

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

MARION POWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001923

APPENDIX

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1 THE COURT: Did he give an answer?

2 COURT REPORTER: He did repeat it.

3 Q. Just Kenya; not special?

4 THE COURT: You understand that?

5 A. I said that.

6 MR. SHELDON: Yes, he did.

7 Q. Oh, just Kenya?

8 A. Yeah, and nothing special about it.

9 Q. But Kenya, according to you, was what formed the
10 basis of your connection or your bond with Marion
11 Powell, right?

12 A. Yes, sir.

13 Q. Okay. Let me ask you a little bit again about the
14 privacy of the jail and prison. Do they tell you
15 when to go to bed in prison or jail?

16 A. They tell you what time to go to your rooms.

17 Q. Okay. Do they tell you what time to get up or get
18 out of your room?

19 A. No, sir.

20 Q. They don't?

21 A. No, sir.

22 Q. Do they tell you when chow is?

23 A. Yes, sir.

24 Q. All right. Do they tell you when you're supposed to
25 go take a shower?

1 A. No, sir.

2 Q. Okay. Do they tell you - do they give you a choice
3 of what you like to have for breakfast, lunch, or
4 dinner?

5 A. No, sir.

6 Q. You eat whatever's there?

7 A. Yes, sir.

8 Q. Is it safe to say that particularly prisons can be
9 dangerous places. Do you agree with that?

10 A. Yes, sir.

11 Q. Okay. Violence, gangs -

12 A. Yes, sir.

13 Q. - that sort of thing?

14 A. Yes, sir.

15 Q. Sexual assaults?

16 A. Yes, sir.

17 Q. Okay. And a lot of times when these things happen,
18 they're in the common areas of a jail, right?

19 A. Yes, sir.

20 Q. Okay. Mr. Riley, is it safe to say that you're
21 pretty familiar with the legal system and the court
22 system?

23 A. Not of South Carolina, no, sir.

24 Q. Not South Carolina?

25 A. No, sir.

1 Q. But in general, you've been to court quite a few
2 times. You've been to city jails, county jails and
3 you've been to a couple - several prisons, right?

4 A. Yes, sir.

5 Q. So you kind of know how it works?

6 A. Yes, sir.

7 Q. You got to know the game, right?

8 A. Yes, sir.

9 Q. And so, getting back to the South Carolina versus the
10 Georgia system. Your robbery in Georgia, you did
11 three years on, right?

12 A. Yes, sir.

13 Q. Okay. And it was originally a 15-year sentence,
14 right?

15 A. Yes, sir.

16 Q. Okay. And then, you had the - and so - and then the
17 next one was a ten-year sentence?

18 A. Yes, sir.

19 Q. Okay. And the next one was a three?

20 A. Yes, sir.

21 Q. All right. South Carolina, that ain't happening in
22 South Carolina; is it?

23 A. No, sir.

24 Q. Okay. Because your attempted armed robbery charge is
25 what's called a no-parole offense, right?

1 A. Yes, sir.

2 Q. Which means you can't get parole?

3 A. Yes, sir.

4 Q. Okay. And you say you already knew that?

5 A. I knew that once I came to Beaufort County jail.

6 Q. Okay. And that's a lot different than Georgia; isn't
7 it?

8 A. Yes, sir.

9 Q. It's a lot tougher?

10 A. Yes, sir.

11 Q. Okay. So you're looking at doing the whole ten;
12 aren't you?

13 A. Yes, sir.

14 Q. Unless it gets reduced, right?

15 A. Yes, sir.

16 Q. And your deal with the Solicitor's Office is for them
17 to go before a judge and say reduce Eric Riley's
18 sentence that he got, right?

19 A. He's going to - he's going to ask her to - ask them
20 to reduce my sentence.

21 Q. Can anybody else ask the judge to reduce your
22 sentence that you know of?

23 A. Yes, sir. I -

24 Q. Okay.

25 A. - I assume that the lawyers can, I think.

1 Q. What lawyers?

2 A. Like my attorney who I had on my case like for
3 special reasonings.

4 Q. Special reasons?

5 A. Yes, sir.

6 COURT REPORTER: Is that yes?

7 A. Yes.

8 Q. Mr. Riley, do you think it carries more weight if
9 your lawyer asks the judge to reduce your sentence,
10 or if the prosecutor asks the judge to reduce your
11 sentence?

12 A. The prosecutor.

13 Q. Yeah. And he's - because the prosecutor is going to
14 be the only one there with you in front of a judge,
15 right?

16 A. I never been through that situation, sir.

17 Q. But nobody's going to be opposing that, are they?
18 You don't know?

19 A. I never been through it, sir.

20 Q. You never been through it. But you found out about
21 it, didn't you, the South Carolina way of doing that,
22 right?

23 A. I - yes, sir, I learned about it.

24 Q. Okay. So you were stuck with a ten-year sentence and
25 no parole, right? Out-of-state, away of your family,

- 1 a ten-year sentence, no parole?
- 2 A. Yes, sir.
- 3 Q. You're in a pretty tight spot?
- 4 A. Yes, sir.
- 5 Q. Not to mention you had been shot?
- 6 A. Yes, sir.
- 7 Q. And that you were, what, 60 miles away from home or
- 8 more?
- 9 A. Yes, sir.
- 10 Q. Now, the other thing that you get as part of the deal
- 11 for saying all this is you get to, let me use your
- 12 words, special housing?
- 13 A. Yes, sir.
- 14 Q. Okay. And special housing is keeping you out of the
- 15 general population and out of the common areas,
- 16 right?
- 17 A. Yes, sir.
- 18 Q. Okay. And you know that that's where the dangerous
- 19 things happen, right?
- 20 A. Yes, sir.
- 21 Q. Okay. So special housing is a pretty good thing to
- 22 have; isn't it?
- 23 A. It is, but when I came to the courtroom today, I
- 24 asked him to take that off. I asked him to make a
- 25 call and do away with that.

1 Q. So you want to be where the dangerous part of jail
2 is, the prison?

3 A. No, just - I'm on - I was on special housing since I
4 talked to him, and you don't get to go to store; you
5 can't use the phone; you can't eat, really; you can't
6 wash really. And I asked him to make a call today
7 and put me back in general population.

8 Q. And so, all it takes is a phone call from your new
9 friend, the Solicitor, to do that?

10 A. Well, he's not really a friend, but he's the
11 Solicitor and not really a friend, no, sir.

12 Q. Okay. Because you've only known him for the last two
13 - you've only known him for nine days, right?

14 A. Yes, sir.

15 Q. And was it just a stroke of luck that he happened to
16 walk in to see you, as far as you're concerned?

17 A. No, I pretty knew - I pretty much think he knew what
18 he was coming to do. I don't think he just lucked up
19 and did it.

20 Q. You think that he knew he was coming to see you about
21 this case?

22 A. I don't know what his intention was or what he knew,
23 but I'm pretty sure that he knew what he was coming
24 to do. I don't know what he was thinking, but he
25 knew what he was doing. That doesn't make any sense.

- 1 Q. You believe he knew what he was doing?
- 2 A. Yes, sir.
- 3 Q. Okay. Now, speaking of making new friends, when you
- 4 were in the jail and Mr. Powell was there, I guess
- 5 word around the jail or something like that was that
- 6 he was from the Vickstate-Yemassee-type area, the one
- 7 in Beaufort County, and that he knew or might know
- 8 Kenya Hagood, right?
- 9 A. No, sir.
- 10 Q. Well, you said that you went and asked him for help
- 11 on your case.
- 12 A. Uh-huh.
- 13 Q. And he laughed?
- 14 A. Yes, sir.
- 15 Q. That made you mad, didn't it?
- 16 A. Yes, sir.
- 17 Q. He didn't help you on your case; did he?
- 18 A. No, sir.
- 19 Q. Okay. And you wanted help on a case where you had
- 20 gone under the guise of buying drugs and were going
- 21 to rob them, but Kenya Hagood got the jump on you,
- 22 and shot you, and you wanted help on that case,
- 23 right?
- 24 A. Yes, sir.
- 25 Q. And you thought Kenya Hagood could help you somehow?

- 1 A. No, sir.
- 2 Q. Oh, you didn't?
- 3 A. I knew that - I knew that Scooter could help me.
- 4 Q. Okay. You knew that he could help you?
- 5 A. Yes, sir.
- 6 Q. Okay. But he laughed?
- 7 A. Yes, sir.
- 8 Q. Okay. He didn't help you?
- 9 A. No, sir.
- 10 Q. Okay. And while you were - your, I guess, approach
- 11 to him is, look man, we got something in common. We
- 12 got this Kenya Hagood in common. Help me out. Does
- 13 that make sense?
- 14 A. Yes, sir.
- 15 Q. Okay. And he laughed at you; didn't he?
- 16 A. Yes, sir.
- 17 Q. Okay. So you don't like Marion Powell and you don't
- 18 like Kenya Hagood, do you?
- 19 A. No, sir.
- 20 Q. And the reason you don't like Kenya Hagood is because
- 21 she put - didn't keep it on the street?
- 22 A. Yes, sir. Yes, sir.
- 23 Q. Okay. So you think that - and is that a character
- 24 flaw of her, or is it just uncool, or, I mean, what's
- 25 the problem with not keeping it on the street?

1 A. I guess the only problem with it is like when you
2 choose to be in a certain lifestyle, you subject
3 yourself to certain things that happen to you and we
4 accept those consequences.

5 Q. Okay. But keeping it on the street is settling
6 something your own way, right? Didn't you testify to
7 that earlier?

8 A. Sir?

9 Q. Settling it your own way is what keep it on the
10 street means.

11 A. Yes, sir.

12 Q. And so, you fault Kenya Hagood for going to the
13 police?

14 A. Yes, sir.

15 Q. Okay. And you think she should have handled it on
16 the street?

17 A. Yes, sir.

18 Q. Or a different way?

19 A. Yes, sir.

20 Q. Is that something that you try to - a credo you try
21 to live by?

22 A. Until -

23 Q. Keeping it on the street?

24 A. Yes, sir.

25 Q. It is?

1 A. Yes, sir.

2 Q. Okay. And you think that's a positive thing to do?

3 A. It's not positive.

4 Q. It's not?

5 A. No, sir.

6 Q. Mr. Riley, you - and would it be safe to, with all

7 things considered, to call you a survivor? Would you

8 agree with that?

9 A. A survivor?

10 Q. A survivor.

11 A. Yes, sir.

12 Q. I mean, you've been to prison at least three times,

13 right?

14 A. Yes, sir.

15 Q. And now you're on Number 4?

16 A. Yes, sir.

17 Q. You've managed to get out your sentences pretty

18 early, considering what the sentences were, right?

19 A. No, sir.

20 Q. You haven't?

21 A. No, sir.

22 Q. That three-year robbery, that wasn't?

23 A. It was 15/serve 3. Three years to serve in the State

24 Department of Corrections and twelve years on

25 probation, sir.

- 1 Q. All right. But you've been through some tough times;
2 haven't you?
- 3 A. Yes, sir.
- 4 Q. You go to jail, prison at least four times, bunch of
5 county jails, that sort of thing, right?
- 6 A. Not a bunch of county jails.
- 7 Q. Because you stayed down in Savannah and did all this
8 stuff, Chatham County jail, several times?
- 9 A. That's the only one, sir.
- 10 Q. Is that more accurate? And you keep it on the
11 street; don't you?
- 12 A. Up until my hand was forced this time, sir.
- 13 Q. Your hand was forced. Okay. So up - you know, you
14 have a history of handling things your own way, doing
15 what you need to do, right?
- 16 A. Do I have a way of handling things?
- 17 Q. Uh-uh. Your own way, keep it on the street?
- 18 A. Yes, sir.
- 19 Q. Okay. And that's what you fault Kenya for not doing?
- 20 A. Yes, sir.
- 21 Q. And so, you believe that Kenya Hagood should have
22 handled this in a different way?
- 23 A. Yes, sir.
- 24 Q. Okay. So you don't think she should have reported it
25 to the police?

- 1 A. No, sir.
- 2 Q. Okay. Even at the risk of - for her having shot
3 somebody, she shouldn't have said anything?
- 4 A. Even though the risk of her shooting somebody?
- 5 Q. Well, she had just shot somebody. You don't think
6 she should tell the police what happened?
- 7 A. She chose that lifestyle, sir. So, no, I don't
8 think.
- 9 Q. So she should have lied to the police like you did
10 when you were at the hospital, right, and that would
11 have made everything better?
- 12 A. I can't say what she should have did, but I felt she
13 should not have got the police involved.
- 14 Q. Okay. Fair enough. Fair enough. Armed robbery
15 where somebody gets shot five times?
- 16 A. Yes, sir.
- 17 Q. Okay. Let's get back to the thing about surviving.
18 You've survived prison, several things, and you've
19 also survived five gunshots, right?
- 20 A. Yes, sir.
- 21 Q. Okay. So you're a fighter and you know how to take
22 care of yourself, right?
- 23 A. Yes, sir.
- 24 Q. You're a believer in keeping it on the street?
- 25 A. Yes, sir.

1 Q. Of settling things in your own way?

2 A. Yes, sir.

3 Q. You're a believer in lying to people to get what you
4 want; aren't you?

5 A. No, sir. I believe -

6 Q. Okay. Did you lie to Little J?

7 A. Yes, sir.

8 Q. Okay. Did you lie at the hospital?

9 A. Yes, sir.

10 Q. Were you convicted of lying to the police officer in
11 2010 in Georgia?

12 A. Yes, sir.

13 Q. Any other benefits you get from telling this story
14 today, Mr. Riley?

15 A. Do I get any benefits?

16 Q. Yes, sir. For handling it your own way today, you
17 get any other benefits besides what we heard about,
18 the downward departure and special housing, and that
19 sort of thing? Anything else going to help out Eric
20 Riley?

21 A. No, sir.

22 Q. How about the guy that laughed at you, the guy that
23 wouldn't help you with your case?

24 A. Yes, sir.

25 Q. You going to get him back, right?

- 1 A. It's not really getting him back. It's really -
- 2 Q. You're testifying against him. Well, are you trying
- 3 to help him or hurt him?
- 4 A. It's really towards Kenya. It's not to Scooter.
- 5 Q. It's what?
- 6 A. It's really towards Kenya. It's not to Scooter.
- 7 Q. Okay. Well, I was going to ask you that. But he's
- 8 getting harmed by you coming in here and telling the
- 9 story. If the jury believed all this, wouldn't it
- 10 harm him? You're accusing him of a crime; aren't
- 11 you?
- 12 A. I'm not accusing him, sir. I'm repeating what he
- 13 told me, sir.
- 14 Q. Okay. So it's even worse. You're saying he did a
- 15 crime and he has to confess to it?
- 16 A. He didn't -
- 17 Q. What do you think he's tell - what did he tell that
- 18 wasn't true?
- 19 A. What do I think was the truth?
- 20 Q. Do you think he lied to you?
- 21 A. He had no reason to.
- 22 Q. He had no reason to lie to you?
- 23 A. No, sir.
- 24 Q. He had no reason to sit there and confess to you
- 25 either; did he?

1 A. That goes back to that bond that you called special,
2 sir.

3 Q. Okay.

4 A. Kenya.

5 Q. Okay. Well, I understand why you don't like Kenya,
6 and I understand why you wouldn't like Mr. Powell.
7 And so, besides hurting Mr. Powell today, whether you
8 think you are or not, the other thing you're doing is
9 you're accusing Kenya Hagood of being involved in
10 this robbery partly; aren't you?

11 A. No, sir.

12 Q. Do you think she set it up?

13 A. No, sir, I'm not saying that.

14 Q. You're not?

15 A. No, sir. I'm just -

16 Q. You're saying she set it up. Isn't that - aren't you
17 familiar with -

18 MR. SHELDON: I ask that he allows him to answer the
19 question -

20 A. No, sir.

21 MR. SHELDON: - before he asks another question.

22 A. I am saying that - I am repeating what Marion Powell
23 told me about Kenya, sir.

24 Q. But what you say he said is harmful to Kenya. Would
25 you agree with that?

- 1 A. No, sir.
- 2 Q. You don't. You don't think it's against the law to
3 set up a robbery/burglary?
- 4 A. But Kenya's not on trial, sir.
- 5 Q. I know she's not. But you're giving evidence against
6 Kenya right now, aren't you, based on what Powell
7 allegedly told you?
- 8 A. Sir, you keep trying to make me say things and assume
9 things. I'm not - that's not what I'm saying. I'm
10 saying what he told me, sir.
- 11 Q. So you do not see this as an opportunity to settle
12 things your own way as to Kenya?
- 13 A. That's a different question from what you asked, but
14 in a way, sir. In a way.
- 15 Q. And obviously, you can't keep something on the street
16 if you're in prison; can you?
- 17 A. No, sir.
- 18 Q. Okay. And if you're in prison, you can't get out to
19 handle something your own way; can you?
- 20 A. No, sir.
- 21 Q. Okay. So, really, the only thing you have, Mr.
22 Riley, this is really the only thing you could do;
23 wasn't it?
- 24 A. Yes, sir.
- 25 Q. Because you're a survivor and you were desperate to

1 do something, because every avenue had been used up
2 other than this, correct?

3 A. Sir, I - I wasn't desperate. I never reached out and
4 asked nobody for this -- this situation.

5 Q. Okay.

6 A. It was brought to me.

7 Q. It was brought to you.

8 A. And I accepted it.

9 Q. So it fell in your lap?

10 A. Yes, sir.

11 MR. LEE: I beg the court's indulgence?

12 THE COURT: All right, sir.

13 Q. So when you leave here today, you're going back to
14 prison, right?

15 A. Yes, sir.

16 Q. And you're going to be, unless your new friend
17 changed it, you're going to be going to special
18 housing?

19 A. Sir, that's not my friend, sir.

20 Q. All right.

21 A. You keep repeating that. We just met, sir.

22 Q. You just met?

23 A. Yes, sir.

24 Q. And he brought you perhaps the best gift you've ever
25 had in your life. Would you agree to that?

1 A. No, sir.

2 Q. No?

3 A. No, sir.

4 Q. He brought you the opportunity to get back to your
5 family, the people that love you, right?

6 A. Yes, sir.

7 Q. To get back to Georgia?

8 A. He brought me the opportunity to come a little
9 closer, sir. Well, hopefully, it'll come a little
10 closer.

11 Q. Okay. And what you had to do to get a little closer
12 was come in here and testify about Marion Powell,
13 right?

14 A. He asked me to come in here and tell the truth about
15 Marion Powell, sir.

16 Q. Did it really pain you not to keep this on the
17 street?

18 A. Yes, sir. I almost backed out of it yesterday.

19 Q. You almost backed out of coming to testify?

20 A. Yes, sir. Yes, sir.

21 Q. Okay. And it's because your conscience got the best
22 of you or -

23 A. My - yes, sir. My conscience and just - I always
24 just - I always accepted my punishment, you know what
25 I'm saying, for my wrongs, whatever. And it just is

1 not me to be doing - up here testifying like that.

2 Q. Just not you?

3 COURT REPORTER: Is that a no?

4 A. That - no, no, sir. I'm sorry, ma'am.

5 Q. Well, sometimes deals are too good to be passed up;
6 aren't they?

7 A. Yes, sir.

8 Q. Despite your conscience, right?

9 A. But sir, it's not really a deal. It's like he say
10 he's going to attempt it. He's going to try, but you
11 keep saying a deal. It's not a deal.

12 Q. That's all he is going to do, he's going to try?

13 A. Yes, sir.

14 Q. Do you think the better you testify, the harder he's
15 going to try?

16 A. Honest answer, sir. I hope he get down and beg for
17 it, sir, you know, but I don't know.

18 Q. For him to get down and beg for it, he's going to
19 have to really feel strongly about your testimony;
20 isn't he?

21 A. No, sir.

22 Q. He's not?

23 A. No, sir. He just have to be a man of his word that
24 he told me that he would try.

25 Q. He would try?

1 A. That was the agreement. If I came and tell the
2 truth, then, he would try.

3 Q. He would try. Do you know of any other way you can
4 get your sentenced reduced at this point?

5 A. Yes, sir. We got some - there's technicalities that
6 was wrong in my sentencing.

7 Q. Some technicalities?

8 A. Yes, sir.

9 Q. So you think it's going to get reduced anyway?

10 A. I don't know. Me and attorney had talked about on
11 that last visit, and I don't know yet.

12 Q. It's kind of a chancy thing to do, though, isn't it
13 to hope something gets reversed?

14 A. No, it's not going to get reversed, just about the
15 sentencing.

16 Q. But that's a chancy thing, right? You don't know
17 whether it's going to work or not.

18 A. If the law stick to the facts, it should work.

19 Q. Do you think your lawyer is going to have more sway
20 in front of a judge or the Solicitor saying let's
21 help -

22 MR. SHELDON: Asked and answered, Your Honor.

23 THE COURT: Go ahead.

24 A. Answer it?

25 MR. SHELDON: All right.

1 Q. Mr. Riley, thank you.

2 A. You welcome, sir.

3 THE COURT: Re-direct?

4 MR. SHELDON: Thank you, Your Honor.

5 THE COURT: Uh-huh.

6 ERIC LEONARD RILEY, JR.

7 RE-DIRECT EXAMINATION BY MR. SHELDON:

8 Q. Mr. Riley, explain what you mean by your conscience
9 was telling you.

10 A. Not to come up here?

11 Q. Yeah.

12 A. Just that - I just really didn't want to - I just
13 really didn't want to do it, because I just didn't
14 want to do it.

15 Q. Tell us why you didn't want to do it.

16 A. That ain't how I was raised. I mean, -

17 Q. What do you mean?

18 A. I'm like, I know I was wrong for what I did, and I
19 got caught in - I got caught up for what I did.

20 Q. So you feel bad for trying to get less time?

21 A. No, sir.

22 Q. Do you feel bad for snitching?

23 A. Yes, sir.

24 Q. Do you feel bad because you're not telling the truth?

25 A. I'm telling the truth, sir.

1 Q. Okay. I want to make that clear. And you do have a
2 conscience; don't you?

3 A. Yes, sir.

4 Q. In fact, I was looking through your record, and it
5 looks like in almost all the charges you've ever had,
6 you pled guilty to; haven't you?

7 A. Yes, sir.

8 Q. You've accepted it and said I'm guilty?

9 A. Yes, sir.

10 Q. Do you have a conscience?

11 A. Yes, sir.

12 Q. It's not how you were raised to snitch and rat people
13 out. You accept responsibility?

14 A. Yes, sir.

15 Q. Now, you also said that, hopefully, you'll get less
16 time, correct?

17 A. Yes, hopefully.

18 Q. Because I made it very clear that -

19 A. Nothing.

20 Q. - you don't know whether you're going to get any less
21 time or not.

22 A. I don't know.

23 Q. Even if I recommend it?

24 A. I don't know.

25 Q. Because that power ultimately does not rest in my

1 hands; does it?

2 A. No, sir.

3 Q. And you said we're not friends?

4 A. No, sir.

5 Q. Because isn't it a fact my office is the one that
6 sent you to prison for ten years?

7 A. Yes, sir.

8 Q. And I called you a career criminal when you first got
9 up here; didn't I?

10 A. Yes, sir.

11 Q. Now, Mr. Lee asked you about a lot of things being
12 floated around in the jail, correct?

13 A. Yes, sir.

14 Q. You knew Mr. Powell, at least for a while, pretty
15 well, correct?

16 A. Yes, sir.

17 Q. Did you know him to share the secrets of his case
18 with a lot of people?

19 A. No, sir.

20 Q. Who are the only people he would share the secrets of
21 his case with, to your knowledge, to your personal
22 knowledge?

23 MR. LEE: I would object to the use of the word
24 secret. There is no evidence that there's a secret.

25 THE COURT: I'll sustain the objection.

1 MR. SHELDON: Details, details of his case.

2 Apologize, Your Honor.

3 Q. Do you have any personal knowledge of the folks that
4 he would tell the details of his case to?

5 A. Huh-uh. The names I say won't be for sure. It would
6 just be me knowing that who our little circle was and
7 who he like really talked to. And it'll be me, Akeem
8 Sweet, Trevor Millage. That's about it.

9 Q. A little circle?

10 A. Yes, sir. Yes, sir.

11 Q. In jail, correct?

12 A. Yes, sir.

13 Q. And you were in A-1 with him for a while, correct?

14 A. Yes, sir.

15 Q. And that's a dorm that's part of the Beaufort County
16 Detention Center?

17 A. Yes, sir.

18 Q. Did you ever leave that area?

19 A. Yes, sir.

20 Q. Why?

21 A. Scooter had came to me one day - well, he been
22 throwing little hints and that he was saying - his
23 words was - I don't - I don't know if I could say it.
24 His words was:

25 *Scott Lee is going to tell me - well,*

1 *Scott Lee said -*

2 MR. LEE: Yeah, I'm going to object to anything that
3 he's claiming that I told my client. It's clearly
4 hearsay, and I can't testify to -

5 THE COURT: I'm going to sustain that to.

6 MR. SHELDON: Your Honor. May we approach, Your
7 Honor?

8 OFF-THE-RECORD BENCH CONFERENCE.

9 BY THE COURT:

10 THE COURT: Might be a good time of day to take a
11 restroom break, ladies and gentlemen. Let's take a short
12 ten-minute recess.

13 BAILIFF: And the jury is clear, Your Honor.

14 JURORS LEAVE COURTROOM 10:35 A.M.

15 THE COURT: Before we take a break, let's take up a
16 matter. While the jury was exiting, the witness leaned
17 over to me and asked me if he could speak to his lawyer.

18 MR. RILEY: It could - it could be after. I just
19 wanted to make sure that I talk to him.

20 MR. SHELDON: I'm sorry.

21 MR. RILEY: I say it could be after the hearing. I
22 just wanted to make sure I speak with him.

23 MR. SHELDON: Okay. Yeah, absolutely. We can make
24 sure that happens.

25 MR. LEE: Okay.

1 MR. SHELDON: Okay. Thank you. Thank you, Mr.
2 Riley.

3 THE COURT: All right. Let's take five.

4 MR. SHELDON: Make sure you do not speak of this to
5 anyone, Mr. Riley, while you're on the stand, please.

6 MR. RILEY: Yes, sir.

7 MR. SHELDON: And stay there, unless you need to use
8 the restroom.

9 MR. RILEY: Yes. Yes, sir.

10 OFF THE RECORD.

11 BACK ON THE RECORD.

12 BY THE COURT:

13 THE COURT: Let's bring the jury in.

14 JURORS ENTER COURTROOM 10:48 A.M.

15 BAILIFF: The jury is entering, Your Honor.

16 THE COURT: Welcome back, ladies and gentlemen. Mr.
17 Sheldon, you may resume examination of the witness.

18 MR. SHELDON: Thank you, Your Honor. May it please
19 the court.

20 ERIC LEONARD RILEY, JR.

21 CONTINUE RE-DIRECT EXAMINATION BY MR. SHELDON:

22 Q. Mr. Riley, did your and Mr. Powell's relationship
23 take a turn?

24 A. Yes, sir.

25 Q. Did your relationship with his inner circle take a

1 turn?

2 A. No, sir.

3 Q. So yours and Mr. Powell's relationship took a turn?

4 A. Yes, sir.

5 Q. When was that?

6 A. I can't remember the exact date, but it was the last
7 day that I was in that Dorm A-1, and that was in the
8 end of April.

9 Q. End of April?

10 A. Yes, sir.

11 Q. Now, did he say anything directly to you? Did he
12 say, at any point, people are playing dangerous
13 games?

14 A. Those are his exact words, sir.

15 Q. Did he say it for the jury?

16 A. That it was his exact words.

17 Q. And what were those - what were his exact words?

18 A. *Niggers playing dangerous games.*

19 Q. And what did that mean to you?

20 A. That mean that he done found out that I had asked my
21 lawyer about testifying.

22 MR. LEE: Now, I'm going to object to that last
23 statement. There's no evidence of that, and I ask it be
24 stricken from the record. There's nothing to base that
25 on.

1 MR. SHELDON: It's his statement. He's testifying to
2 me cross-examining him about whether - he's under oath.

3 THE COURT: I will sustain the objection and order
4 that stricken from the record, and I would ask the jury to
5 disregard it. You may ask another question.

6 MR. SHELDON: Okay. Thank you, Your Honor.

7 Q. Specifically, what was he mad at you about? Not
8 where you got the information, but what was he mad at
9 you about?

10 A. By offering to snitch.

11 Q. He thought you were a snitch?

12 A. Yes, sir.

13 Q. And you said it came to a head towards the end of
14 April?

15 A. Yes, sir.

16 Q. Was there anything building up to that point?

17 A. In a way it was. Over the last couple of weeks, I
18 guess, he kept making comments like when we might be
19 on the basketball court or sitting down playing chess
20 or something, because me and him always played chess
21 together, and he might be like - he would say that -
22 he would say that:

23 *Them folks ain't know nothing about*
24 *me and Kenya until you and your cousin*
25 *got locked up.*

1 Those - that was his words:

2 *Them folks ain't know nothing about*
3 *me and Kenya until you and your cousin*
4 *got locked up.*

5 MR. SHELDON: Beg the court's indulgence, Your Honor.

6 THE COURT: All right.

7 Q. And then what happened between you and Powell that
8 led you to get moved to a different dorm?

9 A. It started from that early - it started from earlier
10 that day when he said - I was playing chess with
11 somebody else, and the chess table was right by the
12 phone, and he got off the phone. He walked by me.
13 He didn't say it directly to me, but me knowing what
14 I was doing, you know, like, I guess, guilty
15 conscience of me knowing what I was doing, I knew
16 that statement was directed to me. He walked by me
17 and said - that when he said:

18 *Niggers playing dangerous games.*

19 So we locked down and I was like - that was before
20 the 12:00 o'clock count, the 12:30 count. We locked down
21 and came back out at 4:00 o'clock that day, and we was
22 getting our trays. We was fixing to eat, and I seen him.
23 You know, like I say, me and him usually really kick it in
24 the dorm. You know, really it was cool. So we was
25 getting our trays, and you could just feel the tension

1 when somebody like know there's a problem in that - you -
2 in a little jail, so you could feel the tension. And like
3 he didn't say nothing to me, so I tried to like pick him,
4 so I was like - I said:

5 *What's out, Dirty?*

6 Because that's what I call people. I said:

7 *What's out, Dirty?*

8 He was like:

9 *What up?*

10 You know what I'm saying, like not-looking-my-way
11 type of way. So, I knew - I really knew what it was
12 already, so when he said - no, he didn't say anything to
13 me, but I'm seeing him talk to the other people that's,
14 you know, that came in the dorm, and I see him speaking to
15 them. They talking in huddles or whatever. And usually,
16 I'm a part of the huddle, you know, but -

17 Q. And then you were on the outside?

18 A. Yeah, I'm on the outside now, so I see these little
19 huddles happening. So, I'll say we came out about 4:00
20 o'clock. So maybe around maybe about 6:00 o'clock, after
21 we ate, he asked me to hold my shoes to go play
22 basketball. So, I let him hold my shoes to play
23 basketball. And he came - I don't even think they
24 finished that game. He came right back in and he went to
25 talking some more - every - with everybody. So he gave me

1 my shoes.

2 Well, he set - he set my shoes by my door. So, I
3 went to put my shoes on. So, he came - so he was like -
4 he said, man, - he said, man, - he said, what -

5 MR. LEE: Your Honor, I'm going to object. Now, I
6 don't know where this is going. We haven't been advised
7 of this. I'm not sure there's any relevance and -

8 MR. SHELDON: Your Honor.

9 MR. LEE: - and I've never heard this before. I've
10 never been provided with it and I have no idea what he's
11 going to say, and I would object to it unless he can put
12 some kind of relevance on it.

13 MR. SHELDON: I'm getting to one specific incident.
14 So, and I'm just going to ask him this one question, Your
15 Honor.

16 THE COURT: Fine, if you could tie it in, then.

17 Q. Did you get in a shoving match with him?

18 A. Yes, sir.

19 Q. Okay. And after that, were you transferred?

20 A. To another dorm, yes sir.

21 Q. Okay. And back towards the end of April?

22 A. Yes, sir.

23 Q. You pleaded guilty on almost all the things you've
24 ever been charged with, correct?

25 A. Yes, sir.

1 Q. And you've lied to cops before?

2 A. Yes, sir.

3 Q. What have you lied to cops before about?

4 A. Like, I was a passenger and I - I was the passenger
5 in the car with that marijuana - that last marijuana
6 charge I had in 2010. And detectives - it was like
7 two detectives that was following in a car, but I
8 didn't - I wasn't aware of it. And he told me that -
9 he asked me - first, he asked me where did I just
10 come from, because he pulled us over leaving from a
11 Walgreen's parking lot. And he pulled us over and -

12 MR. LEE: Your Honor, again, I hate to object again,
13 but, I mean, I don't think it's appropriate to go into - I
14 mean, we know he's lied to the police, so I don't think
15 it's - we have time for him to go through every single
16 case and talk about how much he's lied to police officers,
17 and I don't think the specifics of the case should come
18 in.

19 MR. SHELDON: The argument is that he's opened the
20 door to say he's lied to police officers. May we
21 approach, Your Honor?

22 THE COURT: All right.

23 OFF THE RECORD BENCH CONFERENCE.

24 Q. You've been convicted of lying to a police officer,
25 correct?

1 A. Yes, sir.

2 Q. Have you ever testified before?

3 A. No, sir.

4 Q. Did you tell the truth when you pleaded guilty to all
5 your crimes before?

6 A. Yes, sir.

7 Q. Are you telling the truth today?

8 A. Yes, sir.

9 Q. Thank you.

10 MR. LEE: A couple of follow-ups, Your Honor, please.

11 THE COURT: Briefly.

12 ERIC LEONARD RILEY, JR.

13 RE-CROSS-EXAMINATION BY MR. LEE:

14 Q. So you're telling us that you were - the way you were
15 raised was to accept responsibility?

16 A. Yes, sir.

17 Q. And as the Solicitor said, because you pled to most
18 of your charges, right?

19 A. Yes, sir.

20 Q. Okay. And that has been the way you were brought up
21 to do that?

22 A. To plead guilty?

23 Q. No, to accept responsibility.

24 A. Yes, sir.

25 Q. Okay. You don't want anybody else to bring you down,

1 right?

2 A. If I'm guilty, yes sir.

3 Q. But you're not doing that today?

4 COURT REPORTER: I'm sorry?

5 A. If I'm guilty of it.

6 Q. But you're not doing that? You're not taking your
7 punishment today; are you? You're trying to get less
8 punishment by blaming somebody else for something,
9 right?

10 A. Wrong, sir. I accepted my - I accepted my punishment
11 July 29th of this year, sir. I pled guilty to
12 attempted armed robbery.

13 Q. Yeah, you did, but your punishment is getting ready
14 to change, because you've been here today, right?

15 A. I hope it do, sir.

16 Q. God willing?

17 A. God willing.

18 Q. And you hope he begs for it to the judge?

19 A. I hope so, sir.

20 Q. Yeah. Now, all these things you testified about,
21 these additional conversations with Powell and
22 shoving match and stuff like that, is that something
23 that you recalled over the five-minute break that we
24 took that you - that some reason you didn't testify
25 to when you first went on the stand?

1 A. I wasn't asked that question. I was told to only
2 answer the questions that I'm asked.

3 Q. And this shoving match you talked about, you - you're
4 saying that Powell was mad at you?

5 A. Yes, sir.

6 Q. Okay. Now, is this before or after he laughed at you
7 when he didn't want to help you on your case, when
8 you were mad at him?

9 A. This was months after.

10 Q. Months after?

11 A. Yes, sir.

12 Q. Okay. So that - you had been mad at him for months
13 when this shoving match happened, right? You had
14 been mad at him because he laughed at you, right?

15 A. I couldn't say you mad. It was just like I see it
16 ain't no - it ain't no friendship. Like, if I was in
17 his situation and I knew that - and I knew her, and
18 we supposed to be so street, he wouldn't have had to
19 ask me to put a word in and talk to her.

20 Q. But wait a second, if you supposed so street?

21 A. If we supposed to be so real.

22 Q. So real?

23 A. So - so, yeah.

24 Q. So you were mad at him because he wasn't being real?

25 A. Yes, sir.

1 Q. Because he wasn't, from jail, trying to help you on
2 your armed robbery case?

3 A. I wouldn't - yes, sir.

4 Q. Okay. Now, the Solicitor talked to you - he said,
5 isn't it our office that convicted - that you pled
6 and he gave you ten years. Was it his office?

7 A. Yeah, he works with the Beaufort County Solicitor?

8 Q. Yeah. Okay.

9 A. Yes, sir.

10 Q. Okay. So you don't really like him?

11 A. I don't really like him?

12 Q. No, the Solicitor's Office. The one's that
13 prosecuted you; the same office that prosecuted you
14 for the attempted armed robbery.

15 A. No, sir.

16 Q. You don't? Okay. Even though they're going to go to
17 court and try to get your sentence reduced, right?

18 A. Yes, sir.

19 Q. Okay.

20 A. You're right.

21 Q. So there's nothing else the Solicitor's Office has
22 ever done for you that you're thankful for them and
23 they might be willing to come in and help you do
24 this?

25 A. No, sir.

1 Q. No?

2 A. No, sir.

3 Q. Okay. Let's talk about your plea bargain, then?

4 A. Yes, sir.

5 Q. You weren't just charged with attempted armed
6 robbery; were you?

7 A. No, sir.

8 Q. You were charged with attempted murder?

9 A. Yes, sir.

10 Q. Right?

11 A. Yes, sir.

12 Q. Attempted armed robbery, and in possession of a gun,
13 right?

14 A. Yes, sir.

15 Q. Okay. And their office did what with the attempted
16 murder?

17 A. They dropped it, sir.

18 Q. They dropped it?

19 A. Yes, sir.

20 Q. What did they do with the gun charge?

21 A. They dropped it, sir.

22 Q. Okay. They're gone, dismissed?

23 A. Yes, sir, dismissed.

24 Q. Okay. So they've done things for you in the past,
25 called pleading, right?

1 A. Can I explain? Can I go into it?

2 MR. SHELDON: I say may he explain his answer.

3 MR. LEE: Which one?

4 MR. SHELDON: I asked that he may answer the question
5 and explain his answer.

6 A. I can?

7 Q. I'm just asking if they've helped you before and
8 that's a plea - that's a plea op, yeah.

9 A. I don't feel like they really helped me, because when
10 I asked for this, I was turned down. The solicitor
11 that was over my case, she turned it down.

12 Q. Okay. Did you try to sell this story before?

13 A. No, I wasn't trying to sell a story. I was repeating
14 what I was told by your client, sir.

15 Q. And trying to get help from the Solicitor's Office
16 for doing that?

17 A. Yes, sir.

18 Q. Okay. The same office Mr. Sheldon works for?

19 A. Sir?

20 Q. The same office Mr. Sheldon works for?

21 A. Yes, sir.

22 Q. You presented this testimony to their office prior to
23 your plea, you're saying that?

24 A. I didn't present this testimony. I said - I told my
25 lawyer one day, you know how your lawyers come talk

1 to you. I told my lawyer in the room one day, I was
2 like, what if I know something about Marion Powell?
3 I said what if I know something about him, would that
4 help me out if I traded that information?

5 Q. Uh-huh.

6 A. And I'm assuming that he went and asked whoever he
7 would have to ask about that, and he was like they
8 say they not interested.

9 Q. You're assuming that?

10 A. No, he told me they wasn't interested.

11 Q. So you tried before your plea to try to get less time
12 and get help, right?

13 A. I tried to do something, yes sir.

14 Q. Yeah. Okay. And that didn't work, apparently.

15 A. No, sir.

16 Q. So now you're in more desperate straights, because
17 you already have the conviction and the time. So,
18 now, you're up there to try again, right?

19 A. I said it was brought to me, sir.

20 Q. Okay. Okay. That's what I'm saying. So their
21 office, which you say has already been on notice that
22 you have information, randomly came to you on another
23 case saying let's do this. They say, hey, we can
24 help you out. Is that your story?

25 A. Like I say, I don't think he randomly. I think he

1 knew what he was - what he was going to come and do,
2 but yes, sir.

3 Q. So you think the prosecutor lied to you?

4 A. Did he lie to me? No, sir.

5 Q. He told you there was something else; didn't he?

6 A. Huh-uh. He didn't - he never said, Mr. Riley, I'm
7 here to speak with you about such and such. When he
8 came in, he introduced himself and introduced the
9 investigator behind him -

10 Q. Uh-huh.

11 A. - and he asked me did somebody send me - did somebody
12 like introduce me to rob Kenya Hagood.

13 Q. Right.

14 A. And the conversation just flowed from there.

15 Q. Okay. Let me ask you about your case.

16 A. Okay.

17 Q. Your attempted armed robbery case, your attempted
18 murder case that you'd already pled to, right?

19 A. If you want to transform my words to saying that.
20 Like I said that he asked me did somebody send me to
21 rob Kenya Hagood.

22 Q. To rob Kenya Hagood?

23 A. Uh-huh.

24 Q. The time when you got shot?

25 A. Yes, sir.

1 Q. The thing you pled to?

2 A. Yes, sir.

3 Q. Okay. Did you think he was there to talk about this?

4 A. Did I think that?

5 Q. Yeah.

6 A. I had no idea what he was there to talk about. I
7 seen my lawyer, Mr. Tabor, and I went to smiling. I
8 thought something had happened.

9 Q. All right. Now, a couple of other things. You've
10 talked about being in prison and being in the jail
11 before. You know what discovery is; do you not?

12 A. Discovery?

13 Q. Discovery?

14 A. A motion for discovery?

15 Q. Yeah.

16 A. Yes.

17 Q. A motion for discovery is you're entitled to get all
18 the stuff in your case, reports, photo lineups,
19 witness statements, DNA, whatever, you're entitled to
20 get that; aren't you?

21 A. Yes, sir.

22 Q. And they send it to your lawyer, right?

23 A. Yes, sir.

24 Q. Did your lawyer take it to you to show it to you,
25 talk about your case?

1 A. Yes, sir.

2 Q. Okay. And if you're at the jail, is there any other
3 place you can talk to your lawyer about your
4 discovery?

5 A. Is there any other place?

6 Q. Yeah. You can't go to your lawyer - if you're in
7 jail, you can't go to your lawyer's office to talk
8 about your case; can you?

9 A. No, sir.

10 Q. The lawyer comes to you.

11 A. Yes, sir.

12 Q. Okay. Do you know plenty of people who actually have
13 copies of their discovery in their jail cell with
14 them? You seen that before, legal papers?

15 A. Only motion of discovery that I seen, other than
16 mine, was Akeem Sweets.

17 Q. Okay. But you know that - I mean, inmates have jail
18 paperwork, and legal paperwork and some have copies
19 of discovery, all kinds of things; don't they?

20 A. Yes, sir.

21 Q. Okay. And obviously, the clients in jail, the only
22 place their lawyer can go see them is at the jail,
23 right?

24 A. They call us out to a room separate from where we at.

25 Q. Yeah.

1 A. So, it's like you and that lawyer one-on-one.

2 Q. Right. Okay. Have you had those legal visits with
3 your lawyers before in all your other cases?

4 A. Yes, sir.

5 Q. Did they come see you at the jail?

6 A. Yes, sir.

7 Q. Talk about your case?

8 A. Yes, sir.

9 Q. Share things with you?

10 A. As in what?

11 Q. Keep you updated on the case?

12 A. Yes, sir.

13 Q. Say, hey, I got this document today or here's
14 something that arrived from the prosecutor's office
15 that we need to talk about?

16 A. I got all mine at once.

17 Q. Got all your -

18 A. Me and my lawyer spoke several times.

19 Q. Yeah.

20 A. He always came to see me, but I got my motion and all
21 my paperwork at one time.

22 Q. You mean it's brought to you at one time?

23 A. At one - yes, sir.

24 Q. So, you had all your paperwork.

25 A. Yes, sir.

1 Q. At one time.

2 A. At one time.

3 Q. Okay. Talk about your case when you're in jail?

4 A. Did I talk about my case?

5 Q. Do people talk about their cases in jail?

6 A. I guess they do, but I don't - like I said, I don't
7 know nobody from South Carolina. You know, the
8 people that I was involved with, their circle was
9 just a few, so.

10 Q. Okay.

11 A. So, no, people don't want to talk to me in Beaufort
12 about their case.

13 Q. Okay. Unless you got a special bond with them like
14 you have with Marion Powell, right?

15 A. You keep trying to use that word *special*, sir.
16 There's nothing special about it.

17 Q. There's not?

18 A. It just came.

19 Q. It just what?

20 A. It just came. It's nothing special.

21 Q. So you're saying that you talked to your lawyer about
22 wanting to maybe provide some information prior to
23 your plea, right?

24 A. Yes, sir.

25 Q. You tell anybody else that?

1 A. No, sir.

2 Q. So the only person you told was your lawyer?

3 A. Yes, sir.

4 Q. Okay. But you act like everybody knew that or Marion

5 Powell knew that, right? That's what you're saying.

6 A. That's the only person that knew that.

7 Q. The only person knew what?

8 A. You asked me - you said -

9 Q. You asked your lawyer can I go - can I provide

10 information and help me out on my plea, right?

11 A. Yes, sir.

12 Q. Did you tell anybody else?

13 A. No, sir.

14 Q. Okay. You and your lawyer are the only people that

15 know?

16 A. Yes, sir.

17 Q. Okay. And you didn't tell anybody?

18 A. No, sir.

19 Q. Did your lawyer start going in and telling people?

20 A. I know he -

21 Q. That his client wanted to be a snitch or wanted to

22 provide information in Marion Powell's case?

23 A. Yes, sir. He told whoever - if I was your client and

24 you went to your superiors or to the solicitor's

25 office, -

1 Q. Uh-huh.

2 A. - you would - whoever you would tell, I'm assuming
3 that's who - that's who he told, cause they rejected
4 it, they said, no, they wasn't interested. They said
5 really they had me.

6 Q. That's what you're assuming?

7 A. No, they told me no. I'm not assuming. They said
8 no.

9 Q. They didn't want your help?

10 A. They didn't want it.

11 Q. Did your lawyer tell Marion Powell that they had made
12 that offer and it was turned down?

13 MR. SHELDON: Objection.

14 A. That would be a breach of contract, sir.

15 THE COURT: Hold on a second.

16 MR. SHELDON: Objection.

17 THE COURT: Hold on just one second.

18 MR. SHELDON: I let this go on long enough. He keeps
19 asking questions that regard lawyer/client privilege that
20 I haven't objected to yet, and now he keeps asking
21 questions that call for an answer for which he has no
22 personal knowledge. He's asking you assume, you assume,
23 you assume. This has been going on for about ten minutes
24 now.

25 THE COURT: Okay.

1 MR. LEE: I think the relevance will come out in a
2 couple of more of his witnesses about what he's attempting
3 to - he's attempting to prove part of his case.

4 MR. SHELDON: And also, asked and answered. He's
5 already gone down this line of questioning without an
6 objection already.

7 THE COURT: You can state the objection, then.

8 MR. LEE: I think we've heard enough from Mr. Riley,
9 Your Honor. Thank you.

10 MR. SHELDON: One question.

11 THE COURT: One.

12 ERIC LEONARD RILEY, JR.

13 RE-DIRECT EXAMINATION BY MR. SHELDON:

14 Q. Who is Akeem Sweet?

15 A. That's my co-defendant.

16 Q. And you're related to him?

17 A. We're not blood related, but we call each other
18 cousins.

19 Q. Okay. Thank you.

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

21 MR. SHELDON: I asked that Mr. Riley may be
22 transported back to SCDC.

23 THE COURT: You don't object?

24 MR. LEE: No objection.

25 THE COURT: You may call your next witness.

1 MR. SHELDON: Thank you. Craig Karafa.

2 BAILIFF: I'll get him. What's his name?

3 MR. SHELDON: Craig Karafa. He's coming. Thank you.

4 OFFICER CRAIG NELSON KARAF A

5 being first duly sworn, testified as follows:

6 MADAM CLERK: If you'll state your full name for the
7 record and spell it please.

8 OFFICER CRAIG NELSON KARAF A: Craig Nelson Karafa,
9 C-R-A-I-G N-E-L-S-O-N K-A-R-A-F-A.

10 OFFICER CRAIG NELSON KARAF A

11 DIRECT EXAMINATION BY MR. SHELDON:

12 Q. Officer Karafa, you can hear me, I can hear you and
13 vice-versa, and then the jury can hear you, too?

14 A. Yes, sir, I can hear you.

15 Q. Where do you work?

16 A. The Beaufort County Detention Center.

17 Q. And what is - what are your duties there now?

18 A. Currently, I'm the intelligence officer. I gain
19 intelligence inside the Detention Center. I also
20 handle all subpoenas that come through. I'm also
21 part of the Training Unit.

22 Q. Part of the subpoenas that would require you to
23 produce jail tape records?

24 A. Yes, sir.

25 Q. And tell us about that, please. Are you an

1 administrator for the jail tape system?

2 A. Yes, sir. We go through a contract through an
3 outside agency known as Securis, which handles all
4 the outside databases. What we do in-house is, we
5 can monitor all phone calls, record all phone calls,
6 listen to phone calls, live calls, made calls
7 previously, things like that.

8 Q. Do you have access to that database -

9 A. Yes, sir.

10 Q. - as the administrator?

11 A. Yes, sir.

12 Q. Can any of those calls, phone calls, be changed in
13 any way?

14 A. No, sir.

15 Q. Can they be manipulated any way?

16 A. No, sir.

17 Q. Now, explain how a inmate, first of all, is able to
18 call on the phone?

19 A. Inmates can either purchase a phone card or they can
20 have their families basically set up an account. And
21 either way, they can purchase their phone card
22 through commissary. And then, they just - they can
23 call up. There's so many -- depending on where you
24 call, basically, is how many minutes it's going to
25 take up and how much money it's going to take up, or

1 the family can set up an account and put so much
2 money on it, and then they can call as many times as
3 what's left for money-wise. And then, when the
4 money's out, it stops.

5 Q. And how much money does a phone call take?

6 A. It depends if it's basically local or if it's long
7 distance. A local call I believe is a dollar, a
8 dollar and nine cents.

9 Q. Now, how would inmates access the actual - their
10 account for the phone call?

11 A. When an inmate comes into the Beaufort County
12 Detention Center, they are issued something called
13 OCA number. It's basically a number that stays with
14 them throughout the whole entire time they are at the
15 facility. Every time they come in, it's the same
16 number. How you access the phone is you put that
17 number into the phone, and then you can call the
18 number, which, by doing that, shows who's making the
19 phone call, when they're making it, and to whom.

20 Q. And each inmate's number is specific?

21 A. Yes, sir.

22 Q. It's assigned them?

23 A. Yes, sir.

24 Q. Do you monitor to make certain that inmates only use
25 their numbers?

1 A. Yes, sir, to the best I can.

2 Q. Sometimes it happens that they trade numbers?

3 A. Yes, sir.

4 Q. Is that rare or -

5 A. It's not uncommon. It does happen, but that's what
6 part of my job is, is to reprimand individuals that
7 don't put in their correct numbers to make phone
8 calls.

9 Q. Now, did you answer a subpoena for phone calls
10 related to Marion Powell?

11 A. Yes, sir, I did.

12 Q. And what was the number - what was the - in effect,
13 what was that subpoena asking you to do?

14 A. I have the subpoena right here, if I can go directly
15 to the subpoena.

16 Q. Will it help refresh your recollection?

17 A. Yes, sir. The subpoena that I secured was all secure
18 phone calls and/or data compiled, therefore, showing
19 dates and times of calls from the Beaufort County
20 Detention Center for the dates of 3/27/2011 through
21 the dates of 10/22/2013 made to the number of
22 843-263-7832.

23 Q. 843-263-7832?

24 A. Yes, sir.

25 Q. And did you produce, first of all, a document that

1 had all those phones on it?

2 A. Yes, sir, I did.

3 Q. And then did you also produce a document under the -
4 under that subpoena for all the phone calls that
5 specifically Marion Powell made to that number?

6 A. Yes, sir.

7 MR. SHELDON: May I approach the witness, Your Honor?

8 THE COURT: Yes, sir.

9 MR. SHELDON: The State's approaching Mr. Karafa with
10 State's Exhibit 61, Madam Court Reporter.

11 Q. This is for identification only.

12 A. Yes, sir.

13 Q. Do you recognize what that document is?

14 A. Yes, sir.

15 Q. What is it?

16 A. This is the document that I printed from the secure
17 system showing all calls from Marion Powell and his
18 OCA number to the number on that subpoena.

19 Q. 843-263-78 -

20 A. Yes, sir. 7832.

21 Q. Thank you. And what time period was it, again?

22 A. The subpoena is 3/27/2011 to 10/22 of 2013.

23 Q. And why was that date chosen?

24 A. Which date, sir?

25 Q. That time frame?

1 A. I believe it was the time that he was incarcerated.

2 Q. Now, how many phone calls did he make to that number?

3 A. I have a total from the date specified, 198.

4 Q. 198. And that is a true, accurate copy of the record
5 you provided to me?

6 A. This is directly from my system, sir.

7 MR. SHELDON: The State moves State's Exhibit 61 into
8 evidence.

9 MR. LEE: No objection.

10 THE COURT: Without objection.

11 DOCUMENT SHOWING PHONE CALLS MADE

12 BY MARION POWELL MARKED STATE'S

13 EXHIBIT NUMBER 61, ADMITTED AS EVIDENCE.

14 MR. SHELDON: Thank you, Your Honor. May I approach
15 the witness, Your Honor?

16 THE COURT: You may.

17 Q. Now, I'm approaching with State's Exhibit 60, and
18 I'll ask if you can identify this.

19 A. Yes, sir. This is the exact disc that I completed
20 regarding that subpoena.

21 Q. And what does that disc contain?

22 A. The exact information that is mentioned in the
23 subpoena.

24 Q. Okay.

25 A. The dates and times specified to that number. All

1 calls that are attempted, completed, incomplete.

2 Q. And how far back does the database inside of the
3 system actually store numbers - store phone calls
4 itself, rather?

5 A. We have access, basically, to phone calls that go
6 back, but if it's under - it only goes back 365 days
7 to listen to audio. It will show records that go
8 farther back, but you cannot listen to those phone
9 calls. It'll just show that, if the phone call is
10 made, attempted, or completed, and the times and
11 things like that, but you cannot listen to the audio.

12 Q. And that C.D. itself contains all of the audio for
13 365 days of calls made to that number by Marion
14 Powell?

15 A. Yes, sir.

16 Q. And that is a fair and accurate copy of the C.D.?
17 You made that yourself, correct?

18 A. This is the exact copy that I made with my mark.

19 Q. And how was it done?

20 A. I actually have a subpoena book that I brought with
21 me, as well, that I mark every single subpoena with
22 the exact numbers that go to the disc, and I also
23 mark the disc with my writing with my initials.

24 Q. And is that writing reflected on - and the same as
25 what you marked in your records?

1 A. Exactly.

2 MR. SHELDON: Okay. And the State enters State's
3 Exhibit 60, I believe, into evidence, Your Honor.

4 MR. LEE: May we approach the bench?

5 MR. SHELDON: Oh, I apologize. Actually, I withdraw
6 moving it into evidence, the proper foundation.

7 MR. LEE: I don't think we can put all of them in as
8 one.

9 MR. SHELDON: Yeah, I'm not going to put all of them
10 in.

11 MR. LEE: Yeah.

12 MR. SHELDON: Yes.

13 Q. It's identified by you and that's your true copy,
14 correct?

15 A. Yes.

16 MR. SHELDON: Withdraw the motion at this time, Your
17 Honor. That's all the questions I have. Thank you.

18 OFFICER CRAIG NELSON KARAFA

19 CROSS-EXAMINATION BY MR. LEE:

20 Q. When you were looking at Exhibit 61, it showed 198
21 calls?

22 A. Yes, sir.

23 Q. Okay. Now, and that was for a one-year period?

24 A. 365.

25 Q. Now, what's your definition of a call, an attempted

1 call?

2 A. An attempted call, it could be anything as putting
3 the number in, calling the number, it's not accepted.

4 Q. Okay.

5 A. It can be denied. It could be insufficient funds, so
6 it will not go through.

7 Q. So the one - that 198 is the attempts?

8 A. Yes.

9 Q. Okay. And obviously, not all of those are completed,
10 correct?

11 A. Correct.

12 Q. And do you know how much were actually completed?

13 A. No, sir, not until -

14 Q. Can you look at them -

15 A. I can. It may take me a little bit to go through all
16 those pages.

17 Q. Okay. And doesn't it summarize them at the end of
18 the -

19 A. No, sir, I don't believe that it does.

20 Q. Okay. Page 6, for example, says:

21 *Attempts 62; complete 29.*

22 *and*

23 *Incomplete 33?*

24 A. Yes, sir.

25 Q. Okay. So that would show - but it would show the

1 attempts. You would be 62?

2 A. Yes.

3 Q. Okay. And then back here it says attempts 136.

4 A. Yes, sir.

5 Q. Complete 31, incomplete 105?

6 A. Yes, sir.

7 Q. So it looks like we have 60 complete phone calls, 29
8 plus 31?

9 A. Added up.

10 COURT REPORTER: I'm sorry, 60 complete phone calls
11 between?

12 A. I said adding up 29 and 31.

13 Q. Okay. Now, I don't know if - you have no way of
14 knowing, I guess, this, but is it common sometimes
15 for inmates to repeatedly call people?

16 A. Yes, sir.

17 Q. Okay. Sometimes, there's not a whole lot going on,
18 and they try to call people over and over and over,
19 right?

20 A. Yes, sir.

21 Q. Okay. And when they're calling somebody, they are
22 kind of at the mercy of that person they're calling
23 to push the button and accepted a call, right?

24 A. Yes, sir, it has to be accepted.

25 Q. All right. And what you testified to is those are

1 the number of calls for that one-year period where
2 Marion Powell called out to the number that he gave
3 you?

4 A. Yes, sir.

5 Q. Okay. And you produced all of those completed phone
6 calls, the audio of them, to the Solicitor's Office
7 pursuant to the subpoena, right?

8 A. Correct.

9 Q. Okay. You got any idea how long that is?

10 A. I have no idea, sir. I don't.

11 Q. Okay. But hours, if not many, many hours?

12 A. It just depends on - I mean, it contains a lot of
13 different things. It just depends on each phone, how
14 long the phone call was and things like that.

15 Q. Okay.

16 MR. LEE: That's all the questions I have, Your
17 Honor.

18 MR. SHELDON: I ask this witness be excused, Your
19 Honor.

20 MR. LEE: No objection.

21 THE COURT: Thank you, sir.

22 MR. KARAFI: Thank you.

23 THE COURT: You may step down.

24 MR. SHELDON: The State calls Investigator Andrew
25 Rice of Beaufort County Sheriff's Office. Andrew Rice.

1 BAILIFF: Step forward to be sworn please, sir.

2 INVESTIGATOR ANDREW RICE

3 being first duly sworn, testified as follows:

4 MADAM CLERK: Thank you. Have a seat. If you'll
5 state your name for the record and spell your last name,
6 please.

7 INVESTIGATOR ANDREW RICE: Andrew Rice, R-I-C-E.

8 INVESTIGATOR ANDREW RICE

9 DIRECT EXAMINATION BY MR. SHELDON:

10 Q. Deputy Rice, who do you work for?

11 A. The Beaufort County Sheriff's Office.

12 Q. And what is your role now?

13 A. Criminal Investigator.

14 Q. And what was your role before that?

15 A. I worked with the Drug Investigation Section.

16 Q. Drug Investigation Section?

17 A. Yes, sir.

18 Q. As a Criminal Investigator and just through your
19 general duties, have you ever had an opportunity to
20 speak with a guy named Byron Young?

21 A. Yes, I have.

22 Q. Does he have a nickname?

23 A. Yes, sir.

24 Q. What is his nickname?

25 A. Lil Lil.

1 Q. Did you have the opportunity to speak with him back
2 in March and April of this past year?

3 A. Yes, sir, I did.

4 Q. And were you able to determine what his number was?

5 A. Yes, sir.

6 Q. How so?

7 A. It was how I made contact with him. I had put - gone
8 out looking for him to talk to him as a - he was a
9 witness, and also, a victim in a case I was working.
10 And there was a phone number he contacted me on. And
11 then, I also had an additional case where I had
12 called him at that same number, and was able to make
13 contact with him, and had gotten his cell phone
14 records, once he was listed as a subscriber with that
15 phone.

16 Q. For that same phone number?

17 A. Yes, sir.

18 Q. What is that phone number?

19 A. I don't have it in front of me. Do you have it?

20 Q. Would your report help refresh your recollection?

21 A. Yes, sir, it would.

22 MR. SHELDON: May I approach?

23 THE COURT: You may.

24 Q. I'm handing you your report.

25 A. Thank you.

1 Q. Do you recognize what that is?

2 A. Yes, sir. It's the incident report from the March
3 17th of this year, and the phone number is
4 843-263-7832.

5 Q. 843-263-7832?

6 A. Yes, sir.

7 Q. Have you had the opportunity to speak with Mr. Young
8 numerous times?

9 A. Yes, sir.

10 Q. Are you familiar with his voice?

11 A. Yes, sir.

12 Q. Is his voice somewhat distinctive?

13 A. It is.

14 MR. SHELDON: May I approach the witness, Your Honor?

15 THE COURT: Certainly.

16 Q. I'm handing you what's been previously marked for
17 identification purposes as State's Exhibit 60. Have
18 you ever seen that before?

19 A. Yes, sir, I have.

20 Q. How do you know?

21 A. I actually listened to it. It had jail phone calls
22 that were on, and I've initialed the C.D.

23 Q. Specifically, did you listen to a jail phone call
24 from March the 9th, 2013?

25 A. Yes, sir.

1 Q. And in that jail phone call, do you hear a voice?

2 A. Yes, sir, two voices.

3 Q. And do you recognize either one of those voices?

4 A. Yes, sir.

5 Q. Which one?

6 A. One of the voices is Byron Young.

7 Q. Nickname Lil?

8 A. Lil, yes sir.

9 Q. What about for 4/25/2013?

10 A. Yes, sir.

11 Q. Did you listen to that one?

12 A. Yes, sir.

13 Q. And do you recognize that voice?

14 A. Yes.

15 Q. Whose voice is it?

16 A. Byron Young or Lil Lil.

17 Q. Now, you say you used to work for Drug Task Force or
18 Drug Investigations?

19 A. Yes, sir.

20 Q. And I apologize.

21 THE COURT: I apologize. I move State's Exhibit 70
22 in for the purposes of March the 9th, 2013 and April the
23 25th, 2013.

24 MR. LEE: No objection.

25 THE COURT: Without objection it's submitted.

1 AUDIO OF PHONE CONVERSATION MARKED
2 STATE'S EXHIBIT NUMBER 70, ADMITTED
3 AS EVIDENCE.

4 Q. Did you ever do any type of surveillance in the Grays
5 Hill area of Beaufort County?

6 A. Yes, sir, I did. Very often.

7 Q. Did you ever come across a person named Cleven Jones?

8 A. I did.

9 Q. Describe what you saw, where you saw him, and how you
10 came across him?

11 MR. LEE: Your Honor, for the record, I'm going to
12 object to the relevance of this testimony. The call on
13 Mr. Jones, I don't believe is relevant.

14 MR. SHELDON: We discussed it yesterday, Your Honor,
15 establishing him in that area.

16 THE COURT: I'm going to overrule the objection and
17 permit it. Go ahead.

18 MR. SHELDON: Thank you, Your Honor.

19 Q. How did you see him?

20 A. During the course of a drug investigation, ongoing
21 drug investigation in the Grays Hill area, I was observing
22 a location that we had information that drugs were being
23 either brought in or sold from that location, or stored
24 there. And on March 8, 2010, while conducting
25 surveillance, observed a silver Audi SUV that was

1 registered to Mr. Jones at [REDACTED] in Bluffton.
2 I observed him go to the location. And then, leave the
3 location, and I was able to follow it back to the Oaksdale
4 address.

5 Q. I apologize. Slow down. I didn't catch all that.

6 COURT REPORTER: Follow it back to what, now?

7 A. The [REDACTED] address.

8 Q. So you saw in Grays Hill area the car registered to
9 Oaksdale Drive, correct?

10 A. Yes, sir. It was a silver Audi.

11 Q. And that's registered to Cleven Jones?

12 A. Yes, sir.

13 Q. And [REDACTED], is that - where is that?

14 A. That's in the Mill Creek Subdivision in Bluffton,
15 South Carolina, Beaufort County.

16 Q. And then what did you do after that? Did you do any
17 surveillance on Mr. Jones' house?

18 A. I did.

19 Q. You weren't surveilling Mr. Jones' house on October
20 25, 2010; were you?

21 A. No, sir.

22 Q. That would have been convenient. However, I'm going
23 to approach with what's been marked as State's
24 Exhibit 59. I'm going to ask if you recognize what
25 this is?

1 A. It's a map showing the Beaufort, South Carolina area.

2 Q. You said the Beaufort, South Carolina area?

3 Specifically, is it the whole county? Is it

4 Beaufort? Is it Port Royal? What is it?

5 A. It's the entire county, Hilton Head, Bluffton,

6 Beaufort, St. Helen.

7 MR. SHELDON: Okay. I asked that the witness may
8 step down from the stand and show the areas of the map.

9 THE COURT: Certainly.

10 MR. SHELDON: Thank you, Your Honor.

11 Q. You're familiar with the whole county of Beaufort
12 working in law enforcement, correct?

13 A. Yes, sir.

14 Q. And residing here?

15 A. Yes.

16 Q. I ask that you actually mark different areas on the
17 map as you point them out to the jury.

18 MR. SHELDON: Actually, may I borrow your pen, Madam
19 Court Reporter?

20 COURT REPORTER: Yes, sir.

21 MR. SHELDON: Yes. Thank you. You may approach the
22 jury closer, so they can see what you're marking.

23 A. This is the general Beaufort area and surrounding
24 counties.

25 Q. Please speak up very loudly so the court reporter can

1 hear you.

2 A. This is the Grays Hill area where I was initially
3 conducting surveillance. It was an area off of Bruce
4 K. Smalls, which would be in this general area. I
5 was able to follow that silver Audi SUV that was
6 registered to Mr. Jones to [REDACTED], which
7 is back in this general vicinity over here. I don't
8 have the exact street right here to mark, but that's
9 the general area in the Mill Creek subdivision.

10 Q. And do you know where Big Estate is on that map?

11 A. Yes, sir, I do.

12 Q. Where is that?

13 A. That's back up in this general area right there.

14 Q. Will you please mark that on the map?

15 A. Yes, sir, that's the Big Estate area.

16 Q. Okay. Please show it to the jury and mark so they
17 can see it. It's a little glossy. It's kind of hard
18 to see it.

19 MR. SHELDON: May the witness return to the witness
20 stand, Your Honor?

21 THE COURT: I couldn't understand you?

22 MR. SHELDON: May the witness return to the witness
23 stand, Your Honor.

24 THE COURT: Sure.

25 MR. SHELDON: Thank you. State moves State's Exhibit

1 59 into evidence.

2 MR. LEE: No objection.

3 THE COURT: Without objection it's submitted.

4 MAP OF BEAUFORT COUNTY, SOUTH CAROLINA,

5 MARKED STATE'S EXHIBIT NUMBER 59,

6 ADMITTED AS EVIDENCE.

7 MR. SHELTON: And may I approach the witness, Your
8 Honor?

9 THE COURT: You may.

10 Q. I'm handing you State's Exhibit Number 58. Do you
11 recognize that exhibit?

12 A. I do.

13 Q. What is it?

14 A. It's a photograph of Kenya Hagood.

15 Q. Have you had contact with Kenya Hagood before?

16 A. I have.

17 Q. So you have personal knowledge of what she looks
18 like?

19 A. Yes, sir.

20 MR. SHELTON: The State moves -

21 Q. And that's a fair and accurate of how she looks?

22 A. Yes, sir, it is.

23 MR. SHELTON: State's Exhibit 58 is moved into
24 evidence.

25 MR. LEE: I don't see the relevance of that picture,

1 but I'm not going to object to it.

2 MR. SHELDON: I move it into evidence relevant to
3 establish so the jury can see, actually, who we're talking
4 about here.

5 THE COURT: Overruled. Go ahead.

6 MR. SHELDON: Thank you, Your Honor.

7 PHOTO OF KENYA HAGOOD MARKED STATE'S

8 EXHIBIT NUMBER 58, ADMITTED AS EVIDENCE.

9 Q. Now, you've known Byron Young for a number of years?

10 A. Yes, sir.

11 Q. And do you know him to have varying hairstyles?

12 A. Yes, sir.

13 Q. And do you know whether in 2010 what his hairstyle
14 was?

15 A. Yes, sir. It was longer dread locks, way down to his
16 shoulders.

17 Q. Can you describe what those dread locks -- were they
18 thick dread locks or thin dread locks?

19 A. I guess they were thicker.

20 Q. With dread locks down to his shoulders, correct?

21 A. Yes, sir.

22 MR. SHELDON: Your Honor, State moves Exhibit 62,
23 which is a portion of the jail tapes that we're about to
24 publish for the jury, into evidence.

25 MR. LEE: Without objection.

1 THE COURT: Without objection.

2 PORTION OF JAIL TAPES MARKED STATE'S

3 EXHIBIT NUMBER 62, ADMITTED AS EVIDENCE.

4 MR. SHELDON: Thank you, Your Honor. State published
5 first phone call made on March the 9th, 2013 entered into
6 evidence for Marion Powell the number for jail to voice
7 identified as Byron Young; phone number 843-263-7832.

8 Now, the State publishes from the phone call from
9 April 25, 2013. First - apologize, Your Honor.

10 Q. Are you familiar with what people call things in the
11 street, street language?

12 A. Yes, sir, some things.

13 Q. What does shorty mean?

14 A. It usually means a female, a girl.

15 Q. What about an old girl? Obviously mean a girl?

16 A. Yes, sir.

17 MR. SHELDON: That's all the questions I have of this
18 witness. Thank you.

19 THE COURT: Any questions for the witness?

20 INVESTIGATOR ANDREW RICE

21 CROSS-EXAMINATION BY MR. LEE:

22 Q. Investigator Rice, so you said that March 2010 - I
23 think you said March 8, 2010 -

24 A. Yes, sir.

25 Q. - you said Mr. Jones' car right here?

1 A. Yes, sir, I did.

2 Q. Okay. And that is March 8th. So, that would be
3 seven-and-a-half months before the thing we're here
4 today for?

5 A. Yeah. Yes, sir.

6 Q. Okay. And so, seven-and-a-half months before that,
7 you saw that car drive from there to there, right?

8 A. Yes, sir.

9 Q. Okay. And he asked you about the Big Estate area?

10 A. Yes, sir.

11 Q. Where the people appear to be from, and that's up
12 there?

13 A. Yes, sir.

14 Q. Okay. Would you agree, if you know, as the crow
15 flies, isn't it probably 35 to 40 miles to drive from
16 Big Estate to Bluffton?

17 A. Yes, sir. It's about 30 miles.

18 Q. And there's really not a great way to get there, is
19 there? And you can't try to make it a straight shot.
20 So, what does it take, 45-50 minutes for non-law
21 enforcement vehicles to get there?

22 A. Yes, sir. I used to live in that area. It took me
23 45 minutes to get to Bluffton.

24 Q. Okay. All right. From up here to down here?

25 A. Yes, sir.

1 Q. Okay.

2 MR. LEE: That's all I have, Your Honor.

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

4 INVESTIGATOR KARAFA: Thank you, Your Honor.

5 THE COURT: You may call your next witness.

6 MR. SHELTON: The State calls Steven Thomas from the
7 Hardeeville Police Department. Steven Thomas.

8 THE COURT: You best say it one more time.

9 MR. SHELTON: Steven Thomas. Thank you, Your Honor.

10 BAILIFF: Please come forward and be sworn.

11 OFFICER STEVEN C. THOMAS

12 being first duly sworn, testified as follows:

13 MADAM CLERK: Thank you. If you'll have a seat
14 please. If you will state your full name and spell your
15 name for the record, please.

16 OFFICER STEVEN C. THOMAS: Steven C. Thomas,
17 S-T-E-V-E-N C. T-H-O-M-A-S.

18 OFFICER STEVEN C. THOMAS

19 DIRECT EXAMINATION BY MR. SHELTON:

20 Q. Officer Thomas, -

21 A. Yes, sir.

22 Q. - where do you work?

23 A. Hardeeville Police Department.

24 Q. And what's your job there?

25 A. Presently, I'm the patrol lieutenant for Hardeeville

1 Police Department.

2 Q. What was your job in March of 2011?

3 A. I was a patrol sergeant supervisor on the road.

4 Q. Did you get any calls related to a guy named Marion
5 Powell during March 2011?

6 A. Yes, sir, I did.

7 Q. And do you know what that call was about?

8 A. I received a call from dispatch stating that there
9 was a subject at the Knights Inn Hotel that would
10 wish to turn himself in.

11 Q. And did you go there and find him?

12 A. Yes, I did, sir.

13 Q. Have you reviewed the report before looking at it
14 today?

15 A. I briefly went over it this morning. Yes, sir.

16 Q. And do you recall what happened when you got there?

17 A. I pulled into the motel parking long in a fully
18 marked patrol car. And as soon as I did, Mr. Powell,
19 you know, immediately put up his hands. I placed my
20 patrol vehicle so he was in front of my patrol
21 vehicle. I got out and immediately told him that I
22 was going to place him under arrest - or I was going
23 to place handcuffs on him until I could figure out
24 what was going on. I got his I.D. from him. I
25 verified through dispatch that he was wanted through

1 Beaufort County, and waited there for a Bluffton
2 officer to come to take Mr. Powell back to Beaufort
3 County.

4 Q. And as part of that, when you developed information
5 from Mr. Powell, did you get his height and weight?

6 A. Yes, sir, I did.

7 MR. SHELDON: May I approach the witness, Your Honor?

8 THE COURT: You may.

9 Q. Is that reflected in your report?

10 A. Yes, sir.

11 Q. And what was his height and weight listed in your
12 report?

13 A. Six-one, 180 pounds.

14 MR. SHELDON: May I approach?

15 THE COURT: Sure.

16 MR. SHELDON: Thank you, Your Honor.

17 Q. You said Hardeeville?

18 A. Yes, sir. Hardeeville Police Department.

19 Q. And where was this?

20 A. In Jasper County. It's in Jasper County, Hardeeville
21 City Police Department.

22 Q. And specifically, where did you - where did you pick
23 him up?

24 A. The Knights Inn Motel.

25 Q. I'm sorry.

1 A. The Knights Inn Motel.

2 Q. Knight's Inn Motel?

3 A. Yes.

4 Q. And do you know where he called from?

5 A. There is a pay phone out there, but I don't know if
6 he used a pay phone or if he actually went into the
7 Knights Inn and used the clerk's phone there, because
8 there was a pay phone there at that time, but I don't
9 know if it was operational.

10 Q. And you know whether he had any cell phone on him or
11 anything when you arrested him?

12 A. No, sir.

13 Q. No, sir? He didn't have one?

14 A. No, he didn't have a cell phone on him.

15 MR. SHELDON: Thank you. Those are all the questions
16 I have.

17 A. Yes, sir.

18 THE COURT: Anything, Mr. Lee?

19 OFFICER STEVEN C. THOMAS

20 CROSS-EXAMINATION BY MR. LEE:

21 Q. Where do you get the information when you - of
22 somebody's height and weight?

23 A. Either their driver's license, identification, or
24 through dispatch. If I - you know, like I say, if we
25 were confirming warrants, you know, I'd have probably

1 asked dispatch to - you know, do they have any kind
2 of, you know, identifiers as far as scars, marks.

3 Q. Okay. And sometimes it varies?

4 A. Yes, sir.

5 Q. A few inches and several pounds, correct?

6 A. Yes, sir. Yes. Yes, sir.

7 Q. All right. Would it surprise you if his - if the
8 booking report from that night from the jail read
9 five feet, eleven inches, 150?

10 A. No, sir, it wouldn't.

11 Q. Okay. Or the arrest, the booking report from
12 Bluffton P.D. registered six feet, 160. That's
13 pretty common?

14 A. Yes, sir.

15 Q. Okay. So it's not an exact science?

16 A. No, sir. We don't, you know, put them on a scale or,
17 you know -

18 Q. Okay.

19 A. - get a tape measure out, sir.

20 Q. All right. So, clearly, Mr. Powell contacted law
21 enforcement and said I want to turn myself in.

22 A. Yes, sir.

23 Q. And when - and you were just - I guess you got the
24 short straw or you were closest, so you got to go do
25 it?

1 A. Yes, sir.

2 Q. And when you arrived, he was compliant with you?

3 A. Yes, sir, he was very compliant.

4 Q. Even to the extent of putting his hands up so they'll
5 be no mistake that he's trying to do anything, pull
6 any funny business?

7 A. Yes, sir. He was very compliant and very courteous.

8 Q. Okay. And but for the fact he had called, you
9 probably wouldn't have seen him that night, right?

10 A. No, sir.

11 Q. All right.

12 MR. LEE: That's all I have. Thanks, Officer Thomas.

13 MR. SHELDON: No more questions, Your Honor.

14 THE COURT: Thank you. Sir, you may step down. Call
15 your next witness.

16 STATE RESTS.

17 MR. SHELDON: The State rests, Your Honor.

18 THE COURT: The State rests. We have a motion?

19 MR. LEE: Yes, sir.

20 THE COURT: Ladies and gentlemen, I need to ask you
21 to step into the jury room while I discuss a few matters
22 of law with the attorneys. I hope to be back with you
23 shortly.

24 JURORS LEAVE COURTROOM.

25 BAILIFF: The jury is clear, Your Honor.

1 DEFENSE MOTION FOR DIRECTED VERDICT:

2 MR. LEE: Your Honor, at this time, I would make the
3 standard directed verdict motion under Rule 19 of the
4 *South Carolina Rules of Criminal Procedure*.

5 As you know, the standard is whether - is looking at
6 existence of evidence, rather than the weight.

7 On direct evidence, it does require competent
8 evidence as to direct evidence. And then, as far as
9 circumstantial evidence, it requires substantial
10 circumstantial evidence. And it's our position that this
11 is strictly an I.D. case. That the I.D.s are not
12 competent to take the case to the jury, based upon
13 everything that was heard, including the subsequent
14 in-court identification of Mr. Young.

15 Circumstantial evidence is all over the place in this
16 case, and in an attempt to tie Marion Powell to Byron
17 Young and tie both of them back to the crimes and place.
18 So, I would respectfully request a directed verdict on all
19 charges.

20 I think it all goes to identity, and I think it's all
21 or nothing on this. And I respectfully move for a
22 directed verdict on each and every charge in favor of
23 acquittal.

24 THE COURT: Thank you, Mr. Lee. Mr. Sheldon?

25 MR. SHELTON: Thank you, Your Honor.

1 I'm going to go through charge-by-charge. First of
2 all, for armed robbery, two witnesses testified that - and
3 identified Mr. Young both in - excuse me, Mr. Powell both
4 in court, and also in the photo lineup, the day after the
5 incident as being someone who came into their home armed
6 with a gun and took multiple valuables from them, holding
7 them at gunpoint, and putting them in fear of their
8 safety, the State would submit the armed robbery charge
9 should go to the jury, based on that evidence alone.

10 Next, for the burglary first degree, evidence says
11 that the children were corralled into the home outside by
12 a masked - one masked man and two unmasked men, one of
13 them being Mr. Powell identified. Held at gunpoint, kept
14 in a certain area of the home where they could not move.
15 The wife was asked to get on the floor, to stay down and
16 tell them where the money is. Obviously, there is direct
17 evidence of lack of consent to gain entry into the home,
18 as well as all kinds of circumstantial evidence of that
19 element of the offense.

20 Furthermore, to commit a crime, it could be armed
21 robbery, it could be larceny, it could be pointing and
22 presenting of a firearm, in possession of weapon during
23 the commission of a violent - well, pointing and
24 presenting a firearm would be multiple different count -
25 charges of the crime that they intended to commit inside

1 of the residence.

2 Next, we have kidnaping. Four children were held at
3 gunpoint and forced to go up the stairs against their
4 will. They were seized while putting them - forcing them
5 to be down against on the ground next to the wall. The
6 mother was seized by having a gun pointed at her and
7 telling her to get to the ground and stay on the ground.

8 The State submits the mother identified each one of
9 the four children that were there that were held against
10 their will. And also, Ms. [REDACTED] A.H. testified to the
11 same evidence. The State submits that that evidence
12 alone, after identifying Mr. Powell, is enough evidence to
13 send it to the jury.

14 Possession of a weapon during the commission of a
15 violent crime, both burglary first degree and armed
16 robbery and kidnaping involved in violent crimes and we
17 have two witnesses who identified the defendant as
18 possessing a firearm. We have asked that that evidence go
19 to jury.

20 He had that firearm on his person, unlawfully
21 carrying it. The unlawful possession of a firearm, then
22 should also go to the jury, Your Honor.

23 And if he - and if it was not in a place where it
24 could be an unlawful possession of the firearm, he was in
25 possession of it, even if he had a concealed weapon

1 permit.

2 THE COURT: Mr. Lee, the Court agrees that there is
3 substantial evidence which the jury could consider, and
4 therefore, the Court is compelled to deny your motion.

5 MR. LEE: Yes, sir.

6 THE COURT: Where does that leave us?

7 MR. LEE: Well, can I talked to Mr. Vaux for just a
8 second?

9 THE COURT: Sure.

10 MR. LEE: I think it's going to leave us that we're
11 up and that my expert is going to be here first thing in
12 the morning on the eyewitness.

13 THE COURT: Okay.

14 MR. LEE: But I'd like to talk to Mr. Vaux real quick
15 as far as issue that came up during Mr. Riley's testimony.
16 If I could have five minutes?

17 THE COURT: All right. We'll be at ease and that's
18 it.

19 MR. LEE: Thank you.

20 OFF THE RECORD.

21 BACK ON THE RECORD,

22 MR. LEE: Mr. Vaux, I appreciate your time. I
23 believe the only witness that we're going to end up
24 calling is the psychologist, Lori Vanwallendael.

25 I have spoken - Judge, as far doing stuff today, I've

1 spoken with my client. We've discussed his right to
2 testify, his right not to testify. If you would like to
3 take care of that issue now, we can do it. Or if you want
4 to wait until we're ready to close. I've discussed that
5 with him. However the Court wants to do it.

6 MR. SHELDON: I'd just as soon do it today. That way
7 we can move straight into tomorrow and have the testimony.

8 THE COURT: That's what I think. You can talk when
9 you go to lunch; come back; and talk about what we're
10 going to do tomorrow.

11 Let me do that. Let me talk to Mr. Powell now about
12 his right to testify.

13 DEFENDANT'S RIGHTS, BY THE COURT:

14 Mr. Powell, at this time I'm going to explain to you
15 certain of your rights. If you don't understand anything
16 that I say, please let me know. If you want me to explain
17 anything in more detail, please let me know.

18 We have now reached the stage in the trial where you
19 have the right to present your defense. I need to tell
20 you, though, that you have the right to claim the
21 protections given to you by the *Fifth Amendment* to the
22 *Constitution of the United States*. And the amendment
23 states, in part, as follows:

24 *No person shall be compelled in any*
25 *criminal case to be a witness against himself.*

1 And this means you cannot be required to testify.
2 You have the right to testify. However, no one can make
3 you testify. This is a personal right that you have, and
4 no one can waive this right except you.

5 If you decide to testify, you will be subject to the
6 same rules that govern other witnesses. And you may be
7 examined and cross-examined on any relevant issue.

8 In addition, if you have any convictions involving
9 dishonesty, a false statement, all the crimes punishable
10 by imprisonment for more than one year, and this Court
11 determines that the probative value of admitting that
12 evidence outweighs its prejudicial effect to you, the
13 Solicitor would will be able to introduce your record to
14 attack your credibility.

15 If you decide to testify, the decision on your part
16 must be made freely and voluntarily, with the knowledge of
17 the protections given to you by the *Fifth Amendment* and
18 the consequences of your decision to testify.

19 If you decide not to testify, I will instruct the
20 jurors that they cannot give that fact that you did not
21 testify, any consideration whatsoever and there will be
22 absolutely no prejudice to you, because you did not
23 testify.

24 It's left entirely up to you as to whether or not you
25 wish to testify. And you may talk with anyone you wish to

1 about this, including, but not limited to your family,
2 friends, anyone else, but the final decision is up to you.

3
4 Thus far, do you understand what I've said?

5 MR. POWELL: Yes, I do, sir.

6 THE COURT: Any questions about it?

7 MR. POWELL: No, sir.

8 THE COURT: Apparently, you have discussed with your
9 lawyer your right to testify or not testify?

10 MR. POWELL: Yes, sir.

11 THE COURT: Have you made a decision yet?

12 MR. POWELL: Yes, I have, sir.

13 THE COURT: And your decision is?

14 MR. POWELL: I don't wish to testify.

15 THE COURT: You're not going to testify. All right.
16 Thank you.

17 MR. LEE: Your Honor, can I also add that I had that
18 discussion with him. He does have a prior conviction for
19 ABWIC, I believe a gun charge. I've explained to him that
20 may or may not come in, but we don't have a ruling on
21 that. And there are certain ways it may be kept out, and
22 there are certain ways it may come in. But he's not
23 basing his - I believe he's not basing his decision on an
24 assumption that that would automatically come in. So I'm
25 making a point.

1 I've explained to him that that is a consideration,
2 but we do not have a definitive ruling on that. And
3 despite that, it's my understanding from him that he does
4 not want to testify, regardless of the admissibility of
5 his prior convictions. I just want to add that.

6 THE COURT: All right. I guess we need to bring the
7 jury in and give them the bad news. Well, maybe that's
8 good news. We told them they would be here most of the
9 day.

10 MR. LEE: My lady is coming down from Charlotte in
11 the morning. I don't know if she's emailed me something
12 back, but we got - she said she would come early Friday.
13 She's going to drive down tomorrow morning. So I don't
14 know what time you want to start, but every minute,
15 obviously, helps her. I'll tell her to be here when she
16 needs to be here. But she is the only witness that we
17 intend to offer.

18 THE COURT: What's your guess on your presentation
19 with her?

20 MR. LEE: Thirty minutes. I mean, she's -

21 MR. SHELDON: Probably no longer than whatever he
22 takes. It might be pretty short.

23 MR. LEE: And I will tell one issue as far as that
24 too. I got an email from - just a back-and-forth with
25 her.

1 Apparently, she did an analysis of the warnings on
2 some kind of computer software something. And I haven't
3 seen the report. I don't know if she actually did a
4 report, but just to tell Mr. Sheldon, I found out last
5 night she's saying that the comprehension level of the
6 warnings that were given prior to looking at the photo
7 lineups is for a 14-year-old, I think seventh or eighth
8 grade. I don't have a report. I can see if there is one.
9 I'm not trying to sandbag anybody or ambush him. If Mr.
10 Sheldon objects to that, you know, - I don't want to hide
11 anything.

12 MR. SHELTON: Mr. Lee has been more than fair with
13 evidence as it's come up before this trial. I'm
14 particularly not going to complain on that.

15 THE COURT: So I guess 9:00 o'clock is not really a
16 workable thing then?

17 MR. LEE: I think that would be tough, but, I mean, I
18 will defer to the Court and tell her. She had a
19 commitment with her teenage daughter tonight, and said she
20 didn't want to face the wrath of a teenager. So she's
21 going to come down in the morning. I don't think her
22 testimony will take more than an hour, combined. And if
23 we start at 10:00, that will put us at 11:00, and then we
24 close and then we charge. But you drive in, too.
25 Everybody drives in, so whatever you want to do. I just

1 need to tell her.

2 THE COURT: She's got normally a drive of five or so
3 hours.

4 MR. SHELDON: Your Honor, the State would defer to
5 her schedule. I think we've done that a lot this week and
6 tried to work around Mr. Lee's schedule. We would just
7 like to get started as soon as possible, so that, out of
8 abundance of caution, we don't have any closing arguments
9 that end up starting in the afternoon after lunch, and
10 then closings charged for the jury be after lunch, and
11 then they have it and may not be done with it. Everybody
12 would like to - we have experts come in from all over the
13 state and get ready at 9:00 o'clock in the morning, we do
14 that often. I understand that she's coming from
15 Charlotte, but if she needs to get on the road, the
16 State's position is she needs to get on the road. And
17 there's always a possibility that I can have reply
18 testimony, depending on what she testifies to.

19 THE COURT: Have what?

20 MR. SHELDON: There's a possibility I could have
21 reply testimony, depending on what she testifies to.

22 THE COURT: Now, let me ask you - let me hear you all
23 on this. What about 30 minutes each total amount of time
24 for closing arguments?

25 MR. SHELDON: I'm fine with that, Your Honor. I

1 think I can keep myself within that framework. Judge
2 Buckner often does that to us, keeps us - he's got a five-
3 minute rule where if you hear the pen going, I'm very
4 accustomed to that, Your Honor.

5 MR. LEE: I'm fine with that, too, Your Honor. I
6 think anything longer than that, they wouldn't be
7 listening to us anyway, so.

8 THE COURT: I do think that's true.

9 BAILIFF: Judge, if you wanted to feed the jury
10 tomorrow, we'd save some time that way, too, possibly.

11 THE COURT: Yeah.

12 MR. LEE: I'll be glad to buy the jury lunch
13 tomorrow, Judge.

14 THE COURT: I'm sorry?

15 MR. LEE: I said, I'll buy the jury lunch tomorrow,
16 if you like.

17 THE COURT: Only if you can get credit for it.

18 MR. LEE: Exactly right. That's why I offered that.

19 THE COURT: Let's just bring the jury back in.

20 BAILIFF: The jury is entering, Your Honor.

21 THE COURT: Mr. Lee, do you want me to mention to the
22 jury your client's decision?

23 MR. LEE: Let's do it tomorrow.

24 JURORS ENTER COURTROOM.

25 BY THE COURT:

1 THE COURT: Welcome back again, ladies and gentlemen.
2 Before I forget it, when you come back tomorrow morning, I
3 need for you to see if you can select a foreperson to
4 represent the jury. I don't want you all get in a fuss
5 and fight over who ought to serve as foreperson. I mean,
6 I can tell you, if you all are going to get into a fuss
7 and fight, I can do it. But if you can, select one. And
8 so, that's the news.

9 The news, I guess, is either good or bad, depending
10 on how you look at it. We're going to have to recess
11 until tomorrow morning. We're going to try to have it
12 ready at 9:00 o'clock. We've got a witness coming from
13 North Carolina in the morning, so they've got a five-or-
14 hour drive to get here in the morning.

15 We anticipate - the anticipation is the same as I
16 told you yesterday, and that is that we're going to finish
17 this and give you the case around lunchtime or something
18 like that, maybe early lunch, if we get lucky.

19 So I'm getting ready to let you go. Anybody going to
20 have a problem being back at 9:30 in the morning? And we
21 may have to wait a little bit on this person. Like I
22 said, they're coming from Charlotte.

23 I remind you once again, don't talk to anybody about
24 the case. Don't let anybody talk to you about the case.

25 See you in the morning, ladies and gentlemen at 9:30.

1 BAILIFF: The jury is clear, Your Honor.

2 JURORS LEAVE COURTROOM 12:05 P.M.

3 DISCUSSION RE JURY CHARGE:

4 THE COURT: Have you all had any time to think about
5 charges and such?

6 MR. SHELDON: I haven't had much time. I was going
7 to look at it this afternoon. Your Honor, the typical
8 charges in the charge book, general, obviously, I was fine
9 with. You said we'll book reasonable doubt charges. That
10 obviously suits the State, as well.

11 As far as other specific charges, the only charge
12 that the State would submit that is an inference of
13 flight. There is no direct evidence of flight, no
14 circumstantial evidence of flight, but -

15 THE COURT: I don't think you get a charge on that.

16 MR. SHELDON: Okay. Okay. I was just putting it up
17 there.

18 MR. LEE: You can't get a charge.

19 MR. SHELDON: I can't get a charge, right? I
20 apologize, Your Honor, I don't mean to -

21 THE COURT: The identification charge -

22 MR. SHELDON: The identification charge.

23 THE COURT: You've got a record of a witness.

24 MR. LEE: When you talk about I.D., are you talking
25 about the Telfair charge?

1 THE COURT: Yes.

2 MR. LEE: Okay.

3 THE COURT: These are on - I don't have them right in
4 front of me. I'll tell you what, let's come back. If
5 there's any problem coming back at 1:30?

6 MR. LEE: No, sir.

7 MR. SHELDON: None for the State, Your Honor.

8 THE COURT: What we could do is run these things real
9 quickly, look at them and see if you all have any problems
10 with any of them. But if you all don't have anything, I
11 guess it won't take long. If you all don't have any other
12 specific requests to charge.

13 MR. LEE: Are you using - is that what you - do you
14 get on your computer or your -

15 THE COURT: No. We have a charge book ourselves
16 that's been approved by court administration that they put
17 online a few weeks ago, maybe last month. You can go to
18 accourts.org and find the charges. I told somebody this
19 last week, that the - I had a trial in Jasper County a
20 month ago, maybe three weeks ago, and I asked the
21 attorneys if they had any specific requested charges. And
22 one of the attorneys handed me a copy of a charge book,
23 the ones that applied to it. He said:

24 *Here. Got them off the website, Judge.*

25 MR. SHELDON: We can try to pull that for you over

1 the lunch break, Your Honor, if that would help.

2 THE COURT: I mean, I just thought you all might want
3 to look at them.

4 MR. SHELDON: The State would ask for a hand-of-one,
5 hand-of-all charge. That way, we don't have other co-
6 defendants, specifically, in this. We have different
7 people - we have three different defendants, assailants,
8 committing an act together. We have two of them - one
9 identified in court, the other one is still unknown.
10 However, we have an armed robbery charge, or a part of a
11 charge, lesser included or a part of the - not lesser
12 included. Part of the armed robbery is a grand larceny.
13 There's nothing in the evidence that shows that Marion
14 Powell actually carried anything out the door with him,
15 and that would be the reason for the hand-of-one, hand-of-
16 all charge.

17 MR. LEE: I vigorously object to that.

18 THE COURT: Let me think about it. You're saying if
19 we don't - if we don't do that, then you need an
20 attempted?

21 MR. SHELDON: Correct.

22 THE COURT: Lesser-included sentence.

23 MR. SHELDON: If we don't do that, is it possible for
24 an attempted? And I don't think the evidence that's
25 submitted supports a lesser-included attempt. I don't

1 think there's any evidence in the record that will support
2 a lesser included of attempted.

3 MR. LEE: Attempted what, grand larceny?

4 MR. SHELDON: Armed robbery.

5 MR. LEE: Oh, attempted robbery.

6 THE COURT: All right. Let's think about it. All
7 right. Recess until 1:30.

8 MR. SHELDON: Thank you, Your Honor.

9 OFF THE RECORD

10 BACK ON THE RECORD 1:33 P.M.

11 CONTINUE DISCUSSION RE JURY CHARGES:

12 THE COURT: Anymore about your charges? The State
13 have anymore thoughts?

14 MR. SHELDON: Your Honor, the State would ask for a
15 hand-of-one, hand-of-all charge, or act of one act of all
16 charge, based on the fact that there are two different
17 people, at least, that took part in this crime, and there
18 are different parties that have different roles.

19 Furthermore, some of the roles that the Defendant
20 played, if they take that person, his actions alone may
21 not constitute the crime as charged. I said armed robbery
22 and used that as an example earlier. However, we also
23 have a burglary where, if you consider larceny is part of
24 the burglary, the crime they intended to commit, or armed
25 robbery, that would also be, effectively, a lesser

1 included of that, and then you would end up without
2 arguably a principal, which I think the evidence shows
3 that he should be considered a principal in each charge
4 that's being submitted to the jury and not any lesser
5 includeds.

6 Specifically, I'm looking into the language of the
7 charge, the suggested charges. I think the language
8 supports the State's argument, in that, if a crime is
9 committed by two or more people who are acting together in
10 committing the crime, the act of one is the act of all. I
11 think that pretty much speaks for itself. I think this is
12 the case here.

13 If you had a case where, for example, I'm going to
14 use an analogy, two people went to rob a bank together.
15 And in robbing the bank, they committed - one was the
16 getaway driver and the other one was the armed robber who
17 committed the murder inside the bank. But then,
18 unbeknownst to them at the time, and then they are driving
19 away. And during a high-speed chase, the one who
20 committed the actual hand, actually committed the murder,
21 say, is killed, and he's not available for trial, and
22 would never be charged, and I didn't - but still, the hand
23 of one the hand of all would apply.

24 In this case, there is more and more evidence
25 suggesting that, at least with the identity of one other

1 co-defendant, but all of the evidence is that at least two
2 other people, and most probably, at least three other
3 people, took part in this crime and, therefore, we would
4 ask for the charge of hand of one hand of all.

5 MR. LEE: Judge, I was kind of surprised when he
6 asked for that earlier, but I had a little chance to think
7 about it. I agree with what he's giving that example for
8 hand of one hand of all.

9 The significance and the difference and the problem
10 in this case for giving a hand-of-one, hand-of-all charge
11 is, I think, we all can agree that this is an
12 identification case. There are two ID's. There is no
13 physical evidence. There's no - there was no DNA. There
14 were no fingerprints. There is, arguably, some jail
15 calls. There is testimony by Mr. Riley, for what it's
16 worth, talking about him making an alleged admission. But
17 when it comes down to it, it's an I.D. case. And when you
18 have an I.D. case, it changes the rules a little bit,
19 because the problem we have in - and I certainly think
20 I.D., I think everybody agrees that certainly needs to be
21 charged, based on everything that occurred. But the
22 problem you have with an I.D. case and hand of one is hand
23 of all is when the State - well, I shouldn't say that -
24 when the jury is likely to use the hand of all - the hand
25 of one is the hand of all charge to establish identity of

1 the defendant and that's - that interaction is the
2 problem.

3 The hand of one is the hand of all talks about the
4 act of one is the act of all, and it says that you're
5 responsible for all the reasonable and probable things
6 that are going to happen as a result of one of your co-
7 defendants. Not to mention the issues, you know, if - if
8 they - if they hadn't identified anyone, for example, and
9 if somebody goes in, and four people commit a crime, and
10 one person gets arrested, even - no matter what the three
11 other people do, yeah, it'll be - it can be attributable
12 to the first person as far as the acts go, the taking of
13 something, whatever. But this case is different, because
14 this hand of one is hand of all is going to be used to try
15 to establish his identity.

16 Well, we've proved Byron Young - all right, we proved
17 Byron Young did this. Byron Young hangs around with Mr.
18 Powell. He's now I.D.'d Byron Young in court. And the
19 problem is, it takes away from whether or not they truly
20 have proved beyond a reasonable doubt the identity of the
21 defendant and that interaction. I don't know how you
22 would do it without being charging on the facts.

23 I understand what he's saying about, well, some of
24 the elements or the things - but listen, we all know I
25 think, they're either going to find him not guilty of

1 everything or guilty of everything.

2 I don't know how they're going to say, well, we think
3 he kidnaped these people, but he didn't rob them. We
4 think that he robbed them, but didn't burglarize the
5 house. I mean, it's - it is all or nothing. I mean, I
6 don't see how they possibly could have some type of split
7 verdict. Either he was there or he wasn't.

8 THE COURT: Well, wait a minute. Explain to me
9 again, Mr. Lee, how you think the Solicitor or a jury is
10 going to use that charge to say your client is guilty of a
11 crime? Explain that to me again.

12 MR. LEE: Because the testimony that has been brought
13 out in an attempt to identify Byron Young, which they
14 have, has come out through a variety of ways, who,
15 incidentally - and I mean, fundamentally, I think there is
16 a real issue about using a known, supposedly to the State,
17 but uncharged co-defendant. Because what you're allowing
18 them to do, essentially, is say we didn't arrest him; we
19 can't give you a reason for not arresting him. Maybe it's
20 because there wasn't probable cause to arrest him, but we
21 want to use that. We want to use his identity to prove
22 beyond a reasonable doubt his identity and it - it just -
23 logistically, it doesn't work.

24 So to get back to your question, though, a hand of
25 one, you know, talks about certain acts. Not the being at

1 - not the identity of the person, which, all of this is
2 going to be used for, Judge, and I don't see how - I mean,
3 and, you know, obviously, the Supreme Court frowns upon
4 doing - commenting on the facts during a charge, but I
5 mean, I think that - the only thing hand of one is hand of
6 all could be used is, arguably, to establish what Mr.
7 Sheldon argued.

8 Well, the two other people took some property.
9 That's an element of armed robbery, or, you know, that's
10 one of the things you can prove on a burglary first. But
11 again, if there is a kidnaping and there's a burglary
12 first, if there's a armed robbery, it's a burglary first.
13 If there is any underlying crime with intent to commit a
14 crime, they don't have to actually prove, they just have
15 to show the intent to commit the crime, not necessarily
16 that a crime was committed.

17 So, again, the problem is that, if you're going to
18 charge hand of one, which I would obviously object to, I
19 think you'd have to say, yeah, hand of one is hand of all.
20 You can talk about the act of one is the act of all, but
21 you cannot use the hand of one is the hand of all, the
22 vicarious liability of that, to establish identity,
23 because the State has the burden of proving identity
24 independently and in and of itself beyond a reasonable
25 doubt, and it tells you the things that you're supposed to

1 look at, and that is the accuracy of the identification of
2 the defendant by whoever identified him.

3 I don't think that - I don't think -- I just don't
4 think we can get there and make a fair charge and be
5 assured that the jury isn't going to rely on this hand of
6 one to convict Mr. Powell, based upon their belief that
7 Byron Young, who isn't even here, who wasn't called to
8 testify, was involved in this crime.

9 MR. SHELTON: Under this theory, I don't think the
10 hand of one hand of all could ever be charged. We're not
11 asking it to be identification evidence. We're asking -
12 we have multiple different charges of different
13 indictments, and the hand one of and hand of all would
14 obviously apply. I don't -

15 THE COURT: I agree. Yeah.

16 MR. SHELTON: Thank you.

17 THE COURT: I'm going to charge hand of one.

18 MR. LEE: Please note my objection. And I would
19 offer, in lieu of charging that, I would offer to agree
20 not to argue in my close that, hey, this can't be an armed
21 robbery, because there is no proof that he carried
22 anything away himself. I wouldn't argue that and I'll
23 stay away from that, and I'll stay away from whatever
24 argument, because that isn't - that isn't why we're here.
25 So, I mean, I'm willing to tailor my argument to avoid the

1 problems that Mr. Sheldon is concerned about.

2 MR. SHELTON: My only response to that for the
3 record's sake, Your Honor, is that, whether it's argued or
4 not, is really irrelevant. I have a lot of - a great deal
5 of respect for the finder of fact and the jury. And they
6 can be back in the jury, and we have no idea and say that,
7 you know, he never carried anything out, so maybe he's not
8 guilty of that. And without being charged on the law, I
9 don't think, correctly, I don't believe that they can come
10 to a true verdict.

11 THE COURT: All right. I agree. I'm going to charge
12 it. I'm going to charge identification. Expert witness,
13 assuming we have one. I guess we will.

14 MR. LEE: I hope so.

15 THE COURT: Lack of a record of a witness, the basic
16 just says - let me find it.

17 *A person who has a past criminal*
18 *record is competent to testify during a*
19 *trial. A past record does not affect the*
20 *ability of that witness to testify. A past*
21 *record may only be considered by you, if at*
22 *all, in determining your witness's believability.*
23 *You are the sole judges of the facts and the*
24 *believability of the witnesses.*

25 How do you all propose charging possession of a

1 firearm by a person who's convicted?

2 MR. SHELDON: I thought about that, and we are
3 talking about submitting that charge - indictment to the
4 jury. And I think we have to - we have to use a jury and
5 a verdict form for that one, I believe, because it says
6 convicted of a violent offense. And I brought it up.
7 Scott didn't. But I do not think he has proper notice of
8 convicted of a violent offense. I think it's only
9 unlawful carrying of a firearm.

10 MR. LEE: Okay. And we talked about that, and that's
11 why I didn't raise that in the directed verdict motion and
12 say, hey, they haven't proved that.

13 THE COURT: You all did mention that to begin with.

14 MR. LEE: Yes, sir.

15 THE COURT: Does that mean that you - we are going to
16 present all but that charge?

17 MR. SHELDON: Correct. Correct. And I may just -
18 I'll probably just nolle pros that charge, since we have
19 possession of a weapon in the commission of a violent
20 crime. I think it can be assumed by that any way, but I
21 think that'll save everybody, including the jury, a lot of
22 headache.

23 MR. LEE: I do, too.

24 MR. SHELDON: Thank you.

25 THE COURT: All right.

1 MR. LEE: Your Honor, do you have a specific charge
2 you use on bias?

3 THE COURT: Bias?

4 MR. LEE: Witness bias?

5 THE COURT: No, just part of the - let me find it.
6 Part of the jury's duty to determine the credibility of
7 the witnesses and they may consider whether they believe
8 the witnesses exhibited any bias and prejudice.

9 MR. LEE: That's all I have.

10 THE COURT: Somewhere it's sitting in here. But I
11 don't have anything other than that. I'm getting ready to
12 find it real quick in just a -

13 *If necessary, ladies and gentlemen,*
14 *you must determine the credibility of the*
15 *witness.*

16 *So and so, so and so.*

17 *You may believe part of it. You also*
18 *may consider whether any witness has*
19 *exhibited to you any interest or any bias*
20 *or any prejudice or any other motive in the*
21 *case.*

22 *So, what else from a charge standpoint?*

23 MR. SHELTON: I believe that, that is all from the
24 State. I have the checklist. You had it, Judge.
25 Everything.

1 MR. LEE: Circumstantial evidence?

2 MR. SHELDON: Yeah, the circumstantial evidence
3 charge, I imagine that's in your general charge?

4 THE COURT: Yeah.

5 MR. LEE: I'm just trying to think if there is
6 circumstantial evidence that was brought.

7 MR. SHELDON: I believe that there is plenty of
8 circumstantial evidence, because I think part of the issue
9 with a lot of the arguments that have taken place in this
10 trial, or that has been State's presenting not only
11 indirect evidence case of identity, but also
12 circumstantial evidence case of identity. And so, that's
13 - I think the circumstantial evidence charge would be
14 proper.

15 THE COURT: All right. So let's try and see if our
16 expert can get here 9:30 or maybe a little bit after 9:30.
17 I mean, it's going to be hard to expect her to do.

18 MR. LEE: Well, you all have been very accommodating,
19 so I'll do everything I can.

20 THE COURT: I told the jury we're going to try to
21 have the witness ready at 9:30, if she gets here. If we
22 could finish with her by 11:00, argue till 12:00, charge
23 to 12:30 and have lunch for the jury, but I don't think we
24 want them under pressure to go to lunch to make a decision
25 about lunch. Maybe we'll try to bring them lunch.

1 MR. LEE: We also talked about - I asked Ben whether
2 he was planning to open on the law, because, if,
3 obviously, we put up a case, we lose last argument, and I
4 believe he does intend to do a brief opening on the law,
5 then we close, then they close, but.

6 MR. SHELDON: Correct.

7 MR. LEE: If he's still shooting for 30 minutes each.

8 THE COURT: That's what I was hoping.

9 MR. SHELDON: 35? I mean, I think I can get it
10 within 30, but the opening of the law always makes it, and
11 I apologize. I think I can still do 30. The opening of
12 law should not take much time. I just like to lay out the
13 elements at the beginning.

14 THE COURT: 35. Thank you.

15 MR. SHELDON: Thank you, Your Honor.

16 THE COURT: Defendant is 35, too.

17 MR. SHELDON: Absolutely. What's good for the goose
18 is good for the gander.

19 THE COURT: All right. This case is adjourned till
20 tomorrow morning at 9:30.

21 MR. SHELDON: Thank you, Your Honor.

22 OFF THE RECORD 1:49 P.M.

23 BEGIN DAY FIVE, FRIDAY, NOVEMBER 22,
24 2013, 9:33 A.M.

25 BY THE COURT:

1 BAILIFF: All rise. The Honorable Brooks Goldsmith
2 presiding.

3 THE COURT: Good morning, ladies and gentlemen.
4 Please be seated.

5 MR. SHELTON: Good morning, Your Honor.

6 THE COURT: Are the jurors all present, as far as we
7 know?

8 BAILIFF: Yes, sir.

9 MR. SHELTON: The State's ready to proceed if defense
10 is, Your Honor.

11 MR. LEE: We're ready, Your Honor.

12 THE COURT: My understanding is the jury has selected
13 it's foreperson, Janet Kelly, Juror 173. So let's bring
14 the jury in.

15 BAILIFF: Yes, sir. The jury is entering, Your
16 Honor.

17 JURORS ENTER COURTROOM 9:35 A.M.

18 THE COURT: Good morning and welcome back, ladies and
19 gentlemen.

20 It's my understanding that the jury has selected to
21 serve as foreperson Juror 173, Janet Kelly. That's a wise
22 decision the jury made.

23 If you recall, ladies and gentlemen, yesterday, the
24 State rested, meaning the State had presented its case to
25 you. Defense now has the opportunity to present what

1 should the defendant decide to do so. Mr. Lee?

2 MR. LEE: Thank you, Your Honor. May it please the
3 Court. The Defense would call Dr. Lori Vanwallendael to
4 the stand.

5 LORI VANWALLENDAEL

6 being first duly sworn, testified as follows:

7 MADAM CLERK: Thank you. If you'll have a seat,
8 please. Thank you. If you'll state your full name for
9 the record, please.

10 MS. VANWALLENDAEL: Lori Vanwallendael.

11 DR. LORI VANWALLENDAEL

12 DIRECT EXAMINATION BY MR. LEE:

13 Q. Good morning, Doctor.

14 A. Good morning.

15 Q. Thank you for coming down to Beaufort. Have you had
16 an early morning this morning?

17 A. I have, indeed.

18 Q. Okay. Where did you come from?

19 A. Gold Hill, North Carolina, which is close to
20 Charlotte.

21 Q. Okay. You drove down this morning?

22 A. Yes.

23 Q. All right. Dr. Vanwallendael, can you tell the jury
24 your current occupation?

25 A. I am an associate professor of psychology at the

1 University of North Carolina at Charlotte.

2 Q. Okay. And how long have you been in that position?

3 A. I have been at UNCC for about 27 years now.

4 Q. And can you tell us a little bit about your
5 educational background.

6 A. Yes. I received a bachelor's degree in psychology
7 and English from McMurry College, which is a small
8 school in Central Illinois. And then, I did my
9 graduate work at Northwestern University in the
10 Chicago area, and I received my Ph.D. in 1986.

11 Q. All right. And can you tell us a little bit about -

12 MR. LEE: And Your Honor, I have a copy of her
13 Curriculum Vitae. I've given a copy to Mr. Sheldon.
14 Would you like one? A copy of her C.V.?

15 THE COURT: No, that's fine. You keep it. I've
16 already got one.

17 Q. Can you tell us a little bit about your professional
18 experience.

19 A. Yes. I - as I said, I've been at UNC-Charlotte
20 basically since I got my degree. And my duties there
21 include teaching, research, service to the
22 university, publication of - publish or perish as
23 they say.

24 Q. And we'll get to that in a minute. Can you tell us
25 what courses you've taught at college.

1 A. Yes, I have taught courses in cognitive processes,
2 which is basically memory and decision-making. I
3 teach forensic psychology. I teach an advanced
4 seminar in forensic psychology. And then, I also
5 teach the usual general psychology, research methods,
6 kind of the core undergraduate courses.

7 Q. And do you have any specific research interests in
8 the field of psychology that you concentrate or spend
9 more time with?

10 A. Yes. Most recently, I've spent my time looking at
11 memory in the context of eyewitness memory, voice
12 recognition, face recognition, lineup procedures.

13 Q. All right. And as part of that research,
14 particularly with regard to the eyewitness and the
15 memory, have you had any articles published in any
16 publications?

17 A. Yes, I have.

18 Q. Okay. Can you just tell us, in general, how many and
19 maybe a couple of examples.

20 A. Specifically in the area of eyewitness memory,
21 probably ten or twelve. I've done book chapters. I
22 had a chapter recently in the *Annual Review of*
23 *Psychology and Law*. I've published in *Memory and*
24 *Cognition*, *Applied Psychology*, *American Journal of*
25 *Psychology*.

1 Q. And those are kind of the publications in the
2 industry that you're in?

3 A. Yes.

4 Q. So it's your peers that are going to be reading your
5 articles?

6 A. Right.

7 Q. Okay. All right. We probably wouldn't read them
8 just for the heck of it.

9 A. Probably not, no.

10 Q. That's why we have you here. Have you gotten any
11 grant money for any research in the past?

12 A. I have gotten some, yes.

13 Q. Okay. And in general, what was that for?

14 A. Basically, issues of, again, human memory. Primarily
15 my grant money has been more in the educational end
16 of, you know, things like how to get students to
17 remember their tests better, how to get people to
18 learn more effectively in the classroom.

19 Q. Have you done any presentations, professional
20 presentations at meetings, seminars, that sort of
21 thing before?

22 A. Yes.

23 Q. Okay. And in general, can you tell what those were
24 and, you know, where they were.

25 A. It's a couple of different kinds of those. I

1 routinely present at psychology meetings such as the
2 Psychonomics Society or the Society for Judgment and
3 Decision Making. But also, I tend to present at more
4 legal kinds of gatherings, continuing education for
5 attorneys, for instance.

6 Q. Okay. And again, in the field of eyewitness memory,
7 as well?

8 A. Yes.

9 Q. Are you a member of any professional organizations
10 related to psychology?

11 A. Yes. There is actual a specific society for forensic
12 psychology called the American Psychology Law
13 Society, and that's my sort of primary group for
14 keeping informed on developments in the field and
15 keeping other people informed of my research
16 interests.

17 Q. Have you testified in court before?

18 A. Yes.

19 Q. As an expert?

20 A. Yes.

21 Q. Okay. In the field of eyewitness memory?

22 A. Yes.

23 Q. And you've been qualified as an expert in that field
24 in the past?

25 A. Yes.

1 Q. Do you know how many times you've testified in court
2 before?

3 A. It's getting up there. I don't like to count, but
4 it's probably 20, 25, somewhere in between there.

5 Q. Okay. And has that been for the defense in criminal
6 cases?

7 A. Yes, it has.

8 Q. Has a government entity or prosecutor's office or
9 U.S. attorney ever come to you and asked you to
10 testify on their behalf?

11 A. No, they haven't.

12 Q. Okay. Would you do it if they did?

13 A. Sure.

14 Q. All right. Let me -

15 MR. LEE: Judge, at this point, I would offer Dr.
16 Vanwallendael as an expert in the field of psychology,
17 specifically, the field of eyewitness memory.

18 MR. SHELDON: No objection at all, Your Honor.

19 THE COURT: I'll grant that motion. Let me just make
20 a brief statement to the jury about this.

21 Ladies and gentlemen, we just qualified this witness
22 as a expert witness. Normally, witnesses are not
23 permitted to give their opinions about matters, but are
24 restricted to the testifying about things that they have
25 seen or heard. An exception is made for an expert

1 witness, though. I'll tell you more about that later, but
2 she is permitted within her area of expertise to offer
3 opinion about certain matters.

4 MR. LEE: Thank you, Your Honor.

5 Q. Dr. Vanwallendael, so you were contacted by me to
6 consult with this case, correct?

7 A. Yes.

8 Q. Okay. And I assume you don't do it for free?

9 A. No.

10 Q. Okay. Can you tell the jury what your fee rate is
11 that you typically charge and what you charging in
12 this case?

13 A. Typically, for actual courtroom testimony and the
14 research, report reading and so forth that leads up
15 to it, I charge \$200.00 an hour, and half of that for
16 travel to and from the court, as well.

17 Q. Okay. Does the fact that you're being compensated in
18 any way affect your testimony?

19 A. No. My job is basically to review, you know, the
20 pros and cons of any case.

21 Q. Sure. Okay. And have you been given or received
22 materials in this particular case, The State vs.
23 Marion Powell?

24 A. Yes, I have.

25 Q. Okay. And have you had a chance to review that

1 material?

2 A. Yes.

3 Q. And can you tell us briefly what material you have -
4 you've looked at.

5 A. I have looked at police reports. I've looked at the
6 statements of the eye witnesses. I've looked at the
7 actual lineups from which they made their choices,
8 and the instructions that were given to them on those
9 lineups. I have seen a video of the actual lineup
10 identifications, and I've also listened to the 911
11 call on the night of the crime.

12 Q. Okay. Have you also been provided, by me, a summary
13 of the testimony that has occurred in court to date?

14 A. Yes.

15 Q. Have you reviewed that?

16 A. Yes.

17 Q. Now, moving from this case to kind of your field in
18 general. I want to ask you a little bit about
19 eyewitness testimony and your research and that sort
20 of thing, okay? Can you tell us how, in general,
21 research or eyewitness reliability is conducted.

22 A. Sure. Research on eyewitnesses actually goes back
23 over a hundred years now in psychology. And
24 psychology, like any other science, biology,
25 chemistry, relies a lot on laboratory

1 experimentation. It's where we try to find out about
2 causes and effects. So, frequently, what we will do
3 is try to create a situation where a person, a
4 subject, has to view an incident off of a videotaped
5 crime. And then, we carefully control so that we
6 vary only one thing at a time. So everybody sees the
7 same video, except the perpetrator is wearing a hat
8 in one and not in the other. And we check people's
9 accuracy of recall later. And if there is a
10 difference, we know that it's due to the hat and not
11 anything else, because that's the only thing that was
12 basically different for the groups or participants.
13 So that's one way that we conduct research, and it's
14 probably been the primary way.
15 But obviously, laboratory research has its flaws.
16 It's very different for a college student viewing a
17 video in a laboratory and a real person who is
18 dealing with someone who has entered their home or
19 someone who is holding them up on the street. So,
20 we've tried, particularly in recent years, to do more
21 real-world kinds of research.
22 There have now been field studies where we go out
23 into the community, and we test people's accuracy of
24 face recognition, and we look for real people. You
25 know, we test convenience store clerks. We test bank

1 tellers. We test average people on the street. And
2 more recently, still, there's been a number of lines
3 of research that have tried to look at real crimes.
4 So, for instance, a couple of years ago, my
5 colleague, Brian Cutler, and I were involved in a
6 study with the Charlotte-Mecklenburg Police
7 Department where we actually were able to study the
8 performance of real witnesses doing real lineups and
9 see, you know, how many times they make errors and in
10 what kinds of circumstances.

11 Q. Let me stop you just one second. We're talking about
12 reliability. Can you tell us real quick what the
13 definition of reliability is in the context of these
14 - this research you're talking about.

15 A. Sure. Reliability basically would be a witness's
16 accuracy in terms of their ability to pick someone
17 out of a lineup, in terms of their ability to talk
18 about details of a crime and be correct about those
19 details. And it includes, in the case of a lineup,
20 both a person's ability to actually recognize the
21 real perpetrator, if they are presented with that
22 person, but it also includes a person's chance of
23 making a false recognition, if they're presented with
24 a lineup that doesn't include the real perpetrator at
25 all.

1 Q. Okay. Now, staying with the real-world research,
2 what would you say is the best way to do it? In
3 recent years, are you familiar with what's called The
4 Innocence Project?

5 A. Yes.

6 Q. Is that some of what you based your research on,
7 these studies?

8 A. Yeah.

9 Q. And can you tell us real quick about The Innocence
10 Project as it relates eyewitness identification.

11 A. Sure. The Innocence Project has, for my purposes, a
12 very useful database of cases where we know that the
13 wrong person was convicted. And in many cases, we
14 know for certain that an eyewitness error occurred.

15 Q. Now, wait one second. How would you know the wrong
16 person had been convicted of something?

17 A. A very good question. This is why it's fairly
18 recent, because this is basically asked on DNA
19 exonerations. So, these are cases where someone has
20 been tried and convicted. And then, later DNA
21 analysis has shown that they were not the right
22 person, and that someone else committed the crime.

23 Q. So it showed actual innocence?

24 A. Yes.

25 Q. Now, has -- and so The Innocence Project is kind of

1 the - what you all have been waiting, I guess, for
2 lack of a better word, and kind of the gold standard
3 for what you all have been waiting on, right?

4 A. Well, I mean, it's obviously a small percentage of
5 all cases that have ever been tried in the U.S., but
6 it does represent that illusive situation where we
7 actually know who did it. And so, that's very
8 valuable.

9 Q. Sorry to interrupt you. Now, the DNA exonerations,
10 obviously, if there is no DNA in a case that you can
11 go back and later test, it wouldn't - you wouldn't be
12 able to do that; would you?

13 A. Right.

14 Q. Okay. And I didn't phrase that very well. And so,
15 are a lot of it, the DNA exonerations, DNA was
16 present at a scene, but couldn't be tested under
17 existing technology; and then was retained,
18 fortunately; and then tested with later technology
19 later on which then indicated innocence?

20 A. Yes.

21 Q. Is that a -

22 A. The technology has come very far in the last few
23 years. So, a lot of things, you know, that even
24 weren't testable five years ago, are now testable.

25 Q. Okay. And I know that it is an every-day-type thing.

1 Do you have any idea how many DNA exonerations have -
2 The Innocence Project has revealed?

3 A. It's been over 200 now.

4 Q. 200. And those are people who, convicted at trial,
5 were later exonerated through DNA?

6 A. Correct.

7 Q. Okay. Now, let's get back to your area of research,
8 the eyewitness. Has The Innocence Project, or have
9 you, done any research or have any research typing
10 DNA exonerations to cases involving eyewitness,
11 memory eyewitness identification?

12 A. Yes.

13 Q. Okay. And can you tell the jury, in whatever words
14 you can, the connection between The Innocence Project
15 versus the reliability of eyewitness testimony?

16 A. Of the two-hundred-some-odd cases that The Innocence
17 Project has looked at over the years, about 75
18 percent of them do involve an eyewitness who
19 identified the wrong person. And so, obviously, that
20 interests psychologists a lot to try and see, you
21 know, what are the factors that could lead a person
22 to make that kind of a mistake in that situation.
23 So, we look at those case studies. And then, from
24 there, sometimes we use some of those cases to give
25 us ideas in the laboratory and in the field of what

1 to study.

2 Q. 75 percent?

3 A. Yes.

4 Q. So using round numbers, if there were 200 total
5 cases, 150 of the convictions that later turned out
6 to be incorrect would have involved eyewitness
7 identification at trial as a basis for conviction.

8 Is that correct?

9 A. Yes.

10 Q. Is there also data as far as cases where there is
11 more than one eyewitness identification?

12 A. Yes.

13 Q. Okay. And how - what - that 75 percent number, what
14 if there's multiple ID's, does that have any effect
15 on that number?

16 A. Yeah. About half of that 75 percent involves more
17 than one eyewitness making the same identification.

18 Q. So there's still at the mid-thirties percent error
19 rate?

20 A. Yeah, probably 30-35 percent or more.

21 Q. Okay. Let me ask you - is there anything else about
22 The Innocence Project that you rely on or that you
23 think is relevant to this case, in general?

24 A. It's - I think the numbers, you know, are probably
25 the thing that, you know, boosts psychological

1 research in the sense that, you know, we know that,
2 if this many cases are out there, and that is, you
3 know, a very strong impetus for people in my field to
4 continue to study and continue to try and, you know,
5 figure out ways to avoid these kinds of situations in
6 the future.

7 Q. So a lot of your research is trying to find out how
8 to avoid the problems that have plagued -

9 A. Right.

10 Q. - eyewitness reliability all along, and then try to
11 get that 75 percent - it may never get to zero, but
12 hopefully to -

13 A. To hopefully get it down.

14 Q. Right.

15 A. Uh-huh. Yeah.

16 Q. Can you tell us a little bit about memory, and does
17 memory work like a video camera, where it's
18 consistently taping in your mind, and then you can
19 rewind it and that sort of thing?

20 A. Definitely not.

21 Q. Okay.

22 A. That's one of the myths that I often talk about and
23 try to dispel in my psychology classes. Memory -

24 Q. Do you find - I'm sorry. Do you find that students
25 and people that have no training in this assume that?

1 A. I - yeah, to a certain extent.

2 Q. Okay. You used the word *myth*, so is it kind of a -

3 A. Yes.

4 Q. Okay. But it's not supported by the science?

5 A. Right.

6 Q. Okay. And I didn't mean to interrupt you. So tell
7 us a little bit about the stages in memory in the
8 human mind and remembering things.

9 A. I like to tell my students to think of remembering as
10 less of an act of watching a video, and more of an
11 act of putting a puzzle together, because, typically,
12 as human beings, when we have anything happen to us,
13 good or bad, we have a fairly limited ability to pay
14 attention to details about it. There is only so much
15 that we take - can take in. We have to attend to it.
16 We have to process the information.
17 Typically, information goes through a kind of a
18 short-term or temporary stage of memory, and we know
19 that there is a limited number of facts that we can
20 take in at any given time in that short-term or
21 temporary store. And if we manage to encode it into
22 our more permanent memory storage, what we usually
23 wind up with are bits and pieces. And then, when we
24 go back and try to retrieve that information, we take
25 the bits and pieces. We take the puzzle pieces that

1 we have and our brain does not like incomplete
2 pictures. So, our brain, basically, tries to fill in
3 the holes where there are pieces missing.

4 Q. Now, what does the brain fill in those holes with?

5 A. The brain can fill in those holes with information
6 that we've gleaned from other people, from
7 information that maybe was brought up during
8 questioning or when we were telling other people.
9 Sometimes it can just be common sense or, you know,
10 what I think should have happened in this situation.
11 It's kind of like, you know, your brain is trying to
12 make sense of what it has and make a coherent
13 complete story out of it and the pieces that don't
14 come from actual memories become a part of that
15 story, so that, ultimately, you really can't tell
16 what is, you know, an actual memory stored in your
17 brain and what is something that you've just guessed
18 at or inferred in the meantime.

19 Q. Doctor, is that something that we can stop our brains
20 from doing?

21 A. Oh, no.

22 Q. I mean, is it a conscience decision or unconscious?

23 A. It's very unconscious.

24 Q. And there's no way to stop that?

25 A. No

1 Q. That's just how it works.

2 A. Yeah. And it's actually a good thing, because, if we
3 really did remember every little detail of our lives,
4 we'd go crazy with, you know, all kinds of irrelevant
5 information.

6 Q. And there's only so much space?

7 A. Exactly.

8 Q. All right. Now, are there certain things that may
9 affect that storage process, as well as the retrieval
10 process that may be relevant in a eyewitness
11 identification in this case?

12 A. Yes.

13 Q. Okay. Can you tell us a little bit about that.

14 A. Sure. I'll start with storage.

15 Q. Okay.

16 A. Obviously, I teach college, and I try to teach my
17 students how to study effectively and how to remember
18 information. And so, I tell them study repeatedly, I
19 tell them study for a long time, I tell them study
20 without distractions. I tell them all these things
21 that are designed to help them do well on the tests.
22 An eyewitness never has that kind of luxury to study
23 things in the way that they really need to be. An
24 eyewitness is often in a situation where, you know,
25 they only see a face or an incident once. It may be

1 a short amount of time. It may be under, you know,
2 less than ideal conditions in terms of just
3 opportunity to look at someone. And in a typical
4 eyewitness situation, most eyewitnesses are victims,
5 and so they're under a great deal of stress. And one
6 of the most studied factors of memory is what stress
7 does to it. And we know that stress has a very
8 negative effect on our ability to remember, and makes
9 us much more likely to make mistakes in our memory.

10 Q. What does the stress do to the normal encoding
11 process that causes a problem?

12 A. Basically, what it does is, our bodies are geared in
13 a stressful time to a kind of a fight or flight
14 response. And if you're in danger or someone you
15 love is in danger, most of your mental resources are
16 going to be focused on survival. So, what you have,
17 basically, is a situation where your attention is
18 narrowed toward, you know, think about getting away,
19 think about surviving, and you can't - you don't have
20 as much attention left over to process details about
21 people's appearance, people's faces, people's
22 clothing. What's happening in the brain, and not to
23 get too technical, but you're probably all familiar
24 with the idea of an adrenaline rush when you're
25 stressed. And adrenaline is just one of the

1 chemicals that is released in your body and your
2 brain when you're stressed. Some of those chemicals
3 actually slow down the brain areas that process
4 memory. They affect an area called the hippocampus
5 where a lot of your memories are supposed to be
6 processed and consolidated. And so, what happens is,
7 people are literally slowed down in their ability to
8 take in details of a situation.

9 Q. Okay. Now, let's talk a little bit about this stress
10 does - you said something about the amount of time.
11 Is there any set amount of time that someone, like an
12 eyewitness, would have to view someone else in order
13 to accurately encode, and then later retrieve a
14 memory of the person?

15 A. I wouldn't say that there is a set amount of time.
16 It'll obviously depend on a situation. One thing
17 that makes that question hard to answer is that, most
18 of the time, people under stress tend to overestimate
19 the amount of time that's passed in a situation. So,
20 we'll see, for instance, where someone will say, you
21 know, that a certain incident took, you know, five
22 minutes or ten minutes or longer. And if there is a
23 way to actually verify the time period, we often find
24 that, you know, five minutes was really two; ten
25 minutes was really five.

1 Q. Are you aware of a study - a research study that a
2 Charles Morgan did regarding the time?

3 A. Oh, yes.

4 Q. Can you tell us briefly about that.

5 A. Yeah. Charles Morgan is kind of the gold standard of
6 the study that we all wish we'd done. He's a
7 researcher at Yale University who, a few years ago,
8 had a very unique opportunity to study participants
9 under very real stress. Obviously, a lot of times,
10 when we study stress in the laboratory, we can't put
11 people under the kind of stress that they would be
12 under in a real crime. It's just not ethical. You
13 can't do that to people.

14 But Morgan had the opportunity to study a group of
15 Armed Services personnel who were undergoing a
16 survival school training. And as part of their
17 training, they went through a very realistic scenario
18 where they were basically dropped into a wilderness
19 area, captured by people who were playing the role of
20 enemy soldiers. They were taken to a place where
21 they were interrogated. And Morgan basically, in his
22 study, he was able to look at people's reactions to a
23 physically stressful interrogation versus a low
24 stressful, you know, the interrogator is just kind of
25 trying to trick you, but you know, there's no, like,

1 physical threat involved. And in the particular
2 scenario that these military personnel were
3 undergoing, they were basically interrogated under
4 these high- or low-stress kinds of conditions for
5 about 45 minutes. Brightly lit room. The
6 interrogator was in their face under bright lights
7 for 30 to 45 minutes. And then, an hour or so later,
8 Morgan brought them out and gave them a chance to try
9 to identify their interrogator from a lineup.

10 Q. And this had been in their face, well-lit -

11 A. In their face.

12 Q. - 30 to 45 minutes?

13 A. Yeah.

14 Q. Nothing else going on, interrogation.

15 A. Yeah.

16 Q. Okay. And what were the findings that Dr. Morgan did
17 in that study?

18 A. He tried to - one of the things he was trying to do
19 was study different lineup types. And you don't need
20 to know about all of that, but the basic finding was
21 that, under the high stress conditions, only about 30
22 to 35 percent of the people who were interrogated
23 were actually able to identify their interrogator.
24 And when they were presented with a lineup that
25 didn't even have their interrogator in it, a very

1 large percentage, 45-50 percent in some cases,
2 actually identified the wrong person.

3 Q. Let me stop you for a second and I'm just going to
4 use one of our - I know it's not the same one, but
5 this is just one of the exhibits. And when you're
6 talking about showing them a line up, you said that
7 the correct person, and in Dr. Morgan's study,
8 wouldn't even be one of the six people?

9 A. Right.

10 Q. Okay. And he showed it to people, read warnings and
11 advisement of -

12 A. Right.

13 Q. - be careful what you do and don't. That sort of
14 thing that we're familiar with. And yet,
15 nevertheless, 45 percent of the people picked
16 somebody out in the lineup?

17 A. Yes.

18 Q. Okay. Even though the actual person wasn't in there?

19 A. Yes.

20 Q. Even though they had been advised to be careful -

21 A. Yes.

22 Q. - for lack of a better - okay. Now, getting back to
23 stress a little bit, is there something in the study
24 he's talking about that's called weapon's focus?

25 A. Yes.

1 Q. Can you tell us, is that related to stress?

2 A. It can be.

3 Q. Okay. Can you tell us a little bit about weapon's
4 focus/

5 A. Sure. It's a very simple kind of phenomenon that was
6 actually suggested to researchers by police officers
7 who told us you really ought to research this. It
8 has to do with the fact that, when there is a weapon
9 involved in the commission of a crime, people are
10 less likely to be able to identify the perpetrator
11 later. So, for instance, if, let's say, someone has
12 a gun, the tendency is to focus on that gun. Again,
13 it's survival instinct. You know, you want to see
14 where that gun's pointed. You want to see where that
15 finger is on the trigger and how tense that finger
16 muscle appears to be. And so, people tend to spend
17 time focusing on the gun rather than necessarily
18 trying to study the details of the face of the person
19 holding it.

20 And it's not even just a visual thing. A lot of
21 people think that it's, you know, just your eyes are
22 trained on the gun, but it's - even when your eyes
23 are not on the gun, your attention is on the gun so
24 what we see is when there is a gun present, not only
25 do people have trouble visualizing the person's face

1 and other details, but they have trouble remembering
2 things like what was said, what happened, recognizing
3 voices. So, it really is a narrowing of attention,
4 rather than just a focusing of the eyesight.

5 Q. Okay. And again, these people that are in these
6 situations, these eyewitnesses, they're not
7 intentionally doing anything wrong; are they? I
8 mean, that's just how their brain is working, right?

9 A. Yeah. Absolutely.

10 Q. And have no intention of any -

11 A. I mean, it's not something that anyone could avoid.

12 Q. Right. Right. Can you tell us briefly a little bit
13 as far as the research that you may know about or
14 done as far as the reliability or accuracy of
15 children eyewitnesses versus adults.

16 A. Sure. Now, that's been a fairly important topic in
17 research, actually. A number of researchers have
18 done studies where they have had adults and children
19 of various age groups who basically witnessed the
20 same kind of event, and then are asked to choose the
21 person who committed the crime out of a lineup. And
22 what we typically find is that, children tend to make
23 more false identification mistakes; that they're
24 actually not that different from adults in terms of,
25 you know, when they see the right person, and you

1 know, being able to say, yes, that was the right
2 person; but they're more likely to pick a wrong
3 person out of a lineup. And it's basically -- it's
4 kind of a pretty standard progression of, you know,
5 from adult down to, you know, adults have a certain
6 error rate. And then, you know, children like nine
7 to ten have maybe a 50 percent higher error rate.
8 And children seven and eight have a little higher
9 than that, and so forth.

10 Q. Okay. And you're aware that the -- one of the
11 eyewitnesses in this case was ten years old, which is
12 why you --

13 A. Yes.

14 Q. Okay. Now, the -- did you have a chance to review the
15 warnings or the admonition on the back of the photo
16 lineups that were shown to --

17 A. Yes.

18 Q. Okay. And with regard to a ten-year-old, did you do
19 any type of research as far as that, the effect of
20 those admonitions on a ten-year-old or the
21 ten-year-old's ability to comprehend those?

22 A. Yeah. When I read the instructions, one of the
23 things that kind of stands out in the research
24 literature is that children tend to have kind of a
25 more limited short-term memory than adults do, so

1 they have trouble kind of processing complex
2 instructions that have a lot of steps to them. And
3 so, one of the things that I looked at was just, you
4 know, how many things are we throwing at a child with
5 these instructions. Now, it's like, you know, you
6 shouldn't, you know, be biased; and you know, don't,
7 you know, think that just because you're looking at
8 these photos, that the person is necessarily in
9 there; and it's just as important to identify
10 innocent people as, you know, guilty people. And you
11 know, there's kind of a whole string of things that
12 come right in a row.

13 And one of the things that sort of struck me is that
14 there was language in the admonition that seemed like
15 it was not quite at a ten-year-old sort of level.
16 So, I just kind of typed it into a program that
17 analyzes writing for reading level, and it came out
18 at about, I think it was an eighth grade level. So,
19 you know, probably more of a 13-year-old or so
20 reading ability, rather than a ten-year-old.

21 Q. Okay. So, would it be your opinion, to a reasonable
22 degree of certainty, that the admonitions in this
23 case were not written in an appropriate level for a
24 ten-year-old?

25 A. And obviously, you've, you know, not - no two

1 ten-year-olds are alike and, you know, but I think
2 given the fact that you have a ten-year-old and what
3 I would like to see done is, you know, someone who
4 knows a little bit more about children and their
5 vocabulary and their understanding just, you know,
6 kind of walking through those instructions a little
7 more step by step, you know, one sentence at a time.
8 You know, do you understand what that means? Maybe
9 get the child to repeat it back to you in their own
10 words. Just to be sure that they did understand.

11 Q. And again, after reviewing the documents from this
12 case. And we talked about weapons focus, you're
13 aware that there were allegations of weapons being
14 present, correct?

15 A. Yes.

16 Q. Now, let's - we talked about does it make a
17 difference - well, you said this is probably talked
18 about even with multi-identifications of the same
19 person, that there is still the error rate that I
20 think you said was in the mid-thirties, right?

21 A. Yes.

22 Q. Okay. Now, does it - in this case, does that make a
23 difference from a psychological point of view or
24 eyewitness memory point of view that two witnesses
25 identified the same person?

1 A. There are two things that I think are relevant here.
2 One is that the two witnesses in question had a
3 chance to talk to each other, you know, before they
4 even ever talked to police; and then, again, before
5 they did their lineup procedures. And that's one of
6 the things that can make two people, you know, tend
7 to agree on their statements and, potentially, be
8 looking for the same sort of things.

9 Q. And was that from Senora Jones' statement saying that
10 she spoke with the children -

11 A. Yes.

12 Q. - for five minutes before she even called 911?

13 A. Right.

14 Q. Sorry to interrupt you.

15 A. No, quite all right. And the other thing that I was
16 going to say is that, when you have multiple
17 witnesses, and the ideal situation would be that each
18 of them sees a different line up. If two people see
19 the same lineup, if there's anything with that
20 lineup, they're both going to be affected by it. And
21 so, you would, in fact, you would expect to see both
22 of them picking the same person.

23 Q. And when you say the same lineup, you don't mean show
24 both of them this lineup at the same time and, like -

25 A. The same set of photographs.

1 Q. Right. Okay. All right. And in this case, are you
2 aware that they were shown the same set of
3 photographs?

4 A. Yes.

5 Q. Okay. And so, the - well, we'll talk about it in a
6 minute, as far as the issue - any issues about the
7 lineup would affect both of them equally and would
8 not -

9 A. Correct.

10 Q. - if it's bad, it's bad, it doesn't matter?

11 A. Right, to even someone who had never known anything
12 about the crime might pick the same person.

13 Q. Sure. Now, I want to talk to you a little bit about
14 switching from the encoding, the retrievable, and
15 then the identification process, to the confidence
16 that's exhibited by an eyewitness, and how it relates
17 to reliability or accuracy. Again, that's a long
18 sentence, but can you tell us a little bit about
19 witness confidence as it relates to reliability.

20 A. Sure. So it's another one of those myths that I
21 teach my students about, because common sense would
22 dictate that people who are confident are more likely
23 to be accurate, and people who are accurate are going
24 to be confident. And in fact, most studies that are
25 done in the laboratory do involve measuring people's

1 confidence after they make an identification. And of
2 course, in the lab we know whether they're right or
3 wrong.

4 And what we've found is that the relationship between
5 confidence and accuracy is actually a pretty weak
6 one. There is a general tendency for more confident
7 people to be a little more accurate. But rather than
8 give you numbers and statistics that are just going
9 to be meaningless, let me give you a real-world
10 example. The relationship between a person's
11 confidence and their accuracy is just about the same
12 level of relationship as the relationship in the real
13 world between height and gender. So on the whole,
14 males tend to be taller than females, but we all know
15 tall females; we all know short males. My tall
16 daughter is engaged to a male who is shorter than she
17 is, so it just kind of gives you that notion of what
18 sort of relationship we're talking about here that,
19 you know, as many tall females as there are in the
20 world, that's the number of confident witnesses who
21 might be wrong, and the number of short males in the
22 world, that's the number of really unconfident
23 witnesses who might actually be right.

24 Q. Right. And I skipped over something. Just let me
25 back up just a second. The lineup that - the lineups

1 that we're talking about, the six people that are -
2 that are in the lineup, can you tell us generally
3 what the studies have shown as far as the connection
4 or relationship or, I don't know the right word, as
5 far as making up a lineup.

6 A. Uh-huh.

7 Q. Assume - well, let's just assume, suppose we -
8 they've already picked one out. So, looking at this
9 lineup, what's important that you look at, as far as
10 the other five people that are in the lineup, which I
11 think we call fillers, correct?

12 A. Correct.

13 Q. Okay. So fillers are the people that aren't picked?

14 A. Right.

15 Q. Okay. Tell us a little bit about what the studies
16 have shown as far as fillers.

17 A. It's really important when you select fillers that
18 they share the same sorts of characteristics with the
19 kinds of things that the eyewitness or the victim has
20 talked about in their statements to police. So, for
21 instance, if, you know, the witness says the person
22 was a, you know, black female, age about 30,
23 five-foot-five, then you want to be sure that
24 everybody in the lineup is about that age. And if
25 the witness says something about the hair, then you

1 want to have everybody in the lineup have that same
2 sort of hair. And you don't ever want one person to
3 stand out for any reason in terms of having a really
4 noticeable characteristic that nobody else has, but
5 you especially don't want one person to stand out in
6 being the only person that has a characteristic that
7 the witness actually mentioned in their memory.

8 Q. Okay. And let's talk about this case. Are you
9 familiar that there was a description about a
10 flared-out nose?

11 A. Yes, I believe both of the witnesses said that.

12 Q. And is that kind of a specific description -

13 COURT REPORTER: *A flared out nose*, and your answer
14 was what?

15 A. Yes, that I remembered both of the witnesses
16 mentioning the flared-out nose.

17 Q. And was that the type of specific or unique feature
18 that you were talking about earlier that really needs
19 to be tied into the fillers, as well?

20 A. Yes, exactly.

21 Q. Okay.

22 A. You know, that's one of those, you know, one of those
23 things that you want to get in an identification.
24 Because, so often, things are generic, but that, you
25 know.

1 Q. And tell us what the problem is if you have one
2 person exhibiting certain features and the fillers do
3 not. What's the problem, from a psychological or
4 eyewitness standpoint, what's the problem with that?

5 A. Let's say you're an eyewitness and you're under
6 extreme stress, and you're only able to remember a
7 few things about a person's face, but one thing that
8 does stand out is let's say the flared nostrils.

9 Q. Right.

10 A. And then you're shown a set of photographs where only
11 one person has that characteristic. You've already
12 got a tendency, as a witness, to want to pick out
13 someone. You're going to be comparing the six photos
14 and trying to find the one that most closely
15 resembles what you remember. There's a lot of things
16 maybe you don't remember. You don't really remember
17 what the ears looked like or maybe the eyes, but you
18 remember those nostrils. And there is only one
19 person in the lineup that has that characteristic,
20 and you're drawn to that person.

21 Q. And is that known as suggestibility of the lineup?

22 A. Yes, that would be a suggestive lineup.

23 Q. And again, is this - this isn't something somebody is
24 doing consciously. It's something the brain is doing
25 filling things in. They're subconsciously drawn to

1 that, correct?

2 A. Right. That would just be the, you know, the picture
3 that you spent the most time looking at. The picture
4 that just drew your focus, and you might not even
5 necessarily know why.

6 Q. Okay. Now, how is suggestibility of - well, back up.
7 Do you, based on your studies and research
8 experience, do you believe that, with regard to the
9 fillers versus the picture that was picked out that,
10 that was suggestive?

11 A. Yes, I do.

12 Q. Okay.

13 A. The photograph of the defendant seems to also
14 exaggerate that characteristic. He seems to be kind
15 of leaning back. You can't really see that much of
16 the eyes, but you can really see the nose.

17 Q. You talking about the characteristic of the flared
18 nose?

19 A. Yes.

20 Q. Okay. So does that enhance the suggestibility in
21 your opinion?

22 A. Yes.

23 Q. How do you avoid the suggestibility problem in a
24 lineup?

25 A. Basically, there are a number of things that we can

1 do.

2 Q. And I guess the short answer is you just try to make
3 people that match the - I mean, you try to make them
4 look similar. So, they don't know he stands out?

5 A. Yeah. And if the witness tells me, you know, black
6 male, certain age, flared nostrils, I would try to
7 make sure that I had six pictures of people who had
8 that characteristic.

9 Q. And I went back. Let's jump forward. We talked
10 about witness confidence. Are there things that can
11 affect a witness - eyewitness's confidence level in
12 your studies, in your research?

13 A. Sure. Confidence tends to increase over time between
14 an event and, certainly, a courtroom appearance, and
15 it increases for a lot of reasons. Partly, it
16 increases every time you tell your story. You
17 recollect it to yourself. Time passes. The very
18 fact that there is a trial going on is a certain
19 amount of confirmation to you that, you know, hey, I
20 must have gotten it right. And then, in some cases,
21 investigators will actually tell the witness or give
22 them some kind of feedback to indicate that, you
23 know, yeah, you got it right or you picked the same
24 person that another person picked. And we know from
25 research studies that, when we tell people that,

1 although it can't effect their accuracy in any
2 positive way, it definitely inflates their
3 confidence, so they become more confident of their
4 choice. In some cases, they actually become more
5 confident that they had a better view; that they had
6 - that they paid more attention. They just tend to
7 see, you know, everything in a more positive light
8 when someone tells them, you know, good job.

9 Q. Okay. Just so - but that - the actual confidence
10 that they exhibit is not a good indicator of their
11 reliability, because that confidence has been
12 inflated or bolstered or boosted by an external
13 source, right?

14 A. Sure.

15 Q. Okay. Now, you said you had a chance to review the
16 videotape in this case.

17 A. Yes.

18 Q. All right. Looking at that, did you have any
19 concerns about the issues about confidence of the
20 eyewitnesses?

21 BY THE COURT:

22 THE COURT: Let's take a five-minute recess, ladies
23 and gentlemen, so we can find out what's going on. The
24 deputy believes that it's an electrical issue. They've
25 had problems with the construction going on here, but

1 let's just take a five-minute break and while we find out.
2 And we'll keep you posted, and may bring you right back
3 in, and ask you to step in the jury room.

4 JURORS LEAVE COURTROOM.

5 BAILIFF: The jury is clear, Your Honor.

6 OFF THE RECORD 10:24 A.M.

7 BACK ON THE RECORD.

8 DR. LORI VANWALLENDAEL

9 CONTINUE DIRECT-EXAMINATION BY MR. LEE:

10 Q. Can you, again, talk about the, I guess what the
11 common perception is versus what the science shows as
12 far as the relationship between confidence and
13 accuracy.

14 A. Common sense would say that they should be highly
15 related, but in fact, they're really very different
16 animals. Confidence and accuracy are not necessarily
17 all that related, because they tend to be affected by
18 different factors. And some of it's just
19 personality, and some of it is the kinds of feedback
20 and confirmation that a witness can get over time
21 that will increase their confidence.

22 Q. Did you indicate that there are some things in this
23 case that may be related to that confidence level?

24 A. Yes. When I looked at the videos of the lineup
25 procedures with the young girl at the end of the

1 procedure, the officer kind of patted her on the head
2 and said something like good job. And then the -

3 Q. Let's talk about that one. Is that - is that a bad
4 thing for - with regard to trying to get a true
5 measure of confidence?

6 A. It's - basically what it does is, it kind of tells
7 the witness that, you know, you picked the person
8 that we're thinking of.

9 Q. Right.

10 A. So it's not, you know, quite saying, you know, yes,
11 you picked exactly the person we wanted you to, but
12 it leans in that direction.

13 Q. So later on, they come to court with that additional
14 information bolstering -

15 A. Right.

16 Q. - and that is reflected -

17 A. They come to court thinking good job.

18 Q. How about with the mom. Any bolstering that you saw
19 or any thoughts or issues?

20 A. Yes. I believe there was the statement made that she
21 had picked the same person that her daughter did when
22 she was going after her daughter.

23 Q. Problem with confidence later on?

24 A. Yes. Again, when you tell people that, you know,
25 they picked the same person as another witness did,

1 that's another kind of indicator to them that this is
2 a good sign that I did it right.

3 Q. And is it commonsense for lay people to say, the more
4 confident somebody is, the more believable, and the
5 more I'm going to believe them?

6 A. Yeah, I think that is commonsense. And we actually
7 do have studies of mock jurors that suggest that
8 confidence is - it's really the one thing they have
9 to go on. And so, very often it plays a very
10 important role in how they feel about believability
11 and accuracy.

12 Q. So, yeah, confidence goes to believability, but
13 believability is not the same as accuracy, correct?

14 A. No, definitely not.

15 COURT REPORTER: You said what is not?

16 MR. LEE: Accuracy.

17 Q. So someone can believe with all their heart that
18 today is Thursday, and come across as being
19 believable, when, in fact, it's not Thursday,
20 correct?

21 A. Absolutely.

22 Q. A child could believe in Santa Claus, when, in fact,
23 be very convincing, and yet, still the same -

24 A. Correct.

25 Q. I'm trying to break it down to the non-science area.

1 All right. You're aware, also, that both witnesses
2 were shown a total of eight photo lineups. Is that
3 correct?

4 A. Yes.

5 Q. Four each on the first day. And then, about a week
6 or so later, they each were shown four different
7 ones, right?

8 A. Correct.

9 Q. Now, one of the things the admonitions talked about
10 is they don't feel like you got to pick somebody, and
11 that's something that should be on there, right?

12 A. Yes, absolutely.

13 Q. So on those other seven, neither one of them picked
14 anybody, right?

15 A. Correct.

16 Q. They said, I don't recognize anybody on here,
17 correct?

18 A. Right.

19 Q. Now, does the fact that they failed or refused to
20 identify someone on those other seven have any affect
21 on their identification of - on the one? Does it
22 make it more reliable?

23 A. I like to look at each lineup as a separate thing,
24 because each lineup has its own quality in terms of
25 the fillers and the photograph used of the suspect

1 and so forth. So, and while it would probably be a
2 red flag if somebody picked someone on every lineup
3 they were ever shown, it's not necessarily an
4 advantage or disadvantage for one lineup to look at
5 how people performed on others.

6 Q. And it would at least indicate that, as to the other
7 lineups, that they understood it wasn't a multiple
8 essay. They didn't have to pick -

9 A. Correct, and they obviously understood the
10 admonition.

11 Q. Okay. Now, - and you viewed those - the video of the
12 first four lineups -

13 A. Yes.

14 Q. - of each one?

15 A. Yes.

16 Q. And you saw that Mrs. Jones picked one, and then
17 passed on three other ones, correct?

18 A. Correct.

19 Q. And then, are you aware that she also - again, on the
20 next four, she passed on those?

21 A. Yes.

22 Q. Okay. Are you advised - or have you been advised
23 that, the other day in court, that Ms. Jones looked
24 at two of those seven she didn't identify, and
25 actually selected someone?

1 A. Yes. That was in the summary that you provided to
2 me.

3 Q. And does that - from what you do, your research, is
4 that a main concern to you, or can you enlighten us a
5 little bit as far as what your thoughts are about
6 that?

7 A. My own opinion is not to put too much stock in that
8 for two reasons. One being that three years have
9 passed between now and the time of the crime. The
10 other being that she has seen those lineups before.
11 And typically, a lineup is really only valid once.
12 After that, you know, photos are familiar because
13 you've seen the picture before. And so, it's hard to
14 disentangle what might be a memory of just seeing a
15 lineup versus what is a memory that actually goes
16 back to the crime.

17 Q. Is it your opinion, to a reasonable degree of
18 certainty, that the one lineup we're concerned about,
19 the one where they both picked Marion Powell, is it
20 your opinion that that lineup has suggestibility
21 problems?

22 A. Yes.

23 Q. And is it your opinion that suggestibility issues,
24 such as that of not having the proper fillers, is one
25 of the causes of false or misidentification?

1 A. Yes.

2 Q. Is that safe to say? And obviously, you can't come
3 in here today and say, I know that the wrong person
4 was selected. I mean, -

5 A. No, of course not.

6 Q. You can't do that. I mean, that's - all you can do
7 is study the evidence and look at it, and give an
8 opinion as to the potential problems related to the
9 accuracy of the selection, correct?

10 A. Correct.

11 Q. I think I'm through. Is there anything else that I
12 have completely left out that you think is relevant
13 or important for the jury to hear before I sit down?

14 A. I think you've been very thorough.

15 MR. LEE: I would tender the witness to the
16 prosecution, Your Honor.

17 MR. SHELDON: May it please the Court.

18 DR. LORI VANWALLENDael

19 CROSS-EXAMINATION BY MR. SHELDON:

20 Q. Mr. Lee said that he had given you a review of the
21 testimony that has been presented in the case?

22 A. Yes.

23 Q. Did he tell you that the defendant confessed to
24 someone he was in jail with?

25 A. No.

1 Q. He didn't? This defendant. As being one of the
2 armed robbers. Did he tell you that?

3 A. No.

4 Q. Did he tell you that, that random guy that she picked
5 out three years later - if I can find which lineup it
6 is. Here's one, State's Exhibit Number 49, which is
7 Number 4 here. That the defendant also confessed to
8 this guy being with him when it happened?

9 A. No.

10 Q. He didn't tell you that?

11 A. No.

12 Q. And that's the individual that Ms. Jones picked out
13 of this lineup three years later.

14 A. That is him? Okay.

15 Q. That was the guy that had a mask over his face and
16 only has his eyes shown.

17 A. Okay.

18 Q. Did he inform you that she recognized him in the
19 first lineup procedure, but didn't select him because
20 of the warning given?

21 A. Yeah. He informed me that she had hesitated on him
22 the initial time, and had said that she wasn't sure
23 enough or something like that.

24 Q. But he didn't inform you of any of the corroborating
25 facts that now bolster that identification?

1 A. He said that that person was associated with the
2 defendant in some way. That's all I really know.

3 Q. Okay. You said that you've testified multiple times
4 for the defense, correct?

5 A. Correct.

6 Q. And you've never testified for the prosecution.

7 A. That is correct.

8 Q. That's because we've never asked you.

9 A. That is right.

10 Q. Could that be because many of the opinions in your
11 field and your opinions individually are contrary to
12 long-established Supreme Court precedent?

13 A. I don't believe so.

14 Q. For example, some of the factors the court takes into
15 consideration when determining whether a lineup is
16 suggestive is a witness's confidence, correct?

17 A. Correct.

18 Q. And you said that that can be overinflated, correct?

19 A. Correct.

20 Q. Another thing the court takes into - has to take,
21 because it's the law, is determine whether something
22 suggestive is certainty, correct?

23 A. Correct.

24 Q. And you said that that doesn't really matter either.

25 A. Correct.

1 Q. Another thing that the court takes into
2 consideration, for over 30 years, from the Supreme
3 Court of the United States all the way down to this
4 court right here, is that a high-stress situation,
5 such as a victim of a crime, a violent crime, is
6 going to pay closer attention to detail than someone
7 who is buying coffee from a barista, correct? Well,
8 you don't know that, but - you're not agreeing with
9 that, but that is a Supreme Court precedent.

10 A. That is a finding.

11 Q. And that is not what you're saying here?

12 A. No.

13 COURT REPORTER: I'm sorry, you said that's a Supreme
14 Court precedent and that - what did you say?

15 A. That is a finding.

16 Q. And that's not what you were testifying to here?

17 A. No.

18 Q. You said that Dr. Morgan's study where folks are
19 dropped into the woods in survival mode and they're
20 interrogated for hours. Now, did they know that
21 this a practice that they were doing? Is this some
22 type of -

23 A. Yes, they did know that.

24 Q. So they knew they weren't going to die.

25 A. Right.

1 Q. And in fact, isn't it true that it is nearly
2 impossible to do actual studies in this field,
3 correct?

4 A. Where someone would actually be -

5 Q. Correct.

6 A. - under the kind of stress where they thought - yeah,
7 you can't make somebody believe they're going to die.

8 Q. You basically can't. And if you did, it would be
9 illegal; wouldn't it?

10 A. Correct.

11 Q. So, you can't actually do real field studies.

12 A. Correct.

13 Q. We've already touched on this for Mr. Lee, but you
14 cannot say that Ms. [REDACTED] A.H., the ten-year-old's
15 I.D. is incorrect; can you?

16 A. No, I cannot.

17 Q. And you cannot say that Ms. Senora Jones' I.D. is
18 incorrect; can you?

19 A. No, I cannot.

20 Q. Have you ever interviewed Senora Jones?

21 A. No.

22 Q. Have you ever interviewed [REDACTED] A.H. ?

23 A. No, I have not.

24 Q. Do you know whether or not [REDACTED] A.H. is in advanced
25 classes?

1 A. No, I do not.

2 Q. Do you know that she had an eighth grade reading
3 level when she was in fourth grade?

4 A. Good for her.

5 Q. Now, you said that witnesses in these high-stress
6 situations are focused on survival, correct?

7 A. Yes.

8 Q. And that can mean many different things; can't it?

9 A. Yes, it can.

10 Q. For example, one thing it could mean is that, if
11 there's one person without a mask that's in a room,
12 and there's other people going through a house,
13 they're tearing the house apart, and they have a gun,
14 and another person comes in while that person is
15 watching over a victim - okay, you follow me? I'm
16 giving an example here. If this person is in that
17 room being held at gunpoint thought it was in their
18 interest to make a connection with the defendant, to
19 look into his eyes and plead with him, have the
20 opportunity to beg him, search into his soul for a
21 glimpse of humanity, would that be evidence - would
22 you look at -

23 MR. LEE: I would just say his question is
24 argumentative, and he can save that for the closing
25 argument if he wants to.

1 THE COURT: Overruled. Go ahead.

2 Q. That could be a - all I'm asking is that could be a
3 way for someone to survive?

4 A. Yes, it could.

5 Q. Okay. A way to try to find a common sense of
6 humanity between them and stare into their face.
7 You're a doctor of psychology, correct?

8 A. Sure. That would make a lot of sense.

9 Q. Yeah. Especially if you had four children right
10 outside the room with you?

11 A. Oh, yes.

12 Q. Okay. Because you would probably care about yourself
13 dying before them, correct?

14 A. Absolutely. I can't even imagine as a mother what
15 that would be like.

16 Q. Now, one thing that you didn't talk about is cross-
17 racial identification. I know that's a field -

18 A. Yes, it is.

19 Q. And that's something that - first of all, I applaud
20 your work, or the work you do with The Innocence
21 Project because it's every prosecutor's worst
22 nightmare to prosecute anyone who is actually
23 innocent, okay. Now, cross-racial identification,
24 would you just tell the jury what that is.

25 A. Sure. There's a lot of research that looks at

1 eyewitness situations where a white person has to
2 identify a black perpetrator or vice versa. And the
3 research is very consistent in showing that we're
4 better at identifying people of our own race,
5 whatever race that might be. And we are not as good
6 at identifying people across other races.

7 Q. So someone who's African-American, who's identifying
8 another person who's African-American, may specify
9 attributes to that person that a white person
10 wouldn't specify.

11 A. Exactly.

12 Q. Like skin tone, for example.

13 A. Yes.

14 Q. Like many white people wouldn't look at three
15 different black people - I'm not trying to be racial
16 here, but it's just the fact of the discourse - and
17 say that this person is a lighter-skin tone and
18 medium-skin tone and a darker-skin tone. They would
19 probably just call them black. Correct?

20 A. Correct.

21 Q. And that's a big problem with cross-racial
22 identification; isn't it?

23 A. Yes, it is.

24 Q. Do you know whether cross-racial identification
25 exists in this case?

1 A. I believe it did not.

2 Q. Okay. When you have an eyewitness case, is
3 corroborating evidence important?

4 A. Sure.

5 Q. Why is that?

6 A. Well, it - I mean, to the jury, you know, that's how,
7 you know, you try to determine which kinds of
8 evidence to weight more and which kind of evidence to
9 weight less. You're looking at a balance.

10 Q. Correct. So, if you have someone who confesses to a
11 person, it fits what the victim says, is that
12 corroborating evidence?

13 A. Yes, I would define it that way.

14 Q. And would it give more weight to the identification
15 or less weight?

16 A. My focus tends to be to try to look at the
17 identification by itself.

18 Q. Correct.

19 A. You know, I tend to look at the rest of that as the
20 jury's job, but not mine. And so, I actually ask not
21 to see any of that kind of evidence.

22 Q. Okay. But that would be important.

23 A. For the jury, sure.

24 Q. And other circumstantial evidence that connects the
25 defendant to a crime, that would be important, as

1 well, correct?

2 A. Uh-huh.

3 COURT REPORTER: Is that yes?

4 A. Yes.

5 Q. What do you get paid by the hour again?

6 A. 200.

7 Q. And that's for testifying?

8 A. Yes.

9 Q. Waiting time you get \$100.00, correct?

10 A. Correct.

11 Q. Did you count how long we were on that fire break?

12 A. Yes.

13 Q. And what time did you leave this morning to get here?

14 A. I left at 4:30.

15 Q. Okay, that's early.

16 A. Yes.

17 Q. How long did it take you to get here?

18 A. About four hours and forty-five minutes or so.

19 Q. And you're planning on returning tonight?

20 A. Yes.

21 Q. That's a long drive, as well.

22 A. Yes, it is.

23 Q. You travel all over the country to tell about people

24 - tell people - first of all, in conferences about

25 wrongful identification, correct?

1 A. Mostly in the southeast, but

2 Q. Mostly in the southeast.

3 A. - I've been to a few other places.

4 Q. As well as testifying in court, correct?

5 A. Yes.

6 Q. And you're fairly familiar with criminal law?

7 A. Yeah, reasonably familiar in a layman's sense, I
8 guess.

9 Q. Okay. You mentioned to Mr. Lee earlier, talking
10 about The Innocence Project numbers, the 300 that we
11 know are wrongful convictions.

12 A. Uh-huh.

13 Q. And you said that's a very small sample to take.

14 A. Yes.

15 Q. Knowing criminal law a little bit, isn't true that
16 identity is an element of every single crime?

17 A. How so?

18 Q. You have to prove that the person on trial is the
19 actual person who -

20 A. Yes.

21 Q. - committed a crime, correct? And do you have any
22 idea how many folks have been found guilty in the
23 United States in the course of its history?

24 A. No, I do not.

25 Q. Okay. That would be a lot.

1 A. Yes.

2 Q. And out of the - you broke the numbers already for
3 the - you said it was about 70 percent had wrongful
4 identification?

5 A. Yeah, 70 to 75.

6 Q. And that's not everyone in the United States. That's
7 of three -

8 A. Right -

9 Q. - 300 that are shown to be wrongful.

10 COURT REPORTER: Sorry?

11 MR. SHELDON: Apologize.

12 Q. That's not out of the history of the United States or
13 just saying the last ten years. That's with the
14 folks of The Innocence Project with their resources
15 have been able to locate and identify, correct?

16 A. Correct.

17 Q. Those 300. And that's 70 percent of that 300,
18 correct?

19 A. Yes.

20 Q. And then you said that, out of that percentage, there
21 was a very small percentage, about 30 percent of that
22 percentage, which involved two eyewitnesses?

23 A. Yes.

24 Q. How many of those involved cross-racial
25 identification?

1 A. I don't think that's been broken down. My sense is
2 probably - probably at least half, but that's a
3 guess.

4 Q. Okay, it's a guess. So let's bring it down into now
5 we're dealing with 15 percent.

6 A. Okay, sure.

7 Q. So, 15 percent were wrongful identifications.

8 A. Fair estimate.

9 Q. Or anywhere similar to the case we have here. Every
10 case is different.

11 A. Every case is different.

12 Q. And out of those percentages, how many persons - how
13 many of the crimes occurred in a place where a person
14 was otherwise safe, like in their own home?

15 A. That, I do not know.

16 Q. And in those cases, how many of those are
17 uncorroborated?

18 A. Quite a number of The Innocence Project cases involve
19 eyewitness testimony where that is pretty much the
20 only evidence.

21 Q. Just eyewitness testimony.

22 A. Correct.

23 Q. No confession, no circumstantial evidence. Just
24 eyewitness testimony.

25 A. Correct.

- 1 Q. Almost all of them, correct?
- 2 A. Yeah. I'd hesitate to offer a guess, but I would
- 3 certainly say the majority.
- 4 Q. So that's not really what we have here either.
- 5 A. I'm not aware of all the testimony here, so I
- 6 couldn't answer that.
- 7 Q. And out of those, that percentage that we're breaking
- 8 down to almost zero now, how many witnesses in those
- 9 testified that they pleaded by looking at the
- 10 defendant and tried to look into his soul and his
- 11 eyes to make a connection, to find some type of
- 12 humanity so that to save her life and save her
- 13 children's lives?
- 14 A. I'm not aware of any with exactly that circumstance.
- 15 Q. You mentioned earlier that - not to tell the jury
- 16 some numbers because they were meaningless?
- 17 A. Right.
- 18 Q. Now, isn't it true that many of the cases that
- 19 you've, indeed, testified in, the defendant was
- 20 actually found guilty by the jury?
- 21 A. Yes.
- 22 Q. So it's fair to say that you've been paid before to
- 23 testify on behalf of guilty defendants?
- 24 A. Of people who have been found guilty. I don't know
- 25 whether they're guilty or not.

1 Q. You said you have a very strong interest in this
2 subject?

3 A. Yes.

4 Q. And this subject is the way you make your living,
5 predominantly now, along with teaching, correct?

6 A. Yes.

7 Q. And much of your teaching is about this subject.

8 A. Yes.

9 Q. You're also an actor; aren't you?

10 A. Yes, I am. You read my data carefully.

11 Q. And you're very involved with the Charlotte acting
12 community?

13 A. Yes.

14 MR. SHELDON: Thank you.

15 THE COURT: Re-direct, Mr. Lee?

16 MR. LEE: Yes, real quick.

17 DR. LORI VANWALLENDael

18 RE-DIRECT EXAMINATION BY MR. LEE:

19 Q. I just want to see if we can clear up a little bit of
20 what he just said. Around 75 percent of the DNA
21 exonerations have involved eyewitness testimony
22 identification.

23 A. Yes.

24 Q. Cases where somebody sat on a stand just like you
25 under oath and said this: The defendant is the one

1 who committed the crime.

2 A. Yes.

3 Q. And we probably can assume that they were certain,
4 they were sure, they were without a doubt to testify
5 under oath in court that that happened, right?

6 A. Yes.

7 Q. Okay. So this isn't just some willy-nilly
8 everybody's got to be identified because, you know, I
9 mean, these are people who have had sworn testimony
10 pointing to them that played a part in their
11 conviction.

12 A. Yes, these are people who genuinely believed a
13 hundred percent in their own identifications.

14 Q. Okay. And unless - we have no new information, but
15 unless the witness was purposely lying for some
16 reason, those witnesses believed and testified that
17 that was the person that committed the crime.

18 A. Yes, absolutely.

19 Q. And can't we assume that the Prosecution isn't going
20 to put somebody up who's going to say, I don't think
21 that's him?

22 A. Yes.

23 Q. And 75 percent of them end up being wrong.

24 A. 75 percent of the cases where someone has been
25 exonerated -

1 Q. Right.

2 A. - have involved an incorrect eyewitness.

3 Q. Okay. All right. So regardless of why, the witness
4 or witnesses were wrong.

5 A. Yes.

6 Q. Okay. And what you're talking about is someone with
7 many reasons why they're wrong.

8 A. Correct.

9 Q. Or they've shown to be wrong in the past.

10 A. Yes.

11 Q. And again, you can't - you can't put an ad in the
12 paper for people to come participate in a survey if
13 we're going to stick a gun in your face. I mean, you
14 can't replicate that. I mean, -

15 A. No.

16 Q. Good point. You can't replicate that. The Innocence
17 Project is dealing with live - real cases with
18 lawyers and they go back and forth. And juries - and
19 juries not only heard what the witness said, he or
20 she is the one that did it. Juries believed it.

21 A. Yes.

22 Q. And they were incorrect in believing it?

23 A. Yes.

24 Q. That they found anyone guilty?

25 A. Yes.

1 Q. Now, the summary of the testimony that I emailed you,
2 those things that Mr. Sheldon was saying to, I guess,
3 foreshadowing his closing argument. Do those matter
4 in what you've testified to today? That,
5 essentially, believability does not equal accuracy?

6 A. No.

7 Q. Okay. I mean, I could have sent you the trial
8 transcript, but very little of it would have been
9 important of why you're here today, right?

10 A. Right. I always ask for just what's relevant to the
11 identification.

12 Q. And quite frankly, some of it may have tainted your
13 thoughts about it, or it was just totally
14 unnecessary?

15 A. Just really unnecessary. I mean, I see my job as,
16 you know, teaching the jury a little bit about what
17 we know about eyewitnesses. And it's their job to
18 put it all together with everything else that's gone
19 on in the court.

20 Q. And so, I didn't send you any summary of a testimony
21 of Eric Riley and the deal that he was getting from
22 the Prosecutor to come testify on his behalf. I
23 didn't put that in there either; did I?

24 A. No.

25 Q. No need to.

1 A. No need to. It's not relevant to the eyewitness's
2 situation at the time of the crime.

3 Q. And really, the prosecutor's theory or theme of the
4 case and his opinions really aren't relevant to your
5 work here; is it?

6 A. No.

7 MR. LEE: Okay. That's all I have, Your Honor.

8 THE COURT: You may step down.

9 MR. LEE: May this witness be excused, please.

10 THE COURT: No objection.

11 MR. SHELTON: No objection, Your Honor.

12 THE COURT: You may be excused.

13 THE WITNESS: Thank you.

14 MR. SHELTON: The State does have a brief reply
15 witness, Your Honor.

16 MR. LEE: And at this point, the defense rests.

17 THE COURT: Defense rests, all right. A brief reply.

18 MR. SHELTON: Senora Jones.

19 THE COURT: Please come around, Ms. Jones. I remind
20 you, you're still under oath.

21 SENORA JONES ON RECALL

22 RE-RE-DIRECT EXAMINATION BY MR. SHELTON:

23 Q. Good morning, Ms. Jones.

24 A. Good morning.

25 Q. I bet you thought you were done with testifying;

- 1 weren't you?
- 2 A. I thought I was done.
- 3 Q. Just a couple of questions. Are you [REDACTED] A.H. [REDACTED]'s
- 4 mother?
- 5 A. Yes.
- 6 Q. Are you familiar with how she does in school?
- 7 A. Yes.
- 8 Q. Are you familiar with what grade level she was on
- 9 when she was ten years old - what grade level she was
- 10 in, rather?
- 11 A. Yes. At N.C. Riley, they tested her for gifted
- 12 classes. She was in third grade, reading at an
- 13 eighth-grade level. They didn't promote her. So,
- 14 she was just placed into core gifted classes,
- 15 reading, science, math and language arts.
- 16 Q. Has she always been in gifted programs?
- 17 A. Ever since - in South Carolina, I think the earliest
- 18 is third grade. So, from the earliest that she
- 19 could, she has been, and she still is. And in fact,
- 20 she's in eighth grade, and she's been recommended,
- 21 based on her academic achievements, for the
- 22 International Baccalaureate Program, which is a
- 23 program when she graduates from twelfth grade, she'll
- 24 have about 34 core semester hours of college.
- 25 Q. You must be really proud of her.

1 A. I am.

2 MR. SHELTON: No more questions.

3 MR. LEE: No questions, Your Honor.

4 BY THE COURT:

5 THE COURT: Thank you, ma'am. You may step down.
6 Anything further?

7 MR. SHELTON: No. Thank you, Your Honor.

8 THE COURT: Are you ready to make closing arguments?

9 MR. SHELTON: Yes, Your Honor, I just need to bring
10 this out, so the jury can see it when the jury is ready.

11 THE COURT: Go ahead. I'm going to speak to the jury
12 just one minute.

13 Ladies and gentlemen, you have heard now - seen all
14 the evidence that's going to be presented to you. You
15 will be required to make your own decision based on what
16 is heard in the courtroom here. The attorneys are going
17 to make closing arguments, and I'm going to tell you about
18 the laws that apply to the case.

19 MR. SHELTON: Defense counsel? Your Honor, may it
20 please the court.

21 THE COURT: Yes, sir.

22 CLOSING ARGUMENT ON BEHALF OF

23 THE STATE, BY MR. SHELTON:

24 MR. SHELTON: Ladies and gentlemen of the jury, it's
25 been a long week. Thank you for your attention.

1 The first thing we're going to do is talk about the
2 law in the case, and Mr. Lee is going to have an
3 opportunity to address you, and then I'm going on to final
4 arguments. I'm not going to be arguing them to you now.
5 I'm going to explain what the law is.

6 The Judge is going to later explain what the law is.
7 Anything I say that is inconsistent with what the Judge
8 says, disregard it immediately. I'll try to make it very
9 consistent with what the Judge says, but the Judge is the
10 judge of the law, okay.

11 Armed robbery. Under South Carolina law, armed
12 robbery is defined by a person who commits robbery while
13 armed with a pistol or any object, which a person that is
14 present during the commission of the robbery, reasonably
15 believes to be a deadly weapon. That means they're guilty
16 of armed robbery.

17 I'm going to break it down for you. Commits robbery,
18 armed with a deadly weapon, is guilty.

19 Robbery, commits a robbery. What is a robbery?
20 Robbery is taking by force from someone else.

21 If you take by force from someone else while armed
22 with a deadly weapon, it's armed robbery.

23 Kidnaping. Under South Carolina law, kidnaping is
24 defined as, whoever shall unlawfully seize, confine,
25 inveigle, decoy, kidnap, abduct or carry away any other

1 person by means whatsoever, any means, without authority
2 of law, is guilty of kidnaping.

3 It doesn't have to be a horrible situation with a
4 little child walking down the street you would think of
5 with someone grabbing them and throwing them into a van.
6 You can find someone, keep him from moving, even if it's
7 in a place they otherwise have a right to be, that person,
8 like in their own home. If someone comes in and keeps
9 them in a hallway, in a bedroom floor, that could be
10 consider confining. Why is that? Because confine means
11 to limit, to restrict, to keep in, to shut in.

12 Burglary in the first degree. Another charge the
13 defendant is charged with. Is to find that someone who
14 enters a dwelling without consent with intent to commit a
15 crime within that dwelling while armed with a deadly
16 weapon, or uses or threatens the use of a dangerous
17 instrument, or displays what is or appears to be a pistol.

18 Why is that important? Because the State doesn't
19 necessarily have to prove that it was an actual gun. It
20 could be a toy gun, so long as the victims believe it was
21 a gun.

22 Possession of a weapon during the commission of a
23 violent crime. This law is defined as someone who is in
24 possession of a weapon, a pistol is a weapon, during the
25 commission of a violent crime is guilty of a possession of

1 a weapon during the commission of a violent crime.

2 Burglary first degree, kidnaping and armed robbery
3 are all violent crimes. So, if you find the defendant
4 guilty of any of those three crimes and had possession of
5 a gun, then he is guilty of possession of a weapon during
6 the commission of a violent crime.

7 I broke it down that way. Now some concepts. The
8 Judge is going to charge you on the concept called - or
9 it's not a concept. It's a law. It's called a hand of
10 one is the hand of all. It's also known as the act of one
11 is the act of all.

12 What that means is, when someone is engaged in a
13 criminal enterprise with someone else, and they commit an
14 act, if the other person doesn't commit that act, but
15 they're involved in a criminal enterprise together,
16 they're both guilty of that act.

17 A classic example of this is when you have a getaway
18 driver in a bank robbery. Someone drives up, somebody
19 else goes in, robs a bank and comes out. The person who's
20 driving the car is just as guilty of the bank robbery as
21 the person who went in and robbed the bank.

22 The Judge is going to charge you on direct and
23 circumstantial evidence. Basically, he will charge you on
24 that and listen, but what to take home is that the law
25 gives no different weight to each one. It treats both of

1 them the same.

2 Direct evidence is someone actually telling you
3 something or someone seeing something.

4 Circumstantial evidence is you see me after work at a
5 grocery store with my jacket off and my tie loosened, my
6 top button unbuttoned, and thought that, well, he must
7 have just come home from work. He's coming home from
8 work, making some type of assumption from another fact.
9 Okay?

10 Now, proof beyond a reasonable doubt. A reasonable
11 doubt is the kind of doubt that would cause a reasonable
12 person to hesitate to act. It does not mean hesitate to
13 think, and I'll talk about that later.

14 And what does firmly convince mean? Well, why is it
15 important here? Because proof beyond a reasonable doubt
16 is proof that leaves you firmly convinced that the
17 defendant is guilty.

18 Reasonable doubt does not require proof beyond every
19 possible doubt. There are very few things in this world
20 that we know with absolute certainty. And the law does
21 not require proof that overcomes every possible doubt.

22 Reasonable doubt means a real possibility that the
23 defendant is innocent, not guilty, not any possibility.
24 Again, proof beyond a reasonable doubt is proof that
25 leaves you firmly convinced that the defendant is guilty.

1 Thank you very much. I'll talk to you in just a little
2 bit. Mr. Lee.

3 CLOSING ARGUMENT ON BEHALF OF

4 DEFENSE BY MR. LEE:

5 MR. LEE: I sincerely apologize to everybody. Today
6 is a really important day. It's important for Marion
7 Powell; for his mom, Brenda; and his dad, James; and his
8 sister, Jessica, who is in the Navy, who've been sitting
9 here all week. It's obviously very important for Mr.
10 Powell.

11 It's also very important for the Jones family.
12 They've been through a lot before this date and this week.
13 It's an important day for you all, because you have an
14 opportunity to make a difference and to do the right
15 thing. And I wouldn't call that jury duty. I think it
16 should be called jury opportunity, but there's no question
17 it's a big day.

18 When I was leaving my office this morning, for
19 whatever reason, when I walked out, I noticed that my
20 certificate from the South Carolina Bar was issued
21 November 22, 1993. And I realized I've been practicing,
22 as of today, I've been practicing law for 20 years. I
23 wish it got easier. I wish I didn't still get nervous. I
24 wish stuff like that didn't happen. And I wish that we
25 knew each other, and I could talk to you like we were golf

1 buddies, go to church together, whatever. But this is a
2 big day, and if I've said anything or done anything
3 throughout this trial, obviously, I'm fighting a terrible
4 cold. I think everyone in my family has been all week.
5 And if I did anything during the trial to turn you off or
6 anything like that, please don't hold it against Mr.
7 Powell. That's me, and I'll certainly apologize.

8 Now, today is also a big day, because 50 years ago,
9 in Dallas, Texas, President John F. Kennedy was
10 assassinated. I don't know if anyone was old enough to be
11 alive then, but John F. Kennedy was one of the most iconic
12 and most famous American presidents that there ever was.
13 And he - he spoke words that were true back then that
14 still hold true today. He's done a lot of quotes, and
15 he's very, very - had a lot of foresight in the 60's when
16 he was alive.

17 The one quote that isn't so well known, but is
18 perfectly appropriate for this trial, in my opinion, was
19 given at a commencement address he gave at Yale University
20 in 1962. He was talking to the students and he said:

21 *The great enemy of the truth is very*
22 *often not the lie, deliberate, contrived,*
23 *and dishonest. But the myth, persistent,*
24 *persuasive, unrealistic.*

25 *The great enemy of truth is not the*

1 lie, but the myth.

2 Let's talk about that. There's two things in this
3 case I think you need to address.

4 One is, obviously, the two photo lineups that A.H.
5 and Ms. Jones did. The other is everything else. And I
6 think when you look at it - now, I can anticipate what Mr.
7 Sheldon's questioning of our witness that he's going to
8 say, all right, well, here's the identification and here's
9 our corroboration. And that corroboration is going to make
10 the accuracy of the identification where we need to get
11 it.

12 There's a few problems with that. Let's start with
13 the corroboration, as I assume what their position is
14 going to be.

15 Corroboration, well, let's start with the ease of a
16 lie, talk about lie versus lie. Eric Riley is a liar,
17 he's a convicted liar, he's a proven liar, and you should
18 not place any weight on what he said. I don't think I
19 need to go through the details. That guy was in there for
20 his own good. He was given the ultimate gift to come
21 testify, and he did. He did exactly what he needed to do.
22 And I will submit to you that his words are: if you
23 believe him, you'd believe anything.

24 He had every motivation not only to testify against
25 Mr. Powell, because that's what the deal is all about, but

1 also testify about Kenya. Remember her, the girl that
2 shot him. Shot him. We'll get back to her in a minute.

3 Everything Mr. Riley said, is it legal? No. We'll
4 talk about it in just a second. Let's talk about what the
5 State has done in an attempt to corroborate this
6 eyewitness identification. And I will submit to you that
7 the reason that they're trying to corroborate the
8 eyewitness identification is because they know darn well
9 there's problems with it.

10 Mr. Sheldon has been practicing law a long time.
11 He's a smart guy and a smart lawyer. The interaction
12 between photo I.D. and criminal law is well known to all
13 of us. He knew we were bringing an expert witness in this
14 field. So what does he have to do? There's some
15 problems; I think there might be some problems with the
16 I.D.; I need to give them something else, something good,
17 something to hang on to. Something corroborated. So this
18 is how they corroborate.

19 Again, this is the State's case. They're calling
20 these witnesses. We've got to get from - they've got to
21 get from [REDACTED] to Marion Powell. So how do
22 they do that?

23 Well, Senora Jones and [REDACTED] A.H. and the three other
24 kids were in the house at Oaksdale Drive when this
25 happened. No question about that. Nobody disputes that.

1 And Senora Jones is married to Cleven Jones, okay. We
2 didn't disagree with that. We didn't argue about that.
3 There's no question about that. This is where their trail
4 kind of gets cold for three years, because this is a
5 three-year-old case. Whatever happened, the State
6 investigated and used all their resources and everything
7 else, and they figured out, for what it's worth, that
8 Cleven Jones was having an affair with Paulette Moultrie.

9 And the State calls Cleven Jones, and on the stand in
10 front of his wife asked him all those questions. It was
11 awkward, it was embarrassing, and it was over the top.

12 What else did they do to Cleven Jones? Well, they
13 brought out weren't you convicted of drug distribution and
14 trafficking in the late 90's? Yeah. What does that have
15 to do with anything?

16 I mean, typically, when you bring up a prior
17 conviction, you're trying to impeach a witness, saying,
18 hey, they have a prior record, so I'm going to impeach
19 him. They did that.

20 And then, they come in later on to Detective Rice and
21 say, we had the house under surveillance; and we saw
22 Cleven Jones in March of 2010 driving his Audi over in the
23 Grays Hill area right there; and we followed him all the
24 way to Bluffton. But all these people we're talking about
25 life in Big Estate.

1 That's interesting. That's racy, sexy, whatever you
2 want to call it. But it's got nothing to do with this
3 case and nothing to do with the ultimate issue. He's
4 having an affair with Paulette Moultrie. We'll call her.

5 So this lady comes down from Charlotte. Weren't you
6 having an affair with Cleven Moultrie? Yeah, yeah, yeah -
7 I mean, Cleven Jones. Yeah, yeah, yeah, yeah, yeah. What
8 does Paulette Moultrie add to this case? Nothing. I
9 mean, real - I guess it's interesting and it's racy and
10 slight realty T.V., but I don't know.

11 Then, though Paulette Moultrie - and he said in his
12 opening, she had a relationship, maybe more, with Kenya
13 Hagood. Of course, Paulette denied the State's theory
14 about a lesbian relationship. But nevertheless, where are
15 we going with this? It's so - so tenuous. And then, they
16 say, well, Kenya knew Byron Young, and then Byron Young
17 knows Marion Powell. So that's corroborating evidence of
18 this lineup. And the way that they did it should suggest
19 to you how desperate they are to try to get something
20 else, some other evidence, because there's a big problem
21 with the I.D., which we'll talk about in a minute.
22 There's a big problem. Why do this?

23 Oh, and then he also brought in, who was it, Thomas
24 General, all the way from prison to come in and say, yeah,
25 everybody knew that Paulette and Kenya, I think they might

1 have had something going on. He said:

2 *Why don't you tell us about Byron and*
3 *Marion. Let's tighten that thing up a*
4 *little bit.*

5 *Well, in 2010, I don't even think they*
6 *were hanging out together.*

7 That's their witness who was brought all the way from
8 prison to come testify to that. It's real interesting,
9 this story. And it's interesting to notice what you have
10 to do.

11 I put six degrees of separation. It's six steps to
12 do that. Why is that interesting? Some people nowadays,
13 when it was called six degrees of Kevin Bacon, and
14 supposedly, the theory is you can thank him - one person
15 being in a movie, and then another person goes six
16 degrees. The basis of that is something - a theory called
17 six degrees of separation, which says, any thing or any
18 person in six person-to-person introductions can be
19 connected to any other person in the world. In the world.
20 I guess I could be connected to Vladimir Putin or you all
21 could be connected to, I don't know, Tiger Woods, whoever.
22 You can do it anywhere in the world, which is six steps of
23 separation. They've got to go from there to there. 35
24 miles, I think Rice said, and it took them six steps to do
25 it. And that is how they want to corroborate the

1 reliability, the accuracy, of this photo lineup.

2 Let's talk about the other issues. What else did
3 they use to bolster, to corroborate, the I.D. that they're
4 worried about?

5 Well, they said, oh yeah, you know, Byron - Marion
6 and Byron's phone calls. They requested and listened to
7 all their phone calls for over a year period. I think
8 there were 60 of them in what, one week or so? I don't
9 think it's that unusual, but there's 60 of them. So what
10 do we have? We've got two. And they're saying, look,
11 read this, and that is corroborating evidence that this
12 lineup wasn't suggestive; that it was an accurate
13 identification. Read this jail conversation or these
14 phone conversation these people had. And I highlighted
15 the part. Read into this, you know, get the officer to
16 say what the code words are. Marion Powell, no, I'm
17 saying that, basically, somebody's been running their
18 mouth about some shit on the outside looking in.

19 That means - and what he was trying to tell us,
20 that's their confession, I guess. Or that's how he's
21 supposed to have the information. This is March 9, 2013,
22 he talks about I just had a visit - he just had a visit
23 with his lawyer and what his lawyer told him.

24 So, if you want to believe their story, they're
25 relying on this. It talks about on the outside looking

1 in. It doesn't say anything about somebody on the inside,
2 who is Eric Riley, who their theory is this is the snitch
3 that Marion bonded with and just really got to know,
4 because he had this tight, tight thing with Kenya, which
5 isn't supported by anything. That's a confession? Or
6 maybe this is the confession that bolsters everything.

7 April 25, 2013, Byron Young:

8 I've got a girlfriend. You know I got
9 a girlfriend. She stay in Mill Creek.

10 I don't know where the hell that is.

11 I know.

12 And then, there's laughing.

13 So this is a guy that's been in jail for over two
14 years, who's talking to his buddy, who, fortunately,
15 accepted his phone call. He's been in jail, he had a
16 meeting with his lawyer, he has all his stuff in the jail.
17 He has, no doubt, talked to his friend about his case, and
18 that's why he's in jail. And just because of an
19 inappropriate perhaps. Huh? That's a confession? And
20 that's the proof beyond a reasonable doubt that they want
21 you to rely on to convict Byron - I mean, Marion Powell?
22 No way.

23 I think they're also going to probably say, well,
24 Marion Powell fled. There was evidence of flight. You
25 know, this happened in October, and he wasn't arrested

1 until March, so that's five months. I guess they'll make
2 the argument, because they brought in that testimony.

3 Well, what else did you hear when you got out there?

4 Marion Powell called the police and said, hey, I hear they
5 got warrants for me; I'm in Knight's Inn in Huntersville;
6 come pick me up. The guy drove up and said he was like
7 this, no trouble, cooperated fully. I mean, is he trying
8 to run? And is that evidence of guilt, which then
9 bolsters that bad photo ID? No, it doesn't.

10 The other thing I think - again, I've got to go
11 first, so I'm trying to answer some of those things. The
12 other thing that they are leaving in here without saying
13 it - I don't know whether they want to say or just want
14 you to assume - is this big drug angle. Why are they
15 calling all these witnesses to establish this? And
16 everyone was, oh, you've been a convicted drug dealer.
17 You had a conviction in '97 for drugs.

18 The only connection, I guess - and again, they're
19 trying to prove, without saying or proof, without proving
20 it is the people that went in, I guess, said give me the
21 money and the dope. I think there was a quote about that.
22 And if I'm not mistaken from the inference, I think
23 they're probably going to say, look our victims, the
24 Joneses, \$51,000.00 worth of stuff was stolen, and she's a
25 nurse, and we're not quite sure where he works. This

1 isn't the State who's going to be arguing this. One of
2 the victims. Must have been dealing drugs, because there
3 was so much stuff. There were \$600.00 tennis shoes, Prada
4 handbags. I'm not saying that. I'm saying that's what
5 you got to believe, because the State's telling you that.
6 And why would they tell you that? I'm not sure why they
7 bring people in here, try their case, and then, beat them
8 up like that, their own witnesses. But there's nothing to
9 that. There's no evidence to suggest any of that.

10 Then, as we go through the trial, all of a sudden,
11 three years later, on the stand, Senora Jones looks at a
12 lineup and says that's - I recognize that guy. In court
13 three years later, after she's been working on the case,
14 she's been watching the case every day, she's been hearing
15 all this information, she does it. Is she trying - is she
16 lying? She's not lying. She's mistaken. She's trying to
17 help. I don't blame her one bit, at all.

18 So what these things that we're talking about are
19 that they're going to attempt to show are called red
20 herrings. The red herrings are things that divert your
21 attention away from the real issue. The real issue here
22 is the lineup, no question about it.

23 Certainly, this speculation and this innuendo and
24 everything else that they've produced would never, in and
25 of itself, be enough to convict anybody of anything. And

1 the underlying problem with all of the speculation, all
2 the corroboration that they're attempting to use is that
3 it hinges on - every bit of it hinges on two things.

4 One is, okay, we proved all this to you and we were
5 so sure that this is so important to a jury for proof, you
6 know, what we're going to do. We're going to get this guy
7 named Eric Riley to come in to tie it all together and
8 take us back up here. That's exactly - if you think about
9 it, that's what he did when he was first approached
10 November 12th, some six days before the trial started, and
11 given the deal of the century, with the hopes that Mr.
12 Sheldon is going to beg for him in front of the judge.
13 There's going to be a hearing with just Mr. Sheldon and
14 just the judge and just Eric Riley. Who's going to fight
15 the Solicitor? There's not going to be anybody on the
16 other side. So this depends on Eric Riley telling the
17 truth, which we know is not true.

18 The other thing that all this corroboration
19 supposedly fails to talk about and fails to consider is
20 everything they talk about involves Byron Young from Kenya
21 Hagood, who supposedly - Kenya Hagood supposedly set the
22 whole thing up. And they have such a good witness who's
23 testified to that under oath and has gotten this fantastic
24 deal. And Byron Young, all the evidence against Byron
25 Young, I mean, he contested through the Mill Creek thing

1 and all that. Neither one of them have been charged, much
2 less arrested. And it's three years old. And it's
3 disingenuous to come in here and try to backdoor
4 indirectly, whatever you want to call it, the charge
5 against Marion Powell on the backs of Byron Young and
6 Kenya Hagood when you haven't even charged them, for three
7 years. That is ridiculous. And it's intellectually
8 dishonest to say, well, we're going to help prove the case
9 against him by all this good information. We have Byron
10 Young and Kenya Hagood, but we're not even going to charge
11 them. We don't even have probable cause to arrest them,
12 but we want you to use - we want you, jury, to find proof
13 beyond a reasonable doubt and find that we provided proof
14 beyond a reasonable doubt. That's where your inkling
15 always needs to come to. Eric Riley and why weren't these
16 other people, five of these other people been arrested,
17 three years later? They've got it all figured out. This
18 corroborates exactly what the witnesses said, Marion
19 Powell being involved. Fine, but it is - you have to keep
20 that in mind.

21 So, let's talk about what this case is really about.
22 This case is really about a photo array, a bunch of them
23 that were shown to Senora Jones and her daughter. And if
24 you noticed, I didn't go after them. Why should I? But
25 as weird as it sounds, the only person who truly lied in

1 this whole trial on the stand was Eric Riley.

2 Did Senora Jones lie? No. Did [REDACTED] A.H. ? Absolutely
3 not, not for a second. Do they honestly believe that they
4 picked out the right person? Yes, they did. And they
5 cannot be blamed for that. They want to see the person
6 punished and -- they want to see the right person punished.
7 They did the best that they could under the circumstances
8 they faced that day. And if I did anything at all towards
9 them, please don't hold it against my client. I agree
10 with what they say as far as what happened. And they're
11 going to say, I'm positive, I'm absolutely sure.

12 And you heard from Dr. Van Wallendael why that
13 happens, in the situations in which that happens. And I
14 don't know all the details for the 300-something Innocence
15 Project cases that have been DNA exonerations. I'm sure
16 that you can't fit them into one tidy, little label. But
17 what they do all involve is 75 percent of them that
18 involve witness identification is somebody, young, old,
19 black, white, man, woman - I don't know - but somebody
20 getting on the stand, under oath, and saying the defendant
21 is the guy who did it, and I'm sure of it, I'm certain of
22 it, I'm absolutely - whatever the case may be. We know
23 that.

24 Why is this case any different? What makes it even
25 worse, I think, for these victims, I mean, there's no

1 question they were robbed or anything else. The question
2 is who? And you spend all the time with PowerPoint and
3 everything else, but I really, really am sympathetic
4 towards them. You should be, too. I asked you in the
5 opening, please don't get blinded by it, but we're all
6 sympathetic. Everybody in this courtroom is sympathetic.
7 I'm sorry that that happened, I absolutely am.

8 So they got to go through that. Then, they've got to
9 come to court. And yeah, we talked a little bit about
10 changing the identification a little bit. But then they
11 have to come to court. And the lawyer representing them,
12 like we said, starts wanting to talk about affairs and
13 that their house is under surveillance and that they
14 followed Mr. Jones over to Grays Hill and suggest that,
15 you know, why put in - why put in all the evidence about
16 the \$51,000.00 worth of stuff that stolen out of their
17 house?

18 The State is trying to piece a puzzle together in
19 order to prove something else that they have a problem
20 with. And I truly am sorry for what they've had to go
21 through, no doubt. I mean, we're not saying that they are
22 intentionally doing something - I shouldn't say that.

23 **A.H.** and Senora, do they believe they're right? Yeah.
24 And they always will, and that's fine. And they believe
25 that they're right. They are believable. They are

1 confident. But what does that mean? And you heard Dr.
2 Van Wallendael talk about exactly what that meant in a
3 scientific way, based on the studies that they've done.

4 So, what do we do? As a jury, you're in a position -
5 I've got two people, sweet people, nothing - nothing
6 against Marion Powell personally. Good people who,
7 unfortunately, had a lot of their personal life exposed,
8 but it wasn't by the defense. And they're sitting on that
9 stand and they're saying, I'm sure, I'm certain, I'm
10 really positive about that.

11 As a jury, what effect would your verdict have on
12 that? Well, none, because they're always going to believe
13 that Marion Powell was one of the guys in the house no
14 matter what happens.

15 If you find Marion Powell not guilty, they're still
16 going to believe it.

17 If you find him guilty, they don't know that it was
18 based solely upon their identification. They will never
19 know that. So it's not like you're sending a message
20 saying, hey, good job you all were accurate and you did it
21 right.

22 So, if you worry about what they may think, that's
23 improper consideration for you. And what you can do,
24 though, is exactly what you're here to do, to keep in mind
25 the burden of proof. To keep in mind your role as a juror

1 to apply the facts you heard to the evidence. So,
2 remember that proof beyond a reasonable doubt, or
3 reasonable doubt, is the type of doubt that can cause a
4 person to hesitate to act. And sometimes it's tough, if
5 you have some hesitations to say, well, that means the
6 only verdict is - the proper verdict is not guilty.

7 Sometimes that's tough. Because we'll have two
8 victims - if it wasn't proven by two victims that go home,
9 they get the satisfaction, I guess, of seeing somebody
10 convicted.

11 But hey, if the State's case is that strong, let's
12 get Kenya Hagood up here, let's get Byron Young and try
13 them.

14 So the great enemy of the truth is often not the lie,
15 which is deliberate, contrived and dishonest. And
16 clearly, everything Eric Riley says, which is crucial to
17 the State's case is deliberate, contrived and dishonest.

18 I can't really put a label on why no one else has
19 been charged, other than the issue should cause you
20 extreme skepticism and extreme hesitation to then
21 bootstrap Byron Young and Kenya Hagood to get Marion
22 Powell.

23 If it's such a good case, if they're so sure, if
24 they're willing to make all these deals, bring them in
25 here. They subpoenaed everybody else. They got people

1 from all over the corners of the state to come in here.

2 So the great enemy is not the lie but the myth,
3 persistent, persuasive and unrealistic. You've heard
4 about the myths of eyewitness identification, that
5 believability is not equal accuracy. And as she explained
6 it, she testified to the things that were in this case.

7 So we respectfully ask you to return a verdict of not
8 guilty. A myth of believability equaling accuracy.
9 Hopefully, you learned about that today from the good
10 Doctor. And when you look at that, we believe that the
11 State's case absolutely lacks proof beyond a reasonable
12 doubt.

13 The appropriate verdict is not guilty, and we
14 anticipate your verdict. Thank you.

15 THE COURT: Thank you. Mr. Sheldon.

16 REBUTTAL CLOSING ARGUMENT ON BEHALF

17 OF THE STATE BY MR. SHELDON:

18 MR. SHELDON: Thank you. Mr. Lee said something that
19 sounded - I couldn't agree with any more. No matter what
20 you do today, after you find him guilty - now, I'll argue
21 while you should in just a moment - it's not going to
22 change these people's lives. Their lives are already
23 changed forever.

24 In his opening statement, Mr. Lee talked about a
25 Sherlock Holmes story with a castle. In this country, in

1 this state, in this county, in Bluffton, South Carolina, a
2 person's home is their castle. Because of what the
3 defendant did on October 25, 2010, the two people that
4 went into their house with him, Ms. Jones can't build a
5 fence tall enough around her home. She cannot put enough
6 locks on her doors to feel safe inside that home again.
7 There aren't enough locks in this world. There's not a
8 warm parent's bed snug enough, safe enough to take away
9 the fear of those four children. It doesn't exist. And
10 they will live with that for the rest of their lives.

11 He quoted John F. Kennedy, God rest his soul. I'm
12 going to quote Martin Luther King, Jr., God rest his soul:

13 *The arc of the universe is long, but*
14 *it bends towards justice.*

15 We truly learned this information from Mr. Riley just
16 last week. Admittedly so, sometimes our office doesn't
17 have the best communication with each other; that's our
18 fault. And in due time, if I have anything to do with it,
19 the other two will be on trial, as well. That's neither
20 here nor there. What's here -

21 MR. LEE: I object to him giving testimony as what
22 he's planning on doing. I think it's not appropriate. I
23 apologize for the interruption.

24 THE COURT: Testimony of what?

25 MR. LEE: He's testifying that he intends to possibly

1 later prosecute people that he hasn't prosecuted. I think
2 that's the testimony by him that is inappropriate.

3 THE COURT: Overruled. Go ahead.

4 MR. SHELDON: Thank you. Because what's here is
5 Marion Powell, so let's focus on that.

6 In his opening statement and just now, Mr. Lee admits
7 that he is not questioning anything that happened to those
8 people that day, these four victims. So everything that
9 was done by whoever went into their home, whatever that
10 is, if it equals the crime as it's charged, they're guilty
11 of it. So let's look at that.

12 First of all, armed robbery. Someone who commits a
13 robbery. Powell served as a lookout while others tore the
14 house apart and stole items. He ordered Senora Jones to
15 give her cash. Remember the hand of one is the hand of
16 all. Even if he doesn't take the cash, he's still guilty
17 of the robbery.

18 Armed with a deadly weapon, which is a pistol.
19 Powell had a pistol. All the co-defendants had pistols.
20 Hand of one, the hand of all.

21 Kidnaping. Whoever shall unlawfully seize, confine,
22 inveigle, decoy, kidnap, is guilty of kidnaping. And this
23 is the law. These aren't my words. This is the law.

24 Confine means to limit, restrict, keep in, shut in,
25 enclose within bounds. Senora Jones said the defendants

1 yelled at her:

2 Get on the ground; don't move.

3 Again, this isn't even questioned this happened.

4 A.H.:

5 They held us at gunpoint.

6 Against the law.

7 Forced us up the stairs.

8 That's kidnaping for each and every one inside that
9 house. Senora Jones, the mother; A.H., the ten-
10 year-old; C.J., a 4-year-old-male;
11 M.V., 7-year-old female; and A.V., a
12 4-year-old female. Five counts of kidnaping.

13 Burglary in the First Degree. Anyone who enters a
14 dwelling, a home, this is obviously a home, without
15 consent. They went through the back door and forced the
16 children inside with guns. With intent to commit a crime
17 therein. You can consider the crimes they intended to
18 commit larceny, robbery or kidnaping, while armed with a
19 deadly weapon. All three assailants had guns.

20 The possession of a weapon during the commission of a
21 violent crime. Possession of a weapon, a pistol, or what
22 appears to be a pistol. All three assailants had guns.
23 Again, during the commission of a violent crime.

24 Burglary in the First Degree, kidnaping, armed
25 robbery and all violent crimes. So, on their face, called

1 undisputed facts of the case. They're guilty of
2 everything. He's guilty of everything he's charged with.
3 The only question is technique says hand of one is hand of
4 all. Was it Marion Powell? So, let's talk about that.

5 We have direct and circumstantial evidence. Direct
6 evidence is the testimony of a person who claims to have
7 actual knowledge of a fact, such as an eyewitness. It is
8 evidence, which immediately establishes a fact.

9 [REDACTED] A.H., remember she testified how he walked up
10 and down the stairs three times. He handed her cousin a
11 Kleenex. You saw the picture of where they were sitting
12 up against that wall. They were right here sitting next
13 to each other, all huddled together. Look how close he
14 was to her, handing a Kleenex to her cousin.

15 *They told us to stop crying.*

16 And then, she remembers him yelling for her mom to
17 get on the ground. And think about this, they left with
18 luggage and handbags and purses, that's what [REDACTED] A.H. said.
19 Marion Powell and the two guys with them left with
20 handbags and purses. Think about that.

21 She understood the instructions when they were read
22 to her. She's a smart child. Admitted that, if she
23 wasn't sure, she could get someone in trouble for no
24 reason; and that she shouldn't lie in court, because it
25 could get someone in trouble who didn't deserve it. I may

1 be paraphrasing her words, but you can recall what she
2 said. And then, she identified the defendant again, and
3 again and again. She's absolutely sure. She has no
4 doubt. And I do think you should take into consideration
5 that she failed to identify anyone in seven other lineups.

6 There was so much pressure on her and she was under
7 so much influence. Wouldn't you feel pressured to
8 identify someone? But she declined to. She didn't,
9 because she didn't see anyone in those lineups. She
10 understood what she was supposed to do. She understood
11 what those warnings meant.

12 Now, Senora Jones. He was the second one in the
13 room:

14 *Ordered me to get off the phone. Put*
15 *down the phone.*

16 So she saw him then.

17 Three years later, without reading her statement -
18 she never read her statement in the three years - she
19 testified to that. Remember she complained when she was
20 on the stand, because we didn't give her the statement
21 that morning. She remembered all these details. She
22 remembered black shirt and faded, black jeans. What did
23 the officer read back in the report:

24 *Black shirt, faded black jeans.*

25 What the defendant had on.

1 The arrest report, one of them showed 6-1, 180
2 pounds. The booking report shows 5 feet-11 inches, 155
3 pounds. Jimmy Duke's report, the lead investigator, said
4 that Senora Jones told him that the defendant looked
5 around 6-1 inches, 180 pounds. You can get into details
6 of that. Even an officer testified under cross-
7 examination from Scott Lee that there's oftentimes
8 variances, even booking reports. That's pretty darn close
9 for someone who is observing someone.

10 Like I said, they didn't have time, they weren't able
11 to wait, and they weren't able to put them up against the
12 wall, measure his height.

13 And then, remember her testimony when she was
14 pleading with him. Think about that. She was looking
15 into his eyes, looking into his soul, trying to find
16 humanity in him. She was trying to reason with him. She
17 wasn't looking at his gun. She was studying him. She was
18 trying to make a human connection with him in her own
19 bedroom on the floor, and ordered to give them the money
20 or they were going to kill her. She was in survival mode,
21 protecting herself and her children.

22 She immediately picked him out of the lineup. There
23 was no hesitation. That's him, that's him. And she
24 declined to pick out Byron Lil Lil Young out of the lineup
25 out of extreme caution, because of the warnings, even

1 though she thought it was him. Remember, she paused in
2 lineup number three. And then, in front of you, three
3 years later, never seen that lineup again, selected him.

4 Now, defense is acting as if the State is coming up
5 with all this on its own. Unfortunately, the truth is
6 stranger than fiction. Lord only knows that we wish these
7 facts weren't true. Subject Number 3 is a light, medium
8 tone. There is no cross-racial identification in this
9 case. Remember when the expert just testified about
10 cross-racial identification, the problems with that.

11 Think about how she defined the three different
12 assailants, the attention to detail she paid to those
13 individuals. And that person had ear-length dreads and
14 his face was not covered. Crazy like he's on drugs. That
15 person was still not identified.

16 Subject one had his face covered, dreads pulled back,
17 and only his eyes showing. And that person just happens
18 to be in Exhibit Number 49, Byron Young. And she said:

19 *Based on his eyes, that's him.*

20 She didn't think it was fair, considering the
21 warnings at the time, to base her identification on his
22 eyes alone, and that's understandable and commendable by
23 her. And remember, she had not seen that lineup since
24 October 26, 2010. And then, three years later, she comes
25 back and she still remembers the face, the eyes. And it

1 just so happens to be Byron Lil Lil Young.

2 More direct evidence. Marion Powell says to Eric
3 Riley, Kenya sent him to rob a dude. Only a dude was
4 supposed to be home. Only children and girlfriend were
5 supposed to be there - were there - ended up being there,
6 rather.

7 He was mad at Kenya because she gave him bad
8 information as to when to hit the house. And he committed
9 the crime with Lil Lil. Lil Lil is Byron Young.

10 Is it a coincidence? No, it's not coincidence that
11 Senora Jones picked Byron Young out of that lineup the
12 other day.

13 Circumstantial evidence. Circumstantial evidence is
14 proved by the chain of facts and circumstances indicating
15 the existence of a fact. Circumstantial evidence is based
16 on inference, and not on personal knowledge or
17 observation. There is no distinction under the law
18 between direct and circumstantial evidence.

19 So, go to circumstantial evidence. And it's ugly. I
20 told you at the beginning of this case that it's ugly.
21 And the State wishes we didn't have to talk about these
22 things. But again, we don't make up the facts. We
23 present the facts as they are. And you, as the jury, has
24 a right to know what all the facts are in a case, to the
25 best that we're able to find them.

1 She's from Grays Hill, Paulette Moultrie, the Cleven
2 Jones was having an affair with. Everybody out there in
3 Big Estate and Grays Hill, all of them know each other.
4 She knows Byron Lil Young. She's very good friends with
5 Kenya Hagood, and they've been friends for years. Another
6 startling coincidence, that he's having an affair with
7 someone who's really good friends with Kenya Hagood, and
8 maybe more. Well, now you'll never know that.

9 And then we have Keith Chisholm, who Cleven Jones
10 worked with for years. He was scared to death to be on
11 the stand, for whatever reason. Think about that. He
12 would see Paulette out, he was good friends with her, tell
13 Cleven about it, and then he'd get a call from Kenya. Why
14 is he getting a call from Kenya when he tells Cleven that
15 he sees Paulette out? Some connection there.

16 Spent time with the Joneses, so he's close enough
17 with the Joneses to go to concerts together. He has known
18 Kenya and Paulette since the '90's. He was having a
19 sexual relationship with Kenya, and he is also a convicted
20 drug dealer.

21 Again, we don't make up these facts; they're facts.
22 So how did the defendant get to Mill Creek? That's a
23 question they're acting like it's so far away. That's
24 it's another universe. However, in fact, it's not.
25 Investigator Andrew Rice of the Beaufort County Sheriff's

1 Office and said that Mr. Jones' Audi SUV was observed in
2 Grays Hill. Remember, Paulette is from Grays Hill, and
3 she says everybody knows each other out there. Do you
4 think that's not going to catch the attention of folks out
5 in Grays Hill, someone driving - I don't know - a \$60,000,
6 \$70,000.00 Audi SUV?

7 The Jones' house was under the Drug Task Force
8 surveillance in September 2010, just a month before this
9 armed robbery, and he has all these connections with
10 Northern Beaufort County. I'm not asking you to hold your
11 judgment on this or direct your verdict on this, but it's
12 just evidence to consider.

13 Kenya Hagood. Senora Jones' angry phone call from
14 Paulette Moultrie:

15 *Your husband isn't the man you think*
16 *he is.*

17 Kenya has a close relationship with Paulette. And
18 then, Riley says that he has no special bond with the
19 defendant. Despite what the defense attorney would like
20 you to say, it suggests Kenya.

21 And regarding the home invasion, what did the
22 defendant tell Riley?

23 *Just the dude was supposed to be there.*

24 *Not the kids, not the girlfriend.*

25 And then the jail calls. Over 190 attempts to call

1 Byron Lil Lil Young from Marion Powell in jail. It just
2 so happens to be that's the guy that Senora Jones just
3 picked out of the lineup. It just so happens to be the
4 guy that Marion Powell confessed to Eric Riley to being
5 the guy that went into the house with him. Is that just
6 another coincidence? No. It's beginning to pile up here.

7 As you listened to the jail calls, consider - again,
8 this is just something in addition to everything else,
9 this isn't one thing for you to hold a jury verdict on.
10 Think of all the evidence together.

11 Consider this when you're listening to them. Riley
12 says that things took a turn between him and Powell.
13 Moved dorms the end of April and that started a few weeks
14 before then. And then, Powell was talking to him before
15 then about N word, playing dangerous games, AKA, otherwise
16 known as, snitching.

17 In the context of Eric Riley, in the context of what
18 we know about Kenya Hagood, just think about that. I'm
19 not saying this is a confession. Why did he have to send
20 him something in the mail? Why can't he just tell him
21 over the phone? If there's nothing to it, why doesn't he
22 just tell him? If it's some hair-brained idea that Kenya
23 Hagood is involved, why doesn't he just tell him? Instead
24 he says:

25 *Shorty, old girl.*

1 Man, I'm lost, brother. You're usually
2 faster. But anyway, your brain usually
3 faster. Come on, man. You know what I'm
4 talking about. Listen to me. I guess I'll
5 just have to write you a letter.

6 Again, Riley:

7 Kenya set up the armed robbery.

8 The defendant told him:

9 Person playing dangerous games.

10 Defendant believed he had snitched about - on him
11 about Kenya.

12 You know, that's a real funny inside joke. It's
13 hilarious.

14 Now, the defendant's expert witness never interviewed
15 A.H. ; never interviewed Senora. There was no cross-
16 racial identification in this case. You can look at the
17 lineup yourself and look at it and study it. There's
18 multiple people in that lineup that look a little
19 different from everyone else. Look at it and do a test
20 and see how many people in that lineup that you would
21 determine have large, flared nostrils besides the
22 defendant. There's at least four of them, not just the
23 defendant. Is his head tilted back a little bit? Sure.
24 Is someone else's tilted back a little bit? Yes. One is
25 kind of cocked to the right, another one is kind of cocked

1 to the left. And there is one guy with his lips pursed,
2 looking away from the camera. Everyone looks a little bit
3 different in that lineup.

4 There's existence of lots of corroborating evidence
5 in this case, despite what the defendants want you to
6 believe. And she cannot say whether their I.D. is
7 incorrect, she can't. And it's interesting she didn't
8 know anything about the corroborating evidence when she
9 testified first, after I brought it up to her.

10 Use your common sense. There's a reason the laws of
11 this country do not go by what she says, and that's
12 because the courts recognize that you cannot recreate
13 situations like this. There are no practice runs of
14 someone truly having their life flashing before their
15 eyes.

16 In all of those cases, she talked about wrongful
17 identification. How many could be equated to this case
18 when we broke it down? None, not a single one. Most of
19 them are uncorroborated witness testimony, eyewitness
20 testimony. Remember that? And almost - and a lot of them
21 are cross-racial. She's a hired gun. The State didn't
22 call her as a witness because we enforce the law. We
23 don't have her testify, because what she says is not the
24 law. That's why she only testifies for the defense.

25 Now, again, a reasonable doubt means a real

1 possibility that the defendant is not guilty, not any
2 possibility. A meteor might strike us in three seconds;
3 we're still here. I don't mean to make light of it, but
4 it's not any possibility. There are few things in this
5 world, which we're absolutely certain. You cannot dissect
6 someone's mind and know exactly what they're thinking,
7 what they did. But a reasonable doubt is a doubt that
8 would make a reasonable person hesitate to act, not
9 hesitate to think. This is so serious, obviously. Think
10 about it.

11 And think about this. A great prosecutor that I'm
12 honored to call a mentor told me one time, when you try
13 the devil, you have to go to hell to get your witnesses.
14 And I thought, well, that's a harsh thing to say. And
15 then, I realized that it's really just at euphemism.

16 It's not that Marion Powell is a devil. Of course
17 he's not. He has a great family, supportive family. We
18 will never know why he did what he did. However, who will
19 a person like Marion Powell confide in? Is it going to be
20 your deacon at the church? No.

21 Is it going to be a coach, a bailiff, a law
22 enforcement officer? No. He's going to confide to
23 someone who's down in hell with him, Eric Riley.

24 You saw Eric Riley on the stand. You watched his
25 demeanor. You heard how he responded to questions

1 directly. He made no bones about it. He testified to the
2 good, the bad, the ugly and the indifferent. And believe
3 me when I say this, if I - if I, as a prosecutor, have to
4 make a decision on whether to maybe shave a couple years,
5 possibly, hopefully, in his eyes, because I don't even
6 have that power, off of somebody who was shot five times
7 by a drug dealer named Kenya Hagood in a drug deal gone
8 bad to ensure that justice is done on behalf of Senora
9 Jones and those four children, because he's testifying
10 truthfully, act together, there's no bones about it, I
11 will do it each and every time. A hundred times I'll make
12 the same decision. I'll never apologize. Because it's
13 the right thing to do.

14 If you begin to sway, if you begin to think there's a
15 real possibility, if you're not firmly convinced, go back
16 to Senora Jones' testimony. Remember it in your mind.
17 Remember when she said after the detective read the
18 warnings and flipped that lineup over and showed it to
19 her, and she immediately saw the defendant, she began to
20 feel like she immediately knew it was him and she felt
21 this relief. She knew that justice would be done.

22 I ask you to do justice, seek the truth, and find the
23 defendant guilty of every count he's charged with, because
24 the evidence compels you to do so. Thank you.

25 BY THE COURT:

1 THE COURT: Thank you, Mr. Sheldon.

2 Ladies and gentlemen, this is now my time to tell you
3 about the law that applies in the case. We've had 20 or
4 so minutes. Does anybody need a break? If you don't,
5 we'll go right into it. We do get a break, okay. Let's
6 take a short five-minute recess. Ladies and gentlemen, I
7 ask you to step into the jury room.

8 JURORS LEAVE COURTROOM 12:28 P.M.

9 BAILIFF: The jury is clear, Your Honor.

10 MR. LEE: Judge, can I put one thing on the record,
11 please. As far as the - we talked briefly about some
12 charges yesterday, including the hand of one, hand of all,
13 as well as the identification charge. And I maybe don't
14 even - I don't think hand of one should be charged. And
15 when it was tied with identification, that the two
16 shouldn't be mixed together. I would renew that request
17 and ask that perhaps that - particularly since they go in
18 order, I would respectfully suggest to the Court saying
19 that hand of one is hand of all cannot be used to prove
20 identification; that identification must be proven beyond
21 a reasonable doubt by the prosecutor and it cannot be
22 based upon a theory of vicarious liability identification.

23 THE COURT: All right. Mr. Sheldon?

24 MR. SHELTON: I would oppose that. I don't think
25 that it really has any basis in law. Again, I think that

1 under that - if that's the case, then, first of all, the
2 State's not using it in that way, and didn't use it that
3 way in closing argument. And even if we did, we would
4 have to charge that in every single hand of one hand of
5 all case. And I just don't think it's appropriate and
6 it's needless. Confuse the jury most of all, so -

7 MR. LEE: My response would be that he just gave a
8 closing argument, talking about bolstering the
9 identification of Mr. Powell. He kept talking about
10 coincidences that tie Byron Young to Mr. Powell.

11 Just for the record, I would ask it to be included
12 that hand of one is hand of all cannot be used. While it
13 can be used for other things, it cannot be used for
14 identification.

15 THE COURT: I understand your argument, and I'll deny
16 the motion.

17 MR. LEE: Yes, sir.

18 THE COURT: Let's take five minutes.

19 MR. SHELTON: Thank you, Your Honor.

20 MR. LEE: Your Honor, I'm sorry, one more thing. At
21 this point, can I renew my previous motion to directed
22 verdict, as well?

23 THE COURT: The Court understands that motion, and I
24 deny the motion.

25 MR. LEE: Yes, sir.

1 OFF THE RECORD 12:30 P.M.

2 BACK ON THE RECORD 12:38 P.M.

3 JURY CHARGE, BY THE COURT:

4 THE COURT: Welcome back. Ladies and gentlemen, as
5 you have been told, the defendant in this case has been
6 charged by way of indictment with the offenses of
7 possession of a weapon during commission of a violent
8 crime; burglary in the first degree; armed robbery and
9 five counts of kidnaping.

10 I'll tell you, though, the fact that the defendant
11 was indicted in this case, was charged and arrested is not
12 evidence, cannot be considered by you as evidence. The
13 fact that he was indicted does not create any presumption
14 or any inference of guilt. These documents are simply the
15 vehicles that bring this case to court.

16 The defendant has pled not guilty to the indictments,
17 and the plea puts the burden upon the State to prove the
18 defendant guilty.

19 A person charged with committing a criminal offense
20 in this state is never required to prove himself innocent.
21 I tell you that it is an important rule of law that a
22 defendant in a criminal trial, no matter what the
23 seriousness of the charge may be, will always be presumed
24 to be innocent of the crime for which the indictment was
25 issued, unless guilt has been proven by evidence that

1 satisfies you of that guilt beyond a reasonable doubt.

2 This presumption of innocence does not end when you
3 begin your deliberations, but it accompanies the defendant
4 throughout the trial, until you reach a verdict of guilt
5 based on the evidence that satisfies you of that guilt
6 beyond a reasonable doubt.

7 The presumption of innocence is like a robe of
8 righteousness placed about the shoulders of the defendant,
9 which remains with the defendant until it has been
10 stripped of the defendant by evidence that satisfies you
11 of the defendant's guilt beyond a reasonable doubt.

12 The presumption of innocence is not mere legal
13 theory. It is not just a legal phrase. It is a
14 substantial right to which every defendant is entitled,
15 unless you, the jury, are satisfied from the evidence of
16 the defendant's guilt beyond a reasonable doubt.

17 A reasonable doubt is a kind of doubt that would
18 cause a reasonable person to hesitate to act. Some of you
19 may have served on juries in civil cases where you were
20 told that it is only necessary to prove that the fact is
21 more likely true than not true, such as by the greater
22 weight or the preponderance of the evidence, but in
23 criminal cases, the State's proof must be more powerful
24 than that. It must be beyond a reasonable doubt.

25 Proof beyond a reasonable doubt is proof that leaves

1 you firmly convinced of the defendant's guilt. But of
2 course, there are very few things in this world that we
3 know with absolute certainty. And in criminal cases, the
4 law does not require proof that overcomes every possible
5 battle. If, based on your consideration of the evidence,
6 you are firmly convinced that the defendant is guilty of
7 the crime charged, you must find the defendant guilty.

8 On the other hand, if you think there's a real
9 possibility that the defendant is not guilty, you must
10 give the defendant the benefit of the doubt in finding him
11 not guilty.

12 I remind you that, during this trial, I have had
13 certain duties to perform as the trial judge. I've had
14 the responsibility to preside over the trial and rule on
15 the admissibility of the evidence during the trial. You
16 are to consider only the competent evidence before you.
17 And as to the testimony that was ordered stricken from the
18 record in this case, you must disregard that testimony.
19 You should consider only the testimony which has been
20 presented from the witness stand and the exhibits that
21 have been made part of the record in this case.

22 I also have the additional duty to charge you and
23 tell you about the law that applies in this case, ladies
24 and gentlemen.

25 As the presiding judge, I am the sole judge of the

1 law in this case. It is your duty as jurors to accept and
2 apply the law as I now state it to you. If you already
3 have an idea of what the law is or what the law ought to
4 be, you must now agree with what I tell you the law is.
5 You must abandon that idea, because you are sworn to
6 accept the law and apply the law exactly as I state it to
7 you.

8 In every case tried before a jury, as I told you, the
9 jury becomes the sole and exclusive judge of the facts. A
10 trial judge, such as myself, cannot comment on or make any
11 statement to a trial jury about the facts in the case.

12 Since you are the sole judges of the trial and the
13 facts of this case, ladies and gentlemen, you are not to
14 infer anything I have said during the progress of this
15 trial in ruling on the admissibility of evidence or
16 otherwise, or anything that I've done or said during the
17 course of this instruction that I have an opinion about
18 the facts of the case. The law does not allow me to have
19 an opinion about the facts of this case. This is a matter
20 solely for you, ladies and gentlemen. You, as jurors. It
21 is your duty to determine the effect, the value, the
22 weight, and truth of the evidence presented during the
23 trial.

24 Now, you've heard there are two types of evidence
25 generally presented during a trial, direct evidence and

1 circumstantial evidence.

2 Direct evidence is the testimony that a person claims
3 to have actual knowledge of a fact, such as an eyewitness.
4 It is evidence which immediately establishes the main fact
5 to be true.

6 Substantial evidence is proof of a chain of facts and
7 circumstances indicating the existence of a fact. It is
8 evidence which immediately establishes lateral facts from
9 which the main fact may be inferred.

10 Circumstantial evidence is based on inference, and
11 not on personal knowledge or observation. The law,
12 though, makes no distinction between the weight or value
13 to be given to either direct or circumstantial evidence,
14 nor is a greater degree of certainty required of
15 circumstantial evidence than of direct evidence.

16 You should weigh all of the evidence in this case.
17 After weighing all of the evidence, if you're not
18 convinced of the guilt of the defendant beyond a
19 reasonable doubt, you must find the defendant not guilty.

20 Necessarily, ladies and gentlemen, you must determine
21 the credibility of the witnesses who have testified. This
22 simply means the believability becomes your duty as jurors
23 to analyze and to evaluate the evidence and determine
24 which evidence convinces you of its truth.

25 In determining the believability of the witnesses who

1 have testified, you may believe one witness over several
2 witnesses, or several witnesses over one witness. You may
3 believe part of the testimony of a witness, and reject the
4 remaining part of the testimony of the same witness. And
5 you might believe the testimony of a witness in its
6 entirety, or reject the testimony of a witness in its
7 entirety. And you may consider whether any witness has
8 exhibited to you any interest, any bias, any prejudice, or
9 any other motive in the case. You may also consider the
10 appearance and manner of a witness while on the witness
11 stand.

12 I instruct you and emphasize to you that the fact
13 that the defendant did not testify is not a fact to be
14 considered by you in any way in your deliberation and your
15 consideration on the question of the guilt or innocence of
16 the defendant. It must not be considered by you in any
17 manner whatsoever.

18 A defendant has a constitutional right to remain
19 silent, and the assertion of this right must not be
20 considered by you in your deliberations. Under your oath,
21 you can draw no conclusion whatsoever from the fact that
22 the defendant did not testify. The fact that the
23 defendant did not testify should not even be discussed in
24 the jury room. The burden of proof, as I have stated to
25 you, is on the State. The defendant is not required to

1 prove his innocence. The burden of proof remains upon the
2 State to prove guilt to you beyond a reasonable doubt.

3 As I told you earlier, ladies and gentlemen, the
4 rules of evidence normally do not permit witnesses to
5 testify as to opinions or conclusions. An exception
6 exists for witnesses that are called expert witnesses.

7 That's a witness who, by education or experience, has
8 become an expert in some art, science, or profession. And
9 they may state an opinion as to relevant and material
10 matters in which the witness claims to be an expert and
11 they give the reasons for their opinion. You should
12 consider these expert - the expert opinion received as
13 evidence in this case like other evidence. You give it
14 the weight you think it deserves.

15 If you decide that the opinion of the expert witness
16 is not based on sufficient education and experience, or if
17 you conclude that the reasons given in support of the
18 opinion are not sound or that the opinion is outweighed by
19 other evidence, you may disregard the opinion entirely.

20 An expert witness's testimony is to be given no
21 greater weight than that of any other witness simply
22 because the witness is an expert.

23 Further, you are not required to accept an expert's
24 opinion, even though it may not be contradicting.

25 I'll also tell you that, if a crime is committed by

1 two or more people who have acted together in committing a
2 crime, the act of one is the act of all. The person who
3 joins with another to accomplish an illegal purpose is
4 criminally responsible for everything done by the other
5 person which occurs as a natural consequence of the acts
6 done in carrying out the common plan.

7 Two or more people gathered together - or two or more
8 people are acting together, assisting each other in
9 committing the offense, the act of one is the act of all.
10 Or as is sometimes said, the hand of one is the hand of
11 all.

12 An issue in this case, ladies and gentlemen, as
13 you've heard, is the identification of the defendant as
14 the person who committed the crime charged. The State has
15 the burden of proving identity beyond a reasonable doubt.

16 You must be satisfied beyond a reasonable doubt of
17 the accuracy of the identification of the defendant before
18 you may convict the defendant.

19 Identification testimony is an expression of belief
20 or impression by a witness. You must determine the
21 accuracy of the identification of the defendant. You must
22 consider the believability of each of the identification
23 witnesses in the same way as any other witness.

24 You may consider whether the witness had an adequate
25 opportunity to observe the offender at the time of the

1 offense.

2 It should be affected by things such as how long or
3 how short a time was available, how far or how close the
4 witness was, the lighting conditions and whether the
5 witnesses had the chance to see or know the person in the
6 past.

7 Once again, I tell you that the burden of proof is on
8 the State to the extent of every element of the crime
9 charged. This specifically includes the burden of
10 proving, beyond a reasonable doubt, the identity of the
11 defendant as the person who committed the crime.

12 If, after examining all of the evidence, you have a
13 reasonable doubt as to the accuracy of the identification,
14 you may find - you must find the defendant not guilty.

15 During the trial, you have heard testimony from a
16 child. Where a witness is a child, we must determine, as
17 with any other witness, whether that testimony is
18 believable.

19 In deciding believability, you may consider not only
20 matters that I've already discussed with you, but you may
21 also consider the age of the child, the child's ability to
22 observe and remember the facts, and the child's ability to
23 understand and answer questions, because young children
24 may not fully understand what is happening here. It is up
25 to you to decide whether the child understood the

1 seriousness of appearing as a witness in this criminal
2 trial, whether the child understood the questions, and
3 whether the child has a good memory, and whether the child
4 understands the difference between lying and telling the
5 truth.

6 In addition, young children may be influenced by the
7 way the questions are asked. It's up to you to decide
8 whether the child understood the questions asked of them.

9 I tell you that a person who has a criminal record is
10 competent to testify here in a trial. A past record of a
11 witness does not affect the ability of that witness to
12 testify. The past record may only to be considered by
13 you, if at all, in determining the witness believability.

14 Remember, you are the sole judges of the facts in
15 this case and of the believability of any and all of the
16 witnesses.

17 The defendant in this case is charged, as you heard,
18 with first degree burglary.

19 The State must first prove, beyond a reasonable
20 doubt, that the defendant entered a dwelling without
21 consent.

22 The State must also prove, beyond a reasonable doubt,
23 that the defendant intended to commit a crime, either a
24 felony or a misdemeanor, at the time of the entry.

25 And the State must prove, beyond a reasonable doubt,

1 when entering or while in the dwelling or in fleeing, the
2 defendant, or an accomplice, was armed with a deadly
3 weapon or explosive; or when entering or while in the
4 dwelling or in fleeing, the defendant, or an accomplice,
5 used or threatened to use a dangerous object.

6 The defendant is also charged with armed robbery. In
7 order to prove this offense, the State must prove, beyond
8 a reasonable doubt, that the defendant took personal
9 property from another person or the property of another
10 person.

11 The State must also prove, beyond a reasonable doubt,
12 that the defendant carried the property away, intending to
13 permanently deprive the owner of the property, to keep the
14 property for the defendant's own use.

15 Taking and carrying away of the property must have
16 been done with violence or while putting the owner of the
17 property in fear of violence.

18 Finally, the State must prove, beyond a reasonable
19 doubt, that the defendant was armed with a deadly weapon
20 during the robbery. And I'll tell you that a deadly
21 weapon is any article or substance likely to cause death
22 or great bodily harm.

23 The defendant is also charged with kidnaping. The
24 State must prove, beyond a reasonable doubt, that the
25 defendant knowingly, unlawfully confined, kidnaped,

1 abducted, or carried away another person without authority
2 of law.

3 Seizing someone means taking hold of them suddenly or
4 forcing to confine, that means to limit, restrict or
5 enclosing within bounds, imprison or shut up or keep in.

6 The State does not have to prove the defendant did
7 all of these things. Instead, if you find, beyond a
8 reasonable doubt, that the defendant did any of these
9 things, you must find the defendant guilty of kidnaping.

10 The defendant is also charged with possession of a
11 weapon during the commission of a crime or attempt to
12 commit a violent crime.

13 The State must prove, beyond a reasonable doubt, the
14 defendant was in possession of a firearm or visibly
15 displayed what appeared to be a firearm. In order to find
16 the defendant guilty of possession of a weapon during the
17 commission of a violent crime, you must first find the
18 defendant guilty of either committing a violent crime or
19 attempting to commit a violent crime.

20 Violent crimes are statutorily defined in our code of
21 law, and I'm tell you that kidnaping is defined as a
22 violent crime, that armed robbery is defined as a violent
23 crime, and that first degree burglary is defined as a
24 violent crime.

25 The indictments in this case allege different

1 offenses against the defendant. Each indictment charges a
2 separate and distinct offense. You must decide each item
3 separately on the evidence and the law applicable to it,
4 uninfluenced by your decision as to any other indictments.

5 The defendant can be convicted or acquitted for any
6 or all of the offenses charged. And you will be asked to
7 make a decision as to each indictment and enter that
8 verdict as guilty or not guilty.

9 In just a moment, I'm going to ask you to step into
10 the jury room, ladies and gentlemen, and check and see if
11 lunch has arrived yet.

12 We know yet about lunch? Your lunch has arrived, so
13 I'm going to ask you to do this. All of you, including
14 the alternate jurors, retire to the jury room, but do not
15 begin deliberating, not until you finish lunch. And let
16 us know when you have completed lunch and are ready to
17 begin deliberating.

18 At that time, what I'll do is ask our two alternate
19 jurors to step back out into the courtroom, and I'm going
20 to send to the jury room the exhibits and the indictments.
21 And I'm going to ask our foreperson, if she will, on
22 behalf of the jury, write on each verdict - on each
23 indictment, excuse me, in the bottom, left corner where
24 the word - below the words *Verdict* and *Issued Indictment*,
25 the words *Guilty* or *Not guilty*, and sign your name as

1 foreperson.

2 Ladies and gentlemen, for there to be a verdict in
3 this case, all of it must be unanimous. As to each of the
4 indictments, it must be a unanimous verdict, meaning all
5 twelve of you must agree before there can be any verdict
6 on each of these indictments.

7 Ladies and gentlemen, if you would please retire to
8 the jury room and let us know when you are ready. I
9 remind you, it's too early to begin discussing the case.

10 JURORS LEAVE COURTROOM 12:58 P.M.

11 EXCEPTIONS TO JURY CHARGE:

12 BAILIFF: The jury is clear, Your Honor.

13 THE COURT: Any exceptions from the State?

14 MR. SHELDON: No, Your Honor.

15 THE COURT: Any additional exceptions?

16 MR. LEE: Just the one I just made, Your Honor.

17 Other than that --

18 THE COURT: Other than the one you have already made?

19 MR. LEE: That's correct.

20 THE COURT: Well, we're going to let them eat. When
21 they're ready, then, I'll sent this back with the
22 exhibits. Have you all made sure all the exhibits are
23 ready?

24 MR. SHELDON: Yes, Your Honor.

25 THE COURT: All right. We'll be at ease.

1 MR. SHELDON: Thank you, Your Honor.

2 OFF THE RECORD.

3 BACK ON THE RECORD.

4 JURORS ENTER COURTROOM 2:19 P.M.

5 VERDICT:

6 THE COURT: Welcome back, ladies and gentlemen.

7 Ms. Kelly, let me ask you a few questions as
8 foreperson for the jury. The Bailiff indicates he
9 believes the jury has reached a verdict in this case. Is
10 that correct?

11 MS. KELLY: Yes, sir.

12 THE COURT: Is the verdict unanimous?

13 MS. KELLY: Yes.

14 THE COURT: Did you reach a verdict as to each of the
15 indictments?

16 MS. KELLY: Yes.

17 THE COURT: Did you complete the verdict and write on
18 each of the indictments of either guilty or not guilty?

19 MS. KELLY: Yes.

20 THE COURT: Did you sign your name?

21 MS. KELLY: Yes.

22 THE COURT: Would you please pass the verdict - the
23 indictments forward. And Clerk, would you please publish
24 for me the verdict.

25 MADAM CLERK: In the State of South Carolina versus

1 Marion Benjamin Powell as to Indictment No.
2 2011-GS-07-00778 for the charge of burglary in the first
3 degree, we, the jury, find the defendant guilty.

4 As to Indictment No. 2011-GS-07-00779 as to the
5 charge of kidnaping, we, the jury, find the defendant
6 guilty.

7 As to Indictment No. 2011-GS-07-00780 for the charge
8 of kidnaping, we, the jury, find the defendant guilty.

9 As to Indictment No. 2011-GS-07-00781 for the charge
10 of kidnaping, we, the jury, find the defendant guilty.

11 As to Indictment No. 2011-GS-07-00782 for the charge
12 of kidnaping, we, the jury, find the defendant guilty.

13 As to Indictment No. 2011-GS-07-00783 for the charge
14 of kidnaping, we, the jury, find the defendant guilty.

15 As to Indictment No. 2011-GS-07-00784 for the charge
16 of armed robbery, we, the jury, find the defendant guilty.

17 As to Indictment No. 2011-GS-07-00786 for the charge
18 of possession of a weapon during a violent crime, we, the
19 jury, find the defendant guilty.

20 Madam Forelady and ladies and gentlemen of the jury,
21 if this is the decision of each and every one of you, if
22 you'll please indicate by raising your right hand, please.
23 Thank you.

24 THE COURT: Anything before the jury is discharged
25 from the State?

1 MR. SHELDON: No, Your Honor. Thank you.

2 MR. LEE: No, your Honor.

3 THE COURT: Ladies and gentlemen, I want to thank you
4 for your service. First of all, I want to, again,
5 apologize to you the disjointed way the court was run this
6 week.

7 Secondly, I'll say to you there's no one in a
8 position to criticize your verdict. And I say that
9 because it is only the twelve of you that sat there and
10 saw the witnesses testify, heard the evidence presented,
11 listened to the lawyers make closing arguments to you, and
12 you listened to me tell you about the laws that applied in
13 the case, and then went back to the room, sat down and
14 discuss with your fellow jurors what you saw and heard.

15 The next thing, before I - I previously told you, you
16 could not talk to anybody about the case. You're free now
17 to talk to anybody you want about the case, including what
18 went on in the jury room, if that's what you want to do.

19 You also have a right not to talk to anybody. I
20 don't have any reason to think anybody's going to bother
21 you about your verdict, but you need to know that, if they
22 do, and you don't want to talk to them, tell them you
23 don't want to talk to them. If they persist, tell them
24 the judge said you don't have to. And if they really
25 bother you, report them to the Clerk of Court. And I say

1 that, we don't have any reason to think that's going to
2 happen. I just want to let you know, if you have that
3 problem.

4 I'm getting ready to excuse you in a minute. As you
5 might expect, we have some more things to do on this case,
6 and you are welcome to stay or not stay as you choose.

7 Some jurors want to stay and some jurors do not want
8 to stay. I'm going to ask my bailiffs - I'm asking you,
9 first of all, if you all will depart the courtroom in
10 front of the bailiffs. And if you wish to stay, come to
11 the back of the courtroom, and that'll give you the option
12 of staying or leaving.

13 We'll wait a few moments to see if anyone wants to
14 come into the courtroom.

15 Any question ladies and gentlemen?

16 Thank you for your service and you're excused.

17 I have told the jurors they can come in and observe,
18 and they say it might take a few minutes for them to come
19 around.

20 MR. SHELDON: I'm printing off the sentencing sheets
21 right now anyway, Your Honor. Thank you, Your Honor.

22 THE COURT: Well, while the Solicitor is doing that,
23 I assume the defense has some motions they wish the court
24 to hear.

25 MR. LEE: Thank you, Your Honor. At this point, we

1 would - you want to do them now?

2 THE COURT: Yes, sir.

3 DEFENSE MOTIONS:

4 MR. LEE: We would renew our earlier motion for a
5 directed verdict for the reasons stated.

6 Also make a motion for a new trial based upon some
7 previous objections we had made. One of which, which I
8 think is very important, is the jury charge on the hand of
9 one is the hand of all. I believe that the case set up
10 perfectly, and I'm only speculating, I don't know what the
11 jury did, but set up perfectly for identification to be
12 established through that doctrine, which I believe is not
13 a proper manner or permitted use of the hand of one is the
14 hand of all. I believe it is more so to prove an element
15 of defense such as the taking away of property and that
16 sort of thing.

17 I also would renew our previous - and also, in the
18 motion for a new trial, would say, based upon the motion,
19 which were denied to suppress the phone calls from the
20 jail between Marion Powell and Byron Young, had those been
21 suppressed, we believe that a new trial - that the result
22 of trial would have been different.

23 Judge, so, singularly and cumulatively, you heard the
24 evidence. And we both made the same argument that there
25 was an I.D., and then there was other evidence. And it's

1 our position that other evidence was not substantial
2 enough to give credence or, actually, to the lineup. The
3 jury obviously felt otherwise. But had some of those -
4 some of that other evidence had it not been there, there
5 is a likelihood the result could have been different. And
6 for those reasons, I would respectfully ask for a new
7 trial on each and every charge, Your Honor.

8 THE COURT: All right. Mr. Lee, I understand your
9 arguments, most all of them, as hard as we - as you have
10 made before the court.

11 MR. LEE: Yes, sir.

12 THE COURT: But as previously ruled, I'm going to be
13 compelled to deny your motions.

14 SENTENCING:

15 THE COURT: Are we prepared for sentencing?

16 MR. SHELDON: Yes, we are. I'll give these to Mr.
17 Lee so he can review them -

18 THE COURT: Okay.

19 MR. SHELDON: - and make sure he thinks they're
20 correct. We just have to enter - we're putting his
21 address in one of the sentencing sheets, and leaving the
22 rest of them blank, so they'll have to base it on one -
23 his I.D., identifying information, that was on the rest,
24 Your Honor.

25 And Your Honor, I will bring to the court's attention

1 that this is a kidnaping case. And unless you specify
2 otherwise, whatever sentence you give him, you must
3 specify non-mandatory GPS monitoring, because it's
4 kidnaping. I can't remember. I think it's pursuant to
5 17. I can't remember the statute off the top of my head
6 for each kidnaping indictment. Otherwise, he will be
7 automatically monitored.

8 THE COURT: Will be automatically -

9 MR. SHELDON: Uh-huh. Correct.

10 THE COURT: Thank you for reminding me.

11 MR. SHELDON: Uh-huh. Since his crime does not
12 involve any type of sexual act, the State doesn't think
13 it's appropriate.

14 THE COURT: Now, are you ready to proceed, then,
15 Solicitor?

16 MR. SHELDON: Yes, Your Honor. Thank you. Ms. Jones
17 or Mr. Jones, whoever wants to come up.

18 Your Honor, you've heard the evidence in this case,
19 and I don't get emotionally involved in cases, and maybe
20 it's a fault of my own, but this is one I have, and it's
21 not taken - I think I've been very professional in the way
22 I've handled the case but - and - but the facts sometimes,
23 you know, when you have children, affect you, and I only
24 say that now after it's over with and Ms. Jones is
25 standing here before us and she's crying.

1 And that doesn't have any effect on what I'm saying
2 right now or any way we handled the case. What I believe
3 is appropriate in this case may not mean - well, I'll
4 defer to the court's judgment, of course, what,
5 ultimately, you believe sentencing should be.

6 However, his prior convictions are for resisting
7 arrest, disturbing schools and assault with intent to kill
8 in 2009 for which he is current - he has receive an active
9 YOA for.

10 There's a pointing and presenting a firearm that he
11 received an active YOA for that was the same act as that
12 assault with intent to kill.

13 He was revoked on that YOA for a year or so before he
14 ended up in the Beaufort County Detention Center in
15 February of 2012, after he was arrested on this charge,
16 and that's one reason this case has pended so long.

17 Burglary in the first degree carries 15 years to
18 life, obviously, and there's all kinds of different
19 burglaries first.

20 There is burglary first where somebody goes into a
21 person's garage. It's their third burglary. It could be
22 during the day time and there is burglary in the first
23 degree where they know the people aren't home. And they
24 do what is a cat burglary, and there is no violence
25 involved. And this is the most heinous burglary, first, I

1 think I've ever been a part of that didn't involve an
2 actual killing. And to hold those four children at
3 gunpoint, even if that wasn't the plan, they could have
4 backed out at any time.

5 Marion Powell seemed to be the lookout, kind of the
6 first one in, the last one out, and he could have had some
7 sway over that, but he didn't.

8 If you look at his other charges, as well, we
9 presented some of that evidence. They're not convictions,
10 but I think you could look at his terms of sentencing. He
11 has two other charges pending of armed robbery over a
12 total of - from July 3, 2010 through October 25, 2010.
13 Three different incidents, including this one, and one of
14 the victims, Thomas General, actually testified in court.
15 And I believe, in some of his testifying, the confusion
16 was my instruction to give him is that he couldn't talk
17 about that incident, so I don't think he could talk about
18 seeing them together.

19 In that case, Thomas General was bound and tied up
20 and brought into the woods. And I believe the evidence of
21 that case is at least something you can take into
22 consideration with sentencing.

23 I'll have Ms. Jones address the court as to how it's
24 affected her and her family, and then I'll ask for what
25 we're going to ask for, Your Honor.

1 THE COURT: Yes, ma'am, Ms. Jones, we'll be glad to
2 hear from you.

3 MS. JONES: First of all, you know, I hate this is
4 even a situation any of us are in. I understand Mr.
5 Powell is someone's son, you know, but like the prosecutor
6 stated, this situation has changed my life and my
7 children's life in a way that no parent would ever wish.
8 I still have a seven-year-old son. I don't know if
9 anybody saw him for a short time, you know, Monday or
10 Tuesday, but they still have nightmares. They still talk
11 about the bad guys coming in. It's not enough that we
12 moved from our house. We have the constant fear of
13 knowing that there's not a big bond. That which, you
14 know, it has changed us in a way that I cannot even
15 describe.

16 I'm sorry to be emotional, but, you know, my job as a
17 mother is to try to keep my kids safe. And to know that I
18 have to look at them in their eyes and feel like I failed
19 them. It's so hard for me. All I can do is just give
20 them a hug and let them know I'm here, but their innocence
21 is lost behind this whole matter.

22 You know, the same with my daughter. I hate that she
23 had to step up, but she even had a sense of protecting the
24 ones that she was there with and trying to keep everything
25 together and I hate that she had to do that. So, in.

1 saying this, I'm just saying, knowing that he's convicted
2 of what he did gives me a small sense of relief. And I
3 thank the jurors for hearing all the facts related to the
4 case and seeing that what he did was wrong and he deserves
5 to pay for it. That's all.

6 THE COURT: All right. Thank you, ma'am. Solicitor?

7 MR. SHELTON: Your Honor, this family is going to
8 have to live with the repercussions of this the rest of
9 their life. These children's lives are going to be
10 altered forever. The heinousness of this crime, the State
11 would argue, deserves life.

12 THE COURT: Thank you. Counselor?

13 MR. LEE: Thank you, Your Honor. May it please the
14 court. This is the hardest part of being a lawyer and
15 dealing from the defense side. Again, we don't know what
16 to say to the victims. I mean, we never went after them.
17 We simply said they made a mistake and that's what the
18 position was from the beginning. The jury felt otherwise,
19 and I'm really, really sorry in the position they find
20 themselves in. And I have two very young children, and as
21 Mr. Sheldon says, it's impossible not to imagine yourself
22 in certain positions, and I certainly understand and
23 appreciate what they're saying.

24 Judge, Marion, or Scooter as he's known to his
25 friends and family, is 27 years old. His dad's here and

1 he walked in. His sister has been here almost all week.
2 She's in the Navy and was down from her merchant leave, I
3 think, from Roanoke. His mom and grandmother were here
4 for almost every day of the trial and, you know, if
5 something happened to anybody else's kids, they would feel
6 the same way that Ms. Jones did when she spoke, and that's
7 part of being a parent, and we understand that.

8 Scooter is 27 years old, Judge. Mr. Sheldon did read
9 you the prior record. It's my understand that the ABWIK
10 charge involved an incident where there was at least a
11 suggestion somebody was driving a car at him but
12 nevertheless, he pled to that. And clearly, there's a
13 history there of firearms and we can't get around that.
14 And Judge, I would just remind you that, you know, he's
15 27. He has a record. It's not substantial. It's not
16 worse than a lot of people we see here, but I will also
17 add that, as you know, under any of these other than the
18 gun charge, any sentence that he gets is no parole. And
19 you know. So, under the law, the best case scenario
20 everything falling together, he does at least 85 percent
21 of whatever crime - whatever sentence he gets, regardless
22 of his sentence.

23 You know, if you do the math on a 20-year sentence,
24 you do 17 years, and that's the best case scenario. There
25 is no way to get around that.

1 We would just ask you to keep that in mind when you
2 come up with that.

3 Would you like to say something, Mr. Powell? His
4 father, James Powell, asks that he be allowed to speak?

5 THE COURT: Yes, sir. I'd be glad to hear from him.

6 MR. JAMES POWELL: I've been sitting here. I went to
7 work a couple of days ago. I been sitting here and I been
8 listening to this whole thing. And it's unfortunate for
9 the family here, and it's definitely unfortunate my son is
10 even involved in this, and I plead for mercy from the
11 court in the sentencing, but I hope we can also look at
12 the whole picture as what was presented to the jury that
13 showed that there was more - there's so much wrong going
14 on here, and I'm afraid that my son has been the total
15 brunt of it.

16 I'm not -- you know, just asking for mercy from the
17 court, because I'm sitting here, and I'm listening to this
18 thing, and it's unveiling to me like a soap opera and I am
19 definitely sorry for whatever happened to this family
20 here, but this is my son, also, and I'm sitting here and
21 I'm listening to the whole story -

22 MR. LEE: Mr. Powell, you can't testify. The jury
23 has spoken.

24 MR. JAMES POWELL: Yeah, I understand that, but I -
25 I'm not trying to overturn their verdict, because I -- but

1 I'm just saying and I'm listening and I'm hoping that, you
2 know, the Judge is listening, too, to the whole realm of
3 this thing. And I'm just asking for mercy from the court
4 for the sentencing, because he deserves some type of life.
5 Please. That's what I was saying.

6 There's just a lot going on here and I'm not saying
7 he's right, because Lord already know what happened,
8 happened and it shouldn't have happened, but there was a
9 whole lot of issues brought up here surrounding this
10 thing, and I just hope you have some mercy on him on his
11 sentence.

12 THE COURT: All right. Thank you, sir.

13 MR. LEE: I think the rest of his family either
14 couldn't come back or was too upset to stick around, but
15 I -

16 MR. JAMES POWELL: She's not - she can't speak.

17 MR. LEE: Judge, on a personal note, I will tell you
18 this, Scooter has been in jail since March of 2011. I'm
19 not exactly sure when I picked up the case, but it wasn't
20 too long after that, and I've had a chance to, obviously,
21 get to know him in jail and stuff like that. And he -
22 he's made some changes.

23 I mean, if you look at that photo lineup, the guy in
24 there and to look in his eyes, it's different from the man
25 you see right here. He has taken a very much of an

1 interest in his case. He's smart. He's funny sometimes,
2 when he writes me letters and stuff like that. He one
3 time sent me some brain teasers from the jail. But the
4 point I'm making is, I can see progress and development in
5 him from the almost three years he's spent in jail. And I
6 just throw that out there, because I think it is a
7 promising sign that he would benefit and become a better
8 person in the system and at some point, hopefully, get to
9 the point where he can get out and add to the society.

10 He's going to be - he's going to be a lot older, no
11 question about that. He's looking at a minimum of 15 just
12 on the burglary and, you know, by that time, hopefully,
13 Ms. Jones' kids will be grown and be better and, you know,
14 they don't have to worry about this again.

15 But I would respectfully ask the court to - whatever
16 mercy you can find. And I would ask the court to
17 respectfully consider maybe a 20-year sentence, knowing
18 full well he's going to do 17 years at a minimum of that
19 20-year sentence and which will make him 44 years old when
20 he gets out, and that's going to be a pretty good while
21 for anybody.

22 Do you want to say anything?

23 DEFENDANT POWELL: I can't.

24 THE COURT: Did you say you don't care to say
25 anything?

1 DEFENDANT POWELL: I said I can't say nothing right
2 now.

3 THE LEE: And he does have two other cases pending,
4 and I would advise him to - but I think he's - he doesn't
5 show it right now, but I believe he's probably too upset
6 to say anything.

7 THE COURT: All right. Anything else, Solicitor?

8 MR. SHELDON: No, thank you, Your Honor.

9 THE COURT: Mr. Powell, on the weapons charge, that
10 carries five years. I sentence you to the Department of
11 Corrections for a period of five years to be concurrent
12 with the other sentences and, of course, you would get -
13 on all of these cases you will get credit for any time
14 served as provided by law.

15 On each of the other cases, I sentence you to the
16 Department of Corrections for a period of 27 years.

17 Good luck to you, Mr. Powell.

18 MR. LEE: Thank you.

19 MR. SHELDON: Thank you, Your Honor.

20 THE COURT: Anything else before we adjourn court?

21 MR. SHELDON: A general order, Your Honor.

22 THE COURT: Court's adjourned.

23 OFF THE RECORD.

24 BACK ON THE RECORD.

25 THE COURT: I forgot to mention, I was looking on the

1 sentencing sheet, this does not involve - I did not find
2 that this involved any sexual intentions, and no mandatory
3 GPS monitoring.

4 MR. SHELDON: Yes, sir.

5 THE COURT: Good luck, Mr. Powell.

6 DEFENDANT POWELL: Yes, sir. Thank you, sir.

7 THE COURT: Court's adjourned.

8 END TRIAL 2:49 P.M.

CERTIFICATE OF REPORTER

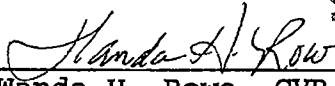
NOVEMBER 18, 19, 20, 21, & 22, 2013 TRANSCRIPT OF TRIAL
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing November 18, 19, 20, 21, and 22,, 2013 Transcript of Trial is a true, accurate, and complete record of the proceedings had on said dates and exhibits admitted in the case of State of South Carolina versus Mario Powell, Beaufort County, South Carolina, Court of General Sessions, Case Numbers 2011-GS-07-00778, 2011-GS-07-00779, 2011-GS-07-00780, 2011-GS-07-00781, 2011-GS-07-00782, 2011-GS-07-00783, 2011-GS-07-00784, 2011-GS-07-00786, 2011-GS-07-00787.

I further certify that I am of neither kin, counsel, or interest to any party hereto.

The original of this transcript, nor any copy of same, is not certified, nor authorized for use by me, to be true, accurate, and complete without my original signature and stamp affixed hereto.

Witness my signature March 3, 2014.


Wanda H. Rowe, CVR-M
Official Court Reporter

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JUL 13 2015

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

The Honorable Brooks P. Goldsmith

Appellate Case No. 2013-002537

The State,

Respondent,

v.

Marion Benjamin Powell,

Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court's admission of the eyewitnesses' identification of Appellant deprive him of due process where the photo array created by the State and shown to two eyewitnesses the day following the alleged crime contained a photo of Appellant that is different than the other array photos and that unduly accentuates Appellant's features consistent with one eyewitness's pre-lineup description of the assailant?

STATEMENT OF THE CASE

Appellant was indicted April 21, 2011 by the Beaufort County grand jury on five counts of kidnapping, one count of burglary in the first degree, one count of armed robbery, one count of possession of a weapon during a violent crime, and one count of unlawful possession of a firearm. R. p. 50, lines 15–23; *see also* R. pp. 11–19. On November 18, 2013, Appellant proceeded to trial before a jury and the Honorable Brooks P. Goldsmith. The State was represented by Benjamin Shelton and Benjamin Coppage. R. p. 38. Appellant was represented at trial by Scott W. Lee. Id.

At the conclusion of the trial on November 22, 2013, the jury found Appellant guilty of first degree burglary, guilty of five counts of kidnapping, guilty of armed robbery, and guilty of possession of a weapon during a violent crime. R. p. 258, line 6–p. 259, line 23. Judge Goldsmith sentenced Appellant to twenty-seven years imprisonment on the kidnapping, armed robbery, and first degree burglary charges with those sentences to run concurrently and with credit for time served in jail prior to trial. R. p. 263, lines 9–16. Appellant was sentenced to five years on the possession count with that sentence to also run concurrently with the other sentences. Id.

Appellant filed his notice of appeal and this appeal follows.

STANDARD OF REVIEW

The decision to admit an eyewitness' identification is within the trial judge's discretion and will generally not be reversed absent an abuse of discretion or prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000); see also State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003). "However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. Moore, 343 S.C. at 288, 540 S.E.2d at 448 (citing Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976)).

ARGUMENT

The trial court erred by admitting the eyewitness identification of Appellant where he was identified in a photo lineup, the day following the alleged crime, in which his photograph is distinct from the other photographs and unduly accentuates his features consistent with an eyewitness' pre-lineup description of the assailant such as to render it patently suggestive. The resulting suggestiveness of the lineup, under the totality of the circumstances, renders both the out-of-court identifications and the in-court identifications inadmissible due to the substantial likelihood of irreparable misidentification the lineup created. This was a violation of Appellant's due process rights and this matter should be remanded for a new trial.

STATEMENT OF FACTS

The home of Senora Jones was invaded by three armed assailants in the early evening of October 25, 2010. R. p. 97, lines 15-16. At the time of the home invasion,

Senora Jones was at home with her minor son, her 10 year old child A.H., and her two nieces. Id., lines 17–18. The three assailants entered the property through Mrs. Jones' backyard where three of the children had been playing and, with the children, entered the home. R. p. 97, line 17–18; R. p. 137, lines 13–18. The three armed assailants were identified by Mrs. Jones as African-American males. R. p. 97, line 16.

Upon entering the home the three men found Mrs. Jones in her bedroom and instructed Mrs. Jones to get off her bed and onto the floor with her face to the ground. R. p. 137, line 21–p. 138, line 6. Mrs. Jones testified she stayed face down in her bedroom for most of the incident. R. p. 137, line 12. Mrs. Jones's child, A.H., and the other three children were instructed to sit against a wall outside Mrs. Jones's bedroom in the upstairs of the home. R. p. 67, line 11–p. 69, line 5. During this time, the assailant that Mrs. Jones and A.H. identified as Appellant was alleged to have been walking back and forth from the hallway to Mrs. Jones's bedroom as well as up and down the stairs in the home. R. p. 71, line 22–p. 72, line 12. The assailant that was moving back and forth between the hallway, the room, and the up and down stairs was also alleged to possess a handgun during this time. Id.

Following the incident, Mrs. Jones gave a description to Sergeant Donald Chandler of the three assailants. R. p. 62, lines 18–24; R. p. 59, line 18–p. 60, line 15. Mrs. Jones described the suspect she later identified as Appellant, suspect two, as “a black male; approximately six-foot, one inches tall; 180 pounds; black pants; black t-shirt” who had “a short Afro with flared nostrils.” R. p. 60, lines 5–8; R. p. 142, line 22–p. 143, line 10. No description appears to have been given by A.H. at the home following the incident.

A.H., who was ten years old at the time of the home invasion, went to the Bluffton Police Department the day following the home invasion in order to participate in a photo lineup. R. p. 73 line 5–p. 77, line 14. At the police department A.H. was shown four 6-person photo lineup cards. R. p. 73, line 10–p. 74, line 4. Prior to viewing the photo lineup cards A.H. was read and shown the standard instructions on the back of the lineup cards and was asked if she understood them. R. p. 74, line 13–p. 79, line 19. A.H. was then shown the photo lineup cards and identified Appellant and signed, initialed, and circled Appellant's photograph on the card which was admitted at trial as Exhibit 46. Id.; R. pp. 77, 264. A.H. also identified Appellant at trial as one of the robbers and the person she identified from the lineup. R. pp. 66–67; R. p. 76.

Senora Jones also participated in a separate photo lineup the same day as A.H. at around 2:09 p.m. prior to which the same instructions and warnings were given. R. pp. 110–116. She was shown four photo lineups as well. Id. The four lineups Mrs. Jones was shown were identical to the ones A.H. had been shown. R. pp. 149–153. Mrs. Jones also identified Appellant's photograph, signed, initialed, and circled appellant's photograph, and it was admitted at trial as Exhibit 48. Id.; R. pp. 110–113, 121, 132. Mrs. Jones also identified Appellant at trial as one of the robbers and the person she identified from the lineup. R. pp. 97–101; R. pp. 106–107.

When Mrs. Jones was shown the four photo lineup cards the day following the robbery she only identified Appellant. R. pp. 110–112. Of note, however, at trial three years after the robbery, Mrs. Jones identified a second assailant, based on his eyes alone as his face was covered during the robbery. R. pp. 114–115; R. pp. 123–125.

Bluffton Police Officer James Duke was the lead investigator of this incident and the officer responsible for showing A.H. and Mrs. Jones the photo lineup cards and reading them the photo advisory instructions. R. pp. 140–141, 146, 153. Officer Duke testified at trial that he requested the photo lineups from the Beaufort County Sheriff's Office's Intelligence Unit, that a civilian analyst with that office sent him the photo lineups, that he reviewed them to make sure that they did not contained mixed gender and did contain six black males, and that he did not have any special training in conducting identifications other than reading the advisory instructions. R. pp. 166, line 2–168, line 15.

During pre-trial motions the State and Appellant stipulated to certain facts regarding how the Intelligence Unit had selected Appellant's photograph for the photo lineup. R. pp. 20-21; R. p. 270. The stipulated facts are that Pam Brown created the photo lineups at issue, she typically pulls a suspect's most recent booking photograph, she tries to keep the photos consistent and similar, she was surprised that she created this lineup due to the fact that Appellant's photo stood out compared to the others in his 6 person lineup card, and she relies on law enforcement to make suggestibility determinations and send them back if changes are needed. R. p. 270. During pre-trial argument on the State's Neil v. Biggers¹ motion, it was undisputed that Appellant's photograph was put into one of the photo lineups after Bluffton Police was contacted by Northern Beaufort County Sheriff's Office who suggested a number of potential suspects for the lineups. R. pp. 23–24.

¹ 409 U.S. 188 (1992).

During pre-trial motions the State submitted a memorandum of law to admit the out-of-court identification. R. p. 282, lines 20–25. No witness testimony was proffered for purposes of the Biggers hearing, but the trial court heard from both the State and Appellant on that issue. R. pp. 20–34. Following argument the trial court granted the State’s motion to admit Mrs. Jones’s and A.H.’s out-of-court identifications of Appellant. Id.

LEGAL AND FACTUAL ANALYSIS

I. The photo array was unduly suggestive which created a substantial likelihood of irreparable misidentification in violation of Appellant’s right to due process.

It is a violation of a criminal defendant’s right to due process of law to admit an out-of-court identification which flows from “an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification.” State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999) (citing Stovall v. Denno, 388 U.S. 293 (1967); State v. Patterson, 337 S.C. 215, 552 S.E.2d 845 (Ct. App. 1999)); see also State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). It follows that “[a]n in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” Moore, 343 S.C. at 286, 540 S.E.2d at 447 (citing Manson v. Brathwaite, 432 U.S. 98 (1977); Simmons v. United States, 390 U.S. 377 (1968); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980)). The reason for these legal safeguards is patent. Justice Brennan has noted that “despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries [as they] seem most receptive, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime.” Watkins v. Sowders, 449 U.S. 341, 352 (1981)

(Brennan J., dissenting) (citing Manson, 432 U.S. at 120); see also State v. Henderson, 27 A.3d 872 (N.J. 2011) (Supreme Court of New Jersey revising Manson framework in favor of more rigorous lineup procedures to overcome inherent unreliability of eyewitness identification because of juries receptiveness to such identifications).

Here the highly suggestive nature of the photo array containing Appellant's photograph is clear. First, it accentuates one of the only physical characteristics reported by Mrs. Jones when describing the suspect later alleged to be Appellant, i.e., flared nostrils. Second, the photo of Appellant stands out from the other photographs in the array by its lack of similarity to any of the fillers – a fact that jumped out at the very analyst who compiled the photo array at the request of law enforcement. Third, that Appellant's head is tilted back and mouth is open further highlights his photo over the others in the array. This suggestiveness and the lack of other indicia of reliability under the totality of the circumstances created a substantial likelihood of irreparable misidentification. Thus, the subsequent in-court identifications should have been excluded as fruit of the poisonous tree.

- a. The photo array selected by law enforcement to identify Appellant was highly suggestive

“A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification.” State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012). Pursuant to Biggers, both the U.S. Supreme Court and South Carolina courts require trial courts to rigorously test the admissibility of out-of-court identifications. The two-prong inquiry used by our courts asks first whether the identification process was unduly suggestive. Moore, 343 S.C. at 287, 540 S.E.2d at 447.

The fairness of a photographic array should be considered by looking at various factors including its size, the number of the photographs, the manner of presentation by the officers, and the array's contents. U.S. v. Concepcion, 983 F.2d 369, 377 (2d. Cir. 1992). If there is nothing inherently prejudicial about the identification procedure, such as "show-up" procedures,² the "principal question is whether the picture of the accused, matching descriptions given by the witness, so stood out from all of the other photographs as to 'suggest to an identifying witness that [that person] was more likely to be the culprit,' " Jarrett v. Headley, 802 F.2d 34, 41 (2d Cir. 1986) (quoting United States v. Archibald, 734 F.2d 938, 940 (2d Cir.1984)).

Here three distinct features of Appellant's photographs set it apart from the five filler photographs in the six person photo array shown to A.H. and Senora Jones some twenty hours after the alleged robbery.

Following the robbery and prior to the identifications, Senora Jones gave Officer Scott Chandler a description of the suspect later identified as Appellant as: "a black male; approximately six-foot, one inches tall; 180 pounds; black pants; black t-shirt" who had "a short Afro with flared nostrils." R. p. 60, lines 5-8. The information that Officer James Duke received prior to the identifications was that the suspect alleged to be Appellant "black male, early 20s, 6-2, and skinny, dark skin, flared-out nose, face uncovered, wearing a black shirt, faded black pants, and black shoes. R. p. 142, line 22-p. 43, line 10. Outside of the suspect's skin color and approximate height the only physical characteristic recalled by Mrs. Jones was the suspect's "flared nostrils" or

² Moore, 343 S.C. 287, 540 S.E.2d at 448.

“flared-out nose.” Id. The subject photo array with Appellant in the sixth position, combined with the leaning position, clearly accentuates the “flared nostrils.” R. p. 264.

One reason Appellant’s nostrils are accentuated in this photograph is because Appellant appears to have his head cocked rearward, exaggerating the effect. This is particularly of concern when it is considered within the context of the description of the crime. Both A.H. and Mrs. Jones testified that they were made to get on the ground by the assailants with A.H. sitting down against a wall and Mrs. Jones lying face down on the floor. R. pp. 67–69; R. pp. 137–138. Mrs. Jones and A.H.’s view of assailant, who was described as over six feet tall, would have been looking up at him as he moved throughout the upstairs. This casts more concern on the photograph of Appellant as the cocked back position of his head with his nose raised exposing his nostrils gives the effect that one is looking up at him.

Last, the person who put the photo array together was “very surprised that she was the individual who created the line-up.” R. pp. 24–25; R. p. 270. In explaining why she pointed out that “[Appellant’s] mouth was slightly open, and that she normally would not have created a line-up with only his mouth open.” R. p. 270. The person who compiled the photo also stated that she “relies heavily on investigators expertise” to let her know if the lineup should be amended out of concerns regarding suggestiveness. Id. Nonetheless, she was surprised that she would have put one together in that manner because it singled out Appellant’s photograph. See id.

This is quite different than a photo array where two photos had different color backgrounds than the others, State v. Turner, 373 S.C. 121, 122, 644 S.E.2d 693, 696 (2007) (not unduly suggestive), or where the photograph of the defendant was four to five

times larger than the other photos shown the witness, State v. Carlson, 363 S.C. 586, 594, 611 S.E.2d 283, 287 (Ct. App. 2005) (unduly suggestive). Here the head position and the open mouth both distinguished Appellant's photograph from any of the other filler photos in the array. Combined with the accentuation of the one physical characteristic Mrs. Jones reported that can be seen in a photo, the flared nostrils, Appellant's photo so stood out compared to the others in the array that it is unduly suggestive. It is not one or two characteristics that Appellant shared with the other fillers. It is three characteristics singular to Appellant, one of which matched perfectly a description of the suspect by Mrs. Jones, that made this photo stand out so as to suggest Appellant's identification. This was clear even to the person who put the photo array together. The trial court erred by not finding the photo array unnecessarily suggestive.

- b. Under the totality of the circumstances the identification based on the unnecessarily suggestive identification process was unreliable and should be excluded

Once an out-of-court identification is ruled unnecessarily suggestive, the trial court must move to the second Biggers prong and assess the identification's reliability. State v. Dukes, 404 S.C. 553, 558, 745 S.E.2d 137, 139 (Ct. App. 2013). The question is whether "under the totality of the circumstances the identification was reliable." Patterson, 337 S.C. at 229, 522 S.E.2d at 852. Five factors should be considered when evaluating the reliability of an identification pursuant to Biggers: (1) the witness's opportunity to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. Stewart, 275 S.C. at 450, 272 S.E.2d at 629.

Here, there are two identifications. The first was by a ten year old child, A.H., who testified that the suspect she identified as Appellant was one of three assailants who ordered her, her brother, and nieces to sit in a hallway upstairs while they moved about the house. R. pp. 67–69. A.H. testified that the suspect would leave and come back, go into her mother’s bedroom, and would go up and down the stairs during the robbery. R. p. 71, lines 16–25. It is unclear from the record how long or how closely A.H. was able to view suspect two. Understandably A.H. testified that she was scared during the ordeal. R. p. 85, line 19. Mrs. Jones’s testimony confirmed that fact. R. p. 136, lines 1–7. A.H. never reported any identifying physical characteristics of the suspect save for that he had a silver gun and was wearing black clothes. Officer Duke did testify that A.H. identified Appellant quickly, R. p. 147, lines 20–25, and A.H. testified she was certain the Appellant was one of the assailants that day, R. p. 91 5–10. However, almost twenty hours had passed since the time of the robbery and A.H. had time to discuss the incident with Mrs. Jones who described A.H.’s recollection was crucial in helping her identify the suspects since Mrs. Jones was face down during much of the robbery. R. p. 137, lines 10–18.

A.H.’s testimony arguably only meets one Biggers reliability factor: certainty. See Moore, 343 S.C. at 289, 540 S.E.2d at 449 (identification excluded as unreliable where only factor supporting finding of reliability was short time between crime’s occurrence and witness’ identification and consequently the identification was excluded). However, Appellant’s expert testified regarding research studies that suggested children from nine to ten have a higher error rate in identifying persons in a lineup. R. p. 194, line 12– p. 195, line 9. Combining that consideration with the conclusion that A.H. did not

meet any of the other reliability criteria under Biggers her out-of-court identification of Appellant which was influenced by the suggestive identification process was so unreliable that a substantial likelihood of irreparable misidentification existed. Cf. State v. Govan, 372 S.C. 552, 559, 643 S.E.2d 92, 95-96 (Ct. App. 2007) (identification reliable where witness viewed robber in well-lit building while in direct contact with him for duration of robbery, robber's appearance was consistent with witness's prior description, and identification occurred 45 minutes after the robbery); State v. Jones, 273 S.C. 723, 730, 259 S.E.2d 120, 124 (1979) (identification reliable where witness observed assailants for an hour and a half, correct description of suspect given immediately after crime).

The same is true of Senora Jones's out-of-court identification. While Mrs. Jones testified she was at one point able to look at the suspect's eyes in order to look into his soul, she also testified at trial that she stayed face down in her bedroom for most of the incident. R. p. 137, line 12. No testimony was elicited about the lighting within the house at the time of the robbery. A.H. testified that the suspect was in and out of her mother's room during the robbery. Mrs. Jones testified that she felt threatened by one of the other suspects and that she feared for her life during the robbery. R. pp. 101-103. As discussed previously, Mrs. Jones told police the suspect was close to six feet tall, had a short afro, and had flared nostrils. R. p. 60, lines 5-10; R. pp. 142-143. It was undisputed at trial that Mrs. Jones was certain her identification of Appellant was correct. And, again, 20 hours had elapsed between the time of the robbery and Mrs. Jones testified discussing the incident with A.H. was crucial in helping her identify the suspects since Mrs. Jones was face down. R. p. 137, lines 10-12.

Taken as a whole, Mrs. Jones's out-of-court statement is also unreliable under Biggers. While the State pointed out that Mrs. Jones was certain of her identification of Appellant, it is worth noting that at trial three years after the incident and after having failed to identify anyone else, Mrs. Jones confidently identified a second assailant based on his eyes alone as his face was covered during the robbery. R. pp. 114-115; R pp. 123-125. Mrs. Jones's admitted she relied on A.H. to help with identifying suspects, admits she was face down for most of the encounter, and that she was fearful for her life and the lives of her children.

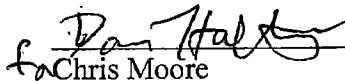
One or two factors do not tilt the scales in favor of reliability. In State v. Spears, 393 S.C. 466, 481, 713 S.E.2d 324, 332 (Ct. App. 2011), the identification was found reliable where the witness provided a detailed description of two suspects to law enforcement, she saw the photo four hours after the robbery, and she previously knew the suspect from her neighborhood. In State v. Jones, the witness's opportunity to observe the suspects during the period of approximately an hour and a half and the correctness of the physical descriptions given police immediately after the commission of the crimes supported a finding of reliability. State v. Jones, 273 S.C. 723, 730, 259 S.E.2d 120, 124 (1979). Finally, in State v. Govan, the witness' identification reliable where witness closely viewed robber in well-lit building, was in direct contact with the robber for the entire as he held her by the arm, and identification occurred 45 minutes after the robbery. State v. Govan, 372 S.C. 552, 559, 643 S.E.2d 92, 95-96 (Ct. App. 2007). Here, under the totality of the circumstances, Mrs. Jones does not sufficiently meet the Biggers criteria and her out-of-court statement was unreliable as a matter of law.

Appellant's identification by A.H. and Mrs. Jones should have been excluded as a matter of law and, as a matter of due process, the witnesses' in-court statements should also have been excluded as fruit of the poisonous tree. This should be the basis for a remand of this matter to the trial court.

CONCLUSION

Appellant respectfully requests that this Honorable Court find the out-of-court identification procedure unduly suggestive and the two ensuing identifications were unreliable as a matter of law and remand this case for a new trial.

Respectfully submitted,



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Dated: July 9, 2015

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of General Sessions

Brook P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-002537

THE STATE,

Respondent,

v.

MATION BENJAMIN POWELL,

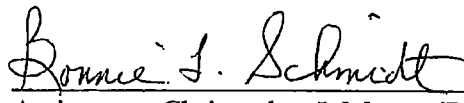
Appellant.

PROOF OF SERVICE

The undersigned employee of the law offices of Richardson, Patrick, Westbrook & Brickman, LLC attorneys for Appellant-Respondent, do hereby certify that service of the Brief of Appellant was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

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ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of General Sessions

Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

JUL 07 2015

SC Court of Appeals

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THE STATE,

Respondent,

v.

MARION BENJAMIN POWELL,

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APPEAL FROM BEAUFORT COUNTY

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STATEMENT OF ISSUE ON APPEAL

The trial court properly admitted the victims' out-of-court identifications from photo lineups because they were not unduly suggestive, did not create a substantial likelihood of irreparable misidentification, and did not deprive Appellant of due process.

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant for five counts of kidnapping, one count of first-degree burglary, one count of armed robbery, one count of possession of a firearm during the commission of a violent crime, and one count of unlawful possession of a firearm. (R.11-19.) On November 18-22, 2013, Appellant proceeded to trial before a jury and the Honorable Brooks P. Goldsmith. Scott W. Lee, Esquire, represented Appellant, and Assistant Solicitors Benjamin Shelton and Benjamin Coppage represented the State. The jury found Appellant guilty on all counts. (R. 259.) Judge Goldsmith sentenced him to twenty-seven years' imprisonment for the kidnapping charges, the first-degree burglary charge, and the armed robbery charge, and five years' imprisonment for the possession of a firearm charge, with all sentences to run concurrently. (R. 263.)

On November 25, 2013, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On October 25, 2010, Senora Jones (Victim) was watching a movie in the upstairs area of her home while her children played outside in a fenced-in backyard. (R. 97, lines 7-15.) Suddenly, three black males came into her bedroom and she could hear the children right outside in the hall. (R. 97, lines 15-18.) The men held her at gunpoint on the floor while they took money and items in the amount of \$51,540. (R. 97, lines 19-24; R. 160, line 18.) Victim called the police shortly after the men left, and she was able to identify one of the men in a photographic lineup the following day. (R. 108, line 21-25; R. 110, line 2-R. 113, line 6.) Victim and her daughter both identified Appellant in separate lineups. (R. 143, line 14-R. 144, line 18.) After confirming Appellant's identification on October 26, 2010, obtaining an arrest warrant, and attempting to locate him with the help of the media, the police finally apprehended him on March 27, 2011, when Appellant turned himself in. (R. 158, line 20-R. 159, 23; R. 180, line 16-R. 181, line 12.) He was charged with five counts of kidnapping, one count of first-degree burglary, one count of armed robbery, one count of possession of a firearm during the commission of a violent crime, one count of unlawful possession of a firearm, and one count of pointing and presenting a firearm and proceeded to trial.¹ (R.11-19.)

Pretrial, the trial court held a Neil v. Biggers² hearing to determine the admissibility of the out-of-court identifications made by Victim and her daughter. (R. 20-34.) Rather than present testimony, the State submitted a memorandum entitled "Memo in Support of Introduction of Identification Evidence (Neil v. Biggers Memo)"

¹ The charges of unlawful possession of a firearm and pointing and presenting a firearm were nolle prossed on January 23, 2014. (R. 9)

² 409 U.S. 188 (1972).

("the State's memo"), to which Appellant made no objection.³ (R. 28, lines 12-14; SROA. 2, line 8.) Along with the State's memo, the State submitted an email from the solicitor to defense counsel regarding the analyst who created the lineup. Both parties stipulated to the facts provided in the email to avoid calling the analyst as a witness. (R. 20, line 16; R. 21, line 7.) Appellant argued the lineup containing Appellant's photo that was shown to Victim and her daughter was overly suggestive. (R. 22, lines 10-12.) However, he conceded "[i]t happened at night so [the lineup] was done the next morning, so there was a short amount of time there." (R. 22, lines 23-25.) Appellant's main complaint in regard to the lineup was that the "flared nostrils," which were the distinguishing characteristic given in the victims' descriptions, were "greatly enhanced by the photo that they chose to put in the photo lineup." (R. 25, lines 10-17.) The solicitor then argued that all the individuals in the lineup had about the same width neck, almost the same skin tone (except the one in position 1 who is darker), and large nostrils that were apparent in the photos. (R. 30, lines 10-14.) He also pointed out the others in the lineup have their heads slightly cocked back or slightly turned to the right or to the left. (R. 30, lines 14-16.) He argued every person in the lineup had slight variations such as pursed lips, turning to the side, or not quite looking at the camera, in addition to Appellant having his mouth slightly open. (R. 30, lines 17-22.) The solicitor noted they all had similarly shaped and sized noses, wore the same orange shirt, and had a concrete background. (R. 31, lines 1-3.) He pointed out that although one could identify two things in each individual that were slightly different from the others, the similarities far

³ The record indicates the trial judge considered the facts recited in the memorandum and they were not opposed. (SROA. 2, lines 1-7.)

exceeded the two differences Appellant argued were significant: a slightly cocked-back head and slightly open mouth. (R. 31, lines 3-10.)

The trial court found the lineup was not unduly suggestive and stated, “[I]f somebody were to – if I were taking a test and somebody told me to pick out, mark the number of individuals on this photo lineup that had flared nostrils, I probably would mark four out of the six. So I don’t find that to be unduly suggestive.” (R. 33, lines 12-17.) Based on the State’s memo, the trial court determined the witnesses had a good opportunity to observe the person they described, noting he was not wearing a disguise or covered in any way. (R. 33, lines 18-21.) The trial court also pointed out the perpetrator was there for an extended period of time and that the lineup was done within 24 hours—the next day. (R. 33, lines 21-25.) Furthermore, the trial court emphasized Victim’s confidence in her decision and both victims’ ability to pick him out almost immediately and separately. (R. 33, line 25-R. 34, line 4.) The trial court denied the defense motion relating to identification. (R. 34, lines 5-6.)

Sergeant Tricia Nicole Brubaker of the Bluffton Police Department testified that she responded to a home invasion, armed robbery, and kidnapping on October 25, 2010. (R. 51, line 16-R. 52, line 12.) She testified that the victims were able to give descriptions of the perpetrators: two or three black males brandishing weapons. (R. 53, lines 12-17.)

Sergeant Scott Chandler testified he responded to the robbery call and observed that everything had been gone through, such as mattresses turned over and drawers pulled out. (R. 57, lines 3-12; R. 58, lines 16-21.) Sgt. Chandler referred to his report to refresh his memory of the description Victim gave him of the suspects. (R. 59, lines 2-8.) Based on his report, he recalled being told the second suspect was a black male, approximately

six feet, one inch tall, 180 pounds, wearing black pants and a black t-shirt, with no facial hair, a short Afro, and flared nostrils, and that he was carrying a silver handgun in his right hand. (R. 60, lines 5-10.)

A.H., Victim's daughter and one of the victims, described being outside and walking into her house to get a jacket. (R. 64, lines 16-25; R. 67, lines 9-11.) On her way down the stairs, she saw three men coming up the stairs. One told her and the other children to sit against the wall and be quiet. (R. 67, lines 11-15.) The man who told her to be quiet went into her mother's room where she heard them yelling at her mother that she was going to die, to show them where everything was, and to be quiet. (R. 67, lines 14-25.) When asked which man she had the most contact with during the incident, A.H. pointed out Appellant and gave a description of what he was wearing the day the crimes occurred. (R. 68, lines 5-15.) Defense counsel objected to A.H.'s in-court identification based on previous arguments. (R. 68, lines 17-22.) A.H. testified Appellant walked back and forth from where the children sat to her mother's bedroom and gave her cousin a tissue because she was crying. (R. 68, line 23-R. 69, line 3.) Between walking back and forth and going up and down the steps, he stood with the children and held them at gunpoint. (R. 69, lines 3-5; R. 71, lines 18-25.)

A.H. testified the men had luggage when they left, and she saw her computer and some clothes, shoes, and purses that were her mother's. (R. 70, line 22-R. 716, line 12.) She testified that she went to the Bluffton Police Department and looked at lineups. (R. 72, lines 2-17.) She identified Appellant in one of the lineups. (R. 74, lines 2-10.) She recognized her signature on the back of the lineup and acknowledged the date of her signature was October 26, 2010, the day after the incident. (R. 74, line 13-R. 75, line 5.) A.H. confirmed that she identified number 6 in the lineup and that it was Appellant, again

identifying him in court. (R. 76, lines 3-18.) She testified she did not recognize anyone else in the lineups, and she affirmed she circled Appellant's picture and put her initials next to it because she was positive she recognized him as the man who came into her house that day and robbed them. (R. 76, line 19-R. 77, line 14.) She further testified that the instructions on the back of the lineup were read to her, telling her not to conclude or guess that the photographs contain a picture of the person who committed the crime and that she was not obligated to identify anyone and stressing the importance of not identifying innocent persons, and that she understood the instructions. (R. 78, lines 7-25.) She explained this meant she did not have to identify someone if she did not see him but that if she recognized someone, she needed to point him out. (R. 79, lines 1-4.) Again, she stated she was positive about her identification. (R. 79, lines 5-8.)

Next, Victim testified regarding what happened on the day of the incident, saying she was watching a movie in her room when three black males came in. (R. 97, lines 1-18.) One of the men instructed her to lie on the floor and not move while pointing a gun at her and asking her where the money was, while the other two men ransacked the house. (R. 97, lines 19-24.) The man whom she called the "main one" told her to stay on the floor and would peek out to check on the children from time to time. (R. 98, lines 10-21.) The man continued to point the gun at her, and she told him where some money was. (R. 99, lines 5-20.) She could hear the men dumping things out in other rooms and even heard them go into the attic. (R. 100, lines 1-5.) She described the one who stayed with her while the others ransacked the house as wearing a black shirt and black pants, and she explained it was so "clear to see him" because he had nothing covering his face. (R. 100, lines 6-19; R. 101, lines 13-15.)

Victim related how at one point she looked directly at him and pleaded with him to look in her eyes just before he pointed the gun at her and told her to keep her head down. (R. 100, line 19-R. 101, line 12.) When the men left, Appellant told her not to call the police or he would come back and kill them. (R. 107, lines 20-22.) She waited five minutes before calling the police, who came and took pictures of the scene and statements from the victims. (R. 109, lines 2-24.) The next day, Victim met with officers to attempt to identify the intruders from lineups. (R. 110, lines 2-13.) She testified she was able to pick the person out of the lineup “immediately” because right when she saw it, she knew it was him—the person she had pleaded with and was there with her the whole time during the robbery. (R. 112, line 11-R. 113, line 6.) Victim testified she had not spoken to A.H. about whether A.H. had made an identification before she made her own and that they were in different rooms at different times. (R. 113, lines 15-19.) She testified that when shown the lineup, she read the instructions about how she should not guess, and that when she saw Appellant she did not have to second guess because she knew it was him as soon as she saw the picture. (R. 139, lines 9-22.)

Officer James Duke testified he showed Victim and A.H. four lineups.⁴ (R. 143, lines 14-21.) Appellant was in position 6 of one of the lineups. (R. 144, lines 6-9.) Duke testified Appellant was referred to as the second suspect in the description he was given. (R. 144, lines 10-18.) He showed the lineups to the two victims separately, in separate rooms. (R. 144, line 22-R. 145, line 11.) Duke explained what the photo lineup advisory stated—not to conclude or guess about whether she recognized anyone—and testified he read it to A.H. before showing her the lineup. (R. 146, lines 1-24.) A.H. took only a

⁴ According to the State’s memo, police showed both victims four more lineups in subsequent days. (R. 275.)

matter of seconds to identify Appellant in the lineup and was certain about the identity. (R. 147, line 15-R. 148, line 2.) The State moved Exhibit Number 47, the photo lineup in which A.H. identified Appellant, into evidence. (R. 147, lines 7-14.) Duke then testified regarding Victim's identification of Appellant in the lineup, noting she too identified him immediately and was positive it was him. (R. 153, line 23-R. 154, line 22.)

After the State rested, the defense called Dr. Lori Vanwallendael, an associate professor of psychology, and offered her as an expert in eyewitness memory. (R. 188, line 10-R. 189, line 17.) The State did not object, and the trial court qualified her as an expert. (R. 190, lines 18-22.) She testified that 75% of Innocence Project cases involve an eyewitness who identified the wrong person. (R. 191, lines 16-19.) She also testified regarding how stress can affect a person's mental resources, focusing on survival rather than paying attention to details about people's appearances. (R. 192, lines 10-22.) In addition, Dr. Vanwallendael testified that people who are focusing on a weapon are less likely to be able to identify the perpetrator. (R. 193, lines 3-19.) She testified that a lineup with one person exhibiting certain features while the others did not would be suggestive and opined the lineup at issue was suggestive because the photograph of Appellant exaggerated the characteristic of the flared nostrils due to his leaning back. (R. 203, line 1-R. 204, line 22.)

The trial judge charged the jurors on identification, telling them they must be satisfied beyond a reasonable doubt of the accuracy of the identification before they could convict and listing things they could consider such as the length of time, how close the witnesses were, and the lighting conditions. (R. 250, lines 12-18; R. 251, lines 2-6.) The jury found Appellant guilty of all charges, and the trial court sentenced him to twenty-seven years' imprisonment for the kidnapping charges, the first-degree burglary

charge, and the armed robbery charge, and five years' imprisonment for the possession of a firearm charge, with all sentences to run concurrently. (R. 263.)

ARGUMENT

The trial court properly admitted the victims' out-of-court identifications from photo lineups because they were not unduly suggestive, did not create a substantial likelihood of irreparable misidentification, and did not deprive Appellant of due process.

Appellant contends the trial court erred in admitting the eyewitness identification of Appellant where he was first identified in a photo lineup, arguing his photograph is distinct from the others and unduly accentuates his features, rendering it patently suggestive. Further, he argues the resulting suggestiveness makes both the out-of-court and in-court identifications inadmissible due to the substantial likelihood of irreparable misidentification. However, the trial court properly admitted the victims' identification testimony, as there was ample evidence supporting the circuit court's finding that the out-of-court photographic lineup identifications did not result from unduly suggestive police procedures. Thus, Appellant's challenge to the identification testimony should be denied and his convictions should be affirmed.

Standard of Review

In criminal cases, appellate courts only review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." State v. Liverman, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012). "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

An out-of-court identification of a defendant violates due process and must be suppressed when the identification procedure used by law enforcement was impermissibly suggestive and conducive to a substantial likelihood of misidentification. Liverman, 398 S.C. at 138, 727 S.E.2d at 425; State v. Dukes, 404 S.C. 553, 557-58, 745 S.E.2d 137, 139 (Ct. App. 2013). A witness's subsequent in-court identification is inadmissible "if a suggestive out-of-court identification procedure created a very substantial likelihood of *irreparable* misidentification." State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (emphasis added). "A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." Id.

In Neil v. Biggers, the United States Supreme Court set forth a two-part test for courts to use in determining whether due process requires suppression of an eyewitness identification. 409 U.S. 188, 198 (1972). "First, the court must determine whether the identification resulted from 'unnecessarily suggestive' police procedures." Dukes, 404 S.C. at 557, 745 S.E.2d at 139. "If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong." Id. at 557-58, 745 S.E.2d at 139. "If the court finds, however, that the police used an impermissibly suggestive identification procedure, it must then determine whether the identification was nevertheless 'so reliable that no substantial likelihood of misidentification existed.'" Id. at 558, 745 S.E.2d at 139. The defendant bears the burden of proving the identification procedure was impermissibly suggestive. Id. at 561, 745 S.E.2d at 141 ("Our supreme court has never placed the burden of disproving suggestiveness on the State. The Fourth Circuit, whose decisions

regarding federal constitutional law are binding on us, has held the defendant bears the burden of proving the identification procedure was impermissibly suggestive.”).

Suggestiveness

In the case at bar, the Intelligence Unit at the Beaufort County Sheriff’s Department created a six-person photo array that included Appellant’s photo. The analyst who put together the lineup, Pam Brown, had no law enforcement training and no other involvement in the case. The Northern Beaufort County Sheriff’s Office told the Bluffton Police Department about four men—including Appellant—who were suspected of similar crimes; they were subsequently put into four photo arrays. (R. 23, line 25-R. 24, line 4.)

Appellant focuses on the comment that Brown herself was “very surprised that she was the individual who created the line-up” and that “she normally would not have created a line-up with only his mouth open.” (App.Br.10 citing Court’s Exhibit 2.)⁵ Although Appellant seems to place great weight on Brown’s opinion that Appellant’s photo stood out, Brown simply did not make such a statement in Court’s Exhibit 2. All the email said was that “[s]he first was very surprised that she was the individual who created the line-up and pointed out that [Appellant’s] mouth was slightly open, and that she normally would not have created a line-up with only his mouth open.” (R. 270) The email also explained how she creates lineups and that she relies heavily on investigators to let her know if one is too suggestive. Nowhere in the email is there any indication that

⁵ In the record, there is some confusion about which exhibit is Court’s 2. Court’s Exhibit 2 is identified as a photo lineup. (R. 48, line 19; R. 21, lines 13-14.) However, it was marked immediately following a discussion of the email between the solicitor and the defense attorney concerning Pam Brown. That email is stamped Court’s Exhibit 2, while the photo lineup is stamped Court’s Exhibit 3, even though the list of exhibits provides that there is no Exhibit 3. (R. 48, line 21.) Regardless of the confusion, it appears both the photo array and the email were before the trial court.

Brown actually said she thought Appellant's photo stood out. In any event, the trial judge was provided with the email—which both parties agreed would be admitted as a Court's exhibit in lieu of having Brown testify—and he was able to consider the information in the email as part of his determination of whether the lineup was suggestive. He still found it not unduly suggestive.

Appellant argues the lineup was unduly suggestive because his photograph accentuated one of the only physical characteristics Victim used in her description: flared nostrils. He also argues the photo stands out in its lack of similarity to any of the fillers, though he does not explain how, and notes that his head is tilted back and his mouth is open. Further, he argues the placement of Appellant in the sixth position clearly accentuates the flared nostrils. The trial court disagreed and found the lineup was not unduly suggestive. (R. 35, lines 12-13). Regarding Appellant's claim that he was the only one who looks like he had flared nostrils, the trial court noted: "[I]f somebody were to—if I were taking a test and somebody told me to pick out, mark the number of individuals on this photo lineup that had flared nostrils, I probably would mark four out of the six." (R. 35, lines 13-17). The photographic lineup itself supports the trial court's observations, as each suspect in each of the photographs has a very similar nose with wide nostrils and each has his head at a slightly different angle. Only one is looking straight ahead. All subjects have similar haircuts, clothing, skin tones (with the exception of number 1 who has a darker complexion), and backgrounds, and all have wide necks. Additionally, Appellant's argument that the lineup was unduly suggestive because he is positioned last is preposterous, as the same could be said if Appellant's photograph were listed first, or in the middle, or in any other position he wished to characterize as suggestive without merit. Nothing about being in the sixth position accentuates his

nostrils. Appellant failed to carry his burden of proving the identification procedure was impermissibly suggestive. See State v. Dukes, S.C. 553, 561, 745 S.E.2d 137, 141 (Ct. App. 2013) (finding the defendant bears the burden of proving the identification procedure was impermissibly suggestive).

It is important to note that Victim and A.H. picked Appellant not just out of a six-person lineup. Rather, they each picked Appellant out of eight six-person lineups, or a total of forty-eight people. When reviewing the other lineups, number 4 has his mouth open and teeth showing in State's Exhibit 47, number 1 has his head slightly cocked back in State's Exhibit 54, and numbers 3 and 6 have their heads slightly cocked back in State's Exhibit 55. Yet both Victim and A.H. chose Appellant as the only person they recognized as one of the intruders. Appellant argues that at trial, Victim "confidently identified a second assailant based on his eyes alone as his face was covered during the robbery." (App.Br.14.) However, Victim indicated she recognized number 4 in State's Exhibit 49 as one of the men who had his face covered, but she was not sure because she could only see his eyes. (R. 114, lines 10-25; R. 115, lines 1-6; 14-20.) She emphasized she did not identify the man based only on his eyes because "you can't, you know, identify somebody a hundred percent by eyes, so I didn't." (R. 123, lines 12-23.) While she did testify she was sure it was him based on his eyes, she also stated that she knew, because of the warnings she read before viewing the lineups, that she could not base an identification on just one part. (R. 124, line 1-R. 125, line 11.)

As evidence existed to support the trial court's decision, it did not abuse its discretion in ruling the procedure was not impermissibly suggestive. Dukes, 404 S.C. at 563, 745 S.E.2d at 142. Indeed, because the evidence supports more than one reasonable inference, the question was a matter of law for the trial court to determine. See

Liverman, 398 S.C. at 138, 727 S.E.2d at 425 (“In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court.”). Consequently, this Court should affirm the trial court’s ruling and need not consider the second prong of Biggers. Id. To the extent this Court disagrees, the State submits there was also sufficient evidence that the out-of-court identification was reliable under the totality of the circumstances.

Reliability

When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors: (1) the witness’s opportunity to view the perpetrator at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Biggers, 409 U.S. at 199-200; State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 697 (2007); State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011).

Appellant argues **A.H.** only met one of the Biggers factors: certainty. On the contrary, she met each one of the five factors. The State’s memo provided all the information the trial judge based his ruling on and was not objected to by Appellant. As to the first factor, the State’s memo indicated both **A.H.** and Victim had ample opportunity to view Appellant at the time of the crime and had conversations with him while his face was not covered. Appellant argues the record is unclear as to how long or closely **A.H.** viewed him. However, the trial court found, based on the State’s memo, that the witnesses had a good opportunity to observe Appellant without a disguise or anything covering his face and that he was there with them for an extended period of time.

Appellant even concedes Victim was able to look at the suspect's eyes despite being face down for most of the incident. (App.Br. 13.) While Appellant argues no testimony was elicited about lighting, the State's memo provided "they were inside their lighted house." (R. 2478.) As to the second factor, they had opportunities to see Appellant both at gunpoint and when a gun was not in their faces. He was the one assailant who was in contact with either A.H. or Victim the entire time while his co-conspirators searched the house. Both witnesses demonstrated a high degree of attention in their descriptions of Appellant and the entire incident, and their accounts are corroborative. While Appellant presented expert testimony that guns distract witnesses from remembering facts, case law disputes that assertion. See State v. Govan, 372 S.C. 552, 560, 643 S.E.2d 92, 96 (Ct. App. 2007) (finding that under circumstances such as an armed robbery, specifically where a gun is being held to a victim's head, the victim's attention would have been heightened) ; see also State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-42 (Ct. App. 1999) ("A person in fear of his life presumably has a more acute degree of attention to his surroundings than a mere passerby."). As to the third factor, A.H.'s and Victim's prior descriptions fit Appellant. Appellant was described as six feet, one inch tall and he was in fact six feet tall; he was described as 180 pounds and he was 160. He had the large nostrils and eyes Victim described to the forensic artist and was strikingly similar to the sketch. While Appellant characterizes as unreliable Victim's depending on A.H. to assist her in describing the suspect when she called 911, Victim pointed out A.H. was able to see all the suspects when they first came in from the backyard and walked the children into the house, while Victim did not see them until they were in her bedroom and made her put her face down. (R. 137, line 10-R. 138, line 19.) As to the fourth factor, A.H. and Victim were certain when they independently picked Appellant out of

eight six-person lineups as the only person they recognized as one of the intruders. The State's memo indicated A.H. and Victim took their time studying each lineup before selecting Appellant in the second lineup, and they did not have any difficulty or hesitation identifying him. As to the fifth and final factor, mere hours passed between the crime and the lineup procedures. They selected Appellant from the lineup the day after the incident. As noted in the above discussion on suggestiveness, the fact that Victim was so adamant about following the instructions when choosing someone from the lineups that she would not identify a person unless she was 100% certain demonstrates her reliability.

Appellant's expert cast doubt on the reliability of the victims' description and identification based on factors such as A.H.'s age, the fact that a gun was involved, the impact of stress on identification, and common problems with lineups, even going so far as to opine that this particular lineup was suggestive. All of these things were presented to the jury, to be considered when weighing the reliability of the identifications. However, none of this was presented to the trial court before it made its ruling regarding the admissibility of the identifications and has no bearing on the trial court's admissibility ruling.

Therefore, the trial court did not abuse its discretion in denying Appellant's motion to suppress the identification testimony, and Appellant's convictions should be affirmed.

CONCLUSION

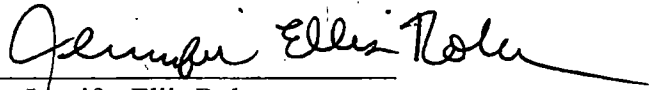
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 7, 2015

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of AppealsAPPEAL FROM BEAUFORT COUNTY
Court of General Sessions

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-002537

THE STATE,

Respondent,

v.

MARION BENJAMIN POWELL,

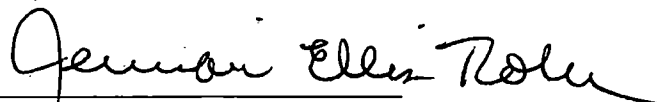
Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule
211(b), SCACR.

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ATTORNEYS FOR RESPONDENT

July 7, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

SC Court of Appeals

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2013-002537

THE STATE,

Respondent,

v.

MARION BENJAMIN POWELL,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 7th day of July, 2015.



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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Marion B. Powell, Appellant.

Appellate Case No. 2013-002537

Appeal From Beaufort County
Brooks P. Goldsmith, Circuit Court Judge

Unpublished Opinion No. 2016-UP-297
Submitted June 1, 2016 – Filed June 15, 2016

AFFIRMED

Christopher James Moore, of Richardson Patrick
Westbrook & Brickman, LLC, and Chief Appellate
Defender Robert Michael Dudek, both of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Jennifer Ellis Roberts, both of
Columbia; and Solicitor Isaac McDuffie Stone, III, of
Bluffton, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Liverman*, 398 S.C. 130, 137, 727 S.E.2d 422, 425 (2012) ("In criminal cases, the appellate court sits to review errors of law only."); *id.* at 137-38, 727 S.E.2d at 425 ("Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact."); *id.* at 138, 727 S.E.2d at 425 ("In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court."); *State v. Traylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526-27 (2004) ("The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification.^[1] First, a court must ascertain whether the identification process was unduly suggestive. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed."); *Liverman*, 398 S.C. at 138, 727 S.E.2d at 425 ("Generally, the decision to admit an eyewitness identification is at the trial [court's] discretion and will not be disturbed on appeal absent an abuse of discretion.").

AFFIRMED.²

HUFF, SHORT, and THOMAS, JJ., concur.

¹ See *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (holding the court should consider the following factors under the totality of the circumstances when evaluating the likelihood of misidentification: "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation").

² We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 01, 2016

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: The State v. Marion B. Powell
Lower Court Case No. 2011GS0700778, 2011GS0700779,
2011GS0700780, 2011GS0700781, 2011GS0700782, 2011GS0700783,
2011GS0700784, 2011GS0700786
Appellate Case No. 2013-002537

Dear Clerk of Court:

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

Very truly yours,

V. Claire Allen, Deputy
CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Christopher James Moore, Esquire
Jennifer Ellis Roberts, Esquire
Isaac McDuffie Stone, III, Esquire

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF BeaufortMarion Benjamin Powell

Full name and prison number (if any) of Applicant.

2017 MAY -1) PM 12:00

IN THE COURT OF COMMON PLEAS

JERRI ANN ROSENEAU
CLERK OF COURT

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

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 McCormick Correctional Institution SC, 29899
2. Name and location of Court which imposed sentence 14th Judicial Cir., County of Beaufort
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: Answer on reverse side labeled (4)
 - (a) _____
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) November 22, 2013
 - (b) 27 years

Revised 3/2003

4.) The indictment number or numbers (if known) upon which⁷⁸⁹ and the offenses for which sentence was imposed :

- a) Indictment No. 2011-GS-07-00780 : Kidnapping
- b) Indictment No. 2011-GS-07-00781 : Kidnapping
- c) Indictment No. 2011-GS-07-00782 : Kidnapping
- d) Indictment No. 2011-GS-07-00783 : Kidnapping
- e) Indictment No. 2011-GS-07-00779 : Kidnapping
- f) Indictment No. 2011-GS-07-00784 : Armed Robbery
- g) Indictment No. 2011-GS-07-00778 : Burglary 1st
- h) Indictment No. 2011-GS-07-00786 : Possession of a weapon during the commission of a violent crime
- i) Indictment No. 2011-GS-07-00787 : Unlawful Possession of a firearm

(c) Judge ruled no gps registry for kidnapping (pages 739 & 740)

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
 (b) after a plea of not guilty ✓ _____
 (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

I filed a direct appeal due to conviction. 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. Direct Appeal was denied
 ii. _____
 iii. _____

(c) the date of each such result:

- i. June 15, 2016
 ii. _____
 iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. Unpublished opinion No. 2016-UP-297
 ii. The courts disagreed with Mr. Moore / Attorney
 iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) _____
 (b) _____
 (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: See attached pages labeled: page 2, questions 10

10 10-11-12-13
1) (a) I was in fact placed in a unfair, inappropriate, and overly suggestive photo line up. 1st → The court and also my attorney allowed Pam Brown the person who created the photo line up to not testify. See Trans pages 129, lines 16-25 & pages 130, lines 1-6 * 2nd * see Trans. page 134 lines 1-25 * In her own opinion that my line up was not done correctly or as should have been done. 3rd * See page 133 lines 18-21 * Pam Brown has no training in photo lineups. * See page 139 of Trans. lines 13-14 * * See Trans page 139, lines 21-22 * See Trans page 141, lines 1-3 * 4th * See Trans. page 141, lines 16-25 * Obvious and apparent framework of authorities. 5th more importantly. Prosecution says that I was placed in this line up because Northern Beaufort incidents were similar to this: Both 2 incidents that I was charged with. 2 incidents that were dropped due to obvious lies → Thomas General: Was allegedly tied up, robbed for drugs, and motion of discovery is full of [a bunch of urban novel extortion ring story.] → K. Bradshaw: (who is not a relative of mine as said in court) allegedly that he was robbed, pistol whipped, and shot at. Where is the similarity?

(b) page 86 in Trial Transcript, lines 4-10. Ben Shelton informs the court that the investigation was not complete. And also that he asked for a continuance. * This trial took place in 2013. It's now 2017 and these "alleged" co-defendants still remain uncharged. Which is further proof and reason jail tapes between myself and Mr. Young should have never been able to be used. Because: have nothing to do with the matter at hand.

(c) → page 333 in Trial Transcript. Cleven Jones was asked where was he at the time of the alleged incident. Line 25 - Cleven Jones stated that he just left his job Stokes Honda.

* Prosecution and also my attorney refused to point out this outright perjury (LIE) to the court *

* Investigative in my Rule 5 motion of discovery * : Reveal that Stokes Honda officials made it very clear! That is that Cleven Jones has never & had never worked as a car broker there. Micheal Coxwell at Stokes Honda nor other Stokes Honda reps were called to testify to this very important information. What type of prosecution or counsel would not want this lie, & fabricated alibi presented to the court, to the jury?

Continued next page →

Marion Brown #SCDL
333610

c) continuance of c → Eric Rileys testimony

• Not only does this man admit that this was his way to get back at Kenya Hagood [Trans. pages 515-516]

• Prosecution know and pin point outright lies in Eric Riley's original written statements. And still allowed his testimony by dissecting what they could use to aid them in a conviction.

* Furthermore, If a thorough investigation and honest effort of truth was being sought. It would be known, that the only Kenya I know is Kenya "Moultrie" from where I was born and raised. Big Estate and Vick State as written in my transcript.

[Eric Riley is nothing more than a hostile witness who made a mockery of the court for his own personal reasons]

d) My trial counsel was indeed ineffective due to him not calling to the stand: Stokes Honda Staff, Det. John Gobel & numerous other narcotic law enforcement that were on trial list and in my rule 5. Most importantly Shawn Byron Young and Kenya Hagood to take the stand.

My trial counsel didn't even find it important to bring to the courts attention about the illegal activity the Jones' were under investigation for. In my trial brief it even speaks of a million in cash found in one of their properties, Meaning it is very possible they were puppets for law enforcement & prosecution to escape their own legal trouble.

e) See "Prosecutors Protect Themselves First" by Glenn Harlan Reynolds. Regarding California Case of Efrain Velasco-Palacios in 2013. I am a victim of court trickery and hidden facts.

Marion B. Gould # SCDC
333610

~~CONFIDENTIAL 7885321~~

- (a) _____
- (b) _____
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10): This is answer is on reverse side (back of page) - →
(meaning attached pages)

- (a) _____
- (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? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? Court of Appeals, SC

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. Direct Appeal after found guilty in trial
 - ii. _____
 - iii. _____
 - iv. _____

- (b) the name and location of the Court in which each was filed:
 - i. SC, Court of Appeals : 1220 Senate Street, Columbia, SC 29201
 - ii. _____
 - iii. _____
 - iv. _____

- (c) the disposition thereof:
 - i. Denied
 - ii. _____
 - iii. _____

② I was in fact placed in a unfair, inappropriate, and overly suggestive photo line up: 1st → The court and also my attorney allowed Pam Brown, the person who created the photo line up to not testify. *See transcript pages 129, lines 16-25; pages 130, lines 1-6 * 2nd * See transcript page 134 lines 1-25 * In her own opinion that my line up was not done correctly or as training in photo line ups. * See page 133 lines 18-21 * Pam Brown has no training in photo line ups. * See page 139 of Transcript lines 13-14 * See Transcript page 139, lines 21-22 * See Transcript page 141, lines 1-3 * 4th * See Trans. pages 141, 16-25 * obvious and apparent framework of investigative authorities. 5th Prosecution states that I was placed in this line up because Northern Beaufort incidents were similar to this: Both (2) incidents I was charged with at the time. 2 incidents that were dropped due to obvious and numerous lies → Thomas General: Was allegedly tied up, robbed for drugs, check rule 5 motion: [obvious exaggerated lies] full of an urban novel extortion ring tale. → Kawan: Bradshaw: [who is not a relative of mine as said in the court] allegedly was robbed, pistol whipped, and shot at; later proved to be not true. But where is the similarity?

③ page 86 in Trial Transcript, 4-10. Ben Shelton [Prosecutor] informs the court that the investigation was not complete. An also that he asked for a continuance. This trial took place in 2013. It's now 2017 and these "alleged" co-defendants still remain uncharged. Neither has this crazy love triangle theory been proven. Which is further proof and reason jail tapes between myself and Mr. Young should not have been allowed. They have and had nothing to do with this case & trial.

④ → page 333 in Trial Transcript. Cleven Jones was asked where was he at the time of the alleged incident. Line 25 - Cleven Jones stated that he just left his job Stokes Honda. Prosecution and also my ATTORNEY refused ~~to~~ to reveal this outright perjury (LIE) to the court. *

* Investigative Discovery in Rule 5 [Stokes Honda interview] *: Reveal that Stokes Honda officials made it very clear! That not only was he not there on that day but he had never worked there as a car broker (salesman). Michael Coxwell at Stokes Honda nor other Stokes personell were called to testify. What type of prosecutor or counsel would not want this fabricated alibi exposed to the court?

Marion Brown #SC16 333610

Continued on next page →

c) continuance of c → Eric Riley's testimony

• Not only does this "hostile witness" admit that this was his way to get back at Kenya Hagood (revenge) [Transcript pages 515-516]

• Prosecution knew of and pin pointed out right lies in Eric Riley's initial & original written statement. And still allowed his testimony by dissecting what they could use to aid them in a conviction.

• Furthermore, If a thorough investigation and honest effort of truth was being sought. It would be known that the only Kenya I know is Kenya Moultrie. Which is from where I'm from. Big Estate, not Vick state as written in my transcript.

[Eric Riley & also Cleven Jones are nothing more than hostile witnesses who were allowed to make a mockery of the court for their own personal reasons.]

d) My trial counsel was indeed ineffective due to him not calling to the stand: Stokes Honda Staff, Det. John Global & numerous other narcotic law enforcement that were on trial list and in my rule 5. Pam Brown. Most importantly Shawn Byron Young and Kenya Hagood.

My trial counsel did not even find it important to bring to the courts attention the illegal activity the Jones were being investigated for. Trial brief speaks of a million in cash in one of their properties.

It is very obvious they were desperate puppets for law enforcement & prosecution to escape their own legal trouble. And I was their escape.

e) See "Prosecutors Protect Themselves First" by Glenn Harlan Reynolds. Regarding California Case of Efrain Velasco-Palacios in 2013. * I am a victim of court trickery and hidden facts

Marion Brown ^{SCDC} #333610

- iv. _____
- (d) the date of each such disposition:
- i. June 15, 2016
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. They did not find my line up was overly suggestive
- 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?
- Yes
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. That my photo line up was unfair and overly suggestive
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. Direct Appeal
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Direct Appeal Counsel → see backside of pg. 4.
- (b) Trial Counsel → see backside of pg. 4.
- (c) _____
17. Were you represented by an attorney at any time during the course of:

page 98, question 16 A & B :

All grounds I have mentioned have been overlooked and intentionally swept under the rug. All except some of the issues regarding my photo line up.

• If my transcript & Rule 5 for this case along with the two others I had at the time, [which prosecution tried to combine] It is a disgusting reality & obvious reality the type of bargaining and favor for favor Beaufort County law enforcement and prosecution took part in to convict me.

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes, Scott W. Lee
- (c) your sentencing? Yes, Scott W. Lee
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Christopher J. Moore, Esquire
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes, Mr. Moore, Esquire

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. Scott W. Lee [1214 King Street, PO Box 2124, Beaufort, SC 29901-2124]
 - ii. Christopher J. Moore [1730 Jackson Street, Darwell, SC 29812]
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Scott W. Lee → Trial Attorney
 - ii. Christopher J. Moore → Direct Appeal Attorney
 - iii. _____

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

I Am respectfully seeking a new trial. A fair trial or release

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

No

STATE OF SOUTH CAROLINA)

County of Beaufort)

VERIFICATION

I, MBP, 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.

Marion B. Powell

SWORN to and subscribed before me this 20th
day of April, 2017.

Michael Colvane (L.S.)
Notary Public

My Commission Expires: July 04 2026

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

I, MBL, 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.

Marion B. Powell
Applicant

SWORN or affirmed to and subscribed before me this
20th day of April, 2017.

Michael Canere
Notary Public

My Commission Expires: July 09, 2026

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FOURTEENTH JUDICIAL
COUNTY OF BEAUFORT	)	CIRCUIT
	)	
Marion Powell, #333610,	)	Case No.: 2017-CP-07-0854
	)	
Applicant,	)	
	)	RETURN AND PARTIAL MOTION
v.	)	TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on May 1, 2017, would respectfully show this Court:

I. PROCEDURAL HISTORY

The facts supporting the underlying charges are as follows: On October 25, 2010, Applicant, along with three other individuals, entered a residence, held a victim at gunpoint, and took items from the home. The victim's children were also in the home. Afterwards, the victim called the police and, along with her daughter, was able to subsequently identify one of the men in a photographic lineup the next day. The police obtained an arrest warrant and shortly located Applicant with the help of the media. Applicant was arrested on March 27, 2011 after he turned himself in. He was then charged with burglary, first degree, five counts of kidnapping, and one count of armed robbery, one count of possession of a weapon during the commission of a violent crime, one count of unlawful possession of a firearm.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In April 2011, the Beaufort County Grand Jury indicted Applicant for burglary, first degree (2011-GS-07-0778), five counts of kidnapping (2011-GS-07-0779; -0780; -0781; -0782; -0783), armed robbery (2011-GS-07-0784),

possession of a weapon during the commission of a violent crime (2011-GS-07-0786), and possession of a firearm or ammunition by a person convicted of a violent offense (2011-GS-07-0787). Scott W. Lee, Esquire, represented Applicant. Assistant Solicitors Benjamin Sheldon, Esquire, and Hon. Benjamin Coppage, Esquire, prosecuted the case. On November 18-22, 2013, Applicant proceeded to trial before the Honorable Brooks Goldsmith. The jury found Applicant guilty as indicted. Judge Goldsmith sentenced Applicant to imprisonment for concurrent terms of twenty-seven years for burglary, first degree, twenty-seven years for each count of kidnapping, and five years for possession of a weapon during the commission of a violent crime. The charge of possession of a firearm or ammunition by a person convicted of a violent crime was dismissed.

Applicant filed a timely notice of appeal. Robert Dudek, Esquire, of the Office of Appellate Defense, and Chris Moore, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 15, 2016. State v. Powell, Op. No. 2016-UP-297 (S.C. Ct. App. filed June 15, 2016). The remittitur was returned to the circuit court on July 13, 2016.

Attached to this Return and incorporated by reference are the records of the Beaufort County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. ALLEGATIONS

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Allegations of Unfairness

- a. "I was in fact placed in a unfair, inappropriate, and overly suggestive photo line up: the court and also my attorney allowed Pam Brown, the person who created the photo line up to not testify...in her own opinion that my line up was not done

correctly or as should have been done...obvious and apparent framework of authorities...More importantly, prosecution says that I was placed in this line up because Northern Beaufort incidents were similar to this: both 2 incidents that I was charged with 2 incidents that were dropped due to obvious lies...was allegedly tied up, robbed for drugs, and motion of discovery is full of a bunch of urban novel extortion ring story...K Bradshaw (who is not a relative of mine as said in court) allegedly that he was robbed, pistol whipped and shot at. Where is the similarity?"

b. "...Ben Shelton informs the court that the investigation was not complete. And also that he asked for a continuance...This trial took place in 2013. It's now 2017 and these "alleged" co-defendants still remain uncharged. Which in further proof and reason jail tapes between myself and Mr. Young should have never been able to be used. Because I have nothing to do with the matter at hand." (internal citations omitted)

c. "...Cleven Jones was asked where was he at the time of the alleged incident...Cleven Jones stated that he just left his job at Stokes Honda. Prosecution and also my attorney refused to point out this outright perjury (lie) to the court. Investigative in my Rule 5 Motion reveals that Stokes Honda officials made it very clear! That is that Cleven Jones has never...worked as a car broker there. Michale Coxwell at Stokes Honda nor other Stokes Honda reps were called to testify to this very important information. What type of prosecution or counsel would not want this lie and fabricated alibi presented to the court, to the jury? Not only does this man admit that this was his way to get back Kenya Hagood...Prosecution know and pin point outright lies in Eric Riley's original written statements. And still allowed his testimony by dissecting what they could use to aid them in a conviction. Furthermore, if a thorough investigation and honest effort of truth was being sought. It would be known, that the only Kenya I know is Kenya Moultrie from where I was born and raised. Big Estate and Vick State was written in my transcript. [Eric Riley is nothing more than a hostile witness who made a mockery of the court for his own personal reasons]."

2. Ineffective Assistance of Trial Counsel

- a. "My trial counsel was indeed ineffective due to him not calling to the stand. Stokes Honda Staff, Det. John Gobel & numerous other narcotic law enforcement that were on trial list and in my rule 5. Most importantly, Shawn Byron Young and Kenya Hagood to take the stand.
- b. "My trial counsel didn't even find it important to bring the court's attention about the illegal activity the Jones' were under investigation for. In my trial brief it even speaks of 2 million in cash found in one of their properties. Meaning it is very possible they were puppets for law enforcement and prosecution to escape their own legal trouble."

3. Ineffective Assistance of Appellate Counsel

- a. For failing to challenge the court's jury instructions
- b. For failing to challenge the court's denial of a directed verdict

III. FAILURE TO STATE A CLAIM

Respondent requests that Applicant's three allegations relating to unfairness (1a, 1b, 1c) be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

These claims are not cognizable under the act. Applicant is not collaterally attacking his guilty plea or sentence, but rather seeks to argue issues best suited for direct appeal. Applicant's contention that such a ground is impliedly created by S.C. Code Ann. § 17-27-90 is meritless, as that section does not pertain to *what* may be raised, but *how* valid grounds must be raised.

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). These issues are improper for post-conviction relief because they could have been raised on direct appeal and are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417,

215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised these issues at trial or on appeal. In fact, his first claim was raised and ruled upon on direct appeal. His failure to do so for the remaining claims has waived those allegations as grounds for relief.

For these reasons and pursuant to Rule 12(b)(6), SCRCP, the Court should dismiss claims one, two, three, and five for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

IV. RES JUDICATA

Applicant's first claim is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all this allegation in his prior actions. Applicant's present allegations are indistinguishable from those offered in his direct appeal. Applicant's complaint regarding the photo lineup, despite not being a cognizable claim, was raised on direct appeal. The Court of Appeals issued a final judgement on the merits on very same issue that Applicant now raises in his present action. The finality of the previous Court ruling should be respected, and the claim should be summarily dismissed as barred by the doctrine of *res judicata*.

V. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully

resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends that Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. Respondent requests an evidentiary hearing on this allegation.

VII. AMENDMENTS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments received prior to 10 days before an evidentiary hearing will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

VIII. PARTIAL MOTION TO DISMISS

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws 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.

X. CONCLUSION

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

RUSTON W. NEELY
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By: 

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August 3, 2017

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

MARION POWELL, #333610

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

IN THE COURT OF COMMON PLEAS

2017-CP-07-0854

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:

Ashley A. McMahan
 Mac | Vance Attorneys, LLC
 PO Box 5501
 West Columbia, SC 29169

DATED this the 3rd day of August, 2017.

Jennifer Jennison
 Jennifer Jennison, Legal Assistant
 For Respondent

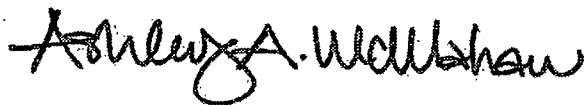
STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FOR THE 14 th JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	Case No.: 2017-CP-07-00854
Marion Benjamin Powell, #333610,	)	
	)	
Applicant,	)	AMENDED POST-CONVICTION
	)	RELIEF APPLICATION
v.	)	
	)	
State of South Carolina.	)	
	)	

The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on May 1, 2017, to include the following additional allegation:

1. Ineffective Assistance of Counsel as to Scott W. Lee, Esquire:
 - a. Failed to call Jarvis Watson as an alibi witness.

Furthermore, the Applicant requests that he be permitted to amend her PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application and this Amended Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



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 SC Bar No. 71676
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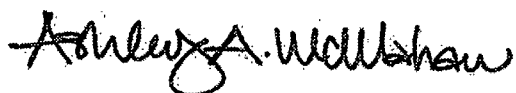
January 15, 2018

CERTIFICATE OF SERVICE

I certify that I have served this document via email to:

Julie A. Coleman
Assistant Attorney General
jcoleman@scag.gov
fourteenthcircuitpcr@scag.gov

This 15th Day of January, 2018.

A handwritten signature in black ink, reading "Ashley A. McMahon". The signature is written in a cursive, flowing style.

ASHLEY A. MCMAHAN, ESQUIRE
Attorney for Applicant

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT
COURT OF COMMON PLEAS
CASE NUMBER 2017-CP-07-00854

MARION B. POWELL

PETITIONER

VERSUS

STATE OF SOUTH CAROLINA

RESPONDENT

JANUARY 31, 2018 POST-CONVICTION RELIEF HEARING

BEAUFORT, BEAUFORT COUNTY, SOUTH CAROLINA

BEFORE HON. R. LAWTON MCINTOSH, JUDGE

APPEARANCES

ON BEHALF OF PETITIONER:
MARION B. POWELL:

HON. ASHLEY A. MCMAHAN
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EXHIBITS

No exhibits admitted.

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BY THE COURT

1 BEGINNING 10:40 A.M.

2 MS. COLEMAN: Your Honor, may we approach?

3 THE COURT: Yes, ma'am.

4 MS. COLEMAN: Thank you.

5 OFF-THE-RECORD BENCH CONFERENCE.

6 END BENCH CONFERENCE.

7 THE COURT: All right. We're here on Marion Powell
8 versus the State of South Carolina, 2017-CP-07-0854. I had a
9 bench conference with counsel, Ms. McMahan and Ms. Coleman.
10 Ms. McMahan advised that she had recently learned of a
11 potential witness to this matter who was not under subpoena,
12 but also advised that he could not get off work today; he would
13 not be available to testify. She requested that she be allowed
14 to submit a written statement of this witness. The State has
15 correctly objected to that as being in violation of the right
16 to confront this witness. I told Ms. McMahan that she would be
17 allowed to submit the affidavit of the witness, and if Ms.
18 Coleman chooses, on behalf of the State, she will have the
19 right to depose this witness.

20 And then, Ms. Coleman, you also brought up the fact that
21 this alleged witness had some type of criminal record that you
22 wanted to impeach him with?

23 MS. COLEMAN: Yes, your Honor.

24 THE COURT: Does it meet the threshold test of
25 dishonestly?

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BY THE COURT

1 MS. COLEMAN: Your Honor, it's a felony conviction within
2 ten years.

3 THE COURT: But the threshold as to relevancy has to
4 involve reason to disbelieve his testimony, because it involves
5 dishonesty?

6 MS. COLEMAN: That's true. It's not a crime of
7 dishonesty. It was a felony DUI resulting in great bodily
8 injury.

9 THE COURT: Okay. I don't think that would qualify.

10 MS. COLEMAN: Okay.

11 THE COURT: Okay? With that being said, are you ready to
12 proceed? Ms. McMahan?

13 MS. MCMAHAN: Your Honor, we're ready.

14 THE COURT: Okay.

15 MS. COLEMAN: Your Honor?

16 THE COURT: Just one second. Okay, Ms. Coleman?

17 MS. COLEMAN: Yes, your Honor. May it please the Court.
18 I'll read the procedural history.

19 Applicant is presently confined in the South Carolina
20 Department of Corrections pursuant to orders of commitment of
21 the Beaufort County Clerk of Court. In April 2011, the
22 Beaufort County Grand Jury indicted applicant for first degree
23 burglary, five counts of kidnaping, armed robbery, possession
24 of a weapon during the commission of a violent crime, and
25 possession of a firearm or ammunition by a person convicted of

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BY THE COURT

1 a violent offense. Scott W. Lee, Esquire, represented the
2 applicant. Assistant Solicitor Benjamin Sheldon, Esquire,
3 prosecuted the case.

4 On November 18 through the 22nd, 2013, applicant
5 proceeded to trial before the Hon. Brooks Goldsmith. The jury
6 found applicant guilty as indicted. Judge Goldsmith sentenced
7 applicant to imprisonment for concurrent terms of 27 years for
8 first degree burglary, 27 years for each count of kidnaping,
9 and five years for possession of a weapon during the commission
10 of a violent crime.

11 The charge of possession of a firearm by a person
12 convicted of a minor crime was dismissed.

13 Applicant filed a timely notice of appeal. Christopher
14 Moore, Esquire, perfected the appeal. The South Carolina Court
15 of Appeals affirmed applicant's conviction on June 15, 2016.
16 The remittitur was returned to the Circuit Court on July 13,
17 2016.

18 Applicant then filed a timely application for post-
19 conviction relief on May 1, 2017, alleging he was being held in
20 custody unlawfully, based on the following allegations:
21 ineffective assistance of trial counsel; ineffective assistance
22 of appellate counsel; and various other allegations of
23 unfairness.

24 The State filed its return and partial motion to dismiss
25 on August 3, 2017. Applicant filed an amended application for

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BY THE COURT

1 PCR on January 15, 2018, which should be in your packet there,
2 adding another allegation of ineffective assistance of trial
3 counsel.

4 He is present today and represented by Ashley McMahan.

5 And your Honor, at this time, the State would renew its
6 motion on -- or formally make its motion to dismiss the direct
7 appeal allegations that he's raised in his application, which I
8 believe are the first three.

9 THE COURT: And what were the direct appeal allegations?
10 Or do you have that in your motion?

11 MS. COLEMAN: Yes, your Honor. And it would be -- he's
12 handwritten them all on his application, but they're also typed
13 up and summarized in the return partial motion to dismiss. And
14 we've kind of categorized them as allegations of unfairness.
15 And he's got several complaints about the suggested photo
16 lineup that was used at trial, which was raised as a direct
17 appeal issue. He actually did raise them on appeal, and the
18 Court dismissed it or denied it.

19 THE COURT: I will grant your motion on those regards.

20 MS. COLEMAN: Okay.

21 THE COURT: Now, Ms. McMahan, I'm going to ask that you -
22 - and what I'm going to call counsel in the case to do is state
23 the meritorious, recognizable claims that you are pursuing
24 today and just place those on the record.

25 MS. MCMAHAN: Sure thing, your Honor. Well, obviously,

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BY THE COURT

1 the issue on the amended application related to Mr. Watson,
2 which we've already addressed.

3 THE COURT: I'm sorry?

4 MS. MCMAHAN: The issue on the amended application
5 regarding Jarvis Watson that we've already addressed in front
6 of the Court today. The witness.

7 THE COURT: Okay. I knew he was not available. What did
8 I address?

9 MS. MCMAHAN: Oh, just that to submit the written
10 statement.

11 THE COURT: Oh, okay. Sure. That's not grounds for
12 relief. That's just part of the testimony. I'm asking for the
13 specific grounds for relief, so I can make notes on it and make
14 a ruling.

15 MS. MCMAHAN: That is a specific ground for relief; that
16 Mr. Lee did not call Mr. Watson as a witness as he should have.

17 THE COURT: Oh, okay.

18 MS. MCMAHAN: The other issues are that Mr. Lee failed to
19 adequately cross-examine witnesses regarding a guy named Cleve
20 Jones, I believe is the appropriately way his name is, about
21 whether or not he worked at Stokes Honda.

22 And then other issues --

23 THE COURT: He failed to properly cross-examine.

24 MS. MCMAHAN: I believe it was an issue regarding
25 Cleveland Jones -- Cleve Jones about working at Stokes Honda.

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BY THE COURT

1 And that Mr. Lee also failed to address issues regarding that
2 Mr. Powell feels like this entire situation is where a
3 gentleman by the name of Eric Riley, and then a lady, Kenya
4 Hagood --

5 THE COURT: Ms. McMahan, I'm having a little difficulty.
6 I want not what he says, because I'm not really all that
7 concerned about what he says. But as an officer of the Court,
8 under Rule 11, what issues are recognizable that we should
9 proceed on? Okay? The rest of them are going to be gone.

10 MS. MCMAHAN: Yes, your Honor. I believe it would be the
11 witness issue.

12 THE COURT: Right. Right.

13 MS. MCMAHAN: And then --

14 THE COURT: His failure to cross-examine him about this
15 Cleve Jones.

16 MS. MCMAHAN: Yes. But the other issues -- and I agree
17 with your Honor. It's just, you know, my client wants me to
18 make the Court aware.

19 THE COURT: I don't care. That's something he can take
20 up with the appellate court, but I'm not going to hear it.

21 MS. MCMAHAN: Okay. And -- one second. I'll find it
22 over here.

23 THE COURT: Yes, ma'am. I tell you what, while you're
24 doing that, Ms. McMahan, I need to go back and make one phone
25 call.

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BY THE COURT

1 MS. MCMAHAN: Okay.

2 THE COURT: So talk to him. I'll be right back.

3 MS. MCMAHAN: Okay.

4 OFF THE RECORD 10:49 A.M.

5 BACK ON THE RECORD 10:54 A.M.

6 BAILIFF: All rise. This Court is back in session.

7 THE COURT: Please be seated. All right, Ms. McMahan,
8 have you had sufficient time to speak with your client?

9 MS. MCMAHAN: Yes, your Honor. Just for the record, we
10 have spoken several times, me and Mr. Powell. So, as an
11 officer of the court, the best issue that I can go forward on
12 would be the Jarvis Watson issue. There's some ancillary
13 issues, but I -- I don't know that that would be successful.

14 THE COURT: Well, -- and I don't want to limit his
15 ability to explore a close issue, but things that are just
16 patently not recognizable.

17 MS. MCMAHAN: Some of the issues that he has raised are
18 appellate issues, like the unfair lineup, which was addressed
19 in the appeal. I would agree that that has been flushed out
20 enough. There were some -- in that -- there was a massive
21 thing at the beginning of the trial about the *Biggers* hearing
22 and the lineup. Any issue to that, I don't think --

23 THE COURT: The questions for a directed verdict.

24 MS. MCMAHAN: Yeah. And that was, you know, raised on
25 appeal, too.

1-31-18 POWELL V STATE

MARION B. POWELL - DIRECT - MCMAHAN

1 THE COURT: And that's the State's motion, so that was
2 granted?

3 MS. COLEMAN: Yes, your Honor.

4 THE COURT: All right. So, are you ready to proceed with
5 your witness that you have?

6 MS. MCMAHAN: Yes, your Honor.

7 THE COURT: Would you call him, please.

8 MS. MCMAHAN: Yes, your Honor. Mr. Powell.

9 MADAM CLERK: Will you place your left hand on the *Bible*
10 and raise your right hand as best you can? Do you solemnly
11 swear or affirm to truthfully answer all questions asked of you
12 by this Court, so help you God?

13 MARION BENJAMIN POWELL: Yes, I do.

14 MADAM CLERK: Thank you.

15 MARION BENJAMIN POWELL, DIRECT EXAMINATION

16 BY MS. MCMAHAN:

17 Q. Would you please state your name for the record.

18 A. Marion Benjamin Powell.

19 Q. And did you file this PCR application?

20 A. Yes, ma'am. Yes, I did.

21 Q. Do you need a copy of it to look at?

22 A. No, ma'am.

23 Q. Okay. There's a couple issues in your application
24 that you heard us talking about, the issue of the direct appeal
25 and all that. But what is the main issue with Jarvis Watson?

1 A. At the time, I had two other pending armed robberies
2 and a parole violation that I was evading from, and I was
3 staying in Vanceboro, North Carolina with him and his baby's
4 mother.

5 Q. And about what time was that? Was that like in --

6 A. That was from like June or July up until March 27th,
7 and I turned myself in. We was at a hotel.

8 Q. So June to March of what year?

9 A. Two thousand -- it was June -- it was June of 2010,
10 but it was March of 2011 when I turned myself in.

11 Q. Did you come back from North Carolina to turn
12 yourself in?

13 A. Yes, after the U.S. marshals came up there looking
14 for me.

15 Q. And once you turned yourself in, did you get out on
16 bond?

17 A. No. I had to go do ten months on my YOA on parole.
18 And then I came back to the county; sat about twenty months, I
19 think.

20 Q. Before you went to trial?

21 A. Yes, ma'am.

22 Q. What else would you like the Court to know about your
23 PCR today?

24 A. Issues that are not -- that they were invalid or just
25 all together?

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MARION B. POWELL - DIRECT - MCMAHAN

1 Q. I'm just -- anything you feel Mr. -- I mean, Judge
2 McIntosh needs to know about your PCR today.

3 A. When I went to trial, I had two alleged co-defendants
4 that were supposed to be my co-defense, and they presented them
5 as if they were hard facts in evidence. Until this day, these
6 people have never been charged, and one of them I have never
7 even met before.

8 Q. And when you say they, you mean the solicitor was
9 presenting them?

10 A. Yeah, when I did my case. Mr. Ben Sheldon.

11 Q. So Mr. Sheldon referenced them in your trial, but
12 they have never been charged.

13 A. Yeah. And he also said on that record that he's not
14 even finished investigating. And then another time I had a guy
15 who was shot when he tried to rob somebody, and she pressed
16 charges on him, and he got on the stand saying this was his way
17 of getting back at her, which I don't understand, because she's
18 never even been charged.

19 Q. Okay. And what were the names of those alleged co-
20 defendants?

21 A. Sean Byron Young and Kenya Hagood, who could walk
22 past me right now and I couldn't tell you who she is.

23 Q. Is there anything else you want the Court to know?

24 A. My like PCR issues and --

25 Q. Okay. How long have you known Mr. Watson?

1 A. All my life.

2 Q. Did you tell Mr. Lee about being with Mr. Watson when
3 you were first charged?

4 A. Yeah.

5 Q. What did Mr. Lee tell you about -- did he call -- did
6 he say he was going to try to call him as a witness to you?

7 A. He got in contact with him through my sister, but I
8 think the issue why he didn't call him was I don't -- I mean,
9 our main issue was photo lineup, and it was basically a mis-
10 I.D. case, and like I don't know if he thought it would have
11 helped me -- or thought it would have hurt me more than it
12 would have helped me because, technically, Jarvis knew I was on
13 the run, and that would have bring up aiding and abetting
14 issues and stuff like that, I guess.

15 Q. So like a misprision of a felon situation, exposing
16 Mr. Watson to it?

17 A. In a way, I guess.

18 Q. And when did you first hear about Young and Hagood's
19 names?

20 A. I knew Mr. Young, but I didn't hear Ms. Kenya's name
21 until I was locked up and a guy got into it with her, and he
22 kept coming to me asking me to get in contact with this person
23 and get him out of jail. And I don't know if he got it
24 misconfused or not, but the only Kenya I know is from where I'm
25 from, which is the Big Estate area, and I later find that Kenya

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MARION B. POWELL - DIRECT - MCMAHAN

1 Hagood is from the Burton area. And I kind of laughed at him
2 one day like I can't get myself out of jail; I don't know how
3 I'm going to get you out of jail. And he got upset.

4 Q. Who is he again? The guy --

5 A. Eric Riley.

6 Q. Okay. So Eric Riley was the guy that you were
7 talking to in jail?

8 A. No, he's the guy -- I guess he heard about it. He
9 said he heard -- he said that I confessed my -- my case to him,
10 but I was on the bottom rack, and he was on the top. There's
11 no way I could have ever really even talked to him.

12 Q. And there was an issue in your trial about Eric
13 Riley, wasn't there?

14 A. Yeah.

15 Q. About your confession to him.

16 A. Yeah. Even in his confession -- like his written
17 statement, he was saying something about a baby or a child
18 about to get put in the oven, which never happened, and the
19 State kind of -- like they didn't put none of that in the
20 trial. They just like dissected his statement, and he
21 testified to what they needed.

22 Q. So, in your opinion, what was the main evidence the
23 State was presenting against you?

24 A. Eric Riley's statement.

25 Q. So you think without Eric Riley, there really

1 wouldn't have been much of a case?

2 A. Without Eric Riley and had -- I had my alibi, I don't
3 believe I would ever went to trial.

4 Q. Anything else you want Judge McIntosh to know?

5 A. When I first turned myself in, I was at Turbeville,
6 and they came to me within like two, three months, and they was
7 just willing just drop all these charges and give me some super
8 sweet deal for all these kidnapings, fifteen years. You know,
9 they really -- I mean, it really wasn't making no sense. All
10 the evidence that they brought against me in trial came within
11 like the last three or four months of my incarceration, and
12 Eric Riley, I was trying to get a time cut.

13 Q. So your initial offer was always fifteen years?

14 A. Yeah.

15 Q. And how many times were you offered fifteen years?

16 A. I think once.

17 Q. Were you ever offered anything more than that, like
18 twenty years?

19 A. Twenty years right -- right before we went to trial.

20 Q. And was the twenty-year offer when you finally had
21 all the evidence from the State? Or was the --

22 A. It was like -- like a couple days before we went to
23 trial.

24 Q. Okay. And then, the fifteen years, did you have all
25 the evidence from the State when they were giving you that

1-31-18 POWELL V STATE

MARION B. POWELL - CROSS - COLEMAN

1 offer?

2 A. What do you mean? Like my Rule 5?

3 Q. Yeah.

4 A. Yeah.

5 Q. You had all that?

6 A. Yeah, but the stuff that they had when it was time to
7 go to trial was a whole bunch of other complicated stuff and
8 what -- like when I first got my Rule 5, they just had that I
9 was picked out of a lineup and had a long list of stuff that
10 were taken.

11 Q. And why did you not want to take any plea offer?

12 A. Because I didn't do what I was accused of being
13 doing.

14 Q. Okay. So your whole point was you wanted to go to
15 trial and fight it?

16 A. Yes.

17 Q. Okay. Anything else?

18 A. That's about it?

19 Q. Okay. Well, answer any questions from Ms. Coleman.

20 A. Yes, ma'am.

21 THE COURT: Ms. Coleman.

22 MS. COLEMAN: Thank you, your Honor.

23 MARION BENJAMIN POWELL, CROSS-EXAMINATION

24 BY MS. COLEMAN:

25 Q. Good morning, Mr. Powell. How are you?

1 A. Morning.

2 Q. You testified a moment ago that Eric Riley -- he
3 testified at your trial, right?

4 A. Yes, ma'am.

5 Q. And he said that you confessed the crime to him?

6 A. Yes, ma'am.

7 Q. But there were details in that that were incorrect.
8 Is that right?

9 A. Yes, ma'am.

10 Q. He said something about putting a baby in the oven?

11 A. Yes, ma'am.

12 Q. But that never happened?

13 A. That's what the victim said.

14 Q. The victim said that never happened?

15 A. Yeah, they said that never happened.

16 Q. Okay.

17 A. He even said that I threatened him after I were --
18 after I was locked up, and they said none of that never
19 happened.

20 Q. Okay. But you don't personally know if it happened
21 or not, right? because you're claiming you weren't there?

22 A. Yes..

23 Q. Okay. Where were you that day?

24 A. I was hiding in Vanceboro, North Carolina.

25 Q. Okay. With Mr. Watson?

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MARION B. POWELL - CROSS - COLEMAN

1 A. Yes, ma'am.

2 Q. And what date was that?

3 A. I can't remember the exact date, it's was so long
4 ago.

5 Q. Okay. Do you remember what you were doing that day?

6 A. I mean, the exact day?

7 Q. Yes.

8 A. I mean, I wouldn't know that.

9 Q. Okay. But you were with Mr. Watson?

10 A. I was from June until March.

11 Q. Okay. So you were with him the whole time of that
12 span.

13 A. Yeah.

14 Q. Did you ever come back to South Carolina?

15 A. No, not until the U.S. marshals came up there looking
16 for me, and I was like I think I better go back.

17 Q. Okay. Why were you with him in North Carolina?

18 A. I was trying not to go to jail on my parole
19 violation.

20 Q. Okay. And you told Mr. Lee about this alibi witness?

21 A. Yes, ma'am.

22 Q. And he told you he didn't think it was a good idea to
23 call him. Is that right?

24 A. I mean, he just didn't feel it was valid. He didn't
25 think it would have helped me.

1 Q. Okay. Okay. Thank you. Nothing further.

2 MS. MCMAHAN: Nothing further, unless the Court has
3 anything.

4 THE COURT: All right. Thanks. You may step down.

5 MARION BENJAMIN POWELL: All right. Do I go back over
6 here or --

7 THE COURT: You go back with your lawyer.

8 MARION BENJAMIN POWELL: All right.

9 THE COURT: Would you call your next witness, please.

10 MS. MCMAHAN: The applicant rests, your Honor.

11 THE COURT: The applicant rests?

12 MS. MCMAHAN: Yes.

13 MS. COLEMAN: The State would call Scott Lee.

14 MADAM CLERK: Thank you. Do you solemnly swear or affirm
15 to truthfully answer all questions asked of you by this Court,
16 so help you God?

17 SCOTT W. LEE: I do.

18 MADAM CLERK: Thank you.

19 SCOTT W. LEE, DIRECT EXAMINATION

20 BY MS. COLEMAN:

21 Q. Good morning, Mr. Lee. How are you?

22 A. Fine. How are you?

23 Q. Thank you. How long have you been practicing law?

24 A. Twenty-four years.

25 Q. And were you appointed or retained in this case?

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SCOTT W. LEE - DIRECT - COLEMAN

1 A. Retained.

2 Q. How many times did you meet with the applicant prior
3 to his trial?

4 A. I went through that last night. Probably -- that's
5 going to be probably fifteen face-to-face.

6 Q. And how long did you have this case before it went to
7 trial?

8 A. It was delayed, like Marion said, because he had to
9 go do some, I think, YOA parole. It was tried in November of
10 2013. So probably two-and-a-half years or so.

11 Q. Okay. Did the applicant cooperate with you during
12 the course of your representation?

13 A. Yes.

14 Q. Did you file any *Brady* or Rule 5 motions?

15 A. Yes.

16 Q. And did you review the discovery materials with the
17 applicant?

18 A. Yes, at length.

19 Q. At length. Did you discuss with the applicant the
20 elements of the charges and what the State was required to
21 prove?

22 A. At length.

23 Q. Okay. Did he seem to understand that discussion?

24 A. Yes.

25 Q. Okay. Would you please tell us the facts of this

1 case as the State was alleging.

2 A. The State alleged that this was a home invasion
3 investigate a woman and four children, I think, under the age
4 of ten or so. From ten all the way down to maybe two. And the
5 allegations of the victims were that three -- three African-
6 American men came into the house with guns. Some -- some with
7 masks. Some with partial masks for part of the time. Lined
8 the people up in the hallway, including children. Told them to
9 face down, and then proceeded to ransack the house, stealing
10 certain items, up to like fifty some thousand dollars. That
11 was the State's allegation.

12 Q. Okay. Was Mr. Powell wearing a mask? Or was the
13 State alleging that Mr. Powell was wearing a mask that day?

14 A. It kind of went back and forth. I believe their
15 contention was that at some point Mr. Powell was unmasked, and
16 then may have put a partial mask on -- on his face.

17 Q. And what was his alleged role in this home invasion?

18 A. That he was a participate with a -- with a gun that
19 came in.

20 Q. Did the State allege that he was the one who forced
21 the children on the ground and was with the children and their
22 mother while the others ransacked the house?

23 A. There was some back and forth about that, about who
24 -- who held -- who held the guns on the kids and who moved
25 around. So I think they believed that all three had different

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SCOTT W. LEE - DIRECT - COLEMAN

1 roles, changing roles, as it went on.

2 Q. What was the applicant's version of the facts, as
3 however explained to you?

4 A. His version of the facts?

5 Q. Did he admit to being there at all or --

6 A. No.

7 Q. -- or taking part in that in any way?

8 A. No.

9 Q. No. Okay. Did he tell you about an alibi?

10 A. We discussed that at -- at one point. It seemed to
11 be an I.D. case pretty much from the beginning, with some --
12 some pretty good impeachment against some of the State's
13 witnesses, but there was a conversation or talk about potential
14 alibi witness, and I believe his sister may have even gotten
15 the fellow, Jarvis, to get in touch with me, but if I remember
16 correctly, my concern was that nobody could pinpoint that on I
17 think it was October 10, 2010 that Marion Powell was in
18 Goldsboro [sic], North Carolina at such and such. I just don't
19 think that Jarvis Watson could provide us with an alibi that
20 was strong enough to -- to carry the day. And I was concerned
21 about what happened with weak alibis. I think it destroys an
22 entire case if your alibi isn't rock solid.

23 So I think there was some limited discussion with Jarvis
24 Watson. He wasn't exactly crawling over broken glass to come
25 talk to us or to come to court. So I think more of a strategy

1 decision than anything else; decided that was not -- not the
2 proper thing to do. I mean, when I've had alibi witnesses in
3 the past, I have a strong alibi witness, I'll be the first one
4 to call them, but alibi witnesses are tough, and my
5 recollection was this one just wasn't strong enough to -- to go
6 with.

7 Q. Okay. What was your trial strategy in this case?

8 A. Well, I mean, as Marion said, I mean, I think from
9 the beginning it was a question about identity. There was the
10 -- the mother had identified him in a photo lineup, which we
11 believe from the -- I still believe was overly suggestive. And
12 then there was a child, who I think was ten at the time, who
13 also pulled him out of a photo lineup the next day.

14 We -- I brought in a witness from UNC Charlotte, Dr.
15 Vanwallendael, to testify about photo lineups. And to answer
16 your question, I think it was we thought it was an I.D. case;
17 and then we believed there was a lot more to it; and there was
18 plenty of impeachment for the witnesses who did testify against
19 him, primarily, Eric Riley.

20 Q. Okay. There's some discussion in the record about
21 how the victims were drug dealers and maybe he was targeting
22 them because they were drug dealers, which was part of a
23 something he did, allegedly. There's a lot of discussion on
24 the record before the trial with the judge about that. Can you
25 tell us about that.

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1 A. Eric Riley was a jailhouse snitch that came up.
2 About a week before the trial, they informed me that they had a
3 statement from Eric Riley in exchange for asking for a downward
4 departure on a sentence he was currently serving. And the gist
5 of the statement was that Marion Powell and Byron Young
6 habitually robbed drug dealers, and he was talking about
7 different instances. And he claimed -- Riley claims that
8 Powell confessed to him in the jail and told him that all these
9 robberies were drug dealers they had done.

10 Getting back to this case, there was some suggestion that
11 Cleveland Jones, who was the husband of the woman and I guess
12 the dad of the kids that were there, there was some suggestion
13 that he was heavily involved in the drug trade. Never really
14 provable by us, by he had done time twenty-something years ago.
15 Drug Task Force had been watching the particular house where
16 this happened where Cleve Jones lived in the weeks leading up
17 to this. So there was a -- there was a drug angle there. And
18 I think one reason why we probably didn't push it even more is
19 because Eric Riley's statement was coming in that he said he
20 targeted drug dealers. And I think we were afraid that that
21 would bolster Eric Riley's story.

22 Q. And did you move to suppress the prior bad acts of
23 Mr. Powell's involvement with other drug dealers?

24 A. Yes.

25 Q. And were those suppressed by the court?

1 A. They were.

2 Q. And did you bring up in the trial or argue to the
3 jury that Cleveland Jones sold drugs?

4 A. Did I argue that Cleve Jones sold drugs?

5 Q. Or was that an approach, I guess, a strategical
6 approach you were taking or -- you testified a moment ago you
7 were trying to minimize that, I guess, because it matched Eric
8 Riley's statement?

9 A. I think there was always an underlying thought that
10 drugs might be involved. I don't think that specifically
11 alleged. I mean, I know I asked Cleve Jones have you done time
12 for drugs; yes; you sold now; and he said no. Of course,
13 nobody would admit it, but I don't think we argued that too
14 much. I think it was out there, though.

15 Q. Okay. Now, the State alleged and they argued to the
16 jury a connection to the victims through Marion Powell through,
17 I believe, Kenya Hagood and one or two other witnesses that we
18 talked about today. Can you describe that a little bit, what
19 the State's allegation was there.

20 A. Well, it was a -- a theory that came up kind of late
21 in the process, and the State's theory, because I remember I
22 did a demonstration about six degrees of separation, which is
23 kind of a six degrees, Kevin Bacon, if you ever heard about
24 that, where anybody in the world could be attached through six
25 people that they even know or -- so, anyway, we did kind of

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1 that. The -- what the State did, in my opinion, is they proved
2 their case about what happened in this. They proved it by
3 establishing that Byron Young was involved, who was an
4 unindicted, uncharged, co-conspirator. And then their theory
5 was that Kenya Hagood kind of put the whole thing together.

6 And then what they did is they -- in my opinion, they
7 kind of back-doored Marion's guilt by saying these are the two
8 principals; put them together, Marion was friends with Byron
9 Young; we have these 190 phone calls they've made back and
10 forth talking in code from the jail. And my thought and what
11 concerned me or bugged me the most was I feel like they proved
12 a case against two people they didn't even charge and still
13 haven't charged, and then tied him in at the end as being
14 running mates with -- with Byron Young.

15 So I don't think I answered your question. I kind of
16 went off on a tangent there.

17 Q. No, that's fine. Did you think that that evidence,
18 evidence of his connection to Byron Young and Kenya Hagood, did
19 you think that was particularly damage to his case or
20 important?

21 A. Well, yes, because, again, I think that they
22 subsequently proved at least that Byron Young was involved. I
23 mean, the woman who was a victim was shown a photo lineup with
24 Byron Young in it the day after. She did not identify anybody
25 in the lineup. And then at trial, they showed her the same

1 lineup three years later, and she identified Byron as a second
2 person that had gone in there. So I clearly think that it was
3 important, the evidence about Byron Young and Kenya Hagood.

4 Q. And what was your argument to the jury about his
5 connection to those two? You testified about your six degrees
6 and Kevin Bacon.

7 A. Yeah. Cause it started with -- it started with Cleve
8 Jones, who was the husband who wasn't there. And then it went
9 to a woman named Paulette Milledge, who he was having an affair
10 with. And then there was an allegation -- the State suggesting
11 that then Paulette Milledge was involved in a relationship with
12 Kenya Hagood. And then it was alleged that Kenya Hagood had --
13 had somehow gotten Marion and Byron Young to rob the Jones,
14 because she wanted to get back because her girlfriend was
15 having an affair with Mr. Jones. I might have left one out,
16 but there were different things. So, because all this happened
17 in Bluffton. All the other people that they're talking about
18 were from the Yemassee and in Northern Beaufort County area,
19 rather than Bluffton.

20 Q. The photo lineup, obviously, you tried to argue
21 against that and challenge the photo lineup, and that was your
22 strategy there.

23 A. Right.

24 Q. Did you believe that that was damage evidence?

25 A. Absolutely.

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SCOTT W. LEE - DIRECT - COLEMAN

1 Q. Was it -- how would you characterize it?

2 A. The most damaging evidence.

3 Q. Would you describe it as overwhelming?

4 A. Well, I don't know what weight the jury put in it. I
5 mean, I've had lots of cases with photo I.D.s, and the law, the
6 research clearly shows that eyewitness identification is the
7 type of evidence relied most heavily upon by jurors, but it is
8 also the least reliable type of evidence that is out there. I
9 had a trial down here in 1999 and brought in Dr. Gary Wells,
10 who was a very -- world known in the issues of photo I.D., and
11 learned a lot. So I've been dealing with these issues for a
12 long time. But I think the evidence was -- was very -- very
13 harmful to us because the mother and the daughter, I think it
14 came across to the jury as very believable. And we did bring
15 the expert in to testify that she says that, you know, just
16 because a witness is believable doesn't mean that the I.D. is
17 accurate, but, I mean, it's hard for the jurors to separate the
18 two. You know, if somebody seems believable and seems
19 convinced that they're right, juries tend to believe I.D.
20 witness cases. I think that was the most harmful piece of
21 evidence that there was.

22 Q. What other evidence did the State present?

23 A. Well, the two photo I.D.s. They had Eric Riley, who
24 I think we impeached him pretty well. He had a lot to gain by
25 his testimony. You know, I think that probably was the main

1 part of the State's case. And then, again, they -- they had
2 some phone calls from the jail, most of which we were able to
3 get suppressed, but the one that comes to mind is that, again,
4 Byron Young and Marion Powell speaking on the phone, and Byron
5 Young says something about he has a girlfriend who lives in
6 Mill Creek, which is the subdivision where this happened. And
7 he said I have a new girlfriend from Mill Creek, and Marion
8 said something like, oh, I don't know where that is and then
9 laughed. And the State was taking the position that that
10 laughing was essentially an admission on his part. It didn't
11 help, but I don't think it was too harmful, but it was kind of
12 cumulative of everything else.

13 Q. Okay. And sorry to bounce around, but kind of back
14 to the alibi witness there. Did the applicant give you any
15 other potential witnesses or leads to investigate?

16 A. I mean, he took a very active role in the whole
17 thing. I mean, I have a whole box over there where I gave him
18 discovery that he'd write on the side, and he would make notes.
19 And I mean, he was in the law library a lot. I mean, he was
20 very helpful in pointing out some of the things and giving his
21 opinion about it, but. At one point, I think there was a
22 discussion about do we try to call Byron Young and Kenya Hagood
23 as witnesses. And a recollection, it was more of a strategy
24 decision that it would be more effective trying to cast, you
25 know, doubt on the State not bringing them as witnesses, but

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1 yet using them as essentially the backbone of the State's case.
2 But he fully cooperated. We met a lot. I probably have forty
3 letters over there he wrote me from when he was incarcerated,
4 and most of them were several pages long. So he did provide
5 lots of information. He did provide help. He took an active
6 role in it, no question.

7 Q. What kind of investigation did you do?

8 A. Well, I mean, it was over a two-and-a-half-year
9 period. I mean, obviously talked to -- I think we had two or
10 three prosecutors on this case. I talked to them. I mean,
11 obviously, reviewed all the discovery. Spoke to law
12 enforcement and researched criminal histories of potential
13 witnesses for the State. Talked to his mom quite a bit.
14 Talked to him quite a bit. But you know, there wasn't a whole
15 lot of true investigation needed to be done. It was done in a
16 confined location at a house, so it wasn't a whole lot to -- I
17 did research as far as the different -- how far Big Estate was
18 from Mill Creek and did these maps and stuff like that, but I
19 feel like we certainly investigated it and turned over every
20 stone that we could looking into it.

21 Q. Okay. Did you have enough time to prepare for trial?

22 A. Yes.

23 Q. Okay. Nothing further. Thank you very much.

24 THE COURT: Cross-examination.

25 SCOTT W. LEE, CROSS-EXAMINATION

1 BY MS. MCMAHAN:

2 Q. When was the first time you'd heard of Mr. Young and
3 Ms. Hagood?

4 A. Byron Young's name had been out there for a while.
5 He was suspected in some other robberies that had occurred over
6 the preceding few months. And as a matter of fact, I think
7 that Marion's name, his name, and maybe two others had been
8 given as possible suspects by the Sheriff's Office, because
9 there had been -- they were suspects in unrelated cases. And I
10 think that's how at least Marion Powell and Byron Young's
11 pictures got in the photo lineups. His name came up right
12 away. Kenya Hagood was, I don't know, a few months before
13 trial before her name came up. And it was the solicitor that
14 came up with -- they did some digging and came up with that
15 theory.

16 Q. The six-degrees-of-separation theory?

17 A. That's right.

18 Q. And you referenced earlier that you thought calling
19 Young and Hagood might do better to cast doubt on the State's
20 case. Had you been able to locate them at all and talk to
21 them?

22 A. I didn't talk to Hagood. She would not have been a
23 favorable witness for us. But Byron Young, I did speak to.

24 Q. What did he tell you about everything? Do you
25 recall? What did you learn after talking to him?

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SCOTT W. LEE - CROSS - MCMAHAN

1 A. That he didn't know anything about anything,
2 essentially. He did not know anything about anything with
3 regards to this.

4 Q. Do you believe he would have been more like a non-
5 witness, I guess?

6 A. Yeah, I think he would have been a non-witness for
7 us, but I also think him being there, it would have taken away
8 my ability to point that the -- point out that the State did
9 not call certain witnesses that they based their proof of guilt
10 on.

11 Q. Okay.

12 A. And had I called them, they would have been able to
13 cross-examine him. That would have taken away that line.

14 Q. Did the victim in this case ever I.D. anything else
15 years later?

16 A. Yeah, like I say, the woman, after not identifying
17 Byron Young in a photo lineup the day after this happened, when
18 we were in trial, they showed her that lineup again for some
19 reason, and she pointed out Byron Young. And of course, I
20 about had a heart attack and didn't know how to handle that. I
21 still remember taking a lunch break and trying to figure out
22 how to handle her in-court identification of the person that
23 now the State is saying was there, too. And they were able to
24 show a connection between Byron Young and Marion Powell. So
25 that in-court I.D. certainly did not help us.

1 Q. So, initially when they were shown -- when she was
2 shown all the six pictures of the different people, she did not
3 ever pick out Byron Young, but then she points him out in
4 trial.

5 A. Yeah. And he was in a lineup, and she said she
6 didn't recognize anybody in the picture, in the photo array,
7 the six pack. She picked out no one; and then later on, same
8 one, she picked him out.

9 Q. Did you ever bring up -- like make a motion or
10 anything to what we call reveal the deal for Mr. Riley?

11 A. Yes.

12 Q. Did you ever contact or speak to Mr. Cleve Jones?

13 A. Did I ever speak to him? No.

14 Q. What was Mr. Powell's issue with Mr. Jones regarding
15 Stokes Honda?

16 A. There was some -- I guess at some point somebody
17 asked Cleve Jones where were you when all this happened. And I
18 believe his response was he had just left Stokes Honda; had
19 been at Stokes Honda. And there was a question -- there was a
20 suggestion, I guess, that -- that he worked there. My
21 recollection is that, and looking into it, that he was actually
22 kind of an independent car broker, and that he'd go and find
23 these cars on his own; and then one of the people he sold them
24 to was Stokes Honda.

25 Q. So, by working there, he was working as an

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SCOTT W. LEE - CROSS - MCMAHAN

1 independent, I guess?

2 A. That's always what my understanding was. And then
3 there was some back story about the -- some of the employees at
4 Stokes Honda were involved in drugs and that sort of thing.
5 And again, I was kind of trying to stay away from the drug
6 angle, knowing that Eric Riley was going to testify that Powell
7 allegedly told him he was robbing drug dealers.

8 Q. So, and did Mr. Jones, did he give this statement to
9 an officer? Is that how you found it? About what --

10 A. I think it was in discovery. And then I think he
11 also testified to that at trial.

12 Q. Okay. Did you ever follow up with the solicitor,
13 inquiring as to why -- well, at least Young, definitely, was
14 not charged ultimately with this as well?

15 A. Well, follow up after the trial?

16 Q. Yes, sir.

17 A. No. I mean. One thing that did -- I objected to it,
18 too, was in the State's final argument and the rebuttal. I had
19 brought up the fact these people weren't even charged, and the
20 solicitor said that to the jury, he goes, he's saying these
21 people aren't charged, but I intend to investigate this and
22 charge -- maybe charge them later. And of course, I objected,
23 saying that that was testimony and objected to it, but the
24 judge overruled that. But I did not follow up. I mean, I
25 didn't see the point --

1 Q. Yeah.

2 A. -- in asking about that.

3 Q. Because, ultimately, that decision's up to the
4 solicitor.

5 A. Sure. And they still haven't been charged. I do
6 know that.

7 Q. In regards to the plea offer, so there was a fifteen-
8 year plea offer that you were never interested in?

9 A. Yeah, that came pretty early, and that wasn't even
10 the same solicitor that tried the case. We may have had three
11 total solicitors, and the offer was always fifteen. And then I
12 think, as I always do before trial, is ask if there's any final
13 offer. And I think Marion was right; I think it went up to
14 twenty pretrial.

15 Q. But he never had any interest in accepting a plea
16 offer?

17 A. No.

18 Q. Is there anything else you'd like to tell the Court
19 today about this case?

20 A. No, ma'am.

21 MS. MCMAHAN: Nothing further, your Honor.

22 MS. COLEMAN: Just one follow-up question, your Honor.

23 SCOTT W. LEE, RE-DIRECT EXAMINATION

24 BY MS. COLEMAN:

25 Q. The fact that the co-defendants, alleged co-

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SCOTT W. LEE - RE-DIRECT - COLEMAN

1 defendants, were never charged in this case, does that have any
2 bearing or have any effect on the fact that the jury must have
3 believed that Mr. Powell was there as part of this incident?

4 A. Well, I don't know what the jury thought. I just
5 thought that it was fundamentally unfair to base a conviction
6 or a case on people that, you know -- they're arguing that
7 these people were involved and so was he beyond a reasonable
8 doubt, and then they don't even have probable cause to get a
9 warrant as to the -- as to those two, so. I'm not sure that I
10 answered your question, but.

11 Q. Does that change the evidence against him, including
12 the photo lineup or the victims' identification of him on the
13 photo?

14 A. Whether they were charged or not?

15 Q. Right.

16 A. No.

17 Q. Okay. Thank you. Nothing further.

18 THE COURT: Thank you, sir. You're excused.

19 SCOTT W. LEE: Thank you, Judge.

20 THE COURT: Appreciate you.

21 SCOTT W. LEE: Yes, sir.

22 MS. COLEMAN: The State calls Chris Moore.

23 THE COURT: Mr. Moore.

24 MADAM CLERK: Do you solemnly swear or affirm to
25 truthfully answer all questions asked of you by this Court, so

1 help you God?

2 CHRIS MOORE: I do.

3 MADAM CLERK: Thank you.

4 CHRIS MOORE, DIRECT EXAMINATION

5 BY MS. COLEMAN:

6 Q. Good morning, Mr. Moore.

7 A. Good morning.

8 Q. How long have you been practicing law?

9 A. Almost ten years.

10 Q. Okay. Where are you currently employed?

11 A. Richardson, Patrick, Westbrook & Brickman in their
12 Columbia office.

13 Q. How did you come to represent the applicant on his
14 appeal?

15 A. Sure. I was -- a couple years ago, Judge Few, when
16 he was on the Court of Appeals, had a appellate practice
17 project program for young lawyers, where we would take a pro
18 bono appeal, generally in a criminal case, to lighten the load
19 for the public appellate defender's office, I believe. And I
20 was volunteered by my senior partner to do so.

21 Q. Had you had any previous experience with criminal
22 appeals?

23 A. Not with criminal appeals. I had appealed a case
24 through completion at the Supreme Court of South Carolina, and
25 had worked on another appeal or two, but nothing in the

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CHRIS MOORE - DIRECT - COLEMAN

1 criminal world.

2 Q. So this was your first and only criminal appeal?

3 A. It was.

4 Q. Okay. What did you do when you received the case?

5 A. Well, as part of the program, because in theory, we
6 were going to do it all the way through oral argument. I think
7 the idea behind the practice is that it would give young
8 lawyers the chance to take a case all the way through appeal,
9 which would be a good thing.

10 So you were required to meet with Mr. Dudek, who is the
11 chief public defender; you were required to meet with another
12 senior practitioner, in this case, it was Debbie Barbier, I
13 believe; and go through some instructional program about doing
14 an appeal and things to look for in a criminal case. So that
15 was the initial thing.

16 I had gone to law school with the solicitor, and may have
17 just mentioned to him in passing that I was looking over the
18 shoulder on the case. He, of course, you know, thought it was
19 a clean case. I spoke with Mr. Lee about potential issues to
20 look into that might be grounds for appeal. And then,
21 obviously, I reviewed the entire record. I had some
22 correspondence from Mr. Powell. And I think that was
23 everything I did prior to starting the briefing process.

24 Q. So you had some discussions with some other people
25 who had been involved with this case about which issues might

1 be meritorious or not?

2 A. That's correct.

3 Q. Okay. What kind of legal research did you do to
4 prepare?

5 A. So, like Mr. Lee testified to today, it seemed to me
6 that the identification was a big issue. That was certainly
7 the biggest issue pretrial. And so, I looked at that. There
8 was also a potential jury instruction issue that I researched
9 pretty thoroughly. And so, I look at those issues and I read
10 the entire transcript and kind of looked at the entire file,
11 identified those as kind of the two, you know, most plausible
12 grounds for appeal. And then, obviously, I researched the law
13 in those areas as best I could.

14 Q. Which issue, or issues, did you end up raising on the
15 appeal?

16 A. So the only issue on the direct appeal was the
17 identification issue. It did, as I recall, it did seem overly
18 suggestive, or at least Mr. Powell's counsel convinced me of
19 such at trial, although not the judge. And so, I decided to
20 make that the main and only grounds for appeal. And that was
21 what we went with.

22 Q. What was your strategy behind choosing only that one
23 issue? As opposed to, maybe, the jury instruction issue.

24 A. Yeah. I looked at the jury instruction closely. It
25 seemed, you know, that -- well, first of all, if it's going to

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CHRIS MOORE - DIRECT - COLEMAN

1 be an abuse of discretion standard, and it -- the judge -- the
2 whole -- I recall the argument on that charge related primarily
3 to they were trying to back-door the identification through
4 kind of a hand-of-one-hand-of-all theory. The solicitor
5 basically said, well, otherwise, we're going to have to have a
6 lesser included, because they didn't provide enough evidence of
7 a carrying away of any property by Mr. Powell in the case -- or
8 in the trial. And it, you know, it seemed like it was one of
9 those things where the judge was on solid ground for having
10 ruled the way that he did, and that it wasn't something that
11 the appellate court is going to disturb on appeal. And that
12 was just really my strategy, to kind of focus the briefing and
13 our efforts on the identification issue.

14 Q. Okay. The applicant has alleged today that you were
15 ineffective for failing to raise the issue of the directed
16 verdict motion, the judge -- the court's denial of the directed
17 verdict motion. Do you recall the directed verdict motion?

18 A. My recollection is that the directed verdict motion
19 was solely on the bigger -- the identification issue. And so,
20 I felt like that was encapsulated by our appeal. I don't know
21 that I separately said, you know, they messed it up in pretrial
22 and messed it up after the evidence was in. But I think that
23 that legal issue was well covered in the appeal.

24 Q. Okay. So did you see any reason to challenge that
25 specific motion?

1 A. Not specifically.

2 Q. Okay. Were there any other issues that you believe
3 you should have raised?

4 A. No. No, I -- I don't think so.

5 Q. Okay. Thank you very much. No further questions.

6 THE COURT: Cross-examination.

7 CHRIS MOORE, CROSS-EXAMINATION

8 BY MS. MCMAHAN:

9 Q. Were there any issues you could have raised if they
10 were properly preserved?

11 A. I mean, in theory, I supposed. But with the trial
12 record, there was not an issue that I thought, when going
13 through everything, he, you know, counsel started to raise the
14 issue and then failed to preserve it in the record. So, if
15 that's what you mean, no, I'm not aware of an issue where it
16 was started to raise, and then, you know, improperly preserved
17 for appellate review.

18 Q. Okay. Did you consider sending this up to the
19 Supreme Court for cert?

20 A. I, -- so, we didn't get the oral argument. It was
21 scheduled. And then we got just kind of a Rule 220, you know,
22 affirmed, with a couple citations, which was a little bit of a
23 surprise, based on my participation in the program. And I
24 think I communicated that to Mr. Powell in written
25 correspondence. I had had some conversations with his sister,

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CHRIS MOORE - CROSS - MCMAHAN

1 I think, about that as well. And I think I advised that, you
2 know, it was unlikely to change in the Supreme Court, but that
3 if they wanted to go that route, that they needed to let the
4 appellate defender's office know very quickly. I'm pretty sure
5 I sent that letter immediately upon receiving the opinion of
6 the Court of Appeals, because, frankly, I wasn't sure whether I
7 had signed on for certiorari or whether or not that was
8 something that was going to be kicked back over to Mr. Dudek's
9 office.

10 Q. So what was the outcome on that request? Nobody ever
11 asked you to follow up with it or?

12 A. You know, I don't recall getting a response. And I
13 looked in the electronic fill that I had yesterday, and just
14 didn't see it. I want to say I sent everything, complete copy
15 of everything, to Mr. Powell and his sister. And I think I
16 talked to her on the phone about, you know, you got to do this
17 quick, if you all want to pursue it.

18 Q. Did you discuss with Mr. Dudek about a possible cert
19 or taking it up? If he had any feelings about that?

20 A. I did not discuss it with Mr. Dudek or anyone at the
21 appellate defender's office, and I've -- I've never heard
22 anything else from them about it.

23 Q. Okay.

24 MS. MCMAHAN: Nothing further, your Honor.

25 MS. COLEMAN: Nothing further.

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BY THE COURT

1 BY THE COURT:

2 THE COURT: Thank you. May this witness be excused?

3 MS. COLEMAN: He may.

4 CHRIS MOORE: Thank you, your Honor.

5 THE COURT: Ms. McMahan, let me make sure I'm clear on
6 something. The issue that you presented was really failure to
7 call Jarvis Watson to establish an alibi?

8 MS. MCMAHAN: Yes, sir.

9 THE COURT: So, as far as appellate counsel is concerned,
10 are there any issues raised as to his alleged ineffective work?

11 MS. MCMAHAN: No, no, not for appellate counsel. Really,
12 for appellate counsel, my main question was were there any
13 issues that weren't preserved that could have been. That was
14 it.

15 THE COURT: I'm going to dismiss any claims against
16 appellate counsel. You're free to go.

17 CHRIS MOORE: Thank you, your Honor.

18 THE COURT: All right. So 30 days enough time for you
19 all to do this, you know, get the affidavit and depose Mr.
20 Watson?

21 MS. MCMAHAN: I believe so, your Honor.

22 MS. COLEMAN: Yes, your Honor.

23 MS. MCMAHAN: Absent something weird, I'm sure we'll
24 contact you if there's an issue, but I don't anticipate it.

25 THE COURT: Yeah. I'm there every day.

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BY THE COURT

1 MS. COLEMAN: Your Honor, if, within 30 days she is
2 unable to an affidavit from the witness, should be --

3 THE COURT: If you're unable to get an affidavit from the
4 witness, just let me know and I'll dismiss this case, because
5 that's all the evidence that's out there.

6 MS. COLEMAN: Thank you, your Honor.

7 THE COURT: Mr. Scott, thank you for being here today.
8 Appreciate it. Good to see you again.

9 SCOTT W. LEE: Yes, sir.

END PROCEEDING 11:43 A.M.

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CERTIFICATE OF REPORTER

CERTIFICATE OF REPORTER

JANUARY 31, 2018 POST-CONVICTION RELIEF HEARING

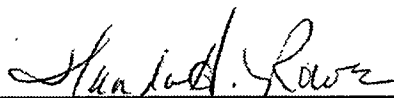
STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, do hereby certify that the foregoing January 31, 2018 Post-conviction Relief Hearing was taken by and before me and at the time and place set forth; that the foregoing is a true and accurate record of the proceeding had and exhibits introduced; that I am of neither kin, counsel, nor interest to any party hereto.

This Certificate of Reporter contains my original signature and is attached to the original of this transcript requested by SCCID. Pursuant to SCACR 607, requests for copies of this transcript must be made to the court reporter. Unauthorized copying/emailing is prohibited.

Witness my signature June 3, 2019.



Wanda H. Rowe
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StarSouthReporting@yahoo.com

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Marion Powell, #333610,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2017-CP-07-00854

ORDER OF DISMISSAL

2018 OCT 18 PM 1:24

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 1, 2017. Respondent submitted its Return and Partial Motion to Dismiss on August 3, 2017. An evidentiary hearing was convened on January 31, 2018, at the Beaufort County Courthouse. Applicant was present at the hearing and was represented by Ashley McMahan, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from Scott W. Lee, Esquire ("Trial Counsel"), and Chris Moore, Esquire ("Appellate Counsel"). This Court had before it the records of the Beaufort County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, Applicant's appellate records, Applicant's records for the Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In April 2011, the Beaufort County Grand Jury indicted Applicant for burglary,

first degree (2011-GS-07-0778), five counts of kidnapping (2011-GS-07-0779; -0780; -0781; -0782; -0783), armed robbery (2011-GS-07-0784), possession of a weapon during the commission of a violent crime (2011-GS-07-0786), and possession of a firearm or ammunition by a person convicted of a violent offense (2011-GS-07-0787). Scott W. Lee, Esquire, represented Applicant. Assistant Solicitors Benjamin Sheldon, Esquire, and Hon. Benjamin Coppage, Esquire, prosecuted the case. On November 18-22, 2013, Applicant proceeded to trial before the Honorable Brooks Goldsmith. The jury found Applicant guilty as indicted. Judge Goldsmith sentenced Applicant to imprisonment for concurrent terms of twenty-seven years for burglary, first degree, twenty-seven years for each count of kidnapping, and five years for possession of a weapon during the commission of a violent crime. The charge of possession of a firearm or ammunition by a person convicted of a violent crime was dismissed.

Applicant filed a timely notice of appeal. Robert Dudek, Esquire, of the Office of Appellate Defense, and Chris Moore, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 15, 2016. State v. Powell, Op. No. 2016-UP-297 (S.C. Ct. App. filed June 15, 2016). The remittitur was returned to the circuit court on July 1, 2016.

II. ALLEGATIONS

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

1. Allegations of Unfairness

- a. "I was in fact placed in a unfair, inappropriate, and overly suggestive photo line up: the court and also my attorney allowed Pam Brown, the person who created the photo line up to not testify...in her own opinion that my line up was not done correctly or as should have been done...obvious and apparent framework of authorities...More importantly, prosecution says that I was placed in this line up because Northern Beaufort incidents were similar to this: both 2 incidents that I was charged with 2 incidents that were dropped due to obvious lies...was

allegedly tied up, robbed for drugs, and motion of discovery is full of a bunch of urban novel extortion ring story...K Bradshaw (who is not a relative of mine as said in court) allegedly that he was robbed, pistol whipped and shot at. Where is the similarity?"

- b. "...Ben Shelton informs the court that the investigation was not complete. And also that he asked for a continuance... This trial took place in 2013. It's now 2017 and these "alleged" co-defendants still remain uncharged. Which in further proof and reason jail tapes between myself and Mr. Young should had never been able to be used. Because I have nothing to do with the matter at hand." (internal citations omitted)
 - c. "...Cleven Jones was asked where was he at the time of the alleged incident... Cleven Jones stated that he just left his job at Stokes Honda. Prosecution and also my attorney refused to point out this outright perjury (lie) to the court. Investigative in my Rule 5 Motion reveals that Stokes Honda officials made it very clear! That is that Cleven Jones has never... worked as a car broker there. Michael Coxwell at Stokes Honda nor other Stokes Honda reps were called to testify to this very important information. What type of prosecution or counsel would not want this lie and fabricated alibi presented to the court, to the jury? Not only does this man admit that this was his way to get back Kenya Hagood... Prosecution know and pin point outright lies in Eric Riley's original written statements. And still allowed his testimony by dissecting what they could use to aid them in a conviction. Furthermore, if a thorough investigation and honest effort of truth was being sought. It would be known. That the only Kenya I know is Kenya Moultrie from where I was born and raised. Big Estate and Vick State as written in my transcript. [Eric Riley is nothing more than a hostile witness who made a mockery of the court for his own personal reasons]."
2. Ineffective Assistance of Trial Counsel
 - a. "My trial counsel was indeed ineffective due to him not calling to the stand. Stokes Honda Staff, Det. John Gobel & numerous other narcotic law enforcement that were on trial list and in my rule 5. Most importantly Shawn Byron Young and Kenya Hagood to take the stand.
 - b. "My trial counsel didn't even find it important to bring the court's attention about the illegal activity the Jones' were under investigation for. In my trial brief it even speaks of 2 million in cash found in one of their their properties. Meaning it is very possible they were puppets for law enforcement and prosecution to escape their own legal trouble."
 3. Ineffective Assistance of Appellate Counsel
 - a. For failing to challenge the court's jury instructions
 - b. For failing to challenge the court's denial of a directed verdict

Additionally, on January 22, 2018, Applicant filed an amended post-conviction relief application, listing the following allegation:

1. Ineffective Assistance of Counsel as to Scott W. Lee, Esquire:
 - a. Failed to call Jarvis Watson as an alibi witness.

At the outset of the evidentiary hearing, Respondent moved to dismiss all direct appeal allegations. This Court granted the motion to dismiss, and Applicant proceeded on his other allegations. Following the hearing, the Court allowed Applicant to hold the record open for thirty days to allow him to provide additional testimony from his alleged alibi witness. However, after a period of time, Applicant informed the Court it would not be able to submit further testimony.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the evidentiary hearing, Applicant testified that he turned himself into law enforcement in March 2011 when he came back from North Carolina. He stated he had two alleged co-defendants who have never been charged to this day, Kenya Hagood and Shawn Byron Young. Applicant testified that he has an alibi witness, Jarvis Watson, who he has known all his life. He stated he told Trial Counsel that he was with Watson during the time of the crime and Trial Counsel got in contact with Jarvis through his sister but did not call him as a witness at trial. Applicant testified that Trial Counsel told him the photo lineup was the main issue in his case, but there were also issues about aiding and abetting and the fact that Applicant was on the run. He testified that he was in North Carolina for several months during the time of the crime, but he does not remember what he was doing on the specific day of the crime. He testified that he was offered a fifteen year plea deal, but he chose not to take the offer.

Trial Counsel's testimony

At the evidentiary hearing, Trial Counsel testified that this case involved a home invasion where three black men, armed with guns and some wearing masks, entered a home where children were present. Trial Counsel stated Applicant did not admit to being there and that he

and Applicant had some discussion about an alibi. Trial Counsel testified his concern was that no one could pinpoint that Applicant was in North Carolina on that date and at that time, which Trial Counsel opined could have destroyed an entire case. Trial Counsel testified that he investigated Jarvis Watson as a potential alibi witness, but Watson did not really want to help. Trial Counsel further testified that he made a strategic decision not to call Watson as an alibi witness because he would not have been a helpful witness.

Trial Counsel testified his general trial strategy was to attack the identification of Applicant and suppress the photo lineup by arguing it was overly suggestive. He stated the photo lineup was extremely damaging to Applicant because both the mother and the ten-year-old child who were victims of the home invasion picked Applicant out of the photo lineup. Trial Counsel stated that he had an expert testify at trial about the suggestive nature of the photo lineup. He testified that he does not know what weight the jury gave the evidence, but he thought the lineup was very, very harmful and was the victims' identification was believable to the jury.

Trial Counsel testified that he did not talk to Kenya Hagood, but she would not have been a helpful witness for Applicant. He testified that if he had called Shawn Young as a witness, it would have taken away his ability to argue the State's lack of witnesses and evidence. Trial Counsel stated he made a motion to reveal the deal for Eric Riley, the "jailhouse snitch." He stated he never spoke to Clevon Jones, but his investigation showed that Jones was an independent car broker and he sold some cars to Stokes Honda. He stated the backstory was that some Stokes Honda people were involved with drugs, and Trial Counsel wanted to avoid that coming in at trial, so he chose not to call Jones at trial.

Appellate Counsel's testimony

Appellate Counsel testified he came to represent through the Appellate Practice Project and he took the case pro bono. He stated he does not usually do criminal appeals, and this was his first and only criminal appeal case. He stated that, because it was his first case, when he received the case, he met with the head of Appellate Defense and a senior practitioner, went through an instructional program, and spoke with both Trial Counsel and the Solicitor who prosecuted the case. Appellate Counsel testified he did extensive legal research on the issues in the case, including the photo lineup issue and the jury instructions. He stated his strategy was to raise the identification issue as his only issue on appeal, as he believed it was the most meritorious. Appellate Counsel stated he did not challenge the trial court's denial of the directed verdict motion because it was the same as the issue he raised—the identification of Applicant. He stated he was not aware of any issues that Trial Counsel failed to preserve for appellate review that he would have raised on appeal. Appellate Counsel testified he chose not to petition for certiorari to the Supreme Court and that he advised Applicant it was unlikely they could change the court's ruling. Appellate Counsel testified that he informed Applicant that if he wanted to continue the appeal, Applicant could contact the Office of Indigent Defense to do so. Appellate Counsel stated he sent a copy of the appellate materials to Applicant and his sister.

IV. APPLICABLE LAW

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 that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 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.

V. 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 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 (1985).

"ALLEGATIONS OF UNFAIRNESS"

This Court finds all of Applicant's allegations concerning "allegations of unfairness" should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

These claims are not cognizable under the act. Applicant is not collaterally attacking his guilty plea or sentence, but rather seeks to argue issues best suited for direct appeal. Applicant's contention that such a ground is impliedly created by S.C. Code Ann. § 17-27-90 is meritless, as that section does not pertain to *what* may be raised, but *how* valid grounds must be raised.

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. PCR relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). These issues are improper for post-conviction relief

because they could have been raised on direct appeal and are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised these issues at trial or on appeal. In fact, his first claim was raised and ruled upon on direct appeal. His failure to do so for the remaining claims has waived those allegations as grounds for relief.

Furthermore, Applicant's first claim is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981). Because it was raised and ruled upon in his prior litigation, this allegation is dismissed.

For these reasons and pursuant to Rule 12(b)(6), SCRCP, this Court finds these allegations are denied and dismissed for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Trial Counsel was ineffective in his representation before and during his trial. This Court finds Applicant has failed to meet his burden of proving any of his allegations and that Trial Counsel was not ineffective in any of his actions or inactions. Applicant alleges Trial Counsel was ineffective for failing to call specific witnesses at trial. However, Trial Counsel testified that he investigated each of these witnesses, and he articulated

valid strategical decisions in choosing not to call them.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Trial Counsel testified that he did not talk to Kenya Hagood, but he chose not to do so because she would not have been a helpful witness for them. He articulated that he chose not to call Shawn Young as a witness because having him there would have taken away his ability to argue the State's lack of witnesses and evidence. Trial Counsel testified that he never spoke to Cleven Jones because his investigation showed he was part of the drug involvement at Stokes Honda, and he did not want to bring any of that into the trial, as it would have harmed Applicant. Finally, Trial Counsel credibly testified that he did investigate and attempt to speak to Jarvis Watson as a potential alibi witness, but Watson did not really want to help. Trial Counsel further testified that he could not accurately pinpoint Applicant as being in North Carolina on the date of

the crime, so he made a strategic decision not to call him as a witness.

To qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

This Court finds Trial Counsel's decision not to call Jarvis Watson as an alibi witness was not deficient, as he was unable to get Watson to cooperate and Watson's testimony would not have qualified as an alibi regardless. Most importantly, Applicant cannot meet his burden of proving prejudice because he failed to present the testimony of Watson as an alibi witness. This Court cannot speculate the contents or credibility of his testimony. Therefore, Applicant has failed to meet either prong of the Strickland test on any of his allegations, and they are denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court finds Applicant's allegations of ineffective assistance of appellate counsel are meritless and are denied and dismissed with prejudice.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State,

302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Here, Applicant alleges Appellate Counsel was ineffective for failing to brief the trial court's jury instructions and the denial of his directed verdict motion. However, the meritorious issue Appellate Counsel raised on direct appeal essentially is the same as the issue of the denial of a directed verdict, as the directed verdict motion was made to argue the victim's identification from the photo lineup was not competent evidence to create substantial circumstantial evidence of Applicant's guilt. ROA 184. Appellate Counsel's meritorious issue on direct appeal was:

- i. The photo array was unduly suggestive which created a substantial likelihood of irreparable misidentification in violation of Appellant's right to due process.
 - a. The photo array selected by law enforcement to identify Appellant was highly suggestive.
 - b. Under the totality of the circumstances, the identification based on the unnecessarily suggestive identification process was unreliable and should be excluded.

Brief of Appellant. Appellate Counsel's issue on appeal was a challenge to the photo lineup evidence and subsequent identification which was the subject of the directed verdict motion. The Court of Appeals found in its opinion that the trial court did not abuse its discretion in allowing the photo lineup, as it was not unduly suggestive and there was no substantial likelihood of misidentification. State v. Powell, Op. No. 2016-UP-297 (S.C. Ct. App. filed June 15, 2016). Even if Appellate Counsel had attacked this evidence by raising this issue as one of error in denying the directed verdict motion, it would not have been successful based on the appellate court's ruling on the admissibility of this evidence. Accordingly, there can be no prejudice from his failure to do so. Additionally, Appellate Counsel testified that he thoroughly researched the jury instruction issue and chose not to raise this issue, as he did not believe it would be as successful as the issue he raised could be. This Court finds Appellate Counsel was not deficient in choosing not to raise either of these issues, and there is no resulting prejudice from his decision not to do so, as the issues would not have changed the outcome of the appeal. Accordingly, these allegations are denied and dismissed with prejudice.

[signature page to follow]

VI. CONCLUSION

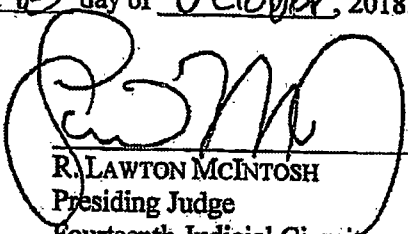
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of 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 the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 16 day of October, 2018.


R. LAWTON MCINTOSH
Presiding Judge
Fourteenth Judicial Circuit

Anderson, South Carolina

WITNESSES

Duke/ Bluffton PD

ARREST WARRANT NUMBER

J351167

ACTION OF GRAND JURY

Becca Wells
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2011GS0700788

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Weapons / Pointing and presenting firearms at
a person

SC Code: 16-23-0410
CDR Code:0122

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 BEAUFORT)

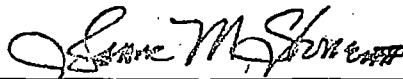
INDICTMENT
2011GS0700788

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Weapons / Pointing and presenting firearms at a person

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, did point or present a firearm at [REDACTED] A.H. [REDACTED]; in violation of Section 16-23-410 of the Code of Laws of South Carolina, (1976, as amended.

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



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351166

ACTION OF GRAND JURY

Butt Wolf
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700787

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Weapons / Possession of Firearm or
Ammunition by person conv

SC Code: 16-23-0500(A)
CDR Code:3434

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 BEAUFORT)

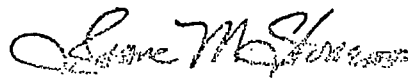
INDICTMENT
2011GS0700787

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Weapons / Possession of Firearm or Ammunition by person conv

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did carry about his person a handgun, described as follows: pistol; in violation of Section 16-23-20, 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

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351165

ACTION OF GRAND JURY

Brent used
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2011GS0700786

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marlon Benjamin Powell

Indictment for

Weapons / Poss. weapon during violent crime,
if not also sen

SC Code: 16-23-0490
CDR Code:0549

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 BEAUFORT)

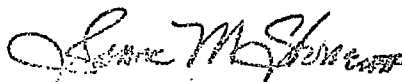
INDICTMENT
2011GS0700786

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Weapons / Poss. weapon during violent crime, if not also sen

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, did possess a pistol or visibly display what appeared to be a pistol during the commission, or attempted commission, of Armed Robbery, a violent crime. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

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



Solicitor

WITNESSES

Duke/ Bluffton PD

ARREST WARRANT NUMBER

J351164

ACTION OF GRAND JURY

Becca Wolf
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2011GS0700785

The State of South Carolina
County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

**Weapons / Pointing and presenting firearms at
a person**

SC Code: 16-23-0410
CDR Code:0122

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 BEAUFORT)

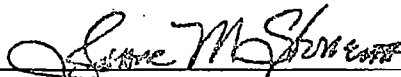
INDICTMENT
2011GS0700785

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Weapons / Pointing and presenting firearms at a person

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, did point or present a firearm at Senora Jones; in violation of Section 16-23-410 of the Code of Laws of South Carolina, (1976, as amended).

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


Solicitor

WITNESSES

Duke/ Bluffton PD

ARREST WARRANT NUMBER

J351163

ACTION OF GRAND JURY

Burt Wolf
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2011GS0700784

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

**Robbery / Armed Robbery, robbery while armed
or allegedly ar**

SC Code: 16-11-0330(A)
CDR Code:0139

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 BEAUFORT)

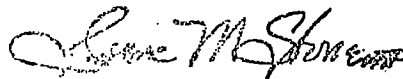
INDICTMENT
2011GS0700784

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Robbery / Armed Robbery, robbery while armed or allegedly ar

That on or about October 25, 2010, in Beaufort County, South Carolina, the Defendant, Marion Benjamin Powell, at [REDACTED], Bluffton, SC, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or other object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Senora Jones with the intent to permanently deprive the victim of possession thereof, in violation of Section 16-11-330(A) of the South Carolina Code of Laws, 1976, as amended.

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



Solicitor

WITNESSES

Duke/ Bluffton PD

ARREST WARRANT NUMBER

J351162

ACTION OF GRAND JURY

FILED

Burt Wolf
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700783

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Kidnapping / Kidnapping

SC Code: 16-03-0910
CDR Code:0095

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 BEAUFORT)

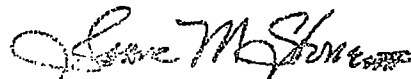
INDICTMENT
2011GS0700783

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, [REDACTED] A.V., without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

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



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351161

ACTION OF GRAND JURY

True

Ben Wagon
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700782

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Kidnapping / Kidnapping

SC Code: 16-03-0910
CDR Code:0095

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 BEAUFORT)

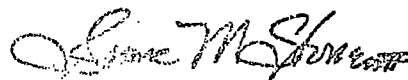
INDICTMENT
2011GS0700782

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, [REDACTED] M.V., without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

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



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351158

ACTION OF GRAND JURY

Ben W. [Signature]
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2011GS0700779

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Kidnapping / Kidnapping

SC Code: 16-03-0910
CDR Code:0095

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 BEAUFORT)

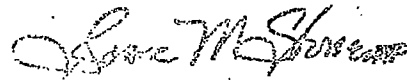
INDICTMENT
2011GS0700779

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Senora Jones, without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

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



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351160

ACTION OF GRAND JURY

Ben Wolfe
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700781

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Kidnapping / Kidnapping

SC Code: 16-03-0910
CDR Code:0095

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 BEAUFORT)

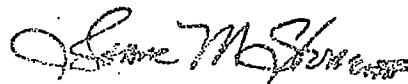
INDICTMENT
2011GS0700781

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, [REDACTED] C.J., without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

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



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351159

ACTION OF GRAND JURY

Bevot W. [Signature]
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700780

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Kidnapping / Kidnapping

SC Code: 16-03-0910
CDR Code:0095

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 BEAUFORT)

INDICTMENT
2011GS0700780

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Kidnapping / Kidnapping

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, unlawfully did seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, A.H., without authority of law; all in violation of Section 16-3-910 of the Code of Laws of South Carolina, (1976, as amended)

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



Solicitor

WITNESSES

Duke/Bluffton PD

ARREST WARRANT NUMBER

J351157

ACTION OF GRAND JURY

Brent Wolfe
Foreperson of Grand Jury
Date:

APR 21 2011

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2011GS0700778

The State of South Carolina

County of Beaufort

COURT OF GENERAL SESSIONS

April Term 2011

THE STATE

vs.

Marion Benjamin Powell

Indictment for

Burglary / Burglary (After June 20, 1985) - First
degree

SC Code: 16-11-0311
CDR Code:0079

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 BEAUFORT)

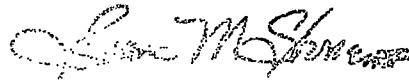
INDICTMENT
2011GS0700778

At a Court of General Sessions, convened on April 21, 2011, the Grand Jurors of Beaufort County present upon their oath:

Burglary / Burglary (After June 20, 1985) - First degree

That in Beaufort County, South Carolina, on or about October 25, 2010, the Defendant, Marion Benjamin Powell, did enter the dwelling of Senora Jones, located at [REDACTED] Bluffton, SC, without consent and with the intent to commit a crime therein. That, in addition, was armed with a weapon; in violation of Section 16-11-311 of the South Carolina Code of Laws (1976, as amended).

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



Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Beaufort

STATE VS.

Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

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

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

in violation of § 16-23-0490

of the S.C. Code of Laws, bearing CDR Code # 0549

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

ATTEST:

Shelton, Ben

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 5 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.

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

SPECIAL CONDITIONS:

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

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

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

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

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

INDICTMENT/CASE#: 2011GS0700786

A/W#: J351165

Date of Offense: 10/25/2010

S.C. Code § : 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

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

Presiding Judge

Judge Code: 2139

Sentence Date: November 22, 2013

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.

Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27

DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#:

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

In disposition of the said indictment comes now the Defendant who was

TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

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's initials)The plea is: ☐ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

Shelton, Ben

SC Bar# 77207

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,for a determinate term of 27 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.

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

SPECIAL CONDITIONS:

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

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

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

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

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

10-30475

INDICTMENT/CASE#: 2011GS0700784

A/W#: J351163

Date of Offense: 10/25/2010

S.C. Code § : 16-11-0330(A)

CDR Code #: 0139

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

Presiding Judge

Judge Code:

Sentence Date:

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

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
 STATE VS.
Marion Benjamin Powell

AKA: _____

Race: B Sex: M Age: 27DOB: [REDACTED] SS#: [REDACTED]

Address: _____

City, State, Zip: _____

DL#: [REDACTED] SID#: _____*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Kidnapping / Kidnapping

IN THE COURT OF GENERAL SESSIONS

0-3045

INDICTMENT/CASE#: 2011GS0700783A/W#: J351162Date of Offense: 10/25/2010S.C. Code § : 16-03-0910CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095

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

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: [Signature]Sheldon, BenSC Bar# 77207

Defendant

Attorney for Defendant

SC Bar# _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 27 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.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

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

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

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

Clerk of Court/ Deputy Clerk Kristy TaylorCourt Reporter: Wanda Rame

SCCA/217 (03/2011)

Presiding Judge 2/39

Judge Code: _____

Sentence Date: November 22, 2013

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
 STATE VS.
Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Kidnapping / Kidnapping

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

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

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

ATTEST

Shelton, Ben77207
SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 27 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.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

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

Clerk of Court/ Deputy Clerk

Court Reporter: Wanda Rouse

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

0-307rs

INDICTMENT/CASE#: 2011GS0700780A/W#: J351159Date of Offense: 10/25/2010S.C. Code § : 16-03-0910CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

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: NO

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

Presiding Judge 2139Judge Code: 2139Sentence Date: November 22, 2013

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
 STATE VS.
Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Kidnapping / Kidnapping

IN THE COURT OF GENERAL SESSIONS

0-3075

INDICTMENT/CASE#: 2011GS0700782A/W#: J351161Date of Offense: 10/25/2010S.C. Code §: 16-03-0910CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095

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

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

ATTEST:

Shelton, BenSC Bar# 77207

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 27 days/months/years of ☐ 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.

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

SPECIAL CONDITIONS:

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

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

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

PTUP

 days/hours Public Service EmploymentObtain 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 FundOther: 400 OPS

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

Clerk of Court/ Deputy Clerk

Court Reporter: Wanda Powell

SCCA/217 (03/2011)

Presiding Judge 2139Judge Code: Sentence Date: November 22, 2013

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Beaufort

VS.

Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27

DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip:

DL#: [REDACTED] SID#:

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

IN THE COURT OF GENERAL SESSIONS

0-307r1

INDICTMENT/CASE#: 2011GS0700781

A/W#: J351160

Date of Offense: 10/25/2010

S.C. Code § : 16-03-0910

CDR Code #: 0095

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

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

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

ATTEST:

Shelton, Ben

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 27 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.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

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

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

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

\$ _____ paid to Public Defender Fund

Other:

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

Presiding Judge

Judge Code:

Sentence Date:

2139

November 22, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Beaufort
 STATE VS.
Marion Benjamin Powell

0-30749
 INDICTMENT/CASE#: 2011GS0700779
 A/W#: J351158
 Date of Offense: 10/25/2010
 S.C. Code §: 16-03-0910
 CDR Code #: 0095

AKA: _____
 Race: B Sex: M Age: 27
 DOB: [REDACTED] SS#: [REDACTED]
 Address: _____
 City, State, Zip: _____
 DL#: [REDACTED] SID#: _____

SENTENCE SHEET

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

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

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

ATTEST [Signature] 77207
Shelton, Ben SC Bar# _____ Defendant Attorney for Defendant SC Bar# _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 27 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.

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

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

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

PTUP _____
 _____ days/hours Public Service Employment
 Obtain GED ☐
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling ☐
 Random Drug/Alcohol testing ☐
 Fine may be pd. in equal, consecutive weekly/monthly
 prmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: No GPS

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

Clerk of Court/ Deputy Clerk Kurtis Tager
 Court Reporter: Wanda Roue
 SCCA/217 (03/2011)

Presiding Judge 2139
 Judge Code: [Signature]
 Sentence Date: November 22, 2013

STATE OF SOUTH CAROLINA

COUNTY OF Beaufort
STATE VS.

Marion Benjamin Powell

AKA:

Race: B Sex: M Age: 27

DOB: SS#:

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Burglary / Burglary (After June 20, 1985) - First degree

IN THE COURT OF GENERAL SESSIONS

15-LIFE

INDICTMENT/CASE#: 2011GS0700778

A/W#: J351157

Date of Offense: 10/25/2010

S.C. Code § : 16-11-0311

CDR Code #: 0079

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

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

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

ATTEST:

Shelton, Ben

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 27 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.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 56-1-286 (DUI Breath Test) \$25 \$ _____

Proviso 47.9 (Public Def/Prob) \$500 \$ _____

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$ _____

§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ 3.90TOTAL \$ 133.90

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

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

\$ _____ paid to Public Defender Fund

Other: _____

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

Clerk of Court/ Deputy Clerk

Court Reporter: Wanda Rouse

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2139

Sentence Date: November 22, 2013