

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Honorable Larry B. Hyman, Jr., Circuit Court Judge

CLARENCE J. FISHBURNE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001228

APPENDIX

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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 percept
2 they saw may be different from what actual

3 Q And, Lieutenant, narrowing it down a little
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 t
2 and how you feel this surface would be to M
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 the 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 let'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 pinging, 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

1 him. Because he was raised up in house along with my
2 baby boy. My baby boy is in college. And he was about
3 to start in college also. And for this happen is
4 something that's -- it's mind-blowing. And it's
5 affecting the family greatly right at this moment.

6 All I'm asking the Court to do right now is
7 search your heart. Each of us have kids. Each of us
8 have children. Sometimes they have problems, sometimes
9 they go through some things sometime.

10 I'm not saying he went through anything, did
11 anything wrong. But we could understand that this
12 young man has a future. He wants to have a future.
13 Think about that when it comes to sentencing him.
14 Think about his future and what he wants to become.
15 Because we made it there. Just give him a chance to do
16 the same. Thank you.

17 THE COURT: Thank you.

18 Is there anything further?

19 MR. AYLOR: Your Honor, I believe my client
20 would like to briefly speak.

21 THE DEFENDANT THOMPSON: I mean, Your Honor, I
22 just want to say that --

23 THE COURT: I can't hear you. Can you speak up,
24 Mr. Thompson, I'm sorry.

25 THE DEFENDANT THOMPSON: Yes, ma'am. My life is

1 just in your hands. I'm just begging for mercy right
2 now.

3 THE COURT: Okay. Mr. Aylor or Mr. McCoy, you
4 went over the possible punishment and what the
5 consequences of this guilty conviction are?

6 MR. AYLOR: Yes, Your Honor.

7 THE COURT: You've explained to Mr. Thompson the
8 mandatory minimums as it applies to the armed robbery
9 and to the burglary in the first degree?

10 MR. AYLOR: Yes, Your Honor.

11 THE COURT: That I have no discretion. That
12 even if I wanted to find kindness in my heart, which is
13 not my job, but even if I did that the law does not
14 allow me to impose anything less than 10 years on an
15 armed robbery, and 15 years on the burglary in the
16 first degree. You did explain that to him?

17 MR. AYLOR: Yes, Your Honor.

18 THE COURT: You also explained to your client
19 that each of these offenses is a violent and most
20 serious and what that impacts as to any future crimes
21 that he may commit?

22 MR. AYLOR: Yes, Your Honor.

23 THE COURT: As well as to what the percentage of
24 the sentence that he will have to serve that I impose?

25 MR. AYLOR: Yes, Your Honor.

1 THE COURT: You've also explained to Mr.
2 Thompson his appellate rights?

3 MR. AYLOR: Yes, Your Honor

4 THE COURT: Mr. Thompson, do you understand all
5 of the questions that I have just asked your attorney?

6 THE DEFENDANT THOMPSON: Yes, ma'am.

7 THE COURT: Do you understand that each of these
8 offenses is classified as a violent offense, and a most
9 serious offense?

10 THE DEFENDANT THOMPSON: Yes, ma'am.

11 THE COURT: Mr. McCoy, anything you wish to add?

12 MR. MCCOY: Your Honor, I only add that I came
13 here, as I told you and told the Court in my opening,
14 because I wanted to come help Mr. Thompson with his
15 case in any way that I could. It has been a pleasure
16 sitting here with him. It's been a pleasure getting to
17 know his family. And he is a good young man who I
18 believe has a future, and has an opportunity to be a
19 benefit to society when he is given that chance again,
20 Your Honor.

21 THE COURT: Anything else, Mr. Aylor?

22 MR. AYLOR: Your Honor, obviously, I think
23 everything has been well-spoken by his family, as well
24 as Mr. McCoy. We just ask for the minimum considering
25 his lack of prior record.

1 THE COURT: Mr. Thompson, I wish I had some
2 words of wisdom to give to you. You and I sat hear and
3 heard the trauma that the victims went through as three
4 individuals entered their home, held one at gunpoint,
5 and choked one. You heard the testimony of what
6 happened that night.

7 And whether or not you were the one, and you
8 pled not guilty to these offenses, I'm troubled by the
9 fact that you were out at 11:30 at night with an
10 individual that is 12 years older than you with a
11 felony record.

12 There is nothing that this Court can say to you
13 that your mother hasn't told you, that your family
14 hasn't told you that can impact the next years of your
15 life.

16 Two of these offenses carry life sentences. Do
17 you understand that, Mr. Thompson?

18 THE DEFENDANT THOMPSON: Yes, ma'am.

19 THE COURT: And, Mr. Thompson, you understand
20 that the decisions that were made that evening, or
21 prior to that evening, impact the rest of your life?

22 THE DEFENDANT THOMPSON: Yes, ma'am.

23 THE COURT: Mr. Thompson, one of the hardest
24 things that I have to do as a Judge is impose a
25 sentence of this serious nature on a young individual

1 such as yourself with family, loving family, supportive
2 family, with an individual that has no prior record.

3 And when I look at you and I look at your family
4 background and what you have accomplished, this makes
5 absolutely no sense to me.

6 Mr. Thompson, the law indicates that I have to
7 impose mandatory minimums. In no way by imposing the
8 minimum am I discounting what those victims went
9 through that evening. But I am taking into account the
10 lack of prior record, the future that you had planned
11 for yourself, and your supportive family.

12 It's the order of the Court on indictment
13 2011-GS-08-1572 that you be committed to the State
14 Department of Corrections for a term of 15 years. That
15 is concurrent to the other four indictments. You are
16 to be given credit for the time that you have served.

17 It's the order of the Court on indictment
18 2011-GS-08-1570 that you be committed to the State
19 Department of Corrections for a term of 15 years. That
20 you are to be given credit for the time that you've
21 served.

22 And that is concurrent to the previous
23 indictment and to 2011-GS-08-1571, you are to be
24 committed to the State Department of Corrections for a
25 term of 15 years.

1 It's the order of the Court on indictment
2 2010-GS-08-1558, that you be committed to the State
3 Department of Corrections for a term of 15 years. You
4 are to be given credit for the time that you have
5 served.

6 2010-GS-08-1659, that you be committed to the
7 State Department of Corrections for a term of 15 years.
8 You are to be given credit for the time that you have
9 served. All indictments are to run concurrently.

10 Mr. Thompson, I wish you good luck.

11 You are excused. Thank you, Mr. Aylor and Mr.
12 McCoy.

13 MR. MCCOY: Thank you, Your Honor.

14 MR. AYLOR: Thank you, Your Honor.

15 Anything further on behalf of the State?

16 MS. CORNWELL: Nothing, Your Honor.

17 MR. SHELTON: Yes, Your Honor.

18 THE COURT: Mr. Shelton.

19 MR. SHELTON: And my client is not here. I
20 think there needs to be something on the record towards
21 the kidnapping and the sex offender registry.

22 THE COURT: You are correct. And I meant to
23 place that on the record.

24 I believe that the statute indicates that the
25 Judge must make a finding as to the -- must make a

1 finding if it is of a sexual nature, but it is my
2 policy, and thank you for reminding me because I think
3 that it controls an individual's placement, and the
4 calculation of their time.

5 I am going to write on both the individuals'
6 sentencing sheets that the kidnapping is not of a
7 sexual nature, and so that there is no question. I
8 have had this matter come up in the past. And it's a
9 lot easier if it's written on there and there is
10 clarity on the sentencing sheet.

11 So thank you, Mr. Shelton, for bringing that to
12 my attention because I wish to avoid any consequence as
13 related to that kidnapping for your client and for Mr.
14 Thompson. Thank you.

15 MR. SHELTON: Thank you, Your Honor.

16 THE COURT: We are at ease. Thank you.

17 (Whereupon, the proceedings in this matter
18 before the Court were adjourned.)

19 * * * * *

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21

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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

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Berkeley)Clarence J. Fishburne #364187)
Full name and prison number (if any) of Applicant.)20 14 -CP-08- 809

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION REVIEW

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Berkeley County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Douglas M. Thompson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-08-1653; 1654; 1655; 1656, and 1657 (Armed Robbery x2;
 - (b) Kidnapping x2; Burglary 1st); 2011-GS-08-1567; 1568; 1569,
 - (c) 1660; and 1661 (Armed Robbery x2; Kidnapping x2, Burglary 1st)
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 10, 2011 (20 years)
 - (b) _____

374

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty jury trial _____
- (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. South Carolina Court of Appeals _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 2, 2014 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 2014-UP-133 _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) 6th Amendment Violation
- (b) 14th Amendment Violation
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Ineffective Assistant of Counsel
- (b) Due Process Violation
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. N/A
- ii. _____
- iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) First PCR Application
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

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

- (a) the name and address of each attorney who represented you:
- i. Chad Shelton & David Schwacke, Esquire
- ii. Kathrine Haggard Hudgins / S.C. Comm. on Indigent Defense
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial & Sentencing
- ii. Direct Appeal
- iii. _____

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

Evidentiary Hearing ; Appointment of Counsel ; New Trial

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

No

STATE OF SOUTH CAROLINA)

County of Dorchester)20 14 -CP-00-809
VERIFICATION

Clarence J. Fishburne
I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Clarence J. Fishburne

SWORN to and subscribed before me this 10th
day of April, 2014.

Lucretia Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

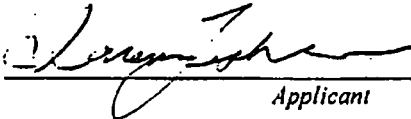
FILED
2014 APR 14 PM 3:56
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2014 CP-08-809

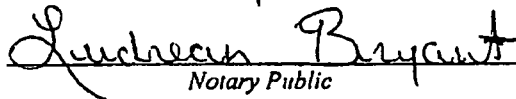
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

Clarence J. Fishburne
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.


Applicant

SWORN or affirmed to and subscribed before me this
10th day of April, 2014.


Notary Public

My Commission Expires: May 26, 2020

FILED
2014 APR 14 PM 3:56
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

April 10, 2014

The Honorable Mary P. Brown
Berkeley County Clerk of Court
P.O. Box 319
Moncks Corner, SC 29461

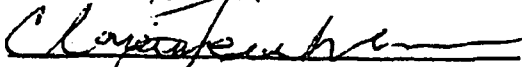
Re : Clarence J. Fishburne vs. The State

Dear Ms. Brown :

Enclosed please find for filing the original PCR Application.
I would appreciate if you would file the original and return a
clocked - stamp copy to me in the self-addressed envelope that's
enclosed herewith .

With best regards, I am

Sincerely,



Clarence J. Fishburne #261387

Lieber Correctional Institution

P.O. Box 305

Bidgeville, SC 29472

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2014-CP-08-0809
Clarence J. Fishburne, #264287,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed April 14, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the October 2010 and November 2011 term of the Berkeley County Grand Jury for two counts of armed robbery (2011-GS-08-1567, -1568), two counts of kidnapping (2011-GS-08-1660, -1661), and burglary- first degree (2011-GS-08-1569). The Applicant was represented by Chad Shelton, Esquire, and David Schwacke, Esquire.

On November 10, 2011, the Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for a period of twenty years on all charges. The Applicant's convictions are be served concurrently.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Kathrine Hudgins, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences

were affirmed by the Court of Appeals. State v. Fishburne, 2014-UP-133 (S.C. Ct. App. April 2, 2014). The Remittitur was issued on April 18, 2014.

Attached herewith and incorporated herein are the records of the Berkeley County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Due process violation.
 - a. 14th amendment violation.

III.

The Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant alleges a denial of 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 that his due process and other constitutional rights were violated, the Respondent would submit that this allegation should be summarily dismissed for failing to specifically set forth the grounds upon which the application is based.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel and that the Applicant's remaining claims be summarily dismissed with prejudice.

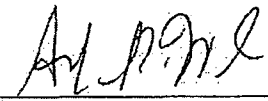
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

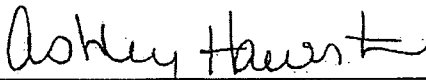
April 20, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2014-CP-08-0809
	)	
CLARENCE J. FISHBURNE, #264287,	)	
	)	
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:

Mr. Rodney D. Davis, Esquire
Lowcountry Law Office
4000 Faber Place Drive, Suite 300
Charleston, South Carolina 29405

DATED this 20th day of April, 2015.



 Ashley Haworth, Legal Assistant
 For Respondent

1

2 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON) CASE NO. 2014-CP-08-0809

4

CLARENCE J. FISHBURNE,)
5 Plaintiff,) Transcript of Record

6

7 vs.

8

STATE OF SOUTH) Date: September 9, 2015
CAROLINA,)

9

Defendant.

10 * * * * *

11

12

13 B E F O R E:

14

THE HONORABLE LARRY B. HYMAN, JUNIOR

15

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18 * * * * *

19

Denise J. Lauder, RPR

20

Ninth Judicial Circuit

21

22

23

24

25

1 A P P E A R A N C E S

2

3 REPRESENTING THE PLAINTIFF:

4 RODNEY DAVIS, ESQUIRE

5 Lowcountry Law Office

6 4000 Faber Place Drive, Suite 300

7 Charleston, SC 29405

8

9

10 REPRESENTING THE DEFENDANT:

11 J. RUTLEDGE JOHNSON, ESQUIRE

12 Office of the Attorney General

13 Rembert Dennis Building,

14 1000 Assembly Street, Room 519

15 Columbia, SC 29201

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1	I N D E X	
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17

18 E X H I B I T S

19

20 (No Exhibits Proffered)

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1 (The following proceedings were held
2 September 9, 2015, Charleston County Circuit Court,
3 at 2:23 p.m.)

4 MR. JOHNSON: May it please the Court,
5 Your Honor. This is the case of Clarence Fishburne
6 versus the State of South Carolina, case number
7 2014-CP-08-0809. Mr. Fishburne was indicted at the
8 October 2010 and the November 2011 term of the
9 Berkeley County Grand Jury with two counts of armed
10 robbery, two counts of kidnapping, and two counts
11 of burglary in the first degree -- excuse me -- one
12 count of burglary in the first degree.

13 He was represented by Chad Shelton. On
14 November 10th, 2011, he proceeded to trial and was
15 found guilty as indicted. He was sentenced by the
16 Honorable Kristie Harrington, confined for 20 years
17 on all charges, all to be served concurrently.

18 There was a notice of appeal filed on
19 his behalf and his conviction and sentences were
20 affirmed by the Court of Appeals, the remittitur
21 was issued on April 18th, 2014. The State filed
22 its Return, it says April 14th, I think of this
23 year, 2015. And in his application -- he is
24 represented here today by Mr. Rodney Davis. In his
25 application, he has listed ineffective assistance

1 of counsel and due process violation.

2 First, I would move for specificity on
3 what grounds he is proceeding as to Mr. Shelton,
4 and while he has listed Kat Hudgins, who is a
5 public defender, as one of the attorneys that
6 represented him, he has not listed an allegation of
7 ineffective assistance of appellate counsel.

8 I will hopefully move to dismiss that,
9 and I will also argue against any type of amendment
10 at this time, Your Honor. But I will turn this
11 over to Mr. Davis.

12 THE COURT: All right. Mr. Davis?

13 MR. DAVIS: Thank you, Your Honor. And
14 before I get started, if you would on the record go
15 over the benefits and risks for my client, I would
16 appreciate you doing that.

17 THE COURT: Mr. Fishburne, I understand
18 that you are presently under sentence for -- he was
19 tried for two counts of armed robbery and two
20 counts of kidnapping and a burglary first degree,
21 convicted on all of them?

22 MR. JOHNSON: Yes, sir.

23 THE COURT: And were there any other
24 charges dismissed?

25 MR. JOHNSON: I don't believe so, Your

CLARENCE FISHBURNE EXAM BY THE COURT

1 Honor.

2 THE COURT: And he received a sentence
3 of?

4 MR. JOHNSON: Twenty years.

5 THE COURT: How many?

6 MR. JOHNSON: Twenty on all counts.

7 THE COURT: All right.

8 EXAMINATION

9 BY THE COURT:

10 Q. Mr. Fishburne, I want you to understand
11 that should you prevail on your post-conviction
12 relief application, it does not mean an acquittal.
13 It simply means that you are tried again for the
14 same charges. And if you are convicted at that
15 time, the trial judge is under no requirement to
16 limit his sentence to what you have already
17 served -- received.

18 I understand that is the rule in the
19 federal courts, but not in the state courts, which
20 means you could be sentenced up to --

21 THE COURT: I believe, life in this
22 matter?

23 MR. JOHNSON: Yes, Your Honor

24 BY THE COURT:

25 Q. You could receive up to life, and that

CLARENCE FISHBURNE EXAM BY THE COURT

1 would be without any possibility of parole. Do you
2 understand?

3 A. Yes, sir.

4 Q. Okay. Do you understand that if I
5 grant you relief, it does not end your case? Your
6 case goes back to square one and you will try it
7 again. Do you understand?

8 A. Yes, sir.

9 Q. And you could get a greater sentence?

10 A. Yes, sir.

11 THE COURT: Okay. Anything further,
12 Mr. Davis, that you think he needs to understand?

13 MR. DAVIS: I don't believe so, Your
14 Honor.

15 THE COURT: All right.

16 MR. DAVIS: Based on that we would
17 proceed forward. And to the State's issue, I would
18 point out --

19 THE COURT: Well, the State has asked
20 you be specific as to the allegations of
21 ineffective appellate counsel and ineffective trial
22 counsel.

23 MR. DAVIS: And, Judge, I will answer
24 if I could just first, in the client's original
25 application, we would argue that to maintain a case

1 against both -- against appellate counsel, he does
2 on page 3 of the application list ineffective
3 assistance of counsel, and then on page 5, he lists
4 both trial attorneys, Mr. Shelton, Mr. Schwacke and
5 lists appellate defender, Ms. Hudgins.

6 So we would argue that is sufficient
7 notice, and I'm happy to lay out, Your Honor, the
8 allegations.

9 THE COURT: All right. Lay them out.

10 MR. DAVIS: It does apply to
11 ineffectiveness. As to the appellate counsel, it
12 would be that there were two issues specifically
13 that were -- one was -- one was specifically
14 discussed on the record, objected to by trial
15 counsel. It was a Fourth Amendment stop, search,
16 and seizure issue. It was not raised by appellate
17 counsel, and we believe it should have been raised.

18 There's another issue that goes to both
19 trial counsel and appellate counsel. There was an
20 interpreter used during testimony of one of the
21 witnesses, and we believe that process was
22 inherently unreliable.

23 There was no question by the Court and,
24 in fact, trial counsel knew ahead of time there was
25 going to be an issue about finding an appropriate

1 interpreter on that. So as to appellate counsel,
2 it would be two claims that were not raised. There
3 was only one claim raised by appellate counsel.

4 As to trial counsel, in addition to
5 objecting -- not objecting, to the handling of the
6 interpreter for one of the witnesses, we have a
7 series of either incorrect or insufficient
8 explanations to the client about trial strategy and
9 failures of counsel at trial, that is either
10 continued in the record or absent in the record.
11 It is purely an ineffectiveness in general in
12 presenting the defense on behalf of the client.

13 We were discussing it -- we took a
14 break to set up, if necessary, for appellate
15 counsel to be contacted and handled by phone. We
16 have no objection to the testimony being handled
17 that way. For planning purposes, I believe our
18 points would be brief. I don't expect this would
19 be --

20 THE COURT: We'll go forward. Okay?

21 MR. DAVIS: Thank you, Your Honor. We
22 would call Mr. Fishburne to the stand.

23 CLARENCE FISHBURNE, JUNIOR,
24 being first duly sworn, testified as follows:

25 THE CLERK: Please be seated. Speak

CLARENCE FISHBURNE - DIRECT EXAM BY MR. DAVIS

1 into the microphone and state your full name and
2 spell the last name for the record.

3 THE COURT: Clarence Fishburne, Junior.
4 Fishburne is F-I-S-H-B-U-R-N-E.

5 DIRECT EXAMINATION

6 BY MR. DAVIS:

7 Q. Mr. Fishburne, you have heard the
8 presentation to the Court about the charges that
9 you were convicted of for our PCR hearing today.
10 Who was your lead attorney at trial in this case?

11 Mr. Shelton here?

12 A. Mr. Shelton.

13 Q. Do you see him in the courtroom here
14 today?

15 A. Yes, sir.

16 Q. Okay. I want to talk about the trial
17 and lead-up to the trial first. Okay? In the
18 lead-up to your trial, how often would you say you
19 spoke to Mr. Shelton to prepare for going to trial?

20 A. Once or twice. About twice.

21 Q. Okay. And then in those meetings,
22 would he have discussed with you the elements that
23 the State would have to prove to each of these
24 charges?

25 A. He didn't fully explain the elements

CLARENCE FISHBURNE - DIRECT EXAM BY MR. DAVIS

1 that he had to prove.

2 Q. Did he discuss with you any potential
3 defenses in the case?

4 A. No.

5 Q. Were there any discussions about not
6 going to trial, but resolving the case in another
7 way?

8 A. It was going to be a couple of plea
9 offers, but it wasn't explained fully --

10 MR. JOHNSON: Your Honor, he has not
11 listed anything about plea offers. This is almost
12 like trial by ambush. I just don't know what to
13 prepare for.

14 MR. DAVIS: Judge, the only issue there
15 is to set forth what they discussed or didn't
16 discuss in lead-up to trial. It's going to be
17 brief as to that issue.

18 THE COURT: All right. I'll hear it.

19 MR. DAVIS: Thank you, Your Honor.

20 BY MR. DAVIS:

21 Q. You rejected those offers?

22 A. Yes, sir.

23 Q. Do you recall --

24 MR. DAVIS: Last question on this, Your
25 Honor.

CLARENCE FISHBURNE - DIRECT EXAM BY MR. DAVIS

1 Q. (BY MR. DAVIS) Do you recall Mr.
2 Shelton's -- did Mr. Shelton share with you an
3 opinion about whether you should have -- should
4 take those offers or proceed to trial, do you
5 recall?

6 A. He didn't explain it to me.

7 Q. At least one of the accusers -- did you
8 discuss the issue at least one of the accusers
9 perhaps not being a resident of the United States
10 with your attorney?

11 A. It was enforcement. It was mentioned
12 to him but that was about it.

13 Q. And what was it that Mr. Shelton
14 indicated to you about anyone who was not a
15 resident of the United States?

16 A. Said that they couldn't stand trial.
17 Without legal documentation, they can't stand
18 trial. That they was going to get them legal
19 documents.

20 Q. There was another person charged with
21 these offenses as well?

22 A. Yes.

23 Q. And they could have went to trial at
24 the same time?

25 A. Yes, sir.

CLARENCE FISHBURNE - DIRECT EXAM BY MR. DAVIS

- 1 Q. Mr. Thompson?
- 2 A. Yes, sir.
- 3 Q. Was there any discussion with your
- 4 attorney about severing the trials or having a
- 5 separate trial for Mr. Thompson?
- 6 A. No, sir.
- 7 Q. Did you and Mr. Shelton discuss the
- 8 issue about -- one of your charges was -- two of
- 9 the charges were armed robbery; is that right?
- 10 A. Yes.
- 11 Q. Did you and Mr. Shelton discuss what
- 12 evidence was required to prove the armed part of
- 13 armed robbery?
- 14 A. Yes, sir, we did discuss it.
- 15 Q. Did he talk to you about the fact that
- 16 a weapon does not need to be used as long as
- 17 victims believe there was a weapon?
- 18 A. Yes, sir.
- 19 Q. Okay. And in this case there is no
- 20 weapon that was presented as evidence?
- 21 A. No, sir. No, sir.
- 22 Q. Do you recall discussing with your
- 23 attorney about any potential injuries to the
- 24 victims?
- 25 A. No, sir.

CLARENCE FISHBURNE - DIRECT EXAM BY MR. DAVIS

1 Q. You don't recall discussing that? Now,
2 with your discovery, would your attorney have given
3 you a copy of that or he showed it to you and kept
4 it himself? What happened with the discovery?

5 A. He showed it and kept it to himself.

6 Q. You were never given a copy?

7 A. No, sir.

8 Q. Did you rely on Mr. Shelton's
9 experience to represent you adequately at trial?

10 A. Yes, sir.

11 Q. Do you feel that he did?

12 A. No, sir.

13 Q. Other than some of the specific areas
14 that I touched on, is there any complaints, other
15 than what I mentioned, that you want the Judge to
16 know about?

17 A. No, sir.

18 MR. DAVIS: Your Honor, could I have
19 just one moment?

20 THE COURT: Uh-huh.

21 MR. DAVIS: Thank you, Mr. Fishburne.
22 That's all the questions I have. The Attorney
23 General may have some questions.

24 MR. JOHNSON: Briefly.

25 THE COURT: Yes, sir.

CLARENCE FISHBURNE - CROSS EXAM BY MR. JOHNSON

1 CROSS-EXAMINATION

2 BY MR. JOHNSON:

3 Q. Mr. Fishburne.

4 A. Yes, sir.

5 Q. The facts of the case as presented to
6 the jury were that you and Mr. Thompson -- there
7 was a gentleman outside smoking a cigarette on the
8 porch and you and Mr. Thompson barreled into his
9 apartment, held one of them by the neck, and
10 whipped one with the pistol, and then proceeded to
11 rob them of a laptop and a couple of cell phones
12 and some money, correct?

13 A. I was accused of that.

14 Q. That's what the facts were presented at
15 trial, correct?

16 A. I was accused of that.

17 Q. And that's what the evidence that came
18 out of witnesses' mouths that the jury heard,
19 correct?

20 A. That's what I was accused of.

21 Q. Do you want to answer my question yes
22 or no?

23 THE COURT: Mr. Fishburne, don't play
24 games. Answer the question.

25 THE WITNESS: Yes, sir. Correct.

CLARENCE FISHBURNE - CROSS EXAM BY MR. JOHNSON

1 BY MR. JOHNSON:

2 Q. Thank you. And they were of Portuguese
3 descent, correct? They were Brazilian?

4 A. Yes, sir.

5 Q. All right. And you had an issue
6 apparently with the interpreter in this case, as
7 presented by your attorney just now. Right?

8 A. Yes, sir.

9 Q. Do you speak Portuguese?

10 A. No, sir.

11 Q. So you don't know exactly what was said
12 to the victims in the case, right?

13 A. Right.

14 Q. Okay. So you have to trust that he
15 translated exactly what the victims were testifying
16 to?

17 A. Right.

18 Q. As instructed by Judge Harrington,
19 right?

20 A. Right.

21 Q. Okay. And your attorney, Mr. Shelton,
22 objected to your seizure in this case. When the
23 police came and got you and put you up against the
24 car, he objected to that, correct?

25 A. Yes, sir. I'm not sure.

CLARENCE FISHBURNE - CROSS EXAM BY MR. JOHNSON

1 Q. And he argued that that was illegal and
2 that the case should have been thrown out, right?

3 A. Yes, sir.

4 Q. Okay. And he also argues that the ID,
5 the show-up lineup, you know, when you were on the
6 car and the victims were driven up by the police,
7 that that should have been illegal, right?

8 A. Yes.

9 Q. That that was unduly suggestive,
10 correct?

11 A. Yes.

12 MR. JOHNSON: Okay. No further
13 questions, Your Honor.

14 THE COURT: Anything further?

15 MR. DAVIS: No, not of this witness.

16 THE COURT: You can step down.

17 (WITNESS EXCUSED.)

18 MR. DAVIS: Your Honor, we would call
19 Mr. Chad Shelton as the next witness.

20 CHAD SHELTON,
21 being first duly sworn, testified as follows:

22 THE WITNESS: Yes, sir.

23 THE CLERK: Be seated. Please state
24 your full name and spell your last name for the
25 record.

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 THE WITNESS: Chad Shelton,
2 S-H-E-L-T-O-N.

3 DIRECT EXAMINATION

4 BY MR. DAVIS:

5 Q. Mr. Shelton, in no particular order I
6 happen to have over here, do you recall the
7 discussions prior to the trial about the difficulty
8 of finding an interpreter for Portuguese?

9 A. Yes. With the Solicitor? Yes,
10 absolutely. We had -- we have one interpreter that
11 we know about that speaks Portuguese, but she
12 reluctantly will help us out if we have a client.
13 And I knew that she did not want to do trial, so I
14 mentioned that to the Solicitor, that that's the
15 person we used and she didn't want to do trial.
16 And they were having difficulties finding an
17 interpreter.

18 Q. Do you recall on the -- what appears to
19 be an initial State's witness list, they had a
20 Theodore Wright written as the potential
21 interpreter?

22 A. Yes.

23 Q. And that's not who actually interpreted
24 it?

25 A. Right. And I was prepared for a motion

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 that he would not be allowed to be an interpreter.

2 Q. Being Mr. Wright?

3 A. Yes.

4 Q. Okay. Ultimately, Mr. John Rock was
5 used; is that correct?

6 A. Yes..

7 Q. Do you recall during the testimony that
8 required the interpreter that the Judge actually
9 had to interject over concerns about the
10 interpreter; do you recall that?

11 A. Yeah. There were a couple of times
12 that it seemed like the interpreter was not
13 repeating exactly what the person had said or would
14 ask a question, the person would not respond, and
15 the other witness wouldn't respond and the
16 interpreter would say the question again. So we
17 had some sidebars talking about that.

18 Q. Despite that, the record is absent of
19 any type of, for lack of a better term,
20 interrogation of the interpreter before they were
21 qualified?

22 A. Right. We did not do that or ask to do
23 that.

24 Q. And even despite these interruptions
25 and sidebars, there's no -- nothing in the record

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 where you objected to the use or the continued use
2 of this interpreter?

3 A. Right; and no mistrial. I didn't move
4 for a mistrial or anything.

5 Q. You did at the beginning of this case,
6 you had a motion to quash the indictment, correct?

7 A. Yes.

8 Q. And that was dealing with the fact --
9 on the argument that the State had failed to allege
10 an aggravating factor for the burglary in the first
11 degree; is that right?

12 A. That's correct.

13 Q. There was, in fact, evidence in the
14 investigation that perhaps one of the residents of
15 the house was choked with a gun to their head,
16 correct?

17 A. Correct.

18 Q. Did you obtain from the State any
19 photographs of any types of injuries?

20 A. No.

21 Q. Isn't it fair that, that was not a
22 major contention in your defense either, though?

23 A. That's true.

24 Q. And barring an aggravated factor --
25 given the other evidence in the case, barring an

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 aggravated factor, this would not have been a
2 burglary first degree?

3 A. I believe it did happen at nighttime.

4 MR. DAVIS: Your Honor, could I have a
5 moment?

6 THE WITNESS: I may be -- I may be
7 wrong on that.

8 MR. DAVIS: And, Your Honor, as an
9 officer of the Court, the evidence shows it
10 happened around 11:00 at night, 11:30.

11 BY MR. DAVIS:

12 Q. Is it fair to say that the most direct
13 evidence against Mr. Fishburne was this show-up
14 identification?

15 A. Yes.

16 Q. And this show-up identification would
17 have been made by the alleged victims in the case;
18 is that correct?

19 A. That's correct.

20 Q. In the lead-up to this trial, there
21 were discussions or investigations about the
22 immigration or residency status of those witnesses,
23 correct?

24 A. That's correct.

25 Q. And, in fact, in your file there is an

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 investigation about how courts handle and what is
2 appropriate for nonresidents to conduct business in
3 courts?

4 A. Right.

5 Q. You investigated that, correct?

6 A. I looked at the U-visa and getting a
7 U-visa and motivations. That was going towards
8 motivations to lie and that sort of thing. In
9 addition, there was some discussion with -- with
10 the plaintiffs and I that we didn't know if the
11 victims would actually come and testify, so I did
12 hire an investigator that spoke Spanish that went
13 out to try to find them and see if they were even
14 still here. And he did find them and was able to
15 determine that they were -- they were there and
16 they were going to testify.

17 Q. During the trial, since it had been --
18 identification was a major factor, you had a motion
19 -- there was a pre-trial hearing about the
20 identification process, correct?

21 A. Yes.

22 Q. As part of your arguing against the
23 identification, you actually raised the issue of
24 the stop and seizure by law enforcement and the
25 detention, at least the detention by law

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 enforcement, correct?

2 A. Yes. And part of that plan was also to
3 get the 911 dispatcher. That's why I had her
4 subpoenaed, so that she could testify about the CAD
5 report and the time frame and just the different
6 time -- how long they had them out there on the
7 side of the road seized without much evidence, or
8 any at all, in our opinion.

9 Q. Do you recall there was a -- again,
10 since there was a co-defendant, there was a lengthy
11 discussion by lawyers on both sides about those
12 issues?

13 A. Yes.

14 Q. Is it fair to say, though, that the
15 Court more focused on the ID portion of it as
16 opposed to the length of detention? The discussion
17 got diverted into the ID more than the detention;
18 do you recall that?

19 A. Yes. It was a mixture of both of
20 those, ID and detention, yes.

21 Q. And, ultimately, the ruling was made
22 about allowing the identification in, correct?

23 A. Yes.

24 Q. One of the items of evidence seized was
25 a cell phone which purported to have a photo of

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 Mr. Fishburne. Do you recall that?

2 A. I do.

3 Q. What efforts did you make to suppress
4 that or distance Mr. Fishburne from that photo?

5 A. They -- I did a 403 based on
6 prejudicial and probative value. I didn't feel
7 they had any link whatsoever to the cell phone
8 being Clarence's. The officer testified that he
9 saw a picture of Clarence, but he also testified in
10 a previous hearing that it looked like Clarence,
11 but he didn't have -- he -- so we didn't have any
12 pictures that were brought out at trial, and we
13 couldn't tell, based off of that cell phone or
14 based off any pictures that the State showed.

15 They did not have any records showing
16 that Clarence had this cell phone or this was his
17 phone. So based off of all those, I made the 403
18 argument.

19 Q. But there was evidence at some point
20 that the officer identifying the photo on that
21 phone as being Mr. Fishburne, correct?

22 A. Yes.

23 Q. There was not a suppression hearing as
24 to that identification separately from the show-up?

25 A. No, there wasn't.

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 MR. DAVIS: Your Honor, if I could have
2 one moment.

3 BY MR. DAVIS:

4 Q. Just a couple more questions,
5 Mr. Shelton. Despite the allegations and show-up
6 ID, this case was lacking any fingerprint evidence,
7 correct?

8 A. That's correct.

9 Q. Finally, forgive me if I asked this
10 earlier, but Mr. Fishburne was tried with his
11 co-defendant, Mr. Thompson, simultaneously,
12 correct?

13 A. That's correct.

14 Q. There was no motion to attempt to sever
15 these cases so that he could be tried on his own?

16 A. No. We did bring up about the
17 statements and Bruton issues, and the State agreed
18 not to put in any statements so that there wouldn't
19 be any Bruton issues. That's the only analysis we
20 did, but we didn't make an actual formal motion to
21 sever.

22 In our case, we actually filed a speedy
23 trial motion, so I don't -- I figured if we were
24 going to trial, we would be going to trial with
25 both of them, or it would just be us going to

CHAD SHELTON - DIRECT EXAM BY MR. DAVIS

1 trial. So ours wasn't going to get delayed in any
2 way.

3 Q. Certainly there is inherent -- even --
4 you've been practicing how long?

5 A. Eight years now.

6 Q. And during that time -- you've been a
7 public defender in Berkeley that entire time?

8 A. Yes.

9 Q. This wasn't your first serious or most
10 serious or violent trial, was it?

11 A. No, it was not.

12 Q. There are, in fact, inherent dangers
13 being tried with multiple co-defendants in front of
14 a jury, would you --

15 A. That's true.

16 Q. Okay. Would -- potential guilt by
17 association, that would be a concern?

18 A. Yes, sir.

19 Q. Splitting of strikes?

20 A. Yes.

21 Q. No control over arguments made by
22 co-defendant's counsel?

23 A. That's true.

24 MR. DAVIS: Your Honor, if I could have
25 just a moment, that may be all.

CHAD SHELTON - CROSS EXAM BY MR. JOHNSON

1 Thank you, Mr. Shelton. That's all I
2 have. Thank you, Your Honor.

3 MR. JOHNSON: May it please the Court,
4 and if I may take these in the reverse order.

5 CROSS-EXAMINATION

6 BY MR. JOHNSON:

7 Q. First is the motion for severance.
8 Your client's and Mr. Thompson's interest were not
9 adverse to each other in this case, were they?

10 A. No.

11 Q. Neither one of them was involved; that
12 was the argument?

13 A. Yes.

14 Q. As to the lack of fingerprint evidence,
15 you argued that -- or you cross-examined the
16 officer on that and the fingerprint expert,
17 correct?

18 A. Yes.

19 Q. Okay. And as to the issue of the photo
20 on the phone, didn't Judge Harrington say if you
21 were claiming it's not your client's phone, then he
22 has no constitutional standing to challenge that?

23 A. True.

24 MR. JOHNSON: And, Your Honor, I will
25 point you to page 250 of the record.

CHAD SHELTON - CROSS EXAM BY MR. JOHNSON

1 BY MR. JOHNSON:

2 Q. And you don't speak Portuguese, do you?

3 A. No.

4 Q. And so you didn't understand exactly
5 what he was saying to the victim in this case?

6 A. No, I don't.

7 Q. So you must rely that he took the
8 Judge's instruction and translated it exactly how
9 the victim portrayed the testimony, correct?

10 MR. DAVIS: Objection; calls for
11 speculation, Your Honor.

12 THE COURT: I'll sustain that.

13 BY MR. JOHNSON:

14 Q. But you can't affirmatively say that he
15 was saying anything other than what he was saying
16 in Portuguese, correct?

17 A. No, but it did seem like there was some
18 extra stuff. But I don't know.

19 Q. And Judge Harrington called him out on
20 it, didn't she?

21 A. Yes, she did.

22 Q. About how many times did you meet with
23 Mr. Fishburne in this case?

24 A. I know I met with him at least five,
25 six, seven times. I did correspond a lot through

CHAD SHELTON - CROSS EXAM BY MR. JOHNSON

1 letters with him. I have a couple of letters that
2 I sent back and forth to him about the speedy trial
3 motion and that sort of thing.

4 Q. And you said he rejected some plea
5 offers. Did you explain the offers to him?

6 A. Yes, absolutely. It was an offer of
7 15 years.

8 Q. But he rejected that, right?

9 A. Yes.

10 Q. And you explained the discovery to him?

11 A. Yes.

12 Q. And the State's case against him?

13 A. Yes. And I know at least one time I
14 gave him a copy of the discovery that I have dated
15 from 2010 October, but I don't have any other right
16 here that I can find. But I gave him some updated
17 ones, but I did give him at least partial
18 discovery.

19 Q. And you discussed the elements of the
20 crimes involved in this case?

21 A. Yes.

22 Q. Did you discuss the injuries to the
23 victims in this case?

24 A. I don't recall because I don't -- I
25 didn't feel that that was a main issue in the case.

CHAD SHELTON - EXAM BY THE COURT

1 Q. Because the kidnapping doesn't have to
2 involve injuries?

3 A. Right.

4 Q. Neither does armed robbery?

5 A. That's true.

6 Q. Or burglary in the first degree?

7 A. That's true.

8 Q. And you felt that you represented him
9 properly in this case? I know it's not a favorable
10 outcome, but --

11 A. It's not a favorable -- when you go to
12 trial, there's always stuff that, you know, you
13 wish you could have done and wish you did. So --
14 and I always find problems that I have done or
15 things I wish I could have done and should have
16 done. I tried my best at the time.

17 MR. JOHNSON: That's all I have for
18 now, Your Honor. Thank you.

19 EXAMINATION

20 BY THE COURT:

21 Q. Mr. Shelton, let me ask you a couple of
22 questions. You considered the issue of severance,
23 I believe you testified?

24 A. Yes, sir.

25 Q. But the State was willing to forgo the

CHAD SHELTON - EXAM BY THE COURT

1 use of any statements --

2 A. Yes, sir.

3 Q. -- in exchange for that? That was
4 consideration for you in not objecting to or moving
5 for severance?

6 A. Yes, sir. And I felt that Clarence was
7 in a different situation than the co-defendant,
8 where actually I thought it could help Clarence to
9 be on trial with the co-defendant.

10 Q. And I believe you said a moment ago, in
11 the end you do not know whether the translator did
12 anything improper or not?

13 A. I don't know because I don't know what
14 he's saying.

15 Q. Okay. Would you have objected had you
16 known?

17 A. Yes.

18 Q. Okay. And you challenged the stop?

19 A. Yes.

20 Q. And you challenged the ID?

21 A. Yes.

22 Q. Okay. Was there any other evidence
23 that you challenged, anything that you moved to
24 suppress?

25 A. The cell phones that were found on him.

CHAD SHELTON - EXAM BY THE COURT

1 Q. So you did all that?

2 A. Yes.

3 Q. And did you discuss the strategic moves
4 with your client?

5 A. I don't recall.

6 Q. Let me ask you this: Did you tell him
7 why you were doing it or what you were doing?

8 A. I don't recall at what depth I did.
9 Some of this came on at the very last minute,
10 obviously.

11 Q. Just pops up in a trial sometimes?

12 A. True, yes.

13 THE COURT: All right. That's all I
14 have.

15 MR. DAVIS: I have nothing further,
16 Your Honor.

17 THE COURT: Mr. Johnson?

18 MR. JOHNSON: Nothing.

19 THE COURT: You may step down,
20 Mr. Shelton. Thank you.

21 MR. DAVIS: That would be the
22 plaintiff's presentation.

23 MR. JOHNSON: And, Your Honor, if
24 that's the plaintiff's presentation, at this time,
25 we'd move for a directed verdict under 41(B), in

1 that he has not proven his case.

2 He has not proven that Mr. Shelton was
3 ineffective in this case. He certainly has not
4 proven that appellate counsel -- has not met the
5 burden of proving that appellate counsel did
6 anything wrong in this case.

7 THE COURT: There was nothing about
8 appellate counsel, Mr. Davis.

9 MR. DAVIS: There is, Your Honor. At
10 the appropriate time I will argue that.

11 MR. JOHNSON: But there's been no
12 evidence to support that and no constitutional
13 argument, Your Honor, and that's why we are asking
14 for a directed verdict in this case. And that does
15 not limit my presentation of evidence under
16 Rule 41.

17 THE COURT: All right. I understand.

18 MR. DAVIS: Judge, as to the appellate
19 issue, what we would argue, Your Honor, is that in
20 the record, it is clear that on appeal the only
21 issue raised was -- I'm going to read from the
22 documents. The trial judge erred in refusing to
23 suppress identification testimony when the show-up
24 identification procedure was inherently unreliable
25 and conducive to irreparable mistaken

1 identification. That was the sole issue.

2 But we've had two things testified to
3 already that's in the record. Mr. Shelton, in
4 addition to the identification, had the issue about
5 the length of detention, the stop, search and
6 seizure. That was argued in court, that was
7 preserved for appeal, it was not raised up on
8 appeal.

9 We would secondly argue --

10 THE COURT: Do you not agree with me
11 that appellate counsel is not required to -- to
12 base his appeal on every possible claim that may be
13 made?

14 MR. DAVIS: That's correct.

15 THE COURT: Appellate counsel may look
16 at it and say, I agree with the Judge. I think he
17 made the proper decision.

18 MR. DAVIS: I understand that, Judge,
19 but this would be a constitutional violation that
20 expands some -- approximately, 20 or so -- 20,
21 25 pages on the issue.

22 As Mr. Shelton testified, it was kind
23 of joined together with the identification. It was
24 connected, obviously, but that, I think, enhances
25 the complaint that we have that -- we have one

1 issue about the suggestive nature of the show-up
2 ID. But that show-up ID would not have happened
3 but for the extended detention after an improper
4 stop. That was part and parcel of that issue.

5 It was preserved, it was objected to,
6 there was a pre-trial hearing on it, and it was not
7 raised.

8 THE COURT: What have you presented to
9 me? I mean, I've heard nothing about appellate
10 counsel, as to the reasoning.

11 MR. DAVIS: Well --

12 THE COURT: I've really heard nothing
13 from Mr. Shelton, other than Mr. Shelton said, I
14 did raise that issue at trial and challenged it.

15 MR. DAVIS: Your Honor, certainly I'm
16 -- I would -- if you need further, I would ask that
17 the Court cue the clerk. We've got it set up here;
18 Ms. Hudgins, I believe, is on standby.

19 If it's my error, I certainly don't
20 want to penalize my client. I simply hope that by
21 what you already have in the record showing that a
22 potential constitutional violation was not raised
23 at all, since it is very clear what was raised.

24 The absence of this other
25 constitutional violation would be ineffective

1 assistance and, again, what I would argue in
2 response to the State, at this point in the record
3 we don't have --

4 THE COURT: Tell me this: What --
5 what deviation from the professional standard has
6 Mr. Shelton -- what have you shown? What has he
7 done?

8 MR. DAVIS: If you will give me a
9 second, I'm happy to shift gears on that.
10 Obviously, I was --

11 THE COURT: We have --

12 MR. DAVIS: -- on the appellate issue
13 here.

14 THE COURT: He's making a motion for
15 directed verdict on the issue of trial counsel.

16 MR. DAVIS: I understand, and if you
17 give me just a moment, I'll focus on that.

18 Your Honor, I guess we would bring it
19 down to four things, if I could just -- give me one
20 moment.

21 Now -- forgive me, I think I reduced it
22 to three. So, Your Honor, this is what we would
23 argue. We'd argue that the outcome of this case
24 would have been different if Mr. Shelton would have
25 handled these major issues differently.

1 There is testimony that Mr. Fishburne
2 -- one of the issues in choosing to go to trial was
3 the ability of the identification. One of the
4 issues on that would have been whether or not a
5 nonresident without proper visa could be a witness
6 in court. We would argue --

7 THE COURT: Has that been testified to?
8 Did your client ever say that?

9 You said it, but did your client say
10 it? You should have asked Mr. Shelton that.

11 MR. DAVIS: Yeah, we focused more on
12 Mr. Shelton. You'll recall my questioning of my
13 client was not as extended as Mr. Shelton, because
14 really it goes to what --

15 THE COURT: Well, I don't recall
16 Mr. Shelton saying that he said that.

17 MR. DAVIS: That is correct, so you
18 will have to weigh the evidence between --

19 THE COURT: Well, Mr. Shelton said he
20 didn't say that.

21 MR. DAVIS: I understand, Your Honor,
22 and obviously Mr. Fishburne said they did have
23 discussions and his concern was the ability of
24 someone who was not a legal resident to testify.

25 THE COURT: All right.

1 MR. DAVIS: We would argue that
2 Mr. Shelton failed to move to sever this case. We
3 heard about the inherent difficulties when there is
4 a co-defendant. I will not go over those again,
5 but there are inherent dangers and risks of going
6 to trial with a co-defendant.

7 We would argue that the testimony --
8 here's the fourth, Your Honor. I apologize. We
9 would argue that the identification of the client
10 through a photo on a cell phone by an officer was
11 not objected to or argued, similar to the show-up
12 identification.

13 He did a thorough job on the show-up
14 identification, but then there is -- to corroborate
15 that is this photo that may or may not have been
16 Mr. Fishburne, there was conflicting testimony on
17 that, but the officer --

18 THE COURT: Well, how do you do that on
19 a cell phone? I mean, you have a show-up
20 identification. Okay. And you go with the things
21 like, how long had it been since the witness had
22 seen the defendant? Did he know the defendant?
23 What was the lighting when he saw the defendant?
24 How suggestive the show-up may have been -- you go
25 into things like that.

1 How do you do that on a cell phone when
2 you just take a picture and say, here it is? This
3 is precisely what we saw.

4 MR. DAVIS: No, Your Honor. The -- my
5 understanding is the officer had the photos, said
6 that's Mr. Fishburne's. And another time it might
7 be Mr. Fishburne's. So his ability to see the
8 photo -- those same questions. How many times have
9 you seen Mr. Fishburne before? In what conditions?
10 In what lighting? For what length of time were you
11 able to look at the photo? Oh, yeah, that's him.

12 THE COURT: Well, what did he do when
13 he looked at it? I'm somewhat lost as to how the
14 cell phone came into play.

15 MR. DAVIS: It wraps back to the stop
16 and the -- during the stop and the detention and
17 the show-up, there is a phone found that is --

18 THE COURT: At the scene of the
19 burglary? Where was the phone found? Do you know
20 where the phone was found?

21 MR. DAVIS: Forgive me, Your Honor,
22 because I do not want to tell you wrong.

23 THE COURT: Mr. Shelton, can you tell
24 us where the phone was found?

25 MR. SHELTON: I'm sorry. The phone was

1 found -- it was found at the scene. It was a phone
2 that was found at the scene of the burglary.

3 THE COURT: Okay. That makes more
4 sense. Thank you.

5 MR. DAVIS: And so that when the
6 officer sees it and then says, oh, I know who that
7 is, who's being detained, that obviously
8 corroborates the show-up ID which is -- which has
9 been argued thoroughly. But that --

10 THE COURT: Wasn't the picture on the
11 phone shown to the jury? Was it shown to the jury?

12 MR. DAVIS: No, Your Honor. There's
13 testimony about that and we would argue that it was
14 ineffective not to have the same interrogation of
15 that officer on how he was able to make such a
16 statement prior to the statement being made. It's
17 not your normal photo array or sequential array.

18 It's not a show-up, but it's still an
19 identification by a law enforcement officer. So
20 the jury may add extra credence to a law
21 enforcement officer from a single photo, which is
22 inherently suggestive, to someone that's already
23 being held in custody, which makes it more
24 suggestive.

25 All of those things could and should

1 have been gone into so that the jury could weigh
2 the reliability of that identification and the
3 credibility of that officer. Because the -- as
4 Mr. Shelton testified, when we boil it down, this
5 is an ID case. Either they stopped and got the
6 right guys or they didn't. It comes down to two
7 different things: Show-up ID and then this picture
8 on the phone.

9 THE COURT: Did it make any difference
10 when you have the victims ID your client?

11 MR. DAVIS: Which takes me to the last
12 argument, Your Honor, and it deals with this
13 interpreter issue. And I can certainly point out
14 to you two difference places in the record, which
15 of course you have, where the Court sua sponte
16 interrupts over concerns of the adequacy of the
17 interpreter. I'm going to --

18 THE COURT: Do you have any evidence
19 that the interpreter was doing anything wrong?

20 MR. DAVIS: Your Honor, I'm going back
21 to before that. We're going to say there was a
22 violation when the interpreter was used without it
23 being a qualified interpreter or the Court going
24 through that process. So we are going to say
25 inherently it's prejudicial to my client if the

1 Court did not follow that process.

2 MR. JOHNSON: And that would be a
3 direct appeal issue, Your Honor.

4 MR. DAVIS: But it wasn't objected to
5 either, so it's a performance of counsel issue as
6 well. Counsel never objected to it, knowing ahead
7 of time --

8 THE COURT: If we're going to have an
9 issue with this, did you ask him if he objected to
10 it?

11 MR. DAVIS: Yes, Your Honor.

12 THE COURT: I don't think you did.

13 MR. DAVIS: Pardon?

14 THE COURT: I don't think you did.

15 MR. DAVIS: Your Honor, I'm sure I did,
16 because I led up to the fact that he knew prior to
17 trial it was going to be an issue. I asked him if
18 he objected to it prior to. I asked when there
19 were issues where the Court could object itself,
20 did you object then?

21 So I -- Judge, I questioned that.

22 THE COURT: Okay.

23 MR. DAVIS: And this is citing State V
24 Rogers, a 2004 case. The Court must first make a
25 determination that this action, meaning using the

1 interpreter, if it's not a qualified interpreter.

2 And in this case the record is clear the

3 interpreter is not qualified.

4 The Court must make a determination
5 that the action is in the best interest of the
6 individual and is in the best interest of justice.
7 Okay. This was not -- there is no testimony he was
8 a qualified interpreter. There is nothing in the
9 record that the Court went through the process of
10 ensuring that this was an independent, unbiased,
11 either qualified or while not qualified okay to use
12 in the best interest of justice.

13 And that, of course, is then this --
14 this case is interpreting Section 15-27-15. So
15 it's statutory and there is case law expanding
16 that. We would argue that the failure of Mr.
17 Shelton to object to that ahead of time, knowing it
18 was an issue pre-trial and then, when the Court was
19 concerned about improper or incorrect
20 interpretation, Mr. Shelton failed to object
21 spontaneously to that, failed to preserve it for
22 appeal and affected the outcome of the case.

23 THE COURT: All right. I will deny the
24 motion for directed verdict and let Mr. Johnson go
25 forward. Okay?

1 MR. JOHNSON: As to which issue, Your
2 Honor?

3 THE COURT: Both.

4 MR. JOHNSON: Do I need to present
5 evidence on appellate counsel? I don't think he
6 presented any evidence that I have to refute.

7 THE COURT: Have you, sir?

8 MR. DAVIS: Again, Your Honor, we
9 believe we have.

10 THE COURT: Have you? He keeps
11 arguing, but I haven't heard him put up anything.

12 MR. DAVIS: Constitutional violation,
13 Your Honor.

14 THE COURT: You just say, well, there's
15 a constitutional violation that's inherent on the
16 record and it wasn't argued. That's essentially
17 what you're saying.

18 MR. DAVIS: It -- correct. It was not
19 argued by appellate counsel. It's a -- it's a
20 clear violation of his constitutional rights. The
21 detention was unduly lengthy.

22 THE COURT: How do you know that?

23 MR. DAVIS: And, again, Judge, forgive
24 me, I'm happy to belabor the point, but it's
25 clearly in the record and, as I said, there is 20,

1 25 pages of argument, not just about the show-up
2 ID, but about the improper stop, and even if the
3 stop briefly --

4 THE COURT: All right. I'll get you
5 past the directed verdict stage. Let me hear from
6 Mr. Johnson.

7 MR. JOHNSON: Your Honor, if I may call
8 Kat Hudgins on the phone.

9 THE COURT: Yes, you may.
10 (Whereupon, the witness testified via
11 cell phone.)

12 THE WITNESS: This is Katherine
13 Hudgins.

14 MR. JOHNSON: Kat, hey. It's Rutledge.
15 How are you?

16 THE WITNESS: I'm fine, Rutledge. How
17 are you?

18 MR. JOHNSON: We have Judge Hyman here.
19 You're on speakerphone in the courtroom.

20 THE WITNESS: Okay. Very good.

21 MR. JOHNSON: Judge, if you would like
22 to swear her in.

23 THE CLERK: I will swear you in.

24 KATHERINE HUDGINS,
25 being first duly sworn, testified as follows:

KATHERINE HUDGINS - DIRECT EXAM BY MR. JOHNSON

1 THE CLERK: Thank you. State your full
2 name and spell your last name for the record.

3 THE WITNESS: My name is Katherine
4 Hudgins, H-U-D-G-I-N-S. First name is with a K.

5 DIRECT EXAMINATION

6 BY MR. JOHNSON:

7 Q. Ms. Hudgins, how did you become
8 involved in this case?

9 A. I'm an appellate defender and the case
10 was assigned to me for direct appeal.

11 Q. And when you receive a case, how do you
12 go about preparing that case?

13 A. Well, we receive the trial transcript,
14 and what I will do is I will do an initial reading
15 through the trial transcript to try to identify
16 what issues I think are most likely to result in
17 relief.

18 So I would make notes and jot those
19 notes down and read through the whole trial
20 transcript. Hopefully, I get a chance to go
21 through it more than once, but sometimes it's only
22 one time.

23 Q. How long have you been at this
24 position?

25 A. I've been an appellate defense since

KATHERINE HUDGINS - DIRECT EXAM BY MR. JOHNSON

1 2006, so nine years.

2 Q. And about how many, give or take,
3 appeals have you done?

4 A. Oh, my goodness. We are filing at
5 least two briefs a week, so I don't know what that
6 math is. I could add it up for you. I've done a
7 lot of appeals. I did appeals before I came to
8 appellate defense when I was in private practice.

9 Q. And during your review of the
10 transcript, do you look for issues that are
11 preserved?

12 A. Yes.

13 Q. And in this case in particular, do you
14 remember what issues you specifically looked at?

15 A. No, I don't remember exactly which
16 issues I specifically looked at. I -- I've pulled
17 my briefs to look at what issue I did raise. You
18 know, we sometimes raise more than one issue;
19 however, if there is one stronger issue and one
20 issue that's marginal, I will usually go with the
21 stronger, just so as to not dilute that stronger
22 issue.

23 Q. And did you do that in this case?

24 A. I did.

25 Q. And that would have been the ID issue?

KATHERINE HUDGINS - CROSS EXAM BY MR. DAVIS

1 A. That's correct. That's the issue I
2 raised.

3 Q. And so you don't have to raise every
4 issue possible?

5 A. No.

6 Q. Especially frivolous ones?

7 A. True.

8 Q. And don't you have an ethical
9 obligation not to raise frivolous issues?

10 A. That's correct.

11 MR. JOHNSON: That's all I have at this
12 point, Your Honor.

13 THE COURT: Please answer anything
14 Mr. Davis will have for you.

15 MR. DAVIS: May I approach to question,
16 Your Honor?

17 THE COURT: You may.

18 CROSS-EXAMINATION

19 BY MR. DAVIS:

20 Q. Ms. Hudgins?

21 A. Yes.

22 Q. Do you recall the absence of an
23 issue -- any issue about the use of the interpreter
24 being preserved for appeal?

25 A. You know, I understood that that was an

KATHERINE HUDGINS - CROSS EXAM BY MR. DAVIS

1 issue that was being raised in this PCR
2 application. I remember there was an issue with
3 the neighbor serving as an interpreter for the
4 show-up. I don't recall whether or not that was
5 preserved or not.

6 Q. Okay. Do you recall a lengthy
7 discussion that was connected to the show-up
8 identification which you did raise that dealt with
9 the initial stop and detention?

10 A. I don't have an independent memory of
11 that. I have the brief in front of me. I have
12 reviewed that and that would -- that would really
13 be my only memory, unfortunately.

14 Q. Length of detention is clearly a
15 Fourth -- can be a Fourth Amendment issue, correct?

16 A. Sure.

17 Q. And so the improper detention after
18 providing identification, barring more, could be an
19 unconstitutional detention, correct?

20 A. I suppose.

21 Q. Well, in this case -- if you recall, in
22 this case, my client was detained by law
23 enforcement relatively soon after the incident, but
24 with very little other evidence connecting him to
25 the crime. After he provided his identification,

KATHERINE HUDGINS - CROSS EXAM BY MR. DAVIS

1 then he was detained for a significant period of
2 time before the show-up identification was
3 performed. Do you recall that?

4 A. I trust your -- I don't recall it. If
5 that's what happened I trust -- I trust the record
6 to reflect that.

7 MR. DAVIS: If I could have a moment on
8 this.

9 THE COURT: Uh-huh.

10 BY MR. DAVIS:

11 Q. Ms. Hudgins, if you'll give me a
12 second, I will try to assist you with the record.
13 It appears from the record -- and, Judge, for your
14 purposes, this is page -- beginning on page 215,
15 Mr. Shelton, who was the trial counsel for
16 Mr. Fishburne, pointed out that there is nothing
17 linking Mr. Fishburne at that point in time. They
18 are holding my client, there is nothing linking him
19 to the crime.

20 He has -- the report is also red and
21 white stripe. There is no testimony he was wearing
22 that clothing. And this is all before the
23 identification, but during detention.

24 On the next page Mr. Shelton again
25 arguing, Your Honor, we feel it is completely

KATHERINE HUDGINS - CROSS EXAM BY MR. DAVIS

1 unreasonable in scope and duration of this for them
2 to hold Mr. Fishburne for that period of time
3 without any other evidence that he actually
4 committed the crime. They could have allowed him
5 to go, and they could have done a six-photo lineup
6 with his picture, since they had the valid ID.

7 So given the fact -- with that from the
8 record, if someone has been stopped and provided
9 identification with nothing more linking them to a
10 crime, would it not be unconstitutional to further
11 detain them?

12 A. Possibly.

13 Q. Okay. And if that were the -- and --
14 and if that were an unconstitutional detention,
15 then is it not -- does it not follow that evidence
16 obtained following that could be suppressed as
17 fruit of the poisonous tree?

18 A. Sure.

19 Q. So that if the following evidence
20 obtained was this suggestive -- arguably suggestive
21 photo -- this arguably suggestive show-up ID, which
22 you did argue, that could be suppressed if the
23 initial detention was unconstitutional, correct?

24 A. Right.

25 Q. Okay. However, given all of that, that

KATHERINE HUDGINS - CROSS EXAM BY MR. DAVIS

1 was not an issue raised on your appeal, correct?

2 A. Correct.

3 Q. If, however, you had raised the issue
4 and sufficient -- insufficient reason for stop or
5 detention was proven or that the length of
6 detention was unreasonable based on the facts at
7 the time, that could have been a successful
8 argument?

9 A. My testimony during these PCR hearings
10 is always, if there was an issue that I did not
11 raise that would have resulted in relief, then the
12 client is entitled to relief.

13 Q. And there have been cases in which
14 improper stop has resulted in relief, or resulted
15 in -- on direct appeal or through PCR, has resulted
16 in an overturning of the conviction?

17 A. Of course.

18 Q. And there have been cases where undue
19 length of detention has caused evidence that was
20 seized to be suppressed and resulting in
21 overturning their conviction?

22 A. Yes.

23 Q. And, finally, there have been -- cases
24 have been successful in suppressing identification,
25 not just through the suggestive nature, which you

KATHERINE HUDGINS - CROSS EXAM BY MR. DAVIS

1 did argue, but identification following an improper
2 stop or improper detention that would be suppressed
3 that would -- that resulted in overturning of a
4 conviction?

5 A. You know, not -- a particular case
6 doesn't come to mind, but there may be that case
7 out there, sure.

8 Q. That legal theory is sound?

9 A. Sure.

10 Q. Okay. And in this case you did not
11 raise issue about the Fourth Amendment
12 constitutional violation of the stop?

13 A. I did not.

14 Q. And you did not raise a Fourth
15 Amendment constitutional violation about the length
16 of detention?

17 A. I did not.

18 Q. And, finally, you did not, based on
19 those arguments, try to suppress -- try to overturn
20 the identification?

21 A. That's correct.

22 MR. DAVIS: Okay. Your Honor, if I
23 could have just one moment.

24 Ms. Hudgins, thank you so much. No
25 other questions.

KATHERINE HUDGINS - REDIRECT EXAM BY MR. JOHNSON

1 THE COURT: Redirect?

2 MR. JOHNSON: Redirect briefly.

3 REDIRECT EXAMINATION

4 BY MR. JOHNSON:

5 Q. Ms. Hudgins, isn't the length of the
6 detention and the stop a totality of the
7 circumstances argument?

8 A. Yes.

9 Q. And if that is raised, isn't that
10 within the sound discretion of the trial judge?

11 A. Yes.

12 MR. JOHNSON: All right. Thank you.

13 Your Honor, I have no further
14 questions.

15 EXAMINATION

16 BY THE COURT:

17 Q. Ms. Hudgins, if you look at a
18 transcript, even where there are issues concerning
19 length of detention or detention in general, and
20 you review the record and the Judge's reasoning for
21 refusing to suppress the evidence or reasoning for
22 finding that there was -- that the officer had a
23 reasonable suspicion supported by particular facts,
24 are there cases where you simply look at it and
25 determine that it's not an appellate issue?

KATHERINE HUDGINS - EXAM BY THE COURT

1 A. Yes.

2 Q. All right. Do you know whether you did
3 that in this case or not? There's a rather lengthy
4 discourse on the matter by Judge -- I think it was
5 Judge Harrington who tried the case?

6 A. You know, I don't have any independent
7 recollection. From looking at the issue that I did
8 raise, I probably just felt like the suggestive
9 nature of the identification procedure was a much
10 stronger issue in that regard.

11 THE COURT: All right. Thank you.

12 MR. JOHNSON: That's all I have, Your
13 Honor.

14 MR. DAVIS: Nothing more.

15 THE COURT: Thank you, Ms. Hudgins.

16 MR. JOHNSON: Thank you so much, Kat.
17 I appreciate it.

18 THE WITNESS: Thank you.

19 (WITNESS EXCUSED.)

20 THE COURT: Okay. Anything further?

21 MR. JOHNSON: If you could give me one
22 second, Your Honor, just to make sure that all my
23 T's are crossed and I's are dotted.

24 Your Honor, I think that's all the
25 State has at this time. However, I would ask the

1 Court's permission to be allowed to brief some of
2 these issues, as, like I said at the beginning of
3 this hearing, this is the first time I've heard
4 about --

5 THE COURT: I'm going to let you both
6 do it. Give you both 30 days. All right?

7 MR. JOHNSON: Thank you, Your Honor.

8 MR. DAVIS: Thank you, Your Honor.

9 (These proceedings were concluded at
10 3:56 p.m.)

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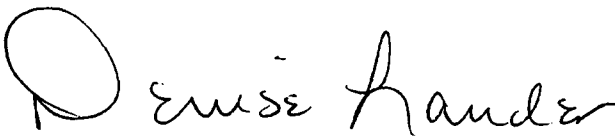
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CERTIFICATE OF REPORTER

I, Carol Denise Lauder, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 24th day of August, 2016 at Charleston, Charleston County, South Carolina.


S/Denise Lauder
Carol Denise Lauder
Registered Professional
Reporter, CP
My Commission expires
August 2, 2017

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Clarence J. Fishburne, #264287,

2014-CP-08-0809

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED
16 MAY -3 PM 4:36
CLERK OF COURT
BERKELEY COUNTY, S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 14, 2014. The State made its Return on April 20, 2015. An evidentiary hearing into this matter was convened on September 9, 2015. The Applicant was present and was represented by Rodney D. Davis, Esquire. The Respondent was represented by J. Rutledge Johnson, Assistant Deputy Attorney General. At the hearing, Applicant testified on his own behalf. Chad Shelton, Esquire, and Kat Hudgins, Esquire, also testified. This Court has before it a transcript of the trial, a copy of the briefs filed on direct appeal, a copy of the Court of Appeals' opinion on direct appeal, a copy of the records of the Berkeley County Clerk of Court regarding the subject conviction, and a copy of the Applicant's records with the South Carolina Department of Corrections.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the October 2010 and November 2011 term of the Berkeley County Grand Jury for two counts of armed robbery (2011-GS-08-1567, -1568), two counts of kidnapping (2011-GS-08-1660, -

1661), and burglary- first degree (2011-GS-08-1569). The Applicant was represented by Chad Shelton, Esquire, and David Schwacke, Esquire.

On November 10, 2011, the Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for a period of twenty years on all charges. The Applicant's convictions are to be served concurrently.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Kathrine Hudgins, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the South Carolina Court of Appeals. State v. Fishburne, 2014-UP-133 (S.C. Ct. App. April 2, 2014). The Remittitur was issued on April 18, 2014.

Attached herewith and incorporated herein are the records of the Berkeley County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Due process violation.
 - a. 14th amendment violation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. The Court has also read the trial transcript and appellate records, all of which assists the Court in judging their credibility. The Court finds the testimony of Chad Shelton, Applicant's trial

counsel, and Kat Hudgins, Applicant's appellate counsel, very credible, while also finding the Applicant's testimony is not credible.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified he was represented by Chad Shelton and spoke with him twice; however, he claims they did not discuss any elements of the crime or any potential defenses. Applicant stated that he rejected any and all plea offers, but Counsel did not explain the offers. Applicant also stated Counsel mentioned his accusers are not legal residents of the United States. Applicant testified that there were no discussions about severing his trial from his codefendant. Applicant stated he was charged to armed robberies and that he discussed the fact that an armed robbery is in the perception of the Victim, but that there were no weapons presented. Applicant stated Counsel did not discuss the injuries to the victims. He further stated that he was shown a copy of the discovery, but never given one. He lastly stated he relied on Counsel's experience, but did not feel that he was represented properly.

On cross-examination, Applicant admitted that the jury heard the facts as presented at the trial. Applicant also admitted he did not speak Portuguese; thus, he could not prove that the translator translated incorrectly. Applicant admitted that Counsel argued the Fourth Amendment seizure issue as well as the issue that the identification of Applicant was unreliable.

Counsel testified he had discussions with the solicitor about the interpreter. Counsel then stated he was prepared that Mr. Wright, a Portuguese interpreter, was not going to be used; and was prepared that Mr. Rock, another Portuguese interpreter, would be utilized for testimony instead.

Counsel stated that the judge interjected a few times during Mr. Olivera's testimony to ensure that Mr. Rock was translating correctly. Counsel admitted that the record was void of any questioning of the interpreter; he did not object, nor move for mistrial. Counsel stated he moved to quash the indictment, as he argued there is no aggravating factor for burglary. Counsel stated he did not get photos of the victim's injuries, as they were not in contention for the defense. Counsel stated because the incident occurred at night time, it was properly indicted as a burglary- first degree. Counsel stated the direct evidence was a showup identification, and that he challenged this showup identification.

Additionally, Counsel stated he checked into the immigration status of the victims and how the courts handle this type of situation. Counsel stated he used the issue of U-Visa to show motivations to lie. Counsel stated he hired an investigator to speak with the victims to ensure they would appear to testify at trial.

Counsel stated he made a pretrial motion concerning the identification; as well as the issue of seizure and length of detention. Counsel stated he subpoenaed the 911 dispatcher and challenged the timeframe of the seizure of Applicant. Counsel stated the court focused on the identification and length of detention, but allowed the identification into evidence. Counsel stated he also challenged a photo of the Applicant on a cell phone under a 403 analysis, because, as Counsel argued, there was no link from the cell phone to the crime. Counsel also stated there was no fingerprint evidence and no motion for severance. Counsel also stated that codefendant statements did not present a Bruton issue. Counsel then stated he filed a speedy trial motion.

On cross-examination, Counsel admitted he did not speak Portuguese either and that he must rely on the fact that the interpreter was correctly translating the victim's testimony. Counsel also stated he met with Applicant 5 to 6 times and had other correspondence with Applicant. Counsel

testified there was an offer of 15 years, which Applicant rejected. Counsel also testified that he gave Applicant a copy of his discovery, discussed the elements of the crime, and the fact that the injuries on the victims were not at issue. Counsel further stated, as to the issue that the officer identified Applicant by a photo on the cell phone, that the judge ruled Applicant had no standing to challenge the photograph. Counsel lastly stated that he did not move for severance, as there was no Bruton issue because statements given by his codefendant were not adverse to Applicant.

Upon questioning by the Court, Counsel testified he considered a severance, but thought it would be beneficial to Applicant to proceed to trial with his codefendant because the State agreed to forego introduction of defendant and codefendant statements. Counsel also stated he did not know if the translator did anything improper; and would have objected had he known of any impropriety. Counsel lastly stated he challenged the stop, challenged the identification and challenged the cell phone photograph.

Appellate counsel testified she prepares her cases by receiving and reviewing the transcript and looking for preserved issues in the record. Counsel stated she did not remember any specific issues, but her common practice is to go with the stronger issues in a case. Counsel stated she believed the strongest issue in this case was the identification of Applicant by the victim. Counsel also stated she has an ethical obligation not to raise frivolous arguments.

On cross-examination, Counsel stated she could not recall whether the interpreter issue was preserved for appeal. She then testified that in her memory, her brief to the Court of Appeals was concerned with the length of detention of Applicant. Counsel then admitted that she did not raise the issue of the stop or the length of detention, but simply identification process.

On redirect examination, Counsel agreed that the standard at the Court of Appeals is an abuse

of discretion standard and that the Court of Appeals looks at the totality of the circumstances in each case. Upon questioning by the Court, counsel stated she looks at the transcripts and the judge's decision to determine whether or not there are appellate issues. She also stated she felt the identification was a much stronger issue than the others.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at

117-18, 386 S.E.2d at 625.

Failure to Properly Advise on Plea Offer

While Applicant claims Counsel failed to explain to him the risks and rewards of rejecting a plea offer of 15 years and proceeding to trial, this Court finds Applicant's testimony not credible, while finding Counsel's testimony credible. Applicant claimed Counsel did not explain the elements of the charges to him. On the contrary, Counsel testified he gave a copy of the discovery to Applicant, discussed the elements of each charge with Applicant, and explained the offers from the State to Applicant. Counsel also testified it was Applicant's decision to reject this offer. This is simply a case of buyer's remorse. This Court finds Applicant has failed to meet his burden of proof as to this allegation. Thus, this allegation is denied.

Failure to object to the Interpreter

Applicant claims Counsel was ineffective for failing to object to the interpreter not being qualified prior to translating the victim's testimony. This issue is without merit.

Under S.C. Code Ann. § 17-1-50 (1998), Section (A) states, a "Qualified interpreter" means a person who: (a) is eighteen years of age or older; (b) is not a family member of a party or a witness; (c) is not a person confined to an institution; and (d) has education, training, or experience that enables him to speak English and a foreign language fluently, and is readily able to interpret simultaneously and consecutively and to sight-translate documents from English into the language of a non-English speaking person, or from the language of that person into spoken English." Additionally, Section (B)(1) states, "[n]otwithstanding any other provision of law, whenever a party, witness, or victim in a criminal legal proceeding does not sufficiently understand or speak the English language to comprehend the proceeding or to testify, the court must appoint a certified or

otherwise qualified interpreter to interpret the proceedings to the party or victim or to interpret the testimony of the witness." Further, State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999) footnote 2 states: "An interpreter is considered a witness in the sense that the accuracy of his or her translation is a question of fact for the jury which may be disputed by counsel. While the administration of the oath to a witness is fundamental to give the witness's testimony binding force, in the absence of a timely objection, unsworn testimony does not constitute a nullity. Further, **no constitutional provision is violated when unsworn testimony is received.**" (emphasis added) (internal citations omitted).

This Court finds Counsel was arguably ineffective for not objecting to the interpreter not being qualified prior to victim's testimony. However, this Court finds the interpreter in this case met the qualifications of S.C. Code Ann. § 17-1-50. Thus, Counsel had no good faith basis to object to the interpreter's translation of the victim's testimony. Additionally, as Counsel testified, he did not see an issue with the interpreter, and would have objected had he noticed any issue. Further, Applicant has failed to prove any resulting prejudice, as he cannot prove that the interpreter incorrectly translated the victim's testimony. As the Applicant admitted, he did not speak Portuguese; thus, he cannot prove that the interpreter erroneously translated victim's testimony. This Court also notes Applicant failed to present any other Portuguese-speaking witnesses to show any inaccurate translation. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.) Therefore, this allegation is denied.

All other allegations

This Court notes that Applicant alleged other allegations, such as ineffective assistance concerning the identification challenge, for failing to move to sever the case, and the fact that the identification of the photograph on the cell phone was not argued like the showup lineup was argued. However, this Court finds Applicant either failed to meet his burden of proving Counsel was ineffective or failed to show how Counsel's actions prejudiced Applicant's case thereby. Specifically, this Court finds that Counsel improperly argued the identification challenge, as it was the subject of Applicant's appeal. Additionally, this Court finds Counsel provided strategic reason why he did not request a severance of this case. Lastly, as the trial judge properly ruled, Applicant had no standing to challenge the photograph on the cell phone and therefore Counsel cannot be held ineffective for failure to challenge. Accordingly, these allegations are denied.

Ineffective Assistance of Appellate Counsel

Applicant also alleges ineffective assistance of appellate counsel for failure to raise a Fourth Amendment claim concerning the length of the detention of Applicant and the seizure of a cell phone linked to Applicant. This allegation is without merit.

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.

In this case, Appellate counsel testified that after reviewing the entire case, she believed the strongest issue in this case was the identification of Applicant by the victim. Counsel also stated she has an ethical obligation not to raise frivolous arguments. Moreover, Counsel agreed that the standard at the Court of Appeals is an abuse of discretion standard and that the Court of Appeals looks at the totality of the circumstances in each case. Upon questioning by this Court, Counsel stated that she looks at the transcripts and the judge's decision to determine whether or not there are appellate issues. She lastly stated she felt the identification was a much stronger issue than the others.

This Court finds Counsel was effective in her representation of Applicant in this case.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland v. Washington, 466 at 689-90, 104 at 2065-66.

While Applicant claims Counsel was ineffective for not raising the Fourth Amendment issue, this Court finds Counsel's testimony credible that she reviewed the entire record and in her professional judgment, chose to argue what she perceived as the strongest issue in this case: the identification of Applicant. This cannot be second-guessed now simply because Applicant received an unfavorable ruling and outcome. This Court views Appellate Counsel's decision to brief the strongest issue from her perspective at the time she briefed this issue, without the distorting effects of hindsight. Therefore, this Court finds Applicant has failed to meet his burden of proving Appellate Counsel's actions were ineffective in this case, as she made a strategic decision to pursue the strongest issue. Thus, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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 notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!


Larry B. Hyman
Presiding Circuit Court Judge
Ninth Judicial Circuit

4-19, 2016

Cowley, South Carolina

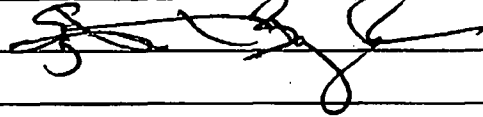
2014-CP-08-0809

COR2010-08-01561

WITNESSES

J.R. Charlton

Berkeley County Sheriff's Office



AGENCY CASE NUMBER

1008034498



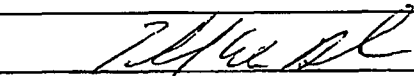
ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

August 7, 2010

ACTION OF GRAND JURY



Foreperson of Grand Jury

11/2/11

VERDICT

Guilty

Roland Harb

Foreperson of Petit Jury

11-10-2011

Date:

INDICT

DOCKET NO. 2011-GS-08-1567

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

November Term 2011

THE STATE

Vs

CLARENCE J FISHBURNE

DOB: [REDACTED]

B/M

Indictment for

Armed Robbery

CLERK OF COURT
BERKELEY COUNTY, SC

2011 NOV -2 PM 12:08

FILED



STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on November 2, 2011 the Grand Jurors of Berkeley County present upon their oath:

Armed Robbery

That Clarence J Fishburne, while acting in concert with others, did in Berkeley County, South Carolina on or about August 6, 2010, while armed with a deadly weapon, to wit: a handgun, take and carry away personal property of Paulo Silva from or in the immediate presence of Paulo Silva with intent to deprive Paulo Silva of possession by use of force, threats or intimidation, in violation of Section 16-11-0330(A) of the South Carolina Code of Laws, 1976, as amended.

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


ASHLEY B CORNWELL
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Berkeley
 STATE VS.
Clarence J Fishburne

AKA:

Race: BLACK Sex: M Age: 33DOB: [REDACTED] SS: [REDACTED]

Address:

City, State, Zip:

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Armed Robbery

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011-GS-08-1567A/W#: 2011-GS-08-1567Date of Offense: 8/6/2010S.C. Code § : 16-11-0330(A)CDR Code #: 0139

SENTENCE SHEET

10-30

☒ CONVICTED OF or ☐ PLEADSIn violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

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

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

ATTEST:

Comwell, Ashley B76577
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,

for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2011-GS-08-1568, 1569, 1660, 1661
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

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

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

SPECIAL CONDITIONS:

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

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

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

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

PTUP _____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

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

\$ _____ paid to Public Defender Fund

Other: _____

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

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

Kristina Haring
2157
11/10/11

COR2010-08-01561

WITNESSES

J.R. Charlton

Berkeley County Sheriff's Office

[Signature]

AGENCY CASE NUMBER

1008034498

ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

August 7, 2010

ACTION OF GRAND JURY

[Signature]
Person of Grand Jury

VERDICT

Guilty

Roland Lee
Foreperson of Petit Jury

11-10-2011

Date:

INDICT

DOCKET NO. 2011-GS-08-1568

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

November Term 2011

THE STATE

Vs

CLARENCE J FISHBURNE

DOB: *[REDACTED]*

B/M

Indictment for

Armed Robbery

772

2011 NOV -2 PM 12:07

FILE

[Handwritten initials]

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

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Armed Robbery

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


ASHLEY B. CORNWELL
ASSISTANT SOLICITOR

774
STATE OF SOUTH CAROLINACOUNTY OF Berklee
STATE OF VS.
Clarence J Fishburne

AKA:

Race: BLACK Sex: M Age: 33DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: SID#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Armed Robbery

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011-GS-08-1568A/W#: 2011-GS-08-1568Date of Offense: 8/6/2010S.C. Code § : 16-11-0330(A)CDR Code #: 0139

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Cornwell, Ashley B76077
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years/or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services, standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2011-GS-08-1568, 1569, 1560, 1561
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §

Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
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3% to County (if paid in installments)		\$ <u>3.90</u>
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PTUP

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pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
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Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: Sentence Date: 11/10/11

COR2010-08-01561

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J.R. Charlton

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[Signature]

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ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

August 7, 2010

ACTION OF GRAND JURY

[Signature]
Person of Grand Jury

VERDICT

Guilty

[Signature] 11-10-2011
Foreperson of Petit Jury Date:

INDICT

DOCKET NO. 2011-GS-08-1569

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

November Term 2011

THE STATE

Vs

CLARENCE J FISHBURNE

DOB: [REDACTED]

B/M

Indictment for

Burglary, First Degree

MAILED
OCT 11 2011
CLERK OF COURT
BERKELEY COUNTY, SC

2011 NOV -2 PM 12:07

FILE

[Handwritten initials]

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on November 2, 2011 the Grand Jurors of Berkeley County present upon their oath:

Burglary, First Degree

That Clarence J. Fishburne, while acting in concert with others, did in Berkeley County on or about August 10, 2010, willfully, unlawfully and feloniously enter the dwelling of Paula Silva and Adao Olivera located at [REDACTED] Goose Creek, South Carolina during the night time hours and/or while armed with a deadly weapon, without consent and with the intent to commit a crime therein, to wit: larceny. This is in violation of Section 16-11-311, SC Code of Laws, 1976, as amended.

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


ASHLEY B. CORNWELL
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

777

COUNTY OF
STATE

Berkeley

VS.

Clarence J Fishburne

AKA:

Race: BLACK Sex: M Age: 33

DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Burglary, 1st degree

INDICTMENT/CASE#: 2011-GS-08-1569

A/W#: 2011-GS-08-1569

Date of Offense: 8/6/2010

S.C. Code § : 16-11-0311

CDR Code #: 0079

SENTENCE SHEET

15-life

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-11-0311 of the S.C. Code of Laws, bearing CDR Code # 0079

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

ATTEST:

Cornwell, Ashley B

SC Bar# 76577

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2011-GS-08-1567, 1568, 1660, 1661
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.98
TOTAL		\$ 133.98

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

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

\$ _____ paid to Public Defender Fund

Other: _____

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

Presiding Judge

Judge Code: _____

Sentence Date: 11/10/10

Clerk of Court/Deputy Clerk

Court Reporter: Anne Myers

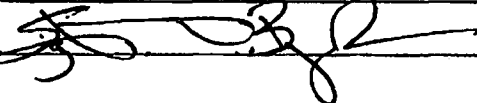
SCCA217 (03/2011)

COR2010-08-01561

WITNESSES

J.R. Charlton

Berkeley County Sheriff's Office



AGENCY CASE NUMBER

1008034498

ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

August 7, 2010

ACTION OF GRAND JURY

Person of Grand Jury

Date: 11/12/11

VERDICT

Guilty

Roland Beed

Foreperson of Petit Jury

11-10-2011

Date:

INDICT

DOCKET NO. 2011-GS-08-1660

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

November Term 2011

THE STATE

Vs

CLARENCE J FISHBURNE

DOB: [REDACTED]

B/M

Indictment for

Kidnapping

2011 NOV -2 PM 12:07
RECEIVED
CLERK OF COURT
BERKELEY COUNTY

Handwritten initials

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on November 2, 2011 the Grand Jurors of Berkeley County present upon their oath:

Kidnapping

That Clarence J. Fishburne, while acting in concert with others, did in Berkeley County on or about August 6, 2010 willfully, unlawfully, knowingly, and feloniously seize, abduct, confine or carry away Adao Olivera, without the authority of law and against Adao Olivera's will and consent. This is in violation of Section 16-3-910 of the South Carolina Code of Laws, 1976, as amended.

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


ASHLEY B. CORNWELL
ASSISTANT SOLICITOR

780
STATE OF SOUTH CAROLINACOUNTY OF
STATE

Berkeley

VS.

Clarence J Fishburne

AKA:

Race: BLACK Sex: M Age: 33

DOB: SS#

Address:

City, State, Zip:

DL#: SID#:

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

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011-GS-08-1660

A/W#: 2011-GS-08-1660

Date of Offense: 8/6/2010

S.C. Code § : 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

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

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

ATTEST:

Cornwell, Ashley B

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation formonths/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2011-GS-08-1567, 1568, 1569, 1661
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

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

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

PTUP

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

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

\$ paid to Public Defender Fund

Other

Not a sexual offense

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

Presiding Judge

Judge Code:

Sentence Date:

COR2010-08-01561

WITNESSES

J.R. Charlton

Berkeley County Sheriff's Office

[Signature]

AGENCY CASE NUMBER

1008034498

ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

August 7, 2010

ACTION OF GRAND JURY

[Signature]

Foreperson of Grand Jury

11/12/11

VERDICT

Guilty

Roland [Signature] 11-10-2011

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2011-GS-08-1661

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

November Term 2011

THE STATE

Vs

CLARENCE J FISHBURNE

DOB: [REDACTED]

B/M

Indictment for

Kidnapping

BERKELEY COUNTY
CLERK OF COURT

2011 NOV -2 PM 12:01

[Handwritten initials]

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on November 2, 2011 the Grand Jurors of Berkeley County present upon their oath:

Kidnapping

That Clarence J. Fishburne, while acting in concert with others, did in Berkeley County on or about August 6, 2010 willfully, unlawfully, knowingly, and feloniously seize, abduct, or confine or carry away Paulo Silva without the authority of law and against Paulo Silva's will and consent. This is in violation of Section 16-3-910 of the South Carolina Code of Laws, 1976, as amended.

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



ASHLEY B. CORNWELL
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

783

COUNTY OF
STATE

Berkeley

VS.

Clarence J Fishburne

AKA:

Race: BLACK Sex: M Age: 33

DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: SID#:

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

INDICTMENT/CASE#: 2011-GS-08-1661

A/W#: 2011-GS-08-1661

Date of Offense: 8/6/2010

S.C. Code §: 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

0-30 year

☒ CONVICTED OF or ☐ PLEADS

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

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

ATTEST:

Cornwell, Ashley B

SC Bar# 76577

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years/or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2011-GS-08-1567, 1568, 1569, 1660☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
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§ 56-1-286 (DUI Breath Test)	\$25	\$
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§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
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§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL		\$133.90

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

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

\$ _____ paid to Public Defender Fund

Other:

Not a sexual offense

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

Presiding Judge

Judge Code:

Sentence Date:

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLARENCE J. FISHBURNE,

APPELLANT

APPELLATE CASE NO. 2011-20366

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress identification testimony when the show-up identification procedure used was inherently unreliable and conducive to irreparable mistaken identification?

STATEMENT OF THE CASE

In October of 2010, the Berkeley County Grand Jury indicted Fishburne for 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 of 2011, the indictments were amended and the Berkeley County Grand Jury again indicted Fishburne for 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, 2011, Fishburne and his co-defendant, Douglas M. Thompson proceeded to jury trial before the Honorable Kristi L. Harrington. Attorneys Chad Shelton and David Schwacke represented Fishburne at trial. Attorneys David Aylor and Peter McCoy represented the co-defendant Thompson. Attorneys Ashley Cornwell and Bryan Alfaro prosecuted the case. The jury found both defendants guilty as charged. Judge Harrington sentenced Fishburne to 20 years concurrent for each charge. A timely notice of intent to appeal was filed on November 17, 2011. This appeal follows.

ARGUMENT

The trial judge erred in refusing to suppress identification testimony when the show-up identification procedure used was 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. 255, lines 20 – p. 256, lines 1-12). The three men forced Silva and Olivera inside the house. (R. p. 258, 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. 258, lines 10-12). Two of the three men forced Silva and Olivera upstairs. (R. p. 259, lines 1-13).

When Ms. Silva fled the townhouse, she ran next door to get help from her neighbor, Lucinea Rodriguez. (R. p. 503, lines 13 – p. 504, 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 Silva and a man holding Olivera in one bedroom, and then went into the other bedroom where the child was sleeping. (R. p. 502, lines 18 – p. 544, lines 1-2). The robbers fled when Ms. Rodriguez entered the child's bedroom. (R. p. 514, lines 15-22).

The police were called. The 911 operator testified that the caller described a robbery by two black males wearing red and white striped shirts. (R. p. 173, 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. 303-307). The deputy also learned that a laptop computer had been taken from the townhouse. (R. p. 305, 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. 308, lines 18-25). The deputy stopped to speak with the three individuals and one of them fled. (R. p. 309, lines 3-14). The deputy identified the two remaining individuals as appellant Fishburne and co-defendant Thompson. (R. p. 309, lines 22 – p. 310, lines 1-5). The deputy testified that Thompson was carrying the laptop. (R. p. 310, 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. 313, lines 2 – p. 314, 315, lines 1-21). According to the deputy, Silva and Olivera identified appellant and co-defendant as the robbers. (R. p. 315, lines 22 – p. 316, 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 – 215). After the hearing, counsel for co-defendant Thompson argued that the identification testimony should be suppressed as unduly suggestive. (R. pp. 195 – 204). Counsel for appellant Fishburne joined in the motion to suppress and made additional argument about the unreliability of the identification. (R. p. 204, lines 9 – 25). After the State argued, counsel for co-defendant responded again arguing that the identification testimony should be suppressed. (R. p. 211, lines 24 – p. 212, 213, lines 1-15). The trial judge denied the motion to suppress the identification testimony. (R. p. 213, lines 16 – p. 214, 215, 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. (R. p. 61, lines 17-25). The deputy admitted that he did not separate Silva and Olivera for purposes of making the identification. (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).

Silva testified at the Biggers hearing that when he saw the two individuals detained by the police he recognized the individual who choked Olivera but was unsure if the second individual was the man with the gun or the man who stayed downstairs by the door. (R. p. 155, 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. 159, lines 3-5; p. 169, 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. 157, lines 15-21). Both Silva and Olivera testified that in their opinion all African American males have similar facial features. (R. p. 149, lines 20-23; p. 170, lines 1-3).

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). There were no one hundred dollar bills or two dollar bills found on either appellant or the co-defendant. (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. 424, lines 19 – p. 425, lines 1-11). The gun was never recovered. (R. p. 425, lines 12-13). The third suspect was never apprehended. (R. p. 400, 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 an 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 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 showup 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. 214, 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. 214, lines 16 – p. 215, 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. 214, lines 2-5). Appellant renewed the objection to the identification testimony when Silva testified. (R. p. 263, 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. 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,



Kathrine H. Hudgins
Appellate Defender
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Columbia, South Carolina 29201
(803) 734-1343

ATTORNEY FOR APPELLANT

This 16th day of September, 2013.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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April 18, 2014

RECEIVED

The Honorable Mary P. Brown
PO Box 219
Moncks Corner SC 29461-0219

APR 21 2014

SC OFFICE OF
APPELLATE DEFENSE

REMITTITUR

Re: The State v. Clarence J. Fishburne
Lower Court Case No. 2011GS0801569, 2011GS0801661,
2011GS0801660, 2011GS0801568, 2011GS0801567
Appellate Case No. 2011-203366

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Jerry A. Kitchings
CLERK

cc: Kathrine Haggard Hudgins, Esquire
Mark Reynolds Farthing, Esquire

CLOSING LETTER SENT
ON 4/02/2014

Attorney initials RH

Assistant initials BR

**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.

Clarence J. Fishburne, Appellant.

Appellate Case No. 2011-203366

Appeal From Berkeley County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2014-UP-133
Submitted January 1, 2014 – Filed April 2, 2014

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, 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.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 05/15/14

C0511

FISHBOURN, CLARENCE - FBI # 550127CB3 SID# SC01058584 SCDC # 264287

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ...: LIEBER CORRECTIONAL INST.

SECURITY/CUST.: 3 MINIMUM IN

CURR INCARC SENT...: 20 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #...: [REDACTED]

DORM.....: WC0171A

RACE....:B SEX...:M

PROJ MAXOUT DATE: 08/03/2027

PROJ PAROLE DATE: 08/07/2027

EWC JOB...: BARBER

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 2F5 EEC LEVEL:

ASSIGNMENT...: WARD KEEPER WARD #5

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 35 DATE OF BIRTH...: [REDACTED]

PREVIOUS NUMBERS:

Y00264287

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE		
	YRS	MOS	DYS		START	V/NV	CATEGORY
BURGLARY-1ST DEGREE	20	0	0	BERKELEY	8/ 7/2010	V	4
KIDNAPPING	20	0	0	BERKELEY	8/ 7/2010	V	5
ARMED ROBBERY	20	0	0	BERKELEY	8/ 7/2010	V	4

PREVIOUS SCDC OFFENSES (COMPLETE)	SENTENCE			COUNTY	SENTENCE		
	YRS	MOS	DYS		START	V/NV	CATEGORY
COCAINE POSSESS	0	6	0	COLLETON	10/15/20	8 N	2
FRAUD INSUFF FUNDS CHECK	0	0	60	COLLETON	10/15/20	8 N	1
FRAUD INSUFF FUNDS CHECK	0	0	360	COLLETON	10/15/20	8 N	1
FRAUD INSUFF FUNDS CHECK	0	0	360	COLLETON	10/15/20	8 N	1

PRIOR COMMITMENTS OVER 90 DAYS:

10/14/ 3 *POSSESS PISTOL AFTER CONV

0 YRS 16 MOS 0 DYS

DETAINERS (HOLD, WANTED, NOTIFY):

NO DETAINERS

ESCAPES:

10/15/ 3 OTHER ESCAPE RELATED CODE NOT IN TABLE

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

2/28/ 5 FIGHTING WITHOUT A WEAPO

OTHER

NON-ASSAULTIVE DISCIPLINARIES:

4/12/13 POSSESSION OF CONTRABAND CONVICTED

ADMIN

8/23/ 5 INTERFERING WITH COUNT

OTHER

1/11/ 3 USE OBSCENE, VULGAR, PROFA

OTHER

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
8/ 7/12	LIEBER	INCARCERATED	ADMINISTRATIVE
8/ 7/12	KIRKLAND	INCARCERATED	MEDICAL
1/18/12	LIEBER	INCARCERATED	ADMINISTRATIVE
11/16/11	KIRKLAND	INCARCERATED	R&E PROCESSING
11/16/11	LIEBER	INCARCERATED	NEW ADMISSION
10/30/ 9	UNK	RELEASE	EXPIRATION OF SENTENCE
8/21/ 9	COASTAL	WORK-RELEASE	WORK PROGRAM
7/ 1/ 9	COASTAL	INCARCERATED	LABOR CREW
4/29/ 9	COASTAL	INCARCERATED	ADMINISTRATIVE
4/16/ 9	MANNING	INCARCERATED	ADMINISTRATIVE
4/16/ 9	CENTRAL OFFICE	INCARCERATED	MEDICAL
2/11/ 9	MANNING	INCARCERATED	ADMINISTRATIVE
1/21/ 9	MACDOUGALL CORR	INCARCERATED	ADMINISTRATIVE
12/ 4/ 8	KIRKLAND	INCARCERATED	R&E PROCESSING
12/ 4/ 8	LIEBER	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL

FISHBOURN, CLARENCE -	FBI # 550127CB3	SID# SC01058584	SCDC # 264287 (CONTINUE
LABOR CREW/WORK PROG	07/02/09 10/30/	9	RELEASED/PAROLED 2F5
LABOR CREW/WORK PROG	04/30/09 7/ 1/	9	INSTIT TRANSFER 2F5
LITTER CONTROL PROGR	02/12/09 4/29/	9	INSTIT TRANSFER 2F5
TIMEKEEPER	01/22/09 2/11/	9	INSTIT TRANSFER 2F5
WARDKEEPER ASSISTANT	01/04/08 10/15/	8	RELEASED/PAROLED 2F5
WARDKEEPER ASSISTANT	10/28/05 11/30/	5	RELEASED/PAROLED 2F5
FOOD SERVICE AIDE	07/08/02 1/31/	3	RELEASED/PAROLED 2F5
WARDKEEPER	09/21/00 3/ 5/	2	INSTIT TRANSFER 2F5
WARDKEEPER	07/20/00 9/15/	0	MEDICAL 2F5
CARPENTER HELPER	05/02/00 7/19/	0	INMATE REQUEST 2P5
FARM WORKER	03/07/00 4/28/	0	INSTIT TRANSFER 2F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON
LVL 2 - FULL TIME(NO EWC)	02/25/05	10/27/ 5	COMPLETED EDUC PROGRAM
LVL 2 - FULL TIME(NO EWC)	02/18/05	2/24/ 5	MI ELIGIBLE FOR LEVEL 2
LVL 2 - FULL TIME(NO EWC)	07/08/02	1/31/ 3	RELEASED/PAROLED
LVL 2 - FULL TIME(NO EWC)	09/21/00	3/ 5/ 2	INSTIT TRANSFER
LVL 2 - FULL TIME(NO EWC)	05/09/00	9/15/ 0	MEDICAL

***** END OF REPORT *****

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 05/15/14
 OMCOMITA RELEASE DATE SCREEN C051132
 SCDC# > 264287 LOC: LIEBER
 FISHBOURN, CLARENCE - SCDC CLASSIFICATION... VIOLENT
 OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY... N
 SEXUAL PREDATOR...: NOT APP
 DNA STATUS...: COMPLETED
 GPS REQUIREMENT...: N
 PREA DECISION...:
 CURRENT SENTENCE: 020-00-000 CONSECUTIVE SENTENCE ...: N
 020-00-000 CURRENT SENT START DATE: 08/07/2010
 PROJECTED COMPLETION DATES
 MAXOUT DATE: 08/03/2027 CURRENT EWC ..: 2 F 5
 YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
 INITIAL PAROLE DATE: 08/07/2027 NEXT PAROLE HEARING DATE: 08/07/2027

 TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
 TOTAL EARNED WORK CREDITS ..: 000485 LABOR CREW DISQ REASON:
 TOTAL EDUCATION CREDITS: 000000 CATEGORY 4 OR 5 OFFENSE
 TOTAL EXTRA EARNED CREDITS ..: 000 SUPERVISED REENTRY DATE...: 00/00/00
 TOTAL SERVICE TIME EARNED ...: 001358 ISS.....:

PFKEYS: 5:HISTORY OF DATE CHANGES

4-© 1 Sess-1 167.7.50.33 SCDC1625 3/11