

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-000547

Douglas M. Thompson.....Petitioner,

v.

State of South Carolina.....Respondent.

APPENDIX
VOLUME II OF II

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1 THE COURT: All right. You may put hands down.
2 You've got to speak very loudly so that my court
3 reporter can hear you.

4 Do you understand, Mr. Fishburne?

5 THE DEFENDANT FISHBURNE: Yes, ma'am.

6 THE DEFENDANT THOMPSON: Yes, ma'am.

7 THE COURT: Okay. I'm going to do this in
8 alphabetical order. There's no significance, it's just
9 the way I'm doing it, Mr. Fishburne and then Mr.
10 Thompson. If I look to you, I need you to respond.

11 Do you understand?

12 THE DEFENDANT FISHBURNE: Yes, ma'am.

13 THE DEFENDANT THOMPSON: Yes, ma'am.

14 THE COURT: Thank you.

15 I'm going to explain to you certain of your
16 rights. If you do not understand anything that I say,
17 please let me know. If you need me to explain anything
18 in further detail, please let me know.

19 Do you understand?

20 THE DEFENDANT FISHBURNE: Yes, ma'am.

21 THE DEFENDANT THOMPSON: Yes, ma'am.

22 THE COURT: We likely will reach the part of the
23 trial, hopefully mid-afternoon, where you may present
24 your defense. You have the right to claim the
25 protections given to you by the Fifth Amendment of the

1 Constitution of the United States.

2 This amendment states in part that no person
3 shall be compelled in any criminal case to be a witness
4 against himself. This means that you cannot be
5 required to testify in this case. You do have the
6 right to testify, no one can make you testify.

7 This is a personal right, and no one can waive
8 this right expect for you. If you decide to testify,
9 you will be subject to the same rules that govern other
10 witnesses. And you may be examined and cross-examined
11 on any relevant issues.

12 If you have any convictions involving
13 dishonesty, false statements or for crimes punishable
14 by imprisonment for more than one year, and I determine
15 that the probative value of admitting this evidence
16 outweighs its prejudicial effect, the solicitor will be
17 able to introduce your record to attack your
18 credibility.

19 If you decide to testify, this decision must be
20 freely, voluntarily, and intelligently made with the
21 knowledge of the protections given to you by the Fifth
22 Amendment, and the consequences of your decision to
23 testify.

24 If you decide not to testify, I will instruct
25 the jurors that they cannot give the fact that you did

1 not testify any consideration whatsoever. And there is
2 to be absolutely no prejudice to you because you did
3 not testify.

4 It is left entirely up to you whether or not you
5 testify. You may talk with your attorneys, your
6 friends, your family members or anyone else, but the
7 final decision is left entirely up to you.

8 Do you understand what I have explained to you?

9 THE DEFENDANT FISHBURNE: Yes, ma'am.

10 THE DEFENDANT THOMSPON: Yes, ma'am

11 THE COURT: Do you have any questions about what
12 I have explained to you?

13 THE DEFENDANT FISHBURNE: No, ma'am.

14 THE DEFENDANT THOMPSON: No, ma'am.

15 THE COURT: All right. And when we reach the
16 stage of the trial, if it becomes pertinent at that
17 point, I will ask you have you decided to testify, that
18 will be my question to you. You all may have a seat.

19 We will take our lunch break until 1:45. Thank
20 you.

21 MS. CORNWELL: Thank you, Your Honor.

22 (Whereupon, a recess was taken.)

23 THE COURT: Who is your next witness?

24 MS. CORNWELL: Your Honor, Kokinda is the next
25 witness.

1 THE COURT: You can have Mr. Kokinda on the
2 front row.

3 MR. MCCOY: Your Honor, can we take up something
4 in reference to the next witness? I just want to make
5 sure for the record there is no mention by the
6 prosecution of any sort of comparison to AFIS, or
7 anything like that, indicating that my client would
8 have already been in the system of sort.

9 When I always did it, Your Honor, on the other
10 side we could say, what were the results of your
11 fingerprint analysis. And he'd say, the results of my
12 fingerprint analysis from comparing his prints to, you
13 know, whatever I've dusted he'd say, they were either
14 positive or they were negative

15 THE COURT: So what are you asking?

16 MR. MCCOY: I am asking, Your Honor, that there
17 be no mention of getting my client's fingerprints from
18 anything and comparing them to anything in AFIS.

19 THE COURT: Ms. Cornwell?

20 MS. CORNWELL: Your Honor, Mr. Kokinda is Mr.
21 Alfaro's witness. I'm sure Mr. Alfaro knows he is not
22 allowed to ask, and I will make sure he is aware of it.

23 THE COURT: It's 1:45. Where is Mr. Alfaro?

24 MS. CORNWELL: Somebody has gone to get him now,
25 Your Honor. I can call another witness if he is not up

1 here when the jury comes in.

2 MR. MCCOY: I apologize, I didn't know that was
3 Mr. Alfaro's witness.

4 THE COURT: I didn't either. There he is.

5 MR. MCCOY: I think it can be phrased the right
6 way, Your Honor, I don't have an issue with that.

7 THE COURT: Mr. Alfaro, I understand that Mr.
8 Kokinda is your witness; is that correct?

9 MR. ALFARO: Yes, Your Honor.

10 THE COURT: All right. Mr. McCoy has a request,
11 and so he objects to a question in front of the jury.
12 So, Mr. McCoy, briefly.

13 MR. MCCOY: Yes, ma'am. Ron, my only request
14 was when analyzing fingerprints, I didn't know if there
15 was going to be testimony of, hey, we compared these
16 prints in AFIS, or we did this. I just didn't want
17 there to be an indication that my client was already in
18 AFIS.

19 MR. ALFARO: He'll have to testify as to how
20 fingerprints are compared.

21 MR. MCCOY: I think that he can testify to how
22 fingerprints are compared by saying --

23 MR. ALFARO: He didn't run it through AFIS, so.

24 THE COURT: Well that solves it.

25 MR. MCCOY: Okay. Even better. Thank you.

1 (Whereupon, the jurors enter the courtroom.)

2 THE COURT: Please be seated.

3 Call your next witness.

4 MR. ALFARO: Thank you, Your Honor.

5 State calls Dean Kokinda.

6 MR. DEAN ROBERT KOKINDA,
7 after having first been duly sworn to state the truth,
8 the whole truth and nothing but the truth, testified on
9 his oath as follows:

10 DIRECT EXAMINATION

11 BY MR. ALFARO:

12 Q Could you please tell the jury where you
13 currently work.

14 A I'm employed with the Berkeley County Sheriff's
15 office.

16 Q How long have you been with the sheriff's
17 office?

18 A Since 1989.

19 Q What is your current rank, along with your
20 duties at the sheriff's office?

21 A I'm a lieutenant and I'm in charge of the
22 forensic services division at the sheriff's office.

23 Q And of your time at the sheriff's office, how
24 long have you been working in forensics?

25 A Since 1991.

1 Q Can you describe to the jury what your duties
2 and responsibilities are as lieutenant over the
3 forensic division of the sheriff's office?

4 A Run day-to-day operations of the forensic
5 services unit. We process crime scenes and evidence as
6 directed. And I'm a latent print examiner and do
7 testing, fingerprints and drug testing, within the
8 unit.

9 Q So would it be fair to say that the majority of
10 your job involves handling and dealing with evidence?

11 A Yes, sir.

12 Q And I believe as part of your list of your
13 responsibilities you mentioned fingerprints?

14 A Yes, sir.

15 Q Could you tell us what duties you have
16 specifically related to fingerprints, fingerprint
17 analysis?

18 A Okay. I'm a latent print examiner. As the
19 latent print examiner I will take unknown fingerprints
20 and compare them against known standards.

21 Q And what type of training or education, or
22 training and education and experience have you had in
23 that field?

24 A I have had the FBI basic advance latent
25 fingerprint classes. And also a forensic ridgeology

1 class which was taught by Dave Ashbaugh of the Royal
2 Canadian Mounted Police.

3 Q And in your time at the sheriff's office, how
4 many times would you estimate you've handled or
5 analyzed fingerprints for analysis?

6 A Thousands.

7 Q And have you had the opportunity to testify in
8 court as an expert in the field of forensics, and
9 specifically fingerprint, fingerprint analysis?

10 A Several times.

11 Q And I assume that has been in court in South
12 Carolina?

13 A Yes, sir.

14 MR. ALFARO: Your Honor, at this time the State
15 would ask that Lt. Kokinda be qualified as an expert in
16 the field of fingerprint and fingerprints analysis.

17 THE COURT: Any objection?

18 MR. SHELTON: No objection.

19 MR. MCCOY: No objection, Your Honor. Sounds
20 very qualified.

21 THE COURT: Ladies and gentlemen, normally when
22 a person testifies, they must testify as to what they
23 heard or saw or sensed by smell or something of that
24 nature.

25 Typically a person cannot give opinion

1 testimony, but there is an exception when someone is
2 qualified because of their education or experience,
3 they are allowed and permitted to give their opinion in
4 certain areas if the Court qualifies them in this way.

5 This witness will be qualified in the area of
6 fingerprint and fingerprint analysis to give opinion
7 testimony in that area. That does not mean that you
8 must accept the opinion. It is testimony for you to
9 use in any way that you see fit.

10 Mr. Alfaro.

11 MR. ALFARO: Thank you, Your Honor.

12 Q (By Mr. Alfaro) Lt. Kokinda, can you please tell
13 the jury how different types of evidence are processed
14 for fingerprints?

15 A Well evidence, you have to determine what type
16 of evidence you have. The surface of the evidence
17 really determines what type of process you are going to
18 use.

19 Most evidence on smooth surfaces is processed
20 with powder. The powder merely adheres to the residue
21 that is left behind from the finger.

22 Porous evidence can be processed with different
23 chemicals such as ninhydrin, which is amino acids and
24 it will turn a purple color; paper, wood, those type of
25 items.

1 You can also use what they call super glue,
2 cyanoacrylate. The fumes from heated super glue will
3 adhere to latent fingerprints that are left behind on
4 different surfaces.

5 Q And in your experience is every item that is
6 touched or handled, are you always able to recover
7 fingerprints from those items?

8 A No. But generally finding a fingerprint I
9 always say it's an accidental thing. Just merely
10 touching an object doesn't necessarily mean that you
11 are going to leave a fingerprint behind. It doesn't
12 necessarily mean you are going to leave an identifiable
13 fingerprint behind.

14 Q So is there a difference between, or can you
15 explain the difference between leaving a fingerprint
16 behind and leaving an identifiable fingerprint behind?

17 A If I touch the object of the witness stand. Now
18 if I touch it and twist it. Merely touching it, I'm
19 going to transfer the ridges very clearly.

20 If I touch it, put pressure on it and twist it,
21 those ridges that are contained within the fingerprint
22 kind of push together and basically you'll have what is
23 called a smudge.

24 Q So as you demonstrated by touching the witness
25 stand, if someone was to come in later on and try to

1 dust that area for fingerprints, would it be a
2 guarantee that they would be able to lift your
3 fingerprint from that surface?

4 A No, there is no guarantee.

5 Q And you mentioned the surface of an object
6 having an influence on whether for instance can be
7 recovered. Are there any other types of factors that
8 -- environmental factors or other things that influence
9 your ability, or a crime scene analyst's ability to
10 lift fingerprints?

11 A Certainly. The person is one factor. Some
12 people secrete oils and water through their pores in
13 their fingerprints more than other. Environmental
14 factors such as heat, humidity. And then the time
15 factor.

16 Q And did you have the opportunity to analyze any
17 fingerprint evidence in this case?

18 A Yes, I did.

19 Q And could you tell the jury what type of
20 evidence, or what you had the opportunity to analyze?

21 A Latent fingerprints cards. There were latent
22 fingerprints that were recovered using powder and put
23 on a backing card.

24 Q Do you know where those fingerprints were
25 recovered from?

1 A I don't have my report in front of me. I
2 usually list that stuff on the report. But it's
3 written on the cards.

4 Q Would it refresh your recollection if you could
5 review your report?

6 A Yes.

7 Q Showing you what has been marked State's Exhibit
8 9 for identification. Take a chance to review that.

9 A That's my fingerprint analysis report.

10 Q And was that report prepared by you?

11 A Yes, sir.

12 Q Okay. And having had the opportunity to review
13 your report, does it refresh your recollection as to
14 what type of evidence fingerprints were lifted from?

15 A Yes, sir. There was nine latent fingerprint
16 cards. They're labeled basically, come from computer.

17 Q And what method of fingerprint lifting was used
18 in those print cards?

19 A These print cards it was powder.

20 Q And can you tell the jury what, if any, your
21 findings were?

22 A Of the nine latent lift cards, eight of the
23 latent lift cards do not have sufficient quality of the
24 ridge detail to even make a comparison.

25 One latent lift card did. It contained three

1 latent lifts. I'm sorry, four latent lifts. Three of
2 which were not identified with the two known standards,
3 and one that didn't contain enough quality or quantity
4 of the ridge detail to make an identification.

5 Q Let me take a step back. Can you explain for
6 the jury what process you go through, or how you go
7 about comparing fingerprints?

8 A Certainly. If you look at your hands, and on
9 your hands and on the bottom of your feet you will see
10 that the skin is different than the rest of the skin on
11 your body. It's called friction skin. And that's your
12 body's way of giving you gripping power.

13 Kind of like treads on a tire. When you try and
14 grab a wet surface with smooth skin, you really can't
15 grip, it tries to slip out. So your body has its
16 friction skin that gives you that gripping power.

17 If you look real close at the ridges within
18 there, you'll notice that they're not smooth, they kind
19 of have a pattern. If you look at it closer, you'll
20 look and see that those ridges aren't continuous. They
21 will end, they will split, they will come together.

22 They also, the ridges will be of different
23 sizes. Some are thicker than others, they're thinner,
24 even along the same ridge.

25 And these three levels of detail, the first

1 level being your ridge flow, which is a pattern. The
2 second level would be the ridge path. You take the
3 individual path of one ridge and see if it splits, if
4 it stops. And then the actual shape of the ridge which
5 would be the third level of detail.

6 And to make an analysis and a comparison, we
7 look at all three levels of detail. The relationship
8 of this detail to the other detail within the standard
9 or the unknown. And then the relationship between
10 these individual identifying characteristics and the
11 known standard.

12 Q And when you say known standard, what does that
13 refer to?

14 A A known standard generally is what they call a
15 standardized, FBI ten-print card. Known standard is
16 the rolled fingerprints of someone that you've
17 identified, and it's in a controlled environment.

18 Q And did you have a known standard in this case
19 from the defendants in this case, Mr. Fishburne and Mr.
20 Thompson?

21 A Yes, sir, I did.

22 Q And were those known standards compared to the
23 latent print cards recovered from the laptop?

24 A Yes, sir.

25 Q And were you able to match any of those lift

1 cards to the defendants in this case?

2 A No, sir.

3 Q And based off what you were testifying about
4 earlier, in your experience, does the fact that the
5 fingerprints of the defendants were not found on the
6 laptop, does that necessarily mean that neither of them
7 every touched that laptop?

8 A No.

9 Q So is it possible that -- for someone to carry,
10 to be seen carrying a laptop and not leave a
11 fingerprint or an identifiable fingerprint?

12 A That's correct.

13 Q And did you have the opportunity to analyze any
14 other evidence, or process any other evidence in this
15 case?

16 A No, sir.

17 Q So your only involvement was with the
18 fingerprints off the laptop computer?

19 A That's correct.

20 MR. ALFARO: Thank you. Please answer any
21 questions the defense has for you.

22 CROSS-EXAMINATION

23 BY MR. SHELTON:

24 Q Lt. Kokinda, what is the date on that report?
25 When did you run the fingerprints and generate your

1 report?

2 A September 7, 2011?

3 A You don't know when the incident occurred?

4 A No, sir.

5 Q For all intents and purposes, your job kind of
6 depends on other detectives or other persons?

7 A As a latent print examiner? Generally.
8 Although I do go out and process crime scenes myself.

9 Q And as a forensic, in the forensic division,
10 it's not like CSI or NCIS where you are going out and
11 solving the crime and talking to witnesses or anything?

12 A No, sir. Not at all like CSI or NCIS.

13 Q You get called out if detectives need your help
14 to process the scene?

15 A Detectives or the patrol division, yes.

16 Q So both can call you out?

17 A That's correct.

18 Q And you weren't called out in this case?

19 A I was not, no.

20 Q You get called out for many number of different
21 types of cases?

22 A I get called out as I am needed, yeah.

23 Q Do you know if anybody in the forensic services
24 division was called out in this case?

25 A In this particular case, I think I remember

1 reading that Sharon Schuler was called out in this
2 case.

3 Q Okay. And she would have done a report?

4 A Yes.

5 Q Okay. Would you have signed off on the -- would
6 you have been her supervisor at that time?

7 A Yes, sir.

8 Q Would you have signed off on anything?

9 A Most probably.

10 Q And you are not aware of -- have you seen any of
11 those reports?

12 A I looked through a lot of reports. I can't
13 recall offhand any specific report.

14 Q Okay. So if there were no reports, then there
15 wasn't -- no forensic person that came out?

16 A Not necessarily.

17 Q Okay. You've processed houses before,
18 apartments?

19 A Yes, sir.

20 Q For fingerprints, for DNA?

21 A Yes, sir.

22 Q Many different items. And it's not hard to do
23 or inconvenient on anybody?

24 I mean it's not easy, I'm not saying that it's
25 easy. But it's something that you routinely do?

1 A Yes.

2 Q And it's not inconvenient to do it?

3 A Well I don't really fully understand the
4 question.

5 Q That's all right. It's something that is
6 routinely done?

7 A Yes.

8 Q And you didn't do anything in this case?

9 A No, sir. Other than the latent fingerprint
10 report.

11 Q And you weren't given anything else that
12 potentially could have had fingerprints on it?

13 A No, sir.

14 Q And you weren't given any other standards to
15 compare the fingerprints that were found?

16 A No, sir.

17 Q Okay. But they did not come back to Mr.
18 Fishburne or Mr. Thompson?

19 A That's correct.

20 Q Thank you.

21 THE COURT: Mr. McCoy.

22 MR. MCCOY: Thank you, Your Honor, may it please
23 the Court.

24 CROSS-EXAMINATION

25 BY MR. MCCOY:

1 Q Lieutenant, I appreciate you being here today
2 and I thank you for your time.

3 Just to kind of get right to the point. Can you
4 tell the jury typically what type of crime scenes a
5 crime scene investigator would respond to?

6 A Really it's whatever the patrol division of the
7 detectives need help with. Can range as serious as
8 homicide, to something as small as a petty larceny.
9 It's just whatever we are asked to do, is what we will
10 do.

11 Q That's right. Whenever you are asked to go out,
12 you go out?

13 A That's correct.

14 Q And who normally makes that request for a crime
15 scene investigator to respond somewhere?

16 A It could be a patrol division supervisor; the
17 sergeant that's on the scene or working that shift; it
18 could be a detective; it could be my supervisor, the
19 captain over the investigations.

20 Q Okay. So it could be somebody with rank; it
21 could be a patrol officer; it could be a detective; or
22 it could be a case agent. Really it could be anybody?

23 A Correct.

24 Q To make that call and say, let's come on out and
25 bring crime scene on out.

1 Can you tell the jury, and inform me, what it
2 means to have a secured crime scene?

3 A Well a secured crime scene is basically that
4 once the officer arrives to the crime scene, anybody
5 that has been in the crime scene is removed from the
6 crime scene. They can either use barrier tape or just
7 close the door and keep anybody from going into where
8 the crime scene is at. It's limiting any access to the
9 crime scene.

10 Q Can you tell the jury why it's important to have
11 secured crime scene?

12 A Well basically everything that we do in
13 forensics is based on the theory of transfer. And what
14 the theory of transfer is is that when you enter an
15 environment you are bringing something from your
16 environment into that environment.

17 And when you leave that environment, you are
18 taking something from the area you were at in that
19 environment with you.

20 So limiting access to the crime scene limits
21 what contamination could possibly be there.

22 Q So if I understand your testimony correct,
23 securing a crime scene is important not only to monitor
24 who comes in and who comes out, but also what items of
25 evidence may come in or may come out?

1 A Yes.

2 Q With the theory of transfer like you just
3 described to me?

4 A Correct.

5 Q When a crime scene is secure, is there a log or
6 is there a book that monitors officers who even come in
7 and out of crime scene?

8 A Generally.

9 Q And are you aware, or do you know any of the
10 facts that involved the particular case that you are
11 here for today?

12 A No, sir.

13 Q Lieutenant, would you say that you respond to a
14 good many burglaries or armed robberies, more serious
15 and violent crimes, you respond to more of those than
16 you would anything else?

17 A I think it just kind of goes across the
18 spectrum.

19 Q Okay. So it really could be any crime?

20 A Correct.

21 Q Lieutenant, can you tell the jury the importance
22 of crime scene investigation work when you compare that
23 to maybe what an eyewitness saw?

24 A Well evidence, physical evidence if you have it,
25 is better than eyewitness testimony. Because

1 eyewitnesses can sometimes if their perception of what
2 they saw may be different from what actually happened.

3 Q And, Lieutenant, narrowing it down a little bit
4 to talking about fingerprints. Can you tell the jury
5 what the difference between a latent and a patent
6 fingerprint is?

7 A Sure. Latent fingerprint is a fingerprint left
8 behind that you cannot see unless you enhance it, like
9 I said with powder or a chemical. A patent fingerprint
10 is one that is visible with the naked eye.

11 Q Okay. And you testified on direct examination
12 that basically there are some surfaces that are more
13 conducive to leaving a fingerprint, be it a latent or a
14 patent fingerprint.

15 A That's correct.

16 Q And tell me again what kind of surfaces those
17 are?

18 A Repeat that question again.

19 Q Can you tell me what kind of surfaces would be
20 more conducive to leaving a fingerprint?

21 A Well smooth surfaces are optimal. Paper is an
22 excellent surface. On paper, the latent fingerprint
23 can last for quite a long time.

24 Q Okay. And obviously paper would be a little bit
25 tougher to see a patent print.

1 A Right, you wouldn't see a patent print. But a
2 latent print that's there generally gets soaked into
3 the paper and it will set.

4 MR. MCCOY: Your Honor, may I approach the
5 witness?

6 THE COURT: You may.

7 MR. MCCOY: Thank you.

8 Q (By Mr. McCoy) Lieutenant, I'm going to show you
9 what has been marked for ID purposes by the State as
10 3-A. This is not in evidence, but photographs of this
11 are in evidence.

12 Can you take a look at that and kind of tell me
13 what that is?

14 A That's a laptop.

15 Q Is this the same laptop that you conducted your
16 fingerprint examination on?

17 A I conducted my examination on latent cards.

18 Q Oh, latent cards. I apologize. And latent
19 cards, just for clarification, would be -- latent cards
20 would be what was maybe taken off this laptop, and then
21 you did your comparison later?

22 A Right. The latent fingerprints that were on an
23 object, and then preserved on a latent card.

24 Q Okay. And in looking at this surface, aside
25 from any of the factors that you have already testified

1 to that can affect fingerprints, describe this surface
2 and how you feel this surface would be to not only a
3 latent, but a patent fingerprint?

4 A Well it's a smooth surface so it's a good
5 surface that can leave residue behind.

6 Q Okay. And obviously you've testified that a lot
7 of factors can play into whether a print is either left
8 and then smudged away, or if a print is left and then
9 just happens to just leave.

10 Like you testified earlier to humidity. You
11 testified earlier to sweat, water, any of those kind of
12 things would affect a fingerprint?

13 A That's correct.

14 Q Okay. And, Lieutenant, is there a -- for better
15 word, the only word I have for it -- is there a time
16 stamp or a life that a fingerprint can stay somewhere?

17 A No, not particularly. Again there are so many
18 different factors. Fingerprints are fairly fragile.
19 And there are so many different factors that affect it
20 that you really can't date it, or you really can't
21 determine how long it's going to last.

22 Q Okay. So there is no real way if you do find a
23 print to say, hey, this print was left by Mr. Jones
24 three days ago. There is no way for you to say that?

25 A That's correct, can't say that.

1 Q okay. And also there is no way for you to sit
2 here and say that if I left a fingerprint in your
3 house, and I did that two months ago and nobody else
4 touched that area, or no other climate changes or
5 anything like that affected that print, that it could
6 still possibly be there?

7 A Yes, sir.

8 Q okay. And you've already testified, Lieutenant,
9 that you had some fingerprint cards that were taken off
10 of this laptop and you compared them to two standards?

11 A That's correct.

12 Q And you also testified earlier that the
13 examination that you conducted yielded no match to
14 either defendant one or defendant two in this crime?

15 A of the identifiable fingerprint.

16 Q of the identifiable fingerprints. And can you
17 tell the jury how you look and you compare a card to an
18 actual -- to a fingerprint that you might have?

19 Do you do this with any sort of instrument or a
20 computer? Or is this -- what kind of examination do
21 you do?

22 A It's a visual examination. And I use a
23 computer. I scan both the known standard and the
24 latent into a computer and do a side-by-side comparison
25 enlarged.

1 Q How foolproof would you say fingerprints are if
2 you do get a match?

3 A 100 percent.

4 Q Is it true that every person in the entire
5 world, be it you, be it me, are going to leave and have
6 different sort of fingerprints?

7 A Everybody has a different fingerprint, yes, sir.
8 Even identical twins.

9 Q Okay. And even twins have different ones?

10 A Yes, sir. Models I got that are identical twins
11 will have different fingerprints, but they share the
12 same DNA.

13 Q Okay. Lieutenant, in a hypothetical situation
14 where there is a burglary in a house, and there has
15 been testimony where somebody has rummaged through a
16 downstairs area looking for items to steal, and
17 testimony that there was other suspects that have gone
18 upstairs in a house, obviously I don't know what they
19 have touched in a house, but would it be worth your
20 time or worth your expertise in this situation to at
21 least dust or at least examine for fingerprints?

22 A That's generally part of our policy, yes.

23 Q Okay. And again it's worth it because, as
24 you've already testified to, basically eyewitness
25 testimony can sometimes be flawed. And the only way to

1 really link the two together would be through crime
2 scene investigation tools?

3 A Yes, sir.

4 Q Okay. As a crime scene investigator,
5 Lieutenant, do you have the capabilities, or have you
6 been trained at all in the area of DNA?

7 A As far as what area?

8 Q As far as maybe collecting samples that maybe
9 could leave DNA?

10 A Yes, sir.

11 Q Can you tell the jury a little bit about your
12 training in that area?

13 A Basically as part of the crime scene
14 investigation unit you have little small modules of
15 collecting different things, and that's part of DNA.
16 You collect DNA if you were collecting let's say a
17 blood standard. You have dried blood, you have wet
18 blood, and you collect them a little bit differently.

19 Now with the advent of touch DNA, we are doing
20 more touch DNA collection, and that's collected
21 basically the same way as a dried blood sample would be
22 taken.

23 Q Okay. And you've gone a little fast for me
24 because this is still kind of new to me as well. But
25 you've touched on something called touch DNA. Can you

1 tell the jury what that is?

2 A Touch DNA is basically DNA analysis using skin
3 cells that are left behind when somebody touches an
4 object.

5 Q Okay. And, Lieutenant, I know this is probably
6 impossible for you to really judge or say, but what --
7 how does somebody leave DNA somewhere?

8 A In different ways. Through body fluid. And
9 again now touch DNA, skin cells are left behind.

10 Q Okay. If I were to come up to you and I were to
11 put you in a choke-hold, which I won't do, and I were
12 to have rubbed up behind you, our clothes touch each
13 other, maybe my hair touches you in some form or
14 fashion, but definitely my hands do, okay, and
15 definitely I touch you in some fashion, is it possible
16 to leave some form of DNA on that person?

17 A It's possible.

18 Q It's possible. And what items would you need to
19 examine to cover your bases to say, hey, this did leave
20 DNA or this didn't leave DNA, if I were to do that
21 stranglehold to you?

22 A Well there is no presumptive test to test to see
23 if there is any touch DNA behind.

24 Q Okay. Well would it be helpful to you if you
25 were to have maybe my clothes, or maybe the clothes

1 that you were wearing to examine to see if a hair had
2 fallen off, or maybe even a piece of blood had fallen
3 off if somebody had been struck?

4 A Generally that stuff is visually examined at the
5 scene.

6 Q Okay. But would it be helpful to you in
7 analyzing, or actually ruling out DNA to actually have
8 those items with you?

9 A Generally that stuff is done at the scene.

10 Q Okay. Lieutenant, in this particular case you
11 testified that you compared prints basically on a
12 computer from samples that you had?

13 A Using the computer to magnify, yes.

14 Q Yes, sir. And you found no results on that.
15 Did you actually do, or did you have any sort of crime
16 scene investigation involving the house in this case?

17 A No, sir, I did not.

18 Q Okay. And did you or your office have any
19 examination of a car in this case?

20 A I'm not personally aware of that.

21 Q Okay. But as a supervisor officer in this
22 office, you would be made aware of that?

23 A Maybe at some point. I don't recall at this
24 time whether or not. We generally process a lot of
25 crime scenes?

1 Q Okay. As a supervisor you already testified you
2 would sign off on these normally.

3 A Yes, generally.

4 MR. MCCOY: Your Honor, may I have one moment?

5 THE COURT: You may.

6 Q (By Mr. McCoy) Lieutenant, I only have a couple
7 more questions for you. I appreciate you bearing with
8 me, sorry about the delay.

9 In comparing fingerprints, do you need to have
10 an entire fingerprint, or can you have what is called a
11 partial print?

12 A The known standards are entire fingerprint.
13 Latents can be partial.

14 Q Latents can be partial?

15 A Yes.

16 Q What does a partial print mean?

17 A Well basically a partial print is instead of
18 having a full rolled print, you might have a side or a
19 tip, or the bottom.

20 Q Were you, or did you run the prints that you
21 pulled off this computer through the standards that you
22 have through any sort of computer to have any other
23 sort of matches at all?

24 A I just did a comparison of the latent
25 fingerprints to the two known standards.

1 Q okay. Lieutenant, I appreciate your time, and
2 thank you for answering my questions.

3 MR. ALFARO: No more questions.

4 THE COURT: Is this witness excused?

5 MR. ALFARO: That would be the State's request.

6 MR. SHELTON: No objection.

7 MR. MCCOY: No objection, Your Honor.

8 THE COURT: You may step down.

9 call your next witness.

10 MS. CORNWELL: Thank you, Your Honor.

11 The State calls Paulino Silva.

12 MS. PAULINO SILVA,

13 after having first been duly sworn to state the truth,
14 the whole truth and nothing but the truth, testified on
15 her oath as follows:

16 MS. CORNWELL: May we approach?

17 THE COURT: You may.

18 (Whereupon, a discussion was held at the bench
19 off the record.)

20 THE COURT: Ladies and gentlemen, there is a
21 matter of law I must take up outside your presence. Do
22 not begin your deliberations. Do not discuss this case
23 among yourselves. Please rise for the jury..

24 (Whereupon, the jurors exit the courtroom.)

25 THE COURT: Thank you, be seated. This doesn't

1 have to be so difficult. I'm trying to minimize the
2 need to remove the jury. We knew this was coming up
3 again. Please point these things out to me before we
4 have to bring the jury in and out.

5 Get the next witness so that I can go ahead and
6 advice that witness. Who is the other witness, Ms.
7 Cornwell?

8 MS. CORNWELL: Lucineia Rodriguez.

9 THE COURT: Do you have any witnesses that I
10 need to address?

11 MR. MCCOY: Nobody else, Your Honor.

12 THE COURT: Thank you.

13 Any other potential witnesses, Ms. Cornwell?

14 MS. CORNWELL: No, Your Honor.

15 THE COURT: Please come forward.

16 Mr. Rock, I'm going to ask you just to interpret
17 for both. I'm just going to ask the same Fifth
18 Amendment questions to both. All right.

19 I will need to swear in this witness. It's Ms.
20 Rodriguez?

21 MS. CORNWELL: Yes, Your Honor.

22 MS. LUCINEIA CARMO RODRIGUEZ,
23 after having first been duly sworn to state the truth,
24 the whole truth and nothing but the truth, testified on
25 her oath as follows:

1 THE COURT: All right. Ms. Rodriguez, I just
2 have a few questions to ask you. Stand close to the
3 microphone.

4 I understand that you may be asked questions
5 concerning your immigration status.

6 Do you understand that, Ms. Rodriguez?

7 THE WITNESS: I don't understand.

8 THE COURT: Ms. Rodriguez, what don't you
9 understand?

10 THE WITNESS: There is not for me to speak to
11 before.

12 THE INTERPRETER: Can I explain to Senora
13 Rodriguez the interpreting procedure?

14 THE COURT: You are going to explain to her how
15 the procedure, how you are interpreting only, correct?

16 THE INTERPRETER: Yes, Your Honor.

17 THE COURT: You may.

18 Ms. Rodriguez, do you understand my question?

19 THE WITNESS: Yes.

20 THE COURT: Ms. Olivera, the same question to
21 you. Do you understand that you may be asked about
22 your immigration status?

23 THE WITNESS: Yes.

24 THE COURT: Do you understand that you both have
25 protections under the constitution of the United

1 States?

2 THE WITNESS: Yes.

3 THE WITNESS: Yes.

4 THE COURT: Do you understand, Ms. Rodriguez?

5 THE WITNESS: Yes.

6 THE COURT: And you understand, Ms. Olivera?

7 THE WITNESS: Yes.

8 THE COURT: You understand that no person shall
9 be required to be a witness against himself?

10 THE WITNESS: Yes.

11 THE WITNESS: Yes.

12 THE COURT: Do you have any questions for the
13 Court?

14 THE WITNESS: No.

15 THE WITNESS: No.

16 THE COURT: Thank you.

17 Any additional questions from the state?

18 MS. CORNWELL: None, Your Honor.

19 THE COURT: Mr. Shelton?

20 MR. SHELTON: No, ma'am.

21 THE COURT: Mr. McCoy?

22 MR. MCCOY: No, ma'am.

23 THE COURT: All right, thank you.

24 You can stay in the chair, and we will call you
25 in in just a few moments.

1 All right. Anything before we bring back in the
2 jury?

3 MS. CORNWELL: Nothing from the State, Your
4 Honor.

5 THE COURT: Let's bring back in the jury.
6 (Whereupon, the jurors enter the courtroom.)

7 THE COURT: Thank you, be seated.

8 DIRECT EXAMINATION

9 BY MS. CORNWELL:

10 Q Good afternoon, Ms. Silva. Ms. Silva, where do
11 you live?

12 A Goose Creek.

13 Q And do you live in an apartment in Goose Creek
14 or a house?

15 A Apartment.

16 Q Who lives at your apartment?

17 A I live there, my husband, my two daughters, and
18 my uncle.

19 Q And what is your husband's name?

20 A Paulo Enriquez Silva.

21 Q What is your uncle's name?

22 A Adao Mark Olivera Silva.

23 Q Did something happen to you and your family in
24 your home on August 6, 2010?

25 A Yes.

1 Q Can you tell the jury what happened?

2 A Yes.

3 Q What happened?

4 A It was about 10:30 at night. My uncle was out
5 on the back deck, he was smoking. I was in the front
6 room, and I went to speak with my uncle on the back
7 deck, and my daughter had fallen asleep.

8 I went upstairs to put her in the bed, and I
9 went to take a bath. And I forgot my shampoo on top of
10 the table in the kitchen. And when I was coming down
11 the stairs, I heard some strange voices. And so I went
12 to see who it was.

13 I got as far as the 'fridge, and my husband said
14 to me they were trying to rob us. Then I saw one of
15 them and my husband said something to me I don't
16 remember. I was very much afraid because I was already
17 eight months pregnant.

18 I was going to go upstairs to grab the child,
19 and he said that he prefer nobody to leave. And then I
20 determined to leave by the front door of the room. I
21 went running next door to my neighbor, and she was
22 already asleep.

23 I knocked on the door. I knocked several times.
24 And I hid behind a shrub beside the door to her
25 apartment. I was crouched down. And so she got up and

1 opened the door and I went in.

2 And I said that there were men in the house
3 robbing us. And she asked me, where is your daughter.
4 And I said she is upstairs alone asleep.

5 And she said to me -- and she said to me, I'm
6 going to go and get her. And I was in such a state
7 that I couldn't go back to get my own daughter.

8 And she went to my apartment, and I managed to
9 see. And she said that she went upstairs, went
10 directly to my room, it was at her side. And she said
11 that my husband and Adao were in the other bedroom.

12 MR. SHELTON: Objection, Your Honor.

13 THE COURT: Basis?

14 MR. SHELTON: Hearsay.

15 THE COURT: Sustained.

16 Q (By Ms. Cornwell) Ms. Silva, I can only have
17 you testify as to what you personally say, or what you
18 personally heard.

19 A Okay. The apartment of my neighbor.

20 Q So once you went to your neighbor's apartment,
21 you don't know what happened after that?

22 A No.

23 Q Other than what you have been told?

24 A That's correct.

25 Q But it's your testimony that you did see men

1 come into your house and rob your home?

2 A I knew that he was black, but I don't know
3 anymore.

4 Q All right. And after you went back to your
5 home, did you find anything in your home that didn't
6 belong to you?

7 A Yes, a cell phone.

8 Q I'm going to show you what has been marked as
9 state's Exhibit 4 for identification. Do you recognize
10 that?

11 A I think this is the one.

12 Q The one cell phone that you found?

13 A Yes.

14 Q And is this your phone?

15 A No.

16 Q Is this your husband's cell phone?

17 A No.

18 Q Is this your uncle's cell phone?

19 A No.

20 Q Is it your daughter's cell phone?

21 A No.

22 Q Does it belong to any member of your household?

23 A No.

24 Q But you did find it in your house?

25 A Yes.

1 MS. CORNWELL: Court's indulgence.

2 Q (By Ms. Cornwell) Ms. Silva, do you remember
3 where in your house you found the phone?

4 A In the front room.

5 MS. CORNWELL: Thank you, Ms. Silva. Please
6 answer any questions the defense may have.

7 THE COURT: Mr. Shelton.

8 MR. SHELTON: Thank you, Your Honor, may it
9 please the court.

10 THE COURT: Yes, sir.

11 CROSS-EXAMINATION

12 BY MR. SHELTON:

13 Q Ms. Silva, how long have you been in the United
14 States?

15 A Six years.

16 Q Has anyone in this office helped you or has
17 promised to help you with your immigration status?

18 A No.

19 Q I believe your testimony was that you were
20 upstairs and then came downstairs?

21 A Yes.

22 Q You were about to take a bath?

23 A I was going to take a bath.

24 Q And you heard noises and then saw a black man in
25 your house?

1 A Yes.

2 Q Did you hear them say anything?

3 A No. Even if they had, I wouldn't have
4 understand it.

5 Q You don't understand English?

6 A Very little.

7 Q And you take off running and you go to your
8 neighbor's house?

9 A Yes, to ask for some help.

10 Q Did you see them, the black men, leave your
11 house?

12 A Leaving, no, because I was in the apartment of
13 my neighbor.

14 Q Do you remember the police coming out there?

15 A Yes.

16 Q By the time the police came out there, how many
17 people were outside the house?

18 A At the time several friends came, gathered
19 around. But I really don't know how many.

20 Q Quite a few people, five, ten?

21 A Around about that.

22 Q Was there anybody in your apartment prior to you
23 going back into it?

24 A I don't understand.

25 Q Were any of those -- did any of those friends go

1 in your apartment?

2 A Why?

3 Q Did you see any of those friends go into your
4 apartment?

5 A No.

6 Q And then you found the cell phone in your
7 apartment?

8 A Yes.

9 Q Did you go through the cell phone at all?

10 A No. The cell phone didn't stop ringing.

11 Q You're not sure if this is the actual cell phone
12 that you found?

13 A I think it is.

14 Q Do you know when you gave that to the police
15 officer?

16 A I don't understand.

17 Q Who did you give the cell phone to?

18 A To the policeman.

19 Q Was that the first time that you saw the police
20 officer that you gave the cell phone to him?

21 A Yes.

22 Q Did he ask you about any other cell phones?

23 A No.

24 THE COURT: Mr. Aylor.

25 CROSS-EXAMINATION

1 BY MR. AYLOR:

2 Q Ms. Silva, when you came downstairs after
3 hearing the noise, you only saw one black man; is that
4 correct?

5 A No.

6 Q How many did you see?

7 A I saw one near my husband. It was very quickly.

8 Q So then you only saw one black man?

9 A Yes.

10 Q Was your husband in the kitchen with this black
11 man when you saw them?

12 A No, he was next door to the back porch. He was
13 at the door to the back porch. Next to the door of the
14 back porch.

15 Q Inside the home?

16 A I didn't understand.

17 Q Was he inside the home?

18 A No, he was trying to get into the apartment.

19 Q Did you ever speak with the police?

20 A No.

21 Q Did you find that odd?

22 A No.

23 Q Had your apartment been broken into the night
24 before this incident?

25 A The previous night?

1 Q Correct.

2 A Yes. One day before they entered, they broke
3 the kitchen window. It was round about midnight, but I
4 don't know if it was them. The day before we called
5 the police, and that was it.

6 And then the next day they came to the house.

7 Q They being the police came to the house?

8 A It was the police with my uncle beforehand.

9 Q After you found the phone that you didn't
10 recognize in your home, how long did you keep that
11 phone before you gave it to your husband?

12 A It was a few minutes before the police arrived.

13 Q Your testimony earlier was that after you found
14 that phone that didn't belong to you or your family in
15 your home, you gave it to your husband, correct?

16 A Yes.

17 Q How long did you keep the phone in your hand
18 before you gave it to your husband?

19 A I gave it immediately to my husband to deliver
20 it to the police.

21 Q So you had it for less than one minute in your
22 possession?

23 A It was very quick.

24 Q Yet you can say with certainty over 14 months
25 later that's the exact same cell phone you had for less

1 than a minute?

2 A Yes.

3 Q Have you seen the phone since the time you gave
4 it to your husband until today?

5 A I saw it one time.

6 Q When was that?

7 A When the lawyer called me here.

8 Q To come talk to you about the phone?

9 A It was for me to make a deposition and to show
10 me the phone.

11 Q That was the State, these lawyers?

12 A Yes.

13 MR. AYLOR: Thank you. No further questions.

14 MS. CORNWELL: Nothing further from the State,
15 Your Honor.

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

17 You may call your next witness.

18 MS. CORNWELL: State calls Lucineia Rodriguez.

19 MS. LUCINEIA RODRIGUEZ,
20 after having first been duly sworn to state the truth,
21 the whole truth and nothing but the truth, testified on
22 her oath as follows:

23 DIRECT EXAMINATION

24 BY MS. CORNWELL:

25 Q Ms. Rodriguez, where do you live?

1 A Goose Creek.

2 Q Do you know Paulo Silva and Adao Olivera?

3 A Yes.

4 Q How do you know them?

5 A They moved and became my neighbors.

6 Q Do you recall something happening at their home
7 on August 6th of 2010?

8 A Yes.

9 Q Can you tell the jury what happened?

10 A Yes.

11 Q Please do that.

12 A Paulino was in my house, and I was getting ready
13 to go to bed. And when she knocked on the door, I came
14 downstairs.

15 I asked about the child, and she said that she
16 was asleep. And that they were on the veranda of her
17 house at the back.

18 And I said, I'm going to get there to get the
19 child. When I got to the door and I opened the door,
20 there was a lad there. He had a gun in his hand, and
21 he told me to come in. I passed through and went up
22 the stairs.

23 I looked in the front bedroom, there was a man
24 holding Adam. And Paulo was in the front.

25 I entered into the bedroom to the side where the

1 child was sleeping. I prayed to God to give me
2 strength, and that was the time when they left running.

3 Q Why were you concerned for Paulino's child?

4 A It's because I thought of her as my own child.

5 Q Were you afraid for her?

6 A Can you repeat it?

7 Q Were you afraid for the child?

8 A Yes.

9 Q Why were you afraid for the child?

10 A Because it was dangerous.

11 Q And did Paulino tell you that it was dangerous
12 before you went over there?

13 MR. SHELTON: Objection, Your Honor, calls for
14 hearsay.

15 THE COURT: Sustained.

16 Q (By Ms. Cornwell) I believe you testified when
17 you went upstairs you saw a man holding Adam?

18 A Yes.

19 Q How was he holding him?

20 A (Whereupon, the witness indicates.)

21 He was squeezing him.

22 MS. CORNWELL: Nothing further. Please answer
23 any questions the defense has for you.

24 THE COURT: Mr. Shelton.

25 MR. SHELTON: Thank you, Your Honor, may it

1 please the Court.

2 CROSS-EXAMINATION

3 BY MR. SHELTON:

4 Q Ms. Rodriguez, how long have you been neighbors
5 with Mr. and Mrs. Silva?

6 A More than two years.

7 Q And when you went to their house, you said you
8 opened the door and there was guy with a gun?

9 A Yes.

10 Q And then you went upstairs and there were two
11 guys?

12 A I saw one.

13 Q So you only saw two males?

14 A I saw two men.

15 Q And I believe your testimony was they left the
16 house, ran out of the house?

17 A No.

18 Q So they didn't leave the house?

19 A When I arrived and the time I entered into the
20 bedroom.

21 Q They took off running out of the house?

22 A Yes.

23 Q Did you run after them?

24 A No. I came down the stairs normally.

25 Q Did you see where they went?

1 A They fled and they left the telephone behind.

2 Q So you -- did you see what way the robbers went
3 outside the house?

4 A No, I didn't see.

5 Q Were there a lot of people outside the house at
6 this point in time?

7 A I don't know, I didn't see.

8 Q When you went downstairs, did you see a lot of
9 people outside the house?

10 A The people came to see, but I didn't see many
11 people.

12 Q Did you ever talk to the police?

13 A No.

14 Q You never gave a statement?

15 A No.

16 Q Did you call 911?

17 A No.

18 MR. SHELTON: No further questions.

19 CROSS-EXAMINATION

20 BY MR. AYLOR:

21 Q Good afternoon, Ms. Rodriguez. Ms. Rodriguez,
22 do you know Pedro?

23 A Yes.

24 Q Is he a neighbor of yours?

25 A No.

1 Q You do know him, though?

2 A Yes, I do.

3 Q When you came downstairs after the robber from
4 upstairs had left, did you see Pedro tackle one of the
5 robbers?

6 A No.

7 Q When you came down the stairs, did you leave the
8 home?

9 A I stayed a little while.

10 Q Downstairs?

11 A Yes, downstairs.

12 Q Was anyone else in the home with you at that
13 time?

14 A No, only Paulo and Adam.

15 Q Then your testimony I believe is that you then
16 found the cell phone downstairs?

17 A Yes.

18 Q And then Ms. Silva also found the telephone
19 downstairs?

20 A No, I don't know.

21 MR. AYLOR: Thank you, no further questions.

22 MS. CORNWELL: Nothing from the State, Your
23 Honor.

24 THE COURT: You may step down, thank you.

25 Call your next witness.

1 MS. CORNWELL: The State has no more witnesses.
2 The State rests.

3 THE COURT: Thank you. Mr. Rock, that means you
4 are done, too. Thank you.

5 THE INTERPRETER: Thank you, Your Honor.

6 THE COURT: Ladies and gentlemen, that indicates
7 to the court there is a matter of law that I must take
8 up outside of your presence.

9 Do not begin your deliberations. Do not discuss
10 this case among yourselves. Please rise for the jury.

11 (Whereupon, the jurors exit the courtroom.)

12 THE COURT: Be seated.

13 All right. To go over your exhibits from the
14 State I show 1, 2, 3, 4 and 5 are admitted; is that
15 correct?

16 MS. CORNWELL: Yes, Your Honor. I believe 5 is
17 going to actually be 5-A -- I'm sorry, yes, Your Honor.

18 THE COURT: All right. So the State has rested.
19 Motions or matters, Mr. Shelton?

20 MR. SHELTON: Your Honor, at this point
21 procedurally for the record we move for a directed
22 verdict on all charges. Taking the evidence in the
23 light most favorable to the State, we don't believe
24 they have met the burden for each and every element of
25 both armed robberies, both kidnappings and both

1 burglary in the first degree. Thank you.

2 THE COURT: All right. And what are you
3 requesting, Mr. Shelton?

4 MR. SHELTON: That they be dismissed, Your
5 Honor, and a directed verdict be granted.

6 THE COURT: All right, thank you.

7 Mr. Aylor.

8 MR. MCCOY: Your Honor.

9 THE COURT: I'm sorry, Mr. McCoy.

10 MR. MCCOY: That's okay, Your Honor, that's not
11 a problem. I would join Chad in his motions to also
12 move for a directed verdict. And specifically I don't
13 think they have met the elements for kidnapping, Your
14 Honor.

15 Even viewing this in the light most favorable to
16 the State, there has been no direct evidence that there
17 should be two counts of kidnapping. I just see one
18 that could be there, Your Honor. Thank you.

19 THE COURT: How do you see that there is only
20 one?

21 MR. MCCOY: Because, Your Honor, if I recall
22 testimony correctly, one man was taken, one man was
23 held against his will and the other one was not. The
24 other man was strangled and forced to his knees, and
25 the other one was not.

1 THE COURT: Weren't they both required to move
2 upstairs?

3 MR. MCCOY: Your Honor, they were.

4 THE COURT: All right. Wouldn't that meet an
5 element inveigle or carry away?

6 MR. MCCOY: Your Honor, I'm not prepared to make
7 that argument right now to say whether yes or no to
8 that. But I still think it should be one count as
9 opposed to two. That's my personal opinion.

10 THE COURT: Only because there was only one
11 individual?

12 MR. MCCOY: Correct.

13 THE COURT: All right. Counsel, you know how I
14 like to do them. If you would just give me the
15 elements that make up the facts that fit the elements
16 for armed robbery, kidnapping and burglary first.

17 MS. CORNWELL: Your Honor, the State has
18 presented testimony through several witnesses where
19 both the victims have testified that one was held at
20 gunpoint, one was forcefully choked, personal property
21 was taken from their person at that time. I believe
22 that that meets the elements of armed robbery.

23 As far as kidnapping, you've heard testimony
24 from both Paulo and Adao that they're were forced
25 inside their home and forced upstairs. Paulo testified

1 that he begged --

2 THE COURT: Slow down.

3 MS. CORNWELL: I apologize, Your Honor.

4 Paulo testified that he begged them not to enter
5 the house because his pregnant wife was there. He then
6 begged not to go upstairs because his sleeping child
7 was there. He was held at gunpoint, forced to go
8 inside, forced to go upstairs.

9 Mr. Adao testified that he was forcefully choked
10 the entire time. That he was forced to go inside while
11 being forcefully choked. And that he was forced to go
12 upstairs while he was forcefully choked. I believe
13 those would be the elements of kidnapping, Your Honor.

14 As for the burglary first, I believe there was
15 testimony that this did occur at night. There was
16 testimony the defendants entered the house unlawfully
17 without the consent of the victims. In fact the
18 victims say they asked not to go in the house --

19 THE COURT: Slow down.

20 MS. CORNWELL: In fact the victims asked that
21 they not go in the house. While they were in the
22 house, several items were taken from the house which
23 would meet the standards for burglary first. There was
24 also a firearm involved when they entered the home.

25 We would ask that you deny the directed verdict.

1 THE COURT: Thank you.

2 Mr. Shelton.

3 MR. SHELTON: Your Honor, as to the -- just as
4 to the one, that the victim for the armed robbery that
5 he was choked, there was no gun or anything placed to
6 his head or used on him as far as the armed robbery is
7 concerned.

8 So I would ask that that be dismissed based off
9 the directed verdict. And a strong armed robbery would
10 be the most appropriate charge for the choking for that
11 robbery. But I stand by the same arguments, Your
12 Honor.

13 THE COURT: Mr. McCoy.

14 MR. MCCOY: Your Honor, in hearing what the
15 state has said, I would agree with Mr. Shelton that not
16 only do I feel like there should be one kidnapping, but
17 I feel that the second armed robbery, that Mr. Shelton
18 has already stated for the record, seems to me there
19 was no gun involved, no weapon involved in that one.
20 So, Your Honor, it seems to me it's appropriate for a
21 strong armed robbery as well.

22 THE COURT: Doesn't the indictment alleging in
23 concert with others, so does it matter if they each
24 have a gun, Mr. McCoy?

25 MR. MCCOY: Your Honor, my argument would be no.

1 We have one armed robbery already where a gun was
2 involved. And then number two, there is not a weapon
3 involved to strong armed robbery would seem to be
4 appropriate to me.

5 THE COURT: So your position is had there been 5
6 people, 50 people, it's still one armed robbery?

7 MR. MCCOY: If there are 50 people in the house,
8 is it appropriate to charge for 50 armed robberies.

9 THE COURT: That's my question.

10 MR. MCCOY: Your Honor, no, I don't believe so.

11 THE COURT: Explain that to me, Mr. McCoy.

12 MR. MCCOY: If you have 50 victims, in your
13 hypothetical situation, that are being held up by 50
14 different people with 50 different guns, then 50 armed
15 robberies are appropriate.

16 In the scenario that you presented to me, Your
17 Honor --

18 THE COURT: I was following up what I believed
19 to be your scenario, Mr. McCoy.

20 MR. MCCOY: Okay. Whatever scenario it is, Your
21 Honor, I'm getting a little bit confused now as to what
22 scenario it is.

23 THE COURT: I'm trying to understand your
24 position. Your position is because there is only one
25 gun there can only be one armed robbery?

1 MR. McCoy: I'm saying I don't know -- that's
2 not my position. My position is there was one person
3 with a gun, okay. Testimony has come out that has
4 shown that. One person with a gun. But there was only
5 one victim that was on the receiving end of that gun
6 and not two victims at the receiving end of that gun.

7 THE COURT: Okay. Tell me the testimony of
8 that, Mr. McCoy.

9 MR. MCCOY: Because the testimony, Your Honor,
10 that we have heard from victim number one and victim
11 number two is that as soon as these suspects approached
12 the house, victim number one was -- he did have a gun
13 to him, and he was forced inside of the house.

14 Victim number two was strangled and went behind
15 the rest of the people going inside the house. There
16 was no weapon that was used to force him inside of the
17 house, Your Honor, and therefore would lead to the
18 armed robbery.

19 THE COURT: All right, Mr. McCoy. Anything
20 further?

21 MR. SHELTON: Your Honor, just to expand on
22 that. The taking and carrying away of the property of
23 Mr. Olivera, which is the one that was choked, was done
24 through the choking and not through the threat of a
25 deadly weapon. The taking and carrying away of Mr.

1 silva's property was done through use of a deadly
2 weapon, and that would be the armed robbery. That
3 would be the argument.

4 THE COURT: All right. Under Rule 19 of the
5 Rules of Criminal Procedure and ruling on a motion for
6 directed motion, the Court shall direct a verdict in
7 the defendant's favor on any offense charged in the
8 indictment after evidence on either side had closed, so
9 we are at the close of the State's case.

10 I must direct a verdict if there is a failure of
11 competent evidence tending to prove the charge in the
12 indictments. I'm concerned only with the existence or
13 nonexistence of the evidence, not as to its weight.
14 And I am considering that testimony in the light most
15 favorable to the non-moving party.

16 For kidnapping the elements are whoever shall
17 unlawfully seize, confine, inveigle, decoy, kidnap,
18 abduct or carry away another person by any means
19 whatever without the authority of law. Based upon the
20 testimony that I have heard, both individuals, both
21 victims indicated that they were forced upstairs.
22 Based upon that testimony, I deny both Defendant
23 Fishburne's and Defendant Thompson's motion for
24 directed verdict as to the kidnapping.

25 As to burglary first. A person is guilty of

1 burglary in the first degree if that person enters a
2 dwelling without consent, there was testimony that
3 neither Mr. Thompson nor Mr. Fishburne had consent to
4 be in the dwelling, with the intent to commit a crime
5 in the dwelling; while affecting entry or an immediate
6 flight; or he's armed with a deadly weapon, there was
7 testimony that at least one of the individuals that
8 came into the home was armed with a deadly weapon;
9 and/or displays what appears to be displayed a pistol,
10 revolver, again the same testimony indicates that there
11 was at least one individual that had a weapon; and/or
12 the entering, remaining occurs in the nighttime.

13 Based upon the testimony that was presented, the
14 State has met its burden on burglary in the first
15 degree as to Defendant Fishburne and to Defendant
16 Thompson.

17 A person commits robbery -- a person who commits
18 robbery while armed with a pistol -- and the statute
19 does indicate that there are other weapons that could
20 be used -- or while alleging either by actions or words
21 he was armed, while using a representation of a deadly
22 weapon.

23 Based upon the testimony that was presented
24 there is no question, and I do not believe it is
25 controverted by either defendant, that there was one

1 individual that came in with a weapon. Based upon the
2 testimony that has been presented, I deny your motion
3 for directed verdict on the two armed robberies as to
4 Defendant Thompson and Defendant Fishburne.

5 Note your exception for the record.

6 Counsel, have you had an opportunity to go over
7 and speak with your client about his right to testify?

8 Mr. Shelton?

9 MR. SHELTON: Yes, Your Honor.

10 THE COURT: Mr. Aylor?

11 MR. AYLOR: Yes, Your Honor.

12 THE COURT: All right. Mr. Fishburne and Mr.
13 Thompson, I will remind you that you are still under
14 oath.

15 We have now reached that part of the trial that
16 I told you we would likely get to. And I have advised
17 you previously of your right to testify, and the
18 consequences of that decision.

19 Do you have any further questions for me or your
20 attorney at this time?

21 THE DEFENDANT FISHBURNE: No, ma'am.

22 THE COURT: Mr. Thompson (sic), have you made
23 your decision whether or not you will testify?

24 THE DEFENDANT FISHBURNE: Yes, ma'am.

25 THE COURT: And what is that decision?

1 THE DEFENDANT FISHBURNE: No, ma'am.

2 THE COURT: And, Mr. Shelton, you have gone over
3 the consequences of his decisions to testify or not to
4 testify?

5 MR. SHELTON: Yes, Your Honor.

6 THE COURT: And you believe that you have spent
7 enough time with him, and that he understands not only
8 what the Court says but what you have discussed with
9 him?

10 MR. SHELTON: Absolutely. Yes, Your Honor.

11 THE COURT: All right, thank you.

12 You may have a seat, Mr. Fishburne.

13 Have you understood everything that I have
14 explained to you?

15 THE DEFENDANT THOMPSON: Yes, ma'am.

16 THE COURT: And have you had time to meet with
17 Mr. Aylor and Mr. McCoy?

18 THE DEFENDANT THOMPSON: Yes, ma'am.

19 THE COURT: Do you have any further questions
20 for the Court or for your attorneys concerning the
21 consequences and the benefits of your right to testify?

22 THE DEFENDANT THOMPSON: No, ma'am.

23 THE COURT: Have you made a decision?

24 THE DEFENDANT THOMPSON: Yes, ma'am.

25 THE COURT: What is that decision?

1 THE DEFENDANT THOMPSON: No, ma'am.

2 THE COURT: All right, thank you.

3 Mr. Aylor, same questions to you, or Mr. McCoy.
4 Mr. Aylor, have you had an opportunity to meet with him
5 to discuss not only what I have gone over, but your
6 understanding of the facts and the situation and the
7 consequences of his decisions here today?

8 MR. AYLOR: Yes, ma'am.

9 THE COURT: And do you agree with his decision?

10 MR. AYLOR: I do, ma'am.

11 THE COURT: And do you need any additional time
12 to meet with him?

13 MR. AYLOR: No, ma'am, I don't.

14 THE COURT: All right, Mr. McCoy, same questions
15 to you. Anything additional to add?

16 MR. MCCOY: Your Honor, I have not discussed
17 this with my client. I have left that to lead counsel,
18 Mr. Aylor. But going on the record I do agree with his
19 decision not to testify.

20 THE COURT: All right. With that, Mr. Shelton,
21 do you have any additional witnesses?

22 MR. SHELTON: Your Honor, I want to make sure we
23 haven't put anything into evidence.

24 THE COURT: You have not according to my
25 records.

1 MR. SHELTON: We will not have any additional
2 witnesses.

3 THE COURT: All right.

4 MR. AYLOR: We will have no additional
5 witnesses, Your Honor.

6 THE COURT: So you rest and you rest?

7 MR. AYLOR: Correct, Your Honor.

8 MR. SHELTON: Yes, Your Honor.

9 THE COURT: Are we prepared to charge today?

10 MS. CORNWELL: Your Honor, the preference would
11 be to do it in the morning.

12 MR. SHELTON: That would be defense's also.

13 MR. AYLOR: I'm not going to break up a tend, so
14 morning as well.

15 THE COURT: All right. What time do you all
16 want to start in the morning?

17 MS. CORNWELL: Your Honor, we can be here as
18 early as you'd like us to be.

19 MR. SHELTON: Your Honor, I drop my son off at
20 preschool at 8:30. So 9:30.

21 MR. AYLOR: 9:30 is fine.

22 THE COURT: All right, counsel.

23 Okay, counsel, here is what we are going to do.
24 I'm going to allow you to rest in front of the jury
25 when they come in. Then I'm going to instruct them not

1 to begin their deliberations and that they will be back
2 at 9:45 in the morning, will that sufficient?

3 MR. SHELTON: That's great.

4 Your Honor, just for purposes of the record the
5 directed verdict motions continue after we rest. Do
6 that again for the record.

7 THE COURT: Would you like to -- I haven't heard
8 anything that you need to at least put them on the
9 record.

10 MR. SHELTON: Yes, Your Honor.

11 THE COURT: I believe that's correct, so would
12 you like to do that?

13 MR. SHELTON: We would just renew our directed
14 verdict motions.

15 MR. MCCOY: We would follow along and do the
16 same thing.

17 THE COURT: All right. And, counsel, I haven't
18 heard anything that's going to change my ruling, but I
19 understand that you do need to make those for the
20 record and I understand that.

21 Let's bring in the jury.

22 (Whereupon, the jurors enter the courtroom.)

23 THE COURT: Mr. Shelton.

24 MR. SHELTON: Your Honor, at this time the
25 defense rests.

1 THE COURT: Mr. Aylor.

2 MR. AYLOR: Your Honor, at this time the defense
3 rests as well.

4 THE COURT: Thank you.

5 Ladies and gentlemen, you have now heard all of
6 the testimony that you will hear in this case, and
7 received into evidence all of the exhibits that will be
8 made part of the record in this case.

9 What that leaves is the closing arguments on
10 behalf of counsel, as well as the charge on the law by
11 the Court. Ladies and gentlemen, I have determined
12 that by the time we do closing arguments and charge on
13 the law, it will be well after 5:00 p.m., and so we are
14 going to recess for the afternoon and come back in the
15 morning and begin that process.

16 Do not begin your deliberations. Do not discuss
17 this case among yourselves. Please remember all of my
18 admonitions. Please do not decide any issue in this
19 case. You have not been instructed on the law
20 applicable to this case.

21 Ladies and gentlemen, it is important, and I
22 have not been clear in my instructions about your
23 report time. I need you at a certain time in the jury
24 room, but I understand you need to meet downstairs by
25 the scanners so that you can come up as a group.

1 So I need you to meet as a group downstairs at
2 9:30 in the morning. And then when all of you are
3 here, we will bring you all up. Ladies and gentlemen,
4 it's very important that you stay together in a group
5 downstairs and be brought up at the same time.

6 Ladies and gentlemen, please have a wonderful
7 afternoon. I will see in the morning. We will begin
8 once all of you are here and brought up to the jury
9 room. Please remember to meet downstairs and wait
10 together as a group.

11 Thank you. Please rise for the jury.

12 (Whereupon, the jurors exit the courtroom.)

13 THE COURT: All right, ladies and gentlemen,
14 let's go ahead and do our charge conference.

15 State requesting any lesser included's?

16 MS. CORNWELL: No, Your Honor.

17 THE COURT: Mr. Shelton?

18 MR. SHELTON: Your Honor, we'd request a mere
19 presence charge.

20 THE COURT: All right. I have already included
21 that one.

22 MR. SHELTON: Thank you, Your Honor.

23 MR. MCCOY: Your Honor, the only thing I was
24 going to add to our charging conference was to add a
25 mere presence charge as well.

1 THE COURT: All right. Are you requesting any
2 lesser included's?

3 MR. SHELTON: No, Your Honor.

4 THE COURT: Mr. Aylor?

5 MR. MCCOY: No, ma'am.

6 THE COURT: All right. Is the State requesting
7 hand of one, hand of all?

8 MS. CORNWELL: Yes, Your Honor.

9 THE COURT: Mr. Shelton?

10 MR. SHELTON: Yes. No objection.

11 THE COURT: No objection, all right.

12 Mr. Aylor?

13 MR. MCCOY: Your Honor, I don't know how to
14 phrase this the right way, but I'd rather it not be
15 charged, but I'm not objecting.

16 THE COURT: All right. Well the reason why I am
17 including it is based upon the testimony, it's also
18 included the way the State has pled the indictments as
19 well, but based upon the testimony as presented.

20 So whatever that was, Mr. McCoy, it's noted on
21 the record.

22 MR. MCCOY: I appreciate it, Your Honor, thank
23 you.

24 THE COURT: So with that is there anything
25 further? I think we are ready to get started.

1 Now the jury was told to be there at 9:30 so
2 that they will be downstairs at 9:30. There was some
3 confusion about what time they were supposed to be
4 here. But we will begin at 9:45. So that means I want
5 you all ready to begin at 9:45.

6 Any questions?

7 MS. CORNWELL: None from the State, Your Honor.

8 MR. SHELTON: None.

9 MR. MCCOY: Your Honor, the only question I have
10 is, is there any way for me to get a copy of all of the
11 charges you are going to do tomorrow ahead of time?

12 THE COURT: No. I'm doing mere presence, hand
13 of one, and then the standard charges.

14 MR. MCCOY: Can you tell me what case law you
15 are using for reasonable doubt.

16 THE COURT: The one I have always used Mr.
17 McCoy.

18 MR. MCCOY: Which one is that? Refresh my
19 memory, Your Honor, I'm sorry.

20 THE COURT: Here is a copy of the charge. Don't
21 leave with it.

22 MR. MCCOY: Yes, ma'am, I will not leave. Thank
23 you.

24 THE COURT: We are at ease.

25 (Whereupon, the proceedings in the matter before

1 the Court were adjourned for the evening.)

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1 THE COURT: I understand there is an issue with
2 the translator?

3 MR. ALFARO: Your Honor, the victims -- one of
4 the victims and his wife are present in the courtroom.
5 And Mr. Wright has some equipment, an earpiece that the
6 victims --

7 THE COURT: Can we test it out? You know how
8 sensitive my ears are. So I'd like to make sure it's
9 not going to interrupt any of the closings or my
10 charge.

11 Is there anything before we bring in the jury,
12 Mr. Alfaro?

13 MR. ALFARO: Nothing from the State.

14 THE COURT: Mr. Aylor?

15 MR. AYLOR: Nothing, Your Honor.

16 THE COURT: Mr. Shelton?

17 MR. SHELTON: No.

18 THE COURT: And, counsel, if you'll just come
19 look at the verdict forms just to make sure before you
20 give your closings.

21 MS. CORNWELL: Thank you.

22 THE COURT: Ms. Cornwell, any objection to the
23 verdict forms?

24 MS. CORNWELL: No, Your Honor.

25 THE COURT: Any objection to the verdict forms,

1 Mr. Shelton?

2 MR. SHELTON: No, Your Honor.

3 THE COURT: And, Mr. Aylor?

4 MR. AYLOR: No, Your Honor.

5 THE COURT: All right. And the jury is all here
6 so we will bring the jury in. And defense has the last
7 close. So, Mr. Shelton, in keeping in the alphabetical
8 order you will go first.

9 And then who is closing for -- Mr. Aylor you are
10 closing.

11 And, Ms. Cornwell, you are closing?

12 MS. CORNWELL: Yes, Your Honor.

13 THE COURT: Ms. Cornwell, please make sure you
14 slow down.

15 MS. CORNWELL: I will try my hardest, Your
16 Honor.

17 THE COURT: Thank you. Let's bring in the jury.

18 (Whereupon, the jurors enter the courtroom.)

19 THE COURT: Thank you. Good morning, ladies and
20 gentlemen. As I indicated to you last evening, we have
21 reached the stage of the trial where you will hear
22 closing arguments on behalf of counsel.

23 Ladies and gentlemen, just as I instructed you
24 that opening arguments are not evidence in this case,
25 neither are what the attorneys tell you in their

1 closing argument. Ladies and gentlemen, after you have
2 heard closing arguments on behalf of the State and the
3 two defendants, I will instruct you on the law
4 applicable to this case.

5 At that time you will then retire to your jury
6 room to deliberate. Please remember that the evidence
7 that has been admitted in this case will be go with you
8 during your deliberation. Ladies and gentlemen, please
9 give your strict attention to Ms. Cornwell.

10 MS. CORNWELL: Thank you, Your Honor, may it
11 please the Court, counsel.

12 Ladies and gentlemen, at the beginning of this
13 trial you were told that we live in a CSI world. A
14 world where we have fingerprints, DNA. And thank
15 goodness that we do, because those things are what help
16 us solve crimes.

17 That's not the reality. The reality is that we
18 don't live in a CSI world, we live in the real world.
19 And in the real world you don't always have
20 fingerprints and DNA that definitively link a person to
21 a crime.

22 In fact, you heard expert testimony yesterday
23 that told you exactly why you usually don't find
24 fingerprints and DNA at a crime scene. Fingerprints
25 and DNA are fragile, and a lot of things affect that;

1 heat, humidity, sweat.

2 We don't live in a CSI world. Would it be nice
3 if we had Grissom or Abbey or somebody come onto a
4 crime scene and look at a piece of evidence and tell
5 you exactly who touched it, and when they touched it,
6 and where they touched it, and what color sweater they
7 were wearing when they touched it?

8 Yeah, that would be great. It would be really
9 great because it would mean that we would have wrapped
10 this whole thing up in less than an hour. Wouldn't
11 that have been nice.

12 But we don't live in a CSI world, we live in the
13 real world. And the real world is a common sense
14 world. And common sense tells you that when you have a
15 laptop that has been stolen, and within minutes of that
16 laptop being stolen, and within less than a quarter of
17 a mile of where that laptop was stolen, you have a
18 defendant carrying that laptop, that's the defendant
19 that stole that laptop.

20 And common sense will tell you that when you
21 have cell phones that are stolen, and within minutes of
22 those cell phones being stolen, within less than a
23 quarter of a mile from where those cell phones were
24 stolen, that cell phone was found in somebody's pocket,
25 that's the defendant that took those cell phones.

1 Common sense tells you even more. That when you
2 have a cell phone that is found inside of a victim's
3 home, and inside that victim's home things have been
4 taken, and inside that phones are pictures of the
5 defendant, that's the defendant that was in that home
6 and burglarizing that home. You don't need
7 fingerprints and DNA to tell you that, because common
8 sense tells you that.

9 Now the defense counsel has gone into a lot of
10 details and asked a lot of questions about what the
11 police could have done, who the police could have
12 talked to, evidence the police could have tried to get.

13 And officer Charlton sat up there, and he took
14 his licks. And he admitted to you that he is not
15 perfect. And there were probably things that maybe he
16 could have done.

17 Was this a perfect investigation? No. Was it a
18 good enough investigation to catch two of the
19 defendants that committed these heinous crimes?
20 Absolutely.

21 Defense counsel also wanted to go into maybe who
22 the State has put up and who the State hasn't put up to
23 testify for you. Could I have put up every officer
24 that had something to do with this crime? Of course I
25 could have. And could I have brought every single

1 person that had anything to do with this incident, and
2 every single witness? sure I could have.

3 But that wouldn't have changed the fact that
4 that man had the stolen laptop in his possession. And
5 that man had the stolen cell phones in his possession.
6 Those are the two men that came in, pointed a gun at a
7 man's face, choked another man, threatened an
8 eight-month pregnant wife and a three-year-old child
9 upstairs, stole their belongings, and stole their sense
10 of security.

11 No matter how many people I bring in, no matter
12 how many officers I have testify, that never changes.
13 And their testimonies never changed.

14 officer Charlton's investigation proved that to
15 you. officer Charlton was dispatched to a home
16 robbery, an invasion, a kidnapping, a burglary, an
17 armed robbery. And when he got to that scene, he was
18 informed that three black men had accosted, forced and
19 threatened the victims.

20 He was told that a black laptop was stolen when
21 this occurred. And he turned around and he drove less
22 than a quarter of a mile away. And less than a quarter
23 of a mile from that crime scene he found three black
24 men and nobody else around. And one of those black
25 men, Defendant Thompson, was carrying a black laptop.

1 So he pulls over and he goes to speak with these
2 men. And what do they do? Defendant Thompson, who's
3 holding the stolen laptop, throws it on the ground,
4 acts like he's going to run away. The third suspect
5 did run away. Do innocent people run away? Do
6 innocent people throw stolen materials down? No.

7 The third suspect ran away because he had a gun.
8 He had a Blackberry that didn't belong to him. He had
9 a wallet with identification that wasn't his, it was
10 the victim's. That's why he ran away.

11 And they want you to believe that officer
12 Charlton didn't care anything about this third suspect.
13 But that's not true, because you also heard how other
14 officers apprehended somebody that they thought maybe
15 was involved. That goes to show you that there were
16 other officers looking for this third person.

17 I didn't put them up in front of you because I
18 didn't need to. You had Officer Charlton to tell you
19 all that.

20 Defense counsel is probably also going to tell
21 you about what evidence the State doesn't have. You
22 haven't seen a gun, you haven't seen a Blackberry, and
23 you haven't seen a wallet. Does that mean that a gun
24 wasn't used? No. You heard four people tell you that
25 a gun was used.

1 You also heard how a third suspect ran away.
2 And you heard in great detail how they should have been
3 searching for this third suspect because he probably
4 had a gun. They told you that. That third suspect was
5 with these two defendants, and these two defendants had
6 evidence in their pockets, in their hands, there is no
7 denying that. You haven't heard one denial of that.

8 Officer Charlton also took the victims to the
9 scene where he had these two defendants detained. And
10 they were able to identify these two defendants with
11 absolute certainty. 100 percent positive that these
12 were the two men that did this.

13 Defense counsel is going to have you believe
14 that they couldn't have possibly made a proper
15 identification because Paulo and Adao told you that
16 they don't hang out with black people. And that they
17 think that some black people may have similar
18 characteristics.

19 But that's not the case either. Because both
20 Paulo and Adao told you about the identification. They
21 told you that there was plenty of light. And that they
22 saw them face-to-face for a good amount of time. They
23 also distinguished the difference between the
24 defendants. The defendant that choked Adao was lighter
25 skinned and bigger than the defendant with the gun.

1 The defense also told you at the beginning of
2 this case that the State has to prove each burden
3 beyond a reasonable doubt. And that we have to do that
4 beyond all doubt. That's not true. The Judge is the
5 authority on the law. And she's going to tell you
6 exactly what the State has to prove. And I believe
7 that she is going to tell you that we have to prove it
8 beyond a reasonable doubt, not beyond all doubt.

9 There are very few things in this life that are
10 beyond all doubt, which is why the standard is a
11 reasonable doubt. And reasonable doubt is not an
12 inkling of a doubt, it's not a little bit of a doubt,
13 it is a reasonable doubt. And if you believe that
14 these defendants most probably walked up to Paulo and
15 Adao, pointed a gun in their face, choked them, forced
16 them to go inside where the eight-month pregnant wife
17 was and three-year-old child was sleeping, forced them
18 to go upstairs, forced them on their knees and
19 threatened to kill them, and they ran from the home
20 while taking their possessions, you must find them
21 guilty.

22 Defense went into a lot of details about money
23 and denominations. You heard a lot of testimony about
24 that. Really, most people probably know about how much
25 money they have in their wallet at the time. Most

1 people can't tell you exactly what denomination they
2 have; how many 100's, how many 50's, how many 20's.

3 Defendant Thompson had a lot of money on him
4 when he was caught. And maybe some of those
5 denominations didn't meet up exactly with what the
6 victim thought that he had. But it was just a guess of
7 what he may have had in his wallet.

8 He knew he had about \$600. He knew he had about
9 \$600 because it was his daughter's third birthday party
10 the next day and he had to buy party favors and food,
11 and that was taken from him.

12 A lot of it was found in Defendant Thompson's
13 pocket. Was all \$600 found? No. But you also heard
14 why that was because Officer Charlton told you why that
15 was. Usually when three people commit a crime, three
16 people are going to split the loot. And that's what
17 happened here.

18 Now when we talk about each element of crime and
19 the state having to prove beyond a reasonable doubt
20 each and every element of the crime, that's exactly
21 what I have to do. And you heard the Judge telling you
22 at the beginning of this trial that these defendants
23 have been charged with ten crimes.

24 The State brought ten indictments out, five on
25 each defendant. And we have to prove beyond a

1 reasonable doubt each element for each crime on each
2 defendant. And the State has done that.

3 You've seen evidence to that, and you've heard
4 testimony to that. But I'm going to go over the law
5 and the statutes, and show you exactly how we have
6 proved each element of those crimes.

7 Now if I say something that differs from what
8 the Judge says, obviously the Judge is the authority of
9 the law. She knows the law better than anybody else in
10 this courtroom, and you should defer to what she says.

11 The first thing that you need to remember is
12 that a victim is a victim. It doesn't matter if you
13 were born and raised and lived all your life in this
14 country, if you have been here for six years or one
15 day. If you are accosted and somebody points a gun in
16 your face, if somebody takes your money, takes your
17 cell phones, takes your sense of security, if somebody
18 threatens your home, your family, your pregnant wife
19 and your child, you are a victim. And in this country,
20 we stand up for our victims. And we prosecute the
21 criminals, the defendants that committed the heinous
22 act against the victims.

23 There is a theory in law called hand of one,
24 hand of all. And under the hand of one, hand of all,
25 it basically means that if somebody commits a crime,

1 you find that person guilty. However, if there is also
2 somebody with you while you are committing that crime,
3 and they're assisting in that crime, they're helping in
4 that crime, they're participating in that crime in any
5 way, they are also guilty of that crime as if they
6 committed the crime themselves.

7 so it doesn't matter that one-on-one that
8 somebody did something. If one-on-one somebody did
9 something and you were standing there, and you were
10 helped them to make sure they didn't go anywhere, to
11 make sure they gave you everything that they had, you
12 are also guilty of that crime.

13 so if you think that one of these defendants is
14 the defendant that accosted Paulo and Adao, then you
15 have to find them guilty. And if you find out that one
16 of these defendants was helping in any way by taking
17 property, by making sure they didn't run, by helping
18 out, you must also find that person guilty of each and
19 every crime.

20 Armed robbery in the state of south Carolina
21 means that to convict a defendant, the state must prove
22 beyond a reasonable doubt that the defendant committed
23 a robbery, that he did that while he was armed with a
24 deadly weapon, or that while alleging that he had a
25 weapon he threatened and took something away from

1 somebody.

2 In this crime, in this trial you heard that
3 Paulo testified that one of the suspects held him at
4 gunpoint, went through his pockets, took his wallet,
5 took his Blackberry and took his money. You heard Adao
6 testify that the other suspect was forcefully choking
7 him, demanding money, all the while while Paulo was
8 having his money taken. And that a third suspect was
9 standing in the back with his hand in his waistband
10 under his shirt, indicating that he also had a gun.

11 The first element of robbery has been met in
12 this crime.

13 We have to prove that while they were committing
14 this robbery, they had a weapon. Well you've heard
15 testimony from four people that saw a weapon. You
16 heard Paulo say they had a weapon. You heard Adao say
17 they had a weapon. Paulino and Lucineia all saw a
18 weapon. There was a firearm in this crime, and the
19 second element of armed robbery has been met.

20 We only have to prove one of the two. That or
21 is very important. But here it doesn't matter. This
22 says, or while in the presence of alleging another
23 person -- I'm sorry, it says, while alleging either by
24 action or words he was armed while using a
25 representation of a deadly weapon. The third guy in

1 this used a representation that he had a deadly weapon.
2 He had his hand in his waistband, and a shirt over his
3 hand indicating that he had a weapon. The second
4 element of robbery has been met again.

5 The State has proven that these defendants, both
6 Defendant Thompson and Defendant Fishburne, committed a
7 robbery while armed with a deadly weapon. They are
8 both guilty of armed robbery.

9 The defendants are also charged with kidnapping.
10 And there is a lot of big words in the kidnapping
11 statute. To be kidnapping it says you have to have
12 unlawful seized, confined, inveigled, decoyed,
13 kidnapped, abducted, or carried away another person.
14 You had to have done that without the authority of law,
15 and by whatever means necessary.

16 So those are big words. And I'm going to try to
17 bring it down as easily as I can. In order to confine
18 or carry away, inveigle, decoy, all that means is that
19 I made you move from one place to another and you
20 didn't want to.

21 If I took you out of this jury box and made you
22 move to that jury box, and you didn't want to. And I
23 forced you to do it by any means necessary, I have
24 kidnapped you. I didn't have to take you out of this
25 room. But I have kidnapped you because I have taken

1 you from here to there.

2 In this trial you heard Paulo testify that when
3 he was outside he was forced to go in his house. He
4 didn't want to go into his house. In fact he begged
5 these defendants not to take him in the house because
6 his eight-month pregnant wife was inside that house.
7 And his three-year-old daughter was upstairs sleeping.
8 And he was trying to do everything that he could to
9 keep them from going in that house and threatening his
10 family.

11 You also heard Adao testify that he didn't want
12 to go inside the house. That he was being forcefully
13 choked. And the more that they stood outside the
14 house, the harder they choked him until eventually
15 Paulo had to let them inside the house. He was forced
16 to go inside that house.

17 You also heard that they made them go upstairs.
18 They forced them to go upstairs. Paulo begged them,
19 please, please, please don't go upstairs. My
20 three-year-old daughter is in my room. She's sleeping.
21 Please don't go upstairs. And they forced them
22 upstairs anyway.

23 They forced them into a bedroom. They forced
24 them on their knees. They pointed a gun at their head.
25 And they started to count down from six. They

1 threatened to kill them. The first element of
2 kidnapping has been met.

3 By any means whatsoever. You had a gun and you
4 had a large man choking somebody. I think that's
5 whatever means whatsoever. That means the second
6 element of kidnapping has been met.

7 And without the authority of law. Obviously
8 when you are robbing somebody, when you are kidnapping
9 somebody, and when you are burglarizing their home, you
10 are not acting under the authority of law. There is no
11 law that would allow that.

12 So the state has to prove beyond a reasonable
13 doubt that they were unlawfully seized, they were. By
14 any means whatsoever, they were. And without the
15 authority of law, they did not have that. The state
16 has proven beyond a reasonable doubt that both
17 Defendant Fishburne and Defendant Thompson are guilty
18 of kidnapping.

19 Burglary in the first degree. This is the
20 largest statute, has the most words, but it's probably
21 the easiest of all of them. To be a burglary in the
22 first degree somebody has got to enter into a house
23 unlawfully, without consent, and with the intent to
24 commit a crime.

25 To be burglary in the first degree they have to

1 do it either while armed with a deadly weapon, or while
2 it being at night. Here it was both. You've heard
3 testimony it was at night and it was with a weapon.

4 They came into the dwelling without consent,
5 Paula and Adao didn't want them to come into their
6 house, and they did it with the intent to commit a
7 crime. And the intent to commit the crime in this, was
8 the intent to commit larceny.

9 And larceny, as you can see, is the felonious
10 taking and carrying away of personal property. Well
11 they did that. They took a laptop, and they took cell
12 phones that didn't belong to them. They also took
13 keys, money and a wallet. The first element of
14 burglary has been met.

15 When they entered the dwelling and participated
16 in the crime, they had to have done one of four things.
17 They were either armed with a deadly weapon or
18 explosive, they either caused physical injury to a
19 person, they threatened to use a weapon, or they
20 displayed what appeared to be a weapon. We have to
21 meet one of those four. The State has met all four.

22 You heard Paulo testify that he had a gun
23 pointed in his face, they were armed with a deadly
24 weapon. You heard Paulo and Adao testify that one of
25 guys got angry with Paulo and struck him forcefully in

1 the face, while the other was forcefully choking Adao.
2 That's the second one.

3 Uses or threatens the use of a dangerous
4 instrument. I don't know what's more dangerous than a
5 gun, and they obviously were threatening to use that.
6 And displayed what appeared to be a gun. Pretty
7 redundant, but again there was a gun.

8 The State needs to meet one out of four, we have
9 met four out of four. So this element of burglary has
10 also been met.

11 And then the other is that did it occur at
12 night. Well obviously it occurred at night. You heard
13 Officer Charlton, Paulo, and everybody else testify
14 that this was around 11:30 at night. So that element
15 has been met again.

16 We have to prove beyond a reasonable doubt that
17 each defendant entered into a dwelling without consent,
18 they did. One of those four, we have got all four.
19 Four of the entering, happens at night, and it did.

20 So the State has also proven beyond a reasonable
21 doubt that each of these defendants, Defendant Thompson
22 and Fishburne, are guilty of burglary in the first
23 degree, they're guilty of kidnapping, and they're
24 guilty of armed robbery.

25 The Judge is going to tell you all about

1 reasonable doubt, and I have already touched on it
2 some. But again, reasonable doubt is just that, it's a
3 reasonable doubt. And if you think that these
4 defendants most likely committed this crime, you don't
5 have a reasonable doubt and you must find them guilty
6 of each and every crime.

7 The State has proven beyond a reasonable doubt
8 that Defendant Fishburne and Defendant Thompson are
9 guilty of armed robbery against Paulo Silva. They're
10 guilty of armed against Adao Olivera. They're guilty
11 of kidnapping Paulo Silva. They're guilty of
12 kidnapping Adao Olivera. And they're guilty of
13 burglary in the first degree of Paulo Silva and Adao
14 Olivera's home.

15 THE COURT: Mr. Shelton.

16 MR. SHELTON: Thank you, Your Honor, may it
17 please the Court.

18 walking down the road, blue lights, at that
19 moment little did they know that their freedom would be
20 taken away. Right when Officer Charlton saw them,
21 their freedom was taken away for the next 15 months.

22 would they have done anything different? could
23 they have done anything different? You saw Officer
24 Charlton testify. You see Mr. Fishburne and Mr.
25 Thompson. I submit to you they could have ran. The

1 other person ran, got away. They could have.

2 could they have gotten away? They could have.
3 But they did what all law-abiding citizen do. They
4 stoped and talked to the police. They relied on
5 officer charlton doing his job, on the Berkeley County
6 sheriff's Office doing their job.

7 They failed. The sheriff's office failed to do
8 its job. He testified, Charlton testified there were
9 many things he would have done differently, could have
10 done differently. This investigation was just over his
11 head.

12 However, he was certain on one thing. The ID,
13 essentially, that's all that mattered to him. That's
14 all that mattered to Officer Charlton was the ID. It's
15 more important than any descriptions that the victims
16 made before, after. It's just not that simple.

17 officer charlton testified his job was over in
18 less than 24 hours. Once he got those statements, once
19 he picked up those statements, signed as a witness --
20 at least one of the, Mr. Silva's signed it -- his job
21 was over. He was going back to his patrol duty. He
22 was done. Less than 24 hours.

23 We have been here a lot longer than 24 hours.
24 They were taken to the jail an hour and 50 minutes
25 after they were stopped on the side of the road.

1 officer Charlton testified for longer than an hour and
2 50 minutes.

3 And I apologize if that was a boring part of me
4 trying to get that out from officer Charlton as far as
5 they, as long as they were on the side -- but they were
6 on the side of the road in handcuffs for an hour and 50
7 minutes. He didn't know. He wasn't sure. He doesn't
8 know how long they were there in handcuffs on the side
9 of the road.

10 No gun; no explanation for a change of clothes;
11 missing cell phone, a blackberry cell phone; money;
12 wallet; two sets of keys. And a detective came out to
13 the scene to determine there is nothing else he could
14 do.

15 According to what officer Charlton, the State,
16 everybody believes is there is a third person out
17 there. No detective? A detective is not going to go
18 out and look for this person? A detective is not going
19 to get evidence put together to try to find this third
20 person, according to the state's belief as to what
21 happened?

22 The police missed a lot of holes. Holes that
23 could have spared Mr. Fishburne and Mr. Thompson from
24 going through this process.

25 Let's go through the testimony. The testimony

1 from Mr. Silva, Ms. Silva, Mr. Olivera, Ms. Rodriguez,
2 it was emotional, it was dramatic, it was traumatic.
3 You would expect there to be some differences. Maybe
4 not difference between three and two people, or one and
5 three people, but you would expect there to be some
6 differences.

7 They have also had 15 months to talk to friends,
8 figure out what they're going to say. Talk it over
9 with the State, figure out what they're going to say.
10 They have had 15 months.

11 But what do we not have? We don't have Mr.
12 Wright. And in the jury selection the Judge gave a
13 list of people. You heard Mr. Wright's name called.
14 So where was Mr. Wright?

15 Did he explain why there was some differences in
16 the statements that were given to the police? Why the
17 police officer didn't know about this prior burglary
18 the night before?

19 Why the police officer didn't know, Deputy
20 Charlton, investigating officer, didn't know that the
21 robbers went out to the trash bins, the back part of
22 this apartment complex. The back part where Deputy
23 Charlton says there are trails and things like that
24 that go out to Red Bank Road, go the opposite way?

25 He didn't know about that. Did it matter? I

1 submit to you it didn't matter because Deputy Charlton
2 had his ID. He didn't care. He had his ID.

3 You heard Lt. Kokinda testify. The person that
4 came in here, the most experienced of anybody that
5 testified as far as investigations are concerned, over
6 20 years. And what did he say? He said, the physical
7 evidence is stronger than eyewitness testimony.

8 Deputy Charlton said that his chain of custody,
9 that doesn't matter as much as his report of his
10 eyewitness testimony. The chain of custody is not as
11 important as for the physical evidence.

12 No fingerprints. No fingerprints on this
13 laptop. You are going to get a picture of the laptop.
14 Picture of the laptop. No fingerprints on this laptop
15 that are Mr. Thompson's or Mr. Fishburne's.

16 There are three fingerprints. Kokinda, Lt.
17 Kokinda didn't get the victims' Mr. Olivera, Mr. Silva,
18 he didn't get their fingerprints to compare to those
19 three fingerprints. But when was that report? 13
20 months after this incident. September of 2011. It
21 happened August of 2010. They didn't care.

22 Because they are going to have Mr. Silva come up
23 and say, that's my laptop, that's my client's laptop,
24 that's my thumb-drive. This is a mass-produced laptop,
25 mass-produced thumb-drive. You can buy them anywhere.

1 They didn't have them go through this laptop.
2 They didn't have them go through this thumb-drive, say
3 it's theirs. They could have. The State, powerful
4 State, they could have. Trying to take someone's
5 freedom away. They could have. Nothing unique about
6 this. Nothing. Nothing linked.

7 That gets us to the cell phones. There is also
8 nothing linking those cell phones, there are four cell
9 phones, five cell phones. There is nothing linking
10 those cell phones to Mr. Olivera, Mr. Fishburne, Mr.
11 Thompson.

12 There is a blackberry, don't know where it is.
13 could have tried to figure out where it is. Maybe that
14 would lead to the robbers. Lead to one, lead to the
15 other two. Maybe that could, but no testimony on that.
16 No detective, decided that that wasn't important.

17 Nobody that came up here and said Mr. Fishburne
18 owned this cell phone. We have got a detective -- or
19 Deputy Charlton that says he went through the cell
20 phone, looked like Mr. Fishburne. You also heard that
21 at a prior hearing he wasn't as sure.

22 There is nothing linking that. It's a black
23 man. We know it's a black man's picture on the cell
24 phone. We know from the victims that there were three
25 black men that came and robbed them. But we also don't

1 know where the cell phone was. Charlton doesn't know
2 where the cell phone was.

3 Got two cell phones in evidence. This cell
4 phone was returned to Mr. Olivera. Another cell phone
5 was returned to Mr. Olivera that he no longer has. Why
6 does he have one that doesn't work? He said it didn't
7 work.

8 We have this cell phone. There was a fourth
9 cell phone. The second cell phone that was taken into
10 evidence that Mr. Charlton, Deputy Charlton, he
11 couldn't really tell where it came from. He had it on
12 the chain of custody as coming from Fishburne.

13 So he really didn't know. When did he give Mr.
14 Olivera these cell phones back? At one point in time
15 he handled all four cell phones. He said he gave it
16 back at the apartment. Mr. Olivera said he gave it
17 back in the patrol vehicle. But Deputy Charlton's
18 testimony was he didn't go back to get the cell phones
19 until he arrested them, after he dropped them off back
20 at the house.

21 There is a lot of confusion with the cell
22 phones. Because it was Deputy Charlton's lack of
23 experience and ability. He was over his head. The
24 only investigation he's ever done, before or since, of
25 a burglary in the first degree, an armed robbery and a

1 kidnapping. Only investigation he has ever done. Very
2 serious charges. Only investigation he has ever done,
3 he is way over his head.

4 Why was there no testimony on this fourth cell
5 phone? Why was there no link? If you are confused, as
6 I am confused, about the cell phones, and if you have
7 questions about those cell phones, the great thing
8 about this system is that those questions must be
9 resolved in favor of Mr. Fishburne and Mr. Thompson.
10 They are innocent until proven guilty. All questions
11 must be favored. Must be resolved in favor of them.

12 So let's go to the most reliable, essentially
13 the most important part of the ID. We have Mr. Silva
14 first saying, followed them around trying to find them
15 for 20 or 30 minutes before the police came. He saw
16 two people walking down the road, two black males
17 walking down the road because they're suspects.

18 Officer Charlton testified that Mr. Thompson's
19 house was a mile away. I submit to you, if you just
20 committed a burglary, armed robbery and get chased out
21 of a house, it's not going to take 20 minutes to get
22 home.

23 But Mr. Silva saw two black males walking down
24 the road. That's different than Deputy Charlton's
25 testimony that when he went down the road he saw three.

1 so there are five now.

2 And from a distance he made this ID. According
3 to Charlton, right here to that witness stand, second
4 row. According to Mr. Silva, little bit less than the
5 door. Spotlight, 12 o'clock in the middle of the
6 night. Hands behind their back. Only two black males.
7 officer, at least one officer on one side. Officers in
8 uniforms, patrol cars, marked cars. That's our guys.

9 When they learn about cell phones, throw that in
10 the mix. They know about the cell phones beforehand.
11 And according to Mr. Olivera and Mr. Silva, black men
12 look similar.

13 Is that why Charlton didn't take them out there
14 to go see Mr. Peterson? Could have. Not hard to do.
15 wouldn't have been inconvenient. It's a mile down the
16 road, could have taken them down there to see Mr.
17 Peterson.

18 But he made the determination, that's not the
19 one that ran from me. Okay, but that could have been
20 the person that robbed them. But he didn't want to
21 find out because he had his guys. The first two black
22 guys he saw walking -- three black guys he saw walking
23 down the road. He had them.

24 Why was there no further investigation done by
25 Berkeley County Sheriff's Office? By the state? You

1 heard Deputy Charlton say it was impossible for him to
2 get that third person. It was impossible because he
3 essentially, all he had was a black male. What did he
4 have before he went out there? Black male. It's the
5 only description that was given before Mr. Fishburne
6 and Mr. Thompson's freedom has been taken away.

7 Ladies and gentlemen, the state hasn't met their
8 burden, their high burden of proof. They have to prove
9 their case beyond all reasonable doubt; all reasonable
10 doubt. Some get confused with all doubt. It's all
11 reasonable doubt that they have to get to prove their
12 case.

13 Great thing about the system is, the state has
14 the burden. We don't have to prove anything. There is
15 nothing on Mr. Fishburne or Mr. Thompson to prove.
16 They are the ones that have to prove everything. From
17 a procedural standpoint if we would have presented
18 evidence, if we would have presented testimony, then
19 the state gets to go again. They get to come back up
20 here and talk to you all.

21 So they haven't proved their case. So there is
22 really no reason for us to present anything. They
23 haven't proven their case beyond all reasonable doubt.
24 That's their burden. There is nothing on us. We don't
25 have to prove it, they have to. And they haven't

1 proven it.

2 I ask that when you go back there that you hold
3 the state to that high burden. And on behalf of Mr.
4 Fishburne, I ask that you find him not guilty.

5 Thank you.

6 THE COURT: Mr. Aylor.

7 MR. AYLOR: Ladies and gentlemen of the jury,
8 the first thing I want to say is thank you. Thank you
9 so much for being here. The Judge is going to tell you
10 that, but I wanted to personally tell you that myself.

11 Because while this is so inconvenient to all
12 your lives and your work and your family, you're here
13 for a reason. And that reason is for everybody in this
14 courtroom, and it's for you too.

15 Thank you so much for coming. Thank you so much
16 for listening. And please be patient as we finish
17 today, and take your time in making the decision you
18 make. Because it's because of you that this system
19 works. And I have faith that it will work again today.

20 I want to apologize for having to have my little
21 notepad here with my chicken scratch written on it. I
22 usually like to try to do these things by memory. Try
23 to be a little bit more impressive just coming off that
24 way.

25 But when I began to prepare this closing, I

1 decided that was going to be impossible because there
2 is way too much information, it was way too important
3 to the lives of those two men that I wanted to bring
4 out today.

5 So if I have to go back to my notes, I can
6 assure you it's not because I didn't do my homework.
7 It's just to make sure that all of you hear every
8 single thing because those two men's lives are in the
9 balance of your hands.

10 Let's start with some of the witnesses. We will
11 start with Mr. Silva. He was the first individual who
12 we heard from. It was very tough, I'm sure, to
13 understand everything, with translations and the back
14 and forth. It took a lot to be attentive.

15 But there were a number of things that I felt
16 that came out that need to be pointed out. First of
17 all, he told us that the night before this robbery
18 happened, his apartment had been broken into.
19 Apparently no one had been found, it was unclear if
20 really anything had been taken.

21 But I think that's extremely important just to
22 look at the circumstances and the environment that they
23 were in. There had been a crime, essentially at least
24 to some degree one of the crimes, the exact same crime
25 that had occurred at his house the night before. You

1 know when Deputy Charlton found out about that? When
2 he got here, about the same time you all did.

3 Moving on. He also stated that as he left the
4 home, after the robbers had fled, he chased after
5 them. And he told us that one of them, one of the
6 individuals, had ran out towards the back of the
7 property, the back of the apartment complex towards the
8 dumpster. Then he said he saw the other two, wearing
9 different clothes, sometime thereafter on the back side
10 walking on the street.

11 So the first thing he tells us is that these
12 three individuals have split up. And this is with his
13 own eyes. Which from everything the state tells you,
14 we need to listen exactly how he says it. But maybe
15 not when it conflicts with someone else. Then the
16 memory maybe can be a little faded.

17 And you heard Deputy Charlton tell you, as he
18 showed us on that map, the back of that complex where
19 the dumpster was, there was plenty of trails for that
20 individual to be able to run back up to Red Bank Road,
21 leaving just two people now of the original three.

22 I'm sorry, I should not call them people. Let's
23 call them from what we have heard from day one they
24 are, black men; two black men. So we are down to two
25 even in the area of Harbor Lake Road, from what Mr.

1 silva first told us.

2 Mr. Silva also told us that he lost a laptop. A
3 laptop was stolen from his house. Now there has been a
4 lot of talk about this laptop. Here is this laptop,
5 pretty normal, black laptop with some sort of
6 thumb-drive. You've got a picture of the laptop that's
7 going to go back with you.

8 Now we heard from Deputy Charlton that this
9 laptop was found on my client, Mr. Thompson. Or found
10 that my client threw it, and it was in his possession.
11 We also heard that Lt. Kokinda did fingerprints. Now
12 granted he didn't do fingerprints, in my opinion, for
13 the investigation of this case. He did fingerprints
14 for these attorneys to try to prepare this trial.

15 And when he did those fingerprints, nothing
16 related to my client nor Mr. Fishburne came back. Well
17 what came back on this laptop related to anybody else?
18 Because, you know, there is -- obviously there was
19 three fingerprints on it. You can put fingerprints on
20 it.

21 And as the state pointed out, you can also, you
22 know, miss fingerprints, and fingerprints can be
23 damaged. But there was three fingerprints on that
24 laptop. We have no idea whose fingerprints those were
25 on that laptop. It's not because we couldn't find out,

1 or at least attempt to find out, it's the fact that
2 they didn't even try to find out.

3 They wanted it to be Subject Thompson's. Or
4 maybe because all these black men, they've just really
5 been circling around, so it could have been Fishburne,
6 we could have changed it up if his fingerprints ended
7 up being on it. Maybe they did a hand-off, or maybe
8 Charlton, that's 1 of the 400 things he was wrong about
9 or confused about.

10 So either way it was going to be one of theirs.
11 But then when it wasn't, well then fingerprints don't
12 really matter because they could be messed up. But
13 there is three fingerprints on there.

14 Did they check to see if they were Mr. Paulo's?
15 Mr. Silva rather? No.

16 Did they check to see if they were anybody in
17 the home? No.

18 Did they check to see whose they are? No.

19 They didn't care. They wanted it to be those
20 two. And if it wasn't those two, well then
21 fingerprints don't really matter anyway.

22 Why is that? Oh, and when I say they, I mean
23 when this case was being prepared, not during that --
24 what was it -- 12-hour investigation that Deputy
25 Charlton put in.

1 so again, back to this laptop that Mr. Silva
2 said he lost. He told us that it was not his laptop,
3 it was someone else's because he was working on it.

4 We never found out whose it was. The State
5 never had anybody come and say, I gave my laptop to Mr.
6 Silva to do some work on it. We never had Mr. Silva
7 identify the laptop by opening it up and powering up.
8 There is a power cord right here.

9 You know, maybe these mystery phones, which we
10 will get to later, there is no power. But there is a
11 power cord to this right here. You aren't taking it
12 back with you, though, you all just got the picture.

13 We never found out any of that. What we did
14 find out was that Deputy Charlton told us he never even
15 showed the laptop to Mr. Silva again. He never showed
16 it to him after he got it from wherever he got it from.

17 Mr. Silva said, oh, that's absolutely the
18 laptop. He couldn't remember a lot of things, but he
19 could remember that 14 months later. Could he remember
20 that's absolutely the laptop, and that's absolutely the
21 one because that really is the one and he knows 100
22 percent and just has a good memory about that one
23 specific thing? or did he, like his wife, have a
24 pretrial meeting with the prosecutor's office and be
25 shown that laptop?

1 But why couldn't anybody open up the laptop?
2 why didn't anybody turn it in? If it was Joe Smith's
3 laptop that Mr. Silva was working on, then I would
4 assume there is probably something in somebody's
5 personal laptop to say Joe Smith.

6 or why couldn't Joe Smith come in here to say,
7 you know what, that was my laptop, I gave it to Mr.
8 Silva, he was working on it. And he called me the next
9 day apologizing because someone had stolen it from his
10 house.

11 We never heard any of that. All we know is that
12 this laptop came out from somewhere, from Deputy
13 Charlton. He says it was Subject Thompson, but is that
14 really that easy to believe at this point? Is it that
15 he is lying? No. It's just that he's guessing. or
16 hoping. Just like they were hoping that those
17 fingerprints were going to be on there, but they
18 weren't.

19 Again never turned on. Never identified outside
20 of this courtroom. Never fingerprinted by anyone else.
21 But yet that's the smoking gun that Mr. Silva brought
22 forward.

23 Mr. Silva also made an ID. You know, in going
24 back over my notes, I'm not sure who Mr. Silva
25 ultimately says he saw on the side of that road in that

1 wonderful lineup that Deputy Charlton put together. We
2 do know he saw two black men, we are sure about that.
3 And we know that he thinks all black men look the same,
4 we know that. And we know he doesn't socialize or have
5 anything professional to do with black men.

6 But whether he saw the gunman that was upstairs
7 with him, or the individual that was choking Mr. Adao,
8 or the individual that was rummaging through his things
9 downstairs, I don't know.

10 I know that he saw two of them. At different
11 points it was one, sometimes it was the other. And
12 then finally I believe it was for sure the one that had
13 a gun to his head, and then the other one was one of
14 the other two ones. He didn't know which, but he knew
15 it was one of the other two black men.

16 Next is -- oh, and finally, before I forget, he
17 also told us that none of these black men had gloves
18 on. They robbed this home, they didn't have gloves on.
19 Sort of an interesting thing to think about when you
20 brought up Deputy Charlton later in regards to the
21 fingerprinting issue that we will get into.

22 We know he lost a cell phone that was never
23 recovered. And we know he lost money that was never
24 recovered. And as the state pointed out, a lot of
25 people know about how much money may be in their

1 wallet. But it was Mr. Silva who stated that he
2 carried about \$600 in his wallet all the time.

3 And it was Mr. Silva who gave one of the only
4 detailed things that Deputy Charlton put in his police
5 report; on exactly how many \$100 bills it was, exactly
6 how many \$50 bills it was, exactly how many \$1 bills it
7 was, and exactly how many \$2 bills it was.

8 So, you know, that doesn't really add up there.
9 If he knows exactly what it is and he can do it by the
10 bill, that was his own decision to put that information
11 forward to the deputy. He could have easily just said,
12 as the State pointed out, it was about this much.

13 The bills were specified because that's what he
14 said and that's one of the things Deputy Charlton, for
15 whatever reason, decided to actually put in
16 specifically.

17 Now Mr. Adao, Mr. Adao Olivera. First of all,
18 he doesn't remember much of anything. But from what he
19 does remember, he remembers that there was two men
20 upstairs, he wasn't for certain which one of the two
21 that he identified, but he knows it was one of ones
22 upstairs.

23 And then thought it was the one downstairs, but
24 he's not really sure. But he knows again it was a
25 black man. And he also knows that it was three black

1 men that robbed the house. And he also again stated
2 that he thinks all black men look the same too.

3 And not only does he not even work or socialize
4 with any black people, he actually said, I don't know a
5 single one of them. But what he does know is that they
6 all look the same; somewhat important in the ID you
7 would hope.

8 He also admitted when his statement was brought
9 forward to him by Mr. Shelton that there were multiple
10 facts on his statement related to that one of the
11 robbers spoke Portuguese, that he didn't run
12 afterwards.

13 He seemed to be frustrated in determining
14 whether or not what he had signed with the translator
15 the day after the actual robbery, or what he was saying
16 today was the truth. But either way, I don't know that
17 he was sure.

18 But out of the six sentences on his statement
19 that Deputy Charlton never read, two of them he said
20 weren't true on the stand after he'd originally signed
21 it back during that glorious investigation Deputy
22 Charlton put together.

23 In regards to his cell phones. All I can say
24 first, before we even get started on the cell phones,
25 before you all leave today, make sure you've got your

1 cell phone. We don't want your cell phone going into
2 evidence. Because this cell phone thing is so
3 confusing.

4 I'm not sure how many cell phones there
5 originally were, and how many are left, or which ones
6 you'll even see. But what I do know is I believe this
7 cell phone, I think, is a gray cell phone that Mr. Adao
8 claimed was his.

9 I don't recall if this is the cell phone that he
10 claimed was his that was found in his car or his truck,
11 and then later said, no, it was in the house with the
12 other cell phone. Or if it's the cell phone that's
13 broken. I know we never saw his name in it. I know it
14 was never turned on, so I'm sure it's conveniently
15 broken. Or if it's just the one that was by itself
16 upstairs.

17 Apparently he had two. Apparently one was
18 broken. May or may not have been in his car. May or
19 may not have been in the house with the other cell
20 phones. Apparently now one of those cell phones was
21 lost. I don't know by whom. I don't know if it was
22 Deputy Charlton or if it was himself, that was never
23 explained.

24 This cell phone, I guess because it was broken,
25 was never identified, was never shown anything, but

1 don't worry, you'll get the picture of it to take back
2 with you.

3 so so far you've got a picture of a black
4 laptop, no identification; a picture of a cell phone.
5 It's almost like a Sears catalog without the detailed
6 descriptions.

7 And his other phone, again, is not here. Who
8 knows where it is. Because as we know, neither one of
9 those phones were ever turned into evidence; neither
10 one of these phones were even ever logged.

11 Apparently they were given back in the car, or
12 at some point maybe at the apartment. You know, the
13 apartment, the contaminated scene apartment. But
14 either way, we don't even know where the cell phone
15 came from and whose it was.

16 And if Mr. Adao is recognizing it because it's
17 his cell phone, or if he too had a meeting that
18 refreshed his recollection with the State before coming
19 yesterday. All I know is it was never turned on and
20 said, yep, see that, that's my aunt's phone number,
21 that's my work phone number, I put a phone number for
22 the delivery pizza, nothing.

23 How about you all's cell phone? Look in your
24 cell phones, why don't you, when you have a chance.
25 You got a bunch of personal information it there? Your

1 cell phone might look like hers or his or anybody
2 else's. But I guarantee you, as soon as you start
3 going through it, you will be able to determine real
4 quickly and identify it. It didn't happen here.
5 Never did.

6 And we have the cell phone. And we have the
7 individual. But just never happened. Just one of
8 those things.

9 Now Mrs. Silva, she was up for a brief period of
10 time and experiencing an extremely horrifying traumatic
11 situation. So one can understand why her memory could
12 also be somewhat faint from this incident. Because who
13 would want to remember such a horrible incident.

14 But she came in and said, this cell phone, this
15 black and gray cell phone, I don't know if it's
16 supposed to be black or gray, was the cell phone that
17 she found on the floor of her living room in the
18 contaminated scene after the robbers had left.

19 When I then asked her, how long did you have it?
20 She said she quickly gave it to her husband. Who then,
21 as we know, apparently turned it into the police.

22 So 14 months ago after her home had just been
23 burglarized, with her children there, she grabbed the
24 cell phone that she didn't recognize off the floor,
25 which she said she quickly, more or less as fast as she

1 could, handed it to her husband. But then when the
2 state bought it up she said, oh, yep, that's it right
3 there. That's it. A gray and black tiny cell phone.

4 And then I had asked her, have you ever seen
5 that cell phone since that little quick exchange?
6 Yeah, she had, one time when she came and met with the
7 state to refresh her testimony and take a look.

8 Finally, Ms. Rodriguez came. Ms. Rodriguez, who
9 probably did something more courageous than almost
10 anyone I've ever known; go back in that home. Go back
11 and get that child out, regardless of knowing the fact
12 that there may be people in that home that are trying
13 to commit or committing violent acts.

14 She said she didn't see where any of the
15 individuals went when she left. She said she didn't
16 see Pedro tackle one of the individuals. But what she
17 did know was that when she went back downstairs into
18 the den and the contaminated scene with a couple of
19 other people, there was a cell phone.

20 Was it this cell phone? You know what, she
21 didn't identify this cell phone. But she remembered
22 picking up a cell phone, and it was ringing over and
23 over again, that didn't seem to belong to anybody in
24 the house.

25 And then so when I asked her, did Ms. Silva also

1 find a cell phone? she didn't know. so how many cell
2 phones were found in that contaminated house? who
3 found them? where did they go? And why aren't they
4 connected to anybody?

5 oh, wait, they're supposed to be connected to
6 Mr. Fishburne because apparently one of the cell phones
7 Deputy Charlton found, or was handed to him by one
8 person, no he couldn't remember, maybe it was somebody
9 else, and it had a black guy on it, it kind of looked
10 like Mr. Fishburne. so the phone with the black guy,
11 oh, that's one of the black guys we got.

12 And then people that were involved with this
13 case who were not witnesses to the incident, were not
14 victims to the incident. We have got Lt. Kokinda who
15 came on with a wealth of knowledge as an expert; the
16 state's expert. since 1989 he has been doing this;
17 DNA, fingerprint.

18 And what did he tell us? Well first he told us
19 that fingerprints can smudge, fingerprints can go away,
20 and you can grab something and your fingerprints can,
21 you know, not be able to come back, and not be able to
22 be shown through testing, which is understandable.

23 But what he also told Mr. McCoy was that a
24 surface like this was easy and a good surface to have
25 fingerprints on. And that he also did test the

1 fingerprints that were on that surface. But they
2 didn't come back to either one of those gentlemen.

3 Did he test those fingerprints through the
4 criminal bay system of every fingerprint that they have
5 listed? No, why would he to that? Because that wasn't
6 Thompson and that wasn't Fishburne and we ain't
7 concerned with anybody else because this testing was
8 done for this trial. It wasn't done for the criminal
9 investigation. Charlton already wrapped that baby up
10 by Sunday of the weekend that it occurred.

11 What did he also tell you? He told us that
12 victim testimony, eyewitness testimony is flawed
13 because people are flawed, their memories are flawed.
14 What you thought you saw, mental games you can play.
15 But what is not flawed is forensic testimony.

16 What is 100 percent correct is that's my
17 thumbprint. That's my hair. That's your blood, your
18 saliva, your skin cells. That they can match exactly
19 back to any of us. No matter even if you have a twin.

20 So if Mr. Fishburne or Mr. Thompson's hair,
21 skin, or just to keep it basic, prints were found in
22 this home, well that doesn't have anything to do with
23 what one witness says or what the other one says.
24 That's science. That's scientific evidence which their
25 expert said would be 100 percent.

1 But we don't have it. We don't even have
2 clothes that he could have tested. We don't have any
3 furniture that he could have tested. We don't have any
4 items from the home that he could have tested. The
5 only thing that was tested, which was tested for the
6 trial, was this for those two individuals. Nothing
7 else was tested; the black laptop for the black man.

8 Now the state pointed out in their closing that
9 this is not a CSI world. This isn't Hollywood. It's
10 not the movies. It's not a CSI world. But you know
11 what it's also not? It's not a Mayberry world either.

12 DNA testing is used constantly within cases,
13 criminal investigations. Fingerprints have been used
14 for decades within cases. The fact that these were not
15 utilized in this case are not because they couldn't be,
16 because Berkeley County can't afford it. It's just
17 because they weren't, because no one cared to and no
18 one tried to.

19 But when they didn't, and all they had was this
20 lineup with these two black men that were in the area,
21 they did everything they could to wrap it up and make
22 that exactly what you needed to, as I believe the state
23 put it, think that these people are guilty and be found
24 guilty.

25 That brings me to the investigation. Mr. --

1 Deputy Charlton. What happened? We heard what
2 happened at length from Deputy Charlton from start to
3 finish. He told us a lot of things he couldn't
4 remember. He told us he assumed a lot of things;
5 assuming thing.

6 But what I want to do today is I want to go back
7 through exactly what he's told us and what we know. I
8 was a C student in law school, so I'm far beyond me to
9 try to teach you all the law. But what I can teach you
10 is a little bit of common sense, and remind you exactly
11 what happened in this investigation for this case,
12 which is a burglary first, an armed robbery and a
13 kidnapping charging those two men.

14 First of all, probably the most important right
15 there on the scene, they failed in any way to secure
16 the crime scene. Deputy Charlton is not sure when, at
17 what point there ended up being too many people there,
18 or inside the house or outside the house.

19 All he knows is that at whatever point that was,
20 he just threw in the towel, forget it. There is no way
21 there is a fingerprint, a hair, a clothing item or
22 anything else left in that house, so we won't even tape
23 it off. We won't even have our makeshift translator
24 tell people to just get out of the apartment, get off
25 the front lawn. We will just let it go.

1 Three men in the home, three black men in the
2 home rummaging the place, going upstairs, downstairs,
3 back porch. Contaminated, they all been running around
4 yelling, just forget it.

5 What did he we hear from the Lieutenant? The
6 best evidence, 100 percent correct, is forensic
7 evidence. And they didn't even try, try to stop people
8 from coming into that crime scene. And once they did,
9 did they say then, well le's just see whose prints we
10 find.

11 Obviously we know we will find the family. We
12 know we will find maybe some of the neighbors. But
13 let's see if we find anybody else. You know what? We
14 got two guys that we got arrested, two black guys. We
15 think they're involved. Let's go over there and
16 fingerprint the house, see if we can find their prints,
17 lock up this case.

18 Let's see if we can find another person's
19 prints, run it through the database, get all three of
20 them. Nah, it's contaminated, just let it go.

21 Language Line. Deputy Charlton said he didn't
22 use the service that is provided by Berkeley County 911
23 which provides him translation, official translation
24 for criminal investigations or anyone 911 calls. He
25 used a neighbor. A neighbor who he didn't ask anything

1 about.

2 He told him to make sure he translated directly,
3 but he never even asked the neighbor, hey, are you
4 involved in this case? Did you see anybody? Did you
5 see a man get tackled in the front yard by Pedro? Did
6 you see two other individuals run the other direction?
7 Did you see anything? Hear anything? Nope. He just
8 said, oh, you speak English, Portuguese? Okay, come
9 on. You're in.

10 Sort of like, you're a police officer now.
11 Actually, we will just call Mr. Hilario Rubio his sort
12 of assistant in the investigation, because he pretty
13 much was. No one really else was. And as he said, he
14 never asked him any questions.

15 We still don't know. Mr. Adao said, Hilario may
16 have seen one of them too. I don't know. He was
17 there. Proper translation would have been through the
18 Language Line service. Proper translation would have
19 been through a translator.

20 Emergency translation would have been through an
21 individual who had nothing to do with the incident, and
22 you knew that they had nothing to do with the incident
23 because you had confirmed it. Proper translation is
24 not, hey, you speak English and Portuguese, come on.

25 You can't turn an individual involved into a

1 case into part of the investigation. It does not work
2 that way. It might not be in Deputy Charlton's manual,
3 but it's definitely in the manual of common sense.

4 Now we heard a lot about descriptions. We could
5 never hear from Mr. Paulo, Mr. Silva or Mr. Adao as to
6 what descriptions there were. What we do know, that at
7 some point they told Deputy Charlton that it was three
8 black men. We never heard from Deputy Charlton, from
9 Mr. Silva, or obviously Mr. Adao, anything more than
10 three black men.

11 They said they changed clothes. They maybe
12 didn't change clothes. There was no clothes found. The
13 state never even told us what clothes they were
14 allegedly wearing. All we know is that the only
15 description that was gathered was that there was three
16 black man. And, hey, we got two of them, let's go.

17 They never ever went back. They never tried to
18 go back and figure out from anyone. Deputy Charlton
19 said, well, I let them make their statements through
20 their translator and tried not to influence those
21 statements.

22 Yeah, I'd say he is pretty hands-off on those
23 statements, with no questions of, hey, how tall was
24 this person? How large was this person? Nothing. We
25 know nothing; hair, eye color, anything. No

1 description other than black men.

2 Again going right back to the investigation
3 right there on the scene. You heard testimony from
4 what I would consider one of the victims in this crime,
5 Ms. Silva. It was her home. She's pregnant. Her
6 child is upstairs asleep. She has to run out of the
7 house to go get help.

8 She saw a person, a black man, holding a gun to
9 her husband's head. Deputy Charlton did not even speak
10 to her. He had his new assistant, Mr. Rubio, the
11 translator. They're at the house. They even come the
12 next day. I venture to gather that she was probably
13 there the next day.

14 He never even spoke to her. Who did you see?
15 What did he look like? What kind of clothes did he
16 have on? Did you see everybody? He has no idea. And
17 why didn't he interview her? Because he didn't need
18 to, he had two black guys. And they were taking out
19 there and, yeah, that's two of the black guys and
20 that's it.

21 So he never even spoke to her. She's a victim
22 of an armed robbery, a burglary and a kidnapping, and
23 they never even spoke to her.

24 Again the next-door neighbor, the hero, comes in
25 the home, saves the child, spooks the black men. Was

1 it two or three? I'm not sure. She said two. She
2 said the one downstairs had the gun. Different than a
3 lot of other testimony, but you know, that's what it
4 is, that's what the this whole case is. But never
5 talked to her. She is even mentioned in the
6 statements. Oh, that's right, Deputy Charlton never
7 read those statements.

8 We already know this one. He didn't interview
9 them the night that he was with his assistant
10 translator, he didn't interview them the next day, he
11 has never even spoken to them since. He may be a
12 witness to this case that could have helped at any
13 point, and they never even attempted to talk to him. Or
14 even see if he knew someone that knew something.
15 That's usually the way these investigations work.

16 Pedro, the only individual to have physical
17 contact, through the testimony, with any of the alleged
18 robbers. No one ever spoke to him. What did he look
19 like? Did he have earrings? Did he have tatoos? You
20 tackled one of these people.

21 But you've got to give Deputy Charlton a little
22 credit on that one. How could he talk to someone he
23 doesn't even know exists? Because he never read the
24 statements, he never read the interviews, so as far as
25 he is concerned, Pedro doesn't exist. So that's sort

1 of one down the line that I don't even know if you can
2 blame Charlton for that.

3 And just in general, failed to interview anyone
4 else. The only people for an armed robbery, a
5 kidnapping and a burglary in your community that was
6 interviewed was Mr. Silva and Mr. Adao. And their
7 interviews were done by a translator, translated to
8 English, handed to Deputy Charlton, and then never even
9 read.

10 For some of the most heinous, violent crimes in
11 your community, that is the entire investigation to the
12 victims, and to any potential witnesses. This is an
13 apartment complex. There are people everywhere.

14 This is not out on a farm in the middle of the
15 country. There could have been people, I saw three
16 people running this way, I saw one guy, I saw some
17 people over here three days ago that were casing the
18 joint, nothing. They didn't even talk to one of the
19 victims in the house, much less any other witnesses.

20 Again we will give Deputy Charlton a pass on
21 this one. How can he find out about a break-in the
22 night before that may have a little something to do
23 with this house getting broken into the next night when
24 he never even read the statements. Pretty important
25 information. In hindsight he said, yeah, that would

1 have been good to know. He wishes he would have known
2 it, but he didn't.

3 The original Portuguese statements, I don't know
4 where those went. The first thing, the best time, we
5 have talked so much about memory. Right there on the
6 scene that night, Mr. Silva, Mr. Adao, writing out
7 their statements. Here is exactly what I know, exactly
8 what was said, had just happened.

9 He doesn't know where those went. He knows that
10 they made one. He doesn't know where they went,
11 though. I don't know. Someone's first reaction within
12 almost instantaneous after this occurred, probably
13 pretty important to get that information. Maybe could
14 have used Language Line at a later point, if it wasn't
15 too expensive, and had them translate it, and put that
16 in her report. No, they got lost somewhere.

17 Probably one of the most interesting aspects of
18 Deputy Charlton's testimony was he had no personal
19 notes. He had no recollections. You all have pads. I
20 have to bring mine here just to even remember what I'm
21 talking about.

22 But Deputy Charlton, the lead investigation,
23 granted his sole investigation, of a burglary,
24 kidnapping and armed robbery, had no notes of any type.
25 Had nothing that he had written down on a pad, written

1 down on a computer, typed it up in his car, anything.
2 All he had was that police report.

3 He is the only investigator, or at least the
4 main one. Now the State said they had other police
5 officers they could have brought up. I wish they would
6 have, don't you?

7 They could have at least cleared up the cell
8 phone thing for us. But for all we know it was just
9 Deputy Charlton, and he didn't happen to have any
10 information other than the police report that he could
11 even look back to, look back to that next day, or look
12 back to two days -- oh, never mind, two days later he
13 had already quit working on the case.

14 How about Mr. Adao and Mr. Paulo both having
15 physical injuries; one being choked for an extended
16 period of time, one being hit in the head. Did he take
17 any pictures of this to show, this is what happened, to
18 document the case, document this brutal attack? No, I
19 just didn't.

20 I don't think he said anything more than, I just
21 didn't, on that one. You would think someone's
22 injuries would be pretty important in regards to a case
23 like this, or any case, where someone breaks into your
24 home and physically strikes you and threatens you. He
25 just didn't.

1 In fact, he didn't take pictures of anything.
2 He didn't document anything. He didn't say, you know,
3 write down anything, say a lamp is missing here, looks
4 like they came in through this door. There is no
5 information. There is no pictures of anything.

6 The only pictures we got, here is the real
7 investigatory team right there, here's the pictures.
8 Those picture didn't come from Deputy Charlton. Those
9 pictures came for the trial prep for this case. There
10 is more work done by this office 14 months later, than
11 there ever was in that 12 hours that Charlton put in.

12 And the fingerprints thing. Again, the 100
13 percent best way that they have could have collected
14 evidence in this case. Could they attach them? Maybe
15 they wouldn't, maybe the state's right, maybe all the
16 fingerprints would have been smudged.

17 But wouldn't you check that? Wouldn't that be
18 something that would be worth looking into? What did
19 Deputy Charlton say? The dust was sort of, you know,
20 got in the way for a family.

21 You think the Silva's would have minded if a few
22 police officers came in and dusted their furniture and
23 their TV and their doorframes to try to catch the
24 people that invaded their home? I think they would
25 have probably been okay with that. Nah, the scene is

1 contaminated. It's his fault that it got contaminated
2 by the way, but since it's contaminated they're not
3 even going to try to do that.

4 DNA, forget that. There is nothing to test DNA.
5 There is no reason to even look for the hairs, there is
6 no reason to even look for if anybody spit on the
7 ground, there's no reason to even look if they were
8 walking up the street, maybe one of them -- if there's
9 a witness that might have seen one of them smoke a
10 cigarette.

11 No, it's not a Hollywood world. It's not. And
12 not every single print, not every single hair, not
13 every single sample of saliva is going to come back.
14 But aren't you going to attempt to try and discover and
15 investigate as much as you possibly can until you hit
16 that brick wall?

17 And don't you think that brick wall would take a
18 little bit longer than 12 hours to get to in an armed
19 robbery, burglary first, and kidnapping case? I sure
20 would hope so, for everybody's safety.

21 Now to this ID, this important ID. Again,
22 Charlton now doesn't even recall whether he asked them
23 anything, or if he even knew that they were black men
24 other than just hearing that on the 911 recordings. He
25 didn't talk to them at all about that. He just brought

1 them out there after he got the two black man.

2 And when he brought them out there, he had them
3 in the back of his car with his new assistant, Hilario
4 Rubio, just deputized him, brought him in. They do the
5 ID with both of them in the car, with Hilario talking,
6 and as Charlton put it, they did the ID simultaneously,
7 broken English/Portuguese.

8 You are having two victims of a horrific,
9 violent act identifying two people who they may or may
10 not believe was a part of a crime, and the way you do
11 it is pile them in the back of your car, and letting
12 them talk at the same time, as well as their
13 translator, who may be a witness in himself.

14 We asked him, why didn't you separate one from
15 the other? I don't know, I just didn't. I didn't even
16 ask him to drive back a quarter mile down the road and
17 leave one there and come back. I mean that's too much,
18 you know. He'd already worked too hard.

19 But just pull one out of the car, let one talk.
20 why didn't you, just to make sure. One may be able to
21 recognize one, maybe he'll say two. Maybe one will say
22 none. You know, make sure that the other one doesn't
23 influence the other one. No, he just didn't do it. He
24 had no reason why.

25 The third suspect. Deputy Charlton told us that

1 he saw this individual briefly. Later that night, as
2 the State pointed out, they were looking for that third
3 suspect, what they believed was the only one left with
4 maybe a gun. But then later maybe the guy with the gun
5 was Defendant Thompson, I don't know.

6 They found someone one mile from the home where
7 they had been invaded. Deputy Charlton was still
8 there. He drove up there himself. Did his own ID.
9 This time he just left the guys at home, said no,
10 that's not the guy.

11 That's not the guy that what? That's not the
12 guy you think that ran away from you in the dark that
13 you saw for 20 seconds? How about the guy that ran
14 from the cops? He ran from the cops.

15 The State says innocent people don't run. That
16 man ran from the cops. He didn't have any warrants out
17 for him. He didn't have anything on him by the time
18 they caught him or the dog caught him. Maybe he's
19 involved in this crime.

20 But Charlton really just became the spokesman
21 for the victims and said, nope, that's not the guy that
22 ran from me. So if he is not the guy that ran from me,
23 then he is not the guy that was involved in that
24 robbery. He was just running from the cops because,
25 you know, he just felt like playing a game that night.

1 wouldn't have been too hard to -- he could have
2 piled up the crew again, Paulo, Adao, his new deputy
3 Hilario, bring them on up to the gas station. Nope,
4 too much work. Or why do it when he just doesn't care.

5 After these ID's were done, did he follow up
6 with anymore questions? Okay, now we know we think we
7 have two of them, you've identified them as a group.
8 Tell me more about it. When did they come in? Have
9 you seen them in this neighborhood before? Do you
10 think you might know who the other guy is? Do you have
11 any idea why they would try to break into your home?
12 Do you know anything? Nope.

13 The Portuguese statements were written that
14 night. They got lost. The next day he picked up the
15 English statements, never read them, not even once. He
16 didn't read the victims' statements, the only
17 statements he had that were given to him the day after
18 the robbery, not even once. Not even one time did he
19 read three pages worth of victims' statements in an
20 armed robbery, burglary first and kidnapping case.

21 Ladies and gentlemen, you could have read those
22 documents in less than four minutes. He admitted on
23 that stand in front of you that he never even read
24 them. When I started asking him about them he said, I
25 never read them. I picked them up. Yeah, I picked

1 them up. I signed that I picked them up, I just never
2 read them.

3 I think the answer to that question is pretty
4 easy, he couldn't explain it, but his investigation was
5 over by then. They had two black guys. Nothing wrong
6 with two out of three ain't bad, right. Got two black
7 guys, needed three, but hey, you know, you don't win
8 them all, we're done.

9 So why would he read them. Why would he take
10 four minutes in a violent crime investigation to read
11 the only victims' statements he has, the only
12 statements he has at all? Because he didn't care to,
13 he didn't want to, he didn't need to, he had two of
14 them, there they are.

15 So we went over it again. He had this laptop
16 that he says he found. Did he talk to Paulo about it?
17 He spent -- within his 12-hour investigation, he was
18 with Mr. Silva a good amount of that investigation.

19 Did he ever say, now let's just make sure this
20 is your laptop? Okay, it's not yours, who is it?
21 Okay, well let's contact that person and let him know
22 it's part of a robbery, I got to take it with me.
23 Nope. As he said, Mr. Silva never saw that laptop
24 again -- or, I'm sorry, never saw the laptop that he
25 claimed he found.

1 Chain of custody. There we go back to the cell
2 phones. Deputy Charlton admitted on the stand that his
3 police report, in regards to what he took, and his
4 chain of custody report, in regards to what he logged
5 in, were totally conflicting.

6 He said one phone was found here. One phone was
7 found here. And then he put it on a different person.
8 And then he marked it out. Then one phone he didn't
9 put on there at all. And then another phone is just
10 still gone somewhere.

11 Didn't say whose phone one was, didn't say whose
12 phone another was. There was just a bunch of phones
13 going different places. And Deputy Charlton said, well
14 I was trying. You know, I have been working on the
15 case for awhile, I'm referring back. And if he wanted
16 to go look at that police report, which would have been
17 his best recollection, he's got to drive all the way to
18 Goose Creek.

19 It's 4:00 in the morning. And as we know that
20 case wrapped up by the next day at noon. There wasn't
21 enough time to go look in his police report before
22 logging evidence crucial to a case in a violent crime,
23 crucial to the state, crucial to this prosecution.

24 But he didn't feel like driving to Goose Creek
25 to figure out what was logged right and what his report

1 said, he just kind of guessed at it. It doesn't work
2 that way. You don't put people's lives, people's
3 freedom at risk by guessing where one thing came from,
4 where something else should have come from, or what you
5 think happened to something else. I hope that's not
6 the way the police work for all of us.

7 But you all should take the statements related
8 to those phones to heart, these two phone, which were
9 never identified, never were determined directly to be
10 anybody's, and never confirmed by anything. The other
11 phones, I have no idea where they are at this point. I
12 truly don't even know how many there is.

13 The 911 recordings, what he was originally based
14 off of. Did he have the tapes? Did he go over there?
15 At least there was some clothes description we heard on
16 those. We didn't hear any tapes. We didn't hear any
17 description. We didn't hear anything.

18 Because we know if he didn't do any fingerprint
19 work, he sure didn't go down to the dispatch and get
20 the 911 tapes because that would have come out of that
21 12-hour span. He couldn't even drive to Goose Creek to
22 look at his police report before logging in the
23 evidence chain together on phones he believed were part
24 of the crime, and found on people he thought were
25 involved in the crime, so he said. But who knows?

1 None of it really makes sense. Because when you take
2 several pieces of information and you mix them
3 together, how can you make any sense of it.

4 How about Mr. Silva's Blackberry. Now that's
5 one thing, we never saw a Blackberry, nobody identified
6 one, Mr. Silva said he lost one. We know that even if
7 you believe Mr. -- Deputy Charlton's version, there was
8 one individual who was never caught.

9 Now he didn't understand pingging, but it's
10 pretty simple to go to your local carrier and get your
11 phone records. What could be on those phone records?
12 I'm not a detective, but I'm pretty sure numbers maybe
13 that an individual could have called.

14 And if you looked at the time and say, hey, the
15 robbery was at 11:30 p.m., and these calls were made at
16 2:00 a.m. the next day, and one of them is to this
17 person, then somebody could go interview that person.
18 Who called you from this number.

19 If it was to a cab company, cab companies locate
20 exactly where they were. Who did you pick up from this
21 place? Well you didn't get their name, what did they
22 look like? Nope. How about next messages? Nope.

23 All we know Blackberry gone, never found.
24 Third, alleged third black man gone, never found.
25 Never even asked Mr. Silva to get the records. Never

1 tried to subpoena them. I don't think he ever even
2 thought about it. Because why would he?

3 One, he was outside his 12 hours. I'll give him
4 credit, I think he said it may have been 14. But, two,
5 he'd already got two of the black men. He didn't need
6 the third one. Two out of three ain't bad.

7 The third suspect, as he told Mr. Alfaro, all he
8 knew was black and young. That's almost impossible.
9 Black and young, he could be arresting people left and
10 right. We don't want that.

11 Why is the only things he knew black and young
12 of what he thought to be the third suspect? Because
13 that's the only information that more or less he was
14 provided. Because he sure didn't try to get any
15 himself, you know, by like investigating and all.

16 He claims that Detective Reilly, which as you
17 all heard it took us a list to even figure out who it
18 was that came out to the scene, came out on their own.
19 He said he never called anybody from the criminal
20 investigation division, the people that investigate
21 violent crimes, crimes against individuals, property,
22 people like Lt. Kokinda.

23 Didn't ever talk to him. Said if he did talk to
24 him he doesn't remember. He said he thinks Detective
25 Reilly came out there, shined a light on the ground and

1 said, well, looks like you all got this under control.
2 And he said, I don't think they wrote a report.
3 Because he said, well I would have probably had that
4 report.

5 I would hope so, the lead investigator, the lead
6 and sole investigator -- other than, you know, his
7 assistant Mr. Rubio the translator -- on the case would
8 have had the report. But no, there was no report
9 because they didn't do any because again, why not?
10 Because they didn't need to, they had two of the three.
11 The third one, they'll get him the next time.

12 Then again that should be changed, it might have
13 been 14 hours. He said maybe 14 hours. So on an armed
14 robbery, a burglary, and a kidnapping on a young family
15 trying to survive in an awful economy, who was
16 terrorized by some violent criminals, the most that the
17 Berkeley County Sheriff's Department had to offer was
18 12 to 14 hours of Deputy Charlton.

19 I don't know about you, but I don't want to put
20 my family's life in Deputy Charlton's hands. Because
21 he is not afraid to do 30 percent. But it didn't look
22 like he was going much further than that.

23 Think about all of you in your careers. What if
24 you were Deputy Charlton in your job and you acted that
25 way. Probably wouldn't keep that job too long, right?

1 Probably lose that job. Didn't follow procedure,
2 didn't do anything, didn't follow up.

3 But the State, they don't want you to go against
4 Deputy Charlton. They want you to recognize and
5 respect him, respect what he did, respect what he
6 found, respect that ID. That ID where two black men
7 are standing in front of a police car, only beside a
8 uniformed police officer, with their hands behind their
9 back with handcuffs on.

10 Whether they saw them or not, Deputy Charlton
11 doesn't know. With two individuals, who don't speak
12 English, getting translated, who think all black men
13 look the same, ID'ing them for an armed robbery, a
14 burglary and a kidnapping. You all should respect that
15 kind of police work.

16 He went into the next day. It was into the
17 second day, that 12 to 14 hours. But by Sunday, the
18 case was over. By the 8th, this case was over. They
19 had two out of three. They never followed up. They
20 never went anywhere after that.

21 So you ask yourself, as I ask it, where is this
22 case now? Where is it? Even if you think, you know,
23 he did a stellar performance, Deputy Charlton and
24 Berkeley County did a stellar performance, so you got
25 two of them. This isn't a cold case from 1983. This

1 is an armed robbery, a burglary and a kidnapping from
2 last year.

3 How is the investigation going? Wait, let me
4 rephrase that. Let me not ask you how the
5 investigation is going, Deputy Charlton, just what is
6 the status of the case? You know, the case that you
7 are the lead investigator on?

8 He didn't even know the status. He, himself,
9 the own investigator, the only one involved in this
10 case from start to finish, with finish being the next
11 day sometime around lunchtime, didn't even know the
12 status. Was it open? Was it closed? What was it?
13 Who cares because we got two of the three black men, so
14 why does it matter? Why?

15 Here is why it matters. It's reasonable doubt.
16 As I said earlier, I'm not here to argue law with you.
17 I'm not here to argue any kind of points related to
18 specific criminal investigations that I don't
19 understand, or DNA processes that I don't understand,
20 that none of you all should expect to understand.

21 But what I do know is this. There are two men
22 sitting in this courtroom whose lives are in the
23 balance of all your hands. And the State wants you to
24 find them guilty of these horrendous acts because, I
25 believe quoted from the state, you think that they did

1 these things, you think that they kidnapped these
2 people, that they robbed them, that they burglarized
3 their home, that you think.

4 Because you know what, Deputy Charlton's
5 investigation, Berkeley County's investigation, there
6 was problems. But it was, as the State put it today,
7 good enough. Well I'm here to tell you it was not good
8 enough.

9 Black and in the area does not equal beyond a
10 reasonable doubt. Two out of three, that's what they
11 stand. They got black and in the area, and two out of
12 three, and the case is over. No follow-ups on
13 anything. No reports on anything. No attempted
14 follow-ups.

15 Did Lt. Kokinda get up there and say, we
16 fingerprinted this home from start to finish and we
17 could not find any prints, and that sometimes happens.
18 Absolutely not. He'd never even been to the home.
19 He'd never even put his hands on this laptop to do
20 fingerprints until they started preparing their case.

21 It sure as heck wasn't Deputy Charlton, he
22 didn't even know where the case stood anymore. In
23 fact, probably until he got a call from the solicitor's
24 office, he sort of forgot about it. Because why did he
25 care, he had his two black men.

1 Well how did have those black men? Well because
2 they had been pointed out, you know, by the two victims
3 that think all black men look the same. I mean, that
4 is signed, sealed and delivered.

5 And there was phones somewhere, somehow, which
6 way, whose, I'm not sure. Sometimes the evidence
7 changed, you know, he just didn't have time. He didn't
8 want to drive to Goose Creek.

9 Ladies and gentlemen, that's not the way this
10 system works. Reasonable doubt is not, I think.
11 Reasonable doubt is not, good enough. Reasonable doubt
12 is something that you hold within you and know that
13 there is no way that these two individuals are not 100
14 percent guilty of these horrible crimes.

15 And I'm here to tell you that the State has not
16 even put up even close to a case that could prove that.
17 Is it because of who these lawyers are? These are fine
18 lawyers. These are excellent lawyers. They weren't
19 out there at that scene.

20 Deputy Charlton was at that scene. Berkeley
21 County was at that scene. They failed you. They
22 failed this community. And they failed these two men.
23 And I hope, as you go back to the jury room, and you go
24 over all these facts, you heard so much information
25 from everybody, you look back at all of the things that

1 don't make sense, that don't add up, and can't be
2 explained from how this investigation started from the
3 start -- which was, I don't know, about 11 o'clock at
4 night, 12 o'clock at night -- until the finish, which
5 was sometime around 12 o'clock the next day.

6 Because you know what? You really should be
7 able to make this decision. Because you all put in
8 about four times the amount of hours in this case as
9 Deputy Charlton has. Again, I want to thank you all
10 for the time that you have put in. And I trust
11 everyone to look at this case as critically as you
12 possibly can and free these two men. Black men.

13 THE COURT: Ladies and gentlemen, take this
14 opportunity if you'd like to stand and stretch for just
15 a moment.

16 Ladies and gentlemen of the jury, I remind you
17 that during this trial you and I have had certain
18 duties to perform. As the trial judge, it is my
19 responsibility to preside over the trial of this case.
20 And I have the duty to rule on the admissability of the
21 evidence offered during this trial.

22 You are to consider only the competent evidence
23 before you. If there was any testimony ordered
24 stricken from the record, you must disregard that
25 testimony. You are to consider only the testimony

1 which has been presented from the witness stand, any
2 exhibits which have been made part of the record in
3 this case, as well as any stipulations of counsel.

4 I have the additional duty to charge you on the
5 law applicable to this case. I am the sole judge of
6 the law in this case. And it is your duty, as jurors,
7 to accept the law and apply the law as I state it to
8 you now.

9 If you have any idea as to what the law is or
10 what the law ought to be, and it does not agree with
11 what I'm about to tell you, you must abandoned your own
12 ideas because you are sworn to accept the law and apply
13 the law as I state it to you now.

14 In every case tried in this court before a jury,
15 the jury becomes the sole and exclusive judges of the
16 facts. A trial judge may not make any statements to a
17 trial jury about the facts in the case.

18 You, the jury, are the sole judge of the facts
19 in this case. And you are not to infer from anything
20 that I have said or done during the progress of this
21 trial that I have any opinion about the facts in this
22 case. The law does not allow me to have an opinion
23 about the facts. This is a matter solely for you to
24 determine.

25 As jurors, it is your duty to determine the

1 effect, value, weight and the truth of the evidence
2 presented during this trial. The indictments in this
3 case alleged the following offenses: Armed robbery,
4 kidnapping and burglary in the first degree.

5 Each indictment charges a separate and distinct
6 offense. You must decide each indictment separately on
7 the evidence and the law applicable to it, uninfluenced
8 by your decision as to any other indictment.

9 Each defendant may be convicted or acquitted on
10 any or all of the offenses charged. You will be asked
11 to write a separate verdict of guilty or not guilty for
12 each indictment.

13 I charge you, there are two defendants in this
14 case, each of whom is charged with armed robbery,
15 kidnapping and burglary in the first degree. The case
16 of each defendant, and the evidence and the law
17 concerning that defendant should be considered
18 separately and individually. Your verdict does not
19 have to be the same for both defendants.

20 The fact that you may find one defendant guilty
21 or not guilty, should not control your verdict as to
22 other defendant. Where more than one person is charged
23 with a crime, if the evidence warrants it, you may
24 convict one and acquit the other, or you may acquit
25 both, or you may convict both.

1 It will depend upon your view of the testimony
2 and the evidence. You must take each defendant
3 separately, and consider the evidence as to that
4 defendant and to my instructions on the law. You will
5 then write a separate verdict of guilty or not guilty
6 for each individual defendant.

7 The indictments charge each defendant with armed
8 robbery, kidnapping and burglary in the first degree.
9 I remind you, the fact that a defendant was arrested,
10 charged and indicted in this case is not evidence in
11 this case, and cannot be considered by you as evidence
12 of guilt in this case. Nor does it create any
13 presumption or inference of guilt.

14 These documents are simply the formal written
15 instruments which contain the charges made against the
16 defendant. They are the formal documents by which this
17 case is brought into this court.

18 Just as the indictments in this case are not
19 evidence, any terminology or labels used to refer to
20 the individuals involved in this case cannot be
21 considered as evidence. For example, the use of the
22 words defendant and victim are merely formal labels,
23 and may not be considered by you as evidence in this
24 case.

25 Each defendant has pled not guilty to each

1 indictment. And that plea puts the burden on the State
2 to prove the defendant guilty. A person charged with
3 committing a criminal offense in South Carolina is
4 never required to prove himself innocent.

5 I charge you it is an important rule of the law
6 that each defendant in a criminal trial, no matter what
7 the seriousness of the charge may be, will always be
8 presumed innocent of the crime for which the indictment
9 was issued, unless guilt has been proven by evidence
10 satisfying you of that guilt beyond a reasonable doubt.

11 This presumption of innocence does not end when
12 you begin your deliberations, but it accompanies the
13 defendant throughout the trial until you reach a
14 verdict of guilt based on evidence satisfying you of
15 that guilt beyond a reasonable doubt.

16 The presumption of innocence is not mere legal
17 theory. It is not just a legal phrase. It is a
18 substantial right to which every defendant is entitled,
19 unless you, the jury, are satisfied from the evidence
20 of the defendant's guilt beyond a reasonable doubt.

21 The State has the burden of proving each
22 defendant guilty beyond a reasonable doubt. Some of
23 you may have served as jurors in civil cases where you
24 were told it is only necessary to prove that a fact is
25 more likely true than not true, such as by greater

1 weight or preponderance of the evidence.

2 In criminal cases, the State's proof must be
3 more powerful than that. It must be beyond a
4 reasonable doubt. Proof beyond a reasonable doubt is
5 proof that leaves you firmly convinced of the
6 defendant's guilt.

7 There are very few things in this world that we
8 know with absolute certainty. And in criminal cases,
9 the law does not require proof that overcomes every
10 possible doubt. If, based upon your consideration of
11 the evidence, you are firmly convinced that the
12 defendant is guilty of the crime charged, you must find
13 the defendant guilty.

14 If, on the other hand, you think there is a real
15 possibility that the defendant is not guilty, you must
16 give the defendant the benefit of the doubt and find
17 the defendant not guilty.

18 There are two types of evidence that are
19 generally presented in a trial; direct evidence and
20 circumstantial evidence. Direct evidence is the
21 testimony of a person who claims to have actual
22 knowledge of the facts, such as an eyewitness. It is
23 evidence which immediately establishes the main fact to
24 be proved.

25 Circumstantial evidence is proof of a chain of

1 facts and circumstances indicating the existence of a
2 fact. It is evidence which immediately establishes
3 collateral facts from which the main fact may be
4 inferred. Circumstantial evidence is based on
5 inference, and not on personal knowledge or
6 observation.

7 The law makes absolutely no distinction between
8 the weight or value to be given either to direct or
9 circumstantial evidence. Nor is a greater degree of
10 certainty required of circumstantial evidence than that
11 of direct evidence.

12 You should weigh all of the evidence in this
13 case. And after weighing all of the evidence, if you
14 are not convinced of the guilt of the defendant beyond
15 a reasonable doubt, you must find the defendant not
16 guilty.

17 Necessarily you must determine the credibility
18 of the witnesses who have testified in this case.
19 Credibility simply means believability. It becomes
20 your duty, as jurors, to analyze and to evaluate the
21 evidence, and determine which evidence convinces you of
22 its truth.

23 In determining the believability of witnesses
24 who have testified in this case, you may believe one
25 witness over several witnesses, or several witnesses

1 over one witness. You may believe part of the testimony
2 of a witness and reject the remaining part of the
3 testimony of that same witness.

4 You may believe the testimony of a witness in
5 its entirety, or reject the testimony of a witness in
6 its entirety. You also may consider whether any
7 witness has exhibited to you any interest, bias,
8 prejudice, or other motive in this case. And you may
9 also consider the appearance and the manner of the
10 witness while on the witness stand.

11 The rules of evidence ordinarily do not permit
12 witnesses to testify to opinions or to conclusions. An
13 exception to this rule exists for witnesses who we call
14 expert witness.

15 A witness who by education and experience has
16 become an expert in some art, science, profession or
17 calling, may state an opinion as to relevant and
18 material matters in which the witness claims to be an
19 expert, and may also state the reasons for that
20 opinion.

21 You should consider any expert opinion received
22 in evidence in this case, and like any other evidence
23 give it the weight you think it deserves. If you
24 decide the opinion of an expert witness is not based
25 upon sufficient education or experience, or if you

1 conclude that the reasons given in support of the
2 opinion are not sound, or that the opinion is
3 outweighed by other evidence, you may disregard the
4 opinion entirely.

5 An expert witness's testimony is to be given no
6 greater weight than that of other witnesses simply
7 because the witness is an expert. Further, you are not
8 required to accept an expert's opinion even though it
9 is not contradicted.

10 I instruct you and emphasize that the fact that
11 the defendant did not testify is not a factor to be
12 considered by you in any way in your deliberations, and
13 in your consideration on the question of the guilt or
14 the innocence of the defendant. It must not be
15 considered by you in any manner whatsoever.

16 A defendant has the constitutional right to
17 remain silent. And the assertion of this right must
18 not be considered by you in your deliberations. I
19 repeat, under your oath, you are to draw no conclusion
20 whatsoever from the fact that a defendant in this case
21 did not testify. The fact that a defendant did not
22 testify should not even be discussed in the jury room.

23 As I have indicated to you, the burden of proof
24 is on the State. A defendant is not required to prove
25 his innocence. The burden of proof remains on the

1 state to prove guilt beyond a reasonable doubt.

2 An issue in this case is the identification of
3 the defendant as the person who committed the crime
4 charged. The state has the burden of proving identity
5 beyond a reasonable doubt. You must be satisfied
6 beyond a reasonable doubt of the accuracy of the
7 identification of the defendant before you may convict
8 the defendant.

9 Identification testimony is an expression of
10 belief or an impression by a witness. You must
11 determine the accuracy of the identification of the
12 defendant. You must consider the believability of each
13 identification witness in the same way as any other
14 witness.

15 You may consider whether the witness had an
16 adequate opportunity to observe the offender at the
17 time of the offence. This will be affected by things
18 like how long or short of time was available; how far
19 or close the witness was; the lighting conditions; and
20 whether the witness had a chance to see or know the
21 person in the past.

22 Once again I instruct you, the burden of proof
23 on the state extends to every element of the crime
24 charged, and this specifically includes the burden of
25 proving beyond a reasonable doubt the identity of the

1 defendant as the person who committed the crime.

2 If after examining the testimony you have a
3 reasonable doubt as to the accuracy of the
4 identification, you must find the defendant not guilty.

5 In order to establish criminal liability,
6 criminal intent is required. For example, the mental
7 state required to be proven by the State for a
8 particular crime might be purpose, intent, knowledge,
9 recklessness or criminal negligence.

10 Criminal intent must be proven by the State
11 beyond a reasonable doubt. Criminal intent is always a
12 matter that must be determined by the jury from the
13 circumstances surrounding the situation.

14 There is no way to prove intent to a
15 mathematical certainty. There is no way that medical
16 science can dissect a person's brain and determine what
17 the person had in mind, so the law says that criminal
18 intent may be inferred from the circumstances shown to
19 have existed. This how you make a determination of
20 whether or not the element requiring intent was
21 present.

22 It is not necessary to establish intent by
23 direct and positive evidence. But intent may be
24 established by inference in the same way as any other
25 fact, by taking into consideration the acts of the

1 parties, and all of the facts and circumstances of the
2 case.

3 Criminal intent is a mental state of conscious
4 wrongdoing. It is up to you to determine what the
5 defendant intended to do based upon the circumstances
6 shown to have existed. Criminal intent can arise from
7 action, or a failure to act. It may arise from
8 negligence, recklessness, or an indifference to duty or
9 to consequences that is considered by law to be the
10 equivalent of criminal intent.

11 Mere presence at the scene is not sufficient to
12 prove someone guilty of a crime. A defendant's
13 presence where a crime is being committed, or mere
14 association with the person who commits a crime, does
15 not make a defendant an accomplice, or an aider and
16 abettor of the person committing the crime.

17 The burden is on the State to prove every
18 element of the crime charged. If you find, after
19 reviewing all of the evidence, that the State has
20 proved that the defendant was only present at the scene
21 of a crime, and that they have not proved beyond a
22 reasonable doubt any other participation in a crime,
23 then you must find the defendant not guilty.

24 The law is that proof at the scene of the crime
25 is not sufficient to find someone guilty.

1 If a crime is committed by two or more people
2 who are acting together in committing a crime, the act
3 of one is the act of all. A person who joins with
4 another to commit an unlawful act is criminally
5 responsible for everything done by the other person
6 which happens as a probable or natural consequence of
7 the act done in carrying out the common plan or
8 purpose.

9 If two or more people are together, acting
10 together, assisting each other in committing the
11 offense, the act of one is the act of all. Or as it is
12 sometimes said, the hand of one is the hand of all.

13 Prior knowledge that a crime is going to be
14 committed, without more, is not sufficient to make a
15 person guilty of that crime. Mere knowledge that
16 another person is going to commit a crime, even if the
17 defendant is present when the crime is committed, is
18 not sufficient to convict the defendant as a principal.

19 Guilt as a principal is shown by actual or
20 constructive presence at the scene as a result of prior
21 arrangement. Therefore, a finding of prior arranged
22 plan or common scheme is necessary for a finding of
23 guilt as a principal.

24 The State must prove beyond a reasonable doubt
25 by competent evidence the theory of the hand of one is

1 the hand of all. A principal in a crime is one who
2 either actually commits the crime, or is present
3 aiding, abetting, or assisting in committing the crime.

4 When a person does an act in the presence of,
5 and with the assistance of another, the act is done by
6 both. Where two or more acting with a common plan or
7 intent are present at the commission of a crime, it
8 does not matter who actually commits the crime, all are
9 guilty.

10 The hand of one is the hand of all. Present at
11 the commission of a crime means to be sufficiently near
12 to aid and abet and assist in the commission of the
13 crime. However, mere presence at the scene of a crime
14 is not sufficient to convict one as a principal on the
15 theory of aiding and abetting.

16 Intent is also a necessary element, where there
17 must have been some common design, or intent to commit
18 the crime. And the crime must have been committed
19 pursuant thereto with the person aiding and abetting by
20 some overt act.

21 Intent means intending the result which actually
22 occurs, not accidentally or involuntarily. Intent may
23 be shown by acts and conduct of the defendant, and
24 other circumstances from which you may naturally and
25 reasonably infer intent. The State must prove these

1 elements beyond a reasonable doubt.

2 Ladies and gentlemen, each defendant is charged
3 with the crime of first degree burglary. First, the
4 state must prove beyond a reasonable doubt that the
5 defendant entered a dwelling without consent.

6 A dwelling is any building, or portion of a
7 building, in which a person ordinarily sleeps. The
8 State does not have to prove that force was used to
9 gain entry. If a person enters a building by using
10 deception, trick, misrepresentation to get consent to
11 enter, this is an entry without consent.

12 Next, the State must prove beyond a reasonable
13 doubt that the defendant intended to commit a crime,
14 either a felony or a misdemeanor, at the time of the
15 entry.

16 The mere entry into a dwelling without consent
17 is not burglary. If the intent to commit a crime is
18 formed after the entry, it is not burglary. On the
19 other hand, if the defendant intended to commit a crime
20 at the time of the entry, it is a burglary even if the
21 intent was abandoned after the entry.

22 It does not matter that the intended crime was
23 not completed. Intent may be shown by acts and conduct
24 of each defendant, and other circumstances from which
25 you may naturally and reasonably infer intent.

1 The State must prove beyond a reasonable doubt
2 that the defendant, when entering, while in the
3 dwelling, or when fleeing, caused physical injury to
4 anyone participating in the crime; or was armed with a
5 deadly weapon; or displays what is or appears to be a
6 firearm; or the defendant entered or remained in the
7 dwelling in the nighttime.

8 Nighttime is the period between sunset and
9 sunrise during which there is not enough daylight to
10 recognize a person's face except by artificial light or
11 moonlight.

12 Each defendant is also charged with the crime of
13 kidnapping. The State must prove beyond a reasonable
14 doubt that the defendant knowingly and unlawfully
15 seized, confined, inveigled, decoyed, kidnapped,
16 abducted, or carried away another person without
17 authority of law.

18 To do a thing unlawfully is to do it willfully
19 against the law. Knowingly means with knowledge
20 consciously, not accidentally. Seize means to take hold
21 of suddenly or forcibly.

22 Confine means to limit, restrict or enclose
23 within bounds, imprison or shut or keep in. Inveigle
24 means to lure, entice or lead astray by false
25 representation, promises, or other deceitful means.

1 Decoy means to lure by, or as if by decoy. A
2 decoy is something to entice a person into a trap.
3 Kidnap is to remove a person against his will by
4 unlawful force or by fraud. Abduct means to carry off
5 secretly or by force for an illegal purpose. Carry
6 away means to remove.

7 The State does not have to prove that the
8 defendant did all of these things. Instead, if you
9 find beyond a reasonable doubt that the defendant did
10 any of these things, you may find the defendant guilty
11 of kidnapping.

12 Something done without the authority of law is
13 something which the law does not sanction, permit,
14 allow, condone, or provide justification for. The
15 kidnapping does not have to be for any personal or
16 monetary gain or any illegal purpose, but may be for
17 any reason whatsoever.

18 Each defendant is charged with armed robbery.
19 In order to prove this offense, the state must first
20 prove beyond a reasonable doubt that the defendant took
21 personal property from the person or presence of
22 another person.

23 Property is in the presence of a person if it is
24 within the person's reach, inspection, observation or
25 control, so that person could, if not overcome with

1 violence or prevented by fear, keep possession of the
2 property.

3 The State must also prove beyond a reasonable
4 doubt that the defendant carried the property away
5 intending to permanently deprive the owner of the
6 property, and to keep the property from the defendant's
7 own use. The slightest removal of the property, or the
8 complete possession of the property, even for an
9 instant by each defendant, is sufficient to show a
10 taking and carrying away of the property.

11 The taking and carrying away of the property
12 must have been done with violence, or by putting the
13 owner of the property in fear of violence.

14 Finally, the State must prove beyond a
15 reasonable doubt that the defendant was armed with a
16 deadly weapon during the robbery. A deadly weapon is
17 any article, instrument, or substance which is likely
18 to cause death or great bodily harm.

19 Whether an instrument has been used as a deadly
20 weapon depends upon the facts and circumstances of each
21 case. The following are merely examples of instruments
22 which may be deadly weapons. A pistol, shotgun, rifle,
23 dirk, dagger, knife, or a sling-shot.

24 Ladies and gentlemen, we are now going to go
25 over the verdict forms. As I have indicated to you,

1 each defendant is charged separately by indictment.
2 Each defendant is charged with five separate
3 indictments. So there will be, for each defendant,
4 five separate verdict forms.

5 Ladies and gentlemen, the indictments will go
6 back to you, but the verdict forms clearly indicate the
7 indictment number and the defendant. Ladies and
8 gentlemen, I'm not going to read all ten verdict forms
9 to you. They are all substantially similar, with the
10 exception of the crime charged, the defendant's name,
11 and the indictment number.

12 Ladies and gentlemen, in the Court of General
13 Session, and this is the example, State of South
14 Carolina, County of Berkeley. There is a verdict form.
15 You will be given an option on the charge, we, the
16 jury, find the particular defendant not guilty or
17 guilt, you will select one.

18 As the foreperson, you are responsible for
19 completing all ten of these verdict forms. Mr.
20 Foreman, these are -- must be the unanimous decision of
21 the jury, which means all 12 of you must agree.

22 After you have come to a unanimous decision on
23 each of the verdict forms, make sure that you sign and
24 date the verdict forms. After you have done that, if
25 you will knock on the jury room door indicating to the

1 bailiff you have completed the verdict forms, we will
2 receive you back in the courtroom.

3 Ladies and gentlemen, please do not begin your
4 deliberations. We will begin gathering the verdict
5 forms and the evidence to come back to you. Once we
6 have done that, the bailiff will indicate to you that
7 you may begin your deliberations.

8 To my two alternates, you have completed your
9 service to this case at this time. But please, until I
10 have instructed you and I will release you personally,
11 do not begin any deliberations, do not discuss this
12 case with anyone in case I would need you to be part of
13 the 12.

14 Ladies and gentlemen, please be escorted out of
15 the courtroom. Please rise for the jury.

16 (Whereupon, the jurors exit the courtroom.)

17 THE COURT: Thank you, be seated. Any
18 objection, corrections or additions to the charges read
19 from the State?

20 MS. CORNWELL: None from the State, Your Honor.

21 THE COURT: From Mr. Fishburne?

22 MR. SHELTON: No, Your Honor.

23 THE COURT: From Mr. Thompson?

24 MR. MCCOY: No, Your Honor.

25 THE COURT: All right, thank you.

1 We will gather the exhibits, just the State's
2 exhibit. And, Mr. Shelton and Mr. Aylor, I just wanted
3 to take this opportunity to go over -- I have no idea
4 what the verdict is going to be, but I would like for
5 you to take this time, Mr. Sheldon, you have advised
6 your client, and, Mr. Aylor, you have advised your
7 client of the possible penalty of these charges.

8 Mr. Shelton?

9 MR. SHELTON: Yes, Your Honor.

10 MR. AYLOR: Yes, Your Honor.

11 THE COURT: You have advised your client of the
12 -- that these are violent and most serious?

13 MR. SHELTON: Yes, Your Honor.

14 MR. AYLOR: Yes, Your Honor.

15 THE COURT: And you have also advised your
16 client of his appeal rights?

17 MR. SHELTON: I will. Yes, Your Honor.

18 MR. AYLOR: Yes, Your Honor.

19 THE COURT: All right.

20 Mr. Thompson, just for the record I wish to note
21 you are still out on bond. And just for the record, I
22 have noted you have been here every time I have walked
23 out on the bench for either the morning break, to come
24 back in the morning, or for lunch break.

25 In no way am I doing this because I think that

1 you have violated your bond, but it is my policy if you
2 are out on bond that I'm going to take you into custody
3 while we await the verdict.

4 So, Mr. Thompson, at this point you will be
5 placed into custody awaiting the verdict. Thank you.

6 Is there anything further from the state?

7 MS. CORNWELL: No, Your Honor.

8 THE COURT: Mr. Shelton?

9 MR. SHELTON: No, Your Honor.

10 THE COURT: Mr. Aylor?

11 MR. AYLOR: No, Your Honor.

12 THE COURT: Counsel, on behalf of the State, and
13 on behalf of Mr. Fishburne and Mr. Thompson, I just
14 wish to thank you. I know this has been a very
15 difficult trial for very -- for a lot of reasons.

16 I just wish to thank you. You have been
17 courteous not only to the court, but to each other and
18 that is what makes this court system work the best.
19 You have been respectful to each other and to the
20 witnesses that have been here.

21 Mr. Fishburne and Mr. Thompson, I also wish to
22 thank you for your courtesy and respectfulness to the
23 court. And I appreciate you also being respectful and
24 courteous to the witnesses who have come to testify in
25 your case this week.

1 Mr. Fishburne and Mr. Thompson, you both have
2 had very competent and zealous representation. And
3 again, I do not know what the jury is going to do, what
4 the verdicts will be, but we will await until we find
5 out in just a few moments. Thank you both. You may be
6 seated.

7 All right, we will be at ease. Thank you.

8 (Whereupon, the jury began its deliberations at
9 11:52 a.m.)

10 (Whereupon, a recess was taken.)

11 (Whereupon, the parties reassembled to receive
12 the verdict at 12:32 p.m.)

13 THE COURT: I understand we have a verdict.

14 Is there anything before we bring in the jury?

15 MS. CORNWELL: Nothing from the State, Your
16 Honor.

17 MR. SHELTON: Nothing, Your Honor.

18 MR. AYLOR: Nothing, Your Honor.

19 THE COURT: All right.

20 (Whereupon, the jurors enter the courtroom.)

21 THE COURT: Thank you, be seated. I understand
22 the jury has reached a verdict. If you would hand the
23 verdict forms to the bailiff.

24 THE CLERK: These are Mr. Fishburne's verdicts.
25 Mr. Fishburne.

1 The State of South Carolina, County of Berkeley
2 versus Clarence J. Fishburne. Indictment number
3 2011-GS-08-1567, verdict on the charge of armed
4 robbery. We, the jury, find the defendant guilty.

5 State of South Carolina versus Clarence J.
6 Fishburne. Indictment number 2011-GS-08-1568, on the
7 charge of armed robbery. We, the jury, find the
8 defendant guilty.

9 State of South Carolina, County of Berkeley
10 versus Clarence J. Fishburne, indictment number
11 2011-GS-08-1569, on the charge of burglary first
12 degree. We, the jury, find the Defendant Fishburne
13 guilty.

14 State of South Carolina versus -- County of
15 Berkeley versus Clarence J. Fishburne. Indictment
16 number 2011-GS-08-1660, on the charge of kidnapping.
17 We, the jury, find the Defendant Fishburne guilty.

18 State of South Carolina, County of Berkeley
19 versus Clarence J. Fishburne. Indictment number
20 2011-GS-08-1661, on the charge of kidnapping. We, the
21 jury, find the Defendant Fishburne guilty.

22 And all were certified by the foreperson.

23 If this be your verdict, please signify by
24 raising up your right hand at this time.

25 THE COURT: Let the record reflect that all 12

1 jurors have raised their right hand. Thank you.

2 You may be seated, Mr. Fishburne.

3 Here are the indictments with reference to
4 Defendant Thompson. Please rise.

5 THE CLERK: State of South Carolina, County of
6 Berkeley versus Douglas Monray Thompson. Indictment
7 number 2011-GS-08-1570, on the charge of armed robbery.
8 We, the jury, find the Defendant Thompson guilty.

9 State of South Carolina, County of Berkeley
10 versus Douglas Monray Thompson, indictment number
11 2011-GS-08-1571, on the charge of armed robbery. We,
12 the jury, find the Defendant Thompson guilty.

13 State of South Carolina, County of Berkeley
14 versus Douglas Monray Thompson, indictment number
15 2011-GS-08-1572, on the charge of burglary first
16 degree. We, the jury, find the Defendant Thompson
17 guilty.

18 State of South Carolina, County of Berkeley
19 versus Douglas Monray Thompson, indictment number
20 2011-GS-08-1658 on the charge of kidnapping. We, the
21 jury, find the Defendant Thompson guilty.

22 State of South Carolina, County of Berkeley
23 versus Douglas Monray Thompson, indictment number
24 2011-GS-08-1659, on the charge of kidnapping. We, the
25 jury, find the Defendant Thompson guilty.

1 All certified by the foreperson.

2 If this be your verdict, please signify by
3 raising up your right hand at this time.

4 THE COURT: Let the record reflect that all 12
5 jurors have raised their right hand.

6 Thank you, you may be seated. Anything before I
7 relieve the jury from the state?

8 MS. CORNWELL: No, Your Honor.

9 THE COURT: Mr. Shelton?

10 MR. SHELTON: Your Honor, we would ask that the
11 jury be polled.

12 THE COURT: And do you concur in that request,
13 Mr. Aylor?

14 MR. AYLOR: I do, Your Honor.

15 THE COURT: All right, we will poll as to both
16 defendants.

17 THE CLERK: As to Defendant Fishburne.

18 Juror Number 82.

19 A JUROR: Guilty.

20 THE CLERK: Is this your verdict?

21 A JUROR: Yes.

22 THE CLERK: Is this still your verdict?

23 A JUROR: Yes.

24 THE CLERK: Juror number 194. Is this your
25 verdict?

1 A JUROR: Yes.

2 THE CLERK: Is this still your verdict?

3 A JUROR: Yes.

4 THE CLERK: Juror number 51. Is this your
5 verdict?

6 A JUROR: Yes.

7 THE CLERK: Is this still your verdict?

8 A JUROR: Yes.

9 THE CLERK: Juror number 189. Is this your
10 verdict?

11 A JUROR: Yes.

12 THE CLERK: Is this still your verdict?

13 A JUROR: Yes.

14 THE CLERK: Juror number 123. Is this your
15 verdict?

16 A JUROR: Yes.

17 THE CLERK: Is it still your verdict?

18 A JUROR: Yes.

19 THE CLERK: Juror 163. Is this your verdict?

20 A JUROR: Yes.

21 THE CLERK: Is it still your verdict?

22 A JUROR: Yes.

23 THE CLERK: Juror 216. Is this your verdict?

24 A JUROR: Yes.

25 THE CLERK: Is it still your verdict?

1 A JUROR: Yes.

2 THE CLERK: Juror 46. Is this your verdict?

3 A JUROR: Yes.

4 THE CLERK: Is this still your verdict?

5 A JUROR: Yes.

6 THE CLERK: Juror 154. Is this your verdict?

7 A JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 A JUROR: Yes.

10 THE CLERK: Juror 7, is this your verdict?

11 A JUROR: Yes.

12 THE CLERK: Is it still your verdict?

13 A JUROR: Yes.

14 THE CLERK: Juror 133. Is this your verdict.

15 A JUROR: Yes.

16 THE CLERK: Is this still your verdict?

17 A JUROR: Yes.

18 THE CLERK: And Juror 91. Is this your verdict?

19 A JUROR: Yes.

20 THE CLERK: Is this still your verdict?

21 A JUROR: Yes.

22 THE CLERK: Your Honor, I have polled the jury
23 on Mr. Fishburne and the verdict stands.

24 THE COURT: All right. As to Defendant
25 Thompson, same questions.

1 THE CLERK: Juror 82. As to Defendant Thompson
2 is this your verdict?

3 A JUROR: Yes.

4 THE CLERK: Is this still your verdict?

5 A JUROR: Yes.

6 THE CLERK: Juror 194. Is this your verdict?

7 A JUROR: Yes.

8 THE CLERK: Is this still your verdict?

9 A JUROR: Yes.

10 THE CLERK: Juror 51. Is this your verdict?

11 A JUROR: Yes.

12 THE CLERK: Is this still your verdict?

13 A JUROR: Yes.

14 THE CLERK: Juror 189. Is this your verdict?

15 A JUROR: Yes.

16 THE CLERK: Is it still your verdict?

17 A JUROR: Yes.

18 THE CLERK: Jury 123. Is this your verdict?

19 A JUROR: Yes.

20 THE CLERK: Is it still your verdict?

21 A JUROR: Yes.

22 THE CLERK: Juror 163. Is this your verdict?

23 A JUROR: Yes.

24 THE CLERK: Is it still your verdict?

25 A JUROR: Yes.

1 THE CLERK: Juror 216. Is this your verdict?
2 A JUROR: Yes.
3 THE CLERK: Is it still your verdict?
4 A JUROR: Yes.
5 THE CLERK: Juror 46. Is this your verdict?
6 A JUROR: Yes.
7 THE CLERK: Is it still your verdict?
8 A JUROR: Yes.
9 THE CLERK: Juror 154. Is this your verdict?
10 A JUROR: Yes.
11 THE CLERK: Is It still your verdict?
12 A JUROR: Yes.
13 THE CLERK: Juror 7. Is this your verdict?
14 A JUROR: Yes.
15 THE CLERK: Is it still your verdict?
16 A JUROR: Yes.
17 THE CLERK: Juror 133. Is this your verdict?
18 A JUROR: Yes.
19 THE CLERK: Is this still your verdict?
20 A JUROR: Yes.
21 THE CLERK: And Juror 91. Is this your verdict?
22 A JUROR: Yes.
23 THE CLERK: Is this still your verdict?
24 A JUROR: Yes.
25 THE CLERK: Your Honor, I have polled the jury

1 on Defendant Thompson and the verdict stands.

2 THE COURT: Thank you.

3 Anything further required of the State?

4 MS. CORNWELL: No, Your Honor.

5 THE COURT: Of the jury by Defendant Fishburne?

6 MR. SHELTON: None from the jury.

7 THE COURT: Thank you, Mr. Shelton.

8 MR. AYLOR: Not by the jury, Your Honor.

9 THE COURT: Okay, thank you.

10 Ladies and gentlemen, this completes your
11 service for this case. It also completes your service
12 for the week. Ladies and gentlemen, if you would
13 please retire to your jury deliberation room I will be
14 there in just a few moments. You are excused.

15 Please rise for the jury.

16 (Whereupon, the jurors exit the courtroom.)

17 THE COURT: Thank you please be seated.

18 Outside the presence of the jury, anything
19 further required from the State?

20 MS. CORNWELL: No, Your Honor.

21 THE COURT: Outside the presence of the jury,
22 Mr. Shelton, on behalf of your client?

23 MR. SHELTON: We renew all motions made
24 pretrial, during trial, including directed verdict
25 motions, and same arguments.

1 THE COURT: And, Mr. Aylor, on behalf of your
2 client?

3 MR. AYLOR: The same, Your Honor. We renew all
4 motions pretrial, as well during trial and directed
5 verdict, same argument.

6 THE COURT: All right, counsel. As to Defendant
7 Clarence Fishburne and to Defendant Douglas Thompson, I
8 deny, for the reasons previously stated during my
9 ruling on all the pretrial motions and matters before
10 jury selection, as well as once the jury was selected,
11 specifically dealing with the identification, the
12 lineup and motions to suppress.

13 I am denying your request for a directed
14 verdict. You have made your motions for directed
15 verdict made at the close of the State's case, and then
16 once your cases, individually, you had rested. For all
17 of the reasons that I denied your motion for directed
18 verdict at that time on all five indictments related to
19 each defendant. I'll note your exception for the
20 record.

21 Anything further, Mr. Shelton?

22 MR. SHELTON: Your Honor, I would also ask for a
23 motion for a new trial based off the quickness of the
24 jury verdict, and the passion -- as a result of passion
25 that the quickness of the jury verdict, Your Honor. I

1 would request a new trial.

2 THE COURT: Any other grounds, Mr. Shelton?
3 Motion for new trial on all indictments?

4 MR. SHELTON: On all indictments.

5 THE COURT: All right.

6 Do you join in that motion?

7 MR. AYLOR: I join in that, Your Honor.

8 THE COURT: Based upon evidence that was
9 presented, there is nothing that indicates to the Court
10 that the jury's verdict was based on passion,
11 prejudice, or any other improper motive. The jury
12 deliberated for approximately 35 minutes. The motion
13 for new trial based upon the quickness of the
14 deliberations is denied.

15 Anything further, Mr. Shelton?

16 MR. SHELTON: No, Your Honor.

17 THE COURT: Mr. Aylor?

18 MR. AYLOR: No, Your Honor.

19 THE COURT: Is the State prepared to go forward
20 with sentencing at this time? I understand that you
21 will have to prepare the sentencing sheets; is that
22 correct?

23 MS. CORNWELL: Your Honor, if we can have a
24 moment.

25 THE COURT: Mr. Shelton, do you wish to proceed

1 with sentencing at this time?

2 MR. SHELTON: I guess. We are prepared to go,
3 yes, Your Honor.

4 THE COURT: Mr. Aylor.

5 MR. AYLOR: Your Honor, I believe my client's
6 family is outside.

7 THE COURT: If there is nothing further required
8 of the jury, I'm going to release the jury and have the
9 foreperson sign the indictments.

10 And then if you'll let me know when the family
11 members are here, I will wait until the family members
12 arrive.

13 We will be at ease. Thank you.

14 (Whereupon, a recess was taken.)

15 THE COURT: Does the State have the sentencing
16 sheets?

17 MS. CORNWELL: Yes, Your Honor, I'm signing them
18 now.

19 THE COURT: Mr. Shelton, Mr. Aylor, are you
20 prepared to go forward? We were waiting for the family
21 members.

22 MR. AYLOR: Your Honor, I just spoke with the
23 family members. They were walking in.

24 MR. SHELTON: We are prepared.

25 THE COURT: All right.

1 THE COURT: solicitor, I need the possible
2 penalty for armed robbery.

3 MS. CORNWELL: Your Honor, the penalty for armed
4 robbery is a minimum of 10 years up to 30 years.

5 THE COURT: Do you agree with that, Mr. Shelton?
6 Is that what you advised your client?

7 MR. SHELTON: Yes, Your Honor.

8 THE COURT: And it is a violent, and a most
9 serious; is that correct?

10 MS. CORNWELL: Yes, Your Honor.

11 THE COURT: Do you agree with that, Mr. Shelton?

12 MR. SHELTON: Yes, Your Honor.

13 THE COURT: And the possible punishment for
14 burglary in the first degree?

15 MS. CORNWELL: Your Honor, the State contends
16 that it's a minimum of 15 years up to life.

17 THE COURT: Do you agree with that, Mr. Shelton?

18 MR. SHELTON: Yes, Your Honor

19 THE COURT: Did you advise your client of such?

20 MR. SHELTON: Yes, Your Honor.

21 THE COURT: Did you also advise your client it
22 is a violent and most serious?

23 MR. SHELTON: Yes, Your Honor.

24 THE COURT: And kidnapping.

25 MS. CORNWELL: Your Honor, that's not to exceed

1 30 years.

2 THE COURT: And that is also a violent and most
3 serious?

4 MS. CORNWELL: Yes, Your Honor.

5 THE COURT: Did you advise your client of the
6 possible punishment?

7 MR. SHELTON: Yes, Your Honor.

8 THE COURT: All right. Let me -- do I need to
9 hear the facts again? I sat through trial.

10 MS. CORNWELL: Your Honor, I believe --

11 THE COURT: If there is anything I didn't hear,
12 I'd be happy to hear from you.

13 MS. CORNWELL: I believe you've heard everything
14 as it relates to the facts and the testimony. It was a
15 horrible event for the eight-month pregnant wife, and
16 the three-year-old child which makes it extremely
17 egregious.

18 Mr. Fishburne does have a prior record. He has
19 a '99 possession with the intent to distribute cocaine;
20 2001 unlawful carrying of a weapon; 2003 failure to
21 stop for a blue light; 2004 possession of a firearm by
22 a felon; and 2008 possession of cocaine; and 2008
23 fraudulent check.

24 THE COURT: How long has he been in custody?

25 MS. CORNWELL: He has been in custody since the

1 day of his arrest which was August 7, 2010.

2 THE COURT: All right. Anything further from
3 the State?

4 MS. CORNWELL: Your Honor, based on these crimes
5 the State would ask for 30 years.

6 THE COURT: Do I need to hear from the victims?
7 Anyone else?

8 MS. CORNWELL: Your Honor, the victims are
9 comfortable with what you've heard.

10 THE COURT: All right, Mr. Shelton. Your client
11 is still under oath. I placed him under oath prior to
12 advising him of his right to testify. Mr. Fishburne, I
13 remind you that you are fill under oath. All right.

14 Mr. Shelton, I'm happy to hear from you, your
15 client, and/or any family members that wish to address
16 the Court at this time.

17 MR. SHELTON: Thank you, Your Honor, may it
18 please the Court.

19 As far as my client talking with Your Honor, I
20 have advised him for appeal issues regarding that.

21 However, Your Honor, Clarence is 33 years of
22 age. He has lived his whole life in South Carolina.
23 He does have an out-of-state record. There is some
24 family in New York.

25 THE COURT: Tell me the out-of-state record, is

1 that everything the state has indicated to me or is it
2 additional?

3 MR. SHELTON: Yes, that's the felon in
4 possession of a handgun.

5 Your Honor, he does have three children. One
6 daughter that is 13 years of age, almost 14. And one
7 son that's 3, 4 years of age, Your Honor. In addition
8 he does have a newborn that since he has been
9 incarcerated was born.

10 Your Honor, he has been incarcerated since
11 August 7th of 2010. You've heard the facts of the
12 case. While we respect the jury's verdict, obviously
13 we are here, pled not guilty.

14 We ask Your Honor to fashion the appropriate
15 sentence. We beg the Court not to impose the life
16 without parole.

17 THE COURT: Is there anyone else who wishes to
18 address the Court?

19 MR. SHELTON: I have talked to his grandmother.
20 I believe she was planning on trying to be here on the
21 last term court, which that was continued by the State.

22 And his aunt and his sister, we have been in
23 contact, they were able to get him clothes. So he does
24 have family here that he has been in contact with and
25 has been talking with he does have family in the

1 community, Your Honor. Just they have not been able to
2 make it to court unfortunately because of work and
3 school and such.

4 THE COURT: And your client, under your advice,
5 wishes not to address the court; is that correct?

6 MR. SHELTON: He does want to say something,
7 Your Honor.

8 THE COURT: All right.

9 THE DEFENDANT FISHBURNE: Your Honor, I wanted
10 to say due to respect, you know. My time I spent here
11 you know I changed my life, I turned my life over to
12 God.

13 And doing that, I really see some things, you
14 know, I seen some things and I saw some things in my
15 life that I really did wrong in the past, you know.
16 Some things I ask God to forgive me for, you know what
17 I'm saying.

18 I know some things you just do off of substances
19 as well, you know, alcohol and drugs, you know, off
20 instinct from the alcohol and the drugs, you know.

21 And I'm truly sorry for what happened to these
22 people, you know. My heart goes to them. I pray for
23 them. I ask God to forgive me for whatever happened,
24 you know. I just want to say that, you know, God is
25 love, you know. And I chose him in my life, so that

1 means I'm love too.

2 And he says he's within you, you know what I'm
3 saying. So I'm within him so we is one. We all is
4 one. So we must love each other no matter what,
5 regardless. That's God. We must love each other. See
6 what I'm saying.

7 I'm saying with due respect, Your Honor, I'm
8 saying be reasonable, you know. I want to soon come
9 home sometime to see my kids, be with my family again
10 if God is willing.

11 MR. SHELTON: Thank you, Your Honor.

12 THE COURT: Anything further, Mr. Shelton?

13 MR. SHELTON: No, Your Honor.

14 THE COURT: Anything further from the State?

15 MS. CORNWELL: No, Your Honor.

16 THE COURT: Mr. Fishburne, it's the order of the
17 Court on indictment 2011-GS-08-1567 that you be
18 committed to the State Department of Correction for a
19 term of 20 years. I give you credit for the time that
20 you have served.

21 That is concurrent with GS-11 -- excuse me,
22 2011-GS-08-1568, that you be committed to the State
23 Department of corrections for a term of 20 years. That
24 is current to the previous indictment, and it is
25 concurrent to GS -- 2011-08-1569, that you be committed

1 to the State Department of Corrections for a term of 20
2 years, credit for time served, concurrent to the
3 previous two indictments and to 2011-GS-08-1660, that
4 you be committed to the State Department of Corrections
5 for a term of 20 years.

6 It's the order of the court on indictment
7 2011-GS-08-1661 that you be committed to the State
8 Department of Corrections for a term of 20 years.
9 You're to be given credit for the time that you have
10 served.

11 Mr. Fishburne, good luck to you.

12 THE DEFENDANT FISHBURNE: Thank you, ma'am.

13 MR. SHELTON: Thank you, Your Honor.

14 THE COURT: Mr. Aylor, are you prepared to go
15 forward at this time?

16 MR. AYLOR: We are, Your Honor.

17 THE COURT: As to Mr. Thompson, anything further
18 from the State?

19 MS. CORNWELL: No, Your Honor. Mr. Thompson
20 does not have a prior record. We would also recommend
21 30 years for this defendant.

22 THE COURT: Mr. Aylor, I am happy to hear from
23 you.

24 MR. AYLOR: Thank you, Your Honor, may it please
25 the Court. As stated by the State, my client has no

1 prior record. He's a very young man, he's 21 years of
2 age. He's single. He's been in school up to this
3 point. He is not married. He has no children.

4 Born and raised in this area. Raised by his
5 mother, who is present in the courtroom. Some more of
6 his family as well. I'm not sure if any one of them
7 would like to speak. They are here to support him.

8 THE COURT: Does anyone wish to speak?

9 MR. AYLOR: His mother Jennifer Thompson does.

10 THE COURT: All right. She needs to come
11 forward.

12 Ma'am, I need you to state your full name for
13 the record and please spell your last name.

14 MS. THOMPSON: My name is Jennifer Thompson. My
15 last name is spelled T-H-O-M-P-S-O-N.

16 THE COURT: Yes, ma'am. I'm happy to hear from
17 you.

18 MS. THOMPSON: Thank you. I thank you for
19 letting me come up here at this time and speak on
20 behalf of my son, Douglas Monray Thompson. I love my
21 son. I love all of my children.

22 Monray is a very, very, very good young man.
23 Monray has a very, very good heart. Monray is
24 currently in school at Trident Technical College to
25 become a pharmacist.

1 Monray had counseled other children before he
2 was incarcerated. He used to be a counselor at
3 Metanoya Church for Little Youth.

4 THE COURT: I'm very familiar with that program.

5 MS. THOMPSON: Yeah. Monray has been my rock at
6 home. I have a little young daughter, she is about 12
7 years old now. Whenever I go through situations with
8 her, and I need a little help in the counseling area,
9 there is Monray. He has always been the voice of
10 reason. He has always been the voice of guidance.

11 It's very hard for me to find myself in this
12 position today only because I know of the young man
13 that I raised. I raised him in a Christian
14 environment. I come from a Christian background. I
15 raised him to be good to other people. I especially
16 raised him to be good to females and women.

17 He was the kind to tell me to always lock my
18 door at night. Don't be so giving when I see people
19 that are on the side of the road and they need money.
20 I just handed them the money. He's always told me to
21 protect myself.

22 So it's very unfamiliar to find myself in this
23 position. Especially with Monray, because I know not
24 this young man. I know the young man that I raised
25 from a little boy that was the happy-go-lucky child.

1 I know the young man that I raised with respect.
2 I know the young man that I raised with ambition for
3 life. And now, today, I know he will still have the
4 ambition, because I have always taught him to keep his
5 head up. I always taught him to be strong no matter
6 what the situation.

7 And I just wanted to say that this young man
8 that I raised, I know what people have probably heard
9 about him today is so very different from what came out
10 on the statements today about my son. And I just want
11 everybody to, if you believe in God, and you have a
12 Christian environment and Christian background, say
13 your prayers for him.

14 And I thank you all for your time. God Bless.

15 THE COURT: Thank you, Mrs. Thompson, for your
16 very kind and well-spoken words.

17 Anything else, Mr. Aylor? I will hear from one
18 more.

19 Sir, I need you to state your full name for the
20 record, and please spell your last name.

21 MR. THOMPSON: My name is Thomas Thompson. Last
22 name, T-H-O-M-P-S-O-N.

23 I'm a deacon at Tabernacle of God Soul Saving
24 Center in Strawberry. I'm also a minister there.

25 My family is the type of family, a

1 well-respected family. We respect the law. All of us
2 have been taught that way from my mother, from my
3 mother to wife to me and my kids.

4 Monray is a good kid. He is a good young man.
5 He was raised up in my household with my son. My son
6 and him conspiring together to go to college. My son
7 is in college right now, he's a junior in college.

8 Monray was in college. Was just getting ready
9 to go to college when all this stuff erupted in his
10 life. We know him to be a good kid. My family is that
11 way. If you knew anything about my family, you'd know
12 what I'm saying is true. And just to have this come
13 about is like a blow to the family.

14 And what is so troubling for us right now is the
15 fact that we know in our hearts that he didn't do it.
16 But the law made its case and came to this conclusion.
17 But for him to spend 20 years in jail will be a long
18 time for a young man who had aspirations to become
19 something, who wanted to become something.

20 And for him to spend his time in jail for
21 something I feel in my heart he didn't do, is something
22 like a travesty. But all I'm saying is this, he comes
23 from a well-respected family. A family of people who
24 love him. We all love him because we know him.

25 We're not saying this because we think we know

C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record, and of all the proceedings had and evidence introduced in the above captioned case, relative to appeal, in the Circuit Court for South Carolina, on the indicated date.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

-----*Anne Bouley Meyer*-----

Anne Bouley Meyer, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DOUGLAS M. THOMPSON,

APPELLANT

APPELLATE CASE NO. 2012-212427

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress the identification evidence when the show-up identification procedure used was unduly suggestive, inherently unreliable, and conducive to irreparable mistaken identification?

STATEMENT OF THE CASE

In October of 2010, the Berkeley County Grand Jury indicted Douglas Thompson on two counts of armed robbery, two counts of kidnapping and one count of burglary first degree, indictments #2010-GS-08-1653, 1654, 1655, 1656 and 1657. In November 2011, the indictments were amended and the Berkeley County Grand Jury again indicted Thompson on two counts of armed robbery, two counts of kidnapping and one count of burglary first degree, indictments 32011-GS-08- 1567, 1568, 1569, 1660 and 1661. On November 7-11, 2011, Thompson and his co-defendant, Clarence Fishburne, proceeded to trial before the Honorable Kristi L. Harrington and a jury. Thompson was represented by David Aylor and Peter McCoy while Fishburne was represented by Chad Shelton and David Schwacke. The state was represented by Ashley Cornwell and Bryan Alfaro. The jury found both defendants guilty as charged. Judge Harrington sentenced Thompson to fifteen years concurrent for each charge. A timely notice of intent to appeal was filed. This appeal follows.

ARGUMENT

The trial judge erred in refusing to suppress the identification evidence when the show-up identification procedure used was unduly suggestive, inherently unreliable, and conducive to irreparable mistaken identification.

On August 6, 2010, at about 11:30 at night Paulo Silva and Adao Olivera were outside on the porch of their townhouse when they were approached and robbed at gunpoint by three black men. Silva is married to Olivera's niece, Paulino Silva, and they all lived together in the townhouse with the Silva's three year old daughter. R. p. 252, lines 20 – p. 253, lines 1-12. The three men forced Silva and Olivera inside the house. R. p. 255, lines 1-12. Once inside the house, Silva saw his wife and told her, in Portuguese, to go get help because they were being robbed. The wife left the house. R. p. 255, lines 10-12. Two of the three men forced Silva and Olivera upstairs. R. p. 256, lines 1-13.

When Ms. Silva fled the townhouse, she ran next door to get help from her neighbor, Lucineia Rodriguez. R. p. 502, lines 13 – p. 503, line 1. Ms. Rodriguez became concerned that the Silva's child was still in the house asleep. Ms. Rodriguez went next door, entered the house, saw a man with a gun downstairs, went upstairs, saw a man holding Silva and Olivera in one bedroom, and then she went into the other bedroom where the child was sleeping. R. p. 501, lines 18 – p. 512, lines 1-2. The robbers fled when Ms. Rodriguez entered the child's bedroom. R. p. 513, lines 15-22.

A neighbor called the police. The 911 operator testified that the caller described a robbery by two black males wearing red and white striped shirts. R. p. 171, lines 17-19. Deputy Jason Charlton with the Berkeley County Sheriff's Department arrived at the townhouse and learned that the suspects could possibly be walking up Harbor Lake Road. R. pp. 299-303. The deputy also

learned that a laptop computer had been taken from the townhouse. R. p. 301, lines 19-25. The only description given to the deputy of the suspects was that they were black males. R. p. 88, lines 12 – p. 89, 90, lines 1-10. The deputy drove down Harbor Lake Road and saw three black males walking and one of them was carrying a laptop. R. p. 304, lines 18-25. The deputy stopped to speak with the three individuals and one of them fled. R. p. 305, lines 3-14. The deputy identified the two remaining individuals as Thompson and co-defendant Fishburne from the valid identifications they provided to the deputy. R. p. 305, lines 22 – p. 306, lines 1-5. The deputy testified that Thompson was carrying the laptop. R. p. 306, lines 6-9.

Appellant and the co-defendant were detained on the road by another officer while Deputy Charlton returned to the townhouse. The deputy brought Silva, Olivera and a neighbor, Rubio Hilario, who served as a translator, to the road where appellant and the co-defendant were detained. R. p. 309, lines 2 – p. 310, 311, lines 1-21. According to the deputy, Silva and Olivera identified appellant and co-defendant as the robbers. R. p. 311, lines 22 – p. 312, lines 1-25.

Prior to trial appellant moved to suppress the identifications made by Silva and Olivera. R. p. 28, lines 12-15. The trial judge conducted a hearing pursuant to Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). (R. pp. 34 – 212). After the hearing, Thompson's counsel argued that the identification testimony should be suppressed as unduly suggestive. R. pp. 193 – 202. Counsel for co-defendant Fishburne joined in the motion to suppress and made additional argument about the unreliability of the identification. R. p. 202, lines 9 – 25. After the State argued, Thompson's counsel responded, again arguing that the identification testimony should be suppressed. R. p. 208, lines 24 – p. 209, 210, lines 1-15. The trial judge denied the motion to suppress the identification testimony. R. p. 210, lines 16 – p. 211, 210, lines 1-5. The trial judge erred.

Deputy Charlton testified during the Biggers hearing that he drove Silva, Olivera and Rubio, the translator, to the side of the road where appellant and the co-defendant had been detained. R. p. 43, lines 3-18. When asked what he told the three men the deputy testified, "I told them we found two guys walking up the street that may of [sic] may not been the persons who committed the act. So we would need them to tell whether they were or not." R. p. 43, lines 19-22. The officer admitted that appellant and the co-defendant were the only African American males at the scene and the only two persons not in uniform. R. p. 61, lines 17-25. The deputy admitted that he did not separate Silva and Olivera for purposes of making the identification. They remained in the patrol car about 20 to 30 feet away during the identification. R. 45, ll. 1 - 24; R. p. 63, lines 19 - p. 64, lines 1-4.

The deputy testified that at the time of the identification appellant and the co-defendant were standing in front of a police vehicle handcuffed with their hands behind their backs, although the handcuffs were not visible. R. p. 44, lines 7-20. The deputy testified that the lighting at the scene was "not great" and he used the spotlight on his car to illuminate the area. R. p. 44, lines 21 - p. 45, lines 1-11.

Deputy Robert Ollic testified that he arrived after the men were detained. He kept watch over the two suspects while Deputy Charlton went to speak with the victims. R. 108, lines. 5 - R. 110, line 6. Deputy said the patrol car was a marked unit. He also stated that a computer was laying on the ground where the suspects were stopped. He thought the victims may have seen it because it was still on the ground. R. 95, line 5 - 25; R. 118, line 1 - 25.

Silva testified at the Biggers hearing that when he saw the two individuals detained by the police he recognized the individual who choked Olivera immediately, but was unsure of the second man. Eventually he identified the second man as one of the robbers but did not know if the second

individual was the man with the gun or the man who stayed downstairs by the door. R. p. 153, lines 3-20. Silva admitted that the two individuals detained by the police were not wearing the same clothes as the individuals who entered the house and robbed them. R. p. 157, lines 3-5; p. 167, lines 21-25. Silva admitted giving a statement that one of the individuals was wearing a blue shirt but neither of the individuals detained was wearing a blue shirt. R. p. 155, lines 15-21. Both Silva and Olivera testified that in their opinion all African American males have similar facial features. (R. p. 147, lines 20-23; p. 168, lines 1-3). Olivera did not see the laptop at the show-up. R. 146, lines 1 – 10.

The deputy testified that Silva and Olivera told him that the robbers took money in denominations of one hundred dollar bills and two dollar bills, a Brazilian tradition. R. p. 67, lines 9-13. Thompson had money on him but there were no one hundred dollar bills or two dollar bills found on either Thompson or Fishburne. R. p. 67, lines 14 – p. 68, lines 1-2. The deputy testified that he found two cell phones in appellant's pocket but the deputy did not independently verify ownership of the cell phones and both phones were returned to Olivera. R. p. 64, line 25 – p. 65, lines 1-25. Silva's Blackberry phone, stolen in the robbery, was never recovered. R. p. 68, lines 3-6. There was no clothing recovered matching the descriptions provided. R. p. 423, lines 19 – p. 424, lines 1-11. The state admitted that they could not clear up the confusion about the discrepancy in the clothing because the description was not clear. R. 187, lines. 1 – 9. The gun was never recovered. R. p. 424, lines 12-13. The third suspect was never apprehended. R. p. 399, lines 5-18.

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). The United States Supreme Court has developed a two-prong inquiry to determine the admissibility

of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). First, a court must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.*

In State v. Liverman, 727 S.E.2d 422, 426 (2012) the South Carolina Supreme Court wrote:

In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of eyewitness identification. Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Biggers, 409 U.S. at 198, 93 S.Ct. 375. Under the totality of the circumstances, the factors to be considered in assessing the reliability of an otherwise unduly suggestive identification procedure are: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Biggers, 409 U.S. at 199-200, 93 S.Ct. 375).

Single person show-ups are particularly disfavored in the law. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d. 1199 (1967) (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct.App.1993) (single person show-ups are particularly disfavored in the law).

The state relied on the case of State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003), because the Court of Appeals found the identification reliable in the totality of the circumstances. The witness observed Brown breaking into a drugstore late at night right across the street from the witness's apartment. Brown is distinguished because the witness said his degree of attention was 100% and he gave a detailed and accurate description.

In Thompson's case, the victim Silva was not sure of the identity of the man who held a gun on him and was close face to face for a period of time. Neither Silva nor Olivera gave a detailed nor accurate description of the suspects.

The single person show up identification used in the present case was suggestive. The judge, however, found that the identification was not unduly suggestive stating, "Although the show up was suggestive, it was not unduly suggestive. And as such the Court must determine if the ID given by the victims was so reliable that no substantial likelihood of misidentification existed." R. p. 211, lines 11-15. The judge noted that the victims had an opportunity to view the suspects and provided similar descriptions; one victim indicated certainty with regard to the identification of one of the suspects and that a short amount of time elapsed between the robbery and the show-up identification. R. p. 211, lines 16 – p. 212, lines 1-2. The judge then stated, "Based upon all of those factors, I am denying your motion to suppress the identification as to Mr. Fishburne and to Mr. Thompson. I'll note your exception for the record." R. p. 212, lines 2-5. Appellant renewed the objection to the identification testimony when Silva testified. R. p. 260, lines 7-8.

The judge erred in failing to review the Biggers factors under the totality of the circumstances. The judge failed to address the lack of a prior description other than black males

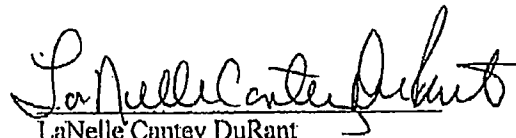
wearing either a blue shirt or a red and white striped shirt. The defendants were sitting in a marked patrol car with a spotlight on them.

Based on the totality of the circumstances surrounding the suggestive show up identification procedure, including the fact that the only prior description provided was that the suspects were black males wearing either a blue shirt or a red and white striped shirt and neither appellant nor the co-defendant's clothing matched the description and both witnesses admitted to difficulty with cross racial identification, there is a substantial likelihood that appellant was irreparably misidentified and the identification is unreliable as a matter of law.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

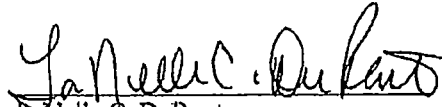
ATTORNEY FOR APPELLANT

This 16th day of September, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 16th, 2013

A handwritten signature in black ink, reading "LaNelle C. DuRant". The signature is fluid and cursive, with the first name "LaNelle" and last name "DuRant" clearly distinguishable.

LaNelle C. DuRant

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

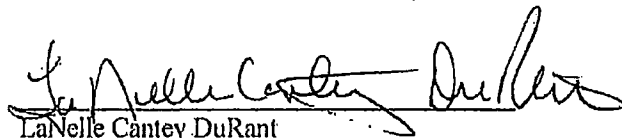
DOUGLAS M. THOMPSON,

APPELLANT

APPELLATE CASE NO. 2012-212427

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of September, 2013.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of September, 2013.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2011-203366

THE STATE,

Respondent,

vs.

DOUGLAS MONRAY THOMPSON,

Appellant.

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STATEMENT OF ISSUE ON APPEAL

The trial judge committed no error in admitting evidence of the victims' out-of-court identifications of Appellant and his accomplice as the perpetrators of the charged offenses because the show-up identification procedure that was employed in Appellant and his accomplice's case was not unduly suggestive and the identification evidence was still reliable under the totality of the circumstances even if the show-up identification procedure was unduly suggestive. However, even assuming the trial judge somehow erred in admitting the identification evidence, any error was entirely harmless in light of the other overwhelming evidence of guilt presented during trial and the procedural safeguards in place that enabled Appellant and his accomplice to call into question the reliability of the identification evidence.

STATEMENT OF THE CASE

In August of 2010, Appellant Douglas Monray Thompson and his accomplice, Clarence J. Fishburne, were arrested following an investigation into a home invasion and robbery. In October of 2010, the Berkeley County grand jury indicted Appellant and Fishburne for two counts each of armed robbery, two counts each of kidnapping, and one count each of first-degree burglary. In November of 2011, the Berkeley County grand jury re-indicted Appellant and Fishburne for the same offenses. On November 7, 2011, a jury trial was commenced in the Berkeley County court of general sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant and Fishburne as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of fifteen years for each of his convictions and sentenced Fishburne to concurrent terms of imprisonment of twenty years for each of his convictions. Subsequently, Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Around 10:30 p.m. or 11:00 p.m. on the evening of August 6, 2010, Adao Olivera went out onto the back porch of the apartment he shared in Goose Creek, South Carolina, with his pregnant niece, Paulino Silva ("Paulino"), Paulino's husband, Paulo Silva ("Paulo"), and Paulino and Paulo's young daughter, Carrie, to smoke a cigarette. (R. p. 137; pp. 252-253; p. 264; pp. 438-439; pp. 501-502). A little while later, Paulo joined Olivera on the back porch and began speaking with him. (R. p. 253; p. 287; pp. 438-439; pp. 501-502). A few minutes after that, three black males approached them, displayed a gun, demanded that they give them money, took Paulo's wallet, grabbed Olivera, and began choking him. (R. p. 253; p. 287; pp. 438-440; pp. 501-502). The man with the gun then insisted that Paulo open the back door to the apartment, and Paulo reluctantly did so. (R. p. 255; p. 440; p. 508). When he opened the back door, Paulo saw Paulino, told her they were being robbed, and asked her to go for help in Portuguese. (R. p. 255; p. 502). Paulino then fled from the apartment through the front door before Paulo, Olivera, and the robbers entered the apartment. (R. p. 255; p. 440; p. 502).

After entering the apartment, the gunman demanded to know where Paulo's wife was, and Paulo told him that she was in the front room. (R. p. 255). The men then went to the front room and did not find Paulino. (R. p. 255). In response, the gunman ordered Paulo and Olivera to go upstairs, and Paulo, Olivera, the gunman, and another of the robbers went upstairs and entered one of the bedrooms while the other robber remained downstairs. (R. pp. 255-257; p. 440; p. 452). The gunman then forced Paulo and Olivera to kneel down, and the other robber struck Paulo in the head. (R. p. 256; pp. 440-441). After that, the gunman demanded to know where Paulino was, threatened to kill Paulo, and began counting down while the other robbers began taking the victims' belongings,

including a laptop computer, approximately \$600 in cash, and several cellphones. (R. pp. 256-257; p. 279; p. 283).

Meanwhile, after fleeing from the apartment, Paulino ran to the apartment of her neighbor, Lucineia Rodriguez, and knocked on the door until Rodriguez answered. (R. pp. 502-503; p. 511). When Rodriguez opened the door, Paulino told her what had happened, and Rodriguez responded by quickly heading to the Silvas' apartment to rescue Carrie. (R. p. 511). At the Silvas' apartment, Rodriguez encountered a man with a gun, and he told her to come inside. (R. p. 511). She then entered the apartment, headed upstairs, saw a man holding Olivera and Paulo in one of the bedrooms, and went into the other bedroom to retrieve the Silvas' daughter. (R. pp. 511-512).

Upon seeing Rodriguez inside of the apartment, the robbers became panicked and rapidly fled. (R. pp. 256-257; pp. 441-442; p. 512). Afterwards, Paulo and Olivera went outside and met up with some of their neighbors. (R. p. 257; p. 442). Paulo then briefly looked around for the robbers, went to the apartment manager's home, was unable to locate the apartment manager, encountered a Brazilian man, and spoke with him about the robbery. (R. pp. 257-258). While speaking with the Brazilian man, he saw two people walking down the road in clothing different from what the robbers were wearing and told the Brazilian man that he thought they were the robbers. (R. pp. 258-259). The Brazilian man then asked his wife to call the police, and Paulo returned to his apartment. (R. pp. 258-259). Back at the apartment, Paulino discovered a cellphone that was abandoned by the robbers when they fled. (R. p. 455; pp. 504-505).

At approximately 11:35 p.m., someone from the apartment complex called 911 and reported that two black males wearing red-and-white-striped shirts committed a

robbery at gunpoint.¹ (R. p. 171; p. 442). Officers were then quickly dispatched to the scene, and Deputy Jason Charlton of the Berkeley County Sheriff's Office arrived at the apartment complex at 11:39 p.m. (R. pp. 171-172; pp. 297-299; p. 325). Upon arriving, Deputy Charlton briefly spoke with people standing in the parking lot of the apartment complex, including the Brazilian man who Paulo spoke with, and was advised a laptop was taken during the robbery, the suspects were black males, and the suspects were armed with a gun. (R. p. 258; pp. 301-302). The people in the parking lot then indicated that the robbers were walking along the side of a nearby road, and Deputy Charlton left to try and locate them. (R. p. 303).

Moments later, Deputy Charlton encountered three black males walking away from the apartment complex approximately one-quarter of a mile away from the entrance to it.² (R. p. 173; pp. 303-304; p. 357). One of the men was carrying a laptop. (R. p. 304). In response, Deputy Charlton stopped his vehicle and started to approach the men. (R. p. 305). However, upon seeing the officer, Appellant Douglas Monray Thompson, who was carrying the laptop, dropped the computer and began hiking up his pants like he was preparing to run while Clarence J. Fishburne, another of the men, told the others not to run and the third man fled. (R. pp. 305-306; pp. 358-359). Deputy Charlton then detained Appellant and Fishburne, frisked them for weapons, found none, and waited for another officer to arrive on the scene to assist him. (R. pp. 307-308).

¹ During trial, Theresa Barnett, the operations supervisor at the Berkeley County 911 call center, indicated that there was a language barrier between the 911 operator who received the call and the caller who reported the robbery. (R. p. 171).

² Deputy Charlton arrived at the location of the men only seconds after leaving the apartment complex. (R. p. 308). The men were the first black males Deputy Charlton encountered, and they were the only black men in the area at the time. (R. pp. 331-332).

A few minutes later, Deputy Robert Ollic of the Berkeley County Sheriff's Office arrived and secured Appellant and Fishburne while Deputy Charlton returned to the apartment complex to speak with the victims. (R. pp. 108-110; p. 174; pp. 307-308). Deputy Charlton then met with Paulo and Olivera along with one of their neighbors, Rubio Hillario, who assisted in translating for the officer and the victims.³ (R. pp. 259-260; pp. 308-309; p. 443). After speaking with them briefly, Deputy Charlton advised the men that he had detained some people who may or may not be the robbers, told them he wanted them to see if they could identify them, transported them to the location where Appellant and Fishburne were being detained, pulled up in front of the suspects' location, stopped approximately twenty to thirty feet away, and used his spotlight to illuminate Appellant and Fishburne, who were standing in front of Deputy Ollic's vehicle with their hands handcuffed behind their backs and with a police officer beside each of them. (R. p. 260; pp. 270-271; p. 290; pp. 310-311; pp. 333-334; pp. 443-444; p. 454). Upon seeing the suspects, Paulo and Olivera almost instantly began nodding and pointing in the direction of Appellant and Fishburne, quickly identified them as the robbers without any hesitation, and indicated they were certain of their identifications. (R. p. 260; pp. 291-293; pp. 311-312; p. 444).

Thereafter, Appellant and Fishburne were arrested and searched incident to their arrests. (R. p. 313). During the searches, Deputy Charlton discovered two cellphones in Fishburne's pockets, a cellphone in Appellant's pocket, and \$442 in cash in Appellant's possession. (R. p. 313; p. 315; p. 318; p. 372). Deputy Charlton then asked Paulo and Olivera to identify the items discovered during the searches, and they identified the two

³ Paulo and Olivera primarily spoke Portuguese and spoke very little English while Deputy Charlton spoke very little Portuguese. (R. p. 42; p. 309).

cellphones recovered from Fishburne's pockets as phones that belonged to Olivera and identified the laptop as the one taken from their home during the robbery. (R. p. 260; pp. 264-266; pp. 293-294; p. 315; pp. 317-318; pp. 444-446). The victims then provided Deputy Charlton with the cellphone that Paulino found in the apartment after the robbery, and the officer looked inside and found a picture of Fishburne stored in the phone. (R. p. 261; pp. 319-322).

Subsequently, Appellant and Fishburne were indicted for two counts of armed robbery, two counts of kidnapping, and one count of first-degree burglary, and they proceeded to trial together. (R. pp. 7-12; pp. 656-665). At the outset of trial, Fishburne's defense counsel objected to the admission of any identification evidence, and the trial judge conducted an in camera hearing on the motion. (R. p. 19; pp. 30-31; p. 35).

During the hearing, Deputy Charlton testified he responded to the report of a home invasion at the victims' apartment complex, was advised that three suspects were involved, and learned the suspects used a gun and took a laptop during the robbery. (R. pp. 35-37). At the time of the hearing, Deputy Charlton could not remember the specifics of the reported descriptions of the suspects he received but recalled that the victims described the suspects as black males. (R. p. 75; p. 88; p. 90). After receiving the description of the suspects, Deputy Charlton indicated he encountered three men matching the descriptions of the robbers only one-quarter of a mile away from the apartment complex where the robbery occurred and that one of the men was carrying a laptop. (R. p. 38). Based on his observations, Deputy Charlton stated he approached the men, one of the men dropped the laptop, another of the men told the others not to flee, and the third man fled. (R. pp. 38-40). He testified he then detained the two that did not flee until Deputy Ollic arrived on the scene, went to the apartment complex, told the

victims that he found two men who may or may not have committed the robbery, asked them to come view the men, and directly brought them to Appellant and Fishburne's location. (R. pp. 40-43). Upon arriving, the officer indicated Appellant and Fishburne were positioned in front of a police vehicle with their hands handcuffed behind their backs, he used a spotlight to illuminate them, and the victims "rather instantly" identified them as the robbers without any prompting or hesitation. (R. pp. 44-47). Subsequently, Deputy Charlton stated the victims were shown property recovered during the investigation and search of Appellant and Fishburne and the victims identified that property as belonging to them. (R. p. 50; p. 66). He further noted Appellant and Fishburne were the only non-uniformed people on the scene during the show-up, the victims were not separated during the show-up, and he could not remember if the victims indicated that one of the suspects changed his shirt after the robbery. (R. p. 61; pp. 63-64; pp. 83-84).

In addition to Deputy Charlton's testimony, Deputy Ollic testified about the details of the show-up. (R. pp. 110-111). During his testimony, Deputy Ollic stated the suspects had their hands handcuffed behind their backs at the time of the show-up, he placed the suspects in front of a patrol car, the suspects were illuminated, and he stood out of the victims' line of sight while the identifications were made. (R. pp. 109-111). He further stated the suspects were identified one at a time and there were no other black males at the scene at the time of the identifications. (R. pp. 122-123).

Additionally, Olivera testified about the circumstances of his out-of-court identifications of Appellant and Fishburne as the robbers. (R. p. 129). Regarding the identifications, Olivera stated he was asked to identify the robbers not long after the robbery and was taken to their location. (R. p. 128). Once there, he indicated both

suspects were detained fifty feet from him, he saw them clearly after they were illuminated, he identified them as the robbers who went upstairs during the robbery, and he was certain of his identifications. (R. pp. 128-129; p. 146). He further testified he immediately recognized them as the robbers when the police vehicle stopped in front of them, was not told who to pick, thought one of the robbers was wearing a blue t-shirt but could not remember if that robber was present during the show-up, and personally felt like all black males have "a lot of similar facial features." (R. p. 130; p. 135; p. 147).

Similarly, Paulo also testified about the circumstances of his identifications of the robbers. (R. p. 153). Regarding the identifications, he stated he was asked to view some men shortly after the robbery to see if they were the people who robbed him, he was taken approximately 200 yards from the apartment complex, the suspects were illuminated, and he immediately recognized the suspects as the robbers and was certain of his identifications. (R. pp. 151-153). He also testified that he prepared a statement after the crimes indicating that the robber who choked Olivera was wearing a blue t-shirt but that neither of the men at the show-up was wearing such a shirt. (R. p. 155). Furthermore, he stated the show-up was performed approximately an hour after the robbery while conceding he was not good at estimating time and further indicated he believed many black males look similar. (R. p. 161; p. 168).

At the conclusion of the hearing, Appellant's defense counsel argued the show-up identification procedure used in the case was unduly suggestive. (R. pp. 193-194). In support of that contention, Appellant's defense counsel asserted one of the victims indicated all black males looked the same to him, the victims did not have a good opportunity to view the suspects during the robbery, the victims did not know what was going on because the robbery occurred late at night, the victims' descriptions of the

suspects did not contain sufficient detail and were inconsistent in regard to Appellant and Fishburne's clothing, there was confusion regarding the number of robbers and the certainty of the victims' identifications, and the details of the show-up were suggestive as both Appellant and Fishburne were handcuffed and placed in front of a police vehicle. (R. pp. 195-198). For those reasons, Appellant's defense counsel moved for the victims' out-of-court identifications to be suppressed, and Fishburne's defense counsel joined in the motion. (R. pp. 201-202).

In response, the solicitor asserted the show-up identification procedure used was not unduly suggestive and there was no substantial likelihood of misidentification. (R. p. 203). In support of that assertion, the solicitor noted the victims had an extensive opportunity to view the robbers during the incident, the victims' attention was focused because of fear, and any deficiencies in the victims' descriptions of the perpetrators resulted from language barrier issues. (R. pp. 203-204). The solicitor further noted the show-up was conducted shortly after the crimes only a short distance away from the scene of the crimes while the victims' memories were still fresh and at a time when the suspects had not had time to dispose of the victims' laptop and cellphones. (R. pp. 204-205). Based on those circumstances, the solicitor asserted there was no substantial likelihood of misidentification and the identifications should be admitted. (R. p. 207).

After considering the arguments of counsel, the trial judge denied Appellant and Fishburne's motion to suppress the identification evidence. (R. p. 212). In making that ruling, the trial judge found the show-up identification procedure was not unduly suggestive based on the facts that it occurred within an hour of the crimes near the scene of the crimes and that the suspects matched the limited description that was provided and were still in possession of the victims' belongings. (R. p. 211). The trial judge further

found the victims had an opportunity to view the suspects and expressed certainty in their identifications. (R. pp. 211-212).

Thereafter, during trial, Deputy Charlton and the victims testified about the robbery, the ensuing law enforcement investigation into the robbery, and the identifications of Appellant and Fishburne as two of the robbers. (R. pp. 252-266; pp. 298-322; pp. 438-447; pp. 501-504; pp. 511-512). During his testimony before the jury, Paulo testified he got a good look at the robbers, identified them during the show-up conducted after the robbery, and was entirely certain of his identifications. (R. p. 260; pp. 292-293). He further identified the laptop introduced into evidence during trial as the one that was taken from his apartment during the robbery. (R. pp. 264-266; pp. 293-294). Subsequently, on cross-examination, he acknowledged he had previously prepared a statement indicating one of the robbers was wearing blue clothing even though neither of the men he identified was wearing blue clothing. (R. pp. 267-268). He further acknowledged he had previously indicated that the faces of black men all looked the same to him. (R. p. 287).

During Deputy Charlton's testimony, he noted the identifications of Appellant and Fishburne were made without any hesitancy shortly after the crimes and that the victims' property was discovered in a search of Appellant and Fishburne after they were identified. (R. p. 301; p. 308; pp. 312-313; p. 315; p. 334). He further stated the victims' identifications of Appellant and Fishburne as the robbers occurred "almost instantly" upon seeing them. (R. pp. 311-312). Additionally, he noted that Appellant was carrying the victims' laptop when he first encountered him and that Fishburne's cellphone was located in the victims' apartment after the robbery. (R. p. 306; pp. 321-322). Subsequently, on cross-examination, he acknowledged the victims were not separated

during the show-up and he did not find any clothing or a gun during his investigation. (R. p. 336; pp. 339-340).

Furthermore, during Olivera's testimony, Olivera indicated he got a good look at all three of the robbers during the robbery since none of them were wearing masks, he could clearly see the suspects during the show-up, and he was certain of his identifications. (R. p. 444; pp. 457-458). He further noted his cellphones were discovered during a search of the suspects after they were apprehended and the cellphone of one of the robbers was discovered in his home after the robbery. (R. pp. 445-447). Subsequently, on cross-examination, he acknowledged he did not know any black males and had previously testified all black males have similar facial features. (R. pp. 464-465).

At the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. (R. p. 516; pp. 529-530; pp. 537-603). During his closing argument, Fishburne's defense counsel attacked the reliability of the out-of-court identifications made by Silva and Olivera while reminding the jury that both of the victims indicated "black men look similar." (R. pp. 560-561). Likewise, during his closing argument, Appellant's defense counsel specifically challenged the reliability of the victims' out-of-court identifications by pointing out the discrepancies in their testimony and emphasizing to the jury that the victims both acknowledged that all black men looked the same to them. (R. pp. 569-572).

Following the presentation of the closing arguments, the trial judge instructed the jury on the applicable law. (R. pp. 604-623). As part of her jury charge, the trial judge instructed the jury that Appellant and Fishburne were presumed to be innocent, that the State had the burden of proving their guilt beyond a reasonable doubt, and that it was the

duty of the jury to determine the credibility and believability of the witnesses who testified during trial. (R. pp. 608-611). Additionally, regarding the identification of the perpetrators of the crimes, the trial judge instructed:

An issue in this case is the identification of the defendant as the person who committed the crime charged. The 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 an impression by 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 offence. This will be affected by things like how long or short of time was available; how far or close the witness was; the lighting conditions; and whether the witness had a chance to see or know the person in the past.

Once again I instruct you, the burden of proof on the State extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime.

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. pp. 613-614).

Thereafter, at the conclusion of trial, the jury convicted Appellant and Fishburne of all of the indicted offenses. (R. pp. 627-628). Following the verdict, Fishburne personally addressed the trial judge during the sentencing proceedings, expressed remorse for what happened to the victims, and prayed for forgiveness. (R. pp. 642-643). The trial judge then sentenced Appellant to an aggregate term of imprisonment of fifteen years and Fishburne to an aggregate term of imprisonment of twenty years. (R. pp. 643-644; pp. 653-654).

ARGUMENT

The trial judge committed no error in admitting evidence of the victims' out-of-court identifications of Appellant and his accomplice as the perpetrators of the charged offenses because the show-up identification procedure that was employed in Appellant and his accomplice's case was not unduly suggestive and the identification evidence was still reliable under the totality of the circumstances even if the show-up identification procedure was unduly suggestive. However, even assuming the trial judge somehow erred in admitting the identification evidence, any error was entirely harmless in light of the other overwhelming evidence of guilt presented during trial and the procedural safeguards in place that enabled Appellant and his accomplice to call into question the reliability of the identification evidence.

Appellant contends the trial judge erred in admitting evidence of the victims' out-of-court identifications of Appellant and Fishburne as the perpetrators of the charged offenses. In support of that contention, Appellant maintains that the show-up identification procedure used in his case was unduly suggestive, a substantial likelihood of misidentification existed, and the identification evidence was inherently unreliable. To the contrary, the trial judge properly declined to suppress the identification evidence because the show-up identification procedure used in Appellant's case was not unduly suggestive under the totality of the circumstances. Furthermore, even if the show-up identification procedure was unduly suggestive, the trial judge nonetheless properly admitted the identification evidence because the evidence was reliable under the totality of the circumstances and there was no very substantial likelihood of misidentification. For those reasons, the trial judge committed no error in admitting the identification evidence. However, even assuming the trial judge somehow erred in admitting the evidence, any error was entirely harmless in light of the other overwhelming evidence of guilt presented during trial and the procedural safeguards in place that enabled Appellant and Fishburne to call into question the reliability of the identification evidence. Appellant's convictions should be affirmed.

A. Propriety of the Admission of the Identification Evidence

The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); see State v. Govan, 372 S.C. 552, 556, 643 S.E.2d 92, 94 (Ct. App. 2007) (“The decision to admit an eyewitness identification is in the trial judge’s discretion and will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error.”). On appeal, appellate courts give “great deference” to trial judges when reviewing evidentiary rulings. State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); see State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (“[D]eference is due to the trial court’s admission of the evidence.”). Moreover, an appellate court will not reverse a trial judge’s decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge’s broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) (“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.”); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

In determining the admissibility of evidence of an out-of-court identification, a court must conduct a two-prong inquiry into the matter. See Neil v. Biggers, 409 U.S.

188, 199-200 (1972) (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). That inquiry involves first ascertaining whether the identification process was unduly suggestive and then determining whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Govan, 372 S.C. at 558, 643 S.E.2d at 95; see State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (“Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.”). A trial judge should only exclude the identification evidence if there is “ ‘a **very substantial** likelihood of irreparable misidentification.’ ” Perry v. New Hampshire, ___ U.S. ___, ___, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted). Significantly, the exclusion of evidence is a “drastic sanction” and should be “limited to identification testimony which is manifestly suspect.” Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983).

Amongst the various identification procedures, single person show-ups are disfavored because they are inherently suggestive. State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). However, “[m]ost eyewitness identifications involve some element of suggestion[,]” and suggestiveness alone does not mandate the exclusion of identification evidence. Perry, 132 S. Ct. at 727; see State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003) (“Suggestiveness alone does not mandate the exclusion of evidence.”). Accordingly, there is no bright line rule concerning show-ups, and the admissibility of an identification made during a show-up is controlled by the particular facts and circumstances of each individual case. Gibbs v.

State, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013); see Perry, 132 S. Ct. at 720 (“An identification infected by improper police influence, our case law holds, is not automatically excluded.”).

If a show-up is conducted, the show-up may be proper where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness’ memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching. Brown, 356 S.C. at 503-504, 589 S.E.2d at 785; see also Willis v. Garrison, 624 F.2d 491, 493-494 (4th Cir. 1980) (acknowledging show-ups are inherently suggestive but recognizing prompt on-the-scene show-up identifications can promote fairness by enhancing the reliability of the identifications and permitting the expeditious release of innocent suspects). The use of a show-up is less objectionable the closer the show-up is in time and proximity to the scene of the crime. Brown, 356 S.C. at 504, 589 S.E.2d at 785. Furthermore, a show-up may even be proper where the police refer to the suspect as a suspect and the suspect is handcuffed and in the presence of law enforcement officers. Id.

However, even assuming the particular show-up procedure used in a case is found to be unduly suggestive, the witness’ identification may still be admissible if the State can prove by clear and convincing evidence that the identification is reliable notwithstanding the suggestiveness of the show-up. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. “Reliability is the linchpin in determining the admissibility of identification testimony.” Brown, 356 S.C. at 504, 589 S.E.2d at 785. To determine whether the identification is reliable, a court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the

accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the identification. Govan, 372 S.C. at 559, 643 S.E.2d at 96; see also State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) ("The reliability of an identification is determined by the facts."). "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." Perry, 132 S. Ct. at 720.

In State v. Mansfield, 343 S.C. 66, 69-70, 538 S.E.2d 257, 259 (Ct. App. 2000), this Court considered whether identification evidence obtained from a show-up identification procedure conducted at a police station was properly admitted during trial. In that case, a neighbor witnessed a man later identified as Mansfield attempting to break into a home in his neighborhood in the middle of the afternoon. Id. During the attempted break-in, the neighbor looked right at Mansfield's face and attempted to speak with him before Mansfield quickly exited the area. Id. at 70, 538 S.E.2d at 259. Thereafter, the neighbor contacted the authorities and correctly described Mansfield's height, race, skin tone, and shirt but incorrectly indicated that Mansfield was wearing white shorts and tennis shoes and had his hair in plaits. Id. A short time later, Mansfield was apprehended while wearing grey sweat pants pulled up to his knees and boots and with his hair in an afro. Id. at 70-71, 538 S.E.2d at 259. Following his apprehension, Mansfield was transported to a police station, and the neighbor identified him as the attempted burglar. Id. at 71, 538 S.E.2d at 259. Subsequently, Mansfield sought the exclusion of the neighbor's identification of him as the perpetrator of the crime, the motion was denied, and Mansfield appealed. Id. at 71-72, 538 S.E.2d at 259-260. On appeal, this Court

affirmed Mansfield's conviction after finding the neighbor's identification of Mansfield to be reliable under totality of the circumstances. Id. at 79-80, 538 S.E.2d at 263-264. In reaching that conclusion, this Court relied upon the following circumstances supporting the reliability of the identification: (1) the neighbor's attention was heightened; (2) the neighbor had a good opportunity to view the attempted burglar in good lighting; (3) the neighbor expressed certainty in his identification of Mansfield; (4) the neighbor's description of Mansfield was generally consistent even though there were slight discrepancies in the description of Mansfield's hair and clothing; and (5) the show-up was conducted less than an hour after the crime. Id.

Likewise, in State v. Govan, 372 S.C. at 555, 643 S.E.2d at 93, this Court again considered the admissibility of identification evidence obtained through the use of a show-up identification procedure. In that case, law enforcement officers responded to the scene of an armed robbery, and one of the victims described the suspect to the officers as a black male wearing a black jacket and a black hat or rag. Id. at 555, 643 S.E.2d at 94. Roughly forty-five minutes after the robbery, Govan, who fit the description of the armed robbery suspect, was apprehended after abandoning evidence and attempting to flee from the police. Id. at 556, 643 S.E.2d at 94. Following Govan's arrest, the victim was transported to Govan's location and identified him as the perpetrator of the robbery. Id. Subsequently, during trial, Govan moved to exclude any identification evidence, the trial judge denied his motion, and Govan appealed. Id. at 558, 643 S.E.2d at 95. On appeal, this Court initially found the victim's out-of-court identification of Govan was not unduly suggestive in light of the fact that it occurred near the scene of the crime shortly after the crime was committed. Id. at 558-559, 643 S.E.2d at 95. Thereafter, this Court found the identification was reliable even if the show-up identification procedure was unduly

suggestive because the victim viewed Govan in a well-lit building from close proximity during the robbery, the victim had heightened attention due to the circumstances of the crime, the show-up occurred shortly after the crime, and the victim expressed certainty regarding his identification. Id. at 559-560, 643 S.E.2d at 96. For those reasons, this Court found the show-up was not unduly suggestive and was reliable under the totality of the circumstances and affirmed the trial judge's decision to admit the identification evidence. Id. at 560, 643 S.E.2d at 96.

In the case sub judice, the trial judge did not abuse her discretion in admitting the identification evidence because, although suggestive, the show-up identification procedure used in Appellant and Fishburne's case was not unduly suggestive. However, even if the particular circumstances of the show-up identification procedure employed rendered it unduly suggestive, the trial judge nonetheless properly admitted the identification evidence because the out-of-court identifications were reliable under the totality of the circumstances such that there was no "very substantial" likelihood of misidentification. See Perry, 132 S. Ct. at 720 (indicating that identification evidence should only be excluded where a very substantial likelihood of misidentification exists).

Initially, regarding the suggestiveness of the show-up identification procedure used, the investigating officers conducted the show-up in such a manner that it was not so suggestive that it was improper. Critically, the show-up was conducted within an hour of the robbery and, thus, took place shortly after the incident. Cf. Govan, 372 S.C. at 559, 643 S.E.2d at 95 (finding a show-up that occurred within approximately forty-five minutes of a robbery was not unduly suggestive). In fact, Deputy Charlton testified he apprehended Appellant and Fishburne within minutes of the 911 call about the robbery coming in, and he quickly transported the victims to Appellant and Fishburne's location

following their apprehension. Additionally, the show-up unquestionably occurred near the scene of the crimes as Deputy Charlton stopped Appellant and Fishburne only one-quarter of a mile away from the scene of the incident. Also, due to the brief period of time between the incident and the show-up, the witnesses' memories were still fresh, and they were able to express absolutely certainty in their identifications. Furthermore, although some evidence suggested the suspects may have had time to alter their looks prior to the show-up by possibly changing their shirts, Appellant and Fishburne had not had time to dispose of the proceeds of the robbery and were still in possession of a large quantity of cash, two of Olivera's cellphones, and a laptop computer stolen from the victims' apartment. Cf. id. ("Since one officer observed Govan drop the paper bag full of money and Govan was still in possession of his gun when he was apprehended, it would appear he had not had enough time to dispose of evidence."). Finally, the show-up certainly would have expedited Appellant and Fishburne's release and enabled the police to continue their search if the victims had indicated Appellant and Fishburne were not, in fact, the robbers. Accordingly, under those circumstances, the show-up identification procedure used was not unduly suggestive, and the trial judge properly declined to find that it was so. See Brown, 356 S.C. at 503-504, 589 S.E.2d at 785 (indicating that a show-up may be proper where it occurs: (1) shortly after the alleged crime; (2) near the scene of the crime; (3) while the witness' memory is still fresh; (4) when the suspect has not had time to alter his looks or dispose of evidence; and (5) when it may expedite the release of innocent suspects and enable the police to determine whether they need to continue searching); see also Govan, 372 S.C. at 559, 643 S.E.2d at 95 ("We find that although this show-up was suggestive, it was not unduly suggestive under the above noted test.").

However, regardless of the fact that the show-up identification procedure was not unduly suggestive, the victims' identifications of Appellant and Fishburne were reliable under the totality of the circumstances such that no very substantial likelihood of misidentification existed even if the show-up had been unduly suggestive. Initially, both victims had an excellent opportunity to view Appellant and Fishburne during the course of the robbery because none of the robbers wore masks. In fact, both victims testified during trial that they had good opportunities to view the robbers, and both Paulo and Olivera saw the robbers' unobstructed faces. Additionally, the attention of the victims was heightened due to the facts that they were the victims of an armed robbery and that the robbers threatened them with a gun and used physical force upon them. See Govan, 372 at 560, 643 S.E.2d at 96 (recognizing that the victim's attention would have been heightened during an armed robbery); Blassingame, 338 S.C. at 252, 525 S.E.2d at 541-542 ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby."). Also, although the victims' descriptions of the robbers do not appear to have been highly detailed, Deputy Charlton testified that the appearances of Appellant, Fishburne, and their confederate matched the descriptions of the suspects that were provided to him. Cf. State v. Frazier, 394 S.C. 213, 222, 715 S.E.2d 650, 654 (Ct. App. 2011) (finding an out-of-court identification to be sufficiently reliable even though the witness did not provide a description of Frazier's physical appearance); Govan, 372 S.C. at 555, 643 S.E.2d at 93-94 (finding an out-of-court identification to be sufficiently reliable based on the consistency of the prior description even though the description of the suspect was simply "a black guy in a long black jacket and black hat (or rag)"); State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993) (finding identification evidence to be reliable even though the victim

described the robber as wearing a ski jacket and cap and Johnson was not wearing a jacket or hat when he was apprehended). Furthermore and most importantly, both of the victims immediately recognized Appellant and Fishburne as the robbers upon seeing them and expressed absolute certainty in their identifications without hesitation or reservation. Cf. Frazier, 394 S.C. at 222, 715 S.E.2d at 654 ("Although Sanders's description of Frazier's jacket was incorrect, she demonstrated a high degree of certainty in her identification during the show-up."). Notably, the victims were both completely certain of their identifications despite the fact that they were conscious of and accepting of their own deficiencies in distinguishing the faces of black males. Finally, the show-up was conducted within an hour of the incident only one-quarter of a mile away from the location where the robbery occurred. Accordingly, when considering the totality of the circumstances surrounding the out-of-court identifications of Appellant and Fishburne, the identifications were sufficiently reliable such that there was no substantial likelihood of misidentification, and it was ultimately for the jury to decide if the identifications were sufficiently reliable to constitute proof of Appellant and Fishburne's guilt. See Perry, 132 S. Ct. at 728 ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); see also Brown, 356 S.C. at 504, 589 S.E.2d at 785 ("Reliability is the linchpin in determining the admissibility of identification testimony.").

When considering the totality of the circumstance surrounding the show-up identification procedure employed in Appellant and Fishburne's case, the show-up was not unduly suggestive and there was no substantial likelihood of misidentification even if it was unduly suggestive. For those reasons, the trial judge did not abuse her broad discretion in declining to employ the drastic remedy of suppressing the identification evidence, and the question of the reliability of the identification evidence was properly

left for the jury to decide. See Harker, 800 F.2d at 443 (characterizing the exclusion of identification evidence from trial as a “drastic sanction” that should only be employed where the reliability of the evidence is “manifestly suspect”); see also Perry, 132 S. Ct. at 720 (“[T]he reliability of relevant testimony typically falls within the province of the jury to determine. . . . [I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.”). Accordingly, the trial judge committed no error in denying Appellant’s motion to suppress the victims’ out-of-court identifications of Appellant and Fishburne as the robbers. Cf. Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (“[W]e cannot say that under all of the circumstances of this case there is a ‘very substantial likelihood of irreparable misidentification.’ Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.” (citation omitted)). Appellant’s convictions should be affirmed.

B. Harmlessness of Any Error in the Admission of the Identification Evidence

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484

(2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”). “When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In the case at bar, even assuming the trial judge somehow erred in admitting the out-of-court identification evidence, any error was entirely harmless under the facts and circumstances of Appellant and Fishburne’s case. As a result, Appellant could have suffered no prejudice from the admission of the identification evidence, and his convictions should not be reversed based on the admission of that evidence.

Initially, even without the identification evidence, the other evidence presented during trial overwhelmingly established Appellant and Fishburne’s guilt for the indicted offenses. Critically, testimony and evidence was presented establishing Appellant, Fishburne, and another man were walking along the side of the road in close proximity to the scene of the robbery shortly after the incident occurred. When they saw a police officer stop nearby and begin to approach them, Fishburne found it necessary to encourage his confederates not to flee, Appellant immediately dropped a laptop he was carrying to the ground, and their accomplice quickly fled from the area. See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) (“As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of

consciousness of guilt.”); State v. Al-Amin, 353 S.C. 405, 413, 578 S.E.2d 32, 36 (Ct. App. 2003) (“Flight from prosecution is admissible as evidence of guilt.”); see also Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (“Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing but it is certainly suggestive of such.”). Significantly, the laptop that Appellant dropped to the ground was the laptop stolen from the victims’ apartment only minutes earlier. See State v. Lyles, 211 S.C. 334, 339, 45 S.E.2d 181, 183 (1947) (instructing that proof of a defendant’s possession of recently-stolen property supports an inference that the defendant was the person who stole the property); see also State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983) (instructing that the inference to be drawn from recent possession of stolen property is an evidentiary fact as opposed to a rebuttable presumption and constitutes circumstantial evidence of guilt). Thereafter, law enforcement officers discovered Fishburne had two of Olivera’s cellphones in his pockets and Appellant was carrying a large quantity of cash in his pocket, and the victims located Fishburne’s cellphone in their apartment shortly after the robbery. See McNamara v. Henkel, 226 U.S. 520, 525 (1913) (“Possession of [recently stolen property] in these circumstances tended to show guilty participation in the burglary. This is but to accord the evidence, if unexplained, its natural probative force.”); see also Barnes v. United States, 412 U.S. 837, 845-846 (1973) (approving of a jury instruction allowing for the jury to infer the defendant’s guilt from his unexplained possession of recently stolen property and recognizing common sense and experience support such an inference). In light of that overwhelming evidence of guilt, the out-of-court identification evidence could not have had any impact on the verdict. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (“[I]n view of the overwhelming evidence of appellant’s

guilt, we hold any error harmless beyond a reasonable doubt.”); see also State v. Singleton, 395 S.C. 6, 14, 716 S.E.2d 332, 336 (Ct. App. 2011) (finding any error in the admission of identification evidence to be harmless in light of the overwhelming evidence of guilt presented during trial).

Furthermore, notwithstanding the overwhelming nature of the other evidence presented during trial, other procedural safeguards protected Appellant from suffering any undue prejudice from the admission of the out-of-court identification evidence. Specifically, the trial judge thoroughly instructed the jury on the State’s burden of proof, the defendants’ presumed innocence, and the necessity that the State prove the defendants’ identity as the perpetrators of the charged offenses beyond a reasonable doubt. The trial judge also specifically instructed the jury on the factors to be considered in evaluating identification evidence. Beyond the trial judge’s instructions, defense counsel for Appellant and Fishburne also were able to expose any deficiencies in the victims’ identifications of Appellant and Fishburne through their cross-examinations of the witnesses and were able to continue calling into question the reliability of the identification evidence in their closing arguments. Cf. Liverman, 398 S.C. at 143-144, 727 S.E.2d at 428-429 (finding any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments). In light of those procedural safeguards, any error in the admission of the identification evidence was rendered harmless. See Perry, 132 S. Ct. at 728-729 (“We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on the eyewitnesses testimony of questionable reliability. These protections

include the defendant's Sixth Amendment right to confront the eyewitness. Another is the defendant's right to effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence." (citations and footnote omitted)).

In light of the other overwhelming evidence of guilt presented during trial and the procedural safeguards built into the trial process that enabled Appellant and Fishburne to fully call into question the reliability of the identification evidence during trial, any error that could have resulted from the admission of the out-of-court identification evidence was rendered entirely harmless. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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Attorney General

MARK R. FARTHING
Assistant Attorney General

BY:



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ATTORNEYS FOR RESPONDENT

August 30, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2011-203366

THE STATE,

Respondent,

vs.

DOUGLAS MONRAY THOMPSON,

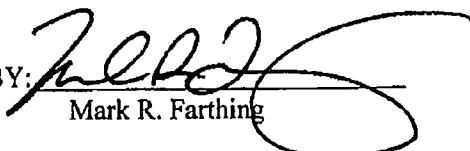
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

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STATE OF SOUTH CAROLINA
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Appeal from Berkeley County
Honorable Kristi Lea Harrington, Circuit Court Judge
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THE STATE,

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vs.

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Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, 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:

LaNelle Cantey DuRant, 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 30th day of August, 2013.

Ellen R. DuBois
ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Douglas M. Thompson, Appellant.

Appellate Case No. 2012-212427

Appeal From Berkeley County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2014-UP-136
Submitted January 1, 2014 – Filed April 2, 2014

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: *State v. Brown*, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App.
2003) ("Generally, the decision to admit an eyewitness identification is in the trial
[court's] discretion and will not be disturbed on appeal absent an abuse of

discretion, or the commission of prejudicial legal error."); *State v. Turner*, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007) ("The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification."); *id.* (stating the first prong of the inquiry is "whether the identification process was unduly suggestive"); *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 447-48 (2000) ("Only if [the procedure] was suggestive need the court consider the second question—whether there was a substantial likelihood of irreparable misidentification." (alteration by court) (internal quotation marks omitted)); *Gibbs v. State*, 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013) ("[C]ourts have deemed a show[up] procedure proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness'[s] memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching." (internal quotation marks omitted)); *Brown*, 356 S.C. at 504, 589 S.E.2d at 785 ("The closer in time and place to the scene of the crime, the less objectionable is a showup."); *id.* ("A show[up] may be proper even though the police refer to the suspect as a suspect, and even though the suspect is handcuffed or is in the presence of the police."); *State v. Govan*, 372 S.C. 552, 559, 643 S.E.2d 92, 95 (Ct. App. 2007) (holding a showup was not unduly suggestive when it occurred forty-five minutes after a robbery, it took place near the scene of the robbery, the suspect fit the description given by the victim, and the suspect was found with a bag of money and a gun).

AFFIRMED.¹

FEW, C.J., and SHORT and KONDUROS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

2014-CP-08-1602

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Berkeley)Douglas M. Thompson # 348634)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in legible (legibly handwritten or typewritten), signed by the applicant and veified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish an answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make reference 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 threes 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 Lieber C.I. p.o. Box 205 Ridgville, SC
2. Name and location of Court which imposed sentence Berkeley County, 300 Calif Ave Moncks Corner, SC 29461
3. Name(s) of co-defendant(s) (if any) Clarence J. Fishburn
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011 GS 1570
 - (b) 2011 GS 1573
 - (c) 2011 GS 1659
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 11/10/11 Kidnapping x2 15 yrs. Concurrent
 - (b) 11/10/11 Armed Robbery x2 15 yrs. Concurrent

Revised 3/2003

Tom

- (c) 11/10/11 1st degree Burglary 15 yrs. Concurrent
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. S.C. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed pursuant to Rule 220(b), SCACR
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 2, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Gornitz, 372 S.C. 552, 559, 643 S.E.2d 92, 95 (Ch App 2007)
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Counsel
 (b) prosecute misconduct
 (c) Violating 14th Amendment

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See Attach Sheet
 (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? yes
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 (d) any other petitions, motions or applications in this or any other Court? _____

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. Motion asking the Court to grant the relief of relieve Counsel and act
 ii. Writ of Mandamus asking the Court to let me act prose Pro Se.
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. The Supreme Court of South Carolina p.o. Box 11330 Columbia,
 ii. U.S. District Court p.o. Box 2317 Florence, SC 29503. SC 29211.
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. Since the Court of Appeals has not issued a final decision, motion
 ii. petition for Writ of Mandamus is dismissed with dismissed
 iii. prejudice.

- iv. _____
- (d) the date of each such disposition:
- i. October 7, 2013
- ii. January 17, 2014
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Aiken Speir v. Henry, 326 S.C. 268, 486 S.E. 2d 492 (1997)
- ii. United States v. Schirre, 727 F.2d 91 (4th Cir. 1984) Cert. denied 467 U.S. 1208 (1984)
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- NO
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. N/A
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. N/A
- 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) Ineffective assistance of trial counsel - First time PCR claim.
- (b) Prosecute misconduct - First time PCR claim.
- (c) Violation of 14th Amendment - First time PCR claim.
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Lonell C. Durant
- (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. David Aylor 24 Broad St. Charleston, SC 29401
- ii. _____
- iii. Lonelle C. Durant 1330 Lady St. Suite 401 Columbia, SC 29211.
- (b) the proceedings at which each such attorney represented you:
- i. trial - David Aylor
- ii. Appeal - Lonelle C. Durant
- iii. _____

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

Vacated With prejudice

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

No

STATE OF SOUTH CAROLINA)

VERIFICATION

County of

Berkeley

I, Douglas Thompson, 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.

Douglas M. Thompson

SWORN to and subscribed before me this 7th
day of July, 2014.

Ludeman Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

2014 JUL -9 PM 12:22
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

FILED

702

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

Douglas Thompson
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.

Douglas M. Thompson
Applicant

SWORN or affirmed to and subscribed before me this
7th day of July, 2014.

Quedam Bryant
Notary Public

My Commission Expires: May 26, 2020

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2014 JUL -9 PM 12:22

FILED

TM

The applicant set forth this cause of action pursuant to the Jurisdiction that are set forth in Chapter 17-27-20(1)(b) Collateral attack upon his Conviction of any grounds of alleged error heretofore available under this uniform Post Conviction Relief Act, that are being Submitted or Amended.

The applicant asserts (3) grounds for relief at this time (1) Ineffective assistance of trial / (2) prosecutor misconduct and (3) Violation of 14th Amendment. Applicant also asserts that due to his lack of understanding of law, Applicant request that Counsel be appointed pursuant to 71.1(d) SCRC iv. p., and S.C. Code of Laws 17-27-90.

Applicant asserts that there are no ~~more~~ ^{further} grounds at this time, to be raised due to the lack of records and the assistance of Counsel. It would be Chronologically impossible for the applicant to carry such a burden to show his entitlement for relief by a preponderance of the evidence, and for the appointment of Counsel to insure that all ~~more~~ ^{available} grounds for relief are included in the application.

Therefore, Applicant request that this Court appoints Counsel in the above mentioned application, Applicant moves this Honorable Court to grant leave to amend this application in this Cause of action due to the lack of Counsel and applicant is a lay person at law.

Applicant seeks this Court approval of this application so that applicant right to a PCR won't be deem abandon due to the fact that applicant has only one year to file this application from the date of a final judgment or the remittiture to the lower court which ever comes first.

000744

Respectfully Submitted,

Douglas M. Jones

STATE OF SOUTH CAROLINA

County of Berkeley

15 FEB 11

AM 10:49 Court of Common Pleas

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.Douglas M Thompson #348434
Full name and prison number (if any) of Applicant2014-CP-08-1602
AmendedThe State of South Carolina
Name of RespondentAPPLICATION 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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention: Lieber C.I. P.O. Box 205 Ridgeville, SC
2. Name and location of Court which imposed sentence: Berkeley County 300 Calif. Ave Moncks Corner, SC 29461
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2011-GS-1570
 - (b) 2011-GS-1573
 - (c) 2011-GS-1659
4. The offense or offenses upon which sentence was imposed and the terms of the sentence:
 - (a) 11/10/11 Kidnapping X2 15 yrs. Concurrent
 - (b) 11/10/11 Armed Robbery X2 15 yrs. Concurrent
 - (c) 11/10/11 1st degree Burglary 15 yrs. Concurrent

5 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 _____

6 Did you appeal from the judgment of conviction or the imposition of sentence?

yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. S.C. Court of Appeals
 ii. _____
 iii. _____

(b) the result in each such Court to which you appealed:

- i. Affirmed pursuant to Rule 220(b), SCACR
 ii. _____
 iii. _____

(c) the date of each such result:

- i. April 2, 2014
 ii. _____
 iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. State v. Goran, 372 S.C. 552, 559, 643 S.E.2d 92, 95 (Ct. App. 2007)
 ii. _____
 iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) _____
 (b) _____
 (c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Counsel of trial and Appellate Court
 (b) Prosecute Misconduct, Fraud
 (c) Violations of 5th, 6th, 13th, 14th and 15th Amendment, due process

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) _____
 (b) See Attached Sheet
 (c) _____

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? No
- (d) any other petitions, motions or applications in this or any other Court? No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Motion asking the Court to grant the relief of relieve Counsel and a
 ii. Writ of Mandamus asking the Court to let me act pro se. pro se
 iii. _____
 iv. _____

(b) the name and location of the Court in which each was filed:

- i. The Supreme Court of South Carolina P.O. Box 11330 Columbia, SC
 ii. U.S. District Court P.O. Box 2317 Florence, SC 29503. 29211
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. Since the Court of Appeals has not issued a final decision, motion
 ii. Petition for Writ of Mandamus is disses with prejudice, dismiss
 iii. _____
 iv. _____

(d) the date of each such disposition:

- i. October 7, 2013
 ii. January 17, 2014
 iii. _____
 iv. _____

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

- i. Aiken Speir v. Henry, 326 S.C. 268, 486 S.E.2d 492 (1997)
 ii. United States v. Schmece, 727 F.2d 91 (4th Cir. 1984) Cert denied 487 U.S. 1208 (1998)
 iii. _____
 iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

1. SEE original PCR

ii. u

iii. u

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

i. u

ii. u

iii. u

15. If any ground set forth in (9) 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) u

(b) u

(c) u

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

(a) your arraignment and plea? u

(b) your trial, if any? u

(c) your sentencing? u

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? u

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? u

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. u

ii. u

iii. u

iv. u

v. u

(b) the proceedings at which each such attorney represented you:

i. u

ii. u

iii. u

18. State clearly the relief you seek in filing this application.

SEE pages attached

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

NO

4
10/1/00

County of

Berkley

I, Douglas M Thompson, 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.

Douglas M Thompson

15 FEB 11 AM 10:41
MARY P. BRAUN
CLERK OF COURT
BERKLEY COUNTY, S.C.

SWORN to and subscribed before me this 18th
day of November, 2014

Ludrea Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Douglas M Thompson, 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 therefor.

Douglas M Thompson
Applicant

SWORN or affirmed to and subscribed before me this

18th day of November, 2014

Ludrea Bryant
Notary Public

My Commission Expires May 26, 2020

15 FEB 11 AM 10:41
MARY P. BRAUN
CLERK OF COURT
BERKLEY COUNTY, S.C.

BRIEF

15 FEB 11 AM 10:41
 MARK P. STOWN
 CLERK OF DISTRICT
 RECORDED & INDEXED
 S.C.

(1). Did the trial court err, and was the Applicant's Fifth, Sixth and Fourteenth Amendment and due process rights violated, due to "[p]rosecutorial [d]efect", in that the prosecuting agents acted as sole witness on the warrant(s) and/or indictment(s)?

Judicial Notice takes place of proof. It simply means that the Court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Moss v. Aetna Life Ins. Co., supra; State v. Broad River Power Co., supra; 31 C.J.S. EVIDENCE, §6 and §9, Federal Rules of Evidence, Rule 20(A).

This is also manifest Constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional rights of the party are compromised? A manifest Constitutional error can be reviewed by a court of appeals even if the Applicant did not object at the proceedings. (Black's Law Dictionary 8th Edition).

The Applicant humbly avers, it is the Applicant's Sixth Amendment right to be "[f]ully" apprised as to the "[c]ause" and "[n]ature" of the accusation, as well as is his Constitutional right to be "[f]ully" apprised as to the circumstances and/or particular averments related to the charge. State v. Tabor, 262 S.C. 136, 141, 202 S.E.2d 852 (1974). It is also his Fifth Amendment right not to be tried on evidence and/or allegations that were not alleged in the indictment(s) passed upon by the grand jury, whose basis is given solely on hearsay testimony. Thus in order that the Applicant's rights under the

Sixth Amendment to a fair and impartial trial and rights to due process not be forgotten, keeping this portion of the process non-adversarial. The names of the witness(es) who have first hand knowledge and/or who bring the accusation against the defendant, and/or testimony before the grand jury must be known, listed, and passed upon or acknowledged by the grand jury to ensure compliance to Rules of Court and Due Process of law. State v. Jones, 439 S.E.2d 282.

S.C. Code Ann. §1-7-730 and S.C. Code Ann. §17-13-150, require that the prosecution and/or prosecuting body "[s]hall" fulfill and see that all duties, requirements, and Rules of Court, as well as Rules of Criminal Procedure related to the State and Federal Constitution and Due Process law are adhered to and completed in the court.

In State v. Anderson, 312 S.C. 185, 439 S.E.2d 855 (1993), Anderson's issue of concern, placed before the court as it pertained to this issue, was whether the court of appeals erred in affirming his conviction, when the only witness before the grand jury was the assistance solicitor. In Anderson, supra, the Supreme Court stated haec [v]erba: "Because of the uncertainty and confusion that is taking place at all levels of the judiciary, regarding this issue, we take this opportunity to explicitly prohibit the practice of using prosecutors appearing as sole witnesses before the grand jury." State v. Capp, 275 S.E.2d 875 (1981); State v. Dawkins, 377 S.E.2d 298 (1989).

This is not an issue of a preliminary hearing. Nor is this an issue of parties or witnesses showing up at a preliminary hearing for which no testimony by any supposed victim was ever given. This specifically deals with the requirement of having the witnesses appear on the warrants and/or indictments to also ensure that the grand jury did a proper job of investigating the facts. Not one alleged victim appeared on any warrant or indictment to ensure they were present during this process and

appeared before the grand jury. None of them were dead. They were alive and well then as they are today. None were mentally ill; nor were they physically incapacitated to the point where they could not have only signed the warrants. There was also nothing that would have prevented them from being present at the grand jury proceedings as a matter of "stare decisis". The only possible reason why they did not want these witnesses present as is required at these proceedings is to make efforts to cover up some of the various aspects of prosecutorial misconduct that was committed in this case in bringing prosecution. This extremely prejudiced the Applicant and denied the grand jury an opportunity to do it's job and investigate the facts in fullness, to give the Applicant knowledge of such witnesses, and to have these witnesses passed upon by the grand jury or made a part of the court record.

The witnesses were not deployed to Iraq Afghanistan, or Syria. This shows that this was an arbitrary action done on the part of the prosecuting agents and police, conspiring and acting unjustly under color of state law. They failed to adhere to their own prescribed state laws in violation of the Applicant's Federal Constitutional rights of due process. Also in violation of 18 U.S.C. §241 and §242. Such action by the investigators and/or prosecuting body serve to deny the Applicant the equal protection of the laws against unjust prosecution.

If this had not been done the grand jury investigation would have not only likely uncovered misconduct, but they also could have verified if copy of the statements were given the time they were made substantiating that the receipt signed by the witnesses were indeed valid. They could have established that there were breaches in the chain of custody related to the evidence and many other things. This demonstrates the prejudice and damage that was caused by this egregious injustice. The investigating officers and/or prosecuting agents, can produce no justifiable reason as to why anything should have

prevented the proper and required witness(es) from not only signing and/or confirming the warrant(s), but also being present acting as witnesses at the grand jury proceeding except to conceal the fraud and deception they were initiating before the court in they establishing this modern day slavery. Screws v. United States, supra; State v. Middleton, supra; Eslinger v. Thompson, supra; McLaughlin v. Florida, supra; Jones v. State of Arkansas, supra; Dubinka v. Judges of Superior Court of the State of California, for the County of Los Angeles, supra; Dozier v. Loop College, City of Chicago, supra; Hicks v. Oklahoma, supra; Lugar v. Edmondson Oil Co., supra; Williams v. United States, 179 F.2d 656 (Fla. 1950), cert. granted, 340 U.S. 850, 71 S.Ct. 70, 95 L.Ed. 622; Brown v. United States, 204 F.2d 247 (Tenn. 1953); United States v. Ramey, 336 F.2d 512 (W.Va. 1964), cert. denied, 379 U.S. 972, 85 S.Ct. 649, 13 L.Ed.2d 564; United States v. Kozminski, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788, 46 CCH E PD 9 38067 on remand 852 F.2d 1288 (Mich. 1988); 18 U.S.C. §241, §242; Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966).

Furthermore, the conflict between that of a witness, and of an advocate, should cause courts great concern, because the "[a]uthoritative [n]ature" of such a relationship, the testimony of a police officer who is in his official capacity a representative of the State, would be too potent to allow as a general rule. You see the damage of such which clearly occurred in this case. See United States v. Birdman, 602 F.2d 547 (3rd Cir. 1979), cert. denied, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668.

In Ex parte McLeod; In re: Investigation in Charleston Magistrate Court, 272 S.C. 373, 252 S.C. S.E.2d 126 (1979), the Court, in adhering to the rule that the grand jury proceedings should remain non-adversarial. The practice of using

a solicitor or other officer of the State, as a sole witness before the grand jury, to provide only a summary of evidence can be severely abused and we strongly state that it be abandoned unless no other alternative is available. This is what has occurred here. The grand jury was denied in acts of fraud to initiate their shielding function where their full investigation of the witnesses would have revealed the fraud related to the statements, chain of custody of evidence, etc., and they may have caught their own error related to the structural constitutional error where they themselves unjustly adjudicated guilt by the language of the indictments presented.

Ethical consideration 5-9 of the Code of Professional Responsibility provide: "The role of an advocate and a witness are inconsistent; the function of an advocate is to advance the cause of another, while that of a witness is to state the facts objectively. As is indicative of attorney-witness, the environment of one-sided proceedings before the grand jury increases the potential for abuse of the relationship, which did occur along with fraud on the court-members holding prosecutorial function may not additionally appear before the grand jury as a witness. The routine acquisition of an indictment based solely on hearsay evidence requires that the warrant(s) and/or indictment(s) be dismissed. This includes making and/or rendering any evidence inadmissible that has been passed upon by the grand jury, unnecessarily using these prosecuting agents in establishing said evidence and/or indictment(s) before those proceedings. The entire record sub judice is polluted with violations of the Applicant's due process rights. This one-sided grand jury due process violation, arbitrarily done, must deem the evidence passed upon by the grand jury, used at the Applicant's trial and/or in an effort to obtain a guilty plea, "fruit of poisonous tree". Mapp v. Ohio, 81 S.Ct. 1684 (1961); Rochin v.

People of the State of California, 342 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952); Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652; United States v. Gramolini, 301 F.Supp. 39. Due to this blatant disregard for the Applicant's due process rights, the amount of prejudice suffered, the sentence and conviction must be vacated.

(2). Did the trial court err, and was the Applicant's Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution violated, as well as Article IV, §2, and his due process rights violated, by paid counsel's failure to motion for severance causing substantial prejudice to his trial proceedings?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Moss v. Aetna Life Ins. Co, supra; State v. Broad River Power Co., supra; 31 C.J.S. EVIDENCE, Rule 201(a).

This is a manifest Constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional rights of the party are compromised. A manifest Constitutional error can be reviewed by a court of appeals even if the appellant did not object at the proceedings. (Black's Law Dictionary 8th Edition).

The Applicant places forth this issue in a straight forward fashion. Primarily for reasons of economy of time in judicial administration, the general rule has evolved that persons jointly indicted should be tried together. Hall v. United States, 83 U.S.App.D.C. 166, 168 F.2d 161 (1948); Dykes v. United States, 114 U.S.App.D.C. 189, 313 F.2d 580 (1962).

This rule has particular strength where, as here, one crime may be proved against two or more defendants on a single set of facts or from the same evidence. United States v. Lebron, 222 F.2d 531 (2nd Cir. 1955), cert. denied 350 U.S. 876, 76 S.Ct. 121, 100 L.Ed. 774 (1955). Notwithstanding the need for

efficiency in judicial administration, a joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial. Baker v. United States, 329 F.2d 786 (10th Cir. 1964), cert. dismissed 379 U.S. 853, 85 S.Ct. 101, 13 L.Ed.2d 56 (1964); Barton v. United States, 263 F.2d 894 (5th Cir. 1959).

For these reasons, although Rule 14 of the Federal Rules of Criminal Procedure places the granting or denial of a severance in the sound discretion of the trial judge. Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954); United States v. Frazier, 394 F.2d 258 (4th Cir. 1968), pursuant to the holdings made therein, if a "substantial degree of prejudice" springs from a joint trial, a severance is mandated. United States v. Morgan, 394 F.2d 973 (6th Cir. 1968); United States v. Burgio, 279 F.Supp. 843 (S.D.N.Y. 1968). Not surprisingly, the facts peculiar to each case will determine whether sufficient prejudice exist to make a denial of a severance reversible error, and in this case, counsel being Constitutionally ineffective, conspiring under color of state law, in acts of fraud on the court, being compromised by the state prosecutor in acts of prosecutorial misconduct, failing to motion for such. Schaffer v. United States, 221 F.2d 17, 19 (5th Cir. 1955). The cell phone placed the co-defendant, not the Applicant at the scene of crime.

In light of the fact that the state prosecutor, conspiring under color of state law, compromised the Applicant's state paid counsel to throw him under the bus. Severance in this case would have been obligatory. This is what has occurred here. The Applicant was held in the status of pretrial for an unnecessary prolonged period of time. The state prosecutor hoped that the Applicant being a youth and with no prior criminal

record would crumble to the prosecutor's whims and unjust prolonged detention. When the prosecutor realized his ploy did not work and he went past the [180] days prescribed under Article V, §4 to have the case disposed of. He, conspiring with the lower court, who was fully aware of the procedural defect and failure to file written order of continuance; angry that their ploy did not work and they went past [180] days required by due process. The prosecutor conspiring with the court itself, not pros the existing indictments, because they were no longer any good. They then illegally abused the direct indictment process and had the Applicant direct indicted to cover up their failure to be in compliance to the [180] day mandate prescribed by the South Carolina Supreme Court.

The Applicant asked the attorney to motion to have the case severed. The attorney refused. The Applicant asked the attorney to negotiate for a youth sentence. The attorney refused because the prosecutor, with the knowledge of the court was angry they could not manipulate or coerce the Applicant into accepting an outrageous sentence on a guilty plea.

When the witness identified the alleged perpetrator. The witness only identified one man. In all likelihood and truth it was the Applicant's co-defendant. The alleged laptop's chain of custody was compromised. At first it was alleged the officer took it from the co-defendant. When the Applicant did not submit to the plea, it now mysteriously in breach of the chain of custody, ends up in the Applicant's hand. The Applicant's co-defendant has a criminal history. Once the prosecuting agents compromised and purposely confused the fact. Due to the evidence first being found in the co-defendant's hands. Identification being made of him, not the Applicant. The conspiring parties ran the trials together because of all facts were more incriminating to the co-defendant. They including the court, after allowing the state to abuse the direct indictment

process, knew the case not being severed, would extremely prejudice the Applicant in their effort to have him unjustly convicted, since they knew he had no criminal history. This is not a conclusory claim because why would the attorney tell the Applicant it was impossible for him to be given a youth sentence and it was impossible to have the case severed which is why he would not submit the motion? Why would the prosecutor abuse the direct indictment process and the court let them? It was because they knew they were past the [180] days and they engaged in clear acts of fraud on the court. Their very actions constitute proof. Fraud of this magnitude would serve to render the commitment order void initiating the conviction. Callon Petroleum Co. v. Frontier Ins. Co., 351 F.3d 204, 208 (5th Cir. 2003); Digital Equip. Corp. v. Desktop Direct Ins., 511 U.S. 863, 868, 114 S.Ct. 1992, 1996, 128 L.Ed.2d 842 (1994); Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003); Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003); King v. First American Investigators, Inc., 287 F.3d 91, 95 (2nd Cir. 2002), cert. denied 537 U.S. 960, 123 S.Ct. 393, 154 L.Ed.2d 314 (2002); Brailsford, 380 S.C. 443, 669 S.E.2d 342.

The severance would have permitted greater protection to the Applicant, not being seated at the same table as his co-defendant, which these injustices related to the identification done by the witnesses, he being in possession of the alleged laptop, not the Applicant, showing the prosecutions efforts at framing him, compromising the chain of custody related to this evidence, could have been brought out at separate trials requiring the Applicant's co-defendant to take the stand to address these claims. The compromised state attorney even failed to submit the evidence which demonstrated that the cash the Applicant had in his possession was not obtained by ill gotten

means. State appointed counsel is obligated by the Code of Professional Ethics not to engage in acts of fraud on the court and to defend the interest of his client to his utmost ability, with all his skill and energy and not allow himself to be compromised by the state, acting as a prosecutor not defense attorney, stripping him of any claim of immunity. State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970); People v. Blalock, 197 Colo. 320, 592 P.2d 406 (1979); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); United States v. Echles, 352 F.2d 892 (7th Cir. 1965).

The Fifth Amendment in this instance gave the co-defendant the right not to be called to the stand and that right extended so far as to forbid, not only government, but even the Applicant from calling his co-defendant to the stand which extremely prejudiced this petitioner. United States v. Keeman, 267 F.2d 118, 126 (7th Cir. 1959), cert. denied 361 U.S. 836, 80 S.Ct. 121, 4 L.Ed.2d 104 (1959); Poretto v. United States, 196 F.2d 392, 394 (5th Cir. 1952); DeLuna v. United States, 308 F.2d 140 (5th Cir. 1952); United States v. Housing Foundation, 176 F.2d 665, 666 (3rd Cir. 1949).

However, if the Applicant's co-defendant's case was severed from his, while the co-defendant would retain the privilege against self-incrimination, as a witness, he could no longer have the right not to be called to the stand which he exercised during the Applicant's trial. Thus, absent the Applicant's co-defendant's willingness to waive his Fifth Amendment rights while joined as a defendant to the Applicant, severance was the only way of affording the Applicant any possibility of persuading the co-defendant to testify. Landy v. United States, 283 F.2d 303 (5th Cir. 1960).

In a situation where the elusive quality of credibility is of such importance the jury should have the

benefit of all relevant testimony likely to shed light on the situation, in this case where the Applicant had an alibi defense, the co-defendant was in possession of the alleged stolen property there was a lawful source of all funds in the Applicant's possession not being a product of a robbery, the co-defendant was identified, not the Applicant, violations of the chain of custody of evidence and more. Where the opportunity to severance by counsel's ineffective assistance, resulted in withholding this crucial witness testimony on such critical points, so tipped the scales against this Applicant, that this Applicant failed to receive a fair trial. A verdict based so heavily on less than the full available testimony, where the missing testimony of the co-defendant could, with relative ease, have been procured had counsel filed and submitted the motion for severance, should not stand due to counsel's ineffectiveness. United States v. Turner, 274 F.Supp. 412 (D.C. Tenn. 1967); United States v. Crisona, 271 F.Supp. 150 (S.D.N.Y. 1967); United States v. Kilgore, 403 F.2d 627, 628 (4th Cir. 1968), cert. denied 394 U.S. 932, 89 S.Ct. 1204, 22 L.Ed.2d 462 (1969); 454 F.2d 772 (1971).

Due also to potential alibi defense that was prevented from being asserted. This is not an exercise in clairvoyance. The Applicant clearly made it known to state paid counsel these issues including his desire for severance which was never submitted by the attorney conspiring under color of state law with the prosecutor demonstrating his ineffectiveness requiring reversal. All the aforementioned produced an inability of the Applicant to produce other testimony from the co-defendant that would have been vital to the Applicant's defense. Deluna v. United States, 308 F.2d 140 (5th Cir. 1962); United States v. Kahn, 366 F.2d 259, 263-64 (2nd Cir.), cert. denied 389 U.S. 1015, 88 S.Ct. 591, 19 L.Ed.2d 661 (1967); 454 F.2d 772 (1971); State v. Rocheville, 425 S.E.2d 32 (1993); State v. Kelsey, 502 S.E.2d 63 (1998).

The trial court and/or prosecuting body acting arbitrarily under color of state law, in egregious violation of 18 U.S.C. §241, §242, has failed to adhere to their own state laws and federal law, in violation of the Applicant's substantial Constitutional rights giving the Applicant this compromised ineffective counsel who purposely refused and failed to submit motion for severance, overwhelmingly prejudicing the petitioner creating a fundamentally unfair trial in acts of retaliation simply because I would not accept their plea offer to cover the court's procedural defect and default. This violates the Applicant's rights of due process denying him the equal protection of the laws. Screws v. United States, supra; State v. Middleton, supra; Eslinger v. Thompson, supra; McLaughlin v. Florida, supra; Dubinka v. Judges of Superior Court of the State of California, For The County of Los Angeles, supra; Jones v. State of Arkansas, supra; Hicks v. Oklahoma, supra; Dozier v. Loop College, City of Chicago, supra; Lugar v. Edmondson Oil Co., supra.

When an officer of the court uses the instrument of arrest and incarcerate an accused for the purpose of engaging in malicious and fraudulent, criminal activity, in deception of both jury and defendant, and the court in acts of fraud on the court aids them or turn the blind eye and deaf ear, willfully subjecting the Applicant to deprivation of any rights, immunities or privileges secured by the Constitution and laws of the United States within any State, District or territory, they shall be subject to state and/or federal penalty. By what the state has done here, such action is indeed deprivation of the rights of the accused to liberty and a violation of 18 U.S.C. §241 and §242. Neither threat, nor violence is a necessary ingredient of the offense under these circumstances where these individuals were clearly acting arbitrarily under color of law acting for an ulterior purpose. Williams v. United States, 179 F.2d 656 (Fla.

1950), cert. granted 340 U.S. 850, 71 S.Ct. 70, 95 L.Ed. 622; Brown v. United States, 204 F.2d 247 (Tenn. 1953); United States v. Ramey, 336 F.2d 512 (W.Va. 1964), cert. denied 379 U.S. 972, 85 S.Ct. 649, 13 L.Ed.2d 564; United States v. Kozminski, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988), 46 CCH EPD 938067 on remand 852 F.2d 1288 (Mich. 1988); 18 U.S.C. §241, §242; Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966); United States v. Otherson, 637 F.2d 1276 (9th Cir. 1980), cert. denied 454 U.S. 840, 102 S.Ct. 149, 70 L.Ed.2d 123 (1981). If there were no ill intent this issue would merely be reversible error. But since it is clear that we have fraud and prosecutorial misconduct upon the agents of the court itself. Also due to the extreme prejudice the Applicant was subject to, the conviction and sentence must be set aside. The Applicant seeks such.

(3). Did the trial court err, and was the Applicant's Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution violated, as well as Article IV, §2, and his due process rights violated, by the state's abuse of the direct indictment process and the court and state paid attorney conspiring under color of state law and acts of fraud on the court to aid them in this injustice?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Moss v. Aetna Life Ins. Co., supra; State v. Broad River Power Co., supra; 31 C.J.S. EVIDENCE §6 and §9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional rights of the party are compromised. A manifest Constitutional error can be reviewed by a court of appeals even if the appellant did not object at the proceedings. (Black's Law Dictionary 8th Edition).

Now let's address the matter. The state prosecutor abused the direct indictment process, conspiring under state law, compromising state paid attorney and the court conspired with them knowingly to allow them to do so.

Once an individual is arrested in the State of South Carolina. He or she automatically falls under the provisions of due process dictated, made mandatory, draconian by South Carolina Supreme Court judicial order issued under Article

V, §4 that is also clearly tied to the South Carolina Constitution. They had [180] days to conclude.

The direct indictment process was designed for cases where if a defendant was arrested for a crime. But within the initial stages of process regarding that arrest. The state then discovers that there is insufficient evidence to bring that person to trial within the [180] days mandated. The state is required to nol pros and release the defendant. If sometime after the release the state discovers new evidence or testimony it did not have at the time of that initial arrest and release of the defendant. Upon receipt of that evidence or testimony the state did not have in it's possession originally. The state can now take this newly obtained evidence they did not originally have in their possession, present it to the grand jury and have the defendant direct indicted.

This is not what occurred here. There was no newly obtained testimony or evidence the state prosecutor did not have in his possession upon the defendant's arrest or within the initial [180] day time period. There were no other exceptional circumstances that occurred in this case that were placed on the court record warranting exemption from the [180] day mandate by judicial order of the South Carolina Supreme Court.

Thus, the state prosecutor, conspiring under color of law, in acts of fraud on the court, abused the direct indictment process to conceal his failure to be in compliance to the Supreme Court order, compromising the state attorney and the court aided them in acts of fraud fraud and misrepresentation.

There is no need to cite law in this issue because the law argued for issue number (4) is also being argued for issue number (5). The overwhelming prejudice is clear. The Applicant should be home by now. The sentence and conviction must vacated. The Applicant seeks such.

(4). Did the direct appeal court err, and was the Applicant's Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution violated, as well as Article IV, §2, and his due process rights violated by that court forcing the appellant to keep compromised counsel on direct appeal and the appellant upon immediate discovery of the fraud, sought to exercise his right to self representation?

This is also a manifest Constitutional error. An error on the part of the trial court, in this case the direct appeals court, that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional rights of the party are compromised. A manifest Constitutional error can be reviewed by a court of appeals even if the appellant did not object at the proceedings. (Black's Law Dictionary 8th Edition).

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. MOSS v. Aetna Life Ins. Co., supra; State v. Broad River Power Co., supra; 31 C.J.S. EVIDENCE §6 and §9; Federal Rules of Evidence, Rule 201(a).

The Applicant humbly avers, and states this clearly for the record for all courts and parties to understand. Unless there is some exceptional circumstance that exist. No court or party within the United States, at any level can deny a defendant his Constitutional due process right of self representation. This was done within the South Carolina Court of Appeals, citing Roberts when United States v. Gonzales-Lopez, decided in 2006 overruled Roberts with the Barnes case.

This judicial chicanery and travesty of adjudication did not end in the trial court. Once the state prosecutor realized all the wrongs that occurred at the trial level. They realized they had to continue to pursue their nefarious enterprise into the direct appeals court because if the conviction was not affirmed there they would be liable to suit.

For the record. All the legal issues argued within this document were intended to be argued on direct appeal. To prevent this the state prosecutor knew they had to make efforts to compromise both court and attorney on direct appeal. These are the mechanics to the so-called "good ole boy system of justice". This is how it works. To maintain a high conviction rate within this state. They generally decide their course of action by the intelligence level and financial resources or lack thereof of the defendant. If they determine that the defendant lacks the intelligence to put forth a proper brief and is limited, indigent, in financial resources in his ability to hire an outside attorney. The compromised state appointed attorney, with knowledge, and aid of the South Carolina Court of Appeals, state they see no viable issues that can be argued, submit a frivolous issue the know would affirm the conviction and allow the defendant to submit brief they know he lacks the intelligence to submit. The court then accepts the attorneys assessment, relieving him, then everybody's covered by this sham process. If the defendant has intelligence to submit brief. The lawyer blocks him under the no-hybrid defense mechanism, places forth a Johnson Brief arguing it in a manner that would affirm the conviction, the Court of Appeals accepts the fraud then everybody's covered, concealed in sham process.

The Applicant realized this was going on so he immediately informed state appointed counsel before she submitted brief when she was initially assigned of his desire of self

representation. She lied to the Applicant giving him the false impression this could not be done. Conspiring with the state and with aid from the appeals court, she submits Johnson Brief in efforts to block the Applicant from the court to prevent these issues from being argued, places forth an issue she knew would affirm the conviction. The Applicant immediately objected but was blocked by the South Carolina Court of Appeals because they did not want these issues placed before the court due to the controversy behind them.

The fact that the Applicant was not permitted to present these issues on direct appeal demonstrates the prejudice. Had they been presented the outcome of the direct appeal would have been entirely different. This is not a conclusory allegation. Their actions constitute proof. Why would the court and state appointed counsel conspire to deny the Applicant his clearly established right of self representation if the claims were not true? Self representation was the Applicant's exercise of his right to "counsel of choice".

The Constitutional right to counsel of choice do not only extend to trial proceedings. It applies to direct appeals, pcr's writ of certiorari and writ of habeas corpus, including all other proceedings as well. The provision of 28 U.S.C.A. §1654 speak with all [c]larity and [p]articularity. By the mandates of U.S.C.A., Amend. 6, in "[a]ll, (emphasis added), court of the United States the parties may plead and conduct their own case personally, or by counsel as, by Rules of such courts, respectively, are permitted to manage and conduct cause therein. Turner v. American Bar Ass'n, 407 F.Supp. 451 (D.C. Tex. 1975), aff'd 542 F.2d 56; United States v. Dougherty, 473 F.2d 1113 (1972), 154 U.S.App.D.C. 76.

The outcome of the direct appeal proved that this was not a harmless error producing violations of 42 U.S.C. §1983, §1985(2), §1985(3), and 1986; 18 U.S.C. §241 and §242; Chapman v.

California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967). To compel a criminal defendant to be represented by counsel in all cases would conflict with his statutory and Constitutional right to conduct and manage his own defense. Lowe v. United States, 418 F.2d 100 (Ind. 1969), cert. denied 397 U.S. 1048, 90 S.Ct. 1378, 25 L.Ed.2d 660; Faretta v. California, 422 U.S. at 835, 95 S.Ct. at 2541, 2549, 45 L.Ed.2d 562, 592 (1975); Wiggins v. Estelle, 681 F.2d 266 (1982).

The fraud on the court related to this issue was never addressed by any court and like subject matter jurisdiction it cannot be waived and can be raised at any time. The Sixth Amendment itself grants every defendant, state or federal, the right to personally conduct his own defense. The defendant has the right to proceed without state appointed counsel when he voluntarily and intelligently elects to do so and no act of fraud must be permitted to prevent this requiring that the affirming of the conviction in the Court of Appeals be void and reversed. This unjust actions is if though the Applicant had no direct appeal or counsel at all. Juelich v. United States, 342 F.2d 29, 30 (5th Cir. 1965); Middlebrook v. United States, 457 F.2d 657, 659 (5th Cir. 1972)(decision to defend pro se is exercise of defendant's right to "freedom of choice"); Callon Petroleum Co. v. Frontier Ins. Co., supra; Digital Equip. Corp. v. Desktop Direct Ins., supra; Chewning v. Ford Motor Co., supra; Appling v. State Farm Mut. Auto Ins. Co., supra; King v. First American Investigators Inc., supra; Brailsford, supra; Strickland v. Washington, supra; Evitts v. Lucy, 469 U.S. at 387, 105 S.Ct. at 830, 83 L.Ed.2d at 831 (1985); Gray, 800 F.2d at 646.

The Constitutional right to have a lawyer is a treasured one. But the Constitutional right to refuse an attorney's help is also given Constitutional dignity in the form of self representation. The United States Supreme Court loathe denying the latter, unless compelled to do so by clear and

commanding precedent. The Constitutional due process right to act pro se, self representation, as counsel of one's choice must not be denied. Court's within the Fourth Circuit have determined that the right to "counsel of choice" is not absolute. (citations omitted). That was because the defendants who attempted to invoke this right as a legal tactic to delay and disrupt the court's schedule. This was not the case here. The Applicant was lied to by appointed counsel to deny him that right. Once discovered that counsel failed to address these legal issues after agreeing to do so and/or waiving them without the Applicant's consent. The Applicant immediately brought this to the attention of the court seeking to exercise his Constitutional right, but the court conspired with the state to deny this right in acts of fraud warranting review before this court. Chapman v. United States, 553 F.2d 886 (1977); United States v. Pike, 439 F.2d 695 (9th cir. 1971); United States v. Warner, 428 F.2d 730 (8th Cir. 1970), cert. denied 400 U.S. 930, 91 S.Ct. 194, 27 L.Ed.2d 191 (1971); Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969), cert. denied 396 U.S. 1021, 90 S.Ct. 593, 24 L.Ed.2d 514 (1970); United States v. Plattner, 330 F.2d 271 (2nd Cir. 1964); United States v. Gonzales-Lopez, 548 U.S. 140, 147-48 (2006); Chaplin & Drysdale, Chartered v. United States, 491 U.S. 607, 624-25 (1989); Wheat v. United States, 486 U.S. 153, 159 (1988); Rodriguez v. Chandler, 382 F.3d 670, 675 (2004), cert. denied 543 U.S. 1156 (2005); Powell v. Alabama, 287 U.S. 45, 53 (1932); Sullivan v. Louisiana, 508 U.S. 275, 282; Arizona v. Fulminate, 499 U.S. 279, 309-310; McKaskle v. Wiggins, 465 U.S. 168, 177-78 n.8 (1984). Unlike those prior cases the appellant was not attempting to hire outside counsel. He was not waiting until family paid for that counsel of choice. The court did not have any undue weight or disruption since the right for rehearing had not passed and the Applicant could have immediately taken over

the case and was immediately ready to submit Brief. This makes the right absolute and the holdings made in related cases would be misplaced, consisting of materially different sets of facts. This is confirmed by the State v. Barnes case. Fraud cannot be waived.

The South Carolina Court of Appeals was required once the Applicant confronted the fraud seeking to waive counsel and act pro se, to apply the traditional Faretta standard which would reflect if appellant was competent which the appellant was. No matter who assisted the appellant, the appellant took active role in constructing and reviewing all issues on his own, independently despite any assistance he sought from any source. Thus, the appellant being mentally competent doing the research also independently should have never been denied this due process right, by this fraud on the court.

A South Carolina defendant has the Constitutional right to represent himself under both state and federal Constitution. U.S.C.A. Const. Amend. 6; South Carolina Constitution Article I, §14. A defendant may waive the right to counsel and it's the court's affirmative duty to protect the right of self representation. The Applicant must knowingly and intelligently waive counsel which the Applicant did do. The South Carolina Court of Appeals was then required to warn of the dangers of self representation which the Applicant on the court record acknowledge he was clearly aware of the dangers. Thus, this right should have never been denied in acts of fraud on the court. The Sixth Amendment guarantees every criminal defendant the right to proceed without counsel when he voluntarily and intelligently elects to do so. The Applicant informed the South Carolina Court of Appeals that he was not attempting to delay,

nor did he seek continuance, but was ready to submit Brief immediately. The erroneous denial of Faretta request is a structural error requiring automatic reversal. Due to the fraud and extreme prejudice the Applicant seeks reversal and also vacating the offenses. State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014); State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010); Faretta, 422 U.S. at 834, 95 S.Ct. at 2525; State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

(5). Did the trial court err, and was the Applicant's Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution violated, as well as Article IV, §2, and his due process rights violated, by the trial court allowing testimony of various witnesses to be entered into the court record as evidence, and/or allowing their statements related thereto to be entered as evidence in the case, when there was no evidence adduced at trial to show that they were given a copy of the statements at the time they were made, nor was there signed by them a copy of the receipt for the taking thereof?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Moss v. Aetna Life Ins. Co, supra; State v. Broad River Power Co., supra; 31 C.J.S. EVIDENCE §6 and §9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest Constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional rights of the party are compromised. A manifest Constitutional error can be reviewed by a court of appeals even if the appellant did not object at the proceedings. (Black's Law Dictionary, 8th Edition).

S.C. Code Ann. §1-7-730 and S.C. Code Ann. §17-13-150, requires that the prosecuting body "[s]hall" fulfill, and see that all duties, requirements and rules of procedure related to criminal due process and/or the state and federal Constitution and/or state and federal law are adhered to and completed within the court(s).

So the law is written "ita lex scripta est", S.C. Code Ann. §19-1-80 states in hanc verba: "Conditions on examinations of witnesses in criminal proceedings concerning written statement(s) made to public employee(s) - No witness in any preliminary hearing or in any criminal judicial proceeding of any kind or nature, shall be examined or cross-examined by any examiner, solicitor, lawyer or prosecuting officer concerning a written statement formerly made or given to any person employed by this state, or any county, city, or municipality thereof, or any part of any such government body, unless it first be shown that at the time of making of the statement the witness was given an exact copy, and that before any examination or cross-examination the witness was given a copy of the statement and allowed a reasonable time in which to read it, and the witness signed a receipt taken therefor." State v. Motes, 215 S.E.2d 19 (1975); State v. Steadman, 257 S.C. 528, 186 S.E.2d 712 (1972).

S.C. Code Ann. §19-1-90 states in hanc verba: "Admissibility in criminal proceedings of written statements made to public employees -- unless the provisions of S.C. Code Ann. §8-15-50 and S.C. Code Ann. §19-1-80 have been complied with, no statement such as referred to in those sections shall be admissible into evidence in any case, nor shall any reference be made to it in any trial of any case."

The South Carolina Supreme Court in subsequent cases gave greater clarity to this issue. That Court determined that the prosecuting agent and/or law enforcement officer who took the statement, do not have to give a copy of the statement at the exact time that it was made. But it "[m]ust", (emphasis added), be given to the person making the statement a reasonable time shortly after the statements were taken. Even though many of the statements were recorded. This did not take

away from the duty of the officer to have the tape transcribed on paper, have the witnesses sign it, and then give them a copy. In this instance it would not have taken from the state agents to have it transcribed on paper, have any interpreter go over the statement with the witness and both the witness and person who was assigned as the legal interpreter sign a receipt that both of them received a copy and they both agreed to and have full knowledge of the contents of the statements. So in order to be fair to the prosecution we will say (90) days to transcribe the recording to paper, have the parties sign it and sign the receipt for the taking of the statements. In fundamental fairness to the Applicant it cannot be construed to mean over (15) months later. State prosecutors have continually used the method of a recorded statement, conspiring under color of law to circumvent the legal mandates under S.C. Code Ann. §1-19-80 and §1-19-90 in acts of fraud, but the law still requires that they transcribe the oral/recorded statements to writing, have the party sign them and return to them a copy in order for the testimony related thereto and the actual statements themselves to be deemed admissible. Due to the South Carolina Supreme Court's determination as it relates to statements given to public officials. There is no room for the court to impose a different meaning or judgment based upon it's own notions once the South Carolina Supreme Court has made a determination on this issue. The plain meaning rule applies to all applicable statutes related to this issue. Bass v. Isochem, 617 S.E.2d 369 (Ct.App. 2005); State v. Brannon, 666 S.E.2d 272 (Ct.App. 2008); State v. Pittman, 647 S.E.2d 144 (2007); Liberty Mut. Ins. v. S.C. Second Injury Fund, 611 S.E.2d 297 (Ct.App. 2005).

It is perspicuous at this juncture that the witnesses in this case, some that could speak and write English gave their recorded statements to the various law enforcement

officers, and those officers recorded them in their efforts to circumvent the statute, but was still obligated to have those recordings transcribed in writing thereupon they were required to have the statements signed, also by receipt given to the parties. (Tr.p. 186-187; Tr.p. 416-417; Tr.p. 440-443; Tr.p. 299-300; - Tr.p. 599-600; Tr.p. 64). By these pages the witnesses testified the recorded, the officer wrote down verbatim what they said, had them sign it, but failed to give them a copy. The statements were written.

It is also perspicuous that even a controversy came up when the interpreters were switched. Now you have a party interpreting who was not present when the statements were originally recorded not having first hand knowledge now interpreting what was said after the fact producing extreme prejudice by the statements entry and state paid compromised attorney allowed it and did not object. (Tr.p. 46-47).

The witnesses clearly went on the record stating the statements were written and they were not given a copy. Any witness that was not questioned in this manner, the prosecution conspiring under color of law, avoided questioning on this issue because he knew fully well the answer would be the same in acts of fraud and misrepresentation and it would prove that the witnesses testimony and the statements themselves were in violation of the statute and if anything was produced stating they were given a copy, it would be a fraudulent document, where for (15) months until trial no witness was given a copy of these statements to the prejudice of the Applicant who had the due process right to challenge their admissibility pursuant to this statute violation. once the prosecution conspired under color of state law to enter those statements into the proceedings as evidence knowing fully well they were not in compliance to the statute and/or possessing fraudulent entry and misrepresentation.

That fraudulent entry and/or misrepresentation rendered those statements and any testimony given related thereto void, required it to be stricken from the record and be deemed "fruit of a poisonous tree". Mapp v. Ohio, supra.

The Applicant is arguing preemption this being an Article III, §2, case because the first legal issue argued and others connected to it within this document effects all (50) states. Pursuant to 18 U.S.C. §1001 (1988 Ed.); "Whoever, in any manner, within the jurisdiction of any department or agency of the United States, knowing and willfull falsifies, conceals, or cover up by any trick, scheme, or devise a material fact, or make use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry (ci stating they were given a copy or producing a fraudulent receipt), shall be fined not more than \$10,000.00 or imprisoned not more than 5 years or both."

This covers false statements or document of any kind to include those falsehoods that pervert government functions. United States v. Gonzales, 520 U.S. 1, 5 (1997); Brogan v. United States, 522 U.S. 398 (1998); United State v. Gilliard, 312 U.S. 96 (1941).

Fraud will vitiate any legal transaction which include the taking and admissibility of these statements, and any asserted title to them as evidence, or pursuing properly in the form of this so-called "debt to society", this modern day slavery in the form of this unjust conviction by this broke judicial system, founded on them is void. Although public documents in the form of these illegally obtained and admitted statements, which are part of this modern day slavery are deemed prima facie evidence of facts which they purport to state, they are open to

be impugned for fraud. The Conception, Brunn, Coll. C. 497, 2 Wheeler CC 597, 6 F.Cas. 359 No. 3137 (CCD SC 1819); The La Conception, 19 U.S. 235, 1821 WL2188, 5 L.Ed. 249, 5 Wheat 235 USSC (March 8, 1821); The Acmistad, 40 U.S. 518, 15 Pet. 518, 1841 WL5024, 2006 A.M.C. 2955, 10 L.Ed. 826, U.S. Conn., January 1841.

By these egregious acts of fraud and violations of due process as well as state and federal law. The state prosecutor, court and compromised attorney entered themselves into a secret and deliberate scheme to defraud the Applicant, jury and any further future court that would possibly give review, and planned as well as executed to tamper with the administration of justice in a manner showing harm to the Applicant, subverting the integrity of the court itself, so that the judicial machinery cannot perform in it's usual manner it's impartial tasks of adjudicating matters requiring that the statements and testimony related to them be rendered void and stricken from the record being also deemed "fruit of a poisonous tree". The state actors violated the provisions of 18 U.S.C. §241 and §242 requiring sanctions which is sought, to include having the sentence and conviction vacated due to these issues in total. Callon Petroleum Co. v. Frontier Ins. Co., supra; Digital Equip. Corp. v. Desktop Direct Inc., supra; Chewning v. Ford Motor Co., supra; Appling v. State Farm Auto Ins. Co., supra; United States v. Beggerly, supra; King v. First American Investigators Inc., supra.

(6). Did the trial court err, and was the Applicant's Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution violated, as well as Article IV, §2, and hid due process rights violated, by the trial court allowing constructive amendment of the indictments at the Applicant's trial?

Judicial notice takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Moss v. Aetna Life Ins. Co., supra; State v. Broad River Power Co., supra; 31 C.J.S. EVIDENCE §6 and §9; Federal Rules of Evidence, Rule 201(a).

This is also manifest Constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional rights of the party are compromised. A manifest Constitutional error can be reviewed by a court of appeals even if the appellant did not object at the proceedings. (Black's Law Dictionary, 8th Edition).

It is the body of the indictment which is the [v]ital part of the charging instrument. State v. Tate, supra. And it "[c]annot" be so cryptic or the wording so loose and ambiguous as to fail to comply with the basic right of the accused to be fully informed as to the "[c]ause and [n]ature" of the accusation being levied against him, which is one of his most basic, fundamental, and universally recognized rights of due process. Smith v. Grady supra; State v. Tabory, supra. Reliance upon a caption to bolster a fatally defective indictment is therefore contrary to the Constitutional mandate that for most offenses, a defendant may only be required to answer an indictment of a grand jury that is deemed good. South Carolina

Article I, §11; Cf State v. Tabory, supra (holding that the state may not support a conviction for an offense intended to be charged by relying upon the caption to the exclusion of the language contained within the body of the indictment).

Insomuch, the indictments for kidnapping do "[n]ot" sufficiently and/or properly apprise the Applicant of the "[c]ause and [n]ature" of the offenses or of what he is called upon to meet and defend because the indictment for kidnapping does not allege how the kidnapping occurred and makes use of the generic terms of the statute. The indictments for Armed Robbery and burglary do not state how much money was robbed or burglarized. No specific goods as listed. The indictments allege the Applicant acted in concert, but do not state exactly who or how many people he acted in concert with. The indictments fail to descend to particulars alleging cryptic, loose and ambiguous numerous materially different sets of facts that do not apply to this case. The indictments cannot be deemed sufficient if the prosecution is permitted to prove all of these materially different set of facts. The indictments cannot be construed as to give reasonable notice. This creates an enigma as to exactly what the Applicant is called upon to meet and defend. The indictments "[m]ust" descend to particulars and these particulars "must" be passed upon by the grand jury in accordance to the Constitutional rights of the accused. No one can say what was in the mind of the grand jury. To not allege these crucial elements and/or allegations in the body of the charging instruments returned against the accused, having them passed upon by the grand jury, then, thereafter the trial court, and/or prosecuting body add these material averments in one form or the other within the proceedings, and allow a trial to go forward, where such was not passed upon by the grand jury, is constructive amendment of the indictments. No one can say what was in the mind of the grand

jury. State v. Munn, supra; State v. Rallo, supra; S.C. Code Ann. §17-19-10; S.C. Code Ann. §17-19-20; State v. Hardee, supra; State v. Tate, supra; State v. Beachum, supra; United States v. Abrams, supra; State v. Keith, supra; United States v. Hooker, supra; Russell v. United States, supra; Hamling v. United States, supra; United States v. Cabrera-Teron, supra; United States v. Pupo, supra.; (Tr.p. 269; 272; 279; 577; 582; 583; 603; 604.

In regard to the Constitutional structural error and/or defect in the indictments, as construed in all (33) states that make use of an indictment, the remaining (17) states that make use of a complaint document in state captivity and all (50) states that make use of an indictment under federal captivity, taking away the presumption of innocence and automatically shifting the burden of persuasion, predetermining in advance the outcome of the proceedings. According to the findings of the grand jury the Applicant is already found guilty and convicted. The grand jury does not have the power and/or authority by state or federal law, or by state or federal Constitution to convict a defendant. This is an egregious violation of their shielding function. For the grand jury to produce indictments or complaint documents that state, adjudicate and/or allege that the defendant is not only guilty of the crimes charged, to include the "mens rea" elements related to the offenses; then, thereafter, the court alters the allegations of the indictment(s), to include the "mens rea" elements, and charges that the defendant is innocent until proven guilty, is constructive amendment of the indictments, and changes the very nature of the allegations returned by the grand jury. This creates an instant double jeopardy issue. To accept a guilty plea, and/or take a defendant to trial on charges in an indictment for which he has already been found guilty of, violates due process and is double jeopardy. No one can say what was in the mind of the grand jury

as to whether or not they intended to illegally take upon themselves the role of the trial jury and adjudicate guilt of the offenses not allowing any subsequent adjudication to occur rendering any subsequent proceeding [v]oid. This means this is an error which can only be corrected by the grand jury and not the trial court. This further serves to validate that the structural Constitutional error and/or defect affect the framework of the proceedings and cannot be viewed as harmless, because the Court must constructively amend the indictment(s) on the "mens rea" element(s) of the offense(s) to correct, or in an effort to correct the structural Constitutional error. State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997); State v. Lewis, 321 S.C. 146, 447 S.E.2d 265 (Ct.App. 1996); Sandstrom v. Montana, supra; Morisette, supra; United States v. Gypsum Co., supra; Humanik v. Beyer, supra; United States v. Clemens, supra; Martin v. Ohio, supra; Robinson v. Arvonio, supra; United States v. Briggs, supra; United States v. Chadwick, supra; compare Pierson v. Ray, supra; Jenkins v. McKeithern, supra; Branzburg v. Hayes, supra; moore v. Dempsey, 43 S.Ct. 265, 67 L.Ed. 542 (1923); Tr.p. 269; 280; 285; 286; 289; 292-93; 296.

Constructive amendment of an indictment is a per se violation of the provisions of the Fifth Amendment, when such amendment affects an essential element of the offense. Such a violation requires reversal of the conviction, even without a showing of prejudice, but once prejudice is clearly shown, the sentence and conviction must be vacated. State v. Guthrie, 352 S.C. 103, 512 S.E.2d 309; Article IV, §2, United States Constitution; United States v. Coyne, 4 F.3d 100 (2nd Cir. 1993); United States v. Morgenstein, 933 F.2d 1108, 1115 (2nd Cir. 1991); Wilson v. Lindler, 995 F.2d 1256; Stirone v. United States, 413 F.2d 1061 (D.C. Cir. 1969); Douglas v. State of Alabama, 380 U.S. 417, 85 S.Ct. 1074 (1965); Tr.p. 269; 280; 285; 289;

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292-93; 296.

Inasmuch, constructive amendments of the indictments did occur and the unconstitutional amendment prejudiced the Applicant at his proceedings leading to an unfair and impartial trial and/or guilty plea that was not freely, knowingly, voluntarily or intelligently given, depriving the Applicant of reasonable notice and of this right to have material averments properly passed upon by the grand jury in egregious violation of the Applicant's substantial rights of due process. This occurred when the charging terms of the indictment(s) were altered literally and/or constructively in the manner aforementioned. S.C. Code Ann. §17-19-100 (1985) permits amendment to an indictment provided the nature of the offense charged is [n]ot changed. If (A) there is a defect in form in any indictment, or (B) on the trial of any case there shall appear to be any variance between the allegations of the indictments and evidence offered in proof thereof, the court before which the trial may be had may amend the indictment(s) according to the proof, if the amendment be because of variance, if such amendment does not change the "[n]ature" of the offense charged. After such amendment the trial and/or plea hearing should proceed in all respects and with the same consequences as if the indictments had originally been returned as so amended, unless such amendment shall operate as to surprise the defendant, in which case the defendant shall be entitled upon demand to a continuance of the cause. Tr.p. 269; 280; 285; 289; 292-93; 296.

A variance between pleadings and proof is [n]ot material where matter alleged is [n]ot an [e]lement of the offense. State v. Hiott, 276 S.E.2d 163.

On the other side of the spectrum of this language, a variance between pleadings and proof "[i]s" materials where matter alleged "[i]s" an "[element]" of the offense; and

furthermore, such an amendment to correct this variance "[c]annot" be allowed if such amendment changes the [n]ature of the offense. Hope v. State, 328 S.C. 78, 492 S.E.2d 76; State v. Grainger, 507 S.E.2d 322 (1998).

Once the nature of the elements became altered in the manner aforementioned, the indictments were no longer to be considered the indictments returned against the Applicant. A defendant is entitled to be tried and/or give his guilty plea on charges that are properly set forth in an indictment and such properly set forth charges must be passed upon by the grand jury. S.C. Code Ann. §17-19-10 (1976). The true test of the sufficiency of an indictment is whether or not it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he is called upon to meet. The essential elements and/or allegations are not alleged, the indictments do not descend to particulars, state who the Applicant conspired with, allege what items were taken in some the offenses charged makes use of the generic terms of the statutes. By the language and/or charge of the indictments as construed, it informs the Applicant that he is called upon to meet the burden of production on the critical elements of dispute related to the offenses. By the mandates of due process law, the Applicant is not, by state or federal Constitution, nor by state or federal law, called upon to meet the burden of production on the critical elements of dispute related to the offenses. The indictments inform the Applicant that his guilt is illegally predetermined in advance under oath of the grand jury and the Applicant is being subjected to another proceeding on the same charges. Brown v. State, supra; Mathis v. State, supra; Francis v. Franklin, supra; United States v. Abrams, supra; Martin v. Ohio, supra; In re Winship, supra; Mullaney v. Wilbur, supra; Humanik v. Beyers, supra; Moore v. Dempsey, supra.

What's worse than this the indictment not only by their very nature already prematurely convict the Applicant of all charges made and/or laid before the court, denying the Applicant the presumption of innocence, but it also creates this egregious, blatant, outrageous violation of due process, where the indictments by the structural Constitutional error and/or defect, has denied the Applicant the right to a trial by a jury of one's peers; denied the Applicant the right to confront his accusers or to cross examine witnesses; denied the Applicant the right to call witnesses in his defense or to present expert testimony; denied the Applicant the right to take the stand and testify at his proceedings; denied the Applicant the right to place forth evidence that would vindicate him at trial; denied the Applicant the right to counsel of choice; which include the right of self representation, way before a true trial jury was sworn, not this illegal trial jury in the form of the grand jury who swore upon their oath the Applicant's guilt, way before a trial commenced satisfying these essential Constitutional requirements of due process law; or way before he voluntarily, freely, intelligently or knowingly gave them up if we were dealing with a guilty plea, also way before he hired counsel or way before the court appointed legal counsel to assist the defendant. With the existence of the structural Constitutional error and/or defect the court has attempted to close the barn door far after the time the horses have already been released and/or escaped. The grand jury being duly sworn, in clear violation of their shielding function has taken upon themselves the role of the trial jury, and has has already convicted the Applicant of the crimes charged under oath." (emphasis added). To permit the Applicant to obtain counsel of choice after this egregious unjust ice, or to appoint counsel after the Applicant

has already been illegally convicted by the grand jury and deny the Applicant the previous mentioned Constitutional rights involved deprivation of Constitutional protections so basic and so fundamental that in their absence no criminal trial and/or proceeding can be deemed reliable as a vehicle for the determination of guilt or innocence, and no criminal punishment can be regarded as fundamentally fair, because such action has prematurely, criminally, stripped the Applicant of his inalienable rights of due process, also in violation of the Taking Clause of the Fifth Amendment. The state acting unjustly, conspiring under color of state law, in violation of 18 U.S.C. §241 and §242, has blatantly failed to adhere to their own state laws, causing extreme prejudice to the Applicant's proceedings has been denied, the Applicant the equal protection of the laws. Since the Applicant's guilt was already unjustly adjudicated^{by} the structural Constitutional error and/or defect under oath; this serves to make any other subsequent proceeding initiated "[v]oid", [n]ullified", "[a]rrested" and a violation of the Fifth, Sixth and Fourteenth Amendments also the Applicant rights of due process, to include his rights to double jeopardy protection. How could the court be allowed and/or permitted to have a trial and/or accepted a guilty plea for an offense the grand jury who swore upon their oath, have already found the Applicant guilty of? The structural Constitutional error and/or defect does not affect the framework of the proceedings and cannot be deemed as harmless. Easler, supra; Lewis, supra; Guthrie, supra; Vines v. United States, 28 F.3d 1123, crim. law 1116(1), 1156(1); State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct.App. 2002); State v. Padgett, 354 S.C. 268, 271, 580 S.E.2d 159, 161 (Ct.App. 2003); State v. Honey, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001); Griswald v. State of Connecticut, 381

U.S. 481, 85 S.Ct. 1678, (1965); Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998); 28 U.S.C.A. §1654; State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014); State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010); Turner v. American Bar Ass'n, 407 F.Supp. 451 (D.C. Tex. 1975), aff'd 539 F.2d 715, aff'd 542 F.2d 56; Faretta v. California, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 562, 592 (1975); Wiggins v. Estelle, 681 F.2d 266 (1982); Gonzales-Lopez, supra; Chaplin & Drysdale Chartered, supra; Rodriguez v. Chandler, 382 F.3d 670, 675 (2004), cert. denied 543 U.S. 1156 (2005); Stirone, supra; United States v. Silverman, 30 F.2d 106, 110 (2nd Cir.), listing these functions modified 439 F.2d 198 (2nd Cir. 1970), 91 S.Ct. 1619 (1971); Martin, supra; Francis, supra; Mathis, supra; Brown, supra; Abrams, supra; Dempsey, supra.

Referring back to the claim that this action constitutes the establishing of modern slavery. Congress confers upon no court, state or federal, the power or authority to establish, slavery of any kind in violation of the Peonage Act. The United States signed the convention Against Torture Treaty referred to as the C.A.T. Treaty in 1984, where Congress ratified the Treaty shortly after. Within that Treaty the United States established they would not be party to torture and would make this act criminal if done within any state. Torture was not the only thing that was signed off to within that Treaty. So was slavery. The United States agreed it would not be done within any state and the establishing of such would, like torture, be criminal.

According to the definition signed off to by the United States under the C.A.T. Treaty for slavery. It read in relevant part that if you used fraud or misrepresentation of any kind, to take away a person's liberty. And by means of that fraud and misrepresentation (ci taking away our presumption of

innocence by the indictments, predetermining in advance the outcome of the proceedings by the language, swearing under oath our guilt before any proceeding occur, etc., burden shifting, subjecting us to double jeopardy by the structural Constitutional error) which produces fraud and misrepresentation. Then you force the inmates nationally to work (ci kitchen workers, ground crew, dorm workers, etc.). By the definition sign off to by the United States under the C.A.T. Treaty and International law. The injustice via the legal issues presented do indeed constitute modern day slavery under the C.A.T. Treaty. See COMPENDIUM OF UNITED NATIONS STANDARDS AND NORMS IN CRIME PREVENTION AND CRIMINAL JUSTICE, ISBN: 978-92-1-133765-5; THE AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN; REINSTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Section 702 (1987); Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980); Fortis v. Suarez-Mason, 676 F.Supp. 1531, 1541 (N.D. Cal. 1987); see also IMPLIED WAIVER, *supra*, at 389 393-94; PARKER & NEYLON, JUS COGENS: The Compelling Law of Human Rights In Domestic Courts, *supra*, at 354 n.111; RANDALL, UNIVERSAL JURISDICTION UNDER INTERNATIONAL LAW, 66 Tex.L.Rev. 785, 830 (1988); Wang v. Ashcroft 320 F.3d 130 (2nd Cir. 2003); 28 U.S.C. §1331, §1332; §1343; also see THE FEDERAL ANTI-PEONAGE ACT OF THE THIRTEENTH AMENDMENT.

The Thirteenth Amendment provides - "Neither slavery nor involuntary servitude, except as punishment for crimes whereof the party is 'duly' (emphasis added) convicted, shall exist within the United States, or any other place subject to their jurisdiction."

Some courts have held that by the language of the Thirteenth Amendment the Thirteenth Amendment does not apply to a person serving a sentence for a criminal conviction. Newell, 563

F.2d 123; WL1415149 (2012); Cox v. U.S. Attorney General, F.Supp.2d 2012, WL1570110 D.S.C., April 10, 2012; Gaddy v. S.C. Supreme Court's District of Columbia, SC 2013 WL6150715, D.S.C., November 21, 2013; Flood v. News & Courier Co., 71 S.C. 112, 50 S.E. 637 (1905).

The courts in those previous cited cases abused their discretion in their determination because they are controlled by an error of law in their interpretation and/or they failed to address a critical part of the language written within the Thirteenth Amendment.

An abuse of discretion occurs when the court(s) are controlled by some error of law, or when the order based upon findings of fact are without evidentiary support or fact. Sharpes v. Sharpes, 342 S.C. 71, 535 S.E.2d 913 (2000).

None of the aforementioned legal authorities ever addressed whether or not the issue of slavery and violations of the Thirteenth Amendment have standing if the convicted person is not "duly" convicted. Since none of these citings or any similar ever addressed the issue of whether the Thirteenth Amendment applies in cases where the party is not "duly" convicted. Which is indisputably within the language of the Thirteenth Amendment. Using or applying any of those citings or any similar would be misplaced if the citing intended to be used does not address the issue whether the issue of slavery in this context applies or have standing when a person is not "duly" convicted.

Duly is defined as: 'right and fitting; properly; in accordance with legal requirements'.

The Applicant cannot be "duly" convicted of a crime if they are in advance of any proceeding, prematurely found guilty by the language of the indictments and/or criminal complaints, where the burden of proof by the language is shifted to the defendant even on the "mens rea" elements, their presumption of innocence being clearly taken away before any proceeding began producing an instant double jeopardy claim.

The Applicant cannot be "duly" convicted if from the proceedings onset there is clear acts of fraud and misrepresentation on the terms and level the United States agreed to be sued by that exist in the language of the C.A.T. Treaty regarding slavery, producing a structural Constitutional error of such a magnitude that the Applicant's most basic and fundamental due process rights are taken away, clearly affecting the framework of the proceeding depriving him of Constitutional protection so basic that in it's absence no criminal proceeding can be deemed reliable as a vehicle for the determination of guilt or innocence, and no criminal punishment can be regarded as fundamentally fair.

The Applicant cannot be "duly" convicted if the grand jury by the language, in violation of their shielding function, by their oath, take on the role of the trial jury and by the language and oath convict him. No grand jury by state or federal law or by state and federal Constitution have the power to convict. Yet by the language they did.

The Applicant cannot be "duly" convicted if the indictments and criminal complaints possess defects that are of such a fundamental character as to render them wholly invalid.

The Applicant cannot be "duly" convicted if the courts must egregiously constructively amend the indictments and criminal complaints, even on the "mens rea" elements, in the efforts to correct, or attempt to correct the structural Constitutional error and other defects, depriving the Applicant of proper notice and a fair trial in violation of the Sixth Amendment. Thus, the Applicant has standing under the not being "duly" convicted provision of the Thirteenth Amendment which as far as the Applicant can determine has never been adjudicated before any court. Therefore, using these prior Thirteenth Amendment holdings would be misplaced.

Inasmuch, the requirement of the indictments limit and constrain the subject matter jurisdiction "[p]owers" of both the prosecution and court, by limiting what can be presented at trial, conviction and sentencing. United States v. Promise, 255 F.3d 150 (4th Cir. 2001); Guthrie, supra. It is the command of the United States Constitution, that anything to the contrary is notwithstanding. Article IV, §2, U.S. Const.

Again, the state and/or prosecuting body, acting unjustly, arbitrarily, conspiring under color of state law, has failed to adhere to their own state laws, in egregious violation of the Applicant's substantial Federal Constitutional rights to due process, serving to deny the Applicant the equal protection of the laws against unjust prosecution, also in violation of 18 U.S.C. §241 and §242, Screws, supra; Middleton, supra; Eslinger, supra; McLaughlin, supra; Jones v. Arkansas, supra; Dubinka, supra; Dozier, supra; Hicks v. Oklahoma, supra; Lugar, supra; Williams, supra; Brown, supra; Ramey, supra; Kozminski, supra; Peacock, supra; Otherston, supra.

In Wilson v. Lindler, 995 F.2d at 1256, it was held that constructive amendment of an indictment, sometimes referred to as fatal variance, denies the criminal defendant the fundamental guarantee of notice of the charges pending against him. This right is safely guarded and embodied within the Sixth Amendment, the Fifth Amendment indictment clause, and the Applicant's Fourteenth Amendment rights of due process, as well as pursuant to the Applicant's rights to equal protection of the laws against unjust prosecution and these requirements must be adhered to and not denied. Therefore, due to the enormous amount of prejudice experienced by the Applicant, the sentence and conviction must be vacated.

(7). Did the trial court err, and was the Applicant's Fourth, Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution violated, as well as Article IV, §2, and his due process rights violated, by the illegal search and seizure of the cell phone, then allowing that evidence to be used at the Applicant's trial?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Moss, supra; Broad River Power, supra; 31 C.J.S. EVIDENCE §6 and §9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest Constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional rights of the party are compromised. A manifest Constitutional error can be reviewed by a court of appeals even if the appellant did not object at the proceedings. (Black's Law Dictionary 8th Edition).

Inasmuch, it is conspicuous that various cell phones were introduced into evidence and argued at the Applicant's trial. The specific cell phone the Applicant rely upon for this particular argument, is the one found at the scene of the alleged crime in the Victim's home and/or residence. This phone was not found in a public place, nor was it purposely abandoned. One of the alleged Victims brought this phone found in the residence, handed to the officer, and specifically told that officer it was dropped by one of the perpetrators of the crime. Once dropped, not purposely, by one of the alleged perpetrators but accidentally, because why would a perpetrator purposely leave his cell phone at the scene of an alleged crime? Once accidentally

left, not in flight at that moment, not taken pursuant to arrest, not left in a public place, and once the Witness/Victim specifically informed the officer it was left by the perpetrator, Fourth Amendment protection immediately attached. The officer without a warrant does a search of the phone and finds a picture of the Applicant's co-defendant in the phone. This is another reason and overwhelming prejudice why they conspired under color of state law to try the Applicant and the co-defendant together avoiding severance. The cell phone found at the scene placed the co-defendant, not the Applicant, at the scene of the crime. Without a warrant, knowing fully well the phone belong to an alleged perpetrator the investigating officer went on a "fishing expedition" where there were no limits placed in writing, no warrant stating the place which was to be search, nor a list of the items that were sought to be seized or searched in this instance, all which is required under the Fourth Amendment. United States v. Gibb, 547 Fed.App'x. 174 (SC)(November 21,2013)(No. 12-4743).

An affidavit supporting a warrant that authorizes a search or seizure "must provide the magistrate with a substantial bases for determining the existence of probable cause, in light of the totality of the circumstance." Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

"To establish probable cause, the facts presented to the magistrate need only warrant a man of reasonable caution 'to believe that evidence of a crime will be found.'" There was no affidavit detailing evidence sought, probable cause, the role of the defendant, how it was obtained, where it was obtained, nothing signed off on by a magistrate judge warranting the search. The picture was not the first thing on the phone. Thus was not a superficial search. Here the officer dug through the full contents of the phone, fishing, to obtain the discovered.

photo of the co-defendant warranting Fourth Amendment protection. United States v. Williams, 974 F.2d 480, 481 (4th Cir. 1992); Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); United States v. Worle, 728 F.3d 1, 13 (1st Cir. 2013).

This particular cell phone introduced into evidence and used at trial was not discovered on the Applicant or his co-defendant's person during search, even though another cell phone(s) was. This particular cell phone was obtained from a private residence, not a phone or search incident to arrest which is the exception to the warrant requirement. Riveria v. Georgetown City Police Dep't., F.Supp.2d 2012 WL3746269 (D.S.C.)(July 19,2012); United States v. Robinson, 414 U.S. 218 (1973); United States v. Murphy, 552 F.3d 405, 410 (4th Cir. 2009).

The law may permit search of the arrestee or the area in the arrestee's immediate control, but this was not the case here. The phone was accidentally left in a private residence at a time where there was no flight. The co-defendant and Applicant upon discovery of this evidence were miles away not in the immediate area nor were they in immediate control of this cell phone. The search did not occur at the defendant or co-defendant direction or in their presence. This was not an inventory check. There is material, distinct difference from being in commencement of a crime and in flight from a crime. The illegal search places this particular phone and it's contents under the exclusionary rule. United States v. Currence, 446 F.3d 554, 556 (4th Cir. 2006); Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); United States v. Brown, 787 F.2d 929, 932 (4th Cir. 1986). This was not a minimal intrusive search. Evidence in this case demonstrate that this particular cell phone found at the residence, accidentally dropped by the co-defendant at a time when he was not in flight, clearly

determined, informed by the alleged Victim that it belonged to one of the perpetrators, reveals the cell phone illegally used at the Applicant's trial was not obtained subject to arrest search of any defendant, was not in their immediate vicinity when arrested warranting the obtaining of a search warrant signed off by a neutral magistrate judge. United States v. Lawing, 703 F.3d 229 (N.C. 2012); United States v. LeGrand, 483 Fed.App'x. 771 (Md. 2012); State v. Gibson, S.E.2d 2006 WL7286869.

Abandoned is defined to intentionally give up the control or influence to another. Such was not intentional. It was accidental where the phone was dropped in commencement of an alleged crime, not while in flight from a crime. Where the presence of the police is lawful and the discard occurs in a public place, the defendant cannot reasonably have any continued expectancy of privacy in the discard of property, the property will be deemed abandoned for the purpose of search and seizure. This did not occur here. The phone was not discovered in a public place but rather in a private residence. There can be no doubt that the Fourth Amendment protects a persons body beyond the body surface. State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992). The interest in human dignity and privacy which the Fourth Amendment protects forbids any such intrusions on the mere chance that desired evidence might be obtained. Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908, 919 (1966). Tr.p. 119; 147; 261-62; 381; 412; 411; 487; 186*; 547*. On page 186; 119; 547, two people, Paulo Silva and Theresa Barnett, who actually found the phone said nothing about dropped while fleeing. Any other statement is hearsay. Barnett found it, gave it to Silva, who gave it to police after being found in the home.

The state and/or prosecuting body, acting unjustly, arbitrarily, conspiring under color of state law, has

failed to adhere to their own state laws, in egregious violation of the Applicant's substantial federal Constitutional rights of due process, serving to deny the Applicant the equal protection of the laws against unjust prosecution, also in violation of 18 U.S.C. §241 and §242. Screws, supra; Middleton, supra; Eslinger, supra; McLaughlin, supra; Jones v. Arkansas, supra; Lugar, supra; Ramey, supra; Otherston, supra; Peacock, supra.

The exclusionary rule is clear on this issue. No man shall stand convicted upon illegally obtained evidence. Due to the fraud and extreme prejudice experienced also by the prosecutorial misconduct. The sentence and conviction upon reversal and rendering inadmissible this particular phone used. The conviction should also be vacated. United States v. Brady, 842 F.2d 1313, 1314 (D.C. Cir. 1988); United States v. Most, 876 F.2d 191 (D.C. Cir. 1989); United States v. Clyburn, 24 F.3d 613; Dalia v. United States, 441 U.S. 238, 255, 99 S.Ct. 1682, 1692, 60 L.Ed.2d 177 (1979); Mapp v. Ohio, 81 S.Ct. 1684 (1961); Rochin v. California, 343 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952).

admissibility of the phone found at the residence. Had he properly argued the admissibility of other evidence due to the defect in the chain of custody. Had he properly argued all the outrageous fatal defects in the indictments at trial. There would not have been the egregiously unjust opportunity for this illegal evidence and testimony to be entered at trial which extremely prejudiced the Applicant when it came time to seek that direct verdict before the court.

In the denial of a direct verdict an appellate court must view the evidence in the light most favorable to the state. The evidence is not favorable tainted and where there are overwhelming acts of fraud on the court and prosecutorial misconduct. Ramey, supra; 18 U.S.C. §242; State v. Odem, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). If there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the case would be properly submitted to the jury. If they would not have pulled the lawless, unreasonable, criminal, conspiratorial acts that occurred in this case, the circumstantial or otherwise evidence presented by the state would not have risen to the level of substantial circumstantial evidence to submit this case to the jury.

A defendant would be entitled to a directed verdict where the state fails to produce evidence of the offense charged. Had they not done all the aforementioned they would have failed to produce the evidence of the offense charged. State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct.App. 2013); State v. Brannon, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010). The state has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes. When they identified the Applicant, it was a over suggestive line up. Which in that line up only the

co-defendant was identified which is why the compromised attorney did not seek severance. The co-defendant, not the Applicant's phone was found at the scene. The co-defendant, not the Applicant was in possession of the laptop which is why there was no proper chain of custody, demonstrating if they did not pull these criminal legal stunts they would not have had sufficient evidence of identification. State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984).

If there is substantial circumstantial evidence reasonably tending to prove the defendant's guilt, the appellate court must find that the trial court properly submitted the case to the jury. Lane, 406 S.C. at 121, 749 S.E.2d at 167 (citing Odems, 395 S.C. at 586, 720 S.E.2d at 50). Evidence must constitute positive proof of facts and circumstances which reasonably tend to prove guilt. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). It would be an abuse of discretion to refuse to grant a direct verdict where the evidence merely raises a suspicion that the accused is guilty. If they had not done all the wrongs argued in this case. The evidence would have been so weak, if any, it would only raise a mere suspicion of guilt. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). Suspicion implies a belief or opinion as to the guilt based upon facts or circumstances that do not amount to proof. State v. Buckman, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001).

The witness identified the co-defendant. The phones were found on the co-defendant though evidence is compromised. Co-defendant, not Applicant's phone was found at scene. No fingerprints of Applicant was found on laptop. The only way they could criminally bring the charge against the Applicant is to conspire to keep the trials from being severed, separated.

The only real evidence submitted, though tainted and illegally obtained, was that which incriminated the co-defendant.

Even in State v. Bennett, 408 S.C. 302, 306, 758 S.E.2d 743, 745 (Ct.App. 2014) evidence of DNA and fingerprints were found at the crime which Bennett's case was reversed, due to it being a community room. There no evidence of the Applicants involvement was produced, only possibly the co-defendant and the Applicant had an alibi the compromised paid attorney prevented from being heard working with the solicitor. The evidence merely raised a suspicion of guilt and they had to commit fraud to obtain or reach that level demonstrating the Applicant was denied a proper opportunity to seek direct verdict requiring reversal. State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 853 (1996); State v. Pearson, Opinion No. 5251 (heard June 17, 2014; filed July 30, 2014).

(10). Was counsel inept and Constitutionally ineffective in violation of the Applicant's Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution, as well as Article IV, §2, and his due process rights, which led to an unreasonable, unfair and unjust trial proceedings; creating an egregious miscarriage of justice?

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Moss, supra; 31 C.J.S. EVIDENCE §6 and §9, Federal Rules of Evidence, Rule 201(a).

This is a manifest Constitutional error. An error on the part of the trial court that has an identifiably negative impact on the proceedings to such a degree, that the Constitutional rights of the party are compromised. A manifest Constitutional error can be reviewed by a court of appeals even if the appellant did not object at the proceedings. (Black's Law Dictionary 8th Edition).

A defendant has a Constitutional right to the effective assistance of counsel. To demonstrate ineffective assistance of counsel, an Applicant must show, pursuant to the two prong test enunciated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), that (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. Id., at 687; also Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)(stating that the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims).

To satisfy the first prong of Strickland, Applicant must show that trial counsel's errors were serious enough that his performance fell well below the objective standard of reasonableness guaranteed by the Sixth Amendment to the United States Constitution. With regard to the second prong of Strickland, the Applicant must show that there is a reasonable probability that, but for counsel's performance and unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 694.

Inasmuch, counsel appointed was inept and Constitutionally ineffective for the following reasons: (A) counsel was inept and Constitutionally ineffective because counsel failed to protect the Applicant's due process rights, in that when the indictments possessed a structural Constitutional error and/or defect, by the language and/or charge contained therein, took away the Applicant's presumption of innocence and automatically shifted the burden of persuasion to the defendant, counsel said nothing, nor did counsel do anything. Counsel should have objected and motioned to quash the indictments. Counsel should have never conspired under color of state law in acts of prosecutorial misconduct and in violation of the Code of Professional Ethics to commence with and/or bring the Applicant to trial on offenses the grand jury being duly sworn, illegally taking upon themselves the rule of the trial jury, going beyond the scope of the power and authority given to them by either state or federal law, and/or state and federal Constitution, already prematurely upon their oath and adjudicated and determined in advance the outcome of the proceedings and Applicant's guilt in clear violation of their shielding function, also the Applicant's right to double jeopardy protection, the equal protection of the laws and due process. This produces sham legal process, fraud on the court and the establishing of modern

day slavery where once convicted by this fraud and misrepresentation, we are forced to labor. This is the language of the Convention Against Torture Treaty signed off to by this Nation. Congress confers upon no court, state or federal the power or authority to establish modern day slavery. This cannot be deemed as reasonable notice. No one can say what was in the mind of the grand jury in that the reality exist by the language of the indictments presented, that they never intended any subsequent proceeding to occur. The burden of persuasion is clearly shifted in violation of due process law. The Applicant did not have factual knowledge related to this egregious violation of his substantial due process rights. A curative instruction "boiler plate" do not cure the due process problem. This prejudiced the Applicant leading to an unfair, partial and unreasonable trial proceeding creating an egregious miscarriage of justice. To bring the Applicant to trial conducted before the criminal court on charges the grand jury, upon their solemn oath predetermined in advance the outcome of the proceedings in an act of prosecutorial misconduct, abuse of power and authority, fraud on the court and modern day slavery compromised the entire proceedings. The Amistad, supra; Dempsey, supra; In re Winship, supra; Chewning, supra; Appling, supra; Sandstrom, supra; Morisette, supra; Gypsum, supra; Mullaney v. Wilbur, supra; Humanik, supra; Clemens, supra; Martin v. Ohio, supra; Breakiron, supra; Zola, supra; Francis v. Franklin, supra; Stromberg, supra; Arvonio, supra; Vines, supra; Stirone, supra; Gather, supra; Calandra, supra; Branzburg, supra; Jenkins v. McKeithen, supra; compare Pierson, supra; Chadwick, supra; Briggs, supra.

Certain courts determined that the Thirteenth Amendment does not apply to a person serving a sentence for a criminal conviction. Those courts are in error and they have abused their discretion being controlled by an error of law. Those

determinations notwithstanding, not any one of those courts have ever addressed whether or not the Thirteenth Amendment, a person making claims related thereto, would have standing if the person is not "duly", (emphasis added), convicted (i.e. by use of fraud, illegal evidence, etc.), which is clearly in the language of the Thirteenth Amendment. The accused is protected at every stage of the trial with the presumption of innocence which should never be taken away by any means, even by the language of an indictment, until he is proven guilty beyond a reasonable doubt by "proper and competent evidence" which support the "duly" convicted provision of the Thirteenth Amendment. Thus, by the issues presented in total, this claim is brought under the not being "duly" convicted provision of the Thirteenth Amendment and the Anti-Peonage Act, which was never addressed by the various court in questioned making the use of those case misplaced. Moore v. United States, 271 F.2d 564, (Va. 1954); Takis, supra; Newell, 563 F.2d 123; WL1415149 (2012); Cox v. U.S. Attorney General, F.Supp.2d 2012 WL1570110 (D.S.C. April 10, 2012); Gaddy, S.C. 2013 WL6150715 (D.S.C. November 21, 2013); Flood v. News & Courier Co., 71 S.C. 112, 50 S.E. 637 (1905). Also see COMPENDIUM OF UNITED NATIONS STANDARDS AND NORM IN CRIME PREVENTION AND CRIMINAL JUSTICE, ISBN 978-92-1-1337765-5.

(B) Counsel was inept and Constitutionally ineffective because counsel failed to protect the Applicant's due process rights in that when the trial court went beyond the [180] day deadline mandated and prescribed by judicial order issued by the South Carolina Supreme Court pursuant to the provisions of Article V, §4 of the South Carolina Constitution, counsel said nothing, nor did counsel do anything. The court was prohibited from continuing their subject matter jurisdictionary powers. The Applicant should be home by now. Counsel should have objected and motioned for default and judgment. Counsel should have never conspired with the judge and prosecutor creating and initiating

this illegal trial proceeding in acts of prosecutorial misconduct and fraud on the court which stands in blatant defiance of judicial order issued by the South Carolina Supreme Court. A criminal defendant has a due process right to have a judge assigned to his case in a manner free from bias or the desire to influence the outcome of the proceedings. In this regard we are not talking about the right to have a particular procedure for the selection of a judge. The Applicant is not alleging he is vested under the Federal Constitution with the right in order in which the case is assigned to trial under the Federal Constitution. Nor is he disputing that the solicitor do not have any right to control the docket related to the cases he is intending to prosecute. For the court to construe this issue as the Applicant making these claims would be an error of law. This right is vested by judicial order under the South Carolina Constitution not the federal. We are not talking about the order in which the case is brought, we are talking about the time. This time table is not related in no manner to speedy trial which is not being argued, rather judicial order. The Applicant is not saying the prosecutor could not control his case load because the order made a provision for this concern mandating that that control of the docket be done in a prescribed manner. And that the prosecutor not act in contempt of court requiring sanctions to protect the rights of the party this order was set in place to protect which was a safeguard to ensure that the case move at a deliberate pace. In this instance the Applicant played no part in the delay requiring sanctions be levied against the solicitor's office and the prosecutor. The due process is related to and vested by the State Constitution not the federal. This extremely prejudiced the Applicant's due process matters producing a trial

that should not exist. It is the Applicant who is truly the victim of a kidnapping by way of this false imprisonment. The trial courts jurisdiction is in question, at least their "[p]ower" and/or "[a]bility" to continue the cause due to the deficiency in the jurisdictional requisite. The trial court cannot be permitted to commence with a trial in fundamental fairness to the Applicant, that stands in defiance to due process law and Supreme Court order. Without a "written", (emphasis added), order of continuance filed with the trial court prior to the expiration of the [180] day deadline, the trial court is prohibited from enacting and/or invoking and/or continuing their "[p]owers" of subject matter jurisdiction even though they indeed have jurisdiction to hear this particular class of case. This is an egregious miscarriage of justice and overwhelming prosecutorial misconduct demonstrating extreme prejudice. The state unjustly, arbitrarily, conspiring under color of state law with the assigned judge and counsel for the defense, has failed to adhere to their own state laws, also in violation of 18 U.S.C. §242, and in this context violate the Applicant's substantial federal rights of due process serving to deny him the equal protection of the laws. The provisions of the South Carolina Constitution under Article V, especially in light of judicial order are mandatory, draconian in nature. See South Carolina Constitution, Article V; Munn, supra; Beachum, supra; Robinson v. Shell Oil Co., supra; Article 12, §2; United States v. Meyers, supra; The Vessel Excalibur, supra; Ron Paic Enterprises, Inc., supra; Article 1, §23; Carson, supra; Screws, supra; Matnis, supra; Browning, supra; Lugar, supra; Hicks v. Oklahoma, supra; Toyota of Florence, supra; Isocnem, supra; Brannon, supra; pittman, supra; Liberty Mut. Ins, supra; State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012); Levine v. United States, 182 F.2d 556, 559 (8th Cir. 1950; United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).

(C) Counsel was inept and Constitutionally ineffective, because he failed to protect the Applicant's due process rights in that where there was a "[p]rocedural [d]efect" in the establishing of the warrants and/or indictments due to the prosecuting agents acting as sole witnesses on the warrants and/or indictment, counsel said nothing, nor did counsel do anything. Counsel should have objected to at least preserve this issue for appellate review. Counsel should have motioned to quash the indictments. The Applicant's due process matters at this segment of the action were suppose to be and remain non-adversarial. This means any evidence passed upon by the grand jury in these one-sided proceedings, unnecessarily using the prosecution agents as sole witnesses on the warrants and/or indictments must be rendered inadmissible. It becomes "fruit of poisonous tree". Counsel should have never conspired under color of state law with the prosecutor in acts of prosecutorial misconduct, fraud on the court and modern day slavery to bring forth this case when they were fully aware of these numerous violations of due process law compromising the Applicant's trial proceedings producing overwhelming prejudice denying the Applicant the equal protection of the law. Tabory, supra; Jones, supra; Anderson, supra; Capp, supra; Dawkins, supra; Birdman, supra; In re: Ex parte McLeod, supra; Mapp v. Ohio, supra; Rochin, supra; Weeks, supra; Gramolini, supra.

(D) Counsel was inept and Constitutionally ineffective, because he failed to protect the Applicant's due process rights in that when it was clear, that any evidence the state felt that it had, tainted and compromised that it was, only pointed to the guilt of the co-defendant, and paid counsel, conspiring with the bias court and the prosecutor, failed to seek a severance of two trials. They knew the only possible way they could convict the Applicant with that illegally obtained evidence

was to try the Applicant with the co-defendant since no one identified the Applicant, no evidence pointed to the Applicant, and they had to fraudulently place the laptop in the Applicant's hand when testimony placed it in the hands of the co-defendant. The Applicant was denied the right to present his alibi and call the co-defendant to the stand. They did this in retaliation because they could not coerce the Applicant into a guilty plea and the court and prosecutor conspired with and aided this compromised counsel knowing they went beyond the [180] day prescribed by the Article V, §4 order, knowing the only way they could give the fraudulent impressions to the jury that the Applicant was involved was to try them together creating extreme prejudice and an unfair trial proceedings. Hall v. United States, supra; Dykes, supra; Lebron, supra; Baker v. United States, supra; Barton, supra; Opper, supra; United States v. Frazier, supra; Morgan, supra; Burgio, supra; Schaffer, supra; Frontier Ins. Co., supra; Desktop Direct Ins., supra; Chewning, supra; Henderson, supra; Blalock, supra; Williams v. Taylor, supra; Keenan, supra; Deluna, supra; Landy, supra; Turner, supra; Kilgore, supra; Kelsey, supra; Rocheville, supra; Screws, supra; Ramey, supra.

(E) Counsel was inept and Constitutionally ineffective, because he failed to protect the Applicant's due process rights in that when the prosecutor abused the direct indictment process, compromised state paid attorney conspiring under color of state law said nothing, nor did counsel do anything. Counsel should have objected and sought to have the charges rendered nol pros instead of conspiring in acts of fraud on the court in violation of 18 U.S.C. §241 and §242 denying the Applicant the equal protection of the laws. See Article V, §4 order; Screws, supra; Middleton, supra; Eslinger, supra;

McLaughlin, supra; Dubinka supra; Jones v. Arkansas, supra; Lugar, supra; Williams, supra; Brown, supra; Ramey, supra; Peacock, supra; Kozminski, supra.

(F) Direct appeal counsel was inept and Constitutionally ineffective, because counsel failed to protect the Applicant's due process rights when it conspired with the prosecutor and appeals court to prevent valid legal issues from being given review to criminally affirm his conviction, by denying the Applicant his right to self representation. They did this under the guise of asserting there is no hybrid defense to block the Applicant from the court by fraud. Their actions destroyed the Applicant's direct appeal and it was as if the Applicant had no direct appeal at all. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Boone v. Patrick, 541 F.2d 447 (4th Cir. 1976); Gonzales-Lopez, supra; American Bar Ass'n, supra; Dougherly, supra; Faretta, supra; Wiggins, supra; Middlebrook, supra; Evitts v. Lucy, supra; Barnes, supra; Starnes, supra.

(G) Counsel was inept and Constitutionally ineffective, because he failed to protect the Applicant's due process rights, in that he allowed the prosecution to make reference to various statements, cross-examine or direct examine various witnesses related to these various statements and add these statements and/or testimony into evidence at the Applicant's trial, establishing all the aforementioned within the court record where there was no evidence adduced at the trial that demonstrated the alleged Victims and/or witnesses were given a copy of those statements at the time they were made, nor was there a receipt signed by them for the taking therefor which stands in clear defiance to the applicable statutes. S.C. Code

Ann. §19-1-80 and §19-1-90. Counsel said nothing nor did counsel do anything to attack the statements pursuant to the statutes. This matter should have been addressed before the court and placed on the court record to preserve it for appeal. Instead counsel conspired with the state acting unjustly under color of state law in acts of prosecutorial misconduct, fraud on the court and modern day slavery to manipulate the Applicant into a guilty plea he refused to give, so they subjected the Applicant to this travesty of a trial proceeding producing overwhelming prejudice, fraud on the court and state as well as modern day slavery also in violation of 18 U.S.C. §241 and §242; Motes, supra; Steadman, supra; S.C. Code Ann. §19-1-80 and §19-1-90; Isochem, supra; Pittman, supra; The Amistad, supra; Frontier Ins. Co., supra; Brogan, supra; Gillard, supra; Jackson v. Virginia, 443 U.S. 307, 321 (1979).

(H), (I), (J) Counsel was inept and Constitutionally ineffective, because he failed to protect the Applicant's due process rights in that when the indictment for Kidnapping, Armed Robbery and Burglary either failed to properly allege the element of conspiracy, failed to allege the money amounts or what property or items were taken, failed to allege how the kidnapping occurred makes use of the generic terms of the statute, failed to allege exactly who the Applicant conspired with, These aforementioned crucial averments must be alleged in the indictments and passed upon by the grand jury in accordance to the Constitutional rights of the accused. The indictments can not be deemed as sufficient if these crucial elements and/or aggravating circumstances are not alleged. The language is so loose, cryptic and ambiguous it creates an enigma as to exactly what the Applicant is called upon to meet and defend. This cannot be deemed as reasonable notice. None of these essential averments were properly alleged in the body of the charging instrument. Yet

counsel said nothing nor did counsel do anything. Counsel should have objected and motioned to quash the indictments instead of conspiring under color of state law in acts of prosecutorial misconduct, fraud on the court and modern day slavery with the state in this fiasco and mockery of judicial proceedings denying the Applicant the equal protection of the laws. The Applicant felt like General Custer at Little Big Horn. He was forced to grab the arm rest of his chair, clinching it, holding his breath, bracing himself as to what could possibly be coming at him next as he was subjected to this "indictment ambush" at the onset of his trial proceedings. The indictment must descend to particulars and the particular, essential elements and/or averments must be passed upon by the grand jury. This extremely prejudiced the Applicant's proceedings leading to an unfair and partial trial creating a miscarriage of justice. Munn, supra; Rallo, supra; Locke, supra; In re: Jason T., supra; Hardee, supra; Parker, supra; Tate, supra; Tabory, supra; Abrams, supra; Keith, supra; Wilkes, supra; Daniels, supra; Silverman, supra; Hooker, supra; Russell, supra; Hamling, supra; Cabrera-Teron, supra; Pupo, supra.

(K) Counsel was inept and Constitutionally ineffective, because counsel failed to protect the Applicant's due process rights, in that when constructive amendment of the indictments occurred before the court, counsel said nothing, nor did counsel do anything. Counsel should have at least objected to preserve this issue in the court record. He should have motioned for direct verdict based on this issue as well and the impossibility to prove an indictment where the elements are not properly alleged in the body of the charging instrument. Counsel should have sought to quash the indictments instead of conspiring with the court and prosecutor in producing this travesty of a

trial. No jury trial should have proceeded with these fatally defective indictments giving way to constructive amendment. Constructive amendment of an indictment is a per se violation of the provisions of the Fifth Amendment, when such amendment affects an essential element of the offense(s). Such a violation requires reversal of the conviction, even without showing of prejudice, but once prejudice is shown, clearly as it is in this case, the sentence and conviction must be vacated. Guthrie, supra; Coyne, supra; Wilson v. Lindler, supra; Stirone, supra; Gaither, supra; Douglas v. Alabama, supra; S.C. Code Ann. §17-19-100 (1985); Hiott, supra; Hope, supra; Grainger, supra; Honey, supra; Padgett, supra; Carter, supra.

(L) Counsel was inept and Constitutionally ineffective, because he failed to protect the Applicant's due process rights in that when the cell phone found at the residence was obtained and/or illegally admitted into evidence being an illegal search and seizure in violation of the Fourth Amendment. Counsel purposely conspired under color of state law with the state prosecutor to argue this phone found at the Victim's residence as one found on the co-defendant's person knowing fully well the law is significantly different for a cell phone found on person pursuant to arrest as opposed to one that was accidentally left at a residence where the person was not fleeing which is also why he failed to motion for severance conspiring under color of state law with the state in acts of fraud on the court in efforts to establish modern day slavery. No man shall stand convicted upon illegally obtained evidence. Gates, supra; Gibb, supra; Williams, supra; Texas v. Brown, supra; Georgetown City Police Dep't., supra; Robinson, supra; Murphy, supra; Currence, supra; Chimel, supra; Brown, supra; Lawing, supra; Gibson, supra; Register, supra; Schmerber, supra; Most, supra; Clyburn, supra.

(M) Counsel was inept and Constitutionally ineffective because he failed to protect the Applicant's due process rights when he permitted the state to enter into evidence at trial the laptop and additional cell phones that were allegedly found on the co-defendant without an inventory sheet or proper chain of custody being done or established. Once those phones were not inventoried and taken into custody, given to the alleged Victims. Thereafter, some days later they come back and seize them. There is no way to prove these phones were the exact same phones found on the co-defendant. With no proper chain of custody for the laptop after testimony places the laptop in the possession of the co-defendant. It then mysteriously wind up in possession of the Applicant with no chain of custody because they knew there was no evidence whatsoever that connected the Applicant to this crime which is also why the compromised paid attorney failed to move for severance to allow these corrupt officials pull off this "Kidnapping" false imprisonment of the Applicant. No man shall stand convicted upon illegally obtained evidence. Gibbs, supra; Gates, supra; Williams, supra; Texas v. Brown, supra; Georgetown City Police Dep't., supra; Currence, supra; Chimel, supra; Lawing supra; Screws, supra; Lugar, supra; Peacock, supra; Turpin, supra; State v. White, supra; Moore, supra; Most, supra.

(N) Counsel was inept and Constitutionally ineffective, because he failed to protect the Applicant's due process rights when by his conspiratorial actions the Applicant was denied and/or prejudiced in his opportunity to fairly seek a direct verdict. Odem, supra; Ramey, supra; Lane, supra; Brannon, supra; Schrock, supra; Bostick, supra; Mitchell, supra; Buckmon, supra; Bennett, supra; Pearson, supra.

(O) Counsel was inept and Constitutionally ineffective, because he failed to protect the Applicant's due process rights, when any competent attorney could see that the South Carolina Supreme Court engaged in acts of fraud on the court, modern day slavery and abused it's discretion in their holdings. They held the Gentry case to push him past the statute of limitations because they knew he lacked the education to litigate pass this legal hurdle which effected and was a direct attack upon every inmate within this state. They then ruled on Ex parte Bain, by use of Cotton and Parkhurst without review being given to United States v. Russell, Gaither and Stirone, because they knew fully well that Bain, Cotton and Parkhurst were vague on the "[j]urisdictional [p]rerequisite" issue where Russell, Gaither and Stirone gave the issue greater clarity. They knew fully well in advance, conspiring in acts of fraud on the court and an abuse of discretion that addressing Bain in view of Cotton and Parkhurst alone without considering Russell, Stirone and Gaither it would give a fraudulent impression that they mistakenly combined the two concepts of subject matter jurisdiction and the sufficiency of an indictments and that they were not changing federal law standing unchallenged for over 100 years that they accepted through their state(s) Constitution. This was done behind a class based invidiously discriminatory animus in the form of racial hatred, even if they had any proxy token black judge aid them, for the purpose of establishing modern day slavery knowing this ruling would disproportionately affect the black inmates of this state in violation of the Anti-Peonage Act. Thus, by this fraud on the court, the trial court was prohibited from enacting and/or invoking and/or continuing their "[p]owers" of subject matter jurisdiction to

bring the Applicant to trial, even though they do indeed possess such "[p]ower". Counsel should have done a better job researching and/or studying his or her profession instead of conspiring under color of state law in acts of prosecutorial misconduct, fraud on the court and modern day slavery denying the Applicant the equal protection of the laws. The two concepts of subject matter jurisdiction and the sufficiency of an indictment have not been mistakingly combined. They purposely, criminally abused their discretion and conspired in acts of fraud on the court. One is a "[j]urisdictional [p]rerequisite" of the other. The effect on the courts [p]ower is the same. That "power" is to be arrested, halted, stop, voided though they do possess such power. Sharpes, supra; The Amistad, supra; Mathis, supra; Brown, supra; Browning, supra; Abrams, supra; Stirone, supra; Russell, supra; Gaither, supra; Sharp v. Johnson, supra; Santos, supra; Silverman, supra; Promise, supra; Guthrie, supra.

By all the aforementioned in this case, counsel was inept and Constitutionally ineffective which egregiously violated the Applicant's Fourth, Fifth, Sixth, Thirteenth, Fourteenth and Fifteenth Amendment rights of the United States Constitution, as well as Article IV, §2 and his rights of due process subjecting the Applicant to extreme prejudice. Counsel unjustly conspired under color of state law engaging in overwhelming acts of prosecutorial misconduct, fraud on the court and the establishing of modern day slavery, under the being not "duly" convicted provision of the Thirteenth Amendment, rendering void Applicant's right to vote in state and/or federal elections, with the prosecutor in bringing forth this case. By this conspiracy which stands in violation of 42 U.S.C. §1983, §1985(2), 1985(3), 1986; 18 U.S.C. §241 and §242 they failed to adhere to their own state laws in violation of the Applicant's substantial Federal Constitutional rights of due process, serving

to deny the Applicant the equal protection of the law against unjust prosecution. The United States Supreme Court has held that all acts of the state are automatically "under color of state law" no matter what the source of the substantive rule. Screws, supra; Middleton, supra; McLaughlin, supra; Eslinger, supra; Dubinka, supra; Jones v. Arkansas, supra; Hicks v. Oklahoma, supra; Loop College, City of Chicago, supra; Lugar, supra.

Inasmuch, by points "A" through "O" pertaining to this issue, counsel fell well below the standard of counsel appointed in such matters. It is perspicuous that the outcome of the proceedings would have more than likely been different had these egregious injustices not occurred and they were properly addressed and challenged by state paid counsel who acted as a prosecutor as opposed to defense counsel by conspiring to aid the solicitor giving a false impression he had Applicant's best interest at heart. They put on a show for the court record to conceal their efforts. It is a requirement that cannot be deemed to be satisfied by mere notice if the state has contrived a conviction through the pretense of a trial which in truth defies fundamental fairness and is used as a means of depriving a defendant of liberty through deliberate deception of the court, jurors and Applicant, produced by fraud on the court, modern day slavery, or is inconsistent with the true facts, violating clear statutory provisions and the United States Constitution. Such a contrivance by the state to procure the conviction and imprisonment of a defendant is inconsistent with the rudimentary demands of justice as is obtaining of a like result by intimidation. The Amistad, supra; The La Conception, supra; Desktop Direct Ins., supra; Williams v. United States, 179 F.2d 656 (Fla. 1950), cert. granted 340 U.S. 850, 71 S.Ct. 70, 95 L.Ed.2d 622; Brown v. United States, 204 F.2d 247 (Tenn. 1953);

United States v. Ramey, 336 F.2d 512 (W.Va. 1964), cert. denied 379 U.S. 13, 85 S.Ct. 649, 13 L.Ed.2d 564; United States v. Kozminski, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788, 46 CCH EPD 93067, on remand 852 F.2d 1288 (Mich, 1988); United States ex rel. Almeida, supra; United States ex rel. Thompson, supra; Mooney v. Holohan, supra; Alcorta v. Texas, supra; Lanier, supra; Strickland, supra; McShane v. Moldovan, 172 F.2d 529 (Mich. 1949); United States v. Simmons, 763 F.2d 529, 533 (2nd Cir. 1985).

The government "[m]ust [a]lways" be held accountable to judiciary for a man's imprisonment, and the restraints on liberty if the imprisonment does not conform to the base requirements of due process law. For counsel to conspire under color of state law in egregious acts of prosecuttional misconduct, fraud on the court and modern day slavery with the various parties, breaking just about every due process and/or state and/or federal rule of law under the sun to crash and burn the Applicant's trial producing extreme prejudice, reveals the outcome would have been different if these criminal acts did not occur at the Applicant's trial. This is an outrage and an egregious miscarriage of justice that must be brought into account. By the injustices asserted in this case it is as if the Applicant went to trial with no legal counsel paid or appointed at all. Therefore the sentence and conviction must be vacated. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Boone v. Patrick, 541 F.2d 447 (4th Cir. 1976); Shelton v. Ciccone, 578 F.2d. 1241 (Mo. 1978); Evitts v. Lucy, 469 U.S. at 387, 105 S.Ct. at 830, 83 L.Ed.2d at 831 (1985); Gray, 800 F.2d at 646; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); United States v. Promise, 255 F.3d

150 (4th Cir. 2001); Strickland, supra; Williams v. Taylor, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 398 (2000).

(11). Did the South Carolina Supreme Court in State v. Gentry, supra, err, engaged in acts of fraud on the court to essentially establish modern day slavery, and abused their discretionary "[p]owers", which even took away Applicant's right to vote, and in such, the trial court did err, and lacked subject matter jurisdiction, and/or was prohibited from enacting and/or invoking and/or continuing it's subject matter jurisdiction "[p]owers", even though they possess such "[p]owers", due to the indictment defects and/or errors contained and argued within this document, in violation of the Applicant's Fourth, Fifth, Sixth, Thirteenth, Fourteenth and Fifteenth Amendment rights of the United States Constitution, as well as Article IV, §2 and the laws of due process?

The Applicant did not object to these defects and/or errors at the time of his trial and/or guilty plea, but the defects and/or errors serve to render the indictments wholly invalid. Defects and/or errors in an indictment that are such a fundamental character as to render an indictment wholly invalid are not subject to waiver by the defendant. 41 Am.Jur.2d INDICTMENTS AND INFORMATION §299 (1968); State v. Munn, supra.

Judicial notice takes place of proof. It simply means that the court will admit into evidence and consider, without proof of facts, matters of common and general knowledge. Moss, supra; Broad River Power, supra; 31 C.J.S. EVIDENCE §6 and §9; Federal Rules of Evidence, Rule 201(a).

This is also a manifest Constitutional error. An error and fraud on the part of the South Carolina Supreme Court that has an identifiably negative impact on all criminal proceedings within this state to such a degree, that the Constitutional rights of all defendant within this state, including the Applicant's are compromised. A manifest Constitutional error and fraud on the court of this magnitude

cannot be waived, is not subject to any time limit and can be reviewed by a Court of Appeals even if the Applicant did not object at the proceedings, especially in light of the fact that the court's decision effect all inmates in the state and possibly around the nation. (Black's Law Dictionary 8th Edition); Callon Petroleum Co., supra; Digital Equip. Corp. v. Desktop Direct Ins., 511 U.S. 863, 868, 114 S.Ct. 1992, 1996, 128 L.Ed.2d 842 (1994); Chewning, supra; Appling, supra; King v. First American Investigators Inc., 287 F.3d 91, 95 (2nd Cir. 2002), cert. denied 537 U.S. 960, 123 S.Ct. 393, 154 L.Ed.2d 314 (2002).

The Applicant contends, that the indictments for Kidnapping, Armed Robbery and Burglary do "[n]ot" properly and/or sufficiently apprise the Applicant of the "[c]ause and [n]ature" of the accusation(s), or properly and/or sufficiently apprise the Applicant of what he must prepare himself to meet and defend, because the indictment for Kidnapping, Armed Robbery and Burglary do not properly or sufficiently apprise the Applicant of the elements, makes use of generic terms of the statute, do not allege who the Applicant conspired with, leaves out the element "willfully", do not say how the kidnapping occurred, do not allege money amounts or what items were allegedly taken, do not allege sufficiently who was armed whether it was the Applicant or co-defendant, do not properly allege whether the Applicant was indicted in previous argument(s). The indictment "[c]annot" be deemed sufficient if the state is permitted to prove all these materially different sets of facts, or since they are not properly alleged the state is permitted to make up the facts of the case according to their whims as the case proceeds. The indictments do not descend to particulars. All the aforementioned "[m]ust" be alleged in the body of the charging instrument and passed upon by the grand jury in the indictment returned against

the accused in accordance to the Constitutional due process rights of the defendant. This cannot be deemed as reasonable notice. No one can say what was in the minds of the grand jury. Munn, supra; Rallo, supra; Tate, supra; Tabor, supra; Keith, supra; Hardee, supra; Locke, supra; Wilkes, supra; United States v. Daniels, supra; Abrams, supra; Hooker, supra; Russell, supra; Hamling, supra; Pupo, supra.

The Applicant further contends, that the indictment(s) do not properly and/or sufficiently apprise the Applicant of the "[c]ause and [n]ature" of the accusation, or what he is called upon to meet and defend, because the structural Constitutional error, defect, language and/or charge embodied within the indictmen(s) indicate and/or imply to the Applicant, that the burden of production belong to the Applicant and not the state. By such they also violate S.C. Code Ann. §17-19-10 and S.C. Code Ann. §17-19-20. The language and/or charge in the indictment(s) indicate to the Applicant that he is called upon to meet the burden of production on the critical elements of dispute, in violation of the Applicant's Sixth Amendments rights, the relevant statutes, and due process law. They also violate the Applicant's Fourth Amendment rights to illegal seizure, his Fifth Amendment right to double jeopardy protection, because they predetermine in advance the outcome of the proceedings, taking away the presumption of innocence, and they inform the Applicant that for a second time he is made to plea or go to trial on a prior conviction for the same offense which produces fraud on the court, modern day slavery, takes away the right to vote due to conviction in violation of the Thirteenth and Fifteenth Amendments and infringe upon the Applicant's Fourteenth Amendment right to equal protection of the laws against unjust prosecution behind a class based invidiously discriminatory animus in the form of racial hatred because the act disproportionately affects

African Americans, Due to the structural Constitutional error and/or defect in the construction of the indictment(s) they do "[n]ot" properly, sufficiently, or fully apprise the Applicant of the "[c]ause and [n]ature" of the accusation being brought against him, or of what he is called upon to meet. Lewis, supra; Easler, supra; Mathis, supra; Brown, supra; Browning, supra; Munn, supra; Dempsey, supra; The Amistad, supra; Callon Petroleum Co., supra; Desktop Direct Ins. Co., supra.

This is how this thing went. The inmates in South Carolina were basically getting out of prison arguing the defects in their indictments. The inmates convicted of murder discovered that there was a fatal flaw in the murder indictments related to "time and place". The South Carolina Supreme Court in efforts to stop the exodus from prison engaged in acts of fraud on the court in efforts to essentially establish modern day slavery behind racial hatred, even with the black overseer type of judges on the Supreme Court, came up with a plot, plan and scheme to defraud the inmates of this state. They knew beforehand that in order to make a fair and just determination related to the issue of subject matter jurisdiction. It was required that the court review Bain, Russell, Stirone and Gaither together collectively as a whole. If you do not review them together, you can make a fraudulent determination and no one would be the wiser. They knew that Bain, Cotton, and Parkhurst were ambiguous in that those cases never addressed the "[p]rerequisite" element of the indictment. Cotton used word play to evade addressing the essential question related specifically to the "[p]rerequisite" aspect of the indictment. So they only reviewed Bain because it was vague by itself, then added Cotton and Parkhurst, because they knew the United States Supreme Court did not address the "[p]rerequisite" aspect in that case so it would appear they were not changing federal law, then came up with Gentry to kill

subject matter jurisdiction based upon defects in an indictment to halt the pending exodus. A state can decide subject matter jurisdiction for itself, but they cannot change Federal law by use of a state law, federal law they adopted by their state Constitution. They then held the Gentry case and all other related cases until they were time barred by the statute of limitations to impede and obstruct they seeking review in the United States District Court for South Carolina. The District Court judges were privy to this plot and aided them knowingly fully well most of the inmates whose cases were pending lacked the intelligence to argue past the statute of limitations. This produces the fraud on the court, the essentially establishing modern day slavery since the inmates are forced to work when convicted by that fraud, the taking away of Applicant's voting rights by conspiring to keep Applicant labelled as felons, the illegal seizure by this fraud, as well as violations of §1983; 1985(2); §1985(3); 1986; 18 U.S.C. §241 and §242; the Fourth, Fifth, Sixth Thirteenth, Fourteenth and Fifteenth Amendments; Dempsey, supra; The Amistad, supra; Desktop Direct Ins. Co., supra; First American Investigators Inc., supra; Means v. Wilson, 522 F.2d 833 (S.D. 1975), cert. denied 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364; Berg v. O'Bama, 574 F.Supp.2d 509 (E.D.Pa. 2008); United States v. Figueroa, 729 F.3d 267 (N.J. 2013; Jackson v. Virginia, 433 U.S. 307 (1979).

Some courts have held that the language of the Thirteenth Amendment do not apply to person convicted serving a criminal sentence. They abuse their discretion. This claim is being brought under the not "duly" convicted provision which was never addressed by any of those courts. The Thirteenth Amendment does apply if the person is not properly convicted and where there is fraud. Those cases never addressed this, so using them

would be misplaced. Moore, supra; Takis, supra; Newell, supra; Cox v. United States Attorney General, supra; Gaddy, supra; News & Courier Co, supra.

Perhaps the court of South Carolina would further contend that subject matter jurisdiction, and the sufficiency of an indictment are, and have been combined in the various cited cases, that the indictment is merely a "notice document" and that subject matter jurisdiction is the courts' "[p]ower" to hear and determine a matter, and each should be viewed as separate and distinct from one another and the insufficiency of an indictment does "[n]ot" take away from or "[a]ffect" and/or "[h]inder" a "criminal" court's "[p]ower" and/or "[a]bility" to hear this general class of case, to which the proceedings in question belong. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 495 (2005)(citing United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); State v. Parkhurst, 845 S.W.2d 31 (Mo. 1992). The court(s) has misinterpreted it's citings and are in error, and they have abused their discretionary "[p]owers" in their defermination of this matter. An abuse of discretion occurs when the court(s) are controlled by some error of law, or when the order based upon findings of fact is without evidentiary support or fact. Sharpes v. Sharpes, 342 S.C. 71, 535 S.E.2d 913 (2000).

The State of South Carolina, by this ludicrous piece of legislation or law, in an egregious abuse of discretionary "[p]ower", acting unjustly, arbitrarily, under color of "state law", in defiance of fundamental fairness and judicial integrity, in violation of 18 U.S.C. §241, §242, has either altered, amended, modified, and/or deleted, and/or diminished and/or eradicated, just about every single right and privileged secured and protected by the Fourth, Fifth, Sixth, Thirteenth, Fourteenth, Fifteenth Amendments of th United States

Constitution, as well as the South Carolina Constitution, as it pertains to the requirement and use of an indictment in criminal proceedings, in blatant defiance to the Applicant's rights to equal protection of the laws, producing fraud in the court, essentially establishing modern day slavery and a conspiracy to brand African Americans as felons to deny them the right to vote and kill their political voice. Screws, supra; Middleton, supra; Eslinger, supra; McLaughlin, supra; Dubinka, supra; Jones v. Arkansas, supra; Loop College, City of Chicago, supra; Hicks v. Oklahoma, supra; Lugar, supra; Williams, supra; Brown v. United States, supra; Ramey, supra; Kominski, supra; Peacock, supra; Otherson, supra.

Insomuch, the Fifth Amendment indictment clause has not been held applicable to the state, or the federal concept of a grand jury binding on the Federal Courts under the Fifth Amendment are obligatory to the states. Nevertheless, by their own state(s) Constitution(s), the State of South Carolina, New Jersey, Kentucky, Georgia and [29] other states adopted the Federal provisions, requirements, standards, and mandates pertaining to the use of an indictment, and the remaining [17] states that make use of a complaint document possess the structural error argued as well. In further resolving the conflict, the Federal Courts have held by the "Bill of Rights", many rights guaranteed by the first [8] Amendments of the United States Constitution, have been made applicable to the several states through the Due Process Clause of the Fourteenth Amendment and the Supremacy Clause of Article VI, Clause 2 of the United States Constitution. State v. Watts, 465 S.E.2d 359; Henry v. City of Rock Hill, 376 U.S. 776, 84 S.Ct. 1042, 12 L.Ed.2d 79 (1964); also see South Carolina Constitution Article I, §11; Ex parte Bain, 121 U.S. 1 (1887); Costello v. United States, 350 U.S. 359; Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038

(1962); Woods v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); Frisbee v. United States, 157 U.S. 160, 15 S.Ct. 586, 39 L.Ed. 652 (1895); Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); Hurtado v. California, 110 U.S. 516, 538, 4 S.Ct. 111, 122, 28 L.Ed. 232 (1884); Powell v. Alabama, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 682 (1948); Gideon v. Wainwright, 372 U.S. 335, 342-344, 83 S.Ct. 792, 796, 4 L.Ed.2d 799 (1963).

Yes, the indictment is a "notice document", but being a "notice document", is only one of the mainly purposes and functions the indictment was created for. The Honorable Costa Plecoines, South Carolina Supreme Court Justice, in the Gentry Court, was the only one with enough judicial integrity and insight to see clear to the truth of this matter in part.

Yes, subject matter jurisdiction is the "power" to hear and determine cases of a general class to which the proceedings in question belong. Bell v. Monsanto Corp., 579 S.E.2d 325 S.C. 553 (2003). Inasmuch, the court's "[p]ower" to hear and determine a case is also defined as the court's "[a]bility" to hear and determine a case. Inasmuch, subject matter jurisdiction does not only cover and/or involve whether or not the matter resides in a proper court of jurisdiction to hear and determine it. It also involves any issue that may "[a]ffect" and/or "[h]inder" that "[p]ower" and/or "[a]bility" to act in accordance to Rules of Court, Rules of Procedure and Due Process law. Such matters can be raised at "[a]ny" time "[c]annot" be waived by the defendant, and the court "[s]hall [n]ot" fail to take notice. Mathis, supra; brown, supra; Munn, supra; Browning, supra.

Subject to certain minor exceptions not present, the trial court(s) lack subject matter jurisdiction, and/or is

prohibited from enacting, and/or invoking and/or continuing it's subject matter jurisdictionary "[p]owers" to convict a defendant, even though they may have jurisdiction, when there is no indictment charging him with that offense when the jury is sworn, or when he gives his guilty plea, and we can add, or when the Applicant has been unjustly convicted by the grand jury's language, illegally acting as a trial jury, being duly sworn and swearing upon their oath guilt, predetermining in advance the outcome of the proceedings, in violation of their shielding function, also in violation of the Applicant's right to double jeopardy, protection and due process law, essentially establishing fraud on the court and modern day slavery. Lewis, supra; Easler, supra; Dempsey, supra; The Amistad, supra; State v. Beachum, 288 S.C. 325, 324 S.E.2d 597 (1986).

The Gentry Court misinterpreting it's citings are in error in their determination of this matter in acts of fraud on the court. What gives the court in "[c]riminal" cases and/or proceedings the "[a]bility" to hear and determine cases of "[t]his" general class to which the proceedings in question belong, and to allow it to enact and/or invoke and/or continue it's subject matter jurisdictionary "[p]owers" in these types of cases, placing these "[p]owers" in operation in "an indictment."

Rule 3(c), South Carolina Rules of Criminal Procedure, S.C.R.Crim.P., provides: "Disposition on Arrest Warrant(s): The solicitor shall take action on the warrant(s) within [90] days by preparing 'an indictment' for presentment to the grand jury." In turn said indictment is to be passed on to the trial court to allow it to enact and/or invoke and/or continue it's "[p]owers" of subject matter jurisdiction. Sharp v. Johnson, 107 F.3d 282 (foot notes) (5th Cir. 1997); Santos v. State, 843 S.W.2d 953, 956 (Tex.App. 1992); Studer v. State, 799 S.W.2d 263 (Tex.App. 1990); Williams v. Morris, 320 S.C. 196, 464 S.E.2d 97 (1995).

The indictment is also the legal document that confirms the "[c]riminal" court's "[p]ower" and/or "[a]bility" to hear the particular case, by stating and documenting the class of case, or alleged offense, and the statute of the offense charged, stating the offense in the language of the statute, further validating that the matter(s) reside in the proper court of jurisdiction to hear and determine the matter. These indisputable facts make the indictment more than merely a "notice document". It is the vehicle in "[c]riminal" cases and/or proceedings which invest the "[c]riminal" court the right to act, and/or confirms that right to act, thereby making them inter-linked, inter-locked and inter-dependent upon the viability of each other. To determine that without the indictment(s), it does "[n]ot [a]ffect" and/or "[h]inder" a "[c]riminal" court's "[p]ower" and/or "[a]bility" to hear and determine cases of "[t]his" general class to which the proceedings in question belong, is an error of law, and is like stating not having a soul, conscienceness, or life force, do "[n]ot [a]ffect" and/or "[h]inder" a man's "[p]ower" or "[a]bility" to be a man. Without a soul or a life force, the laws of reason you will still have a "man", but the total truth of the matter is that you will have a "[d]ead man", whose worth to society is useless; the same way the "[c]riminal" court's "[p]ower" and/or "[a]bility" to hear and determine "[t]his" particular class of case is useless without the essentially needed vehicle in the form of the indictment(s). The sufficiency of an indictment is a "[j]urisdictional [p]rerequisite" in cases of "[t]his" general class, to which the proceedings in question belong, and for which an indictment is needed and/or required even though the court does indeed have jurisdiction. See INDICTMENT SUFFICIENCY, 70 Column L. Rev. 876, 888 (1970); United States v. Abrams, 539 F.Supp. 378, 384 (S.D.N.Y. 19982); Stirone v. United States, 361 U.S. 212 (1960);

Gaithers v. United States, 413 F.2d 1061 (D.C. Cir. 1969); also see South Carolina Constitution Article I, §11.

The Gentry Court, by its misinterpreting its citings changed Federal law made applicable to the state(s) by they adopting such via their own state(s) Constitution(s) standing unchallenged for well over 100-years. For the Gentry Court by its misinterpreting of its citings, purposely done in acts of fraud on the court, to view the two concepts of subject matter jurisdiction and the sufficiency of an indictment as being combined, where federal law adopted by their own state(s) Constitution(s), dictate that the sufficiency of an indictment is a [j]urisdictional [p]rerequisite to subject matter jurisdiction in a "[c]riminal" court is an error of law. The Abrams, Strirone, Russell and Gaither court(s) intent should be ascertained from the plain language of these citings of law as is in Ex parte Bain. The language must read in a sense which harmonizes with its subject matter and accords with its general purpose. Once these precedent setting courts have made a choice, there was no room for the Gentry Court to impose a different judgment in acts of fraud on the court and an abuse of discretion based on their own misguided notions. If the provisions of laws language is unambiguous and clear, as it is in Abrams, Strirone, Russell and Gaither there was no need to employ the rules of statutory and/or common law construction, and the South Carolina Supreme Court in the Gentry case and/or court had no right to go on a fishing expedition searching for some ambiguous citing so they could commit fraud on the court to look for and impose another meaning. Where the language of the aforementioned citings of law are clear and explicit, the Gentry Court "[c]annot" rewrite these provisions of law and interpret matters into which are not in the language found in Russell, Strirone, Abrams and Gaither cases under the plain meaning rule, it is not the Gentry Court's place

to change the meaning of a clear and unambiguous provision of law. The law clearly states that the two concepts are not combined, but are "[p]rerequisites" of one another. If both are to be viable and operate in the fullness and purpose for which they were established and created they are not to be viewed and/or separated in the manner reasoned by the Gentry Court in acts of fraud on the court purposely misinterpreting the holdings made in the Cotton, Parkhurst courts because those citings were ambiguous not addressing the [p]rerequisit element attached to this issue. Bass v. Isochem, 617 S.E.2d 369 (Ct.App. 2005); State v. Brannon, 666 S.E.2d 272 (Ct.App. 2008); State v. Pittman, 647 S.E.2d 144 (2007); Liberty Mut. Ins. v. S.C. Second Injury Fund, 611 S.E.2d 297 (Ct.App. 2005).

Further, the indictment(s) serve as a "[s]afeguard" to protect the American citizenry, all those who are held by us, and those who enter our borders or territories, from violations of their inalienable Constitutional rights. Rule 7(c) requires that the indictment(s) contain a "[p]lain", "[c]oncise", and "[d]efinite" written statement of essential elements and/or allegations constituting the offense charged. This requirement performs three Constitutionally required functions: It fulfills the Sixth Amendment right to be informed as to the "[c]ause and [n]ature" of the accusation (notice document); yet, more than this, it prevents a person from being subject to double jeopardy as required by the Fifth Amendment. It also serves the Fifth Amendment protection against crimes based upon evidence not presented to the grand jury. Lewis, supra; Easler, supra; United States v. Silverman, 30 F.2d 106, 110 (2nd Cir.), listing these functions modified 439 F.2d 198 (2nd Cir. 1970), cert. denied 402 U.S. 953, 91 S.Ct. 1619, 29 L.Ed.2d 123 (1971). The indictment clause of the Fifth Amendment requires that the indictment(s) contain some amount of factual

particularity, to ensure that the prosecution will not fill in element(s) of its case with facts other than those considered by the grand jury. Abrams, supra.

The Judges in Gentry, Cotton, and Parkhurst, in their determination appear to have "[n]ot" given "[f]ull" weight to the total requirements and purpose of S.C. Code Ann. §17-19-10; S.C. Code Ann. §17-19-20; and S.C. Code Ann. §17-19-30. It is for the reasons aforementioned, in relevant part, and Federal Rules of Criminal Procedure, Rule 7(c), that the requirements of the mentioned statutes are in effect, to ensure that the indictment(s) comply with Federal and State Rules of Criminal Procedure, the United States Constitution, the South Carolina Constitution, and the laws of due process, which make them more than merely a "notice document".

In addition to this, the indictments aid in instructing the jury of the circumstances of the crime, and the incidentals, as well as the elements of the offense, that they are to confirm, or reject the confirmation of, by the preponderance of the evidence presented before them by the prosecution and/or defense in reaching a verdict. This too, makes them more than merely a "notice document". Abrams, supra; Silverman, supra. The requirement that the offense be stated **** specifically in detail each element of the crime was seen as providing assurance that both the grand jury understood what was necessary to establish the offense and that the jury did engage in the unanticipated extensions of the substance of the offense.

Lastly, the requirement of the indictment(s) limit and constrain the "[p]owers" of subject matter jurisdiction of both the prosecution and the court, by limiting what can be presented at trial, conviction and sentencing. United States v. Promise, 255 F.3d 150 (4th Cir. 2001); State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309. It is the command of the United States

Constitution that anything to the contrary is notwithstanding. (Article IV, §2, U.S. Const.).

The Applicant places forth this issue in a straight forward fashion and want to make certain that there is no misunderstanding as to the specific claim(s) and/or question that is placed before the court. The Applicant is not arguing whether the criminal court has subject matter jurisdiction to hear and determine cases of "[t]his" general class to which the proceedings in question belong. The Applicant concedes this fact. The Applicant in this context agrees with all [3], Gentry, Cotton and Parkhurst court(s) when they determined that the criminal court does have subject matter jurisdiction to hear cases of this general class and/or nature, this is not the issue. What the Applicant is indisputably arguing is a question which clearly was not answered by either the Gentry, Cotton or Parkhurst courts is this. Despite the fact that the criminal court does have subject matter jurisdiction to hear cases of "[t]his" general class to which the proceedings in question belong. Do their egregious, blatant, failure to be in compliance to said certain, essential, crucial "[j]urisdictional [p]rerequisites" and/or "[j]urisdictional [r]equisites at various phases of, and/or at the commencement of the subject matter jurisdictionary action and/or process before the court? Do the state and/or court's egregious. blatant failure to be in compliance to these said certain, essential, crucial "[j]urisdictional [r]equisites" and/or "[j]urisdictional [r]equisites" at various phases of, and/or at the commencement of the subject matter jurisdictionary action and/or process; do that failure halt, check, constrain, restrain, limit, arrest, or stop the continuance of the court's subject matter jurisdictionary "[p]owers" before the court, even though the court without doubt do indeed possess such "[p]owers?"

This is a crucially, materially, distinctly different question related to subject matter jurisdiction that

was never answered by any of the courts involved pursuant to the Gentry case. This is why Justice Plecoines in the South Carolina Supreme Court refuses to be a part of the unjust acts of the South Carolina Supreme Court and conspiring parties handling of the Ezekial Haynes case. Thus using the holdings made in the Gentry Court would be misplaced, especially in light of the fact that it has been adjudicated under a cloud of fraud on the court. Such a new question of law and fact is not barred from seeking relief for, does relate to subject matter jurisdiction "[c]annot" be waived by the Applicant, and the court "[s]hall [n]ot" fail to take notice.

Insomuch, Rules of Criminal Procedure, the sufficiency of an indictment, subject matter jurisdiction, and the process of law are inter-linked and/or inter-locked in these matters. Yes, subject matter jurisdiction and the sufficiency of an indictment are two distinct concepts, but the indictment(s) in "[c]riminal" cases and/or pleadings is the vehicle upon which subject matter jurisdiction is conferred upon the "[c]riminal" court, and/or is that which enables the "[c]riminal" court the "[a]bility" and/or "[p]ower", and/or right to enact, and/or invoke, and/or continue its subject matter jurisdictionary "[p]owers". It is not so much that they are combined, the sufficiency of an indictment is a "[j]urisdictional [p]rerequisite" in cases of "[t]his" general class to which the proceedings in question belong, and for which an indictment is needed and/or required. English 101 and English 102 are two separate and distinct English course, but "[b]oth" make up one English program towards one single College degree to which College courses are "[p]rerequisite" to obtaining. English 101 is a "[p]rerequisite" to English 102. You "[m]ust" have and/or take English 101, before you can have and/or take English 102. You must complete various College courses before you can have and/or

obtain a College degree. Its a simple concept. Its not hard. You "[m]ust" have and/or take a sufficient indictment, have it properly passed upon by the grand jury, before you can enact and/or invoke and/or continue the court's subject matter jurisdictionary "[p]owers" given to a "[c]riminal" court, before a person can be convicted, (emphasis added), even though that court do indeed possess such "[p]ower". To view the two concepts of subject matter jurisdiction and the sufficiency of an indictment as combined, when federal made applicable to the states through the Due Process Clause and/or South Carolina, New Jersey, Kentucky, Georgia and other [29] relevant states adopted this federal law via their state Constitutions, dictate that one is a "[p]rerequisite" of the other, is an error of law and fraud on the court where the South Carolina Supreme Court went on a fishing expedition hoping to find some vague ruling that would permit them to circumvent thus requirement of law. Even if you separate the two concepts aforementioned from one another, the "[e]ffect" and/or "[o]utcome" on the trial court's "[p]ower" of subject matter jurisdiction are the same. Due to the deficiency in the "[j]urisdictional [p]rerequisite" pursuant to the presentment of the fatally defective indictments, it "[n]ullifies" the subject matter jurisdictionary action even though the "[c]riminal" court do indeed possess such "[p]ower". The two concepts are distinct from one another the same way the inner makings are distinct from the bread of a "[s]andwich", but "[b]oth" make the "sandwich". They are distinct from one another the same way a man's soul is distinct from his body, but "[b]oth" make the man. The "[c]riminal" court can have subject matter jurisdiction all day long, but without the indictment(s), when indictments are needed and/or required in this instance when it comes to convicting a person, that "[p]ower" is useless. The lack

thereof do "[e]ffect" and/or "[h]inder" that [p]ower and/or "[a]bility" to hear and determine cases of "[t]his" general class which the proceedings in question belong. To determine otherwise is an abuse of discretion, an egregious error of law, and an act of fraud on the court and conspiracy to essentially establish modern day slavery and take away our voting rights and political voice, especially since this action disproportionately affect African Americans and stand in violation of 18 U.S.C. §241, §242. In comparison, you can have two pieces of bread all day long, but without the inner makings you will never have a "sandwich". Being a "notice document" is only one of the numerous purposes and functions that the indictment serves. These cannot be viewed and/or work separately and independently of each other without affecting the "[t]rue" nature and purpose for which the indictment was created. To do so is an error of law. See Herman Winns v. State, Memo No. #2000-MO-078 (Daniel F. Piper, Justice).

Inasmuch, what the Honorable Court(s) in Gentry, Cotton and Parkhurst failed to see, is that the "[c]onfusion" that the Gentry court spoke of is "[n]ot" coming from the mixing of the two concepts of subject matter jurisdiction and the sufficiency of an indictment together. The "[c]onfusion" that the Gentry court spoke of, is coming from our modern day court(s) and system of jurisprudence losing vision and insight of that which is laid and set before us by our Constitutional forefathers in the establishing of our judicial system, that by all jurisprudence was not meant to be tampered with. That being a system of checks and balances, within a system of checks and balances. You have issues of subject matter jurisdiction, Rules of Criminal Procedure, sufficiency of an indictment issues, and issues of due process law pertaining to the United States Constitution, as well as the South Carolina, New Jersey,

Kentucky, Georgia Constitutions, and other relevant [29] states with the remaining that make use of criminal complaint, overlapping each other and checking each other, balancing each other, as a "[s]afeguard" to ensure that the United States Citizen, those who are held by us, and those who enter our borders or territories, inalienable rights to a fair and impartial trial and/or plea hearing are preserved. Our Constitution forefathers purposely meant and designed for them to be viewed as a whole unit, inter-locked and inseparable though independent to themselves as an integral part of the over-all judicial machine, so that if one part fails, the other parts pick up and kick in. Thus, remaining true to the very nature of [l]egal "system". A system is comprised of various components, nevertheless, it is still to be considered as one. As the Applicant mentioned in one of the previous issues. Our Constitutional forefathers in their wisdom and jurisprudence set up "[b]ulwarks", "[b]arriers" of protection forthrightly established to protect the American citizenry, those who are held by us, and those who enter our borders or territories, from unjust prosecution, that outside of an individual committing acts of treason were "[n]ot" meant to be torn down. These are those sacred "[b]ulwarks", "[b]arriers" of protection aforementioned in the first issue. To view them as separate and independent in the manner viewed by the Gentry court(s), as they relate to each other, goes against the rightly established pattern and design of our judicial system, is fraud on the court, an act of essentially establishing modern day slavery because you force inmates to labor, and is an error of law. It is a form of treason. It is the very epitome of betrayal to our Constitution, and sets itself at war and enmity to the substantial rights of the common wealth, and seeks to eradicate the very core of integrity of the rights, immunities, and privileges of all citizens, those who are held by

us, and those who enter our borders or territories, our Constitutional forefathers have died and sacrificed their best blood to establish and preserve. These sacred "[b]ulwarks" aid to ensure that "[l]ady [j]ustice" remains blindfolded, and the defendant's inalienable rights to a fair and impartial trial and/or plea hearing remain secure and are never taken away. Such action produces fraud on the court, essentially establishing modern day slavery since you force inmates to work, vitiating all convictions. The Amistad, supra; Ex parte Virginia, 100 U.S. 339, 348-349, 25 L.Ed. 767 (1880); Pulliam v. Allen, 466 U.S. 522, 536-543, 104 S.Ct. 1970, 1977-1982, 80 L.Ed.2d 565 (1984); Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286 (1991); Schmidt v. Degen, 376 F.Supp. 664 (E.D.Pa. 1974); 18 U.S.C. §241, §242.

Insomuch, these very issues were at the heart of the matters that existed, in relevant part, during the time of Ex parte Bain in 1887, and still vividly, with all certainty, exist now within our modern day courts and system of jurisprudence, and by the Constitutional rights of every citizen, of those who are held by us, and those who enter our borders or territories these issues "[c]annot" be ignored. These issues secured and protected by the rulings made in Ex parte Bain in 1887, as well as many other such holdings in other similar cases, still apply today and are protected by the United States Constitution and the laws of the United States. These concepts are designed to overlap in these matters to ensure a more true court of jurisprudence to its citizens, those who are held by us, and those who enter our borders and territories, for the sake of justice and fairness.

In regard to Gentry, we are dealing with a "state law", in such a way designed, crafted, drafted, initiated, and set into place, that is egregiously contrary to the United States Constitution's inherent, intrinsic, and explicit presuppositions that by its very nature is intense espionage and diabolical

sabotage, and stands in defiance to the rights of the common wealth, in violation of due process law, establishing fraud on the court, and modern day slavery behind a class based invidiously discriminatory animus in the form of racial hatred because it disproportionately affects the African Americans of this state and nation being more subjected to this broke judicial system than their caucasian counterparts. It creates the similarities seen in trials and/or plea hearings that manifested themselves during the Nazi Occupation, the English Inquisition of 1518, the Spanish Inquisition of 1478, the Salem Witch Trials of the 17th Century, the trials and/or hearings prior to and during the civil rights era, and the like; where trials and/or plea hearings became an arbitrary action, a mere hollow and deceptive formality and/or mechanism, utilized to snatch from the common wealth their inalienable rights, and rob them of their God given liberty.

Inasmuch, the issues here go far beyond that of dealing with indictment defects, which are to be quashed by motion before a jury is sworn, or acknowledged, and/or objected to before a guilty plea is give. The matters here in crucial part, do not have to necessarily be preserved for appellate review by a timely objection, but only need to be considered as a matter brought, conducted and presented before the court in some fashion, for example, fraud, the challenging of the court's power and the essentially establishing of modern day slavery. The court "[m]ust [a]llways" be held accountable to judiciary for a man's imprisonment, and the restraints on liberty if the imprisonment does not conform to the basic requirements of due process law. For the sake of justice and fairness, the Applicant should not be penalized and made to suffer an onerous conviction, because hired counsel, and/or counsel that the state appointed to represent Applicant, was so inept and Constitutionally ineffective, and/or conspired under color of state law with the prosecution to cause

irreparable harm to his proceedings, that he or she could not even see, or refuse of to see the overwhelmingly obvious defects in an indictment presented before the court. Thereupon, the Applicant, who later after conviction, previously having no knowledge of law, and little to no access to legal books or materials before his trial and/or plea hearing, later discovers these "[p]lain", "[c]lear", "[e]gregious", subject matter jurisdiction, fraud and due process issues should not in all fairness be barred from calling these matters to the attention of the courts in order to seek relief. Napue, supra; Giglio, supra; Shelton v. Ciccone, supra; Evitt v. Lucy, supra; Gray, supra; Powell v. Alabama, supra; Promise, supra.

CONCLUSION

Inasmuch, there were no holdings made in the Gentry court(s) that would justify and/or serve to detach from the indictment(s) the Fourth, Fifth, Sixth, Thirteenth, Fourteenth and Fifteenth Amendment issues aforementioned in this document made applicable to the states by they adopting such via their states Constitutions and/or by the Supremacy Clause of the United States Constitution. Likewise, there were no holdings made in the Gentry court that would justify and/or serve to detach from the indictment(s) the due process issues aforementioned in this document. Even if you would view the two concepts of subject matter jurisdiction and the sufficiency of an indictment as being separate and distinct. With the sufficiency of an indictment being a "[j]urisdictional [p]rerequisite to subject matter jurisdiction, not combined, in cases of "[t]his" general class, to which the proceedings in question belong, and for which an indictment is needed and/or required; the "[a]ffect" and/or "[o]utcome" on the trial court's subject matter jurisdictionary

"[p]owers" is the same. The result is, due to the presentment of the "[f]atally [v]ariant" indictment(s), "it [p]rohibits" the trial court and/or "[c]riminal" court from enacting and/or invoking and/or continuing its subject matter jurisdiction "[p]owers" in accordance to Rules of Court, Rules of Procedure, and due process law, even though they do indeed possess such "[p]ower". Therefore, such action enacted subsequent to the presentment of the "[f]atally [v]ariant" indictment(s) is "[n]ullified", and/or is to be rendered "[v]oid". Since the Applicant did not waive his right to double jeopardy protection, by these unjust arbitrary actions, to include the overwhelming amount of prejudice and due process violations the Applicant was subject to, with the grand jury being duly sworn, predetermining in advance the outcome of the proceedings by their language, illegally taking upon themselves the role of the trial jury and upon their oath adjudicating guilt of the offense(s), to include the "mens rea" elements, ect., the sentence and conviction must be vacated.

Insofar, the Gentry court reasoned, if a defendant does not object to an issue, he, by his failure to object, forfeit that right of law. First we have fraud on the court which "[c]annot" be waived. There is not statute of limitations or procedural bar for addressing fraud on the court. Also by their acts they intended to essentially establish modern day slavery as outlined in the C.A.T. Treaty the United States signed off on and Congress ratified. Congress confers upon no court, both state and federal, the power to establish slavery of any kind when you have fraud. This claim is brought under the not duly convicted provision of the Thirteenth Amendment which was not adjudicated by any court. Thus using any present holdings would be misplaced. No time bar or procedural rule can be permitted to hold a man

within the bonds of modern slavery in violation of the Anti Peonage Act. This voids the courts of all jurisdiction from the proceedings onset. These issues can be raised at any time, cannot be waived and the court must take notice.

Also indictment defects that are of such a fundamental character as to render an indictment wholly invalid are not subject to waiver by the defendant. We are also dealing with manifest Constitutional errors which can be reviewed by a court of appeals even if the Applicant did not object at the proceedings. The Applicant is also giving judicial notice that he is arguing a materially, distinctly, different question of law and fact related to subject matter jurisdiction that was never addressed and/or answered by the Gentry court and it's citings, which can be raised at "[a]ny" time, "[c]annot" be waived by the defendant, and the court "[s]hall [n]ot" fail to take notice.

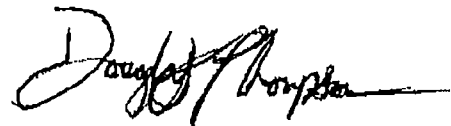
Lastly the court's ability to correct forfeited errors is guaranteed by Rules of Criminal Procedure, Rule 52(b) under the "plain error" doctrine where these issue affect substantial rights calling into question the integrity of the court itselfs, defies fundamental fairness and questions the public reputation of judicial proceeding, depriving the Applicant of Constitutional protection so basic and so fundamental that in it's absence no criminal proceeding can operate as a vehicle for the determination of guilt or innocence and no criminal punishment can be regarded as fundamentally fair because the errors affect the framework of the proceedings and cannot possibly be viewed as harmless, not subject to the harmless error doctrine producing overwhelming prejudice. United State v. Wheeler, 322 F.3d 823 (5th Cir. 2003); Promise, supra; United States v. Olano, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)(interpreting Rule 52(b)); United States v. Young, 470 U.S. 1, 15. 105 S.Ct. 1038, 94 L.Ed.2d 1 (1985); Johnson v. United States, 520 U.S. 461, 466-67. 117 S.Ct. 1544,

137 L.Ed.2d 718 (1997); United States v. Cedelle, 89 F.3d 181, 185 (4th Cir. 1996). Arvonio, supra; Vines, supra.

Wherefore, due to numerous Constitutional and due process violations of the Applicant's substantial rights, fraud on the court, the South Carolina Supreme Court conspiring to essentially establish modern day slavery by going on a fishing expedition to find some ambiguous ruling to circumvent or void the prerequisite aspect of a sufficient indictment, the blatant disregard for clearly established state and federal law they willingly adopted via their state Constitutions, etc., and the overwhelming prejudice related thereto, the Applicant moves and seeks to quash the indictments and/or reverse and/or arrest the judgment, and/or vacate the sentence and conviction due to fraud on the court and other issues argued pursuant to Federal Rules of Procedure, Rule 52(b) and/or any other relevant provision of law cited within this document. The Applicant moves for an order to be issued to expunge his record, return all fees and monies paid out, as well as to remove his name and DNA, (emphasis added), from any derogatory files or that is presently in any state or federal governmental entity's possession. Baker v. United States, 407 F.2d 618 (Ill. 1969); Baughman v. United States, 301 F.Supp. 509 (D.C. Minn. 1969); Screws, supra; The Amistad, supra; Dempsey, supra; to include any and all other relief the court would deem just, fair and proper.

Douglas M. Thompson
Wando-A-220 #348634
Lieber Correctional Institution
Post Office Box 205
Ridgeville, South Carolina
29472-0205

101 of 101

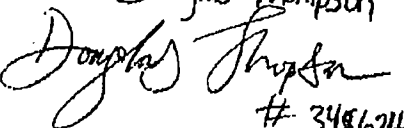


Douglas Thompson #348634
LCI
P.O. Box 205
Ridgeville, SC 29472

RE: 2014-Cp-08-1602 Amended PCR Application

Dear Clerk of Court,

Hereby you will see the returned Amended PCR Application with the requested signature on the brief. I would like for office to clock-stamp the Application attached with brief upon arrival please. I would highly appreciate if your office can send the Attorney General a copy as well. Once received can I get the returned Application clock-stamped as well, just to make sure everything went properly conducted. Thank you for your co-operation.

Douglas Thompson

#348634

000843

**STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY**

Case # 2014CP081602**EXHIBITS**

Circle One
Common Pleas
Family Court
General Sessions

PCR

Annex

2A06

Plaintiff(s) Douglas Thompson
vs.
Defendant(s) SE

PLAINTIFF'S EXHIBITS	DEFENDANT'S EXHIBITS	COURT'S EXHIBITS
1 <u>Container Debit</u>	1	1
2 <u>Summary of Aect</u>	2	2 FILED DEC 08 2016 <i>Jur</i>
3	3	3 CASE NO. MARY P. BROWN CLERK OF COURT BERKELEY COUNTY, SC
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10

Court
Reporter

Clerk of Court

Karen Anderson
Jacqui Williamson

12-9-16

John

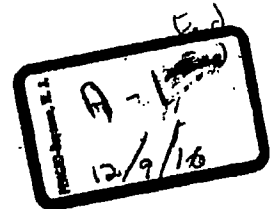
000844

Page 1 of 1.

CUSTOMER DEBIT		NBSC		DATE <u>8 6 2010</u>	
NOT NEGOTIABLE ACCOUNT		PREPARED <u>hep</u>		APPROVED <u>[Signature]</u>	
DESCRIPTION:					
CUSTOMER SIGNATURE X <u>Douglas Thompson</u>		TC (OPTIONAL)		DEBIT AMOUNT	
ACCOUNT NUMBER <u>2533531706</u>				DOLLARS <u>444.00</u>	
⑈5831⑈7777⑈					

7831087 2533531706 \$444.00 On 11/15 PM 08/06/10 02:15 PM TR:103 14-9 305 GOOSE CREEK BLV FRIDAY 11/15/10	

Date:08-06-2010 Sequence:16906650 Serial:6650 TR:58317777 Account:2533531706 TranCode:0 Amount:\$444.00
 DbCr:D InstID:831 MIInstID:831 MIFromInstID:831 MIAccount:2533531706 MICostCenter:8888 MIAppID:2



000845

253-353-170-6

PAGE

110XN18310PCSTN

09131002533531706

Statement of Account

Last statement: July 13, 2010
This statement: August 13, 2010
Total days in statement period: 31
253-353-170-6 113 931
Page 1 of 2

1080

915 GOOSE CREEK BLVD. N.
GOOSE CREEK, S.C. 29445

DOUGLAS THOMPSON
134 SUMMIT AVE
GOOSE CREEK SC 29445

Direct inquiries to: 0
800-703-5637

Summary of Account Balance

Account	Number	Ending Balance
Signature Free Chking	253-353-170-6	\$19.26

A FEDERAL REGULATION IS CHANGING YOUR OVERDRAFT COVERAGE OPTIONS.
VISIT OUR WEBSITE TO LEARN MORE: WWW.BANKOFAMERICA.COM/COURTESY?AY

Signature Free Chking

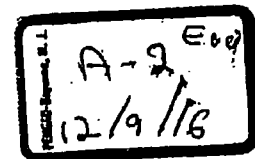
Account Number 253-353-170-6

Beginning balance	1.91	
Deposits/Credits	1,220.14	
Withdrawals/Debits	1,292.79	
Ending balance	19.26	
		Average collected balance 24.00

Checks

Number	Date	Amount	Control
4650	09-06	444.00	00000018906550
47521	11-01	733.20	7339016799120

* Skip in check sequence



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	C/A NO: 2014-CP-08-1602
	)	
Douglas M. Thompson, #348634,	)	
	)	
Applicant,	)	
	)	FIRST AMENDMENT TO PRIOR
v.	)	APPLICATION FOR PCR
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Applicant, through appointed counsel below, makes the following additional claims and amendments to his prior application for post-conviction relief filed July 9, 2014:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (i) Counsel failed to file or request a Motion for Severance from co-defendant.
 - (ii) Counsel failed to object to indictment and indictment process.
 - (iii) Applicant denied his right to self-representation on appeal.
 - (iv) Counsel failed to object to witness testimony.
 - (v) Counsel failed to object to amendment of indictments.
 - (vi) Ineffective assistance of appellate counsel for failing to brief whether the trial court erred in its ruling admitting cell phones and laptop into evidence at trial.
 - (vii) Ineffective assistance of trial counsel for failing to challenge chain of custody of a laptop and cell phones that were admitted into evidence.

(viii) Ineffective assistance of appellate counsel for failing to raise the issue that trial court erred in denying Applicant's Motion for Directed Verdict.

THE BOOZER LAW FIRM, LLC



Lance S. Boozer
Attorney for Applicant
807 Gervais Street, Suite 203
Columbia, SC 29201
Phone: (803) 608-5543
Fax: (803) 926-3463

Columbia, South Carolina
November 11, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	C/A NO: 2014-CP-08-1602
	)	
Douglas M. Thompson, #348634,	)	
	)	
Applicant,	)	
	)	AFFIDAVIT OF SERVICE
v.	)	
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

I, the undersigned of the Boozer Law Firm, LLC, Attorney for Applicant, do hereby certify that I served the foregoing First Amendment to Prior Application for PCR upon the persons below-listed by placing a copy, postage prepaid, in the United States Mail, addressed as follows:

Rutledge Johnson
 Assistant Attorney General
 P.O. Box 11549
 Columbia, SC 29211

THE BOOZER LAW FIRM, LLC


 Lance S. Boozer
 Attorney for Applicant
 807 Gervais Street, Suite 203
 Columbia, SC 29201
 Phone: (803) 608-5543
 Fax: (803) 926-3463

Columbia, South Carolina
 November 11, 2015

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Douglas M. Thompson, #348634,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

C/A NO: 2014-CP-08-1602

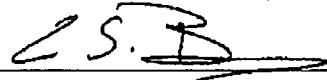
SECOND AMENDMENT TO PRIOR
APPLICATION FOR PCRFILED
2016 JUL 18 PM 1:51
CLERK OF COURT
BERKELEY COUNTY, SC

The Applicant, through appointed counsel below, makes the following additional claims and amendments to his prior application for post-conviction relief filed July 9, 2014:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(i) Counsel failed to introduce bank statements at trial explaining Applicant's possession of money at the time of the alleged crime.

THE BOOZER LAW FIRM, LLC



Lance S. Boozer

Attorney for Applicant

807 Gervais Street, Suite 203

Columbia, SC 29201

Phone: (803) 608-5543

Fax: (803) 926-3463

Columbia, South Carolina
July 15, 2016

LSB

(S.C. Ct. App. filed April 2, 2014). The Remittitur was issued on April 18, 2014.

II.

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

1. "Ineffective counsel"
2. "Prosecute [sic] Misconduct"
3. "Violation of 14th Amendment"

Attached herewith and incorporated herein by reference are the records of the Berkeley County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the opinion of the South Carolina Court of Appeals. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent interprets claims 1(a) and 1(b) as allegations of ineffective assistance of trial counsel and asserts that the Applicant's allegation is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

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

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

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

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

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

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

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

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an

appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Therefore, this allegation should be denied.

VI.

Finally, the Applicant alleges that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

VII.

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

VIII.

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

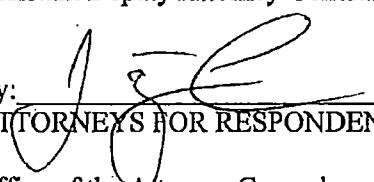
Respectfully submitted,

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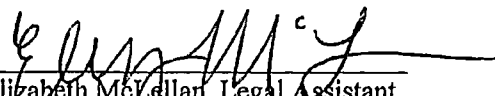
September 4, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2014-CP-08-1602
DOUGLAS M. THOMPSON, #348634	)	
Applicant,	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

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

Lance S. Boozer, Esq.
The Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201

DATED this 4th day of September, 2015.


Elizabeth McCallan, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF BERKELEY) Court of Common Pleas
3 _____) Case No. 2014-CP-08-1602
4 DOUGLAS M. THOMPSON,)
5 Plaintiff,)
6 vs.) Transcript of Record
7 THE STATE OF SOUTH CAROLINA,)
8 Defendant.) DATE: December 9, 2016
9 _____)

10 B E F O R E:

11 THE HONORABLE G. THOMAS COOPER

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

14 LANCE S. BOOZER
15 Attorney for the Plaintiff

16 RUSTON NEELY
17 Attorney for the Defendant

18 Karen V. Andersen, RMR, CRR
19 Circuit Court Reporter
20
21
22
23
24
25

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1 THE COURT: Ready to go, Mr. Boozer?

2 MR. BOOZER: Just one more moment, Your Honor.

3 THE COURT: Take your time. Just for my
4 understanding, Mr. Boozer, I have one amendment to the
5 application. Is that all there is?

6 MR. BOOZER: Your Honor, there actually should be --

7 THE COURT: I've got first amendment.

8 MR. BOOZER: There should be two. Is the first
9 amendment that Your Honor has, does it have quite a number of
10 allegation?

11 THE COURT: Yes, dated November 11th, 2015.

12 MR. BOOZER: There was a second amendment that was
13 made as well, Judge, which is only one allegation. And if I
14 may just thumb through my package here, this was made back in
15 July. And I did have a conversation with the Attorney
16 General's office regarding it to make sure that they had it
17 as well. And I don't believe, for some reason, that they
18 did, but I did file it, made July 18th. I'm happy to hand up
19 a copy to Your Honor.

20 THE COURT: You have seen it, Mr. Neely?

21 MR. NEELY: I have seen it.

22 THE COURT: Didn't get included in my packet. All
23 right. It's submitted.

24 MR. NEELY: Thank you, Your Honor. This is the case
25 of Douglas Thompson vs. State of South Carolina,

1 2014-CP-08-1602. The post-conviction relief application was
2 filed on July 9th, 2014. Applicant was indicted by the
3 November 2011 term of the Berkeley County Grand Jury for
4 kidnapping, that's 2011-GS-08-1659; armed robbery,
5 2011-GS-08-1570; first degree burglary, 2011-GS-08-1573.

6 David Aylor represented him at trial on November
7 7th, 2011. Mr. Thompson proceeded to trial before the
8 Honorable Kristi Harrington. The applicant was found guilty
9 as indicted and was sentenced to 15 years for each charge
10 concurrently. Notice of appeal was filed and an appeal was
11 perfected on applicant's behalf. Lanelle Durant represented
12 the applicant that on appeal.

13 The remittitur was returned April 18th, 2014. And
14 we are here before Your Honor for an evidentiary hearing on
15 PCR.

16 MR. BOOZER: Thank you, Your Honor. If it please
17 the Court. We call Mr. Douglas Thompson to the stand.

18 DOUGLAS THOMPSON,
19 having been duly sworn, testifies as follows:

20 THE CLERK: State your full name and spell your last
21 name for the record.

22 THE WITNESS: Douglas Thompson, T-h-o-m-p-s-o-n.

23 MR. BOOZER: May I approach the witness with
24 package of notes?

25 THE COURT: Sure.

1 DIRECT EXAMINATION

2 BY MR. BOOZER:

3 Q. Mr. Thompson, how are you doing today?

4 A. I'm doing fine.

5 Q. Okay. Do you know why you are here today?

6 A. Yes, sir.

7 Q. Why is that?

8 A. Attacking the ineffective assistance of counsel of
9 my previous trial attorney, which is David Aylor.

10 Q. To get into court today, did you file a
11 post-conviction relief application?

12 A. Correct.

13 Q. What are you currently incarcerated for?

14 A. First degree burglary, two armed robberies and two
15 kidnappings.

16 Q. And you had a trial on these charges?

17 A. Correct.

18 Q. What type of sentence did you receive as a result of
19 that trial?

20 A. 15 years concurrent.

21 Q. And you indicated your trial lawyer was Mr. David
22 Aylor?

23 A. Correct.

24 Q. All right. Now, do you understand that by filing
25 the PCR application -- you and I have obviously discussed

1 this -- but do you understand that the only thing this Court
2 can do for you today is basically to start your case over
3 from day one and start you over, and you would eventually
4 have a trial on your original charges. Do you understand
5 that?

6 A. Correct.

7 Q. All right. And right now, what is your max-out
8 date, as you understand it, from SCDC?

9 A. I believe it's February -- I don't know the exact
10 date, but 2024.

11 Q. Okay. So you've got about seven years left on your
12 sentence?

13 A. Correct.

14 Q. And you understand that if you are successful here
15 today, and you go back and face these charges all over, that
16 there is a possibility, just worst-case scenario, that you
17 could get significantly more time than what you have left or
18 than what you received at trial?

19 A. Correct.

20 Q. And you understand that this Court can't reduce your
21 sentence or cut your time or anything like that?

22 A. Correct.

23 Q. And knowing that, you want to go forward with your
24 PCR?

25 A. Yes, sir.

1 Q. Okay. Now, your application -- you've got some
2 allegations, but before we get to that, how did Mr. Aylor
3 come about representing you?

4 A. I hired Mr. Aylor probably, I will say, November --
5 I don't know the exact date -- November the 2011. When I
6 first spoke with him, he specifically told me that we were
7 going to trial, there's no evidence, like, he had no
8 worries.

9 Q. Okay. So you hired -- you retained Mr. Aylor to
10 represent you?

11 A. Correct.

12 Q. All right. And what was it alleged that you had
13 done? What did the State allege that you had done?

14 A. Committed armed robbery.

15 Q. Okay. And prior to your trial, do you know about
16 how many times you met with Mr. Aylor?

17 A. Yeah, it was very few, too little. I will say
18 probably about, like, only twice.

19 Q. Let me ask you this. Did you ever bond out on the
20 charges?

21 A. Yes, sir. I bonded out February 14th, 2011. I was
22 in county for six months.

23 Q. Was Mr. Aylor representing you at that time?

24 A. Correct.

25 Q. When you guys would meet, what would you two

1 discuss?

2 A. Once again, when we did met, it wasn't -- the
3 discussion was literally very little to nothing. He told me
4 that, as far as my understanding, that he didn't have no
5 evidence and we was going to trial. Until probably about
6 literally a month, I will say a month before I actually went
7 to trial, now I had significant evidence against me. And
8 that's when he told me that me prevailing on trial was not
9 looking good.

10 Q. Okay. So your testimony is that initially, your
11 attorney was telling you that everything looked good and you
12 should go to trial?

13 A. Correct.

14 Q. And then something happened to where -- what
15 happened that made his opinion change?

16 A. Obviously, obviously, the witnesses.

17 Q. What witnesses are you specifically referring to?

18 A. The women, the two unknown women that I had no
19 knowledge of.

20 Q. When did you find out about these two women?

21 A. Literally, the day of trial. And this is why -- and
22 this is what I'm saying. This is why I'm saying that he
23 should have requested for a *Brady vs. Maryland* motion to at
24 least get full disclosure of the evidence.

25 Q. Let me ask you this. Throughout the trial -- or,

1 excuse me, prior to your trial, was there ever an offer for a
2 plea?

3 A. Yes, there was. It was 10 years if I would have
4 took the stand and testified, but that's just off of his
5 statement. That wasn't nothing that I seen written or
6 anything.

7 Q. That was something that your lawyer conveyed to you?

8 A. Yes, sir.

9 Q. All right. So do you know if any charges were going
10 to be dropped or reduced?

11 A. No, I don't know any of that.

12 Q. What was your response to the ten-year offer?

13 A. No.

14 Q. And why is that?

15 A. How can -- well, how can I testify on something I
16 didn't know of, I didn't have no knowledge of?

17 Q. Okay. You just maintained that you were innocent of
18 the charges?

19 A. Yes, sir.

20 Q. And still do?

21 A. Yes, sir.

22 Q. Okay. Were there any other offers made?

23 A. No, sir.

24 Q. Okay. Now, let's go to your allegations in your --
25 the amended application that was filed on your behalf.

1 You've allege first that your lawyer -- and we will go
2 through all these. Okay? You've alleged that your lawyer
3 failed to file or request a motion for severance from the
4 co-defendant.

5 A. Correct.

6 Q. Is that one of your allegation?

7 A. Correct.

8 Q. Explain to the Court what you mean by that and
9 exactly what you think your lawyer should have done for you?

10 A. I specifically asked Mr. Aylor if I could have a
11 separate trial from my co-defendant. And he told me no. He
12 told me it doesn't work like that.

13 Q. Why did you want a separate trial from your
14 co-defendant?

15 A. Because my co-defendant is a nonrepeat (sic)
16 offender.

17 Q. Say that again. I'm sorry.

18 A. He's a repeat offender. He just came out of prison.
19 And I knew that they was trying to tie me in with my
20 co-defendant. So I knew if I could just get a separate
21 trial, just based off of the evidence, off of the evidence
22 that the State had towards me, which was, once again,
23 literally nothing, the State case would have been very weak.
24 But I truly believe the reason why they co-joined (sic) me
25 and my co-defendant together was simple fact if they could

1 tie him to the crime scene and link me with him, they could
2 get a conviction on both of us, which they did.

3 Q. And what did your lawyer tell you about trying to
4 request a severance from your co-defendant?

5 A. He said that's how it's done. He said that's what
6 the court does and that's how it's done. And from him being
7 my lawyer and me being ignorant to the law, I trusted him.

8 Q. All right. And in fact -- and, Your Honor, I'm
9 referring to page 684 of the transcript, and this is actually
10 during sentencing, Mr. Thompson, do you recall the Court
11 actually saying to you during the sentencing: And whether or
12 not you were the one -- and you pled not guilty to these
13 offenses -- I'm troubled by the fact you were out at 11:30 at
14 night with an individual that's 12 years older than you with
15 a felony record.

16 Do you think that that's sort of how -- that's why
17 you wanted the severance, is to get away from this guy?

18 A. Correct.

19 Q. Okay. Is there anything else on the issue of
20 severance that you want to tell His Honor about?

21 A. Now, as far as that statement that he said it
22 couldn't be done, under South Carolina Rule 40(b) for the
23 separate trials, it clearly states that the court, in
24 furtherance of the convenience or to avoid prejudice or when
25 separate trials will be conclusive to the expedition and

1 economy, may order a separate trial of any claim.

2 From my understanding in which that should have been
3 a 14th Amendment violation of my due process for him simply
4 telling me that that couldn't be done when that could have
5 been done.

6 THE COURT: Was a motion made?

7 MR. BOOZER: I don't believe so, Your Honor.

8 BY MR. BOOZER:

9 Q. Is there anything else with regard to that
10 allegation?

11 A. No, sir.

12 Q. Now, you also have an allegation that your lawyer
13 failed to object to the indictments and the indictment
14 process. Go ahead, if you would, and explain that.

15 A. I originally had indictments back in 2010 that I
16 fully had knowledge of. I went to trial November the 7th.
17 I'm still thinking that I had the original indictments. I
18 find out I had direct indictments after I was found
19 convicted, which the jury convened on November the 7th, three
20 days before I went to trial. I had no knowledge of that.

21 So, once again, he was wrong either way as far as he
22 should have put a *Brady vs. Maryland* motion to get a full
23 disclosure of the witnesses, the indictments, and anything
24 else like that. He just retained the information from me,
25 but either way, he was wrong.

1 Q. Let me ask you this. You say there are basically
2 two sets of indictments. Did they nolle pros the original?

3 A. They nolle pros'd the original indictments. And
4 they direct indicted me 15 months later. And I still had the
5 same evidence.

6 Q. To your knowledge, what was different in the second
7 set of indictments from the first set?

8 A. The first indictment, the body clearly reads that
9 Douglas Thompson did such and such crime. The direct
10 indictment clearly stated that I did in concert with others.

11 Q. So the first set of indictments were that basically
12 you were the one who did this, but the second --

13 A. The body of the language.

14 Q. -- they amended to have that you acted in concert
15 with someone else?

16 A. Correct.

17 Q. What do you think your lawyer should have done?

18 A. On that, as far as the indictments? Like I said,
19 for the direct indictment, I had no knowledge of. I think he
20 should have put in the motion to have that direct -- the
21 directed verdict on the indictments.

22 Q. Anything else that you believe your lawyer should
23 have done with regard to the indictments?

24 A. No, no, sir. But I just feel like if he had did
25 that, I could have had a better proper defense as far as

1 coming into trial, because I had no knowledge of that or the
2 witnesses, et cetera.

3 Q. What's your next allegation that you have?

4 A. My bank statement.

5 Q. Okay. Let's get to that one in just a moment,
6 because that deals with the amendment. But you've also got
7 an allegation that you feel that you were denied your right
8 to self-representation?

9 A. Self-representation.

10 Q. On appeal?

11 A. On appeal, yes, sir.

12 Q. So did you have a direct appeal after your
13 conviction?

14 A. Correct.

15 Q. Who represented you on that appeal?

16 A. Ms. Lanelle Durant.

17 Q. Is Ms. Durant part of the appellate defender's
18 office?

19 A. Correct.

20 Q. What is it that you claim with regard to that
21 allegation?

22 A. I spoke to her six months after she was assigned to
23 my case back in 2012. We had a phone conversation, a phone
24 conference of the allegations that I wanted her to present.
25 And she told me she was going to look at it. And she said

1 she was going to put it down. I say probably about another
2 six months later, she only put one of my arguments down. And
3 I will say probably at least three of them was preserved on
4 trial.

5 So from my understanding, she should have at least
6 put all three of them and just let the appellate office make
7 a decision on all three of the arguments. But she only put
8 one of them, which was the photo identification.

9 Q. What was the issue that she --

10 A. And now, when she originally had sent a brief,
11 that's when I wanted the self-representation, when I see --
12 because I asked her to put in all three of the arguments
13 in.

14 Q. What were the other two arguments you wanted your
15 appellate defender to present?

16 A. The directed verdict. That was one of them.

17 Q. When you say the directed verdict, did the trial
18 court err in not granting a directed verdict?

19 A. Yes, sir, on all of the charges.

20 Q. All right. What else?

21 A. The directed verdict and the witness testimony, the
22 witness testimony.

23 Q. And what specifically do you mean by "the witness
24 testimony"?

25 A. The officer.

1 Q. Okay. What specifically do you believe your
2 appellate lawyer should have raised in regard to the
3 officer's testimony?

4 A. It was a lot of his statements was contradicted. If
5 you look on my chain of custody sheet, first he said the
6 evidence was on my co-defendant. Then he said it was on me.
7 And then he was going back and forth. He wasn't very sure.
8 So I feel like his testimony was not reliable at all.

9 Q. All right. Going back, you indicated you wanted to
10 represent yourself after she only briefed the one issue; is
11 that correct?

12 A. Uh-huh, correct.

13 Q. Did you express to anyone that you wanted to
14 represent yourself on the appeal?

15 A. Correct. I write to appeals. They sent me back an
16 order stating -- denying me -- denying me of the case. I
17 have it somewhere, denying me of the case *State vs. Roberts*.
18 And I gave them back a case of *United States vs. Gonzalez vs.*
19 *Lopez*, which override *State vs. Roberts*. *State vs. Roberts*
20 was 2005. *Gonzalez v. Lopez*, that case was back in 2006.
21 And that clearly stated that you could represent yourself in
22 any trial proceeding.

23 Q. And is that what you wanted to do?

24 A. Correct.

25 Q. So, basically, your claim is you were denied your

1 right to represent yourself on appeal?

2 A. Correct.

3 Q. Is it fair to say that, had you represented
4 yourself, you would have included the other appellate issues
5 that you felt were viable?

6 A. Yeah, of course.

7 Q. Is there anything else with regard to that
8 allegation you wish to tell the Court?

9 A. No, sir.

10 Q. You also have an allegation, I think you may have
11 already touched on it, about you feel that your lawyer failed
12 to object to certain witness testimony.

13 A. Yes, sir.

14 Q. Have you covered that in your previous testimony or
15 is there something different you want to state with regard to
16 that allegation?

17 A. No. The only thing different is, I just feel like
18 the outcome would have been a whole lot different if I just
19 knew who was coming and testifying against me. From my
20 understanding, the two unknown women, they had not written no
21 statements, nothing. All of a sudden, they just came on
22 trial and they just testified against me. So, once again,
23 that will fall right underneath that *Brady vs. Maryland*. He
24 should have put in for the full disclosure again, because I
25 had no knowledge of that.

1 How could I have a proper defense if I didn't even
2 know what I'm going up against?

3 Q. Well, what was it at the time of the trial that you
4 knew you were going to be facing at trial with your lawyer?
5 What evidence had you reviewed with your attorney that you
6 thought the State was going to use against you?

7 A. What evidence did I review? Only thing was the
8 evidence that they had since the original arrest forms.

9 Q. But you didn't have an opportunity to review any
10 statements made by these two women?

11 A. No, sir, not at all. They never had a statement.

12 Q. Let me ask you this. When it came up at trial about
13 these women who were going to be witnesses, did you have any
14 discussion with your attorney about that?

15 A. Yes, sir.

16 Q. What was the discussion?

17 A. Of course, when I seen the women -- and not to
18 mention, my co-defendant's cousin was supposed to testify as
19 well too. I seen all of this the very first day when we came
20 to court. From my understanding, the conversation wasn't
21 very -- it wasn't briefed at all. Like, he didn't have no
22 knowledge of that as well either.

23 Q. Do you recall if he raised that issue at trial --

24 A. No.

25 Q. -- about some unknown witnesses or anything like

1 that?

2 A. Not at all. He didn't even attempt to raise that
3 statement.

4 THE COURT: Who are "they"? Do you know the names?

5 THE WITNESS: I know one of the women's name is
6 Rodriguez. It should probably be in that first page right
7 there.

8 THE COURT: What?

9 THE WITNESS: It should probably be in that first
10 page right there.

11 THE COURT: I'm looking for it.

12 BY MR. BOOZER:

13 Q. Is that Ms. Silva and Ms. Rodriguez? Is that who
14 you are referring to?

15 A. Correct, correct.

16 MR. BOOZER: And, Your Honor, I believe, for the
17 Court's information, they would be on page 5, beginning at
18 533 of the transcript.

19 THE COURT: 533?

20 MR. BOOZER: Yes, sir, Your Honor. Now, I'm not
21 sure if Your Honor has the record on appeal or the trial
22 transcript.

23 THE COURT: I am not either.

24 MR. BOOZER: I'm looking at the trial transcript.

25 THE COURT: I have Paulina Silva on 533.

1 THE WITNESS: Uh-huh, that's it.

2 THE COURT: Any colloquy with the judge before they
3 testified?

4 MR. BOOZER: If I may just have a moment, Your
5 Honor. I don't believe so, Your Honor.

6 THE COURT: Okay.

7 BY MR. BOOZER:

8 Q. Now, Mr. Thompson, you also have an allegation, and
9 I believe we covered this when you initially began your
10 testimony, but your lawyer failed to object to the amendment
11 of the indictments. Have you covered that already?

12 A. Correct.

13 Q. That's when you've talked about what you referred to
14 as being directly indicted before trial?

15 A. Yes, sir.

16 Q. Okay. You also have an allegation that you believe
17 your lawyer was ineffective for failing to brief whether the
18 trial court erred in admitting cell phones and laptops into
19 evidence at trial. Is that something that you covered before
20 when we were discussing your appellate defender?

21 A. Correct.

22 Q. And that's one of the issues you wanted her to
23 raise?

24 A. Yes, sir.

25 Q. Is that something that your lawyer actually made

1 motions to try to keep out?

2 A. He did.

3 Q. And those were obviously denied by the trial
4 court?

5 A. Correct.

6 Q. You also have ineffective assistance of trial
7 counsel by failing to challenge the custody of cell phone and
8 laptops that were admitted into evidence. Is that one of
9 your allegations?

10 A. Correct.

11 Q. Explain to the Court what you mean by that and what
12 you feel your lawyer should have done.

13 A. The chain of custody -- the original chain of
14 custody sheet had all of the evidence diverted on to my
15 co-defendant. And none of the original evidence was on me.
16 I figured on that argument right there, on the testimony, on
17 the Jason Charlton, which was the officer, he didn't object
18 to that at all.

19 Q. Okay. Is there anything else with regard to that
20 specific allegation?

21 A. No, sir.

22 Q. You also have allegation, I believe you've already
23 covered, but that your appellate lawyer failed to raise the
24 issue that the trial court erred in denying your motion for
25 directed verdict. Have you covered that already?

1 A. Uh-huh, yes, sir.

2 Q. All right. Now, you've also alleged by a second
3 amendment that was made back in July that your lawyer failed
4 to introduce certain bank statements at trial that would
5 explain why you were in possession of some money at the time
6 you were arrested; is that right?

7 A. Correct.

8 Q. Is that one of your allegations?

9 A. Correct.

10 Q. All right. At the time of your arrest, was there
11 some money found on you?

12 A. Correct.

13 Q. How much money was found on you?

14 A. \$444.

15 Q. Do you recall there being any sort of -- was it ever
16 \$442 or was it 444, to your recollection?

17 A. 442.

18 Q. Okay. And was one of the allegations by the victim
19 in this case that you had stolen money from them?

20 A. Correct.

21 Q. All right. What was the amount that was alleged to
22 have been stolen?

23 A. I believe it was 600 and -- I don't know the exact
24 amount, but I know it was 600. And number of funds was in
25 Brazilian, Brazilian money.

1 Q. All right. Did you have any sort of explanation or
2 did you discuss with your lawyer why it was that you had what
3 was this amount of money on you at the time?

4 A. Of course, yes, sir.

5 Q. Did you discuss that in your meetings prior to your
6 trial with your lawyer?

7 A. Yes, sir.

8 Q. Tell the Court what it is, why you had that money.

9 A. I was paying my car loan back then. I literally
10 went to the bank that day to withdraw those things out.

11 Q. Okay. Did you provide your lawyer with anything
12 from the bank showing where you had withdrawn funds?

13 A. Correct.

14 MR. BOOZER: So at this time, Your Honor, may I
15 approach the witness?

16 BY MR. BOOZER:

17 Q. Mr. Thompson, I'm going to hand you a document. And
18 if you would for me, please, identify that document for me.

19 A. Yes, sir. This is a check that I went inside my
20 bank, which is NBSC, and I withdraw.

21 Q. At the top it says -- did you have a bank account at
22 NBSC?

23 A. Correct.

24 Q. And it says at the top, customer debit, and it says
25 customer signature, Douglas Thompson. Is that your

1 signature?

2 A. Correct.

3 Q. And it says debit amount \$444?

4 A. Correct.

5 Q. And then there at the bottom, it's clocked by NBSC
6 and says that the date of the transactions is August 6th,
7 2010, at 2:15 p.m. Do you see that?

8 A. Correct.

9 Q. All right. When was it alleged that this crime
10 occurred? Do you recall it being August 6th, 2010?

11 A. Yes, sir. I will say like around 10 something that
12 night.

13 Q. Okay. Did you show your lawyer a copy of what it is
14 that you are looking at right now?

15 A. Yes, sir.

16 MR. BOOZER: Your Honor, at this time, I would move
17 to introduce this as Applicant's Exh. 1.

18 THE COURT: Any objection?

19 MR. NEELY: No objection from the State, Your Honor.

20 THE COURT: Without objection.

21 (Plaintiff's Exhibit 1, Bank Statement, is moved
22 into evidence.)

23 BY MR. BOOZER:

24 Q. Mr. Thompson, did you provide your lawyer with
25 anything else with regard to your bank account or banking

1 statements at that time?

2 A. No, sir.

3 Q. Okay. Did you hand him a summary of your account
4 balance or anything like that?

5 A. Yes, sir.

6 Q. I'm going to ask you to take a look at this second
7 document I'm going to hand you. And if you would, take a
8 moment and look at that. And if you could just identify it
9 for me.

10 A. Yes, sir. This is the summary of my bank account.

11 Q. Is this the same account that we were referencing in
12 Exhibit 1?

13 A. Correct.

14 Q. And it says, statement of account, last statement,
15 July 13th, 2010. This statement, August 13th, 2010, for
16 Douglas Thompson at 134 Summit Avenue, Goose Creek, South
17 Carolina; is that you?

18 A. Correct.

19 Q. All right. And this is stamped by NBSC on Goose
20 Creek Boulevard. And did you say that you provided this to
21 your lawyer?

22 A. Correct.

23 Q. And at the bottom it says that on August 6th, it
24 appears that a check was a debit for \$444?

25 A. Yes, sir.

1 Q. Is that what you were referring to in Exhibit 1 that
2 you signed for?

3 A. Yes, sir.

4 Q. All right.

5 MR. BOOZER: Your Honor, at this time, I move to
6 make this Applicant's Exhibit No. 2.

7 THE COURT: Objection?

8 MR. NEELY: No objection, Your Honor.

9 (Plaintiff's Exh. 2, Bank Statement, was received
10 in evidence.)

11 BY MR. BOOZER:

12 Q. Mr. Thompson, when you showed those documents to
13 your lawyer, what was his response?

14 A. Mr. Aylor, he said that he was not going to
15 introduce them because we would have forfeited our chance of
16 having a last argument.

17 Q. Okay. Do you know what he meant by that?

18 A. Correct.

19 Q. I'm asking you, do you know what he meant by that?

20 A. Now, at that point in time, no, I didn't. Now, from
21 my understanding, you still wouldn't forfeit your last
22 argument. And even if you would have, even if you would
23 forfeit argument, I feel like that was a must-see for the
24 jury to see, though. I still would have wanted him to go
25 ahead and put that in there so the jurors could see that.

1 Q. Okay. Why do you think that that was important for
2 the jury to see?

3 A. So they could know that I didn't take these people's
4 money.

5 Q. Do you think this would have explained or given the
6 jury an explanation as to why you had that amount of money in
7 your pocket?

8 A. Of course. I believe that definitely would have
9 changed the outcome, because the jury, they looking and they
10 wondering where these funds came from.

11 Q. And you discussed this with your lawyer?

12 A. Of course.

13 Q. And his explanation to you was, he didn't want to
14 introduce any evidence because he wanted to preserve the
15 last -- the final closing?

16 A. Of course. But that was some crucial evidence that
17 the jury had must seen (sic).

18 Q. Now, Mr. Thompson, obviously, this is your day in
19 court to cover your allegations. We've been through the
20 amendment and second amendment for your application. Is
21 there anything that we have not covered that you raised in
22 your original -- in your PCR application that you want to
23 tell His Honor?

24 THE COURT: While he's doing that, there's some
25 mention of Brazilian money?

1 THE WITNESS: Yes, sir.

2 MR. BOOZER: There was, Your Honor. And we can
3 revisit that. I am not entirely clear. I know there were
4 some discrepancies into the denominations of money that the
5 victim, who was of Brazilian descent, had. I'm not sure it
6 was actually Brazilian currency.

7 THE WITNESS: That's what they said.

8 THE COURT: Found on him?

9 MR. BOOZER: I'm sorry?

10 THE COURT: It was found in his possession?

11 BY MR. BOOZER:

12 Q. What type of money was found in your possession?

13 A. My money, the \$440.

14 Q. Of U.S. currency?

15 A. Yes, sir.

16 Q. Was there any Brazilian currency on you?

17 A. No, no, sir. And the denominations was wrong. As
18 far as -- I forget how many 50s they had --

19 Q. Your lawyer, he cross-examined the victim on what
20 his recollection and officer's recollection of what he
21 thought he had denomination-wise and what you possessed, and
22 it didn't really match up, did it?

23 A. Correct.

24 MR. BOOZER: Going back -- does that answer Your
25 Honor's question?

1 THE COURT: Yes.

2 BY MR. BOOZER:

3 Q. Mr. Thompson, is there anything else with regard to
4 any of your allegations that we have not covered or that we
5 have left out that you want to raise to the Court?

6 A. No, sir.

7 Q. Okay. Mr. Thompson, that's all the questions I
8 have. Please answer any the State may have for you.

9 THE COURT: Mr. Neely.

10 CROSS-EXAMINATION

11 BY MR. NEELY:

12 Q. Good morning, Mr. Thompson. How are you doing?

13 A. Okay. How are you?

14 Q. Doing well.

15 Going back to that that we just mentioned, on page
16 99 of the transcript of the trial, you are aware that it
17 wasn't \$444 found on your person, correct?

18 A. 442 something.

19 Q. It was actually \$242 found on your person.

20 A. No, no.

21 Q. Isn't that what was testified to?

22 A. No.

23 MR. NEELY: Your Honor, may I approach?

24 THE COURT: Sure.

25 THE WITNESS: 200, no.

1 BY MR. NEELY:

2 Q. Mr. Thompson, what I'm showing you is page 99 of the
3 trial transcript. If you will just review lines 22 to 24.

4 THE COURT: Whose testimony is this?

5 MR. NEELY: This the testimony of the investigating
6 officer.

7 THE WITNESS: Oh, yes, that's incorrect. It's
8 documented as far as in the county jail \$444. That's
9 incorrect.

10 BY MR. NEELY:

11 Q. Your testimony today is that the amount that was
12 testified to at trial is incorrect?

13 A. Correct. Yes, sir.

14 Q. And you are aware that in the trial transcript, it
15 was never alleged those funds were Brazilian funds, correct?

16 A. It should have been, yes, sir.

17 Q. Your testimony today is that the victims in that
18 case testified that it was Brazilian funds?

19 A. Yeah, correct, correct.

20 Q. And kind of going back a little further, when you
21 alleged that your attorney failed to request a severance and
22 one of the reasons that you said you wanted the motion to
23 sever was because your co-defendant was a repeat offender?

24 A. Correct.

25 Q. Is that correct?

1 A. Correct.

2 Q. Was that ever brought up at trial?

3 A. No, he never mentioned it.

4 Q. That your co-defendant was a repeat offender?

5 A. As far as on whose behalf, the prosecutor or who?

6 Q. On either side, was it ever mentioned at trial in
7 front of the jury?

8 A. With the prosecutor, yes, sir. And it's in the
9 transcript.

10 Q. Prosecutor brought it up, brought up the
11 co-defendant's record?

12 A. Yeah, when she recommended 30 years. It's in the
13 transcript.

14 Q. Okay. During the sentencing phase --

15 A. Uh-huh.

16 Q. -- the prosecutor mentioned your co-defendant's
17 record? /

18 A. Correct.

19 Q. But not during the trial phase?

20 A. No.

21 Q. And is there a specific trial right that you felt
22 was compromised by your attorney's failing to file a motion
23 to sever?

24 A. Say that one more time.

25 Q. What do you feel was specifically compromised for

1 you in your trial when your attorney did not file for a
2 motion to sever?

3 A. I feel that was very prejudice on my case.

4 Q. Is there a specific right?

5 A. A specific right? I believe so, yes, sir.

6 Q. What is that specific right?

7 A. That specific right, once again, I had no record.
8 And this man right here, this man, he has a record. And
9 there was no evidence found on me. And all of the evidence
10 is towards him.

11 THE COURT: Jury didn't know that?

12 THE WITNESS: The jury?

13 THE COURT: Jury didn't know he had a record?

14 THE WITNESS: No, they didn't know, not at that
15 point in time.

16 BY MR. NEELY:

17 Q. All right. And just moving on to, you said you were
18 denied your right to self-representation on appeal; is that
19 correct?

20 A. Yes, sir. But, once again, let me finish your
21 question.

22 No, the jury did not know that, but all of the
23 evidence was towards my co-defendant, though. The evidence
24 wasn't on me. If they could have made him look guilty and
25 tie me in with him, then they would have got their

1 conviction. And that's why I wanted a separate trial.

2 THE COURT: Okay. I understand.

3 BY MR. NEELY:

4 Q. You are aware there's no constitutional right to
5 self-representation on appeal in South Carolina, correct?

6 A. There isn't?

7 Q. So you are not aware of that?

8 A. How that's not a constitutional right?

9 Q. I will move on. It's a legal matter.

10 How would your defense have changed if you knew
11 about the female witnesses?

12 A. Who knows? I could have had a proper defense or --
13 I could have -- who knows? Once again, I could have plead
14 out. My thing was, I wasn't even given that option. I
15 wasn't even given that option when the females had came. I
16 didn't have no knowledge of them at all.

17 Q. So what do you think would have changed is that, if
18 you had known the evidence against you with the female
19 witnesses, you might have pled guilty?

20 A. No, but I'm just saying -- I would never pled
21 guilty, but only reason, I said I would have had the chance.
22 At least they could have gave me the chance, or I say the
23 simple fact that he should have had the background check as
24 far as on the witnesses, to see if their testimony was
25 reliable.

1 Q. Okay. So the main thing that you are asserting
2 would have been different, you would at least have had a
3 chance to talk about a plea offer if you had known about
4 those witnesses?

5 A. It's a possibility. It's a possibility. I'm facing
6 life.

7 Q. All right. And then I will ask basically the same
8 question concerning the indictment, indictment process. You
9 testified on direct examination that you would have had a
10 better defense if you had known about the change in the
11 direct indictments?

12 A. Of course.

13 Q. How would your defense have changed? What would
14 have been better about your defense?

15 A. I felt like the direct indictment process was
16 illegal, just for the simple fact that they waited 15 months
17 later to direct indict me with the same evidence. Why would
18 you direct indict me 15 months later just before I went to
19 trial? What was new that occurred that you didn't have
20 before, since the original date that I got originally
21 incarcerated?

22 Q. Okay. So you are not alleging that your defense
23 would have been different or better; you are alleging it was
24 an illegal process?

25 A. That too.

1 Q. You say "that too", is there some way your defense
2 would have been changed as well?

3 A. Reason why I say the defense would have been
4 changed, because I would have attacked the direct indictment.
5 I would have tried to get a direct verdict clause on the
6 direct indictment. Now, I'm just thinking of -- I'm thinking
7 that I still had the original indictments. But,
8 unfortunately, it wasn't.

9 Q. So you are saying your defense would have been
10 changed or improved because you would have attacked
11 indictments?

12 A. Of course. Because at the point in time I'm going
13 to trial, I have original indictments and direct indictments.
14 Is that legal? I have original indictments back in 2000 --
15 it wasn't nolle pros'd yet. It was only nolle pros'd after I
16 got convicted. So I still had the 2010 indictments now as
17 well and I have direct indictments during this trial phase.
18 But they only presented the direct indictment. Is that fair?

19 Q. Okay. So you are not saying your defense would have
20 changed? You are saying it's an unfair process for them to
21 direct indict you before?

22 A. Of course, yes, sir. That's why I'm saying my
23 defense would have changed as far as on that because I would
24 have argued on that as well.

25 Q. And what is your understanding of the remedy if you

1 had been able to challenge direct indictments?

2 A. How do you mean "the remedy"?

3 Q. What would have changed if you -- if you argued and
4 were found that you were correct?

5 A. Who knows? I mean, I probably could have get a
6 direct verdict on the indictments. Who knows?

7 Q. Okay. Just kind of going down the list, when you
8 failed -- you are alleging that your attorney failed to
9 challenge the chain of custody for the cell phones and
10 laptop.

11 A. Uh-huh.

12 Q. Are you aware of any problem with the chain of
13 custody?

14 A. Not that I presumably just said before, that it
15 wasn't on me. It was on my co-defendant.

16 Q. So the chain of custody challenge is that it was
17 found on your co-defendant?

18 A. On my co-defendant, correct.

19 Q. But that was brought up at trial, correct? It was
20 testified to that it was found on your co-defendant?

21 A. No, it was found on me.

22 Q. But --

23 A. It was contradicting evidence. That's what I'm
24 saying. But on the chain of custody, it was strictly on my
25 co-defendant. But when we got to trial, the testimony from

1 the officer was contradicted.

2 Q. So what you are saying for chain of custody, it
3 wasn't found on you, it was found on your co-defendant?

4 A. That's in the chain of custody. In our trial, he
5 got mixed upset. He said some of the funds was found on me
6 and some on my co-defendant. At the end of the day, he said
7 he didn't know. He had no idea.

8 Q. And just going over the failure to introduce the
9 bank statements, you said you gave those bank statements to
10 your attorney and you all had a discussion about losing the
11 last argument?

12 A. Correct.

13 Q. And when the judge questioned you about whether you
14 wanted to testify or present evidence at the trial, you said
15 no?

16 A. I trusted his word. I was ignorant to the law.

17 Q. Y'all had a conversation about the pros and cons of
18 entering that evidence?

19 A. Say that again.

20 Q. Y'all had a discussion about whether it was better
21 to have last argument or enter that evidence before you told
22 the judge if you wished to testify?

23 A. Correct.

24 Q. And then going back to the offer, you said you had
25 one-time offer for 10 years. Do you remember when you

1 received that offer?

2 A. I never seen it.

3 Q. When did you receive that offer from your
4 attorney?

5 A. Two months before I went to trial.

6 Q. And were you on the trial docket at that point in
7 time?

8 A. No. Well, yes, sir, yeah.

9 Q. You were?

10 A. Yeah.

11 Q. And your testimony is that you met with him twice?

12 A. Correct.

13 Q. And what was the time period from -- let me back up.
14 When did Mr. Aylor begin to represent you after you picked up
15 the charge?

16 A. When did he represent me?

17 Q. How long after the charge?

18 A. Probably about four months.

19 Q. About four months after the charge? We don't need
20 an exact date. Four months is fine. And how long between
21 that representation and the trial?

22 A. Not even a full year.

23 Q. Okay.

24 A. Probably about 10 months.

25 Q. And when you received that plea offer, what was your

1 attorney's advice on that plea offer?

2 A. Don't take it. We are not taking it. We are going
3 to trial.

4 MR. NEELY: I believe that's all the questions I
5 have for him, Your Honor.

6 THE COURT: Mr. Boozer.

7 REDIRECT EXAMINATION

8 BY MR. BOOZER:

9 Q. Mr. Thompson, you were asked by the State about the
10 money that was found on you.

11 A. Correct.

12 Q. And the State asked you, well, wasn't it true that
13 it was \$242 and not 400 something dollars. Do you recall
14 that line of questioning?

15 A. Yes, sir.

16 Q. Do you recall -- and you are pretty familiar with
17 this transcript?

18 A. Correct.

19 Q. The State was referring to page 99, which is
20 actually preliminary hearing matter with the officer and not
21 in front of the jury. And looking at it on page 99 at line
22 22, the officer testifies: I see where it was \$242.

23 But then actually when the officer testifies in
24 front of the jury, do you recall on page 408, same officer,
25 Officer Charleton --

1 A. Charleton, correct.

2 Q. -- that the question is asked on page 408, line 17:

3 Also, if you will turn back to Mr. Thompson's chain of
4 custody sheet, you see where it says, "wallet with \$442".

5 And the officer says, yes, sir.

6 A. Yes, sir.

7 Q. So it was in front of the jury that you had \$442 in
8 your pocket?

9 A. Correct.

10 Q. And also, when the State was questioning you about
11 your right to testify, you recall that the judge did ask you
12 at trial whether you were going to take the stand and
13 testify?

14 A. Yes, sir.

15 Q. You weren't having a conversation with the judge
16 about whether you were going to introduce evidence. You are
17 talking to the judge about whether you are going to be the
18 one -- if you are going to take the stand and testify,
19 right?

20 A. Correct.

21 MR. BOOZER: That's all the questions I have. Thank
22 you.

23 MR. NEELY: No redirect, Your Honor.

24 THE COURT: All right. Mr. Thompson, you can come
25 down. Thank you very much.

1 Next witness.

2 MR. BOOZER: No further witnesses on behalf of the
3 applicant, Your Honor.

4 THE COURT: Any witnesses on behalf of the State?

5 MR. NEELY: Yes, sir, Your Honor. The State would
6 call Mr. Aylor to the stand.

7 DAVID AYLOR,

8 having been duly sworn, testifies as follows:

9 THE CLERK: Please state your first and last name,
10 and spell your last loudly and clearly into the microphone.

11 THE WITNESS: My name is David. Last name Aylor,
12 A-y-l-o-r.

13 DIRECT EXAMINATION

14 BY MR. NEELY:

15 Q. Mr. Aylor, just some background questions. When
16 were you barred in South Carolina?

17 A. 2006.

18 Q. And how much of your trial experience or litigation
19 experience has been in criminal matters?

20 A. Majority of it. I was initially assistant
21 solicitor. I now practice criminal defense and also am the
22 current city prosecutor for the City of Hanahan.

23 Q. And at the time of the trial, how long had you been
24 practicing criminal matters?

25 A. Six years, somewhere around there.

1 Q. And that was the majority of your work?

2 A. Yeah. Majority of my practice was solely criminal
3 until the last few years.

4 Q. And do you recall representing Mr. Thompson?

5 A. I do. I represented him, as well as I had
6 co-counsel, gentleman by the name of Peter McCoy, former
7 solicitor, Charleston Solicitor's Office. He was my
8 co-counsel. And then the attorney for the co-defendant was
9 Chad Shelton of the public defender's office.

10 Q. And do you recall receiving any offers for
11 Mr. Thompson?

12 A. Yes. If I remember correctly, the best offer, and
13 this is all by memory, was that they were offering 10 years.
14 And along with that would be participation in the trial.
15 Because one thing, for whatever reason left out, there were
16 three individuals that were involved in this armed robbery of
17 this home. And one individual was never captured. And they
18 didn't have his name. They only caught Mr. Thompson and his
19 co-defendant less than a quarter mile away from the home,
20 holding laptops and evidence from the home.

21 Q. And let's go over that. If you wouldn't mind, would
22 you give the Court a quick synopsis of what your
23 understanding of the State's evidence was.

24 A. Yeah. And there may be some things that I obviously
25 can't remember. So I want to make sure it's clear we are

1 talking about the trial I tried maybe over five years ago and
2 probably had, you know, I don't know, 4- or 500 cases since
3 then I dealt with one way or the other.

4 And this is basically what the State alleged: That
5 three individuals went into this home. Might have been like
6 a duplex type of thing over off Red Bank Road in Goose Creek.
7 They came in with weapons. They were not wearing masks.
8 They basically kidnapped everyone, put them down on the bed.
9 They ran through the house. Took various things, some
10 laptops and some other things. There was some money taken
11 off one of the individuals. There was a family that lived
12 there, plus, like, one or two other guys. I can't recall how
13 many people.

14 And let's get something straight. This currency
15 thing, first of all, Brazilian currency is called Real.
16 There was never mention of anything to do with Brazilian
17 currency. There was never a mention of anything to do with
18 Brazilian currency. These people lived at this home. They
19 lived in the United States several years. They were all
20 employed and working in the United States using U.S.
21 currency. So there was absolutely no reference to anything
22 to do with Brazilian currency. I have no idea where that
23 came from.

24 But moving on, basically what happened was, after
25 they left the home, the individuals then ran. They were all

1 on foot. And the police were called by a neighbor. There
2 was a cell phone that was actually dropped at the scene.

3 Now, that cell phone was not tied directly to one of
4 the defendants; however, it was tied to one of their cousins.
5 And that cousin was going to testify. However, that cousin
6 got a lawyer and pled the 5th. So that evidence didn't come
7 in as far as who it was. But there was a cell phone that did
8 not belong to one of the Brazillian residents or victim at
9 the scene.

10 So about a quarter mile from the home, somewhere
11 around there, two individuals, Mr. Thompson and his
12 co-defendant, were stopped. They legitimately were carrying
13 evidence from the house, items from the home. They were
14 stopped. They were held there.

15 While they were held, officers -- one of the
16 officers, I don't recall which, went and got two individuals
17 who then identified them that were from the home, and
18 identified these are the two people who just came from the
19 home.

20 So this whole talk about these women, there were
21 women in the home. They were also robbed at gunpoint. But
22 the main crux of the testimony came from the two people who
23 identified themselves, more or less, on the scene of the
24 crime. It was less than a mile, probably half mile. They
25 brought the individuals from the home out to the road and

1 asked them, were these the individuals who just robbed your
2 house less than 20 minutes ago, that had their laptops right
3 with them. And they said yes.

4 So I have no idea where this theory of these women
5 we didn't know about -- we knew about every single witness.
6 We knew about all of the evidence. The main concern was,
7 yes, the women could potentially identify them, but they were
8 a secondary concern. And we knew about them.

9 And Mr. Thompson, and I understand he's in a
10 desperate position, and I don't fault him for that, but he's
11 completely erroneous in what he's saying. We knew exactly
12 who all the witnesses were.

13 And, by the way, I met with him way more than two
14 times, several times. I met with his mother five times, much
15 less than him. He knew exactly where we stood on the case.

16 The main witness issues were the two Brazillian men
17 who identified him at the scene. Obviously, all that came
18 out in trial.

19 Q. And didn't you actually make a motion to prevent the
20 in-court identification from the women?

21 A. Yes, I did. I made a motion for there not to be any
22 in-court identification from the men or the women. And
23 actually, they testified. And that was one issue that Judge
24 Harrington ruled against us on.

25 Q. But it was objected to?

1 A. Yeah. And so was the chain of custody, and so was
2 any of the issues that, you know, were raised. And but from
3 an evidentiary standpoint, the State did not come with any --
4 as far as most cases I've ever been involved in, the State
5 didn't come with any surprise. We knew exactly what the
6 evidence was from early on.

7 Q. And --

8 THE COURT: Do you know where the objection was to
9 the in-court identification?

10 THE WITNESS: Should be pretrial motions.

11 MR. NEELY: Beg the Court's indulgence.

12 MR. BOOZER: Your Honor, I do note that they had one
13 with the lineup that was made on page 226.

14 THE COURT: I was more concerned about the show-up
15 than the lineup.

16 MR. NEELY: I believe the show-up was the lineup. I
17 don't think there was a lineup.

18 THE WITNESS: It was, Your Honor.

19 THE COURT: He just said they took the two witnesses
20 to the car.

21 MR. NEELY: Right, but there was no lineup. There
22 was only that show-up.

23 MR. BOOZER: It's a show-up.

24 THE COURT: That's what I'm saying. It's not a
25 lineup. It's a show-up. That's why I wanted to see the

1 colloquy with the Court.

2 MR. BOOZER: Judge, I believe that's on 226 or
3 beginning at 225.

4 THE COURT: Okay. Go ahead, Mr. Neely.

5 MR. NEELY: Thank you, Your Honor.

6 BY MR. NEELY:

7 Q. Going back to those meetings you had with
8 Mr. Thompson and his mother, it was testified to that you
9 told him that the State had no evidence, there were no
10 worries. Was that your advice to Mr. Thompson?

11 A. That's the most ludicrous thing I ever heard. The
12 evidence was as black and white as it possibly could be. Him
13 and his co-defendant were found a quarter mile from the home
14 with items from the home. And two individuals who had been
15 robbed at the home less than 25 minutes after the 911 call
16 identified them as the two -- two of the individuals who had
17 just robbed their home.

18 Q. So what was your advice to Mr. Thompson?

19 A. My advice was that I believed that a plea was his
20 best option. However, Mr. Thompson had little-to-no prior
21 record. I believe he might have had one marijuana
22 conviction. He hadn't served any jail time. He was a very
23 young person. This was an incident, I believe, that was
24 fueled by alcohol and, you know, not something that he was
25 ready to go back and serve 85 percent of a ten-year sentence

1 for, and wanted to go in front of a jury and see -- take his
2 chances. And that is what he did.

3 But he was completely clear, as was his mother, and
4 through the whole process, of exactly what the evidence -- I
5 mean, how could he not be completely clear when you are
6 caught on the scene with items from the home. So beyond what
7 I disclosed to him, which was everything, he himself knew
8 exactly what the case was.

9 Now, granted, he doesn't have a legal basis for
10 understanding what can come in and what couldn't, but we made
11 sure we explained that to him.

12 Q. So your understanding of his desire to go to trial
13 was just to roll the dice?

14 A. Exactly. They had caught him less than a mile from
15 the home with items from the home and the co-defendant.

16 Q. And he received the minimum sentence?

17 A. He did receive the minimum sentence.

18 Q. Do you the reason why?

19 A. Absolutely. I think Judge Harrington probably, if
20 the law would have allowed her to, actually given him less
21 time, considering his age and lack of record.

22 And one other thing I definitely want to make clear
23 to you all. This whole issue with the currency, not the part
24 about it being Brazilian currency, because that is completely
25 made up, but this about the amount of money difference, if

1 you go back and look in the transcript, you will see where I
2 actually questioned and found out the exact amounts of money
3 that the person who had missing money from, and the
4 denominations in the money that Mr. Thompson had were
5 completely separate, in different amounts. So the two did
6 not even correlate.

7 So not only was that a secondary issue anyway,
8 because the items that were in his hands, in his actual
9 possession that were stolen from the home, were corroborated
10 to be from the home.

11 But this whole currency issue about me not putting
12 in this bank statement, that wasn't something that was even
13 at all controversial, because they testified the amounts and
14 the currency that was found, that the guy had lost. He said,
15 it was stolen from him, compared to the money, whatever
16 amount it was. This amount difference is obviously a rabbit
17 trail as well.

18 The amount didn't have anything to do with it
19 either. What had to do with it is what currency, basically,
20 like, was it twenties, was it tens, was it fives, ones,
21 whatever. The two amounts didn't equal out, the amount in
22 the actual total, nor did the actual denominations match up.
23 So that was not even an issue at trial at all. I don't know
24 where that came from either.

25 Q. So it's your testimony that the cross-examination

1 that you, and I guess not co-counsel, but co-defendant's
2 counsel, cross-examined the officer on, made the bank
3 statement's evidentiary value lessened?

4 A. It was completely irrelevant. It wasn't part of
5 their closing statement. They weren't trying to correlate --
6 that wasn't even something that was an accusation when he
7 said the different -- they didn't need to prove that this
8 money was or wasn't taken from this one individual, because
9 they had two of the three defendants, one that was never
10 called, so really just two, with actually items from the home
11 that no one could argue against. So there wasn't any need to
12 correlate between this money is the exact same amount of
13 money that was taken from this guy, when you have two people
14 with actual evidence from the home in their possession a half
15 mile from the house.

16 THE COURT: Mr. Aylor, we don't have a jury here.
17 Just remind you.

18 THE WITNESS: It's hard, Your Honor.

19 THE COURT: Are you seeing these? Where is the
20 evidence, Madam Clerk?

21 THE WITNESS: I believe counsel showed me those
22 earlier. I don't need to see them again. I don't remember
23 actually seeing those.

24 THE COURT: Take a look at it. My only question is,
25 did he show you those at some point, either pretrial or

1 during the trial?

2 THE WITNESS: Not that I recall. No, Your Honor.

3 And let me explain again. I want to make sure it's clear.

4 This is what was -- this money thing was not an issue,

5 because as lawyers and our investigator and team that worked

6 tireless amount of hours on this, knew the amount of money

7 that was taken from the client that was on his person at the

8 time of arrest. And we also knew the money that was alleged

9 to be taken from the defendant -- I mean, from the victim.

10 And the two did not match up. So we were not concerned that

11 the State was going to try to correlate one to the other, nor

12 did they try to do that. It was completely irrelevant.

13 My client, as well as the co-defendant, had

14 possessions from the home that were in their possession when

15 they were arrested. That was very relevant. This money

16 issue was not an issue.

17 THE COURT: Physical objects?

18 THE WITNESS: Correct.

19 BY MR. NEELY:

20 Q. What were those physical objects?

21 A. A laptop, and I can't recall, maybe two laptops and
22 a cell phone.

23 THE COURT: So you don't think it would have been
24 relevant, had to weigh it against the loss of final argument,
25 to show the jury or prove to the jury that he had at least

1 withdrawn \$444 on the day of the robbery?

2 THE WITNESS: First of all, I don't know that that's
3 accurate that he did withdraw it. I've never seen this
4 before. I'm looking at -- I don't know if the dates match.
5 But beyond that --

6 THE COURT: He said he showed --

7 THE WITNESS: Well, he also said a lot of other
8 things that weren't accurate, Your Honor.

9 THE COURT: Just stay with me.

10 THE WITNESS: I'm saying he didn't show me this,
11 because I wasn't interested in it.

12 THE COURT: That's fine. You didn't know about that
13 and there's no way you could have done -- used it in any way
14 as evidentiary --

15 THE WITNESS: Right. And, again, the money was
16 never an issue, because the money amounts did not match, nor
17 did the denominations match. So the money was not an issue
18 that the State tried to use, nor was it an issue that we had
19 to defend on.

20 But to make sure that there was clarity, I did, as
21 his defense attorney, make sure that the denomination
22 differential was brought up through cross-examination.

23 Q. And just for clarification purposes, the fact that
24 there was three people, three men alleged that had been in
25 the armed robbery, do you recall when police pulled up to

1 Mr. Thompson and his co-defendant, how many men were there?

2 A. Just two. One was on a different road, different
3 direction. Got out of there.

4 Q. It isn't your recollection that there were three men
5 and one of them ran?

6 A. You mean ran from the scene at the time?

7 Q. Ran from --

8 A. I know that the cops detained two of them. Three
9 people were alleged to be in the home and testified to being
10 in the home, and two were caught. Whether they were all
11 running in the same area, I know one got away from running.
12 I don't remember exactly the specifics.

13 I wasn't concerned since, you know, that person was
14 never caught. He was really irrelevant to the case to the
15 degree that it mattered where he went, because they didn't
16 have his name or any information about him.

17 Q. And going back, I show you the indictments. Would
18 you just give an explanation. Do you remember having direct
19 indictments two days before the trial?

20 A. I have absolutely no recollection what he's talking
21 about.

22 Q. Were you in any way -- do you recall being surprised
23 by direct indictments or having to change your strategy based
24 on direct indictments?

25 A. Not in the least bit, nor do I see how that would

1 come out to play when you consider what the indictments
2 were.

3 THE COURT: Let me ask you this. Was there any
4 difference between the original indictments and the direct
5 indictments?

6 THE WITNESS: No, not that I recall.

7 THE COURT: I wonder why they are direct indicted.

8 THE WITNESS: I can't remember.

9 BY MR. NEELY:

10 Q. . Okay. You just don't recall? It's been too long?

11 A. It's been over five years. But it didn't change the
12 case at all.

13 Q. So it obviously wasn't an issue of concern if you
14 don't remember it?

15 A. No. And also, one other thing about this surprise
16 that allegedly came at the time of trial, the State was very
17 candid and transparent with their file and their discovery
18 and their list of witnesses' names and exactly who each
19 witness was. There was never any mystery or sort of
20 hide-the-ball with the State. We knew exactly who every
21 member of the home was that was there that day. We even knew
22 their immigration status. We knew everything.

23 We had quite a long time to prepare for this case,
24 because we were trying desperately to try to get to some
25 level of a plea that would work for my client. But

1 considering the amount of evidence they had against the
2 client and the fact that they went into a home with several
3 individuals, I believe, maybe even children, robbed them at
4 gunpoint, there was only so much that the State was willing
5 to come off on.

6 So we went back and forth for a long time.
7 Mr. Thompson knew every step of the way; so did his mother.
8 At the point that he didn't want to take 10 years, we had no
9 other option but to try it.

10 THE COURT: Let me ask you this. Was the offer for
11 the co-defendant the same as for your client?

12 THE WITNESS: I don't recall, but if I had to guess,
13 I would say no. He had a pretty bad record.

14 MR. NEELY: I believe that's all the questions I
15 have for him, Your Honor.

16 THE COURT: Okay. Mr. Boozer.

17 CROSS-EXAMINATION

18 BY MR. BOOZER:

19 Q. How are you doing?

20 A. I'm great.

21 Q. I can tell. Going back, I'm not sure if the
22 Attorney General covered this or not. On the severance
23 issue, what discussion, if any, did you have with
24 Mr. Thompson about attempting to get these cases separated?

25 A. We discussed how there was no possible way they were

1 going to sever the cases, considering the two individuals,
2 himself and his co-defendant, were arrested at the exact same
3 moment as a part of the exact same show-up, coming from the
4 exact same crime with evidence from the exact same house.

5 Q. Was he pushing for you to try and get the trial
6 separated; do you recall?

7 A. No, he was not.

8 Q. Okay.

9 A. He wouldn't even have known what that meant, much
10 less pushed for it. We did explain it to him, because you
11 always explain in every case that there's co-defendants the
12 avenues of whether or not you should or shouldn't try and how
13 it would play out one way or the other.

14 And beyond that, it was really irrelevant to the
15 degree that his co-defendant also didn't testify, nor did his
16 co-defendant's record come out. The jury saw two young men
17 sitting at a table. And beyond that, the only evidence they
18 heard about them was maybe what was on one person and what
19 was on the other. But outside of that, there was no
20 differential between the two of them.

21 Q. Now, at the trial, one of the things that you harped
22 on, and whatnot, was actually on the identification of
23 Mr. Thompson; is that right?

24 A. Yes. That was really our only angle, was to try to
25 push the ethnicity issue of the Brazilians not, you know,

1 being familiar with African-American men and thinking that
2 they may look similar.

3 Q. What was their statement?

4 A. You know, and this is probably the only time I've
5 ever heard this in a courtroom, but through the translator
6 during the pretrial hearing for the show-up, one, if not one,
7 maybe two of them, admitted that they said all African
8 American men look the same. And Judge Harrington still left
9 that lineup in, that show-up in.

10 Q. Okay. Talking about the denominations and amount of
11 money that Mr. Thompson had, I think, is it your position
12 that that was sort of collateral, that that wasn't really an
13 issue in the trial?

14 A. Absolutely.

15 Q. Okay. But would you agree with me that looking
16 back -- and I know this has been a long time ago, so I'm just
17 going to refer back to the transcript -- that on page 576,
18 and I will just read it, and this is 576, Your Honor, with
19 the State's closing beginning at line 3:

20 "Defendant Thompson had a lot of money on him when
21 he was caught. And maybe some of those denominations didn't
22 meet up exactly with what the victim thought he had, but it
23 was a guess of what he may have had in his wallet. He knew
24 he had about 600. He knew about 600, because it was his
25 daughter's third birthday party. A lot of it was found in

1 defendant Thompson's pocket. Was all 600 found? No, but you
2 also heard why that was, because Officer Charlton told you
3 why that was. Usually when three people commit a crime,
4 three people are going to split the loot. And that's what
5 happened here."

6 So the State's position was that they had robbed
7 these folks of the money. And then the reason that he had
8 this money in his pocket, it wasn't all 600 bucks, because
9 they divvied it up?

10 A. Yes. That made no sense, because if you look at --
11 again, you go back to -- this was never a concern. One, this
12 wasn't an issue for the defense or one that we were concerned
13 about at all, because even -- you know, obviously, you know,
14 the prosecution, they are going to throw everything at the
15 wall and see what sticks. Throwing in the money is just an
16 extra card, but it was something that was easily defeatable,
17 considering the amount of money they are alleging that they
18 took, the items, all of a sudden met real quick, split it up.
19 And, yet, the amounts they got were completely different.
20 And the other guy didn't have any money on him. Didn't make
21 any sense.

22 So, again, the money issue was not an issue. And it
23 absolutely was never even a thought of myself or my
24 co-counsel, including conversations with our client, to lose
25 final arguments to prove a nonissue in the case.

1 And I never saw these things. He may have -- again,
2 I'm not going to sit here under oath and say he didn't tell
3 me that he had money from another source and he didn't take
4 the money from those people. That I don't recall. But I
5 definitely don't recall getting these or even caring about
6 these, because I wasn't concerned about them.

7 If the money was the only issue somehow connecting
8 this home and the people that had things stolen at gunpoint
9 from them, if the money was the only issue, then, yeah, we
10 would go far and wide to try to figure it out. But I didn't
11 even see it as an issue, because you have to look at the
12 bigger picture when you are defending a person. What is
13 going to stick out in a jury's head? What's going to stick
14 out in a jury's head is two people running down the street
15 with electronics from a house that had just been robbed
16 twenty minutes before. And individuals from that house
17 coming out within minutes of having these people in their
18 face, who didn't have masks on and saying, yeah, those are
19 the people that just robbed my house. That's what the
20 concern of the case was.

21 Q. What -- other than the money, what was your
22 recollection of what was found with Mr. Thompson at the time
23 of the arrest?

24 A. It was electronics. I mean, I'm sure you have
25 whatever is listed there, but I don't recall exactly what

1 they had.

2 Q. And this is actually something that you harped on
3 again in your closing.

4 And, Your Honor, I'm looking at page 598 of the
5 defendant's closing.

6 You indicate: Well, Mr. Silva has also told us that
7 he lost a laptop. A laptop was stolen from the house.
8 There's been a lot of talk about this laptop. Here's this
9 laptop, pretty normal, black laptop with some sort of thumb
10 drive. Now we heard from Deputy Charlton that this laptop
11 was found on my client, Mr. Thompson, or found that my client
12 threw it and it was in his possession. We also heard that
13 Lieutenant Bacon (ph), who I may be butchering his name, did
14 fingerprints. Now, granted, he didn't do fingerprints, in my
15 opinion, for the investigation of this case. He did
16 fingerprints for these attorneys to try to prepare during
17 this trial. And when he did those fingerprints, nothing
18 related to my client nor Mr. Fishburn came back.

19 So, I guess, was the laptop found on him or was it
20 alleged that he had tossed it and had it at some point in his
21 possession? Do you recall? And, again, I understand this is
22 some time ago.

23 A. To be honest, I don't recall. I assume, you know,
24 part of my closing and argument was that, hey, maybe they
25 just happened to be African Americans that were walking down

1 the street, and whoever actually robbed that house, threw the
2 laptop and decided they didn't want it and it just happened
3 to be close and/or on -- or maybe my client found the laptop
4 and picked it up walking down the street, and these
5 Brazilians don't know the difference between one black male
6 to another, and they're just in the wrong place, wrong time,
7 half a mile from the house.

8 And I guess, I mean, you get put in a difficult
9 position when you are trying to come up with a closing
10 related to pretty hard evidence. Whether it was actually on
11 him or, you know, tossed within, I don't know, two to three
12 feet of him at the time that they got blue lighted, I don't
13 remember.

14 Q. But if that is kind of the picture you are trying to
15 paint for the jury, that, hey, we've got these folks that
16 say, basically to paraphrase, not really paraphrase, restate
17 what they said, all black people look the same, or, all black
18 males look the same, and then you are trying to argue to the
19 jury --

20 A. The jury didn't hear that, though. Only the judge
21 heard that was something that was told. That was in-camera
22 in the motions.

23 Q. But were you able to -- you were able to get that
24 out?

25 A. Was I? I don't remember that. I don't recall.

1 Q. If you were, the transcript would show it at some
2 point?

3 A. If it's in there, it's in there. But I don't
4 remember if I was able -- I'm sure I would have probably
5 tried to get that out. But whether or not the judge actually
6 let that come out, I don't know. I do recall that. The time
7 I remember it vividly. And that was why, you know, we were
8 having -- it was during the motion hearing, obviously,
9 without the jury present.

10 Q. But still on, I guess, sort of on that train of
11 thought, what you are arguing to the jury, that this laptop,
12 there's nothing linking it to him, either he threw it or
13 maybe they found it, walking around and found this laptop,
14 wouldn't it assist, though, to come in and be able to show
15 the jury that, hey, here's also why he had all of this cash,
16 \$442 or \$444, or whatever, when you got testimony from the
17 victim that these guys also took all my cash? Don't you
18 think that that would probably help? It would help more than
19 it would hurt?

20 A. Sort of like, you know, going back and watching the
21 NFL football game on a Monday after they played on a Sunday,
22 you can think one thing or another how you would do it
23 different. But I still think that what we did by bringing up
24 the money, showing that the amounts were not -- I mean, this
25 money thing was such a minor issue.

1 I guess over last several years, it's become an
2 issue for Mr. Thompson. But by breaking up the fact that
3 amounts of money were different, that the other people didn't
4 -- it wasn't \$600. And one guy had 200 and one guy had 200
5 and the guy that got away had 200. This is a complete
6 stretch. Their main hit was the fact that they were so close
7 to the house, that multiple people in the house that saw them
8 without masks on said it was them, not just the two
9 individuals that were at the show-up, but the other
10 individuals, these women and everyone else in the house. And
11 those were the main concerns.

12 As far as trying to lose my final, you know, get the
13 final say in as opposed to putting in just this one piece,
14 knowing I wasn't going to have my client testify due to what
15 he had disclosed to me and my ethical obligations and knowing
16 that his co-defendant wasn't going to testify, absolutely not
17 was it worth putting in a couple of bank statements that were
18 not going to change where he was found, how close he was
19 found to electronics, and any of the testimony of the
20 eyewitness victims who said he was there.

21 THE COURT: Let me ask you just a follow-up on this
22 show-up thing. The two that showed up, and I see the
23 pretrial reference to their opinion that all African American
24 males have similar characteristics, the two that showed up,
25 that were at the show-up, were they males or females?

1 THE WITNESS: The two males were the ones that came
2 to the show-up. The females were distraught back at the
3 home. They were involved in the trial part, but the show-up
4 was just the two males.

5 THE COURT: So let me follow that. Obviously, she
6 allowed the two males to testify in court, given in-court
7 identification. How about the females? Did they give an
8 in-court identification of your client, or did they just talk
9 about how the robbery occurred?

10 THE WITNESS: Your Honor, I would have to look back
11 at the transcript. I know that they testified, but
12 specifically whether or not they gave an in-court -- or they
13 would have to know -- the main concern was the two males,
14 because they were the ones that had seen them on the scene.
15 And they were the ones we knew, if allowed in trial, were
16 going to identify them.

17 With the females, I can't recall. But, you know, we
18 thought there may be -- if there was some way that we could
19 keep out that show-up, then they would put them in a
20 different position as far as what they would be able to bring
21 up regarding them being captured.

22 THE COURT: You and Mr. McCoy thoroughly went over
23 that issue with Judge Harrington?

24 THE WITNESS: Oh, absolutely.

25 THE COURT: And if there was an error of law based

1 on the identifications, that would have been an appeal issue?

2 THE WITNESS: Absolutely.

3 THE COURT: Not a PCR?

4 THE WITNESS: Correct.

5 THE COURT: PCR issue?

6 THE WITNESS: Yeah, that would have been appealable
7 issue. And, in fact, the family, after the case was over,
8 talked to me about me appealing it. And I had not been paid.
9 So I don't think they wanted to try to pay me what they owed
10 me and pay me more for the appeal. So they went to another
11 attorney, gentleman by the name of Tony O'Neil, who I know
12 very well, have worked with. And I went over everything and
13 tried to educate him as much as possible to what I thought
14 was an appealable issue with the show-up.

15 THE COURT: Okay. Go ahead. Didn't mean to
16 interrupt you, Mr. Boozer. Every now and then, I just jump
17 in.

18 MR. BOOZER: Court's indulgence, please.

19 THE COURT: But the issue was preserved?

20 THE WITNESS: Oh, absolutely.

21 BY MR. BOOZER:

22 Q. Mr. Aylor, I may have missed this earlier in direct
23 examination, but there was an offer of 10 years made at some
24 point; is that your recollection?

25 A. To my knowledge, yes, I believe it was 10 years.

1 Q. Do you recall specifically what your recommendation
2 was on the plea?

3 A. In regards to what do you mean?

4 Q. Sure. Whether he should take it or whether, hey, I
5 think we've got a good chance at trial?

6 A. It's not my practice to tell someone what to do. I
7 give them all the options, explain the benefits of taking a
8 plea, the risk of going to trial, the issues at hand. And
9 along with their husband and wife, mother, father, whoever
10 else they want me to explain it with, and let them make their
11 own decision after they've been fully educated by me or my
12 co-counsel. And this was a situation where we belabored over
13 that for a while.

14 As I said, situations I've been in with tremendous
15 amount of young individuals that make unfortunate decisions,
16 if they've never done prison time before, it's very difficult
17 to stare at 10 years in prison if you've never done more than
18 24 hours. So it was a difficult position, as it would be for
19 most.

20 MR. BOOZER: Thank you, Mr. Aylor. That's all the
21 questions I have.

22 THE COURT: Redirect?

23 MR. NEELY: Just briefly, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. NEELY:

1 Q. You mentioned that you didn't want your client to
2 testify because of the conversations you had with him. What
3 conversations did you have with your client that made you
4 think that him testifying was a bad idea?

5 A. Am I allowed to say that?

6 MR. NEELY: Yes, Your Honor. He waived --

7 THE COURT: By filing a PCR, he waives.

8 THE WITNESS: Yeah. He told me exactly what
9 happened. He went to a bar. He knew one of the
10 co-defendants somewhat well, but not that well. They all got
11 really intoxicated. And one of them said they knew where
12 some Mexicans -- I think they called them "drug dealers"
13 lived. So they were really drunk, and left the bar and went
14 to this house and they robbed the people and left.

15 BY MR. NEELY:

16 Q. And based on that story that he gave to you, you
17 thought that it would be a bad idea for him to testify?

18 A. Well, I don't think it would be a bad idea, but
19 under my ethical obligations, I couldn't let him get up there
20 and tell something that wasn't the truth, since he disclosed
21 to me exactly what happened that night.

22 MR. NEELY: Thank you. That's all the questions I
23 have.

24 MR. BOOZER: No further questions, Your Honor.

25 THE COURT: You may come down. Thank you very much.

1 THE WITNESS: Can I be released?

2 THE COURT: Any objection?

3 MR. NEELY: No objection from the State.

4 MR. BOOZER: No objection.

5 THE WITNESS: Thank you. Y'all have a good weekend.

6 THE COURT: Next witness.

7 MR. NEELY: Nothing from the State, Your Honor.

8 THE COURT: Anything further?

9 MR. BOOZER: Nothing further, Your Honor.

10 THE COURT: All right. Anybody care to make any

11 closing statements? If not, my usual practice is to accept

12 proposed orders within 30 days. Satisfactory?

13 MR. NEELY: Yes, Your Honor.

14 MR. BOOZER: Thank you, Your Honor.

15 (Whereupon, the proceeding is adjourned.)

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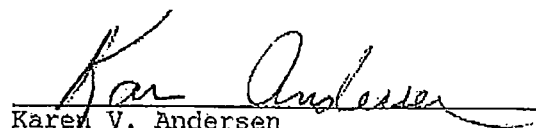
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CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina
at Large, do hereby certify that the foregoing transcript is
a true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT

Douglas Thompson, #348634)

Case No. 2014-CP-08-1602

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

CLERK OF COURT
 BERKELEY COUNTY, S.C.

17 FEB 21 PM 1:47

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This Court convened an evidentiary hearing into the matter on December 9, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Lance Boozer, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, David Aylor, Esquire (hereinafter "trial counsel") was present and testified. This Court had the opportunity to listen to the testimony of Applicant and trial counsel. This Court had before it a copy of the trial transcript, the records of the Berkeley County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the appellate records, and the pleadings in this matter. This Court finds as follows:

I. PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Berkeley County Clerk of Court's orders of commitment. The Applicant was indicted by the November 2011 term of the Berkeley County Grand Jury for kidnapping (2011-GS-08-1659), armed robbery (2011-GS-08-1570), and first degree burglary (2011-GS-08-1573). David Aylor, Esquire, represented him. On November 7-11, 2011, the Applicant proceeded to a trial before the Honorable Kristi L. Harrison and a jury. The Applicant was found guilty as indicted. Judge

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Harrison sentenced the Applicant to confinement for fifteen (15) years for each charge. These were to be served concurrently.

A notice of appeal was filed and an appeal perfected on the Applicant's behalf. Lanelle Durant, Esquire (hereinafter "appellate counsel"), represented the Applicant on appeal. The Applicant then made a Motion to Relieve Counsel and Proceed Pro Se. The Applicant also filed a Writ of Mandamus regarding the same matter. These were both dismissed with prejudice. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Thompson, Op. No. 2014-UP-136 (S.C. Ct. App. filed April 2, 2014). The Remittitur was issued on April 18, 2014.

II. ALLEGATIONS

Applicant alleged the following grounds in his original application:

1. "Ineffective Counsel"
2. "Prosecute Misconduct"
3. "Violation of 14th Amendment"

PCR counsel amended the application to include the following grounds:

1. Counsel failed to file or request a Motion for Severance from co-defendant.
2. Counsel failed to object to indictment and indictment process.
3. Applicant denied his right to self-representation on appeal.
4. Counsel failed to object to witness testimony.
5. Counsel failed to object to amendment of indictments.
6. Ineffective assistance of appellate counsel for failing to brief whether the trial court erred in its ruling admitting cell phones and laptop into evidence at trial.
7. Ineffective assistance of trial counsel for failing to challenge chain of custody of a laptop and cell phones that were admitted into evidence.
8. Counsel failed to introduce bank statements at trial explaining Applicant's possession of money at the time of the alleged crime.
9. Ineffective assistance of appellate counsel for failing to raise the issue that trial court erred in denying Applicant's Motion for Directed Verdict.

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III. SUMMARY OF FACTS

Applicant was convicted for his actions in the armed robbery and burglary of a hispanic household. Multiple victims were held in the house and robbed of money, cell phones, and a laptop at gunpoint by three individuals. Law enforcement was contacted. As a law enforcement officer responded to the scene he drove by three males, one of whom was holding a laptop, less than a quarter of a mile from the incident location. The officer stopped to question the suspects. One suspect ran and was never found. Applicant was the individual holding the laptop, which was later determined to belong to the victims of the burglary. The victims' cell phones were also found on Applicant and his codefendant. One of the defendant's cell phones was left at the scene of the burglary and was given to law enforcement upon arrival at the scene. Law enforcement performed a show-up lineup of the suspects with the victims, who positively identified the suspects as the burglars.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In this post-conviction relief action, Applicant bears the burden to prove the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process" that the proceedings "cannot be



relied upon as having produced a just result.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel’s performance was deficient. Id. Under this first prong, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 688.

This Court finds trial counsel properly prepared for and represented Applicant in his trial. He interviewed multiple witnesses. Trial counsel elucidated valid trial strategies and the reasoning behind his decisions. “A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn’t to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record.” Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689.

Applicant's assertions that appellate counsel failed to brief the issues he wanted briefed is without merit. Appellate counsel's decision to focus on some issues to the exclusion of others is presumed to be tactical and Applicant has failed to show that appellate counsel was deficient for doing so. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption of doing so for tactical reasons rather than sheer neglect, Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1,5, 157 L.Ed.2d 1 (2003)."

After a thorough review of the record, this Court finds Applicant was adequately and professionally represented by both trial and appellate counsel. This Court finds trial counsel rendered adequate assistance and exercised professional judgment in all his decisions at trial. This Court finds appellate counsel rendered adequate assistance and exercised professional judgment in the decisions on which issues to brief for appeal. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

This Court finds trial counsel's testimony credible and persuasive. This Court finds Applicant's testimony lacks credibility. This Court finds Applicant has failed to satisfy his burden to prove the alleged deficiencies. This Court also finds that Applicant has failed to prove he was prejudiced by trial or appellate counsel's actions.

1. Counsel failed to file or request a Motion for Severance from co-defendant

Applicant claimed trial counsel should have made a motion to sever the trial between himself and his codefendant. Trial counsel testified there were no grounds on which to base a motion to sever and Applicant never requested he make the motion. Neither Applicant nor his codefendant testified. At the evidentiary hearing, Applicant was unable to name a specific trial right that was compromised by his joint trial or how a joint trial would prevent the jury from



making a reliable judgment. "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Hughes v. State, 46 S.C. 554, 558-59, 552 S.E.2d 315, 317 (2001) Applicant's only assertion was the jury was biased by his codefendant's record, which implicated his own guilt. His codefendant's record was not introduced at trial and, therefore, did not bias the jury against Applicant.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel's failure to make a motion to sever was deficient. Applicant also failed to prove the alleged deficiency of trial counsel compromised a specific trial right or biased the jury. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

2. Counsel failed to object to indictment and indictment process.

Applicant claimed he was direct indicted three days before trial and the indictment wording was changed to allege he committed the act in concert with someone else. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. State v. Fletcher, 322 S.C. 256, 262, 471 S.E.2d 702, 705 (Ct. App. 1996). Applicant was unable to offer an explanation of how his defense would have changed or how he was prejudiced by the timing of the indictment. Trial counsel testified he didn't remember being surprised by the indictments.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel's failure to challenge the indictments was deficient. Applicant also failed to prove the alleged deficiency of trial counsel was prejudicial. Accordingly, Applicant has failed to satisfy



his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

3. Applicant denied his right to self-representation on appeal.

"Appellant clearly does not have a federal constitutional right to proceed *pro se* in this appeal from his criminal conviction. We also find there is no state constitutional provision which confers such a right." State v. Roberts, 364 S.C. 583, 588, 614 S.E.2d 626, 629 (2005). There is no such right under the Federal or South Carolina constitutions. Therefore, Applicant was not denied any right, as it does not exist. This Court finds this allegation must be dismissed.

4. Counsel failed to object to witness testimony.

Applicant claimed he did not know the female witnesses were going to testify and if he had known he would have plead guilty. Trial counsel testified this was not true and he and Applicant knew of all potential witnesses prior to trial. Trial counsel did make a motion for a Biggers hearing as to the validity of the show-up lineup. The trial judge ruled against Applicant at the Biggers hearing and let the show-up identification into evidence.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel was deficient in his questioning or knowledge of potential witnesses. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

5. Counsel failed to object to amendment of indictments.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel's choosing not to challenge the indictments was deficient. Applicant also failed to prove the alleged deficiency of trial counsel was prejudicial. Accordingly, Applicant has failed to

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satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

6. Ineffective assistance of appellate counsel for failing to brief whether the trial court erred in its ruling admitting cell phones and laptop into evidence at trial.

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption of doing so for tactical reasons rather than sheer neglect." Yarborough v. Gentry. Appellate counsel's choice to focus on issues counsel believed had the best possibility of granting Applicant relief is not deficient. This Court finds that Applicant has failed to satisfy his burden to prove that appellate counsel was deficient. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

7. Ineffective assistance of trial counsel for failing to challenge chain of custody of a laptop and cell phones that were admitted into evidence.

Applicant claims trial counsel should have challenged the chain of custody of the laptop and cell phones at trial.

While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable—the establishment of a strict chain of custody is not required: If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741–42 (2005)

The items in question were non-fungible items with identifiable serial numbers. A strict chain of custody was not required and was properly established by testimony from law enforcement and the owners of the items.

This Court finds that Applicant has failed to satisfy his burden to prove that trial counsel was deficient in failing to challenge the chain of custody of the laptop and cell phones of the victims. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

8. Counsel failed to introduce bank statements at trial explaining Applicant's possession of money at the time of the alleged crime.

Applicant claimed he withdrew the money that was found by law enforcement in his pocket from the bank. Applicant wanted to introduce the bank statement to show that the money in his pocket was not taken in the burglary. Trial counsel testified he did not believe the bank statement was of much evidentiary value. Trial counsel testified that his cross-examination of the victims led to the discovery that the denomination and amount of money the victims' claimed was taken in the burglary was not the same as the amount and denominations found on Applicant. Applicant and his codefendant were found with the victim's laptop and cell phones, which further lessened the value of the bank statement. Trial counsel decided not to introduce the bank statement because he believed the value of last argument was greater than evidence which was redundant. "A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record." Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689.

This Court finds that Applicant has failed to satisfy his burden to that trial counsel was deficient in not introducing the bank statement. This Court finds trial counsel made a reasonable

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strategic decision. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

9. Ineffective assistance of appellate counsel for failing to raise the issue that trial court erred in denying Applicant's Motion for Directed Verdict.

Appellate counsel's choice to focus on issues counsel believed had the best possibility of granting Applicant relief is not deficient. This Court finds that Applicant has failed to satisfy his burden to prove that appellate counsel was deficient. Accordingly, Applicant has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

B. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-



conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Applicant for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17 day of February, 2017.


THOMAS R. COOPER
Presiding Judge
9th Judicial Circuit

CANDLER, South Carolina



State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

G. Thomas Cooper, Jr.
Judge

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February 17, 2017

The Honorable Mary P. Brown
Berkeley County Clerk of Court
Post Office Box 219
Moncks Corner, South Carolina 29461-0219

RE: Douglas Thompson, #348634, v State of South Carolina C/A No.: 2014CP081602
Dear Ms. Brown:

Please find enclosed for filing, a signed order in the above captioned case. I have enclosed a copy of the order and if possible, please timestamp and return to Judge Cooper's chambers for our records.

Very truly yours,

A handwritten signature in black ink, appearing to read "G. James".

George James
Law Clerk to the Honorable G. Thomas
Cooper, Jr.

GTCJr.:gcj

Enclosures