

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

GABRIEL JON RIOS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001549

APPENDIX

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

VOLUME I OF II

RECEIVED

JAN 16 2018

S.C. SUPREME COURT

INDEX

INDEX	i
TRIAL TRANSCRIPT (dated February 26 – 28, 2013).....	1
FINAL BRIEF OF APPELLANT	381
FINAL BRIEF OF RESPONDENT	395
FINAL REPLY BRIEF OF APPELLANT.....	415
APPLICATION FOR POST-CONVICTION RELIEF	426
RETURN.....	434
POST-CONVICTION RELIEF HEARING TRANSCRIPT (dated January 30, 2017).....	440
APPLICANT’S EXHIBIT 2 (PHONE RECORDS).....	485
COURT’S EXHIBIT 1 (AMENDED PCR APPLICATION)	488
ORDER OF DISMISSAL.....	517
MOTION TO ALTER OR AMEND JUDGEMENT	531
MOTION FOR RECONSIDERATION PURSUANT TO RULE 59(e), SCRCP	537
RETURN TO APPLICANT’S MOTION TO ALTER OR AMEND THE JUDGMENT	541
AMENDED ORDER OF DISMISSAL.....	544
INDICTMENTS	561

THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:
Applicant’s Exhibit 1 (CD of 911 call)

1 STATE OF SOUTH CAROLINA
2 COUNTY OF SPARTANBURG } COURT OF GENERAL SESSIONS

3
4 STATE OF SOUTH CAROLINA,) TRANSCRIPT
5 PLAINTIFF,) OF
6 VS.) RECORD
7 GABRIEL JON RIOS,) 2010-GS-42-6830, 6831, 6831(A)
8 DEFENDANT.) 2010-GS-42-6832 - 6834
9

10 February 26th - 28th, 2013
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE R. LAWTON MCINTOSH, Judge, and a jury.

15 A P P E A R A N C E S:
16

17 TIMI POULOS and RUSSELL GHENT
18 ASSISTANT SOLICITORS
Attorneys for the State

19 MATTHEW SHEALY
20 ASSISTANT PUBLIC DEFENDER
21 Attorney for the Defendant
22
23

24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

1	<u>I N D E X O F W I T N E S S E S</u>	
2	<u>WITNESSES</u>	<u>PAGE</u>
3		
4	Motions	8
5	GAIL HOLT	
6	Direct examination by Sol. Poulos	25
7	Cross-examination by Mr. Shealy	34
8	LORIN WILLIAMS	
9	Direct examination by Sol. Poulos	38
10	Cross-examination by Mr. Shealy	42
11	Redirect examination by Sol. Poulos	45
12		
13	Jury selection	50
14	Opening by The Court	87
15	Opening by Solicitor Poulos	99
16	Opening by Mr. Shealy	102
17		
18	GAIL HOLT	
19	Direct examination by Sol. Poulos	106
20	Cross-examination by Mr. Shealy	135
21	Redirect examination by Sol. Poulos	143
22		
23		
24		
25		

1	<u>WITNESSES</u>	<u>PAGE</u>
2		
3	PHIL HOLT	
4	Direct examination by Sol. Poulos	148
5	Cross-examination by Mr. Shealy	155
6	Redirect examination by Sol. Poulos	160
7	Recross examination by Mr. Shealy	160
8	MARIE OLLINGER	
9	Direct examination by Sol. Poulos	162
10	Cross-examination by Mr. Shealy	166
11	RUTH GLENN	
12	Direct examination by Sol. Poulos	172
13	Cross-examination by Mr. Shealy	173
14	LORIN WILLIAMS	
15	Direct examination by Sol. Poulos	175
16	Cross-examination by Mr. Shealy	183
17	Redirect examination by Sol. Poulos	190
18	BRANDON HOWARD	
19	Direct examination by Sol. Poulos	191
20	Cross-examination by Mr. Shealy	214
21	KIMBERLY ASHLEY	
22	Direct examination by Sol. Poulos	225
23	TED SAAR	
24	Direct examination by Sol. Poulos	228
25	Cross-examination by Mr. Shealy	243

1	<u>WITNESSES</u>	<u>PAGE</u>
2		
3	Motions	254
4		
5	DAVID WELCH	
6	Direct examination by Mr. Shealy	264
7	ESTAR BYRD	
8	Direct examination by Mr. Shealy	266
9	Cross-examination by Sol. Poulos	269
10	SONIA RIOS	
11	Direct examination by Mr. Shealy	271
12	Cross-examination by Sol. Poulos	278
13	CURTIS JONES	
14	Direct examination by Mr. Shealy	279
15		
16	Motions	284
17	Closing by Mr. Shealy	303
18	Closing by Solicitor Poulos	315
19	Charge by the Court	324
20	Questions from the Jury	351
21	Verdict	369
22	Motions	372
23	Sentencing	377
24	Certificate	380
25		

1	<u>E X H I B I T S</u>			
2	<u>NOS.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
3	<u>State's Exhibits</u>			
4				
5	S-1	Photographic Line-up	8	132
6	S-2	Diagram	8	115
7	S-3	Photograph	8	120
8	S-4	Photograph	8	120
9	S-5	Photograph	8	120
10	S-6	Photograph	8	120
11	S-7	Photograph	8	120
12	S-8	Photograph	8	120
13	S-9	Photograph	8	120
14	S-10	Photograph	8	120
15	S-11	Photograph	8	120
16	S-12	Photograph	8	120
17	S-13	Photograph	8	120
18	S-14	Photograph	8	120
19	S-15	Photograph	8	120
20	S-16	Photograph	8	120
21	S-17	Photograph	8	120
22	S-18	Photograph	8	120
23	S-19	Photograph	8	120
24	S-20	Photograph	8	120
25	S-21	Photograph	8	120

	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1				
2				
3	S-22	Photograph	8	120
4	S-23	Photograph	8	120
5	S-24	Photograph	8	120
6	S-25	Photograph	8	120
7	S-26	Photograph	8	129
8	S-27	Photograph	8	129
9	S-28	Rock	8	204
10	S-29	Tape	8	205
11	S-30	Tape	8	206
12	S-31	wallet	8	207
13	S-32	Checkbook Cover	8	208
14	S-33	Glass	8	209
15	S-34-A	Fingerprint Card	8	213
16	S-34-B	Fingerprint Card	8	213
17	S-34-C	Fingerprint Card	8	213
18	S-34-D	Fingerprint Card	8	213
19	S-35	Fingerprint Card	8	227
20	S-36	Chart	8	237
21	S-37	Blow-up		242
22				
23				
24				
25				

1	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2		<u>Court's Exhibits</u>		
3				
4	C-1	Note from the Jury	87	
5	C-2	Note from the Jury	359	
6	C-3	Note from the Jury	359	
7	C-4	Note from the Jury	379	
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

P R O C E E D I N G S

1
2
3 (WHEREUPON, a photographic lineup was marked as State's
4 Exhibit No. 1. A diagram was marked as State's Exhibit No.
5 2. Twenty-five photographs were marked as State's Exhibit
6 Nos. 3 through 27. A rock was marked as State's Exhibit No.
7 28. Two wads of tape were marked as State's Exhibit Nos. 29
8 and 30. A wallet was marked as State's Exhibit No. 31. A
9 checkbook cover was marked as State's Exhibit No. 32. A
10 broken piece of glass was marked as State's Exhibit No. 33.
11 Four fingerprints were marked as State's Exhibit Nos. 34-A
12 through 34-D. A fingerprint card was marked as State's
13 Exhibit No. 35. A chart was marked as State's Exhibit No.
14 36. All of the above exhibits were for identification
15 purposes only at this time.)

16 THE COURT: My understanding is we have a Biggers
17 hearing, is that correct?

18 SOLICITOR POULOS: Yes, sir, Your Honor.

19 THE COURT: Y'all ready to proceed on that?

20 SOLICITOR POULOS: Yes, sir, we are.

21 MR. SHEALY: I've got---

22 THE COURT: Have you got your defendant properly
23 dressed?

24 MR. SHEALY: I do, Your Honor.

25 THE COURT: Okay.

1 SOLICITOR POULOS: Your Honor, I believe there are a
2 couple other very short motions after that.

3 THE COURT: Oh, there are?

4 SOLICITOR POULOS: Yes, sir.

5 THE COURT: I'm sorry.

6 (WHEREUPON, the defendant comes into the courtroom at
7 this time.)

8 SOLICITOR GHENT: Your Honor, may I have a moment to
9 speak with Ms. Poulos?

10 THE COURT: Sure.

11 (Pause.)

12 SOLICITOR POULOS: Your Honor, may we approach?

13 THE COURT: Yes, ma'am.

14 (WHEREUPON, a bench conference was held at this time
15 followed by a short recess being taken.)

16 THE COURT: Okay. Do we have any other motions we need
17 to contend with before we have the Biggers hearing?

18 SOLICITOR POULOS: Your Honor, just briefly.

19 The State has a motion to sequester the defense
20 witnesses, Your Honor, under Rule 615 under the South
21 Carolina Rules of Evidence. The defense has served us with
22 notice of alibi which, when we were served, included the
23 names of three witnesses. Your Honor, those witnesses were
24 Sonia Rios and Ms. Byrd, who is Estar?

25 MR. SHEALY: Estar.

1 SOLICITOR POULOS: Estar Byrd and a Bobbie Thompson.
2 On, on the defense witnesses list, Your Honor, there is
3 another witness, a Michael Cooper. And since obviously,
4 Your Honor, that time is or we believe that because of the
5 existence of an alibi defense that time and place are an
6 issue in the case we feel that it's appropriate to have a
7 defense witness sequestered should there be any tainting or
8 altering of their testimony in, in being present for the
9 State's case.

10 THE COURT: Well, it is my general practice, on any
11 request for sequestration, to sequester all witnesses except
12 for the victims, except for the lead investigator, and
13 obviously the defendant. Obviously we can't do that.
14 Otherwise I normally sequester everyone.

15 SOLICITOR POULOS: Okay.

16 THE COURT: Do you have any real reason why I shouldn't
17 do that?

18 MR. SHEALY: Your Honor, we have no problem doing that
19 with the sole exception that Curtis Jones is the
20 investigator, is an investigator with our office. He would
21 be testifying as well basically just to distance between
22 where my client was and this, where this happened. He has
23 to go pick up Ms. Byrd cause Ms. Byrd has no transportation.
24 So, that would be our only --.

25 THE COURT: I don't see any real harm in having his

1 investigator.

2 SOLICITOR POULOS: No, sir, we don't object to that,
3 and just so Your Honor knows the full picture, we do have a
4 potential reply witness, Investigator Todd Wilson, with our
5 office. If the Court feels -- he would just be -- he's not
6 a part of our case in chief. He would just be a rebuttable
7 witness depending on what case they were to put up.

8 So, if anything, Your Honor, we would contend that if,
9 if, anytime it would be appropriate for him to be
10 sequestered would be during the defense's case, but that is
11 his only purpose in the case is a possible reply witness.

12 THE COURT: Let's sequester everyone. I prefer that we
13 do that. That way we don't have any issues at all.

14 Okay. Let me, let me clarify something please, Mr.
15 Shealy.

16 MR. SHEALY: Yes, sir.

17 THE COURT: Your list is Cooper, Byrd, Jones, Rios?

18 MR. SHEALY: Yes, sir.

19 THE COURT: I thought I heard Ms. Poulos mention a
20 Thompson?

21 MR. SHEALY: Yes, Your Honor. We are not calling Mr.
22 Thompson.

23 THE COURT: Okay.

24 MR. SHEALY: No, sir.

25 THE COURT: So I don't need to go over that with the

1 jury?

2 MR. SHEALY: No, sir, and I have Ms. Byrd and Mrs. Rios
3 and Mr. Cooper is currently in the jail, and Mr. Jones are
4 out, is outside. I don't know that Mr. Cooper is been
5 brought up. But so that I can show them to the jury to see
6 if they know either Ms. Byrd or Mrs. Rios or Mr. Jones.

7 THE COURT: Okay. Any question as to strikes in this
8 case?

9 MR. SHEALY: No.

10 THE COURT: I believe it's ten and five.

11 SOLICITOR POULOS: No, sir, I believe the State gets
12 five and they get ten.

13 MR. SHEALY: Yes, sir.

14 THE COURT: That's what it looks like.

15 Alternates, I think we've got -- we should have at
16 least one --

17 MR. SHEALY: Yes, sir.

18 SOLICITOR POULOS: Yes, sir.

19 THE COURT: -- unless either one of you have any
20 different request. I'll be glad to do two. Doesn't matter.

21 SOLICITOR POULOS: Your Honor, I don't think it hurts
22 to have an extra one, but we'll leave it to your discretion.

23 MR. SHEALY: Your Honor, I'm fine with one. It doesn't
24 matter. Would that be---

25 THE COURT: How long, how long do you anticipate this

1 trial being?

2 SOLICITOR POULOS: I think, once we get going, Your
3 Honor, we could be done potentially by the end of the day,
4 maybe early tomorrow, with our part.

5 MR. SHEALY: I expect to be done tomorrow.

6 THE COURT: So probably that means we'll be Thursday if
7 all goes, if all goes to form. Let's do two, and you get
8 two, Mr. Shealy, and you have one per alternate.

9 Now, I've looked over voir dire from the State and from
10 the defendant, and, quite frankly, most of them are in my
11 general or I'm not gonna charge them. I have, just for the
12 record, on State's request, looks like both sides were
13 asking me to ask specifically has anyone ever been arrested,
14 charged, convicted of a crime involving burglary, larceny,
15 assault, or kidnapping. That will be State's No. 4.

16 Has anyone ever been -- has anyone had a family member
17 whose been arrested, et cetera, et cetera, under number
18 five. I had some questions about those. But I'll -- if
19 both sides agree, I'll be glad to ask those, those questions
20 to the panel.

21 MR. SHEALY: Yes, Your Honor. I have---

22 THE COURT: Okay. So, I'll ask, from the State's 4, 5,
23 7, and 8. I'm not gonna ask the remainder that's requested.
24 I would suggest that both the State and the defense, if you
25 feel that that's an error on my part, that you make your

1 voir dire request a Court Exhibit. That way it can be
2 reviewed in case I made a mistake.

3 SOLICITOR POULOS: You are not -- but are you going to
4 ask four, five, seven, and eight, Your Honor?

5 THE COURT: Four, five, seven, and eight, yes, ma'am.

6 SOLICITOR POULOS: You are not. Okay.

7 THE COURT: Okay. Going over to the defense, do you
8 have -- have each of y'all -- have y'all given each other
9 copies?

10 MR. SHEALY: I have, yes, sir.

11 SOLICITOR POULOS: Yes, sir.

12 THE COURT: Okay. Number one I would ask. Number
13 two -- excuse me. Number three and number four. The rest
14 of them I would not.

15 MR. SHEALY: Your Honor, may I ask why number two will
16 not be asked?

17 THE COURT: Cause I already ask that in my general.

18 MR. SHEALY: Oh, okay. Thank you, judge.

19 THE COURT: I want you to ask me questions. So,
20 please, I want, I want both attorneys to feel free. It
21 doesn't hurt my feelings if you want to check, I mean
22 challenge me or question me about something. Please feel at
23 liberty to do so. I would request, however, that you do it
24 outside the presence of the jury so we just keep formalities
25 in order.

1 MR. SHEALY: Yes, sir.

2 THE COURT: Other than that, that, that will be my
3 rationale for not charging number or asking number two.

4 MR. SHEALY: And Numbers 5, 6, 7, and 8 will be
5 incapsulated in State's 4 and 5 I believe?

6 THE COURT: Say -- yeah, I think -- so, I think
7 otherwise we're starting to get redundant.

8 MR. SHEALY: Yes, sir. Yes, sir. Thank you, judge.

9 THE COURT: Okay. Let me -- what is the victim's name
10 in the case?

11 SOLICITOR POULOS: Your Honor, the victim's name is
12 Gail Holt and her husband is Bill Holt, who's also a victim
13 and owner of the home.

14 THE COURT: Gail Holt?

15 SOLICITOR POULOS: Gail Holt, yes. Yes, sir.

16 THE COURT: G-A-I-L-E---

17 SOLICITOR POULOS: Yes, sir.

18 THE COURT: ---or G-A-Y-L-E?

19 SOLICITOR POULOS: G-A-I-L.

20 THE COURT: H-O-L-T?

21 SOLICITOR POULOS: Yes, sir.

22 THE COURT: Okay. Okay. And for the State we have Ms.
23 Poulos and Mr. Ghent and Mr. Shealy for the defense?

24 MR. SHEALY: Yes, sir.

25 THE COURT: Am I correct on all that?

1 MR. SHEALY: Yes, Your Honor.

2 THE COURT: All right. I'll know we're gonna do the
3 Biggers in just a second. I just want to let you know my
4 procedure. Normally what I do is ask the State to -- when
5 we pick a jury, I'll bring them in. Well, we want to get
6 the panel in, excuse me, instead of pick a jury, ask you to
7 call your case, and then bring the -- then I ask you to pass
8 those forward to me, and then I'll go through my questioning
9 process of the you voir dire.

10 Any problems with that?

11 SOLICITOR POULOS: No, sir.

12 MR. SHEALY: No, Your Honor.

13 THE COURT: Okay. Do you want your indictments back?

14 SOLICITOR POULOS: Yes, sir.

15 THE COURT: All right.

16 MR. SHEALY: Your Honor, I do have a motion in limine,
17 a motion to cause the State to elect charges. I don't know
18 if you want to---

19 THE COURT: Okay. I'm gonna ask you to speak a little
20 louder. I've got big ears, but little hearing. So --.

21 MR. SHEALY: Yes, sir, I apologize.

22 THE COURT: That's all right.

23 MR. SHEALY: Your Honor, I do have a motion in limine
24 regarding any mention of my clients, of any crimes my client
25 was charged with when this allegedly happened. Also no

1 mention of probation, bonds people. Any of that, Your
2 Honor, I believe is, is irrelevant.

3 We also present to you, Your Honor, more prejudicial
4 than probative, judge. So, I'd ask that you stop any
5 prosecution witness from speaking in those things---

6 THE COURT: All right.

7 MR. SHEALY: ---Your Honor.

8 THE COURT: Just for the record, we had a meeting in my
9 chambers with Ms. Poulos, Mr. Ghent, and Mr. Shealy, and I
10 asked the question, I know the issue of the defendant's
11 prior record was brought up. I asked the State whether they
12 are aware of any evidentiary rule under which the prior
13 record may become admissible, 609 and 404 in particular. I
14 think the State's position was unless the defendant somehow
15 opens the door for that information that those rules would
16 prohibit the admission of any prior record of this
17 defendant.

18 Is, is that correct, Ms. Poulos?

19 SOLICITOR POULOS: That's correct, Your Honor.

20 THE COURT: Okay. So, I'm gonna ask you to instruct
21 all witnesses for the State that they shall refrain from
22 having any mention or making any mention of any alleged
23 prior record of this defendant in this matter.

24 Okay. We'll, we'll try this case based on the facts of
25 this case. That -- those may become relevant later

1 depending on what the jury does in this case, and I'll
2 reiterate that, as necessary, during the trial.

3 Is anything else from the defense at this stage?

4 MR. SHEALY: Your Honor, I'd ask that the State be
5 required to elect either to charge, either to go to trial on
6 the armed robbery indictment, Your Honor, or the grand
7 larceny indictment. I believe that those are duplicative
8 charges. The armed robbery indictment, Your Honor, is
9 2010-GS-42-6831. The grand larceny indictment is
10 2010-GS-42-6832.

11 SOLICITOR POULOS: And, Your Honor, we have elected to
12 proceed under the armed robbery. I have not pulled the
13 grand larceny indictment. I have the other remaining
14 indictments for, for Your Honor.

15 THE COURT: Okay. So, as far as the, what we'll be
16 proceeding with at trial, based on what my understanding is,
17 the charge of burglary first, possession of a weapon during
18 the commission of a violent crime, armed robbery,
19 kidnapping, assault first degree, is that correct?

20 SOLICITOR POULOS: That is correct, Your Honor.

21 THE COURT: And you're not pursuing grand larceny?

22 SOLICITOR POULOS: That is correct, Your Honor.

23 THE COURT: Okay. And I, I asked the solicitor, or
24 whoever I asked this morning, whether or not the assault and
25 battery first would be by mob or by individual and I was

1 told that it was by individual and not by mob.

2 Is that correct?

3 SOLICITOR POULOS: That is correct, Your Honor.

4 THE COURT: Okay.

5 MR. SHEALY: That's my understanding.

6 THE COURT: And, Mr. Shealy, for your edification, my
7 sole inquiry was the nature of the charge, nothing else, and
8 no factual background.

9 MR. SHEALY: Thank you, Your Honor.

10 THE COURT: Okay. Okay. So, are we ready with all
11 motions except for the Biggers?

12 SOLICITOR POULOS: Yes, sir. Your Honor, Mr. Ghent
13 would like to address a matter.

14 THE COURT: Yes, sir.

15 SOLICITOR GHENT: Your Honor, I, I just want to bring
16 to the attention that, before we begin, Mr. Holt, seated
17 behind me, advised me that he is very hard of hearing. So,
18 I -- he was going to sit up here. He wanted to sit up here.
19 I explained that the table would be taken. It's not that
20 far in back of me, but he did say he is hard of hearing.
21 If -- and he wants to be accommodated that he can sit
22 somewhere closer. If that's possible, fine.

23 Otherwise, could we turn up the volume?

24 THE COURT: I actually have no problem turning up the
25 volume. I had the officer ask me a minute ago if I could

1 get the mic slid closer. It's stationary. So, I can't move
2 the mic. I'll try my best to speak into the mic. I have no
3 problem with him trying to sit in a place a little bit
4 closer so he can hear what's going on in the courtroom as
5 long as it's a reasonable location.

6 SOLICITOR GHENT: Well, I'm fine if he sits up here
7 just next to me.

8 THE COURT: I don't, I don't have a problem with that.

9 SOLICITOR GHENT: The other thing, Your Honor, that I
10 would ask, because he is hard of hearing just to make sure,
11 would Your Honor mind repeating what Your Honor said about
12 the 404(b) matters so that there's no misunderstanding on
13 that?

14 THE COURT: Well, let me just tell you this. What I
15 was gonna do, and, and let me just -- Mr. Holt, would you
16 please stand up?

17 (Mr. Holt complies.)

18 THE COURT: Would you come around a little closer so I
19 can speak to you?

20 (Mr. Holt complies.)

21 THE COURT: Yes, sir, you stay right there. I just --
22 can you hear me fine?

23 MR. HOLT: No, sir.

24 THE COURT: Okay. Can you hear me now?

25 WITNESS: If I cup my ear I can.

1 THE COURT: Okay. Well, let me, let me just tell you
2 this. I don't know what's going on, you know, with this
3 microphone. One would be I cut it on. Okay. And, so, I'm
4 sorry.

5 MR. HOLT: I don't know what you said.

6 THE COURT: I said one of the problems with why you
7 couldn't hear is because my microphone was cut off. I had
8 cut it off at a bench conference.

9 Can you hear me better now?

10 MR. HOLT: I can't make out every word you say.

11 THE COURT: Well, let me just tell you this. You can
12 step close as you need to so you can hear me cause you and I
13 need to be on the same terms.

14 Okay. Can you hear me now?

15 MR. HOLT: Go ahead.

16 THE COURT: Can you hear me now?

17 MR. HOLT: Yes.

18 THE COURT: Okay. Information has come to me that you
19 are not happy about the fact that you're not allowed to
20 bring about this any prior record from this defendant when
21 you take the stand, and I understand this is a family member
22 and I understand it's a very emotional case.

23 Okay. But our rules of evidence apply to everyone,
24 okay, across the board. It applies to defendants and to
25 victims with equal vigor.

1 Okay. So, I want to tell you now that, and I will
2 remind you, that when you take the stand, you're not gonna
3 be allowed to get into any alleged prior record that this
4 defendant has.

5 Okay. Do you understand that?

6 MR. HOLT: Yes.

7 THE COURT: Okay. And let me tell you why. If you do
8 that, the remedy that may be available to this defendant is
9 that I have to declare a mistrial, which means that we have
10 to do, to do this all over again, and I don't think you want
11 to do that. I don't think anybody else involved wants to do
12 that.

13 Okay. Now, I also tell you that that prior record may
14 become relevant at the end of the case depending on what the
15 jury does with their findings, whether they find him guilty
16 or not guilty. If they find this gentleman guilty, then
17 they may be relevant for sentencing.

18 Okay. But while this trial is proceeding, all
19 witnesses, including yourself, will be required not to bring
20 up anything about this gentleman's record. We're gonna try
21 the case based on the facts of this case.

22 Do you understand?

23 MR. HOLT: Yes.

24 THE COURT: Okay. Very good. I'm not trying to pick
25 on you. That -- what we're trying to do is---

1 MR. HOLT: I understand.

2 THE COURT: ---make sure that we have a clean trial,
3 and the case is decided without there being problems.

4 MR. HOLT: Yeah.

5 THE COURT: Okay.

6 MR. HOLT: And I just want to hear the trial.

7 THE COURT: I hear you, and let me tell you, if you
8 have problems -- we don't mind trying to accommodate anyone
9 here regardless -- this goes to the defense side as well.

10 MR. SHEALY: Yes, sir.

11 THE COURT: We want to accommodate everyone involved.
12 So, if you're having problems, if you somehow let one of the
13 attorneys know, they'll bring it to my attention and we'll
14 do our best to try to accommodate you.

15 Okay, sir?

16 MR. HOLT: Yes, sir.

17 THE COURT: One thing you're not gonna be able to do is
18 stand right here throughout the trial---

19 MR. HOLT: Oh, I understand.

20 THE COURT: ---obviously. But it's -- as to the extent
21 we can accommodate you we will accommodate you.

22 MR. HOLT: Thank you.

23 THE COURT: Okay. That's all I had to say.

24 MR. HOLT: Thank you.

25 THE COURT: Thank you.

Gail Holt - Direct examination
by Solicitor Poulos

1 SOLICITOR GHENT: May it please the Court?

2 THE COURT: Sir?

3 SOLICITOR GHENT: Your Honor, just the appellate
4 attorney in me, I would put on the record that I was
5 watching throughout and he was nodding his head that he
6 understood what Your Honor said, and we have moved his chair
7 up to where he is right next to me.

8 THE COURT: Okay.

9 SOLICITOR GHENT: Thank you, Your Honor.

10 THE COURT: And, again, if he hits somebody and says
11 look, I'm having a problem hearing, I mean we all miss one
12 or two things in Court. That's cause of the nature of the
13 proceedings sometimes. But, you know, let's reasonably
14 accommodate him and anyone else we need to.

15 SOLICITOR GHENT: Thank you, Your Honor.

16 THE COURT: All right. Now, is everybody ready to go
17 forward with the Biggers hearing?

18 SOLICITOR POULOS: Yes, sir, we are.

19 THE COURT: Okay.

20 MR. SHEALY: Yes, Your Honor.

21 THE COURT: All right. Would you call your officer
22 please?

23 SOLICITOR POULOS: Yes, sir, we would -- we're actually
24 gonna call the victim first, Your Honor.

25 THE COURT: The victim.

Gail Holt - Direct examination
by Solicitor Poulos

1 SOLICITOR POULOS: Yes, sir, the State calls Gail Holt.

2 GAIL HOLT, being first duly sworn,

3 testified as follows:

4 DIRECT EXAMINATION

5 BY SOLICITOR POULOS:

6 Q If you would, ma'am, please state your name for the
7 record.

8 A My name is Gail Holt.

9 Q And where do you live, Mrs. Holt?

10 A I live at Perrin Drive in Spartanburg.

11 Q And where do you work?

12 A I work at Wofford College Student Health Center.

13 Q Okay. What, what is your title at Wofford?

14 A I'm a registered nurse.

15 Q Okay. And were you the victim of a home invasion that
16 occurred here in Spartanburg County on August 14th, 2010?

17 A Yes.

18 Q And what time did you wake up that morning?

19 A It was maybe a little bit before 7:30. Around 7:30.

20 Q And was your husband with you?

21 A No.

22 Q Okay. Did he go to work that morning?

23 A He went to work that morning.

24 Q All right. And do you remember about what time he
25 left?

Gail Holt - Direct examination
by Solicitor Poulos

1 A No, he'd probably been gone maybe about an hour.

2 Q Okay.

3 A Somewhere around there.

4 Q Okay. So, he left before you woke up?

5 A Yes.

6 Q Okay. What part of the house were you in?

7 A I was in the bedroom in the back of the house.

8 Q Okay. And can you please state what happened, what you
9 recall happening that morning?

10 A I was already awake, had been awake for a few minutes.

11 It had been daylight for quite a while. And my husband and

12 I were keeping my, my dog. My daughter has a dog, and I was

13 just getting ready to take the dog out, and I heard glass

14 break. I heard some glass break.

15 Q And what did you do then?

16 A I thought something had fallen. I just thought maybe a
17 mirror, excuse me, or something had fallen and broken, and I
18 was going down the hall to check to see what happened.

19 Q Okay. And what happened when you got down the hall?

20 A I encountered a man.

21 Q Did you recognize that man?

22 A Yes.

23 Q Did, did you recognize that man immediately?

24 A Immediately.

25 Q Was he wearing a mask?

Gail Holt - Direct examination
by Solicitor Poulos

- 1 A No.
- 2 Q Did he have anything on his head?
- 3 A If I recall, it was a hoodie or a hat, hoodie.
- 4 Q Okay. What did he have in his hands?
- 5 A I don't -- I just came face-to-face with him and he
- 6 immediately made me turn around.
- 7 Q All right. How do you know or who -- do you know the
- 8 name of the person who did this?
- 9 A Yes.
- 10 Q All right. How -- what is his name?
- 11 A Gabe.
- 12 Q Okay.
- 13 THE COURT: I'm sorry. What was that?
- 14 WITNESS: Gabe.
- 15 THE COURT: Gabe.
- 16 Q Okay. And how do you know Gabe?
- 17 A He worked for my husband.
- 18 Q How many times -- what, what kind of business does your
- 19 husband have?
- 20 A My husband owns a insulation business. It's a foam
- 21 insulation business.
- 22 Q All right. And how many occasions did you, would you
- 23 say that you had to, to be around Gabe?
- 24 A Several, a few. I would see him at my husband's shop
- 25 and my husband had brought him to the house a few times.

Gail Holt - Direct examination
by Solicitor Poulos

1 when business would be slow, they came and they roofed the
2 house and did some painting.

3 Q Okay. Was he working for your husband at the time on
4 the day of this incident?

5 A No.

6 Q Okay. Did you recognize his voice?

7 A Yes.

8 Q Did he speak with an accent?

9 A It's a very distinctive voice. I wouldn't say more of
10 an accent, but it's a very distinctive voice.

11 Q And was he all by himself?

12 A Yes.

13 Q When you encountered him in the hallway, what's the
14 first thing that he did?

15 A He told me to turn around.

16 Q And what did he do?

17 A Put his arm around me and held something to my neck.

18 Q Okay. Did -- so, he had something in his hand?

19 A Yes.

20 Q Could you tell what that was?

21 A (Witness nods negatively.)

22 Q All right. What did he do next?

23 A He started backing me down the hall towards my
24 husband's office.

25 Q All right. And what was he saying to you?

Gail Holt - Direct examination
by Solicitor Poulos

- 1 A Just trying to force me in there and he told me to
2 open -- he was telling me to open the safe.
- 3 Q Open the safe.
4 what did he want inside the safe?
- 5 A I don't know.
- 6 Q Now, what happened after that?
- 7 A I didn't address him by name. I've told the detective
8 I believe in guardian angels and something told me not to
9 call him by name, to address him as sir. And he told me to
10 open the safe, open the closet, and I told him I did not
11 know the combination, the combination, which I didn't, and I
12 told him sir, I do not know the combination. I promise you,
13 I do not know it.
- 14 Q Was the safe in a closet?
15 where was the safe, ma'am?
- 16 A It's in a closet.
- 17 Q Okay. And what happened after he couldn't get the safe
18 opened?
- 19 A He just -- he, he said several times open the safe,
20 open the safe, very aggressively, and very much -- he seemed
21 to be in a hurry, and I told him I didn't know it, and I
22 promised him I didn't know it, which I didn't.
- 23 Q What happened after that?
- 24 A He forced me back down the hall towards the master
25 bedroom and told me to lie down on my face. I did. He told

Gail Holt - Direct examination
by Solicitor Poulos

1 me to put my hands behind my back, which I did, and he tied
2 my hands up with tape.

3 Q what did he do after that?

4 A I remember that my husband is very hard of hearing and
5 he keeps a gun. We have a gun in the house, and we kept it
6 in a holster at that time on a poster on the bed. And I was
7 trying to see or trying to watch him and he went and he
8 immediately got the gun out of the holster.

9 Q what did he do with the gun?

10 A He came back and he asked me where my purse was, my
11 cell phone, and my car keys. He wanted those two things,
12 and I told him, I said, sir, my purse is in the dining room
13 on the table. He went down the hall, came back, and he had
14 a bag which he threw in the floor. It was the bag of dog
15 supplies. My daughter had a bag with dog food and toys and
16 things in it, just a black bag with handles, and he came
17 back and he threw it in the floor.

18 He told me I lied to him, and I said sir, I did not
19 lie. My purse is on the dining room table, I promise you.
20 He went back, he came back, and I just remember him
21 throwing, putting my bag down, and he apparently got the
22 keys and the, what he wanted, and he saw I had a jewelry
23 armoire with several drawers in it, and he went over there,
24 pulled some drawers out. I don't have expensive jewelry.
25 It's very inexpensive stuff, and he just threw the, some of

Gail Holt - Direct examination
by Solicitor Poulos

1 the stuff in the floor, and---

2 Q Was he able to get anything from your wallet?

3 A I don't know. I don't remember. But see I had money
4 in there. Seems like he got the money. I was trying to
5 see, but I was on my face.

6 Q Okay. Did he take your car keys?

7 A Yes.

8 Q Did he take your car?

9 A Yes.

10 Q And what happened after he left?

11 A Something told me just to be still and listen, and I
12 listened, and I heard him go back down the hall, and I
13 listened and I could hear the door close. And I laid there
14 for just a minute more, and just immediately started trying
15 to free myself, get myself, my hands out of the tape, which
16 I was able to do after a few minutes. And I got up and I
17 ran and called my husband.

18 Q Did your husband call 9-1-1?

19 A Yes.

20 Q Okay. And, ma'am, when police arrived, did, did you
21 tell them what happened?

22 A Yes.

23 Q And you gave them a description of who gave this to
24 you?

25 A Yes.

Gail Holt - Direct examination
by Solicitor Poulos

- 1 Q And did you tell them who it was?
- 2 A Yes.
- 3 Q And who did you tell them did this?
- 4 A Gabe. I only knew him by Gabe.
- 5 Q Okay. All right.
- 6 A I didn't know a last name.
- 7 Q Was there any doubt in your mind---
- 8 A None.
- 9 Q ---that that was Gabe?
- 10 A No.
- 11 Q While at your house that day, did Investigator Williams
- 12 present you with a lineup?
- 13 A Yes, pictures.
- 14 Q Okay. I'm handing you what's been marked for
- 15 identification purposes as State's Exhibit 1, and I want you
- 16 to tell me if you recognize that.
- 17 A Yes.
- 18 Q Is that the affidavit and, and photo lineup that you
- 19 were presented with?
- 20 A Yes.
- 21 Q Is that your signature on the affidavit?
- 22 A Yes.
- 23 Q And what is the date, ma'am, on that?
- 24 A The 14th of August of 2010.
- 25 Q Is that the date of this incident?

Gail Holt - Direct examination
by Solicitor Poulos

- 1 A That's correct.
- 2 Q Is the lineup a fair and accurate representation of, of
3 what you were presented with---
- 4 A Yes.
- 5 Q ---and asked -- okay. Did Investigator -- what did
6 Investigator Williams ask you to do when he handed you the
7 lineup?
- 8 A He told me he was gonna just give me some pictures and
9 if I recognized a person or if I saw a person that did this
10 to circle it.
- 11 Q Okay. And were you able to make an identification?
- 12 A Yes.
- 13 Q Okay. Did you circle and put your initials beside the
14 photograph that you identified?
- 15 A Yes.
- 16 Q Were you absolutely sure that that man that you circled
17 is the man that did this to you?
- 18 A Absolutely.
- 19 Q Any hesitation whatsoever?
- 20 A Were you forced, threatened, coerced by police or by
21 anyone to identify---
- 22 A No.
- 23 Q ---who you identified?
- 24 A No.
- 25 Q Did Investigator Williams tell you or suggest to you

Gail Holt - Direct examination
by Solicitor Poulos

1 who to identify?

2 A No.

3 Q Did your husband suggest to you or tell you who to
4 identify?

5 A No.

6 Q What was the name of the man that you picked?

7 A Gabe.

8 Q Okay. Is the person who broke into your home, tied you
9 up, and robbed you present here in the courtroom today?

10 A Yes.

11 Q Can you please point him out, ma'am?

12 A He's over there.

13 SOLICITOR POULOS: Okay. Let the record reflect the
14 witness has identified the defendant.

15 THE COURT: It so reflects.

16 Q Thank you, ma'am. Please answer any questions that
17 Mr. Shealy may have for you.

18 THE COURT: Mr. Shealy, cross-examination.

19 MR. SHEALY: Thank you, Your Honor. Thank you, Your
20 Honor.

21 CROSS-EXAMINATION

22 BY MR. SHEALY:

23 Q Mrs. Holt, I have just a couple questions.

24 You testified -- did you testify as to the time on that
25 affidavit?

Gail Holt - Cross-examination
by Mr. Shealy

1 A Yes, around 7:30.

2 Q Okay. Well, on the---

3 THE COURT: What time was that please, ma'am?

4 WITNESS: 7:30.

5 THE COURT: 7:30?

6 WITNESS: Around 7:30, between 7:30 -- around that time
7 of the morning.

8 THE COURT: 7:30AM or PM?

9 WITNESS: AM.

10 Q That's when this, this happened --

11 A That's correct.

12 Q -- right?

13 Okay. But as to -- when did you -- when were you
14 presented the photo lineup?

15 Do you remember?

16 A No, I don't remember the time.

17 Q Oh, yeah.

18 A Is this what you're looking for?

19 Q That's what I'm asking.

20 A Uh-huh. (Affirmative).

21 Q Does it have on there when you were presented that
22 lineup?

23 Looking towards the top.

24 A 10:38AM.

25 Q Okay. So, this was what, three hours?

Gail Holt - Cross-examination
by Mr. Shealy

1 THE COURT: What was that time, Mr. Shealy?

2 MR. SHEALY: It was 10:38AM.

3 Q So, that was about two hours after all this happened,
4 correct?

5 A Yes.

6 Q Okay. Do you know when you signed your statement?

7 Just -- do you remember when you wrote a statement in
8 this case?

9 A That morning.

10 Q That morning?

11 A Yes.

12 Q Was it -- it was a couple hours after they presented
13 you this photo lineup, wasn't it?

14 A Around that time. I just remember it being that
15 morning.

16 Q Okay. Would it surprise you if it was about 12:21PM?
17 Does that sound about---

18 A I just know it's---

19 Q Okay. That sound about right?

20 A (witness shrugs shoulders.)

21 Q Okay. And I want to make sure I understand the
22 chronology.

23 When did you speak with Mr., with Investigator
24 Williams?

25 A When he arrived at the house.

Gail Holt - Cross-examination
by Mr. Shealy

1 Q Do you remember?

2 Okay. So, do you remember around when he got there?

3 A No, I didn't look at the clock.

4 Q Okay. All right. All right. One last question.

5 You testified that this happened somewhere around 7:30,
6 right?

7 A Around that time.

8 Q Around that time?

9 A Maybe shortly. Some time after that.

10 Q Okay. You've testified that Mr. Williams, that
11 Investigator Williams didn't put you, put any pressure on
12 you to pick anybody out?

13 A No.

14 Q Did anybody else put any pressure on you to pick---

15 A No.

16 Q ---any particular person out?

17 A No.

18 Q Okay. Thank you, ma'am.

19 THE COURT: Redirect?

20 SOLICITOR POULOS: No, sir, Your Honor.

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

22 WITNESS: Okay.

23 THE COURT: State calls Investigator Lorin Williams.

24 LORIN WILLIAMS, being first duly

25 sworn, testified as follows:

Lorin Williams - Direct examination
by Solicitor Poulos

1 DIRECT EXAMINATION

2 BY SOLICITOR POULOS:

3 Q If you would, sir, please state your name for the
4 record.

5 A Lorin Williams.

6 Q And where are you employed?

7 A Spartanburg County Sheriff's Office.

8 Q What department do you work in at the Sheriff's Office?

9 A I work in the violent crime division with the Sheriff's
10 office.

11 Q On August 14th, 2010, did you receive a call
12 regarding a home invasion?

13 A I did.

14 Q And what was that location?

15 A It was on Perrin Drive, Perrin Drive in
16 Spartanburg.

17 Q Okay. That's in Spartanburg County?

18 A It is.

19 Q When you arrived did you speak with the victim, Gail
20 Holt?

21 A Yes, I did.

22 Q And did she tell you what happened?

23 A She did.

24 Q Can you describe her demeanor?

25 A She was extremely emotional. She was, she was very --

Lorin Williams - Direct examination
by Solicitor Poulos

1 just distraught.

2 Q Did she provide a description of the person who did
3 this?

4 A Yes, she did.

5 Q And did she tell you that she knew the person who did
6 this?

7 A She did. She stated that, that she knew him as Gabe.

8 Q Okay. And through your investigation, would you --
9 were you able to determine a full name for Gabe?

10 A Yes.

11 Q And what was the name that you had determined?

12 A It was Gabriel Rios. It's actually -- it's Gabriel Jon
13 Rios.

14 Q Okay. And taking all the information that she gave
15 you, did you compile a photo lineup to present to Mrs. Holt?

16 A Yes.

17 Q And how did you combine this lineup?

18 A Basically what we do is, in the mug shot program that
19 is used, was used at that time by the Sheriff's Office, the
20 suspect's photograph is highlighted. Then the computer
21 generates similar characteristics. They're put into that
22 lineup, and then it would be printed off and presented to
23 them, to the victim.

24 Q Okay. And did you show her a lineup in this case?

25 A I did.

Lorin Williams - Direct examination
by Solicitor Poulos

1 Q If you would, take a look at -- it may be up there,
2 State's Exhibit 1.

3 SOLICITOR GHENT: Ms. Poulos.

4 Q Okay. All right. Do you recognize what I've handed
5 you?

6 A Yes, ma'am.

7 Q Is that the photo lineup that you presented Mrs. Holt?

8 A It is.

9 Q Is that a fair and accurate representation of the
10 lineup that you presented her with?

11 A It is.

12 Q Is your signature on, on either of those documents?

13 A It is.

14 Q Okay. Did you ask her -- well, tell her, how, how did
15 you present that to her?

16 A Basically what I do is, once, once a lineup is
17 prepared, I will lay it face down on the table before I ever
18 let her see it. I will explain to her that the person that
19 the or the persons that are in the lineup may or may not be
20 the person that did this, and then tell her that I'm going
21 to present the lineup to her. If she recognizes anyone that
22 is in the lineup, that I would like for her to tell me how
23 she recognizes them and what they would have to do, if
24 anything, with this, this incident.

25 Q Okay. And was she able to pick out one of those six

Lorin Williams - Direct examination
by Solicitor Poulos

1 photographs in the lineup?

2 A Yes, ma'am.

3 Q And who did she pick out?

4 A Mr. Rios.

5 Q Did she indicate to you that she was sure that it was
6 him?

7 A Absolutely.

8 Q Did she hesitate at all?

9 A No, she did not.

10 Q Did she appear to be under the influence at anytime?

11 A No.

12 Q Was she forced, threaten, coerced in anyway, by you or
13 by anyone at the scene, to make an identification?

14 A No, she was not.

15 Q Did her husband suggest to her in anyway who to
16 identify?

17 A No, he did not.

18 Q And what is the date on the affidavit and lineup?

19 A The 14th of August.

20 Q And is that the same date of this incident?

21 A Yes.

22 Q Okay. Thank you. Please answer any questions
23 Mr. Shealy may have.

24 THE COURT: Cross-examination.

25 MR. SHEALY: Thank you, Your Honor.

Lorin Williams - Cross-examination
by Mr. Shealy

1 CROSS-EXAMINATION

2 BY MR. SHEALY:

3 Q Investigator Williams, was her husband there when she
4 was doing the photo lineup?

5 A Yes, sir, he was.

6 Q He was.

7 So, they were all in the same room?

8 A They -- I can't remember if he was in the kitchen or in
9 the, in the threshold between the kitchen and the living
10 room.

11 Q Okay.

12 A He was not directly where we were. She was sitting in
13 a chair on the far side of the living room, which would
14 actually be closest to the hallway going down into the
15 bedroom. That was where she was seated when I came. She
16 was comfortable there, and that's, that's where I presented
17 her with the lineup.

18 Q Okay. Now, now, I'm a little confused. In your report
19 it appears that -- well -- well, when do you get on scene?

20 A It doesn't have the exact time that I arrived here.
21 But it would of been -- let's see if it gives the dispatch
22 time.

23 I apologize, Your Honor.

24 Do you have a copy of the, the actual report?

25 Q I will hand you what I got, Investigator Williams. I

Lorin Williams - Cross-examination
by Mr. Shealy

1 don't -- I've got a copy of the report. I don't know that
2 mine's gonna be any more helpful for you. See what I have.

3 A There, there should be a, an actual incident report.

4 Q I don't believe I have a copy of that. I can ask Ms.
5 Poulos about it.

6 (Pause.)

7 A And, and the reason that I, that I ask, asked for that,
8 this particular incident we were already out. We were
9 working on another case when this, when this happened. So,
10 it wasn't long after the call came out that I would of
11 arrived on the scene. I just don't have that specific time.

12 Q Okay. Well, we'll, we'll put a pen in that and
13 hopefully we'll be able to find this, this report.

14 Now, whenever you got on scene, did -- you spoke with a
15 patrol officer who had gotten there first?

16 A I would of spoken with them to see what information, if
17 any, they had been able to obtain at that point, yes.

18 Q Okay. So, they give you information and then, and then
19 you would of gone in and spoken to the principles, right?

20 A That's correct.

21 Q Okay. And -- now, in the, the first paragraph of your
22 report, I'm a little confused cause it sounded like you were
23 testifying as Mrs. Holt had told you the things in that
24 first paragraph.

25 My understanding of that first paragraph, and please

Lorin Williams - Cross-examination
by Mr. Shealy

1 correct me if I'm wrong, is that that's the information you
2 got from patrol officers, is that right?

3 A well, it would of -- I guess that would, that would be
4 kind of the write-up or this information would paraphrase at
5 some point. It would be both what I had been told by patrol
6 and then, as speaking with Mrs. Holt, what she had stated,
7 what she had seen, and relayed to them, which she later told
8 me as well.

9 Q Okay. Cause there's a line in the second paragraph,
10 once I had gotten this information from patrol?

11 A Right. Like I said---

12 Q So---

13 A It's just kind of a, a combination of everything,
14 talking to them, getting all the information, speaking with
15 her briefly. I think if you go on to read there it says
16 that after I spoke with her a little bit that we had ID come
17 in. Once some items were collected, then I actually sat
18 down and had, and had a more in-depth interview with her at
19 that point.

20 Q Okay. well, my understanding again, from your report,
21 is that the first person you spoke with, after speaking with
22 patrol, was Mr. Holt, is that right?

23 A He was -- if I remember correctly, he was outside --

24 Q Okay.

25 A -- and under the carport.

Lorin Williams - Cross-examination
by Mr. Shealy

1 Q And, so, he would of been the first person?

2 A He would of been the first -- after patrol it would of
3 been him, and then I would of gone inside and spoken with
4 her.

5 Q Okay. All right. If you'll bear with me, judge, one
6 moment.

7 (Pause.)

8 MR. SHEALY: Your Honor, that's all I have.

9 THE COURT: Any redirect?

10 SOLICITOR POULOS: Just briefly.

11 REDIRECT EXAMINATION

12 BY SOLICITOR POULOS:

13 Q Investigator Williams, just to reiterate.

14 When you arrived on scene, it's fair to say that you
15 were briefed on what generally happened, correct?

16 A Sure.

17 Q But you did have an in-death conversation with Ms. Holt
18 as far as the incident and the facts?

19 A Absolutely.

20 Q And she was able to tell you, in her own words, in
21 detail as well as to what happened, correct?

22 A Yes, ma'am, she was.

23 Q And that's what you use to base your compiling of the
24 photo lineup --

25 A Yes.

Lorin Williams - Redirect examination
by Solicitor Poulos

1 Q -- and presenting to her?

2 A Yes.

3 Q Thank you.

4 THE COURT: Thank you, sir. You may step down.

5 WITNESS: Thank you.

6 THE COURT: May I see the ID?

7 Do you have it with you?

8 WITNESS: The lineup, Your Honor?

9 THE COURT: Yes, sir.

10 WITNESS: Yes, sir.

11 THE COURT: Thank you.

12 All right. Mr. Shealy, I'll hear from you.

13 MR. SHEALY: Thank you, Your Honor.

14 It would be our position, Your Honor, that -- well, we
15 make a motion to suppress the in-court identification being
16 tainted by out-of-court identification. Your Honor, given
17 that -- well, simply given the testimony that's been
18 presented.

19 Thank you, Your Honor.

20 Simply given the testimony that's been presented does
21 not establish that it is a reliable lineup and a reliable
22 identification.

23 THE COURT: Well, the first question would be what
24 would be unduly suggestive about the lineup that was
25 presented to the victim in this case.

1 So, what would be your argument in that regard?

2 MR. SHEALY: Well, Your Honor, it -- again, it would be
3 our position that that lineup simply is insufficient.

4 THE COURT: Simply insufficient?

5 MR. SHEALY: Insufficient, yes, sir.

6 THE COURT: Would the standard be unduly suggestive?

7 MR. SHEALY: Yes, sir. Yes, sir. Given where it was
8 presented to her, given the people who were there, it would
9 be our position that it is an unduly suggestive lineup, and
10 that, therefore, it's not reliable.

11 THE COURT: All right. Ms. Poulos.

12 SOLICITOR POULOS: Thank you, Your Honor.

13 Just briefly.

14 Your Honor, there's nothing unreliable or suggestive
15 about this lineup. Mrs. Holt testified she knew the
16 defendant. She had seen him on numerous occasions, both at
17 her husband's place of business, and in her very own home.
18 She identified him without hesitation whatsoever. No one
19 forced her or threatened her. No one -- just because the
20 husband, the, her husband was in the home does not mean he
21 suggested who to pick.

22 I think she made a very clear and very reliable
23 identification, Your Honor, and we see no evidence of
24 unreliability or suggestiveness with that or with the
25 in-court identification, Your Honor.

1 THE COURT: All right. I'm gonna deny the motion.
2 Number one, looking at State's Exhibit No. 1,
3 Ms. Poulos, I'm gonna return back to you so you can keep
4 that --

5 SOLICITOR POULOS: Yes, sir.

6 THE COURT: -- there's nothing about the, the lineup
7 itself that is unduly suggestive. Nothing about the
8 procedure that was used that was unduly suggestive.
9 Although, quite frankly, the victim's husband was there in
10 the vicinity. You would expect that to be the case and in a
11 case like this.

12 So, I don't see anything that would, number one,
13 implicate Biggers, but to the extent that Biggers may be
14 implicated, number one, this victim is testified that she
15 clearly had an opportunity to view him. She came
16 face-to-face with the defendant. She had prior knowledge of
17 the defendant from him being at her home doing painting
18 work, roofing work, and being at the shop where he worked
19 for her husband. Her degree of attention is such that she
20 could of identified him, and, in fact, testified that she
21 admittedly recognized the defendant or the assailant as
22 being Gabe.

23 Her description, from all the reports, was accurate at
24 the time given. She clearly is certain as to the
25 identification being made and the length of time between the

1 time she was confronted by the defendant and her
2 identification was not such as to cause her memory to be
3 suspect. That being said, your motion is denied.

4 Any further motion from the defense?

5 MR. SHEALY: No, Your Honor.

6 THE COURT: From the State?

7 SOLICITOR POULOS: No, sir, Your Honor.

8 THE COURT: Are we ready to bring the panel in here---

9 SOLICITOR POULOS: Yes, sir.

10 THE COURT: ---and pick a jury?

11 SOLICITOR POULOS: We are.

12 THE COURT: Very good.

13 MR. SHEALY: Your Honor, if I may step out and bring my
14 witnesses that are out---

15 THE COURT: Okay. You -- I tell you what, you want to
16 take about a five minute break?

17 I need to get a new ink cartridge anyway I noticed in
18 my pen.

19 We'll take about a five minute break.

20 MR. SHEALY: Thank you, judge.

21 THE COURT: Yes, sir.

22 (WHEREUPON, a short recess was taken at this time.)

23 THE COURT: All right. Mr. Shealy, State ready to
24 proceed?

25 Excuse me. Ms. Poulos, State ready to proceed?

1 SOLICITOR POULOS: Yes, Your Honor.

2 THE COURT: Mr. Shealy, defense ready to proceed?

3 MR. SHEALY: Yes, Your Honor.

4 THE COURT: Could you bring the jury panel back in?

5 (WHEREUPON, the following takes place within the
6 presence of the jury.)

7 THE COURT: Thank you, sir.

8 Good morning.

9 My name is Lawton McIntosh. I am a Circuit Court Judge
10 from Anderson County. It is my pleasure to be here in
11 Spartanburg County where I did my undergraduate work at
12 Wofford College. I appreciate each and every one of you
13 being out today. I know this is not a day you would have
14 selected to come sit at the courthouse and trudge through
15 this weather, but we do appreciate you being here.

16 We're about to start a criminal trial. The case is
17 State versus Gabriel Jon Rios.

18 I'm gonna ask Ms. Poulos to please call her case
19 please.

20 SOLICITOR POULOS: Thank you, Your Honor.

21 State versus Gabriel Jon Rios, Indictment
22 2010-GS-42-6830. It's a true billed indictment for burglary
23 first degree.

24 2010-GS-42-6831, it's a true billed indictment for
25 armed robbery, Count One, and Count Two, possession of a

1 weapon during a violent crime.

2 2010-GS-42-6833, a true billed indictment for
3 kidnapping.

4 2010-GS-42-6834, a true billed indictment for assault
5 and battery in the first degree.

6 THE COURT: Would you pass those forward please, ma'am?

7 SOLICITOR POULOS: Yes, sir.

8 THE COURT: Thank you.

9 All right. First, can everyone hear me okay?

10 (Jurors nod affirmatively.)

11 THE COURT: If you can't, raise your hand cause it's
12 important you do hear me.

13 But the State has called the case of the State versus
14 Gabriel Jon Rios. The charges, and I'll let the attorneys
15 go more in depth with those, is, are burglary first degree,
16 armed robbery, and possession of a weapon during the
17 commission of a violent crime, kidnapping, assault and
18 battery first degree.

19 Now, before we go any further, let me point out to each
20 one of you that the fact that this gentleman has been
21 charged and indicted is not evidence of guilt. It does not
22 raise a presumption nor does it raise an inference of guilt.
23 I will tell you that indictments are simply the mechanism by
24 which the state of South Carolina brings criminal defendants
25 before a jury such as yourselves for a trial and a

1 determination of guilt or innocence.

2 With that being said, what we're about to embark on is
3 a series of what we call voir dire. We will ask you
4 questions, and I'll need you to stand up if it applies to
5 you, and if you would, give me your jury number, and then
6 give me your name.

7 And I'll tell you that I am not -- I can't hear as good
8 as some people. So, I might ask you to speak over or I'm
9 gonna ask you to initially speak loud enough so that you can
10 hear and we can hear your response, and, and we'll go
11 through a series of questions about the case.

12 I don't know the procedure you went through at the
13 beginning of the week where you came up at the end of the
14 process, and were allowed to speak to the Court in a more
15 confidential setting. At this juncture I'm gonna ask you to
16 stand up and give the information in open Court. I'll tell
17 you it won't be any confidential information that is being
18 requested.

19 With that being said, Madam Clerk, would you swear the
20 jury panel?

21 (WHEREUPON, the jury panel was placed under oath at
22 this time.)

23 THE COURT: All right. Very good. Thank you, Madam
24 Clerk.

25 The first question that I have is has anyone ever been

1 related by blood or marriage to either Gabriel Jon Rios or
2 Gail Holt?

3 (No response.)

4 Did y'all -- did everyone get those names?

5 Has anyone ever been related by blood or marriage to
6 any of those individuals, would you please stand?

7 (No response.)

8 THE COURT: Has anyone ever had a close personal or
9 social relationship with either Gabriel Jon Rios or Gail
10 Holt, if so, would you please stand.

11 (Juror responds.)

12 THE COURT: Okay. Ma'am, what is your juror number?

13 THE JUROR: Number 42.

14 THE COURT: Do I have that jury list up here?

15 CLERK: Yes, sir.

16 THE COURT: 40 -- I have it. 43?

17 THE JUROR: 42.

18 THE COURT: 42, Dill?

19 THE JUROR: Yes, ma'am. I mean yes, sir.

20 THE COURT: Okay. And which one is it please, ma'am?

21 THE JUROR: Mrs. Holt. I use to work with Mrs. Holt.

22 THE COURT: And where -- how long ago is that been?

23 THE JUROR: Probably, I don't know, fifteen, twenty
24 years ago.

25 THE COURT: Oh, really.

1 THE JUROR: Yes, sir.

2 THE COURT: And how long did you work together with
3 her?

4 THE JUROR: I don't know. Probably about five, seven
5 years, but I still have a -- when she moved to another job
6 we still had contact.

7 THE COURT: Well, I was gonna ask you.

8 Over the intervening 15 or 20 years, have you
9 maintained social contact with Mrs. Holt?

10 THE JUROR: Not social contact. But where I worked
11 previously, where I worked previously, she was a nurse and
12 we had contact that way --

13 THE COURT: Okay.

14 THE JUROR: -- with the office.

15 THE COURT: Okay. Well, let me ask you this.

16 Would the fact that you had this past and somewhat
17 ongoing professional relationship or otherwise with
18 Mrs. Holt, if this case involves her allegedly being a
19 victim, would that prevent you from being fair and impartial
20 to both the State of South Carolina's case and to the
21 defendant's case in this matter?

22 THE JUROR: Yes, sir.

23 THE COURT: It would?

24 THE JUROR: Yes, sir.

25 THE COURT: All right. I'm gonna excuse you from the

1 trial this week of this matter.

2 I assume that you, Madam Clerk, do you normally send
3 them back to the jury room at the appropriate time?

4 CLERK: Yes, sir.

5 THE COURT: You do.

6 Okay. If you just have a seat and they'll give you
7 instructions. Thank you, Mrs. Dill. If you'll remove her
8 from this case please.

9 Anyone else?

10 (No response.)

11 THE COURT: All right. Ladies and gentlemen, the
12 following is a list of 19 possible, and I emphasize,
13 possible witnesses in this matter. Again, if you do not get
14 a name, raise your hand, and I'll make sure that I repeat it
15 such that you do. But I'm gonna go through all 19 names
16 before I ask you any questions regarding these possible
17 witnesses.

18 But the possible witnesses in this case are Phillip
19 Holt.

20 Michael Cooper.

21 Marie Ollinger.

22 Estar Byrd.

23 Russell Glenn.

24 Curtis Jones of the Public Defender's, Seventh Circuit
25 Public Defender's Office.

1 Ruth Glenn.

2 Sonia Rios.

3 Deputy David Welch, Spartanburg County Sheriff's
4 office.

5 Investigator Lorin Williams, Spartanburg County
6 Sheriff's Office.

7 David Taylor, formerly of the Spartanburg County
8 Sheriff's Office.

9 Officer Brandon Howard, formerly of the Spartanburg
10 County Sheriff's Office.

11 Investigator Jason Bryant, Spartanburg County Sheriff's
12 Office.

13 Sergeant David Hogsed, Spartanburg County Sheriff's
14 Office.

15 Investigator, Investigator Ted Saar, Spartanburg County
16 Sheriff's Office.

17 Sergeant Deanna Burgess, Spartanburg County Sheriff's
18 Office.

19 Sergeant Kimberly Ashley, Spartanburg County Detention
20 Center.

21 Deputy Jack Westmoreland, Spartanburg County Detention
22 Center.

23 First, did I mispronounce any names from your
24 knowledge, Mr. Shealy?

25 MR. SHEALY: No, Your Honor.

1 THE COURT: Ms. Poulos.

2 SOLICITOR POULOS: No, sir, Your Honor.

3 THE COURT: Very good.

4 Did everyone -- did anyone not get those names, raise
5 your hand.

6 (No response.)

7 THE COURT: Very good.

8 Has anyone on the jury panel ever been related by blood
9 or marriage to any of the people that I've just read off to
10 you, if so, would you please stand?

11 (No response.)

12 THE COURT: Has any member of the jury panel ever had a
13 close personal or social relationship with any of the
14 witnesses or potential witnesses that I just read off to
15 you, if so, would you please raise your right hand?

16 (Juror responds.)

17 THE COURT: Okay, sir. Would you stand up and give me
18 your jury number?

19 THE JUROR: Juror 81.

20 THE COURT: 81?

21 THE JUROR: Yes, sir.

22 THE COURT: Hipps?

23 THE JUROR: Yes, sir.

24 THE COURT: Okay. Sir, which one was that please, sir?

25 THE JUROR: officer Welch. I worked at the detention

1 center.

2 THE COURT: I'm sorry?

3 THE JUROR: I worked at the detention center. I know
4 several of the officers.

5 THE COURT: You worked there now or you did?

6 THE JUROR: I did.

7 THE COURT: How long ago has that been?

8 THE JUROR: Almost a year.

9 THE COURT: Almost a year?

10 THE JUROR: Yes, sir.

11 THE COURT: How long did you work there?

12 THE JUROR: About a year.

13 THE COURT: About a year?

14 THE JUROR: Yeah.

15 THE COURT: Well, would the fact that Mr., Officer
16 Welch may be a witness in this case prevent you from
17 listening to the evidence that's presented during the trial
18 of this matter and making your decision based on that
19 evidence and the law as I give you uninfluenced by your
20 knowledge of him?

21 THE JUROR: No, sir.

22 THE COURT: Can you be fair and impartial to both the
23 defendant and to the state?

24 THE JUROR: Yes, sir.

25 THE COURT: Any additional voir dire from the defense,

1 Mr. Shealy?

2 MR. SHEALY: No, Your Honor.

3 THE COURT: From the State?

4 SOLICITOR POULOS: No, sir, Your Honor.

5 THE COURT: Thank you, sir.

6 Anyone else?

7 (Juror responds.)

8 THE COURT: Yes, ma'am.

9 THE JUROR: I'm Juror Number 181.

10 THE COURT: 181.

11 THE JUROR: I know David Taylor.

12 THE COURT: Taylor?

13 THE JUROR: Uh-huh. (Affirmative).

14 THE COURT: Okay. Just one second please, ma'am.

15 (Pause.)

16 THE COURT: Webber?

17 THE JUROR: (Juror nods affirmatively.)

18 THE COURT: Okay. And that was David Taylor who was
19 formerly of the Sheriff's Department?

20 THE JUROR: Correct.

21 THE COURT: And how do you know Mr. Taylor?

22 THE JUROR: He's just a family friend.

23 THE COURT: Family friend?

24 THE JUROR: Uh-huh. (Affirmative).

25 THE COURT: And I assume you've known him for a while?

1 THE JUROR: Yes.

2 THE COURT: Do you still socialize with Mr. Taylor?

3 THE JUROR: No, I haven't seen him in a while.

4 THE COURT: How long has it been?

5 THE JUROR: Probably about two years.

6 THE COURT: Two years?

7 THE JUROR: Yes.

8 THE COURT: Well, would -- if Mr. Taylor were to be a
9 witness in this case, would you, because of your
10 relationship with Mr. Taylor, believe his testimony over any
11 other person, witness testimony, testimony in this matter?

12 THE JUROR: No.

13 THE COURT: Would it prevent you from being fair and
14 impartial to both this defendant and to the State of South
15 Carolina?

16 THE JUROR: No.

17 THE COURT: Any additional voir dire from the defense?

18 MR. SHEALY: None, Your Honor.

19 THE COURT: From the State?

20 SOLICITOR POULOS: No, sir, Your Honor.

21 THE COURT: Thank you, ma'am.

22 Anyone else?

23 (Juror responds.)

24 THE COURT: Yes, ma'am.

25 THE JUROR: Juror 135.

1 THE COURT: 135?

2 THE JUROR: Annette Purser.

3 THE COURT: Just one second please, ma'am.

4 (Pause.)

5 THE COURT: Purser?

6 THE JUROR: Yes.

7 THE COURT: Okay. And what is your -- who, who is it
8 please?

9 THE JUROR: Mr. Holt, I attended church five years ago.

10 THE COURT: That's Phillip Holt?

11 THE JUROR: Yes, sir.

12 THE COURT: And I assume Gail Holt?

13 THE JUROR: Yes, sir.

14 THE COURT: Okay. You attended church with them?

15 THE JUROR: (Nods affirmatively.)

16 THE COURT: Okay. You have to give us verbal responses
17 if you don't mind.

18 THE JUROR: Yes, sir.

19 THE COURT: Okay. And how long did you attend church
20 with them?

21 THE JUROR: Probably about five years.

22 THE COURT: And how long ago is that been?

23 THE JUROR: Probably 2008.

24 THE COURT: Okay. Did you socialize with them outside
25 of the church setting?

1 THE JUROR: No, sir.

2 THE COURT: Well, if, if this case involves Mrs. Holt
3 being alleged to be a victim, and Mr. Holt being a witness,
4 would that cause you to believe their testimony over and
5 above any other witnesses who may appear in this, in this
6 courtroom?

7 THE JUROR: No, sir.

8 THE COURT: Would you be able to give both the State of
9 South Carolina and the defense a fair and impartial trial
10 and according to the laws as I give it to you at the end of
11 this case?

12 THE JUROR: Yes, sir.

13 THE COURT: Okay. Any additional voir dire from the
14 defense?

15 MR. SHEALY: No, Your Honor.

16 THE COURT: From the State?

17 SOLICITOR POULOS: No, sir, Your Honor.

18 THE COURT: Okay. Thank you, ma'am.

19 Anyone else?

20 (No response.)

21 THE COURT: All right. Mr. Shealy, I'm gonna ask that
22 you stand up and introduce yourself and where you practice
23 please.

24 MR. SHEALY: My name is Matthew Shealy. I'm with the
25 Spartanburg County Public Defender's Office, Seventh

1 Circuit, Judicial Circuit.

2 THE COURT: Ms. Poulos.

3 SOLICITOR POULOS: My name is Timi Poulos and I
4 represent the Seventh Circuit Solicitor's Office.

5 THE COURT: Okay. Mr. Ghent.

6 SOLICITOR GHENT: I'm Russell Ghent. I'm also with the
7 Solicitor's Office.

8 THE COURT: Very good.

9 And you're with the Seventh Circuit Public Defender's
10 office?

11 MR. SHEALY: I am, Your Honor.

12 THE COURT: Thank you.

13 Ladies and gentlemen of the panel, has any member of
14 the jury panel ever been represented by any of the attorneys
15 here in this courtroom or any members of the Seventh
16 Circuit Public Defender's Office or by the Solicitor's
17 Office, if so, would you please stand?

18 (No response.)

19 THE COURT: Has any member of the jury panel ever been
20 related by blood or marriage or had a close personal or
21 social relationship with either of these attorneys in the
22 courtroom or any members of their firms, if so, would you
23 please stand?

24 (No response.)

25 THE COURT: Has any member of the jury panel formed or

1 expressed an opinion about any issue or matter involved in
2 the case of the State versus Gabriel Jon Rios, if so, would
3 you please stand?

4 (No response.)

5 THE COURT: Is any member of the jury panel aware of
6 any bias or prejudice that that may have either towards the
7 State or towards the defendant or any defendant in this
8 matter, if so, would you please stand?

9 (No response.)

10 THE COURT: All right. Is there any member of the jury
11 panel who is a member of the Spartanburg County Grand Jury
12 that issued the indictments in this matter, if so, would you
13 please stand?

14 (No response.)

15 THE COURT: So, is there any member of the jury panel
16 who is a member of or a contributor to a group which has as
17 its primary purpose the promotion of law enforcement or
18 victims rights?

19 Examples, but certainly not an exhaustive list of those
20 type of groups would be MADD, SADD, or CAVE.

21 But if you are a member of or a contributor to a group
22 which has as its primary purpose the advancement of law
23 enforcement or victim's rights, would you please stand?

24 (No response.)

25 THE COURT: Is there any member of the jury panel who

1 has knowledge or any reason whatsoever why he or she should
2 not be selected to serve in the trial of this matter with
3 particular emphasis being placed upon your ability to be
4 fair and impartial to both the State and to the defendant in
5 this matter?

6 If anybody knows of any reason whatsoever why you
7 should not be selected, would you please stand?

8 (Juror responds.)

9 THE COURT: Yes, sir, would you give me your number?

10 THE JUROR: Number 4, Mark Andrew.

11 THE COURT: Okay, sir. Mr. Andrew.

12 THE JUROR: I've been a victim of burglary.

13 THE COURT: Okay, sir. How long ago is that been?

14 THE JUROR: It's probably been ten years.

15 THE COURT: You feel like that would prevent you from
16 being fair and impartial to both sides in this matter?

17 THE JUROR: I'm afraid so.

18 THE COURT: All right. I'm gonna strike you from the
19 trial of this case.

20 THE JUROR: Yes, sir.

21 THE COURT: But I'm gonna ask you to stick around till
22 after so we can give you further directions. Thank you very
23 much.

24 Madam Clerk, if you'll remove him for the roll of this
25 case.

1 CLERK: Yes, sir.
2 (Juror responds.)
3 THE COURT: Yes, ma'am.
4 THE JUROR: I've been the victim of burglary and---
5 THE COURT: Just one second.
6 What's your juror number?
7 THE JUROR: 136.
8 THE COURT: Okay. Like I said, I'm a little bit hard
9 of hearing and I'm sorry.
10 THE JUROR: 136.
11 THE COURT: Okay. Okay. Just one second.
12 (Pause.)
13 THE COURT: Okay. Rash. Okay.
14 THE JUROR: I've been the victim of burglary and also I
15 have a relative who has committed some crimes like this.
16 THE COURT: Okay. Would that prevent you from being
17 unfair and biased to both sides of this matter?
18 THE JUROR: I don't think so.
19 THE COURT: Well, we'll have to do a little better than
20 that.
21 THE JUROR: No.
22 THE COURT: It would not?
23 THE JUROR: If it's the truth.
24 THE COURT: Could you listen to the evidence that's
25 presented here in this courtroom and listen to the law as I

1 give it and, at the end of this case, and apply the law to
2 the facts as you find them to be at the end of this case?

3 THE JUROR: Yes.

4 THE COURT: Okay. Thank you very much, Mrs. Rash.
5 Any additional questions from the State?

6 SOLICITOR POULOS: No, sir, Your Honor.

7 THE COURT: From the defense?

8 I'll---

9 MR. SHEALY: No, Your Honor.

10 THE COURT: Okay. Sorry about that.

11 Anyone else?

12 (No response.)

13 THE COURT: Has any member of the jury venire or any
14 member of your immediate family ever been employed by any
15 law enforcement agency, jail, detention center, or
16 correctional facility, if so, would you please stand?

17 (Jurors respond.)

18 THE COURT: Okay. I'm gonna start on the right side
19 then move over to my left side.

20 Sir, you on the front, if you -- if everyone would give
21 me your juror number first and their name, just last name.

22 THE JUROR: 110. Means.

23 THE COURT: Okay, sir. And where did you work?

24 THE JUROR: I use to be law enforcement at 96 Air Force
25 and also I got relatives in the detention center and deputy

1 sheriff's office.

2 THE COURT: And how long ago is that been?

3 THE JUROR: I left in '93.

4 THE COURT: '93?

5 THE JUROR: Yes, sir.

6 THE COURT: Would that former employment prevent you
7 from listening to the facts of this case and giving a fair
8 and impartial trial to both the parties?

9 THE JUROR: No, sir.

10 THE COURT: Okay. And let me just say this since we
11 got a number of people. If either the defense or the State
12 wishes additional voir dire, would you just indicate it.
13 Otherwise I'm gonna assume you do not.

14 MR. SHEALY: Yes, Your Honor.

15 SOLICITOR POULOS: Yes, sir, Your Honor.

16 THE COURT: Thank you, sir.

17 Yes, ma'am.

18 THE JUROR: 181. I have a nephew that works for the
19 detention center.

20 THE COURT: Okay. And would that impact your ability
21 to be fair and impartial to both sides?

22 THE JUROR: No, sir.

23 THE COURT: Thank you very much.

24 Okay. Gentleman on the far right.

25 THE JUROR: Juror 81.

1 THE COURT: You told us about your relationship
2 earlier, and I believe you said that that would not impact
3 your ability to be fair and impartial?

4 THE JUROR: No, sir.

5 THE COURT: Now, I'm not trying to speak for you. I'm
6 just trying not to be redundant.

7 JUROR: No, sir, but I know a lot of the inmates there.
8 I've dealt with them personally.

9 Would that be a conflict of interest?

10 THE COURT: Not unless they are somebody who's listed
11 in this case that would prevent you from being fair and
12 impartial in this matter.

13 THE JUROR: Okay. Yes, sir.

14 THE COURT: Now, the, the defendant is Mr. Rios in this
15 matter, and I gave you the list of witnesses.

16 Did any of those ring a bell to you?

17 THE JUROR: Rios rings a bell and Deputy Welch. I know
18 Deputy Welch.

19 THE COURT: Okay. Did anybody named prevent you from
20 being able to give both sides a fair and impartial trial?

21 THE JUROR: No, sir.

22 THE COURT: Okay. Thank you, sir.

23 Okay. What's your number?

24 THE JUROR: Juror 53. Juror Number 53.

25 THE COURT: Okay, sir.

1 THE JUROR: Military -- United States Navy military
2 police officer.

3 THE COURT: And how long ago was that?

4 THE JUROR: I got out in 1998.

5 THE COURT: 1998?

6 THE JUROR: Yes, sir.

7 THE COURT: Now, would that experience -- again, I'm
8 not gonna be redundant with some of the questions, but would
9 that prevent you from being fair and impartial?

10 THE JUROR: No, sir, it will not.

11 THE COURT: Are you sure?

12 THE JUROR: Yes, sir.

13 THE COURT: Very good.

14 Okay, sir. With the foo man choo.

15 THE JUROR: 170.

16 THE COURT: 170. I'm not trying to pick on you. I'm
17 just pointing you out.

18 THE JUROR: Yes, sir.

19 THE COURT: Okay.

20 THE JUROR: My son-in-law was a correctional officer in
21 Colorado, and my nephew's still a police officer in Jackson,
22 New Jersey.

23 THE COURT: Okay, sir. And what I'm gonna do, with the
24 remaining folks, I'm gonna ask you to identify where you
25 work and remain standing. Then I'll ask, as a group, a

1 question. Maybe simpler to do it that way. Thank you, sir.
2 Okay. You right next -- would you remain standing
3 please, sir?
4 Okay.
5 THE JUROR: 44, Thomas Dabner, Junior.
6 THE COURT: Okay, sir.
7 THE JUROR: My cousin is a New York City cop.
8 THE COURT: USC?
9 THE JUROR: New York City cop.
10 THE COURT: Okay. New York City cop. Okay, sir.
11 All right. Behind him.
12 THE JUROR: Number 11, Belleu. Formerly South Carolina
13 Highway Patrol.
14 THE COURT: Okay. Formerly with?
15 THE JUROR: Yes, sir.
16 THE COURT: Okay. Ma'am, you over here on the left.
17 THE JUROR: I have a first cousin that is -- actually
18 is a---
19 THE COURT: I'm gonna ask you to speak louder.
20 THE JUROR: I'm sorry. 160. I have a first cousin
21 that works for the Sheriff's Department.
22 THE COURT: Okay. Thank you.
23 Yes, ma'am, in the green?
24 THE JUROR: 145, Sally Rock. My husband was employed
25 with the federal law enforcement agency for over 30 years

1 and prosecuted cases in conjunction with the U.S. Attorneys
2 Office.

3 THE COURT: Very good. And I like the way you speak
4 up.

5 Okay. Yes, ma'am.

6 THE JUROR: Number 14, Mel Bishop.

7 THE COURT: Okay.

8 THE JUROR: Twenty years ago, before he retired, my
9 father worked for the Greenville City Police Department.

10 THE COURT: Okay. Thank you, ma'am.

11 Okay.

12 THE JUROR: 163. My husband was a North Carolina state
13 trooper and corrections officer.

14 THE COURT: Okay. And in the pink behind her.

15 THE JUROR: 136. My brother is a police officer in
16 Napa, California and his wife is a Sheriff's Department
17 officer in Napa, California.

18 THE COURT: Okay, sir. In the green shirt.

19 THE JUROR: 155. I'm currently employed by Spartanburg
20 Public Safety.

21 THE COURT: You're currently employed by the Department
22 of Public Safety?

23 THE JUROR: On the fire side. Firefighter.

24 THE COURT: Firefighter?

25 THE JUROR: Yes, sir.

1 THE COURT: Okay. Now, the question I'm gonna address
2 to everyone who's standing, who responded, would the fact
3 that you have, in the past or current employment, prevent
4 you from listening to the facts that will be presented
5 during the trial of this case and giving both this defendant
6 and the State a fair and impartial trial.

7 If you can not, would you remain standing?
8 Otherwise have a seat.

9 (WHEREUPON, all jurors sit down except two.)

10 THE COURT: Okay. Everyone sat down except for these
11 two gentlemen on my right. I'm gonna ask you to repeat your
12 juror numbers only please.

13 THE JUROR: 170.

14 THE JUROR: 44.

15 THE COURT: And do you feel like you can not be fair
16 and impartial to both sides in this matter?

17 THE JUROR: No, I can't.

18 THE COURT: Sir?

19 THE JUROR: No, I can't.

20 THE COURT: And would you mind telling me why without
21 giving me too in-depth or too inflammatory of a response if
22 you will.

23 THE JUROR: My nephew that was a police officer got
24 shot during a burglary.

25 THE COURT: Okay, sir.

1 THE JUROR: Yes, sir.
2 THE JUROR: My cousin's a cop and I just---
3 THE COURT: I can't hear you.
4 THE JUROR: I just don't think I could.
5 THE COURT: Okay. I'm -- the man on the right-hand
6 side, what -- your number again please?
7 THE JUROR: 170.
8 THE COURT: I'm gonna strike you from this case.
9 What's your number?
10 THE JUROR: 44.
11 THE COURT: 44. I'm gonna strike you from this case,
12 but I'm gonna ask that you stick around, Juror 144, and
13 everyone else I'm gonna ask you, you may be picked on
14 another case in this matter. Okay. Not in this trial. But
15 from -- we have several judges running court this week. So,
16 I'm gonna excuse you from the trial of this matter.
17 Madam Clerk, would you make those deletions?
18 CLERK: Yes, sir.
19 THE COURT: Okay. Thank you. You may be seated.
20 Has any member -- I'm gonna go through several
21 questions here cause they're very related. So, let's go
22 ahead and get those, get them all out. If the question
23 applies to you, when I ask it, go ahead and stand. Then
24 I'll go through and question you more about those in just a
25 minute.

1 Has any member of the jury venire or any member of your
2 immediate family or close personal friend been a victim of
3 any type of violent crime?

4 Has any member of the jury venire or any member of your
5 immediate family or close personal friend ever been accused
6 or convicted of a violent crime, if so, would you, would you
7 please stand?

8 (Jurors respond.)

9 THE COURT: Okay. If I've excused you you don't need
10 to stand back up.

11 THE JUROR: Oh, okay.

12 THE COURT: Otherwise, did everybody get the two
13 questions I asked?

14 Okay. Sir, would you give me your jury number?

15 THE JUROR: 79.

16 THE COURT: 79.

17 And, and you've been a victim or accused or convicted
18 of a violent crime or a family member?

19 THE JUROR: No, my daughter -- my brother was accused
20 of molesting my daughter.

21 THE COURT: Accused of molesting your daughter?

22 THE JUROR: And he was convicted.

23 THE COURT: He was?

24 THE JUROR: Yeah, he served three months.

25 THE COURT: Would that prevent you, if you were

1 selected to serve in this case, from being fair and
2 impartial to both the defendant who's charged in this matter
3 and the State in this matter?

4 THE JUROR: No, sir.

5 THE COURT: Are you sure you could listen to the
6 evidence and give a fair and impartial verdict?

7 THE JUROR: Yes, sir.

8 THE COURT: Okay. Thank you, sir.

9 THE JUROR: Yes, sir.

10 THE COURT: Yes, ma'am.

11 THE JUROR: 136.

12 THE COURT: Okay.

13 THE JUROR: My daughter was molested.

14 THE COURT: Okay. And, again, would that prevent
15 you---

16 THE JUROR: No.

17 THE COURT: ---from listening to all the evidence and
18 giving a fair and impartial verdict?

19 THE JUROR: No.

20 THE COURT: Thank you, ma'am.

21 Yes, ma'am.

22 THE JUROR: 137.

23 THE COURT: 137?

24 THE JUROR: Yes, sir.

25 THE COURT: Okay.

1 THE JUROR: I had a friend that was raped and abducted
2 and also two brothers, both have served time for burglary,
3 sexual harassment, several different things.

4 THE COURT: Well, if you -- from having those in your
5 experiences, would that prevent you from listening to the
6 evidence in this case and giving both parties, the State and
7 this defendant, a fair and impartial trial according to the
8 law as I give it to you?

9 THE JUROR: No, sir.

10 THE COURT: Thank you, ma'am.

11 Yes, sir.

12 THE JUROR: 143.

13 THE COURT: Okay.

14 THE JUROR: My brother-in-law is currently awaiting
15 trial for domestic abuse.

16 THE COURT: Say that again please.

17 THE JUROR: My brother-in-law is currently awaiting
18 trial for domestic abuse..

19 THE COURT: For domestic abuse?

20 THE JUROR: Yes, sir.

21 THE COURT: Now, in this case, would that affect your
22 ability to be fair and impartial to both the State---

23 THE JUROR: No, sir.

24 THE COURT: ---and the defendant?

25 THE JUROR: No, sir.

1 THE COURT: Thank you very much.
2 Anyone else?
3 (No response.)
4 THE COURT: Anyone else?
5 (No response.)
6 THE COURT: Has anyone on the jury panel ever been
7 arrested, charged, or convicted of a crime, of a crime
8 involving burglary, larceny, assault, or kidnapping, or has
9 any member of a jury panel -- has any member of the jury
10 panel ever had a family member or a close personal friend
11 who was arrested, charged, or convicted of any crime
12 involving burglary, larceny, assault, and kidnapping?
13 In other words, you have the victims and you have the
14 people who were charged.
15 Does anyone fit those questions, if you would please
16 stand?
17 Some of you may have to repeat.
18 (Jurors respond.)
19 THE JUROR: Number 87.
20 THE COURT: Okay, sir.
21 THE JUROR: My son was arrested for burglary.
22 THE COURT: Your son was?
23 THE JUROR: Yes, sir.
24 THE COURT: And would that affect you from listening to
25 all the evidence presented in this -- let me back-up.

1 Did you -- when -- how long ago has that been?
2 THE JUROR: Probably about three months ago.
3 THE COURT: Three months ago.
4 Are those trial -- are those cases, cases currently
5 pending?
6 THE JUROR: I think he had a pretrial and just did away
7 with it.
8 THE COURT: It's gone?
9 THE JUROR: Yeah, I think so.
10 THE COURT: The charges are not pending still?
11 THE JUROR: No, I don't believe they are.
12 THE COURT: Okay. Well, would that affect your ability
13 to listen to all the evidence in this case and make your
14 decision based solely on that evidence and according to the
15 law?
16 THE JUROR: No, sir.
17 THE COURT: Could you have any bias or prejudice
18 towards the State or the defendant?
19 THE JUROR: No, sir.
20 THE COURT: Okay. Thank you, sir.
21 Ma'am, without having -- are you gonna give me the same
22 response you did earlier?
23 THE JUROR: Yes.
24 THE COURT: What's your juror number?
25 THE JUROR: 137.

1 THE COURT: And you said you could be fair and
2 impartial, correct?

3 THE JUROR: Yes, sir.

4 THE COURT: Okay. Thank you.

5 what we're doing, ladies and gentlemen, just so you
6 know, this lady whose got her back to you actually has the
7 hardest job in the whole courtroom. She takes down
8 everything that's being said or done in here. And, so, the
9 reason I'm asking you sometimes it seems to be redundant is
10 so that we have a good record in the case. And, so, we, we
11 ask you those numbers.

12 So, when she takes it down, somebody reviews the way
13 I've conducted this trial, if I've made a mistake, it can be
14 corrected.

15 Okay, sir. Any additional information?

16 Would you give me your juror number?

17 THE JUROR: 79.

18 THE COURT: Any additional information other than what
19 you just gave me?

20 THE JUROR: No, sir.

21 THE COURT: And you still can be fair and impartial?

22 THE JUROR: Yes, sir.

23 THE COURT: Thank you.

24 Yes, ma'am.

25 THE JUROR: 157.

1 THE COURT: 157?

2 THE JUROR: Yes, sir.

3 THE COURT: And -- okay. And what would be -- what was
4 your response to the questions?

5 THE JUROR: My son got a charge about ten years ago for
6 second degree burglary.

7 THE COURT: For burg second degree?

8 THE JUROR: Uh-huh. (Affirmative).

9 THE COURT: And was he -- did he go to trial or did he
10 plead or were the charges dismissed?

11 THE JUROR: He did like a five year probation.

12 THE COURT: Okay. Now, would the fact that that
13 happened to your son have an impact on your ability to be
14 fair and impartial to both the defendant in this matter and
15 to the State?

16 THE JUROR: No, sir.

17 THE COURT: You can listen to the evidence and make
18 your decision according to the evidence presented here in
19 this courtroom and according to the law as I give it to you?

20 THE JUROR: Yes, sir.

21 THE COURT: Okay. Thank you, ma'am.
22 Okay. What's your number?

23 THE JUROR: 136 and it's the same.

24 THE COURT: Any additional, any additional information
25 other than what you've previously given us?

1 THE JUROR: Is this the same as an armed robbery?
2 THE COURT: Ma'am?
3 THE JUROR: Is this the same as an armed robbery?
4 THE COURT: Well, one of the charges in this case I
5 believe is armed robbery.
6 THE JUROR: Okay. I'm sorry. Should I sit down?
7 THE COURT: No, ma'am. I just want to make sure that
8 I'm, I am correct when I tell you that. We do have -- one
9 charge in here is armed robbery.
10 THE JUROR: Okay.
11 THE COURT: Okay. Let me ask you this.
12 You still could be fair and impartial?
13 THE JUROR: Okay.
14 THE COURT: I mean -- I'm asking you.
15 THE JUROR: Yes, sir.
16 THE COURT: Okay. Thank you.
17 Anyone else?
18 (No response.)
19 THE COURT: Has anyone on the jury panel previously
20 been prosecuted by the Seventh solicitor's, Seventh Circuit
21 solicitor's office, if so, would you please stand?
22 (No response.)
23 THE COURT: Very good.
24 Any additional voir dire from the defense?
25 MR. SHEALY: None, Your Honor.

1 THE COURT: From the State?

2 SOLICITOR POULOS: No, sir, Your Honor.

3 THE COURT: Okay. All right. Ladies and gentlemen,
4 back before I had gray hair the way we would pick jurors was
5 we had somebody who really couldn't read or write, and they
6 would stand up, and there would be a big spindle with all
7 your names in it except the ones who had been removed as
8 I've done during this process. They would select the
9 appropriate numbers of names out, and they would be called,
10 and they would -- you'd come forward, you'd face the State
11 and the defense, and the decision would be made whether or
12 not you'd be selected on the case.

13 The process is very similar, but now, instead of having
14 somebody draw your name out of a cylinder, we have a
15 computer which randomly draws your name. It will take the
16 clerk just a minute or so to have that done, and then we'll
17 go through the selection process.

18 But once we begin, if your name is called, I'm gonna
19 ask that you bring your personal belongings just in case
20 that you are selected on the jury, that you come up and
21 stand right in front of this lady who's sitting in front of
22 me, face the defense and face the State, and they will make
23 a decision as to whether or not you're selected in this
24 case.

25 Now, if you're not selected in this case, I'm gonna ask

1 you to have a seat so we can give you further directions now
2 about any potential use for you as this week goes.

3 Okay. Madam Clerk, you just let us know when you're
4 ready.

5 CLERK: Okay.

6 THE COURT: Yes, ma'am.

7 (WHEREUPON, a jury panel was selected at this time.)

8 THE COURT: Is that 12, Madam Clerk?

9 CLERK: Yes, sir.

10 THE COURT: Let's do two alternates.

11 (WHEREUPON, two alternate jurors were selected at this
12 time.)

13 THE COURT: Any motions from the State with regard to
14 jury selection?

15 SOLICITOR POULOS: No, sir, Your Honor.

16 THE COURT: From the defense?

17 MR. SHEALY: No, Your Honor.

18 THE COURT: Okay.

19 (Pause.)

20 THE COURT: All right. Ladies and gentlemen who were
21 selected, I'm gonna ask, number one, that you go back to
22 your jury room right now after I give you this little
23 instructional.

24 I'm gonna ask that you select, excuse me, I'm sorry.
25 I'm a little froggy today, a person whom you will want to be

1 your foreperson. The foreperson is someone who's in charge
2 with communicating with the Court anytime need be. Also
3 will preside over the deliberations of the matter at the end
4 of this case.

5 It doesn't matter if it's man or woman. The only
6 prohibition is that the alternates may not serve as the
7 foreperson.

8 Let me just get this done. Excuse me.

9 However, you are allowed to vote on whom you'd like to
10 be the foreperson. It will not have to be unanimous a vote.
11 It can be by simple majority.

12 Once you have selected a foreperson in this matter, I'm
13 gonna ask the foreperson then turn around and poll everyone
14 on the jury to determine whom, if anybody, would like to
15 have pad or pencil to use during the trial of this case.
16 Once that's done, I'm gonna ask the foreperson to write
17 their name and juror number on a piece of paper that will be
18 provided to you by the bailiffs. Then give me the response
19 as to whom, if anyone, just by a numerical number, would
20 like to have pad or pencil. If you'd knock on the door,
21 we'll receive that back here in the courtroom. But if
22 you'll go with the bailiff at this juncture please.

23 (WHEREUPON, the following takes place outside the
24 presence of the jury.)

25 THE COURT: Any additions or exceptions to the charge,

1 or not charge, instructions to the jury?

2 SOLICITOR POULOS: Nothing from the State, Your Honor.

3 THE COURT: From the defense?

4 MR. SHEALY: No, Your Honor.

5 THE COURT: All right. Let me ask you, from
6 scheduling, it generally takes about five minutes for this
7 to get done. I would like to go ahead and do opening
8 instructions and opening statements if that's what y'all
9 want to do.

10 SOLICITOR POULOS: That's fine with the State, Your
11 Honor. We're ready.

12 THE COURT: Mr. Shealy.

13 MR. SHEALY: Yes, Your Honor.

14 THE COURT: Very good.

15 Y'all want to take a quick break so we can get that
16 done and come back.

17 MR. SHEALY: Yes, sir.

18 THE COURT: All right. Let's be in recess for about
19 five minutes.

20 (WHEREUPON, a short recess was taken at this time.)

21 THE COURT: All right. Just for the records, the
22 foreperson is Number 149, and 13 of them want pad and
23 pencil.

24 Let me give you this as a Court---

25 COURT REPORTER: Okay.

1 THE COURT: ---Court's Exhibit.

2 (WHEREUPON, the note from the jury was marked as
3 Court's Exhibit No. 1 for identification purposes only at
4 this time.)

5 THE COURT: State ready, Ms. Poulos?

6 SOLICITOR POULOS: Yes, sir, Your Honor.

7 THE COURT: Defense ready, Mr. Shealy?

8 MR. SHEALY: Yes, Your Honor.

9 THE COURT: Very good.

10 Bring them in.

11 (WHEREUPON, the following takes place within the
12 presence of the jury.)

13 THE COURT: All right. Madam Clerk, would you swear
14 the jury please?

15 (WHEREUPON, the jury panel was placed under oath at
16 this time.)

17 THE COURT: Madam Forelady, ladies and gentlemen of the
18 jury, we're about to begin the trial of The State versus
19 Gabriel Jon Rios. Let me give you a few opening thoughts,
20 then we'll have an opening statement at least, and then
21 we'll break for lunch and come back and begin with the
22 presentation of evidence in this matter.

23 I don't know if any of you have ever been involved in
24 the judicial system before, whether it be from a litigant or
25 from other, some other capacity. But I would suspect that

1 each and every one of you have watched what purports to be a
2 trial of a criminal case on, on a TV show or a movie.

3 Let me tell you right now that what you're about to be
4 engaged in is not anything like you've seen on TV or the
5 movies. Trials are slow, they're very deliberate, and
6 they're very methodical. They're certainly not
7 entertainment. But they are a fundamental part of our
8 democracy. They are a search for the truth.

9 Sometimes, through the course of this trial, I'll
10 remind you, by the end of the day or end of this case, there
11 will be times that you are ushered in and out of the
12 courtroom depending on what's going on inside the courtroom.
13 I can assure you, during this case, that I like to work. I
14 like to work early and I like to work long, and we will not
15 be at anytime in here not working in the courtroom.

16 At the same time, there may be periods where you will
17 sit for sometimes extended periods in, in your jury room.
18 I'm just gonna assure you up front that we're not lolly
19 gagging out here in the courtroom if that may be the case.
20 I will do my best to see that that does not happen or that
21 we keep it to a minimum during the course of this trial.

22 Now, let me say something, tell you something about
23 these attorneys. They have an ethical duty, when they're
24 sworn in as lawyers, to be advocates for their clients.
25 That means that they are to zealously represent their

1 position and their client's position here in this courtroom.

2 But, at the same time, they're officers of this Court.
3 What that means is you can expect them to be professional,
4 be competent and ethical in their dealings with each other,
5 with the witnesses that appear with me, and at all times
6 during the course of this case.

7 Now, you just took an oath where you swore or affirmed
8 that you would be fair and impartial to try to reach a just
9 and a, just and unbiased verdict in this matter. What that
10 means is that this Court and the parties and these attorneys
11 have a right to expect of you that you will be fair, that
12 you will be impartial, and you will be ethical in your
13 dealings with one another.

14 Now, Madam Forelady, trials are not marathons. And,
15 so, if, at anytime, any of your jurors needs to have a
16 break, we will more than gladly accommodate you. If I ever
17 ask you to come back into the courtroom before your jury's
18 ready to come back, just send word back. If you ever have a
19 need for anything during the course of this trial, you let
20 the bailiffs know, and if that's not been responded to, you
21 let me know. We'll make sure it's taken care of.

22 Okay. Now, let me tell you this. I will charge you on
23 the substantive law at the end of this case. Some of you
24 may find that a little odd, but that's the way it's been
25 done forever and a day, and I want to tell you a little bit

1 about the process that you're about to undergo so you'll
2 understand it. At least you'll understand where you are
3 during the course of this, of this trial.

4 Now, what I say, again, is not the law. You will hear
5 that later. Thirteen of you have opted to take notes in
6 this matter.

7 Now, taking notes is certainly beneficial. But let me
8 forewarn all of you that, at the end of this case when you
9 begin your deliberations, that the fact that somebody's note
10 may indicate one thing, but somebody's memory indicates
11 something else, the note does not trump somebody else's
12 memory. At the end of the day you will have to deliberate
13 and come up to a unanimous decision if you can as to that
14 issue.

15 Okay. Also, an intimate part in being finders of the
16 fact, which you are, and I'll tell you about that in a
17 second, is to determine credibility of the testimony that
18 you hear. Part of making that determination of credibility
19 is to view a witness' demeanor, along with other factors,
20 but you have to see how they act on the stand.

21 So, if you became so engrossed in taking your notes
22 that you don't see a sole reaction that somebody may make
23 while they're testifying, you may miss something that's
24 vital to credibility in this case. Also, if you become too
25 engaged in taking your notes, you may miss a follow-up

1 question.

2 I say that just to forewarn you. So, try not to do
3 that. I know that some people are better note takers than
4 others.

5 Now, let me remind you that the fact that this
6 defendant has been charged and indicted, again, is not
7 evidence of his guilt. In fact, in this case he says I'm
8 not guilty. What that means is the defendant -- I mean the
9 State has the burden of proving each and every element of
10 all charges against him by proof of, of, beyond a reasonable
11 doubt. Each charge stands on its own, and will be
12 considered by you at the end of this case on its own.

13 It will be your decision to determine whether or not
14 the State has proven all or any of its case by proof beyond
15 a reasonable doubt at the end of this case.

16 Let me give you a quick definition of what reasonable
17 doubt is so you will have that at least in your mind while
18 you listen to the evidence. A reasonable doubt is the kind
19 of doubt that would cause a reasonable person to hesitate to
20 act.

21 Again, the State has the burden of proving the
22 defendant guilty by proof beyond a reasonable doubt. If any
23 of you have ever been involved or served as jurors on a
24 civil jury, the burden in those cases is what we call by a
25 preponderance or the simple greater weight of the evidence.

1 Now, the burden in criminal cases is much higher. It
2 is beyond a reasonable doubt.

3 Now, proof beyond a reasonable doubt is proof that
4 leaves you firmly convinced that, of the defendant's guilt.
5 With that being said, there are very few things in this
6 life, in this world that we know with absolute certainty,
7 and, in criminal cases, the law does not require the State
8 to overcome every possible doubt.

9 At the end of the case, after I charge you on the law,
10 if, based on your consideration of the evidence and the law
11 as I give it to you, you are firmly convinced of the
12 defendant's guilt, then it will be your duty to find him
13 guilty. On the other hand, if you think there is a real
14 possibility that the defendant is not guilty, then you must
15 give him the benefit of the doubt and find him not guilty.

16 Now, the purpose of jurors are to determine what the
17 facts are. As we say in the legal field, you are the sole
18 judges of the facts. Therefore, if, at anytime during the
19 course of this trial, I say something, I do something, if I
20 inadvertently make a gesture that seems to indicate to you
21 the way that you are to find facts, simply what verdict
22 you're suppose to reach, I'm gonna ask you to disregard
23 that.

24 Number one, the State of South Carolina's Constitution
25 provides expressly that no trial judge shall have an opinion

1 on the facts nor may I even comment on the facts. So, if I
2 do something or say something that indicates otherwise to
3 you, number one, it's not me doing that, but, number two,
4 I'm gonna ask you and instruct you to disregard it.

5 Now, you determine the facts from the testimony and the
6 evidence you hear in this courtroom from this witness stand
7 which is right here. You should not and you shall not be
8 influenced by anything that you hear outside of this
9 courtroom.

10 Now, once you find the fact, that something is a fact,
11 it will be up to you to determine any inferences that you
12 may properly draw from those facts. But I will tell you
13 that it's very important that, during the course of this
14 trial, that you remain diligent and pay close attention to
15 the State's case, to the defendant's case, and to the law as
16 I give it to you at the end of this case.

17 I, I'm anticipating, based on my meetings with these
18 lawyers, that we'll be through, and I apologize, this case
19 this week. We will not go through Friday. So, put you at
20 ease.

21 But let me tell you this. Sitting as, up here, I'm the
22 instructor on the law. If I make a mistake, they're a group
23 of people down in Columbia that will correct me if I make a
24 mistake as to the law. But as a general rule, there is no
25 way to correct an improper finding of fact. So, that means

1 that, throughout the course of this trial, please pay close
2 attention to everybody and everything that occurs in the
3 courtroom.

4 Now, Mrs. Forelady, I'm, at anytime you feel that we
5 need to take a break, again, this is not a marathon, please
6 let me know. I don't mind you raising your hand, whatever,
7 and I will certainly accommodate that.

8 Okay. Now, the law that makes you the finders of the
9 fact makes me the instructor of the law. So, what I charge
10 you on the law, you may not be concerned with what you like
11 it to be. You may not discuss what you think it should be.
12 It will be your sworn duty to apply the law as I give it to
13 you. Again, if I make an incorrect statement of the law,
14 then it will be corrected at another date and another time.

15 Now, during breaks during this trial, it will be a more
16 than one day trial for sure, it will be improper for you to
17 discuss, amongst yourselves or with anyone else, anything
18 that occurs in this courtroom. In other words, you can't
19 begin early deliberations. You can't comment about what the
20 witness said. You can't comment about a particular exhibit
21 that may be introduced into evidence.

22 The reason being, we want you to listen to all the
23 testimony and all the evidence before you begin your
24 deliberations once I give you instructions you may do so.
25 Otherwise, you may have a tendency to come to an early

1 conclusion before you've heard everything.

2 Also, when we take a break in the evening, I know I'm
3 married and I have a child, the first thing they'd want to
4 do, once they knew I was picked on a jury, is ask me about
5 the case, and ask me about what they've heard. It will be
6 improper for you to discuss this matter with spouses,
7 significant others, friends, family, or anyone else, or each
8 other, either directly, by face-to-face conversations,
9 emails, or some other form of communication. And, again,
10 the same reason is we do not want you to come to a early
11 conclusion about any of the facts of this case until you've
12 heard all the facts and have heard the law that you must
13 apply to this matter.

14 Also, our chief justice, Chief Justice Jean Toal of the
15 South Carolina Supreme Court, has instructed all trial
16 judges that we are to instruct jurors that they are not
17 allowed to engage in what we call independent jury research.
18 What that simply means is that, through some research
19 mechanism, TV, Internet, who knows all the different sources
20 that are out there, blogs, that you look up something about
21 a court official, one of these attorneys, one of the
22 parties, or any issue that you've heard in this case, or any
23 issue you think may be helpful, and, again, the same idea is
24 your decision must be confined to the evidence and testimony
25 and the law that you have heard and that you will hear in

1 the courtroom.

2 That being said, there will be five phases to this case
3 as there is in every single case in this state.

4 Number one, there will be opening statements. Number
5 two, they'll be presentation of the evidence, and that will
6 generally be the longer part of the trial. Then we'll go to
7 closing statements by the attorneys, I will charge you on
8 the law, and then you will be able to begin your
9 deliberation once I give you clear and unequivocal word that
10 you may do so.

11 Now, in just a moment the solicitor will make her
12 opening statement to you. Let me point out something to
13 both her and the defense attorney, Mr. Shealy. What they
14 say is helpful and it's designed to help you navigate the
15 issues in this case and understand what this case is about.
16 But they have not been sworn. They will not be testifying
17 from the witness stand.

18 So, it is not in evidence in the true sense of the
19 word. So, I want you to take that as, as you will when you
20 hear what opening statements.

21 Now, the defendant in this matter, Mr. Shealy's, Mr.
22 Rios attorney. Mr. Shealy, may, but he is not required to
23 give an opening statement and the reason being the State has
24 the burden at all times to prove its case against this
25 defendant. Again, if he chooses to make an opening

1 statement, it is not evidence. It's helpful and it's
2 designed to help you understand what the case is about.
3 But, again, it is not evidence in this matter.

4 There will be, in almost every single case, objections.
5 The lawyers have an ethical duty to object anytime that they
6 see something that they perceived to be improper in the
7 courtroom, and sometimes, Madam Forelady, ladies and
8 gentlemen of the jury, you may feel like cattle being herded
9 into the courtroom, before you have a chance to sit down,
10 you're brought right back into the courtroom.

11 Now, I'll apologize to you in advance. But the fact
12 that the attorney may make an objection or to the extent I
13 let you stay in the courtroom and listen to my ruling on
14 that objection is not something that you shall comment on to
15 one another during breaks, and you shall not even debate it
16 or discuss it in your deliberations. It would be improper
17 for you to do so. I'll just tell you that, in every single
18 case that I was involved in as I try cases for 25 years or
19 since I've been on the bench, there is been objections.
20 That is part of the process.

21 With that being said, what I'm gonna do is send you
22 back to your jury room. I'm gonna ask the State and defense
23 whether or not I've said something that I shouldn't have
24 said to you or I've neglected to tell you something that I
25 should have. Then we'll come back and have opening

1 statements from the State.

2 If you'll go back. If you need anything, let the
3 bailiffs know please, ma'am.

4 (WHEREUPON, the following takes place outside the
5 presence of the jury.)

6 THE COURT: All right. Any additions or exceptions
7 from the State?

8 SOLICITOR POULOS: No, sir, Your Honor.

9 THE COURT: From the defense?

10 MR. SHEALY: No, Your Honor.

11 THE COURT: All right. You ready to get started or you
12 want to have a quick break before we go?

13 SOLICITOR POULOS: We're ready, Your Honor.

14 THE COURT: I'm ready.

15 You ready?

16 MR. SHEALY: Yes, sir.

17 THE COURT: Good.

18 Would you bring the jury back out, back in the, the
19 courtroom please, sir?

20 (WHEREUPON, the following takes place within the
21 presence of the jury.)

22 THE COURT: And thank you, Mr. Bailiff.

23 And I neglected to tell you that. Madam Forelady, if
24 you would remain in that seat throughout the course of this
25 trial, and our two alternates remain in those seats. It

1 just helps myself as well as Court personnel to keep up with
2 some administrative functions we have to do. The rest of
3 you are welcome to sit where you like when you come in and
4 out of the courtroom.

5 That being said, Ms. Poulos, you ready to proceed?

6 SOLICITOR POULOS: Yes, sir, Your Honor.

7 THE COURT: Mr. Shealy.

8 MR. SHEALY: Yes, sir.

9 THE COURT: Very good.

10 SOLICITOR POULOS: Thank you, Your Honor.

11 May it please the Court?

12 THE COURT: Yes, ma'am.

13 SOLICITOR POULOS: On the morning of August the
14 14th of 2010 a woman was left alone in her home, face down
15 on her bedroom floor, hands bound behind her back with tape,
16 terrified, trembling, and stunned. That woman was Gail
17 Holt, a 62-year old native of Spartanburg, life long
18 resident of Spartanburg, works at Wofford College as a
19 nurse, lives at Hillbrook neighborhood on the east side of
20 town.

21 August 14th, 2010, was a warm summer day. Mrs. Holt
22 woke up that morning early, told her husband good-bye as he
23 left for work, and was back in the back in her bedroom doing
24 some things when all of a sudden she hears a noise. Curious
25 as to what that noise could be, she walks out of her bedroom

1 when she is suddenly met in the hallway by this man.

2 This man had an object in his hands, and that was a
3 piece of broken glass. He runs up to her, grabs her, turns
4 her around, puts his arm around her neck, and the glass
5 right up to her throat, and he says open the safe, I want
6 the guns, and he pushes her into the office where her
7 husband's safe was in a, in a closet.

8 Unfortunately, Mrs. Holt doesn't know the combination
9 to that safe. So, he grew angrier and angrier and he pulls
10 her out and he pushes her into the bedroom. He gets out a
11 roll of tape, binds her hands behind her back, pushes her
12 face down on to the floor, and notices her husband's gun
13 right by the nightstand. He pulls out the gun from the
14 holster, insists that he wants her money, and her car keys,
15 puts that gun to her head and threatens to kill her, and
16 then he takes her money and her car keys and her car and
17 flees the scene leaving her alone face down on her bedroom
18 floor, bound, and absolutely terrified.

19 Who did this to Mrs. Holt?

20 She will tell you who did this to her. She will
21 testify that that man, Gabriel Rios, did this to her, and
22 she will tell you that he was a man that use to work for her
23 husband's construction company, and she had seen him on
24 numerous occasions. He had even been inside the house
25 before. She'll tell you a lot more detail than I'm gonna

1 tell you.

2 why are we here today?

3 We are here because the State has brought charges
4 against that man, Gabriel Rios, for burglary in the first
5 degree, armed robbery, possession of a weapon during a
6 violent crime, kidnapping, and assault and battery first
7 degree, and we, the State, have the burden or the
8 responsibility of proving each and every element of those
9 charges to you beyond a reasonable doubt.

10 We believe that the evidence in this case will place
11 the defendant at the scene of this crime, and we will prove
12 to you that he not only broke into her home, but he attacked
13 her, tied her up, held her against her will, threatened to
14 kill her with her husband's own gun, and robbed her. That's
15 what we are here to prove.

16 Now, Judge McIntosh was right when he told you earlier
17 that this case is not going to be like TV. There's a lot of
18 things that happen and there's a lot of drama, but this case
19 isn't going to be solved in a one hour time slot. There's
20 going to be testimony that you're gonna hear from several
21 witnesses. We're gonna do our best to help you understand
22 it as best as we can.

23 Most importantly, in just a few moments, you're going
24 to hear Mrs. Holt tell her own story in her words of what
25 happened to her on that horrific morning, of what started

1 out to be a bright sunny day, turned out to be the darkest
2 day of her life, and she'll tell you why that day will be
3 etched in her memory forever.

4 On behalf of the State I want to thank you all for your
5 service as jurors this week, and during the course of this
6 trial, all I'm gonna ask of you-all is this. Be fair, pay
7 close attention to the testimony, and, most importantly,
8 remember to use your good old common sense.

9 Thank you.

10 THE COURT: Mr. Shealy, does defense wish to have
11 opening statement?

12 MR. SHEALY: We do, Your Honor.

13 THE COURT: Okay.

14 MR. SHEALY: Thank you, judge.

15 THE COURT: Yes, sir.

16 MR. SHEALY: Ladies and gentlemen, my name is Matthew
17 Shealy. I represent Gabriel Rios who's seated over there at
18 the table.

19 As Ms. Poulos pointed out to you, we don't have any
20 burden, and as the judge is pointed out to you, we don't
21 have a burden to prove that he did not do this. The reason
22 no criminal defendant has that burden is because this
23 happened in 2010, August 14th of 2010.

24 I can't prove where I was August 14th, 2010. I can't
25 prove to you that it wasn't me, and as y'all think about it,

1 I don't know maybe y'all know where you were that day. But
2 I'd put to you that maybe you don't.

3 As the judge is pointed out to you, we don't -- I don't
4 have the obligation to make this opening statement. But I'm
5 a lawyer. So, I have that opportunity to talk. So, I'm
6 going to talk.

7 You're gonna hear a lot of testimony, and a lot of you
8 have opted to take notes. And as the judge cautioned you,
9 you got to make sure you keep an open mind throughout,
10 throughout the entire trial. You can't just take down the
11 notes of Mrs. Holt, what she testifies to, get bound up in
12 that, decide that's the truth, and decide this case on that
13 basis. You just can't do that.

14 You have to listen to the entire case because there
15 were things done, ladies and gentlemen. I believe we're
16 going to be able to show reasonable doubt, and in closing
17 I'll give you an example of what, of how I learned what
18 reasonable doubt was. But we think there will be reasonable
19 doubt in this case and I think you're gonna find my client
20 not guilty so long as you do your jobs, so long as you don't
21 get bound up in the emotions and in the note taking, and in
22 the, the, what is testified to first.

23 Because at the end of day, at the end of this case, I
24 think you're going to find that my client could not have
25 done this. It could not have been him. Despite what they

1 tell you, it could not have been him.

2 And, again, there's gonna be a great deal of emotion.
3 Your job is to take that emotion away. You can't get
4 wrapped up and the solicitor is already tried to get you
5 wrapped up. You just can't get it. You just can't do that
6 otherwise you're not doing what you're here to do, which is
7 search for the truth.

8 So, ladies and gentlemen, I'd ask again that you pay
9 attention to all of these witnesses, each of the witnesses.
10 Pay attention to the credibility, their biases, that sort of
11 thing, and at the end of this trial I'm confident that you
12 will find my client not guilty.

13 Thank you.

14 THE COURT: All right. Madam Forelady, ladies and
15 gentlemen of the jury, just based on prior scheduling I did,
16 what I'm gonna do is go ahead and excuse the jury for lunch
17 at this point. We'll come back at two o'clock. You'll be
18 in your jury room before 2:00, just a minute or two before
19 2:00, I'll try to get the trial started promptly at 2:00.
20 We'll then begin to receive evidence in this matter.

21 Let me remind you that you may not speak amongst
22 yourselves about this matter or with anyone else.

23 I'll excuse you now for lunch.

24 Thank you.

25 (WHEREUPON, the following takes place outside the

1 presence of the jury.)

2 THE COURT: Mr. Shealy, is your client been out on bond
3 or has he been in detention?

4 MR. SHEALY: He's been in the detention center.

5 THE COURT: So, he will remain so during the course of
6 this trial.

7 Anything from the State before we break for lunch?

8 SOLICITOR POULOS: No, sir, Your Honor.

9 THE COURT: Anything from the defense?

10 MR. SHEALY: No, Your Honor.

11 THE COURT: Very good. We'll see you back a few
12 minutes before two o'clock.

13 MR. SHEALY: Thank you, judge.

14 (WHEREUPON, Court was in recess for the lunch hour.)

15 THE COURT: All right. Ms. Poulos, State ready to
16 proceed?

17 SOLICITOR POULOS: Yes, sir, Your Honor. State's
18 ready.

19 THE COURT: Mr. Shealy.

20 MR. SHEALY: Yes, sir.

21 THE COURT: You're ready to proceed?

22 MR. SHEALY: Yes, sir.

23 THE COURT: All right. Bring the jury in.

24 (WHEREUPON, the following takes place within the
25 presence of the jury.)

1 THE COURT: All right. Ms. Poulos, State ready to
2 proceed?

3 SOLICITOR POULOS: Yes, sir, Your Honor.

4 THE COURT: Mr. Shealy?

5 MR. SHEALY: Yes, sir, Your Honor.

6 THE COURT: Would you call your first witness?

7 SOLICITOR POULOS: Yes, sir, Your Honor.

8 State calls Gail Holt.

9 GAIL HOLT, being first duly sworn,
10 testified as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR POULOS:

13 Q If you would, ma'am, please state your name.

14 A My name is Gail Holt.

15 Q And where do you live, Mrs. Holt?

16 A Perrin Drive in Spartanburg.

17 Q And how long have you lived on Perrin Drive?

18 A About 25, 26 years.

19 Q Where do you work?

20 A I work at Wofford College Student Health Center.

21 Q And what is your position there?

22 A I'm a registered nurse.

23 Q Do you and your husband own the home at Perrin
24 Drive?

25 A Yes, we do.

Gail Holt - Direct examination
by Solicitor Poulos

- 1 Q I'm gonna take you back to August 14th of 2010.
2 Do you, do you recall what day of the week that was?
3 A Saturday.
4 Q And can you tell us what time you woke up that morning?
5 A It was around 7:30. It was a little bit before 7:30.
6 Q Were you alone?
7 A Yes.
8 Q Where was your husband?
9 A At work.
10 Q And that morning when you woke up, what part of the
11 house were you in?
12 A I was in the back in the bedroom.
13 Q In relation to the, the front of the house, can you
14 tell us about where that bedroom was?
15 A It's to the far -- we live in a ranch style house. The
16 bedrooms are off to one side versus the kitchen. It's on
17 the other far side of my house.
18 Q And if you can, Mrs. Holt, tell us what happened that
19 morning.
20 A I was awake. I'd been awake for a little bit, was
21 fixing to -- we were keeping my daughter's dog, and I was
22 just getting ready to take the dog out, and it had been
23 daylight for some time, and I heard glass break, and I---
24 Q What did you do then?
25 A I just thought something had, had broken and fallen and

Gail Holt - Direct examination
by Solicitor Poulos

1 broken. So, I started down the hall to, to check it out to
2 see what had happened, and I encountered a man in the
3 hallway.

4 Q Okay. Did you recognize that man?

5 A Yes, I did.

6 Q Who was that man?

7 MR. SHEALY: Objection, Your Honor, based on my prior
8 objection.

9 THE COURT: Overruled.

10 Q You can answer the question, Mrs. Holt.

11 A I know him as Gabe.

12 Q Okay. And how do you know Gabe?

13 A He worked for my husband.

14 Q How many opportunities have you had to be around Gabe?

15 A Oh, several. I would see him at my husband's shop, and
16 he had been to the house a few times for work, doing some
17 work around the house.

18 Q What, what type of work had you done around your house
19 before?

20 A My husband, he's a contractor. So, they had roofed the
21 house and they had done some painting.

22 Q All right. Did you recognize him immediately or did,
23 did it take you a while?

24 A Immediately.

25 Q All right. Did you recognize his voice?

Gail Holt - Direct examination
by Solicitor Poulos

- 1 A Yes.
- 2 Q Does he speak with an accent or not?
- 3 A It's not really what you say -- it's a very distinctive
4 voice.
- 5 Q And how long would you say he had been to your home
6 before this incident?
- 7 How long had it been?
- 8 A It had been a while. Months.
- 9 Q Months?
- 10 A Yes.
- 11 Q Okay. And when you encountered him in the hall, do you
12 recall -- did, did he have anything covering his face?
- 13 A Nothing on his face.
- 14 Q Did he have anything on his head?
- 15 A A hoodie.
- 16 Q Okay. And did he have anything in his hands?
- 17 A I didn't see anything because when I, when I came upon
18 him, he immediately -- I saw him face-to-face. He told me
19 to turn around immediately. He put one arm around me and
20 held a sharp object up to my neck.
- 21 Q Okay. Was he -- when he grabbed you, can you, can you
22 describe how he grabbed you?
- 23 Did he grab you from behind or from the front?
- 24 A From the front kind of turning me around --
- 25 Q Okay.

Gail Holt - Direct examination
by Solicitor Poulos

- 1 A -- at that time with the arm around here.
- 2 Q Okay. And the object that was in his hands, where did
- 3 he have that object?
- 4 A In the front.
- 5 Q Could you tell what that was?
- 6 A No.
- 7 Q What happened once, once he grabbed you and put the
- 8 object up to your neck?
- 9 A He started forcing me back down the hall towards my
- 10 husband's office and told me to -- just kind of forced me
- 11 into the office.
- 12 Q And, and what did he tell you when he forced you in the
- 13 office?
- 14 A Told me to open the closet door.
- 15 Q What was in the closet?
- 16 A A safe.
- 17 Q Do you know what was in the safe?
- 18 A I would assume some money and I don't know everything
- 19 that's in the safe.
- 20 Q Is that your husband's safe?
- 21 A That's -- yes.
- 22 Q And did you know the combination to that safe?
- 23 A No, I did not.
- 24 Q All right. What happened then?
- 25 A He just kept telling me over and over to open it, to

Gail Holt - Direct examination
by Solicitor Poulos

1 open it, and I told him -- I never addressed him by name. I
2 addressed, I addressed him as sir.

3 Q why didn't you address him by name?

4 A I believe in guardian angels and something told me not
5 to, to address him by name, to address him as sir, to let
6 him know he was in control.

7 Q But you knew his name?

8 A Yes.

9 Q what was his demeanor like?

10 A Very aggressive, very hostile, and very much in a
11 hurry. I mean he just seemed frantic. Just --.

12 Q And once you couldn't get the safe open, what happened
13 after that?

14 A I told him repeatedly I did not -- I told him, sir, I
15 promise you, I do not know the combination. I promise you,
16 I do not know. He then told me -- we kind of -- he forced
17 me back out into the hallway towards the master bedroom
18 where we kind of went into the entryway of the master
19 bedroom, and he told me to lie down on my face, and which I
20 did, and he told me to put my hands behind my back.

21 Q And did you comply?

22 A Yes.

23 Q And what did he do with your hands behind your back?

24 A He taped them.

25 Q So, when you are face down, hands behind your back,

Gail Holt - Direct examination
by Solicitor Poulos

1 what is he doing at that point?

2 A I was trying to see -- he saw -- my husbands very hard
3 of hearing, but we do have a gun. But we kept it, at that
4 time, in a holster on a -- we had a four poster bed, and he
5 went directly to the gun and pulled it out.

6 Q And where exactly was the holster?

7 Was it attached to the bed or was it on the nightstand?

8 A Attached to the bed.

9 Q Okay. And when he pulled the gun out, what, what did
10 he do with it?

11 A He came around and he kind of asked me where my purse
12 was. He said I want your, your money, your purse, and I
13 told him, I said, sir, my purse is in the dining room, which
14 was on the other end of the house on the dining room table,
15 and he ran down the hall I guess. He came back and he
16 had -- also on the dining room table was the pet supply bag
17 that we had with the dog food and pet toys in, and he came
18 back in there and he threw the bag in the floor, and he
19 leaned down and he said you've lied to me. And I felt
20 something in the back. I don't know if it was a gun. But I
21 assumed it's a gun right there.

22 Q I'm---

23 A And he said you've lied to me, and he said -- I said
24 no, sir, I have not. My purse is, I promise you, is in
25 there on the dining room table, and he went back and he came

Gail Holt - Direct examination
by Solicitor Poulos

1 back and he rummaged through my purse, and he saw -- I had a
2 jewelry armoire in the bedroom as well. He ran and he
3 emptied out some drawers in that. But I don't have any
4 expensive jewelry. So, at that time he, he got what he
5 wanted and I just laid there and he told me not to move. He
6 said I will kill you.

7 Q Did he ever threaten you?

8 A Yes, he said I will kill you.

9 Q What -- do you recall specifically what he said?

10 A He said I will kill you, don't move, and I said sir, I
11 will not move, I promise, and at that time something told me
12 just to be still and listen, and I heard him go back down
13 the hall, and I listened and I heard the door close.

14 Q So, when he left, did, did he leave with your money?

15 A I -- yes, I had some money in my purse, and he took my
16 cell phone and my car keys.

17 Q Did he take your husband's gun?

18 A I don't know what all he took. I mean he took stuff.

19 Q Did he take your car?

20 A Yes.

21 Q Okay. What type of car do you drive, Mrs. Holt?

22 A I had a 2001 Lexus SUV at that time.

23 Q And approximately how much would you say the car is
24 worth?

25 A At that time, maybe 13, 14,000 maybe, 14, 15.

Gail Holt - Direct examination
by Solicitor Poulos

- 1 Q And do you recall about how much cash you had in your
2 wallet?
- 3 A I had around 200, 200 in the wallet.
- 4 Q All right. And when he left, where were you?
- 5 A When he left?
- 6 Q Yes, ma'am.
- 7 A I was still lying on the floor in the bedroom.
- 8 Q At some point did, did you -- were you able to get your
9 hands---
- 10 A After I heard the door close I, I just felt like I
11 could start trying to get out of the tape, which I did. It
12 took me a few minutes.
- 13 Q And what did you do once you got your hands unbound?
- 14 A I ran to call my husband. I was terrified.
- 15 Q Did your husband call the police?
- 16 A Yes.
- 17 Q Okay. Mrs. Holt, I'm gonna show you what's been marked
18 for identification purposes as State's Exhibit No. 2.
- 19 Do you recognize this?
- 20 A Yes.
- 21 Q All right. And, and, ma'am, is this a -- what is this
22 a diagram of?
- 23 A This is the house.
- 24 Q This is your home?
- 25 A This is the house, uh-huh. (Affirmative).

Gail Holt - Direct examination
by Solicitor Poulos

1 Q Okay. Does that diagram clearly and accurately
2 represent the way that your home looks?

3 A Yes.

4 SOLICITOR POULOS: Your Honor, we would ask that
5 State's Exhibit 2 be admitted into evidence.

6 THE COURT: Any objection?

7 MR. SHEALY: No, Your Honor.

8 THE COURT: Be admitted without objection.

9 (WHEREUPON, State's Exhibit No. 2 was received into
10 evidence at this time.)

11 SOLICITOR POULOS: Permission to publish, Your Honor?

12 THE COURT: Yes, ma'am.

13 Q Mrs. Holt, if you would, using this diagram of your
14 home, if you could, explain where you were.

15 A I was right in through here. There's a bath right here
16 and I was right in about this area of the, the house when I
17 heard the glass break --

18 Q Okay. So, you were---

19 A -- and I started down the hall.

20 Q Okay. You were in the back between the master bedroom
21 and the---

22 A The bathroom.

23 Q ---and bedroom number two?

24 A Uh-huh. (Affirmative).

25 Q Okay. And you started down the hall, and about where

Gail Holt - Direct examination
by Solicitor Poulos

- 1 were you when you encountered the defendant?
- 2 A Right about through here.
- 3 Q Okay.
- 4 A Right in through this area.
- 5 Q Okay. And where is your, your back-door?
- 6 A It's right here.
- 7 Q Right here by the kitchen?
- 8 A Yes.
- 9 Q Okay. Now, Mrs. Holt, about what time, and, and I
- 10 understand that you weren't looking at a clock during all of
- 11 this, but about what time would you say that this incident
- 12 occurred?
- 13 A It was after 7:00 -- around 7:30 and 8:00. Between
- 14 7:30 and 8:00. Somewhere around that time.
- 15 Q Okay.
- 16 A Around 7:30.
- 17 Q All right. And, if you would, I'm showing you what's
- 18 been premarked for identification purposes as State's
- 19 Exhibits 3 through 25. If you would, take a moment to
- 20 review those photographs and let me know when you're ready.
- 21 A (Witness complies.)
- 22 Q Mrs. Holt, are those photographs that were taken on the
- 23 morning of this incident on August 14th, 2010?
- 24 A Yes.
- 25 Q And do those photographs clearly and accurately reflect

Gail Holt - Direct examination
by Solicitor Poulos

1 the way your home was that morning just after this incident
2 occurred?

3 A Yes.

4 SOLICITOR POULOS: Your Honor, State would request that
5 State's Exhibit 3 through 25 be admitted into evidence.

6 MR. SHEALY: Your Honor, I have an objection as to Nos.
7 11 through 14.

8 THE COURT: Nos. 11 and 15?

9 MR. SHEALY: 11 through 14.

10 THE COURT: Okay. Madam Forelady, would you take your
11 jury back to the jury room please.

12 (WHEREUPON, the following takes place outside the
13 presence of the jury.)

14 THE COURT: okay, sir.

15 MR. SHEALY: Your Honor, I object to State's Exhibits
16 Nos. 11, 12, 13, and 14 I believe, Your Honor. Those are
17 pictures of a gun case, a triangular piece of glass, and a
18 rock. They're also close-up pictures of a rock and a
19 triangular, triangular piece of glass.

20 Your Honor, it would be our position that those, those
21 are irrelevant. We believe that the State intends to
22 attempt to prove that that triangular piece of glass was
23 somehow involved in this. She -- the witness is failed to
24 identify that as, as being the -- and she is actually
25 testified she doesn't know what it was.

Gail Holt - Direct examination
by Solicitor Poulos

1 THE COURT: I got that.

2 MR. SHEALY: So, Your Honor, it would be our position
3 that---

4 THE COURT: Wouldn't there be broken glass based on the
5 testimony from the method of entry though?

6 MR. SHEALY: There would be, Your Honor, and the, the
7 broken glass, there, there are some pictures of broken glass
8 that we're not objecting to that's around the entryway.
9 But, Your Honor, that particular piece of glass we believe
10 to be irrelevant. It's not established that that glass came
11 even from this broken window.

12 THE COURT: Well, hold on. The witness testified that
13 the pictures truly and accurately reflect the conditions at
14 her house that day. And, and, so, to that extent, they
15 would of been -- they have been authenticated.

16 Now, the question is whether, to me, is whether it's
17 more prejudicial than probative. You can certainly see the
18 relevance from the house and the condition of the house that
19 day.

20 THE COURT: Well, Your Honor, it would be our position,
21 as, as to relevance, that it makes no fact more or less
22 likely.

23 THE COURT: Well, let me see the pictures right quick.
24 May I see 11, 12, 13, 14 please?
25 Do you have those?

Gail Holt - Direct examination
by Solicitor Poulos

1 WITNESS: Yes.

2 THE COURT: Oh, I'm sorry. Excuse me. I'll keep them
3 in order, ma'am.

4 Is 14 the office area?

5 SOLICITOR POULOS: Yes, sir, should be.

6 THE COURT: All right. I'm gonna overrule your
7 objection as to 12, 13, and 14. Like you pointed out,
8 however, the witness is already identified that she can not
9 testify or can't identify what was held to her neck.

10 No. 11, this gun case, Ms. Poulos.

11 SOLICITOR POULOS: Your Honor, it's the glass that's to
12 the left of that I believe and a rock that's to the right of
13 that. We're not offering to admit the gun case.

14 THE COURT: I got you.

15 SOLICITOR POULOS: But it's the items that the victim
16 has properly authenticated and identified. Well,
17 authenticated as being part of the crime scene. We think
18 it's very relevant, Your Honor.

19 THE COURT: Okay. I, I, for some reason, didn't see
20 the glass or the rock. I'm gonna overrule your objection.
21 Noted for the record.

22 SOLICITOR POULOS: Thank you, Your Honor.

23 MR. SHEALY: Thank you, Your Honor.

24 THE COURT: Those---

25 SOLICITOR POULOS: Your Honor, if I may, just to

Gail Holt - Direct examination
by Solicitor Poulos

1 clarify.

2 Fifteen is the only one that has not been admitted?

3 THE COURT: No, I said 12, 11 -- no, 12, 13, and 14 I
4 was admitting.

5 SOLICITOR POULOS: Okay.

6 THE COURT: Then I subsequently admitted 11. So, 3
7 through 25 will be admitted subject to counsel's objections.

8 SOLICITOR POULOS: So, all of the pictures, Your Honor?

9 THE COURT: All of the pictures.

10 SOLICITOR POULOS: Okay. Thank you, Your Honor. Just
11 wanted to make sure.

12 (WHEREUPON, State's Exhibit Nos. 3 through 25 were
13 admitted into evidence at this time.)

14 (WHEREUPON, the following takes place within the
15 presence of the jury.)

16 THE COURT: Ms. Poulos.

17 SOLICITOR POULOS: Yes, sir, Your Honor.

18 Your Honor, the Court has admitted State's Exhibit 3
19 through 25.

20 May we publish them to the jury?

21 THE COURT: Yes, ma'am.

22 CONTINUED DIRECT EXAMINATION

23 BY SOLICITOR POULOS:

24 Q Okay. Mrs. Holt, I'm gonna get you to go through each
25 of these photographs and describe for the jury what you see.

Gail Holt - Direct examination
by Solicitor Poulos

- 1 This is State's Exhibit 3.
- 2 What is that a picture of, ma'am?
- 3 A That's the front of my house.
- 4 Q Okay. State's Exhibit 4.
- 5 A That's the carport, the kitchen door.
- 6 Q The kitchen door.
- 7 Okay. State's Exhibit 5, what is that a photograph of?
- 8 A The kitchen door going into the kitchen.
- 9 Q Okay. And what, what are these items right here on the
- 10 floor?
- 11 A Glass.
- 12 Q State's Exhibit 6, what door is that?
- 13 A Kitchen door.
- 14 Q And what is this?
- 15 A Glass, broken glass.
- 16 Q Is that glass broken?
- 17 A Yes, broken glass.
- 18 Q This is State's Exhibit 7.
- 19 What is that?
- 20 A And that's the kitchen.
- 21 Q Okay. That's just the opposite view from what we were
- 22 looking at?
- 23 A Yes.
- 24 Q Correct?
- 25 A You're looking at, at the kitchen from the carport.

Gail Holt - Direct examination
by Solicitor Poulos

1 Q All right. And in all of them, these items on the
2 floor, can you identify what those are?

3 A Broken glass.

4 Q Okay. This is State's Exhibit 8.

5 Where is that, Mrs. Holt?

6 A The kitchen floor.

7 Q Is that just a close-up picture of the glass?

8 A Yes.

9 Q This is State's Exhibit 9.

10 What room---

11 A That's the den.

12 Q The den?

13 A The den.

14 Q Okay. And where would the kitchen be?

15 If you're looking at this picture, can you describe
16 where the kitchen would that?

17 A It's right to the left. You're coming from, right from
18 the kitchen into the den.

19 Q Okay. State's Exhibit 10.

20 A That's the hallway coming from the den down to the,
21 towards the bedrooms.

22 Q Okay. And the bedroom that you were in that morning,
23 where would that be in this picture?

24 A I was coming almost from the bathroom. Like when you
25 go down the hall, it's kind of -- you kind of go to the

Gail Holt - Direct examination
by Solicitor Poulos

- 1 right, to the right---
- 2 Q So---
- 3 A ---a little bit.
- 4 Q would it be right here?
- 5 A Right in through there, yes.
- 6 Q Okay. This is State's Exhibit 11.
- 7 Mrs. Holt, can you identify that object right there?
- 8 A Looks like broken glass.
- 9 Q Okay.
- 10 A It's broken glass.
- 11 Q And what about this?
- 12 A That's a rock.
- 13 Q All right. And what is this large black object?
- 14 A That's my husband's gun case.
- 15 Q How did that gun case get in the hallway?
- 16 A He, he brought it out into the hallway. It was in the
- 17 office.
- 18 Q This is State's Exhibit 12.
- 19 Right by the number three, ma'am, there's an object
- 20 right here.
- 21 What is that object?
- 22 A Broken glass.
- 23 Q This is State's Exhibit 13.
- 24 Right by that Yellow Number 4, can you identify that
- 25 object?

Gail Holt - Direct examination
by Solicitor Poulos

- 1 A A rock.
- 2 Q All right. This is State's Exhibit 14.
- 3 what room of the house is this?
- 4 A That's my husband's office.
- 5 Q All right. Is that the room that you just testified to
- 6 that the person who did this to you took you in first?
- 7 A Yes, that's correct.
- 8 Q Is this the room where the safe was?
- 9 A Yes.
- 10 Q And can you describe where the safe was in this room?
- 11 A The safe is to the right. There's a closet.
- 12 Q Would it---
- 13 A Right to the right.
- 14 Q About right here?
- 15 A Right in there, that's correct.
- 16 Q Is this where the closet is, Mrs. Holt?
- 17 A Yes.
- 18 Q And is that where the safe is in that closet?
- 19 A Yes.
- 20 Q And let me ask you this.
- 21 what, what is this green object down here?
- 22 A Gun case.
- 23 Q Gun case.
- 24 How did that gun case get opened?
- 25 A The person. He opened it.

Gail Holt - Direct examination
by Solicitor Poulos

- 1 Q Okay.
- 2 A It was in the office.
- 3 Q This is State's Exhibit 15.
- 4 Is this just another or closer up view of the office?
- 5 A Yes.
- 6 Q And right here --
- 7 A That's the---
- 8 Q -- would this be the closet?
- 9 A That's the closet door, yes.
- 10 Q Is that where the safe was?
- 11 A Yes.
- 12 Q This is State's Exhibit 16.
- 13 Are we also in the office in this picture as well?
- 14 A Yes.
- 15 Q And what are, what are these large---
- 16 A Those are plastic jugs my husband puts change into.
- 17 They're very heavy.
- 18 Q Okay. This is State's Exhibit 15.
- 19 What room are we in right now?
- 20 A The master bedroom.
- 21 Q This is the master bedroom?
- 22 A Yes.
- 23 Q Okay. And where did your husband keep his gun?
- 24 A It's on the post at the head. Right there.
- 25 Q Right there?

Gail Holt - Direct examination
by Solicitor Poulos

- 1 A Yes.
- 2 Q Okay.
- 3 A It's a holster.
- 4 Q This is State's Exhibit 18.
- 5 Are we also in your bedroom in this picture?
- 6 A Yes.
- 7 Q Okay. And what is that object?
- 8 A That's a gun holster.
- 9 Q Is that your husband's gun holster?
- 10 A Yes.
- 11 Q Okay. State's Exhibit 19, is that just a close-up view
- 12 of the holster?
- 13 A Yes.
- 14 Q And did the person who did this to you take your
- 15 husband's gun from that holster?
- 16 A Yes.
- 17 Q This is State's Exhibit 20.
- 18 What is that a picture of, ma'am?
- 19 A Tape.
- 20 Q Where did that tape come from?
- 21 A From my hands.
- 22 Q And where is that table in your home?
- 23 A That's in the den.
- 24 Q When did you remove that tape?
- 25 A When I -- in the bedroom.

Gail Holt - Direct examination
by Solicitor Poulos

1 Q Okay.

2 A I had to take the tape off. I had to, to work to get
3 it off.

4 Q Okay. This is State's Exhibit 21.

5 Identify the object right there.

6 A It's a roll of tape.

7 Q Is that in your bedroom?

8 A Yes.

9 Q This is State's Exhibit 22.

10 What is this item?

11 A That's the pet supply bag that we had the dog food in.

12 Q How, how did that item -- I'm assuming -- is this in
13 your bedroom?

14 A Yes.

15 Q And how did that item get in there?

16 A He brought it in there.

17 Q This is State's Exhibit 23.

18 Is this also in your bedroom?

19 A Yes.

20 Q And what is this object?

21 A That's my purse.

22 Q And what are these objects?

23 A My wallet and checkbook and just things I had in my
24 purse.

25 Q Okay. Can you tell from this photo -- can you describe

Gail Holt - Direct examination
by Solicitor Poulos

1 for us about where you were when you were face down?

2 A It's almost at the -- almost at the entry of the door
3 that's a little bit above that bench that's in front of the
4 bed. I was down in that area.

5 Q Okay. And State's Exhibit 24, is this also in your
6 bedroom?

7 A Yes.

8 Q And what is this piece of furniture here?

9 A That's just a little jewelry armoire that I kept
10 jewelry in.

11 Q And how did those drawers get opened?

12 A He opened them.

13 Q And State's Exhibit 25, what is that a photo of?

14 A The drawers from the jewelry armoire on the floor and
15 the jewelry that was in the drawers.

16 Q How, how did the jewelry get on the floor?

17 A He took the drawers out and dumped them out.

18 Q Okay. And, ma'am, I'm gonna show you State's Exhibit
19 26 and 27 for identification purposes, and I want to ask you
20 if you recall what is in those photographs.

21 A It's my car.

22 Q Okay. Are those clear and accurate reflections of the
23 way that, that your car looked?

24 A Yes.

25 Q Do you still have that car?

Gail Holt - Direct examination
by Solicitor Poulos

1 A No.

2 Q Okay. But at the time, is, is that a true depiction of
3 your vehicle?

4 A Yes.

5 Q And is State's Exhibit 27, is that, is that your
6 license plate?

7 A Yes.

8 SOLICITOR POULOS: Okay. Your Honor, we'd ask that
9 State's Exhibit 26 and 27 be admitted into evidence.

10 THE COURT: Any objection?

11 MR. SHEALY: No, Your Honor.

12 THE COURT: Be admitted without objection.

13 (WHEREUPON, State's Exhibit Nos. 26 and 27 were
14 received into evidence at this time.)

15 SOLICITOR POULOS: Permission to publish, Your Honor?

16 THE COURT: Yes, ma'am.

17 Q Mrs. Holt, just briefly, I'm gonna ask you, State's
18 Exhibit 26, is this your vehicle, ma'am?

19 A Yes.

20 Q Okay. And 27, is that just a close-up of your license
21 plate?

22 A Yes.

23 Q And that is your vehicle?

24 A Yes.

25 Q Now, after this incident happened, Mrs. Holt, who was

Gail Holt - Direct examination
by Solicitor Poulos

- 1 the first person to arrive?
- 2 A My husband.
- 3 Q Your husband.
- 4 Did the police come---
- 5 A They were shortly behind him.
- 6 Q ---as well?
- 7 Okay.
- 8 A Uh-huh. (Affirmative).
- 9 Q Now, earlier you stated that you recognized the man who
- 10 did this to you.
- 11 How did you know this?
- 12 A How did I know him?
- 13 Q How did you know him?
- 14 A Because he had worked for my husband. I had seen him
- 15 before.
- 16 Q And, and I know it's hard to put a number, had you seen
- 17 him more than once?
- 18 A Yes.
- 19 Q Had you seen him more than one time at your husband's
- 20 place of business?
- 21 A Yes.
- 22 Q Had you seen him more than one time in your own home?
- 23 A Yes.
- 24 Q Okay. Do you know whether or not he helped your
- 25 husband install the safe?

Gail Holt - Direct examination
by Solicitor Poulos

1 A I don't know, hu huh. (Negative).

2 Q All right. And did you provide a description to police
3 as to who did this?

4 A Yes, I told them who.

5 Q Did you tell them who it was?

6 A Yes.

7 Q Who did you tell them?

8 A I'm sorry?

9 Q Who, who did you tell them did this?

10 A I told them I only know him as Gabe, the first name.

11 Q And at some point through, after police investigation,
12 did Investigator Williams present you with a photo lineup?

13 A Yes.

14 Q Okay. Mrs. Holt, I'm showing you what's been marked
15 for identification purposes as State's Exhibit 1. If you'll
16 take a minute and review that. Let me know when you're
17 ready.

18 A Uh-huh. (Affirmative).

19 Q Is that the affidavit and photo lineup that you were
20 presented by Investigator Williams?

21 A Yes.

22 Q And does your signature appear on that affidavit?

23 A Yes.

24 Q On the lineup, did your initials appear on the lineup?

25 A Yes.

Gail Holt - Direct examination
by Solicitor Poulos

1 Q And what is the date on those?

2 A August the 14th, 2010.

3 Q Okay. Is that the date of this incident?

4 A Yes.

5 SOLICITOR POULOS: Your Honor, we ask that State's
6 Exhibit 1 be admitted into evidence.

7 MR. SHEALY: Your Honor, no objection except -- well,
8 subject to my prior---

9 THE COURT: Yes, sir.

10 MR. SHEALY: ---objections.

11 THE COURT: Exhibit No. 1 --?

12 SOLICITOR POULOS: Yes.

13 THE COURT: -- will be admitted.

14 (WHEREUPON, State's Exhibit No. 1 was received into
15 evidence at this time.)

16 Q Mrs. Holt -- when Mr. -- when Investigator Williams
17 presented you with that lineup, what, what did he ask, what
18 did he tell you?

19 A He just told me he was gonna show, give me some
20 pictures and just for me to look at them, and if I recognize
21 that person to circle it and initial it.

22 Q And did you recognize anyone?

23 A Yes.

24 Q Were you able to circle a photograph?

25 A Yes.

Gail Holt - Direct examination
by Solicitor Poulos

1 Q Did you identify the man who did this to you?

2 A Yes.

3 Q Did you circle and put your initials around that
4 photograph?

5 A Yes.

6 Q When you did so, were you absolutely sure that it was
7 him?

8 A Positive.

9 Q Any hesitation?

10 A None.

11 Q Any doubt in your mind whatsoever?

12 A No.

13 Q Did anybody force you, threaten you, coerce you to pick
14 a particular person?

15 A No.

16 Q Did Investigator Williams suggest to you who to pick?

17 A No.

18 Q Did your husband suggest to you who to pick?

19 A No.

20 Q Was your husband right beside you when you made that
21 identification?

22 A I don't -- he was in the room, but not -- no.

23 Q Okay. Did anybody on the scene suggest to you who to
24 identify?

25 A No.

Gail Holt - Direct examination
by Solicitor Poulos

1 Q What was the name of the man that you picked?

2 A Gabe.

3 Q Is the person who broke into your home, tied you up,
4 robbed you at gunpoint present in the courtroom today?

5 A Yes.

6 Q Would you identify him?

7 MR. SHEALY: Objection, Your Honor. Again, subject to
8 my prior objection.

9 THE COURT: Overruled.

10 Q Mrs. Holt, would you identify him?

11 A It's this, this man over here.

12 SOLICITOR POULOS: Your Honor, let the record reflect
13 the victim has identified the defendant in this case.

14 THE COURT: It will so reflect.

15 SOLICITOR POULOS: Beg the Court's indulgence for one
16 moment.

17 THE COURT: Yes, ma'am.

18 (Pause.)

19 Q Mrs. Holt, just one follow-up question.

20 Can you, can you just -- can you describe what -- when
21 you first encountered the defendant in your home, what did
22 he look like?

23 A Just an African-American male. Not a very big build,
24 and, like I said, he had a hoodie on, and I just came
25 face-to-face with him and encountered him in the hall.

Gail Holt - Direct examination
by Solicitor Poulos

1 Q But you knew who he was?

2 A Yes.

3 Q Okay. Thank you. Please answer any questions

4 Mr. Shealy may have for you.

5 A Yes, of course.

6 THE COURT: Cross-examination.

7 MR. SHEALY: Yes, Your Honor. See if I can turn this
8 off. Actually I can't.

9 THE COURT: Can you help him get that light cut off
10 please, sir?

11 MR. SHEALY: Okay. All right. Thank you, ma'am.

12 CROSS-EXAMINATION

13 BY MR. SHEALY:

14 Q All right. Mrs. Holt, when you encountered this fellow
15 in your house, could you say again what exactly was he
16 wearing?

17 A All I can recall -- when I came, I saw, I saw his face,
18 but I remember he had a hoodie, something over his head.

19 Q Okay.

20 A But not his face.

21 Q All right. So, it didn't cover up his face, but it, it
22 was a hood on, on his head?

23 A Yes.

24 Q And was it---

25 A Kind of a hood.

Gail Holt - Cross-examination
by Mr. Shealy

1 Q Was it a sweatshirt?

2 A I don't remember. I just remember -- I only had just a
3 few seconds I saw his face.

4 Q Sure.

5 Okay. But you don't know if it was a sweatshirt or---

6 A No.

7 Q ---if he had sleeves on his shirt or anything like
8 that?

9 A (Witness nods negatively.)

10 Q No.

11 Okay. Do you recall speaking with Deputy Welch of the
12 Sheriff's Office?

13 He would of been the first guy to get out there.

14 A I spoke to officers. I don't remember their names.

15 Q You don't remember --?

16 A The names.

17 Q -- in particular, Deputy Welch?

18 A No.

19 Q No.

20 Okay. You don't recall having talked to him and
21 describing the fellow as a black male with a ball cap on?

22 A I just remember -- I think I was -- I was so upset. I
23 remember his head being covered.

24 Q Okay. But you don't recall having given him the
25 description of a black male with a ball cap on?

Gail Holt - Cross-examination
by Mr. Shealy

1 A I don't remember.

2 Q Okay. All right. And you've also testified that
3 whenever you were confronted with this fellow he turned you
4 around pretty quickly, right?

5 A Yes.

6 Q And I guess he held something sharp, we're not sure
7 what, to your throat, right?

8 A That's correct.

9 Q Okay. And then he walked you into your bedroom and
10 laid you down at that point?

11 A No, we went into the office first.

12 Q Okay. And what did you do in the office?

13 A He forced me into the office, told me to open the doors
14 and open the safe.

15 Q Okay. So, he told you to open the safe?

16 A Yes.

17 Q All right. He didn't ask you where the safe was?

18 A No.

19 Q Again, do you recall telling Officer Welch that he
20 asked you where the safe was?

21 A No.

22 Q You don't recall that?

23 A Hu huh. (Negative).

24 Q Okay. Now, once the police got there, how long did it
25 take for them to actually take a written statement from you?

Gail Holt - Cross-examination
by Mr. Shealy

- 1 A I don't remember.
- 2 Q You don't remember?
- 3 A I just remember them, you know, asking me what happened
4 and I gave them all the details.
- 5 Q Okay. Would it surprise you if it took about four
6 hours to actually get this statement written down?
- 7 A I know they had a witness, a victim advocate or
8 something, somebody came too. There were several officers
9 there at the house.
- 10 Q Okay. So, they waited for the victims advocate to get
11 there before they wrote your statement?
- 12 A Yes.
- 13 Q But you had talked to them prior to that?
- 14 A The officers, yes.
- 15 Q All right. The officers, right.
- 16 A Yes.
- 17 Q Looks like you spoke with at least Mr. Welch, then you
18 spoke with, I guess, Mr. Williams or Investigator Williams?
- 19 A Yes.
- 20 Q Okay. And when did Investigator Williams present you
21 with that lineup?
- 22 And if you need to refer to the lineup you can.
- 23 A I'm sorry, the time?
- 24 Q The time, yes, ma'am.
- 25 A 10:38AM.

Gail Holt - Cross-examination
by Mr. Shealy

1 Q Okay. I'm gonna hand you a copy of your statement. I
2 just want to make sure -- so that -- just to refresh your
3 memory as to when you finished this statement.

4 A Uh-huh. (Affirmative).

5 Q I believe that last sentence starting with this
6 statement was complete.

7 When did you complete that statement?

8 A I'm sorry. I don't --

9 Q I'm sorry.

10 When did you complete that statement?

11 A The date on it?

12 Q The, the time as well as the date.

13 A 12:21 on the 14th of August, 2010.

14 Q Okay. So, you completed this statement two hours after
15 you had been presented that lineup, correct?

16 A Yes.

17 Q Get that back from you. Thank you, ma'am.

18 All right. And in that affidavit, could you tell us
19 exactly how you described Gabe?

20 A How I described him?

21 Q How you described him, yes, ma'am.

22 A I, I told him who he was.

23 Q Okay. But in the affidavit you've got that you
24 identified -- you were showed six photographs?

25 SOLICITOR POULOS: Your Honor, objection.

Gail Holt - Cross-examination
by Mr. Shealy

1 May we approach?

2 THE COURT: Yes, ma'am.

3 (WHEREUPON, a bench conference was held out of the
4 hearing of the jury at this time.)

5 MR. SHEALY: Your Honor, for the record, I'm referring
6 to State's Exhibit No. 1, which has been properly admitted I
7 believe without objection.

8 THE COURT: Okay, sir.

9 Q So, to the extent, Mrs. Holt, you need to look at that,
10 feel free, okay, and, in fact, I'm gonna ask you to look at
11 it.

12 okay?

13 A (Witness nods affirmatively.)

14 Q Okay. In point of fact, whenever you're describing the
15 person that you picked out, you write that I know him as
16 Gabe. He worked for my husband. He's done work at my home
17 in the past.

18 Isn't that correct?

19 A That's correct.

20 Q Okay. But no where in there do you say he's the one
21 who robbed me, do you?

22 A I said this is the man.

23 Q But that's not in the affidavit, is it?

24 A (Witness shrugs shoulders.)

25 I don't---

Gail Holt - Cross-examination
by Mr. Shealy

1 Q I'm sorry. We've got a court reporter. You've got to
2 answer that out loud. I'm sorry.

3 A I can't -- I guess not. I just identified the person
4 who broke in and did this to me.

5 Q But according to this affidavit, you're just picking
6 somebody out, correct?

7 A I'm picking out the person who did it.

8 Q But again, ma'am, that's not how you described him, is
9 it?

10 You just simply described him as someone who had worked
11 for your husband and been in your house, is that right?

12 A That's correct.

13 Q Thank you, ma'am.

14 Now, when all this was -- when you first heard the
15 breaking glass, you testified you thought it was something
16 that had fallen?

17 A Yes.

18 Q Is that right?

19 A Uh-huh. (Affirmative).

20 Q Had y'all just put a mirror up or something?

21 A No, I have several mirrors up in the house.

22 Q Okay.

23 A I have one in the living room, one in the den, and I
24 had pictures, fairly large pictures in the house --

25 Q Sure.

Gail Holt - Cross-examination
by Mr. Shealy

1 A -- and it just sounded like something had fallen or
2 maybe broken. I just knew it was glass.

3 Q Does, does that happen, does that happen often---

4 A No.

5 Q ---in your house?

6 A No.

7 Q No.

8 Your Honor, if I may, I'm referring to State's Exhibit
9 No. 2 now. That's the blowup picture or diagram of
10 Mrs. Holt's house.

11 Can you point out where all you have carpet and where
12 all you have hardwood floors?

13 A Okay. There's carpet -- the whole house is carpet
14 except for the kitchen and the living room and the dining
15 room. This is carpet, the hallway's are carpeted, and
16 the -- there's hardwood floors in the office and the
17 bedrooms have carpet.

18 Q Okay. So, the bedrooms have carpet?

19 A Uh-huh. (Affirmative).

20 Q The office has hardwood floors?

21 A That's correct.

22 Q Living room has carpet?

23 A Yes.

24 Q Kitchen has hardwood floors?

25 A Yes.

Gail Holt - Cross-examination
by Mr. Shealy

- 1 Q Dining room has --?
- 2 A Hardwood floors.
- 3 Q Hardwood floors.
- 4 Family room has --?
- 5 A Hardwood floors.
- 6 Q And the entryway?
- 7 A Hardwood floors.
- 8 Q Okay. Where did you think this thing had fallen?
- 9 A I didn't know.
- 10 Q You didn't know.
- 11 okay. I'm curious because again something falling on
- 12 hardwood floors would obviously be different from something
- 13 falling on carpeted floors, correct?
- 14 A That's correct.
- 15 Q So, for whatever reason, you did, you did not get the
- 16 pistol that was next to the---
- 17 A No.
- 18 Q ---the bed?
- 19 A No.
- 20 Q No.
- 21 And it's my understanding you were keeping your
- 22 daughter's dog?
- 23 A That's correct.
- 24 Q Okay. Where was your daughter's dog?
- 25 A With me.

Gail Holt - Cross-examination
by Mr. Shealy

- 1 Q With you?
- 2 A Uh-huh. (Affirmative).
- 3 Q Okay.
- 4 A It's a small dog and she's, was right there with me.
- 5 Q When that---
- 6 A We was going down the hall.
- 7 Q I'm sorry. I didn't mean to cut you off.
- 8 A I'm sorry.
- 9 Q If I do, just let me know and I'll, I'll let you
- 10 finish.
- 11 Okay?
- 12 A Okay.
- 13 Q Now, what was the dog doing when all this happened?
- 14 A Just standing there. It barked -- she barked a few
- 15 times, but he kind of told her to hush, kind of kicked at
- 16 her, and she just stayed there. She's a small -- she's a
- 17 little West Highland Terrier. She just stood there.
- 18 Q Okay. So, when the, the glass broke she didn't bark?
- 19 A No.
- 20 Q No.
- 21 Okay. And you've testified that I guess Mr. Rios
- 22 worked for your husband for some period of time?
- 23 A Yes.
- 24 Q How long was that period of time you said?
- 25 A I don't know.

Gail Holt - Cross-examination
by Mr. Shealy

1 Q Okay.

2 A A couple years or more. I don't know.

3 Q Okay. Over this span of -- when was the last time he
4 was in your house?

5 Do you know?

6 A It'd been months, months.

7 Q It's been---

8 A Quite a while.

9 Q It'd been a while?

10 A Uh-huh. (Affirmative).

11 MR. SHEALY: Okay. Your Honor, if you'd bear with me.

12 (Pause.)

13 MR. SHEALY: Okay. Your Honor, that's all I have for
14 this witness at this time.

15 THE COURT: Redirect.

16 SOLICITOR POULOS: Just briefly, Your Honor.

17 REDIRECT EXAMINATION

18 BY SOLICITOR POULOS:

19 Q Mrs. Holt, Mr. Shealy just asked you about the
20 affidavit on State's Exhibit 1 that went along with your
21 lineup.

22 A Uh-huh. (Affirmative).

23 Q And the whole purpose of the lineup was to identify the
24 person who did this to you, correct?

25 A That's correct.

Gail Holt - Redirect examination
by Solicitor Poulos

1 Q And who did you identify?

2 A Gabe.

3 Q Thank you.

4 THE COURT: All right, ma'am. Thank you. You may step
5 down.

6 THE COURT: Call your next witness please.

7 SOLICITOR POULOS: Your Honor, the State calls Phil
8 Holt.

9 THE COURT: All right. Madam Forelady, just one
10 second.

11 Would you take your jury to the jury room for one
12 moment please?

13 (WHEREUPON, the following takes place outside the
14 presence of the jury.)

15 THE COURT: You come up.

16 (Mr. Holt complies.)

17 THE COURT: All right. Mr. Holt, I just want to take
18 this time to remind you that you're not to bring up any
19 prior record of the defendant as we discussed earlier this
20 morning.

21 Okay?

22 MR. HOLT: (Witness nods affirmatively.)

23 THE COURT: I need you to give me a verbal response on
24 the record please.

25 MR. HOLT: Yes, sir.

1 THE COURT: Thank you.

2 Okay. Let me say something to the attorneys and I want
3 to say especially to Mr. Ghent. I kind of cut you off a
4 minute ago at---

5 SOLICITOR GHENT: I sincerely apologize to the Court.

6 THE COURT: I am not concerned about that at all. I
7 was just -- procedurally, for me, when you come up to the
8 front to give me an objection up here, I'm not gonna give
9 you much leeway to tell me what it is. If you want me to
10 let the jury go out of the room I'll give you more. I'm not
11 suggesting that we try, we try to run them out of the room
12 all the time. I'm just not gonna give you a lot of room to
13 argue up here at the bench with me.

14 okay?

15 SOLICITOR GHENT: I understand, and I apologize. Your
16 Honor had ruled so quick I didn't realize it was a ruling.
17 So, I do sincerely apologize.

18 THE COURT: That's not a problem at all. I promise
19 you, I want everybody to try their case.

20 Okay. Everybody ready to proceed?

21 SOLICITOR GHENT: Yes, sir.

22 SOLICITOR POULOS: Yes, sir, Your Honor.

23 MR. SHEALY: Yes, sir, Your Honor.

24 THE COURT: All right. Would you bring the jury in.

25 (WHEREUPON, the following takes place within the

Phil Holt - Direct examination
by Solicitor Poulos

1 presence of the jury.)

2 THE COURT: All right. Madam Clerk, will you swear the
3 witness?

4 PHIL HOLT, being first duly sworn,
5 testified as follows:

6 DIRECT EXAMINATION

7 BY SOLICITOR POULOS:

8 Q Mr. Holt, can you hear me okay?

9 A If you'll speak up a little better, a little louder it
10 would be better.

11 Q I'll stand right here.

12 Mr. Holt, if you would, please state your name for the
13 record.

14 A Phil Holt.

15 Q Mr. Holt, where, where do you live?

16 A Perrin Drive.

17 Q Okay. Is that in Spartanburg County?

18 A Yes, it is.

19 Q Where do you work, sir?

20 A I'm self-employed.

21 Q What kind of business do you own?

22 A I own a foam insulation company.

23 Q On August the 14th, 2010, did you receive a call from
24 your wife, Mrs. Gail Holt?

25 A Yes, I did. I had left about six o'clock in the

Phil Holt - Direct examination
by Solicitor Poulos

1 morning to help one of my guys put a roof on a, a garage he
2 was building behind his house, and I was on that roof when
3 the phone rang, and my wife was on the other end, and she
4 was hysterical, and I could hardly make out what she was
5 saying.

6 Q Okay.

7 MR. SHEALY: Your Honor, I --

8 A But I---

9 MR. SHEALY: Your Honor, I think I'm gonna have an
10 objection. It sounds like I'm gonna have an objection as to
11 hearsay. I'm gonna have an objection as to hearsay.

12 THE COURT: I'm gonna overrule as to hearsay. He, he
13 hasn't said anything that she said at this point. She -- he
14 was talking about the manner in which she was saying it.

15 MR. SHEALY: Yes, sir.

16 Q Okay. Based on what your, what your wife told you, did
17 you call the police?

18 A I did. I got off the roof immediately, got in my
19 truck, I headed to the house, and I called the police as I
20 was driving, and I told them somebody had broken into the,
21 my house and tied my wife up and robbed us. I was on my
22 route there and I suggested they get there quickly too.
23 Then I hung up and called my wife back.

24 Q Do you know the defendant, Gabriel Rios?

25 A I do.

Phil Holt - Direct examination
by Solicitor Poulos

- 1 Q And how do you know him?
- 2 A He had worked for me off and on for a number of years.
- 3 Q And what type of work did he do for you?
- 4 A Spray foam insulation.
- 5 Q Okay.
- 6 A We had also done some work at the house. When times
- 7 are slow, we don't have work for the guys, I will try to
- 8 manifest some work around the house or we'll work on one of
- 9 their homes --
- 10 Q Okay.
- 11 A -- to keep people employed and working.
- 12 Q And while at your business, did your wife have an
- 13 opportunity to be around him?
- 14 A She had had opportunity to see him several times, not
- 15 only at work, but also in the house because he had
- 16 participated in our painting of the house inside, roofing of
- 17 the house, and he is the one who helped me install the safe.
- 18 Q And where was that safe that he helped you install?
- 19 A Hold that picture out. I'll point exactly where it is.
- 20 Q All right, sir. This is State's Exhibit No. 2.
- 21 A This is the office. The safe was inside that closet.
- 22 Q Approximately how long before this incident had he
- 23 helped you install that safe?
- 24 A I don't remember how long I'd had the safe. I, I
- 25 really just don't know.

Phil Holt - Direct examination
by Solicitor Poulos

1 Q Okay. And besides your family and yourself, of course,
2 and your wife, who else would have knowledge of the safe?

3 A I don't go around telling people about the safe in my
4 home.

5 Q All right.

6 A I don't know that anyone else would of had knowledge.

7 Q Okay. Mr. Holt, how long had it been since, since the
8 defendant had been in your home prior to this incident?

9 A More than a year since he had been in the house or
10 worked for me.

11 Q Okay. Did he have a nickname?

12 A Gabe.

13 Q Okay. Did he speak with an accent?

14 A The Cuban brogue that he speaks with.

15 Q Okay. Do, do you know where he's from?

16 A My understanding is he came from Cuba to Miami to South
17 Carolina.

18 Q Okay. What type of gun did you have, sir, in the
19 holster that was by your bed?

20 A The gun that was taken was a Smith, Smith & Wesson .357
21 that was given to me by my uncle.

22 Q Did you keep that weapon loaded?

23 A Yes.

24 Q Now, what about the other guns in your home, the long
25 gun cases, what -- did, did you keep shotguns in those

Phil Holt - Direct examination
by Solicitor Poulos

1 cases?

2 A I never told anybody about the guns I keep in my house.
3 Don't want to now.

4 Q Okay. All right. I understand, sir.

5 The cases where, that were opened, in the photograph---

6 A The two long black gun cases in the pictures were in
7 the office and they were closed, and they had no weapons in
8 them.

9 Q Okay. So, there were no weapons in those cases that we
10 saw in the photographs?

11 A (Witness nods negatively.)

12 Q All right. Do you keep a roll of tape in your home?

13 A There -- on the day of the incident, Gail was taped up,
14 bound with tape in the bedroom. We found the same kind of
15 tape in the kitchen cabinet drawer we use when we paint the
16 house.

17 Q All right. I'm gonna show you State's Exhibit 2 again,
18 and, if you would, tell us -- if you would, point to the
19 kitchen and tell us about where you would keep your tape.

20 A This is the door to the carport, and the first drawer
21 on that counter there was painter's tape.

22 Q Okay. And I'm gonna get you to take a look at State's
23 Exhibit No. 21, and ask if you recognize that purple object.

24 A That roll of painter's tape.

25 Q Is that your roll of tape?

Phil Holt - Direct examination
by Solicitor Poulos

1 A I would assume it was mine. It's hard to tell one roll
2 of painter's tape from another.

3 Q I understand. Thank you.

4 All right. Now, let's talk about the door, the kitchen
5 door, Mr. Holt.

6 Was the back-door the same door that has always been in
7 your home?

8 A Since we were in the house. It has been changed since.

9 Q All right.

10 A But at that time it was the same door since we'd been
11 in the house.

12 Q All right. What about the glass?

13 A What I know about that glass is this incident happened
14 in, in August. In the Spring of that year my wife had gone
15 to the beach with a friend and I had stayed at home working,
16 and I inadvertently locked myself out of the house.

17 So, I had to break that same pane of glass that Gabe
18 broke to get into my own house in the Spring of 2010. I
19 used a brick. He used a rock. When I broke in I got my
20 keys, I got in my truck, I drove over to Kapasi Glass and
21 bought a five or six, seven dollar piece of glass, went back
22 to the house and did a repair.

23 It was probably a month or six weeks later when I got
24 around to painting the molding that I had taken off to put
25 the new piece of glass in. So, that was a relatively new

Phil Holt - Direct examination
by Solicitor Poulos

1 piece of glass.

2 Q Okay. And you stated again that Mr. Rios hadn't been
3 anywhere near your home until, for a year prior to that, is
4 that correct?

5 A With my knowledge -- as far as I know that's correct.

6 Q All right. Had you had any contact or communication
7 with the defendant since that time?

8 A No.

9 Q All right. Did he have any legitimate reason to be any
10 where at, near, or around your home?

11 A No.

12 SOLICITOR POULOS: Beg the Court's indulgence one
13 moment.

14 THE COURT: Yes, ma'am.

15 (Pause.)

16 Q Mr. Holt, do you see the name, the person in here who
17 you say go by, goes by the nickname Gabe?

18 A Gabriel Rios.

19 Q Okay. That's the man you knew as Gabe?

20 That's the man you knew as Gabe, sir?

21 A Pardon me?

22 Q Is that the man that you knew as Gabe?

23 A Yes.

24 SOLICITOR POULOS: Okay. Your Honor, let the record
25 reflect that the witness has identified the defendant in

Phil Holt - Direct examination
by Solicitor Poulos

1 this case, and please answer any questions---

2 THE COURT: The record will so reflect.

3 SOLICITOR POULOS: ---that Mr. Shealy may have for you.

4 THE COURT: Cross-examination, Mr. Shealy. You'll need
5 to come around closer for him to hear.

6 MR. SHEALY: Yes, I will. I've just got so much stuff
7 here.

8 CROSS-EXAMINATION

9 BY MR. SHEALY:

10 Q All right. Mr. Holt, can you hear me?

11 A Yes.

12 Q Okay.

13 A Thank you.

14 Q All right. Mr. Holt, when you first got there, did
15 y'all move anything?

16 A I moved my wife to a chair.

17 Q Okay. But you didn't touch anything else?

18 You didn't, for example, this painter's tape you didn't
19 move, correct?

20 A Correct.

21 Q Okay. So, the rock, all of this other stuff we've seen
22 in the, in the pictures, it wasn't disturbed, is that
23 correct?

24 A It was where it was when I got there as it was when the
25 police got there.

Phil Holt - Cross-examination
by Mr. Shealy

1 Q Okay. Okay. And let me understand that you're not
2 missing -- you weren't missing any guns bar that I guess
3 there's a .357 that was on the holster, in the holster?

4 A You are correct.

5 Q Okay. In spite of that, those gun cases that were
6 opened, when you were there, when you left, they were
7 closed, correct?

8 A Correct.

9 Q All right. So, whoever it was would of had to touch
10 those things, correct?

11 A Say it again please.

12 Q Whoever did all this would of had to touch those, those
13 cases, right, in order to open them?

14 A Yes, sir.

15 Q Well, yeah, we need you to answer up so that that
16 the---

17 A Yes.

18 Q ---court reporter can take it down.

19 Okay. Now, it's my understanding that Mr. Rios had
20 worked off, off and on for you for about how long?

21 About how many years?

22 A Three or four years.

23 Q Okay.

24 A It seems like he would do well for a while and then he
25 would not do well for a while. We'd have to stand him out

Phil Holt - Cross-examination
by Mr. Shealy

1 and let him get better.

2 Q Okay. All right. This painter's tape ordinarily was
3 kept in a kitchen cabinet drawer?

4 A Yes, sir.

5 Q All right. And for those of the jury who, who may not
6 know, what is painter's tape?

7 A It's for edging. When you want to paint the wall but
8 not the ceiling, you put the tape on the ceiling and paint
9 the wall.

10 Q Okay. And why, why would it be called perfect release
11 or something like that?

12 A Pardon me?

13 Q What, what makes painter's tape special, I guess, apart
14 from other kinds of tape?

15 A It's blue.

16 Q Okay. It's generally less sticky, isn't it?

17 A It is.

18 Q Okay. Cause you got to be able to pull it off without
19 ruining the finish, correct?

20 A Yeah, and if you want me to say that I appreciate him
21 not taping her up with something more sticky, probably not
22 gonna get that out of me.

23 THE COURT: Just one second.

24 Mr. Holt, the question that is asked to you you will
25 answer. You will not editorialize in this courtroom.

Phil Holt - Cross-examination
by Mr. Shealy

1 Do you understand me?

2 Do you understand me?

3 WITNESS: Yes, sir.

4 THE COURT: Thank you.

5 Go right ahead.

6 MR. SHEALY: Thank you, Your Honor.

7 Q All right. And I'll, and I'll be honest, I think I
8 lost the track of, of this particular pane of glass.

9 You had said you locked yourself out in the spring,
10 correct?

11 A Correct.

12 Q Okay. And that would of been what, April or May?

13 A Yes, sir.

14 Q All right. And then it took you about what, six weeks
15 you said before you painted it?

16 A I do think so. I'm kind of slow getting around.

17 Q Okay.

18 A Yes.

19 MR. SHEALY: All right. If you'll bear with me, judge,
20 just one second.

21 THE COURT: Yes, sir.

22 (Pause.)

23 MR. SHEALY: Your Honor, just a few more questions.

24 Q Had you ever replaced any other panes of glass in that
25 house?

Phil Holt - Cross-examination
by Mr. Shealy

1 A I think I replaced every window in that house.

2 Q Okay. And did Mr. Rios -- you've said that he helped
3 you around your house.

4 Did Mr. Rios help you on any of those?

5 A No.

6 Q He never helped you at all?

7 A No.

8 Q Okay. And do you remember speaking with Officer
9 Williams?

10 A I'm sorry. You turned away and I didn't hear you.

11 Q Oh, sorry.

12 Do you remember speaking with Officer Williams about
13 this case on August 14th?

14 A Oh sure. There were probably six cops at my house most
15 of that day.

16 Q Okay. And I'm, I'm a little confused cause when you
17 spoke with Mr. Williams it's -- you don't recall telling him
18 it was about two weeks ago that you locked yourself out of
19 the house?

20 A No.

21 Q You don't recall that?

22 A (Witness nods negatively.)

23 MR. SHEALY: Okay. All right. And if you'll bear with
24 me one more time, judge.

25 (Pause.)

Phil Holt - Redirect examination
by Solicitor Poulos

1 MR. SHEALY: Your Honor, no further questions at this
2 time.

3 THE COURT: Any redirect?

4 SOLICITOR POULOS: Just one, Your Honor.

5 REDIRECT EXAMINATION

6 BY SOLICITOR POULOS:

7 Q Mr. Holt, during the time, entire time that Gabe was
8 working for you, did he wear glasses?

9 During the entire time that Gabe worked for you, sir,
10 did he wear glasses?

11 A I don't recall him wearing any personal glasses.

12 Q Thank you.

13 THE COURT: Okay. Thank you, Mr. Holt.

14 MR. SHEALY: Your Honor?

15 THE COURT: You may step down.

16 MR. SHEALY: Your Honor, if I could -- if I may --

17 THE COURT: Oh, I'm sorry.

18 MR. SHEALY: -- recross?

19 THE COURT: Just, just---

20 MR. SHEALY: If I may just ask --

21 THE COURT: Okay.

22 MR. SHEALY: -- based on that question, Your Honor?

23 THE COURT: Okay. I'm sorry. Come back around.

24 MR. SHEALY: Yes, sir.

25 RECROSS EXAMINATION

Phil Holt - Recross examination
by Mr. Shealy

1 BY MR. SHEALY:

2 Q Mr. Holt, when he was working for you, you expected him
3 to do work, correct?

4 A I expected what?

5 Q To -- him to do work.

6 A Yes, sir.

7 Q Correct?

8 And that work was contracting?

9 A Yes, sir.

10 Q Okay. And when I say contracting, that means painting,
11 roofing, putting in the foam insulation, correct?

12 A Most of our own job work is spray foam insulation.
13 That's what I do.

14 Q Okay.

15 A Any of the painting and the roofing, fencing, things
16 that we make up work to do, either at my house or one of the
17 guy's house --

18 Q Okay.

19 A -- is just something on the side.

20 Q But you weren't paying him to read novels, for example?

21 A No.

22 Q No.

23 There would be no reason for him to have his reading
24 glasses on, would there?

25 A No.

Phil Holt - Recross examination
by Mr. Shealy

1 Q No.

2 All right. Thank you, Your Honor.

3 THE COURT: All right. Now you may step down. Thank
4 you, sir.

5 Call your next witness please.

6 SOLICITOR POULOS: Thank you, Your Honor.

7 State calls Marie Ollinger.

8 She's just outside, Your Honor.

9 MARIE OLLINGER, being first duly
10 sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR POULOS:

13 Q If you would, ma'am, please state your name.

14 A My name is Marie Ollinger.

15 Q And where do you live, Mrs. Ollinger?

16 A I live at Perrin Drive.

17 Q How long have you lived on Perrin Drive?

18 A Since 1978.

19 Q And do you know Gail and Phil Holt?

20 A I have met Gail for the first time today, and I have
21 met Phil on several occasions in the past.

22 Q Do you live in their neighborhood?

23 A I live about seven houses away from them.

24 Q Did you say seven?

25 A Six, seven, I didn't count.

Marie Ollinger - Direct examination
by Solicitor Poulos

1 Q All right.

2 A Something like that.

3 Q And back on August 14th, 2010, do you recall what day
4 that was?

5 A It was a Saturday.

6 Q And what did you do that morning, ma'am?

7 A I went for a walk, which I do almost every, every
8 morning.

9 Q What time did you go for that walk?

10 A Between 7:30 and 8:00, which is my usual time to walk
11 on Saturdays.

12 Q When you walk on Saturdays or any day, do, do you take
13 the same route?

14 A Yes.

15 Q And how long have you been walking in the neighborhood?

16 A This particular route, about almost four years, and
17 before that I walked a different route with my dogs for
18 about 15 years prior to that.

19 Q And on this morning, during, during your walk, did you
20 see anything unusual?

21 A I just noticed an individual walking toward me that I
22 had not seen in the neighborhood before. I would not
23 usually pay any attention. It's just, you notice, okay,
24 somebody's there and keep going.

25 Q What did this individual look like?

Marie Ollinger - Direct examination
by Solicitor Poulos

1 A To me it seemed to be a black person of average height,
2 a little less than average -- between normal and slender as
3 opposed to being, you know, a little less than normal,
4 and -- but otherwise unremarkable. I mean nothing
5 outstanding that you would go like oh or something. Just
6 --.

7 Q And what was he wearing?
8 Do you recall?

9 A My impression was -- I -- probably at the time I had
10 the better description, muted colors, long sleeves, long
11 pants. No shorts that I recall.

12 Q Did he have anything on his head?

13 A I don't recall seeing any hair. When you see somebody
14 you basically see short hair, long hair, gray here, blue
15 hair, whatever it is. So, he must of had something on his
16 head. I mean I do not recall seeing any hair, noticing it.

17 Q Okay. Had you ever seen this person in the
18 neighborhood before?

19 A Not to my knowledge.

20 Q Was he walking in the same direction as you or in the
21 opposite direction?

22 A He was walking toward me. Both of us were walking on
23 our respective left sides of the road. So, he would be
24 walking on the side of the street that Mr. Holt's house is
25 located on, and I was walking on the opposite side. Both of

Marie Ollinger - Direct examination
by Solicitor Poulos

1 us are facing traffic. Sorry.

2 Q Was he walking in the direction of the Holt's house or
3 away from the Holt's house?

4 A In the direction of the house.

5 Q And when you crossed paths --

6 A Uh-huh. (Affirmative).

7 Q -- how close were you to the Holt's house?

8 A I was about two properties away almost. So, I would
9 say maybe 200 feet, give or take---

10 Q When you say 200---

11 A ---passed, passed the Holt house. So, he was before he
12 got to the Holt's house.

13 Q And when you---

14 A I was passed it.

15 Q I'm sorry.

16 And when you say two properties, do you mean two
17 houses?

18 A Two houses, yeah. It means like Holt's driveway, the
19 next driveway is right next to him, then the whole length of
20 that driveway from the property, another driveway, and half
21 the property, something like that. So, that would be about
22 200 feet.

23 Q Were you walking away from the Holt's house?

24 A Yes.

25 Q And was he walking towards the Holt's house?

Marie Ollinger - Direct examination
by solicitor Poulos

1 A Yes.

2 Q Okay. And then -- and after you crossed paths, did you
3 continue on with your walk?

4 A I did.

5 Q Okay. Thank you. Please answer any questions
6 Mr. Shealy may have.

7 THE COURT: Cross-examination.

8 MR. SHEALY: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. SHEALY:

11 Q All right. Mrs. Ollinger, now -- is it Ollinger or
12 Ollinger?

13 A It's Ollinger or Ollinger. Either one.

14 Q Ollinger. Okay.

15 A Okay.

16 Q Mrs. Ollinger, now, I may of been confused.

17 Now, y'all were walking on the same sidewalk or---

18 A No.

19 Q ---separate sidewalks?

20 A Separate sidewalk.

21 Q Okay. So, there's a -- and that's a two lane road,
22 right?

23 A It's a two lane road. There is no sidewalk. We were
24 walking on the side of the road.

25 Q Okay.

Marie Ollinger - Direct examination
by Solicitor Poulos

1 A Both of us on the left side of the road facing traffic.

2 So, that would put us on opposite sides.

3 Q Okay. And was your dog with you --

4 A No.

5 Q -- at this point?

6 A No, no, no. This was like past dog.

7 Q Okay. All right. Well, I'm sorry to hear that.

8 A It's okay.

9 Q And you've been taking this same route for the past
10 four years?

11 A Pretty much. Since May of 2009.

12 Q Okay. And, so, you were past the Holt's house and were
13 you walking towards your house?

14 A No, I had just started my walk. So, I was about six,
15 seven minutes into my walk. I had just left my house, I
16 passed the Holt house, I kept going, and I was about to turn
17 left.

18 Q Okay. And you've also testified you generally -- do
19 you walk from 7:00 to 8:00 in the morning or do you leave
20 sometime between 7:00 and 8:00?

21 A On weekends I tend to leave about 7:30 and walk about
22 30 minutes. On weekdays, light permitting, like from now on
23 until it gets to dark again, I usually leave quarter to
24 7:00 in the morning till quarter past 7:00 to avoid the
25 school traffic.

Marie Ollinger - Direct examination
by Solicitor Poulos

- 1 Q Sure. Okay.
- 2 A But there's no school traffic on Saturdays. So --.
- 3 Q Sure.
- 4 So, you probably would of left about 7:30 --
- 5 A Yes.
- 6 Q -- roughly?
- 7 All right. And you had just started -- you'd gotten I
- 8 guess what nine houses away from your house at that point?
- 9 A One, two, three -- no, it's more like six or seven
- 10 houses away I think.
- 11 Q Okay. All right. And you said you were turning left
- 12 at that point, right?
- 13 A I was about to turn left.
- 14 Q Okay.
- 15 A I had about two more houses to go before the left turn.
- 16 Q And that's when y'all crossed paths, right?
- 17 A No. Well, I crossed, as I said, before, before the
- 18 left turn.
- 19 Q Okay.
- 20 A The street, at that point where Holt's house is
- 21 located, right after Mr. Holt's, Mr. Holt's house takes a
- 22 sharp right and then turns left.
- 23 Q Okay.
- 24 A So, by the time that person had reached Mr. Holt's
- 25 driveway, the bottom of it, whoever it was, I would of been

Marie Ollinger - Direct examination
by Solicitor Poulos

1 unable to see him because of---

2 Q Sure. That sharp?

3 A Yeah.

4 Q And did you ever look back?

5 A I have no reason to look back.

6 Q Okay. And you've testified that this person was
7 unremarkable?

8 A To me it was not anything outstanding, but then with --
9 I don't know. When I walk, I see somebody, I go okay, you
10 know, like either hi or whatever it is. I don't usually
11 dwell on it. I don't usually chitchat because I walk at a
12 fairly good speed.

13 Q Sure.

14 A So, I look up, okay, and go and that's it.

15 Q Okay. And yet you remember all this two, two years
16 prior or hence?

17 A I remember definitely that it was a black person. To
18 me it seemed a black person. I remember the general build.
19 I also remember that it was enough out of the ordinary, the
20 fact that it was an unknown person, the fact that he was
21 walking at that time, and the fact that he was walking at
22 that location at that time that caused me to go to
23 Mr. Holt's house and mention it --

24 Q Okay.

25 A -- on that day.

Marie Ollinger - Direct examination
by Solicitor Poulos

1 Q On that day?

2 A That day, yes.

3 Q Oh.

4 A So, that probably, you know, that might or might not, I
5 don't know, still a police officer have been there, but I
6 had a talk with Mr. Holt on that day, and I'm sure that my
7 description might of been a little bit more detailed. It
8 has been several years.

9 Q Okay.

10 A But it was enough of something unusual for me to make
11 me go down there.

12 Q Okay. All right. Well, that makes sense and all
13 right.

14 If you'll bear with me, Your Honor.

15 (Pause.)

16 MR. SHEALY: Your Honor, we have no further questions.

17 SOLICITOR POULOS: Nothing further, Your Honor.

18 THE COURT: All right. Thank you, ma'am. You may be
19 excused.

20 Any reason why she can't be excused?

21 MR. SHEALY: No, Your Honor.

22 THE COURT: Okay. Thank you, ma'am.

23 WITNESS: Okay.

24 THE COURT: All right. It's about 3:30. Let's take
25 the afternoon break at this point.

1 SOLICITOR POULOS: Yes, sir.

2 THE COURT: Madam Forelady, we're gonna take about a
3 ten minute, fifteen minute break. Take yourself, relax. If
4 you need anything, let the bailiffs know. They'll make sure
5 they get it for you.

6 Okay. Yes, ma'am.

7 (WHEREUPON, the following takes place outside the
8 presence of the jury.)

9 THE COURT: All right. We'll be in recess for about
10 fifteen minutes.

11 MR. SHEALY: Thank you, judge.

12 (WHEREUPON, a short recess was taken at this time.)

13 THE COURT: All right. Ms. Poulos, you ready to
14 proceed?

15 SOLICITOR POULOS: Yes, Your Honor.

16 THE COURT: Mr. Shealy.

17 MR. SHEALY: Yes, Your Honor.

18 THE COURT: All right. Let's bring them in.

19 (WHEREUPON, the following takes place within the
20 presence of the jury.)

21 THE COURT: Would you call your next witness please,
22 ma'am?

23 SOLICITOR POULOS: Yes, sir, Your Honor.

24 State calls Ruth Glenn.

25 RUTH GLENN, being first duly sworn,

Ruth Glenn - Direct examination
by Solicitor Poulos

1 testified as follows:

2 DIRECT EXAMINATION

3 BY SOLICITOR POULOS:

4 Q If you would, please state your name.

5 A Ruth Glenn.

6 Q And where do you live, Mrs. Glenn?

7 A I live in Hillbrook.

8 Q Where do you work?

9 A I work at River Ridge Elementary School.

10 Q Okay. How do you know Gail and Phil Holt?

11 A We met at church 17, 16, 17 years ago.

12 Q Where is your house in relation to their house in the
13 neighborhood?

14 A About a mile apart.

15 Q Back in early August of -- well, actually -- did you
16 receive a call from Phil Holt at some point regarding being
17 locked out of his home?

18 A I did.

19 Q All right. And approximately do you remember when that
20 was?

21 A It was Spring of, of 2010.

22 Q All right. And what did he tell you?

23 A He just said that he was locked out.

24 MR. SHEALY: Objection, Your Honor. That's hearsay.

25 THE COURT: Sustained.

Ruth Glenn - Direct examination
by Solicitor Poulos

1 Q Were you aware that Mr. Holt had to break back into his
2 house to get in?

3 A Yes.

4 Q All right. Do you have knowledge that he replaced the
5 glass on the door?

6 A Yes.

7 Q And how do you have this knowledge?

8 A We went over to their house very shortly thereafter and
9 you could see where the pane had been replaced. It had not
10 been puddied or painted or anything had further been done
11 except for the glass being replaced.

12 Q And I'm gonna show you State's Exhibits 4 and 5, and
13 ask you if that's the door that had the glass that had been
14 recently replaced?

15 A Yes.

16 Q All right. Thank you.

17 Your witness.

18 THE COURT: Cross-examination.

19 CROSS-EXAMINATION

20 BY MR. SHEALY:

21 Q You live a mile away from the Holts?

22 A That's correct.

23 Q All right. Have you ever met my client?

24 A I don't believe I've ever formally met him. I have
25 seen him just in working for Phil at his home or what,

Ruth Glenn - Cross-examination
by Mr. Shealy

1 whatever.

2 Q Okay. But you wouldn't have -- do you know about when
3 you had seen him working there?

4 A Just -- you mean a date?

5 Q Well, just an idea, a general idea as to when he would
6 of been working there.

7 A Just off and on all the years that he worked for him.

8 Q Okay. And what kind of work did he do for him?

9 A I believe he did some maintenance work around the
10 house, and then, of course, he worked for, for Mr. Holt in
11 his business.

12 Q Okay. Did you ever see my client replace any windows
13 for him?

14 A No.

15 Q No.

16 Okay. What kind of, of maintenance work did you see
17 him do?

18 A I think just some landscaping and maybe some roofing.

19 I'm not real sure. Just some -- because we'd be in and out.

20 I didn't stay there. I was like picking Gail up to go
21 somewhere or something.

22 Q Okay. And you're sure that that happened in the Spring
23 of 2010?

24 A Yes.

25 MR. SHEALY: If I may, Your Honor. I'm sorry.

Ruth Glenn - Cross-examination
by Mr. Shealy

1 (Pause.)

2 MR. SHEALY: That's all that I have for this witness.

3 THE COURT: Any redirect?

4 SOLICITOR POULOS: No, sir, Your Honor.

5 THE COURT: May this witness be excused?

6 SOLICITOR POULOS: Yes, sir.

7 THE COURT: Mr. Shealy.

8 MR. SHEALY: Yes, Your Honor.

9 THE COURT: All right. Thank you, ma'am. You may
10 be---

11 WITNESS: Thank you.

12 THE COURT: ---excused.

13 WITNESS: Okay.

14 THE COURT: Okay. Would you call your next witness
15 please?

16 SOLICITOR POULOS: Yes, sir, Your Honor.

17 state calls Investigator Lorin Williams.

18 LORIN WILLIAMS, being first duly
19 sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY SOLICITOR POULOS:

22 Q Investigator Williams, if you would, please state your
23 full name.

24 A Lorin Williams.

25 Q And where are you currently employed?

Lorin Williams - Direct examination
by Solicitor Poulos

- 1 A Spartanburg County Sheriff's Office.
- 2 Q What are your current job duties there?
- 3 A I work violent crime for Spartanburg County.
- 4 Q Back on August the 14th, 2010, did you receive a call
- 5 regarding a home invasion?
- 6 A Yes, ma'am.
- 7 Q And what was that location?
- 8 A It was Perrin Drive.
- 9 Q Is that in Spartanburg County?
- 10 A It is.
- 11 Q When you arrived at that location did you speak with
- 12 the victim, Gail Holt?
- 13 A Yes.
- 14 Q And did she tell you about what happened?
- 15 A She did.
- 16 Q Okay.
- 17 A She had --.
- 18 Q What was her demeanor like?
- 19 A She was very distraught, very up -- you know, very
- 20 upset. You know, I mean it's what you would expect from
- 21 someone who'd just gone through something like that.
- 22 Q And did she report items that had been stolen or taken?
- 23 A I don't know that she -- other than the vehicle at that
- 24 exact moment knew. You know, we kind of, later on, you
- 25 know, during the period of time that we were there,

Lorin Williams - Direct examination
by Solicitor Poulos

1 discovered some items, you know, that had, that had been
2 removed.

3 Q And do you recall what those items were?

4 A There was a pistol that was located in the master
5 bedroom. It had been taken. After we were able to process
6 everything and go through where Mrs. Holt could actually
7 look, some cash had been taken from her pocketbook after it
8 had been, you know, dumped out in the bedroom. Her cell
9 phone was gone and obviously her car had been taken.

10 Q Okay. Did she provide a description of the person who
11 did this to her?

12 A Yes, ma'am, she did.

13 Q And what, what type of a description did she provide?

14 A She had -- at the point that she was giving me a
15 description, I had already had the opportunity to, to speak
16 with the deputies that they had, they had provided a BOLO,
17 which is something that's basically broadcast over the
18 radio. It's a be on the lookout. It's kind of giving a,
19 you know, a generic description or a description of a
20 suspect, which they had provided that along with the
21 description of Mrs. Holt's car. I heard -- once I was able
22 to speak with her, she told me it was Gabe and, and gave me
23 the description of, of Gabe.

24 Q How, how did she know Gabe?

25 A She, she was able to tell me that she had known him

Lorin Williams - Direct examination
by Solicitor Poulos

1 from his working with her husband.

2 Q And did she tell you that she had an opportunity to, to
3 see him on numerous occasions?

4 A Yes, ma'am, she, she had said that, that, over a period
5 of time, that, that Mr. Rios had, had been to the home, had
6 actually been in the home, and had, had helped her husband
7 do different types of work and things such as that at, at
8 their residence.

9 Q And taking all the information that you had, and after
10 speaking with the victim, and through your investigation,
11 were you able to compile a photo lineup to present to
12 Mrs. Holt?

13 A Yes.

14 Q And if you can explain to the jury, how did you prepare
15 this lineup?

16 A Well, in speaking with Mr. Holt, he was able to provide
17 the full name for who Gabe was. Basically you -- we have a
18 system at the Sheriff's Office that, that compiles a large
19 quantities of pictures. You put a certain criteria in
20 there. In this situation you would of put a black male,
21 approximate weight, approximate height, approximate date
22 range for, for date of birth for -- so, you've, you know,
23 you're not putting an 18 year old in a lineup with 40 year
24 olds, and then the computer generates this lineup.

25 You've, you've got the known picture of, of Mr. Rios,

Lorin Williams - Direct examination
by Solicitor Poulos

1 but then it picks five additional pictures that, of similar
2 facial hair, facial features, things such as that,
3 complexion, and it is able to put those things into what we
4 call a photo array or a six pack. It's six photographs, all
5 the same size, and then that is what's provided to, to the
6 victim for identification.

7 Q And did you present her with a lineup?

8 A Yes, ma'am, I did.

9 Q All right. I'm gonna show you what's already been
10 admitted as State's Exhibit 1, and I want to ask you is that
11 the photo lineup and affidavit that you presented Mrs. Holt
12 with.

13 A Yes, ma'am.

14 Q All right. And is that a fair and accurate
15 representation of the actual lineup and affidavit that you
16 did present to her?

17 A Yes, ma'am, it is.

18 Q And did she pick out one of those six photographs as
19 the person who broke into her home and robbed her at
20 gunpoint?

21 A She did.

22 Q All right. And who did she pick out?

23 A Gabriel Rios.

24 Q Did she indicate to you that she was sure it was him?

25 A Absolutely.

Lorin Williams - Direct examination
by Solicitor Poulos

1 Q Did she hesitate at any point?

2 A None, none whatsoever.

3 Q Did she appear to be under the influence?

4 A No, she did not.

5 Q Was she -- when you presented her with that lineup,
6 sir, if you would, what did you tell her?

7 A Sure. In this, in this particular situation, I had --
8 I had printed the lineup, did not have a printer in my car.
9 He, he brought it to me. I verified everything through the
10 computer that it was the same that I had, that I had made.

11 Basically I'll, I'll normally have it in a folder or
12 have it, you know, where they can't see what it is, and
13 explain to them, you know, we've, we've developed a person.
14 We don't know that, that this is the correct picture. We
15 don't know that this is the person that did this. The
16 person that is in this picture, in these pictures may or may
17 not be the person that's done this, you know.

18 So, I'm gonna show you this. When I, when I turn this
19 paper over and you look at it, if you recognize somebody in
20 these photographs, then I want you to tell me how you
21 recognize them and usually that's indicated by circling the
22 whole photograph. Most of the numbers will -- most of the
23 photographs will have a number that's under it that
24 identifies that particular photograph.

25 I'll have them circle the whole picture, including the

Lorin Williams - Direct examination
by Solicitor Poulos

- 1 number, and then initial and date it, and that was, that was
2 the way that Mrs. Holt was presented this lineup.
- 3 Q And did Mrs. Holt circle the entire photograph?
- 4 A Yes, ma'am, she did.
- 5 Q Did she initial also beside that?
- 6 A She did, initialed and dated.
- 7 Q Did she sign the affidavit?
- 8 A Yes, ma'am.
- 9 Q And does your signature appear on that as well?
- 10 A It does.
- 11 Q Was she forced, threatened, or coerced in anyway to
12 identify someone from that particular lineup?
- 13 A Absolutely not.
- 14 Q Did you or anybody else on scene suggest to her or tell
15 her who to pick from the lineup?
- 16 A No, ma'am.
- 17 Q What is the date on the lineup?
- 18 A It is August the 10th. I'm sorry. August the 14th
19 of 2010.
- 20 Q Is that the same day of this incident?
- 21 A Yes, ma'am, it is.
- 22 Q Now, later on that day, Investigator Williams, through
23 your investigation, were you able to make an arrest?
- 24 A Yes, ma'am, we were.
- 25 Q And do you recall approximately what time you were able

Lorin Williams - Direct examination
by Solicitor Poulos

1 to locate the defendant and make an arrest?

2 A I want to think that it was around 6:00 or 6:30.

3 Q PM?

4 A Yes, ma'am, that evening.

5 Q That evening.

6 Okay. And what was the location that you arrested him
7 at?

8 A It was on -- it was on Highway 9 very close to the back
9 side of the hospital off of Florida Avenue there at the
10 Dodge place, the Spartanburg Dodge.

11 Q When you arrested the defendant, was, was he compliant?

12 A He was hesitant to get out of the vehicle.

13 Q Were you able to locate the victim's vehicle?

14 A Yes, ma'am, we did locate the -- well, we didn't. The
15 City of Spartanburg actually located it.

16 Q And based on your knowledge, where was that vehicle
17 recovered?

18 A The -- when I, when I found -- when I got to the
19 vehicle, it was actually located off of Church Street at
20 West Wood Street, which, if you know anything about
21 Spartanburg and the hospital, where Church's Chicken is on
22 the, the back side of the hospital, there's a large parking
23 lot that actually runs down West Wood Street and it's
24 overflow parking for some of those doctor's offices and some
25 of the employee parking. The vehicle was located on the

Lorin Williams - Direct examination
by Solicitor Poulos

1 side of the parking lot that actually faces West Wood
2 Street.

3 Q Okay. And you stated earlier that you arrested the
4 defendant on Florida Avenue.

5 How far is Church's Chicken, where you located the
6 vehicle, to Florida Avenue, where you arrested the
7 defendant?

8 A Roughly less than a quarter of a mile. Around about a
9 quarter of a mile. Not very far.

10 Q Thank you. Please answer any questions Mr. Shealy may
11 have.

12 THE COURT: Cross-examination.

13 MR. SHEALY: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. SHEALY:

16 Q Officer Williams or Investigator Williams, I'm sorry,
17 from what you've testified to, it's my understanding that
18 Mr. Holt is the first one to tell you Gabriel Jon Rios,
19 correct?

20 A I, I guess that would be correct.

21 Q Okay.

22 A At that point I would of already talked to the
23 deputies. They would of have talked to Mr. Holt. So, I
24 can't tell you exactly who would of told me that --

25 Q Okay.

Lorin Williams - Cross-examination
by Mr. Shealy

- 1 A -- at that point.
- 2 Q All right. Well, if you -- you wrote a fairly lengthy
3 report---
- 4 A Yes.
- 5 Q ---in this case, correct?
- 6 And, and you're a good officer?
- 7 You do this fairly regularly, right?
- 8 A Occasionally.
- 9 Q Yeah.
- 10 I mean how long have you been an investigator with the
11 Sheriff's Office?
- 12 A I've been with the Sheriff's Office since 2005.
- 13 Q Okay. And how long have you been investigating these
14 kinds of crimes?
- 15 A Since '94.
- 16 Q Since '94.
- 17 So, you've been doing this a really long time, correct?
- 18 A Yes, sir.
- 19 Q Okay. And you write these reports cause you know that
20 it will come, it may come to trial years --
- 21 A Sure.
- 22 Q -- right?
- 23 Cause, for example, this case happened in 2010?
- 24 A Right.
- 25 Q Right?

Lorin Williams - Cross-examination
by Mr. Shealy

1 A That's correct.

2 Q Okay. So, feel free to reference your report if you
3 need to.

4 And in obtaining this six pack, this six person lineup,
5 again, it's my understanding you got the suspect's
6 information from Mr. Holt, right?

7 A That's correct.

8 Q Okay. All right. You also spoke with Mr. Holt about
9 this piece of glass that was replaced?

10 A Yes, sir, that's correct.

11 Q And I know you've been in the courtroom all day, right?

12 A Yes.

13 Q So, you've heard some people testify.

14 Now, in your -- isn't it true he told you that it was
15 approximately two weeks ago?

16 A That's, that is -- that's -- you know, my recollection
17 and, you know, in writing this and, and things like that, to
18 me, I may of misunderstood him, two weeks or two months. I
19 know that we had spoken with him about had Mr. Rios been at
20 the residence since the glass was broken, and I may of
21 overlooked that as far as the detail of week or month.

22 I knew that it was very clear that this glass had been,
23 had been broken by Mr. Holt to get into his residence and it
24 was very clear to me and very clear to us that Mr. Rios had
25 not been at the residence, you know, for a while prior to

Lorin Williams - Cross-examination
by Mr. Shealy

1 the glass getting broken and definitely had not been there
2 since the glass was broken.

3 Q But that was a pretty important detail, right?
4 Something for you just to overlook?

5 A It is now, yes.

6 Q Okay. All right. And -- now let's go back to where
7 you make this arrest.

8 It's my understanding you've, you've testified that
9 you, it was -- was it on Highway 9 or was it on Florida
10 Avenue?

11 A It was on Highway 9.

12 Q On Highway 9.

13 A They, they had come off of Florida Avenue behind Mintz
14 Scrap Iron and had actually turned to the left headed north
15 on Highway 9 when we were able to stop them.

16 Q Okay. And you're pretty confident that he had gotten
17 into this car on Florida Avenue, correct?

18 A Yes.

19 Q Okay. So, he'd gotten -- he'd been on Florida Avenue,
20 got into a car, and ultimately he's on Highway 9 when y'all
21 pull him over --

22 A That's correct.

23 Q -- is that right?

24 And you've testified that that happened about six
25 o'clock or 6:30, right?

Lorin Williams - Cross-examination
by Mr. Shealy

1 A If I could get another document I could, I could narrow
2 that time down for you a little bit more.

3 MR. SHEALY: Your Honor, with your permission I'd like
4 to let him get whatever---

5 THE COURT: Sure.

6 Q Yeah, get whatever documents you need.

7 A Jason Bryant's.

8 It would of been -- it would of been between 6:00 and
9 6:30.

10 Q Okay. And you've also testified that there was a, that
11 the Lexus that was stolen out of this was located at the
12 Church's Chicken over in that area, right?

13 A Behind, behind the Church's Chicken.

14 Q Behind the Church's Chicken.

15 Okay. When was that recovered?

16 A The next morning.

17 Q The next morning about when?

18 A I think I was actually notified at -- it was in the
19 early morning hours.

20 Q Okay. About six o'clock, 6:30?

21 A Bear with me one second.

22 Q Sure.

23 (Pause.)

24 A That looks right, yes, sir.

25 Q Okay. So, it would of been about 12 hours after the

Lorin Williams - Cross-examination
by Mr. Shealy

1 arrest --

2 A Thereabouts.

3 Q -- on Highway 9?

4 A Thereabouts, yes.

5 Q Okay. And you had already been told that whoever had
6 perpetrated this home invasion had stolen the Lexus, right?

7 A That's correct, yes.

8 Q Okay. Did y'all canvas Hillbrook area to see if there
9 were any derelict vehicles?

10 A Any what?

11 Q Derelict vehicles. Any vehicles that didn't have
12 occupants, a vehicle just parked on the side of the road,
13 that sort of thing.

14 A No, I do not recall doing that specifically.

15 Q Y'all didn't look to see---

16 A I, I do know that, that deputies had ridden the area
17 after this to see if the victim's vehicle could be located.
18 Nothing was brought to my attention as far as an abandoned
19 vehicle or --.

20 Q Okay. And whenever you made this arrest, having the
21 knowledge that this person you were arresting presumably had
22 had the Lexus, did y'all do a canvas of that area to see if
23 the Lexus was around?

24 A We had looked around the Florida Avenue area. We had
25 looked up around Mintz Scrap Iron, back up Magnus Drive, and

Lorin Williams - Cross-examination
by Mr. Shealy

1 then -- and up in there.

2 Did I personally go through the parking lot behind
3 Church's Chicken?

4 No, I didn't.

5 But it was, it was given out as a BOLO, like I said
6 earlier. The cities, the towns, the county, we've got about
7 four channels that we maintain with officers on different,
8 different things. It was given out to all those people to
9 be looking for the vehicle.

10 Q Okay. But my question, in particular, is did you
11 instruct any of the deputies or the patrol officers to do a
12 canvas of that area for the Lexus?

13 A Not a canvas per se, no.

14 Q Okay.

15 A That, that is the purpose of --.

16 Q So, they were just suppose to be looking for him?

17 A That's correct.

18 Q Okay. And you don't recall any, any reports of an
19 abandoned vehicle around the Hillbrook community in that
20 area on August 14th?

21 A Nothing that was brought to my attention, no.

22 MR. SHEALY: Okay. Your Honor, if you'll bear with me.

23 (Pause.)

24 MR. SHEALY: Your Honor, that's all I have for this
25 witness at this time.

Lorin Williams - Redirect examination
by Solicitor Poulos

1 THE COURT: Redirect.

2 SOLICITOR POULOS: Just briefly, Your Honor.

3 REDIRECT EXAMINATION

4 BY SOLICITOR POULOS:

5 Q Investigator Williams, Mrs. Holt gave you the nickname
6 Gabe, is that correct?

7 A Yes, ma'am.

8 Q And is it often, in your investigation, that you are
9 given only a nickname?

10 A Usually given street names more than we are government
11 names.

12 Q And is it typically in your process that you continue
13 to investigate until you're able to determine the full name
14 of a nickname or street name?

15 A Absolutely, yes, ma'am.

16 Q And in this case you didn't have to go far, did you?

17 A No, ma'am.

18 Q Okay. Thank you.

19 THE COURT: Thank you, sir. You may step down.

20 MR. SHEALY: I have nothing, no, sir.

21 SOLICITOR POULOS: Your Honor, the state calls officer
22 Brandon Howard.

23 THE COURT: Okay.

24 SOLICITOR POULOS: Your Honor, may Investigator
25 Williams be excused?

Brandon Howard - Direct examination
by Solicitor Poulos

1 MR. SHEALY: I have no objection.

2 SOLICITOR POULOS: May Investigator Williams be
3 excused?

4 THE COURT: Sure.

5 Any objection?

6 MR. SHEALY: No.

7 THE COURT: He certainly may.

8 BRANDON HOWARD, being first duly
9 sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY SOLICITOR POULOS:

12 Q If you would, sir, please introduce yourself and tell
13 the jury where you are employed.

14 A My name is Brandon Howard. I am currently employed at
15 Spartanburg Regional Hospital.

16 Q And how long have you been an officer?

17 A I became a certified police officer in 2009.

18 Q Back on August the 14th of 2010, did you work for the
19 Spartanburg County Sheriff's Office?

20 A I did.

21 Q And what were some of your general duties at the time?

22 A At that time I was part of the crime scene unit. I
23 would be called to scenes by various officers. I'd go out,
24 photograph, document, collect, preserve evidence.

25 Q And on August 14th, 2010, did you receive a call to

Brandon Howard - Direct examination
by Solicitor Poulos

1 respond to Perrin Drive?

2 A Yes.

3 Q Is that location in Spartanburg County?

4 A Yes.

5 Q And do you recall approximately what time you arrived
6 to process the scene?

7 A It would of been approximately around oh, about 9:32.

8 Q Okay. Were there any other officers present?

9 A Officer or Deputy Welch was there and Investigator
10 Williams I recall was also on scene.

11 Q Did you do a walk through to get a general layout of
12 the home?

13 A Generally I will try to do a walk through, maybe take
14 my camera with me and take some photographs, and then try to
15 do some overall photographs and then a little more detailed
16 photographs as the scene goes on.

17 Q Okay. I'm gonna just hand you State's Exhibits I
18 believe it's 3 through 25.

19 If you can just state did you take these photographs.

20 A Most of these appear to be the ones that I took, but I
21 do not recall taking the ones of this vehicle.

22 Q Okay. Can you describe for the jury what you recalled
23 seeing as you did your walk through and moved through the
24 house?

25 A I started out on roughly what would be the garage. (

Brandon Howard - Direct examination
by Solicitor Poulos

1 Normally I start out taking an overview of the house. Kind
2 of a whole shot of the home showing its location, and then I
3 try to make my way into possible point of entry, and in this
4 case I would of went to the carport door where a glass panel
5 had been busted out, which appeared to be a point of entry,
6 and started doing my photographs there, and then started my,
7 working my way to the back of the home where the incident,
8 roughly the majority of the incident occurred it appeared to
9 be.

10 Q Did you find any glass broken?

11 A I did. At the door from the garage or the carport to
12 the kitchen there was a, glass shattered on the floor and a
13 window pane was broken out.

14 Q Did you determine that to be the point of entry and
15 exit?

16 A That's what it appeared to be, point of entry to me.

17 Q If you can, just briefly explain to the jury, just
18 generally, we'll get into more detail later on, what is
19 involved in processing a scene?

20 A Generally what I would do on a scene is I try to take
21 photographs. In my opinion, the more photographs the
22 better. Kind of paints a picture, and it's good for
23 documentation purposes. And then, depending on the
24 situation, like in this particular situation, we had several
25 items that had been moved throughout the home. I would try

Brandon Howard - Direct examination
by Solicitor Poulos

1 to photograph those for documentation purposes, try to
2 photograph point of entry.

3 If there would be say pry marks or busted glass or
4 tools laying around, just whatever the situation may be, I
5 try to document that, and then I would go in and I'm gonna
6 collect the evidence. I would try to put down number
7 placards for photograph references and my references and I
8 would photograph each item of evidence with a photograph, a
9 numbered placard. And if I wanted to process for
10 fingerprints I would pick locations that I felt like, based
11 on what other deputies have told me what the house looks
12 like that may of been touched or moved or tampered with,
13 and, for that point, try to dust for fingerprints.

14 Q Okay. And besides for the glass that you've had, you
15 saw broken at the point of entry at the door, what other
16 items did you find on the floor?

17 A On the floor down that -- well, of course, when I first
18 walked in, there's glass in the kitchen floor here laying on
19 the ground right at the carport door, and there's also a
20 small purple piece of what looked, appears to be tape laying
21 on the floor.

22 And as I went on into the house, down the hallway,
23 there were a couple of items. There was a, a, a brown or a
24 rock of some sort in the hallway. There was some gun cases
25 laying around. There was a little larger shard, kind of a

Brandon Howard - Direct examination
by Solicitor Poulos

1 triangular looking piece of glass in the hallway.

2 As you go on back to the back of the residence into
3 what I would consider the master bedroom, there were, there
4 was stuff scattered about. There were bags on the floor.
5 If I recall correctly, there was a, a, like a female's
6 wallet. There were jewelry on the floor. There were -- the
7 jewelry box, there was a, I guess a, a larger jewelry box
8 there that had been rummaged through.

9 Q Did you, did you also dust for fingerprints in the
10 home?

11 A I did.

12 Q And how do you decide what areas to, to dust for prints
13 and what not to?

14 A Generally I try to get with the deputies or someone and
15 try to show me what has been moved and what's been messed
16 with in the home, and I, I try to pick those locations and
17 start there. I definitely do the point of entry because we
18 know that something, a suspect or a person has been through
19 that area.

20 In this situation, several of the items that had been
21 moved I had actually collected and taken to the Sheriff's
22 office and processed them for fingerprints.

23 Q Okay. Can you explain the process for dusting for
24 prints?

25 A There's several different processes. The one used

Brandon Howard - Direct examination
by Solicitor Poulos

1 mainly and/or most common was by me. They make a very, kind
2 of a grayish black real fine dust. You can take the dust
3 with a couple different types of brushes and go over the
4 areas that you think may of been touched.

5 I like to use a twirling motion with the brush. It
6 seems to help with me. Everybody else has a different
7 opinion about it, and as you're dusting, the dust tends to
8 start laying down on the different surfaces like if
9 someone's touched it, you can start seeing the dust will
10 be -- the dust will stick to that area, and just kind of
11 start falling off. It won't be as heavy in other areas as
12 it will be where something is pressed against it.

13 Q Is it possible for a person to touch a surface and not
14 leave a fingerprint?

15 A In my opinion it is. I mean there's a lot of cases
16 where you may process something and not get any type of
17 fingerprint off of it.

18 Q Would you say that smooth surfaces are better to lift a
19 print off---

20 A From---

21 Q ---than rough ones?

22 A Yes, from my experience, a smooth cleaner surface tends
23 to do better than a rough course dirty surface.

24 Q Now, in every area that you dust for prints, are you
25 always able to lift a print?

Brandon Howard - Direct examination
by Solicitor Poulos

1 A No.

2 Q And from all the areas that you dusted in the home,
3 which areas were you actually able to lift prints from?

4 A From the home I, I was able to lift a -- two partial
5 prints were removed from the glass door in the carport, and
6 it was the door leading from the carport to the kitchen, and
7 I was also able to remove a print from a Ball cannister that
8 was laying on the floor of the master bedroom.

9 Q Did you recover the rock that you mentioned earlier?
10 Did you recover that and take that into evidence?

11 A I did.

12 Q And do you recall where that rock was located?

13 A It was in the hallway I believe.

14 Q All right.

15 A I'd have to --.

16 MR. SHEALY: Your Honor, I think I have a motion on
17 the, the rock and some other items that Ms. Poulos is
18 attempting to introduce.

19 THE COURT: Would you take your jury back to your jury
20 room please?

21 (WHEREUPON, the following takes place outside the
22 presence of the jury.)

23 THE COURT: All right. Mr. Shealy.

24 MR. SHEALY: Your Honor, as to this rock, Your Honor,
25 it would be our position that -- I believe that's Exhibit

Brandon Howard - Direct examination
by Solicitor Poulos

1 No. 28 for the State.

2 THE COURT: I'm sorry. I can't hear you.

3 MR. SHEALY: Oh, I'm sorry. It's Exhibit No. 28 on the
4 State's list of exhibits.

5 As to the rock, again, Your Honor, I -- it's not been
6 identified as being at all relevant. It's not been
7 identified as the thing that went through the window.

8 THE COURT: I'm overruling you on relevancy.
9 Okay, sir?

10 MR. SHEALY: Yes, sir.

11 And, so, Your Honor, again I -- it would be our
12 position that, that even if it were relevant that, that its,
13 its prejudicial value outweighs its probative. Again, I
14 don't think it's probative of anything. Again, Your Honor,
15 it would be our position that it simply isn't.

16 THE COURT: Okay. Overruled.

17 You got some items we need to take up?

18 MR. SHEALY: Your Honor, I'm also going to renew the
19 objection as to Exhibit No. 33, which, again, I believe
20 was -- that's the triangle -- that's the actual piece of
21 glass, triangular piece of glass.

22 THE COURT: Okay.

23 MR. SHEALY: Again, Your Honor, that wasn't identified
24 as being a part of -- it's not even been identified as being
25 part of the window that was allegedly broken. There's,

Brandon Howard - Direct examination
by Solicitor Poulos

1 there's no context to it. It's simply a piece of glass in
2 the middle of the hallway. And, Your Honor, I just -- I
3 don't think that it's relevant of anything. It's no more
4 less relevant than the gun case that was found, and I don't
5 believe they're attempting to, to put that into evidence.
6 There's simply nothing there.

7 Your Honor, again, it would be our position first that
8 even if it is relevant, again, its probative value
9 substantially is outweighed by the prejudice because, if
10 it's probative of anything, it's very little probative
11 value, and it will be---

12 THE COURT: Well, let me ask Ms. Poulos about that.

13 Okay. You certainly have one of the exhibit numbers we
14 saw that was -- it was a, taking a picture of this piece of
15 glass.

16 SOLICITOR POULOS: Yes, sir.

17 THE COURT: Earlier hearings in the day that appeared
18 to be a weapon. Of course, that was never verified in the
19 testimony from the only person who could verify it.

20 So, at this stage, other than having a picture of it,
21 what would be the purpose of identifying, of admitting that
22 singular piece of glass as found in that picture?

23 SOLICITOR POULOS: Your Honor, just that it's an item
24 of evidence that's collected at the scene. The only other
25 glass broken at the scene was from the window. We're not

Brandon Howard - Direct examination
by Solicitor Poulos

1 sure at this point if we're gonna even say, and I don't
2 believe we can say it was a weapon. But the forensic
3 officer will testify that that's an item he collected along
4 with several others, and we believe it's absolutely
5 relevant.

6 THE COURT: Well then if, if it's absolutely relevant,
7 why aren't you introducing the gun case along with it that's
8 all part of that picture?

9 I mean the -- what I -- here's the concern I have
10 because it appears to me that obviously that was, in some
11 theory at some point, a weapon used in the hallway when the
12 assailant first met the victim.

13 SOLICITOR POULOS: Yes, sir.

14 THE COURT: And if identified as such, that certainly
15 that would be a different characteristic at this point as
16 opposed to being part of the general scene.

17 What would be the purpose in this, you know,
18 identifying or, you know, putting this one piece of shard
19 into evidence after we've seen hundreds of shards of
20 evidence of glass in, there in the pictures out there?

21 SOLICITOR POULOS: Again, Your Honor, it was a large
22 shard of glass that was collected. The little tiny small
23 pieces that were all over the kitchen floor were not
24 collected.

25 THE COURT: Well, so, what would the size have to do

Brandon Howard - Direct examination
by Solicitor Poulos

1 with the value in this case as far as evidentiary wise?

2 SOLICITOR POULOS: It, it doesn't, Your Honor. Only
3 that it was just -- it was an item collected. We do believe
4 it's relevant. We can certainly, if, if Your Honor has
5 concerns about not, us not offering to admit the third item
6 in that photograph, which is the gun cases, we'll be happy
7 to do that --

8 THE COURT: No.

9 SOLICITOR POULOS: -- if, if you believe that there's
10 some type of prejudicial effect in trying to admit two of
11 the three items in that photograph.

12 THE COURT: I do think there's some prejudicial effect,
13 and let me tell you why.

14 The testimony was, by the victim, that there was
15 something sharp at her neck. Clearly the State, at least at
16 some point, thought this is what was held against her neck.
17 That's not been proven. Then it becomes, you know, we've
18 got it into evidence as part of a general scene of what was
19 out there, true and accurate representation of the scene of
20 the house. But to just isolate it on that one piece of
21 large glass I think is just, is prejudicial more so than
22 probative and significantly so.

23 And, so, unless you can tell me another reason other
24 than I've heard so far, I'm gonna grant the motion to, to
25 exclude the actual shard of glass, and I'll let you proffer

Brandon Howard - Direct examination
by Solicitor Poulos

1 it, and out, you know, for purposes of protecting your
2 record. But I just don't see that it's -- is there any
3 forensic matter on that or anything like that?

4 SOLICITOR POULOS: Your Honor, the defendant's prints
5 are on that piece of glass.

6 THE COURT: Okay. Then we'll let you lay your
7 foundation at that point. Okay. And I'm sorry to make you
8 come up with that. I was looking at it from a different
9 prospective. Okay.

10 SOLICITOR POULOS: As far as direction from this point,
11 Your Honor---

12 THE COURT: I am gonna then gonna overrule myself if
13 that's where you're heading with that.

14 SOLICITOR POULOS: That's exactly where I'm heading,
15 Your Honor.

16 THE COURT: I'm gonna -- I'll let you try to go there.
17 Okay.

18 SOLICITOR POULOS: Yes, sir.

19 THE COURT: So, I'm gonna overrule your objection at
20 this point subject to it being renewed if appropriate.
21 okay?

22 MR. SHEALY: Yes, sir, thank you.

23 THE COURT: All right. Thank you.

24 (WHEREUPON, the following takes place within the
25 presence of the jury.)

Brandon Howard - Direct examination
by Solicitor Poulos

1 CONTINUED DIRECT EXAMINATION

2 BY SOLICITOR POULOS:

3 Q Officer Howard, did you recover the rock from the
4 hallway floor?

5 A I did.

6 Q I'm gonna show you what's been marked for
7 identification purposes as State's Exhibit 28. I want you
8 to take a look at that for a moment.

9 A (Witness complies.)

10 Q Do you recognize the item in that envelope?

11 A According to the envelope, it appears to be the rock
12 that I collected from the hallway.

13 Q Did you take that rock into evidence?

14 A I did.

15 Q Is your name written on that envelope?

16 A Yes, it is.

17 Q And has that, to, any, to your knowledge, been altered
18 or changed in anyway?

19 A I can't tell that it has. I mean --.

20 Q That's the rock that came from the scene?

21 A It looks, it looks like the one.

22 SOLICITOR POULOS: All right. Your Honor, I would ask
23 that State's Exhibit 28 be admitted into evidence.

24 MR. SHEALY: Your Honor, subject to prior objections.

25 THE COURT: Sure. It will be admitted.

Brandon Howard - Direct examination
by Solicitor Poulos

1 (WHEREUPON, State's Exhibit No. 28 was received into
2 evidence at this time.)

3 SOLICITOR POULOS: Thank you.

4 Q Officer Howard, did you dust the rock for prints?

5 A I do not recall dusting the rock for prints.

6 Q Does that rock -- and if you would, pull it out so the
7 jury can see it.

8 A Do you have any gloves?

9 I don't.

10 (Witness complies.)

11 Q Does that rock have a smooth clean surface where you
12 could lift a print?

13 A No, it looks to have a rough dirty surface, which
14 would -- I mean, from my experience, would be extremely hard
15 to be able to remove a print from that.

16 Q Okay. Officer Howard, I'm gonna show you what's been
17 marked for identification purposes as State's Exhibit 29.

18 A I'll hand you this back please.

19 Q Yes.

20 And if you would, tell us what this item is.

21 A This is a roll of purple tape, purple colored tape.

22 Q Did you recover that role of purple tape from the crime
23 scene?

24 A I did.

25 Q Where did you recover the item?

Brandon Howard - Direct examination
by Solicitor Poulos

1 A This came from the dresser and what I would consider
2 the master bedroom, which is the rear bedroom.

3 Q Did you take that and collect it and take it to the
4 evidence department at the Sheriff's Office?

5 A I did.

6 Q Is your name on the outside of that envelope?

7 A It is.

8 SOLICITOR POULOS: Your Honor, we would ask that
9 State's Exhibit, I believe it's 29, be admitted into
10 evidence.

11 MR. SHEALY: No objection.

12 THE COURT: Admitted without objection.

13 (WHEREUPON, State's Exhibit No. 29 was received into
14 evidence at this time.)

15 Q Officer Howard, did you also collect a crumbled piece
16 of tape from the incident?

17 A I collected two pieces of tape. I don't -- which --
18 I'm not sure which one you're---

19 Q Okay.

20 A ---referring to.

21 Q I'm gonna ask that you take a look at State's Exhibit
22 30 for identification purposes.

23 If you would, sir, tell me what is in the, in that bag.

24 A It's a purple colored tape.

25 Q All right.

Brandon Howard - Direct examination
by Solicitor Poulos

1 A I believe it's tape that was collected for the scene.

2 Q All right. And do you recall where you collected that
3 tape from?

4 A If I recall correctly it was recovered on a small, like
5 an end table that was between two chairs in the living room.

6 Q And did you put it in that bag?

7 A Yes.

8 Q Did you then take it to the Sheriff's office?

9 A Yes.

10 SOLICITOR POULOS: Your Honor, we would ask that
11 State's Exhibit, I believe it's 30, be admitted.

12 MR. SHEALY: No objection, Your Honor.

13 THE COURT: Be admitted.

14 (WHEREUPON, State's Exhibit No. 30 was received into
15 evidence at this time.)

16 Q Now, Officer Howard, did you also collect a wallet from
17 the scene?

18 A I did, a red wallet with black and white colored
19 designs on it.

20 Q Okay. I'm showing you what's been marked for
21 identification purposes as State's Exhibit 31.

22 Is that the wallet that you recovered from the scene?

23 A Yes, it appears to be.

24 Q Do you---

25 A I'm not sure what the bag has on it.

Brandon Howard - Direct examination
by Solicitor Poulos

1 Q Okay. Let me provide you with it, with the bag. There
2 we go. And you saw me just open it.

3 From where did you locate, did you recover the
4 checkbook?

5 I mean the wallet. I'm sorry.

6 A The wallet came from the floor of the master bedroom.

7 Q Okay. Did the wallet have anything inside when you
8 found it?

9 A Not that I recall.

10 SOLICITOR POULOS: Okay. Your Honor, we'd ask that
11 State's Exhibit 31 be admitted into evidence.

12 THE COURT: Any objection?

13 MR. SHEALY: No, Your Honor.

14 THE COURT: Be admitted.

15 (WHEREUPON, State's Exhibit No. 31 was received into
16 evidence at this time.)

17 Q Did you also collect a checkbook holder?

18 A Yeah, it's a dark colored checkbook holder.

19 Q All right.

20 A Like a plastic file.

21 Q All right. I'm showing you what's been marked as
22 State's Exhibit 32.

23 A Okay.

24 Q Is that the black checkbook cover that you recovered
25 from the scene?

Brandon Howard - Direct examination
by Solicitor Poulos

1 A That appears to be it.

2 Q All right. And did you locate that in the same
3 location as the wallet?

4 A Yes.

5 SOLICITOR POULOS: Your Honor, we ask that State's
6 Exhibit 32 be admitted into evidence.

7 MR. SHEALY: No, your -- no objection, Your Honor.

8 THE COURT: Be admitted.

9 (WHEREUPON, State's Exhibit No. 32 was received into
10 evidence at this time.)

11 Q Now, earlier you stated that you recovered or that
12 there was a triangular piece of glass in the hallway.

13 A Uh-huh. (Affirmative).

14 Q Did you recover that item?

15 A I did.

16 Q And take it into evidence?

17 A I did.

18 Q All right. I'm gonna ask that you take a look at
19 State's Exhibit 33, and ask you if that is the piece of
20 glass that you recovered from the hallway in the victim's
21 home.

22 A Yep, I believe it is.

23 Q Did you put it in that evidence collection bag?

24 A I did.

25 Q All right. What is the case number on the envelope?

Brandon Howard - Direct examination
by Solicitor Poulos.

1 A The case number would be 2010-08-0848.

2 Q Does it have the incident location on the envelope?

3 A Location would be Perrin Drive.

4 Q And does your name appear on that bag?

5 A It does.

6 Q When you recovered that piece of glass, what did you do
7 with it?

8 A I took it to the Sheriff's Office where it was later
9 processed for latent prints.

10 Q When you took it to the Sheriff's Office, was that
11 piece of glass secured?

12 A Yes, I secured the evidence that I took in the crime
13 scene evidence room and it's padlocked, and the only people
14 that have access to it are crime scene personnel.

15 SOLICITOR POULOS: Your Honor, we'd ask that State's
16 Exhibit 33 be admitted into evidence.

17 THE COURT: It will be admitted.

18 MR. SHEALY: Your Honor?

19 THE COURT: Subject to prior objections.

20 MR. SHEALY: Thank you.

21 SOLICITOR POULOS: Thank you, Your Honor.

22 (WHEREUPON, State's Exhibit No. 33 was received into
23 evidence at this time.)

24 Q Officer Howard, once you took the piece of glass and
25 the fingerprints that you lifted and all the other evidence

Brandon Howard - Direct examination
by Solicitor Poulos

1 back to the Sheriff's Office, you stated that they were
2 secured, is that correct?

3 A Yes, ma'am.

4 Q All the evidence that you collected, correct?

5 A Yes.

6 Q Okay. And while you were at the Sheriff's Office, did
7 you process some of items that you collected?

8 A I did. I processed several of the items.

9 Q All right. Can you tell the jury which of those items
10 you processed?

11 A Yes, I can. While at the Sheriff's Office I processed
12 a piece of purple tape, which was one of the smaller pieces
13 that was found in the kitchen, the balled up purple tape,
14 triangular piece of broken glass, which was found in the
15 hallway, a roll of purple tape, a dark blue black colored
16 plastic check holder, a red and white and black wallet, a --
17 several wooden drawers from a larger jewelry box, and some
18 gun cases that were collected.

19 Q All right. And which of those items that you took back
20 to the Sheriff's Office, which, if any, were you able to
21 lift a print from?

22 A The only thing that I was able to lift a print from was
23 a triangular shard piece of glass that was recovered.

24 Q Okay. And that is from the items that you took back to
25 the Sheriff's Office, correct?

Brandon Howard - Direct examination
by Solicitor Poulos

1 A Right.

2 Q Now, also you indicated earlier that you said you
3 lifted three other prints from inside the home, is that
4 correct?

5 A Right. Two from a door and then one from a Ball
6 cannister.

7 Q Okay. So, you -- were you able to lift a total of four
8 prints from this whole incident?

9 A Right.

10 Q And just to clarify again for the jury, one of those
11 prints was from the triangular piece of glass?

12 A Yes.

13 Q And the other three prints were from the crime scene,
14 is that---

15 A Yes.

16 Q Is that accurate?

17 A Yes.

18 Q Okay. Is it common, Officer Howard, to dust several
19 areas and sometimes not be able to actually lift a usable
20 print?

21 A Uh-huh. (Affirmative).

22 A lot of times it is.

23 Q I'm gonna show you State's Exhibit 34-A, B, C, and D,
24 and ask you if you recognize what I've handed you.

25 A These are the print cards that I would of turned in to

Brandon Howard - Direct examination
by Solicitor Poulos

1 the A.F.I.S. for the prints I removed from the scene and the
2 glass.

3 Q Okay. Are those all of the usable prints that you were
4 able to lift in connection with this case?

5 A Yeah, these are the fingerprints that I saw and
6 removed.

7 Q How can you tell that those prints came from this crime
8 scene location as opposed to somewhere else?

9 A Whenever you take prints from somewhere, we have what
10 we call print cards. They're backing cards. It has kind of
11 a glossy finish on one side, and on the back here it has
12 your date, time, or date, case number, type of offense, your
13 victim, the address, and the area it was removed from, and
14 who removed it, and it has a little area for a diagram so
15 you can draw and kind of show exactly where you removed it
16 from.

17 Q What is the date on those cards?

18 A 8/14, 8/14/2010.

19 Q And is that your handwriting?

20 A It is.

21 Q Does your name appear on those cards?

22 A It does.

23 SOLICITOR POULOS: Your Honor, we would ask that
24 State's Exhibit 34-A, B, C, and D be admitted into evidence.

25 MR. SHEALY: Your Honor, I do have an objection as to

Brandon Howard - Direct examination
by Solicitor Poulos

1 one of those. It's derivative from my objections as to the
2 glass though. I continue my objection as to the piece of
3 glass and those, any print card lifted from this glass.

4 THE COURT: All right. I overrule that.

5 (WHEREUPON, State's Exhibit Nos. 34-A through 34-D were
6 received into evidence at this time.)

7 Q How did you get the prints onto those little cards?

8 A After you use your powder or, in this situation, I was
9 using powder, you take a clear tape and you take it and you
10 roll it over your print, and then you pull it back off and
11 lay it down on the backing card, and it, it shows the
12 impression that it was removed.

13 Q Okay. And if you would state where Exhibit 34-A was
14 lifted from?

15 A 34-A was -- Exhibit 34-A was inside of the glass door
16 on the frame just above the handle, and this is the door
17 between the -- it's the kitchen door from the carport to the
18 kitchen.

19 Q Okay. And what about Exhibit 34-B?

20 A 34-B was outside of the glass door on the frame above
21 the handle and it's the same door.

22 Q And how about Exhibit 34-C?

23 A 34-C was outside of the Ball cannister in the bedroom
24 on the floor.

25 Q All right. And, lastly, how about Exhibit 34-D?

Brandon Howard - Direct examination
by Solicitor Poulos

1 A 34-D was from a triangular of glass.

2 Q And once you get those cards, what do you do with them?

3 A Once I get -- I had the cards and fill them out, have
4 all the information, I package them in a envelope that has
5 other information like case number, the amount of lifts.

6 There's some other information, and then it goes to our
7 A.F.I.S. department who actually analyzes the fingerprints
8 and determines who they are, if they belong to anybody, if
9 they're usable, whatever they do.

10 Q Is the A.F.I.S. box at the Sheriff's Office that you
11 put those cards in, is that a secured location?

12 A Yes.

13 Q All right. Thank you.

14 CROSS-EXAMINATION

15 BY MR. SHEALY:

16 Q All right. Officer Howard, you testified you worked
17 for Spartanburg Regional now?

18 A Yes.

19 Q What are you doing for them?

20 A Security.

21 Q Okay. All right. And in addition to collecting all
22 these items that you've testified to, did you also take a
23 number of DNA swabs?

24 A I did.

25 Q Okay. It looks like you took one from the small

Brandon Howard - Cross-examination
by Mr. Shealy

1 jewelry box on the dresser, correct?

2 A Small jewelry box, yes.

3 Q And one from the handles of the large jewelry box?

4 A Yes.

5 Q You took a touch DNA sample and from handles and locks
6 of the black gun case?

7 A Yes.

8 Q Okay. Did you take any more DNA swabs or attempt to
9 take anymore swabs?

10 A I refer back to my -- none for -- well, let's see.
11 Yes, I did do a DNA swab from the edges of the triangular
12 piece of glass that I collected.

13 Q Okay. All right. And, so, you took all of those
14 swabs, correct?

15 A (Witness nods affirmatively.)

16 Q And you did what you were suppose to do with them,
17 correct?

18 A Right.

19 Q You put them in the -- what would you have done with
20 them?

21 A Those, along with everything else, go into evidence.

22 Q Okay. And then evidence would send it down to SLED
23 or---

24 A Normally that is generally left up to the lead
25 investigator.

Brandon Howard - Cross-examination
by Mr. Shealy

1 Q Okay. All right. Okay. And I wanted to just
2 double-check. I'm gonna show you State's Exhibit 2. I was.
3 But I'm not sure where it is. There it is.

4 All right. This is State's Exhibit 2, and can you show
5 the jury where, on State's Exhibit 2, you found that rock?

6 This is the kitchen door. So --.

7 A If I recall correctly, the rock would of been in the
8 hallway in this area right here down the hall.

9 Q In here?

10 A Right.

11 Q Okay. I'm gonna show you State's -- I'm gonna try to
12 show you a picture.

13 A I have them right here, sir.

14 Q Oh, you have them up there. I'm sorry.

15 A Is this what you're looking for?

16 Q That's what I'm looking for.

17 If you'll bear with me, Your Honor.

18 THE COURT: Yes, sir.

19 (Pause.)

20 Q I'm gonna show you State's Exhibit No. 10 so you can
21 get an idea, and then on State's Exhibit No. 2 again, would
22 you point to the jury as to where you found that rock and
23 the gun case?

24 A Looking at this photo and there, it looked -- it
25 appears like it would be in this general area right here.

Brandon Howard - Cross-examination
by Mr. Shealy

1 Q Right here.

2 So, close to bedroom number two?

3 A Well, the gun case looks to be in the middle of the
4 hallway there. The rock, off to one side, and the piece of
5 glass off to the other side.

6 Q Okay. In kind of a T-formation?

7 A Yeah.

8 Q Is that an accurate way of saying that?

9 A I would assume so. Kind of in line there.

10 Q Okay. And when you were doing your walk through,
11 that's where those were located?

12 A Yes.

13 Q And then you can put that picture down?

14 A Okay.

15 Q And y'all are trained to, to not bother a crime scene
16 until after you document it, correct?

17 A Right.

18 Q Okay. So that would of been a fair and accurate
19 representation of that area when the police officers got
20 there?

21 A Well, to -- that would of been a fair estimation as to
22 the best when I got there. I can't say for sure if anybody
23 did anything before I got there or not.

24 Q But you wouldn't of expected them to, right?

25 A No, I don't see why they would.

Brandon Howard - Cross-examination
by Mr. Shealy

1 Q That's why you take the pictures?

2 A Right.

3 Q Okay. All right. And you've testified you got some
4 partial prints.

5 What are the -- what does that mean?

6 A See, to me a partial print I mean is anything that
7 looks like a fingerprint to me because it's just on my
8 opinion. An entire fingerprint can run from side to side.
9 It wouldn't -- a complete fingerprint would be a huge big
10 roll. So, you'd basically have to roll it in my opinion,
11 and a partial, to me, would be just a section of it, a half
12 of it, or I mean it could be anything.

13 Q Okay. So, so, whenever you say partial print, it could
14 be just this part, the face part of the finger?

15 A Yeah, or it could be the side or it could be down. It
16 could be down here. That's, that's what I consider a
17 partial print.

18 Q Okay. So, you would generally, whenever you're
19 processing a crime scene, you're not finding full prints?

20 You're finding partials?

21 A Yeah, generally.

22 Q Because usually people aren't doing this, right?

23 A Right.

24 Q Okay. And did you test this wallet and the checkbook
25 for prints?

Brandon Howard - Cross-examination
by Mr. Shealy

1 A I did.

2 Q Did you find any?

3 A No.

4 Q No.

5 Did you test that for DNA?

6 Did you swab that?

7 A I have no record of doing that.

8 MR. SHEALY: Okay. If you'll beer with me, judge.

9 (Pause.)

10 Q Now, one other or just a few other questions about -- I
11 understand, when you got there, you took all these pictures
12 inside the house.

13 Did you take any pictures of the outside of the house?

14 A I believe I did.

15 Q Okay. And those would be the pictures that have been
16 already admitted?

17 A I believe they're some in here. If I'm not mistaken,
18 yeah, right there is one outside the house.

19 Q Okay. And to the extent that you did a walk through
20 around the house, did you take any pictures of any rocks
21 that look like that?

22 A I don't recall.

23 Q You don't recall?

24 A I don't recall.

25 Q Well, if you would, go through those, those pictures

Brandon Howard -- Cross-examination
by Mr. Shealy

1 that we've got.

2 A I do not see any photographs of any other rocks outside
3 of the home.

4 Q Okay. But you did walk around outside of the home?

5 A Yes, sir.

6 Q Okay. Do you recall seeing any rocks like that?

7 A I, I do not recall.

8 Q Okay.

9 A I just -- I don't remember rocks or anything about --.

10 MR. SHEALY: Okay. All right. I believe, Your Honor,
11 that's all I have for this witness.

12 THE COURT: Any redirect?

13 SOLICITOR POULOS: No, sir, Your Honor.

14 THE COURT: All right. May this witness be excused?

15 SOLICITOR POULOS: Yes, sir.

16 MR. SHEALY: Yes, Your Honor.

17 THE COURT: All right. Thank you, sir. You can be
18 excused.

19 WITNESS: What would you like done with these items?

20 COURT REPORTER: Just leave it there. I'll get it.

21 THE COURT: Thank you.

22 All right. Madam Forelady, and ladies and gentlemen of
23 the jury, it's about seven minutes to 5:00. I -- we are
24 making good progress, and I don't see any real reason to
25 work over five o'clock this evening. So, I'm going to go

1 ahead and call a recess on the proceedings for the day.

2 I'm gonna ask that you be in your jury room by 9:15 in
3 the morning, and we will resume shortly thereafter, but as
4 soon as close to that as you can. I do have some things
5 that I have to take care of starting at 9:00, and hopefully
6 I'll be done by that time.

7 Let me remind each of you not to speak with each other
8 or anyone else about this case tonight.

9 Thank you.

10 (WHEREUPON, the following takes place outside the
11 presence of the jury.)

12 THE COURT: All right. Any additions or exceptions
13 from the State?

14 SOLICITOR POULOS: No, sir.

15 THE COURT: Or defense?

16 MR. SHEALY: No, Your Honor.

17 THE COURT: Very good.

18 Scheduling wise, what, what kind of -- how many
19 witnesses do you anticipate tomorrow?

20 SOLICITOR POULOS: We will have approximately three,
21 Your Honor.

22 THE COURT: Okay. And I'm just getting an idea. I'm
23 not trying to hold you to anything.

24 SOLICITOR POULOS: Right. And that may change, Your
25 Honor, but just right now.

1 THE COURT: I understand. I understand. I'm just
2 trying to schedule.

3 I told them I had a plea, y'all can be seated, I have a
4 plea that I was gonna -- I took it and then I wasn't
5 decided, wasn't quite sure what I wanted to do. And, so, I
6 was gonna do that today, but I'm gonna do that tomorrow at
7 9:00. So, then we start at 9:15.

8 Does that work with everybody?

9 MR. SHEALY: Yes, sir.

10 SOLICITOR POULOS: Yes, sir.

11 THE COURT: I don't see how in the world we'll get
12 finished before lunch. So, I don't see any possibility.
13 Probably more mid afternoon to late afternoon.

14 MR. SHEALY: Yes, sir, and I think so.

15 THE COURT: You think so.

16 MR. SHEALY: I do.

17 THE COURT: And let me just tell you, I trained with
18 Ned Miller when I first started and he always told me, and
19 so did Judge Hill, to just don't turn the case over to a
20 jury after four o'clock in the afternoon unless you have to.
21 So, tomorrow being Wednesday, I doubt I will turn it in to
22 the jury about four o'clock unless y'all just want to beat
23 me up in the back room or something.

24 Okay?

25 SOLICITOR POULOS: Yes, sir, Your Honor, having clerked

1 for Judge Miller, I understand that.

2 THE COURT: All right. Thank you, guys.

3 SOLICITOR POULOS: Thank you.

4 THE COURT: See you in the morning.

5

6 (WHEREUPON, Court was in recess for the evening.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Wednesday, February 27th, 2013

2

3 THE COURT: All right. Ms. Poulos, my understanding is
4 the jury is here.

5 | Anything from the State before we proceed?

6 SOLICITOR POULOS: No, sir, Your Honor.

7 MR. SHEALY: Nothing.

8 THE COURT: Mr. Shealy.

9 MR. SHEALY: Nothing from the defendant.

10 THE COURT: All right. Let's bring the jury in.

11 (WHEREUPON, the following takes place within the
12 presence of the jury.)

13 THE COURT: All right. Good morning, ladies and
14 gentlemen.

15 First, thank you-all for being here promptly and we
16 appreciate that greatly. It's nice what a difference a day
17 makes at least as far as the weather goes.

18 Did you have enough time, Madam Forelady, to get what
19 you need before we get started this morning?

20 | FORELADY: Uh-huh. (Affirmative).

21 THE COURT: Very good.

22 Ms. Poulos, State ready to proceed?

23 | SOLICITOR POULOS: Yes, sir, Your Honor.

24 THE COURT: Mr. Shea, defense?

25 | MR. SHEALY: Yes, sir.

Kimberly Ashley - Direct examination
by Solicitor Poulos

1 THE COURT: All right. Call your next witness.

2 SOLICITOR POULOS: Yes, sir, Your Honor.

3 State calls sergeant Kimberly Ashley.

4 KIMBERLY ASHLEY, being first duly
5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY SOLICITOR POULOS:

8 Q If you would, ma'am, please introduce yourself and
9 where you are employed.

10 A My name is Kimberly Ashley. I'm a sergeant at the
11 Spartanburg County Jail.

12 Q And how long have you been employed at the jail?

13 A Approximately 22 years.

14 Q All right. At the, at the process at the jail, do you
15 formally take fingerprints when someone is booked?

16 A Yes, we do.

17 Q And can you explain to the jury the process?

18 A When an individual is brought into the facility and
19 they are being charged with a criminal offense, everybody is
20 pictured, fingerprinted, and those fingerprints are
21 submitted to SLED for identification, and then we process
22 everybody to see the judge.

23 Q Are the fingerprints that you take inked prints or are
24 they electronic?

25 A They are now submitted electronically.

Kimberly Ashley - Direct examination
by Solicitor Poulos

1 Q And do you keep a copy of those prints in your file?

2 A Yes, ma'am, we do.

3 Q How are the prints maintained?

4 Are they maintained through SLED?

5 A Yes, ma'am.

6 Q Can you tell me---

7 A They're in the SLED database.

8 Q Okay. If you would, please explain to the jury what
9 SLED stands for.

10 A SLED is the State Law Enforcement Division, and what
11 they do is we submit all prints currently for about the past
12 five or ten years now electronically. So, an individual,
13 once they're processed, within a matter of probably ten to
14 fifteen minutes we run what we call a criminal history on
15 the individual and we get that response back. And if
16 they've ever been processed or fingerprinted before, then
17 all that information is put together and we, we obtain that,
18 the criminal history, and that verifies to us that the
19 individual that we have in front of us is who we believe to
20 be.

21 Q I'm gonna show you what's been premarked as State's
22 Exhibit 35.

23 All right. Sergeant Ashley, I'm gonna show you again
24 State's Exhibit 35 for identification purposes and ask you
25 if you recognize that.

Kimberly Ashley - Direct examination
by Solicitor Poulos

1 A This is gonna be a set of prints that were taken at the
2 facility.

3 Q Okay. And were those fingerprints taken at the
4 Spartanburg County Jail?

5 A Yes, they are.

6 Q How do you know that they were taken at the Spartanburg
7 jail?

8 A In the upper left-hand corner there's a unique number
9 that comes back to our fingerprint machine, and that number
10 is generated by that piece of equipment.

11 Q And could you please read out that number?

12 A It's 422100169574.

13 Q Okay. Is there also a name on that card that is
14 associated with that set of prints?

15 A Yes, it's Gabriel Jon Rios.

16 SOLICITOR POULOS: Okay. Your Honor, I would ask that
17 State's Exhibit 35 be admitted into evidence.

18 THE COURT: Any objection?

19 MR. SHEALY: No, Your Honor.

20 THE COURT: Admitted without objection.

21 SOLICITOR POULOS: Thank you.

22 (WHEREUPON, State's Exhibit No. 35 was received into
23 evidence at this time.)

24 THE COURT: Cross-examination.

25 MR. SHEALY: Your Honor, I have no questions.

Ted Saar - Direct examination
by Solicitor Poulos

1 THE COURT: May this witness be excused?

2 SOLICITOR POULOS: Yes, sir, Your Honor.

3 MR. SHEALY: Yes, Your Honor.

4 THE COURT: Thank you, ma'am. You are excused.

5 WITNESS: Thank you.

6 THE COURT: Call your next witness please.

7 SOLICITOR POULOS: Yes, sir, Your Honor.

8 The State calls Investigator Ted Saar.

9 TED SAAR, being first duly sworn,
10 testified as follows:

11 DIRECT EXAMINATION

12 BY SOLICITOR POULOS:

13 Q If you would, sir, please introduce yourself and state
14 where you work.

15 A My name is Theo Demude Saar, III. I work for the
16 Sheriff's Office.

17 Q Okay. And how long have you been at the Sheriff's
18 office?

19 A I been at the Sheriff's Office since 2004.

20 Q What are your current duties there?

21 A I am the senior latent print, fingerprint examiner for
22 the Sheriff's Office.

23 Q Can you explain to the jury what type of training that
24 you've had?

25 A Yes, I've been through numerous classes for fingerprint

Ted Saar - Direct examination
by Solicitor Poulos

1 identification. Started out with Henry Classification and
2 Comparison class, basic latent, latent fingerprint
3 comparison class, latent, advanced latent ridgeology class,
4 and latent palm print comparison class. Also advanced Ace V
5 Application for Fingerprint Examiners.

6 Q And do you hold any special certifications or have you,
7 have you covered that?

8 A I am certified through SLED, the South Carolina Law
9 Enforcement, Law Enforcement Division for A.F.I.S.
10 operation, fingerprint identification.

11 Q What does A.F.I.S. stand for?

12 A A.F.I.S. stands for, it's an acronym, stands for
13 Automated Fingerprint Identification System.

14 Q How long have you been examining fingerprints?

15 A Since 2009.

16 Q And approximately how many fingerprints have you
17 examined in your career?

18 A Examined, I'm not sure. I've, I've made over 3,000
19 identifications today.

20 Q And have you testified at trial before regarding
21 identification of persons based on fingerprint analysis?

22 A I have. I've previously been qualified as, twice in --
23 once in General Sessions, once in Family Court.

24 SOLICITOR POULOS: Okay. Your Honor, we would move
25 that Investigator Ted Saar be qualified as an expert in

Ted Saar - Direct examination
by Solicitor Poulos

1 fingerprint analysis.

2 THE COURT: Mr. Shealy.

3 MR. SHEALY: Your Honor, I have no objection.

4 THE COURT: Okay. Ladies and gentlemen, normally a
5 witness is limited to testifying about what they saw, they
6 heard, they smelled, basically your senses. They're not
7 allowed to give opinions unless it's very limited in that
8 type of area. But because of a person's education or
9 experience they may be allowed to be qualified as an expert
10 in which event they'll be allowed to give their opinion in
11 the area that they've been qualified as an expert in.

12 In this case Mr. Saar will be qualified in the area of
13 fingerprint analysis and he'll be allowed to give his
14 opinion with regard to that area. His opinion, like any
15 other witness or experts, are, are up to you to decide what
16 weight you decide to give them during the course of this
17 trial.

18 Q Investigator Saar, can you tell the jury what a latent
19 print is?

20 A A latent, a latent fingerprint is a fingerprint that
21 you can not see with your, your naked eye. It has to be
22 developed with some sort of medium. Like fingerprint powder
23 is the most common way. So, it's something that you can't
24 see readily.

25 Q Are there different distinguishing characteristics of a

Ted Saar - Direct examination
by Solicitor Poulos

1 fingerprint?

2 A There are.

3 Q And can you explain to the jury what those are?

4 A On your, your fingerprints, what I'm looking for and
5 what distinguishes them from somebody else's are different
6 points of minutia. They're where the -- where you're
7 talking about the little line on your fingerprint. We
8 generally refer to those as ridges. So, I'm looking for
9 ending ridges, where the ridges stop, or where they fork,
10 what they call bifurcate, and also things like islands where
11 they may, they may look like this or a short ridge that
12 looks like little dots.

13 Q How is it possible for a person to leave a fingerprint?

14 A When you -- normally you have oil pores and sweat pores
15 all over your skin. So, when you leave a fingerprint,
16 you're, you're leaving behind small portions of oil and
17 sweat, and because you have these, these ridges on your, on
18 the palms of your hands, it's kind of like mountains and
19 valleys. The ridges are, are raised and then in-between
20 those ridges is a recessed area.

21 So, when you leave a fingerprint, you're living --
22 you're leaving the impression of those ridges and what's
23 in-between those ridges, you know, is, is a valley. So,
24 that's how you leave a fingerprint impression.

25 Q Is it possible for a person to touch a surface and not

Ted Saar - Direct examination
by Solicitor Poulos

1 Leave a fingerprint?

2 A Yes, if you -- you know, of course, if you're wearing
3 gloves or something like that you won't leave a fingerprint
4 behind, and depending on what you're touching, if it's very
5 dirty or wet or things of that nature, it's possible to
6 touch something but actually not leave a fingerprint on it.

7 Q And are fingerprints specific as to each individual?

8 A Yes.

9 Q Go ahead.

10 A No two people have the same fingerprints. You, you
11 also don't have the same fingerprints on your own hands.
12 So, everybody has ten different fingerprints and no two
13 people have the same fingerprints.

14 Q And based on your training and experience, have you
15 ever seen anybody -- have you ever seen two people with the
16 same prints?

17 A No, I have not, and the -- there are numerous
18 fingerprint databases throughout the world, and there's
19 never been two fingerprints found that have been the same.

20 Q Okay. I'm gonna show you State's Exhibits 34-A, B, C,
21 and D, and ask if you recognize those.

22 A I do.

23 Q And what are they?

24 A These were the latent prints that were turned in to me
25 for examination on this case.

Ted Saar - Direct examination
by Solicitor Poulos

1 Q How did you receive those prints?

2 A I received these -- well, in this envelope. This is
3 typically how our forensic investigators, when they find
4 latent prints, they'll fill out one of these envelopes and,
5 and place the latent prints in here. They're turned in
6 directly to me and they're kept in my office.

7 Q Did that envelope come from a secure location?

8 A It did. I have a secure lock drop box that's in my
9 office. It's, it's put into there, and, and stays in there
10 and in my custody once it's turned in to me.

11 Q And how many total cards did you receive?

12 A Four.

13 Q And of those four prints, how many were you able to use
14 to make comparison?

15 A I -- well, I was able to identify one.

16 Q Before we get to that one --

17 A Yes, ma'am.

18 Q -- why weren't you able to use the other three?

19 A There were two others or, or three others that were
20 comparable, but -- and then there was one that was not
21 comparable. But they were not identified.

22 Q Okay. Is it common to have prints lifted like that,
23 and, and not be able to, to use them?

24 A Yes, sometimes I get fingerprints and they'll be good
25 quality, but the person's fingerprints aren't in the

Ted Saar - Direct examination
by solicitor Poulos

1 database. It could be a victim's prints, which is most
2 common. I did not have any victim comparison prints in this
3 case.

4 Q And which of those four were you able to use to make a
5 comparison?

6 A It's -- the, the card is labeled D---

7 Q Would you---

8 A ---and my markings.

9 Q If you could read what exhibit number that is?

10 A It's Exhibit 34-D.

11 Q Okay. And where was that print taken from?

12 A A triangular piece of glass.

13 Q And were you able to find sufficient clarity in that
14 print?

15 A I was.

16 Q So that you -- and you were able to make a comparison?

17 A Yes, ma'am.

18 Q All right. What do you do with the prints after you
19 examine them?

20 A After I examine them, I'll examine them visually,
21 magnified, and then I will enter it into a database to be
22 searched against possible known prints.

23 Q Does, does SLED run the database?

24 A They do.

25 Q Okay. And does that database, what does it then do?

Ted Saar - Direct examination
by Solicitor Poulos

1 Does it give you potential matches?

2 A When I put a fingerprint into the database to, for, you
3 know, to search the database, every fingerprint I put in it
4 gives me a possible, 20 possible matches back. The computer
5 doesn't identity the fingerprint. It just gives me possible
6 matches based on the points and the ending ridge and the
7 forks that I tell the computer to look for. So, it gives me
8 back 20 possible matches, and then I have to look through
9 all 20 of those matches or possible matches to see whether
10 or not it actually is a match to any of those 20.

11 Q And were you able to make a match to one of those
12 possible matches?

13 A I was.

14 Q All right. I'll show you State's Exhibit 35 again, and
15 ask you to, if you could recognize that again and identify
16 that.

17 A Yes, ma'am, this is the -- this is the set of known
18 prints, rolled fingerprint impression of Gabriel Jon Rios.

19 Q All right. And if you could read the number on the
20 left, upper left-hand corner.

21 A It's 422100169574.

22 Q All right. And did you compare those prints with the
23 print that you recovered from the triangular piece of glass?

24 A I did.

25 Q Were you able to make a comparison?

Ted Saar - Direct examination
by Solicitor Poulos

- 1 A I was.
- 2 Q And did you generate a, a chart, a comparison chart?
- 3 A I did.
- 4 Q Okay. And if I could see that?
- 5 (Witness complies.)
- 6 Q All right. Investigator Saar, I'm gonna show you
- 7 what's been marked as State's Exhibit 36 for identification
- 8 purposes --
- 9 A Yes, ma'am.
- 10 Q -- and ask if that is the fingerprint comparison chart
- 11 that you generated.
- 12 A It is.
- 13 Q There is a print on the left side of the comparison
- 14 chart, is that correct?
- 15 A Yes, ma'am.
- 16 Q And where was that print from?
- 17 A That print was the latent print that was turned in to
- 18 me from the triangular piece of glass.
- 19 Q And on the right side of your chart you have another
- 20 print.
- 21 A Yes, ma'am.
- 22 Q Where is that from?
- 23 A That is the known print that was taken of the, the
- 24 number one finger, the right thumb of Mr. Rios from his ten
- 25 print card, the, the known set of prints.

Ted Saar - Direct examination
by Solicitor Poulos

1 Q Okay. And if you could read the respondents --
2 identification number on there?

3 A The SID number?

4 Q The, the number that you used to compare with the, the
5 set of known prints.

6 A It's 422100169574.

7 Q Okay. So, those two numbers matched, is that correct?

8 A Yes, ma'am.

9 Q Okay. Is making a comparison chart something you
10 typically do in your analysis?

11 A Yes, ma'am, for anytime I identify a fingerprint, if
12 it's someone other than a victim's print, I always do a
13 comparison chart and I make this chart to show the point,
14 the comparison, the points of, of correlation between the
15 two prints.

16 SOLICITOR POULOS: Your Honor, at this time we'd ask
17 that State's Exhibit 36 be admitted into evidence.

18 THE COURT: Any objection?

19 MR. SHEALY: No, Your Honor.

20 THE COURT: Admitted without objection.

21 (WHEREUPON, State's Exhibit No. 36 was received into
22 evidence at this time.)

23 Q Investigator Saar, what types of things are you looking
24 for again when analyzing and making a comparison?

25 I know you touched on that briefly, but, if you would,

Ted Saar - Direct examination
by Solicitor Poulos

1 please reiterate for the jury.

2 A Can I use my --

3 Q Sure.

4 A -- chart?

5 This, this is a, just a blown-up comparison chart.

6 It's the same chart. It's just blown-up.

7 Q Is that the exact same --

8 A It is.

9 Q -- thing?

10 A It is the exact same thing.

11 Q Okay.

12 A So, when I'm looking for points of comparison, I'm
13 looking for when these ridges stop or where they fork. In
14 this case I had 21 points of comparison that, that matched,
15 21 points of correlation between the two prints.

16 Q Okay. And whose fingerprint did you determine it to
17 be?

18 A Mr. Rios, Gabriel Jon Rios.

19 Q And what part of his finger did the print from the
20 triangular piece of glass come from?

21 A It was his, the number one finger, which is, is your
22 right thumb, and it's, it's the, the delta area mostly of,
23 of that fingerprint.

24 SOLICITOR POULOS: Your Honor, we ask that the, the
25 blow-up of the fingerprint chart be admitted into evidence

Ted Saar - Direct examination
by Solicitor Poulos

1 as State's Exhibit No. 37.

2 THE COURT: Any objection?

3 MR. SHEALY: I would like to look at that.

4 THE COURT: Okay.

5 MR. SHEALY: I have -- I'm not sure what---

6 WITNESS: It's just an explanation of---

7 MR. SHEALY: This?

8 WITNESS: This right here, yes, sir. That one it only
9 goes to Number 13 on this sheet. There's not enough room
10 for the printing on that.

11 MR. SHEALY: Right. I think I do need a motion, but---

12 THE COURT: Okay. Madam Forelady, would you go back to
13 your jury room please?

14 (WHEREUPON, the following takes place outside the
15 presence of the jury.)

16 THE COURT: Mr. Shealy.

17 MR. SHEALY: Your Honor, given that the comparison
18 chart apparently doesn't, at least on the back, completely
19 match what's been admitted as State's Exhibit No. 36, I'd
20 simply ask that the back be redacted to what its, purports
21 to be a representation of. In other words, I'd ask that it
22 be redacted. I believe 14 through 21 are not on State's
23 Exhibit 36. And, so, I'd ask that they be removed from
24 State's Exhibit 37.

25 THE COURT: Ms. Poulos.

Ted Saar - Direct examination
by Solicitor Poulos

1 SOLICITOR POULOS: Your Honor, I plan to ask him about
2 the points of comparison so that he can help explain how he
3 was able to make that determination. I don't have a problem
4 with it being removed, but he's -- I'm going to ask him to
5 testify about that. So --.

6 THE COURT: All right. I tell you what I'm gonna do,
7 I'm gonna just withhold my ruling on it until she lays a
8 further foundation for it. Then we'll revisit that in just
9 a few minutes.

10 Okay, sir?

11 MR. SHEALY: Okay.

12 THE COURT: All right. You ready to proceed,
13 Mr. Shealy?

14 MR. SHEALY: Yes, Your Honor.

15 THE COURT: Ms. Poulos.

16 SOLICITOR POULOS: Yes, sir.

17 (WHEREUPON, the following takes place within the
18 presence of the jury.)

19 CONTINUED DIRECT EXAMINATION

20 BY SOLICITOR POULOS:

21 Q Investigator Saar, when you're making a fingerprint
22 comparison, and you have a set of known prints from a set of
23 inked prints found at a scene, specifically what are the
24 things that you are looking for?

25 A I am looking for -- I'm looking for where ridges end,

Ted Saar - Direct examination
by Solicitor Poulos

1 where they fork. I'm looking for short ridges. I'm looking
2 for any part of, of that fingerprint that I can use as far
3 as comparing to the, the latent. I mean to the -- yes, to
4 the, to the known print.

5 Q What are points of comparison?

6 A Points of comparison are, are where the, the ridges
7 end, where they fork and kind of short ridge. You can also
8 use some, some more detailed points as far as pores,
9 creases, and what they call open fields of -- there's,
10 there's numerous areas or, or things that I can look for in
11 a fingerprint as far as comparison and identification.

12 Q And are points of comparison necessary when you're
13 comparing a print?

14 A They are. They are. If -- a print has either not,
15 it's not good enough quality as far as the clarity or
16 there's not enough information, there's not enough points to
17 compare, then I don't feel comfortable making an
18 identification.

19 Q And in this case were you able to make points of
20 comparison?

21 A I was.

22 Q How many were you able to make?

23 A Twenty-one. Twenty-one points of comparison in this
24 case.

25 SOLICITOR POULOS: Your Honor, at this time we would

Ted Saar - Direct examination
by Solicitor Poulos

1 ask that State's Exhibit 37 be admitted into evidence.

2 THE COURT: Same objection?

3 MR. SHEALY: Yes, Your Honor, same objection.

4 THE COURT: All right. Be admitted subject to the
5 objection.

6 SOLICITOR POULOS: Thank you.

7 (WHEREUPON, the chart was marked as State's Exhibit No.
8 37 and received into evidence at this time.)

9 Q If you would, please state what the points of
10 comparison were that you found.

11 A In this case, all of, all the points of comparison were
12 either ending ridges or bifurcations. I can -- you want me
13 to go down the list?

14 Q Yes.

15 A Okay. The first point -- and I have them. They're all
16 numbered counterclockwise in this case. The first point was
17 an ending ridge. The second point was an ending ridge. The
18 third point was a bifurcation, which is where it forks.
19 Fourth point was a bifurcation. Fifth was an ending ridge.
20 Sixth point was a bifurcation. Seventh point was a
21 bifurcation. Eighth point was an ending ridge. The ninth
22 point was a bifurcation. And all of the rest of them, 10
23 through 21, were all ending ridges.

24 Q Okay. I want to show you 34-D again.

25 This is the print from the triangular piece of glass,

Ted Saar - Direct examination
by Solicitor Poulos

1 is that correct?

2 A Yes, ma'am.

3 Q And did you make a notation for the match on that card?

4 A I did. Whenever I get a latent, a latent print, I
5 always number it with my own number. It's just for my
6 office, for my purposes. So, this latent print was labeled
7 as 000 and then after I was able to make an identification,
8 I put which known, which finger it was. So, it's the number
9 one finger, the right thumb, and then I put who, who the
10 fingerprint belongs to.

11 Q And what name did you put on that card?

12 A Gabriel Jon Rios.

13 Q Is that your handwriting?

14 A It is.

15 Q Thank you. Please answer any questions Mr. Shealy may
16 have.

17 THE COURT: Cross-examination.

18 A Okay.

19 MR. SHEALY: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. SHEALY:

22 Q Investigator Saar, you've testified that this was a
23 partial print?

24 A Yes, sir.

25 Q Okay. A partial latent print I guess is the way you---

Ted Saar - Cross-examination
by Mr. Shealy

1 A Yes, sir.

2 Q Okay. What does that mean?

3 A It's, it is a latent print and it's a, a partial piece
4 of the full fingerprint.

5 Q Okay. And I believe you testified that most of what
6 you had was the delta portion?

7 A Of that, of that latent print, yes, sir.

8 Q Okay. And on a full print, how many points of
9 comparison can you, do you normally draw?

10 I mean---

11 A It, it varies. You can have upwards of a hundred.

12 Q Okay.

13 A It just -- it depends on each individual.

14 Q All right. So, it, it varies widely as to what, what
15 your threshold of identification is --

16 A Yes, sir.

17 Q -- sounds like?

18 Okay. All right. And now you've testified that it's
19 generally oil and sweat being left behind, and that's what
20 leaves the fingerprint, correct?

21 A Yes, sir.

22 Q Okay. And does the fingerprint -- I think you said
23 that you usually use some kind of a powder.

24 Does that fingerprint powder contaminate that sweat or
25 do something to that sweat?

Ted Saar - Cross-examination
by Mr. Shealy

1 A It adheres to the, to the, to the matrix, to whatever
2 it is that's depositing that, that fingerprint. So, if it's
3 sweat and oil, which is what normally it is, the fingerprint
4 powder adheres to that.

5 Q Okay. And did y'all do any other kind of testing on
6 this sweat and oil?

7 A I'm, I'm not sure.

8 Q You don't know?

9 A I don't know.

10 Q Okay. But it looks like you've got a fingerprint card
11 in front of you, correct?

12 A Correct, yes, sir.

13 Q And that was the fingerprint card you've testified
14 that, that you looked at?

15 A Yes, sir.

16 Q Does it appear to have been messed with since you---

17 A No, sir.

18 Q ---did your identification?

19 A No, sir.

20 Q No.

21 Okay. So, even though you don't know that any DNA, for
22 example, was tested, it, it looks like it's in the same
23 condition it was in when you examined it, correct?

24 A Yes, sir.

25 Q Okay. All right. You've testified that you only got

Ted Saar - Cross-examination
by Mr. Shealy

- 1 four latent prints turned in to you.
- 2 A Four latent cards. Latent print cards.
- 3 Q Cards?
- 4 A Yes, sir.
- 5 Q Okay. And, so, did you get any other latent prints
- 6 throughout this case?
- 7 A No, sir, and when I say cards, it's possible, like on
- 8 this card here, for it to be one card, but have two separate
- 9 prints.
- 10 Q Okay. All right. And you're sure you didn't get any
- 11 more latent prints in this case?
- 12 A Yes, sir.
- 13 Q Okay. Cause I've got this report I'm gonna hand up to
- 14 you. I'm sorry. It's actually three reports, but I'm
- 15 referencing your report down at the bottom here.
- 16 A Okay.
- 17 Q Isn't it true that Detective, I think it's Investigator
- 18 Hogsed had turned in some latent prints to you and you, and
- 19 you looked at those?
- 20 A It appears so by my report, yes, sir.
- 21 Q Okay. And in those latent prints you couldn't
- 22 identify, is that correct?
- 23 A Correct.
- 24 Q Okay. Do you have any idea where those latent prints
- 25 came from?

Ted Saar - Cross-examination
by Mr. Shealy

1 A They would of been turned in in a separate envelope.

2 Q Okay.

3 A It would still be in my office.

4 Q But it -- these weren't apparently collected by
5 Investigator Howard whose already testified yesterday I
6 suppose --

7 A Correct.

8 Q -- as being the guy at the scene?

9 A And sometimes, depending on the, on the case, different
10 investigators will process different things and I'll get
11 multiple envelopes from, from different investigators on the
12 same case.

13 Q Okay. All right. And now you, you haven't really
14 testified to this I don't think, but if you have I'm sorry
15 to go back on you.

16 Can you testify as to how old the fingerprint is or how
17 fresh a fingerprint is?

18 A No, sir, it will -- sometimes I can make a guess as to,
19 as to how old or new I think it is. But there's really no
20 way to determine without seeing the fingerprint laid down.

21 Q Okay. And you would of put, if you would of made a
22 guess, you would of put that in the report, correct?

23 A Yes, sir.

24 Q And it doesn't appear that you did that, did you?

25 A No, sir.

Ted Saar - Cross-examination
by Mr. Shealy

1 Q No.

2 Okay. So, you, you have no idea how old or how new
3 this particular---

4 A No.

5 Q ---print would of been?

6 A No, sir.

7 MR. SHEALY: Okay. If you'll bear with me, judge.

8 (Pause.)

9 MR. SHEALY: Your Honor, we have no further questions
10 for this witness.

11 THE COURT: Any redirect?

12 SOLICITOR POULOS: No, sir, Your Honor.

13 THE COURT: May this witness be excused?

14 SOLICITOR POULOS: Yes, sir.

15 MR. SHEALY: Yes, Your Honor.

16 THE COURT: Thank you, sir. You're excused.

17 WITNESS: Thank you.

18 THE COURT: Would you call your next witness please,
19 ma'am?

20 SOLICITOR POULOS: Your Honor, we have a matter of law
21 we'd like to take up with the Court.

22 THE COURT: Okay. Madam Forelady.

23 (WHEREUPON, the following takes place outside the
24 presence of the jury.)

25 THE COURT: Okay.

1 SOLICITOR POULOS: Your Honor, at this time, Your
2 Honor, with -- we would like to offer again State's Exhibit
3 1 through 37 into evidence. We feel like we've laid the
4 proper foundation for each of those exhibits, Your Honor. I
5 think Your Honor has a clear understanding of where we're
6 going with, with the evidence and the process that, that we
7 were, we were getting at.

8 Specifically, with regard to the rock, the brown rock,
9 Exhibit 28, I believe that was an issue yesterday. Your
10 Honor, we believe that that piece of evidence is relevant.
11 It was collected from the scene. We believe that the jury
12 can in, infer that that is what was used to break the glass
13 of the door to get into the home.

14 THE COURT: Let me ask you this. It seems to me,
15 looking at my notes, that the only thing that I would not
16 let in, without further foundation, and I may be incorrect,
17 was the shard of glass, which is found on the other side of
18 the rock and the gun case in the photograph. But if I have
19 not let the rock in, I would -- certainly let's go over it.
20 I thought I had though.

21 SOLICITOR POULOS: Okay. I just wanted to make sure,
22 Your Honor. With regard to the triangular piece of glass,
23 Your Honor, also -- obviously that was collected at the
24 scene. All the other broken pieces of glass were in the
25 kitchen. That was the only piece of glass in the hallway.

1 Mrs. Holt testified that she felt something sharp on
2 her neck. Now, grant you, she did not say it was that shard
3 of glass, but I think a jury can infer that, Your Honor.

4 THE COURT: All right.

5 SOLICITOR POULOS: That evidence places Mr. Rios at the
6 scene. Not only at the scene, but inside the home, Your
7 Honor, and I established the chain of custody. And we
8 believe that we've laid the proper foundation, and Your
9 Honor, so---

10 THE COURT: Mr. Shealy.

11 Let me stop you.

12 Why has a sufficient foundation not been laid?

13 I know yesterday my concern was that there was
14 testimony the sharp object was placed against the victim's
15 neck, and that it was my, my concern was that might lead to
16 this glass being considered for that regard. You already
17 had a picture of it in the evidence, and, therefore,
18 probative prejudicial analysis was one of the things I was
19 looking at.

20 But at this stage, the State's gone further and shown
21 that, you know, that the fingerprints, at least, in part,
22 partial latent, is the defendants based on the witness'
23 opinion.

24 Why is that not a sufficient foundation at this stage?

25 MR. SHEALY: Well, judge, it would be our position that

1 they've not shown where, on which side of the glass, the
2 inside or the outside, that my client's---

3 THE COURT: Well, of course, it could be inside.

4 MR. SHEALY: Well, Your Honor, he's been inside that
5 house before.

6 THE COURT: Oh, so, I see what you're saying.

7 MR. SHEALY: So, he may of left a fingerprint at
8 anytime, and as the fingerprint expert testified to, he
9 can't tell you how old or how recent that print was left.

10 THE COURT: Well, wouldn't that be a matter of fact for
11 the jury to determine, not a question of admissibility of
12 the evidence?

13 MR. SHEALY: Well, Your Honor, it -- by itself maybe,
14 Your Honor. But I believe that the more I can argue -- I
15 mean all of this goes to whether it's more prejudicial than
16 probative, and as the solicitor has said, apparently they
17 believe that the jury should, and presumably they will argue
18 in closing, that the jury should infer that this was the
19 piece of glass used to threaten Mrs. Holt.

20 Judge, nobody's testified to that. I think that would
21 be improper, and that's why it's overly prejudicial. The
22 fact that there's -- the mere fact that there's a
23 fingerprint on it, it doesn't make it any more relevant
24 because they can't even prove, Your Honor, and they haven't
25 proved, they haven't even attempted to prove, that this

1 shard of glass comes from the door, from the window that was
2 broken. They haven't even proven that, Your Honor.

3 All they've proven is there's a piece of glass in the
4 floor, and it's got my client's right thumbprint on it.
5 They haven't proven which, again, which side of the glass
6 it's on, whether or not it's door glass or framed glass
7 from, as Mrs. Holt testified to. They have pictures that
8 were -- I think she testified to that. He could of touched
9 one of those. Any of the times that he had been working
10 there he may have touched something.

11 There -- it's just too nebulous at this point, Your
12 Honor, and it would be our position that is simply it's --
13 if you find that there is probative value, and obviously we
14 would retain our objection as to relevance as well.

15 THE COURT: Sure.

16 MR. SHEALY: If you do find that there's probative
17 value, we would submit to you that it's vastly outweighed by
18 the prejudicial impact of this inference that apparently the
19 solicitor's Office thinks should -- well, can and should be
20 made, that it was the weapon used in this home invasion.

21 THE COURT: All right. I'm gonna overrule your
22 objection. I'm gonna find that it is admissible and find
23 that the State has sufficiently laid the foundation for the
24 admission, admission of this piece of evidence, and that it
25 is certainly probative to this case. And what you're really

1 arguing is a matter of, questions of fact for arguments for
2 the jury for them to determine.

3 So, I note your objection, and your previous objections
4 at this stage.

5 MR. SHEALY: Yes, sir.

6 THE COURT: But I'm gonna, I'm gonna find that it's
7 admissible.

8 SOLICITOR POULOS: Your Honor, and---

9 THE COURT: And to the extent I did not allow the rock
10 to come into evidence, I thought I had, but I, I had no
11 qualms with it coming in earlier. I don't recall
12 necessarily you objected to the rock coming in, but---

13 MR. SHEALY: I simply made an objection again to
14 relevance.

15 THE COURT: Okay. Just so we're clear on the record --

16 MR. SHEALY: Yes, sir.

17 THE COURT: -- I am allowing that rock to come into
18 evidence.

19 MR. SHEALY: And to the extent that she's asking that
20 these be admitted, I think I'm required to renew my
21 objections as to all of them, Your Honor.

22 THE COURT: Certainly. Certainly.

23 SOLICITOR POULOS: And just to clarify again, Your
24 Honor, you have admitted, in addition to 33, 34-A, B, C, and
25 D, the latent prints cards, 35, the print card, 36, the

1 fingerprint comparison, and 37, the blown-up fingerprint
2 comparison?

3 Is that -- I just wanted to make that clear for the
4 record.

5 THE COURT: Yes, ma'am.

6 SOLICITOR POULOS: Yes, sir.

7 THE COURT: Those are all admitted --

8 SOLICITOR POULOS: Yes, sir, thank you.

9 THE COURT: -- according to my notes.

10 MR. SHEALY: Yes, sir, Your Honor.

11 THE COURT: Subject to your objection.

12 MR. SHEALY: Thank you, judge.

13 THE COURT: Okay. All right. Would -- you ready to
14 call your next witness?

15 SOLICITOR POULOS: Your Honor, the State actually would
16 rest at this time.

17 THE COURT: At this stage.

18 Okay. I'll be glad to hear motions from you,
19 Mr. Shealy.

20 MR. SHEALY: Your Honor, would you bear with me?

21 (Pause.)

22 MR. SHEALY: Your Honor, we would move for directed
23 verdict as to all of these charges based on previous
24 objections to the admission of those other items that we
25 just dealt with, Your Honor, and it would be our position

1 that the State has failed to carry their burden of proof in
2 these cases.

3 THE COURT: I'm gonna overrule your objections, but --
4 I'm gonna overrule your motions and find that that's a
5 question of fact for the jury to make the determination.

6 Now, would you please stand, Mr. Rios?

7 (Defendant complies.)

8 THE COURT: Would you raise your right-hand?

9 (WHEREUPON, the defendant was placed under oath at this
10 time.)

11 THE COURT: Okay. You may be seated.

12 (Defendant complies.)

13 THE COURT: We've reached that point in the trial, Mr.
14 Rios, where you have a right to put on a defense. You have
15 a Constitutional right to present evidence in your own
16 defense. Part of which would be a decision as to whether or
17 not you want to testify.

18 Now, the United States Constitution, Fifth Amendment
19 provides in part that no person shall be compelled to
20 testify against themselves or give evidence against
21 themselves.

22 Has this right been explained to you?

23 DEFENDANT: Yes, sir.

24 THE COURT: Do you understand it?

25 DEFENDANT: Yes, sir.

1 THE COURT: Well, let me just go a little bit further
2 with this so I'm convinced that you do.

3 The decision as to whether or not to testify is a
4 personal decision. It's yours and yours alone to make. You
5 can do so in consultation with your attorney. You can do so
6 in consultation with someone else who may reasonably give
7 you advice as to whether or not you want to testify, but
8 ultimately the decision must be made by you, and it must be
9 made knowingly, intelligently, and voluntarily knowing your
10 right not to testify, and also the consequences of what
11 would happen if you decide that you are gonna testify.

12 With that being said, if you do decide that you want to
13 testify, you'll be subject to direct examination and
14 cross-examination just like any other witness. And if you
15 have any crimes in your record that may be admissible, and I
16 find that the probative value outweighs the prejudicial
17 effect, then the State may be allowed to go into those
18 charges or that criminal record with the idea that they
19 would impeach your credibility.

20 Do you understand that?

21 DEFENDANT: Yes, sir.

22 THE COURT: And has your attorney explained that to
23 you?

24 DEFENDANT: Yes, sir.

25 THE COURT: Now, I'll be glad to give you time to

1 consult with your attorney or with anyone else reasonably
2 within reach in order to make that decision.

3 But have you had time to think about whether or not you
4 wish to take the stand in this matter?

5 DEFENDANT: I had plenty of time, sir.

6 THE COURT: Sir?

7 DEFENDANT: Had plenty of time.

8 THE COURT: Okay. And which way do you want to go?

9 DEFENDANT: I'm gonna sit it out.

10 THE COURT: Does that mean you wish to exercise your
11 Fifth Amendment and not testify?

12 DEFENDANT: Yes, sir.

13 THE COURT: And have you had sufficient time to make
14 that decision?

15 DEFENDANT: Yes, sir.

16 THE COURT: Have you understood everything I've
17 explained to you about your right to testify and your right
18 not to testify?

19 DEFENDANT: Yes, I have, sir.

20 THE COURT: Do you have any questions of me at this
21 juncture?

22 DEFENDANT: No, sir.

23 THE COURT: Do you have any questions of your attorney?

24 DEFENDANT: No, sir.

25 THE COURT: Do you feel like you had that, you've made

1 that decision freely and voluntarily and knowing of your
2 rights?

3 DEFENDANT: Yes, I do.

4 THE COURT: Okay. Has anybody forced, threatened, or
5 promised you anything to get you to testify or not to
6 testify?

7 DEFENDANT: No, sir.

8 THE COURT: That is your own personal decision?

9 DEFENDANT: Yes, sir.

10 THE COURT: Very good. Thank you, sir.

11 Do you intend to call any witnesses?

12 MR. SHEALY: I do, Your Honor.

13 THE COURT: Okay.

14 SOLICITOR POULOS: Your Honor, we have a matter of law
15 with regard to one of the potential witnesses. I just
16 wanted to raise that.

17 THE COURT: Okay.

18 SOLICITOR POULOS: How many witnesses do you intend to
19 call?

20 MR. SHEALY: I intend to call four, Your Honor.

21 THE COURT: Four?

22 MR. SHEALY: Yes, sir.

23 THE COURT: The ones on your list?

24 The ones on your list?

25 MR. SHEALY: Your Honor, we've actually added one.

1 It's Deputy Welch for, who is under, on the list for the
2 State.

3 THE COURT: Okay.

4 MR. SHEALY: We would be calling Mr., Deputy Welch,
5 Estar Byrd, Sonia Rios, and my investigator, Curtis Jones.

6 THE COURT: I need you to speak up just a little bit.

7 MR. SHEALY: Oh, I'm sorry.

8 THE COURT: That's all right.

9 MR. SHEALY: It will be Deputy Welch. We'll also call
10 Estar Byrd, Sonia Rios, and my investigator, Curtis Jones.

11 THE COURT: Okay. Ms. Poulos.

12 SOLICITOR POULOS: Yes, sir, Your Honor.

13 With regard to Mrs. Sonia Rios, potential alibi witness
14 for the defense, we obtained, obtained information from
15 NCIC, Your Honor, where she was previously convicted in 2008
16 of giving false information to police. I have certified---

17 THE COURT: In 2008?

18 SOLICITOR POULOS: Yes, sir, in 2008, giving false
19 information to police, and I have obtained a certified copy
20 of that conviction along with a copy of her rap sheet along
21 with a copy of that incident report from that date, Your
22 Honor, and I can pass it up.

23 THE COURT: Would you provide that to Mr. Shealy
24 please?

25 SOLICITOR POULOS: Yes, sir, I will, and I will pass a

1 copy up for you.

2 THE COURT: So, your, your position would be that would
3 be relevant under 609, Rules of Evidence?

4 SOLICITOR POULOS: Yes, sir, absolutely. We believe
5 that it clearly falls under Rule 609(A)(2), Your Honor, as
6 evidence as to any witnesses been convicted of a crime shall
7 be admitted if it involved dishonesty or false statement
8 regardless of the punishment.

9 Your Honor, our question is how specific we can go into
10 that. In that incident she lied also for her husband. I'd
11 like to be able to ask her about that. I just don't know
12 how far the Court would allow me to go into that.

13 THE COURT: Well, my understanding -- and listen, I, I
14 don't pretend to be an authority on it, but my understanding
15 is that you can go into that, go into the question of asking
16 this witness isn't it, in fact, true that you've been
17 convicted of this crime and she says yes, you stop.

18 SOLICITOR POULOS: Okay.

19 THE COURT: You can't go into any further details about
20 it.

21 SOLICITOR POULOS: Yes, sir.

22 THE COURT: That's my understanding.

23 SOLICITOR POULOS: Now, if she were to---

24 Do you disagree with that?

25 MR. SHEALY: No, Your Honor.

1 SOLICITOR POULOS: If she were to deny that, Your
2 Honor, then would I be allowed to go into it further?

3 THE COURT: I tell you what, let's do this, if she
4 denies it, let's stop, send the jury out.

5 SOLICITOR POULOS: Okay.

6 THE COURT: Let's do an in camera hearing just to make
7 sure we're safe on the record---

8 SOLICITOR POULOS: Okay.

9 THE COURT: ---and we don't dirty it up. I think that
10 would be the safer way to go.

11 SOLICITOR POULOS: Yes, sir.

12 THE COURT: Okay. But that, but that is my
13 understanding, that once she admits it, you got to stop.

14 SOLICITOR POULOS: Yes, sir.

15 THE COURT: Okay.

16 MR. SHEALY: Yes.

17 THE COURT: All right. You ready to go, Mr. Shealy?

18 MR. SHEALY: I believe so.

19 THE COURT: You want a quick break?

20 MR. SHEALY: If I may, Your Honor.

21 THE COURT: You certainly may.

22 THE COURT: All right. Let's take about a ten minute
23 break and then we'll start back.

24 (WHEREUPON, a short recess was taken at this time.)

25 THE COURT: All right. I neglected to say one thing to

1 you, Mr. Rios, when I was going over your rights under the
2 Fifth Amendment. I realize, when I went back during the
3 break, that I didn't tell you that if you choose not to
4 testify then my charge to the jury, I'll instruct them that
5 they can not consider your failure to testify whatsoever
6 cause that's your rights under the Fifth Amendment, and the
7 burden's on the State at all times to prove your guilt.

8 Okay, sir. Now, with that added information, do you
9 need any additional time to speak with your lawyer or anyone
10 else in whether or not you decide to testify in this matter?

11 DEFENDANT: No, sir.

12 THE COURT: Do you, do you still wish not to testify?

13 DEFENDANT: Yes, sir.

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

15 SOLICITOR POULOS: Your Honor, just wanted to raise
16 that the defense witnesses are both present in the
17 courtroom. They have been---

18 MR. SHEALY: Yeah, I'm gonna chase them out.

19 SOLICITOR POULOS: ---sequestered. Okay.

20 MR. SHEALY: I was just gonna ask for a minute to chase
21 them out.

22 THE COURT: Sure. Sure.

23 SOLICITOR POULOS: Okay.

24 MR. SHEALY: Thank you.

25 (Pause.)

1 THE COURT: All right. Mr. Shealy, defense ready to
2 proceed?

3 MR. SHEALY: It is, Your Honor.

4 THE COURT: Ms. Poulos, State ready?

5 SOLICITOR POULOS: Yes, sir, Your Honor.

6 THE COURT: Very good.

7 would you bring the jury back in?

8 (WHEREUPON, the following takes place within the
9 presence of the jury.)

10 THE COURT: Thank you, sir.

11 All right. Ms. Poulos, does the State have any further
12 witnesses?

13 SOLICITOR POULOS: No, sir, Your Honor. The State
14 rests.

15 THE COURT: Very good.

16 Madam Forelady, ladies and gentlemen of the jury, as
17 far as the presentation of the evidence phase of this case
18 goes, the State has presented its case in chief. At this
19 point the defense has a right to put on some witnesses if
20 they desire to do so. Dependent on what happens with that,
21 just to let you know, the State has a right, if they choose
22 and it's relevant, to call a reply witness. Just so you
23 know.

24 All right. Mr. Shealy, do you have a witness?

25 MR. SHEALY: I do, Your Honor.

David Welch - Direct examination
by Mr. Shealy

1 We would call Deputy Welch.

2 DAVID WELCH, being first duly sworn,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. SHEALY:

6 Q All right. Officer Welch, how long have you worked for
7 the Sheriff's Office?

8 A Approximately 15 years.

9 Q Fifteen years.

10 Okay. And were you working August 14th, 2010?

11 A Yes, sir.

12 Q Okay. Did you -- were you the initial responding
13 officer to Perrin Drive --

14 A Yes, sir.

15 Q -- on this day?

16 You were.

17 All right. When you got there, who did you talk to
18 first?

19 A Mr. Holt.

20 Q Okay. And when you spoke with him, how did he describe
21 the suspect?

22 A He did not know the suspect at the time.

23 Q Okay. Did he describe him as an unknown suspect?

24 A Right.

25 Q Okay. Did you also speak with Mrs. Holt?

David Welch - Direct examination
by Mr. Shealy

- 1 A Yes, sir.
- 2 Q You did.
- 3 All right. And when you spoke with Mrs. Holt, how did
- 4 she describe him?
- 5 A I believe her exact words were, I'll get it, a black
- 6 male, middle aged, with a ball cap.
- 7 Q Okay. And did he speak to her?
- 8 A Yes.
- 9 Q Okay. Did he ask her where the safe was?
- 10 A Yes.
- 11 Q Okay. And when you spoke with Mrs. Holt, you were
- 12 trying to get to the truth, right?
- 13 A Yes, sir.
- 14 Q You were trying to get this information.
- 15 When you wrote -- you were trying to get the right
- 16 information?
- 17 A Correct.
- 18 Q Okay. And when you wrote this report you tried to make
- 19 it as, as full and detailed as you could, correct?
- 20 A Yes, sir.
- 21 Q Because that's what a report is for, right?
- 22 A Yes, sir.
- 23 Q And you've been doing this a good long while.
- 24 So, you've written some reports before?
- 25 A Yes, sir.

David Welch - Direct examination
by Mr. Shealy

1 Q Okay. And had she given you a name?

2 A Oh, initially, no.

3 Q Okay. All right. That's all I have for this witness.

4 THE COURT: No, no---

5 SOLICITOR POULOS: No cross, Your Honor.

6 THE COURT: ---cross-examination?

7 All right. May the witness be excused?

8 MR. SHEALY: He may, Your Honor.

9 THE COURT: Ms. Poulos, may this witness be excused?

10 SOLICITOR POULOS: Yes, sir, Your Honor.

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

12 WITNESS: Yes, sir.

13 THE COURT: Would you call your next witness please,
14 sir?

15 MR. SHEALY: Your Honor, we will call Estar Byrd who's
16 outside. If I may go get her.

17 THE COURT: Yes, sir.

18 MR. SHEALY: Thank you, Your Honor.

19 Your Honor, the defense would call Estar Byrd.

20 ESTAR BYRD, being first duly
21 sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MS. SHEALY:

24 Q Morning, Ms. Byrd.

25 A Good morning.

Estar Byrd - Direct examination
by Mr. Shealy

1 Q Can you tell me where you live?

2 A Florida Avenue, Spartanburg, South Carolina,
3 29303.

4 Q I'm sorry. I don't, don't know that we got the last
5 bit.

6 A Spartanburg, South Carolina, 29303.

7 Q Okay. And---

8 THE COURT: Ms. Byrd, do you mind speaking up just a
9 little bit please, ma'am?

10 WITNESS: Oh, excuse me.

11 THE COURT: Just get a little bit closer to the
12 microphone.

13 (Witness complies.)

14 THE COURT: Okay. Thank you.

15 WITNESS: You welcome.

16 Q Okay. And were you living there in August of 2010?

17 A Yes.

18 Q Okay. Did you have cause to know my, my client,
19 Mr. Gabriel Rios?

20 A Say that again please.

21 Q Did you know my client, Gabriel Rios?

22 A I didn't know him.

23 Q Didn't know him very well?

24 A I don't really know him.

25 Q Okay. But did you let him use your phone?

Estar Byrd - Direct examination
by Mr. Shealy

- 1 A Yes.
- 2 Q From time to time?
- 3 A Yes.
- 4 Q Okay.
- 5 A Yes, he asked if it was okay that he could receive
- 6 calls there. He knew the people across the street and they
- 7 always came over and used my phone.
- 8 Q Okay. And what kind of phone was that?
- 9 A A remote controlled.
- 10 Q You mean a wireless phone?
- 11 A Yeah.
- 12 Q But it's not a cell phone?
- 13 A No.
- 14 Q No.
- 15 Okay. So, it was like one of those that just is
- 16 cordless a phone I suppose would be the way of saying it?
- 17 A Yes.
- 18 Q Okay. And do you remember what that phone number was?
- 19 A I had changed phone companies. If it was, it was
- 20 (864) -2858.
- 21 Q Okay. So, (864) -2858 was your phone number back
- 22 then?
- 23 A Correct.
- 24 Q And, in fact, it's still your phone number, isn't it?
- 25 A Yes.

Estar Byrd - Direct examination
by Mr. Shealy

1 Q Okay. Now, do you remember August 14th, 2010?

2 A No.

3 Q No.

4 Okay. I didn't think you did.

5 A But I know I paid my rent on the 3rd. So, I know I was
6 there.

7 Q All right. Ms. Byrd, that's all I have to ask you.

8 Thank you, ma'am.

9 A You're welcome.

10 THE COURT: Cross-examination.

11 SOLICITOR POULOS: Yes, just briefly.

12 THE COURT: Just one second, ma'am.

13 WITNESS: Oh, excuse me.

14 CROSS-EXAMINATION

15 BY SOLICITOR POULOS:

16 Q Ms. Byrd, you just said that you don't really know the
17 defendant, Gabriel Rios, do you?

18 A No.

19 Q And you said often, from time to time you let him
20 borrow your phone, but you don't know for sure if you let
21 him borrow it on August the 14th, 2010, do you?

22 A I can't honestly speak on that.

23 Q And you can't even say that you even saw him on
24 August 14th, 2010, can you?

25 A I can't honestly say that --

Estar Byrd - Cross-examination
by Solicitor Poulos

1 Q Thank you.

2 A -- you know.

3 MR. SHEALY: Nothing further for this witness.

4 THE COURT: May she be excused?

5 MR. SHEALY: I -- yes, Your Honor.

6 SOLICITOR POULOS: Yes, Your Honor.

7 MR. SHEALY: I ask that she be excused.

8 THE COURT: All right. Thank you, Ms. Byrd. You may
9 be excused.

10 WITNESS: You're welcome.

11 MR. SHEALY: Your Honor, next we will call Sonia Rios.
12 Again, she's outside. If I may be excused.

13 THE COURT: Would you get her please, sir?

14 MR. SHEALY: Your Honor, is there any objection if she
15 stays in here since she's testified?

16 THE COURT: I have, I have no objection.

17 Does the State?

18 SOLICITOR POULOS: I don't have any objections, Your
19 Honor.

20 THE COURT: Very good.

21 MR. SHEALY: Your Honor, we would call Sonia Rios to
22 the stand.

23 THE COURT: Come around please.

24 SONIA RIOS, being first duly
25 sworn, testified as follows:

Sonia Rios - Direct examination
by Mr. Shealy

1 DIRECT EXAMINATION

2 BY MR. SHEALY:

3 Q All right. Mrs. Rios, would you state your name for
4 the record?

5 A Sonia Rios.

6 Q Okay. And how do you know my client?

7 A He's my husband.

8 Q Okay. And he's still your husband?

9 A Yeah.

10 Q Okay. Were y'all living together back in 2010, August
11 of 2010?

12 A Yeah.

13 Q You were?

14 A Yes.

15 Q Okay. Okay. Do you remember speaking with Mr. Rios
16 August 14th of 2010?

17 A Yes.

18 Q Okay. Do you remember when about that was?

19 A 7:25.

20 Q 7:25.

21 Are you sure it was 7:25?

22 I can -- I've got some, some information if you need to
23 refresh your recollection.

24 A I can't really remember.

25 Q You can't really remember?

Sonia Rios - Direct examination
by Mr. Shealy

1 A It's so long ago.

2 MR. SHEALY: Your Honor, if I may approach the witness?

3 SOLICITOR POULOS: Your Honor, I'm gonna object to
4 that. It -- if -- we need to take a matter up.

5 THE COURT: Just one second.

6 Madam Forelady.

7 (WHEREUPON, the following takes place outside the
8 presence of the jury.)

9 THE COURT: All right. I'll be glad to hear your
10 objection please.

11 SOLICITOR POULOS: Yes, sir, Your Honor.

12 What I believe Mr. Shealy is going to do is present
13 Mrs. Rios with a copy of some phone records from T-Mobile.
14 I've been provided a copy of those records, Your Honor, but
15 our objection would be that they have not been
16 authenticated. They are hearsay. We don't know where they
17 came from. There's -- there's no one here to authenticate
18 them properly or lay the foundation, Your Honor.

19 Frankly, I don't know where this came from. And, so,
20 we would object to allowing her to testify as to anything
21 regarding some phone records.

22 THE COURT: Okay. So, you're doing it on
23 authentication and hearsay grounds?

24 SOLICITOR POULOS: Yes, sir, Your Honor.

25 THE COURT: All right. Mr. Shealy.

Sonia Rios - Direct examination
by Mr. Shealy

1 MR. SHEALY: Your Honor, I'm not offering the records
2 themselves. I'm offering to refresh her recollection. If
3 she looks at them and says I still can't remember, she still
4 can't remember.

5 SOLICITOR POULOS: Your Honor, he can refresh her
6 memory on previous statements she's made, but not on a
7 T-Mobile copy of a phone record. I think that's improper.

8 THE COURT: Well---

9 MR. SHEALY: Your Honor?

10 THE COURT: ---and I was just looking at the rule, and
11 my impression was that the writing that they used to refresh
12 their recollection has to be something that was created or
13 they had input in at the time it was created.

14 Is that not the way that the rule reads, Mr. Shealy?

15 MR. SHEALY: Your Honor, I simply read it as any
16 writing. A witness uses a writing to refresh memory.

17 Your Honor, there is no -- there is, in other words,
18 no -- we can use anything, Your Honor, is essentially our
19 position in so long as it will refresh her recollection.
20 Now, if it doesn't refresh her recollection, she can say
21 that doesn't refresh my recollection. But I don't think
22 that there's any, any limits placed on it.

23 If, again, I were offering the document to prove the
24 truth asserted therein that would be hearsay. But it
25 doesn't fall within hearsay, Your Honor, and because I'm not

Sonia Rios - Direct examination
by Mr. Shealy

1 offering it as evidence, and I'm offering it as evidence, it
2 has no authentication requirement. I'm just asking her if
3 that will help her remember and she can use it.

4 Now, if it doesn't help her --.

5 THE COURT: Well, in looking at the rule, Ms. Poulos, I
6 don't see any requirement in the rule itself, and that would
7 be Rule 612, that there be a writing that was actually done
8 or prepared by the witness or at the witness' direction.

9 Do you have any authority for that proposition?

10 SOLICITOR POULOS: That what, Your Honor?

11 THE COURT: Do you have any authority for the
12 proposition that is required in order for 612 for the
13 writing to be used to refresh a witness' recollection?

14 SOLICITOR POULOS: No, sir, Your Honor. It would -- I
15 would just submit that I was provided with a copy of phone
16 records they just say Sonia Rios' name. We don't even know
17 for a fact that they were her records. It's -- all these
18 documents prove is that it was a phone billed to this name,
19 and, again, there's no one here from T-Mobile, from the
20 company, that can properly authenticate a document that
21 she's going to be used to refresh her memory.

22 So, again, Your Honor, it's absolute hearsay.

23 THE COURT: All right.

24 SOLICITOR POULOS: Absolute problems with
25 authentication.

Sonia Rios - Direct examination
by Mr. Shealy

1 THE COURT: I hear you. I'm gonna note your objection.
2 I'm gonna allow him to use that writing to refresh this
3 witness' recollection. I have to say I was, you know, first
4 blush, I was under the impression that maybe it had to be
5 something created by her, but since the writing is not gonna
6 be submitted into evidence unless it is requested to be,
7 then we will revisit the issue of authentication. But at
8 this point, solely for the purpose of refreshing her
9 recollection.

10 MR. SHEALY: Yes, Your Honor. I have no plans on
11 entering it into evidence.

12 THE COURT: Okay. Are you ready to proceed, Mr.
13 Shealy?

14 MR. SHEALY: I am, Your Honor.

15 THE COURT: Ms. Poulos, you ready to proceed?

16 SOLICITOR POULOS: Yes, sir.

17 THE COURT: All right. Bring the jury in.

18 (WHEREUPON, the following takes place within the
19 presence of the jury.)

20 THE COURT: Thank you, sir.

21 All right. Mr. Shealy.

22 MR. SHEALY: Thank you, Your Honor.

23 CONTINUED DIRECT EXAMINATION

24 BY MR. SHEALY:

25 Q Mrs. Rios, I'm gonna hand you this document in order to

Sonia Rios - Direct examination
by Mr. Shealy

1 refresh your recollection as to that telephone call. If
2 you'll look that over, and tell me when you're done.

3 A Uh-huh. (Affirmative).

4 Q Are you done?

5 A (Witness nods affirmatively.)

6 Q Okay. Do you recall receiving a telephone call from
7 your husband that morning?

8 A Yes.

9 Q Okay. Do you remember what telephone number he was
10 using?

11 A number.

12 Q
13 what was the rest of that number?

14 Do you remember?

15 A -2858.

16 Q 2858?

17 A Yes.

18 Q I'm sorry. We need you to speak up. We've got a court
19 reporter here.

20 A -2858.

21 Q Okay. Do you know whose telephone number that is?

22 A I mean I don't remember her name.

23 Q Okay. But do you know how he would of been able to use
24 that telephone?

25 A He was at her house.

Sonia Rios - Direct examination
by Mr. Shealy

1 Q Okay.

2 A Staying at her house.

3 Q All right. And she let him use the telephone every
4 once in a while?

5 A Yes.

6 Q Okay. Mrs. Rios, it's been -- the question was asked
7 earlier about where Mr. Rios is from.

8 Is he from Cuba?

9 A He is mixed with Puerto Rican, but he was born in
10 Miami, Florida.

11 Q All right. So, he didn't come from Cuba?

12 A No.

13 Q No.

14 Okay. All right. Mrs. Rios, I do have one more
15 question, and it deals with your past.

16 Okay. Can you remember, in 2008, were you ever
17 convicted of giving false information to law enforcement,
18 fire department, or the rescue department?

19 A Yeah.

20 Q You were convicted of that?

21 A Yeah.

22 Q Did you pay a fine?

23 A Yes.

24 Q Okay. Are you lying today?

25 Are you lying today?

Sonia Rios - Direct examination
by Mr. Shealy

1 A No, sir.

2 Q Okay. You're not trying to save your husband?

3 A No, sir.

4 Q Okay. You weren't with him that morning, were you?

5 A No, sir.

6 Q Okay. All you did was get a phone call from him,
7 correct?

8 A Yes.

9 MR. SHEALY: Okay. If I may approach the witness to
10 get that?

11 THE COURT: Yes, sir.

12 MR. SHEALY: Thank you.

13 Q Thank you, Mrs. Rios. If you'll answer any questions
14 the solicitor has for you.

15 THE COURT: Cross-examination.

16 SOLICITOR POULOS: Yes, sir.

17 CROSS-EXAMINATION

18 BY SOLICITOR POULOS:

19 Q Mrs. Rios, do you love your husband?

20 A Yes, I do.

21 Q How long have you been married to him?

22 A Twenty-one years.

23 Q You weren't at the Holt's house on August the 14th,
24 2010, were you?

25 A Can you repeat that question again?

Sonia Rios - Cross-examination
by Solicitor Poulos

1 Q Were you at Perrin Drive on August 14th, 2010?

2 A Me?

3 Q Yes.

4 A No.

5 Q Okay. And you weren't with your husband on the morning
6 of August 14th, 2010, correct?

7 A No, ma'am.

8 Q Okay. And you don't deny that you have been convicted
9 in 2008 for giving false information to police, do you?

10 A No.

11 Q Okay. Thank you.

12 THE COURT: Redirect?

13 MR. SHEALY: I have no redirect, Your Honor.

14 THE COURT: May this witness be excused?

15 MR. SHEALY: She may, Your Honor.

16 SOLICITOR POULOS: Yes, Your Honor.

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

18 MR. SHEALY: I'm gonna have one more witness, Your
19 Honor.

20 THE COURT: Okay, sir.

21 MR. SHEALY: Your Honor, the defense would call Curtis
22 Jones, Public Defender's Office.

23 CURTIS JONES, being first duly
24 sworn, testified as follows:

25 DIRECT EXAMINATION

Curtis Jones - Direct examination
by Mr. Shealy

1 BY MR. SHEALY:

2 Q All right. Mr. Jones, would you state your name for
3 the record?

4 A Curtis Jones.

5 Q All right. And where are you employed?

6 A At the Seventh Circuit Public Defender's Office.

7 Q How long have you worked there?

8 A I been there approximately two and a half years.

9 Q And what did you do before that?

10 A I was a deputy sheriff, Spartanburg County, retired
11 now.

12 Q Okay. How long were you a deputy sheriff?

13 A Twenty-eight years.

14 Q Twenty-eight years.

15 And during that time where did you work primarily?

16 A Primarily I worked investigations.

17 Q Okay. Did you -- what was your assigned area?

18 Generally were you in the city or in the county or---

19 A The City of Spartanburg mostly. When I was in the
20 civil division and things like that was the City of
21 Spartanburg.

22 Q Okay. So, you've, you've driven the roads of
23 Spartanburg quite a bit?

24 A Yes.

25 Q And you're familiar with them?

Curtis Jones - Direct examination
by Mr. Shealy

- 1 A Yes.
- 2 Q Okay. Intimately, correct?
- 3 A Yes.
- 4 Q All right. Did you ever have calls to drive out to
- 5 Perrin Drive, Perrin Drive?
- 6 A Sure. I think on -- back in February the 8th.
- 7 Q Okay. Of this year?
- 8 A This year.
- 9 Q Okay. And did you -- where did you go?
- 10 From Perrin Drive to where?
- 11 A Florida Avenue.
- 12 Q Okay. Florida Avenue?
- 13 A Florida Avenue.
- 14 Q Okay. What direction did you take or what path did you
- 15 take?
- 16 A Path, we left Perrin Drive, got on Webber Road, Webber
- 17 Road to East Main Street.
- 18 Q Okay.
- 19 A East Main Street to Drayton Avenue, Drayton Avenue to
- 20 Pine Street, Pine Street to Wood Street by the hospital, and
- 21 then to Florida Avenue off Wood Street.
- 22 Q Okay. And about how far is that?
- 23 A On the mile meter it's like 5.2 miles.
- 24 Q 5.2 miles?
- 25 A 5.2 miles.

Curtis Jones - Direct examination
by Mr. Shealy

- 1 Q And about how long does that take you to drive?
- 2 A I think we started -- I think it was 3:53PM and ended
- 3 up at 4:09PM.
- 4 Q Okay. So, approximately 16 minutes?
- 5 A About 16 minutes.
- 6 Q Okay. And were you driving as fast as traffic would
- 7 allow you to?
- 8 A Yes.
- 9 Q Okay.
- 10 A In the flow of traffic.
- 11 Q And did you take the fastest route that you come, come
- 12 up with or go between Perrin Drive and Florida Avenue?
- 13 A Yes.
- 14 Q All right. So, you weren't trying to sandbag anybody,
- 15 are you?
- 16 A No, sir. No.
- 17 Q No.
- 18 You're -- you didn't take the long road, go all the way
- 19 around Robin Hood's barn to get there?
- 20 A No, we didn't do that.
- 21 Q We went from Perrin Drive---
- 22 A Perrin Drive straight---
- 23 Q ---to Florida Avenue?
- 24 A ---directly to Florida Avenue.
- 25 Q And, again, you know the streets of Spartanburg pretty

Curtis Jones - Direct examination
by Mr. Shealy

1 well, correct?

2 A Yes.

3 Q And that was, in your opinion, the most intelligent
4 route to take?

5 A Yes, it was.

6 MR. SHEALY: Okay. All right. I have no further
7 questions for Mr. Jones. Thank you.

8 THE COURT: Cross-examination.

9 SOLICITOR POULOS: No cross, Your Honor.

10 THE COURT: All right. Thank you, sir. You may step
11 down.

12 WITNESS: Yes, sir.

13 THE COURT: All right. Any additional witnesses?

14 MR. SHEALY: Your Honor, that will be all our
15 witnesses.

16 THE COURT: Very well.

17 Madam Forelady, at this point I need to take up some
18 matters with the attorneys. I'm gonna send you back to your
19 jury room, and I'll bring you back as soon as we're ready to
20 proceed.

21 Okay.

22 (WHEREUPON, the following takes place outside the
23 presence of the jury.)

24 THE COURT: Any motions from the State?

25 SOLICITOR POULOS: No, sir, Your Honor.

1 THE COURT: None.

2 okay.

3 SOLICITOR POULOS: No, sir.

4 THE COURT: Okay. Let me ask you this.

5 Do you intend to call -- I assume you're just gonna
6 reiterate your motions?

7 MR. SHEALY: I am, Your Honor.

8 THE COURT: Anything new?

9 MR. SHEALY: No, Your Honor.

10 THE COURT: Okay. I'll be glad to let you argue, but at
11 this stage---

12 MR. SHEALY: Yes, sir, I have nothing new to offer.

13 THE COURT: Okay. Are you gonna call a reply case?

14 SOLICITOR POULOS: No, Your Honor. We are not gonna
15 call any reply witnesses.

16 THE COURT: Okay. What I'd like to do is just let one
17 of my bailiffs send word back that we're going to be a
18 little bit extended. So, you can relax a little bit. I'm
19 gonna do a charge conference with you guys.

20 Is that okay?

21 SOLICITOR POULOS: Yes, sir.

22 THE COURT: Do you -- okay. Do you mind telling the
23 jury that we'll be a little while and then we'll get them
24 back as soon as we can?

25 SOLICITOR POULOS: Your Honor, do you anticipate us

1 closing prior to lunch or taking a lunch break and then
2 closing?

3 THE COURT: I would -- well, let me tell you,
4 they're -- we have other trials. I don't see -- you know,
5 if you want to take a break, I'm gonna give you a break.
6 But I'd soon get, go forward.

7 Do you want a break?

8 SOLICITOR POULOS: I would like one, Your Honor, just
9 to collect my thoughts and---

10 THE COURT: All right.

11 SOLICITOR POULOS: ---if the Court would be so
12 inclined.

13 THE COURT: Mr. Shealy, what's your thought on it?

14 MR. SHEALY: Your Honor, that's fine with me.

15 THE COURT: Okay. Let me go get my charges and go over
16 that and the verdict form with you.

17 (WHEREUPON, a bench conference was held at this time.)

18 THE COURT: Let me just tell, Mr. Rios, and Mrs. Holt,
19 Mr. Holt, what we're gonna do, the State's gonna make copies
20 of the law that I'm gonna charge in this matter. Then we're
21 gonna go back and discuss that law in my chambers, and I'll
22 come back in here in the courtroom and put everything about
23 our discussion on the record.

24 Okay. I'll give your attorneys and the State the right
25 to put more information on the record if I don't cover it

1 all. That way we know it's all there.

2 okay. If you'll just come back in my chambers and
3 we'll have that done.

4 SOLICITOR POULOS: Yes, sir, thank you.

5 THE COURT: Mr. Shealy.

6 SOLICITOR GHENT: Thank you, Your Honor.

7 (WHEREUPON, a short recess was taken at this time.)

8 THE COURT: All right. I reviewed the charges with
9 counsel in my chambers and I want to put the, the substance
10 of our meeting in chambers on the record, and I'll ask both
11 attorneys to fill in any additional information you feel
12 needs to be put on the record.

13 As far as the burglary first charge, I reviewed my
14 standard charge and it consists of one, two, three, four,
15 five, six pages. I would charge from the other applicable
16 circumstances which would begin on Page 3 of the charge,
17 Item Number 1, and then I'd skip down to Item Number 3. I
18 will charge Item Number 4 and then I'd stop. I would give,
19 I would give no further part of that charge.

20 Is that correct from your, from our analysis of it, Ms.
21 Poulos?

22 SOLICITOR POULOS: Yes, sir, Your Honor, that's
23 correct.

24 THE COURT: Mr. Shealy.

25 MR. SHEALY: Yes, Your Honor.

1 THE COURT: Not that you necessarily agree or disagree.
2 I'm just saying that's what we, what we -- I concluded.

3 MR. SHEALY: Yes, sir.

4 THE COURT: Looking at the armed robbery charge, which
5 consists of one, two, three, four pages, I would stop at the
6 top of the, the third page that ends it is not operating.
7 The rest of the charge I would not give.

8 Is that correct?

9 SOLICITOR POULOS: Yes, sir, Your Honor.

10 THE COURT: Correct?

11 MR. SHEALY: It is, Your Honor.

12 THE COURT: Okay. Then under the possession of a
13 weapon during the commission of a violent crime charge, the
14 only violent crime that would be related to the jury based
15 on the indictments in this matter would be armed robbery.

16 Correct?

17 SOLICITOR POULOS: That's correct, Your Honor.

18 MR. SHEALY: That's correct, Your Honor.

19 THE COURT: Okay. The kidnapping charge, two pages
20 would be charged in its entirety.

21 The assault and battery first degree I would do -- I
22 would not charge Item 1, but I would pick up with Item 2,
23 which starts about the middle of the page and finish the
24 charge down through the remainder of the page. It consists
25 of one page.

1 Is that correct, Ms. Poulos?

2 SOLICITOR POULOS: Yes, sir, Your Honor, that's
3 correct.

4 THE COURT: Mr. Shealy.

5 MR. SHEALY: It is, Your Honor.

6 THE COURT: Now, I would say that the gist of our
7 discussion had to do with whether or not the defense of
8 alibi would be charged to the jury. I ruled that it would
9 not be. I looked at the State versus Robbins case. I, I
10 heard Mr. Shealy strenuously object to that, and I'm gonna
11 let you place all your objections on the record and argue it
12 further.

13 But my basis of that, I know that my duty, as trial
14 judge, is to charge the law that's in evidence. It's not
15 for me to make a decision as to whether or not there's
16 sufficient standard of proof met. That's for the jury to
17 make the decision.

18 But in this case, and viewed in the light most
19 favorable to the defendant in this matter, the evidence was
20 that, at 7:22, a charge, a call was placed from -- oh, the
21 neighbor. Let me see.

22 Her name is Byrd?

23 I think it's Ms. Byrd?

24 MR. SHEALY: Yes, Your Honor.

25 THE COURT: Estar Byrd's residence to the defendant's

1 wife, wife, Mrs. Rios, and, therefore, he was not present at
2 the Perrin Drive location. He couldn't have committed
3 that act.

4 Based on the investigators running of the distance
5 between the two, which took a total of 16 minutes on the
6 route he took, now the testimony in this case from the
7 victim was that this -- she wasn't exactly sure when this
8 took place, but it was some time between 7:30 and 8:00.

9 In looking at the Robbins case, it says that it was a
10 physical impossibility for the defendant to have committed
11 the crime because he was somewhere else during the entire
12 period.

13 Now, even in the light most favorable to Mr. Rios, if
14 you look at the 7:22 or 7:24 time frame, then you add 16
15 minutes to it, there's still time for him to have gotten
16 from the Florida Street address to the Perrin Street
17 address, and, therefore, there's insufficient evidence in
18 the record for alibi to be charged because the entire time
19 period in which the crime occurred, at least on the, based
20 on the evidence in the record, is not covered by the other
21 evidence presented in this matter.

22 Now, that being stated, Mr. Shealy, I'll be glad for
23 you to add or first does that relatively relate what we
24 stated in my, I stated to you in my chambers?

25 MR. SHEALY: It is, Your Honor.

1 THE COURT: Do you agree with that, Ms. Poulos?

2 SOLICITOR POULOS: Yes, sir, I agree.

3 THE COURT: And certainly I want you to object on the
4 record cause you told me you needed to, and I agree with
5 you, and I want you to put anything on the record you feel
6 like you must.

7 MR. SHEALY: Yes, sir, as to the not charging alibi,
8 then it would be our position that whenever there's a range
9 given, necessarily there's, there's -- it's difficult to
10 prove where you were every minute of every day.

11 THE COURT: Sure.

12 MR. SHEALY: And because of that, where we can at least
13 cover part of that time, the jury may find that this, given
14 the information presented, for example, Ms. Ollinger, who
15 said it would of been around 7:30 when she was walking, that
16 it would be towards the beginning of that route where my
17 client couldn't have done this.

18 Your Honor, also there's -- there's other evidence in
19 the record. It would simply be our position that where
20 there is a partial alibi given, that that should be at
21 least -- because, again, a jury can, if they so choose,
22 decide to find that it was earlier in that range or later in
23 that range and that's up to them. But if it is earlier in
24 that range, then they need to know the law which they should
25 apply, and, in this case, the law would be, if it was

1 earlier in this range, the law of alibi. I understand
2 there's, there's a case, Your Honor, and then, and I---

3 THE COURT: Let me just tell you this, and I, and I
4 want to add this to the record too. I told you that I'm
5 gonna let you argue essentially the alibi defense because I
6 think that the information that you presented did
7 potentially interject reasonable doubt into the equation.
8 So, I'm gonna let you argue that cause I think that would be
9 fine. I'm unaware of any case that says that partial alibi
10 is sufficient.

11 In other words, if you couldn't have been there during
12 part of the potential time, but your alibi doesn't cover the
13 entire period of time in which the crime occurred, then
14 alibi is sufficient.

15 MR. SHEALY: Yes, sir, and in all candidness, I've done
16 a little quick research here and I have not been able to
17 find---

18 THE COURT: I'll be glad to continue doing that, and if
19 I find that I'm incorrect, I'll, you know, I will change my
20 ruling on that.

21 MR. SHEALY: Thank you, Your Honor.

22 THE COURT: But as far as your argument goes, I'm not
23 gonna prohibit you from arguing essentially alibi, and if I
24 charge it, I charge it, which shouldn't make a difference in
25 your, in your closing.

1 MR. SHEALY: Thank you, judge.

2 THE COURT: Okay. Now, Mr. Shealy, other than what
3 I've placed on the record, anything further from your
4 meeting and Ms. Poulos meeting and mine that, in my
5 chambers, that needs to be placed on the record?

6 MR. SHEALY: I don't believe so, no, sir.

7 THE COURT: Very good.

8 Ms. Poulos.

9 SOLICITOR POULOS: No, sir, Your Honor. I think you've
10 covered everything.

11 THE COURT: Okay. Very good.

12 Now, finally, the verdict form. I believe both parties
13 agree that the verdict form is proper?

14 SOLICITOR POULOS: Yes, Your Honor.

15 MR. SHEALY: Your Honor, we do. I do need to ask do
16 you intend to charge my client's silence will not be held
17 against him?

18 THE COURT: I'll do that. Oh, yeah, let me do that.

19 MR. SHEALY: Okay.

20 THE COURT: Thank you for reminding me.

21 Have either one of you guys ever tried a case with
22 Judge Hill out of Greenville?

23 I basically shameless plagiarized his, body of his, his
24 charge in -- cause I liked it and that's what I'll do. Let
25 me go over that with you.

1 MR. SHEALY: I'm sorry, judge. I just thought to ask
2 you that.

3 THE COURT: Sir?

4 MR. SHEALY: I just thought of it to ask you about
5 that. I just asked -- I just thought of asking you about
6 it.

7 THE COURT: Oh, yeah, you should. Yeah, I need you to.
8 All right. All right. The basic structure of my
9 charge, y'all be seated please, is this.

10 I have three parts to it. The first part is where I go
11 through and, and define the duties that control the jurors
12 duties as jurors, and then I go next to the second part
13 which is the instruction on the substantive law that we've
14 just been over, and then I give them some instructions about
15 their deliberations.

16 In my general rules, in fact, I have the charge here.
17 If you would prefer, I'll let both of you sit down and look
18 at it or I can just summarize to you what it is.

19 MR. SHEALY: I think a summary will be fine.

20 THE COURT: Okay. Well, in there, as I've been telling
21 them throughout the whole trial, that they have to find the
22 facts and the evidence in this case and to that they got to
23 apply the law, and they have to follow the law. They
24 shouldn't be concerned, shall not be concerned with what
25 they wish it was, but they have to apply it as it is, as I

1 give it to them, and they are not to be influenced by any
2 person's likes or dislikes, opinions, prejudice, or undue
3 sympathy they may have for one side or the other.

4 That means that they have to decide the case solely
5 based on the evidence presented here in this courtroom, and
6 from no where else and according to the law as I gave it to
7 them, and I'll remind them that, that their oath requires
8 them to do just that. And I'll remind them that, in
9 following my instructions, they have to follow all of them.
10 They can't pick out the part of my instructions that they
11 like and apply those and disregard parts of my instructions
12 that they may not like.

13 Also, I remind them again that if I've done anything
14 that indicates to them the facts that they are to find them,
15 i.e. the verdict they are to reach, they are to disregard
16 that. Our Constitution does not let me have an opinion. I
17 do not and they and they alone are the judges of the facts
18 and they are to determine those facts by evaluating and
19 weighing the evidence they heard during this trial, and I
20 tell them I can't give them a scale in a literal sense. It
21 is a mental process, and if they evaluate and weigh the
22 evidence by using their good common sense and sound
23 judgment.

24 Then I tell them what is evidence, and sworn testimony
25 and the exhibits in this case. There's no stipulations.

1 Right?

2 SOLICITOR POULOS: Right, Your Honor.

3 MR. SHEALY: No, Your Honor.

4 THE COURT: So, the only true evidence in this case is
5 the testimony and exhibits that have admitted. Things that
6 are not evidence, I'll remind them that your arguments, the
7 statements, and things of that nature is not evidence, and
8 you know, remind them about the objections, it's not
9 evidence, and that you have the duty to do that, and, in
10 fact, if you objected or to the extent I allowed them to be
11 in here while I ruled on them, shall not be a part of their
12 deliberations whatsoever.

13 I don't think there's any evidence stricken from this
14 case. I can't recall---

15 MR. SHEALY: No, Your Honor, there wasn't.

16 THE COURT: ---any. Then I tell them anything that's
17 not, they heard when Court was not in session.

18 MR. SHEALY: I believe so.

19 SOLICITOR POULOS: I don't think so, Your Honor.

20 THE COURT: Okay. I, I -- my notes don't indicate I
21 struck anything. You know, I normally will do that cause I
22 go back and put it in my charge.

23 I'll go in and give them the types of evidence we
24 recognize in South Carolina being direct and circumstantial.
25 I give examples and I, I'll tell you the examples cause I've

1 had people object. People like, you know, Mr. Ghent, who's
2 an academic sometimes. They would, you know, object to my
3 exhibit, my examples.

4 The direct evidence, the example, would be an eye
5 witness on the corner and a car runs a stop light, that
6 would be direct testimony, and I define it and then I give
7 an example.

8 Indirect, I tell the jury that imagine going to bed and
9 there's a, a fresh sheet of snow in your front yard. You
10 wake up in the morning and they're tracks in your yard. You
11 may reasonably infer that someone or some thing walked
12 through your yard during the night although you didn't see
13 that. There's an inference from that.

14 Do either one of you have an objection to those
15 examples?

16 MR. SHEALY: No, Your Honor.

17 SOLICITOR POULOS: No, Your Honor.

18 THE COURT: Okay. Mr. Ghent, do you have -- I'm
19 picking on you here, buddy. I'm kidding with you.

20 SOLICITOR GHENT: Your Honor, I apologize for any
21 academics I've injected into the proceedings.

22 THE COURT: Anyway.

23 Okay. And I tell them that the law makes no
24 distinction between the weight and value to be given to
25 direct or indirect evidence. The only prohibition is if

1 they're gonna draw an inference from another fact, that
2 inference may not lead to speculation or conjecture.

3 Okay. But as long as it doesn't, then they can use it
4 and it's no greater weight required of circumstantial than
5 for direct.

6 I tell them, after considering all the evidence, if
7 they find the defendant is not guilty beyond a reasonable
8 doubt, it would be their duty to find him not guilty. So --
9 but in making the determination, it will be necessary that
10 you must consider which evidence you're going to believe and
11 which evidence you're not going to believe, and that is
12 called credibility of the witnesses, and I go through the
13 litany about, excuse me, factors they can consider, and the
14 fact that they can disbelieve one or disbelieve all or part
15 of anybody's testimony. They may believe all of it. They
16 may believe one against many or one, or many against one,
17 and then I give them the factors. But I tell them what they
18 don't do is add up the number of witnesses that may have
19 testified from one side or the other in making the
20 determination cause it doesn't matter which side the truth
21 comes from.

22 Also I give them the charge on expert testimony. It
23 has to do that they have a right to accept it, reject it, or
24 give them as much weight as it deserves based on the
25 evidence presented and the reasons for it. I remind them

1 that the fact the defendant was arrested and indicted is not
2 evidence of guilt. It does not raise the inference or a
3 presumption of his guilt. It's just simply the document
4 brought here under, the State uses to bring him before them
5 for their decision.

6 And also I give them a charge on multiple indictments,
7 which we have, and tell them that each indictment charges a
8 separate and distinct offense and that you must decide each
9 indictment separately uninfluenced by your decision as to
10 any other indictment, and the defendant may be convicted or
11 acquitted on any and all the offenses charged, and in your
12 verdict form you'll be asked to write a separate verdict for
13 each charge.

14 I go then to charge them on the presumption of
15 innocence, the reasonable doubt, and intent, and I'll end up
16 with failure of the defendant to testify. I may be getting
17 my case -- do we have an identification matter in this case?

18 SOLICITOR POULOS: We did, Your Honor, the lineup and
19 Mrs. Holt's in Court information as well.

20 THE COURT: That's right. We did. Excuse me.

21 Okay. Then I charge them on identification. Then I'd
22 go to the substantive law. Then at the end I tell them
23 about their duty to deliberate, and deliberation means a
24 careful weighing up of a view to a decision, and I'll tell
25 them regardless of what they may think about our system that

1 I would submit to them that allows 12 different people from
2 12 different walks of life from 12 different prospective
3 states to sift through a trial, to listen to the evidence,
4 to listen to the law, and to ultimately reach a verdict.

5 We call them deliberations for a reason. They are to
6 consider all the evidence carefully and, and courteously.
7 They are to discuss it with each other fully in a calm and
8 courteous manner, that they're not advocates or partisans
9 for one side or the other, but they're simply judges of the
10 facts, and their sole interest is to see that justice is
11 done from the evidence they heard in the courtroom, and
12 according to the laws as I've given it to them, and that
13 they are to listen to everyone's points of view, consider
14 their points of view, talk through their points of view,
15 and, and listen to all, and go through all the evidence.

16 If you're doing some deliberately, you're not to be
17 hurried, and they shouldn't be in one today because this is
18 an important case for both the State and to the defendant
19 and this is their only day in Court. That in order for
20 their verdict to stand it must be unanimous. But with that
21 being said, each one of them have to decide the case by
22 themselves. But they should only do so after they have
23 impartially considered all the evidence, they've discussed
24 it with other jurors, you've listened to other juror's point
25 of view, and discussed their points of view.

1 I tell them don't be afraid to change your opinion if
2 the discussion persuades you that you should do so. But do
3 not come to a decision simply because the other jurors
4 thinks it's right, and it is important that they attempt to
5 reach a unanimous verdict, but they can only do that after
6 they've made their own decision, and they are not to change
7 their honestly, honest belief about the weight of the
8 evidence simply to appease the other jurors.

9 Then I'll give the instructions to the forelady about
10 filling out the verdict form and communicating with the
11 Court during, if there's any need.

12 Now, again, I'll give you the option -- I'll make an
13 offer if you want to take a look at the exact charge, but I
14 pretty much covered in at this stage, and it is what it is.

15 Okay. For the record, Ms. Poulos, any objections to
16 the, the skeletal part of my charge?

17 SOLICITOR POULOS: No, sir, Your Honor.

18 THE COURT: Mr. Shealy.

19 MR. SHEALY: No, sir, Your Honor.

20 THE COURT: All right. All right. Let's bring the
21 jury in, dismiss them. Anybody that wants time to go get
22 their heads together, come back at one o'clock, is that
23 correct?

24 SOLICITOR POULOS: Yes, sir.

25 MR. SHEALY: Yes, sir.

1 THE COURT: All right.

2 (WHEREUPON, the following takes place within the
3 presence of the jury.)

4 THE COURT: Okay. Madam Forelady, ladies and gentlemen
5 of the jury, first let me thank you for your patience. I
6 know that jurors sometimes think that we're sitting out here
7 drinking tea and lemonade and not working. But I can assure
8 you that is not the case.

9 What I have told these lawyers I'm gonna do is let you
10 go have an early lunch. They need to get their thoughts
11 together so they can give you some closing arguments. I'm
12 gonna bring you back here a few minutes before 1:00. I will
13 then have them begin their closing arguments at one o'clock
14 and hopefully promptly at one o'clock. I will then charge
15 you on the law. Then we'll have a brief conference with the
16 attorneys and you'll be allowed to deliberate the case.

17 Okay. I'll remind you, over your lunch break, however,
18 please don't speak amongst yourselves or with anyone about
19 the case. I'm gonna excuse you at this point.

20 Thank you.

21 (WHEREUPON, the following takes place outside the
22 presence of the jury.)

23 THE COURT: Any additions or exceptions to my
24 instructions to the jury just now?

25 SOLICITOR POULOS: Nothing from the State, Your Honor.

1 THE COURT: Mr. Shealy.

2 MR. SHEALY: None from the defense.

3 THE COURT: All right. Guys, we'll be in recess until
4 one o'clock.

5 MR. SHEALY: Thank you, judge.

6 SOLICITOR POULOS: Thank you.

7 (WHEREUPON, Court was in recess for the evening.)

8 THE COURT: Anything from the State?

9 SOLICITOR POULOS: No, sir, Your Honor. State's ready.

10 THE COURT: From the defense?

11 MR. SHEALY: Nothing, Your Honor.

12 THE COURT: Do you want me to ask if there's any
13 rebuttable in this matter or you just want to go back
14 straight into closing arguments?

15 SOLICITOR POULOS: We'll go straight to closing, Your
16 Honor. We're, we're gonna waive arguing, arguing on the law
17 first.

18 THE COURT: You have a problem with that?

19 MR. SHEALY: No, sir.

20 THE COURT: Would you bring the jury in?

21 (WHEREUPON, the following takes place within the
22 presence of the jury.)

23 THE COURT: Thank you, sir.

24 All right. Madam Foreman, ladies and gentlemen of the
25 jury, we have completed the presentation of the evidence

1 phase of this case, of this case. We will now go into
2 closing arguments.

3 Is the State ready?

4 SOLICITOR POULOS: State's ready, Your Honor.

5 THE COURT: Defense ready?

6 MR. SHEALY: It is, Your Honor.

7 THE COURT: Okay. Ms. Poulos.

8 SOLICITOR POULOS: Your Honor, we'll, we'll waive
9 opening.

10 THE COURT: You'll waive opening on the law?

11 SOLICITOR POULOS: Yes, sir.

12 THE COURT: Okay. Excuse me. I misunderstood you.

13 SOLICITOR POULOS: That's okay.

14 THE COURT: Mr. Shealy.

15 MR. SHEALY: Thank you, Your Honor.

16 THE COURT: All right.

17 MR. SHEALY: All right. Ladies and gentlemen, you've
18 heard everything, all the evidence in this case. Okay.
19 Anything else that you might want to hear about, anything
20 else you might wish had been put in front of you, it's, it's
21 just not gonna come in. There's nothing else for y'all to
22 see.

23 And I told you at the opening argument that I explained
24 to you how I learned about reasonable doubt cause my dad was
25 a defense attorney for many many years. He still is. And

1 the way he taught me reasonable doubt was an example of
2 going to the supermarket. Okay. You go to the Food Lion or
3 Bi-Lo or wherever it is that you might go shopping, and you
4 go to the meat counter, and in that meat counter you'll see
5 any number of pieces of meat including generally there's a,
6 it's own area marked off.

7 And in that area there's usually some, some meat that
8 is, the expiration date is either that day or maybe there's
9 been two dates put over the top of it. I'm sure we've all
10 seen that before. It goes for milk too. And you look at
11 that meat, and you think I don't know if that's a good idea
12 or not.

13 That's a reasonable doubt. Maybe you ultimately buy
14 that meat. Maybe you think well, I'll just -- it will, it
15 will be all right. Maybe you ultimately think that that
16 meat is good, but you hesitate. It's the doubt that will
17 cause a reasonable person to hesitate to act. In this case,
18 the act is buying it. And, as I said, the ultimate decision
19 you make doesn't matter. The fact that you hesitated is
20 enough for reasonable doubt.

21 And, ladies and gentlemen, I think this, this case is
22 ripe with reasonable doubt, and I'm gonna start with some
23 issues that just bother me. They may not bother you. But
24 they bother me.

25 Officer Howard testified, and I'm gonna show you

1 State's Exhibit No. 2 I believe it is, that he found this
2 rock in this hallway down in this area, and that's the,
3 around in front of the office. They say that the kitchen
4 window that was broken or the kitchen door window pane that
5 was broken is right here.

6 Ladies and gentlemen, you can't throw a rock through
7 this door and have it end up well over here. I, I don't
8 understand how that can be. They want you to draw this
9 inference. They, they want you to not care that that
10 doesn't make any sense. They want you to just assume that
11 that's what was used to break the window.

12 They haven't proven that. They just haven't proven
13 that, and, I'm sorry, but that bothers me, and that's the
14 problem ultimately with the State's case is that they just
15 want you to assume a whole bunch of things despite the fact
16 they just haven't proven any of them.

17 Ladies and gentlemen, the tape at issue is painter's
18 tape. Everybody's testified my client is a trained
19 construction worker. He's been doing construction for years
20 and years and years. He knows what painter's tape is.

21 It's easily taken off. You're not gonna use that in
22 these circumstances unless you don't know what it is. It
23 just doesn't make any sense, and they want you to just
24 assume well, just -- yeah, but maybe it's just the only tape
25 he had.

1 surely there was other tape in that house. Surely he
2 knew where it was cause they testified he knew that house
3 intimately. But he didn't use that.

4 Ladies and gentlemen, that just doesn't make sense, and
5 I have a problem with that, that they just haven't proven
6 these things. They haven't explained these things, and they
7 want you to refuse to look at these things because they have
8 Mrs. Holt, who admittedly she's gone through an emotional
9 time. Okay. A very traumatic incident, and nobody denies
10 that. And I don't doubt that both Mr. and Mrs. Holt today
11 believe that it was my client who did this, that they
12 believe it with every fiber of their being.

13 But, ladies and gentlemen -- and they've testified that
14 they knew it was him from the beginning. They immediately
15 recognized him. That's what they testified to yesterday,
16 but the records don't match that. They just don't match
17 that.

18 You saw Investigator or Deputy Welch whose worked for
19 the Sheriff's Office for 15 years, he's written any number
20 of reports and has done it well, say that she told me it was
21 a black male with a ball cap on. Didn't give me a name. If
22 he'd give -- if she'd given me a name it would of been in
23 that report. That's what he testified to. He testified
24 that Mr. Holt told him that it was an unknown suspect as
25 well, that, whenever he arrived on scene. Mr. Holt

1 testified that when he called 9-1-1 he told them somebody
2 had broken into the house.

3 The records don't match what they testified to, and,
4 and, again, I understand that people want to shade their
5 testimony. They want to build-up because they honestly
6 believe it was him.

7 Okay. And I'm not trying to -- I don't know why.
8 They're apparently was some kind of bad blood it sounds
9 like. There was some kind of -- cause Mr. Rios didn't work
10 for them anymore and Mr. Holt had fired him. But even on
11 the affidavit that was filled out at 10:38 that morning, two
12 hours after all of this, two and a half hours after all of
13 this, she doesn't say he's the one who did it. Just picks
14 him out and says that's the person who worked for my
15 husband, and they've made a lot of, out of the fact that my
16 client helped install the safe.

17 Again, that, that may be true. But Investigator Welch
18 testified that what she told him or what he told her, excuse
19 me, was where's the safe. Not open the safe. Where's the
20 safe. If he helped them install it, he wouldn't have asked
21 it.

22 And I understand that the statement that's signed at
23 12:21 ultimately says that no, no, he said where's the safe
24 or open the safe as opposed to where the, where's the safe.
25 I understand that. But that's four hours later. Four hours

1 of thinking about who could of done this, and the only
2 person they could come up with, the only black guy they
3 could come up with is Gabriel Rios because he's the only one
4 who'd been in their house apparently. The only black fellow
5 that's been in their house that worked for them apparently.

6 Now, we'll deal with that, this fingerprint, which
7 we've got 27 pictures of and we've spent hours pulling on
8 it. I don't know what it proves. The officer testified he
9 can't put an age on it. My client worked in that house, has
10 worked in that house for years. They can't prove where it
11 came from. It's a big piece of glass. All the other glass
12 is small pieces of glass. They haven't fit it in. They
13 just can't -- they can't show where it came from. They
14 can't even show why it's relevant to this case.

15 All they can show is there was a piece of glass found
16 again in this hallway across from a gun case or next to a
17 gun case in this odd arrangement. It looks like to me a
18 lower case T, which doesn't -- it's just another one of
19 those things that strikes me as odd. If you look at State's
20 Exhibit No. 11, you'll have these exhibits back there,
21 you'll be able to see what I mean. It's, it's all lined up,
22 which is not what one would expect of a guy who's in a
23 hurry. That is just, again, is another one of those things
24 that makes no sense, and if it doesn't make any sense, you
25 have to have a reasonable doubt because otherwise, you know,

1 I don't know what we're doing here.

2 Now, I guess it's the inference. The, the -- what
3 they're trying to get y'all to conclude, although they can't
4 prove it, they haven't even attempted to prove it, is that
5 Mr. Rios somehow handled this piece of glass after it was
6 broken. If you'll bear with me. Let me find this piece of
7 glass. And I realized over the lunch break nobody's even
8 shown you this piece of glass.

9 This is the piece of glass that they're talking about.
10 Okay. If he handled this, if he's picking it out of a
11 window or somehow grabbing it, one would expect some kind of
12 DNA because one would expect that somebody got cut or at
13 least sweated on it because there's a fingerprint right
14 there or something that we would -- and Officer Howard
15 testified that he swabbed everything that he could find that
16 could possibly be touched, and yet there's no DNA. None at
17 all.

18 If he's touched the sides of that glass, there would of
19 been blood all over the glass. All we have is a single
20 thumb, which suggests to me that somebody had just touched
21 something. Just touched it in the regular course of
22 business. Fallen and touched it. Knocked on the door and
23 touched it. Done something and just touched it.

24 And, again, we can't tell where it comes from. There's
25 no testimony as to where it comes from, and those are the

1 two pieces of evidence, ladies and gentlemen. That's all
2 they got. The fingerprint, identification. We've talked
3 about the identification. We've talked about the
4 fingerprint.

5 And, ladies and gentlemen, what we haven't talked about
6 is what Investigator Saar testified to, that there were two
7 separate sets of fingerprints submitted to him. There were
8 the ones from the house, and then there was some other set.
9 I think you can logically infer that, given that we only
10 have, we've only talked about two different scenes, we've
11 talked about the house, we've talked about the Lexus, I
12 think you can assume that those other or infer that those
13 other fingerprints must of come from the Lexus. I don't
14 know where else they would of come from, and those didn't
15 match my client.

16 Those didn't match anything apparently. You kind of
17 wonder why Officer Hogsed's not here.

18 Why didn't he testify?

19 What don't they want you to know?

20 Now, as to -- we didn't bear any burden to present a
21 defense. We didn't have to put up any witnesses. We could
22 of rested solely on the fact that they haven't proven their
23 case as I've explained to you. But we didn't.

24 We decided to call these witnesses, and, ladies and
25 gentlemen, what I think we, we got to was that it couldn't

1 have been my client who did this. This Lexus was not found
2 at the Church's Chicken or in the back of the Church's
3 Chicken for 12 hours after my client was arrested. We know
4 that. That's when Investigator Wilson, Williams testified
5 to it, and he also testified to the fact that the Church's
6 Chicken isn't all that far from where my, they know my
7 client got into a car, and then they went and did the
8 traffic stop in order to arrest him.

9 And yet, they didn't find him. They don't find it for
10 another 12 hours. And when they do find it, I think you
11 infer they found other peoples' fingerprints in it. So --
12 and I'd also point out to you that Officer Williams
13 testified that there was no car at all, no derelict
14 abandoned car at all found in the Hillbrook subdivision or
15 around the Hillbrook subdivision. Apparently. They didn't
16 have any reports on it.

17 And, ladies and gentlemen, I point out that
18 Mrs. Ollinger noted some black guy, who is otherwise
19 unremarkable, in her neighborhood. So, they're pretty eagle
20 eyed in that neighborhood it sounds like. They would of
21 seen a black guy getting out of a car, and that's the only
22 way that -- and the State, again, is going to ask that you
23 assume that my client caught a ride from Florida Avenue
24 over to Hillbrook subdivision because we know he would of,
25 that the assailant, that the person who did this was on

1 foot. We know that because the State's witness,
2 Mrs. Ollinger, testified that way, that he didn't get there,
3 at least to the Holt's house, by vehicle. And we know that
4 he couldn't have driven himself over there because we don't
5 find an abandoned car unless we invent accomplices.

6 We just invent people. And, again, if that's what the
7 State's gonna ask you to do, then I don't know how you can
8 do that. They've had this case since 2010, and they've not
9 been able to find any accomplices. Haven't been able to
10 find anybody who gave him a ride.

11 We presented Ms. Byrd who testified that she had a
12 landline phone, what her phone number was. It's -2858.
13 And Mrs. Rios testified that she got this phone call around
14 7:22. I don't believe she testified to the duration of that
15 call. But she did speak with her husband, she testified to,
16 and she, she received that phone call from that number,
17 -2858, that that happened at 7:22.

18 And, again, we had the solicitor say well, don't you
19 love your husband and essentially implying that she's making
20 it up because she had this conviction for giving false
21 information.

22 I'd submit to you, ladies and gentlemen, that if she
23 was gonna make up an alibi surely she's gonna make up a
24 better one than that. She's gonna say we were together. My
25 baby's his alibi. Something. She isn't gonna do a phone

1 call at 7:22. Okay. Cause, again, she's had since 2010 to
2 work on this grand lie, and she's -- that's what she's
3 testified to.

4 So, ladies and gentlemen, I'd submit to you it makes no
5 sense for her to make that up. But then the Solicitor's
6 Office is again trying to get you to not care about that
7 making no sense, the facts that, these facts don't make any
8 sense.

9 Mr. Jones testified that it takes about 16 minutes from
10 Florida Avenue to get over to Hillbrook, and that that drive
11 was -- it was in a car and it was the fastest way he could
12 figure out, and the State had the opportunity to call a
13 witness to reply to that and they didn't. So, that's -- you
14 just have to go with that. That's the only evidence in the
15 record as to the distance between the one, the two points.

16 So, it would of taken 16 minutes or 5.2 miles. And as
17 I pointed out, he couldn't have gotten there driving
18 himself. He either had to walk or catch a ride. These
19 folks would of seen somebody catching a ride, somebody
20 bailing out of a car. Because they see people walking on
21 the road and they remember it three years later.

22 Now, Mrs. Ollinger also testified that, you know, part
23 of the problem in this case is that the range that's given,
24 and I understand she wouldn't have been looking at a clock.
25 So, we have to go with other witnesses and Mrs. Ollinger

1 places the person she saw at roughly 7:30. She says that on
2 weekdays she goes, she goes on her walk from quarter till
3 7:00, quarter after 7:00. She goes a little bit later, but
4 not much later. Once if on a Saturday, for example, when
5 there isn't any school traffic because they don't apparently
6 have any sidewalks. That's what she testified to.

7 And if this happened about 7:30, then even if he caught
8 a ride, he couldn't get over there because 16 minutes, plus
9 22, is 7:38. So, if he had called her, immediately hung up,
10 gotten into the car, driven over there, all of that without
11 anytime in-between, he certainly couldn't have done it now.

12 Ladies and gentlemen, this can't have been my client,
13 and I understand that it's, it's very difficult to separate
14 the emotions you've heard in this courtroom out from the
15 facts. But it's your job to do that. It's your duty to
16 decide based on the facts and facts have to make sense, and
17 the Solicitor's Office's fact don't make sense.

18 And, ladies and gentlemen, again, reasonable doubt is
19 that doubt that is sufficient to make a reasonable person
20 hesitate, and if y'all aren't hesitating, then I can't
21 imagine a case in which you would.

22 It's your duty to find my client not guilty. It's your
23 duty because there is, in this case, at the very least,
24 reasonable doubt.

25 Thank you.

1 THE COURT: Ms. Poulos.

2 SOLICITOR POULOS: Thank you, Your Honor.

3 THE COURT: Move the podium.

4 SOLICITOR POULOS: Thank you.

5 Ladies and gentlemen, what matters at the end of this
6 case is that you-all are able to separate the truth from
7 fiction, the truth from fiction, and that's gonna be a very
8 very important thing. I don't make up these facts. I just
9 take what's given to me and present them to you-all in the
10 best way that I know how.

11 You've heard the saying that a man's home is his
12 castle. Well, a woman's home is her castle as well. Gail
13 and Phil Holt's home was their castle, their haven, a place
14 where they felt comfortable, safe, and secure until that man
15 robbed them of that comfort and that safety and that
16 security. A man they knew, a man that they once trusted, a
17 man that was, had been in their home many times.

18 Gail Holt woke up that morning. Her husband has
19 already gotten up and left for work. Little did she know
20 that a little while later she'd be robbed, tied up, held at
21 gunpoint against her will by someone who she knew, by
22 someone who she knew.

23 When she heard that glass breaking, I'm sure the
24 furthestest thing from her mind was that she was about to be
25 robbed, or tied up, pulled in the bedroom, pushed down face

1 down.

2 what we think happened is this. The defendant went to
3 the kitchen door with a rock, broke the window pane on the
4 door. Rocks just don't appear in the hallways. That rock
5 was found in the hallway by the forensic officer. It had to
6 get there somewhere, some way.

7 He reaches in. He unlocks the door. He opens the
8 kitchen drawer where the tape was, where the Holt's keep
9 their tape. Mr. Holt told you that. Then he grabs
10 something sharp, something sharp, and he walks through the
11 kitchen, the den, finally the hallway. Mrs. Holt hears the
12 glass breaking and she starts walking up the hall.

13 She doesn't even make it down the hall when she's
14 attacked by that man, and he turns her around and he grabs
15 her and he puts his arm around her neck, and she says that,
16 that she felt something sharp on her neck. She couldn't
17 tell you what it was, but she felt something sharp.

18 She told you that she came face-to-face with that man,
19 and she told you she immediately recognized him. She was so
20 scared she didn't even want to say his name. She kept
21 saying sir, sir. She was that terrified. I can't really
22 much blame her for that.

23 And she told you that the first thing that he demanded
24 was the safe, and he pushed her into the room, the office
25 where the safe was. The first thing he asked about was the

1 safe, a safe that Mr. Holt told you he helped install.

2 How else would he have known about that safe?

3 They're very few people that know about that safe other
4 than his family. He trusted that man enough to ask him to
5 help him install a safe. That's the first thing that he was
6 asking about.

7 Once Mrs. Holt didn't know the combination, of course
8 he grows angry and angry and more frantic. So, he realizes
9 he's got to get something. So, he's, he's getting a tape,
10 and he pushes her on the floor, and he ties her hands behind
11 her back, and then he sees the husband's gun by the bed
12 post, and you'll see in the pictures exactly, as we showed
13 you yesterday, exactly where that was, and it was in plain
14 view.

15 He grabs that and he threatens her with it and he's
16 demanding her money, anything, her wallet, her car keys
17 cause he's got to leave there with something. He couldn't
18 get in that safe. So, he's got to leave there with
19 something.

20 So, she's down on the floor helpless while he's
21 frantically going through the house trying to figure out
22 what he can take. And once he finally is able to get some
23 cash, and he's got the gun in his hand, and he's got her car
24 keys, he takes and flees the scene and leaves her there
25 helpless on the floor hands bound behind her back absolutely

1 terrified.

2 Twelve hours later the police find her car in the
3 Church's Chicken parking lot about a quarter mile away from
4 where the defendant was arrested. Gabriel Rios use to work
5 for the Holts, for Mr. Holt. We know that. I don't think
6 that's disputed at all. He use to help him at his
7 construction business.

8 He had also helped the Holts with roofing, painting,
9 things like that around the house in the past in their home
10 on numerous occasions. Mr. Holt, I didn't ask him this, but
11 I'm sure he employs more than just one person. He trusted
12 Mr. Rios enough to bring him into his own home. That's how
13 much he trusted him at the time.

14 When Gabriel Rios robbed these victims, he left behind
15 something very important, and I know the defense wants to
16 downplay that. But the fingerprints in this case or the
17 fingerprint, the right thumbprint, is very important.

18 That fingerprint was found on a sharp piece of
19 triangular broken glass that was in the hallway. It had to
20 get there somewhere. This wasn't just a random piece of
21 glass from a frame. It was a piece of sharp broken glass in
22 the hallway. It had to get there somehow.

23 There is no reason for his fingerprint to be on that
24 glass. No reason whatsoever other than if he wasn't there.
25 That key piece of evidence places him not only at the scene,

1 but that places him inside the home, inside that hallway,
2 and that's where Mrs. Holt told you she first encountered
3 him, right there at that hallway, right there where that
4 glass was found, right there where that brown rock was
5 found. Those two items got there somehow.

6 Now, he had been in the home before we know, and that
7 was a year before that. But he hadn't done anything for the
8 Holts in a year prior to this incident. He hadn't been
9 around the home. He hadn't worked for Mr. Holt's business.
10 He hadn't socialized with them, talked to them. He had
11 nothing to do with them in the year before. So, there's no
12 reason for these prints to be there.

13 We can't prove where the glass came from. Mr. Shealy's
14 right. We can't prove that.

15 But I would tell you that if you have a large piece of
16 broken glass on the floor in the hallway where a victim was
17 confronted, wouldn't you think that that glass piece came
18 from the broken door?

19 wouldn't you think that?

20 Mr. Holt told you, in the spring before this incident
21 happened, he had recently replaced that glass door. He said
22 that he got locked out and he replaced it. So, that was a
23 brand new piece of glass. That was a fresh piece of glass.
24 No reason for Mr. Rios' prints to be anywhere on there, and
25 Ms. Glenn told you that she has knowledge about Mr. Holt

1 getting locked out and having to replace the glass. She
2 knew about that as well.

3 The bottom line was the glass on the door was new
4 glass, new glass. No reason whatsoever for his prints to be
5 on there. He hadn't been anywhere around that home in a
6 whole year before that.

7 Mr. Shealy said the facts don't make sense. They make
8 perfect sense if you just take a minute, take a minute and
9 look at everything, and look at exactly what you have.

10 Defense wants you to believe it couldn't have been him.

11 How could it have not been him?

12 How?

13 Ask yourselves how could it have possibly not been him.

14 It's always easy to say it's not me, I didn't do it.

15 There shouldn't be any doubt whatsoever that it wasn't him.

16 Beside the fingerprints placing him at the scene, you also
17 have Mrs. Holt's testimony and identification. She told you
18 that she knew it was him.

19 This wasn't just some random person she picked out of a
20 lineup. She's given six pictures and she just says ini,
21 mini, miny, mo, I think it's him. No. She knew him. She
22 had been around him at the business. He had been inside her
23 home. She had plenty of opportunities to see him. Plenty
24 of opportunity.

25 She knew his voice. She knew his accent. She knew his

1 face. She immediately saw him when she came face-to-face.
2 There was no doubt in her mind whatsoever. She got up there
3 and she told you that she did not hesitate one bit.

4 She picked him up from a lineup immediately, and she
5 identified him in court for you yesterday immediately. She
6 knew him as Gabe and all she's ever testified to is Gabe.

7 Who is Gabe?

8 Gabe is Gabriel Rios. That's the man she knew. That's
9 the man she knew worked for her husband. That's the man who
10 attacked her. That's the man who did this.

11 Nobody told her who to pick out from that lineup. Not
12 one single person. No officer told her. Her husband didn't
13 tell her. Nobody at the scene told her. Defense wants you
14 to believe that she had plenty of time to chat it up and
15 discuss it with everybody and then all of sudden, yeah, I, I
16 think it was Gabe.

17 That's not how this happened. That's not at all how
18 this happened.

19 She made a solid identification, ladies and gentlemen,
20 and that is up to you to believe that. But I would submit
21 to you that her identification is pretty darn solid.

22 You don't pin something on somebody unless you're
23 absolutely sure. These are serious allegations. You just
24 don't go throwing around names like that unless you're sure.
25 Mrs. Holt told you that she's absolutely sure.

1 Now, the defense is that Gabe was on the phone before
2 this happened. So, he couldn't have been there.

3 One of his witnesses, Ms. Byrd, doesn't even really
4 know him. She said that she let him borrow her phone from
5 time to time. But she couldn't say for sure if she let him
6 borrow it that morning or not. She told you she couldn't
7 even say that she saw him that morning.

8 The other witness was his wife, and she told you that
9 she thinks that she got a phone call from her husband around
10 7:20 something from a number that she believes was Ms.
11 Byrd's number. She wasn't with him. She didn't even see
12 him that morning, and let's not forget that yeah, she was
13 convicted in 2008 of giving false information to police, for
14 lying to police. So, you, you guys take that for what it's
15 worth.

16 Gabriel Rios wants you to think that there's no way
17 that he could of been on Perrin Drive between 7:30 and 8:00
18 when Mrs. Holt says this incident happened because he was on
19 the phone with his wife at 7:20 something. It is absolutely
20 possible. We don't know how he got to the scene. We don't
21 care how he got to the scene. We don't have to prove how he
22 got to the scene. All we have to prove is that he was at
23 the scene. We believe that we've done that.

24 He's had over two and a half years, since this incident
25 happened, to come up with this story and that is all this is

1 is just a story. No one said they were with him that
2 morning. Nobody, nobody that testified for him accounted
3 for his whereabouts. Nobody.

4 Take a step back, see what you have, and use your
5 common sense.

6 If you believe the defense's story, you either believe,
7 one, that Mrs. Holt is just flat outlying or, two, that she
8 is dead wrong. If you believe their side, that's what
9 you're basically saying to Mrs. Holt.

10 Can you look at her and say you're lying?

11 Can you look at her and say you are dead wrong?

12 Think about that.

13 Mrs. Holt has nothing to gain from this. She told you
14 what she saw. She told you what she recalled. She's
15 absolutely certain that she identified him in the lineup and
16 in court, and his right thumbprint was found on a sharp
17 piece of broken glass in the hallway of her home.

18 Ask yourselves who are you going to believe, Mrs. Holt
19 or his people?

20 Just as -- ladies and gentlemen, isn't about doing --
21 it's about doing the right thing, and sometimes these
22 decisions aren't easy. But that's why they're 12 of you and
23 the law has placed the power for you to do justice and do
24 what's right.

25 I told you at the beginning of this case the most

1 important thing for you-all to remember is use your common
2 sense, and I would submit to you again, when you go back in
3 the deliberation room to begin your deliberations, I would
4 ask that you take a step back, look at everything, and just
5 remember to use your common sense and let justice be done.

6 Thank you.

7 THE COURT: All right. Madam Forelady, ladies and
8 gentlemen of the jury, I anticipate my charge on the law
9 being approximately 30 minutes. I'll leave it up to you to
10 poll your jury as to whether or not you want to have a break
11 or I'll give you a break during the middle of my charge. I
12 hate for you to sit here for extra long. But check with
13 them, and see if you want a break.

14 FORELADY: We're fine.

15 THE COURT: You ready to go?

16 FORELADY: Yes, thank you.

17 THE COURT: Very good.

18 All right. Let me preface my remarks with a few
19 things.

20 First, I will try to limit as much as I can reading. I
21 know that nobody likes to have people read to them. I don't
22 either.

23 The information contained in this charge is, in fact,
24 very vital. So, I very well will read some stuff to you.
25 I'll try to limit it as much as possible, but the

1 information, although it may be a little bit hard to go
2 through, it's very important to both sides of this case. I
3 apologize in advance to the extent that I do read to you.

4 But now that you've heard all the evidence in this
5 case, now that you've heard the arguments of the attorneys,
6 it is my duty to instruct you on the law that you must apply
7 to the, to the facts as you find them to be. These
8 instructions will be in three parts.

9 The first aspect of my instructions will be about the
10 duties that define and control or the rules that define and
11 control your duties as jurors.

12 I'll then give you an opportunity, Madam Forelady, to
13 poll your jurors again to see if you'd like to have a break,
14 and then I will charge you on the substantive law, the law
15 that's charged against this defendant in these indictments.
16 I will then charge you on some considerations for your
17 deliberations.

18 And then, Madam Forelady, I will go over with you
19 filling out the verdict form and communicating with the
20 Court during your deliberations.

21 Okay. Now, as I told you at the beginning of this
22 case, you are finders of the facts. That means that you are
23 to find the facts from the evidence that's been presented
24 here in this courtroom. Not from any other location.

25 To the facts as you find them to be, you must apply the

1 law as I give it to you. If you recall, I told you that you
2 may not be concerned with what you would like the law to be
3 or what you wish it would be. You must apply the law as I
4 give it to you. It'd be improper for you to do anything
5 else.

6 Also, in making your decision, you shall not be
7 influenced by any personal likes or dislikes, opinions,
8 prejudice, or undue sympathy that you may have for one side
9 or the other. What that simply means is, is that you make
10 your findings of fact according to the law as I give it to
11 you, and according to the evidence and the testimony that
12 you received in this courtroom.

13 And, if you recall, at the beginning of this case, you
14 took an oath saying that you'd do just that. And, again,
15 all of my instructions are equally important. You must
16 follow all of them. You can't pick out the aspects of my
17 charge that you like and apply that and disregard the
18 others. They are all equally important.

19 Also, I remind you that if I have done anything
20 throughout the course of this trial that seems to indicate
21 to you how you're to find the facts and how -- and let me
22 just say. When you say find facts, in, in a sense of the
23 word that means your verdict. But how you are to find
24 facts, I'm gonna ask you to disregard that.

25 Our Constitution does not allow any State Court judge

1 to have an opinion on the facts nor am I allowed or any
2 other judge allowed to comment on the facts. So, if
3 anything, during the trial or during this charge, appears to
4 be that, please disregard it.

5 Now, you, as jurors, decide what the facts are by
6 evaluating and weighing the evidence that you heard here in
7 this courtroom. There's no way that I can literally give
8 you a set of scales to weigh the evidence you heard. It is
9 a mental process, and you evaluate and you weigh the
10 evidence using your good common sense and your sound
11 judgment that you brought with you here to this courtroom.

12 Now, there are things that aren't evidence, and there
13 are things that are evidence. First, truly in the
14 definition of evidence you have the sworn, sworn testimony
15 of witnesses. It does not matter whether it comes from
16 direct examination or cross-examination or some other
17 combination of that. It does not matter who called the
18 witness. But sworn testimony from a witness is evidence.

19 Also, the exhibits that have been admitted into
20 evidence and that will be sent back to you for your
21 consideration is evidence, and that is only the things in
22 this case that meets the technical, technical definition of
23 evidence.

24 Now, they're things in this case that are helpful, but
25 they do not meet that technical definition.

1 Number one, any things that the attorneys told you in
2 their opening statements, in their closing statements, or
3 whatever other, whatever else during the course of this
4 trial is not evidence. Now, they're not sworn witnesses.
5 They do not take this witness stand. And, so, what they say
6 is not technically evidence. It is helpful and it is
7 designed to help you understand the issues and what's in
8 this case, but it is not evidence.

9 What that simply means is if your memory of the facts
10 in this case differs by whatever either one of these
11 attorneys told you in their opening statements, closing
12 statements, or at other times during the course of this
13 trial, then your memory will control. With that being said,
14 remember because something appears in somebody's notes
15 doesn't mean it controls over somebody's memories. That's
16 why we have deliberations, and you will just have to hash
17 out any differences that may occur in that regard.

18 Also, ladies and gentlemen, questions and objections by
19 attorneys is part of the process. I've told you in every
20 case there would be objections, and in this case there's no
21 difference. You may not and you shall not discuss the fact
22 that an attorney has objected to any particular issue in
23 this case, or to the extent I allowed you to stay in here,
24 my ruling on that objection. That is merely part of the
25 process and it would be improper for you to even discuss the

1 fact of an objection or my ruling.

2 Also, finally, ladies and gentlemen, anything that you
3 may have heard when you were not here in this courtroom is
4 not evidence, and that's just simply common sense.

5 Excuse me.

6 Now, they're two types of evidence that we recognize in
7 South Carolina. We have direct evidence and we have
8 circumstantial evidence.

9 This is direct evidence. Direct evidence is the
10 testimony of a person who asserts or who claims to have
11 actual and direct knowledge of a fact such as an eye
12 witness.

13 For example, if I were standing on the corner and I saw
14 someone run a red light, that would be an example of direct
15 evidence. The other type of evidence we recognize in South
16 Carolina is circumstantial evidence. Let me give this
17 definition to you.

18 Circumstantial evidence is proof of a chain of facts
19 and circumstances from which you can find that another fact
20 exist although it has not been proven directly, and I can
21 see the look in your eyes, and there's a little difference.
22 So, let me give you an example of that.

23 If you were to go to bed at night, and if you were to
24 have a fresh sheet of snow in your front yard that nothing
25 had been through. If you wake up in the morning and there

1 are tracks in your front yard, you can infer or you can
2 decide or you can infer rather that someone or something
3 walked through your yard during the course of the night
4 although, although you did not see that person walk through
5 your yard. That is circumstantial evidence.

6 Excuse me. I'm sorry.

7 The law in our state, ladies and gentlemen, makes no
8 distinction between the value of the weight that is given to
9 either direct evidence or circumstantial evidence. Both are
10 equally valid for your consideration. The only thing you
11 may not do, with regard to circumstantial evidence, is draw
12 an inference that is speculation or conjecture. Otherwise,
13 all the evidence is there for your use.

14 Now, after weighing all of the evidence in this case,
15 if you are not convinced of the guilt of this defendant
16 beyond a reasonable doubt, it will be your duty to find him
17 not guilty.

18 Now, in deciding what the facts are in this case, you
19 must consider all the evidence as I've been over and over it
20 with you. In doing -- in deciding which -- excuse me. In
21 doing this, you have to decide which testimony that you wish
22 to believe and which testimony you wish not to believe. We
23 call that the credibility of the witnesses. You have a
24 right to disbelieve all or part of any witness' testimony.
25 You have a right to believe all of any witness' testimony.

1 In making the decision of witness testimony, I ask that
2 you consider some of the below factors and these are
3 certainly not the only factors. You can ask yourselves was
4 the witness able to see or hear or know the things about
5 which that witness testified, how well was the witness able
6 to recall and to describe those things, what was the
7 witness' manner while testifying. In other words, what was
8 their demeanor.

9 You ask yourselves was there a reason that a witness
10 would want to give testimony that would help or hurt one
11 side or the other. Did that witness have an interest in the
12 outcome of the case or a bias in the outcome of the case or
13 any issue in the case. You can also consider whether the
14 witness' testimony was reasonable in light of all the
15 evidence in this case, and whether that witness' testimony
16 had been contradicted by what they had said or done at
17 another time or by other testimony or evidence presented in
18 this case.

19 Again, ladies and gentlemen, those are just some of the
20 factors you may consider in making this determination of a
21 witness' credibility. One thing you don't do is check your
22 common sense at the door when you become jurors and you
23 shouldn't in this case. You should use those things in your
24 day-to-day lives that you find indicative of truthfulness
25 and indicative of lack of truthfulness when you make this

1 determination of credibility.

2 But one thing you shall not do is add up the number of
3 witnesses who have testified from one side or the other
4 because it does not matter whether the truth comes from the
5 State or the defense or from any combination of that.
6 Again, you can believe many over one or one over many. Your
7 sole interest is to try to find the truth from the evidence
8 presented in this case.

9 Also, ladies and gentlemen, you have heard testimony by
10 a person in this case that were qualified as experts.
11 Again, a person, who by their education or their experience,
12 has become an expert in a particular field has a right to
13 give their opinion to the case as to matters in their field
14 and may state their reasons for that opinion.

15 Now, expert testimony is like any other testimony
16 you've heard in this case. You may accept it. You may
17 reject it. You may give it as much weight as you think it
18 deserves considering the witness' education, their
19 experience, the reason given for their opinion, and other
20 evidence in this case.

21 Ladies and gentlemen, the fact that the defendant in
22 this matter has been arrested, charged, and indicted is not
23 evidence of his guilt. It can not be used to you as
24 evidence of his guilt. It does not raise an inference or a
25 presumption of his guilt. These indictments I have in my

1 hand are simply the charging mechanisms by which the State
2 of South Carolina brings defendants such as this defendant
3 before a jury as yourselves for a determination of guilt or
4 innocence.

5 Also, ladies and gentlemen, there are multiple
6 indictments. The charges are burglary first degree, armed
7 robbery, and possession of a weapon during the commission of
8 a violent crime, kidnapping, assault and battery first
9 degree.

10 Now, each one of these indictments is a separate and
11 distinct offense. You must decide each indictment on the
12 evidence and the law applicable to that indictment
13 uninfluenced by your decision as to any other indictment.
14 The defendant may be convicted or acquitted on any or all of
15 the offenses charged.

16 And, Madam Forelady, at the end of this case you'll be
17 asked to write a separate verdict for each of the charges in
18 this matter, and I will go over that with you.

19 Now, in this case, ladies and gentlemen, the defendant
20 has pled not guilty to all of the indictments. Each and
21 every one of the indictments he says I am not guilty. What
22 that means is, is that puts the, places the burden on the
23 State of South Carolina to prove his guilt by proof beyond a
24 reasonable doubt.

25 Now, I will tell you that a person charged with

1 committing a criminal offense in South Carolina is never
2 required to prove himself or herself innocent, and I charge
3 you that it is an important rule of law that the defendant,
4 in a criminal trial, no matter how serious or not serious
5 the criminal charge may be, will always be presumed to be
6 innocent of the crime for which he has been indicted unless
7 there's evidence satisfying you, the jury, of guilt beyond a
8 reasonable doubt.

9 Now, this presumption of innocence does not end when
10 you begin your deliberations, but it accompanies this
11 defendant throughout your deliberations and throughout this
12 trial until you reach a unanimous verdict of guilt based on
13 evidence satisfying you of guilt beyond a reasonable doubt.
14 In the words of lawyers, the presumption of innocence is
15 like a robe of righteousness which has been placed around
16 the shoulders of a defendant where it remains until it has
17 been stripped by evidence satisfying you, the jury, of guilt
18 beyond a reasonable doubt.

19 Now, let me say one more thing about that. The
20 presumption of innocence is not a mere legal theory. It is
21 not a mere legal phrase. It is a substantial right to which
22 every defendant is entitled unless you, the jury, find guilt
23 beyond a reasonable doubt.

24 Now, I gave you a smaller charge on reasonable doubt
25 earlier, and this will be a little bit of that, but a little

1 bit longer, and this is the law on reasonable doubt. A
2 reasonable doubt is the kind of doubt that would cause a
3 reasonable, sincere, honest, and conscientious person to
4 hesitate to act in an important matter in their own affairs.
5 Proof beyond a reasonable doubt is proof that leaves you
6 firmly convinced of the defendant's guilt.

7 Now, there are very few things in this world that we
8 know with absolute certainty, and in criminal cases the law
9 does not require proof that overcomes every possible doubt.
10 If, based on your consideration of the evidence, you are
11 firmly convinced of the defendant's guilt or that he is
12 guilty of the crime or crimes charged, it will be your duty
13 to find him guilty. On the other hand, if you find that
14 there is a real possibility that the defendant is not
15 guilty, you must give the defendant the benefit of the doubt
16 and find him not guilty. A reasonable doubt may arise from
17 the evidence or from the lack of the evidence.

18 Now, I further instruct you that a defendant is
19 entitled to every reasonable doubt that may rise in a case,
20 and what that simply means, ladies and gentlemen, if, upon
21 any issue that is essential to a conviction, excuse me,
22 essential to a conviction and a verdict of guilt of an
23 offense for which the defendant has been charged, if you
24 have any doubt you should resolve that doubt in favor of
25 this defendant.

1 Now, in order to establish criminal liability criminal
2 intent is required. For example, the mental state required
3 to be proven by the State for a particular crime might be
4 purpose, intent, knowledge, recklessness, or criminal
5 negligence. Criminal intent must be proven by the State
6 beyond a reasonable doubt. Criminal intent is always a
7 matter that must be determined by you, the jury, from the
8 circumstances surrounding the situation.

9 Now, there is no way to prove intent to a mathematical
10 certainty. There's no way that medical science can dissect
11 a person's brain to show you what they, that person had in
12 mind. So, the law says that criminal intent may be inferred
13 from the circumstances shown to have existed. This is how
14 you make the determination of whether or not the element
15 requiring intent is present. It is not necessary to
16 establish intent by direct or positive evidence, but intent
17 may be established by inference in the same way as any other
18 fact by taking into consideration the acts of the parties
19 and the facts and the circumstances of the case. Criminal
20 intent is a mental state, a conscious wrongdoing.

21 Now, ladies and gentlemen, it will be up to you to
22 determine what the defendant intended to do based on the
23 circumstances shown to have existed. Criminal intent can
24 arise from action or a failure to act. It may arise from
25 negligence, recklessness, or an indifference to duty or to

1 the consequences that is considered by law to be the
2 equivalent of criminal intent.

3 Ladies and gentlemen, I will charge you that another
4 important rule of law is that the fact that this defendant
5 did not testify shall not, shall not be considered by you in
6 any way in your deliberations. It would be improper for you
7 or anyone to even mention the fact that this defendant did
8 not testify. The burden is upon the State of South Carolina
9 at all times to prove his guilt beyond a reasonable doubt,
10 and that each person in this country has a Fifth Amendment
11 right not to testify.

12 Now, an issue in this case involves the identification
13 of the defendant as the person who committed the crime
14 charged. This State has the burden of proving identity
15 beyond a reasonable doubt. You must be satisfied, beyond a
16 reasonable doubt, of the accuracy of the identification of
17 the defendant before you may convict the defendant.

18 Identification testimony is an expression of belief or
19 impression by a witness. You must determine the accuracy of
20 the identification of the defendant -- excuse me. You must
21 determine the accuracy of the identification of the
22 defendant. You must consider the believability of each
23 identification witness in the same way as any other witness.
24 You may consider whether the witness had an adequate
25 opportunity to observe the offender at the time of the

1 offense.

2 This will be affected by things like how long or short
3 of a time was available, how far or how close the witness
4 was, the lighting conditions, and whether the witness had
5 the chance to see or know the person in the past. It is not
6 essential that the witness himself or herself be free from
7 doubt as to the correctness of his or her statement.

8 Once again, I instruct you that the burden of proof is
9 on the State and extends to every element of the crime
10 charged, and that would include specifically that of
11 identification. If, after examining the testimony, you have
12 a reasonable doubt as to the accuracy of the identification,
13 you must find the defendant not guilty.

14 Now, Madam Forelady, ladies and gentlemen, ladies and
15 gentlemen of the jury, that's the first phase of my charge.
16 It is the longest part. So, that will give you some solace.
17 If you would like to take a quick break now, let, I'll let
18 you do so. If you want to continue I'll be glad to do so.
19 I anticipate about ten or twelve more minutes.

20 Ready to go?

21 FORELADY: Yes, sir.

22 THE COURT: Good Spartanburg County jury. I hear you.

23 Okay. Ladies and gentlemen, this is the substantive
24 law that has to do with the charges in this case. The first
25 is the law on first degree burglary.

1 The defendant is charged with first degree burglary.
2 The State must prove, beyond a reasonable doubt, that the
3 defendant entered a dwelling without consent. A dwelling is
4 any building or portion of a building in which a person
5 ordinarily sleeps. A building constructed as a dwelling
6 that has never been occupied can not be considered a
7 dwelling for purposes of burglary. But a building is a
8 dwelling even if the residents, residents are temporarily
9 absent from the building.

10 In order to prove that the defendant entered the
11 dwelling, the State does not have to show that the
12 defendant's entire body entered the dwelling. The smallest
13 entry is sufficient. It may be any part of the body such as
14 a hand or foot or even an instrument such as a hook or other
15 instrument. In addition, the State does not have to prove
16 that force was used to gain entry. If a person enters a
17 building by using deception, artifice, trick, or
18 misrepresentation to get consent to enter, this is entry
19 without consent.

20 Next the State must prove, beyond a reasonable doubt,
21 that the defendant intended to commit a crime, either a
22 felony or a misdemeanor, at the time of the entry. The mere
23 entry into a dwelling without consent is not burglary. If
24 the intent to commit a crime is formed after the entry, it
25 is not burglary. On the other hand, if the defendant

1 intended to commit a crime at the time of the entry, it is a
2 burglary even if the intent was abandoned after the
3 burglary. It does not matter that the intended crime was
4 not completed. Intent may be shown by acts and conduct of
5 the defendant and other circumstances from which you may
6 naturally and reasonably infer intent.

7 Finally, the State must prove, beyond a reasonable
8 doubt, that, number one, when entering, while in the
9 dwelling, or when fleeing the defendant or an accomplice was
10 armed, was armed with a deadly weapon or explosive. A
11 deadly weapon is any article, instrument, or substance which
12 is likely to cause death or great bodily harm. Whether an
13 instrument has been used as a deadly weapon depends on the
14 facts and circumstances of each case.

15 The following are examples of instruments which may be
16 deadly weapons: A pistol, a shotgun, a rifle, a dirk, a
17 dagger, a knife, a slingshot, metal knuckles, a razor,
18 gasoline, a fire bomb, Molotov cocktail, lighter fluid, and
19 those are not an exhaustive list. A gun may be a deadly
20 weapon even if it is not operating or the State must prove
21 that when entering, while in the dwelling, or when fleeing,
22 the defendant or an accomplice used an or, excuse me, used
23 or threatened to use a dangerous object or, when entering,
24 while in the dwelling, or when fleeing, the defendant or an
25 accomplice displayed what was or appeared to be a knife,

1 pistol, revolver, rifle, shotgun, machine gun, or other
2 firearm.

3 That is the law of first degree burglary.

4 Next will be the law of armed robbery. The defendant
5 is charged with armed robbery. In order to prove this
6 offense, the State must prove, beyond a reasonable doubt,
7 that the defendant took personal property from the person or
8 presence of another person. Property is in the presence of
9 a person if it is within the person's reach, inspection,
10 observation, or control so that the person could, if not
11 overcome with violence or prevented by fear, keep possession
12 of the property.

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

23 Finally, the State must prove, beyond a reasonable
24 doubt, that the defendant was armed with a deadly weapon
25 during the robbery. A deadly weapon is any article,

1 instrument, or substance which is likely to cause death or
2 great bodily harm. Whether an instrument has been used as a
3 deadly weapon depends on the facts and circumstance of each
4 case. The same examples as I gave you on the law of first
5 degree burglary of deadly instruments, of deadly weapons
6 would be equally applicable to the charge of armed robbery.

7 No, in connection with the charge of armed robbery,
8 there is the charge of possession of a weapon during the
9 commission of a violent crime. Now, the defendant is
10 charged with the possession of a weapon during the
11 commission of or attempt to commit a violent crime.

12 The State must prove, beyond a reasonable doubt, that
13 the defendant was in possession of a firearm or visibly, or
14 visibly displayed what appeared to be a firearm during the
15 commission of a violent, of a violent crime. A firearm
16 means any machine gun, automatic rifle, revolver, pistol, or
17 any other weapon which will is, which will -- is designated
18 to or may be readily converted to expel a projectile.

19 In order to find the defendant guilty of possession of
20 a weapon during the commission of a violent crime, you must
21 first find the defendant guilty of either committing a
22 violent crime or attempting to commit a violent crime. I
23 will tell you, ladies and gentlemen of the jury, that armed
24 robbery is, in fact, considered a violent crime.

25 The next law -- the next charge will be on the law of

1 kidnapping. The defendant is charged with kidnapping.

2 The State must prove, beyond a reasonable doubt, that
3 the defendant knowingly and unlawfully did, did any one or
4 more of the following: Seized, confined, inveigled,
5 decoyed, kidnapped, abducted, or carried away another person
6 without authority of law.

7 To do a thing unlawfully is to do it willfully against
8 the law.

9 Knowingly means knowledge, consciously, not
10 accidentally.

11 Seize means to take hold of suddenly or forcibly.

12 Confine means to limit, restrict, or enclosed within
13 bounds, imprisoned, or to shut or keep in.

14 Inveigle means to lure, entice, or lead astray by false
15 representations, promises, or other, other deceitful means.

16 Decoys means to lure by or as if by decoy. A decoy is
17 something to entice a person into a trap.

18 Kidnap is to remove a person against his will by
19 unlawful force or by fraud.

20 Abduct means to carry off secretly or by force or --
21 excuse me. Abduct means to carry off secretly or by force
22 for an illegal purpose.

23 Carry away means to remove.

24 Now, ladies and gentlemen of the jury, the State does
25 not have to prove that the defendant did all the things I

1 just described. Instead, if you find, beyond a reasonable
2 doubt, that the defendant did any of the things I just
3 described, you may find the defendant guilty of kidnapping.

4 Something done without authority of law is something
5 which the law does not sanction, permit, allow, condone, or
6 provide justification for. The kidnapping does not have to
7 be for any personal or monetary gain for illegal purpose,
8 but may be for any reason whatsoever.

9 But now, finally, ladies and gentlemen, is the law
10 associated with assault and battery first degree. The
11 defendant is charged with assault and battery in the first
12 degree.

13 A person may commit the offense of assault and battery
14 in the first degree if the person unlawfully offers or
15 attempts to injure another person with the presentability to
16 do so, and the act either is accomplished by means likely to
17 produce death or great bodily injury or occurred during the
18 commission of a robbery, burglary, kidnapping, or theft.

19 Great bodily injury means bodily injury which causes a
20 substantial risk of death or which causes serious permanent
21 disfigurement or protracted loss or impairment of the
22 function or the body member or organ.

23 Ladies and gentlemen, as with all the other charges,
24 the State must prove each and every element of this charge
25 by proof beyond a reasonable doubt.

1 That, Madam, Madam Forelady, ladies and gentlemen of
2 the jury, is the substantive law that applies to the charges
3 in this case, and that leads me up to a few thoughts, which
4 will not be long, on your duty to deliberate.

5 Deliberation is defined as this. It's defined as a
6 careful consideration weighing up with a view to a decision.

7 Now, regardless of what you may think about our
8 criminal justice system, I would submit to you that our jury
9 system allows 12 good men and women such as yourselves, who
10 come from different walks of life, who have different
11 prospectives, who have different experiences to listen to
12 the evidence presented during a trial, to listen to the law
13 as charged to them, to go back and go through and consider
14 all the evidence, and to hopefully come up with a unanimous
15 verdict.

16 We call them deliberations for a reason. You are to
17 consider all the evidence in a careful and deliberate manner
18 and discuss it in a calm, courteous, and thorough manner.
19 Remember you're not partisans for one side or the other.
20 You're the judges of the facts, and your sole interest in
21 this matter is to find the truth based on the evidence that
22 is presented to you here in this courtroom unaffected by any
23 other considerations.

24 I would ask you and I also charge you that you are to
25 listen to all of your fellow jurors, consider other peoples'

1 points and their points of view, talk through and discuss
2 all the evidence and everybody's points of view regarding
3 that evidence. And, remember, if you're doing something
4 deliberately, you're not in a big hurry and you should not
5 be today. I will tell you that this case is very important
6 to the State and to defendant in this matter, and this will
7 be their only day in Court.

8 Now, when you retire to your jury room, in order for
9 your verdict to stand or to be valid, it must be unanimous.
10 With that being said, however, each of you must decide this
11 case for yourself and you should only do so after you have
12 impartially considered all the evidence, you have fully
13 discussed that evidence with your fellow jurors, listened to
14 their point and their points of view.

15 Don't be afraid to change your opinions if the
16 discussion persuades you that that is the right thing to do.
17 But do not come to a decision simply because your jurors
18 think it is the right thing to do.

19 Again, it is important for you to attempt to reach a
20 unanimous verdict, but you can only do so after you've made
21 your own decision. Do not change an honest belief about the
22 weight and the effect of the evidence simply to reach a
23 verdict. In other words, simply to appease your fellow
24 jurors.

25 Now, Madam Forelady, ladies and gentlemen of the jury,

1 thank you for bearing with me during that charge. I'm gonna
2 go over with you now the verdict form. You will have to
3 consider each charge independently.

4 Okay. The order that the charges appear is of no
5 consequence. We have to put them in some order, and the
6 order that your options as to those charges appear is of no
7 consequence cause they likewise have to be in a certain
8 order.

9 Now, the first option you will have is we, the jury,
10 unanimously find the defendant, Gabriel Jon Rios, as to
11 Indictment 2010-GS-42-6830, burglary in the first degree,
12 and your option will be not guilty or guilty. Once the jury
13 has unanimously decided which option y'all wish to choose,
14 you will simply make a check there and go to the next
15 option.

16 Okay. Your next option will be we, the jury,
17 unanimously find the defendant, Gabriel Jon Rios, as to
18 Indictment 2010-GS-42-6831, armed robbery, same options,
19 same order. Check which one the jury's able to unanimously
20 come to a decision on.

21 Next option would be as to possession of a weapon
22 during the commission of a violent crime. That option is
23 tied into armed robbery only.

24 Okay. So, if you happen to find the defendant not
25 guilty of armed robbery, then you may not find him guilty of

1 commission of a weapon, excuse me, possession of a weapon
2 during the commission of a violent crime. On the other
3 hand, if you find the defendant guilty of armed robbery, you
4 may decide whether or not the State has proven, beyond a
5 reasonable doubt, that he also had possession of a weapon
6 during the commission of that armed robbery. In other
7 words, you can find him guilty of armed robbery, but still
8 find him not guilty or guilty of possession of a weapon.

9 Okay. The next option will be as to kidnapping. Not
10 guilty or guilty will be the options again, the same order,
11 and, finally, assault and battery in the first degree.

12 Once the jury has gone over each of these indictments,
13 and each of these charges, and made a decision, I'm gonna
14 ask you to sign your name, knock on the door, and we'll
15 receive your verdict back here in the courtroom. Remember
16 each one of these charges are separate except to the armed
17 robbery, armed robbery and possession charge. Otherwise,
18 each one is independent. You can find him guilty on one and
19 not guilty on the others or any combination of that.

20 Okay. Now, Madam Forelady, if, at anytime you feel the
21 need to consult with the Court, if you'd make a note, write
22 a note out, sign it, knock on the door, we'll respond to it
23 here in the courtroom and respond to it accordingly with
24 you.

25 Okay. Now, before you go back and begin your

1 deliberations, I'm gonna check with these attorneys to see
2 if I neglected to say something that I should have said or,
3 or said something that I shouldn't have said to you. So,
4 I'm gonna ask you to go back to your room, but do not begin
5 your deliberations. I'm also gonna ask the alternates to go
6 back there now, and then we'll bring you back in just a few
7 minutes.

8 Okay. You can go back to the jury room.

9 (WHEREUPON, the following takes place outside the
10 presence of the jury.)

11 THE COURT: All right. Any addition or exception from
12 the State as to the charge?

13 SOLICITOR POULOS: No, sir, Your Honor.

14 THE COURT: Other than your prior objection to my not
15 charging alibi, any additions or exceptions to the charge as
16 given?

17 MR. SHEALY: No, Your Honor.

18 THE COURT: Okay. Very good.

19 Would you guys go over the evidence, the exhibits, and
20 make sure we have all of them?

21 SOLICITOR POULOS: Yes, sir.

22 THE COURT: But before you do, let me say something to
23 both the attorneys, and this is mainly for your clients.
24 Both of you are, including all the attorneys, were very
25 prepared, very professional. You did a great job presenting

1 your case. It makes my job easier as the trial judge, and I
2 want to thank you for that.

3 SOLICITOR POULOS: Thank you.

4 MR. SHEALY: Thank you, Your Honor.

5 THE COURT: If y'all will check that now please.

6 SOLICITOR POULOS: Thank you, judge.

7 (Pause.)

8 THE COURT: Are y'all okay on the exhibits?

9 SOLICITOR POULOS: Yes, sir, we checked them all.

10 MR. SHEALY: Yes, sir.

11 THE COURT: Y'all be close by so we can chase you down
12 if need be.

13 SOLICITOR POULOS: Yes, sir.

14 MR. SHEALY: Yes, sir.

15 THE COURT: All right. Thank you again.

16 SOLICITOR POULOS: Thank you, judge.

17 (WHEREUPON, the jury began deliberations at 2:15PM and
18 returned with a question at 4:56PM.)

19 THE COURT: Okay.

20 SOLICITOR GHENT: Your Honor, may I ask?

21 we were told it's a question.

22 THE COURT: It is.

23 SOLICITOR GHENT: Not a verdict?

24 THE COURT: It is. It's a question. Not a verdict.

25 SOLICITOR GHENT: Yes, sir.

1 THE COURT: I was just waiting for the defendant to
2 come in.

3 MR. SHEALY: Yes, sir, and I believe they're bringing
4 him, Your Honor.

5 (WHEREUPON, the defendant comes into the courtroom at
6 this time.)

7 THE COURT: Okay. The first question, it says jurors,
8 and they give their numbers, would like to see or hear the
9 written report by the first officer on the scene. I assume
10 that is Officer Welch that you brought in to the, the, your
11 case---

12 MR. SHEALY: That is---

13 THE COURT: ---and that was never put into evidence,
14 right?

15 MR. SHEALY: The written report was not. I don't, I
16 don't believe there would of been any way to do that.

17 THE COURT: Okay.

18 MR. SHEALY: I suppose we could replay the testimony
19 for them, but I don't---

20 THE COURT: Okay. Then also, they also want transcript
21 of Mrs. Holt's testimony and Mr. Holt's testimony.

22 Now, as to the first request, what I would propose that
23 I would tell the jurors is that I'm not allowed to that --
24 if -- that that report was not put into evidence, and I --
25 if it's not in evidence they can't consider it. However, be

1 glad to replay his testimony, and the same thing for the
2 Holt's. We don't have the technical ability to give you
3 transcripts, but we'll be glad to bring them in here and let
4 them listen to the testimony, and I'm gonna -- with -- what
5 would be your position on that, Ms. Poulos?

6 SOLICITOR POULOS: Your Honor, I would agree with you.
7 We obviously don't have the ability to have a written
8 transcript. If they would like to hear a play back of
9 everything, we would not object to that.

10 THE COURT: Okay. And Mr. Shealy?

11 MR. SHEALY: Your Honor, I believe they have the right
12 to hear it again. So, if they, if they so choose.

13 THE COURT: Well, here's, here's the deal. I'm not
14 gonna sit up here all afternoon listening to this
15 transcript. I mean -- the point being -- I shouldn't say --
16 that's a poor way of wording it. It's gonna take a good
17 hour and a half to get that information brought forward I
18 think if I recall the testimony, and at that point it will
19 be a point in the evening I probably would send them home
20 and let them continue their deliberations.

21 I will propose, let me answer the questions and tell
22 them that I would, you know, since it's gonna take a while
23 for that information to play out, that they come back in the
24 morning at nine o'clock and we'll play it for them at that
25 stage, and then they can resume their deliberations.

1 what would be your feeling on that?

2 SOLICITOR POULOS: I would just go along with whatever
3 the Court wanted to do.

4 THE COURT: Well, I mean if you disagree, I don't have
5 a problem with you telling me.

6 SOLICITOR POULOS: No, sir, I do not disagree at all.

7 THE COURT: Okay.

8 MR. SHEALY: Yes, sir, I have no problem with that.

9 THE COURT: Okay. And for the record, it's quarter
10 till 5:00 now. So, by the time we do it, it just seems to
11 be getting a little late in the hour.

12 MR. SHEALY: Yes, sir. Yes, sir.

13 THE COURT: Okay. Would you bring the jurors in?

14 (WHEREUPON, the following takes place within the
15 presence of the jury.)

16 THE COURT: Madam Forelady, I have what appears to be a
17 request from the jury, and, in fact, this request asks to
18 see or hear the written report by the first officer on the
19 scene.

20 FORELADY: Yes, sir.

21 THE COURT: And secondly, transcripts of Mrs. Holt's
22 testimony and Mr. Holt's testimony.

23 FORELADY: Yes.

24 THE COURT: Okay. Well, let me do this.

25 Number one, the actual report for the officer who

1 initially appeared on the scene was not placed into
2 evidence. So, that's not before the jury. However, I can
3 make it available for you to listen to his testimony, and
4 the same with the Holts and the same with Mr., Mr. and
5 Mrs. Holt.

6 The way we are, we are not technically able to run off
7 a transcript quickly enough for you guys to be able to get
8 it and have it in real time. So, what I would propose, and
9 I'm gonna ask you to go back and talk to your jury, is that
10 we get it set up, and since that testimony would take a
11 while to listen to, number one, make sure listening to it
12 would answer your question, is that what you want, and,
13 number two, since it will take a while, that we break for
14 the day and bring you back at 9:00AM in the morning, and
15 that way you can listen to it at that point.

16 Okay. Would you go back and check with your jury in
17 the jury room and make sure that that answers what they're
18 asking for, and, number one, if you don't want to break,
19 we'll be glad to continue too. So, either way you want to
20 do it.

21 Okay.

22 FORELADY: We actually did have the discussion prior to
23 asking for---

24 THE COURT: Okay.

25 FORELADY: ---requesting that. So, you know, is it

1 totally necessary and those that requested it said yes. So,
2 we've already decided -- they already have -- we've already
3 had the discussion as to whether it really is necessary --

4 THE COURT: Okay.

5 FORELADY -- and that was -- it was stated that yes, it
6 is necessary for them to make a decision.

7 THE COURT: Okay. Now. I, for some reason, it's going
8 over the top of my head. It must be I'm at my house and
9 somebody else is talking to me.

10 But you say that it is totally necessary. That is,
11 they need to see these things or hear them?

12 FORELADY: Yes. Yes.

13 THE COURT: Okay.

14 FORELADY: I mean like what you're asking me to go back
15 there and do and ask them if it's really necessary, we've
16 already had the discussion.

17 THE COURT: Okay. And I wasn't clear.

18 FORELADY: Oh.

19 THE COURT: What I, what I was gonna say is, number
20 one, since we really don't have the technical ability to
21 give you the written transcripts as to the testimony, would
22 you want it -- would it be okay to listen to the audio
23 version of the testimony, which is to recapture the whole,
24 all the testimony from the officer and Mr. and Mrs. Holt?
25 Would that be sufficient?

1 FORELADY: Okay. That's what you want me to ask them?

2 THE COURT: Yes, ma'am, you can go back and check with
3 them, and what I was gonna say to you is because it's gonna
4 take a longer period of time to listen to it, whether they
5 want to continues or come back in the morning, okay, and
6 listen to it.

7 okay?

8 FORELADY: All right.

9 THE COURT: All right.

10 (WHEREUPON, the following takes place outside the
11 presence of the jury.)

12 THE COURT: Any additions or exceptions from the State
13 to my---

14 SOLICITOR POULOS: No, sir, Your Honor.

15 THE COURT: --- questions?
16 Defense?

17 MR. SHEALY: No, Your Honor.

18 THE COURT: Okay. I quite -- I wasn't quite sure what
19 she was saying. I thought she said only it's absolutely
20 necessary they get a written transcript.

21 MR. SHEALY: I, I think what she meant to say is they
22 would insist on hearing it.

23 THE COURT: Okay. We'll find out.

24 Can I see the lawyers up here?

25 MR. SHEALY: Yes, Your Honor.

1 (WHEREUPON, a bench conference was held at this time.)

2 THE COURT: All right. The note we have is we would
3 like to listen to the testimonies of Mrs. Holt, Mr. Holt,
4 officer Welch, and Officer Williams.

5 Okay. I know that's gonna be a couple hours. I may
6 make an executive decision to go ahead and call it and bring
7 them back in the morning, and I mean I just think everybody
8 else -- by the time we do that it's seven o'clock.

9 Do you have any objections to that?

10 MR. SHEALY: I don't, judge. I would suggest it might
11 be a good idea to make the decision for them like that.

12 THE COURT: All right.

13 SOLICITOR POULOS: No objection from the State, Your
14 Honor. I would agree to that's the right thing to do.

15 THE COURT: And listen, don't get me wrong. I don't
16 mind doing that. I just don't see -- then they go back and
17 deliberate and it will be ten o'clock, and I'm -- it's not
18 necessary.

19 Okay.

20 SOLICITOR GHENT: Your Honor, may I see that exhibit
21 again for a moment?

22 THE COURT: Would you hand the second one down?

23 SOLICITOR GHENT: Yes, sir.

24 THE COURT: Well, actually I need to go over that with
25 them.

1 SOLICITOR GHENT: Yes, sir. Do I give this to you or
2 the court reporter?

3 THE COURT: Just give it to the court reporter.

4 SOLICITOR GHENT: Yes, sir.

5 THE COURT: Thank you, sir.

6 (WHEREUPON, the following takes place within the
7 presence of the jury.)

8 THE COURT: All right. Madam Forelady, the jury wants
9 to hear Mrs. Holt, Mr. Holt, Officer Wilson, Officer
10 Williams, is that correct?

11 FORELADY: Yes.

12 THE COURT: Okay. What I'm gonna do, I'm gonna make a
13 call. All that being done is gonna take a couple hours for
14 you to listen to it again. Then you'd have to go back and
15 deliberate. It's five o'clock now.

16 So, what I'm gonna do is excuse you for the day. I'm
17 gonna ask each of you be in your jury room a few minutes
18 before 9:00, and then we'll begin with you listening to that
19 testimony at nine o'clock in the morning, and we'll let you
20 listen to it as much as you want to.

21 Okay. And the reason I'm doing that is that if it
22 takes two hours, it will be seven o'clock, then you start
23 your deliberations, and then you'll be 8:00 or 10:00. And
24 since we're in the middle of the week, it's not crunch time.
25 So, I'm gonna go ahead and call it a day.

1 FORELADY: All right.

2 THE COURT: Let me remind everyone that you're not to
3 speak amongst yourselves or with anyone else about this
4 case. If you hear, see, or read anything about it, just do
5 not do so.

6 Okay. I'll excuse you for the evening.

7 Thank you.

8 (WHEREUPON, the following takes place outside the
9 presence of the jury.)

10 THE COURT: All right. Any additions or exceptions
11 from the State?

12 SOLICITOR POULOS: No, sir, Your Honor.

13 THE COURT: From the defense?

14 MR. SHEALY: No, sir, Your Honor.

15 THE COURT: All right. We'll be in recess until nine
16 o'clock in the morning.

17 SOLICITOR POULOS: Yes, sir, Your Honor.

18 THE COURT: Thank you, guys.

19 SOLICITOR POULOS: Thank you.

20 SOLICITOR GHENT: Thank you, Your Honor.

21 (WHEREUPON, the two notes from the jury were marked as
22 Court's Exhibit Nos. 2 and 3 for identification purposes
23 only at this time.)

24

25 (WHEREUPON, Court was in recess for the evening.)

Thursday, February 28th, 2013

THE COURT: All right. Guys, we'll get started.

Anything from the State which we need to deal with?

SOLICITOR POULOS: No, sir, Your Honor.

THE COURT: Anything from the defense?

MR. SHEALY: No, Your Honor.

THE COURT: I guess what we'll do is run back in --
what order do you have it set up in?

COURT REPORTER: Mrs. Holt, Mr. Holt, Officer Williams,
and Officer Welch.

THE COURT: Okay. In speaking with the clerk this
morning she said what she's gonna do during objection
periods or bench conferences, she's just gonna cut it down,
fast forward through that, and that's the best we can do it.

Okay. Would you bring the jury in?

(WHEREUPON, the following takes place within the
presence of the jury.)

THE COURT: Good morning. Madam Forelady, I have a
last communication from the jury that you'd like to listen
to the testimony of Mrs. Holt, Mr. Holt, Officer Williams,
and Officer Welch, is that correct?

FORELADY: Yes, sir.

THE COURT: And what I'm gonna do is since we don't
have the ability to have the transcript live time, we're

1 gonna play the audio versions of that, and the court
2 reporter is gonna do that and let you listen to them. If
3 you have any difficulty hearing, raise your hand. And if
4 you need to, we'll let you go down and stand around here,
5 but right now I'm gonna let you sit unless there's any
6 difficulty hearing okay.

7 Madam Court Reporter, are we ready?

8 COURT REPORTER: Yes, sir.

9 THE COURT: Okay. You can go ahead and proceed please.

10 COURT REPORTER: Yes, sir.

11 (WHEREUPON, the testimony of Mrs Holt and Mr. Holt was
12 played for the jury at this time.)

13 SOLICITOR GHENT: Your Honor, may I approach?

14 This is not a matter of law.

15 (WHEREUPON, a bench conference was held out of the
16 hearing of the jury at this time.)

17 FORELADY: Sir?

18 THE COURT: Y'all need a break?

19 FORELADY: Yes, please.

20 THE COURT: Okay. Let's take about a ten minute break.
21 Okay.

22 (WHEREUPON, the following takes place outside the
23 presence of the jury.)

24 THE COURT: Be in recess for a few minutes.

25 (WHEREUPON, a short recess was taken at this time.)

1 THE COURT: All right. State ready to proceed?

2 SOLICITOR POULOS: Yes, sir, Your Honor.

3 THE COURT: Defense ready?

4 MR. SHEALY: Yes, Your Honor.

5 THE COURT: Will you bring the jury in when you have a
6 chance please, sir?

7 (WHEREUPON, the following takes place within the
8 presence of the jury.)

9 (WHEREUPON, the testimony of Officer Lorin Williams and
10 Officer David Welch was played for the jury at this time.)

11 THE COURT: All right. Madam Forelady, at this point
12 do you think that satisfies the jury's request for that
13 information?

14 FORELADY: Yes.

15 THE COURT: Okay. I'm gonna ask you to go back to your
16 jury room and we'll send the exhibits back and you can start
17 your deliberations.

18 (WHEREUPON, the following takes place outside the
19 presence of the jury.)

20 THE COURT: Are those exhibits right over there and the
21 verdict form?

22 Okay. You pulled -- you take that back to them and ask
23 them to begin their deliberations unless there's anything
24 from the State or the defense?

25 SOLICITOR POULOS: Nothing from the State, Your Honor.

1 MR. SHEALY: Nothing from the defense.

2 THE COURT: Okay. All right. Guys, we'll be at ease.
3 Thank you.

4 (WHEREUPON, the jury began deliberations again at
5 10:46AM and returned with a question at 12:42PM.)

6 THE COURT: All right. We're on the record. This is
7 the Rios case, Gabriel Jon Rios. We have a question from
8 the jury. The question is may we have the definition of
9 assault and battery in the first degree.

10 what I've done is asked the law clerk to write me,
11 download me the charge on assault and battery, and I was
12 gonna propose something to you. I want to hear from you.

13 I have the charge on assault and battery, assault in
14 the first degree or assault and battery in the first degree.
15 In that charge it does not define assault and it does not
16 define battery.

17 So, what I was thinking is give them this charge, and
18 then pull, extrapolate from the assault and battery charge
19 the definition of assault and the definition of battery.

20 Do you think that would be appropriate, Ms. Poulos?

21 SOLICITOR POULOS: Yes, sir, Your Honor.

22 THE COURT: Mr. Ghent, do you think that would be
23 appropriate?

24 SOLICITOR GHENT: Yes, sir.

25 THE COURT: Okay. Mr. Shealy.

1 MR. SHEALY: Your Honor, I don't think I have an
2 objection. I think that's fine.

3 THE COURT: You sure?

4 MR. SHEALY: Yes, sir.

5 THE COURT: Okay. Well, let me -- it will take -- he
6 was downloading that now. I'm gonna step back there and see
7 if I can go get it. I'll be right back.

8 (Pause.)

9 THE COURT: Counsel, I have the definition of assault
10 and battery in the charge.

11 Y'all want to look at it before I give it out?

12 MR. SHEALY: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. SHEALY: If we may approach?

15 THE COURT: Okay.

16 (WHEREUPON, a bench conference was held at this time.)

17 THE COURT: Is this okay?

18 MR. SHEALY: Yes, sir.

19 SOLICITOR POULOS: Yes, sir.

20 THE COURT: Okay. Thank you.

21 SOLICITOR GHENT: Yes, sir.

22 THE COURT: Okay. Would you bring the jury in?

23 (WHEREUPON, the following takes place within the
24 presence of the jury.)

25 THE COURT: All right. Madam Forelady, I understand

1 that the jury has the following question. It says may we
2 have a request -- may we have the definition of assault and
3 battery in the first degree.

4 Is that correct?

5 FORELADY: Yes.

6 THE COURT: Now, what I have conferred with counsel and
7 what we feel like would be appropriate is for me to give you
8 the charge on assault and battery first degree. Thereafter,
9 I will give you the definition of assault and the definition
10 of battery.

11 Okay. With that being said, I also tell you that your
12 lunch is here. I just withheld giving it to you until I
13 gave you this charge. Once I give it to you, and clear with
14 the attorneys, then you can go back and eat lunch and begin
15 your deliberations again.

16 Okay. All right. This is the charge on assault and
17 battery first degree. The defendant is charged with assault
18 and battery in the first degree. A person may commit the
19 offense of assault and battery in the first degree if the
20 person unlawfully offers or attempts to injure another
21 person with the presentability to do so and the act either
22 is accomplished by means likely to produce death or great
23 bodily harm or occurred during the commission of a robbery,
24 burglary, kidnapping, or theft.

25 Great bodily injury means bodily injury which causes a

1 substantial risk of death or which causes serious permanent
2 disfigurement or protracted loss or impairment of the
3 function of a bodily member or organ. As with the other
4 charges, the state must prove each element of this offense
5 by proof beyond a reasonable doubt.

6 Now, the definition of assault is as follows: An
7 assault occurs when a person unlawfully attempts or offers
8 to commit a violent injury upon another person and had the
9 presentability to complete the attempted injury. An assault
10 is the intentional creation of a reasonable fear of
11 immediate bodily harm.

12 It is not necessary that the attempted injury or harm
13 actually take place. For example, if I walk up to you and
14 when we are within arms reach, excuse me, when we are in
15 arms reach, I draw back to hit you, that is an assault.

16 Now, a battery is the unlawful touching of another
17 person by a person who has committed the assault. An
18 unlawful touching can be caused by a part of the accused
19 body or by any object the accused puts in motion. A battery
20 is the completion of the assault by using or applying force
21 to another person; however slight, in a rude, angry, or
22 resentful manner without legal justification for doing so.

23 So, therefore, using my earlier example, if I carry
24 through the assault by hitting you, then that is the
25 battery.

1 Madam Forelady, does that appear to respond to the
2 request of the jury?

3 FORELADY: Yes, sir.

4 THE COURT: Very good.

5 What I'm gonna do is let you go back to your jury room.
6 They'll begin sentence, serving you lunch. I'm gonna clear
7 with these attorneys whether or not I said something I
8 should have or, or other, and if it's okay we'll send word
9 to begin your deliberations.

10 okay. Thank you.

11 (WHEREUPON, the following takes place outside the
12 presence of the jury.)

13 THE COURT: Add additions or exceptions from the State?

14 SOLICITOR POULOS: No, sir, Your Honor.

15 THE COURT: From the defense?

16 MR. SHEALY: No, sir, Your Honor.

17 THE COURT: All right. Thank you, guys. We'll be at
18 ease.

19 Would you tell them they may begin their deliberations?

20 All right. Good.

21 (WHEREUPON, the jury began deliberations again at
22 12:45PM and returned with a verdict at 1:40PM.)

23 THE COURT: My understanding is we have a verdict.
24 State ready?

25 SOLICITOR POULOS: Yes, sir, Your Honor.

1 THE COURT: Defense ready?

2 MR. SHEALY: Yes, Your Honor.

3 THE COURT: All right. Let me say, mainly to the
4 defendant or anybody else in here, no reactions to the jury
5 verdict please.

6 would you bring the jury in?

7 (WHEREUPON, the following takes place within the
8 presence of the jury.)

9 THE COURT: Okay. Madam Forelady, my understanding is
10 the jury has reached a verdict, is that correct?

11 FORELADY: Yes.

12 THE COURT: Is it unanimous?

13 FORELADY: Yes.

14 THE COURT: Would you pass it to the bailiff please?

15 (Forelady complies.)

16 THE COURT: Would you publish the verdict please, Madam
17 Clerk?

18 CLERK: In the State of South Carolina, County of
19 Spartanburg, the State of South Carolina versus Gabriel Jon
20 Rios, we, the jury, unanimously find the defendant, Gabriel
21 Jon Rios, as to Indictment Number 2010-GS-42-6830, burglary
22 in the first degree, guilty.

23 We, the jury, unanimously find the defendant, Gabriel
24 Jon Rios, as to Indictment 2010-GS-42-6831, armed robbery,
25 guilty.

1 We, the jury, unanimously find the defendant, Gabriel
2 Jon Rios, as to Indictment 2010-GS-42-6831(A), possession of
3 a weapon during a violent crime, guilty.

4 We, the jury, unanimously find for the defendant,
5 Gabriel Jon Rios, as to Indictment 2010-GS-42-6833,
6 kidnapping, guilty.

7 We, the jury, unanimously find the defendant, Gabriel
8 Jon Rios, as to Indictment 2010-GS-42-6834, assault and
9 battery in the first degree, guilty.

10 It is signed by the foreperson and dated today's date.

11 Ladies and gentlemen of the jury, if this is your
12 verdict and still your verdict, please raise your
13 right-hand.

14 (WHEREUPON, all jurors raise their right-hands at this
15 time.)

16 CLERK: So say you all.

17 THE COURT: Led the record reflect that all the 12
18 raised their right-hand.

19 (WHEREUPON, the jury was dismissed at this time.)

20 THE COURT: If you'll prepare, prepare me the
21 sentencing sheets. I'll come back out in just one moment.

22 SOLICITOR POULOS: Yes, sir.

23 THE COURT: Thank you.

24 (Pause.)

25 THE COURT: All right. What are the ranges on these

1 charges for me please, Ms. Poulos?

2 SOLICITOR POULOS: Your Honor, burglary first, the
3 sentencing range is 15 years to life. On armed robbery---

4 THE COURT: Just slow down for a second please.

5 SOLICITOR POULOS: Okay. Sorry.

6 THE COURT: Burglary is fifteen to life?

7 SOLICITOR POULOS: Yes, sir.

8 THE COURT: Okay.

9 SOLICITOR POULOS: Armed robbery is ten to thirty
10 years.

11 THE COURT: Okay.

12 SOLICITOR POULOS: Possession of a weapon during a
13 violent crime, Your Honor, is a consecutive plus five.

14 THE COURT: You say it has to be consecutive?

15 SOLICITOR POULOS: Yes, sir.

16 THE COURT: Okay.

17 SOLICITOR POULOS: Assault and battery first degree is
18 zero to ten years.

19 THE COURT: Okay. And kidnapping would be --?

20 SOLICITOR POULOS: Zero to thirty.

21 THE COURT: Zero to thirty.

22 SOLICITOR POULOS: Yes, sir, and I have the sentencing
23 ranges on the sentencing sheets for you.

24 THE COURT: Very good. Thank you.

25 SOLICITOR POULOS: Yes, sir.

1 THE COURT: All right. Would you bring your client
2 around please?

3 MR. SHEALY: Your Honor, if I may make motions?
4 Should I go ahead and make my post trial motions?

5 THE COURT: Sure.

6 MR. SHEALY: Your Honor, I would renew, I would renew
7 all of those motion that I've already made. In particular
8 the motions regarding the charge and your decision not to
9 charge alibi. Your Honor, I'd ask for a new trial on the
10 basis of those motions.

11 Thank you.

12 THE COURT: All right, sir. I'm gonna deny those
13 motions.

14 Would you bring your client around please, sir?

15 MR. SHEALY: I will.

16 THE COURT: All right. Ms. Poulos?

17 SOLICITOR POULOS: Yes, sir.

18 THE COURT: Would you come around as well?

19 SOLICITOR POULOS: Yes, sir.

20 (Parties comply.)

21 THE COURT: What's the date, the 28th?

22 BAILIFF: Yes, sir.

23 THE COURT: Okay. Would you slowly give me his record?

24 SOLICITOR POULOS: Oh, yes, sir, Your Honor.

25 THE COURT: And I'm gonna let you speak if you desire

1 to speak. If you don't, that's fine too.

2 okay.

3 SOLICITOR POULOS: Your Honor, in South Carolina, his
4 record includes a 1993 possession of disorderly -- I'm
5 sorry. Public disorderly conduct.

6 A 2006 public disorderly conduct.

7 2008, failure to return rental property a value greater
8 than \$5,000.

9 2009, use of vehicle without consent.

10 THE COURT: What was that, use of vehicle?

11 SOLICITOR POULOS: Yes, sir, and a burglary second
12 violent.

13 THE COURT: And burglary second violent?

14 SOLICITOR POULOS: Yes, sir. From Florida, Your Honor,
15 are the remainder.

16 MR. SHEALY: Your Honor, as to that -- it was my
17 understanding it was a nonviolent burglary.

18 SOLICITOR POULOS: I have certified copies of that
19 particular conviction.

20 THE COURT: Have you seen it?

21 Show it to counsel.

22 MR. SHEALY: I've not seen those.

23 (Pause.)

24 MR. SHEALY: Your Honor, it is a violent offense.

25 THE COURT: Okay. Thank you.

1 You satisfied?

2 MR. SHEALY: I am, Your Honor.

3 THE COURT: All right. You started to give me Florida.

4 SOLICITOR POULOS: Yes, sir.

5 1981, strong armed robbery and resisting arrest.

6 1988, possession of cocaine, and possession of

7 marijuana.

8 1989, burglary of a vehicle, and strong armed robbery,

9 petty larceny.

10 1992, vehicle theft.

11 1993, burglary, grand larceny, and possession of

12 cocaine.

13 2001, possession of drug paraphernalia.

14 2002, battery.

15 THE COURT: 2002 what?

16 SOLICITOR POULOS: Battery.

17 THE COURT: Battery?

18 SOLICITOR POULOS: Yes, sir.

19 THE COURT: All right. Mr. and Mrs. Holt, would you
20 like to add anything further other than what you testified
21 to at trial?

22 MRS. HOLT: No, sir.

23 THE COURT: Mr. Holt.

24 MR. HOLT: No, Your Honor.

25 THE COURT: Thank you very much.

1 All right. Mr. Shealy.

2 MR. SHEALY: Thank you.

3 THE COURT: Anything you want to add before I sentence
4 this gentleman?

5 MR. SHEALY: Yes, sir, Your Honor, I'd like to tell you
6 a little bit about Mr. Rios given that he did not testify.

7 Your Honor, he's 52 years old. He has five children.
8 The oldest is 23, Gabe, whose got a parasite right now and
9 so he's filed for his disability. But a 21 year old named
10 Terrell, who is in the military. He does satellite
11 communications for the military. Shakeena, who just had a
12 baby I believe on Tuesday, Your Honor. So, a grandchild.
13 She works at Family Dollar. Jamal, whose 19, who's in the
14 National Guard. And Ke , who's 17. She still lives
15 with Mrs. Rios who would like to speak on her husband's
16 behalf if she may at the appropriate time.

17 THE COURT: Sure.

18 MR. SHEALY: Your Honor, he does have two other
19 grandchildren. He's married obviously to Mrs. Rios whose
20 testified earlier that they've been married for 21 years.

21 He has a college education. Well, he went to college
22 at Brevard Community College. He was going for psychology.
23 But ultimately he decided to, to become a construction
24 worker instead. It's my understanding from what he's told
25 me it's -- he grew up in a wood shop making -- he made lamps

1 essentially, and he just really enjoyed working with his
2 hands. And, so, he's been certified for weatherization,
3 insulation, and that, that sort of thing. And he's worked
4 construction for the vast majority of his life, Your Honor.

5 Obviously, he, he denies that the, he was the
6 perpetrator of these things, judge. But we, we ask that you
7 be as lenient as you can given what I've been able to tell
8 you, Your Honor. Mrs. Rios may, may speak on his behalf at
9 this point.

10 THE COURT: Mr. Rios, do you have anything you want to
11 state?

12 DEFENDANT: Your Honor, I'm still claiming my
13 innocence.

14 THE COURT: I can't hear you.

15 DEFENDANT: I'm still claiming my innocence on this,
16 Your Honor.

17 THE COURT: I understand that.

18 DEFENDANT: Yes, sir.

19 THE COURT: Mrs. Rios, would you like to come forward
20 and say anything?

21 MR. SHEALY: Mrs. Rios, would you like to speak on your
22 husband's behalf.

23 MRS. RIOS: Yes, I was -- on talking on my husband's
24 behalf, I know he haven't done it. He haven't done what
25 they said he done, and I don't believe he done it, and

1 I'm -- I'll be behind him because I know he didn't do it,
2 and I need him to be there with my family and with me cause
3 I'm sick also. Other than my son. And my 16-year old
4 daughter can't take care of me.

5 MR. SHEALY: All right. Thank you, ma'am.

6 THE COURT: Thank you, ma'am.

7 Anyone else?

8 MR. SHEALY: No, Your Honor.

9 THE COURT: Anything else on behalf of the State?

10 SOLICITOR POULOS: No, sir, Your Honor.

11 THE COURT: All right. Under Indictment 2010-6830,
12 burglary first, the Sentence is 40 years. That will be
13 concurrent. Credit for time given.

14 Under Indictment 6831, armed robbery, the Sentence is
15 30 years, concurrent, credit for time given.

16 Under Indictment 2010-6833, kidnapping, the Sentence is
17 30 years, concurrent, credit for time given.

18 Under Indictment 2010-6834, the sentence is ten years,
19 concurrent, credit for time.

20 Under Indictment 2010-6831, the Sentence is five years,
21 consecutive, credit for time given or time served. Excuse
22 me.

23 Good luck.

24 SOLICITOR POULOS: Thank you, Your Honor.

25 Mr. Rios?

1 DEFENDANT: Yes, sir.

2 THE COURT: I know you're speaking with your attorney.
3 You have ten days to appeal this sentence and verdict.

4 Okay, sir. Not counting today.

5 MR. SHEALY: Yes, sir.

6 DEFENDANT: Yes, sir.

7 MR. SHEALY: Thank you, judge.

8 THE COURT: Thank you, attorneys.

9 (Pause.)

10 THE COURT: Mr. Shealy?

11 MR. SHEALY: Yes, sir, Your Honor.

12 THE COURT: Would you bring Mr. Rios back please?

13 OFFICER: Yes, sir.

14 (WHEREUPON, the defendant returns to the courtroom at
15 this time.)

16 DEFENDANT: Yes, sir.

17 THE COURT: I'm sorry. The State said they wanted to
18 supplement the record. I'm not exactly sure what they want
19 to do.

20 But Mr. Ghent.

21 SOLICITOR GHENT: Yes, sir, I apologize, Your Honor.

22 The only thing I would, at this time do, is move to
23 supplement the record simply by having a copy of the
24 defendant's notice and statement of his intent for alibi for
25 the simple reason that Mr. Shealy's a fine attorney. He did

1 a terrific job.

2 It's the State's position that, number one, the notice
3 essentially is a notice of partial alibi, and, number two,
4 that's exactly what counsel did establish and, again, he's a
5 good lawyer. He worked with what he had. But it was a
6 partial alibi, not full alibi, and I would respectfully
7 submit that in this state I do not believe the State of
8 South Carolina recognizes partial alibi. So, we would
9 simply ask to supplement the record with a clean copy of
10 that notice.

11 Thank you, Your Honor.

12 THE COURT: All right. Any objection to that being
13 made a---

14 MR. SHEALY: Your Honor?

15 THE COURT: ---Court's Exhibit.

16 MR. SHEALY: I have no objection. I believe I'd
17 already filed it with the Clerk of Court.

18 THE COURT: Just in case I'll make it a Court's
19 Exhibit.

20 MR. SHEALY: Yes, Your Honor, that's fine.

21 THE COURT: All right.

22 SOLICITOR GHENT: Thank you, Your Honor.

23 THE COURT: Good luck to you.

24 DEFENDANT: Yes, sir.

25 (WHEREUPON, a note from the jury was marked as Court's

1 Exhibit No. 4 for identification purposes only at this time.
2 No other documentation was handed up to be marked as an
3 exhibit.)

4

5 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 26th, 27th, and 28th day of February, 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 14th, 2013



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GABRIEL JON RIOS,

APPELLANT

APPELLATE CASE NO. 2013-000493

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
ARGUMENT	7
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<u>Roseboro v. State</u> , 317 S.C. 292, 454 S.E.2d 312 (1994).....	8, 10
<u>State v. Bealin</u> , 201 S.C. 490, 23 S.E.2d 746 (1943).....	8
<u>State v. Brandt</u> , 393 S.C. 526, 713 S.E.2d 591 (2011)	7, 8
<u>State v. Day</u> , 341 S.C. 410, 535 S.E.2d 431 (2000).....	9
<u>State v. Foust</u> , 325 S.C. 12, 479 S.E.2d 50 (1996)	8
<u>State v. Logan</u> , 405 S.C. 83, 747 S.E.2d 444 (2013).....	7
<u>State v. Robbins</u> , 275 S.C. 373, 271 S.E.2d 319 (1980).....	7, 8
<u>State v. Smalls</u> , 98 S.C. 297, 82 S.E.2d 421 (1914)	9
<u>State v. Williams</u> , 400 S.C. 308, 733 S.E.2d 605 (Ct.App. 2012).....	9

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to charge the jury with the law on alibi when Appellant presented alibi evidence at trial?

STATEMENT OF THE CASE

In November of 2010, the Spartanburg County Grand Jury indicted Rios for burglary first degree, armed robbery and possession of a weapon during the commission of a violent crime, kidnapping and assault and battery first degree, indictments #2010-GS-42-6830 – 6834. On February 26, 2013, Rios proceeded to jury trial before the Honorable R. Lawton McIntosh. Attorney Matthew Shealy represented Rios at trial. Attorney Timi Poulos and Russell Ghent prosecuted the case. The jury returned verdicts of guilty and Judge McIntosh sentenced Rios to 40 years for burglary first, 30 years concurrent for armed robbery, 30 years concurrent for kidnapping, 10 years for assault and battery first degree and 5 years consecutive for the weapon charge. A timely notice of intent to appeal was filed on March 1, 2013. This appeal follows.

STATEMENT OF FACTS

Gail Holt testified that on the morning of Saturday, August 14, 2010, she woke up a bit before 7:30 AM and after being awake for a little bit she heard glass breaking. When she went to investigate, she encountered a man in her hallway. (R. pp. 58, line 1 – pp. 59, lines 1-3). Mrs. Holt testified that she recognized the man as “Gabe,” a man who had previously worked on and off for her husband both at his business and in the Holts’ home. (R. pp. 59, line 4 – pp. 60, lines 1-15). According to Mrs. Holt, the man forced her down the hall to her husband’s office and demanded that she open the safe. (R. pp. 61, line 9 – pp. 62, lines 1-16). When she was unable to open the safe, the man forced her into the bedroom where he taped her hands and then stole a gun from the bedroom and money, a cell phone and car keys from her purse. (R. pp. 63, line 2 – pp. 64, lines 1-18). Mrs. Holt testified that the man then stole her car. (R. pp. 64, lines 19-25).

Officer Brandon Howard with the Spartanburg County Sheriff’s Department testified that he responded to the scene and found that a window pane had been broken in the door from the garage into the kitchen and there was shattered glass on the floor. (R. pp. 144, lines 10-16). Officer Ted Saar with the Spartanburg County Sheriff’s Department testified that a fingerprint from a piece of shattered glass matched the Appellant. (R. pp. 186, lines 12-23). Mr. Holt testified, however, that Appellant previously worked inside the Holt home painting, roofing and installing a safe. (R. pp. 101, lines 14-17).

Marie Ollinger, a neighbor who lived about seven houses away from the Holts, testified that on Saturday August 14, 2010, she went for a walk between 7:30 AM and 8:00 AM and saw an African American man in the neighborhood who she did not recognize. (R. pp. 113, line 20 – pp. 114, 115, lines 1-5). Ms. Ollinger testified that the man was walking

toward the Holts' house. (R. pp. 115, lines 22 – pp. 116, lines 1-25). Ms. Ollinger did not identify the Appellant as the person she saw in the neighborhood. On cross examination she clarified that she probably started her walk at 7:30 and saw the man at the start of her walk. (R. pp. 119, lines 4-10).

Estar Boyd testified that on August 14, 2010, she was living on Florida Avenue and during this time frame she would allow Appellant to use her cordless phone, at her home. (R. pp. 215, line 1 – pp. 216, lines 1-17). Ms. Boyd testified that her phone number at the time was (864) -2858. Sonia Rios, Appellant's wife testified that on August 14, 2010, she received a phone call from her husband at 7:25 AM. (R. pp. 219, lines 15-20). Ms. Rios testified that the phone call from her husband the morning of August 14, 2010 was from the telephone number -2858. (R. pp. 224, lines 6-25).

Curtis Jones, an investigator with the Public Defender Office testified that the Holts' house on Perrin Drive was 5.2 miles from Estar Boyd's house on Florida Avenue (R. pp. 229, lines 4-25). Investigator Jones testified that the drive took about 16 minutes. (R. pp. 230, lines 1-25).

ARGUMENT

The trial judge erred in refusing to charge the jury with the law on alibi when Appellant presented alibi evidence at trial.

During the charge conference the judge advised the parties that he was not going to charge the jury with the law on alibi but would allow counsel to argue alibi. (R. pp. 236-239). The judge cited State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) in support of his decision not to charge the jury with the law on alibi. Counsel for Appellant argued that an alibi instruction was warranted because the jury could believe that the neighbor saw the intruder at 7:30 making it impossible to have been the Appellant as he was making a phone call at 7:25 and was 16 minutes away. (R. pp. 238, line 12 – pp. 239, lines 1-2). The judge noted that the victim testified that the incident took place between 7:30 AM and 8:00 AM and found that “there’s insufficient evidence in the record for alibi to be charged because the entire time period in which the crime occurred, at least on the, based on the evidence in the record, is not covered by the other evidence presented in this matter.” (R. pp. 237, lines 17-21).

At the close of jury instruction the judge asked if there were[o]ther than your prior objection to my not charging alibi, any additions or exceptions to the charge as given?” (R. pp. 297, lines 14-16). After the jury returned with verdicts of guilty counsel for Appellant renewed the objection to the failure to charge alibi. (R. pp. 319, lines 6-10).

In State v. Logan, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013) the South Carolina Supreme Court wrote, “In reviewing jury charges for error, this Court considers the trial court’s jury charge as a whole and in light of the evidence and issues presented at trial. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is

correct if, when read as a whole, the charge adequately covers the law. Id. ‘A jury charge that is substantially correct and covers the law does not require reversal.’ Id. (citing State v. Foust 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996)).” The jury charge in the present case fails to inform the jury that, “An alibi charge places no burden on the defendant, but emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime.” Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994) (citing State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943)).”

In State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980), the South Carolina Supreme Court wrote, “A charge on the defense of alibi is not required when an accused person merely denies committing the criminal act. Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission.” In Robbins the Court reversed and granted a new trial based on the judge’s refusal to charge alibi where Robbins testified that while he had been at the store earlier, he took his wife to work at 10:00 PM and then went straight home making it impossible for him to have robbed the store at 10:45 PM. The Court wrote, “The evidence, viewed as a whole, creates the inference that Robbins was submitting to the court that he was elsewhere at the time of the robbery. Accordingly, his first exception must be sustained and a new trial ordered.” Robbins, 275 S.C. at 376, 271 S.E.2d at 320.

An alibi charge was warranted in the present case because the testimony of the neighbor established that she saw a stranger in the neighborhood walking toward the Holts’ house very close to 7:30 AM. The State offered this evidence in an attempt to establish that Appellant was the stranger seen by the neighbor. It would have been

impossible, however, for Appellant to have been the stranger the neighbor saw close to 7:30 AM as he was making a phone call at 7:25 AM and was 16 minutes away.

In State v. Smalls, 98 S.C. 297, 82 S.E.421 (1914) the South Carolina Supreme Court found the trial judge was in error in instructing the jury that the plea of alibi must be received with caution. The Court held that the defense of alibi is entitled to be considered by the jury the same as any other defense. As with self defense, if there is any evidence in the record from which it could reasonably be inferred that the defendant was asserting an alibi defense, the defendant is entitled to instruction on the defense and the refusal to charge alibi constitutes reversible error. In State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 609 (Ct.App. 2012), the South Carolina Court of Appeals wrote, "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error. State v. Day, 341 S.C. 410, 416-17, 535 S.E.2d 431, 434 (2000)."

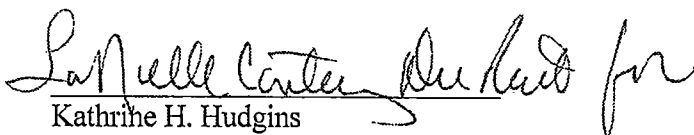
Under the any evidence standard, the judge erred in refusing to instruct the jury on the law of alibi. The failure to charge the jury on the law of alibi constitutes reversible error. While a harmless error analysis is not applicable when the judge refuses to charge the law on alibi and evidence of alibi is presented, as in the present case, the State in the present case failed to present overwhelming evidence of guilt. The State failed to prove how Appellant allegedly traveled from Florida Avenue to the Holts' house and the neighbor was unable to identify Appellant as the stranger she saw in the neighborhood that morning.

Additionally, an alibi charge was necessary in the present case to correct the impression that may have been given by the State in closing argument that Appellant had the burden of proving alibi. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1994). In closing the State reminded the jury that one of the alibi witnesses, Appellant's wife, had been convicted of giving false information to the police. (R. pp. 270, lines 8-15). The State further argued in closing, "He's had over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No One said they were with him that morning. Nobody, nobody that testified for him accounted for his whereabouts. Nobody." (R. pp. 270, line 24 – pp. 271, lines 1-3). The alibi charge was necessary to correct any impression that Appellant bore any burden of proof at trial. The trial judge erred in refusing to charge the jury with the law on alibi.

CONCLUSION

Based on the above argument, the Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

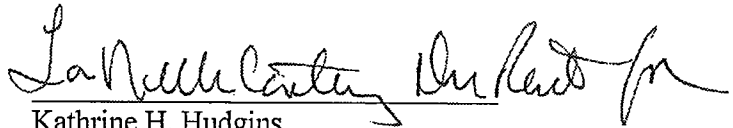
ATTORNEY FOR APPELLANT

This 3rd day of June, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 3rd, 2014

A handwritten signature in cursive script, appearing to read "LaNell Carter" followed by a flourish, positioned above the printed name.

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

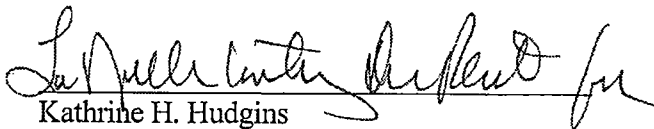
V.

GABRIEL JON RIOS,

APPELLANT

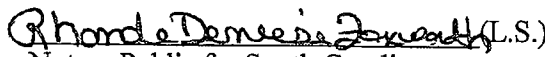
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 3rd day of June, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of June, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000493

THE STATE,

Respondent,

v.

GABRIEL JON RIOS,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
S.C. Bar. No. 68571

JENNY DRAFFIN SMITH
Assistant Attorney General
S.C. Bar No. 76129

South Carolina Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-5254

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	3
ARGUMENT	5
I. The trial court did not err in failing to instruct the jury on alibi defense because Rios' alibi defense was incomplete.....	5
II. Rios suffered no prejudice from the trial court not instructing the jury on alibi defense in light of Rios' closing argument and the entirety of the jury instruction	9
III. Rios was not prejudiced by the trial court's failure to instruct on alibi defense because there is not a reasonable probability that the outcome would have changed	12
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases:

<i>Cherry v State</i> , 300 S.C. 115, 386 S.E.2d 624 (1989)	8, 9
<i>Ford v State</i> , 314 S.C. 245, 442 S.E.2d 604 (1994)	10, 13
<i>Gibbs v State</i> , 403 S.C. 484, 744 S.E.2d 170 (2013)	11
<i>Glover v State</i> , 318 S.C. 496, 458 S.E.2d 538 (1995)	7,8,9
<i>Riddle v State</i> , 308 S.C. 361, 418 S.E.2d 308 (1992).....	7
<i>Roseboro v. State</i> , 317 S.C. 292, 454 S.E.2d 312 (1995).....	6,7,14
<i>State v Lee-Grigg</i> , 374 S.C. 388, 649 S.E.2d 41 (Ct. App. 2007) aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010).....	10
<i>State v Patterson</i> , 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006).....	9,10,11,12
<i>State v Robbins</i> , 275 S.C. 373, 271 S.E.2d 319 (1980)	5, 6, 8
<i>State v Thompson</i> , 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003).....	12, 13

Other Authorities:

21 Am.Jur.2d Criminal Law § 136	5

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in refusing to charge the jury with law related to the defense of alibi when only evidence of a partial alibi was presented at trial?

II.

Whether the trial court's refusal to charge the jury on the defense of alibi prejudiced Rios in light of the closing arguments and the overall jury charge?

III.

Whether the trial court's refusal to charge the jury on the defense of alibi prejudiced Rios in light of overwhelming evidence presented at trial?

STATEMENT OF THE CASE

The Spartanburg County Grand Jury indicted Rios for burglary first degree, armed robbery, possession of a weapon during the commission of a violent crime, kidnapping, and assault and battery first degree. (R. p. 331-340 and R. p. 18, ll. 11-20). On February 26, 2013, Rios proceeded to jury trial before the Honorable R. Lawton McIntosh. Matthew Shealy, Esquire, represented Rios during the trial, and Assistant Solicitor Timi Poulos and Russell Ghent prosecuted the case. The jury returned guilty verdicts on all counts. (R. p. 316 l. 16-p. 317 l. 9). Judge McIntosh sentenced Rios to forty years' imprisonment for burglary first, thirty years' imprisonment for armed robbery, five years' imprisonment for possession of a weapon during the commission of a violent crime, thirty years' imprisonment for kidnapping, and ten years' imprisonment for assault and battery first degree. (R. p. 324 ll. 11-22). Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Gale Holt came face to face with an intruder in her home on the morning of August 14, 2010. (R. p. 58, l. 1 – p. 59, ll. 1-3). Holt recognized the man as “Gabe,” a man who previously worked for her husband both at his business and in the Holts’ home. (R. p. 59, l. 4 – p. 60, ll. 1-15). According to Holt, the man held a sharp object at her neck, forced her down the hall to her husband’s office, and demanded that she open the safe. (R. p. 60, l. 17-20, R. p. 61, l. 9 – p. 62, ll. 1-16).

When she was unable to open the safe, the man forced her into the bedroom, tied her hands behind her back while she was lying face down, and pulled the Holt’s gun from its holster. (R. p. 62, l. 14 – p. 63, l. 10). Rios then demanded Holt’s money and her purse. (R. p. 63, ll. 11-13). Once he located the purse, Rios rummaged through it and through Holt’s jewelry armoire. (R. p. 63, l. 13 – p. 64, ll. 5). Rios took what he wanted, told Holt not to move, and said he would kill her. (R. p. 64, ll. 4-8). Rios took her money, cell phone, and stole her car. (R. p. 64, ll. 14-20). After calling the police and her husband, Holt told police that Gabe committed the crimes, and she identified Gabriel Rios as the perpetrator in a photo line-up on the same day the crime occurred. (R. p. 82, l. 2—p. 84, l. 15).

After being indicted for burglary first degree, armed robbery, possession of a weapon during the commission of a violent crime, kidnapping, and assault and battery first degree, Rios proceeded to a jury trial on February 26, 2013. (R.p.331-340; R. p. 18, ll. 11-20). During the trial, Holt identified Gabriel Rios as the home invader and testified about the events that took place on the morning of August 14, 2010, during the trial. (R. p. 85, ll. 1-14). She also identified a photo line-up where she circled a picture of Rios and identified a signed affidavit. (R. p. 82, l. 14—p. 85, l. 16). Both the circled picture

in the photo line-up and the affidavit were admitted into evidence. (R. p. 82, l. 14—p. 85, l. 16).

Phil Holt, the victim's husband, also testified about the events that transpired on the morning of the home invasion and how he called the police. (R. p. 99, l. 23—p. 100, l. 23). He testified that he knew Rios, who had worked for him on and off for a number of years. (R. p. 100, l. 24—p. 101, l. 2). Specifically, Rios helped Phil Holt install the safe that Rios attempted to open and rob. (R. p. 101, ll. 12-18).

Investigator Lorin Williams with the Spartanburg County Sheriff's Department testified he (Williams) responded to the accident scene. (R. p. 126, l. 22—p. 127, l. 8). Investigator Williams testified that Gale Holt provided a description of the invader and identified him as "Gabe." (R. p. 128, ll. 10-23). Investigator Williams explained the photo line-up presented to Holt on the day of the invasion and Holt's identification of Rios in the line-up. (R. p. 129, l. 14-p. 132, l. 10). Finally, Investigator Williams testified that Rios was arrested between 6:00 and 6:30 on the evening of August 14, 2010. (R. p. 132, l. 22, p. 133, l. 5).

ARGUMENT

I. **The Trial Court did not err in failing to instruct the jury on the alibi defense because Rios' alibi defense was incomplete.**

Rios argues the trial court erred in failing to instruct the jury on the defense of alibi. However, based on the incomplete evidence of Rios' whereabouts during the commission of the crime, the trial did not err, and its ruling should be affirmed.

Evidence of a partial alibi defense is not enough to warrant a jury instruction on the alibi defense. *State v Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). Notably, the *Robbins* Court adopted 21 Am.Jur.2d, Criminal Law section 136 on the defense which provides: "To be successful, *his alibi must cover the entire time when his presence was required for accomplishment of the crime.*" *Id* (citing 21 Am.Jur.2d Criminal Law § 136) (emphasis added). The *Robbins* Court held that "[a]libi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission." *Id*

Rios attempts to establish an alibi defense based on witness testimony. Even examining the testimony from these witnesses in the most favorable light, Rios' alibi defense falls short of being complete. The victim, Gail Holt, testified that on the morning of Saturday, August 14, 2010, she woke up a bit before 7:30 AM. (R. p. 58, ll. 1-5). When questioned about the timing of the crime, the victim testified that it occurred between 7:30 and 8:00. (R. p. 67, ll. 1-9-16).

In his defense, Rios' wife, Sonia Rios, testified that her husband called her at 7:25 a.m. on August 14, 2010. (R. p. 219, ll. 10-20). Rios testified that she received a call from a landline phone number. (R. p. 224, ll. 6-20). Earlier in the trial, Estar Boyd

testified that she was living at a Florida Avenue residence in Spartanburg, SC when the crime occurred and testified as to her phone number, which was the same number testified to by Rios. (R. p. 215, ll. 1-17; R. p. 216, ll. 18-23). Boyd testified that from time to time she would allow Rios to use her Florida Avenue landline, though she did not recall whether Rios used her phone on the day of the crime. (R. p. 215, l. 25—R. p. 217, l. 22).

Curtis Jones, a retired deputy sheriff and current employee of the Seventh Circuit Public Defender's Office then testified on Rios' behalf. (R. p. 228). Specifically, Jones testified that the distance from the residence where the home invasion occurred, to the Boyd residence, from where a call was placed to Sonia Rios, is 5.2 miles. (R. p. 229, ll. 4-25). Additionally, Jones testified that it took him sixteen minutes to drive from the victim's residence to the Florida Avenue residence. (R. p. 230, ll. 1-5). Adding sixteen minutes to the alleged 7:25 phone call is 7:41 a.m. Giving Rios the benefit of any doubt only accounts for eleven minutes of the time period of the crime. Therefore, his alibi defense is incomplete.

As the *Robbins* Court held, to be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime.” 275 S.C. at 375, 271 S.E.2d at 320. Additionally, the *Robbins* Court held that the evidence created an inference that Robbins was elsewhere at the time of the crime. *Id.* at 376, 271 S.E.2d at 320. There, the crime was alleged to have taken place at 10:45 p.m., and Robbins testified that he picked up his wife from work at 10:00 and went straight home. *Id.* at 375, 271 S.E.2d at 320. Therefore, some evidence existed that accounted for Robbins' whereabouts during the 10:45 time of the crime.

In a later post-conviction relief case, the Supreme Court held that the trial lawyer's failure to request an alibi charge was deficient representation. *Roseboro v State*, 317 S.C. 292, 295, 454 S.E.2d 312, 314 (1995). There, Roseboro accounted for his whereabouts for the entire time period in which the crime occurred. *Id* at 293, 454 S.E.2d at 313 ("He testified on February 23 he left his mother's house at 11:45 p.m. and walked to the home of a friend, Roy Miller, where he watched a basketball game until 1:00 a.m. and was then driven home."); *see also Riddle v State*, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992) (where in his defense, Riddle testified that he was home asleep with his wife *the entire night of the crime*, and his wife corroborated this testimony). Clearly, there must be some evidence of the defendant's whereabouts during the entire time period of the commission of the crime in order to warrant a charge on the alibi defense.

In *Glover v State*, another post-conviction relief case, petitioner argued trial counsel was ineffective for failing to contact witnesses who would have placed him in Florida on the day of the crime. 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995). There, the court found that the uncalled witness's testimony was not sufficient to establish an alibi defense. *Id* at 498, 458 S.E.2d at 540. There, the court reasoned that the uncalled witness's testimony only placed Glover in Florida between 8:00 and 8:30 a.m. on the date the crimes occurred, while the crimes occurred in Williamsburg County over eleven hours later at approximately 8:30 p.m. *Id* The *Glover* Court cited to the *Robbins* case for the proposition that "since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, ***a purported alibi which leaves***

it possible for the accused to be the guilty person is no alibi at all.” Id (citing State v Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980) (emphasis added)).¹

The South Carolina Supreme Court ruled similarly in the case of *Cherry v State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). There, Cherry argued his trial counsel was ineffective in failing to ensure the presence of an alibi witness who would have testified that he saw Cherry at the B-Q Lounge on the night of the crime. *Id* However, the alibi witness would only have been able to testify that he had seen “Cherry frequently enough that he could not have gone out, committed the crime and returned to the lounge.” *Id* There, the *Cherry* Court found that this testimony “would not have constituted an alibi because [the alibi witness] could not definitely account for Cherry’s whereabouts during the time the crime was committed.” *Id* at 118-19, 386 S.E.2d at 626.

In the cases where courts found alibi was established, there was evidence of the defendant’s whereabouts during the entire time period in which the crime was committed. Specifically, the accounts of Robbins,’ Roseboro’s, and Riddle’s whereabouts are the distinguishing factors between those cases and this case. Simply put, no evidence exists in the record to demonstrate Rios’ whereabouts after the alleged 7:25 a.m. call he made to his wife. Therefore, this case is distinguishable from those cases.

However, this case is similar to and hard to distinguish from the situations in the cases of *Glover* and *Cherry*. Even assuming Rios drove from the place of the call to the place of the crime (for which there is no evidence), his whereabouts from 7:41 a.m. to

¹ Interestingly, in a footnote, the *Glover* Court notes: “At the PCR hearing, Ms. Jordan (the uncalled trial witness) testified it took her approximately six and one-half hours to drive from her home in Florida to Williamsburg County. This testimony indicates that even if respondent was in Florida on the date the crimes occurred, he had ample opportunity to travel from Florida to Williamsburg County prior to the time the crimes occurred.” *Id* at 498, 458 S.E.2d at 540.

8:00 a.m. on August 14, 2010, are still unknown. Like the situation in *Glover*, Rios' purported alibi leaves it possible for him to be the guilty person. 318 S.C. at 498, 458 S.E.2d at 540. As in *Cherry*, no one can definitely account for Rios' whereabouts during the time frame of when the crime was committed. 300 S.C. 118-19, 386 S.E.2d at 626.

The trial court did not err in failing to instruct the jury on law related to the alibi defense. Assuming Rios called his wife from the residence on Perrin Drive on August 14, 2010, (which is only an allegation) Rios' presence is only accounted for for a small amount of time—not the morning, not an entire day, not even a full minute of time. Based on the lack of evidence in the record accounting for Rios' whereabouts on August 14, 2010, Rios' alibi defense is incomplete. Therefore, the trial court did not err in its jury instruction and should be affirmed. *State v Patterson*, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006) ("The law to be charged must be determined from the evidence presented at trial.").

II. Rios suffered no prejudice from the trial court not instructing the Jury on the Alibi Defense in light of Rios' closing argument and the entirety of the Jury instruction.

A charge on alibi was not necessary to ensure the jury's proper consideration of this case, and the lack of an alibi charge did not adversely affect the outcome of trial. Rios' attorney's closing argument and the trial court's jury instruction as a whole demonstrate that Rios suffered no prejudice from the trial court's refusal to charge the jury on the alibi defense.

Rios' attorney thoroughly argued alibi in his closing argument to the jury. Specifically, he argued:

We presented Ms. Byrd who testified that she had a landline phone, what her phone number was. It's [xxx-xxxx]. And Mrs. Rios testified that she

got this phone call around 7:22. I don't believe that she testified to the duration of that call. But she did speak with her husband, she testified to, and she, she received that phone call from that number, [xxx-xxxx], that that happened at 7:22. . . .

Mr. Jones testified that it takes about 16 minutes from Florida Avenue to get over to Hillbrook, and that that drive was – it was in a car and it was the fastest way he could figure out, and the State had the opportunity to call a witness to reply to that and they didn't. So, that's – you just have to go with that. That's the only evidence in the record as to the distance between the one, the two points. . . .

And if this happened about 7:30, then even if he caught a ride, he couldn't get over there because 16 minutes, plus 22, is 7:38. So, if he called her, immediately hung up, gotten into the car, driven over there, all of that without anytime in-between, he certainly couldn't have done it now.

(R. p. 260, l. 11—p. 262, l. 11).

Though the only evidence proffered by the Defendant on the alibi defense is an alleged phone call placed from a residential phone to his wife's cell phone, the trial court nevertheless allowed Rios to argue alibi in the closing.² Therefore, the jury had ample opportunity to consider the defense in deliberations, and Rios suffered no prejudice as a result. *State v Lee-Grigg*, 374 S.C. 388, 415, 649 S.E.2d 41, 55 (Ct. App. 2007) *aff'd*, 387 S.C. 310, 692 S.E.2d 895 (2010) (“To warrant reversal based on the trial court's failure to give a requested jury instruction, the failure must be both erroneous and prejudicial.”); *State v Patterson*, 367 S.C. 219, 224, 625 S.E.2d 239, 242 (Ct. App. 2006) (“In order for an error to warrant reversal, the error must result in prejudice to the appellant.”); *see also Ford v. State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (where the court did not reverse where Ford failed to establish a reasonable probability

² Notably, the cell phone record was never admitted into evidence. Furthermore, there is no other evidence presented by the defense which would warrant a charge on the defense of alibi-no testimony, no one mentioned Rios was in their presence during the commission of the crime. The entire closing argument on the alibi defense is a hypothetical theory based on nothing but the alleged phone call.

that the result of the trial would have been different had counsel's performance not been deficient).

Additionally, the trial court correctly instructed the jury on the State's burden.

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Patterson*, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006); *see also Gibbs v. State*, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (internal citation omitted) ("In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed in its entirety and not in isolation."). In *Gibbs*, the Petitioner argued that he was prejudiced by his trial counsel's refusal to request an alibi jury charge. There, the *Gibbs* Court reviewed the jury charge requiring the State to prove identity beyond a reasonable doubt and found Gibbs suffered no prejudice from the jury instruction not containing an alibi charge. 403 S.C. at 496, 744 S.E.2d at 176.

Here, the trial court instructed:

The burden is on the State of South Carolina at all time to prove his guilt beyond a reasonable doubt. . . .

Now, an issue in this case involves the identification of the defendant as the person who committed the crime charged. This State has the burden of proving identity beyond a reasonable doubt. You must be satisfied, beyond a reasonable doubt, of the accuracy of the identification of the defendant before you may convict the defendant.

Identification testimony is an expression of belief or impression of a witness. You must determine the accuracy of the identification of the defendant []. . . You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. . . .

Once, again, I instruct you the burden of proof is on the State and extends to every element of the crime charged, and that would include specifically that of identification. If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty.

R p. 285, l. 8—p. 286, l. 13). The trial court’s instruction here and in the *Gibbs* case are nearly identical. Thus, together with Rios’ closing statement and the clear jury instructions, Rios suffered no prejudice by the trial court’s failure to charge the jury on the alibi defense.

III. Rios was not prejudiced by the trial court’s failure to instruct on the alibi defense because there is not a reasonable probability that the outcome would have changed.

Even assuming the trial court erred in failing to instruct the jury on the alibi defense, Rios was not prejudiced because of the overwhelming evidence in the record demonstrating his guilt. *See e g*, *State v. Patterson*, 367 S.C. 219, 228, 625 S.E.2d 239, 243 (Ct. App. 2006). “Error is harmless when it could not reasonably have affected the result of the trial.” *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003)

Gale Holt testified that she “immediately” recognized the man in her hallway on the day of the incident. (R. p. 59, ll. 1-24). She said she knew him as “Gabe” and testified that Gabe had previously worked for her Husband both at Phil Holt’s shop and at their home. (R. p. 59, ll. 10-13). Specifically, she testified that she recognized his “very distinctive voice.” (R. p. 60, ll. 1-4). Additionally, she testified that nothing was covering his face and that she saw him “face-to-face.” (R. p. 60, ll. 1-13).

Immediately following the home invasion, Holt told the police that “Gabe” was the perpetrator, and she identified Rios in a photo line-up that was admitted into evidence. (R. p. 82, ll. 2-13). Holt signed an affidavit to memorialize her line-up identification, and the signed affidavit was admitted into evidence. (R. p. 82, l. 19—R. p. 83, l. 6). Finally, Holt identified Rios in court as the man who broke into her home, tied her up, and robbed her at gunpoint. (R. p. 85, ll. 3-14).

Further, the victim and her husband knew Rios—he was not a random stranger. (R. p. 59, ll. 10-21). In fact, Phil Holt testified that Rios helped him install the safe that Rios attempted to open and rob. (R. p. 101, ll. 12-18). Holt testified that the safe was inside a closet in the office. (R. p. 101, ll. 20-21). Further, Holt testified that he did not know of another individual who would have knowledge of the safe or its placement in the Holt's home. (R. p. 102, ll. 1-6).

Furthermore, the victim's stolen vehicle was found in the Spartanburg Church's Chicken parking lot which was within the same vicinity of where Rios was ultimately arrested. (R. p. 133 l. 6-R. p. 134, l. 9; R. p. 138, l. 8—R. p. 139, l. 4). Specifically, Rios's place of arrest and the stolen car's location are "[r]oughly less than a quarter of a mile" apart. (R. p. 134, ll. 3-9). Finally, Rios' fingerprint was identified by an expert witness on a piece of glass found at the crime scene. (R. p. 186 ll. 12-23). Specifically, the State's expert witness found that the print on the glass matched Rios' right thumb print. (R. p. 186 ll. 12-23). Though Rios had not worked in the Holt home for over a year, his fingerprint was found on the large triangular piece of glass.³

Based on the more than ample amount of evidence proffered by the State, there is no reasonable probability that a trial result would have been different had the trial court instructed the jury on the alibi defense. *Ford v State*, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) ("In light of this overwhelming evidence of Ford's guilt, we find no reasonable probability that the result of the trial would have been different had counsel accepted the alibi charge."); *State v Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003) ("Where a review of the entire record establishes the error is harmless beyond

³ To insinuate that Rios' fingerprint somehow got on the glass from his previous work in the home is a red herring. Not only had Rios not worked for Holt for over a year, but Mr. Holt had the glass door replaced in the spring before the incident occurred. (R. p. 104)

a reasonable doubt, the conviction should not be reversed.”). Moreover, the evidence presented in this case, including the victim’s identification and Rios’ fingerprint on the glass from the crime scene are direct, not circumstantial, evidence of his guilt. *But See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (“An alibi charge is considered especially crucial when the evidence is entirely circumstantial as in this case.”). Therefore, based on the overwhelming evidence of Rios’ guilt and the key pieces of direct evidence incriminating him, Rios’ conviction should be affirmed.

CONCLUSION

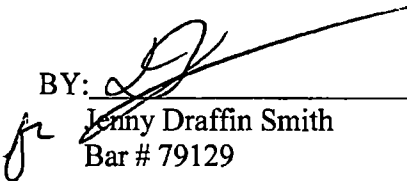
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the trial court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
S.C. Bar. No. 68571

JENNY DRAFFIN SMITH
Assistant Attorney General

BY: 

Jenny Draffin Smith
Bar # 79129

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-5254

ATTORNEYS FOR RESPONDENT

May 23, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000493

THE STATE,

Respondent,

v.

GABRIEL JON RIOS,

Appellant.

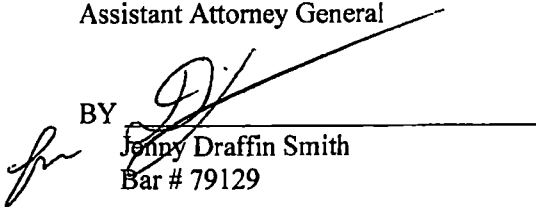
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
S.C. Bar No. 68571

JENNY DRAFFIN SMITH
Assistant Attorney General

BY 

Jenny Draffin Smith
Bar # 79129

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-5254

ATTORNEYS FOR RESPONDENT

May 23, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000493

THE STATE,

Respondent,

v.

GABRIEL JON RIOS,

Appellant.

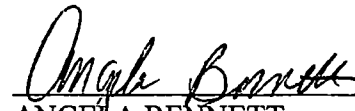
PROOF OF SERVICE

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:

Katherine Hudgins, 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 23rd day of May, 2014.


ANGELA BENNETT
Administrative Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GABRIEL JON RIOS,

APPELLANT

APPELLATE CASE NO. 2013-000493

FINAL REPLY BRIEF OF APPELLANT

KATHRINE H. HUDGINS
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

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
ARGUMENT IN REPLY	3
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<u>Gibbs v. State</u> , 403 S.C. 484, 744 S.E.2d 170 (2013).....	4
<u>State v. Mattison</u> , 388 S.C. 697 S.E.2d.....	7
<u>State v. Cole</u> , 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000).....	7
<u>State v. Day</u> , 341 S.C. 410, 535 S.E.2d 431 (2000).....	3, 6
<u>State v. Smalls</u> , 98 S.C. 297, 82 S.E.2d 421 (1914)	3
<u>State v. Williams</u> , 400 S.C. 308, 733 S.E.2d 605 (Ct.App. 2012).....	3, 5

ARGUMENT IN REPLY

The trial judge erred in refusing to charge the jury with the law on alibi when Appellant presented alibi evidence at trial.

Appellant presented alibi evidence at trial. As noted in the initial brief of Respondent, "Though the only evidence proffered by the Defendant on the alibi defense is an alleged phone call placed from a residential phone to his wife's cell phone, the trial court nevertheless allowed Rios to argue alibi in closing." (Initial Brief of Respondent, p. 10).(footnote omitted). Respondent attempts to minimize the alibi evidence, an issue for the jury to decide, but admits that there was evidence of alibi presented. Alibi and self defense are treated in the same manner such that if there is any evidence in the record from which it could reasonably be inferred that the defendant was asserting an alibi defense, the defendant is entitled to instruction on the defense and the refusal to charge alibi constitutes reversible error. See State v. Smalls, 98 S.C. 297, 82 S.E.421 (1914); State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 609 (Ct.App. 2012) (If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense). If there was no evidence of alibi presented, the judge would have correctly prohibited counsel from arguing alibi during closing argument. The judge in the present case, however, allowed counsel to argue alibi in closing argument because there was evidence of alibi presented at trial. The judge erred in refusing to instruct the jury on the law of alibi.

Respondent argues that Appellant was not entitled to an alibi instruction because the alibi defense presented was incomplete. (Initial Brief of Respondent p. 6). The Respondent, however, ignores State's witness Marie Ollinger who testified that she saw a

stranger walking in the neighborhood near the Holts' house close to 7:30 AM. (R. pp. 113-119). The State offered this testimony in an attempt to establish that Appellant was the stranger seen by the neighbor. It would have been impossible, however, for Appellant to have been the stranger the neighbor saw close to 7:30 AM as he was making a phone call at 7:25 AM and was 16 minutes away. While Mrs. Holt testified that the crime took place between 7:30 and 8:00, the stranger seen by the neighbor at 7:30 and implied as the assailant by the State could not have been Appellant. The Appellant presented complete alibi evidence. The trial judge erred in refusing to instruct the jury on the law of alibi when there was evidence presented of alibi.

The Respondent, relying on Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013), argues in issue two in the brief that "Rios [Appellant] suffered no prejudice from the trial court not instructing the Jury on the Alibi Defense in light of Rios' closing argument and the entirety of the Jury instruction." (Initial Brief of Respondent, p. 9). Respondent's reliance on Gibbs is misplaced as that case involved ineffective assistance of counsel raised during post conviction relief. The present case involves trial court error raised on direct appeal. The Gibbs case and the present case are in different procedural postures with different standards of review. In Gibbs the South Carolina Supreme Court, applying the Strickland analysis found that counsel was ineffective in not requesting a jury instruction on the law of alibi but found no prejudice writing, "Given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt, the PCR court's finding of no prejudice must be sustained under the any evidence standard of review." Gibbs, 403 S.C. at 496, 744 S.E.2d at 176. The Strickland analysis is inapplicable in the present case.

Additionally neither the judge's charge nor the closing argument correct the impression that may have been given by the State in closing argument that Appellant had the burden of proving alibi. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1994). In closing the State reminded the jury that one of the alibi witnesses, Appellant's wife, had been convicted of giving false information to the police. (R. pp. 270, lines 8-15). The State further argued in closing, "He's had over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No One said they were with him that morning. Nobody, nobody that testified for him accounted for his whereabouts. Nobody." (R. pp. 270, line 24 – pp. 271, lines 1-3). The alibi charge was necessary to correct any impression that Appellant bore any burden of proof at trial. The trial judge erred in refusing to charge the jury with the law on alibi.

In issue three Respondent argues, "Rios [Appellant] was not prejudiced by the trial court's failure to instruct on the alibi defense because there is not a reasonable probability that the outcome would have changed." (Initial Brief of Respondent, p.12). As discussed above, the Strickland analysis is inapplicable in the present case. Respondent then argues that any error in refusing to instruct the jury in the law of alibi is harmless because the State presented overwhelming evidence of guilt. First, a harmless error analysis in the context of failure to charge alibi when there is any evidence of alibi is not applicable in the same way a harmless error analysis is not applicable in the context of a failure to charge self defense when there is any evidence of self defense. In State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 609 (Ct.App. 2012), the South Carolina Court of Appeals wrote, "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is

entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error. State v. Day, 341 S.C. 410, 416–17, 535 S.E.2d 431, 434 (2000)."

As noted by the dissent in Gibbs, "An alibi charge is required where the defendant claims to be elsewhere at the time the crime was committed. State v. Robbins, 275 S.C. 373, 374–75, 271 S.E.2d 319, 319–20 (1980). Generally, the failure to give an alibi charge under these circumstances constitutes reversible error. Id. However, if the State presents overwhelming evidence of a defendant's guilt at trial, then there is no reasonable probability that the result of the trial would have been different had trial counsel requested an alibi charge, and reversible error is not present. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994)." 403 S.C. at 496, 744 S.E.2d at 176." While overwhelming evidence of guilt may be sufficient to overcome the prejudice requirement in post conviction relief cases like Gibbs and Ford, the harmless error analysis is inapplicable in the context of trial court error in the refusal to charge alibi and challenged on direct appeal.

Second, without conceding that a harmless error applies, the State did not present overwhelming evidence of guilt. The State's case at trial was based on the testimony of Gale Holt and a fingerprint found on a piece of broken glass found at the scene. If a showing of prejudice is required, prejudice is demonstrated, as discussed above, by the failure to instruct the jury on the law of alibi combined with the State's closing argument that left the impression that Appellant had the burden to prove alibi. (R. pp. 270, line 24 – pp. 271, lines 1-3); See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1994).

In State v. Williams 400 S.C. 308, 314, 733 S.E.2d 605, 608 – 609 (Ct. App.2012), the South Carolina Court of Appeals wrote, "The law to be charged must be

determined from the evidence presented at trial.’ State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (internal citations omitted); see also Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (stating appellate courts should ‘consider the court’s jury charge as a whole in light of the evidence and issues presented at trial’).” When reviewing the circuit court’s refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. Cole, 338 S.C. at 101, 525 S.E.2d at 512–13. Viewing the evidence in the light most favorable to Appellant, there was evidence of alibi requiring the judge to instruct the jury on the law of alibi. The failure to instruct the jury on the law of alibi requires reversal.

CONCLUSION

Based on the above argument and the arguments presented in the initial brief, this Court should reverse the sentence and conviction and remand for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kathrine H. Hudgins", written over a horizontal line.

Kathrine H. Hudgins
Appellate Defender

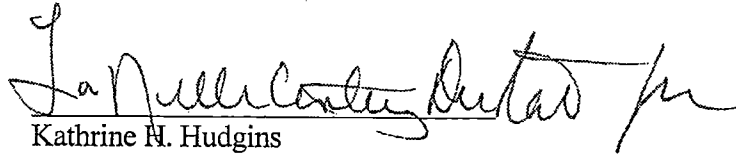
ATTORNEY FOR APPELLANT.

This 3rd day of June, 2014.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 3rd, 2014

A handwritten signature in cursive script, appearing to read "Kathrine N. Hudgins", written in black ink.

Kathrine N. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

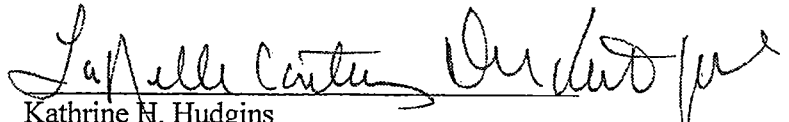
V.

GABRIEL JON RIOS,

APPELLANT

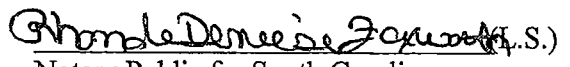
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of June, 2014.


Kathrine M. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 3rd day of June, 2014.


Rhonda Demeeze (S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF SpartanburgGabriel Jon Rios #344751
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2015-CP-42-254APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

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

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution, 430 Oak Lawn Rd.,
PERZER S.C. 29469
2. Name and location of Court which imposed sentence Spartanburg County General 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) Burglary 1st degree (2010-GS-42-6830), Armed Robbery (2010-GS-42-6831)
 - (b) POSSESSION OF WEAPON during Violent Crime (2010-GS-42-6832)
 - (c) Kidnapping (2010-GS-42-6833), Assault and Battery 1st (2010-GS-42-6834)
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) On Feb. 26-28, 40 years Burglary 1st, 30 years Armed Robbery, 30 yrs.
 - (b) Kidnapping, 10 yrs. Assault and Battery 1st degree, and 5 yrs.

(c) CONSECUTIVE POSSESSION OF WEAPON.

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. Appellant Court - Direct Appeal

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. April 1, 2015

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. No. 2015 - 40-135

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: See Attachment 1

2015 JUN -3 PM 12:59
 M. HOPE BLACKLEY

- (a) _____
 (b) _____
 (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) SEE Attachment 1
 (b) _____
 (c) _____
12. Prior to this application have you filed with respect to this conviction:
 (a) any petition in a State Court under South Carolina Law? N/A
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
 (d) any other petitions, motions or applications in this or any other Court? N/A
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. N/A
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. N/A
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. _____
 ii. N/A
 iii. _____

2015 JUN -3 PM 12:59
 H. HOPE BLACKLEY

iv. N/A

(d) the date of each such disposition:

i. _____

ii. N/A

iii. _____

iv. _____

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

i. _____

ii. N/A

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. N/A

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) Post-Conviction Relief action presents first appropriate(b) opportunity for review of these collateral issues.

(c) _____

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

2015 JUN -3 PM 12:59
M. HOPE BLAUGLEY

- (a) your arraignment and plea? NIA
- (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? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Matthew Shealy, 346 N. Church St., Suite 3000
- ii. Spartanburg, S.C. 29303
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial and Sentencing
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
Vacation of Judgment and Sentence, Applicant seeks New Trial.
20. Are you now under sentence from any other court that you have not challenged?
NO

15 JUN -3 PM 12:59
 M. ROPE BLACILEY

Attachment 1

10. (a) The applicant received INEFFECTIVE ASSISTANCE of Counsel prior and during his trial invocation of his rights pursuant to the Sixth and Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution.

11. (a) Trial Counsel failed to provide Applicant effective assistance of counsel in that he failed to object to Solicitor shifting the Burden, Tr. pg. 323 LINES 1 thru 3.

(b) Trial Counsel failed to provide Applicant effective assistance of counsel in that he failed applicant by conceding his guilt, Tr. pg. 305 LINES 24 and Tr. pg. LINES 1 thru 3.

STP
2015 JUN -3 PM12:59
M. HOPE BLACKLEY

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.

Abdul Jon Rios 344751

SWORN to and subscribed before me this 28th
day of May, 2015.

Nancy E. Muckart (L.S.)
Notary Public

My Commission Expires: 1-23-2023

2015 JUN -3 PM 12:59
N. HOPE BLACKLEY

**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.

Salvador J. Rios 344757
Applicant

SWORN or affirmed to and subscribed before me this
28th day of May, 2015.

Nancy C. Merchant
Notary Public

My Commission Expires: 1-23-2017

2015 JUN -3 PM 12:59
H. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Jon Gabriel Rios, #344751,

2015-CP-42-2541

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on June 3, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the November 2010 term of the Spartanburg County Grand Jury for burglary—1st degree (2010-GS-42-6830), armed robbery and possession of a weapon during the commission of a violent crime (2010-GS-42-6831, counts one and two), grand larceny, value \$10,000 or more (2010-GS-42-6832),¹ kidnapping (2010-GS-42-6833), and assault and battery, first degree (2010-GS-42-6834). Matthew Shealy, Esquire, represented Applicant. On February 26, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. The jury found Applicant guilty as indicted. Judge McIntosh sentenced Applicant to imprisonment to concurrent terms of 40 years for burglary, 30 years for armed robbery and kidnapping, and ten years for assault and battery, and a consecutive term of five years for possession of a weapon.

¹ The State elected to proceed on the armed robbery charge and dismissed the grand larceny charge before trial.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 1, 2015. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). The remittitur was returned on April 10, 2015.

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, and Applicant's records for the Department of Corrections and appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of trial counsel in that:
 - a. "prior and during trial involution [sic] of his rights pursuant to the Sixth and Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution"
 - b. Counsel "failed to object to Solicitor shifting the burden"
 - c. Counsel "failed applicant by conceding his guilt"

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, 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, 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. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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 prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

Applicant can satisfy neither 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, 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.

As justification for the ineffective assistance of counsel, Applicant alleges a violation of the Sixth and Fourteenth Amendments to the U.S. Constitution. However, this claim lacks

specificity and factual basis. The Uniform Post-Conviction Procedure Act requires that the applicant "specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In a PCR application, the applicant must make at least a *prima facie* showing that would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965).

Since Applicant has failed to make even a *prima facie* showing, Respondent would submit this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCPP, for failing to meet the requirements of the Uniform Post-Conviction Procedures Act.

V.

Respondent therefore requests that this Court convene an evidentiary hearing only on the allegations of ineffective assistance of trial counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code Ann. § 17-27-10 *et seq.*; Rule 71.1, SCRCPP. All claims should be made well in advance of the PCR hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCPP. Filings by Applicant will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

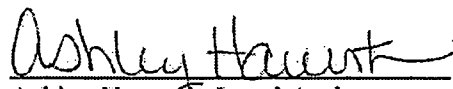
February 11, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
GABRIEL JON RIOS, #244751,	)	2015-CP-42-2541
	)	
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** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Susannah C. Ross, Esquire
Ross & Enderlin, PA
330 East Coffee St.
Greenville, SC 29601

DATED this 11th day of February, 2016.


 Ashley Haworth, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	2015-CP-42-2541
COUNTY OF SPARTANBURG	)	
	)	
	)	
	)	
GABRIEL JON RIOS,	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
THE STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	
_____	)	

January 30, 2017
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE EDWARD W. MILLER, JUDGE

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

SUSANNAH C. ROSS, ESQ.
Attorney for the Applicant

CAITLIN B. HASTINGS, ESQ.
Attorney for the Respondent

CHERYL A. SMITH
Circuit Court Reporter

INDEXPAGEAPPLICANT'S WITNESSESGABRIEL JON RIOS:

Direct Examination by Ms. Ross	5
Cross-Examination by Ms. Hastings	26
Redirect Examination by Ms. Ross	28

SHEKINAH RIOS:

Direct Examination by Ms. Ross	29

Applicant Rests	30

RESPONDENT'S WITNESSMATTHEW SHEALY:

Direct Examination by Ms. Hastings	30
Cross-Examination by Ms. Ross	36
Further Cross-Examination by Ms. Ross	40

Respondent Rests	41

Closing Arguments	41

Ruling by the Court	43

Certificate of Reporter	45

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>

APPLICANT'S EXHIBITS

1	CD of 9-1-1 Call	13	21
2	Sonia Rios T-Mobile Records	21	21

COURT'S EXHIBIT

1	Amended PCR Application and Attachment	6	6

P R O C E E D I N G S

(WHEREUPON, proceedings commenced at 12:20 p.m.)

MS. HASTINGS: May it please the Court. This is the case of Jon Gabriel Rios vs. The State of South Carolina, Case Number 2015-CP-42-2541.

This application was filed on June 3, 2015. The applicant is presently confined in the South Carolina Department of Corrections, and he was indicted at the November 2010 term of the Spartanburg County grand jury for burglary first degree, armed robbery, and possession of a weapon during the commission of a violent crime, grand larceny valued \$10,000 or more, kidnapping and assault and battery first degree. He was represented by Matthew Shealy who is present here today, and on February 26, 2013, he proceeded to trial before Judge McIntosh and a jury.

The jury found the applicant guilty as indicted, and Judge McIntosh sentenced him to concurrent terms of 40 years for burglary, 30 years for armed robbery and kidnapping, ten years for assault and battery, and a consecutive term of five years for possession of a weapon.

He subsequently filed a notice of appeal, and the South Carolina Court of Appeals affirmed his conviction.

I would turn it over to PCR counsel at this time.

1 THE COURT: All right. Yes, ma'am.

2 MS. ROSS: Thank you, Your Honor. May it please the
3 Court. Mr. Rios has alleged ineffective assistance of
4 counsel, and I can summarize this at the end of testimony,
5 or if you want to just have an idea ---

6 THE COURT: Well, I'll tell you what. I don't have
7 -- the application says "see attached." I do not have the
8 attachments in this file.

9 MS. ROSS: All right.

10 THE COURT: Oh, wait a minute. Here it is. I
11 apologize. It was on the back sheet. Ms. Ross, I've got
12 it.

13 MS. ROSS: Okay. And he's got an amended
14 application, but I had told him it encompasses ineffective
15 assistance of counsel, and I told him rather than testify
16 to every word of it, he made a copy for you. It's got
17 citations for you. The State has a copy as well.

18 THE COURT: Okay.

19 MS. ROSS: Basically, he's alleging ineffective
20 assistance of counsel, conduct below a professional
21 standard that brought into question the outcome of the
22 case, the failure to investigate, failure to advise to
23 testify. Mr. Rios didn't have any impeachable convictions
24 that I saw. Failure to effectively impeach the star
25 witness in the case. There were some T-Mobile records

1 that didn't get put in. Failed to do that. Failed to
2 object to hearsay and some improper comments in closing
3 argument as well. He also alleges due-process violations,
4 and as in every PCR, when the reply is not filed within
5 30 days, we move for a summary judgment pursuant to
6 17-27-70 requiring the reply to be filed within 30 days of
7 the application.

8 THE COURT: Okay.

9 MS. ROSS: Okay. We call Mr. Rios.

10 THE COURT: Come on around. Put your left hand on
11 the Bible and raise your right hand when you get there.
12 WHEREUPON,

13 GABRIEL JON RIOS

14 After having been duly sworn, testified as follows:

15 THE COURT: Please state your full name for the
16 record once you're settled in.

17 THE WITNESS: Gabriel Jon Rios.

18 DIRECT EXAMINATION

19 BY MS. ROSS:

20 Q All right. Mr. Rios, you've alleged -- filed for
21 PCR. Do you understand what happens if you win that?

22 A Yes.

23 Q What happens?

24 A I beg your pardon?

25 Q Where are you if you prevail at postconviction

1 relief? Where are you -- where does your case go?

2 A Back to trial.

3 Q Okay. So you're put back into the position you were
4 in before your trial; do you ---

5 A Yes.

6 Q --- understand that? Okay.

7 Now, my understanding is you filed an amended
8 application; is that correct?

9 A I did.

10 Q Rather than reading into the record, we'd ask to make
11 it a Court's Exhibit at this time. Is this is your
12 amended application?

13 A It is.

14 Q And you made that note on it saying -- for the judge?

15 A Yes, sir -- yes, ma'am.

16 MS. ROSS: We'd offer this as Court's Exhibit 1, and
17 the AG has a copy of it as well.

18 THE COURT: Any objection?

19 MS. HASTINGS: No objection.

20 THE COURT: All right. Thank you.

21 (WHEREUPON, Court's Exhibit No. 1 was marked for
22 identification and admitted into evidence.)

23 BY MS. ROSS:

24 Q Okay. Now, just going through your allegation of
25 ineffective assistance of counsel, let's just start with

1 1. You had an argument the attorney's argument in closing
2 suggests your guilt. What did you mean by that?

3 A What I mean by that is that from the beginning of the
4 trial, the judge told the jury along with the State and my
5 attorney that the burden belongs to them, the State, at
6 all times. My attorney, during closing sermon --
7 summation, made the following comments, made the following
8 statements stating that I knew what painter tape was
9 because I was a known construction worker. Doing
10 construction work, I wouldn't have used painter tape in
11 this situation because painter tape is easily taken off.
12 And he went on to say that, but I didn't use that tape
13 because he stated that I had intimate knowledge of that
14 home and I knew where the good tape was but I never used
15 it.

16 Q Okay. Mr. Rios, I'm going to refer you to page 305
17 of the transcript. Is that what you're talking about
18 around Line 17?

19 A Yes. When he made that statement when he said:
20 Ladies and gentlemen, the tape at issue is this painter
21 tape. Everybody testified to the -- everybody testified
22 my client is a trained construction worker.

23 Q All right. Now, moving on, are there any other
24 things in closing that you felt were a problem?

25 A I had a problem with the closing with the State when

1 the State got up and said that I had over two and a half
2 years to come up with this story, and that's all it was
3 was just a story. No one could testify to my whereabouts
4 at the time, and if I -- and -- and told the jury: If you
5 believe this story, then you're flat-out saying that
6 Mrs. Holt is a liar. Because you look at her and say
7 she's -- she's dead wrong -- he's dead -- your dead wrong.

8 At this time, what the State did was to shift the
9 burden of proof, because the burden of proof was the
10 State's at all time and not me to prove anything. It was
11 the State's proof to prove me.

12 Also, they threw the passion of the jury to make the
13 jury choose sides because she went on to say, "Now, who
14 are you going to believe, him or her?"

15 Q And he specifically was arguing to that jury and
16 said, "Can you look at her and say she's lying"?

17 A Yeah. "Could you look at her and say she's lying?"
18 At this time, my lawyer failed to even attempt to object
19 at the time of this -- this -- this -- this -- this --
20 this closing summerytation [sic] from the State to even
21 get the Court to even try to correct this type of -- type
22 of behavior that the solicitor was doing at this time. He
23 did nothing. He just sat there and allowed them to say
24 these things -- these things because this is the only
25 things these people heard, this is the last thing they

1 heard before they went back to deliberate. And I feel
2 that that is very, very cruel, and it's hard to just
3 ignore because the burden of proof at all times belong to
4 the State, and I feel that this should be reversible and a
5 new trial.

6 Q All right. And are you talking about page -- I'm
7 showing you page 322 and ---

8 A Page -- page 322.

9 Q --- and 323.

10 A And 323.

11 Q And that's when they say?

12 A That's when she asked the jury to choose sides.

13 Q And that's at Line 18 on page 323?

14 A Yes, ma'am.

15 Q All right. Now let's talk about the 9-1-1 tape. Are
16 you familiar with the 9-1-1 tape in your case?

17 A Yes, I am.

18 Q All right. And did your lawyer review that with you
19 at any time?

20 A No, he didn't.

21 Q What did he do with the tape during the trial?

22 A I guess he kept it in his folder.

23 Q Was it ever played during the trial for the jury?

24 A No. It was not.

25 Q And you've alleged ineffective assistance of counsel

1 for failing to do that, correct?

2 A Yes, I do.

3 Q Why is that?

4 A Because it shows that during the beginning it was --
5 it was a -- it was a burglary, and -- and Mr. Holt got a
6 call at 8:09 that an unknown suspect had then came into
7 the house and bound his wife with tape. In return, he
8 went home and called 9-1-1. On that tape, the 9-1-1 asks
9 several times, "Do you all know who it was?" and each time
10 they say, "We don't know."

11 Q And what happened at trial?

12 A During trial, Mrs. Holt got on the stand and said she
13 immediately recognized me as the person.

14 Q And how many times did she do that?

15 A She did that -- as a matter of fact, she did it at
16 least seven, eight times because that was the State key
17 witness. They relied on her testimony heavily. And that
18 was a crucial point in that trial for me for her to get up
19 and say these type things. But my lawyer failed to
20 impeach her on her prior inconsistent statements to where
21 she stated she didn't know who it was. She told her
22 husband she didn't know who it was, she told the first
23 officer on the scene she didn't know who it was.

24 Q Okay. Let's go to the record. How about on page 26,
25 Line 21, what does she say there?

1 A 26.

2 Q Line 21.

3 A 21. "Did you recognize the man?"

4 She said, "Yes."

5 "Did you recognize the man immediately?"

6 She said, "Immediately."

7 "Was he wearing a mask?"

8 She said, "No."

9 Q Okay. And I'm going to go to page 28, Line 6. What
10 did she say then?

11 A 28, Line -- okay. "Did you recognize his voice?"

12 "Yes."

13 "Did he speak with an accent?"

14 "It's a very, very distinctive voice."

15 Q And let's see. 29, Line 8. I apologize. What does
16 she say at 29, Line 8?

17 A "I believe in God and angels, and sometimes -- and
18 something told me not to call him by name."

19 Q All right. And what did she do right after she got
20 free from the tape? What did she testify on page 31,
21 Line 15?

22 A She said, "To free myself, get myself, my hands out
23 of the tape, which I was able to do after a few minutes, I
24 got up and I ran and called my husband."

25 Q All right. And is there anything about calling

1 9-1-1?

2 A The husband -- when the -- the husband came home en
3 route, and that's -- that's -- that's -- that's another --
4 another thing. He -- he gave the officer this information
5 that he got the call that an unknown. When he got home,
6 they called 9-1-1.

7 Q All right. And just going again, this is page 111,
8 again, Ms. Holt testifying.

9 A Yes.

10 Q Again, on line 4, what's she talking about ---

11 A She's talking about I believe in God and angels, and
12 something told me not to -- not to -- not to -- not to
13 address him, just as sir.

14 MS. ROSS: Now, at this point, I'd like to play the
15 9-1-1 tape. The attorney general has -- I have the
16 communications officer under subpoena; however, the
17 attorney general has stated she would be willing to allow
18 me to play the 9-1-1 tape, and I believe it can be
19 authenticated as the tape he heard by Mr. Rios' testimony.

20 THE COURT: Do you object to the authenticity of this
21 -- Ms. Ross, where did you get the ---

22 MS. ROSS: I apologize. This was provided to me,
23 this CD, by Mr. Shealy in the Public Defender's Office.
24 And that was the CD provided to him in discovery.

25 THE COURT: Okay. Any question as to the

1 authenticity from the attorney general?

2 MS. HASTINGS: No, Your Honor.

3 THE COURT: Okay.

4 MS. ROSS: I guess should I pull it out and have it
5 marked before I play it?

6 THE COURT: Yeah. That's probably a good idea.

7 (Applicant's Exhibit No. 1 was marked for identification
8 and was played in open court.)

9 BY MS. ROSS:

10 Q Is that what you recall?

11 A Yes.

12 Q And did your lawyer ever play -- your lawyer never
13 played that in your trial. You've already testified to
14 that.

15 A No. He never played it.

16 Q And why do you think he should have?

17 A He should have because it clearly states that they
18 never identified me as the person, because when the police
19 got there, he was met by Mr. Holt under the carport, that
20 he got that call from his wife at 8:09 -- at 8:09 that an
21 unknown suspect had came in there. And Mr. Holt gave that
22 statement to the officer, and my attorney never impeached
23 Mr. Holt either on that statement along with the statement
24 that he got from his wife also.

25 The officer questioned Mrs. Holt, and she only told

1 him it was a black guy with a baseball cap. Never my
2 name. During trial, he even stated the same thing, she
3 never gave him my name. It always was unknown.

4 So when Mr. -- when Deputy Welch came, he wrote this
5 statement which I have, Your Honor, in Exhibit A, which
6 when forensics got there, they was met by a number of
7 officers from the Spartanburg County Sheriff Office that
8 an unknown suspect had came into the house. This is ---

9 Q How long have you worked for Mr. Holt?

10 A I worked for Mr. Holt, I think it was around 2003,
11 2004. I started working for him periodically, and then, I
12 think, around 2009, 2010 I went out to Rock Hill and got
13 my certification in weatherization. So I started working
14 for TQ Contractors. At that time, it was like off-and-on
15 working for him. But . . .

16 Q And how many times have you been to his and Gail's
17 house?

18 A The last time I was -- I worked at that house, we --
19 we put a roof on that house, we painted that house, we put
20 shear walls around -- around their pool. We -- we even
21 replaced windows in that house. We've done all types of
22 things around there, cut the yard, pull weed. He did --
23 we did -- we did a lot of work around that house.

24 Q Okay. I'm going to refer you to page 265, Line 6. I
25 think that's where you were talking about Mr. Welch coming

1 in to testify, the officer?

2 A Yeah. Officer Welch came in and testified, and he
3 stated that he'd been doing this over 12 years, you know.
4 That's -- that's what he does, you know. He -- he -- he
5 know what he do when he -- when he in a situation, and
6 that's when he was met by Mr. Holt that told him that his
7 wife called him and told him that it was unknown.
8 Unknown.

9 Q And when he arrived at the scene, he was told
10 unknown?

11 A When he arrived at the scene, yeah, Mr. Holt told him
12 that his wife told him it was unknown.

13 So he got Mr. Holt's information, went and talked to
14 the wife. The wife told him it was a black guy with a
15 baseball cap. Mr. Welch testimony state that she never
16 told him or gave him a name of a person to who it was.

17 And with this -- with this, I feel by her getting on
18 the stand and saying, "It's him, it's him. I know him by
19 this" -- and my lawyer had this information. He had this
20 discovery because that's how I got my discovery the same
21 way he got his. He never even bothered to impeach them on
22 their prior inconsistent statements. That would have
23 shown -- because, I mean, it was critical. That's all the
24 jury heard was, "It was him."

25 Q Okay. I'm going to refer you to page 320, the

1 bottom, Line 25 over to page 321. What does the solicitor
2 say in closing argument about Ms. Holt's testimony?

3 A Ms. Holt stated in her testimony on page 25 she knew
4 his voice, she knew his accent, she knew his face. She
5 immediately saw him. She came face-to-face. There was no
6 doubt in her mind whatsoever, but she told her husband an
7 unknown suspect.

8 Q And what does it say on Line 3?

9 A And she told -- and she told -- and she told you that
10 she did not hesitate one bit.

11 Q And then on page 351 at line 7, it refers to -- what
12 did the jury do during deliberations?

13 A Which one?

14 Q Line 7.

15 A Okay. During -- during -- during the jury in the
16 back, they came back out requesting the officer report
17 from Officer Welch. On Line 7, it says the Court -- the
18 first question is the jury says to give -- well, he says
19 give their members would like to see or hear the written
20 report by the first officer on the scene. I assume that
21 Officers Welch that you brought into -- into -- into your
22 case. And my lawyer said, "That is."

23 Q All right. So the jury had a question and wanted to
24 hear all that testimony again.

25 A They wanted to hear it because they seen the

1 inconsistencies, they seen that -- that they're saying one
2 thing, retanning [phonetic] the story, and -- and my
3 lawyer sat there and -- and State never failed -- that he
4 failed to impeach them on their prior inconsistent
5 statements.

6 Q All right. Now also, let's talk about did you
7 testify?

8 A My lawyer instructed me that if I was to get on that
9 stand, they could bring up my past record. But I was -- I
10 wanted to testify. But when he told me that, I didn't --
11 I didn't know if I could, I didn't know if I couldn't.
12 But I just went off what my lawyer because that's why I
13 put my fate in his hand.

14 Q And he said that you could be impeached on your past
15 record? Is that what he said?

16 A Yes, yes.

17 Q And advised you against testifying?

18 A Yes.

19 Q Now, on page 373, they list your past record,
20 correct?

21 A No. Those are the charges -- I mean, yeah. They --
22 they listed all of them: marijuana, petit larceny,
23 cocaine possession, paraphernalia, battery -- I mean --
24 yeah, battery.

25 Q What year was the strong-arm robbery?

1 A That was in 1981.

2 Q Possession of cocaine?

3 A '88.

4 Q '89?

5 A '89, burglary of a vehicle.

6 Q And?

7 A Vehicle theft in '92, a grand larceny in '93, 2001 a
8 paraphernalia, and 2002 a battery.

9 Q When was this trial? What year?

10 A It was 2010 -- I mean 2013.

11 Q Okay. Now, going on, there was some T-mobile
12 records.

13 A Yes, ma'am.

14 Q Can you tell me ---

15 A At the time of this incident, I was -- I was kind of
16 separated from my wife at the time, and me and her was
17 bringing -- you know, bringing things back together,
18 mending things back together with one another. So I was
19 using a friend's phone, an associate's phone -- well, a
20 friend of ours phone, which is a landline. And I had --
21 and I was talking to my wife from at least 1:00 that
22 morning all the way up till about the time this so-called
23 incident happened -- well, it happened -- where this
24 incident happened. And ---

25 Q Let me cut to something. Have you seen this before?

1 A Yes, I have. That's --

2 Q What is it?

3 A That's the phone records that I gave my -- my
4 attorney.

5 Q All right. And when did you make phone calls to your
6 wife?

7 A I made phone calls to my wife on August the 14th
8 between 1:00 -- between 1:30, 1:20. If I can ---

9 Q Yeah. Look over on the . . .

10 A It started at 1:27, and it went all the way down, and
11 then it goes all the way up here.

12 Q Yeah. Okay.

13 A And it went all the way down to 7:22 a.m.

14 Q And were there two calls made by you to your wife
15 during that period?

16 A Two calls? There were numerous of calls.

17 Q Numerous calls. Okay.

18 Did you call Esther Boyd's residence?

19 A Yes, I did. That -- that phone is a landline, and
20 that . . .

21 Q And do you, by any chance, recall that number? It's
22 in the transcript.

23 A .

24 Q All right. And there are two calls made, one from
25 and one to that landline, correct?

1 A No. There -- there are more than -- there are more
2 than that.

3 Q Testify to what you see.

4 A I see one, two, three, four, five, six, seven ---

5 Q Let me ask you this. Were there any calls made ---

6 A --- eight. It was eight calls made from that
7 residence to my wife that morning.

8 Q All right. And your wife testified at trial,
9 correct?

10 A Yes, she did.

11 Q And were these records put into evidence as part of
12 her testimony?

13 A It was never put into evidence due to the fact my
14 lawyer failed to contact a T-Mobile representative to come
15 in to my trial to show that these are original documents
16 and haven't been duplicated or authenticated in any kind
17 of way. This was going against -- this was going with my
18 -- my alibi -- my alibi defense.

19 Q All right. And what were the two specific calls that
20 were going to your alibi defense?

21 A The one at -- they said the crimes happened between
22 7:30 and 8:00 that morning, between 7:30 and 8:00 that
23 morning. The last call me and my wife was on the phone
24 was around 7:22 or 7:25 that morning.

25 Q Did you ever talk to your daughter at all?

1 A I talked to my daughter when I called my wife, and
2 she told me to hold on, she's going to get her mother.
3 But my wife -- my daughter couldn't testify because she
4 was getting ready to go into labor when she -- when I was
5 in trial at the time.

6 MS. ROSS: All right. And I'd ask this to be marked
7 as Applicant's Exhibit 3.

8 THE COURT: Any objection?

9 MS. HASTINGS: No objection, Your Honor.

10 THE COURT: You are moving it into evidence, aren't
11 you?

12 MS. ROSS: Yeah. I think I need to move all three
13 into evidence if I haven't. One was a court exhibit. So
14 it's Applicant's Exhibit 2, and then the other is a court
15 exhibit. I apologize. And I would move these into
16 evidence at this time.

17 THE COURT: No objection.

18 (WHEREUPON, Applicant's Exhibit No. 2 was marked for
19 identification. Applicant's Exhibit Nos. 1 and 2 were
20 admitted into evidence.)

21 BY MS. ROSS:

22 Q So it's your opinion that having those records -- the
23 jury having those records would have helped your alimony
24 defense?

25 A My alibi, right.

1 Q I mean your alibi.

2 A The judge stated that without -- without the --
3 without that there, that he'd only give me a partial
4 alibi. And as we know, there's no such thing as a partial
5 alibi.

6 Q Now, going to that, what did your lawyer do as far as
7 measuring the time that it would take you to get from
8 where you were to the Holts' residence?

9 A They did a drive -- they did a drive test run that
10 shows that it took approximately 16 minutes to get from
11 one point to the next point, but never looked at that I
12 was stationary in a home with no transportation and never
13 thought about what about the walk.

14 Q What did the neighbor witness testify about the
15 person she saw around the Holts' house that morning?

16 A The neighbor stated that Ms. Olinger [phonetic] --
17 that's the neighbor's name. Ms. Olinger stated she gets
18 up every morning, and she's a known woman that gets up
19 every morning because she walks her dogs and she take a
20 walk. During the weekdays she get up around 7:00 and take
21 her walk. During the weekend she leave her house
22 approximately 7:30 because there's no kids going to school
23 or anything like that there, and she walks. And she's
24 like five houses down from there. And that she takes that
25 walk every morning at 7:30 that morning.

1 During that walk, she encountered a guy walking on
2 the other side of the road right by her who she never
3 identified as me.

4 Q And she was in the courtroom with you?

5 A Yes. She was in the courtroom. It was one of their
6 witnesses that -- that ---

7 Q The guy she saw, was he driving a car?

8 A She takes this walk every morning. She takes this
9 walk every morning.

10 Q And she testified about that at the same time?

11 A Yes, she did.

12 Q Did she testify about seeing a car or anyone driving?

13 A No. No cars.

14 Q Yet your lawyer measured the distance time?

15 A Car.

16 Q And how -- what would the walking time would you
17 guess it would be?

18 A Probably about an hour and a half.

19 Q All right. Now, is there anything else you want to
20 add about that, the T-Mobile records and that alibi?

21 A Had my lawyer presented these T-Mobile records, my
22 alibi would have been charged. And failure to subpoena a
23 T-Mobile representative to come in shows that my lawyer --
24 my lawyer was -- was ineffective, and I should be granted
25 a reverse for a new trial.

1 Q All right. You also made an argument that your
2 lawyer failed to object to hearsay regarding a broken pane
3 on page 172?

4 A Yeah. Around -- around July, Mr. Holt stated that he
5 broke his -- he locked himself out -- out of the door --
6 out of the house, and he had to break a pane to get back
7 in. During -- during the State's witness, Ms. Glenn, they
8 called her in, which she never seen a pane. She testified
9 she just -- he called her and told her. That is
10 completely hearsay. She never seen a pane broke, she
11 never went to the house and watched the house while he go
12 get a pane. It's just hearsay.

13 Q Can you explain the significance of the pane to the
14 judge? You had worked at that house many times, correct?

15 A I worked at the house many times.

16 Q And there was a fingerprint on a piece of glass,
17 correct?

18 A The Holts stated on trial that I worked in that
19 house. The last time I was up in that house was in July.
20 The last time -- you know, that my prints could have been
21 anywhere in that house because they already testified to
22 the jury, to -- to the State that I've been there, I
23 worked there, I done numerous work in that house, that my
24 prints could have been anywhere in that house.

25 Q Okay. Now, was there any other forensic evidence

1 found in the case besides your print?

2 A They found blood on a -- on a ---

3 Q Did it match you?

4 A No. DNA came back negative. They dusted it for DNA.
5 Everything came back negative.

6 Q Was the car ever ---

7 A The car, that's -- that's -- that's -- that's a good
8 one because my attorney, it's a different crime scene.
9 It's like two separate crime scenes. You've got the house
10 crime scene. You got where you retrieve the vehicle.
11 They dusted it for prints, they dusted it for DNA. My
12 prints came back negative, but it was never ever brought
13 up in trial. It was never brought up.

14 Q Okay. Now, if you had testified, what would you have
15 told the jury?

16 A That I was not guilty. There's no way I could be in
17 two places at one time. There's no way I could be there.
18 There's no way I could do something to someone who had
19 helped me and my family, you know.

20 Q And you could have explained that to the jury, and
21 that's what you would have said?

22 A I never had a chance. He told me I couldn't get up
23 there.

24 Q Okay. This is everything that I recall you giving me
25 to ask you, but is there anything else?

1 A Yeah. I wanted to get the -- Mr. Welch's statement
2 and the forensic guys' statements put into -- put into
3 evidence along with the other issues -- exhibits.

4 Q Okay.

5 A You should have it all right there.

6 Q I believe that's part of the application that we put
7 in as Court's Exhibit ---

8 A Yeah. But I would just like to have it on the record
9 that it's -- that it's being -- being put in there.
10 That's -- that's all. I'm just ---

11 Q Okay. And you recognize that's an attachment to the
12 Court's exhibit?

13 A I understand it's an attachment, but I just like to
14 -- just to have it on record that it's been presented into
15 evidence.

16 Q Okay. It's on the record.

17 I've got no further questions. Is that it?

18 A Yeah.

19 MS. ROSS: Thank you.

20 THE COURT: All right. Cross?

21 CROSS EXAMINATION

22 BY MS. HASTINGS:

23 Q Good afternoon, Mr. Rios.

24 A How are you doing?

25 Q Thank you for being here today.

1 A All right.

2 Q First of all, how many times would you say that you
3 met with Mr. Shealy?

4 A Me and Mr. Shealy met about maybe three times.

5 Q Three times.

6 During these meetings, did you discuss with him your
7 theory of the case, the facts according to you?

8 A Each time Mr. Shealy came, I asked him did he listen
9 to the 9-1-1, and we -- we discussed my alibi.

10 Q Okay. And did you provide Mr. Shealy with any
11 witnesses for him to verify your alibi?

12 A I did. I had my wife, Mrs. Byrd, and I had another
13 witness that I -- I -- I didn't use.

14 Q Okay. Did you explain to Mr. Shealy that you wanted
15 to testify at your trial?

16 A We waited till the end, and he said, "Okay. This is
17 -- this is -- this is what I have to advise you." And
18 this is what he -- and he broke it down to me that if I
19 was to get on the stand, it could bring up my priors and
20 wouldn't look too good with the jury.

21 Q Okay. So he didn't say that you could not testify.
22 That was the decision you made?

23 A Well, if you -- if you advise me that if I get on the
24 stand and they bring up my past and it don't look good,
25 that's basically telling me I don't think you need to get

1 up there.

2 Q But it's still a decision you made. He left it up to
3 you. He was just advising you as his lawyer.

4 A Well, I'll give you -- yeah, yeah, yeah. That's --
5 that's true.

6 MS. HASTINGS: And did you -- no further questions.

7 REDIRECT EXAMINATION

8 BY MS. ROSS:

9 Q One thing briefly. And did he advise you as his
10 lawyer that your prior record could be used to impeach you
11 if you testified?

12 A Yes, he did.

13 MS. ROSS: I've got no further questions.

14 THE COURT: All right. Thank you. You can step
15 down.

16 MS. ROSS: We call Shekinah [phonetic] Rios.

17 THE COURT: How many witnesses do you anticipate?

18 MS. ROSS: This is it, Shekinah. And she'll be about
19 three minutes.

20 THE COURT: Okay.

21 WHEREUPON,

22 SHEKINAH RIOS,

23 After first having been duly sworn, testified as follows:

24 THE COURT: All right. Please have a seat, and state
25 your full name for the record.

1 THE WITNESS: Shekinah Rios.

2 DIRECT EXAMINATION

3 BY MS. ROSS:

4 Q Okay. Ms. Rios, how are you related to Gabriel Rios?

5 A His daughter.

6 Q And you didn't testify at his prior trial?

7 A No, ma'am.

8 Q However, were you familiar -- were you aware of his
9 alibi?

10 A Yes, ma'am. I spoke with my dad that morning.

11 Q And I'm going to show you some T-Mobile records that
12 you looked at before.

13 A Yes, ma'am.

14 Q Did we go over them before trial?

15 A Yes, ma'am.

16 Q And what do they show?

17 A At 7:02 I answered the phone, and my dad asked to
18 speak with my mom. I had spoke with him briefly and I
19 told him to hold on. I was giving my mom the phone.

20 Q Did he sound strange or different or anything?

21 A No, ma'am. Because he had previously called and
22 spoke with my mom.

23 Q And there's a later call reflecting that?

24 A Yes, ma'am.

25 MS. ROSS: All right. I've got nothing further.

1 THE COURT: Any cross?

2 MS. HASTINGS: No cross, Your Honor.

3 THE COURT: All right. Thanks. You can step down.

4 MS. ROSS: That's the applicant's case.

5 THE COURT: Well, it's ten after 1:00. How long do
6 you anticipate your witness is going to be?

7 MS. HASTINGS: Not long Your Honor.

8 THE COURT: Is anybody hungry? All right. Let's go
9 ahead.

10 MS. HASTINGS: The State calls Matthew Shealy.

11 THE COURT: Left hand on the Bible, raise your right
12 hand.

13 WHEREUPON,

14 MATTHEW SHEALY

15 After having been duly sworn, testified as follows:

16 THE COURT: Have a seat. State your name.

17 THE WITNESS: Matthew Shealy.

18 DIRECT EXAMINATION

19 BY MS. HASTINGS:

20 Q Good afternoon, Mr. Shealy. Thanks for being here
21 today.

22 How long have you been practicing law?

23 A Eight years at this point. Maybe nine.

24 Q And what portion of that is criminal?

25 A All of it.

1 Q All of it.

2 And at the time that you handled Mr. Rios' case, had
3 you handled any trials with charges similar to his?

4 A I believe so. I don't know if I'd had a burglary
5 first or not, but I've certainly had an armed robbery, and
6 I just tried a murder. So . . .

7 Q So you felt pretty experienced in trials like these?

8 A Yes, ma'am.

9 Q Okay. And how many times did you say you met with
10 Mr. Rios?

11 A First you have to understand that I was a latecomer
12 to this particular case. He initially was appointed to
13 Dick Whelchel back in 2010. Mr. Whelchel had a conflict
14 so it shifted to Tanya Jones of my office. Mr. Rios then
15 hired Max Singleton. That broke down at some point around
16 October of 2012. I was assigned the case in October of
17 2012. We tried the case February 26th of 2013. So I had
18 it about four months-ish.

19 I spoke to him at least four times that I actually
20 spoke with him. I also spoke with members of his family
21 and some other witnesses.

22 Q And during these meetings, did you review the
23 discovery materials?

24 A Yes.

25 Q Yes.

1 And did the applicant seem to understand everything
2 that you reviewed with him?

3 A Yes.

4 Now, as for the 9-1-1 call, I'm not entirely sure if
5 I played it for him or not. I believe, though, that
6 Mr. Singleton had in the past. I believe we talked about
7 that. So I just didn't play it. I don't have a note that
8 I played it for him.

9 Q Okay. So let's actually go to the 9-1-1 call.

10 A Sure.

11 Q Why did you not admit the 9-1-1 call?

12 A I believe that it was because I had Investigator
13 Welch ultimately.

14 And it was Mr. Holt. Mr. Holt, obviously, was not
15 there when this occurred so he had no personal knowledge
16 as to the person that actually did this. Having gotten it
17 in through Investigator Welch, I thought that was, quite
18 frankly, a little more powerful than Mr. Holt, and there
19 were a number of things that were bad in Mr. Holt's. I
20 mean, they would have confirmed -- I mean, they would have
21 suggested that parts of his story were true. So if I'd
22 played the entirety of the 9-1-1 call, then those bits
23 would have come in as well, whereas I could use Officer
24 Welch to testify that she had initially said that I didn't
25 know who it was. And I believe we hammered that in

1 closing. So . . .

2 Q So you would say that you felt the tape was a little
3 bit more harmful than helpful, and you got the information
4 in through better means?

5 A Right. It would have been duplicative. And, quite
6 frankly, I don't think it would have -- and there would
7 have been some admissibility concerns about personal
8 knowledge and things like that.

9 Q Okay. And did you -- let's talk about Mr. Rios'
10 defense of a partial alibi. Why was this considered a
11 partial alibi?

12 A Because his witnesses who would testify as to the
13 phone call, Ms. Rios, couldn't testify that it happened
14 between -- it covered the entirety of when they said it
15 happened. the T-Mobile records don't go to prove that
16 either. I mean, she was a live person who could testify
17 as to what was said when she received the call. I even
18 suggested their existence by kind of sneaky-peek and
19 handing them to her in front of the jury.

20 I mean, yeah. I just don't think that calling a
21 T-Mobile witness and putting in those particular phone
22 records would have ultimately added sufficiently for the
23 burden of having him testify in front of a jury because a
24 jury, quite frankly, I think would have tuned that out.

25 Q Okay. And is it true that the judge denied to charge

1 the jury on alibi?

2 A He did.

3 Q And you objected to that, correct?

4 A I did.

5 MS. HASTINGS: Okay. Beg the Court's indulgence.

6 THE COURT: Yep.

7 BY MS. HASTINGS:

8 Q Were there any other defenses that you felt were
9 applicable in this case?

10 A Well, I mean, we thought that there were some
11 oddities regarding the scene, the fact that the DNA wasn't
12 brought in. That's what we call pointing to the empty
13 chair. We didn't -- they didn't have that, and I believe
14 we brought that up in closing as well.

15 The whole -- the whole thing just looked like a
16 staged scene to us, so I think that I discussed that as
17 well as the painter's tape. We thought that that was
18 bizarre. And that's -- I believe Mr. Rios has referenced
19 that is in my closing. I thought that that was a pretty
20 good way of building reasonable doubt. A person who is a
21 skilled construction worker wouldn't have used painter's
22 tape.

23 So, I mean, I wasn't trying to take the burden away
24 from the jury -- or from the State. I was just trying to
25 say why it wouldn't make sense for him to have done it.

1 Q Okay. And did you -- did Mr. Rios provide you with
2 any witnesses? Or what investigation did you engage in
3 for this case?

4 A He did. We called -- I believe we called four
5 witnesses. I spoke with, I believe, a Deacon Thomas, but
6 he wouldn't have ultimately been helpful for us. Again,
7 we spoke with Ms. Rios, we spoke with Ms. Byrd. And
8 so . . .

9 Q And did you think that there was anything troublesome
10 about the State's closing argument?

11 A Well, based on what he read, yeah, I probably should
12 have objected to that. It sounded like it was burden
13 shifting. I missed that.

14 Q At the time, if you had recognized it, would you have
15 objected?

16 A It sounds -- yes. Based on what I've heard, it
17 sounded like I should have. Now, there may have been
18 other reasons why I did not, but . . .

19 Q And did you make any motions during this case? Any
20 motions to suppress?

21 A I did. I believe I did a Neil v. Biggers hearing
22 regarding the in-court identification.

23 Q And did you make a motion for a new trial?

24 A I did.

25 MS. HASTINGS: No further questions, Your Honor.

1 THE COURT: Cross?

2 CROSS EXAMINATION

3 BY MS. ROSS:

4 Q Hey, Mr. Shealy.

5 A Hey.

6 Q So in that Neil v. Biggers hearing, did you -- didn't
7 Ms. Holt continually testify that she immediately
8 recognized Gabe, who she knew?

9 A She did.

10 Q And then she repeated that testimony again in trial?

11 A She did.

12 Q And then on page 321, I believe it is, in the
13 closing, the solicitor states at Line 1, "She immediately
14 saw him when she came face-to-face. There was no doubt in
15 her mind whatsoever. She got up there and she told you.
16 She didn't hesitate one bit." Wouldn't you agree that
17 that would be a difficult argument to make if the 9-1-1
18 tape had been played for the jury showing that she could
19 not identify -- right there you can hear her weeping in
20 the background, never said, "It was Gabe, hon. Say it's
21 Gabe," or anything? None of that.

22 A Well, I believe that since Detective Welch had
23 testified, I mean, she's allowed to say that in closing as
24 to what her witness testified to. And I believe that I
25 rebutted that in my closing when I say, "Well, Officer

1 Welch says that she didn't know who it was."

2 Q Okay.

3 A So no. I mean, ultimately, I think she could have
4 still made the argument. I mean . . .

5 Q But that would have been harder if right after the
6 incident Ms. Holt couldn't say who it was. She's arguing
7 immediately I knew who it was, and then on this 9-1-1
8 call, she didn't.

9 A And, again, Officer Welch testified that immediately
10 after the altercation, that she couldn't identify them.

11 Q And I don't know if you heard, but in the beginning
12 of that 9-1-1 call, that was 9-1-1 dispatch calling
13 Mr. Holt, correct?

14 A Correct.

15 Q And that's because he had called earlier to 9-1-1 and
16 gave an address and hung up on them.

17 A Correct.

18 Q And then he drives home, and only then does he answer
19 a call back. And he's there with his wife at that point.

20 A Correct.

21 Q And did you actually listen to the 9-1-1 tape
22 yourself before trial?

23 A I did.

24 Q And as far as the T-Mobile records, you didn't have a
25 witness to authenticate those records and put these pieces

1 of paper ---

2 A Not under subpoena. Because, I mean, I obviously
3 have to plan my trial early, and I chose not -- and I had
4 already chose not to use the T-mobile person, because,
5 again, I had real live witnesses to testify as to what was
6 said on the phone calls and that the phone calls were made
7 and it was, in fact, him. And, you know, a phone
8 record ---

9 Q But when the witness kind of faltered in trial, you
10 weren't able to come back with the records and say, "Isn't
11 this the call you made? Isn't this the call you
12 received"?

13 A Well, I believe I showed it to her, and I believe she
14 ultimately testified to that.

15 And, again, a record doesn't show who made the phone
16 call. The real live person can testify that, yeah, it was
17 Mr. Rios using this phone.

18 Q Okay. And these are questions, I think, that have
19 already been answered, but you didn't impeach Gail Holt or
20 Phil Holt with this 9-1-1 ---

21 A Not with the 9-1-1 call, no. Other people.

22 Q You had Mr. Welch only.

23 A Right.

24 MS. ROSS: Okay. I've got nothing further for this
25 witness.

1 THE COURT: Did you advise him that he could be
2 impeached with his prior record?

3 THE WITNESS: I did advise him of that. I believe
4 so.

5 THE COURT: What offenses could he have been
6 impeached with?

7 THE WITNESS: Judge, if you'll bear with me, I've got
8 his prior record.

9 THE COURT: If you've got the transcript, it's 373.

10 THE WITNESS: Yes, sir. I believe that he could have
11 been impeached with those crimes of dishonesty. I've
12 just ---

13 THE COURT: Which ones were they?

14 THE WITNESS: Well, Judge, there was a robbery, there
15 was another robbery, a petit larceny, a vehicle theft, a
16 burglary of a nonoccupied dwelling and grand larceny. And
17 I've looked through the rule. I may have been incorrect
18 about that. I thought that for crimes of dishonesty,
19 there was no ten-year limitation, and I may be incorrect
20 about that.

21 THE COURT: Okay. Well, so it was a strategic
22 decision on your part?

23 THE WITNESS: For him not to testify?

24 THE COURT: Yeah.

25 THE WITNESS: Yes, sir.

1 THE COURT: Do y'all want to follow up with anything?

2 FURTHER CROSS EXAMINATION

3 BY MS. ROSS:

4 Q Now, if he had no prior record, would it still be a
5 strategic decision for you not to -- tell him not to
6 testify?

7 A Ultimately, I'm not -- the way that I decide whether
8 somebody should testify or not is the way that the case is
9 going. Mr. Rios, he's convincing, but the way that he
10 said that this all happened or the motivations for it
11 being made up were going to be difficult for us, quite
12 frankly. They were kind of murky allegations.

13 Q That's what the closing argument of the State was
14 anyway, wasn't it?

15 THE COURT: Let him finish his answer.

16 Go ahead and finish your answer.

17 THE WITNESS: And so, quite frankly, I'm not entirely
18 sure that it would have been fruitful for him to testify
19 even if he had no prior record. But had he chosen to
20 testify, then we would have had him testify.

21 BY MS. ROSS:

22 Q And you did advise him that he could be impeached if
23 he testified?

24 A I believe that I did.

25 Q And did you ask the judge to go through the charges

1 to make a determination whether any would be impeachable,
2 be able to be used to impeach?

3 A I don't have the transcript in front of me. I assume
4 that I did, but maybe I did not.

5 THE COURT: Are you looking for the prior record?

6 MS. ROSS: I've got the prior record. There is a --
7 I've reviewed the transcript, and I don't believe in there
8 anyway does the judge go through and talk about the prior
9 record until the sentencing, until after.

10 THE WITNESS: Well, I'll defer to that.

11 BY MS. ROSS:

12 Q It's about the record will speak for itself?

13 A Yes. Right.

14 MS. ROSS: Okay. I've got no further questions.

15 THE COURT: Anything from the State?

16 MS. HASTINGS: Nothing further, Your Honor.

17 THE COURT: All right. Thanks. You can step down.

18 THE WITNESS: Thank you, Judge.

19 THE COURT: Anything else?

20 MS. HASTINGS: Yes, Your Honor. The State would
21 briefly like to close.

22 THE COURT: Oh, sure. Yeah. Go ahead.

23 CLOSING ARGUMENTS

24 MS. HASTINGS: The State would argue that Mr. Rios
25 has failed to meet his burden under Strickland. He's

1 failed to show that Mr. Shealy has performed outside of
2 the norms reasonable within criminal litigation and that
3 any prejudice that's resulted therefrom.

4 Additionally, the State would draw your attention to
5 applicant's appellate record which is in your packet. The
6 issue of alibi was ruled upon by the Court of Appeals.

7 That's all the State would have.

8 THE COURT: All right. Ms. Ross, anything?

9 MS. ROSS: Judge, I believe that Mr. Rios went
10 through most of it as did I in opening. I would refer
11 you, I think he handed up a case, Rutland v. State, which
12 is a recent case which I think is on point. This case is
13 all about credibility of witnesses. The 9-1-1 tape, I
14 know it was difficult to hear, I apologize, but it does
15 certainly bring into question the direct testimony of
16 witnesses against Mr. Rios. In fact, it's a prior
17 inconsistent statement given that morning. It's
18 incredibly strong evidence in the case.

19 As far as Mr. Rios not testifying under 609, those
20 were not impeachable charges. They were over ten years.
21 I think, certainly, arguments could be made to keep them
22 out.

23 Mr. Rios has testified what he would have testified
24 from the stand. Bringing into question the motives of the
25 -- the alleged -- the victims is irrelevant to whether

1 someone decides to testify or not. And he told you what
2 he would have testified to.

3 I would ask you to just take a look at that
4 transcript and the cites that I gave as well as the cites
5 Mr. Rios also gave in his amended application just going
6 to separate incidents that should have been done
7 differently.

8 I would especially note in closing on page 321, the
9 State is hammering on the validity of his -- a witness
10 saying that she immediately recognized him, she
11 immediately knew, and that is simply not the case. While
12 that was some for testimony, the State had in its
13 possession a 9-1-1 tape and their own Officer Welch saying
14 that was not the case, so I would argue that's a
15 due-process violation. They perpetrated a
16 misrepresentation on the Court at that time and argue that
17 was a due-process violation as well.

18 And that's it.

19 RULING BY THE COURT

20 THE COURT: Okay. Well, it sounds like a hard-fought
21 trial and a number of issues involved in it. It's a
22 pretty high bar to reach, and I'm going to find that
23 Mr. Rios has not reached it. I don't find that the
24 conduct of his attorney fell below an objective standard
25 of reasonableness, and there were legitimate strategic

1 decisions for pursuit -- the trial strategy that he
2 pursued.

3 And with that, I wish you the best of luck, Mr. Rios.
4 Thank you.

5 Prepare an order, please.

6 (WHEREUPON, proceedings adjourned at 1:28 p.m.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

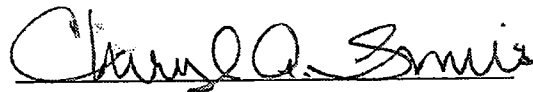
1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA)
4 COUNTY OF SPARTANBURG)
5
6

7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South
9 Carolina, do hereby certify that the foregoing is a true,
10 accurate and complete Transcript of Record of the
11 proceedings had and evidence introduced in the trial of
12 the captioned case, relative to appeal, in the Court of
13 Common Pleas for Spartanburg County, South Carolina, on
14 the 30th day of January, 2017.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.
17

18 August 14, 2017
19

20
21 

22 Cheryl A. Smith, CVR-M

23 Court Reporter
24
25

T-Mobile stick together

T-Mobile USA
Law Enforcement Relations Group
4 Sylvan Way
Parsippany, New Jersey 07054
Phone (973) 292-8911
Fax (973) 292-8697

Date Feb 03, 2012

MAX SINGLETON

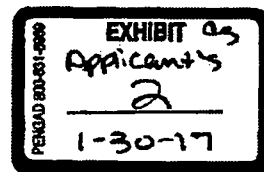
SIMPSONVILLE, SC

Dear SINGLETON

This is in response to the Subpoena, dated Jan 17, 2012, and served upon T-Mobile USA, Inc. on Feb 03, 2012. This subpoena requests Subscriber Information for the T-Mobile subscriber associated with MSISDN: 864-205-2472.

A search of our subscriber database discloses the following information:

Billing Account Number: 63326666
Billing Account Status: Cancel
Billing Account Name: SONIA RIOS
Date of Birth:
Social Security Number:
Company Name: N/A
Address:
Telephone 1:
Telephone 2:
IMSI: 310260523246987
Mobile Number: 864-2472
Mobile Number Name: SONIA RIOS
Date Account Established: 04/30/2010
MSISDN Status: Cancel
Disconnect Type and Date: Cancel 08/24/2011
Post Paid/Pre-Paid: Pre-Paid
Last Refill Date: N/A
Ported Indicator: N/A



Original materials follow via US Mail.

Should you have any questions regarding this information please feel free to contact me at your convenience. My direct telephone number is: 973-292-8922.

Very truly yours,

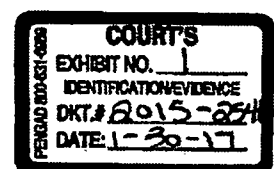
Antoinette Moore
T-Mobile Law Enforcement Relations Group

Subscriber Detail

Sub ID	MSISDN	Date Of Call (PDT)	Called Numbe	FP Call Direction	FP Event Description	Billed Duration (Min)
63326666	(864)	-2472 08/14/2010 01:27:42 AM	864 2858	TERMINATING	VOICE	25.
63326666	(864)	-2472 08/14/2010 01:53:42 AM	864 2858	TERMINATING	VOICE	9.
63326666	(864)	-2472 08/14/2010 02:03:12 AM	864 2858	TERMINATING	VOICE	3.
63326666	(864)	-2472 08/14/2010 02:10:36 AM	864 2858	ORIGINATING	VOICE	6.
63326666	(864)	-2472 08/14/2010 02:18:16 AM	864 2858	TERMINATING	VOICE	23.
63326666	(864)	-2472 08/14/2010 03:02:52 AM	864 2858	TERMINATING	VOICE	2.
63326666	(864)	-2472 08/14/2010 05:58:11 AM	864 5723	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 05:58:27 AM	864 3850	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 05:59:50 AM	864 3085	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 06:55:24 AM	864 5723	ORIGINATING	SMS	
63326666	(864)	-2472 08/14/2010 07:01:30 AM	864 5723	TERMINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 07:02:23 AM	864 5723	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 07:03:22 AM	864 5723	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 07:03:40 AM	864 5723	TERMINATING	SMS	
63326666	(864)	-2472 08/14/2010 07:04:11 AM	864 5723	ORIGINATING	VOICE	2.
63326666	(864)	-2472 08/14/2010 07:07:44 AM	864 5723	TERMINATING	VOICE	9.
63326666	(864)	-2472 08/14/2010 07:16:22 AM	864 2858	TERMINATING	VOICE	4.
63326666	(864)	-2472 08/14/2010 07:21:28 AM	864 6670	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 07:22:27 AM	864 2858	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 07:29:17 AM	864 3085	ORIGINATING	VOICE	8.
63326666	(864)	-2472 08/14/2010 12:12:27 PM	864 3085	ORIGINATING	VOICE	2.
63326666	(864)	-2472 08/14/2010 12:21:39 PM	864 3085	ORIGINATING	VOICE	3.
63326666	(864)	-2472 08/14/2010 12:31:18 PM	864 3085	ORIGINATING	VOICE	3.
63326666	(864)	-2472 08/14/2010 12:38:03 PM	864 6670	ORIGINATING	VOICE	2.
63326666	(864)	-2472 08/14/2010 12:41:33 PM	305 8244	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 12:56:26 PM	864 6670	ORIGINATING	VOICE	4.
63326666	(864)	-2472 08/14/2010 01:09:47 PM	864 5723	TERMINATING	VOICE	3.
63326666	(864)	-2472 08/14/2010 02:06:54 PM	864 6670	TERMINATING	VOICE	2.
63326666	(864)	-2472 08/14/2010 02:08:15 PM	305 8244	TERMINATING	VOICE	12.
63326666	(864)	-2472 08/14/2010 02:20:30 PM	864 3850	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 02:21:12 PM	864 3850	TERMINATING	VOICE	8.
63326666	(864)	-2472 08/14/2010 02:29:32 PM	864 6670	ORIGINATING	VOICE	4.
63326666	(864)	-2472 08/14/2010 02:34:45 PM	864 5723	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 02:50:14 PM	A678 82285	ORIGINATING	VOICE	2.
63326666	(864)	-2472 08/14/2010 03:04:40 PM	864 4823	ORIGINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 03:08:39 PM	864 8779	ORIGINATING	VOICE	4.
63326666	(864)	-2472 08/14/2010 03:23:55 PM	864 5723	TERMINATING	VOICE	4.
63326666	(864)	-2472 08/14/2010 03:35:58 PM	864 5747	TERMINATING	VOICE	1.
63326666	(864)	-2472 08/14/2010 04:17:21 PM	864 5747	ORIGINATING	VOICE	1.

63326666	(864)	-2472	08/14/2010 04:24:44 PM	305	8244	ORIGINATING	VOICE	3.
63326666	(864)	-2472	08/14/2010 04:32:35 PM	864	4610	TERMINATING	VOICE	4.
63326666	(864)	-2472	08/14/2010 04:47:37 PM	864	4623	TERMINATING	VOICE	3.
63326666	(864)	-2472	08/14/2010 04:54:03 PM	864	0027	ORIGINATING	VOICE	1.
63326666	(864)	-2472	08/14/2010 04:56:03 PM	305	3564	ORIGINATING	VOICE	8.
63326666	(864)	-2472	08/14/2010 04:57:54 PM	864	4623	TERMINATING	VOICE	3.
63326666	(864)	-2472	08/14/2010 05:03:51 PM	864	2094	TERMINATING	VOICE	4.
63326666	(864)	-2472	08/14/2010 06:10:19 PM	864	4610	TERMINATING	VOICE	3.
63326666	(864)	-2472	08/14/2010 06:13:35 PM	864	4610	ORIGINATING	VOICE	1.
63326666	(864)	-2472	08/14/2010 06:45:23 PM	864	0027	ORIGINATING	VOICE	1.
63326666	(864)	-2472	08/14/2010 06:47:28 PM	864	4335	TERMINATING	VOICE	7.
63326666	(864)	-2472	08/14/2010 06:54:42 PM	864	3419	TERMINATING	SMS	
63326666	(864)	-2472	08/14/2010 06:57:48 PM	305	8244	ORIGINATING	VOICE	1.
63326666	(864)	-2472	08/14/2010 07:04:27 PM	864	5747	ORIGINATING	VOICE	1.
63326666	(864)	-2472	08/14/2010 07:07:31 PM	864	4710	TERMINATING	VOICE	2.
63326666	(864)	-2472	08/14/2010 07:15:47 PM	864	5747	TERMINATING	VOICE	1.
63326666	(864)	-2472	08/14/2010 10:03:27 PM	864	2674	ORIGINATING	SMS	
63326666	(864)	-2472	08/14/2010 10:04:50 PM	864	2674	ORIGINATING	SMS	
63326666	(864)	-2472	08/14/2010 10:08:12 PM	864	2674	ORIGINATING	SMS	
63326666	(864)	-2472	08/14/2010 10:09:07 PM	864	2674	TERMINATING	SMS	
63326666	(864)	-2472	08/14/2010 10:11:03 PM	864	2674	ORIGINATING	SMS	

Judge



STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

C/A No.2015-CP-42-2541

Gabriel Jon Rios -- Applicant,

-vs-

State of South Carolina -- Respondent,

AMENDED POST CONVICTION RELIEF

APPLICATION PURSUANT TO:

RULE 15, SCRCiv.P.

Gabriel J. Rios
SCDC# 344751
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

Applicant,

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

C/A No.2015-CP-42-2541

Gabriel J. Rios -- Applicant,

-vs-

State of South Carolina -- Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and correct copy of the enclosed Amended Post-Conviction Relief Application was served on parties whose name and address appear below, by placing the aforesaid in the U.S. Mail properly addressed, with first-class post-affixed this _____ day of _____, 2016.

Those Served:

Respectfully Submitted,

Alan Wilson
S.C. Attorney General
P.O. Box 11549
Columbia, SC. 29211

/s/ _____
Gabriel J. Rios

M. Hope Blackely
Spartanburg County
Clerk of Court
P.O. Box 3483
Spartanburg, SC. 29304-3483

INDEX

INDEX,.....	i
MEMORANDUM,.....	1
ISSUE (A),.....	2
ISSUE (B),.....	7
ISSUE (C),.....	10
CONCLUSION,.....	15
EXHIBIT (A),.....	16
EXHIBIT (B),.....	17

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

Gabriel J. Rios)
Applicant,)
-vs-)
State of South Carolina)
Respondent,)
Rule 15, SCRCiv.P.

COMES NOW, above captioned Applicant, Gabriel Rios, by and through attorney of record, respectfully moving this Honorable Court to amend the Original application in case number 2015-CP-42-2541 pursuant to Rule 15, of the South Carolina Rules of Civil Procedure.

Respectfully Submitted,
/s/ _____
Gabriel J. Rios
Applicant,

ISSUES PRESENTED

ISSUE (A)

WAS COUNSEL INEFFECTIVE FOR CONCEDED APPLICANT'S GUILT DURING CLOSING SUMMATION TO THE JURY, THAT WAS A FACT TO BE DETERMINED BY THE JURY?

FACTS

At the onset of the trial, the Trial Court made the following statement to the jury, as was recorded:

Now, let me remind you that the fact that this defendant has been charged and indicted, again is not evidence of his guilt. In fact, in this case he says I'm not guilty. What that means is the defendant -- I mean the State has the burden of proving each and every element of all charges against him by proof of, of beyond a reasonable doubt. Each charge stands on it's own, and will be considered by you at the end of this on its own. It will be your decision to determine whether or not the State has proven all or any of it's case by proof beyond a reasonable doubt at the end of this case.

Tr.p.91, L.5-15.

Again, the State has the burden of proving the defendant guilty by proof beyond a reasonable doubt.

Tr.p.91, L.21-22.

As is seen in the above the Court has instructed the jury that Applicant has entered a plea of [not guilty], and that pleas puts the burden of proof on the State. (emphasis original).

During opening statements to the jury the Prosecution told the jury that "on the morning of August the 14th of 2010 a woman was left alone in her home, face down on her bedroom floor, hands bound behind her back with tape, terrified, trembling and stunned ." Tr.p.99, L.13-16.

During the State's case in chief the State called Mrs. Gail Holt, the alleged victim. ("Holt" hereafter) as a witness. Holt was asked "what did he do with your hands behind your back?", to which Holt replied "he taped them." Tr.p.111, L.23-24.

As is seen the victim also testified that the perpetrator had "taped" her hands behind her back during the incident. Therefore, the burden here was on the State in this regards. However, during closing summation to the jury trial counsel made the following comments to the as was recorded:

Ladies and gentlemen, the tape at issue is painter's tape. Everybody's testified my client is a trained construction worker. He's been doing construction for years and years and years. He knows what painter's tape is.

It's easily taken off. You're not gonna use that in these circumstances unless you don't know what it is. It just doesn't make any sense, and they want you to just assume well, just -- yeah, but maybe it's just the only tape he had.

Surely there was other tape in that house. Surely, he knew it was cause they testified he knew that house intimately. But he didn't use that.

Tr.p.305, L.17-p.306, L.3.

As is seen in the above counsel has told the jury that Applicant used painter's tape to bound Holt's hands behind her back as that was "the only tape he had." Here the jury could have easily interpreted this statement as counsel telling the jury that his client used painter's tape because it was the only tape he had.

DISCUSSION

Applicant submits he was denied the effective assistance of counsel when counsel conceded to the jury that Applicant had taped the victim's hands behind her back with [painter's tape] because it was the only tape he had. (emphasis original).

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743 (87 S.Ct. 1396, 1399)(1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred.

But, if it loses it's character as a confrontation between adversaries, the constitutional guarantee is void. *Cronic v. United State*, 466 U.S. at 656-57, 104 S.Ct. at 2045-46 (footnotes - mitted).

A criminal defendant is also protected from unfairness in the criminal process by due process that his guilt be proved beyond a reasonable doubt [by the Prosecution].

The U.S. Supreme Court has explicitly held the Due Process Clause protects "the accused" against conviction except upon proof beyond a reasonable doubt of [every fact] necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072 (1970).

The Supreme Court has also stated that [due process commands no man shall lose his liberty unless the Government has borne the

burden of producing the evidence and convincing the fact-finder of his guilt. *Spiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.E.2d 1460 (1958)(emphasis added). When, as here a defense attorney concedes that there is [no] reasonable doubt concerning the only factual issue in dispute, the Government has not been held to it's burden of persuading the jury that the defendant is guilty.

The U.S. Supreme Court recognized in Cronic, supra, that there are "circumstances that are so likely to prejudice the accused cost of litigating their effect in a particular case is unjustified. Id 466 U.S. at 658, 104 S.Ct. at 2046. The Court identified the complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial as justifying a presumption of prejudice. Id at 659, 104 S.Ct. at 2047.

Here counsel's statement to the jury conveyed the impression that Applicant no doubt bound Holt's hands with tape. This statement during a critical stage of the proceeding (conceding guilt); caused a breakdown in the adversarial proceeding, that compels an application of the Cronic exception to the Strickland requirement of showing that the outcome of the proceeding would have been different without counsel's errors or omissions. See Cronic, 466 U.S. at 659-60, 104 S.Ct. at 2047.

In *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550 (1975), the U.S. Supreme Court recognized the importance of the closing argument to a criminal defendant. The Court found that a New York law which allowed every judge in a non-jury criminal trial to deny counsel any opportunity to make a closing argument deprived

the accused of his constitutional right to the assistance of counsel. Id at 865, 95 S.Ct. at 2556.

The Court stated:

the very premise of our adversary system of criminal justice is the partisan advocacy on [both] sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact-finding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case for judgment.

Id, at 862, 95 S.Ct. at 2555.

The Tenth Circuit has also recognized that an "attorney who adopts and acts upon the belief his client should be convicted [fails] to function in a meaningful sense as the government's adversary. *Osborn v. Shillinger*, 801 F.2d 612, 625 (10th Cir.1988) (quoting *Cronic*, 466 U.S. at 666, 104 S.Ct. at 2051.

In the instant case the State was trying to prove Applicant bound the victim's hands with [tape], thus essentially kidnapping which was one of the offenses for which Applicant was on trial for. Counsel's inept attempt failed when counsel told the jury ". yeah maybe it's just the only tape he (Applicant) had. (emphasis)

Applicant submits he was denied the effective assistance of counsel at a critical stage of the trial and counsel's inactions undermined confidence in the outcome of the trial. Applicant should be granted a new trial on this issue.

ISSUE (B)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER COMMENTS DURING CLOSING SUMMATION THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF THE DUE PROCESS CLAUSE?

FACTS

During closing summation to the jury the Prosecution made the following comments without objection from counsel, as was recorded:

He's had over two and a half years, since this incident happened, to come up with this story and that is all it is is just a story. No one said they were with him that morning. Nobody, nobody that testified for him accounted for his whereabouts. Nobody.

If you believe the defense's story, you either believe, one, that Mrs. Holt is just flat outlying or, two, that she is dead wrong. If you believe their side, that's what you're basically saying to Mrs. Holt.

Can you look at her and say you're lying? Can you look at her and say you're dead wrong? Think about that?

Tr.p.322, L.24-p.323, L.12

Ask yourselves who are you going to believe, Mrs. Holt of his people?

Tr.p.323, L.18-19.

As is seen in the above cited summation the Prosecutions has invited the jurors to take sides against Applicant. Applicant submits this argument by the Prosecution's statements asking the jury "who are they going to beleive, Mrs. Holt or his (applicant) people", impermissibly shifted the burden of proof to Applicant.

The bears the burden of proof at [all] times and this argument cannot be construed in any other way than shifting the burden to Applicant. Applicant submits counsel should have objected to this line of argument.

DISCUSSION

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and it's contents should stay within the record and reasonable inferences to it. *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); accord *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); see also *State v. Cooper*, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1991) ("A solicitor's closing must be carefully tailored so it does not appeal to the personal biases of the jurors."); *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (holding that because the solicitor's duty is not to convict the defendant but to see justice done, the solicitor's closing argument must be "carefully tailored" to not appeal to the personal biases of jurors nor calculated to arouse their passions or prejudices); *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct.App.2003) (same).

The solicitor's comments here "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, (1974). This determination requires the Court to look to "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." *Bennett v. Angelone*, 92 F.3d 1336, 1345-46 (4th Cir.1996) (internal quotation marks omitted).

The State had last argument. These comments by the solicitor were the last things the jury heard from the attorneys. The solicitor did not just make an isolated remark, but deliberately

violated established rules regarding closing argument. Trial counsel could not have had any reasonable strategy for failing to object to these arguments and giving the trial judge a chance to cure the error. The State's closing contained four (4) egregiously improper arguments which, when taken as a whole, satisfies the Donnelly standard.

Applicant respectfully prays this Court will grant a new trial on the solicitor's improper closing argument that in effect impermissibly shifted the burden of proof.