

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of General Sessions

Brook P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-002537

THE STATE,

Respondent,

v.

MATION BENJAMIN POWELL,

Appellant.

RECORD ON APPEAL

Christopher J. Moore
Richardson, Patrick, Westbrook &
Brickman, LLC
1730 Jackson Street
Barnwell, South Carolina 29812
803.541.7850

And

Robert M. Dudek
Chief Appellate Defender
South Carolina Commission on Indigent
Defense
P. O. Box 11589
Columbia, SC 29211-1589

ATTORNEYS FOR APPELLANT

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SC Attorney General's Office
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ATTORNEY FOR RESPONDENT

RECEIVED
JUL 13 2015
SC Court of Appeals

THE STATE V. MARION BENJAMIN POWELL RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
 STATE VS.
Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27DOB: 01-28-1986 SS#: 248-69-1741

Address:

City, State, Zip:

DL#: 011677589 SID#:*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
 TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Shelton, Ben

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

_____ days/hours Public Service Employment

Obtain GBD ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL		\$ 133.90

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

R.000001

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.

Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27

DOB: 01-28-1986 SS#: 248-69-1741

Address:

City, State, Zip:

DL#: 011677589 SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Shelton, Ben

SC Bar# 77207

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 27 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter: Wanda Rose

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

10-304r5

INDICTMENT/CASE#: 2011GS0700784

A/W#: J351163

Date of Offense: 10/25/2010

S.C. Code § : 16-11-0330(A)

CDR Code #: 0139

SENTENCE SHEET

Presiding Judge

Judge Code: 2/39

Sentence Date: November 22, 2013

R.000002

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.

Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27

DOB: 01-28-1986 SS#: 248-69-1741

Address:

City, State, Zip:

DL#: 011677589 SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Kidnapping / Kidnapping

IN THE COURT OF GENERAL SESSIONS

0-3045

INDICTMENT/CASE#: 2011GS0700783

A/W#: J351162

Date of Offense: 10/25/2010

S.C. Code § : 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0910

of the S.C. Code of Laws, bearing CDR Code # 0095

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS(CSC
w/minor 1st or Lewd Act)☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Shelton, Ben

SC Bar# 77207

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 27 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

☐ Set by SCDPPPSObtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5%) \$

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ 100.00

§ 56-5-2995 (DUI Assessment) \$12 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 47.9 (Public Def/Prob) \$500 \$

§ 14-1-212 (Law Enforce. Funding) \$25 \$

§ 14-1-213 (Drug Court Surcharge) \$150 \$ 25.00

§ 50-21-114(BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ca \$

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ 3.50

TOTAL \$ 133.90

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Wanda Rame

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2/39

Sentence Date: November 22, 2013

R.000003

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.
Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27DOB: 01-28-1986 SS#: 248-69-1741

Address:

City, State, Zip:

DL#: 011677589 SID#:*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
TO: Kidnapping / Kidnapping

IN THE COURT OF GENERAL SESSIONS

0-302rs

INDICTMENT/CASE#: 2011GS0700780A/W#: J351159Date of Offense: 10/25/2010S.C. Code § : 16-03-0910CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Shelton, Ben77207
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 27 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$	<u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$	
§ 56-5-2995 (DUI Assessment)	\$12	\$	
§ 56-1-286 (DUI Breath Test)	\$25	\$	
Proviso 47.9 (Public Def/Prob)	\$500	\$	
§ 14-1-212 (Law Enforce. Funding)	\$25	\$	<u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$	
§ 50-21-114(BUI Breath Test Fee)	\$50	\$	
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	
Proviso 90.5 (SCCJA Surcharge)	\$5	\$	<u>5.00</u>
3% to County (if paid in installments)		\$	<u>3.90</u>
TOTAL		\$	<u>133.90</u>

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: NO

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk Kristy TankCourt Reporter: Wanda Rowe

SCCA/217 (03/2011)

Presiding Judge 2139Judge Code: 2139Sentence Date: November 22, 2013

R.000004

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
 STATE VS.
Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27DOB: 01-28-1986 SS#: 248-69-1741

Address:

City, State, Zip:

DL#: 011677589 SID#:*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Kidnapping / Kidnapping

IN THE COURT OF GENERAL SESSIONS

0-30219

INDICTMENT/CASE#: 2011GS0700782A/W#: J351161Date of Offense: 10/25/2010S.C. Code §: 16-03-0910CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0910of the S.C. Code of Laws, bearing CDR Code # 0095

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Shelton, Ben

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 27 days/months/years of ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: 400.00

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Wanda Rouse

SCCA/217 (03/2011)

Presiding Judge 2/39Judge Code: 2/39Sentence Date: November 22, 2013

R.000005

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.

Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27

DOB: 01-28-1986 SS#: 248-69-1741

Address:

City, State, Zip:

DL#: 011677589 SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Kidnapping / Kidnapping

IN THE COURT OF GENERAL SESSIONS

0-30701

INDICTMENT/CASE#: 2011GS0700781

A/W#: J351160

Date of Offense: 10/25/2010

S.C. Code § : 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Shelton, Ben

SC Bar# 77207

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 27 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$	100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$	
§ 56-5-2995 (DUI Assessment)	\$12	\$	
§ 56-1-286 (DUI Breath Test)	\$25	\$	
Proviso 47.9 (Public Def/Prob)	\$500	\$	
§ 14-1-212 (Law Enforce. Funding)	\$25	\$	25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$	
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$	
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$	
Proviso 90.5 (SCCJA Surcharge)	\$5	\$	5.00
3% to County (if paid in installments)		\$	3.90
TOTAL		\$	133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 2139

Sentence Date: November 22, 2013

R.000006

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.Marion Benjamin Powell

AKA: _____

Race: B Sex: M Age: 27DOB: 01-28-1986 SS#: 248-69-1741

Address: _____

City, State, Zip: _____

DL#: 011677589 SID#: _____*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Kidnapping / Kidnapping

IN THE COURT OF GENERAL SESSIONS

0-30749INDICTMENT/CASE#: 2011GS0700779A/W#: J351158Date of Offense: 10/25/2010S.C. Code § : 16-03-0910CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, _____ (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____

Shelton, Ben77207
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 27 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

No GPS☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Wanda Row

SCCA/217 (03/2011)

Presiding Judge 2139Judge Code: 2139Sentence Date: November 22, 2013

R.000007

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
 STATE VS.
Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27DOB: 01-28-1986 SS#: 248-69-1741Address: 24 Carrigane Lane
 City, State, Zip: Yemassee, SC 29945DL#: 011677589 SID#:*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
 TO: Burglary / Burglary (After June 20, 1985) - First degree

IN THE COURT OF GENERAL SESSIONS

15- LIFE

INDICTMENT/CASE#: 2011GS0700778A/W#: J351157Date of Offense: 10/25/2010S.C. Code § : 16-11-0311CDR Code #: 0079

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Shelton, BenSC Bar# 77207

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 27 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.40
TOTAL		\$ 133.90

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

R.000008

STATE OF SOUTH CAROLINA)
14th Judicial Circuit)
COUNTY OF BEAUFORT)
vs.)
Marion B. Powell.)

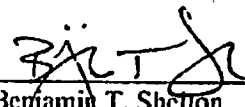
INDICTMENT #: 2011GS0700787

WARRANT #: J35166

J351166

NOLLE PROSEQUI

THE INDICTMENT(s) and WARRANT CAPTIONED ABOVE IS NOLLE
PROSSED ON 1/23/2014. THE FOLLOWING REASON:
Defendant was convicted at jury trial and sentenced to 27 yrs in SCDC for offenses
constituting the same act.


Benjamin T. Shelton
Assistant Solicitor

1/23/2014
Date

2014 JAN 23 PM 1:37
CLERK OF COURT
JAN
S.C.

R.000009

STATE OF SOUTH CAROLINA)
14th Judicial Circuit)

COUNTY OF BEAUFORT)

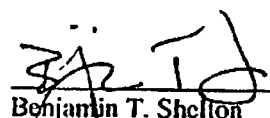
vs.)

Marion B. Powell.)
_____)

INDICTMENT #: 2011GS0700785
WARRANT #: ~~135164~~ 0351164

NOLLE PROSEQUI

THE INDICTMENT(s) and WARRANT CAPTIONED ABOVE IS NOLLE
PROSSED ON 1/23/2014 THE FOLLOWING REASON:
Defendant was convicted at jury trial and sentenced to 27 yrs in SCDC for offenses
constituting the same act.


Benjamin T. Shelton
Assistant Solicitor

1/23/2014
Date

2014 JAN 23 PM 1:37
CLERK OF COURT
S.C.

R.000010

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

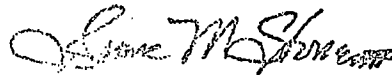
INDICTMENT
2011GS0700782

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Shale Varner, without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351158

ACTION OF GRAND JURY

Brian W. [Signature]
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700779

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

VS.

Marion Benjamin Powell

Indictment for

Kidnapping / Kidnapping

SC Code: 16-03-0910
CDR Code:0095

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.

R.000012

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

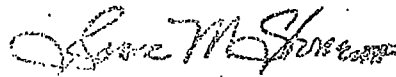
INDICTMENT
2011GS0700779

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Senora Jones, without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351160

ACTION OF GRAND JURY

Brett Wolfe
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700781

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Kidnapping / Kidnapping

SC Code: 16-03-0910
CDR Code:0095

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.

R.000014

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

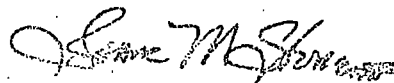
INDICTMENT
2011GS0700781

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Clevan Jones III, without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351159

ACTION OF GRAND JURY

Beet Wages
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2011GS0700780

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Kidnapping / Kidnapping

SC Code: 16-03-0910
CDR Code:0095

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.

R.000016

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

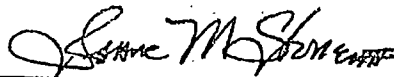
INDICTMENT
2011GS0700780

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Abriya Hart, without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351157

ACTION OF GRAND JURY

Beant Wolfe
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700778

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Burglary / Burglary (After June 20, 1985) - First
degree

SC Code: 16-11-0311
CDR Code:0079

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

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.

R 000018

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

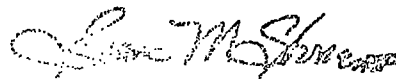
INDICTMENT
2011GS0700778

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Burglary / Burglary (After June 20, 1985) - First degree

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, did enter the dwelling of Senora Jones, located at 153 Oakesdale Dr. Bluffton, SC, without consent and with the intent to commit a crime therein. That, in addition, was armed with a weapon; in violation of Section 16-11-311 of the South Carolina Code of Laws (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Solicitor

1 MR. LEE: I was going to ask if we could have a
2 five-minute break.

3 MR. SHELDON: Yeah.

4 THE COURT: Court is in recess for five minutes.

5 OFF THE RECORD 4:00 P.M.

6 BACK ON THE RECORD.

7 MR. SHELDON: Your Honor, I think that Mr. Lee and I
8 have come to an agreement as far as how to conduct this
9 procedure, if it pleases the Court. First, obviously,
10 it's the defendant's burden for us to show by
11 preponderance of the evidence line-up procedures are
12 somehow is unduly suggested. And then, I think the
13 burden then shifts to us to show that by totality of the
14 circumstances. So, I'm just going to turn the floor over
15 to Mr. Lee.

16 MR. LEE: Thank you. Your Honor, may it please the
17 Court. Your Honor, in order to try to speed this up a
18 little bit, Mr. Sheldon and I have discussed something.
19 And we're trying to avoid having one witness testify.
20 But if I could pass something up. It's an email from Mr.
21 Sheldon to me, dated Friday, September 27th. And what
22 that is, Judge, that is a summary of Mr. Sheldon's
23 discussion with a woman who works in the what's called
24 the Intelligence Unit at the Beaufort County Sheriff's
25 Office. And it kind of goes through and talks about that

1 she doesn't have any specific training on how to do
2 lineups. But if we can just kind of stipulate to the
3 facts that are in here, I think it would prevent me from
4 having to call her as a witness. And we can briefly tell
5 you kind of what we agreed about, and I think it will
6 save some real time today.

7 MR. SHELDON: Agreed, Your Honor.

8 THE COURT: All right. Do we need to have a copy of
9 this marked?

10 MR. SHELDON: Yeah, we probably should do that.

11 THE COURT: We should have it Court's Exhibit Number
12 2, I'm told.

13 PHOTO LINEUP MARKED COURT'S EXHIBIT
14 NUMBER 2.

15 MR. LEE: Do you have the lineup?

16 MR. SHELDON: This right here. This is the actual
17 lineup itself.

18 MR. LEE: The guidelines.

19 MR. SHELDON: This is the lineup that is at issue
20 for Mr. Powell that, actually, where the same lineup was
21 shown twice to Ms. Jones, as well as her ten-year-old
22 daughter, Abriya. So just for the Court to review, this
23 is the lineup that was shown to Ms. Jones and her
24 daughter.

25 THE COURT: Okay.

1 MR. LEE: So where I will start, Your Honor, is as
2 in the *Neil versus Biggers* hearing, the first question
3 for the Court to decide at this point, and again, we have
4 an expert eye witness I.D. coming later in the week, but
5 just for the purpose of this, I'm obviously not calling
6 her to present any testimony from her, but the two things
7 to look at was the process overly-suggestive, and if it
8 was, was the I.D. reliable notwithstanding the
9 suggestiveness?

10 It's our position, based upon several things that
11 the photo lineup that was submitted to Senora Jones and
12 her daughter was overly-suggestive. Without going into
13 too many details, it's our position that the photo array
14 was conducted in a manner that was substantially certain
15 to lead to the selection of Mr. Powell in the lineup.
16 And again, we have some interesting legal questions.

17 I would liken this case more to almost a show-up
18 situation, rather than the standard photo array, because
19 the issue is to suggestiveness. How much does that
20 person stick out from the people around him? And I would
21 point out that the - and I'll go into some of the things
22 Mr. Sheldon's going to have to establish. But the lineup
23 was done roughly the next morning. It happened at night
24 so it was done the next morning, so there was a short
25 amount of time there.

1 But Senora Jones and her daughter went to the
2 Bluffton Police Department. The description that was
3 given up to that point that's contained in the Incident
4 Report is that there's three individuals, and their
5 position is that Mr. Powell was Subject Number 2 on the
6 description. And the description that was given on
7 Chandler's 10/26 report:

8 *Suspect Number 2, black male; six-foot,*
9 *one inch; 180 pounds; black pants; black*
10 *t-shirt; no facial hair; short afro; flared*
11 *nostrils. Had silver handgun in his right hand.*

12 And then, the description of the two others were of
13 shorter black males.

14 So, what we have, and I think everybody would agree,
15 is this, the distinguishing characteristic is what they
16 referred to as flared nostrils. There was also in one of
17 these reports Ms. Jones apparently got the kids together
18 after it happened and talked to them about what happened
19 anywhere from five to ten minutes. But at any rate, the
20 description in play at the time that they looked at the
21 photo lineup was short Afro, flared nostrils. Flared
22 nostrils is a very unique type of characteristic.

23 And the next day, when the photo array was set up,
24 and again, the process apparently is - let me back up a
25 second. Bluffton P.D. contacted - or was contacted with

1 Northern Beaufort County Sheriff's Office, who,
2 apparently, said, look, there's four gentlemen who you
3 may want to put in a photo lineup or that we suspect of
4 similar crimes in Northern Beaufort County. It was Byron
5 Young; it was Marion Powell; it was - I just lost my
6 train of thought -

7 MR. SHELTON: Raymond Singleton and Travis Holmes.

8 MR. LEE: Raymond Singleton and Travis Holmes. So,
9 that's the information that they had. And once they had
10 that what's called the Intelligence Unit through the
11 Sheriff's office, which, until this case I had never
12 heard of, was - was asked to create a six-person photo
13 array.

14 The Intelligence Unit at the Beaufort County
15 Sheriff's Department - or at least at this time and as
16 far as photo lineups consist of, a woman who has no law
17 enforcement training, and I think she's called an analyst
18 or something is her title now. But admittedly, and you
19 can see by the email, she has no specific training as to
20 lineups other than being trained how to use the computer
21 system to pull up pictures of subjects, which they do
22 through the booking process to use it as what are called
23 fillers.

24 And this email kind of goes through how they - how
25 they did this. And I would just point out that, when Mr.

1 Sheldon spoke with her, she, actually, herself was very
2 surprised that she was the individual who created the
3 lineup and pointed - this is the lady that created it -
4 pointed out that Mr. Powell's mouth was slightly open,
5 and she normally would not have created a lineup of only
6 his mouth open. She had a record on the computer that
7 confirmed it was her that created it.

8 So it's our position, Your Honor, that the fillers,
9 the people that aren't the suspect, bear no real
10 resemblance at all to - to Mr. Powell, first of all. And
11 that the lineup is so suggestive as to who the suspect is,
12 because the five others pretty much look similar, with Mr.
13 Powell being Number 6 does not - the problem is made worse
14 by the fact that the - the specific characteristic, the
15 flared nostrils that they talked about, is greatly
16 enhanced by the photo that they chose to put in the photo
17 lineup. And that photo, again, it not only has his mouth
18 partly open, but his head is leaning back. And that, as
19 you can imagine, accentuates the flared nostril look that
20 is - other than short Afro and weight and height, was the
21 defining characteristic that the witnesses gave of the
22 person who - who was Suspect Number 2.

23 They have access to the jail records of the pictures.
24 They could have used another photograph. Apparently, she
25 has no training in doing this. And you know, it was

1 nevertheless shown to the victims.

2 It is our position that, again, it's so suggestive
3 that any - any person selecting from it is going to
4 automatically pull Mr. Powell's - point to his picture,
5 which is what happened. So that is - is essentially our
6 position on this. I think that the best way to do it is
7 to look at the photo lineup if you've never seen it
8 before, and ask yourself does anybody stick out?

9 You know, if I said, somebody with flared
10 nostrils - you know, do you see anybody with flared
11 nostrils, that picture is going to jump out at you. And
12 that is the problem with suggestiveness, because that is -
13 that's what the law tries to avoid. And in the fairness
14 of making these photo lineups, it's not anybody has to
15 look identical. But particularly, if there's a limited
16 description of something, and not only is the person - the
17 suspect, the only person that has that defining
18 characteristic, but is actually accentuated by the
19 photograph.

20 And we would believe that, as a matter of law, based
21 upon that and what was known at the time, that it was
22 unduly suggestive. I think the facts as far as whether it
23 was reliable or not probably are pretty well agreed to.

24 And Mr. Sheldon, if he wants to just go through
25 those, if I disagree, I'll say something. But I think

1 rather than calling a witness, I think he can probably
2 relate what that is because there is a video of the photo
3 lineup process. So, I think we're both pretty familiar of
4 how that - you know, what happened on the lineup.

5 THE COURT: Okay. Thank you, Mr. Lee. Mr. Sheldon.

6 MR. SHELTON: Your Honor, if you haven't had a chance
7 to review the lineup yourself.

8 THE COURT: I have.

9 MR. SHELTON: Thank you, Your Honor. The State will
10 point to one case that's cited in it's brief as *State v.*
11 *Turner*, The Supreme Court of South Carolina, Number 2007.
12 I have a copy if you would like to have it, unless you
13 already had a chance to review it.

14 THE COURT: Sure. I have not had a chance to look at
15 it. Thank you.

16 MR. SHELTON: I also have a copy for defense counsel.

17 MR. LEE: I have one.

18 MR. SHELTON: And this is - this case - the specific
19 facts in this case were that the Court found that the
20 lineup was not unduly suggestive, so it didn't get across
21 the first hurdle. And then, the Court did eventually rule
22 that, nevertheless, even if it was unduly suggestive, it
23 was still reliable. But the Court's ruling in this case,
24 *State v. Turner*, was that the first part was not unduly
25 suggestive, which is the stance we are presently in, in

1 this argument.

2 Now, first of all, in this case, *State v. Turner*,
3 defense submitted that it was unduly suggestive, because
4 the background photo's colors were different in four of
5 the six actual pictures within the lineup. They are
6 purple, and I believe it was a light grey or a light
7 color. Our Supreme Court ruled that that was not unduly
8 suggestive, despite the fact that the defendant in that
9 case appeared before the light colored background, which
10 would logically point to that person as opposed to the
11 others.

12 Our court also cites CEG at the bottom of Page 2 of
13 the copy I gave you, and I cited it in my motion in
14 support of admissibility of the evidence. If you go to, I
15 think it's 697 of the S.E.2nd, right below the factors,
16 after saying it's not unduly suggestive, it cites multiple
17 cases where, similarly, some other lineups were determined
18 to be not impermissibly suggestive.

19 One of those cases includes *U.S. v. Lincoln*, the
20 Ninth Circuit from 1974. And in that case, the photo was
21 in color, and the other photos of the individuals in the
22 lineup were in black and white. And that was ruled not
23 unduly suggestive.

24 In *Burgess versus State*, from Alabama Court of
25 Appeals in 1998, the appellant was wearing a black jacket

1 - or he was standing before a blank wall while others were
2 standing in front of a curtain did not render it unduly
3 suggestive. So he was the only person in front of a wall,
4 where the other people were standing in front of a
5 curtain.

6 And then, in *State v. Holmes*, the appellant's photo
7 was placed in the top, center position of the lineup. It
8 had a lighter background shade than the other photos.
9 That did not render the lineup unduly suggestive.

10 And then, finally *State v. Gullett* from, I think,
11 it's Missouri - sorry about that. I'm not that good at my
12 state abbreviations. The fact the appellant's photo was
13 in color and was slightly larger than the other photos,
14 which were in black and white, did not render the lineup
15 unduly suggestive.

16 So I think that this hurdle of getting to unduly
17 suggestive - and this is a fairly high hurdle to cross. I
18 think that's because of the description from the
19 suggestive. It has to be unduly suggestive; not just
20 suggestive.

21 I also think that the Court's language in *Turner* that
22 - and I'm trying to point to it specifically in the case,
23 Your Honor, but I can't find it right now. However, it's
24 that it's impossible to find six identical people or
25 people - every lineup is going to have some differences

1 involved.

2 In this case, there are many, many similarities
3 involved. Ms. Brown states in the email that I sent Mr.
4 Lee, summarizes her statement to me that, in this case
5 specifically, they get a name; she pulls that person; and
6 then, she looks for people of similar characteristics.
7 She's not pulling it based on the characteristics of the
8 descriptors of the filler. She's pulling it on the
9 characteristics of the person she sees in front of her.

10 In this case, you see that every individual has about
11 the same width neck. Everyone has almost the exact same
12 skin tone. Everyone does have what seems to be large
13 nostrils. The nostrils of everyone are apparent, albeit
14 defendant's is cocked back more than the rest. There are
15 others that are slightly cocked back or slightly turned to
16 the right or to the left.

17 Also contained in this lineup you see, I think it's
18 Number 3 in the lineup where his lips are pursed and he's
19 turned to the side and not quite looking at the camera.
20 There are slight variations with every single person
21 contained within the lineup. The defendant is the only
22 person with their mouth slightly open.

23 The State argues that that is not unduly suggestive,
24 considering that the haircut is substantially the same,
25 the skin tone is almost identical, each person has a

1 similarly-shaped and sized nose. You can see the nostrils
2 of every individual in the lineup, wearing the same orange
3 shirt. The background is all concrete behind it. The
4 similarities far exceed the one thing that stands out - or
5 the two things that stand out with the defendant, which is
6 his head is slightly cocked back and his mouth slightly
7 open.

8 You can point out two things in every other
9 individual in that lineup that are slightly different from
10 the other people, as well.

11 To that extent, the State would argue it is not
12 unduly suggestive, particularly when you consider the case
13 law that's established on this topic.

14 THE COURT: Thank you, Mr. Sheldon.

15 MR. SHELTON: Thank you, Your Honor.

16 THE COURT: Anything else, Mr. Lee?

17 MR. LEE: Judge, I think the case he cited, the
18 difference is because it's some physical factor in the
19 lineup, the change, whether it's a background color or
20 whether it's the type of shirt they have on or whatever.
21 The problem and why this is different is because the
22 distinguishing feature that was used in this lineup, the
23 information they had was the flared nostrils. And you
24 know, the difference is you can - everybody else, you
25 know, they're not up, because it's shaded under everybody

1 else's nose. If you look at Powell, there's light
2 underneath there and you can see the entire round part of
3 his nostril. And that is - that is the problem, is that
4 he's the only one where that's the case.

5 So the other cases, all the ones he cited, talk about
6 different backgrounds and color versus black and white.
7 But what they don't talk about is the one distinguishing
8 characteristic that was in place at the time is not
9 exhibited by the five fillers. And that is essentially a
10 guarantee that the person is going to pick that one, and
11 it is highly, highly suggestible. It's the one thing that
12 he has. It's the one thing that they talk about, and it's
13 the one thing that he exhibits that the other ones don't.
14 And so, based upon that, we respectfully suggest that it
15 was unduly suggestive.

16 And I would also point out that the - well, just to
17 clear up the testimony, my understanding when Mr. Sheldon
18 said that the fillers were matched to the suspect rather
19 than to the identification or the description that was
20 given by the victims. Is that right?

21 MR. SHELDON: Correct, yeah.

22 MR. LEE: Well, Judge, that's not the way you're
23 supposed to do it. The - and again, it goes to the
24 suggestibility problem.

25 You aren't supposed to try to find five people that

1 look like the suspect. You're supposed to find five
2 people that match the description. If you -- that's the
3 proper way to do it, if you have a description. And
4 neither one of the other five, in our opinion, would be
5 described by anyone as having flared nostrils. And so, I
6 think that that is such an important part, and it's not --
7 it's not talking about a background or, you know, a little
8 bit of facial hair, a little bit of facial hair there or
9 color versus black and white. It is the predominant
10 description that the witnesses gave that -- and that's the
11 reason we believe it's overly suggestive.

12 THE COURT: All right. I find that it was not unduly
13 suggestive but for another reason. That, if somebody were
14 to -- if I were taking a test and somebody told me to pick
15 out, mark the number of individuals on this photo lineup
16 that had flared nostrils, I probably would mark four out
17 of the six. So I don't find that to be unduly suggestive.

18 The other things that I find are important is that
19 the most of the witnesses had a good opportunity to
20 observe the person that they described, who was not
21 wearing any disguise or anything to cover himself up. He
22 was there with them for what I would call an extended
23 period of time. Most of the identification was done --
24 photo lineup, excuse me, was done, it sounds to me, within
25 24 hours, the next day. And that the mother of the

1 victims who did the identification appear to be very
2 confident from what I understand, of their decision that
3 they - I don't want to say immediately, but almost
4 immediately and separately picked them out.

5 For all those reasons, I would deny defense motion
6 relating to the identification.

7 What's next?

8 MR. LEE: One thing that relates to this
9 identification, Your Honor, is a motion I filed to exclude
10 testimony, and it is essentially instructing the State and
11 the witnesses not to in any way state the reason that the
12 defendant was placed in the photo lineup, which is
13 Northern Beaufort County, or sheriff's office, said, hey,
14 this guy, Marion Powell, and three others are suspected of
15 doing similar things in Beaufort County.

16 I move and particularly based on your previous *Lyle*,
17 I think it's appropriate, but your *Lyle* ruling, but I
18 would just ask that no testimony be elicited saying that
19 the reason that Powell is even in this photo lineup is
20 because they suspected him of some stuff in Northern
21 Beaufort County.

22 THE COURT: Mr. Sheldon.

23 MR. SHELTON: I do not plan to use that now that our
24 404(b) motion has been denied. Thank you.

25 MR. LEE: The only other thing I know that we can re-

1 look like the suspect. You're supposed to find five
2 people that match the description. If you - that's the
3 proper way to do it, if you have a description. And
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STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF GENERAL SESSIONS
CASE NO'S.:

2011-GS-07-00778
2011-GS-07-00779
2011-GS-07-00780
2011-GS-07-00781
2011-GS-07-00782
2011-GS-07-00783
2011-GS-07-00784
2011-GS-07-00786
2011-GS-07-00787

STATE OF SOUTH CAROLINA

PLAINTIFF

VERSUS

ORIGINAL

MARION BENJAMIN POWELL

DEFENDANT

NOVEMBER 18, 19, 20, 21, & 22, 2013

TRANSCRIPT OF TRIAL

BEAUFORT, SOUTH CAROLINA

B E F O R E:

HON. BROOKS GOLDSMITH, JUDGE; AND A JURY.

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

R.000037

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1 BEGIN DAY ONE, MONDAY, NOVEMBER

2 18, 2013, 11:25 A.M.

3 BAILIFF: All rise. The Honorable Brooks Goldsmith
4 presiding.

5 BY THE COURT:

6 THE COURT: Good morning, ladies and gentlemen.
7 Please be seated. I understand Judge Mullen promised
8 that we were going to get moving and pick two juries
9 before lunch. I hope we can do it.

10 Solicitor, are you ready to call your case?

11 MR. SHELDON: Yes, sir. Your Honor. May it please
12 the court.

13 THE COURT: Certainly.

14 MR. SHELDON: Thank you. The State calls the State
15 versus Marion Benjamin Powell, Indictment Number 2011-GS-
16 07-00778 for burglary in the first degree; 2011-GS-07-
17 0779 for kidnaping; 2011-GS-07-00780 for kidnaping; 2011-
18 GS-07-00781 for kidnaping; 2011-GS-07-00782 for
19 kidnaping; 2011-GS-07-00783 for kidnaping; 2011-GS-07-
20 00784 for armed robbery; and 2011-GS-07-00786 for
21 possession of a weapon during the commission of a violent
22 crime; and 2011-GS-07-00787 for unlawful possession of a
23 firearm.

24 Thank you, Your Honor.

25 THE COURT: Thank you. Mr. Lee, are you ready to

1 spell your last name for the record, please.

2 SERGEANT TRICIA NICOLE BRUBAKER: All right.

3 Sergeant Tricia Nicole Brubaker. Brubaker is going to be
4 B-R-U-B-A-K-E-R.

5 MR. SHELDON: Thank you, Your Honor. May it please
6 the court.

7 THE COURT: Certainly.

8 SERGEANT TRICIA NICOLE BRUBAKER

9 DIRECT EXAMINATION BY MR. SHELDON:

10 Q. Sergeant Brubaker, where do you work?

11 A. I work for the Bluffton Police Department.

12 Q. You're a Sergeant there?

13 A. Yes, sir.

14 Q. What is your role as a sergeant?

15 A. I'm a road patrol sergeant.

16 Q. Where were you working on October 25, 2010?

17 A. I was with the Bluffton Police Department.

18 Q. And do you remember working that day?

19 A. Yes, I do.

20 Q. Do you remember responding to any place in
21 particular?

22 A. Yes, I do.

23 Q. Where?

24 A. I responded to 153 Oaksdale Drive located in the Mill
25 Creek.

1 Q. In Mill Creek. Describe what that is.

2 A. It's a multi-home subdivision located in the town
3 jurisdiction of Bluffton.

4 Q. Is that in Beaufort County?

5 A. Yes, sir.

6 Q. Why did you respond there?

7 A. Dispatcher reported out a home invasion, armed
8 robbery, kidnaping.

9 Q. When you arrived, was there any other officer there?

10 A. No, sir.

11 Q. You were first on the scene?

12 A. Yes, sir.

13 Q. Please describe to the jury what you saw.

14 A. Upon immediate arrival, I did a quick protective
15 sweep of the area of the home, because dispatch had
16 advised that two or three black males had just went
17 into the home brandishing weapons. So, my first role
18 was for preservation of life, making sure everybody
19 was all right. Making sure the scene was safe.
20 Making sure the victims were safe. After I made the
21 protective sweep, I was observing that the victims
22 who were in the house, an adult and several small
23 children, were visibly upset, shaking, crying, very
24 high emotions at that point in time.

25 Q. What did you do next?

1 A. At that point in time, I was attempting to calm them
2 down, console them, let them know that they were safe
3 now. We were here. Get as much information as I
4 could in regard to the suspects out to responding
5 officers. That way, responding officers, if they
6 were to see anything, they wouldn't be caught off
7 guard or they could see the suspects.

8 Q. Did any other responding officers arrive?

9 A. Yes, sir.

10 Q. Who is the next person you remember arriving there?

11 A. Sergeant Chandler.

12 Q. And did they give you descriptions of the suspects?

13 A. They did.

14 Q. What were those descriptions?

15 A. From my recollection, it was two or three black
16 males. I'd have to refer back to the 911 tape at
17 that point in time, but brandishing weapons.

18 Q. Did you stay there until the scene was clear?

19 A. Yes. Until I was relieved by the other officers.

20 Excuse me.

21 Q. Are you the main case officer on this case?

22 A. I am not.

23 Q. You're the person who responded?

24 A. Yes, I am.

25 MR. SHELDON: Thank you. Those are all the questions

1 I have.

2 SERGEANT TRICIA NICOLE BRUBAKER

3 CROSS-EXAMINATION BY MR. LEE:

4 Q. Sergeant Brubaker, can you please tell us again what
5 your recollection was as far as the descriptions
6 given.

7 A. I'd have to refer back to the 911 tape, sir.

8 Q. Okay. But did you say two to three black males
9 brandishing weapons?

10 A. Yes.

11 Q. That was your recollection?

12 A. That was the call that came out, sir.

13 Q. So, did you obtain descriptions of the suspects from
14 the people at the house?

15 A. The victims?

16 Q. Yes.

17 A. Yes, sir.

18 Q. Okay. And do you remember what those descriptions
19 were?

20 A. I'd have to refer back to the tape, sir.

21 Q. To the 911 tape?

22 A. Yes, sir.

23 Q. Well, that wouldn't be on the 911 tape. Would it?

24 A. It would be whatever I put over the radio to
25 responding officers, sir.

1 Q. But you don't have any notes or anything indicating
2 what -

3 A. No, sir.

4 Q. Okay. Did you write a report in this case?

5 A. I did a supplement report, sir.

6 Q. Okay. Can I hand you - is that the report you are
7 referring to?

8 A. Yes, sir.

9 Q. Okay. And it's what, one paragraph?

10 A. Yes.

11 Q. Less than a page? And that's all you filled out for
12 this?

13 A. Yes, sir.

14 Q. Okay. And did you relay the description that you got
15 to Sergeant Chandler?

16 A. Yes, sir.

17 Q. As indicated by - okay. But you don't remember
18 exactly what that description was here today?

19 A. Not at this time, sir.

20 Q. Okay.

21 MR. LEE: That's all I have, Your Honor.

22 THE COURT: Anything else?

23 MR. SHELDON: No, Your Honor.

24 THE COURT: Thank you, ma'am. You may step down.

25 WITNESS: Thank you, sir.

1 MR. SHELDON: I ask that this witness may be relieved
2 from the trial of this case.

3 MR. LEE: No objection.

4 THE COURT: You're excused from your subpoena.

5 WITNESS: Thank you, sir.

6 THE COURT: Call your next witness.

7 MR. SHELDON: Scott Chandler.

8 BAILIFF: Chandler?

9 MR. SHELDON: Correct.

10 BAILIFF: Come forward and be sworn, please.

11 SERGEANT DONALD SCOTT CHANDLER

12 being first duly sworn, testified as follows:

13 MADAM CLERK: Thank you. Have a seat, please. If
14 you will, state your full name and spell your last name
15 for the record, please.

16 SERGEANT DONALD SCOTT CHANDLER: Donald Scott
17 Chandler. C-H-A-N-D-L-E-R.

18 SERGEANT DONALD SCOTT CHANDLER

19 DIRECT EXAMINATION BY MR. SHELDON:

20 Q. Sergeant Chandler?

21 A. Yes, sir.

22 Q. Where do you work?

23 A. Bluffton Police Department.

24 Q. And were you working there on October 25, 2010?

25 A. Yes, I was.

- 1 Q. What was your role then?
- 2 A. I was the road patrol supervisor.
- 3 Q. And did you respond -- do you recall responding to any
- 4 specific location on that day?
- 5 A. Yes, I do.
- 6 Q. Where?
- 7 A. [REDACTED] Drive.
- 8 Q. And where is that?
- 9 A. It's located in the Mill Creek subdivision, which is
- 10 in the town of Bluffton.
- 11 Q. And what was the reference of that call?
- 12 A. I believe it was a robbery call.
- 13 Q. Do you remember when you responded on the scene who
- 14 was there?
- 15 A. Yes, I did.
- 16 Q. Who?
- 17 A. Officer Brubaker was there, and then the complainant,
- 18 the victim.
- 19 Q. Please describe what you see.
- 20 A. When I walk up, the victim is standing inside the
- 21 front doorway. I approach her and we step inside the
- 22 front entryway. I begin speaking to her, and I
- 23 notice that an interior first floor closet door is
- 24 open, and I notice a lot of objects that I believe
- 25 were in the closet were now on the floor.

1 Q. And who else do you see there?

2 A. Further on in the house in the living room I did see
3 four small children. I believe it was three - three
4 girls and one boy.

5 Q. What do you do?

6 A. I begin to ask the victim what happened, why we were
7 there.

8 Q. And does she relay to you anything at all about
9 identification of the suspects?

10 A. Not initially, but later on, when I was speaking with
11 her upstairs.

12 Q. What did you do then?

13 A. Based on my first initial conversation with her, we
14 went upstairs to look at the upstairs hallway and
15 bedrooms.

16 Q. What do you see?

17 A. Basically the same thing I saw downstairs in the
18 closet. It looked as if every single bedroom,
19 bathroom, attic, everything had been gone through.
20 Mattresses were turned over. Drawers were pulled
21 out. Clothing and items were thrown on the floor.

22 Q. What do you do next?

23 A. At that point in time I finished my conversation with
24 the victim. I made my notifications to my command
25 staff, and requested that investigations respond to

1 the scene.

2 Q. Is that the time she gave you identification
3 characteristics of the suspects?

4 A. Yes, sir.

5 Q. Do you recall what those are?

6 A. Not specifically. I would have to look at my report.

7 Q. Would that help refresh your recollection?

8 A. Yes, sir. I would.

9 MR. SHELDON: May I approach, Your Honor?

10 THE COURT: Certainly.

11 Q. I'm handing you what is on your report. Do you
12 recognize what that is?

13 A. Yes, sir. I do.

14 Q. Is that your report for the evening?

15 A. Yes, sir. It is.

16 Q. And that report relates to this incident?

17 A. Yes, sir. It does.

18 Q. Did you document in that report the description of
19 the suspects?

20 A. Yes, I did.

21 Q. Will you please tell the jury what the description
22 is?

23 A. I was told that the first suspect was a black male,
24 approximately five-foot, seven inches tall, wearing a
25 white t-shirt and blue jeans. He may have had

1 dreads. He had something over his head, a white
2 cloth, and he also had a ponytail. He is
3 approximately in his mid-20's. Medium-to-light
4 complexion. The victim could only see his eyes.
5 The second suspect was described as a black male;
6 approximately six-foot, one inches tall; 180 pounds;
7 black pants; black t-shirt. No facial hair. He did
8 have a short Afro with flared nostrils. This
9 individual did carry a silver handgun in his right
10 hand. The third suspect was described as a black
11 male, skinny dreads down to his ears. Light-to-
12 medium complexion. Red, glossy eyes, maybe drug
13 related. A white polo with colored stripes. Jeans
14 with bleach - I'm sorry, three bleach spots under the
15 back pocket. And there was something over his face.

16 Q. Did you do anything to document the scene?

17 A. I completed my incident report and I also took
18 photographs of the scene.

19 Q. You took photographs of the scene that night?

20 A. Yes, sir. I did.

21 MR. SHELTON: Beg the Court's indulgence.

22 THE COURT: Certainly.

23 Q. You said you were the supervising officer?

24 A. Yes, sir.

25 Q. Now, were you in charge of supervising any type of

1 neighborhood canvas to see if anyone saw anything?

2 A. Yes, I was.

3 Q. And did that result in anything at all?

4 A. We did contact one neighbor who said that he did see
5 a vehicle pulling in a driveway on Oaksdale Drive a
6 little bit earlier that night.

7 Q. Anything specific?

8 A. I believe he said it was a grey van, tinted windows,
9 that had pulled into her driveway, and then pulled
10 out. He said that it looked like there was a black,
11 male driver and possibly a passenger.

12 Q. Did anyone else have any other information?

13 A. No, sir.

14 Q. Did you document, initially, anything that was
15 reported stolen by the victims?

16 A. Yes, sir. I did.

17 Q. What are some of those things - items?

18 A. I'd have to look at my report again.

19 Q. Would it refresh your recollection?

20 A. Yes, sir.

21 Q. Please do.

22 A. Initially, the victim told me that there were three
23 or four handbags taken, a necklace, a Rolex watch,
24 miscellaneous U.S. currency, a suitcase, a camcorder
25 and a computer. And that is what she had told me at

1 the time.

2 Q. And did you get an estimated amount for that?

3 A. I believe the numbers have changed, but I think at
4 the time, I did put in the correct amount of what she
5 had reported. Later on, other things were reported,
6 and that number is documented here.

7 Q. Okay. What was the initial amount reported?

8 A. I believe it was 20 thousand, possibly.

9 Q. And then what was the additional - with the
10 additional items that were documented in the report?

11 A. I believe the total ended up being \$51,540.00.

12 MR. SHELTON: Those are all the questions I have for
13 you. Please answer any questions defense counsel has.

14 A. Thank you, sir.

15 THE COURT: Mr. Lee.

16 SERGEANT DONALD SCOTT CHANDLER

17 CROSS-EXAMINATION BY MR. LEE:

18 Q. Sergeant Chandler, Mr. Sheldon was asking you about
19 descriptions that you took. That was from Senora
20 Jones, the mother?

21 A. Yes, sir.

22 Q. Okay. So those descriptions that you gave are from
23 Ms. Jones?

24 A. Yes, sir.

25 Q. Okay. And when you were speaking with her, were you

1 taking any notes down?

2 A. Yes, sir.

3 Q. Okay. And does this report reflect what your notes
4 indicate?

5 A. Yes, sir.

6 Q. Okay. And you put in this report anything that you
7 considered important or relevant? Is that right?

8 A. The descriptions?

9 Q. Yes, as far as the descriptions.

10 A. Yes, sir.

11 Q. Okay. And I notice that, in some instances, there
12 was - seemed to be some certainty and there was some
13 not so certain. Would you agree with that?

14 A. Yes, sir.

15 Q. And again, according to your report, Ms. Jones
16 indicated that Suspect Number 2 had a silver handgun
17 in his right hand. Is that right?

18 A. Yes, sir.

19 Q. Okay. And this neighborhood canvas, which, Mr.
20 Sheldon talked about the vehicle, that was done that
21 night?

22 A. Yes, sir.

23 Q. Okay. So the information about the grey van came
24 that night?

25 A. Yes, sir.

1 Q. Okay.

2 MR. LEE: That's all I have for Sergeant Chandler.

3 No objection to him being excused.

4 MR. SHELDON: Just hold on a second.

5 SERGEANT DONALD SCOTT CHANDLER

6 RE-DIRECT EXAMINATION BY MR. SHELDON:

7 Q. You didn't have - find - you didn't have any license
8 plate or any other description of this grey van.

9 Correct?

10 A. No, sir. We did not.

11 Q. Thank you.

12 MR. SHELDON: That's all the questions I have.

13 THE COURT: Thank you. You may step down and you are
14 excused from your subpoena.

15 WITNESS: Thank you, sir.

16 MR. SHELDON: State calls Abriya H[REDACTED]. Abriya H[REDACTED].

17 BAILIFF: Just come up here by the table and be sworn
18 in.

19 ABRIYA H[REDACTED]

20 being first duly sworn, testified as follows:

21 MADAM CLERK: Okay. You can have a seat, please.

22 We're going to have you state your name for the record and
23 spell your name for us.

24 WITNESS: Abriya H[REDACTED], A-B-R-I-Y-A H[REDACTED].

25 ABRIYA H[REDACTED]

DIRECT EXAMINATION BY MR. SHELDON:

Q. Hey, Ms. Hart. How are you doing?

A. Good. How are you?

Q. How old are you?

A. Thirteen.

Q. How old were you on October 25, 2010?

A. Ten.

Q. What year are you in school?

A. What year?

Q. Huh-uh.

A. Fourth grade. Third or fourth grade.

Q. What year are you now?

A. Seventh - eighth grade.

Q. Ms. H[REDACTED], if I told you that I was wearing an orange tie, would that be true?

A. No, sir.

Q. What would it be?

A. A lie.

Q. If I told you I was wearing a pink suit, would that be true?

A. No, sir.

Q. What would it be?

A. A lie.

Q. If I told you that I had a wristwatch on, would that be true?

1 A. Yes, sir.

2 Q. If I told you that this courtroom has windows that go
3 outside, would that be true or a lie?

4 A. It would be a lie.

5 Q. You understand that it is important to tell the truth
6 in court?

7 A. Yes, sir.

8 Q. Why?

9 A. Because you can mess someone's life up if you don't.

10 Q. Thank you. Do you remember -- did you used to live in
11 Bluffton?

12 A. Yes, sir.

13 Q. Do you remember where?

14 A. In Mills Creek.

15 Q. Do you remember something that happened at Mills
16 Creek while you were living there?

17 A. Yes.

18 Q. What happened?

19 A. Someone walked into my house and they robbed us. It
20 was three men.

21 Q. Since that incident, have you seen that man?

22 A. No, sir.

23 Q. Do you see him anywhere in the courtroom today?

24 A. Right there.

25 Q. Right where?

1 A. There.

2 Q. Are you certain that's him?

3 A. Yes, sir.

4 Q. Have you been in this courtroom since before coming
5 in to testify?

6 A. No.

7 Q. Are you absolutely certain?

8 A. Yes.

9 Q. Tell us what you remember about that day.

10 A. I remember being outside and then walking in the
11 house to get a jacket. And then, on my way back down
12 the stairs, three men coming up and telling us to sit
13 against the wall. And we just sat there, and we
14 cried, and he told us to be quiet. And I remember
15 him going into my mom's room.

16 Q. Who told you to be quiet?

17 A. At some point, they all told us to be quiet, but it
18 was more than once, because we were crying and they
19 asked us to be quiet and stop crying.

20 Q. What was happening in the other room?

21 A. They were yelling at my mom.

22 Q. What were they saying?

23 A. That, if - like, if she said something that she was
24 going to die it was not worth it and to show us where
25 everything is and for her to be quiet and to lay

1 there flat on her stomach.

2 Q. Did they do anything to you or your brother or your
3 cousins?

4 A. No.

5 Q. Who did you have the most contact with out of the
6 three people that came into your house?

7 A. Him.

8 Q. What did he look like that day? What was he wearing?

9 A. He had on a black shirt and pants and his hair was
10 longer.

11 Q. When you say *him*, you're talking about the person
12 with the white shirt and black tie on?

13 A. Yes, sir.

14 MR. SHELTON: Let the record reflect that she has
15 identified the Defendant in the identification.

16 THE COURT: So noted.

17 MR. LEE: Your Honor, I would, again, place on the
18 record my previous objection to the in-court
19 identification of Mr. Powell based upon previous
20 arguments.

21 THE COURT: Noted.

22 MR. LEE: Thank you.

23 Q. And tell us everything you remember him doing, *him*
24 being the Defendant that you see there.

25 A. Walking back and forth from where we were to where my

1 mom was and in her room. And I remember him giving
2 my cousin tissue, because she was crying and like,
3 um, just - he stood there with us. And then, he
4 would walk back and he went up the steps. He pointed
5 to tell us where to sit.

6 Q. Where was that?

7 A. Like in the house?

8 Q. Uh-huh.

9 A. Near the staircase against the wall.

10 Q. Was that upstairs or downstairs?

11 A. Upstairs.

12 Q. What is near that area there?

13 A. A window and like a chandelier-type thing, like a
14 lamp. And it's right like you could see the stairs.
15 And then, there is my mom's room right, a couple
16 steps to the right.

17 Q. You say he was going back and forth between your
18 mom's room and you all?

19 A. Yes, sir.

20 Q. Did any of the other suspects have anything on their
21 face?

22 A. One had a um - I don't know what it was, but it was
23 covering his nose down. You could see his eyes,
24 though.

25 Q. What did he look like?

1 A. He had dreads and his eyes were - like they red and
2 they were kind of thin.

3 Q. What about any of the other people?

4 A. One was short and he was the loudest one, and his
5 eyes were like really red, too, and they were thin.

6 Q. You said they were really red?

7 A. Yes.

8 Q. And they were thin? Did he have anything over his
9 face?

10 A. No.

11 COURT REPORTER: I'm sorry. When he said they were
12 thin, you didn't give a verbal answer.

13 A. They were thin.

14 Q. Did he have anything over his face?

15 A. No.

16 Q. What else do you remember, if anything, the Defendant
17 doing?

18 A. Just he told us to be quiet and stay there when he
19 walked down the stairs. And I think - I believe
20 that's when they left, because they didn't come back
21 up.

22 Q. When they left, do you remember them holding
23 anything?

24 A. They had a lot of bags.

25 Q. Describe those bags.

1 A. They were like luggage that we use when we're going
2 on trips and they were filled - like they had our
3 stuff in them. I seen my computer and some clothes
4 and shoes.

5 Q. Shoes?

6 A. Yes. Purses.

7 Q. Purses?

8 A. (Nodded head)

9 Q. What types of shoes?

10 A. Like heels. Like my mom's stuff.

11 Q. Your mom's stuff?

12 A. Yes.

13 Q. Who was the last of them to leave?

14 A. The guy that had something over his face.

15 Q. Was the very last to leave?

16 A. They all left together, but he was the last one down
17 the stairs.

18 Q. Who was the last - were you held at gunpoint the
19 whole time?

20 A. Not when they went back to my mom's room. We were
21 left there alone.

22 Q. When the Defendant was walking up and down the
23 stairs, was he holding you at gunpoint the whole
24 time?

25 A. Yes.

1 Q. And how many times do you think that he walked up and
2 down the stairs?

3 A. About three. Three or four times.

4 Q. When he was walking up and down the stairs, what was
5 he doing?

6 A. My mom told him - I could hear my mom telling him
7 that my grandma was on her way back from the grocery
8 store. So I think he was looking for them or waiting
9 for them to get back. But he was just walking up and
10 down. And then, he would tell us to be quiet and
11 just sit there. And then, he would go to my mom's
12 room and come back.

13 Q. Did he carry anything besides the gun?

14 A. No.

15 MR. SHELDON: Beg the court's indulgence.

16 THE COURT: Sure.

17 MR. SHELDON: Sorry about that.

18 Q. Do you remember meeting with the officer?

19 A. Yes.

20 Q. Was this before or after the incident?

21 A. After.

22 Q. Do you remember when that was?

23 A. What do you - what do you mean?

24 Q. Do you remember - first of all, did officers arrived
25 at your house?

1 A. Yes.

2 Q. And then did you go to the Bluffton Police
3 Department?

4 A. No. Not that same day.

5 Q. When did you go to the Bluffton Police Department?

6 A. A couple of days after the incident.

7 Q. It was a couple of days after. Are you sure about
8 that?

9 A. Yes.

10 Q. Now, I'm going to hand - did you, at the time, when
11 you went to the police department, did they show you
12 any what you know as lineups?

13 A. Yes.

14 Q. And do you recall how many they showed you?

15 A. No.

16 Q. Was it more than one?

17 A. Yes.

18 Q. Do you remember the first one they showed you?

19 A. No.

20 Q. Do you remember the second one they showed you?

21 A. No.

22 Q. Do you remember the third one they showed you?

23 A. No.

24 Q. Do you remember specifically the fourth one they
25 showed you?

1 A. No.

2 Q. Do you remember, though, whether you identified
3 anyone out of those four lineups?

4 A. Yes.

5 Q. Who did you identify?

6 A. Him over there.

7 Q. The Defendant?

8 A. Yes, sir.

9 MR. SHELTON: Please let the record -

10 A. Okay.

11 MR. SHELTON: May I approach?

12 THE COURT: Certainly.

13 Q. Now, Ms. H■■■■, first of all, I'm going to hand you
14 what has been previously marked State's for
15 identification purposes only. It's not in evidence,
16 okay, so please don't show it to the jury. Okay?
17 Exhibit Number 46. Now, I'd like for you to look at
18 this and see if you recognize, first of all, on the
19 back of it, anything. Okay?

20 A. No.

21 Q. So the back of it, is that your signature?

22 A. Yes.

23 Q. So you do recognize your signature?

24 A. Yes.

25 Q. Okay. And what date is that?

1 A. The 26th in 2010.

2 Q. October 26, 2010?

3 A. Yes.

4 Q. And that is your signature?

5 A. Yes.

6 Q. Now, I ask that you read the back of that to yourself
7 silently if you will. Do you remember ever having
8 that read to you?

9 A. Yes, when I went to the police station.

10 Q. Is that the same thing that was read to you?

11 A. Yes.

12 Q. And you have to speak up. I know it's - you're in
13 court. You have to speak up so everyone can hear
14 you. Okay?

15 A. Okay.

16 Q. Now, have you seen that since that day?

17 A. No. No, sir.

18 MR. SHELDON: May I approach, Your Honor?

19 THE COURT: Sure.

20 Q. Now, Ms. Hart, I'm going to turn the other side over
21 and have you look at it. Okay? And tell me if you
22 recognize what this is.

23 A. It's what I looked at when we went to the police
24 station.

25 Q. Can you repeat that a little bit louder.

1 A. It's what I looked at when we went to the police
2 station.

3 Q. You say what you looked at. Be more specific if you
4 can.

5 A. The lineup that they showed me and asked me to
6 identify someone.

7 Q. And did you identify anyone out of that lineup?

8 A. Yes, sir.

9 Q. What number is he?

10 A. Six.

11 Q. And do you see him in the courtroom?

12 A. Yes.

13 Q. And who -- where is he?

14 A. Over there.

15 Q. You can point to him.

16 MR. SHELDON: Please let the record reflect she has
17 identified the Defendant..

18 THE COURT: So noted.

19 Q. You said that you were shown other lineups that day?

20 A. Yes, sir.

21 Q. And you did not see anyone in those other lineups?

22 A. No, sir.

23 Q. Do you recognize anything that you marked or anything
24 on the front of that lineup that you see in front of
25 you?

1 A. The circle and my initials next to it.

2 Q. And why did you do that?

3 A. Because I recognized him.

4 Q. Are you sure?

5 A. Yes, sir.

6 Q. Are you positive?

7 A. Positive.

8 Q. Who is that man? What did he do?

9 A. He came into my house that day and robbed us.

10 Q. Is he the same man who you said did the acts already
11 to the jury -

12 A. Yes, sir.

13 Q. - you've already testified to?

14 A. Yes, sir.

15 MR. SHELTON: State moves State's Exhibit Number 46
16 into evidence.

17 MR. LEE: No objection.

18 PHOTO LINEUP MARKED STATE'S EXHIBIT

19 NUMBER 46, ADMITTED AS EVIDENCE.

20 MR. SHELTON: Ask that it be published to the jury.

21 THE COURT: Certainly.

22 MR. SHELTON: May I read the back of the card for the
23 jury, Your Honor?

24 THE COURT: You may.

25 Q. Ms. Jones - excuse me. Ms. H■■■■, you say that they

1 read the back of this to you before they flipped the
2 lineup over, correct?

3 A. Yes.

4 Q. And you never saw the front before they read this to
5 you, correct?

6 A. No, sir.

7 Q. The back of the lineup reads:

8 You'll be asked to look at a group of
9 photographs. The fact that the photographs
10 are shown to you should not influence your
11 judgment. You should not conclude or guess
12 that the photographs contain the picture of
13 the person who committed the crime. You are
14 not obligated to identify anyone. It is
15 just as important to free innocent persons
16 from suspicion as to identify guilty parties.

17 Please do not discuss the case with
18 other witnesses nor indicate in any way that
19 you have identified someone.

20 You said that that was read to you?

21 A. Yes, sir.

22 Q. And you understood it?

23 A. Yes.

24 Q. Did you understand what it meant?

25 A. Yes.

1 Q. What did it mean?

2 A. That I don't have to identify someone if I don't see
3 them, but if I recognize them, to point them out so
4 they know.

5 Q. And you recognized him?

6 A. Yes, sir.

7 Q. You're positive?

8 A. Positive.

9 Q. Ms. H■■■■, do you remember giving a statement to law
10 enforcement?

11 A. Yes.

12 Q. And that was the same day you did the lineup?

13 A. Yes.

14 Q. Do you remember whether you wrote it or someone wrote
15 it for you?

16 A. I don't remember.

17 Q. But do you remember whether the statement was your
18 statement?

19 A. Yes. It was mine.

20 Q. And everything that was said in it was true?

21 A. Yes.

22 Q. When you said that statement, was it closer in your
23 mind than it was now?

24 A. Yes.

25 Q. Do you remember during giving that statement stating

1 that -

2 MR. LEE: Your Honor, I'm going to object. I think
3 he is trying to bolster the witness's testimony prior to
4 an inconsistent statement. I don't think it's
5 appropriate. I mean, if he is introducing prior
6 statements by Ms. -

7 MR. SHELDON: I was using it to refresh her
8 recollection, and I can do a different procedure to do
9 that, if necessary.

10 THE COURT: I sustain the objection as it stands.

11 MR. SHELDON: Thank you.

12 Q. Ms. H■■■■, were more details in that statement than
13 what you testified to?

14 A. Yes.

15 Q. Would it help refresh your recollection to look at
16 that statement?

17 A. Yes.

18 MR. SHELDON: May I approach?

19 THE COURT: Certainly.

20 Q. Do you recognize this statement?

21 A. Yes.

22 Q. What is it?

23 A. It's what I told - what I told the officer.

24 Q. Please take the time to read that statement to
25 yourself. Have you seen that statement, first of

1 all, since that statement was given?

2 A. No, sir.

3 Q. No, and have we met before?

4 A. Yes.

5 Q. Did I show it to you then?

6 A. No, sir.

7 Q. Did I show you the lineups then?

8 A. No, sir.

9 Q. And you've never seen that statement since then.

10 Have you?

11 A. No, sir.

12 Q. So please take your time to look at it.

13 MR. LEE: Your Honor, may I approach.

14 OFF-THE-RECORD DISCUSSION, THE COURT

15 AND BAILIFF.

16 THE COURT: It may be a good time for us to take a
17 ten-minute recess. Ladies and gentlemen, I ask you to
18 step in the jury room and remind you it is too early to
19 begin discussing the case.

20 BAILIFF: Thank you, Your Honor. Be careful of the
21 steps, please.

22 JURORS LEAVE COURTROOM..

23 BAILIFF: The jury is clear, Your Honor.

24 THE COURT: We will be in recess for ten minutes.

25 ON-THE-RECORD BENCH CONFERENCE, OUT

1 following Mr. Sheldon's lead.

2 THE COURT: Well, you kind of have to. You have to
3 follow his lead. If he stands up and you don't, you know.
4 What are you going to do?

5 MR. SHELDON: I traditionally stand up for the judge,
6 as well. I stand up for the judges of the facts.

7 THE COURT: In some places, everybody stand up, right?
8 There are some places nobody stands up.

9 MR. LEE: I know, there's no rules. I just wanted to
10 make sure we're on the same page.

11 MR. SHELDON: I came from Berkeley before this, after
12 having to sit here in the back. And Judge Harrington
13 makes everyone stand. We tried most of our cases in front
14 of Judge Harrington. So for whatever reasons, it's gotten
15 into my psyche since then for good, bad, or indifferent.

16 BAILIFF: The jury is entering, Your Honor.

17 JURORS ENTER COURTROOM 11:46 A.M.

18 BAILIFF: Your Honor.

19 THE COURT: Welcome back, ladies and gentlemen. I
20 believe we are ready to resume examination of the witness.

21 MR. SHELDON: Thank you, Your Honor. May I approach?

22 THE COURT: Sure.

23 ABRIYA H [REDACTED]

24 CONTINUE DIRECT EXAMINATION BY MR. SHELDON:

25 Q. Do you remember telling law enforcement when you made

1 this statement that the guy you identified was still
2 there when the other ones left and before he went
3 down the stairs he asked you:

4 *Did you see anything?*

5 We said, No. He said:

6 *We were never here.*

7 A. I don't remember telling him that. I don't remember
8 — I remember I gave —

9 Q. Do you remember that you gave a statement?

10 A. Yes.

11 Q. And everything you said in your statement was true?

12 A. Yes.

13 Q. And this is the statement that you gave?

14 A. Yes.

15 Q. Would it help refresh your recollection?

16 A. Yes.

17 Q. Please take your time to read the statement.

18 Did that help refresh your recollection?

19 A. Yes.

20 Q. Do you remember that?

21 A. Yes.

22 Q. Do you remember it now?

23 A. Yes.

24 Q. Please tell the jury what you remember.

25 A. I remember when they left that they walked down the

1 stairs together, but one of them was lagging behind
2 and he told us to - he asked us like did we see
3 anything or were they there and we said, no, and he
4 told us to be quiet and sit there, then they left.

5 Q. Who was that person?

6 A. I don't remember.

7 Q. You don't remember. Is your statement true?

8 A. Yes.

9 Q. And when you wrote - when you gave your statement, it
10 was true?

11 A. Yes.

12 Q. And does your statement help refresh your
13 recollection as to that?

14 A. Yes.

15 Q. Who was it?

16 A. The guy I identified.

17 Q. And who was that?

18 A. Him.

19 Q. Him, being the Defendant seated next to the counsel?

20 A. Yes, sir.

21 Q. Is everything you're testifying today true?

22 A. Yes, sir.

23 Q. What would happen if you did not testify truthfully?

24 A. I could possibly get him in trouble that he doesn't
25 need to be in. I could mess up his life.

1 Q. Is he the person - is he one of the people who
2 invaded your home that day?

3 A. Yes, sir.

4 MR. SHELTON: May I approach the witness, Your Honor?

5 THE COURT: Sure.

6 MR. SHELTON: No further questions. Thank you.

7 Please answer any questions Mr. Lee has.

8 THE COURT: Mr. Lee.

9 MR. LEE: Please the Court.

10 ABRIYA HART

11 CROSS-EXAMINATION BY MR. LEE:

12 Q. Hey, Abriya.

13 A. Hello.

14 Q. It's probably pretty scary for you to be here in
15 court today; isn't it?

16 A. Yes.

17 Q. And it was probably pretty scary back when all this
18 stuff happened, wasn't it?

19 A. Yes.

20 Q. And you said earlier that you would never
21 intentionally mess up someone's life, right?

22 A. Yes.

23 Q. All right. And you want to see that whoever did this
24 is properly punished, correct?

25 A. Yes.

1 Q. And you don't want to see anybody who didn't do this
2 be punished, right?

3 A. Yes.

4 Q. Okay. Now, when you were testifying earlier, you
5 said the guy with something on his face was the last
6 to leave, right?

7 A. Yes.

8 Q. And the guy with something on his face was one of the
9 short guys, correct?

10 A. Yes.

11 Q. Okay. Not Mr. Powell?

12 A. Yes.

13 Q. Are you - are you sure that the guy with something on
14 his face was the last to leave?

15 A. No.

16 Q. You're not?

17 A. Not positive.

18 Q. Not positive. Are you kind of positive or pretty
19 positive or -

20 A. From what I remember now.

21 Q. From what you remember now, it was the short guy with
22 something on his face that left?

23 A. Yes.

24 Q. Okay. But what you said back then was that it was
25 the person that you had identified in the lineup,

1 right?

2 A. Yes.

3 Q. And that's Mr. Powell?

4 A. Yes.

5 Q. So are you positive here today that it was Mr. Powell
6 that left last?

7 A. Yes.

8 Q. You're positive?

9 A. Yes.

10 Q. Okay. Certain?

11 A. Certain.

12 Q. Absolutely certain?

13 A. Yes.

14 Q. All right. So you're absolutely certain that Mr.
15 Powell was the guy that left last?

16 A. Yes.

17 Q. But you're not quite positive that the guy with
18 something on his face was the one that left last?

19 A. Yes.

20 Q. Okay. And you would agree only one person can leave
21 last, right?

22 A. Yes.

23 Q. Okay. And you said something earlier, Abriya, that
24 what they -- when you went to the Bluffton Police
25 Department, they asked you to identify someone in

1 this photo lineup?

2 A. Yes.

3 Q. Okay. So that's what you got from it to identify
4 somebody?

5 A. Yes.

6 Q. All right. Now, was it -- was it really scary to have
7 that gun all around?

8 A. Yes.

9 Q. Okay. And can you tell us about the gun? Was it
10 silver?

11 A. Yes.

12 Q. It was silver. And are you sure about that?

13 A. Yes.

14 Q. Positive?

15 A. Yes.

16 Q. Certain?

17 A. Certain.

18 Q. Absolutely certain?

19 A. Yes.

20 Q. It was a silver gun?

21 A. Yes.

22 Q. That you claim that Suspect Number 2 had?

23 A. Yes.

24 Q. Not red, green, black, blue, yellow? Silver?

25 A. Silver.

1 Q. And are you as sure about that as you are your
2 identification of Mr. Powell?

3 A. Yes.

4 Q. Okay. Are you as certain about that as you are that
5 Suspect Number 2 was the one who left last?

6 A. Yes.

7 Q. Okay. And you're more certain than you are that the
8 short guy left last? You're more certain about the
9 color of the gun?

10 A. Yes.

11 Q. Okay. Abriya, do you ever make mistakes like
12 everybody else?

13 A. Yes.

14 Q. When you make a mistake, you don't always -- you don't
15 usually do it on purpose, do you? That's why it's a
16 mistake, right?

17 A. It's not on purpose.

18 Q. So even if you're trying to do something right, you
19 may not on purpose do something wrong, right?

20 A. Yes.

21 Q. And that's a little bit different than doing
22 something on purpose, correct?

23 A. Yes.

24 Q. Okay.

25 MR. LEE: That's all I have, Your Honor.

1 Thank you, Abriya.

2 THE COURT: Any re-direct, Mr. Sheldon?

3 MR. SHELDON: Briefly, Your Honor.

4 ABRIYA H [REDACTED]

5 RE-DIRECT EXAMINATION BY MR. SHELDON:

6 Q. You are frightened here today, correct?

7 A. Yes.

8 Q. You were frightened that day, correct?

9 A. Yes.

10 Q. Now, let's clarify. Who was the last person to
11 leave?

12 A. Mr. Powell.

13 Q. And it's important to be honest. Are you sure about
14 that?

15 A. Yes.

16 Q. When you earlier just said that the other guy was the
17 last person to leave, how could both of those things
18 be true?

19 A. I was uncertain. I wasn't completely sure.

20 Q. When?

21 A. When I said the one had something covering his face
22 was the last one to leave.

23 Q. So when you first testified that the person with
24 something on his face was the last one to leave,
25 that's when you were certain?

1 A. Yes - no, I was uncertain.

2 Q. You were uncertain. After reading your statement
3 that you gave the day after the incident, did that
4 refresh your recollection?

5 A. Yes.

6 Q. Now, what are you certain of?

7 A. That Mr. Powell was the last one to leave.

8 Q. Are you saying that because you wrote it, or are you
9 saying it because you remember it?

10 A. Because I remember it.

11 Q. You said it's very important that you don't say
12 anything that's not true, because it can get someone
13 in trouble that doesn't deserve it, correct?

14 A. Yes.

15 Q. So sometimes the way questions can be asked can be
16 hard to know which way to answer, correct?

17 A. Yes.

18 Q. Do you have any doubt in your mind that Mr. Powell
19 was the person inside your house that day?

20 A. No.

21 Q. If you had any doubt whatsoever, would you tell the
22 jury?

23 A. Yes.

24 Q. You would tell the jury if you had any doubt
25 whatsoever?

1 A. Yes, I would tell them that I had a doubt.

2 Q. Why?

3 A. Because, if they don't deserve to be punished, then I
4 don't want them to be punished.

5 Q. Mr. Lee asked you - you said that when you got into
6 the - interpreted one of those statements you said
7 earlier that when you went to the police station you
8 were asked to identify someone, correct?

9 A. Yes.

10 Q. You testified earlier that this was read to you
11 before you identified anyone, correct?

12 A. Yes.

13 Q. And before you identified anyone, before you looked
14 at these lineups, what did you know - what did you
15 know you had to do?

16 A. Identify someone that was there.

17 Q. Did you have to identify someone that was there?

18 A. If I seen them, yes. But if I didn't see them, then
19 don't point out anyone.

20 Q. Wasn't it just as important for you not to point out
21 someone if they weren't there?

22 A. Yes.

23 Q. And that instruction they read, you listened to that?

24 A. Yes.

25 Q. You told the officers you understood it before you

1 looked at any lineups, correct?

2 A. Yes.

3 Q. And in fact, how many people there did not have their
4 face covered?

5 A. Two.

6 Q. And you were shown multiple lineups, correct?

7 A. Yes.

8 Q. Did you identify that second person?

9 A. No.

10 Q. Why not?

11 A. Because I was uncertain.

12 Q. You said that you can make mistakes.

13 A. Yes.

14 Q. Have you made mistakes before?

15 A. Yes.

16 Q. Please tell the jury about a mistake you made.

17 A. Marking the wrong answer on a test; saying that the
18 one with his face covered was the last one to leave.

19 Q. Is that how you remembered it at the time before you
20 read your statement?

21 A. Yes.

22 Q. And after you read your statement, you remembered the
23 truth, correct?

24 A. Yes.

25 Q. And now, after reading your statement, do you

1 remember how the statement was written down and how
2 it was given?

3 A. They asked me what happened.

4 Q. Okay.

5 A. And I just told them. And he wrote it as I told him.

6 Q. And did you have a chance to look at it before you
7 signed it?

8 A. Yes.

9 Q. And was it what you told him?

10 A. Yes.

11 Q. Did you make a mistake in identifying the Defendant
12 as being one of the people that came into your house
13 with a gun that day?

14 A. No.

15 Q. Are you certain of that?

16 A. Certain.

17 MR. SHELDON: Thank you.

18 MR. LEE: Brief follow-up.

19 ABRIYA H [REDACTED]

20 RE-CROSS-EXAMINATION BY MR. LEE:

21 Q. Did you just tell Mr. Sheldon that two of the three
22 people did not have their face covered?

23 A. Yes.

24 Q. So only one had his face covered?

25 A. Yes.

1 Q. Not two. Are you sure about that, that two did not
2 have their face covered?

3 A. Yes.

4 Q. Okay. And you're certain about that?

5 A. Yes.

6 Q. And you're as certain about that as the rest of your
7 testimony?

8 A. Yes.

9 MR. LEE: That's all I have, Your Honor.

10 THE COURT: Thank you. You may step down.

11 MR. SHELDON: I ask that she may be excused for the
12 remainder of the trial. I don't know if Mr. Lee plans on
13 recalling her, but they have plans to leave.

14 MR. LEE: No objection.

15 THE COURT: She's excused from her subpoena then.

16 MR. SHELDON: I ask that she may remain in the
17 courtroom if her family wishes her to.

18 MR. SHELDON: May we approach, Your Honor?

19 OFF THE RECORD BENCH CONFERENCE.

20 MR. SHELDON: The State calls Senora Jones.

21 BAILIFF: Come forward to be sworn, please.

22 SENORA JONES

23 being first duly sworn, testifies as follows:

24 MADAM CLERK: If you'll state your name and spell it
25 for the record, please.

1 Q. Not two. Are you sure about that, that two did not
2 have their face covered?

3 A. Yes.

4 Q. Okay. And you're certain about that?

5 A. Yes.

6 Q. And you're as certain about that as the rest of your
7 testimony?

8 A. Yes.

9 MR. LEE: That's all I have, Your Honor.

10 THE COURT: Thank you. You may step down.

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12 remainder of the trial. I don't know if Mr. Lee plans on
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22 SENORA JONES

23 being first duly sworn, testifies as follows:

24 MADAM CLERK: If you'll state your name and spell it
25 for the record, please.

1 MS. SENORA JONES: Senora Jones, S-e-n-o-r-a J-o-n-e-
2 s.

3 SENORA JONES

4 DIRECT EXAMINATION BY MR. SHELDON:

5 Q. Ms. Jones, how are you today?

6 A. Good.

7 Q. Relatively speaking, what happened on October 25,
8 2010?

9 A. I was getting ready for my husband's birthday dinner.
10 It was his birthday. And my mom, my sister, and my
11 nieces were over to our house for the dinner. And
12 her and my sister ran to the store. I was - I had
13 went upstairs. I was like watching a movie. The
14 kids were outside playing in the backyard. We have
15 an enclosed fence. And the next thing you know,
16 while I was in my bedroom, three black males came in.
17 And I could like hear the kids in the hall next to
18 our room.

19 Q. What did the black males do?

20 A. One had his face covered with like a shirt, And then,
21 one, you know, instructed me to get right to the
22 floor and - you know, to tell him where our money was
23 and was pointing the gun, telling me, you know not to
24 move, while the other two like tore our house apart.

25 Q. Do you see that person in the courtroom today?

1 A. Yes.

2 Q. Would you please identify him for the jury.

3 A. Right there in the white shirt and black tie.

4 Q. Are you certain?

5 A. Positive.

6 Q. Do you have any doubt?

7 A. No.

8 Q. What did that person over there with defense counsel
9 with the white shirt and black tie do?

10 A. He -- he was the main one that like was with us the
11 whole time, trying to make sure, you know, like --
12 because the first thing I remember them doing was
13 emptying my purse and taking my cell phone. And so,
14 he stayed with us the whole time. He instructed me,
15 you know, to like I said, you know, just stay to the
16 ground. He kept, you know -- every now and then he
17 would peek out the door and make sure the kids was
18 still lined up out there and not, you know, moving.
19 And he was just telling me, f you just tell us where
20 your money is, you know, we'll -- you know, we'll
21 leave.

22 And I just kept pleading with him and telling him
23 that I didn't know, you know, what he was talking about.
24 I just kept saying, you know:

25 *We don't have any money.*

1 I said - you know, I begged him. I told him that I
2 was a registered nurse. I even told him - I said:

3 You emptied my purse. Look at my work

4 I.D.

5 You know, my work I.D. was right there. And I kept
6 just pleading with him, you know, that I did not know what
7 he was talking about, you know, just not to hurt us. And
8 he just kept pointing the gun. And the other guy that was
9 with him was, you know, just out of control. So I just
10 felt like anything could happen, because they were all -
11 you know, just - it was just scary.

12 Q. Did you tell him anything else?

13 A. Other than me telling him that, you know, pleading
14 with him not to hurt us and that we didn't know, you
15 know, where the money is. I ended up telling him
16 where I had some money. I had money saved that I was
17 using to like buy me a designer bag. I ended up
18 telling him where that money was, you know, hoping
19 that they would just take that and leave, and they
20 didn't.

21 Q. What did they do?

22 A. While he was holding - you know, making sure that I
23 didn't do anything, the other - like one went into my
24 closet and, you know, tore that apart. And another
25 one went into like my kids' bedroom, my mom's

1 bedroom. And I could hear like, you know, stuff
2 getting dumped. And at one point, I thought I heard
3 like the attic pull come down, you know, like come
4 down. So I guess the other two were just looking
5 through our house.

6 Q. And this whole time, what was the Defendant, Mr.
7 Powell, the same one sitting over there, that's the
8 one you're talking about that was with you?

9 A. Yeah. He's the one that kept the gun down, you know,
10 telling us not to move, not to get up, and to tell us
11 where the money was while the other two ransacked the
12 house.

13 Q. What was he wearing?

14 A. I think he had like on a black shirt, like a t-shirt
15 or tank, you know, some kind of plain tank, and like,
16 some maybe faded light, black pants. He didn't have
17 anything covering his face, like, surprisingly, he
18 didn't have a mask on. And that's why it was like so
19 — like clear to see him. Because at one point I just
20 pleaded him — I said:

21 *Look in my eyes,*

22 so that he would know that I was telling the truth
23 and that I was not trying to hide money or hide anything,
24 that they could have everything in the house if they
25 wanted. So I just at one point said:

1 *Look in my eyes.*

2 And I looked directly at him and I was saying, you
3 know:

4 *I don't know what you're talking about,*
5 *please.*

6 And he, you know, looked at me. And when he saw that
7 I - you know, we were looking at each other, he said:

8 *Face down,*
9 you know, with the gun again.

10 *I told you,*
11 you know,

12 *keep your head down.*

13 And so, I could see clearly. He didn't have any -
14 like a hat on, like nothing that could distort or cover
15 his face in any kind of way.

16 Q. Describe the other two men.

17 A. The other guy was kind of - not short, I guess, in
18 comparison to him. I'm thinking short, but maybe
19 anywhere from 5-8, probably about 5-7. I mean, he
20 didn't seem to be like close to six feet. More of a
21 stocky frame. Not heavy, but like, you know, just a
22 little stocky. And he had his face covered with what
23 appeared to be like a black t-shirt or something,
24 like the bottom part of his face, and he had a hat
25 on. And then, the other guy was - he seemed younger,

1 you know, maybe in his early 20's. He was lighter
2 complexed, and he had dread locks that came like to
3 about his ear. And he appeared to be like high or
4 something on drugs, because his eyes just looked
5 glassy and just - just evil. You know, he was the
6 one that I was afraid of the most, because he kept
7 saying:

8 *I'll blow your head off,*
9 you know.

10 *If you - if you lift your head up*
11 *again,*
12 you know,

13 *I'll kill you.*

14 And he was making like very aggressive threats. And
15 he had like on a white t-shirt and like some jeans and
16 some white gym shoes. And like, I wouldn't know him if I
17 saw him, you know. But -

18 Q. Why do you say that?

19 A. Because, you know, he was - like they all were just
20 so - I mean, the experience in itself was just
21 tormenting. But he, like I said, appeared like he
22 was high, you know. And I just felt like if he was
23 high and he's not thinking - you know, he's going to
24 want to kill us all.

25 Q. You said you would be able to identify him. Why do

1 you say that?

2 A. Because he just - I see - I replay it over and over
3 in my head, like, you know, it was just the
4 situation, because - making me think about the whole
5 thing, because my life and my kids' life flashed
6 before my eyes at this point. And it's something
7 you'll never be able to forget.

8 Q. Do you remember it in great detail?

9 A. It's been some time, so I can't say in great detail.
10 But, I mean, the things that stood out the most to
11 me, I definitely remember in detail.

12 Q. Is one of those things the Defendant?

13 A. Absolutely.

14 Q. Did anyone come home while you were there?

15 A. Well, no - while I was there or while they were
16 there?

17 Q. While they were there.

18 A. No, because I told them that my mother-in-law and
19 sister had went to the store, because what I was
20 afraid of that I knew - like I said, we were planning
21 my husband's birthday dinner. And I knew they would
22 come back, and I didn't want them to be startled.
23 Because I was afraid that them being startled would,
24 you know, escalate to something more. So, I told
25 him, in particular, you know, I said, my mother-in-

1 law and my - I mean, my mother and my sister will be
2 back, you know, soon. They went to the store. And
3 he asked me what store did they go to. What car were
4 they driving. Do you know how long they'd been - you
5 know, were gone. And you know, that kind of made
6 them hurry. You know, like they knew they were
7 trying to leave before they got back. And actually,
8 when - like, maybe within minutes after them leaving,
9 my mom and my sister did come back from Publix.

10 Q. Did the Defendant do anything after you told him
11 about your parents - your mother coming home?

12 A. Yeah. He went out of the room for a quick second. I
13 don't know what he did, maybe looking - because we
14 have a big window there. I don't know if maybe he
15 looked out the window or - I can't really say,
16 because he instructed us not to get up. And even
17 after they left, you know, they instructed us not to
18 get up at all. So all I remember is like a couple
19 minutes after they left, and I didn't hear anything
20 anymore, I did get up off the ground. And I remember
21 my daughter crying and pleading to get back down, you
22 know, because she was like:

23 Mom, they told us not to get up.

24 You know, I said:

25 I think they're gone. I really have to

1 *call the cops.*

2 And a couple of minutes went by with her pleading
3 with me not to call.

4 Q. You said that one of the suspects brought you into
5 your closet?

6 A. Yeah. After I told him about where I had my money.

7 Q. Did you show them anything else in the closet?

8 A. My safe.

9 Q. What was in the safe?

10 A. I have a safe that has all my like important
11 documents, because it's a burn-proof safe. So I had
12 like our kids' birth certificates. I had lost a
13 child recently. He died nine days old. I had some
14 pictures of him in there, and I had just like little
15 keepsakes from the hospital when my baby died, and
16 that was it. And I just took them and showed them
17 that that was all that was kept in the safe.

18 Q. What all did the suspects take from your home?

19 A. They took the money that I had saved. They took like
20 maybe three or four of my designer handbags. They
21 took a watch that I had, like my watch. And they
22 took a necklace that I had. They took a camcorder,
23 like a family camcorder that had like our kids'
24 birthday parties and stuff like that. They took my
25 daughter's mini-laptop, and that's all I can

1 remember. It was more like - and our camera, that
2 kind of thing like - they took more like my things.
3 Like there was nothing really - you know, and I think
4 they took like a couple pairs of my husband's shoes,
5 like his designer shoes.

6 Q. Did any of the suspects communicate with anyone else
7 while they were inside the house?

8 A. Yeah. I - when I was on the floor of my bedroom, one
9 of the - the Defendant in particular that had his
10 face covered, he went into our bath - like our master
11 bathroom that's attached to the - like they're all in
12 one room. And I heard him make a phone call, and he
13 said, you know:

14 *There's nothing. We didn't find*
15 *anything.*

16 Or,

17 *There's nothing here. What do you*
18 *want us to do?*

19 Or,

20 *What do you want me to do?*

21 Or something like that. You know, I couldn't - of
22 course, I couldn't hear the voice on the phone, but they
23 said something, and he said okay, and they hung up. And
24 shortly after that, they - you know, they left a couple
25 minutes after that. And that's when, like I said, he, the

1 guy over there made us still stay down while the other two
2 left, and then he left last.

3 Q. You said *the guy over there*. Who was that?

4 A. The Defendant.

5 Q. The Defendant sitting with the white shirt and the
6 black tie that you identified earlier?

7 A. Yes.

8 Q. Was he wearing any gloves?

9 A. I can't remember if he wore gloves, but I do remember
10 like a rag or something. Either they took one of the
11 shirts that they used and, you know, he held or wiped
12 something down or wiped - I can't remember if he had
13 gloves or not. In particular I cannot remember. I
14 think - I think he had something on his hand or he
15 used something after.

16 Q. Before we go into that, let's talk about what
17 happened after the episode. What all did they tell
18 you before they left? What did the Defendant
19 specifically tell you before they left?

20 A. The Defendant specifically told me not to call the
21 cops. And if I called the police, they would come
22 back and kill us.

23 Q. Did you ever ask for permission to get up?

24 A. No. I just was trying to comply with what they were
25 telling me to do.

1 Q. How did you know the defendants had left?

2 A. Because after -- after he held us in place, I guess
3 while they left, then he left, and he told me not to
4 like get up at all. And then, like maybe a couple,
5 five minutes went by, I didn't hear anything. And
6 that's when I got up and looked over the rail. And
7 like I said, my daughter was pleading with me to not
8 get up and not to call anybody, because she was still
9 kind of like traumatized.

10 Q. Do you remember telling -- do you remember giving a
11 statement to law enforcement? Do you remember
12 telling law enforcement that Suspect Number 2 wiped
13 things down with a camouflage glove?

14 MR. LEE: Your Honor, again, I object to the manner
15 in which he's doing this. I mean, I'm not trying to be
16 picky, but it's not the proper way to use the previous
17 statement that she gave.

18 THE COURT: I'll sustain the objection.

19 MR. SHELDON: May we approach, Your Honor?

20 OFF-THE-RECORD BENCH CONFERENCE.

21 Q. Ms. Jones, did you eventually call police that night?

22 A. Yes.

23 Q. When you called, who did you call?

24 A. I just dialed 911. But I didn't call them first,
25 because, like I told you, I was scared. You know,

1 they told us if we called that they would come back
2 and kill us. And my daughter was pleading with me
3 not to call. So, maybe just like five minutes went
4 by, and I called. I think I called my husband,
5 either my husband or my mom first. He didn't answer,
6 and then I called my mom, and she did answer. And I
7 told her what happened, and she was just like
8 distraught. And she pulled up like immediately.
9 Because she came like shortly after they left, so
10 maybe five, ten minutes went by. And I was telling
11 her, and she was trying to console me. And then, she
12 told me - she said:

13 *Senora, I know you're scared. I know*
14 *you're afraid. I know, you know, that.*

15 She said:

16 *I know they told you not to call,*
17 she said:

18 *But you know, you need to call.*

19 And then, I called 911, and the officer responded
20 shortly after.

21 Q. When the officers were there, do you remember them
22 taking pictures?

23 A. Yeah. They - I think they like took pictures, and
24 they got statements. Later that night, they - they
25 were there for awhile like dusting for fingerprints

1 and all that kind of stuff.

2 Q. Ms. Jones, do you remember meeting with officers the
3 next day?

4 A. Yes.

5 Q. When you met with officers the next day, what did you
6 do? What was the purpose of that meeting?

7 A. They took like video statements, they made me write
8 out like a statement.

9 Q. Were you shown any lineups?

10 A. Yeah, I believe so. Or I don't know if that was - I
11 think I was shown lineups that first meeting.

12 Q. That would have been the day after the armed robbery?

13 A. Yeah.

14 Q. So I am going to approach. State's Exhibit Number
15 48. What I want to show you, it's not published, so
16 please don't show it to the jury. I ask that you
17 just recognize anything on the back of this document?

18 A. Yes.

19 Q. What is it?

20 A. It's the thing.

21 Q. And do you recognize what that actually is?

22 A. Yeah. That's, I guess, when they showed me the
23 lineup, I circled it and initialed it once I spotted
24 the person.

25 Q. Do you recognize anything that's on the right side,

1 the opposite side of that document?

2 A. You said the right side?

3 Q. Look at the opposite side that you're looking at now.
4 What do you recognize?

5 A. My signature and the date and time that I signed it.

6 Q. What date is it?

7 A. October 26th at 2:09 p.m.

8 Q. At 2:09 p.m. Now, did they read the statement on the
9 back of this lineup to you beforehand?

10 A. Yes.

11 Q. I'm going to ask you to take the time to read that
12 statement, not out loud but read it to yourself.

13 MR. LEE: Your Honor, we would be willing to
14 stipulate that the warnings were read to Ms. Jones and
15 that that was read before she viewed the photo lineup, if
16 that will assist.

17 MR. SHELDON: I have a different purpose for having
18 her read it. Thank you, though, Mr. Lee.

19 Q. Did you understand that when they read it to you?

20 A. Yes.

21 Q. What does it mean?

22 A. It's just saying basically - you mean like in my own
23 words?

24 Q. Uh-huh.

25 A. It's just saying that, you know, they're not, I

1 guess, trying to get me to pick anyone, because it's
2 just as important to rule out people not being
3 involved. And it's just as important as it is to
4 identify. Also, you know, it's saying not to discuss
5 the - discuss it with the case or anything about the
6 lineup with anybody else. And also, it's saying, you
7 know, to make a knowledgeable decision, not to guess,
8 not to, you know, imply or, you know. Just make sure
9 that you're knowingly picking the person that you
10 think the one is.

11 Q. Did you pick the person?

12 A. Immediately.

13 Q. What happened when you first saw his face?

14 A. Just like today, it made me real anxious and it made
15 me just kind of real upset, because right when I saw
16 it, I just knew it was him, and I kind of a sense of
17 relief came over me, because I felt like, you know, I
18 knew that this was the person and I thought, you
19 know, like that justice would be served. And it just
20 made me feel all these different emotions at once,
21 because, you know, it was a very - just scary. Just
22 the process. This while thing to me is just a lot.

23 Q. Did anything about that lineup influence your
24 decision to pick him?

25 A. No, not at all.

1 Q. Why did you pick him?

2 A. Because he was there. He was the one that I pleaded
3 with. And I just, like I said, pleaded with him not
4 to hurt us, that whatever they were looking for
5 wasn't there. And you know, he was the one that was
6 there with me the whole time, during the robbery.

7 MR. SHELTON: The State enters Exhibit Number 46, I
8 believe it is, into evidence.

9 THE COURT: Without objection.

10 MR. SHELTON: 48, excuse me, 48 into evidence.

11 PHOTO LINEUP MARKED STATE'S EXHIBIT

12 NUMBER 48, ADMITTED AS EVIDENCE.

13 MR. SHELTON: May I publish to the jury?

14 THE COURT: Sure.

15 Q. Now, when you made that identification, had you
16 spoken to your daughter at all about whether she had
17 made an identification or not?

18 A. No. Because they had us in different rooms, like,
19 you know, different rooms and different times.

20 Q. I'm going to approach with State's Exhibit Number 47,
21 49, and State's Exhibit Number 50. These are for
22 identification purposes only. First of all, I just
23 want to ask you to look at these and see if you
24 recognize anyone in any of the pictures.

25 A. All of these or just 47 only, Exhibit 47 only, or am

1 I looking at the other ones?

2 Q. Read every one if you don't mind. When you're
3 looking at them, please tell the Court which one
4 you're looking at.

5 A. Right now, I'm looking at Exhibit 47.

6 Q. Do you see anyone that you recognize? Were any of
7 those people in your house?

8 A. I don't see anybody necessarily in 47.

9 Q. What about 40 - what about the next one?

10 A. On Exhibit 49 -

11 Q. You're not sure about it?

12 A. I'm not sure.

13 Q. Okay.

14 A. But I think -

15 Q. You think, but you're not sure?

16 A. I think.

17 MR. LEE: Mr. Sheldon, would you identify which one
18 is 49 and which particular -

19 MR. SHELDON: May I approach, Your Honor?

20 MR. LEE: I just want to look at it. I just want to
21 make sure I'm on the same sheet of music. I apologize,
22 Ms. Jones.

23 Q. You said you think, but you're not sure.

24 A. Right.

25 Q. Which one would that be?

1 A. Number 4, like just the eyes, but -

2 Q. Just the eyes, but you're not sure?

3 A. I'm not sure.

4 Q. So you didn't identify that person then. You're not
5 identifying him today; are you?

6 A. No.

7 MR. SHELTON: May I approach, Your Honor?

8 THE COURT: You may.

9 Q. Hand me back the ones you've already looked at,
10 please, and let me see this one one second. Thank
11 you. So State's Exhibit Number 47, you don't
12 recognize anyone, that would be this one?

13 A. No.

14 Q. And State's Exhibit Number 49, you said it's number
15 4, but you're not sure?

16 A. Right. He - his eyes look like the eyes of the other
17 guy that had his face covered.

18 Q. His eyes look like the eyes of the guy that had his
19 face covered, but you're not certain?

20 A. I'm not certain.

21 Q. But he looks like him?

22 A. Right. His - you know, his eyes, this part of his
23 face looks like the guy that had his face covered.

24 Q. And now, State's Exhibit Number 50.

25 A. Nobody looks -

1 Q. Nobody?

2 A. No.

3 Q. In State's Exhibit Number 50, will you describe what
4 those people look like, as far as like what are their
5 attributes. Does they have dread locks? Do they
6 have regular hair or short, cropped hair?

7 A. They all have like short, natural, you know, just cut
8 hair. They all are African-American.

9 Q. Thank you. Ms. Jones, I'm going to hand you a series
10 of photographs. I'm going to ask you to look through
11 them in general first of all, okay, and then tell the
12 jury what they are, okay? You don't have to say
13 photograph by photograph. At this time, I just ask
14 that you look through. There's a lot of photographs
15 here, so, if you just look through all of them.

16 MR. SHELDON: It's State's Exhibit Number 1 through
17 State's Exhibit Number 44, Madam Court Reporter.

18 Q. Do you recognize all those picture?

19 A. Yes.

20 Q. What are they?

21 A. They're pictures of our house and the different rooms
22 of the house, particularly the rooms are like after
23 the incident occurred.

24 Q. Is that a fair and accurate depiction in each of
25 those pictures of how the rooms looked after the

1 incident occurred?

2 A. Yes.

3 MR. SHELTON: I just want to move State's Exhibit
4 Number 1 through 44 into evidence.

5 MR. LEE: No objection.

6 THE COURT: Entered without objection.

7 PHOTOGRAPHS MARKED STATE'S EXHIBIT

8 NUMBERS 1 THROUGH 44, ADMITTED AS EVIDENCE.

9 MR. SHELTON: Now, briefly, Your Honor, may I
10 approach?

11 THE COURT: Sure.

12 MR. SHELTON: Thank you, Your Honor.

13 Q. The first two pictures - first pictures, rather,
14 Exhibits Number 1, 2 and 3, I'm going to have you
15 tell the jury in general what they are.

16 A. Tell the jury?

17 Q. Yes, please.

18 A. Exhibit 1 is a picture of the outside of our house.
19 So is Exhibit 2. That's just a different angle of
20 the front outside. And Exhibit 3 is the - our
21 mailbox with our street number, house number.

22 Q. I'm going to show you now State's Exhibit Number 4
23 and State's Exhibit Number 12 and ask you to identify
24 these for the jury.

25 MR. SHELTON: May I publish, Your Honor?

1 THE COURT: You may.

2 A. Exhibit 4 is the inside of my room with the drawers
3 pulled out and empty. And then, the one next to it
4 is also my room, just the other side of the bed next
5 to the bathroom. And the next one also is my room
6 with the mattress partly up and the drawers empty and
7 all over the floor. And the next one is a picture of
8 our bed, partially, with clothes all over the floor
9 and a clipboard. And the next one also is of our
10 room with the drawers, some all the way out, some
11 partially out, and clothes pulled all out. And the
12 next one is a picture of our master closet, like my
13 bedroom closet, and it has a picture of the safe.
14 And the next one is a picture also of our bedroom
15 with some drawers - one drawer pulled out and
16 clothes, and our coin jar.

17 MR. SHELDON: May I publish, Your Honor?

18 THE COURT: You may.

19 Q. State's Number 14 and - 13 and 14, rather, are the
20 next two I'm going to show you. And if you could
21 identify what these are, specifically.

22 A. This one here, Exhibit 13, is the hallway next to the
23 steps, and coming up to our second floor.

24 Q. Is that where the children were?

25 A. Yeah. They were lined up against that wall right

1 there.

2 Q. And Exhibit Number 14?

3 A. Exhibit 14, that's a picture of the entrance of my
4 bedroom. I think the outside of it. I think the
5 doorway, you know, from the hall going into my room.

6 MR. SHELTON: May I approach, Your Honor?

7 THE COURT: You may.

8 MR. SHELTON: May I publish these to the jury?

9 THE COURT: Sure.

10 Q. Out of the sake of speeding things up, will you just
11 tell the jury - just look through those and tell the
12 jury in general what they contain.

13 A. Just like before, they contain pictures of my
14 bedroom, my master bath, the - my son's room.

15 Q. Which one is your son's room?

16 A. My son's room is the picture - I don't know it's been
17 - Exhibit 26 and Exhibit 25 are pictures of my son's
18 room and Exhibit 24.

19 Q. And what about the other bedrooms? Can you just give
20 one example of one of the exhibit numbers of where
21 the other bedrooms are located - contain the other
22 bedrooms, rather.

23 A. The other bedroom - oh, this is my son's too, Exhibit
24 27, it has two, and 28. The other one is my mom's
25 bedroom, that's Exhibit 29. And 30, 31 and 32, 33,

1 34, 35 through 37, those are all pictures of my mom's
2 bedroom.

3 Q. Are there any remaining pictures?

4 A. And Exhibit 42, 43 and 44 are pictures of my
5 daughter's bedroom. And there's a picture of like
6 where our attic pulls out. That's Exhibit 21 and 22
7 and 23.

8 Q. Did you have your attic door pulled down before the
9 assailants came to your house?

10 A. No.

11 MR. SHELDON: May I approach, Your Honor?

12 THE COURT: You may.

13 MR. SHELDON: May I publish these further exhibits to
14 the jury?

15 THE COURT: Sure.

16 MR. SHELDON: Thank you, Your Honor.

17 Q. Finally, I'm going to show you State's Exhibit Number
18 8 and Number 9.

19 MR. SHELDON: Earlier, Court Reporter, I referred to
20 Exhibits 1 through 11. That would be to the exclusion of
21 8 and 9, I apologize, as well as 38 through 41.

22 Q. What do you see in 8 and 9?

23 A. Exhibit 8 and 9 are pictures of our downstairs, like
24 hall entry closet and kind of like the entry of our front
25 door. Exhibit 9, you can partially see like the living

1 room area, and it's just like our family photos and stuff.

2 MR. SHELDON: May I approach, Your Honor?

3 THE COURT: You may.

4 MR. SHELDON: May I publish?

5 THE COURT: Sure.

6 A. And Exhibits 38 through 41 is photos of our backyard,
7 the things that we had on our outside in the backyard
8 of our house.

9 Q. Is it any way different from those pictures than it
10 was before the incident?

11 A. Exhibit 40 and 41, like a piece of that fence is on
12 the ground. It wasn't prior to the incident.

13 MR. SHELDON: May I approach and publish, Your Honor?

14 THE COURT: Sure.

15 MR. SHELDON: Thank you, Your Honor.

16 Q. Ms. Jones, State's Exhibit Number 48, which is a
17 lineup in which you identified the Defendant
18 initially on October 26, 2010, correct?

19 A. Yes.

20 Q. Have you seen that lineup before today, since that
21 date?

22 A. No.

23 MR. LEE: For the record purposes, I may have messed
24 it up, quite frankly, but I would renew my objection, if I
25 need to, as to the identification.

1 THE COURT: Noted.

2 MR. LEE: Thank you. Sorry, Mr. Sheldon.

3 MR. SHELDON: Thank you, Mr. Lee.

4 Q. And have you seen the Defendant himself since the day
5 of the armed robbery?

6 A. No.

7 Q. And have you been in this courtroom before testifying
8 at all this week with the Defendant here?

9 A. Yesterday, I was in for just like a quick minute,
10 because the victim advocate didn't see me come by,
11 but she immediately came and got me and took me back
12 out.

13 Q. Did you see the Defendant?

14 A. Just a - it was just like the back of someone's head.

15 Q. You didn't see his face?

16 A. No, I didn't see the front of his face. I just was
17 looking, because I was sitting like back there, in
18 the back of the courtroom.

19 Q. Is there any doubt whatsoever that Mr. Powell was the
20 person who served as lookout and held you at gunpoint
21 during this home invasion?

22 A. No doubt.

23 MR. SHELDON: I beg the Court's indulgence.

24 THE COURT: All right.

25 Q. In addition to the four lineups they showed you the

1 day after the incident, do you remember whether you
2 viewed any other lineups?

3 A. They called me - like I met with them several times.
4 They called me maybe a few weeks after I initially
5 identified him and showed me more lineups to try to
6 see if I could identify anybody, like the other two
7 that were involved. I don't remember the exact date
8 of that, but it was maybe a couple weeks or so after.
9 I don't remember exactly, but it was - it was a
10 little time after they showed - after I identified
11 the first.

12 Q. And did you identify any of the other individuals in
13 any of those lineups?

14 A. Well, one of the ones that I saw today looked - like
15 his eyes looked, you know, like the eyes of the guy
16 that had his face wrapped. I saw him, but I didn't
17 identify him, because I couldn't say for sure that it
18 was him, because of how - you know, the bottom of his
19 face was covered. But if I could have said based on
20 his eyes, then I would have probably said him, too.
21 But you know, I just know that you can't, you know,
22 identify somebody a hundred percent by eyes, so I
23 didn't.

24 Q. You couldn't identify him a hundred percent, but you
25 think it's him?

1 A. Um - you know, I'm sure it's him, because his - he
2 was the one that came in like simultaneously with
3 him, like when they first came. , because my bedroom
4 was - like the door was kind of partially closed or
5 cracked, because, like I said, I had my two nieces
6 over to the house and my daughter and my son, and
7 they were playing. So I was finishing the last part
8 of that movie I was watching, so I had kind of
9 cracked the door closed so that I wouldn't hear all
10 the noise from them playing around. And him and the
11 other guy came in - either one came in right behind,
12 but I could see both of them almost like at the same
13 time. He - you know, he was asking me to, you know,
14 tell him where the money was. And he's also the one
15 that went into the bathroom and made a phone call to
16 someone, you know, saying that they didn't find
17 anything.

18 Q. You say you're sure that it was him. Are you as
19 certain of him as you are as certain that Mr. Powell
20 is the other person?

21 A. If I could say based on this part, yes.

22 Q. But for Mr. Powell, his whole face?

23 A. With him, like there - he had nothing covered.

24 Q. And because of that slight change, you failed to
25 identify this person?

1 A. Correct.

2 Q. Because of the warnings?

3 A. Right. Because they read that to me first, and so I
4 knew that, you know, like I couldn't just go based
5 off just that one part. Like I said, you know, those
6 eyes were a dead giveaway, you know, this portion of
7 his face. But because, you know, his whole face was
8 covered, based on what I had read before they showed
9 me any lineups, I didn't want to identify him.

10 Q. Because you wanted to be absolutely sure?

11 A. Yes.

12 Q. I want to approach with State's Exhibit Number 49
13 again. You already have identified in State's
14 Exhibit 49, which that person is. Will you still do
15 that for the jury again?

16 A. Photo 4.

17 Q. Photo 4. Thank you.

18 MR. SHELDON: May I approach, Your Honor?

19 THE COURT: Sure.

20 Q. Did the defendants ever yell at you, asking for
21 anything other than money?

22 A. Um, yeah, one of them. I can't remember
23 specifically. When I was telling them I didn't know
24 where any money was, they said:

25 *Where's the dope?*

1 And I said:

2 *What are you talking about?*

3 Like, I don't know where money is, where dope is.
4 And it's like I said, when I was pleading with him, you
5 know:

6 *I'm a registered nurse, please. You*
7 *emptied my purse. Look at my work I.D.,*
8 you know. And I was just pleading with - with them,
9 you know, not to hurt us. I was telling the truth,
10 because I didn't want to give them - I didn't want them to
11 feel like that I was trying to hide something or that I
12 knew something and wasn't trying to tell them, because I
13 didn't want to risk me and my babies' lives.

14 Q. Did they say anything to you about how they selected
15 the house?

16 A. No. I don't recall.

17 Q. You don't recall? Would anything help refresh your
18 recollection?

19 A. Well, I think I did - they didn't say a person, but
20 they kept saying, you know, like - it was clear like
21 somebody told them to come, you know. Like, because,
22 like I said when he went and called - you know, the
23 other guy that - with the eyes, he went and made a
24 call to someone. But they didn't specifically say,
25 I'm here because this person sent me here or any of

1 that. They just were, you know, obviously, you know,
2 someone sent them.

3 Q. And you said things stolen were handbags and your
4 shoes?

5 A. Yeah, it was mainly all my stuff. It was like two
6 pairs of my husband's shoes and three or four of my
7 handbags and my jewelry. Like, my husband had a
8 watch that was left behind, and I don't know if it
9 was just because they were moving so fast while they
10 were ransacking everything that they overlooked it or
11 I don't know. But all of my stuff was gone.

12 Q. I know it's difficult to talk about. Did you know
13 anything about your husband having an affair before
14 this?

15 A. Yes.

16 Q. Who was he having - and I'm sorry to ask you about
17 it, but who was he having it with?

18 A. Some - a girl named Paulette Moultrie.

19 Q. Do you know if Paulette Moultrie had any friends?

20 A. Well, up until her calling me to tell me about the
21 affair, I didn't know her personally. But when she
22 did call me and she told me - because I found out
23 about the affair from her, like there wasn't any
24 signs. But when she called, she was - she talked to
25 me about how her friends are upset with her because I

1 guess she let it - the affair get out of control.

2 Because when she initially called me to tell me about
3 the affair, my mom was sitting on the couch next to
4 me. And I got this private call, and she was
5 screaming. You know, like she was screaming and -

6 Q. Was she angry?

7 A. She was angry, and she was just telling me, you know,
8 he messed over me for the last time. He messed over
9 the wrong one. And you know, she was screaming. I
10 don't want to scream in the courtroom, but she ended
11 up hanging up. I don't know if it was because she
12 was out of control, but she hung up. And my mom was
13 sitting there, and I didn't want to like tell my mom
14 anything about the call until I kind of figured out
15 what was going on. So I told her it was a
16 disgruntled customer, because my husband is - you
17 know, he sells cars. And so, I was telling her that
18 it was, you know, one of her customers upset. And
19 so, she - my mom told me, she said:

20 *Senora, I already know what she was*
21 *saying. You going to tell me the truth?*

22 And that's when I told her about everything that
23 Paulette was saying. But she did - Paulette did
24 specifically say that she fell out with - what I mean by
25 fall out, like her friends stopped being her friends

1 because of, I guess, how head over heels she got over him
2 or how upset she was about the whole thing. But she
3 particularly talked about one friend that was upset but
4 forgave her, and she said her name was Kenya.

5 MR. LEE: I object to that. It's clearly hearsay. I
6 ask it be stricken from the record. It hasn't ever been
7 produced before, and clearly, it's hearsay.

8 THE COURT: I sustain the objection. Order it
9 stricken from the record.

10 MR. SHELDON: Thank you, Your Honor.

11 Q. Now, without saying what was said by other people or
12 anything like that of that nature, when did you find out
13 about the affair?

14 A. It was in December, like - I think it was around
15 December 16th. It was a couple of weeks before Christmas,
16 and my husband was working. And like I said, she called
17 and she told me -

18 Q. Okay. Please, excuse me.

19 A. Okay.

20 Q. Please do not say anything about what she said to you
21 or anything like that.

22 A. Okay.

23 Q. I apologize. I don't mean to interrupt you, but just
24 say how.

25 A. She called.

1 Q. She called?

2 A. Yeah.

3 Q. And that was before Christmas of what year?

4 A. Of 2000 -

5 Q. Was it before or after the incident?

6 A. It was before the incident. I think it was like
7 2009.

8 Q. Did you receive any other harassing phone calls after
9 that?

10 A. I won't say harassing, but Paulette did call several
11 other times.

12 Q. To you?

13 A. Yeah, to my phone. And one time - well, a couple
14 times she left like comments on my Facebook page.

15 Q. In addition to you at the house when the Defendant
16 and the other two committed the armed robbery and the
17 burglary, who else was home?

18 A. Prior to or when during?

19 Q. During the armed robbery.

20 A. It was myself, my daughter, Abriya, my son, CJ, and
21 my niece Alicia, and my other niece, Shelay.

22 Q. And do you recall how old they were?

23 A. At the time of the incident, my daughter was ten, my
24 son was like 4, my niece was - my oldest niece, Shelay,
25 she was maybe I think 7, and my youngest niece, Alicia,

1 was 5, I believe.

2 Q. There were five people total inside the house?

3 A. Four.

4 Q. Four, plus you?

5 A. Oh, yeah, five, yeah.

6 MR. SHELTON: That's all the questions I have. Thank
7 you.

8 THE COURT: All right. Ladies and gentlemen, this is
9 probably a good time for us to take a lunch break since
10 it's 1:00 o'clock. Let's try to be back at, say, 2:15.
11 Mind you, it's too early to begin discussing the case.
12 Don't let anybody discuss the case with you. See you back
13 at 2:15 ladies and gentlemen.

14 JURORS LEAVE COURTROOM 1:03 P.M.

15 BAILIFF: The jury is clear, Your Honor.

16 THE COURT: All right. Is there anything we need to
17 take up?

18 MR. SHELTON: Not from the State, Your Honor. I
19 apologize for underestimating how long this was going to
20 take, however.

21 THE COURT: It does happen.

22 MR. LEE: It's not the first time it's happened,
23 right?

24 THE COURT: It does happen. All right. Court is
25 recessed until 2:15.

1 MR. LEE: Thank you, Your Honor.

2 MR. SHELDON: Thank you, Your Honor.

3 MR. LEE: Your Honor, I would just ask - I think you
4 told her, but just remind her that she's under oath, and I
5 would ask that she not be allowed to speak to anybody
6 during the break since she's still under oath, including
7 her family, about the case.

8 THE COURT: Okay.

9 MR. SHELDON: Don't talk about the case. You're
10 under oath.

11 THE COURT: Okay.

12 OFF THE RECORD.

13 BACK ON THE RECORD.

14 BY THE COURT:

15 MR. SHELDON: Your Honor, Madam Court Reporter very
16 kindly reminded me that I have not actually, because Mr.
17 Lee was kind in stipulating to a lot coming in, I didn't
18 actually move for the evidence, even though it was
19 published, so the State formally moves at this time for
20 all - I'm moving for all the evidence, that is currently
21 all the Exhibits 1 through -

22 COURT REPORTER: It would be 48.

23 MR. SHELDON: 48 would be introduced into evidence at
24 this time.

25 THE COURT: That's without objection?

1 MR. LEE: Without objection.

2 STATE'S EXHIBIT NUMBERS 1 THROUGH
3 48, ADMITTED AS EVIDENCE.

4 MR. SHELDON: Thank you. Thank you, Madam Court
5 Reporter.

6 COURT REPORTER: You're welcome.

7 BAILIFF: Just come forward, ma'am.

8 THE COURT: Let's bring the jury in.

9 BAILIFF: Your Honor, the jury is entering.

10 JURORS ENTER COURTROOM 2:21 P.M.

11 THE COURT: Please be seated, ladies and gentlemen.

12 BAILIFF: All right, Your Honor.

13 THE COURT: Welcome back. I believe the State had
14 concluded the examination of the witness?

15 MR. SHELDON: Yes, Your Honor.

16 THE COURT: Cross-examination.

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

19 SENORA JONES

20 CROSS-EXAMINATION BY MR. LEE:

21 Q. Good afternoon, Ms. Jones. Do you remember telling
22 Detective Investigator Duke that Suspect Number 2 had
23 a black gun?

24 A. Um.

25 Q. I'm sorry?

1 A. I'm thinking. It's been some time. Possibly.

2 Q. Let me ask you, did Suspect Number 2 have a black
3 gun?

4 A. Didn't I have a statement that I wrote the day after?
5 Like, it's been three years. It's hard for me to
6 tell you every detail.

7 Q. Yeah. Just a second. I'll find that while I ask you
8 other questions. I'm sorry. I thought I had it
9 right in front of me. And your testimony is that two
10 of the three people had their faces covered, correct?
11 That's the description you gave initially to the
12 first responding officer. Right?

13 A. No. I said one of the two had their face covered.

14 Q. One of the two.

15 A. One of the two.

16 Q. Well how about one of the three, then?

17 A. Well, one of the three, rather.

18 Q. One of three.

19 A. One of the three. It was only one out of the three
20 that had their face covered.

21 Q. Didn't you tell them that when Chandler testified
22 earlier that you could only see Suspect Number 1's
23 eyes?

24 A. Who is Suspect Number 1? Like, I'm not -- I didn't
25 get a chance to read my statement this morning, so I

1 don't know exactly who you are referring to when you
2 say suspect 1, 2 or 3.

3 Q. Well, did one of them only have his eyes showing?

4 A. Right.

5 Q. Did one of them have his face completely covered?

6 A. No.

7 Q. Did one of them have a shirt over his head?

8 A. That was the same one.

9 Q. Same one.

10 A. The same suspect that had his eyes exposed and the
11 bottom of his face covered.

12 Q. Well, the guy with the red, glossy eyes. Do you
13 remember which one I'm talking about then?

14 A. Yeah. That's the one that I described as being
15 lighter complected that had dread locks that came to
16 the ear. He didn't - his face was not covered.

17 Q. And you did not tell Investigator Chandler that he
18 had - this Suspect Number 3, the guy with the red,
19 glossy eyes had something over his face?

20 A. No.

21 Q. You didn't tell him that?

22 A. No.

23 Q. Okay. After it happened, isn't it true that you
24 spent about five minutes talking with your kids about
25 what happened before you called 911?

1 A. No. There was no talking. There was all crying and
2 just - just - just like crying and there was no -
3 there was no discussion. I mean, we were all
4 distraught and scared still. I mean, we didn't even
5 know if they were still outside watching to see if
6 anyone came to the house. I mean, we didn't know.

7 Q. Did you spend about five minutes asking the kids to
8 tell me anything - tell you anything related to the
9 incident?

10 A. No, we didn't talk about anything. My daughter just
11 pleaded for me not to call.

12 Q. I'm handing you a document, which I've not marked for
13 identification yet. Can you identify that document?

14 A. This is my statement that I wrote the day after.

15 Q. The day after?

16 A. Uh-huh.

17 Q. Okay. And actually, there looks like there are two,
18 one is one page and one is six pages. Is that right?

19 A. Correct.

20 Q. Okay. Can you turn to Page 6 of the second
21 statement.

22 A. The one that you had turned to for me already?

23 Q. Yes.

24 A. Okay.

25 Q. Yeah, I think so. The last page.

1 A. Okay.

2 Q. Can you read the second sentence starting with, *I*
3 *spent*. Can you read that one sentence for us.

4 A. *I spent about five minutes asking the kids*
5 *to tell me anything related to the incident.*

6 Does that refresh your recollection that you did have
7 conversation with your kids before you called 911?

8 A. Apparently, yes.

9 Q. And do you remember what you talked about?

10 A. My daughter was crucial in helping identify so she
11 just told me because they were outside of the room.
12 The whole incident, I stayed face down in my bedroom.
13 So, she -- I told her to tell me anything she knew
14 about the suspects, because they were walked in from
15 the backyard while they were playing by the suspects
16 and that was what I asked her so that we could call
17 911 and I could give them the information that she
18 knew that I had no knowledge of.

19 Q. Okay. Because you said that you were face down
20 pretty much the whole time?

21 A. Yeah. When they first came, like I stated earlier, I
22 was in my bedroom. You know, my kids were outside
23 playing in the backyard.

24 Q. Okay. And you were face down on the bed or on the
25 floor?

1 A. Initially? You mean during the incident or?

2 Q. Yes, ma'am. During the incident.

3 A. During the incident I was face down on my belly.

4 Q. On the floor or on your bed?

5 A. On the floor. They made me get directly off the bed,
6 because I was on the bed initially.

7 Q. And then you said at one point the one with the crazy
8 eyes, or red eyes, told you to put your head back
9 down?

10 A. Right.

11 Q. So the information you got is from your daughter that
12 you relayed as far as the descriptions?

13 A. No. I - my description that I wrote is what I saw.

14 Q. Okay.

15 A. I asked her to give me anything related that I could
16 tell the cops, because I let them know when I called
17 - I don't know if you - if that's - you know, but I
18 let them know that they told us not to call. That
19 they told us if we called 911 they would kill us.

20 Q. Okay.

21 A. They would come back and kill us.

22 Q. But again, you're - most of the time when this was
23 going on, you were face down on the floor being told
24 to stay down on the floor?

25 A. Correct, and the kids were outside the door.

1 That was number -- that was the third person.

2 Q. So that is not the person you identified here that
3 had his face covered?

4 A. No.

5 Q. You testified that the reason you didn't identify him
6 earlier is a different situation.

7 A. Correct.

8 Q. What do you mean by that?

9 A. Well, like I stated. When I had the lineup, they
10 showed me the first part and they read that to me and
11 they made -- well, actually, I think they made me read
12 it, if I can be -- if I can think. They made me read
13 it and they told me, you know, basically not to guess
14 and, you know, just -- and then I looked, turned it
15 over and the Defendant I was able to point out
16 immediately. I remember like I said earlier, getting
17 anxious and real upset, distraught, when I saw him
18 immediately. There was no -- no second guess about
19 it, because him -- his distinctive thing was his like
20 nose to me and that's, you know, like everything
21 about him was clear but I mean, there was nothing --
22 no -- like as soon as I saw it, I knew it was him.

23 Q. So you believed number 4 was the person, but you
24 didn't want to -- you were being cautious?

25 A. Right. I didn't want to -- like, because his bottom

1 we don't have anything here.

2 BAILIFF: Your Honor, the jury is entering.

3 JURORS ENTER COURTROOM AT 3:46 P.M.

4 BAILIFF: Your Honor.

5 THE COURT: Welcome back, ladies and gentlemen. I
6 believe the Solicitor is prepared to call another witness.
7 Mr. Sheldon.

8 MR. SHELTON: Thank you, Your Honor. Please the
9 Court. The State calls James Duke of the Bluffton Police
10 Department.

11 OFFICER JAMES DUKE
12 being first duly sworn, testified as follows:

13 MADAM CLERK: If you'll state and spell your name for
14 the record, please.

15 OFFICER JAMES DUKE: James Duke, J-A-M-E-S D-U-K-E.

16 OFFICER JAMES DUKE

17 DIRECT EXAMINATION BY MR. SHELTON:

18 Q. Officer Duke, who do you work for now?

19 A. Bluffton Police Department.

20 Q. And who did you work for in October of 2010?

21 A. Bluffton Police Department.

22 Q. Now, in October of 2010, were you involved in an
23 investigation of an armed robbery that's the subject
24 - the home invasion that's the subject of this trial?

25 A. Yes, sir.

1 Q. What was your role?

2 A. I was in Investigations at the time, and I was called
3 out to the scene to conduct the investigation.

4 Q. Were you the lead investigator in the case?

5 A. Yes, sir.

6 Q. What's your role now in the police department?

7 A. Primarily the accreditation process, but I also
8 assist investigations from time to time.

9 Q. Why don't we talk about, first of all, how you
10 arrived at the scene and what did you see?

11 A. I received a phone call to respond. I went to the
12 scene. Sergeant Chandler was on the scene. The
13 family was at the house. The house was in total
14 disarray like it had been ransacked.

15 Q. Who do you remember being in the house?

16 A. Senora Jones, four young children. I believe Mr.
17 Jones was also there. And I believe it was Senora's
18 mother or someone's mother, an older female.

19 Q. Did you look through the whole house?

20 A. I did.

21 Q. What did you do in effort to gather evidence, if
22 anything?

23 A. The - I was briefed by Sergeant Chandler. I
24 interviewed Senora Jones briefly. I took pictures of
25 the residence. I video recorded the residence and

1 County Sheriff's office.

2 Q. Beaufort County Sheriff's office?

3 A. Their forensic services laboratory.

4 Q. Can you answer my question now more accurately about
5 whether any unknown DNA, besides the victims DNA, was
6 found?

7 A. There was no DNA recovered from the swabs that I
8 collected.

9 Q. So there was no DNA recovered from the swabs you
10 collected?

11 A. Correct.

12 MR. SHELDON: Thank you. May I approach?

13 THE COURT: Yes, sir.

14 Q. During the process of your investigation, were you
15 able to collect a description of the suspects that
16 broke into the victims' home?

17 A. Yes.

18 Q. Can you give that description to the jury?

19 A. Can I -

20 Q. If it will help refresh your recollection, please go
21 ahead.

22 A. There were three suspects in the residence. The
23 first one was identified as - or not identified, but
24 described as a black male; mid-20s; 5-8; 160 pounds; with
25 dreads pulled back; a covered face; the eye's were still

1 visible; wearing a white t-shirt; blue jeans; and white
2 shoes.

3 The second suspect was described as a black male,
4 early 20s, 6-2, and skinny, dark skin, flared-out nose,
5 face uncovered, wearing a black shirt, faded black pants
6 and black shoes.

7 There was a third suspect who was described as early
8 20s, 5-8, 150 pounds, lighter skin, ear-length dreads,
9 wearing light-blue jeans with bleach stains and white with
10 blue, red, orange striped shirt.

11 Q. Did you prepare photo lineups on the 26th of October
12 2010 to show to the victims?

13 A. Prepare one or -

14 Q. Did you have photo lineups for the victims to show
15 the victims?

16 A. Yes.

17 Q. How many did you show them on that day?

18 A. Four.

19 Q. Now, I say the victims. Who did you show the photo
20 lineups to?

21 A. Senora Jones and Abriya H[REDACTED].

22 Q. Why didn't you show them to the 7-year-olds and the
23 two 4-year-olds?

24 A. While at the scene, most of the information was
25 collected from Senora and Abriya. They were the ones

1 who were able to give the most descriptive
2 information.

3 Q. First, I'd like to approach with what has already
4 been entered into evidence, State's 46 and 48.

5 MR. SHELDON: May I approach, Your Honor?

6 Q. Who does that lineup contain?

7 A. Marion Powell.

8 Q. And what position is he in?

9 A. Number 6.

10 Q. And who are the victims identified to you as a
11 defendant in that lineup?

12 A. Yes. He was identified as the Suspect 2 in the
13 description that I gave.

14 Q. Which one was he?

15 A. Suspect 2, black male, early 20s, 6-2, skinny, dark
16 skin, flared-out nose, face uncovered, wearing black
17 shirt, faded black pants, black shoes, described as
18 the one who talked.

19 Q. Let's describe how you showed these to them. Is that
20 the first one you showed them?

21 A. No, sir.

22 Q. And when you showed them the lineups, did you show it
23 to them together? Were they both in the same room?

24 A. No, sir.

25 Q. Where were they?

1 A. Senora Jones was with a SLED sketch artist doing a
2 composite sketch of the suspect.

3 Q. And where was Ms. Hart at that point?

4 A. Ms. Hart - they arrived at the police department, we
5 escorted Senora to one room to meet with the SLED
6 artist behind a closed door. I then took Abriya from
7 the lobby into an interview room, where I started to
8 show the lineups.

9 Q. And you kept them separated while the lineups were
10 being shown?

11 A. Correct.

12 Q. So this first lineup was already composed and put
13 together before the sketch artist even did anything,
14 correct?

15 A. Correct.

16 Q. Now, I'm going to show you State's Exhibit Number 47.

17 MR. LEE: Your Honor, may we approach the bench very
18 briefly?

19 OFF-THE-RECORD BENCH CONFERENCE.

20 MR. SHELDON: May I approach the witness, Your Honor?

21 THE COURT: Yes, sir.

22 Q. With State's Exhibit Number 47 - this has not been
23 entered into evidence yet. I want you to first of
24 all look at it and see - tell me what that is.

25 A. It's a photo lineup.

1 Q. Do you know who that photo lineup was presented to?

2 A. It was presented to Abriya H[REDACTED].

3 Q. Now, what order was that photo lineup presented to
4 Abriya H[REDACTED]? The first, the second, third and fourth
5 on the 25th.

6 A. This was the first one.

7 Q. Now, before you presented her with that lineup, what
8 did you do?

9 A. Before showing the lineup, I read the back of the
10 folder to her, which is a photo lineup advisory,
11 basically giving her direction on how to proceed with
12 it.

13 Q. What do you mean by that?

14 A. Telling her what we're going to do and basically how
15 to do it.

16 Q. What does that warning contain?

17 A. Do you want me to read it or just -

18 Q. You can describe it or you can read it. It's already
19 been read into evidence for the jury, but just -

20 A. It explains that she's going to look at the array of
21 photographs. We explain that you shouldn't conclude
22 or guess anything with it. Basically, do you see the
23 person in the lineup or is the person - do you not
24 recognize anyone.

25 Q. And when you read it to them, do you say that, or do

1 you read exactly what's on the lineup.

2 A. I read the lineup, back of the folder, word for word.

3 Q. Now, when you presented Ms. Abriya H [REDACTED] with that
4 first lineup, Number 47, State's Exhibit Number 47,
5 that is the lineup itself?

6 A. Yes.

7 MR. SHELDON: States moves State Exhibit Number 47
8 into evidence.

9 MR. LEE: No objection, other than my previous
10 objection, which I don't think I need to keep interrupting
11 with.

12 THE COURT: I agree.

13 PHOTO LINEUP MARKED STATE'S EXHIBIT
14 NUMBER 47, ADMITTED AS EVIDENCE.

15 Q. Did she identify anyone in that lineup?

16 A. No, sir.

17 Q. Did it take her long to determine whether no one was
18 in that lineup?

19 A. No, sir.

20 Q. How about State's Exhibit Number 48, which you have
21 up there with you? You said she identified the
22 defendant in that lineup, correct?

23 A. Correct.

24 Q. How long did it take her to identify the defendant?

25 A. A matter of seconds.

1 Q. Was she certain?

2 A. She was.

3 MR. SHELDON: Approach with State's Exhibit Number
4 49.

5 Q. Did you present that lineup to Abriya?

6 A. I did.

7 Q. And in that lineup, will you tell us who was in the
8 Number 4 position?

9 A. Byron Young.

10 Q. Was that - do you know what order you presented that
11 lineup to Abriya?

12 A. It was either Number 3 or Number 4.

13 Q. To Abriya H■■■?

14 A. Correct.

15 Q. Did she identify anyone in that lineup?

16 A. No.

17 MR. SHELDON: State's Exhibit Number 50. May I
18 approach, Your Honor?

19 THE COURT: You may.

20 Q. Do you recognize that?

21 A. Photo lineup.

22 Q. And who did you present that photo lineup to?

23 A. It was presented to both of -

24 Q. That particular one?

25 A. I think we're on Abriya's - is that your client?

1 Q. It is.

2 A. Okay, Abriya H[REDACTED].

3 Q. Now, did she identify anyone in that photo lineup?

4 A. No, sir.

5 Q. How long did it take her to figure out no one was
6 identified?

7 A. She looked at it and didn't identify.

8 MR. SHELDON: Move States Exhibit Number 50 and 49
9 into evidence, Your Honor.

10 MR. LEE: No objection. No objection.

11 PHOTO LINEUPS MARKED STATE'S EXHIBIT

12 NUMBERS 49 AND 50, ADMITTED AS EVIDENCE.

13 Q. Now, I'm going to hand you a bag with State's Exhibit
14 pre-marked for identification Number 51, 52, as well
15 as 53. These have been open and shut, correct?

16 A. Yes.

17 Q. There are identical lineups in each one?

18 A. Correct.

19 Q. So, whether either lineup was shown to Abriya H[REDACTED] or
20 Senora Jones, they're identical lineups in both ones?

21 A. Correct.

22 Q. The ones that aren't marked by either one, Abriya
23 H[REDACTED] or Senora Jones, correct?

24 A. Correct.

25 Q. Now, did you show 50 - I apologize -

1 A. I believe 48, 51, 52 and 53 were shown to Senora
2 Jones.

3 Q. 51, 52 and 53 to Senora Jones, and those are
4 identical lineups, as in the previous lineups that I
5 showed you that you showed to Abriya H■■■■, correct?

6 A. Correct.

7 Q. First of all, the first lineup you showed Senora
8 Jones, which one was it?

9 A. Exhibit Number 52.

10 Q. 52, the lineup that is in Exhibit Number 52, correct?

11 A. Correct.

12 Q. Now, did she identify anybody in that lineup?

13 A. No.

14 Q. How long did it take her to figure out no one was in
15 that lineup?

16 A. She looked at it and shook her head no, and there was
17 no identification.

18 Q. State's Exhibit Number 52.

19 A. That's the first one.

20 Q. 53. I apologize. State's Exhibit Number 53, did you
21 show her that lineup?

22 A. Yes.

23 Q. Did you show her the actual - and this is the exact
24 same lineup that you showed to - one of the exact
25 same lineups you showed to Abriya H■■■■, correct?

1 A. Correct.

2 Q. Did she identify anyone in that lineup?

3 A. No.

4 Q. How long did it take her to determine that no one was
5 identified in that lineup?

6 A. She looked at it, and there was no identification.

7 Q. Now, I'm approaching with State's Exhibit Number 51.
8 Did you present that lineup to Ms. Jones?

9 A. Yes.

10 Q. And is that an identical lineup that you had
11 presented to Abriya H[REDACTED]?

12 A. Yes.

13 Q. What order did you present that lineup to Ms. Jones?

14 A. Number 3.

15 Q. Number 3. How do you know that?

16 A. I reviewed the video.

17 Q. Now, when Ms. Jones looked at that lineup, did she
18 identify anyone?

19 A. No.

20 Q. How long did it take her to not - to look at the
21 lineup before she did not identify anyone?

22 A. She looked at it, there was hesitation, and then
23 looked at it and then said no.

24 Q. Was that longer than the other two lineups?

25 A. Yes.

1 Q. Who was in Number 4 in that lineup?

2 A. Byron Young.

3 Q. And that is State's Exhibit Number 50?

4 A. 51.

5 Q. And the other State's - other photo lineup containing
6 Byron Young that's already in evidence, what exhibit
7 is that?

8 A. I don't have that one up here. It's not on the card.
9 It's just a piece of paper.

10 MR. SHELDON: State's Exhibit Number 49.

11 A. Okay.

12 Q. Is that an identical lineup to the other lineup
13 containing Byron Young you just testified to?

14 A. Yes.

15 Q. And what number is Byron Young in that lineup?

16 A. Number 4.

17 MR. SHELDON: Approach. The State moves Exhibits
18 Number 51, 52 and 53 into evidence, Your Honor.

19 MR. LEE: No objection.

20 THE COURT: Motion granted.

21 PHOTO LINEUPS MARKED STATE'S EXHIBIT

22 NUMBERS 51, 52, AND 53, ADMITTED AS EVIDENCE.

23 Q. So these are all the lineups that were shown to
24 Abriya H[REDACTED] and Senora Jones on October the 26th,
25 2010?

1 A. Yes.

2 Q. And out of these lineups, they identified Marion
3 Powell in identical lineups, correct?

4 A. Correct.

5 Q. Separately?

6 A. Correct.

7 Q. And when you met with Senora Jones to give her the
8 lineup procedure, did you do the same thing with her
9 that you did with Abriya H [REDACTED]?

10 A. I did.

11 Q. What is that?

12 A. The Photo Lineup Advisory.

13 Q. Did you do that before or after you showed her the
14 lineup?

15 A. I read the advisory to her and then present the
16 lineup to her.

17 MR. SHELDON: May I publish to the jury, Your Honor?

18 THE COURT: You may.

19 MR. SHELDON: Thank you, Your Honor.

20 Q. So no one out of those lineups was identified besides
21 Marion Powell?

22 A. Correct.

23 Q. Please describe how quickly Ms. Senora Jones
24 identified Marion Powell.

25 A. I - that was the second lineup I showed her. I

1 advised her that the same advisory was in effect for
2 all the lineups. I presented it to her, she looked
3 at it and:

4 *That's him. That's him.*

5 And positive that it was him.

6 Q. What was her physical appearance when that occurred?

7 A. It's almost like she either lost her breath or
8 blacked out. You could just tell. There was an
9 emotional reaction after she realized that the lineup
10 contained Marion Powell.

11 Q. Did Ms. Senora Jones pause while looking at any other
12 of the lineups besides Mr. Powell or the one -
13 apologize. In the first lineup up you showed her,
14 you stated that she did - it did not take her long at
15 all to determine no one was in the lineup?

16 A. She reviewed the pictures and didn't indicate that
17 she - there was really no reaction, no
18 identification.

19 Q. The second lineup you showed her, she immediately
20 identified Marino Powell?

21 A. As I said, her eyes saw him and immediately pointed:

22 *That's him. That's him.*

23 Q. And which one was he?

24 A. Second lineup.

25 Q. And which one was he as far as the assailants?

1 A. Suspect Number 2.

2 Q. And then when you showed the third lineup containing
3 Byron Young, she took longer?

4 A. She reviewed it, then took longer than the first one.

5 Q. And what about the fourth lineup?

6 A. I'd describe the same as the first one. She reviewed
7 the pictures, and there was no reaction and no
8 identification.

9 MR. SHELDON: Beg the Court's indulgence. May I
10 approach the witness, Your Honor?

11 Q. Investigator Duke, I'm going to hand you Exhibit
12 Numbers 54, 55 and 56, State's exhibits that have
13 been marked for identification only, okay?

14 A. Okay.

15 Q. I ask if you recognize these and what they are?

16 A. These were additional lineups shown to Senora Jones
17 over the - about a ten-day period from roughly
18 October 28th through November 5, 2010.

19 Q. And why did you keep showing her the lineups,
20 different lineups?

21 A. We received additional lineups to show.

22 Q. Because you still had other suspects out there?

23 A. Correct. Only one of the three had been identified.

24 Q. Thank you. Did she identify anyone out of those
25 three to you as any of the suspects?

1 A. No.

2 MR. SHELDON: State moves Exhibits Number 54, 55, and
3 56 into evidence.

4 MR. LEE: No objection.

5 THE COURT: Motion granted.

6 PHOTO LINEUPS MARKED STATE'S EXHIBIT

7 NUMBERS 54, 55, AND 56, ADMITTED AS EVIDENCE.

8 MR. SHELDON: May I approach, Your Honor?

9 Q. I'm going to hand you and have you keep State's
10 Exhibit Number 56. Counsel for defense recently
11 identified that and showed it to Senora Jones. Do
12 you see - is Byron Young contained in that lineup?

13 A. He is.

14 Q. And what position is he in?

15 A. Number 4.

16 MR. SHELDON: May I publish to the jury, Your Honor?

17 THE COURT: yes, sir.

18 Q. Was there a fourth lineup - an eighth lineup, as
19 well?

20 A. There was.

21 Q. And do you know where that is?

22 A. There's a copy in the case file, but it's got notes
23 written on it.

24 Q. There's a case file?

25 A. No. It was in my case notes. I do have a copy, but

1 it's got notes on it.

2 Q. May I see it?

3 MR. SHELTON: May I approach?

4 THE COURT: You may.

5 MR. SHELTON: Thank you, Your Honor.

6 MR. LEE: If you would like to introduce that just by
7 consent, just scratch through whatever notes Duke put on
8 it, I have no issue with doing that.

9 MR. SHELTON: Thank you, Mr. Lee. May it please the
10 Court. May I approach the witness, Your Honor?

11 Q. So that is the eighth lineup?

12 A. Yes.

13 Q. And did you present that to Ms. Jones and Ms. H[REDACTED]
14 as well?

15 A. Yes.

16 Q. Now when you present it - does it have anything
17 different on it now than it did then?

18 A. Yes.

19 Q. What?

20 A. From my personal notes, I wrote the name of the
21 suspect that we - the name on there just so I would
22 know for my notes who was who.

23 Q. Was that name on there when you presented that lineup
24 to Ms. H[REDACTED] and Mrs. Jones?

25 A. No.

1 Q. Did they identify anyone off that lineup?

2 A. No.

3 MR. SHELDON: May I approach the witness, Your Honor?

4 THE COURT: You may.

5 Q. Is this a fair and accurate copy of that lineup,
6 besides the name that's written on it?

7 A. Yes, sir.

8 Q. And that would be Number 6, Position Number 6?

9 A. Correct.

10 Q. And that name would be Prentice Scott?

11 A. Correct.

12 MR. SHELDON: The State moves State's Exhibit Number
13 57 into evidence.

14 MR. LEE: No objection, Your Honor.

15 THE COURT: The motion is granted.

16 PHOTO LINEUP MARKED STATE'S EXHIBIT

17 NUMBER 57, ADMITTED AS EVIDENCE.

18 Q. When did this crime occur?

19 A. October 25, 2010.

20 Q. And when did you have a confirmed I.D. from the
21 victims of the Defendant in this case?

22 A. October 26, 2010.

23 Q. And who was that?

24 A. Marion Powell.

25 Q. Did you get a warrant?

1 A. I did.

2 Q. Did you do anything to try to locate Mr. Powell?

3 A. Yes.

4 Q. What did you do?

5 A. We distributed a wanted poster to the - a news
6 release was put out to the media outlets. A wanted
7 poster was created and distributed to surrounding law
8 enforcement agencies.

9 Q. Were you able to find Mr. Powell immediately?

10 A. Not immediately.

11 Q. So it's fair to say you blanketed the area with news
12 releases?

13 A. Yes. We put it out there, multiple new releases as
14 the investigation progressed. I know of at least two
15 releases that went out.

16 Q. Did you employ anyone to help try to locate Mr.
17 Powell?

18 A. The police department contacted U.S. Marshals to ask
19 for their assistance.

20 Q. Do you know if Mr. Powell was eventually apprehended?

21 A. He was.

22 Q. Do you know when that was?

23 A. March 27, 2011.

24 Q. Was your agency and other agencies actively seeking
25 him during that time?

1 A. He was a wanted person. So, yes, we were - wanted
2 him captured. Our goal was to locate him and put him
3 in jail.

4 Q. In fact, your agency had contact with U.S. Marshals
5 on regular occasions to try to find him, correct?

6 A. Yes.

7 Q. And the US Marshals couldn't find him?

8 A. No.

9 MR. SHELDON: Beg the Court's indulgence.

10 Q. Did you subsequently meet with the victims to
11 determine the value of items that was taken from
12 their home?

13 A. There was regular contact, I believe, through late
14 2010, as they were identifying more property that was
15 missing from the house. And we were updating the
16 property records to get the correct values on there.

17 Q. What was the total value at the end of the day?

18 A. \$51,540.00.

19 Q. And do you have that itemized?

20 A. It is itemized. I do not have that attached to my
21 report up here.

22 MR. SHELDON: May I approach the witness, Your Honor?

23 THE COURT: You may.

24 Q. I'm handing you a supplement written on January 4,
25 2011. I believe this has itemized amounts. Will you

1 give the jury those itemized amounts?

2 A. Description and dollar or just different dollar
3 amounts?

4 Q. Description and dollar amounts, please.

5 A. U.S. currency \$2,230.00; Louis Vuitton handbag
6 \$2,200.00; Michael Kors handbag \$300.00; Mark Jacobs
7 handbag \$600.00; Gucci handbag \$1,800.00. I'm not
8 sure of the pronunciation, Tumi luggage \$1,200.00;
9 Louis Vuitton handbag \$2,000.00; Louis Vuitton
10 handbag \$695.00; Louis Vuitton duffle bag \$3,800.00;
11 a silver necklace with a heart pendant \$8,000.00, a
12 Rolex watch with diamond bezel \$12,000.00; her
13 wedding ring and band \$5,000.00; his wedding band
14 \$600.00; a Motorola Droid \$299.00; an Apple iPhone
15 \$300.00; and a Blackberry 400; an Nintendo DS
16 \$130.00; Gucci sunglasses \$350.00; Buffalo Tusk
17 transitional lens glasses 1,800; Chanel sunglasses
18 \$600.00; another pair of sunglasses brown wood with
19 Platinum \$1,200.00; an Apple iPod Touch 16 gigabyte
20 \$199.00; an Apple iPod Touch 32 gigabyte \$299.00;
21 Acer Netbook computer \$370.00; HP notebook computer
22 \$400.00; two pair of Louis Vuitton gym sneakers at
23 \$650.00 each; other shoes at \$1,700.00.

24 Q. Can you describe those shoes?

25 A. The total value of the shoes looks to be \$3,000.00.

1 That was two pair of Louis Vuitton gym sneakers, two
2 pair of Louis Vuitton red, high-top with white trim,
3 black, low-top with silver trim, three pair of Prada
4 sneakers, black patent leather, a pair of white with
5 mesh holes, and then a pair of blue high-top, and
6 then another pair of Christian - I don't know how to
7 pronounce it. Lots of shoes totaling \$3,000.00.

8 Q. Anything else?

9 A. An Olympus digital camera \$289.00; a Sony HandyCam at
10 \$600.00; Nikon Coolpix camera \$400.00; FinePix camera
11 \$98.09; and another digital camera \$380.00.

12 Q. When the defendant was finally arrested on March 27,
13 2011, did anyone from your office try to make contact
14 with the Joneses?

15 A. Yes.

16 Q. And how did they do that?

17 A. I believe they went to his house and - or to their
18 house in Mill Creek. I don't recall if they tried
19 telephone contact or not.

20 Q. Was anyone home?

21 A. No.

22 Q. What had happened?

23 A. They moved.

24 Q. They moved out?

25 A. Correct.

1 Q. You said that in the report an iPod was stolen,
2 correct? Excuse me, an iPhone was stolen, correct?

3 A. I believe so, yes.

4 Q. Did you ever obtain a search warrant for the records
5 of that iPhone?

6 A. I did.

7 Q. And the subscriber information?

8 A. Yes.

9 Q. Who is the subscriber?

10 A. Senora Jones.

11 Q. Was that phone used at all between the time it was
12 stolen and the time that you reactivated the phone?

13 A. It was not.

14 Q. And when I say reactivated the phone, I mean
15 reactivated the account, correct?

16 A. She left the phone active. So, if - whoever had the
17 phone, if they used it, it would show up on her call
18 detail. She - about a week or so later, she actually
19 got a new phone. And within that period of time,
20 there was no phone calls.

21 Q. So you took DNA swabs?

22 A. Correct.

23 Q. And it came back to no one, correct?

24 A. Correct.

25 Q. Not anyone, nothing?

1 A. No DNA.

2 Q. Fingerprints came back with nothing?

3 A. Correct.

4 Q. The phone was stolen and wasn't used?

5 A. No.

6 MR. SHELDON: I beg the Court's indulgence.

7 THE COURT: All right, sir.

8 MR. SHELDON: Those are all the questions I have.

9 Thank you. Please answer any questions Mr. Lee has.

10 THE COURT: Mr. Lee.

11 MR. LEE: Thank you, Your Honor.

12 OFFICER JAMES DUKE

13 CROSS-EXAMINATION BY MR. LEE:

14 Q. Investigator Duke, you were the lead investigator?

15 A. I was.

16 Q. So is it safe to say there were several officers --
17 several officers involved in various aspects of the
18 investigation?

19 A. Correct.

20 Q. And one of them was I think Brubaker, a woman, she
21 was first on the scene, right?

22 A. She was the first responding officer.

23 Q. And then Chandler showed up?

24 A. Correct.

25 Q. And then you showed up?

1 A. Correct.

2 Q. Had you reviewed - and there were other officers
3 involved as well, right?

4 A. There was neighborhood canvases and other aspects in
5 the investigation from other officers.

6 Q. And as lead investigator, was everything kind of
7 filtered into you as lead investigator, reports and
8 that sort of thing?

9 A. As I - when I close an investigation, I try to review
10 all the supplements and make sure everything is
11 straight with everything before it's closed.

12 Q. And how - I don't know if you testified to or not,
13 how long have you been an investigator?

14 A. Total currently or at the time of this -

15 Q. At the time. Tell us when you started. I think we
16 can figure it out.

17 A. I went into Investigations in December of 2008. I
18 left in May of 2009.

19 Q. Okay.

20 A. Went back in May of 2010. So just shy of a year
21 investigative experience.

22 Q. Okay. During that time - let's talk about from June
23 25th - from October 25, 2010 backwards. During that
24 time as an investigator, had you received any special
25 training in the administration of photo lineups?

1 A. Specialized training, no.

2 Q. Had you been to any classes or anything about photo
3 lineups?

4 A. No.

5 Q. Okay. Had you gone to any schools or seminars or
6 anything where they talked about establishing - have
7 you had you had any training about the photo lineup
8 process?

9 A. The only thing I went by is the policy on how to
10 present the lineups. No specialized training.

11 Q. The policy being, put it on one of those folders and
12 read the back?

13 A. Standard operating procedure, read the advisory prior
14 to showing the lineup. Once they identify, have them
15 give a statement, audio record or video record if
16 that capability is available.

17 Q. Now, you are not the one who actually picked the
18 pictures to put in these lineups; were you?

19 A. No.

20 Q. Okay. And in fact, those pictures came to you from
21 the Beaufort County Sheriff's Office, right?

22 A. Correct.

23 Q. Okay. And they came from an outfit that they call -
24 the sheriff's office, the Intelligence Unit. Have
25 you heard that before?

1 A. Yes.

2 Q. Okay. So the Beaufort County Sheriff's Office
3 Intelligence Unit forwarded those lineups to you for
4 you to administer to them?

5 A. Correct.

6 Q. Now, are you aware that the Intelligence Unit at the
7 sheriff's office consists of a woman named Ms. Brown
8 in the sheriff's office?

9 A. Yes.

10 Q. Okay. And are you also - would you also agree that
11 Ms. Brown has - is not law enforcement? She is more
12 of a - I think they call it analyst. But she's more
13 of a secretarial -

14 A. She's not sworn. She's a civilian, I'm pretty sure.

15 Q. So she's never been to the Police Academy. She's
16 never carried a gun -

17 A. Not to my knowledge.

18 Q. Okay. So she's a civilian who is in the office?

19 A. Correct.

20 Q. Okay. And really her training is just how to pull
21 pictures to - I mean -

22 A. I don't know where she gets the pictures.

23 Q. Okay. So the Intelligence Unit is, in fact, a Ms.
24 Brown, who pulls the pictures off a computer, and
25 then sends it to you?

1 A. Correct.

2 Q. Did you look at the pictures that were sent?

3 A. Our prime analyst requested lineups from the
4 Intelligence Unit. She gave them to me. I looked at
5 them, saw who the people - looked at them and then -

6 Q. I think the question is, did you look to see the
7 relationship within each lineup of the six people?

8 A. Yeah, I looked at them and saw that, you know, there
9 was six people in the lineup.

10 Q. Okay. And made sure there weren't like three
11 Hispanic people, two Americans and no -

12 A. No. Combined male and female.

13 Q. So you looked at - you looked at the pictures, and
14 nothing jumped out at you?

15 A. Right. I mean, these lineups were six black males.

16 Q. Okay. Now, part of - when you do the investigation,
17 don't you have some tools at your disposal as far as
18 when a crime involves a vehicle?

19 A. Such as?

20 Q. I'm not trying to fool you, but I'm trying to - let
21 me do it more direct. Are you often able to, as part
22 of your investigation, investigate certain vehicles
23 that may have been involved in a crime?

24 A. We have access to DMV and get vehicle information.

25 Q. So the easiest thing is, if somebody, of course, gets

1 A. No.

2 Q. Now, the - was there anybody that came there, or did
3 you look for any, what they call, trace evidence like
4 hairs or fibers or anything like that?

5 A. No.

6 Q. Okay. And at this point of the investigation is when
7 you would be looking for that, the story was that it
8 was three people that came in, right?

9 A. Correct.

10 Q. And that they were there for a while?

11 A. Correct.

12 Q. And I think it's stating the obvious, but isn't it
13 more likely that you would find trace evidence - the
14 more people, the more trace evidence you were likely
15 to find?

16 A. You're going to leave trace evidence if you walk into
17 a room, so -

18 Q. But three people leave more than one person?

19 A. Yeah, correct?

20 Q. And you can also say the longer somebody is there,
21 the more that's going to be there?

22 A. Yes.

23 Q. Now, let's talk - you're familiar - based on your
24 role as the lead investigator, you're familiar with
25 the descriptions that were given in this case?

1 A. I know that there was descriptions given initially,
2 and I have my descriptions from when I had spoke with
3 the victims.

4 Q. And that's what I'm talking - you knew where I was
5 going. Brubaker, I guess, said that she relayed a
6 description, and Chandler apparently got a
7 description, right?

8 A. Correct.

9 Q. And do you have - do you remember what - who Chandler
10 got the description from?

11 A. I can look back in his report and see if it's
12 indicated.

13 Q. I have one too. If you have it, go ahead.

14 A. Okay. There are descriptions in his report, but it
15 doesn't indicate which victim provided the
16 information.

17 Q. Mine says interviewed the suspect at the top, doesn't
18 it? That should be the victim.

19 A. That's a report format.

20 Q. Okay. Well, is it your understanding that the
21 interview was with Senora Jones rather than one of
22 the children?

23 A. The way the line - the way the report format is set
24 up, had there been a suspect interview, it would go
25 right there. And it appears that he put the

1 description under that formatted suspect area.

2 Q. I didn't get you.

3 A. The report format - it's a report format. You have,
4 you know, a synopsis, observation of scene, interview
5 with victim, you know, 1, 2, 3, 4, 5. And then
6 interview with suspect, however many you have. So
7 had there been an identified suspect at the time, he
8 would have done an interview. There was no suspect
9 interview, because the suspects had fled the scene,
10 but he left that heading in the report.

11 Q. Right.

12 A. And that's where he stuck the description that came
13 from - I don't know where he got it from.

14 Q. Okay. Well, the last person who is mentioned as
15 victim number 6 is Alicia G [REDACTED], a black female,
16 date of birth 12/16/07, four years old. I assume it
17 didn't come from her.

18 A. I don't think so.

19 Q. So you don't know where that description came from?

20 A. I don't know where he got it from?

21 MR. SHELDON: Objection, Your Honor. I've let this
22 go on a while. He's testifying - I want to be open with
23 him, but he's testifying to another officer's report that
24 he really doesn't have personal knowledge of. At this
25 point, he's speculating.

1 MR. LEE: He's the lead investigator and said that
2 everything would run through him and, you know, everybody
3 reports to him. I'm just asking him about previous
4 descriptions inconsistent with the description he
5 ultimately took.

6 THE COURT: Overruled. Go ahead.

7 MR. SHELTON: Thank you.

8 Q. Are you familiar with Chandler's report?

9 A. Correct.

10 Q. You just don't know where that information came from?

11 A. At the time that I got my descriptions, his report
12 had not been completed. I don't know when his report
13 was actually approved and forwarded into the records
14 division.

15 Q. Well, this is dated 10/26/2010, correct?

16 A. It is.

17 Q. Yours says it was entered or changed 1/4/2011, which
18 is a couple of months later.

19 A. Correct.

20 Q. Okay.

21 A. The information that I got. I received my
22 information day of incident when I was on the scene.
23 Even though the supplement is dated, that's when I
24 entered the supplement.

25 Q. But Chandler was there before you left?

1 A. Correct.

2 Q. So, is it safe to assume the description he got was
3 prior to the description you got through the
4 interview of Ms. Jones?

5 A. Correct.

6 Q. All right. So do you have that report?

7 A. I do.

8 Q. It looks like it begins on Page 3; is that right?

9 A. I see the page with Interview of Suspect, 1, 2 -

10 Q. Number 1.

11 A. Correct.

12 Q. Okay. And Suspect Number 1, according to this, dated
13 the next day, black male, 5-7, white t-shirt, blue
14 jeans, may have had dreads, had something over his
15 head - it says white cloth - ponytail, mid-20s,
16 medium-to-light complexion. The victim could only
17 see his eyes, correct?

18 A. Correct.

19 Q. So that - from that ponytail - I guess we'll get back
20 to that in a minute. But that's what the description
21 was for Number 1, right?

22 A. Correct.

23 Q. Okay. And Number 2 - everybody is saying that
24 Suspect Number 2 is Mr. Powell, so let's go down to
25 Number 3, because there seems to be a little bit of

1 discrepancy between 1 and 3 as to who's who; okay?

2 A. Okay.

3 Q. Suspect Number 3, description 10/26/2010: Skinny,
4 dreads down to his ears, light to medium complexion,
5 red, glossy eyes, may be drug related, and then it
6 talks about white-colored stripes, something over his
7 face, right?

8 A. Correct.

9 Q. Okay. So as far as trying to clear up who's who, did
10 you hear Ms. Jones testify when she corrected me and
11 said:

12 *Look, I'm not talking about the guy with*
13 *the red, crazy eyes that I'm now identifying*
14 *in the photo lineup.*

15 Right? Who was Byron Young.

16 A. I understood the red, crazy-eyed guy was Number 3.

17 Q. Was Number 3?

18 A. Correct.

19 Q. But was not Byron Young who was picked out today in a
20 photo lineup by her, right? Didn't she correct me
21 and say that the guy she picked out and was sure
22 about was not the guy with red, glassy eyes?

23 MR. SHELTON: Witness pitting, Your Honor.

24 Objection.

25 MR. LEE: I'm trying to figure out who's -

1 THE COURT: Overruled. Go ahead.

2 Q. Do you know, Investigator?

3 A. My understanding is that the suspect who had his eyes
4 visible with his bottom face covered, is the one who
5 we're referring to as Suspect 1.

6 Q. Okay. And Suspect 1 is the guy that - I think we're
7 saying the same thing. Suspect 1 is the guy that
8 today when shown the photo lineup initially by Mr.
9 Sheldon, she picked out Number 4, which is a guy
10 named Byron Young.

11 A. Correct.

12 Q. Is that - that's State's Number 49 that she picked
13 out Number 4 right there?

14 A. Correct.

15 Q. And again, the description on here is ponytail for
16 Number 1?

17 A. Yes.

18 Q. And you're saying Byron Young is Number 1?

19 A. Correct.

20 Q. Number 3, the one with the guy with red eyes, skinny
21 dreads down to his ears, right?

22 A. Correct.

23 Q. Now, can we go to your report regarding the
24 description of the suspects.

25 A. Okay.

1 Q. All right. Suspect 1, mid-20s, 5-8, 160 - well, back
2 up. Is this one Senora Jones?

3 A. Yes.

4 Q. Okay. Mid-20s, dreads pulled back, for Suspect 1.
5 Consistent with the ponytail, right?

6 A. Correct.

7 Q. Okay. Obviously, I'm no hair or dreads expert, but -
8 and neither is Mr. Sheldon, but when you're talking
9 about these long dreads that can be pulled back into
10 a ponytail, are we talking more like State's Exhibit
11 52? Is that the impression that you get, pulling
12 them into a ponytail?

13 A. Those can be pulled into a ponytail.

14 Q. Okay. So those are the long ones. And when you're
15 talking - and that's the description for Suspect 1,
16 the one that didn't have glassy eyes that now Ms.
17 Jones is saying is Byron Young?

18 A. Correct.

19 Q. Okay. Now, let's go to Suspect 3, on the second
20 description, the one that is in your report. Black
21 male, early 20s, 5-8, 150, light skin, ear-length
22 dreads, wearing light-blue jeans. Described as the
23 one who screamed with red and glassy eyes, appeared
24 to be high and insane. That's Number 3, right?

25 A. Correct.

1 Q. And it said ear-length dreads. Is that more
2 consistent with that?

3 A. I would say so.

4 Q. Okay. And I'm pointing to Byron Young's picture,
5 Number 4.

6 COURT REPORTER: Was that yes or no?

7 A. Yes.

8 Q. Okay. Yet, that description of Number 3 is not the
9 one she says is Byron Young, right?

10 A. The hair styles in the pictures that were used do not
11 exactly match up to the descriptions that we got.

12 Q. Well, neither do the eyes, right? Because she said
13 nothing about red, crazy eyes for Byron Young; did
14 she? She said that was the other guy.

15 A. Correct, she referred to Suspect 3.

16 Q. Okay. Now, let's talk about Suspect 2. Chandler's
17 report the next day. You got it? What does it say
18 about the gun on Chandler's report the next day for
19 Number 2, which the State says is Mr. Powell?

20 A. Had Silver handgun held in his right hand.

21 Q. That says Marion Powell had a silver handgun held in
22 his right hand, right?

23 A. Correct.

24 Q. Okay. Then let's go to your report, Suspect 2. Does
25 it say anything about a gun?

1 A. Under which interview?

2 Q. Suspect 2.

3 A. Which victim interview?

4 Q. Senora Jones.

5 A. During Senora Jones' interview, she described the
6 three suspects as follows and stated that Suspect 2
7 had a black pistol, while either Suspect 1 or Suspect
8 3 had a dull, silver pistol.

9 Q. So it changed. Suspect 2 now has a - from a silver
10 handgun to a black handgun from Chandler's report to
11 your report, right?

12 A. Correct.

13 Q. And it also says - and I think you left it out by
14 accident when you were reading it. It says:

15 *Face uncovered,*

16 *which is what you read. But what you didn't read, I*
17 *believe, was where it says:*

18 *Face uncovered, but covered when leaving.*

19 That's what the second suspect - second report says,
20 correct?

21 A. My supplement shows, under Suspect 2:

22 *Face uncovered, but covered when leaving.*

23 Q. Okay. And that's what Senora Jones said?

24 A. Correct.

25 Q. I guess the point I'm trying to make, Investigator,

1 based on your experience, is it common for people who
2 have been involved in something like this to, I don't
3 think, change their story, but remember differently
4 and make mistakes and have some inconsistency like
5 that?

6 A. During traumatic experiences, sometimes guns can be
7 mis-described.

8 Q. Okay. As can hairstyles and heights and weights and
9 everything else, right?

10 A. I suppose so.

11 Q. Well, do you agree that the physical description for
12 Suspect Number 1 with long dreads and everything else
13 does not match Byron Young?

14 A. Based on the comparison of the other dreads, the
15 other one has long dreads.

16 Q. Okay. So her description is a lot different than her
17 identification at this point?

18 A. The pictures used.

19 COURT REPORTER: Sorry?

20 A. The pictures used have different hair.

21 Q. Okay. Is there any indication to indicate that that
22 picture is improper or doesn't represent the photo
23 correctly?

24 A. The - looking at all the pictures, they don't match
25 up to the hairstyles described.

1 Q. I think we're saying the same thing. Have you ever
2 dealt with Kenya Hagood?

3 A. I have not.

4 Q. Do you know anything about her?

5 A. I've heard the name.

6 Q. Would you know what her height and weight is?

7 A. I don't.

8 Q. Okay. I noted, depending on what side of the fence
9 you are, we used different language on things. Let
10 me ask you - Mr. Sheldon asked you towards the end:

11 *Was Mr. Powell eventually apprehended?*

12 Right? Do you remember that?

13 A. Correct, yes.

14 Q. And you said that he was.

15 A. Well, he -

16 Q. In fact, are you familiar with how he was
17 apprehended?

18 A. I know he was arrested in Hardeeville.

19 Q. Right. Okay. And do you know an Officer Meyers?

20 A. I do.

21 Q. Okay. Part of this investigation?

22 A. She was the one who went to Hardeeville.

23 Q. Okay. To pick him up?

24 A. Correct.

25 Q. Okay. And are you aware that Mr. Powell had actually

1 contacted police wanting to turn himself in?

2 A. I believe that's in her supplement.

3 Q. Okay. Well, can I hand you Officer Mayers'
4 Supplemental Report and see if you can refresh your
5 recollection?

6 A. Bluffton P.D. was notified by Hardeeville that they
7 were in contact with Mr. Powell, who wanted to turn
8 himself in.

9 Q. And he, in fact, did turn himself in?

10 A. Yes.

11 Q. He contacted them?

12 A. Right.

13 MR. LEE: That's all I have for Investigator Duke.
14 Thank you.

15 OFFICER JAMES DUKE

16 RE-DIRECT EXAMINATION BY MR. SHELDON:

17 Q. Investigator Duke, was this photograph of Byron Young
18 taken on October 25, 2010? Do you have any idea
19 whether it was or not?

20 A. I don't know when that photograph was taken. I know
21 it's a jail mug shot, but I don't - it would be any
22 one of his prior arrests in the database.

23 Q. So it could have been from years prior?

24 A. Yes.

25 Q. You don't know? Does hair grow, except for mine?

1 A. Yes.

2 MR. SHELDON: I take judicial notice that the
3 Defendant is writing with his right hand, Your Honor.

4 THE COURT: All right.

5 MR. SHELDON: Thank you.

6 Q. Do you have in any of your case files the actual
7 height and weight of the Defendant?

8 A. I don't have it with me. I take that back. I do
9 have the original incident report.

10 Q. You don't have the booking report?

11 A. I don't have the booking report. I have the incident
12 report. He's listed on the front page of it with his
13 descriptors.

14 Q. And what's his height?

15 A. Six foot.

16 Q. What's his weight?

17 A. 160 pounds.

18 Q. Six foot, 160 pounds. What's the description that
19 they gave of him, being the victims? I mean, we said
20 it a hundred times. I think the jury knows.

21 A. 6-2 and skinny.

22 Q. And what was the other description?

23 A. Suspect -

24 Q. No. Suspect Number 2 first, because you testified to
25 both your report and Sergeant Chandler's report.

1 A. Okay. My report 6-2 and skinny. Sergeant Chandler's
2 report, 6-1, 180 pounds.

3 Q. Are you aware of whether they had the assailant,
4 while he was holding them at gunpoint, stand on the
5 scale and weigh him?

6 A. No.

7 Q. Are you aware of whether they put them against the
8 wall - or they put the kids against the wall maybe
9 and measured his height?

10 A. No.

11 Q. So those are estimations, correct?

12 A. Correct.

13 Q. Pretty close.

14 A. Yes.

15 MR. SHELTON: No further questions. Thank you.

16 THE COURT: Any cross, Mr. Lee?

17 OFFICER JAMES DUKE

18 RE-CROSS-EXAMINATION BY MR. LEE:

19 Q. Do you have any evidence that Byron Young, at the
20 time this happened, had long hair, long dreads he
21 could put into ponytail?

22 A. Do I have any -

23 Q. Yeah. Any suggestion of that?

24 A. I don't have any.

25 Q. So that's just speculation by -

1 DEFENSE MOTION FOR DIRECTED VERDICT:

2 MR. LEE: Your Honor, at this time, I would make the
3 standard directed verdict motion under Rule 19 of the
4 *South Carolina Rules of Criminal Procedure*.

5 As you know, the standard is whether - is looking at
6 existence of evidence, rather than the weight.

7 On direct evidence, it does require competent
8 evidence as to direct evidence. And then, as far as
9 circumstantial evidence, it requires substantial
10 circumstantial evidence. And it's our position that this
11 is strictly an I.D. case. That the I.D.s are not
12 competent to take the case to the jury, based upon
13 everything that was heard, including the subsequent
14 in-court identification of Mr. Young.

15 Circumstantial evidence is all over the place in this
16 case, and in an attempt to tie Marion Powell to Byron
17 Young and tie both of them back to the crimes and place.
18 So, I would respectfully request a directed verdict on all
19 charges.

20 I think it all goes to identity, and I think it's all
21 or nothing on this. And I respectfully move for a
22 directed verdict on each and every charge in favor of
23 acquittal.

24 THE COURT: Thank you, Mr. Lee. Mr. Sheldon?

25 MR. SHELTON: Thank you, Your Honor.

1 I'm going to go through charge-by-charge. First of
2 all, for armed robbery, two witnesses testified that - and
3 identified Mr. Young both in - excuse me, Mr. Powell both
4 in court, and also in the photo lineup, the day after the
5 incident as being someone who came into their home armed
6 with a gun and took multiple valuables from them, holding
7 them at gunpoint, and putting them in fear of their
8 safety, the State would submit the armed robbery charge
9 should go to the jury, based on that evidence alone.

10 Next, for the burglary first degree, evidence says
11 that the children were corralled into the home outside by
12 a masked - one masked man and two unmasked men, one of
13 them being Mr. Powell identified. Held at gunpoint, kept
14 in a certain area of the home where they could not move.
15 The wife was asked to get on the floor, to stay down and
16 tell them where the money is. Obviously, there is direct
17 evidence of lack of consent to gain entry into the home,
18 as well as all kinds of circumstantial evidence of that
19 element of the offense.

20 Furthermore, to commit a crime, it could be armed
21 robbery, it could be larceny, it could be pointing and
22 presenting of a firearm, in possession of weapon during
23 the commission of a violent - well, pointing and
24 presenting a firearm would be multiple different count -
25 charges of the crime that they intended to commit inside

1 of the residence.

2 Next, we have kidnaping. Four children were held at
3 gunpoint and forced to go up the stairs against their
4 will. They were seized while putting them - forcing them
5 to be down against on the ground next to the wall. The
6 mother was seized by having a gun pointed at her and
7 telling her to get to the ground and stay on the ground.

8 The State submits the mother identified each one of
9 the four children that were there that were held against
10 their will. And also, Ms. Abriya Hart testified to the
11 same evidence. The State submits that that evidence
12 alone, after identifying Mr. Powell, is enough evidence to
13 send it to the jury.

14 Possession of a weapon during the commission of a
15 violent crime, both burglary first degree and armed
16 robbery and kidnaping involved in violent crimes and we
17 have two witnesses who identified the defendant as
18 possessing a firearm. We have asked that that evidence go
19 to jury.

20 He had that firearm on his person, unlawfully
21 carrying it. The unlawful possession of a firearm, then
22 should also go to the jury, Your Honor.

23 And if he - and if it was not in a place where it
24 could be an unlawful possession of the firearm, he was in
25 possession of it, even if he had a concealed weapon

1 permit.

2 THE COURT: Mr. Lee, the Court agrees that there is
3 substantial evidence which the jury could consider, and
4 therefore, the Court is compelled to deny your motion.

5 MR. LEE: Yes, sir.

6 THE COURT: Where does that leave us?

7 MR. LEE: Well, can I talked to Mr. Vaux for just a
8 second?

9 THE COURT: Sure.

10 MR. LEE: I think it's going to leave us that we're
11 up and that my expert is going to be here first thing in
12 the morning on the eyewitness.

13 THE COURT: Okay.

14 MR. LEE: But I'd like to talk to Mr. Vaux real quick
15 as far as issue that came up during Mr. Riley's testimony.
16 If I could have five minutes?

17 THE COURT: All right. We'll be at ease and that's
18 it.

19 MR. LEE: Thank you.

20 OFF THE RECORD.

21 BACK ON THE RECORD,

22 MR. LEE: Mr. Vaux, I appreciate your time. I
23 believe the only witness that we're going to end up
24 calling is the psychologist, Lori Vanwallendael.

25 I have spoken - Judge, as far doing stuff today, I've

1 should the defendant decide to do so. Mr. Lee?

2 MR. LEE: Thank you, Your Honor. May it please the
3 Court. The Defense would call Dr. Lori Vanwallendael to
4 the stand.

5 LORI VANWALLENDAEL

6 being first duly sworn, testified as follows:

7 MADAM CLERK: Thank you. If you'll have a seat,
8 please. Thank you. If you'll state your full name for
9 the record, please.

10 MS. VANWALLENDAEL: Lori Vanwallendael.

11 DR. LORI VANWALLENDAEL

12 DIRECT EXAMINATION BY MR. LEE:

13 Q. Good morning, Doctor.

14 A. Good morning.

15 Q. Thank you for coming down to Beaufort. Have you had
16 an early morning this morning?

17 A. I have, indeed.

18 Q. Okay. Where did you come from?

19 A. Gold Hill, North Carolina, which is close to
20 Charlotte.

21 Q. Okay. You drove down this morning?

22 A. Yes.

23 Q. All right. Dr. Vanwallendael, can you tell the jury
24 your current occupation?

25 A. I am an associate professor of psychology at the

1 University of North Carolina at Charlotte.

2 Q. Okay. And how long have you been in that position?

3 A. I have been at UNCC for about 27 years now.

4 Q. And can you tell us a little bit about your
5 educational background.

6 A. Yes. I received a bachelor's degree in psychology
7 and English from McMurry College, which is a small
8 school in Central Illinois. And then, I did my
9 graduate work at Northwestern University in the
10 Chicago area, and I received my Ph.D. in 1986.

11 Q. All right. And can you tell us a little bit about -

12 MR. LEE: And Your Honor, I have a copy of her
13 Curriculum Vitae. I've given a copy to Mr. Sheldon.
14 Would you like one? A copy of her C.V.?

15 THE COURT: No, that's fine. You keep it. I've
16 already got one.

17 Q. Can you tell us a little bit about your professional
18 experience.

19 A. Yes. I - as I said, I've been at UNC-Charlotte
20 basically since I got my degree. And my duties there
21 include teaching, research, service to the
22 university, publication of - publish or perish as
23 they say.

24 Q. And we'll get to that in a minute. Can you tell us
25 what courses you've taught at college.

1 Q. Do you know how many times you've testified in court
2 before?

3 A. It's getting up there. I don't like to count, but
4 it's probably 20, 25, somewhere in between there.

5 Q. Okay. And has that been for the defense in criminal
6 cases?

7 A. Yes, it has.

8 Q. Has a government entity or prosecutor's office or
9 U.S. attorney ever come to you and asked you to
10 testify on their behalf?

11 A. No, they haven't.

12 Q. Okay. Would you do it if they did?

13 A. Sure.

14 Q. All right. Let me -

15 MR. LEE: Judge, at this point, I would offer Dr.
16 Vanwallendael as an expert in the field of psychology,
17 specifically, the field of eyewitness memory.

18 MR. SHELDON: No objection at all, Your Honor.

19 THE COURT: I'll grant that motion. Let me just make
20 a brief statement to the jury about this.

21 Ladies and gentlemen, we just qualified this witness
22 as a expert witness. Normally, witnesses are not
23 permitted to give their opinions about matters, but are
24 restricted to the testifying about things that they have
25 seen or heard. An exception is made for an expert

1 Do you have any idea how many DNA exonerations have -
2 The Innocence Project has revealed?

3 A. It's been over 200 now.

4 Q. 200. And those are people who, convicted at trial,
5 were later exonerated through DNA?

6 A. Correct.

7 Q. Okay. Now, let's get back to your area of research,
8 the eyewitness. Has The Innocence Project, or have
9 you, done any research or have any research typing
10 DNA exonerations to cases involving eyewitness,
11 memory eyewitness identification?

12 A. Yes.

13 Q. Okay. And can you tell the jury, in whatever words
14 you can, the connection between The Innocence Project
15 versus the reliability of eyewitness testimony?

16 A. Of the two-hundred-some-odd cases that The Innocence
17 Project has looked at over the years, about 75
18 percent of them do involve an eyewitness who
19 identified the wrong person. And so, obviously, that
20 interests psychologists a lot to try and see, you
21 know, what are the factors that could lead a person
22 to make that kind of a mistake in that situation.
23 So, we look at those case studies. And then, from
24 there, sometimes we use some of those cases to give
25 us ideas in the laboratory and in the field of what

1 a short amount of time. It may be under, you know,
2 less than ideal conditions in terms of just
3 opportunity to look at someone. And in a typical
4 eyewitness situation, most eyewitnesses are victims,
5 and so they're under a great deal of stress. And one
6 of the most studied factors of memory is what stress
7 does to it. And we know that stress has a very
8 negative effect on our ability to remember, and makes
9 us much more likely to make mistakes in our memory.

10 Q. What does the stress do to the normal encoding
11 process that causes a problem?

12 A. Basically, what it does is, our bodies are geared in
13 a stressful time to a kind of a fight or flight
14 response. And if you're in danger or someone you
15 love is in danger, most of your mental resources are
16 going to be focused on survival. So, what you have,
17 basically, is a situation where your attention is
18 narrowed toward, you know, think about getting away,
19 think about surviving, and you can't - you don't have
20 as much attention left over to process details about
21 people's appearance, people's faces, people's
22 clothing. What's happening in the brain, and not to
23 get too technical, but you're probably all familiar
24 with the idea of an adrenaline rush when you're
25 stressed. And adrenaline is just one of the

1 Q. Can you tell us, is that related to stress?

2 A. It can be.

3 Q. Okay. Can you tell us a little bit about weapon's
4 focus/

5 A. Sure. It's a very simple kind of phenomenon that was
6 actually suggested to researchers by police officers
7 who told us you really ought to research this. It
8 has to do with the fact that, when there is a weapon
9 involved in the commission of a crime, people are
10 less likely to be able to identify the perpetrator
11 later. So, for instance, if, let's say, someone has
12 a gun, the tendency is to focus on that gun. Again,
13 it's survival instinct. You know, you want to see
14 where that gun's pointed. You want to see where that
15 finger is on the trigger and how tense that finger
16 muscle appears to be. And so, people tend to spend
17 time focusing on the gun rather than necessarily
18 trying to study the details of the face of the person
19 holding it.

20 And it's not even just a visual thing. A lot of
21 people think that it's, you know, just your eyes are
22 trained on the gun, but it's - even when your eyes
23 are not on the gun, your attention is on the gun so
24 what we see is when there is a gun present, not only
25 do people have trouble visualizing the person's face

1 and other details, but they have trouble remembering
2 things like what was said, what happened, recognizing
3 voices. So, it really is a narrowing of attention,
4 rather than just a focusing of the eyesight.

5 Q. Okay. And again, these people that are in these
6 situations, these eyewitnesses, they're not
7 intentionally doing anything wrong; are they? I
8 mean, that's just how their brain is working, right?

9 A. Yeah. Absolutely.

10 Q. And have no intention of any -

11 A. I mean, it's not something that anyone could avoid.

12 Q. Right. Right. Can you tell us briefly a little bit
13 as far as the research that you may know about or
14 done as far as the reliability or accuracy of
15 children eyewitnesses versus adults.

16 A. Sure. Now, that's been a fairly important topic in
17 research, actually. A number of researchers have
18 done studies where they have had adults and children
19 of various age groups who basically witnessed the
20 same kind of event, and then are asked to choose the
21 person who committed the crime out of a lineup. And
22 what we typically find is that, children tend to make
23 more false identification mistakes; that they're
24 actually not that different from adults in terms of,
25 you know, when they see the right person, and you

1 know, being able to say, yes, that was the right
2 person; but they're more likely to pick a wrong
3 person out of a lineup. And it's basically - it's
4 kind of a pretty standard progression of, you know,
5 from adult down to, you know, adults have a certain
6 error rate. And then, you know, children like nine
7 to ten have maybe a 50 percent higher error rate.
8 And children seven and eight have a little higher
9 than that, and so forth.

10 Q. Okay. And you're aware that the - one of the
11 eyewitnesses in this case was ten years old, which is
12 why you -

13 A. Yes.

14 Q. Okay. Now, the - did you have a chance to review the
15 warnings or the admonition on the back of the photo
16 lineups that were shown to -

17 A. Yes.

18 Q. Okay. And with regard to a ten-year-old, did you do
19 any type of research as far as that, the effect of
20 those admonitions on a ten-year-old or the
21 ten-year-old's ability to comprehend those?

22 A. Yeah. When I read the instructions, one of the
23 things that kind of stands out in the research
24 literature is that children tend to have kind of a
25 more limited short-term memory than adults do, so

1 they have trouble kind of processing complex
2 instructions that have a lot of steps to them. And
3 so, one of the things that I looked at was just, you
4 know, how many things are we throwing at a child with
5 these instructions. Now, it's like, you know, you
6 shouldn't, you know, be biased; and you know, don't,
7 you know, think that just because you're looking at
8 these photos, that the person is necessarily in
9 there; and it's just as important to identify
10 innocent people as, you know, guilty people. And you
11 know, there's kind of a whole string of things that
12 come right in a row.

13 And one of the things that sort of struck me is that
14 there was language in the admonition that seemed like
15 it was not quite at a ten-year-old sort of level.

16 So, I just kind of typed it into a program that
17 analyzes writing for reading level, and it came out
18 at about, I think it was an eighth grade level. So,
19 you know, probably more of a 13-year-old or so
20 reading ability, rather than a ten-year-old.

21 Q. Okay. So, would it be your opinion, to a reasonable
22 degree of certainty, that the admonitions in this
23 case were not written in an appropriate level for a
24 ten-year-old?

25 A. And obviously, you've, you know, not - no two

1 ten-year-olds are alike and, you know, but I think
2 given the fact that you have a ten-year-old and what
3 I would like to see done is, you know, someone who
4 knows a little bit more about children and their
5 vocabulary and their understanding just, you know,
6 kind of walking through those instructions a little
7 more step by step, you know, one sentence at a time.
8 You know, do you understand what that means? Maybe
9 get the child to repeat it back to you in their own
10 words. Just to be sure that they did understand.

11 Q. And again, after reviewing the documents from this
12 case. And we talked about weapons focus, you're
13 aware that there were allegations of weapons being
14 present, correct?

15 A. Yes.

16 Q. Now, let's - we talked about does it make a
17 difference - well, you said this is probably talked
18 about even with multi-identifications of the same
19 person, that there is still the error rate that I
20 think you said was in the mid-thirties, right?

21 A. Yes.

22 Q. Okay. Now, does it - in this case, does that make a
23 difference from a psychological point of view or
24 eyewitness memory point of view that two witnesses
25 identified the same person?

1 A. There are two things that I think are relevant here.
2 One is that the two witnesses in question had a
3 chance to talk to each other, you know, before they
4 even ever talked to police; and then, again, before
5 they did their lineup procedures. And that's one of
6 the things that can make two people, you know, tend
7 to agree on their statements and, potentially, be
8 looking for the same sort of things.

9 Q. And was that from Senora Jones' statement saying that
10 she spoke with the children -

11 A. Yes.

12 Q. -- for five minutes before she even called 911?

13 A. Right.

14 Q. Sorry to interrupt you.

15 A. No, quite all right. And the other thing that I was
16 going to say is that, when you have multiple
17 witnesses, and the ideal situation would be that each
18 of them sees a different line up. If two people see
19 the same lineup, if there's anything with that
20 lineup, they're both going to be affected by it. And
21 so, you would, in fact, you would expect to see both
22 of them picking the same person.

23 Q. And when you say the same lineup, you don't mean show
24 both of them this lineup at the same time and, like -

25 A. The same set of photographs.

1 Q. Right. Okay. All right. And in this case, are you
2 aware that they were shown the same set of
3 photographs?

4 A. Yes.

5 Q. Okay. And so, the - well, we'll talk about it in a
6 minute, as far as the issue - any issues about the
7 lineup would affect both of them equally and would
8 not -

9 A. Correct.

10 Q. - if it's bad, it's bad, it doesn't matter?

11 A. Right, to even someone who had never known anything
12 about the crime might pick the same person.

13 Q. Sure. Now, I want to talk to you a little bit about
14 switching from the encoding, the retrievable, and
15 then the identification process, to the confidence
16 that's exhibited by an eyewitness, and how it relates
17 to reliability or accuracy. Again, that's a long
18 sentence, but can you tell us a little bit about
19 witness confidence as it relates to reliability.

20 A. Sure. So it's another one of those myths that I
21 teach my students about, because common sense would
22 dictate that people who are confident are more likely
23 to be accurate, and people who are accurate are going
24 to be confident. And in fact, most studies that are
25 done in the laboratory do involve measuring people's

1 confidence after they make an identification. And of
2 course, in the lab we know whether they're right or
3 wrong.

4 And what we've found is that the relationship between
5 confidence and accuracy is actually a pretty weak
6 one. There is a general tendency for more confident
7 people to be a little more accurate. But rather than
8 give you numbers and statistics that are just going
9 to be meaningless, let me give you a real-world
10 example. The relationship between a person's
11 confidence and their accuracy is just about the same
12 level of relationship as the relationship in the real
13 world between height and gender. So on the whole,
14 males tend to be taller than females, but we all know
15 tall females; we all know short males. My tall
16 daughter is engaged to a male who is shorter than she
17 is, so it just kind of gives you that notion of what
18 sort of relationship we're talking about here that,
19 you know, as many tall females as there are in the
20 world, that's the number of confident witnesses who
21 might be wrong, and the number of short males in the
22 world, that's the number of really unconfident
23 witnesses who might actually be right.

24 Q. Right. And I skipped over something. Just let me
25 back up just a second. The lineup that - the lineups

1 that we're talking about, the six people that are -
2 that are in the lineup, can you tell us generally
3 what the studies have shown as far as the connection
4 or relationship or, I don't know the right word, as
5 far as making up a lineup.

6 A. Uh-huh.

7 Q. Assume -- well, let's just assume, suppose we -
8 they've already picked one out. So, looking at this
9 lineup, what's important that you look at, as far as
10 the other five people that are in the lineup, which I
11 think we call fillers, correct?

12 A. Correct.

13 Q. Okay. So fillers are the people that aren't picked?

14 A. Right.

15 Q. Okay. Tell us a little bit about what the studies
16 have shown as far as fillers.

17 A. It's really important when you select fillers that
18 they share the same sorts of characteristics with the
19 kinds of things that the eyewitness or the victim has
20 talked about in their statements to police. So, for
21 instance, if, you know, the witness says the person
22 was a, you know, black female, age about 30,
23 five-foot-five, then you want to be sure that
24 everybody in the lineup is about that age. And if
25 the witness says something about the hair, then you

1 want to have everybody in the lineup have that same
2 sort of hair. And you don't ever want one person to
3 stand out for any reason in terms of having a really
4 noticeable characteristic that nobody else has, but
5 you especially don't want one person to stand out in
6 being the only person that has a characteristic that
7 the witness actually mentioned in their memory.

8 Q. Okay. And let's talk about this case. Are you
9 familiar that there was a description about a
10 flared-out nose?

11 A. Yes, I believe both of the witnesses said that.

12 Q. And is that kind of a specific description -

13 COURT REPORTER: A *flared out nose*, and your answer
14 was what?

15 A. Yes, that I remembered both of the witnesses
16 mentioning the flared-out nose.

17 Q. And was that the type of specific or unique feature
18 that you were talking about earlier that really needs
19 to be tied into the fillers, as well?

20 A. Yes, exactly.

21 Q. Okay.

22 A. You know, that's one of those, you know, one of those
23 things that you want to get in an identification.
24 Because, so often, things are generic, but that, you
25 know.

1 Q. And tell us what the problem is if you have one
2 person exhibiting certain features and the fillers do
3 not. What's the problem, from a psychological or
4 eyewitness standpoint, what's the problem with that?

5 A. Let's say you're an eyewitness and you're under
6 extreme stress, and you're only able to remember a
7 few things about a person's face, but one thing that
8 does stand out is let's say the flared nostrils.

9 Q. Right.

10 A. And then you're shown a set of photographs where only
11 one person has that characteristic. You've already
12 got a tendency, as a witness, to want to pick out
13 someone. You're going to be comparing the six photos
14 and trying to find the one that most closely
15 resembles what you remember. There's a lot of things
16 maybe you don't remember. You don't really remember
17 what the ears looked like or maybe the eyes, but you
18 remember those nostrils. And there is only one
19 person in the lineup that has that characteristic,
20 and you're drawn to that person.

21 Q. And is that known as suggestibility of the lineup?

22 A. Yes, that would be a suggestive lineup.

23 Q. And again, is this - this isn't something somebody is
24 doing consciously. It's something the brain is doing
25 filling things in. They're subconsciously drawn to

1 that, correct?

2 A. Right. That would just be the, you know, the picture
3 that you spent the most time looking at. The picture
4 that just drew your focus, and you might not even
5 necessarily know why.

6 Q. Okay. Now, how is suggestibility of - well, back up.
7 Do you, based on your studies and research
8 experience, do you believe that, with regard to the
9 fillers versus the picture that was picked out that,
10 that was suggestive?

11 A. Yes, I do.

12 Q. Okay.

13 A. The photograph of the defendant seems to also
14 exaggerate that characteristic. He seems to be kind
15 of leaning back. You can't really see that much of
16 the eyes, but you can really see the nose.

17 Q. You talking about the characteristic of the flared
18 nose?

19 A. Yes.

20 Q. Okay. So does that enhance the suggestibility in
21 your opinion?

22 A. Yes.

23 Q. How do you avoid the suggestibility problem in a
24 lineup?

25 A. Basically, there are a number of things that we can

1 A. I am.

2 MR. SHELDON: No more questions.

3 MR. LEE: No questions, Your Honor.

4 BY THE COURT:

5 THE COURT: Thank you, ma'am. You may step down.
6 Anything further?

7 MR. SHELDON: No. Thank you, Your Honor.

8 THE COURT: Are you ready to make closing arguments?

9 MR. SHELDON: Yes, Your Honor, I just need to bring
10 this out, so the jury can see it when the jury is ready.

11 THE COURT: Go ahead. I'm going to speak to the jury
12 just one minute.

13 Ladies and gentlemen, you have heard now - seen all
14 the evidence that's going to be presented to you. You
15 will be required to make your own decision based on what
16 is heard in the courtroom here. The attorneys are going
17 to make closing arguments, and I'm going to tell you about
18 the laws that apply to the case.

19 MR. SHELDON: Defense counsel? Your Honor, may it
20 please the court.

21 THE COURT: Yes, sir.

22 CLOSING ARGUMENT ON BEHALF OF

23 THE STATE, BY MR. SHELDON:

24 MR. SHELDON: Ladies and gentlemen of the jury, it's
25 been a long week. Thank you for your attention.

1 The first thing we're going to do is talk about the
2 law in the case, and Mr. Lee is going to have an
3 opportunity to address you, and then I'm going on to final
4 arguments. I'm not going to be arguing them to you now.
5 I'm going to explain what the law is.

6 The Judge is going to later explain what the law is.
7 Anything I say that is inconsistent with what the Judge
8 says, disregard it immediately. I'll try to make it very
9 consistent with what the Judge says, but the Judge is the
10 judge of the law, okay.

11 Armed robbery. Under South Carolina law, armed
12 robbery is defined by a person who commits robbery while
13 armed with a pistol or any object, which a person that is
14 present during the commission of the robbery, reasonably
15 believes to be a deadly weapon. That means they're guilty
16 of armed robbery.

17 I'm going to break it down for you. Commits robbery,
18 armed with a deadly weapon, is guilty.

19 Robbery, commits a robbery. What is a robbery?
20 Robbery is taking by force from someone else.

21 If you take by force from someone else while armed
22 with a deadly weapon, it's armed robbery.

23 Kidnaping. Under South Carolina law, kidnaping is
24 defined as, whoever shall unlawfully seize, confine,
25 inveigle, decoy, kidnap, abduct or carry away any other

1 person by means whatsoever, any means, without authority
2 of law, is guilty of kidnaping.

3 It doesn't have to be a horrible situation with a
4 little child walking down the street you would think of
5 with someone grabbing them and throwing them into a van.
6 You can find someone, keep him from moving, even if it's
7 in a place they otherwise have a right to be, that person,
8 like in their own home. If someone comes in and keeps
9 them in a hallway, in a bedroom floor, that could be
10 consider confining. Why is that? Because confine means
11 to limit, to restrict, to keep in, to shut in.

12 Burglary in the first degree. Another charge the
13 defendant is charged with. Is to find that someone who
14 enters a dwelling without consent with intent to commit a
15 crime within that dwelling while armed with a deadly
16 weapon, or uses or threatens the use of a dangerous
17 instrument, or displays what is or appears to be a pistol.

18 Why is that important? Because the State doesn't
19 necessarily have to prove that it was an actual gun. It
20 could be a toy gun, so long as the victims believe it was
21 a gun.

22 Possession of a weapon during the commission of a
23 violent crime. This law is defined as someone who is in
24 possession of a weapon, a pistol is a weapon, during the
25 commission of a violent crime is guilty of a possession of

1 a weapon during the commission of a violent crime.

2 Burglary first degree, kidnaping and armed robbery
3 are all violent crimes. So, if you find the defendant
4 guilty of any of those three crimes and had possession of
5 a gun, then he is guilty of possession of a weapon during
6 the commission of a violent crime.

7 I broke it down that way. Now some concepts. The
8 Judge is going to charge you on the concept called - or
9 it's not a concept. It's a law. It's called a hand of
10 one is the hand of all. It's also known as the act of one
11 is the act of all.

12 What that means is, when someone is engaged in a
13 criminal enterprise with someone else, and they commit an
14 act, if the other person doesn't commit that ac, but
15 they're involved in a criminal enterprise together,
16 they're both guilty of that act.

17 A classic example of this is when you have a getaway
18 driver in a bank robbery. Someone drives up, somebody
19 else goes in, robs a bank and comes out. The person who's
20 driving the car is just as guilty of the bank robbery as
21 the person who went in and robbed the bank.

22 The Judge is going to charge you on direct and
23 circumstantial evidence. Basically, he will charge you on
24 that and listen, but what to take home is that the law
25 gives no different weight to each one. It treats both of

1 them the same.

2 Direct evidence is someone actually telling you
3 something or someone seeing something.

4 Circumstantial evidence is you see me after work at a
5 grocery store with my jacket off and my tie loosened, my
6 top button unbuttoned, and thought that, well, he must
7 have just come home from work. He's coming home from
8 work, making some type of assumption from another fact.
9 Okay?

10 Now, proof beyond a reasonable doubt. A reasonable
11 doubt is the kind of doubt that would cause a reasonable
12 person to hesitate to act. It does not mean hesitate to
13 think, and I'll talk about that later.

14 And what does firmly convince mean? Well, why is it
15 important here? Because proof beyond a reasonable doubt
16 is proof that leaves you firmly convinced that the
17 defendant is guilty.

18 Reasonable doubt does not require proof beyond every
19 possible doubt. There are very few things in this world
20 that we know with absolute certainty. And the law does
21 not require proof that overcomes every possible doubt.

22 Reasonable doubt means a real possibility that the
23 defendant is innocent, not guilty, not any possibility.
24 Again, proof beyond a reasonable doubt is proof that
25 leaves you firmly convinced that the defendant is guilty.

1 Thank you very much. I'll talk to you in just a little
2 bit. Mr. Lee.

3 CLOSING ARGUMENT ON BEHALF OF

4 DEFENSE BY MR. LEE:

5 MR. LEE: I sincerely apologize to everybody. Today
6 is a really important day. It's important for Marion
7 Powell; for his mom, Brenda; and his dad, James; and his
8 sister, Jessica, who is in the Navy, who've been sitting
9 here all week. It's obviously very important for Mr.
10 Powell.

11 It's also very important for the Jones family.
12 They've been through a lot before this date and this week.
13 It's an important day for you all, because you have an
14 opportunity to make a difference and to do the right
15 thing. And I wouldn't call that jury duty. I think it
16 should be called jury opportunity, but there's no question
17 it's a big day.

18 When I was leaving my office this morning, for
19 whatever reason, when I walked out, I noticed that my
20 certificate from the South Carolina Bar was issued
21 November 22, 1993. And I realized I've been practicing,
22 as of today, I've been practicing law for 20 years. I
23 wish it got easier. I wish I didn't still get nervous. I
24 wish stuff like that didn't happen. And I wish that we
25 knew each other, and I could talk to you like we were golf

1 buddies, go to church together, whatever. But this is a
2 big day, and if I've said anything or done anything
3 throughout this trial, obviously, I'm fighting a terrible
4 cold. I think everyone in my family has been all week.
5 And if I did anything during the trial to turn you off or
6 anything like that, please don't hold it against Mr.
7 Powell. That's me, and I'll certainly apologize.

8 Now, today is also a big day, because 50 years ago,
9 in Dallas, Texas, President John F. Kennedy was
10 assassinated. I don't know if anyone was old enough to be
11 alive then, but John F. Kennedy was one of the most iconic
12 and most famous American presidents that there ever was.
13 And he - he spoke words that were true back then that
14 still hold true today. He's done a lot of quotes, and
15 he's very, very - had a lot of foresight in the 60's when
16 he was alive.

17 The one quote that isn't so well known, but is
18 perfectly appropriate for this trial, in my opinion, was
19 given at a commencement address he gave at Yale University
20 in 1962. He was talking to the students and he said:

21 *The great enemy of the truth is very*
22 *often not the lie, deliberate, contrived,*
23 *and dishonest. But the myth, persistent,*
24 *persuasive, unrealistic.*

25 *The great enemy of truth is not the*

1 *lie, but the myth.*

2 Let's talk about that. There's two things in this
3 case I think you need to address.

4 One is, obviously, the two photo lineups that Abriya
5 and Ms. Jones did. The other is everything else. And I
6 think when you look at it - now, I can anticipate what Mr.
7 Sheldon's questioning of our witness that he's going to
8 say, all right, well, here's the identification and here's
9 our corroboration. And that corroboration is going to make
10 the accuracy of the identification where we need to get
11 it.

12 There's a few problems with that. Let's start with
13 the corroboration, as I assume what their position is
14 going to be.

15 Corroboration, well, let's start with the ease of a
16 lie, talk about lie versus lie. Eric Riley is a liar,
17 he's a convicted liar, he's a proven liar, and you should
18 not place any weight on what he said. I don't think I
19 need to go through the details. That guy was in there for
20 his own good. He was given the ultimate gift to come
21 testify, and he did. He did exactly what he needed to do.
22 And I will submit to you that his words are: if you
23 believe him, you'd believe anything.

24 He had every motivation not only to testify against
25 Mr. Powell, because that's what the deal is all about, but

1 also testify about Kenya. Remember her, the girl that
2 shot him. Shot him. We'll get back to her in a minute.

3 Everything Mr. Riley said, is it legal? No. We'll
4 talk about it in just a second. Let's talk about what the
5 State has done in an attempt to corroborate this
6 eyewitness identification. And I will submit to you that
7 the reason that they're trying to corroborate the
8 eyewitness identification is because they know darn well
9 there's problems with it.

10 Mr. Sheldon has been practicing law a long time.
11 He's a smart guy and a smart lawyer. The interaction
12 between photo I.D. and criminal law is well known to all
13 of us. He knew we were bringing an expert witness in this
14 field. So what does he have to do? There's some
15 problems; I think there might be some problems with the
16 I.D.; I need to give them something else, something good,
17 something to hang on to. Something corroborated. So this
18 is how they corroborate.

19 Again, this is the State's case. They're calling
20 these witnesses. We've got to get from - they've got to
21 get from [REDACTED] Drive to Marion Powell. So how do
22 they do that?

23 Well, Senora Jones and Abriya and the three other
24 kids were in the house at [REDACTED] Drive when this
25 happened. No question about that. Nobody disputes that.

1 And Senora Jones is married to Cleven Jones, okay. We
2 didn't disagree with that. We didn't argue about that.
3 There's no question about that. This is where their trail
4 kind of gets cold for three years, because this is a
5 three-year-old case. Whatever happened, the State
6 investigated and used all their resources and everything
7 else, and they figured out, for what it's worth, that
8 Cleven Jones was having an affair with Paulette Moultrie.

9 And the State calls Cleven Jones, and on the stand in
10 front of his wife asked him all those questions. It was
11 awkward, it was embarrassing, and it was over the top.

12 What else did they do to Cleven Jones? Well, they
13 brought out weren't you convicted of drug distribution and
14 trafficking in the late 90's? Yeah. What does that have
15 to do with anything?

16 I mean, typically, when you bring up a prior
17 conviction, you're trying to impeach a witness, saying,
18 hey, they have a prior record, so I'm going to impeach
19 him. They did that.

20 And then, they come in later on to Detective Rice and
21 say, we had the house under surveillance; and we saw
22 Cleven Jones in March of 2010 driving his Audi over in the
23 Grays Hill area right there; and we followed him all the
24 way to Bluffton. But all these people we're talking about
25 life in Big Estate.

1 That's interesting. That's racy, sexy, whatever you
2 want to call it. But it's got nothing to do with this
3 case and nothing to do with the ultimate issue. He's
4 having an affair with Paulette Moultrie. We'll call her.

5 So this lady comes down from Charlotte. Weren't you
6 having an affair with Cleven Moultrie? Yeah, yeah, yeah -
7 I mean, Cleven Jones. Yeah, yeah, yeah, yeah, yeah. What
8 does Paulette Moultrie add to this case? Nothing. I
9 mean, real - I guess it's interesting and it's racy and
10 slight realty T.V., but I don't know.

11 Then, though Paulette Moultrie - and he said in his
12 opening, she had a relationship, maybe more, with Kenya
13 Hagood. Of course, Paulette denied the State's theory
14 about a lesbian relationship. But nevertheless, where are
15 we going with this? It's so - so tenuous. And then, they
16 say, well, Kenya knew Byron Young, and then Byron Young
17 knows Marion Powell. So that's corroborating evidence of
18 this lineup. And the way that they did it should suggest
19 to you how desperate they are to try to get something
20 else, some other evidence, because there's a big problem
21 with the I.D., which we'll talk about in a minute.
22 There's a big problem. Why do this?

23 Oh, and then he also brought in, who was it, Thomas
24 General, all the way from prison to come in and say, yeah,
25 everybody knew that Paulette and Kenya, I think they might

1 have had something going on. He said:

2 *Why don't you tell us about Byron and*
3 *Marion. Let's tighten that thing up a*
4 *little bit.*

5 *Well, in 2010, I don't even think they*
6 *were hanging out together.*

7 That's their witness who was brought all the way from
8 prison to come testify to that. It's real interesting,
9 this story. And it's interesting to notice what you have
10 to do.

11 I put six degrees of separation. It's six steps to
12 do that. Why is that interesting? Some people nowadays,
13 when it was called six degrees of Kevin Bacon, and
14 supposedly, the theory is you can thank him - one person
15 being in a movie, and then another person goes six
16 degrees. The basis of that is something - a theory called
17 six degrees of separation, which says, any thing or any
18 person in six person-to-person introductions can be
19 connected to any other person in the world. In the world.
20 I guess I could be connected to Vladimir Putin or you all
21 could be connected to, I don't know, Tiger Woods, whoever.
22 You can do it anywhere in the world, which is six steps of
23 separation. They've got to go from there to there. 35
24 miles, I think Rice said, and it took them six steps to do
25 it. And that is how they want to corroborate the

1 reliability, the accuracy, of this photo lineup.

2 Let's talk about the other issues. What else did
3 they use to bolster, to corroborate, the I.D. that they're
4 worried about?

5 Well, they said, oh yeah, you know, Byron - Marion
6 and Byron's phone calls. They requested and listened to
7 all their phone calls for over a year period. I think
8 there were 60 of them in what, one week or so? I don't
9 think it's that unusual, but there's 60 of them. So what
10 do we have? We've got two. And they're saying, look,
11 read this, and that is corroborating evidence that this
12 lineup wasn't suggestive; that it was an accurate
13 identification. Read this jail conversation or these
14 phone conversation these people had. And I highlighted
15 the part. Read into this, you know, get the officer to
16 say what the code words are. Marion Powell, no, I'm
17 saying that, basically, somebody's been running their
18 mouth about some shit on the outside looking in.

19 That means - and what he was trying to tell us,
20 that's their confession, I guess. Or that's how he's
21 supposed to have the information. This is March 9, 2013,
22 he talks about I just had a visit - he just had a visit
23 with his lawyer and what his lawyer told him.

24 So, if you want to believe their story, they're
25 relying on this. It talks about on the outside looking

1 in. It doesn't say anything about somebody on the inside,
2 who is Eric Riley, who their theory is this is the snitch
3 that Marion bonded with and just really got to know,
4 because he had this tight, tight thing with Kenya, which
5 isn't supported by anything. That's a confession? Or
6 maybe this is the confession that bolsters everything.

7 April 25, 2013, Byron Young:

8 I've got a girlfriend. You know I got
9 a girlfriend. She stay in Mill Creek.

10 I don't know where the hell that is.

11 I know.

12 And then, there's laughing.

13 So this is a guy that's been in jail for over two
14 years, who's talking to his buddy, who, fortunately,
15 accepted his phone call. He's been in jail, he had a
16 meeting with his lawyer, he has all his stuff in the jail.
17 He has, no doubt, talked to his friend about his case, and
18 that's why he's in jail. And just because of an
19 inappropriate perhaps. Huh? That's a confession? And
20 that's the proof beyond a reasonable doubt that they want
21 you to rely on to convict Byron - I mean, Marion Powell?
22 No way.

23 I think they're also going to probably say, well,
24 Marion Powell fled. There was evidence of flight. You
25 know, this happened in October, and he wasn't arrested

1 until March, so that's five months. I guess they'll make
2 the argument, because they brought in that testimony.
3 Well, what else did you hear when you got out there?
4 Marion Powell called the police and said, hey, I hear they
5 got warrants for me; I'm in Knight's Inn in Huntersville;
6 come pick me up. The guy drove up and said he was like
7 this, no trouble, cooperated fully. I mean, is he trying
8 to run? And is that evidence of guilt, which then
9 bolsters that bad photo ID? No, it doesn't.

10 The other thing I think - again, I've got to go
11 first, so I'm trying to answer some of those things. The
12 other thing that they are leaving in here without saying
13 it - I don't know whether they want to say or just want
14 you to assume - is this big drug angle. Why are they
15 calling all these witnesses to establish this? And
16 everyone was, oh, you've been a convicted drug dealer.
17 You had a conviction in '97 for drugs.

18 The only connection, I guess - and again, they're
19 trying to prove, without saying or proof, without proving
20 it is the people that went in, I guess, said give me the
21 money and the dope. I think there was a quote about that.
22 And if I'm not mistaken from the inference, I think
23 they're probably going to say, look our victims, the
24 Joneses, \$51,000.00 worth of stuff was stolen, and she's a
25 nurse, and we're not quite sure where he works. This

1 isn't the State who's going to be arguing this. One of
2 the victims. Must have been dealing drugs, because there
3 was so much stuff. There were \$600.00 tennis shoes, Prada
4 handbags. I'm not saying that. I'm saying that's what
5 you got to believe, because the State's telling you that.
6 And why would they tell you that? I'm not sure why they
7 bring people in here, try their case, and then, beat them
8 up like that, their own witnesses. But there's nothing to
9 that. There's no evidence to suggest any of that.

10 Then, as we go through the trial, all of a sudden,
11 three years later, on the stand, Senora Jones looks at a
12 lineup and says that's - I recognize that guy. In court
13 three years later, after she's been working on the case,
14 she's been watching the case every day, she's been hearing
15 all this information, she does it. Is she trying - is she
16 lying? She's not lying. She's mistaken. She's trying to
17 help. I don't blame her one bit, at all.

18 So what these things that we're talking about are
19 that they're going to attempt to show are called red
20 herrings. The red herrings are things that divert your
21 attention away from the real issue. The real issue here
22 is the lineup, no question about it.

23 Certainly, this speculation and this innuendo and
24 everything else that they've produced would never, in and
25 of itself, be enough to convict anybody of anything. And

1 the underlying problem with all of the speculation, all
2 the corroboration that they're attempting to use is that
3 it hinges on - every bit of it hinges on two things.

4 One is, okay, we proved all this to you and we were
5 so sure that this is so important to a jury for proof, you
6 know, what we're going to do. We're going to get this guy
7 named Eric Riley to come in to tie it all together and
8 take us back up here. That's exactly - if you think about
9 it, that's what he did when he was first approached
10 November 12th, some six days before the trial started, and
11 given the deal of the century, with the hopes that Mr.
12 Sheldon is going to beg for him in front of the judge.
13 There's going to be a hearing with just Mr. Sheldon and
14 just the judge and just Eric Riley. Who's going to fight
15 the Solicitor? There's not going to be anybody on the
16 other side. So this depends on Eric Riley telling the
17 truth, which we know is not true.

18 The other thing that all this corroboration
19 supposedly fails to talk about and fails to consider is
20 everything they talk about involves Byron Young from Kenya
21 Hagood, who supposedly - Kenya Hagood supposedly set the
22 whole thing up. And they have such a good witness who's
23 testified to that under oath and has gotten this fantastic
24 deal. And Byron Young, all the evidence against Byron
25 Young, I mean, he contested through the Mill Creek thing

1 and all that. Neither one of them have been charged, much
2 less arrested. And it's three years old. And it's
3 disingenuous to come in here and try to backdoor
4 indirectly, whatever you want to call it, the charge
5 against Marion Powell on the backs of Byron Young and
6 Kenya Hagood when you haven't even charged them, for three
7 years. That is ridiculous. And it's intellectually
8 dishonest to say, well, we're going to help prove the case
9 against him by all this good information. We have Byron
10 Young and Kenya Hagood, but we're not even going to charge
11 them. We don't even have probable cause to arrest them,
12 but we want you to use - we want you, jury, to find proof
13 beyond a reasonable doubt and find that we provided proof
14 beyond a reasonable doubt. That's where your inkling
15 always needs to come to. Eric Riley and why weren't these
16 other people, five of these other people been arrested,
17 three years later? They've got it all figured out. This
18 corroborates exactly what the witnesses said, Marion
19 Powell being involved. Fine, but it is - you have to keep
20 that in mind.

21 So, let's talk about what this case is really about.
22 This case is really about a photo array, a bunch of them
23 that were shown to Senora Jones and her daughter. And if
24 you noticed, I didn't go after them. Why should I? But
25 as weird as it sounds, the only person who truly lied in

1 this whole trial on the stand was Eric Riley.

2 Did Senora Jones lie? No. Did Abriya? Absolutely
3 not, not for a second. Do they honestly believe that they
4 picked out the right person? Yes, they did. And they
5 cannot be blamed for that. They want to see the person
6 punished and - they want to see the right person punished.
7 They did the best that they could under the circumstances
8 they faced that day. And if I did anything at all towards
9 them, please don't hold it against my client. I agree
10 with what they say as far as what happened. And they're
11 going to say, I'm positive, I'm absolutely sure.

12 And you heard from Dr. Van Wallendael why that
13 happens, in the situations in which that happens. And I
14 don't know all the details for the 300-something Innocence
15 Project cases that have been DNA exonerations. I'm sure
16 that you can't fit them into one tidy, little label. But
17 what they do all involve is 75 percent of them that
18 involve witness identification is somebody, young, old,
19 black, white, man, woman - I don't know - but somebody
20 getting on the stand, under oath, and saying the defendant
21 is the guy who did it, and I'm sure of it, I'm certain of
22 it, I'm absolutely - whatever the case may be. We know
23 that.

24 Why is this case any different? What makes it even
25 worse, I think, for these victims, I mean, there's no

1 question they were robbed or anything else. The question
2 is who? And you spend all the time with PowerPoint and
3 everything else, but I really, really am sympathetic
4 towards them. You should be, too. I asked you in the
5 opening, please don't get blinded by it, but we're all
6 sympathetic. Everybody in this courtroom is sympathetic.
7 I'm sorry that that happened, I absolutely am.

8 So they got to go through that. Then, they've got to
9 come to court. And yeah, we talked a little bit about
10 changing the identification a little bit. But then they
11 have to come to court. And the lawyer representing them,
12 like we said, starts wanting to talk about affairs and
13 that their house is under surveillance and that they
14 followed Mr. Jones over to Grays Hill and suggest that,
15 you know, why put in - why put in all the evidence about
16 the \$51,000.00 worth of stuff that stolen out of their
17 house?

18 The State is trying to piece a puzzle together in
19 order to prove something else that they have a problem
20 with. And I truly am sorry for what they've had to go
21 through, no doubt. I mean, we're not saying that they are
22 intentionally doing something - I shouldn't say that.
23 Abriya and Senora, do they believe they're right? Yeah.
24 And they always will, and that's fine. And they believe
25 that they're right. They are believable. They are

1 confident. But what does that mean? And you heard Dr.
2 Van Wallendael talk about exactly what that meant in a
3 scientific way, based on the studies that they've done.

4 So, what do we do? As a jury, you're in a position -
5 I've got two people, sweet people, nothing - nothing
6 against Marion Powell personally. Good people who,
7 unfortunately, had a lot of their personal life exposed,
8 but it wasn't by the defense. And they're sitting on that
9 stand and they're saying, I'm sure, I'm certain, I'm
10 really positive about that.

11 As a jury, what effect would your verdict have on
12 that? Well, none, because they're always going to believe
13 that Marion Powell was one of the guys in the house no
14 matter what happens.

15 If you find Marion Powell not guilty, they're still
16 going to believe it.

17 If you find him guilty, they don't know that it was
18 based solely upon their identification. They will never
19 know that. So it's not like you're sending a message
20 saying, hey, good job you all were accurate and you did it
21 right.

22 So, if you worry about what they may think, that's
23 improper consideration for you. And what you can do,
24 though, is exactly what you're here to do, to keep in mind
25 the burden of proof. To keep in mind your role as a juror

1 to apply the facts you heard to the evidence. So,
2 remember that proof beyond a reasonable doubt, or
3 reasonable doubt, is the type of doubt that can cause a
4 person to hesitate to act. And sometimes it's tough, if
5 you have some hesitations to say, well, that means the
6 only verdict is - the proper verdict is not guilty.

7 Sometimes that's tough. Because we'll have two
8 victims - if it wasn't proven by two victims that go home,
9 they get the satisfaction, I guess, of seeing somebody
10 convicted.

11 But hey, if the State's case is that strong, let's
12 get Kenya Hagood up here, let's get Byron Young and try
13 them.

14 So the great enemy of the truth is often not the lie,
15 which is deliberate, contrived and dishonest. And
16 clearly, everything Eric Riley says, which is crucial to
17 the State's case is deliberate, contrived and dishonest.

18 I can't really put a label on why no one else has
19 been charged, other than the issue should cause you
20 extreme skepticism and extreme hesitation to then
21 bootstrap Byron Young and Kenya Hagood to get Marion
22 Powell.

23 If it's such a good case, if they're so sure, if
24 they're willing to make all these deals, bring them in
25 here. They subpoenaed everybody else. They got people

1 from all over the corners of the state to come in here.

2 So the great enemy is not the lie but the myth,
3 persistent, persuasive and unrealistic. You've heard
4 about the myths of eyewitness identification, that
5 believability is not equal accuracy. And as she explained
6 it, she testified to the things that were in this case.

7 So we respectfully ask you to return a verdict of not
8 guilty. A myth of believability equaling accuracy.
9 Hopefully, you learned about that today from the good
10 Doctor. And when you look at that, we believe that the
11 State's case absolutely lacks proof beyond a reasonable
12 doubt.

13 The appropriate verdict is not guilty, and we
14 anticipate your verdict. Thank you.

15 THE COURT: Thank you. Mr. Sheldon.

16 REBUTTAL CLOSING ARGUMENT ON BEHALF
17 OF THE STATE BY MR. SHELDON:

18 MR. SHELDON: Thank you. Mr. Lee said something that
19 sounded - I couldn't agree with any more. No matter what
20 you do today, after you find him guilty - now, I'll argue
21 while you should in just a moment - it's not going to
22 change these people's lives. Their lives are already
23 changed forever.

24 In his opening statement, Mr. Lee talked about a
25 Sherlock Holmes story with a castle. In this country, in

1 this state, in this county, in Bluffton, South Carolina, a
2 person's home is their castle. Because of what the
3 defendant did on October 25, 2010, the two people that
4 went into their house with him, Ms. Jones can't build a
5 fence tall enough around her home. She cannot put enough
6 locks on her doors to feel safe inside that home again.
7 There aren't enough locks in this world. There's not a
8 warm parent's bed snug enough, safe enough to take away
9 the fear of those four children. It doesn't exist. And
10 they will live with that for the rest of their lives.

11 He quoted John F. Kennedy, God rest his soul. I'm
12 going to quote Martin Luther King, Jr., God rest his soul:

13 *The arc of the universe is long, but*
14 *it bends towards justice.*

15 We truly learned this information from Mr. Riley just
16 last week. Admittedly so, sometimes our office doesn't
17 have the best communication with each other; that's our
18 fault. And in due time, if I have anything to do with it,
19 the other two will be on trial, as well. That's neither
20 here nor there. What's here -

21 MR. LEE: I object to him giving testimony as what
22 he's planning on doing. I think it's not appropriate. I
23 apologize for the interruption.

24 THE COURT: Testimony of what?

25 MR. LEE: He's testifying that he intends to possibly

1 later prosecute people that he hasn't prosecuted. I think
2 that's the testimony by him that is inappropriate.

3 THE COURT: Overruled. Go ahead.

4 MR. SHELTON: Thank you. Because what's here is
5 Marion Powell, so let's focus on that.

6 In his opening statement and just now, Mr. Lee admits
7 that he is not questioning anything that happened to those
8 people that day, these four victims. So everything that
9 was done by whoever went into their home, whatever that
10 is, if it equals the crime as it's charged, they're guilty
11 of it. So let's look at that.

12 First of all, armed robbery. Someone who commits a
13 robbery. Powell served as a lookout while others tore the
14 house apart and stole items. He ordered Senora Jones to
15 give her cash. Remember the hand of one is the hand of
16 all. Even if he doesn't take the cash, he's still guilty
17 of the robbery.

18 Armed with a deadly weapon, which is a pistol.
19 Powell had a pistol. All the co-defendants had pistols.
20 Hand of one, the hand of all.

21 Kidnaping. Whoever shall unlawfully seize, confine,
22 inveigle, decoy, kidnap, is guilty of kidnaping. And this
23 is the law. These aren't my words. This is the law.

24 Confine means to limit, restrict, keep in, shut in,
25 enclose within bounds. Senora Jones said the defendants

1 yelled at her:

2 *Get on the ground; don't move.*

3 Again, this isn't even questioned this happened.

4 Abriya H[REDACTED]:

5 *They held us at gunpoint.*

6 Against the law.

7 *Forced us up the stairs.*

8 That's kidnaping for each and every one inside that
9 house. Senora Jones, the mother; Abriya H[REDACTED], the ten-
10 year-old; Cleven J[REDACTED], the III, a 4-year-old-male;
11 Michelle V[REDACTED], 7-year-old female; and Alicia V[REDACTED], a
12 4-year-old female. Five counts of kidnaping.

13 Burglary in the First Degree. Anyone who enters a
14 dwelling, a home, this is obviously a home, without
15 consent. They went through the back door and forced the
16 children inside with guns. With intent to commit a crime
17 therein. You can consider the crimes they intended to
18 commit larceny, robbery or kidnaping, while armed with a
19 deadly weapon. All three assailants had guns.

20 The possession of a weapon during the commission of a
21 violent crime. Possession of a weapon, a pistol, or what
22 appears to be a pistol. All three assailants had guns.
23 Again, during the commission of a violent crime.

24 Burglary in the First Degree, kidnaping, armed
25 robbery and all violent crimes. So, on their face, called

1 undisputed facts of the case. They're guilty of
2 everything. He's guilty of everything he's charged with.
3 The only question is technique says hand of one is hand of
4 all. Was it Marion Powell? So, let's talk about that.

5 We have direct and circumstantial evidence. Direct
6 evidence is the testimony of a person who claims to have
7 actual knowledge of a fact, such as an eyewitness. It is
8 evidence, which immediately establishes a fact.

9 Abriya H■■■■, remember she testified how he walked up
10 and down the stairs three times. He handed her cousin a
11 Kleenex. You saw the picture of where they were sitting
12 up against that wall. They were right here sitting next
13 to each other, all huddled together. Look how close he
14 was to her, handing a Kleenex to her cousin.

15 *They told us to stop crying.*

16 And then, she remembers him yelling for her mom to
17 get on the ground. And think about this, they left with
18 luggage and handbags and purses, that's what Abriya said.
19 Marion Powell and the two guys with them left with
20 handbags and purses. Think about that.

21 She understood the instructions when they were read
22 to her. She's a smart child. Admitted that, if she
23 wasn't sure, she could get someone in trouble for no
24 reason; and that she shouldn't lie in court, because it
25 could get someone in trouble who didn't deserve it. I may

1 be paraphrasing her words, but you can recall what she
2 said. And then, she identified the defendant again, and
3 again and again. She's absolutely sure. She has no
4 doubt. And I do think you should take into consideration
5 that she failed to identify anyone in seven other lineups.

6 There was so much pressure on her and she was under
7 so much influence. Wouldn't you feel pressured to
8 identify someone? But she declined to. She didn't,
9 because she didn't see anyone in those lineups. She
10 understood what she was supposed to do. She understood
11 what those warnings meant.

12 Now, Senora Jones. He was the second one in the
13 room:

14 *Ordered me to get off the phone. Put*
15 *down the phone.*

16 So she saw him then.

17 Three years later, without reading her statement -
18 she never read her statement in the three years - she
19 testified to that. Remember she complained when she was
20 on the stand, because we didn't give her the statement
21 that morning. She remembered all these details. She
22 remembered black shirt and faded, black jeans. What did
23 the officer read back in the report:

24 *Black shirt, faded black jeans.*

25 What the defendant had on.

1 The arrest report, one of them showed 6-1, 180
2 pounds. The booking report shows 5 feet-11 inches, 155
3 pounds. Jimmy Duke's report, the lead investigator, said
4 that Senora Jones told him that the defendant looked
5 around 6-1 inches, 180 pounds. You can get into details
6 of that. Even an officer testified under cross-
7 examination from Scott Lee that there's oftentimes
8 variances, even booking reports. That's pretty darn close
9 for someone who is observing someone.

10 Like I said, they didn't have time, they weren't able
11 to wait, and they weren't able to put them up against the
12 wall, measure his height.

13 And then, remember her testimony when she was
14 pleading with him. Think about that. She was looking
15 into his eyes, looking into his soul, trying to find
16 humanity in him. She was trying to reason with him. She
17 wasn't looking at his gun. She was studying him. She was
18 trying to make a human connection with him in her own
19 bedroom on the floor, and ordered to give them the money
20 or they were going to kill her. She was in survival mode,
21 protecting herself and her children.

22 She immediately picked him out of the lineup. There
23 was no hesitation. That's him, that's him. And she
24 declined to pick out Byron Lil Lil Young out of the lineup
25 out of extreme caution, because of the warnings, even

1 though she thought it was him. Remember, she paused in
2 lineup number three. And then, in front of you, three
3 years later, never seen that lineup again, selected him.

4 Now, defense is acting as if the State is coming up
5 with all this on its own. Unfortunately, the truth is
6 stranger than fiction. Lord only knows that we wish these
7 facts weren't true. Subject Number 3 is a light, medium
8 tone. There is no cross-racial identification in this
9 case. Remember when the expert just testified about
10 cross-racial identification, the problems with that.

11 Think about how she defined the three different
12 assailants, the attention to detail she paid to those
13 individuals. And that person had ear-length dreads and
14 his face was not covered. Crazy like he's on drugs. That
15 person was still not identified.

16 Subject one had his face covered, dreads pulled back,
17 and only his eyes showing. And that person just happens
18 to be in Exhibit Number 49, Byron Young. And she said:

19 *Based on his eyes, that's him.*

20 She didn't think it was fair, considering the
21 warnings at the time, to base her identification on his
22 eyes alone, and that's understandable and commendable by
23 her. And remember, she had not seen that lineup since
24 October 26, 2010. And then, three years later, she comes
25 back and she still remembers the face, the eyes. And it

1 just so happens to be Byron Lil Lil Young.

2 More direct evidence. Marion Powell says to Eric
3 Riley, Kenya sent him to rob a dude. Only a dude was
4 supposed to be home. Only children and girlfriend were
5 supposed to be there - were there - ended up being there,
6 rather.

7 He was mad at Kenya because she gave him bad
8 information as to when to hit the house. And he committed
9 the crime with Lil Lil. Lil Lil is Byron Young.

10 Is it a coincidence? No, it's not coincidence that
11 Senora Jones picked Byron Young out of that lineup the
12 other day.

13 Circumstantial evidence. Circumstantial evidence is
14 proved by the chain of facts and circumstances indicating
15 the existence of a fact. Circumstantial evidence is based
16 on inference, and not on personal knowledge or
17 observation. There is no distinction under the law
18 between direct and circumstantial evidence.

19 So, go to circumstantial evidence. And it's ugly. I
20 told you at the beginning of this case that it's ugly.
21 And the State wishes we didn't have to talk about these
22 things. But again, we don't make up the facts. We
23 present the facts as they are. And you, as the jury, has
24 a right to know what all the facts are in a case, to the
25 best that we're able to find them.

1 She's from Grays Hill, Paulette Moultrie, the Cleven
2 Jones was having an affair with. Everybody out there in
3 Big Estate and Grays Hill, all of them know each other.
4 She knows Byron Lil Young. She's very good friends with
5 Kenya Hagood, and they've been friends for years. Another
6 startling coincidence, that he's having an affair with
7 someone who's really good friends with Kenya Hagood, and
8 maybe more. Well, now you'll never know that.

9 And then we have Keith Chisholm, who Cleven Jones
10 worked with for years. He was scared to death to be on
11 the stand, for whatever reason. Think about that. He
12 would see Paulette out, he was good friends with her, tell
13 Cleven about it, and then he'd get a call from Kenya. Why
14 is he getting a call from Kenya when he tells Cleven that
15 he sees Paulette out? Some connection there.

16 Spent time with the Joneses, so he's close enough
17 with the Joneses to go to concerts together. He has known
18 Kenya and Paulette since the '90's. He was having a
19 sexual relationship with Kenya, and he is also a convicted
20 drug dealer.

21 Again, we don't make up these facts; they're facts.
22 So how did the defendant get to Mill Creek? That's a
23 question they're acting like it's so far away. That's
24 it's another universe. However, in fact, it's not.
25 Investigator Andrew Rice of the Beaufort County Sheriff's

1 Office and said that Mr. Jones' Audi SUV was observed in
2 Grays Hill. Remember, Paulette is from Grays Hill, and
3 she says everybody knows each other out there. Do you
4 think that's not going to catch the attention of folks out
5 in Grays Hill, someone driving - I don't know - a \$60.00,
6 \$70,000.00 Audi SUV?

7 The Jones' house was under the Drug Task Force
8 surveillance in September 2010, just a month before this
9 armed robbery, and he has all these connections with
10 Northern Beaufort County. I'm not asking you to hold your
11 judgment on this or direct your verdict on this, but it's
12 just evidence to consider.

13 Kenya Hagood. Senora Jones' angry phone call from
14 Paulette Moultrie:

15 *Your husband isn't the man you think*
16 *he is.*

17 Kenya has a close relationship with Paulette. And
18 then, Riley says that he has no special bond with the
19 defendant. Despite what the defense attorney would like
20 you to say, it suggests Kenya.

21 And regarding the home invasion, what did the
22 defendant tell Riley?

23 *Just the dude was supposed to be there.*

24 *Not the kids, not the girlfriend.*

25 And then the jail calls. Over 190 attempts to call

1 Byron Lil Lil Young from Marion Powell in jail. It just
2 so happens to be that's the guy that Senora Jones just
3 picked out of the lineup. It just so happens to be the
4 guy that Marion Powell confessed to Eric Riley to being
5 the guy that went into the house with him. Is that just
6 another coincidence? No. It's beginning to pile up here.

7 As you listened to the jail calls, consider - again,
8 this is just something in addition to everything else,
9 this isn't one thing for you to hold a jury verdict on.
10 Think of all the evidence together.

11 Consider this when you're listening to them. Riley
12 says that things took a turn between him and Powell.
13 Moved dorms the end of April and that started a few weeks
14 before then. And then, Powell was talking to him before
15 then about N word, playing dangerous games, AKA, otherwise
16 known as, snitching.

17 In the context of Eric Riley, in the context of what
18 we know about Kenya Hagood, just think about that. I'm
19 not saying this is a confession. Why did he have to send
20 him something in the mail? Why can't he just tell him
21 over the phone? If there's nothing to it, why doesn't he
22 just tell him? If it's some hair-brained idea that Kenya
23 Hagood is involved, why doesn't he just tell him? Instead
24 he says:

25 *Shorty, old girl.*

1 Man, I'm lost, brother. You're usually
2 faster. But anyway, your brain usually
3 faster. Come on, man. You know what I'm
4 talking about. Listen to me. I guess I'll
5 just have to write you a letter.

6 Again, Riley:

7 Kenya set up the armed robbery.

8 The defendant told him:

9 Person playing dangerous games.

10 Defendant believed he had snitched about - on him
11 about Kenya.

12 You know, that's a real funny inside joke. It's
13 hilarious.

14 Now, the defendant's expert witness never interviewed
15 Abriya; never interviewed Senora. There was no cross-
16 racial identification in this case. You can look at the
17 lineup yourself and look at it and study it. There's
18 multiple people in that lineup that look a little
19 different from everyone else. Look at it and do a test
20 and see how many people in that lineup that you would
21 determine have large, flared nostrils besides the
22 defendant. There's at least four of them, not just the
23 defendant. Is his head tilted back a little bit? Sure.
24 Is someone else's tilted back a little bit? Yes. One is
25 kind of cocked to the right, another one is kind of cocked

1 to the left. And there is one guy with his lips pursed,
2 looking away from the camera. Everyone looks a little bit
3 different in that lineup.

4 There's existence of lots of corroborating evidence
5 in this case, despite what the defendants want you to
6 believe. And she cannot say whether their I.D. is
7 incorrect, she can't. And it's interesting she didn't
8 know anything about the corroborating evidence when she
9 testified first, after I brought it up to her.

10 Use your common sense. There's a reason the laws of
11 this country do not go by what she says, and that's
12 because the courts recognize that you cannot recreate
13 situations like this. There are no practice runs of
14 someone truly having their life flashing before their
15 eyes.

16 In all of those cases, she talked about wrongful
17 identification. How many could be equated to this case
18 when we broke it down? None, not a single one. Most of
19 them are uncorroborated witness testimony, eyewitness
20 testimony. Remember that? And almost - and a lot of them
21 are cross-racial. She's a hired gun. The State didn't
22 call her as a witness because we enforce the law. We
23 don't have her testify, because what she says is not the
24 law. That's why she only testifies for the defense.

25 Now, again, a reasonable doubt means a real

1 possibility that the defendant is not guilty, not any
2 possibility. A meteor might strike us in three seconds;
3 we're still here. I don't mean to make light of it, but
4 it's not any possibility. There are few things in this
5 world, which we're absolutely certain. You cannot dissect
6 someone's mind and know exactly what they're thinking,
7 what they did. But a reasonable doubt is a doubt that
8 would make a reasonable person hesitate to act, not
9 hesitate to think. This is so serious, obviously. Think
10 about it.

11 And think about this. A great prosecutor that I'm
12 honored to call a mentor told me one time, when you try
13 the devil, you have to go to hell to get your witnesses.
14 And I thought, well, that's a harsh thing to say. And
15 then, I realized that it's really just at euphemism.

16 It's not that Marion Powell is a devil. Of course
17 he's not. He has a great family, supportive family. We
18 will never know why he did what he did. However, who will
19 a person like Marion Powell confide in? Is it going to be
20 your deacon at the church? No.

21 Is it going to be a coach, a bailiff, a law
22 enforcement officer? No. He's going to confide to
23 someone who's down in hell with him, Eric Riley.

24 You saw Eric Riley on the stand. You watched his
25 demeanor. You heard how he responded to questions

1 directly. He made no bones about it. He testified to the
2 good, the bad, the ugly and the indifferent. And believe
3 me when I say this, if I - if I, as a prosecutor, have to
4 make a decision on whether to maybe shave a couple years,
5 possibly, hopefully, in his eyes, because I don't even
6 have that power, off of somebody who was shot five times
7 by a drug dealer named Kenya Hagood in a drug deal gone
8 bad to ensure that justice is done on behalf of Senora
9 Jones and those four children, because he's testifying
10 truthfully, act together, there's no bones about it, I
11 will do it each and every time. A hundred times I'll make
12 the same decision. I'll never apologize. Because it's
13 the right thing to do.

14 If you begin to sway, if you begin to think there's a
15 real possibility, if you're not firmly convinced, go back
16 to Senora Jones' testimony. Remember it in your mind.
17 Remember when she said after the detective read the
18 warnings and flipped that lineup over and showed it to
19 her, and she immediately saw the defendant, she began to
20 feel like she immediately knew it was him and she felt
21 this relief. She knew that justice would be done.

22 I ask you to do justice, seek the truth, and find the
23 defendant guilty of every count he's charged with, because
24 the evidence compels you to do so. Thank you.

25 BY THE COURT:

1 OFF THE RECORD 12:30 P.M.

2 BACK ON THE RECORD 12:38 P.M.

3 JURY CHARGE, BY THE COURT:

4 THE COURT: Welcome back. Ladies and gentlemen, as
5 you have been told, the defendant in this case has been
6 charged by way of indictment with the offenses of
7 possession of a weapon during commission of a violent
8 crime; burglary in the first degree; armed robbery and
9 five counts of kidnaping.

10 I'll tell you, though, the fact that the defendant
11 was indicted in this case, was charged and arrested is not
12 evidence, cannot be considered by you as evidence. The
13 fact that he was indicted does not create any presumption
14 or any inference of guilt. These documents are simply the
15 vehicles that bring this case to court.

16 The defendant has pled not guilty to the indictments,
17 and the plea puts the burden upon the State to prove the
18 defendant guilty.

19 A person charged with committing a criminal offense
20 in this state is never required to prove himself innocent.
21 I tell you that it is an important rule of law that a
22 defendant in a criminal trial, no matter what the
23 seriousness of the charge may be, will always be presumed
24 to be innocent of the crime for which the indictment was
25 issued, unless guilt has been proven by evidence that

1 satisfies you of that guilt beyond a reasonable doubt.

2 This presumption of innocence does not end when you
3 begin your deliberations, but it accompanies the defendant
4 throughout the trial, until you reach a verdict of guilt
5 based on the evidence that satisfies you of that guilt
6 beyond a reasonable doubt.

7 The presumption of innocence is like a robe of
8 righteousness placed about the shoulders of the defendant,
9 which remains with the defendant until it has been
10 stripped of the defendant by evidence that satisfies you
11 of the defendant's guilt beyond a reasonable doubt.

12 The presumption of innocence is not mere legal
13 theory. It is not just a legal phrase. It is a
14 substantial right to which every defendant is entitled,
15 unless you, the jury, are satisfied from the evidence of
16 the defendant's guilt beyond a reasonable doubt.

17 A reasonable doubt is a kind of doubt that would
18 cause a reasonable person to hesitate to act. Some of you
19 may have served on juries in civil cases where you were
20 told that it is only necessary to prove that the fact is
21 more likely true than not true, such as by the greater
22 weight or the preponderance of the evidence, but in
23 criminal cases, the State's proof must be more powerful
24 than that. It must be beyond a reasonable doubt.

25 Proof beyond a reasonable doubt is proof that leaves

1 you firmly convinced of the defendant's guilt. But of
2 course, there are very few things in this world that we
3 know with absolute certainty. And in criminal cases, the
4 law does not require proof that overcomes every possible
5 battle. If, based on your consideration of the evidence,
6 you are firmly convinced that the defendant is guilty of
7 the crime charged, you must find the defendant guilty.

8 On the other hand, if you think there's a real
9 possibility that the defendant is not guilty, you must
10 give the defendant the benefit of the doubt in finding him
11 not guilty.

12 I remind you that, during this trial, I have had
13 certain duties to perform as the trial judge. I've had
14 the responsibility to preside over the trial and rule on
15 the admissibility of the evidence during the trial. You
16 are to consider only the competent evidence before you.
17 And as to the testimony that was ordered stricken from the
18 record in this case, you must disregard that testimony.
19 You should consider only the testimony which has been
20 presented from the witness stand and the exhibits that
21 have been made part of the record in this case.

22 I also have the additional duty to charge you and
23 tell you about the law that applies in this case, ladies
24 and gentlemen.

25 As the presiding judge, I am the sole judge of the

1 law in this case. It is your duty as jurors to accept and
2 apply the law as I now state it to you. If you already
3 have an idea of what the law is or what the law ought to
4 be, you must now agree with what I tell you the law is.
5 You must abandon that idea, because you are sworn to
6 accept the law and apply the law exactly as I state it to
7 you.

8 In every case tried before a jury, as I told you, the
9 jury becomes the sole and exclusive judge of the facts. A
10 trial judge, such as myself, cannot comment on or make any
11 statement to a trial jury about the facts in the case.

12 Since you are the sole judges of the trial and the
13 facts of this case, ladies and gentlemen, you are not to
14 infer anything I have said during the progress of this
15 trial in ruling on the admissibility of evidence or
16 otherwise, or anything that I've done or said during the
17 course of this instruction that I have an opinion about
18 the facts of the case. The law does not allow me to have
19 an opinion about the facts of this case. This is a matter
20 solely for you, ladies and gentlemen. You, as jurors. It
21 is your duty to determine the effect, the value, the
22 weight, and truth of the evidence presented during the
23 trial.

24 Now, you've heard there are two types of evidence
25 generally presented during a trial, direct evidence and

1 circumstantial evidence.

2 Direct evidence is the testimony that a person claims
3 to have actual knowledge of a fact, such as an eyewitness.
4 It is evidence which immediately establishes the main fact
5 to be true.

6 Substantial evidence is proof of a chain of facts and
7 circumstances indicating the existence of a fact. It is
8 evidence which immediately establishes lateral facts from
9 which the main fact may be inferred.

10 Circumstantial evidence is based on inference, and
11 not on personal knowledge or observation. The law,
12 though, makes no distinction between the weight or value
13 to be given to either direct or circumstantial evidence,
14 nor is a greater degree of certainty required of
15 circumstantial evidence than of direct evidence.

16 You should weigh all of the evidence in this case.
17 After weighing all of the evidence, if you're not
18 convinced of the guilt of the defendant beyond a
19 reasonable doubt, you must find the defendant not guilty.

20 Necessarily, ladies and gentlemen, you must determine
21 the credibility of the witnesses who have testified. This
22 simply means the believability becomes your duty as jurors
23 to analyze and to evaluate the evidence and determine
24 which evidence convinces you of its truth.

25 In determining the believability of the witnesses who

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

12 I instruct you and emphasize to you that the fact
13 that the defendant did not testify is not a fact to be
14 considered by you in any way in your deliberation and your
15 consideration on the question of the guilt or innocence of
16 the defendant. It must not be considered by you in any
17 manner whatsoever.

18 A defendant has a constitutional right to remain
19 silent, and the assertion of this right must not be
20 considered by you in your deliberations. Under your oath,
21 you can draw no conclusion whatsoever from the fact that
22 the defendant did not testify. The fact that the
23 defendant did not testify should not even be discussed in
24 the jury room. The burden of proof, as I have stated to
25 you, is on the State. The defendant is not required to

1 prove his innocence. The burden of proof remains upon the
2 State to prove guilt to you beyond a reasonable doubt.

3 As I told you earlier, ladies and gentlemen, the
4 rules of evidence normally do not permit witnesses to
5 testify as to opinions or conclusions. An exception
6 exists for witnesses that are called expert witnesses.

7 That's a witness who, by education or experience, has
8 become an expert in some art, science, or profession. And
9 they may state an opinion as to relevant and material
10 matters in which the witness claims to be an expert and
11 they give the reasons for their opinion. You should
12 consider these expert - the expert opinion received as
13 evidence in this case like other evidence. You give it
14 the weight you think it deserves.

15 If you decide that the opinion of the expert witness
16 is not based on sufficient education and experience, or if
17 you conclude that the reasons given in support of the
18 opinion are not sound or that the opinion is outweighed by
19 other evidence, you may disregard the opinion entirely.

20 An expert witness's testimony is to be given no
21 greater weight than that of any other witness simply
22 because the witness is an expert.

23 Further, you are not required to accept an expert's
24 opinion, even though it may not be contradicting.

25 I'll also tell you that, if a crime is committed by

1 two or more people who have acted together in committing a
2 crime, the act of one is the act of all. The person who
3 joins with another to accomplish an illegal purpose is
4 criminally responsible for everything done by the other
5 person which occurs as a natural consequence of the acts
6 done in carrying out the common plan.

7 Two or more people gathered together - or two or more
8 people are acting together, assisting each other in
9 committing the offense, the act of one is the act of all.
10 Or as is sometimes said, the hand of one is the hand of
11 all.

12 An issue in this case, ladies and gentlemen, as
13 you've heard, is the identification of the defendant as
14 the person who committed the crime charged. The State has
15 the burden of proving identity beyond a reasonable doubt.

16 You must be satisfied beyond a reasonable doubt of
17 the accuracy of the identification of the defendant before
18 you may convict the defendant.

19 Identification testimony is an expression of belief
20 or impression by a witness. You must determine the
21 accuracy of the identification of the defendant. You must
22 consider the believability of each of the identification
23 witnesses in the same way as any other witness.

24 You may consider whether the witness had an adequate
25 opportunity to observe the offender at the time of the

1 offense.

2 It should be affected by things such as how long or
3 how short a time was available, how far or how close the
4 witness was, the lighting conditions and whether the
5 witnesses had the chance to see or know the person in the
6 past.

7 Once again, I tell you that the burden of proof is on
8 the State to the extent of every element of the crime
9 charged. This specifically includes the burden of
10 proving, beyond a reasonable doubt, the identity of the
11 defendant as the person who committed the crime.

12 If, after examining all of the evidence, you have a
13 reasonable doubt as to the accuracy of the identification,
14 you may find - you must find the defendant not guilty.

15 During the trial, you have heard testimony from a
16 child. Where a witness is a child, we must determine, as
17 with any other witness, whether that testimony is
18 believable.

19 In deciding believability, you may consider not only
20 matters that I've already discussed with you, but you may
21 also consider the age of the child, the child's ability to
22 observe and remember the facts, and the child's ability to
23 understand and answer questions, because young children
24 may not fully understand what is happening here. It is up
25 to you to decide whether the child understood the

1 seriousness of appearing as a witness in this criminal
2 trial, whether the child understood the questions, and
3 whether the child has a good memory, and whether the child
4 understands the difference between lying and telling the
5 truth.

6 In addition, young children may be influenced by the
7 way the questions are asked. It's up to you to decide
8 whether the child understood the questions asked of them.

9 I tell you that a person who has a criminal record is
10 competent to testify here in a trial. A past record of a
11 witness does not affect the ability of that witness to
12 testify. The past record may only to be considered by
13 you, if at all, in determining the witness believability.

14 Remember, you are the sole judges of the facts in
15 this case and of the believability of any and all of the
16 witnesses.

17 The defendant in this case is charged, as you heard,
18 with first degree burglary.

19 The State must first prove, beyond a reasonable
20 doubt, that the defendant entered a dwelling without
21 consent.

22 The State must also prove, beyond a reasonable doubt,
23 that the defendant intended to commit a crime, either a
24 felony or a misdemeanor, at the time of the entry.

25 And the State must prove, beyond a reasonable doubt,

1 when entering or while in the dwelling or in fleeing, the
2 defendant, or an accomplice, was armed with a deadly
3 weapon or explosive; or when entering or while in the
4 dwelling or in fleeing, the defendant, or an accomplice,
5 used or threatened to use a dangerous object.

6 The defendant is also charged with armed robbery. In
7 order to prove this offense, the State must prove, beyond
8 a reasonable doubt, that the defendant took personal
9 property from another person or the property of another
10 person.

11 The State must also prove, beyond a reasonable doubt,
12 that the defendant carried the property away, intending to
13 permanently deprive the owner of the property, to keep the
14 property for the defendant's own use.

15 Taking and carrying away of the property must have
16 been done with violence or while putting the owner of the
17 property in fear of violence.

18 Finally, the State must prove, beyond a reasonable
19 doubt, that the defendant was armed with a deadly weapon
20 during the robbery. And I'll tell you that a deadly
21 weapon is any article or substance likely to cause death
22 or great bodily harm.

23 The defendant is also charged with kidnaping. The
24 State must prove, beyond a reasonable doubt, that the
25 defendant knowingly, unlawfully confined, kidnaped,

1 abducted, or carried away another person without authority
2 of law.

3 Seizing someone means taking hold of them suddenly or
4 forcing to confine, that means to limit, restrict or
5 enclosing within bounds, imprison or shut up or keep in.

6 The State does not have to prove the defendant did
7 all of these things. Instead, if you find, beyond a
8 reasonable doubt, that the defendant did any of these
9 things, you must find the defendant guilty of kidnaping.

10 The defendant is also charged with possession of a
11 weapon during the commission of a crime or attempt to
12 commit a violent crime.

13 The State must prove, beyond a reasonable doubt, the
14 defendant was in possession of a firearm or visibly
15 displayed what appeared to be a firearm. In order to find
16 the defendant guilty of possession of a weapon during the
17 commission of a violent crime, you must first find the
18 defendant guilty of either committing a violent crime or
19 attempting to commit a violent crime.

20 Violent crimes are statutorily defined in our code of
21 law, and I'm tell you that kidnaping is defined as a
22 violent crime, that armed robbery is defined as a violent
23 crime, and that first degree burglary is defined as a
24 violent crime.

25 The indictments in this case allege different

1 offenses against the defendant. Each indictment charges a
2 separate and distinct offense. You must decide each item
3 separately on the evidence and the law applicable to it,
4 uninfluenced by your decision as to any other indictments.

5 The defendant can be convicted or acquitted for any
6 or all of the offenses charged. And you will be asked to
7 make a decision as to each indictment and enter that
8 verdict as guilty or not guilty.

9 In just a moment, I'm going to ask you to step into
10 the jury room, ladies and gentlemen, and check and see if
11 lunch has arrived yet.

12 We know yet about lunch? Your lunch has arrived, so
13 I'm going to ask you to do this. All of you, including
14 the alternate jurors, retire to the jury room, but do not
15 begin deliberating, not until you finish lunch. And let
16 us know when you have completed lunch and are ready to
17 begin deliberating.

18 At that time, what I'll do is ask our two alternate
19 jurors to step back out into the courtroom, and I'm going
20 to send to the jury room the exhibits and the indictments.
21 And I'm going to ask our foreperson, if she will, on
22 behalf of the jury, write on each verdict - on each
23 indictment, excuse me, in the bottom, left corner where
24 the word - below the words *Verdict* and *Issued Indictment*,
25 the words *Guilty* or *Not guilty*, and sign your name as

1 foreperson.

2 Ladies and gentlemen, for there to be a verdict in
3 this case, all of it must be unanimous. As to each of the
4 indictments, it must be a unanimous verdict, meaning all
5 twelve of you must agree before there can be any verdict
6 on each of these indictments.

7 Ladies and gentlemen, if you would please retire to
8 the jury room and let us know when you are ready. I
9 remind you, it's too early to begin discussing the case.

10 JURORS LEAVE COURTROOM 12:58 P.M.

11 EXCEPTIONS TO JURY CHARGE:

12 BAILIFF: The jury is clear, Your Honor.

13 THE COURT: Any exceptions from the State?

14 MR. SHELDON: No, Your Honor.

15 THE COURT: Any additional exceptions?

16 MR. LEE: Just the one I just made, Your Honor.

17 Other than that --

18 THE COURT: Other than the one you have already made?

19 MR. LEE: That's correct.

20 THE COURT: Well, we're going to let them eat. When
21 they're ready, then, I'll sent this back with the
22 exhibits. Have you all made sure all the exhibits are
23 ready?

24 MR. SHELDON: Yes, Your Honor.

25 THE COURT: All right. We'll be at ease.

1 under that - if that's the case, then, first of all, the
2 State's not using it in that way, and didn't use it that
3 way in closing argument. And even if we did, we would
4 have to charge that in every single hand of one hand of
5 all case. And I just don't think it's appropriate and
6 it's needless. Confuse the jury most of all, so -

7 MR. LEE: My response would be that he just gave a
8 closing argument, talking about bolstering the
9 identification of Mr. Powell. He kept talking about
10 coincidences that tie Byron Young to Mr. Powell.

11 Just for the record, I would ask it to be included
12 that hand of one is hand of all cannot be used. While it
13 can be used for other things, it cannot be used for
14 identification.

15 THE COURT: I understand your argument, and I'll deny
16 the motion.

17 MR. LEE: Yes, sir.

18 THE COURT: Let's take five minutes.

19 MR. SHELTON: Thank you, Your Honor.

20 MR. LEE: Your Honor, I'm sorry, one more thing. At
21 this point, can I renew my previous motion to directed
22 verdict, as well?

23 THE COURT: The Court understands that motion, and I
24 deny the motion.

25 MR. LEE: Yes, sir.

1 MR. SHELTON: Thank you, Your Honor.

2 OFF THE RECORD.

3 BACK ON THE RECORD.

4 JURORS ENTER COURTROOM 2:19 P.M.

5 VERDICT:

6 THE COURT: Welcome back, ladies and gentlemen.

7 Ms. Kelly, let me ask you a few questions as
8 foreperson for the jury. The Bailiff indicates he
9 believes the jury has reached a verdict in this case. Is
10 that correct?

11 MS. KELLY: Yes, sir.

12 THE COURT: It the verdict unanimous?

13 MS. KELLY: Yes.

14 THE COURT: Did you reach a verdict as to each of the
15 indictments?

16 MS. KELLY: Yes.

17 THE COURT: Did you complete the verdict and write on
18 each of the indictments of either guilty or not guilty?

19 MS. KELLY: Yes.

20 THE COURT: Did you sign your name?

21 MS. KELLY: Yes.

22 THE COURT: Would you please pass the verdict - the
23 indictments forward. And Clerk, would you please publish
24 for me the verdict.

25 MADAM CLERK: In the State of South Carolina versus

1 Marion Benjamin Powell as to Indictment No.

2 2011-GS-07-00778 for the charge of burglary in the first
3 degree, we, the jury, find the defendant guilty.

4 As to Indictment No. 2011-GS-07-00779 as to the
5 charge of kidnaping, we, the jury, find the defendant
6 guilty.

7 As to Indictment No. 2011-GS-07-00780 for the charge
8 of kidnaping, we, the jury, find the defendant guilty.

9 As to Indictment No. 2011-GS-07-00781 for the charge
10 of kidnaping, we, the jury, find the defendant guilty.

11 As to Indictment No. 2011-GS-07-00782 for the charge
12 of kidnaping, we, the jury, find the defendant guilty.

13 As to Indictment No. 2011-GS-07-00783 for the charge
14 of kidnaping, we, the jury, find the defendant guilty.

15 As to Indictment No. 2011-GS-07-00784 for the charge
16 of armed robbery, we, the jury, find the defendant guilty.

17 As to Indictment No. 2011-GS-07-00786 for the charge
18 of possession of a weapon during a violent crime, we, the
19 jury, find the defendant guilty.

20 Madam Forelady and ladies and gentlemen of the jury,
21 if this is the decision of each and every one of you, if
22 you'll please indicate by raising your right hand, please.
23 Thank you.

24 THE COURT: Anything before the jury is discharged
25 from the State?

1 would - you want to do them now?

2 THE COURT: Yes, sir.

3 DEFENSE MOTIONS:

4 MR. LEE: We would renew our earlier motion for a
5 directed verdict for the reasons stated.

6 Also make a motion for a new trial based upon some
7 previous objections we had made. One of which, which I
8 think is very important, is the jury charge on the hand of
9 one is the hand of all. I believe that the case set up
10 perfectly, and I'm only speculating, I don't know what the
11 jury did, but set up perfectly for identification to be
12 established through that doctrine, which I believe is not
13 a proper manner or permitted use of the hand of one is the
14 hand of all. I believe it is more so to prove an element
15 of defense such as the taking away of property and that
16 sort of thing.

17 I also would renew our previous - and also, in the
18 motion for a new trial, would say, based upon the motion,
19 which were denied to suppress the phone calls from the
20 jail between Marion Powell and Byron Young, had those been
21 suppressed, we believe that a new trial - that the result
22 of trial would have been different.

23 Judge, so, singularly and cumulatively, you heard the
24 evidence. And we both made the same argument that there
25 was an I.D., and then there was other evidence. And it's

1 our position that other evidence was not substantial
2 enough to give credence or, actually, to the lineup. The
3 jury obviously felt otherwise. But had some of those -
4 some of that other evidence had it not been there, there
5 is a likelihood the result could have been different. And
6 for those reasons, I would respectfully ask for a new
7 trial on each and every charge, Your Honor.

8 THE COURT: All right. Mr. Lee, I understand your
9 arguments, most all of them, as hard as we - as you have
10 made before the court.

11 MR. LEE: Yes, sir.

12 THE COURT: But as previously ruled, I'm going to be
13 compelled to deny your motions.

14 SENTENCING:

15 THE COURT: Are we prepared for sentencing?

16 MR. SHELTON: Yes, we are. I'll give these to Mr.
17 Lee so he can review them -

18 THE COURT: Okay.

19 MR. SHELTON: - and make sure he thinks they're
20 correct. We just have to enter - we're putting his
21 address in one of the sentencing sheets, and leaving the
22 rest of them blank, so they'll have to base it on one -
23 his I.D., identifying information, that was on the rest,
24 Your Honor.

25 And Your Honor, I will bring to the court's attention

1 interest in his case. He's smart. He's funny sometimes,
2 when he writes me letters and stuff like that. He one
3 time sent me some brain teasers from the jail. But the
4 point I'm making is, I can see progress and development in
5 him from the almost three years he's spent in jail. And I
6 just throw that out there, because I think it is a
7 promising sign that he would benefit and become a better
8 person in the system and at some point, hopefully, get to
9 the point where he can get out and add to the society.

10 He's going to be - he's going to be a lot older, no
11 question about that. He's looking at a minimum of 15 just
12 on the burglary and, you know, by that time, hopefully,
13 Ms. Jones' kids will be grown and be better and, you know,
14 they don't have to worry about this again.

15 But I would respectfully ask the court to - whatever
16 mercy you can find. And I would ask the court to
17 respectfully consider maybe a 20-year sentence, knowing
18 full well he's going to do 17 years at a minimum of that
19 20-year sentence and which will make him 44 years old when
20 he gets out, and that's going to be a pretty good while
21 for anybody.

22 Do you want to say anything?

23 DEFENDANT POWELL: I can't.

24 THE COURT: Did you say you don't care to say
25 anything?

1 DEFENDANT POWELL: I said I can't say nothing right
2 now.

3 THE LEE: And he does have two other cases pending,
4 and I would advise him to - but I think he's - he doesn't
5 show it right now, but I believe he's probably too upset
6 to say anything.

7 THE COURT: All right. Anything else, Solicitor?

8 MR. SHELDON: No, thank you, Your Honor.

9 THE COURT: Mr. Powell, on the weapons charge, that
10 carries five years. I sentence you to the Department of
11 Corrections for a period of five years to be concurrent
12 with the other sentences and, of course, you would get -
13 on all of these cases you will get credit for any time
14 served as provided by law.

15 On each of the other cases, I sentence you to the
16 Department of Corrections for a period of 27 years.

17 Good luck to you, Mr. Powell.

18 MR. LEE: Thank you.

19 MR. SHELDON: Thank you, Your Honor.

20 THE COURT: Anything else before we adjourn court?

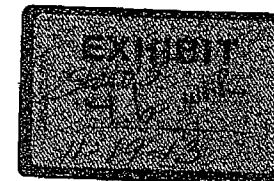
21 MR. SHELDON: A general order, Your Honor.

22 THE COURT: Court's adjourned.

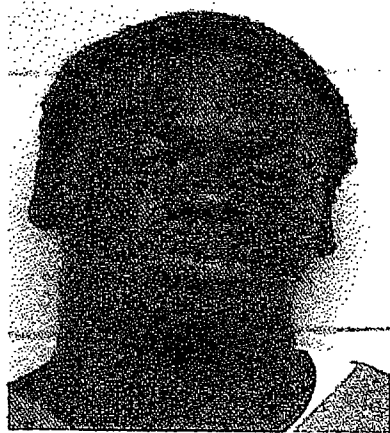
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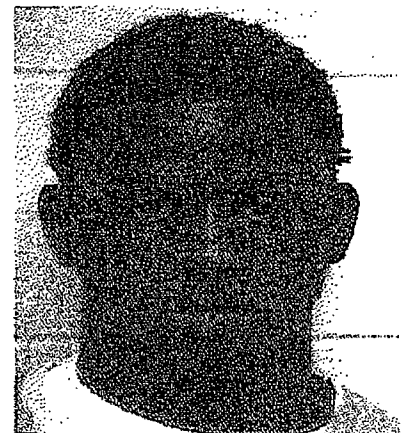
25 THE COURT: I forgot to mention, I was looking on the



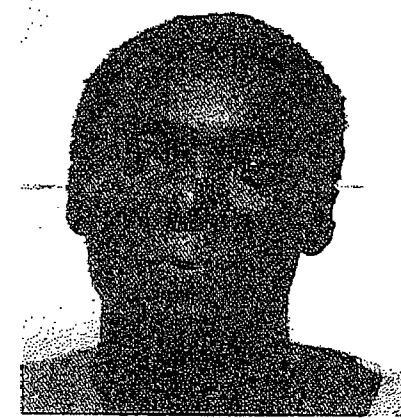
BLUFFTON POLICE DEPARTMENT



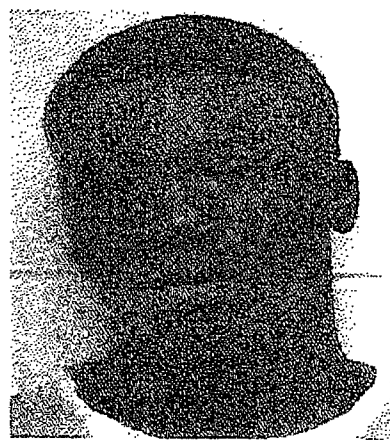
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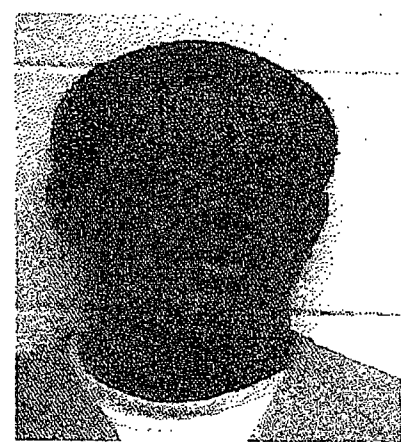
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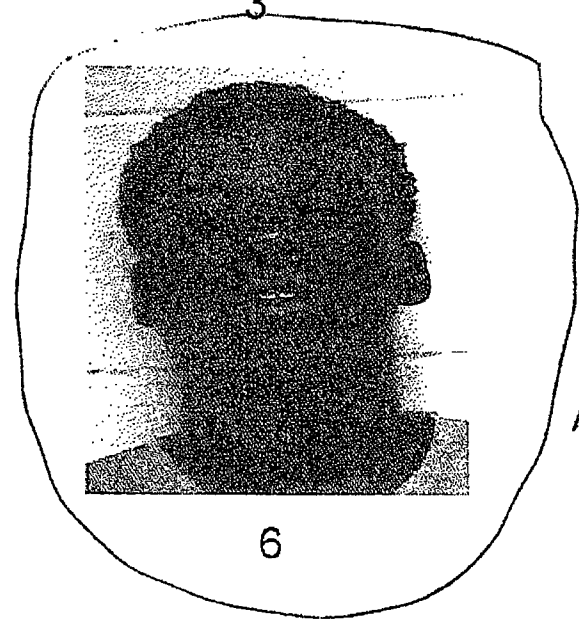
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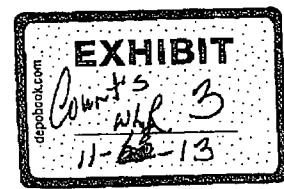


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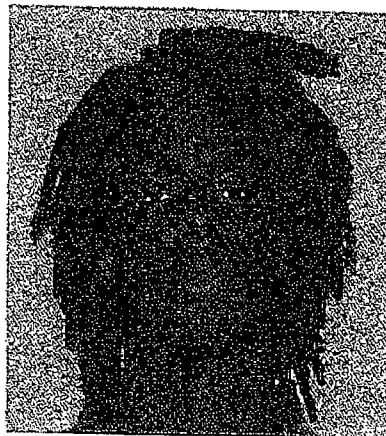


R.000264

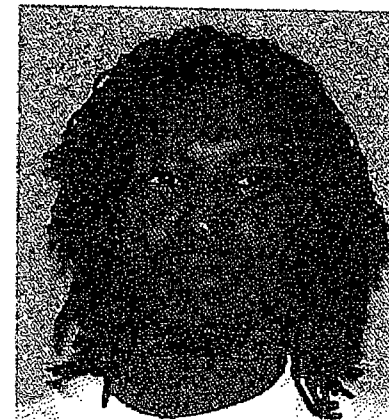
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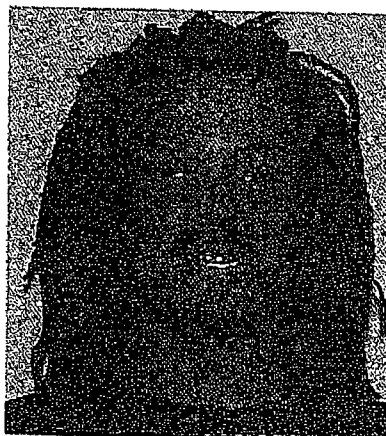
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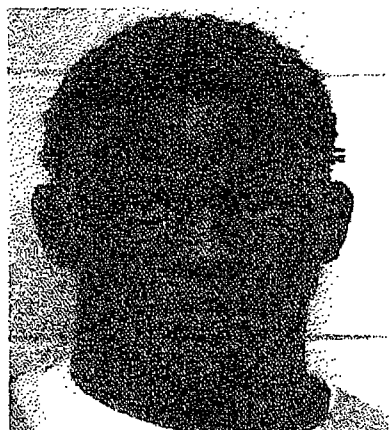
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EXHIBIT
78-11-2

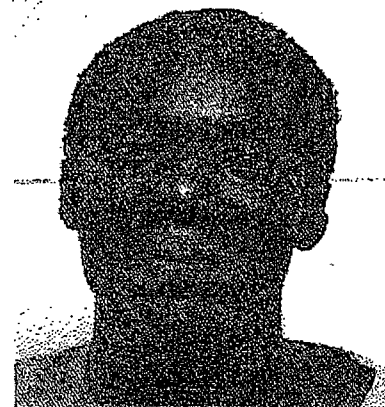
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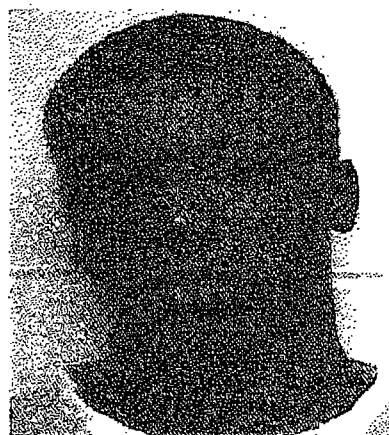
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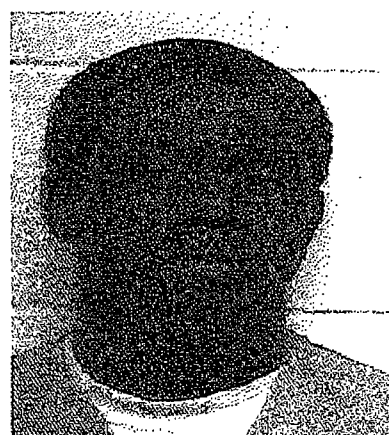
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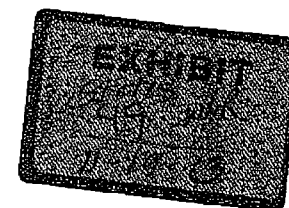
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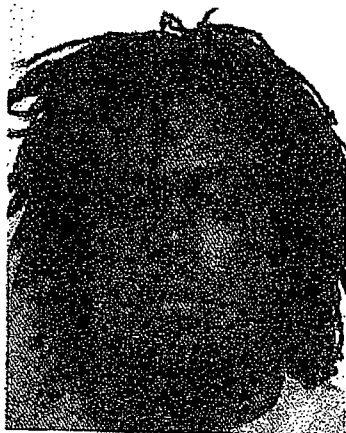
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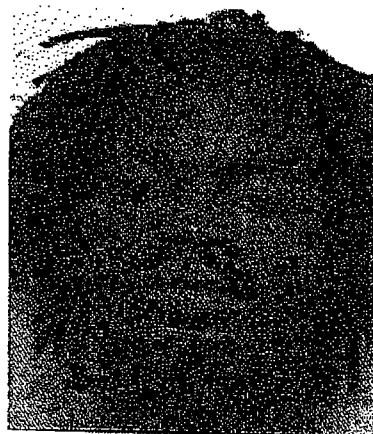
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BLUFFTON POLICE DEPARTMENT



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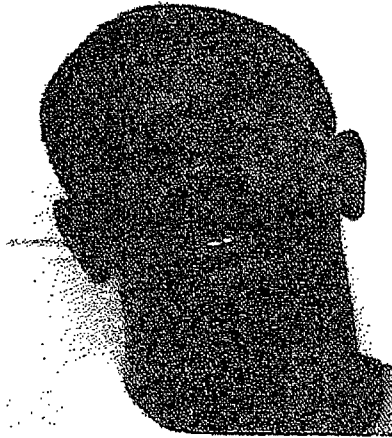
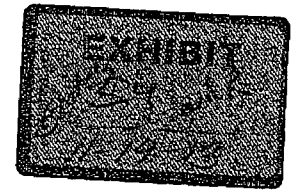
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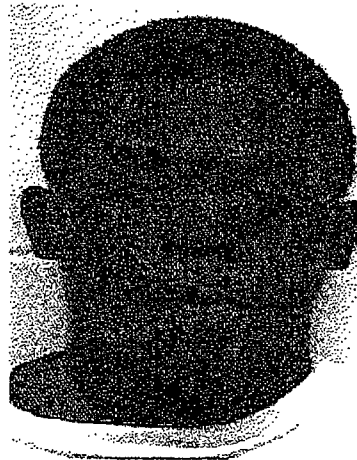
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R.000267

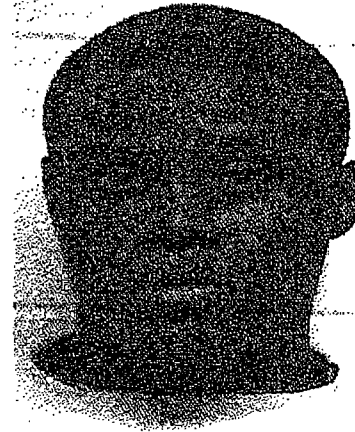
BEAUFORT COUNTY SHERIFF'S OFFICE



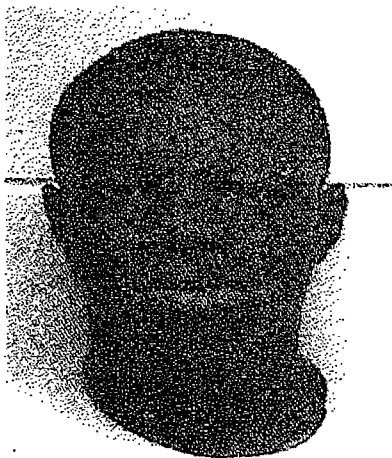
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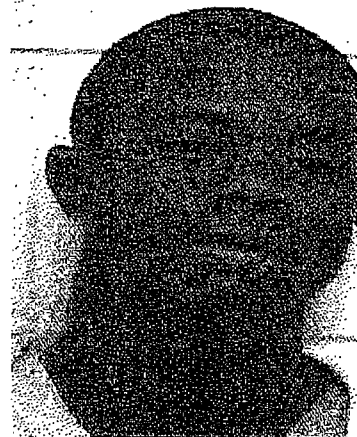
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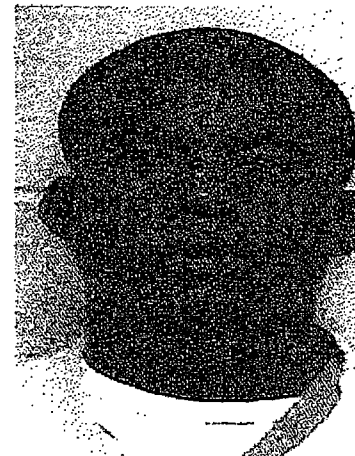
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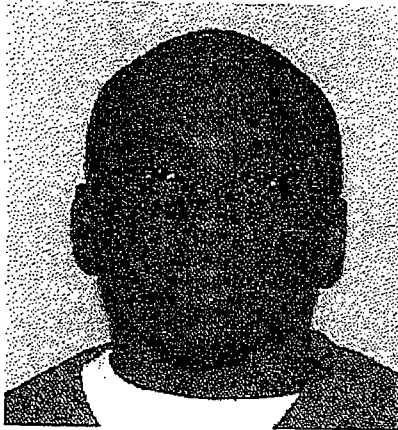
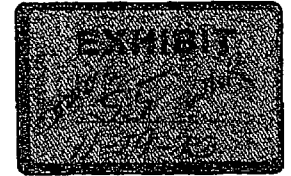
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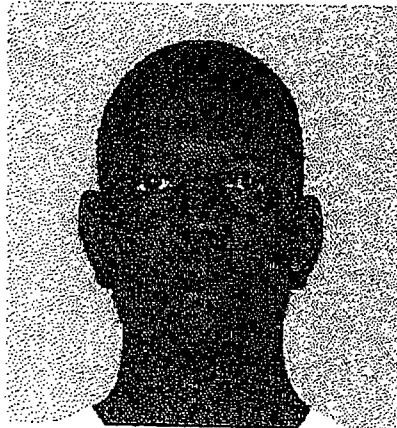
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R.000268

BEAUFORT COUNTY SHERIFF'S OFFICE



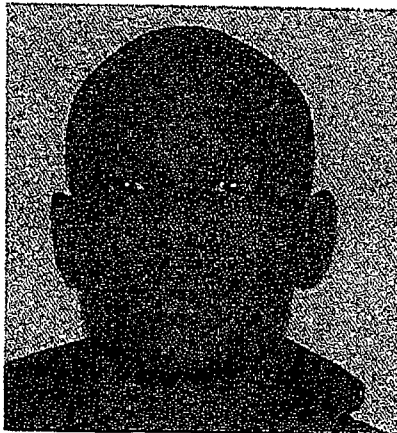
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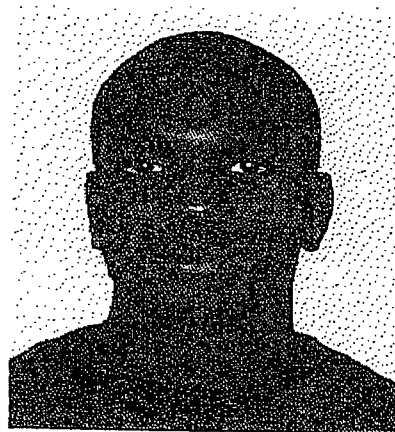
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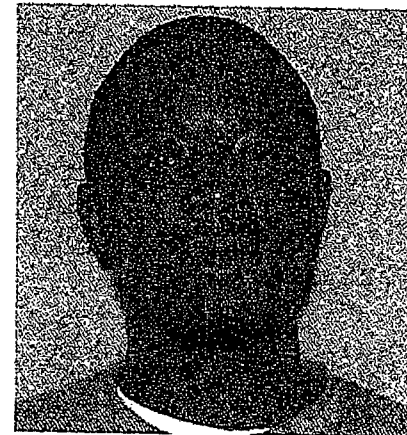
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R.000269

Scott Lee

From: Shelton, Ben
Sent: Friday, September 27, 2013 4:49 PM
To: Scott Lee
Subject: Marion Powell--Brady Response

Hi Scott,

I finally met with Pam Brown with the "Intelligence Unit." She has no specific training as to lineups other than being trained on how to use the computer system to pull up pictures of subjects (all booking photos) to use as fillers. She states that no one gives her any defining characteristics of a suspect, only the suspect's name. She then goes through the system which can be narrowed by putting in qualifiers like "black/male." Some of the qualifiers are more specific, but she states that she only uses the general race/gender and then uses her judgment from there.

The line-up is pulled from the suspect's most recent booking photograph. She stated that she takes many factors into consideration when arranging a line-up, including neck width, head position, T-Shirt position (in some you can see an undershirt, in some you can't, wants to keep those consistent), head position (is it cocked to the side, etc), hair length and color, skin-tone, and head shape and size, eye color, facial hair, nose shape, etc. She makes sure that all of the pictures have the same image size and the head is a similar ratio within the frame.

She does not have a record of the ID for the remaining fillers in Mr. Powell's line-up.

She first was very surprised that she was the individual who created the line-up and pointed out that Mr. Powell's mouth was slightly open, and that she normally would not have created a line-up with only his mouth open. She had a record of it on her computer and confirmed it was her who created it. She remembers creating several lineups around the same time period pursuant to a request from Inv. Rice with the Sheriff's Department, which would be the additional lineups provided to you. She mused that this may have been why she made a lineup with only his mouth open.

While she will not initially receive a defining characteristic (i.e. large ears, etc.) from LE, if such characteristics are obvious, she will attempt to find other individuals who fit that characteristic. At times, investigators will send the lineup back to her to amend if the investigator believes something about the lineup is too suggestive. She relies heavily on investigators expertise in this regard, as "they are the ones who are trained to know what is good and bad."

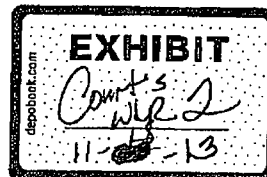
Mrs. Brown is fairly reluctant to testify (scared to death), fearing potential retribution from people in her neighborhood.

This is what I have from my notes from the meeting, filled in by my recollection. Please let me know if you need any follow up clarification.

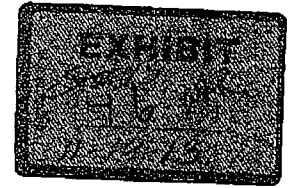
Have a great weekend!

Ben

Benjamin T. Shelton
Prosecuting Attorney
Career Criminal Unit
14th Circuit Solicitor's Office
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(843) 255-5916 (o)
(843) 415-6536 (m)



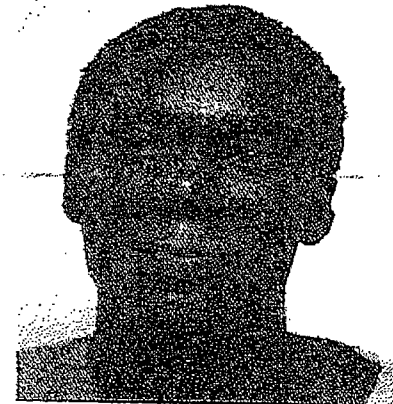
BLUFFTON POLICE DEPARTMENT



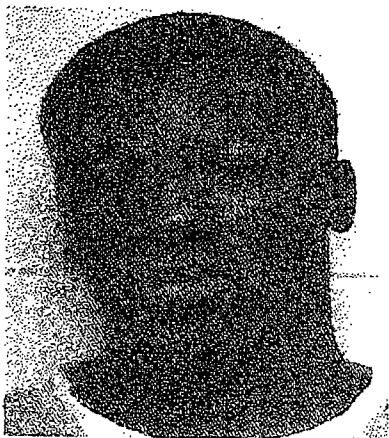
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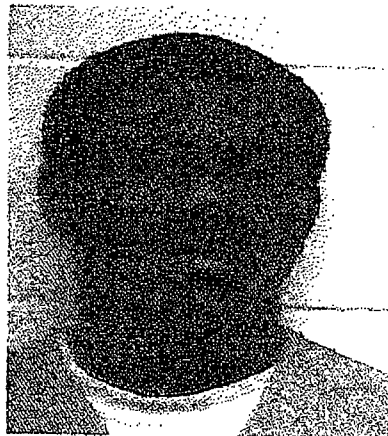
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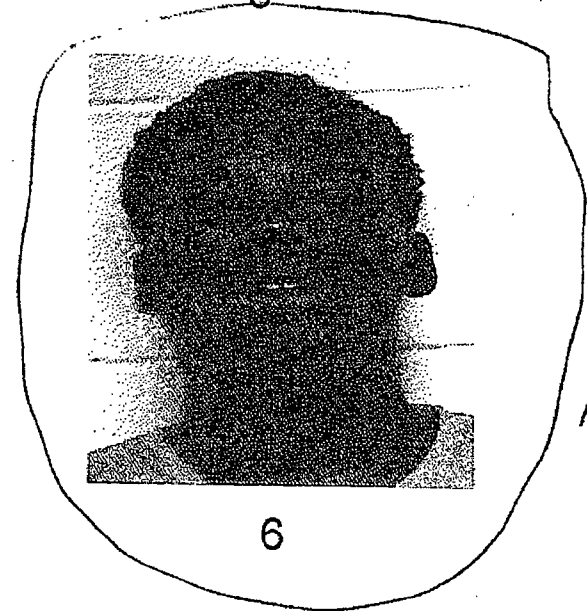
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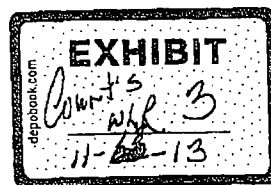


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R.000271



STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

vs.)

Marion Powell,
Defendant.)

IN THE COURT OF GENERAL SESSIONS
14TH JUDICIAL CIRCUIT

INDICTMENT NUMBERS:
2011-GS-07-0778—0784, 0786, 0787

STATE'S MEMO IN SUPPORT OF
INTRODUCTION OF
IDENTIFICATION EVIDENCE
(Neil v. Biggers Memo)

TO: Mr. Scott Lee, Esq.

HERE COMES THE STATE, in a Memorandum in Support of its motion to admit identification evidence, pursuant to Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375 (1972).

FACTS

On October 25, 2010, Senora Jones took care of four children, two of her own, at her home in Bluffton, SC when three African-American males entered through backdoor armed with handguns. The children were herded into the house from the backyard and marched to the top of the staircase and ordered to sit against the wall. The assailants held the children and Ms. Jones at gunpoint while they tore through every room of her home, including the attic looking for money and drugs.

"Suspect #2" was not wearing a mask while inside of the home and served as a lookout and organizer. "Suspect #2" entered the mother Senora's bedroom and screamed for her to drop her phone and give him them the money. Suspect #1 walked her back to her bedroom closet where she retrieved \$2200 she had in a suit pocket. The suspects then ordered her to the ground and threatened to kill her if she did not tell them where the rest of the money and dope was located. Mrs. Jones pleaded with Suspect #2 to believe her, that she was not protecting her property, and she had nothing else. She pleaded with him not to harm her or her children and begged him to look into her eyes and believe her that she had no more money and that no drugs were in the house. Then, "Suspect #3" entered the room and screamed for her to shut up, that she talked too much and threatened to kill her if she didn't tell him where the money was located. Suspects #1 and #3 then ran through the house, ransacking room to room, searching for valuables. Meanwhiel, suspect #2 remained with the children and Mrs. Jones. Suspect #2 paced back and forth and checked the blinds to make sure no one was coming home after Mrs. Jones told him

that her mother and sister may arrive soon, and retrieved shoestring to tie them up if they arrived. She asked him if she could get up and he yelled no. The last one to leave, he wiped everything he had touched down with a camouflage glove before exiting. He told the children, "We were never here," and asked them if they saw anything. They shook their heads, "no."

Mrs. Jones, who is African-American, described Suspect #2 to Sgt. Chandler of the Bluffton Police Department on the night of the home invasion as a black male, 6'1" tall and approximately 180lbs. She stated that he had no facial hair, a short "afro" haircut and had flared nostrils. Ms. Jones remembers him having a black handgun, held it in his right hand. Ms. Abriya Hart remembers the handgun being black and silver.

Suspect #1 description was a black male, 5'7" tall, wearing a white T-Shirt, blue jeans, with a pony tail of dreadlocks in his mid-twenties, and having a white cloth over his head. The victims only could see his eyes.

Suspect #3 was another black male with skinny dreads down to his ears with a light to medium complexion, and was approximately 5'6". He had red glossy eyes and wore a white polo with colored stripes, jeans with three bleach spots under the back pocket and had something partially over his face.

Having no initial concrete leads, the Bluffton Police Department Department utilized intelligence from the Beaufort County Sheriff's Office (BCSO) to develop potential suspects. BCSO investigators informed them of four individuals who were either known defendants or suspects in armed robberies in northern Beaufort County; each targeting individuals believed to be involved in the drug trade. Senora Jones' husband Cleven Jones was a current suspect of interest in a drug investigation with links to the same area of Beaufort County, and the house where the home invasion took place had been under surveillance by the Sheriff's Office unbeknownst to the Jones family.

The first four line-ups shown to the victims each contained one suspect believed to be involved in the armed robberies in the northern part of the county. The BCSO regularly compiles line-ups using a database of booking photographs. BCSO employee Pam Brown included a recent booking photo of Defendant Marion Powell in a line-up containing his picture. In creating a line-up, she takes a recent booking picture of the subject (if available) and then looks for other individuals within the database who share his physical characteristics. She is not "fed" physical characteristics by the investigators to compile line-ups. And, Mr. Powell's physical characteristics were not used in developing him as a suspect: his inclusion occurred

because he was wanted for armed robberies and a kidnapping in other incidents involving suspected drug dealers.

The Identification Procedure and Identification

On October 26, 2010, the morning after the home invasion, Investigator James "Jimmy" Duke presented four line-ups separately to Abriya Hart, age 10, and her mother Senora Jones. The line-ups already were compiled and were shown to Abriya Hart while Mrs. Jones worked with SLED Forensic Artist Deborah Goff on a forensic sketch of Suspect #2.

In a video recorded interview, Investigator Duke read the following to Abriya Hart before presenting the line-up:

You will be asked to look at a group of photographs. The fact that the photographs are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain a picture of the person who committed the crime. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss the case with other witnesses or indicate in any way that you have identified someone.

Then, to Abriya, Inv. Duke asks, "Do you understand all that?"

She replies, "Mmm, hmm" and nods in the affirmative.

He continues, "So the guy may or may not be on here, and if you are not 100% positive, then, that's OK." Abriya nods again.

Officer Duke then shows Abriya the first six person line-up and Abriya declines to identify any suspect, shaking her head when asked if any of the people who were in her house last night are "on that paper". Before showing her the next line-up, Officer Duke reminds her that, "The same thing I read to you is going to apply to all four of these line-ups, OK?" She nods her head, yes.

After being shown the second line-up containing Powell, Abriya looks at the line-up and nods her head within seconds, "Yes." Duke asks, "Which one is he?" She immediately points to Powell. He asks her to circle that person, and she does.

Abriya then is shown the final two line-ups and declines to identify any subject. She gives a statement which Investigator Duke writes down for her and lets her review before signing.

Investigator Duke then shows Mrs. Senora Jones the same line-up presentation, separately prepared for her. Abriya does not communicate with her mother anything that occurred in her interview before Mrs. Jones views the line-ups. Investigator Duke read the same admonition to Mrs. Jones as he gave to her daughter Abriya.

Just as Abriya Hart did, Mrs. Jones identified the Defendant Powell as Suspect #2 in mere moments after being shown the second line-up, and she declined to identify anyone in the first, third, or fourth line-ups.

The Bluffton Police Department prepared four other line-ups containing other suspects for Abriya and Mrs. Jones to attempt to identify in the subsequent days. Neither identified any other suspect in any other line-up presented.

The Line-Up

Mr. Powell is in position #6 in the line-up in which he is identified by Mrs. Jones and Miss Hart. Each person in the line-up is an African-American male, appearing to be in his early to mid-20's. Each picture is a booking photograph. Each individual has a broad nose, similar to the Defendant's. Each individual has a short, cropped haircut similar to the Defendant. Each individual's neck is of similar width as the Defendant's. All individuals' faces are cropped similarly, and are of similar size within each picture-frame. The orange neck of the jail uniform is showing in each individual's photo. All six individuals are of similar if not the same skin-tone. Each photo has a white concrete brick wall as a background. Each individual's nostrils are visible.

While all individuals are forward facing, the person in position #1 has his head cocked slightly to his left with his head tilted slightly back, showing his nostrils. The person in position #2 is forward facing, with his chin pointed slightly downward. In position #3, the individual purses his lips and looks away from the camera, with his head tilted slightly upward and to his right. In position #4, the individual's head is turned and tilted slightly to his right. In #5, the individual turns his head slightly to his left with his chin tilted slightly upward with his nostrils exposed.

In #6, the Defendant Mr. Powell's head is tilted slightly upward and to his right, with his nostrils exposed. His mouth is open slightly, exposing the tips of his upper two front teeth.

LAW/ANALYSIS

A two prong test exists to determine the due process of a pretrial identification procedure by State actors:

1. Was the identification procedure conducted in a manner that was unduly suggestive?
2. If so, was the procedure so suggestive as to give rise to a very substantial likelihood of irreparable misidentification under the totality of the circumstances?

Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375 (1972); State v. Ford, 278 S.C. 384, 296 S.E.2d 866 (1982).

The Defendant bears the burden of showing by a preponderance of the evidence that the procedure was unduly suggestive, and, that the existence of a substantial likelihood of irreparable misidentification under the totality of the circumstances. Id.

Even if the procedure is unduly suggestive, the court must weigh these five factors to determine whether a substantial likelihood of irreparable misidentification exists:

1. the witness' opportunity to view the subject at the time of the crime;
2. the witness' degree of attention; A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby. State v. Brown, 333 S.C. 185, 508 S.E.2d 38 (Ct. App. 1998);
3. the accuracy of the witness' prior description of the criminal;
4. the witness' level of certainty at the confrontation; and
5. the length of time between the crime and the confrontation. Identification made two weeks after crime can still be reliable. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

See Neil v. Biggers, *supra*; State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (Ct. App. 2009)

The Court must weigh these factors against the corrupting effect of the unduly suggestive procedure. Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243 (1977).

In State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007) our State Supreme Court ruled that a six person photo line-up containing four pictures with purple backgrounds and two pictures with gray backgrounds was not unduly suggestive. Before the line-up the victim described the assailant as "pretty tall", "was built

pretty good", did not have a shirt on, and was "dark". Id. at 125, 696. The victim testified that the investigator instructed her only to pick someone out of the line-up if she was sure it was the suspect. Id. at 125-126. The investigator testified that he instructed the victim that she did not have to identify anyone in the line-up and did not tell her that the suspect was in the line-up. Id. at 126. During cross-examination the investigator stated that he used the different colored backgrounds for the line-up because he had no other choice as he attempted to compile a line-up with similar looking suspects. Id.

The Court cited four cases after holding that the line-up containing different in color backgrounds in Turner. "See, e.g., United States v. Lincoln, 494 F.2d 833 (9th Cir. 1974) (fact appellant's photo was in color and photos of the other individuals in the line-up were in black and white is not impermissibly suggestive); Burgess v. State, 827 So.2d 134 (Ala. Crim. App. 1998), *aff'd*, 827 So.2d 193 (Ala. 2000) (fact appellant was wearing a dark jacket or that he was standing before a blank wall while others were standing in front of a curtain did not render line-up unduly suggestive); State v. Holmes, 931 So.2d 1157 (La. App. 4th Cir. 2006) (fact appellant's photo was placed in the top center position of a line-up and had a lighter background shade than the other photos did not render the line-up unduly suggestive); State v. Gullett, 633 S.W.2d 454 (Mo. App. 1982) (fact appellant's photo was in color and was slightly larger than other photos, which were in black and white, did not render the line-up unduly suggestive)." Turner, at 128, at 697.

Further, in its holding in Turner, the Court pointed specifically to the fact that all six men had facial hair and all six men appeared to be built just as the victim described. The Court noted that the Defendant's inclusion in front of a gray background did not make his complexion appear any darker than the other individuals in the line-up.

Finally, in Turner, relying upon the factors established by Biggers, the Court held that *even if* the line-up was unduly suggestive the identification was reliable. The victim had ample opportunity to view her assailant with a fully lit frontal view of him, her description was detailed establishing a high degree of attention at the time of the crime, the description she gave matched the subject picked out of the line-up, she had a high degree of certainty in selecting the individual, and the time between the identification and the crime was minimal. 373 S.C. at 128, 644 S.E.2d at 697.

1. The line-up procedure here is not unduly suggestive.

HERE, the admonition and instructions given by Bluffton Police Department were in greater detail and more thorough than those given in Turner. Not only did Investigator Duke tell both victims that the Defendant may or may not be contained

within the line-up and that they had not duty to select anyone, he followed established protocol in reading from the back of the line-up card the admonition detailed above and recorded the procedure on video. Nothing contained within either video indicates any action by Bluffton Police that could have influenced the victim's identification of Powell. Consideration also should be paid to the fact that the Defendant was selected as a potential suspect because of other recent similar criminal activity and before Senora Jones completed the forensic sketch of Suspect #2; He was not selected because of a trait he shared with the victims' descriptions of the assailants. This shows that the police were not "cherry-picking" suspects based only upon physical characteristics and then highlighting those characteristics for inclusion in the line-up.

While the photo array containing Powell showed his mouth slightly open and with his head tilted slightly back exposing his nostrils, as in Turner, a review of the line-up shows that the similarities of the physical traits shared by the individuals contained in the line-up are too great to make any differences unduly suggestive. Each individual contained in the line-up has what could be described as "large, flared nostrils", each individual's nostrils are visible, and positions 1, 3 and 5 have their heads tilted slightly back. The skin tone of each individual is nearly identical. The haircuts of each individual are substantially the same. Their heads are similarly cropped and the backgrounds are the same. All appear to be the same age and build.

Also, because each individual in the line-up is uniquely positioned in some manner (#1's head is tilted to his left and head is tilted slightly back, #3's lips are pursed and he is looking away, #4's head is tilted to his right, etc), any suggestively created the Defendant's head being tilted back and mouth slightly opened is greatly minimized. Even if the line-up may be characterized as suggestive, it is not unduly so.

2. Even if the court finds the line-up procedure unduly suggestive, the totality of the circumstances firmly shows that the suggestiveness does not give rise to "a very substantial likelihood of irreparable misidentification."

Factor #1: Both Abriya Hart and Senora Jones had ample opportunity to view the Defendant at the time of the crime. Both had conversations with the Defendant and the Defendant's face was uncovered. At 5:40pm it was growing dusk but not dark, and they were inside their lighted house. Both had opportunities to see him at times when a gun was not in their face. He searched and found shoelaces while being observed by Mrs. Jones, rummaged through her room and looked out of the window. He paced up and down the stairs while being observed by Miss Hart. He leaned down and gave a tissue to Miss Hart's younger nephew. He was the first one in the house and the last one to leave. He was the only assailant whose face was not at

least partially covered and was in contact with either Miss Hart and Mrs. Jones for the entire time while he and his co-conspirators tore apart every inch of their house.

Factor #2: Both Miss Hart and Mrs. Jones demonstrate a high degree of attention in not only their description of the Defendant, but their detailed description of his co-conspirators and the entire incident. Further, their accounts are corroborative, with each remembering specific details remembered by the other. The assailants threatened to kill Mrs. Jones multiple times. Four children were held at gunpoint by three armed men.

Factor #3: Miss Hart's and Mrs. Jones' prior descriptions of the Defendant is manifested in his appearance. He is 6'0" tall. He was described as 6'1". He is in his early to mid-twenties, has a short, cropped "Afro" style haircut, is clean shaven, and his driver's license declared him at 160lbs. Mrs. Jones estimated that he was 180lbs. He has large nostrils and eyes as described by Mrs. Jones to the forensic artist. The forensic sketch looks strikingly similar to his actual appearance.

Factor #4: Both Miss Hart and Mrs. Jones were certain that Mr. Powell was Suspect #2. Both independently picked him out of line-ups in severed procedures. Perhaps most telling is both declined to identify any other subject after being shown seven additional line-ups, furthering the credibility and certainty in their identification.

Factor #5: Mere hours passed between the home invasion and the line-up procedure.

CONCLUSION

For the reasons stated above, the State respectfully submits that this court should find the pretrial identification procedure utilized in this case unduly suggestive. If the court should find the pretrial procedure unduly suggestive, considering the totality of the circumstances, the procedure was not so suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Respectfully Submitted,


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11/19, 2013

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1 from Mr. Sheldon that they're not proceeding on the
2 possession of a weapon by a convicted felon, and he is not
3 going to read that charge to the jury, and he is not going
4 to subsequently try to prove up a conviction for a felony
5 as an element of that charge. And that's my
6 understanding.

7 MR. SHELTON: That's correct. The way that that - I
8 saw that indictment this morning. I should have checked
9 it earlier, much prior to this matter. I think it only
10 provides notice for unlawful possession of a handgun, and
11 not unlawful possession of a person during the commission
12 of a violent offense, and that would be what - because
13 that would be what he is convicted of. It would be ABWIK,
14 and not the new violent crime statute, the 16-23-500. And
15 under that, even if it was that statute, I don't think
16 that's a principle matter. I don't think that's an
17 element for the jury to hear. So, I agree with Mr. Lee.
18 I'm not going to go into his assault with intent to kill
19 conviction.

20 THE COURT: All right.

21 MR. LEE: And if I could just look at the photo
22 lineups that were introduced yesterday, and then I'll be
23 ready to go.

24 MR. SHELTON: Finally, Your Honor, pursuant to the
25 *Neil v. Biggers* motion yesterday, if I may make my

1 memorandum -- I understand that you reviewed my
2 memorandum.

3 THE COURT: I did.

4 MR. SHELDON: And took the facts into consideration.

5 THE COURT: I did take the facts into consideration
6 that were stated that were not opposed in that --

7 MR. SHELDON: They're not opposed in my memorandum.
8 I'd like to make that a court's exhibit. Thank you.

9 THE COURT: We actually do have another issue, of
10 course, nobody knew about. The Bailiff just handed me a
11 note, apparently, from Juror 278, Richard Sherman.

12 And the handwritten note says:

13 *I have owned two shooting ranges where*
14 *I was involved with two sheriff departments*
15 *and the National Sheriff's Association. I*
16 *was involved with concealed carry and self*
17 *defense courses.*

18 I take it that's a matter of disclosure is all. All
19 right.

20 MR. LEE: Judge, I would say this. I certainly would
21 have struck him had I known he had such a close
22 relationship with law enforcement. That was one of the
23 questions we specifically asked. And I think him not
24 responding, I would ask that the first alternate be seated
25 and he be excused.

1 well. And I would also point out just for the record that
2 I haven't gone through all my strikes, but I certainly
3 know that Number 45 I struck. I struck him, because he
4 was a firefighter. So, my strike strategy as it always
5 does, is to strike anybody with any connection to the law
6 enforcement. And certainly, someone who works closely
7 with the two sheriff's office and with the National
8 Sheriff's Association would have been a lot higher on my
9 priority strike list than someone who actually was the
10 same race, but I struck him anyway, because he was a
11 firefighter. I think there is a connection between
12 firefighters and law enforcement, so you know, that guy
13 being seated goes to the absolute heart of what I was
14 trying to do in striking this jury and had plenty of
15 strikes left and would have exercised it on Mr. Sherman.

16 THE COURT: All right. Ask Mr. Sherman if he would
17 please step in and we'll bring him - we'll just have him
18 stand right there, and I'm just going to talk to him for a
19 few minutes.

20 COURT REPORTER: The State's memo in support of
21 introduction of identification evidence is Court's Exhibit
22 Number 4.

23 STATE'S MEMO IN SUPPORT OF
24 INTRODUCTION OF IDENTIFICATION
25 EVIDENCE MARKED COURT'S EXHIBIT NUMBER 4.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Brooks P. Goldsmith

Appellate Case No. 2013-002537

The State,

Respondent,

v.

Marion Benjamin Powell,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal complies with Rule 210, SCACR.

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of General Sessions

Brook P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-002537

THE STATE,

Respondent,

v.

MATION BENJAMIN POWELL,

Appellant.

PROOF OF SERVICE

The undersigned employee of the law offices of Richardson, Patrick, Westbrook & Brickman, LLC attorneys for Appellant-Respondent, do hereby certify that service of the Record on Appeal was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Jennifer Ellis Roberts
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P. O. Box 11549
Columbia, SC 29211

July 9, 2015

Bonnie L. Schmidt

Assistant to Christopher J. Moore, Esq.

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