

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

VOLUME II OF II

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Certiorari to York County

Lee S. Alford, Circuit Court Judge

S.C. SUPREME COURT

\_\_\_\_\_  
ISAIAS DIAZ GUTIERREZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001080

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

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1 RIGHTS; THAT HE UNDERSTOOD THOSE RIGHTS; THAT HE FREELY,  
2 KNOWINGLY AND INTELLIGENTLY WAIVED THOSE RIGHTS AND  
3 PROVIDED A STATEMENT TO LAW ENFORCEMENT WHICH WAS NOT  
4 THE PRODUCT OF ANY COERCION, THREATS OR PROMISES IN ANY  
5 FASHION. AND THEREFORE, THE MOTION TO SUPPRESS IS DENIED.

6 ANY OTHER MATTERS WE NEED TO ADDRESS BEFORE THE  
7 JURY'S BROUGHT IN?

8 MR. THOMPSON: YOUR HONOR, THERE ARE THREE REPORTS IN  
9 WHICH THE STATE AND THE DEFENSE ARE STIPULATING; ONE FROM  
10 THE FBI LABORATORY AND TWO FROM THE SOUTH CAROLINA LAW  
11 ENFORCEMENT DIVISION, ONE OF WHICH IS BY KENNETH WHITLER  
12 FROM SLED, WHO EXAMINED THE PHONE THAT WAS RECOVERED AT  
13 THE VICTIM'S RESIDENCE; AND THE POCKET KNIFE FOUND AT THE  
14 DEFENDANT'S RESIDENCE FOR COMPARISON AND TOOL MARKINGS.

15 THE DNA REPORT FROM SLED WHICH WAS DONE BY ROBIN  
16 TAYLOR, ONE OF THE FORENSIC SCIENTISTS AT SLED, REGARDING  
17 FINGERNAIL CLIPPINGS FROM CLARENCE CUBLEY'S FINGERNAILS AT  
18 THE AUTOPSY.

19 AND THEN THE FINAL IS FROM THE FBI LABORATORY. IT IS A  
20 REPORT ON TOOL MARKINGS BY MICHAEL HINNANT, WHO EXAMINED  
21 THE TOOL MARKS FOR THE FBI.

22 I WILL PUT THOSE IN AND WE WILL GO AHEAD AND MARK  
23 THOSE STIPULATIONS AT THIS TIME.

1 THE COURT: YOU'RE STIPULATING AS TO WHAT YOU JUST  
2 STATED OR ARE YOU ACTUALLY GOING TO INTRODUCE SOME  
3 DOCUMENTS?

4 MR. THOMPSON: WE'RE ACTUALLY ENTERING THE ACTUAL  
5 DOCUMENTS.

6 THE COURT: SO, THOSE ARE JOINT EXHIBITS OR ARE THEY  
7 STATE'S EXHIBITS?

8 MR. THOMPSON: THEY WOULD BE, I ASSUME, BY STIPULATION,  
9 WOULD BE MARKED AS STATE'S EXHIBITS.

10 MR. CHIARENZA: I'M JUST NOT REQUIRING THAT THE PEOPLE  
11 WHO CREATED THOSE REPORTS BE HERE, YOUR HONOR.

12 THE COURT: I SEE. YOU KNOW, A STIPULATION IS AN  
13 AGREEMENT AS TO A FACT. SO, Y'ALL ARE NOT STIPULATING TO  
14 ANYTHING; Y'ALL ARE JUST AGREEING TO INTRODUCE THOSE  
15 DOCUMENTS?

16 MR. THOMPSON: THAT'S CORRECT.

17 MR. CHIARENZA: I WILL NOT OBJECT TO THEIR INTRODUCTION  
18 WITHOUT PEOPLE BEING HERE AND CREATING A RECORD.

19 THE COURT: OKAY. ADDITIONAL STATE'S EXHIBITS.

20 MR. CHIARENZA: YES, YOUR HONOR.

21 (WHEREUPON STATE'S EXHIBITS WERE MARKED AND ADMITTED  
22 INTO EVIDENCE WITHOUT OBJECTION. STATE'S NUMBER 103 BEING  
23 TELEPHONE TOOL MARKS REPORT; STATE'S NUMBER 104 BEING DNA  
24 ANALYSIS; AND STATE'S NUMBER 105 BEING WEAPON TOOL MARKS  
25 REPORT.)

**RUSS YEAGER - DIRECT EXAMINATION BY MR. THOMPSON**

1 THE COURT: BRING IN THE JURY.

2 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 3:05 P.M.)

3 MR. THOMPSON: THE STATE CALLS RUSS YEAGER.

4 **RUSS YEAGER, DULY SWORN, TESTIFIED AS**

5 **FOLLOWS:**

6 **DIRECT EXAMINATION BY MR. THOMPSON:**

7 Q DETECTIVE YEAGER, WOULD YOU GIVE YOUR FULL NAME FOR  
8 THE COURT, PLEASE?

9 A RUSS YEAGER.

10 Q WHERE DO YOU WORK?

11 A I WORK FOR THE YORK COUNTY SHERIFF'S OFFICE.

12 Q HOW LONG HAVE YOU BEEN WITH THE SHERIFF'S OFFICE?

13 A SINCE 2001.

14 Q HAD YOU BEEN IN LAW ENFORCEMENT BEFORE THAT TIME?

15 A YES SIR, I HAVE.

16 Q WHERE WERE YOU BEFORE THEN?

17 A I STARTED IN 1989 WITH THE SHERIFF'S OFFICE; WAS WITH ROCK  
18 HILL POLICE DEPARTMENT FOR APPROXIMATELY THREE YEARS, FOR A  
19 TOTAL OF FIFTEEN YEARS.

20 Q SO, YOU CAME BACK TO THE SHERIFF'S DEPARTMENT IN 2001?

21 A YES SIR.

22 Q WHAT DO YOU DO AT THE SHERIFF'S DEPARTMENT?

23 A I AM ASSIGNED TO THE CRIME SCENE DIVISION IN THE  
24 DETECTIVE DIVISION OF THE SHERIFF'S OFFICE.

- 1 Q CAN YOU TELL ME, IN THIS ACTUAL CASE, WERE YOU EVER  
2 ACTUALLY AT THE CRIME SCENE OR EVER INVOLVED IN THE  
3 BEGINNING OF THIS CASE?
- 4 A NO SIR, I WASN'T.
- 5 Q HOW DID YOU BECOME INVOLVED IN THE CASE?
- 6 A I BECAME INVOLVED WHEN THE DEFENDANT WAS ARRESTED  
7 AND BROUGHT TO THE MOSS JUSTICE CENTER TO THE DETENTION  
8 CENTER.
- 9 Q WHAT DAY WAS HE ACTUALLY BROUGHT TO THE MOSS JUSTICE  
10 CENTER?
- 11 A I BELIEVE HE WAS BROUGHT IN ON THE NINTH.
- 12 Q THE NINTH OF?
- 13 A DECEMBER.
- 14 Q OF WHAT YEAR?
- 15 A 2006.
- 16 Q WHEN DID YOU HAVE YOUR FIRST CONTACT WITH HIM?
- 17 A DECEMBER 10, 2006.
- 18 Q DO YOU REMEMBER WHAT DAY OF THE WEEK THAT WAS?
- 19 A THAT WAS ON A SUNDAY.
- 20 Q MYSELF AND DETECTIVE STRAIT WAS NOTIFIED THAT HE WAS IN  
21 OUR JAIL AND WE WENT DOWN TO INTERVIEW HIM AT THE JAIL.
- 22 Q WHEN YOU WENT TO INTERVIEW HIM, WHERE DID YOU GO IN  
23 THE JAIL TO DO THAT?
- 24 A THERE'S A INTERVIEW ROOM INSIDE THE DETENTION CENTER.
- 25 Q IN THE DETENTION CENTER?

1 A YES SIR.

2 Q WAS THERE ANYONE ELSE IN THE ROOM THERE WITH YOU AND  
3 THE DEFENDANT AND DETECTIVE STRAIT?

4 A THAT'S ALL THAT WAS THERE.

5 Q DID YOU THREATEN HIM IN ANY WAY WHILE YOU WERE IN  
6 THERE?

7 A NO SIR.

8 Q WERE Y'ALL WEARING UNIFORMS THAT DAY WHEN YOU WERE  
9 IN THERE?

10 A NO SIR, WE WERE IN PLAIN CLOTHES.

11 Q DID YOU HAVE YOUR BADGES ON?

12 A YES SIR.

13 Q CAN YOU TELL ME, DID YOU IDENTIFY YOURSELVES TO HIM AS  
14 POLICE OFFICERS?

15 A YES SIR, WE DID.

16 Q WHEN YOU BEGAN TO TALK TO HIM, DID HE UNDERSTAND  
17 WHAT YOU WERE SAYING TO HIM?

18 A YES SIR.

19 Q WHAT WAS THE FIRST THING YOU DID WHEN YOU WENT IN AND  
20 BEGAN TO TALK WITH HIM?

21 A WE ASKED HIM IF HE UNDERSTOOD ENGLISH.

22 Q WHAT DID HE SAY?

23 A HE SAID HE DID. HE SAID HE UNDERSTANDS ENGLISH. HE  
24 SPEAKS ENGLISH, BUT HE DOESN'T READ OR WRITE IN ENGLISH.

25 Q DID YOU THEN GO OVER HIS RIGHTS WITH HIM AT THAT TIME?

1 A YES SIR. DETECTIVE STRAIT WAS ACTUALLY CONDUCTING THE  
2 INTERVIEW AND I WAS TAKING NOTES. DETECTIVE STRAIT WENT  
3 OVER THE MIRANDA RIGHTS WITH HIM.

4 Q I'M SHOWING YOU WHAT'S BEEN MARKED AS STATE'S EXHIBIT  
5 106. WOULD YOU LOOK AT THAT? DOES THAT CONTAIN THE RIGHTS  
6 THAT Y'ALL WENT OVER WITH HIM?

7 A YES SIR.

8 Q IF YOU WOULD, READ THE RIGHTS FORM AS DETECTIVE STRAIT  
9 READ THEM TO THE DEFENDANT THAT DAY.

10 A IT SAYS, "YOUR RIGHTS." IT SAY, " BEFORE I ASK YOU ANY  
11 QUESTIONS, I WANT TO ADVISE YOU OF YOUR RIGHTS. YOU HAVE THE  
12 RIGHT TO REMAIN SILENT. ANYTHING YOU SAY CAN AND WILL BE  
13 USED AGAINST YOU IN A COURT OF LAW. YOU HAVE THE RIGHT TO  
14 TALK TO AN ATTORNEY AND HAVE HIM OR HER PRESENT WITH YOU  
15 WHILE YOU'RE BEING QUESTIONED. IF YOU CANNOT AFFORD TO HIRE  
16 AN ATTORNEY, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE  
17 ANY QUESTIONING, IF YOU WISH. YOU CAN DECIDE AT ANY TIME TO  
18 EXERCISE THESE RIGHTS, NOT ANSWER ANY QUESTIONS OR MAKE ANY  
19 STATEMENTS. DO YOU UNDERSTAND EACH OF THESE RIGHTS AS I  
20 HAVE EXPLAINED THEM TO YOU?"

21 Q DID HE INDICATE WHETHER HE UNDERSTOOD THOSE RIGHTS?

22 A YES SIR. HE MARKED YES AND PUT HIS INITIALS.

23 Q DID HE VERBALLY INDICATE THAT HE UNDERSTOOD THESE  
24 RIGHTS?

25 A YES SIR, HE SAID HE DID.

1 Q AND IS THAT HIS INITIALS WHERE IT SAY, "YES, I UNDERSTAND  
2 THESE RIGHTS."?

3 A YES SIR.

4 Q DID HE SIGN THE FORM AS WELL?

5 A HE SIGNED IT.

6 Q WHAT ELSE WAS READ TO HIM OFF THAT FORM?

7 A THE WAIVER OF RIGHTS FORM.

8 Q WOULD YOU READ THAT AS IT WAS READ TO HIM?

9 A IT SAYS, "I'M WILLING TO TALK TO POLICE AND ANSWER  
10 QUESTIONS. I DO NOT WANT AN ATTORNEY AT THIS TIME. I  
11 UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES OR  
12 THREATS HAVE BEEN MADE TO ME AND NO PRESSURE OF ANY KIND  
13 HAS BEEN PLACED UPON ME."

14 Q DID HE UNDERSTAND THAT?

15 A YES SIR.

16 Q DID HE INDICATE VERBALLY THAT HE UNDERSTOOD IT?

17 A YES SIR, HE DID.

18 Q DID HE SIGN THAT?

19 A YES SIR.

20 Q TELL US WHAT IS AT THE BOTTOM OF THE FORM.

21 A AT THE BOTTOM OF THE FORM THERE IS A PLACE FOR HIS NAME,  
22 HIS DATE OF BIRTH, HIS AGE, EDUCATION LEVEL, WHICH HE  
23 INDICATED HE WENT THROUGH THE NINTH GRADE.

24 Q DID HE UNDERSTAND WHEN YOU ASKED HIM HOW FAR HE HAD  
25 GONE IN SCHOOL?

1 A YES SIR. HE SAID NINTH GRADE.

2 Q OKAY.

3 A THE FACT THAT HE COULD READ AND HE COULD WRITE IN  
4 SPANISH ONLY.

5 Q NOW, AS YOU BEGAN TO TALK TO HIM, WHAT DID YOU TELL HIM  
6 AT THAT POINT?

7 A AFTER WE WENT OVER THE RIGHTS FORM WITH HIM, WE  
8 EXPLAINED TO HIM WHY HE WAS THERE; THAT WE HAD ALSO TALKED  
9 WITH DANA AND THAT SHE HAD COOPERATED WITH US AND GIVEN US  
10 A STATEMENT.

11 Q DID YOU ACTUALLY SHOW HIM DANA'S STATEMENT THAT SHE  
12 GAVE AND TALK WITH HIM ABOUT THAT?

13 A NO SIR.

14 Q OKAY.

15 A WE DID TELL HIM THAT DANA TOLD US ABOUT HER  
16 INVOLVEMENT IN THE MURDER OF MR. CUBLEY AND THAT SHE HAD  
17 IMPLICATED HIM AS BEING INVOLVED IN IT.

18 Q DID YOU TELL HIM ANY MORE THAN THAT?

19 A NO SIR. JUST THAT WE HAD TALKED WITH HER AND WE WOULD  
20 LIKE TO SPEAK WITH HIM AND GET HIS SIDE OF THE STORY.

21 Q DID HE THEN TALK WITH YOU ABOUT THAT AT THAT TIME?

22 A YES SIR.

23 Q WHAT, IF ANYTHING, DID HE SAY TO YOU AT THAT TIME?

1 A HE STARTED TELLING US ABOUT SOME CHECKS THAT DANA  
2 GAVE HIM THAT SHE SAID BELONGED TO HER GRANDFATHER. SHE  
3 WANTED HIM TO CASH THE CHECKS, WHICH HE DID.

4 Q ALL RIGHT.

5 A AT THAT POINT DETECTIVE STRAIT SHOWED HIM SOME BANK  
6 PHOTOGRAPHS AND COPIES OF THE CHECKS. HE LOOKED AT THE  
7 PHOTOGRAPHS AND SAID THAT WAS HIM, AND THAT HE DID CASH  
8 THESE CHECKS AT THE BANK, WHICH HE LOOKED AT THE SIGNATURE  
9 ON THE CHECKS AND SAID THAT WAS HIS SIGNATURE.

10 Q WHAT ELSE DID Y'ALL TALK ABOUT?

11 A HE SAID THAT HE GAVE THE MONEY AND THAT SHE WAS GOING  
12 TO BUY A CAR.

13 Q DID HE SAY THEY BOUGHT A CAR AT THAT POINT?

14 A NO SIR.

15 Q WHAT, IF ANYTHING ELSE, DID YOU TALK ABOUT AT THAT TIME?

16 A HE SAID THAT RIGHT AFTER THAT HE KNEW THE POLICE WERE  
17 LOOKING FOR HIM. HE SAID THEY HAD COME BY HIS TRAILER THREE  
18 TIMES; THAT HE PROBABLY HAD SOME OUTSTANDING WARRANTS FOR  
19 CRIMINAL DOMESTIC VIOLENCE. HE SAID THAT WHEN THE POLICE  
20 WOULD COME HE WOULD RUN AND THAT HE KNEW THAT HE WAS  
21 WANTED BY THE POLICE AND THAT HE ALSO WANTED TO GET AWAY  
22 FROM DANA.

23 Q DID HE TELL YOU HOW HE BECAME AWARE OF THE INCIDENT AT  
24 MR. CUBLEY'S AND HIS DEATH?

1 A HE SAID THAT HE DID NOT KNOW MR. CUBLEY WAS DEAD UNTIL  
2 A WHITE BOY SHOWED HIM A NEWSPAPER ARTICLE WHILE HE WAS IN  
3 JAIL IN MISSOURI.

4 Q WAS THAT ABOUT THE TIME THAT HE WAS TRANSPORTED AND  
5 BROUGHT HERE?

6 A YES SIR.

7 Q AT THAT POINT IN THE INTERVIEW, WHAT HAPPENED THEN?

8 A WHILE WE WERE TALKING WITH HIM HE SAID HE COULD  
9 EXPLAIN BETTER IF HE COULD SPEAK IN SPANISH. THERE WERE SOME  
10 WORDS THAT HE DIDN'T KNOW HOW TO PRONOUNCE IN ENGLISH, AND  
11 HE SAID IT WOULD BE EASIER FOR HIM IF HE COULD SPEAK IN  
12 SPANISH.

13 Q AT ANY POINT IN YOUR CONVERSATION DID HE HAVE ANY  
14 TROUBLE UNDERSTANDING YOU?

15 A NO SIR.

16 Q DID YOU HAVE ANY TROUBLE UNDERSTANDING HIM?

17 A NO SIR.

18 Q WHAT DID YOU DO AT THAT POINT WHEN HE SAID HE WOULD BE  
19 ABLE TO EXPLAIN BETTER IF HE COULD SPEAK IN SPANISH?

20 A THERE WAS A DETENTION OFFICER AT THAT TIME, OFFICER  
21 GUZMAN, WHO ALSO WAS WORKING AT THAT PARTICULAR DAY, AND  
22 HE SPEAKS SPANISH. SO, WE ASKED HIM TO COME IN AND TRANSLATE.

23 Q DID HE DO THAT AT THAT TIME?

24 A YES SIR.

1 Q AT THAT POINT, HOW LONG HAD Y'ALL BEEN TALKING WITH THE  
2 DEFENDANT?

3 A WE'D ALREADY SPOKE FOR TWENTY MINUTES, MAYBE.

4 Q ALL RIGHT.

5 A HE STARTED TELLING US THAT WHEN HE LEFT FORT MILL, HE  
6 TOOK A TAXI FROM THE BP STATION IN FORT MILL ON HIGHWAY 21 TO  
7 THE GREYHOUND BUS STATION IN CHARLOTTE .

8 Q DID HE TELL WHERE HE WENT AFTER THAT?

9 A HE SAID WHEN HE LEFT THERE HE WENT TO KENTUCKY FOR A  
10 YEAR, THEN WENT TO FLORIDA FOR A YEAR AND A HALF, THEN  
11 HOUSTON, TEXAS, THEN KANSAS, AND THEN MISSOURI.

12 Q WHAT ELSE DID HE TELL YOU AT THAT POINT?

13 A HE TOLD US HE WAS WORKING AS A ROOFER, DOING ROOFING  
14 WORK AND THAT THEY WOULD TRAVEL TO WHEREVER THEIR JOBS  
15 WERE.

16 Q DID YOU THEN ASK MR. GUZMAN TO ASK HIM SPECIFIC  
17 QUESTIONS ABOUT CLARENCE CUBLEY?

18 A YES SIR, WE DID.

19 Q WHAT HAPPENED THEN?

20 A HE STATED THAT HE KNEW MR. CUBLEY, THAT THEY HAD LIVED  
21 IN A TRAILER PARK AND HE KNEW HIM FROM THERE. HE SAID THAT  
22 HE NEVER DID ANYTHING, HE NEVER ROBBED MR. CUBLEY; THAT  
23 DANA WAS MAD AT HIM AND WAS SAYING THAT HE WAS INVOLVED  
24 WITH IT.

1 Q NOW, GOING BACK TO WHEN YOU GAVE HIM HIS MIRANDA  
2 RIGHTS. AFTER HIS MIRANDA RIGHTS WERE GIVEN, DID YOU ALSO  
3 TALK TO HIM ABOUT HIS RIGHTS WITH THE MEXICAN CONSULATE?

4 A YES SIR, I DID.

5 Q HOW AS THAT RELATED TO HIM?

6 A WE ARE GIVEN A FORM TO FILL OUT WHENEVER-- BEFORE WE  
7 STARTED TALKING WITH HIM WE ASKED HIM ABOUT WHERE HE WAS  
8 BORN TO DETERMINE HIS FOREIGN NATIONAL STATUS.

9 HE SAID HE WAS BORN IN MEXICO. THAT'S WHEN WE ASKED HIM  
10 IF HE WOULD LIKE TO HAVE THE MEXICAN CONSULATE NOTIFIED, AND  
11 HE SAID HE WOULD.

12 Q DID YOU ACTUALLY READ THAT FORM TO HIM?

13 A YES SIR. WE HAD A FORM. WE HAD IT IN ENGLISH AND IN  
14 SPANISH. WE READ IT TO HIM IN ENGLISH, AND THEN GIVE HIM THE  
15 FORM IN SPANISH, HAD HIM READ IT AND HE UNDERSTOOD IT. AT  
16 THAT TIME HE SIGNED IT ALSO.

17 Q WHAT WAS THE PURPOSE OF THAT FORM? WAS IT TO NOTIFY  
18 THE CONSULATE?

19 A NOTIFY THE CONSULATE THAT HE HAD BEEN ARRESTED.

20 Q AND DID YOU IN FACT DO THAT?

21 A YES SIR, WE DID.

22 Q CAN YOU TELL ME, ABOUT WHAT TIME DID YOU WRAP UP THE  
23 INTERVIEW?

24 A WE CONCLUDED OUR INTERVIEW AT APPROXIMATELY 11:07 IN  
25 THE A.M.

1 Q ALL RIGHT. NOW, AFTER YOU CONCLUDED THE INTERVIEW  
2 WHERE DID YOU GO FROM THERE?

3 A WE LEFT THE DETENTION CENTER. MR. GUTIERREZ WAS TAKEN  
4 TO THE HOLDING CELL. MYSELF AND DETECTIVE STRAIT WENT BACK  
5 TO OUR OFFICE, AT WHICH TIME I CALLED THE MEXICAN CONSULATE  
6 NUMBER IN RALEIGH. IT WAS ON A SUNDAY, SO I LEFT A MESSAGE, BY  
7 NOTIFYING THEM ON THEIR VOICE MAIL. THEN I ALSO FAXED A COPY  
8 OF THE NOTIFICATION FORM TO THEM.

9 Q AFTER YOU DID THAT, WHAT ELSE DID YOU DO?

10 A AFTER WE NOTIFIED THEM, I WENT TO MY DESK AND BEGAN  
11 TYPING A STATEMENT FROM MY NOTES THAT I TOOK DURING THE  
12 INTERVIEW FROM WHAT MR. GUTIERREZ TOLD US.

13 Q AFTER YOU TYPED UP THAT STATEMENT, DID YOU GO BACK TO  
14 WHERE MR. GUTIERREZ WAS IN THE DETENTION CENTER?

15 A YES SIR. AFTER I TYPED THE STATEMENT, MYSELF AND  
16 DETECTIVE STRAIT WENT BACK DOWN TO THE JAIL AND READ MR.  
17 GUTIERREZ'S STATEMENT. WELL, WE GOT DETENTION OFFICER  
18 GUZMAN TO READ IT TO HIM IN SPANISH, TO TRANSLATE IT INTO  
19 SPANISH, AND ASKED HIM IF THAT'S WHAT HE TOLD US, DID HE WANT  
20 TO ADD OR TAKE ANYTHING OUT. HE AGREED THAT THAT WAS WHAT  
21 HE TOLD US AND AT THAT PARTICULAR TIME SIGNED THE STATEMENT  
22 FORM SAYING THAT THAT WAS HIS STATEMENT---

23 Q ALL RIGHT.

24 A ---AND EXACTLY WHAT HE TOLD US.

25 Q DID HE ASK TO CHANGE THAT STATEMENT IN ANY WAY?

1 A NO SIR.

2 Q AND THE STATEMENT OF THE MIRANDA RIGHTS WAS ALSO  
3 ATTACHED TO THAT STATEMENT. IS THAT CORRECT?

4 A YES SIR.

5 Q IS THAT THE STATEMENT THAT YOU DREW UP ON THAT DAY?

6 A YES SIR, IT IS.

7 Q DOES IT FAIRLY AND ACCURATELY DEPICT THE STATEMENT  
8 THAT HE GAVE YOU THAT DAY?

9 A YES SIR, IT IS.

10 Q AND IT IS ATTACHED TO THE ACTUAL STATEMENT, IS IT NOT?

11 A YES SIR, IT IS.

12 Q IS THAT HIS SIGNATURE ON IT?

13 A YES SIR.

14 Q WHO ELSE SIGNED IT AS WITNESSES?

15 A DETECTIVE STRAIT WITNESSED IT AND DETENTION OFFICER  
16 ROBERT GUZMAN.

17 Q WHEN WAS THAT STATEMENT COMPLETED? WHEN WAS IT  
18 SIGNED?

19 A AT 12:41 P.M.

20 Q THAT WOULD BE IN THE AFTERNOON?

21 A YES SIR.

22 Q THANK YOU.

23 MR. THOMPSON: I HAVE NO FURTHER QUESTIONS.

24 THE COURT: CROSS EXAMINATION.

25

1 **CROSS EXAMINATION BY MR. CHIARENZA:**

2 Q OFFICER YEAGER, WHEN MY CLIENT WAS BROUGHT TO THE  
3 DETENTION CENTER AND YOU TOOK THE STATEMENT, HE ADMITTED  
4 CASHING THOSE CHECKS WHEN YOU CONFRONTED HIM WITH THAT.  
5 CORRECT?

6 A THAT'S CORRECT.

7 Q AND HE ADMITTED THAT'S HIS SIGNATURE ON THE BACK OF THE  
8 CHECKS?

9 A THAT'S CORRECT.

10 Q HE TOLD YOU THAT HE HAD GOTTEN THEM FROM DANA?

11 A YES SIR.

12 Q AND HE TOLD YOU THAT SHE WANTED HIM TO CASH THE  
13 CHECKS SO THEY COULD BUY A CAR?

14 A YES SIR.

15 Q YOU DIDN'T DISCUSS ANYTHING ABOUT A VEHICLE FIRST? HE  
16 TOLD YOU THAT?

17 A THAT'S RIGHT.

18 Q AND WORKING ON THIS CASE, YOU'RE AWARE THAT DURING  
19 THE TIME THAT WE'RE TALKING ABOUT A CAR WAS IN FACT  
20 PURCHASED BY THESE INDIVIDUALS?

21 A YES SIR.

22 Q NOW, WHEN HE WAS ORIGINALLY BROUGHT IN AND HE WAS  
23 CHARGED WITH WHAT HE STANDS TRIAL FOR HERE TODAY, ARE YOU  
24 AWARE OF THOSE CHARGES?

25 A YES SIR.

- 1 Q MURDER, ARMED ROBBERY, AND THREE COUNTS OF FORGERY.
- 2 RIGHT?
- 3 A YES SIR.
- 4 Q YOU'RE ALSO AWARE THAT HE WAS ALSO SERVED WITH TWO
- 5 COMMITMENTS WHEN HE WAS BROUGHT IN?
- 6 A YES SIR.
- 7 Q AND A COMMITMENT MEANS YOU'VE BEEN IN COURT
- 8 PREVIOUSLY AND STILL OWE THE COURT SOME MONEY OR THIRTY
- 9 DAYS OR SOME SORT OF SENTENCE, AND THAT YOU DIDN'T COME
- 10 BACK AND DO THAT. RIGHT?
- 11 A RIGHT.
- 12 Q SO, A COMMITMENT IS ISSUED BY A JUDGE AND GIVES ALL THE
- 13 LAW ENFORCEMENT OFFICERS IN THE COUNTY THE AUTHORITY TO GO
- 14 AND ARREST SOMEBODY WHO OWES THE COURT SOME MONEY OR
- 15 OWES THE COURT SOME TIME. CORRECT?
- 16 A CORRECT.
- 17 Q SO, THE COMMITMENTS THAT HE WAS SERVED WITH IN THIS
- 18 CASE HAD ABSOLUTELY NOTHING TO DO WITH MR. CUBLEY.
- 19 CORRECT?
- 20 A THAT'S RIGHT.
- 21 Q NOW, HE TOLD YOU THAT HE WAS, THAT HE HAD AN
- 22 OUTSTANDING DOMESTIC VIOLENCE WARRANT, WHEN YOU WERE
- 23 SPEAKING WITH YOU. RIGHT?
- 24 A YES SIR, HE DID.

**ROBERT GUZMAN - DIRECT EXAMINATION BY MS. COLLINS**

1 Q ARE YOU AWARE THAT IN FACT THOSE COMMITMENTS WERE  
2 FOR SOMETHING DIFFERENT? DO YOU HAVE ANY KNOWLEDGE OF  
3 THAT?

4 A NO, I HAVE NO KNOWLEDGE OF THAT.

5 Q BUT YOU WOULD TESTIFY THAT EVEN IF HE HAD ABSOLUTELY  
6 NOTHING TO DO WITH WHAT HE'S ON TRIAL FOR TODAY, IT DOES  
7 APPEAR THAT AT THE TIME HE LEFT TOWN THERE WERE ACTIVE  
8 WARRANTS FOR HIM FOR COMMITMENT?

9 A YES.

10 Q FOR WHICH HE COULD HAVE GONE TO JAIL?

11 A YES.

12 Q I BELIEVE IT WAS YOUR TESTIMONY THAT WHEN Y'ALL FIRST  
13 STARTED TALKING TO HIM, YOU TESTIFIED THAT HE UNDERSTOOD  
14 ALL RIGHT, BUT HE COULDN'T READ OR WRITE IN ENGLISH. IS THAT  
15 CORRECT?

16 A THAT'S CORRECT.

17 MR. CHIARENZA: THAT'S ALL I HAVE, YOUR HONOR.

18 MR. THOMPSON: NOTHING FURTHER, YOUR HONOR.

19 THE COURT: YOU MAY STEP DOWN.

20 MS. COLLINS: YOUR HONOR, THE STATE'S NEXT WITNESS IS  
21 ROBERT GUZMAN.

22 **ROBERT RIVERA GUZMAN III, DULY SWORN,**

23 **TESTIFIED AS FOLLOWS:**

24 **DIRECT EXAMINATION BY MS. COLLINS:**

25 Q WOULD YOU PLEASE STATE YOUR NAME FOR THE RECORD?

- 1 A ROBERT RIVERA GUZMAN III.
- 2 Q WHAT'S YOUR TITLE?
- 3 A I'M A DETENTION OFFICER WITH THE YORK COUNTY SHERIFF'S  
4 OFFICE.
- 5 Q WHERE ARE YOU CURRENTLY EMPLOYED? WITH THE YORK  
6 COUNTY SHERIFF'S DEPARTMENT?
- 7 A WITH THE YORK COUNTY DETENTION CENTER, A DIVISION OF  
8 THE YORK COUNTY SHERIFF'S OFFICE.
- 9 Q AND I SHOULD REFER TO YOU AS OFFICER GUZMAN?
- 10 A YES MA'AM.
- 11 Q WERE YOU SO EMPLOYED IN DECEMBER OF 2006, DECEMBER OF  
12 LAST YEAR?
- 13 A YES MA'AM.
- 14 Q DID YOU HAVE OCCASION TO SPEAK WITH THE DEFENDANT,  
15 ISAIAS GUTIERREZ ON DECEMBER 10, 2006?
- 16 A YES MA'AM.
- 17 Q WHAT CAUSED YOU TO SPEAK TO THE DEFENDANT ON THAT  
18 DAY?
- 19 A DETECTIVE YEAGER AND DETECTIVE STRAIT REQUESTED THAT I  
20 TRANSLATE.
- 21 Q WAS THAT THE FIRST TIME YOU HAD MET MR. GUTIERREZ?
- 22 A YES MA'AM.
- 23 Q YOU HAD NOT HAD ANY PRIOR KNOWLEDGE OF HIM SOCIALLY?
- 24 A NO MA'AM.

1 Q YOU HAD NOT HAD ANY PRIOR INVOLVEMENT WITH HIM AS A  
2 GUARD AT THE DETENTION CENTER?

3 A NO MA'AM.

4 Q DO YOU RECALL APPROXIMATELY WHAT TIME YOU MET WITH  
5 THEM?

6 A APPROXIMATELY 8:00 OR 9:30 A.M., 8:00 OR 9:30.

7 Q WERE YOU ON DUTY AT THE TIME?

8 A YES MA'AM.

9 Q DRESSED AS YOU ARE TODAY?

10 A YES MA'AM.

11 Q FOR THE PURPOSE OF THE RECORD, I WILL REFLECT THAT YOU  
12 ARE IN DETENTION CENTER UNIFORM.

13 A YES MA'AM.

14 Q WHERE DID YOU GO TO MEET WITH THE DEFENDANT?

15 A TO THE INTERVIEW ROOM IN THE INTAKE AREA OF THE YORK  
16 COUNTY DETENTION CENTER.

17 Q WHO ALL WAS PRESENT?

18 A DETECTIVE YEAGER AND DETECTIVE STRAIT.

19 Q WAS THE DEFENDANT HANDCUFFED AT THAT TIME?

20 A NO MA'AM.

21 Q HOW DID YOU CONVERSE WITH THE DEFENDANT?

22 A IN SPANISH.

23 Q WOULD YOU TELL THE JURY A LITTLE BIT ABOUT YOUR  
24 BACKGROUND AND HOW YOU CAME TO BE WELL-VERSED IN THE  
25 SPANISH LANGUAGE?

1 A I AM MEXICAN-AMERICAN. MY FATHER WAS MEXICAN. MY  
2 MOTHER WAS AMERICAN. I WAS BORN IN PHOENIX, ARIZONA. AT THE  
3 AGE OF THREE I MOVED TO CALIFORNIA. I GREW UP IN CALIFORNIA IN  
4 PLACES LIKE SAN DIEGO, FRESNO, OAKLAND UNTIL I WAS FIFTEEN.

5 WHEN I WAS FIFTEEN I MOVED OUT HERE TO SOUTH CAROLINA  
6 UNTIL I WAS SIXTEEN. FROM THE TIME I WAS SIXTEEN UNTIL I WAS  
7 NINETEEN I LIVED IN SOUTH MIAMI, FLORIDA. AND THEN AFTER  
8 NINETEEN I MOVED BACK UP HERE TO THE PRESENT.

9 I GREW UP IN THE LATIN CULTURE. I GREW UP IN A LATIN  
10 HOUSEHOLD WHERE I HAD A FAMILY THAT SPOKE SPANISH. I SPOKE  
11 SPANISH. I SPOKE SPANISH IN THE LATIN COMMUNITY, BOTH IN  
12 FLORIDA AND IN CALIFORNIA, FOR MOST OF MY LIFE.

13 Q YOU SPOKE IN TERMS OF GROWING UP. BUT YOU ALSO  
14 MENTIONED LIVING IN CALIFORNIA, AS WELL AS IN ARIZONA, AS  
15 WELL AS IN FLORIDA. DID YOU INTERACT WITH A LARGE PERCENTAGE  
16 OF THE HISPANIC POPULATION THERE?

17 A THE AREAS THAT I LIVED IN WERE NINETY PERCENT OR MORE  
18 SPANISH CULTURE, SPANISH COMMUNITY.

19 Q AND THEREFORE, YOU ARE ABLE TO UNDERSTAND THOSE WHO  
20 SPEAK SPANISH?

21 A YES MA'AM.

22 Q AND YOU'RE ABLE TO CONVERSE WITH THEM IN SPANISH?

23 A YES MA'AM.

24 Q DOES SPANISH HAVE DIFFERENT DIALECTS?

25 A YES MA'AM.

## ROBERT GUZMAN - DIRECT EXAMINATION BY MS. COLLINS

1 Q JUST LIKE WE MIGHT HAVE SOUTHERN OR OTHER DIALECTS IN  
2 ENGLISH?

3 A YES MA'AM.

4 Q DID YOU HAVE ANY TROUBLE CONVERSING WITH THE  
5 DEFENDANT, ISAIAS GUTIERREZ ON DECEMBER 10, 2006?

6 A NO MA'AM.

7 Q WAS THERE ANY CONFUSION ABOUT DIALECTS OR ANYTHING IN  
8 THAT REGARD?

9 A NO MA'AM.

10 Q DID HE EVER INDICATE THAT HE COULDN'T UNDERSTAND YOU?

11 A THERE WAS A COUPLE OF TIMES WHEN HE DIDN'T QUITE  
12 UNDERSTAND THE IDEA I WAS TRYING TO CONVEY, SO I WOULD RE-  
13 WORD OR REPHRASE THE SENTENCE AND THEN HE WOULD  
14 UNDERSTAND IT.

15 Q SO, AFTER YOU RE-WORDED OR REPHRASED IT, HE INDICATED  
16 THAT HE DID UNDERSTAND?

17 A YES MA'AM.

18 Q DID YOU EVER HAVE TROUBLE UNDERSTANDING MR.  
19 GUTIERREZ?

20 A NO MA'AM.

21 Q DID YOU AT ANY TIME MAKE ANY PROMISES TO MR. GUTIERREZ  
22 IN SPANISH?

23 A NO MA'AM.

24 Q DID YOU AT ANY TIME MAKE ANY THREATS TO MR. GUTIERREZ  
25 IN SPANISH?

- 1 A NO MA'AM.
- 2 Q DID HE AT ANY TIME INDICATE TO YOU THAT ANYONE HAD  
3 MADE ANY PROMISES OR THREATS TO HIM TO CAUSE HIM TO SIGN HIS  
4 STATEMENT?
- 5 A NO MA'AM.
- 6 Q DO YOU RECALL WHETHER OR NOT YOU REVIEWED WITH HIM  
7 HIS RIGHTS?
- 8 A I ASKED HIM IF HE COMPREHENDED HIS RIGHTS.
- 9 Q WHAT DID HE RELATE TO YOU?
- 10 A HE SAID YES.
- 11 Q DID HE ASK YOU FOR ANY ELABORATION ON THAT?
- 12 A NO MA'AM.
- 13 Q DID HE ASK YOU TO GO THROUGH HIS RIGHTS AGAIN?
- 14 A NO MA'AM.
- 15 Q DID YOU GO THROUGH HIS RIGHTS AGAIN?
- 16 A NO MA'AM.
- 17 Q WERE YOU SATISFIED THAT HE UNDERSTOOD HIS RIGHTS?
- 18 A YES MA'AM.
- 19 Q OFFICER GUZMAN, I'M GOING TO SHOW YOU WHAT HAS BEEN  
20 MARKED FOR IDENTIFICATION PURPOSES AS STATE'S EXHIBIT 106. DO  
21 YOU RECOGNIZE THAT DOCUMENT?
- 22 A THIS DOCUMENT, NO MA'AM.
- 23 Q LET ME REPHRASE. THAT'S A TWO-PAGE DOCUMENT I'VE  
24 HANDED YOU. CORRECT?
- 25 A YES MA'AM.

- 1 Q THE TOP PORTION IS A WAIVER OF RIGHTS. CORRECT?
- 2 A YES MA'AM. I NEVER SAW THIS DOCUMENT.
- 3 Q YOU DIDN'T WITNESS THAT, YOU DIDN'T SIGN THAT?
- 4 A NO MA'AM.
- 5 Q IF YOU WOULD, TURN TO THE ATTACHED PAGE, DO YOU
- 6 RECOGNIZE THAT DOCUMENT?
- 7 A YES MA'AM.
- 8 Q THE ONE THAT IS THE SECOND PORTION OF EXHIBIT 106, YOU DO
- 9 RECOGNIZE?
- 10 A YES MA'AM.
- 11 Q DID YOU REVIEW THAT STATEMENT WITH THE DEFENDANT IN
- 12 SPANISH?
- 13 A YES MA'AM.
- 14 Q DID YOU READ THAT TO HIM AS IT'S WRITTEN THERE? IT'S
- 15 WRITTEN IN THE ENGLISH LANGUAGE. DID YOU READ IT TO HIM IN
- 16 SPANISH?
- 17 A YES MA'AM.
- 18 Q DID HE AFFIRM TO YOU THAT THAT WAS HIS STATEMENT?
- 19 A YES MA'AM.
- 20 Q DID HE AFFIRM TO YOU THAT THAT WAS TRUE?
- 21 A YES MA'AM.
- 22 Q DID HE EVER ASK TO MAKE ANY ADDITIONS OR CORRECTIONS
- 23 TO THAT STATEMENT?
- 24 A NO MA'AM.

- 1 Q IF HE HAD DONE SO, WOULD YOU HAVE MADE THOSE ADDITIONS  
2 OR CORRECTIONS AND HAVE HIM INITIAL THEM?
- 3 A I WOULD HAVE INFORMED THE DETECTIVES THAT HE WANTED  
4 THOSE DONE.
- 5 Q BUT HE DID NOT DO SO.
- 6 A NO MA'AM.
- 7 Q DID THE DEFENDANT SIGN THAT STATEMENT IN YOUR  
8 PRESENCE?
- 9 A YES MA'AM.
- 10 Q DID YOU WITNESS HIS SIGNATURE BY SIGNING YOUR NAME  
11 BELOW?
- 12 A YES MA'AM.
- 13 Q DID DETECTIVE STRAIT ALSO WITNESS THE DEFENDANT'S  
14 SIGNATURE AND SIGN HIS NAME IN YOUR PRESENCE?
- 15 A YES MA'AM.
- 16 Q I REALIZE YOU DIDN'T REVIEW THE PRIOR SHEET, BUT ON THE  
17 PRIOR SHEET, THERE'S A REFERENCE TO THE DEFENDANT GOING TO  
18 THE NINTH GRADE.
- 19 A I'M SORRY, MA'AM. WOULD YOU REPEAT?
- 20 Q ON THE PRIOR SHEET THERE'S A REFERENCE TO THE DEFENDANT  
21 GOING THROUGH THE NINTH GRADE.
- 22 A YES MA'AM.
- 23 Q DO YOU SEE THAT AT THE BOTTOM?
- 24 A YES MA'AM.

1 Q AND I REALIZE YOU WEREN'T THERE WHEN THAT WAS  
2 REVIEWED, BUT DO YOU KNOW, IS THE NINTH GRADE IN MEXICO THE  
3 SAME AS THE NINTH GRADE IN THE UNITED STATES?

4 A I KNOW THAT FOR A MAJORITY OF THE PEOPLE IN MEXICO THAT  
5 GO TO THE NINTH GRADE IS ACTUALLY PRETTY GOOD. I'M NOT SURE  
6 OF THE ACTUAL SYSTEM THEY EMPLOY, BUT I DO KNOW THAT MOST  
7 PEOPLE I DEAL WITH ONLY MAKE IT THROUGH GRAMMAR SCHOOL, IF  
8 THEY'RE LUCKY.

9 Q DO YOU KNOW IF PUBLIC EDUCATION IN MEXICO ACTUALLY  
10 GOES BEYOND NINTH GRADE?

11 A NO MA'AM, I DON'T.

12 Q YOU DON'T KNOW ONE WAY OR THE OTHER?

13 A NO MA'AM.

14 Q THANK YOU. IF YOU WOULD TURN AGAIN TO THE SECOND PAGE  
15 OF THAT.

16 MS. COLLINS: YOUR HONOR, AT THIS TIME I WOULD MOVE  
17 STATE'S EXHIBIT 106 INTO EVIDENCE, BEING TWO PAGES OF THAT  
18 EXHIBIT.

19 MR. CHIARENZA: YOUR HONOR, I WOULD JUST RENEW MY PRIOR  
20 OBJECTION.

21 THE COURT: IT'S ADMITTED OVER OBJECTION.  
22 (WHEREUPON STATE'S EXHIBIT NUMBER 106 WAS ADMITTED INTO  
23 EVIDENCE OVER OBJECTION)

24 Q OFFICER GUZMAN, IF YOU WOULD BE SO KIND TO READ THAT TO  
25 THE JURY COMPLETELY IN ENGLISH, PLEASE.

1 A "VOLUNTARY STATEMENT. I, ISAIAS GUTIERREZ, KNOW AND  
2 UNDERSTAND MY RIGHTS, HAVING DECIDED TO ANSWER QUESTIONS  
3 AT THIS TIME, I NOW MAKE THE FOLLOWING STATEMENT ON THE  
4 DEATH OF CLARENCE CUBLEY BY TWO DETECTIVES OF THE YORK  
5 COUNTY SHERIFF'S OFFICE. I TOLD THEM I DIDN'T KNOW ANYTHING  
6 ABOUT MR. CUBLEY'S DEATH UNTIL I WAS IN CUSTODY IN MISSOURI  
7 AND A WHITE BOY SHOWED ME A NEWSPAPER ARTICLE. I NEVER  
8 WENT TO MR. CUBLEY'S TRAILER TO ROB OR ASSAULT HIM. I DID  
9 KNOW MR. CUBLEY BECAUSE WE LIVED IN THE TRAILER PARK IN FORT  
10 MILL FOR ABOUT TWO YEARS. I WAS TOLD DANA MADE STATEMENTS  
11 SAYING I WAS THE ONE WHO KILLED MR. CUBLEY. I THINK DANA  
12 MADE THESE STATEMENTS BECAUSE SHE WAS MAD AT ME. I LEFT  
13 ROCK HILL ABOUT THIS TIME BECAUSE THE POLICE WERE COMING  
14 AROUND MY TRAILER LOOKING FOR ME. I KNEW I HAD WARRANTS ON  
15 ME BECAUSE I DIDN'T SHOW UP FOR COURT ON A CRIMINAL DOMESTIC  
16 VIOLENCE CHARGE. I DID NOT HIT DANA BUT SHE TOLD THE POLICE I  
17 DID. I LEFT TOWN TO GET AWAY FROM DANA AND SO I WOULDN'T GO  
18 TO JAIL. BEFORE I LEFT TOWN DANA GAVE ME SOME CHECKS SHE  
19 SAID HER GRANDFATHER GAVE HER. SHE WANTED ME TO CASH THE  
20 CHECKS SO SHE COULD BUY A CAR. I DID CASH THESE CHECKS. I WAS  
21 SHOWN PICTURES FROM THE BANK AND I TOLD THE DETECTIVES THAT  
22 WAS ME IN THE PICTURES. THE DETECTIVES SHOWED ME COPIES OF  
23 THE CHECKS FROM THE BANK. I TOLD THEM THAT WAS THE CHECKS I  
24 CASHED AND THAT WAS MY SIGNATURE ON THE BACK OF THE  
25 CHECKS. WHEN I LEFT TOWN I GOT A TAXI FROM THE BP ON HIGHWAY

1           21 AND WENT TO THE GREYHOUND BUS STATION IN CHARLOTTE. I  
2           WENT TO KENTUCKY AND I STAYED ABOUT A YEAR. THEN I WENT TO  
3           FLORIDA FOR ALMOST TWO YEARS. I WAS DOING ROOFING WORK AND  
4           WENT TO WHEREVER THE JOBS WERE. I WENT TO TEXAS, KANSAS AND  
5           MISSOURI, WHERE I WAS ARRESTED. THIS STATEMENT WAS WRITTEN  
6           FOR ME BY DETECTIVE YEAGER. I HAVE READ IT AND IT IS MY TRUE  
7           AND ACCURATE STATEMENT."

8    Q           DID YOU READ HIM THE NEXT PORTION OF THE STATEMENT  
9           REGARDING CONSISTING OF ONE PAGE?

10   A           YES MA'AM. "THE STATEMENT ABOVE CONSISTING OF ONE PAGE  
11           IS MADE OF MY OWN FREE WILL. NO ONE HAS THREATENED ME IN  
12           ANY WAY OR PROMISED ME SPECIAL TREATMENT THAT CAUSED ME  
13           TO MAKE THIS STATEMENT. I AM SIGNING MY NAME IN THE SPACE  
14           BELOW TO SHOW THAT THIS IS MY STATEMENT AND THAT IT IS TRUE."

15   Q           AND THE DEFENDANT SIGNED THAT STATEMENT IN YOUR  
16           PRESENCE?

17   A           YES MA'AM.

18   Q           AND IT'S DATED 12/10/06, AND THE TIME IS 12:41. IS THAT  
19           CORRECT?

20   A           YES MA'AM.

21   Q           AT NO TIME PRIOR TO SIGNING THAT STATEMENT DID THE  
22           DEFENDANT REQUEST THE ASSISTANCE OR PRESENCE OF AN  
23           ATTORNEY. IS THAT CORRECT?

24   A           YES MA'AM.

25   Q           THAT IS CORRECT THAT HE DID NOT MAKE SUCH A REQUEST?

1 A HE DID NOT MAKE ANY REQUEST FOR AN ATTORNEY.

2 Q THANK YOU, OFFICER. PLEASE ANSWER ANY QUESTIONS MR.  
3 CHIARENZA MAY HAVE.

4 MR. CHIARENZA: I DON'T HAVE ANY QUESTIONS FOR OFFICER  
5 GUZMAN.

6 THE COURT: YOU MAY STEP DOWN.

7 MS. COLLINS: WE WOULD ASK THAT THIS WITNESS BE EXCUSED.

8 THE COURT: YOU MAY.

9 MR. THOMPSON: THE STATE CALLS EDDIE STRAIT, YOUR HONOR.

10 **WILLIAM EDWARD STRAIT, JR., DULY**

11 **SWORN, TESTIFIED AS FOLLOWS:**

12 **DIRECT EXAMINATION BY MR. THOMPSON:**

13 Q DETECTIVE STRAIGHT, WOULD YOU STATE YOUR FULL NAME  
14 FOR THE COURT, PLEASE?

15 A WILLIAM EDWARD STRAIT, JR.

16 Q WHERE DO YOU WORK?

17 A FOR THE YORK COUNTY SHERIFF'S DEPARTMENT?

18 Q HOW LONG HAVE YOU BEEN THERE?

19 A ALMOST FOURTEEN YEARS.

20 Q CAN YOU TELL ME HOW LONG YOU'VE BEEN IN LAW  
21 ENFORCEMENT ALL TOGETHER?

22 A ALMOST FOURTEEN YEARS.

23 Q CAN YOU TELL ME, WHAT ARE YOUR DUTIES THERE AT THE  
24 SHERIFF'S DEPARTMENT?

## EDDIE STRAIT - DIRECT EXAMINATION BY MR. THOMPSON

- 1 A I'M CURRENTLY ASSIGNED TO THE DETECTIVE'S DIVISION AND  
2 THE CRIMES AGAINST PERSONS DIVISION.
- 3 Q IS THAT WERE YOU WERE ASSIGNED BACK ON DECEMBER 31, OF  
4 2002?
- 5 A YES, IT IS.
- 6 Q CAN YOU TELL ME, AT THAT TIME DID YOU BECOME INVOLVED  
7 IN INVESTIGATING THIS CASE?
- 8 A I DID.
- 9 Q HOW DID YOU BECOME INVOLVED?
- 10 A THEY ASKED FOR A DETECTIVE AND THE FORENSICS UNIT AFTER  
11 THE PATROL OFFICERS ARRIVED AT THE SCENE THAT DAY. I THINK  
12 THEY LEFT THE OFFICE HERE IN YORK; SO, ALMOST FORTY-FIVE  
13 MINUTES LATER WHEN WE GOT TO THE ADDRESS ON HIGHWAY 21.
- 14 Q CAN YOU TELL ME, HOW MANY DETECTIVES WORKED WITH THE  
15 CRIMES AGAINST PERSONS UNIT AT THAT TIME?
- 16 A THREE.
- 17 Q YOU WERE ONE OF THOSE THREE?
- 18 A THAT'S CORRECT.
- 19 Q NOW, CAN YOU TELL ME, ULTIMATELY, WERE YOU ASSIGNED AS  
20 THE CASE AGENT IN THIS CASE?
- 21 A I WAS.
- 22 Q CAN YOU TELL ME WHAT THAT MEANS?
- 23 A THE CASE AGENT BASICALLY IS JUST THE LEAD INVESTIGATOR,  
24 KEEPS UP WITH THE PAPERWORK. WE HAVE PAPERS AND SEARCH  
25 WARRANTS AND STUFF LIKE THAT COMING IN FOR WEEKS, DAYS AND

1 MONTHS AND SOMEBODY HAS TO BE IN CHARGE OF KEEPING THAT IN  
2 ORDER AND IN A FILE.

3 Q SO, YOU'RE NOT ONLY THE CASE AGENT IN THIS PARTICULAR  
4 CASE, BUT YOU'RE THE PERSON THAT PEOPLE NEED TO REPORT DAILY  
5 TO. IS THAT CORRECT?

6 A RIGHT.

7 Q AND YOU ALSO INSTRUCT OTHERS AS TO WHAT THEY SHOULD  
8 DO FROM TIME TO TIME IN THE CASE?

9 A OCCASIONALLY.

10 Q CAN YOU TELL ME, DID YOU BECOME THE CASE AGENT IN THIS  
11 CASE?

12 A I DID.

13 Q WERE YOU THE CASE AGENT IMMEDIATELY, OR DID THAT  
14 HAPPEN LATER?

15 A IT'S LATER. THE REGULAR INCIDENT REPORTS ARE TURNED IN  
16 AT THE END OF THE DAY AND THE CAPTAIN AND LIEUTENANT GO  
17 THROUGH THEM THE NEXT MORNING AND ASSIGN THEM OUT.

18 Q SO, WAS THIS WAS ASSIGNED TO YOU THE NEXT DAY, JANUARY  
19 1?

20 A ACTUALLY, WE WOULD HAVE BEEN OFF, SO...

21 Q YOU WOULD HAVE BEEN OFF?

22 A YES.

23 Q YOU SAID YOU WENT TO THE SCENE THAT DAY ON THE 31ST.  
24 HOW LONG DID YOU STAY AT THE SCENE?

25 A APPROXIMATELY THREE HOURS.

- 1 Q WHY WAS THAT?
- 2 A WE STAYED TILL EVERYBODY WAS THROUGH, THE FORENSIC  
3 UNIT, THE OTHER DETECTIVES.
- 4 Q DID YOU ACTUALLY GO INTO THE SCENE YOURSELF?
- 5 A NO, I DID NOT.
- 6 Q YOU STAYED JUST OUTSIDE?
- 7 A CORRECT.
- 8 Q DID YOU GET SOME OF THE INFORMATION THAT THEY HAD  
9 OBTAINED FROM THE SCENE AT THAT POINT?
- 10 A I DID. THEY HAD THE CRIME SCENE BLOCKED OFF FOR A FAIRLY  
11 LARGE AREA BECAUSE IT WASN'T THAT FAR OFF THE ROADWAY. SO,  
12 WE HAD SEVERAL CARS PARKED ALONG THE ROADWAY. THE FIRST  
13 CARS FOR THE ORIGINAL OFFICERS WERE INSIDE THE CRIME SCENE.
- 14 Q AFTER THAT, WHAT ELSE DID YOU DO THAT DAY?
- 15 A MYSELF AND LIEUTENANT HAGER WENT TO CAROLINAS  
16 MEDICAL CENTER IN CHARLOTTE TO CHECK ON THE VICTIM.
- 17 Q WAS HE ABLE TO TALK TO YOU THAT DAY?
- 18 A NO, HE HAD NOT REGAINED CONSCIOUSNESS.
- 19 Q ALL RIGHT.
- 20 A WE ALSO SPOKE TO THE FAMILY.
- 21 Q WOULD YOU REPEAT THAT?
- 22 A HE WAS STILL UNCONSCIOUS. HE WASN'T ABLE TO TALK. HIS  
23 CONDITION REALLY HADN'T CHANGED FROM WHEN HE LEFT THE  
24 RESIDENCE.
- 25 Q AND YOU SAID YOU ALSO TALKED TO THE FAMILY?

1 A YES.

2 Q FROM YOUR INVESTIGATION AT THAT POINT, WHAT, IF  
3 ANYTHING, DID YOU LEARN?

4 A WELL, THE FACT THAT THERE WAS NO APPARENT FORCED  
5 ENTRY AT THE RESIDENCE. WE ASKED THE FAMILY IF THEY KNEW OF  
6 ANYTHING, THAT MAY HAVE HAD ANYTHING MISSING, ANYBODY  
7 THAT MAY WANT TO HURT MR. CUBLEY. AND AT THAT POINT THE  
8 ONLY THAT MAY HAVE BEEN MISSING WAS HIS WALLET.

9 Q SO, YOU KNEW AT THAT POINT THAT THERE MAY BE A WALLET  
10 THAT YOU NEEDED TO BE LOOKING FOR?

11 A THAT'S CORRECT.

12 Q WERE YOU ABLE TO DO ANYTHING ELSE THAT DAY?

13 A NO, WE WERE NOT.

14 Q NOW, ON JANUARY 1, DO YOU REMEMBER WHAT DAY OF THE  
15 WEEK THAT WAS?

16 A I THINK IT WAS TUESDAY?

17 Q I'M ASKING YOU.

18 A I DO NOT KNOW THE DAY OF THE WEEK.

19 Q WELL, ON JANUARY 1, DO YOU RECALL WHAT YOU DID THAT  
20 DAY? YOU SAY YOU WERE NORMALLY OFF.

21 A RIGHT. WE WERE OFF FOR THE HOLIDAY, BUT MYSELF AND  
22 LIEUTENANT HAGER DID RIDE BACK UP TO THE HOSPITAL TO CHECK  
23 ON MR. CUBLEY AGAIN.

24 Q SO, ON THAT DAY YOU WENT BACK TO THE HOSPITAL TO CHECK  
25 ON MR. CUBLEY AT THAT TIME?

1 A THAT'S CORRECT.

2 Q WHAT WAS HIS CONDITION? WERE YOU ABLE TO SPEAK WITH  
3 HIM AT THAT TIME?

4 A NO. HIS CONDITION STILL HADN'T CHANGED. DIFFERENT  
5 FAMILY MEMBERS WERE STILL THERE. SO, WE DID SPEAK TO THE  
6 FAMILY AGAIN.

7 Q SO, YOU SPOKE TO THE FAMILY AGAIN. WAS THERE ANYTHING  
8 ELSE INVESTIGATION-WISE THAT YOU LEARNED THAT DAY FROM  
9 SPEAKING WITH THE FAMILY?

10 A YES. THAT'S THE DAY WE FOUND OUT THAT A SAFE MAY BE  
11 MISSING FROM THE RESIDENCE.

12 Q ALL RIGHT. NOW, AFTER THAT, THE NEXT DAY, JANUARY 2,  
13 2003, DO YOU RECALL HOW THAT DAY BEGAN FOR YOU, WHAT YOU  
14 STARTED DOING ON THAT DAY?

15 A THAT WAS ACTUALLY THE FIRST DAY BACK TO WORK AFTER  
16 THE HOLIDAYS, OUR REGULAR WORK DAY.

17 Q WAS THAT THE DAY THAT YOU WERE ASSIGNED AS CASE  
18 AGENT?

19 A YES.

20 Q WHAT DID YOU DO THAT DAY?

21 A WE'D ALSO BEEN TOLD, ALONG WITH THE SAFE, ABOUT A  
22 DISCOVER CARD THAT MAY BE MISSING. ITEMS IN THE SAFE WERE  
23 THE TITLE TO A TRUCK; I THINK SOME OLD PAPERWORK; AND THE  
24 DISCOVER CARD.

1 I CALLED DISCOVER CARD THAT MORNING TO SEE IF THERE'D  
2 BEEN ANY ACTIVITY ON IT. THERE HAD NOT BEEN AN ACTIVITY.  
3 THEY DID NOTE AN INQUIRY ON IT. BUT THE ACTUAL SERVICE REP  
4 WAS NOT THERE. THEY WERE GOING TO HAVE HER CALL ME BACK.

5 LATER THAT DAY, I THINK ABOUT MID-DAY, WE DID GO TALK TO  
6 THE BANK OF AMERICA, WHERE SOMEONE HAD TRIED TO CASH A  
7 CHECK ON MAUDE CUBLEY.

8 Q IS THAT WHEN YOU BECAME AWARE OF THE POSSIBLE  
9 FORGERIES THAT WERE INVOLVED?

10 A YES. HE DID NOT GET TO CASH THE CHECK, AND LEFT THE  
11 CHECK AND TWO FORMS OF ID.

12 Q WERE YOU ABLE TO OBTAIN THAT UNCASHED CHECK AND THE  
13 TWO FORMS OF ID THAT DAY?

14 A YES, WE WERE.

15 Q AND CAN YOU TELL ME, WERE YOU ALSO INFORMED BY THE  
16 BANK OF AMERICA THAT THEY HAD GOTTEN THE OTHER TWO  
17 CHECKS?

18 A YES. ACTUALLY, I THINK THEY FAXED US COPIES OF THE  
19 CHECKS AND THE TWO ID'S ON THE SECOND, AND INFORMED US  
20 THROUGH THEIR INVESTIGATION THEY FOUND TWO CHECKS THAT  
21 HAD BEEN CASHED.

22 Q NOW, AS A RESULT OF THAT, WHO WERE YOU THEN LOOKING  
23 FOR?

24 A THE ID'S HAD THE NAME, ISALIAS DIAZ GUTIERREZ ON BOTH ID'S  
25 AND THE CHECK.

## EDDIE STRAIT - DIRECT EXAMINATION BY MR. THOMPSON

1 Q SO, DID YOU THEN BEGIN LOOKING FOR ISAIAS GUTIERREZ AT  
2 THAT POINT IN TIME?

3 A YES. THROUGH THE INVESTIGATION WITH HIS NAME, WE FOUND  
4 THAT HE WAS ASSOCIATED WITH A FEMALE NAMED DANA  
5 BLACKMON. THE ONLY ADDRESS WE COULD COME UP WITH AT THAT  
6 TIME WAS THE HIGHWAY 21 ADDRESS IN FORT MILL. SO, LATER THAT  
7 NIGHT---

8 Q COULD THAT ADDRESS REFERENCE HAVE BEEN CORRECT AT  
9 THAT TIME?

10 A NO. IT COULD NOT HAVE BEEN.

11 Q WHY WAS THAT?

12 A THERE WAS NOBODY LIVING THERE EXCEPT MR. CUBLEY AT  
13 THAT TIME.

14 Q THEN WHAT DID YOU DO AS A RESULT OF THAT?

15 A BASICALLY SPENT THE DAY TRYING TO LOCATE EITHER MR.  
16 GUTIERREZ OR MS. BLACKMON.

17 Q ALL RIGHT.

18 A AND WE DID LOCATE MS. BLACKMON LATE THAT NIGHT.

19 Q HAD YOU ALSO FOUND OUT ABOUT THE TRAILER ON TWIN  
20 LAKES ROAD?

21 A NO, WE NEVER GOT THE EXACT ADDRESS. WE WERE JUST OUT  
22 LOOKING, YOU KNOW, ASKING AROUND. WE WERE GETTING  
23 DIFFERENT AREAS, DIFFERENT ADDRESSES.

24 Q ALL RIGHT.

1 A AND ACTUALLY, WE DID COME UPON DANA ACTUALLY ON HER  
2 WAY HOME TO TWIN LAKES AND FOLLOWED HER TO HER TRAILER.

3 Q SO, DID YOU ASK AROUND IN THAT AREA THAT YOU WERE  
4 LOOKING FOR THESE INDIVIDUALS?

5 A YES.

6 Q WHEN YOU WERE ULTIMATELY ABLE TO FIND DANA, WAS THAT  
7 THE FIRST CONTACT YOU HAD WITH HER?

8 A RIGHT.

9 Q NOW, YOU SAID THAT YOU SAW HER DRIVING AND FOLLOWED  
10 HER HOME. WHAT HAPPENED AT THAT POINT?

11 A SHE WAS BY HERSELF. WE ASKED HER-- ACTUALLY, MY  
12 LIEUTENANT FOUND HER AND CALLED ME. I MET THEM THERE A FEW  
13 MINUTES LATER. WE WENT INSIDE TO TALK TO HER AND WAS ASKING  
14 HER BASICALLY WHERE MR. GUTIERREZ WAS.

15 Q HAD YOU TOLD HER ANYTHING ABOUT THE CHECKS OR THE  
16 ASSAULT AT THAT TIME?

17 A NO, JUST THAT WE NEEDED TO TALK TO MR. GUTIERREZ.

18 Q WAS MR. GUTIERREZ THERE AT ALL?

19 A NO, HE WAS NOT.

20 Q DID YOU STAY THERE AT HER TRAILER FOR A WHILE TALKING  
21 WITH HER?

22 A I DID.

23 Q DID SHE INDICATE TO YOU WHO LIVED AT THAT TRAILER?

24 A SHE, MR. GUTIERREZ AND THEIR CHILD.

25 Q WAS THE CHILD THERE AT THAT POINT?

EDDIE STRAIT - DIRECT EXAMINATION BY MR. THOMPSON

1 A YES.

2 Q WAS ANYONE ELSE THERE EXCEPT HER AND THE CHILD?

3 A THAT'S ALL.

4 Q WHILE YOU WERE THERE WITH HER, DID MR. GUTIERREZ HAVE  
5 ANY CONTACT WITH HER?

6 A YES. THE PHONE RANG AND SHE BEGAN SPEAKING TO SOMEONE  
7 AND SHE MOTIONED TO US THAT THAT WAS HIM.

8 Q WHEN THAT OCCURRED WHAT DID YOU?

9 A I STEPPED OUTSIDE TO MY CAR AND CALLED AN EMPLOYEE OF  
10 THE LOCAL PHONE COMPANY. THEY CAN'T TRACE LAND LINE CALLS,  
11 BUT THEY COULD TELL ME THAT IT WAS A LONG DISTANCE CALL  
12 COMING IN.

13 Q SO, YOU WERE ABLE TO LEARN THAT MUCH ABOUT THE CALL  
14 COMING IN?

15 A RIGHT.

16 Q WERE YOU ABLE TO DETERMINE WHETHER HE WAS  
17 ATTEMPTING TO TRY TO COME BACK HOME TO HER AT THAT POINT?

18 A WHEN SHE HUNG UP SHE TOLD US THAT HE HAD PLANNED TO  
19 CALL BACK LATER AND THAT HE WOULD COME BACK TO SEE HER ONE  
20 MORE TIME.

21 Q AS A RESULT OF THAT, DID YOU WAIT THERE IN THE TRAILER?

22 A YES. I STAYED A WHILE. SHE SAID HE WOULD BE THERE ABOUT  
23 2:30, I THINK IT WAS. I STAYED THERE A LITTLE WHILE AND WHEN I  
24 LEFT WE HAD PATROL OFFICERS AND NARCOTICS OFFICERS KEEP AN  
25 EYE ON THE ROAD.

1 Q DID THEY BASICALLY STAKE IT OUT AT THAT POINT?

2 A YES.

3 Q WOULD SHE HAVE KNOWN THAT THEY WERE THERE OR WAS IT  
4 SUCH THAT SHE WOULD NOT?

5 A NO. IT'S A FAIRLY LONG DRIVE THAT GOES TO ABOUT TEN  
6 TRAILERS DOWN THAT ROAD. THERE'S ONLY ONE WAY IN AND ONE  
7 WAY OUT.

8 Q AND SO, YOU HAD OFFICERS WATCHING THE TRAILER WHEN  
9 YOU LEFT?

10 A YES.

11 Q DID YOU HAVE ANY INDICATION THAT HE MIGHT TRY TO COME  
12 BY THAT EVENING OR LATER THAT NIGHT?

13 A JUST WHAT SHE TOLD US THAT HE SAID HE MAY COME BACK  
14 ABOUT 2:30 IN THE MORNING AND VISIT ONE MORE TIME.

15 Q DID THEY ACTUALLY STAY OUT THERE DURING THAT WHOLE  
16 TIME?

17 A AS FAR AS I KNOW, THEY STAYED OVERNIGHT UNTIL THE NEXT  
18 SHIFT CAME ON AT 6:00 A.M.

19 Q AS A RESULT WERE YOU EVER ABLE TO HAVE CONTACT WITH  
20 THE DEFENDANT AT THAT POINT?

21 A NO.

22 Q NOW, HAD YOU TALKED TO ANY OF THE DEFENDANT'S FAMILY  
23 MEMBERS AT THAT TIME? WERE YOU ABLE TO ASCERTAIN ANY OF HIS  
24 FAMILY MEMBERS AND TALK TO THEM?

1 A YES. WE CONTACTED HIS BROTHER WHO LIVED IN McGUIRE'S  
2 MOBILE HOME PARK.

3 Q WAS HE ABLE TO GIVE YOU ANY INFORMATION AS TO WHERE  
4 THE DEFENDANT WAS?

5 A NO.

6 Q NOW, AT THAT POINT, WERE YOU ABLE TO TALK TO DANA  
7 ABOUT YOU WANTING HER TO DO, OR THAT YOU WERE WANTING TO  
8 TALK TO HER AT THAT POINT?

9 A YES. WE ASKED HER IF SHE WOULD COME IN THE NEXT  
10 MORNING AND AT LEAST SIT DOWN AND GIVE US A FORMAL  
11 STATEMENT FROM THE WEEKEND ON TO THE NIGHT WE SHOWED UP  
12 AT HER PLACE.

13 Q DID SHE IN FACT COME TO YOUR HEADQUARTERS?

14 A YES, SHE DID.

15 Q NOW, BEFORE WE REACH THE DATE OF JANUARY 2, AS PART OF  
16 YOUR INVESTIGATION, YOU SAID WERE SEARCHING FOR BOTH OF  
17 THEM THAT DAY. DID YOU ACTUALLY FORMALLY ENTER ANYTHING  
18 INTO YOUR COMPUTER TO SHOW THAT THERE WAS A SEARCH FOR HIM  
19 AT THAT TIME?

20 A THE FACT THAT WE HAD THE TWO ID'S AND THE CHECK WHERE  
21 HE HAD ATTEMPTED TO FORGE CHECKS, THAT IS CONSIDERED  
22 FORGERY, OR AN ATTEMPT TO PASS THE CHECK AT THE BANK, WE DID  
23 GET A WARRANT ON HIM FOR FORGERY AND ENTERED THAT INTO THE  
24 NATIONAL CRIME COMPUTER.

- 1 Q BUT YOU JUST ACTUALLY ENTERED THAT HISTORY INTO THE  
2 CRIME COMPUTER BASED ON THE WARRANT AT THAT TIME?
- 3 A THAT'S CORRECT.
- 4 Q NOW, ON JANUARY 3, TELL ME HOW THAT DAY STARTED FOR  
5 YOU. WHAT DID YOU DO AT THAT POINT? DID DANA ACTUALLY COME  
6 TO YOU THAT MORNING?
- 7 A YES. SHE CAME IN, I THINK ABOUT NINE THAT MORNING. AND  
8 SHE DID SIT DOWN WITH US AND GIVE, I THINK ABOUT A SIX-PAGE  
9 WRITTEN STATEMENT, HANDWRITTEN SHE DID HERSELF.
- 10 Q DID SHE IMPLICATE ISAIAS GUTIERREZ IN THAT STATEMENT?
- 11 A YES, SHE DID. I DON'T REMEMBER ALL THE DETAILS, BUT  
12 BASICALLY SHE WAS SAYING THAT HE HAD LEFT ON SUNDAY, PLAYED  
13 SOCCER OR SOMETHING; CAME BACK AND HAD DIFFERENT CLOTHES  
14 ON. SAID HE HAD GOTTEN DIRTY WAS THE REASON HE HAD ON  
15 DIFFERENT CLOTHES. SHE WENT ON TO SAY THAT HE HAD LEFT WITH  
16 SOME FRIENDS AND THE DAY HE WENT TO WORK HE NEVER CAME  
17 BACK HOME. BASICALLY HAD TOLD HER THAT HE HAD DONE  
18 SOMETHING BAD AND WASN'T COMING BACK.
- 19 Q DID SHE IN FACT MENTION THAT HE HAD GONE AND BEEN  
20 INVOLVED IN THE COMMISSION OF THIS CRIME AT THAT POINT? NOT  
21 JUST THE FORGERY, BUT THE CRIME AGAINST MR. CUBLEY?
- 22 A I THINK SHE DID MENTION THAT THEY HAD BROKEN IN AND GOT  
23 THE SAFE, OR HAD WENT TO HIS HOUSE AND GOT THE SAFE.
- 24 Q OKAY. NOW, DID SHE IMPLICATE HERSELF IN ANY OF THIS AT  
25 ALL?

1 A NOT AT ALL.

2 Q NOW, AFTER YOU TOOK THAT INTERVIEW WITH HER, WHAT ELSE  
3 DID YOU DO THAT DAY AS FAR AS INVESTIGATING THIS CASE?

4 A SHE ACTUALLY LEFT AFTER THE INTERVIEW. SHORTLY AFTER  
5 THAT I GOT A CALL BACK FROM DISCOVER CARD FROM THE SERVICE  
6 REP THAT ACTUALLY TALKED TO THE PERSON ON THE PHONE THAT  
7 NIGHT. I HAD LEFT A MESSAGE FOR THEM TO CALL AND IT CAME IN.

8 WHEN SHE PULLED UP HER SCREEN, THE NOTES THAT SHE HAD  
9 MADE TO HERSELF, IT HAD THE TELEPHONE NUMBER THE CALL WAS  
10 MADE FROM, AND A NOTATION THAT A WHITE FEMALE HAD  
11 ATTEMPTED TO GET A PIN NUMBER ON THIS CARD, AND DID NOT  
12 KNOW ANY OF THE CARD HOLDER'S INFORMATION, SUCH AS DATE OF  
13 HER DATE OF BIRTH AND HER MOTHER'S MAIDEN NAME.

14 Q WERE YOU ABLE TO TRACE THAT PHONE NUMBER BACK?

15 A YES. IT CAME BACK TO DANA BLACKMON'S RESIDENCE.

16 Q WAS THAT THE RESIDENCE ON TWIN LAKES?

17 A THAT'S CORRECT.

18 Q AND AT THAT POINT WHAT DID YOU DO?

19 A WE DROVE BACK TO HER RESIDENCE AND ASKED HER IF SHE  
20 WOULD COME BACK IN AND TALK TO US AGAIN; THAT SOME THINGS  
21 IN HER FIRST STATEMENT JUST DIDN'T ADD UP AND WE NEEDED TO  
22 TALK TO HER AGAIN.

23 Q DID SHE COME IN AT THAT TIME?

24 A YES. WE FOLLOWED HER BACK AT THAT TIME BECAUSE THE  
25 FIRST TIME SHE CAME IN SHE DID NOT HAVE HER CHILD WITH HER.

1           WHEN WE WENT BACK TO GET HER SHE HAD HER CHILD AND SAYING  
2           THAT SHE DIDN'T HAVE ANYBODY TO WATCH HIM OR PICK HIM UP. I  
3           MEAN HER; EXCUSE ME.

4    Q           HAD SHE MADE ARRANGEMENTS FOR SOMEONE TO WATCH THE  
5           CHILD THAT MORNING WHEN SHE CAME IN?

6    A           THE FIRST TIME, YES.

7    Q           SO, WE LET HER DRIVE BACK WITH THE CAR SEAT AND BRING  
8           THE CHILD. AS SOON AS WE GOT HERE WE CALLED HER PARENTS AND  
9           MADE ARRANGEMENTS FOR THEM TO COME PICK UP THE CHILD.

10   Q           WHEN YOU TALKED TO HER AT THAT TIME, WAS THAT WHEN  
11           SHE GAVE HER SECOND STATEMENT?

12   A           YES. WE CONFRONTED HER WITH THE INFORMATION WE HAD,  
13           THAT IT WAS HER WHO CALLED ABOUT THE DISCOVER CARD. AND  
14           THAT'S WHEN SHE GAVE THE SECOND STATEMENT.

15   Q           AND DID SHE THEN ADMIT CALLING DISCOVER CARD AT THAT  
16           TIME?

17   A           YES, SHE DID.

18   Q           DID SHE FURTHER IMPLICATE MR. GUTIERREZ IN THE CRIME  
19           AGAINST MR. CUBLEY AT THAT TIME?

20   A           YES. IN HER SECOND STATEMENT SHE BASICALLY STATED SHE  
21           KNEW ABOUT IT FROM THE TIME THAT HE CAME HOME AND TOLD HER  
22           HE HAD DONE IT. AND THEN SHE WENT WITH HIM AND CASHED THE  
23           CHECKS AND SO FORTH.

24   Q           SO, SHE STILL HAD NOT ADMITTED THAT SHE WENT AT THAT  
25           TIME. IS THAT CORRECT?

1 A TO MR. CUBLEY'S RESIDENCE, RIGHT.

2 Q NOW, AS A RESULT OF TALKING TO HER ON THIS DATE, THAT  
3 SAME DAY, ON THE SECOND STATEMENT, DID YOU NOTIFY FSU OF  
4 ANYTHING, OR THE FORENSICS TEAM?

5 A YES. DURING HER STATEMENT SHE TOLD US ABOUT THE  
6 WHEREABOUTS OF THE SAFE.

7 Q HOW DID SHE DESCRIBE THAT TO YOU?

8 A WHERE IT WAS?

9 Q YES. WHAT WAS THE DIRECTION?

10 A SHE JUST SAID HE THREW IT IN THE CREEK JUST BELOW THEIR  
11 HOUSE. I WAS FAMILIAR WITH THE LOCATION, KNEW WHERE  
12 DUTCHMAN CREEK WAS AT.

13 Q ALL RIGHT.

14 A WE ALWAYS USUALLY HAVE TWO DETECTIVES IN AN  
15 INTERVIEW AND, IN A CASE LIKE THAT, ONE CAN STEP OUT AND PASS  
16 THAT INFORMATION ON.

17 Q WAS THAT DONE?

18 A YES.

19 Q IN FACT, IS THAT WHEN THE SAFE RECOVERED FROM  
20 DUTCHMAN CREEK?

21 A YES, IT WAS.

22 Q AS A RESULT OF THE RECOVERY OF THE SAFE, DID YOU ASK FSU  
23 TO DO ANYTHING ELSE THAT DAY, AS A RESULT OF HER STATEMENT,  
24 AND ALSO AS A RESULT OF THE RECOVERY OF THE SAFE?

25 A YES, DO A SEARCH OF HER RESIDENCE.

1 Q DID SHE AGREE TO A SEARCH OF HER RESIDENCE?

2 A YES. SHE SIGNED A CONSENT FORM.

3 Q SHE CONSENTED TO THE SEARCH OF HER RESIDENCE. AND DID  
4 THAT FORM ALSO INCLUDE A CONSENT TO SEARCH HER CAR?

5 A YES.

6 Q AT THAT POINT, IS THAT WHEN YOU ASKED THE FORENSIC UNIT  
7 TO SEARCH THAT AS WELL?

8 A YES. THAT'S THE CAR AT THE RESIDENCE.

9 Q DID YOU ALLOW DANA TO LEAVE AT THAT POINT IN TIME?

10 A NO. AT THAT TIME SHE WAS CHARGED WITH ACCESSORY AFTER  
11 THE FACT OF THE ARMED ROBBERY AND GIVING FALSE INFORMATION.

12 Q WERE ANY OTHER WARRANTS OBTAINED ON MR. GUTIERREZ AT  
13 THAT TIME?

14 A YES.

15 Q WHAT WARRANTS WERE THOSE?

16 A ARMED ROBBERY AND ASSAULT AND BATTERY WITH INTENT TO  
17 KILL AND THE FORGERIES. WE ADDED THE OTHER TWO FORGERIES.

18 Q NOW, THE ASSAULT AND BATTERY WITH INTENT TO KILL, WHY  
19 WAS THAT ISSUED? WE'RE HERE TODAY ON A MURDER CHARGE. WHY  
20 AT THAT TIME WAS IT ASSAULT AND BATTERY WITH INTENT TO KILL?

21 A MR. CUBLEY WAS STILL ALIVE AT THAT TIME.

22 Q SO, HAD YOU BEEN ABLE TO CHECK ON THE CONDITION OF MR.  
23 CUBLEY DURING THIS DAY?

24 A WE'RE ON THE THIRD?

25 Q WE'RE ON THE THIRD.

1 A I DON'T REMEMBER CHECKING ON HIM ON THE THIRD.

2 Q THE NEXT TIME YOU WERE ABLE TO GAIN ANY INFORMATION,  
3 WAS THAT ON THE FOURTH? DO YOU RECALL?

4 A (NO RESPONSE)

5 Q OR WERE YOU OFF THAT DAY?

6 A I DON'T RECALL ANYTHING ON THE FOURTH. I THINK THAT WAS  
7 A SATURDAY.

8 Q WERE YOU OFF THAT DAY?

9 A YES.

10 Q DURING THIS TIME DID YOU STILL HAVE OFFICERS NOW  
11 NOTIFIED TO LOOK FOR ISAIAS GUTIERREZ?

12 A YES. WE ALSO HAD INFORMATION THAT HE WAS NOT IN THE  
13 AREA BECAUSE OF THE PHONE CALL. BUT WE DO HAVE THE  
14 INFORMATION OUT TO ALL THE LOCAL AGENCIES.

15 Q YOU WERE STILL ACTIVELY FIND HIM AT THAT TIME, YOUR  
16 DEPARTMENT AND OTHERS?

17 A YES.

18 Q CAN YOU TELL ME, ON JANUARY 5, WHAT IF ANYTHING DID YOU  
19 LEARN ABOUT MR. CUBLEY'S CONDITION THAT DAY?

20 A WE WERE OFF THAT DAY, BUT I WAS CALLED AT HOME THAT  
21 EVENING AND NOTIFIED THAT HE HAD PASSED AWAY THAT DAY.

22 Q YOU WERE OFF, SO THAT WAS, I BELIEVE, ON A SUNDAY?

23 A SUNDAY, YES.

24 Q SO, ON JANUARY 6, WHAT WAS THE NEXT THING YOU DO TO  
25 FORWARD THE CASE?

- 1 A OBVIOUSLY IT HAD MOVED UP TO A DIFFERENT LEVEL FROM  
2 ARMED ROBBERY TO A HOMICIDE. WE BROUGHT DANA BACK OUT  
3 FROM THE JAIL AND WANTED TO SIT DOWN FOR A THIRD INTERVIEW  
4 WITH HER. WE BASICALLY TOLD HER THAT, YOU KNOW, WE STILL  
5 DIDN'T BELIEVE QUITE EVERYTHING THAT SHE WAS TELLING US AND,  
6 YOU KNOW, THAT THIS WAS THE TIME FOR HER TO JUST GO AHEAD  
7 AND TELL IT ALL.
- 8 Q DID YOU TELL HER THAT MR. CUBLEY HAD DIED AT THAT  
9 POINT?
- 10 A NO, NOT AT THAT POINT.
- 11 Q WHEN YOU SAT DOWN AND TALKED TO HER AT THAT TIME,  
12 WERE MORE THAN JUST YOU, OR WERE THERE MORE OFFICERS WHO  
13 TALKED TO HER DURING THAT PERIOD?
- 14 A YES, SHE TALKED TO SEVERAL OF US.
- 15 Q DURING THAT CONVERSATION, DID SHE ULTIMATELY GIVE HER  
16 THIRD AND FINAL STATEMENT?
- 17 A SHE DID.
- 18 Q IN THAT ONE, DID SHE ADMIT HER FAULT IN THIS CASE?
- 19 A YEAH. FROM THE SECOND TO THE THIRD, THAT WAS REALLY  
20 THE ONLY DIFFERENT, WAS THE FACT THAT SHE KNEW IT  
21 BEFOREHAND, WENT WITH HIM TO THE RESIDENCE OF MR. CUBLEY,  
22 AND DID HAVE SOME HAND IN HELPING HIM.
- 23 Q SHE HAD BEEN INCARCERATED FROM THE THIRD, FROM HER  
24 INITIAL ARREST TO THIS POINT?
- 25 A THAT'S CORRECT.

- 1 Q SHE HAD NOT LEFT THE DETENTION CENTER?
- 2 A NO, SHE HAD NOT.
- 3 Q NOW, THE CAR THAT SHE DROVE UP HER ON THE THIRD, DO YOU
- 4 RECALL WHAT CAR THAT WAS?
- 5 A IT WAS A WHITE PONTIAC, THE ONE THEY HAD BOUGHT.
- 6 Q SO, THAT'S THE ONE THEY HAD JUST BOUGHT?
- 7 A THAT'S CORRECT.
- 8 Q SO, AFTER EVERYTHING HAD HAPPENED, THIS IS THE ONE THEY
- 9 BOUGHT?
- 10 A YES.
- 11 Q AT THAT POINT WAS THAT CAR STILL OUT HERE IN THE PARKING
- 12 LOT?
- 13 A YES, IT WAS.
- 14 Q DID YOU MAKE ANY ATTEMPT OR ASK HER TO SEARCH THAT
- 15 CAR AS WELL?
- 16 A WE DID. SHE SIGNED A CONSENT TO SEARCH .
- 17 Q DID YOU LOOK THROUGH THAT CAR?
- 18 A YES.
- 19 Q WAS THERE ANYTHING OF VALUE IN THAT CAR?
- 20 A NO.
- 21 Q NOW, AS FAR AS MR. CUBLEY, I UNDERSTAND FROM YOUR
- 22 TESTIMONY HE DIED ON THE FIFTH. DID YOU GO WHEN THE AUTOPSY
- 23 WAS PERFORMED?

- 1 A I DO NOT KNOW THE EXACT DATE. THE FACT THAT HE DIED IN  
2 CHARLOTTE, IT WOULD HAVE BEEN SEVERAL DAYS BECAUSE THEY  
3 WOULD PERFORM THE AUTOPSY HERE.
- 4 Q NOW, WHEN THE AUTOPSY WAS PERFORMED DID YOU THEN  
5 RECEIVE SOME VERBAL CONFIRMATION OF THE CAUSE OF DEATH AT  
6 THAT TIME?
- 7 A YES. HE DIED AS A RESULT FROM HIS INJURIES FROM THE  
8 ASSAULT.
- 9 Q AS A RESULT OF RECEIVING THAT INFORMATION, DID YOU THEN  
10 CHANGE THE CHARGE AT THAT POINT?
- 11 A YES.
- 12 Q WHAT CHARGE DID YOU MAKE AT THAT POINT?
- 13 A DID A WARRANT FOR DANA FOR MURDER, AND ALSO ISSUED A  
14 WARRANT FOR MR. GUTIERREZ FOR MURDER.
- 15 Q DID YOU ALSO CHARGE DANA WITH ARMED ROBBERY?
- 16 A YES, WE DID.
- 17 Q DID YOU CHARGE MR. GUTIERREZ WITH ARMED ROBBERY? OR,  
18 HE WAS ALREADY CHARGED?
- 19 A HE WAS ALREADY CHARGED.
- 20 Q AND THAT WAS BECAUSE MR. CUBLEY HAD DIED. IS THAT  
21 CORRECT?
- 22 A CORRECT.
- 23 Q AND THE CHARGES FOR DANA, IS THAT BASED ON HER THIRD  
24 STATEMENT?
- 25 A YOU MEAN THE WARRANTS?

1 Q YES.

2 A THE ARMED ROBBERY WARRANT, AND THE MURDER BECAUSE  
3 SHE WAS THERE.

4 Q NOW, AT THIS TIME, EARLY IN JANUARY OF '06, HAD YOU  
5 ACTUALLY RECEIVED THE PHOTOGRAPHS FOR THE VIDEOS OF THE  
6 BANK OF AMERICA?

7 A WE RECEIVED THEM ON THE SIXTH.

8 Q THE PHOTOGRAPHS OF---

9 A OH, NO, I'M SORRY.

10 Q THE PHOTOGRAPHS OF THE VIDEOS.

11 A OH, I'M SORRY. WE GOT COPIES OF THE CHECKS ON THE SIXTH.

12 Q YOU RECEIVED THE TWO ACTUAL CHECKS?

13 A THE ONES THAT HAD BEEN CASHED, YES.

14 Q OKAY. THE ONES THAT HAD BEEN CASHED, YOU RECEIVED  
15 THOSE, THE REAL, HARD COPIES OF THOSE CHECKS ON THE SIXTH?

16 A RIGHT.

17 Q HOW ABOUT THE ACTUAL VIDEO OR STILL PHOTOGRAPHS?

18 WHEN DID YOU---

19 A WE DID NOT HAVE THEM AT THAT TIME.

20 Q WAS THAT LATER IN JANUARY?

21 A YES, IT WAS TOWARD THE END OF THE MONTH.

22 Q SO, NEAR THE END OF THE MONTH YOU RECEIVED THOSE. WHEN  
23 YOU OBTAINED THOSE PHOTOGRAPHS AND THOSE VIDEOS, AFTER YOU  
24 RECEIVED THEM IN LATE JANUARY, IS THERE ANYTHING AS A RESULT  
25 OF THAT THAT YOU NOTICED IN THE INVESTIGATION?

1 A YES. THE JACKET THAT MR. GUTIERREZ HAS ON IN THE BANK,  
2 IT'S A DARK, MAYBE BLACK, JACKET THAT HAS A PLAID LINING. I  
3 DON'T KNOW IF IT'S A HOOD, BUT YOU CAN SEE A LOT OF IT AROUND  
4 THE COLLAR AREA.

5 Q OKAY.

6 A IT WAS ACTUALLY ON THE FLOOR OF THE RESIDENCE IN THE  
7 PHOTOS THAT WERE TAKEN DURING THE SEARCH.

8 Q I'LL ASK YOU TO LOOK AT STATE'S EXHIBIT NUMBER 71. IS THAT  
9 THE PHOTOGRAPH WE'RE TALKING ABOUT, ONE OF THE PHOTOGRAPHS  
10 WE'RE TALKING ABOUT?

11 A YES.

12 Q IF YOU WOULD, COME DOWN AND POINT OUT TO THE JURY ON  
13 THE SCREEN WHERE IT IS THAT YOU SAW THAT PHOTOGRAPH.

14 (WHEREUPON WITNESS EXITED WITNESS STAND TO VIEW  
15 STATE'S EXHIBIT 71 ON OVERHEAD PROJECTOR)

16 A JUST TO THE LEFT OF THE NUMBER FIVE, THAT'S THE PLAID YOU  
17 CAN SEE IN THE BANK PHOTO.

18 Q AND THAT APPEARED TO YOU TO BE THE SAME JACKET?

19 A LOOKED TO BE THE SAME JACKET.

20 Q THANK YOU. YOU MAY BE SEATED.

21 (WHEREUPON WITNESS RETURNED TO WITNESS STAND)

22 Q NOW, THROUGH YOUR INVESTIGATION OF THE WARRANTS  
23 ISSUED FOR ISAIAS GUTIERREZ, WERE YOU ABLE TO FIND OUT THE  
24 HEIGHT AND THE WEIGHT OF THE DEFENDANT?

1 A I'M SURE WE DID. I DON'T KNOW WHAT THEY WERE RIGHT  
2 OFFHAND, BUT THEY WOULD HAVE BEEN TYPED ONTO THE WARRANT.

3 Q I'LL SHOW YOU A COPY OF THE WARRANT FOR MR. GUTIERREZ.  
4 THIS IS WARRANT G-389659. IS THAT THE WARRANT ISSUED FOR MR.  
5 GUTIERREZ?

6 A YES, IT IS.

7 Q WHAT WAS IT THAT YOU WERE ABLE TO DETERMINE THROUGH  
8 YOUR INVESTIGATION AS FAR AS HIS HEIGHT AND WEIGHT?

9 A IT HAS HIS HEIGHT AS 66 INCHES, 190 POUNDS, HISPANIC MALE.  
10 IT HAS THE DATE OF BIRTH AS SEPTEMBER 1, 1980.

11 Q NOW, MOVING A LITTLE BIT FORWARD, ULTIMATELY, WERE YOU  
12 ABLE TO CATCH THE DEFENDANT WITHIN THAT YEAR OF 2003?

13 A NO, WE WERE NOT.

14 Q WHEN WAS IT THAT YOU WERE ACTUALLY ABLE TO FIND OUT  
15 THAT THE DEFENDANT HAD BEEN APPREHENDED?

16 A NOVEMBER OF 2006.

17 Q WHERE WAS HE APPREHENDED?

18 A BRANSON, MISSOURI.

19 Q AS A RESULT OF THAT, WERE YOU ABLE TO CONFIRM THAT HE  
20 WAS THE PERSON YOU WERE LOOKING FOR?

21 A YES, WE DID.

22 Q WERE Y'ALL NOTIFIED BY WAY OF THAT BEING PUT OUT ON THE  
23 NATIONAL CRIME COMPUTER?

24 A THAT'S CORRECT.

1 Q WHEN WAS HE ACTUALLY DELIVERED BACK TO SOUTH  
2 CAROLINA, TO YORK COUNTY?

3 A ABOUT A MONTH LATER. IT WAS IN DECEMBER OF '06.

4 Q DO YOU REMEMBER THE EXACT DATE THAT HE WAS BROUGHT  
5 TO THE DETENTION CENTER?

6 A I WAS NOTIFIED ON DECEMBER 9. IT WAS A SATURDAY  
7 EVENING THAT HE WAS HERE, AND THE WARRANTS HAD BEEN SERVED  
8 ON HIM.

9 Q WHAT DID YOU DO AS A RESULT OF THAT?

10 A I CALLED DETECTIVE YEAGER AND WE MADE ARRANGEMENTS  
11 TO GO IN ON SUNDAY, DECEMBER 10, TO INTERVIEW HIM.

12 Q DID YOU DO THAT?

13 A YES, WE DID.

14 Q AND YOU DID THAT WITH DETECTIVE YEAGER?

15 A YES.

16 Q WHEN YOU WENT IN, WHERE DID YOU INTERVIEW HIM?

17 A THE INTERVIEW ROOM AT THE JAIL PORTION HERE IN THE MOSS  
18 JUSTICE CENTER.

19 Q AND IN THAT INTERVIEW ROOM, WAS IT JUST THE THREE OF YOU  
20 AT THAT TIME WHEN YOU WERE INITIALLY ABLE TO TALK TO HIM?

21 A YES, IT WAS.

22 Q WHEN YOU WENT TO TALK TO HIM, DID YOU HAVE ANY  
23 PROBLEMS COMMUNICATING WITH HIM AT THAT POINT IN TIME?

24 A NO, WE DID NOT.

1 Q WHAT WAS ONE OF THE FIRST THINGS YOU DID WITH HIM WHEN  
2 YOU SAT DOWN TO TALK TO HIM?

3 A I INTRODUCED MYSELF AND DETECTIVE YEAGER, THAT WE  
4 WERE DETECTIVES FROM THE SHERIFF'S OFFICE AND WE WANTED TO  
5 TALK TO HIM.

6 Q DID YOU MAKE IT PLAIN THAT YOU WERE POLICE OFFICERS,  
7 THAT Y'ALL WERE?

8 A YES.

9 Q DID HE SEEM TO UNDERSTAND THAT?

10 A YES, HE DID.

11 Q DID HE HAVE ANY PROBLEMS COMMUNICATING WITH HIM AT  
12 THAT TIME?

13 A NO, HE DID NOT.

14 Q DID YOU GO OVER HIS RIGHTS WITH HIM AT THAT TIME?

15 A I DID.

16 Q I'LL SHOW YOU STATE'S EXHIBIT 103, WHICH SHOULD BE RIGHT  
17 THERE NEXT TO YOU. IS THAT THE WAIVER OF RIGHTS FORM THAT  
18 YOU WENT OVER WITH HIM?

19 A YES, IT IS.

20 Q CAN YOU TELL ME, DID YOU READ THAT WORD FOR WORD FOR  
21 HIM?

22 A I DID.

23 Q DID HE SEEM TO UNDERSTAND IT AS YOU READ IT FOR HIM?

24 A YES, HE DID.

1 Q DID HE INDICATE VERBALLY THAT HE UNDERSTOOD WHAT YOU  
2 WERE READING TO HIM?

3 A HE DID. HE ACTUALLY NODDED THE FIRST TIME. I TOLD HIM HE  
4 NEEDED TO ACKNOWLEDGE VERBALLY SO THAT I KNEW THAT HE  
5 UNDERSTOOD IT.

6 Q AND THEN DID HE ACKNOWLEDGE IT VERBALLY?

7 A HE DID.

8 Q WHAT DID HE SAY?

9 A YES.

10 Q DID HE SIGN SAYING THAT HE UNDERSTOOD THOSE RIGHTS AT  
11 THAT TIME?

12 A HE INITIALED BESIDE YES AND THEN SIGNED HIS NAME OR HIS  
13 SIGNATURE.

14 Q UNDER THAT, THERE IS ALSO A WAIVER OF RIGHTS, WHICH  
15 STARTS OFF, "I AM WILLING TO TALK TO POLICE AND ANSWER  
16 QUESTIONS." DID YOU READ THAT TO HIM AS WELL?

17 A YES, I DID.

18 Q DID HE UNDERSTAND THAT?

19 A HE DID. HE SIGNED THAT PORTION.

20 Q NOW, YOU ASKED HIM AS WELL SOME IDENTIFYING QUESTIONS,  
21 SOME PERSONAL QUESTIONS ABOUT HIMSELF, SUCH AS COULD HE  
22 READ AND WRITE. TELL ME WHAT HE RESPONDED TO THOSE  
23 QUESTIONS. TELL ME WHAT YOU ASKED HIM SPECIFICALLY AND HOW  
24 HE RESPONDED.

1 A I ASKED HOW FAR DID HE GO IN SCHOOL AND HE SAID THE  
2 NINTH GRADE. I ASKED HIM DID HE READ AND HE SAID YES. I ASKED  
3 HIM COULD HE WRITE AND HE SAID JUST IN SPANISH ONLY.

4 Q DID HE HAVE ANY PROBLEM-- DID YOU ASK HIM IF HE COULD  
5 SPEAK ENGLISH?

6 A YES.

7 Q WHAT DID HE SAY?

8 A HE SAID HE COULD SPEAK ENGLISH.

9 Q DID HE SAY HE COULD UNDERSTAND ENGLISH AS WELL?

10 A HE SAID MOST OF IT, JUST ABOUT ALL OF IT.

11 Q NOW, AS YOU BEGAN TALKING AT THAT TIME, WHAT IF  
12 ANYTHING DID HE TELL YOU AND DETECTIVE YEAGER?

13 A HE KNEW, YOU KNOW, WHAT HE WAS CHARGED WITH. SO WE  
14 STARTED ASKING HIM QUESTIONS ABOUT MR. CUBLEY AND ABOUT  
15 THE INCIDENT. AND WE TOLD HIM UP FRONT THAT DANA HAD  
16 ALREADY MADE STATEMENTS TO LAW ENFORCEMENT.

17 HE SAID THAT DANA WAS MAD AND WOULD SAY THOSE THINGS  
18 ABOUT HIM AND HE DIDN'T HAVE ANYTHING TO DO WITH WHAT  
19 HAPPENED TO MR. CUBLEY; THAT HE DIDN'T KNOW THAT HE HAD  
20 BEEN HURT OR DIED UNTIL HE WAS IN CUSTODY IN MISSOURI.

21 Q DID HE TELL YOU WHY HE RAN AT THAT TIME?

22 A HE SAID HE KNEW THAT HE HAD OUTSTANDING WARRANTS ON  
23 HIM AND THE POLICE WERE LOOKING FOR HIM.

24 Q DID HE GO INTO ANY DETAIL ABOUT THE NUMBER OF TIMES  
25 THAT HE KNEW THE POLICE WERE LOOKING FOR HIM?

- 1 A HE SAID THEY'D BEEN BY HIS TRAILER SEVERAL TIMES LOOKING  
2 FOR HIM.
- 3 Q DID YOU TALK TO HIM ABOUT THE CHECKS THAT YOU HAD?
- 4 A WE DID.
- 5 Q WHAT DID HE SAY ABOUT THAT?
- 6 A HE ADMITTED TO CASHING THE CHECKS AND THAT DANA GAVE  
7 THEM TO HIM, SAID THAT HER GRANDFATHER HAD GAVE THEM TO  
8 HER. I SHOWED HIM THE CHECKS AND HE SAID THAT THAT WAS HIS  
9 SIGNATURE ON THE BACK OF THE CHECKS.
- 10 I SHOWED HIM THE BANK PHOTOS. WE HAD TWO STILL PHOTOS.  
11 AND HE SAID THAT WAS HIM IN THE BANK PHOTOS.
- 12 Q AT THAT POINT DID HE SAY WHAT THEY DID WITH THE MONEY  
13 FROM THE CHECKS?
- 14 A I'M PRETTY SURE HE SAID HE BOUGHT THE CAR.
- 15 Q AND YOU WERE THE ONE CONDUCTING THE INTERVIEW. IS  
16 THAT CORRECT?
- 17 A THAT'S CORRECT.
- 18 Q AND DETECTIVE YEAGER WAS THE ONE TAKING THE NOTES AT  
19 THAT TIME?
- 20 A THAT'S RIGHT.
- 21 Q NOW, AS YOU WENT THROUGH THIS WITH HIM, DID HE TELL YOU  
22 WHETHER HE KNEW MR. CUBLEY OR NOT?
- 23 A HE SAID HE DID; HE HAD LIVED IN THAT TRAILER PARK BEFORE.  
24 Q DID HE TELL YOU WHEN?  
25 A HE ACTUALLY SAID HE'D LIVED IN IT FOR ABOUT TWO YEARS.

- 1 Q NOW, AT SOME POINT AFTER YOU READ HIM HIS RIGHTS, I  
2 BELIEVE YOU ALSO TALKED ABOUT HIS RIGHT TO BE IN TOUCH WITH  
3 THE MEXICAN CONSULATE. IS THAT CORRECT?
- 4 A THAT'S CORRECT.
- 5 Q WHAT, IF ANYTHING, DID YOU PROVIDE HIM WITH AT THAT  
6 POINT?
- 7 A WE HAD BOTH IN ENGLISH AND SPANISH A COPY AND I READ  
8 IT--
- 9 Q OF WHAT?
- 10 A THE NOTICE, OR FOR US TO NOTIFY, IF HE WISHED, THE MEXICAN  
11 CONSULATE THAT HE WAS UNDER ARREST.
- 12 Q IS THAT THE NOTICE THAT STATES IF YOU WISH WE CONTACT  
13 THE MEXICAN CONSULATE ON YOUR BEHALF?
- 14 A RIGHT.
- 15 Q DID HE WISH FOR YOU TO CONTACT THE MEXICAN CONSULATE  
16 ON HIS BEHALF?
- 17 A YES, HE DID.
- 18 Q DID Y'ALL ULTIMATELY DO THAT?
- 19 A YES. DETECTIVE YEAGER DID.
- 20 Q NOW, DURING THE TIME THAT YOU WERE WITH THE DEFENDANT  
21 THERE, DURING THE TIME THAT YOU OR DETECTIVE YEAGER OR  
22 ANYONE ELSE PROMISE HIM ANYTHING IF HE WOULD GIVE YOU A  
23 STATEMENT?
- 24 A NO, WE DID NOT.

1 Q DID YOU OR ANYONE ELSE THERE THREATEN HIM IN ORDER TO  
2 GET HIM TO GIVE YOU A STATEMENT?

3 A NO, WE DID NOT.

4 Q WAS THERE THE OFFER OF A HOPE OF A REWARD OF ANY SORT?

5 A NO.

6 Q DID YOU COERCE HIM IN ANY WAY?

7 A NO.

8 Q WAS THERE ANY POINT AT WHICH HE STATED HE WANTED TO  
9 STOP TALKING TO YOU AND WANTED TO GET AN ATTORNEY?

10 A NO, HE DID NOT.

11 Q AT THIS POINT IN THE INTERVIEW, WHEN YOU HAD GATHERED  
12 THE AMOUNT OF INFORMATION THAT YOU HAVE TOLD US ABOUT,  
13 WHAT IF ANYTHING DID THE DEFENDANT SAY TO YOU AT THAT  
14 POINT?

15 A TOWARD THE END OF THE INTERVIEW, HE SAID THAT HE COULD  
16 EXPLAIN SOME THINGS BETTER IF HE COULD SPEAK IN SPANISH, AND  
17 WANTED TO KNOW IF WE HAD SOMEONE THAT HE COULD SPEAK TO IN  
18 SPANISH.

19 Q DID YOU THEN OBTAIN SOMEONE WHO COULD SPEAK IN  
20 SPANISH?

21 A YES. THERE WAS AN OFFICER WORKING, OFFICER GUZMAN,  
22 THAT WE USED, WHO FLUENTLY SPEAKS SPANISH.

23 Q UP TO THAT POINT DID HE INDICATE TO YOU THAT HE DIDN'T  
24 UNDERSTAND ANYTHING OR THAT HE WAS HAVING ANY PROBLEM  
25 UNDERSTANDING WHAT Y'ALL WERE SAYING?

1 A NO, HE DID NOT.

2 Q AND WAS HE ABLE TO ANSWER COGENTLY THE QUESTIONS YOU  
3 ASKED HIM, AND WAS HE ABLE TO DISCUSS WHATEVER QUESTION  
4 YOU JUST ASKED?

5 A YES. THE ANSWERS WENT WITH THE QUESTIONS.

6 Q WHEN YOU GOT OFFICER GUZMAN IN THERE, WHAT HAPPENED  
7 THEN?

8 A WE ASKED A FEW THINGS TO MAKE SURE, YOU KNOW, ABOUT  
9 HIS, HAD HIM ASKED AGAIN ABOUT MR. CUBLEY AND THAT KIND OF  
10 THING. THE ONLY NEW INFORMATION THAT WE GOT WAS BASICALLY  
11 WHERE HE HAD BEEN FOR THE LAST FOUR YEARS.

12 Q DID HE TELL YOU WHERE HE HAD BEEN IN THAT PERIOD OF  
13 TIME?

14 A YES. HE LISTED SEVERAL STATES AND DIFFERENT JOBS.

15 Q NOW, AFTER YOU CONCLUDED THE INTERVIEW, AT THAT POINT,  
16 WHAT TIME WAS IT?

17 A I DON'T REMEMBER EXACTLY. I THINK 11:30, 11:40.

18 Q WHEN YOU LEFT FROM THE INTERVIEW ROOM WHERE DID YOU  
19 GO?

20 A I WENT BACK TO THE OFFICE AND THAT'S WHEN DETECTIVE  
21 YEAGER TYPED THE STATEMENT UP FOR ME.

22 Q AFTER Y'ALL TYPED UP THE STATEMENT, DID YOU GO BACK TO  
23 THE INTERVIEW ROOM?

24 A NO. WE WENT BACK TO THE JAIL AND JUST HAD HIM BROUGHT  
25 OUT INTO THE BOOKING AREA.

1 Q YOU STAYED IN THE BOOKING AREA AT THAT POINT?

2 A YES.

3 Q DID MR. GUZMAN COME BACK, OR, OFFICER GUZMAN COME  
4 BACK AT THAT POINT?

5 A YES. WE NOTIFIED HIM AS SOON AS WE GOT THERE.

6 Q WHAT DID Y'ALL DO AT THAT POINT?

7 A WE HAD HIM JUST GO AHEAD AND READ HIS STATEMENT TO HIM  
8 IN SPANISH.

9 Q OKAY.

10 A AND MAKE SURE HE UNDERSTOOD IT AND THAT HE AGREED  
11 THAT THAT WAS HIS STATEMENT.

12 Q DID HE AGREE THAT WAS HIS STATEMENT AT THAT TIME?

13 A YES, HE DID.

14 Q DID HE IN FACT SIGN THAT STATEMENT?

15 A YES, HE DID.

16 Q AND IS THAT THE STATEMENT THAT'S ATTACHED TO STATE'S  
17 EXHIBIT 103?

18 A YES, IT IS. IT'S 106, IF THAT MAKES ANY DIFFERENCE.

19 Q OKAY. THANK YOU, DETECTIVE. I HAVE NO FURTHER  
20 QUESTIONS.

21 THE COURT: WE'RE GOING TO TAKE A SHORT BREAK. I'LL ASK  
22 YOU TO PLEASE GO TO YOUR JURY ROOM. DON'T DISCUSS THE CASE.  
23 WE'LL BRING YOU BACK AFTER A SHORT BREAK.

24 (WHEREUPON THE JURY EXITED THE COURTROOM AT 4:09 P.M.)

1 COURT'S IN RECESS FOR FIFTEEN MINUTES. YOU CAN STEP  
2 DOWN.

3 COURT IN SESSION - 4:25 P.M.

4 THE COURT: ANYTHING BEFORE WE BRING IN THE JURY?

5 MR. THOMPSON: NOTHING FROM THE STATE.

6 MR. CHIARENZA: NOTHING FROM THE DEFENSE.

7 THE COURT: BRING IN THE JURY.

8 (WHEREUPON THE JURY ENTERED THE COURTROOM)

9 WE'RE NOW READY TO PROCEED WITH THE CROSS  
10 EXAMINATION OF THIS WITNESS. MR. CHIARENZA.

11 MR. CHIARENZA: THANK YOU, YOUR HONOR. MAY IT PLEASE  
12 THE COURT.

13 CROSS EXAMINATION BY MR. CHIARENZA:

14 Q DETECTIVE, AT THE TIME THAT MY CLIENT WAS BROUGHT TO  
15 THE DETENTION CENTER, YOU DID HAVE COMMITMENT WARRANTS ON  
16 HIM. CORRECT?

17 A YES.

18 Q AND I'M NOT TALKING ABOUT ANYTHING THAT YOU MIGHT  
19 HAVE DRAWN UP IN CONNECTION WITH THIS CASE.

20 A YES, HE HAD A COMMITMENT ON HIM.

21 Q HE HAD OTHERS. SO, WHEN HE WAS BROUGHT IN HE WAS  
22 SERVED WITH TWO COMMITMENTS. RIGHT?

23 A I DON'T KNOW FOR SURE THE NUMBER.

24 Q I'M SORRY?

1 A I DON'T KNOW THE NUMBER, BUT I DO KNOW THAT HE HAD  
2 COMMITMENTS ON HIM.

3 Q OKAY. SO THAT WOULD APPEAR TO-- WHEN HE TOLD YOU THE  
4 REASON HE LEFT WAS BECAUSE THERE WERE SOME WARRANTS OUT  
5 FOR HIM OR SOME UNFINISHED BUSINESS WITH THE COURT, THAT  
6 WOULD HAVE APPEARED TO HAVE BEEN CORRECT?

7 A I DON'T KNOW THAT TIME THAT THE COMMITMENTS WERE  
8 ISSUED.

9 Q WELL, HE TOLD YOU THAT THE REASON HE LEFT YORK COUNTY  
10 WAS IN, BECAUSE HE HAD SOME ACTIVE WARRANTS, SOME MATTERS  
11 OF COURT?

12 A RIGHT.

13 Q AND ALL THE INFORMATION THAT YOU PRESENTED TODAY  
14 WOULD APPEAR TO INDICATE THAT HE WAS GONE FOR THIS PERIOD OF  
15 FOUR YEARS IN VARIOUS OTHER STATES?

16 A THAT'S CORRECT.

17 Q YOU'RE NOT AWARE OF ANY OTHER COMMITMENT OR  
18 ANYTHING ISSUED ON HIS BEHALF FROM THE TIME OF THE ASSAULT  
19 OF MR. CUBLEY, ARE YOU?

20 A NOT AFTER THE WARRANTS THAT WE ISSUED.

21 Q SO, IF I SHOWED YOU THE COMMITMENTS COULD YOU SEE  
22 WHEN THEY WERE ISSUED?

23 A THEY SHOULD BE ON THE WARRANTS.

24 Q JUST TAKE A LOOK AT THOSE FOR A MOMENT.

25 A (PAUSE TO REVIEW COMMITMENT FORMS)

- 1 Q CAN YOU IDENTIFY WHAT THOSE ARE?
- 2 A THOSE ARE WARRANTS THAT RELATE BACK TO INDICTMENT  
3 NUMBERS 2002.
- 4 Q WHAT DATE WERE THEY ISSUED?
- 5 A 12/9-- I'M SORRY. THAT WHEN THEY WERE SERVED. 8/15/2002.
- 6 Q AUGUST 15, OF 2002?
- 7 A THAT'S CORRECT, ON BOTH OF THEM.
- 8 Q AND THE ASSAULT ON MR. CUBLEY ALLEGEDLY OCCURRED ON  
9 DECEMBER 29, 2002?
- 10 A THAT'S CORRECT.
- 11 Q AFTER THOSE WERE ISSUED?
- 12 A THAT'S CORRECT.
- 13 Q SO, AT THE TIME THOSE WERE ISSUED THAT PUT MR. GUTIERREZ  
14 IN THE STATUS OF BEING SUBJECT TO ARREST ON THOSE TWO  
15 DOCUMENTS?
- 16 A THAT'S CORRECT.
- 17 Q AND ONE OF THOSE WAS-- WHAT WERE THOSE COMMITMENTS  
18 FOR?
- 19 A ONE WAS FOR DRIVING UNDER THE INFLUENCE, SECOND  
20 OFFENSE. AND THE OTHER ONE IS DRIVING WITHOUT A LICENSE.
- 21 Q TO YOUR KNOWLEDGE, WOULD HE BE SUBJECT TO ACTUAL JAIL  
22 TIME ON ONE OR BOTH OF THOSE WARRANTS?
- 23 A YES. ONE SAYS ONE YEAR AND THE OTHER ONE IS SIX MONTHS.
- 24 Q SO, HE COULD DO A TOTAL OF A YEAR AND A HALF WHEN  
25 SERVED WITH THOSE?

- 1 A YES, AND THERE'S A FINE ASSOCIATED.
- 2 Q NOW, WHEN YOU INTERVIEWED HIM, HE TOLD YOU HE HAD A  
3 DOMESTIC VIOLENCE CHARGE AND THAT'S WHY HE DIDN'T COME  
4 BACK. IT WASN'T-- IT WAS BECAUSE HE HAD AN OPEN DOMESTIC  
5 VIOLENCE CHARGE?
- 6 A THAT'S CORRECT.
- 7 Q BUT IT WAS ALSO YOUR PRIOR TESTIMONY THAT AT SOME  
8 POINT DURING THE INTERVIEW THERE WAS AT LEAST A LITTLE BIT OF  
9 CONFUSION BASED ON THE LANGUAGE SITUATION.
- 10 A SOME WORDS AND PHRASES, YES.
- 11 Q I BELIEVE IT WAS ALSO YOUR TESTIMONY THAT WHEN YOU GOT  
12 TO THE SCENE OF MR. CUBLEY'S HOUSE, YOU DIDN'T NOTE ANY  
13 EVIDENCE OF A FORCED ENTRY. CORRECT?
- 14 A I DIDN'T GO INTO THE CRIME SCENE, BUT I DON'T BELIEVE THERE  
15 WAS ANY NOTED BY ANYONE.
- 16 Q OKAY. AND, IN FACT, ONE OF THE CHARGES THAT WE HAVEN'T  
17 DISCUSSED UP TO THIS POINT, BECAUSE YOU DIDN'T CHARGE HIM  
18 WITH IT, IS BURGLARY IN THE FIRST DEGREE?
- 19 A THAT'S CORRECT.
- 20 Q BUT HE IS ON TRIAL FOR THAT AS WELL, FROM THE SAME  
21 INCIDENT. RIGHT?
- 22 A RIGHT.
- 23 Q AND BURGLARY IN THE FIRST DEGREE, AS IT'S BEEN ALLEGED IN  
24 THIS CASE, REQUIRES SOME SORT OF UNLAWFUL ENTRY INTO THE  
25 HOME AND SOME OTHER MATTERS BEYOND THAT?

1 A THAT'S CORRECT.

2 Q BUT WHEN Y'ALL MADE THE CASE HERE, YOU HAD THE  
3 OPPORTUNITY TO CHARGE HIM WITH THAT, BUT YOU DIDN'T BECAUSE  
4 THERE WAS NO SIGN OF A FORCED ENTRY?

5 A NO, THAT'S NOT MY REASON FOR CHARGING BURGLARIES. WE  
6 NORMALLY WORK HOMICIDES, AGGRAVATED ASSAULTS, ARMED  
7 ROBBERIES, AND THAT'S JUST SOMETHING THAT DOESN'T USUALLY  
8 COME TO MIND FOR US, IS BURGLARY. WE HAVE A DIFFERENT  
9 DIVISION THAT ACTUALLY WORKS THE PROPERTY CRIMES.

10 Q WELL, YOU CHARGED HIM WITH THREE COUNTS OF FORGERY,  
11 THOUGH?

12 A WE WORK FORGERIES ALSO.

13 Q AND IN FACT, LAW ENFORCEMENT NEVER ACTUALLY CHARGED  
14 HIM WITH BURGLARY AT ALL, DID THEY?

15 A NOT THAT I KNOW OF.

16 Q THAT'S A CHARGE THAT COMES DIRECTLY FROM THE  
17 PROSECUTION?

18 A I BELIEVE SO.

19 Q RIGHT IN THE EARLY STAGES OF YOU BEGINNING TO DEVELOP  
20 SUSPECTS IN THIS MATTER, DANA BLACKMON'S NAME CAME UP.  
21 CORRECT?

22 A SHE CAME UP ASSOCIATED WITH MR. GUTIERREZ.

23 Q WITH MR. GUTIERREZ, AND THEN YOU GO WITH THE  
24 CONNECTION BETWEEN HIM AND HER. RIGHT?

25 A RIGHT.

- 1 Q AND SO, WHEN YOU WENT TO FIND HER, THE ONLY ADDRESSES  
2 YOU GOT FOR HER IN YOUR RECORDS WERE THE HIGHWAY 21 TRAILER  
3 PARK. CORRECT?
- 4 A RIGHT. BOTH OF THEM TOGETHER THERE.
- 5 Q SO, YOU FOUND DOCUMENTATION OF DANA BLACKMON LIVING  
6 AT THE HIGHWAY 21 TRAILER PARK?
- 7 A ON THE POLICE REPORTS WITH MR. GUTIERREZ.
- 8 Q AND THAT'S THE SAME PLACE WHERE MR. CUBLEY LIVED AS  
9 WELL?
- 10 A THAT'S CORRECT.
- 11 Q NOW, WHEN SHE FIRST CAME AND SPOKE TO YOU, IN ADDITION  
12 TO TELLING YOU THE OTHER THINGS THAT TURNED OUT TO BE FALSE,  
13 SHE NEVER MADE ANY MENTION OF THE DISCOVER CARD. I'M  
14 TALKING ABOUT DANA BLACKMON.
- 15 A NO.
- 16 Q NEVER MENTIONED THE DISCOVER CARD.
- 17 A NO.
- 18 Q TOLD YOU ABOUT THE SOCCER GAME AND THE ONE-EYED MAN,  
19 OR SOME BROWN-EYED MAN, SOMETHING-EYED MAN, AND THEN  
20 ANOTHER INDIVIDUAL BEING WITH MR. GUTIERREZ. TOLD YOU A  
21 WHOLE BUNCH OF THINGS LIKE THAT, HIM CHANGING HIS CLOTHES,  
22 BUT DIDN'T SAY ANYTHING ABOUT ANY SORT OF DISCOVER CARD?
- 23 A THAT'S RIGHT.

1 Q THEN WHEN YOU RE-INTERVIEWED HER AND CONFRONTED HER  
2 WITH THE DISCOVER CARD, THEN SHE ADMITTED SOME INVOLVEMENT  
3 WITH THE DISCOVER CARD?

4 A THAT'S CORRECT.

5 Q BUT SHE DIDN'T GO AS FAR AS ANY INVOLVEMENT WITH GOING  
6 TO MR. CUBLEY'S?

7 A NO. SHE STARTED WITH HE CAME HOME AND TELLING HER  
8 WHAT HE'D DONE.

9 Q SHE PRETTY MUCH KEPT WITH, YOU KNOW, ISAIAS WAS  
10 INVOLVED, ISAIAS WAS THIS. HE TOLD HE WENT. THEN I KNEW HE  
11 WAS GOING AND I DIDN'T GO. THEN I KNEW HE WAS GOING AND I DID  
12 GO WITH HIM. AND THEN FINALLY, YOU MADE THE DETERMINATION  
13 THAT SHE WAS TELLING THE TRUTH WHEN SHE FINALLY PUT HERSELF  
14 IN THE MIX?

15 A THAT'S CORRECT.

16 Q DETECTIVE, AS THE CASE AGENT, ALL THIS COMES THROUGH  
17 YOU AND YOU CATALOG AND KEEP IT?

18 A NOT THE PROPERTY, ITSELF. WE GET REPORTS FROM THE  
19 FORENSIC UNIT.

20 Q SO, YOU WOULD HAVE RECEIVED THESE REPORTS FROM THE FBI  
21 ABOUT THE THINGS THEY TESTED?

22 A YES.

23 Q DURING ONE OF THE BREAKS, THE SOLICITOR AND I AGREED  
24 THAT CERTAIN REPORTS WOULD COME INTO EVIDENCE. YOU'RE  
25 AWARE OF THAT?

1 A YES.

2 Q SO, THE JURY'S GOING TO HAVE THE OPPORTUNITY TO LOOK AT  
3 THESE REPORTS. AND JUST SO THEY'RE NOT WONDERING WHERE  
4 THESE CAME FROM, I JUST WANT TO QUESTION YOU ABOUT THESE. IS  
5 THAT ALL RIGHT?

6 A YES.

7 Q I'LL HAND YOU STATE'S EXHIBIT 103 AND ASK YOU IF YOU CAN  
8 TELL ME WHAT THAT IS.

9 A IT'S A SLED REPORT WHERE THEY COMPARED THE CUT PHONE  
10 CORD TO THE FOLDING POCKET KNIFE.

11 Q CAN YOU READ THE CONCLUSIONS OF THAT REPORT?

12 A "THE TOOL MARKS IN THE CUT AREAS OF THE CORD ATTACHED  
13 TO THE ITEM, ONE BASE AND HANDSET, WERE CONSISTENTLY WITH  
14 THE TYPE OF MARKS PRODUCED BY A KNIFE AND WERE  
15 MICROSCOPICALLY COMPARED TO THE TESTING PRESENCE FROM THE  
16 ITEM TWO KNIFE. THE CORDS COULD HAVE BEEN CUT BY ITEM TWO  
17 KNIFE. HOWEVER, THE COMPARISON WAS INCONCLUSIVE DUE TO THE  
18 LACK OF SUFFICIENT CORRESPONDING MARKS OF VALUE."

19 Q SO, THAT REPORT SAYS, IT LOOKS LIKE THIS THING WAS CUT BY  
20 A KNIFE, COULD HAVE BEEN THIS KNIFE?

21 A THAT'S CORRECT.

22 Q BUT IT DOESN'T SAY WITH ANY CERTAINTY THAT THERE'S  
23 ANYTHING TO SAY THAT ANY MARKS ON THE CORD ACTUALLY  
24 CORRESPOND TO A UNIQUE MARK THAT THAT KNIFE WOULD HAVE  
25 LEFT. CORRECT?

## EDDIE STRAIT - CROSS EXAMINATION BY MR. CHIARENZA

- 1 A CORRECT.
- 2 Q AND AS A LAW ENFORCEMENT OFFICER, DETECTIVE, WOULD  
3 YOU CHARACTERIZE THAT REPORT AS BEING CONCLUSIVE IN ANY  
4 WAY THAT THE KNIFE HERE IN EVIDENCE CUT THE PHONE CORD?
- 5 A I WOULD GO WITH THE COULD BE PART OF IT.
- 6 Q COULD BE?
- 7 A RIGHT.
- 8 Q ONLY BECAUSE IT WAS CUT BY A KNIFE?
- 9 A RIGHT.
- 10 Q AND THAT THING IS A KNIFE. RIGHT?
- 11 A RIGHT.
- 12 Q BUT IT DOESN'T INDICATE THAT THIS PARTICULAR KNIFE IS ANY  
13 MORE OR LESS LIKELY DOING THE CUTTING THAN ANY OTHER KNIFE?
- 14 A RIGHT.
- 15 Q LET ME ASK YOU, DETECTIVE, TO LOOK AT STATE'S NUMBER 105,  
16 AND IDENTIFY THAT IF YOU COULD.
- 17 A THIS IS THE FBI REPORT ON THE TOOL MARKS.
- 18 Q COULD YOU SPEAK UP JUST A BIT?
- 19 A IT'S FROM THE TOOL MARK SECTION OF THE FBI LABORATORY.
- 20 Q AND, NUMBER ONE, WHAT DOES IT APPEAR THAT Y'ALL ARE  
21 ASKING THE FBI TO TEST? WHAT'S THE SUBJECT OF THAT REPORT?
- 22 A CHECK THE SCREWDRIVER, THE HAMMER AND THE TIRE IRON  
23 AGAINST THE DAMAGE TO THE SAFE.
- 24 Q WHAT IS THE CONCLUSION GIVEN BY THE FBI ANALYST ON  
25 THOSE MATTERS?

1 A "THE BOTTOM PORTION OF THE SAFE EXHIBITS TOOL MARKS  
2 WHICH ARE MOST CONSISTENT WITH HAVING BEEN PRODUCED BY A  
3 SHEARING/NIBBLING TYPE ACTION SUCH AS A POWER OPERATED  
4 METAL, SHEARING/NIBBLING TOOL WHICH REMOVES APPROXIMATELY  
5 1/8 INCH OF METAL AS IT CUTS. DUE TO CORROSION, THESE TOOL  
6 MARKS BEAR EXTREMELY LIMITED MICROSCOPIC MARKS OF VALUE  
7 FOR COMPARISON PURPOSES TO KNOW WHERE SUSPECT TOOL OR  
8 TOOLS WOULD BE LOCATED. FURTHER, SPECIMEN EXHIBITS  
9 NUMEROUS DAMAGE ON ITS FRONT AND BOTTOM PORTIONS. THEY  
10 ARE TOO MUTILATED OR CORRODED TO DETERMINE IF THEY WERE  
11 PRODUCED BY A PARTICULAR TYPE OF TOOL OR TOOLS. THEREFORE,  
12 NO ASSOCIATIONS WERE MADE AMONG THE DAMAGE NOTED ON THE  
13 SAFE WITH CLASS CHARACTERISTICS OF SUCH TOOLS, WE SUBMIT."

14 Q WOULD IT BE A MISSTATEMENT IF I SUMMARIZE THAT REPORT  
15 AS SAYING IT DOESN'T APPEAR THAT THESE TOOLS DID THE DAMAGE  
16 TO THE SAFE, OR AT LEAST WE CANNOT CONCLUDE THAT?

17 A RIGHT.

18 Q THAT'S CORRECT, RIGHT?

19 A CORRECT.

20 Q NOW, IT DID SEEM TO INDICATE THAT ACCORDING TO THE FBI  
21 EXPERT, THE SAFE WAS CUT WITH SOME SORT OF POWER TOOL, A  
22 PNEUMATIC SCISSORS. RIGHT?

23 A IT SAID THE DAMAGE WOULD BE CONSISTENT WITH THAT, YES.

24 Q AND THROUGH THE COURSE OF THIS INVESTIGATION, ARE YOU  
25 AWARE OF ANY SUCH TOOL BEING RECOVERED?

## EDDIE STRAIT - RE-DIRECT EXAMINATION BY MR. THOMPSON

1 A NO.

2 MR. CHIARENZA: I HAVE NOTHING FURTHER, YOUR HONOR.

3 MR. THOMPSON: JUST BRIEFLY, YOUR HONOR.

4 **RE-DIRECT EXAMINATION BY MR. THOMPSON:**

5 Q DETECTIVE, WHEN MR. CHIARENZA ASKED YOU ABOUT THE  
6 CHARGES MADE AGAINST THE DEFENDANT, DO YOU ALWAYS CHARGE  
7 EVERY CHARGE YOU CAN POSSIBLY MAKE?

8 A NO.

9 Q IN FACT, IN THIS CASE, AREN'T THERE OTHER CHARGES YOU  
10 COULD HAVE MADE IN ADDITION TO THE ONES YOU MADE?

11 A YES.

12 Q CAN YOU TELL ME, WOULD THE CHARGE OF SAFECRACKING  
13 APPLY IN THIS CASE?

14 A SAFECRACKING, KIDNAPPING.

15 Q WOULD CONSPIRACY BE A CHARGE THAT YOU COULD HAVE  
16 CHARGED?

17 A YES, THE TWO OF THEM TOGETHER.

18 Q AND LARCENY?

19 A YES.

20 Q BUT YOU DON'T NECESSARILY CHARGE EVERYTHING; YOU  
21 CHARGE TO COVER THE CRIME?

22 A YES.

23 Q NOW, IF YOU WOULD LOOK BACK AT THE FBI REPORT YOU WERE  
24 READING. MR. CHIARENZA, I THINK, WAS MENTIONING THAT SOME  
25 HOW OR OTHER THESE TOOLS DID NOT DO THE DAMAGE. IF YOU

- 1           COULD LOOK BACK AT THAT. I BELIEVE THE SPECIFIC WORD IS, "AS TO  
2           THE DAMAGE", WHEN HE TALKED ABOUT THE CUTTING TOOL, WOULD  
3           BE ON THE BOTTOM OF THE SAFE, HERE. IS THAT CORRECT, ON THIS  
4           PART OF THE SAFE RIGHT HERE?
- 5    A           (NO RESPONSE)
- 6    Q           THIS IS INVOLVING THE SAFE. CORRECT?
- 7    A           RIGHT.
- 8    Q           AND THAT'S WHERE IT SAID THERE WAS POSSIBLY A CUTTING  
9           TOOL?
- 10   A           YES.
- 11   Q           NOW, IF YOU LOOK, THEN, TO WHERE IT TALKS ABOUT THE  
12           ACTUAL TOOL MARKS AND THE DAMAGE IN THE FRONT OF THE SAFE,  
13           THAT'S WHERE IT STARTS TALKING ABOUT THAT. IS THAT NOT  
14           CORRECT?
- 15   A           CORRECT.
- 16   Q           AND THEY SAID THEY COULD NOT COMPARE THAT BECAUSE OF  
17           THE DAMAGE AND/OR CORROSION?
- 18   A           YES. TOO MUTILATED OR CORRODED TO DETERMINE IF THEY  
19           PRODUCED BY ANY PARTICULAR TYPE OF TOOL OR TOOLS.
- 20   Q           SO, WHEN MR. CHIARENZA STATED THAT THESE TOOLS DID NOT  
21           DO THE DAMAGE, THAT WOULD NOT BE CORRECT?
- 22   A           THAT'S ACCURATE.
- 23   Q           THEY JUST CAN'T TELL FROM THE MUTILATION AND THE  
24           CORROSION?
- 25   A           RIGHT, ON THE FRONT PORTION.

1 Q NOW, THERE WERE STIPULATED ITEMS THAT WE HAVE  
2 STIPULATED, THE ONES THAT ARE PROVIDED FOR THE JURY. AND  
3 THERE'S ONE OTHER. I BELIEVE IT'S HERE, STATE'S EXHIBIT NUMBER  
4 104. IF YOU COULD, TELL THE JURY WHAT THAT IS, AS IT IS ALSO IN  
5 EVIDENCE UNDER OUR STIPULATION.

6 A IT'S THE SLED DNA ANALYSIS.

7 Q AND WHAT DID THEY TRY TO ANALYZE IN THE DNA PART OF  
8 THEIR REPORT?

9 A TO SEE IF THERE WAS ANY DNA FOUND UNDER THE FINGERNAIL  
10 CLIPPINGS OF CLARENCE CUBLEY.

11 Q SO, THEY TOOK FINGERNAIL CLIPPINGS OF CLARENCE CUBLEY  
12 TO SEE IF ANY DNA COULD BE RECOVERED FROM THAT?

13 A YES.

14 Q WERE THEY ABLE TO RECOVER ANY DNA AT ALL?

15 A IT SAYS PERSONAL DNA PROFILE DEVELOPED FROM ITEM ONE IS  
16 INSUFFICIENT FOR RELIABLE INTERPRETATION.

17 Q SO, IT'S INSUFFICIENT FOR THEM TO BE ABLE TO DETERMINE IF  
18 THERE'S DNA THERE?

19 A RIGHT.

20 Q AND ONE OTHER THING. WE TALKED ABOUT THE  
21 COMMITMENTS AND YOU SAID SOMETHING ABOUT A FINE. ON THE  
22 SIX-MONTH COMMITMENT, WHAT IS THE FINE THAT WOULD BE PAID  
23 THAT WOULD PREVENT HIM FROM HAVING TO SERVE THOSE SIX  
24 MONTHS?

25 A \$103.

- 1 Q SO, IF HE PAID THAT, ACCORDING TO THAT COMMITMENT HE  
2 WOULD NOT HAVE TO SERVE THAT TIME?
- 3 A THAT'S CORRECT. IT'S EITHER/OR.
- 4 Q AND FOR THE DUI SECOND, WHERE HE COULD SERVE UP TO A  
5 YEAR, WHAT IS THE FINE THAT HE WOULD HAVE TO PAY ON THAT?
- 6 A \$2,173.61.
- 7 Q SO, IF HE PAID THAT FINE HE WOULD NOT HAVE TO SERVE THAT  
8 TIME ON THAT COMMITMENT?
- 9 A THAT'S CORRECT.
- 10 Q AGAIN, THESE WERE SIGNED OUT ON AUGUST 15, OF 2002?
- 11 A THAT'S CORRECT.
- 12 Q WHAT MONTH WERE YOU LOOKING FOR THE DEFENDANT?
- 13 A DECEMBER.
- 14 Q LATE DECEMBER,---
- 15 A 2002.
- 16 Q ---EARLY JANUARY OF 2003?
- 17 A THAT'S RIGHT.
- 18 Q ON OTHER THING. ON THE TWO EXHIBITS, WHERE IS THE  
19 DEFENDANT'S ADDRESS LISTED?
- 20 A THIS ONE IS LISTED AS 1601 TWIN LAKES ROAD AND THE OTHER  
21 ONE IS 1601 TWIN LAKES ROAD.
- 22 Q IS THAT WHERE YOU WERE LOOKING FOR THE DEFENDANT AT  
23 THE TIME THIS OCCURRED?
- 24 A YES.
- 25 Q IS THAT WHERE DANA CUBLEY LIVED?

1 A YES.

2 Q I'M SORRY. DANA BLACKMON?

3 A DANA BLACKMON, YES.

4 Q SO, THAT'S WHERE HE LIVED AS WELL. CORRECT?

5 A YES.

6 Q THANK YOU.

7 MR. THOMPSON: NO FURTHER QUESTIONS.

8 **RE-CROSS EXAMINATION BY MR. CHIARENZA:**

9 Q DETECTIVE, THE OFFICERS COULD HAVE LOOKED TO THIS  
10 ADDRESS FOR THE DEFENDANT IF THEY WANTED TO SERVE THESE  
11 COMMITMENTS. CORRECT?

12 A YES.

13 Q ONE OF THE THINGS HE TOLD YOU WAS THAT OFFICERS HAD  
14 BEEN BY HIS HOUSE A COUPLE OF TIMES. CORRECT?

15 A CORRECT.

16 Q YOU DON'T HAVE ANY INFORMATION AS TO WHETHER OR NOT  
17 HE WOULD HAVE KNOWN ABOUT THE FINES ON THESE MATTERS AT  
18 ANY TIME, WHAT THE AMOUNTS WOULD BE?

19 A NORMALLY A COMMITMENT IS BECAUSE YOU DIDN'T GO TO  
20 COURT; SO HE WOULD NOT KNOW THE FINE AMOUNT.

21 Q THANK YOU, SIR.

22 MR. CHIARENZA: NOTHING FURTHER.

23 THE COURT: YOU MAY STEP DOWN.

24 MS. COLLINS: YOUR HONOR, THE STATE'S NEXT WITNESS AND  
25 OUR LAST WITNESS FOR THIS AFTERNOON IS DOCTOR EARL JENKINS.



## EARL JENKINS - DIRECT EXAMINATION BY MS. COLLINS

1 INJURY, GUNSHOT WOUNDS, SUDDEN UNEXPECTED DEATHS WITH  
2 CAUSES NOT APPARENT.

3 AUTOPSIES ARE PERFORMED TO COLLECT INFORMATION THAT  
4 HELPS DETERMINE THE CAUSE OF DEATH AND CONTRIBUTES TO  
5 DETERMINING THE MANNER OF DEATH.

6 Q HOW MANY AUTOPSIES HAVE YOU PERFORMED IN THE COURSE  
7 OF YOUR OCCUPATIONAL SPECIALTY?

8 A PROBABLY AROUND 2000.

9 Q AND I REALIZE THAT THE DEFENSE HAS STIPULATED, BUT FOR  
10 THE JURY'S INFORMATION, HAVE YOU TESTIFIED PREVIOUSLY IN A  
11 COURT OF LAW AS AN EXPERT WITNESS IN THIS FIELD?

12 A YES.

13 Q APPROXIMATELY HOW MANY TIMES?

14 A A NUMBER OF TIMES A YEAR FOR THE PAST THIRTY YEARS.

15 Q DO YOU WORK ACTUALLY IN ROCK HILL?

16 A I DO.

17 Q OUT OF THE PIEDMONT MEDICAL CENTER?

18 A I DO.

19 Q DOCTOR JENKINS, IN REGARD TO THIS CASE CURRENTLY  
20 BEFORE THE COURT, DID YOU HAVE AN OCCASION TO PERFORM AN  
21 AUTOPSY ON THE REMAINS OF THE BODY OF CLARENCE CUBLEY?

22 A YES, I DID.

23 Q IF YOU NEED TO REFER TO YOUR REPORT TO REFRESH YOUR  
24 MEMORY, WHAT DATE WAS THAT AUTOPSY PERFORMED?

1 A THE AUTOPSY WAS PERFORMED ON JANUARY 6, OF 2003, IN THE  
2 AFTERNOON AT PIEDMONT MEDICAL CENTER IN THE MORGUE.

3 Q DO YOU KNOW WHAT TIME IT BEGAN?

4 A AROUND TWO O'CLOCK.

5 Q DO YOU HAVE THE DATE AND TIME OF DEATH OF MR. CUBLEY?

6 A YES. THE DATE AND TIME OF DEATH WERE PROVIDED TO ME AS  
7 JANUARY 5, 2003, AT 18:18, 6:18 IN THE AFTERNOON, OR EARLY IN THE  
8 EVENING.

9 Q AND AS A PART OF YOUR PERFORMANCE OF YOUR DUTIES, AND  
10 ALSO IN FORMULATING YOUR FINAL CONCLUSION, WHICH WE'LL GET  
11 TO IN A MOMENT, DO YOU REVIEW THE PRIOR MEDICAL RECORDS  
12 THAT MIGHT ACCOMPANY THE BODY OF A DECEASED, AND AS IN THIS  
13 CASE, WHETHER IT WAS PREVIOUS TO AN INCIDENT, BUT PRIOR TO  
14 DEATH?

15 A YES. I HAD ACCESS TO MEDICAL RECORDS FROM CAROLINAS  
16 MEDICAL CENTER.

17 Q DID YOU IN FACT REVIEW THOSE?

18 A YES, I DID.

19 Q DID YOU RELY UPON THOSE IN PART IN COMING TO YOUR  
20 CONCLUSIONS ULTIMATELY?

21 A YES, I DID.

22 Q WHAT IS THE HEIGHT AND WEIGHT OF THE VICTIM?

23 A HEIGHT IS 66 INCHES, 5 FEET, 6 INCHES; WEIGHT, 149 POUNDS.

24 Q DID YOU DETERMINE HIS AGE AT THE TIME OF DEATH?

25 A HIS AGE WAS PROVIDED AT 81.

1 Q CAN YOU DESCRIBE FOR THE JURY THE APPEARANCE OF THE  
2 VICTIM AS YOU OBSERVED IT THAT WAS IMPORTANT FOR YOU IN  
3 ULTIMATELY MAKING YOUR CONCLUSIONS?

4 A YES. AS HE WAS PRESENTED TO ME, HE WAS IDENTIFIED BY AN  
5 IDENTIFICATION BRACELET. HE WAS UNCLOTHED, AN ELDERLY  
6 WHITE MALE. HE HAD A BREATHING TUBE IN PLACE AND A FOLEY  
7 CATHETER IN PLACE. THERE WAS NOTABLE SWELLING AND  
8 DISTORTION ABOUT THE FACE, THE EYES, PARTICULARLY AROUND  
9 THE HEAD, CENTERED AROUND THE HEAD.

10 THERE WERE NO UNUSUAL MARKS OR IDENTIFYING FEATURES  
11 ON THE CHEST OR BACK. I FOUND NO INJURIES TO THE CHEST, BACK  
12 OR TORSO.

13 Q YOU'VE INDICATED THE HEAD AREA. WAS THERE A CAUSE TO  
14 THE HEAD?

15 A YES, THERE WAS.

16 Q YOU CHARACTERIZED THAT AS BLUNT TRAUMA?

17 A YES.

18 Q WOULD YOU EXPLAIN WHAT THAT IS TO THE JURY?

19 A BLUNT TRAUMA IS CONTRACTED TRAUMA ASSOCIATED WITH  
20 STAB WOUNDS, INSIDE WOUNDS, GUNSHOT WOUNDS. BLUNT TRAUMA  
21 CAN BE ASSOCIATED WITH IMPACT WITH SUCH THINGS AS A BOTTLE,  
22 BEING STRUCK WITH A PIPE, A BOARD, A FIGHT. IT CAN BE THOSE  
23 THINGS SUCH AS AUTOMOBILE INJURIES, AUTOMOBILE CRASHES,  
24 FALLS OF VARIOUS TYPES, SUCH AS WHEN A PARACHUTE DOESN'T  
25 OPEN. THOSE INJURIES THAT OCCUR WHEN HITTING THE GROUND ARE

1 BLUNT TRAUMA. SO, THEY WOULD BE CONTRACTED WITH WOUNDS  
2 ASSOCIATED WITH KNIVES, GUNS, THAT TYPE OF THING.

3 Q DID YOU OBSERVE BLUNT TRAUMA ON THE LEFT SIDE OF THE  
4 DECEASED'S HEAD?

5 A YES.

6 MS. COLLINS: I WOULD ASK THAT THIS BE MARKED FOR  
7 IDENTIFICATION PURPOSES AT THIS TIME AS STATE'S EXHIBIT 107.

8 (WHEREUPON STATE'S EXHIBIT 107 WAS MARKED FOR  
9 IDENTIFICATION)

10 Q DOCTOR JENKINS, IF YOU WOULD, I WOULD LIKE TO LOOK AT  
11 STATE'S EXHIBIT 107, AND WITHOUT PUBLISHING THAT AT THIS TIME,  
12 AS IT IS NOT YET IN EVIDENCE, LET ME ASK YOU, DO YOU RECOGNIZE  
13 THAT PICTURE?

14 A YES. THIS IS THE PHOTOGRAPH TAKEN AT THE TIME OF THE  
15 AUTOPSY WHICH ILLUSTRATES THE LEFT SIDE OF MR. CUBLEY'S FACE.

16 Q DOES THAT PICTURE FAIRLY AND ACCURATELY DEPICT THE  
17 LEFT SIDE OF MR. CUBLEY AT THE TIME YOU BEGAN YOUR AUTOPSY?

18 A YES, IT DOES.

19 Q WOULD THAT PHOTOGRAPH BE OF ASSISTANCE TO THE JURY IN  
20 SHOWING THEM WHAT YOU JUST DESCRIBED IN TERMS OF BLUNT  
21 TRAUMA?

22 A IT WOULD ASSIST.

23 MS. COLLINS: MAY WE APPROACH, YOUR HONOR?

24 THE COURT: YES MA'AM.

25 (WHEREUPON A BENCH CONFERENCE TOOK PLACE)

1 Q DOCTOR JENKINS, DID YOU ALSO REVIEW-- DID YOU MAKE  
2 NOTATIONS YOURSELF ON A BODY DIAGRAM?

3 A YES, I DID.

4 Q AND IS THAT A DIAGRAM COMMONLY USED IN THE  
5 PERFORMANCE OF AUTOPSIES?

6 A YES, IT IS. IT'S SOMETHING I USE IN MOST EVERY AUTOPSY.

7 Q DID YOU PROVIDE THAT TO THE SOLICITOR'S OFFICE?

8 A YES, I DID.

9 MS. COLLINS: YOUR HONOR, AT THIS TIME I WOULD MOVE TO  
10 ENTER STATE'S EXHIBIT 102.

11 (WHEREUPON STATE'S EXHIBIT 102 WAS MARKED FOR  
12 IDENTIFICATION)

13 Q I'LL ASK YOU, DO YOU RECOGNIZE THAT?

14 A YES, THAT'S IDENTICAL TO WHAT I HAVE IN MY HAND, EXACTLY  
15 WHAT I PREPARED AT THE TIME. THAT IS THE DRAWING I PREPARED  
16 AT THE TIME OF THE AUTOPSY.

17 Q WOULD THAT BE OF ASSISTANCE TO YOU IN SHOWING THE JURY  
18 WHAT YOU DESCRIBED AS THE TRAUMA TO THE HEAD AS WELL AS  
19 OTHER MARKS ON THE BODY, IF ANY?

20 A YES, IT WOULD.

21 MS. COLLINS: AT THIS TIME, I WOULD MOVE STATE'S EXHIBIT  
22 102 INTO EVIDENCE.

23 MR. CHIARENZA: NO OBJECTION.

24 THE COURT: IT'S ADMITTED.

1 (WHEREUPON STATE'S EXHIBIT 102 WAS ADMITTED INTO EVIDENCE  
2 WITHOUT OBJECTION)

3 Q DOCTOR JENKINS, IF YOU WOULD, YOU MIGHT NEED TO STEP  
4 DOWN HERE.

5 (WHEREUPON WITNESS EXITED WITNESS STAND FOR DEMONSTRATION  
6 WITH OVERHEAD PROJECTOR)

7 USING THE DIAGRAM, PLEASE SHOW US AND THE JURY WHERE  
8 THE BLUNT FORCE TRAUMA YOU DESCRIBED ON MR. CUBLEY'S BODY.

9 A THE LEFT SIDE OF THE HEAD SHOWED AN AREA OF BRUISING  
10 ACROSS THE CHEEK AND PART OF THE JAW WHERE IT COMES DOWN  
11 BEFORE IT BECOMES PART OF THE CHIN.

12 THIS AREA WAS DISCOLORED, BRUISED, SWOLLEN. THERE WAS  
13 A LACERATION ON HIS UPPER LIP ON THE LEFT SIDE. IT SHOWED SOME  
14 TEARING. ON THE OPPOSITE, THE RIGHT SIDE, THERE WAS A SECOND  
15 LACERATION IN THE CORNER OF THE MOUTH. THERE WAS A STAR-  
16 SHAPED LACERATION, TEAR ON THE EYEBROW.

17 ON BOTH SIDES OF THE SCALP, WHEN I DEFLECTED THE SCALP  
18 AND WAS ABLE TO LOOK INSIDE THERE WAS A LITTLE BRUISE IN BOTH  
19 THE TEMPORAL LOBES. THERE WAS A SUTURE INCISION HERE WHICH  
20 CORRESPONDS TO MEDICAL TREATMENT WHICH WAS GIVEN TO MR.  
21 CUBLEY AT THE TIME HE WAS SEEN AT CAROLINAS MEDICAL CENTER  
22 TO RELIEVE THE PRESSURE ON HIS BRAIN.

23 Q WOULD THAT BE DESCRIBED AS A SHUNT?

24 A A SHUNT, YES, TO RELIEVE THE PRESSURE THAT WAS CREATED  
25 FROM HIS INJURY. THERE WERE INJURIES ON THE LEFT AND RIGHT

1           SIDE OF HIS HEAD AND FACE, AND ON THE UPPER AND LOWER PARTS  
2           OF EACH SIDE OF HIS HEAD AND FACE.

3                   AND THERE WAS ACTUALLY SOME BRUISING, WHICH I THINK  
4           HAD SEEPED DOWN FROM BEHIND HIS EAR AND DOWN INTO HIS NECK  
5           FROM THE IMPACT TO THE LEFT SIDE OF THE FACE. IT'S A PRETTY  
6           BROAD AREA.

7    Q            WAS THE IMPACT TO THE LEFT SIDE GREATER THAN THE IMPACT  
8           TO THE RIGHT SIDE?

9    A            YES, IT WAS. AND THAT EXPLAINS THE FRACTURES TO THE  
10           MANDIBLE, THE JAW BONE, HERE, HERE AND HERE. AND HERE, JUST  
11           BELOW THE LEVEL OF THE EAR, RIGHT THERE.

12                   SO, THIS IS A BONE BREAKING BELOW ON THIS SIDE, THE LEFT  
13           SIDE, WHICH PROVES A BROKEN BONE AS WELL AS A SPLAY IN HERE  
14           AND BRAIN TRAUMA. THERE WAS ALSO HEMORRHAGING AROUND  
15           THE BRAIN AND THE SURFACE OF THE BRIAN.

16   Q            AND YOU OBSERVED THAT IN THE BRAIN AS YOU WERE  
17           PERFORMING THE AUTOPSY?

18   A            YES. IN THE AUTOPSY, IN THE CLOSE EXAMINATION OF THE  
19           BRAIN, THE REMOVAL OF THE BRAIN AND THE CLOSE EXAMINATION  
20           OF THE BRAIN NOTED THE BLOOD WHICH HAD CLOTTED IN THE BRAIN.

21   Q            DOCTOR JENKINS, YOU NOTED ON YOUR DIAGRAM THAT THERE  
22           WAS A CONTUSION TO THE LEFT SIDE OF THE FACE WHICH WAS  
23           PURPLE, YELLOW AND BROWN.

24   A            YES.

25   Q            WHAT IS THE SIGNIFICANCE OF THAT?

1 A THOSE BRUISES WERE DAYS OLD. SO, THIS IS THE EVOLUTION  
2 AND RESOLUTION OF A BRUISE, DARK PURPLE, RED, YELLOW, AND  
3 GREEN, WHICH IS WHEN IT BEGINS TO GO AWAY.

4 Q IN TERMS OF THE LAST ABRASION, WAS THAT ON THE INSIDE OF  
5 THE CHEEK AREA?

6 A IT WAS ON THE INSIDE. YOU COULDN'T SEE IT ON THE INSIDE. IT  
7 WAS MORE ON THE INSIDE OF THE MOUTH.

8 Q NOW, THERE IS SOME WRITING ON THE ARM. I'D LIKE TO ASK  
9 YOU IS THAT REFERRING TO SWELLING?

10 A SWELLING AND SOME BRUISES, PROBABLY ASSOCIATED WITH  
11 HIS HOSPITALIZATION, DRAWING OF BLOOD. ELDERLY PEOPLE ARE  
12 VERY FRAGILE AND AT THE TIME HE WAS HOSPITALIZED THERE WAS  
13 SOME SWELLING. THESE ARE WHAT ARE CALLED OLD AGE SPOTS  
14 THAT YOU SEE SOMETIMES ON ELDERLY PEOPLE WITH FRAGILE SKIN.  
15 I DIDN'T REALLY ATTACH ANY SIGNIFICANCE TO THOSE, AS THEY ARE  
16 MORE ACADEMICALLY ASSOCIATED WITH A HOSPITAL STAY.

17 Q THANK YOU. YOU CAN TAKE YOUR SEAT.

18 (WHEREUPON WITNESS RETURNED TO WITNESS STAND)

19 MS. COLLINS: I ASK THE COURT'S INDULGENCE WHILE I LOCATE  
20 ONE EXHIBIT.

21 (PAUSE TO LOCATE EXHIBIT)

22 Q DOCTOR JENKINS, I'M GOING TO SHOW YOU WHAT'S BEEN  
23 PREVIOUSLY ADMITTED INTO EVIDENCE AS STATE'S EXHIBIT 90 AND  
24 ASK YOU IF YOU WOULD REMOVE THAT ITEM. AND I WILL NOTE FOR  
25 THE RECORD THAT HAS BEEN PREVIOUSLY IDENTIFIED AS PART OF A

1           CONCRETE BLOCK. IS THAT ITEM CONSISTENT WITH WHAT COULD  
2           HAVE CAUSED THE TRAUMA TO THE LEFT SIDE OF MR. CUBLEY'S FACE,  
3           AS YOU DESCRIBED IT?

4    A           YES. I THINK THE LEFT SIDE, THE SURFACE AREA WAS COVERED  
5           BY THE BLOW, THE BONE BREAKING CONNECTED WITH THE BLOW,  
6           WOULD BE CONSISTENT WITH THE SURFACE OF A BROKEN CEMENT  
7           BLOCK.

8    Q           AND IF SOMEONE WERE HIT ON THE LEFT SIDE OF THE FACE  
9           WOULD THAT WOULD HE NECESSARILY EMIT A BLOOD SPRAY FROM  
10          THAT?

11   A           THERE WAS NO ACCUMULATION OF BLOOD ON HIS FACE OR  
12          EARS. THE LACERATION TO THE MOUTH WAS THE LARGEST  
13          LACERATION THAT I SAW. AND THAT WAS BENEATH THE IMPACT. IT  
14          WAS MORE THE UPPER PART OF HIS JAW AND THE SIDE OF HIS HEAD.

15   Q           NOW, YOU SAID PREVIOUSLY SOME SEEPING. WHAT IS THAT?

16   A           IT'S JUST SETTLING. LIKE, YOU'VE SEEN A BLOW ACROSS THE  
17          BRIDGE OF THE NOSE WILL ACTUALLY CAUSE BRUISING AND IT  
18          SETTLES AROUND YOUR EYES AND GIVES THAT RACCOON LOOK I'VE  
19          SEEN IN KIDS, YOU KNOW, WHEN THEY FALL. IT'S JUST SETTLING,  
20          SOME OF THAT BLOOD ACTUALLY FROM THE BRUISING BENEATH THE  
21          SKIN SEEPS DOWNWARD WITH GRAVITY AND BACKWARDS.

22   Q           SO, THAT WOULD NOT NECESSARILY BE RELATED TO  
23          IMMOBILITY AFTER THE ATTACK. IS THAT CORRECT?

24   A           NO, IT WOULD NOT.

1 Q DO YOU HAVE AN OPINION TO A REASONABLE DEGREE OF  
2 MEDICAL CERTAINTY AS TO THE ABILITY OF SOMEONE WHO HAS  
3 SUSTAINED THE HEAD TRAUMA AS YOU HAVE OBSERVED IT, WHAT  
4 WOULD BE THEIR ABILITY TO BE MOBILE? HOW WOULD THAT HAVE  
5 BEEN IMPACTED BETWEEN THE ASSAULT AND THE ULTIMATE  
6 TREATMENT TWO DAYS LATER, AS EVIDENCED BY THE MEDICAL  
7 RECORDS?

8 A THAT COULD BE VARIABLE, BUT I DIDN'T FIND ANY EVIDENCE  
9 THAT HE HAD WALKED AROUND, CRAWLED AROUND, STRUGGLED TO  
10 ANY GREAT EXTENT. I DIDN'T FIND ANYTHING TO SAY HE  
11 AMBULATED FROM THE TIME OF THOSE INJURIES AND THE TIME HE  
12 WAS STRUCK.

13 Q WERE YOU ABLE TO DETERMINE HOW MANY TIMES HE HAD  
14 BEEN STRUCK?

15 A DUE TO THAT BOTH SIDES OF THE HEAD WERE INVOLVED AND  
16 UPPER AND LOWER PART OF THE FACE WERE INVOLVED, FOUR  
17 SEPARATE AREAS, I FEEL CONFIDENT IN SAYING IT WAS FOUR BLOWS.

18 Q IS IT FAIR TO SAY THAT ONLY THE ONE, THE BLUNT TRAUMA TO  
19 THE LEFT SIDE WHICH YOU EMPHASIZED BROKE THE JAW BONE ON  
20 THE LEFT SIDE WOULD BE CONSISTENT WITH BEING CAUSED BY THE  
21 CEMENT BLOCK?

22 A YES. THAT WAS THE MOST SERIOUS AND THE ONE WHICH  
23 RESULTED IN THE MOST SERIOUS BRAIN INJURY.

24 Q SO, THERE WAS OTHER TRAUMA THAT COULD HAVE BEEN  
25 CAUSED BY EITHER THIS OR OTHER ITEMS HITTING HIM, PERHAPS?

1 A OTHER SOURCES OF BLUNT TRAUMA.

2 Q DOCTOR JENKINS, YOU'VE INDICATED THAT YOU DID NOT  
3 NECESSARILY THINK THE SWELLING WAS CONSISTENT WITH  
4 DEFENSIVE WOUNDS. BY THAT, DO YOU MEAN THE PLACES ON HIS  
5 ARMS, WHERE HE WOULD HAVE PERHAPS PROTECTED HIMSELF FROM  
6 THE ATTACK?

7 A I DIDN'T.

8 Q AND WE'VE NOTICED THAT THERE'S A NOTATION REGARDING  
9 THE NAILS AS PART OF THE AUTOPSY, AND IN CONJUNCTION WITH IT  
10 BEING FORENSIC AND ASSISTING LAW ENFORCEMENT, DO YOU  
11 GATHER, OR ALLOW LAW ENFORCEMENT IN YOUR PRESENCE TO  
12 GATHER CLIPPINGS OF THE VICTIM'S FINGERNAILS AND SCRAPINGS TO  
13 ULTIMATELY SEE IF HE PERHAPS WAS ABLE TO SCRATCH OR DEFEND  
14 HIMSELF IN THAT WAY?

15 A YES. NAIL CLIPPINGS WERE COLLECTED.

16 Q IF A VICTIM WAS HIT IMMEDIATELY ON THE LEFT SIDE OF THE  
17 HEAD, AS YOU'VE INDICATED, IN YOUR OPINION WOULD THAT BE  
18 CONSISTENT WITH A VICTIM, ESPECIALLY ONE OF THIS AGE, AND THIS  
19 HEIGHT AND WEIGHT, BEING UNABLE TO DEFEND HIMSELF?

20 A I THINK THAT WOULD BE A RESULT OF INCAPACITATION, YES.

21 Q WOULD IT BE IMMEDIATE INCAPACITATION?

22 A YES.

23 Q YOU STATED THAT YOU REVIEWED AND IN PART RELIED UPON,  
24 AS IS THE COURSE OF YOUR PROFESSION, THE MEDICAL RECORDS YOU  
25 RECEIVED FROM CAROLINAS MEDICAL CENTER ON THE VICTIM POST-

1           ASSAULT AND PRE-DEMISE. DID YOU-- DID THOSE RECORDS INDICATE  
2           THAT THE VICTIM WAS EVER ABLE TO REGAIN CONSCIOUSNESS?

3    A           NO, HE WAS NEVER LUCID, ABLE TO SPEAK. HE RESPONDED TO  
4           DEEP STIMULI, PAIN STIMULI ON OCCASION.

5    Q           DO YOU HAVE AN OPINION TO A REASONABLE DEGREE OF  
6           MEDICAL AND SCIENTIFIC CERTAINTY BASED UPON YOUR EXPERTISE  
7           IN FORENSIC PATHOLOGY AS TO THE CAUSE OF DEATH OF CLARENCE  
8           CUBLEY?

9    A           YES.

10   Q           WHAT IS THAT OPINION?

11   A           HE DIED OF CRANIO-CEREBRAL BLUNT TRAUMA, WHICH IS  
12           TRAUMA TO THE HEAD AND BRAIN.

13   Q           AND THAT WAS-- THAT HIS DEATH WAS DIRECTLY RESULTED TO  
14           THAT TRAUMA?

15   A           YES.

16   Q           AND THERE WAS NO OTHER INTERVENING CAUSE OF DEATH  
17           THAT YOU WERE ABLE TO IDENTIFY?

18   A           NO, THERE WASN'T.

19   Q           IN FACT, DO YOU HAVE AN OPINION TO A REASONABLE DEGREE  
20           OF MEDICAL CERTAINTY THAT BUT FOR THE TRAUMA SUSTAINED BY  
21           MR. CUBLEY, BASED UPON HIS OTHER CONDITION AND HIS BODY, AS  
22           YOU OBSERVED HIS ORGANS, ET CETERA, AND BARRING ANY OTHER  
23           ACCIDENT OR UNFORESEEN EVENT, WOULD HE HAVE CONTINUED TO  
24           LIVE HIS LIFE FOR A PERIOD OF TIME, SOME YEARS BEYOND THIS?

1 A I FOUND HIS HEART AND LUNGS WERE IN GOOD CONDITION FOR  
2 A MAN OF EIGHTY-ONE, AND THAT THERE WAS NO REASON HE  
3 SHOULDN'T HAVE LIVED A COUPLE OF MORE YEARS. ACTUALLY, OUR  
4 TABLES SAY THAT IF HE MADE IT TO EIGHTY-ONE, CHANCES ARE HE  
5 WOULD MAKE IT TO EIGHTY-THREE OR FOUR. SO, I FOUND NO REASON  
6 TO SAY HE WOULDN'T HAVE DONE THAT.

7 Q ALL RIGHT, DOCTOR JENKINS. I'M GOING TO HAND YOU WHAT  
8 I'M ASKING TO BE MARKED AS STATE'S EXHIBIT 108, WHICH IS A  
9 DIAGRAM, A SCIENTIFIC DIAGRAM SHOWING THE FRONT AND BACK OF  
10 A HEAD AREA AND ASK YOU TO JUST PLEASE MARK WITH THIS PEN  
11 THE AREA THAT YOU SAW TRAUMA. AND YOU MAY REFER TO YOUR  
12 OTHER DIAGRAM.

13 A (WHEREUPON WITNESS MARKS ON DIAGRAM MARKED AS  
14 STATE'S EXHIBIT 108) THOSE ARE THE MAJOR IMPACT SITES.

15 MS. COLLINS: I WOULD AT THIS TIME MOVE STATE'S EXHIBIT 108  
16 INTO EVIDENCE.

17 MR. CHIARENZA: NO OBJECTION.

18 THE COURT: IT'S ADMITTED.

19 (WHEREUPON STATE'S EXHIBIT 108 WAS ADMITTED INTO EVIDENCE  
20 WITHOUT OBJECTION)

21 Q DOCTOR JENKINS, LASTLY, YOU'VE ALREADY TESTIFIED THAT IT  
22 IS YOUR OPINION TO A REASONABLE DEGREE OF MEDICAL CERTAINTY  
23 THAT THE ASSAULT ON MR. CUBLEY WAS DIRECTLY RELATED TO THE  
24 TRAUMA INCURRED TO HIS HEAD. WOULD THAT TRAUMA BE

1           CONSISTENT WITH AN ASSAULT BASED UPON YOUR EXPERIENCE IN  
2           THIS AREA?

3    A           YES.

4    Q           THANK YOU.

5           MS. COLLINS: THAT'S ALL I HAVE.

6           THE COURT: CROSS EXAMINATION.

7    **CROSS EXAMINATION BY MR. CHIARENZA:**

8    Q           DOCTOR, MR. CUBLEY DIED SOME SEVERAL DAYS AFTER THE  
9           ASSAULT. CORRECT?

10   A           YES, HE DID.

11   Q           DO YOU KNOW HOW MANY?

12   A           THE ASSAULT WAS ON THE 29TH. HE DIED THE 4TH. AROUND  
13           SIX DAYS.

14   Q           OKAY. IN YOUR REVIEW OF THE CMC RECORDS, DO YOU RECALL  
15           SEEING HIS GLASCO TRAUMA SCALE NUMBER?

16   A           I RECALL SEEING A RANGE.

17   Q           DO YOU RECALL WHAT THE RANGE WAS?

18   A           THE RANGE WAS THREE TO SEVEN. THE DESCRIPTION OF THAT  
19           BEING THERE WERE TIMES WHEN HE WAS AROUSE-ABLE AND  
20           RESPONDED TO PAINFUL STIMULI AND TIMES THAT HE DIDN'T.

21   Q           YOU TESTIFIED THAT THE CEMENT BLOCK, STATE'S EXHIBIT 90,  
22           WOULD APPEAR TO BE CONSISTENT WITH THE BLUNT TRAUMA INJURY  
23           THAT YOU FOUND ON THE VICTIM. CORRECT?

24   A           THE LEFT SIDE.

1 Q OKAY. AND THEN YOU SAID IT WAS INCONSISTENT WITH WHAT  
2 WAS FOUND ON THE RIGHT SIDE?

3 A YEAH. I DIDN'T FIND THE EXTENT OF TRAUMA ON THAT SIDE,  
4 THE BONE BREAKING TRAUMA THAT I THINK WOULD BE MORE  
5 CONSISTENT WITH THAT.

6 Q SO, WE'RE LOOKING AT, ONE, WHILE IT WAS CONSIDERABLY  
7 GREATER, THAN WHATEVER CAUSED THIS OTHER INJURY?

8 A YES.

9 Q AND YOU CARRIED THAT-- YOU HELD THAT BLOCK UP.  
10 CLEARLY WE CAN ALL SEE ITS SIZE, AND IT'S SOLID. IT COULD BE  
11 HEFTED BY ANY AVERAGE SIZED INDIVIDUAL. CORRECT?

12 A YES.

13 Q AND YOU DIDN'T COME TO ANY CONCLUSION AS TO WHERE THE  
14 ASSAILANT MAY HAVE BEEN STANDING WHEN THEY, IF THEY HIT MR.  
15 CUBLEY WITH THAT BLOCK, WHERE THEY WOULD HAVE BEEN  
16 STANDING?

17 A I HAVEN'T ASSESSED THAT.

18 Q IN FACT, YOU CERTAINLY HAVE COME TO NO CONCLUSION AS  
19 TO WHAT PARTICULAR INDIVIDUAL MAY HAVE ASSAULTED MR.  
20 CUBLEY?

21 A NO SIR.

22 Q YOU'VE COME TO NO CONCLUSION AS TO WHETHER OR NOT THE  
23 PERSON WHO HIT HIM WAS RIGHT-HANDED OR LEFT-HANDED?

24 A NO SIR.

1 Q YOU'VE COME TO NO CONCLUSION AS TO WHETHER OR NOT THE  
2 PERSON WHO HIT THEM WAS MALE OR FEMALE?

3 A NO SIR.

4 Q AND YOU'VE COME TO NO CONCLUSION AS TO WHETHER OR NOT  
5 THE PERSON WHO HIM THEM WAS OF A PARTICULAR SIZE OR WEIGHT?

6 A NO SIR.

7 Q AND GIVEN MR. CUBLEY'S AGE, AND LET'S JUST ASSUME THAT  
8 HE WAS IN AVERAGE HEALTH FOR A MAN HIS AGE, I BELIEVE IT WAS  
9 YOUR TESTIMONY THAT ONE BLOW LIKE THAT WOULD HAVE MORE OR  
10 LESS INCAPACITATED HIM FROM ANY FURTHER, EITHER BEING ABLE  
11 TO PROVIDE A DEFENSE OR CREATE MUCH OF A STRUGGLE. IS THAT  
12 CORRECT?

13 A YES.

14 Q THANK YOU, DOCTOR.

15 MR. CHIARENZA: I DON'T HAVE ANY FURTHER QUESTIONS.

16 MS. COLLINS: NOTHING FURTHER. THANK YOU, DOCTOR

17 JENKINS.

18 THE COURT: YOU MAY STEP DOWN.

19 MS. COLLINS: YOUR HONOR, WE WOULD ASK THAT THIS

20 WITNESS BE EXCUSED.

21 THE COURT: HE MAY BE.

22 MS. COLLINS: YOUR HONOR, THAT WAS OUR LAST WITNESS FOR

23 THE DAY.

24 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, WE WILL

25 RECESS FOR THE AFTERNOON. KEEP IN MIND MY INSTRUCTIONS I

1 HAVE GIVEN YOU. HAVE A GOOD EVENING. PLEASE REPORT TO YOUR  
2 JURY ROOM AT NINE-THIRTY IN THE MORNING.

3 (WHEREUPON THE JURY EXITED THE COURTROOM AT 5:09 P.M.)

4 THE COURT: WAS THAT THE STATE'S LAST WITNESS, OR DO YOU  
5 HAVE SOMEBODY ELSE YOU'RE GOING TO CALL IN THE MORNING?

6 MS. COLLINS: I BELIEVE THAT WAS OUR LAST WITNESS, BUT WE  
7 JUST WANT TO HAVE THIS EVENING TO GO OVER WHAT WE'VE GOTTEN  
8 IN, JUST IN CASE WE HAVE SOMETHING FURTHER TO PRESENT. BUT I  
9 ANTICIPATE THAT ACTUALLY WOULD BE OUR LAST WITNESS.

10 THE COURT: MR. CHIARENZA, YOU WILL DISCUSS WITH YOUR  
11 CLIENT HIS RIGHT TO TESTIFY OR NOT DURING THE OVERNIGHT  
12 RECESS?

13 MR. CHIARENZA: YES, YOUR HONOR. WE'RE PREPARED TO TAKE  
14 UP OUR PART IN THE TRIAL.

15 THE COURT: COURT IS IN RECESS UNTIL 9:30 IN THE MORNING.  
16  
17  
18  
19  
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21  
22  
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25

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA, )  
 )  
 ) PLAINTIFF, )  
 )  
 ) VERSUS )  
 )  
ISAIAS DIAZ GUTIERREZ, )  
 )  
 ) DEFENDANT. )

TRANSCRIPT OF RECORD  
2007-GS-46-01261  
2007-GS-46-01262  
2007-GS-46-01263  
2007-GS-46-01264  
2007-GS-46-01265  
2007-GS-46-01266

VOLUME IV  
DECEMBER 13, 2007

BEFORE:

THE HONORABLE J. DERHAM COLE, JUDGE, AND A JURY

APPEARANCES:

FOR THE STATE:  
WALTER W. THOMPSON, ESQ., DEPUTY SOLICITOR  
LISA J. COLLINS, ESQ., ASSISTANT SOLICITOR

FOR THE DEFENSE:  
DEREK CHIARENZA, ESQ.

PHYLLIS S. BARRETT  
CIRCUIT COURT REPORTER

1                   **THURSDAY, DECEMBER 13, 2007 - COURT IN SESSION**

2                   **THE COURT: DOES THE STATE HAVE ANY ADDITIONAL**  
3 **EVIDENCE?**

4                   **MS. COLLINS: YOUR HONOR, WE WILL NOT BE PRESENTING ANY**  
5 **ADDITIONAL WITNESSES. WE WOULD NEED TO FORMALLY MOVE IN**  
6 **EXHIBIT 4-A. I HAVE DISCUSSED THAT WITH DEFENSE, YOUR HONOR.**  
7 **IT SHOWS THE POSITION OF THE VICTIM ON THAT DIAGRAM AND THE**  
8 **WITNESS TESTIFIED THAT HE HAD SUBSEQUENTLY MADE THE**  
9 **DIAGRAM HIMSELF. WE DID NOT FORMALLY MOVE THAT IN AND WE**  
10 **WOULD DO SO AT THIS TIME.**

11                   **MR. CHIARENZA: NO OBJECTION.**

12                   **THE COURT: IT'S ADMITTED. THAT'S 4-A?**

13                   **MS. COLLINS: 4-A, YOUR HONOR.**

14 **(WHEREUPON STATE'S EXHIBIT 4-A WAS ADMITTED INTO EVIDENCE**  
15 **WITHOUT OBJECTION)**

16                   **THE COURT: ANY OTHERS?**

17                   **MS. COLLINS: NO, YOUR HONOR. THAT CONCLUDES THE STATE'S**  
18 **CASE, AND THE STATE RESTS AT THIS TIME.**

19                   **THE COURT: OKAY. MR. CHIARENZA, HAVE YOU TALKED TO**  
20 **YOUR CLIENT ABOUT HIS RIGHT TO TESTIFY OR NOT?**

21                   **MR. CHIARENZA: YES, I HAVE, YOUR HONOR. WE DID THAT ON**  
22 **TWO OCCASIONS YESTERDAY AND THEN AGAIN BRIEFLY THIS**  
23 **MORNING.**

24                   **THE COURT: WHAT DOES HE INDICATE TO YOU HE WISHES TO**  
25 **DO?**

1 MR. CHIARENZA: YOUR HONOR, HE WISHES TO REMAIN SILENT  
2 AND THE DEFENSE WILL BE PRESENTING NO EVIDENCE IN THIS CASE.

3 THE COURT: MR. GUTIERREZ.

4 (WHEREUPON DEFENDANT STANDS)

5 YOU'VE HEARD YOUR LAWYER TELL ME THAT YOU DO NOT  
6 WISH TO TESTIFY?

7 MR. GUTIERREZ: YES.

8 THE COURT: YOU UNDERSTOOD MY QUESTION WITHOUT THE  
9 BENEFIT OF THE INTERPRETER?

10 MR. GUTIERREZ: YES.

11 THE COURT: HAVE YOU HAD PLENTY OF TIME TO TALK TO MR.  
12 CHIARENZA ABOUT YOUR DECISION TO TESTIFY OR NOT?

13 MR. GUTIERREZ: YES.

14 THE COURT: AND HAS HE EXPLAINED TO YOU THE ADVANTAGES  
15 AND DISADVANTAGES OF TESTIFYING AS WELL AS NOT TESTIFYING?

16 (PAUSE FOR INTERPRETER TO TRANSLATE)

17 MR. GUTIERREZ: YES.

18 THE COURT: DO YOU UNDERSTAND THAT ONLY YOU CAN MAKE  
19 THE DECISION AS TO WHETHER OR NOT YOU WILL TESTIFY?

20 MR. GUTIERREZ: YES.

21 THE COURT: DO YOU UNDERSTAND THAT WHILE YOU MAY SEEK  
22 ADVICE FROM YOUR LAWYER OR ANYBODY ELSE, FOR THAT MATTER,  
23 AND HE MAY GIVE YOU AN OPINION AS TO WHETHER HE THINKS YOU  
24 OUGHT TO TESTIFY, ONLY YOU CAN MAKE THAT DETERMINATION?  
25 ONLY YOU CAN MAKE THAT DECISION.

1 MR. GUTIERREZ: YES.

2 THE COURT: DO YOU UNDERSTAND THAT IF YOU CHOOSE NOT  
3 TO TESTIFY THAT YOU CAN'T CHANGE YOUR MIND LATER AFTER A  
4 DECISION HAS BEEN REACHED BY THE JURY?

5 MR. GUTIERREZ: YES.

6 THE COURT: IF YOU WANT TO TESTIFY, OR IF YOU WANT TO  
7 CALL OTHER WITNESSES OR PRESENT ANY EVIDENCE, NOW IS THE  
8 ONLY OPPORTUNITY THAT YOU WILL HAVE TO DO SO.

9 MR. GUTIERREZ: YES, I UNDERSTAND.

10 THE COURT: HAVE YOU HAD PLENTY OF TIME TO THINK ABOUT  
11 YOUR DECISION TO TESTIFY OR NOT TO TESTIFY?

12 MR. GUTIERREZ: YES.

13 THE COURT: AND YOU'VE REACHED A DECISION?

14 MR. GUTIERREZ: YES.

15 THE COURT: AND THAT DECISION IS WHAT?

16 MR. GUTIERREZ: I WILL NOT TESTIFY.

17 THE COURT: ARE YOU SATISFIED WITH THE DECISION YOU'VE  
18 MADE?

19 MR. GUTIERREZ: YES.

20 THE COURT: DID ANYBODY FOR YOU INTO IT?

21 MR. GUTIERREZ: NO.

22 THE COURT: DID ANYBODY PRESSURE YOU INTO THAT  
23 DECISION?

24 MR. GUTIERREZ: NO.

1 THE COURT: YOU'VE MADE THAT DECISION OF YOUR OWN FREE  
2 WILL?

3 MR. GUTIERREZ: YES.

4 THE COURT: AND YOU'RE SATISFIED WITH IT?

5 MR. GUTIERREZ: YES.

6 THE COURT: THANK YOU. YOU MAY BE SEATED. ANY  
7 REQUESTS FOR INSTRUCTIONS?

8 MS. COLLINS: YES, YOUR HONOR.

9 THE COURT: I'VE GOT SOME FROM THE STATE.

10 MR. CHIARENZA: YOUR HONOR, I DON'T HAVE ANY REQUESTS.  
11 I'VE REVIEWED THE STATE'S REQUEST. THE ONLY THINK I WOULD  
12 TAKE ISSUE WITH IS THE HAND OF ONE INSTRUCTION. I JUST DON'T  
13 KNOW THAT THIS CASE HAS BEEN PRESENTED AS A HAND OF ONE  
14 CASE. I DON'T SEE THAT THERE'S ANY EVIDENCE ALLEGING THAT MR.  
15 GUTIERREZ IS GUILTY BY VIRTUE OF THE ACTS, OR ALLEGED ACTS OF  
16 OTHER INDIVIDUALS.

17 MS. COLLINS: YOUR HONOR, WE WOULD CERTAINLY THINK  
18 THAT AT LEAST IN THE FORGERY INCIDENTS. BY THE CO-  
19 DEFENDANT'S OWN STATEMENT TO LAW ENFORCEMENT, SHE HANDED  
20 HIM THE CHECKS AND THEY DID NOT BELIEVE THAT HE BOUGHT INTO  
21 THIS THING ABOUT THE GRANDFATHER PROVIDING THEM. AT LEAST  
22 AS TO THE FORGERS THE HAND OF ONE IS THE HAND OF ALL HAS BEEN  
23 AN ISSUE. I WOULD ASK THAT THE JURY BE INSTRUCTED ON THE  
24 PRESENCE OF TWO OR MORE PEOPLE INVOLVED IN THE ACT.

1 THE COURT: I DON'T DISAGREE WITH THAT, BUT TELL ME HOW  
2 THAT RELATES TO THE FORGERY.

3 MS. COLLINS: IN TERMS OF THE FORGERY, IT-- I BELIEVE YOUR  
4 HONOR WILL INSTRUCT THE JURY THAT THEY CAN BELIEVE ALL OR  
5 PART OF A WITNESS' TESTIMONY.

6 THE COURT: RIGHT.

7 MS. COLLINS: SO, IF THEY BELIEVE THAT DANA WROTE THE  
8 CHECK, BUT HANDED THE CHECK TO HIM, UNDER FORGERY AND  
9 UTTERING, THEN CERTAINLY WHATEVER PART HE TOOK IN THE  
10 FORGERY LIES UNDER THE HAND OF ONE IS THE HAND OF ALL; IF THEY  
11 BELIEVE THAT HIS INVOLVEMENT IS MORE LIMITED THAN SHE  
12 INDICATED, THAT HE ACTUALLY WROTE OUT THE CHECKS AND TOOK  
13 THE CHECKS IN.

14 THE COURT: WELL, I UNDERSTAND. BUT THAT WOULDN'T MAKE  
15 ANY DIFFERENCE IN THE CASE OF FORGERY. I MEAN, FORGERY UNDER  
16 USUAL CIRCUMSTANCES AND UNDER THE EVIDENCE IN THIS CASE IS  
17 PRESENTING A FALSE INSTRUMENT FOR PAYMENT WITH FRAUDULENT  
18 INTENT; THAT IS, KNOWING IT IS FRAUDULENT.

19 WELL, IF SHE DID MAKE OUT THE CHECKS AND GAVE THEM TO  
20 HIM AND HE CASHED THEM, HE STILL HAS TO HAVE KNOWLEDGE THAT  
21 THEY'RE FRAUDULENT.

22 MS. COLLINS: YES, YOUR HONOR.

23 THE COURT: SO, I DON'T KNOW THAT THE HAND OF ONE MAKES  
24 ANY DIFFERENCE. HE CAN'T BE GUILTY BY PRESENTING A CHECK  
25 THAT SHE MAKES FALSE UNLESS HE'S AWARE OF IT.

1 MS. COLLINS: YES, YOUR HONOR.

2 THE COURT: IS THE FORGERY THE ONLY OFFENSE THAT YOU  
3 RELATE TO THE HAND OF ONE IS THE HAND OF ALL?

4 MS. COLLINS: NO, YOUR HONOR. I WOULD THINK THAT ANY  
5 TIME THAT A CRIME IS COMMITTED BY TWO OR MORE PEOPLE WHO  
6 ARE ACTING TOGETHER, THAT EACH OF THEM ARE ACCOUNTABLE  
7 AND THE HAND OF ONE IS THE HAND OF ALL.

8 THE COURT: WELL, THAT'S TRUE AS A GENERAL PRINCIPLE. I'M  
9 TALKING ABOUT IN THIS CASE. IS THERE ANY EVIDENCE THAT  
10 ANYBODY OTHER THAN THE DEFENDANT COMMITTED THE HOMICIDE  
11 OR COMMITTED THE ARMED ROBBERY?

12 MS. COLLINS: YOUR HONOR, I THINK YOU HAVE TO TAKE THE  
13 PROPERTY AWAY AND SHE ASSISTED HIM IN REMOVING THE SAFE OUT  
14 OF THE HOUSE.

15 THE COURT: I KNOW SHE ASSISTED HIM. WOULDN'T SHE BE THE  
16 ACCOMPLICE IN THIS CASE?

17 MS. COLLINS: YES, YOUR HONOR. AND I DID ELICIT TESTIMONY  
18 FROM HER IN REGARD TO HER PLEA FOR ARMED ROBBERY BEING  
19 UNDER THE HAND OF ONE IS THE HAND OF ALL. SO, I THINK THAT HAS  
20 ALSO BEEN MENTIONED TO THE JURY.

21 MR. CHIARENZA: IT WOULD BE A RELEVANT CHARGE IN THE  
22 TRIAL OF DANA BLACKMON, BUT IT'S NOT A RELEVANT CHARGE IN  
23 THE TRIAL OF MY CLIENT, WHO'S BEING CHARGED WITH THE  
24 PRIMARY---

1 THE COURT: THAT'S WHAT I'M TRYING TO SORT OUT. IS IT THE  
2 STATE'S THEORY THAT MR. GUTIERREZ IS AN ACCOMPLICE?

3 MS. COLLINS: NO, YOUR HONOR.

4 THE COURT: HE'S THE PRINCIPAL?

5 MS. COLLINS: YES, YOUR HONOR.

6 THE COURT: THEN THE HAND OF ONE IS THE HAND OF ALL IS  
7 REALLY NOT APPLICABLE. IT WOULD BE APPLICABLE TO HER  
8 INVOLVEMENT, PERHAPS. BUT I DON'T THINK THERE'S ANY EVIDENCE  
9 OF HIM BEING AN ACCOMPLICE. I THINK THE EVIDENCE ALL  
10 INDICATES HE'S THE PRINCIPAL. I THINK THAT MIGHT BE MORE  
11 CONFUSING TO THE JURY THAN HELPFUL. BUT IF THEY HAVE A  
12 QUESTION ABOUT IT, I MIGHT HAVE TO INSTRUCT THEM ON IT.

13 MR. CHIARENZA: YOUR HONOR, WE WOULD ASK FOR--  
14 WHATEVER CHARGES YOU PREFER ON THIS ISSUE IS FINE WITH ME.  
15 BUT WE WOULD ASK FOR A CHARGE ON CIRCUMSTANTIAL EVIDENCE.  
16 THERE CERTAINLY IS CIRCUMSTANTIAL EVIDENCE IN THE CASE. I'D  
17 SAY WHATEVER CHARGE THE COURT PREFERS ON REASONABLE  
18 DOUBT AND CREDIBILITY OF WITNESSES. ANY OF THE COURT'S  
19 STANDARD CHARGES WILL BE FINE.

20 THE COURT: LET ME ASK YOU ABOUT NUMBER THREE. MALICE  
21 IS AN ESSENTIAL INGREDIENT. IT IS NOT NECESSARY TO AFFORD ILL  
22 WILL TOWARD THE INDIVIDUAL INTEREST. DO YOU HAVE ANY  
23 COMMENTS ON THE CASE, OTHER THAN THE ILL WILL TOWARD THE  
24 PERSON INJURED?

1 MS. COLLINS: IF THE JURY WERE TO BELIEVE THAT HE HAD NO  
2 ILL WILL, I KNOW THAT IT SEEMS BASIC. WE WOULD THINK HIM  
3 HITTING WITH A CINDER BLOCK, THAT HE HAD ILL WILL FOR THAT  
4 PERSON. BUT IF SOME REASON, SOME PERSON ON THE JURY IS  
5 APPLYING THEIR OWN PRINCIPLE, AND SAY, YOU KNOW, HE DIDN'T  
6 REALLY DISLIKE MR. CUBLEY, HE JUST WANTED TO GET THE SAFE.  
7 AND ESPECIALLY IF THEY CONFUSED IN TERMS OF WHETHER HE  
8 DIDN'T DIE IMMEDIATELY. AND I DON'T KNOW WHAT YOUR HONOR  
9 WOULD CHARGE REFLECTING THAT IN TERMS OF MURDER.

10 THE COURT: OKAY.

11 MR. CHIARENZA: AND YOUR HONOR, JUST FOR THE RECORD, I  
12 AM KNOWINGLY NOT REQUESTING THE PROXIMATE CAUSE CHARGE. I  
13 JUST WANT TO PUT THAT ON THE RECORD. IN THE CASE LAW THERE IS  
14 A CASE WHERE THE VICTIM DID NOT DIE IMMEDIATELY. IN FACT, HE  
15 WAS TAKEN OFF LIFE SUPPORT SYSTEM. THAT DIDN'T COME IN IN THE  
16 EVIDENCE. BUT IF IT HAD, I THINK THE CASE LAW IS CLEAR AND  
17 VIRTUALLY UNIVERSAL THAT THAT WOULD NOT SATISFY THE  
18 INTERVENING EVENTS TO ALLOW THE CHARGE OF PROXIMATE CAUSE.

19 THE COURT: THAT IS THE LAW ON MURDER. IT'S GOING TO BE A  
20 PROXIMATE CAUSE OF DEATH. I MEAN, THAT'S THE DEFINITION FOR  
21 MURDER.

22 MS. COLLINS: I JUST WANT TO UNDERSTAND, YOUR HONOR. I  
23 UNDERSTAND THAT MR. CHIARENZA SAYS HE IS NOT ASKING FOR  
24 THAT, BUT---

25 THE COURT: I'M CHARGING IT.

1 MS. COLLINS: YOU ARE. THANK YOU.

2 THE COURT: I MEAN, THAT'S THE DEFINITION OF MURDER, THAT  
3 DEATH IS A PROXIMATE RESULT.

4 MR. CHIARENZA: WELL, YOUR HONOR, I MAY NOT HAVE BEEN  
5 CLEAR. WHAT I WASN'T ASKING FOR IS TO GET A CHARGE THAT-- I'M  
6 NOT ASKING THE COURT TO CHARGE THAT IT WAS NOT-- I'LL LEAVE IT  
7 AT THIS: IF THE COURT'S GONNA CHARGE IT, I'LL JUST-- I THINK  
8 THERE IS A CHARGE THAT I COULD HAVE POTENTIALLY ASKED FOR IF I  
9 BELIEVED THAT SOME OTHER INTERVENING EVENT OCCURRED.

10 THE COURT: NO, YOU'RE NOT ASKING FOR AN INTERVENING  
11 CAUSE, ARE YOU?

12 MR. CHIARENZA: THAT'S RIGHT; I'M NOT, YOUR HONOR.

13 THE COURT: ANY OTHER REQUESTS OR EXCEPTIONS FOR  
14 INSTRUCTIONS?

15 MS. COLLINS: NO OTHER REQUESTS OR EXCEPTIONS FROM THE  
16 STATE, YOUR HONOR.

17 MR. CHIARENZA: NOTHING FROM THE DEFENSE, YOUR HONOR.

18 THE COURT: WE'LL BE IN RECESS FOR FIVE MINUTES.

19 (WHEREUPON THE COURT WAS IN RECESS AT 9:50 A.M.)

20 **COURT IN SESSION - 9:55 A.M.**

21 THE COURT: BRING IN THE JURY.

22 (WHEREUPON THE JURY ENTERED THE COURTROOM)

23 GOOD MORNING, LADIES AND GENTLEMEN. WHEN WE FINISHED  
24 COURT YESTERDAY, THE STATE INDICATED THEY MAY HAVE SOME

1           ADDITIONAL EVIDENCE TO PRESENT THIS MORNING. DOES THE STATE  
2           HAVE ANY ADDITIONAL EVIDENCE TO PRESENT?

3           MR. THOMPSON: NO, YOUR HONOR. THE STATE RESTS AT THIS  
4           TIME.

5           THE COURT: ALL RIGHT. DOES THE DEFENSE HAVE ANY  
6           ADDITIONAL EVIDENCE IT WISHES TO PRESENT IN THE CASE?

7           MR. CHIARENZA: NO, YOUR HONOR. THE DEFENSE RESTS AT  
8           THIS TIME.

9           THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, THAT IS ALL  
10          OF THE TESTIMONY OR THE OTHER EVIDENCE TO BE INTRODUCED IN  
11          THE TRIAL OF THE CASE. WHAT REMAINS TO BE DONE ARE THE  
12          LAWYERS' FINAL SUMMATIONS, AFTER WHICH I WILL INSTRUCT YOU  
13          ON THE LAW AND THEN YOU'LL BEGIN WITH YOUR DELIBERATIONS.  
14          SO, PLEASE GIVE THE LAWYERS YOUR ATTENTION NOW AS THEY GIVE  
15          YOU THEIR FINAL SUMMATIONS. MR. THOMPSON.

16          MR. THOMPSON: IF IT PLEASE THE COURT.

17          (WHEREUPON CLOSING ARGUMENT BY THE STATE WAS PRESENTED  
18          WITH POWER POINT DEMONSTRATION)

19          MURDER, MURDER IS THE CHARGE, THE MAIN CHARGE THAT WE  
20          ARE HERE TODAY FOR. WHAT IS MURDER? WELL, I'M GOING TO GIVE  
21          YOU SOME SIMPLE DEFINITIONS. THE JUDGE WILL INSTRUCT YOU  
22          FULLY AND YOU'LL HEAR MUCH MORE FROM HIM. BUT I WILL GIVE  
23          YOU THE SIMPLE VERSION OF EACH OF THE CHARGES SO YOU CAN  
24          UNDERSTAND WHAT WE ARE LOOKING FOR IN THIS CASE.

1 MURDER IS THE UNLAWFUL KILLING OF ANOTHER WITH MALICE  
2 AFORETHOUGHT. LET ME SAY IT AGAIN: THE UNLAWFUL KILLING OF  
3 ANOTHER WITH MALICE AFORETHOUGHT.

4 NOW, PEOPLE ASK, I UNDERSTAND WHAT IS AN UNLAWFUL  
5 KILLING IS, BUT WHAT IS AFORETHOUGHT? WELL, THAT'S KNOWING  
6 THAT YOU'RE GOING TO DO SOMETHING. KNOWING THAT YOU'RE  
7 COMING IN, WHETHER TO COMMIT THE ASSAULT AS IT IS IN THIS CASE,  
8 OR TO ACTUALLY KILL SOMEONE. BUT ONE THING YOU NEED TO  
9 REMEMBER: YOU DON'T NEED A SPECIFIC INTENT TO KILL SOMEBODY.  
10 BECAUSE THAT'S WHAT MALICE MEANS.

11 WHAT IS MALICE? WELL, SOME OF THE DEFINITIONS ARE A  
12 HEART FATALLY BENT ON MISCHIEF OR WICKEDNESS OR A CERTAIN  
13 TYPE OF DEPRAVITY. THE SIMPLE DEFINITION FOR MALICE IS  
14 MEANNESS. IT'S BEING MEAN.

15 WHAT DO WE DO TO DETERMINE MALICE? BECAUSE WE HAVE  
16 NO IDEA WHAT THE DEFENDANT SAID TO CLARENCE CUBLEY WHEN  
17 HE WENT IN THE TRAILER THAT NIGHT, IF HE SAID ANYTHING AT ALL.  
18 BUT WE CAN TELL BY HIS ACTIONS WHAT TYPE OF MALICE WAS HIS IN  
19 HEART.

20 MALICE CAN BE INFERRED BY A CERTAIN AMOUNT OF  
21 RECKLESSNESS, AN ACTION SO RECKLESS-- FOR INSTANCE, IN THIS  
22 CASE, SMASHING HIM UP SIDE THE HEAD WITH THAT CINDERBLOCK,  
23 HITTING HIM TO THE POINT THAT HE LAID ON THE FLOOR, DYING.  
24 THAT'S MALICE.

1           LET'S LOOK AT SOME OF THE PHOTOGRAPHS FROM THE TRAILER.  
2           AS YOU LOOK AT THESE PHOTOGRAPHS, I'LL POINT OUT SOME THINGS.  
3           THIS IS ONE VIEW AS YOU COME TO THE TRAILER. GO TO THE OTHER  
4           SIDE AND LOOK; THAT'S THE OTHER VIEW YOU HAVE OF THE TRAILER.  
5           AND YOU CAN SEE ALL THE THINGS ON THE FLOOR. YOU CAN SEE ALL  
6           OF THOSE THINGS THERE.

7           AND THEN WE GO, AS THE OFFICER SAID, ON THIS PARTICULAR  
8           CALENDAR, AND WE'LL POINT OUT, EACH DAY GETS CHECKED OFF.  
9           THE LAST DAY CHECKED OFF IS SUNDAY, THE 29TH.

10          NOW, WHAT DOES THIS HAVE TO DO WITH MALICE? WELL, WE  
11          KNOW THAT IT WAS SUNDAY, THE 29TH FOR A COUPLE OF DIFFERENT  
12          REASONS. ONE: WE HAD MARCUS WHITENER COME TELL YOU THE  
13          AFTERNOON OF SUNDAY, THE 29TH, HE WAS AT THE TRAILER. HE  
14          TALKED TO HIS GRANDFATHER AND THEY SAT AROUND FOR TWO,  
15          TWO AND A HALF HOURS. THAT WAS THE LAST TIME MARCUS  
16          WHITENER SAW HIS GRANDFATHER ALIVE AND WELL.

17          UNTIL THAT NIGHT. HOW DO WE KNOW THAT IT WAS UNTIL,  
18          THAT IT WASN'T LATER THAT NIGHT? BECAUSE ON THE 30TH, ON THAT  
19          MONDAY, THE FIRST DAY THE BANKS ARE OPEN, THE DEFENDANT,  
20          ISAIAS GUTIERREZ, IS STANDING AT THE FORT MILL BRANCH OF BANK  
21          OF AMERICA, CASHING A \$500 CHECK BELONGING TO MAUDE CUBLEY,  
22          THAT WAS STOLEN FROM THIS RESIDENCE THAT NIGHT.

23          SO, THERE YOU HAVE YOUR TIME FRAME PRETTY WELL SET IN  
24          STONE. NOT TO MENTION, DANA SAID IT HAPPENED ON SUNDAY

1 NIGHT, THE 29TH. SO, WE HAVE CERTAINLY A TIME FRAME AS TO  
2 WHEN IT OCCURRED.

3 SO, NOW WE KNOW, ON SUNDAY NIGHT, CLARENCE CUBLEY, AN  
4 EIGHTY-ONE YEAR OLD MAN WHO LIVES ALONE, AND THE ONLY ONE  
5 LIVING IN THIS TRAILER PARK AT THAT TIME, HAS BEEN SMASHED IN  
6 THE HEAD. AND HE WAS HIT MORE THAN THAT. AS YOU HEARD FROM  
7 THE TESTIMONY OF THE PATHOLOGIST, BOTH SIDES OF HIS FACE HAD  
8 INJURIES. THE TOP AND THE BOTTOM OF HIS FACE INDICATE FOUR  
9 DIFFERENT TYPE OF HITS. BUT, ONE, THE CRUSHING BLOW ON THE  
10 LEFT SIDE OF HIS HEAD.

11 AND, OF COURSE, WE KNOW THE DEFENDANT TO BE RIGHT-  
12 HANDED, COMING INTO THE TRAILER, SMASHING WITH THAT BLOW.  
13 HE WAS INCAPACITATED AS A RESULT OF THAT. AND AS HE LAY ON  
14 THE FLOOR OF THIS TRAILER ON NOT JUST SUNDAY NIGHT, ALL  
15 SUNDAY NIGHT, ON INTO MONDAY MORNING. ALL OF MONDAY  
16 MORNING INTO MONDAY AFTERNOON. ALL OF MONDAY AFTERNOON,  
17 INTO MONDAY EVENING. ALL OF MONDAY NIGHT, UNTIL TUESDAY  
18 MORNING. ALL OF TUESDAY MORNING, UNTIL JUST AFTER LUNCH  
19 TIME, AROUND 1:30 OR SO, WHEN WOODROW CULP COMES TO CHECK  
20 ON HIS FRIEND BECAUSE HE'S BEEN CALLING AND THERE'S NO  
21 ANSWER.

22 THAT'S MALICE. HE LEFT A MAN DYING FOR THAT PERIOD OF  
23 TIME.

24 AND AS WE GO ON AND LOOK AGAIN IN THE TRAILER, AND AS  
25 YOU SEE, WE'VE SEEN THE COUNTER HERE. HERE'S THE PHONE RIGHT

1           HERE. AND LET'S LOOK AT THE PHONE RIGHT HERE. THE PHONE  
2           CORD'S CUT.

3                       SO, EVEN IF MR. CUBLEY HAS THE ABILITY TO GET UP OFF THE  
4           FLOOR, HE WON'T BE ABLE TO CALL FOR HELP. THERE'S NOTHING HE  
5           CAN DO TO GET HELP.

6                       AND OBVIOUSLY, IF YOU'LL LOOK AT THIS FLOOR, YOU'LL SEE  
7           THAT THERE'S SOME MOVEMENT WITH HIM ON THAT FLOOR. NOW,  
8           WHETHER IT WAS THE INITIAL ASSAULT; WHETHER AFTER THE  
9           PARAMEDIC TESTIFIED HE HAD INVOLUNTARY MOVEMENT;  
10          INVOLUNTARY COMBATIVE MOVEMENT THEY THOUGHT HE MIGHT  
11          HAVE MOVED SOMEWHERE AROUND THE FLOOR; SOME REACTION  
12          MAYBE TO THE PUPPY WHO WAS ALSO IN THE HOUSE WITH HIM  
13          DURING THAT TIME, PROBABLY TRYING TO PLAY WITH HIM, TRYING  
14          TO LICK HIM, TRYING TO FIGURE OUT WHAT'S GOING ON.

15                      BUT HE LAYS ON THIS FLOOR. AND YOU IMAGINE AT THAT TIME,  
16          YOU KNOW WHAT HAPPENED. HE DOESN'T HAVE ANYTHING TO EAT  
17          OR DRINK. BUT CERTAINLY HE WOULD HAVE TO HAVE A BOWEL  
18          MOVEMENT AND URINATE AT SOME POINT DURING THE TIME, DURING  
19          THAT PERIOD OF TIME.

20                      SO, HE LAYS IN HIS OWN FILTH AND HIS BLOOD ON THE FLOOR  
21          OF HIS OWN HOME, FOR DAYS. THAT'S MALICE. THAT'S MALICE.  
22          THAT'S MEANNESS.

23                      WE DON'T KNOW WHAT COULD HAVE HAPPENED IF THERE HAD  
24          BEEN A SIMPLE PHONE CALL ANONYMOUSLY BY ISAIAS GUTIERREZ OR  
25          DANA BLACKMON TO ALERT THIS MAN HAD BEEN INJURED. BUT

1           WHAT WE KNOW IS THIS WAS AN EIGHTY-ONE YEAR OLD MAN WHO  
2           HAD BEEN INJURED. WHAT WE KNOW IS AN EIGHTY-ONE YEAR OLD  
3           MAN WHO HAD BEEN SEVERELY INJURED LIVED WITHOUT ANY  
4           ASSISTANCE FROM SUNDAY NIGHT TILL TUESDAY AFTERNOON.

5           WE KNOW THAT TWO DAYS AFTER THAT AS WELL THAT THE  
6           DOCTOR SAID HE DIED AS A RESULT OF THAT HEAD INJURY. NOW,  
7           CONSIDER THIS, TOO: HERE'S AN EIGHTY-ONE YEAR OLD MAN. AND  
8           THIS IS MALICE. DO YOU REALLY HAVE TO BEAT AN EIGHTY-ONE  
9           YEAR OLD MAN IN ORDER TO TAKE HIS SAFE? DO YOU HAVE TO  
10          INCAPACITATE HIM IN ORDER TO STEAL HIS SAFE? NO.

11          WELL, WHY WOULD ISAIAS GUTIERREZ DO THIS? WELL, AS HE  
12          ADMITTED TO LAW ENFORCEMENT AND AS DANA TESTIFIED, HE KNEW  
13          CLARENCE CUBLEY. HE LIVED AT THAT TRAILER PARK FOR TWO  
14          YEARS ACCORDING TO HIS OWN STATEMENT. HE KNEW WHO  
15          CLARENCE CUBLEY WAS. AND KNOWING THAT, CERTAINLY HE  
16          WOULD KNOW WHO MAUDE CUBLEY WAS. IT WAS NOT JUST POP; IT  
17          WAS MOM AND POP WHO RAN THAT TRAILER PARK. IT WAS MOM AND  
18          POP. HE KNOWS WHERE IT IS BECAUSE HE LIVED THERE, TOO. AND  
19          BECAUSE HE LIVED THERE HE WOULD HAVE PAID RENT TO CLARENCE  
20          CUBLEY.

21          WHY WOULD HE HURT HIM? BECAUSE CLARENCE CUBLEY  
22          COULD TELL THE POLICE WHO HE WAS. HE COULD TELL. HE KNEW  
23          HIM.

24          ARMED ROBBERY, WHAT IS ARMED ROBBERY? WELL, IT'S  
25          STEALING FROM SOMEONE ELSE, TO STEAL SOMETHING FROM

1           SOMEONE ELSE. OF COURSE, WE HAVE THAT HERE, THE SAFE STOLEN  
2           OUT OF THAT TRAILER. THE JUDGE WILL TALK TO YOU ABOUT HOW  
3           IT'S A LARCENY AND HOW LARCENY INCLUDES TAKING SOMETHING  
4           THAT DOESN'T BELONG TO YOU, THAT BELONGS TO ANOTHER. AND  
5           THEN YOU TAKE IT WITH THE INTENT TO PERMANENTLY DEPRIVE  
6           THEM OF THAT PROPERTY. SO, THAT'S THE DEFINITION, STEALING  
7           FROM ANOTHER, USING FORCE, THREAT OR INTIMIDATION, AND WHILE  
8           ARMED WITH A DEADLY WEAPON.

9           NOW, A DEADLY WEAPON. OBVIOUSLY, IN THIS CASE, YOU  
10          HAVE THIS LARGE PIECE OF CINDERBLOCK THAT'S IN THIS BAG. AND  
11          THE JUDGE WILL TALK WITH YOU ABOUT THE DEFINITION OF A  
12          DEADLY WEAPON. BUT A DEADLY WEAPON IS ANYTHING THAT CAN  
13          BE USED TO CAUSE SERIOUS BODILY HARM OR DEATH. THAT CAN  
14          CAUSE SERIOUS BODILY HARM OR DEATH AND, IN FACT, IT DID IN THIS  
15          CASE.

16          EVEN HANDS. ODDLY ENOUGH, YOU'VE PROBABLY HEARD THE  
17          JOKE ABOUT HIS HANDS ARE A DEADLY WEAPON. WELL, THEY CAN  
18          BE. ANYTHING CAN BE A DEADLY WEAPON. SO, IN THIS CASE, THIS  
19          CINDERBLOCK. AND AS YOU WILL SEE IN THE PICTURES THAT WE  
20          HAVE IN EVIDENCE YOU WILL HAVE IN THE JURY ROOM, THIS  
21          CINDERBLOCK WAS USED TO CAUSE DEATH. SO, ARMED WITH A  
22          DEADLY WEAPON, YOU HAVE THAT IN THIS CASE.

23          FIRST DEGREE BURGLARY, WHAT IS THAT? THAT'S ENTERING  
24          THE RESIDENCE OF ANOTHER. YOU DON'T HAVE TO BREAK INTO A  
25          RESIDENCE. THAT IMAGE OF BREAKING IN OR BREAKING DOWN A

1 DOOR, YOU DON'T HAVE TO DO THAT. ALL YOU HAVE TO DO IS ENTER  
2 THE RESIDENCE OF ANOTHER WITHOUT CONSENT. AND THAT  
3 INCLUDES USING TRICK OR ARTIFICE. IN OTHER WORDS, GETTING IN  
4 IN A FALSE WAY, OR GETTING IN, EVEN IF THE PERSON KNOWS YOU,  
5 BUT GETTING IN FOR THE PURPOSE OF COMMITTING, OR THE INTENT  
6 OF COMMITTING A CRIME THEREIN.

7 SO, THAT INCLUDES THE FACT THAT HE MIGHT HAVE COME TO  
8 THE DOOR, OR HE CAME TO THE DOOR, AND HE SAID, MR. CUBLEY,  
9 AND STARTED ADDRESSING HIM BY PERSON. HE GOT HIM TO OPEN  
10 THE DOOR AND RUSHED IN. OR WHETHER IT INCLUDES JUST RUSHING  
11 PAST HIM. OR WHETHER IT INCLUDES MR. CUBLEY SAYING, HEY, I  
12 REMEMBER YOU, AND THEN HE COMES IN. HE'S STILL COMING IN FOR  
13 THE PURPOSE SOLELY TO BEAT THIS MAN AND STEAL FROM HIM.

14 THAT INCLUDES THE ELEMENTS OF BURGLARY: ENTERING THE  
15 RESIDENCE WITHOUT CONSENT WITH THE INTENT TO COMMIT A  
16 CRIME. BUT FIRST DEGREE BURGLARY IS ONE OF THE AGGRAVATING  
17 CIRCUMSTANCES LISTED UNDER THAT.

18 NOW, NUMBER ONE OF THOSE AGGRAVATING CIRCUMSTANCES  
19 IS THAT IT OCCURRED AT NIGHT. WELL, WE KNOW IT OCCURRED AT  
20 NIGHT. DANA TOLD US THAT. OR THE DEFENDANT INJURED SOMEONE.  
21 IF YOU INJURE SOMEONE IN THAT HOUSE, THAT'S AN AGGRAVATING  
22 CIRCUMSTANCE MAKING IT A FIRST DEGREE BURGLARY. OR, IF THE  
23 DEFENDANT IS ARMED WITH A DEADLY WEAPON. AND WE'VE  
24 ALREADY TALKED ABOUT THAT, THE CINDERBLOCK COULD BE A

1 DEADLY WEAPON. SO, ANY ONE OF THOSE MAKES IT FIRST DEGREE  
2 BURGLARY.

3 NOW, THE FORGERY. AND THERE'S A LOT WE CAN SAY ABOUT  
4 THE FORGERY. LET ME GIVE THE ELEMENTS OF FORGERY. FIRST OF  
5 ALL THERE IS AN IMPLIED INTENT, AN INTENTIONAL INTENT TO  
6 DEFRAUD. SECONDLY, IT REQUIRES THAT INTENT TO FORGE OR CAUSE  
7 OR PROCURE THE FORGERY OF AN INSTRUMENT OF WRITING. NOW,  
8 WHAT IS AN INSTRUMENT OF WRITING? IT'S A CHECK, VERY SIMPLE.

9 NOW, TO FORGE IT, IF YOU FORGE ANY PART OF IT YOURSELF,  
10 ANY PART OF IT. IT CAN BE FORGING THE NAME. OR IT COULD BE  
11 FORGING THE AMOUNT. OR IT COULD BE FILLING IT OUT. OR YOU CAN  
12 HAVE SOMEONE ELSE TO DO IT FOR YOU. THAT'S WHY THE WORD,  
13 PROCURE, IS IN THERE. THAT MEANS YOU CAN PROCURE SOMEONE  
14 ELSE TO DO IT, TO FILL OUT ANY PART OF THE CHECK.

15 IF YOU SIGN THE CHECK AFTER SOMEONE ELSE HAS FILLED IT  
16 OUT AND KNOWING THAT THIS IS A FORGERY, AND THEN TRY TO CASH  
17 THAT CHECK, THAT'S A FORGERY. THOSE ARE ELEMENTS OF FORGERY.

18 NOW, IN ADDITION, SIMPLY UTTERING OR PUBLISHING A  
19 FORGED INSTRUMENT OF WRITING ALONG WITH THE INTENT TO MAKE  
20 A FORGERY. YOU DON'T HAVE TO DO THE FORGERY ITSELF. YOU  
21 DON'T HAVE TO WRITE IT. BUT KNOWING IT'S GOING TO BE PRESENTED  
22 TO SOMEONE ELSE AS A FORGED DOCUMENT.

23 OR IF YOU UTTER OR PUBLICIZE IT. WHEN YOU GO TO THE  
24 TELLER AND YOU PUT THAT CHECK UP THERE, YOU PRESENT THAT

1 CHECK AND ASK FOR PAYMENT. THAT'S WHAT UTTERING IS, THE  
2 ACTUAL PRESENTING OF THE CHECK, ASKING FOR PAYMENT.

3 WELL, HE'S DONE THAT THREE TIMES. WE KNOW THAT. THAT'S  
4 WITHOUT A DOUBT. SO, FORGERY, WE'VE SHOWN THAT.

5 NOW, LET'S TALK ABOUT HOW COME THIS IS SO IMPORTANT.  
6 YOU CAN START OFF WITH THE NORMAL THINGS, IF YOU HAVE THE  
7 CHECKS. OF COURSE, A CHECK ARE MADE OUT TO ISAIAS GUTIERREZ  
8 IN THE AMOUNT OF \$500. THIS IS THE FIRST CHECK HE CASHED. THIS  
9 IS MAUDE CUBLEY'S ACCOUNT. YOU SEE HE SIGNED OVER HERE ON  
10 THE BACK. HE LISTED THE ALIEN ID NUMBER IN THE TOP LEFT HALF.  
11 THAT'S THE ALIEN ID THAT HE PRESENTED AT THAT TIME.

12 LET'S TALK ABOUT SOME MORE THINGS THAT ARE VERY  
13 INTERESTING ABOUT THE CHECKS. THEY'RE MADE OUT TO ISAIAS  
14 GUTIERREZ. DO YOU REMEMBER WHEN THE DEFENDANT GAVE THE  
15 STATEMENT TO THE OFFICERS HERE IN YORK COUNTY AND SAID DANA  
16 GAVE HIM THE CHECKS THAT HER GRANDFATHER GAVE TO HER TO  
17 CASH. WHY WOULD GRANDPA WRITE OUT CHECKS TO ISAIAS  
18 GUTIERREZ AND NOT TO HIS GRANDDAUGHTER? NOT TO MENTION,  
19 DANA'S GRANDFATHER, AS SHE TESTIFIED, HAS BEEN DEAD FOR  
20 YEARS. AND MR. GUTIERREZ WOULD HAVE BEEN WITH DANA FOR AT  
21 LEAST A COUPLE OF YEARS AND WOULD HAVE KNOWN THAT OR  
22 SHOULD HAVE KNOWN THAT.

23 WHAT ELSE IS IMPORTANT? WELL, LET'S LOOK AT THAT, MAUDE  
24 LEE CUBLEY AT THE TOP. REMEMBER HE SAID HE KNEW CLARENCE  
25 CUBLEY? DANA TOLD YOU HE KNEW CLARENCE CUBLEY. AND AS HE

1 WAS LIVING THERE TWO YEARS, HE REMEMBERS MAUDE CUBLEY.  
2 THAT'S NOT A STRANGE NAME TO HIM. THAT'S NOT SOMEONE HE DOES  
3 NOT KNOW.

4 BUT EVEN IF HE SAID, WELL, GRANDFATHER GAVE HER THE  
5 CHECKS, HOW DO YOU GET PAST MAUDE LEE CUBLEY? AND HER  
6 ADDRESS RIGHT UNDERNEATH THE NAME, 1809 21 BY PASS, FORT MILL,  
7 SOUTH CAROLINA. HE WOULD KNOW SHE HAD THE SAME ADDRESS  
8 BECAUSE HE LIVED THERE THOSE TWO YEARS. AND THE ONLY  
9 PERSON WHO LIVES THERE NOW IS POP.

10 SO, ONCE AGAIN, THIS IS SOMETHING THAT OBVIOUSLY POINTS  
11 OUT HE KNEW HE WAS COMMITTING A FORGERY. AND HE KNEW IT  
12 MORE THAN JUST THAT. HE KNEW IT BECAUSE HE WROTE THE CHECKS  
13 HIMSELF.

14 LOOK AT THE DATE ON ALL THE CHECKS. EVEN IF I GO TO THE  
15 NEXT CHECK, THE DATE, DECEMBER 28, 2002. WHAT IS THE  
16 SIGNIFICANCE OF THAT DATE? WELL, IT'S THE DATE JUST BEFORE HE  
17 BROKE IN AND ASSAULTED CLARENCE CUBLEY, ULTIMATELY  
18 RESULTING IN CLARENCE CUBLEY'S DEATH. THAT'S SIGNIFICANT. ALL  
19 THE CHECKS ARE JUST THAT DATE. JUST THAT DATE. JUST THE DAY  
20 BEFORE.

21 AND ONCE AGAIN, WHERE DID THEY CASH THESE CHECKS? NOT  
22 AT JUST ONE BANK. THEY WENT TO SEVERAL. THEY WENT TO THE  
23 FIRST BANK IN FORT MILL AND THE BANK IN FORT MILL PAID \$500.  
24 THEN THEY WENT TO SECOND BANK ON HERLONG HERE IN ROCK HILL.  
25 NOW, REMEMBER, THEIR TRAILER IS ON TWIN LAKES ROAD RIGHT

1           HERE IN ROCK HILL. WHY SHOULD THEY GO ALL THE WAY TO FORT  
2           MILL TO CASH THAT CHECK? AND THEY DIDN'T.

3                   THEY CAME ALL THE WAY TO ROCK HILL AND THEY GO TO  
4           THAT BRANCH TO CASH THE CHECK. AND THEY GET A LITTLE MORE.  
5           THIS CHECK IS FOR \$600. NOW, IT'S WORKING, THEY CAN GET A LITTLE  
6           MORE MONEY. SO, THEY GOT \$600.

7                   AND THEN, AS DANA TESTIFIED, AFTER THEY CASHED THESE  
8           FIRST TWO, THEY GO TO A THIRD BANK THAT WAS CLOSED THAT DAY.  
9           THIS SECOND CHECK WAS CASHED AT 4:50 AND WE KNOW BANKS  
10          CLOSE AT 5:00 SHARP. SO, THEY DIDN'T MAKE IT TO THE OTHER PART  
11          OF TOWN FAST ENOUGH TO CASH IT AT THE OTHER BRANCH.

12                   SO, WHAT DID THEY DO? THEY CAME BACK TO THE NEXT  
13          MORNING, THE NEXT MORNING, BECAUSE THESE ARE CASHED ON THE  
14          30TH. ON THE 31ST THEY COME BACK. AND OF COURSE, THIS CHECK IS  
15          A LITTLE BLEACHED OUT, BUT YOU CAN SEE \$775. THEY'RE A LITTLE  
16          MORE EXCITED ABOUT IT AND THEY'RE GETTING A LITTLE MORE  
17          MONEY, A LITTLE MORE GREEDY.

18                   BUT WHAT THEY DIDN'T COUNT ON IS THAT THE TELLER AT THIS  
19          BANK WOULD KNOW A LITTLE BIT MORE ABOUT MR. CUBLEY, ABOUT  
20          CLARENCE CUBLEY. THIS WAS ACTUALLY THE BRANCH THAT THEY  
21          NORMALLY WENT TO. AND SO, A RED FLAG CAME UP.

22                   NOW, THE DEFENSE SAID TO YOU HE DIDN'T INTENTIONALLY  
23          RUN. BUT HOW DID HE DO IT? BUT HE LEFT THE CHECK AND HE LEFT  
24          HIS ID'S. YOU DON'T DO THAT. ESPECIALLY WHEN YOU'RE ANOTHER

1 COUNTRY. YOU DON'T LEAVE YOUR FORMS OF ID SITTING AT THE  
2 COUNTER. YOU DON'T DO THAT.

3 AND IF YOU DON'T HAVE ANY REASON TO SUSPECT A CHECK IS  
4 A FORGERY, YOU DEFINITELY DON'T LEAVE THAT BANK WITHOUT THE  
5 CHECKS, WITHOUT THE ID. WHY DID THEY FILL OUT THREE OF THE  
6 CHECKS? WHO GIVES THEM BLANK CHECKS AND WHO SAYS JUST GO  
7 AND DO WHATEVER YOU WANT? THAT DOESN'T HAPPEN.

8 LET'S LOOK AT THESE IDENTIFICATIONS. THEY'RE FORGERIES.  
9 EVEN THE TWO FORMS OF IDENTIFICATION THAT HE LEFT AT THE  
10 BANK OF AMERICA IN ROCK HILL. AS YOU CAN SEE, THOSE ARE THE  
11 NUMBERS RIGHT HERE THAT WERE ON THE TWO CHECKS. THEY WERE  
12 CASHED. AND THE ONE CHECK HE DIDN'T GET MONEY FOR, IT WAS  
13 STILL PRESENTED. ALL HE HAD TO WAS PRESENT THAT CHECK AND  
14 THAT COMPLETES THE FORGERY. HE NEVER ACTUALLY HAS TO GET  
15 THE MONEY FOR THE FORGERY TO BE COMPLETE.

16 I WANT YOU TO LOOK AT SOME OTHER THINGS ON THIS, THINGS  
17 THAT MAKE SENSE, JUST NUMBERS AND SYMBOLS. YOU NOTICE THAT  
18 ON BOTH OF THESE ID'S, THERE'S ACTUALLY NO ADDRESS? IT'S A  
19 LITTLE ODD TO HAVE AN ID THAT HAS NO ADDRESS, WHETHER IT'S A  
20 MEXICAN ADDRESS OR AN AMERICAN ADDRESS, OR ANY ADDRESS  
21 STATED.

22 IN ADDITION, YOU HEARD THE TESTIMONY FROM TODD  
23 GARDNER ABOUT THAT FINGERPRINT RIGHT THERE. HE SAID IT'S NOT  
24 AN ACTUAL FINGERPRINT-FINGERPRINT. IT'S MORE OF A FINGERTIP,

1 FROM SOMEONE MOVING IT AROUND. IT'S THREE OR FOUR LAYERS TO  
2 IT THAT OVERLAP. WHY IS THAT? SO YOU CAN'T MATCH IT TO HIM.

3 IS THIS AN OFFICIAL ID? I'M HERE TO TELL YOU THERE'S NO  
4 WAY THIS IS AN OFFICIAL ID BECAUSE IT HAS A PRINT THAT CAN'T BE  
5 READ ON AN OFFICIAL ID, ONE THAT OVERLAPS. THAT DOESN'T  
6 HAPPEN.

7 IN ADDITION TO THAT, DANA TOLD YOU, THIS SHIRT HE WORE,  
8 WITH THE WHITE STRIPES AND THE LITTLE ZIPPER COMING UP HERE,  
9 AND YOU'LL BE ABLE TO SEE IT CLOSER WHEN YOU LOOK AT THE  
10 ACTUAL ID. LET'S GO BACK AGAIN. DETECTIVE STRAIT SAID IN THEIR  
11 HOUSE WHERE THEY FOUND THE HAMMER HERE, HERE'S THAT SHIRT,  
12 AS HE TESTIFIED, INSIDE-OUT, WITH THE WHITE STRIPES INSIDE-OUT  
13 RIGHT HERE, AND THERE'S THE ZIPPER GOING UP RIGHT THERE. AND  
14 AS SHE TESTIFIED, SHE WATCHED HIM MAKE THAT FAKE ID AT ONE  
15 POINT IN THE HOUSE.

16 ONE OTHER THING I WANT TO POINT OUT, AND THIS IS AS  
17 DETECTIVE STRAIT POINTED OUT IS THE JACKET. I WON'T GO  
18 THROUGH ALL THE PICTURES AND THE VIDEOS OF THE BANK, BUT YOU  
19 CAN LOOK AT THEM AND YOU CAN SEE HIM WEARING A DARK JACKET.  
20 YOU CAN SEE THAT BLACK LINE WITHIN THAT JACKET. THAT'S FROM  
21 ALL THREE BRANCHES OF THE BANK. THERE IT IS, ONCE AGAIN, THE  
22 SHIRT THAT WE HEARD FROM THE TESTIMONY FROM DANA.

23 NOW, LET'S LOOK AT THE SECOND ID. THIS ONE DOES HAVE AN  
24 ADDRESS ON IT. BUT LET'S LOOK AT THIS PRINT RIGHT HERE. TODD  
25 GARDNER TESTIFIED THAT'S AN ACTUAL PRINT. BUT IT'S NOT THE

1 ACTUAL PRINT OF ISAIAS GUTIERREZ. ONCE AGAIN, WHAT DOES THAT  
2 TELL US? WELL, IT TELLS US THAT THIS IS A FAKE ID.

3 AND WHAT ELSE CAN WE LEARN ABOUT THAT? WELL, IF YOU  
4 REMEMBER, DECIDING TO GET UP IN THE MORNING ON THE 31ST OF  
5 DECEMBER, 2002, THAT'S WHEN THEY WENT TO THE BANK. MS. BURNS  
6 CAME IN YESTERDAY AND TESTIFIED HOW THEY BOUGHT A CAR FROM  
7 HER ON THE 31ST, THAT AFTERNOON. AND WHEN THEY BOUGHT A  
8 CAR THAT AFTERNOON, HE HAD AN ID, A MEXICAN ID. NOT THE ID  
9 THAT THIS MAN HAD. ONCE AGAIN, HE'S MAKING A FAKE ID TO DO  
10 THINGS JUST LIKE THIS. AND THAT'S THE FORGERIES. BECAUSE IF HE  
11 USES THAT FAKE ID, HOW ARE YOU REALLY GOING TO LINK THINGS  
12 BACK TO HIM. BUT HE CAN LEAVE THEM AND NOT WORRY BECAUSE  
13 HE'S GOT OTHERS, OR HAS THE ABILITY TO GET ONE.

14 THINK ABOUT WHAT SHE TESTIFIED ABOUT THE SELLING OF THE  
15 CAR, VERY INTERESTING THINGS. HE WOULDN'T GIVE AN ADDRESS.  
16 THAT WAS PRETTY ODD. ANYONE THAT'S EVER BEEN TO A  
17 DEALERSHIP OR BOUGHT A CAR FROM SOMEBODY HAS TO AT LEAST  
18 GIVE THEM THEIR ADDRESS TO GET THE PAPERWORK. AND SHE'S GOT  
19 THE PAPERWORK, BUT IT'S NOT FILLED OUT. AND HE CONTROLS THAT  
20 TRANSACTION. AND SHE SAID HE WAS THE ONE WHO CONTROLLED IT.  
21 HE WAS THE ONE WHO HAD THE MONEY. THAT TELLS YOU SOME  
22 MORE ABOUT ISAIAS GUTIERREZ.

23 NOW, A LOT HAS BEEN MADE ABOUT DANA AND HER  
24 STATEMENTS. THE DEFENSE TRIED TO LABEL HER AS A LIAR, AS A  
25 PATHOLOGICAL LIAR. LET'S LOOK BECAUSE THE LAW IS WHEN

1           SOMEONE TESTIFIES UNDER OATH, THAT'S DIRECT EVIDENCE. THAT'S  
2           ACTUALLY DIRECTLY STATING WHAT HAPPENED. AND WHEN A CO-  
3           DEFENDANT TESTIFIES, THERE NEEDS TO BE NO CORROBORATION AS  
4           TO WHAT THEY SAID IN ORDER TO CONVICT THE OTHER CO-  
5           DEFENDANT.

6           HOWEVER, IN THIS CASE, THERE IS A TON OF CORROBORATION.  
7           WE'LL GO THROUGH SOME OF IT. THERE'S A LOT MORE. AND I'LL LET  
8           YOU LOOK AT ALL THE ONES WE HAVE. BUT LET'S LOOK AT SOME OF  
9           THEM NOW. THE DATE OF THE CRIME, DECEMBER 29, 2002, THAT'S  
10          WHAT DANA SAID, AND THAT'S WHAT WE'VE ALREADY TALKED  
11          ABOUT PROVES IT HAD TO BE THAT NIGHT.

12          AN OLD MAN HE KNEW WITH A SAFE AND A GUN. WELL, WHAT  
13          DO WE KNOW FROM THE PHOTOGRAPHS? WELL, HE HAD A SAFE.  
14          OBVIOUSLY, THAT WAS STOLEN. AND HE HAD A GUN. I BELIEVE MR.  
15          MARCUS WHITENER TESTIFIED THAT HE KEPT THAT SAFE AS A  
16          NIGHTSTAND IN HIS ROOM. IT WAS A SMALL ROOM AND THERE'S  
17          ONLY NIGHTSTAND. YOU CAN SEE IN THE PHOTOGRAPH WHERE THAT  
18          SAFE WOULD HAVE BEEN. AND RIGHT NEXT TO IT IS A LOADED  
19          SHOTGUN.

20          SO, THERE IS SOMETHING AGAIN THAT DANA SAID THAT IS  
21          CORROBORATED BY THE EVIDENCE THAT'S BEEN SHOWN AND BY THE  
22          DEFENDANT HIMSELF.

23          THE GLOVES AND THE MASK. WELL, CERTAINLY HE PUT THE  
24          MASK ON TO COVER HIMSELF. THE GLOVES CERTAINLY WOULD KEEP

1 HIS PRINTS FROM SHOWING UP ON THE PHONE WHERE THE CORD WAS  
2 CUT AND THINGS OF THAT NATURE.

3 SO, THINK ABOUT IT. IN THIS DAY AND AGE, WHO DOESN'T  
4 KNOW ABOUT FINGERPRINTS. OBVIOUSLY THE DEFENDANT DID  
5 BECAUSE HE DIDN'T LEAVE ANY. SO, WHY WOULD HE BE DUMB  
6 ENOUGH TO GO BREAK INTO SOMEONE'S PLACE AND NOT WEAR  
7 GLOVES. WHO REALLY IS DUMB ENOUGH NOW.

8 THE CEMENT BLOCK, SHE TOLD YOU ABOUT THAT. LOOK ON  
9 THE FLOOR THERE. THAT'S WHERE IT WAS LEFT AFTER THAT FIRST  
10 STRIKING BLOW THAT NOT ONLY CRUSHED THE SIDE, OR NOT ONLY  
11 BRUISED THE SIDE OF HIS FACE, BUT BROKE HIS JAW AND CAUSED  
12 BRAIN DAMAGE. AND AS HIS GRANDSON SAID IN THE HOSPITAL HE  
13 WAS UNRECOGNIZABLE HE WAS SWOLLEN SO MUCH.

14 MR. CUBLEY HAD BLOOD ALL OVER HIS FACE AND WAS STILL  
15 ALIVE WHEN THEY LEFT. THAT'S ABSOLUTELY CORRECT. YOU CAN  
16 TELL BY THE BLOOD ON THE FLOOR; BY THE FACT THAT THE EMS  
17 TESTIFIED THAT WHEN HE FOUND HIM HE HAD DRIED BLOOD ON HIS  
18 FACE. AND AS THE OFFICER TESTIFIED, WHEN MR. CULP WHEN IN, HE  
19 HAD BLOOD ON HIS FACE. HE WAS STILL ALIVE. HE WAS STILL  
20 BREATHING. AND UNFORTUNATELY, HE DIDN'T LIVE, BUT HE WAS  
21 STILL ALIVE.

22 THE TOOLS USED TO OPEN THE SAFE. YOU'VE HEARD THE  
23 TESTIMONY OF MAUREEN BOTTRELL WITH THE FBI, AND SHE TALKS  
24 ABOUT THE TOOLS. THERE CAN BE NO OTHER EXPLANATION OTHER  
25 THAN THEY WERE USED TO OPEN THE SAFE. THE SCREWDRIVER, THE

1 HAMMER, THE TIRE TOOL. SHE TOLD ABOUT THE TOOLS. AND ONCE  
2 AGAIN, THE EVIDENCE PROVED HER RIGHT.

3 THE CHECKS THAT WERE TAKEN. SHE TOLD ABOUT THE CHECKS  
4 WERE TAKEN. AND WE KNOW THEY WERE FORGING THE CHECKS. THE  
5 WALLET WAS TAKEN. DO YOU REMEMBER HER TESTIMONY ABOUT  
6 WHAT WAS IN THE WALLET, THE DISCOVER CARD, THE PHILLIPS 66  
7 CARD. AND WE KNOW SHE TRIED TO USE THE DISCOVER CARD. THE  
8 TITLE TO THE DODGE TRUCK, WE KNOW THAT WAS IN THERE, IN THE  
9 SAFE. AND ONCE AGAIN, HER STATEMENT WAS CORROBORATED BY  
10 WHAT SHE SAID.

11 THE LOCATION OF THE SAFE WHEN IT WAS FOUND. SHE'S THE  
12 ONE WHO TOLD WHERE HE SAID HE WENT. AND THAT'S EXACTLY  
13 WHERE THEY FOUND IT.

14 THE USE OF THE DISCOVER CARD ITSELF. NOW THINK ABOUT  
15 THAT. THERE WAS TESTIMONY ABOUT SHE WAS THE ONE WHO  
16 CALLED DISCOVER AND SHE WAS THE ONE WHO TRIED TO GET THE PIN  
17 NUMBER. THINK ABOUT THAT. BECAUSE OBVIOUSLY, YOU HAVE A  
18 YOUNG SPANISH MALE WHO SPEAKS ENGLISH, BUT WITHOUT A DOUBT  
19 WOULD HAVE SOME SORT OF SPANISH ACCENT WITH THAT.

20 IF HE HAD CALLED DISCOVER CARD AND SAID HIS NAME WAS  
21 CLARENCE CUBLEY OR MAUDE CUBLEY, THAT WOULD RAISE A RED  
22 FLAG SO QUICK. SO, WHAT DID HE DO? JUST LIKE DANA SAID, HE HAD  
23 HER CALL TO TRY AND SAY I'M THE SECONDARY CARD HOLDER. I'M  
24 MAUDE CUBLEY. BUT SHE DIDN'T KNOW THE NAME. SHE DIDN'T  
25 KNOW THE OTHER THINGS THAT CREDIT CARD COMPANIES USE TO

1           KEEP PEOPLE FROM USING OTHER PEOPLES' CREDIT CARD. SHE WAS  
2           NOT ABLE TO GIVE THAT INFORMATION. SHE HANGS UP WHEN SHE  
3           REALIZES IT'S NOT GONNA HAPPEN.

4           ALL THE FORGERY INFORMATION AND WE'VE GONE OVER THAT.  
5           THERE'S A TON OF FORGERY INFORMATION, FROM THE BANK  
6           BUILDING TO THE AMOUNT TO HOW THE CHECKS WERE FILLED OUT,  
7           THE ID'S BEING WRONG, LEAVING THE ITEMS BEHIND WITH THE  
8           CHECK. SHE WAS ABLE TO TELL YOU ALL OF THOSE THINGS BECAUSE  
9           SHE HAD FIRSHTHAND KNOWLEDGE OF IT, BEING WITH THE DEFENDANT  
10          WHEN IT HAPPENED. ONCE AGAIN, THAT IS ALL CORROBORATED BY  
11          THE EVIDENCE.

12          AND THE CAR PERSON. THE FACT THAT THEY ATTEMPTED TO  
13          BUY ONE CAR AND THEY DIDN'T. AND THEN ULTIMATELY THEY DID  
14          BUY ANOTHER CAR FROM ANOTHER PERSON. ONCE AGAIN  
15          CORROBORATED.

16          AND THE STATEMENTS THAT WERE READ BY THE OFFICER. YOU  
17          CAN RE-HEAR THAT AND PICK UP A TON OF OTHER THINGS TO  
18          CORROBORATE. IF DANA'S LYING, THERE ARE TWO ALTERNATIVES.  
19          ONE ALTERNATIVE IS SHE DID IT ALL BY HERSELF. NOW, LET'S LOOK  
20          AT THE LIKELIHOOD OF THAT.

21          DANA, THIS YOUNG WOMAN, BREAKS INTO CLARENCE CUBLEY'S  
22          TRAILER, USES THIS PARTICULAR CINDERBLOCK, BASHES HIM UP SIDE  
23          THE HEAD. AND NOT ONLY KNOCKS HIM DOWN, BUT INJURES HIM  
24          MORE. ONCE AGAIN, MALICE, JUST BEING MEAN. CUTS THE PHONE  
25          CORD. GOES THROUGHOUT THE TRAILER, ULTIMATELY TAKING THE

1 SAFE OUT, CARRYING IT HOME, BREAKING INTO IT HERSELF. MAYBE  
2 ISAIAS WAS WATCHING THE BABY DURING THIS TIME.

3 THE NATURE OF THIS CRIME IS NOT SOMETHING THAT A WOMAN  
4 CAN DO BY HERSELF. COMMON SENSE WILL TELL YOU THAT A  
5 WOMAN WOULD HAVE AT LEAST ANOTHER PERSON TO HELP. AND  
6 THAT LEADS TO THE SECOND ALTERNATIVE.

7 IF IT'S NOT BY HERSELF AND SHE DID IT WITH SOMEONE OTHER  
8 THAN ISAIAS GUTIERREZ, NOW HOW DOES THAT MAKE SENSE? WHAT  
9 ARE THE OTHER THINGS TO COME BACK TO. IF SHE DID THIS WITH  
10 SOMEONE OTHER THAN ISAIAS GUTIERREZ, HOW WAS THE FORGING OF  
11 THESE CHECKS DONE? THE FORGING OF THOSE CHECKS WAS DONE BY  
12 ISAIAS GUTIERREZ. THE CHECKS WERE IN SEQUENCE. THEY HAVE A  
13 WHOLE BOOK. IF SOMEONE ELSE WAS INVOLVED WHY DID THE  
14 CHECKS NEED TO BE FORGED. AND WHEN DANA TALKS HE  
15 DISAPPEARS? BECAUSE NO ONE ELSE WAS INVOLVED. THEY WERE  
16 THE ONLY TWO INVOLVED.

17 THAT'S WHY IT HAPPENED. ONCE AGAIN, THE DISCOVER CARD,  
18 WHO CALLED THE DISCOVER CARD? WELL, DANA DID. WHY?  
19 BECAUSE ISAIAS, A HISPANIC MALE, COULDN'T MAKE THAT CALL AND  
20 NOT SOUND SUSPICIOUS. AND WHERE DOES THE CALL COME FROM?  
21 THEIR HOME.

22 THE SAFE. THE SAFE OPENED IN THEIR HOUSE. IF SHE HAD  
23 SOMEONE ELSE HELPING HER WITH THIS, WITH BREAKING INTO THE  
24 SAFE THAT WAS IN THEIR HOUSE, AND ISAIAS GUTIERREZ DOESN'T  
25 KNOW THAT? HE'S NOT PART OF THAT. DO YOU THINK DANA HAD THE

1 ABILITY TO BREAK OPEN THAT SAFE? YOU'LL BE ABLE TO SEE IT  
2 YOURSELF. SHE CAN BREAK THIS OPEN? SHE CAN DO ALL OF THIS  
3 AND ISAIAS WOULD HAVE NO IDEA. THERE'S A SAFE IN HIS OWN  
4 HOUSE AND HE WOULD HAVE NO IDEA? IT'S NOT REASONABLE.

5 HERE'S WHAT'S REASONABLE. ALL OF THE EVIDENCE AND ALL  
6 OF THE EVIDENCE POINTS TO ISAIAS GUTIERREZ, THE DEFENDANT IN  
7 THIS CASE. ISAIAS GUTIERREZ SAYS SHE DID THIS BECAUSE SHE WAS  
8 MAD AT ME, AND THAT'S WHY SHE HAD THE SAFE. SHE DID THIS  
9 BECAUSE SHE WAS MAD AT ME.

10 I FIND IT INTERESTING THAT THE WOMAN HE'S LIVED WITH FOR  
11 AT LEAST A COUPLE OF YEARS, THAT HE'S HAD A BABY WITH. HE'S  
12 THE ONE WHO HAS THE CHILD. HE'S THE ONE THAT'S PAYING FOR  
13 THAT TRAILER AND PAYING FOR THE FOOD AND DOING OTHER  
14 THINGS. AND HE THINKS SHE MAD AT HIM AND SHE'S GOING TO SAY,  
15 OH, HE DID THE MURDER. IT DOESN'T MAKE ANY SENSE.

16 YOU'VE HEARD THE DEFENSE TALK ABOUT NO EVIDENCE THAT  
17 HIS CLIENT WAS THERE. ONE THING Y'ALL HAVE TO REMEMBER IS  
18 THAT WE HAVE TO USE COMMON SENSE. YOU USE COMMON SENSE IN  
19 EVERY PART OF THIS. THAT'S YOUR JOB AS JURORS. YOU'VE GOT TO  
20 LOOK AT EVERY SINGLE PIECE AND USE YOUR COMMON SENSE.  
21 COMMON SENSE WILL TELL YOU WHO WAS ARRESTED FOR THIS  
22 CRIME.

23 CAN WE PROVE THAT MARCUS WHITENER OR PAUL KING FROM  
24 THE FORT MILL RESCUE SQUAD WERE IN THAT HOUSE? THERE WAS  
25 TESTIMONY TO THAT. BUT DO WE KNOW THEY WERE IN THAT HOUSE?

1           THERE'S NO FORENSIC EVIDENCE AND NO DNA FOR THE DEFENDANT IN  
2           THAT HOUSE. WE CAN'T PROVE THERE WAS ANY DNA FROM THE  
3           DEFENDANT IN THAT HOUSE.

4           OR BETTER YET, THE RESCUE SQUAD. THERE'S THREE OF THEM.  
5           THEY'RE ALL GOING DOWN AND HELPING THIS MAN AND PUTTING HIM  
6           ON A BACKBOARD. THEY'RE WORKING ON HIM. THEY'RE DOING A LOT  
7           OF THINGS TO HIM AT THAT TIME, LOOKING DOWN HIS MOUTH,  
8           TRYING TO MAKE SURE THERE WAS NO OBSTRUCTION, BLOOD  
9           PRESSURE. IS THERE ANY EVIDENCE THEY WERE IN THAT HOUSE? NO.

10           AND I'M SAYING THIS BECAUSE I WANT YOU TO USE YOUR  
11           COMMON SENSE. JUST BECAUSE YOU WALK IN A ROOM MEANS YOU  
12           EXUDE DNA TO EVERY WALL AND CREVICE WITHIN THAT ROOM.  
13           THAT DOESN'T HAPPEN. AS A MATTER OF FACT, AS THEY WENT BACK  
14           AND PROCESSED THE HOUSE FOR PRINTS, THEY FOUND NO USEFUL  
15           PRINTS IN THE HOUSE AT ALL.

16           SO, HOW DO WE PROVE THAT CLARENCE CUBLEY LIVED IN THAT  
17           HOUSE? WELL, WE KNOW HE DID. SO, REMEMBER THAT. FORENSIC  
18           EVIDENCE ISN'T THE BE ALL AND END ALL OF EVERY CASE.

19           BUT ONE THING ABOUT FORENSIC EVIDENCE, IT IS VERY  
20           HELPFUL AT TIMES, BUT IT DOESN'T ABSOLUTELY TELL US WHO DID  
21           WHAT. FOR INSTANCE, THE TOOLS THAT WERE TESTED, ONE OF THE  
22           QUESTIONS WAS DID YOU TEST THEM FOR FINGERPRINTS BEFORE  
23           THEY WENT TO BE TESTED AT THE FBI LAB. AND WE FOUND OUT,  
24           THEY COULDN'T DO BOTH. YOU HAD TO CHOOSE ONE OR THE OTHER.

1 WELL, WHAT'S MORE IMPORTANT? WHETHER ISAIAS  
2 GUTTIERRIZ'S FINGERPRINTS MIGHT BE ON THIS HAMMER? WELL,  
3 WHAT WOULD THAT SHOW US IF HIS PRINTS WERE ON THIS HAMMER?  
4 THE HAMMER WAS IN HIS HOUSE; IT WAS HIS HAMMER. YOU WOULD  
5 EXPECT THAT HIS FINGERPRINTS WOULD BE FOUND ON THIS HAMMER.  
6 WHAT YOU DON'T EXPECT TO FIND ON THIS HAMMER WOULD BE  
7 ANYTHING OUT OF THE SAFE.

8 THE SCREWDRIVER. NOW, IF YOU LOOK AT THAT SCREWDRIVER,  
9 YOU WOULD EXPECT MAYBE TO FIND SOME SORT OF EVIDENCE THAT  
10 IT IS ISAIAS GUTIERREZ'S SCREWDRIVER BECAUSE IT'S IN HIS HOUSE.  
11 YOU WOULD EXPECT TO FIND SOMETHING ON IT. WHAT YOU  
12 WOULDN'T EXPECT TO FIND IS SOMETHING ON IT FROM THAT SAFE.

13 THE SAME THING WITH THE TIRE IRON. YOU WOULD EXPECT  
14 BECAUSE IT'S ADMITTED IT'S IN HOUSE. WHAT YOU DON'T EXPECT IS  
15 SOMETHING OFF THE SAFE ON IT.

16 THE IMPORTANT THING THERE IS THE FIBER, THE LINT FACTOR  
17 AS WELL. SO, REMEMBER THAT. WHAT DOES FIBER SHOW IF YOU FIND  
18 FIBER EVIDENCE. LET'S THINK ABOUT THAT FOR A MINUTE. IF YOU'RE  
19 LOOKING FOR FIBER FROM THIS PARTICULAR SUIT, WELL, IT  
20 PROBABLY DOESN'T SHED MUCH BECAUSE OF THE KIND OF MATERIAL  
21 IT IS. YOU CAN BE SURE OF THAT. IT PROBABLY DOESN'T SHED MUCH  
22 BECAUSE THAT'S THE WAY IT IS. NOT TO MENTION, WHEN THE  
23 MATERIAL IS MADE, IT'S MADE IN HUGE QUANTITIES AND IT'S SOLD TO  
24 VARIOUS DISTRIBUTORS.

1           SO, WHAT DOES IT TELL YOU IF YOU FIND A PIECE OF FIBER ON A  
2           PIECE OF CLOTHING? YOU'RE NOT GOING TO BE ABLE TO SAY THIS  
3           DEFINITELY IS FIBER OFF OF SO AND SO'S JACKET. ALL YOU'RE GOING  
4           TO SAY IS WELL, THIS COULD BE FIBER OFF THIS OTHER JACKET THAT  
5           THIS GUY BOUGHT FROM WAL-MART, OR BELK, OR DILLARD'S OR ANY  
6           PLACE YOU WANT TO GO. FIBER EVIDENCE DOESN'T NARROW THINGS  
7           DOWN TO THAT'S IT.

8           ONE OF THE WAYS THAT WE CAN PROVE THAT THIS HAPPENED,  
9           THOUGH, IS BY THE DIRECT TESTIMONY OF THE WITNESSES AND THE  
10          CORROBORATION THAT WOULD LATER PROVE OTHER THINGS,  
11          INCLUDING SOME OF THE FORENSIC EVIDENCE.

12          BUT, ONCE AGAIN, DIRECT TESTIMONY FROM THESE MEN,  
13          THEMSELVES, PROVES THEY WERE AT THAT TRAILER WITHOUT  
14          QUESTION. JUST BECAUSE WE DIDN'T FIND A FIBER FROM THEM OR A  
15          FINGERPRINT OR A SHOE PRINT--

16          AND ONCE AGAIN, LET'S LOOK AGAIN AT THE TRAILER; IT'S  
17          VERY DIRTY. AND AS MICHAEL WILLIAMS TESTIFIED, THAT CAUSES  
18          PROBLEMS FOR FORENSICS, A FORENSICS UNIT LOOKING FOR  
19          SOMETHING. IT'S HARD TO FIND SOMETHING WHEN YOU'RE LOOKING  
20          THROUGH DOG HAIRS AND YOU'RE LOOKING THROUGH OTHER  
21          THINGS. IT'S HARD TO FIND SOMETHING THAT YOU KNOW WOULD BE  
22          OF VALUE. IT'S THE PROVERBIAL NEEDLE IN A HAYSTACK. IT REALLY  
23          IS NEXT TO IMPOSSIBLE TO FIND SOMETHING IN SCENES LIKE THAT.

24          BUT THE STATE HAS PROVED DIRECT EVIDENCE AND FORENSIC  
25          EVIDENCE TO SHOW THAT ISAIAS GUTIERREZ KILLED CLARENCE

1 CUBLEY. AND LET'S TALK ABOUT THAT, BECAUSE THE PROOF OF THE  
2 FORGERIES, THE ATTEMPT TO USE THE DISCOVER CARD AND THE SAFE  
3 CONNECTIONS ARE OVERWHELMING IN THIS CASE.

4 AND TWO OF THOSE THINGS, THE FORGERIES AND THE SAFE ARE  
5 FORENSIC CONNECTIONS TO THE DEFENDANT BACK TO THIS TRAILER,  
6 CLARENCE CUBLEY'S TRAILER.

7 THE FORGERIES THEMSELVES, WHAT'S FORENSIC ABOUT THOSE?  
8 THOSE HAVE FINGERPRINTS ON THEM. THAT'S FORENSIC EVIDENCE.  
9 HE'S THE ONE WHO FORGED THOSE CHECKS. WHERE DID THOSE  
10 CHECKS COME FROM? THIS RESIDENCE. AND WHEN WERE THEY  
11 CASHED? THE 30TH, THE FIRST CHECK CASHED ON THE 30TH. WHEN  
12 DID IT HAPPEN? THE 29TH, IT HAPPENED THE 29TH. WHEN IS THE 30TH?  
13 IT'S ON A MONDAY, THE FIRST DAY THE BANK IS OPEN.

14 WHAT DOES THAT TELL YOU TIME-WISE? THAT PUTS HIM BACK  
15 AS THE PERSON WHO STOLE THE CHECKS. THAT'S A FORENSIC LINK  
16 BACK TO HIM, BACK TO THAT RESIDENCE.

17 AND THE SAFE, LET'S LOOK AT THE SAFE FOR A MINUTE.  
18 MAUREEN BOTTRELL FROM THE FBI SAID SOMETHING TO EFFECT OF  
19 THIS INSULATION IS PARTICULAR TO SAFES. THERE IS NO OTHER  
20 INSULATION LIKE IT. THE INSULATION IN YOUR HOUSE, AROUND  
21 YOUR PIPES, AROUND YOUR WATER HEATER, ANY OTHER INSULATION  
22 IS NOT LIKE SAFE INSULATION. IT IS MADE SPECIFICALLY FOR SAFES  
23 AND IT VARIES BY MANUFACTURER TO MANUFACTURER AND FROM  
24 SAFE DESIGN TO SAFE DESIGN. BUT WE KNOW SAFE INSULATION IS  
25 PARTICULAR. THAT IS FORENSIC EVIDENCE.

1           NOW, WE LOOK INTO THIS RESIDENCE, AND AS YOU LOOK ON  
2           THE FLOOR, YOU SEE THOSE LITTLE WHITE BITS. AND REALLY, THIS IS  
3           ANOTHER DIRTY RESIDENCE. SO, COMING INTO THIS RESIDENCE, YOU  
4           MIGHT NOT LOOK AT THIS FLOOR AND SAY, OOH, THAT COMES FROM A  
5           SAFE. YOU'RE JUST THINKING IT'S DIRTY.

6           YOU CAN LOOK TO THE BANK DOOR. YOU CAN LOOK TO THE  
7           CHUNKS THAT THEY FOUND OUT BACK. BUT THIS LOOKS LIKE LITTLE  
8           CHUNKS OF ROCKS. BUT THEY ARE COLLECTED BECAUSE THEY KNOW  
9           AT THE TIME THEY GO TO THIS HOUSE THEY'VE JUST PICKED THE SAFE  
10          UP OUT OF THE CREEK.

11          AND WE GO BACK TO THE SAFE. WHAT WAS SHE ABLE TO TELL  
12          US ABOUT THE SAFE? WELL, A LOT. SHE'S ABLE TO TELL US THAT  
13          THOSE LITTLE PARTICLES ON THE CARPET THAT WAS VACUUMED UP  
14          BY THE FORENSIC SQUAD; THOSE PIECES FOUND ON THE BACK STEPS,  
15          THOSE CHUNKS; THOSE ARE WITHOUT A DOUBT IDENTICAL IN EVERY  
16          WAY. IT'S WHAT THE INSULATION IS ON THE INSIDE OF THIS SAFE  
17          THAT YOU WILL BE ABLE TO SEE WHEN YOU HAVE THE SAFE BACK  
18          THERE. IT'S IDENTICAL TO THE CEMENT NAMED PORTLAND CEMENT.  
19          IT'S IDENTICAL TO THE FOAM DISTRIBUTION IN THE WAY IT'S BLOWN  
20          IN. AND SHE FOUND NOTHING INCONSISTENT WITH THAT.

21          SO, WE KNOW THIS SAFE WAS IN THAT HOUSE AND IT WAS  
22          OPENED IN THAT HOUSE; IT WAS BROKEN INTO IN THAT HOUSE. AND  
23          THE LINING OR THE INSULATION WAS KNOCKED OUT IN THAT HOUSE.

24          NOW, WITH THE TOOLS, SHE TALKED ABOUT THE SMALL  
25          AMOUNTS. AND YOU CAN SEE ON THE TIPS, YOU CAN STILL SEE OF

1 THE WHITE POWDER ON THE TIP OF THE TOOLS. ON THE TIRE TOOL  
2 ITSELF YOU'LL BE ABLE TO SEE LITTLE PIECES OF WHITE STUFF ON THE  
3 TIRE TOOL WHERE SHE TESTED. BUT SHE SAID THESE ARE SO SMALL  
4 THEY DON'T HAVE THE FOAM CHUNKS. ALL THESE ARE IS BASICALLY  
5 DUST FROM THE CEMENT.

6 BUT, SHE'S ABLE TO TELL YOU THIS COLOR IS EXACTLY THE  
7 SAME. SHE'S ABLE TO TELL YOU THAT THE CEMENT IS THE SAME, THE  
8 PORTLAND CEMENT. AND WHAT DOES SHE SAY ABOUT PORTLAND  
9 CEMENT? YOU CAN FIND IT, YOU GENERALLY FIND IT IN OTHER  
10 THINGS. BUT WHEN YOU FIND IT IN OTHER THINGS THERE ARE OTHER  
11 CHEMICALS ADDED, AND NONE OF THOSE CHEMICALS ARE PRESENT  
12 WITH IT AT THIS POINT. BUT THIS IS COMPLETELY CONSISTENT WITH  
13 BEING THE TOOLS THAT WERE USED TO OPEN THIS SAFE.

14 AND MR. CHIARENZA-- YOU WILL HAVE THE WRITTEN REPORT  
15 FROM THE FBI WHERE THEY TRIED TO MAKE THE TOOL COMPARISON.  
16 HE DOESN'T SAY THESE ARE NOT THE TOOLS THEY USED. HE SAYS  
17 THAT THIS FRONT PART OF THE SAFE, AND THIS PART OF THE SAFE IS  
18 EITHER SO DAMAGED OR CORRODED THAT YOU CANNOT TELL, OR  
19 FORENSIC COMPARISONS CANNOT BE MADE WITH THESE TYPES OF  
20 TOOLS.

21 BUT YOU'VE GOT TO THINK, WHAT ARE YOU GOING TO LOOK  
22 FOR IF YOU ARE GOING TO LOOK FOR COMPARISONS ON TOOLS AND  
23 MARKINGS ON THEM? YOU WOULD ACTUALLY HAVE TO LOOK AT  
24 THIS. THIS IS A LITTLE BENT UP FOR A TIRE TOOL. YOU KNOW,  
25 GENERALLY, TIRE TOOLS, YOU'RE GOING TO HOOK IT ONTO A LUG NUT

1           LIKE THIS, AND PULL IT AND TOOL IT AROUND. THE OTHER USE FOR IT  
2           IS THIS END, YOU STICK IT IN THE JACK AND YOU TURN THE JACK AND  
3           MAKE THE JACK COME UP. THAT DOESN'T MAKE SENSE EITHER. TO  
4           BEND THIS, YOU HAVE TO APPLY A LOT OF PRESSURE, THE TYPE OF  
5           PRESSURE YOU WOULD NEED TO DO SOMETHING LIKE THIS WITH THE  
6           SAFE.

7           NOW, THE REPORT ALSO MENTIONED THAT THERE'S THE  
8           POSSIBILITY THAT IT APPEARS THERE MAY HAVE BEEN SOME TYPE OF  
9           SNIPPING TOOL THAT CUT ABOUT ONE-INCH PIECES ON THE BOTTOM  
10          OF THE SAFE; THIS BEING THE BOTTOM. THAT MIGHT HAVE BEEN  
11          USED TO CUT AROUND HERE.

12          FOR ALL WE KNOW, IT COULD BE AN ELECTRIC TOOL. IT COULD  
13          BE A TOOL THAT YOU USE BY HAND. MANY OF YOU MAY HAVE USED  
14          A TYPE OF SHARP TOOL THAT YOU USE TO CUT OR BEND STEEL  
15          SHEETS. AND IT'S KIND OF HARD TO CUT THEM. AND YOU CUT THEM  
16          LITTLE BITS AT A TIME. AND YOU PULL IT BACK AS YOU'RE TRYING TO  
17          DO IT, AND KEEP CUTTING AROUND.

18          JUST BECAUSE THAT TOOL IS NOT AROUND DOESN'T MEAN THAT  
19          THIS DIDN'T HAPPEN, OR HE WASN'T THE ONE THAT DID IT. JUST  
20          REMEMBER, HE'S GETTING RID OF THE EVIDENCE IN THIS PARTICULAR  
21          CASE. HE GOT RID OF THE GLOVES. HE GOT RID OF THE SHOES. HE  
22          TRIED TO GET RID OF THE SAFE. HE GOT RID OF MOST OF THE ITEMS IN  
23          THE SAFE. OF COURSE, THE CHECKBOOK HAS NOW DISAPPEARED AND  
24          WE KNOW HE HAD IT. THE DISCOVER CARD, THE PHILLIPS 66 CARD,  
25          THOSE THINGS ARE GONE. BECAUSE WE CAN'T FIND THEM, DOES THAT

1 MEAN IT DIDN'T HAPPEN? NO. I SUBMIT TO YOU THAT THIS IS A MAN  
2 WHO COULD WORK, DO PHYSICAL LABOR IN CONSTRUCTION IN  
3 ROOFING. HE HAD ACCESS TO TOOLS.

4 IF YOU LOOK THROUGH HIS HOUSE, THERE'S AN INDUSTRIAL  
5 MOP BUCKET IN THERE. THAT WASN'T SOMETHING HE BOUGHT ON  
6 HIS OWN. NOT MANY PEOPLE BUY INDUSTRIAL MOP BUCKETS FOR  
7 THE HOME. HE HAS ACCESS TO SOME OF THESE THINGS.

8 NOW, WE GO BACK TO CLARENCE CUBLEY. AND BASICALLY  
9 WHAT ISAIAS GUTIERREZ HAS DONE IS TAKEN THIS MAN'S LIFE FROM  
10 HIM. A WORLD WAR II VETERAN, A TRUCK DRIVER THAT RAN A  
11 TRAILER PARK, WHO LIVED THERE WITH MAUDE FOR A PERIOD OF  
12 TIME BEFORE SHE PASSED AWAY THAT SAME MONTH THAT THIS  
13 HAPPEN.

14 BUT THE DEFENDANT HAS TAKEN THIS MAN. AND THE ONLY  
15 THING YOU CAN KNOW IS WHAT THE PATHOLOGIST TESTIFIED TO AND  
16 LOOK AT THE DIAGRAM WHERE HE POINTS OUT THE SEVERE BLUNT  
17 TRAUMA IMPACT ON HIS FACE. AND UNFORTUNATELY, THAT WAS  
18 HOW CLARENCE CUBLEY ENDED HIS LIFE.

19 ISAIAS GUTIERREZ, ON THE OTHER HAND, HE RAN. HE RAN. ON  
20 THE SECOND OF JANUARY OF 2003, HE BASICALLY DISAPPEARED OFF  
21 THE FACE OF THE EARTH. DANA DID NOT RUN. DANA STAYED. SHE  
22 STAYED AND SHE TOOK CARE OF HER DAUGHTER. SHE ALSO HAS  
23 TOLD THE BASIC TRUTH.

24 LET'S TALK ABOUT THAT A LITTLE BIT, WHY WOULD DANA TELL  
25 THE POLICE THE STORIES. DANA TOLD THE TRUTH AND PUT HERSELF

1 IN JAIL. AND FACING THE POTENTIAL YEARS SHE FACED ON THESE  
2 KINDS OF CHARGES, SHE ALSO WENT ON THE ARMED ROBBERY, SO  
3 THAT ALL SHE HAS TO SERVE IS TEN YEARS, AND THAT'S WHY SHE DID  
4 THIS.

5 REMEMBER WHEN THE STATEMENTS WERE WRITTEN? THE  
6 STATEMENTS WERE WRITTEN ON THE 3RD OF JANUARY AND ON THE  
7 5TH OF JANUARY, 2003. BEFORE THE PROSECUTORS GOT INVOLVED  
8 BEFORE IT CAME BEFORE THE COURT, AND BEFORE ANY DEAL WAS  
9 STRUCK, BEFORE ANYTHING ELSE COULD BE MADE. SHE GAVE THOSE  
10 STATEMENTS AND THEY WEREN'T GIVEN IN PREPARATION OF, OH, THIS  
11 IS GOING TO HELP KEEP ME OUT OF JAIL.

12 AS A MATTER OF FACT, WHEN SHE GAVE THE STATEMENT ON  
13 THE 3RD, THEY PUT HER IN JAIL. SHE WAS STILL IN JAIL ON THE 6TH  
14 WHEN SHE GAVE HER NEXT STATEMENT, WHICH KEPT HER IN JAIL  
15 WITH EVEN MORE CHARGES THAN BEFORE.

16 IT'S HUMAN NATURE THAT WHEN YOU'RE QUESTIONED ABOUT  
17 SOMETHING, TO NOT ADMIT THAT IT COULD BE YOUR FAULT, OR TO AT  
18 LEAST MITIGATE YOUR FAULT. THAT HAPPENS. THAT HAPPENS. THAT  
19 HAPPENS WITH JUST ABOUT EVERYONE.

20 YOU CAN GO BACK TO ANY EXPERIENCE YOU'VE SEEN SOMEONE  
21 HAVE WITH A CHILD. YOU HEAR THAT LOUD CRASH UPSTAIRS, GLASS  
22 BREAKING. AND YOU YELL UP, BOBBY, WHAT ARE YOU DOING?  
23 NOTHING. WELL, YOU KNOW THAT'S NOT TRUE. AND SO, YOU GO UP  
24 STAIRS AND YOU SEE THE CABINET IS BROKEN, AND THERE'S A BALL  
25 IN IT, BOBBY'S BALL, AND THAT'S THE REASON THE CABINET IS

1           BROKEN. BOBBY, WHAT ARE YOU DOING? UH, JOHNNY WAS  
2           THROWING THE BALL. OF COURSE, HE WAS THROWING THE BALL AT  
3           BOBBY. JOHNNY WAS THROWING THE BALL. WELL, WHO WAS HE  
4           THROWING THE BALL TO. AND YOU MIGHT GET ME, OR YOU MIGHT  
5           HAVE JOHNNY, AND JOHNNY SAYS, I WAS THROWING IT TO HIM.

6           SO, WHEN THEY TALK TO DANA, SHE TELLS THEM ISAIAS WAS  
7           INVOLVED IN IT. EVEN AT THE FIRST STATEMENT YOU FELT HE WAS  
8           INVOLVED IN THAT. SHE HELPS THEM A LITTLE MORE AT THE SECOND  
9           STATEMENT AND TELLS THEM A LITTLE MORE THEY CAN ADD TO IT.  
10          BUT SHE DOESN'T TRY TO HOLD HERSELF OUT. SHE TALKED ABOUT  
11          THE FORGERIES AND SHE TALKED ABOUT THE DISCOVER CARD. IN  
12          THE FINAL STATEMENT SHE SAYS I WAS THERE AND I TOOK PART.

13          AND WHEN THEY FIRST TALK TO ISAIAS GUTIERREZ, WHAT DOES  
14          HE SAY? DANA MUST BE MAD AT ME. ONCE AGAIN, THAT FIRST  
15          REACTION OF A NORMAL HUMAN BEING, IT WASN'T ME, SHE DID IT.  
16          BECAUSE THAT'S THE ONLY OTHER REASONABLE EXPLANATION.  
17          SHE'S NOT INVOLVED. HIS FIRST STATEMENT, SHE DID IT HERSELF.  
18          AND THAT'S NOT REASONABLE AT ALL.

19          HE TOLD THE POLICE IT WAS FOR A DOMESTIC VIOLENCE  
20          WARRANT, TO GET AWAY FROM THEM, THAT'S WHY HE RAN. THAT'S  
21          WHY HE RAN. WELL, YOU HEARD TESTIMONY FROM THE DEFENSE  
22          THAT THEY ELICITED YESTERDAY THAT THEY BELIEVE IT WAS  
23          ACTUALLY BECAUSE OF COMMITMENTS FOR A DUI SECOND AND A NO  
24          DRIVER'S LICENSE CHARGE. THAT'S WHY HE WAS RUNNING. AND

1           THAT'S ALREADY DIFFERENT FROM WHAT HE HAD TOLD THE POLICE  
2           BACK THEN.

3           NOW, THESE COMMITMENTS WERE ISSUED IN AUGUST OF 2002,  
4           AS WAS ELICITED FROM THAT OFFICER YESTERDAY. HE DIDN'T RUN  
5           UNTIL JANUARY 2 OF 2003. THERE'S SOMETHING A LITTLE FISHY  
6           ABOUT THAT. THAT'S BECAUSE THAT'S AFTER HE REALIZES HE'S  
7           GONNA GET CAUGHT BECAUSE OF THE CLARENCE CUBLEY INCIDENT.

8           HE COULD HAVE SIMPLY TAKEN A FINE AND AVOID JAIL TIME.  
9           AND THE DEFENSE ASKED, WELL, HE WOULDN'T NECESSARILY KNOW  
10          THAT. WELL, ONCE AGAIN, IT'S COMMON SENSE. YOU KNOW THAT  
11          WITH COMMON SENSE, SOMEONE WHO'S FACING THE CHARGES IS  
12          GONNA KNOW BASICALLY WHAT THEY'RE GONNA GET.

13          IN ADDITION TO THAT, ONE OF THE CHARGES WAS DUI SECOND,  
14          WHICH MEANS HE HAD A DUI FIRST. SO, HE'S WELL AWARE THAT  
15          WHEN THERE'S A SENTENCE FOR A DUI FIRST, IT'S PAY A FINE OR GET  
16          TIME. SO, HE UNDERSTOOD HOW IT WORKED. HE COULD HAVE JUST  
17          PAID THIS FINE AND HE WOULDN'T HAVE TO SERVE ANY TIME. SO,  
18          THAT'S WHY HE RAN.

19          BETWEEN RUNNING AWAY ON JANUARY 2, 2003, AND BEING  
20          CAPTURED IN NOVEMBER OF 2006, ISAIAS GUTIERREZ RAN MANY  
21          PLACES. IT WAS JUST ABOUT FOUR YEARS. SO, BASICALLY, THE  
22          ENTIRE 2003, 2004, 2005, AND ALMOST THE ENTIRE YEAR OF 2006. SO,  
23          ALMOST FOUR YEARS THAT HE HAD DISAPPEARED. HE RAN TO  
24          CHARLOTTE. HE SAID THAT'S THE FIRST PLACE HE WENT, TOOK A TAXI  
25          TO CHARLOTTE TO CATCH A BUS. AND THEN HE RAN TO KENTUCKY.

1 AND THEN HE RAN TO FLORIDA. NOW, THIS BECOMES INTERESTING,  
2 BECAUSE DOES HE STAY CLOSE BY IN THIS STATE AT ALL? NO.  
3 KENTUCKY, FLORIDA. AND HE RUNS TO TEXAS. TEXAS IS PRETTY FAR  
4 AWAY. AND HE RUNS TO KANSAS. AND THEN HE RUNS TO MISSOURI  
5 BECAUSE HE WAS FOLLOWING THE WORK. HE'S A ROOFER AND HE  
6 WAS FOLLOWING THE WORK.

7 ONCE AGAIN, USE YOUR COMMON SENSE. THINK OF FROM 2002  
8 UNTIL NOW HERE IN YORK COUNTY, IN CHARLOTTE MECKLENBURG, IN  
9 GASTONIA, AND ALL THE SURROUNDING COUNTIES. HAS THERE BEEN  
10 A BUILDING BOOM HERE? WHY, YES, THERE HAS. AND WHAT'S  
11 REQUIRED IN A BUILDING BOOM? SOMEONE WHO CAN MAKE A ROOF.  
12 SOMEONE WHO HAS SKILLS TO WORK.

13 HE ALREADY HAD A JOB HERE. WHY JUST SUDDENLY LEAVE IT?  
14 WHY DOES HE HAVE TO TAKE OFF AND IN FOUR YEARS GO TO ALL  
15 THESE DIFFERENT PLACES FOR FOUR YEARS TO FOLLOW ROOFING  
16 WORK?

17 LADIES AND GENTLEMEN, HE'S ON THE RUN. AND HE KNOWS  
18 WHY HE'S ON THE RUN. HE RAN FROM THE PLACE WHERE HIS FAMILY  
19 LIVES. NOW, I'M NOT TALKING ABOUT DANA AND THE BABY. I'M  
20 TALKING ABOUT OTHER FAMILY MEMBERS. YOU HEARD TESTIMONY  
21 ABOUT A BROTHER WHO IS HERE, AND OTHER THINGS LIKE THAT, AND  
22 LAW ENFORCEMENT GOING TO THE BROTHER'S. DO YOU KNOW  
23 WHERE HE IS; NO, I DON'T KNOW WHERE HE IS. HE HAD OTHER FAMILY  
24 MEMBERS HERE. AND JUST ONE DAY HE DISAPPEARS.

1 HE RAN FROM HIS HOME WITH DANA. REMEMBER, HE'S THE  
2 SOLE SUPPORT FOR DANA AND THAT BABY AT THIS POINT. AND HE  
3 JUST DISAPPEARS. HE RAN FROM HIS EIGHT-MONTH OLD DAUGHTER,  
4 NEVER TO SEE HER AGAIN. AT THIS POINT IN TIME, SHE'S A LITTLE  
5 OVER FIVE. HE HASN'T SEEN HER SINCE SHE WAS EIGHT MONTHS OLD.  
6 HE RAN FROM THAT, AS WELL.

7 HE RAN WITHOUT HIS PERSONAL BELONGINGS. HE LEFT THOSE  
8 IN THE TRAILER. HE DIDN'T PACK A BAG. HE DIDN'T GRAB HIS STUFF.  
9 HE DIDN'T EVEN GET THE MEDICINE THAT HE HAD TO GET FOR HIS  
10 HEARTBURN. HE JUST UP AND LEFT. AND AS DANA TESTIFIED, SHE  
11 WENT OUT LOOKING FOR HIM THAT DAY FROM PLACE TO PLACE.

12 AND WHERE DID THE POLICE FIND DANA? DRIVING AROUND,  
13 JUST LIKE SHE SAID SHE WAS. DRIVING AROUND LOOKING FOR HIM.  
14 SHE WAS SURPRISED THAT HE WAS GONE. SHE TOOK HIM TO WORK  
15 AND HE DISAPPEARED FROM THERE.

16 HE EVEN MENTIONS IN HIS STATEMENT THAT HE KNEW THAT  
17 THREE TIMES LAW ENFORCEMENT HAD COME LOOKING FOR HIM AND  
18 THAT'S WHY HE RAN. YEAH, HE KNEW LAW ENFORCEMENT WAS  
19 LOOKING FOR HIM. JUST LIKE EDDIE STRAIT SAID, THEY HAD GONE  
20 OUT AND STARTED CANVASSING THE NEIGHBORHOOD, ASKING  
21 SPECIFICALLY ABOUT HIM AND WHERE HE WAS. YOU DON'T THINK  
22 THAT GOT BACK TO HIM? HE RAN FROM FORGERY. HE RAN FROM  
23 ARMED ROBBERY. AND HE RAN FROM MURDER. HE RAN BECAUSE OF  
24 WHAT HE HAD DONE.

1           NOW, IN HIS STATEMENT, HE SAYS TO LAW ENFORCEMENT THAT  
2 I DIDN'T EVEN KNOW THAT MR. CUBLEY HAD DIED. LET'S THINK  
3 ABOUT THAT FOR A MOMENT. LET'S THINK ABOUT THAT PARTICULAR  
4 PHRASE THAT HE USES. BECAUSE WHAT HE DIDN'T SAY WAS I DIDN'T  
5 KNOW THAT MR. CUBLEY HAD EVEN BEEN ASSAULTED. THINK ABOUT  
6 THAT. BECAUSE HE KNEW THAT MR. CUBLEY HAD BEEN ASSAULTED  
7 AND HE RAN OFF. HE ACTUALLY RAN OFF BEFORE MR. CUBLEY DIED.

8           HE STILL ATTEMPTS TO RUN TODAY. AS WE GO THROUGH ALL  
9 OF THIS AND WE GO THROUGH THE TRIAL AND PUT UP ALL THE  
10 EVIDENCE, THAT'S WHAT THE DEFENDANT STILL DOES NOW. HE'S  
11 STILL TRYING TO RUN. HE'D LIKE FOR US TO OPEN UP THE BACK DOOR  
12 OF THIS COURTROOM AND LET HIM RUN RIGHT OUT. BUT HE CAN'T  
13 ESCAPE THE RESPONSIBILITY THAT HE NOW HAS TO FACE. HE WANTS  
14 TO RUN FROM JUSTICE, AS HE'S BEEN DOING FOR THE LAST FOUR  
15 YEARS OR SO BEFORE HE WAS CAPTURED IN MISSOURI. HE'S RUNNING  
16 FROM JUSTICE. HE'S RUNNING FROM WHAT HE HAS DONE.

17           YOU DON'T HAVE TO LIKE DANA BLACKMON. YOU SHOULDN'T  
18 LIKE DANA BLACKMON. SHE HAD A HAND IN THE KILLING OF  
19 CLARENCE CUBLEY. BUT ONE THING YOU CAN SAY FOR DANA  
20 BLACKMON IS SHE DID ULTIMATELY TELL HOW SHE WAS INVOLVED.  
21 AND SHE HAS BEEN IN JAIL SINCE JANUARY 3, 2003. SHE CONTINUES TO  
22 BE IN JAIL UNTIL SHE FINISHES HER TEN YEARS WITH NO PAROLE.

23           WHERE WAS THE DEFENDANT, ISAIAS GUTIERREZ, DURING ALL  
24 THIS? HE'S RUNNING. HE'S RUNNING. NOW, TODAY, HE HAS TO FACE  
25 JUSTICE. AND NOW, THAT'S WHAT THE COURT ASKS OF YOU.

1           YOU'VE LISTENED ATTENTIVELY AND YOU'VE SEEN MANY  
2           THINGS COME IN. WE ASK THAT YOU USE YOUR COMMON SENSE AND  
3           LOOK AT EVERYTHING. THE TESTIMONY, THE CORROBORATION, THE  
4           FORENSIC EVIDENCE THAT DIRECTLY LINKS CLARENCE CUBLEY'S  
5           TRAILER TO THE SAFE, TO THE FORGERIES. YOU CANNOT DISCOUNT  
6           THOSE. NOTHING ELSE IS NEEDED. NOTHING ELSE IS NOT ONLY NOT  
7           NECESSARY, BUT THAT SCREAMS HIS GUILT. THAT EVIDENCE  
8           SCREAMS HIS GUILT. IT TELLS YOU BEYOND A REASONABLE DOUBT  
9           THAT HE IS GUILTY OF THESE CRIMES.

10           I TOUCHED JUST A LITTLE BIT ON REASONABLE DOUBT. WHEN  
11           YOU GO BACK THERE TO DELIBERATE, AND YOU'RE ARGUING OVER  
12           CERTAIN POINTS, THAT DOESN'T MEAN THERE'S A DOUBT. YOUR JOB IS  
13           TO IRON THOSE THINGS OUT, TO FIGURE OUT THOSE FACTS FROM  
14           WHAT YOU'VE HEARD AND WHAT YOU'VE SEEN THROUGH THE  
15           TESTIMONY AND THE EVIDENCE.

16           AND ONCE AGAIN, I'LL POINT OUT SOMETHING ELSE ABOUT  
17           REASONABLE DOUBT. THERE'S THIS STORY ABOUT A MAN IN AN  
18           OFFICE WHERE THEY WORK IN LITTLE CUBICLES. THERE'S ANOTHER  
19           GUY SITTING IN THE CUBICLE SITTING ACROSS FROM HIM. THEY COME  
20           IN THE MORNING AND THEY'RE TALKING, AND ONE OF THE GUYS SAYS  
21           I GOT A LOT OF STUFF TO DO, IT'S GOING TO BE A REALLY BUSY DAY.  
22           AT LUNCHTIME THE OTHER GUY SAYS WANT TO GO TO LUNCH AND  
23           THE REALLY BUSY GUY SAYS, NO, I'M GOING TO STAY HERE AND  
24           WORK. I'LL JUST EAT AT MY DESK. SO, THE GUY WHO ASKED HIM TO  
25           GO TO LUNCH WALKS OUT OF THAT BUILDING. WHEN HE WALKS OUT,

1 THE GUY WHO STAYED IN THE BUILDING HEARS SOME LOUD, KIND OF  
2 BOOMING NOISES, BUT HE DOESN'T THINK ANYTHING OF IT. ABOUT  
3 TWENTY OR THIRTY MINUTES LATER HIS OFFICE MATE COMES BACK  
4 AND WHEN HE COMES BACK, HE'S CARRYING A PAPER BAG AND IT'S  
5 GOT WATER DROPLETS ON IT. IN ADDITION, HE'S WEARING AN ALL  
6 WEATHER COAT THAT'S GOT WATER ON IT. HE'S GOT AN UMBRELLA IN  
7 HIS HAND AND IT'S WET. HE'S KIND OF SHAKING IT OUT. HIS SHOES  
8 AND HIS PANTS HAVE WATER DROPLETS ON THEM. HE'S KIND OF  
9 SHAKING IT OFF AS HE COMES IN.

10 SO, WHAT CAN YOU KNOW BEYOND A REASONABLE DOUBT  
11 WHAT'S HAPPENING OUTSIDE WHEN HE COMES IN LIKE THAT? WELL,  
12 YOU KNOW IT'S RAINING OUTSIDE. BECAUSE YOU HAVE EVIDENCE  
13 THAT LEADS YOU TO BELIEVE THAT'S WHAT HAPPENED WITHOUT A  
14 DOUBT. THERE COULD BE ANOTHER EXPLANATION FOR HOW IT  
15 HAPPENED. HE COULD HAVE STOOD UNDER A SPRINKLER OUTSIDE.  
16 HE COULD HAVE GONE INTO THE BATHROOM AND SPLASHED WATER  
17 ON HIMSELF. HE COULD HAVE GONE THROUGH A NUMBER OF STEPS  
18 TO GO OUTSIDE WITH A HOSE AND SPLASH WATER ON HIMSELF. BUT,  
19 ARE ANY OF THOSE REASONABLE?

20 SO, IF YOU HAVE REASONABLE DOUBT, THINK OF IT THAT WAY.  
21 BECAUSE THIS CASE, EVERY PIECE OF THIS EVIDENCE LEADS BACK TO  
22 THIS MAN, ISAIAS GUTIERREZ, BEING AT THAT RESIDENCE AND  
23 COMMITTING THAT CRIME THAT NIGHT.

24 AS MS. COLLINS SAID IN HER OPENING, IT'S LIKE CONNECTING  
25 THE DOTS. SOMETIMES IT'S NO HARDER THAN THAT. AND THAT'S

1           WHAT THIS CASE IS, IS CONNECTING THE DOTS. EACH LITTLE THING  
2           WE FOUND FROM THE FORGERIES, BRINGING HIM BACK, SHOWING HIM  
3           HE HAD TO BE IN CLARENCE CUBLEY'S RESIDENCE. THE SAFE,  
4           SHOWING BRINGING HIM BACK SHOWING HE HAD TO BE IN CLARENCE  
5           CUBLEY'S RESIDENCE. THE CREDIT CARD HE TOOK, THE STUFF OUT OF  
6           HIS HOUSE AND THE TOOLS HE USED. ALL THESE THINGS BRING YOU  
7           BACK TO HIM BEING AT CLARENCE CUBLEY'S TRAILER AND  
8           MURDERING CLARENCE CUBLEY.

9                        SO, WHAT I ASK TODAY AND WHAT THE STATE ASKS OF YOU  
10           TODAY IS THAT YOU GIVE A TRUE VERDICT. THE WORD, VERDICT, IN  
11           LATIN MEANS TO TELL THE TRUTH. AND THAT'S WHAT WE'RE ASKING  
12           OF YOU TODAY, TO RENDER A VERDICT THAT SPEAKS THE TRUTH.  
13           AND THE TRUTH IS ISAIAS GUTIERREZ KILLED CLARENCE CUBLEY,  
14           ROBBED HIM, STOLE THE SAFE, COMMITTED THAT BURGLARY, DID  
15           THOSE FORGERIES, AND THEN HE RAN.

16                       DON'T LET HIM KEEP RUNNING. THIS IS WHERE HE HAS TO STOP.  
17           WE ASK THAT YOU FIND HIM GUILTY. THANK YOU.

18                       MR. CHIARENZA: MAY IT PLEASE THE COURT.

19                       THE COURT: MR. CHIARENZA.

20                       MR. CHIARENZA: WHAT WE HAVE HERE IS A CASE OF QUANTITY  
21           VERSUS QUALITY. THIS IS THE QUANTITY AND IT IS OF VERY LITTLE  
22           QUALITY. FOR THREE DAYS YOU'VE HEARD THE STATE PUT ON  
23           EVIDENCE THAT SUPPOSEDLY PROVES BEYOND ANY REASONABLE  
24           DOUBT THAT MY CLIENT IS GUILTY OF THE CHARGES, THE CRIMES FOR  
25           WHICH HE'S CHARGED.

1           SO, THIS IS GOING TO TAKE A WHILE AND I APOLOGIZE FOR  
2           THAT IN ADVANCE. THIS MAN IS ON TRIAL FOR MURDER. I'M GOING  
3           TO GO THROUGH ALL THIS EVIDENCE. BECAUSE I'M GOING TO POINT  
4           OUT WHAT IT DOES, WHAT I SUBMIT TO YOU, WHAT I BELIEVE IT DOES  
5           AND DOES NOT SHOW ABOUT MR. GUTIERREZ'S GUILT.

6           FIRST, I'D LIKE TO GO THROUGH THE WITNESSES. AND I'M NOT  
7           GOING TO TAKE THREE DAYS TO GO THROUGH ALL THE WITNESS THAT  
8           IT TOOK THREE DAYS TO GO THROUGH. I'M GOING TO QUICKLY  
9           REVIEW WHAT THESE WITNESSES TOLD US. WE'RE GOING TO SEE  
10          WHAT EACH ONE OF THESE WITNESSES IS ABLE TO TELL US ABOUT MR.  
11          GUTIERREZ'S GUILT.

12          NOW, I WOULD SUBMIT TO YOU IN ADVANCE THAT THE  
13          EVIDENCE WOULD APPEAR TO SHOW MR. CUBLEY WAS ROBBED AND  
14          ASSAULTED BY SOMEONE. AND THE EVIDENCE WOULD APPEAR TO  
15          SHOW THAT THIS SAFE WAS BROKEN INTO AND DISCARDED BY  
16          SOMEONE. AND I'M NOT GOING TO INSULT YOUR INTELLIGENCE. THE  
17          EVIDENCE CLEARLY SHOWS THAT MY CLIENT PRESENTED THREE  
18          CHECKS AT THE BANK OF AMERICA. I THINK I MORE OR LESS  
19          CONSENTED TO THAT IN MY OPENING.

20          BUT THE EVIDENCE DOESN'T SHOW THAT HE GOT THOSE CHECKS  
21          FROM MR. CUBLEY. ONLY ONE PERSON TELLS YOU THAT, AND THAT'S  
22          DANA. AND WE'RE GONNA TALK AN AWFUL LOT ABOUT DANA.

23          SO, WHILE MR. THOMPSON WOULD HAVE YOU BELIEVE THAT  
24          SIMPLY HAVING THESE CHECKS PUT HIM IN THE TRAILER, YOU KNOW  
25          BETTER THAN THAT. THE CLERK OF COURT HAS HAD THOSE CHECKS

1 FOR THE LAST THREE DAYS. SHE WAS NEVER IN THE TRAILER. OKAY?  
2 YOU'RE GOING TO HAVE THOSE CHECKS THIS AFTERNOON. YOU WERE  
3 NEVER IN THE TRAILER. YOU DIDN'T HAVE TO GO TO THE TRAILER  
4 AND GET THE CHECKS.

5 I SUBMIT TO YOU THAT DANA PROVIDED THOSE CHECKS TO MR.  
6 GUTIERREZ. AND WHAT MR. GUTIERREZ MAY OR MAY NOT HAVE  
7 KNOWN ABOUT THE NATURE OF THOSE CHECKS AND WHERE THEY  
8 CAME FROM IS FOR YOU TO DECIDE. AND IF YOU FIND THAT HE KNEW  
9 OR SHOULD HAVE KNOWN THERE WAS SOME ISSUE WITH THESE  
10 CHECKS AND THAT HE WENT AND PRESENTED THEM ANYWAY, THEN  
11 IT'S YOUR DUTY TO FIND HIM GUILTY OF FORGERY.

12 BUT IF YOU FIND IT'S WITHIN THE REALM OF POSSIBILITY,  
13 REASONABLE POSSIBILITY, THAT THE LYING DANA BLACKMON, WHO  
14 TOLD HER DAD SHE GOT THE MONEY FOR THE CAR BECAUSE SHE WON  
15 THE POWERBALL; IF YOU FIND IT'S POSSIBLE THAT DANA BLACKMON  
16 COULD HAVE TOLD MY CLIENT I GOT THOSE CHECKS FROM MY  
17 GRANDFATHER; MY CLIENT CAN'T READ OR WRITE ENGLISH, AND  
18 HAVE HIM CASH THE CHECKS, THEN HE'S NOT EVEN GUILTY OF  
19 FORGERY. BECAUSE YOU HAVE TO HAVE A KNOWING INTENT TO  
20 COMMIT THAT FRAUD.

21 YOU'RE GOING TO GET TO LOOK AT THOSE CHECKS AND YOU  
22 CAN DECIDE FOR YOURSELF WHETHER OR NOT THE ENDORSEMENT--  
23 WE ALL KNOW HOW A CHECK WORKS. IF I WRITE YOU A CHECK FOR  
24 DOING A JOB FOR ME, THE HANDWRITING ON THE FRONT'S GONNA BE  
25 MINE. YOUR NAME ON THE FRONT IS GONNA BE MY HANDWRITING.

1 AND WHEN YOU GO TO PRESENT IT, YOU'VE GOT TO SIGN THE BACK  
2 AND PROVIDE SOME FORM OF IDENTIFICATION THAT MATCHES UP  
3 WITH YOUR SIGNATURE ON THE BACK.

4 SO, NECESSARILY, THAT FACT WHERE YOUR NAME IS ON THE  
5 BACK WHERE YOU SIGNED IT IS GONNA LOOK DIFFERENT FROM YOUR  
6 NAME ON THE FRONT FROM WHERE I PUT IT THERE.

7 SO, I SUBMIT TO YOU, IN THIS CASE, YOU'VE GOT TO COMPARE  
8 THE FRONT AND THE BACK, AND YOU WILL SEE THE FRONT AND THE  
9 BACK ARE DIFFERENT. I SUBMIT TO YOU THAT'S BECAUSE DANA WAS  
10 RUNNING THE SHOW WITH THE CHECKS.

11 JUST WHILE I'M ON THE SUBJECT OF CHECKS-- AND I MIGHT GO  
12 AROUND AND I MIGHT HIT THE SAME THING TWO OR THREE TIMES,  
13 AND I APOLOGIZE. BUT WHILE I'M ON THE SUBJECT OF THESE CHECKS,  
14 WHO WOULD ROB A MAN, TAKE HIS CHECKS, AND THEN GO TO THE  
15 BANK AND CASH THOSE CHECKS IN YOUR OWN NAME, PROVIDING  
16 YOUR OWN IDENTIFICATION AND YOUR OWN THUMBPRINT?

17 THE GUY WHO SUPPOSEDLY WHO GOT CONTROL OVER HER,  
18 WHO CAN GET HER TO DO ANYTHING, ACCORDING TO HER; THE GUY  
19 WHO FORCED HER TO COME DRIVE AND ROB AND BEAT THIS MAN,  
20 BROUGHT HER ALONG IN THIS CRIMINAL ENDEAVOR, SOMEHOW HE  
21 COULDN'T GET HER TO CASH THE CHECKS, TOO?

22 I ASKED HER ABOUT THAT. WHY WAS HE SO INSISTENT ON  
23 CASHING THOSE CHECKS? SHE DIDN'T HAVE AN EXPLANATION FOR  
24 THAT BECAUSE THAT DIDN'T HAPPEN. OKAY? THE WAY SHE WANTS  
25 YOU TO BELIEVE IT HAPPENED. HE WASN'T INSISTENT ON CASHING

1 THE CHECKS. HE DIDN'T KNOW ANY BETTER. SHE GAVE HIM THE  
2 CHECKS TO CASH. AND LIKE A DUMMY, HE WALKS IN THERE AND  
3 CASHES, ATTEMPTS TO CASH, CASHES TWO AND ATTEMPTS TO CASH A  
4 THIRD CHECK, THAT HAVE BEEN STOLEN FROM THE SCENE OF AN  
5 ARMED ROBBERY AND AN ASSAULT.

6 PRETTY DUMB FOR A GUY THAT CAN SOMEHOW FIGURE OUT TO  
7 DISPOSE OF EVIDENCE AND HOW TO RUN FROM THE LAW AND HOW TO  
8 COME UP CONVENIENTLY THAT THE REASON HE WAS RUNNING WAS  
9 BECAUSE HE HAD THESE WARRANTS OUT FOR HIM, WHEN HE  
10 ACTUALLY DID. I MEAN, HE DIDN'T CRAFT ALL THIS IN ADVANCE.  
11 THIS WAS THE REALITY OF THE SITUATION. AND I'LL GET BACK TO  
12 THAT. BUT LET'S JUST GO THROUGH THESE WITNESSES.

13 ANITA CULP, A FRIEND OF MR. CUBLEY'S, TESTIFIED THAT SHE  
14 WAS FAMILIAR WITH HIM. I BELIEVE SHE TESTIFIED TO THE CALL  
15 THAT SHE GOT. BUT DID SHE REALLY TELL YOU ANYTHING ABOUT MY  
16 CLIENT? NO. IN FACT, SHE TESTIFIED SHE DIDN'T KNOW MY CLIENT  
17 AND DIDN'T EVEN KNOW IF MY CLIENT HAD ANYTHING TO DO WITH  
18 THIS CASE. SO, ESSENTIALLY, AS FAR AS HER GOING TO PROVE ANY  
19 GUILT OF MY CLIENT, SHE DOESN'T.

20 NOW, IF YOU FIND THE EVIDENCE TO BE OTHERWISE, THEN IT'S  
21 NOT FOR ME TO INVADE YOUR PROVINCE. BUT I SUBMIT TO YOU,  
22 ANITA CULP DIDN'T PROVE ANYTHING ABOUT MY CLIENT  
23 COMMITTING ANY CRIME.

24 MR. WHITENER, MR. CUBLEY'S RELATIVE, HAD VISITED HIM  
25 THAT AFTERNOON, SPENT SOME TIME WITH HIM THAT AFTERNOON.

1 DOES MR. WHITENER ESTABLISH THE LAST TIME THAT SOMEONE SAW  
2 MR. CUBLEY ALIVE? PROBABLY SO. DOES HE ESTABLISH WHO MAY  
3 HAVE COME INTO THAT TRAILER AFTERWARDS AND DONE ANYTHING  
4 AND TAKEN ANYTHING FROM MR. CUBLEY? NO, HE DOESN'T.

5 SO, AGAIN, I DON'T THINK THAT THERE'S A LACK OF EVIDENCE  
6 PROVING THAT SOME CRIMES WERE COMMITTED. WHAT I'M ASKING  
7 YOU IS TO REALLY INVESTIGATE AND LOOK AND SEE IF THERE'S ANY  
8 EVIDENCE MR. GUTIERREZ COMMITTED THESE CRIMES.

9 SO, I SUBMIT TO YOU THAT MR. WHITENER HAS NO EVIDENCE.  
10 AND IT MAY NOT EVEN-- HE WAS THREE DAYS AGO. HE WAS THE  
11 YOUNG MAN WHO TESTIFIED. HE HAS NO EVIDENCE, DOESN'T KNOW  
12 MY CLIENT, DID NOT SEE HIM LURKING ABOUT THE TRAILER THAT  
13 AFTERNOON, CASING THE JOINT.

14 DEPUTY STONEBURNER, FIRST TO ARRIVE ON THE SCENE,  
15 SECURED THINGS, GOT THERE WHEN THE EMS WAS THERE. NO  
16 INFORMATION REGARDING MY CLIENT. COLLECTED NO EVIDENCE  
17 REGARDING MY CLIENT. DOESN'T HAVE ANYTHING TO TELL YOU  
18 ABOUT MY CLIENT BEING THE PERPETRATOR OF THIS CRIME.

19 PAUL KING FROM THE FORT MILL RESCUE SQUAD. AGAIN, HE  
20 CAME IN. HE TOOK CARE OF MR. CUBLEY, BUT HAS NO EVIDENCE  
21 THAT PROVES THAT MY CLIENT MAY HAVE DONE ANYTHING TO MR.  
22 CUBLEY ON THAT DAY.

23 NOW, WE GET TO THE FIRST GUY WHO'S KIND OF INTERESTING,  
24 THE BANK INVESTIGATOR, MR. ZINKANN. I SUPPOSE IT WAS  
25 NECESSARY TO PUT MR. ZINKANN ON THE STAND TO TESTIFY TO

1           THESE CHECKS AND BANK PROTOCOL AND HOW ALL THOSE SORT OF  
2           THINGS WORK. BUT MR. ZINKANN, WITH THIRTY-FIVE YEARS OF LAW  
3           ENFORCEMENT EXPERIENCE, CAME IN AND TOLD YOU, MY CLIENT RAN  
4           OUT OF THE BANK.

5           YOU'RE ALLOWED TO REPLAY ANY OF THE TESTIMONY YOU  
6           HEARD IN THIS TRIAL. IT'S ALL BEEN RECORDED. SO, IF YOU DON'T  
7           REMEMBER IT THE WAY I DID, YOU COME BACK AND ASK TO REPLAY  
8           IT. MR. ZINKANN'S TESTIMONY WAS THAT MY CLIENT RAN OUT OF  
9           THE BANK.

10          THEN WHEN MR. ZINKANN GOT THE BENEFIT OF SEEING THE  
11          VIDEOTAPE WHERE CLEARLY MY CLIENT'S ASKED TO STEP BACK AND  
12          HE DOES. AND HE STANDS THERE. I THINK FOR A SOLID TWO  
13          MINUTES, HE'S STANDING IN THE LOBBY, BUT IT MAY BE MORE THAN  
14          THAT. AND THEN HE WALKS OUT.

15          THERE'S NO CAMERA ON THE OUTSIDE OF THE BANK, OR IF  
16          THERE IS, IT WASN'T A PART OF THIS CASE. THE PHOTOGRAPHIC  
17          EVIDENCE WOULD CERTAINLY CONTRADICT ANY TESTIMONY THAT  
18          MY CLIENT RAN OUT OF THE BANK. WELL, TO HIS CREDIT, HE WAS AT  
19          LEAST ABLE TO ADMIT THAT AFTER WE SAW THE VIDEO.

20          THEN HE TRIED TO TELL YOU THAT RUNNING WAS SOME SORT  
21          OF BANK TERMINOLOGY. I MEAN, HE TRIED SAVING HIMSELF, BUT IT  
22          WASN'T-- HE COULDN'T JUST SAY, WELL, I WAS WRONG, OR YEAH,  
23          MAYBE I WAS TRYING TO MAKE THIS SOMETHING IT WASN'T. WHAT  
24          HE SAID WAS, WELL, RUNNING IS ACTUALLY A BANK TERM THAT WE  
25          USE FOR WALKING, OR FOR LEAVING, OR SOMETHING LIKE THAT.

1           BUT WHEN I ASKED HIM THE COMMON, EVERYDAY USAGE OF  
2           THE TERM, RUNNING, WAS MY CLIENT RUNNING; NO, HE WASN'T  
3           RUNNING. SO, I SUBMIT TO YOU THERE WAS NO GREAT URGENCY ON  
4           THE PART OF MR. GUTIERREZ TO LEAVE THE BANK.

5           WELL, WHAT DO WE KNOW ABOUT THE PEOPLE WAITING  
6           OUTSIDE? WE KNOW HIS BABY WAS OUTSIDE. WE KNOW HIS BROTHER  
7           WAS OUTSIDE. WE KNOW MS. BLACKMON WAS OUTSIDE. USE YOUR  
8           COMMON SENSE. IS IT POSSIBLE MAYBE HE WENT OUTSIDE AND SAID  
9           THERE'S SOME KIND OF HOLD UP, THERE'S A DELAY? AND AGAIN, I  
10          WON'T INVADE YOUR PROVINCE. IF YOU THINK YOU KNOW  
11          SOMETHING ABOUT THE FORGERY, THEN, CERTAINLY, MAYBE HE DID  
12          GO OUTSIDE AND SAY, WE BETTER GET OUT OF HERE. THAT'S FOR YOU  
13          TO DECIDE. I DON'T KNOW WHAT THE EVIDENCE SHOWS YOU IN THAT  
14          REGARD.

15          BUT WHETHER HE'S GUILTY OF THE FORGERY, WHETHER HE  
16          WENT IN THERE KNOWING THAT SOMETHING WASN'T RIGHT WITH  
17          THESE CHECKS OR NOT, THEN I SUBMIT TO YOU, THAT'S A TOUGH  
18          CALL. THAT DOESN'T PROVE THAT HE'S GUILTY OF MURDER.

19          I SUBMIT TO YOU THAT WHEN HE GOT OUT THERE, AND THE  
20          REASON HE LEFT HIS IDENTIFICATION, WHICH THE TESTIMONY FROM  
21          THE TELLER, I BELIEVE WAS THOSE ITEMS WERE TAKEN INTO A BACK  
22          ROOM SOMEWHERE. SO, HE COULDN'T EVEN ASK FOR THEM  
23          ACCORDING TO THAT. HE WENT OUTSIDE. I SUBMIT TO YOU, DANA'S  
24          THE ONE WRITING THE CHECKS. MY GUY COMES OUT AND SAYS

1           THERE'S SOME KIND OF DELAY. AND IT WAS DANA WHO IS BEHIND,  
2           LET'S GET THE HECK OUT OF HERE NOW.

3                   AND IS THAT NOT POSSIBLE? I MEAN, DID WE NOT HEAR ANY  
4           TESTIMONY ABOUT DANA TAKING CHARGE? THINK BACK TO THE  
5           FIRST GUY THEY TRIED TO BUY A CAR FROM. NOW, THEY WERE  
6           GONNA LEAVE THE MONEY THERE. AND, AGAIN, THIS TESTIMONY'S  
7           RECORD. THEY WERE GONNA LEAVE THE MONEY THERE. AND THAT  
8           INDIVIDUAL, I HAVE HIS NAME. BUT THE GUY THAT TESTIFIED ABOUT  
9           THE FIRST CAR THEY WERE GONNA BUY SAID SHE HAD THE MONEY.  
10          AND WHEN THEY DIDN'T HAVE ENOUGH, SHE SAID WE'RE NOT  
11          LEAVING THE MONEY HERE. WE'LL GO BACK TO THE BANK AND GET  
12          SOME MORE. WE'LL GO BACK TO THE BANK AND GET SOME MORE.

13                   SO, WHO'S RUNNING THE SHOW WHEN IT COMES TO CASHING  
14          THESE CHECKS ALL OVER TOWN? DANA IS. MY GUY'S NOT DRIVING  
15          THE CAR AND HE DOESN'T HAVE THE CHECKS AND HE DOESN'T HAVE  
16          THE MONEY AND HE DIDN'T FILL OUT THE CHECKS. AND DANA, WHO  
17          AS THE SOLICITOR TOLD YOU, IT'S HUMAN NATURE TO WANT TO  
18          ISOLATE YOURSELF FROM CRIMES THAT YOU HAVE COMMITTED, AND  
19          CREATE A BUFFER, STAND BACK AND NOT ADMIT THINGS; YOU KNOW,  
20          MINIMIZE YOUR INVOLVEMENT.

21                   WELL, IF YOU STOLE A CHECKBOOK FROM SOMEBODY AND YOU  
22          WANT TO CASH THAT CHECK, WHAT'S THE BEST WAY TO MINIMIZE  
23          YOUR INVOLVEMENT? GET SOMEBODY ELSE TO DO IT FOR YOU. SO,  
24          THAT'S WHAT HAPPENED WITH THE CHECKS.

1           NOW, YOU'VE GOT TO MAKE A DECISION AS TO WHETHER OR  
2 NOT MY CLIENT KNEW OR SHOULD HAVE KNOWN THAT MAYBE, YOU  
3 KNOW, THESE CHECKS DIDN'T COME FROM HER GRANDFATHER. YOU  
4 CAN'T MAKE THE LEAP FROM HE'S GOT CHECKS, SO HE COMMITTED  
5 THE MURDER.

6           TODD GARDNER TESTIFIED. HE WAS THE FIRST GUY TO COME IN  
7 AND TALK ABOUT FINGERPRINTS. HE WORKS WITH THE FORENSIC  
8 SERVICES UNIT. HE TESTIFIED THAT HIS INVOLVEMENT IN THIS CASE  
9 WAS LIMITED TO PHOTOGRAPHING THE CRIME SCENE, I BELIEVE, AND  
10 MATCHING UP SOME THINGS.

11 AND WE LISTENED TO TODD GARDNER TESTIFY FOR ABOUT FORTY-FIVE  
12 MINUTES THAT THE FINGERPRINT THAT MY CLIENT INKED AT THE  
13 COUNTER OF THE BANK AND PUT ON THE CHECK TO CASH IT WAS IN  
14 FACT HIS FINGERPRINT. I'M WONDERING IF ANY OF YOU ARE  
15 THINKING, WHY ARE WE LISTENING TO THIS.

16           THERE'S VIDEOTAPE OF MY CLIENT CASHING THE CHECKS. HE  
17 ADMITTED IN HIS STATEMENT TO POLICE THAT HE CASHED THE  
18 CHECKS. THERE'S NEVER BEEN ANY QUESTION THAT HE WAS IN THE  
19 BANK CASHING THESE CHECKS. BUT WE HAD TO HEAR FOR FORTY-  
20 FIVE MINUTES ABOUT FINGERPRINTS AND MATCHING UP ALL THE  
21 DETAILS AND DOING THIS AND DOING THAT.

22           AND I SUBMIT TO YOU THAT THAT IS PART OF THE QUANTITY  
23 VERSUS QUALITY ASPECT OF THE STATE'S EVIDENCE IN THIS CASE.  
24 BECAUSE WHEN WE'RE DONE WITH ALL OF THAT TESTIMONY, WHAT  
25 DOES IT TELL YOU? IT TELLS YOU WHAT YOU ALREADY KNOW, THAT

1 MR. GUTIERREZ'S THUMBPRINT IS ON THAT CHECK, WHERE HE PUT IT  
2 WHEN HE WENT TO CASH THE CHECK, WHICH IS THE POLICY OF THE  
3 BANK OF AMERICA IF YOU DON'T HAVE A BANK ACCOUNT THERE.

4 OFFICER GARDNER ALSO TOLD YOU THAT ONE OF THE THINGS  
5 THEY CAN DO IN THE FORENSIC SERVICES UNIT IS COLLECT DNA  
6 EVIDENCE. AND MR. THOMPSON'S RIGHT. IF YOU JUST SIMPLY WALK  
7 THROUGH A ROOM, THE LIKELIHOOD IS NOT THAT YOU'RE GOING TO  
8 LEAVE DNA IN EVERY NOOK AND CRANNY IN THAT ROOM.

9 BUT IF YOU'RE AT A CRIME SCENE FOR HALF AN HOUR  
10 INVOLVED IN A BEATING AND A STRUGGLE WITH A VICTIM, AND  
11 YOU'RE RIFLING THROUGH HIS PROPERTY, AND YOU'RE CUTTING  
12 PHONE CORDS, AND YOU'RE PICKING UP BRICKS AND YOU'RE DOING  
13 THIS AND YOU'RE DOING THAT, AND YOU'RE OPENING DOORS, AND  
14 YOU'RE CARRYING OUT OBJECTS, AND YOU'RE THERE FOR HALF AN  
15 HOUR, WELL, THEN, MAYBE THERE'S A LITTLE BIT MORE OF A  
16 POSSIBILITY THAT YOU DO LEAVE SOME SORT OF EVIDENCE OF YOUR  
17 PRESENCE IN THAT LOCATION.

18 AND IF YOU'RE WEARING GLOVES, THEN YOU LEAVE SOME  
19 SWEAT ON THE INSIDE OF THE GLOVE? OR A LITTLE OF SKIN? OR A  
20 LITTLE BIT OF HAIR? IT DOESN'T TAKE MUCH. I MEAN, THE SOLICITOR  
21 SEEMS TO WANT TO HAVE IT BOTH WAYS, THAT, WELL, YOU CAN'T  
22 LEAVE ANY DNA HERE AND IF YOU LEFT SOME FIBERS, I THINK THEY  
23 MAKE THOUSANDS OF JACKETS LIKE THIS. SO, WHAT WOULD THAT  
24 PROVE. WHAT IF I'M NOT LOOKING FOR FINGERPRINTS ON A  
25 HAMMER? YOU CAN'T HAVE IT BOTH WAYS.

1 FORENSIC EVIDENCE IS IMPORTANT AND IT CAN BE USED TO  
2 PROVE THINGS. WE'LL TALK ABOUT THE FORENSIC EVIDENCE THEY  
3 HAVE AND THE FORENSIC EVIDENCE THAT THEY DON'T HAVE. BUT I  
4 SUBMIT TO YOU WHEN IT COMES TO CORROBORATING DANA  
5 BLACKMON - WE'RE BACK TO HER AGAIN - A LOT MORE COULD HAVE  
6 BEEN DONE TO PROVE WHAT IT WAS SHE WAS SAYING MY CLIENT'S  
7 INVOLVEMENT WAS IN THIS CASE.

8 THEY COULD HAVE TAKEN BLOOD. THERE'S NO BLOOD  
9 EVIDENCE IN THIS ENTIRE CASE, NONE. NONE FROM THE VICTIM.  
10 OKAY. I'M NOT TELLING YOU THAT THEY HAD TO TEST THE BLOOD OR  
11 THE STAIN ON THE FLOOR OF THE TRAILER TO COME BACK AND TELL  
12 YOU IT'S THE VICTIM'S BLOOD. THAT WOULD PROVE ABSOLUTELY  
13 NOTHING, GRANTED.

14 BUT IF THERE WAS SOME OF THE VICTIM'S BLOOD IN THE BLUE  
15 CAR, THAT MIGHT HAVE PROVED SOMETHING. MAYBE WE WOULDN'T  
16 EVEN ALL BE HERE TODAY IF THAT WERE THE CASE. OF IF WE EVER  
17 FOUND HIS BLOODY GLOVES, WITH THE VICTIM'S BLOOD ON. DANA  
18 SAID HE THREW THEM OUT THE WINDOW. WELL, THAT WOULD HAVE  
19 BEEN SOME PRETTY DARNED IMPORTANT EVIDENCE. I DON'T EVEN  
20 KNOW IF THEY LOOKED FOR THE GLOVES. I DON'T BELIEVE THERE  
21 WAS ANY TESTIMONY TO THAT FACT.

22 WHAT I KNOW IS THEY'RE NOT HERE TODAY. SHE SAID THAT  
23 THEY WERE THROWN OUT. DANA'S SO BELIEVABLE AND SHE  
24 CORROBORATES SO MANY THINGS, THAT SHE SAID THEY WERE  
25 THROWN BETWEEN RIVERVIEW ROAD AND CELANESE ROAD. AND I

1 DON'T KNOW HOW FAMILIAR Y'ALL ARE, BUT I TRUST THAT ONE OUT  
2 OF TWELVE IS, FAMILIAR WITH THAT AREA OF ROCK HILL. IT'S NOT A  
3 LONG STRETCH OF ROAD. RIVERVIEW AND MT. GALLANT. I'M SORRY.

4 BUT WE'RE TALKING HIGHWAY, PAVEMENT, SIDEWALKS, AND  
5 TWO BLOODY GLOVES IN A PLASTIC BAG. THAT WOULDN'T HAVE  
6 BEEN TOO TOUGH TO FIND. THEY'RE NOT HERE. WOULD THAT HAVE  
7 HELPED? I DON'T KNOW. MAYBE BLOODY GLOVES WOULDN'T HAVE  
8 BEEN IMPORTANT IN THIS CASE. MAYBE WE SHOULDN'T LOOK FOR  
9 THOSE LIKE WE SHOULDN'T LOOK FOR FIBERS, FINGERPRINTS.

10 TIRE TRACKS. THE TESTIMONY OF MS. BLACKMON WAS THAT  
11 THEY TOOK THE CAR THERE TO THIS CRIME SCENE, HER BLUE  
12 PONTIAC. AND THERE WAS-- I DON'T KNOW HOW MUCH OF AN EFFORT  
13 WAS MADE. I THINK THERE WAS SOME TESTIMONY THAT WE SAW  
14 SOME TIRE TRACKS OVER HERE, FIGURED OUT THOSE WERE FROM A  
15 POLICE CRUISER. AND THEN WE LOOKED AROUND FOR SOME OTHERS  
16 AND DIDN'T SEE ANY. WOULD THAT HAVE HELPED CORROBORATE  
17 SOMETHING? I SUBMIT TO YOU IT WOULD HAVE. THAT EVIDENCE  
18 ISN'T HERE.

19 MR. GARDNER ALSO TOLD US THAT THEY CAN LOOK FOR HAIR.  
20 AND WE'VE HEARD THAT THERE WAS SO MUCH DOG HAIR AROUND  
21 THAT THEY DIDN'T BOTHER COLLECTING ANY.

22 LET'S GET BACK TO BLOOD FOR A SECOND. THEY COLLECTED  
23 THIS HAT. OKAY? THIS SKI CAP. NOW, THAT'S GREAT. DANA SAYS HE  
24 WAS WEARING A SKI CAP. DANA SAYS A LOT OF THINGS. DANA SAYS  
25 HE DID IT. DANA SAYS HE DID IT ISN'T ENOUGH. OKAY? WHEN WE'RE

1 TALKING ABOUT CORROBORATION, THAT DOESN'T MEAN, WELL, DANA  
2 SAYS HE USED A BRICK, AND THERE WAS A BRICK. SO, DANA'S  
3 CORROBORATED.

4 WELL, I SUBMIT TO YOU, THAT'S NOT WHAT IT MEANS.  
5 CORROBORATION MEANS ONE PERSON SAYS SOMETHING AND THEN  
6 SOMETHING INDEPENDENT OF THAT PERSON SAYING IT ALSO TENDS  
7 TO SHOW THAT IT OCCURRED. SO, DANA SAYS HE USED A SKI CAP,  
8 WAS WEARING A SKI CAP. WELL, I DON'T EVEN KNOW IF HE OWNS IT.  
9 THEY FOUND A SKI CAP AT HIS PLACE. AS I TOLD YOU IN OPENING, IF  
10 THEY GO LOOK IN MY CAR, THEY'RE GOING TO FIND ONE THERE, TOO.

11 DANA SAID HE USED A SKI CAP, AND LO AND BEHOLD, THEY  
12 FIND A SKI CAP. WHY NOT TEST IT FOR BLOOD, THE VICTIM'S BLOOD?  
13 HE'S IN THERE FOR A HALF AN HOUR BEATING THIS MAN. IS IT  
14 POSSIBLE HE COULD HAVE GOTTEN SOME BLOOD ON THE SKI CAP? HIS  
15 HANDS RE ALL BLOODY. IS IT POSSIBLE, HE COULD HAVE GONE LIKE  
16 THIS WITH HIS BLOODY GLOVES AND GOTTEN SOME BLOOD ON THE  
17 SKI CAP? I GUESS THAT WASN'T IMPORTANT. YOU KNOW, MAYBE IF  
18 WE HAD THAT, WE WOULDN'T BE HERE TODAY.

19 SO, WHY DO WE TEST THINGS AND WHY DO WE DON'T TEST  
20 THINGS. AND MAYBE WE DON'T TEST THINGS BECAUSE WE DON'T  
21 WANT THE RESULTS THAT WE MIGHT GET. OKAY? AND THAT'LL TAKE  
22 ME TO THE HAMMER AND THE SCREWDRIVER AND THE TIRE TOOL.

23 YEAH, THESE THINGS ARE IN HIS HOUSE; YOU WOULD EXPECT  
24 TO FIND HIS OWN FINGERPRINTS ON HIS OWN THINGS THAT ARE IN HIS  
25 HOUSE. SO, THEY WANT TO LEAVE IT AT THAT. IT'S THAT SIMPLE. WE

1           WON'T TEST THIS STUFF BECAUSE WE FOUND IT IN HIS HOUSE. WHAT'S  
2           IT GONNA PROVE. IT'S GOT HIS FINGERPRINTS ON IT. WELL, THAT'S  
3           GONNA PROVE ABSOLUTELY NOTHING.

4                    BUT WHAT WOULD IT PROVE IF IT HAD DANA'S FINGERPRINTS  
5           ON IT AND NONE OF MY CLIENT? WHAT WOULD IT PROVE IT IF HAD  
6           SOME THIRD INDIVIDUAL'S FINGERPRINTS ON IT AND NOT MY  
7           CLIENT'S? WELL, IF THAT WERE THE CASE, THEN IT WOULD BE MY  
8           CLIENT WOULDN'T BE HERE TODAY AND SOMEBODY ELSE WOULD.

9                    BUT THEY DON'T TEST THAT STUFF. OH, IT'S IN HIS HOUSE; IT'S  
10          GOTTA BE HIS. DANA SAID THAT'S WHAT HE USED. DANA NEVER SAID  
11          ANYTHING ABOUT SNIP, SNIP, SNIP, SNIP, SNIP, THOUGH, LIKE THE FBI.  
12          BECAUSE IN THEIR REPORT, AND YOU CAN LOOK AT THIS WITH YOUR  
13          OWN TWO EYES AND SEE THE SAFE ISN'T BROKEN OPEN HERE WITH A  
14          HAMMER AND A SCREWDRIVER. THIS THING WAS CUT WITH A  
15          PNEUMATIC POWER TOOL OF SOME SORT.

16                   SO, THERE YOU GO. YOU'RE NOT GETTING THE WHOLE STORY  
17          FROM DANA. RIGHT? AND MY CLIENT, HE'S SMART ENOUGH TO GET  
18          RID OF THIS PNEUMATIC TOOL, BUT HE LEAVES THE SCREWDRIVER,  
19          THE HAMMER AND THE CROW BAR IN THE APARTMENT. THAT  
20          DOESN'T MAKE ANY SENSE.

21                   I SUBMIT TO YOU, YOU FOLLOW THAT PNEUMATIC POWER TOOL  
22          AND THEN YOU FIND THE PERSON WHO WAS OPENING THE SAFE. I  
23          WISH DANA HAD TOLD US ABOUT THAT.

24                   THERE ARE A FEW PAGES HERE ON DANA. WE'RE GONNA SAVE  
25          HER FOR LAST.

1           WHO WAS MR. VARGAS? HE WAS THE FIRST GUY THEY TRIED TO  
2           BUY THE CAR FROM. HE SAID THE GIRLFRIEND SAID NO, WE'RE NOT  
3           LEAVING THE MONEY. WE'RE GOING BACK TO THE BANK AND GET  
4           SOME MORE. HE SAID SHE'S GOT THE MONEY. OKAY? SO, IF YOU NEED  
5           TO HEAR THAT GAIN, THAT'S MR. VARGAS.

6           SHARON BURNS, SHE SOLD THEM A CAR. HER TESTIMONY  
7           WOULD SEEM TO CONTRADICT THAT OF MR. VARGAS. SHARON BURNS  
8           WANTS TO TELL YOU THAT MY CLIENT WAS RUNNING THE WHOLE  
9           SHOW HERE. SHARON BURNS ALSO COULDN'T REMEMBER WHAT SHE  
10          TOLD DEPUTIES SIX WEEKS AGO. OKAY? ABOUT IT COSTING \$1000.  
11          SHE'S GOT A WRITTEN STATEMENT SHE GAVE TO DEPUTY STRAIT ON  
12          OCTOBER 17, SHE SOLD THE CAR FOR \$1000. SHE CAME IN HERE  
13          YESTERDAY OR THE DAY BEFORE AND SAID SHE WASN'T SURE. SHE  
14          THOUGHT MAYBE IT WAS \$600 OR \$800. THEN SHE SAID SHE WAS  
15          GOING THROUGH SOME BILLS, AND THERE ARE ISSUES ABOUT THAT.

16          I SUBMIT TO YOU THAT AT THE VERY LEAST DANA BURNS  
17          COULD BE CONFUSED ABOUT SOME THINGS. BUT EVEN IF YOU TAKE  
18          HER ENTIRE TESTIMONY AT ABSOLUTE FACE VALUE, I SUBMIT TO YOU  
19          THAT IT DOESN'T PROVE THAT MY CLIENT MURDERED ANYBODY. IT  
20          PROVES HE PURCHASED THE CAR WITH SOME MONEY THAT POSSIBLY  
21          THEY GOT FROM THE BANK WITH THOSE CHECKS.

22          MIKE WILLIAMS, ANOTHER FORENSIC SERVICES OFFICER.  
23          SIMILARLY TO OFFICER GARDNER, WHO TESTIFIED THAT THEY COULD  
24          TEST FOR BLOOD SPLATTER EVIDENCE. THEY COULD TEST FOR

1 FINGERPRINTS, DNA, HAIR, FIBERS, TIRE TRACKS, FOOT PRINTS, NIKE  
2 SNEAKERS. THEY COULD HAVE LOOKED FOR THAT.

3 DANA WANTS YOU TO BELIEVE THAT MY CLIENT DISPOSED OF  
4 SOME BLOODY PAIR OF NIKE SNEAKERS ON THAT DAY. WELL,  
5 WOULDN'T HAVE BEEN NICE TO HAVE SOME NIKE PRINTS OUT OF THIS  
6 HOUSE TO CORROBORATE DANA? NOT ONLY DO WE KNOW ABOUT  
7 THAT, WE DON'T EVEN HAVE THE SNEAKERS. OKAY? IF SOMEONE  
8 COMMITS A CRIME, THEY'RE GOING TO TRY TO GET RID OF THE  
9 BLOODY STUFF. THAT'S FINE. BUT DANA TOLD YOU HE STUFFED THE  
10 SNEAKERS INTO THE SAFE.

11 THEY DIDN'T RECOVER ANY SNEAKERS OUT OF THE SAFE. AND  
12 THERE ARE NO NIKE FOOTPRINTS AT THE CRIME SCENE. I SUBMIT TO  
13 YOU THERE'S NO EVIDENCE THAT THERE WERE EVER ANY NIKE  
14 SNEAKERS AT ALL. OH, AND AGAIN, THESE ARE SUPPOSED TO BE  
15 BLOODY SNEAKERS, WHICH MAYBE THEY COULD HAVE FOUND SOME  
16 BLOOD IN THE CAR THAT THE GOT INTO WITH HIS BLOOD SNEAKERS  
17 AND HIS BLOODY GLOVES.

18 NOT ONLY DID HE CLOSE THE DOOR WEARING THE BLOODY GLOVES, BUT HE  
19 TOOK THE BLOODY GLOVES OFF TO GO GET THE BABY. SO, THE  
20 BLOODY GLOVES WERE ALL OVER THE PLACE AND HE'S GETTING IN  
21 AND OUT OF THE CAR. HE'S IN THE CAR WITH THE BLOODY SNEAKERS.  
22 HE GETS OUT TO GET THE BABY. HE GETS BACK INTO THE CAR WITH  
23 THE BLOODY SNEAKERS, REPOSITIONING HIS FEET AGAIN. AND THEN  
24 HE GETS BACK OUT OF THE CAR WITH THE BLOODY SNEAKERS.

1           THERE'S NO EVIDENCE OF ANY BLOODY SNEAKERS OR ANY  
2           BLOOD IN THE CAR. I SUPPOSE WE COULD PRESUME THAT MAYBE  
3           THERE WOULD BE SOME OF HIS BLOOD IN THE HOUSE, TOO, WHEN HE  
4           WALKED IN WITH THE BLOODY SNEAKERS. BUT THEY NEVER TESTED  
5           MY CLIENT'S RESIDENCE AND MS. BLACKMON'S RESIDENCE FOR  
6           BLOOD. THEY SUCK UP A LOT OF SAFE DUST WITH THE VACUUM  
7           CLEANER.

8           SO, I THINK THEY'VE DONE A PRETTY GOOD JOB OF PROVING TO  
9           YOU THAT AT SOME POINT THAT SAFE WAS IN THAT RESIDENCE. AND  
10          OF COURSE, DANA SAYS IT'S SO; IT MUST BE TRUE.

11          BUT THEY HAVEN'T PROVEN TO YOU WHAT MY CLIENT'S  
12          INVOLVEMENT IS WITH THE SAFE, GETTING IT INTO HIS RESIDENCE,  
13          GETTING IT OUT OF MR. CUBLEY'S RESIDENCE. THEY DIDN'T TEST IT  
14          FOR FINGERPRINTS, DESPITE THE FACT THAT IT WAS ONLY PARTIALLY  
15          SUBMERGED THAT YOU'VE SEEN IN THE PHOTOGRAPHS, IT  
16          SUPPOSEDLY RAINED AND WASHED ALL THE FINGERPRINTS OFF OF IT.

17          OFFICER WILLIAMS TESTIFIED ABOUT CROSS-CONTAMINATION.  
18          OKAY? THEY ARE SO CONCERNED WITH CROSS-CONTAMINATION  
19          THAT THEY WON'T TOUCH ONE PIECE OF EVIDENCE WITHOUT  
20          CHANGING THE GLOVES THAT THEY HAVE ON. THEY'RE WEARING  
21          GLOVES AND THEY'RE HANDLING THIS. AND THIS COULD HAVE SOME  
22          EVIDENCE ON IT, SOME SAFE DUST, SOME DNA, SOME BLOOD, WHAT  
23          HAVE YOU.

24          SO, ONCE THEY'VE HANDLED THIS AND PROCESSED IT, NOW  
25          THEY REMOVE THOSE GLOVES, DISCARD THEM AND PUT ON NEW

1 GLOVES SO THEY DON'T TRANSFER ANY OF THE STUFF FROM THIS TO  
2 THIS.

3 AND THAT'S A CONCERN OF LAW ENFORCEMENT. I BRING THAT  
4 UP BECAUSE IF THEY'RE THAT CONCERNED THAT MERELY TOUCHING  
5 AN ITEM COULD TRANSFER SOME BIT OF EVIDENCE FORM ONE ITEM  
6 TO THE NEXT, LET'S THINK ABOUT WHAT WE HAVE IN THIS CASE.

7 I MEAN, THERE'S TESTIMONY, CLEARLY, THAT THERE'S SOME  
8 DUST ON SOME OF THESE ITEMS, TH SCREWDRIVER, THE TIRE TOOL,  
9 THE HAMMER. I THINK ONE OF THEM DIDN'T HAVE IT AND THE OTHER  
10 TWO DID HAVE IT. THOSE THINGS WERE LAYING AROUND THE  
11 APARTMENT THAT'S COVERED IN THIS STUFF. IT'S ALL OVER THE  
12 FLOOR. YOU'VE GOT THE PHOTOGRAPHS. THEY'RE WALKING AROUND  
13 THE PLACE. I MEAN, DANA CONTINUED TO LIVE THERE FOR FOUR, OR  
14 FIVE OR SIX DAYS BEFORE MIKE WILLIAMS GOT THERE AND  
15 COLLECTED THAT STUFF.

16 CLEARLY, THESE ITEMS WERE SUBJECT TO CROSS-  
17 CONTAMINATION. THEY COULD HAVE DUST ON THEM JUST MERELY  
18 FROM THE FACT THAT THEY WERE IN THE RESIDENCE. THAT'S FOR  
19 YOU TO MAKE A DETERMINATION ABOUT. BUT IF THEY'RE THAT  
20 CONCERNED ABOUT CROSS-CONTAMINATION, WELL, THEN, MAYBE  
21 YOU OUGHT TO BE, AS WELL. MAYBE WE DON'T KNOW HOW THEY GOT  
22 DUST ON THEM. MAYBE IT'S BECAUSE YOU GOT PEOPLE WALKING  
23 AROUND, TRACKING THIS STUFF ALL OVER THE PLACE AND IT'S  
24 GENERALLY ALL OVER THE FLOOR. IT SPILLED OUT ON THE FLOOR  
25 HERE THE OTHER DAY.

1           BUT, CLEARLY, WHAT WE KNOW, WHETHER YOU FIND THAT  
2           THESE TOOLS MAY OR MAY NOT HAVE BEE USED TO ENTER THE SAFE,  
3           THE GIRL WHO PURPORTS TO KNOW EVERYTHING ABOUT EVERYTHING  
4           THAT HAPPENED IN THIS CASE-- I MEAN, THERE'S A GAPING HOLE IN  
5           HER STORY. OKAY? AND IT'S RIGHT THERE. YOU'RE NOT GETTING THE  
6           WHOLE STORY FROM DANA BLACKMON. YOU CAN'T BELIEVE HER  
7           BECAUSE SHE'S STILL HIDING THINGS FROM YOU.

8           DANA TOLD THEM THAT THEY HAD DISCARDED, GOT RID OF THE  
9           DISCOVER CARD, AND ANOTHER CARD IN A PLASTIC BAG OVER THERE  
10          IN THE GROSS NEAR THE TRAILER. AND THEY SEARCHED AND THEY  
11          SEARCHED. IN FACT LAW ENFORCEMENT SEARCHED THAT AREA SO  
12          WELL THAT THEY FOUND A SET OF KEYS OUT THERE IN THE HIGH  
13          GRASS. NOW, THOSE KEYS HAVE NOTHING TO DO WITH THIS CASE.  
14          SOMEBODY ELSE LOST A SET OF KEYS OUT THERE. BUT THE POINT IS  
15          THAT THEY FOUND THOSE KEYS BY THEY COULDN'T FIND TWO CREDIT  
16          CARDS IN A PLASTIC BAG?

17          USE YOUR OWN COMMON SENSE WHICH ONE WOULD BE EASIER  
18          TO FIND. THE REASON THEY DIDN'T FIND IT IS BECAUSE IT WASN'T  
19          THERE. BUT WHO TOLD IT WAS THERE? DANA. OKAY? THERE'S  
20          SOMETHING ELSE GOING ON HERE. SHE'S GIVING THEM LITTLE BITS  
21          AND PIECES, INSULATING HERSELF FROM HER TRUE CULPABILITY.  
22          NOT GIVING THEM THE PNEUMATIC POWER TOOL THAT WAS TRULY  
23          USED TO OPEN THE SAFE. NOT REALLY TELLING THEM WHERE THE  
24          DISCOVER CARD WAS. I DON'T KNOW IF THEY EVER LOOKED FOR THE  
25          GLOVES, BUT WE KNOW THEY'RE NOT HERE. SO, IF THEY LOOKED AND

1 DIDN'T FIND THEM, THEN MAYBE SHE DIDN'T TELL THEM THE TRUTH  
2 ABOUT THE GLOVES EITHER. MAYBE THE GLOVES JUST NEVER  
3 EXISTED. THE SNEAKERS, WELL, THE SNEAKERS WEREN'T WHERE  
4 DANA SAID THEY WOULD BE EITHER. MAYBE THE SNEAKERS NEVER  
5 EXISTED.

6 THEY DIDN'T TEST THE CINDERBLOCK. NOW, I WANT THEM TO  
7 TEST THAT FOR MR. CUBLEY'S BLOOD. IF IT WAS USED TO HIT HIM  
8 AND IT WAS THERE WHERE HE WAS LAYING, WHAT WOULD THAT  
9 PROVE? IT MIGHT PROVE THAT IT WAS USED, I SUPPOSED, AND THE  
10 STATE WANTS TO PROVE THAT A WEAPON WAS USED IN THIS  
11 ASSAULT.

12 BUT I BELIEVE THERE'S ALREADY BEEN ENOUGH EVIDENCE TO  
13 PRESENT TO YOU THAT YOU CAN DECIDE WHETHER OR NOT THAT WAS  
14 USED IN THE ASSAULT. I'M SAYING WHY NOT TEST IT FOR SOME  
15 FIBERS, IF HE WAS ALLEGEDLY WEARING THESE GLOVES.

16 NOW, MAYBE THEY MAKE GLOVES AND ALL GLOVES HAVE THE  
17 SAME KIND OF FIBERS, BUT AT LEAST IT WOULD HAVE SHOWN THERE  
18 WAS SOME FIBER ON THAT THING, YOU KNOW. OR MAYBE AT SOME  
19 POINT HE PICKED IT UP WITH HIS HANDS, YOU KNOW, AND GOT SOME  
20 SKIN ON IT. IT'S ROUGH. I MEAN, IT'S NOT IMPOSSIBLE TO LEAVE A  
21 LITTLE BIT OF SKIN ON THIS THING.

22 FINGERPRINT, I DON'T KNOW. I MEAN, WE'LL NEVER KNOW.  
23 THEY DIDN'T TEST IT. SO, IT DOESN'T LINK MY CLIENT TO ANYTHING.  
24 NOW, IS IT CORROBORATED BY DANA? DANA SAID IT WAS THERE AND  
25 IT WAS THERE. WE'RE GONNA KEEP GETTING BACK TO DANA.

1           AND WE'RE GONNA GO THROUGH ALL THE EVIDENCE, SO I'LL  
2           TRY AND WRAP IT UP. DETECTIVE YEAGER FROM THE SHERIFF'S  
3           DEPARTMENT TESTIFIED THAT MY CLIENT COULD NOT READ OR  
4           WRITE THE ENGLISH LANGUAGE. AND HE TALKED ABOUT THE  
5           COMMITMENTS. I ASKED HIM ABOUT THOSE. MY CLIENT WAS  
6           SERVED. WHEN THEY BROUGHT HIM BACK HERE FROM MISSOURI ON  
7           THIS CHARGE, THEY ALSO SERVED HIM WITH TWO OUTSTANDING  
8           COMMITMENTS. WHICH MEANS WHEN HE LEFT, HE DID HAVE THE  
9           POLICE LOOKING FOR HIM FOR SOMETHING OTHER THAN THIS. HE  
10          HAD EVERY REASON TO BELIEVE IF THEY CAUGHT UP WITH HIM HE  
11          WOULD GO TO JAIL.

12                 NOW, IS THAT GOOD? DOES THAT MAKE HIM A CLASS A  
13          CITIZEN? DOES THAT MAKE HIM A DADDY THAT YOU WOULD WANT  
14          TO BABY-SIT YOUR KIDS? WOULD YOU TRUST HIM? PROBABLY NOT.  
15          ALL RIGHT. YOU'RE NOT HERE TO DECIDE THAT TODAY. YOU'RE HERE  
16          TO DECIDE WHETHER OR NOT HE'S GUILTY OF MURDER AND ARMED  
17          ROBBERY AND BURGLARY AND THREE FORGERIES.

18                 YOU'RE NOT HERE TO DECIDE WHETHER OR NOT YOU WANT TO  
19          LIKE MR. GUTIERREZ OR WHETHER YOU APPROVE OF HIS BEHAVIOR;  
20          NOT PAYING HIS FINE, NOT GOING TO COURT WHEN HE SHOULD HAVE,  
21          HAVING A DUI CONVICTION. THAT'S GOT NOTHING TO DO WITH  
22          WHETHER OR NOT HE WAS INVOLVED IN MURDERING MR. CUBLEY.

23                 AND HE SAID THE COPS HAVE BEEN OUT TO MY HOUSE A  
24          COUPLE OF TIMES. I DON'T THINK THE TESTIMONY IS REAL CLEAR AS  
25          TO WHEN THEY WERE COMING OUT THERE, WHAT THEY WERE COMING

1           OUT THERE FOR; JUST THAT THEY HAD BEEN OUT THERE A COUPLE OF  
2           TIMES.

3           THE COMMITMENTS WERE ISSUED SOME TIME IN AUGUST. YET,  
4           HE COULD HAVE LEFT AT ANY TIME. BUT MR. THOMPSON WANTS TO  
5           TELL YOU ABOUT HUMAN NATURE. HUMAN NATURE IS TAKING  
6           PRETTY MUCH THE PATH OF LEAST RESISTANCE FOR A WHILE. YEAH, I  
7           KNOW IT'S EASY TO GO TO COURT, BUT AS LONG AS HE CAN SORT OF  
8           DUCK AD DODGE FOR A LITTLE WHILE, HE'S PROBABLY GOING TO DO.  
9           BECAUSE HE'S GOTTEN THIS JOB, YOU KNOW, AND HE'S STAYING AT A  
10          PLACE. HE'S GOT DANA AND YOU KNOW, THAT UP AND DOWN SORT OF  
11          RELATIONSHIP AT BEST THAT SHE TESTIFIED TO. SO, HE DOESN'T  
12          LEAVE FOR A WHILE; HE'S HANGING OUT FOR A WHILE.

13          THEN, FOR WHATEVER REASON, THEY START COMING AROUND.  
14          MAYBE IT'S BECAUSE THESE COMMITMENTS ARE GETTING OLD, ON  
15          SOMEBODY'S DESK DOWN THERE AT THE SHERIFF'S DEPARTMENT.  
16          YOU NEED TO GO FIND THIS GUY. THE POLICE START COMING  
17          AROUND. THAT COMBINED WITH THIS CHECK. ALL RIGHT? I MEAN,  
18          HE HAD TO CERTAINLY FEEL LIKE, WOW, YOU KNOW, SHE MADE YOU  
19          RUN OUT OF THE BANK. I'M SORRY. SHE MADE US LEAVE THE BANK IN  
20          A HURRY WHERE THERE WAS SOMETHING THAT SEEMED TO BE OF  
21          CONCERN TO THE TELLERS IN THE BANK. THAT MAY BE LINKED  
22          TOGETHER BETWEEN THIS OTHER THING I GOT GOING ON. AND LIFE  
23          WITH DANA'S NOT ALL THAT GRAND. AND SOMETHING KINKY  
24          HAPPENED OVER THERE AT THE BANK. MAYBE AT THIS TIME I WILL  
25          PACK AND HIT THE ROAD.

1 WE DON'T KNOW WHAT HE TOOK WITH HIM AND WHAT HE  
2 DIDN'T TAKE WITH HIM. HE CERTAINLY LEFT SOME CLOTHES BEHIND.  
3 THERE'S A PHOTOGRAPH OF A PRESCRIPTION BOTTLE ON THE TABLE.  
4 DANA SAID IT WAS HIS. THEY'VE HAD FIVE YEARS TO GET A DOCTOR  
5 IN HERE TO PROVE THAT MY CLIENT HAD A PRESCRIPTION FOR THAT  
6 MEDICATION, OR THAT THAT WAS EVEN HIS.

7 IF YOU CAN TELL FROM THAT BOTTLE, THEN, MORE POWER TO  
8 YOU. BUT I DON'T THINK YOU CAN READ WHOSE NAME IS ON THAT  
9 BOTTLE. THEY WANT TO HAVE YOU BELIEVE THAT HE JUST UP AND  
10 LEFT. HE WAS IN SUCH A PAIN THAT HE LEFT HIS MEDICINE ON THE  
11 TABLE. WOULDN'T IT BE NICE TO HAVE SOMEBODY SAY THAT IT WAS  
12 HIS MEDICINE, SOMEBODY OTHER THAN DANA?

13 FIVE YEARS THEY COULD HAVE GOT A DOCTOR IN HERE TO  
14 TESTIFY TO THAT. THERE'S NOTHING TO CORROBORATE THAT THAT  
15 WAS HIS MEDICINE.

16 YOU SAW THE PLACE HE WAS LIVING. THOUGH IT MIGHT INSULT  
17 YOUR SENSIBILITIES TO THINK THAT HE MIGHT WANT TO LEAVE?

18 AND IF YOU'RE LEAVING ROCK HILL, YOU'RE TO GONNA STICK  
19 AROUND CHARLOTTE. BECAUSE THERE'S WORK. THERE'S WORK ALL  
20 OVER THE COUNTRY. SO, IT JUST WOULDN'T MAKE ANY SENSE TO  
21 LEAVE, THAT THERE WAS A BUILDING BOOM HERE.

22 HE MANAGED TO SUPPORT HIMSELF SOMEHOW FOR FOUR  
23 YEARS. SO, THERE MUST HAVE BEEN MORE ELSEWHERE. OKAY? SO,  
24 AGAIN, USE YOUR OWN COMMON SENSE. HERE'S A GUY WHO IS  
25 TRAVELING AROUND. QUESTIONABLE IDENTIFICATION. HE'S A

1           LABORER. HE'S KIND OF AT THE WHIM OF OTHERS. NOT DRIVING,  
2           DOESN'T HAVE HIS OWN CAR. OKAY? SO, HE DOES SORT OF HAVE TO  
3           FOLLOW THE WORK. IF HE HOOKS UP WITH A CREW AND THEY CAN  
4           GET A JOB SOMEWHERE ELSE, HE'S GOING TO WHERE THAT JOB IS. HE'S  
5           GOING TO WHERE THE JOBS ARE. HE'S FOLLOWING THE WORK. IS  
6           THAT SO UNREASONABLE?

7           WERE THERE ALSO NOT NATURAL DISASTERS IN FLORIDA, IN TEXAS,  
8           IN OTHER PLACES THAT REQUIRED THE SERVICE OF ROOFERS?

9                   OFFICER GUZMAN TESTIFIED. I DON'T HE REALLY ADDED  
10            ANYTHING TO THE MIX AS FAR AS THAT STATEMENT GOES. BUT FOR  
11            SOME REASON WE HAD TO ENDURE HIS ENTIRE TESTIMONY AGAIN.  
12            QUANTITY, NOT QUALITY. IT'S IF WE CAN TELL YOU THREE OR FOUR  
13            TIMES BASICALLY THE SAME THING, MAYBE THAT WILL SEEM LIKE  
14            WE'VE GOT SO MUCH GOING HERE THAT MR. GUTIERREZ MUST BE  
15            GUILTY.

16                   ONE IMPORTANT THING IN TAKING GUZMAN'S TESTIMONY WAS  
17            THAT HE HAD TO READ THE STATEMENT TO MY CLIENT. THE  
18            STATEMENT WAS WRITTEN IN ENGLISH, TYPED BY THE DETECTIVE  
19            AFTER MY CLIENT GAVE IT TO THEM IN A MIXTURE OF ENGLISH AND  
20            SPANISH TRANSLATIONS. THEY TYPED IT UP IN ENGLISH. THEY DIDN'T  
21            HAND IT TO HIM TO READ. THAT'S WHAT THEY HAVE TO DO. IF YOU  
22            GIVE A STATEMENT TO POLICE YOU'VE GOT TO SIGN AT THE BOTTOM  
23            SAYING THAT YOU DIDN'T CHANGE ANYTHING. YOU DIDN'T MAKE IT  
24            LOOK LIKE I WAS DOING SOMETHING I DIDN'T DO. YOU HAVE A RIGHT  
25            TO REVIEW YOUR STATEMENT AND THEN SIGN IT.

1 WELL, IT'S IMPORTANT IN THIS CASE THAT THEY DIDN'T JUST  
2 HAND IT TO HIM AND SAY, IS THAT RIGHT, IS THAT WHAT YOU SAID,  
3 READ OVER THAT FOR US. NO. THEY HAD SOMEONE COME IN AND  
4 READ IT TO HIM IN SPANISH BECAUSE HE CAN'T READ ENGLISH. IF HE  
5 CAN'T READ ENGLISH HE COULDN'T READ THAT THAT WAS MAUDE  
6 CUBLEY'S CHECK.

7 AND IF DANA TELLS YOU, GO CASH THESE, MAYBE YOU'RE NOT  
8 GONNA WORRY TOO MUCH ABOUT HOW COME IF YOU GOT THEM  
9 FROM OUR GRANDFATHER THEY'RE MADE OUT TO ME. SO, IF YOU  
10 WANT TO THINK HE SHOULD HAVE KNOWN BETTER ON THOSE  
11 CHECKS, THAT'S PART OF YOUR JOB TO DECIDE WHAT TO DO WITH THE  
12 FORGERY CHARGES. BUT THAT DOESN'T MEAN HE MURDERED MR.  
13 CUBLEY OR ROBBED MR. CUBLEY.

14 DETECTIVE STRAIT TESTIFIED ALMOST EXACTLY TO WHAT  
15 DETECTIVE YEAGER TESTIFIED TO AS FAR AS TAKING THAT  
16 STATEMENT AND EVERYTHING. SO, AGAIN, QUANTITY VERSUS  
17 QUALITY. YOU HAD THREE WITNESSES ALL IN ROW TELLING YOU  
18 VIRTUALLY THE SAME THING.

19 DOCTOR JENKINS TESTIFIED AS TO THE CAUSE OF DEATH. ONE  
20 THING YOU HAVE TO FIND IS THAT MR. CUBLEY'S DEATH RESULTED  
21 FROM AN ASSAULT, A BEATING, AND THAT THERE WAS A WEAPON  
22 USED, THERE WAS MALICE, ALL THOSE THINGS. AND THE JUDGE IS  
23 GONNA CHARGE YOU WHAT YOU NEED TO FIND OCCURRED TO FIND  
24 THAT MURDER OCCURRED. SO, IT'S IMPORTANT THAT YOU HAVE TO

1 DETERMINE WHETHER OR NOT THE DOCTOR'S TESTIMONY CONVINCES  
2 YOU THAT MR. CUBLEY DIED AS A RESULT OF A BEATING.

3 I'LL LEAVE THAT UP TO Y'ALL TO DECIDE THAT'S WHY MR.  
4 CUBLEY DIED. MY CONCERN IS THAT DOCTOR JENKINS CAN'T TELL  
5 YOU ANYTHING ABOUT WHO DID IT. OKAY? IN SOME CASES, THEY'LL  
6 BRING A CORONER IN HERE TO TELL YOU, WELL, FROM THE ANGLE OF  
7 THE WOUNDS, OR FROM THE WAY SOMEBODY APPEARS TO HAVE BEEN  
8 INJURED, WE CAN SUMMARIZE THAT HE WAS ATTACKED BY A  
9 PREDOMINANTLY RIGHT-HANDED PERSON OR A PREDOMINANTLY  
10 LEFT-HANDED PERSON; HE WAS HIT FROM THE FRONT; HE WAS HIT  
11 FROM THE BEHIND; HE WAS ATTACKED WITH A GUN, A KNIFE, A BOW  
12 AND ARROW, A BRICK. YOU KNOW, THOSE SORTS OF THINGS.

13 HE SAID THAT THE BRICK APPEARED TO MAKE THE WOUNDS ON  
14 MR. CUBLEY. HE COULDN'T TELL YOU WHO USED THE BRICK, IF THE  
15 BRICK IN FACT WAS USED. HE CANNOT TELL YOU WHETHER HE WAS  
16 ATTACKED FROM THE FRONT OR FROM BEHIND. I BELIEVE HE DID  
17 TESTIFIED THAT A PERSON OF AVERAGE DEMEANOR, HEIGHT COULD  
18 EASILY HANDLE THAT BRICK. THAT'S DANA, OF COURSE. HE  
19 COULDN'T TESTIFY IF IT WAS A MALE OR A FEMALE.

20 SO, SHE'S STILL IN THE MIX. MR. THOMPSON WANTS YOU TO  
21 BELIEVE-- AND I CAN'T WAIT TILL THE NEXT TIME THAT I HAVE A  
22 FEMALE CLIENT CHARGED WITH A CRIME LIKE THIS. BECAUSE MR.  
23 THOMPSON WANTS YOU TO BELIEVE THAT A WOMAN COULDN'T DO  
24 THIS. I GUESS HE WANTS YOU TO BELIEVE THAT A WOMAN CAN'T PICK

1 UP THIS BRICK. WE'VE GOT SEVERAL WOMEN ON THIS JURY. YOU'LL  
2 HAVE THIS BRICK BACK THERE IN THE JURY ROOM.

3 THE DOCTOR TESTIFIED HE DIDN'T KNOW IF THE BLOW CAME  
4 FROM THE FRONT OR THE BACK. WELL, IF SOMEONE'S LOOKING AT  
5 YOU, AND AN INJURY TO THE LEFT SIDE OF THE FACE COMES FROM  
6 THE FRONT, THAT'S PROBABLY FROM A RIGHT-HANDED PERSON. BUT  
7 IF SOMEBODY'S FACING AWAY FROM YOU, AND THERE'S AN INJURY TO  
8 THE LEFT-HANDED SIDE OF THE FACE, IT'S PROBABLY FROM A LEFT-  
9 HANDED PERSON.

10 SO, WE WOULDN'T KNOW WHETHER THE PERSON WHO  
11 ATTACKED MR. CUBLEY WAS STANDING IN THE FRONT OR STANDING  
12 IN THE BACK. THE DOCTOR COULDN'T TELL YOU AND NOBODY ELSE  
13 IN THIS CASE TOLD YOU ANYTHING ABOUT THAT, HOW THAT MAY  
14 HAVE OCCURRED.

15 SO, DOES IT NOT MAKE IT EVEN MORE PROBABLE THAT  
16 SOMEONE GETTING THE JUMP ON AN EIGHTY-ONE YEAR OLD MAN AND  
17 POSSIBLY HITTING HIM FROM THE BACK WHEN HE'S NOT LOOKING  
18 COULD BE A PERSON OF EVEN SMALLER STATURE THAN DANA? AND  
19 SHE'S NOT A SMALL GIRL. I SUBMIT TO YOU-- WE DIDN'T MEASURE  
20 HER HERE, BUT YOU SAW HER WALK ACROSS THE FLOOR. THERE'S  
21 BEEN TESTIMONY THAT MY CLIENT'S FIVE FOOT, SIX. I SUBMIT TO  
22 YOU THAT DANA, IF SHE'S NOT BIGGER THAN HIM, SHE'S JUST ABOUT  
23 HIS SIZE.

24 SO, I THINK THAT IT INSULTS YOUR COMMON SENSE TO BE TOLD  
25 THAT A WOMAN COULDN'T HAVE COMMITTED THIS CRIME. AND MR.

1 THOMPSON PUT THAT UP THERE ON HIS SCREEN. THERE ARE TWO  
2 OTHER POSSIBILITIES HERE, THAT DANA DID THIS ACTING ALONE.  
3 DANA CERTAINLY KNEW AN AWFUL LOT ABOUT THINGS. SO, I DON'T  
4 THINK THERE'S ANY QUESTION THAT DANA WAS THERE.

5 AND LET'S BE REAL CLEAR ABOUT THIS. DANA WAS EITHER  
6 HERE BY HERSELF, SHE WAS THERE WITH MY CLIENT, OR SHE WAS  
7 THERE WITH SOMEBODY ELSE. THERE'S NO QUESTION ABOUT IT;  
8 DANA WAS THERE. DANA DOESN'T WANT YOU TO KNOW THE WHOLE  
9 TRUTH. SHE KNOWS IT.

10 BECAUSE THE DISCOVER CARD WASN'T WHERE SHE SAID IT  
11 WOULD BE. AND THE SNEAKERS WEREN'T WHERE SHE SAID THEY  
12 WOULD BE. AND SHE DIDN'T TELL YOU ANYTHING ABOUT HOW THE  
13 SAFE WAS REALLY CUT OPEN. AND WE KNOW DANA TO BE A LIAR. WE  
14 KNOW THAT SHE GAVE FIVE FALSE STATEMENTS BEFORE SHE FINALLY  
15 GAVE ONE THAT THEY CHOSE TO ACCEPT AS THE TRUTH.

16 WE KNOW THAT DANA LIED IN THIS COURTROOM ON A  
17 PREVIOUS OCCASION. SHE CAME IN HERE TO ADMIT HER GUILT, HER  
18 PART IN THIS ROLE, IN THIS MURDER. HER ROLE IN THE MURDER. SHE  
19 PLEAD GUILTY TO ARMED ROBBERY. SHE CAME IN HERE AND  
20 ADMITTED TO BEING GUILTY. SHE HAD TO PUT HER HAND ON THE  
21 SAME BIBLE. SHE HAD TO SAME THE SWEAR OATH TO TELL THE  
22 TRUTH, BUT SHE DIDN'T. WHEN SHE TESTIFIED IN THIS TRIAL, SHE  
23 ADMITTED TO LYING IN THAT GUILTY PLEA. OKAY? BECAUSE SHE  
24 HAD SOMETHING TO GAIN FROM IT. SHE WANTED TO PAINT THINGS A  
25 CERTAIN WAY FOR THE JUDGE THAT WAS HEARING HER TESTIMONY

1           THAT DAY. THE MORE SYMPATHETIC SHE COULD SEEM WITH HER  
2           LYING, THE LESS OF A SENTENCE SHE WOULD GET.

3           THEY GAVE HER A DEAL, YOU'LL GET SOMETHING BETWEEN TEN  
4           AND TWENTY YEARS. GUESS WHAT? SHE ENDED UP WITH TEN. SHE  
5           DID A PRETTY GOOD JOB FOR HERSELF, DIDN'T SHE? AND NOW, AS  
6           PART OF THAT PLEA AGREEMENT, SHE HAD TO AGREE TO TESTIFY  
7           EXACTLY AS SHE HAD PREVIOUSLY TOLD THE POLICE IN HER FINAL  
8           AND LAST STATEMENT.

9           IF ANY OF Y'ALL WERE WAITING FOR THAT PERRY MASON  
10          MOMENT, I'M JUST NOT THAT KIND OF LAWYER. OKAY. I WASN'T  
11          GONNA BE ABLE TO GET UP HERE AND CROSS EXAMINE DANA  
12          BLACKMON AND GET HER TO BREAK DOWN ON THE STAND THAT SHE  
13          HAD ACTUALLY DONE THIS. I'VE BEEN AT THIS FOR A WHILE NOW.  
14          I'VE NEVER REALLY SEEN THAT HAPPEN OTHER THAN IN TELEVISION  
15          AND IN MOVIES.

16          SHE KNEW WHAT SHE WAS GONNA SAY. SHE WAS REHEARSED.  
17          SHE HAD REVIEWED HER STATEMENT. AND SHE ALSO KNEW THAT  
18          THERE WAS ONE BIG, GIANT PRIZE AT THE END OF HER TESTIMONY.  
19          ALL SHE HAD TO DO WAS GET THROUGH IT THE WAY SHE HAD DONE IT  
20          BEFORE AND THAT MURDER CHARGE GOES AWAY. OKAY? IT'S GONE.  
21          IT'S GONE FOR HER. IF SHE HELD UP HER END OF THE DEAL, WHICH  
22          WAS TO COME IN HERE AND TELL US LIKE YOU TOLD IT THE SIXTH  
23          TIME AROUND.

24          YOU SAW HER WHEN MS. COLLINS WAS ASKING HER QUESTIONS  
25          AND WHEN I WAS ASKING HER QUESTIONS. CORRECT, CORRECT,

1 CORRECT. SHE HAD SO FORMULATED HER REHEARSED AND  
2 PRACTICED TESTIMONY, THE ONLY THING THAT MATTERED TO HER  
3 SITTING IN THIS COURTROOM WAS MAKING SURE THAT MURDER  
4 CHARGE WASN'T COMING BACK. AND SHE KNEW I'VE JUST GOTTA  
5 TELL IT LIKE I TOLD IT THE LAST TIME. SHE MAY NOT BE GOOD AT  
6 TELLING THE TRUTH. SHE'S GOOD AT TELLING A STORY. AND SHE'S  
7 REALLY GOOD AT THAT ONE BECAUSE SHE HAD A LONG TIME TO  
8 REHEARSE IT.

9 THE EMOTIONAL-LESS TESTIMONY FROM HER, NINETY-NINE  
10 PERCENT OF IT, UNTIL THE TIME SHE HAD TO THINK ABOUT SEEING  
11 MR. CUBLEY BLEEDING, LAYING ON THE GROUND IN THAT TRAILER. I  
12 SUBMIT TO YOU THAT WAS, FOR A COUPLE OF SECONDS THERE, THAT  
13 WAS GUILT GETTING THE BEST OF HER. SHE CHOKED THAT BACK  
14 PRETTY QUICKLY. I DON'T EVEN KNOW IF YOU NOTICED IT, IT  
15 HAPPENED SO FAST.

16 SHE STARTED THINKING ABOUT WHAT SHE HAD DONE. IT  
17 HAPPENED, BUT SHE MANAGED TO CHOKE THAT BACK. SHE WASN'T  
18 GONNA MESS UP HER DEAL. SHE HAD SO MUCH TO GAIN BY TELLING  
19 THAT STORY. HER TESTIMONY IS NOT CREDIBLE. SHE CAME IN HERE  
20 AND ADMITTED TO LYING UNDER OATH. AND SHE'S WHAT STANDS  
21 BETWEEN MR. GUTIERREZ AND A MURDER CONVICTION. YOU CANNOT  
22 TAKE THIS WOMAN AT HER WORD. HER WORD IS THE ONLY THING  
23 THAT PUTS HIM IN THE TRAILER.

24 LET'S GO THROUGH THESE EXHIBITS. THE EXISTENCE OF THIS  
25 BRICK IS CORROBORATED. DANA'S STATEMENT IS CORROBORATED

1 BECAUSE THIS BRICK EXISTS. WHY IS THAT? WELL, BECAUSE DANA  
2 WAS THERE. I MEAN, DANA CAN TELL YOU ABSOLUTELY EVERYTHING  
3 ABOUT THIS CASE. SHE COULD EVEN TELL YOU WHAT COLOR THE  
4 CURTAINS WERE IF THAT WERE IMPORTANT BECAUSE SHE WAS THERE.

5 THAT DOESN'T MEAN MY CLIENT WAS THERE. OKAY? WOULD  
6 THIS HAVE BEEN A BETTER PIECE OF EVIDENCE IF IT HAD SOME FIBERS  
7 ON IT FROM MY CLIENT'S GLOVES THAT HE WAS SUPPOSEDLY  
8 WEARING? OR SOME FINGERPRINTS ON IT FROM MY CLIENT? OR SOME  
9 BLOOD ON IT FROM MY CLIENT? OR SOME SWEAT ON IT FROM MY  
10 CLIENT? OR IF WE KNEW EXACTLY WHERE IT CAME FROM?

11 OR, IF DANA SAID I ASSUME HE PICKED UP A BRICK. SHE KNEW  
12 THERE WAS A BRICK THERE BECAUSE SHE WAS A LOT MORE  
13 INVOLVED IN THIS CASE. SHE DIDN'T WANT TO TESTIFY THAT SHE  
14 SAW HIM PICK IT UP, THOUGH. SHE ASSUMED HE PICKED IT UP.

15 SO, WHAT DOES THIS TELL YOU ABOUT MY CLIENT'S  
16 INVOLVEMENT IN THE CASE? I SUBMIT TO YOU, ABSOLUTELY  
17 NOTHING. BECAUSE ONE OF THOSE THINGS ON THE LIST, YOU KNOW,  
18 THAT IS CORROBORATED. BUT AGAIN, LET'S NOT CONFUSE THESE  
19 TWO NOTIONS OF CORROBORATION.

20 DANA BLACKMON TELLS YOU A MILLION THINGS HAPPEN, AND  
21 SHE'S TELLING YOU THAT BECAUSE SHE WAS THERE WHEN IT  
22 HAPPENED. I MEAN THAT JUST PROVES SHE WAS THERE WHEN THEY  
23 HAPPENED. IT DOESN'T PROVE THAT MY CLIENT WAS INVOLVED IN  
24 THE OCCURRENCE OR THAT HE WAS THERE.

1           DANA SAID THERE WAS AN OLD MAN WITH A GUN. HOW DID  
2           SHE KNOW THAT? SHE KNEW THAT BECAUSE SHE WAS THERE. DANA  
3           SAID THAT THERE WERE GLOVES AND A MASK. WELL, THE GLOVES  
4           AREN'T CORROBORATED. REMEMBER? THEY NEVER FOUND THOSE,  
5           AND THOSE WOULD HAVE HAD BLOOD ON THEM, ACCORDING TO HER.  
6           SO, THAT'S A PRETTY IMPORTANT PIECE OF EVIDENCE THAT'S  
7           UNCORROBORATED.

8           DANA SAID THERE WAS A MASK. THEY FOUND A MASK IN THE  
9           HOUSE. I SUPPOSE DANA COULD HAVE SAID HE WAS WEARING PANTS  
10          AND THEN THEY WOULD HAVE SAID, LOOK, WE FOUND PANTS IN THE  
11          HOUSE. THERE WAS A MASK IN THE HOUSE UNCONNECTED TO  
12          ANYTHING BY ANY FORENSIC EVIDENCE WHATSOEVER. THEY CAN'T  
13          EVEN REALLY CONNECT IT TO MY GUY. THEY COULD HAVE TAKEN  
14          HAIR. DO YOU THINK THERE MAY HAVE BEEN SOME OF HIS HAIR IN  
15          THAT SKI MASK?

16          DANA SAID THAT MR. CUBLEY'S FACE APPEARED TO BE BLOODY.  
17          SURE, SHE KNEW THAT BECAUSE SHE WAS THERE. THAT DOESN'T  
18          CORROBORATE IN ANY WAY THE FACT THAT MR. GUTIERREZ WAS  
19          THERE. I MEAN, WE ALL GOT TO ASSUME THAT DANA WAS THERE SO  
20          THEY CAN TELL US ABOUT WHAT THE SCENE LOOKED LIKE. WE WANT  
21          CORROBORATION FROM SOME OTHER PEOPLE. THAT'D BE AWFULLY  
22          NICE.

23          DANA SAID THEY DROPPED THE KID OFF. TAKE CARE OF OUR  
24          KID FOR A COUPLE OF HOURS WHILE WE GO COMMIT A BURGLARY.  
25          THEY'VE HAD FIVE YEARS TO TALK TO THE PEOPLE WHO WERE

1 WATCHING THE KID. WHAT IF THEY HAD COME INTO COURT AND SAID  
2 YES, ON THE 29TH, DANA AND MR. GUTIERREZ CAME BY IN A BLUE  
3 PONTIAC AND THEY DROPPED OFF THE BABY. AND THEN A COUPLE OF  
4 HOURS LATER THEY CAME BACK AND PICKED THE BABY UP. MAYBE  
5 THEY LOOKED WEIRD, MAYBE THEY LOOKED EXCITED, MAYBE THEY  
6 LOOKED PANICKED, MAYBE THEY WERE IN A HURRY. OR MAYBE HE  
7 WAS WEARING BLOOD NIKE SNEAKERS. THAT'S CORROBORATION.  
8 AND WE DON'T HAVE ANY OF THAT IN THIS CASE. FIVE YEARS  
9 THEY'VE HAD TO BRING THOSE PEOPLE INTO COURT. BUT THEY JUST  
10 WANT YOU TO BELIEVE DANA BECAUSE DANA CORROBORATES DANA.

11 THE TOOLS. YEAH, THERE WERE SOME TOOLS IN THE TRAILER  
12 AND THEY HAD SOME DUST ON THEM WHICH MAY HAVE BEEN FROM  
13 CROSS-CONTAMINATION OR OTHERWISE. BUT WHY ARE THE TOOLS  
14 IMPORTANT? BECAUSE DANA SAID THAT'S WHAT WAS USED TO  
15 BREAK INTO THE SAFE. WELL, YOU KNOW THAT THERE'S EVIDENCE TO  
16 THE CONTRARY.

17 AND YOU CAN LOOK AT THIS AND SEE THIS THING WAS CUT  
18 OPEN. AND SHE DIDN'T TELL YOU THAT. SHE'S NOT TELLING YOU THE  
19 WHOLE TRUTH, LADIES AND GENTLEMEN. AND THAT IS CRITICALLY  
20 IMPORTANT BECAUSE IF YOU'RE GOING TO USE HER TESTIMONY TO  
21 CONVICT MY CLIENT OF MURDER, DON'T FORGET THIS GAPING HOLE IN  
22 HER STORY.

23 OH, DANA CAN CORROBORATE THE ITEMS THAT WERE TAKEN.  
24 WELL, SHE KNOWS THAT BECAUSE SHE WAS THERE, SHE TOOK THE  
25 ITEMS. SHE USED THE DISCOVER CARD. SHE PULLED OUT THE

1 CHECKS. DOES ANYONE ELSE-- WELL, DID THEY FIND THE DISCOVER  
2 CARD? YOU KNOW, SHE DIDN'T TELL THE TRUTH ABOUT THAT.

3 BECAUSE, I SUBMIT, IF YOU FIND THE DISCOVER CARD AND YOU  
4 FIND THIS CUTTING TOOL, AND YOU FIND THE CHECKBOOKS, THEN  
5 YOU FIND THE REAL TRUTH OF WHAT HAPPENED AND IT DOESN'T  
6 INVOLVE MY CLIENT. IT SURE DOES INVOLVE DANA BLACKMON,  
7 THOUGH. AND WHO KNOWS WHO ELSE.

8 THEY EVEN SAID THE CORD WAS CUT. AND I THINK IT WAS PART  
9 OF WHAT DANA TESTIFIES TO, WAS THAT MY CLIENT BEFORE HE  
10 COMMITTED THIS CRIME, I'M GOING TO HAVE TO GO, AND THIS GUY  
11 HAS A GUN AND I'M GONNA HAVE TO HIT HIM WITH SOMETHING, I  
12 THINK HE MIGHT HAVE GUN, AND THEN I'M GONNA GO IN THERE. AND  
13 THEN WHEN I CAME OUT OF THERE I CUT THE CORD. AND THEN WE  
14 DID THIS AND THEN WE DID THAT. IT'S AN AWFUL LOT OF TALKING  
15 ABOUT SPECIFIC THINGS THAT SOMEBODY DID.

16 USE YOUR OWN COMMON SENSE. IS THAT HOW THIS THING  
17 WOULD HAVE GONE DOWN? I DID X, Y, Z. I'M GONNA DO ALL THESE  
18 THINGS. OR IS IT MORE THAT SHE KNOWS THESE THINGS BECAUSE  
19 SHE'S INVOLVED IN THESE THINGS BECAUSE SHE WAS THERE AND HAD  
20 A MUCH LARGER ROLE THAN SHE'S TELLING YOU. SHE'S NOT TELLING  
21 YOU THE TRUTH.

22 LET'S TALK ABOUT THE PHONE, AN ITEM OF EVIDENCE THAT  
23 HAS NO FINGERPRINTS ON IT. AN ITEM OF EVIDENCE THAT DOESN'T IN  
24 ANY WAY CONNECT YOU TO MY CLIENT. YEAH, THEY SAID THEY GOT  
25 A KNIFE OUT OF THE PLACE WHERE HE USED TO LIVE. AND THE FBI

1 REPORT SAID THE PHONE WAS CUT BY A KNIFE. OKAY. I HAVE A  
2 KNIFE. YOU HAVE A KNIFE. YOU HAVE A KNIFE. EVERYONE IN THIS  
3 COURTROOM HAS A KNIFE, EITHER A POCKETKNIFE, A KITCHEN KNIFE.  
4 AND ALL THAT FBI REPORT SAYS IS THAT THE PHONE CORD WAS CUT  
5 BY A KNIFE. NOT THAT KNIFE, A KNIFE.

6 LET'S REMEMBER WHAT DANA WOULD HAVE YOU BELIEVE  
7 ABOUT THAT KNIFE. THAT HE CARRIED IT WITH HIM ALL THE TIME.  
8 WELL, FOR THE LAST FOUR DAYS ANYWAY, BECAUSE HE SUPPOSEDLY  
9 HE GOT IT ON CHRISTMAS. BUT EVER SINCE CHRISTMAS HE CARRIED  
10 WITH HIM ALL THE TIME. ALWAYS HAD IT ON HIM. BECAUSE SHE  
11 WANTS YOU TO BELIEVE THAT HE CUT THE CORD.

12 I GUESS HE ALWAYS HAD IT ON HIM UP UNTIL THE TIME HE  
13 DECIDED TO LEAVE IT IN THAT DRAWER WITH THE SCREWDRIVER. SO,  
14 THE KNIFE THAT HE ALWAYS KEPT WITH HIM, IT DIDN'T HAPPEN TO BE  
15 WITH HIM FOR THE LAST COUPLE OF DAYS BECAUSE THEY FOUND IT  
16 OVER THERE IN THE TRAILER. THE KNIFE, TOO, NO FINGERPRINTS.

17 REMEMBER, SHE'S THE ONE WHO CALLED ON THE DISCOVER  
18 CARD.

19 AS FAR AS THIS FORGERY INFORMATION, SHE WAS PART OF  
20 THAT. SHE WAS THE RINGLEADER OF THAT. IT WAS HER IDEA. SHE  
21 FILLED IN THE CHECKS, DIFFERENT WRITING ON THE FRONT THAN ON  
22 THE BACK. SHE SENT HIM IN THE BANK TO INSULATE HERSELF. SHE  
23 KNOWS WHERE THOSE CHECKS CAME FROM. SHE'S NOT GONNA GO  
24 TRY AND CASH THEM. LET'S SEND CHARRO IN THERE.

1           SHE HAD NO EXPLANATION FOR WHY HE INSISTED IN GOING IN  
2           THE BANK. NONE. SHE HAD A LOT OF EXPLANATIONS FOR A LOT OF  
3           OTHER THINGS. I SUBMIT TO YOU BECAUSE HE DIDN'T INSIST ON  
4           GOING IN THE BANK; SHE MADE HIM GO INTO THE BANK. AND  
5           REMEMBER, THIS IS SUPPOSED TO BE A GUY WHO CAN GET HER TO DO  
6           ANYTHING.

7           SO, IF YOU'RE GONNA STEAL THESE CHECKS, WHY NOT GET HER  
8           TO GO CASH THEM FOR YOU, RATHER THAN PUTTING YOUR OWN  
9           NAME ON A STOLEN CHECK?

10          SHE CORROBORATES THE ONE CAR PURCHASE, THE PURCHASE  
11          THAT THEY ACTUALLY DID. BUT IT'S A TOTALLY DIFFERENT STORY  
12          FROM MR. VARGAS BECAUSE SHE'S THERE, SHE'S GOT THE MONEY,  
13          SHE'S CALLING THE SHOTS. AND I LOVE THIS LINE: WE'LL GO BACK TO  
14          THE BANK AND GET SOME MORE. IF YOU DON'T REMEMBER IT, IT'S  
15          THERE.

16          THE SAFE, WE'VE HEARD ABOUT IT BEING CUT. WE'VE HEARD  
17          ABOUT IT BEING OPENED. WE'VE HEARD IT BEING DISPOSED OF.  
18          WE'VE HEARD ABOUT THE SNEAKERS THAT WERE SUPPOSED TO BE IN  
19          IT THAT AREN'T IN IT. YOU'LL HAVE IT BACK IN THE JURY ROOM. THIS  
20          IS THE SAFE THAT HE NEEDED HELP CARRYING OUT. THIS IS THE SAFE  
21          DANA BLACKMON COULDN'T POSSIBLY CARRY BY HERSELF. THAT'S  
22          THE SAFE THAT TWO PEOPLE HAD TO CARRY.

23          WHY WOULD DANA SAY SHE HAD TO HELP HIM? BECAUSE SHE  
24          KNEW SHE WAS THERE. SHE KNEW SHE WASN'T GETTING AROUND  
25          THAT. BUT ALL SHE DID WAS HELP HIM CARRY IT OUT THE DOOR. I

1           SUBMIT TO YOU, DANA CARRIED THE SAFE OUT THE DOOR. DANA'S  
2           THINKING MAYBE IT'S GOT MY FINGERPRINTS ON IT. I GOTTA GIVE  
3           SOME SORT OF EXPLANATION FOR THAT. SO, I HELPED HIM GET IT OUT  
4           THE DOOR. WELL, A WOMAN PROBABLY COULDN'T CARRY THAT SAFE  
5           ALONE.

6           CORROBORATING TESTIMONY THAT THEY JUST DON'T HAVE.  
7           REMEMBER, FIVE YEARS THAT THEY'VE HAD TO GET SOME REAL  
8           HUMAN BEINGS IN HERE, SOME REAL, LIVE PEOPLE WHO COULD HAVE  
9           TESTIFIED ABOUT THE THINGS THAT DANA SAID AND MATCH THEM  
10          UP. THE BABYSITTERS, THE PEOPLE WHO WATCHED THE BABY. THE  
11          ALLEGED COMMISSION OF THIS CRIME, THEY WOULD HAVE OBSERVED  
12          THINGS THAT EVENING. THE DOCTOR WHO PRESCRIBED THESE PILLS  
13          THAT MY CLIENT SUPPOSEDLY RAN OUT WITHOUT TAKING. THEY  
14          COULD HAVE HAD THOSE PEOPLE IN COURT AND THEY'RE NOT HERE.

15          DANA LIED AT HER GUILTY PLEA. SHE LIED TO LAW  
16          ENFORCEMENT ON FIVE, SEPARATE OCCASION. SHE LIED TO HER  
17          FATHER ABOUT WINNING THE MONEY. BECAUSE DANA KNEW THERE  
18          WAS SOME ILL-GOTTEN GAINS GOING ON HERE. DANA HAD A STORY  
19          FOR EVERYTHING. DANA WAS KEEPING HERSELF WELL-PROTECTED  
20          AND ISOLATED FROM THIS CRIME.

21          WHEN IT ALL STARTED CRASHING DOWN ON HER WAS WHEN  
22          LAW ENFORCEMENT STARTED PUTTING THINGS TOGETHER. SO, SHE  
23          FINALLY GETS TO A VERSION THAT PUTS HER IN IT. UP UNTIL THEN,  
24          IT'S DON'T KNOW ANYTHING. IT'S CHARRO CAME HOME IN DIFFERENT  
25          CLOTHES. THEN CHARRO TOLD ME HE WAS GONNA GO, SO I KNEW HE

1 WAS GOING TO DO IT, BUT I DIDN'T GO. THEN IT WAS, WELL, WE  
2 PLANNED IT AND I WENT WITH HIM. AND THAT'S THE ONE THEY  
3 DECIDED TO STICK ON.

4 I SUBMIT TO YOU THAT THEY STOPPED TOO SOON. IF THEY HAD  
5 KEPT GOING, THEN THE CHARRO INVOLVEMENT WOULD HAVE BEEN  
6 MINIMIZED AND THE REAL STORY WOULD HAVE COME OUT. BUT  
7 DANA LUCKED OUT, BECAUSE THEY FINALLY GET ON ONE THAT THEY  
8 WERE OKAY WITH. ALL RIGHT. THIS GIVES US ANOTHER GUY. SHE'S  
9 ADMITTED HER PART. AND THEN THEY LOCKED HER IN AND SAID AS  
10 LONG AS YOU SAY IT THAT WAY NEXT TIME AROUND, WE'LL DROP THE  
11 MURDER CHARGE.

12 SO, NOW SHE DIDN'T HAVE A CHOICE TO CHANGE HER STORY.  
13 SHE CAME IN HERE AND SAID, CORRECT, CORRECT, CORRECT,  
14 CORRECT. SHE HAD NO INTEREST IN TELLING THE TRUTH HERE  
15 TODAY. BY HER AGREEMENT SHE JUST HAD TO SAY WHAT SHE SAID  
16 THE LAST TIME.

17 LET ME TOUCH BRIEFLY, AS WELL, ON REASONABLE DOUBT AND  
18 THE BURDEN OF PROOF. THE JUDGE IS GOING TO CHARGE YOU THAT  
19 THE STATE HAD THE BURDEN TO PROVE MR. GUTIERREZ GUILTY IN  
20 THIS MATTER. HE DOESN'T HAVE TO PROVE HIS INNOCENCE. THAT'S  
21 NOT THE WAY IT WORKS. IT'S DIFFICULT TO PROVE THAT YOU DIDN'T  
22 DO SOMETHING. OKAY? OUR FOREFATHER RECOGNIZED THAT FACT  
23 WHEN THEY CREATED A SYSTEM OF LAWS IN THIS COUNTRY WHICH  
24 REQUIRES THE ACCUSING AUTHORITY TO HAVE THE BURDEN TO  
25 PROVE THAT SOMETHING OCCURRED.

1 I SUBMIT TO YOU THAT THAT IS A GREAT AND HEAVY BURDEN,  
2 AND THAT THEY HAVE NOT CARRIED IT THROUGHOUT THIS TRIAL.  
3 WHAT THEY HAVE TO PROVE TO YOU IS BEYOND A REASONABLE  
4 DOUBT MY CLIENT IS GUILTY OF THE CHARGE, OF THE CRIMES FOR  
5 WHICH HE'S CHARGED. AND THAT BEING THE MURDER AND THE  
6 ARMED ROBBERY AND BREAKING INTO THIS TRAILER, WHICH IS THE  
7 BURGLARY, AND THEN FORGING THESE THREE CHECKS.

8 AND THE WAY THEY PROPOSE TO HAVE DONE IT IS BY BRINGING  
9 IN DANA BLACKMON. AND I THINK I'VE SAID JUST ENOUGH ABOUT  
10 HER. THEY WANT TO SAY THAT THE COMBINATION OF ALL OF THIS  
11 STUFF, NONE OF WHICH DIRECTLY POINTS TO MR. GUTIERREZ, EXCEPT  
12 FOR THE CHECKS. YOU KNOW, THIS STUFF THAT DOESN'T HAVE ANY  
13 IDENTIFYING FORENSIC MARKINGS ON IT OR FINGERPRINTS OR  
14 ANYTHING OF THAT NATURE, POINTS TO MR. GUTIERREZ, OTHER THAN  
15 THE CHECKS.

16 THEY WANT TO SAY TAKE ALL THIS STUFF AND THEN USE IT IN  
17 CONJUNCTION OF THE TESTIMONY OF THIS LIAR, THIS ADMITTED LIAR,  
18 WHO GOT A MURDER CHARGE DISMISSED IN ORDER TO KEEP TELLING  
19 HER STORY, AND USE THAT TO FIND MR. GUTIERREZ GUILTY BEYOND  
20 A REASONABLE DOUBT.

21 YOU KNOW, Y'ALL ARE LUCKY IN THIS SENSE: BECAUSE ONCE  
22 THIS IS OVER YOU'RE GOING TO BE GLAD YOU GOT TO SIT ON THIS  
23 JURY AND YOU'RE GOING TO TELL YOUR FAMILY ABOUT IT. WHAT  
24 KIND OF CASE DID YOU HAVE WHEN YOU WERE UP THERE ON JURY  
25 DUTY? IT WAS A MURDER CASE. YEAH, WHAT'D YOU DO? WELL, I

1 HOPE THIS IS NOT THE CONVERSATION THAT Y'ALL HAVE: WELL, WE  
2 FOUND HIM GUILTY. OH, YEAH, WHAT WAS THE EVIDENCE? WELL,  
3 THE STATE BROUGHT IN A BUNCH OF SCREWDRIVERS AND HAMMERS  
4 AND STUFF. OH, THEY MUST HAD HIS FINGERPRINTS ON THEM. WELL,  
5 NO, THEY DIDN'T. AND THE STATE BROUGHT IN A SAFE FROM THE  
6 DEFENDANT'S HOUSE. OH, THAT MUST HAVE BEEN WHY YOU  
7 CONVICTED HIM. YEAH, WELL, HE LIVED THERE WITH THIS OTHER  
8 GIRL WHO SAID HE DID IT, TOO. OH, SO THERE WAS A WITNESS? WELL,  
9 NOT EXACTLY. SHE WAS ALSO CHARGED WITH THE MURDER, TOO.  
10 SHE LIED HALF A DOZEN TIMES ABOUT IT UNTIL SHE FINALLY CAME  
11 AROUND ADMITTING HER INVOLVEMENT. BUT SHE SAID HE DID IT.  
12 AND SHE SAID HE BROKE INTO THAT SAFE WITH SOME OF THOSE  
13 TOOLS. OH. BUT THERE WAS A BIG, GIANT HOLE IN THE TOP OF THE  
14 SAFE. IT WAS OBVIOUSLY CUT OPEN WITH SOME SORT OF POWER  
15 TOOL, BUT SHE NEVER TOLD US ABOUT THAT. BUT SHE TOLD US  
16 ABOUT THE SNEAKERS THAT THEY COULDN'T NEVER FIND. AND SHE  
17 TOLD US ABOUT SOME BLOODY GLOVES, BUT THEY COULD NEVER  
18 FIND THOSE EITHER. AND SHE TOLD US ABOUT DISPOSING OF SOME  
19 EVIDENCE, BUT THEY COULD NEVER FIND THAT STUFF EITHER. BUT  
20 WE FOUND HIM GUILTY, THOUGH. THAT WAS SOME PRETTY GOOD  
21 EVIDENCE. WE FIGURED THE STATE CARRIED THE BURDEN.

22 I JUST HOPE YOU DON'T HAVE THAT KIND OF CONVERSATION  
23 WITH FAMILY MEMBERS.

24 I DON'T WANT TO IN ANY WAY MINIMIZE THE TRAGEDY THAT  
25 HAPPENED TO THE CUBLEY FAMILY. BY ALL ACCOUNTS AND

1           EVERYTHING I'VE LEARNED THROUGHOUT THIS CASE, HE SEEMED  
2           LIKE A FINE GENTLEMAN. AND HE SERVED HIS COUNTRY IN WORLD  
3           WAR II. HE DIDN'T DESERVE TO DIE. MY HEART GOES OUT TO THEM.

4                       BUT ONE PERSON WHO'S ALREADY ADMITTED THEIR  
5           INVOLVEMENT IN THE MURDER HAS GOTTEN AWAY WITH MURDER.  
6           OKAY? I TOLD YOU AT THE BEGINNING OF THIS TRIAL NOBODY  
7           WANTS A MURDERER TO GO FREE. NOBODY WANTS AN INNOCENT  
8           MAN TO BE CONVICTED. I'M ASKING YOU NOW TO COMPOUND THE  
9           ONE TRAGEDY THAT DANA BLACKMON ENABLED. BUT SHE DIDN'T GO  
10          FREE. SHE'S GOT TO DO TEN YEARS, NOT THIRTY TO LIFE. DON'T  
11          ALLOW THAT TO ALTER YOUR JUDGMENT AND SKEW YOUR  
12          JUDGMENT AND COMPOUND THAT TRAGEDY OF NOW CONVICTING AN  
13          INNOCENT MAN, BASED ON THE TESTIMONY OF DANA BLACKMON.

14                      THAT DOESN'T BRING ANY RELIEF TO THE VICTIM'S FAMILY OR  
15          TO THE STATE. WHAT WE DON'T WANT TO GIVE IS SATISFACTION TO  
16          DANA BLACKMON. DON'T GIVE HER THAT SATISFACTION.

17                      LOOK AT THIS EVIDENCE WHEN YOU GET BACK THERE. IF YOU  
18          FIND YOU'VE GOT SOME DOUBT ABOUT HER TESTIMONY, SOME  
19          QUESTIONS ABOUT WHY SOME OTHER IMPORTANT EVIDENCE THAT  
20          WAS NEVER FOUND IN THIS CASE, THEN I'M ASKING YOU TO DO YOUR  
21          DUTY IN THIS CASE AND FIND MR. GUTIERREZ NOT GUILTY OF  
22          MURDER, NOT GUILTY OF ARMED ROBBERY, NOT GUILTY OF  
23          BURGLARY.

24                      I'LL SEPARATE THOSE THREE CHARGES FROM THE FORGERIES.  
25          BECAUSE I'M NOT GOING TO STAND HERE IN FRONT OF YOU AND TELL

1 YOU THERE'S NOT EVIDENCE THAT HE PASSED THOSE CHECKS. YOU  
2 HAVE TO DECIDE IF HE KNEW WHAT HE WAS DOING AT THE TIME  
3 WHEN HE PASSED THEM. HE HAD THE REQUISITE CRIMINAL INTENT TO  
4 BE FRAUDULENTLY SEEKING THAT MONEY. HE DOESN'T READ OR  
5 WRITE ENGLISH.

6 THAT'S ALL I'VE GOT. NOW, YOU'VE GOT TO LISTEN TO THE  
7 JUDGE FOR A WHILE. I WANT TO THANK YOU FOR SERVING ON THIS  
8 JURY. I KNOW YOU'VE BEEN PAYING ATTENTION. I'VE BEEN  
9 WATCHING. NOBODY'S BEEN DOZING OFF. AND I JUST HOPE THAT YOU  
10 DELIVER A TRUE VERDICT AND THAT THAT VERDICT WILL BE NOT  
11 GUILTY. THANK YOU.

12 THE COURT: I'M GOING TO LET Y'ALL TAKE A SHORT BREAK  
13 BEFORE I INSTRUCT YOU ON THE LAW. WE'LL TAKE ABOUT TEN  
14 MINUTES. PLEASE GO TO YOUR JURY ROOM. DO NOT DISCUSS THE  
15 CASE. I'LL BRING YOU BACK IN TEN MINUTES.

16 (WHEREUPON THE JURY EXITED THE COURTROOM AT 12:15 P.M.)  
17 WE'LL BE IN RECESS FOR TEN MINUTES.

18 **COURT IN SESSION - 12:28 P.M.**

19 THE COURT: BRING IN THE JURY.

20 (WHEREUPON THE JURY ENTERED THE COURTROOM)

21 THE COURT: LADIES AND GENTLEMEN, YOU HAVE HEARD ALL  
22 THE EVIDENCE IN THE CASE AS WELL AS THE SUMMATIONS OF THE  
23 LAWYERS. THEREFORE, IT NOW BECOMES MY OBLIGATION TO  
24 INSTRUCT YOU ON THE LAW THAT'S APPLICABLE IN THE CASE. THEN  
25 YOU'LL BE ASKED TO GO BACK AND BEGIN WITH YOUR

1 DELIBERATIONS. THROUGH THAT DELIBERATION PROCESS YOU'LL  
2 EXAMINE THE EVIDENCE, DECIDE THE FACTS, APPLY THE LAW AND  
3 ARRIVE AT A FAIR AND JUST DECISION IN THE CASE.

4 IT IS YOUR EXCLUSIVE DUTY TO DETERMINE WHAT THE FACTS  
5 ARE. AND YOU DO THAT THROUGH YOUR OWN COMMON SENSE  
6 EXAMINATION AND EVALUATION OF ALL THE TESTIMONY AND OTHER  
7 EVIDENCE RECEIVED DURING THE TRIAL OF THIS CASE. YOU TWELVE  
8 JURORS ALONE WILL DECIDE WHAT WEIGHT, VALUE AND EFFECT TO  
9 GIVE TO ANY PARTICULAR TESTIMONY OR OTHER EVIDENCE IN THE  
10 CASE.

11 YOUR SOLE OBJECTIVE IS TO SIMPLY REACH THE TRUTH IN THE  
12 MATTER, AND BY DOING THAT YOU WILL HAVE FULFILLED YOUR  
13 OBLIGATIONS AS JURORS. AND THAT IS TO SIMPLY GIVE BOTH THE  
14 STATE AND THE DEFENDANT A FAIR AND IMPARTIAL TRIAL.

15 NOW, IN THIS CASE, AS YOU KNOW, THE STATE THROUGH THE  
16 PROSECUTOR HAS ACCUSED THE DEFENDANT, ISAIAS DIAZ  
17 GUTIERREZ, WITH HAVING COMMITTED SIX SEPARATE AND DISTINCT  
18 OFFENSES. EACH OF THOSE OFFENSES IS ALLEGED IN A SEPARATE  
19 INDICTMENT.

20 AS I TOLD YOU AT THE TRIAL'S BEGINNING, THE INDICTMENT IS  
21 NOT EVIDENCE IN THE CASE. IT'S NOT PROOF OF ANYTHING, BUT IT  
22 DOES SIMPLY SET FORTH THE ALLEGATIONS THAT THE STATE HAS  
23 BROUGHT AGAINST THE DEFENDANT AS IT RELATES TO A PARTICULAR  
24 CRIMINAL CHARGE.

1           NOW, IN THIS CASE, AS YOU KNOW, THE STATE HAS ACCUSED  
2           THE DEFENDANT WITH HAVING COMMITTED THE CRIMES OF  
3           BURGLARY IN THE FIRST DEGREE, ARMED ROBBERY, MURDER, AND  
4           THREE SEPARATE COUNTS OF FORGERY. THE ALLEGATIONS  
5           SUPPORTING THOSE CHARGES ARE IN THOSE INDICTMENTS. THE  
6           INDICTMENTS WILL BE IN THE JURY ROOM WITH YOU WHEN YOU GO  
7           BACK TO DELIBERATE.

8           AS I SAID, THE INDICTMENTS DON'T PROVE ANYTHING. THEY'RE  
9           NOT EVIDENCE OF ANYTHING. THE REASON THE INDICTMENTS WILL  
10          BE IN THE JURY ROOM IS THAT THEY WILL SERVE AS THE VERDICT  
11          FORM. IN OTHER WORDS, MR. FOREMAN, IT'S ON THE BACK OF EACH  
12          OF THE RESPECTIVE INDICTMENTS THAT YOU WILL INDICATE THE  
13          JURY'S DECISION AS IT RELATES TO THAT PARTICULAR CHARGE.

14          AND, IN THIS CASE, YOUR VERDICTS MAY BE THE SAME AS TO  
15          EACH INDICTMENT; THEY MAY BE DIFFERENT. THAT WILL DEPEND  
16          UPON YOUR DETERMINATION OF FACT AND THEN YOUR APPLICATION  
17          OF THE LAW AS I WILL HAVE PROVIDED IT TO YOU.

18          NOW, AS TO THE CHARGES THAT ARE CONTAINED IN EACH OF  
19          THOSE INDICTMENTS, THE DEFENDANT HAS ENTERED A PLEA OF NOT  
20          GUILTY. AND AS YOU'VE BEEN TOLD, THAT PLEA OF NOT GUILTY  
21          THEREFORE HAS PLACED UPON THE STATE THE BURDEN OF PROVING  
22          THE ALLEGATIONS THAT THEY HAVE SET FORTH IN EACH OF THOSE  
23          INDICTMENTS; THE BURDEN OF PROVING EACH OF THE ESSENTIAL  
24          ELEMENTS THAT CONSTITUTE THE CRIMES ALLEGED IN THOSE  
25          INDICTMENTS; AND THEREFORE, THE BURDEN IS UPON THE STATE TO

1 ESTABLISH THE DEFENDANT'S GUILT TO THE SATISFACTION OF YOU  
2 TWELVE JURORS BEYOND A REASONABLE DOUBT BEFORE A VERDICT  
3 OF GUILTY COULD BE RETURNED AS TO ANY OF THE INDICTMENTS.

4 THE BURDEN IS NEVER UPON A DEFENDANT TO PROVE THAT HE  
5 IS NOT GUILTY, OR TO PROVE THAT HE IS INNOCENT, BECAUSE IN  
6 MANY CASES THAT MIGHT NOT EVEN BE POSSIBLE. THE BURDEN IS  
7 ALWAYS UPON THE STATE BECAUSE THEY HAVE BROUGHT THE  
8 ACCUSATION, THEY'VE MADE THE ALLEGATIONS AGAINST THE  
9 DEFENDANT, TO PROVE HIS GUILT TO YOUR SATISFACTION BEYOND A  
10 REASONABLE DOUBT.

11 YOU ARE INSTRUCTED THAT IT IS A VITAL, IMPORTANT AND  
12 CARDINAL RULE OF LAW THAT EVERY DEFENDANT IN A CRIMINAL  
13 TRIAL, AND IT DOESN'T MATTER HOW SERIOUS THE OFFENSE MIGHT BE  
14 FOR WHICH THAT PERSON STANDS CHARGED, A DEFENDANT IN A  
15 CRIMINAL TRIAL IS ALWAYS PRESUMED TO BE INNOCENT OF ANY  
16 CHARGE. AND THAT PRESUMPTION OF INNOCENCE REMAINS WITH  
17 ANY DEFENDANT AS IT DOES WITH THIS DEFENDANT FROM THE TIME  
18 THAT HE IS PLACED UNDER ARREST AND THROUGHOUT THE COURSE  
19 OF THE CRIMINAL PROCESS, AND EVEN THROUGHOUT THE COURSE OF  
20 THE ACTUAL TRIAL OF THE CASE.

21 AND AS I TOLD YOU, THAT PRESUMPTION OF INNOCENCE WILL  
22 BE WITH MR. GUTIERREZ EVEN AT THE TIME THAT YOU GO BACK TO  
23 BEGIN WITH YOUR DELIBERATIONS IN THIS CASE. AND THAT  
24 PRESUMPTION OF INNOCENCE WILL BE WITH HIM IN THAT JURY ROOM,  
25 AND IT WILL REMAIN WITH HIM FOREVER UNLESS YOU TWELVE

1 JURORS DETERMINE THAT HE'S NO LONGER ENTITLED TO THE  
2 PRESUMPTION OF INNOCENCE; THAT IS, AFTER YOU HAVE CAREFULLY  
3 CONSIDERED ALL THE EVIDENCE IN THE CASE. FROM THAT EVIDENCE  
4 YOU DECIDED WHAT YOU BELIEVED TO BE THE TRUE FACTS. AND  
5 AFTER DECIDING THOSE FACTS, YOU APPLY THE LAW THAT I HAVE  
6 PROVIDED YOU, IF YOU TWELVE JURORS UNANIMOUSLY DETERMINE  
7 THAT HIS GUILT HAS BEEN PROVEN BEYOND A REASONABLE DOUBT  
8 AS TO A PARTICULAR CHARGE, THEN THE DEFENDANT WOULD NO  
9 LONGER BE ENTITLED TO THAT PRESUMPTION OF INNOCENCE. BUT  
10 IT'S ONLY IF, UNLESS AND UNTIL YOU ARE SATISFIED WITH HIS GUILT  
11 BEYOND A REASONABLE DOUBT THAT THAT PRESUMPTION OF  
12 INNOCENCE WOULD NO LONGER BE APPLICABLE.

13 NOW, WHILE THE STATE DOES HAVE THE BURDEN OF PROVING A  
14 DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT, THAT DOESN'T  
15 MEAN THAT THE STATE HAS TO PROVE HIS GUILT BEYOND ALL DOUBT  
16 OR BEYOND ANY POSSIBLE DOUBT. BUT IT DOES REQUIRE THE STATE  
17 TO PROVE HIS GUILT TO YOUR SATISFACTION BEYOND A REASONABLE  
18 DOUBT.

19 AND THE TERM, REASONABLE DOUBT, SHOULD BE GIVEN ITS  
20 PLAIN AND ORDINARY MEANING. A REASONABLE DOUBT IS THE KIND  
21 OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE  
22 TO ACT UPON THE INFORMATION PROVIDED.

23 AND A DEFENDANT IN A CRIMINAL TRIAL IS ENTITLED TO ANY  
24 REASONABLE DOUBT THAT ARISES FROM THE EVIDENCE OR LACK OF  
25 EVIDENCE IN THE CASE. AND IF UPON ANY FACTUAL ISSUE ESSENTIAL

1 TO A FINDING OF A VERDICT OF GUILTY, YOU HAVE SOME  
2 REASONABLE DOUBT AS TO HOW THAT ISSUE SHOULD BE RESOLVED,  
3 IT WOULD ALWAYS BE YOUR DUTY TO RESOLVE THAT REASONABLE  
4 DOUBT IN FAVOR OF THE DEFENDANT.

5 AND, THEREFORE, IF UPON YOUR CONSIDERATION OF THE  
6 WHOLE CASE YOU HAVE A REASONABLE DOUBT AS TO HIS GUILT AS  
7 TO A PARTICULAR CHARGE, YOU MUST RESOLVE THAT REASONABLE  
8 DOUBT IN HIS FAVOR AND RETURN A VERDICT OF NOT GUILTY AS IT  
9 RELATES TO THAT PARTICULAR CHARGE.

10 ON THE OTHER HAND, AFTER YOU'VE CAREFULLY CONSIDERED  
11 ALL THE EVIDENCE IN THE CASE AND APPLIED THE LAW, IF YOU  
12 TWELVE JURORS UNANIMOUSLY DETERMINE THAT HIS GUILT HAS  
13 BEEN PROVEN BEYOND A REASONABLE DOUBT AS TO A PARTICULAR  
14 CHARGE, THEN, OF COURSE, IT WOULD BE YOUR CORRESPONDING  
15 DUTY TO CONVICT HIM OR TO FIND HIM GUILTY OF ANY CRIME YOU  
16 FIND HAS BEEN PROVEN TO YOUR SATISFACTION BEYOND A  
17 REASONABLE DOUBT.

18 NOW, THE SAME LAW THAT PROVIDES THAT YOU ARE THE  
19 JUDGES OF THE FACTS ALSO PROVIDES THAT I AM THE JUDGE OF THE  
20 LAW. THAT SIMPLY MEANS THAT NO ONE IS GOING TO TELL YOU HOW  
21 TO ARRIVE AT YOUR DETERMINATION OF FACT IN THIS CASE. YOU DO  
22 THAT AS I HAVE STATED THROUGH THE EXERCISE OF GOOD  
23 JUDGMENT AND COMMON SENSE, CONSCIENTIOUSLY APPLIED TO THE  
24 TESTIMONY AND THE EVIDENCE RECEIVED DURING THE TRIAL OF THIS  
25 CASE.

1           YOU MUST, HOWEVER, UNDER YOUR OATH AS A JUROR, ACCEPT  
2           THE LAW AS I PROVIDE IT TO YOU AS BEING THE LAW THAT IS  
3           APPLICABLE IN THIS PARTICULAR CASE. IN OTHER WORDS, YOU ARE  
4           NOT TO CONCERN YOURSELF WITH WHAT YOU THOUGHT THE LAW  
5           WAS BEFORE YOU CAME TO SERVE AS A JUROR THIS WEEK, OR WHAT  
6           YOU THINK THE LAW OUGHT TO BE. YOU MUST UNDER YOUR OATH AS  
7           A JUROR ACCEPT THE LAW AS I PROVIDE IT AS BEING THE LAW THAT  
8           YOU ARE TO PROVIDE IN THIS PARTICULAR CASE. AND THEN YOU  
9           SIMPLY TAKE THAT LAW AND YOU APPLY IT TO THE FACTS AS YOU  
10          TWELVE JURORS DETERMINE THOSE FACTS TO BE BASED UPON YOUR  
11          COMMON SENSE EXAMINATION OF THE EVIDENCE IN THE CASE.

12           NOW, AS I HAVE TOLD YOU, YOU ARE THE SOLE JUDGES OF THE  
13          FACTS IN THIS CASE. AND YOU ARE THEREFORE, NECESSARILY, THE  
14          SOLE JUDGES OF THE CREDIBILITY; THAT IS, THE BELIEVABILITY, OF  
15          EACH WITNESS THAT HAS TESTIFIED DURING THIS TRIAL.

16           YOU TWELVE JURORS ALONE WILL DECIDE WHAT WEIGHT,  
17          VALUE AND EFFECT TO GIVE TO ANY PARTICULAR WITNESS'  
18          TESTIMONY OR EVEN PORTIONS OF TESTIMONY. AND THEREFORE,  
19          THERE ARE A NUMBER OF FACTORS WHICH YOU SHOULD TAKE INTO  
20          ACCOUNT AS YOU ASSESS AND EVALUATE A WITNESS' CREDIBILITY.  
21          AND I'M GOING TO LIST THOSE FACTORS FOR YOU.

22           YOU MAY CONSIDER THE Demeanor OF THE WITNESS; THAT IS,  
23          HOW THE WITNESS APPEARED TO YOU WHEN THE WITNESS TESTIFIED  
24          FROM THE WITNESS STAND. WAS THE WITNESS STRAIGHTFORWARD IN  
25          RESPONDING TO QUESTIONS, OR WAS THE WITNESS HESITANT OR

1           EVASIVE IN RESPONDING TO QUESTIONS THAT WERE ASKED OF THAT  
2           WITNESS.

3           SIMPLY PUT, DID THE WITNESS APPEAR TO YOU TO BE TELLING  
4           THE TRUTH AND TO HAVE KNOWLEDGE OF THE FACTS TO WHICH THAT  
5           WITNESS HAS TESTIFIED?

6           YOU MAY ALSO CONSIDER WHETHER OR NOT THE TESTIMONY  
7           OF A WITNESS WAS CONSISTENT OR WAS IT INCONSISTENT WITH THAT  
8           WITNESS' OWN TESTIMONY; WHETHER THAT INFORMATION PROVIDED  
9           BY THAT WITNESS, WHETHER IT BE IN COURT OR OUT OF COURT. AND  
10          YOU MAY CONSIDER WHETHER OR NOT THE TESTIMONY OF A WITNESS  
11          IS CONSISTENT OR INCONSISTENT WITH OTHER TESTIMONY AND  
12          OTHER EVIDENCE RECEIVED DURING THE TRIAL OF THE CASE.

13          NOW, YOU MAY ALSO CONSIDER HOW THE WITNESS CAME TO  
14          KNOW THE FACTS TO WHICH THAT WITNESS HAS TESTIFIED; THAT IS,  
15          WHAT WAS A PARTICULAR WITNESS' OPPORTUNITY AND ABILITY TO  
16          PERCEIVE THE EXISTENCE OF THOSE FACTS TO WHICH THAT WITNESS  
17          HAS TESTIFIED BY HAVING PREVIOUSLY USED HIS OR HER SENSES.  
18          AND THEN WHAT IS THAT WITNESS' ABILITY TO BE ABLE TO COME  
19          INTO COURT AND TO ACCURATELY RECOLLECT TO YOU AS TO WHAT  
20          THEY HAVE PREVIOUSLY SEEN OR HEARD OR FELT, FOR THAT MATTER.

21          YOU MAY ALSO CONSIDER ANY BIAS OR PREJUDICE OR  
22          INTEREST THAT THE WITNESS MIGHT HAVE IN A CASE. IN OTHER  
23          WORDS, WHEN YOU FIND SOME REASON THAT A PARTICULAR WITNESS  
24          WOULD COME INTO COURT AND WOULD TESTIFY ONE WAY OR  
25          ANOTHER TO HELP OR TO HURT ONE SIDE OR THE OTHER, THEN YOU

1 MAY CONSIDER ANY INTEREST THAT A WITNESS MIGHT HAVE IN THE  
2 OUTCOME OF A CASE.

3 IF YOU DETERMINE THAT A WITNESS DOES HAVE SUCH AN  
4 INTEREST, YOU FURTHER FIND THAT THAT INTEREST WOULD BEAR  
5 UPON THAT PARTICULAR WITNESS' CREDIBILITY.

6 YOU MAY ALSO CONSIDER WHETHER OR NOT THE TESTIMONY  
7 OF A WITNESS IS STRENGTHENED OR IS IT WEAKENED BY OTHER  
8 TESTIMONY OR OTHER EVIDENCE RECEIVED DURING THE TRIAL OF  
9 THE CASE.

10 NOW, DURING THE TRIAL OF THIS CASE YOU'VE HEARD  
11 TESTIMONY FROM CERTAIN PERSONS WHO ARE QUALIFIED AS  
12 EXPERTS AND TESTIFIED IN AN OPINION FORM BASED UPON THEIR  
13 EXPERTISE. ORDINARILY, LAY WITNESSES, THOSE WHO ARE NOT  
14 EXPERTS, ARE NOT PERMITTED TO TESTIFY IN AN OPINION FORM  
15 BASED UPON THE FACTS OF THE MATTER. BUT WHERE A PERSON HAS  
16 A SPECIAL EXPERTISE IN A PARTICULAR FIELD, BASED UPON SPECIAL  
17 EDUCATION AND TRAINING AND EXPERIENCE; WHERE THEY ARE  
18 QUALIFIED AS AN EXPERT, THEY MAY COME INTO COURT AND TESTIFY  
19 AS TO THEIR EXPERT OPINION, BASED UPON THE FACTS THAT RELATE  
20 TO THE CASE.

21 NOW, JUST BECAUSE I QUALIFY AN EXPERT DOESN'T MEAN THAT  
22 I'M TELLING YOU HAVE TO ACCEPT THAT EXPERT'S OPINION IN ITS  
23 ENTIRETY OR EVEN ANY PORTION OF IT, BECAUSE YOU'RE GOING TO  
24 HAVE THE SOLE OBLIGATION AND DUTY TO ASSESS AND EVALUATE  
25 THE CREDIBILITY OF EXPERT TESTIMONY JUST AS YOU DO ANY OTHER

1 TESTIMONY. I SIMPLY MUST DETERMINE WHETHER OR NOT A PERSON  
2 IS QUALIFIED TO TESTIFY AS AN EXPERT. IN THIS PARTICULAR CASE I  
3 HAVE QUALIFIED SOME WITNESSES AS EXPERTS IN A PARTICULAR  
4 FIELD.

5 BUT IN YOUR ASSESSMENT AND IN YOUR EVALUATION OF EACH  
6 OF THE WITNESSES' CREDIBILITY, IF YOU DETERMINE THAT A PERSON  
7 QUALIFIES AS AN EXPERT, DOES NOT POSSESS THE REQUISITE  
8 TRAINING OR EDUCATION OR EXPERIENCE IN THAT PARTICULAR  
9 FIELD, OR YOU FIND THAT THEY DID NOT PROPERLY CONSIDER THE  
10 FACTS THAT RELATE TO THIS PARTICULAR CASE, THEN YOU MAY  
11 DISREGARD AN EXPERT'S OPINION IN ITS ENTIRETY OR ANY PORTION  
12 OF IT.

13 SIMPLY PUT, YOU JUST THE CREDIBILITY OF EXPERT WITNESSES'  
14 TESTIMONY JUST AS DO ANY OTHER AND YOU TWELVE JURORS ARE  
15 PERMITTED TO BELIEVE AS MUCH OR AS LITTLE OF WHAT A WITNESS  
16 HAS TESTIFIED TO AS YOU DEEM IS APPROPRIATE. AND SO, YOU MAY  
17 BELIEVE EVERYTHING THAT A WITNESS HAS TESTIFIED TO. YOU MAY  
18 CHOOSE TO BELIEVE NONE OF IT. YOU MAY BELIEVE ONE PORTION OF  
19 A WITNESS' TESTIMONY AND REJECT SOME OTHER PORTION OF THAT  
20 SAME WITNESS' TESTIMONY.

21 NOW, YOU MAY BELIEVE ONE WITNESS AS OPPOSED TO  
22 SEVERAL; OR SEVERAL AS OPPOSED TO ONE. BUT WHATEVER YOUR  
23 GOOD JUDGMENT AND COMMON SENSE TELLS YOU IS THE MOST  
24 BELIEVABLE AND CREDIBLE TESTIMONY IS THE TESTIMONY YOU  
25 SHOULD ACCEPT. AND YOU SHOULD REJECT ANY TESTIMONY OR

1 OTHER EVIDENCE THAT YOU FIND NOT TO BE CREDIBLE OR  
2 BELIEVABLE.

3 AGAIN, YOUR SOLE OBJECTIVE IS TO SIMPLY REACH THE TRUTH  
4 OF THE MATTER AND BY DOING THAT YOU WILL HAVE FULFILLED  
5 YOUR OBLIGATIONS AS JURORS IN THIS CASE.

6 NOW, WHILE THERE ARE VARIOUS FORMS OF EVIDENCE, SUCH  
7 AS WITNESSES' TESTIMONY, SUCH AS PHOTOGRAPHS, DOCUMENTS,  
8 CHARTS, AND OTHER TYPES OF PHYSICAL EXHIBITS, THERE ARE  
9 REALLY ON TWO TYPES OF EVIDENCE. EITHER OR BOTH OF THOSE  
10 TYPES OF EVIDENCE MAY BE USED TO PROVE ANY FACT IN ISSUE. THE  
11 TWO TYPES OF EVIDENCE ARE DIRECT EVIDENCE AND  
12 CIRCUMSTANTIAL EVIDENCE.

13 NOW, DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO  
14 TESTIFIES FROM ACTUAL KNOWLEDGE OF A FACT. IT IS TESTIMONY  
15 BY A PERSON WHO HAS PERCEIVED THE EXISTENCE OF A FACT BY  
16 MEANS OF HIS OR HER SENSES. AND THEN THEY COME TO COURT AND  
17 THEY TESTIFY AS TO WHAT THEY HAVE PREVIOUSLY PERCEIVED.

18 CIRCUMSTANTIAL EVIDENCE, ON THE OTHER HAND, IS THE  
19 PROOF OF SOME OTHER FACT OR SET OF FACTS WHICH, TAKEN EITHER  
20 SINGLY OR COLLECTIVELY, MAY PROVE THE EXISTENCE OF A FACT IN  
21 QUESTION AS A NECESSARY CONSEQUENCE; THAT IS, BY OR THROUGH  
22 AN INFERENCE.

23 AND AN INFERENCE IS SIMPLY A DEDUCTION OF FACT WHICH  
24 MAY LOGICALLY AND REASONABLY BE DRAWN FROM THE PROOF OF  
25 SOME OTHER FACT OR SET OF FACTS. IN OTHER WORDS, IT'S NOT A

1 FACT PROVEN BY DIRECT TESTIMONY OF A WITNESS BASED UPON  
2 PERSONAL PERCEPTION, BUT IT IS A CONCLUSION WHICH MIGHT  
3 REASONABLY BE DRAWN FROM THE PROOF OF OTHER FACTS.

4 IN OTHER WORDS, YOU MAY INFER THAT A PARTICULAR EVENT  
5 OCCURRED OR THAT A PARTICULAR FACT EXISTS BASED UPON THE  
6 PROOF OF SUFFICIENT FACTUAL CIRCUMSTANCES WHICH WOULD  
7 REASONABLY WARRANT YOUR ARRIVING AT SUCH A CONCLUSION.

8 NOW, THE LAW, HOWEVER, MAKES ABSOLUTELY NO  
9 DISTINCTION BETWEEN THE WEIGHT OR THE VALUE TO BE GIVEN TO  
10 EITHER DIRECT EVIDENCE AS OPPOSED TO CIRCUMSTANTIAL  
11 EVIDENCE. NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF  
12 CIRCUMSTANTIAL EVIDENCE AS OPPOSED TO DIRECT EVIDENCE.

13 WHATEVER THE TYPE OF EVIDENCE USED TO PROVE ANY FACT  
14 IN THIS CASE, YOU SHOULD CONSIDER ALL OF THE EVIDENCE  
15 PRESENTED DURING THE TRIAL OF THIS CASE AND AFTER CAREFULLY  
16 CONSIDERING ALL THE EVIDENCE AND WEIGHING IT IN YOUR MIND, IF  
17 YOU ARE NOT CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND  
18 A REASONABLE DOUBT AS IT RELATES TO A PARTICULAR CHARGE,  
19 THEN YOU MUST RESOLVE THAT DOUBT IN HIS FAVOR AND RETURN A  
20 VERDICT OF NOT GUILTY.

21 NOW, YOU HAVE SIX SEPARATE AND DISTINCT OFFENSES:  
22 BURGLARY, ARMED ROBBERY, MURDER AND THREE COUNTS OF  
23 FORGERY. SO, I'M GOING TO BE INSTRUCTING YOU ON THE LAW AS IT  
24 RELATES TO THE CRIME OF BURGLARY FIRST. THEN I'LL INSTRUCT

1 YOU ON THE LAW AS IT RELATES TO THE CRIME OF ARMED ROBBERY,  
2 THEN MURDER, AND THEN FORGERY.

3 NOW, SECTION 17-11-311 PROVIDES THAT A PERSON IS GUILTY OF  
4 BURGLARY IN THE FIRST DEGREE - THAT'S WHAT THE DEFENDANT IS  
5 CHARGED WITH IN THIS CASE - IF THAT PERSON ENTERS A DWELLING  
6 WITHOUT CONSENT WITH THE INTENT TO COMMIT A CRIME THEREIN,  
7 AND ONE OR MORE OF THE FOLLOWING CIRCUMSTANCES OF PROVEN:

8 WHEN IN EFFECTING ENTRY TO THE DWELLING, OR WHILE  
9 INSIDE THE DWELLING, OR IN IMMEDIATE FLIGHT THEREFROM THE  
10 DEFENDANT IS ARMED WITH A DEADLY WEAPON; OR HE CAUSES  
11 PHYSICAL INJURY TO A PERSON WHO'S NOT A PARTICIPANT IN THE  
12 CRIME; OR THE ENTERING OR THE REMAINING IN THE DWELLING  
13 OCCURS IN THE NIGHTTIME.

14 SO, BASED UPON THAT FOREGOING STATUTE, BEFORE YOU  
15 COULD RETURN A VERDICT OF GUILTY AS TO THE CRIME OF  
16 BURGLARY IN THE FIRST DEGREE AS ALLEGED IN THE INDICTMENT, IT  
17 WOULD BE NECESSARY THAT THE EVIDENCE IN THIS CASE HAS  
18 PROVEN TO YOUR SATISFACTION BEYOND A REASONABLE DOUBT THE  
19 FOLLOWING FOUR ESSENTIAL ELEMENTS: NUMBER ONE - THE  
20 EVIDENCE MUST PROVE THAT THE DEFENDANT ENTERED A DWELLING.  
21 ENTRY IS AN INDISPENSABLE ELEMENT IN THE CRIME OF BURGLARY.  
22 AND ENTRY IS DEFINED AS THE ACT OF GOING INTO THE DWELLING  
23 AND THE LEAST ENTRY IS SUFFICIENT.

24 IT IS NOT NECESSARY THAT ACTUAL FORCE BE USED TO  
25 ACCOMPLISH AN ENTRY, NOR DOES ANY DOOR, WINDOW OR OTHER

1 BARRIER HAVE TO BE OPEN OR REMOVED IN ORDER TO EFFECT AN  
2 ENTRY. BUT IT MUST BE AN ENTRY AND IT MUST BE AN ENTRY INTO A  
3 DWELLING.

4 AND A DWELLING IS DEFINED IN THE LAW AS A BUILDING OR  
5 STRUCTURE WHICH IS USED OR NORMALLY USED FOR SLEEPING,  
6 LIVING, OR LODGING BY ANY PERSON.

7 SECONDLY, THERE MUST BE AN ENTRY OF A DWELLING AND IT  
8 BE WITHOUT CONSENT. ENTERING WITHOUT CONSENT MEANS TO  
9 ENTER A DWELLING WITHOUT THE CONSENT OF THE OWNER OR  
10 PERSON OTHERWISE IN LAWFUL POSSESSION, OR TO ENTER A  
11 DWELLING BY USING DECEPTION, ARTIFICE, TRICK OR  
12 MISREPRESENTATION IN ORDER TO GAIN CONSENT TO ENTER INTO  
13 THE DWELLING.

14 THIRDLY, THERE MUST BE AN ENTRY INTO A DWELLING  
15 WITHOUT CONSENT OF THE OWNER AND IT MUST BE WITH AN INTENT  
16 TO COMMIT A CRIME THEREIN. THERE MUST BE AN INTENT TO  
17 COMMIT A CRIME WHETHER OR NOT THE CRIME IS ACTUALLY  
18 COMMITTED OR ACCOMPLISHED.

19 THE MERE ENTERING OF A DWELLING WITHOUT AN INTENT TO  
20 COMMIT A CRIME DOES NOT CONSTITUTE THE CRIME OF BURGLARY.  
21 IT IS ONLY WHEN THERE IS AN ENTRY INTO A DWELLING WITHOUT  
22 CONSENT AND WHERE THERE IS AN INTENT TO COMMIT THE CRIME  
23 THEREIN THAT THE CRIME OF BURGLARY IS COMPLETE. AND A CRIME  
24 OF ANY GRADE IS SUFFICIENT TO SATISFY THIS ELEMENT OF THE  
25 CRIME OF BURGLARY.

1           IT'S ALSO ESSENTIAL TO COMMIT A CRIME THEREIN EXISTS AT  
2           THE TIME OF THE ENTRY. IT'S NOT SUFFICIENT THAT ANY SUCH  
3           INTENT IS FORMED AFTER THE ENTRY HAS BEEN OBTAINED. AND  
4           INTENT, OF COURSE, MEANS THE STATE OF A PERSON'S MIND WHICH  
5           DIRECTS HIS ACTIONS TOWARDS A SPECIFIC OBJECT OR GOAL.

6           THE ENTERING OF A DWELLING WITHOUT CONSENT AND WITH  
7           THE INTENT TO COMMIT A CRIME THEREIN COMPLETES THE CRIME OF  
8           BURGLARY.

9           NOW, THE FOURTH ELEMENT WHICH WOULD BE NECESSARY TO  
10          BE ESTABLISHED IN ORDER FOR THE BURGLARY TO BE A BURGLARY IN  
11          THE FIRST DEGREE IS THAT WHEN EFFECTING ENTRY, OR WHILE IN THE  
12          DWELLING OR IN IMMEDIATE FLIGHT THEREFROM, THE DEFENDANT  
13          MUST HAVE BEEN SHOWN BEYOND A REASONABLE DOUBT TO HAVE  
14          BEEN ARMED WITH A DEADLY WEAPON, OR TO HAVE CAUSED  
15          PHYSICAL INJURY TO A PERSON WHO IS NOT PARTICIPATING IN THE  
16          COMMISSION OF A CRIME; OR THE ENTERING OR THE REMAINING;  
17          THAT IS, THE BURGLARY, OCCURRED IN THE NIGHTTIME.

18          NOW, IN THIS PARTICULAR CASE THE STATE IS ALLEGING AS THE  
19          FOURTH ELEMENT OF THAT, THE DEFENDANT ENTERED THE  
20          DWELLING IN THE NIGHTTIME. THEY FURTHER ALLEGE THAT HE DID  
21          CAUSE PHYSICAL INJURY TO A PERSON WHO WAS NOT A PARTICIPANT  
22          IN THE COMMISSION OF ANY CRIME; AND THEY FURTHER ALLEGE  
23          THAT HE WAS ARMED WITH A DEADLY WEAPON.

24          NOW, WHILE THE STATE MAY PROVE ALL OF THOSE IT'S NOT  
25          NECESSARY THAT ALL BE PROVEN, BUT AT LEAST ONE OF THOSE

1           ADDITIONAL FACTORS MUST BE ESTABLISHED BEFORE THE  
2           DEFENDANT COULD BE FOUND GUILTY OF BURGLARY IN THE FIRST  
3           DEGREE.

4           AND, AGAIN, THOSE ADDITIONAL FACTORS ARE THAT HE WAS  
5           ARMED WITH A DEADLY WEAPON; OR THAT HE CAUSED PHYSICAL  
6           INJURY TO A PERSON WHO WAS NOT PARTICIPATING IN THE  
7           COMMISSION OF A CRIME; OR THE ENTERING; THAT IS, THE BURGLARY,  
8           OCCURRED IN THE NIGHTTIME.

9           NOW, THE SECOND INDICTMENT THAT I WILL REFER TO IS THE  
10          INDICTMENT ALLEGING THE DEFENDANT COMMITTED THE CRIME OF  
11          ARMED ROBBERY. ARMED ROBBERY NECESSARILY INCLUDES THE  
12          LESSER OFFENSES OF LARCENY AND ROBBERY. SO, I'M GOING TO  
13          DEFINE LARCENY FOR YOU FIRST; THEN I'LL DEFINE ROBBERY FOR  
14          YOU; AND THEN I'LL DEFINE ARMED ROBBERY AS CONTAINED IN THE  
15          STATUTE.

16          LARCENY IS COMMONLY REFERRED TO AND KNOWN AS  
17          STEALING. LARCENY IS DEFINED IN THE LAW AS TAKING, STEALING  
18          AND CARRYING AWAY THE PERSONAL PROPERTY OF ANOTHER, WITH  
19          THE INTENTION OF DEPRIVING THE TRUE OWNER OF USE AND  
20          POSSESSION OF HIS OR HER PROPERTY, AND CONVERTING THE  
21          PROPERTY TO THE TAKER'S OWN USE.

22          ROBBERY IS OFTEN REFERRED TO AND KNOWN AS A LARCENY  
23          BY FORCE. AND ROBBERY IS DEFINED IN THE LAW AS TAKING,  
24          STEALING, AND CARRYING AWAY THE PERSONAL PROPERTY OF  
25          ANOTHER HAVING ANY VALUE WHATSOEVER FROM THE PERSON OR

1 FROM THE PRESENCE OF ANY PERSON WITHOUT HIS OR HER CONSENT,  
2 AND WITH AN INTENT TO STEAL, AND THE LARCENY IS  
3 ACCOMPLISHED BY THE USE OF FORCE OR VIOLENCE OR BY THE  
4 THREAT OF THE USE OF FORCE OR VIOLENCE; THAT IS, BY WAY OF  
5 INTIMIDATION.

6 SO, ROBBERY IS THE FORCING OF A PERSON TO SURRENDER  
7 PROPERTY BY THE USE OF FORCE OR VIOLENCE, OR BY THREATENING  
8 TO USE FORCE OR VIOLENCE.

9 NOW, WITHIN THE MEANING OF THE CRIME OF ROBBERY, IF THE  
10 THING IS WITHIN THE PRESENCE OF A PERSON WITH RESPECT TO THAT  
11 CRIME, WHICH WHERE IT IS SO WITHIN THE PERSON'S REACH OR  
12 CONTROL THAT HE COULD, IF NOT OVERCOME BY VIOLENCE OR  
13 PREVENTED BY FEAR, RETAIN POSSESSION OF HIS PROPERTY.

14 NOW, SECTION 16-11-330 OF THE CODE OF LAWS PROVIDES THAT  
15 A PERSON WHO COMMITS THE CRIME OF ROBBERY, AS I HAVE DEFINED  
16 THAT TERM FOR YOU, WHILE ARMED WITH A PISTOL, DIRK,  
17 SLINGSHOT, METAL KNUCKLES, RAZOR OR OTHER DEADLY WEAPON, IS  
18 GUILTY OF THE CRIME OF ARMED ROBBERY. SO, ARMED ROBBERY IS A  
19 ROBBERY COMMITTED WHILE THE PERSON IS IN POSSESSION OF AND  
20 EMPLOYS THE USE OF A DEADLY WEAPON IN ORDER TO ACCOMPLISH  
21 THE ROBBERY.

22 NOW, A DEADLY WEAPON UNDER THE LAW IS DEFINED AS ANY  
23 DEVICE OR INSTRUMENT WHICH IN THE MANNER IT IS USED OR  
24 INTENDED TO BE USED IS KNOWN TO BE CAPABLE OF PRODUCING  
25 DEATH OF SERIOUS BODILY HARM.

1           NOW, ORDINARY OBJECTS, SUCH AS STICKS OR TOOLS OR  
2           BOTTLES, OR HANDS, FISTS OR FEET, OR ANY OTHER TYPE OF OBJECT  
3           WHICH ARE GENERALLY NOT CONSIDERED TO BE DEADLY WEAPONS  
4           IN THE ORDINARY SENSE OF THE WORD, MAY UNDER THE  
5           APPROPRIATE CIRCUMSTANCES BE USED IN SUCH A FASHION AND IN  
6           SUCH A MANNER AS TO CONSTITUTE A DEADLY WEAPON.

7           WHETHER OR NOT AN OBJECT WHICH HAS BEEN UTILIZED IN THE  
8           COMMISSION OF A ROBBERY IS A DEADLY WEAPON OR NOT DEPENDS  
9           UPON THE FACTS AND CIRCUMSTANCES OF A PARTICULAR CASE AND  
10          IT IS AN ISSUE FOR YOU TWELVE JURORS TO DETERMINE AS TO  
11          WHETHER OR NOT ANY OBJECT EMPLOYED IN THE COMMISSION OF A  
12          ROBBERY IS A DEADLY WEAPON OR IS NOT.

13          NOW, THE THIRD CRIMINAL OFFENSE THAT I WILL INSTRUCT  
14          YOU WITH REGARD TO IS THE CRIME OF MURDER. SECTION 16-3-10  
15          DEFINES MURDER AS THE KILLING OF ANY PERSON WITH MALICE  
16          AFORETHOUGHT, EITHER EXPRESSED OR IMPLIED. EXPRESSED OR  
17          IMPLIED REFERS TO THE ELEMENT OF MALICE.

18          NOW, IN ORDER FOR YOU TO FIND THE DEFENDANT GUILTY OF  
19          THE CRIME OF MURDER IT WOULD BE NECESSARY THAT THE  
20          EVIDENCE IN THIS CASE ESTABLISHES TO YOUR SATISFACTION  
21          BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID COMMIT  
22          SOME ACT OR ACTS WHICH PROXIMATELY CAUSED THE DEATH OF A  
23          PERSON AND THAT THOSE ACTS; THAT IS, THAT KILLING, WAS DONE  
24          WITH MALICE AFORETHOUGHT. MALICE AFORETHOUGHT IS AN  
25          ESSENTIAL ELEMENT OF THE CRIME OF MURDER. AND WHILE A

1 SPECIFIC INTENT TO KILL IS NOT NECESSARY TO BE PROVEN IN ORDER  
2 FOR A MURDER TO BE ESTABLISHED, IT IS NECESSARY THAT THE  
3 ELEMENT OF MALICE AFORETHOUGHT BE PROVEN BEYOND A  
4 REASONABLE DOUBT.

5 AND THE ACTS THAT THE STATE ALLEGES CAUSED THE DEATH  
6 OF THE DECEDENT IN THIS CASE MUST BE THE PROXIMATE CAUSE OF  
7 THE DECEDENT'S DEATH; IN THIS CASE, MR. CUBLEY.

8 THE LAW DEFINES THE PROXIMATE CAUSE OF DEATH TO BE  
9 SOMETHING WHICH BRINGS ABOUT A CHAIN OF EVENTS WHICH IN THE  
10 END BRINGS ABOUT THE DEATH OF THE DECEASED. THE PROXIMATE  
11 CAUSE IS THE DIRECT CAUSE WITHOUT WHICH THAT DEATH WOULD  
12 NOT HAVE OCCURRED.

13 AS I HAVE STATED, THERE MUST BE A KILLING, AND THE  
14 KILLING MUST BE ACCOMPANIED BY MALICE AFORETHOUGHT. NOW,  
15 MALICE IS A TERM CONNOTING ILL WILL AND AN INTENT TO DO HARM.  
16 IT IS A TECHNICAL TERM IMPORTING WICKEDNESS AND EXCLUDING  
17 JUST CAUSE OR LEGAL EXCUSE.

18 MALICE MAY BE LIKEWISE DEFINED AS A STATE OF MIND WHICH  
19 INDICATES A FORM, PURPOSE AND DESIGN TO DO A WRONGFUL ACT  
20 UNDER CIRCUMSTANCES THAT EXCLUDE ANY LEGAL RIGHT TO DO IT.

21 NOW, THE WORDS, EXPRESSED OR IMPLIED MALICE, DO NOT  
22 MEAN DIFFERENT KINDS OF MALICE, BUT MERELY THE MANNER IN  
23 WHICH MALICE MAY BE SHOWN TO HAVE EXISTED. THAT IS TO SAY,  
24 WHETHER THAT MALICE BE PROVEN BY DIRECT EVIDENCE OR BY

1 CIRCUMSTANTIAL EVIDENCE IMPLYING OR INFERRING THE EXISTENCE  
2 OF MALICE.

3 NOW, MALICE MAY BE EXPRESSED AS WHERE THERE IS AN  
4 EXPRESSED THREAT TO KILL, OR WHERE IT IS SHOWN THERE WAS A  
5 LYING IN WAIT; OR WHERE THE CIRCUMSTANCES SHOWED DIRECTLY  
6 THAN AN INTENT TO KILL WAS ENTERTAINED BY THE KILLER.

7 MALICE MAY BE INFERRED, THOUGH NO EXPRESSED INTENT TO  
8 KILL IS PROVEN BY DIRECT EVIDENCE, WHERE THE FACTS AND THE  
9 CIRCUMSTANCES WHICH HAVE BEEN PROVEN BY THE EVIDENCE IN  
10 THE CASE SATISFIES YOU BEYOND A REASONABLE DOUBT THAT  
11 MALICE WAS PRESENT IN THE MIND OF THE DEFENDANT AT THE TIME  
12 THAT ANY KILLING TOOK PLACE.

13 THE EXISTENCE OF MALICE MAY BE INFERRED FROM THE  
14 CIRCUMSTANCES SHOWN TO HAVE EXISTED AT THE TIME OF THE  
15 EVENT. AND YOU ARE PERMITTED TO INFER THE EXISTENCE OF  
16 MALICE FROM PROOF ON THE UNLAWFUL AND THE INTENTIONAL  
17 KILLING OF ANOTHER WITHOUT JUSTIFICATION OR LEGAL EXCUSE.

18 YOU ARE PERMITTED TO INFER MALICE FROM A WRONGFUL  
19 INTENT TO INJURE ANOTHER PERSON THROUGH THE INFLECTION OF  
20 SERIOUS BODILY HARM INDICATIVE OF A WICKED OR DEPRAVED  
21 SPIRIT. YOU ARE PERMITTED TO INFER THE EXISTENCE OF MALICE  
22 FROM THE INTENTIONAL USE OF A DEADLY WEAPON.

23 YOU ARE PERMITTED TO INFER THE EXISTENCE OF MALICE  
24 FROM PROOF OF THE INTENTIONAL COMMISSION OF AN ACT WHICH IS  
25 INHERENTLY DANGEROUS TO HUMAN LIFE. YOU ARE ALSO

1           PERMITTED TO INFER MALICE FROM THE INTENTIONAL KILLING OF  
2           ANOTHER WHILE THE INTENTIONAL COMMISSION OF CRIMINAL ACTS  
3           RESULTED IN THE DEATH OF ANOTHER PERSON DURING THE  
4           COMMISSION OF A FELONY, WHICH IS DANGEROUS TO HUMAN LIFE OR  
5           WHERE THE CIRCUMSTANCES OF THE CRIME CREATE A SUBSTANTIAL,  
6           FORESEEABLE RISK TO HUMAN LIFE.

7                   AND YOU ARE FURTHER INSTRUCTED THAT THE CRIMES OF  
8           BURGLARY IN THE FIRST DEGREE AND ARMED ROBBERY ARE  
9           CLASSIFIED AS FELONIES UNDER THE LAW OF THIS STATE.

10                   YOU ARE ALSO PERMITTED TO INFER MALICE FROM THE  
11           COMMISSION OF A RECKLESS OR RECKLESS ACTS WHICH ARE  
12           INHERENTLY DANGEROUS TO HUMAN LIFE AND WHICH ARE DONE SO  
13           RECKLESSLY AS TO MANIFEST A DEPRAVITY OF MIND SIGNIFYING AN  
14           EXTREME DISREGARD FOR OR AN EXTREME INDIFFERENCE TO HUMAN  
15           LIFE.

16                   NOW, MALICE AS AN ESSENTIAL ELEMENT OF THE CRIME OF  
17           MURDER MAY BE DESCRIBED AS THE STATE OF A PERSON'S MIND  
18           SIGNIFYING A GENERAL MALIGNANT RECKLESSNESS AND EXTREME  
19           DISREGARD FOR OR INDIFFERENCE TO HUMAN LIFE.

20                   EVEN WHERE THE FACTS ARE PROVEN THAT ARE SUFFICIENT TO  
21           RAISE AN INFERENCE OF MALICE, SUCH AN INFERENCE WOULD SIMPLY  
22           BE AN EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION BY  
23           YOU TWELVE JURORS ALONG WITH ALL THE OTHER EVIDENCE IN THE  
24           CASE. AND YOU MAY GIVE SUCH INFERENCES ANY WEIGHT THAT YOU  
25           DETERMINE THEY SHOULD RECEIVE, IF ANY.

1           SIMPLY STATED, YOU ARE PERMITTED TO INFER THE EXISTENCE  
2           OF MALICE FROM THE PROOF OF ANY ONE OR MORE OR THOSE  
3           CIRCUMSTANCES THAT I HAVE DESCRIBED AS WELL AS FROM ANY  
4           OTHER EVIDENCE IN THE CASE REASONABLY TENDING TO PROVE  
5           SUCH A FACT. BUT YOU ARE IN NO WAY REQUIRED TO DO SO.

6           YOU SIMPLY MUST MAKE A DETERMINATION OF WHETHER OR  
7           NOT MALICE IS PROVEN BY THE EVIDENCE IN THE CASE TO YOUR  
8           SATISFACTION BEYOND A REASONABLE DOUBT BY CONSIDERING ALL  
9           THE EVIDENCE INTRODUCED DURING THE TRIAL OF THAT CASE AS IT  
10          RELATES TO THAT ISSUE AND ANY REASONABLE INFERENCES THAT  
11          MIGHT BE DRAWN FROM THAT EVIDENCE.

12          IT IS ALSO ESSENTIAL THAT THERE EXISTS NOT ONLY A KILLING  
13          ACCOMPANIED BY MALICE, BUT THAT MALICE BE AFORETHOUGHT.  
14          NOW, THE LAW DOES NOT REQUIRE THAT MALICE MUST EXIST FOR  
15          ANY APPRECIABLE LENGTH OF TIME BEFORE THE COMMISSION OF ANY  
16          ACT PROXIMATELY CAUSING A FATAL RESULT. INDEED, IT MAY BE  
17          CONCEIVED AT THE VERY MOMENT THAT THE FATAL ACT IS  
18          COMMITTED.

19          IT IS SUFFICIENT IN THE LAW SO LONG AS THE STATE DOES  
20          PROVE BEYOND A REASONABLE DOUBT BOTH THE EXISTENCE OF  
21          MALICE AND THE COMMISSION OF AN ACT OR ACTS BY THE  
22          DEFENDANT WHICH PROXIMATELY CAUSED THE DEATH OF MR.  
23          CUBLEY.

24          NOW, WHILE THE STATE MUST PROVE BEYOND A REASONABLE  
25          DOUBT THAT A KILLING DID OCCUR, ACCOMPANIED BY MALICE

1           AFORETHOUGHT IN ORDER TO ESTABLISH THE CRIME OF MURDER, IT  
2           IS NOT NECESSARY THAT THE STATE PROVE ANY MOTIVE FOR SUCH A  
3           KILLING, ALTHOUGH THERE MAY BE EVIDENCE RELATED TO THE  
4           EXISTENCE OF MOTIVE INTRODUCED INTO THE TRIAL OF THE CASE.

5           AND THE FINAL CRIMINAL OFFENSE THAT I WILL INSTRUCT YOU  
6           ON THE LAW AS IT RELATES THERETO IS THE CRIME OF FORGERY.  
7           NOW, UNDERSTAND THERE ARE THREE SEPARATE INDICTMENT FOR  
8           FORGERY. TWO ARE ALLEGED TO HAVE OCCURRED ON DECEMBER 29;  
9           ONE IS ALLEGED TO HAVE OCCURRED ON DECEMBER 30. THEY ARE  
10          THREE SEPARATE AND DISTINCT OFFENSES, BUT THE SAME LAW  
11          WOULD APPLY TO EACH OF THOSE INDICTMENTS.

12          SECTION 16-13-10 OF THE SOUTH CAROLINA CODE OF LAWS  
13          RELATES TO THE CRIME OF FORGERY AND IT PROVIDES AS FOLLOWS:  
14          IT IS UNLAWFUL FOR A PERSON TO FALSELY MAKE, FORGE OR  
15          COUNTERFEIT OR CAUSE OR PROCURE TO BE FALSELY MADE, FORGED  
16          OR COUNTERFEITED, OR TO WILLFULLY ACT OR ASSIST IN THE FALSE  
17          MAKING, FORGING OR COUNTERFEITING OF ANY WRITING OR  
18          INSTRUMENT OF WRITING.

19          THAT STATUTE FURTHER PROVIDES IN A SEPARATE PARAGRAPH  
20          THAT IT SHALL BE UNLAWFUL FOR ANY PERSON TO UTTER OR TO  
21          PUBLISH AS TRUE ANY FALSE, FORGED OR COUNTERFEITED WRITING  
22          OR INSTRUMENT OF WRITING.

23          AND THE STATUTE ALSO PROVIDES IN A SEPARATE PROVISION  
24          THAT IT SHALL BE UNLAWFUL FOR ANY PERSON TO WILLINGLY ACT

1 OR ASSIST IN ANY OF THOSE PROVISION THAT I'VE JUST STATED THAT  
2 ARE CONTAINED IN THE OTHER TWO PROVISIONS OF THE STATUTE.

3 NOW, FORGERY IS GENERALLY DEFINED AS THE FALSE MAKING  
4 OR THE ALTERING OF A WRITING OR AN INSTRUMENT OF WRITING BY  
5 A PERSON WITH THE INTENT TO DEFRAUD ANOTHER PERSON. IT IS THE  
6 FALSE MAKING OR THE ALTERATION OF WRITING OR INSTRUMENT OF  
7 WRITING WHICH PURPORTS ON ITS FACE TO BE GOOD AND VALID FOR  
8 THE PURPOSE FOR WHICH IT WAS CREATED, WITH A DESIGN TO  
9 DEFRAUD ANOTHER.

10 A FORGERY MAY ALSO BE COMMITTED BY THE UTTERING OR  
11 PUBLISHING AS TRUE ANY FALSE, FORGED OR COUNTERFEITED  
12 WRITING OR INSTRUMENT OF WRITING WHERE THE PERSON UTTERING  
13 OR PUBLISHING THE INSTRUMENT DOES SO WITH THE INTENTION TO  
14 DEFRAUD ANOTHER PERSON, EVEN THOUGH SOMEONE OTHER THAN  
15 THE PERSON PRESENTING OR PUBLISHING THE DOCUMENT PREPARED  
16 OR ALTERED THE DOCUMENT.

17 IN ORDER TO PROVE A FORGERY AS IT RELATES TO THE FALSELY  
18 MAKING OF A DOCUMENT, WHICH IS CONTAINED IN PARAGRAPH A-1  
19 OF SECTION 16-13-10, IT WOULD BE NECESSARY THAT THE STATE  
20 PROVE TO YOUR SATISFACTION BEYOND A REASONABLE DOUBT THE  
21 THREE FOLLOWING ESSENTIAL ELEMENTS:

22 ONE - THERE MUST HAVE BEEN A FALSE MAKING OF A WRITING  
23 OR INSTRUMENT OF WRITING. THE FALSE MAKING OF THE DOCUMENT  
24 MUST HAVE BEEN COMMITTED BY THE DEFENDANT WITH AN INTENT  
25 TO DEFRAUD SOME OTHER PERSON. AND THE WRITING OR THE

1 INSTRUMENT MUST BE OF SOME APPARENT LEGAL EFFICACY AND  
2 APPARENTLY VALID ON ITS FACE BY WHICH THE FORGERY WOULD  
3 ALLOW SOMEONE TO DEFRAUD SOMEONE ELSE IN SOME FASHION.

4 UNDER SUBSECTION A-2 OF THE STATUTE; THAT IS, UTTERING  
5 OR PUBLISHING AS TRUE AN INSTRUMENT OF WRITING, IT WOULD BE  
6 NECESSARY FOR THE STATE TO PROVE THE FOLLOWING THREE  
7 ESSENTIAL ELEMENTS:

8 THAT THE WRITING OR THE INSTRUMENT OF WRITING MUST BE  
9 UTTERED OR PUBLISHED AS TRUE AND GENUINE. AND IT MUST BE  
10 KNOWN BY THE PERSON UTTERING OR PUBLISHING THE WRITING OR  
11 THE INSTRUMENT THAT IT IS IN FACT FALSE, FORGED OR  
12 COUNTERFEITED. AND THIRDLY, IT MUST HAVE BEEN UTTERED OR  
13 PUBLISHED WITH AN INTENTION TO DEFRAUD ANOTHER PERSON.

14 TO UTTER OR PUBLISH AS TRUE SIMPLY MEANS TO MAKE OR  
15 ATTEMPT TO MAKE USE OF A WRITTEN INSTRUMENT OR DOCUMENT  
16 WHERE BY SOME ASSERTION OR REPRESENTATION OR CLAIM IS MADE  
17 TO ANOTHER IN SOME WAY, DIRECTLY OR INDIRECTLY, EXPRESSLY OR  
18 IN PRIVATE, BY WORDS OR BY CONDUCT THAT THE INSTRUMENT OR  
19 THE DOCUMENT PRESENTED IS A GENUINE DOCUMENT.

20 ONE WHO KNOWINGLY UTTERS OR PUBLISHES AS TRUE AN  
21 INSTRUMENT OF WRITING WITH AN INTENT TO DEFRAUD ANOTHER IS  
22 GUILTY OF THE CRIME OF FORGERY, EVEN THOUGH HE MAY NOT HAVE  
23 ACTIVELY PREPARED THE FORGED DOCUMENT HIMSELF.

24 NOW, FRAUDULENT INTENT IS ALSO NECESSARY TO MAKE OUT  
25 THE CRIME OF FORGERY. AND FRAUDULENT INTENT IS THE ESSENCE

1 OF THE CRIME. AND UNDER EITHER SECTION OF THE STATUTE AS I  
2 HAVE ACCORDED ABOVE IT IS NECESSARY THAT AN INTENT TO  
3 DEFRAUD BE PROVEN BEYOND A REASONABLE DOUBT.

4 IT'S NOT NECESSARY, HOWEVER, TO MAKE OUT THE CRIME OF  
5 FORGERY THAT ANY PERSON ACTUALLY BE DEFRAUDED OR SUFFER  
6 ANY LOSS AS A RESULT OF THE FORGERY, EVEN THOUGH THAT MIGHT  
7 BE PROVEN. BUT THERE MUST BE AN INTENT TO DEFRAUD  
8 ESTABLISHED. AND AN INTENT TO DEFRAUD IS AN INTENT TO  
9 DECEIVE ANOTHER PERSON FOR THE PURPOSE OF GETTING SOME  
10 ADVANTAGE OVER ANOTHER AND TO ACCOMPLISH THAT PURPOSE BY  
11 SOME FALSE STATEMENT, SOME FALSE PRETENSE, OR SUPPRESSION OF  
12 THE TRUTH, OR BY ANY OTHER ARTIFICE OR ACT INTENDED TO  
13 DECEIVE.

14 BUT IF ONE, IN GOOD FAITH OR IN IGNORANCE OF THE TRUTH  
15 UTTERS OR PUBLISHES AN INSTRUMENT NOT KNOWING IT TO BE A  
16 FORGERY, THEN HE WOULD NOT BE GUILTY OF FORGERY.

17 IN DETERMINING WHETHER OR NOT THE STATE HAS PROVEN AN  
18 INTENT TO DEFRAUD AND KNOWLEDGE OF THE FRAUD, YOU MAY  
19 CONSIDER ALL OF THE CIRCUMSTANCES SURROUNDING THE EVENT  
20 AND THE MAKING AND THE UTTERING OF THE INSTRUMENT,  
21 INCLUDING ANY ACTIONS, DECLARATIONS OR CONDUCT OF THE  
22 DEFENDANT, AS WELL AS ANY OTHER EVIDENCE WHICH REASONABLY  
23 TENDS TO PROVE THE EXISTENCE OF ANY SUCH INTENT.

24 NOW, YOU ARE FURTHER INSTRUCTED, AND I EMPHASIZE TO  
25 YOU THAT THE FACT THAT A DEFENDANT DOES NOT TESTIFY DURING

1 THE TRIAL OF A CRIMINAL CASE IS NOT A FACT WHICH MAY BE  
2 CONSIDERED BY YOU IN ANY WAY WHATSOEVER IN YOUR  
3 DELIBERATIONS OR IN YOUR DETERMINATION AS TO WHETHER OR  
4 NOT HIS GUILT HAS BEEN PROVEN BEYOND A REASONABLE DOUBT.

5 AS I HAVE STATED, THE BURDEN IS ALWAYS UPON THE STATE  
6 BECAUSE THEY BRING THE ACCUSATION TO PROVE A PERSON'S GUILT  
7 BEYOND A REASONABLE DOUBT. THE BURDEN IS NEVER UPON A  
8 DEFENDANT TO PROVE THAT HE IS NOT GUILTY OR TO PROVE THAT HE  
9 IS INNOCENT, BECAUSE IN SOME CASES, THAT WOULD NOT BE  
10 POSSIBLE. AND, THEREFORE, YOU MAY NOT DRAW AN INFERENCE NOR  
11 REACH ANY CONCLUSION FROM THE FACT THAT A DEFENDANT DOES  
12 NOT TESTIFY DURING THE TRIAL OF A CASE. NOR, MAY SUCH A FACT  
13 EVEN BE DISCUSSED WHILE YOU ARE ENGAGED IN YOUR  
14 DELIBERATIONS IN THE JURY ROOM. YOU MUST NOT ALLOW SUCH A  
15 FACT TO ENTER INTO YOUR DETERMINATION AS TO WHETHER OR NOT  
16 HIS GUILT HAS BEEN PROVEN BEYOND A REASONABLE DOUBT.

17 NOW, MR. FOREMAN AND LADIES AND GENTLEMEN OF THE  
18 JURY, I AM NOT IN ANY WAY CONCERNED WITH WHAT YOUR  
19 VERDICTS ARE. BUT YOU ARE INSTRUCTED THAT YOUR DECISIONS  
20 MUST BE UNANIMOUS. ALL TWELVE OF YOU MUST BE IN AGREEMENT.

21 AND MR. FOREMAN, AS I TOLD YOU, YOU'RE GOING TO HAVE  
22 EACH OF THE INDICTMENTS IN THE JURY ROOM WITH YOU. BUT THEY  
23 ARE THERE SOLELY FOR SERVING AS THE VERDICT FORM. YOU WILL  
24 SEE ON THE LOWER, LEFT-HAND CORNER OF EACH INDICTMENT,

1 WHERE VERDICT IS. IT'S BENEATH THAT WORD WHERE YOU'RE GOING  
2 TO BE ASKED TO INDICATE THE JURY'S UNANIMOUS DECISION.

3 AND AS I TOLD YOU, THE VERDICTS MAY BE THE SAME WITH  
4 RESPECT TO EACH INDICTMENT; THEY MAY BE DIFFERENT. AND THAT  
5 WILL DEPEND ON YOUR DETERMINATION OF FACT AND YOUR  
6 APPLICATION OF THE LAW AS I WILL HAVE PROVIDED IT TO YOU.

7 BUT, WITH RESPECT TO EACH OF THE SEPARATE INDICTMENTS,  
8 YOU HAVE TWO POTENTIAL VERDICT FORMS. IF THE STATE HAS  
9 PROVEN EACH OF THE ESSENTIAL ELEMENTS BEYOND A REASONABLE  
10 DOUBT THAT MAKE UP THE CRIME ALLEGED IN THE INDICTMENT,  
11 THEN YOUR VERDICT WOULD BE GUILTY AS TO THAT PARTICULAR  
12 INDICTMENT.

13 AND IF THE STATE HAS FAILED TO PROVE ANY ONE OR MORE OF  
14 THE ESSENTIAL ELEMENTS NECESSARY TO ESTABLISHING GUILT OF  
15 THAT CRIME BEYOND A REASONABLE DOUBT, THEN YOUR VERDICT  
16 WOULD BE NOT GUILTY.

17 SO, WHATEVER YOUR DECISION IS, GUILTY OR NOT GUILTY,  
18 INDICATED IN THE SPACE PROVIDED FOR ON THE BACK OF THE  
19 INDICTMENT, AND THEN MR. FOREMAN, YOU WILL BE ASKED TO SIGN  
20 YOUR NAME AS A FOREPERSON AND PLACE THE APPROPRIATE DATE IN  
21 THE VERDICT FORM.

22 DURING YOUR DELIBERATIONS THERE MAY COME A TIME WHEN  
23 YOU HAVE SOME QUESTION ABOUT THE EVIDENCE IN THE CASE OR  
24 THE FACTS THAT RELATE TO THE CASE. PLEASE UNDERSTAND THAT I  
25 AM NEVER PERMITTED TO ANSWER ANY QUESTION THAT YOU HAVE

1 AS IT RELATES TO THE FACTS OF THE MATTER OR AS IT RELATES TO  
2 THE EVIDENCE IN THE CASE.

3 ALSO, NO EVIDENCE MAY BE RECEIVED NOW THAT YOU'RE  
4 GOING BACK TO BEGIN YOUR DELIBERATIONS. EVEN IF THERE IS  
5 OTHER EVIDENCE THAT EXISTS SOMEWHERE IN THE WORLD THAT  
6 RELATES TO THIS CASE, IT CAN'T BE INTRODUCED. SO, IF YOU GO  
7 BACK IN THE JURY ROOM AND YOU THINK, WELL, WONDER IF THEY  
8 HAVE SUCH AND SUCH, WONDER IF THAT'S AVAILABLE; DOESN'T  
9 MATTER IF IT'S AVAILABLE OR NOT, YOU CAN'T HAVE IT.

10 ALL THE EVIDENCE UPON WHICH YOU HAVE TO BASE YOUR  
11 DECISION HAS BEEN INTRODUCED AND NO ADDITIONAL EVIDENCE  
12 MAY BE RECEIVED.

13 NOW, DURING YOUR DELIBERATIONS, IF YOU HAVE A QUESTION  
14 ABOUT THE FACTS AND YOU THINK THAT THAT QUESTION COULD BE  
15 ANSWERED BY HAVING TESTIMONY REPLAYED IN WHOLE OR IN PART,  
16 IF YOU'LL LET THE BAILIFF KNOW, MR. FOREMAN, JUST WRITE A NOTE  
17 TO ME. GIVE IT TO THE BAILIFF TO PROVIDE TO ME, AND I'LL BE HAPPY  
18 TO BRING YOU BACK IN THE COURTROOM TO HAVE TESTIMONY OF  
19 ANY WITNESS REPLAYED IN WHOLE OR IN PART.

20 THERE ARE NO TRANSCRIPTS AVAILABLE. YOU CAN'T GET A  
21 TRANSCRIPT OF THE WITNESSES' TESTIMONY. BUT, SHOULD YOU HAVE  
22 A QUESTION ABOUT THE EVIDENCE OR THE FACTS, AND YOU THINK IT  
23 CAN BE ANSWERED BY RE-HEARING TESTIMONY, WE CAN BRING YOU  
24 BACK AND HAVE THAT TESTIMONY BY THAT PARTICULAR WITNESS IN  
25 ITS ENTIRETY OR JUST SOME PORTION, IF THAT'S ALL YOU NEED.

1           BUT, IF AT ANY TIME DURING YOUR DELIBERATIONS YOU HAVE  
2           A QUESTION ABOUT THE LAW THAT'S APPLICABLE, I CAN ALWAYS  
3           ANSWER THOSE QUESTIONS. SO, DURING YOUR DELIBERATIONS, IF  
4           YOU NEED ADDITIONAL EXPLANATION OR RE-EXPLANATION OR A  
5           CLARIFICATION OF SOME SORT, LET ME KNOW OF THAT FACT, AND I  
6           WILL BRING YOU BACK TO PROVIDE YOU WITH THAT ADDITIONAL  
7           EXPLANATION OR CLARIFICATION OF ANY EXPLANATION OR ANY  
8           PROVIDED.

9           IF WE HAVE ANY SMOKERS ON THE JURY, YOU CAN SMOKE  
10          DURING DELIBERATIONS, BUT YOU CANNOT SMOKE IN THE JURY  
11          ROOM. IF YOU WANT TO SMOKE YOU'LL HAVE TO GO OUTSIDE. THE  
12          BAILIFF WILL MAKE THOSE ARRANGEMENTS. YOU ARE INSTRUCTED  
13          THAT DELIBERATIONS MUST STOP IF ANY JUROR IS ABSENT FOR ANY  
14          PURPOSE. AND THOSE DELIBERATIONS MAY ONLY RESUME WHEN ALL  
15          TWELVE JURORS ARE PRESENT SO THAT ALL MAY PARTICIPATE.

16          AND, OF COURSE, YOUR LUNCH WILL BE ARRIVING SHORTLY, IF  
17          IT HAS NOT ALREADY ARRIVED. WITH REGARD TO THAT, YOU CAN  
18          EAT FIRST, THEN DELIBERATE. YOU CAN START DELIBERATING, EAT,  
19          STOP, WHATEVER. THAT'S UP TO YOU. YOU CAN DO THAT HOWEVER  
20          IT SUITS YOU.

21          I THINK THAT COVERS EVERYTHING. WITH THE EXCEPTION OF  
22          THE TWO ALTERNATE JURORS, I'LL ASK THE PRIMARY TWELVE JURORS  
23          IF YOU WILL GO WITH THE BAILIFF BACK TO YOUR JURY ROOM. DO TO  
24          BEGIN YOUR DELIBERATIONS UNTIL I SEND YOU WORD TO DO SO. I'VE  
25          GOT SOME MATTERS I'LL NEED TO ADDRESS WITH THE LAWYERS.

1 IF I DON'T NEED TO BRING YOU BACK FOR ANY REASON, I'LL  
2 SIMPLY SEND WORD BY WAY OF THE BAILIFF THAT YOU CAN BEGIN  
3 DELIBERATIONS. IN THAT EVENT HE WILL BRING TO THE JURY ROOM  
4 ALL OF THE EXHIBITS WHICH HAVE BEEN INTRODUCED IN THE TRIAL.  
5 AND TO YOU, MR. FOREMAN, HE'LL ALSO BRING THESE VERDICT  
6 FORMS.

7 SO, PLEASE RETIRE TO YOUR JURY ROOM, BUT AWAIT MY  
8 INSTRUCTION AS TO WHEN TO BEGIN YOUR DELIBERATIONS.

9 (WHEREUPON THE JURY EXITED THE COURTROOM AT 1:13 P.M.)

10 WITH REGARD TO MR. TUCKER AND MR. SHAH, YOU HAVE BEEN  
11 SERVING AS ALTERNATE JURORS, AS YOU KNOW. THE ORIGINAL  
12 TWELVE ARE APPARENTLY ABLE TO PARTICIPATE IN JURY  
13 DELIBERATIONS AND SO, THAT'S GOING TO CONCLUDE YOUR SERVICE  
14 FOR THE TRIAL OF THIS CASE. NEVERTHELESS, WE DO SINCERELY  
15 APPRECIATE YOUR PARTICIPATION AS JURORS IN THE CASE. I HOPE  
16 THAT IT HAS BEEN OF SOME BENEFIT TO YOU.

17 THIS IS GOING TO CONCLUDE YOUR SERVICE FOR THE WEEK.  
18 YOU DO NOT NEED TO REPORT BACK OR CALL BACK ANY MORE THIS  
19 WEEK. IF YOU WANT TO STAY JUST BECAUSE YOU'RE CURIOUS AS TO  
20 WHAT YOUR FELLOW JURORS MIGHT SAY WITH REGARD TO THEIR  
21 DECISION, YOU'RE WELCOME TO STAY, BUT YOU DON'T HAVE TO. IF  
22 YOU WANT TO STAY, JUST HAVE A SEAT IN THE AUDIENCE  
23 SOMEWHERE. IF YOU DON'T WANT TO STAY, IF YOU'LL SEE THE CLERK  
24 BEFORE YOU GO, SHE'LL LET YOU KNOW ABOUT HOW YOU'RE GOING  
25 TO BE PAID, WHETHER THAT WILL BE GIVEN TO YOU NOW OR MAILED

1 TO YOU. SO, I'LL LEAVE IT UP TO YOU. STAY OR BE EXCUSED, BUT  
2 YOU WON'T NEED TO COME BACK. SO, THANKS AGAIN, FOR YOUR  
3 PARTICIPATION.

4 (WHEREUPON ALTERNATE JURORS EXITED THE COURTROOM)  
5 ARE THERE ANY EXCEPTIONS TAKEN TO THE INSTRUCTIONS OR  
6 REQUEST FOR ADDITIONS TO THE INSTRUCTIONS BY THE STATE?

7 MR. THOMPSON: NO, YOUR HONOR.

8 THE COURT: BY THE DEFENDANT?

9 MR. CHIARENZA: NO SIR.

10 THE COURT: LET ME ASK Y'ALL TO VERIFY ALL THE EXHIBITS  
11 BEFORE THEY GO BACK, PLEASE.

12 MS. COLLINS: YOUR HONOR, IF WE CAN PUT THIS ONE THING ON  
13 THE RECORD BEFORE WE DO THAT?

14 THE COURT: OKAY.

15 MS. COLLINS: MY ASSISTANT HAS BROUGHT TO MY ATTENTION  
16 THAT AT LEAST ONE, IF NOT TWO OF THE JURORS, APPEARED TO BE  
17 TAKING NOTES. I DON'T KNOW YOUR HONOR'S POSITION ON THAT.  
18 THE LADY IN THE BLACK SWEATER WITH THE STRIPED SHELL  
19 UNDERNEATH AND---

20 THE COURT: I DON'T HAVE ANY OBJECTION TO IT. DO YOU  
21 WANT ME TO INSTRUCT THEM TO USE THEM FOR THEIR OWN  
22 PURPOSES?

23 (PAUSE)

24 BRING THE JURY BACK. I'LL TELL THEM THAT.

25 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 1:17 P.M.)

1 LADIES AND GENTLEMEN OF THE JURY, THIS WON'T TAKE BUT A  
2 MINUTE, BUT THERE'S SOMETHING I FORGOT TO ADDRESS. ONE OR  
3 MORE OF THE JURORS MAY HAVE BEEN TAKING NOTES DURING THE  
4 TRIAL AND THAT'S OKAY. BUT UNDERSTAND THAT NOTES THAT ARE  
5 TAKEN BY A JUROR ARE FOR THE PERSONAL BENEFIT OF THAT JUROR  
6 ONLY. IN OTHER WORDS, OTHER JURORS ARE NOT TO RELY UPON  
7 SOME JURORS' NOTE TAKING OF YOUR RECOLLECTION OF WHAT THE  
8 EVIDENCE WAS, WHAT THE TESTIMONY WAS. YOU CAN'T RELY UPON  
9 THOSE NOTES AS BEING PROOF OF ANY FACT IN THE CASE.

10 IF YOU BELIEVE THAT THAT'S CORRECT, THEN YOU CAN ACCEPT  
11 IT, BUT I'M JUST SAYING YOU CAN'T-- IF YOU'RE NOT SURE OR YOU  
12 THINK THE WITNESS SAID SOMETHING ELSE, YOU CAN'T RELY UPON  
13 SOME JUROR'S NOTES AS BEING YOUR UNDERSTANDING OR  
14 RECOLLECTION OF WHAT WAS SAID.

15 AS I TOLD YOU, IF THERE'S AN ISSUE ABOUT IT, WE CAN BRING  
16 YOU BACK AND HAVE TESTIMONY RE-PLAYED. SO, THE NOTES TAKEN  
17 BY ANY JUROR ARE FOR THE PERSONAL USE BY THAT JUROR ONLY.  
18 THEY ARE NOT TO BE RELIED UPON BY ANY OTHER JUROR. OKAY?

19 RETIRE TO YOUR JURY ROOM AND WHEN THE BAILIFF BRINGS  
20 BACK THE EXHIBITS AND THE JURY FORMS YOU MAY BEGIN YOUR  
21 DELIBERATIONS.

22 (WHEREUPON THE JURY EXITED THE COURTROOM AT 1:19 P.M.)

23 VERIFY THE EXHIBITS, PLEASE.

24 (WHEREUPON ALL EXHIBITS WERE VERIFIED BY COUNSEL FOR  
25 THE STATE AND COUNSEL FOR THE DEFENSE AND THE COURT

1 REPORTER, AT WHICH TIME SAID EXHIBITS WERE TAKEN TO THE JURY  
2 ROOM, ALONG WITH THE VERDICT FORMS, AND AT WHICH TIME  
3 DELIBERATIONS BEGAN AT 1:27 P.M., AND COURT WAS RECESS  
4 PENDING A VERDICT)

5 COURT IN SESSION - 3:51 P.M.

6 THE COURT: IT'S MY UNDERSTANDING WE HAVE A QUESTION  
7 FROM THE JURY. BRING THE JURY IN.

8 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 3:51 P.M.)

9 MR. FOREMAN, I UNDERSTAND THAT YOU AND YOUR JURORS  
10 WANT TO HAVE THE TESTIMONY OF DANA BLACKMON REPLAYED  
11 REGARDING HER READING OF SOME STATEMENTS SHE HAS PROVIDED  
12 LAW ENFORCEMENT?

13 JURY FOREMAN: THAT'S CORRECT. SHE READ FROM THE  
14 STATEMENTS AND WE'D LIKE TO HAVE THAT REPLAYED.

15 THE COURT: ALL RIGHT. I THINK THE COURT REPORTER HAS  
16 THAT CUED UP.

17 (WHEREUPON THE PORTION OF THE TESTIMONY OF THE STATEMENTS  
18 GIVEN BY WITNESS DANA BLACKMON WAS RE-PLAYED FOR THE JURY)

19 ANYTHING FURTHER?

20 JURY FOREMAN: NO SIR.

21 THE COURT: YOU MAY RESUME YOUR DELIBERATIONS.

22 (WHEREUPON THE JURY EXITED THE COURTROOM AT 4:03 P.M.,  
23 TO RESUME DELIBERATIONS. JURY NOTE MARKED COURT'S NUMBER 2)

24 WE'LL BE AT EASE WHILE THE JURY RESUMES THEIR  
25 DELIBERATIONS.

1 COURT IN SESSION - 4:48 P.M.

2 THE COURT: BRING IN THE JURY.

3 (WHEREUPON THE JURY ENTERED THE COURTROOM)

4 MR. FOREMAN, HAVE YOU AND YOUR FELLOW JURORS REACHED  
5 A UNANIMOUS DECISION AS TO EACH OF THE SEPARATE  
6 INDICTMENTS?

7 JURY FOREMAN: YES SIR, WE HAVE.

8 THE COURT: DID YOU INDICATE THOSE DECISIONS ON THE BACK  
9 AS REQUESTED?

10 JURY FOREMAN: YES SIR, WE DID.

11 THE COURT: AND YOU SIGNED YOUR NAME AS THE  
12 FOREPERSON AND PUT TODAY'S DATE ON IT?

13 JURY FOREMAN: YES SIR, I DID.

14 THE COURT: IF YOU WILL, HAND THOSE UP BY WAY OF THE  
15 BAILIFF.

16 (WHEREUPON THE JURY VERDICTS WERE PASSED TO THE COURT AND  
17 READ BY THE CLERK OF COURT)

18 CLERK OF COURT: INDICTMENT 2007-GS-46-1266, THE STATE  
19 VERSUS ISAIAS GUTIERREZ, INDICTMENT FOR BURGLARY, FIRST  
20 DEGREE; VERDICT, GUILTY. SIGNED BY THE FOREPERSON, DATED  
21 TODAY'S DATE.

22 INDICTMENT 2007-GS-46-1262, THE STATE VERSUS ISAIAS  
23 GUTIERREZ, INDICTMENT FOR ARMED ROBBERY, GUILTY. SIGNED BY  
24 THE FOREPERSON, DATED TODAY'S DATE.

1 INDICTMENT 2007-GS-46-1263, THE STATE VERSUS ISAIAS  
2 GUTIERREZ, INDICTMENT FOR MURDER; VERDICT, GUILTY. SIGNED BY  
3 THE FOREPERSON, DATED TODAY'S DATE.

4 INDICTMENT 2007-GS-46-1264, THE STATE VERSUS GUTIERREZ,  
5 INDICTMENT FOR FORGERY; VERDICT GUILTY, SIGNED BY THE  
6 FOREPERSON, DATED TODAY'S DATE.

7 INDICTMENT 2007-GS-46-1261, THE STATE VERSUS GUTIERREZ,  
8 INDICTMENT FOR FORGERY; VERDICT GUILTY, SIGNED BY THE  
9 FOREPERSON, DATED TODAY'S DATE.

10 INDICTMENT 2007-GS-46-1265, THE STATE VERSUS GUTIERREZ,  
11 INDICTMENT FOR FORGERY; VERDICT GUILTY, SIGNED BY THE  
12 FOREPERSON, DATED TODAY'S DATE.

13 LADIES AND GENTLEMEN OF THE JURY, IF THAT BE YOUR  
14 VERDICT SO SAY YOU ALL BY RAISING YOUR RIGHT HAND.

15 (WHEREUPON JURORS RESPOND)

16 LET THE RECORD SHOW ALL JURORS AFFIRMED THIS VERDICT.

17 THE COURT: DOES THE DEFENDANT WISH TO HAVE THE JURY  
18 POLLED?

19 MR. CHIARENZA: YES, YOUR HONOR.

20 THE COURT: POLL THE JURY, PLEASE, MA'AM.

21 CLERK OF COURT: IF YOU ALL WOULD PLEASE STAND.

22 (WHEREUPON JURY STANDS)

23 FOREPERSON, MR. RICHARD SORROW, JUROR NUMBER 211, IS  
24 THIS YOUR VERDICT?

25 JUROR: YES, IT IS.

1 CLERK OF COURT: YOU MAY HAVE A SEAT. NUMBER 157, SCOTT  
2 MULLINAX, IS THIS STILL YOUR VERDICT?

3 JUROR: YES, IT IS.

4 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 34,  
5 COLLEEN CASSIDY. IS THIS YOUR VERDICT?

6 JUROR: YES MA'AM.

7 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

8 JUROR: YES MA'AM.

9 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 182,  
10 KAREN RAWLS, IS THIS YOUR VERDICT?

11 JUROR: YES, IT IS.

12 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

13 JUROR: YES, IT IS.

14 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 207,  
15 EDWARD SMITH, IS THIS YOUR VERDICT?

16 JUROR: YES, IT IS.

17 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

18 JUROR: YES, IT IS.

19 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 167,  
20 LISA PICKETT, IS THIS YOUR VERDICT?

21 JUROR: YES, IT IS.

22 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

23 JUROR: YES, IT IS.

24 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 37,  
25 DONALD CASTON, IS THIS YOUR VERDICT?

1 JUROR: YES, IT IS.

2 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

3 JUROR: YES, IT IS.

4 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 1,  
5 LISA ADAMS, IS THIS YOUR VERDICT?

6 JUROR: YES, IT IS.

7 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

8 JUROR: YES, IT IS.

9 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 98,  
10 RAYMOND HESS, IS THIS YOUR VERDICT?

11 JUROR: YES, IT IS.

12 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

13 JUROR: YES, IT IS.

14 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 140,  
15 HATTIE MATHIS, IS THIS YOUR VERDICT?

16 JUROR: YES, IT IS.

17 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

18 JUROR: YES, IT IS.

19 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 55,  
20 DORIS DAVIS, IS THIS YOUR VERDICT?

21 JUROR: YES, IT IS.

22 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

23 JUROR: YES, IT IS.

24 CLERK OF COURT: YOU MAY HAVE A SEAT. JUROR NUMBER 5,  
25 SCOTT ALLEN, IS THIS YOUR VERDICT?

1 JUROR: YES, IT IS.

2 CLERK OF COURT: IS THIS STILL YOUR VERDICT?

3 JUROR: YES, IT IS.

4 CLERK OF COURT: YOU MAY HAVE A SEAT.

5 THE COURT: ANY MATTERS THAT NEED TO BE ADDRESSED WITH  
6 THE JURY PRESENT?

7 MR. THOMPSON: NOTHING FROM THE STATE, YOUR HONOR.

8 MR. CHIARENZA: NO, YOUR HONOR.

9 THE COURT: THANK YOU, LADIES AND GENTLEMEN. THAT WILL  
10 CONCLUDE YOUR SERVICE FOR THIS CASE AS WELL AS YOUR SERVICE  
11 FOR THE WEEK. SO, I DO WANT TO TAKE THIS OPPORTUNITY TO  
12 SINCERELY THANK YOU FOR YOUR SERVICE AS JURORS THIS WEEK,  
13 AND I HOPE THAT IT HAS NOT POSED TOO MUCH OF A HARDSHIP UPON  
14 YOU. I SINCERELY HOPE THAT IT HAS BEEN AN EDUCATIONAL AND  
15 BENEFICIAL EXPERIENCE FOR YOU.

16 YOU WILL NOT NEED TO CALL BACK. YOU WON'T NEED TO  
17 REPORT BACK TOMORROW. AS YOU LEAVE, YOU ARE LEAVING WITH  
18 YOUR THANKS. I HOPE YOU ALL WILL HAVE A NICE HOLIDAY.

19 YOU WILL PAID FOR YOUR SERVICE. IT WILL BE MAILED TO YOU  
20 AT THE ADDRESSES THAT APPEAR ON YOUR JUROR SUMMONS, UNLESS  
21 YOU PROVIDE THE CLERK WITH A DIFFERENT ADDRESS. THANK YOU  
22 AGAIN FOR YOUR PARTICIPATION.

23 (WHEREUPON JURORS EXIT THE COURTROOM)

1           BEFORE WE BEGIN THE SENTENCING PHASE, THERE IS ONE  
2           MATTER THAT THE COURT WISHES TO TAKE UP WHICH OCCURRED  
3           PRIOR TO THE DELIBERATION TAKING PLACE.

4           THE COURT WAS NOTIFIED BY THE FOREPERSON THAT ONE OF  
5           THE JURORS HAD TO LEAVE MOMENTARILY, SAYING HE HAD TO  
6           TRANSACT SOME KIND OF BUSINESS. HE LEFT THE COURTHOUSE  
7           PRIOR TO THE DELIBERATION TAKING PLACE.

8           ACCORDING TO THE NOTE SUBMITTED BY THE FOREPERSON,  
9           BECAUSE OF HIS ABSENCE, THE FOREPERSON FOLLOWED THE  
10          INSTRUCTIONS GIVEN BY THE COURT PRIOR TO THE DELIBERATIONS,  
11          THAT BEING THAT THERE WERE NO DELIBERATIONS TAKING PLACE  
12          UNLESS ALL TWELVE JURORS WERE PRESENT. AND SO, THE  
13          DELIBERATIONS DID NOT BEGIN UNTIL ALL TWELVE JURORS WERE  
14          PRESENT.

15          I PRIVATELY DISCUSSED WITH THE ABSENT JUROR WHEN HE  
16          RETURNED WHY HE LEFT. HE INDICATED HE HAD TOLD THE  
17          FOREPERSON THAT HE HAD A MATTER HE HAD TO ATTEND TO. HE  
18          HAD TO SEND AN EMAIL REGARDING SOME BUSINESS THAT HE WAS  
19          ENGAGED IN AND IT HAD TO BE GOTTEN OUT THAT MOMENT. SO, HE  
20          LEFT TO SEND THAT EMAIL ON HIS COMPUTER. HE INDICATED THERE  
21          WERE NO DISCUSSIONS ABOUT THE CASE, HE CONDUCTED NO OTHER  
22          BUSINESS. THERE WAS NOTHING RELATED TO HIS DUTIES AS A JUROR.  
23          IT WAS SIMPLY A MATTER THAT HE HAD TO ATTEND TO BEFORE HE  
24          COULD RESUME HIS DUTIES AS A JUROR.

1           SO, HAVING HAD THAT DISCUSSION WITH HIM I WAS SATISFIED  
2           THAT HE HAD NOT VIOLATED HIS OATH IN ANY WAY AND THAT HE  
3           WAS ABLE TO CONTINUE TO SERVE IN THE CASE. AND THAT THE  
4           OTHER JURORS HAD FOLLOWED THEIR OATH AND HAD NOT  
5           DELIBERATED UNTIL SUCH TIME AS ALL TWELVE JURORS WERE  
6           PRESENT.

7           ALL THAT INFORMATION AND THOSE CIRCUMSTANCES WERE  
8           TOLD TO COUNSEL FOR THE STATE AND THE DEFENSE AND THE COURT  
9           WAS ADVISED THAT NEITHER WISHED TO MAKE ANY MOTIONS  
10          REGARDING THOSE CIRCUMSTANCES.

11          IS THAT A FAIR STATEMENT OF THE CIRCUMSTANCES AS KNOWN  
12          BY THE STATE AND THE DEFENSE?

13          MR. THOMPSON: YES, YOUR HONOR, IT IS.

14          MR. CHIARENZA: YES, IT IS, YOUR HONOR.

15          THE COURT: IS THERE ANYTHING ELSE THAT EITHER SIDE  
16          WISHES TO PLACE ON THE RECORD THAT I NEGLECTED TO INCLUDE?

17          MR. THOMPSON: NO, YOUR HONOR.

18          MR. CHIARENZA: NO, YOUR HONOR.

19          THE COURT: ANY OTHER MATTERS WE NEED TO ADDRESS PRIOR  
20          TO THE IMPOSITION OF SENTENCE?

21          MR. THOMPSON: NO, YOUR HONOR.

22          MR. CHIARENZA: YOUR HONOR, AT THIS TIME, THE DEFENDANT  
23          WOULD MOVE FOR-- WELL, FIRST I WOULD RENEW ANY MOTIONS AND  
24          OBJECTIONS I MADE DURING THE COURSE OF THE TRIAL, AND MOVE  
25          FOR THE COURT TO DIRECT A VERDICT BASED ON THE INSUFFICIENCY

1 OF EVIDENCE PRESENTED IN THIS CASE. AS THE COURT KNOWS, THE  
2 STATE'S CASE WAS BASED LARGELY ON THE TESTIMONY OF DANA  
3 BLACKMON, AND OTHER CIRCUMSTANTIAL EVIDENCE.

4 IN THE EVENT THE COURT DOES NOT WISH TO DIRECT A  
5 VERDICT WE WOULD ASK ALTERNATIVELY FOR A NEW TRIAL, YOUR  
6 HONOR, BASED ON THE JURY RENDERING A VERDICT ON EVIDENCE  
7 THAT'S NOT SUFFICIENT TO RENDER THAT VERDICT.

8 THE COURT: CLEARLY, THE EVIDENCE WAS SUFFICIENT TO  
9 SUPPORT THE VERDICT, IF DETERMINED TO BE CREDIBLE BY THE  
10 FINDER OF FACT, IN THIS CASE, THIS JURY, AND THEY DETERMINED  
11 APPARENTLY THAT THAT EVIDENCE WAS CREDIBLE, AND THAT IT  
12 PROVED THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

13 I AM SATISFIED THEY FOLLOWED THE INSTRUCTIONS. IT'S THE  
14 JURY'S PREROGATIVE TO DETERMINE THE CREDIBILITY OF THE  
15 EVIDENCE AND THE WEIGHT TO BE GIVEN TO IT. AND THEY HAVE  
16 DONE THAT IN THIS CASE. SO, I FIND NO REASON TO DIRECT A  
17 VERDICT OF NOT GUILTY, OR TO ORDER A NEW TRIAL TO BE HELD.

18 SO, EACH OF THOSE MOTIONS ARE DENIED.

19 MR. CHIARENZA: THANK YOU, YOUR HONOR.

20 THE COURT: ANYTHING ELSE?

21 MR. CHIARENZA: NOTHING FROM THE DEFENSE, YOUR HONOR.

22 MR. THOMPSON: YOUR HONOR, AT THE PROPER TIME, THE  
23 FAMILY DOES WISH TO ADDRESS THE COURT.

24 THE COURT: OKAY. LET'S GO AHEAD AND DO THAT NOW WHILE  
25 THEY'RE COMPLETING THE PAPERWORK.

1                   MR. THOMPSON: SANDRA WILLIAMSON, BOBBY CUBLEY, AND  
2                   FAY BOHELER ALL WISH TO ADDRESS THE COURT AT THIS TIME.

3                   THE COURT: I'LL BE GLAD TO HEAR FROM THEM. YOUR NAME,  
4                   MA'AM?

5                   FAYE BOHELER: MY NAME IS FAYE BOHELER. I'M CLARENCE  
6                   CUBLEY'S DAUGHTER. YOUR HONOR, WE FEEL LIKE THAT NO MATTER  
7                   HOW MUCH TIME HE GETS, IT'S NOT GONNA EVER BRING OUR FATHER  
8                   BACK AND IT'S NOT GONNA EVER GIVE US THE CHANCE TO SPEND ANY  
9                   MORE TIME WITH HIM. BUT WE FEEL LIKE IT WILL KEEP HIM FROM  
10                  EVER PUTTING ANYBODY ELSE THROUGH WHAT WE'VE HAD TO GO  
11                  THROUGH THESE LAST FIVE YEARS. SO, WE JUST WANTED THE COURT  
12                  TO KNOW THAT WE'RE SPEAKING ON BEHALF OF DADDY BECAUSE HE  
13                  CAN'T BE HERE TO SPEAK FOR HIMSELF. AND WE JUST WANT YOU TO  
14                  KNOW THAT WE DON'T WANT ANYBODY TO EVER SUFFER WHAT WE'VE  
15                  HAD TO SUFFER BECAUSE OF HIM.

16                  THE COURT: THANK YOU, MA'AM. I WISH YOU THE BEST. YES  
17                  MA'AM?

18                  SANDRA WILLIAMSON: MY NAME IS SANDRA WILLIAMSON,  
19                  AND I'M THE DAUGHTER OF CLARENCE CUBLEY. I JUST WANTED THE  
20                  COURT TO KNOW THAT NOBODY DESERVES TO DIE IN THAT MANNER.  
21                  AND I HOPE THAT NOBODY EVER GETS TO DIE BY HIS HANDS AGAIN.  
22                  THANK YOU.

23                  THE COURT: THANK YOU, MA'AM. GOOD LUCK TO YOU. YES  
24                  SIR?

1           BOBBY CUBLEY: I'M BOBBY CUBLEY, SON OF CLARENCE  
2           CUBLEY. I WANT TO THANK THE JURY. I WANT TO THANK THE  
3           COURTS FOR WHAT THEY DOING. I THINK IT'S THE RIGHT THING.

4           THE COURT: YES SIR, THANK YOU. ANYTHING ELSE ON BEHALF  
5           OF THE STATE?

6           MR. THOMPSON: YES, YOUR HONOR. AS TO THE DEFENDANT'S  
7           PRIOR RECORD, WE ONLY HAVE-- HE APPARENTLY HAS GONE UNDER  
8           OTHER NAMES AND ID'S. WE ONLY HAVE FROM WHAT HE WAS  
9           ARRESTED HERE IN OUR COUNTY. IN ADDITION, WHEN HE WAS  
10          CAUGHT IN MISSOURI, HE WAS ARRESTED FOR RESISTING ARREST AT  
11          THAT TIME, AND PLEAD GUILTY TO THAT.

12          IN 2001, PUBLIC DISORDERLY CONDUCT. ALSO, WITHIN THAT  
13          SAME YEAR, DRIVING WITHOUT A LICENSE, OPEN CONTAINER. WITHIN  
14          THAT SAME YEAR, ANOTHER DRIVING WITHOUT A LICENSE AND  
15          FAILURE TO MAINTAIN PROOF OF INSURANCE. WITHIN THAT SAME  
16          YEAR, CRIMINAL DOMESTIC VIOLENCE, WHICH THE VICTIM WAS DANA  
17          BLACKMON.

18          IN 2002, A DRIVING UNDER THE INFLUENCE SECOND, WHICH THE  
19          COURT WAS MADE AWARE OF. AND THE DRIVING WITHOUT A LICENSE  
20          WHICH IS ACTUALLY A SECOND OFFENSE, AS WELL.

21          THE STATE WOULD POINT OUT TO THE COURT, YOUR HONOR,  
22          THIS CASE, AS THE COURT IS WELL AWARE, WOULD HAVE BEEN  
23          DEATH PENALTY ELIGIBLE FOR A NUMBER OF REASONS. WE DECIDED  
24          NOT TO DO THAT. WE RECEIVED MANY LETTERS FROM THE MEXICAN  
25          CONSULATE ASKING US NOT TO, EXPRESSING HOW THEY WOULD BE

1 INVOLVED THOROUGHLY IF WE DID, AND THAT SORT OF THAT. SO, TO  
2 PREVENT THAT WAS ONE OF THE REASONS WE DID NOT SEEK THE  
3 DEATH PENALTY.

4 HAVING SAID THAT, JUDGE, WE CERTAINLY LOOK AT THIS  
5 CRIME AS JUST AS SERIOUS AS IT IS. IT'S ONE OF THE MOST  
6 HORRENDOUS THINGS YOU CAN DO TO SOMEONE. AND MR. CUBLEY,  
7 OF COURSE, IN THE LONG PERIOD OF TIME THAT HE LAY THERE ON HIS  
8 FLOOR BEFORE HE HAD SOMEONE COME TO HELP HIM, WE DON'T  
9 KNOW IF WOULD EXPIRE. OF COURSE, WE TALKED TO THE  
10 PATHOLOGIST ABOUT IT. HE TOLD US THAT CERTAINLY SOMEONE  
11 WHO WAS OF HIS AGE, WHO WAS ABLE TO SURVIVE THAT DAY AND A  
12 HALF, OR TWO DAYS, WITHOUT WATER, WITHOUT TREATMENT,  
13 WITHOUT FOOD, AND STILL SURVIVE A FEW DAYS AFTER THAT  
14 BEFORE HE PASSED AWAY, VERY WELL MAY HAVE BEEN ABLE TO  
15 HAVE AT LEAST SOME LIFE IN HIM TO BE TREATED IN SOME WAY THAT  
16 COULD HAVE HELPED AND BE ABLE TO MAINTAIN SOME SORT OF  
17 REASONABLE LIFE HAD HE HAD IMMEDIATE MEDICAL ATTENTION.

18 SO, THE BRUTALITY OF THIS PARTICULAR CASE, THE FACT THAT  
19 THE DEFENDANT RAN, HAS BEEN ON THE RUN SINCE THEN; THE FACT  
20 THAT HE IS HERE ILLEGALLY IN THE UNITED STATES AND HAS BEEN  
21 FOR THE ENTIRE TIME HE'S BEEN HERE, HIS ACTIONS, AND OF COURSE,  
22 THE ID'S, WHICH CERTAINLY APPEAR TO BE FAKE; THE STATE WOULD  
23 RESPECTFULLY ASK THE COURT TO SENTENCE HIM TO THE MAXIMUM  
24 FOR THE MURDER, TO LIFE IN PRISON.

25 THE COURT: ANYTHING ELSE ON BEHALF OF THE STATE?

1 MR. THOMPSON: NO, YOUR HONOR.

2 THE COURT: MR. CHIARENZA.

3 MR. CHIARENZA: DO YOU REQUIRE THE DEFENDANT TO COME  
4 AROUND?

5 THE COURT: HE CAN STAND RIGHT THERE. DO YOU HAVE  
6 ANYTHING YOU WANT TO TELL ME?

7 MR. CHIARENZA: YOUR HONOR, YOU'VE HEARD THE TRIAL IN  
8 THIS CASE FOR THE LAST THREE AND A HALF DAYS. THE COURT IS  
9 OBVIOUSLY AWARE OF THE CIRCUMSTANCES. THE JURY HAS  
10 RENDERED ITS VERDICT AND I RESPECT THE VERDICT OF THE JURY.

11 MY CLIENT IS TWENTY-SEVEN YEARS OLD. YOUR HONOR, THE  
12 MINIMUM SENTENCE YOU'RE OBLIGATED TO IMPOSE IS THIRTY YEARS.  
13 CERTAINLY THAT IN AND OF ITSELF IS A GREAT DEAL OF TIME.

14 I WOULD HOPE THAT THERE IS THE OPPORTUNITY FOR MR.  
15 GUTIERREZ TO GET SOME EDUCATION AND SOME REHABILITATION IN  
16 THE DEPARTMENT OF CORRECTIONS.

17 WE LEAVE IT UP TO THE WISDOM OF THE COURT, QUITE  
18 FRANKLY. I UNDERSTAND THE DIFFICULTY YOU MAY HAVE  
19 RENDERING THE SENTENCE TODAY. I DON'T KNOW THERE'S MUCH I  
20 CAN TELL YOU. WE WAIVE MITIGATION. THE JURY HAS SPOKEN. THE  
21 MINIMUM ON THESE CRIMES IS SUBSTANTIAL.

22 I THINK THAT HE IS-- I WORKED WITH HIM IN PREPARING FOR  
23 THIS TRIAL. I MET WITH HIM EXTENSIVELY. I THINK THAT HE CAN BE  
24 A PRODUCTIVE PERSON. NOW, WHETHER THAT HAS TO BE THIRTY  
25 YEARS FROM NOW, WHEN HE'LL BE PUSHING SIXTY, THAT JUST MAY

1 HAVE TO BE HIS LOT. SO, I WOULD JUST IMPLORE THE COURT TO  
2 CONSIDER FASHIONING SOME SORT OF SENTENCE WHICH WILL ALLOW  
3 HIM TO HAVE AT LEAST SOME PORTION OF HIS LIFE AS A FREE MAN  
4 WITH THE ABILITY TO CONTRIBUTE SOMETHING TO SOCIETY, YOUR  
5 HONOR.

6 JUST LET ME INQUIRE AS TO WHETHER OR NOT MY CLIENT  
7 WISHES TO ADDRESS THE COURT.

8 (PAUSE TO CONFER WITH CLIENT)

9 YOUR HONOR, MY CLIENT WILL NOT BE ADDRESSING THE  
10 COURT AT THIS TIME.

11 THE COURT: MR. GUTIERREZ, YOU DID NOT WISH TO SAY  
12 ANYTHING TO THE COURT PRIOR TO THE IMPOSITION OF SENTENCE?

13 MR. CHIARENZA: ONE MOMENT, YOUR HONOR.

14 (WHEREUPON COUNSEL, DEFENDANT AND INTERPRETER CONFER)

15 BARBARA GUIDRY, INTERPRETER: HE WOULD LIKE TO TELL THE  
16 COURT THAT HE AND THE FAMILY, HE'S VERY SORRY FOR WHAT  
17 THEY'VE GONE THROUGH AND FOR ALL THE SUFFERING THAT HE HAS  
18 CAUSED THEM.

19 THE COURT: ALL RIGHT. 2007-1263, THAT'S THE INDICTMENT FOR  
20 MURDER, WHEREIN YOU HAVE BEEN FOUND GUILTY BY A JURY OF  
21 THAT OFFENSE, THE SENTENCE OF THE COURT IS THAT YOU, ISAIAS  
22 DIAZ GUTIERREZ, BE CONFINED TO THE SOUTH CAROLINA  
23 DEPARTMENT OF CORRECTIONS FOR A PERIOD OF YOUR NATURAL  
24 LIFE.

1 INDICTMENT 2007-1266, INDICTMENT FOR BURGLARY, IN THE  
2 FIRST DEGREE, A LIKE SENTENCE.

3 INDICTMENT 2007-1262, INDICTMENT FOR ROBBERY, WHEREIN  
4 YOU WERE FOUND GUILTY, THE SENTENCE OF THE COURT IS YOU BE  
5 CONFINED TO THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
6 FOR A PERIOD OF THIRTY YEARS.

7 INDICTMENT 2007-1261, 1264, AND 1265, EACH OF THOSE  
8 CHARGING YOU WITH FORGERY, WHEREIN YOU HAVE BEEN FOUND  
9 GUILTY BY A JURY OF THOSE OFFENSES, THE SENTENCE OF THE COURT  
10 IS THAT YOU, ISALAS DIAZ GUTIERREZ, BE CONFINED TO THE SOUTH  
11 CAROLINA DEPARTMENT OF CORRECTIONS FOR A PERIOD OF TEN  
12 YEARS AS TO EACH OF THOSE INDICTMENTS.

13 MR. GUTIERREZ, YOU HAVE A RIGHT TO APPEAL THE VERDICT  
14 FROM THE JURY AND THE SENTENCE OF THE COURT. YOU MUST FILE  
15 ANY NOTICE OF YOUR INTENTION TO APPEAL THOSE DECISIONS  
16 WITHIN TEN DAYS OF TODAY'S DATE.

17 ANYTHING FURTHER?

18 MR. THOMPSON: ONE THING, YOUR HONOR. I BELIEVE THE  
19 CHARGES OF FORGERY WOULD ONLY CARRY FIVE YEARS APIECE.

20 THE COURT: WELL, THEY MAY.

21 MR. THOMPSON: LESS THAN \$5000, I BELIEVE THEY WOULD  
22 CARRY A FIVE-YEAR SENTENCE.

23 THE COURT: ALL RIGHT. AS TO THE SENTENCES IMPOSED ON  
24 1261, 1264, AND 1265, AS TO EACH OF THOSE INDICTMENTS, THE

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SENTENCE OF THE COURT IS THAT YOU BE CONFINED TO THE  
DEPARTMENT OF CORRECTIONS FOR A PERIOD OF FIVE YEARS.

MR. THOMPSON: THANK YOU, YOUR HONOR.

THE COURT: IF NOTHING FURTHER, COURT IS ADJOURNED.

(COURT'S NOTES MARKED AS COURT'S NUMBER 3)

(WHEREUPON COURT WAS ADJOURNED AT 5:30 P.M.)

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CERTIFICATE

I, THE UNDERSIGNED PHYLLIS S. BARRETT, CIRCUIT COURT REPORTER FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE TRIAL HELD IN THE CAPTIONED CASE, RELATIVE TO APPEAL IN THE COURT OF GENERAL SESSIONS FOR THE SIXTEENTH JUDICIAL CIRCUIT, YORK COUNTY, SOUTH CAROLINA, ON THE 11TH, 12TH, 13TH AND 14TH DAYS OF DECEMBER, 2007.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

PHYLLIS S. BARRETT

County: YORK  
 Date: 12/10/17

VOIR DIRECase No: 07-GS-46-1261-1266Judge: ColePl./State: STATEState/Pl's. Accy: Thompson/CollinsDefendant: Isaias Diaz GutierrezDefense Accy: ChiavennaCourt Reporter: Phyllis Barrett

Juror No.	Name	Sex	Race	*Cause	Strikes		
					Plaintiff	Defense	Accept
157	Scott Mullinax	M	W				✓
225	Rena Truesdale	F	B		✓		
103	Ethel Doss	F	W			✓	
211	Richard Sorrow	M	W				✓
34	Colleen Cassidy	F	W				✓
196	Carla Saylor	F	W			✓	
12	Samantha Barnett	F	W			✓	
237	David White	M	W			✓	
182	Karen Rawls	F	W				✓
207	Edward Smith	M	W				✓
108	Cindy Humphrey	F	W			✓	
105	Tania Dunphy	F	W		✓		
176	Lisa Pickett	F	B				✓
37	Donald Chastain	M	W				✓
1	Lisa Adams	F	W				✓
16	Raymond Hess	M	W				✓

\*For the Court column, indicate who made the motion to strike the jurors "for cause". C-Court, P-Plaintiff, D-Defense



STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from York County

J. Derham Cole, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

ISAIAS DIAZ GUTIERREZ,

APPELLANT

---

FINAL ANDERS BRIEF OF APPELLANT

---

ROBERT M. PACHAK  
Appellate Defender

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

ATTORNEY FOR APPELLANT

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CERTIFICATE OF COUNSEL.....	9

TABLE OF AUTHORITIES

**Cases**

Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989).....6

State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986).....5

State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986) .....5

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting a knife into evidence when it was irrelevant and prejudicial?

STATEMENT OF THE CASE

Appellant was convicted of murder, burglary in the first degree, armed robbery, and three (3) counts of forgery after a jury trial held before the Honorable J. Derham Cole on December 10-13, 2007, in York County. Life sentences were imposed for murder and burglary. A thirty (30) year sentence was imposed for armed robbery and three (5) year sentences were imposed for the forgery charges.

This appeal follows.

ARGUMENT

The trial court erred in admitting a knife into evidence when it was irrelevant and prejudicial.

Appellant was alleged to have broken into the victim's home to obtain access to a safe believed to contain large amounts of cash. On the evening of the break-in, the victim was home and appellant struggled with him hitting and kicking the victim. The victim died several days later in the hospital.

The solicitor sought to have introduced into evidence a knife that was given to him by a relative that he supposedly carried with him all the time. The solicitor argued the knife was relevant because a phone cord was cut in the victim's home and appellant's knife could have been used to cut the phone line. No forensic testing was done to see if the knife matched the cutting of the phone cord. (ROA p. 201, line 16 – p. 202, line 8)

Defense counsel objected because there was no competent evidence linking this particular knife with the cut phone cord. There was no allegation the knife was used in the assault. The mentioning of the knife was more prejudicial than probative. (ROA p. 202, lines 9-25)

The trial court overruled defense counsel's objection to the knife. (ROA p. 203, lines 1-3) Thereafter, the knife was admitted subject to defense counsel's objection. (ROA p. 241, lines 1-6)

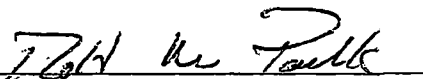
The decision to admit the knife was in error. There was insufficient evidence to tie the knife to the cut phone cord. State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986). It was also not relevant to any issue in dispute. State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). The admission of the knife was only to put appellant's character into issue and

to show criminal propensity or that appellant was a bad person. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989).

CONCLUSION

Appellant's conviction should be reversed due to the erroneous admission of the knife.

Respectfully submitted,

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of October, 2008.

STATE OF SOUTH CAROLINA  
 IN THE COURT OF APPEALS

---

Appeal from York County

J. Derham Cole, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

ISAIAS DIAZ GUTIERREZ,

APPELLANT

---

PETITION TO BE RELIEVED AS COUNSEL

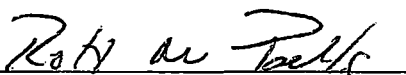
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Counsel for Isaias Diaz Gutierrez states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge J. Derham Cole, which was held on December 10-13, 2007, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed the one arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Isaias Diaz Gutierrez.

Respectfully submitted,

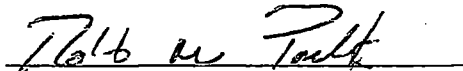
  
 Robert M. Pachak  
 Appellate Defender  
 ATTORNEY FOR APPELLANT

This 27th day of October, 2008.

## CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 27<sup>th</sup>, 2008



Robert M. Pachak  
Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA  
 IN THE COURT OF APPEALS

---

Appeal from York County

J. Derham Cole, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

ISAIAS DIAZ GUTIERREZ,

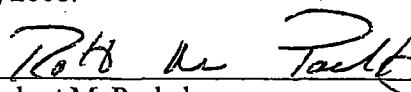
APPELLANT

---

CERTIFICATE OF SERVICE

---

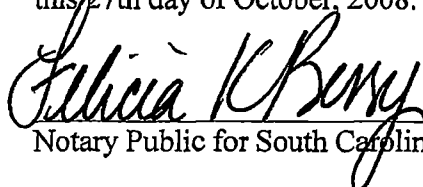
The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Final Anders Brief of Appellant and Record on Appeal has been served on Isaias Diaz Gutierrez, #325762 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472; this 27th day of October, 2008.



Robert M. Pachak  
 Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
 this 27th day of October, 2008.

 (L.S.)  
 Notary Public for South Carolina

My Commission Expires: August 15, 2010 .

2009 WL 9530090

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

The STATE, Respondent,

v.

Isaias Diaz **GUTIERREZ**, Appellant.

No. 2009-UP-495.

Submitted Oct. 1, 2009.

Decided Oct. 21, 2009.

Appeal from York County; J. Derham Cole, Circuit Court  
Judge.

**Attorneys and Law Firms**

Appellate Defender Robert M. Pachak, of Columbia, for  
Appellant.

Attorney General Henry Dargan McMaster, Chief  
Deputy Attorney General John W. McIntosh, Assistant

Deputy Attorney General Salley W. Elliott, Assistant  
Deputy Attorney General Donald J. Zelenka, all of  
Columbia; and Solicitor Kevin S. Brackett, of York, for  
Respondent.

**Opinion**

PER CURIAM.

\*1 Isaias Diaz Gutierrez appeals his convictions  
and sentences for murder, first-degree burglary, armed  
robbery, and forgery, arguing the trial court erred in  
admitting a knife into evidence because it was irrelevant  
and prejudicial. After a thorough review of the record and  
counsel's brief pursuant to *Anders v. California*, 386 U.S.  
738 (1967), and *State v. Williams*, 305 S.C. 116, 406 S.E.2d  
357 (1991), we dismiss the appeal and grant counsel's  
motion to be relieved.<sup>1</sup>

**APPEAL DISMISSED.**

SHORT, WILLIAMS, and GEATHERS, JJ., concur.

**All Citations**

Not Reported in S.E.2d, 2009 WL 9530090

**Footnotes**

<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

98-200



ATTORNEY GENERAL'S OFFICE  
RECEIVED 11-9-09 747

2007  
FILE  
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# The South Carolina Court of Appeals

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FAX: (803) 734-1830  
www.sccourts.org

November 6, 2009

## REMITTITUR

The Honorable David Hamilton  
1675 -1G York Highway  
PO Box 649  
York, SC 29745-0649

Re: The State v. Gutierrez, Isaias Diaz  
2007-GS-46-01261 2007-GS-46-01262 2007-GS-46-01263  
2007-GS-46-01264 2007-GS-46-01265 2007-GS-46-01266

Dear Mr. Hamilton:

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

Sincerely,

Renee S. Johnson  
Administrative Specialist

JFB/rj

cc: Appellate Defender Robert M. Pachak  
Isaias Diaz Gutierrez # 325762  
Assistant Deputy Attorney General Donald J. Zelenka  
Kevin Scott Brackett, Esquire

2010CP4602611

STATE OF SOUTH CAROLINA ) In the Court of Common Pleas

County of York

CERTIFIED TRUE COPY  
2010 JUN 24 PM 3:40

DAVID HAMILTON  
C.C.P. & GS  
YORK COUNTY, SC

2010 JUN 23 PM 4:00

RECEIVED

Isaias Diaz Gutierrez

Full name and prison number, if any, of applicant

DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

APPLICATION FOR

v.

POST-CONVICTION RELIEF

State of South Carolina

Name of Respondent

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lieber C.I. P.O. Box 205  
Ridgeville, S.C 29472

2. Name and location of Court which imposed sentence York County Court  
South Carolina

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) 2007-GS-46-01261, 2007-GS-46-01262,

(b) 2007-GS-46-01263, 2007-GS-46-01264,

(c) 2007-GS-46-01265, 2007-GS-46-01266,

4. The date upon which sentence was imposed and the terms of the sentence:

(a) 12-13-07 life, 12-13-07 5 years,

(b) 12-13-07 5 years, 12-13-07 5 years,

(c) 12-13-07 30 years, 12-13-07 life,

- 5. Check whether a finding of guilty was made
  - (a) after a plea of guilty \_\_\_\_\_
  - (b) after a plea of not guilty Yes
  - (c) after a plea of nolo contendere \_\_\_\_\_
- 6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

- 7. If you answered "yes" to (6), list
  - (a) the name of each Court to which you appealed:
    - i. Court of Appeals S.C.
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. Appeal Dismissed
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. October 21, 2009
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. unpublished Opinion No. 2009-up-495
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_

- 8. If you answered "no" to (6), state your reasons for not so appealing:
  - (a) N/A
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_

- 9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
  - (a) Ineffective assistance of Counsel
  - (b) Ineffective assistance of Appellate Counsel
  - (c) \_\_\_\_\_

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) Counsel Failed to request Competency Hearing to determine if Applicant
- (b) understood his situation or the nature of his Charges
- (c) Appellate Counsel was ineffective in that Appellate Counsel did not Appeal sentence.

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law?  
NO
- (b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?  
NO
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO
- (d) any other petitions, motions or applications in this or any other Court?  
NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
  - i. N/A
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. N/A
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. N/A
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

(d) the date of each such disposition:

- i. \_\_\_\_\_ N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. \_\_\_\_\_ N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? \_\_\_\_\_ NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. \_\_\_\_\_ N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised:

- i. \_\_\_\_\_ N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) \_\_\_\_\_ N/A
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

16. Were you represented by an attorney at any time during the course of:

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

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Robert M. Pachak Division of Appellate
- ii. Defense 1330 Lady<sup>st</sup> Suite 401 P.O. Box 11589-29211
- iii. Derek Chiarenza

(b) the proceedings at which each such attorney represented you:

- i. Robert M. Pachak Appeals Counsel
- ii. Derek Chiarenza Trial Counsel
- iii. \_\_\_\_\_

18. State clearly the relief you seek in filing this application.

Reverse and Remand

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

NO

STATE OF SOUTH CAROLINA )  
 ) VERIFICATION  
COUNTY OF \_\_\_\_\_ )

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

Isidias Collier

Sworn to and subscribed before me

This 7th day of June, 2012

Sylvia Jones L.S.

Notary Public for South Carolina

My Commission Expires 1/24/2013

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

I, Isidias Collier, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Isidias Collier  
Applicant

Sworn to and subscribed before me

This 7th day of June, 2012

Sylvia Jones L.S.

Notary Public for South Carolina

My Commission Expires: 1/24/2013

STATE OF SOUTH CAROLINA )  
 )  
 )  
 COUNTY OF YORK )  
 )  
 Isaias D. Gutierrez, #325762 )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE 16<sup>TH</sup> JUDICIAL CIRCUIT  
 Case No.: 2010-CP-46-2611

**RETURN**

The Respondent, making its Return to the application for Post-Conviction Relief filed June 23, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the April 2007 term of the Court of General Sessions for York County for three counts of Forgery (2007-GS-46-1261, 1264, 1265), Armed Robbery (2007-GS-46-1262), Murder (2007-GS-46-1263), and Burglary, 1<sup>st</sup> degree (2007-GS-46-1266). Derek S. Chiarenza, Esquire, represented him. On December 13, 2007, the Applicant proceeded to a jury trial after which he was found guilty as indicted of all of the aforementioned charges. The Honorable J. Derham Cole sentenced the Applicant to confinement for a period of five (5) years for each forgery conviction, thirty (30) years for armed robbery, and to life imprisonment for the murder and burglary convictions, sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals

affirmed the Applicant's conviction and sentence. State v. Gutierrez, Op. No. 2009-UP-495 (S.C. Ct. App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

Attached herewith and incorporated herein by reference are the records of the York County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the appellate court records including the trial transcript.

## II.

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

1. Ineffective assistance of trial counsel;
2. Ineffective assistance of appellate counsel.

## III.

In his first allegation, the Applicant claims he received ineffective assistance of trial counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

#### IV.

The Applicant's second allegation, that appellate counsel was ineffective, is without merit. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985); Tisdale v. State, 594 S.E.2d 166, 167 (S.C.2004). In order to show ineffective assistance of appellate counsel, the Petitioner must show that appellate counsel's performance was (1) deficient; and (2) that he suffered prejudice from appellate counsel's deficiency. Tisdale, 594 S.E.2d at 167.

The Anders brief procedure requires the appellate court to review the record in its entirety. The South Carolina Court of Appeals dismissed the appeal pursuant to Anders with a finding that there were no meritorious issues.

Respondent asserts that Petitioner has failed to prove deficient performance or prejudice on the part of appellate counsel. However, deficient performance is not an issue this Court needs to reach, because even assuming that the court concludes that appellate counsel's performance was deficient, Petitioner has not shown the necessary prejudice to succeed on this claim. In this case, to establish prejudice Petitioner would have to show that the South Carolina Court of Appeals would have found prejudicial error warranting reversal of his conviction and/or sentence if appellate counsel had not filed an Anders brief. He has failed to do so.

The South Carolina Court of Appeals has held under Anders, ... [t]he court ... is obligated to conduct a “full examination” of the record to determine whether the appeal is “wholly frivolous” ... according to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. *See State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991). After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. *See Anders*. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant ‘the assistance of counsel to argue the appeal.’ *Id.* At 744. The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal. *State v. McKennedy*, 559 S.E.2d 850, 854-855 (S.C.2002).

Therefore, when the South Carolina Court of Appeals denied Applicant's appeal, to the extent that an underlying issue was properly preserved for appellate review, the merits of the appeal were reached. *State v. Sullivan*, 282 S.E.2d 838 (S.C. 1981)(objection or motion must be raised to trial judge in order to preserve issue for appellate review). Therefore, the Applicant has not shown any prejudice due to his appellate counsel filing an Anders brief. This issue is without merit and should be dismissed.

V.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

HENRY DARGAN McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

JENNIFER A. KINZELER  
Assistant Attorney General

By: *Mary S. Williams* for  
ATTORNEYS FOR RESPONDENT

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

Dec 22, 2010

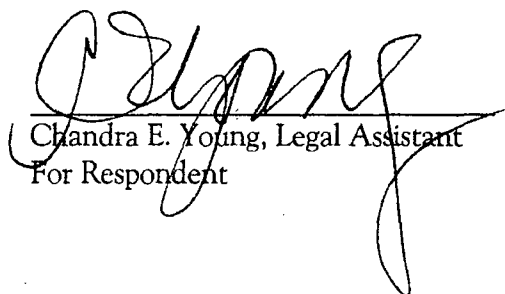
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
	)	
	)	2010-CP-46-2611
	)	
ISAIAS D. GUTIERREZ,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

---

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Charles T. Brook, III, Esquire  
Post Office Box 3512  
Sumter, SC 29151

DATED this 22<sup>nd</sup> day of December, 2010.

  
Chandra E. Young, Legal Assistant  
For Respondent

State of South Carolina., ) In the Court of Common Pleas  
 ) Of York  
 )  
 ) Case No. 2010-CP-46-02611  
 County of York. )

Isaias Diaz Gutierrez., )  
 )  
 Applicant., )  
 )  
 ) Transcript of Record  
 ) Post-Conviction Relief  
 State of South Carolina., )  
 )  
 Respondent. )

June 1, 2011  
 York, South Carolina

B E F O R E:

The Honorable Lee S. Alford, judge.

Mr. David Clayton Cook  
 Cook Law Firm, LLC  
 PO Box 1449  
 Lancaster, South Carolina 29721  
 dcook@dcooklaw.com  
 803. 285.4848  
 Attorney for the Applicant

Mr. Harrison David Brant  
 Assistant Attorney General  
 South Carolina Attorney General's Office  
 P.O. Box 11549  
 Columbia, South Carolina 29211-1549  
 803.734.3970  
 Attorney for the Respondent

Wanda S. Nelson, CVR-M  
 Official Court Reporter  
 Sixteenth Judicial Circuit  
 To The Honorable John C. Hayes, III

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<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
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Derek Chiarenza	Mr. Brant. . . . .	P.31-46
	Mr. Cook . . . . .	P.46-50
	The Court. . . . .	P.50-53
Court Reporter's Certificate page . . . . .		P.59

I N D E X

E X H I B I T S

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits were received into the record.

1 (COURT IN SESSION WEDNESDAY, JUNE 1ST, 2011 AT 09:45  
2 AM.)

3 THE COURT: You ready to proceed?

4 MR. COOK: Yes, sir, your Honor.

5 THE COURT: Oh, we're waiting on . . .

6 (APPLICANT ISAIAS GUTIERREZ, HISPANIC MALE, ENTERS  
7 COURTROOM AT 09:48 AM.)

8 MR. BRANT: May it please the Court?

9 THE COURT: Yes, sir.

10 MR. BRANT: Your Honor, this is York County Case 2010-  
11 CP-46-2611. The applicant's name is Isaiah Gutierrez SCDC  
12 Number 325762. He was indicted in April of 2007 with three  
13 counts of forgery, armed robbery, murder, and burglary in  
14 the first degree.

15 He was represented by Derek Chiarenza. On December  
16 10th he proceeded to trial until December 13th before Judge  
17 Cole and he was found guilty as indicted of all charges and  
18 sentenced to life for murder and life for burglary as well.  
19 And then received thirty years for armed robbery and  
20 received five years for each forgery charge.

21 He filed an appeal that was perfected by Robert Pachak  
22 pursuant to Anders v. California. The Court of Appeal  
23 dismissed. The remittitur was sent on December 6th, 2009.  
24 This application for post-conviction relief was filed on  
25 June 23rd, 2010. The State made its return on December

1 22nd, 2010. And his attorney today is Mr. David Cook and  
2 I'll turn it over to him at this point.

3 MR. COOK: Thank you, your Honor.

4 THE COURT: Yes, sir.

5 MR. COOK: May it please the Court.

6 THE COURT: Yes, Sir.

7 MR. COOK: Your Honor, in this case we have a  
8 translator that we would like for your Honor to consider to  
9 qualify her for this case. Her name is Linda Mummert.

10 And, Ms. Mummert, could you please tell the judge what  
11 experience you have in translating in cases in the past?

12 MS. MUMMERT: Well so far I've done two cases and  
13 that's it. One in Lancaster and another here in York.

14 MR. COOK: And who are you employed with right now?

15 MS. MUMMERT: On my own.

16 MR. COOK: Okay. And how do you -- How did you come  
17 to learn the Spanish language?

18 MS. MUMMERT: Oh, I'm natural born in Mexico.

19 MR. COOK: Native speaker?

20 MS. MUMMERT: Yeah, native.

21 MR. COOK: And the two cases you translated for in  
22 Lancaster County and what was the other you said?

23 MS. MUMMERT: Here in York.

24 MR. COOK: What types of cases were those?

25 MS. MUMMERT: The one here in York was --

1 MR. COOK: I mean what court was it in? Was it in  
2 Circuit Court or was it in a Magistrate level court?

3 MS. MUMMERT: I don't know. They didn't tell me. I  
4 think it was Magistrate level. But I couldn't tell you for  
5 sure. It was here in downtown York.

6 MR. COOK: Okay. And at this time, your Honor, she's  
7 a native speaker and she's had some experience translating  
8 in court.

9 THE COURT: Was she on the approved list by Court  
10 Administration?

11 MS. MUMMERT: Yes.

12 MR. COOK: Yes, sir. That's where we got her name  
13 from was the Clerk of Court forwarded it to us.

14 THE COURT: Okay. All right, fine. We'll allow her.  
15 She's on the approved list. I have no problem with  
16 that ---

17 MR. COOK: Thank you, your Honor.

18 THE COURT: --- and appointing her to translate this.  
19 The Clerk have the oath to administer?

20 MADAM CLERK: Yes, sir.

21 THE COURT: Go ahead. We'll put her under oath first.

22 MADAM CLERK: Raise your right hand.

23 (WHEREUPON, LINDA MUMMERT,  
24 BEING FIRST CALLED AND DULY SWORN, TRANSLATED/TESTIFIED AS  
25 FOLLOWS:)

1 MR. COOK: And for the record, your Honor, her name is  
2 Linda Mummert, M-u-m-m-e-r-t.

3 THE COURT: All right, sir. Okay.

4 MR. COOK: And I'd also like to put on the record,  
5 your Honor, that she is not employed with the Solicitor's  
6 Office or any of the law enforcement.

7 THE COURT: And not related to the affiant, correct?

8 MR. COOK: That's correct, your Honor.

9 There was an issue - The reason I say that there was  
10 an issue the last time. The case was continued because my  
11 client wasn't happy with the translator the Court provided  
12 because she was employed by the Solicitor's Office. So I  
13 want to put on the record that we have a translator here  
14 that's not employed by the Solicitor's office.

15 THE COURT: All right, sir.

16 MR. COOK: Also, your Honor, at this time I'd like to  
17 move to orally amend my client's application for Post-  
18 Conviction Relief. If it please the Court, my client  
19 stated that he's alleging that counsel failed to request a  
20 competency hearing to determine if the applicant understood  
21 his situation on the nature of his charges. And we're not  
22 gonna move forward on the competency hearing issue, your  
23 Honor. We'll withdraw that allegation.

24 I'd like to substitute it with an allegation of  
25 ineffective assistance of counsel based on two things I

1 want to focus on this morning.

2 One is failure to tender an offer by the State. And  
3 the second is failure to make proper objections during the  
4 *Jackson v. Denno* hearing which may have resulted in his  
5 confession to be excluded from the record. And those are  
6 the two things I want to move forward on today, your Honor.

7 THE COURT: All right.

8 MR. COOK: Furthermore, for the record I'd like to say  
9 that my client in his petition ask for a ineffective -- a  
10 finding of ineffective assistance of appellate counsel.  
11 And I want to withdraw that completely. I've reviewed the  
12 *Anders* brief and I don't think there's any grounds there so  
13 for judicial economy I'd like to withdraw that as well,  
14 your Honor.

15 THE COURT: Okay.

16 MR. COOK: Having said all that at this time, your  
17 Honor, I'd like to call my client Isaias Gutierrez.

18 THE COURT: Yes, sir.

19 MADAM CLERK: Place his left hand on the Bible.

20 Raise your right. Raise your right.

21 ((WHEREUPON, ISAIAS  
22 GUTIERREZ, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS  
23 FOLLOWS:))

24 MADAM CLERK: Have a seat.

25 THE COURT: Yes please. Wherever you need to stand is

ISAIAS GUTIERREZ: DIRECT BY MR. COOK

-9-

1 fine.

2 (INTERPRETER IN WITNESS BOX BESIDE WITNESS.)

3 MR. COOK: Okay, Mr. Gutierrez.

4 THE COURT: Let me just say, now he will probably not  
5 be answering. If he answers I will ask him to speak up.  
6 If he does not answer you answer through translation where  
7 you say what he's saying. I'll get you to speak up loud  
8 enough for everybody to hear.

9 MS. MUMMERT: Okay.

10 (COLLOQUY BETWEEN WITNESS AND TRANSLATOR IN SPANISH.)

11 MS. MUMMERT: Okay.

12 THE COURT: Translate it.

13 MR. COOK: Ms. Mummert, if you want to translate what  
14 my client just said for the record. We're asking that you  
15 do it. Translate every word that he says for the record.

16 MS. MUMMERT: He says that he wants me to when he  
17 answers a question in Spanish he wants me to translate and  
18 tell it in English to everybody.

19 MR. COOK: Thank you, ma'am.

20 DIRECT EXAMINATION

21 ISAIAS GUTIERREZ BY MR. COOK

22 Q. And my first question is, could you state your name  
23 for the record, please, sir.

24 A. Isaias Gutierrez.

25 Q. Okay. And, Mr. Gutierrez, is it true that you are

ISAIAS GUTIERREZ: DIRECT BY MR. COOK

-10-

1 petitioning this Court for a finding of or for post-  
2 conviction relief based on a finding of ineffective  
3 assistance of counsel?

4 (INTERPRETER TRANSLATES IN SPANISH.)

5 MS. MUMMERT: Can you repeat the question?

6 I'm sorry, sir.

7 Q. What are you here for today?

8 (INTERPRETER TRANSLATES IN SPANISH.)

9 (WITNESS RESPONDS IN SPANISH.)

10 A. He wants one more opportunity to defend his sentences  
11 cause he's concerned he was not well represented on the  
12 first trial.

13 Q. Okay. Mr. Gutierrez, one of the allegations that  
14 you're making is that your trial counsel - First of all,  
15 what was his name, your attorney for this trial?

16 (INTERPRETER TRANSLATES IN SPANISH.)

17 (WITNESS RESPONDS IN SPANISH.)

18 A. Chiarenza.

19 Q. And he's in the courtroom here today; is that correct?

20 (INTERPRETER TRANSLATES IN SPANISH.)

21 (WITNESS RESPONDS IN SPANISH.)

22 A. Yes he is.

23 Q. Okay. As I understand it one of the points that  
24 you're trying to make today is that your attorney did not  
25 properly give you an offer in this case; is that correct?

1 (INTERPRETER TRANSLATES IN SPANISH.)

2 (WITNESS RESPONDS IN SPANISH.)

3 A. Um, he says he really was not aware about the thirty  
4 year offer and that the lawyer really didn't consult him.  
5 If he had known exactly what - that he was - that the offer  
6 was for thirty years he would have not taken it.

7 (WITNESS RESPONDS IN SPANISH.)

8 A. He -- He concerns that he could have been negotiated  
9 to less than thirty years.

10 Q. Okay.

11 A. And he would have taken it for sure.

12 Q. All right.

13 MR. COOK: And, Ms. -- Madam Translator, I'm going to  
14 ask, and I know it's kind of hard to get a rhythm going,  
15 but if he says a lot of sentences ---

16 MADAM INTERPRETER: Uh-huh.

17 MR. COOK: --- a word that you may forget and word for  
18 word what he's saying ---

19 MADAM INTERPRETER: Uh-huh.

20 MR. COOK: --- so tell Mr. Gutierrez, translate one  
21 sentence at a time. When he says something then you say  
22 it.

23 MADAM TRANSLATOR: Okay. Sentence by sentence. Okay.

24 MR. COOK: All right.

25 Q. Now, Mr. Gutierrez, can you remember the conversation

ISAIAS GUTIERREZ: DIRECT BY MR. COOK

-12-

1 you had with your attorney about the offer and if so what  
2 was said?

3 (INTERPRETER TRANSLATES IN SPANISH.)

4 (WITNESS RESPONDS IN SPANISH.)

5 A. He told me ---

6 (WITNESS RESPONDS IN SPANISH.)

7 A. --- that he was offered ---

8 (WITNESS RESPONDS IN SPANISH.)

9 A. --- of thirty years. He was offered thirty years.

10 (WITNESS RESPONDS IN SPANISH.)

11 A. But he said ---

12 (WITNESS RESPONDS IN SPANISH.)

13 (INTERPRETER RESPONDS IN SPANISH.)

14 A. He -- He told him that he wasn't going to take the  
15 thirty years. That he was going to take to a jury trial.

16 (WITNESS RESPONDS IN SPANISH.)

17 A. Because the case --

18 (WITNESS RESPONDS IN SPANISH.)

19 A. Because the case was not too complicated.

20 (WITNESS RESPONDS IN SPANISH.)

21 A. And he said ---

22 (WITNESS RESPONDS IN SPANISH.)

23 A. --- that he was --

24 (WITNESS RESPONDS IN SPANISH.)

25 A. That he --

1 (WITNESS RESPONDS IN SPANISH.)

2 A. That if he had negotiated less than thirty years  
3 maybe he could a got -- hadn't gotten them but if he only  
4 arrange for the thirty that he told him no.

5 Q. Let me stop and get it straight. Let me try to  
6 understand what you're saying. Okay.

7 First of all, did I hear you say that Mr. Chiarenza  
8 told you that you had an offer of thirty years but already  
9 turned it down; is that correct?

10 (WITNESS RESPONDS IN SPANISH.)

11 A. That the lawyer told him he had the offer of thirty  
12 years but the lawyer said I already told them you were not  
13 taking it.

14 Q. Okay. Let me stop you right there.

15 MADAM INTERPRETER: Uh-huh.

16 Q. So the first thing that you're alleging today is that  
17 the attorney didn't give you an offer. He said there was  
18 an offer of thirty years but I turned it down without  
19 consulting with you; is that correct?

20 BY THE WITNESS:

21 A. That's correct.

22 Q. Okay. The next thing I want to ask you is this.

23 Did your attorney -- Did Mr. Chiarenza --

24 (INTERPRETER RESPONDS IN SPANISH.)

25 Q. Did you have other conversations at this time about

ISAIAS GUTIERREZ: DIRECT BY MR. COOK

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1 whether he thought he would win the trial or not?

2 (INTERPRETER TRANSLATES IN SPANISH.)

3 (WITNESS RESPONDS IN SPANISH.)

4 A. He told him ---

5 (WITNESS RESPONDS IN SPANISH.)

6 A. --- that the case for him ---

7 (WITNESS RESPONDS IN SPANISH.)

8 A. --- it was an easy case for the lawyer.

9 (WITNESS RESPONDS IN SPANISH.)

10 A. That he had won even harder trials, harder cases.

11 Q. That he had won harder cases ---

12 MADAM TRANSLATOR: Yeah, Yeah.

13 Q. Did you, Mr. Gutierrez, I remember when you were  
14 talking with me in preparation for the case, did you ever  
15 have a conversation with Mr. Chiarenza where you ask for a  
16 different attorney?

17 (WITNESS RESPONDS IN SPANISH.)

18 (INTERPRETER TRANSLATES IN SPANISH.)

19 (WITNESS RESPONDS IN SPANISH.)

20 A. He ask him about it and he was told ---

21 (WITNESS RESPONDS IN SPANISH.)

22 A. --- that he didn't need to ---

23 (WITNESS RESPONDS IN SPANISH.)

24 A. --- because the case was not too hard. It was not  
25 a hard case for him.

1 (WITNESS RESPONDS IN SPANISH.)

2 A. As a matter of fact he ask him for - He ask him to  
3 see, to show him that the -- all the charges where he could  
4 see the paper where it list all the charges for that was  
5 against him -- that were against him.

6 (WITNESS RESPONDS IN SPANISH.)

7 A. And he never gave them to him. Never show him more.  
8 Never gave him the paper.

9 Q. All right. Let me clarify this then. So, you're  
10 saying that you ask him for a different attorney and he  
11 said you - And what was his response to that?

12 (WITNESS RESPONDS IN SPANISH.)

13 A. That he -- there -- he was told by his -- by Mr.  
14 Chiarenza that it was not necessary to request another  
15 lawyer cause the case was not a hard case for him.

16 A. Okay. The next question is, you said you ask for  
17 discovery. Did you ever receive discovery?

18 (WITNESS RESPONDS IN SPANISH.)

19 A. He is still waiting for it.

20 Q. Okay. Did you have a preliminary hearing where your  
21 attorney didn't show, failed to show?

22 (WITNESS RESPONDS IN SPANISH.)

23 A. Yes. He came to his first hearing and that he was  
24 right in here but the lawyer never showed up.

25 Q. Did you ever ask your attorney for a translator at

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1 your meetings with your attorney?

2 (INTERPRETER TRANSLATES IN SPANISH.)

3 (WITNESS RESPONDS IN SPANISH.)

4 A. The first time that he -- he was visited by the  
5 lawyer ---

6 (INTERPRETER TRANSLATES IN SPANISH.)

7 (WITNESS RESPONDS IN SPANISH.)

8 A. --- by the - by his lawyer --

9 (WITNESS RESPONDS IN SPANISH.)

10 A. They had troubles with the language.

11 (WITNESS RESPONDS IN SPANISH.)

12 A. So he ask for an interpreter.

13 (WITNESS RESPONDS IN SPANISH.)

14 A. And the lawyer told him that on the second time --  
15 the second time that he came to see him he will bring an  
16 interpreter with him.

17 Q. Did he ever bring an interpreter with him?

18 MADAM INTERPRETER: He never did.

19 BY MR. COOK:

20 Q. How much time did you spend in preparation for this  
21 murder trial with your attorney?

22 (INTERPRETER TRANSLATES IN SPANISH.)

23 (WITNESS RESPONDS IN SPANISH.)

24 A. The first time that he came to see him ---

25 (WITNESS RESPONDS IN SPANISH.)

1 A. --- he --- the lawyer talked to him for about ten  
2 minutes but he didn't understand all of it so that's when  
3 he requested an interpreter.

4 (WITNESS RESPONDS IN SPANISH.)

5 A. And he was told that -- And he was told by his lawyer  
6 that he was going to bring one.

7 (WITNESS RESPONDS IN SPANISH.)

8 A. And on the second time that he came to visit ---

9 (WITNESS RESPONDS IN SPANISH.)

10 A. --- that he didn't bring another - the interpreter  
11 and things stayed the same.

12 (WITNESS RESPONDS IN SPANISH.)

13 A. And the last time that the -- the last visit that's  
14 when they came to the -- to the jury. To the trial. Here  
15 to the jury trial -- trial.

16 Q. Okay. Last couple of questions. Did you want to  
17 testify at your trial?

18 (WITNESS RESPONDS IN SPANISH.)

19 A. Yeah. He wanted to testify because he concerns  
20 that everything that was being said it was lie -- they were  
21 lies.

22 Q. And what did your attorney say about your request to  
23 testify at trial?

24 (INTERPRETER TRANSLATES IN SPANISH.)

25 (WITNESS RESPONDS IN SPANISH.)

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1 A. He was told that if he testified in his defense ---

2 (WITNESS RESPONDS IN SPANISH.)

3 A. --- that he -- they were going to get him nervous ---

4 (WITNESS RESPONDS IN SPANISH.)

5 A. --- and he wasn't going to be able to answer the

6 questions.

7 (WITNESS RESPONDS IN SPANISH.)

8 A. And that he was told that if he didn't testify ---

9 (WITNESS RESPONDS IN SPANISH.)

10 A. --- he was - the lawyer was going to have the

11 opportunity to have the last talk ---

12 (WITNESS RESPONDS IN SPANISH.)

13 A. --- and convince the jury.

14 (WITNESS RESPONDS IN SPANISH.)

15 A. And he did not know any better ---

16 (WITNESS RESPONDS IN SPANISH.)

17 A. --- took the lawyer's advice.

18 (WITNESS RESPONDS IN SPANISH.)

19 A. Because of his ignorance not knowing exactly what was  
20 going on, you know, he paid attention and heed the lawyer's  
21 advice.

22 Q. Those are all the questions I have, Mr. Gutierrez.

23 Is there anything that you'd like to tell the court  
24 while you're on the stand about the ineffective assistance  
25 of your counsel provided.

1 (WITNESS RESPONDS IN SPANISH.)

2 A. What he wants to say is he was not represented as  
3 he should have been.

4 (WITNESS RESPONDS IN SPANISH.)

5 A. They took him to a jury trial - --

6 (WITNESS RESPONDS IN SPANISH.)

7 A. --- where he really was not aware of what was going  
8 on in his case.

9 (WITNESS RESPONDS IN SPANISH)

10 A. He didn't know even who ---

11 (WITNESS RESPONDS IN SPANISH.)

12 A. --- or what that there was going they had him --  
13 against him.

14 (WITNESS RESPONDS IN SPANISH.)

15 A. The --

16 MADAM INTERPRETER: I'm sorry.

17 A. Because he ask for a motion discovery to his lawyer,  
18 the discovery ---

19 (WITNESS RESPONDS IN SPANISH.)

20 A. --- to know about his case ---

21 (WITNESS RESPONDS IN SPANISH.)

22 A. --- but he never saw it.

23 (WITNESS RESPONDS IN SPANISH.)

24 A. And that's why -- and because of that motive ---

25 (WITNESS RESPONDS IN SPANISH.)

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1 A. --- of lack of communication with his lawyer ---

2 (WITNESS RESPONDS IN SPANISH.)

3 A. --- of not knowing about his case ---

4 (WITNESS RESPONDS IN SPANISH.)

5 A. --- and that's why ---

6 (WITNESS RESPONDS IN SPANISH.)

7 A. --- and that's why he lost the jury trial.

8 (WITNESS RESPONDS IN SPANISH.)

9 A. So he wants now ---

10 (WITNESS RESPONDS IN SPANISH.)

11 A. --- a new jury trial and show his innocence.

12 Q. Okay. One last question. Do you remember during the  
13 *Jackson v. Denno* hearing at the trial where they were  
14 talking about your confession?

15 MR. COOK: I'm gonna let you to translate that.

16 (INTERPRETER TRANSLATES IN SPANISH.)

17 THE COURT: I think he's understanding. He's  
18 answering your questions without her translating the  
19 question. So I'm not sure where you are at on this or we  
20 may be getting a little bit -- I don't know how much he  
21 understands but he's answered several of your questions in  
22 Spanish before you -- before she said one word, so I think  
23 he understands ---

24 MR. COOK: Yes, sir, your Honor.

25 THE COURT: --- a lot more than --

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1 (INTERPRETER TRANSLATES TO WITNESS IN SPANISH.)

2 THE COURT: I'm not saying he understands everything  
3 but he's certainly understanding your questions. So as to  
4 your questions he's been able to answer several of your  
5 questions without any equip from the translator at all so  
6 he's understanding quite a bit of English here. I don't  
7 know how much. I'm not saying he understands it all.

8 (WITNESS RESPONDS IN SPANISH.)

9 MR. COOK: Mr. Gutierrez, one moment please, sir.

10 Q. All right. I want to ask you a question.

11 During the trial you had the hearing to determine  
12 whether your confession was proper. There was talk at the  
13 -- during that time of the trial --

14 Its along about page 521 of the transcript. 520 and  
15 521 where there was an interpreter at your confess - where  
16 you gave a statement. It wasn't a confession. It's where  
17 you gave a statement.

18 And there was an interpreter present there.

19 (INTERPRETER TRANSLATES IN SPANISH.)

20 Q. And the interpreter admitted that he didn't translate  
21 everything properly.

22 (INTERPRETER TRANSLATES IN SPANISH.)

23 Q. He said that during your talk with him you mentioned  
24 that you got into an argument with the descendent.

25 (INTERPRETER TRANSLATES IN SPANISH.)

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1 Q. This interpreters name was Robert Guzman.

2 (INTERPRETER TRANSLATES IN SPANISH.)

3 Q. And you said to him that you had been in an argument  
4 with the descendent in the past but Mr. Guzman neglected to  
5 translate that portion.

6 All I'm asking you is do you remember what I'm talking  
7 about?

8 (WITNESS RESPONDS IN SPANISH.)

9 A. He remembers but he never ---

10 (WITNESS RESPONDS IN SPANISH.)

11 A. --- that he - He says they never had that conversation  
12 about that he had had an argument with that person the  
13 descendent.

14 (WITNESS RESPONDS IN SPANISH.)

15 A. Yeah. As a matter of fact Guzman said other things  
16 that he never said.

17 Q. Okay.

18 MR. COOK: Thank you very much. I've got no further  
19 questions. Please answer any questions that the Attorney  
20 General might have.

21 CROSS-EXAMINATION

22 ISAIAS GUTIERREZ BY MR. BRANT:

23 Q. Mr. Gutierrez, did you know what charges you were  
24 facing prior to the trial?

25 (INTERPRETER TRANSLATES IN SPANISH.)

1 (WITNESS RESPONDS IN SPANISH.)

2 A. Yeah, he did.

3 Q. And how did you know what the charges were?

4 (INTERPRETER TRANSLATES IN SPANISH.)

5 (WITNESS RESPONDS IN SPANISH.)

6 A. Because the lawyer told him.

7 Q. Did he go over -- In those conversations with your  
8 lawyer did you understand what each charge meant you were  
9 accused of doing?

10 (INTERPRETER TRANSLATES IN SPANISH.)

11 (WITNESS RESPONDS IN SPANISH.)

12 A. Yes he did, he understood the charges.

13 (WITNESS RESPONDS IN SPANISH.)

14 A. But he ask for an interpreter because ---

15 (WITNESS RESPONDS IN SPANISH.)

16 A. --- because he had problems in communicating with  
17 him.

18 Q. Was it problems communicating throughout the entire  
19 conversation or would you just not understand a word here  
20 and there?

21 (INTERPRETER TRANSLATES IN SPANISH.)

22 (WITNESS RESPONDS IN SPANISH.)

23 A. He understood little bit and that's why he wanted  
24 an interpreter to understand everything real good.

25 Q. Back to the plea offer. You said you were offered

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1 thirty, correct?

2 (INTERPRETER TRANSLATES IN SPANISH.)

3 BY THE WITNESS:

4 A. Uh-huh.

5 BY THE INTERPRETER:

6 A. Yes.

7 Q. But you said you wanted less than thirty?

8 (INTERPRETER TRANSLATES IN SPANISH.)

9 (WITNESS RESPONDS IN SPANISH.)

10 A. He's point is ---

11 (WITNESS RESPONDS IN SPANISH.)

12 A. --- that he was told ---

13 (WITNESS RESPONDS IN SPANISH.)

14 A. --- you will get thirty years ---

15 (WITNESS RESPONDS IN SPANISH.)

16 A. --- but I told him no. But he told them no.

17 (WITNESS RESPONDS IN SPANISH.)

18 A. Oh. He didn't say that. The lawyer said that he said

19 no. The lawyer. Yeah.

20 (INTERPRETER INTERPRETS IN SPANISH.)

21 (WITNESS RESPONDS IN SPANISH.)

22 A. Yeah. The lawyer said but no without consulting with  
23 him and the lawyer said yeah he --- without consulting with  
24 him the lawyer said yeah he takes 'em.

25 Q. Didn't you say earlier --

1 BY THE WITNESS:

2 A. No, no.

3 (WITNESS RESPONDS IN SPANISH.)

4 A. When he came to visit him - When the lawyer came to  
5 visit him ---

6 (WITNESS RESPONDS IN SPANISH.)

7 A. --- the lawyer told him you will get thirty years ---

8 (INTERPRETER TRANSLATES IN SPANISH.)

9 A. --- but -- but the lawyer say I already declined them.  
10 I told them already no.

11 (WITNESS RESPONDS IN SPANISH.)

12 A. But he didn't ask him if he was agreeing with it.

13 (WITNESS RESPONDS IN SPANISH.)

14 A. And he - The lawyer had negotiated those thirty years.

15 (WITNESS RESPONDS IN SPANISH.)

16 A. He maybe could have gotten a better offer.

17 Q. You wanted a better offer than thirty years.

18 (WITNESS RESPONDED IN SPANISH.)

19 A. Correct.

20 Q. So would you have taken the thirty years?

21 (WITNESS RESPONDS IN SPANISH.)

22 (INTERPRETER TRANSLATES IN SPANISH.)

23 (WITNESS RESPONDS IN SPANISH.)

24 A. He -- The lawyer told him he would - you are getting  
25 thirty years.

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1 (WITNESS RESPONDS IN SPANISH.)

2 A. But the lawyer told him he already declined it.

3 (WITNESS RESPONDS IN SPANISH.)

4 A. But he wanted that if the lawyer had negotiated a less  
5 than thirty years ---

6 (WITNESS RESPONDS IN SPANISH.)

7 A. --- maybe he would have taken it.

8 Q. So he had not declined, according to your testimony  
9 the thirty years without consulting you, you still wouldn't  
10 have taken the thirty years, you wanted a better deal?

11 BY THE WITNESS:

12 A. Yes.

13 THE COURT: See, he understands. That's what I'm  
14 saying. He answered yes. He understands quite a bit of  
15 English here and he has understood the questions ask by the  
16 Attorney General.

17 (WITNESS RESPONDS IN SPANISH.)

18 BY MADAM INTERPRETER

19 A. He says he understands English. Of course he's in  
20 the school. He has been in school.

21 (WITNESS RESPONDS IN SPANISH.)

22 A. But he understands a little bit. Not a lot.

23 Q. When you said that you told Mr. Chiarenza you wanted  
24 another attorney, were you intending to hire an attorney or  
25 were you wanting to get another appointed attorney?

1 (INTERPRETER TRANSLATES IN SPANISH.)

2 (WITNESS RESPONDS IN SPANISH.)

3 A. He wanted to get his own lawyer.

4 Q. With his own money?

5 (INTERPRETER TRANSLATES IN SPANISH.)

6 A. With his own money.

7 Q. Did you have money saved up for an attorney?

8 (INTERPRETER TRANSLATES IN SPANISH.)

9 (WITNESS RESPONDS IN SPANISH.)

10 A. Not really but his family would have found out a way  
11 to get the money.

12 Q. And did you ever tell Mr. Chiarenza he was fired?

13 (INTERPRETER TRANSLATES IN SPANISH.)

14 (WITNESS RESPONDS IN SPANISH.)

15 A. No.

16 Q. Did you ever ask the court for a new attorney?

17 (INTERPRETER TRANSLATES IN SPANISH.)

18 (WITNESS RESPONDS IN SPANISH.)

19 A. No.

20 Q. The statement from the *Jackson v. Denno* hearing you  
21 said your attorney did not -- I'm trying to think of a  
22 simply way to say this -- did not adequately object to the  
23 statement coming in; is that correct?

24 (INTERPRETER TRANSLATES IN SPANISH.)

25 (WITNESS RESPONDS IN SPANISH.)

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1 A. Correct.

2 Q. What in that statement hurt your defense?

3 (INTERPRETER TRANSLATES IN SPANISH.)

4 (WITNESS RESPONDS IN SPANISH.)

5 (INTERPRETER TRANSLATES IN SPANISH.)

6 (WITNESS RESPONDS IN SPANISH.)

7 A. First, ---

8 (WITNESS RESPONDS IN SPANISH.)

9 A. --- when he ask for the interpreter he never got  
10 him.

11 (WITNESS RESPONDS IN SPANISH.)

12 A. Second, ---

13 (WITNESS RESPONDS IN SPANISH.)

14 A. --- when he ask his discovery ---

15 (WITNESS RESPONDS IN SPANISH.)

16 A. --- to know about his case ---

17 (WITNESS RESPONDS IN SPANISH.)

18 A. --- he never got it.

19 THE COURT: That's not the question he ask.

20 Ask him to answer the questions that counsel ask him  
21 which was how he was prejudiced in the statement itself;  
22 the questions he didn't ask in the *Jackson v. Denno*  
23 hearing.

24 Isn't that what you ask him?

25 MR. BRANT: I ask him --

1 THE COURT: How he was prejudiced by the statement coming  
2 in I guess. Isn't that what you ask him?

3 BY MR. BRANT:

4 Q. Do you understand the statement we're talking about?  
5 Your attorney was asking you about it earlier.

6 (INTERPRETER TRANSLATES IN SPANISH.)

7 Q. When Officer Guzman testified about what he - what  
8 he translated which became your statement later.

9 MADAM INTERPRETER: I'm sorry, say it again. I messed  
10 up about the statement that the lawyer was talking about.

11 BY MR. BRANT:

12 Q. There was a hearing to determine whether the statement  
13 would be admissible at trial. Do you recall that?

14 (INTERPRETER TRANSLATES IN SPANISH.)

15 (WITNESS RESPONDS IN SPANISH.)

16 BY MADAM INTERPRETER:

17 Q. Do you remember that?

18 (WITNESS RESPONDS IN SPANISH.)

19 A. Yes.

20 BY MR. BRANT:

21 Q. And you are alleging that your attorney failed to do  
22 something with regards to that statement at trial?

23 (INTERPRETER TRANSLATES IN SPANISH.)

24 (WITNESS RESPONDS IN SPANISH.)

25 A. He says he didn't know about the statement. He

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1 doesn't remember the statement that the lawyer was  
2 telling him about.

3 Q. You don't remember getting it or you don't remember  
4 it coming out at trial?

5 (INTERPRETER TRANSLATES IN SPANISH.)

6 (WITNESS RESPONDS IN SPANISH.)

7 A. He didn't gave that direction to Guzman when he was  
8 interpreting.

9 (WITNESS RESPONDS IN SPANISH.)

10 A. That's why he - He says he didn't give that statement.

11 Q. He never made the statement?

12 A. He never made that statement.

13 (WITNESS RESPONDS IN SPANISH.)

14 A. He did that statement to the investigators.

15 (WITNESS RESPONDS IN SPANISH.)

16 A. And he had problems with them too in - with the  
17 language.

18 (WITNESS RESPONDS IN SPANISH.)

19 A. So they brought him Guzman.

20 (WITNESS RESPONDS IN SPANISH.)

21 A. But he never gave that statement.

22 MR. BRANT: I beg the Court's indulgence.

23 Nothing further, your Honor.

24 MR. COOK: No further questions, your Honor.

25 At this time, your Honor, I would rest with the



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1 trouble expressing himself but if he needs it translated  
2 then she should be translating. If there's something he  
3 doesn't understand he can request her to explain it. We'll  
4 take time to do that.

5 MR. BRANT: If someone will just let me know and slow  
6 down.

7 Q. Do you recall meeting with Mr. Gutierrez?

8 A. Yes.

9 Q. Do you recall how many times you met with him?

10 A. A couple of times in the Detention Center and I  
11 believe my investigator met with him on several occasions  
12 as well.

13 Q. Did you ever have a translator present for any  
14 meetings?

15 A. Not down in the Detention Center but it really wasn't  
16 an issue.

17 Q. Can you elaborate on that?

18 A. I didn't seem to have a lot of trouble communicating  
19 with him. My recollection is when we went over the file we  
20 discussed things. I speak a little bit of Spanish. My  
21 investigator is -- speaks a little bit of Spanish, and  
22 again, the information I had when I first got the case is  
23 that he was speaking fairly fluently in English with the  
24 employees down in the Detention Center. And his original  
25 statement was done in English and then they fine tune some

1 of it with the assistance of Officer Guzman. I mean there  
2 just didn't seem to be a real problem communicating.

3 Q. Based on your observations was there any important  
4 matter in your discussions with him that he did not  
5 understand?

6 A. I -- No. I mean I don't recall him -- there being a  
7 situation where I felt like we weren't getting through to  
8 him or he wasn't aware about what was going on, or, you  
9 know in fact through working with my investigator he tried  
10 to develop some potential alibi witnesses. Those never  
11 panned out and we couldn't ever find these people.

12 We did discuss general concepts of his right to put on  
13 a defense, the pros and cons would be there, and what the  
14 State's evidence would be, and we had some lengthy  
15 discussions about the fact that the State had a cooperating  
16 co-defendant who was actually the mother of his child who  
17 was going to be testifying against him.

18 Q. You said he presented you with names of possible  
19 witnesses?

20 A. That is correct.

21 Q. Did he present you -- Did he give you his side of what  
22 happened; his version of the facts?

23 A. Just that he admitted about the checks, you know,  
24 that Dana, his girlfriend, for lack of a better word I  
25 guess, had given him some checks to cash and that he did

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1 indeed cash those checks. He denied having any involvement  
2 with robbing the victim in this case or assaulting the  
3 victim in this case. Claimed to have been working on that  
4 day. We could never corroborate that with anybody, so he,  
5 you know, the things that were -- that there was actual  
6 slam dunk evidence there was a video tape of him at the  
7 banks, so obviously he did admit to cashing the checks but  
8 explained that he had gotten them from her; denied having  
9 gone into the trailer where the assault took place.

10 Q. And did he -- During your discussions did he ask you  
11 questions about the case?

12 A. Yeah, I'm sure we went back and forth, you know, the  
13 way you would prepare for any case.

14 Q. No, I'm -- And at no time did you get the  
15 impression that he didn't understand the nature of the  
16 charges ---

17 A. No.

18 Q. --- and the penalties?

19 A. I felt like he and I communicated fairly well and I  
20 know that we had a long conversation prior to trial with  
21 the interpreter just to go over everything. I think the  
22 plea offer if I recall correctly was pretty much good all  
23 through the trial, you know, even while we were waiting for  
24 the jury to come back.

25 Q. What was the plea offer?

1 A. Thirty years in which categorically turned down. So  
2 the conversation we had when I told him I had turned down  
3 the thirty year offer he wasn't gonna take thirty years.  
4 It was thirty years no parole. He understood that. He was  
5 denying any involvement. I mean, so I think its just  
6 ingenious for him to say that he would have taken -- Well I  
7 don't think he said he'd take thirty years but he -- he had  
8 no intention of pleading to thirty years.

9 Q. And he told you that? Clearly stated that he did not  
10 want --

11 A. If he wanted it we'd a done it. You know I would much  
12 rather plead this case out than gone to trial for three or  
13 four days with --

14 Q. Did you ever tell him to go to trial because you've  
15 won part of your cases?

16 A. No.

17 (PAUSE/INTERPRETER INTERPRETING IN SPANISH.)

18 Q. Did he ever express interest in getting a different  
19 attorney?

20 A. I have no recollection of any conversations about him  
21 asking for another lawyer. Again, that's -- I wouldn't  
22 have stood in his way if he wanted to get another attorney.  
23 This was, you know, gonna be a time consuming case. There  
24 was a lot on the line. I would have gladly stepped aside  
25 had he had any desire or the means or indicated to me that

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1 he was looking to hire another lawyer.

2 Q. So he --

3 MR. BRANT: Beg the Court's indulgence.

4 Q. You never told him as you said that he shouldn't take  
5 the plea because you've won part of your cases and you also  
6 never told him what he stated that he didn't need another  
7 attorney because it was simple enough for you to handle?

8 A. No, I certainly did not tell him those two things the  
9 way that's been represented to the Court. Now, in all  
10 fairness, you know, if I in retrospect had given him the  
11 benefit of the doubt could we have had conversations about  
12 my belief or the relative ease or difficulty of a  
13 particular case or what my experience had been in trying  
14 cases, I mean, its entirely possible we could have had  
15 conversations along those lines.

16 But did I ever tell him, no, you don't need another  
17 lawyer because I've tried tougher cases than this?  
18 Absolutely not. And did I ever tell him don't take the  
19 thirty years because this will be an easy case or we'll win  
20 it or something like that? Absolutely not. Would have  
21 never said anything along those lines either.

22 Now, in an effort to tell -- to, you know, instill him  
23 with some idea of what my experience is, yeah, I would have  
24 told him what my experience was. But I would have never  
25 done that with the intention of encouraging him to go to

1 trial or not hire another lawyer.

2 Q. Did he ever -- Did Mr. Gutierrez ever tell you he  
3 wanted to testify?

4 A. I think that -- I read the transcript from the last  
5 time the case was continued and I think the record is  
6 pretty clear on, you know, his being advised of his right  
7 to testify and, sure, we had that conversation. And  
8 typically what I'll tell any defendant in that, you know  
9 when we're having that conversation, is I go over the  
10 pluses and minuses of that. I think in this case, you  
11 know, just having reviewed the file and the transcript  
12 probably what I would have told him in this case is, you  
13 know, I would have summarized what the State had presented;  
14 would have told him it's really come down to the  
15 credibility of Ms. Blackman as far as the murder case is  
16 concerned because there was no -- there really was no  
17 forensic evidence directly linking him to the crime to the  
18 exclusion of other individuals.

19 You know, no fingerprints or DNA or things of that  
20 nature, so, I would have discussed that with him. I would  
21 have told him that, you know, if he gets up there and  
22 denies things that the jury knows obviously are true; for  
23 instance, the bank, the situation with the forged checks.  
24 If he gotten into a position where they felt he was not  
25 being truthful about that then that could possibly hurt his

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1 case; that he would be going up against very skilled  
2 prosecutors whose job would be to try and box him into a  
3 corner or make it look like he was lying or trip him up or  
4 make him seem nervous and those are things he would have to  
5 be concerned about.

6 Certain like I do with all clients is I told him its  
7 his decision. You know I can only give him my opinion one  
8 way or the other. I would have advised him that we would  
9 be entitled to final argument and that there's, you know,  
10 some potentially perceived advantage in that because we get  
11 to hear the way the State sums things up and then we can  
12 address all those things without the State having the  
13 benefit to come back so. I expect he would have been armed  
14 with all of that knowledge when he had the opportunity to  
15 make his decision as to whether or not he wanted to testify  
16 or not.

17 Q. You never told him he couldn't testify?

18 A. No, certainly not. Now I don't recall but I may very  
19 well have advised him that in my opinion I thought it would  
20 be best for him not to, but again, that's always, you know  
21 a lawyer's job is to render an opinion and to give some  
22 advice but at the same time I don't do that to the  
23 exclusion of allowing my client to ultimately make the  
24 decision on their own.

25 Q. In this case under these circumstances were there any

1 specific -- anything specific to Mr. Gutierrez that you  
2 didn't want to come out if he testified or any other  
3 specific reasons for not --

4 A. Well, he -- he left the jurisdiction the day after the  
5 assault occurred, or maybe a day or two. Shortly  
6 thereafter he disappeared never to be heard from again in  
7 York County - with a child. Either his girlfriend was  
8 either pregnant or had just given birth to their child and  
9 I know that Ms. Collins was gonna question him about that.  
10 That's a discussion that we had prior to trial. And, so I  
11 think he'd had a hard time answering those questions.

12 I think that that would have not been of any benefit  
13 to him to get up on the witness stand and try and explain  
14 why mere days after the assault occurred that he left his  
15 girlfriend and his child and his home and no one heard from  
16 him again for seven, eight years; however long it was until  
17 he was apprehended in another state. So I don't know that  
18 he would have really been in a position to help himself had  
19 he took the stand.

20 Q. And you - I'm still a little fuzzy on the issue in  
21 the *Jackson v. Denno* hearing, but do you recall the *Jackson*  
22 *v. Denno* hearing in regards to his statement?

23 A. If -- My understanding in where I would -- I don't  
24 know that he has an issue there is that originally he was  
25 interviewed by two officers down at the Detention Center

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1 that resulted in a statement that maybe potentially he had  
2 some issues he wanted to clarify. They got Officer Guzman  
3 in who is also a deputy or he works -- He's a detention  
4 officer. Officer Guzman then I think really just sort of  
5 went over what the other officers had already gleaned from  
6 him. Maybe they made some minor corrections. There was a  
7 question about, you know, did he or did he not have an  
8 argument with the victim but unless I'm mistaken I think  
9 that we got that excluded. I don't think that there was  
10 ever any testimony before the jury about that.

11 Q. My next question is gonna be, the statement that they  
12 entered into - at trial that they entered into evidence,  
13 how prejudicial was it to him?

14 A. Other than the fact that he admits the forgeries, I  
15 don't see that there's any -- I mean I tried keeping it out  
16 but you know when all is said and done the most prejudicial  
17 thing didn't get in there. The jury never heard this did  
18 he have -- you know was there some argument that he had  
19 with -- and with the victim in this case.

20 Q. And in regard to the forgeries, without that statement  
21 what was the evidence like?

22 A. Well there's a video tape of him in the bank  
23 presenting the forged checks with also a fake ID. And I  
24 think ultimately on one of the checks he left the bank  
25 before he got the money. So, you know, I think that there

1 was certainly -- And I won't speak to the weight of that  
2 evidence but there was certainly some evidence a case could  
3 be made that he was involved in passing forged checks.

4 Q. Did Mr. Gutierrez ever tell you that his statement  
5 that was entered was a result of the -- a *Jackson v. Denno*  
6 hearing that he never made that statement?

7 A. No, not to my recollection.

8 Q. In fact there were a couple of things, the discovery,  
9 did you go over the discovery with him?

10 A. Yeah, we'd had to gone through everything in the file  
11 and with a large concentration on Ms. Blackman's statements  
12 because she gave a number of them. And a big part of our  
13 case were just inconsistencies in her statements. They  
14 seemed to get more and more focused on his liability or his  
15 involvement in the case as the statements went on so we  
16 spent a lot of time with those.

17 Q. As a result of your discussions regarding the  
18 discovery he was able to give you input and help with in  
19 building his defense?

20 A. Again, yes. And this really came down to as many  
21 cases do, what the State can or cannot prove; not so much  
22 what we were in a position to disprove because there was a  
23 lot of circumstantial evidence, you know, tools that were  
24 alleged to have been used in the break in and the safe was  
25 recovered. Things of that nature, you know, that all

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1 touched him in one way or another or certainly touched Ms.  
2 Blackman who he had an involvement in with. So this case  
3 became about poking holes in the State's witnesses  
4 particularly Ms. Blackman; pointing out the lack of any  
5 direct forensic evidence again pointing to him. From the  
6 standpoint of, you know, we were never able to put together  
7 an alibi or to show, you know, to come up with any  
8 affirmative defenses for him.

9 Q. So the lack of forensic evidence and attacking his  
10 girlfriend's credibility that was -- you're saying those  
11 were your two main strategies?

12 A. Pretty much, yeah.

13 Q. And you discussed that with him?

14 A. Yes, absolutely. I mean that's what -- That would  
15 have been -- Those would have been the main things to  
16 discuss when we're going to trial on a murder case and  
17 trying to break it down with him as to what our theory is  
18 and what, you know, how we're gonna go about attacking this  
19 thing.

20 Q. Did he concur with the decision to go with that  
21 defense?

22 A. He -- Yeah. Well he didn't have a whole of choice.  
23 You know that's really the only case that I saw we were  
24 able to make from a defense standpoint. And, you know,  
25 again, all through the process I felt like he understood

1 what our position was gonna be here. And certainly, you  
2 know, he did have a lot of explanations as to what went on  
3 with those checks. I think that at some point they even  
4 went and used some of the money to go buy or attempt to buy  
5 a used car. And he explained to me that that was, you know  
6 -- His position was Ms. Blackman was really kind of the  
7 ring leader. She was the one calling the shots and I think  
8 we tried to develop that at trial as well, so, that was  
9 information I got from him. That wasn't' -- I just didn't  
10 create that. You know he told me that she was telling him  
11 what to do and where to go and she's the one who sent him  
12 to the bank and things of that nature.

13 Q. And he told you she was the ring leader in regards to  
14 what exactly?

15 A. Well just that she - She was directing his movements  
16 in taking the checks to the bank. And then I think for  
17 some reason the transaction, the deal with the used car,  
18 becomes somewhat relevant at some point during the course  
19 of the trial and he indicated that, again, this was  
20 something that she was the moving force behind; the  
21 negotiating the car deal and whatever was, you know  
22 whatever occurred there.

23 Q. So he didn't say that she was the ring leader with  
24 regards to the actual assault?

25 A. No, no, he never said she made me do that or she put

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1 me up to that. A ring leader - I probably misspoke. But  
2 he indicated that more or less she was, you know a lot of  
3 times she would tell him go do this, go do that, you know.  
4 And so that was what his position was certainly on the  
5 checks and with regard to purchasing the used vehicle.

6 Q. Did he ever mention to you that he did take part in  
7 the assault on the victim or was there when it happened?

8 A. No. He never, never did.

9 MR. BRANT: Beg the Court's indulgence.

10 (PAUSE.)

11 Q. Did you hear the testimony earlier about your failure  
12 to appear at a preliminary hearing?

13 A. Yes, and I don't have any recollection of that. That  
14 may have been prior to my being appointed to the case or  
15 they may have gone ahead and just indicted the charges  
16 before we had a chance either to ask again for another  
17 prelim. Just speaking in general terms I think that's  
18 probably a moot point. One, I would -- It would go contrary  
19 to my previous experiences in this court to believe that  
20 that case -- that probably cause would not have been found.  
21 But had some magistrate decided that there was no probable  
22 case for any of these charges I think we could have fully  
23 expected these cases to be directly presented to a Grand  
24 Jury.

25 And again, just basing on prior history I think the

1       likelihood would have been good that these charges would  
2       have been True Billed nonetheless. So, without knowing  
3       exactly what the situation was with the prelim I don't  
4       think he was prejudiced in any way there.

5       Q.    I'm just -- the last question. Back to the  
6       negotiations, did you try for a better deal?

7       A.    Thirty would have been the minimum that they could  
8       have offered on a murder. They -- I worked in this office  
9       and I've worked against this office for over ten years,  
10      fourteen now I think, and given their case the nature of  
11      the victim and what happened to the victim in this case and  
12      the fact that they had a cooperating, testifying co-  
13      defendant, there's -- this offer was never gonna get any  
14      better than thirty years. So, that just wasn't gonna  
15      happen. We can all hope and wish for something better but  
16      that, you know, that's why this case went to trial because  
17      there was just never gonna be anything better on the table  
18      than thirty years.

19      Q.    And -- Didn't make this the last question. You were  
20      talking about your experience with this office. How long  
21      have you been practicing law?

22      A.    I passed the bar in '92 and that's when I started in  
23      the York County Solicitor's Office and worked there for, I  
24      think, just under five years.

25      Q.    So how much of your practice --

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1 A. And I've been in private practice since 1997 and  
2 that's been probably eighty percent criminal.

3 MR. BRANT: Nothing further, your Honor.

4 CROSS-EXAMINATION

5 DEREK CHIARENZA BY MR. COOK:

6 Q. Mr. Chiarenza, how are you, sir?

7 A. Okay.

8 Q. Now, I'm sure you have opinions on what this  
9 solicitor's office would have -- do as far as negotiate it,  
10 but did you actually ever make an effort to try to  
11 negotiate the thirty-year number down? Did you have any  
12 conversations with Mr. Thompson or --

13 A. I'm sure I did now, and I'm sure that they were  
14 pretty short conversations.

15 Q. Now, you say that you definitely extended the thirty-  
16 year offer. It's your position that you extended the  
17 thirty- year offer to your client? You're not stating that  
18 you said to him your offer was thirty years but I turned it  
19 down already; is that correct?

20 A. That's correct, I didn't.

21 Q. And you're saying to him, if I'm not correct, is it  
22 your position today that you never discouraged him from  
23 retaining new counsel?

24 A. That's correct.

25 Q. Okay.

1 A. I can't imagine why I would ever do that.

2 Q. Do you have a recollection maybe as far as your  
3 memory saying to him a sentence somewhere along the lines  
4 of save your money and you can spend that in Mexico once I  
5 win your trial?

6 A. No, I don't have any recollection of every saying that  
7 to him.

8 Q. Regarding the *Jackson v. Denno*, it's my client's  
9 position -- and I just want to ask your comments on this --  
10 its my client's position that during the hearing to  
11 suppress his statement, and this is along about page 497 of  
12 the transcript, there -- But I'll summarize it. It runs  
13 through about five or ten pages of the transcript.

14 Essentially Mr. Guzman says to everyone at the hearing  
15 that my client at one point says to Mr. Guzman that he got  
16 in an argument -- this is actually on page 493 at line four  
17 and carries on through several pages -- You got in an  
18 argument with Mr. Cudley and left and got in a taxi. This  
19 was years before when he was renting a trailer from Mr.  
20 Cudley, not at that - around the time of the assault.

21 And the important thing is that Mr. Guzman failed to  
22 translate that to the detectives, Strait and Yeager, okay.  
23 And my client's point is that he feels that you should have  
24 made objections at the *Jackson v. Denno* hearing to the  
25 admission of any of the evidence because it was all tainted

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1 because Mr. Guzman admitted it on the record that he didn't  
2 translate properly; that he -- that he omitted certain  
3 things. My client testified today that Mr. Guzman omitted  
4 a lot of things that he said to Mr. Guzman during that  
5 time.

6 Now to clarify further, you did object at the *Jackson*  
7 *v. Denno* hearing but your objection was based on the fact  
8 that the Mexican consultant -- it was an entirely different  
9 issue -- your objection was hinged on the fact that the  
10 Mexican consultant faxed a letter saying that they didn't  
11 want their client -- they were acting like they were  
12 representing Mr. Gutierrez -- to make any statements and  
13 that under the Sixth Amendment nobody should approach him  
14 after that and that after receiving that fax they still  
15 continued on with their interrogation. And so you objected  
16 at the *Jackson v. Denno* hearing on those grounds.

17 But my client is stating that you should have objected  
18 on the grounds of the fact that Mr. Guzman the translator  
19 said on the record that I omitted certain statements that  
20 Mr. Gutierrez made to me during -- while in the course of  
21 making the statement. Do you have any recollection of what  
22 I'm talking about first of all?

23 A. Yes.

24 Q. Okay. Why did you not object at the *Jackson v. Denno*  
25 hearing to the fact that Mr. Guzman admitted to omitting

1 statements?

2 A. Well I think my larger focus was on keeping out that  
3 one statement that he never translated because that was the  
4 only thing that could have hurt him. I mean I certainly  
5 didn't want the jury hearing that he had had an argument  
6 with the victim. So -- And we won that, the jury never  
7 heard that. Now, I guess, you know, you can second guess  
8 whether or not I should have made an objection to the  
9 entire thing possibly, you know, that's -- that really  
10 wasn't where my focus was. I was much more concerned in  
11 keeping out the statement about the argument that he  
12 potentially had.

13 Also, probably just knowing which way the wind was  
14 blowing seemed to me that statement was coming in because  
15 he was read -- you know it does have the rights colloquy in  
16 the statement. He was interviewed by two officers and then  
17 there was some fine tuning. I don't think the statement  
18 changed a whole lot. So, yeah, even if you look at -- what  
19 Guzman did as potentially tainting something he didn't -- I  
20 don't think -- I don't think the final product changes a  
21 whole lot from the time it was given to Detective Strait  
22 and Yeager to the time Guzman went over it and didn't have  
23 the opportunity to add this other thing that he supposedly  
24 heard.

25 Q. Well I guess my last question would be had you

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BY THE COURT

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1 attacked at the Jackson V. Denno hearing this statement  
2 it's entirety based on the fact that the translator's  
3 admitted that he omitted things and that that in essence  
4 tainted the entire statement, would -- would his chances at  
5 the trial have been much greater had his entire -- had you  
6 won the Jackson v. Denno hearing and his statement not  
7 entered the record at all?

8 A. If you're asking my opinion I would say it wouldn't  
9 have made a whole lot of difference. .

10 Q. Thank you.

11 MR. COOK: No further questions.

12 MR. BRANT: Nothing further, your Honor.

13 THE COURT: Let me ask you this, Counsel.

14 If -- And I noticed and I've observed for the record,  
15 the Court will note for the record, that Mr. Gutierrez he's  
16 been able to follow what's going on. He knows what's going  
17 on. He follows your question; he follows his answers; the  
18 translator in the case is saying something you see over  
19 there; but for the most part he's sitting there in tune and  
20 intent on what's being said. He understands it. And so I  
21 have no way of knowing how much he understands but I think  
22 he understands most of what's being said here in court  
23 today.

24 Now not to say that there aren't some things that he  
25 wouldn't understand that needs to be translated for him but

1 for the most part he understands and the Court makes that  
2 observation. He's listened intently - intently and he  
3 didn't need any translation from the questions his counsel  
4 has ask him nor for the most part on the answers. I just  
5 want to make that observation for the record.

6 I want to ask you, Mr. Chiarenza, if you had -- For  
7 the most part were you able to communicate with him in  
8 discussing the case?

9 MR. CHIARENZA: Yes, your Honor.

10 THE COURT: All right. And did he request a  
11 translator at some point?

12 MR. CHIARENZA: Its not my recollection that while  
13 we were prepping for trial that he requested a translator.

14 THE COURT: But you testified that prior to the trial  
15 in getting ready for the trial you did have a translator  
16 available and that you went over everything. Do you  
17 believe he understood everything about his case or not?

18 MR. CHIARENZA: Before we picked the jury I absolutely  
19 believe he understood what the charges he were facing; what  
20 the plea offer was, and what we were getting ready to  
21 embark upon with the jury trial.

22 THE COURT: And did you turn down the plea offer or  
23 did he turn down the plea offer?

24 MR. CHIARENZA: I turned it down after he told me he  
25 did not want it, so I communicated that he would not be

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1 taking a thirty-year plea deal. But I did not just do that  
2 on my own.

3 THE COURT: And it's your testimony you think that the  
4 offer stood even after the jury was drawn and then took the  
5 trial they would still let him plead guilty for the thirty  
6 years?

7 MR. CHIARENZA: I believe that's the case. Again, I'm  
8 just going off my recollection there because I think -- The  
9 case lasted a long time and again it wasn't an absolute  
10 slam dunk for the State that, again, there was no forensic  
11 evidence but, you know, and that's a bird in the hand thing  
12 for the State so I think that before the jury came back I'm  
13 pretty sure thirty was still out there.

14 THE COURT: All right. With regard to the statement,  
15 the *Jackson v. Denno* hearing, as I understand your  
16 testimony you believe the statement was coming in because  
17 he was properly advised of his rights, and the information  
18 was given, and even though there were some question about  
19 some of it with the interpreter that was called in to  
20 clarify, and even though some of it was left out, that  
21 Officer Guzman who testified, said that he left some of it  
22 out, that you kept out the most important part, but you  
23 feel if you had made an objection the whole statement would  
24 come in, the Court would have allowed it in or not?

25 MR. CHIARENZA: I believe my objection would have been

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1 over ruled. I believe the statement would have come in,  
2 your Honor.

3 THE COURT: But you managed to keep out the most  
4 damaging part of his statement?

5 MR. CHIARENZA: Yeah. And in fact I think that  
6 occurred -- For anyone who's looking at the transcript I  
7 think that occurred in chambers. I believe Ms. Collins  
8 stipulated that she didn't think it would be proper for  
9 that to come in given the fact that Officer Guzman never  
10 did communicate that to the other detectives in the case.

11 THE COURT: That's all the questions I have.

12 Any follow up questions to the ones I ask?

13 MR. COOK: Yes, sir, your Honor.

14 THE COURT: I'm sorry.

15 MR. COOK: Oh, I was just gonna say a brief closing.

16 THE COURT: Well I want to hear -- Any followup  
17 questions to the questions I ask of the witness?

18 MR. BRANT: No, your Honor.

19 THE COURT: Thank you, sir.

20 MR. CHIARENZA: Thank you, your Honor.

21 (WITNESS LEAVES WITNESS STAND.)

22 THE COURT: Yes, sir.

23 MR. COOK: May it please the Court, your Honor.

24 I'm retained in this case and I realize that your  
25 Honor pretty much could make my closing argument better

1 than I could but for the record I'd like to make it.

2 THE COURT: All right.

3 MR. COOK: Your Honor, I realize that today my  
4 client's exhibiting perhaps a level of proficiency in  
5 English that he maybe didn't have in 2006 when this trial  
6 occurred. It's been four years, four or five years since  
7 then.

8 I'm not sure but perhaps he's learned some more  
9 English since then. He's alleging for the record today  
10 that he didn't understand the proceedings at that time.

11 I've whittled it down in my petition, your Honor, to  
12 what I thought we had our best chance at. And I realize  
13 that there's conflicting testimony and that Mr. Chiarenza  
14 has testified completely contrary to what my client has  
15 said in regards to the offer.

16 I would just, for the record, cite the *Davies* case  
17 which your Honor's probably aware of and I've given to  
18 counsel. And it's S.C. -- It's at 381 S.C. 601. Basically  
19 it's just case law that says if the offer was not extended,  
20 if your Honor happens to give more weight to my client's  
21 testimony than the attorneys then this case law would say  
22 that that is in fact ineffective assistance of counsel and  
23 we would ask for a proper remedy at that time.

24 On the *Jackson v. Denno* hearing, your Honor, I do  
25 believe that there is some merit here in the sense that the

1 translator, Mr. Guzman, admitted on the record that he  
2 omitted some things. The materiality of what he omitted I  
3 think is irrelevant because we don't know what else he  
4 omitted. He could have omitted some very -- a statement  
5 that would have buttressed my clients case. Who knows?

6 My point is that Mr. Chiarenza had the opportunity at  
7 his objection portion of the trial during the *Jackson v.*  
8 *Denno* hearing to bring this into light and that perhaps the  
9 judge would have had a different consideration had he  
10 stressed this point that the translator tainted the entire  
11 proceeding and that I don't think that any of that  
12 statement should be omitted.

13 Instead he focused on the Mexican consultant issue  
14 that the Mexican consultant faxed a letter. It's not a  
15 very strong issue because they never even sent in a letter  
16 of representation from my client so they weren't  
17 representing my client and that was disposed of rather  
18 quickly by Judge Cole.

19 THE COURT: The argument has to be made though ---

20 MR. COOK: Yes, sir.

21 THE COURT: --- because if they get involved in it  
22 then they're entitled to provide him with a defense and so  
23 that's an issue that needs to be addressed. And I'm sure  
24 or certain that he should raise with regard to his rights  
25 if he was not a US citizen which in fact a citizen of

1 Mexico that they got involved in it. That has to be  
2 addressed. But whether --

3 MR. COOK: Yes, sir.

4 THE COURT: I don't think it was irrelevant.

5 MR. COOK: Perhaps I misspoke. Its not irrelevant.  
6 We're maintaining that the tape issue is far more relevant  
7 and should have been pressed at the *Jackson v. Denno*  
8 hearing. And that also results --

9 THE COURT: How was he prejudiced by that?

10 MR. COOK: Well, your Honor, the statement that he  
11 gave had some irregularities in it which I think caused the  
12 jury to doubt the -- I'm not gonna say the veracity of my  
13 client's position because he didn't testify but perhaps  
14 lend credibility to the testimony of the co-defendant that  
15 testified against him.

16 And if that statement would have been completely left  
17 out of the record and the jury didn't hear his statement,  
18 we posit that they would have been more likely to have  
19 disbelieved Dana Blackman as co-defendant because there are  
20 a lot of holes in her story as well.

21 But the fact that it got in there's some -- there's a  
22 few things in his statement that didn't quite add up which  
23 I can imagine caused a great deal of suspicion by the jury  
24 in this case and so we're alleging that his case was  
25 prejudiced in those regards by the statement getting in.

1 THE COURT: Well that's pretty vague what you're  
2 saying to the Court. He hasn't established any prejudice.  
3 I don't see any prejudice. They kept out the most  
4 prejudicial part which says he got in an argument with the  
5 guy which should indicate the violence as a result of that  
6 and his focus was on keeping that out and he managed to  
7 keep that out. What you're saying what's prejudicial, I  
8 don't see what you're talking about.

9 What they had was this witness that's gonna come in  
10 and testify against him. They had that and they had bank  
11 videos of him being in the bank trying to cash the check  
12 and saw him leaving and so. They had that already and I  
13 don't think he said anymore in that statement.

14 But anyway you got to show prejudice from the  
15 statement if in fact it shouldn't a come in. You got to  
16 show how it -- the fact that he made the argument he didn't  
17 object to the whole statement coming in but he certainly  
18 made it known he objected to certain portions of it; that  
19 Guzman testified he left out, or that in any event that  
20 there was a question about the most damaging part that they  
21 keep it out, the most prejudicial part of it. So anyway.  
22 Okay.

23 MR. COOK: Thank you, your Honor.

24 THE COURT: Yes, sir.

25 MR. BRANT: Your Honor, I would just briefly state, my

1 regards to the alleged rejection of the plea offer and the  
2 failure to communicate it, you know Mr. Chiarenza testified  
3 that he did not reject it and didn't notify him that it was  
4 rejected and it was actually open. Even if it happens the  
5 way the Applicant says it did which I don't think it was  
6 credible on this issue that he admitted he wouldn't a taken  
7 the offer anyway, so. I don't know where the prejudice  
8 would come there either and I'll just leave it at that.

9 Thank you, your Honor.

10 THE COURT: All right. Thank you. I'll take the  
11 matter under advisement.

12 MR. BRANT: Thank you, your Honor.

13 (APPLICANT EXITS COURTROOM.)

14 (END OF TRANSCRIPT OF RECORD.)  
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16  
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CERTIFICATE OF REPORTER

State of South Carolina )  
 )  
 County of York )

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for 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 for York County, South Carolina, on the 1st day of June, 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda S. Nelson

Wanda Nelson, CVR-M  
 Certified Verbatim Reporter,  
 Official Court Reporter,  
 Notary Public, in and for  
 The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: May 22 / 2017

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

FILED-RECEIVED  
2011 SEP 15 AM 10:27  
IN THE COURT OF COMMON PLEAS  
SEVENTEENTH JUDICIAL CIRCUIT

DAVID HAMILTON  
C.O.C.P. & J.S.  
YORK COUNTY, SC 2010-CP-46-2611

Isaias D. Gutierrez, #325762,

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL**

This matter comes before the Court by way of Application for Post-Conviction Relief filed June 23, 2010. The Respondent filed its Return on December 27, 2010. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on June 1, 2011. The Applicant was present at the hearing and was represented by David C. Cook, Esquire. The Respondent was represented by Harrison D. Brant, Esquire, of the South Carolina Attorney General's Office.

The Applicant testified on his own behalf at the hearing.<sup>1</sup> The Applicant's trial counsel, Derek S. Chiarenza, Esquire, also testified at the hearing. This Court had before it the records of the York County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the Applicant's appellate records including the trial transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was

<sup>1</sup> The Applicant answered questions and testified through the use of a Spanish interpreter, Idolinda Mummert.

indicted at the April 2007 term of the Court of General Sessions for York County for three counts of Forgery (2007-GS-46-1261, -1264, -1265), Armed Robbery (2007-GS-46-1262), Murder (2007-GS-46-1263), and Burglary, first degree (2007-GS-46-1266). Derek S. Chiarenza, Esquire, represented him.

From December 10-13, 2007, the Applicant proceeded to a jury trial and was found guilty as indicted of all charges. The Honorable J. Derham Cole sentenced him to confinement for a period of five (5) years for each forgery conviction, thirty (30) years for armed robbery, and to life imprisonment for the murder and burglary convictions, sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Gutierrez, Op. No. 2009-UP-495 (S.C. Ct. App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a) Failure to request competency hearing to determine whether A understood situation or nature of charges
2. Ineffective assistance of appellate counsel
  - a) Failure to appeal sentence

At the commencement of the evidentiary hearing, counsel for the Applicant notified the Court the Applicant was withdrawing all prior claims, and proceeding only on the following allegations:

1. Ineffective assistance of counsel
  - a) Failure to tender offer by the State
  - b) Failure to challenge admissibility of statement during Jackson v. Denno hearing

Further, through his testimony at the evidentiary hearing the Applicant effectively alleged that counsel's preparation for trial was deficient because counsel failed to adequately address issues involving the Applicant's language barrier.

#### SUMMARY OF TESTIMONY

The Applicant testified the State made him a plea offer for thirty (30) years. He stated trial counsel did advise him of the plea offer; however, counsel stated he had already turned it down. He testified counsel said he would take his case to trial because it was not that complicated, he had won harder cases in the past, and he could get him less than thirty years. He stated he wanted counsel to negotiate for less than thirty years, and would have taken less if such an offer was made; however, he stated he would have taken the thirty for sure. On cross-examination, the Applicant's answers were different. He stated he might have taken an offer for less than thirty if such an offer was made. He then admitted he would not have taken the thirty year offer.

The Applicant testified trial counsel failed to appear at his preliminary hearing. He stated he asked counsel to show him the paperwork on all of his charges, but counsel never gave them to him. He testified counsel also never showed him the State's discovery. He stated he asked counsel about the possibility of getting another attorney, but counsel said this was unnecessary because the case was not that complicated. On cross-examination, he testified he did not have any money to hire another lawyer, but his family might have been able to get the money for one. He stated he never asked the court for a new attorney.

The Applicant testified he had trouble communicating with trial counsel due to language barriers. He stated his first meeting with counsel lasted about ten minutes, and he did not understand any of the conversation. He stated he asked for an interpreter and counsel said he

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would bring one, but counsel never did. On cross-examination, he testified he was able to understand a little bit of his conversations with counsel. He then stated he knew the charges he was facing because counsel advised him of this.

The Applicant stated he wanted to testify in his own defense at trial because witnesses were lying about him. He testified he did not, however, because counsel told him he would get nervous on cross-examination and would not be able to respond to questions. He testified counsel also told him not to testify because they would lose the last argument at trial. He stated he did not know any better and followed his attorney's advice.

The Applicant testified trial counsel failed to challenge the admissibility of his statement at the Jackson v. Denno hearing. He stated an individual who interpreted for him at the jail testified he gave a statement indicating he was in a fight with the victim at the time of the crime. He denied saying this, and asserted the interpreter testified he said other things that he did not say. On cross-examination, he testified he was prejudiced by the interpreter's testimony because he never made these statements.

Trial counsel testified he was appointed to the Applicant's case. He testified he worked in the solicitor's office from 1993 until 1998, and since then he has been in private practice consisting of about eighty percent criminal law. He stated he met with the Applicant a couple of times, and his investigator did as well. He testified he did not have an interpreter present at meetings because the Applicant did not have trouble communicating and understood their conversations. He stated the Applicant never requested a translator, but he did have one present for final trial preparation, during which he had a long conversation with the Applicant. An interpreter was also present during trial. He testified he speaks some Spanish, and so does his investigator. He testified the Applicant asked and answered questions, and communicated well

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with them. He stated the Applicant provided him with names of alibi witnesses and his version of the facts. He further stated the Applicant told him that his girlfriend gave him the checks to cash, and he also denied any involvement in the crimes. He testified he discussed all of the State's discovery with the Applicant, including all statements.

Trial counsel testified his defense strategy was to point to evidence indicating the involvement of the Applicant's girlfriend, and poke holes in the State's case by pointing to the lack of forensic evidence connecting the Applicant to the crime. He testified they did not have much choice of any other strategy to go with. He stated the Applicant gave input to help build this defense, and concurred with this strategy. He stated the Applicant specifically explained to him how his girlfriend took charge during their first attempt to purchase a car, and he was able to use this at trial to try and show that the girlfriend was the ringleader.

Trial counsel testified the State did make an offer of thirty years, and the offer was open for the entire length of trial; however, the Applicant told him he would not take thirty years. He further stated that if the Applicant wanted the deal, they would have accepted it. He testified he never told the Applicant not to take the plea because he has won harder cases in the past, and never turned down the offer without consulting him. He stated he is sure he tried to negotiate for less than thirty years. However, he stated he has worked with and against the solicitor's office for more than thirteen years, and based on the nature of the case and the fact the State had a testifying co-defendant, the minimum thirty year sentence for murder was the best offer the Applicant was going to get.

Trial counsel testified the Applicant never asked for another attorney, and he would have gladly stepped aside if he had. He stated he never discouraged the Applicant from seeking another attorney, and never told him to save his money and spend it in Mexico once they won.

He stated he was not aware of any preliminary hearing that he missed, but there may have been one before he was appointed. He testified that, regardless, probable cause would have been found, and if not then a direct indictment would have been sought.

Trial counsel testified that the record is clear the Applicant was advised of his right to testify at trial. He stated he advised the Applicant of the advantages of disadvantages of him testifying. He stated he advised the Applicant that he would be questioned by a skilled prosecutor who would try to make him look bad, and if he denied things the jury knew as true then it would hurt his case. He stated he advised the Applicant that he would be questioned about why he left the jurisdiction after the crime and disappeared, and this would not have been beneficial to his case. He testified he likely advised the Applicant of the perceived advantage of having the last argument to the jury. He stated he might have advised the Applicant not to testify, but the decision was ultimately the Applicant's.

Trial counsel testified nothing prejudicial to the Applicant resulted from the Jackson v. Demmo hearing. He testified the Applicant's statement as used at trial only included an admission to forgery; however, he was able to keep out the most prejudicial portion regarding a fight with the victim. He stated he felt the statement was going to come in because the Applicant was read his rights, and the statement as a whole was not otherwise inadmissible. He testified the State also had video evidence of the Applicant in a bank presenting the forged checks. He stated the Applicant never denied making the statement as he now claims.

#### 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their

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

#### Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

*Failure to Tender Offer by the State*

The Applicant alleges trial counsel failed to communicate to him the State's thirty year plea offer before rejecting it. To prevail on a claim of ineffective assistance of counsel for an uncommunicated plea offer, an applicant must establish counsel failed to communicate a plea offer, and the offer was one the applicant would have accepted and benefited from. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009).

This Court finds the Applicant's claim counsel failed to communicate the thirty year plea offer is entirely without merit. This Court finds the testimony of counsel more credible on the issue than that of the Applicant. Counsel testified he not only communicated the offer, but the offer was open throughout the course of trial. Furthermore, the Applicant testified he wanted something less than what was offered, and would not have taken thirty years. This Court finds the Applicant made the decision to reject the thirty year plea offer. Therefore, this claim is denied and dismissed.

*Failure to Challenge Admissibility of Statement  
During Jackson v. Denno Hearing*

The Applicant alleges counsel should have objected to the admissibility of a statement he made to law enforcement which was addressed during a Jackson v. Denno hearing at trial. The record establishes the Applicant was interviewed at a detention center by detectives after he was apprehended. The detectives read him his rights from a standard form in English, the Applicant indicated he understood his rights, and the Applicant then initialed and signed the form. (Tr. 461-463). The Applicant stated he could read English, but could only write in Spanish. (Tr. 463-464). The detectives proceeded to ask him about his girlfriend and the murder victim, and the detectives only had to reword something periodically; the Applicant otherwise had no problems communicating in English. (Tr. 464-465).

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The Applicant answered questions, and detectives then typed up the Applicant's statement based on those answers. (Tr. 468-469). Detectives then had Robert Guzman, a jailer who speaks Spanish, read the typed statement back to the Applicant in Spanish.<sup>2</sup> (Tr. 468-469). The Applicant agreed with what was typed and signed the statement. The pertinent portions of the Applicant's statement are as follows:

I was asked about the death of Clarence Cubley by two detectives from the York County Sheriff's Office. I told them I didn't know anything about Mr. Cubley's death until I was in custody in Missouri and a white boy showed me a newspaper article. I never went to Mr. Cubley's trailer to rob him or assault him. I did know Mr. Cubley because we lived in the trailer park in Fort Mill for about two years. I was told Dana made a statement saying I was the one who killed Mr. Cubley. I think Dana made these statements because she was mad at me. I left Rock Hill about this time because police were coming by my trailer looking for me. I knew they had warrants on me because I didn't show up for court on a criminal domestic violence charge. I did not hit Dana, but she told the police that I did. I left town to get away from Dana and so I wouldn't go to jail.

Before I left town Dana gave me some checks that she said her grandfather gave her. She wanted me to cash the checks so she could buy a car. I did cash these checks. . . . and that was my signature on the back of the checks.

(Tr. 469-470).

Guzman then testified that when he asked the Applicant why he assaulted the victim, the Applicant responded that "he did not assault Mr. Cubley; that they had an argument and he left in a taxi." (Tr. 492-493). He testified he did not relay this portion of the Applicant's response to detectives because the conversation was fast and he was translating very quickly. (Tr. 493-494). The State agreed not to go into this oral statement regarding the argument with the victim because it was only discovered the week before, and it was not turned over to the defense. (Tr. 495-496).

Trial counsel moved to suppress the entire written statement based on the lack of an intelligent waiver of rights by the Applicant due to the language barrier and the fact he was not

<sup>2</sup> Guzman was initially brought in to help because the Applicant asked for someone who spoke Spanish to help him explain a small portion of the statement better. (Tr. 470-471).

read his rights in Spanish, and also based on the fact the Applicant requested that the Mexican consulate be notified of his arrest, but this was only complied with after the interview. (Tr. 498-499). The trial court denied the motion, and found the statement was voluntarily given after the Applicant knowingly and intelligently waived his rights. In the presence of the jury, the entire written statement was read into the record. (Tr. 525-526). As agreed by the State, the oral statement regarding the argument with the victim was never presented before the jury.

This Court finds the Applicant's claim to be without merit. The record clearly establishes trial counsel moved to suppress the statement at the conclusion of the hearing on two separate grounds, but his motion was denied. Trial counsel's determination the statement would have been admissible over any further objection is a reasonable conclusion. As the trial court found, the Applicant was advised of his Miranda rights, waived those rights, and voluntarily gave a statement. Accordingly, this claim is denied and dismissed.

*Inadequate Trial Preparation Due to Language Barriers*

The Applicant testified at the hearing that counsel was deficient in his preparation and handling of trial due to a language barrier, and testified counsel failed to bring an interpreter to meetings despite his requests for one. The Applicant initially testified he did not understand anything that was said in his first meeting with counsel. However, he also testified to having numerous detailed discussions with counsel concerning, among other things, the thirty year plea offer, the possibility of obtaining another attorney, and the charges he was facing. Assuming all of these discussions took place, the Applicant was clearly able to understand the discussions without the help of an interpreter.<sup>3</sup>

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<sup>3</sup> The Court observed the Applicant throughout the hearing and noted that when his attorney or the Assistant Attorney General asked him questions, some of which were not short or simple, he started answering before any translation by the interpreter. He clearly understood their questions in English even though he chose to answer in Spanish.

Further, trial counsel testified he and/or his investigator met with the Applicant several times, and they both speak a little Spanish. He testified that communication with the Applicant was never a problem.<sup>4</sup> He testified the Applicant never requested a translator, but one was used in final preparation for trial. He testified the Applicant was able to provide him with names of alibi witnesses and his version of the facts. He further testified the Applicant agreed with his trial strategy, and provided input to help build the defense.

This Court finds no merit to this issue. Based on the above testimony, this Court finds counsel's testimony on the issue more credible than that of the Applicant. This Court finds the Applicant was able to sufficiently communicate with counsel. This Court also finds the Applicant did not request an interpreter, but one was involved in final preparation for trial. Furthermore, this Court finds the Applicant failed to present any evidence to show how the alleged language barrier affected the outcome of his case or his decisions. Therefore, this Court finds no prejudice to the Applicant with regards to the preparation and trial of his case due to language limitations. This claim is denied and dismissed.

*Miscellaneous Issues Raised at the Hearing*

The Applicant testified to several other issues that were not specifically alleged as claims for relief. With regards to each of these issues, the Court finds the testimony of trial counsel more credible than that of the Applicant. Specifically, the Applicant indicated in his testimony that he expressed to counsel some desire to have him substituted with retained counsel. Counsel's testimony refuted this claim entirely, and stated he would have gladly stepped aside if that's what the Applicant wanted. Moreover, the Applicant testified he did not have any money for a lawyer, but his family *might* have been able to get money for one. This Court finds the

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<sup>4</sup> The trial record further establishes the Applicant could sufficiently communicate in English with little problem. At least three witnesses testified to this. See Tr. 214-215, 462-465, 477-488.

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Applicant made no effort to hire an attorney to replace trial counsel, nor does it appear the Applicant even had the means to. Further, this Court finds trial counsel is a very experienced criminal defense lawyer whose practice area is primarily criminal defense. To the extent the Applicant raised this issue in his testimony, the allegation is denied and dismissed as being without merit.

The Applicant also testified that he wanted to testify at trial, but he remained silent based on counsel's advice. He testified counsel told him he would get too nervous to respond to questions, and also told him not to testify because they would lose the right to argue last to the jury. To the contrary, this Court finds counsel merely rendered sound advice for the Applicant to consider in making his decision of whether to testify. Counsel testified he advised the Applicant that he would be questioned by a skilled prosecutor who would try to make him look bad in front of the jury, and who would question him on why he fled the jurisdiction for so long. He testified he also advised the Applicant that if he decided to testify, they would in fact lose the right to argue last to the jury. Further, he testified the Applicant ultimately made the decision not to testify. This Court agrees the decision not to testify was made by the Applicant. Therefore, to the extent the Applicant's testimony raised allegations as to this issue, it is denied and dismissed.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence trial counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, the

allegation of ineffective assistance of counsel is denied.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

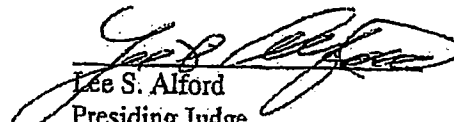
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

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**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11<sup>th</sup> day of August, 2011.

  
Lee S. Alford  
Presiding Judge  
Sixteenth Judicial Circuit

York, South Carolina.

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

Isaias Diaz Gutierrez #325762,

Plaintiff(s)

vs.

State of South Carolina,

Defendant(s)

FILED IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

2015 OCT 21 AM 10:01

CIVIL ACTION COVERSHEET

DAVID HAMILTON

2015CP-16-3199

(Please Print)

Submitted By: Isaias Diaz Gutierrez

Address: Wando-B-229 #325762 LCI

Post Office Box 205

Ridgeville, South Carolina

29472-0205

SC Bar #: PRO SE

Telephone #:

Fax #: Not Applicable

Other:

E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint. This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20-CP-..., Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Other (799)
Administrative Law/Relief: Reinstate Driver's License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Commission (990), Employment Security Comm (991), Other (999)
Special/Complex/Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

Submitting Party Signature: Isaias Gutierrez

Date: 10-16-15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

CERTIFIED RUE COPY 2015 OCT 21 AM 10:52 DAVID HAMILTON CLERK OF COURT YORK COUNTY, SC

FORM 5

2015 OCT 21 10 31 99  
CERTIFIED TRUE COPY

IN THE COURT OF COMMON PLEAS

DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

STATE OF SOUTH CAROLINA )  
 )  
County of YORK )  
 )  
Isaias Diaz Gutierrez #325762 )  
 )  
Full name and prison number (if any) of Applicant )

v. )

State of South Carolina )

APPLICATION FOR

POST-CONVICTION RELIEF

2015 OCT 21 AM 10:01

DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lieber Correctional Institution, 136 Welbourn Street, Ridgeville, South Carolina 29472-0205
2. Name and location of Court which imposed sentence Court of General Sessions, York County, South Carolina
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:  
 (a) #2007-GS-46-1261; 1262; 1263; 1264; & 1265  
 (b) \_\_\_\_\_

- (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:  
 (a) December 13, 2007 - Life Without Parole  
 (b) \_\_\_\_\_  
 (c) \_\_\_\_\_
6. Check whether a finding of guilty was made:  
 (a) after a plea of guilty \_\_\_\_\_  
 (b) after a plea of not guilty X  
 (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
Yes
8. If you answered "yes" to (7), list:  
 (a) the name of each Court to which you appealed:  
 i. South Carolina Court of Appeals  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 (b) the result in each such Court to which you appealed:  
 i. Unpublished Opinion  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 (c) the date of each such result:  
 i. October 21, 2009  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 (d) if known, citations of any written opinion or orders entered pursuant to such results:  
 i. State v. Gutierrez, Op. No. 2009-UP-495  
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:  
 (a) Not Applicable  
 (b) \_\_\_\_\_

(c) \_\_\_\_\_

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) PCR counsel failed to file appeal from adverse dismissal

(b) \_\_\_\_\_

(c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Addendum Pages For 10(a) & 11(a) - [1] thru [6]

(b) \_\_\_\_\_

(c) \_\_\_\_\_

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Not Applicable

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Post-Conviction Relief Application

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(b) the name and location of the Court in which each was filed:

i. Court of Common Pleas - York County, S.C.

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

- (c) the disposition thereof:
  - i. Dismissed with prejudice
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

- (d) the date of each such disposition:
  - i. September 16, 2011
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. Not Applicable
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
  - i. Not Applicable
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings in which each ground was raised:
  - i. Not Applicable
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

10(a). PCR counsel demonstrated a deficient performance in violation to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, (and its progeny, Article(s) I, §3; and I, §14, of the South Carolina Constitution), insomuch that, at a critical stage of the collateral proceedings, PCR counsel failed to file the desired Notice of Appeal from an adverse PCR proceeding, thereby depriving Applicant of his "one bite at the apple", and the full panoply of statutory and Constitutional rights associated with these types of circumstances.

11(a). "Applicant's are entitled to a full and fair opportunity to present claims in one PCR application. Successive PCR application and appeals are generally disfavored because they allow an Applicant to receive more than 'one bite at the apple' as it were." Matthews v. Evatt, 105 F.3d 907, 916 (1997)(quoting Gamble v. State, 298 S.C. 176, 379 S.E.2d 118, 119 (1989)). The general rule to successive applications is one that raises grounds not raised in a prior application; raises questions previously heard and determined; or raises grounds waived in prior proceedings. See Carter v. State, 293 S.C. 528, 362 S.E.2d. 20 (1987), also S.C. Code Ann. §17-27-90 (1997). For Applicant to be entitled and afforded a successive PCR application, he must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Tilley v. State, 334 S.C. 24, 511 S.E.2d. 689 (1999)(fourth pcr application not successive because applicant could not have raised the manner his sentence would be interpreted for parole purposes at the time the previous pcr applications were filed). Furthermore, there

exists rare exceptions concerning procedural circumstances where successive applications are permitted. See, e.g., Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1987).

Our Supreme Court has permitted successive PCR applications where an Applicant has been denied complete access to the appellate process. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); cf., Washington v. State, 478 S.E.2d 833 (1996). In accordance with the PCR rules, this Applicant is entitled to a full adjudication on the merits of the original petition, or "one bite at the apple". Aices v. State, 305 S.C. 448 452, 409 S.E.2d 392, 395 (1991). This term "bite" includes this Applicant's right to appeal the denial of his PCR application, and the right to assistance of counsel in that appeal. Aice, 305 S.C. at 448, 409 S.E.2d at 392.

With this mindset, Applicant believes and takes the stance that Austin is applicable to this current circumstance where he has been prevented from seeking appellate review of a denial of PCR relief, and where PCR counsel has failed to file a timely appeal and/or review of that adverse decision. Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n.1 (1997)(permitting an Austin appeal where original PCR counsel failed to appeal from the first denial of PCR relief). As with the case at bar, the defendant in Austin never received his full procedural "bite at the apple" because he was prevented from seeking his review from the denial of his PCR application. Aice, 305 S.C. at 452, 409 S.E.2d at 395. So as effectuating the purpose and intent of Rule 71.1(g), SCRPC, and enforcing the entitlement to PCR proceedings, the Supreme Court held in Austin that it has opened a door to attack PCR counsel's effectiveness.

Applicant believes that he is entitled to an Austin review if the PCR judge affirmatively finds either: (1)

Applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. See King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992). This PCR Court should examine the documents attached to Applicant's Verified Affidavit and find this Applicant has been denied his right to appeal. And with the documents attached hereto, there should be sufficient evidence to meet Applicant's burden of proof and finding that he has been denied his full "bite" and grant the relief of an Austin appeal as a manner of a belated appeal.

(2). In Matter of Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991), this State's Supreme Court examined a grievance filed due to the failure of counsel to file or initiate an appeal for the client. (relying on White v. State, 362 S.C. 110, 208 S.E.2d 35 (1974)); also Rule 1.3, Rules of Professional Conduct, RPC, (see Rule 407, of the South Carolina Appellate Court Rules, SCACR). The Court held that counsel should give the client his professional judgment whether an appeal should be taken and ascertain whether the client wishes to appeal.

It is evident by the correspondence marked [ATTACHMENT #10] that Applicant contacted PCR counsel in an effort to have a Notice of Appeal filed regarding his rights in these matters. Simply providing a non-speaking person a "SAMPLE" to guide them is not sufficient as a means of ensuring due process rights are adamantly adhered with. This Applicant is Mexican born and raised, and his native language is Spanish. It is very difficult for him to communicate, more or less, attempt to comprehend a [FORM] to file an appeal. The right to have PCR

counsel, at a minimum, file a Notice of Appeal, is necessary whether counsel is appointed or retained. PCR counsel should have filed the required and desired Notice of Appeal consistent with Rule 203(b)(1), SCACR, and the matter would have automatically relieved PCR counsel of any further duties to Applicant; and would have placed the matter under the duty and care of the Appellate Defenders Office. Anonymous Member, 303 S.C. at 306, 400 S.E.2d at 483.

As is applicable to this present case, even though Applicant's family retained PCR counsel, at the end of the PCR proceedings, Applicant was indigent and counsel should have fulfilled his duty to ensure a Notice of Appeal was filed, thereby ensuring his client's rights were safeguarded.

The Anonymous Member Court further held that, Rule 1.16(d), RPC, required counsel to take all necessary steps as may be reasonably practicable to protect this client's interest, whether requested by Applicant, or in furtherance of his duty to ensure his client receives the full panoply of rights associated with these matters. Even if PCR counsel was of the position or opinion that the appeal was meritless, an appeal should have been filed to preserve Applicant's interests in these matters. Also, it is confusing to Applicant that PCR counsel would take a case that he was of the opinion and/or belief had no merit. This is a question that now plagues this Applicant's thoughts. The justification for this question plaguing Applicant's mind is ... PCR counsel was not appointed to this case, and was not obligated to pursue whatever issues were originally raised, but, was retained by private funding and had professional knowledge of the case and its issues. Why would he take a case he believed had no merit? Applicant would argue that PCR counsel has taken an contrary position to the one that he took when receiving funds to pursue this case in the beginning.

Such a fruitless comment by PCR counsel, in his responsive correspondence, should have great bearing on PCR counsel's credibility in this matter. Also, the requirements to take reasonable steps to protect the client requires counsel that is retained for only that specific proceeding to serve and file the Notice of Appeal, and to continue representation of the client until relieved by the Supreme Court consistent with Rules 235, SCACR. PCR counsel would have been relieved from any appellate representation by showing the he was not retained or hired to represent this Applicant, who was an indigent client who desired to appeal. See Wilson v. State, 348 S.C. 215, 218 n.3, 559 S.E.2d 581, 583 n.1 (2002)(relying on Rule 602(e), SCACR).

PCR counsel left a non-English speaking client to [fend] for himself, having the knowledge of this client's handicaps, and therefore, took his own initiative to make an appellate review of the case; had taken the case knowing that the matters he had been retained to represent were meritless in a PCR proceeding. This would greatly undermine the performance and representation of PCR counsel in these matters. Applicant believes that an "exceptional circumstance" exists with this particular case and issues.

Applicant would take the position that he has been wrongfully deprived and denied his panoply of rights associated with applicable statutory provisions and Constitutional protections that relate to these circumstances. As is evident by the record, and arguments presently before this Court, Applicant is of the belief and stance that PCR counsel has waived his statutory rights to the PCR proceedings, (See Sutton v. State, 361 S.C. 544, 606 S.E.2d 779 (2004)(recognizing the statutory right to PCR proceedings), without his consent nor any colloquy on record to support such a consent and/or waiver, and therefore, has exceeded his duty and authority to these rights adherent to statute and due process principles. Cooper v. Moore,

351 S.C. 207, 569 S.E.2d 330 (2002). Applicant is of the belief that this matter warrants an evidentiary hearing and the appointment of competent counsel.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) PCR counsel failed or refused to file appeal
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

17. Were you represented by an attorney at any time during the course of:

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

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

- (a) the name and address of each attorney who represented you:
  - i. Derek S. Chiarenza, Esquire, P.O. Box 340, Lexington, S.C. 29071 - Trial Counsel
  - ii. Appellate Defense Office, Robert Pachak, Esquire, P.O. Box 11589, Columbia, S.C. 29211 - Direct Appeal Counsel
  - iii. David C. Cook, Esquire, 300 North White Street, Lancaster, S.C. 29720 - PCR counsel
- (b) the proceedings at which each such attorney represented you:
  - i. Trial counsel  
Direct Appeals counsel
  - ii. PCR counsel
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application:  
An evidentiary hearing as to a belated appeal; and/or  
remanding to the lower court for a new trial

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

STATE OF SOUTH CAROLINA )  
 ) VERIFICATION  
County of YORK )

I, Isaias Diaz Gutierrez #325762, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Isaias Diaz Gutierrez  
Isaias Diaz Gutierrez #325762  
PRO SE APPLICANT

SWORN to and subscribed before me this 16<sup>th</sup>  
day of Oct., 2015.

Luduan Bryant (L.S.)  
Notary Public

My Commission Expires: May 26, 2020

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

I, Isaias Diaz Gutierrez #325762, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Isaias Gutierrez  
Applicant  
Isaias Diaz Gutierrez #325762

SWORN or affirmed to and subscribed before me this  
16 day of Oct, 2015.

Ludrean Bryant  
Notary Public

My Commission Expires: May 26, 2020

Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

CLERK OF COURTS OFFICE, YORK COUNTY  
FOR THE SIXTEENTH JUDICIAL CIRCUIT  
David Hamilton, Clerk  
Post Office Box 649  
York, South Carolina  
29745-0649

RE: FILING OF ENCLOSED MATTERS

Clerk,

Find enclosed for filing in this Office:

- 1). Application for Post-Conviction Relief, with Addendum Pages [1] thru [6];
- 2). Applicant's Affidavit In Support Of Post-Conviction Relief, with Verification attached;
- 3). Attachments as Exhibits, (1) thru (16); and
- 4). Verified Affidavit Of Ronald De'Ray Skipper #138244, with attached Verification.

Please find enclosed an additional copy of these matters. I would request that the copy be "clocked stamped", to include the Affidavits because they do not have a C/A No. affixed upon them, and return the stamped copies back to me for my file.

I am an incarcerated person and have no funds for return postage or copying fees, if such were applicable.

If I may be of any further assistance to this Office, in these matters, please do not hesitate to contact me. Thank you for this Office's time and attention to these matters.

October 16, 2015

Respectfully Submitted,

*Isaias Gutierrez*

rds/IDG

Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0206

cc: FILE  
CLERK

CERTIFIED TRUE COPY

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS )  
FOR THE SIXTEENTH JUDICIAL CIRCUIT )  
CLERK OF COURT )  
YORK COUNTY, SC )

2015 OCT 21 AM 10:53

Isaias Diaz Gutierrez #325762, )  
Applicant, )

C/A No. #2015-CP-46-3199

vs. )

APPLICANT'S VERIFIED )  
AFFIDAVIT IN SUPPORT OF )  
POST-CONVICTION RELIEF )

State of South Carolina, )  
Respondents. )

FILED-RECEIVED )  
2015 OCT 21 AM 10:02 )  
MIDHAMILTON )  
CLERK OF COURT )  
YORK COUNTY, SC )

PERSONALLY appeared before me, Isaias Diaz Gutierrez #325762, pro se Applicant, who being sworn under penalty of perjury, deposes and says:

1). I am, Isaias Diaz Gutierrez #325762 (hereafter, "Applicant"), the pro se Applicant in this current Post-Conviction Relief (PCR) action, and offering this Affidavit as sworn testimony.

2). Affiant is a citizen of Mexico, where he was born and raised until his arrival in the United States of America. There exists a language barrier that has caused this Applicant to not be in a position in which to comprehend any of

the complexities of the legal system.

Attached hereto and incorporated herewith is a copy of the TABE testing scores that were printed on August 6, 2015, by Ms. Jennifer Turner, Education Administrative Specialist. Please note that this applicant has no [language] scoring, and has to be explained most all English that is spoken to him. (See attached hereto and incorporated herewith, a copy of the document dated August 6, 2015, Marked ATTACHMENT #1 & #2).

3). Applicant was represented by, David C. Cook, Esquire (PCR counsel), in the PCR proceedings. Applicant had been appointed, Charles T. Brooks, III, Esquire, but did not feel comfortable with Mr. Brook's Firm representing him. (Attached hereto and incorporated herewith, a copy of the Order For Substitution Of Counsel, dated May 26, 2011, Marked ATTACHMENT #3).

4). Applicant approached an inmate, Ronald De'Ray Skipper #138244, and inquired how long the Supreme Court had to notify him about his appeal. Please find attached hereto and incorporated herewith a copy of Inmate Ronald De'Ray Skipper's #138244 Verified Affidavit. This Affidavit executed by Inmate skipper reflects some of the conversations that occurred between Applicant and Inmate Skipper about this subject matters.

5). On June 19, 2015, Applicant, with the assistance of Inmate Skipper, served a formal correspondence upon, Daniel E. Shearouse, Clerk for the South Carolina Supreme Court, inquiring as to any Notice of and/or pending appeal that had been filed on Applicant's behalf with that Court. (See attached hereto and incorporated herewith, a copy of the

correspondence dated June 19, 2015, Marked ATTACHMENT #4).

On June 24, 2015, Mr. Shearouse responded to the inquiry, informing Applicant there existed no records showing that an appeal had been filed with the Supreme Court and/or Court of Appeals. Mr. Shearouse further informed Applicant a copy of this correspondence was being forwarded to PCR counsel. (See attached hereto and incorporated herewith, a copy of the correspondence dated June 24, 2015, Marked ATTACHMENT #5).

6). On June 22, 2015, Applicant served a formal correspondence upon, Robert Pachak, Esquire, Chief Appellate Defender, inquiring as to any record of a Notice of Appeal that this Office may have been appointed to represent. (See attached hereto and incorporated herewith, a copy of the correspondence dated June 22, 2015, Marked ATTACHMENT #6).

For the record, at no time has Mr. Pachak, nor any one from that Office, been responsive as to the nature of this inquiry. No response has been issued by that Office, and it is Applicant's position that this Office should have examined its records and provided some form of denial and/or notice as to the requested information.

7). On June 25, 2015, Applicant served a formal correspondence on, David Hamilton, Clerk of Court, Sixteenth Judicial Circuit, seeking a copy of the Order of Dismissal for C/A No. #2010-CP-46-2611. (See attached hereto and incorporated herewith, a copy of the correspondence dated June 25, 2015, Marked ATTACHMENT #7).

On July 2, 2015, Applicant was served a copy of the requested Order of Dismissal, executed and filed by the Honorable Lee S. Alford, Circuit Court Judge, whom presided over the PCR matter. (See attached hereto and incorporated herewith, a copy of the Order of Dismissal dated September 16, 2011, Marked

ATTACHMENT #8).

8). On July 8, 2015, PCR counsel served a formal correspondence upon this Applicant, stating a position that "I did not file and appeal", then directed Applicant to a copy of a correspondence dated October 10, 2011, that was included; and a copy of a written contract that Applicant had purportedly entered into, but does not provide for Applicant [s]eal to such consent as to specific terms. (See attached hereto and incorporated herewith, a copy of the responsive correspondence dated July 8, 2015, Marked ATTACHMENT #9; a copy of the correspondence dated October 11, 2011, Marked ATTACHMENT #10; and a copy of the written contract dated February 12, 2011, Marked ATTACHMENT #11).

Applicant would point out in ATTACHMENT #9, PCR counsel stated a position that the reason he did not file a Notice of Appeal, and provide Applicant with a correspondence explaining the procedure, "as a precaution". The correspondence in question is Marked ATTACHMENT #10.

In ATTACHMENT #10, PCR counsel stated his Firm had not been retained to represent Applicant in a PCR appeal; had supplied Applicant with a SAMPLE copy of the Notice of Appeal; and PCR counsel did not believe the appeal had merit. It would seem that PCR counsel had placed himself in a position as someone whom is qualified enough to determine the merits of the issues of the PCR proceedings. That would not be permissible under reasonable standards of law, where PCR counsel represented the matter during the PCR proceedings, causing a conflict of interest in offering advice as to appellate issues; and where PCR counsel was aware his representation was inadequate and fruitless.

Furthermore, PCR counsel has taken a position that his Firm was not retained to represent Applicant during the appellate stage, and Applicant has never taken a position that

PCR counsel, or his Firm, should represent his interests in the appellate process. The only request was that PCR counsel file the Notice of Appeal. As to whether PCR counsel could recall the request or not is a question of credibility, because PCR counsel issued a correspondence October 11, 2011, concerning the pursuit of an appeal in this matter. It is evident by that very correspondence that PCR counsel refused and failed to file after being requested to do so. This should raise several questions concerning that representation due to the refusal to perform with his ethical and professional duties.

9). On July 10, 2015, Applicant served a formal correspondence upon trial counsel, Derek S. Chiarenza, Esquire, seeking production of documents relating to the case/manual file amassed during that Firm's representation in the criminal proceedings. (See attached hereto and incorporated herewith, a copy of the correspondence dated July 10, 2015, Marked ATTACHMENT #12).

Applicant felt that PCR counsel did not have all the materials which trial counsel had utilized to prepare for trial. PCR counsel's representation in this matter has become in serious question. The following information would demonstrate this position.

On August 17, 2015, trial counsel served a formal correspondence on Applicant pertaining to the request for production, dated July 10, 2015. In this correspondence trial counsel informed Applicant that all of his file materials had been transferred to the Office of Appellate Defense in 2009. Applicant found it a little eerie that PCR counsel could prepare for PCR proceedings when, in fact, PCR counsel did not even have the documents that trial counsel used in trial. (See attached hereto and incorporated herewith, a copy of the responsive correspondence dated August 17, 2015, Marked ATTACHMENT #13).

Please note that Applicant had sought information from the Office of Appellate Defense and has never received any form of responsive correspondence in that matter. With that mindset, Applicant does not believe that that Office would be responsive to another such formal request.

10). On July 10, 2015, Applicant served a formal request for production of documents upon PCR counsel seeking disclosure of the case/manual file that his Firm utilized to prepare for the PCR proceedings. (See attached hereto and incorporated herewith, a copy of the formal correspondence dated July 10, 2015, Marked ATTACHMENT #14).

PCR counsel had served Applicant with a formal correspondence concerning his failure to file the requested Notice of Appeal. This correspondence (ATTACHMENT #10) was served because Mr. Shearouse, Clerk for the Supreme Court, contacted PCR counsel concerning an inquiry as to whether a Notice of Appeal had been filed pertaining to the adverse PCR Order.

On July 28, 2015, PCR counsel served a responsive correspondence, in it was that Firm's position that it had complied with all the ethical rules that were cited. Yet, at no time during the PCR proceedings, whether at the beginning or end, did PCR counsel inform Applicant that Applicant would have to file his own Notice of Appeal. (See attached hereto and incorporated herewith, a copy of the correspondence dated July 28, 2015, Marked ATTACHMENT #15).

Applicant would direct this Court to examine [ATTACHMENT #1 & #2], and it should clearly show that this Applicant does not possess the necessary education, even at a minimum, nor does he comprehend the documents necessary to perform in such a manner as preparation of a Notice of Appeal. And as this record shows, it is replete with Applicant's

inability to comprehend the English language in such a way. Even PCR counsel admits to purportedly explaining the appellate procedures "in Spanish", and this should be sufficient enough to cause this Court to take a good, long look at these matters.

When serving the compliance to the formal request for documents, PCR counsel enclosed a copy of the Order of Dismissal that had been filed within the case/manual file kept by his Firm. Upon careful examination of that Order of Dismissal, (see attached hereto and incorporated herewith, a copy of the Order of Dismissal dated September 16, 2011, Marked ATTACHMENT #16), it came to Applicant's attention that PCR counsel may not have really believed that the case he represented was meritless. According to the PCR counsels alteration of that Order of Dismissal, it would seem that there existed more than an opinion that the case had merit. If this Court would take the time to examine this Order of Dismissal (ATTACHMENT #16), it would discern that PCR counsel crossed out specific words and identified within that Order, pages, cover/face page, and last pages of this Order.

11). Applicant expressed the desire for PCR counsel to appeal the adverse PCR dismissal to the South Carolina Supreme Court. And Applicant takes the position that his claims are meritorious, if they had been properly litigated by PCR counsel. This would have afforded Applicant some form of relief in the Certiorari stages.

12). Applicant would attest that he has had an individual trained in law to assist him in the preparation of these matters. This assistance is required due to Applicant's severe handicap in expressing himself and presenting a viable argument before this Court, in the English language and in

accordance with the procedural rules.

13). Applicant would attest that he understands that the Respondents may take a position that this application is successive due to the fact that it is, per se, a second application. Also, that their stance may attempt to raise a claim of the statute of limitations, where it has been a period of four (4) years since the initial PCR proceedings. But, this Court must be mindful that the reason for the delay is due to the presumption that PCR counsel filed the required Notice of Appeal. Furthermore, as is evident by the record, and documentation that has been presented to this Court ... PCR counsel, by his own admissions has stated that [he] failed to timely file the required notice. A careful examination of the correspondences served by PCR counsel (ATTACHMENT #10), was served with sufficient time to serve the Notice of Appeal, as consistent with Rules 203(b)(1), of the South Carolina Appellate Court Rules, SCACR. The time for filing an appeal from the Court of Common Pleas is thirty (30) days, after the day of service is completed. If the appeal is not sought within that amount of time then the appellate court has no jurisdiction to entertain the appeal. The Order of Dismissal was filed on September 16, 2011, and PCR counsel responded to the inquiry by Applicant about the appeal on October 11, 2011. This was more than enough time in which to prepare and serve the desired notice.

14). Applicant would attest that since being assisted by Inmate Skipper, he has began to learn something about the appeal, or its disposition, and his situation that no one else would take the time to explain to him. And now he has discovered that no appeal was ever filed on his behalf. This was disturbing because of the adverse denial from the PCR

proceedings; where the matter was dismissed with prejudice, which is a harsh standard; and Applicant has now been denied his "full and complete bite at the apple" that is guaranteed him under due process principles. At no time has Applicant ever knowingly nor intelligently waived his right to appeal the adverse Order of Dismissal.

15). As this Court will discover, there is no way that this Applicant could have prepared these pleadings and Affidavits without the assistance of this Inmate. But, everything has been explained to Applicant in great detail, and Applicant agrees to their application and content in this case.

16). Applicant would submit this Verified Affidavit as sworn testimony in accordance with 28 U.S.C. §1726; Rule 43(d) and (e), of the South Carolina Rules of Civil Procedure, SCRPC; Rule 603, of the South Carolina Rules of Evidence, SCRE; and S.C. Code Ann. §17-27-70 (1985).

AFFIANT SAYETH NO FURTHER

October 16, 2015

Respectfully Submitted,

*Isaias Gutierrez*

Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

STATE OF SOUTH CAROLINA )  
 COUNTY OF YORK )

V E R I F I C A T I O N

PERSONALLY appeared before me, Isaias Diaz Gutierrez #325762, Applicant, who being duly sworn under penalty of perjury, deposes and says that he is the Applicant/Affiant to the attached Applicant's Verified Affidavit In Support Of Post-Conviction Relief, that he has read the Affidavit and the facts stated therein are true to his own knowledge, except those matters and things stated on information and belief, and as to those matters and things, he believes them to be true.

October 16, 2015

Respectfully Submitted,

*Isaias Gutierrez*

Isaias Diaz Gutierrez  
 Wando-B-229 #325762  
 Lieber Correctional Institution  
 Post Office Box 205  
 Ridgeville, South Carolina  
 29472-0205

Sworn and subscribed before me this  
16<sup>th</sup> day of Oct, 2015

*Isabelina Bryant*  
 Notary Public for South Carolina

My commission expires: May 26, 2020

STATE OF SOUTH CAROLINA )  
 COUNTY OF DORCHESTER )

VERIFIED AFFIDAVIT OF RONALD DE'RAY  
 SKIPPER I, #138244

PERSONALLY appeared before me, Ronald De'Ray Skipper I, #138244, Affiant, who being duly sworn under penalty of perjury, deposes and says:

1). I am, Ronald De'Ray Skipper I, #138244 (hereafter, "Affiant"), offering this Verified Affidavit as sworn testimony to facts and matters known to him.

2). Affiant is an inmate within the custody and control of the South Carolina Department of Corrections ("SCDC"), serving a sentence of twenty (20) years to Natural Life. Affiant has been incarcerated for 3½ decades upon this sentence.

Affiant has an adequate and competent education in Western jurisprudence, and was approached by, Isaias Dias Gutierrez #325762 ("Applicant"), in this matter.

3). Around the middle portion of June 2015, Applicant approached Affiant inquiring about how long it takes to hear from the Supreme Court concerning an appeal.

Affiant informed Applicant that there was no specific time line for the appellate courts to respond or issue a decision. Then Affiant inquired as to how long it had been since he filed an appeal, and Applicant informed Affiant that 3½ years had passed and Applicant had not heard anything. As this line of

questioning occurred, Affiant informed Applicant that he did not believe that was an extremely long time for the Supreme Court to decide the questions before it.

4). Affiant had been an avid subscriber of the SHEAROUSE ADVANCE SHEETS until June 29, 2009. At that time, the Advance Sheets were no longer printed but only available on electronic formats. Affiant had been a subscriber to these Advance Sheets for approximately 8 years. This was an essential part of Affiant's ability to comprehend the education he was receiving and comprehending how the legal standards were applied. Furthermore, it gave Affiant an advantage over other inmates, and many attorneys, due to his ability to study the Court of Appeals and/or Supreme Courts decisions weekly.

5). Applicant approached Affiant, again, and this time Affiant would learn that Applicant had never heard from the Office of Appellate Defense, after believing that the Notice of Appeal had been filed relating to his PCR issues. At this time, Affiant would inform Applicant that the amount of time that had passed was extremely too long a period of time in communicating with the Office of Appellate defense.

At this time, Affiant would begin to prepare the formal correspondences that are attached and incorporated in Applicant's Verified Affidavit, in an effort to discover the progress of the appeal. It would be discovered that there was no appeal pending in the appellate courts; that PCR counsel had failed or refused to initiate the Notice of Appeal; and could have done so without further representation in the appellate matter; and that trial counsel had relinquished all documents that were amassed during that Firm's representation in the criminal matter to the direct appeal counsel. Affiant believes

that direct appeal counsel would have not served a responsive pleading and forwarding one to that Office had already proven unfruitful.

6). Affiant assisted Applicant in contacting, Ms. Jennifer Turner, Administrative Assistant, here at Lieber Correctional Institution ("LCI"), in discovering Affiant's educational testing scores from entrance exams into SDC until present times. This was done in an effort to establish the preponderance of proof necessary in proving that Affiant does not have the requisite learning to make competent decisions in legal matters. As this Court is aware, mental retardation does not always equate to mental deficiencies, but is commonly associated with educational levels and social histories.

7). Furthermore, Affiant would attest that in all the times that he has communicated with Applicant, it has taken a great deal of time to get Applicant to comprehend the most minimal aspects of the situation that Applicant has found himself in, and what it would require to correct it.

Affiant has come to the conclusion that Applicant cannot begin to grasp the complexity of the legal process. It is easy to establish such a fact, because Affiant could identify with Applicant's circumstance, because Affiant could not imagine his being in the same position in Mexico, where he would have an extremely difficult time comprehending the language and procedures. Even with the experience and education Affiant has in legal procedures and preparation. Simply because some one might translate the language, it does not necessarily mean that the complexity of the legal process can be easily explained.

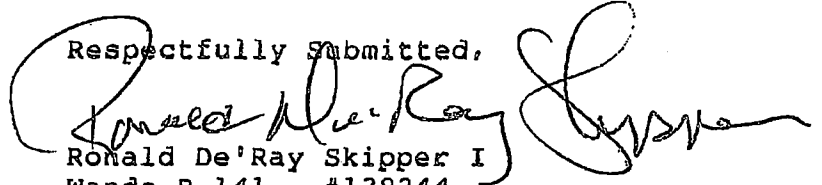
8). Affiant attests that a duty was owed to Applicant in reserving and preserving his right to appeal under well-settled standards of law.

9). Affiant submits this Verified Affidavit as sworn testimony in accordance with Rule 43(d) and (e), of the South Carolina Rules of Civil Procedure, SCRPC; 28 U.S.C. §1726; and Rule 603, of the South Carolina Rules of Evidence, SCRE.

AFFIANT SAYETH NO FURTHER

October \_\_\_\_\_, 2015

Respectfully Submitted,



Ronald De'Ray Skipper I  
Wando-B-141 #138244  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

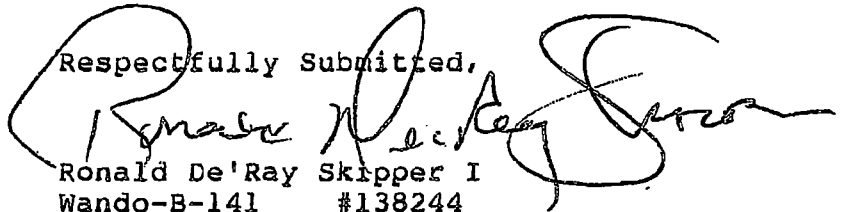
STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )

V E R I F I C A T I O N

PERSONALLY appeared before me, Ronald De'Ray Skipper I, #138244, Affiant, who being duly sworn under penalty of perjury, deposes and says that he is the Affiant to the attached Verified Affidavit Of Ronald De'Ray Skipper I, #138244, that he has read the Affidavit and the facts stated therein are true of his own knowledge, except those matters and things stated on information and belief, and as to those matters and things, he believes them to be true.

October 16, 2015

Respectfully Submitted,



Ronald De'Ray Skipper I  
Wando-B-141 #138244  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

Sworn and subscribed before me this  
16<sup>th</sup> day of Oct, 2015  
Stachean Bryant  
Notary Public for South Carolina  
My commission expires: May 26, 2020

**Education**

**TURNER**

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Secured Applications Logout

August 6, 2015

GUTIERREZ, ISAIAS DIAZ (00325762)

LIEBER (0421)

<b>Enrollment</b>	<b>Assessments</b>	<b>HS Diploma</b>	<b>HS Equivalency</b>	<b>WorkKeys</b>	<b>ESC</b>	<b>DOL</b>	<b>VOC</b>	<b>OJT</b>
<b>Archived</b>								
<input type="checkbox"/> Assessments								
<b>Date</b>	<b>Location</b>	<b>Type</b>	<b>Level</b>	<b>Read</b>	<b>Math</b>	<b>Lang</b>	<b>Total</b>	<b>Actions</b>
07/03/2008	LIEBER	TABE 9	EASY	03.8	05.6	00.0	02.6	
12/28/2007	KIRKLAND	WRAT		08.5	05.9			

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 [Version: 2.0.28 Built: 08/04/2015 12:42:48 PM Time: 09:50:31 AM]

ATTACHMENT #1

Because of the TABE grade content at each level, you may need to choose a different level of TABE for post-testing to make sure your student has the grade content room to move into the next level.

<u>TABE LEVEL</u>	<u>GRADE CONTENT</u>	<u>GRADE EQUIVALENT (GE)</u>
Literacy	0-1.9	<u>RANGE</u> 0-4.9
Easy	2.0-3.9	0-6.9
Moderate	4.0-5.9	0-9.9
Difficult	6.0-8.9	0.7-12.9
Advanced	9.0-12.9	1.1-12.9

Make sure your Testing Coordinators have the information that they need to

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

Isaias Gutierrez,

Petitioner,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
Case No.: 2010-CP-46-2611

ORDER FOR  
SUBSTITUTION OF COUNSEL

This matter came before me on motion of David C. Cook, newly retained counsel for Petitioner, to be substituted for Charles T. Brooks, previously appointed counsel for Petitioner.

NOW, THEREFORE, with the consent of Mr. Brooks,

I HEREBY ORDER, ADJUDGE, AND DECREE that David C. Cook be substituted for Charles T. Brooks as counsel for Petitioner.

AND, IT IS SO ORDERED.

York, South Carolina  
5/19, 2011

Johel Henriquez  
Judge

I so move:

[Signature]  
David Cook  
Cook Law Firm, L.L.C.  
P. O. Box 1449  
Lancaster, SC 29721  
(803) 285-4848 Office  
(803) 283-3680 FAX

I consent:

[Signature]  
Charles T. Brooks

FILED-RECEIVED  
2011 MAY 26 PM 3:14  
DAVID HAMILTON  
C.C.C.P.&G.S.  
YORK COUNTY, SC

Isaias D. Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

SOUTH CAROLINA SUPREME COURT  
CLERK OF COURTS OFFICE  
Daniel E. Shearouse, Clerk  
Post Office Box 11330  
Columbia, South Carolina  
29211-1330

RE: REQUEST FOR INFORMATION CONCERNING APPEAL  
Gutierrez v. State, #2010-CP-46-2611

Mr. Shearouse,

Please permit this correspondence to serve as a formal request for production and/or disclosure of information relating to a Notice of Appeal from an adverse Post-Conviction Relief ("PCR") proceeding.

On or about December 11, 2007, I was tried in the Court of General Sessions, under Indictment No. (s) #2007-GS-46-01261; 01262; 01263; 01264; 01265; and 01266. A timely direct appeal was filed and the Appellate Defense Office filed an Anders Brief associated with that case. For the record, please note that I am originally from Mexico and have a very limited comprehension of the English language. I have some one who is assisting me in these communications with this Office, or any other judicial department associated to these types of circumstances.

ATTACHMENT #4

In 2010 I filed a PCR application seeking collateral review of my claims in the Court of Common Pleas, York County, Sixteenth Judicial Circuit. It was my position that I was provided with incompetent trial counsel for several reasons. Sometime in 2011 the PCR court issued an Order of Dismissal relating to those matters raised during the PCR evidentiary hearing. At the time that the Order of Dismissal was executed and served, I had someone that was suppose to assist me with the Notice of Appeal to that adverse decision. I do not have a copy of that Order of Dismissal because the individual informed me it was required to accompany the Notice of Appeal that was to be served upon this Court.

Over three years has passed since the Notice of Appeal was suppose to be filed. I have not heard from the Appellate Defense Office, and that raises concerns because the Court Reporter who recorded the evidentiary proceedings only has to keep the tapes and/or transcribed records for three years. I am afraid that those records may no longer exist. I am writing this Court in search of any documents that may have been filed relating to the Notice of Appeal from the adverse PCR proceeding. At this Court's earliest convenience please provide me with any information and/or documents that are pertinent or relevant to the Notice of Appeal for Case No. #2010-CP-46-2611.

If I may be of any further assistance to this Court, in these matters, please do not hesitate to contact me. Thank you for this Court's time and attention to these matters.

June 19, 2015

Respectfully Submitted,

*ISAIAS GUTIERREZ*

rds/IDG

Isaias D. Gutierrez

Wando-B-229 #325762

cc: FILE

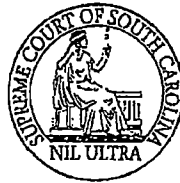
Lieber Correctional Institution

SHEAROUSE

Post Office Box 205

Ridgeville, South Carolina

29472-0205



## The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211  
TELEPHONE: (803) 734-1080  
FAX: (803) 734-1499

June 24, 2015

Mr. Isaias D. Gutierrez #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina 29472-0205

Re: *Gutierrez v. State*, 2010CP4602611

Dear Mr. Gutierrez:

This responds to your letter dated June 19, 2015. This office can find no record of a notice of appeal being filed with either this Court or the South Carolina Court of Appeals regarding *Gutierrez v. State*, 2010CP4602611. Since you were represented by counsel in this matter, I am forwarding a copy of your letter to your counsel.<sup>1</sup>

Very truly yours,

CLERK

cc: David C. Cook, Esquire (with copy of correspondence)  
Office of the Attorney General

<sup>1</sup> The public case index for York indicates that a notice of appeal may have been filed with the circuit court. If a notice of appeal has in fact been served in this case, a copy of that notice of appeal, a proof of service showing that the notice of appeal has been served on the counsel for the State and a copy of the order(s) to be challenged on appeal, along with a motion to allow the late filing of that notice of appeal, should be filed with this Court within fifteen (15) days of the date of this letter.

I do call your counsel's attention to Rule 71.1(g) of the South Carolina Rules of Civil Procedure which states, in part: "If an applicant represented by counsel desires to appeal, counsel shall serve and file a Notice of Appeal as required by Rule 243, SCACR, and shall continue to represent the applicant on appeal unless automatically relieved under Rule 602, SCACR, or allowed to withdraw under Rule 264, SCACR. If the applicant is indigent, counsel shall assist the applicant in obtaining representation by the Division of Appellate Defense of the Office of Indigent Defense."

Isaias D. Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

SOUTH CAROLINA OFFICE OF APPELLATE DEFENSE  
Robert Pachak, Esquire  
Chief Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina  
29211-1589

RE: REQUEST FOR INFORMATION CONCERNING APPEAL  
Gutierrez v. State, #2010-CP-46-2611

Mr. Pachak,

Please permit this correspondence to serve as a formal request for production and/or disclosure of information relating to a Notice of Appeal from an adverse Post-Conviction Relief ("PCR") proceeding.

Sometime in 2011 or 2012, I filed for an appeal in the South Carolina Supreme Court. I have come to be aware that once an Notice of appeal is served, this Office then begins to process it and order the transcript of the proceedings. My appeal arises from an adverse Post-Conviction Relief ("PCR") proceeding. I do not have a copy of the Order of Dismissal or any matter relevant thereto. Yet, it has been three years since I served that Notice of Appeal. At this Offices earliest convenience could you please contact me concerning this matter.

ATTACHMENT #6

If I may be of any further assistance to this Office, in these matters, please do not hesitate to contact me. Thank you for this Office's time and attention in these matters.

June 22, 2015

Respectfully Submitted,

Isaias Gutierrez

rds/IDG

Isaias D. Gutierrez  
Wando-B-229 #325762

cc: FILE  
PACHAK

Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

Isaias D. Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

CLERK OF COURTS OFFICE, YORK COUNTY  
FOR THE SIXTEENTH JUDICIAL CIRCUIT  
David Hamilton, Clerk  
Post Office Box 649  
York, South Carolina  
29745-0649

RE: REQUEST FOR PRODUCTION OF ORDER OF DISMISSAL  
Gutierrez v. State, #2010-CP-46-2611

Clerk,

Please permit this correspondence to serve as a formal request for production of documents relating to a denial from a Post-Conviction Relief (PCR) proceeding.

In 2011 or 2012, an evidentiary hearing had been convened and the Circuit Court Judge issued an Order of Dismissal denying the relief sought within the PCR application.

I do not believe that I was served a copy of this written Order of Dismissal. I am a Mexican citizen and have very limited communication and comprehension skills concerning the English language. I have someone who is assisting me in locating this Order. A careful examination of my records has disclosed that I do not have a copy. Furthermore, I am indigent and have no

funds to pay for any such copy. At this Office's earliest convenience please serve upon me a copy of the Order of Dismissal relating to Case no. #2010-CP-46-2611.

If I may be of any further assistance to this Office, in these matters, please do not hesitate to contact me. Thank you for this Office's time and attention in these matters.

June 25, 2015

Respectfully Submitted,

*ISAIAS GUTIERREZ*

rds/IDG

Isaias D. Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

cc: FILE  
CLERK

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF YORK

CASE NO: 2010CP4602611

IN THE COURT OF COMMON PLEAS

**Isaias Diaz Gutierrez vs. South Carolina State Of**

**CHECK ONE:**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Other:
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other:

**IT IS ORDERED AND ADJUDGED:**

See attached order;

Statement of Judgment by the Court:

**ORDER OF DISMISSAL**

Dated at York, South Carolina, this 11th day of August, 2011.

Court Reporter:

Lee S. Alford

**PRESIDING JUDGE - Lee S. Alford**

This judgment was entered on the 16th day of September, 2011, and a copy mailed first class this 16th day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Isaias Diaz Gutierrez 325762 Lieber Corr Inst  
PO Box 205, Ridgeville, SC 29472  
David C Cook Cook Law Firm, L.L.C. P O Box  
1449 Lancaster, SC 29721

Harrison Brant Office Of The Attorney General  
P O Box 11549 Columbia, SC 292111549

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**DAVID HAMILTON**

SCRPC APP-24/FORM 4

David Hamilton - Clerk of Court

19. State clearly the relief you seek in filing this application:  
 Due to circumstances argued within: (1) new evidentiary hearing; and/or (2) reconsideration of the prior proceedings; and/or (3) new trial due to no transcript of prior PCR proceedings.
20. Are you now under sentence from any other court that you have not challenged?  
Not Applicable

STATE OF SOUTH CAROLINA )  
 )  
 County of YORK )

VERIFICATION

I, Isaias Diaz Gutierrez #325762, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

\_\_\_\_\_  
 Isaias Diaz Gutierrez #325762

SWORN to and subscribed before me this \_\_\_\_\_  
 day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
 Notary Public (L.S.)

My Commission Expires: \_\_\_\_\_

FILED-RECEIVED

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

2011 SEP 15 AM 10:27

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

DAVID HAMILTON  
D.C.C. II, S.C.J.S.  
YORK COUNTY, SC

2010-CP-46-2611

Isaias D. Gutierrez, #325762,

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL**

This matter comes before the Court by way of Application for Post-Conviction Relief filed June 23, 2010. The Respondent filed its Return on December 27, 2010. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on June 1, 2011. The Applicant was present at the hearing and was represented by David C. Cook, Esquire. The Respondent was represented by Harrison D. Brant, Esquire, of the South Carolina Attorney General's Office.

The Applicant testified on his own behalf at the hearing.<sup>1</sup> The Applicant's trial counsel, Derek S. Chiarenza, Esquire, also testified at the hearing. This Court had before it the records of the York County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the Applicant's appellate records including the trial transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was

<sup>1</sup> The Applicant answered questions and testified through the use of a Spanish interpreter, Idolinda Mummert.

#1  
237

indicted at the April 2007 term of the Court of General Sessions for York County for three counts of Forgery (2007-GS-46-1261, -1264, -1265), Armed Robbery (2007-GS-46-1262), Murder (2007-GS-46-1263), and Burglary, first degree (2007-GS-46-1266). Derek S. Chiarenza, Esquire, represented him.

From December 10-13, 2007, the Applicant proceeded to a jury trial and was found guilty as indicted of all charges. The Honorable J. Derham Cole sentenced him to confinement for a period of five (5) years for each forgery conviction, thirty (30) years for armed robbery, and to life imprisonment for the murder and burglary convictions, sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Gutierrez, Op. No. 2009-UP-495 (S.C. Ct. App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a) Failure to request competency hearing to determine whether A understood situation or nature of charges
2. Ineffective assistance of appellate counsel
  - a) Failure to appeal sentence

At the commencement of the evidentiary hearing, counsel for the Applicant notified the Court the Applicant was withdrawing all prior claims, and proceeding only on the following allegations:

1. Ineffective assistance of counsel
  - a) Failure to tender offer by the State
  - b) Failure to challenge admissibility of statement during Jackson v. Denno hearing

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Further, through his testimony at the evidentiary hearing the Applicant effectively alleged that counsel's preparation for trial was deficient because counsel failed to adequately address issues involving the Applicant's language barrier.

#### SUMMARY OF TESTIMONY

The Applicant testified the State made him a plea offer for thirty (30) years. He stated trial counsel did advise him of the plea offer; however, counsel stated he had already turned it down. He testified counsel said he would take his case to trial because it was not that complicated, he had won harder cases in the past, and he could get him less than thirty years. He stated he wanted counsel to negotiate for less than thirty years, and would have taken less if such an offer was made; however, he stated he would have taken the thirty for sure. On cross-examination, the Applicant's answers were different. He stated he might have taken an offer for less than thirty if such an offer was made. He then admitted he would not have taken the thirty year offer.

The Applicant testified trial counsel failed to appear at his preliminary hearing. He stated he asked counsel to show him the paperwork on all of his charges, but counsel never gave them to him. He testified counsel also never showed him the State's discovery. He stated he asked counsel about the possibility of getting another attorney, but counsel said this was unnecessary because the case was not that complicated. On cross-examination, he testified he did not have any money to hire another lawyer, but his family might have been able to get the money for one. He stated he never asked the court for a new attorney.

The Applicant testified he had trouble communicating with trial counsel due to language barriers. He stated his first meeting with counsel lasted about ten minutes, and he did not understand any of the conversation. He stated he asked for an interpreter and counsel said he

#3  
UBA

would bring one, but counsel never did. On cross-examination, he testified he was able to understand a little bit of his conversations with counsel. He then stated he knew the charges he was facing because counsel advised him of this.

The Applicant stated he wanted to testify in his own defense at trial because witnesses were lying about him. He testified he did not, however, because counsel told him he would get nervous on cross-examination and would not be able to respond to questions. He testified counsel also told him not to testify because they would lose the last argument at trial. He stated he did not know any better and followed his attorney's advice.

The Applicant testified trial counsel failed to challenge the admissibility of his statement at the Jackson vs. Denno hearing. He stated an individual who interpreted for him at the jail testified he gave a statement indicating he was in a fight with the victim at the time of the crime. He denied saying this, and asserted the interpreter testified he said other things that he did not say. On cross-examination, he testified he was prejudiced by the interpreter's testimony because he never made these statements.

Trial counsel testified he was appointed to the Applicant's case. He testified he worked in the solicitor's office from 1993 until 1998, and since then he has been in private practice consisting of about eighty percent criminal law. He stated he met with the Applicant a couple of times, and his investigator did as well. He testified he did not have an interpreter present at meetings because the Applicant did not have trouble communicating and understood their conversations. He stated the Applicant never requested a translator, but he did have one present for final trial preparation, during which he had a long conversation with the Applicant. An interpreter was also present during trial. He testified he speaks some Spanish, and so does his investigator. He testified the Applicant asked and answered questions, and communicated well

#4  
200

with them. He stated the Applicant provided him with names of alibi witnesses and his version of the facts. He further stated the Applicant told him that his girlfriend gave him the checks to cash, and he also denied any involvement in the crimes. He testified he discussed all of the State's discovery with the Applicant, including all statements.

Trial counsel testified his defense strategy was to point to evidence indicating the involvement of the Applicant's girlfriend, and poke holes in the State's case by pointing to the lack of forensic evidence connecting the Applicant to the crime. He testified they did not have much choice of any other strategy to go with. He stated the Applicant gave input to help build this defense, and concurred with this strategy. He stated the Applicant specifically explained to him how his girlfriend took charge during their first attempt to purchase a car, and he was able to use this at trial to try and show that the girlfriend was the ringleader.

Trial counsel testified the State did make an offer of thirty years, and the offer was open for the entire length of trial; however, the Applicant told him he would not take thirty years. He further stated that if the Applicant wanted the deal, they would have accepted it. He testified he never told the Applicant not to take the plea because he has won harder cases in the past, and never turned down the offer without consulting him. He stated he is sure he tried to negotiate for less than thirty years. However, he stated he has worked with and against the solicitor's office for more than thirteen years, and based on the nature of the case and the fact the State had a testifying co-defendant, the minimum thirty year sentence for murder was the best offer the Applicant was going to get.

Trial counsel testified the Applicant never asked for another attorney, and he would have gladly stepped aside if he had. He stated he never discouraged the Applicant from seeking another attorney, and never told him to save his money and spend it in Mexico once they won.

#5  
28th

He stated he was not aware of any preliminary hearing that he missed, but there may have been one before he was appointed. He testified that, regardless, probable cause would have been found, and if not then a direct indictment would have been sought.

Trial counsel testified that the record is clear the Applicant was advised of his right to testify at trial. He stated he advised the Applicant of the advantages of disadvantages of him testifying. He stated he advised the Applicant that he would be questioned by a skilled prosecutor who would try to make him look bad, and if he denied things the jury knew as true then it would hurt his case. He stated he advised the Applicant that he would be questioned about why he left the jurisdiction after the crime and disappeared, and this would not have been beneficial to his case. He testified he likely advised the Applicant of the perceived advantage of having the last argument to the jury. He stated he might have advised the Applicant not to testify, but the decision was ultimately the Applicant's.

Trial counsel testified nothing prejudicial to the Applicant resulted from the Jackson v. Denno hearing. He testified the Applicant's statement as used at trial only included an admission to forgery; however, he was able to keep out the most prejudicial portion regarding a fight with the victim. He stated he felt the statement was going to come in because the Applicant was read his rights, and the statement as a whole was not otherwise inadmissible. He testified the State also had video evidence of the Applicant in a bank presenting the forged checks. He stated the Applicant never denied making the statement as he now claims.

#### 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their

# 6  
2010

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

### Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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*Failure to Tender Offer by the State*

The Applicant alleges trial counsel failed to communicate to him the State's thirty year plea offer before rejecting it. To prevail on a claim of ineffective assistance of counsel for an uncommunicated plea offer, an applicant must establish counsel failed to communicate a plea offer, and the offer was one the applicant would have accepted and benefited from. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009).

This Court finds the Applicant's claim counsel failed to communicate the thirty year plea offer is entirely without merit. This Court finds the testimony of counsel more credible on the issue than that of the Applicant. Counsel testified he not only communicated the offer, but the offer was open throughout the course of trial. Furthermore, the Applicant testified he wanted something less than what was offered, and would not have taken thirty years. This Court finds the Applicant made the decision to reject the thirty year plea offer. Therefore, this claim is denied and dismissed.

*Failure to Challenge Admissibility of Statement  
During Jackson v. Denno Hearing*

The Applicant alleges counsel should have objected to the admissibility of a statement he made to law enforcement which was addressed during a Jackson v. Denno hearing at trial. The record establishes the Applicant was interviewed at a detention center by detectives after he was apprehended. The detectives read him his rights from a standard form in English, the Applicant indicated he understood his rights, and the Applicant then initialed and signed the form. (Tr. 461-463). The Applicant stated he could read English, but could only write in Spanish. (Tr. 463-464). The detectives proceeded to ask him about his girlfriend and the murder victim, and the detectives only had to reword something periodically; the Applicant otherwise had no problems communicating in English. (Tr. 464-465).

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The Applicant answered questions, and detectives then typed up the Applicant's statement based on those answers. (Tr. 468-469). Detectives then had Robert Guzman, a jailer who speaks Spanish, read the typed statement back to the Applicant in Spanish.<sup>2</sup> (Tr. 468-469). The Applicant agreed with what was typed and signed the statement. The pertinent portions of the Applicant's statement are as follows:

I was asked about the death of Clarence Cubley by two detectives from the York County Sheriff's Office. I told them I didn't know anything about Mr. Cubley's death until I was in custody in Missouri and a white boy showed me a newspaper article. I never went to Mr. Cubley's trailer to rob him or assault him. I did know Mr. Cubley because we lived in the trailer park in Fort Mill for about two years. I was told Dana made a statement saying I was the one who killed Mr. Cubley. I think Dana made these statements because she was mad at me. I left Rock Hill about this time because police were coming by my trailer looking for me. I knew they had warrants on me because I didn't show up for court on a criminal domestic violence charge. I did not hit Dana, but she told the police that I did. I left town to get away from Dana and so I wouldn't go to jail.

Before I left town Dana gave me some checks that she said her grandfather gave her. She wanted me to cash the checks so she could buy a car. I did cash these checks. . . . and that was my signature on the back of the checks.

(Tr. 469-470).

Guzman then testified that when he asked the Applicant why he assaulted the victim, the Applicant responded that "he did not assault Mr. Cubley; that they had an argument and he left in a taxi." (Tr. 492-493). He testified he did not relay this portion of the Applicant's response to detectives because the conversation was fast and he was translating very quickly. (Tr. 493-494). The State agreed not to go into this oral statement regarding the argument with the victim because it was only discovered the week before, and it was not turned over to the defense. (Tr. 495-496).

Trial counsel moved to suppress the entire written statement based on the lack of an intelligent waiver of rights by the Applicant due to the language barrier and the fact he was not

<sup>2</sup> Guzman was initially brought in to help because the Applicant asked for someone who spoke Spanish to help him explain a small portion of the statement better. (Tr. 470-471).

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read his rights in Spanish, and also based on the fact the Applicant requested that the Mexican consulate be notified of his arrest, but this was only complied with after the interview. (Tr. 498-499). The trial court denied the motion, and found the statement was voluntarily given after the Applicant knowingly and intelligently waived his rights. In the presence of the jury, the entire written statement was read into the record. (Tr. 525-526). As agreed by the State, the oral statement regarding the argument with the victim was never presented before the jury.

This Court finds the Applicant's claim to be without merit. The record clearly establishes trial counsel moved to suppress the statement at the conclusion of the hearing on two separate grounds, but his motion was denied. Trial counsel's determination the statement would have been admissible over any further objection is a reasonable conclusion. As the trial court found, the Applicant was advised of his Miranda rights, waived those rights, and voluntarily gave a statement. Accordingly, this claim is denied and dismissed.

*Inadequate Trial Preparation Due to Language Barriers*

The Applicant testified at the hearing that counsel was deficient in his preparation and handling of trial due to a language barrier, and testified counsel failed to bring an interpreter to meetings despite his requests for one. The Applicant initially testified he did not understand anything that was said in his first meeting with counsel. However, he also testified to having numerous detailed discussions with counsel concerning, among other things, the thirty year plea offer, the possibility of obtaining another attorney, and the charges he was facing. Assuming all of these discussions took place, the Applicant was clearly able to understand the discussions without the help of an interpreter.<sup>3</sup>

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<sup>3</sup> The Court observed the Applicant throughout the hearing and noted that when his attorney or the Assistant Attorney General asked him questions, some of which were not short or simple, he started answering before any translation by the interpreter. He clearly understood their questions in English even though he chose to answer in Spanish.

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Further, trial counsel testified he and/or his investigator met with the Applicant several times, and they both speak a little Spanish. He testified that communication with the Applicant was never a problem.<sup>4</sup> He testified the Applicant never requested a translator, but one was used in final preparation for trial. He testified the Applicant was able to provide him with names of alibi witnesses and his version of the facts. He further testified the Applicant agreed with his trial strategy, and provided input to help build the defense.

This Court finds no merit to this issue. Based on the above testimony, this Court finds counsel's testimony on the issue more credible than that of the Applicant. This Court finds the Applicant was able to sufficiently communicate with counsel. This Court also finds the Applicant did not request an interpreter, but one was involved in final preparation for trial. Furthermore, this Court finds the Applicant failed to present any evidence to show how the alleged language barrier affected the outcome of his case or his decisions. Therefore, this Court finds no prejudice to the Applicant with regards to the preparation and trial of his case due to language limitations. This claim is denied and dismissed.

#### *Miscellaneous Issues Raised at the Hearing*

The Applicant testified to several other issues that were not specifically alleged as claims for relief. With regards to each of these issues, the Court finds the testimony of trial counsel more credible than that of the Applicant. Specifically, the Applicant indicated in his testimony that he expressed to counsel some desire to have him substituted with retained counsel. Counsel's testimony refuted this claim entirely, and stated he would have gladly stepped aside if that's what the Applicant wanted. Moreover, the Applicant testified he did not have any money for a lawyer, but his family *might* have been able to get money for one. This Court finds the

<sup>4</sup> The trial record further establishes the Applicant could sufficiently communicate in English with little problem. At least three witnesses testified to this. See Tr. 214-215, 462-465, 477-488.

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Applicant made no effort to hire an attorney to replace trial counsel, nor does it appear the Applicant even had the means to. Further, this Court finds trial counsel is a very experienced criminal defense lawyer whose practice area is primarily criminal defense. To the extent the Applicant raised this issue in his testimony, the allegation is denied and dismissed as being without merit.

The Applicant also testified that he wanted to testify at trial, but he remained silent based on counsel's advice. He testified counsel told him he would get too nervous to respond to questions, and also told him not to testify because they would lose the right to argue last to the jury. To the contrary, this Court finds counsel merely rendered sound advice for the Applicant to consider in making his decision of whether to testify. Counsel testified he advised the Applicant that he would be questioned by a skilled prosecutor who would try to make him look bad in front of the jury, and who would question him on why he fled the jurisdiction for so long. He testified he also advised the Applicant that if he decided to testify, they would in fact lose the right to argue last to the jury. Further, he testified the Applicant ultimately made the decision not to testify. This Court agrees the decision not to testify was made by the Applicant. Therefore, to the extent the Applicant's testimony raised allegations as to this issue, it is denied and dismissed.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence trial counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, the

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allegation of ineffective assistance of counsel is denied.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

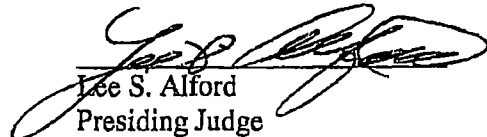
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

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**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 17<sup>th</sup> day of August, 2011.

  
 Lee S. Alford  
 Presiding Judge  
 Sixteenth Judicial Circuit

York, South Carolina.

#14  
ZBB

## COOK LAW FIRM, L.L.C.

DAVID C. COOK, ESQ.

LAW OFFICES AT  
300 NORTH WHITE STREET  
P.O. BOX 1449  
LANCASTER, SOUTH CAROLINA 29721

July 8, 2015

Isaias D. Gutierrez, # 325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, SC 29742-0205

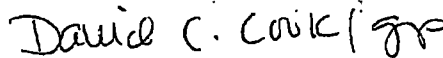
VIA US MAIL

Re: Gutierrez v. State

Dear Mr. Gutierrez:

I received a letter from the Appellant Clerk of Court that you wrote inquiring as to whether I had filed an appeal in your Post Conviction Relief case. I did not file an appeal, however, I want to direct you to a letter that I mailed to you on October 10, 2011 that explained to you that I would not be filing an appeal. Furthermore, the letter details how you could file an appeal on your behalf. I do not remember you asking me to file an appeal after I explained that I did think it would have merit, nevertheless I sent you a letter explaining the procedure as a precaution. I hope this information assists you in the matter and I wish you the best of luck.

Sincerely,



David C. Cook, Esq.

Encl.

## COOK LAW FIRM, L.L.C.

DAVID C. COOK, ESQ.  
ROSALEE H. DAVIS, ESQ.

300 NORTH WHITE STREET  
P.O. BOX 1449 • LANCASTER, SC 29721

1722 YORK HWY  
YORK, SC 29745

October 10, 2011

Lieber Correctional Institution  
Isaias Gutierrez SCDC # 00325762  
Post Office Box 205  
Ridgeville, SC 29472

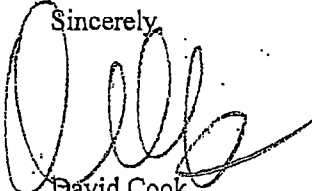
COPY

VIA US MAIL

Dear Mr. Gutierrez:

Please find enclosed the original Order of Dismissal, your handwritten notes that you forwarded to our office and a SAMPLE copy of a Notice of Appeal. To be very clear, Cook Law Firm, LLC is not representing you in the Post Conviction Relief Appeal. I do not believe that your case for an appeal has very good standings. Moreover, our contract was for me to represent you on the case-in-chief, and has specific language in it stating that I will not represent you on an appeal. Please find a copy of the contract enclosed. If you would like to contact the Office of Indigent Defense to see if they would be available to help you with this case, you can contact them at 803-734-1343. I have already contacted them and they said they would not take your case if I didn't think it has merit. I don't think it has merit.

If you want to do this appeal yourself, you must file a Notice of Appeal with the Clerk of Common Pleas in York County at David Hamilton, York County Clerk of Court, P. O. Box 649, York, SC 29745 and also with the Court of Appeals at Calhoun Building, 1015 Sumter Street, Columbia, SC 29201. This is the one page sample I have included. There are other things you must do later on like filing a brief and getting the transcript and record of appeal to appellate court. Good luck in your endeavors. Thank you for your time and consideration.

Sincerely,  
  
David Cook

Encl.: Order of Dismissal  
Handwritten Notes  
Sample Copy of Notice of Appeal

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Cook Law Firm, L.L.C.  
Retainer and Fee Agreement  
300 N. White St.  
P.O. Box 1449  
Lancaster, South Carolina 29721  
Ph. 803-285-4848  
Fax 803-283-3880

FOR

Ruben Gutierrez  
ISAIS Diaz Gutierrez

COOK

I, \_\_\_\_\_ (hereinafter referred to as "Client") do hereby retain the law firm of Cook Law Firm, L.L.C. (hereinafter referred to as "Attorneys") as my attorneys to represent me in the following criminal action(s):

PCR CASE

The attorney's fee for this charge is: \$ 5000.00 to pay \$ 3500.00 down and \$ 2000.00 in payments of \$ 500.00 per month total balance has to be paid before court date.

I realize that representation by Attorneys for the above referenced charge(s) will not begin until Attorneys have received the full amount for representation listed above. I also realize that at no time will any money be returned to me for any reason, including termination of Attorneys for convenience. By signing this contract, I am entering into an attorney-client relationship with Attorneys, and all conversations and correspondences will be protected completely from disclosure.

I further realize that Attorneys represent me only for the charges listed above and do not represent me for any other legal actions. Moreover, the representation for the above-referenced charges will end upon disposition of this case at the trial level. In no way will Attorneys represent me for any appeal related to the charges listed above, unless I enter a new fee agreement with Attorneys for such appeal.

I acknowledge, by execution hereof, that the foregoing contractual agreement has been fully explained to me, that I acknowledge receipt of a copy of this Agreement; and that I acknowledge and understand that this is a binding contract between myself and Attorneys and/or the law firm of Cook Law Firm, L.L.C.

Sanor Cook ha explicado este contrato en Espanol  
( Mr. Cook has explained this contract in Spanish)

Dated at Rock Hill, South Carolina, this 12<sup>th</sup> day of Feb., 2011.

Ruben Gutierrez  
(CLIENT SIGNATURE)

[Signature] ESQ.  
David C. Cook

FOR ISAIS Diaz Gutierrez

ATTACHMENT #11

Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

THE CHIARENZA LAW FIRM, P.A.  
Derek S. Chiarenza, Esquire  
Post Office Box 340  
Lexington, South Carolina  
29071-0340

RE: FORMAL REQUEST FOR PRODUCTION OF DOCUMENTS  
State v. Gutierrez, #2007-GS-46-1261; 1262; 1263; 1264; 1265;  
and 1265

Mr. Chiarenza,

Please permit this correspondence to serve as a formal request for production of documents and/or information relating to this Firm's past representation, pursuant to Rule 1.16(d), Rules of Professional Conduct, (See Rule 407, of the South Carolina Appellate Court Rules, SCACR).

Rule 1.16(d), provides in pertinent part: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled ... ."

These types of requests are a common practice which permit the client an opportunity in which have the case/manual file disclosed for their inspection. The matters sought are

ATTACHMENT #12

relevant to the investigation, preparation and defense of my rights and issues in a criminal arena. This request is further argued to be a proper vehicle, and mechanism, in which to seek production of the requested documents and materials. This formal request is not a means to cause undue delay, harass, nor waste the time and resources of this Firm. It is my position that this request is an effective, and economic, means in which to provide me a copy of the case/manual file for my inspection.

Please further take notice that I would respectfully make demand that this Firm, within thirty (30) days exclusive the date of service, comply and/or object to this formal request. Further note that, if, this Firm should opt to object to any portion of this formal request that a written correspondence stating with specificity as to this Firm's reason[s] and/or objection[s] for such objection[s] be served upon me. Please produce the following materials, documents and/or information:

1). Please disclose and produce any and all documents, or copies thereof, within this Firm's actual and/or constructive possession, relating to or otherwise pertinent to the case of: State v. Gutierrez, #2007-GS-46-1261; 1262; 1263; 1264; 1265; and 1266; described herein as, Arrest Warrants, Indictments, Search Warrants, Returns, Affidavits of Service, statements, Affidavits, interview notes/ transcripts, investigative notes/reports, DNA analysis/reports, SLED reports, finger print analysis/reports, motions (to include, but not limited to, pre-trial, post-trial, suppression, Rule 5, Brady, discovery, quash, in limine, etc.), plats, maps, books, ledger pages, sketches, drawings, composites, notes, handwritten notes, handwriting analysis/reports, Gun Shot Residue (GSR) analysis/reports, audio/video recordings, coroner reports, pathologist reports, serological/toxicological reports/analysis,

medical records, 911 records, EMS reports, incident reports, supplemental incident reports, photographic line ups, photographs, waiver forms (search, statement, etc.), NCIC reports (to include, but not limited to, witnesses, jurors, co-defendants), witness interview notes, and any other matters relevant to the above captioned case.

As this Firm is well aware, I am of Mexican descent and have no adequate comprehension of the English language; and do not understand the legal system of this State or Country. At this time I have sought out an individual to assist me in asserting my rights in the courts. I would request that, at this Firm's earliest convenience it supply me with a copy of the entire case/manual file relating to this case action number(s) and this Firm's prior representation.

If I may be of any further assistance to this Firm, in these matters, please do not hesitate to contact me. Thank you for this Firm's time and attention to these matters. I look forward to hearing from this Firm in the very near future.

July 10, 2015

Respectfully Submitted,

rds/IDG

cc: FILE  
CHIARENZA

*Isaias Gutierrez*

Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

ATTACHMENT #12

**CHIARENZA LAW FIRM**

P.O. Box 340  
Lexington, SC 29071

COLUMBIA, SOUTH CAROLINA  
(803) 727-2603

DSClawyer@gmail.com

ROCK HILL, SOUTH CAROLINA  
(803) 366-6050

August 17, 2015

Isaias Diaz Gutierrez  
Wando-B-229 #325762 Lieber C.I.  
PO Box 205  
Ridgeville SC 29472-0205

Mr. Diaz Gutierrez,

I am in receipt of your "FORMAL REQUEST FOR PRODUCTION OF DOCUMENTS". Please be advised that I am no longer in possession of any file materials or any documents related to your case. All of my file materials were transferred to the Office of Appellate Defense at the time of your appeal in 2009 I believe.

You may have some success seeking documents related to your case from the York County Solicitor's Office who prosecuted you. It is my understanding that they maintain stored files from their closed cases. You may also possibly obtain documents related to your case from the York County Clerk of Court and/or the Office of Appellate Defense. I wish you success in your efforts.

Sincerely,



Derek S. Chiarenza

Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

THE COOK LAW FIRM, P.A.  
David C. Cook, Esquire  
300 North White Street  
Lancaster, South Carolina  
29720

RE: FORMAL REQUEST FOR PRODUCTION OF DOCUMENTS  
Gutierrez v. State, #2010-CP-46-2611

Mr. Cook,

Please permit this correspondence to serve as a formal request for production of documents and/or information relating to this Firm's past representation, pursuant to Rule 1.16(d), Rules of Professional Conduct, (See Rule 407, of the South Carolina Appellate Court Rules, SCACR). As this Firm should be aware, on June 1, 2011, it represented me in a Post-Conviction Relief (PCR) proceeding which ended in an adverse decision.

Rule 1.16(d), provides in pertinent part: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled ... ."

These types of requests are a common practice which permit the client an opportunity in which have the case/manual file disclosed for their inspection. The matters sought are relevant to the investigation, preparation and defense of my rights and issues in a PCR arena. This request is further argued to be a proper vehicle, and mechanism, in which to seek production of the requested documents and materials. This formal request is not a means to cause undue delay, harass, nor waste the time and resources of this Firm. It is my position that this request is an effective, and economic, means in which to provide me a copy of the case/manual file for my inspection.

Please further take notice that I would respectfully make demand that this Firm, within thirty (30) days exclusive the date of service, comply and/or object to this formal request. Further note that, if, this Firm should opt to object to any portion of this formal request that a written correspondence stating with specificity as to this Firm's reason[s] and/or objection[s] for such objection[s] be served upon me. Please produce the following materials, documents and/or information:

1). Please disclose and produce any and all documents, or copies thereof, within this Firm's actual and/or constructive possession, relating to or otherwise pertinent to the case of: Gutierrez v. State, #2010-CP-46-2611; described herein as, case/manual file amassed by trial counsel (#2007-GS-46-1261; 1262; 1263; 1264; 1265; and 1266), PCR application, amendments, pre-trial/post-trial pleadings, discovery, Rule 5, Brady, client/attorney contracts, fee receipts, interview notes, notes, handwritten notes, investigative reports/notes, transcripts, preliminary hearing proceeding records, motions, photographs, medical reports,

forensic testing reports, and any other materials, documents and/or information that may be related to the above captioned case.

On one further note, I would inquire as to why this Firm did not file a Notice of Appeal with the South Carolina Supreme Court relating to the adverse decision, with prejudice, by the Honorable Lee S. Alford, Circuit Court Judge, Sixteenth Judicial Circuit? It was my position, at the time of the PCR judge's decision, to appeal these matters. This forms the opinion that this Firm has effectively waived any right I had to appeal, without benefit of an intelligent or knowing waiver and relinquishment of that right by me, who is the aggrieved party in that matter.

As this Firm is well aware, I am of Mexican descent and have no adequate comprehension of the English language; and do not understand the legal system of this State or Country. At this time I have sought out a trained Paralegal to assist me in asserting my rights in the courts. I would request that, at this Firm's earliest convenience it supply me with a copy of the entire case/manual file relating to this case action number and this Firm's prior representation.

If I may be of any further assistance to this Firm, in these matters, please do not hesitate to contact me. Thank you for this Firm's time and attention to these matters. I look forward to hearing from this Firm in the very near future.

July 10, 2015

rds/IDG

cc: FILE  
COOK

Respectfully Submitted,

*Isaias Gutierrez*

Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0205

## COOK LAW FIRM, L.L.C.

DAVID C. COOK, ESQ.

LAW OFFICES AT  
300 NORTH WHITE STREET  
P.O. BOX 1449  
LANCASTER, SOUTH CAROLINA 29721

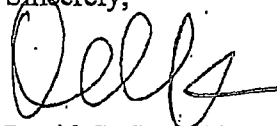
July 28, 2015

Lieber Correctional Institution  
Isaias Gutierrez SCDC # 00325762  
Post Office Box 205  
Ridgeville, SC 29472

Dear Mr. Gutierrez:

In response to your last letter of July 10, 2015, please find enclosed the materials you requested. I want to remind you that I sent a letter on July 8 wherein I replied with the most relevant of the materials from my file, which is a letter from October 10, 2011 wherein I clearly explained to you that it was up to you to file your appeal. I also explained that to you in Spanish at the hearing. I showed you all of the procedures necessary. I am positive that I have complied with all of the ethical rules that you cited and I wish you the best of luck in your endeavors.

Sincerely,



David C. Cook, Esq.

STATE OF SOUTH CAROLINA  
COUNTY OF YORK  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NO: 2010CP4602611

**Isaias Diaz Gutierrez vs. South Carolina State Of**

**CHECK ONE:**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRCP;
  - Rule 41(a), SCRCP (Vol. Nonsuit);
  - Rule 43(k), SCRCP (Settled);
  - Other:
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRCP;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other:

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

**ORDER OF DISMISSAL**

Dated at York, South Carolina, this 11th day of August, 2011.

Court Reporter:

*Lee S. Alford*

**PRESIDING JUDGE - Lee S. Alford**

This judgment was entered on the 16th day of September, 2011, and a copy mailed first class this 16th day of September, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Isaias Diaz Gutierrez 325762 Lieber Corr Inst  
PO Box 205, Ridgeville, SC 29472  
David C Cook Cook Law Firm, L.L.C. P O Box  
1449 Lancaster, SC 29721

Harrison Brant Office Of The Attorney General  
P O Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

**COOK LAW FIRM**

**DAVID HAMILTON**

SEP 19 2011

David Hamilton - Clerk of Court

BY: \_\_\_\_\_

ATTACHMENT #16

FILED-RECEIVED

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS  
2011 SEP 16 AM 10:27 SIXTEENTH JUDICIAL CIRCUIT

DAVID HAMILTON  
C. C. P. CLERK  
YORK COUNTY, SC

2010-CP-46-2611

Isaias D. Gutierrez, #325762,

Applicant,

v.

State of South Carolina,

Respondent.

*Granting PCR*

**ORDER OF DISMISSAL**

This matter comes before the Court by way of Application for Post-Conviction Relief filed June 23, 2010. The Respondent filed its Return on December 27, 2010. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on June 1, 2011. The Applicant was present at the hearing and was represented by David C. Cook, Esquire. The Respondent was represented by Harrison D. Brant, Esquire, of the South Carolina Attorney General's Office.

The Applicant testified on his own behalf at the hearing.<sup>1</sup> The Applicant's trial counsel, Derek S. Chiarenza, Esquire, also testified at the hearing. This Court had before it the records of the York County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the Applicant's appellate records including the trial transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was

<sup>1</sup> The Applicant answered questions and testified through the use of a Spanish interpreter, Idolinda Mummert.

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indicted at the April 2007 term of the Court of General Sessions for York County for three counts of Forgery (2007-GS-46-1261, -1264, -1265), Armed Robbery (2007-GS-46-1262), Murder (2007-GS-46-1263), and Burglary, first degree (2007-GS-46-1266). Derek S. Chiarenza, Esquire, represented him.

From December 10-13, 2007, the Applicant proceeded to a jury trial and was found guilty as indicted of all charges. The Honorable J. Derham Cole sentenced him to confinement for a period of five (5) years for each forgery conviction, thirty (30) years for armed robbery, and to life imprisonment for the murder and burglary convictions, sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Gutierrez, Op. No. 2009-UP-495 (S.C. Ct. App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a) Failure to request competency hearing to determine whether A understood situation or nature of charges
2. Ineffective assistance of appellate counsel
  - a) Failure to appeal sentence

At the commencement of the evidentiary hearing, counsel for the Applicant notified the Court the Applicant was withdrawing all prior claims, and proceeding only on the following allegations:

1. Ineffective assistance of counsel
  - a) Failure to tender offer by the State
  - b) Failure to challenge admissibility of statement during Jackson v. Denno hearing

Further, through his testimony at the evidentiary hearing the Applicant effectively alleged that counsel's preparation for trial was deficient because counsel failed to adequately address issues involving the Applicant's language barrier.

#### SUMMARY OF TESTIMONY

The Applicant testified the State made him a plea offer for thirty (30) years. He stated trial counsel did advise him of the plea offer; however, counsel stated he had already turned it down. He testified counsel said he would take his case to trial because it was not that complicated, he had won harder cases in the past, and he could get him less than thirty years. He stated he wanted counsel to negotiate for less than thirty years, and would have taken less if such an offer was made; however, he stated he would have taken the thirty for sure. On cross-examination, the Applicant's answers were different. He stated he might have taken an offer for less than thirty if such an offer was made. He then admitted he would not have taken the thirty year offer.

The Applicant testified trial counsel failed to appear at his preliminary hearing. He stated he asked counsel to show him the paperwork on all of his charges, but counsel never gave them to him. He testified counsel also never showed him the State's discovery. He stated he asked counsel about the possibility of getting another attorney, but counsel said this was unnecessary because the case was not that complicated. On cross-examination, he testified he did not have any money to hire another lawyer, but his family might have been able to get the money for one. He stated he never asked the court for a new attorney.

The Applicant testified he had trouble communicating with trial counsel due to language barriers. He stated his first meeting with counsel lasted about ten minutes, and he did not understand any of the conversation. He stated he asked for an interpreter and counsel said he

would bring one, but counsel never did. On cross-examination, he testified he was able to understand a little bit of his conversations with counsel. He then stated he knew the charges he was facing because counsel advised him of this.

The Applicant stated he wanted to testify in his own defense at trial because witnesses were lying about him. He testified he did not, however, because counsel told him he would get nervous on cross-examination and would not be able to respond to questions. He testified counsel also told him not to testify because they would lose the last argument at trial. He stated he did not know any better and followed his attorney's advice.

The Applicant testified trial counsel failed to challenge the admissibility of his statement at the Jackson v. Denno hearing. He stated an individual who interpreted for him at the jail testified he gave a statement indicating he was in a fight with the victim at the time of the crime. He denied saying this, and asserted the interpreter testified he said other things that he did not say. On cross-examination, he testified he was prejudiced by the interpreter's testimony because he never made these statements.

Trial counsel testified he was appointed to the Applicant's case. He testified he worked in the solicitor's office from 1993 until 1998, and since then he has been in private practice consisting of about eighty percent criminal law. He stated he met with the Applicant a couple of times, and his investigator did as well. He testified he did not have an interpreter present at meetings because the Applicant did not have trouble communicating and understood their conversations. He stated the Applicant never requested a translator, but he did have one present for final trial preparation, during which he had a long conversation with the Applicant. An interpreter was also present during trial. He testified he speaks some Spanish, and so does his investigator. He testified the Applicant asked and answered questions, and communicated well

with them. He stated the Applicant provided him with names of alibi witnesses and his version of the facts. He further stated the Applicant told him that his girlfriend gave him the checks to cash, and he also denied any involvement in the crimes. He testified he discussed all of the State's discovery with the Applicant, including all statements.

Trial counsel testified his defense strategy was to point to evidence indicating the involvement of the Applicant's girlfriend, and poke holes in the State's case by pointing to the lack of forensic evidence connecting the Applicant to the crime. He testified they did not have much choice of any other strategy to go with. He stated the Applicant gave input to help build this defense, and concurred with this strategy. He stated the Applicant specifically explained to him how his girlfriend took charge during their first attempt to purchase a car, and he was able to use this at trial to try and show that the girlfriend was the ringleader.

Trial counsel testified the State did make an offer of thirty years, and the offer was open for the entire length of trial; however, the Applicant told him he would not take thirty years. He further stated that if the Applicant wanted the deal, they would have accepted it. He testified he never told the Applicant not to take the plea because he has won harder cases in the past, and never turned down the offer without consulting him. He stated he is sure he tried to negotiate for less than thirty years. However, he stated he has worked with and against the solicitor's office for more than thirteen years, and based on the nature of the case and the fact the State had a testifying co-defendant, the minimum thirty year sentence for murder was the best offer the Applicant was going to get.

Trial counsel testified the Applicant never asked for another attorney, and he would have gladly stepped aside if he had. He stated he never discouraged the Applicant from seeking another attorney, and never told him to save his money and spend it in Mexico once they won.

He stated he was not aware of any preliminary hearing that he missed, but there may have been one before he was appointed. He testified that, regardless, probable cause would have been found, and if not then a direct indictment would have been sought.

Trial counsel testified that the record is clear the Applicant was advised of his right to testify at trial. He stated he advised the Applicant of the advantages of disadvantages of him testifying. He stated he advised the Applicant that he would be questioned by a skilled prosecutor who would try to make him look bad, and if he denied things the jury knew as true then it would hurt his case. He stated he advised the Applicant that he would be questioned about why he left the jurisdiction after the crime and disappeared, and this would not have been beneficial to his case. He testified he likely advised the Applicant of the perceived advantage of having the last argument to the jury. He stated he might have advised the Applicant not to testify, but the decision was ultimately the Applicant's.

Trial counsel testified nothing prejudicial to the Applicant resulted from the Jackson v. Denno hearing. He testified the Applicant's statement as used at trial only included an admission to forgery; however, he was able to keep out the most prejudicial portion regarding a fight with the victim. He stated he felt the statement was going to come in because the Applicant was read his rights, and the statement as a whole was not otherwise inadmissible. He testified the State also had video evidence of the Applicant in a bank presenting the forged checks. He stated the Applicant never denied making the statement as he now claims.

#### 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their

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

### Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

*Failure to Tender Offer by the State*

The Applicant alleges trial counsel failed to communicate to him the State's thirty year plea offer before rejecting it. To prevail on a claim of ineffective assistance of counsel for an uncommunicated plea offer, an applicant must establish counsel failed to communicate a plea offer, and the offer was one the applicant would have accepted and benefited from. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009).

This Court finds the Applicant's claim counsel failed to communicate the thirty year plea offer is entirely without merit. This Court finds the testimony of counsel more credible on the issue than that of the Applicant. Counsel testified he not only communicated the offer, but the offer was open throughout the course of trial. Furthermore, the Applicant testified he wanted something less than what was offered, and would not have taken thirty years. This Court finds the Applicant made the decision to reject the thirty year plea offer. Therefore, this claim is denied and dismissed.

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*Failure to Challenge Admissibility of Statement  
During Jackson v. Denno Hearing*

The Applicant alleges counsel should have objected to the admissibility of a statement he made to law enforcement which was addressed during a Jackson v. Denno hearing at trial. The record establishes the Applicant was interviewed at a detention center by detectives after he was apprehended. The detectives read him his rights from a standard form in English, the Applicant indicated he understood his rights, and the Applicant then initialed and signed the form. (Tr. 461-463). The Applicant stated he could read English, but could only write in Spanish. (Tr. 463-464). The detectives proceeded to ask him about his girlfriend and the murder victim, and the detectives only had to reword something periodically; the Applicant otherwise had no problems communicating in English. (Tr. 464-465).

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The Applicant answered questions, and detectives then typed up the Applicant's statement based on those answers. (Tr. 468-469). Detectives then had Robert Guzman, a jailer who speaks Spanish, read the typed statement back to the Applicant in Spanish.<sup>2</sup> (Tr. 468-469). The Applicant agreed with what was typed and signed the statement. The pertinent portions of the Applicant's statement are as follows:

I was asked about the death of Clarence Cubley by two detectives from the York County Sheriff's Office. I told them I didn't know anything about Mr. Cubley's death until I was in custody in Missouri and a white boy showed me a newspaper article. I never went to Mr. Cubley's trailer to rob him or assault him. I did know Mr. Cubley because we lived in the trailer park in Fort Mill for about two years. I was told Dana made a statement saying I was the one who killed Mr. Cubley. I think Dana made these statements because she was mad at me. I left Rock Hill about this time because police were coming by my trailer looking for me. I knew they had warrants on me because I didn't show up for court on a criminal domestic violence charge. I did not hit Dana, but she told the police that I did. I left town to get away from Dana and so I wouldn't go to jail.

Before I left town Dana gave me some checks that she said her grandfather gave her. She wanted me to cash the checks so she could buy a car. I did cash these checks. . . . and that was my signature on the back of the checks.

(Tr. 469-470).

Guzman then testified that when he asked the Applicant why he assaulted the victim, the Applicant responded that "he did not assault Mr. Cubley; that they had an argument and he left in a taxi." (Tr. 492-493). He testified he did not relay this portion of the Applicant's response to detectives because the conversation was fast and he was translating very quickly. (Tr. 493-494). The State agreed not to go into this oral statement regarding the argument with the victim because it was only discovered the week before, and it was not turned over to the defense. (Tr. 495-496).

Trial counsel moved to suppress the entire written statement based on the lack of an intelligent waiver of rights by the Applicant due to the language barrier and the fact he was not

<sup>2</sup> Guzman was initially brought in to help because the Applicant asked for someone who spoke Spanish to help him explain a small portion of the statement better. (Tr. 470-471).

read his rights in Spanish, and also based on the fact the Applicant requested that the Mexican consulate be notified of his arrest, but this was only complied with after the interview. (Tr. 498-499). The trial court denied the motion, and found the statement was voluntarily given after the Applicant knowingly and intelligently waived his rights. In the presence of the jury, the entire written statement was read into the record. (Tr. 525-526). As agreed by the State, the oral statement regarding the argument with the victim was never presented before the jury.

This Court finds the Applicant's claim to be without merit. The record clearly establishes trial counsel moved to suppress the statement at the conclusion of the hearing on two separate grounds, but his motion was denied. Trial counsel's determination the statement would have been admissible over any further objection is a reasonable conclusion. As the trial court found, the Applicant was advised of his Miranda rights, waived those rights, and voluntarily gave a statement. Accordingly, this claim is denied and dismissed.

*Inadequate Trial Preparation Due to Language Barriers*

The Applicant testified at the hearing that counsel was deficient in his preparation and handling of trial due to a language barrier, and testified counsel failed to bring an interpreter to meetings despite his requests for one. The Applicant initially testified he did not understand anything that was said in his first meeting with counsel. However, he also testified to having numerous detailed discussions with counsel concerning, among other things, the thirty year plea offer, the possibility of obtaining another attorney, and the charges he was facing. Assuming all of these discussions took place, the Applicant was clearly able to understand the discussions without the help of an interpreter.<sup>3</sup>

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<sup>3</sup> The Court observed the Applicant throughout the hearing and noted that when his attorney or the Assistant Attorney General asked him questions, some of which were not short or simple, he started answering before any translation by the interpreter. He clearly understood their questions in English even though he chose to answer in Spanish.

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Further, trial counsel testified he and/or his investigator met with the Applicant several times, and they both speak a little Spanish. He testified that communication with the Applicant was never a problem.<sup>4</sup> He testified the Applicant never requested a translator, but one was used in final preparation for trial. He testified the Applicant was able to provide him with names of alibi witnesses and his version of the facts. He further testified the Applicant agreed with his trial strategy, and provided input to help build the defense.

This Court finds no merit to this issue. Based on the above testimony, this Court finds counsel's testimony on the issue more credible than that of the Applicant. This Court finds the Applicant was able to sufficiently communicate with counsel. This Court also finds the Applicant did not request an interpreter, but one was involved in final preparation for trial. Furthermore, this Court finds the Applicant failed to present any evidence to show how the alleged language barrier affected the outcome of his case or his decisions. Therefore, this Court finds no prejudice to the Applicant with regards to the preparation and trial of his case due to language limitations. This claim is denied and dismissed.

*Miscellaneous Issues Raised at the Hearing*

The Applicant testified to several other issues that were not specifically alleged as claims for relief. With regards to each of these issues, the Court finds the testimony of trial counsel more credible than that of the Applicant. Specifically, the Applicant indicated in his testimony that he expressed to counsel some desire to have him substituted with retained counsel. Counsel's testimony refuted this claim entirely, and stated he would have gladly stepped aside if that's what the Applicant wanted. Moreover, the Applicant testified he did not have any money for a lawyer, but his family *might* have been able to get money for one. This Court finds the

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<sup>4</sup> The trial record further establishes the Applicant could sufficiently communicate in English with little problem. At least three witnesses testified to this. See Tr. 214-215, 462-465, 477-488.

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Applicant made no effort to hire an attorney to replace trial counsel, nor does it appear the Applicant even had the means to. Further, this Court finds trial counsel is a very experienced criminal defense lawyer whose practice area is primarily criminal defense. To the extent the Applicant raised this issue in his testimony, the allegation is denied and dismissed as being without merit.

The Applicant also testified that he wanted to testify at trial, but he remained silent based on counsel's advice. He testified counsel told him he would get too nervous to respond to questions, and also told him not to testify because they would lose the right to argue last to the jury. To the contrary, this Court finds counsel merely rendered sound advice for the Applicant to consider in making his decision of whether to testify. Counsel testified he advised the Applicant that he would be questioned by a skilled prosecutor who would try to make him look bad in front of the jury, and who would question him on why he fled the jurisdiction for so long. He testified he also advised the Applicant that if he decided to testify, they would in fact lose the right to argue last to the jury. Further, he testified the Applicant ultimately made the decision not to testify. This Court agrees the decision not to testify was made by the Applicant. Therefore, to the extent the Applicant's testimony raised allegations as to this issue, it is denied and dismissed.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence trial counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, the

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allegation of ineffective assistance of counsel is denied.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

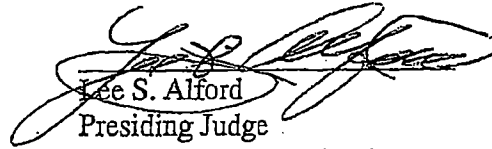
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

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**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11<sup>th</sup> day of August, 2011.

  
 Lee S. Alford  
 Presiding Judge  
 Sixteenth Judicial Circuit

York, South Carolina.

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Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0105

SOUTH CAROLINA SUPREME COURT  
OFFICE OF DISCIPLINARY COUNSEL  
Julie K. Martino, Esquire  
Assistant Disciplinary Counsel  
Post Office Box 12159  
Columbia, South Carolina  
29211-2159

RE: COMPLAINT

Ms. Martino,

Please permit this correspondence to serve as my formal Complaint in the following particulars.

On February 12, 2011, my brother, Ruben Gutierrez, retained, THE COOK LAW FIRM, P.A., David C. Cook, Esquire, 300 North White Street, Post Office Box 1449, Lancaster, South Carolina 29721, to represent me in a Post-Conviction Relief (PCR) matter. (See #2010-CP-46-2611). This matter was relevant to issues in York County within the ambience of the Court of Common Pleas.

On September 16, 2011, the Honorable Lee S. Alford, Circuit Court Judge, Sixteenth Judicial Circuit, filed and executed an Order of Dismissal, denying the claims in the PCR proceeding, with prejudice.

After receiving a formal notice that an Order of Dismissal had been filed, (I do not believe that I ever received an actual copy of that Order of Dismissal), I contacted Mr. Cook by correspondence concerning appealing this adverse dismissal of my PCR claims. On October 11, 2011, Mr. Cook responded to my inquiry stating a position that his Firm had not been retained to represent an appeal. It was not my intent to have that Firm to represent me in any appeal, but, simply wished to assert my rights to the "one bite at the apple" in the PCR proceedings. Alces v. State, 305 S.C. 446, 409 S.E.2d 392 (1991).

For the record, I am a Spanish speaking person, who originally from Mexico, and do not comprehend the complexities of the English language nor the American Legal System. If Mr. Cook did send me a SAMPLE of a notice of appeal to use as a guideline, as stated in his October 11, 2011, correspondence, I did not understand what it was or how to apply it.

Please further note that I have sought out an inmate who is trained in law to assist me in the preparation and service of this Complaint. And he has further assisted me in the preparation of another PCR application to assert claims against the failure of Mr. Cook to, at a minimum, file the desired notice of appeal for preservation of my appeal and simply assisting me in the right to preserve my appeal.

I would ask that this Office take into consideration that there exists an "exceptional circumstance" where I do not comprehend nor speak English, and I feel that Mr. Cook took advantage of the situation in two particulars: (1) refusing to serve a notice of appeal, (see Matter of Biddle, Opinion No. #275116 (S.C. Sup. Ct. filed June 24, 2015) (MATTER II & III), when he had knowledge that my desire was to appeal, and thereby ensuring the preservation of my due process rights; and (2) made an

intentional determination that deprived me of my "one bite at the apple". Mr. Cook has asserted that the appeals was without merit, but the appeal would have hinged on the product of the PCR proceedings, and therefore, would question Mr. Cook's performance due to the fact that he was privately retained and was aware of the issues that should have been meritorious in the proceeding. I believe, had Mr. Cook believed the PCR issues did not have merit, then, he should have refused to take my monies and conducting a performance or service that was, in his opinion, without merit.

If I may be of any further assistance to this Office, in these matters, please do not hesitate to contact me, Thank you for this Office's time and attention to these matters.

October 12, 2015

Respectfully Submitted,

*Isaias Gutierrez*

rds/IDG

Isaias Diaz Gutierrez  
Wando-B-229 #325762  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina  
29472-0105

cc: FILE  
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STATE OF SOUTH CAROLINA )  
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 COUNTY OF YORK )  
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 Isaias Gutierrez, )  
 S.C.D.C. No. 325762, )  
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 Applicant, )  
 )  
 v. )  
 State of South Carolina, )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 OF THE SIXTEENTH JUDICIAL CIRCUIT

2015-CP-46-3199

**RETURN AND MOTION TO  
 DISMISS ALL CLAIMS EXCEPT  
AUSTIN REVIEW**

In response to the post-conviction relief application filed by Isaias Gutierrez (Applicant) on October 2, 2015, the Respondent would show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the April 2007 term of the Court of General Sessions for York County for three counts of Forgery (2007-GS-46-1261, -1264, -1265), Armed Robbery (2007-GS-46-1262), Murder (2007-GS-46-1263), and Burglary, first degree (2007-GS-46-1266). Derek S. Chiarenza, Esquire, represented him. From December 10-13, 2007, Applicant proceeded to a jury trial and was found guilty as indicted of all charges. The Honorable J. Derham Cole sentenced him to confinement for a period of five years for each forgery conviction, thirty years for armed robbery, and to life imprisonment for the murder and burglary convictions, all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals

affirmed Applicant's conviction and sentence. State v. Gutierrez, Op. No. 2009-UP-495 (S.C. Ct. App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

2010-CP-46-2611

On June 23, 2010, Applicant filed his first application for post-conviction relief, alleging that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Failure to request competency hearing to determine whether Applicant understood situation or nature of charges
2. Ineffective assistance of appellate counsel
  - a. Failure to appeal sentence

Respondent filed its Return on December 27, 2010. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on June 1, 2011. Applicant was present at the hearing and was represented by David C. Cook, Esquire. Respondent was represented by Harrison D. Brant, Esquire, of the South Carolina Attorney General's Office. Applicant testified on his own behalf at the hearing, through the use of a Spanish interpreter, Idolinda Mummert. Applicant's trial counsel, Derek S. Chiarenza, Esquire, also testified at the hearing.

At the commencement of the evidentiary hearing, counsel for Applicant notified the Court Applicant was withdrawing all prior claims, and proceeding only on the following allegations: Ineffective assistance of counsel, for failure to tender offer by the State, failure to challenge admissibility of statement during Jackson v. Denno hearing, and failure to adequately address issues involving Applicant's language barrier.

By an order signed August 11, 2011, and filed September 16, 2011, the Honorable Lee S. Alford denied and dismissed Applicant's application with prejudice. The order indicates that a copy was mailed to Applicant and Mr. Cook on September 16, 2011.

## II.

In his current application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. "PCR Counsel failed to file appeal from adverse dismissal"

For the purpose of this Return, Respondent incorporates the Clerk of Court's records regarding Applicant's convictions, the current application, and the Order of Dismissal from the prior PCR. Respondent reserves the right to amend this Return upon receipt of any relevant materials

## III.

Except for Applicant's claim that he was denied an appeal from the denial of his first PCR application, the Respondent submits that this Application for Post-Conviction Relief should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The remittitur from Applicant's unsuccessful direct appeal was issued on November 6, 2009. Applicant was therefore required to file his application before November 6, 2010. This application was filed on October 2, 2015, well after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

#### IV.

Applicant alleges that his prior PCR counsel failed to appeal the denial of his first PCR application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation..." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their

application. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

V.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, with the exception of Applicant's allegation that he is entitled to belated review of his first PCR application, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT BOLCHOZ  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

JUSTIN J. HUNTER  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

March 28, 2017

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 )  
 )  
 ISAIAS GUTIERREZ, #325862, )  
 )  
 )  
 )  
 Applicant, )  
 )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 )  
 )  
 Respondent. )

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IN THE COURT OF COMMON PLEAS

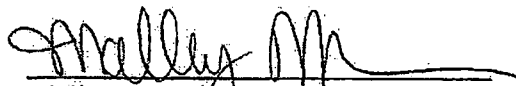
2015-CP-46-3199

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Nathan Sheldon, Esquire**  
**PO Box 36682**  
**Rock Hill, SC 29732**

DATED this 28<sup>th</sup> day of March, 2017.

  
 \_\_\_\_\_  
 Mallory Morris, Legal Assistant  
 For Respondent

State of South Carolina., )  
 )  
 )  
 )  
 )  
County of York. )

In the Court of Common Pleas  
Of York

Case No. 2016-CP-46-03199

Isaias Diaz Gutierrez., )  
 )  
Applicant., )  
 )  
 )  
State of South Carolina., )  
 )  
Respondent. )  
\_\_\_\_\_ )

Transcript of Record

April 17, 2017  
York, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, judge.

Mr. Nathan James Sheldon  
The Law Office of Nathan J. Sheldon, LLC  
PO Box 36682  
Rock Hill, South Carolina 29732  
nathan@nathansheldonlaw.com  
(803) 909-9343  
Attorney for the Applicant

Mr. Justin James Hunter  
Assistant Attorney General  
South Carolina Attorney General's Office  
PO Box 11549  
Columbia, South Carolina 29211-1549  
jhunter2@scag.gov  
(803) 734-3737  
Attorney for the Respondent

Wanda S. Nelson, CVR-M  
Official Court Reporter  
Sixteenth Judicial Circuit  
Union and York Counties  
To The Honorable John C. Hayes, III

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I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

WITNESS

BY:

PAGE NO.

No witnesses were called.

Court Reporter's Certificate page . . . . . P.6

1

I N D E X

2

E X H I B I T S

3

NO.

DESCRIPTION

ID.

EVD.

4

No Exhibits were received into the record.

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1 (COURT IN SESSION IN THE MATTER OF ISAIS DIAZ  
2 GUTIERREZ V. STATE OF SOUTH CAROLINA AT 09:50 AM.)

3 (APPLICANT, ISAIS GUTIERREZ, ENTERS COURTROOM.)

4 MR. HUNTER: Yes, sir, may it please the Court, your  
5 Honor. The next case is *Isais Gutierrez versus State of*  
6 *South Carolina*, it's 2015-CP-46-3199.

7 Your Honor, he was indicated in April of 2007 for  
8 three counts of forgery, armed robbery, murder, and  
9 burglary first degree. Derek Chiarenza represented him at  
10 trial. December 10th through 13th 2007 he proceeded to a  
11 jury trial before Judge Cole and was found guilty as  
12 indicted on all charges.

13 Your Honor, he was sentenced to five years for each  
14 forgery, thirty years for armed robbery, and life  
15 imprisonment for murder and burglary. The Notice of Appeal  
16 was filed and an Anders Brief was submitted. The Court of  
17 Appeal affirmed his conviction and sentence October 21st,  
18 2009.

19 On June 23, 2010 he filed his first PCR application.  
20 A hearing was held in this courthouse June 1st, 2011  
21 wherein he was represented by Mr. David Cook.

22 An order was signed August 11th, 2011 by Judge Alford  
23 denying -- denying and dismissing the application.

24 Your Honor, he filed this current action on October  
25 2nd, 2015 wherein he alleges that his prior PCR counsel did

1 not file a Notice of Appeal from the denial of his first  
2 PCR action. And, your Honor, based on the information that  
3 was shared with the applicant's counsel and myself, the  
4 State is consenting to Austin relief.

5 THE COURT: Mr. Sheldon.

6 MR. SHELDON: That's accurate, your Honor, and we have  
7 a consent order that we'll submit to the Court at some  
8 point, either today or when I come back on Wednesday, and  
9 we will get that Notice of Appeal on the Austin relief  
10 filed.

11 THE COURT: All right. Thank you, very much.

12 MR. HUNTER: Thank you.

13 (APPLICANT ISAIS GUTIERREZ EXITS COURTROOM.)

14 (END OF TRANSCRIPT OF RECORD.)  
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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 Isaias Gutierrez, )  
 S.C.D.C. No. 325762, )  
 )  
 Applicant, )  
 )  
 v. )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 OF THE SIXTEENTH JUDICIAL CIRCUIT

2015-CP-46-3199

FILED-RECEIVED  
 2017 APR 19 PM 3:04  
 DAVID HAMILTON  
 S.C.D.C. P. & G.S.  
 YORK COUNTY, SC.

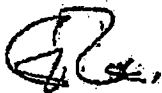
ORDER GRANTING A  
 BELATED REVIEW PURSUANT  
 TO AUSTIN V. STATE<sup>1</sup>

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 2, 2015. Respondent made its Return on March 28, 2017, requesting an evidentiary hearing be convened solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing was held on April 17, 2017, at the Moss Justice Center in York County. Applicant was present and represented by Nathan Sheldon, Esquire. Justin J. Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted at the April 2007 term of the Court of General Sessions for York County for three counts of Forgery (2007-GS-46-1261, -1264, -1265), Armed Robbery (2007-GS-46-1262), Murder (2007-GS-46-1263), and Burglary, first degree (2007-GS-46-1266). Derek S. Chiarenza, Esquire, represented him. From December 10-13, 2007, Applicant proceeded to a jury trial and was found guilty as indicted of all charges. The Honorable J. Derham Cole sentenced him to confinement for a

<sup>1</sup> Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).



period of five years for each forgery conviction, thirty years for armed robbery, and to life imprisonment for the murder and burglary convictions, all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence, State v. Gutierrez, Op. No. 2009-UP-495 (S.C. Ct. App. filed October 21, 2009). The Remittitur was issued on November 6, 2009.

**2010-CP-46-2611**

On June 23, 2010, Applicant filed his first application for post-conviction relief, alleging that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Failure to request competency hearing to determine whether Applicant understood situation or nature of charges
2. Ineffective assistance of appellate counsel
  - a. Failure to appeal sentence

Respondent filed its Return on December 27, 2010. An evidentiary hearing into the matter was convened at the Moss Justice Center in York County on June 1, 2011. Applicant was present at the hearing and was represented by David C. Cook, Esquire. Respondent was represented by Harrison D. Brant, Esquire, of the South Carolina Attorney General's Office. Applicant testified on his own behalf at the hearing, through the use of a Spanish interpreter, Idolinda Mummert. Applicant's trial counsel, Derek S. Chiarenza, Esquire, also testified at the hearing.

At the commencement of the evidentiary hearing, counsel for Applicant notified the Court that Applicant was withdrawing all prior claims, and proceeding only on the following allegations: Ineffective assistance of counsel, for failure to tender offer by the State, failure to



challenge admissibility of statement during Jackson v. Denno hearing, and failure to adequately address issues involving Applicant's language barrier.

By an order signed August 11, 2011, and filed September 16, 2011, the Honorable Lee S. Alford denied and dismissed Applicant's application with prejudice. The order indicates that a copy was mailed to Applicant and Mr. Cook on September 16, 2011.

#### Current Application 2015-CP-46-3199

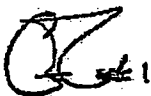
In his current application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons:

1. "PCR Counsel failed to file appeal from adverse dismissal"

Before this Court are the records of the York County Clerk of Court regarding Applicant's convictions, the records from the South Carolina Department of Corrections, Applicant's prior PCR application and the corresponding Order of Dismissal, the current application and attachments, and the Return and Partial Motion to Dismiss.

#### II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Prior to the start of the evidentiary hearing, the State indicated to this Court that they would be consenting to the grant of an Austin appeal. The State informed this Court that they were consenting based off of the letters presented from Applicant in his application. The letters indicate that Applicant asked his counsel to file a notice of appeal from the denial of his first PCR application, and his counsel indicated that he would not file the appeal.




Respondent consents to allow Applicant a belated review of the denial of his PCR application (2010-CP-46-2611). After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that Applicant did not knowingly and voluntarily waive his right to appeal his first PCR application. Accordingly, this Court grants Applicant a belated review of the denial of post-conviction relief action (2010-CP-46-2611) pursuant to Austin v. State, in which he may raise on appeal any issues that were raised and ruled upon in his prior application. In order to secure this review, however, Applicant must appeal from this Order.

**IT IS THEREFORE ORDERED:**

1. That the Applicant be granted an appeal of case 2010-CP-46-2611 pursuant to Austin v. State; this second application for post-conviction relief is hereby denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are direct to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR for the appropriate procedure for a belated appeal; and
3. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19 day of APRIL, 2017.

  
G. THOMAS COOPER, JR.  
Presiding Judge

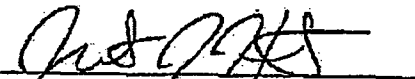
J.P.C., South Carolina

I consent:



Nathan Sheldon, Esquire  
Counsel for Applicant

I consent:



Justin Hunter, Esquire  
Counsel for Respondent

937

WITNESSES

YCSO / Hager

mac

ARREST WARRANT NUMBER

G389648

ACTION OF GRAND JURY

**TRUE BILL**

*Oliver Thompson*  
Foreperson of Grand Jury  
4-2-07

VERDICT

*Guilty*

*H. Gunn*  
Foreperson of Petit Jury

Date: *12-13-07*

DOCKET NO. 2007-GS-46- *01261*

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

APRIL 12, TERM 2007

THE STATE

vs.

ISAIAS DIAZ GUTIERREZ

Indictment for

FORGERY

SC Code: § 16-13-10

CDR Code: 2427

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )

INDICTMENT

At a Court of General Sessions, convened on April 12, 2007, the Grand Jurors of York County present upon their oath:

**FORGERY**

Isaias Diaz Gutierrez did in York County on or about December 30, 2002, willfully and unlawfully forge or cause or procure to be forged an instrument of writing. To-wit: Isaias Diaz Gutierrez forged or caused or procured to be forged, check number 1652 drawn on the account of Maude Cubley in the amount of \$600.00. Further, Isaias Diaz Gutierrez knowingly uttered or published the forged check as true to Bank of America in ~~York~~ <sup>York</sup> ~~South Carolina~~ <sup>York</sup>, all in violation of Section 16-13-10, 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

OF York  
VS.  
Isaias Diaz Gutierrez

INDICTMENT/CASE#: 2007-GS46-01261

A/W#: G389648

AKA:

CERTIFIED TRUE COPY

Date of Offense: 12/30/2002

Race: H

Sex: M

Age: 27

S.C. Code § : 16-13-0010(B)(2)

DOB: [REDACTED]

SS#: [REDACTED]

2015 OCT 21

CDR Code #: 2427

Address: Unknown

DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

SENTENCE SHEET

DL#:

SID#: SC01360244

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO: Forgery / Forgerv. value less than \$5.000

in violation of § 16-13-0010(B)(2) of the S.C. Code of Laws, bearing CDR Code # 2427

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

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. (Defendant initial)

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST

*Isaias Gutierrez*  
Solicitor: Defendant

*David Hamilton*  
Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of 45 days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

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

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered

PTUP \_\_\_\_\_

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

\_\_\_\_\_ days/hours Public Service Employment

Payment Terms: \_\_\_\_\_

Obtain GED \_\_\_\_\_

set by SCDPPPS \_\_\_\_\_

Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

Recipient: \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

\*Fine: \$ \_\_\_\_\_

Substance Abuse Counseling \_\_\_\_\_

§ 14-1-206 (Assessments 107.5 %) \$ \_\_\_\_\_

Random Drug/Alcohol testing \_\_\_\_\_

§ 14-1-211(A)(1) (Conv Surcharge) \$100 \$ 100

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

§ 56-5-2995 (DUI Assessment) \$12 \$ \_\_\_\_\_

Other: \_\_\_\_\_

§ 35.13 (Public Def/Prob) \$500 \$ \_\_\_\_\_

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25

§ 33.7, 1B TP (Drug Court Surcharge) \$100 \$ \_\_\_\_\_

§ 50-21-114(BUI Breath Test Fee) \$50 \$ \_\_\_\_\_

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ \_\_\_\_\_

3% to County (if paid in installments) \$ \_\_\_\_\_

TOTAL \$ 125

Appointed PD or appointed other counsel. §35.13 TP Requires \$500 be paid to Clerk during probation.

*David Hamilton*  
Clerk of Court/ Deputy Clerk

PRESIDING JUDGE *David Hamilton*

Judge Code: 2101513

Sentence Date: 2-13-07

*Phyllis Barnett*

WITNESSES

YCSQ / Hager

mac

ARREST WARRANT NUMBER

G389859

ACTION OF GRAND JURY

**TRUE BILL**

*Oliver Hampton*  
Foreperson of Grand Jury  
4-12-07

VERDICT

*Guilty*

*R. Green*  
Foreperson of Petit Jury  
Date: 12-13-07

DOCKET NO. 2007-GS-46-01262

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

APRIL 12, TERM 2007

THE STATE

vs.

ISAIAS DIAZ GUTIERREZ

Indictment for

ARMED ROBBERY

SC Code: § 16-11-330

CDR Code: 0139

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )

INDICTMENT

At a Court of General Sessions, convened on April 12, 2007, the Grand Jurors of York County present upon their oath:

**ARMED ROBBERY**

Isaias Diaz Gutierrez did in York County on or about December 29, 2002, willfully and unlawfully commit an armed robbery against Clarence Cubley. Isaias Diaz Gutierrez robbed Clarence Cubley of a steal a safe, checkbook, wallet and/or other items of value by means of force or intimidation, while the Defendant was armed with a deadly weapon. The crime occurred at Clarence Cubley's residence located at 1890 Hwy. 21 in Fort Mill, South Carolina; all in violation of Section 16-11-0330(A), 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

942-1051-100  
 STATE OF YORK  
 VS.  
 Isaias Diaz Gutierrez  
 AKA:  
 Race: H Sex: M Age: 27  
 DOB: [redacted] SS#: [redacted] 9  
 Address: Unknown  
 2015 OCT 21 PM 5:56

INDICTMENT/CASE#: 2007-GS46-01262  
 A/W#: G389659  
 Date of Offense: 12/29/2002  
 S.C. Code §: 16-11-0330(A)  
 CDR Code #: 0139

SENTENCE SHEET

DL#: \_\_\_\_\_ SID#: SC01360244  
 In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO: Armed Robbery

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

ATTEST:  
Willy Thompson Solicitor: Isaias Gutierrez Defendant: [Signature] Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of 30 days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_  
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.  
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered PTUP \_\_\_\_\_  
 Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
 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: \_\_\_\_\_

Recipient: \_\_\_\_\_  
 \*Fine: \$ \_\_\_\_\_

§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment) \$40/ea	\$40	\$
3% to County (if paid in installments)		\$
<b>TOTAL</b>		<b>\$ 125</b>

Appointed PD or appointed other counsel, §35.13 TP  
 Requires \$500 be paid to Clerk during probation.

David Hamilton  
 Clerk of Court/ Deputy Clerk  
Phyllis Barrett

PRESIDING JUDGE [Signature]  
 Judge Code: 2101513  
 Sentence Date: 12-13-07

943

WITNESSES

YCSO / Hager

mac

ARREST WARRANT NUMBER

G389660

ACTION OF GRAND JURY

TRUE BILL

*Oliver Longshore*  
Foreperson of Grand Jury  
4-12-07

VERDICT

*Guilty*

*R Green*  
Foreperson of Petit Jury  
Date: 12-13-07

DOCKET NO. 2007-GS-46- 01263

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

APRIL 12, TERM 2007

THE STATE

vs.

ISAIAS DIAZ GUTIERREZ

Indictment for

MURDER

SC Code: § 16-03-0010

CDR Code: 0116

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

INDICTMENT

At a Court of General Sessions, convened on April 12, 2007, the Grand Jurors of York County present upon their oath:

**MURDER**

Isaias Diaz Gutierrez did in York County on or about December 29, 2002, feloniously, willfully and with malice aforethought, kill one Clarence Cubley by beating him with a piece of a cement block and that the said victim died as a result thereof, all in violation of Section 16-3-10, *Code of Laws of South Carolina* (1976), as amended. The Murder occurred at Clarence Cubley's residence located at [REDACTED] in Fort Mill, South Carolina.

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



\_\_\_\_\_  
SOLICITOR

COUNTY OF York  
STATE VS.

Isaias Diaz Gutierrez

INDICTMENT/CASE#: 2007-GS46-01263

A/W#: G389660

AKA: CERTIFIED TRUE COPY

Date of Offense: 12/29/2002

Race: W Sex: M Age: 27

S.C. Code § : 16-03-0010.0020

DOB: [REDACTED] SS#: [REDACTED] 2015 OCT 21 PM 1:56

CDR Code #: 0116

Address: Unknown

DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

SENTENCE SHEET

DL#: SID#: SC01360244

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO: Murder

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116

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

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. (Defendant initial)

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST:

Willy Thompson  
Solicitor

Isaias Gutierrez  
Defendant

[Signature]  
Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of life days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_  
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.  
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
Payment Terms: \_\_\_\_\_  
 set by SCDPPPS \_\_\_\_\_

PTUP \_\_\_\_\_  
\_\_\_\_\_ days/hours Public Service Employment  
Obtain GED \_\_\_\_\_  
Attend Voc. Rehab. or Job Corp. \_\_\_\_\_  
May serve W/E beginning \_\_\_\_\_  
Substance Abuse Counseling \_\_\_\_\_  
Random Drug/Alcohol testing \_\_\_\_\_  
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_  
\$ \_\_\_\_\_ paid to Public Defender Fund  
Other: \_\_\_\_\_

Recipient:	*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv Surcharge)	\$100	\$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)		\$
<b>TOTAL</b>		<b>\$ 125</b>

Appointed PD or appointed other counsel, §35.13 TP  
Requires \$500 be paid to Clerk during probation.

David Hamilton  
Clerk of Court/ Deputy Clerk

PRESIDING JUDGE [Signature]  
Judge Code: 21 0 1 5 13  
Sentence Date: 12/13/07

Chyllis Barnett

WITNESSES

YCSO / Hager

mac

ARREST WARRANT NUMBER

G389661

ACTION OF GRAND JURY

**TRUE BILL**

*Oliver Hernandez*  
Foreperson of Grand Jury  
4-12-07

VERDICT

*Guilty*

*R. Garcia*  
Foreperson of Petit Jury  
Date: 12-13-07

DOCKET NO. 2007-GS-46-01264

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

APRIL 12, TERM 2007

THE STATE

vs.

ISAIAS DIAZ GUTIERREZ

Indictment for

FORGERY

SC Code: § 16-13-10  
CDR Code: 2427

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )

INDICTMENT

At a Court of General Sessions, convened on April 12, 2007, the Grand Jurors of York County present upon their oath:

**FORGERY**

Isaias Diaz Gutierrez did in York County on or about December 29, 2002, willfully and unlawfully forge or cause or procure to be forged an instrument of writing. To-wit: Isaias Diaz Gutierrez forged or caused or procured to be forged, check number 1651 drawn on the account of Maudé Cubley in the amount of \$500.00. Further, Isaias Diaz Gutierrez knowingly uttered or published the forged check as true to Bank of America in <sup>Fort</sup> Mill, South Carolina, all in violation of Section 16-13-10, 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

948

SOUTH CAROLINA

York

VS.

Isaias Diaz Gutierrez

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2007-GS46-01264

A/W#: G389661

Date of Offense: 12/30/2000

S.C. Code § : 16-13-0010(B)(2)

CDR Code #: 2427

AKA:

Race: H Sex: M Age: 27

DOB: [redacted] SS#: [redacted]

Address: Unknown

CERTIFIED TRUE COPY 2015 OCT 21 PM 1:56

DL#: [redacted] SID#: SC01360244

DAVID HAMILTON CLERK OF COURT YORK COUNTY, SC

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was TO: Forgery / Forgery, value less than \$5,000

in violation of § 16-13-0010(B)(2) of the S.C. Code of Laws, bearing CDR Code # 2427

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Willy Thompson Solicitor

Isaias Gutierrez Defendant

[Signature] Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 90 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135

SPECIAL CONDITIONS:

RESTITUTION: Heard, Waived, Ordered Total: \$ plus 20% fee: \$ Payment Terms: set by SCDPPPS

PTUP days/hours Public Service Employment Obtain GED Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol testing Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender Fund Other:

Table with columns for Recipient, \*Fine, and various assessment codes (e.g., § 14-1-206, § 14-1-211(A)(1), § 14-1-211(A)(2), § 56-5-2995, § 35.13, § 73.3, § 33.7, § 50-21-114, § 56-5-2942(J)) and their corresponding amounts.

Appointed PD or appointed other counsel § 35.13 T Requires \$500 be paid to Clerk during probation.

David Hamilton Clerk of Court/ Deputy Clerk Phyllis Barrett

PRESIDING JUDGE [Signature] Judge Code: 2101513 Sentence Date: 12-13-07

WITNESSES

YOGO / Hager

mac

ARREST WARRANT NUMBER

G389862

ACTION OF GRAND JURY

**TRUE BILL**

*Olivia Hampshire*  
Foreperson of Grand Jury  
4-12-07

VERDICT

*Guilty*

*R. [Signature]*  
Foreperson of Petit Jury  
Date: 12-13-07

DOCKET NO. 2007-GS-46- 01265

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

APRIL 12, TERM 2007

THE STATE

vs.

ISAIAS DIAZ GUTIERREZ

Indictment for

FORGERY

SC Code: § 16-13-10  
CDR Code: 2427

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
  )  
COUNTY OF YORK          )

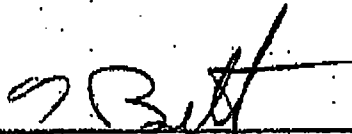
INDICTMENT

At a Court of General Sessions, convened on April 12, 2007, the Grand Jurors of York County present upon their oath:

**FORGERY**

Isaias Diaz Gutierrez did in York County on or about December 29, 2002, willfully and unlawfully forge or cause or procure to be forged an instrument of writing. To-wit: Isaias Diaz Gutierrez forged or caused or procured to be forged, check number 1655 drawn on the account of Maude Cubley in the amount of \$775.00. Further, Isaias Diaz Gutierrez knowingly uttered or published the forged check as true to Bank of America in Rock Hill, South Carolina, all in violation of Section 16-13-10, *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

COUNTY OF York STATE VS.

INDICTMENT/CASE#: 2007-GS46-01265

Isaias Diaz Gutierrez

A/W#: G389662

AKA:

Date of Offense: 12/31/2002

Race: H Sex: M Age: 27

S.C. Code § : 16-13-0010(B)(2)

DOB: [redacted] SS#: [redacted] 9

CDR Code #: 2427

Address: Unknown

CERTIFIED TRUE COPY 2015 OCT 21 PM 1:55

DL#: SID#: SC01360244

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was [X] CONVICTED OF or [ ] PLEADS TO: Forgery / Forgery, value less than \$5,000

in violation of § 16-13-0010(B)(2) of the S.C. Code of Laws, bearing CDR Code # 2427 [X] NON-VIOLENT [ ] VIOLENT [ ] SERIOUS [ ] MOST SERIOUS [ ] Mandatory GPS(CSC [ ] §17-25-45 w/minor 1st or Lewd Act)

The charge is: [X] As Indicted, [ ] Lesser Included Offense, [ ] Defendant Waives Presentment to Grand Jury. (Defendant initial) The plea is: [ ] Without Negotiations or Recommendation, [ ] Negotiated Sentence, [ ] Recommendation by the State.

ATTEST: Willy Thompson Solicitor; Isaias Gutierrez Defendant; [Signature] Attorney for Defendant

WHEREFORE, the Defendant is committed to the [X] 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:
[ ] The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
[ ] The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

[ ] RESTITUTION: [ ] Heard, [ ] Waived, [ ] Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
[ ] set by SCDPPPS

PTUP
days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

Table with columns for Recipient, \*Fine, and various assessment codes (e.g., § 14-1-206, § 14-1-211(A)(1), etc.) with corresponding dollar amounts.

[ ] Appointed PD or appointed other counsel §35.13 T Requires \$500 be paid to Clerk during probation.

TOTAL \$ 125

PRESIDING JUDGE [Signature]
Judge Code: 2101513
Sentence Date: 12-3-07

David Hamilton Clerk of Court/ Deputy Clerk
Phyllis Barrett

WITNESSES

YCSO / Hager

MAC

ARREST WARRANT NUMBER

Direct Indictment NWN

ACTION OF GRAND JURY

**TRUE BILL**

*Oliver Hernandez*  
Foreperson of Grand Jury  
4-12-07

VERDICT

*Guilty*

*[Signature]*  
Foreperson of Petit Jury  
Date: 12-13-07

DOCKET NO. 2007-GS-46- *01266*

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

APRIL 12, TERM 2007

THE STATE

vs.

ISAIAS DIAZ GUTIERREZ

Indictment for

BURGLARY 1ST DEGREE

SC Code: § 16-11-0031  
CDR Code: 0079

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )

INDICTMENT

At a Court of General Sessions, convened on April 12, 2007, the Grand Jurors of York County present upon their oath:

**BURGLARY FIRST DEGREE**

Isaias Diaz Gutierrez did in York County on or about December 29, 2002, willfully and unlawfully enter the dwelling of Clarence Cubley located at [REDACTED] in Fort Mill, South Carolina. Isaias Diaz Gutierrez entered without consent and with the intent to commit a crime therein. The entering occurred in the nighttime, the defendant caused physical injury to Clarence Cubley who was not a participant in the crime and/or the Defendant was armed with a deadly weapon. All in violation of Section 16-11-311, *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.

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SOLICITOR

954

SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

York

VS.

Isaias Diaz Gutierrez

INDICTMENT/CASE#: 2007-GS46-01266

A/W#: NWN0701266

Date of Offense: 12/29/2002

AKA:

Race: H Sex: M Age: 27

DOB: [redacted] SS#: [redacted] CDR Code #: 0079

Address: Unknown

2015 OCT 21 PM 1:55

DL#: [redacted] SID#: SC01360244

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO: Burglary / Burglary (After June 20, 1985) - First degree

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

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

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. (Defendant initial)

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST:

*Willy Thompson*  
Solicitor:

*Isaias Gutierrez*  
Defendant

*David Hamilton*  
Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of life days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_  
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.  
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
Payment Terms: \_\_\_\_\_  
 set by SCDPPPS \_\_\_\_\_

PTUP \_\_\_\_\_  
\_\_\_\_\_ days/hours Public Service Employment  
Obtain GED \_\_\_\_\_  
Attend Voc. Rehab. or Job Corp. \_\_\_\_\_  
May serve W/E beginning \_\_\_\_\_  
Substance Abuse Counseling \_\_\_\_\_  
Random Drug/Alcohol testing \_\_\_\_\_  
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_  
\$ \_\_\_\_\_ paid to Public Defender Fund  
Other: \_\_\_\_\_

Recipient: _____	
*Fine:	\$ _____
§ 14-1-206 (Assessments 107.5 %)	\$ _____
§ 14-1-211(A)(1) (Conv Surcharge)	\$100 \$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100 \$ _____
§ 56-5-2995 (DUI Assessment)	\$12 \$ _____
§ 35.13 (Public Def/Prob)	\$500 \$ _____
§ 73.3, 1B TP (Law Enforce. Funding)	\$25 \$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	\$100 \$ _____
§ 50-21-114(BUI Breath Test Fee)	\$50 \$ _____
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea \$ _____
3% to County (if paid in installments)	\$ _____
TOTAL	\$ 125

Appointed PD or appointed other counsel, §35.13 TI  
Requires \$500 be paid to Clerk during probation.

*David Hamilton*  
Clerk of Court/ Deputy Clerk  
*Phyllis Barnett*  
Court Reporter

PRESIDING JUDGE *William*  
Judge Code: 2101513  
Sentence Date: 12-13-07