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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

CHEVES D. HEYWARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

COURT OF GENERAL SESSIONS

2007-GS-23-8510

2007-GS-23-8511

2007-GS-23-8512

2008-GS-23-9038

2008-GS-23-9039

STATE OF SOUTH CAROLINA,

vs.

TRANSCRIPT OF RECORD

CHEVES DWAYNE HEYWARD,
DEFENDANT.

ORIGINAL

April 27 and 28, 2009
Greenville, South Carolina

B E F O R E:

THE HONORABLE EUGENE C. GRIFFITH, JR., JUDGE; and a
jury.

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

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Assistant Solicitor

STEVE W. SUMNER, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

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(SW) - Denotes State's Witness
 (DW) - Denotes Defense Witness
 (IC) - Denotes In Camera

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P R O C E E D I N G S

1

2

THE COURT: Good morning.

3

Mr. Sumner, where are his clothes?

4

MR. SUMNER: Well, I took him two sets of clothes.

5

Stand up, Heyward.

6

THE COURT: He's a big fellow.

7

MR. SUMNER: Well, I'm about 6'4". He's -- I bought

8

him -- I went and bought another pair of clothes this

9

morning, the biggest clothes I could find.

10

So I don't know what else to do right now. I went

11

and got the clothes from the Public Defender's Office,

12

which were not big enough. And I went and got the biggest

13

clothes I could find. And I was told they ripped off of

14

him. I don't know. I haven't seen him try to put those

15

clothes on.

16

DEFENDANT HEYWARD: He saw them. He saw it downstairs.

17

MR. SUMNER: So, I mean, I can go and try to buy some

18

more.

19

THE COURT: I'm inclined to give you the opportunity

20

over lunch to do that.

21

MR. SUMNER: I'm sorry.

22

THE COURT: I'm inclined to give you the opportunity

23

over lunch to do that, just out of an abundance of

24

caution. Because an orange jump suit is --

25

MR. SUMNER: I don't want to do that. I went and

1 bought another set. May if we say on the record --

2 What size pants do you wear?

3 DEFENDANT HEYWARD: 46.

4 MR. SUMNER: Okay. And what size -- I'll just go get
5 a triple XL. I guess I'll just go out to maybe the Casual
6 Big and Tall store over lunch.

7 What size shoes do you wear?

8 DEFENDANT HEYWARD: The shoes are appropriate.

9 THE COURT: The shoes fit?

10 DEFENDANT HEYWARD: Yeah. I've got on sneakers.

11 MR. SUMNER: What size -- oh, the shoes that I bought
12 are okay?

13 DEFENDANT HEYWARD: Yes.

14 THE COURT: That's difficult to do.

15 Well, let's don't proceed with selection of this jury
16 until we get appropriate clothes on him. I want to give
17 this man as fair a trial as we can have.

18 MR. SUMNER: Sure.

19 THE COURT: I mean, we're at 12:00 right now. And we
20 can reconvene this thing at -- I hate for the jury -- we
21 can reconvene at 1:30, if that suits y'all.

22 Will that be enough time, an hour and a half, or do
23 you want me to give you until 2:00?

24 MR. SUMNER: I feel like an hour and a half will be
25 fine.

1 THE COURT: Madam Solicitor, do you have any
2 objection to that?

3 MS. SEAY: No, sir, Your Honor.

4 THE COURT: Okay. Yes, sir.

5 DEFENDANT HEYWARD: I would like to address the Court
6 about my representation with Mr. Sumner.

7 THE COURT: Sure.

8 DEFENDANT HEYWARD: I mean, Mr. Sumner, he's been my
9 lawyer approximately -- I was assigned to Mr. Larry Cooke.
10 And Mr. Cooke was relieved of my case. And Mr. Sumner
11 took over my case. And, during the process, I think I've
12 seen him maybe, roughly, three or four times,
13 approximately maybe 10 minutes at the most.

14 So, I mean, I feel that's not enough adequate time to
15 prepare for a trial. I mean, I don't even -- he didn't
16 even ask me about any clothes. I mean, just certain
17 things -- I mean, he didn't have a defense strategy or
18 anything. And I feel, I mean, he hasn't given me
19 effective -- I mean, efficient counsel.

20 THE COURT: When was he appointed to you?

21 DEFENDANT HEYWARD: I would probably say May of last
22 year.

23 THE COURT: So 11 months ago, or so?

24 DEFENDANT HEYWARD: Yes, sir.

25 And I've probably seen him maybe three or four times,

1 maybe the minimum 15 minutes at the most. I mean, he's my
2 attorney. I mean, he knew I was going to trial. And,
3 yesterday, he could have come and talked to me about
4 getting my size for my clothes, and things of that nature.
5 And I feel he hasn't given me any good counsel.

6 THE COURT: How long has --

7 DEFENDANT HEYWARD: I feel 15 minutes of the time
8 that I have seen him is not efficient to go to trial. I
9 mean, he doesn't know anything about my case, and so on
10 and so forth. He doesn't know if I take the stand -- he
11 hasn't asked me if I was guilty.

12 THE COURT: Well, I doubt he would ever do that.

13 DEFENDANT HEYWARD: My life is on the line, sir. And
14 he hasn't given me that representation that I need.

15 THE COURT: All right. Hang on one second.

16 How long has this been on the trial roster?

17 MS. SEAY: Your Honor, this case has been on the
18 trial roster approximately once a month since December of
19 2008, and it has not been reached. We were, actually,
20 even first up maybe the time before last. And it was when
21 we had the snowstorm out of nowhere.

22 So we have really tried hard to get this case heard.
23 And it is two years old now. The incident, actually,
24 happened March 28th of 2007. So it's a little over two
25 years old.

1 Mr. Sumner has communicated with me quite regularly
2 about the case. And we've gone over a lot of discovery
3 materials and other matters, photographic lineups and
4 different things. So I would offer that to the Court to
5 let you know that.

6 But we have all of our witnesses here. They have
7 been on call and have come up here numerous times prior to
8 this. And the State is ready to go. And we would like to
9 get this case tried.

10 THE COURT: Mr. Sumner, let me ask you a question.
11 Do you feel like you're ready and prepared to go forward
12 with this trial this afternoon?

13 MR. SUMNER: I do, Your Honor.

14 But I would like to expand on that answer, if I
15 could, if that's all right.

16 THE COURT: Please do so.

17 MR. SUMNER: Okay. I don't know exactly what date I
18 was appointed. But I want to give you a history of what
19 my file notes reflect, and that might weigh into your
20 decision here this morning.

21 On July 16th of 2008, I reviewed the file myself and
22 communicated to Ms. Seay, Madam Prosecutor, that I had
23 taken over the case in July of last year. On September
24 25th of 2008, I had a client conference, a general status
25 and file review.

1 The Defendant -- I'm reading from my file notes, Your
2 Honor. The Defendant was pretty adamant about a detailed
3 file review and told me he would plead for credit for time
4 served. This file needs to be reviewed. I wrote a note
5 to myself, File needs to be reviewed further and talk back
6 with him. That was on September 25th of 2008. So that
7 was the first conference.

8 The second was October 16th, 2008. And my notes say,
9 It's pretty rough. Client has a very bad attitude and
10 it's a tough meeting. Client very antagonistic. My
11 investigator was present, Scottie Roberson. And I've got
12 bold print, all caps, Trial. And that's a note to me
13 meaning that Mr. Heyward has said it's a trial. And
14 that's fine. That's okay. That was in October of 2008.

15 On November 25th of 2008, my investigator visited
16 with Mr. Heyward and he was adamant that there were no
17 witnesses. He was -- my investigator's notes, He was very
18 upset. My investigator showed him the photographic
19 lineup. The Defendant said, Where is the DNA? Where are
20 the fingerprints? My investigator wrote, Not a good
21 meeting. But we sent all the discovery to him. So we
22 copied all the discovery in the file and mailed it to him
23 at the law enforcement center.

24 On December 10th, 2008, I had another client
25 conference. He indicated to me there were no witnesses

1 that he wished to call, no testimony that he was going to
2 give. The Defendant said, No way to a straight-up plea.
3 He said, It's a trial. That's fine.

4 Okay. Now, I, also, visited with him on April 13th
5 of -- that would have been, I guess, two weeks ago in this
6 courthouse. I went over the basic trial structure --
7 well, I started to, but the client was very belligerent,
8 You haven't done anything for me. I want to fire you.
9 You aren't helping me. You aren't working for me. You
10 haven't interviewed any of the witnesses in the case.
11 Then he just gets up and leaves the meeting. He gets up
12 and says, I'm done talking with you. My notes from
13 October 16th, 2008, Extensive client conference, no
14 witnesses. It's a trial.

15 So I feel that I'm very -- from my communication with
16 him, I feel that I'm ready to go. He's reiterated to me
17 three or four different times in person that there are no
18 witnesses. He's told me -- I mean, he's, unfortunately,
19 bringing attorney/client stuff in. I don't know what else
20 to do, except to respond to it as if it's a quasi PCR
21 here. I've sent him all of my discovery.

22 THE COURT: You sent the discovery back in October?

23 MR. SUMNER: Yes, sir.

24 THE COURT: Okay.

25 MR. SUMNER: I sent discovery -- I want to make sure

1 about that. That would have been November of 2008. The
2 file is pretty thick. I mean, my notes say I sent it to
3 him.

4 Did you get all of it?

5 DEFENDANT HEYWARD: I'd like to say that --

6 MR. SUMNER: No.

7 I meant, did you get the discovery?

8 DEFENDANT HEYWARD: No.

9 I received the discovery from Mr. Cooke. I never got
10 discovery from him.

11 MR. SUMNER: Okay.

12 DEFENDANT HEYWARD: You say on 4/13, when I came and
13 saw you, I spoke with you.

14 First of all, Your Honor, I was supposed to go to
15 trial December the 9th.

16 THE COURT: That's what the Solicitor said.

17 DEFENDANT HEYWARD: And she just made that note. Two
18 or three days later, Mr. Sumner came and spoke with me,
19 him and his investigator. I feel we was ready to go to
20 trial. That was Monday. He didn't even come and notify
21 me that Sunday and say, well, Mr. Heyward, we're prepared
22 to go to trial.

23 I mean, he just hasn't done anything for me, sir. I
24 mean, nothing. And I feel that he's not ready to go to
25 trial. He hasn't done anything for me, sir. And I

1 expressed that adamantly that I didn't want him to
2 represent me, because he hasn't given me any type of
3 representation.

4 I've asked him questions, well, sir, what about this?
5 What about this? I've got to go right now. I'll talk to
6 you later. And, I mean, every conversation has been five
7 minutes or less. And that's not fair. My life -- I'm
8 like, sir, well, can I ask you about this? Can I ask you
9 about that? I don't have time right now, give me a call.
10 I mean, that's not right.

11 MR. SUMNER: Not only is it not right, it's not true.

12 DEFENDANT HEYWARD: I don't have any reason to lie.
13 I mean, you've been belligerent as well with me --

14 THE COURT: Hold on there now.

15 This thing has been on the trial roster since
16 December 9th, once a month since then. And we haven't
17 gotten it up for one for one reason or another.

18 DEFENDANT HEYWARD: I mean, I've been up here. He
19 can tell you. I've been up here probably eight times
20 since December 9th, maybe 10 times. Every time I come up
21 here, go back, come up, go back, come up, go back. I
22 asked Mr. Sumner, Well, what's transpired? Do they have
23 all their ducks in the right -- I don't know.

24 I mean, you're my attorney. You're supposed to know
25 these things.

1 I mean, I've been up here eight, maybe 10 times since
2 December. The case is two years old. I mean, he hasn't
3 done anything.

4 THE COURT: Well, you said Mr. Cooke had represented
5 you before?

6 DEFENDANT HEYWARD: Yes, sir.

7 THE COURT: Did Mr. Cooke give you all the discovery?

8 DEFENDANT HEYWARD: Yes.

9 I got all this from Mr. Cooke.

10 THE COURT: Right.

11 And have you had a chance to review all of that?

12 DEFENDANT HEYWARD: I've reviewed some of it. But I
13 really --

14 MR. SUMNER: What is the letter right here?

15 DEFENDANT HEYWARD: I got that.

16 MR. SUMNER: This is from me. Let's --

17 DEFENDANT HEYWARD: Don't --

18 THE COURT: Hold on.

19 I want to make sure, whether you got it from
20 whomever, at least, you got it.

21 MR. SUMNER: Well, he just said that he didn't get
22 discovery from me.

23 DEFENDANT HEYWARD: I got that piece of paper right
24 there from you --

25 MR. SUMNER: I'm going to hand up -- the first cover

1 sheet in the file says, Per our conversation, please find
2 the discovery in your case.

3 DEFENDANT HEYWARD: But I haven't received any
4 discovery. I got this from Mr. Cooke.

5 That's all you sent me right there.

6 THE COURT: Mr. Heyward, this appears, just reading
7 this letter that you had a conversation with either
8 Mr. Sumner or --

9 DEFENDANT HEYWARD: I spoke to --

10 THE COURT: -- or his investigator.

11 DEFENDANT HEYWARD: I spoke with the investigator,
12 Mr. Robertson, or whatever. And he sent me that. I
13 didn't get the discovery. If he knew he sent me any
14 discovery, why did he just ask me a few minutes ago did I
15 get discovery?

16 So, I mean, he's not --

17 THE COURT: Here's the distinction, Mr. Heyward. Let
18 me explain something to you. Mr. Sumner has more than one
19 client. You have only but one lawyer. So it's a lot
20 easier for you to remember what's coming to you than it is
21 for him having multiple cases.

22 So he was trying to reassure that the discovery had
23 been done, because that's normally the practice. The
24 Solicitor gives it to the Defense attorney. The Defense
25 attorney gives it to the client. If that hadn't been

1 done, that would be a very valid reason not to go forward.
2 But it appears it was done --

3 DEFENDANT HEYWARD: Your Honor, that's all that he
4 sent me. He didn't send me discovery.

5 THE COURT: All right. I'm going to hand this back
6 to you and you can put it back in the file.

7 MR. SUMNER: Okay.

8 THE COURT: I'll tell you what. Let's --

9 DEFENDANT HEYWARD: I'm just unhappy with his
10 representation, Your Honor.

11 THE COURT: All right. Well, I'm going to let the
12 jury go for lunch. And we're going to reconvene at 1:45.
13 At 1:45, we're going to reconvene. I may hear a little
14 bit more. But I think I'll -- we'll decide what we're
15 going to do at that point in time.

16 DEFENDANT HEYWARD: I feel that's not fair, Your
17 Honor.

18 THE COURT: I haven't ruled.

19 How is that not fair?

20 DEFENDANT HEYWARD: I mean, as far as him even
21 representing me.

22 MR. SUMNER: Do you want me to go get the clothes,
23 Judge?

24 THE COURT: Yes, sir.

25 Madam Solicitor, we'll see you at 1:45.

1 And court will stand in recess until then.

2 (WHEREUPON, a lunch break was taken.)

3 THE COURT: All right. I hope everybody had a good
4 lunch.

5 Mr. Heyward, you look much better in those clothes.

6 DEFENDANT HEYWARD: Thank you.

7 THE COURT: Mr. Heyward, I'd like to ask you a few
8 more questions. You brought up an issue before we
9 adjourned for lunch regarding Mr. Sumner's representation
10 of you.

11 Are there any witnesses you have or you have
12 knowledge of that you discussed with him with whom he's
13 not talking?

14 DEFENDANT HEYWARD: I just found out some new
15 discovery about two people that's housed where I'm housed
16 in the county jail.

17 THE COURT: Are they involved in this case?

18 DEFENDANT HEYWARD: No.

19 But they overheard a guy that's supposed to testify
20 against me. They overheard him saying that he's going to
21 testify against me. And he's just, basically, doing it to
22 get himself off so that he won't get any time.

23 THE COURT: Well, that's your co-defendant; is that
24 right?

25 DEFENDANT HEYWARD: Pardon me?

1 THE COURT: That's the co-defendant, a man charged
2 with a similar crime as you are?

3 DEFENDANT HEYWARD: Yes.

4 THE COURT: So what you're telling me is that --

5 DEFENDANT HEYWARD: That he was going around bragging
6 saying that he was going to take the stand and testify
7 against me and, basically, that he's doing it so he can
8 get a time cut, and that I wasn't really even involved.
9 He's just using me as a scapegoat.

10 THE COURT: Do you have reason to believe Mr. Sumner
11 has not had a chance to talk with him?

12 DEFENDANT HEYWARD: I just brought that to his
13 attention a few minutes ago.

14 THE COURT: All right. Now, other than that one
15 witness, the co-defendant, which I believe, I mean, just
16 observing brief facts that counsel told me before you came
17 in was that it was the co-defendant and he was going to
18 testify. And so they told me that, which is -- generally,
19 when two people are involved, one party will testify
20 against the other. And that is not uncommon. It's very
21 common for one defendant to testify against another. That
22 never came as a surprise to me when I was a trial lawyer,
23 or now as a judge. That's kind of more likely than not.

24 Do you find it surprising that this guy would testify
25 against you?

1 DEFENDANT HEYWARD: Yeah, I do. Because I'm innocent
2 of the crime I've been accused of.

3 THE COURT: All right. Now, other than him, is there
4 any other witnesses you know of who you've not told him
5 about, or whom he's not spoken with?

6 DEFENDANT HEYWARD: Not right offhand. Just these
7 two guys.

8 THE COURT: These two guys that overheard your
9 co-defendant saying he was going to testify?

10 DEFENDANT HEYWARD: Well, he, basically, told them --
11 they brought -- when they saw me in the hallway, they
12 explained that, hey, man, you're so and so --

13 THE COURT: You don't have to tell me. I understand
14 how it works. You don't have to tell me exactly what they
15 said.

16 Now, other than that, you, also, told me earlier on
17 that you hadn't had enough time to speak with Mr. Sumner.
18 Other than this one witness, who these two gentlemen say
19 they overheard, the three people, the two you spoke with
20 who overheard or listened to the co-defendant say what he
21 was going to do --

22 DEFENDANT HEYWARD: Yeah.

23 THE COURT: -- is there anybody else you would like
24 him to talk to?

25 DEFENDANT HEYWARD: No, not right offhand.

1 THE COURT: Is there any other time you need with him
2 to discuss the facts of your case, or your defenses, or
3 your right to testify? Do you need time to discuss your
4 case with him?

5 DEFENDANT HEYWARD: I mean, I've, basically, felt
6 that he -- I mean, me and him, initially -- I mean, he
7 got -- Your Honor, we got off to a rocky start as far as a
8 client and an attorney. And, like I say, I'm adamant and
9 I still feel that I kind of -- he really didn't put a lot
10 of time or a lot of effort in --

11 THE COURT: All right. Well, here's what I'm going
12 to do, I'm going to help you out. I'm going to give you
13 some time to talk with him. What we're going to do, we're
14 going to pick this jury first. We're going to pick a
15 jury. And we're going to start the trial first thing in
16 the morning.

17 And I'm going to give you Mr. Sumner this afternoon.
18 You'll have him all afternoon. If he needs a witness to
19 be made available, I'm going to require the Solicitor's
20 Office assist him and get that witness available to y'all
21 so he can talk to him or his investigator, whomever, to
22 prepare your case for trial starting first thing in the
23 morning. Because I want you to have a fair trial. And I
24 think I assured you of that when I saw you first, my first
25 question was where were your clothes.

1 So I want you to understand that I'm going to do my
2 best to give you a fair trial as your trial judge. And by
3 doing that, I'm going to make Mr. Sumner available to you
4 for the rest of the afternoon to talk as long as you want
5 to talk. And we're going to start this trial first thing
6 in the morning.

7 DEFENDANT HEYWARD: Yes, sir.

8 THE COURT: And I think that will give you ample time
9 to make certain that you understand y'all's trial
10 strategy, and you can discuss about these other witnesses.
11 And he'll have a chance to talk with them and his
12 investigator, also.

13 All right. Let's pick this jury. And then we're
14 going to start first thing in the morning. Because I
15 think this will be the best way to assure that Mr. Heyward
16 gets a fair trial on this. And I hope it doesn't
17 inconvenience y'all. But, to me, that's the best way to
18 handle this matter.

19 MS. SEAY: May we approach for a scheduling matter
20 concerning tomorrow morning?

21 THE COURT: Sure.

22 (WHEREUPON, a bench conference was held.)

23 THE COURT: Are you all ready to pick the jury?

24 MR. SUMNER: That's fine.

25 And we have some pre-trial stuff that we can do. It

1 won't take very long. And we'll be cleared up and ready
2 for tomorrow.

3 THE COURT: Okay. For my education, how long do we
4 anticipate the State's case taking before the jury comes
5 in?

6 MS. SEAY: Your Honor, I would think we could
7 probably take care of this in three hours or so. Once
8 we've gotten the pre-trial motions and things out of the
9 way, I would say three hours.

10 THE COURT: Okay. And then whatever defense they
11 decide to put up.

12 MR. SUMNER: I think we can finish tomorrow.

13 THE COURT: Okay. That's fair enough.

14 MR. SUMNER: By the end of Tuesday, I think it should
15 be resolved.

16 THE COURT: Okay.

17 THE CLERK: The strikes are five and 10?

18 THE COURT: Yes, ma'am.

19 THE CLERK: Do you want them to come forward?

20 THE COURT: Whatever you normally do.

21 (Pause.)

22 MR. SUMNER: Your Honor, my client, Mr. Heyward, has
23 expressed a desire to speak with you. I told him I did
24 not think he could speak to you in your chambers, which is
25 what he mentioned, but if he had anything he wanted to

1 bring to your attention --

2 THE COURT: We'll address that after jury selection.

3 MR. SUMNER: Right.

4 That he would be given ample opportunity.

5 (WHEREUPON, the jury panel entered the courtroom.)

6 THE COURT: Good afternoon, ladies and gentlemen.

7 My name is Eugene Griffith. I'm from Newberry
8 County.

9 It's a pleasure to be here in Greenville County
10 holding court this week. I did not have the pleasure of
11 qualifying you all. Y'all were in front of Judge Pyle who
12 asked you some preliminary questions this morning to make
13 certain y'all were qualified to serve as jurors here in
14 Greenville County during this court week.

15 In this courtroom, courtroom #2, we're holding
16 General Sessions court, which is another word for criminal
17 court. And so y'all, as a small panel, have been selected
18 to come up here and from which, we're going to select 12
19 members of the jury, and one alternate for the trial we're
20 going to have this afternoon and tomorrow.

21 Now, on trial this afternoon under several different
22 indictments, which I hold in my hand, is Cheves D.
23 Heyward.

24 Mr. Heyward, stand up and turn around and let the
25 jury look at you.

1 He's represented by Steve Sumner from here in
2 Greenville County.

3 All right. Thank you, Mr. Heyward.

4 Mr. Heyward has been indicted for burglary first
5 degree, armed robbery, as well as assault and battery with
6 intent to kill. Those are indictments only. And those
7 are for the purposes of the Greenville County Grand Jury
8 notifying Mr. Heyward of what he is charged with. They're
9 not offered for proof of anything, but for notice to him
10 as to what formally he is being charged with.

11 The State is represented by Ms. Seay.

12 Ms. Seay, I do not remember your first name. I
13 apologize.

14 MS. SEAY: It's Bryna Seay.

15 THE COURT: Ms. Bryna Seay. And she's representing
16 the Greenville County Solicitor's Office in this matter.

17 JURY QUALIFICATION

18 THE COURT: Now, I've been notified or told that the
19 State's potential witnesses are Maurilio Gregorio
20 Martinez, Aquileo Gregorio Martinez, Joe Whitmire of the
21 Greenville County Sheriff's Office, Investigator John
22 DiVittorio of the Greenville County Sheriff's Office,
23 David Alan Bridges, Investigator Peter Gutierrez of the
24 Greenville County Sheriff's Office, and Ron Lendway of the
25 Greenville County Forensics Unit.

1 Does any member of this jury panel have any
2 relationship or are you related by blood or marriage to
3 any of the parties who have introduced themselves, the
4 Solicitor, Mr. Sumner, as well as any of the witnesses
5 which I've just called out? If so, please, stand.

6 Yes, sir. You in the yellow shirt. State your name
7 and juror number for me.

8 JUROR #12, ARTHUR BAIDEN, III: Yeah. I'm Art
9 Baiden. And I have known Mr. Sumner and his family for
10 several years. I have no problem serving. But I would
11 leave that up to the discretion of the Court.

12 THE COURT: And, Mr. Baiden, your number is?

13 JUROR #12, ARTHUR BAIDEN, III: Sir?

14 THE COURT: What's your juror number?

15 JUROR #12, ARTHUR BAIDEN, III: 12

16 THE COURT: Juror #12.

17 Now, Mr. Baiden, your relationship with Mr. Sumner,
18 would you be able to listen with impartiality, listen to
19 the facts and the evidence presented from the witness
20 stand, and consider the facts and evidence presented as a
21 whole during the trial, as well as instructions on the
22 law, which I will give to you at the conclusion?

23 JUROR #12, ARTHUR BAIDEN, III: Yes, sir.

24 THE COURT: And you could be fair and impartial?

25 JUROR #12, ARTHUR BAIDEN, III: Yes, sir.

1 THE COURT: And you could provide Mr. Heyward a fair
2 trial?

3 JUROR #12, ARTHUR BAIDEN, III: Yes, sir.

4 THE COURT: All right. Thank you, sir.

5 Has anybody in the jury panel heard any type of media
6 report, television report, newspaper, magazine, or
7 otherwise regarding these charges, which, I believe,
8 occurred back in March of 2007? If so, please, stand.

9 (There was no response.)

10 THE COURT: No one is standing.

11 Is there any member of the jury panel who's personal
12 or immediate family member has been the victim of a
13 violent crime? If so, please, stand.

14 (There was no response.)

15 THE COURT: No one is standing.

16 Does any member of the jury panel know of any reason
17 why they cannot give the State of South Carolina, County
18 of Greenville, or Mr. Heyward a fair trial in this matter?
19 If so, please, stand.

20 (There was no response.)

21 THE COURT: Is there any member of the jury panel
22 who's a member of any of the -- I'm going to say
23 organizations such as Citizens Against Violent Crimes or
24 any type of temperance organizations? If so, please,
25 stand.

1 (There was no response.)

2 THE COURT: No one is standing.

3 All right. Any other questions from the State?

4 MS. SEAY: No, sir.

5 THE COURT: Mr. Sumner?

6 MR. SUMNER: Likewise.

7 THE COURT: All right. Ladies and gentlemen, the way
8 this is going to work, the Clerk is going to call your
9 name one at a time. I'm going to allow you to come
10 forward almost to this podium and turn and face the
11 attorneys. And they're going to say, please seat the
12 juror, or swear the juror, whichever is appropriate. And
13 as you're selected or not selected, please, either return
14 to the jury box -- I mean, return to the jury box or
15 return to your seat.

16 All right. Listen carefully.

17 JURY SELECTION

18 THE CLERK: #119, Brandy Kirksey.

19 (Brandy Kirksey, a white female, came forward.)

20 THE CLERK: What says the State?

21 MS. SEAY: Please present the juror.

22 THE CLERK: What says the Defendant?

23 MR. SUMNER: Please swear Ms. Kirksey.

24 THE CLERK: You may have a seat in the jury box.

25 #82, Michael Flanagan.

1 (Michael Flanagan, a white male, came forward.)

2 THE CLERK: What says the State?

3 MS. SEAY: Please present this juror.

4 THE CLERK: What says the Defendant?

5 MR. SUMNER: Please excuse Mr. Flanagan from the
6 trial of this case.

7 THE CLERK: You're excused from this case. You may
8 have a seat.

9 Juror #158, Julie Odell Murphy.

10 (Julie Odell Murphy, a white female, came forward.)

11 THE CLERK: What says the State?

12 MS. SEAY: Please present this juror.

13 THE CLERK: What says the Defendant?

14 MR. SUMNER: Please excuse Ms. Murphy from the trial
15 of this case.

16 THE CLERK: You're excused from the case.

17 Juror #169, Kellye Ratcliff.

18 (Kellye Ratcliff, a white female, came forward.)

19 THE CLERK: What says the State?

20 MS. SEAY: Please present this juror.

21 THE CLERK: What says the Defendant?

22 MR. SUMNER: Please excuse Ms. Ratcliff.

23 Thank you.

24 THE CLERK: You're excused from this case.

25 Juror #235, Emilio Zordan.

1 (Emilio Zordan, a white male, came forward.)
2 THE CLERK: What says the State?
3 MS. SEAY: Please present this juror.
4 THE CLERK: What says the Defendant?
5 MR. SUMNER: Please excuse this juror.
6 THE CLERK: You're excused from this case.
7 Juror #138, Michael McCarter.
8 (Michael McCarter, a white male, came forward.)
9 THE CLERK: What says the State?
10 MS. SEAY: Please excuse him from this case.
11 THE CLERK: You're excused from the case.
12 Juror #83, Christopher Ford.
13 (Christopher Ford, a black male, came forward.)
14 THE CLERK: What says the State?
15 MS. SEAY: Please present the juror.
16 THE CLERK: What says the Defendant?
17 MR. SUMNER: Please swear Mr. Ford.
18 THE CLERK: You may have a seat in the jury box.
19 Juror #128, Melissa Long.
20 (Melissa Long, a white female, came forward.)
21 THE CLERK: What says the State?
22 MS. SEAY: Please present this juror.
23 THE CLERK: What says the Defendant?
24 MR. SUMNER: Please excuse Ms. Long.
25 THE CLERK: You're excused from the case.

1 Juror #240, Richard Penkert.

2 (Richard Penkert, a white male, came forward.)

3 THE CLERK: What says the State?

4 MS. SEAY: Please present the juror.

5 THE CLERK: What says the Defendant?

6 MR. SUMNER: Please excuse Mr. Penkert.

7 THE CLERK: You're excused from the case.

8 Juror #56, Donna Coster.

9 (Donna Coster, a white female, came forward.)

10 THE CLERK: What says the State?

11 MS. SEAY: Please present the juror.

12 THE CLERK: What says the Defendant?

13 MR. SUMNER: Please swear Ms. Coster.

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

15 Juror #4, Aaron Archibald.

16 (Aaron Archibald, a white male, came forward.)

17 THE CLERK: What says the State?

18 MS. SEAY: Please present the juror.

19 THE CLERK: What says the Defendant?

20 MR. SUMNER: Please swear Mr. Archibald.

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

22 Juror #148, Laura Morgan.

23 (Laura Morgan, a white female, came forward.)

24 THE CLERK: What says the State?

25 MS. SEAY: Please present her.

1 THE CLERK: What says the Defendant?
2 MR. SUMNER: Please excuse Ms. Morgan.
3 THE CLERK: You're excused from the case.
4 Juror #192, George Smith.
5 (George Smith, a white male, came forward.)
6 THE CLERK: What says the State?
7 MS. SEAY: Please present him.
8 THE CLERK: What says the Defendant?
9 MR. SUMNER: Please swear Mr. Smith.
10 THE CLERK: You may have a seat in the jury box.
11 Juror #159, Laura Olson.
12 (Laura Olson, a white female, came forward.)
13 THE CLERK: What says the State?
14 MS. SEAY: Please excuse her from this case.
15 THE CLERK: You're excused from the case.
16 Juror #100, Linda Harrigan.
17 (Linda Harrigan, a white female, came forward.)
18 THE CLERK: What says the State?
19 MS. SEAY: Please present this juror.
20 THE CLERK: What says the Defendant?
21 MR. SUMNER: Please swear Ms. Harrigan.
22 THE CLERK: You may have a seat in the jury box.
23 Juror #26, Cephus Bolden.
24 (Cephus Bolden, a black male, came forward.)
25 THE CLERK: What says the State?

1 MS. SEAY: Please present this juror.
2 THE CLERK: What says the Defendant?
3 MR. SUMNER: Please swear Mr. Bolden.
4 THE CLERK: You may have a seat in the jury box.
5 Juror #160, Rex Osteen.
6 (Rex Osteen, a white male, came forward.)
7 THE CLERK: What says the State?
8 MS. SEAY: Please present this juror.
9 THE CLERK: What says the Defendant?
10 MR..SUMNER: Please excuse Mr. Osteen.
11 THE CLERK: You're excused from the case.
12 Juror #31, Sandra Browning.
13 (Sandra Browning, a white female, came forward.)
14 THE CLERK: What says the State?
15 MS. SEAY: Please present this juror.
16 THE CLERK: What says the Defendant?
17 MR. SUMNER: Please excuse Ms. Browning.
18 THE CLERK: You're excused from the case.
19 Juror #129, Robin Long.
20 (Robin Long, a white female, came forward.)
21 THE CLERK: What says the State?
22 MS. SEAY: Please present this juror.
23 THE CLERK: What says the Defendant?
24 MR. SUMNER: Please excuse Ms. Long.
25 THE CLERK: You're excused from the case.

1 Juror #43, Eddie Carver.

2 (Eddie Carver, a white male, came forward.)

3 THE CLERK: What says the State?

4 MS. SEAY: Please present this juror.

5 THE CLERK: What says the Defendant?

6 MR. SUMNER: Please swear the juror.

7 THE CLERK: You may have a seat in the jury box.

8 Juror #115, James Jordal.

9 (James Jordal, a white male, came forward.)

10 THE CLERK: What says the State?

11 MS. SEAY: Please present the juror.

12 THE CLERK: What says the Defendant?

13 MR. SUMNER: Please swear Mr. Jordal.

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

15 Juror #107, Kenneth Hoskins.

16 (Kenneth Hoskins, a white male, came forward.)

17 THE CLERK: What says the State?

18 MS. SEAY: Please present the juror.

19 THE CLERK: What says the Defendant?

20 MR. SUMNER: Please swear Mr. Hoskins.

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

22 Juror #152, Jeffrey Murrell.

23 (Jeffrey Murrell, a white male, came forward.)

24 THE CLERK: What says the State?

25 MS. SEAY: Please present him.

1 THE CLERK: What says the Defendant?

2 MR. SUMNER: Please swear Mr. Murrell.

3 THE CLERK: You may have a seat in the jury box.

4 Juror #133, Donna Markell.

5 (Donna Markell, a white female, came forward.)

6 THE CLERK: What says the State?

7 MS. SEAY: Please present this juror.

8 THE CLERK: What says the Defendant?

9 MR. SUMNER: Please swear Ms. Markell.

10 THE CLERK: You may have a seat in the jury box.

11 THE COURT: We'll pick one alternate. It will be two
12 and one.

13 THE CLERK: Juror #125, Anedra Lee.

14 (Anedra Lee, a black female, came forward.)

15 THE CLERK: What says the State?

16 MS. SEAY: Please present this juror.

17 THE CLERK: What says the Defendant?

18 MR. SUMNER: Please swear Ms. Lee.

19 THE CLERK: You may have a seat in the jury box.

20 THE COURT: Do we have any issues or matters of law
21 we need to take up regarding the jury composition?

22 MS. SEAY: Nothing from the State, Your Honor.

23 MR. SUMNER: Nothing from the Defendant, Your Honor.

24 THE COURT: Ladies and gentlemen who were selected,
25 I'm going to ask you to step back to the jury room. The

1 bailiff will show you where it's going to begin. When you
2 all know where the jury room is, and we have to let y'all
3 know since y'all have been selected, we're going to
4 commence this trial first thing in the morning at 9:30.

5 So I want you to see where the jury room is. Let the
6 bailiff show you how to get out of here. And then,
7 tomorrow morning, you come straight to the jury room. You
8 don't go straight to the jury assembly room. Y'all come
9 up to where this bailiff shows you.

10 THE BAILIFF: They will -- they have to scan in the
11 jury assembly room and then come up.

12 THE COURT: All right. You all scan in the assembly
13 room, and then come straight to the jury room, y'all's
14 jury room tomorrow.

15 So, if you will, everybody else be seated while this
16 jury departs. And we'll see y'all at 9:30 -- scan in a
17 little bit early. I want you all up here at 9:30, if you
18 please.

19 (WHEREUPON, the jury was excused from open court at
20 approximately 2:21 p.m.)

21 THE COURT: Those of y'all not selected, other
22 members of this jury panel, I'm sorry you weren't
23 selected. The bad news for y'all is y'all have got to
24 return to the jury assembly room, and await for further
25 instruction. You may be lucky enough to be selected on a

1 jury this afternoon, but it won't be by this Judge.

2 So y'all go back to the jury assembly room and await
3 on further instructions on when you can go home this
4 afternoon, and when to come back tomorrow.

5 Sorry you didn't get picked on this jury, but good
6 luck to you next time.

7 (WHEREUPON, the remaining jury panel members exited
8 the courtroom.)

9 THE COURT: All right. Now that we've picked the
10 jury, Mr. Sumner or Ms. Seay, which -- do we have any
11 pre-trial matters from the State?

12 MS. SEAY: Yes, sir.

13 We do have several things that we need to take care
14 of.

15 If the victims would like to be present for these
16 pre-trial matters, I would like to give them the
17 opportunity, if they'd like to be here.

18 THE COURT: Bring them in.

19 And I'll go ahead and swear the interpreter.

20 She's here for the victims; is that correct?

21 MS. SEAY: That's correct.

22 THE COURT: Yes, ma'am. Is it Ms. Sampson?

23 INTERPRETER TERESA SAMPSON: Yes. Correct.

24 THE COURT: If you'll come forward, I'm going to ask
25 the Clerk to place you under oath.

1 (WHEREUPON, the interpreter was sworn at
2 approximately 2:24 p.m.)

3 THE COURT: And, Ms. Sampson, will you tell the
4 victims exactly what you just did.

5 INTERPRETER TERESA SAMPSON: Yes, I will.

6 THE COURT: All right. Ms. Seay.

7 MS. SEAY: Yes, sir.

8 Thank you, Your Honor.

9 THE COURT: Yes, ma'am.

10 MS. SEAY: May it please the Court.

11 THE COURT: Yes, ma'am.

12 MS. SEAY: One minor matter that I have discussed
13 already with Defense counsel, and it's my understanding
14 that there is no objection to this, is there is a minor
15 misspelling of the victims name in indictment 07-8511 and
16 07-8512. And that just needs to be corrected. And I'll
17 be glad to do that if you would like for me to. It just
18 needs to be spelled M-A-U-R-I-L-I-O.

19 THE COURT: So on the end of the first name, it's
20 L-I-O, rather than just L-O?

21 MS. SEAY: That's correct.

22 THE COURT: Any objection to that, Mr. Sumner?

23 MR. SUMNER: No, sir.

24 I don't think that goes to any substantive portion of
25 the indictment. So I don't have any objection to that.

1 THE COURT: I believe that would be a scribblers
2 error, if anything.

3 MS. SEAY: Your Honor, secondly, the State intends to
4 introduce two prior burglary convictions that Mr. Heyward
5 has. We would be doing so as proof of aggravating
6 circumstance for burglary first degree.

7 So we would ask that you recognize these two prior
8 convictions as true copies. And pursuant to Rule 902,
9 they are self-authenticating as they are certified copies
10 of public records. And these -- copies of these have,
11 also, been provided to Defense counsel.

12 THE COURT: Mr. Sumner.

13 MR. SUMNER: Your Honor, if I could just see those.
14 I know they've already been provided.

15 (Pause.)

16 MR. SUMNER: Your Honor, I don't have any objection
17 to these. However, I would ask -- we -- the Defense would
18 offer to stipulate to the prior convictions.

19 I'll hand these back to the Solicitor.

20 I've previously offered to stipulate before. I think
21 it's highly prejudicial as it relates to the trial of this
22 case with Mr. Heyward for a jury to be aware of these
23 prior offenses. So I would agree that those are
24 accurately -- we would agree they should come into
25 evidence, but I do not believe they should be published to

1 the jury. And I believe it would just -- under Rule 403,
2 in your discretion, it would be, certainly, much
3 more prejudicial than probative of any fact in this
4 case.

5 So I would ask that those be taken into your purview
6 for sentencing purposes should that become necessary, but
7 that they not be referred to in any manner to the jury.
8 Now, I understand they may be subject to impeachment
9 should Mr. Heyward testify. And I, certainly, understand
10 that. In that respect, you would have to weigh whether or
11 not they could be mentioned for impeachment purposes.

12 But in terms of the State's case in chief or being
13 referred to in any manner in front of the jury, I would
14 ask that that not occur.

15 THE COURT: Okay.

16 MS. SEAY: Your Honor, I would point out that the
17 State does have to prove these two prior convictions as an
18 element of this crime as an aggravating circumstance for
19 burglary first degree. And there is a case I would, also,
20 point out to the Court. It is State v. Benton, 526 S.E.2d
21 228, from our Supreme Court in the year 2000, which holds
22 that the State cannot be made to stipulate to the element
23 of two or more prior burglaries.

24 THE COURT: What was the page number, 523?

25 MS. SEAY: 526 S.E.2d 228.

1 THE COURT: All right. Anything else?

2 MS. SEAY: Nothing else as to that point, Your Honor.

3 Do I need to hand these up to you at this time or --

4 THE COURT: No, ma'am.

5 Hang on to those.

6 MS. SEAY: Okay.

7 THE COURT: My preliminary ruling, I'm going to allow
8 him to stipulate to that. And I understand you're not
9 required to. But I think out of an abundance of caution,
10 we're going to move forward without the benefit of those
11 being published to the jury.

12 MS. SEAY: Is it okay if I bring some case law to
13 that effect, Your Honor.

14 THE COURT: Absolutely.

15 Bring me anything you would like me to read.

16 MS. SEAY: Okay. I will do that.

17 Your Honor, as you already know, the co-defendant in
18 this case, David Allen Bridges, is expected to be called
19 as a witness in this case. He has already pled guilty to
20 several charges in relation to the case and the sentence
21 has been deferred.

22 So we just wanted to make Your Honor aware that we
23 would ask that you be responsible for imposing sentence
24 upon him at the conclusion of the trial. And he is
25 represented by counsel. And I've made them aware. And

1 they would like to be notified and present. So we can
2 arrange that at the appropriate time.

3 THE COURT: Okay.

4 MS. SEAY: Your Honor, he does have what, I believe,
5 would be two impeachable offenses as a prior record. One
6 is a shoplifting. The other one is a possession of
7 cocaine. And I've already advised Defense counsel that I
8 intend to produce those. So there should be no issue with
9 that.

10 THE COURT: That's with the co-defendant?

11 MS. SEAY: Yes.

12 MR. SUMNER: I've been made aware of those, Your
13 Honor. And that's fine.

14 THE COURT: All right.

15 MS. SEAY: Your Honor, as to potentially impeachable
16 offenses should Mr. Heyward choose to testify, pursuant to
17 Rule 609, I have several that I will present to the Court
18 for your consideration. I've, also, gone over these with
19 Defense counsel. So he's aware of what we're intending to
20 use --

21 THE COURT: In addition to the burglaries?

22 MS. SEAY: Pardon me?

23 THE COURT: In addition to those two burglaries?

24 MS. SEAY: The burglaries are outside the 10-year
25 time period. So I do not believe they would be

1 impeachable offenses.

2 THE COURT: All right.

3 MS. SEAY: However, there are several crimes of
4 dishonesty or false statement which we would seek to
5 introduce. In 1991, a false police report; in 1998, he
6 has a strong armed robbery conviction, which is within the
7 10-year time period. In 1999, another false police
8 report. In 2000, a false information to purchase alcohol;
9 in 2001, a possession of stolen goods, and that is within
10 the 10-year period. In 2004, another false information;
11 in 2006, a petit larceny.

12 THE COURT: When was that last one? 2006?

13 MS. SEAY: Yes, sir.

14 MR. SUMNER: Your Honor, the only response I would
15 have to that from the -- to the Solicitor would be the
16 1991 false information. I think that is in the Court's
17 discretion. I would ask that that not be able to be used
18 for impeachment, because it is some 17, 18 years prior to
19 the allegations in this case. And I think -- I would ask
20 that that particular false information not be considered
21 or allowed to be considered as impeachment by the Court
22 because of the time difference.

23 The other convictions that were mentioned beginning,
24 I believe, in 1999 --

25 Is that correct? The other ones start in 1999?

1 MS. SEAY: 1998, the false reports.

2 MR. SUMNER: Yes.

3 The other ones from 1999 forward, if you would like
4 me to argue those, I would. I think the Court is well
5 aware of the case law governing that. So if I can be of
6 any assistance, I'll be happy to. But my primary
7 objection would be the one from 1991.

8 THE COURT: All right. Fair enough. We'll just wait
9 and see if he decides to testify.

10 MS. SEAY: All right. And I think the final matter
11 the State has, Your Honor, is that we intend to introduce
12 evidence of two positive identifications made by way of
13 photographic lineup. So we would ask the Court to conduct
14 an analysis under Neil v. Biggers to ensure that there was
15 no suggestibility that rose to a level of
16 misidentification.

17 THE COURT: Okay. Do you want to do that in the
18 morning, or do you want to do it this afternoon?

19 MR. SUMNER: We can go ahead and do that this
20 afternoon, Judge, if you're all right with that. That's
21 fine.

22 THE COURT: Sure.

23 MS. SEAY: Would you like me to begin?

24 THE COURT: Yes, ma'am.

25 Call your witness.

1 MS. SEAY: The State calls Investigator John
2 DiVittorio.

3 THE CLERK: Place your left hand on the Bible and
4 raise your right hand.
5 WHEREUPON,

6 JOHN DIVITTORIO,
7 after first having been duly sworn, testified as follows:

8 THE CLERK: You may have a seat.
9 State your name, please.

10 THE WITNESS: John DiVittorio, D-I-V-I-T-T-O-R-I-O.

11 THE CLERK: Thank you.

12 MS. SEAY: Your Honor, I would ask that these be
13 marked for identification purposes for purposes of this
14 hearing.

15 (WHEREUPON, State's Exhibit Nos. 1, 2, and 3 were
16 marked for identification only.)

17 DIRECT EXAMINATION

18 BY MS. SEAY:

19 Q Mr. DiVittorio, do you recognize these documents?

20 A Yes, ma'am, I do.

21 Q How do you recognize them?

22 A They bear my signature on the bottom of the
23 affidavit. And these are lineups that I did make on my
24 computer at the office.

25 Q And what was the purpose of making this particular

1 lineup that you're looking at?

2 A The -- this lineup here is a lineup that included the
3 Defendant. And it was presented to the co-defendant,
4 David Bridges.

5 Q How did you go about compiling that particular lineup?

6 A It's done on a system, a photo system that we have at
7 the office, and, actually, just going through looking at
8 certain mug shots to try to make sure that the backgrounds
9 and all the physical characteristics appear to be the
10 same.

11 Q And did you locate six photographs that bore a
12 similar physical resemblance to Mr. Heyward?

13 A Yes, ma'am.

14 Q And that is the final product you came up with there?

15 A Yes, ma'am, it is.

16 Q And where were you when you showed this lineup to the
17 co-defendant, Mr. Bridges?

18 A At the Greenville County Sheriff's Office in the
19 criminal investigation division.

20 Q What date did that occur?

21 A That occurred on the 11th of April, 2007.

22 Q Okay. What did you tell him about why you were
23 showing him this lineup?

24 A I just advised Mr. Bridges that the person that he
25 physically described as "Charleston" would or would not be

1 in the photo lineup.

2 Q Did you tell him he had to choose a photo from the
3 lineup?

4 A No, I did not.

5 Q Did he have ample opportunity to look at this lineup?

6 A He looked at the lineup and, immediately, he drew a
7 circle around the Defendant's face. And you can see that
8 circle there.

9 Q And what position --

10 MR. SUMNER: I just --

11 THE COURT: Yes, sir.

12 MR. SUMNER: I just want to see which one he circled.
13 Which one?

14 THE WITNESS: Do you see the pen --

15 MR. SUMNER: Yes.

16 I just wanted to see which one.

17 THE WITNESS: After Mr. Bridges circled around his
18 face, I asked him to place a bigger box around there, and
19 sign his initials and date it. And we marked the time as
20 3:25 p.m.

21 BY MS. SEAY:

22 Q And did he, in fact, sign this document below that?

23 A Yes, he did. That's his signature.

24 Q And, in fact, that photograph is Mr. Heyward;
25 correct?

1 A Yes, ma'am, it is.

2 Q Okay. And you have verifying data to back that up?

3 A Yes, I do.

4 Q Okay. And what is the other document there that
5 you're looking at?

6 A This is a form and affidavit of photo identification
7 where I presented it to David Allen Bridges. He viewed a
8 group of six photographs on the 11th day of April, 2007.
9 It was presented by me. And I identified myself as a
10 member of the Greenville County Sheriff's Office. In his
11 own handwriting, he wrote on here, "#4 was with me during
12 the crime. He was the one that beat the Mexican with the
13 picket stick."

14 Q Okay.

15 A And it was signed with his address and telephone
16 number. And I witnessed it.

17 Q Okay. And, at the time that you conducted this
18 lineup process with Mr. Bridges, was anyone else
19 present?

20 A No, ma'am. I don't believe there was anybody else.

21 MS. SEAY: Thank you.

22 Please answer any questions Mr. Sumner has.

23 MR. SUMNER: Thank you, Your Honor.

24 May it please the Court.

25 THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. SUMNER:

Q I'm going to look, Detective, at what you just referenced for the Solicitor. There is no question that this took place at the Greenville County Sheriff's Office; is that correct?

A That's correct.

Q And that Mr. Bridges was in custody at that time; is that right?

A That is correct, sir.

Q So he was -- so Mr. Bridges was taken out of lock up and brought to your office, would that be correct?

A Yes, sir.

Q And he was then in custody, at that point, in chains, or do you recall if he was handcuffed at that point?

A Yes, sir. I would have handcuffed him with a belt.

Q Okay. And you have testified that this document that's been marked for identification only, at this time, as State's Exhibit No. 2 -- was this the actual photographic lineup that you used to show to Mr. Bridges?

A Yes, sir, it is.

Q It is. Okay. Do you recall if any other colleagues of yours or law enforcement were present for this process that you testified to Judge Griffith about?

A I don't recall, sir. We sit in an open bay office,

1 and there could have been. But my conversation was
2 strictly with the co-defendant at that time. There could
3 have been six, there could have been one person. I don't
4 remember.

5 Q And what did you -- how did the topic of Mr. Heyward
6 come up in this conversation with Mr. Bridges that
7 occurred here when this alleged identification took place?

8 A When I first arrested Mr. Bridges, the co-defendant,
9 he could only provide me with a physical description and a
10 street name of "Charleston." Mr. Bridges -- that was all
11 I had at the time.

12 And I ended up speaking to one of the property crimes
13 investigators. And I was outlining some of the facts
14 about the case. And I asked Investigator Scott Phillips
15 if he was familiar with anybody in his beat area that met
16 the physical description and went by the nickname
17 "Charleston." And, at that time, he presented me with
18 Mr. Heyward's name. That's how this began.

19 Q And do you recall the physical description that was
20 given to you, initially, by Mr. Bridges?

21 A Not right offhand, just a very tall black male. He
22 went by the name "Charleston."

23 Q So, primarily, it was the name "Charleston" and your
24 conversation with the other officer that led to this; is
25 that correct?

1 A That is correct.

2 Q And when you brought Mr. -- did you bring Mr. Bridges
3 up yourself from the jail, do you recall, to your bay or
4 not? Do you recall?

5 A I picked up Mr. Bridges and walked him up there.

6 Q And you told him the purpose of his being there with
7 you was to go through a photographic identification
8 process?

9 A I don't remember all the details. But I walked him
10 over to the --

11 Q And did you not, in fact, tell him that Mr. -- that
12 Charleston's -- or Mr. Heyward's photograph would be in
13 this group of six?

14 A I never said whether it was or wasn't in there.

15 Q Did you show him more than one set of photographs?

16 A That's the only set I showed him, right there.

17 MR. SUMNER: One second, please, Your Honor.

18 (Pause.)

19 MR. SUMNER: I don't have any other questions, at
20 this point, regarding this issue.

21 THE COURT: Anything else, ma'am?

22 MS. SEAY: I can use him for this next lineup
23 briefly, if we're ready to move on.

24 THE COURT: Sure.

25 My question is: What was the time of the incident to

1 the time of this identification, the time frame?

2 MS. SEAY: The incident occurred on March 28th of
3 2007. And this lineup was conducted on April 11th.

4 THE COURT: All right.

5 Ms. Seay.

6 MS. SEAY: I'm going to ask that these be marked for
7 identification purposes.

8 (WHEREUPON, State's Exhibit Nos. 4 and 5 were marked
9 for identification only.)

10 FURTHER DIRECT EXAMINATION

11 BY MS. SEAY:

12 Q Investigator DiVittorio, I'll ask if you recognize
13 these?

14 A That is another copy of the photo lineup containing
15 the Defendant, Mr. Heyward.

16 Q Okay. What did you do with that particular photo
17 lineup that you have now?

18 A We notified the victim, Maurilio Martinez, at which
19 time, he responded to the Greenville County Sheriff's
20 Office. And he spoke with Investigator Peter Gutierrez.

21 Q And were you present when he spoke with Investigator
22 Gutierrez?

23 A I was present.

24 Q And did -- what -- let me ask you this. What was
25 your involvement in the process that took place?

1 A I made the photo lineup. I numbered it.

2 Investigator Gutierrez was familiar with the case. He,
3 actually, spoke to the victim. And through his interview
4 with the victim, the victim picked out the Defendant as
5 the subject that struck him and robbed him.

6 Q Okay. And were you present when he did that?

7 A Yes, ma'am.

8 Q Okay. And did he give a sworn statement regarding
9 the photograph that he had picked as well?

10 A Yes, ma'am, he did. It says, "On April 11, 2007, I
11 came to the law enforcement center to meet with
12 Investigator P. Gutierrez for the purpose of viewing a
13 lineup. I was shown a photo lineup which included six
14 photos of subjects. I picked photo #4 as the subject that
15 robbed and hit me at my home on 3-28-07."

16 Q And there's another line?

17 A I identified photo #4 without any doubt.

18 Q And did you sign as a witness to that statement?

19 A I signed as a witness that I was present when
20 Investigator Gutierrez was.

21 MS. SEAY: Okay. Thank you.

22 I'll ask you to answer any questions Mr. Sumner has.

23 And then I'll call Investigator Gutierrez.

24 MR. SUMNER: Thank you, Your Honor.

25 May it please the Court.

1 THE COURT: Yes, sir.

2 FURTHER CROSS-EXAMINATION

3 BY MR. SUMNER:

4 Q Detective DiVittorio, you were present for this as
5 well; is that correct, sir, with Mr. Martinez?

6 A Yes.

7 Q You were?

8 A Yes.

9 Q He does not speak English; is that right?

10 A That is correct.

11 Q Are you really -- are you able to speak Spanish?

12 A No, sir.

13 Q So you really had no verbal communication directly
14 with Mr. Martinez?

15 A No, sir, I did not.

16 Q This, also, occurred on April 11th; is that right?

17 A Yes, sir.

18 Q The reason I ask is I notice that the notary is
19 blank; is that correct?

20 A Yes, sir.

21 Q He circled photograph #4; is that correct?

22 A Yes, sir.

23 Q Was that Mr. Martinez's actual pen gestures there
24 or --

25 A Yes, sir. And his initials in the upper right-hand

1 corner.

2 Q He did not date this; is that correct?

3 A That is correct. It's dated on the victim witness
4 statement.

5 Q Who was communicating with Mr. Martinez?

6 A Investigator Gutierrez.

7 Q Would he be the detective that really handled this,
8 more or less, with Mr. Martinez, this photographic ID?

9 A Yes, sir. All communications that was done with both
10 of the victims was handled through Investigator Peter
11 Gutierrez.

12 Q So you were simply, at this point of the testimony,
13 a witness to what occurred in your presence; is that
14 right?

15 A Correct.

16 Q Would it be fair to say you did not have a
17 significant role in this photo ID process with
18 Mr. Martinez as it relates to Mr. Heyward?

19 A Other than creating it, briefing the investigator on
20 the status of the case, at the time, so he was kept up to
21 speed with everything, and that was it.

22 Q But you did create this -- in fact, this is the same
23 photographic lineup that was shown to Mr. Bridges; is that
24 right?

25 A That is correct.

1 MR. SUMNER: I don't have any other questions.

2 Thank you.

3 MS. SEAY: Thank you.

4 That's all the questions I have for Investigator
5 DiVittorio at this time.

6 THE COURT: Thank you.

7 You may step down.

8 MS. SEAY: The State calls Investigator Peter
9 Gutierrez.

10 THE CLERK: Place your left hand on the Bible and
11 raise your right hand.

12 WHEREUPON,

13 PETER GUTIERREZ,

14 after first having been duly sworn, testified as follows:

15 THE CLERK: Thank you.

16 You may be seated.

17 State your name for the record, please.

18 THE WITNESS: My name is Investigator Peter
19 Gutierrez, special investigator with the Greenville County
20 Sheriff's Office.

21 DIRECT EXAMINATION

22 BY MS. SEAY:

23 Q Investigator Gutierrez, just briefly, as to your
24 translation duties, are they part of your employee there
25 at the Greenville County Sheriff's Office?

1 A Yes, it is, ma'am.

2 Q Okay. And can you just briefly tell the Court what
3 your education and training is to perform translation
4 duties from English to Spanish, and vice versa?

5 A Okay. My -- Spanish is my first language. English
6 is my second language. I was born in Havana, Cuba. I
7 grew up in East LA in a Mexican neighborhood. Then I went
8 to live in Miami in an entirely Cuban neighborhood. I was
9 a police officer there from 1978 until my retirement in
10 1998.

11 During my time in Miami Beach, I was a homicide
12 investigator with the Miami Beach Police Department. I
13 handled all the cases that involved either Hispanic
14 victims or Hispanic subjects. So I'm very fluent in the
15 language. I write it, read it, and speak it.

16 Q And how long have you been employed here at the
17 Greenville County Sheriff's Office?

18 A Approximately three years.

19 Q During that time, have you regularly dealt with
20 translations with Hispanics and other people that speak
21 Spanish?

22 A Yes, ma'am. My first job is I am -- I work the Sex
23 Offender Registry. But I do -- I'm assigned to assist the
24 investigators in any crime that has a Hispanic victim or
25 Hispanic subject, anything ranging from auto theft to

1 homicide.

2 Q Okay. And you heard Investigator DiVittorio say that
3 he had involved you, in this case, because Mr. Maurilio
4 Martinez and Mr. Aquileo Martinez did not speak English;
5 is that correct?

6 A That's correct.

7 Q And he briefed you on the facts of this case?

8 A Yes.

9 Q Would you look at what is State's Exhibit Nos. 4 and
10 5 for identification purposes?

11 A (Witness complied.)

12 Q Do you recognize those?

13 A Yes.

14 Q Okay. How do you recognize those?

15 A Okay. These are -- Aquileo Martinez came in on April
16 11th. That was the second time that I had met with him.
17 I had taken an initial statement about what happened on
18 April 3rd, shortly after the incident happened. And on
19 April 11th, he had him come in just to, specifically, look
20 at this lineup.

21 Q All right. And who was present?

22 A Myself and Investigator DiVittorio.

23 Q All right. And what did you do in order to present
24 this lineup to Mr. Martinez? What was the process you
25 went through?

1 A The process is that before I showed him the
2 photographs, I told him I was giving him six photographs
3 to look at, and I needed him to see if he could possibly
4 identify anyone out of those pictures.

5 I always tell them there are six different pictures
6 from six different people and to take into consideration
7 that the photographs could have been taken four, or five,
8 six years ago. That it's not going to be that we took a
9 picture of a person coming out of his house. So there's
10 going to be a slight difference, maybe younger or
11 whatever.

12 Q Did you tell him that the person that had committed
13 this act against him that his picture was in this photo
14 lineup?

15 A No, I did not.

16 Q Did you tell him that he had to choose someone from
17 the lineup?

18 A No, I did not.

19 Q Okay. And what did he do when he looked at the
20 lineup?

21 A I showed him the lineup. He looked at it for about,
22 I would say, no more than 30 seconds and pointed to
23 picture #4.

24 Q Okay. And picture #4, I believe, has already been
25 testified to is the Defendant, Mr. Heyward?

1 A Yes.

2 Q Okay. Did Mr. Martinez make any markings to indicate
3 his selection?

4 A Yes. After he pointed to him, I asked him to put a
5 circle around his photograph and to initial the inside of
6 the circle, and he did.

7 Q And did he sign there as well?

8 A Yes.

9 Q Okay. And what about State's Exhibit No. 5?

10 A Okay. This is the statement that I took from him
11 after I showed him the photographs. And he told me in
12 Spanish -- we went through the fact that he had come in to
13 look at the lineup, and he had viewed a six-photo lineup
14 and had identified #4, wrote it all down. And I
15 translated it into English and translated back to him in
16 Spanish so he knew exactly what I wrote, and what he was
17 signing.

18 Q And did you accurately translate what he told you
19 onto this statement?

20 A Yes.

21 Q And he then signed that statement; is that right?

22 A Yes.

23 Q And does your signature appear on that statement as
24 well?

25 A Yes, ma'am, right there.

1 MS. SEAY: Thank you.

2 Please answer any questions Mr. Sumner has.

3 MR. SUMNER: Thank you, Your Honor.

4 May it please the Court.

5 THE COURT: Yes, sir.

6 CROSS-EXAMINATION

7 BY MR. SUMNER:

8 Q Detective Gutierrez, is that your signature there,
9 sir?

10 A Yes, sir.

11 Q On the top line of the witness?

12 A Yes.

13 Q And your testimony to Judge Griffith is that you did
14 contact Mr. Martinez and tell him there's a lineup that I
15 want you to look at?

16 A We called him after the investigator -- after
17 Investigator DiVittorio asked me to, then I called him.
18 Investigator DiVittorio is still the lead investigator on
19 the case.

20 Q Okay. And you told Mr. Martinez -- or you got in
21 touch with him and summoned him down to the LEC?

22 A Yes.

23 Q And you told him it was about a photographic lineup?

24 A I wanted to show him a photo lineup.

25 Q And he was only shown one; is that correct? That one

1 right there?

2 A He was shown this one on that date.

3 Q Yes, sir. And there were no other photographs shown
4 to him that day, other than that lineup there?

5 A That's the only one.

6 Q On other dates, was he shown other pictures?

7 A On -- the first day that I met with him was on April
8 3rd of 2007. And that was to take a statement from him on
9 what happened from the get-go. And we showed him a
10 photograph of the co-defendant.

11 Q Okay. Was he shown a photograph of any black males
12 that day?

13 A It was just a photo lineup, including the photograph
14 of the white male.

15 Q Who would later be known as Mr. Bridges?

16 A Right.

17 MR. SUMNER: I don't have any other questions.

18 Thank you.

19 MS. SEAY: Nothing further from the State on these
20 issues, Your Honor.

21 THE COURT: You may step down.

22 THE WITNESS: Thank you.

23 THE COURT: Mr. Sumner.

24 MR. SUMNER: Your Honor, may it please the Court.

25 THE COURT: Certainly.

1 MR. SUMNER: Does that conclude the presentation on
2 that issue, Ms. Seay?

3 MS. SEAY: Yes.

4 MR. SUMNER: Your Honor, I would, at this point, ask
5 the Court to suppress this photographic identification
6 from coming into trial in this case. Your Honor, when you
7 look at the lineup that was used -- I'm going to refer to
8 these and hand these up at this point. When you look at
9 the lineups that were used -- there you are. As I make
10 these arguments to you -- and it's a little bit hard to
11 articulate for the record. I'll do, certainly, the best I
12 can.

13 In terms of being suggestive, photographs #4 and #6
14 are noticeably darker-skinned African American males than
15 photographs #1, #2, #3, and #5. And that would be my
16 primary argument about this in terms of this being unduly
17 suggestive and not a fair procedure. When you look --
18 when the Court looks at photographs #1 through #6,
19 photographs #4 and #6 -- and #4 is Mr. Heyward -- are,
20 clearly, darker-skinned black males.

21 So what we really have is a photographic lineup of
22 two people, from the Defense's perspective, and not really
23 #6. So I would ask that it be suppressed as not matching
24 the Constitutional standard that has been articulated in
25 the case law.

1 And, Your Honor, I know you're familiar with those
2 cases. If you would like argument on that point from me,
3 I'm happy to provide it. But I know that the Court -- I
4 feel like the Court is very well aware of the
5 requirements. It is a discretionary call by the trial
6 court in terms of whether or not the photographic lineup
7 process in its totality is fair. I would ask that it be
8 suppressed, first, on that basis.

9 Secondly, Your Honor, it came out during the
10 testimony at this suppressions hearing that there were --
11 these were the only photographs that were shown to the two
12 people who allegedly have identified my client. I would
13 ask the Court to take that factor into consideration as
14 well.

15 The third factor that I would like to take into
16 consideration is that in terms of Mr. Bridges'
17 identification, there's not a corroborating witness. I
18 understand Mr. DiVittorio's testimony. But I believe he
19 was the only one that can testify to Mr. Bridges' alleged
20 identification photographically of Mr. Heyward.

21 And, Your Honor, I guess, summarily, on that basis, I
22 would ask the Court to, please, suppress this
23 identification of Mr. Heyward and not receive it or allow
24 it to be referred to in any way in the trial of this case.

25 Thank you.

1 THE COURT: Mr. Sumner, I've got down your argument.
2 You said that there are three points to it. The first one
3 was that the two photographs are darker than the other
4 four, and made it suggestive that there are two persons to
5 select from. Your second --

6 MR. SUMNER: That is correct, yes, sir. You've
7 articulated it, yes, sir.

8 THE COURT: And then your second argument was -- I
9 mean, the third was Bridges only had one corroborating
10 investigator there to note that.

11 What was the second argument?

12 MR. SUMNER: The second argument was I believe the
13 testimony came from both investigators that these were the
14 only photographs shown. In other words, there were not a
15 series of photographs shown where Mr. Heyward did not
16 appear. They were only shown these six pictures. And,
17 basically, much as in my first argument, it was really
18 just two pictures from our perspective, Your Honor.

19 Thank you.

20 THE COURT: All right. Anything else from the State?

21 MS. SEAY: Nothing, Your Honor.

22 Just, obviously, the State does not feel that the
23 procedure, nor the lineup themselves are impermissibly
24 suggestive. And you have them there for your review. And
25 you heard the testimony from the -- the sworn testimony of

1 the law enforcement officers.

2 THE COURT: All right. I'm going to take this under
3 advisement until in the morning.

4 Anything else we can do this afternoon?

5 MR. SUMNER: Does the State have anything else?

6 MS. SEAY: Nothing further from the State, Your
7 Honor.

8 MR. SUMNER: Your Honor, just a couple of
9 housekeeping matters. The Defense would make a motion
10 that all the witnesses be sequestered during the
11 testimonial phase.

12 THE COURT: Certainly.

13 MR. SUMNER: Additionally, I believe it's my
14 understanding from Madam Prosecutor that there are no
15 written or verbal statements from Mr. Heyward.

16 Is that correct?

17 That she seeks to submit in her case in chief.

18 MS. SEAY: That is correct.

19 MR. SUMNER: Okay.

20 MS. SEAY: As to the sequestration, Your Honor, I
21 assume that that, of course, does not apply to the crime
22 victims and to the lead investigating officer.

23 THE COURT: I would think they would have to be here.

24 MR. SUMNER: My understanding is the lead officer and
25 the victims -- it wasn't applicable to those.

1 MS. SEAY: I just wanted to make sure we were under
2 the same understanding.

3 MR. SUMNER: Your Honor, I would, also, at this
4 point, make a motion under Rule 3 of the South Carolina
5 Rules of Criminal Procedure that the indictments be
6 dismissed for failure to -- for my client to be indicted
7 within 90 days of the arrest -- or within 90 days of his
8 arrest on these charges. And I believe that Rule 3 speaks
9 to that. I didn't bring that rule book. I don't have it
10 with me. But I would make that motion at this time, Your
11 Honor.

12 MS. SEAY: Your Honor, if I'm not incorrect, I
13 believe that there is a standing administrative order in
14 this circuit providing for an additional period of time
15 under which an indictment may occur. If I may, I would
16 like to have time to look into that to bring you more
17 information.

18 THE COURT: All right. It seems to me that most of
19 the circuits have adopted the scheduling order of the
20 hastening -- I won't say hastening of the pace, but
21 orderly administration of moving criminal cases. And some
22 of those require that the indictments not be made until
23 certain things are done.

24 So I would like to see your administrative order
25 first before I make a ruling on that. Because it may be

1 they were complying with the order by not doing so in
2 light of Rule 3. Let me see that order either this
3 afternoon or bring it to me in the morning and let me
4 review that.

5 MS. SEAY: Yes, sir.

6 MR. SUMNER: I think there is an administrative order
7 that that does address this for your review. But I would
8 make that portion under Rule 3, Your Honor, pre-trial. I
9 know you'll take it under advisement and rule on it in the
10 morning.

11 Your Honor, I don't have any other pre-trial motions
12 or matters, other than I think Mr. Heyward has indicated
13 that he wanted to speak with you. I advised him that he
14 could not speak with you in your chambers, as he's asked.
15 But I would, certainly, tender him to the Court now if
16 there are any questions he has or anything he wants to
17 bring up with you. I'll stay here with him at the jail
18 and answer any questions he has, or I would ask that he
19 stay here in terms of transportation just for a little
20 while.

21 THE COURT: I would like for him to be made available
22 here. That way it is convenient, he's here, you're here.

23 MR. SUMNER: That's fine.

24 I'm going to stay here. I'm going to stay here until
25 we begin -- but I would say if we begin to cover ground

1 that we continue to cover the same ground, but as an
2 officer of the court, I'll go through the file with him.

3 THE COURT: And if there are any subpoenas of
4 witnesses which need compelling, the Clerk's Office will
5 assist you in getting those out and the Sheriff's Office
6 will assist you in getting those served.

7 MR. SUMNER: Yes, sir.

8 Thank you.

9 And as soon as I -- if I feel like there are any
10 witnesses that need to be subpoenaed, I would ask -- I
11 will get that information to the Sheriff's Office just as
12 soon as I can.

13 THE COURT: Fair enough.

14 MR. SUMNER: And it will happen this afternoon,
15 clearly.

16 THE COURT: All right. Mr. Heyward.

17 MR. SUMNER: You need to stand when you talk to the
18 Judge.

19 DEFENDANT HEYWARD: Yes, Judge, I think it's -- I
20 mean, this crime supposedly happened at night. And it
21 was -- I spoke to Mr. Sumner about it. And I think it
22 will be a lot of help in my defense. I mean, I don't know
23 if you would authorize it, but I hope that you would take
24 it into consideration that when he implements the Defense
25 that the lights be turned off. Because the victims

1 stipulated in my motion that the lights were off in the
2 house and there wasn't no lights on.

3 So, I mean, how could you, basically, see me if there
4 were no lights on?

5 THE COURT: Well, Mr. Heyward, that is one of the
6 defenses you have available to you is to argue that, and
7 to make that request at the appropriate time in front of
8 the jury. I can't give you legal advice from this
9 perspective. But if that request were made, viewing with
10 the lights off, and it's appropriate and it seems
11 reasonable, I would most likely grant that. But that's
12 not before the Court quite yet. So that's available to
13 you to argue at the appropriate time with Mr. Sumner's
14 assistance.

15 DEFENDANT HEYWARD: I just wanted to make that --
16 bring that to your attention.

17 And, also, I wanted to find out as far as Rule 3, I
18 mean, South Carolina Rules and Procedures, I mean, I was
19 supposed to be indicted within 90 days. And it was six
20 months before they, actually, indicted me.

21 So I was, you know --

22 THE COURT: And your lawyer has made that motion.
23 But I've, also, asked for additional materials from the
24 Solicitor's Office for an administrative order that was
25 signed by another judge. And I have to see that and

1 review that to kind of do a little research prior to my
2 ruling. So I've not ruled on that yet. So far Mr. Sumner
3 has stood for you well right beside you.

4 DEFENDANT HEYWARD: As far as the two witnesses that
5 I have, who do I have to give that to?

6 THE COURT: Mr. Sumner has already gotten it taken
7 care of. All he has to do is get the names, give it to
8 the clerk, subpoenas will be given to the sheriff's
9 office. And if they're in the county detention, they'll
10 be brought over. No problem.

11 DEFENDANT HEYWARD: How long do you think this trial
12 will last?

13 THE COURT: Well, I think you may have heard. I
14 asked the Solicitor how many witnesses she intended to
15 call and she told me she felt like her side of the case
16 would take, roughly, three hours.

17 So I suspect if we start at 9:30, 10:00 in the
18 morning, her side of the case may be done by lunchtime.
19 We'll take a lunch break and whatever witnesses if you so
20 choose to present, you and Mr. Sumner can discuss it this
21 afternoon and we can go from there. So that's what he's
22 here for.

23 DEFENDANT HEYWARD: Thank you.

24 THE COURT: Yes, sir.

25 All right. If there's nothing else from the parties,

1 we'll stand at ease until 9:30 in the morning.

2 Mr. Sumner, you can talk to your client.

3 MR. SUMNER: I will.

4 THE COURT: Mr. Seay, I look forward to seeing you in
5 the morning.

6 Thank you.

7 (WHEREUPON, the proceedings were concluded at
8 approximately 3:09 p.m. to be reconvened on
9 Tuesday, April 28, 2009.)

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1 TUESDAY, APRIL 28, 2009

2 (WHEREUPON, State's Exhibit Nos. 6, 7, 8, 9, 10, 11,
3 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,
4 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37,
5 38, 39, 40, 41, and 42 were marked for identification
6 only.)

7 THE COURT: Are we ready, Ms. Seay.

8 MS. SEAY: Yes, sir, we are.

9 THE COURT: Did we -- did someone get a copy of that
10 administrative order regarding the scheduling?

11 MS. SEAY: I have that, Your Honor.

12 And I would appreciate the opportunity to address the
13 Court on that, if it's the appropriate time.

14 THE COURT: Sure. Let's go ahead and resolve that
15 issue.

16 MS. SEAY: Yes, sir.

17 Your Honor, I will hand to Mr. Sumner a copy of this
18 order. And I'll hand up a copy for you and your clerk, a
19 copy of that administrative order. It was signed by Judge
20 Kittredge on December 7th of 2000. And it was in relation
21 to a petition that had been made by our Solicitor,
22 Mr. Ariail, for an order granting an extension of time
23 pursuant to Rule 3 beyond the 90 days that is given in the
24 rule. And so for good cause, Judge Kittredge did issue
25 this administrative order granting the State 180 days

1 within which to comply with action on the warrant pursuant
2 to the rule.

3 And, in that regard, Your Honor, as to the warrants
4 in the case here against Mr. Heyward, the timing is done
5 from the date that the warrants are, actually, filed in
6 the Clerk of Court's Office.

7 And, in this case, the first set of warrants was
8 filed on April 30th of 2007. The cases were taken before
9 the Grand Jury and true bills were issued on October 16th
10 of 2007. And so that is approximately 14 days before the
11 running of the 180 days. So we were within the 180-day
12 time period on those warrants.

13 There are two additional warrants that were issued.
14 Those were filed in the Clerk of Court's Office on
15 December 4th of 2008. And a true bill was issued by the
16 Greenville County Grand Jury on those warrants on December
17 16th of 2008. So it was well within the 180-day time
18 period.

19 So the State's position would be that we have been in
20 compliance with Rule 3 as amended by the administrative
21 order of Judge Kittredge, which is still in effect.

22 THE COURT: Mr. Sumner.

23 MR. SUMNER: Your Honor, briefly, I think Rule 3
24 speaks for itself. It is, certainly, a rule of criminal
25 procedure codified that it's applicable throughout the

1 State of South Carolina. I would renew my motion that
2 these warrants be dismissed for lack of compliance
3 strictly with Rule 3.

4 And, also, I would bring to the Court's attention
5 that any -- my understanding is any rules that are penal
6 in nature and/or are to be strictly construed against the
7 State is my second argument.

8 So I would, again, reiterate, at this time, after
9 Madam Solicitor's arguments, I have been provided a copy
10 of the administrative order, but I would move my motion to
11 dismiss on the grounds stated yesterday. And if you would
12 like any further argument on that, I'll be happy to
13 provide it.

14 Thank you.

15 THE COURT: All right. As I understand the timing on
16 these five indictments, there are two for the victim,
17 Aquileo Gregorio Martinez, one for assault and battery
18 with intent to kill and one for armed robbery. And the
19 other three indictments are for armed robbery, burglary
20 first, and assault and battery with intent to kill. It's
21 clear that the two indictments -- that the warrants that
22 were filed in December of 2008 and indicted in December of
23 2008, that those indictments were well within the 90 days
24 of Rule 3 and well within the 180 days of the
25 administrative order. And so those would not be subject

1 to this scrutiny, because they were done within the rule
2 time limit.

3 However, considering that the administrative order
4 signed by Judge Kittredge, which I understand that was
5 done under petition because of the heavy case load of
6 Greenville County, I'm going to deny your motion and let
7 these indictments stand. Because they do meet the
8 constraints of the administrative order notwithstanding
9 criminal procedure Rule 3.

10 MS. SEAY: Thank you, Your Honor.

11 THE COURT: Now, the --

12 MR. SUMNER: Your Honor.

13 THE COURT: Yes, sir.

14 MR. SUMNER: Can I make just one procedural point,
15 sir?

16 THE COURT: Sure.

17 MR. SUMNER: I'm not going to continue to refer to
18 that argument unless you feel in order to protect the
19 record that you feel like I need to.

20 Do you feel like I need to, or do you feel like it's
21 sufficiently been put forward even though the jury hasn't
22 been sworn --

23 THE COURT: The jury hasn't been sworn.

24 MR. SUMNER: All right. Do I need to renew this
25 after the jury has been sworn or --

1 THE COURT: I think you should to protect yourself.

2 I did not swear the jury yesterday in light of your
3 meeting with your client yesterday. I didn't know what
4 would come of that, or any other needs you may have. And
5 I didn't want to get caught in a predicament where
6 jeopardy attached and the case wouldn't be ready to go
7 forward because of an attorney-client problem.

8 MR. SUMNER: All right. I will renew the Rule 3
9 motion further after the jury is sworn.

10 THE COURT: Good enough.

11 MR. SUMNER: Now, could I address something else,
12 Your Honor, just for the record?

13 THE COURT: Certainly.

14 MR. SUMNER: I don't want to be pre-empting my
15 colleague.

16 After court concluded yesterday, I do want to put on
17 the record that I did meet with Mr. Heyward at length
18 yesterday afternoon. I answered all of his questions. I
19 explained the basic procedure today. We did discuss the
20 subpoenaing of other witnesses. A decision was made not
21 to subpoena witnesses for this trial beginning today. And
22 I want to put that on the record and make sure that that's
23 clear and -- because that was the Court's instruction to
24 me yesterday.

25 THE COURT: It was.

1 MR. SUMNER: So, you know, if you need anything else
2 further on that, I would be happy to answer those
3 questions. I did meet with him downstairs. And we met
4 and went over the trial strategy and other things,
5 including this potential summoning of witnesses on his
6 behalf, and a decision was made not to do that. So I just
7 want to put that out there in case it's reviewed again.

8 THE COURT: And, as a result of your meeting and
9 discussions yesterday, y'all are ready to go forward this
10 morning?

11 MR. SUMNER: Yes, sir.

12 THE COURT: All right. Good enough.

13 On the issue for the admission of the lineup, I've
14 reviewed the in-camera hearing which we had. I believe
15 that based upon the factors to be considered under Neil v.
16 Biggers, a United States Supreme Court case regarding
17 co-defendants identification, I believe that the
18 co-defendant, Mr. Bridges, had the opportunity to view the
19 accused. He had sufficient intention, according to the
20 testimony of both the -- particularly Investigator
21 DiVittorio, the accuracy of his description was quite high
22 and his level of certainty was, also, high. And there was
23 a short length of time between the crime and the
24 confrontation. So I would allow it with regard to him.

25 Regarding the victim, I'm uncertain as to whether we

1 heard testimony in that hearing yesterday regarding the
2 opportunity of the victim to view the accused and the
3 degree of attention they had. I don't believe we had any
4 presentation of any evidence as to the two victims, or
5 either of them. However, we did hear from the detectives,
6 both DiVittorio, who assisted in providing a lineup, as
7 well as Detective Gutierrez regarding the level of
8 certainty that the victims had, and their accuracy, and
9 the short time length between the time and the
10 confrontation was presented. I would like to hear a
11 little bit more from the victim, if I could, regarding
12 that particular issue before I rule on that
13 identification.

14 MS. SEAY: Yes, sir.

15 Would you like me to take care of that now?

16 THE COURT: I would.

17 MS. SEAY: All right. Your Honor, if it pleases the
18 Court, the State calls Maurilio Martinez.

19 THE CLERK: Place your left hand on the Bible and
20 raise your right hand.

21 WHEREUPON,

22 MAURILIO GREGORIO MARTINEZ,
23 after first having been duly sworn, testified as follows:

24 THE CLERK: You may be seated.

25 State your full name for the record, please.

1 INTERPRETER TERESA SAMPSON: My name is Maurilio
2 Gregorio Martinez.

3 MS. SEAY: Your Honor, for purposes of this hearing,
4 I will limit it mostly to just the incident itself and
5 those factors that you're interested in.

6 THE COURT: Yes. Just focus on those points.

7 (WHEREUPON, the following testimony of Mr. Maurilio
8 Martinez was translated by Ms. Teresa Sampson.)

9 DIRECT EXAMINATION

10 BY MS. SEAY:

11 Q Mr. Martinez, were you present in your apartment on
12 March 28th, 2007?

13 A Yes.

14 Q At some time during the night, did someone enter your
15 apartment without your consent?

16 A Yes. Two men entered the apartment, one white and
17 one African American or black.

18 Q Had you ever seen this one white man or this one
19 African American or black man?

20 A No.

21 Q When the two men entered your apartment, what were
22 you doing?

23 A I was sleeping. And I got up when I -- when they
24 came in.

25 Q Did the men enter your front door first?

1 A Yes, the main door. First, they knocked down the
2 main entrance. And then they came into the bedroom.

3 Q Okay. When you were in your bedroom, at that time,
4 were you asleep?

5 A Yes. I was sleeping, but I got up when I heard
6 noises.

7 Q Okay. So did you awaken when you heard the first
8 break-in at your front door?

9 A Yes. As soon as I get up, they knock down the second
10 door in my room, in my bedroom. And then they started
11 hitting me.

12 Q Okay. Tell us what you observed about each man.

13 A I had an opportunity to see him, because the light in
14 the kitchen was on.

15 Q Where is the kitchen in relation to your bedroom?

16 A It's right next to the bedroom.

17 Q Okay. Did you have any lights on in your bedroom?

18 A No.

19 Q Did your bedroom have any windows?

20 A Yes, it does.

21 Q Okay. Were there any coverings, curtains, or
22 anything like that over your windows?

23 A Yeah, curtains.

24 Q Okay. Did those curtains allow any light to come
25 into your bedroom at that time of night?

1 A Yes.

2 Q So you said that you had an opportunity to see this
3 man that we're talking about?

4 A Yes. I saw him when he was hitting me.

5 Q And, at that time, what did you observe about him? I
6 know you said that he was a black male or an African
7 American. Can you tell us anything else that you noticed
8 about him as far as his physical appearance?

9 A I saw him. I can recognize him.

10 MR. SUMNER: I'm sorry. I couldn't understand.

11 INTERPRETER TERESA SAMPSON: I saw him. And I can
12 recognize him.

13 BY MS. SEAY:

14 Q Do you know about how long the two men were in your
15 bedroom?

16 A Five minutes.

17 Q Okay. And the men, were they there long enough to
18 take some of your property?

19 A I give him my wallet right away.

20 Q Did they take some of your brother's property?

21 A Yeah. I, personally, give him.

22 Q Okay. After this incident happened, did the
23 investigators ask you to come look at some pictures of
24 some people?

25 A Yes.

1 Q Did they show you some pictures of some white men?

2 A Yes.

3 Q Did they ask you if the person who had been in your
4 bedroom was in those pictures?

5 A Yes.

6 Q Did you see that person in those pictures?

7 A Yes.

8 Q Were you certain about which person it was?

9 A There were two that looked very similar, but I told
10 him which one.

11 Q So you told him these are the two that I think it
12 might be, the man might be one of them?

13 A Yes.

14 Q Okay. Did they, also, on a different date show you
15 some pictures of some black men?

16 A Yes.

17 Q Did they ask you to see if the person who had been in
18 your apartment was in those pictures?

19 A Yes.

20 Q Did they tell you that the person who had been in
21 your apartment would be in those pictures?

22 A Yes.

23 MS. SEAY: Your Honor, may I try to rephrase the
24 question just in an effort to make sure there's not been
25 anything lost --

1 THE COURT: Sure.

2 MS. SEAY: -- between the way I'm saying that?

3 MR. SUMNER: Your Honor, I hate to object on a
4 pre-trial, but I think the question has been asked and
5 answered. I mean, the question was clear. And I would
6 object to a rephrasing or re-asking of that question
7 simply because she asked a very clear question, Were you
8 told the person was the black person in your apartment?
9 And he said, Yes -- I'm sorry -- and he said, Yes, so.

10 THE COURT: She can translate your objection to him.

11 MR. SUMNER: Okay. I mean, I didn't give her enough
12 time to translate. But I would -- I think it's been asked
13 and answered.

14 MS. SEAY: I would like to ask if they told him he
15 had to pick a photo.

16 THE COURT: I think that's a valid question.

17 MR. SUMNER: Okay.

18 THE COURT: That's not asking him the same question
19 again.

20 BY MS. SEAY:

21 Q Did the police officers tell you that you had to pick
22 a picture?

23 A Yes.

24 Q Did you look at the pictures carefully?

25 A Yes.

1 Q Did you see the person who had been in your bedroom,
2 the person who was the black male?

3 A Yes.

4 Q And did you show them which person that was?

5 A Yes.

6 Q Were you certain about the picture you chose?

7 A Yes.

8 MS. SEAY: May I have just a moment, Your Honor?

9 THE COURT: Sure.

10 (Pause.)

11 BY MS. SEAY:

12 Q Mr. Martinez, when you looked at these pictures, did
13 the police officers tell you that the person that might
14 have been in your bedroom might not be in those pictures?

15 A Yes. But he was in those pictures.

16 MS. SEAY: All right. Thank you.

17 Those are all the questions I have. Please answer
18 any Mr. Sumner has.

19 CROSS-EXAMINATION

20 BY MR. SUMNER:

21 Q You are Maurilio Martinez?

22 A Yes.

23 Q You have already testified that you were in your
24 apartment?

25 A Yes.

1 Q Sleeping?

2 A Yes.

3 Q With the lights off?

4 A Yes.

5 Q When this incident occurred on March 28th of 2007?

6 A Yes.

7 Q Do you remember speaking to the police that night?

8 A Yes.

9 Q And they asked you that evening to --

10 A Yes.

11 Q -- describe the men; is that correct?

12 A Yes.

13 Q And you were not able to give them a description?

14 A No.

15 Q Do you remember going back to the police station?

16 A Yes.

17 Q About a week later?

18 A Yes.

19 MR. SUMNER: And I'd like to mark this for
20 identification, please. This is Mr. Martinez's statement.
21 I don't believe there's any objection to it being marked
22 for identification for purposes of this hearing.

23 THE COURT: I don't see why there would.

24 MR. SUMNER: This is for the purposes of this
25 hearing, Your Honor.

1 (WHEREUPON, Defendant's Exhibit No. 1 was marked for
2 identification only.)

3 BY MR. SUMNER:

4 Q Is this your signature, sir?

5 A Yes.

6 MR. SUMNER: And, for the record, I'm referring to a
7 victim statement reportedly signed by Maurilio Martinez.
8 It has a notary block, but the notary block has not been
9 completed. The typed date appearing on the document is
10 04-03 of 2007. It is one page, approximately 10 lines,
11 typed. And for additional identifying information, the
12 initials "M.G.M." appear twice on the document.

13 BY MR. SUMNER:

14 Q You did not write that statement, did you?

15 A Yes.

16 Q So you did write this statement?

17 A How -- I don't understand.

18 Q All right. Can you read English?

19 A No.

20 Q Can you write English?

21 A No.

22 MR. SUMNER: One second, please, Your Honor.

23 (Pause.)

24 MR. SUMNER: I don't have any other questions.

25 Thank you.

1 THE COURT: Anything further?

2 MS. SEAY: Nothing further for Mr. Martinez.

3 I would, however, ask the Court to allow the State to
4 recall Investigator Gutierrez. I believe there's some
5 important points he made yesterday that need to be
6 reiterated at this time.

7 THE COURT: You may call him.

8 MS. SEAY: Investigator Gutierrez.

9 THE CLERK: Is he not still under oath, Judge?

10 THE COURT: He is.

11 DIRECT EXAMINATION

12 BY MS. SEAY:

13 Q Investigator Gutierrez, I believe yesterday you
14 testified about your role in the process of showing this
15 photo lineup to Mr. Maurilio Martinez, State's Exhibit
16 Nos. 4 and 5, the photo lineup and an affidavit; is that
17 correct?

18 A Yes.

19 Q In addition, was it your testimony that you assisted
20 on several days prior to this, on April the 3rd of 2007,
21 in taking a statement from Mr. Martinez since he speaks
22 Spanish?

23 A Right.

24 Q Okay. And let me show you Defendant's Exhibit No. 1
25 for identification purposes. Do you recognize that?

1 A Yes, I do.

2 Q How do you recognize it?

3 A This is the statement that I typed up after my
4 conversation with the victim on April 3rd of 2007.

5 Q Okay. And that would have been approximately four or
6 five days after the incident; is that correct?

7 A Yes.

8 Q Okay. Would you, please, relate to the Court the
9 description that Mr. Martinez gave to you of the
10 perpetrators at that time?

11 A I asked him what the description of the subjects
12 were. He described one subject as a white male, which
13 stayed in the background. He was a little uneasy on his
14 description being more exact. But the black male was
15 standing right in front of him. In fact, he was hitting
16 him with a stick. And he described him as a black male,
17 tall, medium build, with a very short beard.

18 Q And would you continue on there to that next line?

19 A Short hair, wearing black shirt, and black pants.

20 MS. SEAY: Thank you, Mr. Gutierrez.

21 Those are all the questions I have for you. Please
22 answer any from Mr. Sumner.

23 CROSS-EXAMINATION

24 BY MR. SUMNER:

25 Q Mr. Gutierrez --

1 A Yes.

2 Q -- you were not -- was this your first involvement in
3 the case?

4 A Yes, it was.

5 Q You were not out when he was, initially, asked for a
6 description and could not provide one that evening? You
7 were not a part of that?

8 A No.

9 MR. SUMNER: All right. Thank you.

10 I don't have any other questions.

11 Thank you.

12 THE COURT: Okay. Mr. Gutierrez, you may step down.

13 THE WITNESS: Thank you.

14 MS. SEAY: Your Honor, I have an additional witness I
15 would like to call briefly, if I may.

16 THE COURT: Yes.

17 MS. SEAY: Investigator Joe Whitmire.

18 THE CLERK: Place your left hand on the Bible and
19 raise your right hand.

20 WHEREUPON,

21 JOSEPH WHITMIRE,

22 after first having been duly sworn, testified as follows:

23 THE CLERK: You may have a seat.

24 State your name for the record.

25 THE WITNESS: Joseph Whitmire.

DIRECT EXAMINATION

BY MS. SEAY:

Q Investigator Whitmire, just briefly, for the Court's information, at the time of this incident, were you a uniform patrol officer?

A Yes, ma'am.

Q And were you the first responding officer to the scene that we're here about today that happened on March 28th, 2007?

A Yes, ma'am.

Q And approximately what time was that?

A Approximately 00:30. I think I arrived at 00:37.

Q Okay. And did you have an opportunity to come into contact with Mr. Maurilio Martinez and Mr. Aquileo Martinez?

A Yes, ma'am.

Q Okay. Did you speak with them concerning what had happened to them?

A Yes, ma'am.

Q Did you have any difficulty in communicating with them?

A Yes, ma'am. There was some difficulty.

Q All right. Were you able to gain any information from them whatsoever about what had happened and a description of the persons who had done this?

1 A Yes, ma'am, I did.

2 Q Okay. Can you, please, inform the Court about what
3 you were able to learn from these victims that night?

4 A What I was able to learn was that the suspects
5 were --

6 MR. SUMNER: Your Honor, I object.

7 Just one second, Your Honor.

8 Just for clarification, did you say "victims,"

9 Ms. Seay, or "victim"? Are we speaking of just
10 Mr. Martinez here?

11 MS. SEAY: I was asking him about both victims. He
12 communicated with both was his testimony.

13 MR. SUMNER: But are we only here about
14 Mr. Martinez's identification?

15 THE COURT: I'm unaware whether the other victim made
16 a --

17 MS. SEAY: He has not made an identification.

18 BY MS. SEAY:

19 Q I'll limit -- my question then is to your
20 communication only with Mr. Maurilio Martinez, the victim
21 with the head injury that night.

22 A Yes, ma'am.

23 Q What was the information he gave you?

24 A He gave me a brief description of the two suspects.
25 He described one as a black male, the other as a white

1 male. My -- I have very limited Spanish capability. And
2 they had very limited English capability at that time. We
3 were using very simple terms, Negro, Blanco, alto, terms
4 like that.

5 The neighbor had a -- Mrs. Price had a more -- a
6 larger Spanish vocabulary than I did. And she assisted me
7 in the translation to get an immediate description so we
8 could broadcast it on the radio.

9 Q Okay. And did you learn anything additional from
10 Mr. Martinez that was able to assist you at that time,
11 just right there on the scene?

12 A Only that it was a tall black male and a shorter
13 white male.

14 Q Okay.

15 A And I can't recall if I had any more information, but
16 I spoke with him later. I can't differentiate at that
17 point.

18 Q Okay. You later went to the hospital to talk with
19 them; is that correct?

20 A Yes, ma'am.

21 Q And approximately how much later was that?

22 A I would say within 30 to 45 minutes.

23 Q Okay. And when you went to the hospital, did you
24 have anybody to assist you with translating in speaking
25 with these victims?

1 A Yes, ma'am. The hospital employees a translator, a
2 Spanish-speaking translator. And I used a
3 Spanish-speaking translator.

4 Q Okay. And just in reference to Mr. Maurilio
5 Martinez, did you gain any additional identifying
6 information about the perpetrators at that meeting?

7 A Not that I recall.

8 MS. SEAY: All right. Thank you, Investigator.

9 Please answer any questions Mr. Sumner has.

10 MR. SUMNER: I don't have any questions.

11 Thank you.

12 THE COURT: All right. You may step down.

13 Based upon the testimony that's been provided from
14 the victim, Maurilio Martinez, regarding the photo lineup
15 and considering the factors outlined in Neil v. Biggers,
16 as well as State v. Drakeman, I'm going to suppress the
17 identification by him in the photo lineup, because I'm
18 concerned by the two answers he gave regarding the
19 suggestion.

20 And I understand there was conflicting testimony from
21 Investigator Gutierrez and him regarding whether it was
22 suggested to him that the Defendant was in the lineup and
23 he had to select someone from the lineup. For that
24 reason, I'm going to suppress that photo lineup on his
25 behalf.

1 Anything else we need to address?

2 MS. SEAY: Not as to this issue, Your Honor, other
3 than the State's objection to your ruling, of course.

4 But I would like to move on to the other issue that
5 you had taken under advisement regarding the prior
6 burglary.

7 THE COURT: And I have done a little research on
8 that. And, based upon my research, I believe that it is
9 my duty to allow you to introduce the two priors by
10 stipulation, but by a Court's Exhibit that there are two
11 prior -- assuming they're verified, and I assume they are,
12 that you can introduce those proving that one element to
13 first degree burglary.

14 So I'm going to correct my initial ruling from
15 yesterday and find that those can be introduced at the
16 appropriate time with the limited instruction that their
17 introduction is for the purposes of only establishing that
18 element of burglary first degree.

19 MS. SEAY: Yes, sir.

20 Thank you.

21 THE COURT: You're quite welcome.

22 MR. SUMNER: Let me -- Your Honor, to follow-up on
23 that point, though, didn't this occur allegedly at night?

24 THE COURT: The first I heard was just the last
25 witness that they arrived at 12:36 a.m., which would be at

1 night.

2 MR. SUMNER: But if it's a dwelling and it's at
3 night, wouldn't that satisfy the requirements of burglary
4 first degree without the need to bring the other two
5 convictions in?

6 MS. SEAY: If I may, Your Honor, I have a case on
7 point as to that issue.

8 THE COURT: Okay. Let me hear it.

9 MS. SEAY: There is a case, Your Honor, State v.
10 Cheatham. And I have a copy I'll give to -- and this
11 packet includes copies of the other cases that I had
12 researched that you had already talked about that you
13 researched. But it's the last case in that packet.

14 MR. SUMNER: It is. It's the last one.

15 MS. SEAY: And, Your Honor, in that case, the
16 Defense, specifically, offered to stipulate as to
17 nighttime being an aggravating circumstance in an effort
18 to keep the State from introducing the prior burglary
19 convictions as an element of the crime.

20 And, again, this Court said that the State could
21 offer evidence of the prior burglary and housebreaking
22 convictions as an element of the charged offense, and that
23 they were not required to stipulate -- they're not
24 required to accept the Defendant's stipulation as proof of
25 nighttime. Because the State still bears the burden of

1 proving each and every element of the crime beyond a
2 reasonable doubt.

3 THE COURT: All right. Well, here's what I'm going
4 to do. I'm going to follow the presets established in
5 this Cheatham case. And, at the appropriate time, the
6 prior convictions will be allowed and the jury will be
7 given a specific instruction that the prior convictions
8 are not to be considered as evidence of the burglary that
9 we're trying today. But they're limited to consideration
10 to the element of burglary first of having two or more
11 prior convictions. I think that follows the language of
12 that Supreme Court case. And I'm going to attempt to
13 adhere to it as close as possible.

14 MS. SEAY: Thank you, Your Honor.

15 MR. SUMNER: One last thing, Your Honor. I just want
16 to put on the record an offer to stipulate that this
17 incident did occur at night, it did occur with a dwelling.
18 I'll stipulate to that. I'm not going to stipulate that
19 my client was involved in it. But I want to renew my
20 offer to stipulate to those. Because I do think the other
21 two convictions are not necessary with that stipulation
22 and they're unduly prejudicial.

23 THE COURT: All right. Well, as soon as we swear the
24 jury, at our first break, I'm going to allow you to renew
25 both motions, the Rule 3, as well as the stipulation to

1 these two facts so we can make certain you have the record
2 preserved.

3 MR. SUMNER: Thank you.

4 If we could have just five minutes.

5 THE COURT: Sure.

6 MR. SUMNER: I would like to speak with the Solicitor
7 for a second before we begin. Just five minutes.

8 THE COURT: Sure. That will be fine.

9 (WHEREUPON, a break was taken.)

10 THE COURT: Are we ready to proceed?

11 MR. SUMNER: Yes, sir. The Defendant is ready.

12 THE COURT: Bring in the jury, please.

13 (WHEREUPON, the jury came into open court at
14 approximately 10:36 a.m.)

15 THE COURT: Good morning, ladies and gentlemen.

16 I'm sorry for the delay. We've had some pre-trial
17 matters, which we've now resolved between the parties and
18 made some preliminary rulings. Hopefully, the trial will
19 progress at a faster pace and we won't have to keep taking
20 breaks.

21 Madam Clerk, please, swear the jury.

22 THE CLERK: Ladies and gentlemen, please rise and
23 raise your right hand for the oath in this case.

24 (WHEREUPON, the jury was sworn at approximately
25 10:37 a.m.)

1 THE CLERK: Thank you.

2 You may be seated.

3 INTRODUCTORY REMARKS

4 THE COURT: Ladies and gentlemen, I want to give you
5 all a brief preliminary instruction regarding the oath
6 that you've just taken. One of the most important aspects
7 of your duty lies, essentially, in the oath you've just
8 now taken to well and truly try and determine the facts of
9 this case. That, in a very essential way, says that
10 you're the sole judges of the facts in this case.
11 Obviously, any case you try will involve the question
12 about what happened, or how something came to happen, or
13 who, if anyone, did something in a particular set of
14 circumstances. From this point forward, no one concerned
15 with this trial has the right to decide any question of
16 fact in this trial or the truth of it except you, as the
17 jury. The facts then are for your resolution, your
18 decision and yours alone.

19 After y'all hear all the evidence in this case, it
20 will then be your duty by mutual and joint discussion to
21 determine the truth of this case by deciding the weight
22 and the believability of each part of the evidence, and by
23 applying the law as I instruct it to you at the end of the
24 case. Please understand that the presumption of innocence
25 is sufficient to compel a verdict of not guilty or a

1 verdict of acquittal, unless the jury concludes that the
2 State has satisfied its obligation to prove the
3 Defendant's guilt beyond a reasonable doubt.

4 And I'll instruct you now that reasonable doubt is
5 the kind of doubt which would cause a reasonable person to
6 hesitate to act. This case will be opened by the
7 Solicitor reading or explaining to you the indictments.
8 The State will then proceed by presenting evidence, after
9 which, the same opportunity will be afforded to the
10 Defendant to have evidence offered.

11 When all the evidence has been received by the Court,
12 counsel for the State and the Defendant will then state to
13 you their respective positions. After that, then I will
14 instruct you -- fully instruct you on the applicable law
15 in this case. Obviously, all parts of this case are very
16 important. And you do not know which witness in the case
17 will impress you the most, whether the first witness or
18 the last. In reaching your final conclusion, you will
19 need the guidance of the laws that will be offered to you
20 by this Court.

21 For all of these reasons, then, if we have any recess
22 periods during this trial, I will instruct you each and
23 every time to, please, not make up your mind. Please do
24 not discuss any of the issues in this case until the final
25 conclusion and my final instructions on the law have been

1 given.

2 So at each break we take or any objection that's made
3 and we have to ask y'all to retire to the jury room,
4 please, understand that's to protect the criminal
5 processes which are handed down by the State government,
6 as well as the Supreme Court. But y'all are not to
7 discuss the believability, or the facts, or evidence of
8 any of the things presented until the conclusion of the
9 trial and my instructions on the law. After y'all receive
10 my instructions, then you'll be allowed to deliberate.

11 Now, with that in mind, Madam Solicitor.

12 MS. SEAY: Thank you, Your Honor.

13 May it please the Court.

14 THE COURT: Yes, ma'am.

15 OPENING STATEMENTS

16 MS. SEAY: Good morning, ladies and gentlemen of the
17 jury: Thank you for your patience with us. Hopefully,
18 now that we're getting started, we'll get some momentum
19 going and we'll get this case taken care as efficiently as
20 we can. Although it's an important case, I ask you to,
21 please, exercise as much patience as you can as you listen
22 to the evidence in this case.

23 I know you've heard the indictments, what the charges
24 alleged in this case are. The Judge has read those to
25 you. You know that Cheves Heyward is charged with

1 burglary first degree, two counts of armed robbery, and
2 two counts of assault and battery with intent to kill.
3 They are all very serious offenses.

4 Let me tell you what led to this. On March 28th of
5 2007, right about two years ago, at about 12:30 at night,
6 the two victims in this case, two young brothers, 20 and
7 28 years old, I believe, were asleep in their apartment.
8 They live in an apartment, which you'll hear and see a
9 little more about when we have some photographs to show
10 you and some descriptions of it to show you. They live a
11 modest life in a small apartment. They work long hours
12 every day. They have painting jobs. And they work hard
13 and they sleep hard.

14 And, on that night, they had gone to bed after a long
15 day of work. I believe it was a Wednesday. They were
16 pretty exhausted and tired and in a pretty good sleep when
17 they were awakened by a loud boom. The boom being they
18 knew somebody had broken into the front door of their
19 apartment.

20 So within seconds, the people who had broken in,
21 Mr. Heyward and his colleague, had broken into their
22 bedroom door as well, which they will tell you that they
23 kept locked as well with just a regular bedroom lock.
24 Mr. Heyward and his colleague, who you will hear from and
25 learn a little more about, Mr. Bridges, decided that what

1 these young men had and what they worked so hard for
2 wasn't going to belong to them any more. They weren't
3 entitled to it. And even though these two hadn't done
4 anything to earn it, they were going to take it. And they
5 were going to take it by force.

6 And Mr. Bridges told these young men, Give us your
7 wallets, give us your wallets. Mr. Heyward was screaming
8 at them, Give me your wallet. He took the wallets, the
9 little bit of money that these guys have to live on on a
10 daily basis, a few hundred dollars. And he took a stick,
11 a 2X2 stick like what would come off of a deck, like a
12 picket from a deck building. And he hit Mr. Martinez over
13 the head so hard that he just about busted the poor guy's
14 head in. And you're going to hear more from him about
15 that and what kind of injury that was, and how that felt,
16 and how that's affected him.

17 He, also, hit his younger brother. And he hit him on
18 his arm and he injured him. He hit Mr. Martinez on his
19 back as well. He'll be able to tell you about the
20 terrible marks and whelps on his back from being beaten
21 over a couple hundred dollars in a wallet.

22 So what I want to ask you to think about, because I
23 know that in our society today that we're all pretty
24 seasoned as far as movies, and television, and video
25 games, and everything else that we're inundated with all

1 the time, whether it's stuff we, personally, see or it's
2 stuff we see that our children are seeing. And it's
3 violent. And it's become more and more prevalent to see
4 that to such the extent, sometimes, I think we forget what
5 real violence is.

6 And, ladies and gentlemen, this was real violence.
7 These two busted into the private home of these two young
8 men and beat them, and stole their wallets and what little
9 money they had. And that was real violence. And you're
10 going to hear about it. You're going to see pictures of
11 it.

12 That's why Mr. Heyward is here today. That's the
13 evidence that you're going to hear in the case. The State
14 is going to present the evidence. The State bears the
15 burden of proving this case. And the Judge is going to
16 tell you a lot about that. We're required to prove every
17 element of this case beyond a reasonable doubt. And I'm
18 confident that the State is going to meet its duty in
19 doing that through the witnesses and the physical evidence
20 that we put here before you.

21 At the conclusion of this case, I'll have an
22 opportunity to talk further with you to kind of go over
23 what has been presented. And, at that time, I'll ask you
24 for a verdict that speaks the truth and that does justice,
25 not just to Mr. Heyward, but to Mr. Martinez and his

1 brother.

2 Thank you.

3 THE COURT: Mr. Sumner.

4 MR. SUMNER: Thank you, Your Honor.

5 May it please the Court.

6 THE COURT: Yes, sir.

7 MR. SUMNER: Madam Solicitor.

8 Good morning again. My name is Steve Sumner. And I
9 practice law here in Greenville. And it's my pleasure to
10 be representing Mr. Cheves Heyward, who is seated at
11 counsel table to my left.

12 Briefly, I will make just a few comments. As you've
13 already been made aware by Judge Griffith, Mr. Heyward
14 faces extremely serious charges and is on trial for
15 extremely serious accusations and charges here today. He
16 is charged with assault and battery with intent to kill,
17 which, basically, is murder, only the person did not die.
18 It's the same elements as a murder charge. Burglary in
19 the first degree, which is the very highest degree in
20 South Carolina and, also, armed robbery. Because this is
21 a criminal prosecution, there are several important ground
22 rules, ladies and gentlemen, that will stay in effect
23 during the course of this trial. Judge Griffith has
24 already touched on them. And I'll touch on them briefly.
25 And we will get the trial started.

1 First of all, as you've already been told,
2 Mr. Heyward is presumed not guilty of these charges. That
3 is the difference between criminal court and civil court.
4 In criminal court, the Defendant is presumed or assumed to
5 be not guilty. That's the first ground rule.

6 Second, the burden of proof remains entirely on the
7 State. Mr. Heyward does not have to prove anything to you
8 during the course of this trial. The burden of proof
9 remains on the State at all times. The State must prove
10 every element of every charge beyond a reasonable doubt.

11 If they fail to prove one element of the charge, then
12 the verdict -- the proper verdict would be not guilty.
13 Judge Griffith has already said a reasonable doubt is a
14 doubt which will cause you to hesitate to act. And if you
15 have any hesitation -- and I'll speak on that at the
16 conclusion of the trial. But if you have any hesitation
17 about whether or not a charge has been proven in its
18 entirety, then your verdict should be and must be not
19 guilty. All doubts are resolved in Mr. Heyward's favor,
20 again, because this is a criminal prosecution.

21 As in all court cases, ladies and gentlemen, this
22 trial will turn on solid evidence, on convincing evidence
23 beyond any hesitation. And that's what the standard is.
24 And that's what this trial will turn on, like all trials
25 turn on, it turns on the proof.

1 Please -- I'm closing my comments here. Initially,
2 please, consider the motive or potential motive behind the
3 testimony you'll hear. I believe you will hear from
4 Mr. David Bridges, who is, also, charged in this incident.
5 Please consider what motive he may have for the testimony
6 that he may provide you here this morning.

7 I would, also, like you to use your good clear common
8 sense regarding issues of identification. And that is
9 what proof is going to be put forward against Mr. Heyward.
10 I'm talking about proof, not -- there will be some
11 photographs shown. I believe you're going to hear some
12 things. But, also, think about proof, evidence,
13 identification, fingerprints, those type of things. And,
14 please, consider all of those things as this case -- this
15 case will not take a long time. We'll probably be done
16 today. Even though it's extremely serious, I think we'll
17 be done today. But observations and identification,
18 please, think about those things as you go through the
19 trial.

20 And I want to echo Judge Griffith's comments he said
21 earlier, do not think about leaning one way or the other
22 during the course of the trial. As we take a break, I
23 think I'm leaning this way, I believe this way. Please
24 don't do that. Wait until everything has come in. Wait
25 until you've heard the arguments of everybody. Wait until

1 Judge Griffith has instructed you on the law and until
2 you're in the deliberation room before you give any
3 thought to what type verdict you may render.

4 Thank you very much.

5 THE COURT: Thank you, Mr. Sumner.

6 MR. SUMNER: Yes, sir.

7 THE COURT: Ms. Seay.

8 MS. SEAY: Thank you, Your Honor.

9 The State calls Investigator Joe Whitmire.

10 THE CLERK: Investigator Whitmire, if you'll step up
11 here and place your left hand on the Bible and raise your
12 right hand.

13 WHEREUPON,

14 JOSEPH WHITMIRE,

15 after first having been duly sworn, testified as follows:

16 THE CLERK: You may be seated.

17 State your full name for the record, please.

18 THE WITNESS: Joseph Whitmire.

19 THE CLERK: Thank you.

20 DIRECT EXAMINATION

21 BY MS. SEAY:

22 Q Investigator Whitmore, if you will, I want to direct
23 your attention over here so I can make sure everybody can
24 hear you.

25 You're employed with the Greenville County Sheriff's

1 Office?

2 A Yes, ma'am.

3 Q How long have you been employed there?

4 A A little over five and a half years.

5 Q And what is your training and education to perform
6 the duties of a law enforcement officer?

7 A I have a Bachelor's Degree from Clemson University.
8 I completed the South Carolina Criminal Justice Academy
9 and was certified as a law enforcement officer.

10 Q And when -- back when this incident took place --
11 I'll direct your attention back to March of 2007. What
12 were your duties, at that time, with the Sheriff's Office?

13 A I was working in the uniform patrol division.

14 Q Okay. What were your duties as a uniform patrol
15 officer?

16 A A uniform patrol officer is -- they're the ones you
17 see driving around, generally, in the marked cars. Their
18 primary duties are to patrol their assigned beat areas, to
19 deter and detect criminal activity, and to answer calls
20 from the public.

21 Q So you would, actually, have been wearing a uniform
22 at that time as well?

23 A Yes, ma'am.

24 Q And what is your current occupation with the
25 Sheriff's Office?

1 A I'm an investigator with the property crimes unit.

2 Q And how long have you been doing that?

3 A About a year and a half.

4 Q Again, let's go back to March 28th, 2007. You were
5 working on that date?

6 A Yes, ma'am.

7 Q Can you describe for us whether you received a call
8 that involved the Martinez brothers?

9 A I received a call at approximately 12:30 that night,
10 00:30 hours, in reference to a burglary that had just
11 occurred at

12 Q Okay. And do you recall where you were and how long
13 it took you to get there?

14 A No, ma'am, I don't.

15 Q Okay. Approximately, what time did you arrive at
16 that location at

17 A At about 12:37.

18 Q And that would have been in the nighttime?

19 A Yes, ma'am.

20 Q What did you find when you arrived?

21 A When I arrived, I, initially, met with the person who
22 had called, which we refer to as the complainant. The
23 complainant was a neighbor of the victims. They spoke
24 briefly to me. We had a short exchange in which they told
25 me that the victims had been robbed.

1 At that time, I entered the victims apartment. And
2 they were sitting in the living room.

3 Q What did you observe about the victims, if anything?

4 A One victim was holding a cloth to his head. I
5 believe it was a white-colored cloth to his head. They
6 were both seated in the living room.

7 Q The man that was holding the cloth to his head, did
8 he appear to have some kind of injury?

9 A Yes, ma'am. He appeared to have an injury to his
10 head that was bleeding.

11 Q Okay. Did he appear to be in pain?

12 A He appeared to be in some distress, yes, ma'am. I
13 requested for emergency medical services to respond
14 immediately.

15 Q Okay. And were you able to communicate very well
16 with Mr. Maurilio Martinez and Mr. Aquileo Martinez?

17 A Not really. I don't speak Spanish. And they spoke
18 very limited English.

19 Q What, if anything, were you able to determine from
20 Mr. Maurilio Martinez about what had happened?

21 A Primarily, that -- and, again, this was basic
22 communication. That people had come into their house --
23 their apartment and had hit them and taken their money.

24 Q Okay. And you stated that you called EMS. Did EMS
25 get there in a timely fashion?

1 A Yes, ma'am. They came from the EMS station, which is
2 at the end of

3 Q And were they able to offer any treatment to the
4 Martinez brothers?

5 A Yes, ma'am, they did. And I believe they bandaged
6 Mr. Maurilio Martinez's head. And they both put them --
7 they put them into the ambulance and transported them to
8 the emergency room.

9 Q Okay. Did you call anyone else to come to the scene?

10 A Yes, ma'am. I called for forensics.

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

12 A To collect any physical evidence that may be left at
13 the scene.

14 Q Okay. Did you look over the scene? Did you make any
15 observations about the scene itself?

16 A Yes, ma'am. I observed that the front door to the
17 apartment had been forced open, based on the condition of
18 the door jam and the lock. I, also, observed that the
19 bedroom door, where the victims said they were sleeping,
20 had been forced open as well, based on the condition of
21 the door frame, the door jam, and the frame around the
22 door.

23 Q Did you notice anything of interest in terms of any
24 physical -- any other physical evidence?

25 A Yes, ma'am. There was a piece of stick approximately

1 12 inches long. It appeared to be what's commonly
2 referred to as a 2X2. In my experience, they're normally
3 used as pickets in deck railings, like on a deck behind a
4 house or something, a 2X2. It looked like a pressure
5 treated piece of wood. It was laying in the living room
6 floor. One end of the stick appeared to have a fresh
7 break in it. I believe the other end was squared off.

8 Q Okay. Did the forensics folks come and take pictures
9 of the scene?

10 A Yes, ma'am.

11 Q I'm going to show you State's Exhibits Nos. 6 through
12 42 that are marked for identification. I'll ask you to
13 take a few minutes to look through those, and tell me if
14 you recognize them.

15 A Yes, ma'am. I'm familiar with those photographs,
16 with the subjects.

17 Q And are all those photographs fair and accurate
18 representations of the things that you observed at the
19 scene that night, as well as the victims that you observed
20 that night?

21 A Yes, ma'am.

22 MS. SEAY: Your Honor, I would ask that these
23 photographs be entered into evidence as State's Exhibit
24 Nos. 6 through 42.

25 MR. SUMNER: No objection.

1 THE COURT: All right. Without objection State's
2 Exhibit Nos. 6 through 42.

3 (WHEREUPON, State's Exhibit Nos. 6, 7, 8, 9, 10, 11,
4 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,
5 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37,
6 38, 39, 40, 41, and 42 were admitted into evidence.)

7 BY MS. SEAY:

8 Q Investigator Whitmire, I'm going to ask you -- while
9 I project these photographs for the Court and the jury,
10 I'm going to ask you to, please, describe what each one
11 depicts as far as what you saw that night.

12 A Would it be all right if I stood over there?

13 THE COURT: Whichever is more comfortable for you.

14 BY MS. SEAY:

15 Q As far as this photograph, can you just briefly tell
16 us what that shows?

17 A This is here. This is

18 I think it was, also, known as

19 Apartments. This is a church. This road here that goes
20 off of West Parker in front of the apartments is Pittman
21 Circle.

22 Q Okay. And I believe this is --

23 A This is another picture showing

24 Pittman Circle. And is the L-shaped
25 apartment building.

1 Q Okay.

2 A This is the entrance into the location where the
3 victims apartment are -- where the victims apartment is.
4 It's like a breezeway. If you go into that breezeway and
5 you turn left, you go into the victims -- the victims
6 front door is right there.

7 This is another picture of the door going into the
8 building. The victims apartment door would be on the
9 left.

10 Again, this is another picture going into the
11 breezeway.

12 This is apartment . That's where the complainant
13 was living, the one that, actually, called.

14 Q And that -- you're referring to the neighbor you
15 mentioned earlier, Investigator?

16 A Yes, ma'am, the neighbor, Ms. Rice.

17 This is, again, taken from the outside. It's a
18 picture into the breezeway. On the left-hand side here is
19 the victims apartment, the doorway.

20 This is a picture looking into the victims apartment
21 from just outside the doorway.

22 Again, this is a picture looking into the victims
23 apartment showing the damage to the front door, the
24 victims doorway.

25 This is a picture looking from inside the victims

1 apartment out to the breezeway through the doorway, also,
2 showing damage to the front door.

3 This is a picture looking into the victims apartment.

4 This picture, it shows blood stains or what appear to
5 be blood stains at this point, and a stick sort of in the
6 top center.

7 Q Is that the stick you were talking about earlier when
8 you testified it resembled a picket?

9 A Yes, ma'am. This is a close-up of that picket that
10 was laying in the middle of the living room. Again, it's
11 the other end of that picket, the one I said was squared
12 off.

13 This is the end of the picket, which I described as
14 having a fresh break. These drops are what appeared to me
15 to be blood drops, blood drippings in the living room.

16 Again, this is inside the victims apartment. This is
17 the living room area. This, I believe, goes back to the
18 kitchen area toward the other bedroom. And this appears
19 to be -- these drops appear to be a blood trail.

20 This is a picture taken inside the victims -- pardon
21 me, the living room is over here. The living room and the
22 large bedroom are parallel to each other separated by a
23 wall.

24 This is looking into the victims bedroom from outside
25 the bedroom door from the kitchen hallway area.

1 Q Were you able to observe any damage to that door
2 frame?

3 A Yes, ma'am. There was observable damage to the left
4 side of that door frame as shown in this picture.

5 This is a picture inside the victims bedroom. I
6 believe Aquileo Martinez was sleeping in that bed there.

7 This is another picture inside the victims bedroom.
8 I believe this was the bed in which Maurilio Martinez was
9 sleeping. You can observe some blood drops or what
10 appeared to be blood drops on the covers.

11 Again, this is a closer picture of the previous --
12 it's a close-up of the previous picture.

13 This is a picture taken from inside the bedroom
14 looking out toward the door showing a trail of blood
15 drops.

16 This is a picture of the bedroom door showing some
17 damage when the bedroom door was opened into the wall.
18 It's a close-up of the previous picture showing damage to
19 the wall.

20 This is a photograph looking into the bedroom from
21 the hallway showing damage to the door frame.

22 Again, this is another picture showing damage to the
23 door frame.

24 This is a photograph of Aquileo Martinez taken at the
25 hospital showing damage or injury to his right wrist area.

1 Again, this is a close-up of the injury to Aquileo
2 Martinez's wrist.

3 This is a photograph of Maurilio Martinez taken at
4 the Greenville Memorial Hospital emergency room. This was
5 when he arrived. This was the treatment that the
6 paramedics provided to him.

7 Again, this is a close-up of Mr. Martinez.

8 This is a photograph of Mr. Martinez, his back,
9 showing injuries to his back and around his left arm. I
10 observed all these prior to the photographs being taken.

11 This is a close-up showing injuries to Mr. Martinez's
12 back again.

13 That's another photograph of the injury to
14 Mr. Martinez's back, showing a scale.

15 That's a similar picture showing the injury to his
16 back and to his left arm with the scale.

17 This is a photograph of Mr. Maurilio Martinez showing
18 the laceration to his head.

19 This is another photograph of the laceration.

20 Again, a third photograph.

21 Q Thank you, Investigator Whitmire.

22 If you would, just take the stand again, please.

23 A (Witness complied.)

24 Q Investigator, after you did everything that you just
25 talked about at the scene, did you go anywhere else in

1 reference to this case?

2 A I went to the hospital --

3 Q Okay.

4 A -- following the -- well, I remained at the scene
5 until Sergeant Lendway from forensics came. I walked him
6 through the scene, showed him the scene. I then attempted
7 to locate the other piece of wood, you know. I saw that
8 one end was freshly broken. Also, based on information I
9 had received from the neighbor that the suspects had
10 carried the other part of the broken wood with them when
11 they left the scene. I attempted to locate that other
12 piece of wood.

13 So I walked down through the parking lot. I checked
14 the area of the parking lot, walked down Pittman Circle,
15 walked around behind the building trying to locate the
16 other piece of wood or, possibly, locate an origin of
17 where that wood may have originated from.

18 Q Did you have any luck?

19 A No, ma'am.

20 Q You said you went to the hospital after that?

21 A Yes, ma'am.

22 Q Okay. What did you do at the hospital?

23 A I interviewed the victims again separately. They
24 were in separate rooms.

25 Q Did you have any assistance in translation while you

1 were there?

2 A Yes, ma'am. I used the hospital translator.

3 Q And, in doing so, were you able to get any additional
4 information from the Martinez brothers about a description
5 of who had done this to them?

6 A From Mr. Aquileo Martinez, he gave me a more -- a
7 better -- or a more detailed description than what I had
8 learned at the scene in which he described the black male
9 suspect as having slight facial hair.

10 Q And so, at that point, what was the total amount of
11 information you had developed about these two suspects?

12 A Based on information that I had received from the
13 victims at the scene, as well as the complainant, the
14 neighbor, I had already prior to going to the hospital --
15 prior to leaving the scene and going to the hospital, I
16 had provided a BOLO to dispatch over the radio that
17 included a --

18 Q When you -- just would you state what that is,
19 please?

20 A Be on the lookout. It's a term we use, just be on
21 the lookout for.

22 The information I had that I provided back to
23 dispatch in that BOLO was two suspects, one black male
24 suspect, approximately 6'1", 160-175 pounds, 30 to 35
25 years of age. One white male suspect, 5'8" to 5'9", 30 to

1 35 years of age with sandy close-cropped or buzzed hair
2 wearing a gray sweat suit. The black male was described
3 as having a black hoodie sweatshirt, black trousers, and
4 black shoes.

5 Q So as far as what you're saying, this was sort of a
6 compilation of information that you had gotten from all of
7 these different --

8 A Yes, ma'am. It was a composite description based on
9 information I had received from the victims, as well as
10 the neighbor.

11 Q Okay. Now, did you take any written statements from
12 the victims when you went to talk to them at the hospital?

13 A No, ma'am.

14 Q Okay. And what did you do -- what else did you do in
15 this case then as far as your involvement?

16 A I completed a criminal description form, which
17 included the descriptions that I -- of the suspects I had
18 received from the victims and the complainant.

19 Q Okay. And did you have any further involvement in
20 the investigation of the case?

21 A No, ma'am.

22 Q Okay. And can you explain why that would be?

23 A Cases of this nature are, generally, turned over to
24 investigators. At that time, I was a road deputy. And
25 these cases are, generally -- unless the suspect can be

1 identified, these cases are turned over to investigators
2 for follow-up investigation.

3 MS. SEAY: Thank you, Investigator Whitmore.

4 Please answer any questions Mr. Sumner might have.

5 THE COURT: Mr. Sumner..

6 CROSS-EXAMINATION

7 BY MR. SUMNER:

8 Q Just a few points, Officer Whitmire.

9 You were the first officer to arrive over there that
10 evening; is that correct?

11 A Yes, sir.

12 Q And you remained there, I believe you've already
13 testified to the jury, until forensics came on the scene;
14 is that right?

15 A Yes, sir.

16 Q And forensics are -- who were the ones that took all
17 the pictures? There were about 50, roughly, pictures
18 taken; is that correct?

19 A The first two pictures showing the location of the
20 apartment buildings came off of Google. The remainder of
21 the pictures were taken by the forensics officer.

22 Q And were you there when the forensics officer went
23 through and took the photographs?

24 A No, sir. I had already left and gone to the
25 hospital.

1 Q Now, when you got there, you spoke with the two
2 Martinez brothers; is that correct?

3 A Yes, sir.

4 Q And you spoke with them separately; is that right?

5 A No, sir. They were together.

6 Q They were together?

7 A Yes, sir.

8 Q And, at that point, initially, about how long had it
9 been before this incident had occurred, roughly?

10 A Less than 10 minutes, six or seven minutes.

11 Q Okay. And they told you that they had been sleeping
12 when an intrusion occurred; is that right?

13 A Yes, sir.

14 Q In their bedroom?

15 A Yes, sir.

16 Q And they were able, at that point, only to say, I
17 believe from your testimony, that one of the intruders was
18 a white male; is that correct?

19 A I don't think I was asked that before.

20 Q Sir?

21 A I don't think I was asked that before in this case.
22 In the previous hearing, I was asked that.

23 Q All right. But you were -- you asked them to
24 describe the person when you first -- or persons when you
25 first saw them. And one said he was white -- they both

1 said it was a white male; is that right?

2 A Yes, sir.

3 Q And the other perpetrator was a black male; is that
4 correct?

5 A Yes, sir.

6 Q Okay. Later, you, at the hospital, spoke, actually,
7 with them separately; is that right?

8 A Yes, sir.

9 Q Okay. And when you spoke with them separately, there
10 was a hospital translator that was there; is that correct?

11 A Yes, sir.

12 Q At that time, you, also, I guess, for a second time,
13 at a minimum, asked them for a description; is that correct?

14 A I tried to get a follow-up description, yes, sir.

15 Q All right. And you were not able to get one; is that
16 correct, or was there any further information?

17 A I was able to get further information from Aquileo
18 Martinez, who told me the black male had slight facial
19 hair around his face.

20 Q Okay. But you, also, that evening spoke with a Paula
21 Rice, the neighbor; is that correct?

22 A Yes, sir.

23 Q And she described the black male as 6'1" tall; is
24 that right?

25 A She provided a description, yes, sir.

1 Q Okay. She provided a more detailed description than
2 the two people that had been in the apartment?

3 A Like I testified before, it was a composite based on
4 the victims, as well as Ms. Rice.

5 Q Well, you've already testified to the jury about what
6 the two Martinez brothers told you that evening. Now
7 let's talk about Ms. Rice. She told you, first of all,
8 that the black male was 6' to 6'1" tall; is that correct?

9 A Approximately, yes, sir.

10 Q Okay. And she, also, said that the black male was
11 160 to 175 pounds; is that right?

12 A Yes, sir.

13 MR. SUMNER: I don't have any other questions.

14 Thank you.

15 THE COURT: Any redirect?

16 MS. SEAY: I have nothing further for Investigator
17 Whitmore.

18 THE COURT: All right. You may step down.

19 MS. SEAY: The State calls Sergeant Ron Lendway.

20 THE CLERK: Sergeant Lendway, if you'll step up here.

21 Please place your left hand on the Bible and raise
22 your right hand.

23 WHEREUPON,

24 RONALD DAVID LENDWAY,

25 after first having been duly sworn, testified as follows:

1 THE CLERK: Thank you.

2 You may be seated.

3 State your full name for the record, please.

4 THE WITNESS: Ronald David Lendway.

5 THE CLERK: Thank you.

6 DIRECT EXAMINATION

7 BY MS. SEAY:

8 Q Sergeant Lendway, by whom are you employed?

9 A Greenville County forensics --

10 Q Okay.

11 A -- within the crime scene unit.

12 Q All right. And can you tell us what some of your
13 general duties are?

14 A Our office responds to various crime scenes within
15 Greenville County. If there's an agency that requests
16 forensics or crime scene processing, they'll notify our
17 office, whether it's the Sheriff's Office, the city
18 police, or the smaller agencies within Greenville County.
19 And we'll go and document the crime scene. We may take
20 photographs. We may process for fingerprints. We may
21 collect evidence. It just depends on what type of crimes
22 have taken place.

23 Q And how long have you been employed in your current
24 position?

25 A I've been with the crime scene unit for eight years.

1 Q Can you briefly tell us what your education and
2 training is to perform those duties?

3 A My education, I've got a college degree. I've, also,
4 had various training within our unit, which includes blood
5 spatter, evidence collection, DNA collection, various -- I
6 don't have the whole list of my classes or training right
7 in front of me, but various crime scene processing
8 techniques.

9 Q And were you employed in your current position back
10 on March 28th of 2007?

11 A Yes, I was.

12 Q Were you requested to respond to a scene on
13 on that date?

14 A Yes.

15 Q Approximately, what time did you receive that call?

16 A It was approximately 1:00 in the morning.

17 Q And you went to that location around that time?

18 A Yes.

19 Q Okay. I believe Investigator Whitmore, who has
20 already testified, was the first responding officer. Did
21 you communicate with him?

22 A Yes, I did.

23 Q What did he tell you about the scene there?

24 A When I arrived, he had advised me that there was two
25 Hispanic victims, male victims, that were inside their

1 apartment sleeping in their bedroom. And there were two
2 suspects that came to the residence and forced the front
3 apartment door open. They then went to the victim's
4 bedroom and forced the bedroom door open, which then awoke
5 the victims.

6 And Deputy Whitmire advised me that one of the
7 suspects was a white male and the other was a black male.
8 And the black male had a stick and was beating the victims
9 and, also, took their wallets -- demanding money from the
10 victims and took their wallets containing some cash.

11 Q And did he point out some various areas at the scene
12 that he felt were important for you to process or to take
13 photographs of.

14 A He advised me of -- I had asked him about some blood
15 that was found. And he advised that it was from the
16 victim. And he, also, pointed out a piece of wood that
17 was on the living room floor and advised that that was
18 part of the weapon used.

19 Q And so we have already had some photographs entered
20 into evidence that Investigator Whitmore was able to
21 discuss with the Court. Did you take all those
22 photographs of the scene?

23 A I did take photographs of the scene. I'm not sure
24 which photographs you're referring to.

25 Q I'll just ask you to briefly look at these and tell

1 me if those are the ones you took? Not those two.

2 A Yes. These are the photos I took.

3 Q So you took the photographs of the scene, as well as
4 the victims at the hospital; is that right?

5 A Right. I took photographs from three different
6 areas. One was from the initial scene, the other of the
7 victims at the hospital, and, also, some photographs I
8 took of the piece of wood at the crime scene office.

9 MS. SEAY: I would like to have this marked, please.

10 (WHEREUPON, State's Exhibit No. 43 was marked for
11 identification only.)

12 BY MS. SEAY:

13 Q Sergeant Lendway, this is State's Exhibit 43 for
14 identification purposes. Do you recognize this?

15 A Yes.

16 Q How do you recognize it?

17 A This is a box with my handwriting on it and my
18 initials.

19 Q Is there any identifying information that lets you
20 know what that is?

21 A There is. When we package evidence, we have the case
22 number, which I have here. This is the case number that I
23 wrote, the date and time that I collected it, the type of
24 case it is, the address, and the apartment number, and the
25 city.

1 And, also, how I list my evidence, which I normally
2 will list my evidence either with numbers or letters. And
3 before the number or letter, I will put my initials. And
4 this one here is RL-1. "RL" standing for my initials.
5 The one is for the one piece of evidence in this case, and
6 the description of the evidence I collect. Also, there's
7 my name and unit number. I then seal it with evidence
8 tape and then initial the tape.

9 Q Okay. And so you're able to say that you packaged
10 this, and this is what it is, this is the date you did it,
11 and this is still intact; is that right?

12 A That's right.

13 MS. SEAY: Your Honor, I would ask, at this time,
14 that this item be entered into evidence as State's Exhibit
15 No. 43.

16 MR. SUMNER: Can I just see it?

17 MS. SEAY: Yes

18 MR. SUMNER: I don't have any objection, Your Honor.

19 (WHEREUPON, State's Exhibit No. 43 was admitted into
20 evidence.)

21 BY MS. SEAY:

22 Q Sergeant Lendway, would you mind opening this package
23 for us, please?

24 Do you need scissors?

25 A Yes, if you have some.

1 Q Is that, in fact, the stick you collected from that
2 scene?

3 A Yes, it is.

4 Q Does it appear to be in the same or substantially the
5 same condition as when you collected it?

6 A Yes. This is the piece of wood right here. What I
7 did, so it wasn't bouncing around, I did put some tape on
8 it. I initialed it right here on the piece of wood and
9 put RL-1, which is the evidence number.

10 Q Sergeant, did you process that piece of wood for any
11 potential fingerprints?

12 A Yes, I did.

13 Q And what were the results?

14 A The results were negative for fingerprints on the
15 piece of wood.

16 Q Is that common or uncommon in your experience for
17 certain items to leave fingerprints or not?

18 A It will depend on the particular item and, actually,
19 how the item was handled. This particular item here, it
20 was a piece of wood and the wood is somewhat rough. And
21 the potential of getting fingerprints on here is very
22 small. However, I did attempt it.

23 Q And is that due to the surface -- you said the
24 potential is small, is that due to the surface of that
25 type of wood?

1 A That's right.

2 MS. SEAY: Those are all the questions I have for
3 you, Sergeant.

4 Thank you.

5 Please answer any questions Mr. Sumner might have.

6 THE COURT: Mr. Sumner.

7 MR. SUMNER: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. SUMNER:

10 Q Officer Lendway, just a couple of questions.

11 You were there -- and I might have missed this
12 earlier. You took the pictures; is that correct?

13 A Yes, I did.

14 Q You did. Okay. And they were, roughly, I
15 guess, give or take, around 50 photographs; is that
16 right?

17 A I don't have the exact count.

18 Q Somewhere in that range?

19 A Yeah, maybe a little less.

20 Q Okay. 40 -- 30 to 40 pictures?

21 A Yes.

22 Q Okay. Now, would you describe the premises, please,
23 to the jury, what you can remember about the apartment
24 inside?

25 A (There was no response.)

1 Q And you can look at the photographs, just the general
2 layout.

3 A Anything in particular?

4 Q No. Just the general layout. I mean, would you say
5 it was a large residence? Was it a small residence?

6 A It was a fairly small apartment. When you walk in
7 the front door, you have the living room right there. If
8 you continue on, you'll have the kitchen straight ahead
9 and a little bit to the left. And around to the right,
10 you have where the victim's bedroom was.

11 Q So, I guess, you would agree with me that the number
12 of photographs was fairly extensive for that size of a
13 residence?

14 A I mean, it depends. I mean, there's -- you know,
15 there's no certain guidelines how many photographs we have
16 to take. All those photographs were, also, from three
17 different locations. So they weren't all taken at the
18 apartment.

19 Q Okay. Were you in charge of the forensic
20 investigation in this case?

21 A "In charge," how do you mean?

22 Q Were you the person that was out there on the scene
23 with forensics? Were you the one that was handling the
24 forensic end of the investigation?

25 A Yes, I was.

1 Q And tell us, if you would, please, your background
2 and training in forensics.

3 A Background and training?

4 Q Yes, sir.

5 MS. SEAY: Your Honor, I'm going to object to this.
6 He's already explained his background and training in
7 response to my questions.

8 MR. SUMNER: Your Honor, this is, specifically,
9 regarding forensics.

10 THE COURT: I'll allow it.

11 THE WITNESS: When a person is -- prior to my
12 forensics training or my forensics position, I was a
13 police officer for the Greer Police Department, where I
14 did go to different crime scenes at the Greer Police
15 Department. When I was hired with the forensics division,
16 we had an FTO, which is a field training officer program,
17 which you have a training manual. You have -- I don't
18 know how many pages it is offhand. But it's numerous
19 pages with numerous tasks which cannot all be completed in
20 a quick fashion. Some of the processes we use, it
21 makes -- it may depend on the type of crime. And some of
22 the processes may include a homicide, which you don't know
23 when one of those would occur. So that whole process
24 takes many months to complete.

25 We, also, have a training book we complete with --

1 there's, at least, 16 chapters in it. And, at the end of
2 each chapter, we have a written test, which we complete.
3 There's, also, a DNA test that we need to complete. We
4 watch that on a DVD.

5 We do have a latent print division, also. Part of
6 our training was to go to the latent print division and
7 speak with the latent examiners as far as what types of
8 prints they're looking for, taking elimination prints from
9 individuals, and any type of footwear or tire track
10 evidence, which I've had classes in footwear impressions.

11 I've had a course in North Carolina, which was
12 approximately a week long, in blood spatter analysis.
13 I've, also, had an advanced blood spatter analysis course
14 at the same college up in North Carolina approximately two
15 years after the first initial course in blood spatter
16 where we tested various objects with blood. In that
17 particular case, we used horse blood. And we made
18 different spatter projections on the wall, on the floor
19 with different weapons, transfer, swipe patterns. We saw
20 a video on different objects and how they relate to --
21 bloody objects, the motion of those particular objects.

22 If I can just go back as far as the training, like I
23 said, I don't have it in front of me, but my position here
24 is, also, a class one law enforcement officer position.
25 Prior to getting hired with the Greer Police Department,

1 before that, I was sent to the South Carolina Criminal
2 Justice Academy, which, at the time, was eight weeks. I
3 think it's nine weeks now, where you had to go through the
4 whole eight-week program to be a certified law enforcement
5 officer in the State of South Carolina. I did that prior
6 to Greer.

7 And, you know, a lot of -- there's, also, training
8 that you may go to, especially if you're starting off in
9 the forensics field. I was a police officer with Greer
10 for several years, as I said. But when you go to the
11 forensics division, which covers the whole county of
12 Greenville, you see a lot more crimes than you do in
13 Greer. A lot of those are violent crimes. And I see
14 those on a regular basis, on pretty much a daily basis.

15 So, being in forensics for eight years, I've seen
16 many crimes. A lot of them, like I said, were violent.
17 And you don't get to -- you may not know when a bank
18 robbery is going to occur. You may not know when a
19 suicide or a homicide is going to occur. So over the
20 period of time, you're constantly gaining knowledge and
21 skills from going to and from those various crimes. And
22 if you're starting off -- I've been there eight years. If
23 I have some newer officers in our division, I may take
24 them on some of those more violent crimes so they do gain
25 the experience. Being there eight years, I have seen

1 quite a few.

2 BY MR. SUMNER:

3 Q Thank you.

4 A Okay.

5 Q One point, when you testified to the jury about
6 latent fingerprints, you're meaning what, in our common
7 knowledge, we would just call fingerprints; is that right?

8 A Right. And I, also, did attend a week-long school
9 down at the Criminal Justice Academy on latent
10 fingerprints.

11 Q Exclusively on latent prints for one week?

12 A Yes.

13 MR. SUMNER: Thank you.

14 I don't have any other questions.

15 THE COURT: Any redirect?

16 MS. SEAY: Thank you.

17 No further questions for Sergeant Lendway.

18 And would the Court grant him permission to be
19 excused, if he so desires?

20 MR. SUMNER: There's no objection.

21 THE COURT: All right. You may be excused.

22 MS. SEAY: Your Honor, the State calls Maurilio
23 Martinez.

24 THE COURT: Ladies and gentlemen, I meant to give
25 y'all an instruction or explanation prior to this during

1 my initial instructions. But Mr. Martinez does not speak
2 English. And throughout the entire trial and my opening
3 comments, he's been sitting by a translator who's been
4 translating. She's translating to him everything that's
5 being said, as well as his brother.

6 So since he does not speak English, the Court
7 appoints a translator who is certified by the State. And
8 that's Ms. Sampson standing here with him. She's no kin.
9 She's paid by the court system to do the translating for
10 the purpose of this hearing. And she's been sitting there
11 translating to him. That's the purpose for her. And
12 she's been placed under oath to translate everything
13 accurately from Spanish to English, and from English to
14 Spanish, by virtue of the questions that the Solicitor and
15 defense attorney will ask him, as well as the oath he's
16 about to take.

17 THE CLERK: Place your left hand on the Bible,
18 please, and raise your right hand.

19 WHEREUPON,

20 MAURILIO GREGORIO MARTINEZ,
21 after first having been duly sworn, testified as follows:

22 THE CLERK: Thank you.

23 You may be seated.

24 MR. SUMNER: Your Honor, may counsel and I approach
25 the bench for just one second, please?

1 THE COURT: Certainly.

2 (WHEREUPON, a bench conference was held.)

3 THE COURT: Ladies and gentlemen, I'm going to ask
4 y'all to step back to the jury room. I've got a matter of
5 law I've got to address with the attorneys, and it does
6 not require your presence. If you'll step back there and
7 have a brief break. I'll get you back out very quickly.
8 And I promise you, it won't be as long as the last break.

9 Please remember, don't discuss the case and keep an
10 open mind.

11 (WHEREUPON, the jury was excused from open court at
12 approximately 11:44 a.m.)

13 THE COURT: All right.

14 MR. SUMNER: Your Honor, may it please the Court.

15 THE COURT: Yes, sir.

16 MR. SUMNER: Steve Sumner for the Defendant.

17 I wanted to make sure before examination of
18 Mr. Maurilio Martinez takes place that I understand the
19 Court's ruling regarding the photographic identification.

20 And I, also, neglected to bring up the issue of an
21 in-court identification. My understanding is the
22 photographic identification that's been suppressed, I'm
23 not going to make any reference to it on cross-examination
24 whatsoever. I think that might violate the spirit of the
25 ruling.

1 Am I correct in that?

2 THE COURT: Yes, sir.

3 MR. SUMNER: I was not planning on asking him. I was
4 just not even going to really get into identification
5 whatsoever with this witness.

6 THE COURT: I think if you do, then you're opening
7 the door for them to go back and have, basically, the same
8 hearing that I had. And my purpose was for us to not have
9 any reference to it. She can go into the initial
10 conversation by the investigator, the follow-up
11 conversation with Mr. Gutierrez, ask him for the
12 description that -- my recollection is a black male,
13 medium build, short, cropped beard, that type of thing.
14 And then there she goes. And that would be about where
15 she could go with that.

16 MR. SUMNER: Okay. Well, what I was going to do was
17 simply not even -- that was my understanding. But I
18 wanted to be clear before the questioning started. I
19 don't know if there's -- I think the area of
20 identification is very sticky. I think when I read the
21 case law, sometimes, I'm a little bit unclear myself as to
22 exactly what is permitted and not.

23 I'm assuming it would not be -- and I'm not trying to
24 invade her trial strategy. I'm assuming there would not
25 be an attempt for an in-court identification from this

1 witness as to Mr. Heyward. I am not going to allude to
2 it. I just wanted to see if there was planning on being
3 one. Because I think that's a whole other issue that we
4 would need to address outside the presence of jury.

5 MS. SEAY: Your Honor, my concern is that -- the
6 State's position would be that Mr. Maurilio Martinez
7 should be allowed to make an in-court identification,
8 based on the circumstances of what you've already reviewed
9 in terms of his positive identification from the photo
10 lineup. I think that the case law that we've been looking
11 at would indicate that you would need to make a finding
12 that it -- that an in-court identification would not have
13 been tainted by any previous identification. And that we
14 would then be allowed to do that.

15 THE COURT: Now, my understanding of the law, the
16 Biggers factors, is that the fact finders -- I mean, if we
17 allow the in-court identification and you follow the same
18 exact factors -- however, the photo lineup questions that
19 were asked of Mr. Martinez don't come in, you know. You
20 must select someone, the person that came into your
21 apartment is most likely in this lineup, those sort of
22 issues don't come into the in-court identification.

23 MS. SEAY: Right.

24 THE COURT: Because those were the reasons for
25 tainting the photo lineup in my prior ruling.

1 MS. SEAY: Right.

2 MR. SUMNER: Your Honor, I would like to be heard on
3 that point.

4 THE COURT: Sure.

5 MR. SUMNER: I don't want to interrupt your thought
6 process as you're mulling over it. Just at the
7 appropriate time, I'd like to be heard on that.

8 THE COURT: Well, let me hear you now. Because I'm
9 reading the five factors that I'm evaluating. And let me
10 hear you.

11 MR. SUMNER: Thank you, Your Honor.

12 May it please the Court.

13 I may view this differently than my colleague. First
14 of all, in terms of the suppression of the -- I think it's
15 already clear that the Court has ruled that the
16 photographic identification is not going to come into this
17 case in front of the jury.

18 I would move to suppress an in-court identification
19 and agree that I'm not going to mention identification to
20 this witness in my cross-examination. Because if he now
21 identifies Mr. Heyward -- I think this is the lynch pin.
22 If he now attempts to identify Mr. Heyward today and says
23 that's the person who came in, then I think that I'm going
24 to have to be able to ask him, isn't it correct that
25 you've already testified that you were told -- I think

1 it's going to wind up -- and I, certainly, don't think
2 that the Solicitor is trying to go around.

3 I think it's going to wind up undoing the pre-trial
4 ruling. That's why I felt like we needed to get into this
5 outside the presence of the jury, you know. The
6 identification -- the photographic identification, we've
7 already had an extensive hearing on that. That's been
8 suppressed. I think if there's an in-court
9 identification, that's going to undo that. And we're
10 going to be right back where we started. I don't know any
11 other way to avoid it.

12 What I was going to do is I was not going to mention
13 the photographic identification to this witness. I was
14 just -- I wasn't going to do it. And so, I guess, we
15 probably -- the Solicitor and I probably need a ruling as
16 to -- about an in-court identification. But if there is
17 an in-court identification, then I think I'm going to have
18 to be able to get into all the testimony that was provided
19 before, you know. I don't see a way around that in terms
20 of cross-examination and impeaching the witness's
21 identification today.

22 Thank you.

23 THE COURT: Thank you, Mr. Sumner.

24 MS. SEAY: Your Honor, I'm trying to articulate this
25 the best way I can figure out how. But it seemed that the

1 ruling that you made in regard to the factors you
2 considered revolved mainly around that one segment of time
3 where Mr. Martinez, in my opinion, appeared to give
4 inconsistent answers because he said that, yes, they had
5 told him he had to choose a photograph. But then when I
6 asked him, Did they tell you that the person that did this
7 might not be in the photo array, he said, yes, they told
8 him that.

9 So I think that the suggestibility -- if you're
10 focusing on just that one portion there where he said that
11 they told him to, I don't think that that would be so much
12 of a taint because of the inconsistency of the answer,
13 which, in my opinion, is some of what is lost in the
14 translation of this whole matter. I don't think that
15 would so taint the in-court identification as to prevent
16 it from being able to be done. And I hope that made some
17 sense.

18 THE COURT: Well, here is what I remember him
19 testifying to during the in-camera hearing before was
20 that -- I think I wrote this down. I saw him when he was
21 hitting me. I saw him and I can recognize him. That's
22 the language that I remember him saying. Then that was
23 coupled with the follow-up questions as to whether it was
24 suggested to him he had to make a selection, and whether
25 the Defendant was or was not, certainly, in the lineup.

1 I believe outlining the factors, if you take away the
2 lineup, that Mr. Martinez can testify as to his
3 opportunity to view the accused during the attack. That's
4 subject to cross-examination how much degree of attention
5 he gave. His prior description should be limited to the
6 fact that he's already testified there was a black male,
7 six foot, medium build, with a close-cropped beard.
8 That's been consistent.

9 MR. SUMNER: Your Honor, I'm sorry. That's not his
10 testimony. That was the neighbor's testimony. I want to
11 make sure the record is straight here. I think this
12 witness testified, initially, that it was -- according to
13 Officer Whitmire, that it was -- initially, Officer
14 Whitmire -- initially, Officer Whitmire said he said it
15 was a black male.

16 And then when he went to the hospital -- and I get
17 the brothers confused. But I believe it was this brother
18 that said, The only thing I can add to that is short
19 facial hair when he went to the hospital. Okay. That it
20 was a black male with some type of short facial hair. I
21 want to make sure -- the neighbor is the one that said
22 6'1", 160 to 175. I just want to keep the record straight
23 on that point.

24 So, you know, I didn't want to interrupt you, Judge.
25 I would not ever want to do that, but I wanted to try

1 to --

2 THE COURT: I understand.

3 MS. SEAY: Well, Your Honor, if I may point out, the
4 victim's statement that Investigator Gutierrez testified
5 about, he did give a description of a black male, tall,
6 medium build, with a short beard, short hair, wearing a
7 black shirt and black pants. And that's in the victim's
8 sworn statement. I think I should be able to question him
9 about that.

10 THE COURT: All right. If we limit your questions to
11 that description he provided those four days after, that
12 was four or five days after the incident, subject to
13 cross-examination and not make an in-court identification,
14 you're still going to have the other witness, the
15 co-defendant. And I don't want to try your case. But I'm
16 assuming that he would name him, you know, this is the man
17 who was with me, that type of thing. If his
18 identification is in --

19 Am I incorrect on that?

20 MS. SEAY: Yes, sir.

21 You did rule that that was admissible.

22 THE COURT: Right.

23 I think the best way to rule on this matter would be
24 to limit his description as to identification as to what
25 was contained in that statement, that general description

1 there. And that should keep us clear of any of the
2 tainted identification which occurred during the photo
3 lineup.

4 MS. SEAY: And just to make sure that I'm clear on
5 that -- on the understanding, I may still ask him
6 questions about what happened at the scene, and the things
7 that were factors at the scene, and him being able to
8 determine that it was a black male and a white male?

9 THE COURT: Yes, absolutely.

10 MS. SEAY: Okay.

11 MR. SUMNER: I can live with that. And so,
12 basically, he can be asked by either the Prosecutor or
13 myself about the initial description when Officer Whitmire
14 came, the second description that evening at the
15 hospital --

16 THE COURT: With the hospital interpreter.

17 MR. SUMNER: -- and this description that he
18 referenced in this statement?

19 THE COURT: Yes.

20 This in no way limits the co-defendant's description,
21 because I believe it was a little more specific.

22 MR. SUMNER: Okay. And I'm not going to get into
23 this photographic identification. I'm not.

24 THE COURT: Well, if you do --

25 MR. SUMNER: I'm not.

1 THE COURT: You understand the consequences of
2 opening the door. She can walk through it.

3 Ms. Sampson, I want to make certain that Mr. Martinez
4 understands what our discussions entailed, that he's to
5 answer the questions which are asked of him regarding his
6 initial description of the incident, conversations he had
7 at the hospital, and then the follow-up conversations with
8 Investigator Gutierrez.

9 INTERPRETER TERESA SAMPSON: Yes.

10 THE COURT: Okay. Are y'all ready?

11 MS. SEAY: Yes, sir.

12 MR. SUMNER: I'm ready.

13 THE COURT: Bring in the jury.

14 (WHEREUPON, the jury came into open court at
15 approximately 12:01 p.m.)

16 THE COURT: All right. Are you ready to go?

17 MS. SEAY: Yes, sir, Your Honor.

18 THE COURT: Ms. Seay, please, proceed.

19 MS. SEAY: Mr. Martinez has been sworn; is that
20 correct?

21 THE COURT: Yes.

22 He took his oath prior to the break.

23 MS. SEAY: Okay.

24 (WHEREUPON, the following testimony of Mr. Maurilio
25 Martinez was translated by Ms. Teresa Sampson.)

DIRECT EXAMINATION

BY MS. SEAY:

Q Mr. Martinez, I'm going to stand back here because I want to make sure everyone in the courtroom can hear what you have to say.

Would you, please, state your name into that microphone so I can make sure we hear you?

A My name is Maurilio Gregorio Martinez.

Q Mr. Martinez, how old are you?

A I am 28 years old.

MS. SEAY: If you can, pull that microphone down a little bit for him.

BY MS. SEAY:

Q Let's try that again. How old are you?

A 28 years old.

Q What is your date of birth?

A

Q Where do you live, Mr. Martinez?

A Apartment

Q How long have you lived there?

A Four years.

Q Can you, please, tell us what your education background is?

A I finished middle school.

Q So would that be about the eighth grade?

1 A Yes, eighth.

2 Q Okay. Mr. Martinez, do you read and write Spanish?

3 A Yes.

4 Q Is Spanish your native language?

5 A Yes.

6 Q Do you read, write, or understand English?

7 A No.

8 Q Where are you, currently, working?

9 A Painting houses.

10 Q Do you have your own company, or do you work for
11 someone else? Do you work for someone else?

12 A I work for Alex Painting.

13 Q How long have you worked for Alex Painting?

14 A Four and a half years.

15 Q How many hours a week do you usually work for him?

16 A From Monday through Saturday.

17 Q How many hours?

18 A About 50 hours.

19 Q Do you have any other jobs or employment that you do?

20 A No.

21 Q So back -- if you were living -- have been living at
22 your current place for four years, then you were living
23 there, where you are now, on March 28th of 2007; is that
24 right?

25 A Yes.

1 Q Does someone live with you?

2 A Yes. There are three of us living there. My other
3 brother was in Atlanta at that time.

4 Q Your older brother was not there that night?

5 A No.

6 Q And then is it your younger brother, Aquileo, who
7 lived with you?

8 A Yes. Both of us were there.

9 Q Okay. Do you know what hours your brother worked?
10 Were they similar to yours?

11 A Yes.

12 Q Did he work for the same company, Alex Painting?

13 A Yes.

14 Q I believe this was on a Wednesday night?

15 A Yes.

16 Q Do you remember what you had done during the day that
17 day?

18 A Yes.

19 Q What had you done that day?

20 A I just went to work that day.

21 Q Do you know about what time you went to work that
22 day?

23 A I arrived home at 8:00 p.m.

24 Q What time did you start work that day?

25 A 8:00 a.m.

1 Q Okay. So you started work at 8:00 a.m., and you
2 arrived home at 8:00 p.m.; is that right?

3 A Yes.

4 Q Had you been paid for your work that day?

5 A No.

6 Q Did you do anything when you got home that night?

7 A No.

8 Q At some point in time, did you go to sleep, go to
9 bed?

10 A Yes. I got home. I took a shower. And then I went
11 to sleep.

12 Q Okay. So what -- about what time do you think you
13 went to sleep?

14 A About 9:30.

15 Q All right. After you had gone to sleep, did
16 something happen there in your apartment?

17 A Yes.

18 Q And was your brother, Aquileo, there in the apartment
19 at that time?

20 A Yes. Both of us, we sleep in the same room.

21 Q Okay. In the room where you slept, did you have
22 separate beds?

23 A Yes.

24 Q Do -- or did you -- as a normal practice, did you
25 lock your doors in your home when you went to sleep at

1 night?

2 A Yes. That's what I do every day.

3 Q Okay. And so you said that something did happen that
4 night. Can you describe what you heard and what you saw?

5 A Yes. I heard a noise by the main entrance, the front
6 door. They come in. And then they hit the other door,
7 the bedroom door.

8 And then when they saw me, they started hitting me
9 right away. And he was telling me, I want money, I want
10 money. And I gave it to him. And I give it to him,
11 personally, on his hand. I put it on his hand.

12 And then after that, he continued hitting me and
13 hitting me. And then when he hit me on the head, I just
14 lost it. And then when they saw me bleeding, they left.
15 But I had an opportunity to see him.

16 Q Okay. Let me back up just a little bit. When you
17 heard that somebody had entered your apartment, what did
18 that sound like?

19 A That's what woke me up, because it was a very loud
20 noise.

21 Q And what kind of lock did you have on your front
22 door?

23 A Like you lock it with a key. I'm not sure exactly.
24 You have to use a key.

25 Q And what kind of lock did you have on your bedroom

1 door?

2 A It's just like you lock it from the inside, sort of
3 like a clip.

4 Q Okay. When these men came into your bedroom, what
5 did you notice about them?

6 A How?

7 Q Okay. You stated that there were two men; is that
8 correct?

9 A Yes, two men, one black and one white.

10 Q Okay. Let's talk about the white man. What did you
11 notice about his physical appearance, or how would you
12 describe him?

13 A Tall, a little bit bald right here. He didn't have
14 any facial hair.

15 Q All right. What was the white male doing?

16 A He was just standing there watching how the other one
17 was hitting me.

18 Q Did the white man say anything?

19 A No.

20 Q Did you ever hear him scream or ask you for money?

21 A Yes. Both of them say at the same time that they
22 wanted money.

23 Q Did the white man ever hit you?

24 A No.

25 Q Did you see the white man ever hit your brother?

1 A No. The black man was the one that hit my brother,
2 also.

3 Q All right. Let's move on then to talk about the
4 black man that you saw. What can you tell us about his
5 physical appearance? What did you observe?

6 A I saw him and I can identify him. I can recognize
7 him.

8 Q Did -- was he short or tall, or somewhere in between?

9 A Tall, about six foot, six feet tall.

10 Q Okay. And do you remember anything else about him,
11 about his hair, or body, or anything like that?

12 A Yes. He had short hair and a little bit of a beard,
13 facial hair.

14 Q Tell me about how that black man hit you. Where all
15 did he hit you?

16 A He was hitting me. And, at that moment, he was
17 hitting me in the back of the head. He was screaming.
18 And then he continued hitting me. And then he hit me on
19 my head last.

20 Q Was it painful, the beating that he was giving you?

21 A Yes.

22 Q Did he ever knock you down with those beatings?

23 A Yes.

24 Q Okay. Did you observe him hit your brother?

25 A Yes.

1 Q Was that before or after he hit you?

2 A He first hit me. And then he hit my brother after.

3 Q And did you give him the money that he was asking
4 for?

5 A Yes. I give him my wallet. And I, also, give him my
6 brother's wallet.

7 Q Where was your wallet?

8 A It was right on the table. I have a small table in
9 my bedroom.

10 Q I'm sorry. Can you repeat that?

11 A Yes. My wallet was on the table. I have a small
12 table inside my bedroom.

13 Q Okay. And what was contained inside your wallet?

14 A My ID and \$300.

15 Q Okay. And what was the \$300 from? Where had you
16 gotten that?

17 A Working as a painter.

18 Q Okay. And you said you gave him your brother's
19 wallet as well?

20 A Yes.

21 Q Mr. Martinez, did you know these two men who came
22 into your apartment that night?

23 A No. I had never seen them before.

24 Q That's what I'm asking. Had you ever seen them
25 before in your life?

1 A No.

2 Q The area where you were in your bedroom, did you have
3 any lights on in your bedroom?

4 A No.

5 Q Was there any light coming into the room?

6 A Yes, light from the kitchen.

7 Q And where was the kitchen as it related to where your
8 bedroom was?

9 A It was right next to it.

10 Q Did your bedroom have any windows?

11 A Yes.

12 Q Did those windows have any kind of covering over
13 them, or blinds, or anything like that?

14 A Curtains.

15 Q Okay. And even with the curtains on the windows, did
16 they allow any light at that time of night to come into
17 the room?

18 A Yes.

19 Q Do you know who called for help for you?

20 A Yes, the neighbor.

21 Q And then when the police came, did you try to tell
22 them about what had happened and who had been there?

23 A Yes.

24 Q What did you tell them about the people who had been
25 there?

1 A I told them that two men, one black and one white,
2 had come into my house and they had hit me.

3 Q Did you see what you were being hit with,
4 Mr. Martinez?

5 A Yes.

6 Q This is State's Exhibit No. 43. Do you recognize
7 this?

8 A Yes. That's what I was being hit with.

9 Q Mr. Martinez, I want to ask you a little bit about
10 your injuries.

11 A Yes.

12 Q Actually, I'm going to ask you a few questions about
13 your apartment. This is State's Exhibit No. 8. Is that
14 the entrance to your apartment?

15 A Yes.

16 Q State's Exhibit No. 12, is that a view of inside your
17 apartment?

18 A Yeah. That's the living room.

19 Q State's Exhibit No. 13, you note the damage to the
20 door, was that there before this happened to you?

21 A No.

22 Q And is that the stick that you stated that you
23 recognized?

24 A Yes.

25 Q And that was left lying in your floor?

1 A Yes, on the floor in the living room.

2 Q Were your injuries such that you were dripping blood
3 on your floor?

4 A Yes.

5 Q Can you tell me what that picture shows?

6 A That's the bed where my brother, Aquileo, sleeps in.

7 Q And what does State's Exhibit No. 23 show?

8 A That's my bed. That's where I sleep.

9 Q Okay. And can you tell me what those red spots on
10 your bed are? Were they there before this happened?

11 A No. They were not there. That's the blood.

12 Q Can you tell me what door that is?

13 A That's the bedroom door.

14 Q Okay. And that's State's Exhibit No. 26.

15 And then State's Exhibit No. 27, what does that show?

16 A That's the bedroom door. And that's the damage done
17 to the wall when they pushed the door against the wall.

18 Q That damage was not there before this happened?

19 A No.

20 Q Can you tell me what that is, what that shows?

21 A That's the frame of the room -- the frame of the
22 door.

23 Q Was the frame of your door broken before this
24 happened?

25 A No.

1 Q Do you recognize this picture, State's Exhibit
2 No. 32?

3 A Yes. That's me.

4 Q And State's Exhibit No. 33?

5 A Yeah. That's me.

6 Q State's Exhibit No. 34, is that you?

7 A Yes.

8 Q What kind of injuries do we show here in this
9 picture?

10 A You can see the blows there.

11 Q What were you hit with to make those marks on your
12 back?

13 A With the same piece of wood.

14 Q And what about State's Exhibit No. 39?

15 A The same.

16 Q Okay. This is State's Exhibit Nos. 35, 36, 37, and
17 38. Do you recognize those?

18 A Yes.

19 Q Are those pictures of you?

20 A Yes.

21 Q Okay. And how did you receive these injuries?

22 A That's the same one that hit me. That's the
23 laceration they caused.

24 Q Okay. And when you were at the hospital being seen
25 about these injuries, what did they have to do for you at

1 the hospital?

2 A They just -- right away, they took care of me. They
3 gave me some shots.

4 Q They gave you some shots?

5 A Yes. And then they stitched my wounds.

6 Q They stitched your wounds?

7 A Yes, more like staples.

8 Q Staples. Okay. Do you know how many?

9 A About 13 stitches.

10 Q And did this cause you great pain?

11 A Yes.

12 Q How -- well, did it affect your ability to do your
13 job after this happened, right after you had been hit with
14 the stick in the head and your back?

15 A I stayed home 15 days without working.

16 Q 15 days. And when you don't work for 15 days, do you
17 still get paid?

18 A No.

19 Q All right. When the black male was hitting you over
20 the head with the stick that we just looked at that you
21 said is the one that you remember from that night, do you
22 remember if that stick broke while he was hitting you?

23 A Yes. It broke when he was hitting me on the back.

24 Q Mr. Martinez, did you later, just a few days later go
25 and give the law enforcement officers a statement about

1 what had happened to you?

2 A Yes.

3 Q And did they provide a translator for you to help you
4 understand?

5 A Yes.

6 Q And did they then translate what you told them into a
7 statement for you to sign?

8 A Yes.

9 Q Has all of your testimony been truthful to the best
10 of your ability today?

11 A Yes.

12 MS. SEAY: May I have just a moment, Your Honor?

13 (Pause.)

14 MS. SEAY: Those are all the questions I have,
15 Mr. Martinez. Please answer any Mr. Sumner might have for
16 you.

17 THE COURT: Cross-examination, Mr. Sumner.

18 MR. SUMNER: Thank you.

19 CROSS-EXAMINATION

20 BY MR. SUMNER:

21 Q Mr. Martinez, you have already testified today for
22 this jury --

23 A Yes.

24 Q -- that you were sleeping?

25 A Yes.

1 Q I'm kind of breaking my questions up. Let me just
2 finish my question.

3 You were sleeping when the two people came in your
4 apartment; is that correct?

5 A Yes.

6 Q And that was in the bedroom?

7 A Yes.

8 Q And the outside door was locked?

9 A Yes.

10 Q And you've already said that the bedroom door was
11 locked as well; correct?

12 A Yes.

13 Q You've, also, testified today that you spoke with
14 several police officers that evening?

15 A Yes.

16 Q And when you were first questioned about 10 or 15
17 minutes after this happened, you said that it was a white
18 male and a black male; is that correct?

19 A Yes.

20 Q And you, also, later that evening at the hospital
21 said that it was a black male; is that right?

22 A Yes.

23 Q About a week later, you went down to the police
24 station; is that right?

25 A Yes.

1 Q And this is your signature; is that correct?

2 A Yes.

3 Q And these are your initials?

4 A Yes.

5 Q But you cannot speak English?

6 A No.

7 Q Nor can you write English?

8 A No.

9 Q You were asked to put your initials there, weren't
10 you?

11 A Yes.

12 Q You were asked to put your initials there, weren't
13 you?

14 A Yes.

15 Q You were asked to put your name there, weren't you?

16 A Yes.

17 Q But you don't know what any of these words are
18 saying, do you?

19 A I do not know. But the one that was translating for
20 me, yes, because I said it in Spanish and he said it back
21 in Spanish to me.

22 Q But you don't know -- this is in English, isn't it?

23 A Yes. But he was reading English and he was
24 translating it to me into Spanish.

25 Q Well, is it your testimony then today for this jury

1 that all of these words are yours?

2 A Yes.

3 Q Without any question?

4 A No.

5 Q So your sworn testimony to this jury is that one week
6 later, after being asked two previous times for a
7 description, that you then described this person as a
8 tall, black male, medium build, with a short beard, short
9 hair, wearing a black shirt and black pants? So that's
10 your testimony today to this jury?

11 A Yes.

12 Q And those were your words?

13 A Yes.

14 Q But there is no question --

15 A No.

16 Q -- that twice on the night that this happened that
17 you only described a black male?

18 A Yes.

19 MR. SUMNER: I don't have any other questions.

20 Thank you.

21 THE COURT: Any redirect?

22 MS. SEAY: Nothing further of Mr. Martinez at this
23 time.

24 We would be ready to call our next witness.

25 THE COURT: All right. Let's go on and take a lunch

1 break, because my court reporter has been working
2 diligently.

3 Ladies and gentlemen, I'm going to let you take your
4 lunch break. We'll resume at 2:00. Please remember,
5 don't discuss the case. Keep an open mind. And see you
6 at 2:00.

7 (WHEREUPON, the jury was excused from open court at
8 approximately 12:37 p.m.)

9 THE COURT: Ms. Seay, how many more witnesses do you
10 think you've got?

11 MS. SEAY: I have the other Mr. Martinez, and then I
12 have Investigator DiVittorio and Gutierrez. I think
13 they'll both be very brief. And then David Allen Bridges.
14 And that would be it. And his may be a little bit
15 lengthier, but not really lengthy.

16 THE COURT: All right. We'll see you all at 2:00.
17 I'm working on the charge. I should have that ready by
18 2:00. And we'll assume -- well, we won't. We may wait
19 and argue and charge in the morning.

20 MR. SUMNER: Your Honor, yes, I would like to
21 conclude the testimony today, if at all possible.

22 I want to reiterate before we break, I understand
23 your ruling my Rule 3 motion for dismissal. I don't need
24 to re-argue that, unless you feel like I need to re-argue
25 that. I don't want to formulate that again after the jury

1 has been sworn. And, also, my previous stipulations
2 regarding the two burglary convictions.

3 THE COURT: Just for the record purposes, we'll
4 republish the comments and arguments you made prior to the
5 jury being sworn on both issues, as well as responses
6 given by the Solicitor, as well as my rulings on each of
7 them will remain consistent with the prior hearing.

8 Fair enough?

9 MR. SUMNER: Okay.

10 (WHEREUPON, a lunch break was taken.)

11 MR. SUMNER: Your Honor.

12 THE COURT: Yes, sir.

13 MR. SUMNER: May it please the Court.

14 I think I've already advised my colleague. I think
15 that Mr. Heyward wants to put some things on the record
16 about me. I've told him if he wanted to, he could. So I
17 felt like you would allow him to do that.

18 THE COURT: Sure.

19 MR. SUMNER: Go ahead.

20 DEFENDANT HEYWARD: Your Honor, first of all, I would
21 like to put on the record that I adamantly told you that I
22 didn't want Mr. Sumner representing me, because he's not
23 working in my best interest. I just spoke to him just
24 now. Me and him are having a conflict of interest. He
25 told me he doesn't like me. He thinks that I don't like

1 him, so on and so forth.

2 He's come to me with certain -- two or three
3 different pleas. And I want to state for the record -- I
4 mean, I overstand and understand that I'm really -- I
5 don't have control over the jury or what their verdict
6 would be. I mean, as far as me being convicted or
7 acquitted, or so on and so forth. I mean, it could go
8 against me and I could receive life. I'm aware of that.

9 The crime that I'm charged for, like I told him, I
10 did not commit. But I was willing to take a plea of 10
11 years. He came to me from -- it went from 10 years up to
12 15 years with probation, this and that.

13 I mean, I've already been confined in the county jail
14 for two years, you know. And I'm not trying to spend the
15 rest of my life in prison. And I told him that I would
16 plead to a straight 10 years, that I would -- that I
17 didn't want to plead to 15 suspended to 10.

18 And, I mean, a lot of the things that I've told him
19 and asked him to do as far as my representation, he hasn't
20 even done. There's certain things that I told him to ask
21 the victim that he hasn't done. I mean, he hasn't done a
22 lot of things that I told him to do. And I feel that's
23 unfair. The victims blatantly stated that the police,
24 actually, coerced them into picking me out of a lineup. I
25 mean, what more -- I mean --

1 THE COURT: Well, the victim didn't tell that to the
2 jury. I suppressed that.

3 DEFENDANT HEYWARD: I understand that.

4 But that should just be ruled for dismissal upon
5 that. I mean, if you're making him pick me out of a
6 lineup and you're telling him that the person that done
7 this is right here on the picture, I mean, how can I win
8 against those odds? You've got to put yourself in my
9 position and in my shoes. I mean, he's not -- they should
10 have never made him pick somebody out of a lineup.

11 THE COURT: But, Mr. Heyward, you've been sitting
12 here since this morning early. I think my ruling has been
13 consistent since the testimony yesterday that I did not
14 allow the victim to say that, nor the police officers.
15 The Solicitor was restricted in her ability to question
16 him on that issue in particular.

17 The victims and the police officer gave a general
18 description of who the person that came in the apartment
19 was. They didn't say, we looked at a picture lineup and
20 there was six people and this is the one we picked. That
21 was all suppressed and not allowed to be said in front of
22 the jury. We made a record of it here with the court
23 reporter in front of everybody. The jury was not allowed
24 to hear that. So that does not prejudice your case at
25 all.

1 DEFENDANT HEYWARD: Yeah.

2 But that theory is still embedded in his mind as far
3 as him thinking that I'm the assailant that did that.

4 THE COURT: Well, I'm not certain what I can do as
5 the trial judge to change what you believe the victim
6 thinks. I mean, what the victim thinks is what the victim
7 is going to think and what he remembers. And that's
8 solely within his own province.

9 What -- your defenses which are available to you,
10 Mr. Sumner has done an excellent job of presenting limited
11 testimony regarding the identification issue. And I don't
12 know if you had a lawyer from TV or one that defended O.J.
13 Simpson that could have done a better job thus far. He's
14 done a very good job thus far. Because the victim did not
15 say, that's the man. He didn't do that. I think
16 that's -- now, my job, as the trial judge, is to ensure
17 you get as fair a trial as possible and --

18 DEFENDANT HEYWARD: But, I mean, that's not fair in
19 my eyesight, Your Honor, I mean, if the police are telling
20 him who to pick out of the lineup.

21 THE COURT: But that wasn't told to the jury.

22 Now, here's the way it's going to work. It's my job
23 to try to ensure that you get a fair trial. It's my job
24 to make the calls on whatever comes before the jury and
25 what does not. And I'm going to continue to do that. If

1 the Solicitor's Office and Mr. Sumner and you haven't
2 reached a decision as to a resolution short of a verdict,
3 then we're going to move forward.

4 DEFENDANT HEYWARD: But I -- like I said, again, me
5 and him are not seeing eye to eye as far as lawyer and
6 client.

7 THE COURT: I understand that.

8 But what you're telling me, as I understand it,
9 correct me if I'm wrong, is you're still concerned about
10 what the victim thinks. And the victim has already
11 testified and the jury didn't hear a word of the
12 suggestibility or the inferences the investigators may or
13 may not have given him. That was all left out. Not a
14 word of that came in. The victim was allowed to say it
15 was a black man, short hair, and short beard, and medium
16 build. And that was it.

17 DEFENDANT HEYWARD: Okay. Also, Your Honor, if he
18 was never coerced, he probably would have never picked me
19 out of the lineup to start with.

20 THE COURT: Well, the case hasn't gotten all the way
21 over yet. I think all the Solicitor has done is present
22 evidence about the investigator, the victim, and then the
23 forensics guy. And she still has witnesses yet to call,
24 because I asked her that before lunch.

25 So what you're, also, apparently, concerned about is

1 how the jury is evaluating all this. And I've not given
2 them their instructions on the law yet. Now, you may
3 disagree on how the jury is perceiving this. But the jury
4 is 12 people who don't know one another, who are sitting
5 in here totally independent of this case, and have no
6 bearing on the outcome.

7 And they're listening to every witness that comes to
8 this witness stand that's told to tell the truth. And
9 they're going to make a decision based upon that testimony
10 alone, not on police investigatory files, or the
11 conversations we've had outside the jury's presence, only
12 testimony that comes from that witness stand. And that's
13 part of my job is to make sure that's all they hear is the
14 proper testimony. And thus far, I think I've protected
15 your interest in that regard.

16 MR. SUMNER: Judge, just for the record, I did advise
17 Mr. Heyward about the negotiated offer. I did tell him
18 that a length of probation could be terminated early, that
19 that is something that does happen. That's something that
20 he could be made eligible for depending on down the line.

21 So I did explain that to him. I think he's hung up
22 that he would, actually, have to do, for sure, five years
23 of probation. He may have to -- or he could have it
24 terminated as early as two years, from my understanding.
25 So I want to make sure he knows that. I've said that to

1 him.

2 THE COURT: Well, as I understand the negotiated
3 offer that you and the Solicitor discussed, it was two
4 parts, 10 years straight on the armed robberies, 15
5 suspended to 10 years on the other three charges with a
6 probationary term, and possible restitution, depending on
7 a restitution hearing at a later date. And if that's not
8 acceptable, we'll move on.

9 MR. SUMNER: That's it.

10 So they're either going to bring the jury in, or
11 we're going to resolve this.

12 THE COURT: I mean, I'm not going to make the
13 Solicitor change her offer.

14 MR. SUMNER: No, no. Nobody is changing anything.

15 Let me confer with him just for one minute just right
16 here.

17 (Pause.)

18 DEFENDANT HEYWARD: Your Honor, is there any feasible
19 way that maybe you can speak with the Solicitor and I can
20 get the 10 years without probation?

21 THE COURT: No.

22 I'm not allowed to do that. That's not part of my
23 job.

24 DEFENDANT HEYWARD: Well, are you allowed to do that,
25 Ms. Seay?

1 MR. SUMNER: No.

2 She doesn't have to speak to you. She speaks to me.

3 DEFENDANT HEYWARD: Excuse me.

4 MR. SUMNER: That's all right.

5 (Pause.)

6 THE COURT: We've had the jury back there long
7 enough.

8 MR. SUMNER: We'll step around here. He's told me
9 he's ready to plead, Your Honor.

10 MS. SEAY: We've got to sign his paperwork.

11 MR. SUMNER: Okay. Your Honor, I'm handing in the
12 sentencing sheets. I think Ms. Seay is going to make a
13 few notes. And then we'll be ready to proceed.

14 (Pause.)

15 MR. SUMNER: Your Honor, I believe we're ready to
16 proceed whenever the Court is.

17 THE COURT: I'm ready and waiting on y'all.

18 MR. SUMNER: Your Honor, we're going to, I think,
19 proceed under North Carolina v. Alford. There's no
20 objection from the Solicitor, I believe, to that. It's a
21 negotiated plea, but it will be offered as an Alford plea.

22 THE COURT: And the benefit he's receiving is the
23 burglary first coming down to a burglary second?

24 MR. SUMNER: Yes, sir.

25 THE COURT: And a recommendation of 10 years on the

1 one charge, and 15 suspended to 10 on the other?

2 MR. SUMNER: Yes, sir. That's correct.

3 MS. SEAY: That's correct.

4 MR. SUMNER: Is that right, Solicitor?

5 MS. SEAY: Uh-huh.

6 THE COURT: Madam Clerk, will you place the Defendant
7 under oath.

8 THE CLERK: Raise your right hand.

9 WHEREUPON,

10 CHEVES DWAYNE HEYWARD,

11 after first having been duly sworn, testified as follows:

12 THE CLERK: State your full name.

13 DEFENDANT HEYWARD: Cheves Dwayne Heyward.

14 THE COURT: Mr. Heyward, you've been an attendant to
15 the jury trial which we're right now in the middle of. So
16 it's my understanding, based upon conversations your
17 lawyer has had with the Solicitor's Office, that you wish
18 now to tender a plea under the terms of North Carolina v.
19 Alford; is that correct?

20 DEFENDANT HEYWARD: Yes.

21 THE COURT: And it's my understanding that you're
22 indicted for two counts of armed robbery, two counts of
23 assault and battery with intent to kill, and one count of
24 burglary first. But upon presentment, you wish to plead
25 to a burglary second violent, two counts of assault and

1 battery with intent to kill, and two counts of armed
2 robbery with a negotiated 10 years on the armed robbery,
3 and 15 years suspended to 10 years on the other three
4 charges; is that correct?

5 DEFENDANT HEYWARD: Yes.

6 THE COURT: Now, it's -- Mr. Sumner, you've
7 represented Mr. Heyward since, I think, you said earlier,
8 October of --

9 MR. SUMNER: No, sir.

10 That would be -- I'm sorry, Your Honor. I didn't
11 mean to interrupt.

12 It would be July of 2008, when I got this case.

13 THE COURT: July of 2008?

14 MR. SUMNER: Yes, sir.

15 THE COURT: And you and Mr. Heyward have had
16 conversations over the last several months since the trial
17 has been in progress since sometime in December of 2008;
18 is that correct?

19 MR. SUMNER: Yes, sir, it is.

20 THE COURT: And y'all had extensive conversations
21 yesterday in pre-trial discussions discussing the facts,
22 the defenses, and testimony in great detail; is that
23 correct?

24 MR. SUMNER: That is correct.

25 THE COURT: And do you feel that the State has

1 sufficient evidence that if it were to proceed further
2 with this jury trial that a guilty verdict would likely
3 result?

4 MR. SUMNER: Yes, sir.

5 I know he's pleading under North Carolina v. Alford,
6 but I think there's a very material chance that the
7 verdict could be guilty, yes, sir.

8 THE COURT: Now, understanding that material chance,
9 do you then agree with his decision to enter a plea now
10 under the tenants of North Carolina v. Alford?

11 MR. SUMNER: I do, Your Honor.

12 THE COURT: Do you agree with that?

13 MR. SUMNER: I do agree with it.

14 THE COURT: Mr. Heyward, today or within the last 24
15 hours, have you consumed any sort of substance, drugs,
16 alcohol, medication, or anything that would affect your
17 ability to understand what's going on here today and what
18 you're doing right now in front of me?

19 DEFENDANT HEYWARD: No.

20 THE COURT: You're clear headed?

21 DEFENDANT HEYWARD: Yes.

22 THE COURT: Do you suffer from any emotional,
23 nervous, or physical deformity which would cause your
24 ability not to understand my questions and what's going on
25 here today?

1 DEFENDANT HEYWARD: No.

2 THE COURT: So you're ready to go forward?

3 DEFENDANT HEYWARD: Yes.

4 THE COURT: Now, you have had ample opportunity to
5 discuss these five cases with your attorney; is that
6 correct?

7 DEFENDANT HEYWARD: Somewhat.

8 THE COURT: Did the Court not afford you yesterday
9 all afternoon with your attorney here at the courthouse to
10 get ready for this trial, in addition to the other times
11 before pre-trial?

12 DEFENDANT HEYWARD: I spoke with him after we left.

13 THE COURT: All right. Now, you understand the
14 benefit being provided to you under the North Carolina v.
15 Alford case is that the burglary first, which has a
16 mandatory minimum of 15 years is being allowed to -- or
17 you're being allowed to plead to a burglary second, which
18 carries a maximum of 15 years?

19 Do you understand that? Do you understand that's a
20 benefit conveyed to you?

21 DEFENDANT HEYWARD: Yes.

22 THE COURT: And it limits your exposure to upwards of
23 15 plus years?

24 DEFENDANT HEYWARD: (Defendant Heyward nodded.)

25 THE COURT: I'm sorry. You've got to answer for the

1 record. Ms. Jenkins is taking down everything I'm saying,
2 as well as everything everybody is saying.

3 Now, as you know, before I can accept your plea of
4 guilt, we've got to go over your Constitutional rights,
5 some of which you've already heard about as we proceeded
6 through a trial by jury. Obviously, we've already
7 selected a jury here in Greenville County that's been
8 sworn to hear this case. And they're back in the jury
9 room ready to proceed, if we need to.

10 Now, you understand that the State, throughout this
11 entire trial, has the burden of proving your guilt beyond
12 a reasonable doubt?

13 Do you understand that?

14 DEFENDANT HEYWARD: Yes.

15 THE COURT: And they have to prove each and every
16 element of all five charges, every element of all five
17 charges beyond a reasonable doubt or else they fail to
18 meet their burden and you'll be found not guilty?

19 Do you understand that?

20 DEFENDANT HEYWARD: Yeah.

21 THE COURT: Do you understand throughout this trial,
22 you have the right to representation, that your attorney
23 can present the defenses you may have available to you, he
24 may cross-examine the witnesses as he's done thus far, as
25 well as call witnesses on your behalf?

1 Do you understand that?

2 DEFENDANT HEYWARD: Yes.

3 THE COURT: And you, also, understand that I've, not
4 allowed, but made certain that the subpoena power of the
5 Court is available to you in your defense. And you were
6 able to utilize that last night and today to secure
7 testimony of any witnesses you may wish to call.

8 Do you understand that?

9 DEFENDANT HEYWARD: Yeah.

10 THE COURT: Now, when you plead guilty under North
11 Carolina v. Alford, the Court considers it -- or, I'm
12 sorry, the Court system considers it the same as pleading
13 guilty.

14 Do you understand that?

15 So you'll be treated, once you're sentenced, just as
16 any other sentence. The decision under North Carolina v.
17 Alford you make is you wish not to go forward with the
18 trial, because you believe a guilty verdict would result.
19 But you believe there's some benefit conveyed to you to go
20 ahead and resolve by way of plea.

21 Do you understand that?

22 DEFENDANT HEYWARD: Yes.

23 THE COURT: And you believe there's been a benefit
24 conveyed to you by having this burglary first reduced to a
25 burglary second; is that correct?

1 DEFENDANT HEYWARD: Somewhat.

2 THE COURT: All right. I want to make certain on
3 that. Do you understand burglary first carries a minimum
4 of 15 years?

5 MR. SUMNER: Well, it, also, carries up to life.

6 THE COURT: Yes, 15 to life. The burglary second
7 only carries zero to 15.

8 Do you understand that?

9 DEFENDANT HEYWARD: Yeah.

10 THE COURT: Do you understand the difference between
11 15 and life and zero to 15?

12 DEFENDANT HEYWARD: Yes.

13 MR. SUMNER: And, also, if I could, there's a
14 recommendation -- or a negotiated plea for the bare
15 minimum sentence on armed robbery. Armed robbery is 10 to
16 30 years, and it could be consecutive. I'm not trying to
17 belabor this point, Judge. I'm just trying to put all
18 this on the record.

19 THE COURT: Right. I agree with you. I want to make
20 certain Mr. Heyward understands. There's several benefits
21 here to him that I observe. And I want to make certain he
22 acknowledges them.

23 So you understand, too, Mr. Heyward, that you're
24 receiving a minimum sentence on the armed robbery as a
25 result of negotiated sentence.

1 Do you understand that?

2 DEFENDANT HEYWARD: Yeah.

3 THE COURT: All right. Now, do you understand once
4 you -- that the armed robbery is a violent 10, and you'll
5 serve 85 percent of the sentence given to you?

6 Do you understand that?

7 DEFENDANT HEYWARD: Yeah.

8 THE COURT: And once you're released, you'll be on
9 community supervision with regard to that charge.

10 And the negotiations on the other charges were the 15
11 suspended to 10 years with a probationary sentence to
12 follow.

13 Do you understand that?

14 DEFENDANT HEYWARD: How many years probation?

15 THE COURT: The maximum you can get with probation is
16 five. That's the cap. No more than five.

17 Do you understand that?

18 DEFENDANT HEYWARD: Yeah.

19 THE COURT: All right --

20 MR. SUMNER: But, Your Honor, if I may just
21 interject, as I've already explained -- I apologize. But
22 I've explained to him that he could have his probation
23 severely -- or a lot shorter than five years. That would
24 just depend on down the line.

25 THE COURT: Yes.

1 Mr. Heyward, I can explain to you this. I cannot
2 make any representation to you of how long a probationary
3 sentence you'd have to do. However, it is common that
4 once people receive probationary sentences, if they comply
5 with the terms of probation, it is not uncommon for them
6 to be terminated prior to their actual probation ending
7 date. That is not uncommon at all.

8 Do you understand that?

9 However, you must plan to serve the entire time. I
10 want to explain that to you. I don't want my
11 representations to you for you to take as a promise you'll
12 get off early. However, there is that opportunity should
13 you comply with the terms of probation.

14 Do you understand?

15 DEFENDANT HEYWARD: Yes.

16 THE COURT: Now, you, also, understand that this
17 armed robbery is a most serious offense. And if you were
18 to get another most serious offense or a combination of
19 two serious offenses after this that this could be
20 utilized as a sentence enhancer for a later conviction,
21 which could result with you being in prison for life?

22 Do you understand that?

23 DEFENDANT HEYWARD: Yes.

24 THE COURT: Now, understanding all of these
25 considerations, do you wish to give up your right to a

1 trial by jury and proceed with this plea under North
2 Carolina v. Alford?

3 DEFENDANT HEYWARD: Yeah.

4 THE COURT: All right. Please listen closely as I
5 hear additional facts from the Solicitor's Office.

6 MS. SEAY: Your Honor, I think you have probably
7 heard the basic facts in this case from the witnesses who
8 have previously testified. But there would be an
9 additional witness testifying, his name is David Alan
10 Bridges. He is -- was, also, charged in this case, along
11 with Mr. Heyward, for going over to the victims residence
12 and breaking in and stealing the wallets and money of
13 these young men, and the injury -- charged for the injury
14 to them.

15 However, I think the victims testimony was clear that
16 the black male was the one who had done the hitting. And
17 that both the black male and the white male had been the
18 ones asking for the money and taking the money. And they
19 did cooperate in the commission of the crime.

20 Mr. Bridges would tell you that they did not know
21 these victims, that this was just a random crime for them,
22 that he did not really know Mr. Heyward. And I think you
23 heard some testimony about that that he only knew him by a
24 street nickname, so to speak. And he later learned his
25 real identity.

1 Those are the basic facts of the case. I think you
2 probably knew most of that. And I don't know if the
3 victims have anything they want to say to you. But if you
4 would just offer them that opportunity at the appropriate
5 time, I will appreciate it.

6 THE COURT: I'd be glad to.

7 All right. Now, Mr. Heyward, those are the facts as
8 you understand them, which the State was intending to
9 continue to offer should this case go further to trial.

10 And you believe those facts were sufficient that if
11 we were to go to trial, a conviction probably would
12 result; is that correct?

13 DEFENDANT HEYWARD: (There was no response.)

14 THE COURT: You're not admitting those are the facts.
15 You're admitting those are the facts the State has told
16 you they were going to present at this trial; is that
17 correct?

18 DEFENDANT HEYWARD: Yeah.

19 THE COURT: Fair enough.

20 Now, I understand you made several comments to me
21 regarding Mr. Sumner's not getting done what you wanted to
22 have done. But since we've been in trial, as of yesterday
23 morning, has he been attentive to you and gone over the
24 entire case file, as well as all the discovery provided by
25 the State to you? Has he done that?

1 DEFENDANT HEYWARD: Well, I'd like to say he went
2 over the motion. But, I mean, as far as him implementing
3 a lot of things I asked him to do, he didn't do it.

4 THE COURT: Well, tell me what else he could have
5 done that you wanted him to do.

6 DEFENDANT HEYWARD: I mean, basically, in -- I mean,
7 from -- like I told you, Your Honor, I had no involvement
8 in this crime. And it's just a lot of things that don't
9 add up. I mean, you can, basically, see, 6'5" 319. I
10 mean, how can you get a 6'5" guy from 6 foot? I mean,
11 it's just a lot of inconsistencies in the case. I mean,
12 they say I had a hood on. And it's totally dark. If
13 you're in a totally dark room, how can you identify
14 somebody?

15 THE COURT: Now, what you're telling me are
16 identification issues, which we've been over in great
17 detail.

18 DEFENDANT HEYWARD: Yeah.

19 THE COURT: And the case -- there was very limited
20 testimony from the victim as to his description he gave of
21 the assailant. So it would appear to me that Mr. Sumner
22 did a good job of bringing out and minimizing what was
23 said.

24 And by entering this plea, we're not seeing the
25 result of what may have been argued at closing arguments

1 or the second half of the case, so to speak; is that
2 correct?

3 DEFENDANT HEYWARD: Yes.

4 But, I mean, like I said, I mean, you've got to look
5 at it coming from my perspective. Here I am, an innocent
6 person. And I'm pleading to something I have no knowledge
7 of, you know. But the only thing that's really allowing
8 me to plead now is because, I mean, I may get a guilty
9 plea from -- I mean, a guilty verdict from the jury. And,
10 I mean, 10 years is less than life. I mean, I understand
11 that.

12 But still, at the same token, I'm being confined and
13 being arrested. And I'm going to jail for something I
14 have no knowledge of. And just Mr. Bridges, I mean, how
15 could his testimony be any good? I mean, he's a criminal.
16 He, basically, said he was on drugs. I mean, he said I
17 jumped in his van and told him to go -- I mean --

18 THE COURT: We haven't heard that yet, though.

19 DEFENDANT HEYWARD: I'm just going by what's in the
20 motion. And it all just don't make sense, I mean.

21 MR. SUMNER: Your Honor --

22 DEFENDANT HEYWARD: I mean, I'm saying they're saying
23 we used a 2X4 to hit the victim. So, I mean, basically,
24 I'm walking around Greenville with a 2X4. And, I mean,
25 just in the streets with a 2X4, and I go and rob these

1 guys, you know. It don't make sense.

2 I mean, then she's saying, well -- I mean, she's very
3 adamant that, well, Mr. Heyward was in there. He is the
4 one that hit the victim. Mr. Bridges didn't do this. And
5 he was a part of it, but he didn't hit the victim. I
6 mean, she's making sure that she's simply put all that in
7 there.

8 THE COURT: Well, that's her job. You don't fault
9 her for doing her job, do you?

10 DEFENDANT HEYWARD: I mean, but making me the bad guy
11 and working him like he's the good guy.

12 THE COURT: No. I don't think she said that at all.

13 DEFENDANT HEYWARD: I mean, not in all actuality,
14 but, I mean, sublimely, that's what she's trying to say.

15 MS. SEAY: Your Honor, have you accepted his plea?

16 THE COURT: No.

17 MS. SEAY: Would you allow the State to withdraw this
18 plea?

19 THE COURT: I'm not certain he's going forward with
20 his plea.

21 MS. SEAY: Well, that's my concern as well.

22 MR. SUMNER: Yes. That's fine.

23 THE COURT: I think that, based upon your answers, I
24 would be unable to accept the plea, even under North
25 Carolina v. Alford.

1 I think we have to go forward.

2 MS. SEAY: I agree.

3 Thank you.

4 DEFENDANT HEYWARD: Your Honor, I would like to ask
5 you a question before the jury comes in.

6 THE COURT: No.

7 I've got to bring the jury in, because I've had them
8 back there for almost an hour now.

9 (WHEREUPON, the jury came into open court at
10 approximately 2:53 p.m.)

11 THE COURT: I'm sorry for the delay, ladies and
12 gentlemen. We had several issues unrelated to this case
13 that we had to take up. So I apologize. Y'all can place
14 that blame on me. We're ready to go forward.

15 Ms. Seay, call your next witness.

16 MS. SEAY: Yes, Your Honor.

17 The State calls Aquileo Martinez

18 THE CLERK: Mr. Martinez, if you'll step up here and
19 place your left hand on the Bible and raise your right
20 hand.

21 WHEREUPON,

22 AQUILEO MARTINEZ,
23 after first having been duly sworn, testified as follows:

24 THE CLERK: Thank you.

25 You may be seated.

1 THE COURT: Ms. Sampson, I remind you that you're
2 still under oath.

3 INTERPRETER TERESA SAMPSON: Yes, sir.

4 THE CLERK: State your name for the record.

5 INTERPRETER TERESA SAMPSON: My name is Aquileo
6 Martinez.

7 (WHEREUPON, the following testimony of Mr. Aquileo
8 Martinez was translated by Ms. Teresa Sampson.)

9 DIRECT EXAMINATION

10 BY MS. SEAY:

11 Q Mr. Martinez, I want to focus your attention here so
12 all the jurors can hear what you have to say.

13 How old are you, Mr. Martinez?

14 A I'm 20 years old.

15 Q What is your date of birth?

16 A

17 Q Where do you live?

18 A Apartment

19 Q How long have you lived there?

20 A Two and a half years.

21 Q Do you live there with anyone?

22 A With my brothers.

23 Q Okay. And what are your brothers names?

24 A Maurilio Gregorio Martinez and Hasin Gregorio
25 Martinez.

1 Q Okay. Mr. Martinez, tell us what your educational
2 level is, please.

3 A I finished middle school.

4 Q Okay. So you finished eighth grade?

5 A Yes.

6 Q Okay. Do you read and write Spanish?

7 A Yes.

8 Q Do you read, write, or understand English?

9 A No.

10 Q Where are you, currently, working?

11 A Alex Painting.

12 Q How long have you been employed by Alex Painting?

13 A Almost three years, going on three years.

14 Q How many days and hours a week do you usually work?

15 A I work six days a week, 50 hours in total.

16 Q 50 hours? I'm sorry.

17 A 50 hours.

18 Q Okay. Thank you.

19 Mr. Martinez, did you live in the place where you
20 live now back on March 28th of 2007?

21 A Yes, I live there.

22 Q And, on that date, were your brothers living there,
23 also?

24 A My brother, Maurilio, yes.

25 Q Was your other brother not there that day?

1 A No. He was in Atlanta.

2 Q On that date, what did you do during the daytime?

3 A I went to work all day.

4 Q What hours did you work that day?

5 A From 8:00 a.m. to 7:00 p.m. And I got home at
6 8:00 p.m.

7 Q What did you do after you got home?

8 A I took a shower. I ate dinner. And then I fell
9 asleep. I went to bed.

10 Q After you went to bed, did something unusual happen?

11 A Yes. They came and robbed me.

12 Q Did you know the people that came and robbed you?

13 A No.

14 Q Did you allow them to come into your apartment?

15 A No.

16 Q How did they get into your apartment?

17 A They forced the door open. And then they went in and
18 went into the bedroom and hit my brother.

19 Q Were you in the same bedroom as your brother?

20 A Yes. In the same bedroom, yes.

21 Q You said two people came in and robbed you and you
22 did not know them. What did those two people look like?

23 A One was a black one, and one was a white one.

24 Q Okay. And did you have any kind of lights on in your
25 room during that time?

1 A In the living room, they turn on the lights. Also,
2 in the kitchen, they turn on the lights, too, in the
3 kitchen.

4 Q Did you have any light coming into your room from the
5 windows that were there?

6 A Yes.

7 Q And is that how you were able to see that it was one
8 black male and one white male?

9 A Yes.

10 Q Who was the person that hit your brother?

11 A The black one.

12 Q Okay. What did he hit him with?

13 A With a piece of wood, 2X2.

14 Q Okay. Mr. Martinez, this is State's Exhibit No. 43.
15 Does that look like the stick that your brother was hit
16 with?

17 A Yes. That's the one that they hit my brother with.
18 And, also, they hit me with that one, too.

19 Q Where on his body did the man hit your brother?

20 A On his back and on his head.

21 Q And did you see that?

22 A Yes. I saw him when he was being hit.

23 Q Did it knock your brother down?

24 A Yes.

25 Q What about the person who hit you, did you say it's

1 the same person?

2 A Yes, the same person.

3 Q Where did he hit you on your body?

4 A Right there.

5 Q Okay. What kind of injury did you have as a result
6 of that?

7 A It really hurt. It was really painful.

8 Q And did you get medical treatment at the hospital for
9 it?

10 A Yes, at the hospital.

11 Q Is this a picture that shows where your arm was hurt?

12 A Yes.

13 Q This is State's Exhibit Nos. 30 and 31. And would
14 you hold your arm up now so we can see how your arm looks
15 now?

16 A (Witness complied.)

17 Q Okay. And just turn it over, please.

18 A (Witness complied.)

19 Q All right. Thank you, Mr. Martinez.

20 Was that a painful injury for you?

21 A Yes.

22 Q What kind of treatment did you get at the hospital?

23 A They give me some pills.

24 Q Some pills?

25 A Yes.

1 Q Did it affect your ability to do your painting work?

2 A Yes. I cannot work.

3 Q Did you -- so you still have a problem with your arm
4 with painting?

5 A Sometimes, yes. Sometimes, no.

6 Q But you are still continuing to work as a painter?

7 A Yes, still.

8 Q Okay. You said that the men who broke in took your
9 wallets. Did you have any money in your wallet?

10 A Yes.

11 Q About how much money did you have?

12 A \$400.

13 Q And where was that money from?

14 A I had been saving from my work.

15 Q Did you have anything else of value in your wallet?

16 A No, just the money and my ID.

17 MS. SEAY: Mr. Martinez, I don't have any more
18 questions for you right now. Please answer any Mr. Sumner
19 may have.

20 MR. SUMNER: Your Honor, may it please the Court.

21 THE COURT: Yes, sir.

22 CROSS-EXAMINATION

23 BY MR. SUMNER:

24 Q Just a few questions, Mr. Martinez.

25 On the night that this incident occurred, you spoke

1 with the police several times; is that correct?

2 A Yes.

3 Q And, in fact, you stated to Officer Whitmire that
4 both the lights in the bedroom and the lights in all the
5 rest of the apartment were off when the people came in;
6 isn't that correct?

7 A Yes.

8 Q And my last question is, every time that you have met
9 with the police officers regarding this case, the only
10 description of the black male has been the appearance of
11 facial hair around the mouth and nose area?

12 A Yes.

13 MR. SUMNER: Okay. One second, please, Your
14 Honor.

15 THE COURT: Sure.

16 (Pause.)

17 MR. SUMNER: No other questions.

18 Thank you.

19 THE COURT: Any redirect?

20 MS. SEAY: No, sir.

21 THE COURT: Okay.

22 MS. SEAY: Your Honor, the State calls Investigator
23 DiVittorio.

24 THE CLERK: If you'll step up here and place your
25 left hand on the Bible and raise your right hand.

1 WHEREUPON,

2 JOHN DIVITTORIO,

3 after first having been duly sworn, testified as follows:

4 THE CLERK: Thank you.

5 You may be seated.

6 And state your full name for the record, please.

7 THE WITNESS: My name is John DiVittorio,

8 D-I-V-I-T-T-O-R-I-O.

9 THE CLERK: Thank you.

10 DIRECT EXAMINATION

11 BY MS. SEAY:

12 Q Investigator DiVittorio, you're, currently, employed
13 by the Greenville County Sheriff's Office; is that
14 correct?

15 A That is correct.

16 Q How long have you been employed there?

17 A Over 22 years.

18 Q Okay. Would you tell us what some of your job titles
19 and positions have been with the Sheriff's Office over
20 those years?

21 A Early on, I started off in uniform patrol. I moved
22 up into special operations, which was vice and narcotics,
23 public corruption. I moved over to arson, auto theft,
24 armed robbery. And for the last few years, homicide.

25 Q What is your education and your training to perform

1 the duties of a law enforcement officer?

2 A I'm a 1987 graduate from the South Carolina Criminal
3 Justice Academy. Throughout the years, I've been to
4 several different schools, advanced investigation
5 techniques, interviewing, and interrogation.

6 Q Would it be safe to say you've had a lot of ongoing
7 education?

8 A Yes, ma'am.

9 Q And do you, also, have military experience?

10 A Yes, ma'am, I do.

11 Q Would you, please, describe that?

12 A I'm a chief intelligence specialist in the United
13 States Navy, currently, command chief for Naval forces
14 central command unit 267 out of Atlanta.

15 Q Okay. So you still have duties from time to time
16 related to your military work?

17 A Yes, ma'am.

18 Q Were you working as an investigator in armed
19 robberies, homicides, and things of that nature back on
20 March 28th of 2007?

21 A That's correct.

22 Q How did you get involved in this case?

23 A I was issued the case. Cases are divvied up between
24 the people that work in the violent crimes division. And
25 I was issued this from, I believe, Sergeant Tim Jones.

1 Q Okay. And what were you asked to do, basically, by
2 this case being assigned to you?

3 A When I received the case, there was no suspect
4 information, other than what you've heard. My job is to
5 go out and, actually, try to find the people responsible
6 for this incident.

7 Q And did you go about doing that?

8 A Yes, ma'am.

9 Q Okay. What was the first thing that happened in your
10 work there that helped you in developing this case?

11 A On March 30th, I received information that latent
12 prints that had been recovered at the scene had been
13 examined, and a subject named David Bridges was identified
14 through the latent prints.

15 Q Okay. Where were those latent prints from?

16 A The latent prints were taken by Sergeant Lendway from
17 a doorknob.

18 Q Was it the front doorknob of the apartment, or do you
19 know?

20 A Yes, ma'am. I believe it was from the front
21 doorknob.

22 Q And, as a result of getting that information that you
23 had prints that belonged to David Bridges at the scene,
24 what did you do?

25 A After I received that information on April 3rd, I had

1 Investigator Peter Gutierrez do the language barrier. I
2 do not speak Spanish. I asked him to call the victims
3 into the office. That way, I can obtain a statement from
4 them with his assistance.

5 Q So did you meet with Victim Maurilio Martinez?

6 A I met with both of the Martinez brothers. And I was
7 introduced to them. And then Investigator Gutierrez spoke
8 with them.

9 Q Okay. And he is employed by the Greenville County
10 Sheriff's Office, too; is that right?

11 A That is correct.

12 Q Okay. Were you able to obtain a statement from
13 Maurilio Martinez at that time?

14 A Yes, we did. The Sheriff's Office did obtain a
15 statement.

16 Q Okay. What happened next in your investigation?

17 A Next in the investigation, based upon the information
18 that I had with the latent prints, I met with Magistrate
19 Hudson down at the law enforcement center. And he felt
20 there was probable cause that existed to obtain warrants
21 for David Bridges.

22 Q Okay. And, as a result of that, what did you do?

23 A On April 9th, David Bridges was arrested by our
24 uniform patrol person. And he was brought to the
25 Greenville County Sheriff's Office up into my office where

1 we sat and spoke.

2 During the conversation, I advised Mr. Bridges of his
3 right to have an attorney present and his right that he
4 did not have to speak to me. And Mr. Bridges decided to
5 waive all that and gave me a statement outlining the
6 details referenced in this incident.

7 Q So you're describing, I believe, what you would
8 call -- you gave him his Miranda rights?

9 A That's correct.

10 Q That he has the right --

11 A He had the right to remain silent, that anything he
12 said could be used in court. He had the right to have
13 legal representation. And if he could not afford it, the
14 State would take care of it for him. I, also, advised him
15 that he, also, had the right to stop talking to me at any
16 time until he spoke to an attorney.

17 Q And did you give him that in writing, as well as
18 telling him that?

19 A Yes, ma'am.

20 Q Did he sign a waiver of rights?

21 A Yes, he did.

22 Q Did he talk with you about what had happened?

23 A Yes, ma'am.

24 Q Okay. As a result of your talking with him, what did
25 you do next?

1 A I spoke with Mr. Bridges. And he explained to me
2 that he had -- he advised me that the other person
3 involved with the incident that he only knew by the name
4 of "Charleston," a nickname. He could not provide me any
5 information in reference to his name. Mr. Bridges --
6 that's all he put in his initial statement. I spoke --

7 Q Did you know who that person was?

8 A All I had was a black male that goes by the street
9 name of "Charleston." That is all I had at the time.

10 Q I'm sorry. Go ahead. I didn't mean to interrupt.

11 A That's all right.

12 Later, I was speaking to a property crimes
13 investigator that regularly works that beat up around the
14 Cedar Lane Road area, property crimes. They are,
15 actually, divided into beat areas where -- I have to work
16 the whole county. And they, actually, work small
17 portions.

18 And I explained the situation to Investigator Scott
19 Phillips of what I had and that I was trying to find any
20 information I could in reference to a black male that goes
21 by the street name "Charleston." At which time, he
22 provided me with Mr. Heyward's information.

23 Q So he indicated to you that he thought that the
24 person nicknamed "Charleston" was this Mr. Heyward?

25 A That is correct.

1 Q What did you do after you learned that?

2 A After I learned that, I obtained a photographic
3 lineup that included Mr. Heyward's picture. And I went
4 and spoke to Mr. Bridges at the Greenville County Law
5 Enforcement Center. He was -- had already been detained.
6 I asked Mr. Bridges if Charleston's picture was or was not
7 in that group of photographs that I had.

8 Q Okay. Let me just interrupt you there for just a
9 moment, Investigator. I'm going to ask you if you
10 recognize State's Exhibit Nos. 1, 2, and 3 that have been
11 marked for identification purposes?

12 A Yes, ma'am.

13 Q How do you recognize those?

14 A I recognize that with my signature.

15 Q And what are those documents?

16 A The first document is an affidavit of photo
17 identification. This was a piece of paper that
18 Mr. Bridges signed stating that he viewed a group of six
19 photographs on the 11th day of April, 2007, that was
20 displayed to him by me.

21 And that -- in his own writing, he writes on here, #4
22 was with me during the crime. He was the one who beat the
23 Mexican with the picket stick.

24 Q Investigator, when you prepare a photo lineup like
25 that, what is the criteria for preparing a photo lineup to

1 show somebody?

2 A To make sure the information is as close as possible
3 to the person that we're placing in it. The background is
4 the same color, the skin tone is the same color, hair,
5 facial hair.

6 Q So, obviously, you would use -- if you had
7 information that your suspect was a white male, you would
8 make it all white males or vice versa, depending on what
9 the situation was; correct?

10 A That is correct, similar hair color and hair style.

11 Q So you would try to get as many similar
12 characteristics as you could in order to prepare this
13 photo lineup?

14 A That is correct.

15 Q And did you do that in this case?

16 A Yes, ma'am.

17 Q When you showed Mr. Bridges the lineup, tell me
18 again -- I think you stated it just a minute ago, but tell
19 me again what the process was, and what you said to him
20 about it.

21 A Anybody that I show a photo lineup to, I just tell
22 them that the subject may or may not be in the lineup.
23 And I let them review it for themselves.

24 Q Do you tell them that they have to chose somebody
25 from the lineup?

1 A No.

2 Q And so you do tell them that they may not be in the
3 lineup, may or may not be?

4 A That's correct.

5 Q And is that the lineup you showed David Bridges?

6 A Yes, ma'am, it is.

7 Q What did he do when you showed him that lineup?

8 A Initially, when I showed David Bridges this lineup,
9 he took an ink pen and he just drew a circle right over
10 top of Mr. Heyward's face and said, That's Charleston. I
11 asked him to put a whole box around the photograph, to put
12 his initials on it, and to sign it and date it -- not sign
13 it, but to put the date. And we put the time down on it.
14 It bears -- well, he signed it at the bottom, and
15 initialed at the top with the date and time.

16 Q Okay. And I believe you, also, stated that he signed
17 that affidavit that you described what he put on the
18 affidavit. Does that have his signature?

19 A Yes, it does.

20 Q Does your signature appear on that document as well?

21 A Yes, ma'am.

22 Q And what's the third document there?

23 A This third document is -- I just make this for future
24 reference. If I'm ever questioned of who -- the photo
25 lineup that I present has no names or any information on

1 it at all. The photo lineup that I keep for later on, for
2 example, two years later, if anything comes into question,
3 it has the name of the people I used in the photo lineup.

4 MS. SEAY: Your Honor, at this time, I would ask that
5 these, State's Exhibit Nos. 1, 2, and 3, be entered into
6 evidence.

7 THE COURT: All right.

8 MR. SUMNER: There's no objection.

9 THE COURT: All right. No objection.

10 (WHEREUPON, State's Exhibit Nos. 1, 2, and 3 were
11 admitted into evidence.)

12 BY MS. SEAY:

13 Q And after you obtained this positive identification
14 of Mr. Heyward, what did you do?

15 A Based upon the statement and the identification of
16 Mr. Heyward, I obtained warrants for his arrest.

17 MS. SEAY: I would ask that these be marked for
18 identification purposes, please.

19 (WHEREUPON, State's Exhibit Nos. 44 and 45 were
20 marked for identification only.)

21 BY MS. SEAY:

22 Q Investigator, do you recognize these two photographs?

23 A Yes.

24 Q And who are those photographs of?

25 A There's a photograph of David Allen Bridges, and a

1 photograph of Cheves Dwayne Heyward.

2 Q Do you know the date that those photographs were
3 taken?

4 A The photograph date is marked on here as April 9th,
5 2007, on Mr. Bridges, and April 15th, 2007, on
6 Mr. Heyward.

7 Q Okay. Is that how they appeared to you on that date
8 in terms of their physical characteristics?

9 A Yes, ma'am.

10 MS. SEAY: Your Honor, I would ask that these be
11 admitted into evidence, State's Exhibit Nos. 44 and 45.

12 MR. SUMNER: I think those are records normally kept
13 in the course of business; is that correct?

14 MS. SEAY: Yes.

15 MR. SUMNER: Okay. I would have no objection.

16 THE COURT: Very well. Without objection.

17 (WHEREUPON, State's Exhibit Nos. 44 and 45 were
18 admitted into evidence.)

19 BY MS. SEAY:

20 Q Investigator, did that conclude your involvement with
21 this case, for the most part, until the Court process was
22 concerned?

23 A That's correct.

24 MS. SEAY: Thank you.

25 Please answer any questions Mr. Sumner has for you.

1 MR. SUMNER: Your Honor, could counsel and I approach
2 for just one second, please?

3 THE COURT: Yes.

4 (WHEREUPON, a bench conference was held.)

5 THE COURT: We're going to take a brief recess,
6 ladies and gentlemen.

7 Detective, you're under oath. And you're not allowed
8 to talk with the Solicitor during the break. So stay
9 clear, because they can cross-examine you on what you
10 talked about with the Solicitor, I'll remind you of that.

11 THE WITNESS: Yes, sir.

12 THE COURT: Ladies and gentlemen, retire to the jury
13 room. Take a short break. And I'll be back with you
14 shortly.

15 (WHEREUPON, the jury was excused from open court at
16 approximately 3:26 p.m.)

17 THE COURT: You can step down.

18 THE WITNESS: Thank you, sir.

19 MR. SUMNER: Your Honor, may it please the Court.

20 Mr. Heyward indicated to me about 45 minutes ago that
21 he wished to withdraw his Alford plea and plead guilty.
22 I'm going to ask that the negotiated plea remain on the
23 table for the next five or 10 minutes. I think the
24 extensive colloquy that's already taken place will
25 eliminate the need for a lot of questions.

1 But I'll ask Mr. Heyward now to stand, please.

2 You've indicated to me that you wish to withdraw the
3 Alford plea and plead guilty; is that correct?

4 DEFENDANT HEYWARD: Yes.

5 MR. SUMNER: Is there any doubt about that?

6 DEFENDANT HEYWARD: No.

7 MR. SUMNER: Do you have any complaints you want to
8 make against anybody in this courtroom?

9 DEFENDANT HEYWARD: No.

10 MR. SUMNER: Okay. Do you want to go forward now
11 with the negotiated plea?

12 DEFENDANT HEYWARD: Yes.

13 MR. SUMNER: Is that correct?

14 DEFENDANT HEYWARD: Yes.

15 MR. SUMNER: And you're going to plead guilty to
16 those charges; is that correct?

17 DEFENDANT HEYWARD: Yes.

18 MR. SUMNER: Your Honor, I would ask that we be able
19 to approach the bench and be able to complete this -- or
20 approach the podium.

21 THE COURT: Sure. Come to the podium.

22 MR. SUMNER: Speak up and speak clearly.

23 THE COURT: All right. Mr. Heyward, I think at the
24 point of the plea where we were reaching some
25 difficulties -- do you understand the facts the State has

1 presented? They've presented just about all their
2 witnesses, except for the other man charged in this case,
3 who would be Mr. Bridges. And do you understand his
4 testimony would come, if we were to proceed on with the
5 trial?

6 Do you understand that?

7 DEFENDANT HEYWARD: Yes.

8 THE COURT: Now, when you withdraw your negotiated
9 plea under Alford, you're not exactly receiving a benefit.
10 But, as I understand the negotiations, you're willing to
11 tender a plea to armed robbery for a 10-year sentence,
12 burglary second, which is capped at 15, two counts, as
13 well as two counts of assault and battery with intent to
14 kill with a cap of 15. Those would be 15 suspended to 10
15 years, respectively, on those four.

16 Have I got that backwards, two armed robberies and
17 one burglary?

18 MR. SUMNER: Two armed robberies, one burglary
19 second, and there's two assault and battery with intent to
20 kill.

21 Is that right, Solicitor?

22 MS. SEAY: Yes.

23 THE COURT: All right. Let me go back over those.

24 MR. SUMNER: Okay.

25 THE COURT: Burglary first reduced to burglary

1 second, capped at 15, armed robbery will be 10 years.
2 That's a violent offense and that's not negotiated --
3 that's negotiated, but it's a violent 10. That's the
4 minimum. Two counts of assault and battery with intent to
5 kill. The negotiations on that with the burglary second
6 were 15 years suspended to 10 years with a probationary
7 sentence to follow; is that correct?

8 MS. SEAY: I believe it is, Your Honor.

9 MR. SUMNER: Yes, sir.

10 Is that correct?

11 DEFENDANT HEYWARD: Yes.

12 THE COURT: Mr. Heyward, have you understood the
13 negotiations so that the end result would be you would
14 have 15 suspended to 10 years, as well as a 10-year active
15 sentence all to be served concurrently; is that right?

16 DEFENDANT HEYWARD: Run that by me again.

17 MR. SUMNER: It's concurrent.

18 THE COURT: The concurrent means running at the same
19 time. So all your time would run at the same time. You
20 wouldn't have a stacked sentence, so to speak, where you'd
21 do one sentence and once you finished with it, you'd do
22 the next sentence, and when you're finished with that one,
23 you'd do the next one. It would be all five sentences
24 would run along the same time frame.

25 DEFENDANT HEYWARD: I know what you mean by concurrent.

1 THE COURT: That's called concurrent time. So you
2 would not get consecutive time, which would be stacked on
3 top of one another. 10 plus 15 would be 25. This would
4 be 15 suspended to 10 on the two burglary seconds -- I'm
5 sorry, on the burglary second. And on the two assault and
6 batteries with intent to kill, it would be 15 suspended to
7 10 years. On the armed robbery, two 10-year sentences 85
8 percent.

9 Is that your understanding?

10 DEFENDANT HEYWARD: Yes.

11 THE COURT: Now, as I understand it, you're
12 withdrawing your tender of a plea under North Carolina v.
13 Alford and you're pleading, basically, what's called an
14 open plea and straight up.

15 You're agreeing, other than the negotiations, to
16 admit your guilt in this matter; is that right?

17 DEFENDANT HEYWARD: Yes.

18 THE COURT: You've been placed under oath by the
19 Clerk prior to this. In order to plead guilty, you must
20 give up all the Constitutional rights and trial by jury,
21 which I've been through all those, and you're still
22 willing to waive and abandon your jury trial on all five
23 of these charges to enter this plea of guilty right now;
24 is that correct?

25 DEFENDANT HEYWARD: Yes.

1 THE COURT: Now, have you had enough time to discuss
2 this matter with your attorney?

3 DEFENDANT HEYWARD: Yes.

4 THE COURT: And it is your free and voluntary
5 decision to enter a plea to these five charges right now
6 in front of me based upon these negotiations?

7 DEFENDANT HEYWARD: Yes.

8 THE COURT: Now, are you, in fact, guilty of assault
9 and battery with intent to kill, two counts?

10 DEFENDANT HEYWARD: Yes.

11 THE COURT: Are you, in fact, guilty of armed robbery
12 one count -- two counts?

13 DEFENDANT HEYWARD: Yes.

14 THE COURT: Two victims in the armed robbery. And I
15 keep mistaking that. Two counts of armed robbery.

16 And are you, in fact, guilty of burglary second
17 degree, the violent version, one count?

18 DEFENDANT HEYWARD: Yes.

19 THE COURT: And you're pleading guilty because you
20 are, in fact, guilty?

21 DEFENDANT HEYWARD: Yes.

22 THE COURT: All right. I think I've heard his prior
23 record in preliminary pre-trial matters.

24 Is there anything else from the Defense?

25 MR. SUMNER: Yes, sir, Your Honor.

1 The only thing that I would want to put on the record
2 is that I did explain to him the maximum possible
3 punishment that each of these charges carries, which is
4 burglary first degree is life, 15 minimum to life.

5 Is that correct, Mr. Heyward?

6 DEFENDANT HEYWARD: (Defendant Heyward nodded.)

7 MR. SUMNER: It is? And the armed robbery is 10 to
8 30, two counts.

9 Is that correct, Mr. Heyward?

10 DEFENDANT HEYWARD: Yes.

11 MR. SUMNER: And the burglary second is zero to 15.

12 Is that correct?

13 DEFENDANT HEYWARD: Yes.

14 THE COURT: And the assault and battery with intent
15 to kill is zero to 20.

16 MR. SUMNER: Yes, sir, two counts.

17 THE COURT: Two counts, Mr. Heyward. If you got
18 consecutive time on all that, you could receive life plus
19 70, 20 plus 20 plus 30 consecutive time. But that's not
20 the case. You're agreeing to plead to concurrent time of
21 10 years on the armed robbery, those two counts, and 15
22 suspended to 10 years on the other three charges. Those
23 are the negotiations.

24 Am I missing anything else?

25 MR. SUMNER: No, sir.

1 THE COURT: And probation with a restitution hearing,
2 if need be. I'm told there is no restitution, but I don't
3 know -- that may be a complication we don't need to make.

4 MR. SUMNER: Your Honor, there is no restitution
5 being sought. I believe she has indicated that.

6 Is that correct?

7 MS. SEAY: It is my understanding that the State
8 Office of Victim Assistance has covered those medical
9 expense.

10 MR. SUMNER: So no restitution.

11 THE COURT: So no restitution.

12 MR. SUMNER: There's no restitution sought.

13 And I want to be sure that I did put on the record
14 that I have explained the maximum possible punishments to
15 him. That is being taken into consideration, I believe,
16 by Mr. Heyward regarding his plea, negotiated plea. So,
17 really, there's nothing else that I feel like I need to
18 say at this point.

19 THE COURT: All right. Do the victims wish to be
20 heard on this negotiated sentence?

21 Ms. Seay, can you assure they understand that this is
22 going to be 85 percent of 10 on one?

23 (Pause.)

24 MS. SEAY: Your Honor, the victims do understand the
25 sentence that is going to be imposed. And, as far as the

1 restitution is concerned, they wanted to see if the Court
2 would be willing to order restitution for the time that
3 they missed from work. And I told them I did not know,
4 but I would ask you that.

5 THE COURT: Was there any money recovered?

6 MS. SEAY: No.

7 THE COURT: You're not seeking that?

8 All right. Well, I'll tell you what I'll do as a
9 condition of probation, I'll defer restitution until a
10 hearing can be held once he's released. And that will be,
11 I think, appropriate that that issue can be addressed
12 then. And that will protect their interest in that regard.

13 MS. SEAY: After the Defendant is released from
14 active sentence?

15 THE COURT: Right.

16 Is that fair enough, Mr. Sumner?

17 MR. SUMNER: Yes, sir, Your Honor. It is fair.

18 Your Honor, one other thing I want to put on the
19 record. There are two warrants that have been dismissed
20 and will remain dismissed with prejudice pursuant to this
21 plea. And that is warrant I362897, a conspiracy charge,
22 and I36289, a solicitation to commit a felony charge.
23 Those have been dismissed, I believe, on a good faith
24 statement from my colleague. That is a part of this, that
25 they will not be pursued. I just wanted to put that on

1 the record.

2 MS. SEAY: And, for the Court's information, that was
3 an unrelated incident that was assigned to another
4 Solicitor. And she had already handled that. I didn't
5 have any involvement in that.

6 THE COURT: So that will be taken care of. And we
7 don't have to worry about that?

8 MR. SUMNER: Yes, sir, we don't.

9 I wanted to put that on the record.

10 THE COURT: All right. Mr. Heyward, I've heard from
11 you throughout the trial, pre-trial, during trial and now,
12 post-trial.

13 Is there anything you would like to tell me?

14 DEFENDANT HEYWARD: No.

15 THE COURT: Okay. If there's nothing else from
16 either side, I'm going to accept the plea. And I'm going
17 to fill out the sentencing sheets accordingly.

18 So I'll tell you what let's do. While I'm filling
19 this out, I want to bring back in the jury and let them
20 go. I don't believe there's any need to delay them.

21 So, Mr. Heyward, if you'll sit back down.

22 Bring in the jury.

23 MR. SUMNER: There's one other thing. He's been in
24 jail since 4-14-07.

25 MS. SEAY: He should have credit for 745 days, Your

1 Honor.

2 THE COURT: 4-14-07?

3 MR. SUMNER: Yes, sir.

4 MS. SEAY: Yes, sir.

5 THE COURT: Yes. He gets credit for time served, I
6 think, under the law.

7 MS. SEAY: Would it be all right if we had
8 Mr. Bridges brought up at this time as well?

9 THE COURT: Sure.

10 And I will publish this sentence as soon as I get rid
11 of the jury, or if the jury wants to stay and listen to
12 it. I don't care.

13 Now, is there any objection to me telling the jury
14 what I've done?

15 MR. SUMNER: If they're going to serve on another
16 case potentially this week, I don't know.

17 MS. SEAY: I don't know.

18 MR. SUMNER: I would probably say -- out of an
19 abundance of caution, just say it's been resolved.

20 THE COURT: All right. Bring the jury in, please.

21 (WHEREUPON, the jury came into open court at
22 approximately 3:39 p.m.)

23 THE COURT: All right. Ladies and gentlemen, as you
24 all know, we've had extensive conversations in and out of
25 your presence. And this case has been resolved without

1 the necessity of y'all deliberating.

2 Now, the bad news is y'all have to call back after
3 6:00. We may have another trial in the morning. So I'm
4 going to let y'all go home. It's a few minutes until
5 4:00. Enjoy the rest of your afternoon.

6 Call back -- you all have the jury information card
7 you were given yesterday. Call back on that number.
8 There will be a recording for the pool to call back as to
9 what time to come in tomorrow, if at all. So, please, do
10 so.

11 Thank you for your service.

12 And y'all did help resolve this case, believe it or
13 not, as well as several others.

14 So thank y'all so much for your attendance. Enjoy
15 your evening. And call back after 6:00.

16 (WHEREUPON, the jury was excused from open court at
17 approximately 3:40 p.m.)

18 THE COURT: Prior to my filling out the sentencing
19 sheets, I did not make the findings, but, for the record,
20 I find the Defendant, Cheves D. Heyward, made a free and
21 voluntary plea of guilty in the five indictments which
22 we've published for the record. They are indictments
23 2007-GS-23-8510; 8511; and 8512, as well as
24 2008-GS-23-9038 and 9039.

25 The sentence is -- I'm sorry. Let me return back to

1 my finding. The Defendant made a free and voluntary plea
2 of guilty on those five indictments. He's done so with
3 the advice of a very competent attorney in this matter
4 after extensive testimony has been taken in all five of
5 these cases. And I hereby accept that plea. I, also,
6 find the State has produced a substantial factual basis
7 upon which to base this plea.

8 SENTENCE

9 THE COURT: All right. Regarding indictment
10 2007-GS-23-8510 and 2008-GS-23-9038, two counts of armed
11 robbery, the Defendant is committed to the State
12 Department of Corrections for a term of a period of 10
13 years. He's given credit pursuant to Code Section
14 24-13-40 for 745 days, which have accrued since his arrest
15 on April 14th, 2007. The costs and assessments imposed
16 are to be set upon his release by the Department of
17 Probation.

18 Regarding indictment 2007-GS-23-8512, burglary second
19 degree violent, the Defendant is committed to the State
20 Department of Corrections for a term of a period of 15
21 years, provided upon the service of 10 years, plus costs
22 and assessments, probation for five years. This is
23 concurrent to the other four indictments. The Defendant
24 is, also, given credit for time served under 24-13-40, 745
25 days. Costs and assessments are imposed.

1 Regarding indictments 2007-GS-23-8511 and
2 2008-GS-23-9039, two counts of assault and battery with
3 intent to kill, the Defendant is committed to the State
4 Department of Corrections for a term of a period of 15
5 years, provided upon the service of 10 years, plus costs
6 and assessments. Probation for five years. These are
7 both concurrent to the other four indictments. And he's
8 given credit for time served under the same code section,
9 24-13-40, of 745 days.

10 On indictment 2008-GS-23-9039, one of the assault and
11 batteries, restitution is deferred pending a hearing and
12 upon the release of the Defendant.

13 And so I've only wrote it on that one, also, imposed
14 a public defender fee on that, also, as well as costs and
15 assessments.

16 Is that consistent with the negotiated sentence? I
17 believe it is.

18 MR. SUMNER: Yes.

19 MS. SEAY: Yes, sir.

20 THE COURT: All right. If there's nothing else,
21 that's the sentence of the Court.

22 Good luck to you.

23 *****END OF TRANSCRIPT OF RECORD*****
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 27th and 28th days of April, 2009.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 27, 2010



Hollie M. Jenkins, Court Reporter

My Commission Expires: 11-17-10

FORM 5

STATE OF SOUTH CAROLINA)

County of Greenville)

IN THE COURT OF COMMON PLEAS

Charles Heyward #276057

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

2010-CP-23- 3255

INSTRUCTIONS B 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 SOUTH CAROLINA Department of Correction
Albion Correctional Inst P.O. Box 1151 Taylors SC 29688
2. Name and location of Court which imposed sentence Greenville County
Courthouse 305 E. North St Greenville, SC 29601
3. Name(s) of co-defendant(s) (if any) DAVID ALAN BRIDGES
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 1472586 1st Degree Burglary, 1472587- Armed Robbery
1472588- ABWITK

- (b) 1472587 - Armed Robbery
- (c) 1472588 - ABWITK
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) April - 28, 2009
- (b) 15 years suspended to 10 years
- (c) With 5 years probation
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty yes
- (b) after a plea of not guilty NO
- (c) after a plea of nolo contendere NO
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. N/A
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. N/A
- iii. N/A
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) Applicant was UNAWARE of any appealable issues

(b) N/A(c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel(b) Lawyers Misconduct Due To Not Me Truly + Voluntarily(c) Improperly Advised By Counsel On Sentencing Guidelines Before Accepting A Plea of Guilt

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Didn't Explain The Plea Deal In Details(b) Didn't Prep Me Inform of All Proceedings Through 2 years(c) Didn't Try To Negotiate Sentence Just Took What Was Offer

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 Ayes@ to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/Aii. N/Aiii. N/Aiv. N/A

(b) the name and location of the Court in which each was filed:

i. N/Aii. N/Aiii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

(b) the proceedings in which each ground was raised:

i. N/A

ii. N/A

iii. N/A

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) N/A
- (b) N/A
- (c) N/A
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Steve Sumner 114 Manly St
Greenville, S.C. 29601
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. At Plea Deal + Sentencing Date
- ii. _____
- iii. _____

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Cherise Heyward #2576057, 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.

Cherise Heyward
Applicant

SWORN or affirmed to and subscribed before me this
23 day of March, 2010.

Helen P. Lamm
Notary Public

My Commission Expires: 5/18/14

19. State clearly the relief you seek in filing this application:

Sentence To Be Vacated, Setted Aside
OR CORRECT THE CONVICTION + SENTENCE

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/200

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Charles Heyward #276057, 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.

Charles Heyward #276057

SWORN to, and subscribed before me this 23
 day of March, 2010.

Hal P. Freeman (L.S.)
 Notary Public

My Commission Expires: 5/18/14

230
County of Greenville

IN THE COURT OF COMMON

PLEAS

2010-CP-23- 3255

Charles D. Heyward #276057

State of South Carolina

Grounds For Post Conviction Relief

THE defense Attorney Steve Sumner, conduct WAS INAPPROPRIATE. Due to how he advised me to plea guilty to a charge of ABWITK, ARM Robbery, 1st Degree Burglary. With out fully explaining the nature of the charge. My defense Attorney was incompetent by informing me to plead to the charges above. Knowing that I (Charles D. Heyward) innocent within this case. I was not guilty of my charges. That I would like to go to trial. Upon going to trial my lawyer didn't have a defense strategy, and lacked the competence of being an effective counsel. Steve Sumner was adamant about my taking a plea. While the trial was in progress Mr. Sumner showed no interest, compassion, or expertise. Because of behavior I stopped (was informed) to take a plea. Mr Sumner explained that I would plea to my original offer. Which was 2nd Degree Burglary, Strong ARM Robbery, ABWHIN. Even after he knew that I was innocent of my charges. He kept stipulating that what would I rather have life and 10 or 10 years.

Authority between client & lawyer PARAG. 1.0 (D) shows that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make the validity, scope, meaning or application of the law.

Rule 1.3 Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client ① A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. And take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment & dedication to the interests of the client & with zeal in advocacy upon the client's behalf ② A lawyer's work product must be controlled so that each matter can be handled competently ③ Perhaps unprofessional shortcoming is widely presented than procrastination. Rule 1.4 Communication ④ A lawyer shall ① promptly inform the client of any decision or circumstance with respect to which the client's informed consent as defined in rule 1.0 (f) is required by the rules ② Reasonably consult with the client about the means by which the client's objectives are to be accomplished ③ Keep the client reasonably informed about the status of the matter ④ Promptly comply with reasonable requests of/for information and ⑤ Consult with the client about any relevant limitations on the lawyer's

2914 Defendant who leads guiltily on ad se of counsel may only attack the voluntary and intelligent character of a plea by showing that counsels representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and that there is a reasonable probability but for counsels errors, defendants would not have plead guilty and would have insisted on going to trial and reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

If not for my defense attorney poor judgement and persuasive advice I would have went to and continued my trial instead of pleading guilty. The fact that my defense lawyer neglect was unprofessional, how he forced and deceived me to plea after he was informed numerous times by me that I was not guilty and would like to continue my trial. Violates the lawyer and client relationship statutes of South Carolina Rule 1.2 Scope of representation and association of authority between client and lawyer. Rule 1.4 Shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a clients decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the decision after consultation with lawyer as to a plea to be entered.

The defense attorney conduct was poor and unsatisfactory due to how he only visited me twice within a 2 year period and that was to threaten me with derogatory words by implying I was asinine and incompetent. If I think I can win this case at trial. Because he stipulated that without a shadow of doubt I would lose and be sentenced to life plus 40 years.

about the proceeding concerning my case & in an overall period he never responded to any of my calls or my request for information pertinent to my case. And never informed me on important decision's or circumstances with respect toward me. When I informed him that I wasn't the culprit in this case. Rule 1.3 Diligence

This should have been taken more seriously due to the nature of my charges and should have been researched properly to build a accurate defense on my behalf as his client, by knowing I could get a life sentence for this charge but my defense attorney. Gave me no other way out but to plea to the charge of ABWTK, Arm Robbery, 1st Degree Burglary. With his own discretion of judgement without fully understanding the facts at hand, in which I would have not plead guilty if not for my lawyers incompetence

My lawyer got out of his character during the course of my trial he told me that he didn't like or anything about me. I informed him that I wanted to dismiss him off my case. For his lack of unprofessionalism. Due to how he used inappropriate language to address the situation at hand concerning me wanting a new attorney, because of his lack of interest with my case from the beginning. My defense attorney failed in his duty's to prepare a substantial defense for me as a client which jeopardized my burden of proving my innocence on my charges. By knowing my co-defendant's prints were found at the scene and he had already plead guilty to the charges.

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my behalf as his client, due to the fact presented to him from me and also the evidence at end showing who was the suspect within this case on this charge. My defense attorney knew what was going to transpire. But still refused to show any interest because I was his client at the time of this procedure while my trial was going on. Mr Sumner stipulated that a plea deal was offered to me without me fully understanding the details of such offered of agreement and the charge I was said to plead guilty to in the first place.

My lawyer should have allowed me the opportunity to proceed to trial. But my lawyer still informed me if I choose to continue my trial on my charges I would receive life plus 40 years. Which I feel was not an important factor after I have informed him of my innocence of such charges. My lawyer should have been more concerned toward preparing a proper defense for my trial on my behalf as his client and investigating the facts more seriously. My lawyer's conduct was unethical, unprofessional, on my behalf as his client toward representing me through a 2 year period. In which I was forced to accept a plea without having full knowledge to what I was pleading to. This also demonstrated that the defendant (Cheves Heyward) would not have pleaded guilty but for attorney's ineffective assistance. So you could understand why I might have question my defense attorney's inappropriate actions by having me plea to a charge that he knew that someone else committed the crime. They had no physical evidence implicating me DNA, fingerprints, etc, etc, The alleged person was 6.1- 160-170 by know means is that me I'm 6.5 318 lbs. My co-defendant was lying on my to save his own soul he's not credible.

IN Greenville County Detention Center for a period of 2 years as he was awaiting for his attorney to pursue his case & do a research within applicant. The attorney didn't take the proper step that was needed to insure applicant safety such as a motion to suppress all evidence after knowing that I was innocent. To submit a motion for a fast & speedy trial after being informed by applicant that he would like to go to trial this denies applicant the right to prove his innocence to be found guilty in front of a jury of peers. The attorney failed to research the motion to discover which clearly shows applicant was not guilty on the charges brought forth by Greenville County Police. Also the SCRPC (Rule 3) was violated they had 90 days from the time of my arrest to indict me. But they didn't I was arrested on April 14, 2007 and indicted until Oct, 16 2007. When the police showed the victims a 6 photo lineup, they told the victims that the person who robbed them was in one of those pictures. The victim also stipulated that the police said that he had to pick someone out of the lineup. The victim was literally coerced into picking me out. Which should have been grounds for dismissal. But the inept ineffective, counsel from Steve Sumner didn't challenge that motion.

UNP'S HEYWARD 276057

Charles Heyward

FI-B-10

Allendale Corr Inst

P.O. Box 1151

Fairfax, S.C. 29827

B. Wickensumner
Co. County Clerk of Court
East North St
He, S.C. 29601

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2010-CP-23-3255
COUNTY OF GREENVILLE	)	
	)	
Cheves D. Heyward,	)	
S.C.D.C. No. 276057,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

In response to the post-conviction relief application filed April 22, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the October 2007 term of General Sessions for armed robbery (2007-GS-23-8510), assault and battery with intent to kill (ABIK) (2007-GS-23-8511), and first-degree burglary (2007-GS-23-8512) and at the December 2008 term for armed robbery (2008-GS-23-9038) and ABIK (2007-GS-23-9039). Steven W. Sumner, Esquire represented the Applicant.

After the State called the case for trial, the Applicant chose to plead guilty. On April 28, 2009, the Honorable Eugene C. Griffith sentenced the Applicant to concurrent terms of ten (10) years for each count of armed robbery, fifteen (15) years suspended on service of ten (10) years and five (5) years probation for each count of ABIK, and fifteen (15) years suspended on service of ten (10) years and five (5) years probation for second-degree burglary (violent). The

Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections. The plea transcript will be forwarded upon receipt.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel:
 - a. Did not explain the plea in detail.
 - b. Did not keep the Applicant informed of all proceedings in the two years before the plea hearing.
 - c. Did not attempt to negotiate a better plea recommendation.
 - d. Did not properly advise regarding sentencing guidelines.
 - e. Did not file a motion to suppress.
 - f. Did not file a speedy trial motion.
 - g. Did not argue Rule 3(c), SCRCrimP.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

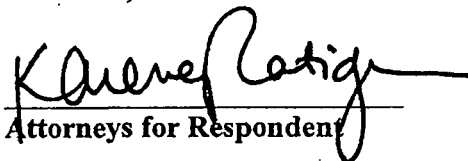
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

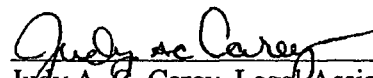
August 20, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
	)	
	)	2010-CP-23-3255
	)	
CHEVES D. HEYWARD, 276057	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT 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** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Cheves D. Heyward, 276057
Allendale Correctional Institution
Post Office Box 1151
Fairfax SC 29827**

DATED this 20th day of August, 2010.


Judy A. E. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Case No(s) : 2010CP2303255
	)	
Cheves D. Heyward,	)	
	)	
Applicant,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

May 09, 2011
Greenville, South Carolina

B E F O R E :

HONORABLE G. EDWARD WELMAKER, Judge.

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

KAREN RATIGAN, Esquire
Attorney for the State

ELIZABETH WIYGUL, Esquire
Attorney for the Applicant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



I N D E XDIRECT CROSS REDIRECT RECROSS

Cheves Heyward

by Ms. Wiygul 5

by Ms. Ratigan 12

Steve Sumner

by Ms. Ratigan 15

by Ms. Wiygul 20

Remarks by Applicant 24

Certificate of Reporter 27

EXHIBITS PAGENO.DESCRIPTIONID EV

APPLICANT EXHIBITS

(No exhibits offered.)

RESPONDENT EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 9th day of May, 2011 at approximately 4:02 p.m.)

THE COURT: Okay. Ms. Ratigan, we ready to proceed with the next case?

MS. RATIGAN: Yes, Your Honor. Thank you. May it please the Court. This is the case of Cheves Heyward versus the State of South Carolina. The docket number is 2010-CP-23-3255. Mr. Heyward was indicted for two counts of Armed Robbery, two counts of Assault and Battery with Intent to Kill and one count of first degree Burglary. He was represented on these charges by Mr. Sumner.

You will see from the lengthy transcript before Your Honor the case actually went to trial. During the middle of the trial, on page 175 of the trial transcript, there is an attempt to enter an Alford plea. That Alford plea falls apart. The trial resumes. And then shortly thereafter, starting on page 208, uh, Mr. Heyward enters into a negotiated plea. The negotiation was for 10 years on each count of Armed Robbery, 15 years suspended on the service of 10 years and 5 years probation for

1 each count of Assault and Battery with Intent
2 to Kill and to reduce the Burglary first down
3 to Burglary second violent and 15 years
4 suspended on the service of 10 years and 5
5 years probation. Again, that was negotiated.
6 That was accepted by Judge Griffith. He
7 received those sentences and did not file an
8 appeal. The State is ready to proceed.

9 **MS. WIYGUL:** Your Honor, the Applicant
10 would call Cheves Heyward.

11 **THE COURT:** All right. Mr. Heyward, if
12 you would, come around and be sworn please.

13 **THE CLERK:** Step up here to the Bible.
14 Place your left hand on the Bible and raise
15 your right hand please.

16 **CHEVES HEYWARD**
17 having first been sworn, testifies as follows:

18 **THE CLERK:** Thank you. You may be seated.
19 State your full name for the record.

20 **THE WITNESS:** Cheves Dewayne Heyward.

21 **THE CLERK:** Thank you.

22 **DIRECT EXAMINATION**

23 **BY MS. WIYGUL:**

24 **Q** Mr. Heyward, who represented you on the
25 charges for which you are incarcerated?

1 **A** Uh, Steve Sumner.

2 **Q** And was he appointed or retained?

3 **A** Uh, he was appointed.

4 **Q** And was he the first attorney that
5 represented you on these charges?

6 **A** Uh, no, ma'am. Prior to having him, I had,
7 uh, Larry Cooke.

8 **Q** Okay. And at some point, Mr. Cooke was
9 relieved and Mr. Sumner was appointed?

10 **A** Uh, yes, ma'am.

11 **Q** Did you enter a guilty plea in this case?

12 **A** Uh, no, not at first. I went to trial.
13 And I would say probably, probably middleways of the
14 trial, uh, I pled guilty.

15 **Q** Okay. When you decided to enter that
16 guilty plea, did you feel Mr. Sumner was prepared to
17 try your case?

18 **A** Uh, no, ma'am.

19 **Q** And why did you feel that way?

20 **A** Because he didn't come to speak with me
21 about strategically how we were going to handle the
22 trial, I mean, what kind of defensive mechanism or
23 anything of that order. The day that I was supposed
24 to start the trial, he didn't even have any clothes.
25 I mean, he didn't even speak with me. Judge Griffith

1 had to stop the trial for him to go get clothes and
2 get me outfitted and so on and so forth. So I know
3 that he --

4 Q So just to clarify, he had brought you
5 clothes, right? They just didn't fit.

6 A No, uh, they had given me some clothes, but
7 they didn't fit. He went out and got some clothes.
8 So that took a vast amount of time for him to go and
9 do that.

10 Q Okay.

11 A So he was unprepared fully, I mean, as far
12 as that matter.

13 Q Okay. How many times did Mr. Sumner visit
14 you during the course of his representation?

15 A I would say maybe two times. Two to three
16 minutes at the most. And his investigator, I think
17 his name was Scottie Robertson or Robinson came and
18 saw me one time briefly for about maybe five minutes
19 at the most.

20 Q Okay. Did you ever speak with Mr. Sumner
21 or anyone from his office over the phone?

22 A Uh, no, ma'am.

23 Q Did Mr. Sumner ever speak with you about
24 defenses you might have or what to expect at trial?

25 A Uh, he told me that I was stupid, I was

1 incompetent and there is no way in the world that I
2 could win my case. He told me --

3 Q Okay. And when did he tell you this?

4 A Uh, one time when he came to visit me.

5 Q Okay. Uh, did you ever receive a plea
6 offer in this case?

7 A Yes, ma'am.

8 Q Can you tell us what that plea offer was.

9 A My plea offer was to plea to Assault and
10 Battery with a high aggravated nature, Strong Armed
11 Robbery and Second Degree Burglary.

12 Q Okay. Did you ever indicate you wished to
13 accept that plea offer?

14 A No, ma'am, because I told him that I wanted
15 a trial.

16 Q Did you ever provide him with any witnesses
17 that you wanted him to speak with?

18 A Uh, yes, I had told him I had two witnesses
19 that were in the county jail. He said that he felt
20 it wouldn't be a good idea if I was to call the
21 witnesses because we wouldn't get the last say at
22 the, at the, I mean, at the, uh, -- as far as he
23 wouldn't get the last word at the trial if he was to
24 call the witnesses.

25 Q Okay. You mentioned earlier that you did

1 have a plea offer at one point. Were you aware of
2 any other plea negotiations between Mr. Sumner and
3 the state?

4 A Uh, no, ma'am.

5 Q What caused you to stop the trial and enter
6 a guilty plea?

7 A Mr. Sumner was very adamant during the
8 trial. He kept saying, Mr. Heyward, you're not going
9 to win this case. I mean, I think you better, you
10 know, go on and take the plea offer. So we went
11 outside in the little room where I just came from.
12 He's holding his hands. He's like what do you think,
13 I mean, is better? Life plus 40 or 10 years. Life
14 plus 40, 10 years. Life plus 40, 10 years.

15 So, I mean, I got to thinking, I mean, I
16 was like, man, I mean, I really don't want to plea
17 guilty to something that I didn't do. So he said,
18 well, you're not going to win this case. I mean,
19 you're stupid if you think you're going to win this
20 case. He said some other things that made me know he
21 didn't have my best interest. He told me --

22 Q This is your opportunity to put anything
23 you wish for the court to hear before the court. So
24 you need to go on and tell the court what you want it
25 to hear.

1 **A** He blatantly told me that he didn't like me
2 and he knew that I didn't like him. But after this
3 is all over, we don't have to go drink a beer
4 together. And right then, him telling me that, I
5 know that he didn't have, have me in his best
6 interest. I mean, if you going to tell your client
7 you don't like them. I mean, verbatim, that was what
8 he said. You know, when he said that, I just looked
9 at him. I knew he didn't have my best interest right
10 then. If you going to tell me "I don't like you and
11 I know you don't like me", I mean, why would you work
12 to try to help me, you know, win my case, you know,
13 if you don't like me?

14 **Q** Okay. What, uh, -- when you decided -- I
15 understand the trial was stopped twice.

16 **A** Yes, ma'am.

17 **Q** We're not talking about the initial Alford
18 plea that you attempted to enter. When you actually
19 entered your guilty plea, what was your understanding
20 of what you were pleading guilty to?

21 **A** My understanding is that I was just going
22 to plead guilty to 10 years.

23 **Q** And why did you believe that?

24 **A** Because Mr. Sumter -- Sumner told me. He
25 said, well, look, I spoke to Mrs. Seay. If I'm not

1 mistaken, I think her name is Brianna or --

2 Q Bryna. That's okay.

3 A Brianna Seay. He said I spoke with her and
4 they going to offer you 10 years. I was like 10
5 years. He was like yeah. You know, you be back home
6 in eight years. You know, you go down the road. You
7 do eight years. So again, I'm weighing the options
8 of life plus 40 and 10 years. Life plus 40, 10
9 years.

10 Q Okay.

11 A I mean, initially, I thought I was only
12 going to receive 10 years. When I got up here, they
13 was talking about 15 suspended to 10 and 5 years
14 probation. And that wasn't part of the agreement.

15 Q Okay. During your plea colloquy, the judge
16 asked you several times about the armed robbery and
17 other charges that you actually pled to.

18 A Yes, ma'am.

19 Q Why didn't you explain that you thought you
20 were pleading guilty to something else?

21 A Because Mr. Sumner told me that -- I mean
22 we already had stopped this one time and went outside
23 and discussed it. He told me if I was to interject
24 again, the plea would be taken off the table and we
25 would proceed on with the trial.

1 Q Okay. Do you understand that if you win
2 this hearing, the only possible -- the only possible
3 choice the court would have, if you win, is to vacate
4 your convictions and all your charges would come back
5 and start over again?

6 A Yes, ma'am.

7 Q You understand that you would be looking at
8 the possibility of life plus 40?

9 A Yes, ma'am.

10 Q And you still wish to proceed?

11 A Yeah, I'd like to proceed on with the, uh,
12 -- yes, ma'am.

13 Q All right. I have no further questions.
14 Please answer any questions Ms. Ratigan has.

15 **CROSS-EXAMINATION**

16 **BY MS. RATIGAN:**

17 Q A few quick questions, Mr. Heyward. Did
18 you ever review the State's evidence when you were
19 talking to Mr. Sumner?

20 A Uh, yes, ma'am.

21 Q And did you tell him, kind of, your version
22 of the facts?

23 A Yes, I told him everything of what
24 transpired and everything that my motion, I mean,
25 everything that was in my motion of discovery.

1 Q And you did not take that initial plea
2 offer because you wanted to go ahead and go to trial?

3 A Yes, ma'am.

4 Q Okay. And why did you tell the judge that
5 you were satisfied with Mr. Sumner when it seems
6 pretty clear today that you were not satisfied with
7 him?

8 A I never told the judge I was satisfied. I
9 initially tried to fire Mr. Sumner at the beginning
10 of, before the trial. But he told me that if I was
11 going to fire him, I would have to represent myself.
12 I told him I was not an attorney and so on and so
13 forth. I initially tried to relinquish Mr. Sumner.

14 Q Okay. Well, the judge did ask you if you
15 had had enough time to discuss this with your
16 attorney and you said yes.

17 A Yes, I'm only going by what he told me to
18 say, ma'am.

19 Q So you said yes just because Mr. Sumner
20 told you to say yes?

21 A Yes, ma'am.

22 Q Did Mr. Sumner explain to you what a
23 negotiated sentence was, what that would mean?

24 A No, ma'am. He just told me that, uh, when
25 I was in the back there, that I would be sentenced to

1 10 years. He didn't say anything about a suspended
2 sentence or he didn't say anything about probation.

3 Q Now, when the judge sentenced you and
4 mentioned the 15 years suspended to 10 years, why
5 didn't you say something at that point that you
6 didn't understand what was going on?

7 A Because I was only doing what Mr. Sumner
8 told me. First of all, ma'am, I'm not trying to be
9 confrontational or anything. We already had walked
10 -- I mean, prior to me taking this plea, we already
11 had went back outside and spoke about the plea.
12 Then, when we came back in, he told me, he said you
13 know if you interject at any time or if you say
14 anything, just say yes to everything that they are
15 saying. If you don't, we're going to stop this and
16 we're going to continue on with the jury trial.

17 Q So he just told you to go on?

18 A Yes, ma'am.

19 Q Okay. And did he tell you that when you
20 pled guilty, the State would dismiss or nol pros some
21 of your pending charges?

22 A Pardon me?

23 Q Did he tell you that if you went ahead and
24 pled guilty, the State would also dismiss or nol pros
25 some pending charges you had?

1 **A** Uh, yes, ma'am.

2 **MS. RATIGAN:** That's all I have, Your
3 Honor.

4 **THE COURT:** Any redirect?

5 **MS. WIYGUL:** I have no further questions.
6 Mr. Heyward, you can come down.

7 The Applicant has no further witnesses,
8 Your Honor.

9 **MS. RATIGAN:** Your Honor, the State would
10 call Mr. Sumner.

11 **THE COURT:** You can come around and be
12 sworn, Mr. Sumner.

13 **THE CLERK:** Place your left hand on the
14 Bible please and raise your right hand.

15 **STEVE SUMNER**

16 having first been sworn, testifies as follows:

17 **THE CLERK:** Thank you. You may be seated.
18 State your full name for the record please.

19 **THE WITNESS:** Uh, Steven Wayne Sumner.

20 **THE CLERK:** Thank you.

21 **DIRECT EXAMINATION**

22 **BY MS. RATIGAN:**

23 **Q** Mr. Sumner, do you recall representing Mr.
24 Heyward on these charges?

25 **A** I do.

1 Q And were you, in fact, appointed in this
2 case?

3 A I was. I took over. Larry Cooke was
4 initially appointed. Then I took over for him.

5 Q Did you file discovery motions or had Mr.
6 Cooke already filed it?

7 A Mr. Cooke, uh, I believe had already filed
8 them, but the complete discovery was made available
9 from the Solicitor's office and provided to me.

10 Q Did you review those materials with your
11 client?

12 A Extensively.

13 Q Did you review the charges he was facing
14 such as elements and potential sentences, things of
15 that nature?

16 A Extensively.

17 Q How many meetings would you say you would
18 have had with him prior to trial?

19 A I have it recorded. So there won't be any
20 mystery to it.

21 Q Okay.

22 A I met with him on September 25th of 2008.
23 My file reflects it was an extensive meeting. I had
24 a meeting with him on October 16th of 2008. It was
25 an extensive meeting. His attitude became very

1 difficult and my notes were that he became very
2 antagonistic and emphasized that it would be a trial.
3 My investigator met with him on November 25th of 2008
4 and hand-delivered another copy of the discovery to
5 him. Antagonistic meeting. I met with him again on
6 December 10th of 2008 where he stated to me that
7 there were no witnesses, that he would not testify
8 and that it would be a trial. I also met with him on
9 April 13th of 2009 extensively. We also started the
10 trial and got, I guess, a half or two-thirds of the
11 way through it. So, in summary, I met with him
12 extensively, numerous and multiple times.

13 Q On the day of the trial, the case was
14 brought to trial, were you prepared to go forward
15 that day?

16 A Completely prepared.

17 Q Now, Mr. Heyward has stated that there was
18 a plea offer at one point to reduce the charges down
19 to ABHAN, Strong Arm and Burglary second. Do you
20 recall there being such an offer?

21 A I do not.

22 Q Would it be fair to say that this case was
23 going to trial from Day 1?

24 A According to Mr. Heyward, it was. He told
25 me one time that he would take credit for time

1 served. He had been in jail about 600 days. He said
2 I will plead guilty for credit for time served,
3 otherwise, it would be a trial.

4 Q Do you recall why Mr. Heyward decided in
5 the middle of the trial that he wanted to plea
6 guilty? You recall the rationale to that?

7 A I do not. I remember that I filed and
8 argued some pretrial motions. I think that the
9 photographic lineup that the State intended to offer
10 was actually, uh, suppressed by Judge Griffith. I
11 think it just dealt with the fact that he was looking
12 at 100 and -- life plus 40 years. But his decision
13 to plead was knowingly, freely and voluntarily made
14 without any question.

15 Q So the State came to you or did you go to
16 the State during the trial and work out this
17 negotiated plea? Do you recall?

18 A I don't recall who initiated it, uh, but I
19 know the agreement was reached and put on the record.

20 Q And did you explain to Mr. Heyward exactly,
21 first of all, the terms of the negotiated agreement
22 and also what would negotiated mean?

23 A I don't have specific recollection if I did
24 or not. I would have to just direct Judge Welmaker
25 to the transcript on that point.

1 Q But prior to taking him out there to enter
2 that negotiated plea, would it have been your general
3 practice to explain ---

4 A Yes.

5 Q --- these are the terms?

6 A Absolutely.

7 Q I mean, to answer that, that's another
8 reason why my file has really, Judge, has such
9 extensive notes. I knew that this hearing would take
10 place.

11 Q Since the negotiated sentence was, uh, in
12 part, 15 years suspended on the service of 10 and 5
13 years probation, so you would have explained to him
14 he was getting a suspended sentence if the judge
15 accepted that?

16 A No question about that.

17 Q Would you have ever told him that he was
18 just going to get 10 years straight time if he pled
19 to this negotiated sentence?

20 A No.

21 Q Did you ever tell him that if he pled
22 guilty pursuant to this negotiated sentence, that he
23 was pleading to lesser charges of Strong Arm and
24 ABHAN?

25 A No, it would have been exactly what is in

1 the transcript. I believe there was kind of an
2 aborted plea about a fourth of the way through the
3 trial and then this plea occurred about halfway
4 through the trial.

5 **MS. RATIGAN:** That's all I have, Your
6 Honor.

7 **THE COURT:** Any redirect -- any cross
8 examination?

9 **MS. WIYGUL:** Yes, Your Honor.

10 **CROSS-EXAMINATION**

11 **BY MS. WIYGUL:**

12 **Q** Uh, Mr. Sumner, you were in the courtroom
13 to hear Mr. Heyward's testimony earlier, correct?

14 **A** I was. I was.

15 **Q** And did you hear him mention the fact that
16 he provided you with witness names?

17 **A** I did and that was complete perjury. Most
18 of his testimony was perjury today.

19 **Q** All right.

20 **A** I've got --

21 **Q** Do you --

22 **A** Yeah, I do because I'm looking at it. And
23 my notes from December 10th of 2008 were that there
24 are no witnesses. I've also got -- actually, Ms.
25 Wiygul, I've actually got notes from that meeting

1 that I can hand up. If you want to mark it as an
2 exhibit, that's fine. It's dated October 16th of
3 2008. Extensive client conference. Defendant, no
4 witnesses. Now, I've got that in bold print which is
5 a signal to me that I went over it with him several
6 times. So there is absolutely no question I was
7 repeatedly told by Mr. Heyward that there were no
8 witnesses and that it's a trial.

9 Q Okay.

10 A So that was complete perjury when he
11 testified a while ago.

12 Q Do you recall the day that the jury was
13 actually selected or it might have been the day
14 before trial when Mr. Heyward gave you a list of
15 witnesses?

16 A Absolutely not. That is complete and total
17 fabrication.

18 Q Okay.

19 A Complete, complete, 100 percent
20 fabrication.

21 Q Do you recall Judge Griffith actually
22 telling Mr. Heyward that he would give you time to
23 speak with these witnesses and order the Solicitor's
24 office to make the witnesses available?

25 A No, but if he did, I'm sure that's correct.

1 I had never been provided any witnesses by Mr.
2 Heyward.

3 Q Okay.

4 A That was a -- I think the question was had
5 he provided me any witnesses. And the answer is no.
6 I've made replete notes of that in my file. The
7 answer to that question is no.

8 Q Okay. When you met with Mr. Heyward just
9 prior to trial, the afternoon prior to trial, do you
10 recall whether you recommended that he plead guilty
11 or go forward to trial?

12 A I do not.

13 Q Do you recall ever discussing with him any
14 defenses he may have had at trial?

15 A Extensively.

16 Q Do you recall a -- do you recall a plea
17 offer in this case?

18 A I do not.

19 Q Okay.

20 A Are you talking about prior to trial or
21 during the trial?

22 Q Prior to trial.

23 A I do not, prior to trial.

24 Q Okay. Do you recall there being a kind of
25 personality clash between you and Mr. Heyward?

1 **A** I recall Mr. Heyward being probably the
2 most difficult person that I ever been appointed to
3 represent.

4 **MS. WIYGUL:** No further questions. Thank
5 you.

6 **THE COURT:** Any redirect?

7 **MS. RATIGAN:** No, Your Honor. The State
8 would rest at this time and ask that Mr. Sumner
9 be excused.

10 **THE COURT:** All right. You may step down,
11 Mr. Sumner.

12 **MR. SUMNER:** Okay. Thank you for letting
13 me come back when you weren't ready the first
14 time.

15 **THE COURT:** All right. Anything else from
16 the State?

17 **MS. RATIGAN:** No, Your Honor.

18 **MS. WIYGUL:** Your Honor, Applicant would
19 just request that the Court review pages 18, 19,
20 20, 21, 22 and 23 of the transcript regarding
21 witnesses and a discussion on that date about
22 possible witnesses for the trial prior to making
23 a ruling.

24 **THE COURT:** 18 to 22 basically?

25 **MS. WIYGUL:** Yes, Your Honor.

1 **THE COURT:** And 23. (Pause.)

2 All right. I'll review those in more
3 detail. Take this case under advisement.

4 **MS. WIYGUL:** Thank you, Your Honor.

5 **MS. RATIGAN:** Thank you, Your Honor.

6 **MS. WIYGUL:** Your Honor, Mr. Heyward has
7 asked to be permitted to address the Court. I'm
8 really not sure what it regards, but he's here.

9 **THE COURT:** Yes, sir. I'll be glad to
10 hear from you briefly if you don't believe your
11 attorney can address this to me.

12 **MR. HEYWARD:** I'm sorry to inconvenience
13 you, Your Honor.

14 **THE COURT:** Yes, sir.

15 **MR. HEYWARD:** Just on the situation with
16 Mr. Sumner, I mean, I mean, I felt it was unfair
17 for them, for him to even be representing me.
18 He didn't have any compassion. The man just
19 boldly told me he didn't like me. I mean, if
20 you don't like me, why would you waste your time
21 and assist me. I felt that was wrong.

22 I mean, I was kind of brought into
23 something blindly. You know, I was supposed to
24 get 10 years and so on and so forth. And then
25 when I got in front of them, I got 15 years with

1 5 years probation. That wasn't the deal.

2 **THE COURT:** Well, you got --

3 **MR. HEYWARD:** Pardon me?

4 **THE COURT:** I think the 15 was then
5 suspended to 10?

6 **MS. WIYGUL:** Yes, Your Honor.

7 **THE COURT:** So your active time is 10,
8 right?

9 **MR. HEYWARD:** Yes, but I'm still, I mean,
10 5 years probation. That wasn't included in any
11 of that.

12 **THE COURT:** Well, I think I've read the
13 transcript. I think there was some discussion.
14 I'll review it again.

15 **MR. HEYWARD:** Yeah.

16 **THE COURT:** Both on the first Alford plea
17 and the other plea of you and the judge talking
18 about that.

19 **MR. HEYWARD:** I mean, as far as his
20 representation, I mean, it was poor. He didn't
21 do just the bare minimum. All the time that he
22 said he came and saw me, that's a lie. I mean,
23 I seen him maybe two or three times. Two times
24 at the minimum. Once I got to speaking about
25 this, he was, oh, I got to go, you know, I'll

1 see you later. He didn't have a care in the
2 world about it.

3 **THE COURT:** Well, I, uh, I've reviewed
4 some of the transcript and some of the motions
5 made about the burglary and where the prior
6 offenses came in and things like that. So I'll
7 review it some more and I'll issue a ruling.

8 **MS. WIYGUL:** Thank you, Your Honor.

9 **THE COURT:** Thank you for sharing that
10 with me, Mr. Heyward.

11 **MR. HEYWARD:** Thank you.

12 **(WHEREUPON, the proceedings conclude at**
13 approximately 4:33 p.m.)

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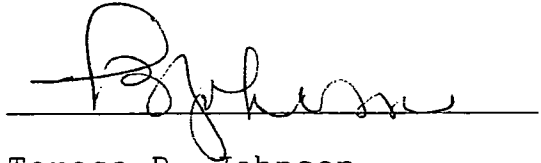
25

CERTIFICATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville, South Carolina, on this 3rd day of January, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

A handwritten signature in dark ink, appearing to read "T. B. Johnson", is written over a horizontal line.

Teresa B. Johnson

Circuit Court Reporter

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

C.A. No. 2010-CP-23-3255

Cheves D. Heyward,)
S.C.D.C. No. 276057,)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

2011 JUL - 6 P 2:31

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 22, 2010. The Respondent made its return on August 20, 2010. An evidentiary hearing into the matter was convened on May 9, 2011 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Elizabeth P. Wiygul, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Steven W. Sumner, Esquire. The Court had before it the transcript of the guilty plea hearing, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the Respondent's return.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the October 2007 term of the Greenville County Grand Jury for armed robbery

1 

(2007-GS-23-8510), assault and battery with intent to kill (ABIK) (2007-GS-23-8511), and first-degree burglary (2007-GS-23-8512) and at the December 2008 term for armed robbery (2008-GS-23-9038) and ABIK (2007-GS-23-9039). He was represented by Steven W. Sumner, Esquire.

After the State called the case for trial, the Applicant chose to plead guilty pursuant to a negotiated plea agreement. On April 28, 2009, the Honorable Eugene C. Griffith sentenced the Applicant to concurrent terms of ten (10) years for each count of armed robbery, fifteen (15) years suspended on service of ten (10) years and five (5) years probation for each count of ABIK, and fifteen (15) years suspended on service of ten (10) years and five (5) years probation for second-degree burglary (violent). The Applicant did not appeal.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. Did not explain the plea in detail.
 - b. Did not keep the Applicant informed of all proceedings in the two years before the plea hearing.
 - c. Did not attempt to negotiate a better plea recommendation.
 - d. Did not properly advise regarding sentencing guidelines.
 - e. Did not file a motion to suppress.
 - f. Did not file a speedy trial motion.
 - g. Did not argue Rule 3(c), SCRCrimP.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

2 

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

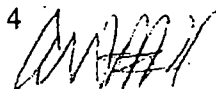
The Applicant stated he and plea counsel reviewed both the State's evidence and his version of events. The Applicant stated, however, that plea counsel was not prepared for trial and that they had not discussed either trial strategy or defenses. The Applicant stated he rejected the State's first plea offer because he wanted to go to trial. The Applicant stated plea counsel said he would not call any witnesses at a trial because he would then lose the final closing argument. The Applicant stated he stopped the trial and pled guilty because plea counsel told him he would lose the trial. The Applicant stated plea counsel told him that he would plead guilty to a ten (10) year offer and that he would be out of prison within eight (8) years. The

Applicant stated he believed he was pleading guilty to the lesser charges of strong arm robbery and assault and battery of a high and aggravated nature. The Applicant stated he did not understand what a negotiated sentence was but went along with the plea process because it was what plea counsel told him to do.

Plea counsel testified the Applicant was the most difficult client he ever had and that they had numerous antagonistic meetings. Regardless, plea counsel testified they extensively reviewed the discovery, charges, elements of the offenses, potential sentences, and defenses over the course of several meetings. Plea counsel testified he did not recall a prior plea offer and that the Applicant always wanted to take the case to trial. Plea counsel testified the Applicant never gave him the names of witnesses to contact. Plea counsel testified he did not recall why the Applicant decided to plead guilty during the trial. Plea counsel testified he would have explained the nature of a negotiated sentence with the Applicant. Plea counsel testified he would have explained the nature of a suspended sentence to the Applicant but that he did not tell the Applicant either that he would serve a straight ten (10) year sentence or that the armed robbery and ABIK charges would be reduced.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.213). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty and was satisfied with counsel. (Plea transcript, pp.212-13).

4 

This Court finds the Applicant failed to meet his burden of proving plea counsel should have spent more time reviewing his case and discussing it with him. This Court finds this allegation is not supported by either the PCR testimony or the record. Plea counsel provided detailed testimony from his notes about numerous meetings with the Applicant¹ and the Applicant testified that he met with plea counsel several times to both review the State's evidence and discuss his version of the facts. Further, the Applicant did not register any complaints with any individuals during the guilty plea hearing. (Plea transcript, p.209). This Court finds the Applicant has failed to articulate what more plea counsel should have done in order to investigate his case and prepare it for trial. See, e.g., Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have contacted potential witnesses in his case. Initially, this Court notes plea counsel testified the Applicant never gave him the names of any possible witnesses. This Court finds plea counsel's testimony is credible. Regardless, as these alleged witnesses did not testify at the PCR hearing, any discussion regarding what they would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (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 from the witness' failure to testify at trial.")

¹ This Court notes plea counsel had also informed the plea judge of the various meetings and discussions he had with the Applicant in preparation for trial. (Plea transcript, pp.10-12).

5 

(emphasis in original).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly explain the negotiated plea agreement. Plea counsel testified he would have explained the nature of a negotiated plea to the Applicant. Plea counsel also testified he told the Applicant the sentence he would receive and that it would involve suspended sentences. This Court finds plea counsel's testimony is credible. This Court finds the Applicant was fully informed of the details of the negotiated plea, including the "violent" classification of the armed robbery charges, that he was receiving the minimum sentence for armed robbery, and that his sentences would be concurrent. (Plea transcript, pp.211-12; p.214).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

6 

CONCLUSION

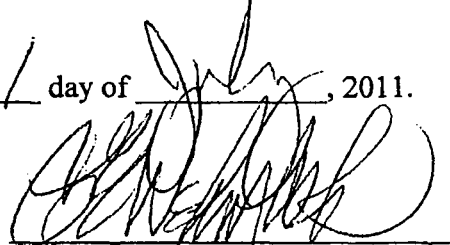
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

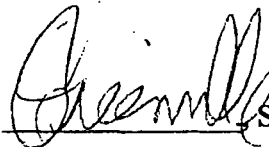
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1 day of July, 2011.


G. Edward Welmaker
Resident Judge
Thirteenth Judicial Circuit


South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

AMENDED INDICTMENT FOR
ASSAULT AND BATTERY WITH INTENT TO KILL

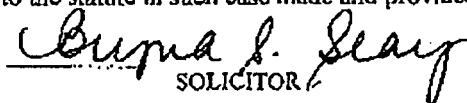
At a Court of General Sessions, convened on
County present upon their oath:

DEC 16 2008

the Grand Jurors of Greenville

That CHEVES D. HEYWARD did in Greenville County, on or about the 28th day of March, 2007, willfully, unlawfully and with malice aforethought, either express or implied, commit an assault and battery upon AQUILEO GREGORIO MARTINEZ. This is in violation of §16-3-620 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

John Divittorio



Greenville County Sheriffs Office

11/17/2008

DOCKET NO. 2008-GS-23-009039

AMENDED INDICTMENT BSD

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

December

TERM 2008

PLEAD GUILTY

THE STATE

vs.

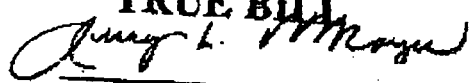
CHEVES D. HEYWARD

ARREST WARRANT NUMBER

1476765

ACTION OF GRAND JURY

TRUE BILL



FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

0014

Indictment for

ASSAULT AND BATTERY WITH INTENT TO
KILL

VIOLATION § 16-03-0620

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

AMENDED INDICTMENT FOR
ARMED ROBBERY

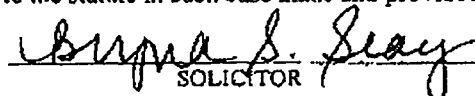
At a Court of General Sessions, convened on
County present upon their oath:

DEC 16 2008

the Grand Jurors of Greenville

That CHEVES D. HEYWARD did in Greenville County, on or about the 28th day of March, 2007, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: U.S. currency from the person or presence of AQUILEO GREGORIO MARTINEZ. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

John Divittorio

Greenville County Sheriffs Office

11/17/2008

DOCKET NO. 2008-GS-23-009038

AMENDED INDICTMENT BSD

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

December TERM 2008

THE STATE

vs.

CHEVES D. HEYWARD

ARREST WARRANT NUMBER

1476766

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Indictment for

ARMED ROBBERY

VIOLATION § 16-11-0330

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
BURGLARY FIRST DEGREE

At a Court of General Sessions, convened on October 16, 2007 the Grand Jurors of Greenville
County present upon their oath:

That CHEVES D. HEYWARD did in Greenville County, on or about the 28th day of March, 2007, willfully and
unlawfully enter the dwelling of MAURILLO MARTINEZ located at (Apts.)
Greenville, SC, without consent and with the intent to commit a crime therein and the entering and/or remaining
did occur during the night time hours and/or did cause physical injury to victim and/or has two or more prior
convictions for burglary. This is in violation of §16-11-311 of the South Carolina Code of Laws (1976) as
amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Angela S. Flay
SOLICITOR

WITNESSES

DOCKET NO. 2007-GS-23-
BSD 008512

The State of South Carolina

County of Greenville

John Divittorio / Martin / S

Greenville County Sheriffs Office

4/14/2007

COURT OF GENERAL SESSIONS

OCTOBER TERM 2007

✓
4/28/09
PLEAD GUILTY

THE STATE

vs.

CHEVES D. HEYWARD

ARREST WARRANT NUMBER

1472586

ACTION OF GRAND JURY

~~TRUE BILL~~

Foreperson of Grand Jury

~~FOREMAN OF GRAND JURY~~

VERDICT

Indictment for

BURGLARY FIRST DEGREE

VIOLATION § 16-11-0311

Foreperson of Petit Jury

Date:

447

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

INDICTMENT FOR
 ARMED ROBBERY

At a Court of General Sessions, convened on October 16, 2007 the Grand Jurors of Greenville County present upon their oath:

That CHEVES D. HEYWARD did in Greenville County, on or about the 28th day of March, 2007, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: U. S. Currency from the person or presence of MAURILJO MARTINEZ. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Wynna S. Seay
 SOLICITOR

WITNESSES

DOCKET NO. 2007-GS-23-
BSD 008510

The State of South Carolina

County of Greenville

John Divittorio /Martin LS

Greenville County Sheriffs Office

4/14/2007

COURT OF GENERAL SESSIONS

OCTOBER TERM 2007

✓
PLEAD GUILTY THE STATE

vs.

ARREST WARRANT NUMBER

1472587

CHEVES D. HEYWARD

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

✓
0139

Indictment for

ARMED ROBBERY

VIOLATION § 16-11-0330

Foreperson of Petit Jury

Date:

445

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on October 16, 2007 the Grand Jurors of Greenville
County present upon their oath:

That CHEVES D. HEYWARD did in Greenville County, on or about the 28th day of March, 2007, willfully,
unlawfully and with malice aforethought, either express or implied, commit an assault and battery upon
MAURILLO MARTINEZ. This is in violation of §16-3-620 of the South Carolina Code of Laws (1976) as
amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Bryana J. Leary
SOLICITOR

WITNESSES

DOCKET NO. 2007-GS-23-

BSD

008511

The State of South Carolina

County of Greenville

John Divittorio

Martin LS

Greenville County Sheriffs Office

4/14/2007

COURT OF GENERAL SESSIONS

OCTOBER TERM 2007

✓
PLEAD GUILTY THE STATE
vs.

ARREST WARRANT NUMBER

1472588

CHEVES D. HEYWARD

ACTION OF GRAND JURY

[Signature]
~~FOREMAN GRAND JURY~~

Foreperson of Grand Jury

VERDICT

Indictment for

✓
0014

ASSAULT AND BATTERY WITH INTENT TO
KILL

VIOLATION § 16-03-0620

Foreperson of Petit Jury

Date:

446