Q. You also testified you're also facing a lot of
24 time.

25 A. Yes, sir.

1 Q. Facing a possible life sentence?

2 A. Yes, sir.

3 Q. And you said you haven't been offered anything.

4 A. No, sir.

5 Q. You haven't pled guilty yet either, have you?

6 A. No, sir.

7 Q. You haven't been in front of a judge yet.

8 A. No, sir.

9 Q. You haven't been sentenced yet.

10 A. No, sir.

11 Q. That's going to take time -- take place
12 sometime in the future?

13 A. Yes, sir.

14 Q. And the State can still make an offer then;
15 right?

16 A. Maybe.

17 Q. All right. And that's why -- you're saying
18 that's why you're here today?

19 A. I'm here today to tell the truth to the family.

20 Q. You've had other opportunities to tell the
21 truth, haven't you?

22 A. Yes, sir.

23 Q. In fact, you -- the first time you had an
24 opportunity to tell the truth was on August 12th,
25 2015; is that correct?

1 A. That's false.

2 Q. That's false?

3 A. August 12th? We got locked up -- August 12th,
4 if that's when he wrote the statement, yeah.

5 Q. That's when you wrote your first statement.

6 A. Yeah.

7 Q. And you had the opportunity to tell the truth
8 then.

9 A. Yeah.

10 Q. And the first time when you gave that statement
11 you were speaking to Mr. Moore here; right?

12 A. Yes, sir.

13 Q. Who's seated at the State table; correct?

14 A. Yes, sir.

15 Q. And you were in a police car with him.

16 A. Yes, sir.

17 Q. Along with Detective Andaloro.

18 A. Yes, sir.

19 Q. All right. And at that time, your first
20 opportunity to tell the truth, you told them that
21 you were not with Ricky.

22 A. Yes, sir.

23 Q. You told them that you did not hold a gun.

24 A. Yes, sir.

25 Q. You told them that you never seen Ricky with a

1 gun.

2 A. Yes, sir.

3 Q. You told them that you were at your brother's
4 house.

5 A. Yes, sir.

6 Q. You told them that you were at your brother's
7 house passed out; correct?

8 A. Yes, sir.

9 Q. You told them that you were passed out on the
10 couch; correct?

11 A. Yes, sir.

12 Q. And that you were passed out on the couch from
13 drinking all day.

14 A. Yes, sir.

15 Q. You said that you never pointed a gun at
16 anyone.

17 A. Yes, sir.

18 Q. You had another chance to tell the truth later
19 on that night and into the next morning; correct?

20 A. Yes, sir.

21 Q. When you accompanied the -- Detective Moore to
22 the sheriff's department.

23 A. Yes, sir.

24 Q. And at that point you had learned that they
25 could prove that you had lied.

1 A. Yes, sir.

2 Q. Right. That they had spoken to your brother.

3 A. Yes, sir.

4 Q. And you were told that they were not -- that he
5 was not with you.

6 A. Yes, sir.

7 Q. And at that point they also showed you a
8 picture of a bracelet.

9 A. Yes, sir.

10 Q. And it was a picture of a bracelet -- of you
11 wearing that bracelet.

12 A. Yes, sir.

13 Q. And that picture was from Facebook.

14 A. Yes, sir.

15 Q. And at that point you said the bracelet was
16 yours.

17 A. Yes, sir.

18 Q. You also said you gave the bracelet to Ricky;
19 correct?

20 A. Yes, sir. But that's not the same bracelet.

21 Q. It's not the same bracelet, but you said that
22 the bracelet was yours.

23 A. Yeah.

24 Q. And you said you gave it to Ricky.

25 A. Yeah.

1 Q. And then you had said that Ricky always carries
2 a gun.

3 A. Yep.

4 Q. And this was after previously saying that you
5 never seen him carry a gun; correct?

6 A. Yes, sir.

7 Q. And he said he carries a gun in the open;
8 right?

9 A. Yes, sir.

10 Q. Okay. And then at that point you told Sergeant
11 Sowards that it was Ricky and two other guys;
12 correct?

13 A. No, sir.

14 Q. You never said that?

15 A. No, sir.

16 Q. And you never told Detective Andaloro that you
17 were at the scene but didn't do anything?

18 A. Yes, sir.

19 Q. And then you said that you didn't shoot a gun.

20 A. Yes, sir.

21 Q. You told him that?

22 A. Yes, sir.

23 Q. All right. Now you're saying that it was all
24 Rick; correct?

25 A. I had some part in it too.

1 Q. You had some part in it, but it was his idea.

2 A. Yes, sir.

3 Q. It was his guns.

4 A. Yes, sir.

5 Q. And they were in his bag.

6 A. Yes, sir.

7 Q. And that you're just doing this because you're
8 scared.

9 A. Yes, sir.

10 Q. And you're scared now.

11 A. Yes, sir.

12 Q. In August, how tall were you?

13 A. Six foot.

14 Q. How tall is Ricky?

15 A. Five-ten, five-eleven.

16 Q. All right. And how much did you weigh?

17 A. About 250.

18 Q. And how much did he weigh?

19 A. Way less than me.

20 Q. Way less than you. So you're taller than
21 him --

22 A. Uh-huh.

23 Q. -- and you're bigger than him?

24 A. Uh-huh.

25 Q. And you're younger than him --

1 A. Uh-huh.

2 Q. -- by about, what, 15 years?

3 A. Yes, sir.

4 Q. All right. In your statement and in what
5 you've told us, you haven't mentioned anything about
6 hearing a bottle break, have you?

7 A. No, sir.

8 Q. And you haven't mentioned anything about the
9 young man throwing a can of soda or kicking someone
10 in the face, have you?

11 A. No, sir.

12 Q. And you haven't mentioned seeing the wife
13 outside, have you?

14 A. No, sir.

15 Q. Or hearing anyone threaten her, have you?

16 A. No, sir.

17 Q. And so now your testimony today is that you
18 shot the gun twice?

19 A. Yes, sir.

20 Q. You shot one warning shot at the truck.

21 A. Yes, sir.

22 Q. And then you shot the young man.

23 A. Yes, sir.

24 Q. The young man who is in this courtroom;
25 correct?

1 A. I'm not sure.

2 Q. Not sure. You didn't get a good look at him?

3 A. No, sir.

4 Q. You just fired at anybody?

5 A. Huh?

6 Q. You just shot your gun at anybody?

7 A. Yes, sir.

8 Q. At any point in time in the next few days, did
9 you ask to leave?

10 A. No.

11 Q. Did -- at any point in time in the next few
12 days, did Ricky forcibly keep you by his side?

13 A. Not really.

14 Q. Not really. At any point in time did you give
15 Ricky \$50?

16 A. No, sir.

17 Q. Did you keep the wallet?

18 A. No, sir.

19 Q. This is the wallet that you took; right?

20 A. The wallet I took, I gave it to Ricky.

21 Q. This is the first time you're testifying to
22 that case, isn't it, to that fact?

23 A. Huh?

24 Q. First time you're testifying to that fact,
25 isn't it?

1 A. Uh-huh.

2 Q. You didn't testify to that on direct, did you?

3 A. Huh?

4 Q. You did not say that on direct, did you, that
5 you gave the wallet to Ricky?

6 A. No.

7 MR. CHEHOSKI: One moment, please.

8 THE COURT: Okay.

9 BY MR. CHEHOSKI:

10 Q. This is the first time you've told anybody this
11 version of events; isn't that true?

12 A. Yes, sir.

13 Q. All right. And you're -- again, we've already
14 gone over this, but you're facing a murder charge;
15 right?

16 A. Yes, sir.

17 Q. And you know that carries 30 to life; right?

18 A. Yes, sir.

19 Q. And you're facing an attempted murder charge.

20 A. Yes, sir.

21 Q. And you know that carries zero to 30 --

22 MS. PATTERSON: Objection, Your Honor. He
23 cannot comment about the penalty of these charges.

24 THE COURT: He can raise the issues of his
25 jeopardy. He can't talk about his own client's

1 sentence. Right.

2 Go ahead.

3 MR. CHEHOSKI: I can talk about how much time
4 he's facing; correct?

5 THE COURT: And you already have and he's
6 answered the question.

7 MR. CHEHOSKI: All right.

8 BY MR. CHEHOSKI:

9 Q. And you're facing charges of armed robbery?

10 A. Yes, sir.

11 Q. And you know how much time that carries.

12 A. Yes, sir.

13 Q. Ten to 30; right?

14 A. Yes, sir.

15 Q. And again -- and you've had multiple times to
16 tell this story to the police; correct?

17 A. Yes, sir.

18 Q. And this is the first time you're doing so.

19 A. Yes, sir.

20 MR. CHEHOSKI: Nothing further.

21 THE COURT: Thank you.

22 Ms. Patterson, redirect?

23 MS. PATTERSON: Just briefly.

24 REDIRECT EXAMINATION

25 BY MS. PATTERSON:

1 Q. Mr. Pitts, on the occasions you met with me and
2 Ms. Martin, was Investigator Moore there?

3 A. Huh?

4 Q. Was Investigator Moore present when you met
5 with me and Ms. Martin in our office?

6 A. Yes, ma'am.

7 Q. And during those meetings, did you tell us
8 about what you've testified to today?

9 A. Yes, ma'am.

10 Q. So you have told this version to law
11 enforcement prior to today?

12 A. Yes, ma'am.

13 Q. And on direct, did I ask you anything about a
14 wallet?

15 A. Yes, ma'am.

16 Q. Did I ask you a while ago -- I meant, did I ask
17 you in court what did you do with the wallet?

18 A. No, ma'am.

19 Q. Okay. So what happened to the wallet?

20 A. The wallet, I gave it to Esaw, Ricky.

21 Q. And Ricky picked you up from Newberry; correct?

22 A. Yes, ma'am.

23 Q. And did you have a car in Columbia that you
24 could have just left?

25 A. No, ma'am.

1 Q. And let me just show you to make sure we have
2 your location during all this. I'm going to show
3 you what's been entered as State's Exhibit 17 and
4 just ask you to take a look at that. Do you see the
5 bracelet that you left behind in that picture?

6 A. Yes, ma'am.

7 Q. And what is beside that bracelet?

8 A. A number 2.

9 Q. And so is that the area that you were when you
10 were committing the robbery on the man?

11 A. Yes, ma'am.

12 Q. And did you notice what was going on on the
13 other side of the car with Ricky and the people that
14 he was robbing?

15 A. No, ma'am.

16 Q. So you don't know if anybody came over on that
17 side -- out the house on that side --

18 MR. CHEHOSKI: Objection; leading.

19 THE COURT: I'll sustain the objection.

20 BY MS. PATTERSON:

21 Q. So did you see anybody on that side of the car?

22 A. When I first -- when we first rode up, yeah, I
23 seen people standing over there. But once I got the
24 dude wallet and my bracelet came off, I heard a
25 gunshot and I ran to the car and ain't see nothing.

1 MS. PATTERSON: No further questions, Your
2 Honor.

3 THE COURT: Thank you.

4 Any followup on those brief points?

5 RE CROSS-EXAMINATION

6 BY MR. CHEHOSKI:

7 Q. Mr. Pitts, when is the first time that you told
8 this version of events?

9 A. To the solicitors, like, maybe a month ago, I
10 think.

11 Q. Thank you.

12 THE COURT: Ms. Patterson, you got the last
13 word.

14 MS. PATTERSON: No further questions, Your
15 Honor.

16 THE COURT: Thank you.

17 Mr. Pitts, you can step down.

18 MS. PATTERSON: We ask that this witness be
19 excused.

20 THE COURT: Certainly.

21 MS. PATTERSON: Your Honor, may we approach?

22 THE COURT: Yes, ma'am.

23 (Sidebar conference.)

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

1 THE COURT: Thank you.

2 Ladies and gentlemen, that means that you have
3 now heard all of the evidence and testimony you're
4 going to hear from the State in presentation of it's
5 case in chief. Necessarily, at every trial of this
6 nature and at this juncture of every trial like
7 this, I have to send you out to your jury room to
8 deal with some matters of law that do not require
9 your presence.

10 Please remember, as always, that you're still
11 not at liberty to discuss this case among
12 yourselves. There might be more for you to hear
13 yet; there certainly is the arguments that will be
14 made and the charge that I will give you, at the
15 very least.

16 The defendant has the right to offer evidence
17 and testimony if he chooses to do so. But, as I
18 told you earlier, he does not have to do that. So
19 those are the things that we will inquire out of
20 your presence and find out what the balance of the
21 afternoon work will be.

22 Please don't discuss this case among yourselves
23 yet in the jury room. Thank you.

24 (The jury exits the courtroom at 2:57 PM.)

25 THE COURT: Mr. Chehoski, Ms. Fullwood, I'll be

1 glad to hear motions now from the Defense.

2 MR. CHEHOSKI: Thank you, Your Honor. At this
3 time the Defense moves the Court to direct a verdict
4 of not guilty in the favor of Mr. Esaw.

5 At the end of the State's presentation of
6 evidence, they have failed to provide the --
7 sufficient evidence to the point where even in
8 viewing the evidence in a light most favorable to
9 the State where any reasonable juror would be able
10 to find the guilty. I make this motion under, I
11 think it's Rule 19 under South Carolina -- Rule 9 --
12 Rule 19 under South Carolina Rules of Criminal
13 Procedure. And at this time we ask the Court to
14 direct a verdict of not guilty.

15 THE COURT: All right. Thank you.

16 As we know, the standard that the Court applies
17 in ruling on a Rule 19 motion is that the evidence
18 must be taken in the light most favorable to the
19 State, and considering that evidence in the light
20 most favorable to the State, if there is any direct
21 or circumstantial evidence that reasonably intends
22 to prove the guilt of the accused, then the motion
23 for directed motion must be denied.

24 In this particular case, the State has
25 several choices -- excuse me. The jury has several

1 choices that if it chose to believe the evidence
2 that they could determine that the guilt of the
3 accused had been proved. If they chose to believe,
4 for example, the evidence and testimony that was
5 offered by Franklin Vasquez or if they chose to
6 believe the evidence and testimony offered by the
7 detectives in response to the questions about the
8 statements made by Mr. Esaw or if they chose to
9 believe the testimony of Mr. Pitts, any of those,
10 taken separately or, of course, in their cumulative
11 effect, are sufficient to withstand the motion. And
12 the motion for directed verdict is respectfully
13 denied.

14 Would you-all like for me to discuss with
15 Mr. Esaw at this time his rights to testify or not
16 to testify, his Fifth Amendment rights? Is that
17 something you'd like for me to inquire of him?

18 MR. CHEHOSKI: Yes, sir.

19 THE COURT: All right.

20 Mr. Esaw, if you'll stand right where you are
21 and raise your right hand, please.

22 RICKY ESAW

23 being first duly sworn, testified as follows:

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Thank you. You may have a seat.

1 Mr. Esaw, we're now about to enter the phase of the
2 trial of this case where you have the right but not
3 the obligation to present evidence and testimony on
4 your behalf. You have the right to call witnesses,
5 you have the right to testify yourself; however, you
6 cannot be forced to testify and you cannot be forced
7 to call other witnesses, for that fact.

8 Now, if you choose not to testify, the jury
9 will be told that they cannot consider that fact in
10 their consideration and their deliberation on the
11 question of your guilt or innocence because the jury
12 will be told, as I tell you now, that under our law
13 you cannot be forced or compelled to testify
14 yourself in a criminal proceeding.

15 Our Fifth Amendment of our United States
16 Constitution and our similar counterpart, our state
17 constitution, says that no person in a criminal
18 proceeding can be compelled to give evidence against
19 himself, so a right to remain silent is a right that
20 is yours and it is only yours; nobody else can
21 exercise it and nobody else can give it up except
22 you. So you have the right to testify, but you also
23 have the right not to testify. And, as I said, the
24 jury will be told they cannot take that into
25 account, the fact that you did not testify if you

1 choose not to.

2 If you give up the right to remain silent and
3 if you choose to testify, then you'll be subject to
4 all the other witnesses that you've seen testify in
5 this trial; you'll be asked questions not only by
6 Mr. Chehoski or Ms. Fullwood, but you'll also be
7 asked questions by either Ms. Martin or
8 Ms. Patterson. You'll be cross-examined to the
9 extent that the law allows on any issue that is
10 relevant to this case. Do you understand that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: So do you fully understand your
13 right to remain silent or your right to testify?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Can I then assume that whatever you
16 do in exercising that right, whether you choose to
17 testify or choose not to testify, that you're doing
18 that with a full understanding of what your rights
19 are?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. Do you have any
22 questions you want to ask me about those rights?

23 THE DEFENDANT: No, sir.

24 THE COURT: All right. Mr. Chehoski, do you
25 desire any further inquiry on that part?

1 MR. CHEHOSKI: No, Your Honor.

2 THE COURT: Thank you.

3 All right. This is a good time to take a brief
4 recess, for many reasons; to change sides and get
5 you-all ready to go, and I think you want to call a
6 witness. And your expert witness will be here at
7 3:30; is that right?

8 MR. CHEHOSKI: Correct, Your Honor.

9 THE COURT: Let's take about ten more minutes
10 and start back at 3:15, please.

11 MS. MARTIN: Yes, sir.

12 THE COURT: Thank you.

13 MS. MARTIN: Your Honor, if we may, since we're
14 all still here, I think at sidebar defense counsel
15 indicated that they need Detective Barry Sowards.
16 And we have a concern about that and I'm not sure
17 why he's recalling him. If it's subject to one of
18 the rules, we may have an objection.

19 THE COURT: Subject to a rule?

20 MS. MARTIN: To Rule 613(b), extrinsic evidence
21 of a prior inconsistent statement. If he's
22 trying -- I don't know what he's trying to do. But
23 I believe he's trying to impeach Mr. Pitts by using
24 Investigator Sowards. And I don't believe he laid
25 the proper framework with the witness Pitts.

1 THE COURT: We'll -- I'll be glad to rule on
2 that when the question is posed. I'm not sure what
3 the purpose is either.

4 MR. CHEHOSKI: Your Honor, if I may address
5 that.

6 THE COURT: All right.

7 MR. CHEHOSKI: In Rule 613 I have to -- given
8 the opportunity -- I advised of the substance of the
9 statement and I asked Mr. Pitts about telling --
10 about where it was on -- it was on August 12th. And
11 Detective Moore -- or, I'm sorry, at the Lexington
12 County Sheriff's Department and into the early
13 morning hours of the 13th.

14 The person to whom it was made, which was
15 Investigator Sowards, was given the opportunity to
16 explain or deny the statement. He denied the
17 statement. And so if he does not admit the
18 statement, extrinsic of evidence of such statement
19 is admissible. I think in this case I have laid --
20 I fit within the proper framework to call
21 Mr. Sowards to be able to impeach Mr. Pitts through
22 the extrinsic evidence of what's in his report, as I
23 tried to do yesterday during his cross-examination.

24 THE COURT: Right. Okay. What is the
25 statement that was made to Investigator Sowards that

1 would be the subject of your inquiry, so that I'll
2 know what we're talking about?

3 MR. CHEHOSKI: It was that it was Ricky Esaw
4 and two other guys at Woodbine Apartments. That was
5 the subject of the statement, that was the subject
6 of my question on cross-examination.

7 THE COURT: Right. Okay.

8 Ms. Martin?

9 MS. MARTIN: And I just don't believe that he
10 framed it properly. I could have missed it. I
11 don't think he laid the foundation as to where they
12 were, what day it was, who was there, and I don't
13 think -- I just don't think the proper groundwork
14 was laid, I don't think Mr. Pitts understood what he
15 was asking.

16 THE COURT: And where and when was that
17 statement made, Mr. Chehoski? You asked him about
18 the other chances to tell the truth, once in the
19 police car with Mr. Moore and Mr. Andaloro.

20 MR. CHEHOSKI: Andaloro. And then I said, you
21 had another opportunity to tell the truth when he
22 accompanied -- back when he accompanied Detective
23 Moore to Lexington County Sheriff's Department.

24 And then I asked, you know, at that time did
25 you tell Detective Sowards that it was Ricky Esaw

1 and two other people at Woodbine Apartments.

2 THE COURT: Right. And that was the statement,
3 later that night or early the next morning. Is that
4 what you're talking about?

5 MR. CHEHOSKI: Yes, sir.

6 THE COURT: That's right. He set that
7 timeframe -- or my notes reflect that he asked
8 specifically about that timeframe. All right. I
9 will allow it, subject to objection, of course. It
10 seems to me that Rule 613 has been complied with.

11 Now we'll start back at 20 after the hour.
12 Okay?

13 MR. CHEHOSKI: Thank you.

14 (Brief recess.)

15 THE COURT: Are both sides ready for the jury?

16 MS. MARTIN: State is ready, Your Honor.

17 MR. CHEHOSKI: Defense is ready, Your Honor.

18 THE COURT: Bring us the jury, please.

19 (The jury enters the courtroom at 3:21 PM.)

20 THE COURT: Ladies and gentlemen, I remind you
21 the State has now rested its case in chief and the
22 Defendant has the right to offer evidence and
23 testimony if he chooses to, but he is under no
24 obligation to do that.

25 Mr. Chehoski?

1 MR. CHEHOSKI: Thank you, Your Honor. The
2 Defense recalls Detective Barry Sowards.

3 THE COURT: Detective Sowards, please.

4 THE CLERK: Still under oath, Your Honor?

5 THE COURT: Yes, ma'am.

6 Detective, come forward, please, sir, and
7 resume the stand. You're still under oath.

8 DIRECT EXAMINATION

9 BY MR. CHEHOSKI:

10 Q. Good afternoon, Detective.

11 A. Good afternoon.

12 Q. You all settled in there?

13 A. I believe so.

14 Q. All right. I wanted to ask you about when you
15 sat in with -- on the interview with Wilfred Pitts.
16 And I spoke to you yesterday about -- again, about
17 your recording habits, about being complete and
18 accurate and thorough; is that right?

19 A. That's correct.

20 Q. And, therefore, you don't want to write -- you
21 don't want to report any -- put down anything in
22 your report, excuse me, that didn't actually happen
23 or wasn't actually said; right?

24 A. That's correct.

25 Q. And you were with Mr. Pitts in the late-night

1 hours and early-morning hours of August 12th of 2015
2 to August 13th, 2015; is that correct?

3 A. Yes, that's correct.

4 Q. All right. And you were in the interview room
5 with Mr. Pitts; correct?

6 A. Yes.

7 Q. And also in the interview room was Detective
8 Moore; correct?

9 A. Yes.

10 Q. And Detective Andaloro?

11 A. Correct.

12 Q. All right. And you took notes of that meeting;
13 correct?

14 A. Yes.

15 Q. And in those notes you advised -- you wrote
16 down that Mr. Pitts knew about the shooting?

17 A. Yes, that's correct.

18 Q. And he knew about the shooting and it was Ricky
19 Esaw and two other guys from Woodbine Apartments?

20 A. Yes, that's correct.

21 Q. All right. And that he didn't want to rat them
22 out?

23 A. Correct.

24 Q. And that he didn't want to rat them out because
25 of fear of retaliation from them?

1 A. Yes.

2 Q. And you did not get the names of those other
3 two people?

4 A. No.

5 Q. And, also, there was nothing in your report --
6 you didn't write anything in your report about
7 noticing any injuries to Mr. Esaw?

8 A. I don't believe I did.

9 Q. No. You didn't notice any -- you didn't write
10 down that you noticed any scratches?

11 A. That's correct. I don't believe I did.

12 Q. Or cuts? You didn't notice any cuts?

13 A. Correct.

14 Q. Or bruises?

15 A. I didn't indicate that on the report, no.

16 Q. And, again, you do your best to be complete and
17 accurate and thorough?

18 A. Sure. We try to do the best we can.

19 Q. Thank you. One moment, please. Thank you,
20 Detective Sowards.

21 THE COURT: Any cross, ladies?

22 MS. MARTIN: Yes, please.

23 CROSS-EXAMINATION

24 BY MS. MARTIN:

25 Q. During this interview with defendant Pitts, was

1 this during the same time he was giving an alibi?

2 A. It was right at the same time, yes.

3 Q. And is this during the time period when he said
4 the bracelet wasn't his?

5 A. That's correct.

6 Q. And is this during the same time period when he
7 said that actually Ricky was wearing the bracelet?

8 A. Yes, it was.

9 Q. Would it be fair to say this was the time when
10 Mr. Pitts was telling lots of lies?

11 A. Yes.

12 Q. Okay. And have you been present with Mr. Pitts
13 when he's told -- scratch that.

14 Before today, have you heard Mr. Pitts admit
15 that he shot Franklin?

16 A. Yes.

17 Q. And before today, have you heard Mr. Pitts say
18 Ricky Esaw shot Hector?

19 A. Yes.

20 MS. MARTIN: That's all I have, Your Honor.

21 THE COURT: Thank you.

22 Redirect, Mr. Chehoski?

23 REDIRECT EXAMINATION

24 BY MR. CHEHOSKI:

25 Q. You heard Mr. Pitts say that he shot Franklin

1 back then in 2015?

2 A. No.

3 Q. Did you hear him say that in 2016?

4 A. No.

5 Q. All right. And I just want to get one more
6 thing, that this was -- you were the one who refuted
7 Mr. Pitts' alibi; correct?

8 A. That's correct.

9 Q. And you had already refuted his alibi when you
10 heard him give this statement; correct?

11 A. Correct.

12 Q. And you had already called Detective Moore to
13 confirm that you refuted his alibi before you saw
14 him give this statement; correct?

15 MS. MARTIN: Your Honor, this is direct -- or
16 redirect. He's leading.

17 THE COURT: Well, the timing of it, the
18 question you asked was, had he heard Mr. Pitts
19 before today admit these things. And I think what
20 Mr. Chehoski is doing is trying to set up a more
21 finite time limit on those things.

22 Is that right?

23 MR. CHEHOSKI: Correct.

24 THE COURT: You can do that.

25 BY MR. CHEHOSKI:

1 Q. Do you need me to repeat the question?

2 A. Would you, please?

3 Q. Okay. And, again, this was -- you had already
4 called Detective Moore to tell him that his alibi
5 was a lie?

6 A. Yes, that's correct.

7 Q. And it was after that that you returned to
8 Lexington County Sheriff to sit in the interview
9 room?

10 A. Correct.

11 Q. And it wasn't at that time that he admitted to
12 shooting Franklin; correct?

13 A. No, sir.

14 Q. Okay. And it wasn't at any time last year that
15 he admitted to shooting Franklin --

16 THE COURT: That's been asked and answered.

17 MR. CHEHOSKI: Nothing further, Your Honor.

18 THE COURT: Thank you.

19 Detective, you can step down. Thank you.

20 MR. CHEHOSKI: No objection to him being
21 excused at this time, Your Honor.

22 THE COURT: You're free to go back to work.
23 Thank you.

24 MR. CHEHOSKI: Your Honor, I want to make sure
25 our next witness is here, Dawn McQuiston.

1 THE COURT: All right. Do we know that she's
2 in the building?

3 MR. CHEHOSKI: I haven't been told that, Your
4 Honor.

5 MS. FULLWOOD: I'll go look for her, Your
6 Honor.

7 (Brief pause in the proceedings.)

8 MS. FULLWOOD: She's in the elevator.

9 THE COURT: In the elevator. That's good.
10 We'll wait.

11 MR. CHEHOSKI: Thanks for your patience.

12 THE COURT: Our next witness is Dr. Dawn
13 McQuiston. She's here from Wofford College. She's
14 here and on the elevator.

15 (Brief pause in the proceedings.)

16 THE COURT: Maybe taking the stairs?

17 MR. CHEHOSKI: Sometimes it's a slow elevator,
18 Your Honor.

19 THE COURT: Come forward, please, ma'am, to be
20 sworn. You do know how to make an entrance.

21 DAWN MCQUISTON

22 being first duly sworn, testified as follows:

23 THE WITNESS: Yes.

24 THE CLERK: Have a seat, please, ma'am. Once
25 you're seated, state your full name spelling your

1 last, please.

2 THE WITNESS: It's Dawn McQuiston,
3 M-C-Q-U-I-S-T-O-N.

4 DIRECT EXAMINATION

5 BY MR. CHEHOSKI:

6 Q. Good afternoon, Doctor.

7 A. Good afternoon.

8 Q. Where are you currently employed?

9 A. At Wofford College in Spartanburg.

10 Q. And what is your job there?

11 A. I'm an associate professor of psychology.

12 Q. All right. Tell us a little bit about your
13 background and education, please.

14 A. Sure. I have a bachelor's degree in psychology
15 from Eastern New Mexico University, a master's
16 degree and Ph.D. in experimental psychology from the
17 University of Texas at El Paso.

18 Q. And what does your faculty position consist of?

19 A. I teach classes and I do research.

20 Q. And what is your field of expertise?

21 A. My general area is legal psychology or the
22 intersection of psychology and law.

23 Q. Do you belong to any professional
24 organizations?

25 A. I do; the American Psychology Law Society,

1 which is the flagship organization for people who do
2 research in psychology and law, the Society for
3 Applied Research in Memory and Cognition, and the
4 Society for Empirical Legal Studies.

5 Q. Have you ever had any of your research
6 published?

7 A. I have, yes.

8 Q. And have you ever had any of your published
9 research subject to peer review?

10 A. It all has been. Yes.

11 Q. And what does that mean that your research has
12 been subject to peer review?

13 MS. PATTERSON: Your Honor, we won't object to
14 her expertise.

15 THE COURT: All right. In what field do you
16 wish to qualify her?

17 MR. CHEHOSKI: That's what I was about to --
18 the field of eyewitness -- I guess eyewitness
19 identification or eyewitness testimony.

20 THE COURT: All right. Without objection then,
21 Dr. McQuiston is so qualified in the field of
22 eyewitness -- the psychology of eyewitness
23 testimony. Right?

24 MR. CHEHOSKI: Thank you.

25 THE COURT: All right.

1 BY MR. CHEHOSKI:

2 Q. Dr. McQuiston, can you tell the jury how -- is
3 there a generally accepted theory of how memory
4 works?

5 A. Yes. Back in the -- it goes back to the 1960s.
6 A couple of psychologists, Atkinson and Shiffrin,
7 they proposed this idea that has carried to nowadays
8 that memory doesn't work like a videotape, instead
9 information has to -- information that you process
10 has to pass through a series of stages in order to
11 make it into long-term memory or to have it actually
12 form a memory.

13 So there are three stages that information must
14 pass through: Sensory memory, short-term memory,
15 and long-term memory.

16 Q. Can you tell us about the sensory memory stage,
17 please?

18 A. So sensory memory is everything that's going on
19 around you at one time. And you can only really
20 hold onto that information for a matter of seconds
21 before it's lost. And you're really -- in that
22 moment, you're -- that mechanism is filtering out
23 information you don't need, trying to hang onto
24 information that you do need, so then any
25 information that you hang onto then can make it into

1 short-term memory.

2 Short-term memory, you can hold onto that
3 information for about 30 seconds, and you really are
4 only going to hang onto it if you rehearse it and
5 rehearse it and rehearse it. It's similar to the
6 days we had to memorize phone numbers; someone would
7 tell you a phone number and you had to memorize it
8 until you could write it down, you had to rehearse
9 it and rehearse it, and if you didn't, it was gone.
10 So it's gone in 30 seconds if you don't -- roughly,
11 if you don't do that.

12 If you rehearse it rehears it and hang onto it,
13 then it has the opportunity to move into the last
14 stage which is, of course, long-term memory. Those
15 memories, researchers say, are accessible forever.

16 Q. Does memory work like a photograph or a
17 videotape?

18 A. It doesn't. And that's what common knowledge
19 is, I think. But, in fact, memory does not work
20 like a videotape. Instead, we actually -- the way
21 we all remember things is there's always gaps in
22 what you remember, and we tend to fill in those gaps
23 later on with lots of information that we get from
24 various sources, from other people or from what we
25 hear on the news or on TV, from talking to others,

1 or even from rehearsing things in your own head you
2 can fill in information in.

3 So because of that, we tend to think of memory
4 as being more reconstructive than anything. You're
5 reconstructing things into one thing.

6 Q. All right. Do memory -- do memories tend to
7 fade over time?

8 A. They do.

9 Q. They do. Can they fade over a period of days?

10 A. They can. And there's a lot of variability in
11 that. But, in general, memories tend to fade over
12 time.

13 Q. What do scientists mean by the term attention?

14 A. Attention is a mechanism by which it acts as a
15 filter and it filters out irrelevant information so
16 that you're able to focus on whatever the task at
17 hand is.

18 Q. And how does attention affect memory?

19 A. We can only later remember the things that we
20 have attended to.

21 Q. Under what kind of circumstances would someone
22 fail to attend to some important thing?

23 A. So because there's a lot going on -- in any
24 given moment there's a lot going on around you and
25 attention is limited. We can only really attend to

1 one thing at a time, and so it will be at the cost
2 of other things.

3 And then also, if you don't think that you're
4 going to need something later, if you don't think
5 there's any reason to hang onto information to use
6 later, you may not attend to it.

7 Q. What do scientists mean by the term
8 perception?

9 A. Perception is another mechanism that we use to
10 process information, specifically the idea of
11 perception is to process sensory information, so
12 anything coming in through the senses; vision,
13 hearing, touch, taste, smell, those things. So
14 that's what perception is, how we interpret
15 information that comes in through the senses.

16 Q. How does that affect memory?

17 A. In terms of how does perception affect memory?

18 Q. Yes.

19 A. There's a lot of things that we -- a lot of
20 mistakes we can make in terms of things we think
21 we're perceiving in the right way that we may not
22 be.

23 Q. Are there things that would influence the
24 quality of information that is being perceived or
25 attended to that would affect the memory?

1 A. There can be, yes.

2 Q. For example, would the amount of time that
3 someone has to perceive, would that affect memory?

4 A. Yes. The amount of time that someone has can
5 certainly affect -- it will affect how much
6 information you get. And how much information you
7 get will certainly influence what you remember
8 later.

9 Q. Also, would your -- how about would light --
10 the light you're -- the light under which you're
11 perceiving, would that affect it?

12 A. Sure. Anything that might interfere with your
13 ability to take in information, so how good the
14 lighting is, if the lighting is dim, that's going to
15 be less information available; if it's great
16 lighting, that will be more information available.
17 So whatever the information that is available, that
18 will certainly influence how much you'll remember
19 later.

20 Q. All right. And is it common that people would
21 make mistakes in perceiving events?

22 A. Yes. Yes.

23 Q. Can that happen to anybody?

24 A. Yes.

25 Q. And what impact does stress have on memory?

1 A. Stress can have -- under different
2 circumstances, stress can have a negative effect on
3 memory.

4 Q. All right. Does -- and does heightened stress
5 or fear affect that?

6 A. Sure. So when you're under any sort of
7 heightened stress, extreme fear, anything that is
8 physiologically arousing, can interfere with the
9 ability to form memories.

10 Q. Is there scientific research out there that has
11 examined the effect of stress on memory?

12 A. Yes. There's specifically -- there's been a
13 lot of research looking at how stress influences
14 memory in general. But specifically eyewitness
15 memory, there's been many studies and they were put
16 together in what researchers call a meta-analysis,
17 and that paper, that article, was published.

18 And what that is, it's a statistical technique
19 used to combine the results of lots of studies into
20 one paper. So this meta-analysis was published
21 several years ago that combined the results of
22 dozens of studies looking at the impact of stress on
23 memory.

24 Q. Who participated in these studies?

25 A. It's all adults over 18, males, females.

1 Q. Did people under the age of 18 participate in
2 these studies?

3 A. Typically not.

4 Q. Why not?

5 A. Usually for ethical reasons, researchers are
6 using people over the age of 18.

7 Q. Okay. And how are these studies that examine
8 stress generally conducted?

9 A. So these studies involve inducing stress in
10 some way. So studies have looked at various ways of
11 inducing stress, so some sort of threatening object
12 or threatening situation to try and induce that kind
13 of state physically and mentally.

14 And so you'd have a group that is undergoing
15 some kind of stressful event or frightening event
16 and then another group of people who are not, and
17 then you test everybody to see how well they
18 remember certain things.

19 Q. And what were those results of those studies?

20 A. And so you generally find that the people in
21 the heightened stress group don't remember things as
22 well. They tend to not be able to describe events
23 and people as well as the nonstressed group and they
24 tend to make more mistakes in their identification
25 of other people than the nonstressed group.

1 Q. All right. Is there something called the
2 cross-race effect?

3 A. There is, yes.

4 Q. Is that also called the own-race bias?

5 A. Yes.

6 Q. And what does that refer to?

7 A. That is a phenomenon that eyewitness
8 researchers have been studying for years, and so
9 lots of research looking at this. It is this
10 phenomenon in which people tend to not be as
11 accurate when they are attempting to recognize or
12 identify a face, a person, that is of a different
13 race or ethnic group than their own.

14 Q. Is there research that demonstrates this?

15 A. There is years of research. Again, it all came
16 together in another meta-analysis published several
17 years ago combining dozens of studies that were
18 done.

19 Q. Can you tell the how this phenomenon happens?

20 A. There are a number of theories that researchers
21 have posed to explain why this happens. But the one
22 theory that seems to have gained the most support by
23 researchers is what they call the contact
24 hypothesis. And what this means is that people who
25 have less contact with other -- with another group

1 seem to be -- over their lives, seem to be more
2 susceptible to making those mistakes.

3 Q. All right. Has this found to occur within
4 different racial groups?

5 A. Yes. This is something that has been studied
6 with various ethnic groups all over the world. And
7 it's a pretty consistent finding.

8 Q. And is it generally supported in the academic
9 field?

10 A. Yes.

11 Q. All right. I also want to talk to you about
12 another event -- not event, but factor that might
13 impact accuracy, and that is involving multiple
14 perpetrators. Is there research that addresses
15 situations with multiple perpetrators instead of
16 just one?

17 A. There is. There have been several studies that
18 have looked at how an eyewitness is able to give
19 information after an event when there have been
20 multiple perpetrators involved as opposed to one.

21 Q. What is the purpose of that?

22 A. The purpose is to look at how accurate people
23 are, if there happens to be any difference in how
24 accurate -- in accuracy rates, depending on the
25 number of perpetrators.

1 Q. What has that research generally shown?

2 A. So the research generally shows that
3 identification accuracy suffers when there are
4 multiple people involved in the crime as opposed to
5 one. Identification accuracy suffers and the
6 descriptions that people give also tend to suffer.

7 Q. And so when there are multiple perpetrators,
8 does that affect the description of just one or all
9 of them?

10 A. It can affect the description of all of them.
11 And the idea here is that a witness must divide his
12 or her attention when there's multiple people and
13 multiple things happening. Of course -- and I
14 talked about attention, that we can really only
15 attend to one thing at a time. That's how this
16 mechanism works for all of us. And so it's the idea
17 of having to try to divide your attention between
18 people. That's why it will all suffer, typically.

19 Q. Have research -- have there been research on
20 the relationship between confidence and accuracy?

21 A. Yes.

22 Q. And what has that research shown?

23 A. So that's another thing that eyewitness
24 researchers have looked at is when someone makes an
25 identification and then is asked how confident he or

1 she is in that identification, so looking at how
2 related those two are.

3 So many studies, again, put together in a
4 meta-analysis, and what this shows is there isn't as
5 strong of a relationship as one would think between
6 confidence and accuracy, meaning that confidence is
7 not a really good, really strong predictor of
8 accuracy; it's not really terrible either, it's
9 somewhere in the middle.

10 Q. Why is that? Why is the relationship so weak?

11 A. Researchers think it's weak because confidence
12 can fluctuate over time. People's confidence in
13 what they think they saw, what they think happened,
14 how great their memory was, how -- anything.

15 Confidence can change over time based on feedback
16 that you were given, based on thinking about the
17 event over and over again, discussing it with your
18 friend. Confidence can certainly fluctuate over
19 time. So it disrupts the relationship between
20 confidence and accuracy.

21 Q. And do eyewitness experts generally support the
22 conclusions concerning the relationship between
23 accuracy and confidence?

24 A. Yes.

25 Q. Okay. Have there been national guidelines that

1 discuss the composing and administering of
2 photographic lineups?

3 A. There have been, yes.

4 Q. Do you know what those guidelines are?

5 A. Well, it's lots of guidelines. But it was a
6 document that was published by the Department of
7 Justice back in 1998, distributed to '99 to all law
8 enforcement agencies in the country, and it
9 discussed how to -- best practices for putting
10 together a lineup, administering a lineup,
11 interviewing witnesses, first responders, so lots of
12 things.

13 Q. Okay. And what do these documents say about
14 presenting a lineup?

15 A. They say lots of things about presenting a
16 lineup. Is there something specific --

17 Q. What do they say about a double-blind
18 procedure?

19 A. So a blind or double-blind procedure -- you
20 might have heard that in medical -- it's used a lot
21 in medical research. That idea is that it's good
22 practice to present a lineup, the person presenting
23 the lineup does not know who the person in the
24 lineup is -- which person is the suspect.

25 So the reason to -- the reason behind that is

1 decades of psychological -- purely psychological
2 research shows that we all can give nonverbal cues
3 that we're totally unaware of in lots of situations.
4 So this is in order to prevent that, that it is good
5 practice, just to make sure there's no cues
6 unknowingly given to a witness who is looking at a
7 lineup and attempting to make an identification.

8 Q. Is it an attempt to prevent bias?

9 A. Sure. Yes.

10 Q. Or is it -- or could there be come cues that
11 the investigator might not even be aware of?

12 A. That's exactly the idea, yes.

13 Q. And do you know if police departments across
14 the country have started adopting this procedure?

15 A. There are several that have started to adopt
16 this, yes.

17 Q. Okay. And are there any difficulties that
18 would arise from a lineup identification,
19 transferring that into an in-court identification?

20 A. Sure. I think that in-court identifications
21 are tough to assess in terms of their reliability,
22 because if you think about the purpose of a lineup,
23 the purpose of a lineup is similar to a
24 multiple-choice test, it's in order to screen out
25 someone who doesn't know the answer. If you know

1 the answer, you should be able to pick the right
2 answer amongst a bunch of wrong answers.

3 So a lineup, that's the same theory; to protect
4 from a witness who may not have a great memory. So
5 an in-court identification doesn't offer that kind
6 of protection, for one thing. So that's one reason
7 that that's a -- it's tough to assess how reliable
8 that might be. Secondly, everyone in the courtroom
9 knows where the defendant is sitting, so that can
10 also be part of the issue.

11 Q. All right. Just kind of wrapping up here, when
12 assessing the reliability of memory here, would a
13 high-stress event affect that memory?

14 A. It can, yes.

15 Q. And would a dark environment affect that
16 memory?

17 A. It certainly can.

18 Q. Would a cross-race effect affect that memory?

19 A. It can, yes.

20 Q. And also depending -- and the presence of
21 multiple perpetrators, could that affect that
22 memory?

23 A. It can.

24 MR. CHEHOSKI: Just one moment, please, Your
25 Honor.

1 THE COURT: Yes, sir.

2 MR. CHEHOSKI: Please answer any questions from
3 the State counsel.

4 THE COURT: Ms. Patterson, cross-examine?

5 CROSS-EXAMINATION

6 BY MS. PATTERSON:

7 Q. You're not here to comment on the specific
8 lineup in this case, are you?

9 A. That's right.

10 Q. As a matter of fact, you were not there when
11 that lineup was given, so you can't comment on the
12 manner in which the police officer gave that lineup,
13 can you?

14 A. That's right.

15 Q. And you don't have any law enforcement training
16 or experience, do you?

17 A. No.

18 Q. And you've never presented a photo lineup to
19 anybody; correct?

20 A. Only in a research scenario.

21 Q. So it wasn't a real scenario where these people
22 may have witnessed anything violent?

23 A. That's right.

24 Q. And you've never met the person in this case
25 who identified the suspect, have you?

1 A. No.

2 Q. So you don't know anything about his life
3 experiences or his ability to recall, do you?

4 A. No.

5 Q. And you mention these studies. What kind of
6 situations were these people presented in which they
7 had to identify the perpetrator?

8 A. Well, there's all kinds of different situations
9 because we're talking about decades of eyewitness
10 research, so literally thousands of studies. And so
11 do you have a specific question?

12 Q. Would that have included someone who may have
13 witnessed their parent being killed?

14 A. Probably not.

15 Q. And you mention these studies -- the
16 participants in these studies are adults 18 or over;
17 correct?

18 A. Right.

19 Q. So there have been no studies dealing with
20 people 17 and younger; right?

21 A. There are certainly studies that I know of
22 involving how well children remember events and
23 whether the memory of children differs from that of
24 adults. I think the idea is that the theories that
25 apply to how memory works with all these things that

1 I described with adults certainly apply to teenagers
2 as well.

3 Q. And you would agree people recall things
4 differently; correct?

5 A. Sure. Yes.

6 Q. And people deal under stressful situations
7 differently; right?

8 A. Sure.

9 Q. So some people may be able to recall things
10 just perfectly under a stressful situation; correct?

11 A. Some people.

12 Q. And, in fact, I think in psychology there's a
13 response called fight or flight that helps people
14 react to stressful situations, isn't there?

15 A. That's right.

16 Q. And would you agree that a person who has clear
17 view and close contact, let's say from you to me,
18 would be more likely attentive to the situation
19 that's going on; right?

20 A. I certainly think that there are lots of
21 factors you have to consider, but certainly I would
22 agree that those -- the proximity matters,
23 certainly.

24 Q. And that person would be more likely to give a
25 reliable identification; correct?

1 A. Based on proximity, you mean, or -- because I
2 think there are a lot of factors involved, like I've
3 described.

4 Q. Would that be a factor that would --

5 A. Proximity is certainly a factor, yes.

6 Q. Okay. And also with the amount of time that
7 they're attentive to that situation, would that also
8 be a factor that may help render their
9 identification reliable?

10 A. Amount of time, yes.

11 Q. And you've testified that the accuracy level
12 decreases when there are multiple perpetrators;
13 correct?

14 A. It can. Not all the time, but it can.

15 Q. So not all the time?

16 A. Right.

17 Q. And what about in situations where that person
18 may be focused primarily on one perpetrator?

19 A. I think that what's -- one of the things that's
20 hard about assessing is that these are mechanisms
21 that are happening without having much control over
22 them. And so I think it's hard for me to comment
23 about how much someone might have been attending to
24 one thing or another thing or another thing.

25 Q. Now, do these studies also include situations

1 when the perpetrator admitted to being at the scene?

2 A. Generally, the types of studies I'm talking
3 about are identifications of people who -- a witness
4 who has never seen before. Is that getting to your
5 question?

6 Q. And I think you spoke about -- on direct
7 examination about this cross-racial effect or
8 own-race bias identification. Right?

9 A. Yes.

10 Q. Now, what about a situation where a person has
11 frequent exposure to the race to which the person
12 they identified is included?

13 A. Right. So like I was describing before, this
14 idea of the contact hypothesis, researchers tend to
15 agree that the more contact someone has with a
16 different ethnic group, the less susceptible they
17 might be to the own-race bias or the cross-race
18 effect.

19 Q. So if they have friends, neighbors, classmates,
20 of that race of the person they identified, they're
21 more likely to make a more accurate identification?

22 A. Probably.

23 Q. And what about the accuracy of a person's photo
24 lineup identification that's given, like, within
25 days of the event?

1 A. Right. So we'd called that the retention
2 interval, the time between the event and the lineup.
3 Obviously, it's good practice, if possible, to make
4 that time delay be as short -- and there are lots of
5 factors that can play into that in a case.

6 But because memory tends to fade over time
7 naturally, the shorter that retention interval the
8 better in terms of being able to remember details
9 better.

10 Q. And would you consider a three-to-four-day
11 timeframe a short retention period?

12 A. It's actually hard for me to quantify that
13 because research doesn't necessarily pinpoint how
14 many days or hours would be in a good range or a not
15 good range. So I think I probably can't necessarily
16 comment on that.

17 Q. So what about if during that three-to-four-day
18 time period this person is repeatedly retelling this
19 stressful event? Would that be what you, I think,
20 referred to as rehearsing?

21 A. It could be. It could be. And it's hard to
22 say because people's telling of an event can differ
23 over time and -- or not. So I think that's an
24 individual thing that I wouldn't be able to comment
25 on over all.

1 Q. And you talked about the way that law
2 enforcement presents photo lineups. And I think you
3 admitted earlier you have no law enforcement
4 experience; correct?

5 A. Correct.

6 Q. And you talked about in-court identification
7 usually doesn't add anything to the photo
8 identification?

9 A. Right.

10 Q. And -- but would you agree that it also doesn't
11 take away anything from the photo identification?

12 A. Yeah, I agree with that.

13 Q. Okay. And, Dr. McQuiston, how much do you get
14 paid by the Defense for your testimony?

15 A. I get paid \$300 an hour.

16 Q. And do you get paid travel?

17 A. I do.

18 Q. Per mile?

19 A. I do.

20 Q. And how many days have you been here to testify
21 for the Defense?

22 A. This is the second day.

23 MS. PATTERSON: No further questions.

24 THE COURT: Thank you.

25 Mr. Chehoski, redirect?

1 REDIRECT EXAMINATION

2 BY MR. CHEHOSKI:

3 Q. Are you aware of something called weapon focus?

4 A. I am.

5 Q. And what does that mean?

6 MS. MARTIN: Objection, Your Honor; outside the
7 scope.

8 THE COURT: How does that fit in with the --

9 MR. CHEHOSKI: Your Honor, again, it would go
10 to the retention that was asked about on cross.

11 THE COURT: Okay. If it's a part of what was
12 asked about on cross, she can't go into it.

13 MR. CHEHOSKI: What's that?

14 THE COURT: If she can tie it to what she
15 testified about earlier --

16 MR. CHEHOSKI: I think it was tied, again, to
17 what was discussed about as far as retention
18 intervals.

19 THE COURT: Well, let's see if the doctor can
20 tie it.

21 MR. CHEHOSKI: Okay.

22 THE WITNESS: Can you repeat the question?

23 BY MR. CHEHOSKI:

24 Q. What is weapon focus?

25 A. Weapon focus is a term that refers to the idea

1 that when a perpetrator has a weapon during an
2 event, the witness -- the witness's eyes are drawn
3 to it, that you spend -- the witness would be really
4 focusing on that weapon at the expense of being able
5 to attend to the other information happening.

6 Q. And even if someone is, say, this close away,
7 can that affect the person's -- the person's
8 perception?

9 A. Yes.

10 Q. All right. And when talking about, again,
11 amount of time, how are people -- how does that
12 stress and all the other factors that we've talked
13 about affect the people's estimation of that?

14 A. Can you rephrase that?

15 Q. All right. When talking about -- again, I'm
16 talking about, again, amount of time in describing
17 an event --

18 A. Right.

19 Q. -- do the stress of -- do the factors of stress
20 and own-race bias and all the other factors we
21 talked about, does that impact someone's -- a
22 person's perception about how long something
23 happened?

24 A. It certainly can. And people tend to be
25 notoriously bad at estimating things like time and

1 speed and height and weight. And people are often
2 not good at those things.

3 Q. Do they tend to overestimate or underestimate?

4 A. I can't say for sure.

5 MR. CHEHOSKI: Nothing further.

6 THE COURT: Thank you.

7 Any follow-up Ms. Patterson?

8 MS. PATTERSON: No, sir, Your Honor.

9 THE COURT: Thank you, Doctor McQuiston. You
10 may step down and you're excused. Have a safe trip
11 back.

12 MR. CHEHOSKI: One moment, please.

13 THE COURT: Okay.

14 MR. CHEHOSKI: Your Honor, at this time, the
15 Defense rests.

16 THE COURT: Ladies and gentlemen, you've now
17 heard all of the evidence and testimony that you'll
18 hear in the trial of this case. You've yet to hear
19 the final arguments that the lawyers will present
20 and the charge on the law which I will give you
21 after that has been done.

22 Obviously, the hour of the time the day is such
23 that we're not going to enter into that exercise at
24 this late hour, but we will start tomorrow at 9:30.
25 So I'm going to ask that you be in your jury room

1 tomorrow morning at 9:30. Reminding you as always,
2 of course, not to discuss this case among yourselves
3 or with anybody else, and do not allow yourself to
4 be exposed to any other publicity or any other
5 information about this case.

6 You've heard all of the testimony, you've seen
7 all of the evidence, you're not going to see any
8 more of that. Your oath said that you will well and
9 truly try the case and render a true verdict
10 according to the law and the evidence. You have not
11 yet heard the law, so you're still not at liberty to
12 talk about this case among yourselves.

13 Thank you, folks, for your attention and your
14 patience throughout this. We'll come back tomorrow
15 morning with a fresh start of the day and we'll put
16 the final phase of this case before you and put it
17 in your hands. Thank you very much.

18 (The jury exits the courtroom at 4:07 PM.)

19 THE COURT: I'll note the renewal of all
20 motions that were made at the conclusion of the
21 State's case and will renew my rulings as to those
22 motions and will be glad to hear any additional
23 motions -- or any additional grounds for those
24 motions at this time.

25 MR. CHEHOSKI: Your Honor, I think what I've

1 left off was -- and I meant to encompass all prior
2 motions and objections that were made during the
3 State's case in chief and any violations of the
4 federal and state constitution and appropriate
5 provisions to the Fifth, Sixth, and Fourteenth
6 Amendment and Article 1, Sections 3 and 10 of the
7 State Constitution.

8 THE COURT: Thank you. I think my rulings have
9 encompassed the concerns expressed by those bodies
10 of law, although it certainly didn't mention as
11 such. And so I accept that the record is complete
12 in that regard.

13 Folks, I wanted to get the notebook because I
14 put my charges in that and I wanted to go over the I
15 wanted to go over the proposed charges and then ask
16 you-all about any additional charges or exceptions
17 to those. Folks, let me review proposed charges
18 that I think are appropriate in this case. And, as
19 I said, I'll be glad to hear exceptions or requested
20 additions from you.

21 My standard felony charge contains the
22 reasonable doubt definition from Victor vs. Nebraska
23 or State vs. Darby. I've tried cases with some of
24 you-all before. And that's the definition of firmly
25 convinced or real possibility, the two sides of that

1 coin. You are free to argue or discuss any
2 reasonable doubt definition that our Supreme Court
3 has adopted, I just did not want you to be led down
4 the path of telling the jury that the Judge is going
5 to tell you that a reasonable doubt is a doubt that
6 causes a reasonable person to hesitate to act. I'm
7 not going to tell them that. I'm going to use the
8 Victor vs. Nebraska. I'll charge the fact that the
9 defendant did not testify.

10 On the credibility of witnesses, I'll charge
11 expert witnesses and the conviction or crime by a
12 witness, the standard murder charge, of course, with
13 the definition of malice, the armed robbery charge,
14 the attempt charge, which applies to the armed
15 robbery and the murder, possession of a weapon
16 during the commission of a violent crime, the
17 elements of that, the aiding and abetting or the act
18 of one -- the hand of one becomes the hand of all;
19 the identification charge from Telfair and from Neil
20 vs. Biggers, substantial evidence charge.

21 Folks, I think that that's -- that all that I
22 can think of. I'll be glad to be educated further
23 by any of you-all or take any exceptions to any of
24 those proposed charges. From the State?

25 MS. MARTIN: Your Honor, may I see your

1 substantial evidence charge for a moment?

2 THE COURT: Circumstantial evidence?

3 MS. MARTIN: Oh, okay. We thought you said
4 substantial. And I'm were like, I don't know what
5 that id.

6 THE COURT: Did I say that? Circumstantial.

7 MS. MARTIN: Thank you. Yes, sir. I am
8 familiar with that.

9 THE COURT: Okay. I tell you what, I may have
10 said that because I've been conditioned over the
11 years. One of the most unfortunate adjectives --
12 or, actually, adverbs that has slid into our case
13 law over the years in the directed verdict motion is
14 substantial circumstantial evidence, which is a
15 contradiction in terms, when we think about it, in
16 saying, well, I'm not concerned about the weight of
17 the evidence, only its existence.

18 And when a charge is to circumstantial evidence
19 to say, circumstantial evidence is good evidence,
20 provided it beats the test of the law, and the law
21 doesn't require a greater degree of proof of
22 circumstantial than it does of direct evidence, but
23 yet when we say substantial circumstantial evidence,
24 it just throws those things out of whack. So I may
25 have said substantial, but I didn't mean to. And I

1 take it -- I try to slide that concern of mine into
2 the record.

3 As a former English teacher, I recognize that
4 adjectives and adverbs have meaning. And we're
5 supposed to give the meaning, and when the meaning
6 is contrary to the law, it upsets me. Our Court of
7 Appeals got real confused a couple years ago and it
8 started kicking out cases because the judge failed
9 to grant a directed verdict when there was only a
10 little bit of circumstantial evidence. So, anyway,
11 there we go. That's a CLE free of charge.

12 MS. FULLWOOD: How many credits do we get?

13 THE COURT: I don't believe anybody could -- I
14 don't believe I could get the Court of Appeals or
15 the Supreme Court to approve you for a single
16 minute. But other than that, as long as I don't
17 charge substantial evidence, Ms. Martin?

18 MS. MARTIN: I don't think we have anything
19 else, Your Honor.

20 THE COURT: All right. Mr. Chehoski?

21 MR. CHEHOSKI: Yes, Your Honor. We're going to
22 request a jury instruction that was derived from the
23 New Jersey case of State vs. Cromedy that can be
24 found at 158 NJ 12 -- 112 and at 727 A. 2d 457.
25 It's a 1999 case where the court had approved the

1 following language, and we're going to ask that --
2 this is the language that we ask the Court to adopt:

3 When a witness who is a member of one race
4 identifies a member who is of another race, we see
5 that there has been a cross-racial identification.
6 You may consider, if you think it is appropriate to
7 do so, whether the cross-racial nature of the
8 identification has affected the accuracy of the
9 witness' original perception and/or accuracy of the
10 subsequent identification.

11 THE COURT: Okay. Do you know whether or not
12 the New Jersey law allows a judge to charge on the
13 facts?

14 MR. CHEHOSKI: I would imagine it does.

15 THE COURT: It does.

16 MR. CHEHOSKI: Okay.

17 THE COURT: Do you know whether or not the
18 South Carolina law allows a judge to charge on the
19 facts?

20 MR. CHEHOSKI: It does, doesn't it?

21 MS. MARTIN: It does not.

22 THE COURT: It does not. I'll be glad for you
23 to make a copy of that as a Court's exhibit and --

24 MR. CHEHOSKI: I'll do that in the morning.

25 Thank you.

1 THE COURT: Anything else?

2 MR. CHEHOSKI: As far as jury selection -- jury
3 charges, Your Honor, no.

4 THE COURT: My view of the cases, the verdict
5 forms as to each of these charges will be either
6 guilty or not guilty under the theory of the case
7 and the evidence that's been presented. I'll be
8 glad to hear --

9 MR. CHEHOSKI: That is correct, Your Honor. At
10 this time though, I would also like to make a
11 request under State vs. Beaty. It's a 2016 case
12 that has not yet been published that upon request --
13 I'm sorry. I want to make sure I have the language
14 correct, so please allow me to read.

15 THE COURT: Okay.

16 MR. CHEHOSKI: That -- the holding is that in a
17 criminal trial where the party with the middle
18 argument requests -- in this case it would be the
19 Defense -- the party request -- we request of the
20 party with the right to first and last closing
21 arguments must open in full on law and the facts,
22 and in reply may respond -- may respond to the other
23 party's argument but may not raise new matter.

24 THE COURT: Right. Exactly. Of course
25 petition for rehearing has been granted in Beaty, it

1 has not been heard. And you're right. I think that
2 Beaty did effectively did change the law where both
3 sides put into evidence, although it created
4 considerable confusion when it used the term middle
5 argument, and I'm hopeful that in the end, the
6 rehearing will clarify it.

7 There are only two possible circumstances:
8 Either the defendant offers evidence or it does not.
9 If the defendant does not offer evidence, it has a
10 right to make the last argument. If the defendant
11 offers evidence, it does not have the right to make
12 the last argument. But Beaty seems to think that
13 the State is then required, as in civil cases, to
14 open in full on the law and the evidence and to
15 respond and reply only to issues that are raised by
16 the Defense but can't introduce new matters.

17 Is there any argument about that -- the state
18 of the law since Beaty is out there?

19 MS. PATTERSON: Your Honor, I'm fine with --
20 I'm fine with our opening with the law and then
21 reply.

22 THE COURT: When you open with the law, you
23 have to open with the law and the facts. You have
24 to open in full, in other words.

25 MS. PATTERSON: Yes, sir. I'm fine with that.

1 THE COURT: Just like the civil law.

2 MS. PATTERSON: Yes, sir.

3 THE COURT: And be prepared to only respond to
4 whatever issues are raised.

5 Okay. So we will apply Beaty because it's --
6 in spite of the fact that it was somewhat inartfully
7 drafted when it introduced the term middle argument,
8 because when the defendant does not offer evidence,
9 there is no middle argument. It had been easy if
10 they just said if the defendant offers evidence, you
11 know. But then that wouldn't -- anyway, the
12 greatest concern about Beaty is it said don't use
13 the words truth. So --

14 MR. CHEHOSKI: I think it is to seek the truth.

15 THE COURT: That's right. And we went beyond
16 that. Of course we all know we can't use the words
17 seeks the truth or any of those words when we're
18 talking about the burden of proof or credibility or
19 things of that nature because it does shift the
20 burden.

21 Well, enough of that. But you're right,
22 Mr. Chehoski. We will apply Beaty and all of its
23 imperfect language in this case.

24 MR. CHEHOSKI: We're all imperfect people here
25 anyway.

1 THE COURT: Exactly. Thank you.

2 Now, arguments themselves, I think all of you
3 have tried cases with me before and you know that I
4 don't ring a bell but I do like to get some idea of
5 how long you're going to take to argue, because that
6 helps me decide when to take breaks and when to tell
7 Ms. Hope to start making sandwiches and things like
8 that.

9 So what do you think, Ms. Patterson?

10 Ms. Martin? Who's going to open and who's going to
11 close and about how long in total?

12 MS. PATTERSON: I'm going to close, Your Honor.
13 I'll say about 30. And I apologize in advance,
14 sometimes I get a little overexcited and I talk a
15 little longer. But I'm thinking about 30.

16 THE COURT: When you say close, do you mean the
17 closing argument?

18 MS. PATTERSON: I'm going to do everything.
19 I'm going to open, close, and then reply. Yes, sir.

20 THE COURT: All right. I understand. Thank
21 you.

22 MR. CHEHOSKI: Your Honor, I'm going to be
23 doing closing arguments. And please don't hold me
24 to this, because this has not been finalized, but I
25 would imagine probably in the range of probably 20

1 to maybe 35 minutes.

2 THE COURT: There's certainly nothing
3 unreasonable about that. And, as I say, I don't
4 ring a bell or blow a whistle, but I do sometimes
5 tell lawyers, if I get the impression you have
6 completely forgotten how long you told me you were
7 going to take, I'll try to find some discreet way to
8 I'm going to try to find some discreet way to get
9 your attention to do that.

10 Chief Justice Ernest Finney, when he was on the
11 circuit bench, a mentor of mine and a wonderful
12 judge all those years, would find a way just
13 to (demonstrating), and you'd look and he'd say, two
14 minutes. I don't do that because I'm not on track
15 to be a chief justice. But I will try to get your
16 attention. I think we're together on that, folks,
17 and that's not going to be a problem.

18 All right. The case has been well-presented.
19 You-all have taken good use of everybody's time and
20 there's not been a really wasted moment in the
21 testimony itself and the presentation of it. And
22 I'm sure the jury appreciates that, because they've
23 been a good jury. They've been right here early
24 every day and they deserve that good use of their
25 time that you've given them.

1 I'll be here a little bit before 9:30 in the
2 morning, so if anything needs last-minute attention,
3 I'll be in chambers.

4 MS. MARTIN: Your Honor, I would ask if defense
5 counsel is comfortable with the defendant not
6 putting anything on the record as far as his
7 decision not to testify. Is everyone comfortable
8 with the charge you gave --

9 THE COURT: Well, I think we covered that
10 pretty thoroughly and I think they were comfortable
11 with that.

12 MR. CHEHOSKI: Yes, Your Honor.

13 MS. FULLWOOD: You can confirm it with him if
14 that's what his decision was.

15 THE COURT: Thank you. I saw a bit of
16 anticipatory when I asked Mr. Esaw if I could assume
17 that -- whether he chose to testify or not to
18 testify, he did it with a full understanding of his
19 rights, and he said yes. I'll be glad to affirm.

20 Mr. Esaw, is it your decision not to testify in
21 this case?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. Thank you.

24 MS. MARTIN: Thank you very much, Your Honor.

25 THE COURT: All right. Folks, 9:30 tomorrow

1 morning. Have a good evening.

2 (Trial in recess for the evening at 4:22 PM.)

3 (The following proceedings were held October
4 19, 2017.)

5 THE COURT: Are both sides ready for the jury?

6 MS. PATTERSON: The State is ready, Your Honor.

7 MR. CHEHOSKI: The Defense is ready. I just
8 wanted to note for the record that I have provided
9 the Court with a written copy of the jury that
10 instruction that the Defense had requested yesterday
11 and we'd request that it be made a Court's Exhibit.

12 (Court's Exhibit No. 2 marked for
13 identification.)

14 THE COURT: It is a Court's exhibit, so it's
15 preserved for appellate review, if that should be
16 necessary.

17 MR. CHEHOSKI: Otherwise, the Defense is ready.

18 THE COURT: All right. Thank you.

19 Ms. Patterson, you'll begin and then,
20 Mr. Chehoski, you'll reply, and then, Ms. Patterson,
21 you're reply, and then I'll instruct the jury, as
22 indicated yesterday.

23 MS. PATTERSON: Yes, sir.

24 THE COURT: All right. Bring us the jury,
25 please.

1 (The jury enters the courtroom at 9:33 AM.)

2 THE COURT: Mr. Foreman, ladies and gentlemen,
3 good morning. Thank you. You're prompt as always
4 and we appreciate that. We're ready now to enter
5 into the very final phase of the trial of this case
6 which will consist of the arguments the lawyers will
7 present to you and then the charge on the law which
8 I'll give you after that has been done, and then
9 you'll go back into your jury room, finally, to
10 start talking about this case and to deliberate and
11 to reach a verdict in this case.

12 The order of the arguments will be the State,
13 Ms. Patterson will present the State's case in full
14 and lay out before you the entirety of the State's
15 case and -- in its final argument; Mr. Chehoski
16 then, on behalf of Mr. Esaw, will make the defense
17 final argument in that regard, and after
18 Mr. Chehoski has finished his argument, then the
19 State, which has the burden of proof, has the right
20 to come back and reply to any matters that Mr.
21 Chehoski has raised, but it cannot introduce any new
22 matter at that particular time.

23 Obviously you-all have been attentive
24 throughout this trial, and we appreciate that
25 attention. You have followed it closely and I have

1 watched you as you have done that, and we appreciate
2 that. You understand the seriousness of the case
3 and you've given it the attention that it deserves.
4 I ask that you give that same attention now to the
5 lawyers as they present their final arguments.

6 Thank you.

7 Ms. Patterson?

8 MS. PATTERSON: Thank you, Your Honor. May it
9 please the Court.

10 THE COURT: Yes, ma'am.

11 MS. PATTERSON: Defense counsels.

12 Good morning, ladies and gentlemen. This case
13 is about choices; bad choices, senseless choices,
14 deadly choices. On August 9th, 2015, the Vasquez
15 family, their lives were shattered. And why?
16 Because that man, the defendant, Ricky Esaw, made
17 bad choices, he made senseless choices, he made
18 deadly choices.

19 Now, the Judge will instruct you later on about
20 the elements of the offenses that we, as the State,
21 bear the burden of proving. He will charge you
22 about the elements of murder, attempted murder,
23 armed robbery, attempted armed robbery, possession
24 of a weapon during the commission of a violent
25 crime. But right now, it's my opportunity to give

1 you the elements and to explain to you how we are
2 certain that we have met our burden of proof.

3 The defendant is charged with murder. Murder,
4 under our South Carolina statute, is the killing of
5 a person with malice aforethought either expressed
6 or implied. We submit to you Hector Vasquez was
7 unfortunately gunned down on August 9th, 2015. You
8 heard Dr. Ross talk about his death. We have met
9 this burden.

10 With malice aforethought ether expressed or
11 implied. That means that the malice can either be
12 spoken or it can be implied through the actions of
13 someone. And we submit to you that the defendant,
14 through his actions and his words in telling the
15 co-defendant we're going to get those people, we've
16 met that burden with malice.

17 Attempted murder is defined under our code, a
18 person with intent to kill attempts to kill another
19 person with malice aforethought either expressed or
20 implied. We submit to you that this attempt was
21 towards Franklin when he was shot by co-defendant
22 Wilfred Pitts.

23 The defendant is also charged with armed
24 robbery and attempted armed robbery. It's a
25 robbery, the talking of someone's property. The

1 defendant, through his accomplice Wilfred Pitts,
2 they took property belonging to Rafael Izaguirre.
3 Armed with a pistol or deadly weapon, the defendant
4 provided Wilfred Pitts with that gun.

5 Attempted armed robbery. This is what the
6 defendant himself, as he attempted to take property
7 from Franklin and Hector, he attempted to commit
8 armed robbery and he was armed with a gun. Again,
9 robbery is just the larceny from the person or
10 immediate presence of another in violence -- by
11 violence. Intimidation or by putting a person in
12 fear. We've all -- we've met that. We've talked
13 about that over and over through the testimony of
14 Franklin and Rafael.

15 The defendant is also charged with possession
16 of a weapon during the commission of a violent
17 crime. Possession of a firearm during the
18 commission of that murder and that robbery or an
19 attempt, that attempted murder or that attempted
20 armed robbery, of a violent crime. We've met that
21 burden.

22 Now, the Judge will also instruct you, under
23 South Carolina law there is something called
24 accomplice liability or what we refer to as the hand
25 of one is the hand of all. A person who has

1 knowledge of the principal's criminal conduct and is
2 present at the scene and his presence is such as to
3 show he has associated himself with and participated
4 in the criminal undertaking.

5 Now, we talked about the defendant's statement,
6 and I'll get to that later on in my argument. But
7 even if you were to only believe his statement, he's
8 guilty under this principle of law. He knew that
9 they were going to commit a robbery, he drove them
10 there, he drove them away, and he took \$50. So even
11 if you just believe his story, which I submit to you
12 is not really what happened, but even if you just
13 believe his story, he's guilty under this theory,
14 hand of one, hand of all. And also with the actions
15 that Mr. Pitts committed, he's guilty under this
16 theory.

17 The Judge will also instruct you about
18 reasonable doubt. Now, the State must prove all of
19 these elements beyond a reasonable doubt. Now,
20 reasonable doubt is not beyond all doubt. There are
21 few things we know with absolute certainty. The law
22 doesn't require us to do that, it only must leave
23 you firmly convinced. And we submit to you that
24 we've met that burden of proof.

25 Now, before I get into the witnesses -- and as

1 the Judge said, I know you paid attention. But this
2 is my opportunity to go over the key points of our
3 witnesses and how their testimony has aided us in
4 proving all of these elements. But the first thing
5 I want to do, I just want to go ahead and talk about
6 what the Defense put up just so we can go ahead and
7 put those distractions away, because I submit to you
8 that's all they were, distractions.

9 They recalled Detective Barry Sowards to get
10 him to talk about that Mr. Pitts told him that on
11 that night that they finally caught up with these
12 two, that it was Esaw and two other guys. Well,
13 Mr. Pitts admitted he was lying that night; he
14 wanted to tell the truth, but he wanted to talk to
15 his mom and to an attorney first. Distraction.

16 They put up Dr. Dawn McQuiston, an expert in
17 the field of psychology and eyewitness testimony.
18 She referred to studies, talked about the studies,
19 participants were over the age of 18. Franklin was
20 17. Her studies did include suspects who had
21 admitted to being at the scene, like our defendant,
22 and they didn't involve people who had actually
23 witnessed violent offenses.

24 She didn't really say anything unusual, things
25 common sense might tell us. Yeah, people's memories

1 are different, people recall things differently
2 based on their perception, the timeframe, just based
3 on a lot of things. But she also said she couldn't
4 comment on Franklin's identification in this case.
5 She never met that young man, she doesn't know
6 anything about his life experiences, she wasn't
7 present when Detective Moore presented the lineup,
8 she doesn't know the manner it was presented. She
9 can't speak to that.

10 And I know when I was questioning Franklin
11 about his friends, his classmates, you were probably
12 wondering why is she making race an issue? Because
13 I knew they were going to call the doctor and I knew
14 they were going to make race an issue. It's not a
15 factor, it's a distraction. Franklin went to school
16 with black kids, black kids lived in his
17 neighborhood, he just hung around to black kids
18 before this tragic event occurred. It's a nonissue.
19 There's nothing wrong with his identification.

20 Now, what she also admitted was that she was
21 getting paid \$300 an hour plus mileage. I'm sure
22 they met with her before testifying. She drove from
23 Spartanburg, two days of testifying, a meeting,
24 driving from Spartanburg. I can't count that high,
25 that's why I went to law school. But I assure you

1 that's a lot of money.

2 The issuance of the new warrants, that didn't
3 have anything to do with this. That was a
4 technicality beyond Investigator Moore's control.
5 He straightened it out and they -- this -- the
6 warrants that he was ultimately served are the ones
7 he's ultimately on trial for.

8 Now, the Judge is going to instruct you later
9 about using common sense. You don't have to leave
10 it at the door, you take it back there in the jury
11 room when you're deliberating. You heard the
12 witnesses. You evaluate their credibility, their
13 believability.

14 And let's start with Christy Vasquez. Married
15 to Hector 20 years, four children. She heard those
16 gunshots and she raced outside. She didn't care
17 about that man at the door, she knew her husband and
18 her son was out there. And what did she encounter?
19 Her husband being laid on the ground after being
20 shot.

21 That person also threatened her with a gun, but
22 her attention was on her husband as he lied there
23 dying. She didn't get a good look at him, she
24 didn't lie to investigators, she couldn't make an
25 identification. She called 911 while trying to

1 console her husband, trying to keep Franklin there.
2 It was so much going on. You heard the 911 tape,
3 you heard the chaos, you heard the panic.

4 But she did tell law enforcement that she saw
5 two black males in a dark-colored four-door sedan.

6 Rafael. They were at the neighbor's party,
7 baptism, it was a fun time, a good time. He was
8 there with his friend Hector hanging out. He also
9 testified about seeing a dark-colored car, two guys
10 jumped out, he had more interaction with one, the
11 bigger one, than he did the other one. However, he
12 said, you know, he wasn't able to make an
13 identification because he just complied, he gave
14 over his property, he started walking when he heard
15 gunshot. His phone was later recovered at the exit
16 leaving Rolling Meadows trailer park.

17 Franklin, 17 years old, just a kid. You heard
18 him. He's a little taller, but he's still a kid.
19 He had to witness this tragic event. Playing
20 basketball with his friends, school shopping with
21 his family, neighbor's party, cut the grass, fun
22 times that turned tragic. Checked in with his dad
23 because it was getting dark, got a drink from the
24 cooler.

25 And you'll get to take these pictures back

1 there and you can look at them and you can evaluate
2 the witnesses' stories. You can even see a cooler
3 on the side of the house. He didn't go far. He
4 didn't come back far when the most awful event of
5 his life occurred. That dark-colored car with those
6 two black guys jumped out, one approached him, he
7 said I don't have anything. But that wasn't enough.
8 The man pointed the gun, tried to fire the gun, and
9 his dad stepped in, a struggle ensued. Franklin was
10 still close to this person.

11 He said, yeah, he froze, but he snapped out of
12 it, he saw what was going on, and he went to try to
13 aid his father. He got close enough to this person
14 to throw a soda can and kick him in the face on the
15 left side. Then he hears the gun go off and the
16 person jumps in the driver's side of that open door
17 and leaves. But not before his accomplice, who was
18 Mr. Pitts, jumps in the passenger's side, where he
19 was sitting, and fires two shots, one hitting
20 Franklin in his inner thigh.

21 Dr. Ross' testimony supports Franklin's version
22 of events. The entrance was located on the side,
23 there was a muzzle imprint which indicates close
24 contact. It fits. And you heard Franklin testify,
25 yes, he gave statements that night, he gave

1 statements at the hospital when he was undergoing
2 treatment, but this was just a kid who just
3 witnessed his father being murdered, who needed
4 treatment himself. And he responded to the
5 questions posed to him.

6 But the next day he met with Detective Moore,
7 he gave more information: The man who shot my
8 father was about the same size as my father,
9 five-seven, 160 pounds. And also ensured him he
10 could identify this person in a photo lineup. He
11 remembers the beard. And three days after the
12 killing, he does just that.

13 Franklin gave a statement under these
14 conditions that night. He participates in a photo
15 lineup. The first one, he didn't see him. I said,
16 why you didn't pick anybody? I didn't see him in
17 this lineup. This, he identified number 2 who is
18 the defendant, Ricky Esaw. This is who he
19 identified, one out of 12 people. It's nothing
20 wrong with this photo lineup, it's nothing wrong
21 with the way it was presented. Without hesitation,
22 Franklin was able to identify his father's killer.

23 Now, he didn't make an identification on the
24 one that contained Wilfred Pitts. And it makes
25 sense, he didn't have that much contact with this

1 person. And he was not afraid to say I don't see
2 him, I don't know, I'm not sure.

3 He was able to identify the car. He said it
4 was a sedan. He didn't say anything about it being
5 a hatchback, which is what AJ girlfriend's car was.
6 Now, there was some discussion about, yeah, he said
7 it was gray. He said, I meant it was a dark-colored
8 car.

9 There was nothing wrong with the lighting out
10 there, it was dark, but there was a streetlight,
11 there was a porch light. I mean, a party was going
12 on, I'm sure they weren't standing out there in
13 complete darkness. And you can look at some of
14 these pictures and you can see the porch light; got
15 pictures you can see the streetlight. It was a
16 party going on, it was light out there.

17 Now, you had heard from Deputy Steen,
18 responding officer, you heard from Detective Miles
19 Rawl who was there on scene, you heard about the
20 chaos, you heard about all the vehicle traffic, all
21 the foot traffic. So it wouldn't be surprising if
22 bullets or other evidence may have gotten carried
23 away inadvertently.

24 But they did locate a bracelet which would
25 later help prove who was involved. A bracelet that

1 Wilfred Pitts later said is mine. It was mine, I
2 dropped it; I remember dropping it, but I couldn't
3 pick it up; didn't pick it up, had to get back in
4 that car, heard a gunshot, didn't know if it was
5 Esaw. Marker two shows where that bracelet is
6 located, and that location is important because it's
7 away from the body. This is where the body was
8 lying. It's away from the body. It was over here
9 because that's where he encountered Rafael
10 Izaguirre. And that's just a close-up of it.

11 The phone was located that Rafael said was his.
12 It was located in the shrubbery, again, exiting
13 Rolling Meadows on the side where Pitts would have
14 been sitting as the passenger.

15 Now, major crimes, this is the division that is
16 responsible for violent crimes against people. They
17 deal with all types of things. They were swamped.
18 And although these officers were working multiple
19 violent crimes and multiple hours, they pulled it
20 together, all hands on deck. They followed lead
21 upon lead upon lead, they worked hours upon hours.

22 Time was of the essence, again, using all kinds
23 of investigating tools, including Crimestoppers.
24 And they tried to make a big deal because this
25 Crimestoppers tip came in and it had the wrong date

1 of the killing, it had the wrong name of the victim.
2 That doesn't matter. It was a tip, it was an
3 investigative tool. Crimestoppers is not even
4 maintained by it the sheriff's department.

5 These officers have no way of knowing who
6 calls. The calls are anonymous. They have no way
7 of interviewing this person. It's not a sworn
8 statement, doesn't give the same weight as a written
9 statement from a witness. However, what did this
10 tip do? It gave us a name, it gave us a starting
11 point, and it led us to Alfred Pitts' Facebook
12 showing him wearing jewelry of a similar nature that
13 was found at the scene.

14 It led to Ricky Esaw who just happened to be
15 one of Wilfred Pitts' Facebook friends. It led to
16 Woodbine where they saw the car that fit the
17 description of the car used that night. It led to
18 finding Wilfred Pitts and the defendant, Ricky Esaw,
19 who would later give statements about their
20 involvement, admitting that they were where, which
21 led to Franklin picking one out of 12, the
22 defendant, as the shooter of his father. It wasn't
23 a fruitless tip. Don't let that distract you.

24 And Detective Sowards, Detective Moore, they
25 worked this case. They used their resources to

1 locate these people once they followed through with
2 this tip. They served warrants, they got
3 statements, they sorted through Pitts' supposed
4 alibi. They got statements, they made multiple
5 trips interviewing people. In fact, Detective
6 Moore, along with Detective Creech, got the
7 defendant's statement. This was all good work, good
8 police work, it was done with integrity. Don't let
9 them call it into question.

10 Even when talking with Wilfred Pitts, he wanted
11 to talk and he told you that he wanted to talk that
12 night. And he started to talk; he lied, but he knew
13 he was caught because he knew he had left that
14 bracelet. He gave his buccal swab. But he wanted
15 to talk to his mom first who told him to get a
16 lawyer, and then all communication has to stop. But
17 once he got a lawyer, they got with our office, us
18 lawyers, and we talked. So don't fault law
19 enforcement for not following up. After he lawyered
20 up, they had to stop.

21 And Defense may say something about Esaw not
22 having a cut because he got hit in the head with a
23 bottle. We don't even know what area of the head he
24 got hit with; may have been the top, may have been
25 the back, may not have left a cut. There was no

1 testimony about him being cut or bleeding. Pitts
2 didn't say it, Franklin didn't say it, Luenetta
3 didn't say it, there was no evidence of that. And
4 just because a person is at the scene doesn't mean
5 we're going to find DNA. This isn't television, it
6 doesn't happen all the time.

7 But what we did see when Pitts was arrested, he
8 did have a bruise over that left eye that's still
9 visible three days after he was kicked in the face
10 by Franklin. Now, Pitts did say that he saw
11 swelling on Esaw's face as well. Luenetta didn't
12 see it, but that's the area of the eye you really
13 see if it's closed, as shown in this picture. She
14 may not have just seen it.

15 And you heard from Luenetta Grayson, her and
16 the defendant dating about ten months. She said
17 Esaw and Pitts were always together, they were
18 together this day at her house, they all left there
19 together to go to Esaw's mom's house for a party.
20 She knew they left together at least twice; once to
21 the store to get some meat, came back, came back
22 together, left again in her car with the defendant
23 driving to get something from the convenience store,
24 came back; they could have left again, her keys were
25 on the counter, she was in the living room.

1 But what she also told you is they all left
2 that house together that night, went back to her
3 house, Pitts was there with Esaw, she went to work
4 the next day, they were there together that
5 Wednesday when law enforcement came.

6 She also told you about her car. She told you
7 about her education. She went to USC, over two
8 years had a Gamecock decal on her gas tank. All of
9 a sudden, it was gone. And she didn't even notice
10 it was gone because it had been there so long, just
11 not something she would notice. Why the sudden
12 urgency to get rid of that decal? You know why?
13 Because the way Esaw parked that car, he was afraid
14 that someone would identify the car by that decal.

15 She talked about she found some bullets in her
16 apartment that wasn't hers. And we played for you
17 this call, this conversation between the two. And
18 you'll have this back in the jury room. Listen to
19 it. Listen to it over and over and over. Did you
20 handle it? Did you have the chance to handle it?
21 Talking about the black and green Nike bag. Hear
22 his desperation pleading with Net to get rid of the
23 bag.

24 What was so important in that bag that she
25 needed to get rid of? I submit to you it was the

1 guns that were used that night in that robbery and
2 that murder. She didn't want to get involved. She
3 has a good job, she has a master's degree. She told
4 his family about the bag and she also told them she
5 was never going to visit him again. They're no
6 longer in a relationship. Listen to this. Pitts
7 told you what he saw in that bag. He seen those
8 guns in that bag weeks prior.

9 And at the beginning of her opening, Ms. Martin
10 told you sometimes it takes a criminal to convict a
11 criminal. Sometimes we have to call people who have
12 pending charges. It doesn't make their case less
13 credible, especially when their testimony fits in
14 with the evidence and other testimony.

15 And here we call AJ, Arthur Evans. Yes, he's
16 in the department of corrections right now for drug
17 charges, but we had to call him because Esaw put his
18 name in it. He testified he only knew Pitts through
19 the defendant, Esaw; knew Esaw as Silk, knew him
20 better; said he didn't even really like Pitts, and
21 they certainly never went anywhere together and
22 certainly not Rolling Meadows.

23 And y'all saw AJ, he doesn't look anything like
24 the defendant, and certainly not in 2015 when he
25 weighed 135 pounds. Shorter, skin is lighter, frame

1 is much smaller. He said he saw the police at
2 Silk's house, he's the one that called him and told
3 him. And what did he get instead? He got blamed,
4 he got put into this. He said, I wasn't there. Net
5 said AJ wasn't even at the party. Pitts said AJ
6 wasn't at the party. Esaw, again, is trying to put
7 off blame.

8 Pitts, he didn't want to be here. He got the
9 same charges. He has no deals, he has no offers, it
10 was no threats against him to testify. He said he
11 wanted to give the Vasquez family closure, he wanted
12 to give his family closure. He's represented by an
13 attorney. And his family was here, his mama, his
14 daddy, his uncle, his brother, and they had to
15 listen to him admit to what he and Esaw did on
16 August 9th, 2015. He had to tell it to his mama.

17 You heard him, he's going to prison for a long
18 time, he knows it. But he also told you he's not
19 going to have a trial, he's going to own up to what
20 he did. He admitted to not telling law enforcement.
21 Once again, he admitted that. Don't let that be a
22 distraction. But he wanted to talk to his mom again
23 who told him, son, you need a lawyer.

24 Now, he told you their roles. His story is
25 consistent with Franklin's, it's consistent with

1 where that bracelet was laying, where the body was
2 laying, where the witnesses said the participants
3 went, one jumped back in the driver's seat, that's
4 the smaller one, the bigger one in the passenger's
5 side. His story is consistent.

6 Look where the cell phone that he admitted to
7 throwing out, it's on the passenger's side as you're
8 exiting. Look who's always hanging around each
9 other, Esaw and Pitts. Look at their differences in
10 sizes and look at the descriptions testified to by
11 the witnesses.

12 He downloaded the app on Esaw's phone because
13 he wanted to keep track. And Esaw [sic] told y'all
14 he found out something on the news. Admitted seeing
15 Esaw with guns, he was scared of him, carried them
16 in that green and white Nike bag, they just went
17 shooting weeks before at Woodbine Apartments. Got
18 back to Woodbine Apartments where they scrape that
19 decal off and they threw their shirts in that
20 dumpster.

21 Much bigger than Esaw. He's still bigger even
22 though he's lost 20 to 30 pounds. And he's also
23 much younger, 15-year age difference. What an
24 unlikely friendship. Who do you think is the leader
25 and who do you think is the follower? He didn't

1 have are a car to leave. Ricky picked him up in
2 Newberry. He didn't really want to leave him, he
3 was kind of scared, said he's still cared. But just
4 listen to his testimony. It fits with what
5 everybody else is saying. It fits with where the
6 evidence was found.

7 And the defendant's statement, let's get to
8 this. And you'll have this in the jury room, you'll
9 have the much smaller version. But, as I stated,
10 even if you just believe his story, he's guilty.
11 Because what does he say? They came to get me from
12 my mom's house, they needed a driver, I drove the
13 Nissan back to Rolling Meadows because they had some
14 Mexicans to get.

15 He drove. He talks about other people doing
16 the things that he did. Who came up with the plan?
17 AJ, he said, but Pitts told you that wasn't true.
18 He talks about the direction that they went into the
19 trailer park. He's giving information only a person
20 who was there would know.

21 He even talks about the guns, even talks about
22 how many times he heard gunshots. And it was three,
23 he shot once and Pitts shot twice, one hit Franklin
24 and one went into the truck's radiator. Says he
25 never got out the car, but also remember the

1 statements that he gave orally to law enforcement
2 talking about, but I know they saw my face because
3 of the lighting and because I was close up.

4 When did you -- where did you -- when you left,
5 where did you go? He drove them away. So even if
6 you believe this, he drove them away. How much
7 money was received? \$50. So even if you believe
8 his statement, he got \$50. He knew what was going
9 to happen, drive them there, drove them away, \$50,
10 hand of one, hand of all.

11 There are a lot of things worth living for,
12 there are a few things worth dying for, but there is
13 nothing worth killing for. On August 9th, 2015,
14 Hector Vasquez had so much to live for. He'd been
15 married to Christy 20 years, four beautiful
16 children. He just moved here to work with his
17 family in their roofing company. And there were
18 things worth dying for: His 17-year-old son
19 Franklin. And he jumped in when he saw that man
20 pointing that gun at his son.

21 And there is nothing worth killing for. But
22 you know what? He did. He killed Hector Vasquez.
23 He attempted to rob Franklin and Hector, and he set
24 it in motion for Wilfred Pitts to rob Rafael
25 Izaguirre and attempt to murder Franklin. We have

1 proved all of this beyond a reasonable doubt, and I
2 ask that you find the defendant, Ricky Esaw, guilty
3 of murder, attempted murder, armed robbery,
4 attempted armed robbery two counts, and possession
5 of a weapon during the commission of a violent
6 crime. I appreciate your attention. Thank you.

7 THE COURT: Thank you, Ms. Patterson.

8 Ms. Patterson, if you'll take a moment to remove
9 some of these things before Mr. Chehoski begins his
10 argument. Thank you.

11 MS. PATTERSON: Yes, sir.

12 THE COURT: Thank you, ladies.

13 Mr. Chehoski?

14 MR. CHEHOSKI: Thank you, Your Honor. May it
15 please the Court.

16 THE COURT: Yes, sir.

17 MR. CHEHOSKI: I'm just going to try to talk
18 and you a minute. Please bear with me. This
19 morning I woke up with a song in my head, that old
20 Schoolhouse Rock song, Three is the Magic Number. I
21 don't know why. Maybe it was because I was thinking
22 about what I'm about to do here. But it seems to me
23 that it's actually kind of apt.

24 The State is relying on, essentially, three
25 things, and that would be Mr. Pitts' testimony,

1 Mr. Esaw's statement, and Mr. Vasquez's
2 identification. And these three things are big
3 things, flashy things, they are things that give the
4 appearance of both being powerful and conclusive,
5 and they are things that we used to think are
6 ironclad.

7 We, on the other hand, are not relying on those
8 flashy things, but foundational matters that strike
9 to the heart and that support what the State should
10 be presenting, and it's the absence of DNA that are
11 at the scene that belongs to Ricky Esaw, the absence
12 of DNA in the car that belonged to Hector Vasquez,
13 and the absence of any injury to Ricky Esaw
14 following that incident.

15 Now, these three things, again, are at the
16 foundation of the State, and without them the
17 State's case just rests on shifting sand. And I
18 want to first talk about Pitts' testimony, because
19 he lied a lot and he had a reason to lie. I was
20 tempted even, at some point during his testimony, to
21 ask him, well, were you lying then or are you lying
22 now, but it wouldn't have made a difference because
23 the answer is, yes, he lied then, he's lying now,
24 and he has a reason to.

25 He lied first to just try to absolve himself of

1 any responsibility. I wasn't even there, I was with
2 my brother. And then that fell apart and he was
3 like, well, maybe I was involved, I gave the
4 bracelet to Ricky, but it was him and two other guys
5 at Woodbine Apartment. But as the DNA shows that he
6 was there, and now it's, well, maybe if I testify
7 and tell the State what they want to hear and match
8 it all together with their story, I'll get some kind
9 of deal, maybe not now but maybe later.

10 He had a reason to lie because he's trying to
11 save his skin. There was really only one thing that
12 I believed about his testimony yesterday --

13 MS. MARTIN: Objection, Your Honor.

14 THE COURT: I'll sustain the objection as to
15 the attorney's belief or non-belief. Okay.

16 MR. CHEHOSKI: He said he was scared and when
17 he's scared he lies. He was scared when the police
18 picked him up, he was scared when they took him to
19 the sheriff's department. Both of those times that
20 he was scared, he lied.

21 He also said he was scared of Ricky even though
22 he was four inches taller and 70 pounds heavier, 15
23 years younger, at the peak of his physical strength.
24 He wasn't being held against his will, he wasn't
25 being forcibly restrained, he wasn't even told that

1 he couldn't go anywhere. Yeah, he was lying because
2 he knew they had him, his DNA was there. His was
3 the only DNA that was there.

4 Now, DNA seems like it could be a sneaky
5 subject here because the State didn't really talk
6 about it that much. And -- but it's important.
7 It's important because it gives conclusive evidence
8 that supports their story and their theory and their
9 theme.

10 And in that, you have a right to question that
11 because they picked up evidence that should have had
12 it with a soda can that was thrown with the force
13 that it was thrown and a beer bottle swung with
14 enough force to shatter it, to break on someone's
15 skin. That's going to leave DNA. And they looked
16 for it, they swabbed for it, and they didn't come
17 back with anything that matches to Ricky Esaw.

18 They also took the car, looking for something
19 there. The only thing you heard about the car or
20 the inside of the car is they processed it. I
21 submit to you they swabbed it, they treated for it.
22 You did not hear one mention in any testimony of any
23 blood in that car, of any DNA in that car that
24 belongs to either Ricky Esaw or Hector Vasquez, you
25 did not have anything that connects that car

1 scientifically to that scene. And that's because it
2 probably wasn't there.

3 There's also -- if -- given with what we know
4 has happened and what the testimony says, if Ricky
5 didn't leave anything at the scene of the crime and
6 nothing from the scene of the crime went with Ricky,
7 again, with a beer bottle being broken over his
8 head, with getting a can of soda thrown at
9 significant force into his face and being kicked in
10 the face with just as much if not more force, that's
11 going to leave a mark.

12 And all this time you -- I'm sure you're sick
13 of me asking questions about police officers being
14 complete with their documents and accurate with
15 their reports and thorough with their writings.
16 Because that is what good investigators do, like
17 John Moore and like Barry Sowards, that they
18 document everything that they see, everything that
19 they hear, everything that they do. And with good
20 investigators, if they don't write it down, it
21 likely didn't happen. Not one person, police or
22 otherwise, could testify that they saw any marks,
23 any scrapes, any bruise s.

24 In fact, the most independent witness to take
25 that stand, Luenetta Grayson, who was in an intimate

1 relationship, sharing a bed with Ricky, with him
2 less than an hour after this happening, didn't
3 notice a thing. She's not in a relationship with
4 him anymore. Regardless of your verdict, she's
5 going to live her life without Ricky. She has no
6 stake in this, no reason to try and cover up. And
7 what did she tell you? I didn't see a thing. That
8 is powerful. Didn't notice anything wrong with the
9 clothes, anything, nothing from that.

10 And, unfortunately, this brings us to the
11 statement, what the State told about what Ricky told
12 police. And we already know there is inaccuracies
13 in it, talks about AJ being there or black Sentra
14 and AJ testifying it's not there. But look at that
15 statement closely. For someone to have a front row
16 seat to that, there's an awful lot missing.

17 There is no mention of Ms. Vasquez coming out
18 or of anybody pointing the gun at her and
19 threatening her or of Franklin acting as he did,
20 throwing the can of soda and kicking him in the
21 face. For all that is missing from that statement,
22 it really looks like Ricky is just taking the police
23 narrative, trying to tell them what they want to
24 hear, and hopefully they'll leave him alone.

25 And I submit to you that's what happened, he's

1 just telling them a story. I think this is what
2 happened, this is probably what you want to hear.
3 It's just not credible and there's a reason to
4 question it. There's a reason to question it
5 because it wasn't recorded.

6 Here we are in 2017. We'll go back to 2015.
7 We're more than eight years after the first iPhone
8 that puts recording capabilities in the pocket of
9 any person. And digital recorders, I checked on
10 Amazon last night, they're selling for less than
11 \$50, available. And they're telling you with all
12 the vast resources and the budget of the Lexington
13 County Sheriff's Department, they didn't have one
14 available or the one they wanted to use was dead.
15 Is that a compelling excuse for you?

16 What's even more striking is that John Moore
17 wanted -- he wanted to record it. He's a good
18 detective, he knows that hearing the voice and
19 hearing the words is going to be much more powerful
20 than just pen to paper. But if you hear it, you
21 know it's him. And his recorder is dead.
22 There's -- you can't wait 15 minutes to get -- or
23 five minutes to charge it up, bring it over, plug it
24 in, and then get it running for the interview? You
25 got to ask yourself, does that carry water? I don't

1 think it does.

2 Also, I want to talk about, again, Franklin
3 Vasquez. He's both sympathetic, he was poised on
4 the stand. And just because he was those
5 characteristics doesn't mean we can't question it.
6 We have something to question him about. And this
7 ties in with what Dr. McQuiston said, because with
8 all that is going on, with the likelihood of gaps
9 being there between a high-stress moment in the dark
10 with multiple perpetrators carrying guns and the
11 cross-race effect or the own-racial bias, all of
12 those are going to impact how well you perceive
13 something.

14 And with what was going on, Franklin said he
15 froze, and then he finally snapped out of it. And
16 in that moment of frozen, are you perceiving
17 something or are you just in shock like, what's
18 happening? It's not meshing, and that's a reason to
19 question his testimony. And then add the height of
20 that emotion, the height of that, and come to with
21 the investigator working the case who knows who the
22 victim is but knows who the alleged perpetrator is,
23 puts him front and center in the lineup with lighter
24 skin than everything, and that opens the door for a
25 problematic identification.

1 I don't blame him. He's doing the best he can.
2 Like Ms. Patterson said, he's a kid, he just lost
3 his father. My heart goes out to him. That doesn't
4 mean we can just give him a pass, we have to
5 question. And those questions need to be answered:
6 Is this something we can trust? Is there something
7 that we can question? Does it bring us into a
8 shadow of doubt? Do we have a reason to doubt?
9 And, yes, there is. With all of what they have, we
10 have a reason to question it, we have a reason to
11 doubt it, and that is why I stand before you asking
12 you to ask those questions, to resolve your doubts.

13 As I said you can't give Mr. Pitts any benefit
14 of the doubt. All the benefit of the doubt goes to
15 Ricky. That's his right. He's the one on trial,
16 he's presumed innocent, he gets the benefit of your
17 doubt, no one else. So, again, I'm asking you,
18 resolve your doubts, resolve them in the favor of
19 Ricky Esaw, find him not guilty. Thank you.

20 THE COURT: Thank you, Mr. Chehoski.

21 Ms. Patterson?

22 MS. PATTERSON: Yes, sir, Your Honor. Thank
23 you.

24 Now is my chance to redirect your attention to
25 what we did prove, what we did have. Forget about

1 all those distractions he brought about. Again,
2 there was nothing in the testimony about the
3 defendant bleeding. There was testimony about a lot
4 of foot traffic, things could have been carried
5 away. His DNA may not have been at the scene, but
6 it doesn't mean he wasn't there.

7 If Franklin Vasquez was essentially just
8 picking out the person in the middle, why didn't he
9 make a selection on this one and pick out this
10 person? There's nothing wrong with this lineup.
11 His skin is not that lighter than anybody else's,
12 same physical features. Franklin talked about a
13 beard. Detective Moore didn't even generate this.
14 He talked about the process in which these people
15 are selected with similar characteristics.

16 The investigators did document good. They
17 documented so well they remembered the defendant
18 making these statements: That wasn't me. I was
19 just the driver. Hell no, you ain't got me on
20 nothing. Oh, at best, you got me on accessory.
21 They documented it. He was there, he admitted to
22 being there. They got rid of the shirt, so Luenetta
23 may not have seen anything if it was on it.

24 His statement, he talked about it not having
25 anything about Christy. Why would he mention that?

1 Why would he mention victimizing somebody else by
2 pointing a gun at them? It's seven pages. This is
3 a lot of stuff. He understood his rights. He said
4 he wanted to talk. And it does mention something
5 about Franklin, but he refers to him as the younger
6 man. Read his statement, you'll have it back there.
7 And Luenetta, she's busy doing dictation, she had a
8 lot to do. She went straight upstairs and went to
9 work when she got back.

10 There's no Lexington County Sheriff's
11 Department policy about recording. There's no
12 Department-issued recording devices. Again, seven
13 pages. The officers didn't feed him any
14 information. They couldn't even get through reading
15 the warrants before he was interrupting them talking
16 about it wasn't me. They didn't feed him
17 information; he had the information, enough
18 information for seven pages, because he was there.

19 Now, the doctor who talked about
20 identification -- cross-racial issues and
21 identification, she also agreed there's something
22 fright [sic] or flight. It means when a person is
23 in a stressful situation, they react to help them
24 survive, and that's what Franklin did. He was
25 frozen for a second, but he snapped out of it. And

1 his perception, his attention was on that person.
2 Again, there is nothing wrong with his
3 identification. If nothing else, he didn't pick
4 one, but he saw him on this one, he saw him in the
5 courtroom.

6 I submit to you refocus, refocus on what was
7 presented. And we submit to you that we have proven
8 this case beyond a reasonable doubt. Thank you.

9 THE COURT: Thank you, Ms. Patterson.

10 Madam Clerk, if you'll hand up the indictments,
11 please.

12 THE CLERK: Yes, sir.

13 THE COURT: Thank you.

14 Now, ladies and gentlemen, give me your
15 attention for a few more moments. It is my
16 responsibility now to instruct you and charge on you
17 what the law is. Before I begin this, let me tell
18 you that you've been in here about an hour, almost
19 exactly an hour. My instructions are scripted,
20 they're going to take about 30 minutes. I'm
21 prepared to do them right now.

22 But if any of you need a break, a brief break,
23 before we begin the instructions, I want to give you
24 a chance to let me know that right now, because once
25 I start, I can't stop. And so if anybody needs a

1 break -- it just takes one of you, you don't have to
2 be unanimous on this. If any one of you needs a
3 break, a brief recess, we'll declare that and get
4 that concern out of your mind. Anybody need a
5 break? Good. Thank you.

6 So now, ladies and gentlemen, it becomes by
7 responsibility, as I told you to instruct you as to
8 what the law is. You've been very patient
9 throughout this trial and you have listened
10 patiently and attentively to Mr. Chehoski and
11 Ms. Patterson. And I now ask that you give me the
12 same attention as I instruct you as to what the law
13 is in this case.

14 Under our constitution, I have the
15 responsibility of telling you what the law is and it
16 is your responsibility as jurors to accept the law
17 as I charge it to you now to be the correct law.
18 It's your exclusive duty as jurors to decide any
19 issues of fact in this case, and for that purpose
20 you have to determine the effect and the value and
21 the weight and factual nature of the evidence that
22 you heard and determine what you determine to be the
23 true facts.

24 Both the State and the Defendant have the right
25 to expect that you will conscientiously consider and

1 evaluate the evidence and that you will apply the
2 law of the case to that evidence so that both the
3 State and the Defendant will receive a fair and
4 impartial trial at your hands.

5 Throughout the course of this charge when I use
6 the word Defendant, I'm referring to Mr. Ricky
7 Lamont Esaw. Mr. Esaw has been indicted by the
8 Grand Jury of Lexington County and charged in the
9 indictments, which I read to you earlier this week,
10 first of all, with the crime of murder.

11 That indictment accuses Mr. Esaw in Lexington
12 County on or about August 9th of 2015 with malice
13 aforethought, causing the death of Hector Vasquez by
14 shooting him and that Mr. Vasquez died as a result
15 thereof. He's also charged with the attempted
16 murder, while acting alone or in concert with
17 Wilfred Pitts, attempting to murder Franklin Vasquez
18 with malice aforethought either expressed or implied
19 in violation of the law.

20 He is next charged with the armed robbery while
21 acting alone or in concert with Wilfred Pitts,
22 taking from the person or presence of Rafael
23 Izaguirre, by means of force or threats or
24 intimidation, a wallet or cell phone in violation of
25 the law.

1 He is next charged with the attempted armed
2 robbery of Franklin Vasquez while armed with a
3 deadly weapon, a handgun, attempting to take money
4 and/or a cell phone with the intent to steal it, and
5 also with the attempted armed robbery of Hector
6 Vasquez while armed with a handgun by attempting to
7 take his money or cell phone in violation of the law
8 with the intent to steal it. And finally, with
9 being in possession of a weapon, a firearm, during
10 the commission of a violent crime.

11 Now, ladies and gentlemen, as I told you before
12 this trial began, and I remind you again, those
13 indictments that I just summarized for you very
14 briefly are not evidence nor are they proof of the
15 charges that they contain, because to the charges in
16 the indictments, as you know, Mr. Esaw has entered
17 pleas of not guilty and has requested a jury trial
18 at your hands which he has received and which
19 you-all will soon conclude.

20 The legal effect of a plea of not guilty then
21 is to place the burden of proof on the State to
22 prove the guilt of the defendant beyond a reasonable
23 doubt before you can convict him and find him
24 guilty. Mr. Esaw is presumed innocent of these
25 charges. It is a fundamental rule of our law of

1 evidence that a defendant, regardless of the number
2 of charges, the nature of the charges, the
3 seriousness of the charges against him, will always
4 be presumed innocent of the charges for which he's
5 been indicted unless and until his guilt has been
6 proven by evidence that satisfies you jurors of that
7 guilt beyond a reasonable doubt.

8 The presumption of innocence is not a mere
9 legal theory, it is not an empty legal phrase. The
10 presumption of innocence has been likened to a robe
11 of righteousness which is placed about the shoulders
12 of a defendant, and it assigns to that defendant a
13 class known as the innocent. And that presumptive
14 robe righteousness continues to exist to the benefit
15 of a defendant until it has been stripped from his
16 person by evidence, evidence that satisfies you of
17 guilt beyond a reasonable doubt.

18 The presumption of innocence accompanies the
19 defendant from the time of his arrest and follows
20 him throughout every stage of this trial, indeed it
21 even continues to his benefit when you go into that
22 jury room to deliberate and to reach a verdict in
23 this case. The presumption of innocence continues
24 to exist to the benefit of the defendant unless and
25 until you as a jury reach the conclusion that the

1 State has proven his guilt beyond a reasonable
2 doubt. So that then is the burden of the State to
3 prove guilt beyond a reasonable doubt.

4 Some of you might have served as jurors in
5 civil cases before. And if you did, the judge in
6 the civil case told you that it is only necessary
7 for the party that has the burden of proof to
8 present evidence to you that is more convincing on
9 that party's side than the evidence is on the other
10 party's side. They call it the preponderance of the
11 evidence.

12 But in criminal cases, the State's proof has to
13 be more powerful than that. In criminal cases, the
14 State's evidence must be beyond a reasonable doubt.
15 So what then do we mean by proof beyond a reasonable
16 doubt? Proof beyond a reasonable doubt is proof
17 that leaves you firmly convinced of the defendant's
18 guilt.

19 Now, there are very few things in this world
20 that you and I know with absolute certainty. And in
21 criminal cases, the law does not require proof that
22 overcomes every possible doubt. And so if based on
23 your consideration of the evidence you are firmly
24 convinced that the defendant is guilty of the crime
25 charged, you must find him guilty. If on the other

1 hand you think there's a real possibility that he is
2 not guilty, you must give him the benefit of the
3 doubt and find him not guilty.

4 Reasonable doubt can arise from evidence in the
5 case or it might arise from the lack of evidence in
6 the case. But you, ladies and gentlemen, have to
7 decide whether or not reasonable doubt exists as to
8 the guilt of this defendant. I tell you that he is
9 entitled to every reasonable doubt which arises in
10 the case.

11 And so if on any issue of fact that is
12 necessary to a conviction and a verdict of guilty
13 you have a reasonable doubt as to how that issue
14 should be resolved, it is your duty to resolve that
15 reasonable doubt in favor of the defendant.

16 A defendant, ladies and gentlemen, is not
17 required to prove his innocence. The State is
18 required in law to prove every essential element of
19 the defense charged against him by evidence that
20 satisfies you of his guilt beyond a reasonable doubt
21 before you can convict him and find him guilty.

22 And I instruct you now and I emphasize to you
23 that the fact that the defendant did not testify in
24 his own behalf is not a factor to be considered by
25 you in any way in your deliberation and in your

1 consideration of the question of his guilt or
2 innocence. It must not be considered by you in any
3 matter whatsoever. It must not militate against the
4 defendant in any respect whatsoever.

5 A defendant has a constitutional right to
6 remain silent, and if he chooses to assert that
7 constitutional right, that fact cannot and must not
8 be considered by you in your deliberations. And so
9 under your oath then, you are to reach no inference
10 and draw no conclusion whatsoever from the fact that
11 this defendant did not himself testify. That should
12 not even be discussed by you in the jury room
13 because, as I have said, the defendant has no
14 obligation to prove innocence and the burden remains
15 upon the State to prove guilt beyond a reasonable
16 doubt and the fact that the defendant did not
17 testify is not a factor to be considered by you in
18 determining his guilt or his innocence.

19 So then, ladies and gentlemen, if upon the
20 whole case you have a reasonable doubt as to the
21 guilt or the innocence of the defendant, he's
22 entitled to that reasonable doubt and would be
23 entitled to an acquittal and a verdict of not
24 guilty. But, on the other hand, if upon the whole
25 case you find the State has proven by evidence that

1 satisfies you as a jury of his guilt beyond a
2 reasonable doubt, then in such circumstances it is
3 equally your duty to convict him and to find him
4 guilty.

5 Now, during the trial, ladies and gentlemen,
6 each of us, you and I, have our separate duties to
7 perform. As the trial judge it is my job to preside
8 over and rule upon the admissibility of evidence and
9 things of that nature during the course of this
10 trial, and to you to consider only the competent
11 evidence that has been offered in the course of this
12 trial, that is, the testimony offered in this
13 witness chair right here, and the items and
14 documents of evidence that you'll have with you in
15 the jury room when you begin your deliberations.

16 I have the additional duty to charge you as to
17 what the applicable law of the case is, and that's
18 what I'm doing right now. As the presiding judge I
19 am made the sole judge of the law of the case and it
20 is your duty to accept and apply this law as I state
21 it to you now to be the correct law.

22 If you have some preconceived idea of what you
23 think the law is or if you've brought with you into
24 your service as jurors some preferences or
25 understandings that you might have about the law and

1 if your ideas about the law disagree with what I'm
2 telling you now the law actually is, under your oath
3 you're obligated to forget what you think the law is
4 or what you'd like for the law to be, because under
5 that oath you're bound to accept the law as I charge
6 it to you now to be the correct law.

7 Now, since you're the sole and exclusive judge
8 of the facts and I'm the judge of the law, our trial
9 courts have said and our constitution has said, I
10 should say, that the trial judge can't hint to you
11 or comment to you or intimate to you any opinion
12 about any facts in the case.

13 Since you're the sole judge of the facts of the
14 case then, you're not to gather from anything that I
15 have said during the course of this trial or
16 anything that I'm saying to you now that I have an
17 opinion about the facts of the case. The law does
18 not allow me such an opinion. That is solely a
19 matter for you, ladies and gentlemen, to determine.
20 So as jurors it becomes your duty to determine, as I
21 have told you, the value, the weight, the effect,
22 and the truth of the evidence offered during the
23 course of this trial.

24 Now, as you determine what the facts of the
25 case are, you must necessarily pass upon the

1 credibility, which is just another word that means
2 believability, of the witnesses who have testified,
3 and you have to decide the value and the effect that
4 you will give to the testimony you have heard. You
5 and you alone have to decide the force and the
6 effect and the truth of the testimony that has been
7 offered.

8 Now, there are a lot of things that you can
9 take into account when you do this. You can look at
10 the appearance, the manner of the witnesses as he or
11 she testified from the witness stand. We sometimes
12 call that the demeanor of the witness. How did the
13 witness appear to you as he or she was testifying on
14 the witness stand?

15 Was the witness forthright or was the witness
16 hesitant? Was a witness' testimony consistent or
17 did it contain discrepancies? What was the ability
18 of that witness to know the things that he or she
19 was telling you about? Did the witness have an
20 interest to be served by his or her testimony; in
21 other words, the cause to be served by that
22 testimony? Was the testimony of a witness made
23 stronger by other evidence or was it made weaker by
24 other evidence in the case?

25 You've heard in this particular case the

1 testimony of an expert witness. Our rules of
2 evidence ordinarily don't allow witnesses to testify
3 about opinions or conclusions. However, persons who
4 by their training and by their qualifications and by
5 their experience in certain fields can be qualified
6 as expert witnesses in those particular fields, and
7 they then have a right to render opinions on those
8 fields in which they have been qualified as experts.

9 You should consider any expert opinion received
10 in evidence in this case like any other evidence in
11 this case and give it the weight you think it
12 deserves. If you decide that the opinion of an
13 expert witness is not based on sufficient education
14 and experience or if you conclude that the reasons
15 given in support of the opinion are not sound or
16 that the opinion is outweighed by other evidence,
17 you can disregard the opinion entirely, because an
18 expert witness' testimony is like the testimony of
19 any other witness; it doesn't receive any greater
20 weight than that of any other witnesses.

21 Because as jurors, ladies and gentlemen, you've
22 got the right to believe a small portion of the
23 testimony of a single witness, disbelieve the larger
24 portion of the testimony of the same witness, or you
25 can believe everything that a witness tells you or

1 none of what a witness tells you.

2 Now, there's been admitted into the record in
3 this case also evidence of an alleged prior criminal
4 record of one of the witnesses who was called. And
5 that evidence was admitted for a limited purpose and
6 you can consider that evidence only for the limited
7 purpose for which was it offered and you can
8 consider that evidence only for the purpose of
9 evaluating the credibility or the believability of
10 the testimony offered by that witness himself or
11 herself and you can give it no other weight for any
12 other purpose at all.

13 Now, ladies and gentlemen, in determining the
14 matter of what you believe, that law requires that
15 you use your good common sense, your mental
16 processes, your sense of logic and reason, and your
17 experiences in life. In other words, as I told you
18 before you began this trial, you use the same
19 qualities in this courtroom in determining what you
20 believe that you use every day outside of this
21 courtroom in determining what you believe, those
22 same unique abilities that each of you brings from
23 your own individual ways of life and from your own
24 experiences in life to bear on what you heard in
25 this courtroom, and you'll be able to decide what

1 you believe. And once you decide what you believe,
2 then you apply the law that I'm giving you to what
3 you believe to be the facts of this case and you'll
4 arrive at a true verdict in this particular case.

5 Now, ladies and gentlemen, I'm going to
6 instruct you as to the particular charges which are
7 contained in these indictments. I charge you first
8 as to the law of the crime of murder. Murder is
9 defined in our law as the killing of any person with
10 malice aforethought either expressed or implied.

11 In order for the State to prove the defendant
12 guilty of murder, it has to be proven beyond a
13 reasonable doubt that this defendant had, in fact,
14 killed the person alleged to have been killed in the
15 indictment, and that the killing was done a malice
16 aforethought. The State doesn't have to prove a
17 motive for the killing, but it does have to prove
18 malice to prove that beyond a reasonable doubt.

19 So what is malice? Malice aforethought is a
20 deliberate and well-formed purpose to do the
21 unlawful act. Aforethought means that the intention
22 to do the unlawful act was conceived or planned
23 sometime before it actually occurred, but it need
24 not exist for any particular length of time prior to
25 the act to meet the test of malice aforethought.

1 Malice itself is a word that suggests a
2 wickedness or a hatred or a determination to do what
3 one knows to be wrong without just cause or legal
4 provocation. Malice need not be in the mind of the
5 one doing the act for any particular length of time
6 in order to render the killing murder. If it is
7 present in the mind of the one doing the killing any
8 length of time before the act, then its presence
9 would be sufficient to render the killing murder.

10 Malice can be expressed or it can be inferred.
11 Malice is said to be expressed when there is shown a
12 deliberate, violent intention to unlawfully take
13 away the life of another human being. Malice may be
14 inferred when no legal provocation or excuse for the
15 killing appears and when the circumstances attending
16 the killing show an abandoned heart or a malignant
17 heart fatally bent on mischief.

18 Now, the defendant is also accused of the
19 attempted murder of Franklin Vasquez through the
20 acts of Mr. Pitts. So in order to prove the charge
21 of attempted murder, the State has to prove beyond a
22 reasonable doubt that this defendant, either alone
23 or in concert with somebody else, and I'll charge
24 you on that law in a few moments, attempted to kill
25 in this case Franklin Vasquez, with malice

1 aforethought either expressed or implied as I've
2 already defined malice to you.

3 Now, an attempt to commit an act is an act done
4 in part in execution of a plan or a design to commit
5 a crime. There has to be an intent that the action
6 be committed and an act done, not in full execution
7 of the crime, but in pursuing the intent to commit a
8 crime. An attempt is different from preparation and
9 it's also different from the intent to commit.

10 The law does not punish the mere entertainment
11 of a criminal intent. To bring the law of attempt
12 into action, it is necessary that some act should be
13 done in pursuance of the intent immediately and
14 directly tending to the commission of the crime, an
15 act which, if the crime is carried out, would
16 constitute a part and parcel of the crime itself,
17 but it doesn't reach the accomplishment which was
18 intended because it is prevented or voluntarily
19 abandoned.

20 The defendant is also charged with armed
21 robbery, once again, in concert with Mr. Pitts. I'm
22 going explain to you now the offense which is known
23 in law as armed robbery. And I'll tell you that the
24 statute says that a person who commits robbery while
25 armed with a pistol or other deadly weapon or while

1 alleging with action or words that he is armed with
2 such a weapon is guilty of armed robbery. So let me
3 define for you first robbery and then armed robbery.

4 Robbery is what we normally call stealing, but
5 it's a little bit more than just stealing. Robbery
6 is stealing, is just taking somebody else's
7 property, whether they know it or not. That's
8 larceny or stealing. But robbery, robbery is the
9 wrongful taking and carrying away of somebody's
10 personal property, of something of value of somebody
11 else, either taking it for himself or herself, or in
12 the presence of that person by putting that person
13 by threat of violence or putting them in fear of
14 violence. So robbery then is stealing from the
15 person, himself or herself, in the presence of the
16 person himself, by the use of force or fear or
17 violence.

18 So now, what is armed robbery? Armed robbery
19 is robbery of somebody's property from his or her
20 person or in that presence by putting that person in
21 fear of violence and by the use of a deadly weapon.
22 A handgun, of course, is a deadly weapon. And so
23 the law then requires in order to prove the offense
24 of armed robbery, it must prove that the defendant
25 robbed someone of their personal property from their

1 presence or in their -- from their person or in
2 their presence by fear or force or intimidation and
3 by using a deadly weapon. Those are the elements of
4 armed robbery.

5 Once again, the defendant is charged with the
6 attempted armed robbery of Hector Vasquez and
7 Franklin Vasquez. The law of attempt that I charge
8 you on murder also applies to the law of attempt for
9 armed robbery; that is, there has to be some act and
10 furtherance of that event which was either
11 voluntarily abandoned or stalled for some other
12 reason.

13 The defendant is also charged with possession
14 of a firearm during the commission of a violent
15 crime. Our law makes it illegal to possess a
16 firearm during the commission of a violent crime.
17 And so a violent crime includes murder, attempted
18 murder, robbery, attempted armed robbery, I should
19 say, or attempted armed robbery. All of these are
20 violent crimes in the definition of the law.

21 And so in order for you to find the defendant
22 guilty of this separate offense of possessing a
23 weapon during the commission of a violent crime, you
24 must first find that the State has proven to you
25 beyond a reasonable doubt that he actually committed

1 one of those violent crimes, murder, attempted
2 murder, robbery, attempted robbery, and then that he
3 was in possession of a firearm during the commission
4 of that crime.

5 Now, ladies and gentlemen, as this has been
6 explained to you, some of these charges arise out of
7 allegations of Mr. Esaw being in concert with
8 Mr. Pitts. And the State brings a theory -- those
9 cases under the theory of the law known as
10 accomplice liability or the hand of one is the hand
11 of all.

12 And I tell you, ladies and gentlemen, that when
13 two or more person aid, encourage, and abet each
14 other in the commission of a crime, all who are
15 present are principals and are equally guilty. When
16 two or more persons combine together and commit a
17 crime and the crime is committed, all of those who
18 are present to aid and abet and assist in the
19 commission of the crime are guilty. The act of one
20 becomes the act of all, the hand of one becomes the
21 hand of all; it makes no difference by whose
22 immediate hand the crime is committed, all are
23 principals.

24 However, I tell you that mere presence at the
25 scene of the crime, even with knowledge of the

1 commission of the crime but without an intent to
2 aid, abet, or assist in its commission, does not
3 constitute guilt. And so the burden is upon the
4 State then to establish beyond a reasonable doubt
5 that the defendants, and each of them as to those
6 particular charges, those charges in concert with
7 Mr. Pitts, they were there with each other, they
8 were present, and that they were there with a
9 criminal intent; that is, with the intent to aid,
10 encourage, and abet each other in committing the
11 offense of attempted murder and armed robbery.

12 Now, ladies and gentlemen, an issue in this
13 case is the identification of the defendant as a
14 person who committed the crime charged. The State
15 has the burden of proving identity beyond a
16 reasonable doubt, and you must be satisfied beyond a
17 reasonable doubt of the accuracy of the
18 identification of the defendant before you can
19 convict him.

20 Identification testimony is an expression or a
21 belief of an impression by a witness and you must
22 determine the accuracy of the identification of the
23 defendant. You must consider the believability of
24 the identification witness in the same way as any
25 other witness.

1 You may consider whether the witness had an
2 adequate opportunity to observe the offender at the
3 time of the offense, and this can be affected by
4 things about how long or short the time was
5 available or how far or close the witness was, the
6 lighting conditions, whether the witness had a
7 chance to see or know the person in the past.

8 Once again I tell you that the burden of proof
9 upon the State extends every element of the offense
10 charged, and this includes specifically includes the
11 burden of proving beyond a reasonable doubt the
12 identity of the defendant as the one who committed
13 the crime. After examining the testimony if you
14 have a reasonable doubt as to the accuracy of the
15 identification, then you must find the defendant not
16 guilty.

17 Now, criminal intent is a necessary element of
18 the offenses in this case and it has to be proven by
19 the State beyond a reasonable doubt. Criminal
20 intent is always a matter that has to be determined
21 by a jury from the circumstances surrounding the
22 situation because there is no way that we can cut
23 off a person's skull and look down at their brain
24 and figure out what they had in mind at the time.
25 And the law says that criminal intent may be

1 inferred from the circumstances which are shown to
2 have existed at the time. And that's how you make a
3 determination as to whether or not the criminal
4 intent was present.

5 So criminal intent is a state of mind and it
6 operates jointly with an act in the commission of a
7 crime. It is a mental state, it is a conscious
8 wrongdoing, and it's up to you as a jury to
9 determine what the defendant intended to do based on
10 the circumstances which are shown to have existed.
11 I tell you that the State has to prove criminal
12 intent beyond a reasonable doubt just as it has to
13 prove every other element beyond a reasonable doubt.

14 Now, ladies and gentlemen, in this case a
15 statement alleged to have been made by the defendant
16 has been admitted into the record of this case. And
17 while I have determined as a preliminary matter that
18 the statement is admissible, it is up to you as a
19 jury to make the ultimate decision as to whether or
20 not the defendant actually made the statement and
21 what -- whether or not the statement was given
22 freely and voluntarily, that is, by the own free
23 will and accord of the defendant.

24 This means the State has to prove to you beyond
25 a reasonable doubt that the statement was not caused

1 by pressure, force, fear, threats, coercion, or
2 intimidation; it was not obtained by hope or a
3 promise of leniency or reward of any kind. And as
4 you determine whether or not the statement was
5 voluntary, you should consider the circumstances of
6 the defendant and the circumstances surrounding the
7 questioning.

8 You can consider the age of the defendant, his
9 education or lack of it, his apparent mental
10 ability, his background, the length of the
11 detention, the nature of questions, whether or not
12 the defendant was advised of his constitutional
13 rights including the right to remain silent and that
14 any statement could be used against him in a court
15 of law, the right to have a lawyer present with him,
16 if he could not afford a lawyer then one would be
17 appointed to represent him without cost, that he
18 could stop making a statement at any time.

19 You must carefully consider all the
20 circumstances surrounding this before you give any
21 weight at all to the alleged statement. The State,
22 I so tell you again, has the burden of proving
23 beyond a reasonable doubt that the alleged statement
24 was made by the defendant and that it was voluntary,
25 and if you determine that it was, you can give the

1 statement any further consideration that you think
2 it should receive. You must decide what weight, if
3 any, should be given to the alleged statement, and
4 if you determine the alleged statement was not the
5 free and voluntary statement of the defendant, you
6 should not consider it for any purpose whatsoever.

7 Now, ladies and gentlemen, the State attempts
8 to meet its burden of proof in this case by the
9 introduction of the two types of evidence: Direct
10 evidence and circumstantial evidence. Direct
11 evidence is evidence that directly proves the
12 existence of a fact and it doesn't require any
13 conclusions or any deductions.

14 Circumstantial evidence is a proof of a chain
15 of facts which indicates the existence of another
16 fact and is -- the existence of another fact is
17 developed by deduction or by conclusions based on
18 the evidence presented. Crimes can be proven by
19 circumstantial evidence. The law doesn't make any
20 distinction between the weight or the value that
21 you'll give direct evidence or circumstantial
22 evidence.

23 However, to the extent that the State relies on
24 circumstantial evidence, all the circumstances must
25 be consistent with each other, and when they're

1 taken together they must point conclusively to the
2 guilt of the accused beyond a reasonable doubt. If
3 the circumstances merely portray the defendant's
4 behavior as suspicious, then the proof has failed.

5 The State has the burden of proving the
6 defendant guilty beyond a reasonable doubt, and this
7 burden rests upon the State whether the State relies
8 on direct evidence or circumstantial evidence or
9 some combination of the two.

10 Now, ladies and gentlemen, let me tell you,
11 finally -- finally, there's a word you can hang
12 onto -- let me tell you, finally, that you're not
13 that you're not partisans or advocates for the State
14 of South Carolina or for this defendant. You don't
15 serve as jurors to reward your friends or punish
16 your enemies. Obviously, such a perverted system of
17 justice would not be justice at all.

18 You have been selected by both the State and
19 the Defendant to be fair and impartial jurors, and
20 so it is your duty then, by your joint
21 deliberations, to determine the facts in this
22 particular, giving to this defendant the benefit of
23 every reasonable doubt on each and every issue, and
24 then to the facts which you determine to exist in
25 this case, you apply the law which I've just given

1 you, and thus arrive at a verdict.

2 The word verdict means the truthful saying.
3 And when you've accomplished the responsibilities,
4 you'll have satisfied your oath as jurors and you
5 will have discharged your duty to the Court.

6 Now, ladies and gentlemen, I'm going to
7 instruct you as to the forms of verdict in this
8 particular case. They are here on this verdict
9 sheet. There are six different charges, and so you
10 will write six different verdicts. Your verdict on
11 one charge does not necessarily determine your
12 verdict on another charge. The defendant can be
13 convicted or acquitted on any or all of the charges
14 contained in these indictments.

15 You're not to gather anything at all from the
16 order that I have written these possible choices of
17 verdict on this sheet. I simply write them in the
18 order that I find easiest to explain. I'm giving
19 the verdict form to the foreperson because it's
20 going to be his responsibility to fill it out. And,
21 as I have said, there are six different charges and
22 six different verdicts.

23 The first charge of murder says we the jury, by
24 unanimous consent, find the defendant as to the
25 charge of murder, the choices of verdict are two,

1 guilty if the State has met its burden of proof as I
2 have instructed you on that particular charge, not
3 guilty if the State has failed to meet its burden of
4 proof.

5 Each of the other charges contain the same
6 choices of verdict. The attempted murder of
7 Franklin Vasquez, guilty or not guilty; guilty if
8 the State has met its burden of proof under the
9 theory of the hand of one is the hand of all, not
10 guilty if it has failed to meet its burden of proof.

11 The armed robbery, once again under the theory
12 of the hand of one is the hand of all, guilty if the
13 State has met its burden of proof, not guilty if it
14 has failed to meet its burden of proof.

15 The attempted armed robbery, there are two
16 charges, one of Franklin Vasquez and one of Hector
17 Vasquez as the alleged victims. And their names are
18 there so you can tell which of those charges apply
19 to each particular victim. The possible charges are
20 the same.

21 The last charge is possession of a weapon
22 during the commission of a violent crime. You'll
23 reach this charge only if you have found Mr. Esaw
24 guilty of one of the violent crimes above. If your
25 verdict is not guilty as to those charges, you will

1 not reach the verdict of possession of a weapon
2 during the commission of a violent crime. If you do
3 find that he is guilty of at least one of those
4 crimes of violence, then you will reach the last
5 verdict. And your choices of verdict are, once
6 again, the same, guilty or not guilty.

7 Now, I've shown the verdict form to the
8 foreperson, ladies and gentlemen, because he's the
9 one who's got to fill it out. But it, obviously,
10 will not be the foreman's verdict alone; the
11 verdicts have to be unanimous, all 12 have to agree
12 as to what the verdicts will be. And, Mr. Foreman,
13 you're not authorized to fill out the verdict form
14 nor to sign it until all 12 of your number have
15 agreed as to what the verdicts will be.

16 We're going to send you to your jury room right
17 now. I want you to wait just a few moments before
18 you begin your deliberations. I've got to talk with
19 the lawyers to see if I have misstated anything or
20 if I've left out anything, and if I have, I'll have
21 to bring you back out to correct that. But if we do
22 not have to bring you back out, we will send back
23 the items of evidence. Once the items of have been
24 sent in, then that will be your signal to begin your
25 deliberations. Please, not until then.

1 Once the items of evidence have been delivered,
2 you will begin your deliberations. And you will
3 deliberate until you've reached verdicts, at which
4 point, Mr. Foreman, you will fill out the verdict
5 form, knock on the door, advise the bailiff, and we
6 will bring you back out to receive the verdict.
7 Before you begin your deliberations, Ms. Frick is
8 going to bring in menus to give you for the ordering
9 of lunch, to allow you to go ahead and get that
10 matter out of the way, and she'll explain to you how
11 that is going to be done before you begin your
12 deliberations.

13 Please retire to your jury room. Do not begin
14 yet begin your deliberations. I'll ask that the
15 alternates just stay where you are, please.

16 (The jury exits the courtroom at 11:06 AM.)

17 THE COURT: Ms. Patterson, Ms. Martin, any
18 requests for additional charge or exception from the
19 State?

20 MS. PATTERSON: None from the State, Your
21 Honor.

22 THE COURT: Thank you.

23 Ms. Fullwood, Mr. Chehoski?

24 MS. FULLWOOD: Yes. Simply, Your Honor, we'd
25 like to put on the record that we take exception to

1 that portion of your charge that stated that malice
2 is implied where no legal provocation or excuse
3 appears. We believe that's burden shifting and
4 could be interpreted to require the Defense to
5 disprove legal provocation or excuse, and thereby
6 violating rights under the Fifth, Sixth, and
7 Fourteenth Amendments of the comparable provisions
8 of the South Carolina Constitution.

9 THE COURT: Thank you. Ms. Fullwood, I note
10 that, respectfully decline to recharge with that.
11 That language has been time-honored, and although
12 our malice and the definition of malice under the
13 law have received some tweaking over the years
14 through case law, that portion of the charge has
15 been left undisturbed, or at least I hope it has.
16 If they've changed it, they've failed to let me
17 know. Thank you. That's respectfully noted, but
18 declined.

19 MS. FULLWOOD: Thank you, Your Honor.

20 (Court's Exhibit No. 3 marked for
21 identification.)

22 THE COURT: All right. Folks, you-all can
23 start then getting the evidence together and making
24 sure the evidence is in order.

25 Folks, you, obviously, have realized that your

1 role as alternate jurors would have been to take the
2 places of any of these 12 in that jury room if they
3 had not been able to last throughout the trial. We
4 knew when we began this trial that it was going to
5 last several days, and there was probability or some
6 likelihood, maybe, that some of these 12 might have
7 had some emergencies in their lives that would not
8 allow them to conclude the trial and go back and
9 deliberate.

10 If that had happened and you were not there, we
11 would have had to start this whole case over from
12 scratch and everything done up to that point in time
13 would have been wasted. And so when I saw you each
14 day, I knew that we were not going to be wasting our
15 time because I knew that if something happened to
16 those, either of you could have stepped into their
17 shoes. And you're just as capable as they are in
18 this case. Thankfully you don't have to do that.

19 But your service has been valuable to us for
20 reasons that I've already mentioned to you. And, as
21 I said, you can step into that room and make the
22 same decisions they have. You have been equally
23 prompt and attentive as they have. But I'm going to
24 let you go now. You don't have to come back and you
25 don't have to call back. We've pretty much killed

1 your week, so we won't take any more of your time.

2 If you need a slip telling anybody who needs to
3 know where you've been, go downstairs to the Clerk's
4 office and ask for Carol and they'll give you a
5 slip. You'll get a check in the mail some time in
6 near the future. It's not going to begin to pay you
7 for the real time that you've spent with us. But I
8 hope that you'll accept our gratitude for what
9 you've done this week.

10 And I hope that you have gained, during your
11 experience this week as a juror, of the importance
12 of folks like you who have to submit themselves to
13 jury service and I you've gained a greater
14 appreciation for what we do and what folks like you
15 do in this process. Thank you, folks, for your
16 service and your willingness to serve, and you're
17 free to go.

18 (Alternate jurors excused at 11:10 AM.)

19 MS. MARTIN: Your Honor, should we have an IT
20 person come up with a blank computer for them to
21 play a disc or wait for them to ask or how do you
22 want to do that?

23 THE COURT: When you take the evidence in, tell
24 the jury if they need to have any of this electronic
25 evidence replayed, let us know. If they tell us

1 they need it, we'll cross that bridge at that time.

2 (The jury begins deliberations at 11:13 AM.)

3 THE COURT: Ladies and gentlemen, we're advised
4 that the jury has reached a verdict and momentarily
5 the jury is going to be brought in for us to receive
6 the verdict. Let me tell you before they come in
7 that I recognize that this is an emotional case, for
8 obvious reasons, and that there are emotions on
9 either side of the aisle.

10 At this juncture, none of us has any way of
11 knowing which side of the aisle will feel relief and
12 which side will feel disappointment. I don't expect
13 you-all to be automatons, you-all have a great deal
14 at stake in this case, but at the same time I do
15 expect, and I'm sure that you will, use the same
16 dignity and restraint throughout this process of
17 receiving the verdict that you've use throughout the
18 trial itself.

19 If you feel that you might have some difficulty
20 in restraining your emotions when the verdict of the
21 jury is announced, I'll give you a chance now to
22 leave the courtroom, because if you stay, I will
23 expect you to abide by those same rules and decorum
24 and dignity that we have followed throughout. All
25 right?

1 Are both sides ready to receive the verdict?

2 MS. PATTERSON: The State is ready, Your Honor.

3 MR. CHEHOSKI: The Defense is ready, Your
4 Honor.

5 THE COURT: All right. Bring us the jury,
6 please.

7 (The jury enters the courtroom at 12:51 PM.)

8 THE CLERK: Mr. Foreman, have you reach your
9 verdicts?

10 THE FOREMAN: Yes, we have.

11 THE CLERK: Please pass them up by the bailiff.

12 THE COURT: You may publish the verdicts.

13 THE CLERK: Indictment 2016-GS-32-00217, 218,
14 214, 213, 216, and 206, The State vs. Ricky Lamont
15 Esaw. As to Indictment 2016-GS-32-00217, charge
16 murder, we the jury, by unanimous consent, find the
17 defendant, as to the charge of murder, guilty.

18 Indictment 2016-GS-32-00218, charge attempted
19 murder, we the jury, by unanimous consent, find the
20 defendant, as to the charge of attempted murder,
21 guilty.

22 Indictment 2016-GS-32-00214, charged armed
23 robbery, we the jury, by unanimous consent, find the
24 defendant, as to the charge of armed robbery,
25 guilty.

1 Indictment 2016-GS-32-00213, charge of
2 attempted armed robbery, we the jury, by unanimous
3 consent, find the defendant, as to the charge of
4 attempted armed robbery of Franklin Vaquez, guilty.

5 Indictment 2016-GS-32-00216, attempted armed
6 robbery, we the jury, by unanimous consent, find the
7 defendant, as to the charge of attempted armed
8 robbery of Hector Vasquez, guilty.

9 Indictment 2016-GS-32-00206, possession of a
10 weapon during the commission of a violent crime, we
11 the jury, by unanimous consent, find the defendant,
12 as to the charge of possession of a weapon during
13 the commission of a violent crime, guilty.

14 It is so sign by the foreperson Randall
15 Hallman, October 19th, 2017.

16 Mr. Foreman, ladies and gentlemen of the jury,
17 if this is your verdicts, please indicate so by
18 raising your right hand.

19 All hands raised, Your Honor.

20 THE COURT: Thank you.

21 Does the Defense wish for the jury to be
22 polled?

23 MR. CHEHOSKI: Yes, Your Honor, we do.

24 THE COURT: Thank you.

25 Ladies and gentlemen, you're going to be polled

1 now. That means that your names are going to be
2 called individually, and as your names are called,
3 you'll be asked was this your verdict and is it
4 still your verdict, and you'll give whatever the
5 appropriate answer is to those questions. Thank
6 you.

7 Madam Clerk?

8 THE CLERK: If you'll hold your hand up when I
9 call your name so I can recognize you. Okay?

10 Anthony Lane, as to the verdicts, were this
11 your verdicts and are they still your verdicts?

12 JUROR LANE: Yes, ma'am.

13 THE CLERK: Dale Stiffler, as to the verdicts,
14 are these your verdicts and are they still your
15 verdicts?

16 JUROR STIFFLER: Still my verdict

17 THE CLERK: Dawn Coulter, as to the verdicts,
18 are they your verdicts and are they still your
19 verdicts?

20 JUROR COULTER: Yes, ma'am.

21 THE CLERK: Patricia Waters, as to the
22 verdicts, were these your verdicts and are they
23 still your verdicts?

24 JUROR WATERS: Yes, ma'am.

25 THE CLERK: Jason Hall, as to the verdicts,

1 were these your verdicts and are they still your
2 verdicts?

3 JUROR HALL: Yes, ma'am.

4 THE CLERK: David Martin, as to the verdicts,
5 were these your verdicts and are they still your
6 verdicts?

7 JUROR MARTIN: Yes.

8 THE CLERK: Brandon Burnette, as to the
9 verdicts, were these your verdicts and are they
10 still your verdicts?

11 JUROR BURNETT: Yes, ma'am.

12 THE CLERK: Rashad Mcrae, as to the verdicts,
13 were these your verdicts and are they still your
14 verdicts?

15 JUROR MCRAE: Yes, ma'am.

16 THE CLERK: Michael Ragsdale, as to the
17 verdicts, were these your verdicts and are they
18 still your verdicts?

19 JUROR RAGSDALE: Yes.

20 THE CLERK: Randall Hallman, as to the
21 verdicts, were these your verdicts and are they
22 still your verdicts?

23 JUROR HALLMAN: Yes, ma'am.

24 THE CLERK: Justin Rauton, as to the verdicts,
25 were these your verdicts and are they still your

1 verdicts?

2 JUROR RAUTON: Yes, ma'am.

3 THE CLERK: Edith Smith, as to the verdicts,
4 were these your verdicts and are they still your
5 verdicts?

6 JUROR SMITH: Yes.

7 THE CLERK: Jurors polled, Your Honor.

8 THE COURT: Any further matters before the jury
9 is dismissed?

10 MS. PATTERSON: Nothing from the State, Your
11 Honor.

12 MR. CHEHOSKI: Nothing from the Defense.

13 THE COURT: All right. Ladies and gentlemen,
14 I'm going to be able to dismiss you now with the
15 gratitude of the Court for the services you have
16 rendered. I never comment, by criticism or
17 commendation, upon the verdicts you reach. I'm glad
18 you have to make those difficult decisions instead
19 of me.

20 But I do commend you for the quality of your
21 service. You've been prompt, you've been here --
22 we've never had to wait on you, and you've been
23 attentive throughout the trial of this case. It's
24 been somewhat lengthy. And we've taken most of your
25 week and we've had to expose you to a side of

1 society and life that you're not used to being
2 exposed to, and we apologize for that.

3 We thank you for your commitment of time and
4 effort and for the attention. You did not rush to
5 judgment, you've taken time to make your decisions
6 in this regard, and we appreciate the fact that
7 you've done that. You only have to answer to your
8 conscience for the verdicts which you have reached.
9 You don't have to answer to anybody else. You have
10 no need to fear your conscience for the verdict that
11 you've reached in this case.

12 If anybody should ask you about this case, if
13 you want to discuss it with them, you're now free to
14 discuss it with anybody, if you want to. But at the
15 same time, if someone should ask you about this case
16 and if you do not care to discuss it, you don't have
17 to, just tell the folks that you do not want to talk
18 about it and that should end the discussion at that
19 point. I'm sure it will. But if it doesn't, if
20 somebody persists in that regard, you let that be
21 known to the Clerk's Office and the officials, and
22 we'll take care of that matter.

23 Briefly, you've earned an exemption that will
24 not require you to serve as a juror in the circuit
25 courts of our state for the next three years if you

1 get called. You shouldn't get called. But if you
2 do get called and don't want to serve, just tell
3 them that you served in October of 2017 and you
4 don't care to serve again at that point in time.

5 You will get a small check in the mail sometime
6 in the next few days. It's not going to begin to
7 pay you for the time that you've spent with us and
8 for your involvement in this and for what you
9 brought to this case. If you will add to that small
10 check the appreciation of the court officials for
11 the service that you rendered, I trust you'll be, in
12 some way, compensated. If you need to get any juror
13 slips so that anybody who needs to know other than
14 you where you've been this week, they're available
15 downstairs in the clerk's office.

16 By the way, ladies and gentlemen, let me tell
17 you this: I hope that you never find yourselves
18 caught up in the judicial process. You can get
19 caught up in this process whether you want to or
20 not. Really, nobody in this courtroom wanted to get
21 caught up in this process for whatever reason, but
22 they're in it. And I hope that ever happens to you.

23 But if it ever happens to you, if you find
24 yourself involved in a case of a personal nature to
25 you because of you or somebody that you love is

1 involved in the case as a defendant or a victim,
2 when you come to court on Monday morning like these
3 folks came to court Monday morning and are seated
4 inside the rail, on this side of the rail, and when
5 you turn on Monday morning of the week of your
6 trial, whatever it happens to be, to look into the
7 faces of the jurors that we have summoned to try
8 your case, you're going to hope we were able to get
9 jurors like yourselves; people who have got better
10 things to do, but who are willing to put those
11 things aside, just as you were willing to do, to try
12 the case that you have an involvement in.

13 The last thing that you'd want us to do to get
14 jurors to try your case is to wander around the
15 streets of Lexington and try to scrape up 12 people
16 who don't have anything better to do. We want
17 people who have better things to do who are willing
18 to what you did; to set them aside and do what
19 you've done. You've given us that quality of jurors
20 and we're grateful for it.

21 We still have some legal matters here in the
22 matter of sentencing. You don't have to stay for
23 that, you're free to go. I hope you will wait on
24 your sandwiches to come. They should be here
25 shortly if they're not already here. And please

1 wait -- at the very least, you can eat them in the
2 jury room, you can take them with you. If you don't
3 get those sandwiches, you're going to be real
4 disappointed when you see how small that check is.
5 So please do that, ladies and gentlemen, and accept
6 our gratitude for your services this week.

7 (The jury excused at 1:00 PM.)

8 THE COURT: All right, folks. Thank you for
9 your patience. I'll be glad to hear any additional
10 motions from the Defense.

11 MR. CHEHOSKI: Thank you, Your Honor. At this
12 time the Defense moves for a new trial encompassing
13 all previous motions and objections that were made
14 during the course of the trial up to and including
15 cumulative error for -- a need for just, I guess,
16 the compounding of all of the motions and objections
17 that we've made here during the course of this trial
18 from the pretrial stage all the way up through jury
19 instructions.

20 THE COURT: Thank you. And having heard those
21 motions during the course of this trial and having
22 ruled on them earlier, I simply adopt my earlier
23 rulings and confirm those as the ruling of the Court
24 on each of those motions. Thank you.

25 All right. Is the State ready to proceed to

1 sentencing?

2 MS. PATTERSON: Yes, sir, Your Honor.

3 THE COURT: All right. If you'll pass up the
4 sheets, please.

5 I'll be glad to hear from the victims,
6 Ms. Patterson.

7 MS. PATTERSON: Yes, sir.

8 THE COURT: And then from Mr. Esaw and anyone
9 on his behalf.

10 MS. PATTERSON: Christy Vasquez would like to
11 speak, Your Honor.

12 THE COURT: Ms. Vasquez.

13 MS. VASQUEZ: Your Honor, this man has not only
14 taken a loving father, a husband, a best friend that
15 I've had for 20 years; he's taken a cousin, a
16 brother, a son. We had a lot of things that we had
17 planned to do: See our kids get grown up, graduate
18 high school, graduate college, see our grandkids
19 together. And he's not here anymore. Ricky Esaw
20 took that away from our family.

21 Everybody has a right to see their family grow,
22 everybody. I don't care the color of your skin,
23 your race, whoever, everybody has a right to do
24 that. Nobody has a right to take that away from
25 you. My kids do not deserve to grow up without a

1 mother, without a father, how me and my husband were
2 both grown up. They don't deserve that. And my son
3 surely did not deserve to see his father get shot or
4 get shot himself.

5 And for me personally, I think he deserves the
6 maximum penalty that he can get because he's not the
7 one suffering, his life isn't the one that got
8 turned around in a matter of seconds, it was ours.
9 And I just want justice for my husband and for my
10 family.

11 THE COURT: Thank you, ma'am.

12 MS. PATTERSON: Your Honor, I -- as we stated
13 when this trial began, we have served Mr. Esaw with
14 a life without parole notice, Your Honor. He has a
15 prior record that supports that, Your Honor. But
16 I'd just like to share with Your Honor his prior
17 record in total.

18 THE COURT: All right.

19 MS. PATTERSON: In 1993 he has a grand larceny
20 of a vehicle, petit larceny; 1999, a possession of a
21 pistol by an unlawful person; in 2001, he has a
22 burglary second, armed robbery, and an assault and
23 battery of a high and aggravated nature, two counts,
24 which I would like the Judge to know that I did
25 research on those cases, and those cases involve

1 robbing Hispanics in mobile home parks in Jasper
2 County. It was six incidents, Your Honor, and the
3 Solicitor's Office down there made a recommendation
4 of a 12-year sentence. So he did that back in '01.

5 THE COURT: All right. Is that his record?

6 MS. PATTERSON: Yes, sir, Your Honor.

7 THE COURT: And you have a copy of the
8 qualifying --

9 MS. PATTERSON: It's in the clerk's file, Your
10 Honor.

11 THE COURT: Okay. Thank you. Anything further
12 from the State?

13 MS. PATTERSON: Nothing further from the State.

14 THE COURT: Thank you. I have before me the
15 copy of the notice of the State to intend to seek
16 life without parole filed September 12th of this
17 year. I have attached to that certified copies of
18 the County of Jasper sentence sheet for the crime of
19 armed robbery, sentence imposed on March 19th of
20 2001 for armed robbery, the most serious offense in
21 the eyes of the law. The prerequisite requirements
22 of 17-25-44(a) seem to have been met in that regard.

23 All right. Mr. Esaw, gentlemen, ladies, I'll
24 be glad now to hear from the Defense.

25 MR. CHEHOSKI: Thank you, Your Honor. Ricky is

1 42 years old, he finished the 10th grade and grew up
2 in Jasper County in South Carolina. He had been
3 working on his GED. He is the father of four
4 children. While he was free, he did work in
5 temporary service most, and I think it did come out
6 in trial he had done some maintenance work. He had
7 worked outside.

8 In my preparation of the case and learning
9 about it, Ricky was -- had good work ethic, he would
10 get up early, get to work early. His mother
11 Patricia Reid has been at the courthouse for the
12 entirety of the trial. As you know, Your Honor, she
13 was on our witness list and, therefore, could not be
14 in the courtroom.

15 But her -- his mother, rather, works at
16 Lexington Medical Center, would typically work third
17 shift. Right now is typically her nighttime and has
18 sacrificed to be here the whole time. You also saw
19 other family members, including his brother, that
20 were here for the majority of the trial.

21 THE COURT: Right.

22 MR. CHEHOSKI: He was skilled in both building
23 and construction labor. Subsequent to his release
24 he did have difficulty finding work because of his
25 record.

1 Your Honor, personally, I received this case in
2 September of last year. Ms. Fullwood was originally
3 assigned to the case and, I think, due to some
4 conflict and Ms. Fullwood's caseload regarding major
5 crimes, reassigned me the file. I met with Ricky as
6 soon as I could. I met with him a number of times,
7 practically once a month up until trial date, did
8 extensive investigation into this case trying to
9 get -- to get that Ricky has never once indicated
10 that he had committed this crime.

11 Your Honor, I said in my opening that I hope
12 our conduct throughout the trial demonstrated
13 respect to the victims and the victims' family. I
14 hear Ms. Vasquez's statement, I can't imagine the
15 grief she's going through. I offer my deepest
16 condolences. And, Your Honor, I understand -- I
17 don't know if there's any discretion to the Court,
18 if there was, we'd be asking the Court, in our
19 fullest sincerity, for a term of years.

20 THE COURT: All right. Thank you.

21 Mr. Esaw, do you want to add anything to what's
22 been said on your behalf?

23 THE DEFENDANT: No, sir.

24 MR. CHEHOSKI: And, Your Honor, one last thing
25 I did neglect to add, he has been in custody 798

1 days.

2 THE COURT: Okay.

3 All right. Mr. Esaw, on the charge of
4 possession of a weapon during the commission of a
5 violent crime, the sentence is five years. On the
6 remaining charges, attempted armed robbery,
7 Indictment 213; armed robbery, 214; attempted armed
8 robbery, 216; murder, 217; attempted murder, 218,
9 the sentence is fixed by statute. You are to be
10 committed to the state department of corrections for
11 the balance of your natural life without the
12 possibility of parole. These sentences all run
13 concurrent to each other with credit for time
14 served.

15 Good luck, folks, to all of you. Ms. Vasquez,
16 we're all sorry for your loss.

17 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Lexington County, South Carolina, on the 16th, 17th, 18th, 19th of October, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 16, 2018

s/Bethanie K. Creppon

Bethanie K. Creppon
Circuit Court Reporter



Lexington County Sheriff's Department



VOLUNTARY STATEMENT

(Not Under Arrest)

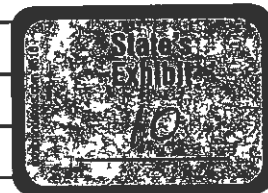
I, Christy Herrera Vasquez, am not under arrest, nor am I being detained for any criminal offenses concerning the events I am about to make known to Heitor Vasquez

I volunteer the following information of my own free will, for whatever purposes it may serve. I am 37 years of age, and I live at 3941 Charleston Hwy lot 162

West Columbia SC 29172
Alternate Contact Name: _____ Phone (H) _____ (W) _____ (C) 4660902

Alternate Contact Name: _____ Phone (H) _____ (W) _____ (C) _____

I was inside and I heard a gun shot and then a guy ran inside & then he said don't go outside And I yelled that is my husband and I went outside And then when I saw him on the ground and A Black Man with a gun he told me that if I got any closer he was going to kill me also then they left. And then I saw that My son had a shot over on his legs.



I have read each page of this statement consisting of 1 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained here in are true and correct.

Dated at 3941 Charleston Hwy lot 162, this 9 day of Aug 20 15

Christy Herrera
Signature of person giving voluntary statement.



Lexington County Sheriff's Department

VOLUNTARY STATEMENT



(Not Under Arrest)

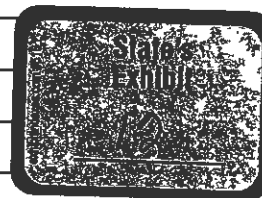
I, Rafael Izaguirre, am not under arrest, nor am I being detained for any criminal offenses concerning the events I am about to make known to _____.

I volunteer the following information of my own free will, for whatever purposes it may serve. I am 45 years of age, and I live at 3941 Charleston Hwy lot 256.

Alternate Contact Name: Guadalupe Phone (H) 803-319-7224 (C) _____

Alternate Contact Name: _____ Phone (H) _____ (W) _____ (C) _____

They pointed a gun at me and took my phone + wallet. A small black car with two African Americans.



I have read each page of this statement consisting of _____ page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained here in are true and correct.

Dated at 3941 Charleston Hwy lot 263, this 08 day of 09 20 15

Rafael Izaguirre
Signature of person giving voluntary statement.



Lexington County Sheriff's Department Statement Form



DATE 08.09.2015 PLACE RECHLAND E.R. TIME STARTED 1145 P M

I, the undersigned, Franklin Vasquez, am 17 years of age, my date

and place of birth being the [REDACTED] day of [REDACTED], 19 97, at [REDACTED]

My present address is 3941 Charleston Hwy lot 162

I completed 11 grade(s) in school. I can read and write. FV (Initials)

CONTACT NUMBERS: H) _____ W) _____ C) _____

ALTERNATE CONTACT: Name Christy Herrera Phone Numbers: 803-466-0404

Before answering any questions or making any statements, Det. D. Edmondson

a person who identified him/herself as a LEXINGTON COUNTY P.O.

duly warned and advised me that:

- ~~1) I HAVE THE RIGHT TO REMAIN SILENT. _____~~
- ~~2) ANYTHING I SAY, CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW. _____~~
- ~~3) I HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVICE BEFORE ASKED ANY QUESTIONS AND TO HAVE HIM OR HER PRESENT WITH ME DURING QUESTIONING. _____~~
- ~~4) IF I HAVE NO MONEY FOR LAWYER'S FEES, THE COURT WILL APPOINT ONE TO REPRESENT ME WITHOUT COST TO ME IF I WISH. _____~~
- ~~5) IF I DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, I WILL STILL HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME. I ALSO HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANYTIME UNTIL I TALK WITH A LAWYER. _____~~

I HAVE READ THIS STATEMENT OF MY RIGHTS AND I UNDERSTAND WHAT MY RIGHTS ARE. _____ I MAKE THE FOLLOWING STATEMENT:

I just had come from basketball at the park with my friends nate and aleshia and I was walking down the road to go tell my mom and dad that I came back home from the park. like 10 or 15 mins later I had went to go get a fanta out of the cooler from behind the trailer then when I went and met up with my dad at the corner of the fence a grey 4 door car approached us slowly two black males got out the car and pointed guns at me and my dad and another gentlemen. telling us to empty out our pockets and to give them our money

Witness

Notary Public

Franklin Vasquez
Person giving Statement

8-10-15
Date

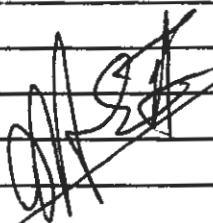
My Commission expires

Pg 1 of 2 pgs

VOLUNTARY STATEMENT

Page 2 of 2 pages.

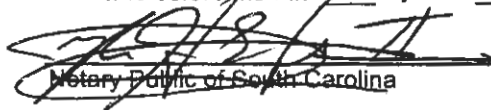
and wallets and cellphones the guy driving the car approached my dad saying give me ur wallets and phone. me and my dad repeatedly told him that he didnt have any money on him then they took the guys wallet and phone then my dad confronted the other man which was the driver. my dad pulled the gun then the guy pulled back and my dad was getting closer to the man and he was shooting at him but bullets werent coming but thats when my dad hit the guy in the head with a corona beer bottle on the head when my dad and the driver were on the ground wrestling on the ground I throw my soda at the guys face and it busted and I also kicked the guy in the face. then all of a sudden I heard a gunshot and they had shot my dad. then the passenger driver had shot his gun inside the car and it grazed me and hit the white track. the passenger driver was a fat guy.



I have read this page, initialed corrections or changes, if any, and received a copy of this page. I certify that the facts contained herein are true and correct to the best of my knowledge.

Franklin Vasquez
Signature of person giving voluntary statement

Sworn to before me this _____ day of _____ 20____.


Notary Public of South Carolina

WITNESSES

Lexington County Sheriffs Department

J. A. Moore

Law Enforcement Case #: 15015095

RWP

ARREST WARRANT NUMBER

2015A3210201589

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 1-14-16

VERDICT

DOCKET NO. 2016GS3200218

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JANUARY TERM 2016

THE STATE
vs.

Ricky Lamont Esaw

CDR #: 3410

Indictment for

Attempted Murder

§ 16-03-0029

DONALD V. MYERS, SOLICITOR

Foreperson of Petit Jury

Date:



STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 Attempted Murder

§ 16-03-0029

At a Court of General Sessions, convened on January 2016, the Grand Jurors of Lexington County present upon their oath:

That Ricky Lamont Esaw in Lexington County, South Carolina, on or about August 9, 2015, did, with the intent to kill, attempt to kill another person with malice aforethought, either express or implied, to wit: the defendant shot the victim Franklin Vasquez in his legs, in violation of §16-03-0029 of the South Carolina Code of Laws of 1976, as amended.

A TRUE COPY
[Signature]
 Lex. Co. C.C.C.P., G.S. & F.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

[Signature]

ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

J. A. Moore

Law Enforcement Case #: 15015095

RWP

ARREST WARRANT NUMBER

2015A3210201586

ACTION OF GRAND JURY

TRUE BILL

For person of Grand Jury

Date: 1-14-16

VERDICT

DOCKET NO. 2016GS3200217

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JANUARY TERM 2016

THE STATE
vs.

Ricky Lamont Esaw

CDR #: 0116

Indictment for

Murder

§ 16-03-0010

DONALD V. MYERS, SOLICITOR

Foreperson of Petit Jury

Date:



STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
Murder

§ 16-03-0010

At a Court of General Sessions, convened on January 2016, the Grand Jurors of Lexington County present upon their oath:

That **Ricky Lamont Esaw** did in Lexington County on or about August 9, 2015, with malice aforethought, either express or implied, shoot the victim, Hector Vasquez and the victim died as a proximate result thereof, in violation of §16-3-10, Code of Laws of South Carolina, 1976, as amended.

A TRUE COPY
Lex. Co. C.C.C.P., G.S. & F.C.
[Signature]

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

[Signature]

ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

J. A. Moore

Law Enforcement Case #: 15015095

RWPARREST WARRANT NUMBER

2015A3210201585

ACTION OF GRAND JURY**TRUE BILL**

Foreperson of Grand Jury

Date: 1-11-16

VERDICTDOCKET NO. 2016GS3200216**The State of South Carolina**

County of Lexington

COURT OF GENERAL SESSIONS**JANUARY TERM 2016****THE STATE
vs.****Ricky Lamont Esaw**CDR #: 0139**Indictment for****Armed Robbery****§ 16-11-0330(A)****DONALD V. MYERS, SOLICITOR**Foreperson of Petit JuryDate:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 Armed Robbery
 § 16-11-0330(A)

At a Court of General Sessions, convened on January 2016, the Grand Jurors of Lexington County present upon their oath:

That **Ricky Lamont Esaw** did in Lexington County, South Carolina on or about August 9, 2015 knowingly and willfully while armed with a deadly weapon to wit: a handgun, did feloniously take from the person or presence of Hector Vasquez, by means of force, threats or intimidation goods or monies being described as follows: money and/or cell phone with intent to deprive the owner of the use of such property, in violation of Section 16-11-330 (A) of the South Carolina Code of Laws, 1976, as amended.

A TRUE COPY
 Lex. Co. C.O.C.P., G.S. § F.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

J. A. Moore

Law Enforcement Case #: 15015095

RWPARREST WARRANT NUMBER

2015A3210201584

ACTION OF GRAND JURY**TRUE BILL**

Foreperson of Grand Jury

Date: 1-14-16

VERDICTDOCKET NO. 2016GS3200214The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JANUARY TERM 2016

THE STATE
vs.

Ricky Lamont Esaw

CDR #: 0139

Indictment for

Armed Robbery

§ 16-11-0330(A)

DONALD V. MYERS, SOLICITOR

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 Armed Robbery

§ 16-11-0330(A)

At a Court of General Sessions, convened on January 2016, the Grand Jurors of Lexington County present upon their oath:

That **Ricky Lamont Esaw** did in Lexington County, South Carolina on or about August 9, 2015 knowingly and willfully while armed with a deadly weapon to wit: a handgun, did feloniously take from the person or presence of Rafael Izaguirre, by means of force, threats or intimidation goods or monies being described as follows: money and/or cell phone with intent to deprive the owner of the use of such property, in violation of Section 16-11-330 (A) of the South Carolina Code of Laws, 1976, as amended.

A TRUE COPY
[Signature]
 Lex. Co. C.C.C.P., G.S. & F.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

[Signature]

ASSISTANT SOLICITOR

DOCKET NO. 2016GS3200213

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JANUARY TERM 2016

THE STATE
vs.

Ricky Lamont Esaw

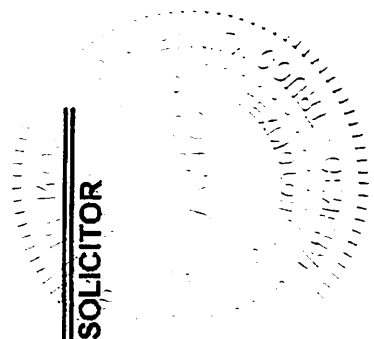
CDR #: 0139

Indictment for

Armed Robbery

§ 16-11-0330(A)

DONALD V. MYERS, SOLICITOR



WITNESSES

Lexington County Sheriffs Department

J. A. Moore

Law Enforcement Case #: 15015095

RWP

ARREST WARRANT NUMBER

2015A3210201583

ACTION OF GRAND JURY

TRUE BILL

Forperson of Grand Jury

Date: 1-19-16

VERDICT

Forperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 Armed Robbery

§ 16-11-0330(A)

At a Court of General Sessions, convened on January 2016, the Grand Jurors of Lexington County present upon their oath:

That **Ricky Lamont Esaw** did in Lexington County, South Carolina on or about August 9, 2015 knowingly and willfully while armed with a deadly weapon to wit: a handgun, did feloniously take from the person or presence of Franklin Vasquez, by means of force, threats or intimidation goods or monies being described as follows: money and/or cell phone with intent to deprive the owner of the use of such property, in violation of Section 16-11-330 (A) of the South Carolina Code of Laws, 1976, as amended.

A TRUE COPY
 Lex. Ob. C.C.C.P., G.S. § 16-11-0330

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

R. P. Potts

ASSISTANT SOLICITOR

RECEIVED
OCT 25 2017
APPELLATE DEFENSE

DOCKET NO. 2016GS3200206

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JANUARY TERM 2016

THE STATE
vs.

Ricky Lamont Esaw

CDR #: 0549

Indictment for

Possession of a Weapon During the
Commission of Violent Crime

§ 16-23-0490

DONALD V. MYERS, SOLICITOR

WITNESSES

Lexington County Sheriffs Department

J. A. Moore

Law Enforcement Case #: 15015095

RWP

ARREST WARRANT NUMBER

2015A3210201582

ACTION OF GRAND JURY

TRUE BILL

For person of Grand Jury

Date: 1-14-16

VERDICT

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 Possession of a Weapon During the
 Commission of Violent Crime

§ 16-23-0490

At a Court of General Sessions, convened on January 2016, the Grand Jurors of Lexington County present upon their oath:

That **Ricky Lamont Esaw** did in Lexington County, South Carolina on or about August 9, 2015 knowingly and willfully possess a firearm during the commission of a violent crime or attempt to commit a violent crime, to wit: murder and armed robbery such weapon described as a firearm in violation of § 16-23-490 of the Code of Laws of South Carolina, 1976, as amended.

Lex. Co. C.C.C.P., G.S. § 16-23-490.

A TRUE COPY

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY L. ESAW,

APPELLANT

APPELLATE CASE NO. 2017-002213

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge violate Appellant's Sixth Amendment right to a fair trial by failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject?

STATEMENT OF THE CASE

In January 2016, a Lexington County grand jury indicted Appellant for possession of a weapon during a violent crime (2016-GS-32-206), armed robbery of Franklin Vasquez (2016-GS-32-213), armed robbery of Rafael Izaguirre (2016-GS-32-214), armed robbery of Hector Vasquez (2016-GS-32-216), murder of Hector Vasquez (2016-GS-32-217), and attempted murder of Franklin Vasquez (2016-GS-32-218). R. 537-555.

The state, represented by Rhonda Patters and Angela Martin, called the case to trial before the Honorable Thomas W. Cooper and a jury on October 16-19, 2017. R. 1. Concerning the armed robbery charges involving Hector and Franklin Vasquez, at trial, the state alleged Appellant attempted to rob those individuals. R. 3, ll. 1-3; R. 3, l. 23 – R. 4, l. 6; R. 4, ll. 16-22. Finally, concerning the attempted murder charge, the state alleged Appellant attempted to kill Franklin Vasquez through the conduct of another individual, Wilfred Pitts. R. 3, ll. 5-15.¹

Jason Chehoski and Elizabeth Fullwood represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 534, l. 13 – R. 535, l. 13. Based upon the state's service of its intent to seek life imprisonment without the possibility of parole (LWOP), Judge Cooper sentenced Appellant to LWOP for two counts of attempted armed robbery, armed robbery, attempted murder, and murder. R. 536, ll. 5-12; R. 537-555. For the weapon, Judge Cooper

¹ At the conclusion of the trial, the judge instructed the jury that malice required to be proven for attempted murder could be inferred. R. 515, l. 18 – R. 516, l. 2. Along these lines, the judge charged the jury that some of the allegations against Appellant required the jury to consider the conduct of Wilfred Pitts and the theory of accomplice liability. R. 519, ll. 5-23. Specifically, the judge instructed the jury that Appellant was “accused of the attempted murder of Franklin Vasquez through the acts of Mr. Pitts.” R. 515, ll. 18-20. This was made abundantly clear during the final portions of the jury charge when the judge instructed the jury to find Appellant guilty of attempted murder of Franklin Vasquez if the state “met its burden of proof under the theory of the hand of one is the hand of all.” R. 527, ll. 5-10. Despite the erroneous nature of these charges, trial counsel failed to object. See *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (explaining that “[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill”).

sentenced Appellant to five years imprisonment. R. 536, ll. 3-5; R. 537-555. Judge Cooper ordered the sentences to be served concurrently. R. 536, ll. 12-14; R. 537-555.

On October 20, 2017, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

“In criminal cases an appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Id.

ARGUMENT

Violating Appellant's Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject.

Relevant facts

The state's primary evidence against Appellant was the testimony of an eyewitness, Franklin Vasquez. Seventeen-year-old Franklin went to play basketball with two friends in his neighborhood during the afternoon and early evening of August 9, 2015. R. 9, l. 12 – R. 10, l. 7. When it was too dark to continue to play, Franklin returned home. R. 9, ll. 20-22. At home, Franklin found his father, Hector, standing near a white fence in front of the house where a baptism party was occurring. R. 10, ll. 8-13. Franklin walked behind the house to a cooler to get a drink. R. 10, ll. 14-16. Then, Franklin returned to his father. R. 3, ll. 23-24.

Franklin claimed that as a sedan passed buy, the driver said something. R. 9, l. 24 – R. 10, l. 2. Hector turned around and said something back to the driver. R. 10, l. 2. The car then stopped. R. 10, l. 3. Franklin claimed a man got out of the car, pointed a gun at him, and demanded he empty his pockets. R. 10, l. 25 – R. 11, l. 2. Hector jumped in front of Franklin and asked the man what his problem was. R. 12, ll. 1-2. The man pointed the gun at Hector and told him to empty his pockets. R. 12, ll. 2-4. When Hector responded that he did not have anything, the man “tried to shoot the gun, but the gun jammed.” R. 12, ll. 4-6. Hector hit the man “upside the head with a beer bottle” and the two began to struggle over the gun. R. 12, ll. 6-7.

Although Franklin initially “froze,” he “snapped out of it.” R. 13, ll. 2-4. He threw a soda can at the man and kicked him in the face. R. 13, ll. 4-5; R. 13, ll. 13-18. A second man then shot a gun through the passenger’s side of the car. R. 13, ll. 5-7. The bullet grazed Franklin. R. 13, ll. 7-8. Franklin ran inside, grabbed his keys, and chased the men in his car. R. 13, ll. 8-11. He was unable to catch them. R. 13, l. 12.

Franklin asserted he had “pretty good” eyesight, that he was “focused on the driver pointing the gun” at him and Hector. R. 13, l. 19 – R. 14, l. 3. He estimated the entire incident took between five and ten minutes. R. 14, ll. 23-24.

Days later, on August 13, 2015, Franklin picked Appellant from a photographic line-up. R. 17, ll. 9-25. At trial, Franklin claimed he made his selection based upon the “facial features” of the man. R. 18, ll. 6-9. He further claimed he made his selection in less than a minute. R. 18, ll. 15-17.

During the trial, Appellant called Dr. Dawn McQuiston as an expert witness in eyewitness identification and psychology. R. 49, ll. 21-23; R. 51, ll. 19-21. Dr. McQuiston described the phenomenon of cross-race effect on memory and identifications. R. 58, ll. 2-4. She explained that “people tend to not recognize people of other ethnic groups as well as people of their own ethnic group.” R. 58, ll. 5-8. The research indicated that “many ethnic groups are susceptible to the cross-race effect, so people ... tend to not be as accurate when they’re trying to recognize or identify a face of a different ethnic group versus their own.” R. 58, ll. 11-21. The cross-race effect affects all racial groups all over the world. R. 59, ll. 4-11. Based upon the research in the area, the reason that a person of one ethnic group may not be as accurate in identifying a person of another ethnic group is due to “contact.” R. 58, ll. 22-25. In essence,

“the more contact [a person has] with another ethnic group, the less susceptible [the person] would be to this effect.” R. 59, ll. 1-3.

During the closing argument, the solicitor remarked upon Dr. McQuiston’s testimony. According to the solicitor, Dr. McQuiston “didn’t really say anything unusual, things common sense might tell us.” R. 473, ll. 16-25. The solicitor emphasized that Dr. McQuiston “couldn’t comment on Franklin’s identification” because she “never met that young man,” didn’t “know anything about his life experiences, “and “wasn’t present when Detective Moore presented the lineup.” R. 474, ll. 3-9. The solicitor then explained that she questioned Franklin about the race of his friends and classmates because she knew the defense was “going to call the doctor” and “were going to make race an issue.” R.474, ll. 10-14.² The solicitor told the jurors: “It’s not a factor, it’s a distraction. ... It’s a nonissue. There’s nothing wrong with his identification.” R. 474, ll. 14-19.

At the conclusion of the trial, trial counsel requested the judge instruct the jury regarding cross-race identifications. R.465, l. 21 – R.466, l. 10. Relying upon, State v. Cromedy, 727 A.2d 457 (N.J. 1999), trial counsel asked the judge to instruct the jury as follows:

When a witness who is a member of one race identifies a member who is of another race, we see that there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness’ original perception and/or accuracy of the subsequent identification.

R.465, l. 21 – R.466, l. 10; see also R. 536-538. Suggesting that the instruction was a “charge on the facts,” the judge refused to instruct the jury as requested. R. 466, ll. 11-23.

² The solicitor elicited that Franklin attended school with African-Americans, had friends who were African-American, lived in a neighborhood with African-Americans, and had played basketball that day with African-Americans. R. 19, ll. 15-24.

Instead the judge instructed the jury that one of the issues in the case was “the identification of the defendant as a person who committed the crime charged.” R.520, ll. 12-14. After explaining that the state had the burden of proving identity beyond a reasonable doubt, the judge defined “[i]dentification testimony” as “an expression or a belief of an impression by a witness.” R. 520, ll. 14-21. He told the jurors to “consider the believability of the identification witness in the same way as any other witness.” R.520, ll. 23-25. Critically, he explained the jurors could consider “whether the witness had an adequate opportunity to observe the offender at the time of the offense, and this can be affected by things about how long or short the time was available or how far or close the witness was, the lighting conditions, whether the witness had a chance to see or know the person in the past.” R.521, ll. 1-7.

Discussion

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt – including the element that the defendant is the actual perpetrator. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). Therefore, a trial court must instruct the jury to ensure the jury’s verdict is based upon the evidence presented. Jury instructions are important particularly in matters of witness identifications due to the high number of wrongful convictions based upon erroneous identifications. See Perry v. New Hampshire, 565 U.S. 228, 244-245 (2012).

“The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). “If there is any evidence to support a jury charge, the trial judge should grant the requested charge. The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law.”

State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). The South Carolina Supreme Court addressed jury instructions concerning witness identifications in State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975). The Court held that the trial judge's failure to provide the model instruction³ concerning identification was not error where two witnesses identified the defendant as the perpetrator of the crime. Id. at 326, 215 S.E.2d at 194. Nevertheless, the Court explained its holding was based upon the fact that the trial court's instructions adequately focused the attention of the jury on the necessity of finding that the testimony identified the defendant as the perpetrator beyond a reasonable doubt in order to convict. Additionally, the Court noted the identification presented "no peculiar problem." Id.

Although the Supreme Court found no error in a trial court's instructions to the jury on the issue of identification where the judge instructed the jury that the defendant had asserted an alibi claiming she was not at the scene of the crime, the court "admonish[ed] the trial bench that in single witness identification cases the court should instruct the jury that the burden of proving the identity of the defendant rests with the state." State v. Simmons, 308 S.C. 80, 83-84, 417 S.E.2d 92, 94 (1992).

In State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371-372 (1991), the South Carolina Supreme Court held that expert testimony concerning eyewitness identification was admissible where the witness was a qualified psychologist who explained how certain aspects of everyday experience affect human perception and memory and therefore affects the accuracy of

³ In the United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir.1972), the Court of Appeals for the District of Columbia explained that the presumption of innocence "must be a premise that is realized in instruction and not merely a promise." Thus, the judicial system required "special instruction on the key issue of identification, which emphasize[d] to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt." Id. As a result of the concerns attendant to criminal prosecutions based upon witness identifications, the Court issued a model jury instruction. Id. at 558-559.

eyewitness identification. The Court further explained that the expert's testimony was particularly relevant where the witness testified that her assailant's features were partially obscured during the entire incident, the identification involved cross race, and each witness had been exposed to the assailant for a short length of time. Id. at 143, 406 S.E.2d at 372.

In Cromedy, the New Jersey Supreme Court explained that a "cross-racial identification occurs when an eyewitness is asked to identify a person of another race." Cromedy, 727 A.2d at 461. The court noted that "[f]or more than forty years, empirical studies concerning the psychological factors affecting eyewitness cross-racial or cross-ethnic identifications have appeared with increasing frequency in professional literature of the behavioral and social sciences." Id. Further, the court noted that "jurors tend to place great weight on eyewitness identifications, often ignoring other exculpatory evidence." Id. According to the research, "eyewitnesses are superior at identifying persons of their own race and have difficulty identifying members of another race." Id. In other words, "eyewitnesses experience a 'cross-racial impairment' when identifying members of another race." Id.

No one disputed the identification at issue at Cromedy's trial involved a cross-racial identification. Id. at 466. Cromedy's trial counsel argued there was a mistaken identification, but the state argued the identification was credible. Id. Cromedy "requested a cross-racial identification jury instruction that would treat the racial character of the eyewitness identification as one of the factors bearing on its reliability in much the same way as lighting and proximity to the perpetrator at the time of the offense." Id. The New Jersey Supreme Court held "a cross-racial identification, as a subset of eyewitness identification, requires a special jury instruction in an appropriate case." Id. at 467. The court went on to explain that the instruction "should be

given only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." Id. at 467.

Several years later, the Supreme Court of New Jersey addressed the matter of cross-racial jury instructions again. State v. Henderson, 27 A.3d 872 (N.J. 2011). The court held that in light of the additional research on "own-race bias" in identifications, trial courts should instruct juries on cross-racial identifications "whenever" those are "in issue at trial." Id. at 926.

The trial judge erred in failing to instruct the jury with the specific requests made by Appellant concerning evaluating witness identifications. Appellant's proposed instructions encompassed the evidence presented to the jurors and allowed them to synthesize the matter in evaluating the evidence. Not only did the judge refuse to give the proposed charge, but he used his "standard charge," which omitted certain items and failed to include any type of catch-all provision. Having standard charges benefits judges, but trial judges should not abdicate their duties of charging the jury on the law as presented by the facts to a book of general charges. Rather, trial judges must mold standard charges to fit the particular circumstances of each case.

As the South Carolina Supreme Court explained in State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) "standard charges" or "approved charges" do not prohibit a trial judge from crafting charges designed to address the specific case. In Fuller, 297 S.C. at 443, 377 S.E.2d at 331, the Court explained that "[i]n charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." The trial courts are required to "specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). In Day, the Court further stated that "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defense which were applicable to the

issues raised by the defendant.” Id. As with jury instructions on self-defense, there is no logical reason to refrain from charging the jury on facts and theories presented by the defendant in an eyewitness identification case. See Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005); State v. Long, 721 P.2d 483 (Utah 1986) (discussing the importance and need for tailoring jury instructions on eyewitness identifications to the facts and circumstances of each individual case).

In Appellant’s case, the jury instructions left the jury with the impression that it could only consider the factors expressly stated - whether the witness had an adequate opportunity to observe the offender at the time of the offense, which may have been affected by things like how long or short a time was available, how far or close the witness was, the lighting conditions, and whether the witness had a chance to see or know the person in the past. What the instruction failed to do was inform the jury of how it should synthesize and analyze the additional facts and factors uncovered during cross-examination of the witnesses and through the testimony of Appellant’s expert. In fact, the nature of the instruction left the jury with the impression that most of the evidence produced by Appellant, particular the evidence of potential mis-identifications when the individuals are of different races, was not to be considered by the jury during its deliberations. This was error.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.



Susan B. Hackett
Appellate Defender

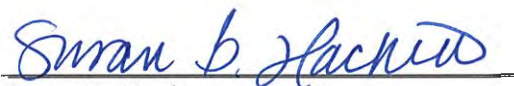
ATTORNEY FOR APPELLANT

This 21st day of February, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 21, 2019



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY L. ESAW,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon W. Joseph Maye, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of February, 2019.



Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of February, 2019.



Notary Public for South Carolina

My Commission Expires: September 27, 2028

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY LAMONT ESAW,

APPELLANT

APPELLATE CASE NO. 2017-002213

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge violate Appellant's Sixth Amendment right to a fair trial by failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Whether defense counsel's acquiescence at trial bars review of his charge request on appeal? Alternatively, was the trial court within his discretion to deny Appellant's request for a specific jury instruction regarding expert testimony of cross-race identification when South Carolina law does not permit jury instructions on the specific facts of a case and where the Court provided a thorough instruction on the law for the credibility of witness testimony, the believability of victim's identification, and explanation of expert testimony and the manner in which expert testimony may be considered by the jury?

STATEMENT OF THE CASE

Appellant was indicted for possession of a weapon during the commission of a violent crime, two counts of attempted armed robbery, armed robbery, murder, and attempted murder by Lexington County Grand Jury (2016-GS-32-206; 213; 216; 214; 217; and 218). (R. p. 2, line 22 through p. 3, line 3; p. 6, line 20). Assistant Solicitors Rhonda Patterson and Angela Martin represented the State at trial, and Defendant Ricky Lamont Esaw (hereinafter “Appellant”) was represented by attorneys Jason Chehoski and Elizabeth Fullwood (hereinafter “Defense Counsel”). (R. p. 1). The case was called to trial before the Honorable Thomas W. Cooper, and a jury, on October 16-19, 2017. (R. p. 1). The jury returned a guilty verdict for all charges against Appellant. Judge Cooper, by statute, sentenced Appellant to life imprisonment for the collective charges of armed robbery, robbery, armed robbery, murder, and attempted murder. (R. p. 536, lines 5-14). Appellant received a five year sentence for his possession of a weapon charge, with all sentences to run concurrently. (R. p. 536, lines 3-5). This appeal follows.

STANDARD OF REVIEW

“An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). An abuse of discretion “means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to error of law.” *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961).

STATEMENT OF FACTS

The Crime

On the night of August 9, 2015, Hector Vasquez (hereinafter "victim"), along with his wife Christy, and son, Franklin, were at their next door neighbors' yard celebrating a baptism. (R. p. 93, lines 5-25). The family lived in the mobile home park known as Rolling Meadows. (R. p. 92, lines 14-16). That same night, Mr. Wilfred "King" Pitts, Jr. and Appellant arrived at the home of the Vasquez's with the intent to commit an armed robbery. (R. p. 393, line 2 through p. 394, line 25). When they stopped the vehicle, Mr. Pitts went to one side to rob a bystander at the party named Rafael Izaguirre. (R. p. 395, lines 14-20; p. 112, line 24 through p. 113, line 8). In his effort, Mr. Pitts acquired Mr. Izaquirre's cell phone and wallet, but lost his bracelet in the process. (R. p. 113, lines 2-5; p. 396, line 18 through p. 397, line 19; p. 419). Appellant, who was driving the vehicle, exited the vehicle and held a gun up to Franklin Vasquez (hereinafter "Franklin"), asking for his money and valuables. (R. p. 123, line 11 through p. 124, line 15; p. 412, lines 20-22). Franklin claimed he did not have anything and Victim stepped in between Appellant and his son to protest Appellant's demands. (R. p. 125, lines 9-25). Christy Vasquez (hereinafter "Christy") witnessed the commotion and began to approach Appellant as well. (R. p. 95, line 11 through p. 96, line 24).

Appellant attempted to fire his weapon, but the gun jammed and a struggle ensued. (R. p. 125, lines 19-25). Franklin attempted to assist his father in the struggle when the gun discharged and struck victim in the chest. (R. p. 125, line 25 through p. 126, line 3; p. 203, lines 8-16). Upon hearing a gun shot and witnessing Appellant's struggle, Mr. Pitts fired his weapon and grazed Franklin in the leg. (R. p. 126, lines 4-9; p. 398, lines 3-17). Both Mr. Pitts and Appellant fled

the scene in their car. Victim was rushed to the hospital, but ultimately died from his gunshot wound. (R. p. 103, line 5 through p. 104, line 10).

Investigation and Evidence Presented at trial

A police investigation began, led by Detective John Moore, and assisted by Sergeant Miles Rawl, Detective Barry Sowards, and Detective Adam Creech. The initial statement from Franklin demonstrated that due to the proximity of the altercation, he got an excellent look at the individual who attacked and killed his father. (R. p. 124, line 2 through p. 126, line 9; p. 133, line 20 through p. 134, line 17). Officers created an initial photo lineup, reviewed separately by both Franklin and Christy while at the hospital, but neither individual made a selection from the photo lineup provided at that time, as Appellant had not yet been identified as a suspect. (R. p. 185, line 21 through p. 187, line 7).

A breakthrough in the case came a couple of days later. Detective Sowards, who manages the Crimestoppers Tip system, received a tip identifying Ricky Esaw and King Pitts as the individuals responsible for a shooting in the mobile home park. (R. p. 209, line 1 through p. 211, line 23; p. 308, line 19 through p. 309, line 8). Admittedly, the tip was not accurate as to the date, (noting August 11, instead of August 9) and did not have the name of the victim correct. (R. p. 350, line 12 through p. 351, line 9). Nevertheless, the police investigated the tip. They then utilized photographs of both individuals in a subsequent lineup, presented separately to Christy and Franklin Vasquez. (R. p. 257, line 1 through p. 259, line 14). While Christy was not able to make a selection, and in her testimony admitted that she was not as close to the culprits as her son, Franklin was able to make a selection from the new lineup. (R. p. 259, line 15 through p. 260, line 1; p. 105, line 1 through p. 106, line 4; p. 135, line 6 through p. 136, line 25). By his

own testimony, he was able to identify Appellant in the lineup almost immediately. (R. 137, lines 1-9).

Investigative efforts led police to discover that the vehicle used by Appellant's girlfriend matched the description of the vehicle that Franklin testified to seeing the night of the murder.¹ (R. p. 214, lines 3-16; p. 398, line 18 through p. 400, line 18). Both Mr. Pitts and Appellant were apprehended, and both confessed to being involved in the crime. Mr. Pitts, in cooperation with authorities, testified at trial as to his involvement in the crime as the perpetrator who robbed Rafael Izaguirre. (R. p. 394, line 14 through p. 396, line 17). He also confessed to firing his gun at Franklin once he realized that Appellant was in trouble. (R. p. 398, lines 3-15). Mr. Pitt's testimony demonstrated that Appellant planned the robbery and participated by holding up the victim, which ultimately led to the murder. (R. p. 412, lines 12-13). Forensic evidence also corroborated Mr. Pitt's testimony. DNA evidence taken from the stolen cell phone and his lost bracelet, both found at the scene of the crime, matched Mr. Pitts' DNA. (R. p. 218, line 21 through p. 219, line 15; p. 317, line 15 through p. 318, line 4).

Appellant, upon initial contact with police, immediately admitted to his involvement in the crime, when he claimed that he was "just the driver" and "at best you got me for accessory". (R. p. 233, lines 4-15). These comments were offered freely without questioning while officers attempted to read the contents of the warrant. (R. p. 233, lines 4-15; p. 234, lines 1-6). Appellant repeated his guilt as an accessory after his arrest as well. Once under arrest and Mirandized, Appellant agreed to make a formal statement, both orally and in his own signed handwriting. This statement reads as follows:

¹ It does not appear from the evidence that Appellant's girlfriend, Luenetta Grayson, had any participation or knowledge of the crime committed. Appellant simply borrowed her car.

They came to get me from my mom's house telling me they need a driver, so I drove the Nissan black headed to Rolling Meadows because they had some Mexicans to get. So I drive them down there and when they got out there, they pulled their guns out on the Mexican. Pitts was fighting with one, then he shot him. When they got into the car, AJ asked him why did he shoot him. He said that he was coming at the gun, so he shot him. When Pitts did that, he came back to West Columbia and I went back to my mom's house

(R. p. 339, line 20 through p. 340, line 5). In his statement, Appellant attempts to place blame on a third individual named "AJ" (aka Arthur Gene Evans, Jr.) who testified at Appellant's trial and denied having any involvement in the crime. (R. p. 384, lines 14-24). AJ's absence from the crime was confirmed by Mr. Pitt's testimony, and Detective Creech noted Appellant's inability to provide details concerning AJ's alleged involvement. (R. p. 412, lines 1-5; p. 269, line 3 through 270, line 8).

In the Defendant's case in chief, expert witness Dr. Dawn McQuiston testified regarding the psychology behind eye-witness identification. Part of her testimony dealt with the theory of "cross-race bias" or "cross-race effect", which she explained relates to the premise that a witness's lack of familiarity or exposure to certain races or ethnic groups contributes to a less accurate recollection or identification of those ethnic groups. (R. p. 445, line 1 through p. 446, line 10). Dr. McQuiston acknowledged that if a witness has friends, neighbors, or classmates of the same race of the person they identified, they would "probably" be more accurate in their identification. (R. p. 456, lines 6-22). To this topic, Franklin testified that he attends school with African-American kids, had African-American friends, some of which lived in his same neighborhood, and had even hung out with African-American friends earlier that same day. (R. p. 138 line 16 through p. 139, line 1).

THE ISSUE AS IT WAS PRESENTED AT TRIAL

Following the conclusion of evidence from Defendant, Defense Counsel requested that Judge Cooper give a specific jury instruction regarding “Cross-race” identification. Defense Counsel’s proposed instruction reads as follows:

When a witness who is a member of one race identified a member who is of another race, we see that there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness’ original perception and/or accuracy of the subsequent identification.

(R. p. 466, lines 3-10). Defense counsel noted that the charge was based on upon New Jersey case *State v. Cromedy*, 158 NJ 12, 727 A.2d 457 (1999). (R. p. 465, lines 21-25). The court asked Defense counsel if he was aware that South Carolina, in contrast to New Jersey, does not permit jury charges based upon the facts of the particular case. Defense Counsel was not aware of the difference in laws, and did not press the request for the instruction further. (R. p. 466, lines 11-25).

After closing arguments, Judge Cooper provided thorough instructions on the State’s obligation to prove Appellant’s guilt beyond a reasonable doubt, and explained what constitutes reasonable doubt. (R. p. 505, line 18 through p. 509, line 4). Judge Cooper also provided a thorough instruction regarding the determination of credibility, wherein he explained to the jury that it was their obligation to determine the believability of the witnesses who testified before them, and that they may do so by judging numerous factors such as demeanor, hesitancy, consistency, biases, self-interests, and corroboration by other evidence. (R. p. 510, line 24 through p. 511, line 24). Pertinent to the issue, Judge Cooper lastly provided detailed jury instructions regarding expert witness testimony and witness identification. These charges were set forth as follows:

You've heard in this particular case the testimony of an expert witness. Our rules of evidence ordinarily don't allow witnesses to testify about opinions or conclusions. However, person who by their training and by their qualifications and by their experience in certain fields can be qualified as expert witnesses in those particular fields, and they then have the right to render opinions on those fields in which they have been qualified as experts.

You should consider any expert opinion received in evidence in this case like any other evidence in this case and give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you can disregard the opinion entirely, because an expert witness' testimony is like the testimony of any other witness; it doesn't receive any greater weight than that of any other witnesses.

Because as jurors, ladies and gentlemen, you've got the right to believe a small portion of the testimony of a single witness, disbelieve the larger portion of the testimony of the same witness, or you can believe everything that witness tells you or none of what a witness tells you.

...

Now, ladies and gentlemen, an issue in this case is the identification of the defendant as a person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt, and you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you can convict him.

Identification testimony is an expression or a belief of an impression by a witness and you must determine the accuracy of the identification of the defendant. You must consider the believability of the identification witness in the same way as any other witness.

You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense, and this can be affected by things about how long or short the time was available or how far or close the witness was, the lighting conditions, whether the witness had a chance to see or know the person in the past.

Once again I tell you that the burden of proof upon the State extends every element of the offense charged, and this includes specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the one who committed the crime. After examining the testimony if you have a reasonable doubt as to the accuracy of the identification, then you must find the defendant not guilty.

(R. p. 511, line 25 through p. 513, line 1; p. 520, line 12 through p. 521 line 16). No objections were made to the Court's provided jury charges and Defense Counsel did not raise any arguments as to the insufficiency of the Court's jury charges.

ARGUMENT

II. The trial court properly denied the requested jury charge on the grounds that it constituted a charge on the facts, impermissible under South Carolina law.

Appellant argues that the trial court erred in declining his requested jury instruction concerning "cross-race identification". However, Appellant's requested jury instruction was not properly preserved for appellate review, runs counter to the prohibition against jury instructions on matters of fact, as set forth by Article V, § 21, and is, in the alternative, harmless in light of the substantial evidence of Appellant's guilt. As such, the trial court was correct in denying Appellant's request for a cross-racial identification charge.

a. This issue was not properly preserved for appellate review.

Appellant failed to preserve this issue for appellate review. Defense Counsel initially made the request for the proposed jury instruction concerning "cross-race identification". However, Defense Counsel acquiesced to the Court's reasoning that such a charge would constitute a charge upon the facts, impermissible under South Carolina law. (R. p. 465, line 21 through p. 466, line 25). *State v. Rios*, 388 S.C. 335, 341, 696 S.E.2d 608, 612 (Ct. App. 2010); *Ex parte McMillan*, 319 S.C. 331, 334, 461 S.E.2d 43, 45 (1995) (holding a party cannot

acquiesce to an issue at trial, but then complain on appeal).

Generally, “[Where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary to preserve the point on appeal, to renew the request at conclusion of the court’s instructions.” *State v. Johnson*, 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998). While the trial court offered to make the requested instruction a court’s exhibit following its refusal of the charge, Appellant never argued why the trial court’s instruction was not sufficient and did not argue why the court’s reasoning regarding factual instructions was not proper under the circumstances of the case. (R. p. 465, line 21 through p. 466, line 25). Defense Counsel failed to articulate any factual explanation to the trial court as to why this specific instruction was needed, why the trial court’s instruction would be in error, and failed to articulate the arguments now presented on appeal.

The trial court was never given an opportunity to consider and respond to the Appellant’s arguments that its standard charge allegedly “omitted certain items and failed to include any type of catch-all provision.” (Appellant’s Brief, p. 11); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Likewise, the trial court was not given the opportunity to hear and decide on the issue concerning whether its provided instruction “left the jury with the impression that it could only consider the factors expressly stated”, thereby giving the jury the impression that it should not consider misidentification due to race. (Appellant’s Brief, p. 12); See *Gilchrist v. State*, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005) (holding that “trial counsel’s submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court’s failure to charge the specific language. . .”). In order to properly preserve an issue for appellate review the matter “should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error.” *State v. Johnson*, 363 S.C.

53, 58, 609 S.E.2d 520, 523 (2005).

As such, the issue presented on appeal has not been properly preserved for appellate review. The convictions should therefore be affirmed.

b. Appellant's requested charge is impermissible under the South Carolina Constitution.

In Appellant's case in chief, Defense Counsel elicited the expert testimony of Dr. Dawn McQuiston. Dr. McQuiston testified as to the many elements that can affect memory, and more specifically an alleged occurrence referred to as "cross-race effect". (R. p. 436-461; p. 445). She explained that "cross-race" identification can be less reliable due to the eye-witness's lack of familiarity with individuals of other races or ethnicities. (R. p. 445, line 4 through p. 446, line 10). At the conclusion of the Appellant's case, Defense counsel sought to have the court provide an additional jury instruction that specifically instructed the jury regarding cross-racial identification and the ability for the jury to consider such a factor in its judgment of the accuracy of eye-witness testimony, citing New Jersey case law as its support for the charge. The trial court denied the jury charge request and noted that while New Jersey permits jury instructions based on the facts of the case, South Carolina does not. (R. p. 466, lines 3-25). Defense counsel sought no objection to the ruling, and did not further argue for inclusion of the charge or for the inadequacy of the court's charges.

The trial court was correct in its recognition that South Carolina, by constitutional prohibition, does not permit a court to give jury instructions based on the facts of a case. S.C. Const. art. V, § 21. Moreover, the trial court was within its discretion to deny the charge based on the parameters guiding proper jury instructions.

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. "[T]he trial court is required to charge only the current and correct law

of South Carolina.” *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). “The law to be charged must be determined from the evidence presented at trial.” *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). “Generally, the trial judge is required to charge only the current and correct law of South Carolina.” *State v. Zeigler*, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” *Id.* Here, the charge was a current and correct statement of the law on identification testimony in South Carolina. “An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion. To warrant reversal, a trial judge’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *State v. Commander*, 396 S.C. 254, 270-71, 721 S.E.2d 413, 422 (2011). “Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues.” *State v. Dickey*, 394 S.C. 491, 512, 716 S.E.2d 97, 108 (2011). “The substance of the law is what must be charged to the jury, not any particular verbiage.” *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011).²

² Appellant makes a limited reference to *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir 1972). To the extent the model *Telfaire* charge is considered relevant to the issue at hand, *State v. Motes* considered the model jury instruction from *United States v. Telfaire* and held that there was no error in the trial court’s refusal to charge the *Telfaire* model instruction. *State v. Motes*, 264 S.C. 317, 215 S.E.2d 190, 194 (1975). The Supreme Court noted that the model instruction was “designed to focus the attention of the jury on the identification issue and minimize the risk of conviction through false or mistaken identification.” *Id.* However, the Supreme Court found, “The trial, and the instructions given, adequately focused the attention of the jury on the necessity for a finding that the testimony identified defendant as the offender beyond a reasonable doubt; therefore, no prejudice resulted to defendant from the failure to give the requested instruction.” *Id.* Here, the Court provided explicit instruction to the jury that identity must be proven by the State beyond a reasonable doubt. (R. p. 520, line 12 through p. 521 line 16). Moreover, *Telfair* concerned a case reliant up on the identification evidence of a singular witness. Here, there is substantial evidence independently demonstrating Appellant’s guilt, and corroborating the eye witness testimony.

Most importantly, this Court has already ruled in this matter, holding that a cross-racial jury charge is “improper instructions into matters of fact or comments on the weight of the evidence.” *State v. Green*, 412 S.C. 65, 77, 770 S.E.2d 424, 431 (Ct. App. 2015). In *State v. Green*, the Court considered Green’s proposed jury instruction that “instructed the jury to consider issues implicated by cross-racial identifications; specifically, that ‘[i]dentification by a person of a different race may be less reliable than identification by a person of the same race.’” *Id.* at 428-29. Our Court of Appeals in *Green* denied the requested charge, and instead provided the standard identification charge. *Id.* The court in *Green* ruled that the provided instruction was proper and that the trial court properly informed the jury that the State had the burden to prove beyond a reasonable doubt the identity of the defendant. *Id.* at 430. Lastly, and controlling in the matter at hand, the court in *Green* ruled that the requested charge constituted “improper instruction into matters of fact or comments on the weight of evidence,” in conflict with Article V of the South Carolina Constitution. *Id.* at 431.

Appellant’s case is indistinguishable as to the matter of jury charges concerning cross-racial identification. There is no error of the trial court, and certainly no abuse of discretion in denying the requested charge. The conviction and sentence should be affirmed.

a. Alternatively, any error by the trial court in denying the contested jury charge was harmless.

In the alternative to Respondent’s above arguments, any alleged error in denying the requested charge is harmless in light of the evidence presented at trial. The conviction and sentence should be affirmed.

“When considering whether an error with respect to a jury instruction was harmless, we must ‘determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.’” *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v.*

Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct.App.1998). “In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.” *Id.*

Here, the jury was not solely reliant upon the accuracy of Franklin’s eye-witness identification of Appellant. In addition to Franklin’s *confident* selection, Appellant provided an oral and signed written confession to his knowledgeable involvement in the armed robbery, albeit allegedly only as a driver. While this confession would be independently sufficient for a conviction under a “hand of one/hand of all” theory (See *State v. Langley*, 334 S.C. 643, 649, 515 S.E.2d 98, 101 (1999)), the evidence presented by the State also included a full and detailed confession from Mr. Pitt’s as to his involvement in the crime that also detailed Appellant’s involvement. This confession was substantively equivalent to Franklin Vasquez’s testimony. The State’s case also included corroborative DNA evidence that supports Mr. Pitt’s testimony and a matching eye-witness description of Appellant’s girlfriend’s vehicle, which Mr. Pitt’s testified was used for the crime.

Moreover, the court’s instruction concerning the accuracy of eye-witness identification was broad enough not to discourage the jury from considering the elements discussed by Appellant’s expert witness. The breadth of the charge as whole placed the jury on notice that they could consider all matters presented at trial, and the court’s expert witness instruction specifically instructed them to consider and give weight to such testimony as they see fit. Cf. *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), overruled on other grounds by *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009))(holding that the trial court did not err in refusing jury instruction that would provide specific examples of legal provocation, where the broad and accurate recitation of the law was sufficient.).

The evidence presented at trial against Appellant was substantial, and the denial of cross-racial identification jury charge was harmless, if found to be in error. The conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

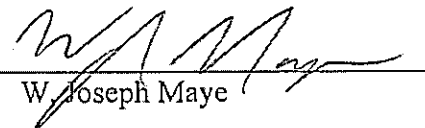
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March 5, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

RICKY LAMONT ESAW,

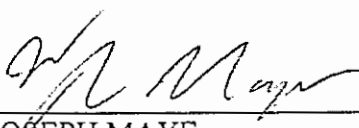
APPELLANT

Appellate Case No. 2017-002213

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 5th day of March, 2019.



W. JOSEPH MAYE
Assistant Attorney General

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

RICKY LAMONT ESAW,

APPELLANT

Appellate Case No. 2017-002213

CERTIFICATE OF SERVICE

I, **W. Joseph Maye**, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Susan B. Hackett, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. 401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 5th day of March, 2019.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY L. ESAW,

APPELLANT

APPELLATE CASE NO. 2017-002213

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Violating Appellant's Sixth Amendment right to a fair trial, the trial judge erred in failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of Appellant as the perpetrator, including expert testimony on the subject.

Error Preservation

Respondent argued the issue presented is not preserved for review because “[d]efense [c]ounsel acquiesced to the Court’s reasoning that such a charge would constitute a charge upon the facts, impermissible under South Carolina law.” BOR at 9. Respondent, while citing the relevant page numbers of the trial transcript, misapprehends what occurred at the trial and how the law applies to those facts.

Trial counsel requested the judge provide the jury with a specific instruction. R. 466, ll. 3-10. The judge then inquired about New Jersey and South Carolina permitting “a judge to charge on the facts.” R. 466, ll. 11-21. Ultimately, the judge refused to instruct the jury as requested. Respondent argued that because trial counsel did not “press the request for the instruction further,” Respondent “acquiesced to the Court’s reasoning that such a charge would constitute a charge upon the facts, impermissible under South Carolina law.” BOR at 7; BOR at 9. In other words, it is Respondent’s contention that the error preservation rules require defense counsel to raise the issue to the trial judge, obtain a ruling, and argue further with the trial judge regarding an adverse ruling in direct contravention of the Rules of Criminal Procedure. See Rule 18, SCRCrimP. Specifically, “[c]ounsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.” Rule 18(a), SCRCrimP. Additionally, argument on the conduct of trial is not even permitted “unless specifically

requested by the court.” Rule 18(b), SCRCrimP. Thus, in order to satisfy the high burden espoused by Respondent to preserve an error for review, one would be required to violate the South Carolina Rules of Criminal Procedure. Such a requirement simply cannot be the law.

According to Respondent the issue is not preserved because trial counsel “never argued why the trial court’s instruction was not sufficient and did not argue why the court’s reasoning regarding factual instructions was not proper under the circumstances of the case.” BOR at 10. Additionally, Respondent faults trial counsel for failing “to articulate any factual explanation to the trial court as to why this specific instruction was needed, why the trial court’s instruction would be in error, and failed to articulate the arguments now presented on appeal.” BOR at 10. Based upon Respondent’s presentation in its brief, it appears Respondent wants South Carolina to adopt a new form of error preservation – even more stringent than the one currently used – and require trial counsel to articulate all arguments in support of a position before the trial judge. In essence, Respondent wants the trial lawyers to prepare appellate briefs and make appellate arguments for each issue presented in a case. Thus, appeals would be reduced to appellate judges simply reading the transcripts with no need for the assistance of appellate counsel. Quite simply, Respondent’s position goes too far.

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing Creech v. South Carolina Wildlife and Marine Resources Dep’t, 328 S.C. 24, 491 S.E.2d 571 (1997)). “Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector.” Id. “Error preservation requirements are intended ‘to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.’” Staubes v. City of Folly Beach, 339 S.C. 406,

412, 529 S.E.2d 543, 546 (2000)(quoting I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). “Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.” Id. The rationale of issue preservation is to prevent “a party from keeping an ace card up his sleeve – intentionally or by chance – in hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” I’On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724.

An appellant may waive his right to appeal a decision by the trial judge through acquiescence. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000); Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 481, 629 S.E.2d 653, 673 (2006). Acquiescence occurs when one agrees with the trial judge’s ruling. In State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998), the Supreme Court held appellant acquiesced in the judge’s limitation of his cross-examination by responding to the judge’s ruling that appellant could ask the witness about pending charges, but could not go into the specifics by saying, “Right.” In State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007), the Court discussed counsel’s “acknowledgment to the trial court that the absence of certain documents would not be prejudicial to the defense” was acquiescence in the trial judge’s ruling that he was not denied a fair trial due to the state not turning those records over sooner, which was the subject of the appeal. Finally, this Court held an issue conceded in trial court could not be argued on appeal where the appellant contended on appeal that his case was not under the Tort Claims Act, but informed the trial judge that the complaint was, in part, under the Act. Ex Parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995). Defense counsel never agreed with the trial court’s ruling regarding his request for a specific jury instruction concerning eyewitness identification.

Defense counsel did everything that was required of him to preserve his request for a specific instruction on eyewitness identifications. Counsel presented the judge with his proposed instruction, including case law to support the instruction. The proposed instruction was made a part of the record. Counsel's decision not to argue further with the trial judge was in keeping with counsel's duties under the Rules of Professional Conduct and the Rules of Criminal Procedure.

State v. Green

Appellant acknowledges this Court addressed a similar request in State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). While Appellant disputes this Court's determination in Green that "some" of the requested charges "would have been improper instructions into matters of fact or comments on the weight of the evidence," Appellant's request to charge did not include the language found improper in Green. See Green, 412 S.C. at 77, 770 S.E.2d at 431. Specifically, Appellant requested the following:

When a witness who is a member of one race identifies a member who is of another race, we see that there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness' original perception and/or accuracy of the subsequent identification.

R. 465, l. 21 – R. 466, l. 10; see also R. 536-538. This Court found the sentence that "[i]dentification by a person of a different race may be less reliable than identification by a person of the same race" to be an improper charge on the facts. Green, 412 S.C. at 77, 770 S.E.2d at 431. Despite Respondent's contention in its brief, Appellant's requested instruction did not include the offending language from Green. Thus, the issue presented is not controlled by Green. Finally, the requested language was not a charge on the facts. The proposed instruction was clear that the jury "may consider," "whether the cross-racial nature of the identification has affected the accuracy of the witness' original perception and/or accuracy of the subsequent identification." Such

an instruction in no way indicated to the jury the judge's opinion on the credibility of a witness, the weight of the evidence, or the guilt of the accused.

Not harmless beyond a reasonable doubt

"Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt." State v. Henson, 407 S.C. 154, 166-167, 754 S.E.2d 508, 515 (2014) (citing Chapman v. California, 386 U.S. 18, 24 (1967)). Respondent argued the judge's failure to give the requested instruction was harmless because of Respondent's statement to police and the testimony of his co-defendant, Pitts. Turning to Respondent's argument that Respondent's statement to police, which Respondent claimed amounted to a "signed written confession," was enough to determine the judge's failure to give the instruction was harmless, it must be noted Respondent begrudgingly admitted Appellant implicated himself only as a driver of the car in which the shooter was the passenger. IBOR at 14. Respondent also admitted that at best, the state's case against Appellant based solely on his statement would be under an accomplice liability theory. IBOR at 14. Appellant denied being involved in the shooting at all. Appellant's statement to police differed significantly from the testimony of the state's only eyewitness – Franklin Vasquez. Franklin claimed Appellant got out of the car and held a gun to Franklin's head. R. 10, l. 25 – R. 12, l. 6. He even claimed Appellant tried to shoot the gun, but it jammed. R. 12, ll. 4-6. Appellant's statement to police is a far cry from the evidence this Court and the Supreme Court have found overwhelming evidence of guilt to support a harmless error argument.

The Supreme Court discredited the testimony of co-defendants when conducting a harmless error analysis. Henson, 407 S.C. at 167, 754 S.E.2d at 515. The Court explained that the co-defendants in that case "both faced charges for their participation in the crimes and thus, had an incentive to downplay their involvement and shift blame to others." Id. Similarly, Pitts admitted he

was charged with murder, attempted murder, three counts of armed robbery, obstruction of justice, and possession of a weapon. R. 387, l. 19 – R. 388, l. 2. He also admitted that he was “facing a lot of time.” R. 388, ll. 3-5. Thus, like the co-defendants in Henson, Pitts had an incentive to shift blame to Appellant and his testimony lacks any merit in a harmless error analysis as a result.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of February, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 21, 2019



Susan B. Hackett
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY L. ESAW,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon W. Joseph Maye, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of February, 2019.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of February, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028

**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.

Ricky Lamont Esaw, Appellant.

Appellate Case No. 2017-002213

Appeal From Lexington County
Thomas W. Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-353
Submitted October 1, 2019 – Filed November 6, 2019

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General W. Jeffrey Young, Deputy Attorney
General Donald J. Zelenka, Senior Assistant Deputy
Attorney General Melody J. Brown, and Assistant
Attorney General W. Joseph Maye, all of Columbia; and
Solicitor Samuel R. Hubbard, III, of Lexington, all for
Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("In criminal cases, the appellate court sits to review errors of law only."); *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."); *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) ("The trial court is required to charge only the current and correct law of South Carolina."); S.C. Const. art. V, § 21 ("[Trial courts] shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Green*, 412 S.C. 65, 77, 770 S.E.2d 424, 431 (2015) ("[The defendant's] request to charge the jury that '[i]dentification by a person of a different race may be less reliable than identification by a person of the same race' would have been improper because it would have asked the jury to place less weight on [the v]ictim's testimony because he was of a different race than [defendant].").

AFFIRMED.¹

SHORT, THOMAS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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November 22, 2019

The Honorable Lisa M. Comer
205 East Main Street
Suite 128
Lexington SC 29072

REMITTITUR

Re: The State v. Ricky L. Esaw
Lower Court Case No. 2016GS3200206, 2016GS3200213,
2016GS3200214, 2016GS3200216, 2016GS3200217, 2016GS3200218
Appellate Case No. 2017-002213

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Melody Jane Brown, Esquire
William Joseph Maye, Esquire
Donald J. Zelenka, Esquire
W. Jeffrey Young, Esquire
Samuel R. Hubbard, III, Esquire

RECEIVED

NOV 22 2019

APPELLATE DEFENSE

FORM 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of LexingtonRickey Esaw # 273842

Full name and prison number (if any) of Applicant

2020-CP-32-01009

v.

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2020 MAR -3 AM 9:03
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institute
Ridgeville, South Carolina
2. Name and location of Court which imposed sentence Lexington County
Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Wilfred Pitts, Jr.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2016-GS-32-00206, 213, 214, 216, 217, 218
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 19, 2017 Life without possibility of parole.
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
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. November 6, 2019
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 2019-UP-353
- 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) See Attachment.
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attachment.
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective assistance of counsel issues

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Jason Chehoski, Assist. Public Defender

ii. Elizabeth Fullwood

iii. Susan Barber Hackett

(b) the proceedings at which each such attorney represented you:

i. Trial and Sentencing

ii. Trial and Sentencing

iii. Direct Appeal

19. State clearly the relief you seek in filing this application:

Conviction vacated, Remanded

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Lexington County)

VERIFICATION

I, Ricky E. SAW, 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.

Ricky E. SAW

SWORN to and subscribed before me this 6 day of Feb. 6, 2020.

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

FILED

2020 MAR -3 AM 9:08

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Ricky E SAW, 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.

Ricky E SAW
Applicant

SWORN or affirmed to and subscribed before me this
6th day of February, 2020.

Luduan Bryant
Notary Public

My Commission Expires: May 26, 2020

FILED

2020 MAR -3 AM 9:04

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

ATTACHMENT

10. (a) Applicant was denied the right to effective assistance of counsel — guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution — during the guilt-or-innocence phase of his jury trial.

11. (a) Supporting Facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

Counsel's acts or omissions included, but not limited to, the following:

(1). Ineffective Assistance of Counsel for failure to properly prepare Applicant for voir dire and jury selection portion of his trial, as a result, Applicant was compelled to violate the presumption of innocence, beyond a reasonable doubt.

On October 16, 2017; The Honorable Thomas W. Cooper began the proceeding by inquiring if both sides were ready to proceed to jury selection. After an affirmative reply from both the State and Defense counsel, the State called it's case against Applicant.

Trial court reiterated each Indictment alleging the charges against Applicant, explaining to potential jurors they are not evidence.

The jury pool was informed Applicant had entered pleas of not guilty when trial court requested Applicant to stand and face the potential jurors behind him. The record confirms compliance. Trial court immediately began voir dire. This procedure is not necessarily unusual in a jury trial, what did stand out was the accused dressed in prison garb with both hands shackled.

When an accused is tried in identifiable prison garb, the dangers of a fair trial and the possibility of a verdict not based on the evidence are obvious. Jurors may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact he poses a danger to the community or has a prior record; a significant danger is thus created of corruption of the fact finding process through mere suspicion. It is difficult to conceive of any other situation more fraught with risk to the presumption of innocence and the standard of reasonable doubt. See Estelle v. Williams, 96 S.Ct. 1691, 1700 (1976).

At 12:42 PM the selected jurors were dismissed, Trial court granted the Applicant permission to have the use of one hand during the various pretrial motions, no security threat present. October 17, 2017, day two the Applicant is properly dressed without restraints.

Trial counsel's failure creates constitutional violations that will not be preserved for appellate review and consequently will be procedurally barred or deemed harmless error. Prejudice presumed.

(2.) Ineffective assistance of counsel for failing to move for a speedy trial.

Applicant notified the Honorable William P. Keesley, Judge of The Circuit Court of the Eleventh Judicial Circuit. On August 3, 2016 Applicant asserted he had been in jail for approximately a year and indicated that his attorney, Elizabeth Fullwood, is not assisting him, additionally, Applicant stated he was ready to proceed to trial. Applicant's repeated requests for a speedy trial were futile. On July 28, 2017 Judge Keesley instructed trial counsel and the Solicitor's office to either set this case for trial or provide an explanation as to why it cannot be scheduled.

The prosecution did not present an indictment for LWOP until nearly two weeks prior to trial. Trial counsel had an obligation to represent his client's constitutional right to a speedy trial.

(3.) Ineffective assistance of counsel for failing to challenge superseding indictments.

Trial counsel's failure to object to the prosecution's intentional delay allowed the Solicitor to gain an unfair tactical advantage reducing the time to prepare for trial. The Solicitor did not present the indictments to the grand jury within the time allowed from date of the incident.

(4.) Ineffective assistance of counsel for failure to adequately cross-examine the State witnesses.

Trial counsel failed to inform the jury that codefendant was charged with an additional obstruction of justice charge. Had the jury been informed of this charge in detail they could have easily inferred that the State had manipulated this witness to fabricate his testimony. Trial counsel has a duty to thoroughly cross-examine each witness to present bias to the jury.

(5.) Ineffective assistance of counsel for failure to object to the hand of one is the hand of all instruction.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed. 2d 368 (1970).

Trial counsel's failure to object allowed the prosecution to convict the defendant without the element of intent to kill. See Flowers v. Blackburn, 779 F.2d 1115, 1121-22 (5th Cir.

) Jury instructions at the guilt-or-innocence phase of the trial were unconstitutional because they relieved the State of its burden of showing specific intent to kill.

(6.) Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of applicant's guilt-or-innocence.

(7.) Counsel failed to object to the prosecutor's improper vouching for state witnesses credibility and on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution.

10(b): Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his trial.

11(b): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

Counsel's acts or omissions included, but are not limited to, the following:

(1.) Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence. See Wiggins v. Smith, 539 U.S. 510 (2003). As a result of counsel's failure to uncover and present this evidence, applicant's sentence is unreliable.

(2.) The cumulative effect of trial counsel's errors are significant enough to undermine the reliability of the results at trial.

Therefore, to the extent that it is unclear whether each independent deficiency is sufficiently substantial to have caused prejudice, the errors in counsel's performance were so interrelated that the cumulative effect of prejudice was such that, but for the series of errors, the result of the proceedings would have been different.

Pursuant to 28 U.S.C § 1746 I swear under the penalty of perjury that the foregoing is true and correct

Ricky Esaw

RICKY ESAW

____ day of Feb. 2020.

FILED
2020 MAR -3 AM 9:04
LISA M. COMER
CLERK OF COURT
LEXINGTON KY

COUNTY OF Lexington

CIVIL ACTION COVERSHEET

Rickey Esau #273842

Plaintiff(s)

2020 .CP. 32 . Q1009

vs.

State of South Carolina

Defendant(s)

Submitted By: Rickey Esau, Pro-seAddress: Lieber C.I. CB-16P.O. Box # 205Ridgville, S.C. 29472

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings and other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ General (130)
☐ Breach of Contract (140)
☐ Fraud/Bad Faith (150)
☐ Failure to Deliver/Warranty (160)
☐ Employment Discrim (170)
☐ Employment (180)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
<u>20 -NI-</u>
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Assault/Battery (370)
☐ Slander/Libel (380)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☒ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex/Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Sexual Predator (510)
☐ Permanent Restraining Order (680) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Pre-Suit Discovery (670) | | |

Date: _____

Submitting Party Signature: _____

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

840
Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**



ALAN WILSON
ATTORNEY GENERAL

September 9, 2020

The Honorable Lisa M. Comer
Clerk of Court, Lexington County
205 East Main Street, Suite 128
Lexington, South Carolina 29072

Re: Rickey Esaw, #273842 v. State of South Carolina
2020-CP-32-1009

Dear Ms. Comer:

Enclosed please find the original **Return and Motion for a More Definite Statement** in the above-captioned case for filing in your office.

Sincerely,

s/LillianMeadows

LILLIAN L. MEADOWS
Assistant Attorney General

LLM/ch
Enclosure

cc: Ola A. Johnson, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
	)	
Rickey Esaw, SCDC #273842,	)	Case No. 2020-CP-32-1009
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION FOR A
	)	MORE DEFINITE STATEMENT
	)	(COUNSEL APPOINTED)
State of South Carolina,	)	
	)	
Respondent.	)	
	)	
	)	

In response to the post-conviction relief (PCR) action commenced by Rickey Esaw (Applicant) on March 3, 2020, the State makes this return:

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its January 2016 term, the Lexington County Grand Jury indicted Applicant for murder (2016-GS-32-0217); attempted murder (2016-GS-32-0218); armed robbery (2016-GS-32-0214); possession of a weapon during the commission of a violent crime (2016-GS-32-0206); and two counts of attempted armed robbery (2016-GS-32-0213, -0216).

On October 16, 2017, Applicant proceeded to a jury trial before the Honorable Thomas W. Cooper. Assistant Public Defenders Jason Chehoski and Elizabeth Fullwood (collectively, "Counsels") represented Applicant. Assistant Solicitors Rhonda Patterson and Angela Martin of the Eleventh Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

On the night of August 9, 2015, Hector Vasquez (Victim) along with his wife, Christy, and son, Franklin, were at their next door neighbors' yard celebrating a baptism. (R. p. 93, lines 5-25).

The family lived in the mobile home park known as Rolling Meadows. (R. p. 92, lines 14-16). That same night, Mr. Wilfred “King” Pitts, Jr. and Applicant arrived at the home of the Vasquez’s with the intent to commit an armed robbery. (R. p. 393, line 2 through p. 394, line 25). When they stopped the vehicle, Mr. Pitts went to one side to rob a bystander at the party named Rafael Izaguirre. (R. p. 395, lines 14-20; p. 112, line 24 through p. 113, line 8). In his effort, Mr. Pitts acquired Mr. Izaguirre’s cell phone and wallet, but lost his bracelet in the process. (R. p. 113, lines 2-5; p. 396, line 18 through p. 397, line 19; p. 419). Applicant, who was driving the vehicle, exited the vehicle and held a gun up to Franklin Vasquez (hereinafter “Franklin”), asking for his money and valuables. (R. p. 123, line 11 through p. 124, line 15; p. 412, lines 20-22). Franklin claimed he did not have anything and Victim stepped in between Applicant and his son to protest Applicant’s demands. (R. p. 125, lines 9-25). Christy Vasquez (hereinafter “Christy”) witnessed the commotion and began to approach Applicant as well. (R. p. 95, line 11 through p. 96, line 24).

Applicant attempted to fire his weapon, but the gun jammed and a struggle ensued. (R. p. 125, lines 19-25). Franklin attempted to assist his father in the struggle when the gun discharged and struck victim in the chest. (R. p. 125, line 25 through p. 126, line 3; p. 203, lines 8-16). Upon hearing a gun shot and witnessing Applicant’s struggle, Mr. Pitts fired his weapon and grazed Franklin in the leg. (R. p. 126, lines 4-9; p. 398, lines 3-17). Both Mr. Pitts and Applicant fled the scene in their car. Victim was rushed to the hospital, but ultimately died from his gunshot wound. (R. p. 103, line 5 through p. 104, line 10).

B. Verdict & Subsequent Proceedings

On October 19, 2017, the jury convicted Applicant as indicted. Judge Cooper sentenced Applicant to five concurrent sentences of life without the possibility of parole for murder,

attempted murder, armed robbery, and both counts of attempted armed robbery.¹ Applicant also received a concurrent five year sentence for the weapons charge.

Applicant filed a timely notice of appeal. Appellate Defender Susan B. Hackett perfected the appeal by briefing the following issue for the Court of Appeals:

1. Did the trial judge violate [Applicant]’s Sixth Amendment right to a fair trial by failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of [Applicant] as the perpetrator, including expert testimony on the subject?

On November 6, 2019, the Court issued an opinion affirming Applicant’s convictions and sentences pursuant to Rule 220(b), SCACR and the following authorities: *State v. Baccas*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (“In criminal cases, the appellate court sits to review errors of law only.”); *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (“An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.”); *id.* (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.”); *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (“The trial court is required to charge only the current and correct law of South Carolina.”); S.C. Const, art. V, § 21 (“[Trial courts] shall not charge juries in respect to matters of fact, but shall declare the law.”); *State v. Green*, 412 S.C. 65, 77, 770 S.E.2d 424, 431 (2015) (“[The defendant’s] request to charge the jury that ‘[identification by a person of a different race may be less reliable than identification by a person of the same race]’ would have been improper because it would have asked the jury to place less weight on [the victim’s testimony because he was of a different race than [defendant]].”).

¹ Pursuant to section pursuant section 17-25-45 of the South Carolina code. Applicant was served with the State’s notice of intent to seek life without parole (LWOP) on September 12, 2017. Applicant’s SCDC records indicate he was convicted of assault and battery of a high and aggravated nature; second-degree burglary; and armed robbery in 1999, all of which are “serious offenses” under § 17-25-45(B).

The case was returned to the circuit court on November 22, 2019.

Applicant commenced this PCR action on March 3, 2020.

II. CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

I. Ineffective Assistance of Counsel

- a. “[F]ailure to properly prepare Applicant for voir dire and jury selection portion of his trial, as a result, Applicant was compelled to violate the presumption of innocence beyond a reasonable doubt.”
- b. “[F]ailing to move for a speedy trial.”
- c. “[F]ailing to challenge superseding indictments.”
- d. “[F]ailure to adequately cross-examine the State’s witnesses.”
- e. “[F]ailure to object to the hand of one hand of all instruction.”
- f. “Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim. Counsel’s failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of Applicant’s guilt or innocence.”
- g. “Counsel failed to object to the prosecutor’s improper vouching for State witnesses credibility and on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution.”
- h. “Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence.”
- i. “The cumulative effect of trial counsel’s errors are significant enough to undermine the reliability of the results at trial.”

Applicant requests relief as follows:

“Conviction vacated, remanded”

Attached herewith and incorporated by reference are the Lexington County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, including the trial transcript, and the records of the current PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

III. RESPONSE TO ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. Motion for a More Definite Statement

The State submits Applicant's claims of ineffective assistance of counsel are without merit. However, it is impossible for the State to adequately respond to Applicant's allegations because Applicant has completely failed to provide any specific facts to support such claims. For example, Applicant contends Counsels were ineffective for failing to object to the hand-of-one hand-of-all charge; failing to object to the solicitor's alleged improper vouching of the State's witnesses; and failing to adequately cross-examine the State's witnesses. However, Applicant fails to specify what Counsels should have objected to, who Counsels failed to adequately cross-examine, and on what basis Counsels could have objected to the hand-of-one hand-of-all charge. The State is therefore unable to adequately respond to these claims.

"[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the [applicant] that he was deprived of adequate and effective assistance of counsel is insufficient." *Coardes v. State*, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974); *see* S.C. Code Ann. § 17-27-50 (2014) (requiring an applicant to "specifically set forth the grounds upon which the application is based"); *see also* Rule 8(a)(2), SCRCP (requiring all civil pleadings to include "a short and plain statement of the facts showing that the pleader is entitled to relief"); Rule 71.1(d), SCRCP

(“Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.”).

Accordingly, the State moves for Applicant, through counsel, to amend his application to provide a more definite statement of his allegations of ineffective assistance of counsel pursuant to Rule 12(e), SCRCR and the Post-Conviction Procedure Act.

B. Ineffective Assistance of Trial Counsel, Generally

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant—like all other defendants—the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient

prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” demanded of attorneys in criminal cases. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonably professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). 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*, 466 U.S. at 688–89; *see id.* at 691 (“Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Id.* at 689. The ultimate question is not whether counsel’s actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland’s* deferential standard.

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. 466 U.S. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance 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. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. *See id.*, at 695 (Where a defendant challenges his conviction, he must show that there exists “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt”).

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient “to show [counsel’s] errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” *Id.* at 687 (emphasis added). “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had

no effect on the judgment.” *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690. Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant’s burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the “benchmark” of the right to counsel is the “fairness of the adversary proceeding”).

C. Failure to Prepare

Applicant’s assertion Counsels failed to properly prepare him for voir dire and jury selection is meritless. There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence counsel met with Applicant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have

been ineffective. *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). “[B]revity of time spent in consultation, without more does not establish that counsel was ineffective.” *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980).

D. Failure to Investigate

Applicant contends Counsels were ineffective for failing to sufficiently investigate the circumstances surrounding the victim’s death. The State is presently without sufficient information to fully respond to this claim because Applicant does not indicate with any specificity what it is that Counsel should have investigated and thereafter presented at trial. However, to the extent Applicant contends Counsels were ineffective for failing to investigate and present all mitigating evidence, Applicant cannot show prejudice because the judge was required to sentence Applicant to life without parole under § 17-25-45.

“A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). “[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses “when it is reasonable to do so.” *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). “In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris*, 377 S.C. at 75–76, 659 S.E.2d at 145–46 (citing *Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Harris*, 377 S.C. at 75–76, 659 S.E.2d at 145–46. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.* at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel’s duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 (noting that “this duty is limited to a reasonable investigation”). Reviewing courts “should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” *Strickland*, 466 U.S. at 690. Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel’s decision not to undertake a particular investigation must be evaluated with heavy deference to counsel’s judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014).

E. Failure to Challenge Indictment

Applicant’s allegation Counsels were ineffective for failing to challenge the amended indictments is meritless. “An indictment is merely a notice document.” *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010). Whether the indictment could be made more definite and certain is irrelevant. *Baker*, 390 S.C. at 62, 700 S.E.2d at 442. *Baker* set for the following test for viewing indictments:

[T]he court must look at the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Id.

Moreover, “an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.” *Id.* at 63, 700 S.E.2d at 443 (citing *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007)). Furthermore, in order to challenge the sufficiency of an indictment, an objection must be made before the jury is sworn in. S.C. Code Ann. §17-19-90.

A court reviewing an indictment for sufficiency should consider the indictment “‘on its face,’ *and* consider the events at trial.” *State v. Reddick*, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). In other words, a court should examine “the totality of the circumstances” to determine if the applicant was cognizant of the crimes for which he was charged. *Id.*

F. Cumulative Error

Finally, Applicant contends the cumulative effect of Counsels’ errors “are significant enough to undermine the reliability of the results at trial.” The propriety of the cumulative error analysis is an unsettled question of law in South Carolina. *See generally Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002). The Fourth Circuit Court of Appeals has rejected the cumulative error analysis stating “ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively.” *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998).

Recently, in *Smalls v. State*, our Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. 422 S.C. at 194, 810 S.E.2d at 864 (“As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.”). “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Id.* at 188, 810 S.C. at 844 (internal citations omitted).

G. Conclusion and Action Requested

The State submits Applicant can satisfy neither requirement of *Strickland*. However, the record likely does not refute or disprove Applicant’s allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”).

IV. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. 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. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231,

834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. *Id.*, 428 S.C. at 245, 834 S.E.2d at 203 (Kittredge, J., dissenting) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRPC. *See also* Rules 15(a)-(b), SCRPC. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRPC.

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. The State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

V. GENERAL DENIAL

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

[Conclusion and signature on following page]

VI. CONCLUSION

WHEREFORE, the State respectfully requests this Court grant its motion for a more definite statement as set forth in section III, and thereafter convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General

By: s/LillianMeadows
ATTORNEYS FOR THE STATE
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

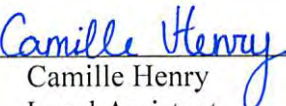
September 9, 2020

STATE OF SOUTH CAROLINA	)	
	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	2020-CP-32-1009
	)	
RIKCEY ESAW, #273842	)	
	)	
Applicant,	)	
	)	
vs	)	
	)	CERTIFICATE OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ola A. Johnson, Esquire
P.O. Box 549
Lexington, SC, 29071

DATED this 9th day of September, 2020.


Camille Henry
Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
 RICKEY ESAW,	)	 CASE NO.: 2020-CP-32-01009
	)	
Applicant,	)	
	)	
v.	)	AMENDMENT TO APPLICATION
	)	FOR POST CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

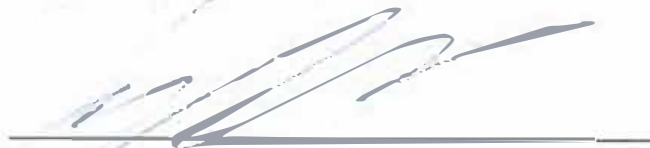
Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief. This amended complaint adopts and includes all grounds in the original application filed March 3, 2020, by Applicant. Applicant further alleges as additional grounds regarding his claim of ineffective assistance of counsel as to Jason Chehoski and Elizabeth Fullwood as follows:

1. Applicant's counsel Jason Chehoski and Elizabeth Fullwood failed to meet with the applicant a sufficient number of times to properly review the evidence and discuss this case with applicant.

2. Applicant was informed that Elizabeth Fullwood was relieved as his attorney.
3. Applicant's counsel Jason Chchoski and Elizabeth Fullwood failed to object to the indictments presented in this case.
4. Applicant's counsel Jason Chchoski and Elizabeth Fullwood failed to inform applicant regarding conversations they had with the trial judge and solicitor at side bar.
5. Applicant's counsel, Jason Chchoski and Elizabeth Fullwood, failed to properly investigate the facts of this case and failed to call alibi witnesses to confirm I was attending a family members birthday party (niece of sister Erica Esaw).
6. Applicant's counsel, Jason Chchoski and Elizabeth Fullwood, failed to provide a copy of the evidence to Applicant.
7. Applicant's counsel, Jason Chchoski and Elizabeth Fullwood, failed to object to Applicant appearing in front of the jury in a jail uniform and in restraints.
8. Applicant's counsel, Jason Chchoski and Elizabeth Fullwood, failed to object to the statement of Christy Vasquez being placed into evidence by the state (p.266, Lines 1-6, EX: 10), as cumulative and hearsay.
9. Applicant's counsel, Jason Chchoski and Elizabeth Fullwood, failed to object to the statement of Rafael Izaguirre being placed into evidence by the state (p.272, Lines 17-20, EX: 12), as cumulative and hearsay.

10. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to the statement of Franklin Vasquez being placed into evidence by the state (p.289, Lines 8-12, EX: 13), as cumulative and hearsay.
11. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to testimony regarding a crime stoppers tip as hearsay from Sgt. Miles Rawl (p.344, Lines 1-7), despite making this objection later in trial (p.377).
12. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to hearsay by Inv. Barry Sowards, "I called him up on the phone and asked him if he knew Ricky Esaw and he said he did" (p.381, Lines 5-7).
13. Applicant's counsel, Jason Chchoski and Elizabeth Fullwood, failed to object to testimony regarding Applicants alleged confession (p.437 - p.439).
14. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to testimony regarding DNA evidence connecting evidence to co-defendant Pitts who was a states witness.(p.494,495).
15. Applicant's counsel Jason Chehoski and Elizabeth Fullwood failed to call my mother as a witness. Patricia Esaw.
16. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'OLA JOHNSON', is written over a horizontal line.

OLA JOHNSON

Attorney for Applicant

P.O. Box 549

Lexington, SC 29071

803-360-8692 Phone

This 27 day of May, 2022

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

RICKEY ESAW,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2020-CP-32-01009

CERTIFICATE OF SERVICE

I, Ola Johnson, hereby certify on that on May 27th, 2022, I served a copy of the
 AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF on Taylor Z. Smith,
 Assistant Attorney General by Email and U.S. Mail to the following address:

Taylor Z. Smith, Asst. Attorney General

SC Attorney General's Office

Rembert Dennis Building

PO BOX 11549

Columbia, SC 29201

5-27-22

Date

OLA JOHNSON

FILEDSTATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

2022 JUN -8 AM 8:44

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH
JUDICIAL CIRCUIT

RICKEY ESAW,

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Case No. 2020-CP-32-01009

Applicant,

v.

**ORDER OF CONTINUANCE
AND RELIEVING COUNSEL**

State of South Carolina,

Respondent.

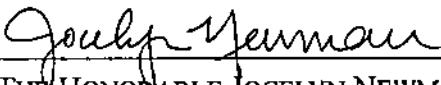
This matter comes before this Court by way of an application for post-conviction relief filed by Rickey Esaw (Applicant) on March 3, 2020. Respondent made its return to the application requesting an evidentiary hearing. The matter is scheduled for an evidentiary hearing on June 6, 2022. However, Applicant's attorney Ola Johnson, has informed the parties that he has discovered a conflict in that he previously represented the co-defendant Wilfred Akeem Pitts for the related General Sessions case.

Counsel for Applicant moves for a continuance of this matter until the next regularly scheduled term of Post-Conviction Relief matters for the Eleventh Judicial Circuit and for counsel to be relieved and for the next available attorney from the 608 contract list to be appointed. Counsel for Respondent has consented to the continuance request and the motion to be relieved.

Accordingly, this Court finds this matter shall be continued to the next regularly scheduled term of post-conviction relief matters for the Eleventh Judicial Circuit and for counsel to be relieved and for the next available attorney from the 608 contract list to be appointed.

AND IT IS SO ORDERED this 6th day of June, 2022.

Lexington, South Carolina


THE HONORABLE JOCELYN NEWMAN
Presiding Judge
Eleventh Judicial Circuit

FILED

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

2022 JUN 14 PM 2:30

IN THE COURT OF COMMON PLEAS

Rickey Esaw
273 842
15

Applicant)

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

CASE NO. 2020-CP-32-01009

STATE OF SOUTH CAROLINA)

Respondent)

ORDERING APPOINTING COUNSEL

POST CONVICTION RELIEF APPLICATION

The Applicant has filed an application for post-conviction relief pursuant to Section 17-27-20, South Carolina Code of Laws, and it appears that the Applicant is indigent.

In accordance with the order and direction of the Court in such case, IT IS ORDERED that *Ashley Mc Mahan* Esquire, *P.O. Box 50536*
(Address)
Columbia, SC 29250, Telephone No. *(803) 219-1110*, is appointed to represent the Applicant in this proceeding.

The trial attorney was

Jason Chehowski

The court reporter at the trial was

Attention is directed to a publication of the Post Conviction Relief Subcommittee of the Young Lawyers Division, Post Conviction Relief Proceedings in South Carolina, South Carolina Bar, 1990.

Lisa Comer

Clerk of Court for LEXINGTON County

Lexington, South Carolina

June 14, 20*22*

White Copy - Original

Yellow Copy - To Attorney

Pink Copy - To SC Attorney General

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Ricky L. Esaw, #273842,

Applicant,

v.

State of South Carolina.

FILED

2023 NOV 29 PM 12:38

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

COURT OF COMMON PLEAS

FOR THE 11th JUDICIAL CIRCUIT

Case No.: 2020-CP-32-01009

SECOND

AMENDED POST-CONVICTION
RELIEF APPLICATION

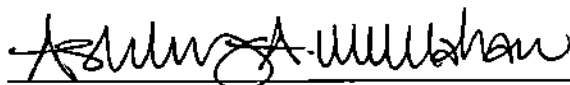
The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on March 3, 2020, to add the following allegations:

1. Ineffective Assistance of Counsel of Elizabeth C. Fullwood, Esquire and Assistant Public Defender Jason S. Chehoski:

- a. Failure to object to the instruction on transferred intent for attempted murder.
- b. Failure to move to redact the 911 call, particularly the ending, due to unfair prejudice.

Furthermore, the Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



ASHLEY A. MCMAHAN, ESQUIRE

MCMAHAN LAW, LLC

PO Box 50536

Columbia, SC 29250

803-219-1110

ashley@mcmahanlawsc.com

SC Bar No. 71676

ATTORNEY FOR APPLICANT

November 20, 2023

CERTIFICATE OF SERVICE

I certify that I have served this document via email to:

Donald J. Zelenka
Deputy Attorney General
dzelenka@scag.gov

This 20th Day of November, 2023.

A handwritten signature in black ink, appearing to read "Ashley A. McMahon", written over a horizontal line.

ASHLEY A. MCMAHAN, ESQUIRE
Attorney for Applicant

STATE OF SOUTH CAROLINA)
) IN THE COMMON PLEAS COURT
 COUNTY OF LEXINGTON)

Rickey Esaw,)
)
 -vs-) TRANSCRIPT OF RECORD
) 2020-CP-32-01009
 State of South Carolina,)
)
 Defendant.) December 18, 2023
) Lexington, South Carolina

B E F O R E:

The Honorable Perry Gravely, Presiding Judge.

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

ASHLEY MCMAHAN, Esq.
 McMahan Law, LLC
 P.O. Box 50536
 Columbia, SC 29250
 Attorney for the Plaintiff

DONALD ZELENKA, Esq.
 S.C. Attorney General's Office
 P.O. Box 11549
 Columbia, SC 29211
 Attorney for the Defendant

Barbie Teboe
 Certified Judicial Transcriber

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P R O C E E D I N G S

1 (Whereupon, the following proceedings started at 11:32 a.m.)

2 THE COURT: This is, I believe, Rickey Esaw?

3 MR. ESAW: Yes, sir.

4 THE COURT: Good morning, by the way.

5 MR. ESAW: Good morning.

6 THE COURT: I'm sorry I didn't say that as I came in.

7 All right. I'll be glad to hear from you.

8 MS. MCMAHAN: Judge, this is 2020-CP-32-1009. This is
9 Mr. Rickey Esaw versus the State.

10 At this time, the applicant would call Mr. Esaw to the
11 stand.

12 THE COURT: All right.

13 MS. MCMAHAN: So you're going to go stand over there.

14 THE COURT: If you'll come forward, Mr. Esaw.

15 MS. MCMAHAN: Here. Take your stuff with you.

16 (Mr. Esaw is sworn at 11:33 a.m.)

17 DIRECT EXAMINATION BY MS. MCMAHAN:

18 Q Would you state your name for the record, please?

19 A Rickey Esaw.

20 Q And did you file this PCR application?

21 A Yes, ma'am.

22 Q And you have two amended PCR applications after that;
23 right?

24 A Yes, ma'am.

25 Q So what do you want to tell the Court today about your

PCR?

1 A My PCR from --

2 Q Well, let's start with the first issue that Mr. Chehoski,
3 Ms. Fullwood failed to meet with you a sufficient number of
4 times.

5 Tell Mr. -- Judge Gravely about that.

6 A Well, when I first had Ms. Fullwood as my lawyer, she
7 just -- when I was asking her to look in the stuff for me for
8 my case, she just plain -- just denied. She's like, "I'm not
9 ready to do that yet." She didn't -- she did not got me an
10 investigator or nothing. I didn't get an investigator until
11 she got off of my case.

12 Q So you had Ms. Fullwood first?

13 A Yes, I had Ms. Fullwood first.

14 Q And you wrote the clerk and the judge about --

15 A I wrote the judge about her -- about her misbehaving on
16 it and not looking into my case.

17 Q And --

18 A When I wrote the judge, that's when she got out -- that's
19 when she got off my case. And they hired me somebody else.

20 Q So then they appointed Mr. Chehoski?

21 A Yeah. I was appointed Jason Chehoski.

22 Q So then -- so these letters that you have, these were
23 all filed with the clerk that Mr. --

24 A Yes.

25 Q -- that Judge Keesley had written about?

A Yes.

1 MS. MCMAHAN: Your Honor, I think they're already part of
2 the lower court record, but Mr. Esaw would like you to look at
3 it.

4 THE COURT: Okay. You want to mark them? Or do you want
5 me to mark them or (indiscernible)?

6 MS. MCMAHAN: Well, I'll need to show this to Ms.
7 Alligood, too, but --

8 THE COURT: Do you want to look at them, Mr. Zelenka?

9 MR. ZELENKA: Yes, sir.

10 THE COURT: I'll let you look -- I'm (indiscernible).

11 MS. MCMAHAN: I believe they're already part of the
12 clerk's record.

13 (Pause.)

14 MR. ZELENKA: No objection.

15 THE COURT: All right.

16 MS. MCMAHAN: If you want, Your Honor, we can make these
17 a Court's exhibit.

18 THE COURT: All right. You want to make them a court --
19 yeah. Okay. Let's go ahead and make them an exhibit, then.

20 (Pause.)

21 THE COURT: All right.

22 Q (By Ms. McMahan) In your letters to Judge Keesley, what
23 were you talking about? What were you requesting?

24 A I was basically trying to get some understanding of my
25 case and see how far they got on it, and Judge Keesley was

basically getting in contact with my lawyer in the Solicitor's
1 Office, trying to get them to bring up a -- excuse me, get
2 them to bring it up -- bring him up to speed on my case.

3 Q Okay.

4 A I had to go through the judge to really get some --
5 get -- speed up on my case, really. I was in the county for
6 two years, and for the whole two years, I wasn't getting no --
7 nothing. If I didn't write Judge Keesley, I was -- probably
8 still be in the county.

9 Q And so these are the letters that he wrote you back?

10 A Yes, ma'am.

11 Q And in those letters does he tell you that Ms. Fullwood
12 is no longer your attorney?

13 A Yeah.

14 Q Okay. So back to number one, that you didn't meet with
15 them a sufficient number of times to be prepared for trial.
16 Obviously, Ms. Fullwood was not your attorney after -- how
17 long? About a year, you said?

18 A Yeah.

19 Q And then Mr. Chehoski was appointed. Then -- when did
20 Mr. Chehoski come and meet with you?

21 A He came and meet me, like, about a month later, after he
22 got appointed.

23 Q Okay. What did you guys talk about?

24 A About my case.

25 Q What specifically?

1 A About how -- like, my co-defendant, when we -- when he
2 first got arrested, he was charged with obstruction of
3 justice. That was his first charge. So when my co-defendant
4 got charged with that, I'm, like, how can he testify on the
5 stand? I mean, you know what I'm saying, if he got charged
6 with obstruction of justice first? And he was telling me he
7 can do that, you know what I'm saying.

8 Q Uh-huh. And then -- and so did you have issues with the
9 fact that Ms. Fullwood ended up being at your trial?

10 A Yes. Yes. When she -- when I went to trial, she was at
11 my trial. And if she was no longer my lawyer, that's, like, a
12 conflict that interest to me, you know what I'm saying.
13 Because she didn't do what I asked her to do, I didn't want
14 her to be my lawyer. And she was there at trial.

15 Q You didn't want her involved in your case at all?

16 A Period.

17 Q Period. Okay.

18 A And she knew that.

19 Q And then, what were the issues with the indictments?

20 A They -- when I first got arrested, they gave me the
21 original warrants. They came back and took the original
22 warrants. They misplaced it. And then they reserved me some
23 more warrants. And I told my lawyer about that, you know what
24 I'm saying, about my warrant issue, never checked into that,
25 never looked at it or nothing.

Q And actually, in the letters that you have from Judge

Keesley, there's --

1 A He said --

2 Q -- a different warrant numbers --

3 A Yeah. He said it --

4 Q -- at the beginning; right?

5 A -- it didn't pull up. He lost them. They really
6 misplaced the paper and reserved me some more warrants that's
7 the replacement warrant for this.

8 Q So the issue is really more with the warrants, not
9 necessarily with the indictments?

10 A No.

11 Q Okay. Then --

12 A The indictments and the warrants, just -- they lost it,
13 period.

14 Q Because the indictments were now off the new --

15 A Yeah.

16 Q -- replacement warrants?

17 A Yeah.

18 Q Okay. So what was the issues with you and Mr. Chehoski
19 Ms. Fullwood about the side bars they were having with the
20 judge?

21 A Every time they go to the sidebar, I asked them what was
22 going on and they never tell me nothing.

23 Q So they wouldn't tell you what you got -- they were
24 talking about up there?

25 A They never told me nothing. Every time they go up there,

1 I'd ask what's going on. They tell me, just hold on, just
2 hold on. Never told me nothing.

3 Q Did you ever learn anything about any type of
4 conversation at the sidebar?

5 A No, ma'am. Never told me nothing.

6 Q And what was the issue with the witnesses that they
7 didn't investigate, about you being at a birthday party?

8 A Yeah, they never investigated none of that. And then my
9 mama was supposed to be a witness. They had made her sit out
10 of the courtroom that whole week, then they pulled her back in
11 and said they didn't need her again. And she was my witness.

12 Q And what in her -- that was that you were at a niece's
13 birthday party?

14 A That I was at the party.

15 Q At the time that this --

16 A Incident happened.

17 Q Okay.

18 A They said that I got -- they -- they said, when the
19 incident happened, I supposed to have been -- I was supposed
20 to got hit in the head with a can, supposed to got kicked in
21 the face and all that, but I wasn't swoll up or nothing. They
22 didn't have no pictures for none of that.

23 Q So there weren't any injuries on you?

24 A No.

25 Q How soon after the incident happened, did -- were you
arrested?

- A About four days later.
- 1 Q So there were no bruises or anything on you then?
- 2 A No.
- 3 Q Okay. And what was the issue with them failing -- was
- 4 that related to the failure to provide you with the evidence,
- 5 Number 6?
- 6 A Yes.
- 7 Q That they -- that there was no evidence of you being beat
- 8 up?
- 9 A Nope. No evidence of me bruising --
- 10 Q Did they provide you any other discovery in the case?
- 11 A The only thing they had was a bracelet my co-defendant
- 12 had. And that belonged to my co-defendant.
- 13 Q That was Mr. Pitts'?
- 14 A Yes.
- 15 Q And at the beginning of the trial, when the jury was
- 16 being qualified, were you sitting in front of the jury in your
- 17 detention center uniform?
- 18 A Yeah. I was in my detention uniform.
- 19 Q When did you dress out for court?
- 20 A Like, Tuesday.
- 21 Q So the jury was selected while you were sitting there in
- 22 a uniform?
- 23 A I was -- yeah, I was -- I didn't dress out until Tuesday.
- 24 Q And, in fact, there's a notation in your trial, right,
- 25 about you being in uniform?

A Right.

1 (Pause.)

2 Q What was the issue about your alleged confession that Mr.

3 Chehoski and Ms. Fullwood didn't do? Did they object to your

4 alleged confession?

5 A No.

6 Q Did you have a Jackson V. Denno hearing?

7 A No.

8 Q Did you guys have a conversation about your alleged

9 confession?

10 A No.

11 Q So you guys never met and talked about how they could use

12 that statement against you or anything like that?

13 A No.

14 (Pause.)

15 Q And what was the testimony about the DNA evidence that

16 they didn't object to with Mr. -- regarding Mr. Pitts?

17 A What was that?

18 Q Did they object to the DNA evidence connecting Mr. Pitts?

19 A No. They never objected to nothing of that.

20 Q Did they object to the chain of custody on that DNA or

21 anything like that?

22 A No.

23 Q And you already talked about that they didn't call your

24 mom as a witness: right?

25 A Yes.

Q And she -- you said she was sitting outside the whole
1 time?

2 A Yeah. She was there from day one. They told her to step
3 out because she was a witness. And so she had to stay out of
4 the courtroom.

5 Q She was just waiting to be called?

6 A Yep.

7 Q And the 911 call -- did you ever hear it?

8 A They never --

9 Q You didn't hear it played in court?

10 A No, they didn't play nothing.

11 Q They never came and played it for you at the detention
12 center.

13 A I ain't heard nothing -- no 911 tape. The only thing I
14 heard about a 911 tape was when the trial started. They said
15 the 911-caller had called like, three different dates or
16 something, the day the incident happened. That was the only
17 thing. I never heard a 911 call.

18 Q And that was at the beginning of the trial?

19 A Yes.

20 (Pause.)

21 Q Did you ever have a conversation with Mr. Chehoski or Ms.
22 Fullwood about transferred intent or anything in regards to
23 attempted murder?

24 A No.

25 Q Did you guys talk about the statements of Ms. Vasquez or

Raphael Isagari (phonetic) or anything like that?

1 A No. We ain't talking about no statements.

2 Q Or Franklin Vasquez?

3 A No.

4 Q Did you talk about whether or not the Crime Stoppers tip
5 can come in as --

6 A No. They mentioned the Crime Stoppers tip during my
7 trial. They never said anything about the Crime Stopper tip.

8 Q In your conversation at all?

9 A No.

10 Q Was that the first time you'd heard about the Crime
11 Stoppers tip?

12 A In my trial.

13 (Pause.)

14 Q Is there anything else you want Judge Gravely to know
15 about your PCR today?

16 A My PCR -- I'm just trying to just get justice, Your
17 Honor, you know I'm saying. I'm -- they got me for a crime
18 that I did not commit, you know I'm saying. Like, I done did
19 time at SCDC before. I came in 2010. From 2010 to 2015, I
20 was in Colombia for five years. Never had trouble with
21 nobody, nothing, until this guy put my name and said I was
22 with him. And I was not with him. I was only five years
23 doing everything I supposed to do.

24 I've got a little child at home, doing good. And I had
25 no problem with the law until this (indiscernible) came up.

And then when they brought this up -- they don't have no
1 evidence on me. They just got hearsay, him saying that I was
2 there.

3 They took my girlfriend car. When this whole thing
4 happened, now, they took the car, towed her car -- they went
5 through her car and everything. They ain't gave her the car
6 back at all. Said they couldn't find my DNA or nothing -- the
7 DNA from the crime scene, nothing put that caught at the crime
8 scene. But somebody said that the car was there and I was
9 there.

10 That's all I have to say.

11 Q Did you guys ever talk about you testifying or the
12 possibility of testifying at your trial?

13 A No. They told me they didn't want me to testify. My
14 lawyer told me not to testify.

15 Q Was that because you have a record?

16 A Yeah.

17 Q And there's this alleged confession out there. If you
18 weren't at the scene, what was the issue with the alleged
19 confession? How did that come about?

20 A I told them that because they threatened my girlfriend.
21 Anita Grayson, they threatened her. They told her they were
22 gonna charge her with the crime that she didn't even have
23 nothing to do with. I was, like, "I was there," to get her
24 off. But I wasn't there, and she wasn't there.

25 She -- she's -- this -- my girlfriend, she's graduated

from USC, got a good job, everything. And had no problem with
1 the law. Soon as they arrested me, the detective that was
2 over the case, they start harassing her, following her to
3 work, telling her that she had to come and talk to them about
4 the case and all this and that, you know I'm saying. They
5 scared the girl off. Basically scared her off. And she --
6 after the trial, she just moved away.

7 Q So were you kind of hot when you were talking to them?

8 A Yeah. I was mad because they were going after her, and
9 she didn't -- you know I'm saying. That was just crazy, you
10 know I'm saying.

11 Q Is that why you, kind of, were like, oh, at best --

12 A Yeah.

13 Q -- you only got an accessory?

14 A Yeah. But they say that I got hit in the head with
15 bottles and got kicked in the face, but I wasn't swoll up. My
16 DNA wasn't at the crime scene.

17 Q Did they ever take any pictures of you when you were
18 being arrested or anything like that?

19 A No, ma'am. One detective said that I was swollen on the
20 right side. One detective said I was swoll up on the left
21 side.

22 Q So whichever side of the face you were apparently swollen
23 up on was different for each detective?

24 A Yeah. That's what Detective Moore did and Sergeant
25 Sward (phonetic) say.

Q Do you believe that your attorneys adequately
1 cross-examined them about that, about their inconsistencies in
2 their two statements?

3 A Did I what?

4 Q Do you believe your attorneys were effective in
5 cross-examining the detectives --

6 A No.

7 Q -- about that?

8 A No. They wasn't effective.

9 (Pause.)

10 Q Anything else you want Judge Gravely to know today?

11 A No, ma'am.

12 Q Answer any questions that the attorney general may have.

13 THE COURT: Cross-examination, Mr. Zelenka?

14 MR. ZELENKA: Thank you. May it please the Court.

15 CROSS-EXAMINATION BY MR. ZELENKA:

16 Q Mr. Esaw, I just want to make sure I understand your
17 answers. Because I was a little confused by some of them.

18 You indicated that there wasn't a Jackson V. Denno
19 hearing challenge in your statements?

20 A No, sir.

21 Q So you don't recall testifying at the Jackson V. Denno
22 hearing?

23 A Testifying against the Jackson V. -- when?

24 Q Yeah. Before the trial started in front of the jury.

25 You don't remember --

1 A Oh, when they had me on the stand? When they was
asking -- yeah.

2 Q Okay.

3 A Yeah.

4 Q And they were asking you whether your statement was
5 voluntary, whether it was coerced, whether you were given your
6 Miranda rights.

7 A And I told him that I was coerced. Yep.

8 Q Yeah. And after hearing your testimony and the testimony
9 of the law enforcement officers, the judge made a ruling on
10 that; right?

11 A Yeah.

12 Q If -- with respect to your mother being out of the
13 courtroom, do you remember that your mother was sequestered
14 because she was a potential witness in the case?

15 A Yes.

16 Q And because she was sequestered, she wouldn't be in the
17 courtroom.

18 A I understand that, but --

19 Q Yeah.

20 A But when it was over --

21 Q And was a decision made to not call your mother?

22 A Yes.

23 Q And who made that decision?

24 A Jason and Ms. Fullwood.

25 Q Pardon me?

- A Jason and Ms. Fullwood.
- 1 Q Okay. And why did they make that decision? Did they
2 tell you?
- 3 A Nah, they say that they don't need my mom to testify
4 again. I say, "Why?" They said, "You just don't need her."
- 5 Q Okay. While you were meeting with Jason, preparing the
6 case, did -- what was going to be your defense?
- 7 A What you mean?
- 8 Q What was going to be the reason that your lawyers are
9 going to put forward that you didn't commit the crime?
- 10 A What was the what? I don't understand what you're
11 saying. You say what was my defense?
- 12 Q Let me back up.
- 13 Did your lawyers go over the discovery with you, prior to
14 trial?
- 15 A No.
- 16 Q Did you know what were being charged with?
- 17 A Yeah. I mean, I knew I was being charged. Yeah. I knew
18 I was going to be charged. Yeah. I know I was being charged,
19 but we never went over my defense, though.
- 20 Q Okay. And what were you being charged with?
- 21 A Murder.
- 22 Q Murder of who?
- 23 A Huh? Murder of Franklin -- I mean, I don't know the
24 guy's name.
- 25 Q Okay. And did you have a co-defendant in the case?

A Yes, sir.

1 Q Was that Wilfred Pitts?

2 A Yes, sir.

3 Q And what was he charged with?

4 A First, he was charged with a obstruction of justice.

5 That was the first charge he got charged with. And then when

6 they brought me from Richmond County to Lexington County Jail,

7 that's when he got the rest of charges with me.

8 Q Okay. And the facts of the case were, you were alleged

9 to be -- shown up in a house and were committing a robbery.

10 And result of that robbery, an individual was killed and

11 another individual was shot?

12 A Yeah.

13 Q All right.

14 A Yeah.

15 Q And were goods taken at that time?

16 A I don't know.

17 Q Was anything taken from anybody?

18 A I don't know. I wasn't there.

19 Q Okay. And -- but that's where you were charged with --

20 A Yes.

21 Q And as a result of those charges, why did you think you

22 shouldn't be convicted of those crimes?

23 A Because I didn't do it.

24 Q Okay. And what did you tell your lawyers you were doing

25 at the time of the crime?

- A I was at a party.
- 1 Q You were at a party?
- 2 A Yes.
- 3 Q And who else was at that party?
- 4 A My mother, my sister --
- 5 Q Was your --
- 6 A -- girlfriend.
- 7 Q -- girlfriend at the party?
- 8 A Yes. She told -- she said the same thing at trial. She
- 9 was at the party.
- 10 Q Okay.
- 11 A And she -- they --
- 12 Q She testified at trial, didn't she?
- 13 A Yup. And they asked at trial, was I bruised up, was I
- 14 dirty or anything at -- when I left. She said, "No."
- 15 Q Okay. And she testified that you were in the vehicle
- 16 that was taken?
- 17 A Yeah. It was her vehicle.
- 18 Q It was her vehicle?
- 19 A Yes.
- 20 Q At the time -- consistent with the crime -- the time of
- 21 the crime; correct?
- 22 A No.
- 23 Q No, it wasn't?
- 24 A No.
- 25 Q Her testimony wasn't --

A No. I'm saying -- what you about the vehicle?

1 Q (Indiscernible) the question.

2 She testified at trial on behalf of the State?

3 A Yes.

4 Q Against you; correct?

5 A Yes.

6 Q All right. And --

7 A But really, not against me. They -- it wasn't really

8 against me.

9 Q It was just facts.

10 A Yeah.

11 Q Okay. What was your mother going to testify about?

12 A Saying that I was at the party.

13 Q Okay.

14 A Saying that I was at the party. She sent me to the store

15 to get something from the store, and I came right back and was

16 at the party.

17 Q Okay.

18 A That's what she gonna tell you.

19 Q Okay. And did you share that with your lawyers?

20 A Yeah. I told them that -- told Jason that when he became

21 my lawyer.

22 Q Okay.

23 A And I told the investigator -- he -- I told the

24 investigator he had got for me and all. He never put the

25 investigator on the stand so he can say what he found.

- Q Okay. Did you want a speedy trial?
- 1 A Yes.
- 2 Q Okay. And did you ask your lawyers to move for a speedy
- 3 trial?
- 4 A Yes. And Ms. Fullwood says she's not gonna do that.
- 5 That's the first thing she told me when I asked them.
- 6 Q Did they move for a speedy trial?
- 7 A Nope.
- 8 Q All right. And did the State --
- 9 A My trial didn't get speed up until I wrote Judge Keesley.
- 10 Q Okay. Did they tell you why they weren't asking for a
- 11 speedy trial?
- 12 A No.
- 13 Q Did they meet with you and go over the discovery?
- 14 A Excuse me?
- 15 Q Did they meet with you and go over the discovery?
- 16 A No.
- 17 Q You wanted the two alibi witnesses, Patricia -- excuse
- 18 me, Erica Esaw and Patricia Esaw, to testify on your behalf?
- 19 A Yes.
- 20 Q And was Erica Esaw present at the Court?
- 21 A When?
- 22 Q When you were tried?
- 23 A No.
- 24 Q Okay. And you told your lawyers about her?
- 25 A Yeah, they know about her. They done talked -- they had

talked to her and all.

1 Q Okay. Did they indicate to you why they weren't going to
2 call her?

3 A No. They didn't tell me nothing.

4 Q Okay. And you're claiming at one time -- or sometime,
5 you appeared somewhat as you are today, in a jail uniform?

6 A Yes.

7 Q In front of the jury?

8 A Yeah. No. The jury wasn't in there. They had left out.
9 But I was in the courtroom when they was in there. They let
10 the jury go out when they put me up here on the stand.

11 Q In front of the jury?

12 A No, the jury already left out the courtroom.

13 Q The jury was out of the courtroom --

14 A Yeah.

15 Q -- when you were brought in?

16 A No. The jury was left out the courtroom when they put
17 me -- they called me up here on the stand. The jury was still
18 sitting over there the whole time I was by the desk.

19 Q Okay.

20 A They was still in the --

21 Q And when was that?

22 A Huh?

23 Q When was that?

24 A When was what?

25 Q When were you wearing the uniform?

1 A When they first brought me to the courtroom that morning,
2 from that morning to that afternoon, the whole day I was in
3 there in my prison uniform.

4 Q So were you wearing that when the jury was picked?

5 A Yeah.

6 Q You were?

7 A Yeah.

8 Q Were you wearing that in the Jackson V. Denno hearing?

9 A Yeah. I had this on.

10 Q Were you wearing it when the judge -- when you picked the
11 jury?

12 A Yeah, I had this on. I had my -- the prison jumpsuit on
13 when I came to the courtroom.

14 Q The whole time?

15 A I never changed out until my trial started. I never
16 dressed out to my trial started.

17 Q Okay. And the jury was there?

18 A Yes.

19 (Pause.)

20 Q Let me --

21 (Pause.)

22 Q Did you want to testify?

23 A (No audible response.)

24 Q Did you want to testify?

25 A No.

Q You did not?

1 A I don't think I had a reason. I didn't think I needed to
testify.

2 Q Okay.

3 A Because the evidence would have just plain showed it, you
4 know I'm saying. I wasn't there.

5 Q Okay. And you talked about your lawyer -- about that,
6 and your lawyer gave you the options to testify or not?

7 A No. He never gave me no option. He just told me that he
8 didn't want me to testify. He didn't let me go on the stand.
9 He wasn't gonna call me to the stand. That was what him and
10 Ms. Fullwood told me. It -- they wasn't calling me to the
11 stand.

12 Q Okay. You're claiming your girlfriend was threatened?

13 A Yeah.

14 Q Was this the same girlfriend who testified in court?

15 A Yup.

16 Q Okay.

17 A Before she testified for the State, before she became --
18 before she started testifying for the State, they was
19 threatening her.

20 Q Who threatened her?

21 A Detective Moore.

22 Q Pardon me?

23 A Detective Moore.

24 Q Detective Moore? And what was the threat?

25 A That she was -- that he was going to charge her if she

1 didn't testify. And if she didn't come -- he said that if
2 he -- she didn't testify, that he was gonna charge her with
3 it.

4 Q Okay.

5 A -- with the -- with murder.

6 Q When did they have that discussion with her?

7 A Huh?

8 Q When they have that discussion?

9 A When did he have that discussion with her?

10 Q Yeah.

11 A Before she got on the stand for the State.

12 Q Okay.

13 A When she was staying with my mom -- because she was
14 staying with mom when the incident happened, because she
15 didn't have a car. So she was driving my mama's car, but my
16 mom was taking her to work, but he was following her. Every
17 time she goes somewhere, they was following her.

18 Q Was it when they served a subpoena on her?

19 A Huh?

20 Q When did he say it? When he served the subpoena on her?

21 A I don't know.

22 Q When --

23 A I know I was still in the county jail. Me and her still
24 was talking -- you know, still was on our talking term when
25 that happened.

Q Okay.

1 A She came to see me at the county one night -- at the jail
2 I was -- (indiscernible) and told me how the detective was
3 following her.

4 (Pause.)

5 Q When did you learn that Mr. Pitts was going to testify
6 against you?

7 A I didn't learn that until it was time for me to go to
8 trial.

9 Q Okay. Were you thinking he was going to testify against
10 you?

11 A No. I didn't know nothing. I ain't know nothing about
12 Mr. Pitts. The whole time I was in the county -- when I first
13 saw Ms. Fullwood, I told her, put in for a fast, speedy trial.
14 I ain't know nothing about Mr. -- if he was gonna testify or
15 nothing. I didn't know nothing.

16 Q Did you know Mr. Pitts before the night of the incident?

17 A Yeah.

18 Q All right.

19 A His brother stay behind my mama, in apartment area.

20 Q Okay.

21 (Pause.)

22 MR. ZELENKA: Your Honor, I don't have any further
23 questions.

24 THE COURT: All right. Any redirect?

25 MS. MCMAHAN: Just briefly.

REDIRECT EXAMINATION BY MS. MCMAHAN:

Q Did you guys have any conversations about the fact that
1 you were still in your detention center outfit that morning?

2 A No.

3 Q Did they say, "Hey, you need to dress out in these
4 clothes?"

5 A They didn't say nothing to me.

6 Q Did you ask like, "Hey, why am I sitting here in this
7 orange suit?"

8 A No. I didn't ask.

9 Q Did you just think it was normal to be --

10 A Yeah.

11 Q -- in a prison jumpsuit during a jury selection?

12 A Yeah. I ain't never went through it.

13 Q Is that your first criminal trial?

14 A Yeah. That was my first time going through a trial.

15 Q All the other ones had been guilty pleas?

16 A Yeah.

17 Q Okay. And the next day you said you dressed out. What
18 was the conversation about that, when you dressed out the next
19 day, when you changed clothes?

20 A I just changed clothes. It wasn't no conversation. They
21 just --

22 Q Did someone bring you the clothes?

23 A My clothes was already in the courtroom.

24 Q There were clothes sitting there waiting?

25 A Yeah. My mom brought the clothes there.

Q Your mama brought you clothes the next morning?

1 A Yeah.

2 Q Okay.

3 (The Court and clerk confer.)

4 Q And they were your clothes --

5 A Yeah.

6 Q -- from your -- from her house?

7 A Yeah.

8 Q Okay.

9 (Pause.)

10 Q And did you have any conversation with Ms. Fullwood or

11 Mr. Chehoski about possible jury instructions or anything like

12 that?

13 A No. We was having a little discussion at the table when

14 he was picking the jury. They never said nothing. Just keep

15 telling me to hold on.

16 Q There wasn't, like, any instructions about, "Hey, we're

17 going to ask for this or object --"

18 A No.

19 Q "-- to this or anything like that?

20 A They never said anything.

21 Q And what was the issue with some sort of photo with you

22 wearing jewelry?

23 A Yeah. They said that the photo that my co-defendant had,

24 that's supposed to be my jewelry. That's the one they found

25 at the crime scene.

Q Oh, the bracelet?

1 A Yeah.

2 Q That Mr. Pitts had on?

3 A Yeah. They said --

4 Q The State was trying to say it was your --

5 A Yeah.

6 Q -- jewelry?

7 A Yeah. They was trying to say it was mine, but my DNA

8 wasn't on there.

9 Q Only Mr. Pitts' DNA was found on there?

10 A Yes.

11 Q Would you wear any jewelry like what was found?

12 A I don't wear jewelry, period.

13 Q If you do wear jewelry, do you typically wear gold-

14 colored jewelry or anything like that?

15 A No. Like --

16 MS. MCMAHAN: No further questions, Your Honor.

17 THE COURT: All right.

18 Thank you. You may step down.

19 MS. MCMAHAN: Judge, at this time, I think his mother is

20 logged in.

21 THE COURT: All right.

22 MS. MCMAHAN: There should be a -- is there a phone

23 number, Madam Law Clerk?

24 THE CLERK: Is there -- is it Patricia Reid?

25 MS. MCMAHAN: Yes. That's here.

THE COURT: All right. So that's gonna be your next
1 witness?

2 MS. MCMAHAN: Yes, Your Honor.

3 If I could be a unmuted, please.

4 THE COURT: All right. Ms. Reid, if you'll turn on your
5 video.

6 And you-all need to turn your speakers off until you
7 speak.

8 (Pause.)

9 THE COURT: You can call Ms. Reid.

10 (Pause.)

11 THE COURT: Are you calling Patricia Reid?

12 MS. MCMAHAN: Yes, Your Honor.

13 THE COURT: All right.

14 MS. MCMAHAN: At this time, the applicant calls Patricia
15 Reid.

16 MS. REID: This is Patricia Reid.

17 THE COURT: All right. Can you turn on your video, Ms.
18 Reid?

19 MS. REID: Hold on a minute.

20 (Pause.)

21 MS. REID: Hold on a second, okay.

22 (Pause.)

23 MS. REID: It's not giving me the option to --

24 MS. MCMAHAN: Ms. Reid, did you use the call-in number?

25 MS. REID: Yes, I have the call-in number.

1 MS. MCMAHAN: I don't think -- I think she just phoned
2 into WebEx, Your Honor. I don't think she used the video part
3 of it.

4 MS. REID: I didn't use the video part of it.

5 THE COURT: Well --

6 MS. REID: So do you want me to call in or --

7 MS. MCMAHAN: Were you able to get in through the video
8 link that I sent you before?

9 (Pause.)

10 MS. REID: So do you want me to call or --

11 THE COURT: We just need you to be able to do your video.

12 MS. MCMAHAN: Do you know that link that I sent you, the
13 join link? MS. Reid: Yes.

14 MS. MCMAHAN: Can you try that?

15 MS. REID: Okay.

16 (Pause for audio connection issues.)

17 MS. MCMAHAN: Is there another person that's logged in?
18 His sister says she's already on.

19 THE CLERK: We have a Erica.

20 MS. MCMAHAN: That's his sister. We could start with her
21 if she's already logged on.

22 THE COURT: Okay.

23 (Pause.)

24 THE COURT: All right. Ms. Esaw, if you could turn your
25 video on and your -- and unmute yourself.

(Pause.)

ERICA ESAW - DIRECT BY MS. MCMAHAN

34

MS. MCMAHAN: There you go. We can see you now.

1 All right. Judge, at this time then, we call Erica Esaw.

2 THE COURT: All right. Let's see if we can -- ask her a
3 question, see if she can hear you.

4 MS. MCMAHAN: Can you hear me?

5 THE COURT: Well, I can't --

6 MS. MCMAHAN: We can't hear you now.

7 THE COURT: I'm trying to figure out how to keep it
8 from -- and we've got this echo.

9 MS. MCMAHAN: Okay. And whoever's the person in the
10 background needs to step back.

11 (Pause.)

12 MS. MCMAHAN: Okay. We can hear you now. Can you hear
13 us?

14 MS. ESAW: Yeah. I can hear you.

15 MS. MCMAHAN: Okay.

16 DIRECT EXAMINATION BY MS. MCMAHAN:

17 Q Okay. How are you related to Mr. Esaw?

18 A I'm his baby sister.

19 Q In the night of -- in question, what were you guys doing?

20 A We was chilling. Having fun like we always do. That was
21 the day that was -- you know, that we were celebrating my
22 daughter, Zion's birthday.

23 Q Okay. And the law -- the court reporter would ask that
24 you just state your name for the record real fast.

25 A Erica Tawanna Esaw.

Q And it's E-r-c -- E-r-i-c-a?

1 A E-r-i-c-a. Yeah.

2 THE COURT: Turn off your microphone there.

3 (Pause for audio connection issues.)

4 Q (By Ms. McMahan) Okay. So it's Erica, E-r-i-c-a?

5 A Yes, ma'am.

6 Q Okay. And so at -- the day that the incident happened,
7 did he have a working car?

8 (Background conversation.)

9 A Go ahead, ma'am. Can you repeat that?

10 Q The day of the incident, did he have a working car?

11 A A working car? No.

12 Q Okay. And what were you --

13 A He don't have no working car.

14 A You said you were chilling. Were you guys at your
15 niece's birthday party, or were you doing something else?

16 A No. I had -- we had something at my mom house?

17 Q Okay.

18 A And we was living at -- my mama lives in an apartment.

19 THE COURT: All right. See if you can put that
20 microphone down next to the speaker (indiscernible).

21 MS. MCMAHAN: Okay.

22 Q And then what -- were you guys -- you were just hanging
23 out at that apartment?

24 A Yes, ma'am.

25 Q Okay. And have you ever seen him wear any jewelry or

anything like that?

1 A No. He don't wear no jewelry. The only thing he ever
2 wear was a silver watch.

3 Q So you've never seen him wear any gold jewelry?

4 A Never. He don't -- my brother don't never wear no gold
5 jewelry. Never.

6 Q And what color car did he have, the one that was broken
7 down?

8 A He don't got -- no, he always had a white car.

9 Q Okay. And were you ever called or subpoenaed to testify
10 at the trial?

11 A Yes, but I told him I won't be able to make it, because
12 at that time, I already moved to Atlanta.

13 Q So you had talked to them, but you said you said you
14 wouldn't be able to make it because you had already moved?

15 A Yeah. And then on top of that, they didn't even, like,
16 really ask to testify anyway, so you know.

17 Q So they never tried to subpoena you to get you to come?

18 A Mm-mm. No, ma'am.

19 Q And were all of you-all living with your mom, including
20 his girlfriend?

21 A No. They was already living in Richland County.

22 Q Okay.

23 A My brother and his girlfriend was already living in
24 Richland County.

25 Q At one point, were you-all living with your mom?

A Yeah. That was maybe, like, when he got out in 2010.

1 Q One second.

2 I have nothing further, so answer any questions the

3 Attorney General may have.

4 THE COURT: All right. Do you have any questions?

5 (Pause.)

6 MR. ZELENKA: Hold on.

7 CROSS-EXAMINATION BY MR. ZELENKA:

8 Q Ms. Esaw --

9 THE COURT: All right. Turn your --

10 A Yes, sir.

11 THE COURT: Turn your speaker off.

12 MS. MCMAHAN: Now turn your speaker on. Turn your

13 speaker up.

14 MR. ZELENKA: Okay.

15 Q (By Mr. Zelenka) Ms. Esaw, I'm Don Zelenka with the

16 Attorney General's office. How are you today?

17 A (No audible response.)

18 Q I just have a couple of questions. Can you hear me?

19 A Yes, sir.

20 Q Okay.

21 A I can hear you loud and clear.

22 Q Okay. Great. Prior to the trial, did you meet at all

23 with any of the lawyers representing --

24 A No.

25 Q Okay.

A No, sir.

1 Q Did you have conversations with Rickey Esaw, prior to his
2 trial --

3 A No, sir.

4 Q -- after the arrest?

5 A No, sir.

6 Q Okay.

7 A No.

8 Q And testified on direct that you were someplace else at
9 the night of the incident?

10 A No. All of us at the same place.

11 Q You were always -- and where was that?

12 A That's at -- right there, at the -- an apartment that we
13 were living, right there in West Columbia.

14 Q Okay.

15 A At Woodbine Park Apartments.

16 Q Okay. Were you at a birthday party?

17 A I had something -- but that was for my daughter.

18 Q Okay. So is it --

19 A My baby girl.

20 Q There you go. So is your daughter --

21 A (Indiscernible.)

22 Q So it was your daughter's birthday party that was going
23 on --

24 A Yes.

25 Q -- that day?

A Yes, sir.

1 Q Okay.

2 A And we cooked out and had fun and everybody just sit
3 around and just had a good time.

4 Q Okay. And you're indicating at some time --

5 THE COURT: Mr. Zelenka, can you turn the volume on your
6 computer up?

7 MS. MCMAHAN: It's already at 100.

8 THE COURT: Oh. It is.

9 MS. MCMAHAN: It's already at 100, Your Honor.

10 THE COURT: It is? All right. Okay. I'm not sure that
11 helps.

12 (Pause while addressing audio connections.)

13 THE COURT: All right. Just go ahead.

14 MR. ZELENKA: Okay.

15 Q (By Mr. Zelenka) And how long were you at that party?

16 A All day long, because, you know, it was at my mom's
17 house, and that's where I stay at.

18 Q Okay.

19 A Yeah.

20 Q And were there a number of people there?

21 A It was his girlfriend, his son -- that he always get
22 every two weeks -- my mom, and my two -- well, it was my
23 daughter, Zion -- you know, she was the baby girl, that's why
24 I had a party for her -- then my oldest daughter and my son.
25 I had a one-year-old son at the time.

- Q Okay. Was Rickey's girlfriend there?
- 1 A Yes. That's who he stays with.
- 2 Q Okay. Was she there the whole time?
- 3 A Yes.
- 4 Q Okay. Did you have any conversations with Rickey after
- 5 he was charged with his crime?
- 6 A No.
- 7 Q You never spoke to him?
- 8 A All I ever did was come to -- you know, when he was at
- 9 Lexington, when they had him locked up at the time. I took
- 10 him to visit him and sent him some money and all that, like,
- 11 you know, where he was at, at the county jail, Lexington.
- 12 Q Okay. Did the police ever talk to you?
- 13 A Well, I will tell you, the Detective Moore, I could tell
- 14 you that he was, like, harassing us the whole time. I mean,
- 15 he had -- with people -- he had to sit at the car that he --
- 16 you know, that he heard that was -- you know, that they said
- 17 murder suspect. The person who did it had a red and green
- 18 cars. And my brother only owned, like, a white car. And that
- 19 car been broke down, so he didn't have no vehicles at all to
- 20 drive anywhere.
- 21 Q Okay. But law enforcement came and talked to you at some
- 22 time?
- 23 A Yes, sir.
- 24 Q Okay.
- 25 A Harass.

Q Pardon me?

1 A I said he -- like, Detective Moore, they came to harass
2 our family. That's why -- that was one of the reasons why I
3 moved to Georgia, where I'm living at right now.

4 Q Okay. Now you described Rickey as never wearing gold
5 jewelry?

6 A No jewelries. The only -- never did. And this -- never
7 did.

8 Q Okay. Do you know Wilfred Pitts?

9 A That was somebody, like, a neighbor -- maybe, like,
10 across -- like, across the -- you know, the -- like, you go,
11 like -- when you go right there, over the little part right
12 there, where you go down on the stairway, but you had to go
13 all the way over the other side, past the bricks that go -- he
14 was living with his brother at the time.

15 Q Okay.

16 A And he would go off and on from his brother to, you know,
17 his mom. But he was living in Greenville, South Carolina at
18 the time.

19 Q But you knew Mr. Pitts; correct?

20 A Yeah. We knew him.

21 Q Okay.

22 A From his brother and his sister-in-law.

23 Q Okay. Was Mr. Pitts a friend of Rickey's?

24 A Well, they would see each other sometime but not all the
25 time, because Rickey, you know, he was a parent on-hands with

his -- at the time, his son was two years old at the time.

1 Q Okay.

2 A So you know, he would get his sone every two weeks, you
3 know I'm saying. And --

4 Q Okay.

5 A That's how the agreement was. So --

6 Q Well --

7 A -- anytime -- he had a son at the time. And he was
8 working on top of that.

9 Q Where were you living at the time of the trial?

10 A Where he was living at? He was living in Richmond
11 County.

12 Q Where were you living?

13 A In the same apartment my mama lived at, at Woodbine Park
14 Apartments --

15 Q Okay.

16 A -- West Columbia, South Carolina.

17 Q Okay. Did you go to the trial?

18 A Did I -- it never -- they never invited me to come to the
19 trial in anything.

20 Q Okay. So you weren't there. Did you know it was going
21 on?

22 A No, sir. No, sir.

23 Q You didn't know he was being tried?

24 A Only think, like I told you that -- you know what I'm
25 saying that, that, you know, the whole time when he was locked

up, like in Lexington County, you know what I'm saying,
1 because on top of -- every now -- we went to go see him. I
2 give him money and everything. Put money on his books when he
3 was at Lexington County Jail. On top of that -- there -- and
4 you know, they won't even, like, let you know what's going on.
5 Q Okay. I have no further --
6 A But I saw it in the news.
7 Q Go ahead.
8 A Yeah. I saw it on the news when they had on there saying
9 that, you know, Mr. Pitts and Mr. Esaw was charged for murder.
10 Q Okay. And again, what's your relationship to Rickey
11 Esaw.
12 A I'm his little sister.
13 Q Okay. All right.
14 MR. ZELENKA: No further questions.
15 THE COURT: All right.
16 Do you have any re-direct?
17 But you have to mute and turn your speaker off, Mr.
18 Zelenka.
19 MS. MCMAHAN: I have no further questions, Your Honor.
20 THE COURT: All right.
21 Thank you, Ms. --
22 MS. MCMAHAN: Thank you, Erica. We're done.
23 THE COURT: Thank you, Ms. Esaw.
24 MS. ESAW: Okay. You're welcome.
25 THE COURT: All right. You want to to pull Ms. Reid --

MS. ESAW: Can I go off camera?

1 MS. MCMAHAN: Yes, you can.

2 MS. ESAW: Okay. Thank you.

3 THE COURT: All right. So we get Ms. Reid back in here.

4 (Pause.)

5 THE COURT: All right. There we go.

6 MS. MCMAHAN: There you go. Ms. Reid, can you lower your
7 video just a little bit?

8 (Pause.)

9 MS. REID: All right. I'm here.

10 MS. MCMAHAN: Thank you.

11 Your Honor, this applicant calls Patricia Reid.

12 THE COURT: All right.

13 All right. Ms. Reid, if you'll raise your right hand.

14 PATRICIA REID,

15 having been called as a witness for the Applicant at
16 12:22 p.m., was sworn and testified as follows:

17 THE COURT: All right. Can you please state your full
18 name for the record and spell it?

19 MS. REID: My name is Patricia Ann Reid, P-a-t-r-i-c-i-a,
20 A-n-n, R-e-i-d.

21 DIRECT EXAMINATION BY MCMAHAN:

22 Q Ms. Reid, is Rickey Esaw your son?

23 A Yes, he is.

24 Q And the night that they allege that he committed a crime,
25 what were you guys doing?

1 A Okay, we was having a birthday party for my little
granddaughter.

2 Q Okay. Where were you guys having that?

3 A At my apartment.

4 Q And who all was there?

5 A It was some neighbors across the way. It was Rickey, his
6 girlfriend, Erica and her kids. We was out there playing
7 cards.

8 Q And did Mr. -- excuse me -- did Rickey have a working
9 vehicle at that time?

10 A No, he didn't.

11 Q What color is his car?

12 A He didn't have that car at the time. His white car was
13 break down. So he didn't had a car. His girlfriend had a
14 car.

15 Q What color was the girlfriend's car?

16 A I think her car was like, black. Yeah.

17 Q And was she also staying with you at the time, or were
18 Rickey and his girlfriend staying somewhere else?

19 A Rickey and his girlfriend stays (sic) someplace else.

20 Q And did you ever see him with any bruising or anything on
21 his face?

22 A No.

23 Q Does he wear jewelry that you know of?

24 A Never wear jewelry. He won't even wear jewelry. It's --

25 Q And did you bring him clothes to the trial?

- A Yes, I did.
- 1 Q What day did you bring those clothes on? Was it Tuesday?
- 2 A I think it was on a Tuesday, I think. It's been so long.
- 3 Q Who asked you to bring those clothes?
- 4 A His public defender told me to bring the clothes.
- 5 Q Did he asked you after trial had already started to bring
- 6 them?
- 7 A No. He asked me before the trial --
- 8 Q Okay.
- 9 A -- that he was going to trial and, you know, could I
- 10 bring him some clothes.
- 11 Q Were you there at the beginning of the trial?
- 12 A I was there beginning to the end.
- 13 Q Were you sitting outside most of the time?
- 14 A I was sitting outside because they refused to let me in
- 15 the courtroom.
- 16 Q Was that because you were also a potential witness?
- 17 A Yes.
- 18 Q And then that Monday, did you see the jury come in at
- 19 all?
- 20 A No.
- 21 Q Did you see Rickey at all that very first day when the
- 22 jury was being selected?
- 23 A No. I didn't see Rickey. I didn't see him that first
- 24 day because they wanted to let me in.
- 25 Q Okay. And when you brought the clothes on that Tuesday,

where did you bring them to?

1 A I took it to the public defender office.

2 Q Did you get them back the end of that day?

3 A Pardon me?

4 Q Did you get the clothes back the end of that day or at
5 the end of the week?

6 A I get it back that -- the day they sentenced him.

7 Q Okay. And did the -- his attorneys ever say they were
8 going to call you as a witness about being at the birthday
9 party?

10 A Yes.

11 Q But you never testified, right?

12 A I never testified because they never called.

13 Q Answer any questions the attorney general may have. Ms.
14 Reid.

15 THE COURT: All right. Cross-examination.

16 And you'll have to mute yourself, turn your volume off,
17 turn your (indiscernible) and unmute yourself.

18 CROSS-EXAMINATION BY MR. ZELENKA:

19 Q Ms. Esaw, how are you today?

20 A Can you hear me?

21 THE COURT: Have you got your volume on?

22 Q Ms. Esaw, can you hear me?

23 MS. MCMAHAN: Are you unmuted.

24 (Pause for audio connection issues.)

25 Q Ms. Esaw, can you hear me? Oh. Ms. Reid --

- A Yes, I can hear you.
- 1 Q -- can you hear me? I'm sorry.
- 2 A No. I can hear you.
- 3 Q Okay. Just a couple of questions.
- 4 You indicated that Rickey and his girlfriend were at the
- 5 party?
- 6 A Yes.
- 7 Q Okay. Were you there the whole time?
- 8 A Yes, I was.
- 9 Q Okay. And you told his attorneys that Rickey was at that
- 10 party that you were having that day?
- 11 A Yes.
- 12 Q Okay. And was his girlfriend there the whole time?
- 13 A Yes. Yes, she was.
- 14 Q Okay. And you described that you did not see Rickey ever
- 15 wear jewelry; is that correct?
- 16 A No.
- 17 Q Okay. Did you know Wilfred Pitts?
- 18 A Yes.
- 19 Q How do you know him?
- 20 A He used to come to his -- pardon me?
- 21 Q He's a friend of his?
- 22 A No. He used to come to his brother's house across the
- 23 way.
- 24 Q Okay.
- 25 A And -- because I know his brother -- his brother and his

sister-in-law.

1 Q Okay. You weren't in the -- anytime --

2 No. I don't have any further questions.

3 MS. MCMAHAN: I just --

4 THE COURT: All right. You're going to need to mute and
5 turn your volume off. Mr. Zelenka.

6 MR. ZELENKA: Oh. Okay.

7 Can I have one question?

8 Q (By Mr. Zelenka) Did the police talk to you?

9 A Yes. The police did -- yes. The policemen talked to me.

10 Q Okay. When did they talk to you?

11 A They came -- I think it came through -- I forgot what day
12 they came through. That's the day they was looking for him.

13 Q Okay.

14 A That's the day they were looking for him, and they came
15 to my house.

16 Q Okay.

17 A And was telling me that -- you know, they were looking
18 for Rickey. And they were telling me that he said he was
19 driving a red car, and one of them said he was driving a green
20 car. And I was telling him, I said, "Sir, he don't have no
21 car. How could he be driving that?"

22 Q Okay. Did you tell them about the birthday party?

23 A Yes, I did.

24 Q Okay. Did you tell them whether Rickey was there the
25 entire time?

1 A Yes. I told them that he was there entire time because
we was out there playing cards.

2 Q Okay. And did you tell the lawyers about the statement
3 you had given law enforcement?

4 A Yes.

5 Q Okay. Did the lawyers ever talk to you to tell you why
6 they didn't call you as a witness?

7 A No, the lawyer never did talk to me. Even after they
8 was -- he was sentenced, the lawyer never did talk to me.

9 Q Okay. All right. I have no further questions. Thank
10 you for the indulgence.

11 A Uh-huh.

12 MS. MCMAHAN: I just have one question, Judge.

13 THE COURT: Mute yourself, and turn your volume off
14 there.

15 MS. MCMAHAN: I just have one follow up, Your Honor.

16 THE COURT: Okay.

17 RE-DIRECT EXAMINATION BY MS. MCMAHAN:

18 Q Ms. Reid, did the detective, kind of, harass Rickey's
19 girlfriend?

20 A Yes. And he harassed us, also.

21 Q In what way?

22 A Because he keep coming back with different stories. And
23 he keep telling me that, "Oh, it was a red car. It was a
24 green car." And, you know, just -- what he -- this is what he
25 was wearing. This is what he was wearing. And I was telling

him, I said, "No --"

1 THE COURT: Ask her to be on the video.

2 A -- I said, "He wasn't wearing it --"

3 THE COURT: -- video. See you can --

4 A -- you know. So they kept coming back harassing me and

5 that's how my daughter moved to Atlanta. And I was there. Me

6 and my other son was there by ourself.

7 Q Okay.

8 MS. MCMAHAN: I have no further questions, Judge.

9 THE COURT: All right.

10 A Are you talking to me?

11 Q I have -- I don't have any more questions, Ms. Reid.

12 A Okay.

13 THE COURT: All right. Thank you.

14 She can sign off.

15 MS. MCMAHAN: You can you can log off now. You can hang

16 up.

17 A Okay.

18 Q Thank you.

19 A Thank you.

20 MS. MCMAHAN: Judge, at this time the applicant rests.

21 THE COURT: All right.

22 The State?

23 MR. ZELENKA: Thank you, Your Honor.

24 The State will call Jason Chehoski.

25 JASON CHEHOSKI,

having been called as a witness for the State at 12:33 p.m.,
1 was sworn and testified as follows:

2 DIRECT EXAMINATION BY MR. ZELENKA:

3 Q Jason, state your name for the record, please.

4 A Jason Chehoski.

5 Q And how are you employed?

6 A I am employed with the 11th Circuit Public Defender's
7 Office.

8 Q And how long have you been employed there?

9 A Just over eight years.

10 Q Okay. And what's your current role?

11 A I am the Chief Public Defender for Edgefield, Saluda, and
12 McCormick counties.

13 Q Okay. As part of that responsibility, did you have cause
14 to represent Rickey Esaw?

15 A Yes, I did.

16 Q And briefly advise the Court what he was charged with.

17 A He was charged with murder and armed robbery and
18 possession of a weapon during a violent crime.

19 Q Okay. And briefly, what was State's version of the case?

20 A The State's version of the case was that Mr. Esaw, along
21 with Wilfred Pitts, the co-defendant, went to the incident
22 location, attempted to rob the Vasquez family, and during a
23 struggle, I believe Mr. Esaw was the one who was accused of
24 firing the fatal shot. And I believe there was -- there may
25 have been some money that was taken, that's what -- for the

attempt -- for the armed robbery.

1 Q Okay. And what was his co-defendant charged with?

2 A Charged with murder and armed robberies, same charges.

3 Q Okay. And did you have the opportunity to meet with Mr.
4 Esaw?

5 A Yes.

6 Q Well, let me back up one step. Prior to you representing
7 Mr. Esaw, who represented him?

8 A Elizabeth Fullwood.

9 Q Okay. And had she then -- was she a member of the public
10 defender's office?

11 A Yes, she -- Ms. Fullwood was the Lexington Public -- the
12 county public defender at the time.

13 Q And in that role, she was representing Mr. Esaw, and at
14 some time you became primary counsel in the case; is that
15 correct?

16 A It is correct; in September of 2016.

17 Q Okay. And as part of that, did you interview Mr. Esaw?

18 A Yes, sir.

19 Q Approximately, how many times did you meet with him?

20 A I believe, approximately, a dozen times.

21 Q A dozen?

22 A Yes, sir.

23 Q Okay. And during those meetings, did Mr. Esaw indicate a
24 defense to the charges?

25 A We did pursue an alibi defense. He never indicated at

any time that he was there, that he was -- at any time that he
1 ever indicate that he was guilty.

2 Q Okay. And what was the nature of the alibi defense?

3 A Again, there was a birthday party that he was attending
4 for a family member.

5 Q Okay. And how did you investigate that?

6 A I -- before I came on the case, Ms. Fullwood had obtained
7 funding for a private investigator. And we hired these
8 investigations out of Saluda with Don Kneece and Jason Rushton
9 heading up the investigation.

10 Q Okay. And was the investigation that he was there the
11 entire time?

12 A The investigation did not bear that out. No, there was a
13 window of time where he had left, and I believe, had taken his
14 girlfriend-at-the-time's car, and that we could not account
15 for a window of time. And that coincided roughly with the
16 time that the incident took place.

17 Q Okay. And did the State had evidence of that break in
18 the time when the crime occurred?

19 A Yes, they did.

20 Q And was that evidence his girlfriend?

21 A Yes, it was.

22 Q And did the State have evidence whether or not the
23 defendant was identified at any time at the scene of the
24 incident?

25 A Yes, there was -- I know there was one witness who

1 testified. There may have been a second one as well -- I was
2 just reviewing my notes -- who would have been -- who
3 picked -- one picked Mr. Esaw out of a photo lineup. And how
4 did the defendant reveal the alibi to you?

5 A It was during a face-to-face meeting.

6 Q Okay. Did the defendant give a statement?

7 A Yes. He did speak to law enforcement.

8 Q And what -- briefly summarize his statement if you can.

9 A In his statement, he did admit to being an accessory. I
10 think -- and he also admitted to being present at the scene.

11 Q Okay. And how did that information impact what you did
12 in your defense?

13 A It certainly didn't help. Everything -- it put us in a
14 little -- in a bit of a hole, because everything that we're
15 trying to investigate to establish that alibi would also have
16 to overcome that admission.

17 Q Okay. And as part of that, did you communicate with
18 family members --

19 A Yes.

20 Q -- in the alibi?

21 A Yes.

22 Q Did you communicate with Patricia, the defendant's
23 mother, and his sister, Erica?

24 A I believe so. Yes.

25 Q Okay. And were their versions consistent with Rickey's
version?

1 A Best of my memory, there was still -- they could not
2 account for Mr. Esaw's location at the time that the incident
3 took place.

4 Q Okay. Did you share that information with your client?

5 A Yes.

6 Q And what if anything occurred after that -- as a result
7 of that?

8 A We continued to investigate, and then we also wanted to
9 take steps to try and -- again, hurt the State's best points
10 as best we could through -- you know, we investigated the DNA.
11 We also retained an expert in cross-racial identification.

12 Q Okay. How did you investigate the DNA? And why does the
13 Court -- give him some context --

14 A Right.

15 Q -- of the DNA was.

16 A Well, there was there was DNA on a bracelet. And I
17 believe that bracelet was being worn by Mr. Pitts. There was
18 also a beer can and beer bottles, some, I think, that were
19 alleged to have been used during the fight that broke out
20 between Mr. Esaw and some of the complaining witnesses. And
21 we wanted to see if there was DNA on that as well --
22 essentially, try to see if there is any independent,
23 scientific evidence that would place Mr. Esaw there.

24 Q And what was the result of that?

25 A At best, I think it was inconclusive to ruling out Mr.
Esaw. Certainly Mr. Esaw was ruled out as anybody wearing --

as someone wearing the bracelet.

1 Q Okay. With respect to to the confession, did you do a
2 Jackson V. Denno hearing?

3 A Yes, we did.

4 Q And what was the purpose of that?

5 A To determine the voluntariness of that statement. And
6 you know, before that hearing, we, you know, spoke to Mr. Esaw
7 about the nature of the hearing, the purpose of it, and
8 determine if he wanted to testify as to how he felt on that.

9 Q Okay. And did he do so?

10 A He did testify. Yes.

11 Q Okay. Was a statement introduced?

12 A I would -- I don't remember. I would defer to the
13 record. I imagine it was because it was certainly helpful to
14 the State.

15 Q With respect to your further investigation, why did you
16 call the identification of the (indiscernible)?

17 A We wanted to have the jury understand that when a member
18 of one race or ethnicity picks out someone from another, what
19 problems can arise from that, what is looked for, what can be
20 overlooked -- especially in members of African American
21 heritage, whether it's skin tone -- and other features that
22 people of not of that heritage would not know to look for.

23 Q Okay. And she testified in front of the jury and then in
24 a in-camera proceeding; right?

25 A Correct.

Q Did you present any other defense witnesses at trial?

1 A No, we did not.

2 Q Okay. Why did you choose not to call the mother after
3 you sequestered her?

4 A I didn't --

5 Q Was it something that occurred at trial that changed a
6 strategy? Or was that all --

7 A I don't remember, going back -- again, it's five, six
8 years. But I believe it was -- I don't believe that there was
9 anything that her mother could testify to that would go to our
10 theory of defense. It would be consistent with that.

11 Q Okay. And had information about the existence of the
12 party been presented at the trial?

13 A I believe so.

14 Q Okay. Through his statement, did he ever indicate he was
15 at the party that day?

16 A I -- again, I believe so. I would defer to the record.

17 Q All right. Let me ask a couple of other questions.

18 Was there any reason to object to the indictments in this
19 case?

20 A Not that I can recall.

21 Q Okay. Do you review indictments prior to the trial?

22 A I get them as soon as I can, and do review them.

23 Q And why do you review them?

24 A Past experience have come -- and I've had either faulty
25 indictments that can be quashed, or again, I think -- and case

law requires that any objection to flaws in the indictment
1 have to be done before the jury's picked.

2 Q Okay. During the trial, there were frequent objections
3 made or sidebars that occurred during the trial. Did you
4 discuss what occurred at the sidebars with your client?

5 A I don't think so.

6 Q Why not?

7 A We're in the middle of a witness, either myself or Ms.
8 Fullwood, is preparing for a cross-examination. And after
9 every sidebar, we always made a note to put matters that were
10 discussed on this -- during a sidebar on the record at the
11 next break in testimony.

12 Q Okay. And as far as you know, did that occur?

13 A Yes.

14 Q Okay. In your investigation, did you provide discovery
15 and evidence to your client?

16 A Yes.

17 Q Did that -- did he seem to understand the nature of the
18 State's case against him?

19 A Yes.

20 Q Did -- when did you all learn that Mr. Pitts was going to
21 testify against him?

22 A If I may refer to my notes?

23 Q Please.

24 (Pause.)

25 A First notes I have that indicated were in October 10th of

2017, so a couple weeks before the trial.

1 Q Okay. Did you indicate that -- did you let your client
2 know that that was a possibility?

3 A I don't have it anywhere in my notes, but I have to
4 believe I did. It would have been -- it was something that we
5 should be anticipating.

6 Q Okay. Jumping to another subject, there's an allegation
7 that your client appeared in front of the jury in a jail
8 uniform and restraints. Do you have any knowledge about that?

9 A No.

10 Q When you saw your client in court, how was he dressed
11 during the trial?

12 A He was dressed wearing civilian clothes. However, during
13 the pretrial hearings that took place after jury selection,
14 they -- court security may have required him to put back on
15 the uniform. But all of those hearings took place outside the
16 presence of the jury.

17 Q Okay. Did -- there were testimony from Christie Vasquez
18 about the incident, and subsequent to the testimony of the
19 statement that was given to the police was introduced after
20 cross-examination by the defense. Do you recall that?

21 A I do not.

22 Q Okay.

23 A And I would defer to the record.

24 Q All right. And the same thing with Raphael Isgare, who
25 testified for the State. The defense cross-examined him, and

on reply, the State introduced the statement given. Do you --
1 and you did not object -- or Ms. Fullwood did not object to
2 that.

3 A Okay.

4 Q Do you recall that occurring?

5 A I don't recall. Again, I would defer to the record.

6 Q Okay. Same thing with Franklin Vasquez; State puts the
7 evidence in of his statement to law enforcement; are you going
8 to defer to the record on that one also?

9 A Yes. Yes, I will.

10 Q And there were -- information about a Crime Stoppers' tip
11 that was introduced; do you recall that?

12 A Yes.

13 Q And it came from Miles Raul. Did you seek to object to
14 that, if you recall?

15 A I don't recall.

16 Q Do you have the transcript in front of you?

17 A I do.

18 Q Look at Page 344.

19 (Pause.)

20 MS. MCMAHAN: And what page did you say, Don?

21 MR. ZELENKA: 344.

22 A All right. Page 344, is -- it looks like it's the direct
23 examination of John Moore?

24 Q Yes.

25 A Okay.

MS. MCMAHAN: Miles Rawl.

1 Q And now look at page 377.

2 (Pause.)

3 A Yes, sir.

4 Q (Indiscernible.)

5 A Oh. Okay. I'm definitely looking at the wrong one.

6 Okay.

7 Q Now, at the top of that, he's talking about a
8 Crimestoppers' tip about possible suspects. Do you see that?

9 A Yes.

10 Q And you didn't object to that statement by Miles Rawl at
11 that time?

12 A I did not.

13 Q All right. Now look at Page 377.

14 (Pause.)

15 A Yes.

16 Q And what does that indicate?

17 A There is an objection.

18 Q And what was your objection?

19 A It was to hearsay.

20 Q Okay.

21 (Pause.)

22 Q Let me ask you to refer to page 381, testimony by Barry
23 Sowers, Line 5 through 7: "I called him on the phone and
24 asked him if he knew Rickey Esaw, and he said he did."

25 A Uh-huh.

- Q No objection was made to that.
- 1 A That's correct.
- 2 Q Was there a strategic reason for not making an objection
3 to that? Or what would your objection have been?
- 4 A There would have been an objection to hearsay. There was
5 not a strategic reason for failing to object.
- 6 Q Okay.
- 7 A That I can recall.
- 8 Q With respect to -- and you did object to the admission of
9 the confession?
- 10 A Yes, we did.
- 11 Q In the Jackson V. Denno hearing?
- 12 A Yes.
- 13 Q And what would have been your objection to the DNA
14 evidence that came in against Mr. Pitts, in hindsight?
- 15 A In hindsight, I guess it would have been to relevance,
16 since it would be to Mr. Pitts and not Mr. Esaw.
- 17 Q Okay. And what was the reason that you failed to call
18 Patricia Esaw, again, to testify?
- 19 A I believe that the reason was that we -- I don't -- the
20 reason we didn't call her is that we could not establish a
21 firm alibi for the time -- or for Mr. Esaw's whereabouts for
22 the time that we needed her to establish it.
- 23 Q Okay. Jumping back to the 911 call, did you play that
24 for the defendant? Had he ever heard that --
- 25 A I --

Q -- 911 call?

1 A I don't remember.

2 Q Okay. There was an objection made to the 911 call by
3 you. And the objection was overruled by the trial judge in
4 the case. Did you -- had you listened to all the 911 call
5 before the trial?

6 A I know I'd listened -- I don't know if -- I think I did.
7 I can't say for sure, though.

8 Q Okay. But the 911 call was played to the Court prior to
9 its introduction, wasn't it -- if you recall?

10 A Yes.

11 Q And the judge allowed, over your objections, for the 911
12 call to be played to the jury in full. Isn't that correct?

13 A Yes, I believe so. I would - again, I would defer to the
14 record.

15 Q Okay.

16 MR. ZELENKA: Court's indulgence.

17 (Pause.)

18 Q In the application, they also asserted that you failed to
19 object to an instruction on transferred intent for attempted
20 murder. Was transferred intent instructed in this case?

21 A I would defer to the record.

22 Q Okay.

23 MR. ZELENKA: I have no further questions.

24 THE COURT: Cross-examination?

25 MS. MCMAHAN: Just briefly, Your Honor.

CROSS-EXAMINATION BY MS. MCMAHAN:

1 Q Were you here earlier when Mr. Esaw was talking about
2 some replacement warrants?

3 A Yes.

4 Q Do you recall what the issue with that was?

5 A I do not.

6 Q Do you remember if he had some more -- well, he --
7 obviously, based on the clerk's records that were admitted, he
8 had one set of warrant numbers, and then they changed to a
9 different set of warrant numbers. Do you remember anything
10 about that?

11 A I remember there being a change. And again, maybe --
12 there may have been a flaw in the original warrant as well.

13 Q Okay. And the issue with the transferred intent, did you
14 see any issue with a request for transfer and intent when it
15 came to attempted murder?

16 A Probably not at the time, but in hindsight, yes.

17 Q Would that be the *King* case that basically says you can't
18 be guilty of attempted murder by implied malice, because it
19 does not encompass the essential specific intent to kill?

20 A Correct.

21 Q And then -- but you didn't object to that. It wasn't
22 preserved for the record; right?

23 A If it's not in the record, I didn't object to it. No.

24 MS. MCMAHAN: Judge, if you just note, Footnote 1 in the
25 appellate's -- the final brief of appellant, I think it kind

of goes over the issue with the transferred intent

1 instruction. Ms. Hackett's footnote kind of addresses that
2 perfectly for me. So I will adopt her argument in that she
3 does note that it was not preserved for appeal or for
4 argument.

5 Q (By Ms. McMahan) In the 911 call --

6 THE COURT: For the malice -- inferred malice?

7 MS. MCMAHAN: Yes, Your Honor, to the bottom Page 2.
8 It's her Footnote 1.

9 THE COURT: All right.

10 Q (By Ms. McMahan) And the 911 call -- although you did
11 object to the 911 call, did you see any reason to request
12 otherwise that it be redacted if it was going to come in?

13 A Not that I can recall.

14 Q The ending of it wasn't possibly prejudicial to the --
15 Mr. Esaw?

16 A I don't remember what the ending said. Again, if I
17 didn't object to it or I didn't make the motion for the
18 redaction, then I did not. If it's not in the record, I
19 didn't do it.

20 Q And at one point -- I'm sorry. I'm kind of jumping all
21 over the place a little bit here. I apologize for that.

22 Did Mr. Esaw ever tell you that he didn't want Ms.
23 Fullwood on his case at all?

24 A I don't remember him saying so. I remember asking Ms.
25 Fullwood to sit with me because she did have experience -- she

was familiar with the case and has many years more experience
1 than I do.

2 Q But she didn't tell you that she had been relieved from
3 Mr. Esaw's case earlier?

4 A No, she didn't. My understanding was that she had a high
5 number of murder cases that were pending and was reassigning
6 this one to me to help lighten her load.

7 Q And so you weren't aware of the letters that Judge
8 Keesley had responded to Mr. Esaw and had sent to you guys and
9 to the clerk of court?

10 A I was not.

11 Q And did Mr. Esaw tell you that the detectives were
12 harassing his girlfriend and his parents -- his mom and
13 everything?

14 A I believe he mentioned that, at least in reference to his
15 girlfriend, that they were threatening to charge her.

16 Q And he was actually identified after multiple lineups;
17 right?

18 A If that's what the record indicates, yes.

19 Q Well, there was an initial lineup where he wasn't the
20 suspect yet.

21 A Correct.

22 Q And there -- once he became a suspect, they did more
23 lineups?

24 A Correct.

25 Q And I believe Franklin Vasquez was the only person that

was actually able to identify him?

1 A That's correct.

2 Q Okay. And then in the trial, specifically on Page 153,
3 Line 12, I believe it was during the Neil V. Biggers hearing,
4 but he point to Mr. Esaw in the court and says "He's the one
5 sitting there in the orange jumpsuit."

6 A Okay. Yes. That'd be -- again, that'd be during the
7 pretrial hearing, outside the presence of the jury.

8 Q But the jury was just selected prior to this; right?

9 A The jury was selected prior, and then we broke for lunch
10 and did pretrial afterwards.

11 Q And do you remember talking to his mom and asking her to
12 bring clothes?

13 A Yes.

14 Q Did -- were you here for her testimony when she said she
15 didn't bring him on that Monday? She only brought them on
16 Monday? Well, we may have provided clothes -- we probably
17 provided clothes for him on Monday --

18 Q You-all have a --

19 A -- out of our own supplies.

20 Q You-all have, like, a clothes closet or something?

21 A Correct.

22 MS. MCMAHAN: Court's indulgence, Your Honor.

23 (Pause.)

24 Did you ever sit and go over all the discovery with him at the
25 detention center?

- A Can I refer my notes, please?
- 1 Q Sure.
- 2 (Pause.)
- 3 A I don't think we did by page by page, but during the many
- 4 meetings we had, we did over individual pieces. And it looks
- 5 like he may have already been provided discovery before I came
- 6 on board.
- 7 Q By Ms. Fullwood?
- 8 A Yes.
- 9 Q Okay. And the audio -- you said his statement was audio.
- 10 Were any of the other witness statements by audio or video?
- 11 A I don't remember. I don't think so, but I don't -- I'm
- 12 not sure.
- 13 Q Do you remember when he was served with LWOP Notice?
- 14 A Yes.
- 15 Q When was that?
- 16 (Pause.)
- 17 A September 13th of 2017 -- or -- I'm sorry, September
- 18 16th.
- 19 Q And he went to trial about a month later?
- 20 A Correct.
- 21 Q And were there any plea offers or anything in this case?
- 22 A Yes. The offer, I think, was plead to murder for 30.
- 23 Q Was that relayed to Mr. Esaw?
- 24 A Yes.
- 25 Q Did he decline that offer?

A Immediately.

1 Q Was that offer still on the table by the time you guys
2 went to trial?

3 A No.

4 Q Was that offer still on the table after the LWOP notice
5 was heard?

6 A I don't believe so.

7 (Pause.)

8 Q Did you see any reason to challenge the LWOP Notice based
9 on his prior charges? Did they all qualify (indiscernible)
10 convictions?

11 A This was his second most serious charge. He had -- I
12 believe he served time for an armed robbery out of Jasper
13 County.

14 (Pause.)

15 Q Did they bring up his prior record during trial or
16 sentencing? Do you remember?

17 A The only time they would have brought up the prior record
18 is when -- during his testimony in the Jackson versus Denno
19 hearing or during -- or after the verdict. Again, I would
20 defer to the record on both.

21 Q Are the judge's hands tied once an LWOP notice --

22 A I'm sorry?

23 Q Are the judge's hands tied in regard to an LWOP notice
24 once it's served?

25 A Yes, I believe so.

1 Q And did you see any reason to object to any of the
statements of Mr. Vasquez or Christy Vasquez coming in?

2 A I mean, I can't think of any. I mean, I'm sure there
3 should be good reason -- best evidence or obviously prior
4 consistent -- you know, prior consistent statements would be
5 basis. Again, if I didn't object to it, I didn't object to
6 it. It was not part of the strategy.

7 Q Okay.

8 MS. MCMAHAN: One -- Court's indulgence.

9 I have nothing further, Your Honor.

10 THE COURT: All right.

11 Redirect?

12 MR. ZELENKA: Court's indulgence.

13 (Pause.)

14 REDIRECT EXAMINATION BY MR. ZELENKA:

15 Q Your -- the State's theory in this case, on the shooting
16 in the leg of Franklin, was "hands of one hand, the hand of
17 all," wasn't it?

18 A Yeah. I think -- if that's what's in the transcript,
19 then, yes.

20 Q Okay. Do you recall a specific instruction on
21 transferred intent being given?

22 A I do not.

23 Q Okay.

24 (Pause.)

25 MR. ZELENKA: No further questions.

THE COURT: All right. You may step down.

1 THE WITNESS: Thank you.

2 THE COURT: You have, what, one more witness?

3 MR. ZELENKA: We've got two.

4 THE COURT: Are they -- how long do you think they'll be?
5 I mean, do we want to go -- I mean, we going to -- it's five
6 after one now. And I'm just --

7 MR. ZELENKA: Well, Beth Fullwood, was also the lawyer --

8
9 THE COURT: Right. I'm not saying -- I mean, I know who
10 they are. But what -- I mean, how long do you think they'll
11 be if --

12 MR. ZELENKA: I think Beth would be a half an hour.

13 THE COURT: Let's take a short break. And then I guess
14 we'll -- because I'd like to be able to finish this one before
15 lunch --

16 MR. ZELENKA: Okay.

17 THE COURT: -- if that's all right with everybody.

18 Okay. Short break, and then we'll proceed.

19 (Recess from until 1:06 p.m. to 1:13 p.m.)

20 THE COURT: All right. State, call your next witness.

21 MR. ZELENKA: The State calls Elizabeth Fullwood.

22 (Pause.)

23 THE COURT: All right. Ms. Fullwood, if you could turn
24 on your video and unmute.

25 All right. Can you hear us, Ms. Fullwood?

1 MS. FULLWOOD: (Indiscernible). Can you hear me?

2 THE COURT: Yes.

3 MS. FULLWOOD: Okay. Then we're -- that's fine.

4 THE COURT: All right. Will you raise your right hand?

5 ELIZABETH FULLWOOD,
6 having been called as a witness for the State at 1:14 p.m.,
7 was sworn and testified as follows:

8 THE COURT: And state your full name for the record.

9 MS. FULLWOOD: Elizabeth C. Fullwood.

10 DIRECT EXAMINATION BY MR. ZELENKA:

11 Q Ms. Fullwood, state your name for the record. Oh, you
12 just did.

13 MS. MCMAHAN: She just did.

14 Q I apologize.

15 How are you currently employed?

16 A I'm retired from the 11th Circuit Defender's Office as of
17 March the 31st of this year.

18 Q Okay. And how long had you been practicing law in South
19 Carolina?

20 A Since November 1979.

21 Q And how were you employed over your course of career?

22 A Primarily in the field of criminal defense. I worked
23 briefly for about a year for a unrelated state agency. I went
24 from there to the Sumter County Public Defender's Office. I
25 stayed there 18 months, 2 years, and went to work for

1 appellate defense, stayed there eight years. I was briefly in
2 private practice and became chief public defender for
3 Lexington County in 1991 and stayed there until earlier this
4 year.

5 Q Okay. Thank you. And as part of your practice in
6 Lexington County, were you appointed counsel for Mr. Rickey
7 Esaw?

8 A I was.

9 Q Okay. And did you participate in the trial with Mr.
10 Esaw?

11 A I did.

12 Q In your representation, did you meet with Mr. Esaw?

13 A I did.

14 Q And do you have a guesstimate as to how often you met
15 with him?

16 A I do not. I did not have access to that file at this
17 time. It's over at the public defender's office. So I really
18 cannot say --

19 Q Okay.

20 A -- any degree of exactness, how many times I met with
21 him.

22 Q Did you -- in your meetings with him, did you go over the
23 facts of the case and the charges against him?

24 A Yes.

25 Q Did you have -- get discovery while you were representing

him?

A Yes.

Q Did you go over the discovery with Mr. Esaw?

A Yes.

Q What type of -- when you were representing him, before Mr. Chehoski got involved, what was your theory or Mr. Esaw's theory on whether he was involved in the crime or not?

A It's my recollection that he was just sort of an innocent bystander.

Q Okay. And --

A Like that's -- again, that's my recollection. It's been seven years. I do have access to my notes anymore. But it was either innocent bystander or it wasn't me, I wasn't there (indiscernible).

Q Okay. Did you review the indictments once you received them from the government?

A Yes.

Q And --

A Absolutely.

Q Why did you do that?

A That's what I would always do, because it's not uncommon to find some defects in an indictment.

Q Okay. But did you find any in these indictments?

A I did not.

Q Is that why you didn't file a Motion to Quash?

1 A That's right. If I had, I would have filed that motion.

2 Q All right. During the trial, there were sidebar
3 conferences that occurred, and you were involved in some of
4 those sidebar conferences. Did you relate to Mr. Esaw what
5 occurred on those conferences after them? Or was it handled
6 in a different way?

7 A It -- there probably wouldn't have been right after them,
8 because when you're having side bars, that's because the judge
9 and other person they'll want to move case along. So with
10 side bars, you can't be spending time explaining the sidebar
11 and listening to what's happening in the courtroom at the same
12 time. I would always tell my clients during a break what the
13 sidebar was about, or almost always I would (indiscernible) --
14 the substance of the sideboard are on the record to preserve
15 any objection I made at the bench, but the court reporter
16 didn't have a chance to record it.

17 Q Okay.

18 A So in some way or another, that's what one of my clients
19 at trial would know what was going on at the sidebar.

20 Q Okay. Do you recall a theory that a defense in this case
21 would be an alibi defense?

22 A I'm not sure about that. I'm not sure about that. I
23 know he got, I think, it was David Dougal to look into that --

24 Q Okay.

25 A -- and see how strong the one was or if it even had one.

1 Now, he's now deceased, but he was an excellent investigator,
2 probably the best I ever worked with in all the years I
3 practiced law. And if there was an alibi, David Dougal would
4 have found an alibi. And if it was a strong alibi, we would
5 have used it.

6 Q Okay.

7 A I also recall going with Mr. Dougal and Mrs. Schakowsky
8 and I think a paralegal from my office, out to Rolling Meadows
9 and looked at scene of crime, looked at any street lights, any
10 porch lights, the layout of the land, so we all have a vision
11 in our heads that would be more or less correct.

12 Q Okay.

13 A As to where things were happening as we heard testimony.

14 Q Were you on when the defendant's mother and sister
15 testified today in this proceeding?

16 A I heard them. Yes.

17 Q Okay. Was that consistent with information that the
18 defendant was claiming that at some point in time that he was
19 at a birthday party?

20 A In my reflection (indiscernible), said it could be. If
21 it is, it would probably be in Mr. Dougal's report.

22 Q Okay. Do you recall why -- in your role -- why the
23 mother was sequestered during the trial?

24 A I don't recall. She might have been subpoenaed.

25 Q Okay.

1 A I'm not sure why we would have used her, though, if I'm
2 recalling correctly, she was the one trying to say the car
3 involved was green or red.

4 Q Okay. With respect to the discovery, you provided
5 discovery -- according to your testimony earlier -- to the
6 defendant. Did you go over that discovery with him, or leave
7 it with him?

8 A Yes.

9 Q Would that --

10 A Yes.

11 Q And you left it with him?

12 A Yes. That was the standard practice for me and for, I
13 think, all in the office was to, once we got discovery, we
14 would send a copy of the discovery to the client, unless it --
15 there's something in the discovery that you just did not show
16 anyone else.

17 Q Okay. With respect to the allegation concerning him
18 having jail clothes on in front of the jury. Do you ever
19 recall that situation happening while you were representing
20 him at the trial?

21 A That didn't happen. That did not happen. I think what's
22 being referred to is, normally after jury selection in the
23 morning, the jury's sent home for the rest of the day, and
24 after the lunch break, we had the pretrial motions. During
25 the pretrial motions, the defendant is in the jail clothing

1 and is manacled or after whatever as a safety precaution,
2 because no jurors are present at that time.

3 Q Okay. Was the defendant present during jury selection,
4 or was it just the lawyers? Do you recall?

5 A No. He would have been there.

6 Q Okay. And when he was there, was he wearing normal
7 clothes?

8 A Yes.

9 Q Okay. With respect to some testimony that came in from
10 Christy Vaughn and -- do you recall that cross-examination of
11 Christy Vaughn? And let me refer you -- do you have the
12 transcript there?

13 A I do.

14 Q Can you refer to page -- excuse me -- I had it, and all
15 of a sudden I lost it.

16 Okay. Refer to Transcript Page 266, and see if that
17 refreshes your recollection.

18 A (Indiscernible) them right now.

19 (Pause.)

20 Q Yeah. My question to you is --

21 A I'm not quite there yet.

22 Q Okay.

23 A (indiscernible.)

24 (Pause.)

25 A Okay. I'm on 266.

1 Q Okay. And my question to you is the State after -- or
2 before that had presented testimony from Christy Vaughn. And
3 then in the cross-examination, you referred to the statement
4 by the witness. Do you recall that? It's two pages before.

5 A Yes. Yes.

6 Q Do you recall why you didn't object to the introduction
7 of the statement by the State, which was States Exhibit 10?

8 A Yeah, for -- well, for one reason, I had, I think, sort
9 of insinuated that she'd later on (indiscernible) her
10 statement and basically insinuated that what she was
11 testifying, it was fabricated and (indiscernible) for trial,
12 and that is something that would let a statement like that in
13 anyway. And in addition to that, I didn't ask her about the
14 prior statements. So I thought that it was probably
15 admissible under the rule of completeness.

16 Q Okay. And -- but similar -- the Rule of Completeness is
17 Rule 106?

18 A Yes.

19 Q Okay. And similar situation with Raphael Isagari at Page
20 272?

21 A That's right.

22 Q And that was the same reason that you didn't object for
23 that?

24 A That's right. That's correct.

25 Q And with respect to the statement of Franklin Vasquez at

1 page 289?
2 A Yes.
3 Q Okay. Let me ask you to refer to Page 381 --
4 A Give me a second.
5 Q -- which is the testimony of Barry Sowers at Lines 5
6 through 7?
7 (Pause.)
8 A And that's 389 that we're looking for?
9 Q 381. I may have misspoke.
10 A (Indiscernible.)
11 Q Yeah. Lines 5 through 7.
12 A (Indiscernible.)
13 (Pause.)
14 Q Do you see that testimony yet?
15 A Yeah. Yeah, I see. Yeah.
16 Q Okay. The Lines 5 through 7, Mr. Sowers testifying,
17 "Knew an individual that worked up there on the maintenance
18 team. And I called him up on the phone and asked him if he
19 knew Rickey Esaw, and he said, 'Yes.'"
20 And based upon that information, what did you do next?
21 Was there an objection that you thought about or considered
22 with respect to the statement that, "I called him up on the
23 phone and asked him if he knew Rickey Esaw," and he said he
24 did?
25 A Well, you couldn't make a hearsay objection. However,

1 it's a sort of situation where the fact that he said he knew
2 Rickey Esaw didn't go to the truth of the matter in the
3 assertion, but as the next question was based on that
4 information, which you do -- in other words, it just explained
5 why the officer took the next step that he took.

6 Q Okay. And you had a Jackson V. Denno hearing in this
7 case; correct?

8 A Yes.

9 Q And your client testified in that particular hearing;
10 correct?

11 A I'd have to look at that. I think he did, but I'm not
12 sure.

13 Q Do you want to let the record speak for itself on that?

14 A That's probably the best way to known for sure. Yeah.

15 Q Okay.

16 A I could look it up real quick if you'd like.

17 Q I can -- He testified on Page --

18 A It looks he did -- yeah, he looks like he did.

19 Q Let me ask this. Did your client give you a defense to
20 the introduction of the confession?

21 A Not to my recollection.

22 Q Okay.

23 (Pause.)

24 MR. ZELENKA: I don't have any further questions of this
25 witness, Your Honor.

THE COURT: All right.

1 Cross-examination?

2 MS. MCMAHAN: Just briefly.

3 (Pause.)

4 MS. MCMAHAN: Sorry, Judge. I'm just trying to get my
5 speaker set up.

6 CROSS-EXAMINATION BY MS. MCMAHAN:

7 Q Ms. Fullwood, do you recall Mr. Esaw not wanting you as
8 his attorney?

9 A No. But he'd make kind of (indiscernible) why Mr.
10 Chehoski ended up on the case.

11 Q If he didn't want you as his attorney and Mr. Chehoski
12 was the reason -- and that was the reason why Mr. Chehoski
13 took over, did he ever express that to you that he didn't want
14 you to even help out with the trial or anything?

15 A No. I think that was sort of the -- Mr. Chehoski agreed
16 to take the case, but I needed to agree to sit second chair,
17 since I'd been on the case and not just leave him on his own
18 (indiscernible).

19 Q Do you mean -- "he," you mean Mr. Chehoski?

20 A Yeah.

21 Q Had -- you and Mr. Esaw, did y'all have any, like,
22 arguments or anything?

23 A Not that I recall.

24 Q And the PI that you guys had hired, do you remember it
25 being Don Kneece?

A I remember it being Dave McDougal (phonetic).

1 Q Okay.

2 A But, you know, Mr. Chehoski probably has the file. And
3 so, whoever was the investigator, their invoice is in there.

4 Q Okay.

5 MS. MCMAHAN: Court's indulgence.

6 (Counsel and client confer.)

7 Q Earlier, when Mr. Esaw testified he had presented some
8 letters that were in the clerk's file that Judge Keesley had
9 written him. One of those letters indicated that you were no
10 longer on his case. Do you recall if you had a conversation
11 with Judge Keesley about that, or that may have been somebody
12 else within your office?

13 A I don't remember having a conversation with Judge Keesley
14 about it.

15 Q Okay.

16 MS. MCMAHAN: I have nothing further Your Honor.

17 THE COURT: All right.

18 Any redirect?

19 MR. ZELENKA: Nothing on redirect, Your Honor.

20 THE COURT: All right.

21 Thank you. You may log off.

22 And that -- we don't need anything else from WebEx;
23 correct?

24 MS. MCMAHAN: No, Your Honor.

25 MS. FULLWOOD: May I be excused?

THE COURT: You may be.

1 MR. ZELENKA: Thank you.

2 MS. FULLWOOD: Sir?

3 THE COURT: Tell her she may be. Yes, ma'am. You're
4 excused.

5 MS. FULLWOOD: Thank you.

6 THE COURT: All right. Call your next witness.

7 MR. ZELENKA: Okay. Court's indulgence one moment.

8 (Pause.)

9 MR. ZELENKA: have no further witnesses, Your Honor.

10 THE COURT: All right.

11 Any further evidence by the applicant?

12 MS. MCMAHAN: None, Your Honor.

13 THE COURT: All right. I'll be glad to hear closings.

14 MS. MCMAHAN: Judge, one, we'd just ask that you take the
15 time to review the record as a whole. I'm including the
16 entire trial transcript.

17 But, specifically, we would point out our issues where,
18 you know, there is case law that states the issues with that
19 transferred intent jury instruction, specifically noted in the
20 Final Brief of Appellant.

21 We believe that we have presented adequate testimony in
22 regards to potential alibi defense that should have been
23 presented to the jury. And if it had been presented, the
24 outcome of the trial would have been different. We --

25 THE COURT: And discuss this transferred intent. I mean,

King -- *State V. King* talks about you have to have specific
1 intent. But, I mean, how's that rule out a transferred
2 intent? I mean, do you have another case that --

3 MS. MCMAHAN: Well, Judge, it's just that the -- you
4 know, the trial judge instructed the jury that malice has to
5 be proven for attempted murder, and it can be inferred. I
6 think it's the fact that you can infer that malice incurred by
7 transferred intent of Mr. Pitt's shooting the victim. None of
8 that was really objected to or preserved for an appellate
9 issue which would have been a great appellate issue.

10 THE COURT: Well, they did object to it, didn't they?

11 MS. MCMAHAN: No, they did not.

12 THE COURT: After the -- they objected --

13 MS. MCMAHAN: But they didn't object contemporaneously or
14 before the instruction was even read. So it was not preserved
15 for appeal.

16 THE COURT: Okay. Because they did afterwards. They
17 said, "We take exception to your charge of malice."

18 MS. MCMAHAN: Yes, but I would not say that that's an
19 objection.

20 THE COURT: Well, when did that -- I mean, what if they
21 didn't know exactly what he was gonna say until he says it?

22 MS. MCMAHAN: Well, I mean, we don't know that. That's
23 the problem.

24 THE COURT: But, I mean, they made an exception after the
25 charge. And usually at that point, they can come back in and

correct any of the statements unless some were waived.

1 MS. MCMAHAN: Well, the biggest issue is you can't unring
2 the bell once it's --

3 THE COURT: No.

4 MS. MCMAHAN: -- already been wrung. So I mean,
5 regardless of whether or not you instruct the jury, that's
6 going to be -- you know, take that back/strike it; it's
7 already out there.

8 THE COURT: But I guess my question is, was it not
9 preserved enough to where it (indiscernible) --

10 MS. MCMAHAN: I don't believe it was preserved at all. I
11 think if it was preserved intact, it would have raised it.

12 THE COURT: So -- all right. I'm --

13 THE COURT: And she noted in her footnote, she did not
14 think it was preserved or she would have raised it.

15 THE COURT: All right. Go ahead. I'm sorry I
16 interrupted you.

17 MS. MCMAHAN: Other -- you know, other than there are
18 some issues, you know, related to whether or not he was
19 dressed out in a prison uniform, you know, just all that
20 combined with the fact that there were parts of the 911 call
21 that were prejudicial, that should have been asked to be
22 redacted. You know, taking all that together, I believe that
23 this Court should grant post-conviction relief.

24 THE COURT: All right. Yes, Mr. Zelenka?

25 MR. ZELENKA: I'll be brief, Your Honor.

1 I believe that upon a full review of the record,
2 including essentially the testimony of Mr. Chehoski, that the
3 defendant has failed in his burden of proof.

4 The transferred intent issue -- when I saw that
5 allegation, I was a little confused, because when I read the
6 jury charge that was given, I didn't see a transfer of intent
7 charge. I saw a "hand of one, hand of all charge" being given
8 related to the attempted murder case, which I think is
9 different than asserting transferred intent. But --

10 THE COURT: I guess they're saying it because if they can
11 be -- it looks like in reading her footnote, they're saying
12 that since he's charged, attempted murder could be expressed
13 or implied. And since it was -- it sounds like kind of a --
14 maybe a circular argument. But I think that's the argument
15 they're making there.

16 MR. ZELENKA: Yeah. All right. That much I understand.
17 And with the attempted murder charge, I think at the time,
18 that it wasn't unreasonable for the actions that the defense
19 counsel took with respect to that. I think the record would
20 show that they particularly failed to show Strickland
21 prejudice, that the result of the proceedings would have been
22 different. Clearly, they met a sufficient number of times to
23 have a full understanding of the case and be able to make
24 strategic decisions based upon clearly the credible testimony
25 of Mr. Chehoski.

There was no reason the indictment should have been

1 objected to the case, so I don't think defense counsel was
2 deficient. And they hadn't shown a reason for objecting to
3 the indictments. They were adequate and timely, true billed.

4 I think the assertion about the sidebar conferences, they
5 failed to show any deficient performance on the part of
6 counsel about a sidebar -- particular sidebar consult --
7 conference not being revealed in open court.

8 As far as the alibi witnesses go, I think Mr. Chehoski's
9 testimony is strong, that they made strategic decisions in
10 that case based upon their investigation and in not calling
11 the particular witnesses, particularly the mother who was one
12 that they indicated they would have called. There's no
13 showing that the evidence, through the testimony of Mr.
14 Chehoski, was not provided to the defendant.

15 Similarly, with the discovery, the limited time the
16 defendant was wearing the jail garb, based upon the testimony
17 of Mr. Chehoski, was not in front of the jury, so they weren't
18 deficient in failing to object to something which did not
19 occur.

20 And the testimony concerning the introduction of the full
21 statements of Christy Vasquez, Raphael Isagari, and Franklin
22 Vasquez, I submit that defense counsel was not deficient in
23 introducing that, essentially having opened the door to that
24 and the Rule of Completeness, Rule 106, authorizing the
25 admission of those.

And with respect to the statement, Barry Sowers, I called

1 him up on the phone and ask him if he knew Rickey, and he said
2 he did. To the extent that it's hearsay that he knew -- he
3 said he did, I would submit that -- in fact, if they clearly
4 cannot show prejudice, that the result of the proceeding would
5 have been different if they objected to that. It was
6 basically showing the course of the investigation at that
7 particular time.

8 With respect to the alleged confessions, there was a
9 Jackson V. Denno hearing, a hearing in which the defendant
10 testified. And the judge made a determination that it was
11 freely and voluntarily entered.

12 And with respect to the DNA evidence, the DNA evidence
13 was not the defendant's DNA evidence, it was Mr. Pitt's DNA
14 evidence. And there was sufficient chain sufficiently shown
15 in that to allow its admission.

16 And finally, with respect to not calling Ms. Esaw, I
17 think I would rely on the testimony of Mr. Chehoski for that.

18 THE COURT: All right.

19 Any additional response, Ms. McMahan?

20 MS. MCMAHAN: No, Your Honor.

21 THE COURT: All right. I have a pretty substantial
22 record here to review, so I'm going to review that and take it
23 under advisement and let you-all know.

24 MR. ZELENKA: Thank you, Your Honor.

25 (At 1:46 p.m., the hearing concluded.)

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END OF TRANSCRIPT.

CERTIFICATE OF TRANSCRIBER

State of South Carolina

County of Lexington

I, BARBIE TEBOE, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings and evidence introduced in the trial of the captioned case, in the Court of Common Pleas for Lexington County, South Carolina, on the 18th day of December 2023.

I further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 25, 2025

A handwritten signature in cursive script that reads "Barbie K. Teboe". The signature is written in dark ink and is positioned above a horizontal line.

Barbie Teboe,
Transcriber

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON 2025 JUN -6 AM 10:57) FOR THE ELEVENTH JUDICIAL CIRCUIT

Ricky Esaw, SCDC #273842,)
LISA M. CONNER)
CLERK OF COURT)
LEXINGTON, SC) Case No. 2020-CP-32-1009

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before this Court by a *pro se* application for post-conviction relief filed by Ricky Esaw on March 3, 2020. On May 6, 2020, the Clerk of Court initially appointed Ola Johnson to represent the Applicant. The State made a Return and Motion for a More Definite Statement on September 9, 2020. On May 27, 2022, the Applicant, through counsel Johnson made an amendment to the *pro se* application for post-conviction relief. On June 6, 2022, the matter came before The Honorable Jocelyn Newman for an evidentiary hearing. However, at that time, counsel Johnson moved to have the matter continued because he claimed to have a conflict of interest because he had previously represented Esaw's co-defendant, Wilfred Akeem Pitts, in a related General Sessions case. Judge Newman entered an order relieving counsel Johnson in an order filed June 8, 2022. On June 14, 2022, the Clerk appointed Ashley A. McMahan as new counsel for the Applicant. The matter was scheduled for October 12, 2022, but continued by Judge Walton McLeod, Jr. on October 5, 2022. On November 29, 2023, counsel McMahan filed a Second Amended Application.

At the December 18, 2023 term of PCR hearings, this matter was heard before this Court. The Applicant was present and represented by his appointed counsel, Ashley A. McMahan. The

Respondent was represented by Deputy Attorney General Donald J. Zelenka. During the hearing, evidence was presented of the testimony of the following witnesses: Ricky Esaw, Patricia Reid (his mother) (via Webex), Erica Esaw (his sister)(via Webex), Jason Chehoski, and Elizabeth Fullwood. This Court also had the Lexington County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, including the trial transcript, and the records of the current PCR action.

Based upon the Court's review of the records and the testimony presented, the Court denies post-conviction review. The Court makes the following findings of fact and conclusions of law as required by S.C. Code Ann. Section 17-27-70.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections. During its January 2016 term, the Lexington County Grand Jury indicted Applicant for murder (2016-GS-32-0217); attempted murder (2016-GS-32-0218); armed robbery (2016-GS-32-0214); possession of a weapon during the commission of a violent crime (2016-GS-32-0206); and two counts of attempted armed robbery (2016-GS-32-0213, -0216). The Applicant was served with a notice to seek life without the possibility of parole.¹

On October 16, 2017, Applicant proceeded to a jury trial before the Honorable Thomas W. Cooper. Assistant Public Defenders Jason Chehoski and Elizabeth Fullwood (collectively, "Counsel") represented Applicant. Assistant Solicitors Rhonda Patterson and Angela Martin of the Eleventh Circuit Solicitor's Office prosecuted the case.

¹ Pursuant to section pursuant section 17-25-45 of the South Carolina Code. Applicant was served with the State's notice of intent to seek life without parole (LWOP) on September 12, 2017. Applicant's SCDC records indicate he was previously convicted of assault and battery of a high and aggravated nature; second-degree burglary; and armed robbery in 1999, all of which are "serious offenses" under § 17-25-45(B).

Verdict, Sentencing & Subsequent Proceedings

On October 19, 2017, the jury convicted Applicant as indicted. Judge Cooper sentenced Applicant to five concurrent sentences of “life without the possibility of parole” for murder, attempted murder, armed robbery, and both counts of attempted armed robbery. Applicant also received a concurrent five year sentence for the weapons charge.

Direct Appeal

Applicant filed a timely notice of appeal. Appellate Defender Susan B. Hackett perfected the appeal by briefing the following issue for the Court of Appeals:

1. Did the trial judge violate [Applicant]’s Sixth Amendment right to a fair trial by failing to provide the jury with specific instructions regarding how to analyze the evidence presented concerning the identification of [Applicant] as the perpetrator, including expert testimony on the subject?

On November 6, 2019, the Court issued an opinion affirming Applicant’s convictions and sentences pursuant to Rule 220(b), SCACR and the following authorities: *State v. Baccas*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (“In criminal cases, the appellate court sits to review errors of law only.”); *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (“An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.”); *id.* (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.”); *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (“The trial court is required to charge only the current and correct law of South Carolina.”); S.C. Const, art. V, § 21 (“[Trial courts] shall not charge juries in respect to matters of fact, but shall declare the law.”); *State v. Green*, 412 S.C. 65, 77, 770 S.E.2d 424, 431 (2015) (“[The defendant’s] request to charge the jury that ‘[identification by a person of a different race may be less reliable than identification

by a person of the same race' would have been improper because it would have asked the jury to place less weight on [the victim's testimony because he was of a different race than [defendant].").

The case was returned to the circuit court on November 22, 2019.

II. ALLEGATIONS

In his *pro se* application for post-conviction relief, Applicant alleged he was being held in custody unlawfully based on the following:

1. Ineffective Assistance of Counsel
 - a. "[F]ailure to properly prepare Applicant for voir dire and jury selection portion of his trial, as a result, Applicant was compelled to violate the presumption of innocence beyond a reasonable doubt."
 - b. "[F]ailing to move for a speedy trial."
 - c. "[F]ailing to challenge superseding indictments."
 - d. "[F]ailure to adequately cross-examine the State's witnesses."
 - e. "[F]ailure to object to the hand of one hand of all instruction."
 - f. "Counsel failed to adequately investigate the facts and circumstances surrounding the death of the victim. Counsel's failure to conduct such an investigation deprived the jury of critical information relevant to an accurate assessment of Applicant's guilt or innocence."
 - g. "Counsel failed to object to the prosecutor's improper vouching for State witnesses' credibility and on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution."
 - h. "Counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence."
 - i. "The cumulative effect of trial counsel's errors are significant enough to undermine the reliability of the results at trial."

On May 31, 2022, prior appointed counsel Ola Johnson made the following amendments to the application:

1. Applicant's counsel Jason Chehoski and Elizabeth Fullwood failed to meet with the applicant a sufficient number of times to properly review the evidence and discuss this case with applicant.
2. Applicant was informed that Elizabeth Fullwood was relieved as his attorney.
3. Applicant's counsel Jason Chehoski and Elizabeth Fullwood failed to object to the indictments presented in this case.

4. Applicant's counsel Jason Chehoski and Elizabeth Fullwood failed to inform applicant regarding conversations they had with the trial judge and solicitor at side bar.
5. Applicant's counsel, Jason Chehoski and Elizabeth Fulwood, failed to properly investigate the facts of this case and failed to call alibi witnesses to confirm I was attending a family members birthday party (niece of sister Erica Esaw).
6. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to provide a copy of the evidence to Applicant.
7. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to Applicant appearing in front of the jury in a jail uniform and in restraints.
8. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to the statement of Christy Vasquez being placed into evidence by the State (Tr. p. 266, Lines 1-6, State Exh. 10), as cumulative and hearsay.
9. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to the statement of Rafael Izaguirree being placed into evidence by the State (Tr. p. 272, l. 17-20), State Exh. 12), as cumulative and hearsay.
10. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to the statement of Franklin Vasquez being placed into evidence by the State (Tr.p. 289, Lines 8-12, State Exh. 13), as cumulative and hearsay.
11. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to testimony regarding a crime stoppers tip as hearsay from Sgt. Miles Rawl (Tr. p.344. Lines 1-7), despite making this objection later in trial (Tr. p. 377).
12. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to hearsay by Inv. Barry Sowards, "I called him up on the phone and asked him if he knew Ricky Esaw and he said he did" (Tr. p. 381 . Lines 5-7).
13. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to object to testimony regarding Applicants alleged confession. (Tr. p. 437 - p.439).
14. Applicant's counsel, Jason Chehoski and Elizabeth Fullwood., failed to object to testimony regarding DNA evidence connecting evidence to co-defendant Pitts who was a State's witness. (Tr.p. 494,495).
15. Applicant's counsel Jason Chehoski and Elizabeth Fullwood failed to call my mother as a witness, Patricia Esaw.
16. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

Amendment to the Application for Post Conviction Relief, dated May 7, 2022, p. 1-3.

In the *Second Amended Post-Conviction Relief Application* dated November 20, 2023, by second appointed counsel Ashley McMahan, adding as grounds for relief:

Ineffective Assistance of Counsel of Elizabeth C. Fullwood, Esquire and Assistant Public Defender Jason S. Chehoski:

- a. Failure to object to the instruction on transferred intent for attempted murder.

- b. Failure to move to redact the 911 call, particularly the ending, due to unfair prejudice.

III. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Ineffective Assistance of Trial Counsel, Generally

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant—like all other defendants—the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice

to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” demanded of attorneys in criminal cases. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonably professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). 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*, 466 U.S. at 688–89; *see id.* at 691 (“Representation is an art, and

an act or omission that is unprofessional in one case may be sound or even brilliant in another.”). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Id.* at 689. The ultimate question is not whether counsel’s actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*’s deferential standard.

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. 466 U.S. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance 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. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. *See id.*, at 695 (Where a defendant challenges his conviction, he must show that there exists “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt”).

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient “to show [counsel’s] errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” *Id.* at 687 (emphasis added). “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the

testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690. Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant’s burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the “benchmark” of the right to counsel is the “fairness of the adversary proceeding”).

Failure to object to the transferred intent instruction on Attempted Murder or a failure to request a specific intent instruction. (Second Amended Application, allegation 1(a))

This Court initially concludes that there was no instruction on “transferred intent” given in the Applicant’s trial. In his most recent amended allegation through counsel McMahan, the Applicant contends that counsel was ineffective in failing to object and preserve an issue for appeal concerning the instruction given at trial based upon transferred intent as it related to attempted murder. However, during the PCR hearing, the evidence and argument presented to the Court raised a different allegation on whether counsel erred in failing to object or present an issue concerning inferred malice and the attempted murder instruction. This alleged issue arises from

the *Final Brief of Appellant* in the direct appeal when no issue about a transferred intent instruction was raised.² In the brief, the Applicant, by appellate counsel Susan Hackett, stated the following on page 1, footnote 1 citing to *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017):

At the conclusion of the trial, the judge instructed the jury that malice required to be proven for attempted murder could be inferred. [R. 515-516] Tr. 716, l. 18 - Tr. 717, l. 2. Along these lines, the judge charged the jury that some of the allegations against Appellant required the jury to consider the conduct of Wilfred Pitts and the theory of accomplice liability. [R. 519] Tr. 720, ll. 5-23. Specifically, the judge instructed the jury that Appellant was “accused of the attempted murder of Franklin Vasquez through the acts of Mr. Pitts.” [R.515].Tr. 716, ll. 18-20. This was made abundantly clear during the final portions of the jury charge when the judge instructed the jury to find Appellant guilty of attempted murder of Franklin Vasquez if the state “met its burden of proof under the theory of the hand of one is the hand of all.” [R. 527]Tr. 728, ll. 5-10. Despite the erroneous nature of these charges, trial counsel failed to object. *See State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (explaining that “[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill”).

State v Esaw, Final Brief of Appellant, p. 2.

A review of the trial record reveals the following instructions on “attempted murder”:

Now, the defendant is also accused of the attempted murder of Franklin Vasquez through the acts of Mr. Pitts. So in order to prove the charge of attempted murder, the State has to prove beyond a reasonable doubt that this defendant, either alone or in concert with somebody else, and I’ll charge you on that law in a few moments, attempted to kill in this case Franklin Vasquez, with malice aforethought either expressed or implied as I’ve already defined malice to you.³

² In the charge conference, Judge McCaslin indicated that she would be charging, among other matters, her standard murder charge with the definition of malice, aiding and abetting or the hand of one hand of all charge. Trial Tr.p. 657-662. No request was made for a transferred intent instruction nor was there was objection to a “hand of one, hand of all” instruction.

³ In the earlier instructions, malice was defined as follows:

The State doesn't have to prove a motive for the killing, but it does have to prove malice to prove that beyond a reasonable doubt.

So what is, malice? Malice aforethought is a deliberate and well-formed purpose to do the unlawful act. Aforethought means that the intention to do the unlawful act was conceived or planned sometime before it actually occurred, but

Now, an attempt to commit an act is an act done in part in execution of a plan or a design to commit a crime. There has to be an intent that the action be committed and an act done, not in full execution of the crime, but in pursuing the intent to commit a crime. An attempt is different from preparation and it's also different from the intent to commit.

The law does not punish the mere entertainment of a criminal intent. To bring the law of attempt into action, it is necessary that some act should be done in pursuance of the intent immediately and directly tending to the commission of the crime, an act which, if the crime is carried out, would constitute a part and parcel of the crime itself, but it doesn't reach the accomplishment which was intended because it is prevented or voluntarily abandoned. . . .

Trial Tr.p. 515-516, R p. 716 – 717.⁴

The trial judge further instructed on “accomplice liability” or the “hand of one, hand of all” theory in the following manner:

Now, ladies and gentlemen, as this has been explained to you, some of these charges arise out of allegations of Mr. Esaw being in concert with Mr. Pitts. And the State brings a theory -- those cases under the theory of the law known as accomplice liability or the hand of one is the hand of all.

And I tell you, ladies and gentlemen, that when two or more person aid, encourage, and abet each other in the commission of a crime, all who are present

it need not exist for any particular length of time prior to the act to meet the test of malice aforethought.

Malice itself is a word that suggests a wickedness or a hatred or a determination to do what one knows to be wrong without just cause or legal provocation . Malice need not be in the mind of the one doing the act for any particular length of time in order to render the killing murder. If it is present in the mind of the one doing the killing any length of time before the act, then its presence would be sufficient to render the killing murder.

Malice can be expressed or it can be inferred. Malice is said to be expressed when there is shown a deliberate, violent intention to unlawfully takeaway the life of another human being. Malice may be inferred when no legal provocation or excuse for the killing appears and when the circumstances attending the killing show an abandoned heart or a malignant heart fatally bent on mischief.

Trial Tr.p. 715-716; R.p. 514-515.

⁴ The Record on Appeal is referred in this Order as “R.p_.”

are principals and are equally guilty. When two or more persons combine together and commit a crime and the crime is committed, all of those who are present to aid and abet and assist in the commission of the crime are guilty. The act of one becomes the act of all, the hand of one becomes the hand of all; it makes no difference by whose immediate hand the crime is committed, all are principals.

However, I tell you that mere presence at the scene of the crime, even with knowledge of the commission of the crime but without an intent to aid, abet, or assist in its commission, does not constitute guilt. And so the burden is upon the State then to establish beyond a reasonable doubt that the defendants, and each of them as to those particular charges, those charges in concert with Mr. Pitts, they were there with each other, they were present, and that they were there with a criminal intent; that is, with the intent to aid, encourage, and abet each other in committing the offense of attempted murder and armed robbery.

Trial Tr.p. 720-721; R.p. 519-520.

In addition, the following instructions on criminal intent were given:

Now, criminal intent is a necessary element of the offenses in this case and it has to be proven by the State beyond a reasonable doubt, Criminal intent is always a matter that has to be determined by a jury from the circumstances surrounding the situation because there is no way that we can cut off a person's skull and look down at their brain and figure out what they had in mind at the time. And the law says that criminal intent may be inferred from the circumstances which are shown to have existed at the time. And that's how you make a determination as to whether or not the criminal intent was present. So criminal intent is a state of mind and it operates jointly with an act in the commission of a crime. It is a mental state, it is a conscious wrongdoing, and it's up to you as a jury to determine, what the defendant intended to do based of the circumstances which are shown to have existed. I tell you that the State has to prove criminal intent beyond a reasonable doubt just as it has to prove every other element beyond a reasonable doubt.

Trial Tr.p. 722, l. 17– p. 723, l. 13; R.p. 521-522.

After the presentation of the instructions, defense counsel Fullwood made the following objection:

MS. FULLWOOD: Yes. Simply, Your Honor, we'd like to put on the record that we take exception to that portion of your charge that stated that malice is implied where no legal provocation or excuse appears. We believe that's burden shifting and could be interpreted to require the Defense to disprove legal provocation or excuse, and thereby violating rights under the Fifth, Sixth, and Fourteenth Amendments of the comparable provisions of the South Carolina Constitution.

THE COURT: Thank you. Ms. Fullwood, I note that, respectfully decline to recharge with that. That language has been time-honored, and although our malice and the definition of malice under the law have received some tweaking over the years through case law, that portion of the charge has been left undisturbed, or at least I hope it has. If they've changed it, they've failed to let me know. Thank you. That's respectfully noted but declined.

Trial Tr.p. 731, R.p. 530.

During the PCR hearing, the Applicant testified that there were no discussions with his lawyers about “transferred intent” or attempted murder instructions. Counsel Chehoski testified that if an objection about transferred intent was not in record, “I didn’t object.”

Concerning “transferred intent” instructions, this Court has reviewed the entire jury instructions and can locate no instruction on transferred intent given by the trial judge. An instruction on transferred intent would likely be stated as follows:

Pursuant to the transferred intent doctrine, if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal intent toward the second applies to the third as well.

Where a defendant, with malice aforethought, intends to unlawfully kill or seriously injure one person, but by mistake or inadvertence kills a different person from the one he intended to kill, the law holds the defendant responsible for his felonious intent, merely transferring the intent from the original person the defendant attempted to kill to the actual person killed. If malice is found at the time of the killing, even if a third party is killed rather than the intended victim, the defendant is guilty of murder. This concept is known as transferred intent. Under this doctrine, the defendant's intent to kill his intended victim is said to be transferred to his actual victim. The degree of guilt is the same as it would have been if the attempt had resulted in the death of the person at whom it was aimed.

§ 2-4 Transferred Intent Doctrine--Murder, Anderson, S.C. *Requests to Charge - Criminal*, § 2-4. *State v. Smith*, 337 S.C. 27, 522 S.E.2d 598 (1999); *State v. Gandy*, 324 S.E.2d 66 (1984); *State v. Horne*, 282 S.C. 444, 446, 319 S.E.2d 703, 704 (1984); Black's Law Dictionary 1536 (8th ed. 2004) (defining transferred intent doctrine); Black's Law Dictionary 1498 (6th ed. 1990) (“If an illegal yet unintended act results from the intent to commit a crime, that act is also considered

illegal. Under doctrine of ‘transferred intent,’ original malice is transferred from one against whom it was entertained to person who actual suffers consequence of unlawful act.”).

This Court must find that the Applicant has failed in his burden of proof related to a “transferred intent” instruction.⁵ This Court finds that no transferred intent instruction was charged to the jury at Applicant’s trial, so the Applicant’s counsel cannot be deficient for failing to object. Alternately, there was no showing that defense counsel should have requested such a “transferred intent” charge. This Court denies relief on that issue finding there was no deficient performance or prejudice.

Based upon the newer arguments of counsel, it appears that that the issue is that counsel should have either objected to the attempted murder charge or requested an additional charge related to the attempted murder instruction based upon *State v. King*. This Court notes that the case was tried from October 16-19, 2017. *State v. King* was decided on October 25, 2017. This retrospective application of *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017) to Esaw’s 2017 trial and conviction does not require the grant of post-conviction relief. This presentation is more similar to *State v. Burdette*, 427 S.C. 490, 505, 832 S.E.2d 575, 583 (2019) which addressed an

⁵ The issue concerning transferred intent and attempted murder is presently pending before the South Carolina Supreme Court. See, *State v. Geter*, 434 S.C. 557, 864 S.E.2d 569 (Ct. App. 2021), cert. granted, September 7, 2022. (SCSCt Appellate Case No. 2021-001408) (Oral Argument heard September 13, 2023)(Doctrine of transferred intent was inapplicable in prosecution of defendant for attempted murder of bouncer, who was stabbed in the eye when he attempted to break up bar fight between defendant and third-party, and thus, jury instruction on doctrine of transferred intent was not warranted; to support attempted murder charge, State had to prove that defendant attempted to kill bouncer, and that was not State's theory of the case, so long as attempted murder was specific intent crime, transferring intent to kill did not satisfy necessary *mens rea* to convict defendant of attempted murder of unintended victim, and public policy supported lesser offense of assault and battery of a high and aggravated nature as appropriate punishment).

assertion related *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803 (2009) wherein the Supreme Court stated:

“Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, so long as the issue is preserved. See *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final”). However, today's ruling will not apply to convictions challenged on post-conviction relief. See *Belcher*, 385 S.C. at 613, 685 S.E.2d at 810 (citing *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).”

Belcher, *id.*, (emphasis added).

In deciding whether counsel's performance was deficient, judicial scrutiny is “highly deferential” and requires us to “ ‘indulge [the] strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment.’ ” *Strickland*, *supra*, 466 U.S. at 689-90). The courts “are not interested in grading lawyers' performances;” but rather, “are interested in whether the adversarial process at trial ... worked adequately.” *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)(quotation marks omitted). To be unreasonable, the performance must be such that “no competent counsel would have taken the action that [the petitioner's] counsel did take.” *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001)(emphasis omitted). Courts have consistently held that courts will not “second-guess counsel's strategy.” Strategic choices, even those “made after less than complete investigation,” are evaluated for their reasonableness and “counsel's reliance on particular lines of defense to the exclusion of others—whether or not he investigated those other defenses—is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable.” *Strickland*, 466 U.S. at 690-91. In other words, “[e]ven if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would

have done so.” *Rogers*, 13 F.3d at 386. Under the second prong of the *Strickland* test, a petitioner can be said to have been prejudiced by counsel's performance only if there was “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Counsel cannot be deemed deficient and ineffective in failing to object to an instruction that the Supreme Court did not decide whether it was error until after the trial. Esaw’s case was tried from October 16-19, 2017 before the South Carolina Supreme Court issued its decision in *King* on October 25, 2017.⁶ *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) (stating the appellate courts have “never required an attorney to anticipate or discover changes in the law”); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (finding counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial). *See Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (“[E]ven if there is reason to think that counsel's conduct ‘was far from exemplary,’ a court still may not grant relief if ‘the record does not reveal’ that counsel took an approach that no competent lawyer would have chosen.” (quoting *Harrington v. Richter*, 562 U.S. 86, 104 (2011)). *Cf. Hill v. State*, 350 S.C. 465, 567 S.E.2d 847 (2002) (counsel was deficient in failing to object to an instruction where the Court of Appeals had ruled it improper prior to the trial of the case, although the Supreme Court had not yet held similarly). Perhaps even

⁶ See *United States v. Morris*, 917 F.3d 818, 823 (4th Cir. 2019) (“A lawyer does not perform deficiently by failing to raise novel arguments that are unsupported by then-existing precedent. Nor does counsel fall below *Strickland*’s standard of reasonableness by failing to anticipate changes in the law, or to argue for an extension of precedent.” (internal citations omitted)); *Almon v. United States*, 302 F. Supp. 2d 575, 586 (D.S.C. 2004) (“There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable.” (citing *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994); *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999))); *Lavernia v. Lynaugh*, 845 F.2d 493, 499 (5th Cir. 1988) (“Counsel cannot be faulted for failing to pursue meritless motions.”).

more important to why trial counsel is not deficient is the concurrence of Justice Kittredge which reflects that the court was not unanimous on the issue of whether attempted murder was a specific as opposed to a general intent crime because it included the general intent “malice aforethought” in the statute. In light of this concurrence, applying the law at the time of the trial, this Court cannot find that trial counsel were deficient in failing to object because the Applicant failed to meet the high bar that no reasonable attorney would have failed to object or chosen not to object. *See United States v. Williams*, 246 Fed. App'x. 626, 635 (11th Cir. 2007) (on direct appeal, rejecting ineffective assistance claim based on failure to object to jury instructions because “where jury has been properly instructed, counsel is not ineffective for failing to object to an instruction”) (quoting *Lucas v. Wainwright*, 604 F.2d 373, 375 (5th Cir. 1979)); see also *Parker v. Sec'y, Florida Dept. of Corr.*, 555 Fed. App'x. 870, 875 (11th Cir. 2014) (As to the Section 2254 motion, “we cannot conclude that no reasonable trial attorney would have failed to object to the standard jury instruction that had yet to be questioned, much less disparaged, by any state appellate court”).⁷

Section 16–3–29 of the South Carolina Code (Supp.2014) defines attempted murder: “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.” Because the crime is defined by statute, a reviewing court must first look to the language of the statute to determine what the

⁷ Counsel is not ineffective just because the chosen defense strategy proved unsuccessful. *Waters v. Thomas*, 46 F.3d 1506, 1522 (11 Cir. 1995)) (“It does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance”) and then concluding, “[n]or does the fact that a particular defense ultimately proved to be unsuccessful demonstrate ineffectiveness.” *Chandler v. U.S.*, 218 F.3d 1305, 1314 (11th Cir. 2000). See *Cano v. United States*, Nos. 1:09CV321, 1:05CR354-4, 2009 WL 3526564, *3 (M.D.N.C., Oct. 22, 2009) (“Petitioner cannot succeed on an ineffective assistance of counsel claim simply because his attorney did not win”); *Lockard v. United States*, No 07-cv-323-JPG, 2008 WL 5104222, *3 (S.D. Ill., Dec. 2, 2008) (“it should go without saying that merely because [counsel] failed to prevail on his arguments does not render [him] ineffective”).

Legislature intended the elements of the crime to be—including the level of intent required. *See Guinyard v. State*, 260 S.C. 220, 227, 195 S.E.2d 392, 395 (1973) (“The power of the Legislature to declare what acts shall constitute crimes ... includes the power to make the commission of the act criminal without regard to the intent or knowledge of the accused.... Therefore, whether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute....” (citing *State v. Manos*, 179 S.C. 45, 49–50, 183 S.E. 582, 584 (1936))).

In the earlier South Carolina Court of Appeals decision in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff’d as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), and overruled by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), it concluded that “specific intent to commit murder is an element of attempted murder” and more particularly that it was error for the trial court to instruct that “specific intent to kill was not an element of attempted murder.” The Court of Appeals decision was issued on April 22, 2015. This was well over two years before *King* was decided.

The purpose of a trial judge’s jury instructions is “to enlighten the jury and to aid it in arriving at a correct verdict.” *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). To carry out that purpose, a trial judge is required to charge the jury on the current and correct South Carolina law applicable to the case based on the evidence presented. *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003); *see State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented). In doing so, the trial judge is only required to instruct the jury on the substance of the law and does *not* have to use any particular verbiage. *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002); *see Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (“The substance of the law is what must be charged to the jury, not any particular

verbiage.”). Importantly, so long as the trial judge’s jury instructions are substantially correct and adequately cover the applicable law, those instructions are considered to be appropriate and not erroneous. *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); *see State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) (“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.”).

In this case, the issue that has been raised centers on the propriety of the trial judge’s jury instructions on the indicted offense of attempted murder. Over a decade ago, that particular offense was enacted through our legislature’s passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished all prior statutory and common law assault and battery offenses and replaced them with a number of new offenses. *See* Act No. 273, § 6.A, 2010 S.C. Acts & Joint Resolutions (adding the statutory offense of attempted murder to the South Carolina Code of Laws); *see also State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (“Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses.”). Pursuant to South Carolina’s attempted murder statute, the offense of attempted murder is committed when a person “with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]” S.C. Code Ann. § 16-3-29. Thus, based on the plain language of the statute, the statutorily-delineated elements of the offense include: (1) an attempt to kill another person; (2) with intent to kill; and (3) with malice aforethought, either expressed or implied. *Id.*; *see State v. White*, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) (“We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language.”). The trial judge in this case clearly set that out.

Significantly, in *State v. King*, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017), the Supreme Court addressed an appellate challenge to a trial judge’s jury instructions on attempted murder subsequent to the enactment of the offense. In that case, King was charged with attempted murder, and, as part of his jury instructions on the offense, the trial judge explained to the jury over defense counsel’s objection a specific intent to kill is *not* an element of attempted murder and the offense could be committed with only a general intent to commit serious bodily harm. *Id.* at 54, 810 S.E.2d at 21.⁸ At the conclusion of the trial, the jury convicted King of attempted murder along with several other offenses, and he appealed. *Id.* On appeal, the Court of Appeals reversed King’s attempted murder conviction after finding the legislature “intended to require the State to prove specific intent to commit murder as an element of attempted murder[.]” *State v. King*, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015). The State then filed a petition for a writ of certiorari in regard to that particular ruling, and the Supreme Court granted the State’s petition.⁹ *King*, 422 S.C. at 50, 810 S.E.2d at 20. Thereafter, on certiorari, the Supreme Court agreed with the Court of Appeals a specific intent to kill was an element of the crime. *Id.* at 55, 810 S.E.2d at 22. In reaching that conclusion, the Court found the legislature’s use of “intent to kill” and “malice aforethought, either express or implied” evidenced an intention to create an offense requiring a higher level of *mens rea* than the offense of murder. *Id.* at 61, 810 S.E.2d at 25. However, the Court further cautioned implied malice was “arguably” inconsistent with a specific intent crime. *Id.* at 64, n. 5, 810 S.E.2d at 27, n. 5. As support for that conclusion, the Court noted the Nevada Supreme Court had previously concluded the offense of attempted murder would be inconsistent

⁸ In Esaw’s case, there was no defective instruction, like in *King*, that “specific intent to kill” is not an element of attempted murder.

⁹ King also filed a petition for a writ of certiorari on unrelated grounds, and the Supreme Court granted King’s petition as well. *King*, 422 S.C. at 50, 810 S.E.2d at 20.

with implied malice as one cannot attempt an unintended result, attempt to be negligent, or attempt to be malignantly reckless. *Id.* at 57, 810 S.E.2d at 23.

Looking to the relevant language employed in the attempted murder charge as presented, the trial judge: (1) advised the jury of the exact language used by the statute to define the offense; (2) explained the general concept of malice as hatred, ill will, hostility, and the intentional doing of a unjustified and wrongful act; (3) defined the “aforethought” component of the malice as requiring the malice to exist before and at the time of the act;¹⁰ (4) defined attempted murder as “an attempt to commit an act is an act done in part in execution of a plan or a design to commit a crime. There has to be an intent that the action be committed and an act done, not in full execution of the crime, but in pursuing the intent to commit a crime” and (5) explained that malice can be proven when there is shown “a deliberate, violent intention to unlawfully takeaway the life of another human being”, and (6) explained various ways the required intent could potentially be inferred, including through when no legal provocation or excuse for the killing appears and when the circumstances attending the killing show an abandoned heart or a malignant heart fatally bent on mischief” and (7) never indicated that specific intent to kill was not an element of the offense. Significantly, when giving that language its natural meaning and viewing the charge as a whole, the jury could have *only* convicted Esaw if they found he or Pitts¹¹ committed an *intentional* act with the *specific intent to kill* his victim with an unlawful and malicious purpose. *See Sheppard v.*

¹⁰ In the State’s closing argument, the prosecutor asserted that the attempted murder was based upon “that the attempt was towards Franklin when he was shot by co-defendant Wilfred Pitts.” Tr. 671. He concluded the argument with a Esaw set into motion that he killed Hector Vasquez, he attempted to rob Franklin and Hector, and he set into motion for Wilfred Pitts to rob Rafael Izaguirre and attempt to murder Franklin. Tr.p. 690-691. *See State v. Wilds*, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) (“Although malice must be aforethought, there is no requirement that it must exist for any appreciable length of time before the commission of the act. It may be conceived at the very moment the assault occurs.”).

¹¹ The jury would have read this in context with the accomplice liability instruction.

State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004) (“[T]he test is what a reasonable juror would have understood the charge as meaning.”); *see also Foye v. State*, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267, n. 1 (1999) (“The jury was instructed to determine petitioner’s guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice.” (citations omitted)). Moreover, nothing in the trial judge’s attempted murder charge would have permitted the jury to convict Taylor based on a finding she merely engaged in negligent or reckless conduct, and, instead, the charge required the jury to find Taylor had the specific intention to end the newborn infant’s life through her actions in order to convict. *Cf. United States v. Kwong*, 14 F.3d 189, 196 (2nd Cir. 1994) (finding the trial judge reversibly erred when instructing the jury on the requisite elements of attempted murder by including an instruction that indicated “reckless indifference might serve as a substitute for proof of a specific intent to kill”). Under such circumstances, the trial judge’s jury instructions properly instructed the jury on the required elements of attempted murder without incorrectly permitting the jurors to convict Taylor for attempting an unintended result, attempting to merely be negligent, or attempting to be reckless, and, therefore, those instructions were not erroneous. *See King*, 422 S.C. at 63-64, 810 S.E.2d at 26-27 (holding the offense of attempted murder includes specific intent to kill as an element); *see also State v. Rye*, 375 S.C. 119,123, 651 S.E.2d 321, 323 (2007) (recognizing a trial judge’s decisions regarding jury instructions will not be reversed when the instructions properly charged the applicable law when considered in their entirety); *cf. State v. Jackson*, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989) (“It is unlikely that a reasonable juror would have singled out this portion of the charge and interpreted it as an opinion on the facts of this case or an instruction as to the weight to be given the evidence.”).

Assuming *arguendo* that counsel was deficient in failing to request an instruction on specific intent to kill as an element of attempted murder, relief is not required because he has failed to prove the *Strickland* prejudice prong, that there is a reasonable probability that the result of the proceeding would have been different. *See Hill v. State*, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002) (guilt was so conclusively proven that there was no reasonable probability that the trial judge's faulty instruction affected the result); *State v. Truesdale*, 285 S.C. 13, 328 S.E.2d 53 (1984) (where review of the entire record establishes error is harmless beyond a reasonable doubt, conviction will not be overturned for a *Doyle* violation), *rev'd in part on other grounds, Truesdale v. Aiken*, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed. 2d 539 (1987).

A review of the decision in *State v. Perry*, 440 S.C. 396, 892 S.E.2d 273 (2023), *reh'g denied* (Oct. 4, 2023), is instructive on why relief should not be given in this PCR setting because any alleged error was harmless. As the South Carolina Supreme Court has recently stated in *State v. Perry*:

Turning to the law on jury instruction challenges, “An erroneous instruction alone is insufficient to warrant this Court’s reversal.” *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). “Errors, including erroneous jury instructions, are subject to harmless error analysis.” *Id.* (internal quotation omitted).

Id., at 404, 892 S.E.2d at 277. “To warrant reversal, a trial judge’s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). “When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.” *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (internal quotations omitted). “[W]e are required to review the trial court’s charge to the jury in its entirety.” *Id.* at 498, 832 S.E.2d at 580.

In *Perry*, the Court distinguished *Burdette* and found, similar to the instant case, that there could be harmless error. In *Burdette*, the Supreme Court concluded an erroneous instruction on inferred malice was not harmless. *Id.* When instructing the jury on the lesser-included offense of voluntary manslaughter in a murder trial, the court failed to explain to the jury that malice is not an element of voluntary manslaughter. *Id.* at 499–500, 832 S.E.2d at 580–81. There, the Supreme Court found the jury had an incorrect impression malice was an element of voluntary manslaughter. *Id.* at 501, 832 S.E.2d at 581. The jury asked for clarification of the charges, and the trial court repeated the same. *Id.* Importantly, the State's and Burdette's theories of the case conflicted - Burdette claimed to have fatally shot the victim accidentally. *Id.* at 493, 832 S.E.2d at 577; *State v. Perry*, 440 S.C. 396, 408, 892 S.E.2d 273, 279.

In *Perry*, unlike in *Burdette*, the Supreme Court concluded that the trial court's error was harmless. Therein, a disinterested eyewitness corroborated Officer Taylor's testimony that Perry fired directly at him, as opposed to up in the air. Evidence of specific intent was clear. The eyewitness observed the events from the upstairs window of a nearby apartment building. In his testimony, the eyewitness observed Perry fire two - maybe three - gunshots in the officers' direction while fleeing. No less than six times did the eyewitness indicate he observed Perry fire *at* the officers. Therefore, the Supreme Court cannot say beyond a reasonable doubt that the jury found only general intent to commit a crime.

Here, the Applicant, along with his accomplice, Pitts entered into a plan to commit an armed robbery. On the night of August 9, 2015, Hector Vasquez (Victim) along with his wife, Christy, and son, Franklin, were at their next door neighbors' yard celebrating a baptism. (R. p. 93, lines 5-25). The family lived in the mobile home park known as Rolling Meadows. (R. p. 92, lines 14-16).

That same night, Mr. Wilfred “King” Pitts, Jr. and Applicant arrived at the home of the Vasquez’s with the intent to commit an armed robbery. (R. p. 393, line 2 through p. 394, line 25). When they stopped the vehicle, Mr. Pitts went to one side to rob a bystander at the party named Rafael Izaguirre. (R. p. 395, lines 14-20; p. 112, line 24 - p. 113, line 8). In his effort, Mr. Pitts acquired Mr. Izaguirre’s cell phone and wallet but lost his bracelet in the process. (R. p. 113, lines 2-5; p. 396, line 18 - p. 397, line 19; p. 419).

Applicant, who was driving the vehicle, exited the vehicle and held a gun up to Franklin Vasquez (hereinafter “Franklin”), asking for his money and valuables. (R. p. 123, line 11 - p. 124, line 15; p. 412, lines 20-22). Franklin claimed he did not have anything and Victim stepped in between Applicant and his son to protest Applicant’s demands. (R. p. 125, lines 9-25). Christy Vasquez (hereinafter “Christy”) witnessed the commotion and began to approach Applicant as well. (R. p. 95, line 11 - p. 96, line 24).

Esaw attempted to fire his weapon, but the gun jammed and a struggle ensued between Hector and the Applicant. (R. p. 125, lines 19-25). Franklin attempted to assist his father in the struggle when Esaw’s gun was discharged and struck the victim in the chest. (R. p. 125, line 25 through p. 126, line 3; p. 203, lines 8-16). Upon hearing a gun shot and witnessing Applicant’s struggle, Mr. Pitts issued a warning shot and then fired his weapon and grazed Franklin in the leg. (R. p. 126, lines 4-9; p. 398, lines 3-17). Both Mr. Pitts and Applicant fled the scene in their car. Victim was rushed to the hospital, but ultimately died from his gunshot wound. (R. p. 103, line 5 through p. 104, line 10).

Here, like *Perry* and unlike *Burdette*, the Court cannot say that the Esaw jury found only general intent rather than specific intent to kill. Here, unlike in *Burdette*, and like *Perry*, this Court concludes that the failure to charge specific intent to kill was not prejudicial under *Strickland*

because if the charge was given there was no reasonable probability the result of the verdict on attempted murder would have been different. *Strickland* prejudice was not proven. The Applicant has failed in his burden of proof to show a reasonable probability that the result of the proceeding would have been different. The record supports the showing overwhelming of a specific intent to kill Franklin by Pitts when he fired the weapon at Franklin who was aiding his father in the struggle with Esaw and grazed his leg.

Here the elements of malice and intent to kill were shown overwhelmingly. The Applicant was jointly involved with Pitts and a plan to commit an armed robbery. The Applicant initially revealed his own malice and an intent to kill when he initially held his gun pointed at Franklin Vasquez and attempted to fire the weapon at Hector when it jammed. R.p. 125, Trial Tr.p. 282. Further, in addition to Applicant's use of the weapon, Pitts also was acting with malice in his earlier use of the weapon toward Rafael during that simultaneous robbery. After Pitts heard the gunshot that struck and ultimately killed Hector, Pitts then fired his weapon at Franklin which grazed his leg.

The State's version was that the attempted murder related to the attempt by Pitts to murder Franklin. Pitts had the weapon from Esaw and committed an armed robbery of the other individuals while Esaw was struggling with Hector and Franklin. Then after Esaw and Pitts had returned to the vehicle after Esaw had shot Hector. Pitts fired two shots from the passenger side at Franklin, one striking Franklin in the inner thigh. Pitts testified that he fired a warning shot and then he fired at the young man. Trial Tr.p. 583, l. 8-17, 607. Pitts claimed he fired the shot at Franklin because he thought that Ricky was hurt. This was overwhelming evidence to show the specific intent to kill by Pitts when Pitts admits that after a warning shot, he shot at Franklin and it struck Franklin's body. See also Trial Tr.p. 671. ("We submit to you this attempt was toward Franklin when he was

shot by co-defendant Wilfred Pitts.”). The Petitioner has failed in his burden of proof of Sixth Amendment prejudice on this issue where the evidence of attempted murder and specific intent to kill by Pitts was overwhelming.

b. Failure to move to redact the 911 call, particularly the ending, due to unfair prejudice. (Second Amended Application, allegation 1(b)).

In the Applicant’s second amended application, Esaw asserted that counsel was ineffective in failing to move to redact the 911 call, particularly the ending pf the call which he claims was prejudicial. A review of the trial record reveals that the 911 call was made by Christy Vasquez and identified by her as accurate. R.p. 100, Trial Tr. p. 255. The call recording was identified as State Exhibit 8 and published to the jury, *subject to the objection by the defense*. R.p.100, 1-25- 101, 1. 4, Trial Tr.p. 255-256.¹² At the PCR hearing, Esaw claimed that he had never heard the 911 call before trial. Counsel Chehoski recalled that he made an objection to the 911 call, but that was overruled. However, In hindsight at the PCR hearing, he did not think that the call was unduly prejudicial, although he could not specifically recall it. The record reflects that the objection was actually raised by co-counsel Fullwood.

Trial Record Related to 911 Call Issue.

Christy Vasquez testified at trial that on the 911 tape, she could hear her own voice and the voices of her daughter, as well as her telling her husband (in Spanish) that she could not let him go because he had to help raise the kids together, but her husband told her to “just let me go.” R.p. 101-102, Trial Tr.p. 256-257. She also was yelling at Franklin Vasquez asking him not to leave, although he did briefly leave. *Id.*

¹² The 911 call was initially referenced in the State’s opening statement. R. p. 84, Tr. p. 239.

Later during the trial, Judge Cooper indicated at a sidebar that when the 911 tape was offered, counsel Fullwood made a timely objection. Judge Cooper indicated the following:

Ms. Fullwood objected to the playing of the 911 tape was very emotional and would inject an emotional theme into this case that could very well prejudice her client. I overruled the objection at that time. As it turned out, the 911 tape was part of the *res gestae* of the event. It did not, of course, implicate Mr. Esaw in any way. But, as Ms. Fullwood properly objected and raised the point, it was emotional and could have, in her view, tainted the proceedings.

Ms. Fullwood, I didn't say that nearly as eloquently as you did, so I will be glad for you to add anything to the record that you want to add.

MS. FULLWOOD: Well, basically, I'd just like to make reference to the rules of evidence that I'm invoking.

THE COURT: Okay.

MS. FULLWOOD: And that would be basically Rule 402 about relevance generally; 401, definition of relevance; 403, exclusion of evidence on the grounds of prejudice, confusion, waste of time.

My point is that it was emotional, it was cumulative to the witness' testimony; that its probative value was far outweighed by its prejudicial impact because it would relate to the jury information that may persuade them to base their verdict on their passions, emotions, or prejudice, rather than upon the evidence presented to them.

THE COURT: All right. It was indeed emotional. Obviously, the event itself was emotional. There's no way to avoid that, as everybody recognizes. At the same time, it did have probative value. It was a partial identification of the perpetrator and of the event that, if not led up to the fact, immediately followed the fact, a partial identification, as I recall it, perhaps of the vehicle, and the entire *res gestae* of this event was capsulated in the timeframe preserved in the 911 tape.

I note those objections and I would simply renew my earlier rulings and allow it into evidence for the reasons which I mentioned.

Trial Tr.p. 274, l. 11- p. 276, l. 10.

Finding and Conclusions Related to the 911 Issue

This Court must find that the Applicant failed in his burden of proof in showing that counsel was deficient in failing to object to the 911 call where an objection was actually made. The trial

court concluded that counsel Fullwood made a timely objection related to the relevance of the evidence of the 911 call and asserted that it was unduly prejudicial and not relevant. However, the trial court overruled the objection noting it contained relevant evidence and revealed the *res gestae* of the event. Although defense counsel could have been more specific in an objection to the conclusion of the 911 call, her assertion that the tape was not relevant and its prejudicial value outweighed its probative value was adequate to put the trial court on notice as to the grounds for the objection. Although defense counsel did not request or suggest redacting any particular portions of the 911 call, the trial court addressed the objection on the basis of Rule 403 and allowed the admission of the entire call.

Since the Court finds that counsel was not deficient in the concerning the objection, it does not need to address the prejudice prong since he has failed in his burden of showing a Sixth Amendment violation. However, upon the Court's review of the record and the testimony of the witnesses, including Christy Vasquez who made the call, the Court must alternately conclude that the Applicant has failed in his burden of proof that either that the trial court would have granted redaction or the result of the verdict would have been different to a reasonable probability had counsel requested unspecified redaction of the 911 call. This ground is denied and dismissed.

Counsel Failed to Meet with Applicant Sufficient Times and Review Evidence with the Applicant. (Amended Application, allegation 1).

In the amended application by former counsel Ola Johnson, he raised an allegation that counsel failed to meet with him a sufficient number of times to properly review the evidence and discuss the case with the Applicant. During the PCR hearing, the Applicant alleged that both counsel failed to meet with him a sufficient number of times. He claimed that his initial counsel, Elizabeth Fullwood, failed to adequately meet with him or timely retain an investigator in his case. He asserted that he wrote the court complaining about her and he received new counsel, Mr.

Chehoski. The correspondence Applicant wrote to the court prior to the trial was made an exhibit and reviewed by this Court. Applicant complained that he was in jail for two years before his case got moving and he complained that counsel Fullwood would not move for a speedy trial, despite his request. Subsequent to the letter, counsel Chehoski became involved in the case. He complained before this Court that Ms. Fullwood assisted at the trial with Mr. Chehoski when he wanted her removed.

Counsel Jason Chehoski testified that prior to the trial he met with Applicant a dozen times. He stated that they initially pursued an alibi defense because his client indicated that he was not there and did not indicate that he was guilty. The record shows that a notice of alibi was filed. Counsel Chehoski testified that Applicant claimed that he was attending a family member's birthday party. He stated that before he was hired the Public Defenders office had already hired an investigator to assist in the defense. The defense investigation showed that there was a brief window of time that the Applicant had left the party and taken his girlfriend's car. There was also information from his girlfriend, Lunetta Grayson, who ended up being a witness for the state about his presence at the party.¹³ Counsel was also aware Applicant was also picked out of a line-up which was challenging evidence for the defense to combat. The Applicant had also given a statement to police admitting his involvement in the crime, but limiting his role.

Counsel Beth Fullwood testified remotely due to her health issues. She stated that she participated in the trial with counsel Chehoski. However, she did not have access to the Public

¹³ Lunetta Grayson testified at trial as a subpoenaed state witness that there was a birthday party that night. However, she testified that the Applicant left the party twice in her car and that Pitts was with him. Trial Tr.p. 466-468. She testified that he was gone for around 15-20 minutes. Trial Tr.p. 468. A jail call was also admitted over objection about the Applicant wanting her to get rid of a green and white bag. Trial Tr.p. 473. She advised the Applicant's family and later law enforcement about this call.

Defenders file prior to the PCR hearing so she was testifying based upon her memory. She recalled the meeting with the Applicant and going over the charges and defenses. She recalled that an investigator that was retained on the case was either Don Kneece or David MacDougall, but she could not recall who was the specific investigator.¹⁴ She stated that Esaw may not have wanted her as counsel which could be a reason why Mr. Chehoski ended up on the case.

This Court finds that the Applicant failed in his burden of proof on the issue of insufficient number of meetings. Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. *Campbell v. Polk*, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if trial counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. *See Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing *Easter*) ("First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation.") Mere speculation and

¹⁴ Mr. MacDougall died in January 15, 2014.

conjecture is insufficient to substantiate allegation that counsel's deficient performance was prejudicial. *See Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds that the Applicant failed in his burden of proof. This Court finds credible counsel Chehoski's testimony that he personally met at least 12 times prior to the trial. The record shows that counsel Fullwood had met with Applicant and discussed the case with him, but that the Applicant had complained that she was not doing enough prior to Mr. Chehoski's involvement. The record shows that the defense team of counsel was not deficient and that their preparation for trial when it occurred was adequate with a full understanding of the State's case against the Applicant as well as the Applicant's possible defense of alibi. The Applicant's mere speculation that more could have been done does not establish that counsel was unprepared for the trial or that any further specific consultation was constitutionally necessary under the 6th Amendment. He has failed to show deficiency under *Strickland*. The allegation must be denied.

Allegation that Counsel Fullwood was relieved as Counsel. (Amended Application, allegation 2).

In the next allegation, Applicant contends that Fullwood was actually removed as counsel. This Court finds that the allegation does not have merit because there was no prior court finding that counsel Fullwood had been relieved as counsel. Although this Court must find that the Applicant complained about counsel Fullwood's representation to the administrative judge related to a speedy trial matter, the Applicant has failed to show that the court actually relieved counsel Fullwood from her representation in this matter where there is no order entered removing Ms. Fullwood.

The credible testimony at this hearing was that counsel Fullwood was not relieved as counsel in the trial. Credible testimony from counsel Chehoski was that then Public Defender

Fullwood asked him to assist in the case and that he asked her to sit with him at the trial because she was familiar with the case. It was Chehoski's recollection that he asked her to assist because she had a high number of murder cases and was asking him to assist in this case to lighten her caseload.¹⁵ He did not recall the Applicant not wanting Fullwood on the case at the time of the trial. He stated that he was not aware of an earlier letter that had been sent to the court by Esaw before he became involved.

Counsel Fullwood indicated that because she did not have access to the file her recollection was that she may have asked Chehoski to be involved on the case because Esaw did not want her. However, the Applicant has failed to show the counsel Fullwood was ever relieved by court order. *United States v. Gonzales-Lopez*, 548 U.S. 140, 147–48, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

In *Gonzales-Lopez*, the United States Supreme Court noted that the right to counsel of choice is not absolute and is subject to several limitations, but because the government conceded that the district court erroneously deprived respondent of his counsel of choice and without proper justification, the broad discretion normally afforded to trial judges was not applicable. *Id.* at 152, 126 S.Ct. 2557. Importantly though, the *Gonzalez-Lopez* court made clear that its holding did not cast any doubt or place any qualifications upon its prior holdings that “limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them.” *Id.* at 151, 126 S.Ct. 2557.

Reaffirming its earlier holdings, the Court further noted this right to counsel of choice does not extend to defendants represented by appointed counsel. *Id.* The Court also reiterated the wide

¹⁵ Counsel Chehoski's statement at the sentencing proceeding is consistent. Chehoski state that he was assigned the case in September 2016 after Ms. Fullwood was originally assigned the matter. He stated It was due to some conflict and Ms. Fullwood's caseload regarding major crimes, the file was re-assigned to him. Trial Tr.p. 748, l. 1-6.

latitude that must be afforded to trial courts in balancing the right to counsel of choice with the needs of fairness, and its “interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Id.* at 152, 126 S.Ct. 2557. *See State v. Cottrell*, 421 S.C. 622, 634–35, 809 S.E.2d 423, 430 (2017).

The United States Supreme Court has held that the right to counsel does not encompass “the right to a meaningful attorney-client relationship.” *Morris v. Slappy*, 461 U.S. 1, 13 (1983). The evidence before this Court reflects that counsel Fullwood was active, along with counsel Chehoski throughout trial. The trial record reveals there was no indication that by anyone that counsel Fullwood was relieved as counsel by the court or precluded from participating. To the contrary, she was fully engaged and took numerous witnesses during the trial. These witnesses included Adam Creech (Trial Tr.p. 108-109, 445-457); Franklin Vasquez (Trial Tr.p. 153-166, 302-313); Christy Vasquez (Trial Tr.p. 263-265); and Dr. Janice Ross (Trial Tr.p. 373-74).

Some circumstances call for the substitution of counsel, “such as ‘a conflict of interest, a complete breakdown in communication or an irreconcilable conflict with [the defendant's] attorney.’ ” *Heness v. Bagley*, 644 F.3d 308,321 (6th Cir. 2011) (quoting *United States v. Sullivan*, 431 F.3d 976, 979 (6th Cir. 2005)). The Applicant has failed to show this Court credible evidence that such a complete communication breakdown occurred or that there was an irreconcilable conflict between them. The allegation must be denied for failing to meet the burden of proof of this specific factual issue about counsel Fullwood’s status.

Allegation that Applicant’s counsel Jason Chehoski and Elizabeth Fullwood failed to object to the (superseding) indictments presented in this case. (Amended Application, allegation 3, Pro Se Application, allegation c)).

The Applicant has failed to show either deficiency performance or prejudice on this allegation related to the superseding indictments. At the PCR hearing, the Applicant asserted that

he was initially served with arrest warrant by the police and then later he received additional warrants with different warrant numbers. He claimed that they lost the warrants and issued new ones. In his pleading, he also claimed that the indictments were made untimely and counsel should have objected. Counsel Chehoski testified that that he was not aware of a valid objection that could have been made to the indictments. As the Applicant acknowledged, he was aware that he was being charged with murder.

At the outset there appears to have been a series of amended indictments made on October 16, 2017. These amended indictment were also true billed as amended with the same indictment number and each went before the jury and included the verdict as signed by the foreman.¹⁶

The record shows that he was indicted for attempted armed robbery (2016-GS-32-00216) on January 19 2016 and recorded again as amended on October 16, 2017 noting arrest warrant 2015A3210201585, for murder (2016-GS-32-00217) on January 19, 2016 on arrest warrant 2015A3210201586 served on September 16, 2015; for attempted murder (2016-GS-32-00218) on January 19, 2016 and again as amended on October 16, 2017 on arrest warrant 2015A3210201589; for armed robbery on January 19, 2016 (2016-GS-32-00214) on arrest warrant 2015A3210201584; for possession of a weapon during a violent crime 2016-32-00206 on January 16, 2016 on arrest warrant 2015A3210201582; and attempted armed robbery (2016-GS-32-00213) on January 19, 2016 and recorded again as amended on October 16, 2017 noting arrest warrant 2015A3210201583.

¹⁶ This ground is interesting because it suggest that the original indictments had been lost. However, in the record on appeal a copy of the original indictments were included but not the amended indictments. See R.p. 538 – 555. None of those indictments include the verdict and signature by the grand jury foreman. However, the indictments and amended indictment provided by the Lexington County Clerk of Court include the verdict and signature.

Applicant's allegation that his counsels were ineffective for failing to challenge the superseding indictments is meritless as a matter of law. "An indictment is merely a notice document." *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010). Whether the indictment could be made more definite and certain is irrelevant. *Baker*, 390 S.C. at 62, 700 S.E.2d at 442. *Baker* set for the following test for viewing indictments:

[T]he court must look at the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." *Id.* at 63, 700 S.E.2d at 443 (citing *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007). Furthermore, in order to challenge the sufficiency of an indictment, an objection must be made before the jury is sworn in. S.C. Code Ann. §17-19-90.

A court reviewing an indictment for sufficiency should consider the indictment "'on its face,' and consider the events at trial." *State v. Reddick*, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). In other words, a court should examine "the totality of the circumstances" to determine if the applicant was cognizant of the crimes for which he was charged. *Id.*

The Applicant has not met his burden to show how counsel were deficient in failing to object to the amended true billed indictments from October 16, 2017 or that the indictments were improper where each was re-indicted by the grand jury. Deficiency has not been shown since he has shown no basis for reasonably competent trial counsel to successfully object. Further, there is

no showing at the hearing concerning the arrest warrants as suggested in his allegation that would have supported a successful objection.

As to the alleged delay in the indictment after the arrest, the Supreme Court of South Carolina has held Rule 3 of the South Carolina Rules of Criminal Procedure is an “administrative rule adopted for the purpose of insuring an orderly and prompt disposition of cases. While the rule is designed to secure a prompt handling of cases, it was not intended to be the criterion for determining whether the constitutional guaranty of a speedy trial has been met.” *State v. Culbreath*, 316 S.E.2d 681, 681 (S.C. 1984) (“[T]he failure of the solicitor to act upon a warrant within ninety (90) days ... does not within itself invalidate a warrant or prevent subsequent prosecution.”). Therefore he has failed to prove counsel was deficient in failing to seek dismissal of the true billed indictments under Rule 3.

Allegation that Applicant’s counsel Jason Chehoski and Elizabeth Fullwood failed to inform applicant regarding conversations they had with the trial judge and solicitor at side bar. (Amended Application allegation 4).

In this ground the Applicant generally claims that there were side bars with the trial judge that he asserts counsel never told him what had occurred. Counsel Chehoski disagreed in his PCR testimony and stated that when objections were made in the middle of a witness, they made a note and the matters discussed at a side bar were placed on the record at the next break. Counsel Fullwood confirmed that it was consistent with her recollection that sidebars during testimony were placed on the record at the next break from the jury. She stated that her client would know what had occurred at the sidebar. The record supports that there were a series of sidebars throughout the trial. Trial Tr.p. 62, 126, 255, 274, 296, 354, 367, 377-78, 419, 423, 452, 514-515, 546, 562. There were critical bench conferences also preserved on the record. Trial Tr.p. 274 (related to 911 call objection); p. 354 (related to State Exhibits 15 and 16 photograph of Franklin’s

wounds in hospital setting); Tr.p. 423 (related to the Crimestoppers tip); p. 452 (related to motion to exclude jail call); p. 527 (related to side bar about use of blowup of Applicant's statement as a demonstrative exhibit); p. 560 (related to defense objection at side bar to AJ Evans testimony about matters outside of his knowledge). The Applicant has failed to show any deficiency related to any of the specific side bars that occurred during the trial.

This Court finds counsel's statements credible that these were either discussed with him or the reasons for the sidebar conferences were placed on the record. He has failed in his burden of proof or show any prejudice to him in the manner the bench conferences were carried out.

Allegation that Applicant's counsel, Jason Chehoski and Elizabeth Fullwood, failed to properly investigate the facts of this case and failed to call alibi witnesses to confirm I was attending a family members birthday party. (Alibi Issue) (Amended Application, allegation 5)

Allegation that Applicant's counsel Jason Chehoski and Elizabeth Fullwood failed to call my mother as a witness. Patricia Esaw. (Amended Application, allegation 15)

In these allegations in the amended application, Esaw contends that counsel failed to investigate or call alibi witnesses including his family members. Esaw testified in this hearing that his mother was supposed to be a witness, but she was sequestered from the court and never testified. Esaw stated that she was his witness because he was claiming that he was at a party at the time the incident happened. He claimed that she was never investigated by the defense for alibi. After she had been sequestered, Esaw stated that counsel advised him that they did not need her to testify. Esaw claimed that he was at the birthday party with his girlfriend (Lunetta Grayson), his mother and his sister. He claimed that he told counsel Chehoski when they met that his mother was going to testify that he was at the party. The Applicant also claimed that counsel never put an investigator on the witness stand.[The Applicant did not state what the investigator would testify.] This Court finds that the Applicant failed to prove a Sixth Amendment violation under *Strickland*.

“A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). “[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses “when it is reasonable to do so.” *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). “In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris*, 377 S.C. at 75–76, 659 S.E.2d at 145–46 (citing *Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Harris*, 377 S.C. at 75–76, 659 S.E.2d at 145–46. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.* at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Our Supreme Court has cautioned reviewing courts not to lose sight of the standard of reasonableness regarding counsel’s duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 (noting that “this duty is limited to a reasonable investigation”). Reviewing courts “should keep in

mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014).

When trial counsel's conduct is challenged for failing to present certain evidence, the inquiry is generally focused on whether the investigation supporting counsel's decision not to present certain evidence was reasonable. *See Wiggins v. Smith*, 539 U.S. 510, 521-23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (in context of limited scope of investigation into potential mitigating evidence); *Wilson v. Ozmint*, 352 F.3d 847, 860 (4th Cir.2003) (same). "Strickland's objective reasonableness prong requires counsel to conduct appropriate factual and legal inquiries and to allow adequate time for trial preparation and development of defense strategies." *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir.1998). And "when evaluating decisions not to investigate further, [the court] must regard counsel's choice with an eye for 'reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' " *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir.1991) (*quoting Strickland*, 466 U.S. at 691, 104 S.Ct. 2052); *cf. Turner v. Williams*, 35 F.3d 872, 896 (4th Cir.1994) (in the context of ineffective assistance of counsel claims, the court "address[es] not what is prudent or appropriate, but only what is constitutionally compelled."), overruled on other grounds by *O'Dell v. Netherland*, 95 F.3d 1214, 1222-23 (4th Cir.1996).

Evidence from the PCR Hearing

During the hearing, his mother, Patricia Reid, testified virtually. She testified that she was at the birthday party for her granddaughter the entire time. She stated Applicant was also at the

party with his girlfriend along with her daughter Erica and her children. She said that she spoke with the police the day they were looking for the Applicant. She stated that she told law enforcement that the Applicant was at the party the entire time playing cards. She also stated that she told this to her lawyers and about what she told law enforcement.

Reid also testified that she did not see any bruise on her son's face that day.¹⁷ She confirmed that her son did not have a working vehicle at that time and used his girlfriend's black car. She also stated that her son never wore jewelry.¹⁸ She stated that the Applicant and his girlfriend lived somewhere else at that time. She admitted that she was sequestered during a portion of the trial because she was a potential witness and they would not let her into the courtroom.¹⁹

Erica Esaw testified at the PCR hearing that she was the Applicant's baby sister. She said that they were celebrating her daughter's birthday at her mother's house the day of the incident. She said that the Applicant did not normally wear jewelry and only wore a silver watch. She

¹⁷ This PCR testimony by the mother is a response to Det. Moore's trial testimony that the Applicant's face was swollen when he interviewed him. Trial Tr.p. 541. It was also consistent with Luenetta Grayson's trial testimony.

¹⁸ This PCR testimony was responsive to her belief that the state was trying to contend that the bracelet that belonged to Pitts was alleged to have been on the Applicant that day. This was not the State's position at trial.

¹⁹ The record shows that Patricia Reid was present at the trial and was included on the sequestered witness list. Trial Tr.p. 22, l. 20-25. However, while the trial proceeded, counsel Chehoski made a decision that they were not going to use Patricia Esaw as a witness and had her sequestration ended and removed from the witness list so that she was able to be in the courtroom. Trial Tr.p. 570-571. This decision was made immediately prior to Wilfred Pitts testifying and after the Applicant's girlfriend Luenetta Grayson testified about the Applicant leaving the party in her vehicle and the Applicant's statement to law enforcement had been introduced. Trial Tr.p. 466-468 (noting that Esaw and Pitts left the party on two occasions that night in her car to go to a store to meat and another to go to a convenience store). On cross-examination, Luenetta testified that she went inside the house around between 7 and 7:30 to work and did not know if her car was used after that. She stated Ricky around 10 PM asked her to be ready to leave the party and she did not see any blood on his clothes or injuries to his face. Trial Tr.p. 478.