

VOLUME THREE OF THREE

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Calhoun County
Maite Murphy, Circuit Court Judge

RECEIVED

JUN - 8 2015

S.C. Supreme Court

PHILLIP SPEARS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-002096

APPENDIX

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1 doubt, that is a reasonable doubt. And under the law you
2 must, no options, you must find my client, Phillip Spears,
3 innocent of the charges. Thank you.

4 THE COURT: Thank you, Mr. Johnson. Mr. Jeffries in
5 reply?

6 MR. JEFFRIES: Your Honor, may it please the court?

7 THE COURT: Yes.

8 MR. JEFFRIES: Somebody's lying. Somebody's lying all
9 right. When Mr. Prezzie took that stand whatever day it
10 was last week, he told you he could not identify anybody.
11 He never pointed over there to either one of those tables.
12 Mr. Iskier Prezzie never identified anybody back on
13 November 6th, never identified anybody in court. So, if
14 that's what they're saying, yeah, you're right. Somebody's
15 lying. And if Mr. Spears through his attorney, Mr.
16 Johnson, says that he did not rob the Wagon Wheel, then
17 he's lying. He's lying now or he was lying to Tanesha
18 Adams when he told her he robbed the Wagon Wheel.
19 Somebody's definitely lying, but it's not the state.

20 Ladies and gentlemen, somebody's lying. Ms. Hinds
21 told you there's no markings or anything on the roll of
22 coins. Somebody's lying, but it's not the state. Ms.
23 Hinds went on about whether or not they were nappy braids
24 or a short afro. What you might call a short afro,
25 somebody else might call nappy braids, but what you have to

1 look at is the face. She picked the face, not the hair.
2 She picked the face out of the photo lineup. That's the
3 man who robbed me. Never met him before. We agree with
4 that, never met him before, but she said that's the man
5 that robbed me, the second man that robbed me. Whether
6 they were braids, a short afro, whatever it was, she saw
7 the face and identified it.

8 Now, I will agree with Ms. Hinds on one thing. She
9 told you last Monday when we started, or Tuesday, whatever
10 day we had our opening statements, she told you that the
11 evidence speaks for itself. I agree with that, ladies and
12 gentlemen; the evidence speaks for itself. The evidence in
13 this case says that her client, this man right here, Titus
14 Bantan, and his buddy, Phillip Spears, robbed the Wagon
15 Wheel on November 6, 2006. The evidence speaks for itself.

16 Ladies and gentlemen, if we have learned nothing, we
17 learned nothing else during the course of this trial, we've
18 learned that armed robbery is risky business. When you
19 take it upon yourself to grab a weapon, a handgun, and go
20 to a store with the intentional of robbing that store, you
21 have to take a number of risks. You have to assume the
22 risk that you could hurt somebody whether it's your
23 intention to go in there and shoot anybody or not. When
24 people are under stress when guns are involved, things can
25 get out of hand very fast. Being a prosecutor, I've seen

1 it too many times. That's the risk you have to take if
2 you're going to rob a store.

3 Ladies and gentlemen, you assume the risk that you'll
4 get hurt yourself. You heard the testimony and you'll see
5 in Natasha Rivers's statement they're asked where's the
6 gun, where is the gun? Does the owner have a gun? Because
7 you don't know if the people you're robbing might also have
8 a weapon that's bigger than yours, more powerful than
9 yours, but that's the risk you have to take if you're going
10 to commit an armed robbery.

11 Ladies and gentlemen, on a more practical note and as
12 it's played out in this courtroom last week and this week,
13 when you commit robbery, you assume the risk that you're
14 going to get caught. They got caught. Sometimes you just
15 get caught. Ladies and gentlemen, they got caught.

16 As to Phillip Spears, he got caught because Natasha
17 Rivers knows the man, knows Pastor Mood, knows his people.
18 He used to come to her basketball games. Evidently he
19 didn't put that together, but she knows him. So, she
20 immediately says I know him. I can't think of his name,
21 but I know that man. He's related to Pastor Mood. They go
22 see Pastor Mood. Next thing you know, they're at Nata --
23 at Tanesha Adams's house. Find out that's her -- his
24 girlfriend, also his cousin but they didn't, they didn't
25 grow up as family. So, the next thing you know they got

1 Phillip Spears.

2 Ladies and gentlemen, they got caught because of the
3 cell phone records. They got caught because of the cell
4 phone records. Mr. Johnson talks about three phones.
5 Well, ladies and gentlemen, you'll hear, you'll see that,
6 you'll see in those records, if you care to look at them,
7 that first call is made to Tanesha Adams early in the
8 morning. Comes up unavailable, private. Ladies and
9 gentlemen, that's early in the morning. He's in Charlotte.
10 Is it, is it unreasonable to believe they might have a
11 phone in the house in Charlotte and he used that phone?
12 But then when he gets down to South Carolina, he uses his
13 cell phone, the same one he left at the store. That's why
14 they got caught, ladies and gentlemen. He dropped his cell
15 phone during the robbery. This isn't a law enforcement
16 case. Chris Golden didn't break this case. The man left
17 his phone in the robbery. It's a comedy of errors, ladies
18 and gentlemen.

19 They got caught because Tanesha Adams. Phillip Spears
20 was so consumed by the fact of whether or not they had
21 cameras in the Wagon Wheel. He asked her before. She
22 didn't even take into consideration why is he asking about
23 cameras. Then he calls back and asks about cameras again.
24 Said I robbed the Wagon Wheel. He got caught because he
25 ran his mouth to his girlfriend. That's why they got

1 caught.

2 Ladies and gentlemen, they got caught because Mr. J.K.
3 Bourgeois came in here and testified. He was never shown a
4 photo lineup, okay? He was never shown a photo lineup.
5 They showed on to Natasha, and she identified both the
6 robbers. Then they go to the trailer, find all the
7 evidence. They got the phone records. They don't even
8 need to show Mr. Bourgeois. He told you he told them way
9 back then if I saw them again, I could identify them. They
10 just never showed it to him. He came in this courtroom and
11 said yeah, him and him. And everybody in this courtroom,
12 both the attorneys believe Mr. J.K. Bourgeois wasn't lying.
13 That's why they got caught.

14 And the flight back to North Carolina -- when I say
15 flight, I mean the act of fleeing back to North Carolina.
16 That is evidence you can consider. You heard Tanesha Adams
17 say Phillip Spears called me and said I'm down in South
18 Carolina. I want to see you. Okay, meet me at the gas
19 station. But during that time where he gets off the phone
20 with her, he realizes I left myself my cell phone in the
21 gas station, in the convenience store. I can't meet her.
22 She might be setting me up. She knows I just robbed the
23 store. They know I know her. I'm not going over there to
24 meet her at the hospital.

25 Ladies and gentlemen, they got caught because he was

1 found with the cell phone, with the, with the phone
2 disassembled, broken up. Ladies and gentlemen, if it's not
3 your phone, why are you breaking it up? You see, they
4 tracked him with that phone back to North Carolina with the
5 gun matching the description of the one used in the
6 robbery.

7 Ladies and gentlemen, I'm not telling you that's
8 definitely the gun they used. I don't know. Mr. Bourgeois
9 said it certainly looked like one. He said he called it
10 silver with black trim because the way the man was holding
11 it sideways at him, he was covering up a lot of the black.
12 He saw that barrel, which was silver. He saw some other
13 silver, thought it was a silver gun. Saw some black. Said
14 a silver and black gun. Is that reasonable doubt? Is that
15 a reason to let them go? Sometimes you get caught, ladies
16 and gentlemen, when you commit an armed robbery.

17 Why did the Phillip Spears -- why did Titus Bantan get
18 caught? Again, Natasha Rivers. Never met him a day in her
19 life, but she identified both of them. They got caught
20 because the man took his mask off in the middle of the
21 robbery. Why did he even put it on if he was just going to
22 take it off? Ladies and gentlemen, this is a grand
23 conspiracy, they must both be in on it because they
24 contributed to being arrested as much as law enforcement
25 did. You take your mask off in the middle of the robbery?

1 They got caught because Titus Bantan kept the Bi-lo
2 receipt where he turned the money in for cash. He kept the
3 receipt. What, he's going to claim it on his taxes? Why
4 do you keep the receipt after you stole the money from the
5 convenience store? That's why they got caught. They got
6 caught because the cash was in the house with the Newport
7 cigarettes. Mr. Johnson, Ms. Hinds, one or the other, I
8 can't recall, talked about it was only so much cash whereas
9 they took a lot more. Well, I mean, is Mr. Spears not
10 going to get a cut? Of course he doesn't have all the
11 cash. You got to, you got to settle up as some point.

12 Then there was a question -- well I'll just say it.
13 They got caught because of the tan Timberland boots,
14 orange, tan. Now, ladies and gentlemen, I submit to you
15 when Natasha Rivers said he had on tan Timberland boots and
16 those of the ones we recovered, that's evidence, ladies and
17 gentlemen. Now, whether or not there were some orange
18 shoes, well guess what? There was another robber. Maybe
19 he had on the orange shoes. He got caught because the
20 boots are at the house.

21 Ladies and gentlemen, the only reason they are at this
22 trailer where Titus Bantan is, because they were looking
23 for Phillip Spears. They kind of lucked into that. They
24 weren't even looking for Titus Bantan. They were looking
25 for Phillip Spears because they knew he hung out there. Lo

1 and behold, they don't find Phillip Spears but they find
2 Titus Bantan, and what else did they find? The Bi-lo
3 receipt, the tan boots, bullets, all this stuff that's
4 relevant to the robbery, the black BDUs. Sure, I'm sure a
5 lot of people wear black BDUs, but the description of the
6 robber on that day, that same day was that he had on black
7 BDUs. And lo and behold, that's what you find at the
8 trailer of Titus Bantan.

9 And the phone records, they got caught because the
10 phone records tie Titus Bantan to Phillip Spears. Ms.
11 Hinds asked you about the ID, what's significant about the
12 ID. Of course he has an ID. And he told you, well, he
13 lays his head at [REDACTED] Now, ladies and
14 gentlemen, on his ID, [REDACTED] -- I'm
15 sorry, [REDACTED]. And the reason that's important,
16 because when you, when you look at the phone records, the
17 calls that Phillip Spears is making to Titus Bantan go to
18 this address, not the one at [REDACTED] so it
19 just ties them together. That's why it's significant,
20 nothing other than that. Ladies and gentlemen, they just
21 got caught. If it's a big conspiracy, they must be in on
22 it. They helped law enforcement out a great deal in this
23 case.

24 Ladies and gentlemen, this is the state's one and only
25 opportunity to hold those men responsible for what they

1 did. If they are found not guilty, there's no
2 responsibility attached. They go back into the community
3 and that's it. You have an opportunity to show this
4 community, make a statement that this type of behavior will
5 not be accepted in this county.

6 Reasonable doubt is nonexistent in this case. Ladies
7 and gentlemen, when I'm preparing for trial a like this, I
8 have to try to anticipate, try to guess what the defense is
9 going to be because they don't have to tell us. And a lots
10 of times it's not until we get to trial that we actually
11 realize what their defense is going to be. But in a case
12 like this, it usually comes down to one of a couple of
13 things.

14 Mr. Bantan indicates he's got an alibi. And, ladies
15 and gentlemen, Ms. Miranda was a honest young lady. She
16 told you she cares about her brother; she loves her
17 brother. She wasn't going to lie for her brother. She
18 gave the answers she thought would help him as much as she
19 could without lying. But then when Ms. Fryar asked her
20 could he have went out the back of that trailer without you
21 knowing? Yes. She wasn't going to lie for him. So, if
22 that's an alibi, find him not guilty, cut him loose but to
23 do that, you have to ignore all the credible evidence that
24 ties Titus Bantan to this crime. So, alibi out the window.

25 Mr. Spears doesn't go that route. Mr. Spears's

1 defense, as I can tell now, is no defense. It's just
2 attack the police investigation. Get the jury looking over
3 here away from the evidence right here. Get the jury's
4 attention away from the facts. Use speculation,
5 conjecture. Ask the jury to speculate about anything in
6 the world other than the facts in this case. Don't let
7 them do it, ladies and gentlemen, because the thing about
8 facts is that you're stuck with them. After all the smoke
9 clears, they're still there. They can't be speculated
10 away; they can't be conjectured away. The facts are still
11 the facts.

12 The only reasonable conclusion that you can come to in
13 this case is that those two men went to the Wagon Wheel on
14 November 6, 2006. They held guns to Natasha Rivers,
15 Cleveland Williams, Iskier Prezzie, Natasha Rivers's two
16 small children, and Mr. J.K. Bourgeois. They took money
17 out of the register. Natasha Rivers told you Mr. Bourgeois
18 took money out of the register. Titus Bantan said where's
19 more? Where's the rest of the money, Shortie? I know you
20 got more money, Shortie. And she opens up a drawer. Not
21 the register but another drawer. She opens up the drawer.
22 Mr. Bourgeois opened up the register. There's nothing
23 inconsistent about that. They took the money. Mr. Bantan
24 was the one back there at the end who knocks over the
25 cigarettes, the Newport cigarettes. Lo and behold, what do

1 you find in Titus Bantan's house? Newport cigarettes.

2 Ladies and gentlemen, how is there any doubt, any
3 doubt, much less a reasonable doubt that those men
4 committed armed robbery? They held those people against
5 their will. In this state, that's kidnapping.

6 Let's talk about what we learned beyond a reasonable
7 doubt. Now, ladies and gentlemen, reasonable doubt, that
8 phrase means exactly what it sounds like. It's not proof
9 beyond any doubt. It's not proof beyond a shadow of the
10 doubt. It's proof beyond a reasonable doubt and what that
11 means, and the judge will tell you, is that if the evidence
12 leaves you firmly convinced, just firmly convinced of their
13 guilt, then you must find them guilty. Now, ladies and
14 gentlemen, the evidence in this case should leave you far
15 more than just firmly convinced. There should be no doubt
16 those men are guilty.

17 What have we learned beyond a reasonable doubt?

18 Ladies and gentlemen, I want to briefly go over the
19 testimony of the witnesses only because when they
20 testified, that was over a week ago and I want to make sure
21 y'all remember what they said. And you remember what you
22 heard. Don't let me put the words in your mouth. Don't
23 let them put words in your mouth.

24 Natasha Rivers identified both of the suspects. She
25 knew one of them; she knew Phillip Spears, knew Pastor

1 Mood, knew his family, and Tanesha Adams corroborates that.
2 She knows him. She is related to him. She knows Pastor
3 Mood. They're all related. She said one had a mask, and
4 that's Titus Bantan, and he took it off in the middle of
5 the robbery. And she told you when he took that mask off,
6 she's looking directly in his face, and she thinking he
7 ain't got nothing to lose now. He's taken his mask off,
8 and she's thinking she's going to die. That speaks to her
9 degree of attention. She says when he took that mask off,
10 I was looking directly at him. He ain't got nothing to
11 lose.

12 Now, they point to the fact that Mr. Bourgeois never
13 saw anybody with a mask. Well, that corroborates what
14 Tanesha Adams told -- I mean, Natasha Rivers told you. The
15 man had a mask, took it off. Remember that Mr. Bourgeois,
16 Mr. Williams, and Mr. Prezzie are outside bringing in
17 boxes. Phillip Spears had to actually go out there and
18 bring them back in the store. So, is it unreasonable that
19 while they're doing that, Titus Bantan is taking the mask
20 off, for whatever reason you take a mask off during a
21 robbery. I can't speak to that.

22 Ms. Rivers told you the first gunman jumped the
23 counter. She said right then when he jumped that counter,
24 first of all she knew this was for real. Second of all,
25 she looked at that face and knew that she knew that man.

1 She couldn't put it together with how she knew him, but she
2 knew him.

3 So, the second guy took off his mask, was hitting Mr.
4 Bourgeois in the back of the head and talking to her. He's
5 hitting Mr. Bourgeois in the back of the head telling him
6 to stay down, but he's also talking to Mr. Bourgeois:
7 where's is this, where's that. Mr. Bourgeois, because of
8 his condition, they can't hear him so he's talking, but
9 they can't hear him. So, in order for them to hear him, he
10 keeps lifting up and talking to them. But while he's doing
11 that, he's also looking at them. He keeps lifting his head
12 up, and they keep hitting him in the back. Put your head
13 down, but they're asking him questions at the same time.
14 They can't hear him. But during this, Natasha Rivers is
15 looking right at him.

16 Says he knocks over the cigarette rack with Newports
17 and takes those. Lo and behold, that's what you find in
18 Titus Bantan's trailer. Tells you they took coins and
19 cash. What do you find in Titus Bantan's trailer? Bi-lo
20 receipt where he turned in the coins for cash and some of
21 the cash from the robbery. Not all of it. Phillip Spears
22 had to get a cut. Mr. Bourgeois corroborates Natasha, as
23 well as Mr. Williams and Mr. Prezzie.

24 Mr. Bourgeois was never showed a photo lineup, but he
25 told them back then and he told you he could identify them

1 if he saw them, and he did that in this courtroom. Natasha
2 had already identified both; they had already tied them to
3 the robbery several other ways. But she -- but he did say
4 that one had a ball cap on. One had acne on his face,
5 blemishes, and everybody was consistent on that. Whether
6 you call them blemishes or acne, however you describe them,
7 they all saw that, the ones who did identify him. Mr.
8 Prezzie never identified anyone then or now. Mr. Bourgeois
9 didn't see the mask on Titus because he was outside.

10 Said the gun was silver and black. He didn't swear
11 that was the gun. He didn't come in here to try to lie to
12 you and say that's definitely the gun because he doesn't
13 know. I don't know. Nobody knows except them. He
14 corroborated Natasha by telling you about the rolls of
15 coins taken.

16 Mr. Iskier Prezzie, and last name is Prezzie and I say
17 that because a man who's been through what he has, having a
18 gun pointed in his face, being called a punk A.S.S., told
19 to get on the floor, this is a grown man having to listen
20 to this from some kids or some younger men anyway.
21 Whatever happened to respecting your adults, that's out the
22 window. But a man like that deserves to have his name
23 pronounced right. It's Iskier Prezzie.

24 He told you how he didn't identify anybody. He says
25 he wasn't looking at them. He was scared to death. He was

1 on the ground. But what else did he tell you? He said
2 while that man was standing over him, he dropped his phone
3 and he just kind of stuck his elbow out there, a little
4 chicken wing, took the phone. And you know he's thinking
5 who's the punk A.S.S. now? He keeps that phone and that's
6 how -- one of the ways you tie Phillip Spears to the
7 robbery. And he corroborates the testimony. He never
8 tried to identify anybody. He told you the truth, same
9 thing he told them. The question is whether or not the guy
10 had a mask on or his hat on. Does it matter? Either way,
11 he can't tell you who it was and he ain't trying to tell
12 you who it was. He's just telling you what he could tell
13 you. There's nothing inconsistent about what he told you.
14 He didn't try to make the story any better. He told Mr.
15 Johnson yes, I didn't read that statement.

16 Ladies and gentlemen, it's the minor inconsistencies
17 because I admit there were some inconsistencies in the
18 state's witnesses, people at the store, because they were
19 all separated, all interviewed separately, and so they may
20 -- you tend to view things a little differently, but there
21 were minor inconsistencies, and I submit to you that's how
22 you know they are true. If everybody would have came in
23 that -- to that witness stand and they had identical
24 stories and everybody could point to both of them, that's
25 how you know something's wrong. That's how you know people

1 are lying. But they had minor inconsistencies, and that's
2 how you know when they're telling the truth. They don't
3 try to make it anything better or any worse. Just told you
4 what happened.

5 Mr. Cleveland Williams told you he wasn't shown a
6 lineup, but he recognized one of the individuals. I
7 believe he recognized Mr. Spears because that's the one man
8 that went out and brought them back into the store.

9 Now Tanesha Adams, and Mr. Johnson said that that lady
10 is a liar when she's scared to death sitting on that
11 witness stand. I asked her, can you point out Phillip
12 Spears, and she about died. But she finally got up and
13 pointed to the man who was her boyfriend, who she was
14 related to down the line. They're all one family. She
15 knows his family. She came in here and did what she had to
16 do, and that took courage, ladies and gentlemen; that took
17 courage. She didn't want to testify and implicate that
18 man.

19 He called her before the robbery, and it's all in the
20 phone records. That first call at 5 or whatever in the
21 morning, it just comes up as unavailable. I submit to you
22 he's in the house in Char -- up in Charlotte and he's using
23 that phone. He uses a different phone when he gets down
24 here. He uses a cell phone. And could he have two cell
25 phones? Is that unusual to carry two cell phones?

1 MR. JOHNSON: Your Honor, objection, the fellow had
2 two.

3 THE COURT: Sir?

4 MR. JOHNSON: Don't worry about it. Withdrawn.

5 THE COURT: You may proceed.

6 MR. JOHNSON: Is that that unusual when we know he
7 only left with one of those cell phones? And Tanesha Adams
8 told you how he called her and said he robbed the Wagon
9 Wheel, and he wanted to meet her before he left. And she,
10 as much as, as hard as it was for her to do, tried to set
11 him up. The police were at her house as he's calling, and
12 they said well, get him to go somewhere to meet you and
13 then wait for him. Again, while that's happening, he
14 realizes I left my cell phone.

15 And another significant thing about Ms. Adams's
16 testimony is Mr. Johnson asked you -- asked her. Well, who
17 told you Phillip Spears robbed the Wagon Wheel? And she
18 said well, I guess I heard it twice because first he told
19 me, and then the police showed up and they told me. So, I
20 guess I heard it twice. How was she not credible? What
21 does she have to gain by implicating one of her family
22 members, her former boyfriend? To help the state? Why did
23 she want to help the state and turn against her own family?
24 Because she's telling the truth. She's doing what she had
25 to do. And she didn't want to do it, but she did. And her

1 story is totally corroborated by the phone records. You'll
2 have them back there to look at.

3 Now, Investigator Chris Golden. Ladies and gentlemen,
4 it's up to you to decide why, when Investigator Golden
5 heard armed robbery at the Wagon Wheel, one of them's from
6 New York, Phillip Spears. It's up to you to decide why he
7 knew that. But what you do know is he knew Phillip Spears,
8 he knew Titus Bantan, he knew both of those individuals
9 before this armed robbery and for whatever reason with the
10 information he got, he thought about Phillip Spears. But
11 lo and behold when it's all said and done, who robbed the
12 Wagon Wheel? Phillip Spears. It doesn't matter how an
13 individual is developed as a suspect when you find out
14 later he did it. Again, they're trying to turn your
15 attention away from the facts, get you thinking about
16 anything other than the evidence.

17 They talk about whether or not there was consent to
18 search, and you heard that there was a lawful search
19 warrant done at [REDACTED] and that's how they
20 get the evidence: the coins, the boots, the pants, the
21 Bi-lo receipt, the cash. That was a lawful search warrant.
22 There's absolutely nothing wrong with that.

23 And you find out from Chris, Chris Golden that he knew
24 Phillip, he knew Titus. Ladies and gentlemen, it's a small
25 community we're talking about. We're talking about

1 community policing. You heard from Officer Kinnerly who
2 knows all the individuals down there. That's how they
3 developed Phillip Spears. He knows Pastor Mood. These
4 people know each other outside of law enforcement; they
5 know each other. But they'd have you believe this is this
6 grand conspiracy. Everybody's out to get Phillip Spears
7 and Titus Bantan. Well, what makes them so special that
8 everybody is willing to put their reputations, their jobs
9 on the line just to frame these two men? Who are they?
10 And again, if this is a conspiracy, they must be in on it,
11 too, because they implicate themselves as much as law
12 enforcement does. Leave your phone, take your mask off.

13 Now, ladies and gentlemen, Ms. Hinds brought up the
14 fact that Investigator Golden gave her one story and then
15 changed his story. Well, ladies and gentlemen, take this
16 into consideration. Investigator Golden, as he told you,
17 he doesn't work for Calhoun County law enforcement anymore.
18 He's in another agency. He doesn't have access to all his
19 records, and when he talked to us the first time, he hadn't
20 looked at his stuff. And when he did look at it, he took
21 it upon himself to call them and let them know hey, I made
22 a mistake. It didn't happen exactly like I told you
23 before. He didn't wait to get here in court to try to foul
24 them up during trial. He told them beforehand. He was
25 straight up and honest about it. It didn't happen that

1 way. It happened this way.

2 You heard from Investigator Tim Stephenson, who did
3 the second photo lineup when Natasha Rivers selects Titus
4 Bantan with no hesitation. And Ms. Hinds points out the
5 facts, the fact that one of the, one or two of the
6 individuals who weren't selected were in the first lineup
7 and the second lineup. But what does that matter when she
8 goes immediately to the person she recognizes that robbed
9 her? You don't even know if she saw those other people
10 because she's looking for the man -- first of all, she's
11 looking for the man she knows that robbed her, robbed her
12 because that's what they told her to point out, the first
13 guy. And then later on they say well, point out the second
14 guy who robbed you. And again, she points out Titus
15 Bantan. There's no undue influence on that. Six-person
16 lineup; that's the way they do it; that's the way it's
17 always been done.

18 He also told you he attempted to get fingerprints at
19 the scene, and I think one of those photos in there shows
20 where he kind of dusted the area for fingerprints. They
21 didn't get anything. And again, this ain't *CSI*. He told
22 you in twenty-one years of law enforcement, he's never made
23 a case based on fingerprints. Just doesn't happen. But he
24 tried.

25 And you heard Investigator Graham. Mr. Graham's

1 testimony was important because they keep talking about how
2 Natasha Rivers never described the suspects even though she
3 picked them out in a lineup. Well, you heard Investigator
4 Graham say he took the description from her. She didn't
5 put it in her statement because she had already told
6 Investigator Graham, who put it in the incident report.
7 It's all documented. She describes how they was dressed,
8 how they were dressed, and then she picks them out of the
9 photo lineup.

10 Investigator Graham also went and got the Bi-lo
11 receipt from the Coinstar. He talked about how the
12 witnesses were when they were interviewed at the scene and
13 were all separated, interviewed individually. So, there's
14 no collusion and that's why you have these minor
15 inconsistencies because people process things differently.
16 That's what makes them believable.

17 You've heard from Mark Hill. He just told you that he
18 worked at Bi-lo. Told you how the Coinstar machine worked
19 and that he gave that receipt to Investigator Graham. We
20 just have to -- a lot of these witnesses are just
21 establishing a chain of events. Mark Hill couldn't tell
22 you what happened at the Wagon Wheel. He didn't know
23 anything about that. He could just tell you about the
24 Coinstar.

25 Then you heard from Keith Johnson from SLED, who went

1 up to Charlotte to locate Phillip Spears. He was using
2 these phone tower records and research, and that's how they
3 kind of traced him up to Charlotte with Kim Cherry, that
4 phone he was calling from. Not the one that was left at
5 the scene but the other one, the phone he was using in Kim
6 Cherry's name. And that's just a coincidence? Found him
7 up in Charlotte, which corroborates Tanesha's testimony as
8 far as the phone calls. Said the phone was dismantled when
9 he got there. Said Phillip Spears was in a towel but he
10 was bone dry standing by the window trying to escape.

11 And what else is in that room? A semiautomatic pistol
12 and it's ironic, ladies and gentlemen. You find Phillip
13 Spears with a gun, no bullets. You find Titus Bantan with
14 the bullets, no gun. And again, we don't know which guns
15 were used. We can't tell you that, but it's all evidence.
16 You don't look at this evidence in a vacuum. You look at
17 it all together. You look at it as a picture, a puzzle
18 with different pieces put in. It leads to one conclusion,
19 and that's that they are guilty.

20 Ladies and gentlemen, I'm wrapping up. I know you've
21 heard enough. Investigator Greg Whetstone told you how the
22 phone records were used to tie Phillip Spears to making
23 those calls to Tanesha Adams, which corroborated Tanesha
24 Adams's testimony. Used the phone records to show Phillip
25 Spears called Titus Bantan not at [REDACTED] but

1 at the address on his, his photo ID, [REDACTED].
2 He's calling Phillip Spears after the robbery. Why? He
3 doesn't know he was arrested. You heard the phone call for
4 one minute. He's getting the answering machine. For some
5 reason, Titus Bantan ain't picking up. It's because he's
6 been arrested, but Phillip Spears doesn't know that. He's
7 up in Charlotte. He's arrested several days after Titus
8 Bantan. But importantly, those phone records tie Phillip
9 Spears to the phone dropped at the scene. It has the same
10 contacts, thirty percent of the same contacts.

11 Ladies and gentlemen, just ask yourself this. What's
12 the likelihood that the phone -- that Phillip Spears leaves
13 that phone at the scene, that he told Tanesha Adams before
14 and after that he robbed the store when he was asking about
15 cameras, that Titus Bantan is found with the items from the
16 robbery in his bedroom the day of the robbery with the
17 Bi-lo receipt where the money's turned in the day of the
18 robbery, with the Timberland boots described by Natasha
19 Rivers, with the cash, the dark BDUs, and the fact that
20 they're both identified in a photo lineup, what's the odds
21 that all of that is a coincidence? And then ask yourself
22 about reasonable doubt. There's no doubt, ladies and
23 gentlemen.

24 Ladies and gentlemen, sometimes you get caught.
25 Sometimes you just get caught. Like Ms. Fryar told you

1 when we started this trial last week, those men brought
2 violence in to Calhoun County. It's up to you to bring
3 justice to Calhoun County. Show them that the time for
4 running, for toting guns, for pointing guns at a woman
5 while she's trying to protect her babies, for that
6 cowardly, despicable act, show them that it's not
7 acceptable. We're asking for the verdict that the evidence
8 requires, that the facts dictates, and that justice
9 demands. I'm asking you to find them guilty of armed
10 robbery, kidnapping, and possession of a weapon during the
11 commission of a violent crime. Thank you.

12 THE COURT: Thank you, Mr. Jeffries. Ladies and
13 gentlemen, are you all ready for a little comfort break?
14 Very well, here's what we're going to do. We're going to
15 take a comfort break that you all need. We'll be waiting
16 for your conclusion. Just knock on the door, let Mr.
17 Whaley know, and he will let me know and we will then get
18 back together for the argument -- excuse me, for the
19 instruction on the law which I will then deliver to you.

20 You have not received that instruction on the law.
21 Therefore, you are not prepared to deliberate. So, please
22 remember do not discuss this matter or allow anyone to
23 discuss it with you. Step to your jury room, and when you
24 all have finished your comfort break, just let Mr. Whaley
25 know by a knock on the door.

1 (THE JURY EXITS AT 11:59 A.M.)

2 THE COURT: And we'll take a comfort break, everyone.

3 (OFF THE RECORD.)

4 THE COURT: Thank you very much, and be seated.

5 Anything from the state before we bring the jury out?

6 MR. JEFFRIES: No, Your Honor.

7 THE COURT: Anything, Mr. Bantan?

8 MS. HINDS: No, Your Honor.

9 THE COURT: Mr. Spears?

10 MR. JOHNSON: No, Your Honor.

11 THE COURT: Bring the jury in.

12 (THE JURY ENTERS AT 12:21 P.M.)

13 THE COURT: Ladies and gentlemen, you have now heard
14 the evidence and the arguments of counsel. It is now my
15 duty to explain or charge the law applicable to this case
16 to you.

17 The indictments in this case charge the defendants
18 with armed robbery, kidnapping, and possession of a firearm
19 or knife during the commission of a crime of violence.
20 Ladies and gentlemen, I remind you that the fact that each
21 of these defendants was arrested, charged, and indicted in
22 this case is not evidence in this case and cannot be
23 considered by you as evidence of guilt in this case. Nor
24 does it create any presumption nor inference of guilt.
25 Ladies and gentlemen, the indictments in this case are

1 simply the formal written instruments which contain the
2 charges made against each of the defendants; they are the
3 formal documents by which the case is brought into court.

4 Ladies and gentlemen, I'm going to read to you again
5 the indictments in this case. I'm first going to read to
6 you the indictments regarding Mr. Bantan and then the
7 indictments regarding Mr. Spears. First of all, I'm going
8 to read the indictment of armed robbery.

9 The indictment alleges, ladies and gentlemen, that
10 Titus Abraham Bantam did in Calhoun County on or about
11 November 6, 2006, feloniously take from the person or
12 presence of the victim James Bourgeois at the Wagon Wheel
13 Convenience Store by means of force or intimidation while
14 armed with a deadly weapon, being a handgun, goods or
15 monies of the said victim being described as follows: U.S.
16 currency. This offense being a violation of section
17 16-11-330 of the South Carolina Code of Laws as amended.

18 Ladies and gentlemen, the indictment for kidnapping
19 alleges that Titus Abraham Bantan did in Calhoun County on
20 or about November 6, 2006, willfully and unlawfully seize,
21 confine, inveigle, decoy, kidnap, abduct or carry away
22 Natasha Rivers and/or Lamarques Rivers and/or Raheem Rivers
23 and/or James Bourgeois and/or Cleveland Williams and/or
24 Iskier Prezzie without authority of law, this offense being
25 in violation of section 16-3-910 of the South Carolina Code

1 of Laws.

2 Ladies and gentlemen, the indictment of possession of
3 a firearm or knife during the commission of a crime of
4 violence alleges that Titus Bantan did in Calhoun County on
5 or about November 6, 2006, while committing the violent
6 crime of armed robbery have in his possession and/or did
7 visibly display a firearm during the commission of the
8 aforementioned crime and as a result violated section
9 16-23-490 of the South Carolina Code of Laws as mended.
10 Those are the indictments containing the allegations
11 regarding Mr. Bantan.

12 Ladies and gentlemen, I am now going to read to you
13 the indictments and the allegations regarding Mr. Spears.
14 The armed robbery alleges that Phillip Lee Spears did in
15 Calhoun County on or about November 6, 2006, feloniously
16 take from the person or presence of the victim James
17 Bourgeois at the Wagon Wheel Convenience Store by means of
18 force or intimidation while armed with a deadly weapon,
19 being a handgun, goods or monies of the said victim being
20 described as follows: U.S. currency, this offense being a
21 violation of 16-11-330 of the South Carolina Code of Laws
22 as amended.

23 Ladies and gentlemen, the indictment for kidnapping
24 alleges that Phillip Lee Spears did in Calhoun County on or
25 about November 6, 2006, willfully and unlawfully seize,

1 confine, inveigle, decoy, kidnap, abduct or carry away
2 Natasha Rivers and/or Lamarques Rivers and/or Raheem Rivers
3 and/or James Bourgeois and/or Cleveland Williams and/or
4 Iskier Prezzie without authority of law, this offense being
5 a violation of section 16-3-910 of the South Carolina Code
6 of Laws as amended.

7 The indictment for possession of a firearm or knife
8 during the commission of a crime of violence alleges that
9 Phillip Lee Spears did in Calhoun County on or about
10 November 6, 2006, while committing the violent crime of
11 armed robbery have in his possession and/or did visibly
12 display a firearm during the commission of the
13 aforementioned crime and as a result violated section
14 16-23-490 of the Code of Laws of South Carolina as mended.

15 Now, ladies and gentlemen, each of the three
16 indictments regarding Mr. Bantan charges a separate and
17 distinct offense. Each of the indictments regarding Mr.
18 Spears charges a separate and distinct offense. There are
19 three indictments regarding Mr. Bantan; there are three
20 indictments regarding Mr. Spears. You must decide each
21 indictment separately on the evidence and the law
22 applicable to it uninfluenced by your decision as to any
23 other indictment. Ladies and gentlemen, you do this
24 analysis for each of these defendants completely
25 independently of the other defendant. Each of these

1 indictments must be decided separately on the evidence and
2 law applicable to it uninfluenced by your decision as to
3 any other indictment, and that applies equally to each of
4 these defendants. And each of these defendants would --
5 likewise you would consider the indictments against each of
6 them completely independently of the other.

7 Ladies and gentlemen, a defendant may be convicted or
8 acquitted on any or all of the offenses charged. You will
9 be asked to write a separate verdict of guilty or not
10 guilty for each indictment. Ladies and gentlemen, I want
11 to be certain that I was clear that you will write a
12 verdict. You will consider each of these indictments
13 separately for each of these defendants, of course the
14 indictments for that defendant. And that you understand
15 that as you do that review for each, that a defendant may
16 be convicted or acquitted upon any or all the offenses
17 charged.

18 Now, ladies and gentlemen, as you know, there are two
19 defendants in this case, and each has been charged with
20 armed robbery, kidnapping, and possession of a firearm or
21 knife during the commission of a crime of violence. The
22 case of each defendant and the evidence and the law
23 concerning that defendant should be considered separately
24 and individually. Your verdict does not have to be the
25 same for both defendants. The fact that you may find one

1 defendant guilty or not guilty should not control your
2 verdict as to the other defendant. Where more than one
3 person is charged with the crime, if the evidence warrants,
4 you may convict one or acquit the other, or you may acquit
5 both, or you may convict both. It will depend upon your
6 view of the testimony and the evidence. You must take each
7 defendant and consider the evidence as to that defendant
8 and my instructions to you on the law. You will then write
9 a separate verdict of guilty or not guilty for each
10 individual defendant on each of the charges alleged against
11 that defendant.

12 Now, ladies and gentlemen, Mr. Bantan and Mr. Spears,
13 these defendants have pled not guilty to each of the
14 indictments against him, and that puts the burden on the
15 State of South Carolina to prove guilt. A person charged
16 with committing a criminal offense in South Carolina is
17 never required to prove himself or herself innocent. I
18 charge you that it is an important rule of the law that a
19 defendant in a criminal trial no matter, no matter what the
20 seriousness of the charge may be will always be presumed to
21 be innocent of the crime for which an indictment was issued
22 unless guilt has been proven by evidence satisfying you of
23 that guilt beyond a reasonable doubt.

24 Ladies and gentlemen, this presumption of innocence
25 exists for both of these defendants on each of the charges

1 against him. The presumption of innocence does not end
2 when you begin your deliberations, but it accompanies each
3 defendant throughout the trial until you reach a verdict of
4 guilt based upon evidence satisfying you of that guilt
5 beyond a reasonable doubt. The presumption of innocence,
6 ladies and gentlemen, is like a robe of righteousness
7 placed about the shoulders of each of these defendants
8 which remains with him until it has been stripped from him
9 by evidence satisfying you of that defendant's guilt beyond
10 a reasonable doubt.

11 The presumption of innocence, ladies and gentlemen, is
12 not a mere legal theory; it is not just a legal phrase. It
13 is a substantial right to which each and every defendant is
14 entitled unless you, the jury, are satisfied from the
15 evidence of the defendant's guilt beyond a reasonable
16 doubt. This is true independently and individually for
17 each of these defendants.

18 What, then, is a reasonable doubt in the law? A
19 reasonable doubt is the kind of doubt that would cause a
20 reasonable person to hesitate to act. The state has the
21 burden of proving a defendant guilty beyond a reasonable
22 doubt. The state in this case has the burden of proving
23 each of these defendants guilty beyond a reasonable doubt
24 independently, ladies and gentlemen, regarding each of the
25 charges against each of these defendants. Some of you may

1 have served as jurors on civil cases. An awful lot of our
2 jurors panel had served on civil cases and had served on
3 cases, particularly civil it seemed, where you were told
4 that it is only necessary to prove a fact is more likely
5 true than not true such as by the greater weight or the
6 preponderance of the evidence.

7 In criminal cases, the state's proof must be more
8 powerful than that. It must be beyond a reasonable doubt.
9 Proof beyond a reasonable doubt is proof that leaves you
10 firmly convinced of the defendant's guilt. You of course
11 do this analysis for each defendant on each charge.

12 There are very few thing in this world that we know
13 with absolute certainty, and in criminal cases the law does
14 not require proof that overcomes every possible doubt. If,
15 based on your consideration of the evidence, you are firmly
16 convinced that the defendant that you are considering at
17 that time is guilty of the crime that you are considering,
18 you must find the defendant guilty. If, on the other hand,
19 you think there is a real possibility that the defendant is
20 not guilty, you must give the defendant the benefit of the
21 doubt, and you must find him not guilty. This applies
22 equally to each of these defendants for each of the charges
23 against him.

24 I remind you that during this trial you and I have had
25 certain duties to perform. As the trial judge, it is my

1 responsibility to preside over the trial of this case. I
2 also have the duty to rule on the admissibility of the
3 evidence offered during the trial. Ladies and gentlemen,
4 you are to consider only the competent evidence before you.
5 If there was testimony ordered stricken from the record in
6 this case, you must disregard that testimony. There was
7 testimony in this case so stricken, and you are to
8 disregard that. You are to consider only the testimony
9 which has been presented from the witness stand, the
10 exhibits which have been made a part of the record in this
11 case, and any stipulations of counsel.

12 I have the additional duty to charge you the law
13 applicable to this case. As the presiding judge, I am the
14 sole judge of the law of this case, and it is your duty as
15 jurors to accept and apply the law as I now state it to
16 you. If you already have an idea about what the law is or
17 what it should be and it does not agree with what I now
18 tell you the law is, you must abandon your preconceived
19 idea because you are sworn by your oath to accept and apply
20 the law exactly as I give it to you.

21 Ladies and gentlemen, in every trial in this court
22 before a jury, the jury becomes the sole and exclusive
23 judge of the facts in a case. The trial judge cannot
24 intimate, state, comment or make any statement to a trial
25 jury about the facts in a case. Since you, the jury, are

1 the sole judge of the facts in this case, you are not to
2 infer from what I have said during the progress of this
3 trial in ruling on the admissibility of evidence or
4 otherwise, or anything that I say to you now or during the
5 course of this instruction given to you that I have any
6 opinion about the facts in this case. I have no opinion
7 regarding the facts in this case. Ladies and gentlemen,
8 the law does not allow me to have an opinion about the
9 facts in this case. What the facts are in this case is a
10 matter solely for you to determine. As jurors, it is your
11 duty to determine the effect, the value, the weight, and
12 the truth of the evidence presented during this trial.

13 Ladies and gentlemen, I further charge you that there
14 are two types of evidence that are generally presented in a
15 trial. One is called direct evidence and the other is
16 called circumstantial evidence. Direct evidence is the
17 testimony of a person who claims to have actual knowledge
18 of a fact, such as an eyewitness. It is evidence which
19 immediately establishes the main fact to be proved.

20 Circumstantial evidence is proof of a chain of facts
21 and circumstances indicating the existence of a fact. It
22 is evidence which immediately establishes collateral facts
23 from which the main fact may be inferred. Circumstantial
24 evidence is based on inference and not on personal
25 knowledge or observation.

1 Let me give you an example. It's February. You are
2 all bundled up and you are standing outside, and you see it
3 snowing. That's direct evidence that it's snowing. It's
4 February. It's cold outside. The sky is gray. When
5 evening falls, you go to sleep, you can see your grass kind
6 of brown, looking kind of ragged because it's February, and
7 you wake up in the morning and your lawn is covered with
8 new-fallen snow. That is circumstantial evidence that it
9 snowed during the night.

10 The law makes absolutely no distinction between the
11 weight or value to be given to either direct or
12 circumstantial evidence. Nor is a greater degree of
13 certainty required of circumstantial evidence than of
14 direct evidence. You should weigh all the evidence in the
15 case, and after weighing all the evidence, if you are not
16 convinced of the guilt of the defendant who you are
17 considering at that time, if you are not convinced of the
18 guilt of that defendant beyond a reasonable doubt, you must
19 find him not guilty.

20 Now, necessarily you must determine the credibility of
21 witnesses who have testified in this case. Credibility
22 simply means believability. It becomes your duty as jurors
23 to analyze and to evaluate the evidence and determine which
24 evidence convinces you of its truth. In determining the
25 believability of witnesses who have testified in this case,

1 you may believe one witness over several witnesses, or
2 several witnesses over one witness. You may believe a part
3 of the testimony of a witness and reject the remaining part
4 of the testimony of that same witness. You may believe the
5 testimony of a witness in its entirety, or you may reject
6 the testimony of a witness in its entirety. You may
7 consider whether any witness has exhibited to you any
8 interest, bias, prejudice or other motive in this case.
9 You may also consider the appearance and the manner of a
10 witness while on the witness stand.

11 Ladies and gentlemen, in this case you heard the
12 testimony of one who was designated to be an expert witness
13 and I'm going to talk to you, and you may remember I
14 mentioned I would talk to you more about that in the final
15 instruction. The rules of evidence ordinarily do not
16 permit witnesses to testify to opinions or conclusions. An
17 exception to this rule exists for witnesses we call expert
18 witnesses, a witness who by education and experience has
19 become expert in some art, science, profession or calling.
20 And this witness may state an opinion as to the relevant
21 and material matter in which the witness claims to be an
22 expert and may also state the reasons for the opinion.

23 You should consider any expert opinion received in
24 evidence in this case and like any other evidence, you give
25 it the weight you think it deserves. If you decide that

1 the opinion of the expert witness is not based on
2 sufficient education and experience, or if you conclude
3 that the reasons given in support of the opinion are not
4 sound, or that the opinion is outweighed by other evidence,
5 you may disregard the opinion entirely. An expert
6 witness's testimony is to be given no greater weight than
7 that of other witnesses simply because the witness is an
8 expert. Further, you are not required to accept an
9 expert's opinion even though it is not contradicted.

10 Ladies and gentlemen, I instruct you and I emphasize
11 to you that the fact that the defendants did not testify is
12 not a factor to be considered by you in any way in your
13 deliberations and in your consideration on the question of
14 whether each of these defendants is guilty or not guilty as
15 to each of these charges. It must not be considered by you
16 in any manner whatsoever.

17 Ladies and gentlemen, a defendant in a criminal case,
18 and each of these defendants has the constitutional right
19 to remain silent. And the assertion of this right must not
20 be considered by you in your deliberations. I repeat:
21 under your oath, you are to draw no conclusion whatsoever
22 from the fact that each of these defendants did not
23 testify. The fact that the defendants did not testify,
24 ladies and gentlemen, should not even be discussed in the
25 jury room. The burden of proof, as I have stated to you,

1 is and remains on the state. A defendant is not required
2 to prove his innocence. The burden of proof is and remains
3 on the state to prove guilt beyond a reasonable doubt.

4 Now, ladies and gentlemen, there has been an issue in
5 this case, and that issue has been the identification of
6 each of the defendants as the persons who committed the
7 crimes charged against that defendant. The state has the
8 burden of proving identity beyond a reasonable doubt. You
9 must be satisfied beyond a reasonable doubt of the accuracy
10 of the identification of the defendant before you may
11 convict that defendant. Each of these defendants is
12 entitled independently and individually to your review
13 independently.

14 Identification testimony is an expression of belief or
15 impression by a witness. You must determine the accuracy
16 of the identification of each defendant. You must consider
17 the believability of each identification witness in the
18 same way as any other witness. You may consider whether
19 the witness had an adequate opportunity to observe the
20 offender at the time of the offense. This will be affected
21 by things like how long or how short a time was available,
22 how far or how close the witness was, the lighting
23 conditions, and whether the witness had the chance to see
24 or know the person in the past. Once again, I instruct you
25 the burden of proof is on the state and it extends to every

1 element of the crime, each of the crimes charged, and this
2 specifically includes the burden of proving beyond a
3 reasonable doubt the identity of each defendant as the
4 person who committed the crime alleged against that
5 defendant.

6 If after examining the testimony you have a reasonable
7 doubt as to the accuracy of the identification, you must
8 find that defendant who you are then considering not
9 guilty. And again, this applies to each of these
10 defendants independently.

11 Now, ladies and gentlemen, in order to establish
12 criminal liability, criminal intent is required. For
13 example, the mental state required to be proven by the
14 state for a particular crime might be purpose, intent,
15 knowledge. Criminal intent must be proven by the state
16 beyond a reasonable doubt. Criminal intent is always a
17 matter that must be determined by a jury from the
18 circumstances surrounding the situation. There is no way
19 to prove intent by a mathematical certainty; there is no
20 way medical science can dissect a person's brain and
21 determine what the person had in mind. So, the law says
22 that criminal intent may be inferred from the circumstances
23 shown to have existed.

24 This is how you make a determination of whether or not
25 the element requiring intent was present. It is not

1 necessary to establish intent by direct and positive
2 evidence, but intent may be established by inference in the
3 same way as any other fact: by taking into consideration
4 the acts of the parties and all the facts and circumstances
5 of the case. Criminal intent is a mental state, a
6 conscious wrong doing. It is up to you to determine what
7 each of the defendants intended to do based on the
8 circumstances shown to have existed. Criminal intent can
9 arise from action or a failure to act. It may arise from
10 consequences, and you will of course make the determination
11 of criminal intent by the evidence which has been presented
12 before you.

13 Now, ladies and gentlemen, if a defendant is found
14 possessing recently stolen goods, this may be used as
15 evidence that the defendant stole the goods. This,
16 however, would simply be an evidentiary fact to be taken
17 into consideration by you, along with all the other
18 evidence in the case, and you may give it the weight you
19 decide it should have.

20 Ladies and gentlemen, at this time I am going to be
21 going over with you the elements of the three offenses
22 charged, of course, against each defendant. There are the
23 three charges against Mr. Bantan, there are the three
24 charges against Mr. Spears, but the three are the same.
25 There is a charge of armed robbery against each, kidnapping

1 against each, and commission while armed with a deadly
2 weapon, a violent crime. So, while I am going to be
3 reading to you each of these three offenses, as you know
4 from my having read the indictments, the same three
5 offenses are alleged against each of these defendants.

6 First armed robbery, 16-11-330, the Code of Laws.
7 Ladies and gentlemen, each of these defendants are charged
8 with armed robbery. In order to prove this offense, the
9 state must first approve beyond a reasonable doubt that the
10 defendant took personal property from the person or
11 presence of another person. Property is in the presence of
12 a person if it is within the person's reach, inspection,
13 observation or control so that the person could, if not
14 overcome with violence or prevented by fear, keep
15 possession of the property.

16 The state must also prove beyond a reasonable doubt
17 that the defendant carried the property away intending to
18 permanently deprive the owner of the property and to keep
19 the property for the defendant's own use. The slightest
20 removal of the property or the complete possession of the
21 property even for an instant by the defendant is sufficient
22 to show a taking and carrying away of the property. In the
23 taking and carrying away of the property, this must have
24 been done with violence or putting the owner of the
25 property in fear of violence.

1 Finally, the state must prove beyond a reasonable
2 doubt that the defendant was armed with a deadly weapon
3 during the robbery. A deadly weapon is any article,
4 instrument or substance which is likely to cause death or
5 great bodily harm. Whether an instrument has been used as
6 a deadly weapon depends on the facts and circumstances of
7 each case.

8 Ladies and gentlemen, the following are examples,
9 simply examples which may be deadly weapons: shotgun,
10 rifle, dirk, dagger, knife, slingshot, metal knuckles, or
11 razor, gasoline, a firebomb, lighter fluid, Molotov
12 cocktail. Ladies and gentlemen, a gun may be a deadly
13 weapon even if it is not operating. Ladies and gentlemen,
14 that concludes the instruction on the armed robbery, and
15 again you will consider each of these defendants
16 independently.

17 Kidnapping 16-3-910. Ladies and gentlemen, each of
18 these defendants is charged with kidnapping. The state
19 must prove beyond a reasonable doubt that the defendant
20 knowingly and unlawfully seized, confined, inveigled,
21 decoyed, kidnapped, abducted, or carried away another
22 person without authority of law. To do a thing unlawfully
23 is to do it willfully against the law. Knowingly means
24 with knowledge. Consciously, not accidentally. Seized
25 means to take hold of suddenly or forcibly. Confined means

1 to limit, restrict, or enclose within bounds, imprison or
2 shut or keep in. Inveigle means to lure, to entice, or
3 lead astray by false representations, promises, or other
4 deceitful means. Decoy means to lure by or as if by decoy.
5 A decoy is something to entice a person into a trap.
6 Kidnap is to remove a person against his or her will by
7 unlawful force and/or by fraud. Abduct means to carry off
8 secretly or by force for an illegal purpose. Carry away
9 means to remove.

10 The state does not have to prove that the defendant
11 did all of these things. Instead, if you find beyond a
12 reasonable doubt that the defendant did any of these
13 things, you may find that defendant guilty of kidnapping.
14 Something done without authority of law is something which
15 the law does not sanction, permit, allow, condone, or
16 provide justification for. The kidnapping does not have to
17 be for any personal or monetary gain, for any illegal
18 purpose, but may be for any reason whatsoever. Again, you
19 go through this analysis independently with each defendant
20 unaffected by your determination regarding the other
21 defendant.

22 Now I'm going to talk to you about the offense of
23 possession of a weapon during the commission of or attempt
24 to commit a violent crime, and that is section 16-23-490.
25 Ladies and gentlemen, each of these defendants is charged

1 with possession of a weapon during the commission of a
2 violent crime. The state must prove beyond a reasonable
3 doubt in order for someone to be convicted and founds
4 guilty of this offense, the state must prove beyond a
5 reasonable doubt that the defendant was in possession of a
6 firearm or visibly displayed what appeared to be a firearm
7 during the commission of a violent crime. A firearm means
8 any machine gun, autocratic rifle, or any other weapon
9 which will, is designed to, or may readily convert to
10 expend a projectile.

11 Ladies and gentlemen, in order to find a defendant
12 guilty of possession of a weapon during the commission of a
13 violent crime, you must first find that defendant guilty of
14 either committing a violent crime or attempting to commit a
15 violent crime. Ladies and gentlemen, as indictments have,
16 the indictments have stated, I do charge you that armed
17 robbery is a violent crime.

18 Ladies and gentlemen, I further charge you that if a
19 crime is committed by two or more people who are acting
20 together in committing a crime, the act of one is the act
21 of all. A person who joins with another to commit an
22 unlawful act is criminally responsible for everything done
23 by the other person which happens as a probable or natural
24 consequence of the act done in carrying out the common plan
25 and progress.

1 Ladies and gentlemen, I will conclude by telling you
2 that you will consider each of these indictments alleged
3 against each of these defendants separately and
4 independently, and you will make your decision regarding
5 each of these defendants separately and independently. And
6 as each of the defendants, you would likewise consider each
7 of the indictments against that defendant separately and
8 independently.

9 Now, ladies and gentlemen, I am going to go over the
10 verdict forms with you. And, ladies and gentlemen, they
11 are put on two different sheets, and I will go over them.
12 I'm going to come over there.

13 (A PAUSE.)

14 THE COURT: Ladies and gentlemen, the way that I have
15 set up the verdict form -- in a minute we're going to go
16 over that, but before we even do that, there are really two
17 things I want to tell you. Ladies and gentlemen, your
18 verdict must be unanimous. Your verdicts, as you will go
19 through the verdict form, you must keep in mind -- and
20 there are lots of reminders on the sheets -- that your
21 verdict must be, must be unanimous. That means your
22 verdict must be the verdict of each and every one of you.
23 This is not the rule of the majority, nor is this the
24 verdict of only one of you, but this must be the verdict of
25 each and every one of you. It must, it, the verdict, must

1 be unanimous.

2 Now, in a minute we're going to go over these things,
3 and there are two possible verdicts for each of these
4 offenses charged. One is not guilty and the one is guilty,
5 and I've written them down on this paper. Well, ladies and
6 gentlemen, when we put words on a piece of paper, one has
7 got to be first and one has got to be second. I want you
8 to take no hidden meaning from the judge by virtue of the
9 order in which these words have been put on paper because I
10 can assure you there's none intended. It's just that when
11 we put words on a piece of paper, one's got to be first and
12 got to be second. So, please don't take any hidden meaning
13 from the judge.

14 The way that the verdict form is, and you'll see two
15 pieces of paper. One of these pieces of paper deals with
16 the charges against Mr. Bantan, and then the other piece of
17 paper deals with charges against Mr. Spears so that when
18 you have this piece of paper, you're going to know that
19 this piece of paper involved the charges regarding Mr.
20 Spears and Mr. Spears only, and this one would be Mr.
21 Bantan and Mr. Bantan only.

22 So, let's, we'll go over Mr. Bantan's first. Ladies
23 and gentlemen, the first little bullets here, if you will,
24 says: As to the charge of armed robbery, we the jury
25 unanimously find the defendant, Titus Abraham Bantan, and

1 it says here please circle one. Once your unanimous
2 determination is made, you will circle one. And you'll see
3 that guilty is written first, not guilty is written second.
4 I could have just as easily put not guilty first and guilty
5 second. That's where I say take no meaning.

6 The next matter here is as to the charge of
7 kidnapping, we the jury unanimously find the defendant,
8 Titus Abraham Bantan, and again there are two possible
9 verdicts. Whichever is the unanimous verdict by the jury,
10 circle that.

11 And then the last charge here listed is as to the
12 charge of possession of a firearm or a knife during the
13 commission of a crime of violence, we the jury unanimously
14 find the defendant, Titus Abraham Bantan, please circle
15 one. Guilty, not guilty are the two possible verdicts.
16 Whichever is the verdict of the jury, circle that one. And
17 you know who you are as the presiding juror, and then you
18 will date the verdict form once you have completed all of
19 your deliberations, filled out the form. Then for
20 informational purposes, today is October the 10, 2007.

21 Now, that is the sheet of paper regarding Mr. Bantan.
22 Now, this is the sheet of paper regarding Mr. Spears, and
23 the first matter is as to the charge of armed robbery, we
24 the jury unanimously find the defendant, Phillip Lee
25 Spears, and again I remind you that your verdict must be

1 unanimous, and there are two possible verdicts. Whichever
2 is the unanimous verdict of the jury, simply circle, circle
3 that verdict. The second matter as to the charge of
4 kidnapping, we the jury unanimously find the defendant,
5 Phillip Lee Spears, and again whichever is the unanimous
6 verdict of the jury -- there are two possible verdicts --
7 you would circle. And finally on this sheet of paper, as
8 to the charge of possession of a firearm or knife during
9 the commission of a crime of violence, we the jury
10 unanimously find the defendant, Phillip Lee Spears, two
11 possible verdicts, guilty or not guilty. Whichever is the
12 unanimous verdict of the jury, please circle it. And
13 again, once you've completed your deliberations, sign it,
14 fill out the form, sign it, and date the form.

15 Now, in a minute I will ask you to step back to your
16 jury room with this instruction. Do not discuss this
17 matter or allow anyone to discuss it with you. All of you
18 are right at this point about to say wait a minute. We
19 listened to you a long time, and you told us and you said
20 when we listened to the evidence and listened to the
21 arguments of counsel and your instruction, we're ready to
22 deliberate. What I'm going to do when you step back to
23 your room on this occasion, I am simply going to turn to
24 these lawyers. I'm going to ask them two questions. Have
25 I given this jury all of the law that they may need for

1 their deliberations? Secondly, have I stated it correctly?

2 Now, sometimes, ladies and gentlemen, something comes
3 out wrong. Goodness knows I don't intend it to. Sometimes
4 it does, and sometimes I need to bring the jury back out
5 because I need to correct something I told them that is not
6 correct. I ask you in advance if I need to bring you back
7 out for that reason, please allow me to correct my error.
8 Sometimes I fail to give jury instructions that they may
9 need in their deliberation. These lawyers help me know
10 that. Sometimes I need to bring jurors back out because I
11 have failed to give juries all of the law that they may
12 need in their deliberation. In the event that I need to
13 bring you back out for that reason, please don't consider
14 that instruction with any emphasis. Just know that this is
15 my chance to get this right to give you all the law that
16 you may need for your deliberations and to state it for you
17 correctly.

18 In the event that I do not need to bring you back out,
19 then you will be brought two things. You will be brought
20 the exhibits which have been admitted into evidence, and
21 you will be brought the verdict forms, so that will be more
22 than two things but two categories of things. One, the
23 verdict forms, and the other will be the exhibits, and
24 instruction to begin your deliberations because Mr. Whaley
25 is probably going to be bringing you these things, and he

1 will tell you to begin your deliberations. He won't forget
2 but if he should forget, you will not have the verdict
3 forms and the exhibits unless you are prepared to
4 deliberate.

5 Now, lunch is coming. I'm hoping it's in there. I
6 don't know if it's back in your jury room at this moment
7 but if it isn't, it'll be coming really soon. Perfectly
8 fine for you to deliberate over lunch if you want to,
9 perfectly fine. Which does bring to mind and I need to
10 tell you this. Ladies and gentlemen, all twelve of you
11 must be present for you to deliberate. So, any of you need
12 to take a break, stop your deliberations, take your break,
13 and then reconvene your deliberations when all twelve of
14 you are together again. I know we've got some smokers on
15 the jury, so it may be that you need to, during your
16 deliberations, that you need stop, take a smokey smoking
17 break, and then come on back and begin your deliberations.
18 Please be mindful that all twelve of you must be present.

19 When your deliberations have concluded and you have
20 filled out your verdict form, you will knock on the door.
21 You will return to the courtroom, bringing the forms with
22 you. You'll give those to Mr. Whaley, who in turn will
23 give those to me. You do not publish the verdict forms.

24 Now, I do want to leave you with one concluding
25 thought, and it is this. The word verdict comes from the

1 phrase *verdicto*, and that means to speak truth, to speak
2 the truth. Ladies and gentlemen, that is now your task.
3 Other than my alternates, if you all would please step to
4 your jury room. Do not discuss this matter or allow anyone
5 to discuss it with you.

6 (THE JURY EXITS AT 1:20 P.M.)

7 THE COURT: All right, you're Mr. Pierce, Kevin
8 Pierce, alternate, and you are Shirley Benjamin, alternate.
9 Let me tell you what I'm going to ask you to do for me. I
10 don't quite know how I'm going to do this.

11 As you know, we have been doing this now for quite
12 some time, and I believe that if something should happen to
13 one of our jurors in the next fifteen minutes, I can stop
14 the deliberations and seat one of you, begin the
15 deliberations anew, and I'd hate to lose this trial, the
16 work that we've done.

17 Claudia, is there a place that Mr. Pierce and Ms.
18 Benjamin can go for fifteen minutes outside the jury room?

19 CLERK OF COURT: Back to the conference room if
20 there's no one back there.

21 THE COURT: Wonderful. You watch your watch. You all
22 keep up with that time because I really don't think I can
23 do that beyond fifteen minutes. And when that fifteen
24 minutes is up, y'all remind me because I sure do want to
25 tell you goodbye, but in any event, if you will just stay

1 with us an additional fifteen minutes. If we get lunch,
2 we'll bring it to you, too. So, if y'all will please go
3 with Claudia.

4 (A PAUSE.)

5 THE COURT: You come on with Ms. Claudia. Thank you.

6 (A PAUSE.)

7 THE COURT: Are there any exceptions or additions from
8 the state?

9 MR. JEFFRIES: None from the state, Your Honor.

10 THE COURT: On behalf of Mr. Bantan?

11 MS. HINDS: No.

12 THE COURT: On behalf of Mr. Spears?

13 MR. JOHNSON: I have none, Your Honor.

14 THE COURT: Thank you, counsel. Let me ask you to do
15 this for me. Since it was in this courtroom and during a
16 trial that I tried that we found the paper in the back
17 pocket, I have always been careful and ask, particularly
18 since -- I actually did it beforehand -- but particularly
19 since that time, counsel, please if you would each of you
20 look at the exhibits that are going to the, to our jury and
21 look at them to be sure that what's going to this jury is
22 supposed to be what's going to this jury. Again, look at
23 the verdict forms and then once you all have done that --
24 and done that, of course, with Ms. Harris -- Mr. Whaley, if
25 you will take the exhibits to the jury and the verdict

1 forms, there are two sheets, and an instruction to begin
2 their deliberations. And then we will be in recess until
3 we hear from the jury.

4 Very well, gentleman, y'all can all come on back with
5 the sheriff and these folks. And, counsel, if y'all will
6 do that for me?

7 MR. JOHNSON: Your Honor, I did have questions for the
8 alternate jury members.

9 THE COURT: Sure.

10 MR. JOHNSON: Just does the court have any rules as
11 far as whether we can ask them or talk to them after you
12 release them?

13 THE COURT: I tell you what I will do. Absolutely,
14 thank you. In fifteen minutes, I'm going to talk to them,
15 and then I'm going to tell them exactly that. That it is
16 completely up to them if they are willing to talk with you,
17 talk away. If they don't want to, just let y'all know, and
18 I know y'all wouldn't persist. I will preface that in my
19 comments to them.

20 MR. JOHNSON: Thank you, Your Honor.

21 THE COURT: Thank you.

22 (JURY DELIBERATIONS BEGIN AT 1:30 P.M.)

23 *IN-CHAMBERS HEARING*

24 (JURY NOTE MARKED AS COURT'S EXHIBIT NUMBER 15.)

25 THE COURT: We are back on the record in this case,

1 and I have been brought a note from the presiding juror,
2 Ms. Jones. It has been marked as Court's Exhibit Number
3 15, and the note says:

4 It has been brought to the jury's attention that
5 one of the jurors has heard, quote unquote,
6 something about these two guys being targeted by
7 the police for an alleged bank robbery in
8 Cameron, South Carolina. It is my concern that
9 by hearing this comment, this juror may not be
10 capable of providing an unbiased opinion based
11 solely on the evidence.

12 And it's signed by Rosella Jones, and there is another
13 signature underneath it I, quite frankly, can't read.
14 Obviously my concern is that this comment, this comment
15 being these two guys being targeted by the police for an
16 alleged bank robbery in Cameron, South Carolina, that that
17 has been published to the jury.

18 Even before -- I think I can anticipate on behalf of
19 Mr. Bantan and Mr. Spears a motion, but I think it is
20 important to know more fully what has occurred. And I
21 guess my first question is whether or not there is an
22 objection on behalf of the state with me asking, bringing
23 in the presiding juror and just trying to determine a
24 little more fully what has occurred.

25 MR. JEFFRIES: My only objection would be that if by

1 bringing her in here we have already established that this
2 case would be a mistrial. If that in any way, the actual
3 act of bringing her in here in itself would influence the
4 court's decision as to whether or not this case can go
5 forward, then I would object to bringing her in here. If
6 it's done to be independent of that analysis, then I don't
7 have a problem with bringing her in.

8 THE COURT: Well, that clearly is the analysis, and
9 then the analysis, quite frankly, is has this comment been
10 published to the jury. There's no way for me to know
11 unless I ask. It appears from the note that it has
12 occurred; that is precisely what has occurred. But before
13 I make a decision on that basis, I feel compelled to know
14 that.

15 MR. JEFFRIES: And I'm understanding as the individual
16 analysis, that this is -- would be the first step in the,
17 in the full analysis of whether or not this case could go
18 forward?

19 THE COURT: Yes.

20 MR. JEFFRIES: With that said, I don't have an
21 objection; the state has no objection.

22 MS. HINDS: No objection.

23 MR. JOHNSON: No objection.

24 THE COURT: All right, let me have, we can ask Mr.
25 Whaley to ask the jury to stop their deliberations and just

1 ask Ms. Jones to step in.

2 (THE JUROR ENTERS THE JUDGE'S CHAMBERS.)

3 THE COURT: Ms. Jones, come on in. Look at Ms. Jones
4 looking around. I think you know who everyone is that's in
5 the office, and I wanted you to come in here rather than
6 going into open court. But I just, I do need to have a
7 record of what you would tell me.

8 Thank you for your note, and I've read your note.
9 I've shared it with counsel, and can you tell me how this
10 came to your attention?

11 JUROR: In the course of discussing the evidence and
12 some voicing their opinions about everything that has gone
13 on this week and a half, and one of the jurors who is quite
14 adamant about inquiring about ---

15 THE COURT: You don't have to tell me ---

16 JUROR: Okay.

17 THE COURT: Yes, you don't have to tell me what he or
18 she is adamant about.

19 JUROR: Okay, but, okay, part of what is sticking in
20 his head, testimonies of the authorities. And so then he
21 brought up a comment about I heard about these same guys
22 being targeted for an alleged bank robbery.

23 THE COURT: Was that comment made in the presence of
24 all of the jurors?

25 JUROR: Yes.

1 THE COURT: Because I asked you don't deliberate
2 unless you do ---

3 JUROR: Yes.

4 THE COURT: --- in the presence of everyone.

5 JUROR: We were all discussing it and...

6 THE COURT: All right. Do ---

7 JUROR: My comment is, excuse me, is because I felt
8 like he was trying to make a connection between possible
9 set up by the police and this alleged other incident,
10 incidence, and it was clouding his...

11 THE COURT: Which is exactly what you articulated, but
12 no question but that that comment was heard by all of the
13 jurors?

14 JUROR: Yes, and half were, like, wait a minute.
15 Whoa, whoa. When did you get this knowledge?

16 THE COURT: And his response was?

17 JUROR: He heard it this morning.

18 THE COURT: All right. Did he indicate from whom he
19 heard it this morning?

20 JUROR: He indicated that he did not know the people
21 that were making the comments, but he heard it.

22 THE COURT: Okay.

23 JUROR: And he has said if you wish to speak to him
24 directly, he will let you know that.

25 THE COURT: Very nice, very nice, and who is the

1 juror?

2 JUROR: Mr. Gladden.

3 THE COURT: Mr. Gladden, okay, and just, is this Mr.

4 -- whose name ---

5 JUROR: That's his signature.

6 THE COURT: This is Mr. Gladden's?

7 JUROR: Yes.

8 THE COURT: Thank you.

9 JUROR: Yes.

10 THE COURT: Okay, very well. I think that then is
11 appropriate, and I will do that. Thank you so much, and I
12 would be so grateful if obviously the deliberations now
13 need to stop.

14 JUROR: Yes.

15 THE COURT: Until I can figure out where we are, and
16 in an abundance of caution, I would simply ask that you not
17 talk about this further with the jury, if that makes sense.

18 JUROR: Okay.

19 THE COURT: Very well. Thank you. In other words,
20 what this note entails.

21 JUROR: Okay.

22 THE COURT: If you would not discuss that any further
23 with the jury. Very well, and you can chat about whatever
24 else, but deliberation at this time needs to halt.

25 JUROR: Okay.

1 THE COURT: And thank you so much, and just, I need to
2 talk, let me talk to these folks and then I'll probably
3 want to talk to Mr. Gladden.

4 JUROR: Okay.

5 THE COURT: Thank you so much.

6 (THE JUROR EXITS THE JUDGE'S CHAMBERS.)

7 THE COURT: All right.

8 MR. JEFFRIES: It wasn't Mr. Buckman, who I thought it
9 was.

10 MR. JOHNSON: Who is that?

11 MR. JEFFRIES: It's the older black gentleman on the
12 front row.

13 THE COURT: I see no reason not to discuss the matter
14 with Gladden. I think it is appropriate that we do that.
15 Okay, all right, Kendall, please ask Mr. Whaley to ask Mr.
16 Gladden to step in.

17 (THE JUROR ENTERS THE JUDGE'S CHAMBERS.)

18 THE COURT: Hi, Mr. Gladden.

19 JUROR: How you doing? How you doing?

20 THE COURT: I'm fine. Come on have a seat, and you
21 know all these folks.

22 JUROR: Right.

23 THE COURT: We've been together now for ten days. Mr.
24 Gladden, I have the note that's been signed by Ms. Jones
25 and by you. Is that right? And just, of course as a juror

1 you are under oath for these proceedings. Tell me what
2 happened.

3 JUROR: Well, the only thing I said was I was pumping
4 gas this morning.

5 THE COURT: Yes, sir.

6 JUROR: And it was two fellows standing to the gas
7 tank.

8 THE COURT: Yes, sir.

9 JUROR: Talking and I didn't feel like it make that
10 different. You know, I just said that I heard this morning
11 that, that there was, there was a robbery in Cameron some
12 time back, and they was trying to trap these two fellows
13 with it, and that's all I said, you know. But I ain't
14 thought it much, that much toward, you know, me.

15 THE COURT: Now, you made the comment, or somebody
16 made -- who made the comment?

17 JUROR: There's two fellows standing at the gas tank
18 this morning.

19 THE COURT: Did you know them?

20 JUROR: No, I ain't know them.

21 THE COURT: Okay.

22 JUROR: They was just talking.

23 THE COURT: Okay.

24 JUROR: And I, I was putting gas in the truck and I
25 hear them say that. And I really ain't pay it no

1 attention, you know, but then after they was talking in
2 there, then I said.

3 THE COURT: Well, did they know you were serving on
4 the jury?

5 JUROR: No, no, no. They ain't know nothing about me.

6 THE COURT: Had you ever seen these people before?

7 JUROR: No, no. Just pumping some gas.

8 THE COURT: And what gas station?

9 JUROR: The Exxon up there.

10 THE COURT: The Exxon. So, you go pump gas at the gas
11 station, and you were pumping gas at the gas station,
12 putting it in your own car?

13 JUROR: Right.

14 THE COURT: And these two gentlemen, had you ever seen
15 either one of them before?

16 JUROR: No. They was over on the other side of the
17 tank there pumping gas talking.

18 THE COURT: And how did you know it had anything to
19 do ---

20 JUROR: Well, the only thing they said that court was
21 going on downtown like that, Calhoun County court. And
22 they said that, like I said, they said these two fellows,
23 that they say that, claimed that might have robbed the bank
24 in Cameron some time back. And I ain't pay it no
25 attention, you know.

1 THE COURT: All right.

2 JUROR: I ain't pay it no attention.

3 THE COURT: And they said there's something going on
4 down at the courthouse?

5 JUROR: No. They say court going on.

6 THE COURT: They say court going on?

7 JUROR: Calhoun, Calhoun County.

8 THE COURT: Calhoun County?

9 JUROR: Yeah, court.

10 THE COURT: I gotcha, okay, and your discussions as
11 you all were deliberating, you just, you ---

12 JUROR: Yeah.

13 THE COURT: --- relayed to ---

14 JUROR: The only thing, they was saying that I said --
15 where they were saying that, they were saying that the day
16 when the police went in wrong before they got the warrant,
17 and so we was talking, and I said and I made that position.
18 I said let's don't take the wrong initiative because --
19 then I said that, and just that kill it. You know, that
20 just kill it because you can't go no further.

21 THE COURT: All right, all right, all right, and you'd
22 never seen the people at the gas station?

23 JUROR: No, I ain't never seen them.

24 THE COURT: And they were -- what, do you know what
25 kind of car they were driving?

1 JUROR: I ain't pay that much attention. They just
2 been talking out there.

3 THE COURT: Were they young men or older men?

4 JUROR: Seld [sic] mens, I guess.

5 THE COURT: There was, they were ---

6 JUROR: I would say, I say selder [sic] mens.

7 THE COURT: How old do you think?

8 JUROR: Maybe they were forty.

9 THE COURT: Forties, in their forties, okay. Were
10 they white or African American or ---

11 JUROR: They were black.

12 THE COURT: They were black, two black men, okay, all
13 right. And that was right here in St. Matthews?

14 JUROR: Uh-huh, Exxon.

15 THE COURT: At the Exxon, at the Exxon in St. Matt,
16 and you'd never seen them before?

17 JUROR: Uh-uh.

18 THE COURT: All right. Did you feel like they were
19 making those comments for you to hear?

20 JUROR: No, not at me. I think they were just
21 talking.

22 THE COURT: Okay.

23 JUROR: You know, because I didn't know them.

24 THE COURT: And you didn't feel in any way threatened?

25 JUROR: No.

1 THE COURT: Or anything like that?

2 JUROR: Not me.

3 THE COURT: Okay, okay.

4 JUROR: No.

5 THE COURT: Okay. That, all right, and that just
6 happened this morning?

7 JUROR: This morning.

8 THE COURT: Okay, sir. All right, you all did right,
9 Mr. Gladden. Y'all did right to stop, and so I'm going to,
10 let me just talk to these folks a little bit. And if you
11 would just be sure that y'all don't deliberate any further
12 until I report back to you.

13 JUROR: All right. Thank you.

14 THE COURT: Thank you so much, Mr. Gladden.

15 *CONCLUSION OF IN-CHAMBERS HEARING*

16 THE COURT: For the benefit of the record for Mr.
17 Bantan and Mr. Spears, I want to review what has been
18 happening in the last few moments. I received a note from
19 the presiding juror, which been marked as the Court's
20 Exhibit 15, and this note says this:

21 It has been brought to the jury's attention that
22 one of the jurors has, quote unquote, heard
23 something about these two guys being targeted by
24 the police for an alleged bank robbery in
25 Cameron, South Carolina. It is my concern that

1 by hearing this comment, this juror may not be
2 capable of providing an unbiased opinion based
3 solely on the evidence.

4 This has been signed by Ms. Jones, and it has also
5 been signed by Mr. ---

6 MR. JEFFRIES: Gladden, Gladden.

7 THE COURT: That's right, Mr. Gladden. Following
8 that, I asked Ms. Jones to come in to chambers and on the
9 record with counsel present, I just inquired about the
10 note. And my interest in doing that, as much as anything,
11 to determine whether or not that information was
12 articulated before the jury as a whole. And she indicated
13 that yes, it was because the comment was made during
14 deliberations.

15 So, I then spoke with Mr. Gladden, and again counsel
16 was present and there is a record of it, and asked Mr.
17 Gladden what he had heard. He was very forthright, I
18 think, and said that while he was pumping gas this morning
19 at the Exxon station, that there were two gentlemen who
20 were also pumping gas at the gas station. And they were
21 both African-American men. He referred to them as being
22 black men. And they were pumping gas at the same time he
23 was and made a comment that there was a case going on at
24 the Calhoun County courthouse, and these two gentlemen were
25 being targeted for allegedly -- as a result of their having

1 been involved in a bank robbery in Cameron, and that he had
2 heard it.

3 And he said that he -- he being Mr. Gladden -- he said
4 that as they began to, the jury began to talk about the
5 evidence and law enforcement, that he shared that
6 conversation with the other jurors. And that he, that the
7 gentlemen clearly, he didn't feel they had approached him.
8 They weren't talking to him, and he didn't feel threatened
9 in any way. But that he clearly had heard the
10 conversation, and that he clearly thought it had something
11 to do with this trial because the gentlemen talked in terms
12 of the case that was ongoing at the Calhoun County
13 courthouse. And that is the substance of the conversation.

14 Mr. Jeffries and Ms. Fryar, can you think of anything
15 to add?

16 MR. JEFFRIES: No. I would agree that was an accurate
17 rendition of what took place.

18 THE COURT: And Ms. Hinds?

19 MS. HINDS: I would absolutely agree.

20 THE COURT: And Mr. Brown?

21 MR. BROWN: I would agree.

22 THE COURT: All right. Yes, sir.

23 MR. JOHNSON: On behalf of my client, I agree as
24 well.

25 THE COURT: All right.

1 MR. JOHNSON: Your Honor, for the record I think I
2 just have an obligation just to object to my client not
3 actually being there at the time, although that was an
4 accurate rendition of what happened.

5 THE COURT: All right, sir. Of course that objection
6 wasn't made prior to my hearing from Mr. Gladden. But be
7 that as it may, be that as it may, there is a record of it
8 and if Mr. Spears at this juncture would like to hear the
9 recording, we have it. I'm delighted for him to hear it,
10 and you could raise anything additional. As you know, you
11 didn't ask -- you weren't allowed to ask any questions at
12 that point.

13 MR. JOHNSON: Right.

14 THE COURT: I was trying to ascertain ---

15 MR. JOHNSON: But, but ---

16 THE COURT: --- the information.

17 MR. JOHNSON: No, Your Honor, I'm not saying that --
18 he's okay with that. I just think just in procedure wise,
19 I think there's some, there's a requirement that the client
20 is actually present whenever they question jury or there's
21 a question from the jury. And since he wasn't there, I
22 think it would be malpractice on my part, and I should at
23 least note an objection. But, but what you renditioned is
24 exactly what happened.

25 THE COURT: Right.

1 MR. JOHNSON: And I did not object to it prior.

2 THE COURT: Right.

3 MR. JOHNSON: And I want to make that part of the
4 record.

5 THE COURT: Very well, all right, and again if Mr.
6 Spears wants to hear a recording of it, I'm happy for him
7 to hear it and to do that immediately.

8 Now, this is how I propose to proceed. I am going to
9 bring the jury out because they are now sitting back there,
10 and I'm going to tell them all that I do want them to stop
11 the deliberations at this time, and that I'm going to need
12 to speak with each of, with each of them briefly, and that
13 we'll get to them just as quickly as we can. Any objection
14 to me proceeding in that regard?

15 MR. JEFFRIES: None from the state, Your Honor.

16 THE COURT: All right. Ms. Hinds?

17 MS. HINDS: None, Your Honor.

18 THE COURT: And Mr. Johnson?

19 MR. JOHNSON: None, Your Honor.

20 THE COURT: Mr. Whaley, bring me the whole jury panel.
21 Counsel, if you want me to ask additional questions that I
22 don't, you approach, ask to approach, okay?

23 (THE JURY ENTERS AT 3:49 P.M.)

24 THE COURT: Ladies and gentlemen, I wanted to tell you
25 how we are now going to proceed. First of all, I do need

1 you to stop your deliberations at this time, and I'm going
2 to need to speak with each of you very briefly. And I
3 think when I have that opportunity to do, that will be very
4 evident, the purpose of my questioning, I think. What do
5 they say? It will be self-explanatory.

6 So, what I'm going to ask you to do is not -- of
7 course I don't want you to discuss these matters as we go
8 through this process with each other, if you will. Don't
9 deliberate, don't talk about this case, and don't discuss
10 this matter or anyone who has anything to do with it as we
11 go through this process.

12 What I am going to ask you to do is I'm going to ask
13 you at this point to step to your jury room and just, if
14 you will give me an opportunity to speak again with each of
15 you briefly.

16 Ms. Jones, you can remain as your presiding juror.
17 And, ladies and gentlemen, the remainders of you, if you
18 will please step to your jury room. And I know we're going
19 to have somebody want to smoke at some point, and that is
20 okay.

21 (THE JURY EXITS AT 3:51 P.M.)

22 *COURT'S INDIVIDUAL EXAMINATION OF JURORS*

23 THE COURT: And you are Ms. Rosella Jones?

24 JUROR: That's correct.

25 THE COURT: Our presiding juror. Ms. Jones, I will

1 begin by telling you the conversation and the information
2 that was relayed by Mr. Gladden has absolutely nothing to
3 do with these matters whatsoever. I ask is can you, A,
4 accept that and B, are you able to disavow that portion of
5 that conversation with Mr. Gladden and that information?
6 Are you able, you think, to disavow that from your mind?

7 JUROR: Yes, ma'am.

8 THE COURT: Do you believe that you would be able to
9 continue as a juror in this case and make up your mind
10 based upon the evidence in this case?

11 JUROR: Yes, ma'am.

12 THE COURT: The evidence in this case of course being
13 the testimony of the witnesses from the witness stand and
14 the exhibits admitted into evidence.

15 JUROR: Yes, ma'am, I intend to.

16 THE COURT: Very well, and is there any, do you have
17 any concern about your ability to do that?

18 JUROR: None whatsoever.

19 THE COURT: Thank you, Ms. Jones. I'm going to, just
20 so you know, as I speak to the other jurors, I am going to
21 ask them that if they have any concerns about their ability
22 to do that, meaning to make up their minds based solely on
23 the evidence in this case, if they are uncomfortable for
24 whatever reason telling me that, that they would give you a
25 note or tell you that and allow you to give me a note. So,

1 there will be that additional opportunity for them to begin
2 to share their concerns.

3 JUROR: Okay.

4 THE COURT: Thank you, Ms. Jones, and would you, do
5 you mind asking Ms. Jamison to please step back?

6 (THE JUROR EXITS THE COURTROOM.)

7 (A PAUSE.)

8 (JUROR #87 ENTERS THE COURTROOM.)

9 THE COURT: You're Ms. Jamison? You don't have to go
10 all the way, and you are Elizabeth Jamison, right?

11 JUROR: Yes, ma'am.

12 THE COURT: Ms. Jamison, did you hear the comment that
13 Mr. Gladden made?

14 JUROR: Uh-huh.

15 THE COURT: That's a yes?

16 JUROR: Yes.

17 THE COURT: All right. I would tell you, Ms. Jamison,
18 that the comment he relayed has got absolutely nothing to
19 do with this case whatsoever, so I will begin by telling
20 you that. And my question to you, Ms. Jamison, is whether
21 or not you believe that you can make up your mind based
22 solely on the evidence which has been brought out in this
23 courtroom from the witness stand, from those exhibits which
24 have been admitted into evidence? Do you believe that you
25 can make up your mind based solely on the evidence in this

1 courtroom?

2 JUROR: Yes, ma'am.

3 THE COURT: Do you believe that you can disavow the
4 comments that were made earlier?

5 JUROR: Yes, ma'am.

6 THE COURT: And disavow that from your mind?

7 JUROR: Yes, ma'am.

8 THE COURT: Very well. Ms. Jamison, this is what I'm
9 going to ask you to do. If you have a, if you are
10 concerned or in the next few minutes you have a concern, I
11 guess at any point in time during your deliberations if you
12 are uncomfortable telling me that, you can write a note or
13 you can certainly let Ms. Jones, your presiding juror, know
14 and she can write a note and let me know, okay?

15 JUROR: Okay.

16 THE COURT: Thank you, Ms. Jamison.

17 JUROR: Thank you.

18 THE COURT: Yes.

19 (THE JUROR EXITS THE COURTROOM.)

20 THE COURT: Mr. Buckman, John Buckman.

21 (JUROR #19 ENTERS THE COURTROOM.)

22 THE COURT: Hi, Mr. Buckman. You can sit anywhere,
23 Mr. Buckman.

24 JUROR: All right.

25 THE COURT: That's just fine. Mr. Buckman.

1 JUROR: Yes.

2 THE COURT: There was a comment made in the jury room
3 that had to do with information that was not a part of the
4 evidence in this case. Do you know of the statement of
5 which I speak?

6 JUROR: Very vaguely.

7 THE COURT: Very vaguely?

8 JUROR: I wasn't, I wasn't really paying much
9 attention.

10 THE COURT: Paying that much attention?

11 JUROR: Yes.

12 THE COURT: The comment, I believe, was made by Mr.
13 Gladden if that is helpful for you.

14 JUROR: Yes, yes.

15 THE COURT: All right, and my question to you, Mr.
16 Buckman -- first of all, I want to tell you that that
17 comment and that information has got absolutely nothing to
18 do with this case whatsoever. And I ask you if you believe
19 that despite that comment having been made, do you believe
20 that you could continue anew or even begin anew the
21 deliberations and make up your mind based upon the evidence
22 which has been presented in this courtroom from this
23 witness chair, as well as the exhibits which have been
24 admitted into evidence? Do you believe that you could do
25 that?

1 JUROR: Oh, yes, ma'am.

2 THE COURT: And could you do that and disavow that
3 comment and that information, that comment and disavow that
4 completely from your mind?

5 JUROR: Yes, ma'am.

6 THE COURT: All right, and again make up your mind as
7 though that comment had never been made?

8 JUROR: Yes, ma'am.

9 THE COURT: Mr. Buckman, thank you and what I'm going
10 to ask you to do is that for whatever reason, if you
11 realize that you cannot do that and that you cannot disavow
12 that comment from your mind, you can either tell me with a
13 note, or you can tell your presiding juror, and she will
14 give me a note. In other words, I hear what you're saying,
15 and I certainly take what you're saying. But if you should
16 determine otherwise during your deliberations, please feel
17 free to let me know that, all right?

18 JUROR: All right.

19 THE COURT: Thank you, sir. Thank you, and I'm
20 looking for Ms. Koffler. Thank you, Mr. Buckman.

21 (THE JUROR EXITS THE COURTROOM.)

22 (JUROR #106 ENTERS THE COURTROOM.)

23 THE COURT: You can sit anywhere, wherever you're
24 comfortable. Grab a chair, your chair.

25 JUROR: I'm sitting in my chair.

1 THE COURT: Ms. Koffler, there apparently, as I
2 understand it, there was a comment made in the jury room,
3 and it was from information that was received outside of
4 the courtroom. Do you know the comment of which I speak?

5 JUROR: Yes.

6 THE COURT: First of all, I will tell you that that
7 comment has got absolutely nothing to do with this case
8 whatsoever. Having said that, my question, Ms. Koffler, is
9 do you believe that you could either begin anew or continue
10 your deliberations in this case and make up your mind based
11 solely on the evidence in this courtroom, the evidence that
12 you've heard in this courtroom from the witness stand, from
13 the exhibits admitted into evidence?

14 JUROR: I do. I do think that.

15 THE COURT: And can you set that comment aside and
16 disavow it from your mind?

17 JUROR: I did after it was said.

18 THE COURT: All right. If you should, and I say this
19 in an abundance of caution, if you should find as you begin
20 the deliberations anew that you're having difficulty doing
21 that, you can write me a note. You can tell me. You can
22 tell your presiding juror and she will give me a note. In
23 other words, I just want you to know that should you find
24 that something else is happening and you're not able to do
25 that, you can certainly communicate that to me. Would you

1 be willing to do that?

2 JUROR: Yes, ma'am.

3 THE COURT: Thank you, Ms. Koffler.

4 (THE JUROR EXITS THE COURTROOM.)

5 THE COURT: And I will now send for Mr. Gibson.

6 BAILIFF: Mr. who?

7 THE COURT: L.B. Gibson, Gibson.

8 (JUROR #49 ENTERS THE COURTROOM.)

9 THE COURT: You take a seat anywhere. If you're comfy
10 there, you come on up here. Mr. Gibson, Mr. Gibson, there
11 was a comment that was made in the jury room that came from
12 information that wasn't received here in the courtroom,
13 wasn't evidence. Do you know the comment of which I speak?
14 I think it was made by Mr. Gladden.

15 JUROR: He said ---

16 THE COURT: Yes, I don't need to know what the comment
17 is, but do you know of which comment I speak?

18 JUROR: Yes, ma'am.

19 THE COURT: You know which one I'm talking about?

20 JUROR: Yes, ma'am.

21 THE COURT: First of all, Mr. Gibson, I will tell you
22 that that comment or that information has got absolutely
23 nothing to do with this case whatsoever; I would tell you
24 that to begin with. I will ask you this. Mr. Gibson, if
25 you think that you could continue or begin again your

1 deliberations, do you believe you can do that and make up
2 your mind based solely on the evidence which was received
3 here in the courtroom, the witnesses' testimony, the
4 exhibits admitted into evidence without any consideration?

5 JUROR: Yes, ma'am.

6 THE COURT: Of that comment?

7 JUROR: All right, sir, and do you believe that you
8 could really disavow that comment from your mind?

9 JUROR: Yes, ma'am.

10 THE COURT: All right and, Mr. Gibson, as you begin
11 anew your deliberations, if you got concerned about your
12 ability to set all that information, that comment aside,
13 you could either tell me, or you could give me a note, or
14 you could have your presiding juror give me a note to that
15 effect. Would you be willing to do that?

16 JUROR: Yes, ma'am.

17 THE COURT: Thank you, Mr. Gibson. Thank you so much.
18 Thank you, Mr. Gibson.

19 (THE JUROR EXITS THE COURTROOM.)

20 (JUROR #159 ENTERS THE COURTROOM.)

21 THE COURT: Hi. All right, now I'm talking to Ms.
22 Saxon. Hi, Ms. Saxon.

23 JUROR: Hi. How you doing? Do I need to come up
24 here?

25 THE COURT: You can sit there.

1 JUROR: Thank you.

2 THE COURT: You can sit here. You can stand. You can
3 do whatever you want.

4 JUROR: Okay.

5 THE COURT: Ms. Saxon, during the deliberations of the
6 jury, there was a comment that was made that came from
7 maybe information that wasn't received in the courtroom.
8 Didn't come from the witness stand, didn't come from the
9 exhibits admitted into evidence. Do you know the comment
10 of which I am speaking?

11 JUROR: Yes, ma'am.

12 THE COURT: First of all, Ms. Saxon, I will tell you
13 that comment has got absolutely nothing to do with this
14 case whatsoever. Bearing that in mind, I would ask you,
15 Ms. Saxon, continuing with the deliberations, do you think
16 that you could make up your mind based solely on the
17 evidence in this courtroom, the witnesses' testimony from
18 the witness stand, the exhibits admitted into evidence? Do
19 you believe you could make up your mind on the evidence and
20 set that comment completely aside?

21 JUROR: Yes, ma'am, because I didn't really hear the
22 comment. I was in the restroom at the time.

23 THE COURT: All right, very well. Ms. Saxon, would
24 you do this for me?

25 JUROR: Okay.

1 THE COURT: In the event as you begin the
2 deliberations anew, if you have some concerns about it or
3 some concerns about your ability to disavow that comment
4 completely from your mind, if you had any concerns about
5 that, I would tell you you could either tell me, you could
6 write me a note, you could have your presiding juror write
7 a note and say, you know, I'm really kind of concerned
8 about this. I ask. Would you be willing to do that?

9 JUROR: If you wanted me to write a note?

10 THE COURT: No. If you, as you begin your
11 deliberations, if you became concerned about your ability
12 to keep that comment completely out of your mind, and if
13 you became concerned that you weren't able to make up your
14 mind based solely on the evidence, if that happened to you
15 and you kept thinking about whatever, this comment outside
16 of the evidence, do you believe that you could let me know?

17 JUROR: Yes, ma'am.

18 THE COURT: Okay, and that's what I'm saying. You
19 could tell me. You could write me a note. You could have
20 your presiding juror write a note. Of course I would need
21 the note in the event that you became concerned about your
22 ability to make up your mind based solely on the evidence.

23 JUROR: Okay.

24 THE COURT: All right?

25 JUROR: All right.

1 THE COURT: Thanks, Ms. Saxon.

2 (THE JUROR EXITS THE COURTROOM.)

3 THE COURT: Next Mr. Gladden, Gladden.

4 (JUROR #51 ENTERS THE COURTROOM.)

5 THE COURT: Hi. Sit wherever, Mr. Gladden. Mr.
6 Gladden, I will begin by telling you, Mr. Gladden, that the
7 comment that you heard at the gas station has absolutely
8 nothing to do with this case whatsoever. I would begin by
9 telling you that. And I would ask of you, Mr. Gladden, do
10 you believe that if you were to continue deliberating that
11 you could set that comment or comments aside completely and
12 disavow it from your mind?

13 JUROR: Yes, ma'am.

14 THE COURT: Do you believe that in doing that, that
15 you could make up your mind based solely on the evidence
16 which has been presented in court?

17 JUROR: Yes, ma'am.

18 THE COURT: That of course is the witnesses, the
19 testimony from the witnesses.

20 JUROR: Yes, ma'am.

21 THE COURT: And any exhibits admitted into evidence.

22 JUROR: Yes, ma'am.

23 THE COURT: And, Mr. Gladden, if you became concerned
24 about your ability to do that, if it weighed on your mind
25 and you felt like you really weren't able to set it one

1 hundred percent aside, would you be willing to let me know
2 that?

3 JUROR: Yes, ma'am.

4 THE COURT: You could do that, Mr. Gladden, by telling
5 me. You could write a note. You could even ask your
6 presiding juror to write me a note and let me know that.
7 Could you do that?

8 JUROR: Yes, ma'am.

9 THE COURT: All right, and is there any question in
10 your mind, any concern in your mind at this time, Mr.
11 Gladden, that you could set that comment aside?

12 JUROR: Yes, ma'am.

13 THE COURT: You have, you have concerns about that?

14 JUROR: Yes, ma'am.

15 THE COURT: What is your concern?

16 JUROR: My concern is to, to make a decision, a right
17 decision.

18 THE COURT: All right, sir, and do you believe that
19 you can make up your mind based on the evidence in the
20 court?

21 JUROR: Yes, ma'am.

22 THE COURT: And what, what do you think you -- what
23 are you going to do about that information that you say
24 your heard this morning?

25 JUROR: Let it go. Forget about it.

1 THE COURT: Let it go? You feel like you can do that?

2 JUROR: Yes, ma'am.

3 THE COURT: Completely?

4 JUROR: Yes, ma'am.

5 THE COURT: Thank you, Mr. Gladden. Thank you so
6 much.

7 (THE JUROR EXITS THE COURTROOM.)

8 THE COURT: And I now need to talk to Ms. Haigler.

9 (JUROR #64 ENTERS THE COURTROOM.)

10 THE COURT: Hi, Ms. Haigler. You're fine there. You
11 can sit. You can stand. I just want you to be
12 comfortable.

13 JUROR: Okay.

14 THE COURT: Ms. Haigler, it is my understanding that
15 there was a comment made during the deliberation, and the
16 comment came from information outside the courtroom,
17 outside the evidence in the court. Do you know the comment
18 of which I speak?

19 JUROR: Just that something was said about...

20 THE COURT: Something was said?

21 JUROR: Uh-huh.

22 THE COURT: You don't even have to relate to me what
23 the comment was.

24 JUROR: Right.

25 THE COURT: But there was a comment?

1 JUROR: It was.

2 THE COURT: And I think Mr. Gladden was the gentleman
3 who made the comment.

4 JUROR: That's correct.

5 THE COURT: And, Ms. Haigler, first of all let me say
6 to you that comment has got absolutely nothing to do with
7 this case whatsoever. So, that would be the first thing I
8 would tell you. And I would ask you whether or not if you
9 were to continue your deliberation, do you believe that you
10 could disavow that comment from your mind completely?

11 JUROR: Yes.

12 THE COURT: And do you believe that going forward in
13 the deliberation room, do you believe that you could make
14 up your mind based solely on the evidence in this
15 courtroom, being the witnesses who testified and any
16 exhibits which were admitted into evidence?

17 JUROR: Yes.

18 THE COURT: And you could do that and disregard,
19 disavow that comment completely?

20 JUROR: Yes.

21 THE COURT: Ms. Haigler, I'm going to ask you this as
22 well. If you should find as your begin your deliberations
23 that you are not able to do that, would you be willing to
24 let me know that?

25 JUROR: Yes.

1 THE COURT: I would tell you that you could do that.
2 You could just say I've got to go talk to the judge, or you
3 could give me a note, you could tell your presiding juror
4 and she could give me a note. Would you be willing to do
5 that?

6 JUROR: Yes.

7 THE COURT: Very good. Thank you, Ms. Haigler. Thank
8 you.

9 (THE JUROR EXITS THE COURTROOM.)

10 THE COURT: And I need to speak to Mr. Stanfield.

11 (JUROR #171 ENTERS THE COURTROOM.)

12 THE COURT: Hi. You can either sit or stand.

13 (A PAUSE.)

14 THE COURT: How are you, Mr. Stanfield?

15 JUROR: Fine.

16 THE COURT: Mr. Stanfield, it is my understanding that
17 during the deliberations that there was a comment that was
18 made based upon information outside the courtroom that came
19 from somewhere else. Do you know the comment of which I
20 speak?

21 JUROR: Yes, ma'am.

22 THE COURT: I think it came from Mr. Gladden.

23 JUROR: Yes.

24 THE COURT: All right and, Mr. Stanfield, first of all
25 I would tell you that that comment has got absolutely

1 nothing to do with this case whatsoever. So, I would tell
2 you that, and I would ask you this question. Mr.
3 Stanfield, do you believe that you could set aside
4 completely that comment and disavow it from your mind?

5 JUROR: I already have.

6 THE COURT: And do you believe that going forward with
7 the deliberations that you could make up your mind based
8 solely on the evidence in this court, the witnesses and any
9 exhibits which were admitted into evidence?

10 JUROR: Yes.

11 THE COURT: Mr. Stanfield, if during the
12 deliberations, if you had concerns that you weren't able to
13 disavow the comment from your mind, would you be willing to
14 let me know that?

15 JUROR: Yes.

16 THE COURT: I would tell you that you could do that.
17 You could just say I've got to go talk to the judge, or you
18 could give me a note, or you could have Ms. Jones, your
19 presiding juror, give me a note, okay?

20 JUROR: Okay.

21 THE COURT: Thank you, Mr. Stanfield.

22 (THE JUROR EXITS THE COURTROOM.)

23 THE COURT: I need Mr. Cumbee, Cumbee, Mr. Julian
24 Cumbee.

25 (JUROR #37 ENTERS THE COURTROOM.)

1 THE COURT: Mr. Cumbee, how are you?

2 JUROR: Fine. How are you?

3 THE COURT: Listen, court reporters have the most
4 unusual looking microphones in the whole wide world.

5 JUROR: Okay.

6 THE COURT: Mr. Cumbee, it is my information that
7 there was a comment made during your deliberations that
8 came from information outside the courtroom. Do you know
9 of the comment that I make ---

10 JUROR: Yes, ma'am.

11 THE COURT: --- mention of? I think it came from Mr.
12 Gladden.

13 JUROR: Yes, ma'am.

14 THE COURT: Mr. Cumbee, do you believe -- first of all
15 I would tell you that that comment, that comment has got
16 absolutely nothing to do with this case whatsoever. I
17 would tell you that to begin with. And secondly I would
18 ask you if you thought going forward that you could dismiss
19 that comment and disavow it from your mind?

20 JUROR: I have no problem with that.

21 THE COURT: All right, sir. Do you believe going
22 forward that you could make up your mind based solely on
23 the evidence in this courtroom, the witnesses' testimony
24 and the exhibits which have been admitted into evidence?

25 JUROR: Yes, ma'am.

1 THE COURT: Mr. Cumbee, if going forward you learned,
2 you discovered that you were not able to do that, would you
3 be willing to let me know that?

4 JUROR: Absolutely.

5 THE COURT: I would tell you, you say I've got to go
6 talk to the judge, or you could write me a note, or you
7 could have Ms. Jones write me note in that event, okay?

8 JUROR: Sure.

9 THE COURT: Thank you, Mr. Cumbee.

10 (THE JUROR EXITS THE COURTROOM.)

11 THE COURT: And I'm looking for Ida Pondexter-Snider.

12 (JUROR #147 ENTERS THE COURTROOM.)

13 THE COURT: Hi, Ms. Pondexter-Snider.

14 JUROR: Yes, ma'am.

15 THE COURT: And you're fine right there. Ms. Snider,
16 there was a comment, I understand, that was made during the
17 deliberation that came from information received outside
18 the court proceedings. Do you know comment of which I
19 speak? I think Mr. Gladden made the comment.

20 JUROR: Yes, ma'am.

21 THE COURT: All right, and I would tell you, ma'am,
22 that that comment has got absolutely nothing to do with
23 this case whatsoever, and I would ask you this. Do you
24 believe, going forward in deliberations, do you believe
25 that you could disavow that comment completely and take it

1 and place it completely out of your mind?

2 JUROR: Yes, ma'am.

3 THE COURT: And do you believe, going forward, that
4 you could make up your mind based solely on the witnesses
5 who testified and the exhibits that were admitted into
6 evidence?

7 JUROR: Yes, ma'am.

8 THE COURT: Ms. Snider, if you began your
9 deliberations anew and you learned that you couldn't set
10 that comment aside, that it stayed in your mind, would you
11 be willing to let me know?

12 JUROR: Yes, ma'am.

13 THE COURT: You could do that, Ms. Snider, by either
14 saying I've got to go talk to the judge, or you could give
15 me a little note to that effect, or you could get Ms.
16 Jones, your presiding juror, to give me a note, okay?

17 JUROR: Yes, ma'am.

18 THE COURT: Thank you, Ms. Snider. Thank you.

19 (THE JUROR EXITS THE COURTROOM.)

20 THE COURT: Ms. Donna Lloyd.

21 (JUROR # 113 ENTERS THE COURTROOM.)

22 THE COURT: Ms. Lloyd, hi, Ms. Lloyd. You're fine
23 right there wherever you want to.

24 JUROR: Wherever.

25 THE COURT: Ms. Lloyd, it is my understanding that

1 there was a comment that was made during the deliberations
2 that arose out of some information perhaps outside the
3 court and the court's proceedings. Do you know the comment
4 of which I speak?

5 JUROR: Yes.

6 THE COURT: Made by Mr. Gladden, I think?

7 JUROR: Yes.

8 THE COURT: All right. I will tell you first of all,
9 that comment has got absolutely nothing to do with this
10 case whatsoever. I would tell you that to begin with, and
11 then I would ask. Going forward in the deliberations, do
12 you believe that you could disavow and take that comment
13 completely from your mind?

14 JUROR: Yes.

15 THE COURT: And do you believe going forward that you
16 could make up your mind based solely, based only on the
17 witnesses' testimony, who testified, the competent
18 testimony that you have heard, and the exhibits which have
19 been admitted into evidence?

20 JUROR: Yes.

21 THE COURT: I would ask this of you, Ms. Lloyd. If
22 when you began your deliberations anew, if you learned that
23 you couldn't for whatever reason keep that comment out of
24 your mind and believe that, in fact, you were still
25 considering that, would you be willing to let me know that?

1 JUROR: Yes.

2 THE COURT: I will tell you that you could do that a
3 couple of ways if that happens. You could say I've got to
4 go talk to the judge and you could tell me. You could
5 certainly write me a little note and let me know, or you
6 could tell Ms. Jones, your presiding juror, and she would
7 give me a note. So, do you understand that you could
8 certainly let me know that?

9 JUROR: Yes.

10 THE COURT: Thank you, Ms. Lloyd. Thank you so much,
11 and you may step to your jury room.

12 (THE JUROR EXITS THE COURTROOM.)

13 (END OF JUROR CONFERENCES.)

14 THE COURT: First of all, are there any objections --
15 let me reverse it. Are there any motions before the court
16 at this time from the state?

17 MR. JEFFRIES: None from the state, Your Honor.

18 THE COURT: On behalf of Mr. Bantan?

19 MS. HINDS: Yes, ma'am.

20 THE COURT: Yes.

21 MS. HINDS: Your Honor, we would move for a mistrial.

22 THE COURT: Yes, ma'am.

23 MS. HINDS: I think all we've done is confirm that the
24 entire jury panel has been tainted by that comment. I
25 think that as human beings, even though I think they would

1 make an attempt not to, to think about that at all and to
2 disavow it, I think it's very, very difficult to leave
3 those things out.

4 They've heard something that is clearly prejudicial.
5 They've heard something that we've all been dancing around
6 from the beginning of this trial trying not to have happen,
7 and the very worst has happened. I think that the
8 prejudice is so severe that it cannot be cured.

9 And I would say in addition to that we've got a
10 cumulative, cumulative effect of two other mistrial motions
11 when we had statements made or statements come in again
12 that were prejudicial to the client, to my client. This is
13 the third time now. I just don't think that -- I think by
14 itself it would be prejudicial enough to grant a mistrial.
15 I think in addition to that we've got the other two
16 motions, the other evidence that's been mentioned in court
17 when it should not have been.

18 And in addition to that, I'm a little concerned about
19 the one juror. I think it was Ms. Saxon who stated that
20 she couldn't really hear the comment or only heard a little
21 bit because she was in the restroom. Why are they
22 deliberating if she's in the restroom? Your Honor, for all
23 those reasons, we'd ask for a mistrial.

24 THE COURT: Mr. Johnson.

25 MR. JOHNSON: Thank you, Your Honor. Your Honor, I

1 concur with co-defendant's counsel. I won't go over the
2 same issues, but note their, those issues are my issues as
3 well.

4 I also made a note of that, Your Honor. When you
5 questioned one of the jury members, she stated -- I think
6 Ms. Saxon. Ms. Saxon said that she was actually in the
7 bathroom, which means she wasn't in the room when they were
8 deliberating.

9 We've had the other motions concerning this trial.
10 The prejudicial effect, I mean, we did everything we could
11 to make sure that that didn't become part of this case
12 because of the effect it could have on the jury, and now
13 the jury have it. Even though you have given them
14 instructions, I don't think that that cure, what they heard
15 and what they would keep in their mind, and it's too big of
16 an issue, I think, to be cured by a curative instruction,
17 and we request a mistrial.

18 MS. FRYAR: Yes, sir. Thank you. Yes, sir.

19 MR. JEFFRIES: Thank you, Your Honor. What's ironic
20 is is that I'll agree we've had these other two mistrial
21 motions but, in fact, based on what each and every one of
22 these jurors said as to this comment, it's far more
23 prejudicial to the state. The comment was made that these
24 individuals were targeted by law enforcement. It came in
25 the context that law enforcement somehow being prejudicial

1 towards these individuals and that they were targeted
2 because of the prior incident. It's far more prejudicial
3 to the state.

4 Having said that, a curative instruction they've been
5 given is more than adequate. I have case law where much
6 more prejudicial things have gone to a jury. They've heard
7 testimony where they weren't supposed to in a drug case, an
8 error in testimony that there were drugs found that didn't
9 relate to what they were charged with. The death penalty
10 case that Your Honor tried, State vs. Bowman, where the
11 state intentionally inserted potential error when they
12 asked whether the defense escaped in a capital, speaking,
13 you know, to his custody on death row, which clearly
14 prejudiced the defense in that case, and that was cured by
15 jury instruction. This doesn't come anywhere near that.

16 Again, it's, if there's prejudice based on what they
17 hear, it's prejudice against state. We're willing to go
18 forward. We think the curative instruction takes care of
19 it. We feel like the record is protected. We feel like
20 this case should go forward, Your Honor.

21 MS. HINDS: Your Honor, just for the record, I don't
22 know that we know where the prejudice might lie. I think
23 he's making an inference that it would be more prejudicial
24 to the state, but I don't necessarily agree with that. We
25 don't know how those jurors might be interpreting that

1 comment, or how they might be taking it, and I do feel
2 that's it's prejudicial to my client.

3 MR. JEFFRIES: Your Honor, just from a procedural
4 issue, this -- I mean, first of all, I think if you're
5 going to object and ask for a mistrial, you have to first
6 object to the curative instruction. In this case, we've
7 already heard the curative instruction given to the jurors.
8 You can't ask then ask for a mistrial after the curative
9 instruction. Your objection has to be that the curative
10 instruction is inadequate in some way. That's my
11 understanding of the procedure.

12 THE COURT: I understand. No, no, and I do understand
13 exactly what you're saying, Mr. Jeffries. But there isn't
14 any question but that I was absolutely well aware that the
15 defense counselors intended -- in fact, made -- as we were
16 discussing a mistrial motion. And I do understand your
17 concern it wasn't done at that point. That certainly
18 wouldn't be fair because I absolutely knew that you all
19 were making a motion for a mistrial. And so I wouldn't
20 want the fact that I went forward with my examination and
21 curative instruction at the same time to keep you from
22 being able to have made that procedurally, but no question
23 I was aware that you all were doing that.

24 Now, this is what I think. This is what I think. I
25 think that, and of course I've had an opportunity to

1 observe each and every one of these jurors, to include Mr.
2 Gladden, and that I am very satisfied with their demeanor
3 from my ability to observe them that while they all heard
4 the comment, that their ability to disavow it can be done.
5 And if it cannot be done, I have certainly told them that
6 they have several avenues to communicate that to me. And
7 at that point, I certainly could reconsider any motions at
8 that point. But I am well satisfied with the jury
9 responses, observing and watching them in noting their
10 willingness to go forward.

11 I would also say that with regards to Ms. Sexton about
12 her stating she was in the restroom, I'm not so sure what
13 she was telling me. I think maybe she was trying to
14 explain why she was without any knowledge whatsoever about
15 the comment at all and she thought maybe, maybe I was in
16 the bathroom. Maybe she wasn't listening. But I think
17 she was trying to give me some basis about why she hadn't
18 heard it at all. So, I'm not concerned at this juncture
19 that the jury was not following my instruction insofar as
20 the deliberation is concerned as much as she was just
21 trying to figure out why in the world she didn't hear the
22 comment and tried to give me some explanation for that.
23 So, I'm not troubled by that.

24 So, I note the exception of Mr. Bantan and Mr. Spears.
25 I think that the jury had a curative instruction. I have

1 done an inquiry of them, and I am satisfied that they can
2 disavow that comment. And I am going to ask them to
3 return, and I'm going to ask them to please continue with
4 their deliberations. And I do note the exception of both
5 Mr. Bantan and Mr. Spears to my going forward and to the
6 ability of the curative instruction to cure as well as the
7 curative instruction itself. Let me have the jury come
8 back.

9 (THE JURY ENTERS AT 4:30 P.M.)

10 THE COURT: Ladies and gentlemen, at this time I am
11 going to ask you to please retire to your jury room and
12 continue your deliberations with the instructions, of
13 course, that each of you have with regards to the comment.
14 You are to disavow that completely from your mind and make
15 up your mind based upon the evidence in this courtroom,
16 that being the competent testimony which was received from
17 the witness stand, as well as any of the exhibits admitted
18 into evidence which you now have in your jury room.

19 If you would, please retire to your jury room and
20 continue your deliberations, remembering, of course, that
21 in order for you to deliberate, all twelve of you must be
22 present. If you need to take a break, stop your
23 deliberations, take your break, and renew your
24 deliberations when all twelve of you are together again.
25 If you will, please retire to your room.

1 (THE JURY EXITS AT 4:31 P.M.)

2 THE COURT: All right, anything further from the state
3 at this time?

4 MR. JEFFRIES: Your Honor, I'd just ask that you'd
5 allow me to submit the case law that I was referring to off
6 the record.

7 THE COURT: Oh, listen, I have State vs. Bowman.

8 MR. JEFFRIES: I figured you did.

9 THE COURT: Absolutely. Thank you. Thank you, Mr.
10 Jeffries. It's interesting. The one I was looking for was
11 Judge Clary's capital case where the pamphlets came in was
12 the one that I always think of as the seminal case. I had
13 forgotten about that issue coming up in my own, but it
14 certainly did.

15 All right, yes, and, Ms. Hinds?

16 MS. HINDS: Nothing further.

17 THE COURT: And Mr. Johnson?

18 MR. JOHNSON: Your Honor, just for the record, I
19 disagree with the Bowman case he put forward. I had Mr.
20 Bowman. That was PCR for a death penalty. I represent Mr.
21 Bowman now, and that case has really not really been
22 settled yet.

23 THE COURT: Well, let me just say this, and that's why
24 I was -- and there again, that's why I was looking at Judge
25 Clary's case.

1 MR. JOHNSON: Thank you, Your Honor.

2 THE COURT: Thank you, Mr. Johnson, all right, and we
3 will continue in recess until we hear from our jury.

4 (OFF THE RECORD.)

5 THE COURT: It is my understanding the jury has
6 reached its verdict. Bring them in.

7 (THE JURY ENTERS AT 5:12 P.M.)

8 THE COURT: I find that the verdict is in due order,
9 and you may publish it. Thank you.

10 CLERK OF COURT: Mr. Bantan, Mr. Spears, would you
11 please stand for me? In the case of the State vs. Titus
12 Abraham Bantan as to the charge of armed robbery, we the
13 jury unanimously find the defendant, Titus Abraham Bantan,
14 guilty. As to the charge of kidnapping, we the jury
15 unanimously find the defendant, Titus Abraham, guilty. As
16 to the charge of possession of a firearm or knife during
17 the commission of a crime of a violent -- of violence, we
18 the jury unanimously find the defendant, Titus Abraham
19 Bantan, guilty.

20 As to in the case of the State vs. Phillip Lee Spears
21 as to the charge of armed robbery, we the jury unanimously
22 find the defendant, Phillip Lee Spears, guilty. As to the
23 charge of kidnapping, we the jury unanimously find the
24 defendant, Phillip Lee Spears, guilty. As to the charge of
25 possession of a firearm or knife during the commission of a

1 crime of violence, we the jury unanimously find the
2 defendant, Phillip Lee Spears, guilty.

3 Ms. or Madame Juror and ladies and gentlemen of the
4 jury, if that be your verdict, please indicate by raising
5 your right hand.

6 (THE JURORS COMPLY.)

7 THE COURT: Let the record reflect that all of our
8 jurors have their right hands raised. All right, anything
9 from the state before ---

10 MR. JEFFRIES: Nothing from the state, Your Honor.

11 THE COURT: --- we dismiss the jury? From Mr. Bantan?

12 MS. HINDS: Your Honor, we would request that the jury
13 be polled.

14 THE COURT: Very well.

15 MR. JOHNSON: We second that.

16 CLERK OF COURT: Ms. Presiding Juror, was this your
17 verdict and is this still your verdict, and please answer
18 in an audible voice.

19 JUROR: Yes, it is.

20 CLERK OF COURT: Is, was this your verdict, and is
21 this still your verdict?

22 THE COURT: I tell you what, Claudia. Why don't you
23 do the names.

24 CLERK OF COURT: Call them? Okay.

25 THE COURT: Yes, just call their names. And just

1 stand when your name is called, please.

2 CLERK OF COURT: Ms. Elizabeth Jamison, please stand
3 for me. Was this your verdict, and is this still your
4 verdict?

5 JUROR: Yes.

6 CLERK OF COURT: Mr. John Buckman, was this your
7 verdict, and is this still your verdict?

8 JUROR: Yes.

9 CLERK OF COURT: Ms. Joyce Koffler, was this your
10 verdict, and is it still your verdict?

11 JUROR: Yes, ma'am. CLERK

12 OF COURT: Mr. L.D. Gibson, was this your verdict,
13 and is this still your verdict?

14 JUROR: Yes.

15 CLERK OF COURT: Ms. Kathy Saxon, was this your
16 verdict, and is this still your verdict?

17 JUROR: Yes.

18 CLERK OF COURT: Mr. Bernard Gladden, was this your
19 verdict, and is it still your verdict?

20 JUROR: Yes.

21 CLERK OF COURT: Ms. Tina Haigler, was this your
22 verdict, and is this still your verdict?

23 JUROR: Yes.

24 CLERK OF COURT: Mr. Furman Stanfield, was this your
25 verdict, and is this still your verdict?

1 JUROR: Yes, ma'am.

2 CLERK OF COURT: Mr. Julian Cumbee, was this verdict,
3 was this your verdict, and is it still your verdict?

4 JUROR: Yes, ma'am.

5 CLERK OF COURT: Ms. Ida Pondexter-Snider, was this
6 your verdict, and is it still your verdict?

7 JUROR: Yes, ma'am.

8 CLERK OF COURT: Ms. Donna Lloyd, was this your
9 verdict, and is it still your verdict?

10 JUROR: Yes.

11 THE COURT: Ms. Hinds, anything further at this time?

12 MS. HINDS: Your Honor?

13 THE COURT: Before we dismiss the jury.

14 MS. HINDS: No, Your Honor.

15 THE COURT: All right. Yes, sir, Mr. Johnson.

16 MR. JOHNSON: I have nothing further, Your Honor.

17 THE COURT: Very well. Ladies and gentlemen, I want
18 to thank you for your service on this jury. You've been
19 with us now, what, eight days, nine days, and I am so
20 grateful to each and every one of you.

21 I think I did make a comment when we were together on
22 Monday how absolutely attentive you have been. I am so
23 grateful to you. That initial instruction is a little bit
24 of a new one for me when it says do not let your thoughts
25 wander, but give the strictest attention to these matters

1 so that at the end of all of the evidence, you will be in a
2 position to deliberate. You all have paid attention and no
3 matter if it was before lunch or after lunch, you did give
4 the strictest attention to these matters. And I am so
5 grateful that you did so.

6 Let me give you a little bit of further instruction,
7 and it really is this. The practice of law is an art and
8 not a science, and sometimes lawyers will contact you as
9 they learn their practice. If you are willing to talk
10 about this manner, that is perfectly fine. When you go
11 home tonight and whoever has been very, very curious, if
12 they are curious tonight, the only thing I could say is
13 that maybe you want to say take me to dinner and I'll tell
14 you all you want to hear. But you are at liberty now to
15 talk about this case if you choose to do so.

16 Ladies and gentlemen, if these lawyers happen to
17 contact you because again they want to know how to do what
18 they do better and you are comfortable talking to them,
19 fine. If not, just tell them. They're not going to
20 persist.

21 Let me share with you, though, that sometimes there
22 can be, sometimes students find out folks served on a jury
23 and they will be doing a study or whatever. And sometimes,
24 and let me share with you that it is extraordinarily rare,
25 maybe in ten years arguably, there was a situation where

1 there was someone who was a little more persistent when a
2 juror said I don't want to talk to you about it. The only
3 reason that I mention it at all is that should you find
4 yourself in that circumstance, you call Ms. Claudia Pauling
5 or you call your Clerk of Court, Ken Hasty. And they will
6 contact me and I will be happy to intercede on your behalf
7 because if you do not wish to talk about it, I'm not going
8 to have anybody bothering you about it. Sure hope it ain't
9 your spouse or significant other, though, ladies and
10 gentlemen.

11 And, Ms. Claudia, do you do the things for work today,
12 or do you send it to them or both or neither?

13 CLERK OF COURT: I probably could do it tomorrow if
14 anybody needs one in the morning.

15 THE COURT: In the morning if anybody needs it, she
16 will get that for you. Otherwise, it will come in the mail
17 to you. But if you need it and you've got a particular
18 difficulty, just chat with her on your way out, and I'm
19 sure she will look after you.

20 Let me remind you that you have well earned your juror
21 exemption up for the next three years, two years after this
22 year. You are not eligible to serve on jury in a court
23 record for the balance of 2007, but you have an exception
24 for 2008 and 2009 in a court of record in the event that
25 you choose to exercise that exemption. So, I share that

1 and remind that. You may not remember way back when we did
2 the jury qualification.

3 I will tell you that it certainly has been an honor
4 and a privilege to serve with you all. And should our
5 paths cross again, it would likewise be an honor and a
6 privilege in the future.

7 Let me tell you how we are going to be proceeding for
8 your informational purposes. There may be some motions
9 that I will hear, and then we will have sentencing. You
10 are a member of the public. Ofttimes jurors wish to
11 remain. If you wish to remain, keep your seat. If you
12 wish to go, then you are at your leisure to go when you
13 wish. And just know that you take with all of us involved
14 with the court system, you take our appreciation and our
15 gratitude because to our system you have given so much of
16 your dear and precious time. And I am so grateful to you
17 for it, as we all are. And again thank you, and your jury
18 service is now ended. Again, if you wish to remain for the
19 proceedings, you are more than welcome. And you can just
20 keep your seats, or you are free to go. Thank you, ladies
21 and gentlemen.

22 (THE JURY EXITS AT 5:21 P.M.)

23 THE COURT: Ms. Hinds, motions?

24 MS. HINDS: Your Honor, I would move at this time to
25 renew all our prior motions on the same basis. We also

1 move for a judgement notwithstanding the verdict, and in
2 the alternative, a new trial.

3 THE COURT: Thank you, Ms. Hinds. On the basis of the
4 prior rulings, each and every one, I would deny your
5 motions, noting your exception thereto. I think that there
6 was evidence before the jury for the jury to have found as
7 it did, but the other motions that were made over the
8 course of the trial, I would simply reiterate the rulings
9 as I stated throughout the course of the trial, noting your
10 exception thereto.

11 MS. HINDS: Thank you, Your Honor.

12 MR. JOHNSON: Your Honor, on behalf of Mr. Spears, I'd
13 like to also make a motion to renew all prior motions heard
14 before the court, those associated with the co-defendant as
15 well as those made separately by himself.

16 Also, we request judgement notwithstanding the
17 verdict. We do not feel there was evidence sufficient
18 enough, and we'd ask the court to consider that in this
19 matter.

20 THE COURT: Thank you, Mr. Johnson, and on the same
21 basis I would likewise respectfully deny your motions. I
22 would reiterate the rulings throughout the trial and would
23 find that there was evidence for the jury, for the jury to
24 find as it did, noting your exception thereto.

25 All right, you all finishing the sheets for me?

1 MS. FRYAR: Yes, ma'am.

2 MR. JOHNSON: Your Honor.

3 THE COURT: Yes.

4 MR. JOHNSON: There is one matter I actually think we
5 need to make part of the record.

6 THE COURT: Sure.

7 MR. JOHNSON: It's my understanding that a conviction
8 for armed robbery and kidnapping, or for kidnapping/armed
9 robbery, under the sentencing guidelines it's mandatory
10 that they be placed on the sexual registry unless there is
11 an affirmative finding by the court that this was not a
12 sexually related incident. And I need to make sure that
13 that's placed, that there is no evidence of any sexual-
14 related incidents here. And we ask that that be made a
15 part of the sentencing sheet.

16 MR. BROWN: And we would likewise concur.

17 THE COURT: Yes, I do understand. On behalf of the
18 state, you wish to be heard?

19 MR. JEFFRIES: We don't, Your Honor. We leave it to
20 the court's discretion.

21 THE COURT: Yes. There isn't, there is no evidence of
22 any conduct of a sexual nature, and I would so indicate.

23 (A PAUSE.)

24 THE COURT: All right, if y'all would bring your
25 clients around, please. And of course, Mr. Jeffries, if

1 any or all of the victims wish to speak, I am of course
2 certainly happy to hear from them. And who will give me
3 the record of Mr. Bantan and then of Mr. Spears?

4 MR. JEFFRIES: Thank you, Your Honor. May it please
5 the court?

6 THE COURT: Yes, sir.

7 MR. JEFFRIES: I've been consulting my victims; none
8 of them want to make any statement to the court. The court
9 is well aware they've been here all week, testified in
10 trial and have been present during the entire trial. Your
11 Honor, with that said, you've heard all the facts in this
12 case, so I'm not going to go into that.

13 As to Mr. Titus Bantan, his criminal history as I know
14 it is a 1996 conviction for malicious injury to personal
15 property; 2002 public disorderly conduct; and in the State
16 of New York, possession of marijuana in 2002.

17 THE COURT: All right, how about Mr. Spears?

18 MR. JEFFRIES: Mr. Spears's record is a 2003 resisting
19 arrest and assault while resisting arrest, and that's from
20 South Carolina. And from the State of New York, he has a
21 conviction in 1994 for robbery and resisting arrest; 1995
22 conviction for criminal mischief; 2006 possession of a
23 weapon conviction. And last year in Orangeburg, I believe
24 he was convicted of some drug charges. I'm not absolutely
25 sure what he was convicted of as far as that.

1 Your Honor, as you've also heard, Mr. Spears escaped
2 from this courthouse at some point in time. I believe --
3 I'm not sure when that was. I'm not sure if he was
4 convicted of that. But that's some of what we've been told
5 about his history.

6 THE COURT: Okay, all right. All right. Yes, ma'am,
7 Ms. Hinds.

8 MS. HINDS: Your Honor, on behalf of Mr. Bantan, you
9 heard from the testimony he's a young man with two small
10 children. As to his record, you heard from the solicitor
11 basically a very minimal record and certainly nothing that
12 would show any kind of propensity for violence or anything
13 of that nature.

14 With respect to the jury's decision, we would just
15 like to reiterate Mr. Bantan would like the court to know
16 he still maintains his innocence. So, we will just leave
17 it at that.

18 I would like to bring to court's attention he was
19 incarcerated for a good bit of time from when he was
20 arrested on November 6th until I believe some time in May.
21 So, he spent approximately seven months in jail. He then
22 did bond out and then was reincarcerated on August 27th, I
23 believe, and obviously until the present day. Of course we
24 would ask for credit for all the time he has served.

25 MR. JEFFRIES: Your Honor, I apologize. I believe I

1 misspoke when I said that Mr. Spears was convicted of some
2 drug charges. That was actually Mr. Bantan who was
3 convicted of the drug charges. They stem from the arrest
4 at his home at [REDACTED] as was heard in this
5 courtroom at the same time as these charges. But that was
6 not Mr. Spears. Mr. Spears did not have that drug charge
7 in 2006.

8 THE COURT: Okay. I'm sorry, go ahead, Ms. Hinds.

9 MS. HINDS: That would be it, Your Honor. We would
10 ask for the court's mercy.

11 THE COURT: Mr. Johnson, let me hear from you on
12 behalf of Mr. Spears.

13 MR. JOHNSON: Thank you, Your Honor. On behalf of Mr.
14 Spears, I'm glad that was cleared up; we was concerned
15 about the drug charges they have.

16 THE COURT: Sure.

17 MR. JOHNSON: And far as related to any escape from
18 court or anything of that nature, Your Honor, he never
19 charged or found guilty of that charge. We'd ask the court
20 not to consider that as well.

21 My client is thirty, thirty, thirty-one years old. He
22 was working and employed in North Carolina at the time of
23 his arrest. He's been incarcerated since November of 2006.
24 We would ask the court to consider the time, credit for the
25 time he's been incarcerated. He has no children. He was

1 living at the time in North Carolina. He's a, he's a high
2 school graduate.

3 I have talked with my client, who's asked me to
4 address the court. Once again, Your Honor, we ask that the
5 court consider his age, consider the different factors such
6 as mitigating factor in setting his sentence, and we ask
7 any type of mercy that the court may consider.

8 THE COURT: Thank you, Mr. Johnson.

9 MR. JOHNSON: And then, Your Honor, and my client
10 reminds me that he, he's still relating, he still states
11 that he feels that he is, that he is innocent. He's
12 innocent and he knows he's been found guilty, but he wanted
13 to make the court know that he still holds his innocence.

14 THE COURT: All right, does anyone know any reason why
15 I should not at this time pass sentence on the defendants?

16 SENTENCE OF THE COURT:

17 THE COURT: All right, with regards to 2007-GS-09-218,
18 which is an indictment for possession of a weapon during a
19 violent crime, Mr. Bantan, I am going to commit you to the
20 State Department of Corrections for a period of five years.
21 With regards to the armed robbery indictment, 07-GS-09-
22 0004, Mr. Bantan, I am going to commit you to the State
23 Department of Corrections for a period of thirty years.
24 With regards to 07-GS-09-220, which is an indictment for
25 kidnapping -- first of all I find that this offense did not

1 involve a sexual offense or attempted sexual offense. I am
2 going to commit you to the State Department of Corrections
3 for a period of thirty years. These sentences will run
4 concurrent, and you are to be given credit for all the time
5 that you have served.

6 Mr. Spears, with regards to 2007-GS-09-219, which is
7 an indictment for possession of a firearm, knife during the
8 commission of a crime of violence, I am going to commit you
9 to the State Department of Corrections for a period of five
10 years. With regards to 07-GS-09-221, which is the
11 indictment for kidnapping, I am going to find that this
12 offense did not involve a sexual offense nor attempted
13 sexual offense, and I am going to sentence you, commit you
14 to the State Department of Corrections for a period of
15 thirty years. With regards to 07-GS-09-148, which is an
16 indictment for armed robbery, I am going to commit you to
17 the State Department of Corrections for a period of thirty
18 years. These sentences will run concurrent, all of them,
19 and you will receive credit for the time that you have
20 served.

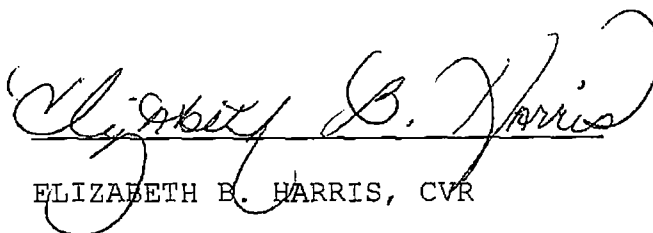
21 Good luck to you.

22 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR CALHOUN COUNTY, SOUTH CAROLINA, ON
THE 1ST, 2ND, 3RD, 4TH, 8TH, 10TH DAYS OF OCTOBER,
2007.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.


ELIZABETH B. HARRIS, CVR

COLUMBIA, SOUTH CAROLINA

MAY 31ST, 2008

10-2-07
5:15 PM

STRIKING JURORS

Fryar X 1113
Bantan X
Spears X

NO.	NAME	RACE/SEX	JUROR NO	
1.	Kenneth Keels	WM	95	BX
2.	Elizabeth Jamison	BF	87	Seated
3.	Marcia Kolberg	WF	107	BX
4.	Shirley S. Wilson	WF	194	SX
5.	Ronald Houck	WF	82	BX
6.	John H. Buckman	BM	19	Seated
7.	Katina Pondexter	BF	146	BX
8.	Joyce Koffler	WF	106	Seated
9.	Gilbert Strock	WM	176	BX
10.	Crystal Hewitt	WF	76	FX
11.	L. D. Gibson	BM	49	Seated
12.	Kathy Saxon	BF	159	Seated
13.	Bernard Gladden	BM	51	Seated
14.	Joy Lawson	WF	112	BX
15.	Jimmy L. Mitchell	WM	132	SX
16.	James H. Hampton	BM	66	FX
17.	Artie Cokley	BM	31	BX
18.	Rosella S. Jones	BF	93	Seated
19.	Tina P. Haigler	WF	64	Seated
20.	Furman L. Stanfield	WM	171	Seated

STRIKING JURORS

NO.	NAME	RACE/SEX	JUROR NO	
21.	Julian L. Cumbee	WM	37	Seated
22.	Ida Pondexter-Snyder	BF	147	Seated
23.	Daniel Bolin	WM	12	SX
24.	Barbara Robinson	WF	153	BX
25.	Donna Lloyd	WF	113	Seated
26.				
27.	Alternates			
28.1.	Kevin Pierce (A1)	WM	142	Seated
29.2	Arthur Mcadden	BM	122	FX
30.3	Shirley Benjamin (A2)	BF	9	Seated
31.				
32.				
33.				
34.				
35.				
36.				
37.				
38.				
39.				
40.				

FORM 5

STATE OF SOUTH CAROLINA)

County of Calhoun)

IN THE COURT OF COMMON PLEAS

Phillip Lee Sparks # 297965)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2011-CP-09-00197

APPLICATION FOR
POST-CONVICTION RELIEFKENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

2011 OCT -6 P 12:25

FILED

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.

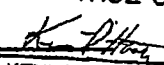
Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

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 Broad River Correctional Institution
4466 Broad River Rd. Columbia S.C. 29210
2. Name and location of Court which imposed sentence Calhoun County General Sessions
P.O. Box 709 St. Matthews, S.C. 29155
3. Name(s) of co-defendant(s) (if any) Titus Abraham Bantua
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2007-GS-09-0148

ATTEST TRUE COPY


 KENNETH HASTY
 CLERK OF COURT
 CALHOUN COUNTY

- (b) 2007-GS-09-0219
- (c) 2007-GS-09-0221
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 10, 2007 (all sentences consecutive)
- (b) 30 years for armed robbery & kidnapping
- (c) 5 years for possession of weapon during violent crime
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- Yes
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. June 15, 2011 affirmed conviction
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 15, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 4843
- ii. Hazel March 10, 2011 - Hazel June 15, 2011
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ③ Ineffective assistance of trial counsel; ④ lack of subject matter
- (b) jurisdiction; ⑤ violation of 4th 5th 6th 14th amendments; ⑥ presence of counsel;
- (c) ⑦ prosecutor misconduct; ⑧ ineffective assistance of appellate counsel; ⑨ juror misconduct
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See memorandum of law supporting application for
- (b) Post conviction Relief (attached)
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. PRESENCE OF ACCUSED; INEFFECTIVE ASSISTANCE OF COUNSEL;

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. Post conviction Relief

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) They were not preserved for direct appeal Review with the appellate
 (b) court. my appeal just got denied.
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____
 (b) your trial, if any? yes
 (c) your sentencing? yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Charles Jay Johnson Jr 1911 Pickens St. Columbia S.C. 29201
P.O. Box 11212, Columbia S.C. 29211
 ii. Marge C. Robinson. P.O. Box
1229 Elmwood Ave. Columbia S.C. 29201
 iii. Brian R. Stevens
P.O. Box 11589 Columbia S.C. 29211-1589
 (b) the proceedings at which each such attorney represented you:
 i. Trial (Charles J. Johnson Jr)
 ii. 1st Brief with appellate court (Marge C. Robinson)
 iii. Brian R. Stevens (argued at oral argument)

19. State clearly the relief you seek in filing this application:

Conviction & sentence Reversed & Remanded for a New Trial. (b) for a Ruling on each ground; (c) and order open the facts with conclusions of law; (d) for such other & further Relief as the court deems just. Vacated Sentence & conviction

20. Are you now under sentence from any other court that you have not challenged?

NOT to my knowledge.

2011-CP-09-00197

STATE OF SOUTH CAROLINA)

County of Calhoun)

VERIFICATION

I, Philip Lee Spear # 297965, 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.

Philip Lee Spear # 297965

SWORN to and subscribed before me this 18 day of July, 2011.

Eugene Keith (L.S.)
Notary Public

My Commission Expires: 2016

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
SOUTH CAROLINA

2011 OCT -6 P 12:26

FILED

ATTEST TRUE COPY

Kenneth Hasty
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

Revised 3/2003

2011-CP-09-00197

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Phillip Lee Spinks # 297965, 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.

Phillip Lee Spinks # 297965
Applicant

SWORN or affirmed to and subscribed before me this
18 day of July, 2011.

Eugene Keltz
Notary Public

My Commission Expires: 2016

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

2011 OCT - 6 P 12: 26

FILED

ATTEST TRUE COPY

Kenneth Hasty
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
Revised 3/2003

State of South Carolina
 County of Calhoun
 Philip Lee Spears
 Applicant
 vs
 State of South Carolina
 Respondent,

In the Court of common Pleas
2011-CP-09-00197
 Memorandum on law Supporting
 Application for post conviction Relief

FILED
 2011 OCT - 6 PM 12:06
 KENNETH B. HAYES
 CLERK OF COURT
 CALHOUN COUNTY
 ST. MATTHEW, SC

Comes now the above named applicant, Philip Lee Spears, after the applicant, hereby respectfully submits this memorandum in support of this application for post conviction Relief, pursuant to S.C. Code ann 17-27-10 thru 17-27-120 (1985). This memorandum will address specific issues in which applicant's application is based as follows,

The applicant contends that in order to prevail, the applicant must show both that counsel's representation fell below an objective standard of Reasonableness. Strickland v Washington 104 S.Ct. 2688; that there exists a Reasonable Probability that, for counsel's disproportionate errors, the Results of the proceeding would have been different.

~~Go into ineffective assistance of~~ ^{Trial} ~~counsel~~

1. Trial counsel was ineffective for not filing a motion to dismiss charges for lack of speedy Trial within the time limitations of the interstate agreement on detainers act, S.C. Code 1976 section 17-11-10 IV (c)
2. Failed to object to Solicitors closing argument stating everyone in the courtroom, both attorneys believe James (the victim) wasn't lying even though the applicant requested for counsel to object.

3. Failed to object to co-defendants attorney closing argument statement stating she doesn't believe the victim "James" would tell the truth.
4. Failed to Request an in chambers hearing Regarding the Reliability of the in-court identification by the victims Williams & Prezzie
5. Failed to object to curative instruction given to jury.
6. Failed to object to the in chambers hearing with the Jurors outside of the appellants presence until the in chambers hearing was over, depriving appellant of right to be present at all stages.
7. Failed to inform appellant that one of the Jurors was Related to the victim & officer who testified at the trial
8. Failed to contemporaneously object to in-court identification during direct testimony of "James & Nicholas".
9. Failed to object to state agent Donald K. Johnson Testifying to non-existing evidence of a phone found near appellant when he was arrested that was never submitted as evidence
10. Failed to object to any victims trial testimony Regarding the appearance of the gold or its similarity to the gold supposedly found near appellant at the time of his arrest.
11. Failed to allow appellant to testify at the suppression hearing of the Gold.
12. Failed to object to Solicitors closing argument statement that appellants defense is no defense.

13. failed to object to solicitor arguing flight in closing argument when the court did not charge flight.
14. failed to move to suppress Sprint phone records.
15. failed to move to suppress testimony about phone allegedly found in Charlotte near applicant during arrest.
16. failed to object to the admissibility of the evidence obtained at co-defendants' house due to the fact that no witness identified any evidence obtained from co-defendants' house.
17. failed to object to hearsay testimony of witnesses which placed applicant's character in evidence.
18. failed to challenge the arrest warrant as invalid.
19. failed to investigate the case & evidence & documents.
20. ineffective for withdrawing objection when solicitor pulled out 2 telephones out of his pocket in closing argument to show the jury.
21. failed to object to agent Donald K. Johnson's hearsay testimony about what Kimberly Cherry supposedly said about the gun & what the sheriff said about applicant trying to flee after the murder.
22. failed to object to prozzio testifying about recovering a phone at the scene of the crime which was in evidence that he never identified in trial.
23. never introduced to jury of the state's indictments until the day of trial.

(4)

24. NEVER informed of who will was testifying against applicant & who was going to take the stand & allege that they could identify applicant until trial.

25. NEVER seen any discovery material or Brady material until October 2008, 1 year after the conviction, even though applicant requested it from counsel on numerous occasions prior to trial.

26. Failed to object to selectors vouching for state's witnesses even though applicant requested for him to object.

27. advised applicant not to testify even though applicant wanted to testify. Counsel stated he would bring up applicants prior conviction.

28. The day of trial was the first time applicant was informed of the indictments of kidnapping & possession of weapon during violent crime due to not being served with arrest warrants or indictments.

29. Failed to subpoena capital Tim Stephenson prior testimony to the grand jury.

30. Failed to move to sequester state witnesses

31. Failed to contest a proper lineup upon applicants request

32. Failed to object to selectors inflammatory comment during closing argument.

33. Not informed until trial date that trial would be held with a co-defendant.

34. Failed to request further questioning of jurors Saxon, Gabel, & Buckman in regards to jury deliberations.

35. Applicant was not informed of what all he was going to be tried for & what evidence to prepare for trial.
36. Failed to object to prosecutor misconduct.
37. Failed to object to juror misconduct.
38. Failed to suppress testimony by Golden; Give because there was no written statements or documents of the testimony given.
39. Failed to object to solicitor misleading the jury during closing argument.
40. Failed to conduct preliminary hearing upon applicants Request.
41. Failed to file a Brady motion.
42. Failed to object to the opinions of certain witnesses testimony as expert witness testimony.
43. First day in general sessions court was applicants first day of trial.
44. Failed to object to trial courts Ruling on Redirecting the Search Warrant due to the fact that the jury saw the entire Search Warrant without it being ~~Redirected~~ Redirected.
45. Failed to call certain witnesses to the stand for the defense.
46. Failed to render reasonably effective assistance under prevailing Professional norms & the deficient performance prejudiced the applicant's defense.

B. Lack of subject matter jurisdiction

1. Applicant convicted under sham/faulty indictment.
2. Applicant did not Receive Requested preliminary hearing.
3. Granting indictment for possession of a weapon during commission of a violent crime is unconstitutional.

C. Violation of 4th, 5th, 6th, 14th Amendment

1. Illegally seized by unlawful arrest
2. Prejudiced by double jeopardy of subsequent indictment
3. Trial court judge was biased
4. Right to confrontation was violated due to admission of hearsay testimony.
5. Trial judge did not rule that denies in-court identification was based off of out of court identification.
6. Trial court did not instruct the jury to disregard extraneous information disclosed to the jurors during deliberations.
7. Trial court did not ask applicant if it was his decision not to testify at trial.
8. denied adequate appellate counsel at oral argument.

D. Presence of counsel

1. applicant's right to confrontation at grand jury hearing was violated.
2. applicant was not allowed to be present when evidence was being submitted against him.
3. applicant had a right to testify at Grand Jury.

4. Grand jury evidence was based on hearsay evidence when sole witness was the police officer.

5. Grand jury violates due process when proceedings had not been recorded.

6. Grand jury proceedings unconstitutional in duties

2. Prosecutor misconduct

1. Vouching for state witnesses.

2. Misleading jury during closing argument

3. inflammatory statements

4. commenting on applicants right to remain silent shifting the burden of proof to the applicant.

7. Ineffective assistance of appellate counsel

1. failed to organize the brief on direct appeal which resulted in a confusing presentation to the appellate court.

2. failed to file a Reply Brief to the states brief.

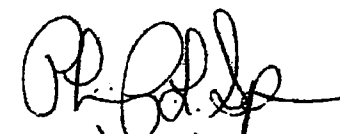
3. failed to cite legal authority in support of argument that was highly meritorious

4. Failed to argue specific prejudices to the defendant in the context of the assigned errors in light of the evidence & events that occurred at trial.
5. The omission of certain portions of the events at trial from the Record on appeal, in particular, Jury voir dire.
6. Failed to submit a Record & Brief adequate to give the court a full understanding of the significance of the errors assigned.
7. Failed to argue in Brief trial court erred in allowing Elliott Grove to vouch for the authenticity of the Sprint Phone Records when he was not a custodian of Records.

G. Juror misconduct

1. Juror Gladden was exposed to extrinsic information about other bad acts by the opponent before deliberations & he never informed the court that he brought it to the attention of the remaining jurors during deliberations.
2. Juror Gladden disobeyed the court's instruction along with the remaining jurors by deliberating while all jurors were not present.

only 2 will probable enumerated facts & new matter not articulated hereinabove is reserved for an evidentiary hearing & by Rule 71.1 S.E.R.C.P. for an amendment or addition by post conviction counsel.


Phillip L. Spears

Philip Lee Spears # 297965
 B.R.C.I / Subdiv B # 114
 4460 Brookview Rd.
 Columbia S.C. 29210

September 30, 2011

2011-CP-09-00197

Kenneth Hasty
 Calhoun County Clerk of Court
 P.O. Box 709
 St. Matthews, S.C. 29135

KENNETH HASTY
 CLERK OF COURT
 CALHOUN COUNTY
 ST. MATTHEWS, SC

2011 OCT - 6 P 12:25

FILED

Dear MR Hasty,

Please find enclosed applicants application for post conviction
 Relief with memorandum of law supporting application for post conviction Relief.
 I am requesting the application to be stamped & clocked with a case number
 & the clerk of courts official seal with a copy being mailed back to the
 applicant at the above listed address.

cc: 1.6 copy

Respectfully

Mr. Phil Lee Spears

Philip L. Spears

ATTEST TRUE COPY

Kenneth Hasty
 KENNETH HASTY
 CLERK OF COURT
 CALHOUN COUNTY

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

IN THE COURT OF COMMON PLEAS

2011-CP-09-0197

Phillip Lee Spears, #297965,

Applicant,

v.

State of South Carolina,

Respondent.

RETURN

(Appointment of Counsel Requested)

In response to the post-conviction relief application filed on October 6, 2011, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Calhoun County Clerk of Court's orders of commitment. Applicant was indicted for Armed Robbery (2007-GS-09-0148), Possession of a Weapon During Commission of a Violent Crime (2007-GS-09-0219), and Kidnapping (2007-GS-02-0221). Charlie Jay Johnson, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Diane S. Goodstein. Applicant was found guilty. On October 10, 2007, Applicant was sentenced to an aggregate term of thirty (30) years.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed. State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The Remittitur was sent on July 1, 2011.

For the purpose of this Return, the Respondent incorporates the transcript, the Clerk of Court records, the appellate records, and the South Carolina Department of Corrections' records. The

Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "...not filing a motion to dismiss charges for lack of speedy trial within the time limitations of the Interstate Agreement on Detainers Act..."
 - b. "Failed to object to solicitor's closing argument statement stating everyone in the courtroom. Both attorneys believe James (the victim) wasn't lying even thou[gh] the applicant requested for counsel to object."
 - c. "Failed to object to co-defendants attorney closing argument statement stating she doesn't believe the victim "James" would not tell an untruth."
 - d. "Failed to request an in camera hearing regarding the reliability of the in-court identification by the victims Williams and Prezzie."
 - e. "Failed to object to curative instruction given to jury."
 - f. "Failed to object to the in chambers hearing with the jurors outside of the applicant's presence until the chambers hearing was over, depriving applicant of right to be present at all stages."
 - g. "Failed to inform applicant that one of the jurors was related to the victim and officer who testified at the trial."
 - h. "Failed to contemporaneously object to in-court identification during direct testimony of 'James & Natasha.'"
 - i. "Failed to object to SLED agent Donald K. Johnson testifying to non-existing evidence of a phone found near applicant when he was arrested that was never submitted as evidence."
 - j. "Failed to object during victim's trial testimony regarding the appearance of the gun or its similarity to the gun supposedly found near applicant at the time of his arrest."
 - k. "Failed to allow applicant to testify at the suppression hearing of the gun."
 - l. "Failed to object to the solicitor's closing argument statement that applicant's defense is no defense."
 - m. "Failed to object to the solicitor arguing flight in closing argument when the court did not charge flight."
 - n. "Failed to move to suppress Sprint phone records."
 - o. "Failed to move to suppress testimony about phone allegedly found in Charlotte near applicant during arrest."
 - p. "Failed to object to the admissibility of the evidence obtained at co-defendant's house due to the fact that no witness identified any evidence obtained from co-defendant's house."
 - q. "Failed to object to hearsay testimony of Tanesha which placed applicant's

- character in evidence.”
- r. “Failed to challenge the arrest warrant as invalid.”
 - s. “Failed to investigate the case of evidence & documents.”
 - t. “Ineffective for withdrawing objection when solicitor pulled out 2 telephones out of his pocket in closing argument to show the jury.”
 - u. “Failed to object to agent Donald K. Johnson hearsay testimony about what Kimberly Cherry supposedly said about the gun & what the sheriff said about applicant trying to flee out a window.”
 - v. “Failed to object to Prezzie testifying about recovering a phone at the scene of the crime which was in evidence that he never identified in trial.”
 - w. “Never introduced to any of the states indictments until day of trial.”
 - x. “Never informed who all was testifying against applicant & who was gonna take the stand & allege that they could identify applicant until trial.”
 - y. “Never seen any discovery material or Brady material until October 2008, a year after the conviction, even though applicant requested it from counsel on numerous occasions prior to trial.”
 - z. “Failed to object to solicitors vouching for state’s witnesses even thou[gh] applicant requested for him to object.”
 - aa. “Advised applicant not to testify even thou[gh] applicant wanted to testify. Counsel stated he would bring up applicant’s prior conviction.”
 - bb. “The day of trial was the first time applicant was informed of the indictments of kidnapping & possession of a weapon during violent crime due to not being served with arrest warrants or indictments.”
 - cc. “Failed to subpoena Captain Tim Stephenson prior testimony to the grand jury.”
 - dd. “Failed to move to sequester state witnesses.”
 - ee. “Failed to conduct a proper lineup upon applicant request.”
 - ff. “Failed to object to solicitors inflammatory comment during closing argument.”
 - gg. “Not informed until trial date that trial would be held with co-defendant.”
 - hh. “Failed to request further questioning of jurors Saxon, Gladden, & Buckman in regards to jury deliberations.”
 - ii. “Applicant was not informed of what all he was going to be tried for & what evidence to prepare for trial.”
 - jj. “Failed to object to prosecutor misconduct.”
 - kk. “Failed to object to juror misconduct.”
 - ll. “Failed to suppress testimony by Golden; Grove because there was not written statements or documents of the testimony given.”
 - mm. “Failed to object to solicitor misleading jury during closing argument.”
 - nn. “Failed to conduct preliminary hearing upon applicant’s request.”
 - oo. “Failed to file a Brady motion.”
 - pp. “Failed to object to the opinions of certain witnesses testimony as expert witness testimony.”
 - qq. “First day in general sessions court was applicants first day of trial.”
 - rr. “Failed to object to trial courts ruling on redacting the search warrant due to the fact that the jury saw the entire search warrant without it being redacted.”

- ss. "Failed to call certain witnesses to the stand for the defense."
- tt. "Failed to render reasonably effective assistance under prevailing professional norms & the deficient performance prejudiced the applicant's defense."
- 2. Lack of subject matter jurisdiction.
 - a. "Applicant convicted under sham/faulty indictment."
 - b. "Applicant did not receive requested preliminary hearing."
 - c. "Grand jury indictment for possession of a weapon during commission of a violent crime is unconstitutional."
- 3. Violation of 4th, 5th, 6th, 14th Amendment.
 - a. "Illegally seized by unlawful arrest."
 - b. "Prejudiced by double jeopardy of subsequent indictment."
 - c. "Trial court judge was biased."
 - d. "Right to confrontation was violated due to admittance of hearsay testimony."
 - e. "Trial judge did not rule that James in-court identification was based off of out of court identification."
 - f. "Trial court did not instruct the jury to disregard extraneous information disclosed to the jurors during deliberations."
 - g. "Trial court did not ask applicant if it was his decision not to testify at trial."
 - h. "Denied adequate appellate counsel at oral argument."
- 4. Presence of accused.
 - a. "Applicant's right to confrontation at grand jury hearing was violated."
 - b. "Applicant was not allowed to be present when evidence was being submitted against him."
 - c. "Applicant had a right to testify at grand jury."
 - d. "Grand jury evidence was based on hearsay evidence when sole witness was the police officer."
 - e. "Grand jury violates due process when proceedings had not been recorded."
 - f. "Grand jury proceedings unconstitutional in duties."
- 5. Prosecutor misconduct.
 - a. "Vouching for state witnesses."
 - b. "Misleading jury during closing argument."
 - c. "Inflammatory statements."
 - d. "Commenting on applicant's right to remain silent shifting the burden of proof to applicant."
- 6. Ineffective assistance of appellate counsel.
 - a. "Failed to organize the brief on direct appeal which resulted in a confusing presentation to the appellate court."
 - b. "Failed to file a reply brief to the state's brief."
 - c. "Failed to cite legal authority in support of argument that was highly meritorious."
 - d. "Failed to argue specific prejudices to the defendant in the context of the assigned errors in light of the evidence & events that occurred at trial."
 - e. "The omission of certain portions of the events at trial from the record on appeal, in particular, jury voir dire."
 - f. "Failed to submit a record & brief adequate to give the court a full understanding

of the significance of the errors assigned.”

- g. “Failed to argue in brief trial court errored in allowing Elliot Grove to vouch for the authority of the Sprint phone records when he was not a custodian of records.”
- 7. Juror misconduct.
 - a. “Juror Gladden was exposed to extrinsic information about other bad acts by the applicant before deliberations & he never informed the courts until he brought it to the attention of the remaining jurors during deliberations.”
 - b. “Juror Saxon disobeyed the courts instruction along with the remaining jurors by deliberating while all jurors weren’t present.”

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

For purposes of this Return, Respondent interprets allegations 1, 3, 4, 5 and 7 as allegations of ineffective assistance of trial counsel. Respondent asserts that the Applicant’s allegation of ineffective assistance of trial counsel is without merit. Respondent asserts that the Applicant’s attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The

Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The Respondent submits that 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. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate

counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate 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. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Applicant has claimed that the trial court lacked subject matter jurisdiction. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); See also U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the

power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45, -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. at 101, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant’s trial counsel was ineffective and whether the Applicant’s appellate counsel was ineffective.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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Jan - 18, 2012.

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

PHILLIP LEE SPEARS, 297965,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2011-CP-09-0197

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Nicole Singletary, Esquire
 4511 Main Street
 Columbia, SC 29203

DATED this 18th day of January, 2012.

Lauren Meara
 Lauren Meara, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF CALHOUN

CASE NO. 2011-CP-09-0197

3 PHILLIP LEE SPEARS)

4)

vs.)

5)

STATE OF SOUTH CAROLINA)

6

7

MAY 28, 2014
ST. GEORGE, SC

8

9

B E F O R E:

10

HONORABLE MAITÉ MURPHY

11

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

13

CHARLES T. BROOKS, III, ESQUIRE
Attorney for the Applicant

14

MEGAN E. HARRIGAN, ESQUIRE
Attorney for the State

15

16

Ruth L. Mott, RPR, CRR
Official Court Reporter

17

18

19

20

21

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I N D E X

2

3

WITNESS

DIRECT

CROSS

REDIRECT

RECROSS

4

PHILLIP LEE SPEARS, JR.

MR. BROOKS

9

5

MS. HARRIGAN

25

6

CHARLIE J. JOHNSON, JR.

MR. BROOKS

36

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MS. HARRIGAN

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8

MARY CECELIA ROBINSON

MR. BROOKS

59

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9

MS. HARRIGAN

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10

CERTIFICATE OF REPORTER

70

11

12

E X H I B I T S

13

14

NO.

DESCRIPTION

ID

EVD

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(NONE MARKED)

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1 MS. HARRIGAN: Your Honor, may it please the Court.

2 THE COURT: Yes, ma'am.

3 MS. HARRIGAN: The next matter is *Phillip Lee Spears*
4 *versus the State of South Carolina*, Docket No.

5 2011-CP-09-0197. Mr. Spears was indicted by the Calhoun
6 County grand jury for armed robbery, kidnapping and
7 possession of a firearm during the commission of a violent
8 crime. He was represented by Charlie J. Johnson, Jr.

9 On October 1st through 10th, 2007, Mr. Spears proceeded
10 to a jury trial before the Honorable Diane S. Goodstein,
11 alongside a codefendant, where he was convicted and indicted
12 on all three charges.

13 Judge Goodstein sentenced him to 30 years' imprisonment
14 for armed robbery, 30 years' imprisonment for kidnapping and
15 five years for the weapons charge with all sentences to be
16 served concurrently.

17 Mr. Spears filed a timely notice of appeal and was
18 represented by appellate defender Mary Cecelia Robinson.
19 Following the submission of briefs and oral argument, the
20 South Carolina Court of Appeals affirmed his convictions and
21 sentence in a published opinion, *State v. Spears* 393 SC 466,
22 that was filed June 15th of 2011. The remittitur was sent on
23 July 1st of 2011.

24 Thereafter, on October 6th, 2011, Mr. Spears filed a
25 timely application for post-conviction relief, alleging he

1 was being held in custody unlawfully based on 81 grounds of
2 ineffective assistance of counsel; lack of subject matter
3 jurisdiction, violations of various U.S. constitutional
4 amendments, prosecutorial misconduct and ineffective
5 assistance of appellate counsel, as well as juror misconduct.

6 The State made a return and partial motion to dismiss on
7 January 18, 2012, requesting an evidentiary hearing be held
8 on the ineffective assistance of counsel for trial and
9 appellate allegations.

10 He's represented in this action by
11 Charles T. Brooks III. At this time the State would request
12 that Mr. Brooks place on the record which of his 81
13 allegations he intends to go forward on today.

14 THE COURT: Mr. Brooks.

15 MR. BROOKS: May it please the Court, first off, my
16 client wants me to ask the Court for a continuance in this
17 matter. He wants more time to refine his issues and narrow
18 them down from the 81 or so allegations he's put forth. In
19 addition to that, he indicated he wanted to address the Court
20 in regards to my appointed representation of him.

21 THE COURT: All right. Mr. Spears.

22 THE DEFENDANT: Good afternoon, Your Honor.

23 THE COURT: Good afternoon, Mr. Spears.

24 THE DEFENDANT: Yes, today's my first day actually
25 meeting my attorney and whatnot. He's never came to visit me

1 and prepare me for my PCR at all and whatnot. And I wrote
2 him on several occasions addressing several issues.

3 Now, he had an investigator come and speak with me as
4 well, and I brought all my issues to the investigator, what I
5 needed him to gather for me. He did not do that at all. He
6 did not do that at all. And I need time to get my witnesses
7 so witnesses can come forth and testify at my PCR hearing.

8 THE COURT: Mr. Spears, I'm going to ask your attorney
9 this, obviously he's very well-versed in PCR's, and I'm
10 certain that he has spoken to your -- to the investigator
11 regarding his investigation and his preparedness to move
12 forward today.

13 So, Mr. Brooks, I'll ask you, do you feel that you've
14 been sufficiently prepared and you've had sufficient time to
15 prepare to proceed here today?

16 MR. BROOKS: Judge, in all candor to the Court, I have
17 been on this case for quite some time. I had an order that
18 allowed me to hire an investigator, Glenn Harrell, attorney
19 general is aware. I've done other cases where
20 Glenn Harrell's been the investigator.

21 Mr. Harrell -- first off I've talked with Mr. Spears on
22 teleconferences on several occasions. And, of course, I have
23 a voluminous file that I've written and corresponded with
24 him.

25 But Mr. Harrell, my court-appointed retained

1 investigator, he -- he brought me his report and talked to me
2 about the case and everything that he thought was pertinent
3 as an investigator in the case. I did tell Mr. Spears that
4 obviously Mr. Harrell probably saw things a little
5 differently than he did.

6 And in telling the Court -- Mr. Harrell is a former
7 detective with the Sumter County Sheriff's Department, so
8 he's not somebody that hadn't done this kind of stuff before.
9 He's been a detective, has been doing this for a number of
10 years; so I don't have any reason to question whatever, you
11 know, he tells me as far as his expertise or whatever.

12 But that's what he gave me, and I sent Mr. Spears a copy
13 of his report, as well as the Attorney General. This is what
14 he -- what he's given me in regards to your allegations and
15 what his assessment of all the information in the case
16 independently; so, Judge, that's what we've got.

17 THE COURT: All right, sir, Mr. Spears, based on your
18 attorney's assertion regarding his preparedness to move
19 forward here today along with the fact that he's met with the
20 investigator, he's confident in his abilities, he's talked to
21 you via phone conferences, even though maybe not in person,
22 he has communicated with you to the point that he feels
23 comfortable that he's prepared to move forward on your case.
24 Unless, do you have any other grounds?

25 THE DEFENDANT: Yes, Your Honor, because I wrote -- I

1 wrote this man and brought up several issues to this man
2 alone, and this man wrote me back saying that he was going to
3 check on those issues. The man never checked on any of the
4 issues.

5 And when the investigator said he was going to go out of
6 state and speak to people that got locked up in another
7 state, I was staying in another state. He told me that he
8 was going to go and speak to these individuals that need to
9 come and testify for me. He hasn't even addressed that in
10 his investigative report at all, Your Honor. He hasn't
11 spoken to any of the individuals that I asked him to speak to
12 on my behalf.

13 THE COURT: Well, Mr. Spears, your attorney's telling me
14 that he's prepared to go forward. He's done sufficient
15 investigation. And at this point I'm going to deny your
16 request for a continuance; so we'll move forward.

17 THE DEFENDANT: Can I represent myself, Your Honor,
18 then? That's -- I mean, because he doesn't have my best
19 interests at heart, Your Honor.

20 THE COURT: Mr. Spears, I'm not going to allow you to do
21 that. Obviously it's something very important for you to
22 have legal representation at this stage. Mr. Brooks is an
23 excellent attorney that does a very good job with these PCR
24 motions and matters, and he's familiar with the procedures
25 and the evidentiary procedures to go forward.

1 And to protect your rights, I'm not going to relieve him
2 as counsel at this time. I think you need an attorney, quite
3 frankly, and he's a good attorney. He says he's prepared to
4 go forward.

5 And you'll be allowed to testify; so certainly you'll be
6 allowed to bring forth certain issues that you think the
7 Court needs to know about and be allowed -- he'll ask you if
8 there's anything else he didn't ask you that you want me to
9 know about that I'll be happy to listen to if you need to add
10 further information to the Court, okay?

11 THE DEFENDANT: Yes, Your Honor.

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

13 MR. BROOKS: In light of that, Judge, we would go ahead
14 and call Mr. Spears to the stand.

15 THE COURT: All right. Mr. Spears, if you'd step
16 forward.

17 MR. BROOKS: And, Judge, I'll ask this matter to my
18 client on the stand, and I'll kind of narrow what the issues
19 are. We've already got them down to prosecutorial
20 misconduct, juror misconduct and ineffective assistance of
21 counsel, and we'll narrow them from there.

22 THE COURT: Certainly. I'll be happy to grant you that
23 latitude, with the objection from Ms. Harrigan. Thank you.

24 MS. HARRIGAN: If I could just place on the record
25 for -- do you know what allegations it will be that you are

1 waiving out of these 81? I'm envisioning, for proposed
2 orders coming in, needing to address all 81.

3 MR. BROOKS: Just let me go ahead.

4 MS. HARRIGAN: If we could just place at the end of the
5 record what the defined issues are, that would be
6 appreciated. Thank you.

7 MR. BROOKS: To help you with the order, I got you. We
8 can -- we can handle that. We can handle that.

9 PHILLIP LEE SPEARS, JR.,
10 being first duly sworn, testified as follows:

11 THE COURT: Your witness, Mr. Brooks.

12 MR. BROOKS: Thank you, ma'am.

13 DIRECT EXAMINATION BY MR. BROOKS:

14 Q. Mr. Spears, all right. You understand that you've got
15 to talk up because the court reporter has to take down what
16 you say. You can't just nod your head or shake your head.
17 You've got to give a verbal response. Do you understand
18 that?

19 A. Yes.

20 Q. Okay. Now, you had Mr. Charlie Johnson as your lawyer;
21 is that correct?

22 A. Yes.

23 Q. Okay. And he was court appointed; is that correct?

24 A. Yes.

25 Q. Now, this involved an allegation of you robbing a Wagon

1 Wheel in Calhoun County; is that correct?

2 A. Yes.

3 Q. With a codefendant, Titus Bantan?

4 A. Yes.

5 Q. Okay. Now, do you recall how often you met with
6 Mr. Johnson in preparing your case?

7 A. Seen Mr. Johnson probably two times.

8 Q. Okay. Now, he had an investigator, a guy named
9 Amos Jones. Do you recall him coming to see you?

10 A. I don't know his name, but an investigator came to see
11 me.

12 Q. Okay. Do you recall how many times you saw him?

13 A. Once or twice.

14 Q. Now, you tried this case, and you were convicted, and
15 Judge Goodstein issued a sentence. As far as Mr. Johnson's
16 representation of you, the ineffective assistance of counsel,
17 what are you saying that he did wrong in representing you?

18 A. The issues that he could have raised while I was at
19 trial, my objections that could have been made at trial, he
20 failed to object to certain things.

21 Q. Okay. Like what?

22 A. My first ineffective assistance of counsel issue was on
23 Mr. Johnson failed to file a motion to dismiss my charges for
24 lack of speedy trial within the time it would take to the
25 Interstate Agreement on Detainers Act, being that I was

1 extradited from North Carolina -- I was extradited from North
2 Carolina to South Carolina.

3 I didn't waive extradition. Under the Extradition Act,
4 they had 120 days to take me to trial. I didn't get -- I got
5 extradited to South Carolina on April 2nd, 2007. I didn't
6 get taken to trial until October the 10th -- October the 1st
7 2007, which is over the 120-day time limitation that they
8 had.

9 Q. Okay. Are you saying he should have objected to that;
10 is that correct?

11 A. Yes. He should have filed a motion to dismiss my
12 charges.

13 Q. Okay. What else in regards to Mr. Johnson's
14 representation?

15 A. All right. He failed to object to the solicitor's
16 closing arguments stating everyone in the courtroom, both
17 attorneys believed that the victim James Bourgeois wasn't
18 lying, even though I requested for him to object to that.

19 Q. So when the solicitor -- basically you're characterizing
20 this as vouching?

21 A. Yes.

22 Q. Okay. And you're saying that Mr. Johnson should have
23 objected to that?

24 A. Yes.

25 Q. Okay. All right. Now, what else should have

1 Mr. Johnson done in representing you?

2 A. Mr. Johnson failed to object to my codefendant's
3 attorney's closing arguments statement -- stating that she
4 doesn't believe that the victim Mr. James Bourgeois would
5 tell an untruth to the Court.

6 Q. All right. So you're saying that -- I want to make sure
7 I get this correct that you're saying that your lawyer should
8 have objected to Titus's lawyer's closing argument?

9 A. Yes.

10 Q. Okay.

11 A. And she vouched for the credibility of the witness.

12 Q. Titus was convicted too, correct?

13 A. Yes.

14 Q. All right. What else about Mr. Johnson's
15 representation?

16 A. My next issue, he failed to object -- he failed to
17 request an in camera hearing regarding the liability of the
18 in-court identification of two of the victims, Mr. Williams
19 and Mr. Prezzie. I was never picked out of a photo
20 identification, a photo ID, a photo lineup by any of these
21 victims. Still they both got on the stand and pointed me
22 out, saying I was the one that robbed the store.

23 Q. Okay. So he should have asked for in camera hearing to
24 try to suppress the identification?

25 A. Yes.

1 Q. All right. And you didn't have that?

2 A. No.

3 Q. Okay. All right. What else?

4 A. Well, Mr. Johnson failed to object to the in chambers
5 hearing with the jurors outside of my presence until the
6 chambers hearing was over, depriving me the right to be
7 present at all stages.

8 Q. What was that about?

9 A. One of the jurors, during deliberation, brought up to
10 the rest of the jurors that he heard that me and my
11 codefendant was wanted by the Calhoun County Sheriff's
12 Department for a prior bank robbery. The Judge had already
13 ruled prior to that that the bank robbery would not be
14 admitted to the jury at all.

15 They had an in chambers hearing outside of the presence
16 of me and my codefendant. I had no knowledge this was going
17 on until after the hearing.

18 Q. Okay. And what was the Judge's ruling?

19 A. She gave -- she -- she didn't, I guess my lawyer filed
20 for a motion for a mistrial.

21 Q. Okay.

22 A. She denied it.

23 Q. Okay. So he raised that as an issue?

24 A. Yes.

25 Q. Okay. Now we're not talking about -- PCR is not

1 designed for what the Judge ruled or didn't rule; it's about
2 what mistakes your lawyer made.

3 A. Right.

4 Q. Because what the judge did or didn't do, that's what was
5 taken up on direct appeal.

6 A. Right.

7 Q. Okay? So we're not talking about Judge Goodstein.

8 A. Right.

9 Q. Okay. So in light of that, is there anything else?

10 A. Yes. Mr. Johnson failed to contemporaneously object to
11 the in-court identification during direct testimony of
12 Mr. Bourgeois and Mrs. Rivers.

13 Q. Okay. Doesn't that go to the in-court identification
14 not having a hearing?

15 A. No. This one was a hearing on these two. It was
16 four -- it was four people that took the stand and testified
17 against me. These two, it was -- it was *Neil v. Biggers*
18 hearing on these two. But during trial, he failed to object
19 to identification, which made my -- waived my right to -- it
20 wasn't preserved for direct appeal or review.

21 Q. Okay. All right. What else? What other mistakes did
22 Mr. Johnson make?

23 A. He failed to object during the victim's trial testimony
24 regarding the appearance of the gun or the similarity to a
25 gun supposedly found near applicant at the time of his

1 arrest. And by him failing to object to that, it wasn't
2 preserved for direct appeal or review either.

3 Q. The victim saying -- say that last -- say that part
4 again now?

5 A. Mr. Johnson failed to object to the victim's trial
6 testimony regarding the appearance of the gun or its
7 similarity to the gun supposedly found near myself at the
8 time of my arrest. And the Court of Appeals ruled that it
9 wasn't preserved for appellate review because he failed to
10 make contemporaneous objection to it at trial.

11 Q. Okay. All right. I got that. Talking about the gun.
12 What else?

13 A. Mr. Johnson failed to allow me to testify at trial.

14 Q. You wanted to testify?

15 A. Yes.

16 Q. What would you have said if you had testified?

17 A. I would -- I would have stated my case, that I wasn't --
18 I wasn't at the scene of the crime when the crime happened,
19 where I was at when the crime happened and anything else that
20 was asked about me.

21 Q. Okay. Would it have been your position to testify that
22 you weren't there?

23 A. Yes.

24 Q. Okay. Did you tell Mr. Johnson that?

25 A. Yes.

1 Q. Did you tell Mr. Jones that? That would have been his
2 investigator.

3 A. Who was Mr. Jones?

4 Q. That would have been his investigator.

5 A. No. He never asked me that.

6 Q. Okay. Did you know -- did you -- you never told his
7 investigator that you weren't there?

8 A. Yes, I told his investigator I wasn't there, but he
9 never asked me did I want to testify.

10 Q. Okay. That's what I'm saying: You told the
11 investigator that you weren't there?

12 A. Right.

13 Q. And you told Mr. Johnson you weren't there?

14 A. Right.

15 Q. Okay. All right. What else on Mr. Johnson?

16 A. He failed to object to the admissibility of the evidence
17 obtained from my codefendant's house due to the fact that no
18 witnesses identified any evidence obtained from my
19 codefendant's house, all the evidence that was taken from my
20 codefendant's house. The officers identified the evidence.
21 No witnesses identified no evidence. All the evidence was
22 still used against me due to the fact that I had a joint
23 trial with my codefendant.

24 Q. That's in regards to the search warrant?

25 A. No, that's in regards to the search period, the evidence

1 that was obtained prior to the search -- prior to the search
2 warrant and after the search warrant.

3 Q. From Titus's house?

4 A. Yes.

5 Q. Okay. What else we got on Mr. Johnson?

6 A. He failed to investigate the case of evidence and the
7 documents of my case.

8 Q. The evidence and documents. What do you mean by that?

9 A. There was no evidence in my case pertaining to me being
10 the individual that committed this crime.

11 Q. Okay. All right. Okay.

12 A. And he failed to investigate -- he failed to investigate
13 my claims I brought to Mr. Johnson's attention that it was an
14 individual, you know, extradited from Charlotte with me. He
15 was in the car with me when I came to South -- when I came to
16 South Carolina.

17 He got taken out of the car after me. He came in the
18 holding cell and told me that the officers questioned him
19 about me. The officers told him that I was locked up for
20 armed robbery, that I committed a bank robbery and did I
21 confess anything to him about this crime.

22 He told them no. And then he told them that if he write
23 a statement against me saying that I confessed it that
24 they'll let him go. He was in the county with me. I brought
25 it -- I brought it to Mr. Johnson's attention, and I brought

1 it to the investigator's attention.

2 Q. Is this a part -- is this a part of your claim for
3 prosecutorial misconduct?

4 A. Ineffective assistance of counsel.

5 Q. All right. So this hasn't got anything to do with the
6 prosecutorial misconduct claim?

7 A. No.

8 Q. Okay. All right. Any other things that Mr. Johnson
9 failed to do?

10 A. He failed to object to Mr. Prezzie testifying about
11 recovering a phone at the scene of the crime which was
12 evidence that he never identified at trial.

13 Q. Okay. Anything else?

14 A. Besides that, I never seen any discovery material or
15 Brady material until a year later after I was convicted,
16 which was October 2008.

17 Q. Is that when Mr. Johnson sent you your file?

18 A. Yes, sir. He didn't send me my whole file.

19 Q. Okay.

20 A. He failed to -- he failed to object to the solicitor's
21 vouching for states witnesses, even though applicant
22 requested for him to object to it.

23 Q. All right. I think we covered that one, the solicitor.
24 We talked about the solicitor vouched for the victim, we
25 already covered that. Is there anything else?

1 A. Yes. He failed to suppress the testimony by Mr. -- by
2 Chris Golden and Elliott Grove because there was not written
3 statements or documents of the testimony given in regards to
4 the Sprint phone records. The Sprint, it was for some phone
5 records that was used against me at trial and whatnot.

6 But first and foremost, they never even had an actual
7 phone to go with the -- with the phone records and whatnot.
8 But he didn't -- he didn't -- when Mr. Grove -- when
9 Mr. Grove testified and whatnot, he didn't object to any of
10 the -- any of the testimony of Mr. Grove.

11 Q. Okay. All right. Anything else you need to tell the
12 judge?

13 A. He failed to object to the solicitor misleading the jury
14 during closing argument. He failed to conduct a preliminary
15 hearing upon applicant's request.

16 Q. Okay. Hold on a second. Preliminary -- are you saying
17 that you should have had a preliminary hearing?

18 A. Yes.

19 Q. Okay. And you also are saying that he didn't object to
20 some misleading closing argument?

21 A. Yes.

22 Q. Okay. All right.

23 A. There was a -- he failed to object to trial court's
24 ruling on redacting search warrant due to the fact that the
25 jury saw the entire search warrant without it ever being

1 redacted.

2 Q. Okay. All right. And now, the search warrant didn't
3 pertain to you, it pertained to Titus, right?

4 A. Yes.

5 Q. Okay.

6 A. But the evidence that was obtained through the search
7 warrant was used against me at trial also, being that we had
8 a joint trial.

9 Q. Okay.

10 A. He failed to call certain witnesses to the stand for
11 my -- for my defense.

12 Q. Okay. What particular witnesses did you want him to
13 call?

14 A. The witness that got extradited from South Carolina with
15 me -- I mean from North Carolina with me, the officer, the
16 officer, Ms. Burke, at the county jail who the investigator
17 spoke with about my allegations.

18 Q. Why did you -- but that person didn't have anything to
19 do with your case.

20 A. I just -- that's the person that the police said if he
21 write a statement against me saying I confessed, that
22 they'll -- they'll let him out of jail.

23 Q. Okay. All right.

24 A. So I needed him -- I needed him to come to contradict
25 the officers' statements.

1 Q. Okay. All right.

2 A. But he -- he questioned -- he questioned one of my
3 relatives in regards to this case as well and whatnot, and he
4 filed for a subpoena to have my relative come to court and
5 whatnot.

6 Q. Mr. Johnson?

7 A. Yes.

8 Q. Okay.

9 A. But he never called her to the stand. He spoke to her.
10 And once I asked him, "Well, what did she say?" and whatnot.

11 He like, "Don't worry about it," and whatnot. He never
12 called her to the stand, because I have a copy of that
13 subpoena.

14 Q. Okay. What did you expect that relative to say?

15 A. I don't know, but he spoke to her.

16 Q. Okay. All right. Anything else?

17 A. As far as for ineffective assistance of counsel?

18 Q. Correct.

19 A. I don't believe so.

20 Q. Okay. Now, you talked about juror misconduct, is that
21 any different than where you talked about some juror who said
22 that they knew that you and Titus had been wanted for prior
23 bank robbery in Calhoun County?

24 A. Yes. I got -- yes. Because one of the jurors -- one of
25 the jurors stated that she didn't hear the comment that was

1 made.

2 Q. Okay. Let me ask you this: Is there any other
3 allegation of juror misconduct other than that?

4 A. That's what I was getting to.

5 Q. Okay. Is there anything different than that?

6 A. Besides the jurors saying -- one of the jurors saying
7 that she didn't hear the comment?

8 Q. Right. Okay. We talked about that already.

9 A. That's one juror that made the comment.

10 Q. Okay. What other allegation of juror misconduct are you
11 referring to?

12 A. There's a juror -- it was a juror that stated that she
13 didn't hear the comment because she was in the bathroom
14 during the deliberations.

15 Q. Okay. All right.

16 A. The judge had already ruled that all jurors had to be
17 present during the deliberations.

18 Q. Okay.

19 A. There was another juror that said he was vaguely paying
20 attention to -- to what was going on and whatnot. He wasn't
21 really paying attention to the comment that was made. But
22 you had the juror foreperson say anyone heard the statement
23 that was made; so one of the jurors is lying or all of the
24 jurors is lying.

25 Q. Okay. Any other allegations about the jury?

1 A. No. Yes. One of the jurors -- I didn't know that one
2 of the jurors was related to the victim until I got my trial
3 transcript. Mr. Johnson never even allowed me to know that.

4 Q. One of the people was related to you -- to the victim?

5 A. One of the jurors was related to the victim. I didn't
6 know that. Had I known that, I wouldn't have picked her as a
7 juror in the first place.

8 Q. Okay.

9 A. And she was related to the officer also that testified
10 at my trial.

11 Q. Okay. All right. Any other allegations about
12 prosecutorial misconduct?

13 A. Vouching for the State witnesses, they commented on --
14 commented on my right to remain silent, shifting the burden
15 of proof against me, when I didn't -- when I didn't get on
16 the stand and testify and whatnot, during closing arguments,
17 the solicitor made a statement stating that Mr. Bantan put
18 his sister on the stand to testify for him so he had an alibi
19 witness. As far as Mr. Spears -- as far as Mr. Spears go,
20 his -- his alibi is no alibi. Why not just attack the
21 credibility of the State and whatnot, which I never got on
22 the stand because Mr. Johnson never allowed me to get on the
23 stand to testify in the first place, but you shift the burden
24 of proof, like now I have to prove myself now to the jury
25 now.

1 Q. Okay. All right. Anything else in regards to the
2 prosecution?

3 A. No.

4 Q. Okay. All right. I'm going to go ahead now, unless
5 you've got something else.

6 A. Ineffective assistance of appellate counsel.

7 Q. Oh, sorry about that. That is correct. What's your
8 allegation in regards to appellate counsel?

9 A. My appellate counsel abandoned one of my issues on
10 appeal that had merits. The issue that was abandoned was the
11 fact that the bank robbery, when Mr. Johnson filed for a
12 motion for mistrial because the bank robbery was mentioned,
13 the Court of Appeals ruled that the issue was abandoned
14 because my appellate attorney, she didn't file any, any case
15 law to support her argument and whatnot; so they said it
16 wasn't preserved for direct appellate review.

17 Q. All right.

18 A. And my other -- my other -- my other attorney,
19 Mr. Breen Stevens, I asked him to file a writ of petition to
20 the Supreme Court on my direct appeal. He refused to file
21 the petition to the Supreme Court, which I had six issues
22 that was raised on oral argument and whatnot, and I had
23 issues that could have went to the Supreme Court and got
24 ruled on with the Supreme Court, which I sent an affidavit to
25 the -- to the Supreme Court, let them know that I do not wish

1 to waive my right to file the petition, I don't know how to
2 do it, and my attorneys abandoned me and whatnot, which I
3 have copies of those papers with me as of today and whatnot.

4 Q. And that's fine. But that's an issue in regards to
5 ineffective assistance of appellate counsel?

6 A. Yes.

7 Q. Okay. Anything else in regards to appellate counsel?

8 A. That's about it.

9 Q. Okay. All right. I think we've got it all down,
10 appellate counsel, prosecutorial misconduct, juror misconduct
11 and ineffective assistance of trial counsel?

12 A. Yes.

13 MR. BROOKS: Answer any questions of the attorney
14 general.

15 THE COURT: Ms. Harrigan.

16 MS. HARRIGAN: Briefly, Your Honor.

17 CROSS-EXAMINATION BY MS. HARRIGAN:

18 Q. Mr. -- is it Spear or Spears?

19 A. Spears.

20 Q. Thank you. SCDC has you listed as Spear.

21 One of your allegations is that Mr. Johnson didn't
22 challenge the in-court identification of Mr. Prezzie,
23 correct?

24 A. Yes.

25 Q. But Mr. Prezzie testified that he couldn't actually

1 identify anyone because he was on the ground, correct?

2 A. No.

3 Q. Do you know where in the transcript he identifies you?

4 A. They took it out of my transcript. I challenged my
5 transcript also, but my appellate attorney filed -- she sent
6 a letter to the court reporter too late, and they said that
7 they destroyed the tapes already.

8 Q. Have you had an opportunity to review the transcript
9 before coming today?

10 A. Yes.

11 Q. And you don't know where Mr. Prezzie makes that
12 identification of you in court?

13 A. Because I said, it's taken out of my transcript. That's
14 what I was just explaining to you. The court reporter took
15 it out of my transcript.

16 Q. She took it out of your transcript?

17 A. Yes. I have sent -- I have letters that I've sent to
18 the court reporter, and I have letters that I sent to Ms. --
19 Ms. Robinson of the appellate defense where she sent to the
20 court reporter about this issue as well. It's totally
21 missing out of my transcript.

22 Q. What else is missing from your transcript?

23 A. The testimony from Mr. -- Mr. Kinnerly, Earl Kinnerly,
24 which was one of the -- one of the deputies, he brought up
25 something about my bank robbery also. And when I brought it

1 to Mr. Johnson's attention, Mr. Johnson was on his laptop.
2 When I brought it to his attention, he said don't worry about
3 it; it's a direct appeal issue.

4 But that's missing out of my transcripts also, which I
5 sent a letter to Ms. Cecelia Robinson about that and to the
6 court reporter as well, and she said that she destroyed the
7 tapes already. By the time Ms. Cecelia Robinson had sent her
8 her letter about that, she said she destroyed the tapes; so
9 there was no way for me to challenge it.

10 Q. One of your other allegations is that Mr. Johnson was
11 ineffective for failing to call witnesses on your behalf,
12 correct?

13 A. Yes.

14 Q. And I believe you referenced the inmate who was
15 transferred to South Carolina from North Carolina with you as
16 one of the witnesses?

17 A. Yes.

18 Q. Do you have him here today to testify?

19 A. No. Because my appellate -- my appellate counsel --
20 excuse me, my -- my PCR counsel, he -- I brought it to his
21 attention with the letter I showed him, and I brought it to
22 the investigator, and no one has investigated it.

23 Q. Did you give them the full name of the person?

24 A. No. Because I never had the full name of the person. I
25 told him that the person got arrested, got extradited from

1 South -- from North Carolina to South Carolina with me, and
2 he got booked after me, which I have the letter on the desk
3 over there that I sent to Mr. Brooks.

4 Q. And your testimony is that you told your attorney,
5 Mr. Johnson, about this other inmate?

6 A. Yes.

7 Q. And he refused or failed to investigate into it?

8 A. Yes. I told Mr. Johnson and the investigator.

9 Q. Which investigator, Mr. Amos Jones or --

10 A. Yes.

11 Q. -- Mr. Harrell?

12 A. I told -- I told Mr. -- Mr. -- I guess that's his name,
13 Amos Jones or --

14 Q. Mr. Johnson's investigator not Mr. --

15 A. I told Mr. Johnson's investigator, and I told Mr. --
16 Mr. -- Mr. Brooks' investigator about it also. And I wrote a
17 letter to Mr. Brooks.

18 Q. You also testified that you wanted one of your family
19 members to be called to the stand. Which family member was
20 that?

21 A. It wasn't a family member. It was one of the victims --
22 one of the witnesses that testified against me, she got in
23 contact with my family members and told my family members
24 that she was willing to come back and testify to me that she
25 lied on the stand.

1 I brought it to the investigator -- to Mr. Harrell was
2 his name? I brought it to his attention, and I brought it to
3 Mr. Brooks' attention also, and no one -- no one got in
4 contact with my witness.

5 Q. So just so we're clear, it's not an allegation that
6 Mr. Johnson subpoenaed one of your family members to come to
7 court and then didn't put them on the stand, because that's
8 what I thought your allegation was.

9 A. Oh, yes. Yes.

10 Q. That's what I'm asking about.

11 A. Yes. Ms. Johnson, Tanya Johnson, is my relative.
12 Mr. Johnson spoke with Tanya Johnson while we was in trial,
13 and he said he was gonna put her on the stand. I have a
14 subpoena in my paperwork over here with Ms. Johnson's name on
15 it and Mr. Johnson's name on it where he's supposed to
16 subpoena her, but he never subpoenaed her. He spoke to her,
17 and I asked him, "What did she say?"

18 And he was like, "Don't worry about it."

19 And that was that.

20 Q. But you testified she actually was subpoenaed because
21 you have it in your records, correct?

22 A. Yes. I have it in my records.

23 Q. Why did you want her called to the witness stand?

24 A. No. Mr. Johnson said he was going to call her to the
25 stand.

1 Q. So you don't know what her testimony would have been?

2 A. No. Because Mr. Johnson spoke with her.

3 MS. HARRIGAN: Moment's indulgence, Your Honor.

4 Q. One of your allegations of juror misconduct is that one
5 of the jurors was related to the victim, correct?

6 A. Yes. Yes.

7 Q. Which juror and which victim?

8 A. Ms. Snyder. It's Ms. Snyder Poindexter, and she was
9 related to Natasha Rivers.

10 Q. What proof do you have of this?

11 A. It's in my trial transcripts. It states in my trial
12 transcripts that she's related to the victim, and she stated
13 later on in the trial transcripts that she related to
14 Mr. Earl Kinnerly, which was a deputy that testified at my
15 trial also. I had no knowledge of this until I got my
16 transcripts.

17 Q. So she wasn't related to a victim; she was related to a
18 witness. Because Mr. Kinnerly wasn't a victim; he was a
19 witness at your trial.

20 A. He was a witness, but Mrs. Rivers was supposed to be a
21 victim.

22 Q. And you testified in regards to ineffective assistance
23 of appellate counsel that you asked Breen Stevens to petition
24 for certiorari to the Supreme Court, correct?

25 A. Yes.

1 Q. And he refused?

2 A. Yes.

3 Q. Did he explain with you that you're not entitled as a
4 right to petition for certiorari; you're only entitled to
5 your one appeal by right to the Court of Appeals?

6 A. No, that was never explained to me.

7 Q. He never told you it's discretionary to petition for
8 certiorari?

9 A. No. He told me to go straight to PCR. I have the
10 letter that he sent me also in regards to that.

11 Q. You testified that you didn't go over discovery with
12 Mr. Johnson, correct?

13 A. Yes.

14 Q. He never showed you any witness statements or anything?

15 A. No.

16 Q. Did you ever discuss with him what the State would
17 introduce against you at trial?

18 A. Yes.

19 Q. So you were aware that you were identified by two of the
20 witnesses before trial, correct?

21 A. Yes.

22 Q. You knew Ms. Rivers had identified you?

23 A. No.

24 Q. You didn't --

25 A. All I know -- all I know -- all I know is he said that

1 two witnesses -- two people had picked me out -- he said one
2 person had picked me out of a lineup, because there was only
3 one lineup shown. He said one person picked me out of a
4 lineup.

5 So I was under the impression that only one person was
6 coming in to take the stand and point me out, but four people
7 came to the stand and pointed me out. The other three, they
8 was never even shown a lineup.

9 Q. Did you know that your -- Tanisha Adams, is she your
10 ex-girlfriend --

11 A. Yes.

12 Q. -- or distant family member?

13 A. Both.

14 Q. Okay. Did you know that she had given statements to law
15 enforcement that you had called and confessed to committing
16 the crime to her?

17 A. When we was at trial.

18 Q. You didn't know that until you got to trial?

19 A. Yes.

20 Q. And your testimony is that you never discussed possible
21 defenses with Mr. Johnson before your trial?

22 A. No. He didn't allow me to testify.

23 Q. Did you ask him to testify?

24 A. Yes.

25 Q. What did you want to testify to?

1 A. Like I said, let them know that I wasn't even in South
2 Carolina when that transpired, let them know where I was at.
3 The judge never even allowed me to testify.

4 Q. You heard the testimony of Ms. Adams, your girlfriend,
5 distant family member, at trial, correct?

6 A. Right.

7 Q. Do you recall her testifying that you called her the day
8 of the crime and asked her to meet you at a hospital in
9 Orangeburg?

10 A. I recall that at trial.

11 Q. Did you call her and ask her to meet you at a hospital
12 in Orangeburg?

13 A. No.

14 Q. Do you recall her testifying that you called her at
15 around 4:15 in the morning and then 7 a.m. in the morning
16 asking whether the Wagon Wheel had surveillance cameras
17 because you intended to rob it?

18 A. I recall her testifying to that.

19 Q. Did you call her?

20 A. No. The phone records show there was no call.

21 Q. So she was lying on the stand?

22 A. Yes.

23 MS. HARRIGAN: Moment's indulgence, Your Honor.

24 (Brief pause.)

25 Q. In regards to your allegation that Mr. Johnson refused

1 to let you take the stand, Judge Goodstein advised you about
2 your right to testify, correct?

3 A. Yes.

4 Q. And that was on the record, correct?

5 A. Right.

6 Q. And you told her on the record that you didn't want to
7 testify, correct?

8 A. No. My codefendant did. She never asked -- she
9 never -- she never asked me whether I waived my right to
10 testify.

11 Q. So you'd refute if the record shows that she discussed
12 that with you on the record, and you said you didn't want to
13 take the stand?

14 A. Excuse me. Say that again?

15 Q. If the record says that she did ask you if you wanted to
16 testify --

17 A. Uh-huh.

18 Q. -- and she discussed those rights with you, and you told
19 her you did not want to testify, you'd refute what the record
20 says?

21 A. Right. That's not in the record. She asked my
22 codefendant was he waiving his right to testify, and my
23 codefendant told her "yes." Mr. Johnson came back out. She
24 asked Mr. Johnson. Mr. Johnson said, "My client is not
25 testifying." She never asked me was I waiving my right to

1 testify. And then they went on to something totally
2 different. That's in the record.

3 Q. And just so we're clear, your allegations of ineffective
4 assistance of counsel are that he didn't investigate this
5 witness inmate who was transferred from North Carolina, as
6 well as your family member?

7 A. Yes.

8 Q. Anything else you wanted him to do investigation-wise
9 that he didn't do?

10 A. No. Like I said, I didn't have a preliminary hearing.
11 And basically, that was pretty much the main thing:
12 Investigating -- investigating -- investigating the
13 witnesses. And he didn't -- really, Mr. Johnson didn't
14 really do anything pertaining to my case because he -- if --
15 it wasn't anything really he actually did.

16 Q. Your allegation that he didn't request a preliminary
17 hearing on your behalf, did you ever talk about that with
18 him?

19 A. Yes.

20 Q. And you requested a preliminary hearing?

21 A. Yes.

22 Q. What was his response?

23 A. He said I was already indicted.

24 Q. You were arraigned on the record before the trial
25 started, correct?

1 A. I was arraigned on October 1st or 2nd.

2 Q. But that was before the jury was sworn, correct?

3 A. No. The jury was sworn already, I believe.

4 MS. HARRIGAN: No further questions, Your Honor.

5 THE COURT: Any further redirect?

6 MR. BROOKS: No, ma'am.

7 THE COURT: You may step down, Mr. Spears. Thank you.

8 You may call your next witness.

9 MR. BROOKS: Call Charlie Johnson to the stand.

10 THE COURT: Mr. Johnson.

11 CHARLIE J. JOHNSON, JR.,

12 being first duly sworn, testified as follows:

13 THE COURT: Your witness.

14 DIRECT EXAMINATION BY MR. BROOKS:

15 Q. Ready, Mr. Johnson?

16 A. I'm ready.

17 Q. You represented Mr. Spears in this matter; is that
18 correct?

19 A. Yes, I did.

20 Q. Court appointed?

21 A. Yes.

22 Q. You recall how long you'd been on this case?

23 A. I don't remember the exact time, but from the time of
24 the court appointment to the trial.

25 Q. Okay.

1 A. It might have been -- the trial came pretty quick; so
2 I'm not sure of the exact time.

3 Q. Okay. Now, did you raise any objection in regards to
4 him not being tried within 120 days?

5 A. No. I was not aware of that requirement; so no.

6 Q. Okay. All right. Did you raise any issue about the
7 search warrant of Titus's place and the materials taken --

8 A. I didn't raise an issue about the search warrant of
9 Titus's place because it had nothing to do with my client,
10 and there was no evidence found at Titus's place that
11 connected my client to the case.

12 Q. Okay. Now, in your -- could you summarize what the
13 State's case was against Phillip?

14 A. It's a while back, but basically what happened was when
15 I got the case, I actually did meet with Phillip numerous
16 times, more than two times. Maybe he doesn't remember it
17 now, but I met with him on a number of times. I had my
18 investigator -- we both met with him on numerous times about
19 the case.

20 We discussed that -- if I remember right, that there
21 was -- there was certain evidence that Titus took some
22 evidence. It was stuff taken from the store, if I remember,
23 that they had found at the house, at Titus's house, and that
24 Mr. Spears and the codefendant was friends.

25 And then they had the statements from the other

1 witnesses saying that they confessed to them. They had the
2 young lady who said that he called on her and said to come to
3 the hospital and then the other lady saying that he confessed
4 as well. So it was a number of different things, but I went
5 over all the evidence with him.

6 Q. Okay. So it really wasn't a direct evidence case. It
7 was -- you know what I mean by direct evidence? Somebody at
8 the scene of the crime. It was more of a situation of a
9 girlfriend that said he gave a statement?

10 MS. HARRIGAN: Your Honor, I would object to the leading
11 and the testimonial questions by Mr. Brooks.

12 MR. BROOKS: I'm just trying to narrow it down, Judge.
13 Mr. Johnson says it's been a while for him; so I was asking
14 him if he could briefly summarize the State's evidence
15 against Mr. Spears.

16 THE COURT: All right. Let's move on.

17 Q. Okay. Now, make sure I understand this. It was the
18 statements by the two ladies, right?

19 A. Right. I mean, the record reflects the statements that
20 came in. But everything that happened in the trial we were
21 aware of before the trial, and I went over it with Mr. Spears
22 prior to the trial.

23 Q. Okay. Do you recall raising any objection to the
24 in-court identification?

25 A. I think everything -- the record speaks for itself, but

1 I don't believe I missed any objections in the record.

2 Matter of fact, at the end of the trial, I renewed my
3 objection for all prior objections prior to the trial.

4 Q. Okay.

5 A. We did that before directed verdict, at the end of the
6 prosecution case. We did that again at the end of the final
7 closing arguments, where I renewed all my objections
8 previously made; so I think I covered all objections that
9 were related. I don't remember missing any.

10 We asked for a mistrial when the things came up about
11 the jury.

12 Q. Okay.

13 A. And that was denied; so that was protected.

14 Q. Okay.

15 A. As far as Mr. Spears not testifying, I believe that he
16 indicated to me that he did not want to testify. I mean, I
17 would not intentionally tell anybody that you can't testify
18 or not to testify. I wanted him to -- I wanted to represent
19 him and do everything I could to help him. As a defense
20 attorney, it doesn't aid me when I lose a case; so I was not
21 in there trying to help Mr. Spears go to jail. I was trying
22 to defend him.

23 Q. Did you raise any issue about the solicitor's closing
24 argument?

25 A. There was nothing in the closing argument that I felt

1 rose to the level for me to object; so I guess it was a call
2 on my behalf. If I was wrong, then perhaps I was wrong, but
3 I didn't see anything that required me to object to it.

4 Q. So if the -- whatever the record is, you'd stand by the
5 record?

6 A. Whatever the record says.

7 Q. Did you ever think about -- well, let me rephrase.

8 Did Mr. Spears tell you about the conversation between
9 him and another gentleman that was brought down from North
10 Carolina?

11 A. I don't quite remember that; however, that would not
12 have been anything that I would have brought that gentleman
13 forward anyway. It would not have proven anything. The
14 gentleman didn't make any statements against Mr. Spears; so
15 he didn't go along with what the police asked him to do.

16 The police didn't make any statements saying that the
17 gentleman made a statement; so there was nothing there for me
18 to object to, there was nothing there for me to defend, there
19 was nothing there for me to bring up.

20 Q. Did you object to any of these ladies testifying about
21 these alleged statements or phone calls?

22 A. There was nothing to object to. They were making
23 statements as to what they say my client said to them. I
24 tried to cross-examine them and tried to show some --
25 something in the statement that was not correct. I tried to

1 cross-examine them and show that maybe they wasn't telling
2 the truth, but there was nothing for me to object to. I
3 cannot object to what somebody said my client said.

4 Q. Do you remember his codefendant's lawyer's closing
5 statement?

6 A. I don't remember it, but --

7 Q. Do you think that was something that you should have
8 objected to?

9 A. No. Because by objecting to it, I would have called
10 more attention to it, made the jury think about it more. And
11 I do not believe that the codefendant attorney said anything
12 related to my client; so to be honest with you, I really
13 didn't care too much about what she said.

14 Q. Do you recall any testimony about a gun being found near
15 Mr. Spears when he was arrested?

16 A. There was a gun found, I think. He was arrested in
17 North Carolina. I think there was a gun found, if I remember
18 right. And I brought up the difference in the gun as far as
19 they say it was silver and black. And I brought up the
20 difference showing that there was some difference in the way
21 it was described, but the Judge basically ruled that that was
22 a question for the jury to make that determination, that they
23 could look at it, see the differences in the description and
24 make their own decisions about it.

25 Q. And do you remember Grove's testimony and another

1 gentleman? I believe this was about the phone.

2 A. I think that was testimony about phone records where
3 they got phone records from the phone department, either the
4 wireless phone department, something like that. There was
5 nothing to object to the phone records.

6 It just showed that certain phone that were registered
7 to certain individuals, and it showed the phone records or
8 phone calls being made, but there was nothing in the record
9 to indicate what was said or anything like that. It would
10 just be a typical phone record that said that there was a
11 phone call made and it lasted this number of seconds or
12 minutes or whatever.

13 Q. But you'd acknowledge you didn't object to that or try
14 to keep that out?

15 A. We knew about the phone records beforehand. I went over
16 the phone records with Mr. Spears.

17 MR. BROOKS: Okay. Beg the Court's indulgence.

18 THE COURT: Yes, sir.

19 MR. BROOKS: No other questions.

20 MS. HARRIGAN: Your Honor, may we have a very brief
21 break before my cross-examination.

22 THE COURT: Sure.

23 MS. HARRIGAN: Thank you.

24 (Recess held.)

25 CROSS-EXAMINATION BY MS. HARRIGAN:

1 Q. Good afternoon, Mr. Johnson.

2 A. Good afternoon.

3 Q. How long have you been practicing law?

4 A. 19 years.

5 Q. What percentage of your practice is comprised of
6 criminal defense, estimate?

7 A. 99 percent.

8 Q. Do you recall the approximate date you were appointed?

9 A. No. I guess it would be reflected in the record.

10 Q. Do you recall when Mr. Spears was indicted?

11 A. I don't recall, no. I don't have the file before me.

12 Q. There was some discussion on direct examination as to
13 whether or not you moved for a speedy trial within 120 days
14 pursuant to the Interstate Agreement on Detainers Act,
15 correct? Do you recall that?

16 A. Correct, right.

17 Q. Mr. Spears wasn't actually incarcerated in North
18 Carolina; he was just arrested in North Carolina, correct?

19 A. That's correct.

20 Q. Are you familiar with the Interstate Agreement on
21 Detainers Act?

22 A. Somewhat familiar with it. At that time I didn't really
23 check it, because as I said, he was arrested. And when I was
24 appointed, he was already in jail here in South Carolina.

25 Q. He was arrested at someone's home. He wasn't extradited

1 from jail with pending charges in North Carolina, correct?

2 A. Correct.

3 Q. And he wasn't serving a prison sentence in North
4 Carolina, correct?

5 A. Correct.

6 Q. So he was arrested at a private residence?

7 A. Correct.

8 Q. Based on your understanding of the IADA, is it
9 applicable here?

10 A. I don't think it is. As I said, when I received the
11 appointment, he was already incarcerated here in South
12 Carolina. He was at the Orangeburg detention center; so I
13 wasn't even aware of where he was arrested prior to that
14 until after I got discovery.

15 Q. When did you get discovery?

16 A. Probably within two to three weeks after I was
17 appointed, whatever that date was. As I said, I don't have
18 my particular file before me. I've been moving. I wasn't
19 able to bring it today.

20 Q. You testified you met with him numerous times?

21 A. Yes.

22 Q. More than ten?

23 A. Maybe not more than ten but definitely more than two
24 times.

25 Q. And you recall meetings with yourself, your

1 investigator, Amos Jones, and Mr. Spears?

2 A. Yes.

3 Q. Did your investigator, Amos Jones, meet with him
4 individually?

5 A. He did at least once, but most of the time he was with
6 me.

7 Q. Why did you select Jones as your investigator in this
8 case?

9 A. He's one of the most qualified investigators in the
10 state. Basically, he's my investigator whenever I have
11 criminal trials. He's the investigator I use. He's the
12 death penalty -- he's been investigator on numerous death
13 penalty cases. He's been an ex-policeman from Charleston.
14 He was at the public defender's office some 19 years ago when
15 I started. I would estimate he's probably one of the most
16 qualified investigators in the state.

17 Q. And you'd worked with him previously?

18 A. Yes.

19 Q. Did you file any Brady or Rule 5 motions in this case?

20 A. I file a Rule 5 and Brady whenever I get a case.

21 Q. Do you believe you were given all the information by the
22 State?

23 A. I believe so. There was nothing brought up at trial
24 that I wasn't aware of.

25 Q. Did you review these discovery materials with

1 Mr. Spears?

2 A. Yes, I did.

3 Q. How many times?

4 A. As I said, we went over -- we went over all the
5 discovery. It was quite a bit of discovery. We went over
6 discovery. I don't know if I set there and went page by page
7 with him, but I know we went over the pertinent evidence and
8 anything that I felt that was applicable in the case.

9 Q. When you talk about pertinent evidence, what evidence
10 did you consider pertinent? Could you share that with the
11 Court?

12 A. To me, pertinent evidence is evidence that indicate --

13 Q. No, sorry, Mr. Johnson, not the definition. In this
14 case, what statements were particularly useful for the State
15 or what identifications?

16 A. I couldn't tell you specifically, because as I said,
17 that's been like seven years ago. The evidence that I went
18 over with them was all evidence of identifications, all
19 discovery evidence related to things that they tried to
20 connect him to committing this crime.

21 Q. And statements were -- allegedly have been made by
22 Mr. Spears to his ex-girlfriend, correct?

23 A. Correct.

24 Q. Admitting to committing the crime?

25 A. Correct.

1 Q. And then there were two calls earlier, one very early in
2 the morning and then one at 7 a.m. in the morning, asking if
3 there were cameras because he intended to rob the Wagon
4 Wheel, correct?

5 A. Yeah. It was something about statements that he had
6 called saying he was just getting in town that morning or
7 something like that, if I remember right -- I mean, I could
8 be wrong because I'm recalling it six, seven years ago -- but
9 some statement about he had just got in town earlier that
10 morning; there was another statement called later on that
11 day.

12 Q. Do you recall her testimony at all at trial?

13 A. Vaguely.

14 Q. Do you recall the jury leaving for an in camera hearing
15 and some proffered testimony regarding third-party guilt
16 pertaining to her brother?

17 A. Vaguely something about it, but I don't remember the
18 details of it.

19 Q. Do you allow the Court ruling that neither yourself or
20 Co-counsel Hinds could go into third-party guilt based on the
21 proffered testimony?

22 A. That's correct. I remember attempting to try to go into
23 third-party guilt. Because our argument was most jurors
24 would ask, "If Mr. Spears didn't do it, then who did?" I
25 mean, it would probably be in the back of their minds.

1 And I know that's proof to prevent the jury from
2 speculating for third-party guilt, but in this case, there
3 was some evidence that connected that that we thought that we
4 could be able to discuss it just because of the relationship
5 of the brother and in reference to this case and stuff, but
6 we wasn't allowed to do that.

7 Q. And you testified before, I think, that Mr. Spears
8 alleged he was in Charlotte at the time; he wasn't in North
9 Carolina -- or South Carolina at all, excuse me, correct?

10 A. Right.

11 Q. Did you ever consider calling his friend whose home he
12 was arrested at, Kimberly Charlie -- or Cherry, excuse me, to
13 confirm that?

14 A. We talked to people, but we could find nobody to confirm
15 that or to support the claim.

16 Q. So you looked into his alibi defense, you just couldn't
17 find any viable alibi witnesses?

18 A. That's correct.

19 Q. Did you explain that to your client?

20 A. Yes.

21 Q. And he knew you wouldn't be calling Ms. Cherry or anyone
22 else?

23 A. Yes.

24 Q. You were in the courtroom for his testimony earlier this
25 afternoon, correct?

1 A. Yes.

2 Q. Did you hear his testimony regarding a family member you
3 had subpoenaed and didn't call?

4 A. Yes. Because after talking to her, she didn't have
5 anything to offer.

6 Q. Who was that family member?

7 A. I don't remember who it was.

8 Q. But you found her to not be useful after talking to her?

9 A. Right.

10 Q. Do you recall whether or not you made any motions to
11 suppress the identification of your client by the victim,
12 Natasha Rivers?

13 A. I had no -- no reason to. There was -- I think there
14 was one photo lineup shown, and everybody else did an
15 identification of him in court.

16 Q. If the record reflects you did have a *Neil v. Biggers*
17 hearing challenging Ms. Rivers ID of your client, would you
18 have any reason to dispute that?

19 A. No, I wouldn't dispute it. Whatever the record states.
20 I remember we did have one hearing on identification, but I
21 didn't remember who it was.

22 Q. Do you also recall having a hearing on victim and store
23 owner of the Wagon Wheel James Bourgeois's ID of your client?

24 A. I don't recall it, but I would go by the record.

25 Q. Do you recall joining in a motion to sever Mr. Spears

1 trial from that of his codefendant, Titus?

2 A. Yes, I did.

3 Q. Do you recall whether, that was obviously denied by the
4 Court, correct?

5 A. We did not.

6 Q. And I believe you testified before on direct, but you do
7 recall making a motion to suppress the gun found on
8 Mr. Spears when he was arrested in Charlotte?

9 A. Yes.

10 Q. And once that was denied on cross-examination, do you
11 recall trying to impeach the witnesses on their description
12 of the gun versus the gun that actually came into evidence?

13 A. Yes.

14 Q. Do you recall what some of those differences were
15 between the descriptions and the actual weapon?

16 A. I think one was -- had an all-black handle and some
17 silver showing, and one gun was described as being all silver
18 or shiny, something of that nature. It was -- it was the
19 description of the gun that didn't quite match the gun.

20 Q. Did you see any reason to challenge his arrest in
21 Charlotte?

22 A. No.

23 Q. And as you testified before, he was arrested at a
24 private home, correct?

25 A. Correct.

1 Q. Do you recall whether or not there was assistance from
2 Charlotte-Mecklenburg sheriff's deputies who helped in
3 obtaining him?

4 A. I don't recall, but his being there in Charlotte, would
5 have to have been some type of assistance from Charlotte
6 Police, but as of right now, I don't recall.

7 Q. Do you recall having Mr. Spears arraigned on the record
8 before his trial began?

9 A. I think so, yes.

10 Q. Did you see any reason to challenge the three various
11 indictments brought against Mr. Spears?

12 A. I reviewed them. I didn't see any problems with them.

13 Q. And they all three were true billed, correct?

14 A. Correct.

15 Q. Did Mr. Spears ever ask you for a preliminary hearing?

16 A. I don't remember him asking me for one. As I said, the
17 trial went pretty fast. As to why we didn't have one, I
18 can't tell you that reason now. I think it might have been
19 because he was already indicted.

20 Q. And I --

21 A. But I'm not sure.

22 Q. And I believe you testified that he was already housed
23 in the Orangeburg County detention center by the time you
24 were appointed, correct?

25 A. That's correct.

1 Q. All of the previous objections that you made pretrial
2 based on your motions to suppress the various statements,
3 weapons, and in-court identification, do you recall whether
4 or not those were preserved on the record throughout the
5 trial?

6 A. I believe I did. My normal standard practice, as I
7 said, is at the end of the prosecution testimony, when
8 directed verdicts are made, I renew my objections, all
9 previous objections. And then also at the end of the case, I
10 renew my objections. And I think also once the verdict is
11 turned in, I renew my objections with the judge.

12 Q. Do you recall cross-examining the four employee victims
13 of the Wagon Wheel during the trial?

14 A. I somewhat remember cross-examining them.

15 Q. And a few of those witnesses had given statements to law
16 enforcement, correct?

17 A. Correct.

18 Q. Do you recall cross-examining these four witnesses on
19 the differences between their statements to law enforcement
20 and their testimony either pretrial or during the trial?

21 A. Yes. I believe that's normally -- that was my only --
22 well, that's -- that was the best way to cross-examine them,
23 try to show the inconsistencies in their statements at trial
24 compared to the statements they give when they give initial
25 written statements.

1 Q. Would you also characterize that as your strategy in
2 regards to Calhoun County sheriff's deputies, such as
3 Christopher Golden?

4 A. Yes.

5 Q. And they made a few different statements pretrial in
6 meetings and then during their pretrial testimony, correct?

7 A. That's correct.

8 Q. Do you feel you were able to successfully highlight that
9 to the jury?

10 A. I don't think I was successful since my client was found
11 guilty, but I attempted to.

12 Q. Do you recall highlighting that during your closing
13 argument as well?

14 A. Yes, I do.

15 Q. Regarding the cell phone records that were introduced,
16 do you recall making an objection when the State attempted to
17 introduce those through a member of law enforcement?

18 A. I believe I did. I guess the record would reflect if I
19 did or not, but I think I did.

20 Q. Do you recall after that, when a Sprint employee took
21 the stand, also objecting to those records coming in?

22 A. I probably -- I -- right now sitting here, I don't
23 remember if I did, but I'm assuming that I did because that
24 would have been something that I would have objected to.

25 Q. And again, you would stand by what their record said,

1 since the trial was quite a few years ago?

2 A. Yes.

3 Q. And you testified on direct that it was your client's
4 decision whether or not to take the stand, correct?

5 A. That's correct.

6 Q. Did you advise him of the pros and cons if he were to
7 take the stand?

8 A. Yes.

9 Q. Do you recall whether or not he was advised by
10 Judge Goodstein about his constitutional right to testify or
11 to remain silent?

12 A. I don't remember. I mean, there was two codefendants
13 there. I'm assuming that she did because I can't remember a
14 trial when it wasn't done.

15 Q. Had you been before Judge Goodstein before?

16 A. Many times.

17 Q. And her standard practice is to advise clients of this
18 right during trial?

19 A. Right. And I would assume that the record would reflect
20 that. If it didn't, then I would have to go by what the
21 record said.

22 Q. You testified before that you didn't find anything in
23 the State's closing argument to be objectionable, correct?

24 A. Correct.

25 Q. Would you agree with the contention that solicitors and

1 defense counsel have pretty wide leeway in their closing
2 arguments?

3 A. They do to a certain degree.

4 Q. And you've reviewed them and don't find anything to be
5 objectionable?

6 A. No. I mean, you can always miss something and go back
7 later on and say maybe I should have objected to it or
8 something, but I don't think it was -- if my recollection is
9 correct, I don't remember hearing anything that was so
10 egregious that I would say I made a mistake by not objecting.

11 Q. And in regards to co-counsel's attorney Ms. Hinds'
12 statements that she made during closing arguments, I believe
13 your testimony was you didn't want to highlight that to the
14 jury?

15 A. Well, as I said, I didn't hear anything or remember
16 hearing anything that was objectionable to me. But in most
17 cases, especially in closing arguments, I tried not to make a
18 big thing about something that someone says. Most of the
19 time it's something that prosecution said.

20 Because usually, by the time, in most cases, when a
21 trial's been going on four or five days, by the time you get
22 closing arguments, I've found out over the years, most
23 juries, they're just ready to go back and make a decision.
24 They really don't want to sit there for no long, drawn-out
25 closing arguments.

1 Sometimes you can make an objection at closing arguments
2 to bring attention to something that really the jury probably
3 wasn't even paying attention to to start with.

4 Q. And you testified before that you recall the jury note
5 and the discussion about Mr. Spears and his codefendant and a
6 possible bank robbery in Cameron, correct?

7 A. Correct.

8 Q. Do you recall whether or not the trial court then
9 individually questioned and polled each juror?

10 A. I believe she individually questioned and polled each
11 juror. I think it was -- actually, I don't know if we was in
12 the jury room or whether we was in her chambers, but I
13 remember her bringing each jury member in and questioning
14 them separately as to whether they heard anything.

15 I don't know if the Judge asked them directly, "Did you
16 hear specifically about something?" I think the Judge asked
17 did you hear anything particular about my client, without
18 bringing up specifically what it was.

19 Q. Do you recall moving for a mistrial on this ground?

20 A. Yes, I did.

21 Q. I know you testified that you can't recall whether or
22 not it was held in chambers or out in open court. If the
23 record reflects it was held in chambers, do you have any
24 reason to dispute that?

25 A. No. Because for some reason, I kind of remember sitting

1 in chambers doing that.

2 Q. Do you remember objecting to that, that your client
3 wasn't allowed to come in chambers and listen to this?

4 A. Yes. I think -- I think I made an argument that my
5 client had a right to be there.

6 Q. Do you recall Judge Goodstein overruling your objection
7 but allowing your client to listen to the testimony right
8 then from the court reporter?

9 A. Yes.

10 MS. HARRIGAN: Moment's indulgence, Your Honor.

11 (Brief pause.)

12 Q. Mr. Johnson, have you had an opportunity to review the
13 trial transcript in full before coming to court today?

14 A. No, not today.

15 Q. Have you ever had a chance to review the trial
16 transcript?

17 A. Not in full. Some parts of it.

18 Q. Did you notice anything that was taken out of the
19 transcript?

20 A. No.

21 MS. HARRIGAN: No further questions, Your Honor.

22 THE COURT: Any further redirect?

23 REDIRECT EXAMINATION BY MR. BROOKS:

24 Q. Mr. Johnson, by your own admission, this has been
25 several years ago?

1 A. Yes. I think it was 2007.

2 Q. Okay. And if there are any discrepancies about what
3 you've testified to here today and what the record is, you
4 would rely on the record; is that correct?

5 A. Always go with the record.

6 Q. Okay. Whether it was -- whether or not you made any
7 objections or whether Mr. Spears fully waived his right to
8 testify, you would rely on what's on the record?

9 A. Whatever is on the record.

10 Q. In the transcript?

11 A. In the transcript.

12 MR. BROOKS: Okay. No other questions.

13 THE COURT: Thank you. You may step down, Mr. Johnson.
14 Thank you.

15 THE WITNESS: Thank you, ma'am.

16 MR. BROOKS: We would call Ms. Cecelia Robinson to the
17 stand.

18 THE WITNESS: Your Honor, can I be excused?

19 THE COURT: Any objections to Mr. Johnson being excused?

20 MS. HARRIGAN: Charles, do you plan to have any
21 additional witnesses to call?

22 MR. BROOKS: No. No objection, no. Just Ms. Robinson
23 here.

24 MS. HARRIGAN: No objection, then.

25 THE COURT: You may be excused, Mr. Johnson.

1 MARY CECELIA ROBINSON,
2 being first duly sworn, testified as follows:

3 THE COURT: Your witness.

4 DIRECT EXAMINATION BY MR. BROOKS:

5 Q. Ms. Robinson, you work for appellate defense?

6 A. I did.

7 Q. You did at the time?

8 A. I did at the time. I don't now.

9 Q. Okay. And you're the one that put together Mr. Spears'
10 appellate brief?

11 A. Right.

12 Q. And there were some things that were left out?

13 A. Yes.

14 Q. Can you tell us what they were?

15 A. When I got the Court of Appeals -- when I got the Court
16 of Appeals opinion years ago, that's when I remembered what
17 happened. I'd written a, you know, 45-page brief raising I
18 think originally it was four issues. And then I was reading
19 over it at the last minute, and I thought, "These mistrial
20 issues are both important." I thought they were the best
21 issues in the case. "Why am I sticking them together?"

22 They're different subjects. One of them is the judge
23 somehow let in evidence he'd told the defense wouldn't come
24 in, and the other was the jurors were informed that he was a
25 bank robber. Those are different. So at the last minute, I

1 split off that last argument into a fifth argument. And what
2 I was supposed to do was pull the cites, "see supra." You
3 know, make my little argument, which I was doing, and then
4 say, "see Parker supra." I just didn't. And the Court of
5 Appeals found, Well, this argument had no -- no authority
6 cited for it; so we're not even going to consider it.

7 I was surprised by that ruling, since the authority has
8 been mentioned throughout the brief, and it was on Page 42,
9 and this argument's on Page 43. I thought that was a little
10 extreme, but I know the rules, and I should have done it, and
11 I just missed it.

12 Q. So basically that never got considered because --

13 A. No. They wouldn't consider it because I didn't put in
14 the supra cite. That's all I had to do was put, "see Parker
15 supra," but I somehow, at the last minute, just forgot.

16 Q. And as a result of that --

17 A. They didn't consider it, and I think it was the best
18 issue.

19 MR. BROOKS: Okay. All right. No other questions,
20 Judge.

21 THE COURT: Cross-examination?

22 MS. HARRIGAN: Briefly, Your Honor.

23 CROSS-EXAMINATION BY MS. HARRIGAN:

24 Q. Ms. Robinson, how long were you at appellate defense?

25 A. Three years, I think.

MARY CECELIA ROBINSON - CROSS-EXAMINATION BY MS. HARRIGAN 61

1 Q. Was that your first appellate job experience?

2 A. No. I was at the Supreme Court after I got out of law
3 school, and then I was -- I ran my own appellate practice.
4 And then I went into partnership with two of my best friends
5 from law school, which is a great idea. Then immediately
6 after that, I went to appellate defense.

7 Q. And you were at the office of appellate defense for
8 three years?

9 A. I think so.

10 Q. Do you recall roughly how many briefs you handled while
11 you were there?

12 A. I'd say five a week. It seemed like there was one due
13 every day. I could be -- you know, I could be exaggerating,
14 but it seemed like that.

15 Q. What is your standard procedure when you did receive a
16 new file at appellate defense?

17 A. Read the transcript, come up with a list of issues, do
18 the research, do the brief. And then there comes that step
19 where you've done this monstrous brief and you go in and try
20 to make it more readable, try to reduce some of the cites,
21 reduce some of the jabber about the same things going on and
22 on so the Court can read the brief and care about it. That's
23 where I fell down on his case, that step.

24 Q. How do you decide what issues to raise on appeal?

25 A. The ones that are preserved and have merit and might

1 result in a new appeal, in a new trial.

2 Q. And you raised either five or six issues here?

3 A. I can't remember. I just got the brief yesterday
4 online, and I didn't print it; so it's been years.

5 If I raised six, I originally had five, one of them with
6 three -- with two different mistrial issues, and then I split
7 it into six.

8 Q. Did you have an opportunity to speak with trial counsel,
9 Mr. Johnson, about the case?

10 A. No.

11 Q. Is that something you typically do?

12 A. Never.

13 Q. Did you have an opportunity to discuss this case with
14 Mr. Spears?

15 A. Often.

16 Q. Can you elaborate what you mean by often?

17 A. He would call me and say, I got this, I didn't get that.
18 He wasn't -- he wasn't happy about anything. I don't
19 remember -- there was something possible about the record on
20 appeal. I don't remember that. I remember that there was a
21 problem. I don't remember what it was.

22 Q. Have you had an opportunity to review the record on
23 appeal before coming to court today?

24 A. No.

25 Q. Did you ever indicate to Mr. Spears that you could file

MARY CECELIA ROBINSON - CROSS-EXAMINATION BY MS. HARRIGAN 63

1 a reply brief to the State's final brief of respondent?

2 A. We didn't do a reply brief?

3 Q. The record does not reflect --

4 A. Okay.

5 Q. -- that one was done. Did you ever tell him you were
6 going to?

7 A. No. If I told him I was going to, I would have; so
8 maybe they didn't say anything I needed to reply to.

9 Sometimes the reply brief can be really strong if the State
10 says something that you can squash them on. But if they
11 don't, now you're just taking up more time to go over what
12 you already said.

13 Q. And oral arguments were held in this case, correct?

14 A. Right.

15 Q. Did you argue the case?

16 A. I wasn't there then.

17 Q. Do you recall who argued it?

18 A. Breen Stevens, or Steven Breen.

19 Q. Breen Stevens.

20 A. Okay.

21 Q. Do you -- in your appellate experience, does a client
22 have a right to petition for certiorari to the South Carolina
23 Supreme Court?

24 A. No. It's not an as of right. It's discretion of the
25 attorneys, I guess.

1 Q. And again, you weren't the attorney of record at that
2 point; it was Breen Stevens?

3 A. No.

4 Q. Okay.

5 A. And I can't speak to his decision not to go up on cert.
6 We weren't encouraged to just go up on cert as a matter of
7 rote. I mean, once it's been ruled on, unless you've really
8 got an issue, leave the Court alone.

9 Q. And your testimony is that you were ineffective for
10 failing to add the supra to this case?

11 A. I just -- what I did was, now that argument has been
12 robbed of all the authority, the cases cited. I just took
13 all the factual elements from that argument and moved them
14 around. And I forgot to pick up -- all I had to do was copy
15 the paragraph, and I just didn't. I missed it.

16 Q. Do you believe that that issue was meritorious to the
17 point that it would have warranted a new trial and the
18 reversal of his convictions?

19 A. I do. I do. And I thought it was the strongest issue
20 he had. The jury was informed in the middle of his trial for
21 robbery that he was a bank robber, and they all knew it, and
22 they all discussed it, and I don't know how you'd disabuse
23 yourself of the fact that we're trying a bank robber for
24 robbery; so I thought it was a good issue. And as luck would
25 have it, that's the one I managed to mess up and leave out.

MARY CECELIA ROBINSON - CROSS-EXAMINATION BY MS. HARRIGAN 65

1 Q. Do you recall, and it has been a while since you handled
2 this case on appeal, but do you recall whether or not the
3 Court individually polled each of the jurors about the length
4 of the discussions --

5 A. I don't. I don't.

6 Q. -- or anything like that?

7 So your comments here today that this came up in the
8 middle of trial and there was a discussion about it --

9 A. It's my memory. It's not. I don't know the record like
10 you all do.

11 Q. And you said that you believe this issue is meritorious
12 and would have warranted reversal and a new trial, correct?

13 A. Yes. I'm from appellate defense. I generally think
14 that. But Court of Appeals didn't say, "We're not
15 considering this and it wouldn't have been good anyway."

16 They've given no indication this wouldn't be a good issue.

17 Q. Have you ever had cases before where the Court of
18 Appeals sees that an issue isn't technically preserved, such
19 as here where there's no argument cited, but they still find
20 a way to rule on the issue, either the Court of Appeals or
21 Supreme Court?

22 A. I know the Supreme Court's done that. I just -- I can't
23 really speak to the Court of Appeals.

24 Q. So in your personal experience, they haven't done that
25 before?

1 A. No.

2 MS. HARRIGAN: Okay. No further questions, Your Honor.

3 THE COURT: Thank you. Anything further, redirect.

4 REDIRECT EXAMINATION BY MR. BROOKS:

5 Q. Ms. Robinson, in order for you to have a strong writ to
6 take to Supreme Court, you need to have these things
7 deliberated by the Court of Appeals?

8 A. Right.

9 Q. And since they were never really deliberated by the
10 Court of Appeals --

11 A. Well, I guess maybe Breen Stevens looked at it and went,
12 "Well, that last issue's the best one. I can go up on cert
13 with it, but what am I going to say? She didn't preserve it.
14 We've lost it. Procedural default." So what's he going to
15 do?

16 Q. Whereas if you had it in there --

17 A. If it was in there and they denied it on the merits,
18 then I -- I don't know Breen Stevens, but I have every reason
19 to think he would have taken it up on cert.

20 Q. If it were you when you were still there --

21 A. Oh, yes, I was really obnoxious about it.

22 MR. BROOKS: No other questions.

23 THE COURT: You may step down, ma'am, thank you.

24 THE WITNESS: Thank you.

25 THE COURT: Any further witnesses?

1 MR. BROOKS: Judge, that's applicant's case.

2 THE COURT: All right.

3 MS. HARRIGAN: State has no witnesses to call.

4 THE COURT: Anything further?

5 MR. BROOKS: Judge, we don't have any other thing other
6 than, I know it's a late hour, I would say that my client is
7 entitled to his PCR, ineffective trial counsel and, as you
8 heard, from appellate counsel. I know my opposing counsel is
9 going to argue the other side.

10 THE COURT: Yes.

11 MR. BROOKS: And I know you are pressed for time, but
12 we've been here for quite a while, and you've heard all the
13 evidence, but it's my position and my client's position he
14 should get a new trial.

15 THE COURT: Thank you, Mr. Brooks.

16 MS. HARRIGAN: And briefly, Your Honor, the State would
17 rely on the testimony from Mr. Johnson, as well as the
18 extensive record that is before Your Honor, that there was no
19 deficiency of trial counsel. Every objection was made, every
20 objection was preserved on the record. I don't believe that
21 Mr. Spears has met his burden of proof in regards to a
22 deficiency as well as prejudice.

23 I think this is a case where there was significant
24 evidence of his guilt, including a confession into earlier
25 warnings of the attempted robbery to his girlfriend. There

1 is quite amount of evidence of guilt here, so the State would
2 also argue it's not only no deficiency, there's also no
3 prejudice.

4 Turning next to the issue of juror misconduct, the State
5 would submit that these issues were already addressed and
6 ruled upon by Judge Goodstein. Your Honor can see in the
7 record that Judge Goodstein brought each juror out -- not
8 out, excuse me, into chambers but on the record, asked them
9 about this issue. A mistrial motion was made based on this
10 issue, and it was denied; so that was all properly preserved.

11 Mr. Johnson couldn't have done anything differently,
12 and, if anything, the State does not think it was trial court
13 error, but, if anything, that would have been a direct appeal
14 issue.

15 And lastly, turning to ineffective assistance of
16 appellate counsel, the State would submit that applicant
17 cannot show prejudice here despite Ms. Robinson's testimony
18 that she was ineffective or deficient for not adding a supra
19 there.

20 The appellate courts in South Carolina have often
21 overlooked -- well, maybe not often, but in various
22 instances, I know I've had it in my short legal career, where
23 they have overlooked an issue that wasn't technically
24 preserved and still ruled upon it because they feel that it
25 is a meritorious issue.

1 Additionally, the State would argue no prejudice can be
2 shown because this is not an issue that would have warranted
3 a new trial and defines that appellate counsel is
4 ineffective. You have to show that the issue would have
5 warranted a new trial.

6 So based on those grounds the State would argue that
7 this application should be denied in full.

8 THE COURT: All right. Thank you. Again, I'll take the
9 time to review the entire record and then issue a ruling in
10 writing to the parties. Thank you.

11 MR. BROOKS: Thank you.

12 MS. HARRIGAN: Thank you, Your Honor.

13 --- END OF TRANSCRIPT OF RECORD ---

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1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA

3 COUNTY OF CALHOUN

4

5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of the above-captioned case, relative to appeal,
10 in the First Judicial Circuit Court for Calhoun County, South
11 Carolina, on the 28th of May, 2014.

12 I further certify that I am neither related to nor
13 counsel for any party to the cause pending or interested in
14 the events thereof.

15 October 23, 2014

16

17 *Ruth L. Mott*

18 Official Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

Phillip Lee Spears, #297965,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-09-00197

ORDER OF DISMISSAL

2011 SEP 23 P 3:58

FILED

This matter comes before the Court by way of an application for post-conviction relief filed October 6, 2011. The State made its Return on April 12, 2012, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on May 28, 2014, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After reviewing all testimony and other evidence presented at the hearing, along with a review of all records provided to the Court, this Court finds that there are no constitutional deprivations or other grounds on which to grant relief and is denying and dismissing this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Calhoun County Clerk of Court. Applicant was indicted by the Calhoun County Grand Jury during the June 2007 term for Armed Robbery (2007-GS-09-0148) and during the August 2007 term for Possession of

a Firearm or Knife during the Commission of a Violent Crime, and Kidnapping (2007-GS-09-0221). Charlie J. Johnson, Jr., Esquire, represented him. On October 1-10, 2007, Applicant proceeded to a jury trial before the Honorable Diane S. Goodstein, where he was convicted as indicted. Judge Goodstein sentenced Applicant to thirty years imprisonment for Armed Robbery, five years for Possession of a Firearm or Knife during the Commission of a Violent Crime, and thirty years for Kidnapping, with all sentences to be served concurrently.

A notice of appeal was filed and an appeal was perfected on Applicant's behalf by Appellate Defender M. Cecelia Robinson. Following briefing and argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Spears, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The Remittitur was sent on July 1, 2011.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of counsel.
 - a. "...not filing a motion to dismiss charges for lack of speedy trial within the time limitations of the Interstate Agreement on Detainers Act..."
 - b. "Failed to object to solicitor's closing argument statement stating everyone in the courtroom. Both attorneys believe James (the victim) wasn't lying even thou[gh] the applicant requested for counsel to object."
 - c. "Failed to object to co-defendants attorney closing argument statement stating she doesn't believe the victim "James" would not tell an untruth."
 - d. "Failed to request an in camera hearing regarding the reliability of the in-court identification by the victims Williams and Prezzie."
 - e. "Failed to object to curative instruction given to jury."
 - f. "Failed to object to the in chambers hearing with the jurors outside of the applicant's presence until the chambers hearing was over, depriving applicant of right to be present at all stages."
 - g. "Failed to inform applicant that one of the jurors was related to the victim and officer who testified at the trial."

- h. "Failed to contemporaneously object to in-court identification during direct testimony of 'James & Natasha.'"
- i. "Failed to object to SLED agent Donald K. Johnson testifying to non-existing evidence of a phone found near applicant when he was arrested that was never submitted as evidence."
- j. "Failed to object during victim's trial testimony regarding the appearance of the gun or its similarity to the gun supposedly found near applicant at the time of his arrest."
- k. "Failed to allow applicant to testify at the suppression hearing of the gun."
- l. "Failed to object to the solicitor's closing argument statement that applicant's defense is no defense."
- m. "Failed to object to the solicitor arguing flight in closing argument when the court did not charge flight."
- n. "Failed to move to suppress Sprint phone records."
- o. "Failed to move to suppress testimony about phone allegedly found in Charlotte near applicant during arrest."
- p. "Failed to object to the admissibility of the evidence obtained at co-defendant's house due to the fact that no witness identified any evidence obtained from co-defendant's house."
- q. "Failed to object to hearsay testimony of Tanesha which placed applicant's character in evidence."
- r. "Failed to challenge the arrest warrant as invalid."
- s. "Failed to investigate the case of evidence & documents."
- t. "Ineffective for withdrawing objection when solicitor pulled out 2 telephones out of his pocket in closing argument to show the jury."
- u. "Failed to object to agent Donald K. Johnson hearsay testimony about what Kimberly Cherry supposedly said about the gun & what the sheriff said about applicant trying to flee out a window."
- v. "Failed to object to Prezzie testifying about recovering a phone at the scene of the crime which was in evidence that he never identified in trial."
- w. "Never introduced to any of the states indictments until day of trial."
- x. "Never informed who all was testifying against applicant & who was gonna take the stand & allege that they could identify applicant until trial."
- y. "Never seen any discovery material or Brady material until October 2008, a year after the conviction, even though applicant requested it from counsel on numerous occasions prior to trial."
- z. "Failed to object to solicitors vouching for state's witnesses even thou[gh] applicant requested for him to object."
- aa. "Advised applicant not to testify even thou[gh] applicant wanted to testify. Counsel stated he would bring up applicant's prior conviction."
- bb. "The day of trial was the first time applicant was informed of the indictments of kidnapping & possession of a weapon during violent crime due to not being

- served with arrest warrants or indictments."
- cc. "Failed to subpoena Captain Tim Stephenson prior testimony to the grand jury."
 - dd. "Failed to move to sequester state witnesses."
 - ee. "Failed to conduct a proper lineup upon applicant request."
 - ff. "Failed to object to solicitors inflammatory comment during closing argument."
 - gg. "Not informed until trial date that trial would be held with co-defendant."
 - hh. "Failed to request further questioning of jurors Saxon, Gladden, & Buckman in regards to jury deliberations."
 - ii. "Applicant was not informed of what all he was going to be tried for & what evidence to prepare for trial."
 - jj. "Failed to object to prosecutor misconduct."
 - kk. "Failed to object to juror misconduct."
 - ll. "Failed to suppress testimony by Golden; Grove because there was not written statements or documents of the testimony given."
 - mm. "Failed to object to solicitor misleading jury during closing argument."
 - nn. "Failed to conduct preliminary hearing upon applicant's request."
 - oo. "Failed to file a Brady motion."
 - pp. "Failed to object to the opinions of certain witnesses testimony as expert witness testimony."
 - qq. "First day in general sessions court was applicants first day of trial."
 - rr. "Failed to object to trial courts ruling on redacting the search warrant due to the fact that the jury saw the entire search warrant without it being redacted."
 - ss. "Failed to call certain witnesses to the stand for the defense."
 - tt. "Failed to render reasonably effective assistance under prevailing professional norms & the deficient performance prejudiced the applicant's defense."
2. Lack of subject matter jurisdiction.
 - a. "Applicant convicted under sham/faulty indictment."
 - b. "Applicant did not receive requested preliminary hearing."
 - c. "Grand jury indictment for possession of a weapon during commission of a violent crime is unconstitutional."
 3. Violation of 4th, 5th, 6th, 14th Amendment.
 - a. "Illegally seized by unlawful arrest."
 - b. "Prejudiced by double jeopardy of subsequent indictment."
 - c. "Trial court judge was biased."
 - d. "Right to confrontation was violated due to admittance of hearsay testimony."
 - e. "Trial judge did not rule that James in-court identification was based off of out of court identification."
 - f. "Trial court did not instruct the jury to disregard extraneous information disclosed to the jurors during deliberations."
 - g. "Trial court did not ask applicant if it was his decision not to testify at trial."
 - h. "Denied adequate appellate counsel at oral argument."
 4. Presence of accused.

- a. "Applicant's right to confrontation at grand jury hearing was violated."
 - b. "Applicant was not allowed to be present when evidence was being submitted against him."
 - c. "Applicant had a right to testify at grand jury."
 - d. "Grand jury evidence was based on hearsay evidence when sole witness was the police officer."
 - e. "Grand jury violates due process when proceedings had not been recorded."
 - f. "Grand jury proceedings unconstitutional in duties."
5. Prosecutor misconduct.
- a. "Vouching for state witnesses."
 - b. "Misleading jury during closing argument."
 - c. "Inflammatory statements."
 - d. "Commenting on applicant's right to remain silent shifting the burden of proof to applicant."
6. Ineffective assistance of appellate counsel.
- a. "Failed to organize the brief on direct appeal which resulted in a confusing presentation to the appellate court."
 - b. "Failed to file a reply brief to the state's brief."
 - c. "Failed to cite legal authority in support of argument that was highly meritorious."
 - d. "Failed to argue specific prejudices to the defendant in the context of the assigned errors in light of the evidence & events that occurred at trial."
 - e. "The omission of certain portions of the events at trial from the record on appeal, in particular, jury voir dire."
 - f. "Failed to submit a record & brief adequate to give the court a full understanding of the significance of the errors assigned."
 - g. "Failed to argue in brief trial court erred in allowing Elliot Grove to vouch for the authority of the Sprint phone records when he was not a custodian of records."
7. Juror misconduct.
- a. "Juror Gladden was exposed to extrinsic information about other bad acts by the applicant before deliberations & he never informed the courts until he brought it to the attention of the remaining jurors during deliberations."
 - b. "Juror Saxon disobeyed the courts instruction along with the remaining jurors by deliberating while all jurors weren't present."

This Court finds that the allegations listed in 2, 3, 4, 5, and 7 are direct appeal issues that cannot be raised in a post-conviction relief action, and therefore, this Court is summarily dismissing these allegations. S.C. Code Ann. § 17-27-20(b) (1985); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974) (Post-conviction relief is not a substitute for a direct appeal); Ashley v. State,

260 S.C. 436, 196 S.E.2d 501 (1973) (A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal.) Below, this Court will address the remaining allegations based on how the issues were presented to this Court during the evidentiary hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. This Court finds that Counsel's testimony is credible and should be afforded great weight; conversely, this Court finds that Applicant's testimony lacks credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, including a review of the testimony of the witnesses presented at the evidentiary hearing, this Court denies this application on the basis that Counsel's performance did not fall below the standard required and there was no resulting prejudice to Applicant from these alleged deficiencies. Below are the specific findings as to Applicant's allegations of ineffective assistance of counsel:

Allegation that counsel was ineffective for failing to file a motion to dismiss the charges for lack of a speedy trial within the Interstate Agreement on Detainers Act

Applicant alleges that Counsel was ineffective for failing to move for dismissal for lack of a speedy trial. See Allegation 1(a). Specifically, Applicant asserts that because he was arrested in North Carolina, the Interstate Agreement on Detainers (hereafter "IAD") applied and Counsel should have filed a motion for a speedy trial under IAD. Counsel testified that Applicant was indicted for two of his three charges during the August 27, 2007 term of the Calhoun County

Grand Jury and tried on October 1, 2007. Counsel testified that the thirty-six day time span between the final indictments and the trial was incredibly speedy and such a motion was not necessary.

The Interstate Agreement on Detainers, codified as S.C. Code Ann. § 17-11-10 (1976), encourages "the expeditious and orderly disposition" of charges that an out-of-state inmate faces within another jurisdiction. Under Article III of the IAD, which is applicable when a prisoner initiates the IAD request for disposition, the State has 180 days to dispose of any related charges. S.C. Code Ann. § 17-11-10 Art. III (a). However, under Article IV of the IAD, applicable when the State is the invoking entity, the State has 120 days to bring the prisoner to trial. S.C. Code Ann. § 17-11-10 Art.

This Court finds that such a motion was not necessary, as Applicant was tried expeditiously without any such motion being filed. Counsel's performance in not filing a motion for a speedy trial or a motion pursuant to the IAD was reasonable, especially in light of the speed in which he was brought to trial. Therefore, Counsel's performance was not deficient and this allegation must be denied and dismissed with prejudice. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice from Counsel's failure to file such motions. As shown above, once invoked, the IAD requires a disposition of charges within either 120 or 180 days. In the present case, Applicant's trial began within thirty-six days of his final indictment. Had Counsel made such a motion, the result would have been the same. Therefore, this Court finds that this allegation is without merit and must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to closing argument of co-defendant regarding the victim telling the truth

Applicant alleges that Counsel was ineffective for failing to object to the closing argument made by co-defendant's counsel regarding one of the victims telling the truth. See Allegation 1(b),(c); Tr. p. 982 lines 6-7. Counsel testified that during the closing argument, he did not find anything to be objectionable. Additionally, Counsel testified that he has since reviewed the closing argument, including the portion specific to this allegation. Counsel testified that he generally tries to avoid objecting during closing arguments unless the comment is egregious and harmful to his client, as otherwise it draws attention to the comment and can have a negative impact with juries. This Court has reviewed the portion in question and finds that Counsel's performance was reasonable according to professional standards and that he was not deficient in this regard. Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required for relief, as there is no reasonable likelihood that the result of the proceeding would have been different – i.e., that the jury would have acquitted Applicant – but for Counsel's alleged failure. Specifically, this Court notes that there is overwhelming evidence of Applicant's guilt, as highlighted in the Court of Appeals decision. Spears, supra. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); *cf.* Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent

failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to request an in-camera hearing regarding the in-court identification of victims Williams and Prezzie

Applicant alleges that Counsel was ineffective for failing to request an in-camera hearing regarding the in-court identifications made by two of the victims, Cleveland Williams and Iskier Prezzie. See Allegation 1(d). The record reveals that Neil v. Biggers hearings were held on the reliability of the identification from two witnesses, Natasha Rivers and J.K. Bourgeois. Rivers identified both Applicant and his co-defendant from "six-pack" lineups created by law enforcement. Bourgeois identified both from various court proceedings. The trial court allowed both identifications following the pre-trial hearings. Counsel testified, and the record reveals, that pre-trial hearings on the identification of the other witnesses, including Williams and Prezzie, were not necessary, as they could not make identifications of the suspects and were not shown photo line-ups. The record reveals that both Williams and Prezzie testified accordingly and did not make in-court identifications of Applicant, but rather, gave general physical descriptions of the suspect. This Court finds that Counsel's performance was reasonable according to professional standards and that Counsel's performance was not deficient.

Additionally, this Court finds that Applicant has failed to establish the requisite prejudice required for relief, as there is no reasonable likelihood that the result of the proceeding would have been different – i.e., that the jury would have acquitted Applicant – but for Counsel's

alleged failure. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to contemporaneously object to the in-court identification of James Bourgeois and Natasha Rivers

Applicant alleges that Counsel was ineffective for failing to contemporaneously object to the in-court identifications of Bourgeois and Rivers. See Allegation 1(h). As discussed above, the record reveals that Neil v. Biggers hearings were held on both Rivers and Bourgeois' identifications, after which the trial court ruled both were admissible. This Court finds that Applicant is unable to establish any requisite prejudice from this allegation, as there is no reasonable likelihood that the proceeding would have been different but for Counsel's error. As noted in the Court of Appeals decision, there is no substantial likelihood of misidentification based on the factors surrounding the victims' viewing of Applicant. Spears, supra. Had Counsel contemporaneously objected and the issues were preserved for appellate review, the result would still have been the same – the convictions and sentence would have been affirmed. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object during the victim's trial testimony regarding the appearance of the gun or its similarity to the gun found near Applicant at the time of his arrest

Applicant alleges that Counsel was ineffective for failing to object to the victim's trial testimony regarding similarities between the gun found near him during his arrest and the suspect's gun. See Allegation 1(j). The record shows that Counsel made a pre-trial motion to suppress the gun, which was denied. Counsel then made a contemporaneous objection to the admission of the gun, which was also denied. Counsel did not object to the testimony regarding

similarities between gun found and the suspect's gun; however, as noted in the Court of Appeals decision, Counsel did "extensively" cross-examine Bourgeois regarding the discrepancy of his description and the actual gun recovered during Applicant's arrest. This Court finds that Applicant cannot establish that he was prejudiced by Counsel's performance. While Counsel did not contemporaneously object to the testimony in question, he was able to vigorously attack the witnesses' credibility regarding to the weapon. This Court is convinced that the result of the proceeding would not have been different if Counsel had objected, as the testimony would have been allowed at trial and affirmed on appeal. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to allow him to testify at the pre-trial suppression hearing regarding the gun found near him during his arrest

Applicant alleges that Counsel rendered ineffective assistance by failing to allow him to testify at the pre-trial suppression hearing to determine the admissibility of the weapon found near him during his arrest. See Allegation 1(k). Applicant testified that he wanted to testify at this pre-trial hearing to explain that he did not possess the gun when arrested, but that Counsel did not allow him. Counsel testified that he explained to Applicant that he could testify at any point, both during the trial and pre-trial, and that it was Applicant's own decision not to testify. This Court finds that this allegation must be denied and dismissed with prejudice. Counsel's credible testimony reveals that he advised Applicant that he could testify and Applicant made the decision not to take the stand. This Court finds that Counsel's performance was reasonable according to professional standards and was not deficient. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice, as the desired information regarding

Applicant's location in reference to the weapon was elicited during the cross-examination of other witnesses. Furthermore, this Court finds that the result of the proceeding would have been the same if Applicant had testified. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to the admissibility of evidence obtained at co-defendant's house

Applicant alleges that Counsel was ineffective for failing to object to the admissibility of the evidence found at his co-defendant's house "due to the fact that no witness identified any evidence obtained from the co-defendant's house." See Allegation 1(p). The evidence obtained from the residence where the co-defendant was located included boots and pants similar to the suspect's clothing, several packs of Newport cigarettes, \$260 in twenty dollar bills, and a "Coinstar" receipt showing that \$3000 in coins had been exchanged shortly after the robbery, all matching the items reported stolen during the robbery. Applicant and his co-defendant both moved to suppress these items based on a lack of consent and probable cause. Following a hearing in which the responding officers who entered the residence and executed the eventual search warrant, the court ruled that the items were admissible. Applicant is now contending that Counsel was ineffective for failing to object to these items based on a lack of witness testimony identifying the objects found. This Court finds that this allegation is without merit and must be denied and dismissed with prejudice. The record reveals that Christopher Golden, formerly Captain of Calhoun County Sheriff's Department, testified regarding his entry into the co-defendant's residence and described the items seized. Therefore, there was no need for Counsel to object based on this ground. This Court finds that Counsel's performance was reasonable, as

there was no valid objection to be made based on this allegation. Additionally, as such testimony was elicited, there can be no resulting prejudice. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to investigate the case

Applicant alleges that Counsel was ineffective for failing to investigate the case fully. See Allegation 1(s). Specifically, Applicant alleges that Counsel "failed to investigate the case of evidence and documents." This allegation is sharply refuted by Counsel, who testified that he employed a private investigator who fully investigated the case and met with Applicant several times. Counsel elaborated that he hired private investigator Amos Jones, whom he specifically selected for this case due to his highly respected reputation for thorough and skilled work. This Court finds that Counsel's credible testimony reveals that an exhaustive investigation was completed by a competent investigator prior to Applicant's trial. Furthermore, Applicant failed to present any evidence or testimony to show what any additional investigation might have yielded or how it could have been beneficial to Applicant's case. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to the testimony of Prezzie regarding a phone that was never identified at trial

Applicant alleges that Counsel was ineffective for failing to object to the testimony of one of the victims, Iskier Prezzie, regarding a cell phone he recovered from one of the suspects

during the robbery. See Allegation 1(v). During Mr. Prezzie's testimony, he describes how he recovered and concealed a cell phone dropped by one of the assailants during the robbery. See Tr. p. 681-85. The cell phone, marked for identification only at that time, was not moved into evidence until the testimony of Tim Stephenson, who recovered the phone at the incident location and took it into evidence. See State's Ex. No. 14 from trial. This Court finds that this allegation must be denied and dismissed with prejudice. Testimony was presented from two different witnesses, Prezzie and Stephenson, who both described how they came into contact with the phone. This Court finds that the phone was properly admitted into evidence, and therefore, any challenge based on this allegation would not have been successful. Furthermore, this Court finds that there is no likelihood that the result of the proceeding would have been different based on overwhelming evidence of guilt. See Spears, supra; Franklin, supra; Geter, supra. Therefore, Applicant cannot establish any deficiency or resulting prejudice. This allegation is denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to suppress the testimony pertaining to the cell phone records

Applicant alleges that Counsel was ineffective for failing to object to the testimony pertaining to the cell phone records for the phone found at the incident location. See Allegation 1(ii). However, the record reveals that Counsel did object to the cell phone records being admitted into evidence, and any testimony pertaining to those records, which was denied by the trial court once proper authentication was established. Therefore, this Court finds that Counsel's performance was not deficient in regards to this allegation. Furthermore, this Court finds that Applicant cannot establish prejudice because there is no likelihood that the result of the

proceeding would have been different – i.e., Applicant would have been acquitted – absent the cell phone records and accompanying testimony. The records and testimony were not crucial to the State's case and there was much more overwhelming evidence of Applicant's guilt, as highlighted in the Court of Appeals decision. Spears, supra. Franklin, supra; Geter, supra. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to the solicitor's closing argument

Applicant alleges that Counsel was ineffective for failing to object to solicitor's closing arguments that mislead the jury. See Allegation 1(mm). Counsel testified that he did not find any portion of the State's closing argument to be objectionable. He elaborated that parties are given leeway during closing arguments and are allowed to comment on reasonable inferences from facts in the record. He testified that if the solicitor's argument had been objectionable, he would have posed the necessary objection.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the persona biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609–10, 602 S.E.2d at 744. "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). "Improper

comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

Based on this standard, this Court has reviewed the State's closing argument and concludes that Counsel's performance was reasonable, as the closing arguments were not tailored to appeal to the personal biases of the jury and stayed within the record and reasonable inferences. Additionally, this Court finds that Applicant cannot establish requisite prejudice stemming from this allegation, as the closing arguments do not "so infect[] the trial with unfairness." Therefore, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to request a preliminary hearing

Applicant alleges that Counsel was ineffective for failing to request a preliminary hearing on his behalf. See Allegation 1(nn). Counsel testified that Applicant never requested a preliminary hearing before he was indicted by the Calhoun County Grand Jury and that he did not move for a preliminary hearing because the trial was fast approaching and he was devoting his time and resources to preparing for trial. Counsel also testified that he did not think a preliminary hearing was necessary, as he knew what evidence was going to be introduced against Applicant and did not think that a preliminary hearing would have resulted in the dismissal of the

charges. Additionally, he testified that Applicant was indicted fairly quickly after the incident and then tried quickly thereafter.

Every criminal defendant is entitled to notice of his right to a preliminary hearing "to determine whether sufficient evidence exists to warrant [his] detention and trial." Rule 2(a), SCRCrimP. If a defendant makes a timely request for a hearing, one should be held within ten days. Rule 2(a)-(b), SCRCrimP. However, the hearing "shall not be held. . . if the defendant is indicted by a grand jury . . . before the preliminary hearing is held." Rule 2(b), SCRCrimP; see also State v. Hawkins, 310 S.C. 50, 54-55, 425 S.E.2d 50, 53 (Cl.App.1992) (holding trial court did not err in refusing to quash defendant's indictments because he did not receive a requested preliminary hearing because he was indicted before a preliminary hearing was held). Furthermore, a defendant has no constitutional right to a preliminary hearing. State v. Keenan, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982). Thus, although the Applicant could have timely requested a preliminary hearing, his right to have the hearing ended with the grand jury's indictment.

This Court finds that Counsel's performance was reasonable according to professional standards, as his credible testimony reveals that Applicant never requested a hearing and that Counsel did not think it was necessary. Furthermore, this Court finds that Applicant cannot establish any resulting prejudice, as a preliminary hearing would not have resulted in dismissal of the charges, and therefore, there is no likelihood that the result of the proceeding would have been different. This Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to call certain witnesses

Applicant alleges that Counsel was ineffective for failing to call certain witnesses to the stand on his behalf. See Allegation 1(ss). At the evidentiary hearing, Applicant testified that the witnesses he wanted Counsel to call were an inmate that was transferred from North Carolina with him and a family member, Tonya Johnson. He testified that Johnson was subpoenaed but did not testify during his trial. He acknowledged that neither was present at the evidentiary hearing.

An applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the post-conviction relief hearing or otherwise offer testimony within the rules of evidence. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). Therefore, because Applicant failed to offer any testimony or other evidence regarding these two witnesses, this allegation must be denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments

and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, a court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Therefore, to succeed on a claim of ineffective assistance of appellate counsel, Applicant must establish that appellate counsel's performance was deficient and that he was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Additionally, there is no right to effective assistance of counsel when seeking discretionary review. Douglas v. State, 369 S.C. 213, 631 S.E.2d 542.

Applicant alleges that he received ineffective assistance of appellate counsel. Specifically, Applicant alleges that appellate counsel failed to include all pertinent parts of the transcript in the record, failed to properly organize the brief, failed to brief all meritorious issues, failed to cite appropriate legal authority, failed to file a reply to the State's brief, and failed to petition the South Carolina Supreme Court for certiorari. One of Applicant's appellate defenders, M. Cecelia Robinson, Esquire, testified that she handled Applicant's appeal until she left the office shortly after filing Applicant's brief. She testified that she was at the Office of Appellate Defense for three years, but also had previous appellate experience. She testified that she would have petitioned for certiorari to the South Carolina Supreme Court, but was no longer

handling Applicant's case at the appropriate time. She also testified that she neglected to include appropriate authority for one issue raised in Applicant's appeal. She testified that she explained to Applicant that she could not file a reply brief to State's brief, as well as explained harmless versus reversible error and the small likelihood of reversal on appeal.

This Court finds that this allegation must be denied and dismissed, as Applicant cannot establish that he would have been successful on appeal absent counsel's allegedly unprofessional errors. Specifically, this Court notes that there was overwhelming evidence of Applicant's guilt, which was highlighted by the Court of Appeals in its opinion, and that there is no reasonable likelihood that Applicant would have been successful on appeal. Spears, supra. Therefore, this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

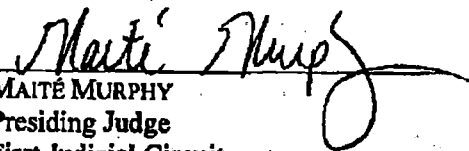
This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant's

behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED this 9 day of Sept., 2014.


MAITE MURPHY
Presiding Judge
First Judicial Circuit

St. George, South Carolina.

1233

WITNESSES

STEPHENSON

Arresting Agency:
Calhoun Co. Sheriff Office

ARREST WARRANT NUMBER

K036756

Arrested: Apr 02, 2007

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: June 8, 2007

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2007GS09-0148

The State of South Carolina

County of

CALHOUN

COURT OF GENERAL SESSIONS

June 11, 2007 TERM

THE STATE
vs.

Phillip Lee Spears

Indictment for
ARMED ROBBERY

SC Code: 16-11-0330
CDR Code: 0139
Class: FEL-A(V)

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST TRUE COPY

KENNETH HASTY
CLERK OF COURT

FILED
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KENNETH HASTY
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

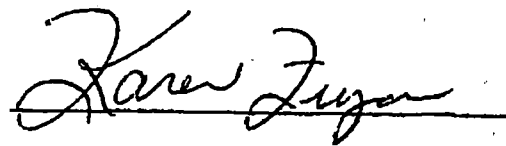
INDICTMENT
2007GS09-0148

At a Court of General Sessions, convened on June 11, 2007 the Grand Jurors of Calhoun County present upon their oath:

ARMED ROBBERY

That Phillip Lee Spears, did in Calhoun County, on or about November 6, 2006, feloniously take from the person or presence of the victim, James Bourgeois at the Wagon Wheel convenience store, by means of force or intimidation, while armed with a deadly weapon being a handgun, goods or monies of the said victim, being described as follows: U.S. currency. This offense being a violation of Section §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.



Karen Fryar SOLICITOR

WITNESSES

TIM STEVENSON

Arresting Agency:
Calhoun Co. Sheriff Office

ARREST WARRANT NUMBER

2007C15

ACTION OF GRAND JURY

LaVetta Hutto
Foreperson of Grand Jury
Date: August 24, 2007

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

DOCKET NO. 2007GS09-0219
The State of South Carolina
County of
CALHOUN

COURT OF GENERAL SESSIONS

August 27, 2007 TERM

THE STATE
vs.

Phillip Lee Spears

Indictment for

POSSESSION OF A FIREARM OR
KNIFE DURING THE COMMISSION OF A
CRIME OF VIOLENCE

SC Code: 16-23-490
CDR Code: 0549
Class: FEL-F

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.G. PLS. AND G.S.

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 2007 AUG 24 P 2:24
 KENNETH
 CLERK

ATTEST TRUE COPY

ATTEST
 CLERK OF COURT
 CALHOUN COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

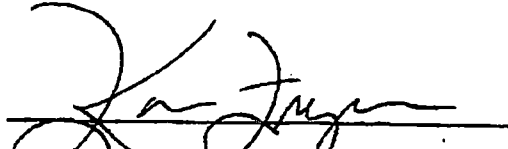
INDICTMENT
2007GS09-0219

At a Court of General Sessions, convened on August 27, 2007 the Grand Jurors of Calhoun County present upon their oath:

**POSSESSION OF A FIREARM OR KNIFE DURING THE COMMISSION OF
A CRIME OF VIOLENCE**

That Phillip Lee Spears, did in Calhoun County, on or about November 6, 2007, while committing the violent crime of Armed Robbery, have in his possession and/or did visibly display a firearm during the commission of the aforementioned crime and as a result violated Section 16-23-490, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Karen Fryar ASST.SOLICITOR

WITNESSES

TIM STEVENSON

Arresting Agency:
Calhoun Co. Sheriff Office

ARREST WARRANT NUMBER

2007C17

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: August 24, 2007

VERDICT

TRUE BILL

Foreperson of Petit Jury
Date:

DOCKET NO. 2007GS09-0221

The State of South Carolina

County of

CALHOUN

COURT OF GENERAL SESSIONS

August 27, 2007 TERM

THE STATE
vs.

Phillip Lee Spears

Indictment for

KIDNAPPING

SC Code: 16-03-910
CDR Code: 0095
Class: FEL-A

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED
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KIMMETH HASTY
CLERK OF COURT

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Kimmeth Hasty
KIMMETH HASTY
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

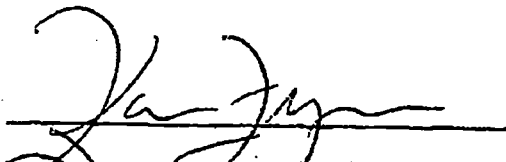
INDICTMENT
2007GS09-0221

At a Court of General Sessions, convened on August 27, 2007 the Grand Jurors
of Calhoun County present upon their oath:

KIDNAPPING

That Phillip Lee Spears, did in Calhoun County, on or about November 6, 2007, willfully
and unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away Natasha
Rivers and/or Lamarques Rivers and/or Raheem Rivers and/or James Bourgeois and/or
Cleveland Williams and/or Iskier Prezzie, without authority of law. This offense being a
violation of Section §16-3-910 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.


Karen Fryar ASST. SOLICITOR