

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO RICHLAND COUNTY
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Lower Court Case No. 2011-CP-38-01539
Appellate Case No. 2015-0004242015-001483

ANTIONELLE LA'TROY OWENS

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

APPENDIX

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
2009-GS-38-1186
2009-GS-38-1449

STATE OF SOUTH CAROLINA,
PLAINTIFF,

VS.

ANTIONELLE OWENS,
DEFENDANT.

TRANSCRIPT OF RECORD

AUGUST 10 & 11, 2009
ORANGEBURG, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JAMES C. WILLIAMS, JR., AND A JURY

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

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CIRCUIT COURT REPORTER

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1 THE COURT: Good morning, ladies and gentlemen.
2 Have a seat. You may be seated.

3 I think this is the first time in history we've had two
4 judges for one term of court -- well, sometimes we have one
5 in civil and one in criminal, but this is the first time
6 we've ever had two doing criminal court. So there's a
7 little confusion this morning. Nobody knows how to handle
8 it, exactly. So there is a little confusion.

9 My name is Jimmy Williams. I'm a circuit court judge.
10 I actually retired in January, but I've been working full-
11 time, and so I'm here this week assigned in Orangeburg, and
12 we're fixing to draw a jury to try a case.

13 Solicitor, you may call your case.

14 MR. SORENSON: Please the Court, Your Honor.

15 THE COURT: Yes.

16 MR. SORENSON: At this time the state would call
17 Antionelle Latroy Owens, Indictment Number 2006-GS-38-1449
18 and 2009-GS-38-1186, charging one count of assault and
19 battery with intent to kill and one count of attempted
20 burglary in the first degree.

21 The state is represented by myself, Mr. Sorenson, and
22 Ms. Kelley Burbage. The defendant is represented by Mr.
23 Mellard and Ms. Hinds.

24 THE COURT: All right. Mr. Mellard and Ms.
25 Hinds, y'all step up here.

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1 (Off the record bench conference with counsel and the
2 Court.)

3 THE COURT: Apparently, Mr. Owens is on his way
4 upstairs, so we're going to wait on him, ladies and
5 gentlemen.

6 (Pause.)

7 THE COURT: While he's on the way, let me tell you
8 this. Mr. Owens is charged with these two charges, as
9 you've heard the solicitor say. And the state has prepared
10 these two indictments that set out these two charges against
11 Mr. Owens. To the charges in these charges in these
12 indictments, Mr. Owens has pled not guilty. These
13 indictments are not evidence. They are simply documents
14 drawn up to advise him and his lawyer of the charges he's
15 facing.

16 By pleading not guilty, he places the burden of proving
17 him guilty on the state. A person charged with a criminal
18 offense is never required to prove themselves innocent. Both
19 the state and the defendant in the case are entitled to what
20 we call a fair and impartial jury. And by that we mean a
21 jury which can base its decisions solely on the testimony
22 and the evidence put up in this courtroom, what you hear in
23 the courtroom. A jury that would not be influenced by
24 anything outside of the courtroom, whether that be something
25 you might have heard about this case or some other case or

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1 some experience that you've had in your life that might
2 affect your ability to serve as a fair and impartial juror
3 in this particular case. And so in just a minute, I have a
4 number of questions that I'm going to ask you to determine
5 your ability to serve on this jury. It's very important
6 that you furnish the information to the court that might be
7 required by one of those questions. If it is of a personal
8 or private nature, and you would prefer not to share that
9 with everyone, then you can come up and speak with me
10 privately about it, or you can wait until I have asked all
11 of the questions and then answer a particular question and
12 come up and speak with me about it. But please do not
13 withhold any information that might be required by any of
14 these questions.

15 So I'm going to read you the indictment, ladies and
16 gentlemen, so you will know what the charges are.

17 First, Indictment 2006-1449, alleges that Antionelle
18 Latroy Owens did in Orangeburg County on or about June 5,
19 2006, with malice aforethought commit an assault and battery
20 upon the victim, Irene S. Shannon. It says that he shot the
21 victim with a gun in violation of the law.

22 The second indictment is number 2009-GS-38-1186, and in
23 that indictment the state alleges that in Orangeburg County,
24 South Carolina on or about June 5, 2006, that the defendant
25 Antionelle Latroy Owens, did willfully and unlawfully

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1 attempt to enter the dwelling of Irene S. Shannon without
2 consent and with the intent to commit a crime therein. And
3 that he was armed with a deadly weapon or caused physical
4 injury to a non-participant in the offense.

5 Now, ladies and gentlemen, as I said, to these offenses
6 he had pled not guilty, and I think he will be up here in
7 just a minute, and when he does, I will introduce you to
8 him.

9 But let me first ask you, ladies and gentlemen -- tell
10 me solicitor, where is this alleged to have occurred?

11 MR. SORENSEN: Your Honor, the address is ---
12 ---, in Orangeburg.

13 THE COURT: --- here in Orangeburg?

14 MR. SORENSEN: Yes, sir.

15 THE COURT: And it's alleged to have happened on
16 June 5, 2006. It is alleged that he attempted to enter
17 without consent the home of Ms. Irene S. Shannon, and that
18 he did shoot Ms. Shannon with a gun. And, as I said, he's
19 pled not guilty.

20 Come on down, Mr. Owens.

21 Is there any member of the jury panel who has heard
22 anything about this case? It might have been in the
23 newspaper at the time that it happened. Could have been on
24 TV, I don't know. You could have heard somebody talking
25 about it at the barber shop or the beauty parlor or the

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1 convenience store or filling station or something.

2 If you know anything at all about the facts of this
3 case, would you please stand at this time.

4 (No one stands.)

5 If you've formed any opinion about it or discussed it,
6 or heard anybody discussing it, would you please stand.

7 (No one stands.)

8 All right, Mr. Owens, would you stand please and face
9 the jury so they can identify you.

10 (Mr. Owens stands.)

11 THE COURT: Thank you, sir. You may be seated.

12 Ladies and gentlemen, this is Mr. Antionelle Latroy
13 Owens.

14 Is any member of the jury panel related by blood,
15 connected by marriage, close personal friend, have any
16 knowledge or acquainted with Mr. Owens, if you know him in
17 any capacity whatsoever, would you please stand.

18 (No one stands.)

19 Ladies and gentlemen, Mr. Owens is represented by Mr.
20 Doug Mellard and Ms. Peggy Hinds of the Public Defender's
21 Office here in Orangeburg, who are standing.

22 Thank you, you may be seated.

23 Is anybody member of the jury panel related by blood or
24 connected by marriage, close personal friend, have any
25 knowledge or acquaintance with either of these attorneys or

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1 any members of the staff of the Public Defender's Office.
2 If so would you please stand if you know any of those folks
3 that work in that office including these two lawyers, please
4 stand.

5 (No one stands.)

6 The case is being prosecuted by Mr. Mellard -- I'm
7 sorry, Mr. Sorenson and Ms. Burbage, who are seated at the
8 counsel table, my left, your right.

9 You may be seated.

10 They are both members of the Solicitor's Office here in
11 Orangeburg County. If you know any of these -- either of
12 these attorneys or anyone else who is a member of the staff
13 of the solicitor's office, would you please stand at this
14 time.

15 (No one stands.)

16 All right, ladies and gentlemen, I'm going to read you
17 the names of some individuals who may testify in this case.

18 Are there any from the defendant; no witness list?

19 MR. MELLARD: No.

20 THE COURT: All right.

21 If these individuals are present in the courtroom, I
22 would ask that they stand when I call their names, but they
23 may not be in the courtroom because all of them couldn't
24 possibly get in here to testify this morning. But if you
25 know any of these individuals that I would ask that you

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1 stand when I call their names. Please do not wait until
2 I've finished the list. First the alleged victim in this
3 case, Ms. Irene Shannon. Is Ms. Shannon present?

4 (Ms. Shannon stands.)

5 This is Ms. Shannon, standing to your left, ladies and
6 gentlemen.

7 Thank you, Ms. Shannon

8 Deputy Reginald Conyers of the sheriff's department.

9 (No one stands.)

10 From the Orangeburg Department of Public Safety, ladies
11 and gentlemen, four officers; Cpl. John Caddell, Sgt. Donell
12 Shuler, Cpl. Jimmy Jones, and detective --

13 (Panel member stands.)

14 Yes, sir. Your name and number?

15 JUROR NO. 173: Jim Ulmer. My number is 173.

16 Jimmy Jones. I know him, I've known him for many years.

17 THE COURT: Would that affect your ability to be a
18 fair and impartial juror in this case?

19 JUROR NO. 173: Not at all.

20 THE COURT: Thank you, sir. You're qualified to
21 serve.

22 Yes, sir.

23 JUROR NO. 52: I'm very good friends with Officer
24 Jimmy Jones' children.

25 THE COURT: And would that affect your ability to

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1 be a fair and impartial juror?

2 JUROR NO. 52: No, sir.

3 THE COURT: Okay. Yes, sir.

4 Oh, wait a minute. We didn't get your name and number?

5 JUROR NO. 52: No. 52, Brian Etheridge.

6 THE COURT: Number what?

7 JUROR NO. 52: 52.

8 THE COURT: All right. Thank you.

9 Yes, sir.

10 JUROR NO. 108: My name is Tony Linder, and my
11 number is 108.

12 THE COURT: Yes, sir.

13 JUROR NO. 108: I'm a friend of Jimmy Jones.

14 THE COURT: Would that affect your ability to be a
15 fair and impartial juror?

16 JUROR NO. 108: No, sir.

17 THE COURT: Thank you, sir. You're qualified.

18 All right. Det. Mike Smalls, who is standing before you
19 at this time.

20 (Panel member stands.)

21 Yes, sir, your name and number?

22 JUROR NO. 36: I don't know my number, but my name
23 is James Chavis.

24 THE COURT: David?

25 JUROR NO. 36: James Chavis.

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1 THE CLERK: No. 36.

2 THE COURT: 32?

3 THE CLERK: 36.

4 THE COURT: 36. All right, sir, you can sit down
5 officer.

6 Do you know this officer?

7 JUROR NO. 36: Yes, sir.

8 THE COURT: Would that affect your ability to be a
9 fair and impartial juror in this case?

10 JUROR NO. 36: No, sir.

11 THE COURT: Thank you, sir, you're qualified to
12 serve.

13 With the Highway Department, Trooper Gerald Hoffman.

14 (No one stands.)

15 With SLED or the State Law Enforcement Division, Agent
16 John Roberts.

17 (No one stands.)

18 And Ms. Maria Jenkins, with EMS. She's an emergency
19 medical person. Maria Jenkins.

20 (No one stands.)

21 All right. Ladies and gentlemen, is any member of the
22 jury panel who is a close personal friend or family member
23 has ever been employed by any type of law enforcement
24 agency, whether that's state, county, local, federal, or
25 military. You or a close member of your family ever been so

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1 employed would you please stand.

2 (Panel members stand.)

3 JUROR NO. 104: My daughter is a Probation, Pardon
4 and Parole Agent in Manning.

5 THE COURT: Your name, please and number?

6 JUROR NO. 104: Roger Kovach. I don't know my
7 number.

8 THE COURT: All right, sir. And she works with
9 probation and parole in Orangeburg?

10 JUROR NO. 104: She did but she transferred to
11 Manning.

12 THE COURT: All right. Thank you, sir. Would that
13 affect your ability to be a fair and impartial juror in this
14 case?

15 JUROR NO. 104: No, sir.

16 THE COURT: Thank you, sir.

17 Yes, sir, your name and number?

18 JUROR NO. 4: Blease Ashe. Juror No. 4.

19 THE COURT: Yes, sir.

20 JUROR NO. 4: South Carolina Highway Patrol,
21 civilian employee.

22 THE COURT: You're still there?

23 JUROR NO. 4: Yes, sir.

24 THE COURT: Will that affect your ability to be a
25 fair and impartial juror?

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1 JUROR NO. 4: No, sir.

2 THE COURT: Do you know this trooper?

3 JUROR NO. 4: No, sir.

4 THE COURT: Thank you, sir.

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

6 JUROR NO. 71: My nephew is employed by SLED.

7 THE COURT: And would that affect your ability to
8 be a fair and impartial juror?

9 JUROR NO. 71: No, it wouldn't.

10 THE COURT: Thank you, ma'am. You're qualified to
11 serve.

12 Yes, ma'am.

13 JUROR NO. 105: Roxanne Lelande.

14 THE COURT: And would that affect your ability to
15 be a fair and impartial juror?

16 JUROR NO. 105: No, sir.

17 THE COURT: Thank you.

18 Yes, sir.

19 JUROR NO. 40: My cousin in employed by Orangeburg
20 Public Safety.

21 THE COURT: And would that affect your ability to
22 be a fair and impartial juror?

23 JUROR NO. 40: No, sir.

24 THE COURT: Thank you, sir. You're qualified to
25 serve.

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1 Ladies and gentlemen, I ask the same question about any
2 prosecutorial agency. If you or a member of your family are
3 close friends or has ever been employed by any prosecutorial
4 agency, such as the solicitor's office, a state office,
5 attorney general or state's attorney or military prosecutor,
6 if so would you please stand.

7 (No one stands.)

8 Is any member of the jury panel, you, yourself or a
9 close member of your family or friend ever been the victim
10 of a serious crime -- and, I guess, if you were the victim
11 anything was serious, but if it was something like a
12 shoplifting or something it wouldn't count, but anything
13 more serious than that. If you or a close family member or
14 friend were ever a victim?

15 (Panel members stand.)

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

17 JUROR NO. 134: Susan Palmer. I don't know my
18 number. I was the victim of a crime.

19 THE COURT: All right. How long ago was that?

20 JUROR NO. 134: Twenty years ago.

21 THE COURT: And was that -- of course that matter's
22 ended now?

23 JUROR NO. 134: Sir?

24 THE COURT: That matter's ended now, after 20 years
25 it's not still pending?

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1 JUROR NO. 134: Oh, yes, sir.

2 THE COURT: Would anything about that affect your
3 ability to be a fair and impartial juror?

4 JUROR NO. 134: No, sir.

5 THE COURT: Thank you, ma'am. You're qualified to
6 serve.

7 Yes, sir.

8 JUROR NO. 124: Lloyd Morgan. My wife was involved
9 in two bank robberies. She got held up twice.

10 THE COURT: All right. Is anything still pending
11 about those two instances?

12 JUROR NO. 124: Both have been settled.

13 THE COURT: Would anything about those experiences
14 that she had affect your ability to be a fair and impartial
15 juror in this case?

16 JUROR NO. 124: No, sir.

17 THE COURT: Thank you, sir, you're qualified.

18 Yes, ma'am.

19 JUROR NO. 174: Kim Ulmer, 174. And my brother was
20 shot and killed during an armed robbery.

21 THE COURT: How long ago?

22 JUROR NO. 174: 1993.

23 THE COURT: Would that affect your ability to be a
24 fair and impartial juror in this case?

25 JUROR NO. 174: No.

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1 THE COURT: Is that the Calhoun case?

2 JUROR NO. 174. No. Orangeburg County.

3 THE COURT: All right. Thank you, ma'am. You're
4 qualified.

5 Yes, ma'am.

6 JUROR NO. 107: Linda Lee, 107. My nephew was shot
7 and killed in New York City October 16, 2004.

8 THE COURT: Would that affect your ability to be a
9 fair and impartial juror in this case?

10 JUROR NO. 107: I have no idea.

11 THE COURT: You have no idea?

12 JUROR NO. 107: I would hope not.

13 THE COURT: Well, I'll excuse you from serving on
14 this case, but you need to remain with us right now.

15 Is any member of the jury panel or a close member of
16 your family, a family friend, a member of or contributed to
17 now or in the past any organization, MADD, SADD, CAVE,
18 CADRE, or any such type organization, would you please
19 stand.

20 (No one stands.)

21 Is any member of the jury panel a member of the
22 National Rifle Association. If so would you please stand or
23 if there's any member of the jury panel who is so strongly
24 opposed to the possession of any type of firearm by anybody
25 under any circumstances, that it would affect your ability

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1 to be a fair and impartial juror in this case. If you are
2 so strongly opposed to the use of any weapon or if you are a
3 member of the National Rifle Association, would you please
4 stand, either way.

5 (Panel members stand.)

6 Yes, sir, your name and number.

7 JUROR NO. 173: Jim Ulmer, No. 173, and I'm a
8 member of the National Rifle Association.

9 THE COURT: Will that affect your ability to be a
10 fair and impartial juror in this case?

11 JUROR NO. 173: No, sir.

12 THE COURT: All right. Ladies and gentlemen, this
13 case may involve the testimony about the use of alcohol
14 and/or illegal drugs. If there's any member of the jury
15 panel who feels so strongly against the use of alcohol or
16 illegal drugs, if that, in itself, would interfere with your
17 ability to be a fair and impartial juror, would you please
18 stand.

19 (No one stands.)

20 Has any member of the jury panel ever served on a jury
21 in a criminal case before. If so would you please stand?

22 (No one stands.)

23 Is any member of the jury panel who has ever received
24 assistance from any victim's or witness advocacy program or
25 victim or witness support program. If so would you please

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1 stand and give your name and number.

2 (Panel member stands.)

3 JUROR NO. 134: Susan Palmer, the CASA group.

4 THE COURT: How long ago?

5 JUROR NO. 134: Twenty years ago.

6 THE COURT: Would that affect your ability to be a
7 fair and impartial juror in this case?

8 JUROR NO. 134: No, sir.

9 THE COURT: Thank you, ma'am.

10 Yes, ma'am.

11 JUROR NO. 89: Wanda Irving, 89. CASA.

12 THE COURT: Would that affect your ability to be a
13 fair and impartial juror in this case?

14 JUROR NO. 89: No, sir.

15 THE COURT: Thank you, ma'am.

16 Is any member of the jury panel or any close member of
17 your family or close friend ever been accused of a crime
18 other than maybe simple crime in a magistrate's court or
19 municipal court, if so would you please stand.

20 (No one stands.)

21 Does any member of the jury panel need to come forward
22 and speak to me privately about any of the matters I've
23 mentioned. If so, please come forward at this time.

24 (Panel member stands.)

25 Come on down, ma'am. If any panel member knows of any

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1 reason whatsoever, whether I've mentioned it or not, it
2 might affect your ability to be a fair and impartial juror
3 in this particular case would you please come forward at
4 this time.

5 (Off the record discussion with counsel and the court with
6 jury panel member.)

7 THE COURT: The juror is qualified.

8 Yes, ma'am.

9 (Off the record discussion with counsel and the Court with
10 jury panel member.)

11 THE COURT: What was your number, do you remember?

12 JUROR NO. 174: 174..

13 THE COURT: No. 174 is excused.

14 Anyone else, ladies and gentlemen?

15 (No one stands.)

16 Anything else from the state?

17 MR. SORENSON: No, Your Honor.

18 THE COURT: From the defense?

19 MR. MELLARD: No, Your Honor.

20 THE COURT: Ma'am. You need to wait. You can't
21 leave right now. I've excused you from serving on the
22 trial, but you've got to wait because I don't know what the
23 instructions are going to be when we finish this.

24 Y'all come up to the bench just one second.

25 (Off the record conference with counsel and the Court.)

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1 THE COURT: The lady that came up here just a while
2 ago, the first lady, what was your number?

3 JUROR NO. 184: 184.

4 THE COURT: 184. Thank you, ma'am.

5 All right. The strikes will be five and five, I think.

6 MR. SORENSON: I believe it's 10 and five, Your
7 Honor.

8 THE COURT: I've got it written down here,
9 somewhere.

10 MR. SORENSON: May I approach, Your Honor.

11 THE COURT: Yes.

12 (Off the record bench conference with counsel and the
13 Court.)

14 THE COURT: All right, five and ten.

15 You got it printed.

16 THE CLERK: Yes, sir.

17 THE COURT: Ladies and gentlemen, under our system,
18 both the state and the defense have a right to excuse a
19 certain number of people from serving on the jury. They can
20 do that for any reason whatsoever. They do not have to give
21 any reason to do that. And so in just a minute -- what the
22 clerk is doing -- we used to have this nice little basket
23 and we'd put everybody's name in there like we were playing
24 bingo or something, and we're draw it out and read that
25 name, and it worked so good. Now, they do it by computer,

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1 and I don't understand anything I can't see. So I don't
2 understand how the computer works. But in just a minute the
3 computer is going to generate a random list of your names
4 and the clerk will call the names on that list. If your
5 name is called I'll ask you to come up and stand right up
6 against this podium and just look at that back door. Now,
7 don't make a run for it, now -- but the lawyers need to get
8 one more look at you before they make their decision as to
9 whether they use one of their excuses, we call those
10 strikes, of whether you'll be seated on the jury.

11 So if your name is called, please come on up to the
12 front and bring your -- if you've got a hat or coat or
13 umbrella or book or something bring that with you so you
14 won't have to go back. You might be going over in this jury
15 box. Last week I had a lady came up with a crutch and then
16 when she was selected on the jury she had to go back and get
17 her other crutch. She came up with one.

18 I hear the printer running. That means we're getting
19 good at this.

20 THE COURT: Ladies and gentlemen, I'm sure Judge
21 Dickson introduced you to -- she used to be my court
22 reporter for a long time, Ms. Walker, but today in my
23 courtroom -- he didn't introduce you this morning?

24 MS. WALKER: No, sir. He never does.

25 THE COURT: This is Ms. Harry Dot Walker. And this

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1 is Ms. Hilda Jordan, and they are both court reporters, and
2 it's their job to take down every word that is spoken in
3 this courtroom. This is a court of record, which means if
4 we need to print out a record of what a witness said or we
5 need to go back at the middle of the trial to see what a
6 witness said, or if we need to do that six months from now
7 we can do that.

8 If you notice your magistrate's courts sometimes are
9 referred to as Summary Courts. Summary court means a court
10 where the official record is simply a summary prepared by
11 the magistrate. And rather than a verbatim record.

12 Now, a lot of the magistrate's now have the facility
13 and the people to do a verbatim record, but we have to do
14 it. So I tell people there are only two people that we
15 can't have court without, we can do without any solicitor or
16 any public defender or any defense lawyer. We can do
17 without any member of the clerk's staff, but we can't do
18 without the judge and the court reporter.

19 So that's what these two ladies are and that's what
20 they're doing. And that's another reason sometimes when
21 we're both talking, and I ask you -- and you know what the
22 question is and you start answering before I even finish the
23 question it's terrible for a court reporter to try to write
24 that down. So we have to try to guard against that.

25 All right. The clerk is ready. Is the state ready?

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1 MR. SORENSON: Yes, sir.
2 THE COURT: Defense ready?
3 MR. MELLARD: Yes, sir.
4 THE COURT: All right. Mr. Clerk, you may proceed.
5 THE CLERK: Juror No. 84, Terry L. Haynes.
6 THE COURT: Come on down Ms. Haynes. You can show
7 everybody how to do it. Just come right on down here and
8 turn around and look back that direction while the lawyers
9 get one last thought.
10 THE CLERK: What says the state?
11 MR. SORENSON: Please excuse Ms. Haynes.
12 THE CLERK: You may return to your seat.
13 No. 136, Robert Paulk.
14 THE COURT: Morning, sir.
15 JUROR NO. 136: Morning, sir.
16 THE CLERK: What says the state
17 MR. SORENSON: Please present Mr. Paulk.
18 THE CLERK: What says the defense?
19 MR. MELLARD: Please seat Mr. Paulk.
20 THE CLERK: You may be seated in the jury box, Mr.
21 Paulk.
22 No. 186, Isabella Way.
23 What says the state?
24 MR. SORENSON: Please present Ms. Way.
25 THE CLERK: What says the defense?

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1 MR. MELLARD: Please seat the juror.

2 THE CLERK: You may be seated in the jury box, Ms.
3 Way.

4 No. 48, Kimberly Dubose.

5 What says the state?

6 MR. SORENSON: Please present Ms. Dubose.

7 THE CLERK: What says the defense?

8 MR. MELLARD: Please seat Ms. Dubose.

9 THE CLERK: You may be seated in the jury box, Ms.
10 Dubose.

11 No. 170, Ernestine Thompson.

12 What says the state?

13 MR. SORENSON: Please present Ms. Thompson.

14 THE CLERK: What says the defense?

15 MR. MELLARD: Please seat the juror.

16 THE CLERK: You may have a seat in the jury box,
17 Ms. Thompson.

18 No. 154, Violene Scott.

19 What says the state?

20 MR. SORENSON: Please excuse Ms. Scott.

21 THE CLERK: You may return to your seat, Ms. Scott.

22 No. 52, Brian Etheredge.

23 What says the state?

24 MR. SORENSON: Please present Mr. Etheredge.

25 THE CLERK: What says the defense?

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1 MR. MELLARD: Please excuse Mr. Etheredge.

2 THE CLERK: You may return to your seat.

3 No. 105, Roxanne Lalande.

4 What says the state?

5 MR. SORENSON: Please present Ms. Lalande.

6 THE CLERK: What says the defense?

7 MR. MELLARD: Please excuse Ms. Lalande.

8 THE CLERK: You may return to your seat.

9 No. 199, Kathryn Gramling.

10 What says the state?

11 MR. SORENSON: Please present Ms. Gramling.

12 THE CLERK: What says the defense?

13 MR. MELLARD: Please seat Ms. Gramling.

14 THE CLERK: Please be seated, Ms. Gramling.

15 No. 40, Lawrence Curtis.

16 What says the state?

17 MR. SORENSON: Please present Mr. Curtis.

18 THE CLERK: What says the defense?

19 MR. MELLARD: Please excuse Mr. Curtis.

20 THE CLERK: You may return to your seat, Mr.

21 Curtis.

22 No. 133, Lisa Padgett.

23 What says the state?

24 MR. SORENSON: Please present Ms. Padgett.

25 THE CLERK: What says the defense?

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1 MR. MELLARD: Please seat Mr. Padgett.

2 THE CLERK: Have a seat, Mr. Padgett.

3 No. 193, Andrew Williams.

4 What says the state?

5 MR. SORENSON: Please present Mr. Williams.

6 THE CLERK: What says the defense?

7 MR. MELLARD: Please seat the juror.

8 THE CLERK: Please have a seat in the jury box, Mr.
9 Williams.

10 No. 8, Julia Bailey.

11 What says the state?

12 MR. SORENSON: Please present Ms. Bailey.

13 THE CLERK: What says the defense?

14 MR. MELLARD: Please seat Ms. Bailey.

15 THE CLERK: Please have a seat in the jury box, Ms.
16 Bailey.

17 No. 143, Sandra Ravenell.

18 What says the state?

19 MR. SORENSON: Please present Ms. Ravenell.

20 THE CLERK: What says the defense?

21 MR. MELLARD: Please excuse Ms. Ravenell.

22 THE CLERK: You may return to your seat, Ms.
23 Ravenell.

24 No. 104, Roger Kovach.

25 What says the state?

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1 MR. SORENSON: Please present Mr. Kovach.
2 THE CLERK: What says the defense?
3 MR. MELLARD: Please excuse Mr. Kovach.
4 THE CLERK: You may return to your seat, Mr.
5 Kovach.
6 No. 14, Tracy Bird.
7 What says the state?
8 MR. SORENSON: Please present Ms. Bird.
9 THE CLERK: What says the defense?
10 MR. MELLARD: Please seat Ms. Bird.
11 THE CLERK: Have a seat in the jury box.
12 No. 171, Jason Toole.
13 What says the state?
14 MR. SORENSON: Please present Mr. Toole.
15 THE CLERK: What says the defense?
16 MR. MELLARD: Please seat Mr. Toole.
17 THE CLERK: You may be seated in the jury box.
18 No. 134, Susan Palmer.
19 What says the state?
20 MR. SORENSON: Please present Ms. Palmer.
21 THE CLERK: What says the defense?
22 MR. MELLARD: Please excuse Ms. Palmer.
23 THE CLERK: You may return to your seat, Ms.
24 Palmer.
25 Alexander Drayton. This is a transfer. (9999)

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1 What says the state?

2 MR. SORENSON: Please present Mr. Drayton.

3 THE CLERK: What says the defense?

4 MR. MELLARD: Please seat Mr. Drayton.

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

6 No. 191, Johnnie White.

7 What says the state?

8 MR. SORENSON: Please present Ms. White.

9 THE CLERK: What says the defense?

10 MR. MELLARD: Please seat Ms. White.

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

12 THE COURT: Give us two alternates, please.

13 Strikes will be one and two for each.

14 THE CLERK: No. 182, Gay Wannamaker.

15 What says the state?

16 MR. SORENSON: Please present Ms. Wannamaker.

17 THE CLERK: What says the defense?

18 MR. MELLARD: Please seat Ms. Wannamaker.

19 THE CLERK: You may be seated, Ms. Wannamaker.

20 No. 176, Hence Van Noy.

21 What says the state?

22 MR. SORENSON: Please present Mr. Van Noy.

23 THE CLERK: What says the defense?

24 MR. MELLARD: Please seat Mr. Van Noy.

25 THE COURT: Are there any matters as far as the

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1 jury selection from the state?

2 MR. SORENSON: No, Your Honor.

3 THE COURT: From the defense?

4 MR. MELLARD: No, sir.

5 THE COURT: What do we need to tell the jury, to
6 call after 6:00?

7 MR. SORENSON: Yes, sir.

8 THE COURT: All right. Ladies and gentlemen who
9 were not selected on this jury I'm going to excuse you at
10 this time, and ask you to call back in after 6:00 o'clock.
11 Do all of you have the call-in number? Be sure you have
12 that number. We do not know whether we will need you in the
13 morning or not. Obviously, if we knew that now we would
14 tell you, but we don't know. So please call in after 6:00
15 o'clock this afternoon and follow whatever instructions you
16 find on that machine. Just hold up one second.

17 Yes, ma'am?

18 MS. WAY: Sir, I probably need to be excused. I --

19 THE COURT: Wait a minute, wait a minute, wait a
20 minute. Come over here and talk to me at the bench.

21 (Off the record bench conference with juror and the Court.)

22 THE COURT: I do find this juror needs to be
23 excused. If you'll just have a seat back out there.

24 Y'all approach the bench.

25 (Off the record bench conference with counsel and the

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1 Court.)

2 THE COURT: All right. Ms. Wannamaker, you will
3 be on the jury. So you don't have to move right this
4 minute, but you are on the jury, and we're going to draw one
5 more alternate. The strikes will be one and two for each.

6 THE CLERK: No. 184, Angela Watson.

7 What says the state?

8 MR. SORENSON: Please present Ms. Watson.

9 THE CLERK: What says the defense?

10 MR. MELLARD: Please excuse Ms. Watson.

11 THE CLERK: Please return to your seat.

12 No. 89, Lawanda Irving.

13 What says the state?

14 MR. SORENSON: Please present Ms. Irving.

15 THE CLERK: What says the defense?

16 MR. MELLARD: Please excuse Ms. Irving.

17 THE CLERK: Please return to your seat.

18 No. 112, Anthony Lockard.

19 What says the state?

20 MR. SORENSON: Please present Mr. Lockard.

21 THE CLERK: And the defense?

22 MR. MELLARD: Please seat Mr. Lockard.

23 THE CLERK: Take a seat, Mr. Lockard.

24 THE COURT: You can just sit on the back row for
25 right now will be fine. Yeah, right back there.

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1 Now, any other matters regarding the jury from the
2 state?

3 MR. SORENSON: No, sir.

4 THE COURT: From the defense?

5 MR. MELLARD: No, sir.

6 THE COURT: Okay. Now, ladies and gentlemen, you
7 are excused at this time. Please call in after 6:00 o'clock
8 and follow whatever message you find on that machine at that
9 time.

10 (Jury panel is excused for the day.)

11 THE COURT: Ladies and gentlemen, it's going to be
12 just a few minutes. We've got a couple matters -- are there
13 any pre-trial matters I need to take up?

14 MS. HINDS: No, sir.

15 MR. SORENSON: Yes.

16 THE COURT: Come up here real quick.

17 (Off the record bench conference with counsel and the
18 Court.)

19 THE COURT: Ladies and gentlemen, we have some
20 matters that we need to take care of before we start this
21 trial. My best guess is -- my best guess is usually
22 horrible, but my best guess is we'll be ready to start this
23 case at 2:00 o'clock. So I'm going to excuse you until 2:00
24 o'clock. It could be that it takes longer to do what I need
25 to do that you're going to have to wait a little while on us

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1 when you get back. I hope not. We'll do the best we can to
2 get ready at 2:00 o'clock, but I don't want to be ready to
3 start and not have you back.

4 Now, let me tell you, as I told you, you have to make a
5 decision in this case based solely on what you hear in this
6 courtroom. It's also important that you base your decision
7 on everything that you hear in this courtroom. In a few
8 minutes, when you get back after lunch the attorneys are
9 going to make their closing arguments. I mean, they're
10 going to make their opening statements to you. They're
11 going to try to kind of explain to you what they think the
12 evidence is going to show in this case. Then the state has
13 the burden of proof. They have to go first because they
14 brought the case, they have the burden of proof. They will
15 call witnesses, they will have some exhibits, I'm sure.

16 As I told you, the defendant does not have to prove
17 anything. So he doesn't have to testify. He doesn't have
18 to call any witnesses. But if he chooses to testify or call
19 any witnesses, he would do that after state finishes putting
20 up their case.

21 Then the attorneys will come back to you and they will
22 try to persuade you in their closing arguments to see the
23 facts in this case in favor of their respective positions.
24 You are the judges of the facts. You determine what the
25 truth is about the matters of which you're going to hear.

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1 And after you hear the closing arguments, I will explain you
2 to, I will charge you on the law. I will tell you what the
3 law is that might apply to this case, depending upon what
4 you find the facts to be in this case. And only after I
5 have charged you on the law will you have all of the
6 information that you need to start making a decision in this
7 case. For that reason I ask you not to talk about the case.
8 Don't talk about it among yourselves. Don't talk about it
9 with somebody you go to lunch with. They may offer some
10 opinion about the case. It might be that they know all
11 about the case and they'll tell you what they think you
12 should do in this case. That would disqualify you from
13 serving on the jury, and if you start talking about it after
14 you've heard one witness or two witnesses or after lunch
15 after you've heard the opening statement, you'll start
16 making and forming an opinion about the case, and that would
17 be improper because you don't have all the information you
18 need about the case.

19 So for those reasons, I ask you not to talk about the
20 case at all. And so don't talk about the case when you go
21 to lunch. If you go together, that's fine, but don't talk
22 about the case with anybody.

23 Now, the bailiff will take you out the back and she
24 will show you the jury room and she will -- well, we're
25 going to be upstairs. All right. They'll explain that.

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1 We're going to be on the 3rd floor when we come back after
2 lunch, and so you will take the elevator all the way to the
3 3rd floor. There'll be one of the bailiff's standing
4 outside of the elevator at quarter to 2:00 to explain to you
5 where you're to do. You will go to the jury room upstairs
6 on the 3rd floor. Do not come in this courtroom. Do not
7 even stop the elevator on the 2nd floor. And when you come
8 back go straight to that jury room. In other words, if you
9 come back to the courthouse early don't hang around in the
10 lobby or the courtrooms or anywhere. You go straight on up
11 to the 3rd floor to that jury room. And we'll see you
12 there. We'll try to be ready to go at 2:00 o'clock.

13 Thank you very much. You're excused at this time.
14 (Jury out for lunch at 12:10 p.m.)

15 THE COURT: All right, Mr. Mellard, you think we
16 need a Neil Biggers, identification hearing?

17 MR. MELLARD: Yes, sir, in addition to the other
18 motion that we talked about.

19 THE COURT: All right.

20 Solicitor, you said you didn't think we need a hearing?

21 MR. SORENSON: Your Honor, if I can just briefly
22 kind of give you our -- kind of brief factual background?

23 THE COURT: Yes, sir.

24 MR. SORENSON: This occurred about 6:00 o'clock in
25 the morning. The victim, Ms. Shannon, is going -- a carport

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1 door going to her car. She was rushed by a man that she
2 described to the police as being a tall, slender, black male
3 with jeans, a dark t-shirt, and a ski mask pulled over his
4 face with a gun. He tried to get her to go open up her
5 house. She also was shot one time in the leg and the person
6 takes off running. The police, based on that description,
7 apprehended the defendant half a mile away within 15 to 30
8 minutes. He is brought back to the scene without -- they
9 don't find the mask or the gun. He is brought back to the
10 scene. She looks at him, at that point, she didn't see his
11 face. She didn't ID him by his face. She said that looks
12 like the person based on physical build and the clothing. I
13 wasn't intending on having her doing any kind of in court
14 identification to the effect that she doesn't see his face,
15 but she described his looks. That's about all she can
16 describe as far as his face, because he's got a ski mask on.
17 So all she sees are eyes and a mouth.

18 THE COURT: So she's not going to say that the
19 defendant, as he sits in court today, bears the same general
20 description and build as the person who committed the crime.
21 She's just going to testify that when they brought somebody
22 back that night that person fit the general description of
23 the person who committed the crime?

24 MR. SORENSON: Physical build and clothing.

25 THE COURT: I don't see any need for a hearing. I

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1 don't know what we would ask her.

2 MR. MELLARD: That's fine, Your Honor. We just
3 wanted to make sure that there was going to be no inquiry
4 identification.

5 THE COURT: All right.

6 MR. SORENSON: I mean, I don't see how she could --
7 could testify that's the man --

8 THE COURT: Well, I understand. He and I agree
9 that there's no need for a Neil Biggers type hearing.

10 Now, is there anything else pre-trial from the state?

11 MR. SORENSON: I don't know of anything, Your
12 Honor.

13 THE COURT: From the defense?

14 MR. MELLARD: We would ask that you sequester the
15 officers. I understand that -- as far as the rest of the
16 officers, we'd ask you sequester them, Your Honor.

17 THE COURT: I'll sequester all the fact witnesses,
18 except the victim and the case officer.

19 MR. MELLARD: Yes, sir.

20 THE COURT: And if there are any witnesses you
21 anticipate then they must be sequestered, also, Mr. Mellard.

22 MR. MELLARD: Yes, sir.

23 THE COURT: And if there are any, you need to get
24 their names --

25 MR. MELLARD: No, sir, there are not.

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1 THE COURT: You don't have any names. Okay. All
2 right.

3 Now, I know we need to take up a matter without the
4 solicitor. Is there anything else we need to take up with
5 the solicitor?

6 MR. MELLARD: No, sir.

7 THE COURT: All right. We'll be in -- well,
8 solicitor, we have an ex parte matter we need to take up.
9 We are going to take that up at this time.

10 MR. SORENSON: You just need us upstairs before
11 2:00 o'clock, right?

12 THE COURT: And as was just pointed out to me, I
13 have a rehearing in a probation violation case at 2:00
14 o'clock. So I've screwed up again. We won't be quite ready
15 at 2:00 o'clock. But it won't be very long after 2:00
16 o'clock, and I don't know whether I'll do that upstairs. I
17 might -- depending on what they're doing. I might do that
18 downstairs because there might be some people here. Some
19 visitors.

20 MR. SORENSON: Yes, sir.

21 THE COURT: So if you'll excuse us at this time
22 we'll take up the ex parte matter.

23 MR. SORENSON: All right.

24 (State leaves courtroom.)

25 (Ex parte motion by Mr. Mellard.)

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1 THE COURT: Ladies and gentlemen, I need to take up
2 a private matter between the defendant and his attorneys.
3 So I am going to ask that you all vacate the courtroom. Mr.
4 Mellard is there somebody you think should be allowed to
5 stay, if you'll tell me who that is?

6 MR. MELLARD: Investigator McDaniels.

7 THE COURT: All right. Anybody else?

8 MR. MELLARD: He wants his mom to stay.

9 THE COURT: You can stay. And his father. Both of
10 y'all can stay with the understanding -- Y'all please stand.
11 Both of you. And sir, your name?

12 MR. MOSELEY: James Moseley.

13 THE COURT: James Moseley. And your name, please?

14 MS. OWENS: Valerie Owens.

15 THE COURT: Valerie Owens. All right. Raise your
16 right hands.

17 (WHEREUPON, James Moseley, was
18 sworn to tell the truth.)

19 (WHEREUPON, Valerie Owens, was
20 sworn to tell the truth.)

21 THE COURT: Will you agree not to discuss outside
22 of this courtroom what goes on during this closed hearing
23 until this week of court is over. Once this week of court
24 is over if there's something you want to talk about you're
25 welcome to do that, but the nature of this matter does not

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1 need to be discussed outside of this courtroom. Do you
2 agree to that, Mr. Moseley?

3 MR. MOSELEY: Yes, sir.

4 THE COURT: Do you agree to that, Ms. Owens?

5 MS. OWENS: Yes, sir.

6 THE COURT: All right. You can have a seat.

7 All right, Mr. Mellard.

8 MR. MELLARD: At this time, Your Honor, we would
9 ask to be relieved in this case.

10 THE COURT: All right.

11 MR. MELLARD: The grounds for this motion is that
12 the defendant has not really cooperated with us as far as
13 preparing this case for trial.

14 Just to give you a little background, this case was
15 opened by the public defenders office in June of '06. It's
16 about three years old. Michael Culler was the attorney at
17 the time, and in speaking with the defendant he's indicated
18 he didn't really trust Mr. Culler, and, therefore, did not
19 cooperate with Mr. Culler or divulge any information
20 regarding this case to Mr. Culler.

21 THE COURT: That's what Mr. Owens told you?

22 MR. MELLARD: Yes.

23 THE COURT: Okay.

24 MR. MELLARD: That's what he told me.

25 THE COURT: All right.

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1 MR. MELLARD: The case was transferred to me in
2 July of '08, about a year ago. We've tried to get in touch
3 with the defendant in August of '08. He lived in Las Vegas,
4 at the time. So we've been -- me and the defendant have
5 been corresponding actually by phone conference, is mostly
6 how we've been doing this, and during those phone
7 conferences, we had a phone conference in October of '08.
8 He provided no witnesses and no alibis at that time. April
9 28, 2009, we had a phone conference. Again, no witnesses,
10 no alibis. May 12, 2009, I met with the defendant. We
11 talked about the offer, we talked about the trial option.
12 Again, there was no witnesses or alibis discussed by the
13 defendant. May 28, 2009, we had another phone conference.
14 Again, he told me no witnesses nor alibis. At that time,
15 May 28, 2009, he told me he would provide me with a written
16 version of his version of events within seven days. I've
17 never received that written version from the defendant.
18 July '09, July 23, 2009, I got in touch with my investigator
19 and he started talking to potential witnesses and --

20 THE COURT: What was that date?

21 MR. MELLARD: July 23, 2009, I got my investigator,
22 Mr. McDaniels, and he started trying to track down witnesses
23 that we thought, from what I could identify through the
24 discovery. So we've been trying to do that on his behalf.
25 July 24th, my office called Mr. Owens because he was on the

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1 trial roster. We told him he needed to be in our office on
2 that Friday so we could prep for trial. We were concerned
3 it was coming up for trial.

4 THE COURT: Did you talk with Mr. Owens, yourself?

5 MR. MELLARD: I believe my office talked to him,
6 Your Honor. Set a meeting with him that Friday. He did not
7 show up for the meeting on Friday.

8 THE COURT: What was the date on Friday?

9 MR. MELLARD: Let's see -- I believe Friday -- that
10 I don't know. I just have that down that he did not show up
11 for his Friday meeting.

12 THE COURT: All right.

13 MR. MELLARD: On that same day, I did email him a
14 letter to his email address setting out all that I knew
15 about the case, as far as, what the charges were, what they
16 carried, what the state's burden of proof was. So I sent
17 that to him and he responded by email on the 29th of July,
18 the next day, requesting a copy of his discovery. So we put
19 a copy of his discovery in the mail to him. July 30th, met
20 with the investigator, again, and found out what he'd
21 learned on the investigation. On the 31st, I went to the
22 crime scene with the investigator, and Attorney Hinds. On
23 July 31st, we had a meeting set with the defendant to prep
24 for trial. He didn't show up for that meeting.

25 THE COURT: What date?

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1 MR. MELLARD: July 31st.

2 THE COURT: How had you notified him of that
3 meeting?

4 MR. MELLARD: We'd call him, Your Honor. I believe
5 he was in Las Vegas at the time.

6 THE COURT: Okay.

7 MR. MELLARD: August 3, 2009, myself, the
8 investigator, and Attorney Hinds met with Mr. Owens' mom.
9 At that time, he told us he didn't trust his last public
10 defender.

11 THE COURT: That was what date; August what?

12 MR. MELLARD: August 3rd.

13 THE COURT: 3rd. Okay.

14 MR. MELLARD: Yes, sir.

15 We told him, listen, this case is coming up for trial.
16 We've got to have some communication here to prepare for it.
17 Let's see, also on that same day, August 3rd, we talked to
18 him about the fact that he's going to be served with an
19 indictment for attempted burglary, first degree. We talked
20 about that. We talked about he could still plea to the
21 assault and battery with intent to kill, but once he was
22 served with that attempted burglary indictment all offers
23 would be off the table. August 4th, Mr. Owens called my
24 office and spoke to my secretary Deborah, and informed her
25 he was not going to plea, he wanted a trial. August 5th, he

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1 was indicted for attempted burglary, first. That same date,
2 August 5th, myself, Attorney Hinds met with Mr. Owens.
3 Again, he said he didn't trust Michael Culler. Didn't tell
4 him his story. That same day, myself, Attorney Hinds,
5 investigator, Mr. Owens, and Mr. Owens momma went to the
6 site where the defendant was arrested. We basically got in
7 our cars towards the scenes where all these events took
8 place. August 7, 2009, Mr. Owens didn't show up for an
9 11:00 o'clock appointment. We rescheduled the appointment
10 for Mr. Owens for later that day, 2:30 p.m. Again, he was a
11 no show for his 2:30 appointment. We later tried to call
12 him on August 7th. He would not talk to either Attorney
13 Hinds nor myself. He did talk to my investigator, Mr.
14 McDaniels and informed him that he was not going to make his
15 2:30 appointment, and he was not going to talk to Attorney
16 Hinds or myself.

17 Additionally, we had an appointment with the defendant
18 on Saturday, August 8th. He indicated to our investigator
19 that he did not want to make that appointment. So we had to
20 cancel that appointment. And then today, myself, Attorney
21 Hinds and the investigator met with the defendant and the
22 defendant's mom. Again, he kind of indicated he just didn't
23 trust us.

24 So at this point, we would ask to be relieved, Your
25 Honor. It's our position that he's facing some very serious

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1 charges here. He needs to cooperate with us. He has not
2 cooperated with us. We would ask to be relieved or in the
3 alternative we would ask for a 24-hour continuance to allow
4 us to discuss the case with him and to prepare this case for
5 trial, Your Honor.

6 THE COURT: All right.

7 Mr. McDaniel, would you stand, please, and raise your
8 right hand. You can stand right there.

9 (WHEREUPON, Mr. McDaniel, was sworn
10 to tell the truth.)

11 THE COURT: All right, sir. Mr. Mellard said on
12 two occasions the defendant called you and told you he was
13 not going to meet with the attorneys; is that right?

14 MR. MCDANIEL: Yes, that's correct.

15 THE COURT: Tell us what happened on those two
16 occasions.

17 MR. MCDANIEL: Well, actually, I did letters to
18 confirm to back up when our meetings were for documentation
19 purposes. The last meeting was on a Friday --

20 THE COURT: Well, go back to the first time this
21 happened. I think it was August the 7th.

22 MR. MCDANIEL: Yes, sir, I believe it was August
23 7th. That was the second time. I think. We -- that was
24 the second time, I believe. It says (inaudible).

25 THE COURT: I can't hear you.

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1 MR. MCDANIEL: I'm sorry.

2 THE COURT: Come on back up here on the stand.

3 (Mr. McDaniel comes to witness stand.)

4 MR. MCDANIEL: This letter is dated August 7, 2009
5 to Attorney Doug Mellard and Attorney Peggy Hinds.

6 Dear Attorney Mellard and Attorney Hinds, this letter
7 comes to you to document the events of this date with regard
8 to the criminal defense of the defendant Owens. As you both
9 are aware Defendant Owens missed our scheduled meeting at
10 11:00 o'clock a.m., Defendant Owens refused to accept calls
11 from both of you about this 2:30 p.m. reschedule meeting of
12 this date, and his scheduled polygraph on August 8th at 1:00
13 p.m.

14 I made contact with Defendant Owens by cellular
15 telephone in both your presence. Defendant Owens declined
16 my request to put our conversation on speaker. Our
17 conversation basically consisted of Defendant Owens refusing
18 to give me his mother's number, refused to talk to his
19 attorneys, refused to be on speaker phone, refused the 2:30
20 meeting today and refused a Saturday polygraph.

21 Defendant Owens told me that he had a friend in law
22 school who reviewed his file and gave him, Defendant Owens.
23 legal advice. Defendant Owens wanted to know who all was
24 going to testify against him at trial on Monday, August 10,
25 2009, and assured me that he would be there. Defendant

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1 Owens wanted to know why we wanted to speak to his mother.
2 Defendant Owens wanted to know if I would be at his trial on
3 Monday. Defendant Owens was called by me twice from my cell
4 phone, 803.622.4989, in which I called his cell phone,
5 803.528.7694.

6 Additionally, I wanted to document the review of the
7 photographs at the crime scene and cemetery once again to
8 both in pre-trial preparation.

9 This letter is August 7th.

10 THE COURT: All right.

11 MR. MCDANIEL: I've got a letter of August 6th. If
12 you'd like I'll just read it to you.

13 THE COURT: Yes, sir.

14 MR. MCDANIEL: Today, I traveled back -- this is to
15 Attorney Doug Mellard. Today, I traveled back to Memorial
16 Park Cemetery and spoke to caretaker Willie Johnson, who
17 was, in fact, the caretaker on the incident date in
18 question. Caretaker Johnson told me that the arrest and
19 foot chase happened before he got -- before he arrived at
20 work. He further stated that he, Caretaker Johnson, heard
21 the man who got arrested was traveling from the new church
22 parking lot diagonally towards the first drive-way and was
23 arrested in the ditch and fence area. Caretaker Johnson
24 stated that the police have returned to the cemetery several
25 times searching for a gun, specifically on tope of the green

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1 maintenance shed. As far as Caretaker Johnson knows no gun
2 or mask was ever recovered. FYI: I spoke with Walt and
3 Solicitor Sorenson at the cemetery at 2:35 p.m. this date
4 who were also running down the details. As of this writing,
5 Caretaker Johnson is not under subpoena.

6 This letter was dated August 6, 2009.

7 I've got another invoice, letter, I'm sorry -- dated
8 July 31, 2009.

9 Dear Attorneys Mellard and Hinds. I have looked into
10 the arrest of Defendant Owens --

11 THE COURT: I'm just concerned with the
12 relationship between he and his attorneys and his lack of
13 cooperation or his lack of cooperation with your or the
14 attorneys.

15 MR. MCDANIEL: Yes, sir.

16 THE COURT: That's --

17 MR. MELLARD: Your Honor, may I show him a memo
18 that he sent to me?

19 THE COURT: Yes, sir.

20 (Mr. Mellard passes document to Mr. McDaniel.)

21 MR. MCDANIEL: This letter is dated August 4th.

22 Dear Attorneys Mellard and Hinds. This letter comes to
23 you to document our meeting today at the public defender's
24 office with Defendant Owens and his mother, Ms. Valerie
25 Owens. As a result of our meeting I am going to obtain a.

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1 SLED criminal history on victim Irene S. Shannon and a South
2 Carolina Driver's record on Defendant Owens. Defendant
3 Owens is going to obtain detailed Verizon cellular billing
4 information from 6/01/2006 through 6/5/2006. I have
5 listened to Defendant Owens' versions of the events and have
6 some concern and the specifics. I understand his reason for
7 not coming forward to meet his attorneys are based on
8 Defendant Owens' distrust of his previous public defender,
9 as he put it. I feel that we have been put at a slight
10 crunch for time mainly pertaining to the acquisition of the
11 Verizon cellular bills. I have made myself available to
12 Defendant Owens and Ms. Owens at a moments notice should
13 anything new arise.

14 And that letter is dated August 4, 2009.

15 THE COURT: All right, sir. You can step down.

16 Mr. Owens, do you disagree with any of the facts as set
17 out by Mr. Mellard or Mr. McDaniel?

18 MR. OWENS: No.

19 THE COURT: All right. Do you have anything you
20 want to say?

21 MR. OWENS: Yes, sir, if I could?

22 THE COURT: Yes, sir.

23 MR. OWENS: Take the time line on this incident.
24 When this first occurred I was nowhere around. And I just
25 approached. I've never been trouble with the law, so --

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1 technically the reasons why I distrust my attorney --

2 THE COURT: The reason you haven't cooperated with
3 them and you're facing very serious charges.

4 MR. OWENS: Okay. My first public defender,
5 Michael Culler, when I was -- I believe I was before you,
6 and I was offered a plea. But I'm not guilty. So he told
7 me that the gunshot residue was the key fact evidence in the
8 case. He looked me in my face and was waiting for a
9 reaction and said it was positive. So we come in front of
10 you, Your Honor, and it comes up that it's negative. That's
11 why -- I don't know if you remember, but my reaction was
12 like, what, did you say negative? And you said that didn't
13 mean anything. When that happened, like I said, I've never
14 been in trouble before so automatically once he -- I figured
15 he lied to me on purpose to try to get me to plea in order
16 to present myself as guilty when I'm, in fact, not. That's
17 when all the trust -- plus all the trust I have for -- I was
18 hoping to get private legal but unfortunately I'm unable to
19 pay for that. And then when I was unable to come to the
20 meeting -- I can't remember which one, on Friday, I believe
21 it was, my little brother -- I was in Las Vegas for a while.
22 My brother just had a baby girl. I've never seen my niece
23 before in my life and I wanted to go see her for the first
24 time. I mean before -- just in case. She's down in
25 Bluffton, staying with her mother at a maternity home, and I

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1 wasn't sure I was going to ever see her again in my life
2 with what I'm facing, the stuff that's going on, and like I
3 said, my distrust of the public defender's office. I just
4 -- this whole thing has been like a setup, you know. That's
5 the reason I didn't make it. Like he said, I spoke to a
6 friend that I trust very much who's in law school. Even
7 though he's in law school, he has more knowledge of the law
8 than I do. And from what he informed me the polygraph would
9 be inadmissible in court. So the only thing that can
10 possibly do is hurt me. Like I said, there is no evidence
11 -- they didn't find the gun on me. The gunshot residue was
12 negative that I was told was positive. And all this stuff
13 is happening. Like I said, I've never been in trouble
14 before. I've never been arrested. And it's kind of
15 overwhelming and I chose not to meet with them. Hopefully,
16 being able to get a private attorney or in hopes that if
17 they are trying to set me up I would not give them anything
18 to be able to be about to -- those are the reasons why. It
19 was -- I've been to every other appointment. Another reason
20 why I was unable to come when I was in Vegas was that I was
21 unable to afford a ticket in that short period of time. I
22 was only told maybe like five or four days or maybe a week
23 ahead of time. A ticket was a thousand and something. I
24 was unable to find one in that period of time that I could
25 afford.

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1 Those are the reasons why I missed -- and I didn't mean
2 not to cooperate. I don't want to be set up for something I
3 did not do.

4 THE COURT: How old are you?

5 MR. OWENS: I'm 29. Well, I'll be 29 August 28th.

6 THE COURT: And how far did you go in school?

7 MR. OWENS: I -- well, I'm one class away from
8 receiving my bachelor's in political science.

9 THE COURT: Where?

10 MR. OWENS: King College, that's in Bristol,
11 Tennessee.

12 THE COURT: Which college?

13 MR. OWENS: King College in Bristol, Tennessee.

14 THE COURT: Well, you don't -- what you're saying
15 doesn't make sense to me. I mean, if you didn't trust Mr.
16 Culler, I can understand that.

17 MR. OWENS: Well, with the not trusting Mr. Culler,
18 I -- the whole public defender office -- I mean, once
19 somebody tell a blatant lie to you --

20 THE COURT: Well, that doesn't have anything to do
21 with Mr. Mellard and Ms. Hinds.

22 MR. OWENS: That's what I'm trying to say --

23 THE COURT: But beyond that you would rather do
24 nothing than to try to cooperate?

25 MR. OWENS: Well, me and my mother were trying to

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1 get a private attorney.

2 THE COURT: But you -- you've been unsuccessful
3 with that, and even in the last couple of weeks they've been
4 trying to get you to cooperate with them and you've refused.

5 MR. OWENS: Like I said, Your Honor, I'm trying --
6 I believe or I believed --

7 THE COURT: So you would rather just keep your
8 mouth shut and take a chance on going to jail for ever. I
9 mean you could go forever. A life sentence is forever.

10 MR. OWENS: That's what --

11 THE COURT: You'd rather keep your mouth shut and
12 take a chance on going to jail forever than to talk with
13 your lawyers about the case?

14 MR. OWENS: Well, I only missed that meeting on
15 Friday and that Saturday. Those are the only two meetings I
16 missed.

17 THE COURT: But you -- but they're telling me you
18 hadn't told them anything when you met with them. Is that
19 right?

20 MR. OWENS: I mean, I have --

21 THE COURT: Do you have anything else to tell them?

22 MR. OWENS: As far as -- No. I've told them.

23 THE COURT: You've told them every thing about the
24 case that you know to tell them?

25 MR. OWENS: Yes.

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1 THE COURT: Okay. Thank you.

2 Now, Mr. Mellard, he says he's told you everything
3 about the case that he knows to tell you.

4 So my question is to you and Ms. Hinds, do y'all have
5 any discovery; right?

6 MR. MELLARD: We do have the discovery, Your Honor.

7 THE COURT: And you've had the discovery a long
8 enough time to do whatever you needed to do with it; to take
9 advantage of whatever might have been there, to follow it up
10 and do your own investigation?

11 MR. MELLARD: We've done the best we could based on
12 what we had, Your Honor.

13 THE COURT: Okay. So basically, based on
14 information that you have you're ready for trial?

15 MR. MELLARD: I would say I'm ready for trial. I
16 have concerns about the attorney/client relationship being
17 not in place here, Your Honor.

18 THE COURT: I understand that. He doesn't trust
19 you and if I were you I would not like that. But that's not
20 -- I mean, I know that's not going to affect your
21 willingness to represent him and do the best that you can
22 with the evidence that you have. I mean, I've known you and
23 Ms. Hinds long enough to do that, that you're not going to
24 have any grudge or spite against Mr. Owens because he's used
25 bad judgment. So you're thoroughly familiar with the

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1 discovery presented to you by the state and the evidence
2 that they're going to present at trial?

3 MR. MELLARD: Yes, sir.

4 THE COURT: And you've even sent Mr. Owens copies
5 of that discovery?

6 MR. MELLARD: Yes, sir.

7 THE COURT: So in that sense you're ready for
8 trial. It's just that you think he should have told you
9 some things, but he says he's told you everything he knows
10 to tell you; is that right?

11 MR. MELLARD: That's what he's telling me.

12 THE COURT: Yes, sir, Mr. Owens, you want to speak
13 again?

14 MR. OWENS: Yes, sir. I mean, if he took that --
15 he doesn't want to try my case then I -- can I possibly get
16 another attorney?

17 THE COURT: That's not what he's telling me.

18 MR. OWENS: Oh.

19 THE COURT: He's telling me that he feels like you
20 have not cooperated with him and giving him some information
21 that might have made him more able to provide a good defense
22 for you. He's not telling me that he does not want to
23 represent you. He's questioned whether he could do a better
24 job if you had shared some more information with him.
25 That's all. But you're telling me you've told him

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1 everything there is to tell him about the case?

2 MR. OWENS: Right.

3 THE COURT: Right?

4 MR. OWENS: Yes, sir.

5 THE COURT: Well, I see no reason -- I mean, I know
6 Ms. Hinds -- how long you been working here, Ms. Hinds?

7 MS. HINDS: Fourteen years.

8 THE COURT: Fourteen?

9 MS. HINDS: Almost.

10 THE COURT: And I've been in this courtroom with
11 her most of those 14. In fact, I guess I was here before
12 you. I've couldn't remember exactly when you came. I
13 wasn't a judge that long, but I prosecuted on the other side
14 from Ms. Hinds and I've been a judge for 11 years, and she's
15 a very capable lawyer. I haven't known Mr. Mellard that
16 long, but I've seen him try cases and they're both good
17 lawyers.

18 MR. OWENS: I understand that. Like I said, my
19 distrust came from just the blatant lie I was told and -- I
20 don't -- but once somebody tells me a blatant lie the trust
21 was obviously destroyed. And I'm sorry that I put Michael
22 Culler's face on the face of the entire public defender's
23 office. Maybe that was a decision I should not have made,
24 but --

25 THE COURT: Well, I think that was a mistake, but

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1 from what you're telling me you don't really have anything
2 else you can tell them that might help them prepare a
3 defense; right?

4 MR. OWENS: Yes.

5 THE COURT: Okay. I deny your motion, Mr. Mellard.

6 And if you think of something you need to tell them,
7 you need to tell them. You're out on bond, I understand?

8 MR. OWENS: Yes, sir.

9 THE COURT: All right. Technically, your bond ends
10 when the case is called for trial, which means I should put
11 you in jail because there's no bondsman out there to
12 reimburse the state or help find you if you decide not to
13 come back. I'm not going to do that. I'm going to leave
14 you out so that you can talk with your attorneys, and you'll
15 be able to talk with them at recesses and over the lunch
16 hour and recess this afternoon, as the case progresses and
17 tonight.

18 But you need to understand, Mr. Owens, if you for some
19 reason decide that you don't want to show up, the trial will
20 not stop. In other words, we will move forward without you.
21 You understand that?

22 MR. OWENS: Yes, sir.

23 THE COURT: So don't think at this late stage of
24 the game that you can gain yourself any advantage. You will
25 not gain yourself any advantage whatsoever because if you

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1 fail to show up I'll do two things. Number one, I'll issue
2 a bench warrant for your arrest. And number two, I'll --
3 we're going forward with the trial. So you're a lot better
4 off here where you can talk with your lawyers and react to
5 the evidence that you hear from the stand and the other
6 witnesses testimony so you can tell your lawyers what you
7 think about that. At the appropriate time you will have to
8 make a decision about whether you want to testify or not.
9 Of course, if you're not here you can't make that decision.
10 So you understand the importance of your being here?

11 MR. OWENS: Yes, sir.

12 THE COURT: And I have your assurance of your being
13 here?

14 MR. OWENS: If I wasn't going to show up I wouldn't
15 be here now.

16 THE COURT: Well, I believe you. I think you'll be
17 back.

18 So we will be in recess until 2:00 o'clock. I'm sure
19 it will be a few minutes after 2:00.

20 (Court at recess for lunch at 1:30 p.m.)

21 (By agreement of counsel, State's Exhibits 1 through 7 were
22 marked for Identification Only over the lunch recess.)

23 (Court in session after lunch at 2:30 p.m.)

24 (Jury in at 2:31 p.m.)

25 THE COURT: All right, ladies and gentlemen, I

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1 apologize for keeping you waiting. Usually when we have
2 court we never know from one day to the next what we're
3 going to be doing. It's whatever comes up on the docket is
4 what we're doing. Some things we have to schedule far in
5 advance, and I had some lawyers from Columbia, and some
6 lawyers from Charleston and St. George and they had a matter
7 that needed to be heard. Several weeks ago we scheduled
8 that for 2:00 today. And I forgot about it. I just didn't
9 think about it until I told you I would try to be ready at
10 2:00 o'clock. So it's all my fault. That's the reason.
11 I've been downstairs in the courtroom having a hearing. I
12 haven't been some place playing tiddlywinks. But I
13 apologize for having kept you waiting.

14 Would you stand at this time and I will administer to
15 you the jurors oath. Please stand and raise your right
16 hand.

17 (WHEREUPON, the jury, was sworn.)

18 (Jury sworn at 2:32 p.m.)

19 THE COURT: Thank you very much. You may be
20 seated.

21 Ladies and gentlemen, I've already explained to you
22 kind of how we will get started; the state goes first and we
23 will have the opening statements and evidence. So we will
24 begin our trial at this time.

25 All right. We'll have the opening statements first.

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1 MS. BURBAGE: May it please the Court.

2 THE COURT: Yes, ma'am.

3 MS. BURBAGE: On June 5, 2006, Irene Shannon went
4 out into her carport ready for work and was greeted by a
5 masked man who was standing there with a gun demanding entry
6 into her home. When she couldn't get the keys to open the
7 door to her house he left her with a gunshot wound to her
8 leg and then fled out of her carport running up Broad
9 Street.

10 Now, ladies and gentlemen, you've heard from the judge
11 earlier, my name is Kelley Burbage. I'm one of the
12 assistant solicitor's here in Orangeburg County. And I'm
13 here today with Don Sorenson, who is also an assistant
14 solicitor here in Orangeburg County.

15 Ladies and gentlemen, this should be a brief trial, and
16 I want to go ahead and thank each and every one of you for
17 your service here. It's very important to everyone involved
18 in this case that you are here serving as jurors today.

19 Before I go back over the facts of the case, I briefly
20 just mentioned them, I want to go over the law. And as
21 prosecutors for the state the foremost thing I like to tell
22 you about is our burden. As prosecutors, we have a burden
23 to prove this case to you beyond a reasonable doubt.

24 You might ask yourself what is proof beyond a
25 reasonable doubt. Ladies and gentlemen, it's the proof that

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1 leaves you firmly convinced of the defendant's guilt of the
2 crimes for which he is charged. It is not proof beyond any
3 and all doubt. It is proof that leaves you firmly
4 convinced, and after you hear all the evidence and testimony
5 that is presented from this witness stand and you are left
6 firmly convinced of the defendant's guilt for the crimes
7 that he is charged, then you must render a verdict of
8 guilty.

9 What are the crimes he is charged with? We are here
10 today on two different crimes. One is assault and battery
11 with intent to kill, which is an unlawful act of a violent
12 nature to the person of another with malice aforethought
13 either expressed or implied. An unlawful act of a violent
14 nature with malice aforethought. Malice is the intentional
15 act or wrong without just cause or excuse.

16 He is also charged, not only with the assault and
17 batter with intent to kill, but with attempted burglary
18 first. Burglary first, ladies and gentlemen, is the
19 unlawful entry into the dwelling of another without consent
20 with the intent to commit a crime inside. Attempting to
21 enter the dwelling of another without consent with the
22 intent to commit a crime.

23 Well, ladies and gentlemen, when one is doing this they
24 are armed with a deadly weapon or they cause an injury to a
25 person who is not participating in the crime.

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1 Again, you're going to hear all the evidence and
2 testimony that comes from the witness stand and you'll then
3 -- at the end of this whole case the judge will charge you
4 on the law.

5 I just briefly told you what the law is in this case,
6 proof beyond a reasonable doubt. Burglary first, assault
7 and battery with intent to kill, but Judge Williams will
8 charge you on the law and if at any time during this trial
9 if what I've said or what Mr. Sorenson says or any of the
10 other attorneys say about the law conflicts in any way with
11 what Judge Williams tells you you must take what Judge
12 Williams charges you because he is the judge, the sole judge
13 of the law.

14 Now, on June 5, 2006, Ms. Irene Shannon, she got up at
15 about 6:00 in the morning. It's an ordinary Monday morning
16 workday. She's got a cup of water in one hand and car seat
17 for one of her kids in the other arm. She comes out of her
18 carport door headed to her car, and she's greeted, ladies
19 and gentlemen, by a masked man who comes running around the
20 carport standing there with a gun in her face, demanding and
21 yelling at her to open her door. She goes to the door, she
22 tries to open the door, she fumbles with her keys. He then
23 starts yelling at her that if she can't open the door to
24 just give him the keys. She's standing there at the door.
25 He pushes her against the door. He then shoots her in the

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1 leg. And then flees out of her carport up Broughton Street.

2 You'll hear from a number of different witnesses. Ms.
3 Shannon is able to give the officers the description of this
4 person, this masked man who was a slender, tall black male,
5 wearing a mask with dark pants on, a dark shirt, who then
6 was brandishing a gun. She gives his description. The
7 Department of Public Safety gets the description over the
8 radio and they are able to start canvassing the area looking
9 for an individual that meets this description. And ladies
10 and gentlemen, you'll hear how just a short while later they
11 locate a man face down in a ditch in the Memorial Park
12 Cemetery just about a half mile from where this happened,
13 which is at . At this Memorial Park
14 Cemetery they find a man lying in a ditch in the back of the
15 cemetery. They bring that man back to the carport where Ms.
16 Shannon is still there. She hasn't been transported, yet,
17 by EMS to the hospital, and Ms. Shannon is able to look at
18 this man. He's no longer masked. However, she is able to
19 look at his clothing and his stature and everything else
20 that she earlier described, and identify that man that they
21 brought to her home as the person who had previously pointed
22 the gun at her, shot her, and tried to get into her home.

23 And that man, ladies and gentlemen, that the officers
24 brought back is the man who sits over there with his
25 attorneys, Mr. Antionelle Owens.

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1 Now, again, this case should be very brief. I just ask
2 that you use your common sense and that you listen very
3 carefully to all the evidence that is presented to you, and
4 after you hear all that evidence, and after you hear all
5 that testimony and you are left firmly convinced of the
6 defendant's guilt that you return a verdict to these crimes
7 of assault and battery with intent to kill and attempted
8 burglary first, that you will render a verdict of guilty.

9 Thank you.

10 THE COURT: Thank you, ma'am.

11 Ms. Hinds.

12 MS. HINDS: Good afternoon, ladies and gentlemen.
13 I'm Peggy Hinds. This is Doug Mellard. We represent
14 Antionelle Owens. He sits here this afternoon in front of
15 you an innocent man. He's not innocent because I'm telling
16 you he's innocent. He's not even innocent because he's
17 telling you he's innocent. The law tells you that at this
18 moment he is an innocent man as he sits there today.

19 The law tells you that anybody that is accused of a
20 crime is cloaked in innocence. There is a presumption of
21 innocence that must be stripped away. That has not been
22 done yet, and I submit it will not be able to be done.

23 But anyway, that presumption of innocence is not a
24 platitude, it's not an empty phrase. It's something that
25 protects each and every one of us from an accusation, ladies

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1 and gentlemen, an accusation is simply something said
2 against another citizen saying that they did some particular
3 act.

4 Now, that accusation at this point in time has not been
5 proven, and will not be proven, I submit to you. That
6 presumption of innocence is a cornerstone of our system. It
7 is the idea that a person is innocent until they are proven
8 guilty. Not because somebody says so, but because they are
9 proven. An accusation standing alone is no more than that.
10 It is just an accusation. It does not carry any more weight
11 than a piece of paper on which the indictment is printed.

12 Ladies and gentlemen, the state, as Ms. Burbage just
13 told you, has the burden in this case. Mr. Owens does not
14 have to prove that he's innocent. He's telling you he's
15 innocent, but he doesn't have to prove that he's innocent.
16 It is up to the state to prove not to one of you or three of
17 you or ten of you, but to each and every one of you. If and
18 only if they can convince you that he is guilty beyond that
19 reasonable doubt.

20 Ladies and gentlemen, what is this case about?
21 Basically, it revolved around mistaken identity. Basically,
22 what Mr. Owens is accused of, it boils down to mistaken
23 identification. He was in the wrong place at the wrong
24 time, and that wrong place wasn't 975 Hillsborough, that
25 wrong place was the cemetery that morning.

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1 Ladies and gentlemen, you're going to hear testimony
2 that Ms. Shannon was getting ready for work that morning and
3 that someone accosted her, that someone demanded that she
4 give her keys, that someone pushed, and ultimately, someone
5 shot her. With that, we don't have a dispute. We're in
6 agreement with that set of facts. But you also will hear
7 that that someone was a masked man. A masked man that Ms.
8 Shannon had a brief encounter with over a very short period
9 of time.

10 Ladies and gentlemen, Ms. Shannon and the officers
11 would like you to believe and they will testify that Mr.
12 Owens allegedly was the man who committed this crime. We
13 submit to you that the evidence will not be there to
14 corroborate that story, and that's what that is, a story. I
15 know, as Ms. Burbage said, that you will give your attention
16 to the facts and the testimony in this case. I ask you in
17 addition to pay keen attention to what's not given to you.
18 Ask yourselves when you use your common sense where's the
19 corroboration. Where's the things that back this story up,
20 that show me that this is what actually happened that
21 morning.

22 Ladies and gentlemen, we submit to you that the state
23 will not be able to meet that burden. That you will not be
24 firmly convinced and that you will render a verdict keeping
25 Mr. Owens an innocent man when you return a verdict of not

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1 guilty.

2 THE COURT: Thank you, ma'am.

3 All right, state, you may call your witness.

4 MR. SORENSON: Please the Court?

5 THE COURT: Yes, sir.

6 MR. SORENSON: State calls Irene Shannon.

7 THE COURT: Come around Ms. Shannon. See the Bible
8 right up there. Put your left hand on that Bible and raise
9 your right.

10 (WHEREUPON, Irene Shannon, was
11 sworn to tell the truth.)

12 THE COURT: Thank you, ma'am. Have a seat there
13 and state your full name for us.

14 MS. SHANNON: Irene S. Shannon.

15 IRENE SHANNON - DIRECT EXAMINATION

16 BY MR. SORENSON:

17 Q Good afternoon, Ms. Shannon.

18 A Good afternoon.

19 Q If you can, please keep your voice up nice and loud.
20 Could you please tell the judge where you currently live?

21 A I'm residing in St. Matthews at this point.

22 Q Okay. Who are you living in St. Matthews with?

23 A I'm living with my four children. Just me and my four
24 children at this time.

25 Q Okay. Back in June of 2006, where were you living at

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1 that time, Ms. Shannon?

2 A I was at ---

3 Q And that is -- what county is that located in?

4 A Orangeburg.

5 Q And who were you living with at ---
6 back in June of 2007?

7 A At that time I had three children and a husband. We
8 resided together at ---

9 Q And what's your husband's name?

10 A David Shannon.

11 Q Okay. And you said at that time you had three children
12 living with you?

13 A Yes.

14 Q How old were -- what were the ages of the children that
15 were living with you back in June of 2006?

16 A In 2006, the age of my children was six, and there was
17 eight months, and a nine year old.

18 Q Okay.

19 A At the time at the house there wasn't my six year old.
20 There wasn't my nine year old in the house. I had my step-
21 daughter in the house, a three year old, a eight month old
22 and a six year old.

23 Q At the time of the day that this all happened on June
24 5, 2006, how old were your children; what were the ages of
25 the children that were in the home that morning?

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- 1 A Eight months, three and six.
- 2 Q The three year old was your step-daughter?
- 3 A Yes.
- 4 Q Okay. And the morning of June 5, 2006, was your
- 5 husband home at that morning?
- 6 A He was.
- 7 Q Where is your husband at now, ma'am?
- 8 A He's in Virginia in Federal prison.
- 9 Q Prison up in Virginia. What is he there for?
- 10 A He had committed a -- he's there for a drug charge.
- 11 Q Now, Ms. Shannon, back in June of 2006, where were you
- 12 working at that time, ma'am?
- 13 A Lexington Medical Extended Care.
- 14 Q Okay. How long -- do you still work there now?
- 15 A Yes.
- 16 Q How long have you worked there?
- 17 A Fourteen years.
- 18 Q Okay. What do you do there?
- 19 A I'm a schedule coordinator and I'm a part-time
- 20 (inaudible).
- 21 Q Could I show you State's Exhibit No. 1. I'll give you
- 22 a chance just to look at this. Have you seen this map
- 23 before, ma'am?
- 24 A Yes.
- 25 Q Does this show the area around where you resided back

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1 in June of 2006?

2 A Yes, it does.

3 Q And is your house depicted in this map?

4 A Yes, it is.

5 Q If you would, point it out to the jury?

6 A It about there.

7 Q So the house that's got the blue -- with the blue
8 border around it?

9 A Yes.

10 Q And that's 975 Hillsborough?

11 A Yes, it is.

12 Q If I could, Ms. Shannon, I'll turn your attention back
13 to the early morning of June 5, 2006. That Monday morning.
14 Tell the jury, if you would, what you were doing that
15 morning and what happened to you that morning.

16 A That morning I left out of my house a little after 6:00
17 to go to work at my job, and in my hand I had my cup of
18 water and I had my daughter's -- my eight-month-old's car
19 seat, because I always pick my eight-month-old -- pick the
20 kids up after -- in the afternoon when I get from work. And
21 when I enter -- when I left out of my house Mr. Owens came
22 from around another vehicle and he was screaming at me not
23 to -- he was pointing a gun in my face, and was demanding
24 that I open the door. When I got there I was trying to open
25 the door and I wasn't opening the door fast enough. He

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1 pushed me over -- he pushed me over to where the door was,
2 shot down by my leg. He ran -- he ran from the car porch
3 and made a left running up Broughton Street. When he shot
4 down by my leg he hit my right thigh. I have a bullet wound
5 that exit my thigh here.

6 (Ms. Shannon stands and shows her wound scars to jury.)

7 Q Ms. Shannon, let me back you up a little bit. You came
8 out of your house onto the car port, where was your car that
9 you were getting in?

10 A My car was like by the door.

11 Q I'll show you State's Exhibit No. 2; do you recognize
12 that photograph, ma'am?

13 A Yes.

14 Q What's depicted in that photograph?

15 A That's my vehicle, cup, and that's the door where I
16 came from.

17 MR. SORENSON: We'd offer State's 2 into evidence.

18 THE COURT: Objection?

19 MR. MELLARD: No objection.

20 THE COURT: Admitted without objection, State's 2.

21 (State's Exhibit No. 2, photo, was
22 marked and entered.)

23 BY MR. SORENSON:

24 Q That's your vehicle?

25 A Yes.

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1 Q Okay. And off to the kind of the right of the picture
2 up here by my finger --

3 A Yes..

4 Q -- what is that?

5 A That's the door, the cup right here.

6 Q That's the cup --

7 A That I was holding in my hand during the crime.

8 Q Okay.

9 A When I was getting in my car.

10 Q That door up here, where does that lead to?

11 A It leads to my car porch.

12 Q Well, if you went from the car port into the house
13 where you would you go into the house?

14 A In the den.

15 Q In the den. And is that the door you came out that
16 morning?

17 A Yes, sir.

18 Q And you indicated the person came from where?

19 A There's a side area on the -- not the car porch. He
20 came from -- like a paved area. He came from that area onto
21 the car porch where I was.

22 Q Is that area depicted on here; that's your house right
23 here?

24 A Yes. It's right here.

25 Q As you're looking at the map that upper part --

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1 A He was behind a White Expedition.

2 Q He came around the corner. Describe the person that
3 came around the corner that you just testified about?

4 A The person that came from around the corner, he had on
5 a mask, his face was masked. He had on a black t-shirt. He
6 had on dark colored pants. And he had a gun in his hand.
7 At the time, I thought it looked like a cap gun to me. It
8 was gray in color. I found out later it was like a revolver
9 gun. It like a --

10 Q A cap gun. What do you mean by that?

11 A A cap gun. It has like a spin that you can lock in,
12 push it. It's just like it would be -- it's like a circle
13 and you push it in.

14 Q Is that like a --

15 A Revolver.

16 Q -- cylinder?

17 A Yes.

18 Q Okay. And you indicated -- what could you tell about
19 his physical build when he came around the house?

20 A He was tall and he was slender, and I knew from the
21 mask on his head that he had a lot of hair. This part of his
22 face was like a big part where I could see his lips and I
23 could see his eyes.

24 Q Could you tell from his mouth and his eyes whether he
25 was a white male or a black male?

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1 A Black.

2 Q And could you tell anything else about his mouth area?

3 A He had big lips. He had big lips and I know this part
4 -- like a big part protrusion, meaning, but I could really
5 see is physical feature without even pulling the mask off
6 his face.

7 Q Now, the clothing, what do you remember about the
8 clothing he was wearing?

9 A He had on a black t-shirt with black pants on.

10 Q Do you remember what type of pants?

11 A They were like jeans.

12 Q And you indicated that he came up to you and he was
13 trying to get you to open the door?

14 A Yes, he was.

15 Q What door was that; your car door or the house door?

16 A The house door.

17 Q And was that door locked?

18 A Yes, it was.

19 Q Where -- was your husband at home at that point in
20 time?

21 A Yes, he was.

22 Q And was he inside or outside?

23 A He was inside.

24 Q And three children inside the home also?

25 A Yes.

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1 Q And you indicated, you were showing the jury a few
2 minutes ago, that you got shot one time in the right thigh?

3 A Yes.

4 Q And where were you located when that happened?

5 A I was -- he pushed me up against the -- from the door.
6 I was at the door. He pushed me up against the -- my body
7 was on the side of the wall.

8 Q Did you ever actually -- did he ever get the door to
9 your house opened?

10 A No, he ran away.

11 Q After you were shot in the leg he took off at that
12 point in time?

13 A Yes.

14 Q All right. In what direction did he run?

15 A He ran towards Broughton Street.

16 Q I'll show you State's Exhibit No. 1. Can you point for
17 the jury what direction that would be that he ran?

18 A My house, he came out there and ran up this way.

19 Q Where is Broughton Street?

20 A Broughton Street is here.

21 Q Broughton is the first intersection that you hit?

22 A Huh-huh, from my house.

23 Q And after he got around the corner did you have any
24 idea what direction he went?

25 A No. I was unable to see him. I went into the house.

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1 Q When you got into the house Ms. Shannon, what was going
2 on in the house?

3 A My husband was on the phone with 911.

4 Q Did there come a time when you got on the phone also?

5 A As soon as I entered the house they wanted to talk to
6 me.

7 Q What, if any, information did you provide on the
8 telephone?

9 A She wanted to know how he was dressed. I told her he
10 had a mask on his face. He had a black shirt, he had a t-
11 shirt on, and I told her which direction that he was
12 running. And I told her -- she asked me if I was shot. I
13 told her I was shot. I was hit.

14 Q Did the police come out to your house then?

15 A Yes, they did.

16 Q Did the ambulance come out to your house?

17 A Yes.

18 Q Did there come a time, Ms. Shannon, prior to you
19 leaving in the ambulance when you saw law enforcement bring
20 somebody back to your house.

21 A Yes.

22 Q Did you have an opportunity to observe that person that
23 they brought back to your house?

24 A Yes.

25 Q Did he have a mask on at that point in time?

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1 A No, he didn't.

2 Q When you had a chance to see that person that they
3 brought back, did you recognize, did you know him, that
4 person?

5 A I didn't know him at all.

6 Q Ever seen him before that morning?

7 A No.

8 Q Now, in looking at the clothing and he was wearing, his
9 physical build and everything were you able to tell law
10 enforcement anything about him at that point in time?

11 A That was -- that was the guy that shot me. That's the
12 guy that shot me. That's the guy that came and approached
13 me.

14 Q Any doubt in your mind about that?

15 A No. There's no doubt in my mind.

16 Q Tell the judge why that is, why you're certain about
17 it?

18 A There's no doubt in my mind because I knew from the
19 physical feature of the scarf, the thing that was over his
20 face, and the clothes that he was wearing and the build that
21 he was. And I knew once he took that from over his head, I
22 knew it was a lot of hair, which it was a lot of hair when
23 he took the mask off he head.

24 Q Let me show you, ma'am, State's Exhibit Nos. 5 and 6.
25 Do you recognize the person in those photographs there?

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1 A I think that's the guy they brought back there.

2 Q Is that the person that was brought and shown to you at
3 your house?

4 A Yes, it was.

5 MR. SORENSON: Your Honor, we'd offer State Nos. 5
6 and 6 into evidence.

7 THE COURT: Objection?

8 MR. MELLARD: No objection.

9 THE COURT: Admitted without objection.

10 (State's Exhibit No. 5, photograph,
11 was marked and entered.)

12 (State's Exhibit No. 6, photograph,
13 was marked and entered.)

14 BY MR. SORENSON:

15 Q Is that how he looked when he was brought back to your
16 house that morning?

17 A Yes, it was.

18 Q Ms. Shannon, were you ultimately transported by EMS
19 that morning to the hospital?

20 A Yes, I was.

21 Q Where was it they took you?

22 A They took me to Orangeburg Regional.

23 Q Wait a minute, let me back you up. When you came out
24 that morning, about what time was it when you came out to
25 work?

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1 A It was about a little after 6:00.

2 Q Okay. What was the lighting like outside at that time?

3 A It was light.

4 Q The sun had started to come up?

5 A Yes.

6 Q Did you have any difficulty seeing this person?

7 A No.

8 Q How close to you did he get?

9 A He was standing in my face.

10 Q Right -- face-to-face?

11 A Yes.

12 Q Okay. And let me ask you this, when he originally came
13 up to you was he -- what was he saying to you?

14 A He said, I've got your bitch. That's what he said. He
15 was like, open the door. And really wasn't trying to let
16 him in my house because I didn't want my kids hurt.

17 Q And you testified a second ago that you were
18 transported to the hospital?

19 A Yes.

20 Q What was done at the hospital, if you know?

21 A I was there to get x-rayed. They gave me a tetanus
22 shot, and they gave me something for pain, and they bandaged
23 my leg, and I was released.

24 Q So when they x-rayed you, was there a bullet still in
25 your leg?

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1 A No. They it exit.

2 Q Okay. You were only shot one time, right?

3 A Yes.

4 Q Was the entry and exit in the back?

5 A Yes.

6 Q You said you were released from the hospital that day?

7 A Yes.

8 Q And let me ask you, were you out of work as a result of
9 all the injuries; how long were you out of work?

10 A I was out of work for five days, the whole week I was
11 out from work.

12 MR. SORENSON: Beg the Court's indulgence.

13 (Pause.)

14 That's all we have.

15 THE COURT: Cross-examine?

16 IRENE SHANNON - CROSS-EXAMINATION

17 BY MR. MELLARD:

18 Q Let me see if I understand. Now, on June 5, 2006, you
19 got shot?

20 A Yes.

21 Q Okay. And you got shot in the right leg?

22 A Thigh.

23 Q Okay, in the thigh area. And then you were taken to
24 the hospital?

25 A Yes.

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1 Q Okay. And it's your testimony today that you were
2 face-to-face with the person when he shot you?

3 A Yes, I was.

4 Q All right. Now, how close are we talking about; from
5 me to you?

6 A No.

7 Q Okay. How about right there.

8 A Right there.

9 Q So he was this close when he shot you?

10 A No. He was wasn't that close when he shot me --

11 Q Okay.

12 A -- because he shot me -- he shot me at the door. We
13 walked to my door. I couldn't get in my house. He pushed
14 me up against the door, and he was pushing --

15 Q Well, just tell me how close -- no, you stay right
16 there. Just how close -- tell me. Here?

17 A I can't tell you. We were close.

18 Q Okay. We're close. When he shot you about this close?

19 A I was up here. Right here.

20 Q Okay, I'll back up. So he just shot you?

21 A Uh-huh. (Affirmative response.)

22 Q Okay. All right. Now, it's my understanding that you
23 were -- I believe it was around 6:10 in the morning when you
24 got shot; is that correct?

25 A Around that time. I was leaving. I didn't have a

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1 watch. I wasn't looking at the time.

2 Q Okay. And it's my understanding you were walking out
3 of our house going to your car?

4 A Yes.

5 Q Okay. And some guy that you never saw before ran
6 around the house?

7 A No.

8 Q Ran around -- came from somewhere; correct?

9 A He ran onto my car porch.

10 Q Okay. He ran onto your carport and he shot you in the
11 leg?

12 A Thigh.

13 Q Thigh. Okay. And your husband, Stacy Bernard Shannon,
14 he was in the house?

15 A Yes, he was.

16 Q Okay, and he's the drug dealer that you told the jury
17 about?

18 A Yes, he was.

19 Q Okay. In fact, he's serving time in the federal
20 penitentiary for distributing 50 grams or more of crack
21 cocaine; is that correct?

22 A You can speak with the attorney. It probably is. I
23 don't know the scenario of the case.

24 Q You don't know the scenario of the case?

25 A No.

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1 Q Okay. So you're not part of this case?

2 A No.

3 Q You weren't a witness in the case?

4 A No.

5 Q Okay. Now, let's see -- all right. So you walk
6 outside, you get into your car. Your husband, the drug
7 dealer, he's inside your house?

8 A Uh-huh. (Affirmative response.)

9 Q And then this man comes around the house, or comes from
10 somewhere --

11 A Uh-huh. (Affirmative response.)

12 Q -- he's wearing a ski mask?

13 A Uh-huh (Affirmative response.)

14 THE COURT: You need to say yes or no because this
15 lady has to write it down.

16 A Okay.

17 BY MR. MELLARD:

18 Q And he has on dark pants and a dark shirt?

19 A Yes, he does.

20 Q Okay. And he had a gun?

21 A Yes.

22 Q All right. So he tells you to give me the keys, right.
23 He's trying to get your keys?

24 A Yes. He's trying to get in my house.

25 Q Okay. And I assume your keys are in your purse?

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1 A No. They're in my hand.

2 Q They're in your hand?

3 A Yes.

4 Q Okay. So comes up to you, got a gun, tells you, give
5 me the keys. So what do you do, start looking for the keys
6 to your house or what do you do?

7 A Well, I started look -- yes.

8 Q Okay. So you're looking at your keys --

9 A I have a bunch of keys on my key ring so I'm starting
10 to --

11 Q All right.

12 A -- trying to get it --

13 Q Here's my key ring. Have you got this many keys?

14 A Probably so.

15 Q And this is about -- one, two, three, four, five, six,
16 seven, eight, nine -- about 10 keys?

17 A Probably so.

18 Q Okay. So you're key ring's about 10 keys or so?

19 A Yeah.

20 Q All right. So you're looking at your keys, looking
21 down looking at your keys?

22 A Uh-huh. (Affirmative response.)

23 Q Now, you don't find the right key?

24 A No.

25 Q And so he's right there. I assume he's this close when

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1 you're looking for the keys; correct?

2 A He's right on me.

3 Q He's right on you.

4 A Gun to my head.

5 Q Gun to your head. So you're looking down trying to get
6 the keys and apparently you don't do it fast enough and he
7 shoots towards the ground?

8 A I walked over the door because he was right by my car.

9 Q Uh-huh. (Affirmative response.)

10 A And I had turned to the door --

11 Q Uh-huh. (Affirmative response.)

12 A -- he grabbed my shoulder, turned me around like that.

13 Q Uh-huh. (Affirmative response.)

14 A Shot me. Shot down by my side.

15 Q Shot down by your thigh. Okay. All right, now, I
16 assume it hurts when you get shot in the leg? I've never
17 been shot, but --

18 A Yes.

19 Q -- I assume it does hurt, and I assume that you're also
20 bleeding at the time?

21 A Yes.

22 Q And then this fellow runs away and that's the last you
23 see of him until the police bring somebody else to you, to
24 your house?

25 A Yes.

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1 Q Now, this whole incident, it lasted, what, maybe a
2 minute?

3 A With him?

4 Q Right?

5 A I really don't know. I was scared.

6 Q Okay.

7 A I don't know how long it lasted.

8 Q Okay. You have no clue how long it lasted?

9 A I have no clue.

10 Q Okay. All right. Now, when the police bring a fellow
11 back to your house I assume that fellow is in handcuffs?

12 A Yes, he is.

13 Q Okay. Is it cuffed behind his back?

14 A Yes, it is.

15 Q Okay. And the police were with him, I assume?

16 A Yes, they were.

17 Q Do you remember how many police were with him?

18 A No.

19 Q All right. Was it three?

20 A I don't know.

21 Q Okay. Was it five?

22 A I don't remember.

23 Q Okay. You don't know how many police were at your
24 house at the time?

25 A I don't know how many were with him at the time.

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1 Q Well, how many were at your house?

2 A I don't know, because when they arrived I was already
3 in the back of the ambulance.

4 Q All right. So your identification of this individual
5 was when you were in the ambulance; is that what you're
6 saying?

7 A Yes.

8 Q Okay. And I assume you're lying down on a stretcher?

9 A I'm not lying down. I'm sitting up.

10 Q You're sitting up. Are you on a stretcher?

11 A Yes, I am.

12 Q Okay. And I assume the ambulance is kind of tall isn't
13 it? You have to step up --

14 A Yes. The house is up on a hill, too.

15 Q Okay.

16 A So he came up on the hill right at the back door of the
17 ambulance. I had a good visual sight of him.

18 Q Okay. So you're in an ambulance. I assume the
19 ambulance worker is in the ambulance?

20 A Yeah, they're on the side of me.

21 Q Okay. The police are talking to you?

22 A No.

23 Q They're not talking to you?

24 A No, they're not talking to me.

25 Q All right.

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1 A They asked me if he was the one.

2 Q All right. So the police brought somebody to you and
3 said, is he the one?

4 A Yeah.

5 Q That's all they said to you?

6 A That's it.

7 Q Okay. What was that -- how were you feeling when they
8 brought this fellow to you?

9 A How was I feeling?

10 Q Uh-huh. (Affirmative response.)

11 A I was feeling fine. I was -- I was feeling fine.

12 Q When they brought him to you, you were happy they
13 caught somebody?

14 A No.

15 Q You were not?

16 A I was scared.

17 Q You were scared. Okay.

18 MR. MELLARD: No more questions.

19 THE COURT: Redirect?

20 MR. SORENSON: No, Your Honor.

21 THE COURT: Thank you, ma'am. You can step down.

22 All right, sir. Call your next witness.

23 Come on down this way, please, sir. You see the Bible
24 right there. Look at me. Put your left hand on that Bible
25 and raise your right hand.

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1 (WHEREUPON, Reginald Conyers, was
2 sworn to tell the truth.)

3 THE COURT: Thank you, sir. State your full name
4 for the record.

5 MR. CONYERS: Deputy Reginald Conyers, Sr.

6 REGINALD CONYERS - DIRECT EXAMINATION

7 BY MS. BURBAGE:

8 Q Officer Conyers, where are you currently employed?

9 A Orangeburg County Sheriff's Office.

10 Q And how long have you been employed there?

11 A Two and a-half years.

12 Q And where were you employed prior to working for the
13 Orangeburg County Sheriff's Office.

14 A Department of Public Safety.

15 Q And how long were you employed there?

16 A Oh, about two years.

17 Q As an employee of the Orangeburg Department of Public
18 Safety what were your duties and responsibilities?

19 A Patrol, crime suppression, detection radar, police the
20 community.

21 Q All right. What was your title?

22 A PS01.

23 Q And were you working back in June of 2006?

24 A I was.

25 Q In the early morning hours did you have an opportunity

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1 to respond to ??? ? ? ? ? ? ? ? ? ? ?

2 A I did.

3 Q Is that in the city of Orangeburg?

4 A Yes, it is.

5 Q Is that in the County of Orangeburg?

6 A Yes, ma'am.

7 Q Officer Conyers, could you just tell us what you found
8 when you arrived at the scene at ??? ? ? ? ? ? ? ? ?

9 A When I arrived on the scene I saw a black female on
10 scene with a gunshot wound to the right thigh area. She was
11 scared and crying. I walked up on the scene I saw blood in
12 the house, blood on the carport and blood inside the vehicle
13 she was sitting in.

14 Q I'll show you what's been marked as State's Exhibit No.
15 2; do you recognize that?

16 A Yes, I do.

17 Q What is it?

18 A It's a picture of the car up in the carport.

19 MR. MELLARD: Can I see that?

20 THE COURT: Has he seen it? Before he describes
21 it.

22 MR. SORENSON: It's in evidence.

23 COURT REPORTER: Yes, sir, it's in.

24 MS. BURBAGE: I think that one was already in, Your
25 Honor.

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1 THE COURT: Oh, okay. All right.

2 BY MS. BURBAGE:

3 Q All right. Now, I'm going to show you what's been
4 marked as --

5 MR. MELLARD: Can I see that?

6 THE COURT: Just let Mr. Mellard see all of them.

7 MR. SORENSON: He's seen them, Your Honor.

8 MR. MELLARD: I just wanted to see which one --

9 THE COURT: Do you have any objections to any of
10 the photographs. I see five of them for here.

11 MR. MELLARD: No, sir. Those three are in evidence
12 and those two are not -- that she has in her hand right
13 there.

14 THE COURT: All right.

15 BY MS. BURBAGE:

16 Q All right. I'm showing you what's been marked as
17 State's 4 for ID only.

18 THE COURT: You have no objection, so it's admitted
19 into evidence. Tell me what number it is.

20 MS. BURBAGE: That's State's 4 and State's 3, Your
21 Honor.

22 THE COURT: All right. They're admitted without
23 objection.

24 (State's Exhibit No. 3, photo, was
25 marked and entered.)

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(State's Exhibit No. 4, photo, was

marked and entered.)

BY MS. BURBAGE:

Q Could you just tell me briefly what's in each of those pictures?

A Basically, this is the vehicle with the side door open that I found the victim sitting in. Blood on the seat and blood on the carport. The second picture shows a picture of blood underneath the carport.

MS. BURBAGE: I'll publish these to the jury.

BY MR. BURBAGE:

Q Officer Conyers, once you observed the blood in the carport and the blood inside, briefly tell us, were you able to obtain a description from the victim of the assailant?

A Yes, I did.

Q And what was that description?

A She stated it was a black male wearing a dark blue ski mask, a dark colored shirt and a pair of blue jeans.

Q Did you find out where that individual had gone after he left the carport?

A Yes, I did. She stated that he headed toward Broughton Street off of Hillsborough.

Q Again, aside from observing the witnesses demeanor, did you observe her injuries?

A Yes, I did.

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1 Q And what were her injuries?

2 A A gunshot wound to the right thigh area.

3 Q Other than taking the pictures and obtaining the
4 information from the victim, did you have any other
5 involvement with the case?

6 A No, I didn't.

7 MS. BURBAGE: Beg the Court's indulgence.

8 (Pause.)

9 MS. BURBAGE: Your Honor, I'd ask to publish these
10 to the jury so they can pass them around.

11 THE COURT: Yes, ma'am.

12 MS. BURBAGE: Please answer any questions the
13 defense has.

14 REGINALD CONYERS - CROSS-EXAMINATION

15 BY MR. MELLARD:

16 Q It's my understand that you responded to this incident,
17 June 5, 2006?

18 A That's correct.

19 Q That was about three years ago?

20 A That's correct.

21 Q Okay. And according to the incident report you filled
22 out, you were dispatched to the incident location about 6:13
23 a.m.?

24 A That's about correct.

25 Q Okay. And you arrived about 6:20 a.m.?

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1 A That's correct.

2 Q Okay. According to the incident report that you filled
3 out, the incident happened at 6:10 a.m., and it lasted until
4 6:00 a.m.; does that sound about right?

5 A Say that again?

6 Q According to the incident report you filled out, the
7 incident started at 6:10 a.m. and it lasted until 6:11 a.m.?

8 A That's not correct.

9 Q Okay. Well, tell me about that?

10 A You see at the bottom of the incident report --

11 Q Uh-huh. (Affirmative response.)

12 A -- it says time dispatched 6:13 a.m.

13 Q Uh-huh. (Affirmative response.)

14 A Then I have departure time at 7:15.

15 Q That's correct, but I'm talking about the incident, the
16 very incident that -- the shooting.

17 A Okay.

18 Q Okay, is that dates that you put in there -- 6:10 until
19 6:11?

20 A That's correct.

21 Q Okay. About a minute.

22 A That's correct.

23 Q Okay. But you left at 7:15?

24 A That's correct.

25 Q That's what you were talking about?

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1 A Yes.

2 Q Okay. Now, it's my understanding that during your
3 investigation you learned that the person who shot Ms.
4 Shannon was wearing a blue ski mask?

5 A That's correct.

6 Q Okay. Wearing blue jeans; correct?

7 A That's correct.

8 Q And wearing a dark blue shirt?

9 A That's correct.

10 Q You don't say anything in this incident report about
11 the shooter having a lot of hair under his mask, do you?

12 A No, I don't.

13 Q Okay, you don't say anything about him -- the structure
14 of his face under the mask?

15 A No, I don't.

16 Q You don't say anything about any facial hair under the
17 mask, correct?

18 A Correct.

19 Q Don't say anything about lips or not lips or anything
20 like that, right?

21 A Right.

22 Q Just blue jeans, dark blue shirt, and ski mask?

23 A That's correct.

24 Q All right. Now, at some point, I believe the person
25 was brought back to the house, is that correct?

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1 A Correct.

2 Q And you were given that person's personal items?

3 A That's correct.

4 Q And I believe included in those personal items were a
5 cell phone, correct?

6 A Correct.

7 Q And \$1431 in cash?

8 A That's correct.

9 Q Okay.

10 MR. MELLARD: No more questions.

11 THE COURT: Any redirect?

12 MS. BURBAGE: No, Your Honor.

13 THE COURT: Thank you, sir. You can step down.
14 You may be excused.

15 No objection is there to excusing him?

16 MR. SORENSON: No.

17 THE COURT: You can go on back to work.

18 Call your next witness, please.

19 MS. BURBAGE: State calls Maria Jenkins.

20 THE COURT: Come around, please ma'am. See the
21 Bible right up there.

22 MS. JENKINS: Yes, sir.

23 THE COURT: Put your left hand on there and raise
24 your right, please.

25 (WHEREUPON, Marie Jenkins, was

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1 sworn to tell the truth.)

2 THE COURT: Thank you, ma'am. Have a seat right up
3 there and state your name for us, please.

4 MS. JENKINS: Maria Jenkins.

5 THE COURT: Thank you, ma'am.

6 All right, counsel.

7 MARIA JENKINS - DIRECT EXAMINATION

8 BY MS. BURBAGE:

9 Q Ms. Jenkins, can you just tell us where you're
10 currently employed?

11 A Orangeburg County EMS.

12 Q How long have you been employed there?

13 A Seven years.

14 Q What's your title at Orangeburg EMS?

15 A Paramedic.

16 Q And can you tell me briefly what the duties are for a
17 paramedic?

18 A Patient care. To treat and maintain -- treat and
19 prevent shock and get them to where they need to be to take
20 further care or whatever is necessary.

21 Q Ms. Jenkins, were you a paramedic back in 2006?

22 A No.

23 Q What were you in 2006?

24 A I was a medial level medic, an MTI.

25 Q Just briefly, can you tell us where you working on the

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1 morning hours of June 5, 2006?

2 A Yes, ma'am.

3 Q Did you have an opportunity to respond to an incident
4 at ----- ?

5 A Yes, ma'am.

6 Q Is that in the city limits of Orangeburg?

7 A I think it is.

8 Q Is it in Orangeburg County?

9 A Yes.

10 Q When you responded there what did you find?

11 A I found a 34 year old female sitting in the passenger
12 seat of a car in the driveway at her own home, at her home.

13 Q You have to speak up. The court reporter has to take
14 down, and everyone has to hear what you're saying.

15 A I'm sorry. A 34 year old female seating in the
16 passenger seat of her car in the driveway of her home.
17 Stating that she was going to work when an intruder came up
18 and pulled out a gun and tried to gain entry into her home
19 and shot her in the leg.

20 Q All right. When you -- what did you find as far as her
21 injuries?

22 A Gunshot wound to the femur, mid-shaft. One interior
23 and one posterior. A quarter inch in diameter. One in
24 front and one to the back.

25 Q What did you do?

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1 A At that point I put -- looks like Vaseline gauze. It's
2 an dressing. I put one to the front --

3 THE COURT: Ma'am, you need to speak a little
4 slower and a little louder.

5 MS. JENKINS: I'm sorry.

6 THE COURT: I know they can't hear you and I doubt
7 if all the jury can hear you back there.

8 A It looks like a piece of Vaseline gauze. It's a
9 conclusive dressing put to the front and to the back. That
10 keeps any air trapped in. It helps to keep it from
11 bleeding. Basically, it's to control the bleeding.

12 BY MS. BURBAGE:

13 Q Was it bleeding when you got there?

14 A Not profusely. No. It was leaking.

15 Q Were you there by yourself that day?

16 A My partner and I were.

17 Q What was your partner doing?

18 A He helped me with the spine board and the vital signs.
19 And then when we got in back of the truck I maintained care
20 and he drove.

21 Q Okay. What, if anything, else did you do in order to
22 take care of the victims wounds?

23 A At that point, I have to treat for what's possibly the
24 worst case scenario. I treat for what I see. I cannot
25 diagnose. So basically I see the femur and there's an

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1 artery in there. So I have to control the bleed. I treat
2 for a possibility of it hitting that artery and if she's
3 bleeding whether it's inside or outside, so I started some
4 IVs to help prevent shock or in case the blood pressure goes
5 down. I can open up the fluids to keep her blood pressure
6 maintained. Also put her on the spine board, because at
7 that point I do not know where the bullet went. So in case
8 it ricocheted or went up I put her on a spine board just to
9 make sure I've got her spine in a straight line so nothing's
10 aggravated.

11 Q And again, if you'd just one more time, tell us exactly
12 what type of injury did you observe before you dressed the
13 wound?

14 A There was a quarter inch diameter hole to the midline
15 shaft, which is the middle of the leg, in the front and one
16 to the back.

17 Q After the wound was dressed you then --

18 A We sprinted the leg.

19 Q Then what?

20 A Then we put her on the board.

21 Q After you put her on the board did you transport her
22 somewhere else?

23 A We took her to TRMC.

24 Q About how long would you say you were at the scene?

25 A About a half hour, give or take a couple of minutes.

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1 Q Did you observe anything in particular about the
2 patient's demeanor?

3 A I knew she was scared. I knew she was upset because
4 she was on her way to work.

5 Q Okay.

6 MS. BURBAGE: Beg the Court's indulgence.

7 (Pause.)

8 BY MS. BURBAGE:

9 Q Could you just briefly tell me exactly what time you
10 responded to the incident location?

11 A The call came in at 6:15 through our dispatch, and we
12 copied the call at 6:18, we got the base, and we went in
13 route and when the police got the scene.

14 Q Explain -- I'm sorry. Explain specifically -- the call
15 came in at what time?

16 A That's a call that any type of violence we're not
17 allowed to go in until the police secure the scene, because
18 if we get hurt we can't help anybody else.

19 Q Okay. So exactly what time were you notified of the
20 incident?

21 A We were dispatched out at 6:16 from our dispatch. The
22 call came in at 6:15. They dispatched to us at 6:16, and we
23 responded at 6:18. We were on the scene at 6:26.

24 Q You were on the scene at 6:26, and then what time did
25 you leave?

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1 A 6:58.

2 Q Okay.

3 MS. BURBAGE: No further questions. Please answer
4 any questions defense may have --

5 THE COURT: Cross examine, Mr. Mellard?

6 MR. MELLARD: No questions.

7 THE COURT: Thank you, ma'am. You may be excused.
8 Thank you for coming.

9 MS. JENKINS: Thank you.

10 THE COURT: Call your next witness.

11 MR. SORENSON: We all Trooper Gerald Hoffman.

12 THE COURT: Come around, please, sir. Right up
13 here. If you will place your left hand on that Bible, raise
14 your right.

15 (WHEREUPON, Gerald Hoffman, was
16 sworn to tell the truth.)

17 THE COURT: Thank you, sir. Have a seat right
18 there and state your name for us, please, sir.

19 TROOPER HOFFMAN: Senior Trooper Gerald Hoffman.

20 THE COURT: Thank you.

21 All right, counselor.

22 MR. SORENSON: Thank you, Your Honor.

23 GERALD HOFFMAN - DIRECT EXAMINATION

24 BY MR. SORENSON:

25 Q Good afternoon, Officer Hoffman.

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1 A Good afternoon.

2 Q If you would, tell us where you're currently employed?

3 A I'm currently employed with the South Carolina Highway
4 Patrol as a trooper.

5 Q And how long have you been with the Highway Patrol?

6 A Approximately, three years.

7 Q And prior to that where did you work?

8 A Orangeburg Department of Public Safety.

9 Q How long were you with Public Safety?

10 A I believe it was about a year and a-half, sir.

11 Q And, in fact, on the morning of June 5, 2006, where
12 were you employed at that time?

13 A I was employed with Public Safety, here in Orangeburg.

14 Q And in fact that was about the time you ended your
15 stint with Public Safety?

16 A Yes, sir, about two or three months shy.

17 Q Okay. And turn your attention specifically to the
18 morning of June 5, 2006. You had an opportunity to respond
19 out to a shooting incident on _____, that
20 morning, in the city of Orangeburg?

21 A Yes, sir. I did.

22 Q Okay. Tell the jury what your role was when you
23 responded out there that morning?

24 A On the morning of the incident, I just responded out
25 there. My role was to try to help locate a suspect in this

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1 incident. So I did respond out there. A description was
2 given of the suspect being a black male, wearing blue jeans,
3 a black shirt. I canvassed the near-by area in looking for
4 this gentlemen. At some point in time while I was
5 canvassing, it was given out, I believe by the dispatcher
6 for the public safety office that someone had called and
7 said that this gentleman was located behind a maintenance
8 shed adjacent to the cemetery. I responded to that, as well
9 as other officers. I began to look around out there, and I
10 walked into the woods behind this maintenance shed. I
11 didn't see anything at the time. Another officer, asked, I
12 believe, if I remember correctly, he stated he heard
13 something. Where was I at. And I wasn't where this officer
14 thought I was at. So I walked toward where I thought this
15 officer had heard this noise. As I walked towards this
16 location, I scanned the area around me a subject began
17 running away.

18 Q Let me -- that area where you're talking about,
19 describe that area to the jury, please.

20 A It's a wooded area located behind a maintenance shed
21 behind or next to the cemetery, which is a short distance,
22 an eighth of a mile or so away from the incident location.

23 Q Okay. Continue. You say you saw an individual at that
24 point?

25 A This individual ran in the direction of the right,

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1 which would have been down a fence line behind this
2 cemetery. I didn't pursue this individual through the
3 woods. I'm nervous about pursuing individuals through the
4 woods who allegedly just committed a crime of the nature of
5 a shooting. I ran out of the woods along with Officer
6 Caddell. I hear on the radio, somebody said the subject's
7 on Sunset, which is a street behind the woods. So we ran
8 down the woods paralleling Sunset Boulevard or street. I
9 don't know which one it's called. And we continued running
10 down this fence line, and we actually kind of met this
11 subject, you know, in a ditch there along this fence line.
12 This subject was the same subject that jumped up when I ran
13 in the woods or ran away. This subject had blue jeans on, a
14 black shirt and he was a dark complected person. He had
15 dread locks and he was sweating profusely. I drew my
16 weapon. I ordered this subject to the ground. The subject
17 complied and I believe Officer Caddell placed handcuffs on
18 this subject. And at that point in time he was detained,
19 and I believe turned over to, I believe, it was Officer
20 Jones.

21 Q Okay.

22 MR. SORENSON: May have I have him step down, Your
23 Honor.

24 THE COURT: Yes, sir.

25 BY MR. SORENSON:

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1 Q Trooper, if you would, I'm going to get you to come
2 down here.

3 A (Witness complies.)

4 Q I'll show you -- I'll hold it up for us. I'll show you
5 State's Exhibit No. 1. Have you had a chance to kind of
6 look at this map before?

7 A Yes, I have.

8 Q Does it fairly and accurately depict that area that
9 we're talking about?

10 A It appears to. Yes.

11 MR. SORENSON: At this time, I'll offer State's No.
12 1 into evidence.

13 MR. MELLARD: I have no objection.

14 THE COURT: All right.

15 (State's Exhibit No. 1, map, was
16 marked and entered.)

17 BY MR. SORENSON:

18 Q Now, if you could, kind of show for the jury, kind of
19 orient them. They're going to hear testimony about the
20 victim's house being down here in this block, kind of
21 blocked in blue. Show the jury where it was that you
22 initially responded out there that morning; what area you
23 went to?

24 A I responded right here. This area would be the
25 cemetery. I parked my patrol car somewhere in this area. I

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1 believe this would be the shed, the maintenance shed right
2 here. At this point I believe that Officer Jones was on
3 this side of the woods over here, and myself and officer
4 Caddell was at the edge of the woods here. I went on into
5 the woods by myself. At that point the subject fled. I ran
6 back out this way and Officer Caddell ran that way. And we
7 paralleled this wood line right here. And eventually at
8 some --

9 Q You talked about Sunset before, is that Sunset?

10 A Yes, sir. That's Sunset Street. And we again made
11 contact with the individual approximately right in this area
12 right in here. Actually, it would be right in here. And
13 that's where he was placed under arrest.

14 Q Okay. Now, you had indicated when you first saw that
15 individual, what was he doing when you first saw him?

16 A When I first saw him he jumped up and ran. I went in
17 that trench and looked around. I didn't see anybody.

18 Q And describe -- this is kind of a wooded area?

19 A It's a thick wooded area with heavy underbrush and
20 growth, and I believe there was some trash laying around and
21 so forth.

22 Q How about this wood line along the back of the fence
23 area?

24 A There is a ditch along -- or a culvert or whatever
25 along that old stream bed or whatever you want to call it,

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1 along that wood line there.

2 Q And that's heavy underbrush there?

3 A Yes, along that there was.

4 Q Okay. So the person that you saw jump up and take off
5 running and then the person that y'all detained in the ditch
6 over here, any doubt in your mind that that's the same
7 person?

8 A No doubt, sir.

9 Q Did he say anything when he was running from y'all?

10 A Sir, I don't recall him saying anything.

11 Q Let me show you State's Exhibit -- can you describe
12 that individual that y'all took into custody?

13 A The individual had on a pair of blue jeans, a dark
14 colored black shirt. He was dark complexioned and he had
15 long hair.

16 Q Let me show you State's Exhibit No. 5 and 6; is that
17 the individual that y'all took into custody that morning out
18 there?

19 A Yes, sir, it is.

20 Q And this picture was taken that morning?

21 A I don't recall the pictures being taken but it appears
22 that they were.

23 Q That would be -- he was in custody?

24 A Yes, sir.

25 Q You can have a seat.

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1 A Okay. (Witness complies.)

2 Q Did y'all encounter anybody else back in that area?

3 A No, sir, we didn't.

4 Q Now, after he was taken into custody and handcuffed,
5 was he searched?

6 A As best I can recall I believe I did search him and
7 remove a sum of cash out of his pocket. I don't remember
8 how much. And I believe there was a cell phone. And there
9 was a bag. I don't recall what was in that bag.

10 MR. MELLARD: Your Honor.

11 THE COURT: Sir?

12 MR. MELLARD: May we approach?

13 THE COURT: Yes, sir.

14 (Off the record bench conference with counsel and the
15 Court.)

16 BY MR. SORENSON:

17 Q Now, those items, you turned those items over to
18 Officer Conyers?

19 A I did turn them over to another officer, sir, but I
20 don't recall the officer I turned them over to.

21 Q Let me just show you this. Does it say on the last
22 line of your report who you turned those items over to?

23 A Yes, sir. It says I turned them over to Officer
24 Conyers.

25 Q And then after he was taken into custody what was done

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1 with that individual?

2 A As best I can recall he was taken back to the scene of
3 the incident.

4 Q Whose vehicle was he put into at that time?

5 A Police Officer Jones.

6 Q And did you -- out there at the scene, did you learn
7 the identity of the person that you had caught up with at
8 the scene, do you remember?

9 A I'm sure I did, sir, but I can't remember.

10 Q That would be all I'd have. Thank you, Trooper.

11 A You're welcome.

12 MR. MELLARD: Just a couple of questions.

13 GERALD HOFFMAN - CROSS-EXAMINATION

14 BY MR. MELLARD:

15 Q All right. It's my understanding that you were
16 searching the area for a black male; is that correct?

17 A Yes, sir.

18 Q Wearing blue jeans?

19 A Yes, sir. Blue pants.

20 Q Blue pants. A dark top?

21 A Yes, sir.

22 Q Okay. And a blue knit cap?

23 A I don't recall the knit cap. Maybe it was. I don't
24 remember it.

25 Q Okay. And you didn't hear anything about the person

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1. having a lot of hair under the cap?

2. A No, sir, I did not.

3. Q Didn't hear anything about any facial structure of the
4. individual?

5. A No, sir, I did not.

6. Q Or facial hair?

7. A No, sir.

8. Q Okay. You never saw a blue knit cap on Mr. Owens, did
9. you?

10. A No, sir, I don't recall a blue cap.

11. Q Never found a gun on Mr. Owens?

12. A No, sir.

13. Q But you did find a sum of money on him?

14. A Yes, sir.

15. Q Okay. Do you know how much it was?

16. A No, sir, I can't recall how much it was.

17. Q Was it more than \$100?

18. A I don't recall.

19. Q Okay. All right. Just one more question. What time
20. did y'all -- did you go back to the house?

21. A I don't remember.

22. Q You don't remember going --

23. A No, sir.

24. Q Okay.

25. A I apologize.

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1 Q No more questions.

2 THE COURT: Redirect?

3 MR. SORENSON: No, sir.

4 THE COURT: Thank you, sir. You may be excused.
5 Thank you for coming.

6 TROOPER HOFFMAN: Thank you, Your Honor.

7 THE COURT: Call your next witness.

8 MR. SORENSON: State calls Officer John Caddell.

9 THE COURT: Come around this way, please, sir.
10 Right up here on that rail you'll see a Bible?

11 OFFICER CADDELL: Yes, sir.

12 THE COURT: If you'll place your left hand on that
13 Bible and raise your right.

14 (WHEREUPON, John Caddell, was sworn
15 to tell the truth.)

16 THE COURT: Thank you, sir. Have a seat and state
17 your full name, please.

18 OFFICER CADDELL: Full name is John Caddell.

19 THE COURT: Thank you, sir.

20 OFFICER CADDELL: Yes, sir.

21 THE COURT: All right, counselor.

22 JOHN CADDELL - DIRECT EXAMINATION

23 BY MR. SORENSON:

24 Q Good afternoon, Cpl. Caddell.

25 A Yes, sir.

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1 Q Would you tell the jury where you are employed?

2 A Orangeburg Department of Public Safety.

3 Q And how long have you been employed with Public Safety?

4 A Almost six years.

5 Q Back in June of 2006, were you employed there at that
6 time?

7 A Yes, sir.

8 Q Okay. Did you have an opportunity to respond out in
9 reference to a shooting on the morning of
10 June 5, 2006?

11 A Yes, sir.

12 Q About what time were you dispatched or did you respond
13 out there that morning?

14 A Roughly, about 6:13.

15 Q Okay. And if you would, tell the jury what your role
16 was when you responded out there?

17 A When I responded I was there to be in the area to
18 assist the actual responding officer which was Officer
19 Conyers.

20 Q Okay. And did there come a time when y'all were
21 provided with a description of the suspect you were looking
22 for that morning?

23 A Yes, sir. The description that we were given out was
24 blue jeans, dark in color shirt and a ski mask.

25 Q And white male, black male?

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1 A Black male.

2 Q Okay. And were you involved in an attempt to look for
3 that suspect out there?

4 A Yes, sir, I was.

5 Q And were y'all provided information as to what
6 direction he had fled from the scene on Hillsborough?

7 A Not initially when we first arrived.

8 Q Okay. Did you ultimately get that information?

9 A Ultimately we received a call that -- I don't know who
10 it was -- a concerned citizen called into dispatch and said
11 they saw someone fitting that description running across the
12 Memorial Park Cemetery, which is right down Broughton.

13 Q Okay. Which is how far away is that cemetery located
14 from the victims residence?

15 A Approximately, it's right across Broughton Street.

16 Q Let me show you State's Exhibit No. 1. This is the
17 victim's house down here on Hillsborough?

18 A Yes.

19 Q Where is the cemetery?

20 A Cemetery is right here. (Indicating.) This area right
21 here.

22 Q You go out to Broughton, you take a right, the cemetery
23 is just down on the left?

24 A That's correct.

25 Q Okay. What is this area right in here.

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1 A The immediate area in here is all wooded. Everything
2 else back here is residential. It's pretty much wooded.

3 Q Okay. All right. Where -- you were provided
4 information that somebody specifically saw somebody over
5 near the cemetery that fit the description?

6 A That's correct.

7 Q Okay. Where did you go then, sir?

8 A Actually, we went right over here in the patrol car
9 down this road right here by the maintenance shed.

10 Q Okay. Did you, at that point in time, observe anybody
11 initially?

12 A Initially, no, I didn't.

13 Q Trooper Hoffman, you testified that Trooper Hoffman was
14 kind of with you in the area?

15 A Yes, sir. Actually, me and Trooper Hoffman were
16 walking together.

17 Q Okay. And what's the first time that something as
18 brought to your attention that y'all may have found
19 somebody?

20 A Initially, I believe that it was Trooper Hoffman that
21 told me that he heard something in those woods right there.
22 We went over to investigate it. We actually walked back out
23 over a dirt mound that was right there. And what caught my
24 attention then, as Trooper Hoffman said, there he is right
25 there. And he turned around and went to running, and, of

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1 course, I followed him, behind him. We were pretty much in
2 step with each other.

3 Q Okay. Did you see the person initially when Trooper
4 Hoffman said --

5 A No, not initially. I was just there..

6 Q Where was the first time that you actually spotted
7 somebody that you thought might be involved in this?

8 A When we came up on this -- the fence line right here.
9 The ditch and the fence line that runs somewhere around in
10 this area. When I got close to this fence line I could see
11 someone laying down in the ditch.

12 Q Okay. You indicated there's woods that run along the
13 back of the cemetery here?

14 A That's correct.

15 Q And what else was in that wooded area?

16 A There's also a ditch and a fence.

17 Q Okay. That kind of separates the cemetery, I guess,
18 and this neighborhood over here on Sunset?

19 A That's correct. The fence is right along the woods
20 line, and the ditch actually kind of runs like in the middle
21 of the wood line.

22 Q Okay. So y'all indicated that you found somebody in
23 that ditch area?

24 A That's correct.

25 Q Okay. What was done with that person?

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1 A Well, he was laying down at that point. Trooper
2 Hoffman ran up to him. To the best of my knowledge he had
3 him at gun point while I -- because we was told he had a
4 gun, and I then handcuffed him.

5 Q Okay.

6 A I ordered him to show me his hands. Which he did, and
7 he was handcuffed.

8 Q Okay. And did that individual -- you testified about
9 the description that you had. Did that individual appear to
10 match the description of the person that y'all were looking
11 for?

12 A Except for the ski mask.

13 Q Did y'all ever locate a ski mask, to your knowledge,
14 out in that area?

15 A No, sir, I didn't.

16 Q How about do you have any knowledge of a gun ever being
17 located out in that area?

18 A To the best of my knowledge, no.

19 Q You indicated that individual was handcuffed at that
20 point in time?

21 A That's correct.

22 Q I'm showing you State's Exhibits 5 and 6, specifically
23 No. 5. Do you recognize the individual in that photograph?

24 A That's correct.

25 Q And who is that?

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1 A That's the guy I arrested that night or that morning.

2 Q Did y'all have an opportunity to learn what his name
3 was?

4 A Yes, sir.

5 Q What was his name?

6 A Antionelle Owens.

7 Q Is that the same person there in State's Exhibit No. 6?

8 A That's correct.

9 Q Describe him when he was taken into custody; how was he
10 acting?

11 A Well, he was sweating profusely. I mean, sweating a
12 lot.

13 Q Okay. You can kind of see that in State's Exhibit No.
14 6?

15 A That's correct.

16 Q How long do you think you were out there, Cpl. Caddell,
17 from the time that you first responded at quarter after 6:00
18 or so until y'all took Mr. Owens into custody that morning
19 out there?

20 A I would say approximately 15 minutes.

21 Q At any point did you ever see anyone else that matched
22 the description of the person you were looking for?

23 A No, sir.

24 Q Anybody else in that cemetery area?

25 A No, sir.

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1 MR. SORENSON: Beg the Court's indulgence.

2 Thank you, corporeal. Please answer any questions the
3 defense or the Court may have.

4 THE COURT: Cross examine.

5 MR. MELLARD: Nothing from us, Judge.

6 THE COURT: Thank you, sir. You may step down.
7 And you may be excused, if you'd like. Thank you for
8 coming.

9 CPL. CADDELL: Thank you.

10 MR. SORENSON: Can we take a five minute break?

11 THE COURT: All right. Yes, sir.

12 Ladies and gentlemen, we'll take about 10 minutes at
13 this time. Please retire to the jury room. Please do not
14 talk about the case.

15 (Jury out at 3:36 p.m.)

16 THE COURT: All right. Court will be in recess for
17 about 10 minutes.

18 (Court in recess for short break.)

19 (Court in session after break.)

20 THE COURT: Okay.

21 (Jury in at 3:59 p.m.)

22 THE COURT: All right, we have all of our jury
23 back. You may call your next witness.

24 MR. SORENSON: State calls Cpl. Jimmy Jones.

25 THE COURT: Come around, sir. Put your left hand

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1 on that Bible right there and raise your right hand.

2 (WHEREUPON, Jimmy Jones, was sworn

3 to tell the truth.)

4 THE COURT: Thank you, sir. Have a seat and state
5 your full name for us?

6 CPL. JONES: My name is Cpl. Jimmy Jones,
7 Orangeburg Department of Public Safety.

8 THE COURT: Thank you, sir.

9 JIMMY JONES - DIRECT EXAMINATION

10 BY MR. SORENSON:

11 Q Corporeal, if you would, tell the jury how long you've
12 been employed with Public Safety?

13 A Seven and a-half years.

14 Q And back in June of 2006, were you employed as a
15 corporeal at that point in time?

16 A Yes, sir.

17 Q If you would, just describe for the jury what your
18 duties entail?

19 A Patrol officer, enforcing the laws and also
20 firefighting, detecting abilities, also.

21 Q Is that part of Public Safety?

22 A Yes, sir.

23 Q All right. Specifically turning back to the morning of
24 June 5, 2006, did you have an opportunity to respond that
25 morning to the , Broughton Road vicinity?

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1 A Yes, sir.

2 Q And what was the purpose of y'all -- you responding out
3 there that morning, sir?

4 A It was a shots fired call.

5 Q And where -- if you would tell the jury where you went
6 when you responded out?

7 A I responded to Hillsborough, a residence on
8 Hillsborough.

9 Q You went to the incident location, initially?

10 A Yes.

11 Q Okay. And where did you then go from there?

12 A From there we had an account that the suspect had left
13 on foot towards Broughton Street. So myself and PSO Hoffman
14 and Caddell went to that area.

15 Q Okay. So you went up around the Broughton Road area?

16 A Yes, sir.

17 Q Okay. And tell the jury what ended up happening after
18 you got up in that area?

19 A When we got up in that area we got an account that a
20 passerby had saw a somebody matching the suspects
21 description in the same area by the cemetery.

22 Q How far is that cemetery from the victim's household
23 over on Hillsborough?

24 A It's -- I would say an eighth of a mile.

25 Q All right. I'm going to show you State's Exhibit No 1.

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1 Have you had an opportunity to look at this map, sir?

2 A Yes, sir.

3 Q And you heard testimony that the blue box out here is
4 the victim's residence on Hillsborough. Show the jury where
5 you responded to when looking for this person that morning?

6 A We responded to the residence here. And after the
7 victim showed us which direction we went back towards
8 Broughton Street, and back into this area right here.

9 Q And there's a church, I believe, located in this area?

10 A Yeah.

11 Q All right. And you also indicated that you also ended
12 up over around the cemetery?

13 A Yes.

14 Q Show the jury where it is that you went when you
15 responded --

16 A It's in this area right here.

17 Q Okay.

18 A We were right here at the actual church, I think. The
19 cemetery is back over here behind it.

20 Q Okay. Where did you go physically; do you remember?

21 A In a wooded area behind a storage shed which is located
22 right at the edge of the cemetery.

23 Q Right in there?

24 A Yeah, right in there.

25 Q And did you observe anybody in that wooded area

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1 initially?

2 A No, sir.

3 Q Tell the jury what happened when you were over in that
4 area?

5 A Well, we were canvassing in the area and we actually
6 heard something in the woods in the general direction to the
7 rear of the cemetery.

8 Q Okay. And were you then involved in apprehending
9 anybody out there?

10 A A few minutes later, yes, sir.

11 Q Okay. And where was that located at?

12 A At the fence at the very rear of the cemetery.

13 Q Okay. Were you present when the individual was taken
14 into custody by officers Hoffman and Caddell?

15 A Yes, sir.

16 Q And whose patrol car was that person ultimately put in?

17 A It was put in my patrol car.

18 Q And where did you ultimately take him?

19 A Transported the suspect back to the scene.

20 Q And what was the purpose of doing that?

21 A Eye witness.

22 Q Okay. Was Ms. Shannon, the victim, still at the scene?

23 A Yes.

24 Q Okay. I'm showing you State's Exhibit Nos. 5 and 6.

25 Is that the individual that you transported back to the

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1 scene that morning?

2 A Yes, sir.

3 Q Who's depicted in that photograph with him?

4 A Det. Smalls.

5 Q Det. Smalls right there. Was he at this scene, also,
6 at the residence?

7 A Yes, sir, a little later on.

8 Q Thank you, Cpl. Jones.

9 THE COURT: Cross examine?

10 MR. MELLARD: No questions.

11 THE COURT: Thank you, sir. You may step down.
12 You may be excused, if you'd like.

13 CPL. JONES: Thank you, sir.

14 THE COURT: Call your next witness, please.

15 MR. SORENSON: We call Det. Smalls.

16 THE COURT: Place your left hand on the Bible and
17 raise your right.

18 (WHEREUPON, Michael Smalls, Jr.,
19 was sworn to tell the truth.)

20 THE COURT: All right. Have a seat and state your
21 full name for us.

22 DET. SMALLS: Michael Smalls, Jr.

23 MICHAEL SMALLS - DIRECT EXAMINATION

24 BY MR. SORENSON:

25 Q Det. Smalls, if you would, tell us where you're

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1 employed?

2 A The Orangeburg Department of Public Safety..

3 Q And how long have you been with Public Safety?

4 A Now, about right at 17 years.

5 Q Okay. And what are your current duties there?

6 A I am an general investigator.

7 Q Okay. And back in June, 2006, were you employed in
8 that capacity at that time, sir?

9 A Yes, sir, I was.

10 Q Did you have an opportunity on the morning of June 5,
11 2006, to respond out to --- ?

12 A Yes, sir, I did.

13 Q Okay. And State's Exhibit No. 6, you're actually in
14 that picture?

15 A Yes, sir, it is.

16 Q Okay. Who is that that you're with?

17 A The defendant, Owens.

18 Q Antionelle Owens?

19 A Yes, sir.

20 Q That's how he looked that morning?

21 A Yes, sir.

22 Q I'll show you State's Exhibit No. 5. Is that also how
23 he looked that morning?

24 A Yes, sir.

25 Q You had an opportunity to have Mr. Owens that morning

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1 transported back to Public Safety?

2 A Yes, sir. He was transported to 1320 Middleton Street,
3 which is Public Safety Headquarters. I had the officers
4 bring him to my cube. Once there I attempted to talk to Mr.
5 Owens, who immediately --

6 Q I'm showing you -- did you have an opportunity to place
7 him under arrest that morning?

8 A Yes, sir, he was.

9 Q And did you fill out a kind of a -- a booking form?

10 A Yes, sir, I did.

11 Q Okay. Let me show you, do you recognize that as a copy
12 of your booking report?

13 A Yes, sir.

14 Q Does that indicate what Mr. Owens' height and weight
15 is?

16 A Roughly, yes, sir.

17 Q Okay. What's the height and weight?

18 A Six foot, 190, black hair, brown eyes.

19 Q Is that pretty consistent with what you recall him
20 being that morning when he was taken into custody and
21 arrested?

22 A Yes, sir.

23 Q Does it indicate what his occupation is?

24 A Unemployed.

25 Q How about were you able to ascertain whether he had an

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1 address that was in the vicinity of where he was arrested?

2 A He did not.

3 Q Okay. What is the address that you ended up putting on
4 the booking report?

5 A It looks like -- I'm sorry. I don't have my glasses.
6 It looks like Carriage Place Drive in Chattanooga,
7 Tennessee. I know it wasn't a Tennessee address?

8 Q Okay. It wasn't a local address?

9 A No, sir.

10 Q Now, Det. Smalls, did you have an opportunity back at
11 Public Safety that morning to perform something called a
12 Gunshot Residue Test on Mr. Owens?

13 A Yes, sir, I did.

14 Q Okay. Describe for the jury what that gunshot residue
15 test consists of?

16 A It's a pre-packaged test kit that is -- I don't know
17 all the terminology for it, but it has like four little -- I
18 call them dabbers. What you do, you open the kit. Inside
19 is a set of rubber gloves and instructions telling you what
20 to do with each of the dabbers, where to dab on the
21 individual's hands. And you have a set for the left hand
22 and you have a set for the right hand. And what I did --
23 what you do is you dab on the back of each hand and then the
24 palm area of each hand. You seal it back up and then it's
25 placed into evidence and sent off to SLED for analysis.

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1 Q Did you, in fact, that morning do the dabs on the front
2 and back of each of Mr. Owens' hands?

3 A Yes, sir, I did.

4 Q And did you individually seal those four -- those four
5 dabbers, so to speak?

6 A Yes, sir. You seal them back into the one plastic
7 container. It's sent off to SLED from there.

8 Q Okay. Is there a form that's filled out with that,
9 also?

10 A Yes, sir, it is.

11 Q I'll show you State's Exhibit No. 7. Is that the form
12 that's filled out?

13 A Yes, sir, it is.

14 MR. SORENSON: At this time, I'd offer State's
15 Exhibit No. 7 into evidence.

16 MR. MELLARD: No objection.

17 THE COURT: Admitted without objection.

18 (State's Exhibit No. 7, GSR form,
19 was marked and entered.)

20 BY MR. SORENSON:

21 Q This indicates that the collection was done at 0800
22 hours or at 8:00 o'clock in the morning?

23 A Yes, sir. That is correct.

24 Q Det. Smalls, are you aware of whether a weapon or a ski
25 mask was every found out in that area, that vicinity of

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1 where Mr. Owens was found that morning?

2 A No. There wasn't. Later that afternoon, after he was
3 apprehended and the GSR kit was done, and he was transported
4 to the county jail, myself and other officers with the
5 agency went out in the area where we believe he was running
6 in that wooded area, but we were unable to locate the mask
7 or the gun.

8 Q Describe, if you would, for the jury what that area was
9 like around where he was apprehended?

10 A It's heavily -- it's a very heavy wooded area with a
11 lot of underbrush. Like they said, at the back of the
12 cemetery there's a fence and a ditch line, a pretty deep
13 ditch line that runs along the back of that area.

14 Q Let me -- are you familiar with that general area out
15 there?

16 A Yes, sir, I am.

17 Q Okay. How about this area across the street from the
18 victim's house. What is that area?

19 A All heavily wooded area. Heavily wooded area right
20 there.

21 Q Thank you, Detective. Please answer any questions Mr.
22 Mellard has.

23 THE COURT: Cross examine?

24 MR. MELLARD: No questions.

25 THE COURT: Thank you, sir. You may step down.

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1 Call your next witness.

2 MR. SORENSON: Your Honor, we have one witness
3 left. He is coming from Columbia.

4 THE COURT: All right, ladies and gentlemen, we're
5 moving a little bit quicker than anticipated. The last
6 witness on the state's case is not here from Columbia. They
7 will not be here until in the morning. So we're going to
8 take a recess at this time. We will start back at 9:30 in
9 the morning.

10 Please remember don't talk about the case with anyone.
11 Don't try to find out anything to do your own investigation
12 on the case. That would be highly improper. Just be back in
13 the jury room at 9:30 in the morning.

14 Thank you. I'm sure there will be something in the
15 newspaper in the morning, so do not read the Orangeburg
16 Newspaper in the morning. You can read it after this case
17 is all over. You know more about it -- you don't need to
18 read any newspaper article. Okay. We'll see you in the
19 morning.

20 (Jury out for the evening recess at 4:20 p.m.)

21 THE COURT: Anything from the state before we
22 recess?

23 MR. SORENSON: No, sir.

24 THE COURT: All right. Mr. Owens, I expect you
25 here in the morning at 9:30. If you are not here, as I

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1 said, we will proceed without you; do you understand that?

2 MR. OWENS: Yes, sir.

3 THE COURT: All right. Number two. You have a
4 right to testify once the state finishes in the morning.

5 Does he have any record that the state thinks will be
6 used to impeach him?

7 MR. SORENSON: No, sir. Prior arrest and
8 conviction out of Texas, but I don't believe any -- I'm not
9 sure.

10 THE COURT: All right. Well, if you want to
11 testify you have the right to testify. Of course, the
12 state's attorneys will cross examine you just as your
13 attorneys have cross examined your witnesses. You have a
14 right not to testify. That is your constitutional right not
15 to testify. If you chose not to testify I will tell the
16 jury that they cannot hold that against you. They cannot
17 consider that against you in any way whatsoever. That is to
18 exercise your constitutional rights. I will ask that the
19 jury not even talk about that fact when they begin their
20 deliberations.

21 Do you understand your right to testify?

22 MR. OWENS: Yes, sir.

23 THE COURT: And do you understand your right not to
24 testify?

25 MR. OWENS: Yes, sir.

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1 THE COURT: You discuss that fully with your
2 lawyers and anybody else you want to talk to about it, but
3 the final decision as to whether you should testify or not
4 testify should be your decision. Not your lawyers, not your
5 parents. Nobody's but yours. You need to make that
6 decision. Do you understand that?

7 MR. OWENS: Yes, sir.

8 THE COURT: All right. We'll see you at 9:30 in the
9 morning.

10 Count's in recess until 9:30.

11 (Court at recess on 8/10/09 for the evening at 4:15 p.m.)

12 (Court in session on 8/11/09 at 9:30 a.m.)

13 THE COURT: Is state ready to proceed?

14 MR. SORENSON: Yes, sir.

15 THE COURT: Defense ready?

16 MR. MELLARD: Yes, sir.

17 THE COURT: All right. Bring in the jury, please.
18 (Jury in at 9:32 a.m.)

19 THE COURT: Good morning, ladies and gentlemen.
20 Did anybody see the article on TV this morning? All say --
21 no.

22 I told them not to. I'm sure they would have seen it
23 had I not told them.

24 All right, counsel, you may call your next witness.

25 MR. SORENSON: State calls John Roberts.

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1 THE COURT: Mr. Roberts, come around, please, sir.

2 Sir, if you would put your left hand on the Bible and
3 raise your right.

4 (WHEREUPON, John Roberts, was sworn
5 to tell the truth.)

6 THE COURT: Thank you, sir. Come around and have a
7 seat, and state your full name for us, please.

8 MR. ROBERTS: My name is John Gray Dodd Roberts.
9 R-O-B-E-R-T-S.

10 JOHN ROBERTS - DIRECT EXAMINATION

11 BY MR. SORENSON:

12 Q Good morning, Agent Roberts.

13 A Good morning.

14 Q Tell the jury where it is that you're employed?

15 A I work for the South Carolina Law Enforcement Division,
16 also called SLED in Columbia.

17 Q Today, what department do you work in at SLED?

18 A I work in the forensics services unit in the trace
19 evidence department.

20 Q Okay. Would you describe for the jury what the trace
21 evidence department consist of?

22 A Trace evidence is the analysis of evidence that you
23 generally can't see with your naked eye. We do gunshot
24 residue, bullet hole analysis, which is the distant from a
25 mussel to a target. We do explosives, paint, fiberglass,

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1 flammable liquids, arson analysis, bank dye packs and duct
2 tape.

3 Q Okay. How long have you been employed in the trace
4 evidence department?

5 A I've been with SLED for four and a-half years.

6 Q All of that in that same department?

7 A Yes, sir.

8 Q Okay, if you would briefly tell the jury your
9 educational background.

10 A I have a bachelor's in science degree in chemistry from
11 Texas A&M, Corpus Christi. After I got that degree I moved
12 up here to South Carolina and started working for SLED. I
13 worked underneath my Lieutenant, who is a court qualified
14 examiner in all the sub-disciplines we have in trace, all
15 those different analysis that I listed earlier. Training in
16 gunshot residue first, because that's our most numerous
17 analysis. After four or five months of working his cases
18 and helping him do his analysis, I was given a mock court
19 and I was given a test on an analysis of my own. And was
20 qualified to go ahead and take my own analysis and I've been
21 doing that every since.

22 Q Okay. Did you have an opportunity then, Agent Roberts,
23 to come into court and testify about your results
24 specifically in the field of -- as it relates to gunshot
25 residue?

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1 A Yes, sir, I have.

2 Q And have you been qualified as an expert on those
3 occasions?

4 A Yes, sir, I have.

5 Q Approximately how many times has that occurred?

6 A It's over 20.

7 MR. SORENSON: At this time we'd offer Agent
8 Roberts as an expert in the field of trace analysis.

9 THE COURT: Any voir dire?

10 MR. MELLARD: No, sir.

11 THE COURT: Any objection to his qualifications?

12 MR. MELLARD: No, sir.

13 THE COURT: Okay. All right, ladies and gentlemen,
14 I find that he's an expert in the field of trace analysis
15 and gunshot residue.

16 Now, let me tell you what that means. Ordinarily a
17 witness cannot give you an opinion. Ordinarily a witness
18 can only tell you what they know of their own firsthand
19 knowledge and experience, but certain people because of
20 their training and their education and background experience
21 can be allowed to give you an opinion about matters within
22 their area of expertise, and we call those people expert
23 witnesses.

24 That simply means that he will be allowed to give you
25 an opinion about matters within his areas of expertise and

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1 he can give the reason for those opinions, also. As I will
2 tell you later on, it's up to you to judge the weight of the
3 credibility or the believability of all of the witnesses who
4 testify. That includes expert witnesses.

5 All right, solicitor.

6 MR. SORENSON: Thank you, Your Honor.

7 BY MR. SORENSON:

8 Q Agent Robert, if you would explain to the jury what
9 gunshot residue is?

10 A Gunshot residue is a collection of the particles that
11 come out of a weapon when it's fired. When you fire a gun
12 the hammer hits the primer. On the back of the bullet there
13 is a little silver part, little silver circle in the middle
14 of the back of the bullet. That contains three elements
15 that we look for in our analysis. They are lead, barium and
16 antimony. When that primer is fired those elements combine
17 and they set off the main powder charge. It forces the
18 bullet down the mussel and out the end towards the target.
19 Those elements are super heated and super pressurized into
20 small droplets and it comes out in the form of a plum cloud.
21 A big old smoke cloud that comes out the end of a bullet --
22 uh, out the end of a firearm. On a revolver, it you look at
23 slow motion photography, there's smoke that comes out of the
24 cylinder gap, as well. So anywhere there's a hole in the
25 firearm stuff can escape, it escapes from and it gets on

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1 your hands. As I said, the things we look for are lead,
2 barium, and antimony. . And those are metals that we find
3 that are consistent with gun primer.

4 Q So often times when somebody is -- fired a weapon you
5 can get that gunshot residue on your hands?

6 A Yes, sir. Basically, there's three ways to get gunshot
7 residue on your hands. You can either fire the weapon, you
8 can handle a weapon that's been recently fired, or you can
9 be near a weapon when it goes off, because that cloud
10 expands as time goes on. So if someone is shooting a gun
11 and you're next to him, say you're at a firing range or
12 something like that. If you're standing next to them,
13 you're going to get it on your clothes. If your hands are
14 close to the weapon, if you're rubbing your face or you're
15 holding your ears at the same time they're shooting that
16 gun, you can get that material on your hands, as well.

17 Q Okay. Typically it would be that barium, antimony, and
18 lead?

19 A Yes, sir, those are the three elements you're looking
20 for. Yes, sir.

21 Q Okay. Let me ask you, once you get that gunshot
22 residue on your hands, how easy is it to get it off your
23 hands?

24 A It's fairly easy to get off your hands. If you've ever
25 made bread or made biscuits, you get flour on your hands and

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1 all you have to do is rinse them off just a little bit with
2 water and that flour is gone. If you wipe your hands on
3 your shirt, if you wipe your hands on your pants. If you
4 fall down and you dig your hands into the dirt. This
5 material comes off fairly easily.

6 Q How about if a person is perspiring or sweating, what
7 effect will that have on the presence of gunshot residue?

8 A The materials there -- you know, that are deposited on
9 your hands from the firearm are absorbed by the skin
10 naturally. If you just sat there any amount of time you
11 would lose, you know, certain amount of materials per hour.
12 At SLED our protocol is six hours, simply because the body
13 absorbs this material. We tell agencies that they have to
14 have a gunshot residue kit taken within six hours of the
15 incident so that we can analysis it and get any kind of good
16 results.

17 Q And would the fact that a person was sweating more than
18 normal would that have any effect on how fast that gunshot
19 residue was dissipated from their hands?

20 A Yes, sir. The more you sweat, the more often you're
21 going to clench your hands like this to get them dry or
22 you're going to wipe them off on your shirt to get them dry.
23 That just removes the material even faster.

24 Q Do you have -- turning specifically to this case, did
25 you have an opportunity to receive a gunshot residue kit

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1 that was collected from the defendant in this case,
2 Antionelle Owens?

3 A Yes, sir. I did.

4 Q Was here any paper work that accompanied that kit that
5 came in?

6 A Yes, sir. There was.

7 Q Okay. Let me show you State's Exhibit No. 7. Would
8 that be the paper work that accompanied the kit?

9 A Yes, sir, this is a copy of the paper work that came
10 with it.

11 Q And what is the purpose of this paper work that comes
12 with the gunshot residue kit?

13 A That's a gunshot residue date sheet. What it is is a
14 sheet that comes with the gunshot residue kits. It has a
15 place for the date, has a place for the time of the
16 incident. It has a place for the time of the collection,
17 which is important to us, because we have to have it in that
18 six hour window. It also has the person's name that the kit
19 is being taken off of. It has the officer's name, and it
20 has various information like that that is helpful to us so
21 that we know whether we can analysis it or not.

22 Q In this case did you verify to make sure that this kit
23 was collected within that six hour window?

24 A Yes, sir, I did.

25 Q Okay. What was the time -- I'll show you -- do you

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1 have an approximate incident time that was noted on there?

2 A It says 6/5/06 between 0600 hour and 0620 hours. With
3 the date and time the firearm was fired. As for the
4 collection time it was 6/5/06 at 0800 hours.

5 Q That would be --

6 A Two hours.

7 Q -- a little more than two hours or so?

8 A Yes, sir.

9 Q So as a result of that being in that six hour window do
10 you then analysis the kit that was submitted to you?

11 A Yes, we did.

12 Q All right. Explain to the jury, if you would, what
13 items did you actually receive for your analysis?

14 A In this kit what we received are what we call particle
15 lifts. Particle lifts are an aluminum stub with a flat top
16 on top and double sided carbon sticky tape on it. And what
17 we do is we apply it to the four areas of your hands. Your
18 palms, both palms, and both backs of the hands. Those are
19 the parts of your body that are closest to a firearm when it
20 goes off. So there's four particle lifts and that's what we
21 analyzed in this case.

22 Q And so you had all four of them that -- the left palm,
23 left back, right palm, right back?

24 A Yes, sir, I did.

25 Q Okay. And you indicated that you're looking for those

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1 three elements that you talked about earlier, barium,
2 antimony and lead?

3 A On the particle lifts we're looking for the actual
4 gunshot residue particles. The very small droplets that
5 solidify and land on your hands when you fire a weapon.

6 Q And you talked initially about the left hand. When you
7 analyzed the left palm, what were your results?

8 A Left palm, I found no gunshot residue.

9 Q How about the left back of the hand?

10 A I also found no gunshot residue.

11 Q How about the right palm?

12 A On the right palm I did not find any gunshot residue.

13 Q Okay, and how about the right back of Mr. Owens -- the
14 right back of Mr. Owens right hand?

15 A The back of the right hand was inconclusive.

16 Q Okay, and explain to the jury what your findings were
17 that led you to put that as being inconclusive?

18 A What I found, what an inconclusive is, is we have to
19 have a certain number of particles before we can call it
20 positive. In this case I only found one round lead
21 particle. It's not enough for me to call a positive, but
22 it's not a negative either. Round lead is one of the
23 components in gunshot residue is what we see when somebody
24 has fired a gun. We see round lead. In this case since I
25 only found one I couldn't call it a positive, I was forced

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1 to call it an inconclusive.

2 Q Now that round lead particle, you indicated that's one
3 of the components of gunshot residue; is that correct?

4 A Yes, sir.

5 Q So by finding an round lead particle the person had
6 fired or been in close proximity or handled a gun that had
7 been fired?

8 A Yes, sir.

9 Q Okay. Let me ask you; what are the other ways that
10 somebody could get a round lead particle on the back of
11 their right hand?

12 A There's only a couple of other ways that you can get
13 these materials on your hands, specifically, round lead on
14 your hands. One is handling cheap Chinese Christmas light.
15 Their quality control is not all that good. They use a lot
16 of lead in their processing. You can get round lead off of
17 Chinese Christmas lights. The other way is if you're in a
18 lead smelting plant. If you're anywhere that lead is being
19 heated to a high temperature, high enough to where it melts
20 and it pours, you can get round lead on the back of your
21 hands. For instance, if you make your own fishing weights.
22 Or if you reload your own lead bullets. Something like that
23 would make it possible for you to have these particles on
24 your hands.

25 Q So those are basically the three ways that, in your

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1 experience, that you know of that round lead particles can
2 get on your hands?

3 A Yes, sir.

4 Q And again, you talked earlier about how easy it is to
5 remove. I mean, if somebody had handled some cheap Chinese
6 Christmas lights and gotten round lead particles on their
7 hands would they still dissipate the same way that we spoke
8 about the gunshot residue, through sweating, time, rubbing
9 your hands; would that also remove that from your hands?

10 A Yes, sir.

11 Q So you're still be dealing with that same six hour
12 window?

13 A Yes, sir.

14 MR. SORENSON: Beg the Court's indulgence.

15 THE COURT: Yes, sir.

16 MR. SORENSON: Thank you Agent Roberts. Please
17 answer any questions that Mr. Mellard may have.

18 THE COURT: Cross examine.

19 MR. MELLARD: Just a couple of questions.

20 JOHN ROBERTS - CROSS-EXAMINATION

21 BY MR. MELLARD:

22 Q You said that there was no gunshot residue on the right
23 palm; that's correct?

24 A Yes, sir. That's correct.

25 Q Okay. And in your report you put negative?

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1 A No, sir.

2 Q What'd you put?

3 A I put no gunshot residue.

4 Q No gunshot residue. Okay. Now, if there was gunshot
5 residue you're put there was gunshot residue you're put
6 there was gunshot residue?

7 A Yes, sir, I would put gunshot residue.

8 Q Okay. So no gunshot residue on the right palm, there
9 is no gunshot residue on the left palm?

10 A That is correct.

11 Q Okay. There's no gunshot residue on the left back?

12 A That's correct.

13 Q Okay. And you don't know about the right back?

14 A No, sir. I found one round lead particle on the right
15 back.

16 Q Right. But you don't know -- You cannot say for
17 certain it was gunshot residue?

18 A It was round lead, there was not gunshot residue.

19 Q Round lead. It was not gunshot residue. All right.
20 Thank you.

21 MR. SORENSON: No redirect.

22 THE COURT: Thank you, sir. You can step down.
23 Thank you for coming. You may be excused.

24 You may call your next witness.

25 MR. SORENSON: Your Honor, that would be all the

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1 state has. The state rests.

2 THE COURT: All right, ladies and gentlemen, the
3 state has rested. That means they have offered all the
4 testimony and evidence they are going to offer. At this
5 time, we need to take up a couple of legal matters. It will
6 take us a few minutes to do that. So we are going to excuse
7 you. I'll ask you to retire to your jury room for a few
8 minutes. Do not talk about the case.

9 All right.

10 (Jury out at 9:47 a.m.)

11 THE COURT: Motions.

12 MR. MELLARD: Yes, sir. At this time we'd move for
13 a directed verdict.

14 There are two causes of action, one of which is assault
15 and battery with intent to kill. In this particular case,
16 the elements are unlawful act of violent injury to the
17 person of another with malice aforethought either expressed
18 or implied. It's our position that the state has failed to
19 show expressed malice. Expressed malice is when there is a
20 deliberate intention to unlawfully take the life of another.
21 I believe the testimony that the Court heard was that the
22 person who was the shooter was within an arm's length of the
23 victim in this case. I believe that the victim testified
24 that he had the gun at her head, and that the person then
25 lowered the gun and shot towards the ground and it struck

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1 her in the leg. We would say this does not show an intent
2 to unlawfully take the life of another. It does not show
3 expressed malice. Also, there's no evidence of implied
4 malice. Again, applied malice is where the circumstances
5 demonstrate a reckless disregard for human life or where a
6 reasonable person would know that there's a strong
7 likelihood that death would follow the contemplated act.
8 Again, the gun was here, moved it down, fired towards the
9 ground. So we would say that there's no evidence of implied
10 malice. As far as the other charge, it's attempted
11 burglary, first degree. We would say that the state has
12 failed to show that there was an attempt to commit a
13 burglary first degree. I think the facts of the case are
14 that the person who was the assailant tries to get the keys
15 from the woman, but I don't think that that alone shows an
16 intent to get into the dwelling. I think it was just
17 getting keys from the person.

18 So on that we would ask that the Court would grant us a
19 directed verdict.

20 THE COURT: Well, all right, sir. I think there's
21 sufficient evidence which the jury would support a verdict
22 on both of the indictments. I will deny you motion.

23 All right, Mr. Owens, would you stand, please.

24 Have you had an opportunity to discuss with your
25 attorneys whether or not you would testify?

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1 MR. OWENS: Yes, sir.

2 THE COURT: Have you reached a decision?

3 MR. OWENS: Yes, sir.

4 THE COURT: What is your decision?

5 MR. OWENS: I will not.

6 THE COURT: Is that your decision?

7 MR. OWENS: Yes, sir.

8 THE COURT: Did anybody put any undue pressure on
9 you to make that decision?

10 MR. OWENS: No, sir.

11 THE COURT: You're comfortable with that decision?

12 MR. OWENS: Yes, sir.

13 THE COURT: All right. Thank you, sir. I find you
14 freely, voluntarily, knowingly, and intelligently waive your
15 right to testify. I will instruct the jury appropriately.

16 Do you have any other witnesses to offer testimony?

17 MR. MELLARD: No, sir, we don't.

18 THE COURT: All right. I'll take the request to
19 charge.

20 MR. MELLARD: We do have some -- Your Honor, we'd
21 ask that the Court charge, as far as the identification, I
22 believe there is a charge as far as they have to -- I can
23 get the charge.

24 THE COURT: What about that?

25 MR. SORENSON: It's not really a typical --

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1 THE COURT: This is not a typical case. I guess --
2 it's just a strange set of facts here. I'll charge it.

3 MR. MELLARD: That just deals with the facts as far
4 as --

5 THE COURT: I'll let you look at it to see what
6 he's got there. I don't have mine up here. I can get mine
7 and see what it says.

8 What other requests do you have?

9 MR. MELLARD: Well, obviously --

10 THE COURT: Well, both of you are talking at one
11 time. I can't hear either of you.

12 MR. MELLARD: We just wanted to talk about whether
13 or not you were going to charge the fact that he -- it's not
14 held against him that he's not testifying.

15 THE COURT: Oh, absolutely. Yes, sir. No question
16 I'll do that. Sure.

17 MR. SORENSON: If Your Honor intending on charging
18 the lesser included offense of ABHAN?

19 THE COURT: Well, I was waiting to see if the
20 defense was going to request that?

21 MS. HINDS: No, sir.

22 THE COURT: State requesting it?

23 MR. SORENSON: Frankly under the facts I think it
24 would probably be appropriate.

25 THE COURT: Well, I think it's appropriate for the

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1 same reason you said there was no indication of malice. I
2 don't think -- it might be -- on the defense part, I don't
3 know -- under the facts of this case. I guess it wouldn't
4 matter if he wasn't trying to commit murder. So that's up
5 -- I mean, that's up --

6 MR. SORENSON: I would ask for it, Your Honor. So
7 it would be up to them to argue why it's not appropriate or
8 why you shouldn't charge it. As far as the identification
9 --

10 THE COURT: Let me look at that while you argue on
11 your first one --

12 MR. SORENSON: Your Honor, at this point, the
13 charge assault and battery with intent to kill. I mean,
14 I'll leave it up to you as to whether you want to charge it.
15 We would oppose any charge of assault of a high and
16 aggravated nature, but at this point, I'll leave it up to
17 you..

18 THE COURT: Anything else on the ABHAN, ABWIK?

19 MS. HINDS: Your Honor, they're either going to
20 believe he did it or they're going to believe he didn't do
21 it. I don't --

22 THE COURT: So it probably doesn't make any
23 difference. I think it's appropriate to charge it.

24 MR. SORENSON: Just the fact that she was shot in
25 the leg, I think --

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1 MS. HINDS: Note my exception for the record, that
2 we're not requesting ABHAN.

3 THE COURT: And you're requesting that I not charge
4 ABHAN?

5 MR. MELLARD: Yes.

6 MS. HINDS: Correct.

7 THE COURT: Well, you know, -- This is Ralph King
8 Anderson's -- he gets paid by the word, you know. I'm going
9 to go get mine. I don't think -- I'll be back in a few
10 minutes. Let's take about a 10 minutes.

11 (Court at recess for short break.)

12 (Court in session after short break.)

13 THE COURT: All right. Since the defendant is not
14 testifying I'll hear your motion?

15 MR. MELLARD: We'll just renew our motion for a
16 directed verdict, Your Honor.

17 THE COURT: All right. I'll deny your motion. I
18 think it's a question for the jury. Evidence is sufficient
19 to convict the defendant if they believe it. And I am going
20 to charge the lesser included. I think it's appropriate
21 under the circumstances, especially under the facts where
22 initially the defendant had pointed the weapon at the
23 victim's head and then later lowered the weapon. The jury
24 could conclude that there was no malice there. So I think
25 it's appropriate. And we've been over the identification

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1 charge that I'm going to use, and the attempt charge.

2 Anything else from the state before I bring in the
3 jury?

4 MR. SORENSON: No, sir.

5 THE COURT: From the defense?

6 MR. MELLARD: No, sir.

7 THE COURT: All right. State will argue first,
8 defense last.

9 MR. SORENSON: Yes, sir.

10 THE COURT: Bring in the jury.

11 (Jury in at 10:14 a.m.)

12 THE COURT: And I'll let you rest on the record.

13 MR. MELLARD: Yes, sir.

14 THE COURT: All right, ladies and gentlemen, you've
15 heard from the state now.

16 Mr. Mellard.

17 MR. MELLARD: Your Honor, the defense rests.

18 THE COURT: All right, ladies and gentlemen, the
19 defense has rested. That means that you have heard all the
20 testimony they are going to offer. As I told you earlier
21 the defendant does not have to testify, does not have to
22 offer any evidence whatsoever. The burden is on the state
23 to prove him guilty. So since you've heard all the
24 testimony it remains now for the attorneys to come to you
25 and make their closing arguments. Then I'll charge you on

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1 the law.

2 Now, what the attorneys tell you in their closing
3 arguments is not evidence. Evidence is that testimony which
4 comes from the witnesses who've taken the oath and sit on
5 this stand and testify, as well as, any exhibits.

6 Do we have exhibits?

7 COURT REPORTER: Yes, sir. Seven.

8 THE COURT: Yes. We've got some photographs, don't
9 we.

10 And you'll have those with you in the jury room when
11 you begin your deliberations.

12 But what the attorneys tell you is very important.
13 They have a good grasp of the facts of this case and they've
14 been working with it for quite a while, and they've got a
15 good grasp of the law. So what they tell you might help you
16 to understand some of the evidence you've heard and it might
17 answer some questions that you have in your mind presently.
18 It's been a relatively short case, but it's a very important
19 case, of course, to both side. So please give them your
20 attention as they address you at this time.

21 Mr. Sorenson will speak to you first, followed by the
22 defense.

23 All right, Mr. Sorenson.

24 MR. SORENSON: May it please the Court, Your Honor.

25 THE COURT: Yes, sir.

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1 MR. SORENSON: Good morning ladies and gentlemen.
2 This will be my only opportunity to speak to you. I want to
3 start off by thanking you for your attention that you gave
4 to this matter, and the attention that you will continue to
5 give to Ms. Hinds and Mr. Mellard when they come before you.
6 Most important is the attention that you'll give to this
7 matter when you get back in your jury room and begin
8 deliberating. So I thank you on behalf of not only the
9 people of Orangeburg County, but more specifically on behalf
10 of Ms. Irene Shannon for the attention you've given so far.

11 As His Honor said, this is my opportunity to talk to
12 you. I want to take a few minutes initially and talk to you
13 about the two charges Mr. Owens has been charged with, and
14 then I'm going to talk to you about the facts that have been
15 proven to you from this witness stand. They have not been
16 proven to you not beyond a reasonable doubt, but any doubt
17 of Mr. Owens guilt.

18 As you know, Mr. Owens is charged with two different
19 indictments. The first one is assault and battery with
20 intent to kill. I'll talk to you about two separate charges
21 as it relates to that indictment. In that indictment,
22 ladies and gentlemen, basically there are three possible
23 verdicts that you can reach. As I indicated, he was charged
24 initially, indicted by the grand jury for assault and
25 battery with intent to kill. Very simple. That is an

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1 unlawful act of violent injury to another person with malice
2 aforethought, either expressed or implied. The unlawful act
3 of violent injury such as firing a gun to shoot somebody,
4 and that is accompanied with malice aforethought. Malice
5 aforethought. I want to talk to you just for a second about
6 malice is. Malice is an intentional act of violence. A
7 heart depraved of social duty that is fatally bent on
8 mischief. Conduct that signifies a conscious effort to
9 create a serious violent injury to another person. That
10 malice, ladies and gentlemen, we have to show existed at the
11 time that that trigger was pulled. We don't have to prove
12 that it existed ten minutes earlier, twenty minutes earlier,
13 two hours earlier. It's not premeditation. It's at the
14 time that that shot was fired shows malice in Mr. Owens
15 heart and in his mind. It can be either expressed or
16 implied. In other words, expressed, an example of expressed
17 malice is somebody saying I'm going to kill you, and then
18 pulling the trigger. That would be expressed malice.
19 Bitch, I've got you now. Would be expressed malice that
20 shows the evil wickedness inside his heart. Or it can be
21 implied, ladies and gentlemen, you can infer or imply from
22 the defendant's conduct and actions. One way that you can
23 infer malice is through the use of a deadly weapon such as a
24 handgun. When you point a gun at somebody and pull the
25 trigger, you intend to cause a serious bodily injury or

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1 death. That's assault and battery with intent to kill.

2 If you find, ladies and gentlemen, after looking at all
3 the evidence that we've proven beyond a reasonable doubt, in
4 other words, if you're firmly convinced of the defendant's
5 guilt on that charge you would find Mr. Owens guilty of
6 assault and battery with intent to kill.

7 Now, a lesser charge that you're going to consider,
8 which you're also going to have to consider is called
9 assault and battery of a high and aggravated nature. It's
10 kind of hard to know the differences. They're very similar
11 to each other. Essentially, assault and battery of a high
12 and aggravated nature, is again, an unlawful act of a
13 violent nature accompanied by some circumstances of
14 aggravation. The malice doesn't have to be present. But
15 some circumstances of aggravation, and that could be --
16 examples of that is a man assaulting a woman. The disparity
17 in the sizes. You have a very large person assaulting a
18 small person. Could be use of deadly weapon. Could be a
19 baseball bat, could be a gun. Those are circumstances in
20 aggravation that would support the conviction of assault and
21 battery of a high and aggravated nature. Essentially, this
22 is part of this. This is the greater offense and this is
23 the lesser offense. If you basically find that we have not
24 proven malice, then you'd move on to consider whether we've
25 proven assault and battery of a high and aggravated nature.

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1 And obviously the third option is that we have not proven
2 beyond a reasonable doubt of Mr. Owens' guilt, you would
3 find him not guilty.

4 The second charge, ladies and gentlemen; that Mr. Owens
5 has been indicted for is attempted burglary in the first
6 degree. Attempted burglary in the first degree. First I
7 want to talk to you about what burglary is. Burglary is the
8 unlawful entry into another person's home. Burglary in the
9 first degree is entry into another person's home dwelling
10 without their consent with the intent to commit a crime
11 therein. In other words, if you go into somebody else's
12 home without their consent and attempt to commit some crime
13 whether that be to assault somebody, to steal something, to
14 potentially assault somebody. If you go into their home
15 without their consent you're guilty of burglary. Guilty of
16 burglary.

17 Now, what makes it a burglary in the first degree would
18 be aggravated circumstances. If you commit that burglary
19 while armed with a deadly weapon or if you cause physical
20 injury to a non-participant in the crime. In other words,
21 in this case, the homeowner. It doesn't qualify if it's
22 somebody who's with you, but a non-participant. That
23 elevates it to a burglary in the first degree.

24 Now, an attempt is when you take action in steps but
25 don't quite complete that burglary. In other words, when

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1 you pull that gun on a homeowner in their carport, force
2 them up to the door and try to make them open the door,
3 you've attempted to commit a burglary. You didn't actually
4 get in the home so it doesn't rise to a burglary in the
5 first degree, but it is an attempt. Something more than
6 thinking about it, it's actually taking steps towards a
7 completed action. In this case, I submit to you, he did
8 everything but get in that home that morning. Everything
9 but get in that home that morning.

10 Those ladies and gentlemen are the two -- as to this
11 charge, very simply ladies and gentlemen, if you find that
12 we have proven beyond a reasonable doubt after looking at
13 the evidence that Mr. Owens is guilty, then will find him
14 guilty of attempted burglary in the first degree. But by
15 the same token as in the assault charge, if you find that we
16 have not proven, then under your oath, you have a duty to
17 find him not guilty.

18 Ladies and gentlemen, back on June 5, 2006, a little
19 over three years ago, a little after 6:00 o'clock in the
20 morning, that young lady had a parent's worst nightmare
21 happen to her. The worst nightmare.

22 The same routine she goes through every day, locking
23 her door, going out to her car. A cup of water in one hand,
24 a car seat in the other hand. Getting in her car. A masked
25 gunman comes around the corner wanting to get her to go back

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1 into her home. Trying to force her back in her home where
2 her three small children were, including an eight month old
3 baby inside that home. That was the most terrifying moment
4 of that young lady's life happened that day on June 5, 2006.

5 Now, Ms. Hinds got up in front of you yesterday, ladies
6 and gentlemen, I agree with one thing she said
7 wholeheartedly. What you heard from this witness stand, is
8 not really a whole lot of dispute about what happened that
9 morning. Not a whole lot of dispute about what happened.
10 There's no doubt that an assault and battery with intent to
11 kill occurred. There's no doubt that an attempted burglary
12 in the first degree occurred. The only issue, ladies and
13 gentlemen, that you're going to have when you get back in
14 that jury room is who did it. Who did this.

15 Now, I started of, ladies and gentlemen by kind of
16 breaking things down. And Your Honor said this wasn't going
17 to be a long trial. Obviously, the trial -- you heard from
18 the witnesses. Hopefully, I'm going to misrepresent
19 anything you've heard from those witnesses, but obviously if
20 I have, it's not been on purpose, and y'all can take as you
21 remember it back there.

22 I want to basically break things down to talk to you
23 about two different kind of parts of this case. The first
24 part is going to be Ms. Shannon's testimony, and the second
25 part is going to deal with the apprehension of Antionelle

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1 Owens that morning. I want to kind of break things down
2 into those two groups.

3 All right, think back to Ms. Shannon's testimony.

4 Shortly after 6:00 o'clock in the morning she'd gone out to
5 her car. Okay. Same routine she goes through every day
6 going to work. Okay. Just getting light out. No problems
7 seeing. She gets attacked in her carport. Attacked in her
8 carport, and as a result of that gets shot in the right leg.
9 Ang going back to her testimony, face to face with her.

10 Face to face with her at her car. Forces her to her door.

11 When she can't get it open, spins her around face to face --
12 and she came down to Mr. Mellard, within an inch of him.

13 She had nothing obstructing her ability to see and describe
14 this man. She was shot, ultimately, in the left thigh.

15 Look at the description as she described to you from
16 this witness stand and the description she gave to the
17 police. Tall, slender, black male, jeans and a dark t-
18 shirt. Blue knit ski cap. So that's the description given
19 to police that morning. So they are out looking within
20 moments of this incident happening. That's who law
21 enforcement is looking for.

22 What else is she telling you. Tells them that he had
23 big hair under the ski mask and it wasn't pulled down -- he
24 wasn't bald headed or clean shaven on the top of his head.
25 He had big hair under the ski mask. Eventually, she said

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1 she could see his eyes, she could see his mouth. That way
2 she could tell you he's a black male.

3 What else did she tell you she noticed about him? Face
4 to face with him. She said he had big lips. Big lips.
5 Never sees his face. Never sees his face because he's got a
6 ski mask over it. Okay. That's all done -- that
7 description was given, as I indicated to the police on the
8 telephone so before they're even to her resident. So they
9 are saturating that area looking for him within moments of
10 this occurring.

11 The EMS comes out and treats her. Gets ready to
12 transport her, and they -- remember back to the testimony
13 EMS worker that testified yesterday that they have to hold
14 back -- they got there right around 6:30. They were leaving
15 the scene a little before 7:00. I think it was ether 6:56
16 or 6:58, she testified in the morning to transport her to
17 the regional medical center. So we know prior to 7:00
18 o'clock in the morning Mr. Owens had been caught and brought
19 back and identified by Ms. Shannon as being consistent, 100
20 percent with the person she had just seen 15 to 30 minutes
21 earlier pointing a gun in her face, trying to get in her
22 home, and ultimately shooting her in the leg and then taking
23 off running, as she described to police, out of her driveway
24 back towards Broughton Street. That's her testimony, ladies
25 and gentlemen. Ample lighting to see, and there was no

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1 question in her mind about the type of clothing he had on,
2 jeans and a dark black, dark blue t-shirt. No question
3 about it, and absolutely certain he had hair under the mask.
4 No question about it. She was 100 percent certain from that
5 he had hair under the mask. No question about it. She was
6 100 percent certain from that witness stand.

7 Now, ladies and gentlemen, look the second part. The
8 apprehension of Mr. Owens. Okay. The police were out there
9 within minutes. This isn't a case where they had to drive
10 -- responding out to somewhere it took the police 15, 20, 30
11 minutes to get there. I mean, they are here in the city
12 limits of Orangeburg, and they are there within minutes.
13 6:13, I believe is when one of the officers testified that
14 they were on the scene out there. So within minutes that
15 this assault occurred, they have the description of who
16 they're looking for, they began looking in this area, the
17 direction in which Ms. Shannon said the individual took off,
18 back towards Broughton. They also ended up getting directed
19 by somebody that there was a person matching that
20 description over near the maintenance shed in the cemetery.
21 Officers go over there. Officer Hoffman, Officer Caddell,
22 Officer Jones go over and start looking around this area.
23 Officer Hoffman, now with the highway patrol, starts going
24 into the heavily wooded area. A heavily wooded area.
25 Another officer calls out to him; is that you in there. He

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1 was yelling -- that wasn't where he was. So I hear
2 something in those woods. Officer Hoffman goes farther into
3 those woods there. Low and behold, what happens? The jack-
4 in-the-box, Antionelle Owens, pops up out of that
5 underbrush. The person matching the description of the
6 person they were looking for. Tall, slender, black male.
7 Jeans, black t-shirt takes off running. Takes off running.
8 They end up catching him within moments back along this
9 ditch line here where there's a fence and a ditch that runs
10 behind the cemetery and separates this neighborhood up here
11 from the cemetery. Low and behold, who do they have.
12 Antionelle Owens. Found hiding in that ditch: Sweating
13 profusely. You can see that in that picture. And this is a
14 picture taken a little while later he is still sweating
15 profusely. Fits the description that had been given to the
16 police.

17 Now, I want to talk to you in a minute about the mask
18 and the gun. I'm sure you're going to hear a whole lot
19 about that from Ms. Hinds.

20 Obviously, we never found the mask, and we never found
21 the gun. If we did you would have heard about it. Look at
22 something, though, ladies and gentlemen, Ms. Shannon last
23 sees the person she later identifies as Mr. Owens leaving
24 her driveway and heading towards Broughton. He has a mask
25 on at that point in time. A gun in his hand, I guess he

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1 tucked it back in his waistband or pocket or something, in
2 his jeans. The police are responding and are there within
3 minutes. He's not going to stay on the main road. He's not
4 going to stay walking just like a person that's attempted to
5 burglarize this lady's house and shot her. He's not going
6 to be walking down Hillsborough or walking down Broughton in
7 broad daylight while the police are showing up. All right.
8 So he coming down Hillsborough in the direction she sees him
9 go. Well, he ultimately ends up where he's seen over here
10 in the cemetery. Well, what's in between her house and the
11 cemetery. This big wooded area. You heard the testimony
12 that this is heavily wooded with underbrush. As was this
13 small wooded area where he was found up here.
14 Unfortunately, ladies and gentlemen, he had ample
15 opportunity to stuff that gun inside that mask and hide it.
16 Get rid of it. He was found walking in this area with
17 neither his gun or his mask on him. The two things that
18 can't be found. As I indicated, he fits the description and
19 there is something else. I know why he's in that cemetery,
20 he's hiding from the police. Not only is he in that
21 cemetery, but he's hiding in a thickly wooded underbrush
22 area. It's not like when they found him he was kind of
23 wondering out here looking at tombstones or something not
24 hiding in the woods. He had \$1431 in his pocket. \$1431 as
25 the testimony from Officer Conyers. He's not a homeless

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1 person out there. That's not why he's sleeping in the
2 woods. He's up to no good. Whether he was going there to
3 try to rob that house or there were drugs there. I don't
4 know. The opportunity to attempt to assault her in some
5 way. I don't know. I submit to you, he's not just some
6 homeless person who just happens to be caught up out there
7 by the police.

8 The most important thing, ladies and gentlemen, he's
9 found less than a half mile -- testimony has been about an
10 eighth of a mile away from the house within 15 to 20 minutes
11 of this crime occurring, is probably the most important fact
12 of this all, not only that -- that he's found within a half
13 mile within 15 to 30 minutes between 6:30 to 6:45 in the
14 morning. Okay. Public safety didn't go out there -- this
15 isn't something that happened at 3:00 o'clock in the
16 afternoon and they went over to the mall and they went
17 walking about until they found somebody walking around in
18 jeans and a black t-shirt on. This is at 6:30 in the
19 morning in jeans in the middle of June, hiding in the woods.
20 Within less than a half mile where a young lady was shot in
21 her own carport by a man fitting his description to a T. To
22 a T. Jeans, black t-shirt, tall, thin, black male, six
23 foot, 190 pounds, according to the Det. Smalls. A whole lot
24 of hair on the top of his head, in the woods.

25 Ladies and gentlemen, if that's all we had that would

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1 be enough to convict him beyond any doubt.

2 The last few seconds I want to talk to you about what
3 you heard this morning that should remove any possible
4 doubt. That's the gunshot residue results. I'm sure Ms.
5 Hinds is going to get up here and tell you that, basically,
6 that shows that he's not guilty, because that SLED agent
7 couldn't get on this witness stand and say that there was
8 gunshot residue found. Y'all heard his testimony this
9 morning. Go back through it. Left hand, negative. No
10 gunshot residue on either hand. He wasn't shooting with his
11 left hand. We know that. Okay. He is right handed. You
12 heard her testify that when she couldn't get the door open
13 he spun her around and pinned her up against the wall and
14 shot her right leg. Right handed. Holding the gun. Where
15 would you expect the residue to be found -- that cloud on
16 the back of the right hand. Okay. What else did the SLED
17 agent testify to as far as the gunshot residue. Gunshot
18 residue has three different elements they're looking for;
19 barium, antimony, and lead. Okay. You have to find all
20 three of them to be able to say conclusively there's gunshot
21 residue. Okay. There's still looked. What did they find
22 in this case? Round lead particles on the back of his hand.
23 Round lead particles. We know from the gunshot residue from
24 the testimony is easily removed from sweating. If you're
25 sweating from running and hiding from the police. Hiding in

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1 the ditch, taking a ski mask off. Every time you rub your
2 hands on something when you're sweating profusely that stuff
3 is removed. I submit to you, unfortunately for Mr. Owens,
4 it wasn't quite all removed. That round lead particle that
5 was found, what did Agent Roberts testify was the only way
6 that could get on your hand? That round lead particle is
7 found on the back of your hand, either you fired a weapon,
8 you were in close proximity to a weapon that was fired, you
9 handled and somehow rubbed the back of your hand against a
10 weapon that was fired. You played with cheap Chinese
11 Christmas lights in the middle of June. Or you were working
12 at some smelting plant where they pour hot lead. And all
13 that had to have been done within a six hour time frame.
14 The stuff was collected at 8:00 o'clock in the morning. If
15 Mr. Owens hadn't done one of those things, fired a gun or
16 standing by a gun being fired, touching a gun in Ms.
17 Shannon's carport, playing with cheap Chinese Christmas
18 lights or working in a lead factory. We know from the
19 testimony of Det. Smalls he was unemployed at the time. He
20 had an address in Tennessee. The only one that makes sense,
21 the only one at all is that he's the one that fired that
22 gun. He would have fire that gun sometimes between 2:00
23 o'clock in the morning and 6:00 o'clock.

24 I want to thank you for the attention you've given me.
25 I'm sure you'll give Ms. Hinds the same degree of attention.

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1 One thing I want to leave you with ladies and
2 gentlemen, this that His Honor will talk to you about the
3 fact that he is the judge of the law. And if whatever he
4 tells you is the law you are to follow that. Ladies and
5 gentlemen, the 12 of y'all are judges also. You are the
6 judges of credibility, and judges of the facts. In other
7 words, when you get back in that jury you, you and you
8 alone, the collective 12 of you will tell us what the truth
9 is about what happened back on the morning of June 5, 2006.
10 The most important tool that you bring with you, that you
11 brought with you yesterday and you brought back with you
12 today, is your common sense. Common sense. And if you will
13 look at this sensible verdict, one that makes sense, is the
14 one that holds Mr. Owens accountable, holds him responsible
15 for his actions. Holds him accountable for trying to break
16 into that young lady's home, pointing a gun in her face,
17 ultimately shooting her in the leg that morning. That's a
18 verdict of guilty, ladies and gentlemen. Guilty of assault
19 and battery with intent to kill. Guilty of attempted
20 burglary in the first degree.

21 Thank you.

22 THE COURT: Thank you.

23 Yes, ma'am, Ms. Hinds.

24 MS. HINDS: Thank you, Your Honor.

25 Good morning, ladies and gentlemen. As Mr. Sorenson

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1 said you must be firmly convinced. This is not a situation
2 where this kinda could have happened, sorta could have
3 happened. You must be firmly convinced when you reach a
4 verdict.

5 Now, the only thing we are in agreement on is that on
6 the morning of June 5, 2006, was a nightmare for Ms.
7 Shannon. Certainly nobody wishes anybody to get shot.
8 We're just glad she's okay, and that she ultimately did
9 recover. It was also a nightmare for Mr. Antionelle Owens,
10 because he was arrested for a crime that he did not commit.
11 And you are here and have heard the evidence and that is
12 what you will deliberate on.

13 Now, let's talk a little bit about Ms. Shannon's
14 testimony. We are in agreement also that she told the
15 officers that it was a slender, tall, black male wearing
16 jeans, a dark shirt and a ski mask. Okay. Pretty general
17 description other than a ski mask. Jeans, very common.
18 Dark t-shirt, again, very common. Nothing out of the
19 ordinary or very specific. She did say that the person was
20 tall, and she did say that the person was slender. And
21 you've heard testimony from that stand that at the time of
22 this incident that Mr. Owens was six foot tall, weighed 190
23 pounds. Six foot, 190 pounds is slim. I don't think so.

24 Now, Ms. Shannon testified on that stand that, in
25 addition, she knew that the assailant had a lot of hair and

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1 it was up under -- you could see it sticking out. And that
2 protruding lips and she could see his eyes. Okay. And when
3 the police officers came and they're trying to go out and
4 solve this crime, they asked her for a description. Again,
5 remember what every officer told you the description was, a
6 tall, slim, black male wearing jeans and a dark shirt.
7 There is never any mention by any officer or anybody else
8 involved that there was long hair, that there were
9 protruding lips. Certainly this would have helped the
10 police in trying to apprehend somebody had she told them
11 that, but she didn't ladies and gentlemen. Because she
12 didn't know that until after the police brought Mr. Owens
13 back to her doorstep. Now, she testified -- and the
14 solicitor said there was nothing obstructing her view. A
15 man had a ski mask on. Certainly that's obstructed her
16 view. She testified she went into her house, she talked to
17 911 on the phone. She's involved in an assault incident,
18 she is bleeding. She gets on the phone and gives that
19 description. Where did the police find her when they
20 arrive? In her car. Now, she said -- she testified that
21 she had never seen Mr. Owens before and there is no
22 testimony to the contrary. Total strangers. This incident
23 took place in a very short period of time. Ms. Shannon
24 couldn't remember, which is understandable. It's not like
25 the timing, she couldn't remember. But there was testimony

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1 from one of the officers that the whole thing took about a
2 minute. That's the -- very, very quick. She's confronted
3 by this horrible person who assaulted her with a mask on and
4 it's over within seconds, ladies and gentlemen. She never
5 saw him before. She only saw him with the mask, but yet she
6 took the stand and said she was 100 percent sure that Mr.
7 Owens was the one.

8 Ladies and gentlemen, use your common sense. How could
9 she be that sure? A 100 percent when it was a masked man
10 and she had a very limited opportunity to see. Again, she
11 testified that she basically identified him through the
12 clothing and the build. Ladies and gentlemen, that's not
13 enough. And the build doesn't match up with what she told
14 the police. Again, 190 pounds isn't slim.

15 You'll have the pictures to take back with you. Notice
16 the lighting in the pictures, by the way. It's early in the
17 morning. Also notice, if you were going to give a
18 description, you want this guy caught, this person that shot
19 you in the leg. You want to give as much descriptive
20 information as you can. Now, he's got a mask on so you
21 can't be real certain about facial features. But, I submit
22 to you, what's the thing that pops out at you, big gold
23 chain. Did she tell any of the officers that the guy who
24 shot her was wearing a gold chain. Surely that's important,
25 that would have helped the police find the suspect. She

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1 didn't tell them that.

2 Again, it's human, I believe, I submit to you, it's
3 human to want closure. Somebody comes to your house with a
4 gun. You want the guy caught. You want the person to pay.
5 You want the police to catch the person as quickly as
6 possible so you can feel safe again in your house. I submit
7 to you, ladies and gentlemen, that when they brought Mr.
8 Owens back to that house she jumped all over it. Yeah,
9 that's the guy. But ladies and gentlemen, does it make any
10 sense that she could be that sure that Mr. Owens was the man
11 who did this. I believe Ms. Shannon also testified, and the
12 solicitor states, that she was basically in the ambulance
13 when they brought Mr. Owens back to the scene. You hear
14 testimony from the EMS provider that she was trying to treat
15 a worst case scenario. She's not there to diagnose, but
16 she's there to make sure -- what's the worst case scenario
17 that they treat? From her testimony from that stand was
18 that she put Ms. Shannon on a spinal board. A spinal board,
19 ladies and gentlemen, a spinal board, flat on her back. Yet
20 her testimony was that she's sitting up in the ambulance.
21 We know that couldn't have been the case. Again, ladies and
22 gentlemen, she wants the guy caught and that's
23 understandable. But use your common sense. Can she
24 remember, be that sure that Mr. Owens was the one that did
25 it.

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1 We heard testimony from the officers. From Officer
2 Conyers he observed that she was sitting in the vehicle, in
3 the carport. Ladies and gentlemen, why was she in the car
4 in the carport. She's already said she went in the house on
5 the phone talking with officers on 911. Well, you can
6 determine from her testimony that that was a drug house.
7 Bad things happen at drug houses. It's an unfortunate fact
8 of life. Did she not want the officers to get into the
9 house because of illegal activity? We don't know. But we
10 do know that it's strange that after she gets shot instead
11 of going inside and waiting on help to arrive she goes and
12 sits in the car.

13 Again, Officer Conyers told you that this whole
14 incident took place in a very short period of time, less
15 than a minute. He testified that he didn't hear any
16 information about lips or hair or eyes. Nothing of that
17 nature. All he was told, tall, slim, black male, jeans,
18 dark clothing, ski mask. Everybody agrees on that. The
19 officers weren't let in on the long hair and protruding
20 lips. They didn't know. Officer Conyers did say that he
21 recovered \$1431 from Mr. Owens. Then the solicitors argue
22 to you that he went there to rob the place. If he's got
23 \$1431 in his pocket why would he be there to rob Ms.
24 Shannon. It doesn't make any sense, ladies and gentlemen.
25 It doesn't make any sense.

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1 Officer Hoffman, three years on the force, again,
2 testified that he saw a black man, blue jeans, black shirt.
3 And he did testify that they found Mr. Owens about an eighth
4 of a mile away, which is a very short period away. And that
5 he was sweating profusely. Ladies and gentlemen, it's June
6 in South Carolina. Would it be abnormal to be sweating
7 profusely. Again, look at the situation. At the time they
8 find him, we've got multiple officers pulling guns on him.
9 Do you not think that might make somebody nervous, and it
10 might make somebody sweat?

11 Again, officers did not find a gun. They found nothing
12 but a man fitting the general description. Again, not a
13 lot. Officer Hoffman testified that there was thick
14 underbrush in that area. There's multiple officers, and
15 we'll get back to this a little bit later, but how thick
16 could the underbrush be if they couldn't find the gun and
17 they couldn't find a mask. If all this happened within that
18 short period of time that the police stated, how did he --
19 yet they never found a gun, they've never found a mask. And
20 the officers didn't know about the alleged facial features.

21 Officer Caddell didn't add a whole lot to what
22 everybody else said. Again, black male, blue jeans, dark
23 shirt. But he did testify that Mr. Owens appeared to match
24 except for the mask. Appeared to match? Blue jeans with a
25 dark shirt. Again, we hear he is sweating profusely.

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1 Again, the reason, the heat, the situation. Had multiple
2 officers point a gun at you.

3 Officer Jones, basically said, a little over seven
4 years on the force. Again, he basically was one of the
5 people that helped find him. That he was found within an
6 eighth of a mile away.

7 Officer Smalls, with 17 years on the force testified
8 that he didn't find a weapon, didn't find a gun. He
9 actually testified that after they had arrested Mr. Owens
10 that they went back to the area and did some more searching
11 for the mask and the gun.

12 Ladies and gentlemen, we've got multiple law
13 enforcement agents; we've got public safety, we've got
14 county deputies, we've got SLED. Nobody can go back in this
15 short period of time in this short distance and find these
16 things if they allegedly exist. How far -- did they get a
17 metal detector if the brush is that thick. Yet the
18 solicitor is arguing to you that this is a short period of
19 time, I say to you, how much could he have -- why couldn't
20 they go back and find those things. I submit to you they
21 couldn't because Mr. Owens never had a gun. He never had a
22 mask. And he was never at 975 Hillsborough.

23 Ladies and gentlemen, I do agree, again, with the
24 solicitor. You do need to bring your common sense to that
25 jury room. And common sense had to do with all of those

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1 things that you know your life. But I ask you, also, when
2 reading a newspaper or when watching TV shows are there not
3 or have there not been innocent people convicted of crimes
4 with eyewitness identification that later turned out to be
5 mistaken. Mistaken identification does happen, and as I
6 told you yesterday that's what this case is about.

7 All the state has proven to you is what they didn't
8 find. They didn't find a gun. They didn't find a mask.
9 They have offered you on corroborating evidence other than
10 they found Mr. Owens in the cemetery, not even at the scene.
11 Not at 975 Hillsborough, they found him in the cemetery.

12 Reasonable doubt? I think there's a great deal of
13 reasonable doubt. The only time they can put him at 975
14 Hillsborough for anything connected to this is when the cops
15 take him back to 975 Hillsborough and bring him in front of
16 Ms. Shannon.

17 Ladies and gentlemen, between all the cops that
18 testified, from my memory, if my math is wrong, forgive me.
19 But this is over 35 years of law enforcement experience and
20 they couldn't find any other shred of evidence to connect
21 Mr. Owens to this alleged crime. I agree. Someone
22 assaulted Ms. Shannon. Someone demanded her key, and
23 somebody, unfortunately, shot Ms. Shannon. But that someone
24 was not Antionelle Owens. The solicitor said something
25 about he couldn't be found with a gun. In other words, he's

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1 making up a story about how he's somehow ditching a gun on
2 the way because he couldn't be found with it. Solicitor is
3 right. He couldn't be found with it. He never had it,
4 ladies and gentlemen. He never had it.

5 Ladies and gentlemen, this case is clearly about
6 mistaken identification. Again, with all due respect to Ms.
7 Shannon, a horrible thing happened that day. But she -- she
8 has testified to you mistakenly, we submit to you. Mr.
9 Owens, unfortunately, was in the wrong place at the wrong
10 time. That's not a crime, ladies and gentlemen. He was a
11 black male in blue jeans and a dark shirt at the cemetery.
12 If that's a crime you would find him guilty. I submit to
13 you that's not a crime at all.

14 Mr. Owens has lived under the shadow of these charges
15 for three years, ladies and gentlemen. The horror of being
16 held at gunpoint. The horror of being accused of crimes
17 that you did not commit.

18 One last thing. The expert, the GSR expert made a big
19 deal about -- well, we know that three out of four was a
20 finding of no GSR. Ultimately, if you remember his
21 testimony, he said, no -- on the one that was inconclusive,
22 no GSR. He talked about lead particulates, ladies and
23 gentlemen, lead particulates. And there are other way that
24 people can possibly -- that can get on somebody. I submit
25 to you that we have multiple officers drawing their guns and

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1 pointing at Mr. Owens. And what did they do next? They
2 cuffed him, ladies and gentlemen. Could there not have been
3 lead particulates transferred from the hands of the officers
4 onto Mr. Owens. We're not talking gunshot residue, ladies
5 and gentlemen, because he did not have the three elements,
6 he could not testify that he was positive for GSR. Smoke
7 and mirrors, ladies and gentlemen. They are trying to -- to
8 win you over with could have been, might have been, this is
9 the story.

10 When you go back to the jury room, again, you must be
11 firmly convinced beyond a reasonable doubt that Mr. Owens is
12 the man who committed these crimes. We are asking you to
13 find a verdict that speaks the truth. That there is nothing
14 in the evidence that supports that Mr. Owens had anything to
15 do with that shooting and we are asking for a verdict that
16 speaks the truth; not guilty.

17 THE COURT: Thank you, ma'am.

18 Ladies and gentlemen, as you know, the state had
19 prepared two indictments against Mr. Owens. One charges him
20 with assault and battery with intent to kill. One charges
21 him with burglary in the first degree. Now, you will have
22 those indictments with you when you begin your deliberations
23 in the jury room, but as I told you earlier, those
24 indictments are not evidence. Those indictments are simply
25 documents draw up by the state to advise Mr. Owens of the

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1 charges he's facing. To those charges he has pled not
2 guilty. That places the burden on the state to prove him
3 guilty beyond a reasonable doubt. A person charged with
4 committing a criminal offense is never required to prove
5 himself innocent. It is an important rule of law that the
6 defendant in a criminal trial must be presumed innocent
7 until the state has convinced you of his guilty by the
8 evidence they present beyond a reasonable doubt. Of course,
9 it is your duty, ladies and gentlemen, if you are not so
10 convinced to find him not guilty. But by the same token, if
11 you are so convinced, to find him guilty.

12 Well, if the state's burden is to prove him guilty
13 beyond a reasonable doubt. What do we mean by beyond a
14 reasonable doubt. Well, some of you might have served as a
15 juror in a civil case. You would have been told it's
16 necessary to prove that a fact is more likely than not true.
17 We call that the preponderance of the evidence. But the
18 state's burden in a criminal case is greater than that.
19 Proof beyond a reasonable doubt is proof that leaves you
20 firmly convinced of the defendant's guilt.

21 There are very few thing in this life that we know with
22 absolute certainty. And in criminal cases the law does not
23 require proof that overcomes every possible doubt. If,
24 based on your consideration of all of the evidence in the
25 case, you are firmly convinced that he is guilty, then you

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1 must find him guilty. By the same token, if you think
2 there's a real possibility that he is not guilty you must
3 give him the benefit of that reasonable doubt and find him
4 not guilty.

5 Now, ladies and gentlemen, you are the only -- you are
6 the judges of the facts, as I told you earlier. You have to
7 determine the truth of the matters you've heard in this
8 case. So you must determine the credibility, the
9 believability of the witnesses who have testified in this
10 case. And you're the only ones that can do that. And when
11 determining that credibility or believability you should
12 consider a number of things. Was the witness forthright
13 with their testimony. Was the witness hesitant in their
14 testimony. In other words, the demeanor of the witness.
15 Did the witness have reason to be biased or prejudiced. Was
16 the witness testimony contradicted on one hand and was it
17 corroborated and supported on the other. What was the
18 witnesses opportunity for observation and knowledge of the
19 matters about which they testified. How reasonable was the
20 witnesses testimony when considered in the light of the
21 other evidence which you believed. You don't determine
22 credibility by counting the number of witnesses. You can
23 believe one witness against many or many against one. You
24 can believe all of a witnesses testimony or part of a
25 witnesses testimony or none of a witnesses testimony. Use

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1 your good sense in evaluating the credibility or
2 believability of the witnesses remembering that you must
3 give the benefit of any reasonable doubt to the defendant.

4 Now, one issue in this case is the identification of
5 the defendant as the person who committed the crime charged,
6 and the state has the burden of proving the identification,
7 of course, by a reasonable doubt. You must be satisfied
8 beyond a reasonable doubt of the accuracy of the
9 identification of the defendant before you can convict him
10 of these crimes. Testimony, identification testimony is an
11 expression of believe or an impression by a witness. So you
12 must determine the accuracy of that identification. You
13 must consider the believability of the witness in the same
14 way as any other witness. You may consider whether the
15 witness had opportunity to observe the offender at the time
16 of the offense. Things such as how long or how short a time
17 was available, how far or close the witness was. The
18 lighting conditions, whether the witness had a chance to see
19 or know the person in the past. But the burden of proof
20 extends to every element including the identification of the
21 witness. Identification testimony is one part of the
22 testimony which would bear on the identification of the
23 person charged with the crime, and you would consider that
24 testimony with all of the other testimony, and you must be
25 convinced beyond a reasonable doubt that this is the

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1 defendant who committed a particular crime.

2 Now, ladies and gentlemen, there are two types of
3 evidence from which you can find the truth as to the facts
4 of a case. One is by direct evidence and the other is by
5 indirect evidence. Well, if you go back in the jury room
6 back there and look out the window and you see somebody back
7 out the parking place. You'd say, my Lord, that fellow
8 backed out and that lady hit him right in the back. But
9 suppose you go over there in just a minute and you look out
10 the window and you see a car back three-fourths of the way
11 out of the parking place and another car stops right behind
12 him, touching him, but nobody's moving. Nobody is standing
13 around. And you say, that fellow backed out of that parking
14 lot and that person hit him. Well, you didn't see that by
15 direct evidence, but you made that determination by
16 circumstantial evidence. That's the difference in the two.
17 We use it all the time we just don't call it by that name.
18 Direct evidence comes from the use of one of our five
19 senses. We can either see it, smell it, taste it, hear it
20 or feel it. Indirect evidence comes from the proof of facts
21 from the surrounding circumstances that might indicate that
22 that fact has not occurred. But with regard to both direct
23 and circumstantial evidence, it must be such as to prove the
24 guilt of the defendant beyond a reasonable doubt. The law
25 makes no distinction between the weight or the value to be

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1 given to direct or circumstantial evidence. Nor is a
2 greater degree of certainty required of circumstantial or
3 direct evidence. You should weigh all of the evidence in
4 the case, and after considering all of the evidence in the
5 case if you're firmly convinced of the defendant's guilt you
6 must find him guilty. If not, you must find him not guilty.

7 Ladies and gentlemen, the same law and constitution
8 which makes you the finders and the triers of the facts of
9 the case makes me the judge of the law in the case. And I'm
10 the only judge of the law. Just like you are the only
11 judges of the facts, and if you find that what I'm telling
12 you is not what you thought the law was or even if it
13 doesn't include what you think the law ought to be you must
14 put aside your position on the law. You must accept the law
15 as I give it to you, apply that to the facts, as you find
16 them to be, in this case, in order to reach your verdict.
17 That's what your oath requires you to do.

18 Now, ladies and gentlemen, I want to define for you the
19 two charges with which Mr. Owens is charged by the state.
20 And the first is burglary, an attempted burglary in the
21 first degree. Let me tell you, first, there are three
22 degrees of burglary; first, second, and third. In this
23 case, we're talking about an attempt to commit burglary in
24 the first degree.

25 So first I want to tell you what an attempt is. An

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1 attempt is an act done in partial execution of a design to
2 commit a crime. There must be an intent that the act shall
3 be committed and an act done, not in full execution, but in
4 pursuance of the intent. An intent is distinguished from
5 preparation to commit it and also from the intent to commit
6 a crime. The law does not punish mere entertainment of a
7 criminal intent. You don't get punished for thinking about
8 something. To bring the law into action it is necessary
9 that some act should be done in the pursuance of the intent.
10 Immediately and directly in tangent to the commission of the
11 crime. An act, should the crime be perpetrated, would
12 constitute part and parcel of the transaction, but which
13 does not reach to the accomplishment of the original intent,
14 because it was prevented or it was voluntarily abandoned.
15 So an attempt is an act done if partial execution of a
16 design to commit a crime, and in this case, we're talking
17 about the crime of burglary in the first degree.

18 Well, the law defines burglary in the first degree as a
19 -- a person is guilty of burglary in the first degree if the
20 person enters a dwelling without consent with intent to
21 commit a crime in the dwelling, and either one of these
22 options; either when he enters that building without -- that
23 dwelling without consent with the intent to commit a crime
24 he is either armed with a deadly weapon or explosive or he
25 caused physical injury to a person who is not a participant

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1 in the crime or he uses or threatens the use of a dangerous
2 instrument or he displays what is or appears to be a knife,
3 pistol, revolver, rifle, shotgun, machine gun or other
4 firearm. So there are four ways that that burglary can be
5 made a first degree burglary. First a person entering a
6 dwelling. Well, a dwelling is a place where people would
7 normally sleep, ladies and gentlemen. Entering means to --
8 you go inside or any part of the body can go inside.
9 Without consent means without any permission. With the
10 intent to commit a crime. Well, intent is a mental element.
11 Again, you must determine intent by looking at all the facts
12 and circumstances around the occasion. You can't dissect a
13 person's brain and determine what the intent was, so you
14 have to determine that by looking at all the facts that
15 existed at that time. And the state must prove that when
16 entering or while in the building or dwelling he is either
17 armed with a deadly weapon or causes physical injury to a
18 person who is not a participant in the crime or uses or
19 threatens the use of a dangerous instrument or displays what
20 is or appears to be a knife, pistol, revolver, rifle,
21 shotgun, machine gun or other firearm. The state must prove
22 each of those elements. Of course, I said, this is an
23 attempt, which means he did not -- the defendant did not
24 complete the attempt by entering the dwelling completely
25 with the intent to commit a crime because he was prevented

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1 from doing that or he voluntarily withdrew that plan, but
2 there must be an intent that the act should be committed and
3 something done in furtherance of that burglary in the first
4 degree, and the state must prove those elements beyond a
5 reasonable doubt.

6 Now, the second crime he's charged with is assault and
7 battery with intent to kill. Well, under our law, ladies
8 and gentlemen, that also includes a lesser offense of
9 assault and battery of a high and aggravated nature. So I'm
10 going to charge you about both of those. I'm going to tell
11 you when I start that basically the main difference is that
12 assault and battery with intent to kill includes the element
13 of malice. Assault and battery with a high and aggravated
14 nature does not include the element of malice, but it must
15 be accompanied with circumstances of aggravation, which I'm
16 about to explain to you.

17 Now, assault and battery with intent to kill. Ladies
18 and gentlemen, an assault is an offer to do violent injury
19 with the apparent ability to complete that assault or commit
20 the batter. In other words, if I'm over here and I swing at
21 you, that's not an assault because my arm is not long enough
22 to reach over there and hit you. But if I walk over there
23 and lean over that jury box and I swing at you and you tuck
24 your head back and I miss. That's an assault because that's
25 an attempt to do violent injury.

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1 Now, the battery is the completion of that assault by
2 making physical contact or an unlawful touching of a person
3 or another by the party committing the assault themselves.
4 So if I throw a baseball at you and I miss you and hit the
5 wall that's an assault. But if I throw the baseball and hit
6 you that's an assault and battery. If I walk over there and
7 swing at you and hit you, that's an assault and battery.
8 That would be a simple assault and battery no harder than I
9 could hit you. But that's what we mean by assault and
10 battery.

11 Now what is meant by assault and battery with intent to
12 kill. It is an unlawful act of a violent nature to the
13 person of another with malice aforethought either expressed
14 or inferred. So malice is an essential element of the crime
15 of assault and battery with intent to kill. Malice is a
16 term of art. A technical term importing wickedness and
17 excluding just cause or legal excuse. Malice is in form
18 whether it rises from hatred, ill will or otherwise is still
19 malice. Malice springs from depravity. From a heart devoid
20 of social duty and fatally bent on mischief. Malice must be
21 aforethought. The law does not require that malice should
22 exist for any particular time before the commission of the
23 act, but malice must exist in the mind of the accused just
24 before and at the time of the commission of the act. It
25 must be a combination of the previous evil intent and the

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1 act producing the result. Malice aforethought may be either
2 expressed or inferred or implied. These words expressed or
3 inferred do not mean different kinds of malice, but merely
4 the manner in which the only kind of malice known to the law
5 may be shown to exist. That is either by direct evidence or
6 by necessary inference from the facts and circumstances
7 which are proven. Express malice is shown when one by word
8 of mouth expresses his ill will or hatred of another. Or
9 where the state showed that he made preparation beforehand
10 to do the deed which was later accomplished. Lying in wait
11 for a person or any acts of preparation going to show that
12 the deed was in his mind would be expressed malice.

13 Now, ladies and gentlemen, even though no expressed
14 attempt to kill has been proven or no malice is by direct
15 evidence it may be inferred from the facts and circumstances
16 which are proven. Malice may be inferred from the willful,
17 deliberate, and intentional doing of an unlawful act without
18 just cause or illegal excuse. In other words, in it's
19 general signification malice means that doing of a wrongful
20 act intentionally and without justification or legal excuse.
21 The inference of malice may arise when the deed is done with
22 a deadly weapon if the deed was done during the commission
23 of a felony. You may consider that as a fact and
24 circumstances from which malice may be inferred. I charge
25 you that the crime of attempted burglary in the first degree

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1 is a felony.

2 Ladies and gentlemen, malice does not necessarily
3 impart ill will toward the individual injured but signifies
4 rather a general recklessness for the lives and safety of
5 others or condition of mind which shows a heart regardless
6 of social duty and fatally bent on mischief. It is the
7 wrongful intent to injure another and indicates a wicked and
8 depraved spirit intent on doing wrong. So if facts are
9 proven beyond a reasonable doubt sufficient to raise an
10 inference of malice to your satisfaction this inference
11 would be simply an evidentiary fact to be taken into
12 consideration by you, along with all the other evidence in
13 the case, and you may give it such weight as you determine
14 it should receive.

15 Now, specific intent to kill need not be shown to
16 convict with assault and battery with intent to kill. It is
17 sufficient if there is shown a general intent to commit
18 serious bodily injury. Intent means intending the result
19 which actually occurred rather than accidentally or
20 involuntarily. Intent may be shown by acts and conduct from
21 which you the jury may naturally and reasonably infer an
22 intent. And intent to kill may be inferred from the
23 character of the assault, the use of a deadly weapon or the
24 use of a dangerous or deadly weapon in a manner reasonably
25 calculated to cause great bodily harm. It may be inferred

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1 if it is demonstrated that the accused voluntarily and
2 willfully commits and act, the natural tendency of which is
3 to destroy another's life or to commit great bodily harm.

4 Now, as I said, ladies and gentlemen, the charge of
5 assault and battery with intent to kill includes within that
6 the lesser charge of assault and battery of a high and
7 aggravated nature. So I'm going to define that for you.

8 Assault and battery of a high and aggravated nature
9 includes all of the elements of an assault and battery with
10 intent to kill except the malice aforethought, but in
11 addition, the state must prove beyond a reasonable doubt,
12 the aggravating circumstances. So assault and battery of a
13 high and aggravated nature is defined as the unlawful and
14 intentional infliction of a violent injury on the person of
15 another accompanied by circumstances of aggravation. Some
16 examples of circumstances of aggravation; the use of a
17 deadly weapon, the infliction of serious bodily injury, the
18 intent to commit a felony, a great disparity between the
19 ages and physical condition of the parties, the differences
20 of the sexes, indecent liberties or familiarities of a
21 female accomplished by force, or forceful infliction of
22 shame and disgrace, the resistance of lawful authority.
23 Assault and battery of a high and aggravated nature may be
24 with a dangerous weapon or it's mentality. It is committed
25 in a spirit of wantonness or a reckless disregard for the

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1 rights and safety of other.

2 Now, these are merely examples of circumstances of
3 aggravation. Neither serious bodily harm nor the use of a
4 deadly weapon is an essential element of assault and battery
5 of a high and aggravated nature, but they are circumstances
6 of aggravation.

7 So you must first consider charge of assault and
8 battery with intent to kill and if you find the state has
9 not proven the elements of that offense beyond a reasonable
10 doubt you would consider the charge of assault and battery
11 of a high and aggravated nature and see whether the state
12 has proved the elements of that crime beyond a reasonable
13 doubt, and if so you would find him guilty of the lesser
14 crime. Of course, you would have to be convinced that the
15 state has proven those elements beyond a reasonable doubt.
16 If not, you would find the defendant not guilty.

17 Now, ladies and gentlemen, because a defendant in a
18 criminal trial is presumed innocent the law never imposes
19 upon the defendant the burden or the duty of testifying or
20 of calling any witnesses or of producing any evidence. The
21 defendant in a criminal trial has an absolute right under
22 the constitution of the United State and the state of South
23 Carolina not to take the witness stand to testify. The
24 exercise by a defendant of this right not to testify or
25 present evidence must not be considered by you in any way

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1 against the defendant and should play no role whatsoever in
2 your discussions or deliberations. No inference of any kind
3 may be drawn from the defendant's exercise of his
4 constitutional right not to testify or present any other
5 evidence. You should not even discuss that fact when you
6 begin your deliberations.

7 Nothing that I've said or done during this trial,
8 ladies and gentlemen, has been in way intended to suggest to
9 you that I have an opinion about the facts of the case or
10 the credibility of the witnesses or the guilt or the
11 innocence of the defendant. And if anything that I've said
12 seems to indicate to you that I have such an opinion please
13 disregard that and form your own opinion as to each of those
14 matters. You have sworn to -- you've been selected as fair
15 and impartial jurors, and you've been sworn to impartially
16 try and determine the facts of this case. When you have
17 done so no one will have a right to criticize your verdict.
18 You should decide the case according to the testimony that
19 you've heard from the lips of the sworn witnesses along with
20 the other evidence introduced. You are to decide the issues
21 without bias and without prejudice to any party. You cannot
22 allow yourself to be governed by passion, by unfair
23 sympathy, by prejudice for or against any person, by public
24 opinion or any other arbitrary factor. Both the state and
25 the defendant have a right that you will carefully and

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1 impartially consider all of the evidence in the case, and
2 that you will follow the law as I've explained it to you in
3 reaching your verdict on this case.

4 Now, Mr. Toole, I'm going to ask you if you would serve
5 as foreperson of our jury. That means that you would
6 preside as our jury begins it's deliberations. You will see
7 that everyone has an opportunity to speak, gets to speak.
8 Everybody who wants to speak gets the opportunity to speak
9 with out everybody talking all at once. And when the jury
10 has reached a unanimous verdict it will be your duty to
11 report those verdicts on behalf of the entire jury.

12 Ladies and gentlemen, there are only two verdicts as to
13 each of the indictments, and there is no significance as to
14 the order in which I explain to you the verdict. I simply
15 have to state one before the other.

16 If you find the state had proven the elements of the
17 crime as I have charged you in my instructions beyond a
18 reasonable doubt you would find the defendant guilty. If
19 you find the state had failed to prove all of those elements
20 beyond a reasonable doubt you would find the defendant not
21 guilty. And that applies to each of these two indictments
22 and you must make a decision separately as to each of them
23 based on the facts and the circumstances and my charge to
24 you on the law.

25 Mr. Foreman, on the one side of the indictment is a

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1 brief description of the charges. On the other side, in the
2 bottom left hand corner there's a little block that says,
3 the verdict. Once the jury has reached a unanimous verdict
4 if you will simply write that verdict down; either guilty or
5 not guilty. Whichever is the unanimous verdict of the jury
6 and then you would sign your name as foreperson of the jury
7 and write today's date, which is August 11, 2009. And each
8 of the indictments has a place for you to do that. Now,
9 when you reach a verdict you simply knock on the door and
10 tell the bailiff you have reached a verdict. You do not
11 tell the bailiff the verdict or give him the indictments.
12 You simply tell him or her that you've reached a verdict and
13 she will advise the Court, and we will bring you back in the
14 courtroom to receive the verdict here.

15 If you have any questions that come up during your
16 deliberations please write them down a sheet of paper. The
17 bailiff will give you a pad and a pencil and see that you
18 have that ability to do that. Just knock on the door, give
19 the note to the bailiff. She will bring it to me and I will
20 take whatever action I need to take depending on whatever
21 the question is.

22 If we have any smokers and the smokers need a break,
23 they can take you outside downstairs somewhere. Just knock
24 on the door and tell the bailiff the smokers need a break.
25 When the smokers leave the rest of you have to stop

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1 deliberations until they get back. All 12 of you must be in
2 the jury room while you're deliberating.

3 I'm going to ask you just a second to return to the
4 jury room but not talk about the case quite yet. I must
5 discuss my charge to you with the attorneys. Sometimes I
6 fail to tell you everything I need to tell you or I may make
7 a mistake in something that I've told you. I've been known
8 to do that once or twice. If I need to bring you back out
9 and correct some error that I've made in my instructions I
10 will do that promptly. If I do not need to do that I will
11 send in to you, Mr. Foreman, the indictments and the
12 exhibits. Once you get the indictments and the exhibits you
13 can begin your deliberation, but not until that time.

14 Now, it's 11:25. If you want us to order your lunch it
15 usually takes about an hour and a half to get lunch brought
16 in here. Just let the bailiff know and we will take that of
17 that matter for you. I'll leave that entirely up to you.

18 So please retire to your jury room. Do not begin your
19 deliberation until you receive instruction to do so.

20 The two alternates can just remain right here.

21 (Jury out at 11:25 a.m.)

22 THE COURT: All right, gentlemen, I'm going to
23 excuse y'all at this time. It's very important that we had
24 alternates especially when a case continues overnight. At
25 one time I thought the state might run over to tomorrow,

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1 which makes it more likely that something might come up, one
2 juror having an emergency or something and we lose a juror.
3 And if we don't have an alternate to take that jurors place
4 we have to have a mistrial, come back in another term of
5 court and start over from scratch. So it's important that
6 we have you to step in to take over if we have a problem
7 with a juror. But we have not. So I think everybody looked
8 healthy to me. So I'm going to excuse you at this time.

9 Do we know what to tell them?

10 MR. SORENSON: Probably call back after 6:00
11 tonight.

12 THE COURT: Okay. Do y'all have that call in
13 number, just call back after 6:00 o'clock and follow
14 whatever instructions you find on that machine at that time.
15 You're welcome to have a seat and wait with us. If the jury
16 decides they want lunch, I'll buy y'all lunch, too. I don't
17 know what they're going to do back there, but the county
18 will buy y'all lunch if you want to hang around and wait.
19 If they don't want lunch you're going to be out of lunch.
20 But you are welcome to hang around. That's your call on
21 that decision.

22 All right. Thank you very much.

23 Any exceptions to the charge from the state?

24 MR. SORENSON: No exceptions, Your Honor. The only
25 thing I might -- I'm not sure -- and maybe they will

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1 understand it, but you charged ABWIK and ABHAN, but I'm not
2 sure it was made clear on the indictment. I mean, what -- I
3 think it just basically says guilty of --

4 THE COURT: Oh, you're right.

5 MR. SORENSON: I'm not sure if they would remember
6 the terminology --

7 THE COURT: You're right. I need to change that.
8 Anything from you?

9 MS. HINDS: No, sir.

10 THE COURT: Anything else in your exceptions?

11 MR. SORENSON: No, sir.

12 THE COURT: All right. I'll --

13 MR. SORENSON: You want to just write guilty ABWIK
14 or guilty ABHAN, not guilty. Something like that on the
15 indictment?

16 THE COURT: All right. How many exhibits do we
17 have?

18 COURT REPORTER: Seven.

19 THE COURT: All right. Would you gather those?

20 COURT REPORTER: They are ready.

21 THE COURT: Do you mind if I just bring the foreman
22 back in here to explain this to him?

23 MR. SORENSON: I don't have any objection to it.

24 THE COURT: How about the defense?

25 MS. HINDS: No objection.

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1 THE COURT: All right. Guilty, assault and battery
2 with intent to kill; guilty, assault and battery of a high
3 and aggravated nature. Or not guilty.

4 MS. HINDS: Are you going to circle it or --

5 THE COURT: Yes.

6 MS. HINDS: Okay.

7 THE COURT: Okay. Ask the foreman to come back in
8 there just a minute.

9 (Foreman returns to courtroom at 11:27 a.m.)

10 THE COURT: Mr. Foreman, I did leave one thing out.
11 As you know, I told you that under the assault and battery
12 with intent to kill indictment there's a lesser included
13 offense of assault and battery of a high and aggravated
14 nature. So there are three possible verdicts, not two. If
15 you find they have proven the elements of assault and
16 battery with intent to kill, then your verdict would be
17 guilty of assault and battery with intent to kill. If not
18 you would look at the second charge, the lesser charge,
19 assault and battery of a high and aggravated nature. If you
20 find the state has proven those elements then your verdict
21 would be guilty of assault and battery of a high and
22 aggravated nature. Or if you find the state has failed to
23 prove the elements of either of those your verdict would be
24 not guilty. And so you simple circle one or cross two of
25 those out on that indictment. With the other indictment you

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1 simply write guilty or not guilty; do you understand that?

2 JURY FOREMAN: Yes, sir.

3 THE COURT: All right. Those are the exhibits
4 right there and the indictments. You can take those in the
5 jury room and begin your deliberations.

6 Thank you very much.

7 (Jury foreman out with indictment and exhibits at 11:28
8 a.m.)

9 (Deliberations begin at 11:28 a.m.)

10 THE COURT: Any exceptions from the state?

11 MR. SORENSON: No, sir.

12 THE COURT: The defense?

13 MR. MELLARD: No, sir.

14 THE COURT: All right. We will be at ease until we
15 hear from the jury.

16 (Court at recess awaiting jury at 11:29 a.m.)

17 (Court in session for note from jury at 12:06 p.m.)

18 THE COURT: Well, we have a note from the jury. It
19 says, we would like a detailed definition of each charge.
20 So all I know to do it bring them out and give them a
21 detailed definition of each charge. I'm going to probably
22 use plain language this time and see if that works.

23 All right. Bring the jury in.

24 COURT REPORTER: Judge, you want to mark that note
25 as Court's No. 1?

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1 THE COURT: Court's one, please ma'am.

2 (Court's Exhibit No. 1, jury note,
3 was marked.)

4 (Jury in at 12:07 p.m.)

5 THE COURT: All right, Mr. Foreman, I got your
6 note. And I know you wanted me to write down something real
7 simple and send you, but I can't do that, okay. So I'm
8 going to try to explain to you these charges again, and I'm
9 going to try to use a little bit more lay language and see
10 if that helps. Then I'll be glad to do my full charge like
11 I did before, but let me see if I can -- what I can tell you
12 might answer the questions that you're having.

13 All right. We'll look at the burglary charge first.
14 Now, remember he's not charged with burglary. He's charged
15 with an attempted burglary. An attempt just means that you
16 start to do something, you try to do something, but you fail
17 to complete it, but in the law it's more than just thinking
18 about it. You've got to make an effort. There's got to be
19 something done, which in this case, had the burglary been
20 completed that thing that was done would have been a part of
21 that burglary. That's what we mean by an attempt. You
22 tried it, you made some effort, you took some steps to do
23 it, but you didn't complete it. That's what an attempt is.

24 Now, I think it might help if I tell you in the law
25 there are three degrees of burglary; burglary first degree,

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1 second degree, and third degree. Now, second degree and
2 third degree don't have anything to do with the facts of
3 this case, but I think if I explain to you what third degree
4 and second degree is it will help you understand what first
5 degree is.

6 Third degree burglary is entering a building in the
7 daytime with the intent to commit a crime. If somebody goes
8 in a store or office or warehouse during the daytime with
9 the intent to steal something, that's burglary in the third
10 degree. That's the least serious burglary that we have.

11 Second degree burglary is if you go in the building in
12 the nighttime. The law says that's more serious than going
13 in a building in the daytime. So that's burglary in the
14 second degree. Or if you go in a dwelling in the daytime
15 that can be burglary in the second degree.

16 Burglary in the first degree, of course, is the more
17 serious of the three degrees of burglary. Burglary in the
18 first degree in going in the a dwelling at the nighttime.
19 See how that makes logical sense. In the eyes of the law
20 we're getting progressively worse in the conduct. It's all
21 illegal. But going in a building in the daytime is not as
22 bad as going in a building at night or going in a dwelling
23 in the daytime. Those two are put in the same category. A
24 building in the nighttime or a dwelling in the daytime. And
25 that's not as bad as going in a dwelling at night, because

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1 the law defines a dwelling as a place where people sleep,
2 and that's the most serious crime because that's going in a
3 house at nighttime expecting or probably somebody's going to
4 be in there. So that's the most serious crime.

5 Now, but there are other ways it can be a burglary
6 first. There are three ways. But all the burglaries
7 require -- burglary in the first degree -- entering a
8 dwelling without consent, with the intent to commit a crime
9 in that dwelling and one of these four things; either it was
10 done at night -- see, if it was in the daytime it would be
11 burglary second. So to make it a burglary first is either
12 done at night or it was done while somebody was armed with a
13 deadly weapon or a person causes physical injury to a person
14 who is not a participant or he threatens the use of a
15 dangerous instrument or he displays what is or appears to be
16 a knife, pistol, revolver, rifle, shotgun, machine gun or
17 other firearm. So it's one of those things that have to
18 turn it into a burglary first. But it's going into the
19 dwelling, without consent with the intent to commit a crime.
20 He's either armed with a deadly weapon, he causes physical
21 injury, he uses or threatened to use a deadly weapon or what
22 is or appears to be a knife, pistol, revolver, rifle,
23 shotgun, machine gun or other firearm.

24 And the state has to prove each of those elements
25 beyond a reasonable doubt. So to find the defendant guilty

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1 of the burglary in the first degree you just first -- and
2 this is an attempt now. That modifies the whole thing.
3 I'll define attempt for you. An attempt is an act done in
4 partial execution in design to commit a crime. Partial
5 execution. There must be an intent that the act shall be
6 committed. That would be in this case, the burglary. And
7 if an act done, not in full execution, but in pursuance of
8 the intent. To bring the law into action is it necessary
9 that some action be done in pursuance of the intent
10 immediately and directly tending to the commission of the
11 crime. And act, which, should the crime be perpetrated
12 would constituted part and parcel of the transaction, but
13 which does not reach to the accomplishment of the original
14 intent because it is prevented or voluntarily abandoned.

15 All right, so to prove burglary first the state would
16 have to prove the person entered the dwelling, he entered
17 the dwelling without consent, he entered the dwelling with
18 the intent to commit a crime and one of those other four.
19 He's armed with a deadly weapon, he causes physical injury
20 to a person not a participant, or uses or threatens the use
21 of an instrument or displays what appears to be a knife,
22 pistol, revolver, rifle, shotgun, machine gun or firearm.
23 That's what the state would have to prove to prove burglary.
24 To prove the attempt to burglary he'd have to prove that the
25 person took some act, took some steps to accomplish that

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1 burglary in the first degree but didn't succeed.

2 Okay. That's -- Hopefully, that will answer your
3 questions about burglary in the first degree. By the same
4 token with an assault and battery. I told you and assault
5 is an attempt to do violence to another person. The battery
6 is accomplishing that attempt. That's very simple. And
7 there are three degrees of seriousness. We don't call them
8 degrees with assault and battery, like assault and battery
9 first degree, second degree, third degree. We have simple
10 assault and battery. If I walk up and push you and you
11 didn't want me to push you, that's technically a simple
12 assault and battery, because I attempted to hurt you and I
13 succeeded without your permission. A battery is nothing but
14 an unlawful touching by the person committing the battery or
15 something put in motion by the person. Like I told you, if
16 I throw a ball and hit you, that's assault and battery. I
17 didn't hit you with my fist, but the ball hit you. So on
18 the lowest level it's a pushing match is a simple assault
19 and battery.

20 More serious is an assault and battery of a high and
21 aggravated nature. That means there must be an assault and
22 battery. There must be an attempt, there must be unlawful
23 touching, and there must be circumstances of aggravation. I
24 gave you the circumstances of aggravation. I gave you some
25 examples. One could be the use of a deadly weapon. One

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1 could be a 240 pound man and a 90 pound little boy.
2 Difference in size and condition of the two parties would be
3 a circumstance of aggravation, which would turn a simple
4 assault and battery into assault and battery of a high and
5 aggravated nature. Taken indecent liberties with a female
6 is another one. Causing serious bodily injury is another
7 one. Those are just -- whatever you really -- it's up for
8 the jury if we were dealing with that to decide what is the
9 circumstance of aggravation, which aggravates a simple
10 assault and battery and turns it into assault and battery of
11 a high and aggravated nature.

12 The highest degree of culpability for assault and
13 battery is what we call assault and battery with intent to
14 kill, and that requires malice. Malice, as I defined for
15 you, is an intent to do harm. It's an intent to do evil
16 rather than acting negligently or carelessly or recklessly,
17 it's actually an intent. And so having said that, let me
18 tell you that the legal definition of assault and battery
19 with intent to kill is an unlawful act -- in other words, if
20 somebody says punch me and you punch them. That's not
21 assault and battery or unlawful. Unlawful act of a violent
22 nature to the person of another with malice aforethought,
23 either expressed or implied. And remember I told you,
24 malice is an essential element. It's a term of art. It's
25 excludes just cause or legal excuse. Malice arises from

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1 hatred, ill will or otherwise no matter what causes it it's
2 still malice. And it must be aforethought. It doesn't have
3 to require that it exist for any particular time before the
4 commission of the act, but it must exist in the mind of the
5 accused just before and at the time of the commission of the
6 act. So there has to be a combination of the previous
7 intent and the act producing itself. In other words, it had
8 to be an intentional act. And malice maybe expressed or
9 inferred.

10 Expressed malice is where direct -- either by direct
11 evidence or inference from the acts or circumstances which
12 are shown is how you would arrive at malice. Either
13 directly or -- and basically it's a difference in direct
14 evidence and circumstantial evidence that I talked with you
15 about earlier. Expressed malice is show when one, by word
16 or mouth, expresses his hatred. Somebody says, I hate you,
17 I'm going to kill you. Well, that's expressed malice.
18 Something for you to determine, it would be up to you to
19 determine, but that's expressed. Or where the state shows
20 he made preparation. He did something to express his
21 malice, such as lying in wait or any act of preparation
22 would be an expressed demonstration of malice. But even
23 though there's not an expressed demonstration of malice it
24 can be proved -- it can be inferred -- malice can be
25 inferred from the circumstances which are proven. Malice

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1 can be inferred from the willful, deliberate, intentional
2 doing of an unlawful act without just cause or legal excuse.
3 In other words, in it's general signification malice is the
4 doing of a wrongful act intentionally without justification
5 or legal excuse. That's what malice is.

6 The inference of malice can arise when the deed is done
7 with a deadly weapon. You could infer. That's just one
8 fact you would consider. Or, if the act was done during the
9 commission of a felony. You could consider that as a fact
10 and circumstances from which malice may be inferred. So if
11 facts are proven beyond a reasonable doubt sufficient to
12 raise an inference of malice even though there's no
13 expressed malice that would be an evidentiary fact. You may
14 not conclude that malice existed. There's an inference
15 there, an implication, but you would have to determine
16 whether you accept that as proof of malice. So you simply
17 consider those facts from the surrounding circumstances and
18 determine whether or not those are enough to infer or imply
19 that malice was in the person's mind at the time he
20 committed the act.

21 Now, the charge is assault and battery with intent to
22 kill, but specific intent to kill need not be show. It is
23 sufficient, if there is shown a general intent to commit
24 serious bodily injury. Intent means intending the result
25 which actually occurred. Not accidentally or involuntarily.

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1 Intent may be shown by acts and conduct from which you, the
2 jury, may naturally and reasonably infer intent, and it goes
3 back to direct and circumstantial evidence and inferred and
4 expressed malice, implied or expressed malice. Direct
5 evidence would be somebody saying something from which you
6 would conclude, but indirect evidence of intent to kill or
7 general intent would be you looking at the facts and
8 circumstances to see what that person had in their mind.

9 So it may be inferred from the character of the
10 assault. It may be inferred from the use of a deadly weapon
11 or the use of a dangerous weapon in a manner reasonably
12 calculated to cause death or great bodily harm. Intent may
13 be inferred when it is demonstrated that the accused
14 voluntarily and willfully commits and act the natural
15 tendency of which is to destroy another's life or to commit
16 great bodily harm. So that is the definition of assault and
17 battery with intent to kill. It's an unlawful act or
18 violent injury to another person accompanied by malice, and
19 that malice can either be expressed malice or implied
20 malice.

21 Now, the next lesser charge is also an unlawful act of
22 violence upon another person, but it does not have to
23 contain malice, but it does have to have a circumstances of
24 aggravation. So there would be an assault and battery with
25 circumstances of aggravation and, as I said, some examples

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1 are; the use of a deadly weapon, the infliction of serious
2 bodily injury, the intent to commit a felony, a great
3 disparity between the ages or physical condition of the
4 parties, a difference in the sexes, indecent liberties with
5 a female, infliction of shame and disgrace, resistance of
6 lawful authority. All those would be examples of aggravated
7 circumstances which would aggravate a simple assault and
8 battery to assault and battery with intent to kill.

9 Now, Mr. Foreman, do you think I've answered your
10 questions?

11 JURY FOREMAN: Yes, sir.

12 THE COURT: Now, I'll be glad to try again if you
13 still have questions about either one, the burglary or the
14 assault and battery with intent to kill.

15 What I failed to tell you when I let the jury out and I
16 brought the foreman back in and told him. On the burglary
17 indictment, the attempted burglary, you can only -- it's
18 only two verdicts, guilty or not guilty, and the state has
19 the burden of proving those elements beyond a reasonable
20 doubt. But on the other charge there actually was three
21 verdicts. He's charged with assault and battery with intent
22 to kill, and that is one possible verdict if the state has
23 proved malice. Assault and battery with malice. But the
24 charge contained within that, what we call a lesser charge,
25 of assault and battery of a high and aggravated nature. So

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1 you could find him guilty of assault and battery of intent
2 to kill or if you find the state has proven assault and
3 battery has occurred and had circumstances of aggravation
4 but no malice you could find him guilty of assault and
5 battery of a high and aggravated nature. The lesser charge.
6 That's the second possibility of the verdict. Or if you
7 find that state has failed to prove the elements of either
8 one of those beyond a reasonable doubt, and has to prove
9 each element of one or the other, then your verdict would be
10 not guilty. So there are three verdicts on the assault and
11 battery with intent to kill. And I explained the to the
12 foreman and wrote that on the verdict form. Do you
13 understand that?

14 JURY FOREMAN: (Nodding in affirmative response.)

15 THE COURT: I think so. All right.

16 (Jury out at 12:07 p.m.)

17 THE COURT: Any exceptions?

18 MR. SORENSON: Your Honor, my only concern is that
19 when you initially started defining burglary you focused on
20 the daytime/nighttime distinction --

21 THE COURT: Yeah.

22 MR. SORENSON: -- and that really doesn't play and
23 -- there were a couple of times when you said if it was
24 nighttime it would be burglary first, but if it was daytime
25 it'd be burglary second. Well, obviously, it would be our

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1 position that it's not alleged in the indictment that the
2 hours of darkness isn't an aggravating circumstance. We're
3 alleging -- I mean, I don't want them thinking -- well, it
4 was daylight out so -- therefore it couldn't be a burglary
5 first.

6 MS. HINDS: I think you went into great lengths
7 after that to talk about --

8 MR. SORENSON: I understand he did later on, but
9 then later on he talked about you have to find one of these
10 four.

11 THE COURT: It really would have been five.

12 MR. SORENSON: Right. I would rather you said one
13 of these five. I'm just afraid that when you initially
14 defined burglary you started off saying burglary third is a
15 building in the daytime. Burglary second is either building
16 at night or dwelling at daytime. Burglary first is a
17 dwelling at night. Well, that really is not --

18 THE COURT: I understand, and I realize that. It
19 was rather in artfully done and I do think I cleared it up.

20 MS. HINDS: Yes, sir.

21 THE COURT: I don't know -- do you want me to bring
22 them back and re-explain that to them?

23 MS. HINDS: I think if that had been the last thing
24 you said to them, but you went on at length --

25 THE COURT: I think I did, too. And the thing is,

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1 two of the other ones that I mentioned don't have any
2 application in this case. So if I had just said five
3 instead of four there wouldn't have been any problem at all?

4 MR. SORENSON: I understand. It's just that early
5 on you said if it was daytime it would be a burglary second.

6 THE COURT: Yeah.

7 MR. SORENSON: That was just my concern, because I
8 mean, it was said to them multiple times. I understand you
9 did reference it later, but the fact that it wasn't --

10 THE COURT: All right. I'll bring them back -- I
11 understand that I did that, and I was aware of that about
12 halfway through that.

13 How about step to the door and tell them to bring the
14 jury back in here.

15 (Jury in at 12:25 p.m.)

16 THE COURT: Ladies and gentlemen, I just want to
17 clear up something. I think you understand, but you might
18 not because I did not say it in a very skillful way. To
19 make a burglary burglary in the first degree, rather than
20 second degree or third degree. Of course, all burglaries
21 have to be an entering. To make it a first degree is has to
22 be entering a dwelling. It has to be without consent, it
23 has to be intent to commit a crime. Then I told you it's
24 got to be one of four other things, then I named five other
25 things. So if you were really sharp you would say, well, I

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1 don't understand that. So in addition to entering a
2 dwelling without consent with the intent to commit a crime,
3 you're got to find one of five things. Now, you can find
4 two of those five things or three of those five things, but
5 you've got to find at least one of those five things that
6 added to the entering without consent a dwelling with the
7 intent to commit a crime. And those five things are, number
8 one, it can be at nighttime. That could be one of them.
9 Number two -- and this is any defendant -- armed with a
10 deadly weapon or explosive, or causes physical injury to a
11 person who is not a participant in the crime. Or uses or
12 threatens the use of a dangerous instrument or the fifth
13 one, displays what appears to be a knife, pistol, revolver,
14 rifle, shotgun, machine gun or other firearm. I think I
15 made that clear because I said four things, but it's really
16 five, when I got to naming them, that could turn a burglary
17 into a burglary in the first degree.

18 Does that make sense, now?

19 JURY: (All nod in the affirmative.)

20 THE COURT: All right. Please continue with your
21 deliberations.

22 (Jury out at 12:30 p.m.)

23 THE COURT: Hopefully lunch will be here soon, and
24 mine, too.

25 Any further exceptions from the state?

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1 MR. SORENSON: No, sir.

2 THE COURT: From the defense?

3 MS. HINDS: No, sir.

4 THE COURT: All right. Well, we'll be at ease.

5 Hopefully, we'll hear something soon.

6 (Court at recess for jury deliberation at 12:31 p.m.)

7 (Court in session for verdict at 2:15 p.m.)

8 (Jury in at 2:15 p.m.)

9 THE COURT: Mr. Foreman, has the jury reached an
10 unanimous verdict?

11 JURY FOREMAN: Yes, sir, we have.

12 THE COURT: Would you pass it to the bailiff,
13 please.

14 Thank you, ma'am.

15 Indictment 2009-GS-38-1186, the State verses Antionelle
16 Latroy Owens, indictment for attempted burglary in the first
17 degree. The verdict of the jury is guilty.

18 Indictment 2006-GS-38-1449, the State verses Antionelle
19 Latroy Owens, indictment for assault and battery with intent
20 to kill. The verdict is guilty.

21 Each of these verdicts are signed by Jason Toole,
22 foreperson of the jury, August 11, 2009.

23 Any request to poll the jury?

24 MR. MELLARD: Yes, sir, we request to poll the
25 jury.

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1 THE COURT: All right.

2 Ladies and gentlemen, I'm going to ask you two
3 questions. And you'll just answer the questions
4 appropriately. The first question is: Were these your
5 verdicts? And the second question is: Are these still your
6 verdicts?

7 Mr. Foreman, are these your verdicts?

8 JURY FOREMAN: Yes, sir.

9 THE COURT: Are they still your verdicts?

10 JURY FOREMAN: Yes, sir.

11 THE COURT: Sir, were these your verdicts?

12 JURY MEMBER: Yes, sir.

13 THE COURT: Are they still your verdicts?

14 JURY MEMBER: Yes, sir.

15 THE COURT: Ma'am, are these your verdicts?

16 JURY MEMBER: Yes, sir.

17 THE COURT: Are they still your verdicts?

18 JURY MEMBER: Yes, sir.

19 THE COURT: Ma'am, are these your verdicts?

20 JURY MEMBER: Yes, sir.

21 THE COURT: Are they still your verdicts?

22 JURY MEMBER: Yes, sir.

23 THE COURT: Sir, were these your verdicts?

24 JURY MEMBER: Yes, sir.

25 THE COURT: Are they still your verdicts?

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1 JURY MEMBER: Yes, sir.

2 THE COURT: Ma'am, were these your verdicts?

3 JURY MEMBER: Yes, sir.

4 THE COURT: Are they still your verdicts?

5 JURY MEMBER: Yes, sir.

6 THE COURT: Ma'am, were these your verdicts?

7 JURY MEMBER: Yes, sir.

8 THE COURT: Are they still your verdicts?

9 JURY MEMBER: Yes, sir.

10 THE COURT: Ma'am, are these your verdicts?

11 JURY MEMBER: Yes, sir.

12 THE COURT: Are they still your verdicts?

13 JURY MEMBER: Yes, sir.

14 THE COURT: Ma'am, were these your verdicts?

15 JURY MEMBER: Yes, sir.

16 THE COURT: Are they still your verdicts?

17 JURY MEMBER: Yes, sir.

18 THE COURT: Ma'am, are these your verdicts?

19 JURY MEMBER: Yes, sir.

20 THE COURT: Are they still your verdicts?

21 JURY MEMBER: Yes, sir.

22 THE COURT: Ma'am, were these your verdicts?

23 JURY MEMBER: Yes, sir.

24 THE COURT: Are they still your verdicts?

25 JURY MEMBER: Yes, sir.

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1 THE COURT: The jury has been polled and the
2 verdicts stand.

3 Ladies and gentlemen, that concludes your service on
4 this case. Now, if you want to talk about it you can talk
5 about it to your heart's content, but you do not have to
6 talk about it if you don't want to. And if someone insists
7 on trying to get you to talk about the verdict in this case
8 after you make it clear to them that you don't want to
9 discuss it, you please report the name of that person back
10 to the clerk of court's office and we'll deal with that
11 appropriately. We don't allow jurors to be harassed in any
12 way whatsoever.

13 Do they need to call back?

14 MR. SORENSON: Yeah, just to be on the safe side,
15 after 6:00.

16 THE COURT: All right. I'm going to excuse you for
17 the day. Please call back after 6:00 this afternoon. I'm
18 not certain whether they will need you back again today -- I
19 mean, in the morning or not. If you'll call back after 6:00
20 and follow whatever instructions you are given. Please do
21 that and you are excused at this time. We're going to have
22 a motion I'm sure, and then the sentencing proceeding right
23 now in just a couple of minutes. If you'd like to see that
24 just come on back in that door back there and have a seat
25 back there.

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1 You are excused until you call back after 6:00. Thank
2 you very much.

3 (Jury out at 2:35 p.m.)

4 THE COURT: Any motions?

5 MR. MELLARD: Yes, sir.

6 At this time, we'd renew all our previous motions we
7 made, and we'd also make a motion for a new trial. It's our
8 position that a new trial should be granted because there's
9 no evidence to support a conviction for assault and battery
10 with intent to kill. Or for the attempted burglary in the
11 first degree.

12 THE COURT: All right, sir. I would deny both
13 those motions. I think it's a good verdict. I think it's a
14 clean trial. Both of you did a very good job. Actually, I
15 think the evidence was pretty strong. A lot of it was
16 circumstantial, but it was still very strong circumstantial
17 evidence that Mr. Owens was the man who committed these two
18 crimes, and I agree with the verdict. I think it's a proper
19 verdict. I don't think there were any errors made by
20 anybody during the trial, and I would deny your motion for a
21 new trial

22 What is the defendant's record?

23 MR. SORENSON: He does not have one that I'm aware
24 of, Your Honor.

25 THE COURT: Okay. Nothing. Anything else from the

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1 state?

2 MR. SORENSON: Beg the Court's indulgence one
3 moment. Ms. Burbage ran down -- we don't have any
4 sentencing sheets up here, so that's what she --

5 THE COURT: Okay.

6 (Pause.)

7 MR. SORENSON: I have consulted with Ms. Shannon
8 and she does not wish to address the Court.

9 THE COURT: All right.

10 Mr. Mellard, Ms. Hinds, I'll be glad to hear from each
11 of you or both of you or anyone else who wants to speak on
12 behalf of the defendant.

13 MR. MELLARD: Yes, sir. Mr. Owens is 28 years old,
14 Your Honor. As you've heard he had no priors. He went to
15 King's College in Bristol, Tennessee. He's one class away
16 from graduating as a political science major. He played
17 basketball at King's College from '98 until 2003, and then
18 he went over to Switzerland. He was in a pro league playing
19 basketball over there. He was over there from 2004 until 2005
20 playing pro basketball over in Switzerland. He currently
21 lives in Nevada. He is working at the Nellis Air Force Base
22 at the youth center. He does lesson plans and works with
23 children after school. Summer programs for all the military
24 children. His mom and dad live in St. Matthews.

25 Your Honor, he has no priors. We're asking for the

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1 mercy of the Court. This gentlemen has potential in life.
2 He has shown that he is a smart person. He has been to
3 college. He has a career in basketball, he had a career in
4 basketball. He's been in no trouble before this incident,
5 and he's been in no trouble since this incident. So we're
6 asking for the mercy of this Court, Your Honor.

7 I believe his parents want to speak.

8 THE COURT: Yes. I'll be glad to hear from them.
9 Please, if you can speak loud enough for the court reporter
10 to hear you you can stand there. I need your name, please.

11 MS. OWENS: Yes, sir. My name is Valerie Owens.

12 THE COURT: Yes, ma'am.

13 MS. OWENS: I'm Antionelle's mother, and I raised
14 him to be a good child. Put him through school. Lived in
15 Columbia his senior years. Always tried to teach him the
16 right things. Church, the right things to do. Put him
17 through college. Nursed him when he was sick. I ask you,
18 he's a good child, at least I raised him to be a good child.
19 You can bring a child up and raise them and show them the
20 right way. Your Honor, I just ask you, as the Judge, as
21 Your Honor, to have mercy and I ask the defendant for
22 forgiveness. Please forgive us. Don't hold it against. I
23 thank you.

24 THE COURT: Thank you, ma'am.

25 Yes, sir.

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1 MR. MOSELEY: My name is James T. Moseley. Troy is
2 my son, and I haven't always been -- I've been all over the
3 world and doing a lot of different things. But he's always
4 been a good young man, always respectful and this incident
5 is something that is so out of character that speaking on
6 behalf of Troy, that I can't even believe it. I think what
7 it has -- the stages of him going through possibly not being
8 able to be successful at basketball, and possibly having
9 been influenced with some people that he shouldn't have been
10 dealing with kind of led up to this particular incident, and
11 we just pray and ask that the Court will have leniency on
12 him, because I think the young man still has a lot of
13 potential in life. He's shown that he has the capability of
14 higher learning and the capability of being a very
15 successful person. Just being able to be grounded and
16 staying with the right group of people. Thank you.

17 THE COURT: Thank you, sir.

18 MR. MELLARD: Your Honor, I believe he --

19 THE COURT: Yes, sir.

20 MR. OWENS: I also want to ask for mercy. But I
21 also want to stand here and say I am innocent, Your Honor.
22 God have mercy on the souls of the jury and whoever else
23 thinks I'm guilty, but, please. I didn't do this.

24 THE COURT: All right, sir.

25 All right, on indictment 2006-GS-38-1449, assault and

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1 battery with intent to kill, the sentence of the Court is
2 that you, Antionelle Latroy Owens, be committed to the State
3 Department of Corrections for a period of 15 years.

4 On indictment 2009-GS-38-1186, attempted burglary in
5 the first degree, sentence of the Court is that you be
6 committed to the State Department of Corrections for a
7 period of 15 years. They are concurrent. You get credit
8 for any time served. Good luck to you.

9 All right, Court is in recess.

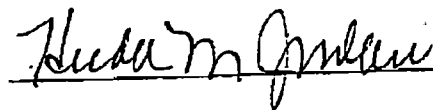
10 (This proceeding was concluded at 2:55 p.m.)
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CERTIFICATE

I, THE UNDERSIGNED HILDA M. JORDAN, CVR, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 19TH DAY OF MARCH, 2009.

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



HILDA M. JORDAN, CVR

COLUMBIA, SOUTH CAROLINA

OCTOBER 23, 2009

ATTACHED TRUE COPY

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG
STATE

IN THE COURT OF GENERAL SESSIONS

VS.

Antionelle Latroy Owens

AKA:

Race: B

Sex: M

Age: _____

DOB: _____

SS#: _____

Address: _____

City, State, Zip: _____

DL# _____

SID# _____

INDICTMENT/CASE#: 2006 -GS- 38 - 144

A/W#: K-059326

Date of Offense: JUNE 5, 2006

S.C. Code §: 16-3-620

CDR Code #: 0014

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Assault And Battery With Intent To Kill

In violation of § 16-3-620 of the S.C. Code of Laws, bearing CDR Code # 0014

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45

The charge is: ☒ As indicted, ☐ Lesser Included Offense,

The plea is: ☐ Without Negotiations or Recommendation,

☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

9512

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 15 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 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: _____

Obtain GED ☐

☐ Set by SCDPPPS

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: [Signature]

Judge Code: 0014

Sentence Date: 8-11-09

*Fine:

§14-1-206 (Assessments 107.5%)

§14-1-211 (A)(1)(Conv. Surcharge)

§14-1-211 (A)(2)(DUI Surcharge)

§56-5-2995 (DUI Assessment)

§56-1-286 (DUI Breath Test)

§47.12 (Public Def/Prob)

§14-1-212 (Law Enforce. Funding)

§14-1-213 (Drug Court Surcharge)

§50-21-114 (BUI Breath Test Fee)

§56-5-2942(J) (Vehicle Assessment)

§90.7(SCCJA Surcharge)

3% to County (if paid in installments)

TOTAL

\$100

\$100

\$12

\$25

\$500

\$25

\$100

\$50

\$40/ea

\$5

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Clerk of Court/Deputy Clerk
Court Reporter: [Signature]

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

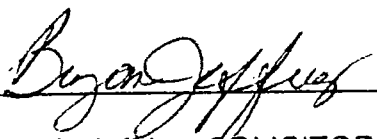
INDICTMENT
2006GS38-1449

At a Court of General Sessions, convened on August 07, 2006 the Grand Jurors of Orangeburg County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

That Antionelle Latroy Owens, did in Orangeburg County, on or about June 5, 2006, with malice aforethought commit an assault and battery upon the victim, Irene S. Shannon, including but not limited to: shooting the victim with a gun and as a result violated section 16-23-620 of the South Carolina Code of Laws (1976 as amended).

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


Bryan S. Jeffries SOLICITOR

WITNESSES

DOCKET NO. 2006GS38-1449

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

W. B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA
The State of South Carolina

County of

ORANGEBURG

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

DET. MICHAEL SMALLS, JR.

COURT OF GENERAL SESSIONS

August 07, 2006 TERM

Arresting Agency:

Orangeburg Public Safety

Defendant

ARREST WARRANT NUMBER

K059326

Arrested: Jun 06, 2006

THE STATE
vs.

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

Antionelle Latroy Owens

Indictment for

ASSAULT AND BATTERY WITH INTENT
TO KILL

VERDICT

Guilty - Assault & Battery w/ Intent to Kill

~~*Guilty - Assault & Battery of High & Aggravated Nature*~~

~~*Not Guilty*~~

SC Code: 16-3-620
CDR Code: 0014
Class: FEL-C

Carson K. Cole
Foreperson of Petit Jury

Date: 8-11-09

FILED
CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA
AUG 11 2009

ARREST WARRANT

K-059326

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

ORANGEBURG

THE STATE

against

ANTIONELLE LATROY OWENS

Address: 133 CARRIAGE PARE DRIVE
CHATTANOOGA TN 37421

Phone: NONE SSN: _____

Sex: M Race: B Height: 6-1 Weight: 190

DL State: TN DL#: _____

DOB: _____ Agency ORI#: SC0380100

Prosecuting Agency: ORANGEBURG DEPT OF PUBLIC

Prosecuting Officer: DET. MICHAEL SMALLS JR

Offense: _____ Offense Code: 0768

Code/Ordinance Sec. 17-25-0030, C/L

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☒ Municipality of

ORANGEBURG

The accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(L.S.)

Date: 06/05/2006

RETURN

A copy of this arrest warrant was delivered to
defendant ANTIONELLE LATROY OWENS

on 06-06-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

ORANGEBURG MUNICIPAL COURT
PO BOX 1425
1320 MIDDLETON STREET
ORANGEBURG, SC 29116

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

ORANGEBURG

AFFIDAVIT

Form Approved by
S.C. Attorney General
July 28, 1999
SCCA 619

Personally appeared before me the affiant DET. MICHAEL SMALLS JR

being duly sworn deposes and says that defendant ANTIONELLE LATROY OWENS

did within this county and state on 06/05/2006 to 06/05/2006

State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of ORANGEBURG

in the following particulars:

DESCRIPTION OF OFFENSE: 17-25-0030, C/L /

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:ON JUNE 5, 2006 AT APPROX 0610 HRS ONE ANTIONELLE LATROY OWENS DID VIOLATE SECTION 17-25-0030 OF THE SC
CODE OF LAWS IN THAT HE COMMITTED THE OFFENSE OF ASSAULT & BATTERY WITH INTENT TO KILL. ON THE ABOVE
DATE AND TIME THE DEFENDANT WENT TO THE RESIDENCE OF THE VICTIM MS. SHANNON WHICH IS LOCATED 975
HILLSBORO ST ORANGEBURG SC. WHILE AT THE RESIDENCE THE DEFENDANT APPROACHED THE VICTIM WITH A BLACK
REVOLVER POINTED AT HER. THE DEFENDANT ATTEMPTED TO HAVE MS. SHANNON OPEN THE DOOR OF THE RESIDENCE.
THE VICTIM HAD TROUBLE FINDING THE KEYS AT WHICH TIME THE DEFENDANT SHOOT THE VICTIM ONCE IN THE RIGHT
LEG.

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

ORANGEBURG

Affiant's Address 1320 ELLIS AVE

ORANGEBURG SC 29115

Affiant's Telephone 533-5907

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 06/05/2006 defendant ANTIONELLE LATROY OWENS

did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of ORANGEBURG) as set forth below:

DESCRIPTION OF OFFENSE: ASSAULT / ASSAULT WITH INTENT TO KILL (AWIK)

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 6/6/06

Signature of Issuing Judge

(L.S.)

Judge Code: 6496

Judge's Address P. O. BOX 1425

ORANGEBURG SC 29116

Judge's Telephone 803-533-5921

Issuing Court:

☐ Magistrate☒ Municipal☐ Circuit

Case: K-059326

ORIGINAL

BAIL set by

Age B M Housel

6/6/06

pe and Amount: \$100,000 surety

ame of Surety: _____

PRELIMINARY HEARING held by

age _____

1 _____

efense Attorney: _____

ecision: _____

DISPOSITION before

uage _____

on _____

by _____
(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

WITNESSES

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS

ATTEST: TRUE COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Orangeburg

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

INDICTMENT/CASE#: 09 -GS- 38 - 1186

VS.

Antionelle Owens

AKA:

Race: B

Sex: M

Age: 28

DOB:

SS#:

Address:

City, State, Zip:

DL#

SID#

In disposition of the said indictment comes now the Defendant who was

A/W#: 2009 02530

Date of Offense: 6-5-06

S.C. Code §: 16-11-311

CDR Code #: 0079

SENTENCE SHEET

TO:

Attempted Burglary 1st Degree

☒ CONVICTED OF or ☐ PLEADS

In violation of §

16-11-311

16-1-80

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

0079

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45

(CSC 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:

Solicitor

SC Bar # 9512

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 15 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 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: _____

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

*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	\$ _____
\$47.12 (Public Def/Prob)	\$500	\$ _____
\$14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
\$14-1-213 (Drug Court Surcharge)	\$100	\$ _____
\$50-21-114 (BUI Breath Test Fee)	\$50	\$ _____
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ _____
\$90.7(SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

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:

Hilda Jordan

Presiding Judge

Judge Code:

Sentence Date

8-11-09

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

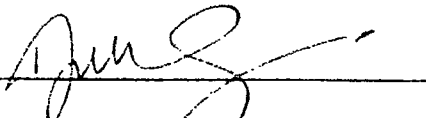
INDICTMENT
2009GS38-1186

At a Court of General Sessions, convened on August 5, 2009 the Grand Jurors of Orangeburg County present upon their oath:

ATTEMPTED BURGLARY - FIRST DEGREE

That in Orangeburg County, South Carolina, on or about June 5, 2006, the Defendant, Antionelle Latroy Owens, did willfully and unlawfully attempt to enter the dwelling of Irene S. Shannon, without consent and with the intent to commit a crime therein and the defendant was armed with a deadly weapon and/or caused physical injury to a non-participant. This offense being a violation of the Common Law of South Carolina and Section 16-11-311 and 16-1-80 of the South Carolina Code of Laws, as amended.

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


Donald N. Sorenson, Solicitor

231

WITNESSES

Michael Smalls

Orangeburg Police Department

ARREST WARRANT NUMBER
2009ORB30

Arrested: June 5, 2006

ACTION OF GRAND JURY

AUG 05 2009

Foreperson of Grand Jury

Date: August 5, 2009

VERDICT

Guilty

Foreperson of Petit Jury

Date: 8-11-09

DOCKET NO. 2009GS38-1186

The State of South Carolina

County of ORANGEBURG

COURT OF GENERAL SESSIONS

August 3, 2009 TERM

THE STATE
vs.

Antionelle Latroy Owens

Indictment for

ATTEMPTED BURGLARY - FIRST
DEGREE

ATTEST: TRUE COPY

Wanda R. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

SC Code: 16-11-311

16-1-80

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.

Indictment - C.C.C. & G.S.

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 02/16/12
OMCOMITA RELEASE DATE SCREEN C051123
SCDC# > 336367 LOC: MCCORMICK
OWENS, ANTIONELLE LATROY SCDC CLASSIFICATION... VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY... N
SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: N
PREA DECISION...:
CURRENT SENTENCE: 015-00-000 CONSECUTIVE SENTENCE ...: N
015-00-000 CURRENT SENT START DATE: 07/17/2009
PROJECTED COMPLETION DATES
MAXOUT DATE ...: 04/13/2022 CURRENT EWC ..: 3 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 04/17/2022 NEXT PAROLE HEARING DATE: 04/17/2022

TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ..: 000221 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS ...: 000000 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS ..: 000
TOTAL SERVICE TIME EARNED ..: 000929

PFKEYS: 5:HISTORY OF DATE CHANGES

4-©

1 Sess-1

167.7.50.33

SCDC1207

3/11

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 02/21/12

002

DWNS, ANTONELLE LEROY FBI # A15477ED4 SID# SC018995A3 SCID # 334247

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION.: MCCORMICK CORR INST

TMRN.: F30148X

SECURITY/CUST.: 3 MINIMUM IN

RACE.: B SEX.: M

CURR INCARC SENT.: 15 YRS 0 MOS 0 DYS

PROJ MAXOUT DATE: 04/13/2022

CENTRAL MONITORING: YES

PROJ PAROLE DATE: 04/17/2022

SOCIAL SECURITY #

FDC JOB.: GENERAL WORKER

CURRENT PROGRAM.: NO CURRENT PROGRAM

FDOC PGM.: NO CURR FDOC PROGRAM

AGE.: 31 DATE OF BIRTH.: 8/28/80

FDC LEVEL: 3F5 FDC LEVEL:

ASSIGNMENT.: RIDING DETAIL RID

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE YRS MOS DYS COUNTY	SENTENCE START U/VU CATEGORY
BURGLARY-1ST DEGREE	15 0 0 ORANGEBURG	7/17/20 9 U 4
ASSLT & BATT W/INTNT KILL	15 0 0 ORANGEBURG	7/17/20 9 U 4

PRIOR COMMITMENTS OVER 90 DAYS:

INMATE HAS NO PRIORS

DETAINERS (HOLD, WANTED, NOTIFY):

NO DETAINERS

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES WHILE IN CUSTODY

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

2/28/10 POSS. DR/ATTEMPT TO POSS CONVICTED MAJOR

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
10/ 7/ 9	MCCORMICK	INCARCERATED	ADMINISTRATIVE
8/17/ 9	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	NOTES
GENERAL WORKER	08/02/11	0/ 0/ 0		3F5
GENERAL WORKER	01/21/10	8/ 5/10	POOR ATTENDANCE	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EDUCATION DESCRIPTION	START DATE	END DATE	TERMINATION REASON

NO SCHOOL ASSIGNMENTS

***** END OF REPORT *****

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG
STATE

VS.
Antionelle Latroy Owens
AKA: _____
Race: B Sex: M Age: _____
DOB: ? SS#: _____
Address: _____
City, State, Zip: _____

INDICTMENT/CASE#: 2006 -GS- 3B - 1449
A/W#: K-059326
Date of Offense: JUNE 5, 2006
S.C. Code §: 16-3-620
CDR Code #: 0014

SENTENCE SHEET

DL# _____ SID# _____
In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Assault And Battery With Intent To Kill
In violation of § 16-3-620 of the S.C. Code of Laws, bearing CDR Code # 0014
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or Lewd Act) (defendant's initials) _____
The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____ 9512 _____ SC Bar # _____
Solicitor _____ Defendant _____ Attorney for Defendant _____ SC Bar # _____
WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, _____ years
for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ days/months/years and or payment
and/or to pay a fine of \$ _____; provided that upon the service of _____ months/years and or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and or payment
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 Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ Set by SCDPPPS _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. Or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling ☐
Random Drug/Alcohol Testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ Beginning _____
\$ _____ Paid to Public Defender Fund

Recipient: _____
*Fine:
\$14-1-206 (Assessments 107.5%) \$100 \$ 100.00
\$14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ _____
\$14-1-211 (A)(2)(DUI Surcharge) \$12 \$ _____
\$56-5-2995 (DUI Assessment) \$25 \$ _____
\$56-1-286 (DUI Breath Test) \$500 \$ _____
\$47.12 (Public Def/Prob) \$25 \$ 25.00
\$14-1-212 (Law Enforce. Funding) \$100 \$ _____
\$14-1-213 (Drug Court Surcharge) \$50 \$ _____
\$50-21-114 (BUI Breath Test Fee) \$40/ea \$ _____
\$56-5-2942(J) (Vehicle Assessment) \$5 \$ 5.00
\$90.7(SCCJA Surcharge) \$ 3.90
3% to County (if paid in installments) \$ 133.90
TOTAL

Clerk of Court/Deputy Clerk _____
Court Reporter: Hilda Jordan

☐ Appointed PD or appointed other counsel, \$47.12 requires \$500 be paid to Clerk during probation.
Presiding Judge: _____
Judge Code: 0014
Sentence Date: 8-11-09

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

COUNTY OF Orangeburg
STATEVS.
Antionelle Owens

AKA:

Race: B Sex: M Age: 28DOB: 11-11-80 SS#: 16-11-311

Address:

City, State, Zip:

DL# SID#

In disposition of the said indictment comes now the Defendant who was

TO: Attempted Burglary 1st DegreeIn violation of 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 0079☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUSThe charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature] 9512Solicitor 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 15 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and or paymentof \$; 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 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 ☐ OrderedTotal: \$ 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 \$ \$47.12 (Public Def/Prob) \$500 \$ \$14-1-212 (Law Enforce. Funding) \$25 \$ 25.00\$14-1-213 (Drug Court Surcharge) \$100 \$ \$50-21-114 (BUI Breath Test Fee) \$50 \$ \$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ 5.00\$90.7(SCCJA Surcharge) \$5 \$ 5.903% to County (if paid in installments) \$ 13.90TOTAL \$ 133.90Clerk of Court/Deputy Clerk Hilda JordanCourt Reporter: Hilda JordanINDICTMENT/CASE#: 09 -GS- 38 - 1186AW#: 2009 02630Date of Offense: 6-5-06S.C. Code §: 16-11-311CDR Code #: 0079

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSMandatory GPS ☐ §17-25-45(CSC w/minor 1st or Lewd Act)Defendant's Initials:

Recommendation by the State.

Negotiated Sentence, ☐ Recommendation by the State.

Recommendation by the State.

Recommendation by the State.

Recommendation by the State.

Recommendation by the State.

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Recommendation by the State.

Recommendation by the State.

Recommendation by the State.

Recommendation by the State.

Recommendation by the State.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County

James C. Williams, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTIONELLE OWENS,

APPELLANT

FINAL BRIEF OF APPELLANT

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT.

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TABLE OF AUTHORITIES**Cases**

<u>Manson v. Braithwaite</u> , 432 U.S. 98 (1977)	7
<u>Neil v. Biggers</u> , 409 U.S. 188 (1972)	5, 6, 7
<u>Stovall v. Denno</u> , 388 U.S. 293 (1967).....	7
<u>White v. Illinois</u> , 502 U.S. 346 (1992).....	7

STATEMENT OF ISSUES ON APPEAL

Did the circuit court judge deny appellant's right to due process by not granting a mistrial when the state elicited an improper in-court identification of appellant by the accuser after informing the court that there would not be any such identification made during trial?

STATEMENT OF THE CASE

Antionelle Owens was indicted by the Orangeburg County grand jury of assault and battery with intent to kill and attempted burglary, 1st degree. He was tried before the Honorable James C. Williams, Jr. and a jury on August 10th and 11th, 2009. He was represented by Robert Douglas Mellard and Margaret Elizabeth Hinds, Esquires. He was convicted, and sentenced to 15 years.

This appeal timely follows.

ARGUMENT

The circuit court judge denied appellant's right to due process by not granting a mistrial when the state elicited an improper in-court identification of appellant by the accuser after informing the court that there would not be any such identification made during trial.

At the start of the trial, defense counsel requested a Neil v. Biggers¹ hearing. ROA

2. The solicitor informed the court that they did not need to conduct a hearing:

MR. SORENSON: This occurred about 6:00 o'clock in the morning. The victim, Ms. Shannon, is going—a carport door going to her car. She was rushed by a man that she described to the police as being a tall, slender, black male with jeans, a dark t-shirt, and a ski mask pulled over his face with a gun. He tried to get her to go open up her house. She also was shot one time in the leg and the person takes off running. The police, based on that description, apprehended the defendant half a mile away within 15 to 30 minutes. He is brought back to the scene without—they don't find the mask or the gun. He is brought back to the scene. She didn't ID him by his face. She said that looks like the person based on physical build and the clothing. I wasn't intending on having her doing any kind of in court identification to the effect that she doesn't see his face, but she described his looks. That's about all she can describe as far as his face, because he's got a ski mask on. So all she sees are eyes and a mouth.

THE COURT: So she's not going to say that the defendant, as he sits in court today, bears the same general description and build as the person who committed the crime. She's just going to testify that when they brought somebody back that night that person fit the general description of the person who committed the crime?

MR. SORENSON: Physical build and clothing.

THE COURT: I don't see any need for a hearing.

ROA 2-3 (emphasis added).

Counsel did not object.

¹ Neil v. Biggers, 409 U.S. 188 (1972).

This is not what happened during the trial.

At trial, the accuser identified two pictures of appellant as the man who shot her.

Q: Let me show you, ma'am, State's Exhibit Nos. 5 and 6. Do you recognize the person in those photographs there?

A: I think that's the guy they brought back there.

Q: Is that the person that was brought and shown to you at your house?

A: Yes, it was.

MR. SORENSON: Your Honor, we'd offer State Nos. 5 and 6 into evidence.

THE COURT: Objection?

MR. MELLARD: No objection.

THE COURT: Admitted without objection.

ROA 23-24.

The state relied on the in-court identification during its closing argument:

That's her testimony, ladies and gentlemen. Ample lighting to see, and there was no question in her mind about the type of clothing he had on, jeans and a dark black, dark blue t-shirt. No question about it, and absolutely certain he had hair under the mask. No question about it. She was 100 percent certain from that he had hair under the mask. No question about it. She was 100 percent certain from that witness stand.

ROA107-108 (emphasis added).

Trial counsel did not object.

The trial court judge should have granted a mistrial because counsel was entitled to challenge the identification in a Neil v. Biggers hearing, but was denied that opportunity by the state's representations. A defendant is entitled to a hearing on the reliability of evidence admitted against him. As identification was the essential issue in the case, appellant was

prejudiced. Appellant was denied his right to due process. White v. Illinois, 502 U.S. 346 (1992); Manson v. Braithwaite, 432 U.S. 98 (1977); Stovall v. Denno, 388 U.S. 293 (1967); Neil v. Biggers, *supra*. Respectfully, appellant asks this Court to reverse his convictions.

CONCLUSION

Respectfully, appellant asks this Court to reverse his convictions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'EAFB' with a stylized flourish at the end.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

This 1st day of September, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 1st, 2010



ELIZABETH A. FRANKLIN-BEST
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County

James C. Williams, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

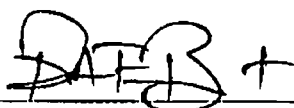
V.

ANTIONELLE OWENS,

APPELLANT

CERTIFICATE OF SERVICE

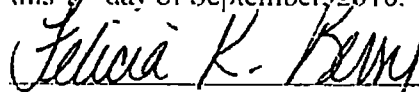
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of September, 2010.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 1st day of September, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Orangeburg County
Honorable James C. Williams, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

ANTIONELLE OWENS,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's issue regarding a mistrial and identification evidence is not preserved for review as it was never presented to the trial judge. Regardless, the trial judge committed no error in admitting the victim's testimony regarding an out-of-court identification procedure.

STATEMENT OF THE CASE

Appellant Antionelle Owens was arrested following a brief police chase. In August of 2006, Appellant was indicted by the Orangeburg County grand jury for assault and battery with intent to kill. Subsequently, in August of 2009, Appellant was additionally indicted for attempted burglary in the first degree. On August 10, 2009, a jury trial was commenced in the Orangeburg County court of general sessions with the Honorable James C. Williams, Jr., circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as charged. The trial judge sentenced Appellant to a term of incarceration of fifteen (15) years for each offense with the sentences to be run concurrently. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

Shortly after 6:00 a.m. on the morning of June 5, 2006, the victim, Irene Shannon, was leaving her home on ----- in order to go to work. (R. p. 14; p. 16). After stepping outside her door, Shannon saw a masked man come running around the corner of her home from behind a parked vehicle. (R. p. 16). The man pointed a gun at Shannon's head and demanded she open the door to her home. (R. p. 16). Shannon's husband and three young children were inside the home at the time. (R. pp. 14-15; p. 20). Shannon attempted to open the door, but she fumbled with her keys and was unable to open it quickly. (R. p. 16; pp. 30-31). Her assailant then pushed her up against the wall and shot her in the leg. (R. p. 17; p. 21). The masked man then ran from Shannon's car port and fled down nearby Broughton Street. (R. p. 17).

As her assailant fled, Shannon went inside her home where her husband was already on the phone with a 911 operator. (R. p. 22). She was able to give a description of the suspect's clothing and revealed the direction in which he had fled. (R. p. 22). Her attacker was a tall and slender black male with a good deal of hair under his mask. (R. pp. 19-20). He was wearing a mask, a black t-shirt, and dark-colored jeans while armed with a revolver. (R. p. 19; p. 20). Shortly thereafter, police officers and an ambulance arrived at Shannon's home. (R. p. 22).

Officer Reginald Conyers of the Orangeburg Department of Public Safety arrived on the scene within minutes of the shooting. (R. pp. 35-36; p. 40). He found the victim with a gunshot wound to her right thigh area. (R. p. 36). He located blood in her carport, home, and the vehicle she was sitting in. (R. p. 36). The officer was able to obtain a description of the suspect and the location he had fled in after the incident. (R. p. 38).

Corporal Jimmy Jones also responded to the scene and was notified a person matching the suspect's description was observed in the vicinity of a cemetery only one-eighth of a mile from the victim's residence. (R. p. 60; pp. 66-67). Officers Gerald Hoffman and John Caddell began canvassing the surrounding area looking for the suspect. (R. pp. 49-50; pp. 59-60). The officers approached the woods towards the rear of the cemetery and heard a noise. (R. p. 50; p. 61). As they investigated the sound, the suspect emerged and took off running. (R. p. 50; p. 61). The officers pursued and were able to locate the suspect hiding in a ditch next to the woods. (R. p. 51; p. 62). The suspect, who was wearing a black shirt and jeans, was hand-cuffed and taken into custody. (R. p. 51; p. 63). Officer Hoffman was certain the man who initially fled was the same person located hiding in the ditch. (R. p. 54). The captured suspect, who was sweating profusely at the time of his arrest, was Appellant Antionelle Owens. (R. p. 64). During their early morning search, the officers did not see or encounter any other individuals other than Appellant. (R. p. 55; p. 64). Appellant was apprehended within fifteen minutes of the initial response to the shooting. (R. p. 64).

Subsequently, Appellant was taken back to Shannon's residence. (R. p. 56). Shannon was still at her residence being treated by paramedics when Appellant was returned to the scene. (R. p. 22; p. 33). Officers escorted Appellant, who was hand-cuffed at the time and was no longer wearing a mask, for Shannon to identify. (R. pp. 22-23; p. 32). Based on his clothing and physical build, she alerted the officers Appellant was the person who shot her. (R. p. 23).

Prior to trial, Appellant requested a Neil v. Biggers hearing to address the issues related to the identification evidence. (R. p. 2). The solicitor asserted the victim would

not be identifying Appellant in-court. (R. p. 3). Instead, the solicitor indicated the victim was only going to testify the person brought back to the scene matched the physical build and clothing of the assailant. (R. p. 3). Defense counsel responded: "That's fine, Your Honor. We just wanted to make sure that there was going to be no inquiry identification."¹ (R. p. 4). The trial judge then determined a pre-trial hearing was unnecessary based on the circumstances of the case. (R. p. 4).

Subsequently, during trial, Shannon testified about her viewing of Appellant at the scene. (R. p. 23). Shannon testified she identified the man shown to her at the scene as the person who shot her based on his clothing and physical build. (R. p. 23). Appellant offered no objection to any of Shannon's testimony regarding the show-up procedure. (R. pp. 22-25).

At the conclusion of the State's case, Appellant moved for a directed verdict and the motion was denied. (R. pp. 91-92). Appellant then requested a charge on identification evidence. (R. pp. 93-94). Subsequently, Appellant was convicted as charged and was sentenced to an aggregate term of imprisonment of fifteen years. (R. p. 124; p. 129).

¹There appears to be an error in the transcription of this sentence. Defense counsel most likely said "in-court" as opposed to "inquiry." (R. p. 4).

ARGUMENT

Appellant's issue regarding a mistrial and identification evidence is not preserved for review as it was never presented to the trial judge. Regardless, the trial judge committed no error in admitting the victim's testimony regarding an out-of-court identification procedure.

Appellant contends the trial court erred by not granting a mistrial after identification evidence was introduced at trial. Appellant neither objected to the allegedly improper testimony nor moved for a mistrial at any point during the proceedings. As Appellant failed to raise the issue to the trial judge, he cannot now raise the issue on appeal. Regardless, even if the issue was preserved, the trial judge committed no error in admitting the testimony related to the out-of-court show-up procedure because the testimony was sufficiently reliable under the facts and circumstances of the case. Appellant's convictions should be affirmed.

A. Issue Preservation

For an issue to be properly preserved for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court. State v. Sweet, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). An issue must be raised in a sufficiently specific manner to call attention to the exact error to the trial court. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005); see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (“[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial

judge.”). An issue cannot be raised for the first time on appeal. State v. Huggins, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999).

In Appellant’s case, Appellant initially indicated a pre-trial identification hearing may be necessary. However, following a discussion between counsel and the trial judge, Appellant agreed with the judge a hearing was not necessary based on the circumstances of the case. Appellant concedes on appeal he did not object to the trial judge’s ruling during these pre-trial discussions. (App. Br. p. 5).

Subsequently, during trial, the victim discussed her viewing of Appellant when he was brought to the scene of the crime by law enforcement officers. She testified she identified him at the scene as the shooter based on his physical build and clothing. She did not specifically identify Appellant in-court, which is consistent with the planned trial procedure the solicitor outlined before trial. Appellant did not object to her testimony, and he readily concedes this fact on appeal. (App. Br. p. 6).

Now, on appeal, Appellant asserts the trial judge should have granted a mistrial because Appellant was entitled to challenge the identification evidence in a pre-trial hearing. Neither at the time of the victim’s testimony nor at any point prior to or subsequent to this testimony did Appellant move for a mistrial on any grounds whatsoever, including on grounds related to identification evidence. As Appellant failed to object to any of the challenged testimony or move for a mistrial, the issue is not preserved for appellate review. Appellant cannot complain of an error on appeal which he did not call to the attention of the trial judge. Likewise, the trial judge is not required to raise evidentiary issues sua sponte. See State v. Dicapua, 383 S.C. 394, 399, 680 S.E.2d 292, 294 (2009) (“[T]he trial court lacked authority to grant relief on the basis of a

ground not raised by [the appellant]. We hold the granting of a new trial sua sponte on a ground waived by a party is an error of law.”). Furthermore, Appellant’s due process issue is not preserved for review as his constitutional claims were also not raised to and ruled upon by the trial judge. See In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) (“Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal.”).

Appellant failed to preserve any of the issues asserted on appeal. As Appellant has conceded no objections were made during trial, his issues are not properly before the appellate court. These issues were not properly raised at trial and cannot now be considered on appeal. Appellant’s convictions should be affirmed.

B. Identification Evidence

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court’s factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of identification evidence falls within the trial judge’s discretion and will not be disturbed on appeal without an abuse of discretion or an error of law. State v. Govan, 373 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007).

Single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). However, identifications obtained from show-ups are not automatically excluded and may be admissible if found to be sufficiently reliable. Id. In State v. Brown, 356 S.C. 496, 503-

504, 589 S.E.2d 781, 785 (Ct. App. 2003), the Court of Appeals thoroughly analyzed the show-up identification procedure:

“ ‘[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness’ memory is still fresh, and the subject has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.’ ” The closer in time and place to the scene of the crime, the less objectionable is a showup. A show-up may be proper even though the police refer to a suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Although show-ups have been upheld by the Court, these situation usually involve either extenuating circumstances or are very close in time to the crime.

Single person show-ups are disfavored because they are suggestive by their nature. However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. Suggestiveness alone does not mandate the exclusion of evidence. Reliability is the linchpin in determining the admissibility of identification testimony.

(citations omitted).

There is a two-prong inquiry involved in determining the admissibility of an out-of-court identification. See Neil v. Biggers, 409 U.S. 188, 199-200 (1972) (outlining the necessary inquiry regarding out-of-court identifications and the factors to weighed when determining reliability). This inquiry involves first ascertaining whether the identification process was unduly suggestive, and then determining whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Govan, 372 S.C. at 558, 643 S.E.2d at 95. “The in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification.”

Id.

The reliability of an identification is determined by the facts of the case. State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984). To determine whether the procedure was unduly suggestive, the Court must look to: (1) the proximity in time to the alleged crime; (2) proximity in location to the crime; (3) the freshness of the witness's memory; (4) whether the suspect had time to alter his looks or dispose of evidence; and (5) whether the show-up will expedite the release of innocent suspects and enable further investigation. Govan, 372 S.C. at 558-559, 643 S.E.2d at 95. However, "[s]uggestiveness alone does not mandate the exclusion of evidence." State v. Patterson, 337 S.C. 215, 229, 522 S.E.2d 845, 852 (1999).

Even if the show-up is found to be unduly suggestive, the identification may still be admissible if the State can prove by clear and convincing evidence the procedure is reliable. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. To determine whether the identification is reliable, the Court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Id. at 559, 643 S.E.2d at 96.

In the case sub judice, regardless of the issue preservation concerns, the trial judge did not commit any error regarding the identification evidence. Initially, Appellant was not directly identified in-court as the victim's assailant. The victim merely testified she identified a suspect during a show-up procedure based on his attire and physical build. Since her out-of-court identification was focused on the clothing as opposed to the individual, it is questionable whether a pre-trial hearing on this evidence was required.

However, even if Shannon's testimony could be considered identification evidence, the trial judge committed no error in allowing this testimony. Applying the factors outlined in Govan, Shannon's identification of Appellant during the show-up procedure was reliable. Shannon had a good opportunity to view her assailant during the crime as he was directly in front of her in close proximity. (R. p. 25; p. 27). Her attention was certainly elevated by the stress of the situation and the presence of the firearm. Furthermore, her description of the suspect's clothing was extremely accurate and directly matched the clothing Appellant was discovered in within fifteen minutes of the incident less than half a mile from the scene of the crime. Also, her physical description of the suspect matched Appellant's physical characteristics and appearance. Additionally, Shannon was entirely certain regarding her identification of the shooter's clothing, and the show-up procedure occurred less than an hour after the shooting. Based on the circumstances of the procedure employed in this case, Shannon's out-of-court identification was clearly reliable. Therefore, even if the issue was preserved, the trial judge committed no error in allowing the testimony. Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

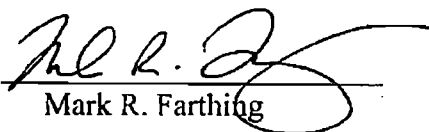
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BY: 
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ATTORNEYS FOR RESPONDENT

August 19, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Orangeburg County
Honorable James C. Williams, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

ANTIONELLE OWENS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

HENRY DARGAN McMASTER
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Chief Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

August 19, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Orangeburg County
Honorable James C. Williams, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

ANTIONELLE OWENS,

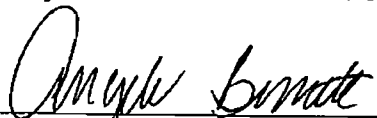
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Elizabeth A. Franklin-Best, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 19th day of August, 2010.



ANGELA BENNETT
Legal Assistant
Office of Attorney General
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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Antionelle Owens,

Appellant.

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Unpublished Opinion No. 2011-UP-220
Submitted May 1, 2011 – Filed May 18, 2011

AFFIRMED

Appellate Defender Elizabeth Franklin-Best, of
Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, and
Assistant Attorney General Mark Farthing, all of
Columbia; and Solicitor David M. Pascoe, Jr., of
Summerville, for Respondent.

PER CURIAM: Antionelle Owens appeals his convictions for first-degree attempted burglary and assault and battery with intent to kill. He argues the trial court erred in failing to grant a mistrial because the State made closing arguments and introduced testimony and pictures identifying Owens as the assailant even though the State and trial court agreed he was not entitled to a Neal v. Biggers hearing regarding those pictures. We affirm¹ pursuant to rule 220(b)(1), SCACR, and the following authorities:

1. As to the closing arguments: State v. Walker, 366 S.C. 643, 660, 623 S.E.2d 122, 131 (Ct. App. 2005) ("Failure to object to comments made during argument precludes appellate review of the issue.").

2. As to the testimony and the pictures: State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding that express consent to the admission of evidence constitutes a waiver of the issue on appeal).

AFFIRMED.

FEW, C.J., HUFF and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

**RECEIVED**

JUN - 6 2011

ATTORNEY GENERALS

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June 3, 2011

REMITTITURThe Honorable Winnifa Brown-Clark
190 Gibson Street
PO Box 9000
Orangeburg, SC 29116Re: The State v. Owens, Antionelle
2006-GS-38-01449 2009-GS-38-01186

Dear Mrs. Brown-Clark:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in cursive script, appearing to read "Renee S. Johnson".

Renee S. Johnson
Administrative SpecialistA handwritten signature in cursive script, appearing to read "TAG/rj".
TAG/rjcc: Appellate Defender Elizabeth Franklin-Best
Assistant Attorney General Mark Farthing
David M. Pascoe, Jr.

FORM 5

2011-CP-38-1539²⁶⁸

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Orangeburg)Antionelle La'Troy Owens 336367)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

APPLICATION FOR)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Orangeburg County Detention Center
2. Name and location of Court which imposed sentence Orangeburg County General Sessions Court
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-38-1186
 - (b) 2006-GS-38-1449
 - (c) Attempted Burglary - First Degree
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 8-11-2009 15 years to run concurrent
 - (b) 8-11-2009 15 years to run concurrent

ATTEST: TRUE COPY

Winnif B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The State of South Carolina in the Court of Appeals _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. May 18, 2011 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel

(b) Ineffective assistance of counsel

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out

in (10): Failure to object to closing arguments, testimony, and pictures

(a) identifying myself as the assailant even though the State and trial court →

(b) Failure to discuss gunshot residue analysis with state's expert witness during their pretrial investigation was unreasonable, and, thus was deficient performance as element of ineffective assistance

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) First time able to argue ~~these~~ these issues
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

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

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

- (a) the name and address of each attorney who represented you:

- i. Doug Mellard, Defender Corporation of Orangeburg County P.O. Box 1112 Orangeburg SC 29111
- ii. Elizabeth A. Franklin-Best, Division of Appellate Defense 1330 Lady Street, Suite 401 Columbia, South Carolina 29201-3332 P.O. Box 11589 Columbia SC 29211-1589
- iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. Trial and sentencing
- ii. Direct Appeal
- iii. _____

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

Reverse of Conviction

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

No

STATE OF SOUTH CAROLINA

County of

VERIFICATION

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Artinelli

SWORN to and subscribed before me this 30
day of Nov 2011

Joyce L Young (L.S.)
Notary Public

My Commission Expires: 10-11-2021

2011 OCT -1 PM 1:03
FILED
NOTARY PUBLIC
JOYCE L. YOUNG
10-11-2021

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

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Antionette A.

Applicant

SWORN or affirmed to and subscribed before me this

30 day of November, 2011

Joyce L Young
Notary Public

My Commission Expires: 10-11-2021

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
	)	2011-CP-38-1539
	)	
Antionelle La'Troy Owens, 336367,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	(Appointment of Counsel Requested)
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed December 1, 2011, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Applicant was indicted at the August 2006 term of the Orangeburg County Grand Jury for Assault and Battery with Intent to Kill ("ABWIK") (2006-GS-38-1449) and Attempted Burglary – First Degree (2009-GS-38-1186). Robert Mellard, Esquire, and Margaret Hinds, Esquire, represented him. On August 10-11, 2009, Applicant proceeded to a jury trial before the Honorable James C. Williams, Jr. Applicant was found guilty of Assault and Battery with Intent to Kill and Attempted Burglary – First Degree. On August 11, 2009, Applicant was sentenced to fifteen (15) years imprisonment for each indictment. The sentences were to run concurrently.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed the appeal. State v. Owens, Op. No. 2011-UP-220 (S.C. Ct. App. filed May 18, 2011). The Remittitur was issued June 3, 2011.

Attached herewith and incorporated herein are the records of the Orangeburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the appellate records and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Failure to object to closing arguments, testimony, and pictures identifying myself as the assailant even though the State and trial court."
 - b. "Failure to discuss gunshot residue analysis with State's expert witness during their pretrial investigation was unreasonable, and, thus was deficient performance as element of ineffective assistance."

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

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

By: Megan E. Harrigan
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Columbia, South Carolina

May 25, 2012.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
	)	2011-CP-38-1539
	)	
ANTIONELLE LATROY OWENS, 336367,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

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

Bryan S. Jeffries, Esquire
Jeffries Law Firm, LLC
Post Office Box 646
Orangeburg, SC 29116

DATED this 30th day of May, 2012.

Lauren Meara
 Lauren Meara, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

ANTIONELLE LA'TROY OWENS

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

IN THE COURT OF COMMON
PLEAS FOR THE FIRST
JUDICIAL CIRCUIT

C/A No: 2011-CP-38-1539

Applicant's Memorandum

Background

Antionelle Owens is 32 years old. At the time of his arrest he was 25. He was born in Orangeburg, South Carolina and moved to Columbia, South Carolina in 1994. He graduated from A.C. Floral High School and went to Kings College in Bristol, Tennessee on a basketball scholarship. After college, Mr. Owens went to Switzerland and played professional basketball for over a year before returning to South Carolina. Mr. Owens had no criminal record before being convicted of these present charges.

Facts

Mr. Owens was arrested after being apprehended in a cemetery located in proximity of a shooting that had recently taken place. After being handcuffed by the police, Mr. Owens was taken for a "show up" identification to the victim of the shooting. At that point, the victim identified Mr. Owens while she was in a stretcher in the back of an ambulance. Mr. Owens was arrested and a gunshot residue (GSR) test was performed on his hands at the police station. When asked to give a statement, Mr. Owens asserted his right for counsel.

Eventually, Mr. Owens bonded out of Orangeburg County Detention Center. Mr. Owens was appointed to Michael Culler. At some point during Mr. Culler's representation of Mr. Owens, he informed Mr. Owens that the GSR tests had come back positive. Mr. Owens still insisted on his innocence and sought a jury trial. Before the matter came up for court, Mr. Owens learned from the Solicitor the GSR tests had actually come back negative. The following month,

Mr. Owens was not noticed for an appearance as he had been previously and believed the charges had been dismissed due to the results of the GSR test.

At that point, Mr. Owens moved to Las Vegas, Nevada to gain employment. Not until receiving a letter from his mother informing Mr. Owens that there was a Bench Warrant against him did he know the charges were still pending. Mr. Owens returned to Orangeburg for an Appearance and was informed by his new public defender that the State had made a plea offer. Mr. Owens informed his counsel that he was innocent and wanted to move forward on a jury trial.

Lack of Corporation

Mr. Owens concedes he did not have full cooperation with his attorneys on this case. He felt lied to by his former attorney and let that distrust apply to the entire Public Defenders' Office.

FIRST STRICKLAND PRONG

Ineffective for Failure to Object to Improper Witness Testimony; Failure to Preserve Argument for Record & Failure to Move for a Mistrial Based on the Testimony

Before Mr. Owens' trial began, his attorneys requested a *Neil v. Biggers* identification hearing. The hearing was essential because the identification of Mr. Owens was made during a one-person show up. "Single person show-ups are particularly disfavored in the law. *Stovall v. Denno*, 388 U.S. 293 (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also *State v. Johnson*, 311 S.C. 132, 134 (Ct.App.1993) (single person show-ups are particularly disfavored in the law). Based on representations made by the State, the Court determined Mr. Owens was not entitled to the hearing. The State and Court had the following exchange:

MR. SORENSON: "This occurred about 6:00 o'clock in the morning. The victim, Ms. Shannon, is going-a carport door going to her car. She was rushed by a man that she described to the police as being a tall, slender black male with jeans, a dark t-shirt, and a ski mask pulled over his face with a gun. He tried to her to go open up her house. She also

was shot one time in the leg and the person takes off running. The police based on that descriptions, apprehended the defendant half a mile away within 15 to 30 minutes. He is brought back to the scene without- they don't find a mask or the gun. He is brought back to the scene. She didn't ID him by his face. She said that looks like the person based on physical build and the clothing. I wasn't intending on having her doing any kind of in court identification to the effect that she doesn't see his face, but she described his looks. That's about all she can describe as far as his face, because he's got a ski mask on. So all she sees are eyes and a mouth."

THE COURT: "So she's not going to say that the defendant, as he sits in court today, bears the same general description and build as the person who committed the crime. She's just going to testify that when they brought somebody back that night that person fit the general description of the person who committed the crime?"

MR. SORENSON: "Physical build and clothing."

THE COURT: "I don't see any need for a hearing. I don't know what we would ask her."

MR. MELLARD: "That's fine, Your Honor. We just wanted to make sure there was going to be no inquiry identification."

Counsel did not object. And at trial this is not what happened. When asked about what happened one of the first comments from the victim was "...when I left out of my house Mr. Owens came from around another vehicle." (Transcript p. 71 line 21-22). The victim specifically identified Mr. Owens by name on the stand, exactly what the State had told the Court she would not do and there was no objection from trial counsel.

Next when the victim was asked about the physical build of her assailant she described him as "tall and he was slender, and I knew from the mask on his head that he had a lot of hair. This part of is (sic) face was like a big part where I could see his lips and I could see his eyes." (Transcript p. 74 lines 20-23). When asked what else she could tell about his mouth area, she replied "He had big lips and I know this part - like a big part protrusion, meaning, but I could really see is (sic) physical feature without even pulling the mask off his face." (Transcript p. 75 lines 3-6).

This testimony is in direct contrast to what the State told the Court. And there was no objection by trial counsel to this improper testimony.

The victim identified two picture of Mr. Owens as the man who shot her.

Q: Let me show you, ma'am. State's Exhibit Nos. 5 and 6. Do you recognize the person in those photographs there?

A: I think that's the guy they brought back there.

Q: Is that the person that was brought and shown to you at your house?

A: Yes, it was.

MR. SORENSON: Your Honor, we'd offer State Nos. 5 and 6 into evidence.

THE COURT: Objection?

MR. MELLARD: No objection.

THE COURT: Admitted without objection.

Counsel did not object. The State then relied on the in-court identification during its closing argument:

That's her testimony, ladies and gentlemen. Ample lighting to see, and there was no question in her mind about the type of clothing he had on, jeans and a black, dark blue t-shirt. No question about it, and absolutely certain he had hair under the mask. No question about it. She was 100 percent certain from that he had hair under the mask. No question about it. She was 100 percent certain from that witness stand.

Counsel still did not object. Nor did Counsel move for a mistrial based on this testimony or argument. Mr. Owens was entitled to challenge the identification in a *Neil v. Biggers* hearing, but was denied that opportunity by the State's misrepresentations and Mr. Owens' counsel did not object.

The testimony by the victim is exactly what should have been covered in the *Neil v. Biggers* hearing. The show up procedure used by the police is clearly unduly suggestive. They brought a single suspect wearing clothing similar to that described by the victim and was surrounded by uniformed police officers. This is

a patent case of a procedure that is unreliable and unduly suggestive. *See State v. Moore*, 343 S.C. 282, 287 (2000).

Nor did the trial counsel have an opportunity to address the factors that must be evaluated in the totality of the circumstances as to whether an identification is admissible.

[T]he opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *State v. Moore*, 343 S.C. 282, 289, 540 S.E.2d 445, 448-49 (2000).

Had trial counsel had the opportunity to address these questions, there is a very good chance the Court would have found the testimony inadmissible. The very fact that the victim says she was only able to identify him by his clothes and build is the exact facts in *State v. Moore* where the South Carolina Supreme Court found there was a substantial likelihood of irreparable misidentification such that the identifications are unreliable as a matter of law.

Counsel was deficient for failing to object to this improper testimony which resulted in the argument not being preserved for Appeal. In *Foye v. State*, 335 S.C. 586, counsel had a conversation with the trial judge requesting to poll the jurors to see if any of them had seen the defendant in chains. The trial judge denied the request and none of the conversation was on the record. The South Carolina Supreme Court noted counsel was deficient because he failed to adequately preserve the issue for review. In *McHam v. State*, 404 S.C. 465, 474 (2013), the South Carolina Supreme Court found "counsel's failure to renew the Fourth Amendment objection constituted deficient performance that satisfies the first prong of the Strickland test. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The proper measure of counsel's performance remains whether he has provided representation within the range of competence required by attorneys in criminal cases.").

In this case, Mr. Owens directly appealed the issues of the improper testimony and failure to order a mistrial based on this testimony to the South

Carolina Court of Appeals. In an unpublished opinion (S.C. Court of Appeals No. 2011-UP-220 May 18, 2011) the Court of Appeals affirmed Mr. Owens convictions because both issues were not preserved for review. The Court cited *State v. Walker*, 366 S.C. 643, 660 (Ct. App. 2005) ("Failure to object to comments made during argument precludes appellate review of the issue.") and *State v. Johnson*, 298 S.C. 496, 498 (1989) (holding that express consent to the admission of evidence constitutes a waiver of the issue on appeal).

Trial counsel's failure to object to the testimony not only allowed the evidence to go before the jury during both the State's case-in-chief and closing arguments, but the error also denied Mr. Owens' ability to challenge the testimony on direct appeal.

Ineffective for Failure to Investigate GSR Reports, Failure to Interview Expert Witness and Failure to Obtain Independent Expert Testimony

The GSR test in this case was the only physical evidence used by the State. Four separate tests were conducted; left palm, left back of the hand, right palm and right back of the hand. On all but the back of Mr. Owens' right hand, the GSR test was negative. And on the back of the right hand the test was determined inconclusive. A single lead particle was found on the back of Mr. Owens' right hand. (Transcript p. 142) Yet, this particle was introduced by the expert and discussed as almost a positive result for GSR. The expert testified that there were only three ways for that particle to get on Mr. Owens' hand: handling cheap Christmas lights from China, smelting lead and being in close proximity to a fired gun.

Trial counsel asked the SLED expert only nine questions on cross-examination. None of these questions were about any alternative theories on how the lead particle could have been found or improper testing circumstances involving the GSR test. In *Frasier v. State*, 306 S.C. 158, (1991) the South Carolina Supreme Court notes that counsel's failure to call an expert witness at trial to

rebut the State's expert testimony will not necessarily rise to the level of deficient performance where he undertakes a vigorous cross-examination of the State's witness. In this case there was no vigorous cross-examination, there were nine questions asked and none of them gave the jury any reason to discredit the State's expert. Trial counsel erred in being unprepared to cross examine the SLED expert.

Trial counsel also erred in failing to call an expert witness to rebut the State's expert. The GSR test in this case was analyzed by John Roberts a SLED agent in Columbia. Mr. Owens believes his attorneys were unaware that Mr. Roberts would be testifying and were unprepared to effectively cross-examine the SLED agent on the GSR test. His attorneys did not retain an expert to prepare a cross on GSR, nor did they retain an expert to rebut the State's expert. This was not trial strategy. This was simple unpreparedness.

In *Ard v. Catoe*, 372 S.C. 318 (2007), the South Carolina Supreme Court dealt with a similar issue involving GSR test. The Court agreed with the PCR court which ruled:

[T]hat trial counsel's failure to adequately evaluate and challenge the State's gunshot residue testimony was deficient performance that resulted in prejudice to respondent. As to deficiency, the PCR court concluded trial counsel failed to: (1) "aggressively re-examine" the gunshot residue reports; (2) "read the documents, evaluate them, and pursue the necessary next steps, such as consulting an appropriate," i.e., "an independent expert;" and (3) "investigate the possibility of retesting the samples." As to prejudice, the PCR court found that the "extent to which the jurors credited Powell's testimony ... was critical to the outcome of the case." Moreover, the PCR court noted that "[d]efense counsel's failure to refute gunshot residue evidence transformed an arguable case into a clear case.... Because of the solicitor's critical reliance on the absence of gunshot residue evidence, there is little question that the tenor of the jury deliberations would have been different, but for counsel's mistakes." Finally, the PCR court stated it was not "confident that a jury, adequately informed, would have convicted [respondent] of murder."

The Court in *Ard* went on to say "a criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation" (*Citing Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986)). There was little to investigate in this case beyond the GSR test. Mr. Owens believes his attorneys were unprepared to cross the SLED expert as they had failed to evaluate the GSR reports, interview the SLED expert, obtain an independent expert and properly prepare for cross-examination.

SECOND STRICKLAND PRONG

There were three main pieces of evidence used by the State against Mr. Owens. First, there was the victim identification. This was improper testimony that should have been the grounds for objection or a motion for mistrial. However, Counsel failed to object, which not only failed to preserve the argument for appeal, but also allowed this testimony to go to the jurors. This was the exact type of testimony that a *Neil v. Biggers* is used to determine the reliability of the identification. Mr. Owens was denied this hearing without objection from his counsel. This was an error.

Second, there is the negative GSR tests that were allowed in to testimony almost unquestioned and without proper preparation for cross-examination. Had an expert been retained or even had trial counsel been prepared to cross the SLED expert of the many different ways a single lead particle can be transferred, it is likely the testimony would not have been admitted, or at least the jury would have understood the results did not prove Mr. Owens was around a fired gun.

Finally, there was Mr. Owens location at the time of arrest. The law is clear that mere presence to a crime is never enough to prove guilt.

Mr. Owens has shown that "but for counsel's errors, there is a reasonable probability the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*.

In this case, where there was never a gun or mask found. And there was no motive established, there is a reasonable probability that but for counsel's errors the jury would have returned a verdict of not guilty.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris L.", written in a cursive style.

Christopher S. Leonard (Bar ID 80166)
KENDRICK & LEONARD, P.C.
P.O. Box 886 (29202)
1916 Barnwell Street
Columbia, South Carolina 29201
(803) 667-3186
Facsimile (803) 667-3187
Chris@KendrickLeonard.com

Attorneys for the Plaintiff

November 1, 2013
Columbia, South Carolina

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF ORANGEBURG 2011-CP-38-1539
3

4 ANTIONELLE LATROY OWENS) TRANSCRIPT OF RECORD
5 VS.)
6)
7 STATE OF SOUTH CAROLINA) NOVEMBER 1, 2013
ST. GEORGE, SC

8
9 B E F O R E:

10 THE HONORABLE DIANE S. GOODSTEIN

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

12 MEGAN E. HARRIGAN, ESQUIRE
13 Attorney for the State

14 CHRISTOPHER S. LEONARD, ESQUIRE
Attorney for the Defendant

15
16 Ruth L. Mott, RPR, CRR
Official Court Reporter
17
18
19
20
21
22
23
24
25

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
JOHN ROBERTS				
MR. LEONARD -	4			
VOIR DIRE				
MR. LEONARD	5		21	
MS. HARRIGAN		17		
THE COURT	22			
ROBERT DOUGLAS MELLARD				
MR. LEONARD	24		52	
MS. HARRIGAN		38		56
MARGARET ELIZABETH HINDS				
MS. HARRIGAN	59			
MR. LEONARD		64		
CLOSING ARGUMENTS				
MR. LEONARD	67			
MS. HARRIGAN	69			
MR. LEONARD	76			
MS. HARRIGAN	78			
MR. LEONARD	78			
CERTIFICATE OF REPORTER	84			

E X H I B I T S

NO.	DESCRIPTION	ID	EVD

(NONE MARKED)

- - -

1 MS. HARRIGAN: Your Honor, the final matter of the term
2 is Antionelle Owens versus the State of South Carolina,
3 Docket No. 2011-CP-38-1539. Mr. Owens was indicted at the
4 August 2006 term of the Orangeburg County Grand Jury for
5 assault and battery with intent to kill and attempted
6 burglary in the first degree. Doug Mellard and Peggy Hinds
7 represented him. On August 10th through 11th of 2009 Mr.
8 Owens proceeded to a jury trial before the Honorable James C.
9 Williams, Jr. He was found guilty of assault and battery
10 with intent to kill and attempted burglary in the first
11 degree as indicted. On August 11th, 2009, Judge Williams
12 sentenced Mr. Owens to 15 years imprisonment for each charge
13 to be served concurrently. A notice of appeal was filed and
14 perfected on his behalf. The South Carolina Court of Appeals
15 affirmed his convictions and sentence, and the remittitur was
16 issued on June 3rd, 2011. He thereafter filed a timely
17 application for post conviction relief on December 1st of
18 2011 alleging ineffective assistance of counsel. The state
19 made its return on May 25th, 2013. He's represented in this
20 action by Chris Leonard, and I'll turn it over to him at this
21 time to set forth his specific allegations onto the record.

22 THE COURT: Yes, Mr. Leonard.

23 MR. LEONARD: Good afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MR. LEONARD: The two main issues that we'll be

1 exploring today dealing with the ineffective assistance of
2 counsel deal with both a Neil v. Biggers type identification
3 matter. One was requested. The solicitor in the case told
4 the Court it was not necessary. The Court agreed. There was
5 no objection. And, unfortunately, that very type of
6 testimony came out during the trial without objection.

7 The second matter would be involving a GSR expert.
8 Agent John Roberts from SLED testified, and we believe that
9 trial counsel's cross-exam of the expert was ineffective and
10 as such Mr. Owens was wrongfully convicted. But to begin the
11 matter we'd like to call Agent John Roberts from SLED to the
12 stand.

13 THE COURT: Okay.

14 JOHN ROBERTS,

15 being first duly sworn, testified as follows:

16 DIRECT EXAMINATION BY MR. LEONARD - VOIR DIRE:

17 Q. Agent Roberts, where do you currently work?

18 A. Work for the South Carolina Law Enforcement Division,
19 more commonly called SLED, in the arson investigations unit.

20 Q. In 2009 were you still employed with SLED?

21 A. I was.

22 Q. Were you in the arson unit at that time?

23 A. No. I was in the forensic services laboratory in the
24 trace evidence department.

25 Q. And dealing with trace evidence, would that include

1 gunshot residue, commonly known as GSR?

2 A. It does.

3 MR. LEONARD: Your Honor, I intend to put forth expert
4 testimony from Agent Roberts. He was the expert who
5 testified at the trial, and I believe the AG's office
6 would --

7 MS. HARRIGAN: We'll stipulate to his qualifications as
8 an expert to the same qualifications he testified to at
9 trial.

10 THE COURT: Very well.

11 MR. LEONARD: Thank you, Your Honor.

12 DIRECT EXAMINATION BY MR. LEONARD:

13 Q. Agent Roberts, did you have the opportunity to testify
14 in Mr. Owens' trial?

15 A. I did.

16 Q. And as part of your testimony were you asked to go over
17 the results of a GSR test that you performed?

18 A. I was.

19 Q. And are you the one who personally performed the GSR
20 test?

21 A. Yes, I was.

22 Q. Just so we have a little bit of background on GSR tests
23 in general, how are those tests performed?

24 A. In general, gunshot residue kits are distributed
25 throughout the state, usually by SLED. We will give them out

1 to agencies who request them, or they can purchase their own.
2 In this case it was -- if you'll give me a second, I can tell
3 you exactly what kind of gunshot residue kit it was.

4 It was a gunshot residue kit from Sirchie. They're a
5 crime scene supply company. What happens is gunshot residue
6 kits are generally two different types of samples. There are
7 particle lifts which are aluminum discs with carbon sticky
8 tape on them, and there are in general four of those carbon
9 discs in a gunshot residue kit, and then there are also
10 swabs. The carbon discs are applied like bingo dabbers to
11 areas of the hand, the right palm, the right back of the hand
12 the left palm, and the left back of the hand. After that's
13 done and they are stored in their separate containers, the
14 swabs are applied, and there are -- there is dilute nitric
15 acid that is applied to the swabs, and then they are used to
16 wipe the surfaces of the hand that correspond in the same
17 places the particle lifts came from. So you have basically
18 two samples from each of four areas of the hand in general.

19 In this case there were only the particle lifts, and the
20 difference between the two is there are two different types
21 of instruments used to analyze each different types of
22 sample. In this case these particle lifts were only run
23 under a microscope because that's what they're designed to be
24 run over is a scanning electron microscope.

25 Q. So you don't actually personally take the samples.

1 Those samples are sent to you from the police officers.

2 A. In this case I did not take the samples, no.

3 Q. But you are the one who analyzed the samples under the
4 microscope.

5 A. I am.

6 Q. What type of microscope do you use?

7 A. It's a scanning electron microscope. Basically what it
8 does is it uses a beam of electrons to interrogate the
9 surface of the particle lifts, looking for round particles
10 that contain lead or lead and barium and antimony or any
11 combination of those three elements.

12 Q. You mentioned those three elements, lead, barium and
13 antimony. Is that the three elements you typically look for
14 when you're looking for GSR residue?

15 A. Yes. What I'm looking for is a round particle that has
16 all three which is unique to gunshot residue, or I'm looking
17 for a particle that contains lead with any combination of the
18 other two elements, so lead and barium or lead and antimony.
19 Those particles are particles that we find consistent with
20 gunshot residue.

21 Q. Just to put one more thing on the record, you mentioned
22 a round particle. Could you describe what you mean by round
23 verse non-round?

24 A. Round is like a basketball. Non-round is not round.

25 Q. And why is that significant?

1 A. Round particles that contain all three components are
2 unique to gunshot residue. We don't find them in anything
3 other than where a gun was fired. Non-round particles that
4 contain all three elements are not unique to the residue, but
5 they are very, very consistent with it. They've only been
6 found one other place. Round particles that are -- that
7 contain lead or lead and barium or lead and antimony are also
8 consist with gunshot residue, but they are not unique either.
9 The reason we have to look for the round is, when you shoot a
10 gun, that the chemicals inside the bullet, inside the primer,
11 which is what we're looking for, are subjected to high heat
12 and high pressure, and those two forces act on the chemicals
13 to force them into droplet shapes. When they're ejected from
14 the firearm, they hit the cool outside air, or the relatively
15 cool outside air, and they cool into round droplets, and
16 that's what we look for when we're sampling the hands is the
17 round droplets of lead or lead and barium or lead and
18 antimony or the combination of all three.

19 Q. Thank you, Agent Roberts. Turning specifically to Mr.
20 Owens' case, you noted that there were four different samples
21 sent to you by the Orangeburg Police Department, one for the
22 right back of the hand, right palm, left back of the hand,
23 left palm; is that correct?

24 A. That's correct.

25 Q. And on the left palm you found no evidence of any GSR of

1 any of the components.

2 A. The report for the left palm states that no gunshot
3 residue was found; however, in my notes I have that I found a
4 non-round particle that contained all three elements. That
5 particle by itself is not enough to be reported.

6 Q. So on the official GSR analysis it would show up as a
7 negative?

8 A. Yes, sir. In the report it shows up as a negative.

9 Q. And that was the left palm. What about the left back of
10 the hand, was that a positive or negative?

11 A. The left back of the hand was completely negative.
12 There were no particles of lead or lead/barium or any other
13 combination thereof found on that -- that sample.

14 Q. And your report shows on the right palm that was also
15 negative?

16 A. Negative, yes, sir.

17 Q. Now, when we come to the right back of the hand, you
18 testified in trial that the test was inconclusive.

19 A. That's correct.

20 Q. You testified the test was inconclusive because you did
21 in fact find one round lead particle on the back of Mr.
22 Owens' hand; is that correct?

23 A. Yes, sir, that's right.

24 Q. Now, why is that not a positive match then if you did
25 find that particle?

1 A. One particle all by itself, one round lead particle all
2 by itself, is not enough for us to call it a positive. We
3 need at least two.

4 Q. So one is not enough to be positive?

5 A. One is not enough.

6 Q. But it's more than negative.

7 A. It is not negative but it is not enough to call it
8 positive, that's correct.

9 Q. Now, when you testified, the prosecutor in the case
10 asked how else could this round lead particle have been found
11 on Mr. Owens' hand. Have you had a chance to review your
12 testimony from this hearing?

13 A. I have.

14 Q. And you answered that question with three possible
15 theories?

16 A. Yes, sir.

17 Q. Would you explain those three theories or don't explain
18 them but just tell us.

19 A. From what I remember, what I said was cheap Chinese
20 Christmas lights, I said lead smelting, and the third one,
21 I'm not sure what the third one was, but I do remember the
22 two.

23 Q. Would you believe the third one was being -- firing a
24 gun or being around a fired gun?

25 A. That would count as one.

1 Q. So really the only three ways you informed the jury that
2 Mr. Owens' could have found -- been found with that round
3 lead particle is cheap Chinese Christmas lights, or handling
4 them.

5 A. Yes, sir.

6 Q. Smelting lead?

7 A. Yes, sir.

8 Q. Or being around a fired gun, either firing it or being
9 around a fired gun.

10 A. Yes, sir, those are the three ways that I can remember
11 of there being of the reason for having that on your hand.

12 Q. And then you were subject to cross-exam by the defense
13 counsel.

14 A. Yes, sir.

15 Q. Did defense counsel elicit any other possible theories
16 on how that round lead particle could have been found on Mr.
17 Owens' right back of the hand?

18 A. I don't believe he did, no, sir.

19 Q. Now, you testified that there were the three ways, cheap
20 Chinese Christmas lights, smelting lead, and being around a
21 fired gun. It is possible that there's another way that this
22 test could have returned an inconclusive result,
23 contamination; is that correct?

24 A. Yes, sir, and that -- the contamination thing would also
25 account for the cheap Chinese Christmas lights. It's not so

1 much the fact that they're cheap or that they're Chinese.
2 The ones that we tested happened to be cheap and happened to
3 be Chinese, but they also happened to come out of a home that
4 the homeowners were both police officers, both of whom
5 carried firearms and both of whom qualified with firearms, so
6 I can't say with any reasonable certainty that the reason
7 that those Christmas lights had round lead on them was
8 because they were cheap or Chinese. It is more than likely
9 that the two police officers who lived in that house handled
10 those Christmas lights, and then when we decided to test them
11 for gunshot residue, that's what we found.

12 Q. So you're saying now that even one of the possible three
13 ways you gave the jury at the time of trial might have been a
14 contamination issue.

15 A. It could have been, yes, sir.

16 Q. Now, let's talk about this contamination issue. Again,
17 you said this wasn't brought out during trial.

18 A. Not to my knowledge it was not.

19 Q. How many times have you testified in court as reference
20 to a GSR expert, roughly?

21 A. 66 -- 65, 66 times.

22 Q. And how often are we dealing with a single round lead
23 particle being the basis of the GSR analysis?

24 A. Very few.

25 Q. Would you say of those very few times that contamination

1 is usually an issue at trial?

2 A. It could be an issue, that's correct.

3 Q. So GSR, or a round lead particle in this instance, can
4 be transferred from one person to another or one thing to a
5 person; is that correct?

6 A. That's correct. In fact, one of the -- one of the ways
7 that you get gunshot residue, in general, on your hands is by
8 picking up a firearm that has been recently fired. So, yes,
9 touching something that has gunshot residue on it will get it
10 on you.

11 Q. Is it likely that police officers usually or can very
12 commonly have GSR on them at all times?

13 A. They can.

14 Q. Are you familiar with any studies that have been done
15 concerning the issue of transference of GSR from police
16 officers to subjects?

17 A. I am.

18 Q. Are you familiar with the study where they sampled the
19 back of police cars to determine whether or not there is GSR
20 just in the back of a police patrol vehicle?

21 A. I am.

22 Q. And there was found to be GSR just in the back.

23 A. There was.

24 Q. And, in fact, placing persons known without having GSR
25 on them in the back of a patrol vehicle with their handcuffs

1 in the cupped portion of the seat have been known to transfer
2 GSR.

3 A. It could, yes, sir.

4 Q. How about handcuffs, have handcuffs ever been known to
5 transfer GSR?

6 A. I believe they have. I believe they've tested
7 handcuffs, and they've come up positive for gunshot residue
8 as well.

9 Q. Now, if you were dealing with a situation,
10 hypothetically, where you had GSR located on all four samples
11 and there was quite a bit of particles, contamination might
12 not be your first inclination.

13 A. It would not.

14 Q. If you're dealing with a single round lead particle,
15 contamination could very well be probable.

16 A. It's not something that I could rule out just out of
17 hand.

18 Q. Now, when you were with the trace evidence department at
19 SLED, would you have returned -- turned this report over that
20 you did to the solicitor's office?

21 A. I would have turned it back in to in this case
22 Orangeburg DPS, and that would have been the end of my
23 involvement in it until I was called to trial.

24 Q. So you wouldn't have known if the report was turned over
25 in a discovery motion to defense counsel?

1 A. I would not have, and if -- specifically, if you're
2 asking about the entire case jacket, I don't believe that it
3 was.

4 Q. Okay. Was it ever requested by defense counsel of you?

5 A. No. I'm almost positive it was not.

6 Q. As an expert for SLED, are you available to defense
7 counsel in general if they would like to interview you?

8 A. I am.

9 Q. Were you requested to be interviewed by defense counsel
10 in Mr. Owens' case?

11 A. No, sir, I don't believe that I was. I don't have it
12 anywhere on my notes that I was.

13 Q. Do you recall the questions that defense counsel asked
14 you during the cross-examination of Mr. Owens' case?

15 A. No, I don't.

16 Q. Do you recall it being a lengthy cross-examination?

17 A. I do not, and the only reason that I can say that is
18 because I have in my case jacket how much time I spent on the
19 stand and it says 15 minutes.

20 Q. 15 minutes total. Does that include direct and cross?

21 A. Yes. It includes direct, cross and qualification as an
22 expert witness.

23 MR. LEONARD: May I beg the Court's indulgence one
24 second?

25 THE COURT: All right.

1 Q. Agent Roberts, sorry to keep you up there, just one more
2 question for you. Standard policy for GSR collection, would
3 that be -- it would be done before a subject was handcuffed
4 and placed in the back of a patrol vehicle?

5 A. The standard procedure is basically up to whatever
6 agency is doing the testing.

7 Q. As a person who later has to do the test analysis, would
8 you prefer a subject be tested before handcuffed and placed
9 in the back of a patrol vehicle?

10 A. I would prefer that it be done on the scene rather than,
11 you know, being handcuffed and taken back to headquarters.
12 As far as being handcuffed and thrown in the back of a patrol
13 car, that's -- that's really not something that is under
14 anybody's control other than theirs. In an ideal world that
15 would be great.

16 Q. Because in an ideal world then you wouldn't have to
17 necessarily worry about contamination issues from the
18 handcuffs, the officers or the back of the patrol car.

19 A. That's correct.

20 Q. Do your case notes reflect when the collection of the
21 GSR was done in this particular case?

22 A. It does. Give me just a second here.

23 Q. Thank you.

24 A. According to the notes that I have, and this is the
25 gunshot residue analysis data sheet from Orangeburg DPS, the

1 date and time that the firearm was fired was June 5th of 2006
2 between 6:00 a.m. and 6:20 a.m. The date and time that the
3 stubs and swabs were taken, and in this case it was only the
4 stubs, it was June 5th of 2006 at 8:00 in the morning, so
5 approximately two hours between the time of the shooting and
6 the time of the collection.

7 Q. And are you aware whether or not the defendant was
8 handcuffed and placed in the back of a patrol vehicle before
9 the swabs were taken?

10 A. It doesn't say.

11 MR. LEONARD: Thank you, Your Honor.

12 Thank you, Agent Roberts. Please answer any questions
13 of Ms. Harrigan.

14 THE WITNESS: Yes.

15 THE COURT: Cross-examination.

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

17 CROSS-EXAMINATION BY MS. HARRIGAN:

18 Q. Mr. Roberts, how many instances since this trial have
19 you found round lead particles that aren't related to
20 gunfire?

21 A. I've never found any that I could not readily attribute
22 to gunfire.

23 Q. In the example you testified to at trial regarding cheap
24 Chinese Christmas lights, the evidence of contamination
25 resulted from two police officers that were around guns quite

1 often, correct?

2 A. That's what I would guess as far as that specific
3 example.

4 Q. And you said that home had two police officers in it,
5 correct?

6 A. That's correct.

7 Q. So double the weapons you'd expect in a normal
8 one-officer home.

9 A. Oh, yes. Yes, they had plenty of guns.

10 Q. I believe the other example you gave was from smelting
11 lead, correct?

12 A. Yes, ma'am.

13 Q. Or firing a gun or being around gunfire.

14 A. Yes, ma'am.

15 Q. How likely would you say round lead particles are found
16 if they're not a result of gun fire?

17 A. Very unlikely.

18 Q. Which is what you testified to at trial, correct?

19 A. I think so. I hope I testified to that. In general
20 that's how I testify to that.

21 Q. And your testimony here today is there is another way
22 that round lead particles can be on a suspect's hands, and
23 that would be contamination, correct?

24 A. It could be from contamination, yes, ma'am.

25 Q. How often have you found contamination on specific kits

1 that you've analyzed?

2 A. That I couldn't tell you. I mean, I can't tell what is
3 contamination and what is not contamination.

4 Q. Have you done any research on testing or lab settings to
5 determine how often contamination occurs?

6 A. What I've done is I've taken samples from doorknobs and
7 such inside our lab, however, we didn't take particle lifts.
8 We just took swabs and we looked for amounts of this metal on
9 the swabs rather than the round lead particles.

10 Q. So the only contamination tests you've done to date
11 before testifying today didn't involve round lead particles.

12 A. It didn't involve finding any.

13 Q. Okay. So you haven't in your own personal knowledge
14 ever found a round lead particle as a result of
15 contamination.

16 A. That I could directly attribute to contamination, no,
17 ma'am.

18 Q. And your testimony at trial was that the inconclusive
19 was not a positive reading, correct?

20 A. It was not a positive, that's correct.

21 Q. And you were cross-examined by Counsel Mellard in
22 regards to this, correct?

23 A. I don't recall what exact questions he asked.

24 Q. And the one round lead particle was found on the back of
25 the right palm, correct?

1 A. Back of the right hand?

2 Q. Right hand, yes, I'm sorry.

3 A. Excuse me for just a second.

4 Yes, ma'am, that's right.

5 Q. And you testified that the left palm had all three
6 elements of gunshot residue, they just weren't of a round
7 quality and therefore were a negative, correct?

8 A. That's correct.

9 Q. How often do you find all three of these elements, the
10 antimony, barium and lead, not attributed to gunfire or being
11 around gunfire?

12 A. All in one component?

13 Q. Yes.

14 A. All in one particle?

15 Q. Yes.

16 A. Almost never.

17 Q. So left palm almost never -- the results here are almost
18 never attributed to something other than gunfire, correct?

19 A. That's correct.

20 Q. And then the right back of the hand also is highly
21 unlikely, I believe your wording was very unlikely, that the
22 round lead particle wouldn't be attributed to gunfire.

23 A. Yes, ma'am.

24 MS. HARRIGAN: No further questions.

25 THE COURT: Redirect?

1 MR. LEONARD: Briefly, Your Honor.

2 THE COURT: All right.

3 REDIRECT EXAMINATION BY MR. LEONARD:

4 Q. Again, the left palm was a negative result.

5 A. That's right.

6 Q. And the fact that there was these components found in
7 the left palm does not rule out the fact that contamination
8 is a potential.

9 A. That's correct.

10 Q. Again, you testified there was three ways at the time
11 that Mr. Owens could have been found with this round lead
12 particle, cheap Chinese Christmas lights, which now may be a
13 contamination.

14 A. Yes.

15 Q. Smelting lead and being around a fired gun. To your
16 knowledge does this case involve cheap Chinese Christmas
17 lights?

18 A. Not to my knowledge.

19 Q. To your knowledge is there any testimony that Mr. Owens
20 was smelting lead?

21 A. No, sir.

22 Q. And the contamination issue was not brought out either
23 on direct or cross-examination?

24 A. I don't believe it was, no, sir.

25 Q. So to a jury who believed your credibility, which I

1 think we can infer, the only possible explanation that was
2 put in front of them was that Mr. Owens' was around a fired
3 gun.

4 A. That's correct.

5 MR. LEONARD: Thank you.

6 MS. HARRIGAN: No recross, Your Honor.

7 THE COURT: I've got a question just because I've got to
8 make the decision.

9 MR. LEONARD: Absolutely, Your Honor.

10 THE COURT: So what would you have done if the question
11 had been asked of you, Agent Roberts, do you have an opinion
12 within a reasonable degree of scientific certainty, that
13 being more likely than not, did these particles appear just
14 as you have described them as a result of contamination; do
15 you have an opinion?

16 THE WITNESS: That's not something that I can rule out.

17 THE COURT: That wasn't my question.

18 THE WITNESS: I know.

19 THE COURT: Do you have an opinion within a reasonable
20 degree of scientific certainty, that being more likely than
21 not, whether or not the presence of the particles as you have
22 described them were there as a result of contamination?

23 First of all, do you have an opinion within a reasonable
24 degree of scientific certainty, being more likely than not?

25 THE WITNESS: The only thing that I can tell you is that

1 I found --

2 THE COURT: No. Do you have an opinion --

3 THE WITNESS: No, ma'am, I do not.

4 THE COURT: -- that being more likely than not, do you
5 have an opinion?

6 THE WITNESS: Not in this case. I can't -- I honestly
7 cannot give you an opinion as to whether this was
8 contamination or whether it was from gunfire or being near
9 gunfire.

10 THE COURT: Okay.

11 THE WITNESS: It could be either one of them fairly
12 equally.

13 THE COURT: And the reason that I ask it that way is
14 because expert opinion testimony is not admissible unless it
15 is asked in the way that I asked it. Do you have an opinion
16 within a reasonable degree of scientific certainty. I'm not
17 interested in having you speculate, and I wouldn't let you
18 speculate in front of the jury. The question is, do you have
19 an opinion within a reasonable degree of scientific
20 certainty, that being more likely than not.

21 THE WITNESS: Not in this case I do not.

22 THE COURT: Okay. Does that prompt any questions from
23 you?

24 MR. LEONARD: No, Your Honor.

25 THE COURT: Does that prompt any questions from you?

1 MS. HARRIGAN: No, Your Honor.

2 THE COURT: Thank you. Is this witness free to leave?

3 MR. LEONARD: I would ask that Agent Roberts be excused
4 from the subpoena.

5 THE COURT: Any objection?

6 MS. HARRIGAN: No objection.

7 THE COURT: Thank you so much for being here.

8 THE WITNESS: It was my pleasure.

9 THE COURT: Absolutely. Call your next witness, please.

10 MR. LEONARD: The Appellant would call Robert Douglas
11 Mellard, Esquire.

12 ROBERT DOUGLAS MELLARD,
13 being first duly sworn, testified as follows:

14 THE COURT: Your witness.

15 DIRECT EXAMINATION BY MR. LEONARD:

16 Q. Mr. Mellard, how are you doing today?

17 A. All right.

18 Q. Where are you currently employed?

19 A. Orangeburg Public Defender's Office.

20 Q. And were you employed at the Orangeburg Public
21 Defender's Office in 2009?

22 A. Yes.

23 Q. Did you have a chance to represent Mr. Owens?

24 A. Yes.

25 Q. There's one thing I want to address very quickly. Mr.

1 Owens was not an ideal client, was he?

2 A. No.

3 Q. He wasn't an ideal client because he really didn't have
4 any communication with your office.

5 A. He didn't want to help out, yes.

6 Q. He didn't want to help out. I understand. That makes
7 it frustrating and hard to prepare for trial when you have a
8 client who doesn't want to help you.

9 A. It doesn't help, that's for certain.

10 Q. I understand. I just wanted to go ahead and address
11 that. The fact that a client doesn't want to help in his
12 trial, does that alleviate any requirement to perform up to
13 standards during the trial?

14 A. No. It basically doesn't give you any direction to go
15 in, so that's kind of what I tried to focus, to get him to
16 care a little bit.

17 Q. I promise you he cares now.

18 A. Oh, I imagine, yes.

19 Q. Turning to Agent Roberts' testimony, were you the
20 attorney who cross-examined Mr. Roberts?

21 A. Yes.

22 Q. Was, in fact, the GSR report provided by Mr. Roberts in
23 the discovery material?

24 A. Yes.

25 Q. Did you have occasion to go through it?

1 A. We received the report. I got this case from Michael
2 Culler, and I believe he had already talked to the defendant
3 about the report, and then I looked at the report, and so I
4 had a copy of it.

5 Q. And if you don't mind me deviating very briefly, you
6 said you got this case from Michael Culler?

7 A. Correct.

8 Q. Are you aware of any issues that arose between Mr. Owens
9 and Mr. Culler?

10 A. Only what -- we had a pretrial motion and we kind of got
11 that out. My understanding is there was some sort of a lack
12 of trust from Mr. Owens to Mr. Culler.

13 Q. Are you aware that Mr. Culler informed Mr. Owens that
14 the GSR test came back positive?

15 A. That's what Mr. Owens said. I'm not aware of that, what
16 he said.

17 Q. And that was Mr. Owens' reason for maybe a lack of trust
18 with the public defender's office?

19 A. I think that might have been part of it.

20 Q. Okay. Thank you. So you got this case from Mr. Culler,
21 and you believe that Mr. Culler had gone through the GSR with
22 Mr. Owens.

23 A. He must have. Mr. Owens knew about it, so he must have
24 talked to him about it.

25 Q. And I understand that, when you got the report, you

1 noticed that of the four samples three were negative.

2 A. Correct.

3 Q. That's a good sign.

4 A. Mm-hmm.

5 Q. And the one was inconclusive.

6 A. Correct.

7 Q. Some might view an inconclusive as kind of a negative.

8 A. Some might.

9 Q. Is that how you viewed it?

10 A. I viewed it as inconclusive.

11 Q. And did you understand at that time what an inconclusive
12 result meant?

13 A. I did not understand Chinese fireworks, if that's what
14 you're asking.

15 Q. That's enough.

16 A. Yes, but I understood.

17 Q. Were you aware that one round lead particle was found on
18 the back of Mr. Owens' right hand?

19 A. I believe so. I'm not sure how many -- I believe so.

20 Q. In preparing for trial did you research any ways that
21 maybe that round particle could have been located on Mr.
22 Owens' right back of his hand?

23 A. No, didn't research that.

24 Q. Did you think it was going to come up at trial?

25 A. I knew it was going to come up at trial.

1 Q. Did you know that Agent Roberts was going to be called
2 to testify?

3 A. We kind of figured he might be called to testify. We
4 weren't sure, but we kind of figured he might be called to
5 testify.

6 Q. At any time during preparation for trial did you contact
7 Agent Roberts?

8 A. No, hm-mm.

9 Q. When you were preparing to -- so you thought he might
10 show up. Did you prepare a cross-examination if he did?

11 A. We kind of -- well, I kind of --

12 Q. Yes.

13 A. -- kind of prepared a little bit, kind of talking about
14 basically the palms and the backs of the hands and that kind
15 of stuff.

16 Q. Did you consult with your own expert about --

17 A. No.

18 Q. -- what an inconclusive result would mean?

19 During direct Agent Roberts gave three possibilities for
20 how that round lead particle could be located.

21 A. Correct.

22 Q. On cross did you challenge any of these?

23 A. No. Well, let me put it to you like this: When he
24 started with the Chinese fireworks and all that other kind of
25 stuff, it was pretty obvious he wasn't going to be helpful;

1 so my basic gist was just to get out what I needed for us to
2 argue at the end, and that was pretty much it.

3 Q. Yes. He noted that he didn't spend much time on the
4 stand. Have you had a chance to review the transcript in
5 this case?

6 A. I read it over.

7 Q. Do you recall your line of questioning for Agent
8 Roberts?

9 A. I think it was pretty much back of one hand was
10 negative, front of one hand was negative, back of one hand
11 was negative or maybe the front was negative and the back was
12 inconclusive.

13 Q. But there was no questioning on other possibilities
14 besides cheap Chinese Christmas lights, lead smelting and
15 being around a fired gun.

16 A. Correct.

17 Q. There was no evidence that Mr. Owens was handling cheap
18 Chinese Christmas lights or smelting his own lead.

19 A. That's correct.

20 Q. So the jury, if they believed Agent Roberts, only had
21 one possibility of why that round lead particle was found on
22 the back of his hand.

23 A. That wasn't what we argued at the end. We kind of
24 argued what you all were talking about earlier is the
25 contamination part, but I don't know what the jury was going

1 to believe.

2 Q. But contamination was not brought out during cross.

3 A. No.

4 Q. Or direct.

5 A. Hm-mm.

6 MR. LEONARD: Okay. Hold on one second.

7 THE COURT: Okay.

8 Q. I'm going to switch gears here, Mr. Mellard. There's
9 another issue that Mr. Owens has raised in his PCR. At the
10 beginning of the trial you requested a Neil v. Biggers
11 hearing?

12 A. Correct.

13 Q. Would you explain to me why you requested such a
14 hearing?

15 A. Generally, when I have a case like this where the person
16 is, I guess as we put it, less than helpful, I like to try to
17 look at some sort of issues. I try to find something that we
18 can kind of argue, so that's kind of what I thought maybe we
19 should go for.

20 Q. Absolutely. You've got to do something. As far as a
21 Neil v. Biggers hearing, I guess for the record would you
22 kind of describe what that hearing does?

23 A. In general they determine whether or not the
24 identification was reliable or not.

25 Q. Was there identification in this case?

1 A. Well, I believe what the solicitor was going to do was
2 they were going to identify clothing and build, I don't think
3 they were going to identify facial features, I think is what
4 he told the Judge he was going to do.

5 Q. Do you think an identification based solely on clothing
6 and build still qualifies for necessity of a Neil versus
7 Biggers hearing?

8 A. I think it could have.

9 Q. But there was no Neil v. Biggers hearing in this case;
10 is that correct?

11 A. Correct.

12 Q. And do you know why there was no Neil v. Biggers
13 hearing?

14 A. Well, as it progressed, it was pretty obvious the Judge
15 was not going to give us a Neil v. Biggers hearing, so that's
16 pretty much -- and also the solicitor represented certain
17 things.

18 Q. What did the solicitor represent to the Court that may
19 have inclined the Judge to not grant a Neil v. Biggers
20 hearing?

21 A. I believe it was just going to be what I said before, he
22 was just going to bring in about the clothing and maybe the
23 build and not have an in-court identification based on facial
24 features, I believe.

25 Q. So in your recollection after reading the trial

1 transcript the solicitor informed the Judge that he wasn't
2 intending on having her do any kind of in-court
3 identification to the effect that she didn't see his face but
4 she described his looks, that's about all she can describe as
5 far as his face because he's got on a ski mask, so all she
6 sees are his eyes and his mouth. Is that your recollection?

7 A. Yes, if that's what's in the transcript, that's -- yes.

8 Q. So if the Court said, I don't see any need for a
9 hearing, I don't know what we'd ask her, that's the Judge
10 telling you he's not going to grant your Neil v. Biggers
11 hearing.

12 A. Pretty much, yes.

13 Q. Did you object at that time to the denial?

14 A. No, hm-mm.

15 Q. In fact, you said that's fine, Your Honor, we just want
16 to make sure there's going to be no in-court identification.

17 A. Correct.

18 Q. And doing an objection is important because it preserves
19 the issue for later appeal; is that correct?

20 A. Without a doubt. You know, in hindsight, I would have
21 probably done it.

22 Q. I understand. Now, as the trial progressed, after the
23 Neil v. Biggers hearing was denied, did identification
24 testimony come out through the victim?

25 A. I believe so, I believe it did.

1 Q. Did she specifically identify Mr. Owens as the one who
2 assaulted her by name?

3 A. That I'm not sure about, if you can tell me where that's
4 at.

5 Q. Do you have a transcript up there?

6 A. I do.

7 Q. Page 71, line 21 and 22.

8 A. Okay. Yes, he did.

9 Q. Starting with, "when I left." "When I left out my
10 house, Mr. Owens came around from another vehicle," so she
11 identified him by name.

12 A. Correct.

13 Q. Even though the solicitor said he wasn't going to have
14 her do any type of in-court identification?

15 A. That's right.

16 Q. Did you object at that time?

17 A. I did not.

18 Q. Later on in that similar part of the transcript the
19 solicitor then asked the victim to describe him. Does she
20 say something similar to, and this is on page 74, lines 20
21 through 23, that "he was tall and he was slender. I knew
22 from the mask on his ahead that he had a lot of hair."

23 A. Correct.

24 Q. It says, "part of his face was like a big part where I
25 could see his lips and I could see his eyes."

1 A. Correct.

2 Q. And then the solicitor continued to ask -- she also
3 noted that, "he had big lips, and I know this part, like a
4 big part protrusion, meaning I could really see his physical
5 features without even pulling the mask off his face,"
6 lines -- that was page 75 lines 3 through 6.

7 A. Right.

8 Q. Would you describe that as an identification of the
9 defendant?

10 A. I would not, simply because of what the cops said when I
11 questioned the cops. I guess maybe you could consider that
12 to be her view of it. I don't know whether you consider it
13 identification or not, to tell you the truth. I mean, I know
14 the cops said she didn't tell them any of that kind of stuff,
15 so I don't know.

16 Q. So this was the first time that you heard that the
17 victim recalls there being a lot of hair under the mask.

18 A. Correct.

19 Q. And this is the first time you recall being told that
20 the victim's going to say even with his mask on she could
21 identify his physical features.

22 A. Correct.

23 Q. In a Neil v. Biggers hearing there's a two-step process.
24 I'm not trying to do a law school exam here, but how long
25 have you been practicing criminal defense?

1 A. A while.

2 Q. So you've done a couple of these.

3 A. Oh, yes.

4 Q. So the first step is to decide whether or not the
5 identification was possibly unduly suggestive; is that right?

6 A. Correct.

7 Q. Do you recall how the identification was done in Mr.
8 Owens' case?

9 A. I believe they found him in a ditch in a cemetery, got
10 him out, took him back to the house. I believe she was in an
11 ambulance, and I think that's how that was done.

12 Q. Okay. So she was -- the victim was in the back of an
13 ambulance when the identification was done?

14 A. I believe so.

15 Q. And he was -- it was a single person showup?

16 A. I believe so.

17 Q. And he was brought there by police officers?

18 A. Correct.

19 Q. Are you familiar with caselaw that would maybe be
20 directly on point that would say that's kind of unduly
21 suggestive at that point?

22 A. Correct.

23 Q. So had there been a Neil v. Biggers hearing, do you
24 think you could have gotten past at least the first prong?

25 A. Honestly? No.

1 Q. No. Is that because of the Judge or the law?

2 A. I would have to go with I don't think Judge Williams
3 would have granted it.

4 Q. Okay. I understand that. But there was no objection to
5 preserve the issue for appeal.

6 A. That's correct.

7 Q. Are you familiar with Mr. Owens' appellate attorney did
8 argue that issue on appeal?

9 A. I saw that.

10 Q. And that the Court of Appeals found it was unpreserved.

11 A. Yes.

12 Q. Okay. So, understandably, the Judge might not have
13 granted you that you made it past the first prong. Caselaw
14 might suggest that you could have possibly.

15 A. Possible.

16 Q. Do you know the second prong -- despite the fact it was
17 unduly suggestive, are there other circumstances that make it
18 reasonably reliable?

19 A. Mm-hmm.

20 Q. And then you'd get to go through the factors.

21 A. Sure.

22 Q. How long did the victim see the assailant, was she shot
23 in the leg -- which she was in this case -- was she in the
24 back of a stretcher, all this could have been brought out
25 during a prehearing before the trial.

1 A. Could have, yes.

2 Q. Okay. Now, getting back to the testimony of the
3 description, as the victim is testifying that he had lots of
4 hair and that she can see his face, despite the fact that he
5 was wearing a ski mask, that she can see his lips and his
6 eyes and other physical features, did you object at that
7 time?

8 A. No.

9 Q. Did you move for a mistrial based on the representation
10 the solicitor would not be doing a --

11 A. No.

12 MR. LEONARD: Okay. May I beg the Court's indulgence?

13 THE COURT: Yes.

14 Q. Do you recall from the trial that the victim during the
15 identification was on a spinal board, strapped in, in the
16 back of an ambulance?

17 A. I don't recall how she was strapped. I think she was
18 sitting up, I think.

19 Q. But you do agree that she was in the back of an
20 ambulance when identification was made.

21 A. Right.

22 MR. LEONARD: I don't believe I have any further
23 questions for Mr. Mellard. Thank you, Your Honor.

24 MS. HARRIGAN: Your Honor, may we have a brief restroom
25 break?

1 THE COURT: Of course. We'll take a comfort break.

2 (Recess held.)

3 CROSS-EXAMINATION BY MS. HARRIGAN:

4 Q. Mr. Mellard, you testified on direct that you've been
5 practicing law for a while, can you --

6 A. Practicing law since '97, I think; been with the public
7 defender since 2005.

8 Q. And what's your current position in the public
9 defender's office?

10 A. Just a regular public defender.

11 Q. And you've been there since -- I apologize.

12 A. No, we don't have titles.

13 Q. Used to Richland County. I apologize.

14 So obviously you were appointed on this case.

15 A. Actually, Michael Culler was. I got the case from him.
16 He was another public defender in the office.

17 Q. How long did you have this case before trial?

18 A. About a year, maybe a little bit more than a year.

19 Q. And I believe early out in direct it came out that Mr.
20 Owens wasn't a cooperative client.

21 A. Not -- not really, no.

22 Q. Were you able to meet with him at all before trial?

23 A. I was.

24 Q. How many times did you meet with him?

25 A. Let's see, we got the case in 2006. That was when

1 Michael Culler got it. I got it transferred to me July the
2 30th. August of '08 I believe the defendant was in Las
3 Vegas. He had a court appearance coming up, but I don't
4 think he made that court appearance. September of '08 we
5 talked about a bench warrant that had been issued for him.
6 October 30th of 2008 we had a phone conference with him,
7 asked him if he had any witnesses and alibis, which he didn't
8 have. April 2009, had another phone conference with him. I
9 met with him, let's see, May 12th of 2009. He was in South
10 Carolina. At that time we went over his discovery, talked
11 about his offer, talked about witnesses or alibis, didn't
12 have any of those.

13 Q. When you said talked about the offer, what was the
14 offer?

15 A. I believe it was ABHAN, it was -- there had been many
16 offers given in the case. One was I believe ABHAN for eight;
17 one was just regular ABHAN, no particular number given. So
18 then, let's see, May, let's see, I think 28, 2009, another
19 phone conference. At that time he told me he'd provide a
20 written version of his story within seven days. Never did
21 get a written version of his story. July 23rd, 2009, that's
22 when I got in touch with my investigator and had him start
23 trying to find something in this case. Let's see, July
24 24th --

25 Q. When you say you got with your investigator and had him

1 try to find something, did he end up doing a report for you?

2 A. He did reports -- a couple of reports. I believe he
3 read them into the transcript at our pretrial hearing.

4 Q. Anything useful in terms of either an alibi defense or
5 witnesses that could be called at trial?

6 A. No. We didn't get his story until, let's see, his
7 version -- we got his version on around August of 2009.
8 That's when we got his version.

9 Q. What was his version?

10 A. As I remember his version, he had met some girl named I
11 believe it was Diana. I don't think he knew her last name.
12 They had gone back to her house. I believe the next morning,
13 around 5:00 or so in the morning, he told her take me
14 somewhere because he didn't want to spend the night at her
15 house, and then I believe on the way she got mad at him and
16 dropped him off, and that's how he said he ended up in the
17 cemetery.

18 Q. And this cemetery where he was found that you testified
19 to on direct was -- do you recall how far it was from the
20 victim's residence?

21 A. I don't know how far it is, but it's -- it's pretty
22 close. I mean, it's within a mile, maybe half a mile.

23 Q. If the transcript indicates that it's within less than
24 an eighth of a mile, would you dispute that?

25 A. I'm not good with distances, but that's probably close.

1 Q. Very close?

2 A. Yes.

3 Q. And he was apprehended around 6:00 a.m., correct, or
4 6:30, shortly after the incident, within 15 minutes?

5 A. Yes.

6 Q. Do you recall if it was within 15 minutes of the
7 incident?

8 A. I don't recall the exact amount of time.

9 Q. Short time, though?

10 A. Short time.

11 Q. And no alibi was ever given for during the time.

12 A. No, hm-mm.

13 Q. And no additional witnesses were provided to you?

14 A. No. Like I said, we couldn't -- he didn't give us the
15 last name of the girl, so we couldn't locate the girl.

16 Q. And you testified that at the time of your
17 representation, when you took over for Michael Culler, Mr.
18 Owens was aware of the gunshot residue results.

19 A. Yes, mm-hmm.

20 Q. And to the best of your recollection he'd been informed
21 by Mr. Culler that they were positive.

22 A. That's what Mr. Owens kept saying.

23 Q. Did you explain to him that they were inconclusive in
24 regards to one of the four areas tested?

25 A. We talked about inconclusive, yes.

1 Q. Did you explain to him what inconclusive meant?

2 A. Yes, it's neither positive nor negative.

3 Q. And he knew at that time that it was just the one -- you
4 knew at the time it was one round lead particle?

5 A. I can't tell you that I knew for sure it was one
6 round -- I mean, I don't remember how many particles I knew.

7 Q. But you knew there was at least one round lead particle.

8 A. Correct.

9 Q. Had you previously had cases involving gunshot residue
10 through your tenure at the public defender's office?

11 A. Maybe. I'm not sure where this fell. This is pretty --
12 let's see --

13 Q. In 2009, August of 2009.

14 A. 2009, I probably had.

15 Q. Do you recall how many you might have had?

16 A. No, that I don't.

17 Q. I believe you testified you were expecting testimony
18 from Agent Roberts from SLED, correct?

19 A. Correct. It wasn't definite, but it was always a
20 possibility.

21 Q. And I believe you testified you had prepared some
22 cross-examination questions in case he was called?

23 A. Yes.

24 Q. You had co-counsel on this case, correct?

25 A. Yes.

1 Q. Peggy Hinds?

2 A. Peggy Hinds.

3 Q. And had she also been at your office for -- she wasn't
4 new to your office at the time of the trial.

5 A. No.

6 Q. Do you recall whether she'd had any cases involving
7 gunshot residue prior to this one?

8 A. That you'd have to ask her, but I'm almost positive she
9 has, but you need to ask her to be certain.

10 Q. Were you surprised when Agent Roberts gave the testimony
11 regarding cheap Chinese fireworks and smelting lead being the
12 only way to get round lead particles besides firing a gun?

13 A. Caught me a little by surprise, yes.

14 Q. Have you had any gunshot residue cases since this case?

15 A. Yes.

16 Q. Have you consulted with an expert to review the
17 materials?

18 A. Yes.

19 Q. What has been the result of an outside expert in those
20 cases?

21 A. What I do is I send inconclusive results to him and -- I
22 can give you an example. Last case I sent to him, said could
23 this be Chinese fireworks or anything like that, and he said
24 the only thing it could be was either gunshot residue or a
25 grenade.

1 THE COURT: Or what?

2 THE WITNESS: Or a grenade.

3 THE COURT: Grenade.

4 Q. Did you end up using that expert at trial?

5 A. No.

6 Q. Have you since used a gunshot residue expert --
7 independent expert at trial?

8 A. No.

9 Q. And why is that?

10 A. Generally, they tend to not help us.

11 Q. Can you elaborate on that a little bit?

12 A. Well, the grenade part didn't really help at the last
13 trial. It didn't really add to our case.

14 Q. Not much better than a gun?

15 A. Yes, right.

16 Q. Would you say that Agent Roberts' three scenarios, or
17 now four today, or three scenarios at the time, have they
18 been supported by your independent experts reviewing
19 materials?

20 A. Honestly, when I asked the last fellow about Chinese
21 fireworks, I don't really think that he would -- I don't
22 think he really believed I was really asking if it was
23 Chinese fireworks.

24 Q. Christmas lights.

25 A. Christmas lights or whatever it was.

1 Q. And you testified that you did not contact Agent Roberts
2 prior to trial?

3 A. That's correct.

4 Q. Why not?

5 A. Honestly, most of the stuff I was trying to do was with
6 the defendant. I was trying to get him to cooperate with us.

7 Q. And, again, there wasn't a positive reading. There was
8 just an inconclusive.

9 A. That's right, it was inconclusive.

10 Q. On one of the four parts of his hand.

11 A. I believe it was his back right, I believe.

12 Q. And I believe you testified before that you did argue
13 contamination during your closing argument.

14 A. I did not. Peggy Hinds did, yes.

15 Q. But it was argued on behalf of the defendant by the
16 defense team.

17 A. I believe so, yes.

18 Q. So it was available for the jury's consideration.

19 A. They could consider it.

20 Q. Do you recall when the gunshot residue test was taken
21 from the defendant?

22 A. That I don't know. I don't have it in front of me, so I
23 don't know.

24 Q. Do you agree that it was taken within two hours of the
25 incident time?

1 A. I think that's probably correct.

2 Q. Did Mr. Owens ever in his version of facts, I believe is
3 what you stated before, tell you that he'd been around
4 smelting lead?

5 A. No.

6 Q. Cheap Chinese Christmas lights?

7 A. No.

8 Q. Or grenades?

9 A. No.

10 Q. In regards to his second issue, you moved for a Neil v.
11 Biggers hearing, correct?

12 A. Yes.

13 Q. And the Court ultimately determined it wasn't necessary.

14 A. Yes.

15 Q. And this was after some representations made by the
16 State, correct?

17 A. Yes, ma'am.

18 Q. And at this point the Court had already ruled you
19 weren't going to get the hearing, correct?

20 A. I believe that's correct. I'd have to read the
21 transcript to make sure, but I believe that's correct.

22 Q. On the stand the victim identified Mr. Owens, correct?

23 A. Yes.

24 Q. She identified his clothing that he was wearing when he
25 was arrested, correct?

1 A. Yes.

2 Q. As well as some facial features involving his lips and
3 overall build and body shape?

4 A. Yes.

5 Q. And this was a showup lineup, correct?

6 A. Yes, it was.

7 Q. Are you aware that our appellate courts have ruled that
8 showup lineups are valid previously?

9 A. They're not favored, but yes, I believe they are valid.

10 Q. And this showup lineup was shortly after the incident.

11 A. It was.

12 Q. Do you recall how shortly after?

13 A. I can't tell you exactly.

14 Q. Do you think within an hour maybe?

15 A. Probably within an hour, yes.

16 Q. And this is after she'd been shot?

17 A. Shot in the thigh, I believe.

18 Q. And you highlighted this to the jury on your
19 cross-examination?

20 A. That she was shot in the thigh?

21 Q. That she'd been shot when she was identifying him.

22 A. Oh, right.

23 Q. And you highlighted that she was in the back of an
24 ambulance at that time?

25 A. I believe I did.

1 Q. Do you recall also highlighting during your
2 cross-examination that the suspect had had a mask on his
3 face?

4 A. Yes.

5 Q. Do you recall cross-examining her -- what was your
6 overall strategy for your cross-examination of the victim?

7 A. To pretty much get the fact that there were other things
8 going on rather than just staring at the person that was at
9 the doorway, or wherever he was at. She was hurt, she was
10 scared, it was 6:30 in the morning, it was early, so I just
11 wanted to kind of cast a little doubt that what she saw was
12 exactly correct.

13 Q. Show the jury that it was kind of incredible that she
14 was able to identify this masked man after she'd been shot,
15 in the back of an ambulance at dusk -- or dawn?

16 A. That's what I was hoping.

17 Q. Did you move for a mistrial when she -- or you didn't
18 move for a mistrial when she identified him.

19 A. I did not.

20 Q. Why not?

21 A. I don't really know. I guess, in hindsight, I probably
22 would. Whether or not it would be granted or not, probably
23 not, but it was an issue I maybe could have saved for him on
24 appeal.

25 Q. Why do you think it wouldn't have been granted? Had you

1 been in front of Judge Williams before?

2 A. I'd been in Judge Williams' court a lot.

3 Q. Based on your previous experiences with him --

4 A. Based on my years of being in front of Judge Williams,
5 not a whole lot of motions were granted.

6 Q. And again, at the time of the trial were you aware of
7 cases as recent as 2003 where our appellate courts have
8 upheld showup lineups?

9 A. I know they've upheld them.

10 Q. In situations similar to this are you aware of any,
11 particularly State v. Brown?

12 A. Well, each case is on its own merits, but I don't want
13 to speculate how it would have gone.

14 Q. There was other evidence of guilt here independent of
15 the identification and the gunshot residue inconclusive test,
16 correct?

17 A. That's correct.

18 Q. What was this other evidence?

19 A. Well, the fact -- I think the biggest thing was we
20 couldn't explain why he was in a ditch in a cemetery at 6:30
21 in the morning. That was kind of what we were hoping to get
22 some sort of explanation when we were meeting with him
23 because that seemed to me to be pretty -- it was a weak link
24 in our case.

25 Q. Extremely close to the victim's home, correct?

1 A. Yes, mm-hmm.

2 Q. And within an extremely short period of time from when
3 the incident occurred.

4 A. Correct.

5 Q. He ran from law enforcement when he was first
6 recognized, correct?

7 A. Yes.

8 Q. And when he was caught, he was extremely sweaty, out of
9 breath, correct?

10 A. I believe that's what they said.

11 Q. Was there any testimony as to whether he appeared
12 nervous?

13 A. I don't remember.

14 Q. But there was evidence of flight that he did take off --

15 A. Right.

16 Q. -- once spotted within an eighth of a mile of the
17 victim's home?

18 A. Yes.

19 MS. HARRIGAN: Court's indulgence.

20 THE COURT: Okay.

21 Q. And again, you did not do the closing argument. That
22 was your co-counsel, Ms. Hinds.

23 A. Correct.

24 Q. Did you discuss any strategy with her regarding closing
25 arguments?

1 A. I believe. We usually do. We try cases together. We
2 usually talk about it.

3 Q. Do you recall what the strategy behind your closing was
4 here?

5 A. I would assume whatever was in the closing was our
6 strategy, but I don't really remember what our conversation
7 was.

8 Q. Do you recall also highlighting to the jury during your
9 cross-examination of the victim that she was primarily
10 looking down while she was face-to-face with the gunman?

11 A. I believe so.

12 Q. Perhaps getting her keys at his request?

13 A. That's right, she was fumbling for her keys, I think.

14 Q. Do you recall highlighting to the jury that she also had
15 a gun at her head or face during this time?

16 A. Correct.

17 Q. Do you recall highlighting for the jury that she wasn't
18 able to really recall timeframes involving this incident?

19 A. I believe that's correct.

20 Q. And again, you highlighted that he had a ski mask
21 covering his entire face.

22 A. Correct.

23 MS. HARRIGAN: No further questions, Your Honor.

24 THE COURT: All right. Redirect?

25 MR. LEONARD: Thank you, Your Honor, may it please the

1 Court.

2 REDIRECT EXAMINATION BY MR. LEONARD:

3 Q. The victim said that the assailant was wearing a mask.

4 Was a mask ever found?

5 A. No.

6 Q. There was a gun involved. Was the gun ever found?

7 A. No.

8 Q. So when the attorney general mentioned that there was
9 other evidence in this case, we basically have three main
10 paces of evidence. We have the GSR, the victim ID, and the
11 location of Mr. Owens where he was apprehended --

12 A. Correct.

13 Q. -- that's a pretty good summation?

14 Are you familiar with the caselaw saying mere presence
15 to a crime scene is not enough?

16 A. Correct.

17 Q. Are you familiar with the caselaw that flight,
18 generally, even from a crime scene, is not sufficient to
19 support a conviction?

20 A. That's correct, not by itself.

21 Q. So, hypothetically, let's say your Neil v. Biggers
22 hearing is granted. We have State v. Moore that says a
23 single person showup, taken to the crime scene, surrounded by
24 police officers, wearing similar clothing identified, is
25 patently unduly suggestive. In front of maybe not Judge

1 Moore (sic) but maybe on an appeal it would get you at least
2 to the second prong of a Neil v. Biggers.

3 A. Okay.

4 MS. HARRIGAN: I would object. I don't think he's asked
5 the witness whether he's ever read the case that he's
6 referencing.

7 Q. I'm sorry. Are you familiar with State v. Moore? It's
8 a 2000 opinion case from the State Supreme Court.

9 A. You're going to have to show it to me. I don't remember
10 names.

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

12 THE COURT: You may.

13 Q. If you would just read from the arrows to the arrows.

14 A. Do you want me to read it out loud?

15 Q. If you don't mind just reading it out loud.

16 A. "Here the witness was brought to a location where two
17 individuals wearing clothing similar to that described by the
18 witness were surrounded by uniformed police officers, is
19 patently the show up procedure used -- it is patent the
20 showup procedure used was unduly suggestive."

21 Q. Would it be fair to say that the situation described in
22 this case is similar to that of the showup of Mr. Owens?

23 A. Could be.

24 Q. Okay. You mentioned that sometimes in front of Judge
25 Williams even maybe proper motions aren't necessarily

1 granted.

2 A. Okay.

3 Q. We'll assume that, judicial notice.

4 The point, appellate-wise --

5 THE COURT: Tell me what the question -- I'm so sorry.

6 Let me hear the question again.

7 MR. LEONARD: Sometimes motions aren't granted that
8 maybe should be in general.

9 THE COURT: Okay. Okay. I just didn't hear the second
10 part of your question.

11 MR. LEONARD: I'm sorry.

12 Q. In general sometimes motions that maybe should be
13 granted aren't granted.

14 A. That's possible.

15 Q. Part of criminal law.

16 A. That's the way it is.

17 Q. And that's why in our system we have a Court that
18 reviews these type of arguments.

19 A. Right, yes.

20 Q. Okay. But the only way to get to that review level is
21 to make a contemporaneous objection.

22 A. Correct.

23 Q. And one was not made in this case.

24 A. Correct.

25 Q. Okay. You've mentioned that since the time of this case

1 you have consulted with gunshot residue experts when
2 specifically you have an inconclusive report.

3 A. It depends on the case, but yes. I did the last murder
4 case we had.

5 Q. Has the issue of contamination ever been brought up?

6 A. Generally, not by the expert.

7 Q. Not by the expert?

8 A. No.

9 Q. Are these cases where you have a lot of GSR located?

10 A. I'm trying to remember. I believe there was more than
11 one round lead particle in the last one.

12 Q. Did you hear Agent Roberts' testimony today regarding
13 contamination?

14 A. Right, yes.

15 Q. Do you think, and again this is hindsight, the
16 contamination -- that testimony, if elicited during Mr.
17 Owens' trial, might have provided some doubt to the jury or
18 at least -- let me rephrase -- maybe put forth another
19 possibility during cross of why that round lead particle was
20 found?

21 A. I guess it could have.

22 Q. And I hate that I'm going back and forth on you here,
23 but turning back to the Neil v. Biggers issue, what is the
24 concern that defense attorneys, and maybe the whole criminal
25 justice system, have against eyewitness identification?

1 A. Well, whether or not it's reliable or not. There's been
2 some question about that.

3 Q. There has been some -- quite a bit of question about the
4 reliability of eyewitness identification.

5 A. Seems to be more academic than anywhere else, but yes, I
6 think it's -- in certain circles there is some question, yes.

7 Q. So the purpose of the Neil v. Biggers hearing is to
8 determine the reliability of that identification.

9 A. Correct.

10 Q. And that's part of a due process constitutional right.

11 A. Well, that would be for the Court to decide; but, yes, I
12 think you could bring it up to the appellate court, see what
13 they say.

14 Q. All right. I think I have one final question. Did you
15 object to the testimony of Agent Roberts based on the fact
16 that the results were inconclusive and not to a reasonable
17 degree of scientific certainty?

18 A. No.

19 MR. LEONARD: Thank you.

20 THE COURT: Any recross?

21 MS. HARRIGAN: Briefly, Your Honor.

22 THE COURT: All right.

23 RECROSS-EXAMINATION BY MS. HARRIGAN:

24 Q. Are you aware of any cases that have come out since the
25 Moore case -- do you know when the Moore case came out?

1 A. Give me -- you're going to have to -- 2002?

2 Q. 2000.

3 A. 2000.

4 Q. How often do you review the advance sheets and cases
5 that come out from our appellate courts?

6 A. How often?

7 Q. Yes.

8 A. I tend to be in court more than I'm able to sit down and
9 read things, so it's more case specific.

10 Q. Are you aware of a 2003 decision that came out after
11 Moore, State v. Brown specifically, dealing with showup
12 lineups?

13 A. Not off the top of my head.

14 Q. Are you aware that our Court has determined that showup
15 lineups are valid when you take into account a variety of
16 factors including whether or not the suspect has had time to
17 alter his looks, how soon it is to the time of the crime?

18 A. I understand that you let it in. I can't tell you it's
19 from that particular case.

20 Q. And again, during Agent Roberts' testimony or
21 cross-examination at the trial you did -- do you feel like
22 you were able to successfully highlight to the jury that
23 inconclusive is not positive?

24 A. That's what we were trying to get across.

25 Q. Do you think you were able to successfully do that?

1 A. I think we did, when you couple that with the closing
2 argument.

3 Q. Can you elaborate on that?

4 A. Well, our closing argument -- well, it wasn't mine. It
5 was actually Ms. Hinds' closing argument. We talked about
6 the -- he was kind of -- we talked about the fact that it
7 could have been contaminated, that it could have been put
8 there by brushing up against a police officer. So, you know,
9 I mean, what the jury believed I don't know.

10 MS. HARRIGAN: No further questions, Your Honor.

11 THE COURT: All right. Now, is this witness free to
12 leave?

13 MR. LEONARD: Please.

14 THE COURT: Any objection?

15 MS. HARRIGAN: No objection.

16 THE COURT: Very well. Call your next witness, please.

17 MR. LEONARD: The appellant would rest at this time,
18 Your Honor.

19 THE COURT: All right.

20 MS. HARRIGAN: The State would call Margaret Hinds to
21 the stand.

22 MARGARET ELIZABETH HINDS,
23 being first duly sworn, testified as follows:

24 THE COURT: Your witness.

25 MS. HARRIGAN: Thank you, Your Honor.

1 DIRECT EXAMINATION BY MS. HARRIGAN:

2 Q. Ms. Hinds, how long have you been practicing law?

3 A. I'm in my 17th year.

4 Q. How long have you been at the -- where are you currently
5 employed?

6 A. The Orangeburg Public Defender's Office.

7 Q. How long have you been there?

8 A. 17 years.

9 Q. So your practice is exclusively comprised of criminal
10 defense.

11 A. Correct.

12 Q. What's your previous experience with gunshot residue in
13 cases?

14 A. I've had plenty of cases that involved gunshot residue
15 because I practice in Orangeburg. We have a lot of weapons
16 charges, that kind of gun violence.

17 Q. Have you had to consult with -- have you ever previously
18 consulted with your own independent gunshot residue expert?

19 A. I have.

20 Q. What is the -- have you consulted when the results have
21 been inconclusive?

22 A. To my recollection I have never been involved in a case
23 where it came back inconclusive and the prosecution was
24 pushing the issue or even bringing it up.

25 Q. So this is the only issue where you've had a SLED expert

1 come and testify with inconclusive results?

2 A. To my recollection, yes.

3 Q. Were you expecting testimony from -- was this your case
4 or was this Mr. Mellard's case?

5 A. It was Mr. Mellard's.

6 Q. Do you traditionally have more than one public defender
7 for trials?

8 A. Almost always.

9 Q. Do you often try cases alongside Mr. Mellard?

10 A. I do.

11 Q. What is your overall strategy when trying cases
12 together, or how do you work together?

13 A. We pretty much do everything together. We brainstorm.
14 We try to look at what we have, what we don't have, and try
15 to pick the best direction that we think is going to get the
16 best results for the client.

17 Q. How long before the trial were you involved in this
18 case?

19 A. I don't remember. I came in -- I certainly wasn't in it
20 for the whole year. I think I came into it closer to when we
21 knew there was going to be a trial.

22 Q. And you helped with trial preparation?

23 A. I did.

24 Q. Would you agree with the previous testimony and
25 statements that Mr. Owens was less than a cooperative client?

1 A. Very much so.

2 Q. Was that a challenge in preparing for his defense and
3 trial?

4 A. It was.

5 Q. Do you recall whether he had been able to view the
6 gunshot residue report from SLED during your -- you and
7 Doug's representation of him?

8 A. Yes, he was aware of it.

9 Q. Did you ever discuss with him what inconclusive meant?

10 A. We basically said it -- basically told him that it was
11 inconclusive, that the agent would not be able to say
12 positively that it was gunshot residue.

13 Q. And you've never independently consulted with an expert
14 on an inconclusive test before or since.

15 A. To my recollection, no -- well, since our policy now in
16 the office is that we're always going to have an expert
17 double-check those results; so as a result of this we have
18 changed policy a little bit because we felt like we were not
19 prepared for that, so we are more prepared for the -- for
20 that in the future, but as to Mr. Owens' trial, we argued
21 that contamination was a very real possibility.

22 Q. When you say your policy is now to double-check, have
23 you since used an expert when gunshot residue is at issue?

24 A. No.

25 Q. You just haven't had any cases requiring it since '09?

1 A. Haven't had any cases where it would be to our advantage
2 to actually bring in our expert to testify.

3 Q. But you've consulted with them outside of court.

4 A. Yes.

5 Q. What are some of the results of these consultations?

6 A. Basically we want to make sure that we're not going to
7 get any other testimony that might be coming from -- the
8 Chinese Christmas lights, I mean, it was just kind of like
9 from out of nowhere; and our basic strategy with that agent
10 was we knew he was hostile, we didn't know what in the world
11 he was going to say more, we wanted to nail him down -- I
12 think the last thing we got him on record is stating again
13 that it was inconclusive.

14 Q. So your strategy was not to have him up there longer and
15 possibly make your case worse for Mr. Owens.

16 A. Exactly.

17 Q. And again, you argued contamination during your closing
18 argument?

19 A. I did.

20 Q. Were you involved in the decision to move for a Neil v.
21 Biggers hearing the beginning of the case?

22 A. Yes.

23 Q. And the Court ultimately -- what was your reasoning
24 behind moving for a Neil v. Biggers hearing?

25 A. Basically to err on the side of caution. We knew that

1 that was -- that the identification was obviously the issue
2 in this case.

3 Q. And you received some representations from the
4 solicitor's office that it would just be physical build and
5 clothing type.

6 A. Correct.

7 Q. And at that time Judge Williams denied even giving a
8 hearing.

9 A. That would be correct.

10 Q. But you did -- strike that.

11 And you did not cross-examine the victim in this case.
12 She was Mr. Mellard's witness, correct?

13 A. That's correct.

14 Q. Did you highlight inconsistencies in her testimony
15 between what she had previously reported to law enforcement
16 and her testimony in court during your closing argument?

17 A. I did.

18 Q. What are some of those inconsistencies that you
19 highlighted for the jury?

20 A. The fact that she doesn't tell any of the officers about
21 a lot of hair or any of the facial feature testimony that
22 ultimately came out. That would be examples.

23 Q. And was your overall strategy just to, can you
24 categorize your overall strategy in regards to refuting her
25 in-court identification?

1 A. Basically that this all happened very, very quickly, by
2 her own admission; she had never seen this guy before; that
3 she was relying on fairly common clothing; and that the guy
4 was masked. I mean, I argued that there's no way she could
5 have made an identification.

6 MS. HARRIGAN: No further questions, Your Honor.

7 THE COURT: All right. Cross-examination.

8 CROSS-EXAMINATION BY MR. LEONARD:

9 Q. Hi, Ms. Hinds. You stated in your direct that Mr.
10 Owens' trial was kind of a lesson learned as far as the GSR
11 testimony, at least with Agent Roberts.

12 A. Yes, it was. I'll be the first to admit it.

13 Q. His testimony today, having now heard that, if he was
14 before you, is that an issue that you would go into, the
15 contamination?

16 A. Again, it would depend on the situation. It would be
17 dependent on how the agent -- sometimes it's a good idea to
18 get in there and get all the information that you can.
19 Sometimes the best strategy is to get in and get out.

20 Q. Had you met with Agent Roberts about this case
21 beforehand?

22 A. No.

23 Q. You said obviously the victim ID was a big issue in this
24 case.

25 A. Correct.

1 Q. And that's the kind of ID that a Neil v. Biggers hearing
2 addresses before the trial starts.

3 A. Correct.

4 Q. One of the critical things a defense attorney does is
5 preserve the record for appeal; is that correct?

6 A. That would be correct.

7 Q. And the only way to preserve the record is to make the
8 contemporaneous objection?

9 A. Yes.

10 Q. In Mr. -- in the solicitor's closing do you recall him
11 saying that the victim was 100 percent certain when she had
12 made that identification?

13 A. I don't recall that, but if you're saying it's in there,
14 I believe you.

15 Q. And do you recall that the fact the victim was attached
16 to a spinal board was brought out in testimony when she made
17 the identification?

18 A. It was. I believe I argued that in my closing also.

19 Q. You did, Ms. Hinds. Would you agree that, had the Neil
20 v. Biggers hearing been allowed, that at least the first
21 prong would have been satisfied in this case under caselaw?

22 A. Probably.

23 Q. Now, you mentioned that Mr. Owens was not very
24 cooperative.

25 A. No, sir.

1 Q. Does that sometimes happen in the public defender's
2 office?

3 A. Often.

4 Q. Have you ever had to try a case -- ever had a client
5 TIA'ed, tried in his absence?

6 A. Oh, yes.

7 Q. Not a fun experience.

8 A. No, it is not.

9 Q. But you still do the very best job you can for them.

10 A. Absolutely.

11 Q. Even when they're no help whatsoever.

12 A. Correct.

13 MR. LEONARD: Thank you very much, Ms. Hinds.

14 MS. HARRIGAN: No redirect, Your Honor.

15 THE COURT: All right. And I know they rode together.
16 Are both these folks free to go?

17 MS. HARRIGAN: Certainly, Your Honor.

18 MR. LEONARD: They may.

19 THE COURT: All right. Call your next witness, please.

20 MS. HARRIGAN: No additional witnesses.

21 THE COURT: All right. Is there any reply/rebuttal?

22 MR. LEONARD: There is no rebuttal, Your Honor.

23 THE COURT: Okay. All right.

24 MR. LEONARD: I would have a brief closing summation.

25 THE COURT: Yes, that would be fine.

1 MR. LEONARD: Your Honor, obviously we're here under the
2 Strickland test. The first prong is was there deficient
3 performance. I think by counsel's own admission there was a
4 failure to object during certain critical stages of the
5 trial. These issues were argued on appeal, and the Court of
6 Appeals wasn't able to address them because they were
7 unpreserved. I think under caselaw that in itself is a
8 deficient performance.

9 Second, we're dealing with a GSR. We have a case, R v.
10 Cato, talks about investigation that a trial counsel has to
11 perform, especially in light of expert testimony: Research,
12 consulting private -- your own expert, just to prepare for a
13 vigorous cross-examination. In this case the trial
14 transcript notes that there was nine questions asked, all of
15 them just re-eliciting what was brought out on direct
16 testimony. Ms. Hinds is correct, in closing they did mention
17 contamination. I don't know if they referred to it as
18 contamination, but wiping off is possible, but on cross that
19 idea was never put forth to the jury.

20 On those two issues I think we have at least met the
21 first prong of Strickland. The second obviously is does it
22 matter. We've heard testimony that there's three pieces of
23 evidence in this case. There's the identification that was
24 never subject to a Neil v. Biggers hearing. There was the
25 GSR test that, you know, in light of the Court's reasoning,

1 was not admitted to a degree of certainty, even on this
2 stand, and wouldn't have been had questioned at the trial
3 court. I believe it was inadmissible because of the
4 inconclusiveness.

5 So we have those two pieces and next we have the fact
6 that Mr. Owens was located in the cemetery, not far away from
7 the crime scene, not long after the shooting. That does look
8 bad. However, the caselaw is very clear that mere presence
9 to a crime scene alone is not enough to convict. Second,
10 even flight from a crime scene is not alone enough to
11 convict, maybe not even alone enough to get past the directed
12 verdict stage of a trial. So clearly, had that been the only
13 testimony or the only evidence presented at court, there
14 would have been a much different outcome to this trial.

15 Mr. Owens was 25 years old at this time. He was raised
16 in Columbia, got a basketball scholarship to Kings College in
17 Bristol, Tennessee, went to Switzerland and played
18 professional basketball for over a year. Came back to
19 Orangeburg, has never had a criminal conviction in his life,
20 and then is arrested for this charge. With all respect, Your
21 Honor, we do believe that we met both prongs of the
22 Strickland test. Mr. Owens would like a new trial in this
23 case. He's aware that he could face more time, but he has
24 maintained his innocence through this entire procedure, and
25 we believe if some of these errors had been corrected, the

1 outcome would have been different for Mr. Owens. Thank you.

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

3 MS. HARRIGAN: I'm a little alarmed by counsel's
4 comments that the second prong doesn't matter or is
5 irrelevant. Strickland is very clear you must show both
6 deficiency and prejudice, and to show prejudice it's but for
7 counsel's deficiency or unprofessional errors, the result of
8 the proceeding would have been different. The State argues
9 you need to show prejudice in both prongs. Just because he
10 was convicted is not enough that prejudice need not be
11 analyzed and strongly urges the Court to analyze prejudice in
12 regards to both of these issues. In regards to the Neil v.
13 Biggers issue the State would argue there was no deficiency.
14 We've got testimony from both members of co-counsel that they
15 argued that the identification was not reliable in closing
16 and also highlighted this during --

17 THE COURT: Can you do this, because I need to get to
18 those pages, where did he testify regarding his opinion
19 because all that I am mindful of is that we've got no, no --

20 MS. HARRIGAN: Are you talking in regards to the second
21 issue, Your Honor?

22 THE COURT: No. I just want to go to the expert because
23 here's what I want to focus on: I got no, no, inconclusive,
24 no.

25 MS. HARRIGAN: The expert's testimony begins on page

1 134.

2 THE COURT: All right. So let's talk about what came
3 in. That's what I'm not clear about, and after listening to
4 him I'm not clear about it.

5 Let's see. Here it is, line 15 on 142, "Back of the
6 right hand was inconclusive. Okay. Explain to the jury what
7 your findings were that lead you to put that as being
8 inconclusive. We have to have a certain number of particles
9 before we call it a positive. It's not enough for me to call
10 it a positive but it's not a negative either.

11 (Brief pause.)

12 THE COURT: Okay.

13 MS. HARRIGAN: Would Your Honor prefer me to address
14 that second issue first?

15 THE COURT: I think so. I just note at 145, Line 16:
16 "Question, right, but you don't know, you cannot say for
17 certain it was gunshot residue." 18: "Answer, it was round
18 lead, there was not gunshot residue." 19: "Round lead. It
19 was not gunshot residue. All right. Thank you." And then
20 there was no redirect.

21 MS. HARRIGAN: Yes, and the State would contend that
22 there is no deficiency shown here that this was ineffective
23 cross-examination. Additionally, we had both members of
24 co-counsel testify that there was a strategic reason for
25 having a very directed, focused and short cross-examination.

1 I believe both of them identified him as a hostile witness,
2 that they could tell he could potentially harm their case
3 much more, that while they were surprised by that comment
4 regarding the cheap Chinese fireworks, that they wanted to
5 keep it to be a very short, directed cross-examination, and
6 the ultimate conclusion he gave to the jury is that it is
7 round lead, it is not gunshot residue. That's the last thing
8 the jury heard from this witness. Strategic reason was
9 given, so there can be no deficiency.

10 In regards to the second prong of Strickland, prejudice,
11 Agent Roberts testified today that he can't testify to a
12 reasonable degree of scientific certainty that there even was
13 any contamination. Additionally, we had testimony from him
14 that it's highly unlikely that round lead particles would be
15 found without being around a gun as it was fired or firing a
16 gun and that it was also highly unlikely that you would have
17 all three elements within one particle, which is what was
18 found here on the left palm. So the State would argue,
19 respectfully, to the Court that there's both no deficiency
20 and no prejudice and Strickland has not been satisfied with
21 regards to the second issue.

22 In regards to the first issue, the Neil v. Biggers
23 issue, the State would argue that there is no deficiency,
24 that Mr. Mellard argued and highlighted during his
25 cross-examination of the victim that her testimony was not

1 reliable, that I believe he characterized or agreed with the
2 characterization to show that it was just absolutely
3 incredible that she would have been able to identify him at
4 dusk, looking down, searching for her keys with a gun at her
5 face for a very short period of time, that it just wasn't
6 reliable, it was incredible. Additionally, Ms. Hinds
7 highlighted this to the jury.

8 THE COURT: Let's walk through it. Let's walk through
9 Neil v. Biggers for a moment and let's say -- let's assume,
10 *arguendo*, that the showup is unduly suggestive, okay. Let's
11 just --

12 MS. HARRIGAN: And the Court has ruled after a Neil v.
13 Biggers that it is?

14 THE COURT: Yes, it's unduly -- I'm worried about this,
15 I think it's unduly suggestive, only person shows up and got
16 law enforcement around him. That's not necessarily the end
17 of the inquiry, right?

18 MS. HARRIGAN: No, it's not, and the State would argue
19 that under State v. Brown, which came out after the case that
20 opposing counsel cites to, the victim in that case gave a
21 good description while police had her attention. She was
22 absolutely positive it was the suspect. It was shortly
23 thereafter. It's more in line with the case we have here, so
24 the State would argue --

25 THE COURT: In other words, if you will, it's just

1 notification to the Court, be careful.

2 MS. HARRIGAN: Yes.

3 THE COURT: When you've got a showup, be careful.

4 MS. HARRIGAN: Yes.

5 THE COURT: Because it may be unduly suggestive, so look
6 beyond that.

7 MS. HARRIGAN: And it might not be as well, that a
8 determination needs to be made. Here counsel requested such
9 hearing. Judge Williams declined to give them such hearing.

10 THE COURT: And there was no exception taken, which
11 means it could have gone up on appeal. Now, up on appeal the
12 Court's then going to take a look at it, and that's when
13 you're going -- the Court would have looked at -- and would
14 have looked at the elements.

15 MS. HARRIGAN: Yes, Your Honor.

16 THE COURT: First of all, could have said was this
17 unduly suggestive. Now let's look at the rest of it. Were
18 there other indicia of reliability on the identification?

19 MS. HARRIGAN: The State would argue, yes, the
20 identification was very short.

21 THE COURT: It was a short period of time, short
22 distance away.

23 MS. HARRIGAN: Yes, wearing the --

24 THE COURT: Wearing the clothes.

25 MS. HARRIGAN: Mm-hmm.

1 THE COURT: We had some physical -- and beforehand had
2 they talked, y'all help me, had they had a conversation about
3 his lips prior to when they were talking about the Neil v.
4 Biggers?

5 MS. HARRIGAN: I believe it was mainly in regards to
6 clothing that matched the exact clothing and overall build.

7 THE COURT: Okay. So, however, that was the
8 representation that was made, and on that basis there wasn't
9 any Neil v. Biggers; but if that is deficient, then the
10 question is is it prejudicial. If you would, would there
11 have been other information that would have saved it. For
12 example, lips, body shape, clothing, time, location.

13 MS. HARRIGAN: And the State would argue, yes, that even
14 had a Neil v. Biggers been performed, that this
15 identification would have come in. I believe her testimony,
16 Shannon is -- Ms. Shannon is the victim. She had a good
17 opportunity to view the assailant during the crime. He was
18 directly in front of her, so close that in fact, when she was
19 shot, she was shot in her lower leg. They were that close.
20 The struggle went on for a few minutes. The physical
21 description that she gave police matched the description --
22 or matched Mr. Owens, additionally, the same clothing, and
23 again, it was in a very short period of time after he was --
24 after the incident occurred.

25 THE COURT: Okay.

1 MR. LEONARD: Your Honor, may I address this point?

2 THE COURT: You'll be able to finish. I'll let you
3 respond. This is where it is. This is where the issue is.
4 Okay. So you would say, even if counsel's failure to object
5 to preserve the issue for appeal, even if it was deficient,
6 was not prejudicial.

7 MS. HARRIGAN: There would be no prejudice because there
8 is caselaw to support that it would have been upheld on
9 appeal, that even had a Neil v. Biggers hearing been held,
10 this evidence would have come in regardless.

11 THE COURT: I'm with you. I got it.

12 MS. HARRIGAN: And additionally, that there is other
13 overwhelming evidence of guilt. We do have the round lead
14 particle, which I know is the other issue at issue here. But
15 he was also found, within the trial, if Your Honor reviews
16 it, he was found within an eighth of a mile of the victim's
17 home, extremely early in the morning. When spotted by police
18 within 15 minutes of the incident, took off on foot. There's
19 some testimony here that when he was arrested, he was out of
20 breath and very nervous and sweaty. The State would argue
21 there's overwhelming evidence of guilt, so even if there was
22 deficiency in regards to the Neil v. Biggers issue, which the
23 State does not concede there was deficient performance; but
24 even if there was, that there's overwhelming evidence of
25 guilt and therefore no prejudice can be shown here.

1 THE COURT: Got it. I'm with you. I've got your
2 argument. Absolutely. All right. Now, talk to me about
3 prejudice.

4 MR. LEONARD: Neil v. Biggers is a constitutional due
5 process right.

6 THE COURT: I know. I know what -- thank you. I know
7 what Neil v. Biggers is. And what it would say to the Court
8 is it would say that if you -- if you have unduly
9 suggestive --

10 MR. LEONARD: Procedures.

11 THE COURT: Such as a showup, be careful. But it
12 doesn't mean that it's inadmissible. It means that you've
13 got to be very careful with regards to the other elements,
14 and there are other elements here. However, however, we
15 don't know. I mean, it calls on us to speculate; and the
16 question then gets to be, you didn't get one. You asked for
17 one. You didn't get one. So then what would -- then it gets
18 to the point, in terms of showing prejudice, what would have
19 happened on appeal -- what would have happened on appeal,
20 right.

21 MR. LEONARD: Correct.

22 THE COURT: Right. They would have said -- the Court of
23 Appeals would have said, all right, we believe one of two
24 things, it's either going to be error or not error. And it
25 could be, we think that it was not error because we believe

1 that there was indicia to support the identification, even if
2 you thought, even if you assume, *arguendo*, that it was unduly
3 suggestive; or -- or the Court could have said that there was
4 other overwhelming evidence of guilt beyond a reasonable
5 doubt, yes, and so, while it maybe error, it wouldn't have
6 been prejudicial error; or it could have reversed.

7 MR. LEONARD: And remanded for determination of whether
8 or not the Neil v. Biggers identification was admissible, and
9 that is obviously what we believe would have happened, that
10 the Court of Appeals would have found the very not allowing
11 the hearing to be error when raised and you had an
12 identification that was made, even if it is just based on
13 building or build and clothes. We still believe that Neil v.
14 Biggers hearing is -- it's a constitutional right. It was
15 denied by the Judge. There should have been an exception
16 taken to that. So that's one issue that would have been, I
17 think, taken to the Court of Appeals, whether or not the
18 denial of the Neil v. Biggers hearing is reversible. You
19 wouldn't go to the other evidence in the case.

20 I do not believe there is overwhelming evidence of Mr.
21 Owens' guilt. We have a single inconclusive GSR test and a
22 mere proximity charge. There's no confession. There's no
23 statements given. I think the Court would have been forced
24 to speculate on whether or not this eyewitness identification
25 was admissible. He had a ski mask on. She was shot. She

1 was in pain. During the procedure where she ID'ed him she's
2 strapped in a stretcher. The police brought Mr. Owens to her
3 while she was in the ambulance. Is this the guy? She
4 probably could barely nod her head because she had the neck
5 brace on.

6 I think there's a lot of grounds that the Court of
7 Appeals could have been very cautious of this identification,
8 especially as you see the national trend towards being very
9 speculative of eyewitness identifications. They are fraught
10 with danger. I think Mr. Owens was very prejudiced by the
11 admission of this, and that goes back to we don't know what
12 Judge Williams would have done had this all come out on the
13 stand pretrial as it should have.

14 THE COURT: Got it.

15 MS. HARRIGAN: If the State can be heard briefly in
16 response to that.

17 THE COURT: Yes.

18 MS. HARRIGAN: The admission as to or exclusion of
19 identification evidence falls within the trial judge's
20 discretion and will not be asserted on appeal without abuse
21 of discretion or error of law. It was clearly within Judge
22 Williams' discretion whether or not to admit this evidence or
23 grant the hearing. That's in as recent a case as State v.
24 Govan in 2007 from our Court of Appeals.

25 MR. LEONARD: The solicitor informed the court there

1 would not be an identification made based beyond more than
2 build and clothing.

3 THE COURT: I gotcha.

4 MR. LEONARD: It was a misrepresentation to the Court.
5 No objection was made.

6 THE COURT: It's the taking exception to the ruling that
7 is the issue. Okay. Here's what I want from you because
8 here's what I think: I think that it was deficient, not that
9 these aren't wonderful lawyers, but that isn't the issue. It
10 was deficient not to make an exception to the failure to
11 grant a Neil v. Biggers motion, not to except -- make an
12 exception. And really that situation was worsened by the
13 failure to raise any issue at the point in time when all of a
14 sudden it's different. In other words, when all of a sudden
15 we're talking about lips. Mr. Owens came around the house.

16 MR. LEONARD: The hair.

17 THE COURT: All of a sudden we're in a different
18 circumstance which makes the original -- and they asked for
19 the Neil v. Biggers, but the failure to take exception was
20 worsened, as we know, because of what ultimately happened in
21 the trial. Now, you know, was it deficient not to move for a
22 mistrial at that point; you know, the law on granting
23 mistrials is so very, very difficult because you could
24 certainly argue that. But I think what ends up happening is
25 that, given what happened ultimately in the trial, it makes

1 the failure to take exception to the denial of the motion or
2 the denial to hear a motion on Neil v. Biggers worse and then
3 to take exception to it. I want you to assume that in your
4 proposed orders. You can say (indicating) on the Judge, but
5 we've been made to take this position, okay? Okay. While
6 the State says, I think you're wrong, the order's been -- you
7 told us to do the order this way, so we're doing the order
8 this way.

9 MS. HARRIGAN: Yes, Your Honor.

10 THE COURT: The question, I think, when you get right
11 down to it, is what then. And for the State, I want them to
12 focus on the what then.

13 Now, for you and I'm going to telegraph this, but I want
14 you to flesh this out in your order, and I'm going to ask for
15 it in Word format because if I take your order, what I'm
16 going to do is I will change it, but I want you to put it in
17 there, and I want to -- because, here's what I think, I don't
18 think you can at all let go of your argument about Roberts.
19 I just don't think you can. I just don't think it was
20 prejudicial. The reason that I don't think it was
21 prejudicial is the way that it ended up because I just -- the
22 way that the cross-examination ended up, you could never ask
23 that to ever be better in a trial but, you can't give that
24 up, see what I'm saying.

25 MR. LEONARD: Absolutely.

1 THE COURT: And I don't want you to. So in your
2 proposed order I want you to stay with that, okay. And but
3 it's not going to be -- it won't be ultimately in the order,
4 but you hold on to it and you keep submitting it. Don't you
5 yield it, okay. But if it's -- if you're successful, based
6 on my view, and I'm not telegraphing it because I don't know
7 what I'm going to do. I've got some work to do, thank you
8 all so much.

9 But the question for me is, okay, it's deficient. Is it
10 prejudicial? I don't know. I really don't know. But you
11 all, I'm going to tell you something, you've got to help me
12 with that issue. That's where I need your help. Don't
13 stand -- please don't just stop with South Carolina. You've
14 got some good South Carolina law, but I need you to go beyond
15 that, okay. I don't know that the Roberts courts will have
16 it, but Fourth Circuit might, so take -- recent Fourth
17 Circuit caselaw may be helpful, so take a look at that for
18 me. And that's where this case is for me, but you don't
19 yield; but you don't worry about it because I really think
20 the Neil v. Biggers is an important issue. That's where I
21 think this case lies. So I think it was -- I think they had
22 to have excepted to it, and it became exacerbated by what
23 happened later in this trial. And that's where my focus is.
24 Am I clear.

25 MR. LEONARD: Absolutely, Your Honor.

1 THE COURT: Now, here's what I want you guys to do:
2 She's going to be busy, so I'm not looking for proposed
3 orders for 60 days. I'm not. Now, you all are both young
4 and overworked.

5 I'm sorry they're young and overworked because I know
6 you need a response. I know you do. But I think you got
7 that I'm paying attention.

8 So here's what I need: If you get -- if you get
9 slammed, busy, I need good work product from you guys, talk
10 to each other, and if you all need an extension, and then,
11 you know, give it to each other and just communicate it to
12 Angel because I really do need good work product from both of
13 you, so if you need an extension just let each other know.
14 Work together. All I need to know is when to expect it so
15 I'll know when my study -- I mean, I sort of pay attention as
16 I'm going through things and I'll start categorizing and
17 putting things away, but I won't get heated on it until I
18 actually get it from both of you, and I don't do it until I
19 get both orders because I don't like to look at one without
20 looking at the other, so that's sort of what's in my head.

21 And I will just tell you, Mr. Owens, this will be the
22 big issue for the week. I'm so glad they saved it for me for
23 last but this is the big issue for me for the week.

24 And I think you know that.

25 MS. HARRIGAN: Yes, Your Honor.

1 THE COURT: So I'm going to need some patience. It's
2 going to take me a little bit of time. And I just share that
3 with you, Mr. Owens. I've got some work to do. I'm going to
4 look at it, do you understand?

5 THE APPLICANT: Yes, ma'am.

6 THE COURT: All right.

7 MR. LEONARD: Thank you, Your Honor.

8 MS. HARRIGAN: Thank you, Your Honor.

9 --- END OF TRANSCRIPT OF RECORD ---

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1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA

3 COUNTY OF ORANGEBURG

4
5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of the above-captioned case, relative to appeal,
10 in the 1st Judicial Circuit Court for Orangeburg County,
11 South Carolina, on the 1st of November, 2013.

12 I further certify that I am neither related to nor
13 counsel for any party to the cause pending or interested in
14 the events thereof.

15 September 8, 2015

16
17 *Ruth L. Mott*

18 Official Court Reporter
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STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

ANTIONELLE LA'TROY OWENS,
#336367

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

IN THE COURT OF COMMON
PLEAS FOR THE FIRST
JUDICIAL CIRCUIT

C/A No: 2011-CP-38-1539

**Proposed Order Granting
Petition**

FILED FOR RECORD
BY CLERK OF COURT
ORANGEBURG

2014 OCT -7 PM 12:19

Presiding Judge: The Honorable Diane Schafer Goodstein
Applicant's Attorney: Christopher S. Leonard
Respondent's Attorney: Megan E. Harrigan
Trial Counsel: Robert Mellard and Margaret Hinds
Date of Hearing: October 31, 2013

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 1, 2011. The Respondent filed its Return on May 30, 2012. An evidentiary hearing into the matter was convened on November 1, 2013 at the Dorchester County Courthouse. The Applicant was present at the hearing and represented by Christopher S. Leonard, Esquire. Megan E. Harrigan, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

Applicant's trial counsel, Robert Mellard, Esquire, and Margaret Hinds, Esquire, testified at the PCR hearing. The original GSR expert witness, John Roberts, also testified. This Court had before it the records of the Orangeburg County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Records on Appeal, the Brief of the Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction, the Remittitur dated June 3, 2011, the PCR application, and the State's Return.

ATTEST: TRUE COPY

Winnifred B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Clerk of Court for Orangeburg County. The Applicant was indicted at the August 2006 term of the Orangeburg County Grand Jury for Assault and Battery with Intent to Kill and Attempted Burglary- First Degree. The Applicant proceeded to trial on August 10-11, 2009, after which a jury found him guilty as indicted. The Honorable James C. Williams sentenced the Applicant to confinement for fifteen years for each indictment; the sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Following full briefing by both sides, the Court of Appeals found the arguments made by Appellant unpreserved and affirmed the conviction and sentence. *State v. Owens*, Op. No. 2011-UP-220 (S.C. Ct. App. Filed May 18, . The Remittitur was issued on June 3, 2011.

FINDING OF FACTS

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Applicant was arrested after being apprehended in the rear of a cemetery in a ditch, located relatively close to the location of the shooting that had taken place 15-30 minutes prior. (Trans. p.64, line 12). Victim's complete description of the suspect given to law enforcement was "he was tall, slender, black male with dark jeans, a dark t-shirt and a ski mask pulled over his face with a gun." (Trans. 37, lines 2-4) After being handcuffed by the police, Applicant was taken for a "show up" identification to the victim of the shooting. At that point, the victim identified Applicant. Applicant was arrested and a gunshot residue (GSR) test was performed on his hands at the police station. The police never located either the ski mask or the gun.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel failed to object to the denial of Applicant's constitutional right to a *Neil v. Biggers* hearing, thereby allowing an inadmissible identification.
2. Ineffective assistance of trial counsel in that counsel failed to properly investigate, prepare and thoroughly cross-examine State's expert GSR witness.

STANDARD OF REVIEW

To establish a claim of ineffective assistance of counsel, Petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gallman v. State*, 307 S.C. 273 (1992). When the defendant claims that counsel's failure to articulate a due process violation was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). For the reasons set forth below, this Court finds the claim is meritorious, therefore satisfying the first prong of *Strickland*.

Neil v. Biggers Hearing

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293 (1967). An in-court identification of an accused is inadmissible if a suggestive out-of court identification procedure created a very substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98 (1997).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. *Neil v. Bigger*, 409

U.S. 188 (1972). First, "a court must first determine whether the identification process was unduly suggestive.... [I]t next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*

Petitioner asserts his trial counsel was ineffective by withdrawing the request for a *Neil v. Biggers* hearing prior to trial. This Court agrees.

Trial counsel for Petitioner did initially request a *Neil v. Biggers* hearing, but when the request was challenged by the State and questioned by the trial judge, trial counsel withdrew the request.

The hearing was essential because the identification of Applicant was made during a one-person show up. "Single person show-ups are particularly disfavored in the law. *Stovall v. Denno*, 388 U.S. 293 (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); *see also State v. Johnson*, 311 S.C. 132, 134 (Ct.App.1993) (single person show-ups are particularly disfavored in the law). Based on representations made by the State, trial counsel withdrew the request for the hearing. The State and Court had the following exchange:

MR. SORENSON: "This occurred about 6:00 o'clock in the morning. The victim, Ms. Shannon, is going a carport door going to her car. She was rushed by a man that she described to the police as being a tall, slender black male with jeans, a dark t-shirt, and a ski mask pulled over his face with a gun. He tried to her to go open up her house. She also was shot one time in the leg and the personal takes off running. The police based on that descriptions, apprehended the defendant half a mile away within 15 to 30 minutes. He is brought back to the scene without- they don't find a mask or the gun. He is brought back to the scene. She didn't ID him by his face. She said that looks like the person based on physical build and the clothing. I wasn't intending on having her doing any kind of in court identification to the effect that she doesn't see his face, but she described his looks. That's about all she can describe as far as his face, because he's got a ski mask on. So all she sees are eyes and a mouth."

THE COURT: "So she's not going to say that the defendant, as he sits in court today, bears the same general description and build as the person who committed the crime. She's just going to testify that when they

brought somebody back that night that person fit the general description of the person who committed the crime?"

MR. SORENSON: "Physical build and clothing."

THE COURT: "I don't see any need for a hearing. I don't know what we would ask her."

MR. MELLARD: "That's fine, Your Honor. We just wanted to make sure there was going to be no inquiry identification."

Counsel appears to withdraw the request or arguably the Court denied the request and counsel failed to object. This exchange becomes important because at trial the proffer by the state is not what occurred. When asked about what happened one of the first comments from the victim was "...when I left out of my house Mr. Owens came from around another vehicle." (Transcript p. 71 line 21-22). The victim specifically identified Applicant by name on the stand, exactly what the State had told the trial court the victim would not do and there was no objection from trial counsel.

When the victim was asked about the physical build of her assailant she described him as "tall and he was slender, and I knew from the mask on his head that he had a lot of hair. This part of is (sic) face was like a big part where I could see his lips and I could see his eyes." (Trans. p. 74, lines 20-23). When asked what else she could tell about his mouth area, she replied "He had big lips and I know this part - like a big part protrusion, meaning, but I could really see is (sic) physical feature without even pulling the mask off his face." (Trans. p. 75, lines 3-6).

This testimony is in direct contrast to what the State told the trial judge. There was no objection by trial counsel and no request for a mistrial because the testimony of the victim differentiated substantially from the state's proffer.

The victim went on to identify what were two pictures of Applicant as the man brought back at the show up.

Q: Let me show you, ma'am. State's Exhibit Nos. 5 and 6. Do you recognize the person in those photographs there?

A: I think that's the guy they brought back there.

Q: Is that the person that was brought and shown to you at your house?

A: Yes, it was.

MR. SORENSON: Your Honor, we'd offer State Nos. 5 and 6 into evidence.

THE COURT: Objection?

MR. MELLARD: No objection.

THE COURT: Admitted without objection.

Given the identification testimony of victim the counsel did not object. The State then relied on the in-court identification during its closing argument:

That's her testimony, ladies and gentlemen. Ample lighting to see, and there was no question in her mind about the type of clothing he had on, jeans and a black, dark blue t-shirt. No question about it, and absolutely certain he had hair under the mask. No question about it. She was 100 percent certain from that he had hair under the mask. No question about it. She was 100 percent certain from that witness stand.

Trial counsel still did not object. Nor did trial counsel move for a mistrial based on this testimony or argument. Applicant was entitled to challenge the identification in a *Neil v. Biggers* hearing, but was denied that opportunity by the State's misrepresentations and trial counsel did not object. *See State v. Ramsey*, 345 S.C. 607, 613 (2001) (a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as a person who

committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation).

The testimony by the victim is what should have been covered in the *Neil v. Biggers* hearing. The show up procedure used by the police was unduly suggestive. They brought a single suspect wearing clothing similar to that described by the victim and he was surrounded by uniformed police officers. This is a similar procedure that was ruled unreliable and unduly suggestive in *State v. Moore*, 343 S.C. 282, 287 (2000). See also *Morrison v. Kimmelman*, 752 F.2d 918, 922 (3d Cir.1985) (suggesting that “proper norms of advocacy” required a “timely [motion] to suppress” where there was a valid basis for suppression), *aff’d* on other grounds 477 U.S. 365, (1986); *Rodriguez*, 906 F.2d at 1160 (“[W]e think it is obvious that in a case like this one-with no murder weapon in evidence and only one witness naming the defendant as the murderer-even the most withering cross examination could not substitute for suppression.”).

Given this finding that the show-up used in this case was unduly suggestive, this Court finds the claim of ineffective assistance of counsel based on trial counsel’s withdrawal of the request for a *Neil v. Biggers* hearing is meritorious. Trial counsel failed to object to this testimony, failed to renew the motion, and failed to make a motion for mistrial once the testimony was presented. For these additional reasons the Court finds trial counsel’s performance failed to render reasonably effective assistance under prevailing professional norms. Petitioner, therefore has met the first prong of the *Strickland* standard.

Trial counsel’s performance was also deficient for failing to object to this improper testimony because this error failed to be preserved for Appeal. In *Foye v. State*, 335 S.C. 586 (1999), counsel had a conversation with the trial judge requesting to poll the jurors to see if any of them had seen the defendant in chains. The trial judge denied the request and none of the conversation was on the record. The South Carolina Supreme Court noted counsel was deficient because he failed to adequately preserve the issue for review. In *McHam v. State*, 404 S.C. 465, 474 (2013), the South Carolina Supreme Court found “counsel’s failure to renew the Fourth Amendment objection constituted deficient performance that satisfies the

first prong of the Strickland test. See *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The proper measure of counsel's performance remains whether he has provided representation within the range of competence required by attorneys in criminal cases.").

In this case, Applicant directly appealed the issues of the improper testimony and failure to order a mistrial based on this testimony to the South Carolina Court of Appeals. In an unpublished opinion (S.C. Court of Appeals No. 2011-UP-220 May 18, 2011) the Court of Appeals affirmed Applicant's convictions because neither issue was preserved for review. The Court cited *State v. Walker*, 366 S.C. 643, 660 (Ct. App. 2005) ("Failure to object to comments made during argument precludes appellate review of the issue.") and *State v. Johnson*, 298 S.C. 496, 498 (1989) (holding that express consent to the admission of evidence constitutes a waiver of the issue on appeal).

Trial counsel's failure to object to the testimony not only allowed the evidence to go before the jury during both the State's case-in-chief and closing arguments, but the error also impacted Applicant's ability to challenge the testimony on direct appeal. The error is ineffective assistance of counsel.

Prejudice

The prejudice component requires Applicant to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. He "need not show that counsel's deficient performance 'more likely than not altered the outcome in the case'-rather, he must show only 'a probability sufficient to undermine confidence in the outcome.'" *Jacobs v. Horn*, 395 F.3d at 105 (citing *Strickland*, 466 U.S. at 693-94). "This standard is not a stringent one." *Id.* Although *Strickland* does not set a high bar with respect to the prejudice inquiry, Applicant must show that he would likely have prevailed on the suppression motion and that, having prevailed, there is a reasonable likelihood that he would not have been convicted. See *Belmontes v. Brown*, 414 F.3d 1094, 1121 (9th Cir.2005) (requiring a "reasonable probability that a motion to suppress would

have succeeded and that the suppression ... would have led to a different out-come at the trial") (citing *Kimmelman*, 477 U.S. at 375).

In summary, in order for Applicant to satisfy the second prong of *Strickland*, this Court must find the victim's identification would have been ruled inadmissible after the *Neil v. Biggers* hearing and without the identification there is a reasonable likelihood that Applicant would not have been convicted. This Court finds the Applicant has met this burden and satisfies the second *Strickland* prong.

Brathwaite Reliability Factors

Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. *State v. Moore*, 334 S.C. at 418. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. *Clyburn v. Sumter County School District*, 317 S.C. 50 (1994). An eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. *Caver v. Alabama*, 537 F.2d 1333, 1335 (5th Cir.1976).

Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (citing *Biggers*, 409 U.S. at 199-200).

In the instant case, the State explains to the trial court the victim could only describe the suspect as a "tall, slender, black male with jeans, a dark t-shirt and a ski mask pulled over his face with a gun." (Trans. P.37, lines 2-4). Further, that when the suspect is brought back for the suggestive show-up, the victim identifies the suspect based only on his physical build and clothing, not by his face. (Trans. 37, lines 10-15).

This description is confirmed by Officer Conyers, who was the first officer to ask the victim for the description. The victim stated "it was a black male wearing a dark blue ski mask, a dark colored shirt and a pair of blue jeans." (Trans. 93, lines 17-18). On cross, Officer Conyers confirmed the victim mentioned nothing about the suspect's hair, facial features, or lips, just clothing. (Trans. 96, lines 2-22). However, when she was on the stand, for the first time the victim stated she recognized the suspect not only by his race and clothing but also his facial features and hair. (Trans. p.78, line 18-23).

When she testified on cross, the victim admitted that during the interaction with the man she was at different points looking down at her keys, trying to find the correct one and later she was pushed against the door. (Trans. pp. 84-86). She testified that she had "no clue" how long the encounter lasted but Officer Conyers testified he estimated the incident lasted about a minute. (Trans. p.95, line 21-22).

During the show-up, she stated that she was in the "sitting up" on a stretcher when the police bring the suspect and asked her "is he the one?" She replied "Yeah." That was the extent of her testimony regarding the show-up. (Trans. pp. 88-89). This testimony was later contradicted by the EMS worker who testified that she placed the victim "on a spine board just to make sure I've got her spine in a straight line so nothing's aggravated." (Trans. p. 101, lines 8-10).

In summary, the victim in this case was getting ready to leave for work at 6:00 AM when a man in a ski mask came up to her and pointed a gun at her. He demanded her keys, which she fumbled with and then was pushed to the door and shot in the leg from behind. The entire encounter occurred in about a minute and then the man ran away. Close to thirty minutes later, while she is on a spine board in the back of an ambulance, a group of uniformed police officers bring a handcuffed suspect to the ambulance and ask "if this is the guy?" The victim states that during the entire encounter the man was wearing a ski mask and when asked for a description she could only describe physical build and clothing, nothing about facial features or hair.

Based on the factors and reasoning laid out in *Biggers* and *Brathwaite*, this Court finds the initial show-up procedure was unduly and unnecessarily suggestive. Further, under the totality of the circumstances here, this Court finds a substantial likelihood of irreparable misidentification such that the identification is unreliable as a matter of law. While some factors do have some degree of reliability, such as the amount of time between the crime and the confrontation, these factors are outweighed by (1) the short period of time of the encounter, (2) the fact the victim was focused on her keys and facing the door away from the suspect during this brief time, (3) lack of previous description of facial features and (4) the ski mask. The encounter occurred for a very brief time and a ski masked obstructed the face of the subject. The completely suggestive nature of the show-up procedure, combined with the inconsistent statements of the victim, highlight the inherent unreliability.

Second Strickland Prong

The final inquiry as to the Applicant's claim of ineffective assistance of counsel is the reasonable likelihood the Applicant would not have been convicted but for trial counsel's failure to protect the constitutional rights to a *Neil v. Biggers* hearing. After finding the motion to suppress the identification was meritorious and the identification was constitutionally inadmissible as a matter of law, this Court finds without the victim's improper identification, there is a reasonable likelihood the jury would have acquitted Applicant.

In reviewing the transcript, there were three main pieces of evidence submitted by the State. The victim's improper identification, an inconclusive gunshot residue test results, and the Applicant's location to the crime scene when arrested. Without the victim's identification, the jury would have basically nothing more than mere presence to find Applicant guilty. This is not sufficient for a guilty verdict. Applicant has shown that but for counsel's errors, there is a reasonable probability the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

In this case there was never a gun or mask found; there was no confession. There is a reasonable probability that but for counsel's errors the jury would have

returned a verdict of not guilty. Applicant has satisfied the second prong of *Strickland*.

Applicant has met his burden of satisfying both prongs under the *Strickland* requirement.

Ineffective for Failure to Investigate GSR Reports, Failure to Interview Expert Witness and Failure to Obtain Independent Expert Testimony

Applicant next argues his trial counsel was ineffective for failing to adequately prepare for and cross-examine the State's gun-shot residue expert (GSR). The GSR test in this case was the only physical evidence used by the State. Four separate tests were conducted; left palm, left back of the hand, right palm and right back of the hand. On all but the back of Applicant's right hand, the GSR test was negative. And on the back of the right hand the test was determined inconclusive. A single lead particle was found on the back of Applicant's right hand. (Trans p. 142) Yet, this particle was introduced by the expert and discussed as almost a positive result for GSR. The expert testified that there were only three ways for that particle to get on Applicant's hand: handling cheap Christmas lights from China, smelting lead and being in close proximity to a fired gun.

Trial counsel asked the SLED expert only nine questions on cross-examination. None of these questions were about any alternative theories on how the lead particle could have been found or improper testing circumstances involving the GSR test. In *Frasier v. State*, 306 S.C. 158, (1991) the South Carolina Supreme Court noted that counsel's failure to call an expert witness at trial to rebut the State's expert testimony will not necessarily rise to the level of deficient performance where he undertakes a vigorous cross-examination of the State's witness. In this case there was no vigorous cross-examination, there were nine questions asked and none of them gave the jury any reason to discredit the State's expert. Trial counsel erred in being unprepared to cross examine the SLED expert.

Trial counsel also erred in failing to call an expert witness to rebut the State's expert. The GSR test in this case was analyzed by John Roberts a SLED agent in Columbia. Applicant believes his attorneys were unaware that Mr. Roberts

would be testifying and were unprepared to effectively cross-examine the SLED agent on the GSR test. His attorneys did not retain an expert to prepare a cross on GSR, nor did they retain an expert to rebut the State's expert. This was not trial strategy. The Court is concerned this was unpreparedness.

In *Ard v. Catoe*, 372 S.C. 318 (2007), the South Carolina Supreme Court dealt with a similar issue involving GSR test. The Court agreed with the PCR court which ruled:

[T]hat trial counsel's failure to adequately evaluate and challenge the State's gunshot residue testimony was deficient performance that resulted in prejudice to respondent. As to deficiency, the PCR court concluded trial counsel failed to: (1) "aggressively re-examine" the gunshot residue reports; (2) "read the documents, evaluate them, and pursue the necessary next steps, such as consulting an appropriate," i.e., "an independent expert;" and (3) "investigate the possibility of retesting the samples." As to prejudice, the PCR court found that the "extent to which the jurors credited Powell's testimony ... was critical to the outcome of the case." Moreover, the PCR court noted that "[d]efense counsel's failure to refute gunshot residue evidence transformed an arguable case into a clear case.... Because of the solicitor's critical reliance on the absence of gunshot residue evidence, there is little question that the tenor of the jury deliberations would have been different, but for counsel's mistakes." Finally, the PCR court stated it was not "confident that a jury, adequately informed, would have convicted [respondent] of murder."

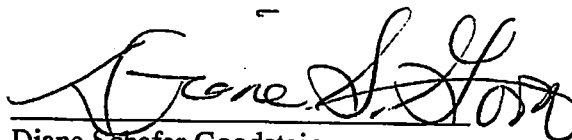
The Court in *Ard* went on to say "a criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation" (*Citing Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986)). There was little to investigate in this case beyond the GSR test. Applicant believes his attorneys were unprepared to cross the SLED expert as they had failed to evaluate the GSR reports, interview the SLED expert, obtain an independent expert and properly prepare for cross-examination. This claim is supported by the testimony of trial counsel. Testimony at the PCR hearing reflected that as a result of the testimony in Applicant's case, trial counsel now routinely consults their own expert in order to prepare for GSR cross-examination.

This Court agrees the record reflects that trial counsel provided ineffective assistance of counsel in the preparation and cross-examination of the GSR expert. Combined with the prejudice shown by the improper identification, this additional failure would have reasonably changed the outcome of the trial.

The Court sympathizes with the difficulty counsel had in gaining cooperation from the defendant. Furthermore, the Court recognizes defense counsel's excellent reputation as fine lawyers and advocates. However, even though this defendant was uncooperative Counsel must still meet a minimum standard of competent representation, which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." S.C. Rules of Prof. Conduct, Rule 1.1. *See also Holland v. Florida*, 130 S.C. 2549 (2010). That standard was not attained under the circumstances presented in this particular case.

THEREFORE, it is ordered Applicant's request for post-conviction relief be GRANTED and the verdicts against him be VACATED and these charges remanded to Orangeburg Court of General Session for new trial.

IT IS ORDERED.



Diane Schafer Goodstein
Chief Administrative Judge
First Judicial Circuit

Oct. 7, 2014

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Antionelle L. Owens, #336367,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-38-1539

**RESPONDENT'S MOTION TO
RECONSIDER, ALTER OR AMEND
PURSUANT TO RULE 59, SCRPC**

Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter or Amend, pursuant to Rule 59, SCRPC, to this Court's "Proposed Order Granting Petition," would respectfully show unto this Court:

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed December 1, 2011. Respondent made its Return on May 25, 2012, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened November 1, 2013, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Christopher S. Leonard, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted during the August 2006 term of the Orangeburg County Grand Jury for Assault and Battery with Intent to Kill (2006-GS-38-1449) and Attempted Burglary in the First Degree (23006-GS-38-1186). Robert D. Mellard and Margaret E. Hinds, Esquires, represented Applicant. On August 10-11, 2009, Applicant proceeded to a jury trial before the Honorable James C. Williams, Jr., where he was convicted as indicted on

both charges. Judge Williams sentenced Applicant to fifteen years imprisonment for each offense, with the sentences to be served concurrently.

Applicant filed a notice of appeal. Applicant was represented by Appellate Defender Elizabeth A. Franklin-Best, who raised the following issue: "Did the circuit court judge deny appellant's right to due process by not granting a mistrial when the state elicited an improper in-court identification of appellant by the accuser after informing the court that there would not be any such identification made during trial?" Following briefing by both parties, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Owens, Op. No. 2011-UP-220 (Ct. App. filed May 18, 2011). The Remittitur was sent on June 3, 2011.

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

1. Ineffective assistance of counsel for failure to object to closing arguments, testimony, and pictures identifying myself as the assailant even though the State and trial court said no such identification would be made; and
2. Ineffective assistance of counsel for failure to discuss gunshot residue analysis with States expert witness during their pre-trial investigation, failure to effectively cross-examine the state's gunshot residue expert, and failure to obtain independent expert testimony

These are the two allegations on which Applicant proceeded forward at the evidentiary hearing. At the close of the evidentiary hearing, this Court orally ruled that it was denying relief as to the allegation involving counsel's handling of the gunshot residue expert and evidence, stating that the end of counsel's cross examination of the State's expert was "never better."¹ As to the identification allegation, this Court requested proposed Orders from both parties. Respondent's proposed Order of Dismissal is attached hereto as Exhibit A. After receiving proposed Orders

¹ Despite this oral pronouncement denying relief as to this allegation, this Court's "Proposed Order Granting Petition" grants relief on this issue, in direct contravention of its oral ruling. This is addressed further below.

from Applicant and Respondent, this Court adopted Applicant's "Proposed Order Granting Petition." This Order was signed and filed on October 7, 2014. Respondent received a copy of the Order on October 14, 2014. This Motion to Reconsider follows.

ARGUMENT IN SUPPORT OF RECONSIDERATION

Respondent moves this Court to reverse its earlier decision and deny post-conviction relief where Applicant failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, an applicant must first prove that counsel's performance was deficient as measured by its "reasonableness under professional norms." Id. Second, an applicant must establish that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Respondent asserts that Applicant has failed to carry his burden in regards to each prong in regards to each allegation, as set forth below:

Allegation that trial counsels were ineffective for failing to object and/or move to exclude State witness Irene Shannon's in-court identification of Applicant

In the Order, this Court found that "the show-up [identification] used in this case was unduly suggestive" and that counsel was ineffective for "withdraw[ing] the request for a *Neil v. Biggers* hearing." Additionally, in the Order, this Court found that Counsel was ineffective for "fail[ing] to object to this testimony, fail[ing] to renew the motion, and fail[ing] to make a motion for mistrial once the testimony was presented." Respondent respectfully asserts this Court's ruling that the show-up identification was unduly suggestive is controlled by an error of law. Additionally, Respondent asserts that this Court's rulings are not supported by the record.

Prior to the start of trial, trial counsels requested a Neil v. Biggers hearing in regards to an anticipated in-court identification of Applicant by victim Irene Shannon. Tr. p. 36 lns. 15-18. The State responded that it did not think a hearing was necessary, as the identification would be limited to physical build and clothing similarities. Tr. p. 36 ln. 21 – p. 37 ln. 24. Based on this representation of the victim's anticipated testimony, the Court determined that a Neil v. Biggers hearing was not necessary. Tr. p. 37 ln.18 – p. 38 ln. 9. Trial counsel replied that he wanted to be sure that there would be no in-court identification. Tr. p. 38 lns. 2-4.

During trial, Shannon testified that the assailant was "tall and slender" and that she "knew from the mask on his head that he had a lot of hair." Tr. p. 74 lns. 20-21. She elaborated that "this part of [his] face was like a big part where I could see his lips and see his eyes." Tr. p. 74 lns. 21-23. She followed up by testifying that the assailant was black, had "big lips" with a "big part protrusion." Tr. p. 74 ln. 25 – p. 75 ln. 6. She then went on to describe the clothing the assailant was wearing. Tr. p. 75 lns. 7-11. When describing the incident to the jury, she once referred to the attacker as "Mr. Owens." Tr. p. 71 lns 21-22. Additionally, Shannon identified two photographs, introduced as State's Exhibits No. 5 and No. 6, as her assailant; however, the photographs were never identified as Applicant. Counsel did not object to this testimony.

Applicant alleged that Counsel performed deficiently in failing to object and/or move for a mistrial in response to this testimony from Shannon. Applicant asserts that he was denied the opportunity to challenge this identification because he was not afforded a Neil v. Biggers hearing. Although Applicant acknowledges that Counsel did request such a hearing, which was denied by the trial court, Applicant asserts that trial counsels' failure to object to this testimony from Shannon amounts to deficient performance.

Respondent respectfully disagrees with Applicant and this Court's ruling that trial counsels' performance was deficient. Before the trial began, counsels moved for a Neil v. Biggers hearing. The trial court declined to conduct a hearing based on representations from the State that Shannon would not be providing an in-court identification, but rather, giving a description of her assailant based on physical build and clothing. A review of Shannon's testimony reveals that she did limit her description to physical build and clothing of her assailant, describing facial features, amount of hair, and attire. Shannon did not make an in-court identification of Applicant, and the two photographs that Shannon said matched her descriptions (State's Exhibits No. 5 and No. 6) were not identified as Applicant. Mellard testified at the evidentiary hearing that he does not believe this testimony amounts to an in-court identification. Additionally, during cross-examination, Mellard vigorously challenged Shannon on the veracity of her identification, highlighting that the assailant was wearing a ski mask, that she observed him briefly in the early morning hours in poor lighting while she was looking down at her keys with a gun pointed at her, and that she made her identification while receiving medical treatment for a gunshot wound. Tr. pp. 81-89. Hinds emphasized to the jury the inherently unreliable nature of Shannon's identification based on these factors during Applicant's closing argument. Tr. pp. 169-178. Based on the foregoing, Counsel's performance was not deficient

Furthermore, Respondent submits that Applicant has failed to establish any resulting prejudice resulting from this alleged deficiency and this Court's ruling to the contrary is not supported by the record and is controlled by an error of law. To establish prejudice in a post-conviction relief action on a claim that counsel was ineffective regarding the admittance of evidence, an applicant must show that had his trial attorney challenged the evidence, there is a reasonable probability that he would have prevailed and the evidence in question would have

been excluded. Rollison v. State, 346 S.C. 506, 509-10, 552 S.E.2d 290, 292 (2001). Had trial counsels objected to Shannon's testimony or had a Neil v. Biggers hearing been held, the testimony would not have been excluded because the lineup was not unduly suggestive (as discussed below). Therefore, there is no reasonable probability that the result of the proceeding would have been different. Cherry, supra.

Additionally, Respondent respectfully submits that this Court's ruling that the show-up identification was "unduly suggestive" is controlled by an error of law. Single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). However, identifications obtained from show-ups are not automatically excluded and may be admissible if found to be sufficiently reliable. Id. In State v. Brown, the Court of Appeals thoroughly analyzed the show-up identification procedure:

"[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness' memory is still fresh, and the subject has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.' " The closer in time and place to the scene of the crime, the less objectionable is a showup. A show-up may be proper even though the police refer to a suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime.

Single person show-ups are disfavored because they are suggestive by their nature. However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. Suggestiveness alone does not mandate the exclusion of evidence. Reliability is the linchpin in determining the admissibility of identification testimony.

356 S.C. 496, 503-504, 589 S.E.2d 781, 785 (Ct. App. 2003) (internal citations omitted).

There is a two-prong inquiry involved in determining the admissibility of an out-of-court identification. See Biggers, 409 U.S. at 199-200 (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). This inquiry involves first ascertaining whether the identification process was unduly suggestive, and then determining whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. State v. Govan, 372 S.C. 552, 558, 643 S.E.2d 92, 95 (Ct. App. 2007). "The in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification." Id.

The reliability of an identification is determined by the facts of the case. State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984). To determine whether the procedure was unduly suggestive, the Court must look to: (1) the proximity in time to the alleged crime; (2) proximity in location to the crime; (3) the freshness of the witness's memory; (4) whether the suspect had time to alter his looks or dispose of evidence; and (5) whether the show-up will expedite the release of innocent suspects and enable further investigation. Govan, 372 S.C. at 558-559, 643 S.E.2d at 95. However, "[s]uggestiveness alone does not mandate the exclusion of evidence." State v. Patterson, 337 S.C. 215, 229, 522 S.E.2d 845, 852 (1999).

Even if the show-up is found to be unduly suggestive, the identification may still be admissible if the State can prove by clear and convincing evidence the procedure is reliable. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. To determine whether the identification is reliable, the Court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of

the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Id. at 559, 643 S.E.2d at 96.

In Applicant's case, the testimony from Shannon would not have been excluded had trial counsels objected or had a Neil v. Biggers hearing been conducted. Initially, Applicant was not directly identified in-court as the victim's assailant. The victim merely testified she identified a suspect during a show-up procedure based on his attire and physical build. Since her out-of-court identification was focused on the clothing as opposed to the individual, it is questionable whether a pre-trial hearing on this evidence was required.

However, even if Shannon's testimony could be considered identification evidence, the testimony would not have been excluded. Applying the factors outlined in Govan, Shannon's identification of Applicant during the show-up procedure was reliable. Shannon had a good opportunity to view her assailant during the crime as he was directly in front of her in close proximity. Her attention was certainly elevated by the stress of the situation and the presence of the firearm. Furthermore, her description of the suspect's clothing was extremely accurate and directly matched the clothing Applicant was discovered in within fifteen minutes of the incident less than half a mile from the scene of the crime. Also, her physical description of the suspect matched Applicant's physical characteristics and appearance. Additionally, Shannon was entirely certain regarding her identification of the shooter's clothing, and the show-up procedure occurred less than an hour after the shooting. Based on the circumstances of the procedure employed in this case, Shannon's out-of-court identification was clearly reliable and would not have been excluded. Applicant cannot establish prejudice from counsel's purported deficiency.

Additionally, Respondent cannot establish any resulting prejudice from trial counsels' purported error because there is overwhelming evidence of his guilt. Applicant was found within

one-eighth of a mile from the victim's residence within fifteen minutes of the shooting in the early morning hours profusely sweating, matched the description of the suspects build and clothing, and had around lead particle on his hand. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (Applicant cannot establish prejudice where there is overwhelming evidence of his guilt); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 U.S. 1114 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Based on the foregoing, Respondent submits that Applicant has failed to establish both deficiency and prejudice in regards to this allegation and respectfully requests that this Court reconsider its ruling.

Allegation that Counsel was ineffective for failing to investigate gunshot residue report, interview expert witnesses and obtain independent gunshot residue expert testimony

In its "Proposed Order Granting Petition," this Court found that "the record reflects that trial counsel provided ineffective assistance of counsel in the preparation and cross-examination of the [State's] GSR expert." Respondent respectfully submits that this writing ruling is in direct conflict with the oral ruling made by this Court at the conclusion of the evidentiary hearing on October 31, 2013, denying relief on this ground. Furthermore, Respondent respectfully submits that there is no evidence of probative value in the record to support these findings.

The cross-examination of Roberts by Mellard during Applicant's trial was succinct and incredibly effective. Mellard was able to elicit from Roberts *six times* that no gunshot residue

was found on Applicant. Tr. p. 144 ln. 22 – p. 145 ln.20. Trial counsel highlighted during his closing argument that no gunshot residue was found on Applicant. Tr. pp 177-78. Trial counsel performed proficiently and in accordance with professional norms.

Furthermore, Respondent submits that Applicant has failed to meet his burden of establishing any resulting prejudice from this alleged deficiency. Applicant presented no evidence or testimony establishing that any independent expert or discussions with Agent Roberts before trial would have yielded a different result. Agent Roberts testified that he was unable to say that the round lead particle found on Applicant was due to contamination to a reasonable degree of scientific certainty. Based on the foregoing, Respondent submits that Applicant has not proven prejudice from counsel's purported errors. This Court respectfully requests that this Court reconsider its ruling in its "Proposed Order Granting Petition."

CONCLUSION

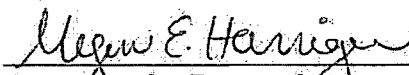
Based on all the foregoing, this Respondent requests that this Court reconsider its prior ruling and deny Applicant post-conviction relief. Respondent requests a hearing to fully argue this 59(e), SCRCF, motion and address each of the raised issues before this Court.

Respectfully submitted,

ALAN WILSON
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By:


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October 17, 2014

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

**Antionelle L. Owens, #336367,
Applicant.**

v.

**State of South Carolina,
Respondent.**

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-38-1539

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed December 1, 2011. Respondent made its Return on May 25, 2012, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened November 1, 2013, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Christopher S. Leonard, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted during the August 2006 term of the Orangeburg County Grand Jury for Assault and Battery with Intent to Kill (2006-GS-38-1449) and Attempted Burglary in the First Degree (23006-GS-38-1186). Robert D. Mellard and Margaret E. Hinds, Esquires, represented Applicant. On August 10-11, 2009, Applicant proceeded to a jury trial before the Honorable James C. Williams, Jr., where he was convicted as indicted on

both charges. Judge Williams sentenced Applicant to fifteen years imprisonment for each offense, with the sentences to be served concurrently.

Applicant filed a notice of appeal. Applicant was represented by Appellate Defender Elizabeth A. Franklin-Best, who raised the following issue: "Did the circuit court judge deny appellant's right to due process by not granting a mistrial when the state elicited an improper in-court identification of appellant by the accuser after informing the court that there would not be any such identification made during trial?" Following briefing by both parties, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Owens, Op. No. 2011-UP-220 (Ct. App. filed May 18, 2011). The Remittitur was sent on June 3, 2011.

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

1. Ineffective assistance of counsel for failure to object to closing arguments, testimony, and pictures identifying myself as the assailant even though the State and trial court said no such identification would be made; and
2. Ineffective assistance of counsel for failure to discuss gunshot residue analysis with States expert witness during their pre-trial investigation.

These are the two allegations on which Applicant proceeded forward at the evidentiary hearing.

SUMMARY OF FACTS ADDUCED AT TRIAL

Shortly after 6:00 a.m. on the morning of June 5, 2006, the victim, Irene Shannon (hereinafter "Shannon"), was leaving her home on _____ in order to go to work. After stepping outside her door, Shannon saw a masked man come running around the corner of her home from behind a parked vehicle. The man pointed a gun at Shannon's head and

demanded she open the door to her home. Shannon's husband and three young children were inside the home at the time. Shannon attempted to open the door, but she fumbled with her keys and was unable to open it quickly. Her assailant then pushed her up against the wall and shot her in the leg. The masked man then ran from Shannon's carport and fled down nearby Broughton Street.

As her assailant fled, Shannon went inside her home where her husband was already on the phone with a 911 operator. She was able to give a description of the suspect's clothing and revealed the direction in which he had fled. She described her attacker as a tall and slender black male with a good deal of hair under his mask. He was wearing a mask, a black t-shirt, and dark-colored jeans while armed with a revolver. Shortly thereafter, police officers and an ambulance arrived at Shannon's home.

Officer Reginald Conyers of the Orangeburg Department of Public Safety arrived on the scene within minutes of the shooting. He found Shannon with a gunshot wound to her right thigh area. (R. p. 36). He located blood in her carport, home, and the vehicle where she was sitting. The officer was able to obtain a description of the suspect and the location he had fled after the incident.

Corporal Jimmy Jones also responded to the scene and was notified that a person matching the suspect's description was observed in the vicinity of a cemetery only one-eighth of a mile from the victim's residence. Officers Gerald Hoffman and John Caddell began canvassing the surrounding area looking for the suspect. The officers approached the woods towards the rear of the cemetery and heard a noise. As they investigated the sound, the suspect emerged and took

off running. The officers pursued and were able to locate the suspect hiding in a ditch next to the woods. The suspect, who was wearing a black shirt and jeans, was hand-cuffed and taken into custody. Officer Hoffman was certain the man who initially fled was the same person located hiding in the ditch. The captured suspect, who was sweating profusely at the time of his arrest, was Applicant Antionelle Owens. During their early morning search, the officers did not see or encounter any other individuals other than Applicant. Applicant was apprehended within fifteen minutes of the initial response to the shooting.

Subsequently, Applicant was taken back to Shannon's residence. Shannon was still at her residence being treated by paramedics when Applicant was returned to the scene. Officers escorted Applicant, who was hand-cuffed at the time and was no longer wearing a mask, for Shannon to identify. Based on his clothing and physical build, she alerted the officers Applicant was the person who shot her.

Prior to trial, Applicant requested a Neil v. Biggers¹ hearing to address the issues related to the identification evidence. The solicitor asserted the victim would not be identifying Applicant from the witness stand. Instead, the solicitor indicated the victim was only going to testify the person brought back to the scene matched the physical build and clothing of the assailant. The trial judge then determined a pre-trial hearing was unnecessary based on the circumstances of the case.

Subsequently, during trial, Shannon testified about her viewing of Applicant at the scene. Shannon testified she identified the man shown to her at the scene as the person who shot her

¹ 409 U.S. 188 (1972)

based on his clothing and physical build. Trial counsels for Applicant did not object to any of Shannon's testimony regarding the show-up procedure.

During trial, the State called South Carolina Law Enforcement Division (hereinafter "SLED") Agent John Roberts, who was qualified as an expert in trace analysis and gunshot residue, to testify regarding gunshot residue evidence collected from Applicant. Agent Roberts testified that he analyzed the gunshot residue kit that was collected from Applicant within approximately two hours of the attack. He testified that on the right back of Applicant's hand, the gunshot residue test was inconclusive, but that a round lead particle was identified. He went on to testify that although this was not a positive reading for gunshot residue, round lead particles are very rarely found absent gunfire. He listed the handling of "cheap Chinese Christmas lights," making your own fishing weights, or reloading your own lead bullets as some of the other instances when round lead particles might be found. On cross-examination, trial counsel elicited from Agent Roberts several times that no gunshot residue was found on Applicant's hands.

At the conclusion of the State's case, Applicant moved for a directed verdict and the motion was denied. Applicant then requested a jury instruction on identification, which the court charged to the jury. Subsequently, Applicant was convicted as charged and was sentenced to an aggregate term of imprisonment of fifteen years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the evidentiary hearing, Applicant presented testimony from SLED Gunshot Residue Expert John Roberts, who testified at trial, as well as trial counsels Robert D. Mellard

(hereinafter "Mellard") and Margaret E. Hinds (hereinafter "Hinds"). Applicant did not testify on his own behalf. This Court also had before it Applicant's trial transcript, the records from the Orangeburg County Clerk of Court regarding the subject convictions, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel:

Allegation that trial counsels were ineffective for failing to object and/or move to exclude State witness Irene Shannon's in-court identification of Applicant

Prior to the start of trial, trial counsels requested a Neil v. Biggers hearing in regards to an anticipated in-court identification of Applicant by victim Irene Shannon. Tr. p. 36 lns. 15-18. The State responded that it did not think a hearing was necessary, as the identification would be limited to physical build and clothing similarities. Tr. p. 36 ln. 21 – p. 37 ln. 24. Based on this representation of the victim's anticipated testimony, the Court determined that a Neil v. Biggers hearing was not necessary. Tr. p. 37 ln.18 – p. 38 ln. 9. Trial counsel replied that he wanted to be sure that there would be no in-court identification. Tr. p. 38 lns. 2-4.

During trial, Shannon testified that the assailant was "tall and slender" and that she "knew from the mask on his head that he had a lot of hair." Tr. p. 74 lns. 20-21. She elaborated that "this part of [his] face was like a big part where I could see his lips and see his eyes." Tr. p.

74 lns. 21-23. She followed up by testifying that the assailant was black, had "big lips" with a "big part protrusion." Tr. p. 74 ln. 25 – p. 75 ln. 6. She then went on to describe the clothing the assailant was wearing. Tr. p. 75 lns. 7-11. When describing the incident to the jury, she referred to the suspect as "Mr. Owens." Tr. p. 71 lns 21-22. Additionally, Shannon identified two photographs, introduced as State's Exhibits No. 5 and No. 6 as her assailant; however, the photographs were not identified as Applicant. Counsel did not object to this testimony.

Applicant alleged that Counsel performed deficiently in failing to object and/or move for a mistrial in response to this testimony from Shannon. Applicant asserts that he was denied the opportunity to challenge this identification because he was not afforded a Neil v. Biggers hearing. Although Applicant acknowledges that Counsel did request such a hearing, which was denied by the trial court, Applicant asserts that trial counsels' failure to object to this testimony from Shannon amounts to deficient performance.

This Court disagrees with Applicant and finds that trial counsels' performance was proficient. Before the trial began, counsels moved for a Neil v. Biggers hearing. The trial court declined to conduct a hearing based on representations from the State that Shannon would not be providing an in-court identification, but rather, giving a description of her assailant based on physical build and clothing. A review of Shannon's testimony reveals that she did limit her description to physical build and clothing of her assailant, describing facial features, amount of hair, and attire. Shannon did not make an in-court identification of Applicant, and the two photographs that Shannon said matched her descriptions (State's Exhibits No. 5 and No. 6) were not identified as Applicant. Mellard testified at the evidentiary hearing that he does not believe

this testimony amounts to an in-court identification, and this Court agrees. Additionally, during cross-examination, Mellard vigorously challenged Shannon on the veracity of her identification, highlighting that the assailant was wearing a ski mask, that she observed him briefly in the early morning hours in poor lighting while she was looking down at her keys with a gun pointed at her, and that she made her identification while receiving medical treatment for a gunshot wound. Tr. pp. 81-89. Hinds emphasized to the jury the inherently unreliable nature of Shannon's identification based on these factors during Applicant's closing argument. Tr. pp. 169-178. Based on the foregoing, this Court finds that Counsel's performance was not deficient

Furthermore, this Court finds that Applicant has failed to establish any resulting prejudice resulting from this alleged deficiency. To establish prejudice in a post-conviction relief action on a claim that counsel was ineffective regarding the admittance of evidence, an applicant must show that had his trial attorney challenged the evidence, there is a reasonable probability that he would have prevailed and the evidence in question would have been excluded. Rollison v. State, 346 S.C. 506, 509-10, 552 S.E.2d 290, 292 (2001). This Court finds that had trial counsels objected to Shannon's testimony or had a Neil v. Biggers hearing been held, the testimony would not have been excluded.

Single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). However, identifications obtained from show-ups are not automatically excluded and may be admissible if found to be sufficiently reliable. Id. In State v. Brown, 356 S.C. 496, 503-504, 589 S.E.2d 781, 785 (Ct. App. 2003), the Court of Appeals thoroughly analyzed the show-up identification procedure:

“ ‘[A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness’ memory is still fresh, and the subject has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching.’ ” The closer in time and place to the scene of the crime, the less objectionable is a showup. A show-up may be proper even though the police refer to a suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police. Although show-ups have been upheld by the Court, these situations usually involve either extenuating circumstances or are very close in time to the crime.

Single person show-ups are disfavored because they are suggestive by their nature. However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used. Suggestiveness alone does not mandate the exclusion of evidence. Reliability is the linchpin in determining the admissibility of identification testimony.

(citations omitted).

There is a two-prong inquiry involved in determining the admissibility of an out-of-court identification. See Neil v. Biggers, 409 U.S. 188, 199-200 (1972) (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). This inquiry involves first ascertaining whether the identification process was unduly suggestive, and then determining whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Govan, 372 S.C. at 558, 643 S.E.2d at 95. “The in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification.” *Id.*

The reliability of an identification is determined by the facts of the case. State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984). To determine whether the procedure was unduly

suggestive, the Court must look to: (1) the proximity in time to the alleged crime; (2) proximity in location to the crime; (3) the freshness of the witness's memory; (4) whether the suspect had time to alter his looks or dispose of evidence; and (5) whether the show-up will expedite the release of innocent suspects and enable further investigation. Govan, 372 S.C. at 558-559, 643 S.E.2d at 95. However, "[s]uggestiveness alone does not mandate the exclusion of evidence." State v. Patterson, 337 S.C. 215, 229, 522 S.E.2d 845, 852 (1999).

Even if the show-up is found to be unduly suggestive, the identification may still be admissible if the State can prove by clear and convincing evidence the procedure is reliable. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. To determine whether the identification is reliable, the Court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Id. at 559, 643 S.E.2d at 96.

In Applicant's case, the testimony from Shannon would not have been excluded had trial counsels objected or had a Neil v. Biggers hearing been conducted. Initially, Applicant was not directly identified in-court as the victim's assailant. The victim merely testified she identified a suspect during a show-up procedure based on his attire and physical build. Since her out-of-court identification was focused on the clothing as opposed to the individual, it is questionable whether a pre-trial hearing on this evidence was required.

However, even if Shannon's testimony could be considered identification evidence, the testimony would not have been excluded. Applying the factors outlined in Govan, Shannon's

identification of Applicant during the show-up procedure was reliable. Shannon had a good opportunity to view her assailant during the crime as he was directly in front of her in close proximity. Her attention was certainly elevated by the stress of the situation and the presence of the firearm. Furthermore, her description of the suspect's clothing was extremely accurate and directly matched the clothing Applicant was discovered in within fifteen minutes of the incident less than half a mile from the scene of the crime. Also, her physical description of the suspect matched Applicant's physical characteristics and appearance. Additionally, Shannon was entirely certain regarding her identification of the shooter's clothing, and the show-up procedure occurred less than an hour after the shooting. Based on the circumstances of the procedure employed in this case, Shannon's out-of-court identification was clearly reliable and would not have been excluded. Therefore, Applicant cannot establish prejudice from trial counsels' purported deficiency.

As Applicant has failed to prove both deficiency and prejudice, this Court finds that this allegation must be denied and dismissed with prejudice.

Allegation that Counsel was ineffective for failing to investigate gunshot residue report, interview expert witnesses and obtain independent gunshot residue expert testimony

Applicant alleges that trial counsel was ineffective for failing to investigate the gunshot residue reports, failure to interview the State's expert witness, and failure to obtain independent expert witness testimony. Applicant asserts that trial counsels failed to speak with SLED Agent John Roberts prior to trial, that the cross-examination of SLED Agent John Roberts was brief and obligatory, and that trial counsels should have obtained an independent gunshot residue expert to combat the State's testimony from Roberts.

In support of these allegations, Applicant called SLED Agent John Roberts to testify at the evidentiary hearing. Roberts testified that he was not contacted by trial counsels before the trial, but noted that this is not rare and he often does not speak to defense counsel on cases in which he renders testimony. He testified that he was only on the stand for a short time during Applicant's trial. He testified that round lead particles, such as the particle found on the back of Applicant's right hand, are the result of gunfire most of the time, but could also be caused by cheap Chinese Christmas lights, smelting lead, or contamination. He testified to the first two instances at trial but did not testify to the possibility of contamination at Applicant's trial. However, he acknowledged that contamination would be rare in the present case, as a gunshot residue kit was collected within two hours of the incident and there was no evidence supporting contamination. Ultimately, Roberts testified that he could not determine if the round lead particle found on Applicant's right hand was caused by contamination to a reasonable degree of scientific certainty.

This Court disagrees with Applicant and finds that Applicant has failed to satisfy his burden of establishing deficiency and resulting prejudice. This Court finds that trial counsels' were beyond proficient and performed above professional norms. The cross-examination of Roberts by Mellard is not terse and perfunctory, but rather, succinct and effective. Mellard was able to elicit from Roberts six times that no gunshot residue was found on Applicant. Tr. p. 144 ln. 22 – p. 145 ln.20. Trial counsels highlighted during its closing argument that no gunshot residue was found on Applicant. Tr. pp 177-78. This Court finds that no independent gunshot

residue expert was necessary. Based on the foregoing, this Court finds that Counsel performed proficiently.

Furthermore, this Court finds that Applicant has failed to meet his burden of establishing any resulting prejudice from this alleged deficiency. Applicant presented no evidence or testimony establishing that any independent expert or discussions with Agent Roberts before trial would have yielded a different result. Agent Roberts testified that he was unable to say that the round lead particle found on Applicant was due to contamination to a reasonable degree of scientific certainty. Based on the foregoing, under the particular facts of this case, this Court finds that Applicant has not proven prejudice from counsels' purported errors. Therefore, this allegation must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's

behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must remain remanded to the custody of the State.

AND IT IS SO ORDERED this ____ day of _____, 2014.

DIANE S. GOODSTEIN
Presiding Judge
First Judicial Circuit

_____, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

ANTIONELLE LA'TROY OWENS,
#336367

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

IN THE COURT OF COMMON
PLEAS FOR THE FIRST
JUDICIAL CIRCUIT

C/A No: 2011-CP-38-1539

**Applicant's Response to Motion
to Reconsider, Alter or Amend
Pursuant to Rule 59, SCRCP**

This matter comes before the Court by way of the State's Motion pursuant to Rule 59(e), dated October 17, 2013, in which the State asks this Court to alter or amend its Order granting the application for post-conviction relief (PCR). The Applicant would submit the following:

I.

This Court's Order Granting Petition filed on October 7, 2014 contained the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 and Rule 52(a) SCRCP. *See also McCray v. State*, 305 S.C. 329 (1991).

II.

The State asks this Court to amend its Order Granting Petition and find that Applicant is not entitled to a new trial. The State is not requesting an alteration or amendment to the Order. Rather, the State is asking the Court to reverse its decision and deny post-conviction relief. Such a request is more properly addressed through the appellate process. *See Wilder Cor. v. Wilke*, 330 S.C. 71, 77 (199) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court). The State has failed to show that an issued was properly raised by not ruled upon by this Court.

III.

The State believes the Order Granting Petition should be rejected because of an error of law. In its Motion to Amend, the State argues the ruling that the single person show-up identification was unduly suggestive is an error. However, the South Carolina Court of Appeals again upheld that "[s]ingle person show-ups are particularly disfavored in the law," and holding that "it is patent the show-up procedure used was . . . suggestive"). *State v. Starks*, 410 S.C. 580, 582 (S.C. Ct. App. 2014).

IV.

The State submits the victim never made an in-court identification of the Applicant. This is clearly rejected by the Record "...[W]hen I left out of my house Mr. Owens came from around another vehicle." (Transcript p. 71 line 21-22). The victim specifically identified Applicant by name on the stand.

V.

Trial counsel asked the SLED expert only nine questions on cross-examination. None of these questions were about any alternative theories on how the lead particle could have been found or improper testing circumstances involving the GSR test. In *Frasier v. State*, 306 S.C. 158, (1991) the South Carolina Supreme Court notes that counsel's failure to call an expert witness at trial to rebut the State's expert testimony will not necessarily rise to the level of deficient performance where he undertakes a vigorous cross-examination of the State's witness. In this case there was no vigorous cross-examination, there were nine questions asked and none of them gave the jury any reason to discredit the State's expert.

CONCLUSION

Based on all the foregoing, the Applicant requests that this Court deny the State's Motion to Amend.

[Signature Block on Following Page]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Leonard". The signature is fluid and cursive, with the first name "Chris" and last name "Leonard" clearly distinguishable.

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Attorneys for the Plaintiff

March 5, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

ANTIONELLE LA'TROY OWENS,
#336367

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

IN THE COURT OF COMMON
PLEAS FOR THE FIRST
JUDICIAL CIRCUIT

C/A No: 2011-CP-38-1539

**Proposed Order Granting
Petition**

FILED FOR RECORD
WITH THE CLERK OF COURT
ORANGEBURG COUNTY

2014 OCT -7 PM 12:19

Presiding Judge: The Honorable Diane Schafer Goodstein
Applicant's Attorney: Christopher S. Leonard
Respondent's Attorney: Megan E. Harrigan
Trial Counsel: Robert Mellard and Margaret Hinds
Date of Hearing: October 31, 2013

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 1, 2011. The Respondent filed its Return on May 30, 2012. An evidentiary hearing into the matter was convened on November 1, 2013 at the Dorchester County Courthouse. The Applicant was present at the hearing and represented by Christopher S. Leonard, Esquire. Megan E. Harrigan, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

Applicant's trial counsel, Robert Mellard, Esquire, and Margaret Hinds, Esquire, testified at the PCR hearing. The original GSR expert witness, John Roberts, also testified. This Court had before it the records of the Orangeburg County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Records on Appeal, the Brief of the Appellant, the Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction, the Remittitur dated June 3, 2011, the PCR application, and the State's Return.

ATTEST: TRUE COPY

Winnif B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Clerk of Court for Orangeburg County. The Applicant was indicted at the August 2006 term of the Orangeburg County Grand Jury for Assault and Battery with Intent to Kill and Attempted Burglary- First Degree. The Applicant proceeded to trial on August 10-11, 2009, after which a jury found him guilty as indicted. The Honorable James C. Williams sentenced the Applicant to confinement for fifteen years for each indictment; the sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Following full briefing by both sides, the Court of Appeals found the arguments made by Appellant unpreserved and affirmed the conviction and sentence. *State v. Owens*, Op. No. 2011-UP-220 (S.C. Ct. App. Filed May 18, . The Remittitur was issued on June 3, 2011.

FINDING OF FACTS

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Applicant was arrested after being apprehended in the rear of a cemetery in a ditch, located relatively close to the location of the shooting that had taken place 15-30 minutes prior. (Trans. p.64, line 12). Victim's complete description of the suspect given to law enforcement was "he was tall, slender, black male with dark jeans, a dark t-shirt and a ski mask pulled over his face with a gun." (Trans. 37, lines 2-4) After being handcuffed by the police, Applicant was taken for a "show up" identification to the victim of the shooting. At that point, the victim identified Applicant. Applicant was arrested and a gunshot residue (GSR) test was performed on his hands at the police station. The police never located either the ski mask or the gun.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel failed to object to the denial of Applicant's constitutional right to a *Neil v. Biggers* hearing, thereby allowing an inadmissible identification.
2. Ineffective assistance of trial counsel in that counsel failed to properly investigate, prepare and thoroughly cross-examine State's expert GSR witness.

STANDARD OF REVIEW

To establish a claim of ineffective assistance of counsel, Petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gallman v. State*, 307 S.C. 273 (1992). When the defendant claims that counsel's failure to articulate a due process violation was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). For the reasons set forth below, this Court finds the claim is meritorious, therefore satisfying the first prong of *Strickland*.

Neil v. Biggers Hearing

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293 (1967). An in-court identification of an accused is inadmissible if a suggestive out-of court identification procedure created a very substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98 (1997).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. *Neil v. Bigger*, 409

U.S. 188 (1972). First, "a court must first determine whether the identification process was unduly suggestive.... [I]t next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*

Petitioner asserts his trial counsel was ineffective by withdrawing the request for a *Neil v. Biggers* hearing prior to trial. This Court agrees.

Trial counsel for Petitioner did initially request a *Neil v. Biggers* hearing, but when the request was challenged by the State and questioned by the trial judge, trial counsel withdrew the request.

The hearing was essential because the identification of Applicant was made during a one-person show up. "Single person show-ups are particularly disfavored in the law. *Stovall v. Denno*, 388 U.S. 293 (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also *State v. Johnson*, 311 S.C. 132, 134 (Ct.App.1993) (single person show-ups are particularly disfavored in the law). Based on representations made by the State, trial counsel withdrew the request for the hearing. The State and Court had the following exchange:

MR. SORENSON: "This occurred about 6:00 o'clock in the morning. The victim, Ms. Shannon, is going a carport door going to her car. She was rushed by a man that she described to the police as being a tall, slender black male with jeans, a dark t-shirt, and a ski mask pulled over his face with a gun. He tried to her to go open up her house. She also was shot one time in the leg and the personal takes off running. The police based on that descriptions, apprehended the defendant half a mile away within 15 to 30 minutes. He is brought back to the scene without- they don't find a mask or the gun. He is brought back to the scene. She didn't ID him by his face. She said that looks like the person based on physical build and the clothing. I wasn't intending on having her doing any kind of in court identification to the effect that she doesn't see his face, but she described his looks. That's about all she can describe as far as his face, because he's got a ski mask on. So all she sees are eyes and a mouth."

THE COURT: "So she's not going to say that the defendant, as he sits in court today, bears the same general description and build as the person who committed the crime. She's just going to testify that when they

brought somebody back that night that person fit the general description of the person who committed the crime?"

MR. SORENSON: "Physical build and clothing."

THE COURT: "I don't see any need for a hearing. I don't know what we would ask her."

MR. MELLARD: "That's fine, Your Honor. We just wanted to make sure there was going to be no inquiry identification."

Counsel appears to withdraw the request or arguably the Court denied the request and counsel failed to object. This exchange becomes important because at trial the proffer by the state is not what occurred. When asked about what happened one of the first comments from the victim was "...when I left out of my house Mr. Owens came from around another vehicle." (Transcript p. 71 line 21-22). The victim specifically identified Applicant by name on the stand, exactly what the State had told the trial court the victim would not do and there was no objection from trial counsel.

When the victim was asked about the physical build of her assailant she described him as "tall and he was slender, and I knew from the mask on his head that he had a lot of hair. This part of is (sic) face was like a big part where I could see his lips and I could see his eyes." (Trans. p. 74, lines 20-23). When asked what else she could tell about his mouth area, she replied "He had big lips and I know this part - like a big part protrusion, meaning, but I could really see is (sic) physical feature without even pulling the mask off his face." (Trans. p. 75, lines 3-6).

This testimony is in direct contrast to what the State told the trial judge. There was no objection by trial counsel and no request for a mistrial because the testimony of the victim differentiated substantially from the state's proffer.

The victim went on to identify what were two pictures of Applicant as the man brought back at the show up.

Q: Let me show you, ma'am. State's Exhibit Nos. 5 and 6. Do you recognize the person in those photographs there?

A: I think that's the guy they brought back there.

Q: Is that the person that was brought and shown to you at your house?

A: Yes, it was.

MR. SORENSON: Your Honor, we'd offer State Nos. 5 and 6 into evidence.

THE COURT: Objection?

MR. MELLARD: No objection.

THE COURT: Admitted without objection.

Given the identification testimony of victim the counsel did not object. The State then relied on the in-court identification during its closing argument:

That's her testimony, ladies and gentlemen. Ample lighting to see, and there was no question in her mind about the type of clothing he had on, jeans and a black, dark blue t-shirt. No question about it, and absolutely certain he had hair under the mask. No question about it. She was 100 percent certain from that he had hair under the mask. No question about it. She was 100 percent certain from that witness stand.

Trial counsel still did not object. Nor did trial counsel move for a mistrial based on this testimony or argument. Applicant was entitled to challenge the identification in a *Neil v. Biggers* hearing, but was denied that opportunity by the State's misrepresentations and trial counsel did not object. *See State v. Ramsey*, 345 S.C. 607, 613 (2001) (a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as a person who

committed the crime and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation).

The testimony by the victim is what should have been covered in the *Neil v. Biggers* hearing. The show up procedure used by the police was unduly suggestive. They brought a single suspect wearing clothing similar to that described by the victim and he was surrounded by uniformed police officers. This is a similar procedure that was ruled unreliable and unduly suggestive in *State v. Moore*, 343 S.C. 282, 287 (2000). See also *Morrison v. Kimmelman*, 752 F.2d 918, 922 (3d Cir.1985) (suggesting that "proper norms of advocacy" required a "timely [motion] to suppress" where there was a valid basis for suppression), aff'd on other grounds 477 U.S. 365, (1986); *Rodriguez*, 906 F.2d at 1160 ("[W]e think it is obvious that in a case like this one-with no murder weapon in evidence and only one witness naming the defendant as the murderer-even the most withering cross examination could not substitute for suppression.").

Given this finding that the show-up used in this case was unduly suggestive, this Court finds the claim of ineffective assistance of counsel based on trial counsels' withdrawal of the request for a *Neil v. Biggers* hearing is meritorious. Trial counsel failed to object to this testimony, failed to renew the motion, and failed to make a motion for mistrial once the testimony was presented. For these additional reasons the Court finds trial counsel's performance failed to render reasonably effective assistance under prevailing professional norms. Petitioner, therefore has met the first prong of the *Strickland* standard.

Trial counsel's performance was also deficient for failing to object to this improper testimony because this error failed to be preserved for Appeal. In *Foye v. State*, 335 S.C. 586 (1999), counsel had a conversation with the trial judge requesting to poll the jurors to see if any of them had seen the defendant in chains. The trial judge denied the request and none of the conversation was on the record. The South Carolina Supreme Court noted counsel was deficient because he failed to adequately preserve the issue for review. In *McHam v. State*, 404 S.C. 465, 474 (2013), the South Carolina Supreme Court found "counsel's failure to renew the Fourth Amendment objection constituted deficient performance that satisfies the

first prong of the Strickland test. See *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The proper measure of counsel's performance remains whether he has provided representation within the range of competence required by attorneys in criminal cases.").

In this case, Applicant directly appealed the issues of the improper testimony and failure to order a mistrial based on this testimony to the South Carolina Court of Appeals. In an unpublished opinion (S.C. Court of Appeals No. 2011-UP-220 May 18, 2011) the Court of Appeals affirmed Applicant's convictions because neither issue was preserved for review. The Court cited *State v. Walker*, 366 S.C. 643, 660 (Ct. App. 2005) ("Failure to object to comments made during argument precludes appellate review of the issue.") and *State v. Johnson*, 298 S.C. 496, 498 (1989) (holding that express consent to the admission of evidence constitutes a waiver of the issue on appeal).

Trial counsel's failure to object to the testimony not only allowed the evidence to go before the jury during both the State's case-in-chief and closing arguments, but the error also impacted Applicant's ability to challenge the testimony on direct appeal. The error is ineffective assistance of counsel.

Prejudice

The prejudice component requires Applicant to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. He "need not show that counsel's deficient performance 'more likely than not altered the outcome in the case'-rather, he must show only 'a probability sufficient to undermine confidence in the outcome.'" *Jacobs v. Horn*, 395 F.3d at 105 (citing *Strickland*, 466 U.S. at 693-94). "This standard is not a stringent one." *Id.* Although *Strickland* does not set a high bar with respect to the prejudice inquiry, Applicant must show that he would likely have prevailed on the suppression motion and that, having prevailed, there is a reasonable likelihood that he would not have been convicted. See *Belmontes v. Brown*, 414 F.3d 1094, 1121 (9th Cir.2005) (requiring a "reasonable probability that a motion to suppress would

have succeeded and that the suppression ... would have led to a different out-come at the trial") (citing *Kimmelman*, 477 U.S. at 375).

In summary, in order for Applicant to satisfy the second prong of *Strickland*, this Court must find the victim's identification would have been ruled inadmissible after the *Neil v. Biggers* hearing and without the identification there is a reasonable likelihood that Applicant would not have been convicted. This Court finds the Applicant has met this burden and satisfies the second *Strickland* prong.

Brathwaite Reliability Factors

Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. *State v. Moore*, 334 S.C. at 418. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. *Clyburn v. Sumter County School District*, 317 S.C. 50 (1994). An eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. *Caver v. Alabama*, 537 F.2d 1333, 1335 (5th Cir.1976).

Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (citing *Biggers*, 409 U.S. at 199-200).

In the instant case, the State explains to the trial court the victim could only describe the suspect as a "tall, slender, black male with jeans, a dark t-shirt and a ski mask pulled over his face with a gun." (Trans. P.37, lines 2-4). Further, that when the suspect is brought back for the suggestive show-up, the victim identifies the suspect based only on his physical build and clothing, not by his face. (Trans. 37, lines 10-15).

This description is confirmed by Officer Conyers, who was the first officer to ask the victim for the description. The victim stated "it was a black male wearing a dark blue ski mask, a dark colored shirt and a pair of blue jeans." (Trans. 93, lines 17-18). On cross, Officer Conyers confirmed the victim mentioned nothing about the suspect's hair, facial features, or lips, just clothing. (Trans. 96, lines 2-22). However, when she was on the stand, for the first time the victim stated she recognized the suspect not only by his race and clothing but also his facial features and hair. (Trans. p.78, line 18-23).

When she testified on cross, the victim admitted that during the interaction with the man she was at different points looking down at her keys, trying to find the correct one and later she was pushed against the door. (Trans. pp. 84-86). She testified that she had "no clue" how long the encounter lasted but Officer Conyers testified he estimated the incident lasted about a minute. (Trans. p.95, line 21-22).

During the show-up, she stated that she was in the "sitting up" on a stretcher when the police bring the suspect and asked her "is he the one?" She replied "Yeah." That was the extent of her testimony regarding the show-up. (Trans. pp. 88-89). This testimony was later contradicted by the EMS worker who testified that she placed the victim "on a spine board just to make sure I've got her spine in a straight line so nothing's aggravated." (Trans. p. 101, lines 8-10).

In summary, the victim in this case was getting ready to leave for work at 6:00 AM when a man in a ski mask came up to her and pointed a gun at her. He demanded her keys, which she fumbled with and then was pushed to the door and shot in the leg from behind. The entire encounter occurred in about a minute and then the man ran away. Close to thirty minutes later, while she is on a spine board in the back of an ambulance, a group of uniformed police officers bring a handcuffed suspect to the ambulance and ask "if this is the guy?" The victim states that during the entire encounter the man was wearing a ski mask and when asked for a description she could only describe physical build and clothing, nothing about facial features or hair.

Based on the factors and reasoning laid out in *Biggers* and *Brathwaite*, this Court finds the initial show-up procedure was unduly and unnecessarily suggestive. Further, under the totality of the circumstances here, this Court finds a substantial likelihood of irreparable misidentification such that the identification is unreliable as a matter of law. While some factors do have some degree of reliability, such as the amount of time between the crime and the confrontation, these factors are outweighed by (1) the short period of time of the encounter, (2) the fact the victim was focused on her keys and facing the door away from the suspect during this brief time, (3) lack of previous description of facial features and (4) the ski mask. The encounter occurred for a very brief time and a ski masked obstructed the face of the subject. The completely suggestive nature of the show-up procedure, combined with the inconsistent statements of the victim, highlight the inherent unreliability.

Second Strickland Prong

The final inquiry as to the Applicant's claim of ineffective assistance of counsel is the reasonable likelihood the Applicant would not have been convicted but for trial counsel's failure to protect the constitutional rights to a *Neil v. Biggers* hearing. After finding the motion to suppress the identification was meritorious and the identification was constitutionally inadmissible as a matter of law, this Court finds without the victim's improper identification, there is a reasonable likelihood the jury would have acquitted Applicant.

In reviewing the transcript, there were three main pieces of evidence submitted by the State. The victim's improper identification, an inconclusive gunshot residue test results, and the Applicant's location to the crime scene when arrested. Without the victim's identification, the jury would have basically nothing more than mere presence to find Applicant guilty. This is not sufficient for a guilty verdict. Applicant has shown that but for counsel's errors, there is a reasonable probability the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

In this case there was never a gun or mask found; there was no confession. There is a reasonable probability that but for counsel's errors the jury would have

returned a verdict of not guilty. Applicant has satisfied the second prong of *Strickland*.

Applicant has met his burden of satisfying both prongs under the *Strickland* requirement.

Ineffective for Failure to Investigate GSR Reports, Failure to Interview Expert Witness and Failure to Obtain Independent Expert Testimony

Applicant next argues his trial counsel was ineffective for failing to adequately prepare for and cross-examine the State's gun-shot residue expert (GSR). The GSR test in this case was the only physical evidence used by the State. Four separate tests were conducted; left palm, left back of the hand, right palm and right back of the hand. On all but the back of Applicant's right hand, the GSR test was negative. And on the back of the right hand the test was determined inconclusive. A single lead particle was found on the back of Applicant's right hand. (Trans p. 142) Yet, this particle was introduced by the expert and discussed as almost a positive result for GSR. The expert testified that there were only three ways for that particle to get on Applicant's hand: handling cheap Christmas lights from China, smelting lead and being in close proximity to a fired gun.

Trial counsel asked the SLED expert only nine questions on cross-examination. None of these questions were about any alternative theories on how the lead particle could have been found or improper testing circumstances involving the GSR test. In *Frasier v. State*, 306 S.C. 158, (1991) the South Carolina Supreme Court noted that counsel's failure to call an expert witness at trial to rebut the State's expert testimony will not necessarily rise to the level of deficient performance where he undertakes a vigorous cross-examination of the State's witness. In this case there was no vigorous cross-examination, there were nine questions asked and none of them gave the jury any reason to discredit the State's expert. Trial counsel erred in being unprepared to cross examine the SLED expert.

Trial counsel also erred in failing to call an expert witness to rebut the State's expert. The GSR test in this case was analyzed by John Roberts a SLED agent in Columbia. Applicant believes his attorneys were unaware that Mr. Roberts

would be testifying and were unprepared to effectively cross-examine the SLED agent on the GSR test. His attorneys did not retain an expert to prepare a cross on GSR, nor did they retain an expert to rebut the State's expert. This was not trial strategy. The Court is concerned this was unpreparedness.

In *Ard v. Catoe*, 372 S.C. 318 (2007), the South Carolina Supreme Court dealt with a similar issue involving GSR test. The Court agreed with the PCR court which ruled:

[T]hat trial counsel's failure to adequately evaluate and challenge the State's gunshot residue testimony was deficient performance that resulted in prejudice to respondent. As to deficiency, the PCR court concluded trial counsel failed to: (1) "aggressively re-examine" the gunshot residue reports; (2) "read the documents, evaluate them, and pursue the necessary next steps, such as consulting an appropriate," i.e., "an independent expert;" and (3) "investigate the possibility of retesting the samples." As to prejudice, the PCR court found that the "extent to which the jurors credited Powell's testimony ... was critical to the outcome of the case." Moreover, the PCR court noted that "[d]efense counsel's failure to refute gunshot residue evidence transformed an arguable case into a clear case.... Because of the solicitor's critical reliance on the absence of gunshot residue evidence, there is little question that the tenor of the jury deliberations would have been different, but for counsel's mistakes." Finally, the PCR court stated it was not "confident that a jury, adequately informed, would have convicted [respondent] of murder."

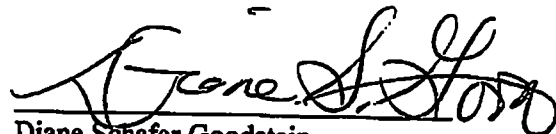
The Court in *Ard* went on to say "a criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation" (*Citing Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986)). There was little to investigate in this case beyond the GSR test. Applicant believes his attorneys were unprepared to cross the SLED expert as they had failed to evaluate the GSR reports, interview the SLED expert, obtain an independent expert and properly prepare for cross-examination. This claim is supported by the testimony of trial counsel. Testimony at the PCR hearing reflected that as a result of the testimony in Applicant's case, trial counsel now routinely consults their own expert in order to prepare for GSR cross-examination.

This Court agrees the record reflects that trial counsel provided ineffective assistance of counsel in the preparation and cross-examination of the GSR expert. Combined with the prejudice shown by the improper identification, this additional failure would have reasonably changed the outcome of the trial.

The Court sympathizes with the difficulty counsel had in gaining cooperation from the defendant. Furthermore, the Court recognizes defense counsel's excellent reputation as fine lawyers and advocates. However, even though this defendant was uncooperative Counsel must still meet a minimum standard of competent representation, which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." S.C. Rules or Prof. Conduct, Rule 1.1. *See also Holland v. Florida*, 130 S.C. 2549 (2010). That standard was not attained under the circumstances presented in this particular case.

THEREFORE, it is ordered Applicant's request for post-conviction relief be GRANTED and the verdicts against him be VACATED and these charges remanded to Orangeburg Court of General Session for new trial.

IT IS ORDERED.



Diane Schafer Goodstein
Chief Administrative Judge
First Judicial Circuit

Oct. 7, 2014

2011CP3801539

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Antionelle La'Troy Owens #336367

Applicant,

vs.

State of South Carolina

Respondent

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

CASE No. 2011-CP-38-01539

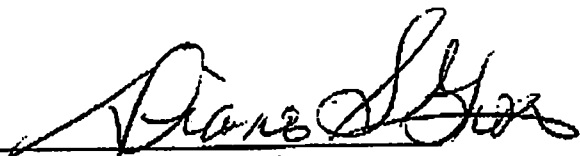
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ORANGEBURG, SC

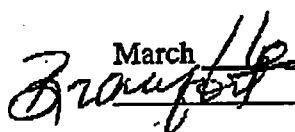
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This matter came before this Court by way of Respondent's Motion to Reconsider, Alter or Amend pursuant to South Carolina Rules of Civil Procedure 59 concerning this Court's order granting Applicant's petition for post-conviction relief. The Respondent's Motion does not raise any novel issues for the Court's consideration

Therefore, the Respondent's Motion for Reconsideration is denied.

AND IT IS SO ORDERED!


Judge Diane S. Goodstein
Presiding Circuit Court Judge

March 16, 2015
 South Carolina