

VOLUME II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Grace Gilchrist Knie, Circuit Court Judge

RICHARD TODD CULBERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000371

APPENDIX

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JORDAN COX
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

RECEIVED
OCT 02 2018
S.C. SUPREME COURT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JUNE 16-17 2014.....	1
TRIAL TRANSCRIPT DATED JUNE 18, 2014	294
FINAL BRIEF OF APPELLANT	442
FINAL BRIEF OF RESPONDENT	455
<u>STATE V. CULBERSON</u> , 2015-UP-546 (S.C. CT. APP. FILED DEC. 2, 2015)	471
REMITTITUR	473
APPLICATION FOR POST-CONVICTION RELIEF	474
RETURN.....	486
SUPPLEMENTAL APPLICATION	492
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPT. 19, 2017.....	495
ORDER OF DISMISSAL WITH PREJUDICE	649
MOTION TO ALTER OR AMEND THE JUDGMENT	677
RETURN TO APPLICANT’S MOTION TO ALTER OR AMEND THE JUDGMENT	680
ORDER DENYING MOTION FOR RECONSIDERATION	691
INDICTMENTS AND SENTENCE SHEETS.....	692

1 MS. ROSS: Yes, the State v. Prather is a recent case
2 filed September 6th this -- of this year, and it goes to
3 the reply, and Vasquez is 380 -- excuse me. 698 S.E.2d 561.
4 That's a 2010 case and that goes sort of generally to some
5 issues in closing.

6 THE COURT: Yes, ma'am.

7 MS. ROSS: All right. At this point, we will call
8 Richard Todd Culberson to the stand.

9 THE COURT: Mr. Culberson?

10 THE WITNESS: Yes, ma'am.

11 THE COURT: Sir, good morning. You just come on up
12 here. The witness stand is over here and I'm gonna swear
13 you in.

14 All right?

15 THE WITNESS: All right.

16 THE COURT: And there's no T in Culberson?

17 THE WITNESS: No, ma'am.

18 THE COURT: Culberson?

19 THE WITNESS: Culberson, yes, ma'am.

20 THE COURT: Okay. All right. Sir, if you'll raise
21 your right-hand for me.

22 RICHARD TODD CULBERSON, being first
23 duly sworn, testified as follows:

24 THE COURT: Okay. Just have a seat and make yourself
25 comfortable.

Richard Culberson - Direct examination
by MS. ROSS

1 Okay. Yes, ma'am.

2 DIRECT EXAMINATION

3 BY MS. ROSS:

4 Q Okay. Mr. Culberson, I'm gonna go through some just
5 issues on your transcript, but, first, just to start, you
6 understand that, if, if you prevail at PCR, that the outcome
7 will be you being put back in the position you were in
8 before that?

9 A Yes, ma'am.

10 Q And how do you wish to proceed?

11 A Carry on.

12 Q All right. Now, you've alleged ineffective assistance
13 of counsel, and I'll start with something that you pointed
14 out on Page 96, Line 23 of the transcript.

15 Do you have a copy of that transcript, sir?

16 A It's in my stuff. I know it. I was there.

17 Q Okay.

18 THE COURT: And, and, ma'am, you're welcome to hand him
19 a copy.

20 MS. ROSS: I will. Okay.

21 THE WITNESS: You can just ask me anything. I've been
22 honest through the whole thing.

23 THE COURT: And what page was that?

24 MS. ROSS: It is 96, Line 23 in the opening.

25 THE COURT: Okay.

Richard Culberson - Direct examination
by MS. ROSS

1 MS. ROSS: And, since they're two transcripts, it can
2 be a little confusing on this as well.

3 Is this the, the larger one?

4 I'm gonna approach and hand that to you.

5 What was your objection to your lawyer's comments in
6 opening?

7 A Oh, about -- he says something like, by the time I'm
8 through here today, there's no way you'll be able to find my
9 defendant not guilty.

10 Q Okay.

11 A Something to that effect, and I couldn't believe it
12 from the start.

13 Q Do you recall hearing that in the courtroom?

14 A Yes, ma'am. And then he said guilty, guilty, and I'm
15 like what is going on.

16 Q Okay.

17 A This how it's starting out.

18 Q And then let's talk -- let's move on to -- well, just
19 generally, how did you feel that the trial, the trial went?

20 A I was shocked. I was like golly. The jury's hearing
21 this. This should have been stopped right then.

22 Q All right. Now, let's talk -- did you have an alibi
23 witness---

24 A Yes, ma'am.

25 Q ---in your case?

Richard Culberson - Direct examination
by MS. Ross

1 A She, she, she was with me the, the night before, the
2 whole night, and all the morning until I run from the
3 police.

4 Q And had you told your lawyer about that alibi witness?

5 A Yes, ma'am, and I told her about a lot -- I told him
6 about a lot of stuff.

7 Q Do you recall her name?

8 A Heather Marie Holmstrom.

9 Q And where was she when your trial started?

10 A Mr. Shealy said she was in the county jail --

11 Q And---

12 A -- for some petty charge. I don't know what the charge
13 was or any -- but he had been talking -- he told me he had
14 been talking to her and she was talking good and
15 everything's gonna be okay.

16 Q And did she end up testifying at your trial?

17 A No, I was -- no, ma'am.

18 Q Do you recall -- did you know whether she was under
19 subpoena or not?

20 A Not until I heard that he had took -- I didn't know
21 what a subpoena was really or anything like that, but I mean
22 I -- he, he had took it off before I even knew what was
23 going on. So, I really had no say so -- I mean the Judge
24 wanted me to stand up and say this and that, but he had
25 done -- he had already took the subpoena off before I even

Richard Culberson - Direct examination
by Ms. Ross

1 stood up to say anything. It was already a done deal
2 before -- why even have me stand up?

3 Q So, can I refer you to Page 78 of the Volume II, which
4 is the thinner volume of your transcript?

5 A Yes, ma'am.

6 Volume II.

7 Q So --.

8 A Yeah. See---

9 Q What's going on there?

10 A Well, see, I'm not -- I been honest through the whole
11 thing, and I might as well -- can I just -- this thing fell
12 off.

13 Q Okay. Here.

14 A But I've been a petty criminal all my life. I'm gonna
15 go ahead and get, get that out in the open, and they had to
16 be some reason why I run from the police, and I kept telling
17 Mr. Shealy, you know you got to -- I don't know, but --.

18 Q Well, how about---

19 A I've been in---

20 Q Go ahead.

21 A ---in front of Judge's a good bit. So, like when you
22 going to the little, the little Court thing out here, the
23 men sit at the back waiting to go to Court and the women are
24 up front. Well, I've never been to a jury trial because
25 I've never been not guilty, and I've had a little to do with

Richard Culberson - Direct examination
by Ms. Ross

1 whatever they was -- they said I done. So, I took the plea,
2 but I had nothing to do with none of this. So, I never been
3 to a jury trial.

4 So, the Monday, Heather's not there where the girls are
5 sitting, and I don't really think much about it cause all we
6 done that day was pick a jury, and this -- but the Tuesday,
7 when, when it was suppose to really get started up, Heather
8 wasn't in there. Well, Matthew Shealy didn't come to the
9 little room to talk to me, and, when I come out here, he was
10 sitting at the table.

11 And the first thing I said was where's Heather. He
12 said oh, they let her out at 8:30 this morning. I'm like do
13 what? How can they do that, you know? She's got -- she's
14 all I got. She's -- I mean she knows I didn't do it.
15 Heather's the -- Heather knows I didn't do it.

16 Q Okay. And is that why you wanted her there?

17 A Yes, ma'am.

18 Q Now, on 78 and 79, it plays out that they did finally
19 locate her, correct?

20 A I told -- I've cooperated 100 percent with the
21 detectives. When all this first started, I had a probation
22 violation. That's why I run from the police when they come
23 up questioning me about where I'd been, and I'm -- I'm
24 sorry. I apologize for getting off track.

25 Q No, you---

Richard Culberson - Direct examination
by Ms. Ross

1 A It's---

2 Q I understand this is emotional for you.

3 A It's very emotional. Yes, ma'am, it is.

4 Q Well, going back to Pages 78 and 79, basically Ms.
5 Holmstrom is located?

6 A Yes, ma'am. Oh, yeah, there you go.

7 Q But she's drunk, correct?

8 A Yes, ma'am, thank you. Yeah. So, like Matthew Shealy
9 says, oh, yeah, she got out of jail this morning about 8:30.
10 Do you have any idea -- I said she's gonna be at the library
11 or the soup kitchen cause we go to the library and get on
12 computer, you know, and check our Facebook, whatever. But
13 that's where we hung out at, the library or the soup
14 kitchen, and he apparently found her at the soup kitchen,
15 and she -- he smelled alcohol on her and he -- she'd been
16 drinking, and --.

17 Q Now, at that point---

18 A I should of said yeah, bring her in, but I didn't---

19 Q You're asked---

20 A I didn't want her in there drunk. I didn't want her in
21 there drunk and talking crazy or something.

22 Q So, when Judge Couch asked you do you want her to
23 testify, your reply -- do you recall your reply?

24 A I said not drunk.

25 Q Okay. And, at that point, did you think you were

Richard Culberson - Direct examination
by Ms. Ross

1 waiving your right---

2 A No, ma'am.

3 Q ---to have your alibi defense---

4 A I thought they was gonna sober her up or something
5 cause she's all I, she's all I had, and now that's over
6 with. She's back in Texas and --.

7 Q Okay. And when you stated not drunk, you did not think
8 that that was indicating a waiver of your alibi witness?

9 A No, I didn't think I was waiving. I thought they was
10 gonna, you know, sober her up or something. I -- they could
11 of got her for public drunk. They could of arrested her
12 right then for public drunk.

13 Q All right. Now, I'm gonna move on about that.

14 A Yes, ma'am.

15 Q Let's talk about you alleged failure to investigate.

16 Can you explain what your lawyer should of
17 investigated?

18 A He should of come and talked to me a lot more often
19 than he did because I was in there for 19-months, and he
20 only come talk to me like three times when the trial was --
21 and that was just for ten minutes, and all he wanted to talk
22 about was how far it was from the bus stop to the Reidville
23 Road place, and the thing about Ricky. I wanted Ricky there
24 cause Ricky knowed that I didn't have no plans -- okay.
25 Like they said oh, he run to his daddy's house and this and

Richard Culberson - Direct examination
by Ms. Ross

1 that.

2 Q Let's talk about who Ricky was. Just the gentleman---

3 A Ricky was the guy that worked at Vic Bailey that I went
4 over there and I borrowed \$2.50 off of. I had a few
5 dollars, but we was gonna go out -- Heather and I was gonna
6 go out to the West Gate Mall area, and, and Ricky was
7 looking out the little door that Vic Bailey hadn't opened
8 yet. He was like an oil changer guy, and he washed cars and
9 stuff, but he was -- he was a friend of my dad's really more
10 than me, but I borrowed money from him before.

11 And he was standing in the door looking at us, and I --
12 that's what gave me the idea to go over there and borrow two
13 dollars -- a couple of dollars is what I said, and he said,
14 he said you better call your daddy because he's going in for
15 surgery. And so I had a cell phone with some minutes on it,
16 but they was a old timey black phone sitting there at the
17 little desk in, in the little area, and I said can I use
18 your phone cause I was wanting to save some minutes, you
19 know.

20 But, anyway, he said yeah. So, I called my dad and he
21 said where you been, boy. He said you got a check down
22 here. I said oh, yeah. He said yeah. So, I said well,
23 look, I got a girl with me and we gonna catch the bus down
24 there and walk cause the, cause the bus -- the last bus stop
25 to my dad's house is probably a mile and a half to where he

Richard Culberson - Direct examination
by Ms. Ross

1 lives at. I said I got a girl with me. He said okay, call
2 me before you get here. I said I will.

3 So, the plans changed right then. Ricky knows the
4 plans changed. I go back across the road happy cause I got
5 a check for like \$94.00, and I tell Heather what the change
6 of plans is, and we sitting there, you know, waiting on the
7 bus, and a police pulls up behind me, and then another
8 police. And I tell Heather, I said look, I got these
9 warrants for probation violation. I'm gonna run. I was
10 wanting to go get that \$94.00. I know I was going to jail
11 cause they'd been looking for me for the probation violation
12 for a year. I couldn't even go to the downtown area to the
13 soup kitchen and all to eat because I had the warrant.

14 So, he knows that it wasn't no big secret plan to run
15 down to my dad's house and hide like that made it -- make
16 the jury believe it was something -- some kind I was hiding
17 out down there like Bin Laden or something.

18 Q All right. How about do -- you also argued in your
19 application, you talked about failed -- failure to pursue a
20 mistake in ID.

21 A Mistaken---

22 Q Is that an issue or I'm just having my notes that you
23 also argued about a puffy coat, failure to investigate that?

24 A Yeah. See, I mean they's all -- I didn't even own any
25 tennis shoes. I mean -- okay. I was -- I'm gonna go ahead

Richard Culberson - Direct examination
by MS. Ross

1 and tell you. This might not be good, but I got to be
2 honest. I've been in trouble for public drunk, this and
3 that, and I always just take the plea, and go ahead and do
4 what I got to do.

5 Yeah, the -- I didn't have any -- nothing matched.
6 Nothing even made sense, and when I got my motion of
7 discovery, I couldn't even figured out how they arrested me
8 for this crazy stuff, and like we had a kiosk, and I could
9 write Matthew Shealy and he'd write me back every blue moon.
10 And everybody wanted Matthew Shealy. He was the best thing
11 going, and I thought well, okay, it's gonna be all right,
12 but he didn't want to listen. He didn't want to -- I should
13 of took the stand.

14 I had to sit there and listen to them people talk
15 all -- Barry Barnette talked -- look at him. He's probably
16 shoplifting. QT is got the best surveillance system. When
17 I got arrested, QT had the best -- they was a new gas
18 station thing in the area, but they had facial recognition
19 cameras and all this. But they wanted to show one picture
20 of me coming in and taking my backpack off, like you suppose
21 to when you go into the QT Store, they want you to take -- I
22 was homeless and they wanted you to take your backpack off
23 and lay it by the door and that's -- I -- that's what I
24 done.

25 And they had that one camera when I -- and my shoulders

Richard Culberson - Direct examination
by Ms. Ross

1 were hurting. I looked like a monster. And I'm like darn,
2 you know, if they can do this, they can show me and Heather
3 coming from where we come. You know, where we did come from
4 instead of making up all this crazy stuff. They could of
5 showed the sidewalk and me and Heather coming down the
6 sidewalk from Scruggs Wrecker Service where we slept that
7 night, and stopping at the store to buy the, the malt liquor
8 beer that the QT didn't sell.

9 And we come in the QT to use the restroom. Heather
10 went on to the restroom, and they wanted to show me looking
11 like a monster, and then go on back -- they want to show
12 that one shot instead of showing -- and they claimed the
13 police questioned me at the QT. They did not question me at
14 the QT. That is a lie and I don't know why they lied about
15 all the stuff that -- little lies add up.

16 I've not told not one lie at none of this. I've
17 cooperated 100 percent and they've got me here for something
18 I didn't do.

19 Q Okay.

20 A If I had anything to do with it, I'm not a -- I would
21 of took a plea cause I didn't do nothing.

22 Q All right. Let me -- so, you're saying you wish you
23 could of testified and rebut some of it?

24 A I should of.

25 Q Okay. We got that.

Richard Culberson - Direct examination
by Ms. Ross

1 A Look, Matthew Shealy and some people I talked to at the
2 jail, Matthew Shealy told me not to. well, when I come back
3 the first -- the trial started on Monday. When I come back,
4 I said look, guys, Matthew Shealy tells me not to take the
5 stand. The Judge is wanting me to know, take the stand or
6 not, and my friend said you always listen to your lawyer or
7 your -- and your doctor. I said that's it. I ain't taking
8 the stand.

9 Q Okay. So, you---

10 A Since Matthew Shealy was my lawyer.

11 Q And he advised you not to?

12 A Yes, ma'am.

13 Q All right. I want to turn back to the QT issue.

14 A Yes, ma'am.

15 Q Page 103.

16 A Why they said that the -- the police did not---

17 Q Hold on.

18 A ---question me at the QT.

19 Q Let me just ask you a question.

20 A Yes, ma'am.

21 Q On Page 103, Line 6, this is Mr. Barnette's closing.

22 Can you read what he's saying there in his closing?

23 A Mr. Barnette. And you seen the video. Yeah, they
24 showed one video---

25 Q Okay.

Richard Culberson - Direct examination
by Ms. Ross

1 A ---of me like a monster.

2 Q Just can you read what it says right there?

3 A Yes, ma'am. And you seen the video, and please look at
4 it again. He goes in and he's looking through -- he's

5 looking through the little store for whatever reasons, come
6 back checking, I don't know. Checking cameras or whatever.

7 I know QT was camera'ed down, and I -- anyway. Yes, ma'am.

8 Q So, did your attorney object when he said that?

9 A I don't remember---

10 Q Yes or no.

11 A I don't think, no.

12 Q Okay. Does it say an objection in there on Page 103---

13 A No, ma'am.

14 Q ---Line---

15 A Mr. Barnette just keeps talking about --.

16 Q Now, were you on trial for shoplifting?

17 A No, ma'am, I wasn't---

18 Q Were you charged with the shoplifting?

19 A I wouldn't pick a bubblegum up. I had so many property
20 crimes I couldn't, you know. I was looking at---

21 Q But let me ask you a question.

22 Were you on trial for shoplifting?

23 A No, ma'am.

24 Q Now, let's go -- I have another point that I just
25 wanted to get out.

Richard Culberson - Direct examination
by MS. Ross

1 A What about the -- see, I was, I was under -- I hate to
2 interrupt.

3 Q Go ahead.

4 A I was under the impression that DNA was gonna save me.
5 When I read in the newspaper the woman fought the guy off,
6 okay, that's it. She's -- you know, she's got DNA. Well,
7 when -- they took -- the only thing the police got right was
8 the gray hoodie. I had a gray hoodie on.

9 But they took that gray hoodie for DNA evidence. They
10 took my toboggan for DNA evidence. They took a blue jean
11 jacket of mine for DNA evidence. And they -- and she kept
12 on saying tennis shoes and blue jeans. That's not what I
13 had, and -- well, they took her clothes too.

14 They took -- she was a nurse and they had -- she had a
15 scrub -- they -- apparently they took some scrubs, a top
16 scrub, and a bottom scrub, and a suede coat. I said okay.
17 She's got DNA under her fingernails. But when the DNA come
18 back or when we went to trial -- well, when the DNA come
19 back, they got unknown female DNA off of a screwdriver
20 that -- I had a pocketknife like that right there.

21 But, anyway -- well, when it went to trial, she had
22 gloves on. She drove from Lyman -- what it read to me, she
23 drove from Lyman Lake in her new Jeep Liberty, that's what
24 kind of car it said she had, all the way to where she worked
25 at. It's a good little -- bit of little ways, with gloves

Richard Culberson - Direct examination
by Ms. Ross

1 on and got out, but the gloves wasn't in the DNA evidence.
2 That should of been the first thing they put in DNA evidence
3 was the gloves that she supposedly had on.

4 Q And that wasn't -- and your lawyer didn't look into
5 that or investigate that?

6 A I just seen it when I started thinking about stuff.

7 Q And he didn't argue it to the jury?

8 A No, I don't recall any of -- no.

9 Q Now---

10 A But see she said I had gloves on whenever, you know --
11 well --.

12 Q Go ahead.

13 A My gloves were Pickens Roofing. I didn't carry my
14 gloves off the job sites. I didn't want to lose them.

15 Q Okay. Now, going on, was there anything else?

16 You talked -- I just have my notes where there were
17 issues that you'd mentioned to me. There was an issue about
18 the teeth that you thought your lawyer should of---

19 A Yeah.

20 Q ---brought up.

21 A They thought -- see, like when you get arrested for
22 public drunk or petty larceny, whatever, you got like a
23 mugshot. They take your mugshot, and I'm always -- see,
24 they put it in a little paper called Jail Birds or
25 something, and they -- you know, all these people see it.

Richard Culberson - Direct examination
by Ms. Ross

1 well, I'm not gonna be there smiling, and I think -- I
2 don't know why they done this, but in all my mugshot
3 pictures, I'm -- I have my mouth closed. So, the way I
4 think, just because I'm a, you know, I was 46 then, just
5 because I was a 46-year old homeless man, they figured I had
6 very bad teeth, but I've, I've took care of my teeth, and I
7 used a whitening tooth -- my teeth looked good, I think.
8 That's my opinion.

9 They wasn't broken or cracked or busted out and all
10 like they claiming, and I, and I had a goatee down in here,
11 and it said few days facial hair. I did not have no where
12 near a few days -- this is, this is a few days facial hair.
13 I had a goatee down to here like a -- and a thick mustache
14 and everything, un, untrimmed. It was nasty looking.

15 Q So, do you feel your lawyer didn't bring out the
16 differences between the description of the bad teeth and
17 everything and your actual physical appearance, appearance?

18 A He said it like it looked -- I mean Barry Barnette was
19 jumping up and down and hollering real loud and everything,
20 and Matthew Shealy was I don't know, you know, and I was
21 just shocked, you know, cause people told me he was the best
22 thing going.

23 Q Okay. You also, in my notes reflect, we were talking
24 about there was a news story with -- about a puffy coat that
25 was never in your discovery.

Richard Culberson - Direct examination
by Ms. Ross

1 A Yeah, I mean---

2 Q What was that issue?

3 A I mean -- yeah, the, the -- I was wearing the puffy
4 coat when I come out of the Sheriff's -- the picture I seen
5 of me in the paper coming out of the Sheriff's Office with
6 my puffy coat on, and, on the news that night, I was on the
7 news the very same night -- I stayed in the Sheriff's Office
8 all day taking lie detector tests, giving DNA, telling them
9 people every step I made from, from the time I woke up to
10 the time, you know, they come and arrested me at my dad's
11 house. I told them every -- I did not tell not one lie.

12 Q All right.

13 A Never.

14 Q And what was the result?

15 Did you fail the lie detector test?

16 A It come -- see, it come back inconclusive. I was told,
17 years ago, don't even take a lie detector test because they
18 get you nervous and upset, but, you know, I didn't do it. I
19 didn't do it, I didn't do it. So, here I go and they asked
20 me five questions five different times. And the---

21 Q Now---

22 A And the, the last set of questions the guy was gonna
23 ask me---

24 MS. GIOVANOLI: Your Honor, I'm gonna object at this
25 point. The lie detector wasn't part of this trial or

Richard Culberson - Direct examination
by Ms. Ross

1 entered into evidence. There's been no allegation against
2 counsel with regard to a lie detector test.

3 THE COURT: Yes, ma'am, Ms. Ross.

4 MS. ROSS: Judge, we just argue that possibly the
5 giving of private, independent lie detector test may have
6 changed the outcome of this, this trial, and this
7 proceeding. While lie detector tests are inadmissible in
8 Court, having passed one could of changed that the doubt---

9 THE COURT: I'll allow it, yes, ma'am.

10 Q Now, did your private attorney hire a private person to
11 give a lie detector test?

12 A No, ma'am.

13 Q So, the one that was inconclusive, inconclusive was the
14 one administered by the State?

15 A Yeah, he looked like---

16 Q The police?

17 A Yes, he, he looked like Doctor Phil.

18 Q Okay. But I'm not asking you that.

19 was the one that was given to you one administered by
20 the police?

21 A Yeah.

22 Q And---

23 A And I took it honestly.

24 Q And this was after your picture was already out there
25 as the perpetrator of this crime?

Richard Culberson - Direct examination
by MS. ROSS

1 A Yes, ma'am.

2 Q All on the news and everywhere?

3 A No. No, ma'am, let me back up now.

4 Q Okay.

5 A No, they gave it to me the day I was at the -- okay. I
6 was at -- they got me down at my dad's house like, I
7 believe, eleven or twelve o'clock, and I stayed there at the
8 sheriff's -- they took me to the Sheriff's Office, and---

9 MS. GIOVANOLI: One second. I'm gonna object to
10 relevance. The issue---

11 MS. ROSS: I think we've got enough out there, Judge.
12 I---

13 THE COURT: Thank you.

14 MS. ROSS: I'll move on.

15 THE COURT: Yes, ma'am.

16 Q Now, lastly in my notes I have some talk about that it
17 looks like that Appellate Counsel failed to address the
18 Judge overruling an objection to the solicitor bolstering
19 his witness in the cross of your expert with facts not in
20 evidence, and I have Page -- Volume II, Page 35.

21 Do you recall anything about that?

22 A It's like some of her co-workers come in saying what
23 she told them and all this.

24 Q Well, that's in rebuttable, and I'm gonna ask the
25 attorney about that, but on Page 35---

Richard Culberson - Direct examination
by Ms. Ross

1 A 35?

2 Q ---you have that there's an eye witness expert on the
3 stand, correct?

4 Do you recall that from the trial?

5 A The expert witness?

6 Q Yes.

7 A Yes, ma'am.

8 Q Okay. Now, what did Mr. Barnette start asking that
9 expert witness about?

10 A The -- so, Mr. Barnette's the question?

11 Q Uh-huh. (Affirmative).

12 A Okay. Do you know she was a nurse for 30 years, and
13 the answer was I knew she was a nurse, yes.

14 And the question was a nurse that would, when people
15 come in, they have to evaluate, look, check the person for
16 their temperature, eyes, and things like that, and the --.

17 Q Go on.

18 A In her job, that she does that, and the answer is no
19 response.

20 And the question, again, was wouldn't that be correct,
21 a nurse -- I know you've been examined by a nurse. A nurse
22 has to check you out and access you and so forth, right? I
23 mean the answer is right.

24 And the question was and that's something that she did
25 for 30 years. Did you know that? And the answer was I did

Richard Culberson - Direct examination
by MS. ROSS

1 know.

2 Thirty years.

3 No.

4 And the question okay. Did you know that she had
5 counseling for two months after this where she had to go
6 through the events and talk to counselors about this? Did
7 you know that?

8 Mr. Shealy objected, and the Court overruled, and the
9 answer was no. And then---

10 Q And then, then they went on about nursing experience
11 and experience of the victim?

12 A Yeah. Well, she knows a few days facial hair from a
13 goatee.

14 Q Right.

15 But this was the eye witness expert?

16 A Oh, well.

17 Q Did she know the victim at all?

18 would she have any ability to know about the alleged
19 victim in this case?

20 A It don't seem like.

21 Q Okay. Now, I want to just turn you back to compare to
22 Page 143 of Volume I, Line 3 through 6.

23 A Line 3 through 6?

24 Q And---

25 A It was well making -- okay.

Richard Culberson - Direct examination
by Ms. Ross

1 Q Go ahead.

2 A It was well making sure---

3 Q well, let's start with Line 1.

4 A Okay. Line 1, the question. Okay. And what was your
5 duties there at the office there?

6 It was well making sure that the patients flow well,
7 taking calls for the patients if I had to, helping to order
8 things and equipment. You know, making sure that they were
9 maintained.

10 Q And that was the testimony of the victim, correct, the
11 woman who was attacked?

12 A Yes, ma'am, the victim.

13 Q Now, does that have anything to do with evaluating
14 patients, looking at them, the, the questioning of your eye
15 witness expert?

16 A Ordering, ordering, I guess, rubber gloves or whatever.
17 I don't really know.

18 Q All right. And was that argued---

19 A Ordering equipment. That's what it said.

20 Q So, that's very -- the testimony of what the victim did
21 is very different from what Mr. -- the solicitor was
22 questioning---

23 A Yeah, it's---

24 Q ---the expert about, correct?

25 A Yes, ma'am.

Richard Culberson - Direct examination
by Ms. Ross

1 Q Okay. And that wasn't argued in your appeal, was it?

2 A No, ma'am.

3 Q Okay. Now, this is all the issues that I had
4 specifically intended to discuss with you to bring out.

5 Are there any others that go to your application that
6 your lawyer was ineffective in your trial?

7 A I just---

8 Q How many times did he meet with you?

9 Do you recall specifically?

10 A About three times.

11 Q Okay.

12 A After 19 months, it seemed like about three times.

13 Well, not counting the -- what's the little thing to see
14 after like 14 days it -- like a preliminary hearing. I saw
15 him at the preliminary hearing, and then I didn't see him
16 again---

17 Q So, it was more than three, but not a huge amount more
18 than three?

19 A No, ma'am.

20 Q Okay.

21 A No, ma'am, I'd write him on the kiosk. He wouldn't
22 hardly ever write back.

23 Q Okay.

24 A And I wanted him to take -- to come take pictures of my
25 teeth because, you know, they was fighting and stuff that

Richard Culberson - Direct examination
by MS. ROSS

1 goes on in the jail, and I didn't want to get my teeth
2 messed up, you know, and he wouldn't come take pictures of
3 my teeth. It's all in the kiosk.

4 Q Now, did you believe that has he -- if he had done all
5 these things and investigated your case and objected---

6 A If he'd of just talked up louder and been a little more
7 forceful and, and told me to take the stand instead of have
8 them make up all this stuff about me that wasn't true.

9 Q What do you think an alibi witness would of done?

10 A Alibi -- I mean she's just an old drunk like me, but
11 it's the truth. If she got up there and told the truth,
12 it's a rap.

13 Q And---

14 A I mean I understand the woman got attacked by somebody,
15 but it wasn't me.

16 Q All right. And do you believe that would of changed
17 the outcome of your trial?

18 A Heather knows that I didn't do it. Heather was with me
19 from the night before until I ran from the police. That's
20 the last time I saw Heather, when I ran from the police.

21 Q Okay. Now, briefly, just for the record, and you, you
22 ran from the police and went to your dad's house, picked up
23 the check, we've got all that.

24 why did you get your hair cut?

25 A Cause I knowed I was going to jail for probation

Richard Culberson - Direct examination
by Ms. Ross

1 violation. I knowed they had me. I was wanting to get my
2 hair cut cause they ain't no, they ain't no free haircuts at
3 the county jail. You got to pay like \$8.00. I wanted to
4 get my hair cut, go get that check cashed. Tell you the
5 truth, get me a couple of beers, and I'd probably turned
6 myself in cause I was tired of running from the probation
7 violation. I'd been running for a year.

8 Q All right.

9 A I couldn't rest.

10 Q Okay. Well, unless you have anything else, I have no
11 further questions.

12 A That's it.

13 THE COURT: Okay. Thank you. No, sir, you need to
14 answer the questions of the Attorney General.

15 THE WITNESS: Oh, okay.

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION

18 BY MS. GIOVANOLI:

19 Q Do you remember at your trial whenever Heather
20 Holmstrom didn't show up to testify in your behalf and your
21 lawyer asked for more time from the Judge so that he could
22 locate her?

23 A He wanted to go to the soup kitchen and---

24 Q Did he ask for more time---

25 A ---see if he could find her.

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 Q ---so that he could locate her?

2 A He asked to go look for her, yes, he did.

3 Q Okay. And did he go locate her with his investigator?

4 A He said he did.

5 Q Okay. Did he find her?

6 A Said he did.

7 Q Okay. And where did he find her?

8 A He said he found her at the soup kitchen.

9 Q Okay. And you're aware that she was intoxicated---

10 A That's what he said.

11 Q ---when he found her?

12 Are you contesting that she was actually not at the
13 soup kitchen and she wasn't intoxicated?

14 A No, ma'am.

15 Q Okay. You keep responding that that's what he said.

16 So---

17 A I didn't see it.

18 Q Are you aware she was with another man who was also
19 very hostile?

20 A No, ma'am.

21 Q Okay. So, you weren't told anything about that?

22 A No, ma'am.

23 Q Okay. Did Mr. Shealy explain to you that he didn't
24 want -- in his opinion, it was not a prudent move to put her
25 on the stand intoxicated?

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 A No, ma'am.

2 Q He didn't say that?

3 A Hu huh. (Negative).

4 Q Okay.

5 A Next thing I know, after I heard she'd been drinking, I
6 was standing up and the judge was asking me---

7 Q Yes.

8 So, you said that?

9 You said that you didn't want her to be testifying
10 drunk?

11 A Not drunk, no, ma'am.

12 Q Okay. But your allegation today is that she should of
13 been put in the drunk tank?

14 A She should of been arrested for public drunk, if
15 anything else, and brought here for four hours and sobered
16 up and brought to my trial. That's what should of happened
17 I feel.

18 Q And you feel that if she -- if counsel had requested
19 that she be arrested and held in the drunk tank that she
20 would testify favorably for you?

21 A Ah, that's---

22 Q Okay. Heather was your friend, right, you said?

23 A Not -- she's just a -- she was a -- I wouldn't call her
24 a friend.

25 Q What would you call her?

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 A Cause -- just an acquaintance. We was drinking
2 buddies, whatever you want to call it.

3 Q So, are your drinking buddies your friends?

4 A Yeah.

5 Q Okay. And you realize that---

6 A Yeah, I'd give her a cigarette if she asked for one.
7 Put it that way.

8 Q And Mr. Shealy subpoenaed her to be at your trial?

9 A (Witness nods affirmatively.)

10 Q So, despite her being your friend and him (sic) being
11 under subpoena, she still didn't show up to testify on your
12 behalf?

13 A Right.

14 Q Is that right?

15 A Yes. Yeah, you're right cause she seen what they done
16 to me, and she didn't want it to happen to her. She knows I
17 didn't do it.

18 Q But she didn't attack anyone, did she?

19 A I don't know what she -- if she has before or whatever.
20 I don't know nothing much about her. Just --.

21 Q You also said, on direct testimony, that you didn't
22 want her there testifying drunk cause she might testify to
23 something crazy.

24 To what were you referring?

25 What would -- what could she have testified to that was

Richard Culberson - Cross-examination
by Ms. Giovanoli

- 1 crazy?
- 2 A There's no telling.
- 3 Q That maybe you weren't with her at the time of the
- 4 attack?
- 5 A No. Well, as long as she told the truth, everything
- 6 would be fine. That's all I know.
- 7 Q You also testified on direct that you asked for money
- 8 from Ricky that day?
- 9 A Yes, ma'am.
- 10 Q So, you were in need of money that day?
- 11 A Yeah, every day.
- 12 Q Okay. Is that, is that why you mugged the victim?
- 13 A Do what?
- 14 Q Is that why you mugged the victim because you needed
- 15 money?
- 16 A I didn't mug anyone.
- 17 Q So, when you talked to your dad on, I guess, the phone
- 18 at Vic Bailey's---
- 19 A Yes.
- 20 Q ---that was the first time you had talked to him in two
- 21 years?
- 22 A No, ma'am.
- 23 Q Oh, didn't you tell your lawyer that you hadn't seen
- 24 your parents for two years?
- 25 A I don't feel like it was that long.

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 Q So, you didn't tell your lawyer that you hadn't seen
2 your family for two years?

3 A Don't seem like that long. I talked to him on the
4 phone. I probably not -- hadn't saw him in two years, but I
5 talked to him on the phone, and I, I wrote my step-mom on
6 Facebook. Me and my step-mom were friends on Facebook, but
7 I couldn't go to the library cause the probation violation
8 warrant. So, I hadn't been getting on the computer.

9 Q So, you're saying it wasn't quite that long.
10 If it wasn't two years, how long had it been since you
11 had---

12 A I don't know.

13 Q Well, can you approximate?

14 A (Witness nods negatively.)

15 I mean I talked to my dad at least once a month on the
16 phone.

17 Q How long had it been since you had gone over to his
18 house?

19 A I have no idea. It could of been two years. Time
20 flies.

21 Q So, you hadn't seen him in two years and you went over
22 there for a haircut that day?

23 A No, I went over there to get a check.

24 Q Okay. But you got a haircut while you were there?

25 A I did, cause the police was after me.

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 Q Right.

2 Okay.

3 A But when I went over there to get the check, the police
4 wasn't after me. I probably got a haircut anyway cause I
5 needed one, and I -- she'd of done it for free. My step-mom
6 gave me plenty of haircuts.

7 Q What do you mean the police weren't after you when you
8 got the haircut?

9 A No.

10 Q Wasn't there a warrant?

11 A No, the police wasn't after me when I was going -- when
12 I decided to go get the check.

13 Q But you said earlier that you knew you had a warrant
14 for your probation violation and they were after you.

15 A I mean when I come back across the road from Vic
16 Bailey, the police pulled up behind me, and that's when I
17 run. When I decided to go -- when, when my dad told me I
18 had a check, I mean the police wasn't dead after me. You
19 know, yeah, I had a warrant and they were looking for me,
20 but not -- see, you trying to make it sound like --.

21 Q I'm sorry. I'm not trying to make it sound like
22 anything, but you testified that you knew that there was a
23 warrant out for your arrest.

24 A Yes, I did.

25 Q And---

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 A And---

2 Q ---the police were after you?

3 A Yes, ma'am.

4 Q Now you're testifying that you didn't know the police
5 were after you when you got your hair cut.

6 A Yeah, I did because they pulled up behind me and I run.

7 Q Okay.

8 A I got the record for running from the police. That's
9 what I do when I don't want to go to jail.

10 Q You were also testifying on direct about the victim
11 wearing gloves on her way to work.

12 A That's what, that's what it said in the transcript.

13 Q Okay. And they didn't test those gloves for DNA.

14 Is that your testimony?

15 A I don't, I don't -- I didn't see it. I didn't see it
16 in the DNA stuff that they --.

17 Q Okay. But that was never alleged in your PCR
18 application. You never mentioned anything about that.

19 A I just seen it after I started looking at stuff and
20 thinking about stuff and all the ways --.

21 Q Okay. So, after you had three years to look at your
22 discovery and come up with some arguments, that's when you
23 noticed this?

24 A Well, that's a very big argument, ma'am, cause, you
25 know, the gloves are on her hands, and she's fighting the

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 guy off. Surely they's DNA evidence on the, on the gloves,
2 but they wasn't into evidence. That's crazy. I mean, I
3 mean how long is has -- since 1995, I believe, that's when
4 DNA started coming about.

5 I mean they been doing this that many years, and they
6 don't know to take her gloves?

7 Q Do you have a copy of the transcript with you?

8 A Yes, ma'am, I do.

9 Q Okay. On -- you, you were making reference -- earlier
10 you read into the record from Page 143 Volume I, three --
11 Lines 3 through 6. That was testimony about what the
12 victim -- what her job was.

13 Do remember that?

14 A Yes, ma'am.

15 Q Okay. Well, if you---

16 MS. ROSS: Can I just -- he doesn't have a physical
17 copy?

18 MS. GIOVANOLI: I thought he said---

19 MS. ROSS: Do you mind if I hand him one?

20 MS. GIOVANOLI: Yeah, that's fine.

21 THE COURT: Yes, ma'am.

22 Q So, I'm gonna refer everyone to Page 55, Lines 17
23 through 22.

24 A That's on the, the first one?

25 THE COURT: Volume I or Volume II?

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 MS. GIOVANOLI: That's in Volume I. That's right.

2 A Page what?

3 Q 55, Line 17 through 22.

4 A Page 55.

5 Line what?

6 Q 17 through 22. You can just read those for me. This
7 is when Solicitor Barnette is out talking to the victim.

8 A And this is the victim?

9 Q Uh-huh. (Affirmative).

10 A Line 14. Solicitor Barry Barnette.

11 Q. Ms. Pruitt, back on January the 24th, 2013, where
12 was you working at, ma'am?

13 And the answer was I was working at Carolina OB-GYN on
14 the west side office.

15 And the question, and what was your position there,
16 ma'am?

17 I was a, and it's a couple of dashes, the head nurse.

18 Okay. And how long had you been with Carolina OB-GYN?

19 And the answer, off and on for about 30 years.

20 Q Okay. You can stop there. Thank you.

21 So, she actually testified at, at a pretrial hearing
22 that she was the head nurse?

23 A A pretrial hearing?

24 Q Yeah, this was in the pretrial hearing whenever your
25 lawyer fought about the---

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 A Oh, oh, I thought you were talking about the other
2 little hearing I had when all this first happened.

3 Q Right.

4 Do you remember---

5 A Preliminary hearing.

6 Q ---when Mr. Shealy made an argument to keep out the
7 evidence of prior bad acts?

8 There was actually a second victim who identified you
9 as the attacker?

10 A Yes. Oh, now that you brought that up, that's a good
11 one too.

12 Q Right. So, Mr. Shealy argued---

13 A Okay. Let's get into that.

14 Q ---to keep that evidence out, didn't he?

15 A Well, he didn't really -- he told me he really didn't
16 know what he wanted to do at the time. He was just playing
17 it by ear.

18 Q Well, no, in the record, he actually made the argument
19 to keep that evidence out?

20 You don't remember that?

21 A Well, maybe I -- yeah, it was kind of -- I don't really
22 understand the law and all that, but---

23 Q Well, the judge, judge ruled in his favor.

24 Isn't that correct?

25 A I don't -- I remember the woman trying to say that I'm

Richard Culberson - Cross-examination
by Ms. Giovanoli

1 the one that robbed her too.

2 Q Okay. But none of that evidence came in at trial
3 because your lawyer, Mr. Shealy---

4 A Not in front of the jury, but it was at trial, yes,
5 ma'am.

6 Q That's right.

7 A The judge---

8 Q Not in front of the jury.

9 A Not in front of the jury?

10 Q And that's because Mr. Shealy argued to keep that
11 evidence out?

12 A Right.

13 Q Okay.

14 A But maybe it should of been brought in because she's
15 saying the guy had a scar from his wrist to his ring finger,
16 and---

17 Q So, now he's alleging Mr. Shealy was ineffective
18 because he didn't allow that evidence of a prior attack?

19 A Who knows?

20 I'm not a lawyer. I mean she said -- the other woman
21 that got robbed or attempted or whatever said the guy had a
22 scar from his wrist to his ring finger, and, and---

23 Q I believe that testimony was that you had a mark or
24 some distinguishing mark on your---

25 A The police told her to write scar. That's what she

Richard Culberson - Cross-examination
by MS. Giovanoli

1 said in the courtroom, ma'am. The police told her to write
2 scar.

3 Q well, let's go back to the victim in this case. She
4 testified that she was a head nurse.

5 A Yeah.

6 Q Do you know the duties of a head nurse?

7 A Not really.

8 Q And she had worked as that -- as a nurse for 30 years?

9 A Yes, ma'am.

10 Q Right.

11 A So, she knows a few days facial hair from a goatee.

12 Q Okay. I have no further questions. Thank you.

13 THE COURT: Yes, ma'am.

14 MS. ROSS: Just a bit.

15 REDIRECT EXAMINATION

16 BY MS. ROSS:

17 Q I just want to refer you back just to Page 79. I
18 wanted to clarify. It was brought up that you stated --
19 Page 79.

20 A On the same book?

21 Q On Volume II.

22 A 79?

23 Q I thought I heard it suggested that you---

24 A Volume II, the little book?

25 Q Yeah, the little book.

Richard Culberson - Redirect examination
by Ms. Ross

1 A 79?

2 Q In cross, you were asked that---

3 A Yes, ma'am.

4 Q ---that you said, you said it was something like
5 what -- you weren't sure what she would say drunk.

6 A Right.

7 Q Well, what did you actually say at Line 3?

8 A Line 3 said oh, yeah, intoxicated, but she's
9 subpoenaed. She needs to be here. She's the best thing I
10 got in my whole case.

11 And the Court said well, do you want to bring her in,
12 and I said not drunk.

13 And the Court said have a seat, sir.

14 Q So---

15 A And here's -- Matthew Shealy---

16 Q So, he never questioned what her testimony would be?
17 You never said don't bring her in or anything?

18 A No, ma'am, I, I wanted her to come in, but I didn't
19 want her to come in drunk.

20 Q And, and, just to clarify, you said something to the
21 effect of, when you decided to get a haircut, the police
22 weren't after you.

23 A No, I mean I had a warrant. Yes, they were after me,
24 but not full -- not, you know --.

25 Q So, let me talk and get---

Richard Culberson - Redirect examination
by Ms. Ross

1 A -- right there in my face.

2 Q So, let me get the sequence correctly.

3 When you went into Vic Bailey, you spoke to your dad on
4 the phone?

5 A Yes, ma'am.

6 Q And he had a check?

7 A Yes, ma'am.

8 Q And, at that point, you decided to go get the check---

9 A Yeah, plans changed.

10 Q ---and to get a haircut?

11 A Yes, ma'am.

12 Q And then the police were after you and you went on,
13 went on and ran?

14 A Yes, ma'am.

15 Q Okay.

16 A Well, when I come back across and sat down, and I, and
17 I told -- well, I guess about ten minutes after I come back
18 from talking to my dad and Ricky and all at Vic Bailey, the
19 police pulled up behind me, and here come another city
20 police car. And I told Heather I was gonna run. Just keep
21 up, keep up with -- see, I had a, I had a carry bag and a
22 backpack with me, and I told Heather just to, just to keep
23 my stuff, and I'd find up -- I'd catch up with her later.

24 So, I took off and run and a county car did pull up,
25 and I'm, I'm thinking to myself why is that county car --

Richard Culberson - Recross examination
by Ms. Giovanoli

1 and I don't know -- and they was hollering stop, and I kept
2 running. I run through Vic Bailey and got to my dad's
3 house.

4 Q Okay. All right. I've got no further redirect.

5 MS. GIOVANOLI: Just very briefly for clarity.

6 RE CROSS EXAMINATION

7 BY MS. GIOVANOLI:

8 Q When I was asking you earlier about you testifying to
9 what the Applicant the -- Heather may have testified to
10 something crazy, that was actually testimony that you gave
11 on direct in this hearing, right?

12 A Say that, say that again.

13 Q Just to clarify, your opposing counsel was having you
14 read from the record from trial that you never testified to
15 what Heather may or may not have testified to.

16 A I don't know what she may of --.

17 Q Right.

18 But, today, in your testimony, you testified that you
19 didn't want her in there drunk if she may testify to
20 something crazy.

21 Isn't that right?

22 A No, she was kind of crazy in the head. She -- like one
23 beer, she'd get super drunk and she'd just bla, bla, bla.

24 It's -- I don't know.

25 Q Okay. Thank you.

Richard Culberson - Recross examination
by Ms. Giovanoli

1 A But I wanted her there.

2 Q I think the record is clear. Thank you very much.

3 THE COURT: Okay. Anything else of this witness, Ms.

4 Ross?

5 MS. ROSS: No, Your Honor.

6 THE COURT: Okay. Mr. Culberson, sir, thank you. I'm
7 gonna let you step down. Watch your step.

8 Okay?

9 THE WITNESS: All right.

10 MS. ROSS: That's our case, Your Honor.

11 THE COURT: Okay. Thank you.

12 Yes, ma'am.

13 MS. GIOVANOLI: We would call Solicitor Barry Barnette
14 to the stand.

15 THE COURT: Solicitor, come forward.

16 Okay.

17 BARRY BARNETTE, being first duly
18 sworn, testified as follows:

19 THE COURT: Thank you. Please be seated. Watch your
20 step. Make yourself comfortable.

21 THE WITNESS: Thank you.

22 DIRECT EXAMINATION

23 BY MS. GIOVANOLI:

24 Q Good morning, Solicitor. Thank you for being here.

25 A Morning, ma'am.

Barry Barnette - Direct examination
by Ms. Giovanoli

1 Q How long have you been practicing law?

2 A Since 1990.

3 Q 1999?

4 A No, 1990.

5 Q Okay.

6 A Yes, ma'am.

7 Q And what is your current position?

8 A Solicitor for the Seventh Circuit.

9 Q Okay. And what was your position at the time of this
10 trial?

11 2014.

12 A Solicitor at that time, yes, ma'am.

13 Q Okay. Do you remember much about the facts of this
14 case?

15 A I do.

16 Q Can you give me a brief overview of the facts?

17 A Yes, ma'am, there was a -- the victim was a nurse. She
18 worked at the Mary Black. I'll call it the west side. She
19 arrived that morning to go to work at the OB-GYN there. As
20 she went in, the defendant went in, attacked her. Actually
21 wind up stabbing her with a screwdriver. Shortly after, he
22 left the scene. Two nurses heard her. Eventually went down
23 and checked on her. When checking with her, they talked to
24 her. Called the police and everything.

25 At that time, law enforcement started doing a wide

Barry Barnette - Direct examination
by Ms. Giovanoli

1 search at that point. Mr. Culberson was developed as a
2 suspect. There was actually a lineup shown to the victim
3 that day, and that's where he was picked out. It wasn't any
4 from TV or anything else from there, and, once he was ID'd
5 from there, they started searching for him, yes, ma'am.

6 MS. ROSS: Judge, I just object. Did, did -- I mean
7 you've got the transcript for this hearing that you can read
8 through, and make your judgment on the facts of this case
9 from that.

10 THE COURT: Yes, ma'am, thank you, and, and I will read
11 every word before I issue any type of order.

12 So, Mr. Culberson, please understand that---

13 MR. CULBERSON: Ask me any question you want to please.

14 THE COURT: Okay. Yes, sir. Thank you.

15 But I am going to allow a brief overview because I
16 think this -- for my benefit. These folks have lived this
17 case. You have lived this case. And, and I am trying to
18 get up to speed on it.

19 MS. ROSS: Okay.

20 MS. GIOVANOLI: Thank you, Your Honor.

21 THE COURT: Thank you.

22 Yes, ma'am, please continue.

23 A I'll do it very brief.

24 Like I said, they'll be a lot more detail in the
25 transcript itself, but, going through there, they actually

Barry Barnette - Direct examination
by Ms. Giovanoli

1 got his -- he was seen down East Main Street. He ran from
2 the City Police at that time when they were looking for him.
3 He---

4 Q When you say East Main Street, that was in the vicinity
5 of where the attack occurred?

6 A No, ma'am, it was not.

7 Q Okay. About how far away?

8 Do you recall?

9 A Probably four or five miles away.

10 Q Okay. So, when he was seen, you may continue.

11 A He left, he ran, and actually crawled over a wall.

12 Later on he was found at his father's house. He had
13 actually had his hair cut by his father there trying to
14 change his appearance. He was arrested from that
15 standpoint. We presented the evidence to the jury from that
16 standpoint.

17 The thing -- the -- now, I'll never forget about the
18 trial was, Mr. Shealy made several motions. We'd had a
19 prior attack six weeks earlier there. The attack occurred
20 to the victim was probably three-quarters of a mile from
21 where this -- the attack occurring with the victim, with the
22 nurse, the lady there, and she testified, went through a
23 long pretrial hearing. Mr. Shealy kept that out. That
24 would of been a huge piece of evidence for us to have.
25 Obviously have two victims ID'ing him in that case.

Barry Barnette - Direct examination
by Ms. Giovanoli

1 Q Right.

2 A And that was kept out.

3 He also got a ID -- an expert in ID, in identification.
4 I've only -- that's the only case I've ever had, in all the
5 cases I've tried over the years, that he'd brought somebody
6 to challenge the ID, and she did -- he did a very good job
7 with that, and---

8 Q Right.

9 A ---went very thoroughly through that.

10 Q So, that was the first time you'd dealt with an expert
11 witness in that context?

12 A Yes, ma'am.

13 Q Okay. Let's go straight to the point. On Page 105,
14 Line 17 through 21, I'm just gonna read it so that you don't
15 have to. It says 17 through 21. Page 105.

16 THE COURT: And this is in Volume I or Volume II?

17 MS. GIOVANOLI: That's right. Volume 1. I'm sorry. I
18 keep forgetting to state one.

19 Okay. I don't think there's a typo. That's not the
20 right page. Let me, let me find what I'm talking about.

21 THE COURT: Yes, ma'am, take your time.

22 Q Okay. In the -- in your closing arguments -- I can't
23 find it right now, but I'm going to.

24 In your closing arguments, do you typically have a
25 spiel that you give on reasonable doubt?

Barry Barnette - Direct examination
by Ms. Giovanoli

1 A I do, yes, ma'am.

2 Q And, and what is that?

3 A Basically, in that case, that the jury must be left
4 firmly convinced of the defendant's guilt, that the
5 defendant's guilt has to be proven beyond a reasonable
6 doubt.

7 Q Okay. And so do you, do you make the same closing,
8 closing arguments with regard to reasonable doubt every time
9 or are there elements that you use in every trial?

10 A It is. Most, most judges, from that standpoint, at
11 that time, Judge Couch gave the firmly convinced, Victor
12 versus Nebraska, reasonable doubt charge.

13 Q Okay.

14 A Judge Cole usually gave the hesitant to act, State
15 versus Manning charge. So, obviously, it's different
16 arguments in different things, but, every time in front of
17 Judge Couch, I used the same argument.

18 Q Okay. And do you recall saying, in this closing
19 argument, that you didn't have to prove this case beyond any
20 reasonable doubt?

21 A No, ma'am.

22 MS. GIOVANOLI: It was Page 105, Line 17, but it's in
23 volume II. I apologize.

24 THE COURT: Yes, ma'am.

25 Q So, that was Line 17. I'm just gonna read it. It says

Barry Barnette - Direct examination
by Ms. Giovanoli

1 Mr. Barnette, in the closing, and the one thing the judge
2 will tell you when he's charging you is to leave you firmly
3 convinced. We don't have to prove this case beyond any
4 reasonable doubt.

5 Have you had an opportunity to review this transcript?

6 A Yes, ma'am, I have.

7 Q Do you recall saying that?

8 A No, ma'am, I don't.

9 Q Would you ever willfully mislead a jury as to the
10 reasonable doubt standard?

11 A No, ma'am.

12 Q Okay. Would you -- would it have been possible that
13 you said, in that, that sentence, we don't have to prove
14 this case beyond any reason -- any, any doubt?

15 A I can't imagine under any circumstance. I've done
16 numerous arguments over the years. I mean I can't name how
17 many arguments I've been in. Magistrate court judge, I
18 give -- I gave the charge every time in criminal cases. I,
19 I can't imagine, under any circumstances, I'd ever say that.

20 Q But do you ever say that we don't have to prove this
21 case beyond any doubt?

22 A No --

23 Q Okay. Versus reasonable---

24 A -- from that standpoint. I mean or -- no, excuse me.
25 Beyond any doubt. Yes, ma'am, I do.

Barry Barnette - Direct examination
by Ms. Giovanoli

1 Q Yes.

2 Okay.

3 A Cause that's -- sometimes I do say we don't have to
4 prove beyond a doubt. We have to prove it beyond any
5 reasonable doubt.

6 Q Okay. And then also, as to Page 103, Line 6, that's in
7 the same volume. That's Volume II in your closing. This
8 came out during direct testimony. So, I just want to direct
9 your attention to it.

10 This is where, in your closing, you said and you've
11 seen the video, and please look at it again. He goes in and
12 he's looking through -- he goes through the whole store, for
13 whatever reason, and comes back and he's checking up,
14 looking up. I don't know if he was checking for cameras or
15 whatever or he didn't realize a camera was right there at
16 the door or what.

17 What was your purpose in arguing that?

18 A Well, obviously, went in -- and that was in a location
19 where the police had seen him, and along the bus route that
20 came back through there. And, obviously, he just goes in
21 and looks. I mean that's for the jury to see, and they
22 have the -- the video was in evidence from that standpoint.

23 Q Okay.

24 A It just was -- and that was just showing that he was
25 there, and that it was obviously him, and he was doing

Barry Barnette - Direct examination
by Ms. Giovanoli

1 something for some reason. He never bought anything. Never
2 did anything from there. He was looking for something.

3 Q So, that, that -- that's what I was gonna ask you.

4 That video was put before the jury---

5 A It was.

6 Q ---and into evidence?

7 A Yes, ma'am.

8 Q Okay. And that he was -- looked a little suspicious in
9 that video?

10 A He did, and what it was -- like I said, it was a
11 combination with the evidence, other evidence and facts in
12 the case. It was basically that they talked about the best
13 route too, which Mr. Shealy had brought up, you know, trying
14 to show how -- distance and even showing times. We wanted
15 to show -- and, of course, there was a time on the video
16 also.

17 Q Okay.

18 A And to show that the -- that he could do all this, and
19 that he was---

20 Q So, just to put this stuff in context, what was the
21 defense in this case?

22 A Basically it was an alibi defense.

23 Q Okay.

24 A They're saying he didn't do it.

25 Q Okay. So, and identity/alibi?

Barry Barnette - Direct examination
by Ms. Giovanoli

1 A Right. It was mostly, it was mostly ID. He had put up
2 an alibi defense, but -- talking about the alibi witness, if
3 you want me to go over this?

4 Q Yeah, that's exactly what I was going to next. Heather
5 Holmstrom.

6 Do you recall that situation?

7 A I do. Mr. Shealy was trying to find her. We actually
8 went over and found -- she was at the soup kitchen that day.
9 Went over. Mr. Shealy, I believe, went over with his
10 investigator, Curtis Jones, talked to her quite detailed
11 from what I understand. Obviously, she's under the
12 influence and things like that.

13 They make that call from that standpoint, but I don't
14 think that, from what I knew about the case, that she could
15 really add anything to the defense. Matter of fact, like
16 the defense said, probably would of hurt in the long run
17 cause she's crazy from that standpoint.

18 Q So, Heather Holmstrom was on the witness list, right?

19 A She was.

20 Q And did you pull her rap sheet in anticipation of her
21 discovery---

22 A I did.

23 Q ---and provided that to my office?

24 A It was on the defense witness, witness sheet, witness
25 list.

Barry Barnette - Direct examination
by Ms. Giovanoli

1 Q Okay.

2 A But I did, yes, ma'am, we had a rap sheet ran on her.

3 Q Okay. And -- okay. And may I approach the witness?

4 THE COURT: Yes, ma'am.

5 Q Do you -- well, first, do you remember what was on her,
6 her rap sheet?

7 You pulled this in 2014.

8 Do you remember?

9 A I could -- if I could refresh your memory with it---

10 Q Okay.

11 A ---that'd be great.

12 Q Okay. Flip through there. You probably can read those
13 better than I can, but I'll just go ahead and let you know
14 my next question will be were there any impeachable offenses
15 that you thought you would use if she did testify.

16 A Yes, ma'am, we had the shoplifting in 2012.

17 Q Okay.

18 A Had another shoplifting in 2013. There was a question
19 we were checking on that was the -- there was obtaining
20 goods by false pretenses in 2012, but I don't know. We'd
21 have to check and make sure there was a conviction for that.

22 Q Is that a crime of dishonesty?

23 A Yes, ma'am.

24 Q Okay.

25 A She was convicted of false information, 1993.

Barry Barnette - Direct examination
by Ms. Giovanoli

1 Q That's another crime of dishonesty?

2 A Yes, ma'am. Making false report to police officer.

3 I apologize, Your Honor. I'm looking through

4 out-of-state convictions---

5 THE COURT: Take your time.

6 THE WITNESS: ---and they're totally different.

7 THE COURT: Take your time.

8 A That's what I can see a conviction on.

9 Q Okay. Thank you.

10 A Thank you.

11 Q Is there anything that I haven't gone over that you'd
12 like to add?

13 A Not at this point.

14 Q Okay. Thank you, solicitor.

15 A Thank you.

16 Q Answer any questions that counsel may have.

17 MS. ROSS: Thank you.

18 THE COURT: Thank you, ma'am.

19 MS. ROSS: Thank you.

20 THE COURT: Yes, ma'am, Ms. Ross.

21 CROSS-EXAMINATION

22 BY MS. ROSS:

23 Q Mr. Barnette, now as far as prior record of the alibi
24 witness, a lot of those were old. So, under -- when
25 bringing them in, there would be an argument whether they

Richard Culberson - Cross-examination
by Ms. Ross

1 would come in or not?

2 A The shopliftings were not. That was 2012 to 2000 -- if
3 I remember right, and please look at the sheet, I think it's
4 2012---

5 Q But aren't they misdemeanors carrying under a year, the
6 property, more than property third offense?

7 A Well, no, I -- my argument would be there was --
8 basically goes to the other part of the rule where it's
9 basically false information from that standpoint. It's a
10 theft from that standpoint. So, I think it would come in.
11 The 1993 one was an older one. However, like I said, we've
12 made an argument, like I said, it was an alibi witness
13 situation from that standpoint.

14 Q Right.

15 But that would be an argument for the Judge to make a
16 determination on that?

17 A Yes, ma'am.

18 Q And I'm just going back to the closings. We talked a
19 little bit about that. On Page 97 of the second volume, you
20 stated, on Line 20, when he pulled her around, just imagine
21 someone right in front of your face. If someone's attacking
22 you, would you remember that?

23 would you---

24 MS. GIOVANOLI: I'm gonna object to outside the scope
25 of direct. I never asked any questions about that.

Richard Culberson - Cross-examination
by Ms. Ross

1 THE COURT: I'll allow it. She's on cross.

2 Yes, ma'am, go ahead.

3 Q Would you remember seeing the face for maybe the last
4 time.

5 Do you recall saying that?

6 A Yes, ma'am, that's an argument I use quite often in ID
7 cases.

8 Q Are you familiar with the Golden Rule where you don't
9 want to put the jurors in the position of the victim in a
10 closing argument?

11 A Yes, ma'am, from that standpoint.

12 Q Yet you said that you make the regular practice to say
13 how would you feel if you were being attacked?

14 A No, what it is from that standpoint, it's a situation
15 where a person's looking at the facial ID standpoint.
16 Here's the person that attacked her around the face. Of
17 course, she was a nurse. She's been 30 years, and going to
18 the ID question, I heard some of the testimony from
19 Mr. Culberson from that standpoint.

20 That was one of the purposes that -- on the ID from
21 that standpoint. Here's a lady that's pretty observant from
22 that standpoint. Someone that she's looking at being
23 attacked by the person face to face, and obviously she
24 testified to that---

25 Q Well, did you---

Richard Culberson - Cross-examination
by MS. ROSS

1 A ---and she---

2 Q ---give her any testing to prove that she was
3 especially observant or any independent testing of that?

4 A Well, when it comes down, it comes down to common
5 sense, yes, ma'am, from that standpoint.

6 Have you been examined by a nurse?

7 Q I have.

8 I'd go to Page 143. This is when you actually asked
9 the victim what her job and duties are.

10 THE COURT: This is in Volume I or Volume II?

11 MS. ROSS: Yes, this is in Volume I. I apologize.

12 Thank you.

13 And you asked her okay. What was your duties there at
14 the office there?

15 And she says making sure that patients flow well,
16 taking calls for the patients if I had to, helping to order
17 things and equipment. You know, making sure that they're
18 maintained.

19 So, that's her own self job description.

20 Did she say anything to the jury about examining
21 patients physically?

22 A Well, that standpoint, I know she had her pretrial
23 hearing also from that standpoint.

24 Q But did the jury hear anything about that?

25 That was not part of the -- what the jury heard,

Richard Culberson - Cross-examination
by Ms. Ross

1 correct?

2 A I'd have to look at the transcript from that
3 standpoint, ma'am.

4 Q Okay. Would you like to see it?

5 A I can, but I'd like to look at the total transcript if
6 I would just -- I understand you have that one part.

7 Q So, in that one part, she never says anything about
8 looking into patients' faces, examining them closely, or
9 anything like that?

10 A No, ma'am, the part you just read to me she does not.

11 Q Okay. Now, going back to what was questioned earlier,
12 Page 105 of Volume II, let's see. The transcript, and I'll
13 show you the line. It's Line 17. I'll pass it up to you.

14 A Yes, ma'am.

15 Q The transcript says, and I've had recent experience
16 with this, but the transcript said, Line 17 and 18 and 19,
17 we don't have to prove this case beyond any reasonable
18 doubt.

19 Correct?

20 A Yes, ma'am, that's what, that's what the transcript
21 says.

22 Q And it says we just have to show it, show it to you so
23 that you're firmly convinced of this man's guilt.

24 A That's what the transcript says, yes, ma'am.

25 Q All right.

Richard Culberson - Cross-examination
by Ms. Ross

1 A Can I take a look at this for a second?

2 Q Sure.

3 A Thank you.

4 (Pause.)

5 Q And I'll go ahead and refer you to Page 103, Line 13 of
6 the transcript --

7 A Okay.

8 Q -- if you don't mind.

9 A No, ma'am. No problem, ma'am.

10 Q Okay.

11 A Line 13 you said?

12 Q I believe so. That's where you said -- you talk about
13 looking around at the QT, looking funny, I can't tell what
14 he's doing there. Looks like he's slipping something behind
15 his coat or something to that effect.

16 A Well, what's interesting is, you know, I don't remember
17 105. If you read 103, the lines you're talking about, you
18 see his reaction going down. He's looking up and -- up and
19 he goes back out on Main Street. I don't know. He's
20 reaching for something else. I don't know what he's
21 reaching for. It seems like she put it underneath of his
22 coat. That's what the transcript says.

23 Q Okay.

24 A So, obviously that's a mistake from that standpoint,
25 and like 105 could of been a mistake in the transcript.

Richard Culberson - Cross-examination
by Ms. Ross

1 Q And then I'd refer you to Page 108, Line 16 of the
2 transcript.

3 A Yes, ma'am.

4 Q Can you read that please?

5 A Don't let him get away with this. Don't. Because a
6 woman like D.P. , the victim, needs to be able to work. Not
7 to face what she faces that day. Not the horror, the
8 horror.

9 Q All right. And there was no objection to that.
10 And also can I refer you to Page 101, Line 17?

11 A Yes, ma'am.

12 Q And that's where you say nurses are different from
13 other folks from the standpoint that they're trying to help
14 folks out, trying to go through there, checking, looking in
15 the eyes, looking at your temperature. That's their thing.
16 All---

17 A Yes, ma'am.

18 Q They write all this information down, and they put it
19 down on a pad.

20 Was there any objection to that?

21 A No, ma'am.

22 Q Did the victim testify at anytime that that was her
23 job, to write everything down and put it on a pad?

24 A Without going through the transcript, I -- the
25 transcript would state that, ma'am.

Richard Culberson - Cross-examination
by Ms. Ross

1 Q Okay. Now, I'd also refer you to Page 80---

2 A Well, let me rephrase it. I'd hope the transcript
3 would reflect that. Like I said, obviously we found one
4 mistake in the transcript already.

5 Q Okay.

6 A And possibly two.

7 Q Now, on, on Page 80 and 81 and 84, this is all part of
8 rebuttable.

9 THE COURT: You said Page 80, 81, and 84?

10 MS. ROSS: And that is of the second transcript.

11 A Is that Stephanie Eubanks, ma'am, you're talking about?

12 Q I believe so.

13 MS. GIOVANOLI: Again, I'm just going to object.

14 Beyond the scope of direct examination.

15 MS. ROSS: That's fine. I actually can get into this
16 with the, the attorney.

17 THE COURT: Okay.

18 A One, one thing if I can, I guess, respond to -- you
19 keep asking me to look at the page. One other thing Mr.
20 Shealy did. He bought a witness in that supposedly said
21 that the different race of the defendant in this case, and
22 that's the reason why we called the reply witnesses, the two
23 nurses. So, actually Mr. Shealy brought that in as part of
24 the evidence in the case, and we bring the two nurses in for
25 reply to that.

Richard Culberson - Cross-examination
by Ms. Ross

1 Q Okay. Well, I'd refer to, to Mr. Faron Cox.

2 Was that the name of the witness?

3 A Yes, ma'am.

4 Q And, on Page 49, I believe he testified, Volume II.

5 Thank you.

6 When you cross-examined Mr. Cox, and you said, on Line
7 2, and you realize that everyone else says that she said a
8 white male, and then on Line 3, he said yes, I realize that.

9 Okay. So, his testimony essentially was admitting that
10 every witness there, except for him, had said it was a white
11 male, correct?

12 A That's what the transcript shows, yes, ma'am.

13 Q Okay. I've got no further questions. Thank you,
14 Mr. Barnette.

15 A Thank you, ma'am.

16 REDIRECT EXAMINATION

17 BY MS. GIOVANOLI:

18 Q Are you aware of any other witnesses that said it
19 wasn't a white male?

20 A No, ma'am.

21 Q So, the only witness said it was -- who said the victim
22 said it was a black male was the defense witness---

23 A That---

24 Q ---Faron Cox?

25 A That's correct.

Richard Culberson - Redirect examination
by Ms. Giovanoli

1 Q Okay. So, I'm just gonna have a brief few follow-up
2 questions to her.

3 THE COURT: Yes, ma'am.

4 MS. GIOVANOLI: Thank you.

5 Okay. On Page 97 of Volume I, this was the I believe
6 Golden Rule argument. Oh, no, that's Page 97, Volume II.

7 Okay. Just imagine somebody right in front of your
8 face. If somebody's attacking you, you would remember that.

9 Would you remember seeing that face for maybe the last
10 time?

11 What is your understanding of the Golden Rule argument?

12 A The Golden Rule is putting the, the witness -- I mean
13 basically the juries in places of the victims or whatever.
14 That's not my goal in this argument.

15 The argument is make sure -- it's common sense
16 basically. If you see somebody, and you're going through a
17 very stressful situation, especially if you think you may
18 die from that situation, that's something that you'll
19 remember.

20 Q That's a proper argument when the defense is arguing
21 that she incorrectly identified this man?

22 A Yes, ma'am.

23 Q Okay.

24 A It wasn't the Golden Argument Rule. It was basically
25 concerning ID from that standpoint.

Richard Culberson - Redirect examination
by Ms. Giovanoli

1 Q Isn't the purpose of the Golden Argument Rule to say
2 put your -- place them -- put yourself in the victim's shoes
3 so you'll render a verdict that the victim would want?

4 A And that was not the purpose---

5 Q Got you.

6 A ---by any means.

7 Q So, that wasn't -- okay. And then on page -- let's
8 see. When there was discussion about the nurse's duties and
9 she testified as to her duties at that point in time, how
10 long had she been a nurse?

11 A For 30 years.

12 Q Okay. And her testimony was that she was head nurse,
13 nurse manager, whatever terminology you want to use.

14 Did someone become a head nurse right out of nursing
15 school in, in general?

16 MS. ROSS: I'd object to this line of questioning. I
17 think it's beyond the scope.

18 MS. GIOVANOLI: It's a question on the nurse duties and
19 the testimony---

20 THE COURT: I'll allow it.

21 MS. GIOVANOLI: Thank you, Your Honor.

22 Q So, you go ahead and answer the question.

23 A Well, what's unusual, and both parties may not know
24 this, my wife's a nurse. She's been a nurse for over 30
25 years herself, and she's held every position from that

Richard Culberson - Redirect examination
by Ms. Giovanoli

1 standpoint. She's even been head nurse and things like that
2 in the hospital, and I'm very familiar with their, with
3 their duties, what they do and so forth, and know what they
4 went through.

5 So, you know, it's a situation you don't go to be the
6 top nurse or whatever just right off the bat. You've got to
7 develop obviously, experience, and work through the system
8 from that standpoint.

9 Q So, do you find that's a matter of general knowledge in
10 the community?

11 A Oh, I think so when you're talking about nurses.

12 Q With regard to some errors in the transcript, you
13 testified, during cross-examination, that you believe some
14 of these things in the transcript are errors.

15 Do you have any experience with the court reporter who
16 actually produced the Volume II transcript, Pamela Faucette?

17 A I do.

18 Q And are you aware of, of kind of a habit of errors in
19 her transcripts?

20 A Unfortunately she's had errors before.

21 Q Okay. And is she still working in this jurisdiction?

22 A I believe she lives in North Carolina, and is working
23 in North Carolina now.

24 Q And also just to address, in your closing on Page 101,
25 Line 17, that's Volume II, during cross-examination, she

Richard Culberson - Redirect examination
by Ms. Giovanoli

1 brought out -- this is Line 17 I believe I said. When you
2 mentioned that nurses are different because they try to help
3 people. They go through everything, checking, looking in
4 the eyes, checking temperature, that's their thing.

5 Once again, this was something you thought of as a
6 matter of general knowledge?

7 A I think it's common sense from that standpoint.
8 Everybody's been examined by doctors and by nurses, and they
9 know -- they're very familiar. Every time you go to the
10 doctor's office, a nurse is going to examine you prior to
11 the doctor examining you.

12 Q So, your argument was that the nature of her work,
13 because of the nature of her work, she was able to recall
14 the face that she had---

15 MS. ROSS: I object to leading. I've allowed a lot of
16 it, but, at this point---

17 THE COURT: Yes, ma'am. Thank you.

18 MS. GIOVANOLI: Sustained?

19 THE COURT: Yes, ma'am.

20 MS. GIOVANOLI: Okay. Thank you. I'll move along.

21 Okay. I have no further questions. Thank you.

22 THE COURT: Thank you, Solicitor Barnette.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: I'm assuming that the Solicitor can be
25 excused?

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 MS. GIOVANOLI: Yes, ma'am.

2 MS. ROSS: No objection.

3 THE COURT: Okay. Thank you.

4 THE WITNESS: Thank you, Your Honor.

5 THE COURT: Thank you.

6 THE WITNESS: Thank you.

7 THE COURT: We'll be in recess. We've been going since
8 9:30. We'll take a ten minute break.

9 MS. GIOVANOLI: Okay. Thank you.

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

11 MS. GIOVANOLI: May it please the Court?

12 THE COURT: Yes, ma'am.

13 MS. GIOVANOLI: State will call its next witness,
14 Matthew Shealy.

15 THE COURT: Yes. Yes, ma'am.

16 Mr. Shealy, if you'll come forward, sir.

17 THE WITNESS: I will, ma'am.

18 THE COURT: Raise your right-hand.

19 MATTHEW SHEALY, being first duly
20 sworn, testified as follows:

21 THE COURT: Thank you. Please be seated. Make
22 yourself comfortable.

23 THE WITNESS: Thank you, ma'am.

24 DIRECT EXAMINATION

25 BY MS. GIOVANOLI:

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 Q Good morning, Mr. Shealy. Thank you for being here.

2 A Sure.

3 Q Okay. How long have you been practicing law?

4 A Eight years now.

5 Q And how much of that has been criminal law?

6 A All of it.

7 Q Have you -- has it always been with the Public
8 Defender's Office?

9 A Yes, ma'am.

10 Q Okay. And that's where you are now?

11 A Yes, ma'am.

12 Q And at the time of the trial.

13 were you appointed -- yeah, you were appointed in this
14 case, right?

15 A Yes, ma'am.

16 Q How many times did you meet Mr. Culberson in the course
17 of your representation?

18 A I believe it was somewhere around seven or eight, but
19 --.

20 Q Okay. And those would have occurred at the jail?

21 A Yes, ma'am. Well, and at preliminary hearings and
22 things like that.

23 Q On the courthouse?

24 A Or the courthouse.

25 Q Did you file a request for discovery---

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 A Yes, ma'am.

2 Q ---in this case?

3 And did you receive that discovery?

4 A Yes, ma'am.

5 Q Okay. Did you review those -- that material with your
6 client?

7 A I did.

8 Q If you could, please give us a brief overview as far as
9 your, your client's version of events.

10 A Okay. Well, what -- it was his position, obviously,
11 that he didn't commit this particular crime, and he gave me
12 an overview of exactly where he was and I've got notes. If
13 you'll bear with me just one second. That he had -- I had
14 just seen them. I'm sorry.

15 He had told me that he had woken up that morning, and
16 gone -- and he -- with Ms., with Ms. Holmstrom, and that
17 they had gone to the Main Street Motel. He had -- he'd
18 gotten a cup of coffee, and that there was an old man there
19 that he bought Valium from. He bought six Valium that
20 morning from the old man, and the old man was -- apparently
21 he, he didn't necessarily live all the time at the Main
22 Street Motel, but he was there a, a good bit, and, at the
23 Main Street Motel, it was -- if you've ever been there,
24 which none of you probably have, it's kind of -- it's a
25 motel that you drive into. There's a courtyard, a central

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 courtyard, and then there's a -- like 2 Ls. It's kind of
2 a -- or maybe it's better a U-shape with -- and that he was
3 the first door on the left I believe it was.

4 So, we went to the Main Street Motel. We couldn't find
5 him, him, unfortunately. Later, he went and held a sign for
6 a while, and then, I believe, he -- we've, we've got into
7 the -- that he went to the QT, and that he went to his
8 mother's house or his father's house.

9 Q And this entire time he was with Heather Holmstrom?

10 A Correct.

11 Q And you actually located her and interviewed her?

12 A We, we did.

13 Q And, when I say you, you or an investigator from your
14 office?

15 A Yes, ma'am, both. I found her in the jail and I took
16 Donald Stepp with my office to serve subpoenas --

17 Q Okay.

18 A -- or serve a subpoena on her.

19 Q Okay. And what was your discussion with Heather?

20 A She basically would -- or told me that yes, he was with
21 me, but couldn't go any deeper into where they had been,
22 where they had gone, what they were doing that day, all of
23 that stuff. It was, while we were together, but it was kind
24 of vague we were together.

25 Q Could she provide any details?

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 A She did not provide me any details, no, ma'am.

2 Q Okay. And -- but your client could provide you the
3 details of where they went?

4 A He provided me a number of details and we tried to
5 chase those details down. Unfortunately, the only one we
6 could really nail down was the QT obviously.

7 Q Because of the video evidence?

8 A Because of the video, and we could also nail down Ms.
9 Holmstrom. But, again, we couldn't find the old guy that
10 sold him the Valium earlier that day. We couldn't find
11 anybody who testified about the sign holding earlier that
12 day, that kind of thing.

13 Q Could Heather Holmstrom have corroborated any of the
14 Applicant's testimony other than that she was with him?

15 A Not the way that she talked to me. I mean, when she
16 told -- when we discussed it, it was just we were together.
17 She wouldn't corroborate where they had gone together or
18 anything like that.

19 Q Did the Applicant explain to you that Heather was his
20 friend?

21 A I thought it was his girlfriend. I thought that they,
22 they were in a romantic relationship at the very least. I
23 can't -- that was my understanding of their relationship.

24 Q And that was what you believed based off your
25 discussions with the Applicant?

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 A Yeah.

2 Q Okay.

3 A Cause they had woken up together that morning in the
4 cold shelter.

5 Q When you went over all of the evidence the State had
6 against the Applicant, did you discuss the strengths and
7 weaknesses of the case with him?

8 A We did.

9 Q And what was your advice, to pursue a jury trial or to
10 plead guilty?

11 A Well, I mean ultimately my -- I don't believe they made
12 him any real offers. So --.

13 Q Okay. So, there were no offers in this case?

14 A I don't believe so.

15 Q Okay.

16 A Or, if there was, it was not such that he wanted to
17 take them. I mean I leave whether you want to plead guilty
18 up to the, the client.

19 Q Sure.

20 But you usually give counsel on that?

21 A Well, I mean we'll talk about, you know, the strengths
22 and the weaknesses and that sort of thing, but---

23 Q You did that in this case?

24 A Yes, ma'am.

25 Q Okay. And what -- and, in your opinion, what were the

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 strengths?

2 A For us?

3 Q Yes.

4 A The strengths?

5 Q Strengths.

6 A Well, it's made no sense that he would go to a QT an
7 hour and ten minutes after the alleged incident.

8 Particularly not if he were going to be attempting to change
9 his appearance because of the, the distances and times
10 involved, the fact that there was no corroborating video in
11 a nurse's pavilion. I would of thought that there would be
12 video cameras there. We rode out there. There weren't any,
13 which I think they may of remedied now.

14 Q And you just mentioned distance and time.

15 Could you, I guess, kind of give a brief overview of
16 the path that your Applicant took according to his version
17 of events, and, and why you felt distances and times were
18 relevant to your defense?

19 A Well, I mean the distances -- the, the Mary Black,
20 again, nurses pavilion, for lack of a better term, was -- is
21 not close to anything, and it would of -- the way that they
22 alleged he would of run away was actually in the opposite
23 direction, I believe, of the QT, and I believe that we got
24 testimony to that effect.

25 We also were, were arguing, again, it, it makes no

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 sense for him to -- it was a very long distance. It's four
2 and a half miles away between the nurses pavilion and the
3 QT. I didn't see how he could possibly have made that trek.
4 Everybody admitting that he's homeless, has no vehicle, has
5 no, has no way of, of getting there. There's no bus route
6 to there or anything like that.

7 Q And you brought that fact out at trial, right?

8 A We did.

9 Q Okay.

10 A Also, it -- if anything, the west -- the nurses
11 pavilion, and I believe Mr. -- Curtis, my investigator,
12 testified to the fact that the nurses pavilion was closer to
13 his mother's house than it was the QT. So, if he was going
14 to be -- if he were trying to change his appearance, if he
15 was doing what they claimed he was attempting to do, it
16 wouldn't have made sense for him to go into town and then
17 back out of town. He would of just gone to Anderson Mill
18 Road where his -- where he got the haircut.

19 Q And there was some testimony that he went to Vic
20 Bailey's first and asked for money, and, at that point,
21 talked to his dad, and that's why he went to his house.

22 So, when, when did that happen?

23 Give us kind of a timeline.

24 A Well, there, there wasn't really good -- I mean he
25 didn't have a watch. So, I mean I can't tell you exactly

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 what time things happened. I mean -- so, he can tell -- he
2 would of -- he would of testified or he told me that he woke
3 up that morning probably somewhere around 6:00 or 6:30 I
4 think, and I mean, you know, it proceeded from there,
5 but --.

6 Q Well, you said Main Street Motel and QT.
7 What after that?

8 A Again, I can't -- and I just saw it while I was sitting
9 over there, but I can't seem to find the note that I wrote
10 all of that information down on. And, again, it -- bear
11 with me. I can look through my notes again.

12 MS. GIOVANOLI: The Court's indulgence?

13 THE COURT: Yes, ma'am.

14 MS. GIOVANOLI: Thank you.

15 A Okay. Here we go.

16 All right. He had overslept that day. He went to --
17 and I left out Brocks across from Kapasi Glass. That's a
18 small convenience store. We went there, asked them about
19 it. He didn't -- they didn't remember him. He bought two
20 half-pints he tells me there. Well, he bought a Hurricane,
21 excuse me, around eight o'clock he says.

22 The old man's name was Steve. He was the first door on
23 the L. See about six yellow Valiums. Four for him. Two
24 for her.

25 He talked to Rick at about nine o'clock. The bus would

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 of gotten there at 9:35. Defendant called Rick or called
2 his father from there. The check was at his dad's house.
3 Defendant needed a haircut. So, he borrowed stepmother's
4 trimmers, and they also -- he told me about some items that
5 would of been found at there or that would be at his
6 mother -- well, his father's house.

7 We, ultimately, I think, put some of those items in. I
8 believe it was a pocketknife and a -- and the check.

9 Q Okay. So, at 9:00AM, he was at Vic Bailey's talking
10 with Ricky for money?

11 A Yes.

12 Q Do you recall what time the attack occurred?

13 A I believe the attack occurred around -- I think it
14 was -- it was early. I want to say it was 7:00---

15 Q Yes.

16 A ---that she testified or 7:10.

17 Q Okay.

18 A It was an hour and ten minutes after the QT.

19 Q Okay. An hour and ten minutes before QT?

20 A Yes.

21 Q Okay.

22 A Before they saw him at the QT.

23 Q On video?

24 A Correct.

25 Q okay. So, in this case, we'll go right to the alibi

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 witness allegation. You asked Judge Couch for more time in
2 order to track down this alleged alibi witness.

3 Is that correct?

4 A I did.

5 Q Okay. And that was on Page 75 of Volume I of the
6 transcript.

7 Did he afford you that time?

8 A He did.

9 Q Okay. And what did you do in that recess?

10 A Well, we went to the address she had given us, and it
11 turned out that that was a padlocked church. So, that was
12 not the right place. It had been suggested she would be at
13 the soup kitchen. I think Mr. Culberson may have said she'd
14 be at the soup kitchen. Also the Solicitor's Office
15 believed that she would be at the soup kitchen.

16 So, we -- that was our next stop. We went to the soup
17 kitchen, and she was there. Unfortunately, it was both my
18 and my investigator's opinion that she was intoxicated, and
19 she was intoxicated to an extent that I believed she would
20 of -- she wasn't -- wouldn't of been a competent witness. I
21 think that there would of been a problem having her testify
22 just because of the intoxication level.

23 She was with some other fellow. She had actually
24 gotten out yet the morning before. I believe it was at
25 eight o'clock in the morning before. Mr. Culber -- and my

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 recollection is substantially different from Mr.
2 Culberson's. I believe we talked about the fact that she
3 was intoxicated and things like that in the jail room
4 because I just -- that was -- that's my recollection is that
5 I explained to him that I'm sorry. She's intoxicated.
6 She's blistered. You can do one of two things. We can ask
7 them to send the black and whites out and have her arrested
8 or we can, you know, release her from the subpoena.

9 My decision was her -- well, my advice was to release
10 her from the subpoena because, again, her testimony was
11 gonna be but he was with me, which was -- while that would
12 of been helpful, that, very easily, could have changed
13 overnight in jail since we would of been the ones arresting
14 her to be put in jail.

15 I've seen the Solicitor's Office do that before, and
16 rarely does that result in a cooperative witness. It just
17 doesn't result in a cooperative witness. Particularly when
18 you're the defense, and you don't get to bring things like
19 perjury charges and things like that. So --.

20 Q So---

21 A That was---

22 Q ---just for clarification, you're saying you've made
23 the decision the witness -- to release her from her subpoena
24 based on what little she could contribute as an alibi
25 witness in comparison to what you were risking by throwing

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 her in the drunk tank all night?

2 A That, and I mean we couldn't call her -- I didn't
3 believe we could call her that day. So, that would of been
4 the only option -- other option---

5 Q Okay.

6 A ---would have been throwing her in the drunk tank---

7 Q Okay.

8 A ---drunk tank or something to that effect.

9 Q But you believe you would of been ineffective for
10 calling an intoxicated witness in your client's case?

11 A I think it would of been an unethical -- I mean I don't
12 think you're allowed to call up a witness who is obviously
13 intoxicated. I mean -- I think that's unethical. I think
14 that's an ethical problem.

15 Q So, you testified that you discussed this when you --
16 after you found the alibi witness, you discussed it with the
17 Applicant and what did he say about it?

18 A Well, he seemed to understand -- I mean he wasn't happy
19 about it. Nobody was happy about it. You know, I clearly
20 would of been willing to call witnesses and call plenty of
21 witnesses here. We weren't pleased, but, again, we were in
22 a bad position and we thought that that was or -- well, I
23 knew -- it was my understanding that we agreed, apparently
24 maybe we didn't, but my understanding that we agreed that
25 that was -- the best course was to just leave it alone.

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 Q Okay.

2 A That we would prefer that she be there not drunk, but
3 we were in the midst of a trial, and we had to get it done.
4 I mean---

5 Q Okay.

6 A ---we had to do something.

7 Q You also mentioned you called other witnesses.

8 Can you give me a brief overview of the witnesses that
9 you called in your defense?

10 A Sure. We called Mr. Cox to testify as to her -- what
11 she told him immediately after the alleged attack.

12 Q And who was Mr. Cox?

13 A He was at the building. I don't remember exactly why
14 he was at the building, but he was---

15 Q Could he have been a maintenance man working on the---

16 A I think that's what it was, yeah.

17 Q ---medical equipment?

18 Okay. And so his testimony was -- go ahead and tell me
19 what -- what was the purpose of putting him on the stand?

20 A That she told him it was a black male.

21 Q Okay. And did you have any other witnesses that could
22 testify to that same statement?

23 A No, there was no other -- there were no other witnesses
24 that I'm aware of who could testify to that or would testify
25 to that.

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 Q Okay. And then the other witness that you called was
2 an expert witness, right?

3 A We, we did. We called Mr. -- Doctor McQuiston over at
4 the -- she's now at Wofford or she was at Wofford at the
5 time, but she had she just moved to Wofford from Arizona
6 state I believe.

7 Q Okay. And how did you get in touch with Doctor
8 McQuiston?

9 A She had talked at the Public Defender's conference I
10 think the year before. So, that's September before. And so
11 --.

12 Q Did---

13 A This was an ID case, and it was solely an ID case.
14 There wasn't any DNA or anything like that, and I thought
15 that she could at least -- we were trying to kick mud on the
16 identification, and I mean he knew that that's -- was our
17 goal.

18 Q So, she was qualified as an expert with regard to
19 identification?

20 A Yes, ma'am.

21 Q Okay. And those were the only witnesses that you
22 called in the case?

23 A No, we called a fellow from the QT I believe to put
24 the -- that -- Ms. Yoman, Mr. Baird. We also called Mr.
25 Culberson's -- I believe it's his stepmother. I'm not

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 certain about that. It's Ms. Martha Culberson to testify as
2 to the haircut. She also testified to some things that --
3 the, the -- there was some investigatory issues with this
4 case that Officer Bryant didn't take into evidence. I think
5 the puffy coat. There were some other things. They, they
6 had thrown things into a pile. There were, again, some
7 investigatory issues that we had.

8 we also used her to get in the check as well as the
9 knife, the pocketknife, cause obviously why use a
10 screwdriver if you've got a knife, things like that. So,
11 that was -- again, she didn't testify as to the -- why use a
12 screwdriver instead of the knife. She just got the knife in
13 and then, I believe, we argued that. We called Curtis to
14 testify as to the distances as well.

15 Q Okay. Curtis is your investigator?

16 A Curtis Jones, yeah.

17 Q And so, Baird -- you offered Baird in order to get the
18 video evidence at the QT Convenience Store?

19 A Correct.

20 Q To show that he was there in that hour?

21 A Correct.

22 Q Okay. Did you make any pretrial motions?

23 A I did.

24 Q Okay. And was one of those with regard to prior bad
25 acts?

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 A They were or it was I suppose.

2 Q And what was the result of that pretrial motion?

3 A I believe they kept it out.

4 Q Okay. And that was -- when you say that out, it was
5 the second victim?

6 A The second victim. The second individual.

7 Q Okay.

8 A That was, again, kept out.

9 Q I believe the second victim testified to a scar or a
10 mark on that Applicant's hand?

11 A In the actual trial, she didn't testify at all.

12 Q Okay.

13 A So---

14 Q Oh, no, I meant in the pretrial hearing. I'm sorry.

15 A I, I don't recall that.

16 Q Okay. But did that evidence come out before the jury?

17 A It did come out before the jury.

18 Q And in, in response to one of your witnesses, Mr. Faron
19 Cox, the solicitor called the two rebuttable witnesses.

20 Is that your recollection?

21 A It is.

22 Q Okay. And did you feel any need to rebut to their
23 testimony?

24 A No, I thought---

25 Q I mean -- excuse me. To object to rebuttal testimony?

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 A I thought that they would be allowed based on my
2 witness having testified that there was, you know, that
3 there were -- that she -- he was told that it was a black
4 male. I believe that was my understanding of the rebuttable
5 witness. He would of been able to argue as to that issue.

6 Q His rebuttal witnesses were Stephanie Eubanks and Kelly
7 Russo?

8 A Yes.

9 Q And that -- well, what did they testify to in
10 rebuttable?

11 A I believe they testified that she told -- that the
12 alleged victim told them, each of them individually, that it
13 was a white male.

14 Q Okay. And did they testify that they saw Mr. Faron Cox
15 there as well?

16 A I can't recall that.

17 Q Okay. Well, that's fine. Let the record speak on
18 that.

19 Beg the Court's indulgence. I'm just reviewing my
20 notes.

21 THE COURT: Yes, ma'am, take your time.

22 Q Okay. Let's go to the victim's job.
23 What's was the victim's job?

24 A She was the person who or the, the nurse that -- the
25 head nurse maybe, I don't know what her actual title she

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 said was, at Carolina OB-GYN. She was -- I think she
2 testified, and it's been brought out already, that she was
3 responsible for patient flow and things like that.

4 Q And, in, in your recollection, how long had she been a
5 nurse?

6 A She'd been working -- I think she testified that she
7 had worked at Carolina OB-GYN off and on for 30 years.

8 Q So, when the solicitor was making inferences to a
9 nurse's general duties, did you find anything objectionable
10 about that?

11 A I did not because I believe that a nurse -- a 30 year
12 nurse's duties are generally, generally common knowledge I
13 think.

14 Q Okay. What about -- what were your thoughts on an
15 objection as to facts not in evidence?

16 A Well, again, I think that those are logical, reasonable
17 inferences drawn from the testimony. I mean --.

18 Q And what is your understanding of an objection for
19 facts not in evidence -- assuming facts not in evidence?

20 Do you know---

21 A I'm not sure that I follow your question.

22 Q Are they suppose to be relevant, relevant, a fact
23 that's in controversy in the trial?

24 A Well, I mean it, it needs to be in controversy. I
25 mean -- and I suppose -- so I guess, yes, it would be -- it

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 would need to be something that was in controversy.

2 Q Were the nurse's duties, in fact, in controversy in
3 this trial?

4 A I didn't put it in controversy. I suppose maybe I
5 should of, but I did not put it in controversy. I don't
6 believe that I argued a nurse's duties are not looking at
7 people and checking temperatures. Of course, I think that
8 it would of been ludicrous for me to argue that that's not
9 what nurses do because---

10 Q Yeah.

11 A ---having gone to the doctor, that's what a nurse does
12 to me every day every time I go to the doctor.

13 Q Okay. So, do you believe it would of been helpful to
14 your client to have objected to the nurse's duties?

15 A No, I don't think that my objection would of been
16 sustained. I don't think Judge Couch would of sustained
17 that objection.

18 Q Okay. Okay. And then going to the State's closing,
19 there's a moment when -- this is on Volume II, Page 97, and
20 I'll just read it to you so you don't -- do you have a copy
21 with you?

22 A I do, yes, ma'am.

23 Q Okay. So, I'm turning to Page 97, Volume II. There's
24 been some discussion about Line 20 through 22 being a Golden
25 Rule argument. It says, when he pulled her around, just

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 imagine somebody right in front of your face. If somebody's
2 attacking you, you remember that. Would you remember seeing
3 the face maybe for the last time?

4 Did you find that comment objectionable?

5 A I did not find that objectionable. I didn't think it
6 was a Golden Rule argument. I thought it was to the -- a
7 common sense understanding of eye witness testimony. Now, I
8 would of hoped that the jury had taken on more what our eye
9 witness expert said, which was that no, in fact, you
10 wouldn't necessarily remember that face, but --.

11 Q So, at the, at the trial, you thought this was a valid
12 argument?

13 A I thought he was allowed to make that argument, yes,
14 ma'am.

15 Q Okay. In response to your identity defense?

16 A Yes, ma'am.

17 Q Okay. And then let's jump to Page 101, Lines 14
18 through 23. This is Volume II. So, these are, again,
19 the -- each person remembers things differently. Oh, I'm
20 sorry. This is Mr. Barnette's closing. But here's a lady
21 that was a nurse for 30 years and was trained. You-all have
22 been treated by nurses. They come in and they evaluate you.
23 They come in. They're different from other folks from that
24 standpoint because they're trying to help folks, trying to
25 go through there, and go through everything you do.

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 Checking, looking in the eyes, checking your temperature.

2 That's their thing.

3 Did you find anything objectionable about those
4 statements?

5 A No. Again, I thought that that was -- I mean you're
6 allowed to argue to the common sense, general knowledge of
7 the jury, and that's what I believed that to be. That's
8 just what I believed it to be.

9 Q And the victim had testified to being a head nurse and
10 working as a nurse for 30 years, right?

11 A Yes, ma'am.

12 Q Okay. Now, let's skip over and go to the end of the
13 State's closing on Page 108, same volume. This is Line 16
14 through 18. It says don't let him get away with this.

15 Don't. Because women like D.P. need to be able to
16 go to work and not face what she faced that day. Not face
17 the horror.

18 Did you find anything objectionable on this statement
19 by the solicitor?

20 A I didn't at the time. Otherwise I would of objected.
21 I mean now maybe I would of objected just -- it walks a
22 line, but having said that, you know we always -- we do walk
23 lines on closing -- in closing.

24 Q Right.

25 And the defense and the State are both not suppose to

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 play on the emotions of the jury.

2 Is that kind of your understanding of the law?

3 A Right. But I mean -- and, to some extent, we do it.

4 You can't overly do it. You know, I will admit that I make
5 arguments to the -- for instance, I'll tell a story that,
6 you know, ask a jury not to be that member of the jury that
7 comes up to me in six months and says Mr. Shealy, I wish I
8 had voted not guilty cause you can't change it. Don't be
9 the person that comes up to me at a Food Lion, and, yeah,
10 that's playing on, I suppose, the emotions of the jury too.
11 I didn't think that that was impermissible. I didn't think
12 that it was over the line.

13 Maybe I should of simply objected to break up the flow
14 of his cross or his closing. I don't think I would of won
15 that objection. I don't think Judge Couch would of
16 sustained that objection, but---

17 Q So, you don't---

18 A Again---

19 Q ---think it would of benefited your client if you had
20 objected?

21 A Not substantially.

22 Q Okay. And you, I guess, you're saying that it's, it's
23 common practice to sort of invoke emotion from a jury?

24 MS. ROSS: Objection. Leading.

25 MS. GIOVANOLI: Sorry. I'll withdraw and rephrase.

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 THE COURT: Thank you.

2 Q Do you think an objection to the statement would of
3 changed the outcome of the verdict -- the guilty verdict?

4 A I don't think so. I mean I can't imagine that that's
5 the thing the jury hang their -- hung their hat on.

6 Q Okay. And so let's go back to Page 105, Line 17, 17
7 through 21. This is also Solicitor Barnette's closing, and
8 this is where he said we don't have to prove this case
9 beyond any reasonable doubt on Line 18 and 19.

10 Is that what you heard?

11 A I -- no.

12 Q Okay. Have you -- how many cases have you tried with
13 Solicitor Barnette?

14 A I don't know. Not many. He doesn't try a lot of the,
15 you know, he just -- I'd say probably three or four maybe.
16 Something like that.

17 Q Okay. But more than one?

18 A Yes, more than just this one. It's been more than just
19 the one.

20 Q Does he usually just bust out new arguments on
21 reasonable doubt in your experience with him?

22 A Not generally.

23 Q He kind of reuses the same elements and the same
24 themes?

25 A Yes.

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 Q Okay. So, you did not hear what this transcript says?

2 A I did not hear that. Otherwise -- if I'd heard that,
3 that -- I would of objected, and, again, I'm willing to
4 object during closing cause I think earlier, in his closing,
5 I did object to it.

6 Q Okay.

7 A I objected to some -- something -- I believe that he
8 was mischaracterizing some testimony. That's back on Page
9 97 in volume II.

10 Q Okay. That's right. That was after the alleged Golden
11 Rule argument. That was actually whenever he said remember,
12 she didn't see the weapon. She felt it. They talk about --
13 they keep talking about this weapon and she didn't see it.

14 And you objected, at that point, because the testimony
15 you thought was that she did see the weapon?

16 A Right, which was important for us because the eye
17 witness expert had testified about I think called weapon
18 focus. So, when you see the weapon, that's what you tend
19 to, to focus on. So, that's why I was pretty vociferous in
20 that particular---

21 Q Because that was relevant---

22 A ---objection.

23 Q ---to your expert's testimony?

24 A Yeah, it was, it was very relevant to our defense.

25 Q So, have you ever heard the solicitor deviate from his

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 standard practice on reasonable doubt?

2 A I'm sure that I have. I mean, you know, we don't
3 always use the same words, but I had never heard him say we
4 don't have to prove this beyond any reasonable doubt. I
5 mean that, that would just be absurd. Again, that -- I
6 would of objected immediately to that.

7 MS. GIOVANOLI: Okay. Beg the Court's indulgence. I'm
8 just gonna glance at my notes.

9 THE COURT: Yes, ma'am.

10 (Pause.)

11 Q Did you do any investigation into Ricky and Vic
12 Bailey's?

13 A I believe we did. I don't have a note that says that I
14 did. So, I hesitate to say that I'm certain that I did go
15 to Vic Bailey. I don't, I don't want to say that. I do
16 know that we went to Main Street Motel. I know that we
17 spoke with Ms. Holmstrom. I know that we went to Brock's.
18 I don't want to say that I went and talked to or that we
19 went to Vic Bailey to find Rick. I think that we did. I
20 think that we failed, but I don't want to -- I can't say for
21 certain.

22 Q How about this?

23 Did the Applicant provide you with a list of potential
24 leads, witnesses?

25 A Yes.

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 Q Okay. And is it your general practice to follow-up on
2 all of those leads?

3 A Yes.

4 Q Okay. Have you ever gotten a lead from a client and
5 didn't follow up on it?

6 A I don't, I don't think so. I've had thousands of
7 cases. So, I don't know that I've not, but I can't imagine
8 that I would of not followed up on the lead.

9 Q Okay. Did the Applicant tell you that he hadn't seen
10 or talked to his parents in two years?

11 A Either he had told me that or his stepmother told me
12 that.

13 Q Okay.

14 A I believe that that was part of what the stepmother
15 testified to.

16 Q Okay. On -- let's see. On Page 103, Line 6 of Volume
17 II, let me doublecheck. This is where Solicitor Barnette --
18 this is going back to his closing. I apologize. This was
19 not originally pled, but the Applicant testified to it on
20 direct. So, I wanted to follow-up with you.

21 Line 6, and you've seen the video, and please look at
22 it again. He goes in and he's looking through. He goes
23 through the whole store, for whatever reason, and comes back
24 and is checking up, looking up. I don't know if he was
25 checking for cameras or whatever or he didn't realize that

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 camera was right there at the door or what. And you see his
2 reaction going down, and he's looking up and he goes back,
3 and I don't know. He's reaching for something else. I
4 don't know what he's reaching for. It seems like she put it
5 underneath his coat.

6 Did you feel that that was an objectionable statement
7 made by the Solicitor?

8 A I did not. Otherwise, again, I would of objected, but,
9 but my understanding of that was that was his interpretation
10 of the video. Again, we're -- we argue our interpretations
11 of videos all the time. I have, you know, that's one of the
12 things that we do.

13 Q Okay. Is your recollection of, during this closing,
14 was he playing the video?

15 A No, I don't believe he was playing the video.

16 Q Okay.

17 A I believe he was -- no, he was not playing the video.

18 Q Okay. Did you investigate anything with regard to DNA
19 tests or a test that may have not been done?

20 What was your understanding of the DNA in this case?

21 A Well, my understanding of the DNA was there, there
22 wasn't any DNA that linked my client to anything. So --.

23 Q And did you bring that out in -- before the jury?

24 A I believe that I did. I think that I did.

25 Q Did you ever feel that gloves that the -- did you --

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 were you even aware that that victim was wearing gloves when
2 she was driving to work?

3 A I don't think that that was one of the things that she
4 had testified to. Again, I don't, I don't recall her
5 testifying or anything that she had told -- said in the
6 incident report. Excuse me. I could be incorrect about
7 that. It's been a while since---

8 Q Okay.

9 A I mean this is a 2014 case.

10 Q Yeah.

11 A But as far as -- again, whenever there's no DNA that
12 links your client to a particular charge, we do what's
13 called pointing to the empty chair.

14 Q Uh-huh. (Affirmative).

15 A You know, it's -- you -- it's one thing to, to have
16 evidence and then try to kick mud on it. It's something
17 else to go looking for something because sometimes it's not
18 good.

19 Q Okay.

20 A Again---

21 Q So, you never requested any additional DNA---

22 A I did not.

23 Q ---testing be done?

24 A No.

25 Q Well, standing here now in hindsight, would you have

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 seen any benefit to requesting DNA tests be done on the
2 gloves she was wearing when she was driving?

3 A No, ma'am.

4 Q Okay. Can I ask you -- do you recall when you were
5 appointed to represent him?

6 A I can tell you I received the file on February 5th of
7 2013.

8 Q And this trial occurred on June 16th through the 18th
9 of 2014.

10 Does that sound right?

11 A Yes, ma'am.

12 Q Did you have ample opportunity to prepare this case and
13 investigate?

14 A Yes, ma'am.

15 Q Okay. If you needed more time, would you have asked
16 for a continuance?

17 A Yes, ma'am.

18 Q There was also an allegation made by an Applicant on
19 direct about his teeth.

20 Were there, were there any discussions about
21 investigating his dental hygiene?

22 A I don't recall any. I mean---

23 Q Okay. Sitting here today, I mean do you see any
24 relevance to that?

25 A Again, the -- no. There was -- he told me about that

Matthew Shealy - Direct examination
by Ms. Giovanoli

1 he had been mistaken in the past for a guy named David
2 Landreth---

3 Q Okay.

4 A ---who had been in the jail previously, and I had asked
5 our -- I included that in our packet that we sent to the eye
6 witness expert person. She did not see that -- she -- I
7 didn't see much of a resemblance. She didn't see much of a
8 resemblance and we decided not to go into that quite
9 frankly.

10 Q Okay. Would you have found it to be difficult to talk
11 about third party guilt without having a pretrial motion on
12 that?

13 A Well, I mean yes. But we -- if we had thought that it
14 was relevant, we thought that we could get it in---

15 Q Okay.

16 A ---then we would of been fine having a pretrial motion.

17 Q Okay. Was there any testimony or anything in discovery
18 regarding the victim mentioning his teeth?

19 A I don't recall that.

20 Q Okay. I have no further questions. Please answer any
21 questions counsel may have. Thank you.

22 THE COURT: Thank you, ma'am.

23 Cross.

24 MS. ROSS: Thank you, Your Honor.

25 THE COURT: Yes, ma'am.

Matthew Shealy - Cross-examination
by MS. ROSS

1 CROSS-EXAMINATION

2 BY MS. ROSS:

3 Q Okay. Mr. Culberson was just explaining to me that
4 there was testimony in the discovery that he had that talked
5 about broken and colored teeth.

6 Does that -- and teeth missing.

7 Was that -- do you recall that being in the discovery?

8 A I mean I don't recall. I can't say if there was or
9 there wasn't. I don't recall.

10 Q But it's possible that could of been in the discovery?

11 A It's very possible, yes, ma'am.

12 Q Okay. That's okay.

13 And then on the David Landreth, is it possible that he
14 had a scar on his hand going up his hand possibly linking to
15 the other case?

16 MS. GIOVANOLI: I object to the relevance. The scar
17 didn't go before the jury. So, it's totally irrelevant to
18 the outcome of the trial.

19 MS. ROSS: It goes---

20 THE COURT: I'll allow it. She's on cross.

21 Yes, ma'am.

22 Q Is that possible he was -- Mr. Culberson just said that
23 he had brought up the David Landreth because he knew that he
24 had a scar on his hand.

25 Is that a possible thing that he could of told you?

Matthew Shealy - Cross-examination
by MS. ROSS

1 A Well, he may very well have had a scar on his hand.

2 That was not what he told me though.

3 Q Okay.

4 A He told me that David Landreth looked like him, that,
5 that they---

6 Q Okay.

7 A That their -- and so that could possibly be a person
8 that she would of -- who could have committed the crime, and
9 that's why she picked the wrong person out of the lineup if
10 that makes since.

11 Q All right.

12 A But, again, we, we investigated that, and I just didn't
13 see that as a credible defense.

14 Q Okay. And so that's why you didn't bring him in.

15 Now, as far as -- the, the State did not test the
16 gloves for DNA, did they?

17 A I don't believe so. It doesn't sound like they did.
18 Everybody seems to have testified. Again, I don't recall if
19 they testified -- if they tested those. I know they did
20 test a number of things for DNA.

21 Q Correct.

22 A The gloves---

23 Q You never specifically argued to the jury why didn't
24 they test the gloves, did you?

25 A I don't, I don't think so.

Matthew Shealy - Cross-examination
by Ms. Ross

1 Q All right. Now, I'm just going up on the, the closing.
2 I guess the, the understanding is, on Page 105, the whole
3 deal about saying we don't have to show proof beyond any
4 reasonable doubt, that, that statement that's in the
5 transcript. Now, this was four years ago.

6 Do you have any independent recollection of that
7 testimony specifically?

8 A I guess you're asking me if -- so, no, I, I can't say
9 that I remember every word that he said in his closing. I
10 can tell you that that's Black Letter Law objectionable. I
11 mean---

12 Q All right.

13 A I mean I just can't imagine that I would of missed
14 that.

15 Q Okay. But it's in the transcript, and it's certainly
16 possible, isn't it?

17 A It is in the, in the transcript, and I mean they're --
18 all things are possible.

19 Q Now, as far as just getting back to the alibi witness,
20 when you went and met with her, did you have Curtis Jones or
21 some investigator with you to provide a witness to her
22 statement?

23 A To what she had --?

24 Q What she's told you.

25 A When -- okay. When you say when we went and met with

Matthew Shealy - Cross-examination
by Ms. Ross

1 her, do you mean when we saw -- found her at the soup
2 kitchen or when we went to the jail?

3 Q Originally when you first met with her and got a
4 statement from her.

5 A Yes. Well, I mean we -- yes, I took Donald Stepp with
6 me.

7 Q Okay. Was he another lawyer or who is he?

8 A No, he's an investigator with our office.

9 Q And did you get a signed statement from her?

10 A We did not.

11 Q Now -- and your testimony is that she had provided --
12 supported Mr. Culberson's alibi?

13 A Well, I mean she, she had that he was with me or I was
14 with him.

15 Q And she had said she had woken up with him, correct?

16 A That day, yes, ma'am.

17 Q And she's seen on video with him at the QT?

18 A I've not seen the video, but, in a while, but I believe
19 that that's accurate. I, I would have to look -- watch the
20 video again, but --.

21 Q I guess the Solicitor's testimony in closing was you
22 can see her putting something under coat.

23 So, would that support that he was with---

24 A Again, he -- well, the Solicitor suggested that that
25 was an error I believe whenever he was testifying to it.

Matthew Shealy - Cross-examination
by Ms. Ross

1 Q Okay.

2 A I don't -- I, I just don't remember.

3 Q Okay.

4 A I'm sorry. If I did, I would testify to it. I, you
5 know---

6 Q All right.

7 A I just don't remember.

8 Q And in the, the incident alert occurred between the
9 time of waking up and the QT?

10 A Yes, ma'am.

11 Q And did Ms. -- did Heather's -- the alibi witness say
12 anything to the effect of they had parted company for a
13 brief time or anything of that sort?

14 A No, I don't believe that she did. I don't have that.
15 That's not in my notes---

16 Q Okay.

17 A ---of my conversation with her.

18 Q Now, when she was at the soup kitchen drunk, did you
19 meet with her then or did you speak to her?

20 A Yes, ma'am.

21 Q And did you bring her with you to the courthouse at
22 that point?

23 A I did not.

24 Q Okay. Now -- and that was because you determined that,
25 as a drunk witness, she -- you wouldn't call her as a

Matthew Shealy - Cross-examination
by Ms. Ross

1 witness?

2 A Well, it was for a couple of reasons. I mean I
3 can't -- I mean I don't know that I'm allowed to force
4 somebody into my car and make them come to the courthouse.
5 So, I could of -- I knew that I wasn't gonna be able to call
6 her that day, and I was trying to think through what to do
7 about the situation because, quite frankly, I'd never had
8 that happen to me before where a witness who had seemingly
9 been willing to come in and testify was blistered the day
10 that she was suppose to come in and testify.

11 Q So---

12 A Again, I could of asked -- I could of asked the judge
13 to send a black and white or a Sheriff's Office car to the
14 soup kitchen. Again, I couldn't force her to come with me.
15 I don't believe that she would of come with me willingly.

16 Q All right.

17 A Cause she was there with another fellow who, again, was
18 not happy to see us.

19 Q Okay. But being under subpoena, you could of requested
20 that she's picked up?

21 A Yes, ma'am.

22 Q And allowed the judge to make a determination as to her
23 ability to testify as a witness at trial?

24 A Yes, ma'am.

25 Q And, and you chose not to.

Matthew Shealy - Cross-examination
by Ms. Ross

1 At that point, did you attempt to proffer any
2 testimony?

3 A No, ma'am.

4 Q And if you had a witness, investigator, Donald Stepp,
5 there with her when she spoke, did you attempt to put him up
6 to provide any testimony or proffer any testimony in her
7 stead?

8 A I did not. I don't know that I'd be allowed to put
9 that testimony in front of the judge or in front of a jury
10 given she hadn't testified, and I don't know that -- I mean
11 I could, I guess, of tried to shoehorn it into an
12 unavailability exception, but I don't---

13 Q Could of made that argument or possibly attempted to
14 just proffer what her testimony would of been for the
15 record?

16 A well, I suppose we could of proffered it, but, again,
17 if there was no -- I don't know what the purpose of that
18 would of been or why we would of proffered it if we knew it
19 wasn't going to be in front of the jury.

20 Q well, for appellate review, for review would be the
21 purpose.

22 Now, I'll get -- I'll just move on from that.

23 As far as a plea offer, was there really no plea offer
24 at all given -- extended by the State in this case?

25 A There may have been one, but I don't -- I know that it

Matthew Shealy - Cross-examination
by Ms. Ross

1 wasn't something that he was interested in doing. It was
2 not a plea that he was willing to take.

3 Q Now, as far as -- but, but if there was a plea offer,
4 your testimony is you talked to him about it?

5 A Yeah, we would of talked about it.

6 Q Now, as far as his failure to testify, did you, in
7 fact, advise him not to testify?

8 A I did.

9 Q And what was the basis of that?

10 A well, he had a little bit of a record on him, and,
11 quite frankly, I didn't think he would do very well under
12 cross-examination.

13 Q Now, at -- yet, his story from the beginning had been
14 that I didn't do it. I've done a lot of things, but I
15 didn't do this.

16 A Yes.

17 Q And was that basically consistent with what he
18 testified earlier today?

19 A well, I mean that was basically -- he didn't give as
20 many details this morning as he did to me, but I think that,
21 just having sat through the AG's cross-examination, when it
22 wasn't an argument in front of the jury, there wasn't that
23 kind of pressure, I didn't think he did that well. I mean
24 he would continually deviate from what you would ask him.
25 If he just -- I didn't think it would go very well for him

Matthew Shealy - Cross-examination
by Ms. Ross

1 frankly.

2 Q Okay. And that's a judgment call, but he never
3 deviated from the I didn't do this, did he?

4 A No. No. No. No. No.

5 Q Okay.

6 A I don't think he would of testified all of a sudden I
7 committed this crime. That's, that's not something I think
8 he would of testified to.

9 Q Now, I want to go -- I've spoken on Page 101 of the
10 second volume. During closing argument, there was an
11 argument made by Mr. Barnette that nurses are different with
12 their training. I think we brought that out as well that he
13 went along with that questioning with Don McQuiston, the,
14 the ID expert, and that's Volume II, Page 35.

15 A Yes, ma'am.

16 Q Now, on that page, Mr. Barnette gets into some
17 questioning of your expert about what he claims, and you're
18 saying it's just general knowledge that everyone knows about
19 a nurse. You later objected that that was irrelevant.

20 You didn't object to that, did you, initially?

21 A I'm sorry.

22 what was the page number?

23 Q Page 35. Just around Line 1. Just started talking
24 about -- and Page 34, Line 19, where he's questioning about
25 you know the victim.

Matthew Shealy - Cross-examination
by Ms. Ross

1 A Yes, ma'am.

2 Q Did you ever object to that as going beyond the scope
3 of, of your questioning of the, of the witness or expert in
4 the first place?

5 A So, you're asking me if I objected as it exceeding the
6 scope of my directed verdict or my direct---

7 Q Right.

8 A ---questioning?

9 I did not object as a -- I objected as to the
10 relevance---

11 Q Right.

12 And that's after he went on---

13 A ---to the counseling.

14 Q ---and starts answering you know she's been counseled
15 for three years, and so, at that point, you objected to the
16 relevance?

17 A Yes, ma'am.

18 Q Okay. And we talked about the prior testimony that
19 she'd been there 30 years, but she, she had a different
20 definition of her job duties than the one that was expressed
21 in closing and by Mr. Barnette?

22 A She had a, a different version of what she was doing at
23 the time that this happened. I don't know that that was---

24 Q Okay.

25 A My understanding was that she had been a nurse for 30

Matthew Shealy - Cross-examination
by Ms. Ross

1 years, and that was a job that she had been moved into.

2 Q Okay. Now, I'm just going to Mr. Faron Cox's

3 testimony. Specific on -- specifically on Page 49.

4 Essentially he testified he was there. He ran up to the

5 victim, and, and she -- he heard her say it was a black

6 male.

7 Correct?

8 A Correct.

9 Q Now, on Page 49 under cross, Mr. Barnette said you
10 realize everyone else says that she said a white male, and
11 he said yes, I realize that.

12 And Mr. Barnette goes on and says five officers,
13 everyone. And he says yes, I know that.

14 The nurses. Everybody.

15 And your witness goes on to say yes, sir, I realize
16 that.

17 Now, at that point, once he's admitted all that, how is
18 putting the nurses back on the stand in rebuttal bringing in
19 or going against something that's been brought out, that --
20 something that was brought out in your case?

21 I'm sorry. I butchered that.

22 But do you understand my question?

23 A I think I understand your question. I think that
24 it's -- that he's able to rebut what -- I mean I understand
25 what you're saying, that he had admitted that other people

Matthew Shealy - Cross-examination
by Ms. Ross

1 had said that. I think that he's allowed, at that point, to
2 point to who these other people are. I think that that was
3 the purpose of the rebuttable was to, and, again, if I
4 should of objected to it, then I should of objected to it,
5 and I'll take that shot.

6 Q And do you---

7 A My understanding of the purpose of the rebuttable was
8 to show who these other people were, and that would be a
9 reply to what my witnesses had testified to. He testifies
10 that, you know, that this is what I do for a living, this is
11 what I heard. My understanding is that the rebuttal and the
12 purpose of the rebuttable was well, no, this is what we
13 heard.

14 Q Well, it technically doesn't rebut anything you brought
15 our in your case cause you brought a witness who openly --
16 is testified everyone else did say white male, you're right.

17 Correct?

18 A Well, again, I think that it, it rebuts my witness
19 saying that this is what I heard. I mean I understand that
20 you're saying that she also or he also testified that other
21 people or everyone else had said this, but---

22 Q Okay. And you---

23 A Again, that---

24 Q You'd agree that you didn't object to it on Page 81 or
25 84?

Matthew Shealy - Cross-examination
by Ms. Ross

1 A I did not.

2 Q To either of those two witnesses?

3 A I did not.

4 Q Now, I want to go into what they specifically said.

5 On Page 81, Line 22, Mrs. Eubanks testified, if you
6 would, it's right around there, did he (sic) tell you the
7 race of the man that attacked her, and what was that race?
8 And she testified white.

9 And then Mr. Barnette asked, Barnette, excuse me, asked
10 are you definitely sure that's what she told you, and she
11 said yes.

12 Now, at that point, you did not object or make any
13 argument, did you?

14 A No, ma'am.

15 Q Now, I refer you back to Page -- Volume I, Page 181,
16 Line 3.

17 THE COURT: You said 181?

18 MS. ROSS: 181, Line 3, and thank you for bearing with
19 me while I'm going through this.

20 THE COURT: Yes, ma'am.

21 Q Actually, let me start with 180, Line 25.

22 What was Mrs. Eubanks answer to what the victim was
23 saying when she approached her?

24 A So, excuse me. Tell me where to start again.

25 Q 181, just at the -- the answer starts on Line 25.

Matthew Shealy - Cross-examination
by Ms. Ross

1 A Okay. Well---

2 Q 180. Excuse me. Line 25.

3 A Well, first of all, I asked her if she was okay, and
4 she was really incoherent. I think more traumatized,
5 couldn't hardly talk. She was trying to talk, but she
6 couldn't make anything out. I ran back upstairs, went into
7 our office, cause I had no cell phone service in our
8 building. So, I ran back into our office. Called 9-1-1.

9 Q Okay. I'll stop you there unless you want to read
10 further.

11 Now, is that the same thing that she stated in
12 rebuttable?

13 A No, ma'am.

14 Q So, that's quite different testimony then was presented
15 in the case -- the rebuttal is very different than what was
16 testified to in the initial case?

17 A Yes, ma'am.

18 Q And didn't she have an opportunity, at that time, to
19 answer the victim said white male or to at least bring that
20 up?

21 A Well, I mean I would of objected to hearsay. Now, they
22 would of probably argued it was a excited utterance, but --
23 so, yes, she could have. It would of been over objection.

24 Q Right.

25 Well, you got in the testimony of your witness,

Matthew Shealy - Cross-examination
by Ms. Ross

1 Mr. Faron (sic) saying he heard black male, correct, cause
2 it's an excited utterance?

3 A I, I did.

4 Q Okay.

5 A But, again, maybe they should of objected to it.

6 Q Okay. Now, I'd refer you to Page 84 of Volume II where
7 Kelly Rudicill, the second nurse, is testifying in
8 rebuttable. On Page 84, she states, Line 10, and did you
9 ask her what happened?

10 A. Yes.

11 And what was the race of the man that she told you?

12 A white man.

13 And then you made the hearsay objection at that point.

14 A Right.

15 Q Correct.

16 And, at that point, the bell had been rung so to speak.
17 That was already in front of the jury.

18 Correct?

19 A Well, yeah, and it was an excited utterance. So --.

20 Q I'm going to Page 189, Line 19. Excuse me. Line 18.
21 What did Kelly, Kelly -- what was Kelly Rudicill's
22 testimony about what the victim said to her upon her
23 immediate arrival at the --?

24 A Again, what was the line number?

25 Q I'm sorry. Volume I, 189, Line 18.

Matthew Shealy - Cross-examination
by Ms. Ross

1 A 18. Once I got to her, I was checking her to make sure
2 that she was or that she, she was, she was in shock. She
3 was in total shock. I, you know, checked her over and she
4 kept saying, she kept saying screwdriver, screwdriver. I
5 said are you hurt anywhere, and I say the places. I pulled
6 the place -- her jacket to the side. I saw marks on her
7 neck. She kept holding her side. The main thing we wanted
8 to do was she go ahead and just get her in -- up into a
9 chair because she was in such shock.

10 Q Now, in, in that description of what the victim said,
11 any mention of she was saying white male there in the case
12 at large, main case?

13 A Again, I objected as to hearsay and the Court---

14 Q All right.

15 A ---instructed the witness not to quote what was said to
16 her but what happened.

17 Q Okay. Now---

18 A So, again---

19 Q Again, in rebuttable, totally different testimony was
20 presented?

21 A Well, I mean it was -- certainly sounds different to
22 me, yes, ma'am.

23 Q Well, from incoherent, can't understand anything she's
24 to it was a white male?

25 A Yes, ma'am.

Matthew Shealy - Cross-examination
by Ms. Ross

1 Q Now, did you make any argument to that effect to the
2 jury in closing?

3 A I don't believe that I did. I don't know that I --
4 again --.

5 Q And again---

6 A Not that I recall.

7 Q ---you didn't object to bringing in the whole---

8 A Right.

9 Q ---rebuttal in the first place?

10 A I did not object to the rebuttal in the first place,
11 no, ma'am.

12 Q And we've gone through what the closing argument -- you
13 objected where you objected and didn't where the transcript
14 shows you didn't.

15 Is that correct?

16 A Correct.

17 Q And you didn't get an independent lie detector test
18 done, did you?

19 A No.

20 Q I believe that's all the questions.

21 Oh, just one thing that I wrote a note about
22 bolstering. Now, Mr. Barnette argued that, in his closing
23 and his cross of, of your expert witness, him talking about
24 how she's a nurse and she looks into eyes, and she studies
25 people closely, closely.

Matthew Shealy - Cross-examination
by Ms. Ross

1 wouldn't there also be a bolstering objection to that
2 where he is bolstering his witness' credibility by making
3 those statements?

4 A You're asking me when he was asking the ID, the eye
5 witness?

6 Q well, when he was asking---

7 A ID person?

8 Q ---asking her and during closing as well.

9 A well, as to closing, I think he's, he's allowed to
10 argue as to whether it's -- his witnesses are credible or
11 not. As far as asking the eye witness ID person those
12 questions, I think that that goes into whether or not the
13 eye witness; ID expert, has considered those factors, and I
14 didn't, you know, she -- I don't know -- I don't believe
15 that she -- I don't know what she testified to.

16 Q And she couldn't consider those factors because, during
17 the trial, those things were not brought out at all.

18 So, this would be bringing in outside information that
19 only an agent of the state would of knowed (sic) to bolster
20 the credibility of his ID witness?

21 A No, ma'am, she was provide -- I provided her a packet
22 of information. We went over particulars of the case. I
23 think she even testified that she knew that she was a nurse,
24 things like that. She had been provided a packet of the
25 discovery cause we needed to -- well, I needed her to

Matthew Shealy - Cross-examination
by Ms. Ross

1 evaluate whether she thought we had some arguments, what
2 kind of arguments we needed to make, things of that nature.
3 I mean -- so, she had the discovery and she, she had
4 incident reports and things of that nature.

5 Q Okay. And one other question. I don't -- this is just
6 a side note. On Page 196 of Volume I, Line 8, you made an
7 objection at some point, and Solicitor Barnette testified --
8 stood and said I'm just trying to clarify some things, Your
9 Honor. I'll just move on from there, and then the Court
10 said all right. And Mr. Barnette moved on. Since he's,
11 since he's objecting to it.

12 Did you make any arrangement, at that point, saying I'm
13 allowed to make objections, don't attack me about whether
14 I'm trying to clarify or anything like that?

15 A I did, I did not.

16 Q Okay.

17 A I mean -- again---

18 Q And that---

19 A I---

20 Q That's just an aside, but, at that part, it appeared
21 that the solicitor was trying to classify your objection as
22 you trying to prevent him from clarifying the facts to the
23 jury.

24 Did you---

25 A I didn't think it was -- I mean cause I have said

Matthew Shealy - Cross-examination
by Ms. Ross

1 things like that before. I'll withdraw the question based
2 on the objection. I mean, you know --.

3 Q Okay.

4 A And I think that the -- we usually or the judge
5 usually, within his charges, will say something along the
6 lines of, you know, we'll do things outside the presence of
7 the jury. They'll be objecting to things. Don't hold that
8 against them. That's paraphrasing. But, generally, that's
9 part of the charges.

10 Q All right. Okay. Well, I have no further questions.

11 THE COURT: Thank you.

12 MS. GIOVANOLI: Brief follow-up please?

13 THE COURT: Yes, ma'am.

14 MS. GIOVANOLI: Thank you.

15 REDIRECT EXAMINATION

16 BY MS. GIOVANOLI:

17 Q I'll try not to make this too long.

18 So, going back to the alibi witness who testified just
19 now on cross-examination that there was another fellow not
20 happy to see us, what did you mean by that?

21 A Oh, she was with some guy, and that guy was -- he, he
22 wanted her away from us basically. I mean he was not --
23 well, he was just hostile. Not that that really mattered
24 that much. I mean we were talking to her, and she was
25 willing to, at least, talk to us. I assumed that he wanted

Matthew Shealy - Redirect examination
by Ms. Giovanoli

1 to get in line and eat, but he was, to some extent, hostile
2 to our, our approaches and discussions with her.

3 Q Was she agreeable to going with you or did she want to
4 stay with him?

5 A Well, she, she didn't come out of the soup kitchen.
6 There's a -- at the soup kitchen, it's a new way -- they
7 just rebuilt it. There's a fence that we were talking to
8 her through the fence basically. We would of -- and she
9 never did come around or anything like that.

10 Q All right.

11 A But we were close enough that we could certainly see
12 her, smell her, and evaluate her.

13 Q And when you -- going to when you testified that you
14 advised your client not to testify in this case because he
15 had a record, and you didn't think he'd do well on a
16 cross-examination, whose decision was it, ultimately, not to
17 testify?

18 A It was his decision ultimately I mean, but it's based,
19 I'm sure, largely on my advice.

20 Q Yeah.

21 A But---

22 Q But you left that option open to him?

23 A Sure. You know --.

24 Q And going to there was some discussion about the
25 questions that the solicitor was asking of Doctor McQuiston

Matthew Shealy - Redirect examination
by Ms. Giovanoli

1 regarding a nurse's duties, and whether, whether or not she
2 knew that the victim was a nurse for 30 years.

3 You remember that?

4 A Yes, ma'am.

5 Q Okay. And was, was that information that she was a
6 nurse for 30 years relevant to the expert's assessments of
7 the case?

8 A Well, I don't, I don't know that she testified that it
9 was her assessment, part of her assessment.

10 Q Okay.

11 A I think that it was a relevant ground to cross-examine
12 her as to whether or not she considered it or if that makes
13 sense. It---

14 Q Right.

15 And sometimes, the experts, they are able to consider
16 things that are not put into evidence before the jury when
17 they're making their assessment of a case, right?

18 A Yeah, in fact, they often are. I mean -- in a DNA
19 case, for instance, they don't always trot out all of those.
20 We get a whole lot of graphs. It's usually you get as many
21 as a hundred pages of just graphs that make no sense, but
22 the person comes in and testifies well, it's a one in
23 5 quintillion match, and then you can ask them questions
24 regarding the math, but you don't usually have them go
25 through, graph by graph, this allele matches this allele

Matthew Shealy - Redirect examination
by Ms. Giovanoli

1 with them.

2 Q Yeah.

3 A You can see it here. I mean you just, you just don't
4 testify to that stiff.

5 Q Was it fair, on cross-examination, to ask her exactly
6 what she used to make her -- in rendering her opinion?

7 A Yes, ma'am.

8 Q Okay. On Page 81, Line 22, Ms. Ross pointed out on
9 Eubanks and Rudicill's rebuttal testimony, this is Volume I,
10 she testified that you did not make an objection to them --
11 let's see. 81, Line 22.

12 A I think that's in Volume II if it's the rebuttal
13 testimony.

14 Q That's right. Volume II.

15 well, let's get into this. The direct testimony of
16 Eubanks and Rudicill did not include the race of the, the
17 attacker.

18 Is that correct?

19 A That's correct.

20 Q Okay. When did race become an issue?

21 A When we put in Ms. Cox or Mr. Cox I suppose.

22 Q Okay. So, on the defense's case?

23 A well, I mean I'll say that we had been challenging the
24 ID the entire time, but---

25 Q But actually the race of the---

Matthew Shealy - Redirect examination
by Ms. Giovanoli

1 A Right. That was the first time that any, anything that
2 would of run counter to their testimony of what race it was
3 came in.

4 Q Okay. So, race wasn't an issue until Faron Cox
5 testified that she said it was a black male?

6 A Sure.

7 Q And then, during cross-examination, Ms. Ross said that
8 you got in Faron Cox's testimony that he was a black male
9 because it was an excited utterance.

10 Was there even an objection to that testimony from the
11 solicitor?

12 A There wasn't.

13 Q Okay. So, you got it in because that's -- was the
14 testimony that was given. Not because it was an excited
15 utterance.

16 A Well, I mean it was -- they didn't object. I think
17 that I had objected to their -- at least one of Mr. --
18 either Mrs. Rudicill or Mrs. Eubanks testifying as to what
19 she was told, and they didn't get into what she was told
20 cause I objected as hearsay. I think they could of argued
21 excited utterance and I could have certainly argued excited
22 utterance, and I think I would of won that argument, but
23 they didn't object. And, you know, it's one of those things
24 that isn't wrong if they don't object.

25 Q But you did object to hearsay on Rudicill's testimony

Matthew Shealy - Redirect examination
by Ms. Giovanoli

1 on Page 189?

2 A Yes, ma'am.

3 Q And that was based on hearsay and that was essentially
4 sustained?

5 A Yes, ma'am.

6 Q And the Judge asked her not to testify to what the
7 victim said?

8 A Yes, ma'am.

9 Q Okay. You didn't -- you testified that you didn't
10 request an independent lie detector test.

11 why didn't you do that?

12 A I -- there's no point in an independent lie detector
13 test unless you're trying to work out a case. If we weren't
14 trying to -- cause it's not -- and we weren't trying to work
15 it out. He didn't want to -- he was gonna plead to anything
16 cause he didn't do it.

17 Q So, when you say work it out, you mean pleading?

18 A Either, either a -- work out some kind of deal --

19 Q Okay.

20 A -- or if there's -- I mean I just don't see a whole lot
21 of use in it. Sometimes you can convince a solicitor to
22 dismiss a sex case. This case had an eye witness. There
23 was a solid ID of a victim who was angry. They weren't
24 gonna dismiss this case based on an independent lie detector
25 test, and independent lie detector tests, they don't --

Matthew Shealy - Recross examination
by Ms. Ross

1 they're just not admissible. And I don't want to suggest
2 that a lie detector test is any way viable. I mean because
3 lie detector tests are scientifically invalid. They're --
4 they just don't matter. They don't, they don't work.
5 That's why they're not admissible.

6 Q Okay. No further questions. Thank you.

7 MS. ROSS: I just have one.

8 RECROSS EXAMINATION

9 BY MS. ROSS:

10 Q The witness, Faron Cox, his statement was in the
11 discovery, correct?

12 A Yes, ma'am.

13 Q Discovery provided to you by the State?

14 A Yes, ma'am.

15 Q And, in that statement, bigger than life, it says black
16 male?

17 A Yes, ma'am.

18 Q Now -- and then you -- and you said the State made no
19 objection to you just bringing that out in your case, all of
20 his statement, including what was potentially hearsay?

21 A I didn't see any objection --

22 Q All right.

23 A -- that they made.

24 Q I have no further questions.

25 THE COURT: Okay. Thank you.

1 MS. GIOVANOLI: May this witness be excused?

2 THE COURT: Any objection---

3 MS. ROSS: No objection, Your Honor.

4 THE COURT: ---to Mr. Shealy being excused?

5 Thank you, Mr. Shealy.

6 THE WITNESS: Thank you, ma'am.

7 THE COURT: You may be excused.

8 MS. GIOVANOLI: And, Your Honor, we had mentioned
9 before calling Tiffany Butler to testify by phone. If I
10 could just have a few minutes to get her connected. She
11 has -- I've been communicating with her. So, she's
12 expecting the call.

13 THE COURT: Yes, ma'am.

14 MS. GIOVANOLI: Thank you.

15 May I approach?

16 THE COURT: Yes, ma'am.

17 (Pause.)

18 MS. GIOVANOLI: Can you hear me, Tiffany?

19 THE WITNESS: Yes.

20 Can you hear me?

21 MS. GIOVANOLI: Yes, I think we all can hear you. Just
22 be sure to keep your---

23 THE WITNESS: Okay.

24 MS. GIOVANOLI: Keep your voice up.

25 okay?

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 THE WITNESS: Okay.

2 MS. GIOVANOLI: I'll let -- go ahead and let you be
3 sworn.

4 THE COURT: Ms. Ross, can you hear?

5 MS. ROSS: I can, Your Honor. Thank you.

6 THE COURT: Okay.

7 All right. Mr. Culberson, can you hear?

8 THE APPLICANT: Yes, ma'am.

9 THE COURT: All right. Ms. Butler?

10 THE WITNESS: Yes.

11 THE COURT: Good afternoon, ma'am.

12 TIFFANY BUTLER, being first duly
13 sworn, testified as follows:

14 THE COURT: Okay. Thank you. Please answer the
15 questions by the Attorney General.

16 THE WITNESS: Okay.

17 DIRECT EXAMINATION

18 BY MS. GIOVANOLI:

19 Q Thank you for being available by phone.

20 I'm just gonna run through these quickly. There's been
21 three allegations against you. I've provided those to you.

22 The first one is the Applicant alleges that you failed
23 to brief the issue of error in Judge's overruling objection
24 to solicitor bolstering his witness with facts contrary to
25 evidence, and I'll refer you to Trial Transcript Volume II,

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 Page 35.

2 A So, Volume II, Page 35?

3 Q Yes, that's correct.

4 THE COURT: I think if you would just have Ms. Butler
5 identify herself and the occupation that she held at the
6 time of this. She was a lawyer for Mr. Culberson.

7 Is that correct?

8 MS. GIOVANOLI: That's correct, and I'm sorry. Let me
9 give a little introduction.

10 At the time of this appeal, where did you work?

11 A I worked for the South Carolina Commission on Indigent
12 Defense in the Appellate Division.

13 Q Okay. And did you come to represent the Applicant in
14 this case?

15 A I did.

16 Q On his appeal, right?

17 A Yes.

18 Q Okay.

19 A Direct appeal.

20 Q And, and are you still with the Office of Appellate
21 Defense?

22 A No, I'm not. I work for Duff & Childs in Columbia.

23 Q Okay. And how long have you been practicing law?

24 A Since 2011.

25 Q Okay. And, at, at the time of this brief, how long had

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 you, had you been doing appellate defense work?

2 A I started with Appellate Defense in September of 2014,
3 and I believe I represented Mr. Culberson around 2015 or so.
4 So, maybe close to a year I'd been at Appellate Defense. A
5 year or less I believe.

6 Q Okay. And so being relatively new to Appellate
7 Defense, did you guys have some policy in the office with
8 having supervisors review your work?

9 A Yes. Yes. Everything -- my boss reviewed every single
10 brief before I filed it.

11 Q Okay.

12 A And I would consult, I would consult with him as I was
13 working on the brief, but he read every single thing I filed
14 with the Court.

15 Q Okay. Great.

16 And so you represented Mr. Culberson on appeal, and do
17 you recall the issue that you briefed in your brief?

18 A I briefed the directed verdict, the motion for directed
19 verdict.

20 Q Okay. And can you explain a little about why you
21 decided to choose to brief that issue?

22 A From what I recall, that was the only issue that was
23 preserved, from what I recall as I was reading through the
24 transcript and everything. That -- that was the only issue
25 that I saw that was preserved.

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 Q Okay.

2 A It was a briefable issue.

3 Q And there was an objection on Page -- of the trial
4 transcript Page 35 of Volume II.

5 If you'll give me one second to grab my transcript?

6 A Okay. And I, I have mine pulled up on my computer.
7 So, I'll go to it.

8 Q Okay. And this was during the cross-examination of the
9 defense's expert ID witness.

10 A Yes.

11 Q Do you see where I'm looking at the objection on Line
12 15?

13 A Yes.

14 Q Okay. Is, is -- what was your reason for not briefing
15 that issue as far as the objection to relevance and the
16 Trial Court overruling that objection?

17 A Just, in my experience, I know the -- when it comes to
18 cross-examination, attorneys usually get a little more
19 leeway, and I just didn't think that that particular
20 objection was meritorious.

21 Q And what was that objection?

22 A You know, I---

23 Q I'm sorry. Go ahead.

24 A It was for, it was for, it was for relevance. Whether
25 the solicitor's question -- questioning of the expert

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 witness about the victim's counseling, whether that was
2 relevant.

3 Q And did you find that it---

4 A It was -- that's how I read it. That's how I saw it.

5 Q Did you---

6 A That's how I saw it.

7 Q When you were reading this transcript, did you find
8 that it was relevant, what the expert witness used in her
9 assessment and coming -- rendering her opinion?

10 A Yeah, I could see, I could see how that -- how a judge
11 could find that relevant especially when her testimony was
12 talking about that witness testimony and memories and so
13 forth. So --.

14 Q Okay.

15 A I saw how the judge could rule that or overrule the
16 objection.

17 Q Okay. But specifically the Applicant has alleged that
18 you didn't brief that issue based on bolstering his witness
19 with facts contrary to evidence.

20 Could you brief that issue if the actual objection was
21 based on relevance?

22 A Those are two separate objections.

23 Q Right.

24 So, could you brief it---

25 A So---

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 Q ---on the second of bolstering witnesses with facts
2 contrary to evidence if the objection was to relevance?

3 A Well, no, I mean the attorney made a separate objection
4 --

5 Q Okay.

6 A -- based on relevance. Not bolstering. So, so, in my
7 eyes, there was no objection for bolstering the witness.

8 Q Okay. And moving to the second allegation against you,
9 failure to brief the denial of due process when Judge allows
10 trial attorney to release alibi witness from subpoena.

11 If you'll turn to Page 79 of Volume II?

12 A Okay.

13 Q Do you, do you see where I'm referring?

14 A Yes. Yeah, the, the defense attorney was looking for
15 the witness, and apparently she was intoxicated. Then he
16 decided not to call her, an alibi witness, because of the
17 fact that she was intoxicated, and he thought that it
18 would -- there would be a credibility issue, and he felt,
19 ethically, that he couldn't call her --

20 Q Okay. And is it your---

21 A -- to the stand.

22 Q And is it your reading of the transcript that the
23 defense attorney excused the witness from her subpoena?

24 A Yeah, I mean that's my understanding. He made a
25 decision, yeah, after consulting with his client or I

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 assume, I assumed that. I believe the Judge, from what I
2 can tell, the Judge questioned Mr. Culberson and the
3 ultimate decision was to release this witness from her
4 subpoena. So --.

5 Q Okay.

6 A And that was defense counsel's decision. It's his
7 discretion.

8 Q Okay. So, two questions there.

9 That strategic decision, is that something that you
10 could brief on appeal?

11 A You know, I think the case law basically explains that,
12 you know, when defense attorneys make strategic decisions in
13 trial, they're allowed to. So, in my reading, I did not see
14 that being a briefable issue.

15 Q And---

16 A You know, the defense attorney made the ultimate
17 decision. I know he, he told the Judge there was a
18 credibility issue. Ethically, he didn't think that he
19 could, then, you know, just from my experience, I know when,
20 whenever the defense doesn't put in a case, they get last
21 argument. So, it's certainly, it's certainly supported by
22 the case law in attorneys making the decision such as
23 releasing the witness from alibi. So, I didn't see that as
24 being a meritorious issue on appeal.

25 Q Okay. And it -- specifically, the denial of due

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 process, in order to brief that issue, you would of still
2 needed an objection.

3 Is that correct?

4 A From my understanding, yes, there would have been -- I
5 would of needed an objection. I know there's some cases
6 where that the Judge's error, even if there's not an
7 objection, that the Judge's error is so egregious to just,
8 you know, such that the defendant had been denied due
9 process, then yeah, brief it. But I mean I, I didn't see
10 any due process argument here. I mean it was the defense's
11 call. So, yeah, I just, I just didn't see any error.

12 Q Okay. And I'll get to the very last issue that you
13 failed to brief the Judge's error of allowing the reply
14 testimony of Stephanie Eubanks and Kelly Rudicill.

15 Do you remember, in this case, the Solicitor called
16 rebuttal witnesses to testify as to the race of the
17 attacker?

18 A I do recall.

19 Q Okay. And was -- this was, I believe, Pages -- give me
20 one moment.

21 (Pause.)

22 Q I want to say 80s, but I'm looking.

23 A Okay.

24 Q Volume II. I'm sorry. Yes, Volume II.

25 MS. ROSS: 81.

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 Q 81. That's right.

2 A 81. Okay. I'm getting there now.

3 Q It starts on Page 80 when she -- the State actually
4 calls Mrs. Eubanks.

5 A Okay.

6 Q Okay. And was there any objection to Mrs. Eubanks or
7 Mrs. Rudicill's testimony?

8 A There wasn't an objection to them testifying. The
9 defense attorney did object to hearsay during the testimony,
10 and the solicitor argued an exception to hearsay. But as
11 far as an objection to the solicitor calling them to the
12 stand, no.

13 Q Okay. And so could you have briefed the issue of reply
14 testimony without a contemporaneous objection?

15 A No. No, if the issue's not preserved, then, you know,
16 there's -- it's not briefable.

17 Q Okay. And this---

18 A And I didn't see any, any objection here as to the
19 witnesses being called to testify.

20 Q You mentioned early that if a Judge's error is so
21 egregious you can, you can brief it without a
22 contemporaneous objection.

23 Did you see that in this case with regard to the
24 allow -- him allowing the reply witnesses?

25 A I did not see that either. Yeah, I -- other than the

Tiffany Butler - Direct examination
by Ms. Giovanoli

1 hearsay objection, which, you know, I consider that too, but
2 I, I didn't see any sort of due process argument or anything
3 about the reply witnesses being called to the stand that was
4 briefable.

5 Q Okay. Just check one more thing, and then I'll be
6 done.

7 A Okay.

8 Q Okay. I have no further questions. Thank you. And if
9 you'll please answer any questions that the opposing counsel
10 may have.

11 A Okay.

12 THE COURT: Yes, ma'am.

13 MS. ROSS: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MS. ROSS:

16 Q I'm gonna approach so -- where I can hear a little
17 better. Thank you for being here.

18 So, on -- as to -- I just want to go down to the
19 rebuttal. As to the, the allegations that you've gone
20 through already, you just didn't have a proper objection to
21 bring those up on appeal.

22 Is that your testimony?

23 A Yeah, I, I didn't.

24 Q Now, I just want to go to the rebuttable testimony.

25 A Yes.

Tiffany Butler - Cross-examination
by Ms. Ross

1 Q There was no objection there.

2 When you, when you review transcripts, do you word
3 search for objections?

4 A I---

5 Q The word objection or anything like that?

6 A Yeah, that's, that's one of the things that we do. We
7 also go through -- I mean we read the transcript, but we
8 also use searches like objection, motion, just to make sure
9 we're thorough cause that's just -- that's normal practice.
10 At least it was in the Office of Appellate Defense, but we,
11 we do read every single transcript, and whether it's a trial
12 transcript or pretrial motions.

13 Q Well -- okay. And would you agree that possibly, if
14 there's no objection, that might not bring your focus in as
15 much on a due process issue or a potential one?

16 A Well, if I've read the transcript, then, you know, I
17 would catch it.

18 Q Okay.

19 A I don't only refer an objection through a word search.
20 I mean I, I do read the transcript. So, if I, you know, if,
21 if I see it, then I'll address it.

22 Q Okay. Now, as far as rebuttable testimony, isn't that
23 suppose to be limited to testimony which is contradictory of
24 testimony that was presented in the case in chief?

25 A Say that again.

Tiffany Butler - Cross-examination
by Ms. Ross

1 Q So, rebuttal testimony, isn't it true that it should be
2 limited only to testimony which is in reply to testimony
3 presented in the case in chief by the defense?

4 Something that the solicitor---

5 A I believe in this, I believe in this case the victim
6 testified that there was an issue with whether the suspect
7 was black and---

8 Q Right.

9 A ---the reply witness was called to the stand to testify
10 that the victim said the suspect was white. So --.

11 Q Correct.

12 Now, if the, the defense witness had said that he was
13 aware and knew that all the other witnesses had said the,
14 the defendant was a white male, at that point, is it still a
15 rebuttable issue if it's been admitted to by the State --
16 the defense's witness?

17 A With -- if the defense's witness admitted?

18 Q That everyone else said -- all the other witnesses said
19 that the victim said white male.

20 A I don't recall that being stated in this case.

21 Are you saying that's what was in the transcripts?

22 Cause I don't recall that.

23 Q It was. The -- let me go to the page. Page 49 of
24 Volume II on Line 2.

25 Beg the Court's indulgence. There's another call.

Tiffany Butler - Cross-examination
by Ms. Ross

1 MS. GIOVANOLI: I apologize. I believe I'm getting
2 another call.

3 THE COURT: Okay.

4 MS. GIOVANOLI: It's just beeping.

5 A Page 42, Line 2?

6 Q 49. Line 2.

7 A Based on my reading, it looks like the solicitor is
8 asking this potential witness whether he realized that the
9 other, other witnesses says -- witness says that the victim
10 said it was a white man, white male.

11 Q Right.

12 So, that had already been brought out in the case in
13 chief, and, at, at that point, should, shouldn't there have
14 been an objection or something?

15 Wouldn't a rebuttal that goes to the same point that
16 was brought up in the case of chief, wouldn't that have been
17 unfair to the defendant?

18 A Well, I mean there wasn't an objection.

19 Q Okay. Okay. I've got no further questions.

20 MS. GIOVANOLI: I have no further questions.

21 THE COURT: Okay. Thank you, ma'am. I believe that
22 your testimony is concluded.

23 MS. GIOVANOLI: May I approach?

24 THE COURT: Yes, ma'am.

25 THE WITNESS: Okay. Thank you.

1 MS. GIOVANOLI: And, at this point, the State will
2 rest.

3 THE COURT: Okay. The State has rested.

4 Okay. Anything else from the Petitioner, the
5 Applicant, Ms. Ross?

6 MS. ROSS: Judge, I think you've heard quite a bit
7 today. Clearly, the, the release of the alibi witness was
8 terribly damaging to his case. That being a decision of his
9 trial attorney, the Appellate Court really couldn't brief
10 that, but I think, if they had and there was an objection,
11 they would also find that Mr. Culberson didn't make a
12 thoughtful waiver of giving up that, that main witness that,
13 that he had in his case.

14 We do stand by the ineffective assistance of counsel
15 for failing to make objections in closing, and we've been
16 through that at length.

17 Furthermore, the failure to object to the rebuttal.
18 It's clear that, while this could of been presented in the
19 case in chief, the State was aware of this witness, this
20 wasn't a surprise defense witness, the State -- it's
21 impermissible for the State to set a trap for the defense
22 to, to walk into in order to, to gain an unfair advantage
23 from rebuttal, and I believe that's exactly what they did.
24 That recent case, State v. Prather, speaks to that while
25 there's many others.

1 We'd also argue that failure to effectively impeach
2 witnesses Stephanie Eubanks and Kelly, Kelly Rudicill in
3 that rebuttal where they could of been shown that their
4 testimony in rebuttal was obviously different from their
5 testimony at the main trial, and I believe they're a number
6 of other issues that I brought out in questioning as, as
7 well.

8 I don't know if this is necessary. There was also no
9 request for an alibi charge. It may become a moot point
10 without that witness.

11 THE COURT: Thank you.

12 Yes, ma'am.

13 MS. GIOVANOLI: May it please the Court.

14 Just to briefly address the rebuttable witness issue, I
15 have not had the opportunity to read Prather again, but I
16 will note that it's a 2017 case, and that this law would not
17 have been applicable in 2014. However, Ms. Ross argument
18 the State had sandbagged, I guess, the defense with their
19 rebuttal witnesses, we would submit that it was totally
20 proper to call witnesses in reply when the issue of race
21 didn't become an issue until the defense presented a witness
22 that said the attacker was black. That -- obviously, the
23 information was in discovery, but it's not incumbent upon
24 the State to anticipate what witnesses the defense are gonna
25 put up, and what the defense witnesses are gonna testify to.

1 So, calling them in reply to confirm that they heard
2 him say a white -- they heard the victim say a white male is
3 totally reasonable, and, therefore, I don't feel and I think
4 Mr. Shealy agreed there was no objection that could of been
5 made at that point or at least not a winnable objection.

6 And then going to, briefly, the standard of ineffective
7 assistance is showing a deficient performance according to
8 the prevailing professional norms, and prejudice therefrom
9 such that there's a reasonable probability that, but for the
10 errors by counsel, the result of the proceeding would of
11 been different.

12 The standard is not perfection. So, we generally do
13 see missed objections, withheld objections, maybe some
14 hearsay coming in in all trials. The standard is simply not
15 perfection. It's reasonableness. And then any alleged
16 deficiency had to have caused prejudice, and we would
17 submit, in this case, there's actually been no deficiency
18 proven by Applicant, and that any alleged deficiency
19 definitely didn't affect the outcome of this case.

20 The, the, the whole crux of Mr. Shealy's case was
21 mistaken identity, and it's clear, from the transcript, that
22 he zealously pursued that defense through thorough
23 cross-examination of the State's witnesses. He also called
24 an expert witness. That's the first time that's been done
25 against Mr. Barnette, and also Mr. Shealy, the first time he

1 had with Doctor McQuiston, who testified as to false
2 identifications.

3 There was also another witness that was put forth that,
4 Mr. Faron Cox, who also could speak to misidentification in
5 the sense that he heard the victim say that the attacker was
6 a black male. Unfortunately, no other witnesses were able
7 to corroborate that. Unfortunately for Mr. Culberson.

8 As far as Mr. Culberson's allegation about a scar on
9 his hand, that was -- is really definitely not prejudicial.
10 That was in a pretrial hearing with regard to another victim
11 who had identified the Applicant as her attacker.

12 Mr. Shealy thoroughly argued that motion and that
13 evidence was kept out. Judge Couch ruled in favor of the
14 defense.

15 The allegation of improper bolstering of the State's
16 victim, victim witness during the cross-examination of the
17 expert witness, it's not a matter of legitimate dispute that
18 the victim testified that she worked as a nurse for 30
19 years.

20 And I've also got some case law. I won't bombard you
21 guys with it, but it's Phillips versus the State, and that
22 is Case Number 728 S.E.2d 681. This was a 1998 case that
23 basically stood for the proposition, that although a
24 question that assumes facts not in evidence, and it's
25 arguable that these facts were in evidence, but, although a

1 question that assumes facts not in evidence is
2 objectionable, the question is only improper if it assumes a
3 fact in controversy.

4 A nurse's duties just simply weren't in controversy in
5 this case. The controversy was whether he was the man who
6 attacked the victim in this case.

7 So, we would argue that there's no deficiency for not
8 objecting to that cross-examination. There was no
9 bolstering of any State's witnesses in that regard too, and
10 that also speaks to the allegation against appellate counsel
11 that she didn't brief that issue. It simply wasn't a
12 meritorious issue, and, in order to, to win on a claim of
13 ineffective appellate counsel, you've actually got to
14 basically prove that appellate counsel did not brief a
15 winnable issue because, otherwise, there's no prejudice.

16 So, we would argue that, even if she did brief that
17 issue, it wouldn't, it wouldn't have been meritorious or it
18 definitely would not have reversed the Applicant's
19 conviction.

20 As to Mr. Culberson's allegations regarding reply
21 testimony of -- well, I kind of already addressed that. So,
22 I'll skip down to my next one.

23 As to Mr. Culberson's allegations regarding the State's
24 closing argument, the just imagine somebody right in front
25 of your face, that's clearly not appeal to -- an improper

1 appeal to a motion or a Golden Rule argument. He was simply
2 arguing the fact that, because this woman was face to face
3 with her attacker, she was able to identify him because that
4 was the crux of this case, identification.

5 The solicitor was not telling the jurors to put
6 themselves in the victim's shoes and find -- and have a --
7 render a verdict that the victim wants. So, we would argue
8 that Mr. Shealy had no valid objection at that point, and
9 therefore, he was objecting -- deficient for failing to
10 object.

11 On Page 105 of Volume II of the transcript, we believe
12 that the transcript has an error. Although we understand
13 that due weight is given to transcripts, I will argue that,
14 in my experience, we deal with a lot of appeals, and we
15 often run into errors in the transcript. In this case, I
16 was not able to reach out to the court reporter to verify
17 that this was an error, but we would submit that it is.
18 Both the solicitor and Mr. Shealy do not recall hear him
19 saying it or hearing that, and had Mr. Shealy heard that, he
20 definitely would of objected, and that was his testimony.

21 And then as to the alibi witness, the case law is
22 pretty clear on this, and, in a PCR action, an Applicant is
23 alleging that the trial counsel failed to call the alibi
24 witness. The only way that they can meet their burden of
25 proof is providing the alibi witness, presenting them or the

1 testimony that they would of testified to. Otherwise, the
2 allegation is merely speculative as to what Heather
3 Holmstrom would of or should of testified to.

4 Regardless of that, we would argue that it was a
5 strategic decision on the part of trial counsel not to call
6 Heather Holstrom. She was intoxicated. That's a very valid
7 reason not to call someone to the stand, but then Applicant
8 alleges that maybe he should of had her arrested and held in
9 order so that, so that she could sober up to testify, and
10 Mr. Shealy testified he didn't think that that was a prudent
11 decision because holding someone in jail in order to testify
12 for you usually doesn't play in your favor.

13 So, that was a strategic decision. It was a reasonable
14 decision. And so we would argue that there was no
15 deficiency there. And that's -- yeah, and as well as
16 appellate counsel, she argued the issue that she found to be
17 the most meritorious. She's explained her reasoning for not
18 briefing the other three issues that were contained in the
19 allegations.

20 A number of them did not have contemporary --
21 contemporaneous objections, which is required in order for
22 an issue to be preserved on appeal. So, we would argue that
23 she was not deficient in any regard for failing to brief the
24 issues that have -- Applicant insists she should have
25 briefed.

1 Furthermore, we would submit that the Applicant has not
2 prove -- met his burden of proof in that regard because he
3 has not proved that those issues would have been winnable on
4 appeal.

5 So, we'd ask that you deny this application. Thank
6 you.

7 THE COURT: Thank you, ma'am.

8 Okay.

9 MS. ROSS: Can I just briefly say, as far as the alibi
10 witness, I recognized from the beginning -- I'm sorry I
11 could not present that witness. However, Mr. Shealy did
12 present testimony from the stand that she was a true alibi
13 witness, that she did state that she was with Mr. Culberson
14 from the moment of waking up to going into that QT all
15 during the time of the incident. So, I would just submit
16 that there is evidence in the record of what she would say,
17 which is distinguishable from an applicant coming in and
18 just saying I didn't have my alibi witness. This was a real
19 witness who we'd argue should of been proffered or presented
20 to the Court.

21 As far as the, the Phillips v. State argument about the
22 nurse, a lot of times, when I read a transcript, it's not
23 just one or two things that's immediately is ineffective
24 assistance of counsel or results in unfair trial. Here
25 they're a number of things, and the cumulative effect is

1 what was so prejudicial to Mr. Culberson.

2 In the closing, here it was just an ID case. That was
3 the crux. And over and over again Mr. Barnette came in and
4 testified about how nurses were particularly special in
5 their ability to pick someone out of a photo lineup
6 essentially, and that's why it becomes an issue in
7 controversy.

8 So, we just leave the Court with that. Thank you so
9 much.

10 THE COURT: Thank you.

11 MS. GIOVANOLI: Just very briefly.

12 we, we heard what Mr. Shealy said she may of testified
13 to, but it's speculative without her actually taking the
14 stand and providing that testimony in PCR. And that's what
15 the case law says.

16 THE COURT: Okay. Thank you.

17 All right. Mr. Culberson, sir?

18 THE APPLICANT: Yes, ma'am.

19 THE COURT: Just so you understand, I am going to
20 review the transcript. I have a copy of the file.

21 THE APPLICANT: Yes, ma'am.

22 THE COURT: And I'm going to review the transcripts.
23 They're two. And also you filed an application, and then
24 I -- there was a supplement to the application, and there's
25 some sentencing sheets and other information that I want to

1 look at with regard to your case.

2 And so I am not going to make a decision on this until
3 I do that.

4 Okay?

5 THE APPLICANT: Okay.

6 (Pause.)

7 MS. ROSS: He wants you to have the motion of
8 discovery, but I believe you've put in some elements with
9 his application, and I don't -- I don't think that's part of
10 the record, Judge.

11 THE COURT: Okay.

12 MS. ROSS: I'll be happy to -- he's willing to provide
13 it if you'd like to review it. However---

14 THE COURT: Counsel.

15 MS. GIOVANOLI: I'm gonna object on that point. It's
16 not been in discovery. I don't know if it's authentic. I
17 have no clue what is even in there.

18 THE COURT: Okay. All right. I'm, I'm not going to
19 allow that, but I've, I've heard a lot about the discovery
20 in Mr. Shealy's testimony in that regard. And so thank you,
21 sir.

22 Okay. I will review it and there will be a decision.
23 Okay?

24 MS. ROSS: Thank you, Your Honor.

25 THE COURT: Thank you.

1 MS. GIOVANOLI: Thank you, Your Honor.

2 THE APPLICANT: Thank you, Your Honor.

3

4 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

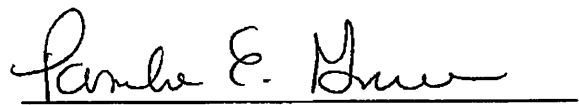
C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 19th day of September, 2017.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 19th, 2018

A handwritten signature in cursive script, reading "Pamela E. Green", is written over a horizontal line.

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Richard Todd Culberson, #355804

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2016-CP-42-0417

**ORDER OF DISMISSAL
WITH PREJUDICE**

CLERK OF COURT
SPARTANBURG COUNTY
2017 NOV -1 AM 11:49
M. HOPE BLACKLEY

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Richard Todd Culberson (Applicant) on January 29, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on September 19, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Solicitor Barry Barnette (Solicitor), Chris Brough, Esquire, (Counsel) and Tiffany Butler, Esquire, (Appellate Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, Respondent's return, and Applicant's supplemental application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the March 2013 term of the Spartanburg County Grand Jury for assault with intent to commit criminal sexual conduct, first degree (2013-GS-42-1814), assault and battery first degree (2013-

GS-42-1811), kidnapping (2013-GS-42-1812), and attempted armed robbery (2013-GS-42-1813). Matthew Shealy, Esquire, represented Applicant. Solicitor Barry Barnette represented the State. On June 16-18, 2014, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for concurrent terms of 20 years each for assault with intent to commit criminal sexual conduct, first degree, kidnapping, and attempted armed robbery, and to 10 years for assault and battery, first degree.

Applicant filed a timely notice of appeal and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Culberson, Op. No. 2015-UP-546 (S.C. Ct. App. filed December 2, 2015). The Remittitur was returned on December 21, 2015.

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

1. Ineffective Assistance of Counsel, in that:

- a. "Trial Counsel was ineffective for failing to object to improper comments and pre-trial remarks made by prosecution during closing arguments
 - i. "the prosecution advised the jury that the state didn't have to prove this case beyond a reasonable doubt (See Tr. P. 105, Lines 16-21). This is erroneously lead the jury to believe the State didn't have to meet the burden of proof. The law states the defendant must be found guilty beyond a reasonable doubt as instructed by the judge in his charge to the jury (p. 112, lines 1-5)(p. 113, lines 3-11)(Tr. P. 114, lines 11-13).
 - ii. "Trial counsel failure to object to improper closing remarks amounted to performance below the objective standard of reasonableness."
- b. "Trial counsel was ineffective for failing to pursue issue of mistaken identity when victim started to Mr. Faron Cox that the perpetrator was black man in a grey hoodie (Tr. Of the third day of trial, Tr. P. 147, line 21-25)(Tr. p. 48, lines 1-5). The defendant at trial was and is a white male.

- c. "Trial counsel was ineffective when he failed to pursue misidentification defense where Petitioner didn't have scar on his hand, the right or the back of his hand, nor a scar between his ring finger (Tr. p. 124, lines 11-25)(Tr. p. 125, lines 1-25).

On or about June 21, 2017, Applicant, through counsel, filed a supplemental application alleging:

1. Ineffective Assistance of Counsel for:
 - a. "failure to object to improper rebuttal testimony,"
 - b. "failure to effectively impeach rebuttal witnesses,"
 - c. "failing to argue for delay to present alibi witness,"
 - d. "releasing alibi witness from subpoena,"
 - e. "failure to effectively object to State bolstering his witness with untrue facts contrary to prior testimony (See trial transcript p. vol II, 35, l.3, & pp. 142, l.14 & 143, l. 3), and"
 - f. "failure to object to improper argument the State's closing argument. (See trial transcript p. 97, l.21, p. 101, l. 17, p. 105, l. 17, & p. 108.)"
2. Ineffective assistance of appellate counsel for failing to brief issues of:
 - a. "error in Judge's overruling objection to Solicitor bolstering his witness with facts contrary to evidence, (See trial transcript vol II, 35-3 & pp. 142-14 & 143-3)"
 - b. "denial of due process when Judge allows trial attorney to release alibi witness from subpoena, (See trial transcript vol II p. 79) and"
 - c. judge error of allowing the reply testimony of Stephanie Eubanks and Kelly Rudicill"

2017 NOV -1 AM 11:49
 CLERK OF COURT
 JUDGE BLCKLEY

FACTS ADDUCED AT TRIAL

Victim, an employee of Carolina Ob-Gyn for approximately thirty years, arrived early to work on the morning of January 24, 2013. (R. p.142, lines 9-16.) She was meeting a maintenance man before the office opened at 8:00 a.m., and she arrived around 7:05 a.m. (R p. 144, lines 12-18.) Victim was wearing scrubs, a corduroy coat, and gloves. (R. p. 144, lines 22-24.) Her purse was on her right arm. (R. p. 148, lines 5-7). Victim walked to the entrance of the building. (R. p. 146, line 12.). She felt a tug on her coat, and as she turned, Appellant stabbed her in the right

shoulder with a screwdriver. (R. p.146, lines 15-17.) Appellant grabbed Victim's breast, and pushed her against the glass door. Victim testified at this point she didn't know where her purse was. (R. 146, lines 19-23.) She struck her head and back on the glass, and slid down to the floor. (R. p. 146, lines 24-25.) As Victim was lying on the ground, Appellant started pulling at the waistband of her pants. (R. p. 147, lines 3-4.) When Victim realized what Appellant was doing, she began kicking him. (R. p. 147, line 7.) Appellant stabbed Victim again on her right side under her rib, and "that's about the last thing I knew." (R. p. 147, lines 8-9.) Victim testified she was in shock, and didn't know how long she was lying on the ground. (R. p. 161, lines 13-18.) She was found later by an elderly couple who called 911. (R. p. 147, lines 12-13.) Her purse was found on the opposite corner of the room, diagonally across from where Victim was attacked. (R. p. 151, lines 11-19.)

Victim was able to describe her attacker to law enforcement. (R. p.168, lines 10-11.) A BOLO went out that morning with Appellant's description. (R. p. 258, lines 10-12) At one point, city officers stopped Appellant four miles away for questioning about another matter, but let him go. (R. 195, lines 11-16.) Officers found Appellant again later that day and recognized him from the BOLO. (R. p. 259, lines 7-12.) The officer obtained his identification, but did not yet detain him, and Appellant walked across the street to another business. (R. p. 261, lines 1-10.) When officers followed Appellant across the street, they were told by the employees of the business that Appellant had exited the rear of the building. (R. p. 262, lines 1-12.) When officers arrived at his address, which was his parent's house, they found Appellant's mother cutting his hair (R. p. 214 lines 15-21.) Investigators also found the hoodie and jacket that matched the Victim's description. (R. p. 217, lines 18-19.) Appellant was taken into custody and arrested later that day.

(R. 218, lines 5-6.) Victim was able to identify Appellant from a photo lineup. (R. p. 197, lines 1-25.)

SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant believed Counsel was ineffective for making an improper statement in his opening statement to the jury. Specifically, Applicant referred to Vol. I, page 96, lines 22-25, in which Applicant believes Counsel's statement, "I don't think ultimately you're gonna be able to find my client not - - guilty cause I just don't think they can carry their burden," was improper.

Applicant recalls asking Counsel where his alibi witness, Heather Holstrom, was during his trial. Counsel had to look for her and when he found her, Counsel said she was intoxicated. Applicant testified he did not know if his alibi witness, Heather Holstrom, had been subpoenaed and that Counsel had released her before Applicant knew what was going on. Applicant explained that although there was a colloquy with the court during trial in which he told the court he did not want her to testify drunk, he did not mean he did not want her to testify at all. (Tr. Vol. II, p. 77-79). Applicant believes Counsel should have had her arrested to force her to sober up so that she could testify. Applicant claimed he did not want the alibi witness testifying at his trial drunk because she might testify to something crazy. Applicant denied Heather was his friend, but rather just another drunk like him.

Applicant admitted he has been a petty criminal his whole life, but he always pled guilty to the crimes he committed. Applicant insisted he was innocent in this case. Applicant claims he only met with Counsel three times and believes Counsel should have come to meet with him more. During the meetings, Counsel only discussed issues with the distance between the scene of the crime and the bus stop. Applicant wanted Counsel to look into Ricky from Vic Bailey's.

Applicant testified he had gone to Vic Bailey's and asked Ricky for few dollars that morning and Heather was with him. Ricky told Applicant that he needed to call his father because his father was going to have surgery. Applicant testified he called his father from Vic Bailey's and his father informed Applicant there was a check at the father's house for Applicant. After hearing this, Applicant decided to go to his father's house. He was going to his father's house for a check, not for a haircut. However, Applicant admitted he got a haircut because he knew he was going to jail for the probation violation. Applicant claims Ricky could testify to his change of plans that morning after his phone call with his father. Applicant testified he and Heather then went to the bus stop when he saw the police. He knew that the police were after him because he had warrants for a probation violation, so he ran.

Applicant testified Counsel and other people at the jail told him not to testify at trial. Applicant believes he should have testified at trial and Counsel's advice to the contrary was erroneous. Applicant believed Counsel should have objected to the Solicitor's closing when the Solicitor referenced the QT video and describing what it looked like Applicant was doing. (Tr. vol. II, p. 103). Applicant claims nothing in the evidence matched him being the attacker. Applicant testified the only thing the police got right was that he was wearing a gray hoodie. Applicant claimed that DNA tests did not connect him to the crime. Applicant believes Counsel should have requested a DNA test of gloves the victim was alleged to have worn while driving from Lyman Lake to work. Applicant also expressed his opinion that he had good teeth. The victim had described her attacker as having bad teeth. (Tr. vol. I, p. 152). Applicant believes Counsel did not investigate his dental hygiene or argue the mischaracterization of his teeth. [Trial counsel cross examined witness about describing bad teeth on p. 168, 169 & 171]

Applicant complained that the Solicitor was yelling at trial and Counsel never did the same and that Counsel was not animated and objecting enough. Applicant also took a polygraph test conducted by law enforcement. Applicant alleges Counsel should have requested an independent polygraph examination in response to the results of the one conducted by law enforcement.

Applicant testified Counsel should have objected during the Solicitor's cross examination of his identification expert witness when the Solicitor was asking her if she considered the victim's job duties for the last thirty years as a nurse in her assessment of the case. (Tr. vol. II, pg. 35). Applicant also believes Counsel should have objected to the Solicitor asking the expert if she considered the victim receiving counseling after the incident in which she had to replay the event. (Tr. vol. II, p. 35). Applicant testified the questions asked of the expert by the Solicitor were contrary to the facts that were presented, in that the victim had described her duties *at that time* as head nurse. (Tr. vol. I, p. 55; p. 143). He also believes Appellate Counsel was ineffective for not briefing the overruled objection to the Solicitor's question of the expert witness.

II. The Solicitor testified to the following:

Solicitor Barry Barnette has practiced law since 1990. He is and was at the time of this trial the Seventh Judicial Circuit Solicitor. Solicitor did not assume facts not in evidence when he cross examined the defense's expert witness. Not only did the victim testify both pre-trial and during trial that she was a head nurse, but also that she had worked for Carolina OB-GYN for thirty years. It was a reasonable inference based on common sense and common knowledge what a nurse's duties are. Furthermore, it was not a fact in controversy. However, the defense

had made the case about identity so the argument about a nurse's duties was fair to suggest the victim was able to correctly identify her attacker.

The Solicitor testified he did not agree with the transcript in that it reads him saying in closing, "we don't have to prove this case beyond any reasonable doubt." The Solicitor is very familiar with the burden placed upon the State and would never willfully mislead a jury to think anything less. The chances that he misspoke that greatly are slim. The Solicitor testified that he has said in closing that the State does not have to prove the case beyond *any* doubt, which is most likely what he said in this case. The Solicitor is familiar with the transcripts transcribed by Pamela Faucette and is aware of past discrepancies in her transcripts.

The Solicitor recalled the alleged alibi witness, Heather Holstrom. His office helped Counsel track her down to a soup kitchen. It was the Solicitor's understanding that she was intoxicated when found. Regardless, the Solicitor had pulled her criminal history in anticipation of her testimony. After using her criminal history report to refresh his recollection, he listed numerous offenses for which he could use to impeach Heather.

The Solicitor did not believe he made a Golden Rule Arguments during his closing. (Tr. vol. II, p. 97). The Solicitor explained that a Golden Rule Argument asks the jury to put themselves in the victim's shoes in order to render a verdict the victim would want. The Solicitor's argument in this case was directed at the defense of mistaken identity.

The Solicitor also did not believe his description of what was on the video of Applicant in the QT store that was admitted into evidence was improper. The video was admitted into evidence by the defense and available for the jury to view. The Solicitor's description of the events caught on the video were fair argument for closing. Additionally, to the extent Applicant complains the Solicitor was implying Applicant was stealing something on the video, the

Solicitor noted that the transcript reads "it seems like *she* put it underneath his coat." (Tr. vol. II, p. 103). (Emphasis added).

III. Counsel testified to the following:

Matthew Shealy has been practicing criminal law for 8 years as an Assistant Public Defender. He was appointed to represent Applicant. Counsel recalls meeting Applicant approximately 7-8 times either at the jail or in the courthouse. Counsel filed a discovery motion and obtained discovery. He reviewed all of it with Applicant and discussed the evidence the State had against him. Applicant always maintained that he did not commit the crime and that he was with Heather Holstrom the entire night before the crime as well as the morning of the crime. Both Applicant and Heather Holstrom were homeless. Applicant's version of events was that he slept in that morning. He and Heather then went to Main Street Motel in order to get drugs from an old man. Applicant gave Counsel the hotel room in which he believed the old man lived. Next, Applicant and Heather went to hold a sign. After that, they went to the QT convenient store. After the QT, they went to Vic Bailey's where Applicant called his father. Then, they went to Applicant's parents' house. Applicant had implied to Counsel that Heather was his girlfriend.

Counsel believed a strength in Applicant's case was the video footage showing him at the QT, 4.5 miles away from the crime scene, only an hour and ten minutes after the attack. Because Applicant was homeless, he did not have a car. Counsel believed it would not make sense for him to walk 4.5 miles to the QT after attacking the nurse. Additionally, he was able to confirm with Applicant's parents that he was at their house after the QT, which was in a different direction from the crime scene as the QT. This also did not make sense to Counsel - why Applicant would walk 4.5 miles in one direction only to turn around and go back to his parents' house.

house. The nurses pavilion, where the crime occurred, was not close to anything which also did not make sense why Applicant would have been out there so early in the morning. Counsel investigated the route and felt it would be a strong argument at trial.

Counsel pursued Applicant's alibi witness. Counsel found that she was serving a short sentence in the county jail. Counsel, with his office's investigator, Donald Stepp, went to the jail and spoke with Heather about the date in question. Counsel testified Heather could only state she was with Applicant, however, she could not provide any details of what they did or where they went as Applicant had done previously. Additionally, Counsel did not recall Heather being on the QT video footage. Therefore, although Counsel fully prepared and anticipated calling Heather to testify because a second person to claim Applicant was with her would be beneficial, Counsel questioned how much benefit she would contribute. Counsel subpoenaed Heather for trial. However, she was not present on the date of the trial. Counsel addressed the court and requested a recess in order to try to track her down, which was granted. (Tr. vol. II. pp. 72-75).

The original address Heather had given to Counsel and his investigator belonged to that of a padlocked church. Counsel's only other idea as to where she may be found was the Supp kitchen. During the recess granted by the court, Counsel and his investigator went to the soup kitchen, where they found Heather. Heather was accompanied by a paramour who seemed agitated with their presence and their desire to talk to Heather about Applicant's trial. It was quickly apparent to Counsel and the investigator that Heather was under the influence of alcohol and maybe drugs. Counsel recognized that he could not call an intoxicated (incompetent) witness to testify in his client's case. Counsel also realized that his only other option would be to have her arrested in order for her to sober up in the "drunk tank." Counsel's opinion on that option was that her testimony may not be favorable to the defense if they had her arrested and

forced to come testify. Counsel made the decision to return to the courthouse without the alleged alibi witness. Counsel returned to the courthouse to discuss the matter with Applicant. Applicant agreed that he did not want Heather to testify while intoxicated. This was also discussed on the record. (Tr. vol. II. pp. 77-79).

Additionally, Counsel investigated and pursued a mistaken identity defense. Counsel knew that the victim had identified his client from a lineup. He procured the services of an expert witness qualified in mistaken identity, Dr. Dawn McQuiston. Counsel came across Dr. McQuiston when she spoke at a Public Defender's conference. Counsel also found another eye witness, Faron Cox, who testified that the victim initially stated it was a black male who attacked her. Unfortunately, he was the only witness at the scene that alleged to have heard the victim say black male. Counsel also subpoenaed the QT manager, Brian Baird, in order to admit the QT surveillance footage of Applicant in the QT store that morning. Counsel also presented Martha Culberson, Applicant's step-mother, to testify that he did in fact come to their house and that she cut his hair. Lastly, Counsel called his investigator, Curtis Jones, to testify regarding the times and distances between the nurse's pavilion, the QT store, and Applicant's parents' house.

Counsel did not see anything objectionable about the Solicitor calling rebuttal witnesses for the purpose of offering testimony in contradiction to that of Faron Cox with regard to the race of the attacker. Counsel realizes the race of the attacker had not become a fact in controversy until he presented Faron Cox. Also, Counsel did not see anything objectionable to the Solicitor's reference to the job duties of a nurse. Although the victim testified she was the head nurse at trial and her duties were not consistent with that of a regular nurse, she also testified she had been a nurse for thirty years. Counsel did not feel that the fact she had worked as a nurse for the past thirty years was a fact in controversy. Counsel also believed the arguments made by the

Solicitor as to a nurse's duties was a matter of common knowledge, as opposed to assuming facts not in evidence.

Counsel did not recall hearing the Solicitor say in closing that he did not have to prove the case beyond any reasonable doubt and believes the transcript does not reflect with the Solicitor actually said. Counsel stated that if the Solicitor had misstated the burden of proof as the transcript indicated, he would have objected. Counsel had tried cases against the Solicitor previously and had never heard him misstate the burden of proof.

Counsel testified Applicant never told him that another man, for whom Applicant had been often mistaken, had a scar on his hand. Applicant had only told Counsel that he had been mistaken for the other man. Counsel was aware that the victim had described her attacker as having bad teeth which went to his argument of mistaken identity. Counsel advised Applicant against testifying in his trial because he had a criminal history that could be used against him and because Counsel did not believe Applicant would withstand the pressures of a tough cross-examination. Regardless, it was Applicant's decision not to testify.

Counsel explained he did not object to the Solicitor's cross examination of the defense expert witness when he asked about a nurse's duties, because he found the questioning to be proper. It is proper to inquire into what facts and knowledge about the case the expert used in coming to her opinion and sometime experts consider evidence not presented to the jury. Counsel disagreed with Applicant's assertion that the Solicitor's description of a nurse's duties contradicted the victim's job duties to which she testified she had at the time of the crime. Counsel believed through common sense everyone understood that the victim had served as a nurse in some capacity for thirty years and that her duties throughout her career would have been consistent with that which is common knowledge of what nurse's do. Although she was a head

nurse at the time and served in a more managerial role, he assumed her duties were typical nurse duties throughout her career.

Counsel explained that although defense witness, Faron Cox, admitted on cross examination that he was aware everyone else at the scene heard the victim say a white male had attacked her, he believed it was still an appropriate call by the Solicitor to call rebuttal witnesses to testify that is what they heard. Mr. Cox's testimony made the race of the attacker an issue and although he testified he was aware other people said the attacker was white, he felt the Solicitor had a right to show the jury who those other witnesses were and to present their live testimony as to what they heard the victim say. Counsel understood that Eubanks and Rudicill could have testified as to the race of the attacker in the State's case in chief, but recalls objecting during Rudicill's testimony in the State's case in chief and the judge sustaining the hearsay objection and requesting the witness not testify as to what the victim said. (Tr. vol. I, p. 189).

Counsel testified he did not request Applicant take an independent lie detector test because the tests are not reliable or accurate and the results could not be used at trial. Essentially, another polygraph test would be useless. With regard to Applicant's allegation that the Solicitor bolstered the State's witnesses' during the cross examination of the defense expert witness and during the State's closing, Counsel felt all of the Solicitor's arguments were fair game. Counsel testified it is proper to argue for or against credibility.

IV. Appellate Counsel testified to the following:

Tiffany Butler worked for the South Carolina Commission on Indigent Defense in the Office of Appellate Defense at the time of Applicant's appeal. Appellate Counsel filed a brief in Applicant's appeal of his criminal conviction, challenging the court's ruling on Applicant motion

for directed verdict of acquittal on the attempted armed robbery charges. Appellate Counsel testified she believed the issue briefed was the most meritorious issue presented.

Appellate Counsel explained she did not brief the court's overruling Applicant's objection to Solicitor bolstering his witness with facts contrary to evidence because there was no objection to that effect. The objection was made based on relevance. Appellate Counsel could not brief an issue arising from a relevance objection based on an argument that the question actually bolstered the State's witness with facts contrary to evidence. Additionally, Appellate Counsel did not believe the Solicitor was bolstering his witness with facts contrary to the evidence.

Appellate Counsel explained she did not brief the issue of a denial of due process where the court allowed Applicant's defense counsel to release an alibi witness from her subpoena. First, Appellate Counsel testified that in general, there needs to be a contemporaneous objection in order to preserve an issue for appeal. However, where there's been an egregious denial of due process, an objection may not be necessary to consider the issue on appeal. But, Appellate Counsel did not believe in this instance, Counsel releasing a witness from a subpoena a denial of due process. In fact, Appellate Counsel believed Counsel made a strategic decision to release the witness and the issue was not proper for direct appeal.

Regarding Applicant's allegation that Appellate Counsel was ineffective for failing to brief the issue of the court allowing reply testimony from two State's witnesses, Appellate Counsel believed the reply testimony was proper to rebut testimony presented during the defense's case. Additionally, Appellate Counsel testified Counsel did not make an objection to the reply witnesses and therefore the issue was not preserved for appellate review.

On cross examination, Appellate Counsel admitted to the practice of using key word searches for the term, "objection," but clarified that appellate defenders always read every word of the transcript in addition to word searches. Therefore, she would not have missed a meritorious issue by only searching for objections in the record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

I. 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), SERCP). 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 (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.

A. Failure to object

Applicant has made a number of allegations revolving around Counsel failing to object at various times during the trial. Counsel's failure to make any conceivable objection is not deficient *per se*. Objections are calculated to achieve a tactical end in keeping with a party's theory of the case. Counsel, on the whole, reasonably calculated his objections to achieve the stated end. In any trial, decisions of Counsel can be, and will be, questioned. However, tactical trial decisions that do not serve to acquit the defendant do not, by definition, prove deficiency. In this matter, Counsel's performance was more than adequate and clearly within the standards of professional conduct. The Court will specifically address all the "failure to object" claims in this section:

1. Failure to object to the Solicitor's closing arguments.

This Court finds that Applicant has failed to meet his burden of proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant has failed to prove, either by

presentation of evidence or from support of the record, that Counsel was ineffective for failing to object to the Solicitor's closing remarks that the State did not have to prove the case beyond any reasonable doubt. (Tr. p. 105, ll. 16-21). Both Counsel and the Solicitor testified that is not what was actually said during the Solicitor's closing argument. This Court finds Counsel and the Solicitor's testimony on the issue credible. The Solicitor has been prosecuting criminal cases for many years and obviously fully understands the State's burden of proof. This Court finds it very likely that this was a transcription error and the Solicitor most likely said the State was not required to prove the case by *any doubt*. On the other hand, if the Solicitor did actually say what appears in the transcript, this Court finds it very difficult to believe the mistake was not inadvertent. Additionally, Counsel testified that had he heard what was written in the transcript, he would have objected. Regardless, Applicant has failed to prove any prejudice from the alleged failure to object. The record is littered with the correct burden of proof, including the trial judge who mentions reasonable doubt twenty-six times during his jury instructions. Therefore, there is no reasonable possibility that had Counsel objected to any alleged misstatement by the Solicitor, it would have affected the outcome.

Applicant also complains Counsel did not object to the Solicitor's statement in closing, "imagine someone in your face," to argue the idea that the victim would remember her attacker's face. This was in reply to the defense's theory set forth that this was a case of mistaken identity. To the extent Applicant alleges this statement was a Golden Rule Argument, this Court finds that contention meritless. The Solicitor was not asking the victim's to put themselves in the shoes of the victim in an effort to garner pity for the victim and have the jury render a guilty verdict on that basis. This Court finds the argument fair game in the case of mistaken identity.

Furthermore, Applicant cannot prove there is a reasonable probability that had Counsel objected, it would have affected the outcome of the trial.

Applicant also complains Counsel did not object to the Solicitor mentioning the general duties of a nurse to imply the victim was observant and therefore paid attention to the face of her attacker. This Court finds these closing remarks appropriate and unobjectionable. The Solicitor was drawing reasonable inferences from the victim's own testimony that she was the head nurse and had worked for the doctor's office for thirty years. Furthermore, any objection from Counsel on this point was not reasonably likely to affect the outcome of the trial.

Lastly, Applicant alleged Counsel was ineffective for failing to object when the Solicitor, in closing, asked the jury not to let Applicant get away with the crime because women need to be able to go to work and not face the horror the victim did. (Tr. vol. II, p. 108). Once again, this Court can find nothing objectionable about the Solicitor's call upon the jury to punish Applicant for his criminal conduct. The Solicitor's argument was fair. The State and the defense are both allowed to play on both the reason and the emotion of a jury. After all, a jury is made up of humans, none of whom are immune to emotion. However, an appeal to the emotion of a jury becomes improper when it is to an extreme or outweighs the appeal to reason. That was simply not the case here. The evidence presented damning facts against Applicant. The jury's verdict was obviously not a result of emotion, but rather a result of the evidence put forth before them. Applicant failed to prove his burden that he was prejudiced by the alleged deficiency on this issue.

Having failed to meet his burden of proof, these allegations against Counsel for failing to object to the Solicitor's closing arguments is denied and dismissed with prejudice.

2. Failure to object improper rebuttal testimony.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by the alleged failure to object to rebuttal testimony offered by the State. This Court finds nothing improper with regard to the rebuttal testimony from Dr. Eubanks or Ms. Rudicill. During the defense's case, Applicant offered a witness, Mr. Cox, who testified the victim stated her attacker was a black male. The State called two employees of the doctor's office to testify as to how they heard the victim describe her attacker as a white male. This was proper rebuttal testimony to which Applicant opened the door. To the extent Applicant claims Counsel should have objected to hearsay, the testimony was admissible as an excited utterance. Therefore, Applicant has failed to prove Counsel was deficient or that he was prejudiced by any deficiency. This allegation is denied and dismissed with prejudice.

3. Failure to object to the State bolstering their witness with untrue facts contrary to prior testimony.

Applicant argues Counsel was ineffective for failing to object when the State elicited testimony regarding a nurse's general duties because the victim testified she had worked at that doctor's office for thirty years, was the head nurse, and performed managerial duties. Essentially, Applicant's contention is that because the victim testified she was the nurse supervisor, the general duties of nurses was not applicable to her and therefore was bolstering the witness's ability to identify her attacker based on job duties that were not hers at the time of the attack. However, it is worth noting, the victim did not become the head nurse supervisor over the course of thirty years of employment with that office without first having served as a nurse. Furthermore, the duties of a nurse were not a fact in dispute or controversy and therefore were not objectionable under the theory that the State was assuming facts not in evidence. Phillips v. State, 728 So.2d 681 (1998). This Court also believes a nurse's duties are general common knowledge. Applicant also cannot prove there is a reasonable probability an objection to this

testimony would have had any effect on the outcome of his trial. Therefore, this allegation is denied and dismissed with prejudice.

B. Failure to pursue mistaken identity

Applicant alleged Counsel failed to pursue an issue of mistaken identity. However, the record reflects the entire defense was centered around mistaken identity. Counsel offered an expert witness to testify regarding the phenomenon of mistaken identity. Counsel also called Mr. Cox to the stand to testify the victim said her attacker was a black male. Additionally, Counsel successfully suppressed evidence of a second victim who identified Applicant as her attacker. Part of that pre-trial motion included Counsel calling attention to the second victim's description of a scar on the hand of her attacker and pointing out Applicant had no such scar. Applicant fails to present evidence of how Counsel could have better pursued the issue of mistaken identity. Therefore this Court finds Applicant has failed to meet his burden to prove Counsel was deficient or that he was prejudiced by any alleged deficiency. This allegation is denied and dismissed with prejudice.

C. Failure to effectively impeach rebuttal witnesses

Applicant alleged Counsel could have more adequately impeached rebuttal witnesses, however he's failed to demonstrate exactly how Counsel could have more effectively impeached the State's rebuttal witnesses. In light of the testimony offered by the rebuttal witnesses and the facts of the case, this Court finds Counsel's performance reasonable with regard to his cross-examination of the State's rebuttal witnesses. This allegation is meritless and therefore, it is denied and dismissed with prejudice.

CLERK OF COURT
STATE OF TEXAS
2017 NOV -
M. HOPE
ACADEMY
AM 11:15

D. Alibi witness allegations

Applicant alleged Counsel was ineffective for failing to request a delay in order to present testimony from an alleged alibi witness and for releasing his alleged alibi witness from her subpoena the day of trial. It is undisputed the alleged alibi witness was intoxicated during Applicant's trial. This Court finds Counsel provided credible testimony on the issue. Counsel testified he and his investigator had previously met with the alleged alibi witness in jail. She told Counsel she could testify Applicant was with her the day of the crime, but she could not provide any details of where they were or what they were doing, like Applicant could do. Counsel believed her alibi testimony was weak, but provided an alibi nonetheless and would be helpful to Applicant's defense. Counsel subpoenaed the alleged alibi witness for trial, but found the address she gave him was to an abandoned church. She failed to appear at trial to testify on Applicant's behalf. Counsel requested a recess in order to attempt to locate her and bring her to court to testify. The trial court granted his request and Counsel and his investigator were able to find her in a soup kitchen with her paramour. Counsel testified it was obvious she was under the influence of something – drugs or alcohol or a combination thereof. Counsel decided to excuse her from her subpoena and move forward with Applicant's defense without the alleged alibi witness's testimony. The record also reflects a colloquy regarding this issue between Counsel, Applicant and the trial judge before proceeding without the alleged alibi witness.

This Court finds that Applicant has failed to show that Counsel was ineffective for either not requesting a delay in order for the alleged alibi witness to sober up and testify or excusing her from her subpoena. First, this Court notes any claims surrounding the failure to present testimony from an alleged alibi witness assumes the testimony from the alleged alibi witness would have been favorable to the defense and therefore affected the outcome of the trial.

D. Alibi witness allegations

Applicant alleged Counsel was ineffective for failing to request a delay in order to present testimony from an alleged alibi witness and for releasing his alleged alibi witness from her subpoena the day of trial. It is undisputed the alleged alibi witness was intoxicated during Applicant's trial. This Court finds Counsel provided credible testimony on the issue. Counsel testified he and his investigator had previously met with the alleged alibi witness in jail. She told Counsel she could testify Applicant was with her the day of the crime, but she could not provide any details of where they were or what they were doing, like Applicant could do. Counsel believed her alibi testimony was weak, but provided an alibi nonetheless and would be helpful to Applicant's defense. Counsel subpoenaed the alleged alibi witness for trial, but found the address she gave him was to an abandoned church. She failed to appear at trial to testify on Applicant's behalf. Counsel requested a recess in order to attempt to locate her and bring her to court to testify. The trial court granted his request and Counsel and his investigator were able to find her in a soup kitchen with her paramour. Counsel testified it was obvious she was under the influence of something – drugs or alcohol or a combination thereof. Counsel decided to excuse her from her subpoena and move forward with Applicant's defense without the alleged alibi witness's testimony. The record also reflects a colloquy regarding this issue between Counsel, Applicant and the trial judge before proceeding without the alleged alibi witness.

This Court finds that Applicant has failed to show that Counsel was ineffective for either not requesting a delay in order for the alleged alibi witness to sober up and testify or excusing her from her subpoena. First, this Court notes any claims surrounding the failure to present testimony from an alleged alibi witness assumes the testimony from the alleged alibi witness would have been favorable to the defense and therefore affected the outcome of the trial.

However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Here, while Applicant's claims are not directly claims that Counsel failed to call the witness at all, they are essentially of the same nature. Because Applicant failed to produce the testimony of the alleged alibi witness, any prejudiced derived from any of Counsel's actions leading to her not testifying is purely speculative.

Secondly, this Court finds Counsel provided credible testimony that he investigated and interviewed the alleged alibi witness. The record proves he physically searched for her and found her at a soup kitchen intoxicated. After this discovery, he considered the potential problems with having her arrested and forcing her to be held in the "drunk tank" to sober up to testify. Having weighed his options and the relatively lackluster and vague testimony she seemed to be able to offer, he ultimately made the strategic decision to refrain from calling the witness. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546,

419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel's strategic decision was based on sound professional judgment which will not be disturbed by this Court in hindsight of Applicant's conviction. Therefore the allegations are denied and dismissed with prejudice.

II. Ineffective Assistance of Appellate Counsel

Applicant also alleges ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (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).

Applicant must show that appellate counsel's performance was deficient and that she was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of 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.*

A. Failure to brief error in Judge's overruling objection to Solicitor bolstering his witness with facts contrary to evidence

Applicant alleged Appellate Counsel was ineffective for failing to brief the overruled objection Counsel made to the Solicitor bolstering his witness with facts contrary to evidence. (Tr. vol. II, p. 35; pp. 142 -143). This Court finds Appellate Counsel testified credibly that she did not brief this issue because there was no objection to that effect. The objection was made based on relevance. As such, Appellate Counsel could not brief an issue arising from a relevance objection based on an argument that the question actually bolstered the State's witness with facts contrary to evidence. Additionally, Appellate Counsel did not believe the Solicitor was bolstering his witness with facts contrary to the evidence. This Court agrees. As discussed above, the Solicitor's questions and comments regarding general nurse duties was not objectionable. Regardless, Applicant has failed to show how briefing this issue would be reasonably likely to affect the outcome of his appeal. This Court finds Appellate Counsel's decision to brief the directed verdict issue was based on sound professional judgment. Applicant has failed to prove otherwise. This allegation is therefore denied and dismissed with prejudice.

B. Failure to brief denial of due process when Judge allowed trial attorney to release alibi witness from subpoena

Applicant alleged Appellate Counsel was ineffective for failing to brief a denial of due process when the trial judge allowed Counsel to release the alleged alibi witness. (Tr. vol. II, p. 79). Appellate Counsel credibly testified that in general, there needs to be a contemporaneous objection in order to preserve an issue for appeal. However, where there's been an egregious denial of due process, an objection may not be necessary to consider the issue on appeal. But, Appellate Counsel did not believe in this instance, Counsel releasing a witness from a subpoena

stronger than those actually raised on appeal. Id.

A. Failure to brief error in Judge's overruling objection to Solicitor bolstering his witness with facts contrary to evidence

Applicant alleged Appellate Counsel was ineffective for failing to brief the overruled objection Counsel made to the Solicitor bolstering his witness with facts contrary to evidence. (Tr. vol. II, p. 35; pp. 142 -143). This Court finds Appellate Counsel testified credibly that she did not brief this issue because there was no objection to that effect. The objection was made based on relevance. As such, Appellate Counsel could not brief an issue arising from a relevance objection based on an argument that the question actually bolstered the State's witness with facts contrary to evidence. Additionally, Appellate Counsel did not believe the Solicitor was bolstering his witness with facts contrary to the evidence. This Court agrees. As discussed above, the Solicitor's questions and comments regarding general nurse duties was not objectionable. Regardless, Applicant has failed to show how briefing this issue would be reasonably likely to affect the outcome of his appeal. This Court finds Appellate Counsel's decision to brief the directed verdict issue was based on sound professional judgment. Applicant has failed to prove otherwise. This allegation is therefore denied and dismissed with prejudice.

B. Failure to brief denial of due process when Judge allowed trial attorney to release alibi witness from subpoena

Applicant alleged Appellate Counsel was ineffective for failing to brief a denial of due process when the trial judge allowed Counsel to release the alleged alibi witness. (Tr. vol. II, p. 79). Appellate Counsel credibly testified that in general, there needs to be a contemporaneous objection in order to preserve an issue for appeal. However, where there's been an egregious denial of due process, an objection may not be necessary to consider the issue on appeal. But, Appellate Counsel did not believe in this instance, Counsel releasing a witness from a subpoena

rose to a denial of due process. In fact, Appellate Counsel believed Counsel made a strategic decision to release the witness and the issue was not proper for direct appeal. This Court agrees. Applicant has failed to meet his burden of proving Appellate Counsel was deficient in her decision not to brief this issue or that he was prejudiced by such a decision. There is no reasonable probability the briefing a denial of due process when Counsel excused the alleged alibi witness from her subpoena would have changed the outcome of Applicant's case on appeal. Therefore this allegation is denied and dismissed with prejudice.

C. Failure to brief judge error of allowing the reply testimony of Stephanie Eubanks and Kelly Rudicill

Applicant also alleged ineffective assistance of appellate counsel for failing to brief the trial court allowing the State to call rebuttal witnesses Stephanie Eubanks and Kelly Rudicill. Appellate Counsel credibly testified she believed the reply testimony from the State was proper to rebut testimony presented during the defense's case. Additionally, Appellate Counsel testified Counsel did not make an objection to the reply witnesses and therefore the issue was not preserved for appellate review. This Court finds Appellate Counsel's decision not to brief this issue reasonable and based on sound professional judgment. Applicant has failed to prove Appellate Counsel was deficient in this regard or that he was prejudiced by the alleged deficiency. Ultimately, Appellate Counsel opined she selected the most meritorious issue to brief in Applicant's appeal. As such, Appellate Counsel fulfilled her duty. Jones, supra. Furthermore, this Court finds none of the issues raised by Applicant were more meritorious than the issue actually briefed by Appellate Counsel. Therefore, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 31st day of October, 2017.


 GRACE GILCHRIST KNIE
 Presiding Judge
 Seventh Judicial Circuit

Spartanburg, South Carolina

CLERK OF COURT
 SPARTANBURG COUNTY
 2017 NOV -1 AM 11:49
 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2016-CP-42-0417
COUNTY OF GREENVILLE	)	
	)	
RICHARD TODD CULBERSON,	)	
APPLICANT,	)	
	)	MOTION TO ALTER OR AMEND
	)	THE JUDGMENT
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	
_____	)	

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCR, to alter or amend the judgment of this Court filed on November 1, 2017. The Applicant takes issue with the findings of fact and conclusions of law set forth resulting in the denial of post-conviction relief in his case. He further argues that while each allegation may not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989).

In the Order of Dismissal's treatment of the Applicant's argument of ineffective assistance of trial counsel for failure to object to the solicitor's closing argument it says that the contested objectionable statement by the Solicitor was "imagine someone in your face." (Order of Dismissal p. 17). At the hearing the Applicant argues the objectionable statement went on to say, "if somebody's attacking you, would you remember that?" which is an improper Golden Rule argument asking the jury to put themselves in the

position of the victim. (Trial transcript vol. II p. 97, l.21). *See Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

In addressing the Applicants argument of ineffective assistance of trial counsel for failure to object to rebuttal testimony, the Order of Dismissal states that the rebuttal testimony by two nurses that the victim described a white male attacker was not improper after a defense witness's claim that she said black male. (Order of Dismissal p. 17). This fails to address a number of issues. In their case in chief the State called two nurse witnesses who had ample opportunity to testify that the victim named a white male as her attacker. Instead Stephanie Eubanks said the victim was incoherent, trying to talk but she couldn't make anything out and Kelly Rudicill said the victim was in shock and kept saying screwdriver. (Trial transcript vol. I p. 181, l.3 & p. 189, l.19). Defense witness, Farren Cox, testified that he heard her say black male but realized that everyone else said she named a white male as her attacker. He agreed that five officers, everybody and the nurses, everybody, heard her say white male. (Trial transcript vol. II p. 49, l.2). The State knew of this witness, had his written statement, and failed to call him in their case.

The same two nurses were recalled in the State's reply with no objection by the defense. (Trial transcript vol. II p. 80). At that point Ms. Eubanks said she was sure the victim said a number of times a white male attacked her. (Trial transcript vol. II p. 81, l. 22). Ms. Rudicill said the victim said white male and repeated to other folks, police officers and people talking to her and went on to answer a number of leading questions from the State about how nurses are specially trained to assess patients by looking in their faces. (Trial transcript vol. II p. 84-5). The solicitor capitalized on this testimony in his closing to bolster the victim's identification by arguing she was clearly naming a white

male and was a nurse with special training to look into the eyes to assess patients. (Trial transcript vol. II p. 101, l. 17).

The trial attorney did not argue that the reply did not refute Mr. Cox's testimony which was that everyone else including the nurses said she named a white male as her attacker. Nor did he argue that the reply went beyond the scope of what was presented in the defense case and served only to complete the State's case in chief. Furthermore, he did not question the reply nurse witnesses about the stark difference of their prior testimony in the case in chief. At the PCR hearing the applicant demonstrated how counsel could have impeached the rebuttal witnesses by referring the nurse witnesses to their trial testimony where Stephanie Eubanks said the victim was incoherent, trying to talk but she couldn't make anything out and Kelly Rudicill said the victim was in shock and kept saying screwdriver. (Trial transcript vol. I p. 181, 1.3 & p. 189, 1.19). He was ineffective for failing to do so, and it likely affected the outcome of the case. The reply was highly prejudicial. It unfairly bolstered the identification of the defendant and was devastating to the defense case which was one based on mistaken identity.

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,

Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This ____ day of _____, 2017.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Richard Todd Culberson, #355804

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2016-CP-42-0417

**RETURN TO APPLICANT'S
MOTION TO ALTER OR AMEND
THE JUDGMENT**

This matter comes before this Court by way of Applicant's motion to alter or amend the judgment, pursuant to Rule 59(e), SCRPC. This return follows.

As a threshold matter, in his motion, Applicant requests that this Court reconsider its order of dismissal and issue an order granting post-conviction relief based on the cumulative effect of counsel's performance. The courts of this state have declined to recognize the idea that several deficient acts of counsel could have a cumulative and prejudicial effect, thus constituting ineffective assistance of counsel. In Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002), the leading case in this state regarding the notion, our Supreme Court declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina."). More recently, in Smalls v. State, App. Case No. 2016-001079, Opinion no. 27764 (filed February 7, 2018), in addressing the PCR prejudice prong, the Supreme Court stated, "[b]ecause we find the evidence is not overwhelming, Smalls' individual claims of deficient performance must be analyzed separately to determine whether either of them gives rise to a reasonable probability the result of

the trial would have been different without counsel's error." (emphasis added). Interestingly, the briefs filed by both Smalls and the State argued the issue of cumulative error analysis in PCR. Respondent submits that this Court properly ruled on all issues without improperly engaging in a cumulative error analysis after ample opportunity for Applicant to present all his issues and that this motion should be denied in full.

Notwithstanding the above, Respondent addresses herein each of Applicant's arguments raised in his motion.

Failure to object to "Golden Rule argument"

In his motion, Applicant argues the Solicitor's comment in closing ("if somebody's attacking you, would you remember that?") was an improper Golden Rule argument and objectionable and therefore, Counsel was ineffective for failing to object. Applicant cites to Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), in support of his position. Applicant's reliance on Von Dohlen is misplaced. Applicant also misapprehends what a Golden Rule argument is and why it is disfavored. In Von Dohlen, our Supreme Court described the Solicitor's comments to the jury to "put yourself in [the victim's] shoes," as a "golden rule argument." Id. at 608-609 602 S.E.2d at 743-744. The Court explained a golden rule argument is one "in which jurors are urged to place themselves in the position of a party, a victim, or a victim's family member and decide the case from that perspective." Id. at 609, 602 S.E.2d at 744 (2004) (emphasis added). See also State v. Reese, 370 S.C. 31, 37, 633 S.E.2d 898, 901 (2006), overruled on unrelated grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias

rather than evidence.) (emphasis added); See also Hayes v. State, 236 Ga.App. 617, 512 S.E.2d 294, 297 (1999) (an improper golden rule argument asks jurors to consider case, not objectively as fair and impartial jurors, but rather from biased, subjective standpoint of litigant or victim). The Court further elaborated on why a golden rule argument is prohibited, because it "tends to completely destroy and nullify all sense of impartiality" and is "intended to arouse the jurors' passions or prejudices" and render a verdict based upon those passions and prejudices rather than the evidence presented at trial. Id. at 609, 610, 602 S.E.2d at 744.

Our appellate courts have consistently condemned golden rule arguments. See State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965) (Court found "How would you like to see him coming in your bedroom or your daughter's bedroom with this butcher knife? ... I don't know whether you have got daughters or not, I believe one or two of you are not married. But everybody has got a mother. Not everybody, but most everybody has got a sister, daughters. Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do? ... How, if this young lady was your sister, how would you feel? How, if she was your wife, how would you feel? How, if she was your daughter, God only knows, how would you feel? Gentlemen, she is all of that to somebody. She is a daughter, she is a sister, she is a wife. And but for the grace of God that could be your sister, your daughter or your wife.... But when you get back there and consider giving him mercy like they are going to ask you for, think about your wife, think about your daughters, think about your sister or your mother, being in the same position as this young lady, with a knife at her throat and a brute on top of her" to be improper argument.); State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct.App.1995) (reversing conviction and remanding for new trial in sexual assault/robbery case where solicitor used "you" or a form of "you" some forty-five times, asking

the jury to put themselves in place of the victim); Reese, 370 S.C. at 37, 633 S.E.2d at 901 (Solicitor's closing found to be improper golden rule argument: "Who speaks for [the victim]? In this system of justice that we have in this type of case, who speaks for [the victim]? ... the question is: Who speaks for [the victim]? And I submit to you that that question can be answered and will be answered today[...] Who speaks for [the victim]? [...] So now I ask you, now that all the evidence is in upon my argument, who speaks for [the victim]? You do, Madam Forelady and Ladies and Gentlemen of the Jury.... You do. You speak for her ... You can speak for her with your verdict.").

However, the Solicitor's comment, "if somebody's attacking you, would you remember that," even taken out of context, was not a Golden Rule argument. The comment in no way encouraged the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence, nor did it urge the jury to place themselves in the position the victim and decide the case from that perspective. Additionally, the context in which the comment was made, and warranted, consisted of a theory made by the defense that the victim misidentified her attacker. The victim's identification of Applicant was put in dispute by the defense and, therefore, it was crucial for the State to make arguments supporting why the victim was able to identify her attacker. The defense offered testimony from an expert witness, Dr. Dawn McQuiston (Trial tr. vol. II, p. 18), to testify specifically on issues of memory, how human memory works and things that can affect an individual's ability to remember things accurately. She also testified that victims often engage in "weapon focus," in which they focus on the weapons with which they are attacked rather than their attacker's face, to support the defense's theory that the victim misidentified Applicant. (Trial tr. vol. II, p.28, l. 25). Because of that, the

Solicitor argued why the victim properly identified Applicant and why the jury should find that identification credible. The Solicitor began,

When he pulled her around, just imagine somebody right in front of your face. If somebody's attacking you; would you remember that? Would you remember seeing that face for maybe the last time? Remember she said she didn't see the weapon; she felt it. They keep talking about this weapon and she didn't see –

(Trial tr. vol. II, p. 97, l. 20). At which point Counsel objected and an *in camera* hearing was held to discuss the testimony regarding whether the victim testified she saw the weapon before or after her attack. The Solicitor's common sense hypothetical ("would you remember") is a far cry from the Golden Rule argument asking a jury to affirmatively put themselves in the victim's shoes and render a verdict based on the victim's perspective, prejudices and passions ("put yourself in her shoes"). The Solicitor was obviously appealing to the jury's common sense here, not their passion or prejudice, after the defense used an expert to tout the victim's alleged memory deficiencies. The argument was proper and not objectionable. Learned Counsel also testified he believed the argument was proper and not objectionable.

Applicant's motion to alter or amend should be denied with regard to this allegation.

Failure to object to the State's rebuttal witnesses

In his motion, Applicant argues the order of dismissal fails to address a number of issues where the court found the rebuttal testimony offered by the State was proper. Notwithstanding these issues were already raised and ruled upon, Respondent will elaborate further here.

The plaintiff must first produce and disclose the entire evidence in support of his case; after the defendant has offered all of his evidence, the plaintiff may reply. McGaha v. Mosley, 283 S.C. 268, 276, 322 S.E.2d 461, 466 (Ct. App. 1984). Reply testimony should be limited to rebuttal of matters raised in defense; it should not be used to complete plaintiff's case in chief. Daniel v. Tower Trucking Co., 205 S.C. 333, 32 S.E.2d 5 (1944).

It was not until after the defense presented testimony from Faron Cox, who testified the victim stated her attacker was a black male, that the State called two hospital employees (Eubanks and Rudicill) who were at the scene of the crime to testify that the victim had alleged her attacker was a white male. Applicant takes the stance that this rebuttal testimony was improper because:

1. the two witnesses had ample opportunity to present that testimony in the State's case-in-chief, and because they failed to, they were precluded from doing so in rebuttal;
2. Faron Cox agreed that everyone else present at the scene said she named a white male as her attacker, and therefore, it was not necessary to call rebuttal witnesses to contradict and impeach Cox's testimony as the rebuttal witnesses did not refute Cox's testimony;
3. the State knew about Faron Cox and failed to call him in their case-in-chief, and therefore, they should have been precluded from calling witnesses to rebut him.

(Applicant's motion, p. 2). There are a number of issues with these arguments. First, the State did not elicit testimony regarding the sex and race of the victim's attacker because sex and race were not elements of the crime. Nor were sex and race material issues in dispute during the State's case-in-chief since the victim had affirmatively identified Applicant as her attacker twice. Even knowing the overall defense theory of mistaken identity, it is not logical to anticipate the defense would argue the victim actually got the sex and race of her attacker wrong. In fact, Applicant believed, and testified, that the victim mistook him for another white male. So, with sex and race not being an issue during the State's case-in-chief, the State was absolutely entitled to call the rebuttal witnesses in response to the defense witness Cox bringing sex and race into dispute.

Secondly, Applicant's argument that "the reply did not refute Mr. Cox's testimony which was that everyone else including the nurses said she named a white male as her attacker," is patently erroneous. (Applicant's motion, p. 3). Eubank's and Rudicill's testimony directly

refuted Cox's testimony that the victim said her attacker was a black male. Further, a defense witness that agrees other people may testify inconsistently than he, does not preclude the State from calling those witnesses to testify on their own so that the jury can determine the credibility of each witness, as is within the exclusive province of the jury. "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). See also Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (Witnesses are generally not allowed to testify whether another witness is telling the truth.). Applicant's argument is analogous to saying if a State's witness testifies that they know what potential defense witnesses saw during a crime that is inconsistent with the State's witness's perception, then the defense would be precluded from calling their witness to testify to their own perceptions since the State's witness has already conceded the inconsistencies. The argument is utterly meritless. Of course, if the defense calls a witness to put an issue in dispute that was not in dispute or at issue prior to the defense witness's testimony, the State is certainly allowed to call its own witnesses in response and allow the jury to determine the credibility of each witness.

Thirdly, the State is not required to call witnesses during their case-in-chief that do not contribute to their case or may potentially hurt their case. While the State is required to turn over such exculpatory information to the defense, as was done in this case, they are certainly not required to introduce it to the jury. Not offering testimony in contradiction to the rest of the State's evidence and theory of the case does not preclude the State from offering rebuttal testimony in the event the defense does. And such a proposition would be wholly impractical and unfair. The Solicitor has the discretion to present the case to the jury as he sees fit – a discretion that is vital where the State has the highest burden of proof in the law. Failing to call a

witness favorable to the defense, because the State knew about him, would not, and should never, preclude the State from offering rebuttal testimony.

Lastly, Applicant claims the reply testimony exceeded the "scope of what was presented in the defense case and served only to complete the State's case-in-chief." (Applicant's motion, p. 3). However, there is no evidence of this in the record.

Applicant's motion to alter or amend should be denied with regard to this allegation.

Failure to effectively cross examine the rebuttal witnesses

In his motion, Applicant argues Counsel "did not question the reply nurse witnesses about the stark difference of their prior testimony in the case in chief." (Applicant's motion, p. 3). Applicant fails to realize the testimony elicited in rebuttal, and properly not elicited during the State's case-in-chief, that the victim stated her attacker was a white male, would have been hearsay if elicited in the State's case-in-chief. It was only until the defense witness testified what sex and color the victim stated her attacker was that the State was able to elicit the non-hearsay testimony from Eubanks and Rudicill. In rebuttal, the State was not offering the victim's statements to Eubanks and Rudicill for the truth of the matter asserted (that her attacker was in fact a white male), but rather to rebut the defense witness's testimony to show Cox was not credible. Therefore, asking the rebuttal witnesses why they did not testify to those statements made by the victim during the State's case-in-chief would have been a futile effort by Counsel since they were not asked that question and were most likely advised of the rule against hearsay prior to testifying.

To the extent Applicant thinks Counsel did not make sufficient arguments regarding Eubanks' and Rudicill's previous testimony, the State would submit such an argument is classic Monday-morning quarterbacking. Counsel's performance should be examined at the time of

trial and in the heat of battle, not with the benefit (and distorting effects) of hindsight and a black and white transcript. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984) (“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.”). Counsel's performance and his arguments were reasonable – which is the standard for effective assistance of counsel. Id. Our courts have created this canon of case law because a hundred different lawyers could have made a hundred different arguments to the jury and maybe another hundred with the benefit of hindsight in PCR. The jury was presented with the testimony, and they could determine the credibility of each witness based on any alleged “stark differences” in their testimony. Also, it is not reasonably possible that had Counsel brought up those alleged “differences” in the testimony, the outcome of the trial would have been different. The alleged error cannot possibly undermine this judiciary's confidence in the fairness or the outcome of Applicant's trial.

Applicant's motion to alter or amend should be denied with regard to this allegation.

[Conclusion and signature to follow]

CONCLUSION

WHEREFORE, having made its Return to the motion, the State requests the relief requested in the motion be denied and that said motion be dismissed.

Respectfully submitted,

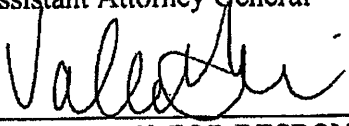
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

February 15, 2018

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

2016-CP-42-0417

RICHARD TODD CULBERSON, #355804,

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

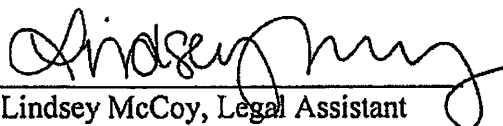
STATE OF SOUTH CAROLINA,

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 to Applicant's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRPC** in the above-captioned matter on the following person by electronic mail:

Susannah C. Ross, Esquire
susannah@rossenderlin.com

DATED this 15th day of February, 2018.

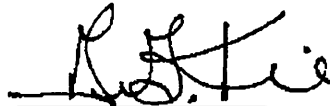

Lindsey McCoy, Legal Assistant

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG	)	
	)	
RICHARD TODD CULBERSON	)	ORDER DENYING MOTION FOR
Applicant,	)	RECONSIDERATION
vs.	)	Indictment Number(s): 2016-CP-42-2417
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

This matter is before The Court upon the Applicant's Motion for Reconsideration regarding The Court's decision denying the Application for Post Conviction Relief recorded with the Spartanburg County Clerk of Court's Office on November 1st, 2017. The Applicant represented by Susannah Ross, Esq., properly filed this Motion for Reconsideration with The Court on November 13th, 2017. The State, by and through its counsel, Valerie G. Giovanoli, Esq., submitted a Reply to the Motion to Reconsider to The Court.

Having fully considered the matter, reviewed the record and pertinent documents, The Court finds no basis upon which to modify The Court's prior decision. The Motion for Reconsideration of The Court's Decision is DENIED.

IT IS SO ORDERED.



The Honorable Grace Gilchrist Knie
Resident Judge, Seventh Judicial Circuit

February 16, 2018

WITNESSES

Spartanburg County Sheriff's Office

1. REPORT ENDED

2. INDEXED

3. INDEXED

4. CHECKED WARRANTS

5. CHECKED SIGNATURE

6. ASSESSMENT AND
FINE CARD MADE
ARREST WARRANT NUMBER

7. TRAFFIC VIOLATION COPY

2013A4210100286

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

MAR 29 2013

Date:

VERDICT

Guilty

Foreperson of Petit Jury

Date:

6-18-14

DOCKET NO.

13-GS-42 4/8/11

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

APR 18 2013

TERM

THE STATE

v.

RICHARD TODD CULBERSON

**Indictment for
ASSAULT AND BATTERY
FIRST DEGREE**

SC Code: 16-3-600(c)(1)

CDR Code: 3412

Class FEL-E

**M. HOPE BLACKLEY
2013 APR - 4 AM 10:53
CLERK OF COURT
SPARTANBURG COUNTY
FILED**

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

MAR 2nd 2013

At a Court of General Sessions, convened on _____ the
 Grand Jurors of Spartanburg County present upon their oath:

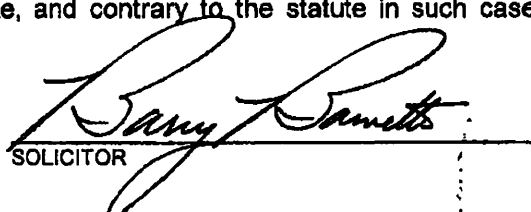
ASSAULT AND BATTERY FIRST DEGREE

That the Defendant, Richard Todd Culberson, did in Spartanburg
 County on or about January 24, 2013 commit an act causing an unlawful
 injury to D.P. and the act:

- (1) involved nonconsensual touching of the private parts of an adult
 with lewd and lascivious intent, or
- (2) occurred during the commission of a robbery, burglary,
 kidnapping, or theft, or
- (3) involves an offer or attempt to injure another person with the
 present ability to do so, and the act is accomplished by means
 likely to produce death or great bodily injury, or occurred during
 the commission of a robbery, burglary, kidnapping, or theft,

all in violation of § 16-3-600, *THE CODE OF LAWS OF SOUTH
 CAROLINA*, (1976), as amended.

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


 SOLICITOR

STATE OF SOUTH CAROLINA

Computer

COUNTY OF SPARTANBURG

STATE VS.

Richard Todd Culberson

AKA:

Race: WHITE Sex: M Age: 47

DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip: Moore, SC 29369-9408

DL#: [REDACTED] SID#: [REDACTED]

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Assault / Assault & Battery 1st degree

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS4201811

A/W#: 2013A4210100286

Date of Offense: 1/24/2013

S.C. Code § : 16-03-0600(C)(1)

CDR Code #: 3412

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

NMT 10 yrs

in violation of § 16-03-0600(C)(1) of the S.C. Code of Laws, bearing CDR Code # 3412

☒ 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: BARNETTE, BARRY 13039 Richard Todd Culberson Attorney for Defendant 77724
SC Bar# Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 10 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: 6/18/14
☒ 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. since 1/24/13
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 138.90

PTUP _____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

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

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.Clerk of Court/ Deputy Clerk A. SeamusCourt Reporter: Fawcett

SCCA/217 (03/2011)

Presiding Judge [Signature]Judge Code: 2135Sentence Date: 6/18/14

WITNESSES

Spartanburg County Sheriff's Department

1. SENTENCE MADE
2. REPORT FILED
3. CARD FILED
4. INDEXED
5. CHECKED WARRANTS
6. CHECKED SIGNATURE
7. ASSESSMENT AND
ARREST WARRANT
8. AFFIDAVIT VIOLATION COPY

2013A4210100287

ACTION OF GRAND JURY

[Signature] True Bill

Foreperson of Grand Jury
Date: MAR 29 2013

VERDICT

[Signature] Guilty

[Signature]
Foreperson of Petit Jury
Date: 6-18-14

DOCKET # 13-GS-42-1812

The State of South Carolina
County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

APR 1 2013

TERM

THE STATE
v.

RICHARD TODD CULBERSON

Indictment for
KIDNAPPING

SC Code: 16-03-910
CDR Code: 0095
Class FEL-A

M. HOPE BLACKLEY
2013 APR -4 AM 10:53
SPARTANBURG COUNTY
CLERK OF COURT
FILED

695

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

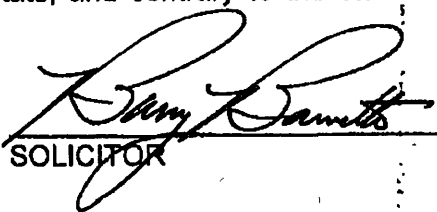
INDICTMENT

At a Court of General Sessions, convened on MAR 29 2013 the
Grand Jurors of Spartanburg County present upon their oath:

KIDNAPPING

That the Defendant, Richard Todd Culberson, did in Spartanburg County on or about January 24, 2013, willfully and unlawfully with criminal intent seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, D.P. without authority of law, all in violation of Section 16-03-910, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

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


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG
STATE VS.

Richard Todd Culberson

AKA:

Race: WHITE Sex: M Age: 47

DOB: SS#:

Address:

City, State, Zip: Moore, SC 29369-9408

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 / Kidnapping

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS4201812

A/W#: 2013A4210100287

Date of Offense: 1/24/2013

S.C. Code § : 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

NMT 30 yrs

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) ☐ §17-25-45

The charge is: ☒ As Indicted. ☐ Lesser Included Offense. ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☒ Without Negotiations or Recommendation. ☐ Negotiated Sentence. ☐ Recommendation by the State.

ATTEST: BARNETTE, BARRY 13039 SC Bar# Richard T. Culberson Defendant Mark E. Hoff Attorney for Defendant 27724 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: 6/18/14
☒ 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. since Jan. 24, 2013
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$	
§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$5.00
3% to County (if paid in installments)	\$	\$390
TOTAL	\$	\$133.90

PTUP _____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

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

\$ _____ paid to Public Defender Fund

Other: _____

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

Clerk of Court/ Deputy Clerk Paula
Court Reporter: Paula

SCCA/217 (03/2011)

Presiding Judge _____
Judge Code: 2135
Sentence Date: 6/18/14

WITNESSES

Spartanburg County Sheriff's Office

1. SENTENCE MADE

2. REPORT ENTERED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND

FINE CARD MADE
ARREST WARRANT NUMBER
... TRAFFIC VIOLATION COPY

2013A4210100285

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

MAR 29 2013

Date:

VERDICT

Guilty

Foreperson of Petit Jury

Date:

6/18/14

DOCKET NO.

13-GS-42-1813

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

APR 18 2013

TERM

THE STATE

v.

RICHARD TODD CULBERSON

Indictment for

ATTEMPTED ARMED ROBBERY

SC Code: 16-11-330 (B)

CDR Code: 26

Class FELC

M. HOPE BLACKLEY

2013 APR -4 AM 10:53

FILED
CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

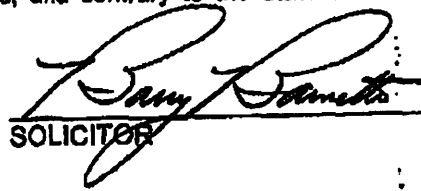
MAR 24 2013

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

ATTEMPTED ARMED ROBBERY

That the Defendant, Richard Todd Culberson, did in Spartanburg County on or about January 24, 2013, while armed with a deadly weapon, feloniously attempt to take, by means of force or intimidation, goods or monies from the person or presence of D.P. in violation of §16-11-330 (B), CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.

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


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

SPARTANBURG

VS.

Richard Todd Culberson

Computer

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS4201813

A/W#: 2013A4210100285

Date of Offense: 1/24/2013

S.C. Code § : 16-11-0330(B)

CDR Code #: 0026

AKA:

Race: WHITE Sex: M Age: 47

DOB: SS#:

Address:

City, State, Zip: Moore, SC 29369-9408

DL#: SID#:

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

In disposition of the said indictment comes now the Defendant who was

TO: Robbery / Attempted armed, or allegedly armed, robbery

☒ CONVICTED OF or ☐ PLEADS

NMT 20 yrs

in violation of § 16-11-0330(B) of the S.C. Code of Laws, bearing CDR Code # 0026

☐ 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: Barnette, Barry 13039 Richard T. Culberson Matthew E. Sharp 27727
BARNETTE, BARRY 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: 6/18/14☒ 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. since 1/24/13☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

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

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 A. SeaneCourt Reporter: Fallatt

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2135Sentence Date: 6/18/14

WITNESSES

Spartanburg County Sheriff's Office

2. REPORT ENDED

3. CARD PULLED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSESSMENT AND
FINE CARD MADE

ARREST WARRANT NUMBER

2013A4210200362

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

MAR 29 2013

VERDICT

Guilty

Foreperson of Petit Jury

Date:

6-18-14

DOCKET NO.

13-GS-42-1814

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

APR 8 2013

THE STATE

v.

RICHARD TODD CULBERSON

Indictment for

ASSAULT WITH INTENT TO COMMIT
CRIMINAL SEXUAL CONDUCT,
FIRST DEGREE

SC Code: 16-3-656; 16-3-652 (2)

CDR Code: 0253

Class FEL-E

M. HOPE BLACKLEY

2013 APR -4 AM 10:53

FILED
CLERK OF COURT
SPARTANBURG COUNTY

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

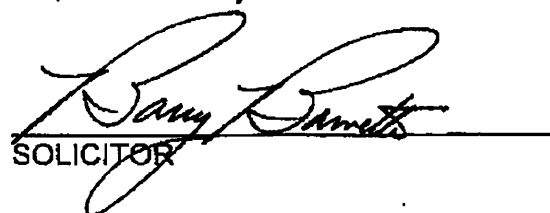
MAR 29 2013

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

ASSAULT WITH INTENT TO COMMIT
CRIMINAL SEXUAL CONDUCT, FIRST DEGREE

That the defendant, Richard Todd Culberson, did on or about January 24, 2013, willfully and unlawfully commit an assault with the intent to commit Criminal Sexual Conduct in the First Degree, against the victim, D████ P████ all in violation of §16-3-656 and §16-3-654 (2), of *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

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


SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

703

COUNTY OF SPARTANBURG

STATE

VS.

Richard Todd Culberson

AKA:

Race: WHITE Sex: M Age: 47

DOB: [REDACTED] SS# [REDACTED]

Address: [REDACTED]

City, State, Zip: Moore, SC 29369-9408

DL#: [REDACTED] SID#: [REDACTED]

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

In disposition of the said indictment comes now the Defendant who was

TO: Sex / Assault with intent to commit criminal sexual conduct - First degree

INDICTMENT/CASE#: 2013GS4201814

A/W#: 2013A4210200362

Date of Offense: 1/24/2013

S.C. Code §: 16-03-0656

CDR Code #: 0253

SENTENCE SHEET

in violation of § 16-03-0656 of the S.C. Code of Laws, bearing CDR Code # 0253

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
 ATTEST: BARNETTE, BARRY 13039 SC Bar# SC Bar# Defendant Attorney for Defendant 77727 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:☒ 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. since 1/24/13☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

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

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: Sex offender registration isrequired
☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.
Clerk of Court/ Deputy Clerk AlseauxCourt Reporter: Fauette

SCCA/217 (03/2011)

Presiding Judge [Signature]

Judge Code: 2135

Sentence Date: 6/18/14