VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Beaufort County

Perry M. Buckner, Circuit Court Judge

JOHN DYKEMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213569

APPENDIX

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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PERPETRATOR ALONE IS RESPONSIBLE, WHICH I THINK GOES ALONG WITH THE PROBABLE CONSEQUENCE LANGUAGE OF NUMBER NINE.

I ALSO HAVE A CHARGE THAT SAYS A PRINCIPAL IN A CRIME IS ONE WHO EITHER IN PERSON PERPETRATES THE CRIME OR WHO BEING PRESENT AIDS, ABETS, AND ASSISTS IN ITS COMMISSION. WHEN ONE DOES AN ACT IN THE PRESENCE OF AND WITH THE ASSISTANCE OF ANOTHER, THE ACT IS DONE BY BOTH, AND WHERE TWO OR MORE ACTING WITH A COMMON DESIGN OR INTENT ARE PRESENT AT THE COMMISSION OF A CRIME, IT MATTERS NOT BY WHOSE IMMEDIATE AGENCY THE CRIME IS COMMITTED. ALL ARE GUILTY. THE HAND OF ONE IS THE HAND OF ALL.

PRESENT AT THE COMMISSION OF A CRIME MEANS TO BE SUFFICIENTLY NEAR TO. HOWEVER, MERE PRESENCE AT THE SCENE OF A CRIME IS INSUFFICIENT TO CONVICT ONE AS PRINCIPAL ON THE THEORY OF AIDING AND ABETTING. INTENT IS ALSO A NECESSARY ELEMENT FOR THERE MUST HAVE BEEN A COMMON DESIGN OR INTENT TO COMMIT THE CRIME AND THE CRIME MUST HAVE BEEN COMMITTED PURSUANT THERETO WITH THE PERSON AIDING AND ABETTING BY SOME OVERT ACT. THE STATE MUST PROVE THESE ELEMENTS BEYOND A REASONABLE DOUBT.

ALSO, THERE IS A FURTHER CHARGE THAT SAYS: AID MEANS TO PROMOTE THE COURSE OF OR THE ACCOMPLISHMENT OF OR TO AFFORD SUPPORT TO, TO HELP, TO GIVE HELP OR ASSISTANCE, A HELPER. ABET MEANS TO ENCOURAGE OR GIVE THE APPEARANCE OF FAVOR OR MORAL SUPPORT AS AID OR APPROVAL. SO THOSE GO ALONG WITH

THAT AS WELL, INDICATING TO A JURY THAT JUST STANDING THERE IS NOT AN AIDER OR ABETTOR.

MY MERE PRESENCE CHARGE SAYS: MERE PRESENCE AT THE SCENE IS INSUFFICIENT TO PROVE SOMEONE GUILTY. THE BURDEN IS UPON THE STATE TO PROVE EVERY ELEMENT OF THE CRIME CHARGED. IF YOU FIND AFTER REVIEWING ALL OF THE EVIDENCE THAT THE STATE HAS PROVED THE DEFENDANT WAS ONLY PRESENT AND THAT THEY HAVE NOT PROVED BEYOND A REASONABLE DOUBT ANY OTHER PARTICIPATION, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY. THE LAW IS THAT PROOF OF MERE PRESENCE AT THE SCENE OF A CRIME IS NOT SUFFICIENT TO FIND SOMEONE GUILTY. AND I PUT THAT IN ALONG WITH THE OTHERS. THOSE ARE THE ONES THAT I'M PLANNING ON USING.

MR. LEE: JUDGE, I THINK SOMETHING ELSE THAT'S GOING TO BE OUT THERE IS UNDER DURESS OBVIOUSLY. THE DEFENSE HAS THE BURDEN OF PROVING THAT BY A PREPONDERANCE OF THE EVIDENCE.

THE COURT: YES, SIR.

MR. LEE: AND I THINK THAT, NUMBER ONE, PREPONDERANCE OF THE EVIDENCE IS GOING TO HAVE TO BE CHARGED AND BE VERY -- PLEASE SPEAK VERY, VERY CAREFUL AS FAR AS HOW THAT'S DONE SO THAT THE JURY DOESN'T BELIEVE THAT THAT'S THE STANDARD OF PROOF IN A CRIMINAL CASE.

THE COURT: I WILL. WHAT I WOULD LIKE FOR YOU TO DO IS WITH RESPECT TO THE REQUEST TO CHARGE THAT I AM NOT ACCEPTING ON YOUR BEHALF THAT YOU WILL HAVE THEM MARKED AS A COURT'S

EXHIBIT SO THAT THEY'LL BE AVAILABLE AS A PART OF THE RECORD FOR ANY REVIEW THAT MAY BE REQUIRED.

MR. LEE: YES, SIR. I'LL BE GLAD TO. THANK YOU. AND JUST FOR MY RECORDS, IT LOOKS LIKE YOU'RE NOT GOING TO CHARGE OUR PROPOSED TWO, FIVE, SIX, SEVEN.

THE COURT: YES. THAT IS CORRECT.

MR. LEE: ALL RIGHT. WE WILL INTRODUCE THESE AS A COURT -- AS COURT EXHIBITS.

(COURT'S EXHIBIT 1 IS MARKED FOR IDENTIFICATION ONLY.)

MR. LEE: AND OBVIOUSLY THAT'S ONLY FOR THE PURPOSES OF THIS HEARING AND NOT TO GO TO THE JURY ROOM.

THE COURT: THERE IS ALSO -- I'M GOING TO ADD ON YOUR DURESS CHARGE TO NUMBER THREE WHERE IT SAYS THERE WAS NO OTHER REASONABLE ALTERNATIVE. I'M GOING TO PUT THE LANGUAGE: TO AVOID THE THREAT AND THE INJURY OTHER THAN COMMITTING THE CRIME OF ARMED ROBBERY AND KIDNAPPING. I THINK IT WORKS BETTER TO PUT THE -- AVOID THE THREAT AND INJURY OR THE EMERGENCY AT THAT POINT RATHER THAN TAGGING IT AT THE END.

MR. LEE: OKAY. ALL RIGHT.

THE COURT: ANY PROBLEM ABOUT MOVING IT AROUND?

MR. LEE: NO, SIR.

THE COURT: OKAY. ALL RIGHT. WELL, WE'LL BE IN RECESS UNTIL ABOUT 1:30.

MR. STONE: MAY I ALSO SUBMIT -- I DO APOLOGIZE. I DIDN'T WANT TO INTERRUPT YOUR THOUGHT. I DON'T KNOW IF I

WANT THIS CHARGED OR NOT, TO BE QUITE HONEST WITH YOU. WHAT I WOULD LIKE TO DO IS HAND IT UP TO, YOUR HONOR, AND I'LL HAND A COPY TO THE DEFENSE. DEPENDING UPON MR. HOOD'S CLOSING ARGUMENT, I WILL LEAVE IT TO YOUR DISCRETION WHETHER OR NOT IT IS APPROPRIATE. THERE WOULD SEEM TO BE SOME CROSS-EXAMINATION ON THE PATHOLOGIST THAT BRETT KINNEY MAY HAVE BEEN DEAD PRIOR TO THE ROBBERY, AND IF THAT'S -- IF THAT'S THE CASE, IF THERE'S AN ARGUMENT BY THE DEFENSE THAT YOU CAN'T ROB A DEAD PERSON, THEN I THINK THERE IS SOME LAW THAT SAYS JUST THE OPPOSITE OF THAT.

ON THE OTHER HAND, IF THAT'S NOT THE ARGUMENT, I'M NOT -- I DON'T NEED THAT. SO I WILL JUST HAND THIS TO YOU AND LEAVE IT TO YOUR DISCRETION, YOUR HONOR. I'LL SEND A COPY TO MR. HOOD. IF THAT BECOMES AN ISSUE IN HIS CLOSING, I'D ASK THAT YOU CHARGE IT. IF IT DOES NOT, THEN I WOULD WITHDRAW IT.

THE COURT: WHAT'S THE STATE'S VIEW AT THIS POINT AS TO THE POSSIBILITY OF CHARGING ANYTHING OTHER THAN ARMED ROBBERY?

MR. STONE: I DON'T BELIEVE THERE'S ACTUALLY -- WELL, MY THOUGHT IS ON THAT, YOUR HONOR, IS THAT THIS IS AN ARMED ROBBERY OR IT'S NOT ANYTHING. IT SEEMS TO ME THAT THE KNIFE BEGINS IT. THERE'S CERTAINLY -- THAT IS CERTAINLY PRESENT DURING THE CONTINUATION OF THE ROBBERY. I WOULD -- MY GUT REACTION: THERE'S NOT ACTUALLY ANY EVIDENCE OF STRONG ARM

ROBBERY, BUT IF THE DEFENSE FEELS STRONGLY ABOUT IT, I'LL RECONSIDER THAT.

MR. LEE: WE WOULD LIKE THAT CHARGED.

THE COURT: I'LL GIVE -- I'LL GIVE STRONG ARM ROBBERY AS A LESSER INCLUDED.

MR. STONE: ALL RIGHT, SIR.

THE COURT: SO THAT FITS THE THEORY OF THE ROBBERY OCCURRED---

MR. STONE: YES, SIR.

THE COURT: ---AFTER THE DECEASE.

MR. STONE: YES, SIR.

THE COURT: ALL RIGHT. WE'LL BE IN RECESS THEN UNTIL ABOUT 1:30.

(WHEREUPON, A LUNCH BREAK WAS TAKEN.)

THE COURT: WE HAVE ONE MATTER TO PUT ON THE RECORD. THE STATE HAS RESTED. I'VE HEARD THE MOTIONS FOR DIRECTED VERDICT. I'VE RULED ON THOSE MOTIONS AND THE OTHER MOTIONS THAT HAVE BEEN PREVIOUSLY OUTSTANDING. WE AGREED AFTER WE RECESSED FOR LUNCH THAT WHEN THE JURY CAME BACK IN THAT -- AND THE DEFENSE RESTED IN THEIR PRESENCE THAT I WOULD NOT SEND THEM BACK OUT AGAIN BUT THAT ALL MOTIONS FOR DIRECTED VERDICT AT THE END OF THE STATE'S CASE AND RELATED MOTIONS WERE TO BE CONSIDERED FOR THE PURPOSES OF THE RECORD AS HAVING BEEN RENEWED AND DENIED AGAIN AT THE TIME THE DEFENSE RESTED. SINCE THERE WOULD BE NO ADDITIONAL EVIDENCE

PRESENTED AT THAT TIME, THERE WOULD BE NO ADDITIONAL BASIS OR ARGUMENTS TO BE MADE. SO RATHER THAN SENDING THE JURY IN AND OUT, WE WILL SIMPLY LET THE RECORD REFLECT THAT THE SAME HAVE BEEN MADE. THE SOLICITOR IS?

MR. THORNTON: HE WILL BE BACK MOMENTARILY, JUDGE, IF WE COULD HAVE JUST ABOUT FIVE MINUTES. I'M FINISHING HOOKING UP A COUPLE OF THINGS REAL QUICK.

THE COURT: VERY GOOD. WELL, WE'LL BE IN RECESS FOR A COUPLE OF MINUTES.

MR. THORNTON: THANK YOU, JUDGE.

(PAUSE IN PROCEEDINGS.)

THE COURT: ALL RIGHT. STATE READY FOR THE JURY TO COME BACK IN?

MR. STONE: YES, SIR.

THE COURT: DEFENSE READY?

MR. HOOD: WE ARE.

THE COURT: ALL RIGHT. VERY GOOD. IF YOU'LL BRING US THE JURY.

(WHEREUPON, THE JURY WAS BROUGHT INTO OPEN COURT AT 1:40 P.M.)

THE COURT: DEFENSE?

MR. HOOD: YOUR HONOR, AT THIS TIME THE DEFENSE WOULD REST.

THE COURT: LADIES AND GENTLEMEN, YOU HAVE HEARD THE EVIDENCE THAT HAS BEEN PRESENTED TO YOU BY THE STATE. THE

DEFENSE HAS IN ESSENCE SAID: WE DO NOT FEEL THAT THE EVIDENCE IS SUFFICIENT TO ESTABLISH THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT AS TO ANY OF THE CHARGES THAT HAVE BEEN BROUGHT BY THE STATE AGAINST THIS DEFENDANT AND, THEREFORE, THE DEFENSE RESTS.

AS I INDICATED TO YOU IN MY OPENING REMARKS, THAT HAPPENS SOMETIMES; SOMETIMES IT DOES NOT HAPPEN. BUT WHEN IT DOES, THAT PRESERVES FOR THE DEFENSE THE FINAL ARGUMENT. GENERALLY IN A CRIMINAL PROSECUTION, THE DEFENSE MAKES ITS ARGUMENT FIRST AND THE STATE MAKES THE FINAL ARGUMENT. WHEN THE DEFENSE CHOOSES TO MAKE NO PRESENTATION, WHEN ITS POSITION IS IN ESSENCE THE STATE HAS NOT MET ITS BURDEN OF PROOF, THEN THE DEFENSE HAS A CHANCE TO MAKE THE LAST ARGUMENT.

SO, LADIES AND GENTLEMEN, IN JUST A MOMENT YOU WILL HEAR THE FINAL ARGUMENTS OF COUNSEL IN THIS MATTER, AND IN THIS PARTICULAR INSTANCE YOU WILL HEAR THE ARGUMENT OF THE STATE AND THEN YOU'LL HEAR THE ARGUMENT OF THE DEFENSE. NOW, LADIES AND GENTLEMEN, THE ATTORNEYS ARE GOING TO HAVE AN OPPORTUNITY TO DISCUSS WITH YOU DURING THEIR CLOSING ARGUMENTS WHAT THEY BELIEVE HAS BEEN ESTABLISHED OR NOT ESTABLISHED BY THE EVIDENCE IN THIS CASE. AS THEY DISCUSS THAT AND THEY DISCUSS THE LAW, THEY WILL HAVE THE OPPORTUNITY TO TALK WITH YOU ABOUT VARIOUS PIECES OR PORTIONS OF TESTIMONY. THEY WILL NOT INTENTIONALLY MISLEAD YOU AS TO

WHAT IT WAS A PARTICULAR WITNESS MAY HAVE SAID, BUT SHOULD THERE BE A DIFFERENCE BETWEEN YOUR MEMORY AS TO THE TESTIMONY OF A PARTICULAR WITNESS AND WHAT MAY HAVE BEEN URGED BY COUNSEL IN THEIR ARGUMENTS, YOU, OF COURSE, ARE TO RELY UPON YOUR COLLECTIVE MEMORIES. YOU ARE THE FACT FINDERS AND, AGAIN, WHAT THE ATTORNEYS ARE TELLING YOU IS NOT EVIDENCE IN THE CASE. THEY WILL BE DISCUSSING WITH YOU WHAT THEY BELIEVE THE EVIDENCE WAS. SO YOU RELY ON YOUR OWN MEMORIES AS TO WHAT IS THE EVIDENCE IN THIS CASE.

LIKEWISE, THEY WILL HAVE A CHANCE TO DISCUSS WITH YOU THE LAW THAT THEY BELIEVE I WILL CHARGE, AND THAT IS A PART OF WHAT WE DID WHEN YOU WERE HAVING YOUR BREAK IS WE WENT OVER THE PROPOSED CHARGES. AND THEY HAVE A RIGHT TO DO THAT, BUT SHOULD THERE BE SOME DIFFERENCE BETWEEN WHAT THEY URGE YOU IS THE LAW AS IT RELATES TO THESE TYPES OF MATTERS AND SHOULD THAT VARY IN THE ACTUAL INSTRUCTIONS THAT I GIVE YOU, THEN PLEASE REMEMBER YOU'RE OBLIGATED TO ACCEPT THE LAW AS I GIVE IT TO YOU AND APPLY IT APPROPRIATELY TO THE FACTS THAT YOU FIND.

BUT THIS IS A VERY IMPORTANT TIME AND AN IMPORTANT PART OF THE CASE. YOU HAVE BEEN MOST KIND IN THE ATTENTION THAT YOU HAVE SHOWN TO ALL OF THE PARTIES INVOLVED IN THIS PROCESS OVER THE LAST SEVERAL DAYS. ON BEHALF OF THE COURTS, I THANK YOU FOR YOUR KINDNESS AND YOUR ATTENTION, AND I'M SURE THAT THE STATE -- THE STATE DOES AND THAT THE DEFENSE DOES AS

WELL. YOU PERFORM AN INVALUABLE SERVICE, AN IMPORTANT FUNCTION FOR THIS COMMUNITY AND FOR SOCIETY AS GENERAL -- IN GENERAL AS YOU COME FORWARD TO SERVE AS JURORS IN THE CASE AND TO MAKE YOUR FACTUAL FINDINGS OF FACT AND TO APPLY THE LAW TO THOSE FACTUAL FINDINGS.

BOTH SIDES, AS WELL AS THE COURT, ASK THAT YOU BE ATTENTIVE IN ALL THAT TAKES PLACE WITHIN RESPECT TO THE COURTROOM AND THAT YOU LISTEN WELL, AND WHEN YOU DO THAT, WHEN YOU HAVE BEEN CONSCIENTIOUS IN PERFORMING YOUR DUTIES, THEN I WILL TELL YOU NOW AND I WILL TELL YOU ALSO IN MY CHARGE THAT REGARDLESS OF WHAT YOUR VERDICT MAY BE, NEITHER SIDE WILL HAVE ANY REASON TO CRITICIZE IT.

IF YOU ARE CALM AND COLLECTIVE, IF YOUR VERDICT SPEAKS THE TRUTH, THAT IT'S NOT THE RESULT OF ANY PASSION OR PREJUDICE OR BIAS FOR OR AGAINST ANYONE, THAT YOU COME IN AND YOU SIFT THROUGH CAREFULLY THE EVIDENCE IN THIS MATTER AND YOU MAKE YOUR FACTUAL DETERMINATIONS, THEN YOU WILL HAVE FULFILLED THE HIGHEST RESPONSIBILITIES OF JURORS, AND FOR THAT WE WILL ALL THANK YOU. SOLICITOR, YOU MAY ADDRESS THE JURY.

MR. STONE: THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT?

THE COURT: YES, SIR.

MR. STONE: THE DECISION YOU HAVE TO MAKE IS: DID HE HELP HER? THAT'S IT. IT ALL COMES DOWN TO THAT ONE

QUESTION. DID HE AID AND ABET? DID HE ASSIST? AS I TOLD YOU IN THE OPENING ARGUMENT, THE HAND OF ONE IS THE HAND OF ALL. BUT SPECIFICALLY WHAT THAT MEANS IS THAT IF SOMEBODY IS PRESENT AND THEY AID, ASSIST, ENCOURAGE, THEN THEY'RE AS GUILTY AS THE PRINCIPAL.

NOW, LET'S ASSUME THAT SAMANTHA MORGAN-MAJOR IS THE PRINCIPAL. LET'S ASSUME THAT SHE STRUCK THE FIRST BLOW WITH THE KNIFE. AT THAT POINT THE ISSUE IS PRETTY CLEAR: THERE IS NOT GOING TO BE ANY ARGUMENT THAT JOHN DYKEMAN WAS PRESENT. WE ALL KNOW HE WAS PRESENT. THERE'S NOT EVEN GOING TO BE ANY ARGUMENT AS TO THAT.

SO HERE'S THE ISSUE: DID HE HELP HER? DID HE HELP HER? IF HE WAS MERELY PRESENT, IF HE WAS JUST THERE, YOUR VERDICT NEEDS TO BE NOT GUILTY. HE NEEDS TO GO HOME. IF HE WAS JUST THERE, THEN WE SHOULD NOT BE HERE. THE ISSUE HERE IS: DID HE HELP? DID HE ASSIST? DID HE ENCOURAGE?

LADIES AND GENTLEMEN, HE DIDN'T JUST AID AND ASSIST. HE JUMPED IN FEET FIRST. HE PARTICIPATED. HE DIDN'T JUST ENCOURAGE. HE DIDN'T JUST STAND THERE. HE PARTICIPATED. AND WHAT I WANT TO TALK TO YOU ABOUT IS THE EVIDENCE AND THE FACTS IN THIS COURTROOM THAT YOU'VE SEEN THAT SHOWS JUST THAT. JUST THAT.

STARTING WITH THE BASICS. HE DROVE THE CAR TO THE A.T.M. MACHINE WITH BRETT KINNEY STILL IN THE TRUNK; WE KNOW THAT. LATER ON HE IS STILL DRIVING THE CAR WHILE SAMANTHA

MORGAN-MAJOR IS TAKING MONEY OUT OF THE A.T.M. MACHINE. WE KNOW THAT AS WELL. IN FACT, HE PROVIDED THE CAR, THE ONE THAT THE BLOOD WAS FOUND IN, WHICH SHOWS THAT BRETT KINNEY WAS IN THE TRUNK OF THAT CAR. OF COURSE, ACCORDING TO HIS OWN STATEMENT, HE WILLINGLY DROVE BRETT KINNEY AROUND WHILE BRETT KINNEY SCREAMED IN THE BACK OF THE TRUNK. WHAT DID HE DO? HE SMOKED DOPE. HE SMOKED DOPE.

HE PROVIDED THE CAR AND THE RIDE THAT RETURNED THESE ITEMS. WE KNOW THAT. AND SOME OF THE THINGS THAT HE DID WITH THIS CARD HE DID RIGHT ALONGSIDE SAMANTHA MORGAN-MAJOR. RIGHT ALONGSIDE. ACTUALLY, NOT EXACTLY RIGHT ALONGSIDE. IN FACT, HE WALKS IN BY HIMSELF UNDER HIS OWN VOLITION BEFORE SHE EVEN GETS IN THERE. SAMANTHA MORGAN-MAJOR COMES IN LATER, AND WHAT DOES HE DO? HE JOINS HER AT THE A.T.M. MACHINE WHILE SHE'S GETTING THE MONEY OUT.

HE KNOWS WHERE SOME OF THE EVIDENCE WAS LOCATED, SPECIFICALLY THE CANE, NOT JUST AT SAMANTHA MORGAN-MAJOR'S HOUSE, BUT IN THE PUMP HOUSE. HOW DID HE KNOW THAT? HOW DID HE KNOW THAT? HE ALSO TOLD WHERE TO FIND THE KNIFE. HOW DID HE KNOW THAT?

WHAT THEY DID TO BRETT KINNEY IS UNHEARD OF. THAT FIRST STAB WOUND THAT STARTED THIS CHAIN OF EVENTS DIDN'T KILL BRETT KINNEY UNFORTUNATELY. THE DAMAGE TO HIS HEAD DID AND THAT CAME LATER. AND WE DON'T KNOW WHICH ONE OF THESE TWO CAST THE LAST BLOW, AND I TOLD YOU THAT AT THE VERY

BEGINNING.

WHAT WE KNOW IS THAT JOHN DYKEMAN DROVE THE CAR. WE KNOW THAT JOHN DYKEMAN SMOKED CRACK WHILE BRETT KINNEY SCREAMED IN THE BACK OF IT. WE KNOW JOHN DYKEMAN WENT INTO THE LI'L CRICKET WITH SAMANTHA MORGAN-MAJOR. WE KNEW THAT HE DROVE SAMANTHA MORGAN-MAJOR TO THE A.T.M. MACHINE. WE KNOW HE DROVE HER -- HE DROVE THE GETAWAY CAR. HE WENT -- WHATEVER THE OTHER VERSION OF THAT WOULD BE IS TO GO TO THE CRIME CAR. HE'S NOT JUST HELPING. HE'S PARTICIPATING. HE'S PARTICIPATING, AND THAT'S WHAT HE DID WITH HER.

BUT, FOLKS, IT DOESN'T END THERE. WHAT DID HE DO WITHOUT HER? THE NEXT DAY -- BRETT KINNEY'S A.T.M. CARD AGAIN. HE'S BY HIMSELF. HE COMES IN BY HIMSELF AND USES BRETT KINNEY'S A.T.M. CARD. WHERE IS SAMANTHA MORGAN-MAJOR?

WHO TOOK THE BLOODY CARPET OUT OF THE TRUNK OF THE CAR AND TRIED TO BURN IT AND WHERE? JOHN DYKEMAN'S HOUSE. AND THIS SHOVEL, THIS SHOVEL THAT HAD BLOOD AND HAIR FROM BRETT KINNEY, WAS FOUND WHERE? JOHN DYKEMAN'S HOUSE. WHERE IS JOHN DYKEMAN'S HOUSE? ALL THE WAY DOWN HERE, ALL THE WAY AWAY FROM SAMANTHA MORGAN-MAJOR'S HOUSE. AND THERE'S NOT ONE BIT OF TESTIMONY THAT SAMANTHA MORGAN-MAJOR EVER WENT TO THAT HOUSE. HE DID THAT BY HIMSELF.

THE SHOVEL THAT HAD THE BLOOD FROM BRETT KINNEY'S HEAD ON IT... AND WE WEREN'T THERE. WE DID NOT SEE HOW BRETT KINNEY DIED. WE'VE GOT SOME IDEA ABOUT HOW HE DIED, BUT WE

DON'T KNOW WHO DID WHAT. IT'S A LOT OF DAMAGE FOR ONE PERSON TO DO WHILE THE OTHER PERSON WAS MERELY PRESENT.

SO WHAT DOES THE DEFENSE SAY? JOHN DYKEMAN SAYS, WHEN HE FINALLY GOT HIS STORY THE THIRD TIME: I WAS SCARED AND I WAS LOOKING FOR AN OPPORTUNITY TO DO SOMETHING. LET'S TAKE THE OPPORTUNITY FIRST. OPPORTUNITY TO DO SOMETHING? SHE'S AT THE A.T.M. MACHINE. YOU'RE IN THE CAR WHILE SHE'S AT THE A.T.M. MACHINE WITH BRETT KINNEY. I DON'T KNOW IF SHE'S HOLDING HIM BY KNIFEPOINT AT THAT POINT, BUT IT CERTAINLY DOESN'T LOOK LIKE IT FROM THE PHOTOGRAPH IN STATE'S EXHIBIT NUMBER 8. THAT'S OPPORTUNITY NUMBER ONE AND THAT'S EARLY.

SAME THING, SECOND OPPORTUNITY. SHE'S AT THE A.T.M. MACHINE, AND HE'S IN THE CAR WITH BRETT KINNEY. DRIVE. TAKE A LOOK AT THIS. HOW LONG WAS HE IN HERE TALKING TO A CORRECTIONAL OFFICER BEFORE SAMANTHA MORGAN-MAJOR EVEN CAME INTO THE STORE? OFFICER, I HAVE A PROBLEM. OFFICER, THERE'S A CRAZY WOMAN WITH A KNIFE THAT IS SCARING ME. OPPORTUNITY? HOW MANY OPPORTUNITIES DO YOU NEED?

AND, OF COURSE, HERE WHEN HE'S TAKING BRETT KINNEY'S MONEY OUT, HE'S TOTALLY BY HIMSELF. NOT ONLY WHERE IS SAMANTHA MORGAN-MAJOR, BUT WHERE IS THE KNIFE? WHERE IS THE COERCION? WHERE IS THE FORCE? DO YOU THINK HE'S GOT ANY OPPORTUNITY, LADIES AND GENTLEMEN, TO DO SOMETHING? HE'S LOOKING FOR AN OPPORTUNITY, ACCORDING TO HIM. WHERE IS IT? ALL OF THESE ARE OPPORTUNITIES, AND HE TOOK NONE OF THEM.

BUT WHY? BECAUSE HE SAYS HE WAS SCARED. NOT ACCORDING TO BRANDY ROSS, NOT ACCORDING TO DEBRA LINCOLN.

REMEMBER DEBORAH LINCOLN IS WHO HE TOOK THE CAR FROM. WE KNOW THAT THE CAR IS USED IN RETURNING THESE ITEMS HERE. ACCORDING TO DEBORAH LINCOLN, I TALKED TO HIM. HE NEVER SEEMED SCARED OR AFRAID TO ME. IN FACT, HE'S NOT A SCARED PERSON. DEBORAH LINCOLN SAYS HE WASN'T SCARED. BRANDY ROSS SAID SHE TALKED TO HIM, SAME TIME FRAME, WHEN SHE FINDS BRETT KINNEY'S I.D. IN THE PANTS HE'S WEARING AND WHEN SHE GETS IN THE BLOOD-SOAKED CAR, AND HE'S NEVER SCARED DURING THAT.

BUT, FOLKS, YOU DON'T HAVE TO TAKE THEIR WORD FOR IT. HOW SCARED DOES HE LOOK? HOW AFRAID DOES HE LOOK? DID YOU SEE ANYTHING IN ANY OF THIS THAT INDICATED HE WAS AFRAID? HE'S NOT AFRAID. WHY? HE WAS QUITE HAPPY BEING INVOLVED IN THIS, AND HE SUMS IT ALL UP IN HIS STATEMENT. WHY? I'M A JUNKY. I WANTED SOME DOPE. WHAT DID HE GET? HE GOT SOME DOPE. THEN HE GOT TO SMOKE HIS DOPE USING BRETT KINNEY'S MONEY, AND HE GOT TO SMOKE HIS DOPE WHILE BRETT KINNEY LITERALLY SCREAMED FOR HIS LIFE IN THE TRUNK OF THE CAR.

THAT'S WHAT THIS CASE IS ABOUT FOR JOHN DYKEMAN. HE WANTED SOME DOPE. AND SO THE ISSUE IS: DOES HE GET A PASS FOR THAT? THE THINGS THAT WE DO IN OUR LIFE ARE CHOICES. WE MAKE THEM EVERY DAY, AND THOSE CHOICES AFFECT OURSELVES AND THOSE CHOICES SOMETIMES AFFECT OTHER PEOPLE. EVERYTHING THAT HAPPENED IN THIS CASE WAS A CHOICE JOHN DYKEMAN MADE, AND IF

HE WANTS TO SAY THOSE CHOICES STARTED AFTER SAMANTHA MORGAN-MAJOR STABBED BRETT KINNEY IN THE BACK, FINE. FINE. WHAT CHOICES DID HE MAKE AFTER THAT? BY HIS OWN ADMISSION: I WAS THE INSTRUMENT THAT DROVE HER AROUND. I TOOK HER TO THE A.T.M. MACHINE. I SHARED IN SOME OF THE MONEY. WELL, HECK, I ACTUALLY GOT SOME OF THE MONEY OUT OF THE A.T.M. MACHINE MYSELF. I SMOKED THE DOPE WHILE BRETT KINNEY SCREAMED IN THE TRUNK. AND SHE KEPT STOPPING AND ASKING ME. AND INTERESTINGLY ENOUGH IN HIS STATEMENT, HE DIDN'T SAY, "SHE MADE ME." HE SAID, "SHE ASKED ME."

AND WHAT DID SHE DO? WOULD YOU POP THE TRUNK? SURE, I'LL POP THE TRUNK AND. ACCORDING TO HIM, BRETT KINNEY GOT OUT OF THE TRUNK ON HIS OWN. DID YOU SEE BRETT KINNEY ON THAT VIDEO? HE CAN'T EVEN USE THE WHOLE LEFT SIDE OF HIS BODY. DO YOU THINK HE'S GETTING IN AND OUT OF THE TRUNK BY HIMSELF? AND ALL OF THOSE ARE CHOICES THAT JOHN DYKEMAN MADE. THE DESTRUCTION OF THE EVIDENCE, THE ATTEMPT: JOHN DYKEMAN. TAKING THE SHOVEL THAT BEAT BRETT KINNEY TO HIS HOUSE IF HE DIDN'T, IN FACT, USE IT HIMSELF ON HER (SIC)? THAT'S A CHOICE HE MADE. ALL OF THOSE ARE CHOICES HE MADE, AND THOSE CHOICES, LADIES AND GENTLEMEN, I SUBMIT TO YOU HE'S RESPONSIBLE FOR.

AS A RESULT OF THOSE CHOICES, BRETT KINNEY IS DEAD. HE WAS TORTURED AND HE WAS MURDERED. HE WAS ROBBED BECAUSE YOU SAW IT. YOU SAW THE ROBBERIES. HE WAS KIDNAPPED BECAUSE YOU

HEARD ABOUT IT, AND YOU HEARD ABOUT THE KIDNAPPING FROM DYKEMAN'S OWN VOICE.

THOSE ARE CHOICES. FOLKS, I WOULD SUBMIT TO YOU YOU DON'T GET A PASS BY SAYING, "I DID IT, BUT I'M A JUNKY. I DID IT, BUT I'M A COWARD. I DID IT, BUT I'M HANGING OUT WITH THE WRONG PEOPLE." THE QUESTION YOU HAVE TO MAKE A DECISION ON IS SIMPLY THIS: WAS JOHN DYKEMAN JUST THERE OR DID HE HELP?

MR. HOOD: MAY IT PLEASE THE COURT?

THE COURT: SURE. MR. HOOD.

MR. HOOD: I'M GOING TO SORT OF START FROM THE BEGINNING AND SORT OF RUN YOU ALL THE WAY THROUGH THIS AND LET YOU -- AND I'LL FILL IN THE SPOTS AS WE GO ALONG. SOMETIME IN THE EARLY MORNING HOURS APPROXIMATELY 12:30 A.M., JOHN DYKEMAN IS CALLED BY SAMANTHA MORGAN-MAJOR TO COME PICK HER UP, TO PICK UP A FRIEND WHO IS GOING TO GIVE HER SOME MONEY.

THEY GO TO THAT FRIEND'S HOUSE. THAT FRIEND COMES OUT, OBVIOUSLY GETS IN THE FRONT SEAT OF THE CAR. THEY DRIVE AWAY. AT THAT POINT IN TIME SAMANTHA MORGAN-MAJOR MAKES SOME COMMENTS THAT BECOME QUITE DISTURBING TO JOHN DYKEMAN WHO'S THE DRIVER OF THE CAR WHO DOESN'T HAVE ANY RELATIONSHIP WITH THIS YOUNG MAN. THIS MAN THAT'S IN THE CAR IS 34 YEARS OLD. HE DOESN'T HAVE ANY RELATIONSHIP WITH HIM, BUT HE NOTICES THAT THE CONVERSATION JUST AIN'T QUITE GOING RIGHT.

NOW, I WANT TO TELL YOU RIGHT UP FRONT: THE STATE

PRESENTED ALL OF THIS EVIDENCE. THEY PRESENTED IT TO YOU, AND WHAT MR. LEE AND I WERE LOOKING FOR DURING THE COURSE OF THIS TRIAL WAS TO MAKE SURE THAT YOU HAVE EVERY BIT OF INFORMATION THAT WAS AVAILABLE FOR YOU TO USE. YOU'LL NOTICE DURING SEVERAL OF THE STATE'S WITNESSES THEY WERE QUITE RELUCTANT TO GIVE US THE GOOD INFORMATION, BUT WE EVENTUALLY GOT IT OUT OF THEM THROUGH CROSS-EXAMINATION AND THIS AND THAT AND THE OTHER.

BUT LET'S GO BACK TO THE CAR. AND, AGAIN, THE EVIDENCE -- NOW, THIS IS EVIDENCE. THE STATE GAVE YOU THIS STATEMENT OF JOHN DYKEMAN'S. THEY WENT TO ALL THE TROUBLE TO FIX IT AND DO ALL OF THIS KIND OF STUFF. THEY HAD IT RECORDED. THEY DID ALL OF THESE THINGS. THAT IS THE EVIDENCE THEY GAVE YOU, AND YOU HEARD IT. YOU READ IT. YOU'RE GOING TO HAVE IT WITH YOU.

JOHN DYKEMAN DIDN'T HAVE ANY EARTHLY IDEA THAT THIS WOMAN, SAMANTHA MORGAN-MAJOR -- UNTIL HE REALIZED WHEN HE SAW, BOOM, SHE STABS BRETT KINNEY IN THE BACK. BLOOD OBVIOUSLY ALL OVER THE PLACE BECAUSE OF THE TESTIMONY YOU'VE HEARD. BLOOD ALL IN THE SEAT OF THE CAR. BLOOD ON THE CONSOLE. JOHN DYKEMAN IS THE, QUOTE -- HAS CARE, CUSTODY, AND CONTROL OF THIS PARTICULAR VEHICLE. IT'S HIS CAR. HE'S RESPONSIBLE FOR WHAT'S INSIDE OF THAT CAR. THIS PERSON HAS JUST STABBED A MAN IN THE BACK UNEXPECTEDLY.

JOHN DYKEMAN AT THAT POINT IN TIME -- I CAN'T IMAGINE

WHAT YOU MAY OR MAY NOT THINK. YOU'RE GOING TO READ IT AGAIN HOPEFULLY WHEN YOU LOOK AT HIS TESTIMONY. AT THIS POINT IN TIME, WITHIN MINUTES OR SO, WE HAVE A THREAT FROM THIS SAME WOMAN TO JOHN DYKEMAN WITH THIS LITTLE KNIFE, AND IF THAT AIN'T A THREAT, I DON'T KNOW WHAT IS.

AND HOW DO WE KNOW THAT SAMANTHA MORGAN-MAJOR OR JOHN DYKEMAN USED THAT KNIFE TO INFLICT THOSE INJURIES ON BRETT KINNEY, THE TWO STABBINGS, THE ONE IN THE BACK AND THE ONE IN THE HEAD? D.N.A. D.N.A. EVIDENCE AGAIN THAT -- THE STATE DIDN'T PRESENT IT. SO I HAD TO WALK THEM THROUGH EACH PIECE OF THIS LITTLE EVIDENCE TO BE ABLE TO VERIFY THAT, NUMBER ONE, THERE WAS A MIXTURE OF D.N.A. ON THAT KNIFE THAT BELONGED TO A FEMALE AND BRETT KINNEY. ALSO, AGAIN, FEMALE CUTTING FROM THE INSIDE OF THE TRUNK AND CONSISTENT WITH BRETT KINNEY'S D.N.A.

THERE IS NOT ONE PIECE OF D.N.A. EVIDENCE THAT LINKS JOHN DYKEMAN TO HAVING EVER TOUCHED, PUT HIS HANDS ON OR OTHERWISE NOT ONE OF THOSE INSTRUMENTS OUT THERE, NOT ONE OF THEM. THERE'S NOT ONE FINGERPRINT. THERE'S NOT ONE PIECE OF D.N.A. BLOOD, HAIR, OTHERWISE THAT LINKS JOHN DYKEMAN TO ANY OF THOSE ITEMS. THEY DO TO A FEMALE IN SOME INSTANCES. TENNIS SHOES. NOTHING THERE. BLUE JEANS. BLUE JEANS. NOTHING THERE. SAMANTHA MORGAN-MAJOR, D.N.A. CONSISTENT WITH BRETT KINNEY ON HER CLOTHING.

JOHN DYKEMAN IS IN A WORLD OF TROUBLE. JOHN DYKEMAN HAD

OUTSTANDING WARRANTS FOR THIS, THAT, AND THE OTHER FOR BAD CHECKS OR WHATEVER IT WAS, BUT MORE IMPORTANTLY JOHN DYKEMAN IS IN THE CARE, CUSTODY, AND CONTROL OF THAT VEHICLE. WHO IS GOING TO BELIEVE JOHN DYKEMAN WHEN YOU'VE GOT BLOOD ALL OVER THE INSIDE OF THIS CAR WHICH IS CONSISTENT WITH THIS YOUNG MAN BY THE NAME OF BRETT KINNEY WHO LATER ON TURNS UP DEAD?

CAN YOU IMAGINE THE TURMOIL THAT YOU'RE GOING THROUGH WHEN SOMEBODY HAS JUST BEEN STABBED IN YOUR VEHICLE AND HOW ARE YOU GOING TO EXPLAIN THAT? YOU NOT ONLY HAVE IT IN THE FRONT SEAT OF YOUR CAR; YOU'VE GOT IT IN THE BACK, IN THE TRUNK. JOHN DYKEMAN SAYS -- AND, AGAIN, THAT'S THE EVIDENCE THERE, THE EVIDENCE THAT THE STATE PRESENTED YOU THAT SAYS: I WAS IN FEAR FOR MY LIFE AND THE LIFE OF MY FAMILY. I DIDN'T KNOW WHAT TO DO. I JUST -- WHATEVER SHE TOLD ME TO DO, I DID IT. AND DO YOU SAY NO TO A WOMAN WITH A KNIFE THAT SIZE? WHO'S GOT THE KNIFE?

WHERE ARE YOU GOING TO GO? NOWHERE TO GO. AND PARTICULARLY YOU'VE JUST WITNESSED THIS HORRIFIC EVENT THAT'S TAKEN PLACE IN YOUR CAR AND YOU'RE TRYING TO FIGURE: WHAT AM I GOING TO DO? WELL, HE DID EVERYTHING THAT HE WAS SUPPOSED TO DO AFTER THE ARMED ROBBERY, THE ALLEGED KIDNAPPING, AND THE MURDER OF BRETT KINNEY. HE STARTED GETTING RID OF ANYTHING AND EVERYTHING THAT HAD ANYTHING THAT WOULD CONNECT HIM TO THIS AUTOMOBILE THAT MIGHT HAVE SOME EVIDENCE IN IT.

SO WHAT DO YOU DO? YOU TAKE OUT THE THING AND YOU THROW

IT OVER ON THE BURN PILE. YEP. I TOLD YOU FROM THE BEGINNING IN MY OPENING STATEMENT THAT JOHN DYKEMAN DID A LOT OF CRIMINAL THINGS, PERHAPS, AFTER THE FACT OF THE THREE THINGS THAT HE'S CHARGED WITH, AND THAT'S ARMED ROBBERY, THAT'S KIDNAPPING, AND THAT'S MURDER.

THE A.T.M. MACHINES, LOOK AT THE TIMES ON THOSE, THE TIMES -- AGAIN, THE STATE PRESENTS THE EVIDENCE. IF YOU'LL NOTICE IN JOHN DYKEMAN'S STATEMENT, HOW LONG DID THIS EVENT OR HOW LONG WAS HE IN THE TRUNK, THIS, THAT, AND THE OTHER BEFORE HE WAS KILLED? FOUR TO FIVE HOURS.

NOW, AGAIN, WE HAD A LITTLE TROUBLE WITH THE STATE'S PATHOLOGIST. ON HER REPORT SHE STATES IN THERE SPECIFICALLY: EARLY A.M. ON 5/2/04. THAT IS THE SAME EARLY A.M. MORNING THAT THE MOTHER SEES BRETT LEAVE THE HOUSE AND GET IN THIS VEHICLE. SO THEY'RE PRESENTING THE EVIDENCE. AND YOU HAVE TO, THEY HOPE, ACCEPT THAT EVIDENCE ALTHOUGH THEY SAY: WAIT A MINUTE. WE REALLY DON'T WANT YOU TO BELIEVE THAT, YOU KNOW, BECAUSE LOOK AT HIM AT THE A.T.M. MACHINE. WELL, THE EVENT IS OVER BY THEN, YOU KNOW, AND HE'S CLEANED UP THE CAR AND HE'S MOVED ALL THIS STUFF. HE'S DONE EVERYTHING HE COULD DO BECAUSE, HECK, HE'S DRIVING ANOTHER WOMAN'S CAR. IT AIN'T EVEN THE SAME CAR ANYMORE.

WHAT DOES HE DO? HE GOES WITH SAMANTHA MORGAN-MAJOR TO GET RID OF MORE EVIDENCE. CELL PHONE. CREDIT CARD. JOHN DYKEMAN USED IT. I MEAN, YOU SEE HIM ON THERE. WHETHER HE

GOT ANY MONEY OR NOT WE DON'T KNOW. WE KNOW THAT OF THE ALLEGED 24 HITS ON THAT PARTICULAR A.T.M. CARD THERE WERE FOUR THAT WERE COMPLETED. WE KNOW THAT OUT OF THOSE FOUR THAT IT AMOUNTED TO $251.29. WE KNOW THAT $201 WAS TAKEN OUT BY SAMANTHA MORGAN-MAJOR AT THE FIRST TRANSACTION AT 1:46 A.M.

SO THE STATE WOULD HAVE YOU BELIEVE THAT ALL OF THESE THINGS HERE, THE A.T.M., WHATEVER -- WE DON'T SEE JOHN DYKEMAN TAKING ANY MONEY OUT OF THE A.T.M. MACHINE. WE DON'T SEE SAMANTHA MORGAN-MAJOR TAKING ANY MONEY OUT OF AN A.T.M. MACHINE. THE LADY WHO CAME IN HERE AND TESTIFIED WITH RESPECT TO THE SECURITY IN THIS PARTICULAR FILM AND THIS AND THAT AND THE OTHER WAS TALKING ABOUT A GAME MACHINE SITTING OVER THERE. AND SAMANTHA MORGAN-MAJOR, IF YOU WANT TO GO BACK AND LOOK AT THE TAPE AGAIN, IS SITTING IN A CHAIR DOING SOMETHING, BUT THE A.T.M. MACHINE IS THE MACHINE NEXT TO HER. SHE'S PLAYING A GAME, WE GUESS. WE DON'T KNOW BECAUSE WE CAN'T SEE IT.

JOHN DYKEMAN, AS I SAID BEFORE, COVERED UP THESE CRIMES. HE DID IT, AIN'T NO DOUBT ABOUT IT. BUT JOHN DYKEMAN -- AND THERE'S NOT ONE SHRED OF EVIDENCE TO CONNECT HIM WITH WILLINGLY AND AGREEING, PARTICIPATING, INCITING, AIDING, AND ABETTING SAMANTHA MORGAN-MAJOR IN AN ARMED ROBBERY, A KIDNAPPING, OR A MURDER. AFTER THOSE OFFENSES HAVE OCCURRED, YEP, HE DOES SOME THINGS THEN BECAUSE WHAT IS HE TRYING TO

DO? SELF-PRESERVATION. PROTECT MYSELF. YOU KNOW, I'VE GOT A PROBLEM HERE. I'VE GOT AN AUTOMOBILE THAT'S FULL OF BLOOD. SO I'M GOING TO DUMP IT IN THE RIVER, ACCORDING TO BRANDY ROSS.

NOW, BRANDY WAS AN INTERESTING PERSON. BUT, ANYWAY, GOING BACK TO HER STATEMENT -- NEEDLE, HYPERDERMIC NEEDLE. YOU KNOW, IF YOU'RE GOING TO DO ALL -- THAT WAS HER TESTIMONY TUESDAY I GUESS IT WAS. NEVER HAD SAID THAT BEFORE IN THREE YEARS SUPPOSABLY.

GUESS WHAT? YOU HEARD THE D.N.A. EXPERT. THERE WASN'T ANY D.N.A. FROM THAT NEEDLE BELONGING TO BRETT KINNEY. IT WAS NOT A MATCH TO BRETT KINNEY. THEY FOUND IT, BUT IT DIDN'T MATCH BRETT KINNEY, DID IT? ANOTHER WILD STORY AND ANOTHER ONE OF THE SILENT WITNESSES, BUT WE'VE WORKED THEM OUT JUST A LITTLE BIT.

YOU'RE GOING TO HAVE TO GO BACK AND USE YOUR OWN MEMORY WITH RESPECT TO A LOT OF THIS, AND I KNOW A LOT OF YOU ARE THINKING, GEEZ, HE MUST HAVE DONE SOMETHING BECAUSE THAT'S WHAT THE STATE IS TRYING TO TELL YOU. HE MUST HAVE DONE SOMETHING. YOU KNOW, HE'S A GUY. SHE'S A WOMAN. YOU KNOW, HE MUST HAVE DONE SOMETHING. WELL, I'LL TELL YOU: I THINK THAT YOU CAN BE THREATENED BY A WOMAN JUST AS EASILY AS YOU CAN BE THREATENED BY ANOTHER MAN.

SO DON'T LET THAT -- YOU KNOW, IT GETS CONFUSING AFTER AWHILE WHAT THE STATE'S TRYING TO DO HERE. THEY'RE TELLING

YOU IN THE FIRST INSTANCE THAT, OKAY, JOHN DYKEMAN DIDN'T KNOW THAT THIS WAS GOING TO HAPPEN, AND JOHN DYKEMAN DIDN'T TAKE ANY OF THE MONEY AND HE DIDN'T DO THIS, BUT HE SOMEHOW AIDED AND ABETTED AND HELPED, INCITED. THE EVIDENCE THAT YOU HAVE DOESN'T -- DOESN'T -- DOESN'T SHOW THAT. AND HE WAS TALKING ABOUT WHETHER OR NOT JOHN DYKEMAN HELPED GET BRETT KINNEY -- I MEAN, HE WAS INSINUATING THAT BRETT KINNEY WAS TAKEN OUT OF THE TRUNK BY SOMEONE, THAT BEING JOHN DYKEMAN.

MINOR PROBLEM THERE, YOU KNOW, BECAUSE THIS D.N.A. EXPERT WHO EXAMINED ALL OF DYKEMAN'S CLOTHES THAT HE HAD ON SAYS, OH, NO, NO, NO. CAN YOU IMAGINE IF THIS GUY HAS BLED ALL OVER THE FRONT OF THE CAR? THERE'S BLOOD ALL OVER IN THE TRUNK OF THE CAR. HE'S GOT BLOOD ALL OVER HIS BODY, AND YOU'RE GOING TO PICK HIM UP AND GET HIM OUT OF THERE WITHOUT GETTING ANY BLOOD ON YOUR CLOTHING?

SAMANTHA MORGAN-MAJOR HAD BLOOD ON HER CLOTHING. WHOSE D.N.A.? A FEMALE'S D.N.A. WAS FOUND ON THE INSIDE OF THE TRUNK MATCHING A MIXTURE WITH BRETT KINNEY. THERE IS ALL OF THIS -- THINGS AND MATERIALS THAT HAVE BEEN PLACED OUT HERE IN FRONT OF YOU, AND AGAIN, THERE'S NOT ONE PIECE OF EVIDENCE FROM ANY OF THAT MATERIAL THAT'S LINKED TO JOHN DYKEMAN, NOT ONE. NO FINGERPRINT, D.N.A., ANYTHING. NOT A THING. NOT A THING.

IS THAT AN ACTUAL HELPER? IF YOU HELP SOMEBODY, YOU HAVE TO DO SOMETHING. NOW, IT SEEMS TO ME THAT YOU WOULD END

UP WITH SOME KIND OF EVIDENCE ATTACHED TO SOMETHING THAT YOU SUPPOSEDLY WOULD HAVE DONE, BUT WE DON'T HAVE THAT HERE.

THE JUDGE IS GOING TO GIVE YOU THE INSTRUCTIONS ON THE LAW. HE'S GOING TO TALK ABOUT IT, AND I'M NOT GOING TO GO THROUGH ALL OF IT. I'M JUST GOING TO TALK ABOUT ONE LITTLE MINOR THING ABOUT DURESS AND COERCION AND THINGS OF THIS NATURE. IF YOU THREATEN SOMEBODY AND YOU HAVE THE MEANS TO CARRY OUT THE THREAT, YOU'VE GOT DURESS AND COERCION BECAUSE IT'S THERE. IT'S VIABLE. IT'S RIGHT THERE IN FRONT OF YOU AND YOU KNOW WHAT CAN HAPPEN, AND YOU'VE JUST SEEN WHAT SHE DID TO SOMEBODY WHO HAD BEEN HER FRIEND FOR MONTHS AND HAD BEEN GIVING HER MONEY FOR MONTHS, ACCORDING TO HIS SISTER.

THAT'S THE WHOLE THING. THE JUDGE IS GOING TO TALK ABOUT DURESS AND HOW IT AFFECTS ARMED ROBBERY, KIDNAPPING, AND HOW IT AFFECTS MURDER FOR THAT MATTER. I WILL TELL YOU THAT DURESS IS NEVER, EVER A DEFENSE TO MURDER. OKAY? I'M GOING TO TELL YOU THAT RIGHT UP FRONT. SO, THEREFORE, YOU HAVE TO FIND THAT JOHN DYKEMAN PARTICIPATED IN THIS MURDER.

IF YOU FIND THAT HE WAS ACTING UNDER DURESS WHICH IS THE STATE'S EVIDENCE THAT HE WAS, IN FACT, ACTING UNDER DURESS, IF YOU BELIEVE THE STATE'S EVIDENCE, THEN YOU'RE GOING TO FIND THAT THERE WAS NO ARMED ROBBERY ON THE PART OF JOHN DYKEMAN. THERE WAS NO KIDNAPPING ON THE PART OF JOHN DYKEMAN. NOW THE ONLY QUESTION IS: DID HE IN ANY WAY INFLICT ANY OF THE INJURIES THAT RESULTED IN THE DEATH OF

BRETT KINNEY? AND THERE'S NOT ONE SHRED OF EVIDENCE TO PROVE THAT, NOT ONE. AS A MATTER OF FACT, THERE'S EVIDENCE TO PROVE THAT THE FEMALE DID ALL THIS.

LOOK AT THE TIMES AGAIN AS I INDICATED BEFORE. JOHN DYKEMAN SAYS IN HIS STATEMENT FOUR OR FIVE HOURS. IF YOU ADD THAT TO LEAVING THE HOUSE AT 12:30 A.M., YOU'RE SOMEWHERE IN THE NEIGHBORHOOD OF AROUND 6:30 A.M. EVERYTHING HAS HAPPENED. IT'S OVER.

I WANT TO THANK YOU FOR YOUR -- FOR YOUR PATIENCE AND YOUR ATTENTIVENESS THROUGHOUT THE COURSE OF THIS TRIAL. WE REALIZE THAT THERE WAS A MASS OF STUFF HERE THAT WAS BROUGHT IN. AND, YOU KNOW, DUCT TAPE AND THINGS LIKE THAT, THE STATE HAS THAT STUFF, JUST LIKE THE NEEDLE AND THINGS LIKE THAT THAT, YOU KNOW, THEY'RE SUPPOSED TO EXAMINE, AND IF EACH ONE OF THOSE THINGS THAT YOU EXAMINE THAT COME BACK THAT DON'T HELP YOU -- DON'T REALLY GET ANY ATTENTION WHATSOEVER, AND SO YOU HAVE TO AGAIN SORT THROUGH ALL THIS STUFF AND TRY TO FIGURE IT OUT FOR YOURSELF, BUT I WILL TELL YOU THAT THAT'S THE EVIDENCE AND THEY GAVE IT TO YOU.

JOHN DYKEMAN'S STATEMENT EXPLAINS EVERYTHING, ANSWERS ALL OF YOUR QUESTIONS, AND HOPEFULLY YOU'LL SPEND TIME WITH IT. SAMANTHA MORGAN-MAJOR COMMITTED ARMED ROBBERY, KIDNAPPING, AND THE MURDER OF BRETT KINNEY. JOHN DYKEMAN AFTER THE FACT DID COMMIT SOME CRIMES, NO DOUBT ABOUT THAT, BUT JOHN DYKEMAN DID NOT COMMIT ARMED ROBBERY. HE DID NOT

COMMIT KIDNAPPING, AND HE DID NOT COMMIT THE MURDER OF BRETT KINNEY. THANK YOU.

THE COURT: MR. FOREMAN AND MEMBERS OF THE JURY, AGAIN, THANK YOU FOR YOUR KIND ATTENTION THAT YOU HAVE PROVIDED TO THE STATE AND TO THE DEFENSE AS THEY HAVE DISCUSSED THIS MATTER WITH YOU, AND I WOULD ASK ALSO THAT YOU LISTEN CAREFULLY AS I TALK WITH YOU ABOUT THE LAW IN THE CASE. AND BEFORE I BEGIN DOING SO, I'M GOING TO ASK A QUESTION BECAUSE IT'S GOING TO TAKE ABOUT AN HOUR OR SO FOR ME TO GO OVER THESE LEGAL PRINCIPLES WITH YOU. IF YOU FEEL YOU'D LIKE TO TAKE A FIVE-MINUTE RECESS BEFORE WE GET STARTED, JUST KIND OF RAISE YOUR HAND. IF YOU'RE READY TO GO FORWARD FOR THE NEXT HOUR OR SO AND FEEL COMFORTABLE AND REFRESHED, DON'T RAISE YOUR HAND. I'LL JUST LOOK TO SEE, AND IF THERE'S ANYBODY WHO WANTS A BREAK, WE'LL TAKE A BREAK. IF EVERYBODY IS READY TO GO, WE'LL GO. IT APPEARS THAT THE JURY IS PREPARED TO GO FORWARD AT THIS TIME.

LADIES AND GENTLEMEN, I GENERALLY HAVE TWO JOBS. ONE OF MY JOBS IS TO PRESIDE OVER THE TRIAL OF THE CASE, TO RULE UPON THE ADMISSIBILITY OF THE EVIDENCE, TO MAKE DETERMINATIONS AS TO VARIOUS ISSUES OF LAW, AND THAT IS THE PORTION OF THE TRIAL JUDGE'S RESPONSIBILITY THAT TAKES PLACE DURING THE ACTIVE PRESENTATION OF THE CASE AND EVEN DURING THE ARGUMENTS OF COUNSEL. WE HAVE NOW REACHED THE POINT IN TIME WHERE I MOVE TO MY SECOND FUNCTION AND THAT IS THE

FUNCTION I HAVE TO CHARGE YOU THE LAW THAT APPLIES TO THE CASE.

AS I INDICATED TO YOU PREVIOUSLY, AS THE PRESIDING JUDGE I AM THE SOLE JUDGE OF THE LAW IN THIS CASE JUST AS YOU ARE THE SOLE JUDGE OF THE FACTS, AND ACCORDINGLY, LADIES AND GENTLEMEN, YOU ARE OBLIGATED UNDER YOUR OATH TO ACCEPT AND APPLY THE LAW AS I GIVE IT TO YOU TODAY. IF YOU HAVE SOME PRECONCEPTION ABOUT WHAT THE LAW IS IN THESE MATTERS OR WHAT THE LAW SHOULD BE IN THESE MATTERS AND IT DOES NOT COINCIDE WITH WHAT I TELL YOU TODAY, YOU ARE OBLIGATED TO SET ASIDE THOSE PRECONCEPTIONS YOU MAY HAVE OR MAY HAVE HAD ABOUT THE LAW AND TO ACCEPT IT AND APPLY IT STRICTLY AS I GIVE IT TO YOU TODAY.

BUT AS I HAVE TOLD YOU THROUGHOUT THE TRIAL OF THIS CASE, WHILE I MAY BE THE SOLE JUDGE OF THE LAW, YOU AND YOU ALONE ARE THE SOLE JUDGE OF THE FACTS IN THIS CASE. SO, PLEASE, LADIES AND GENTLEMEN, REMEMBER THAT AS THE TRIAL JUDGE I AM NOT TO INTIMATE, STATE, COMMENT UPON OR MAKE ANY STATEMENT TO YOU AS THE TRIAL JURY ABOUT THE FACTS IN THE CASE. PLEASE REMEMBER YOU ARE THE SOLE JUDGE OF THE FACTS IN THIS CASE, AND YOU ARE NOT TO INFER ANYTHING FROM WHAT I MAY HAVE SAID DURING THE PROCEEDINGS IN THIS CASE TO MAKE YOU THINK THAT I HAVE SOME FEELING ABOUT THE FACTS IN THIS CASE ABOUT WHAT YOUR DETERMINATION SHOULD BE. THE LAW DOES NOT PERMIT ME TO HAVE AN OPINION. THIS IS A MATTER SOLELY FOR

YOU, THE JURY.

SO THEN IT'S YOUR DUTY AS JURORS TO DETERMINE THE EFFECT, THE VALUE, THE WEIGHT, AND THE TRUTH OF THE EVIDENCE THAT HAS BEEN PRESENTED TO YOU DURING THE TRIAL OF THIS CASE. AND WHEN YOU ARE DOING THAT, YOU MUST NECESSARILY ASSESS THE CREDIBILITY OR THE BELIEVABILITY OF THE WITNESSES WHO HAVE TESTIFIED. IT BECOMES YOUR DUTY AS JURORS TO ANALYZE AND TO EVALUATE THE EVIDENCE AND THEN DETERMINE THAT EVIDENCE WHICH CONVINCES YOU OF ITS TRUTH.

NOW, LADIES AND GENTLEMEN, WE HAVE HAD TWO WITNESSES WHO HAVE BEEN QUALIFIED AS EXPERTS IN PARTICULAR FIELDS, AND AS I TOLD YOU AT THE TIME THEY TESTIFIED, THEY ARE HERE AND THEIR TESTIMONY WAS FOR THE PURPOSE OF ASSISTING YOU AS YOU MAKE DETERMINATIONS. IT WAS NOT FOR THE PURPOSE OF CONTROLLING YOUR FINDINGS IN THE CASE BUT SIMPLY TO PROVIDE YOU ASSISTANCE. AND YOU ASSIGN SUCH WEIGHT TO THE TESTIMONY OF EXPERTS JUST AS YOU DO TO THE TESTIMONY OF LAY WITNESSES. YOU EVALUATE IT AND YOU CONSIDER IT JUST AS YOU DO THE TESTIMONY OF THE LAY WITNESSES AND YOU FOLLOW THE SAME PROCEDURES. YOU GIVE IT SUCH WEIGHT AS YOU BELIEVE IT IS ENTITLED TO RECEIVE WHEN CONSIDERED WITH ALL OF THE EVIDENCE IN THE CASE.

SO, LADIES AND GENTLEMEN, AS YOU'RE CONSIDERING ALL OF THE EVIDENCE IN THE CASE, YOU MAY BELIEVE ONE WITNESS AS AGAINST SEVERAL WITNESSES OR SEVERAL WITNESSES AS AGAINST ONE

WITNESS. YOU MAY BELIEVE A PART OF A WITNESS'S TESTIMONY AND REJECT THE BALANCE OF THAT SAME WITNESS'S TESTIMONY. IF YOU HAVE A GOOD AND A SOUND AND A SUFFICIENT REASON, YOU MAY BELIEVE THE TESTIMONY OF A WITNESS IN ITS ENTIRETY OR REJECT THE TESTIMONY OF A WITNESS IN ITS ENTIRETY. YOU MAY CONSIDER WHETHER OR NOT A PARTICULAR WITNESS HAS EXHIBITED TO YOU ANY INTEREST, ANY BIAS, ANY PREJUDICE, OR ANY OTHER MOTIVE THAT MAY AFFECT THEIR TESTIMONY IN THE CASE. YOU MAY CONSIDER WHETHER THE TESTIMONY OF THE WITNESS HAS BEEN STRENGTHENED BY OTHER TESTIMONY OR EVIDENCE IN THE CASE OR HAS IT BEEN WEAKENED BY OTHER TESTIMONY AND EVIDENCE IN THE CASE?

YOU MAY CONSIDER THE DEMEANOR OF A WITNESS, THAT IS, THE APPEARANCE OF A WITNESS AS THEY OFFER TESTIMONY FROM (SIC) YOU IN CONNECTION WITH THE MATTER. YOU MAY CONSIDER THE REASONABLENESS OF A PARTICULAR WITNESS'S TESTIMONY AND WERE THEY IN A POSITION TO KNOW THOSE THINGS ABOUT WHICH THEY WERE OFFERING TESTIMONY?

SOMETIMES, LADIES AND GENTLEMEN, THE TESTIMONY OF A WITNESS MAY BE DISCREDITED OR IMPEACHED BY SHOWING THAT THAT PARTICULAR WITNESS PREVIOUSLY MADE STATEMENTS WHICH ARE INCONSISTENT WITH THEIR TRIAL TESTIMONY. THE EARLIER CONTRADICTORY STATEMENTS ARE ALSO ADMISSIBLE TO ESTABLISH THE TRUTH OF THOSE EARLIER STATEMENTS. IT IS TOTALLY UP TO YOU, THE JURY, TO DETERMINE THE CREDIBILITY, IF ANY, TO BE GIVEN TO THE EARLIER STATEMENTS AND TO BE GIVEN TO THE TESTIMONY OF

A WITNESS WHO HAS BEEN IMPEACHED. AND IF A WITNESS IS SHOWN KNOWINGLY TO HAVE TESTIFIED FALSELY CONCERNING ANY MATERIAL MATTER, YOU MAY CONSIDER THIS IN DETERMINING WHETHER TO TRUST SUCH WITNESS'S TESTIMONY IN OTHER PARTICULARS. YOU MAY REJECT ALL TESTIMONY OF THAT WITNESS OR GIVE ALL OR PART OF SUCH TESTIMONY THE CREDIBILITY YOU BELIEVE IT'S ENTITLED TO RECEIVE.

LADIES AND GENTLEMEN, SOUTH CAROLINA RULES OF EVIDENCE, OUR RULE 609, PROVIDES THAT THE TESTIMONY OF A WITNESS MAY BE DISCREDITED OR IMPEACHED BY SHOWING THAT THE WITNESS HAS BEEN CONVICTED OF A CRIME FOR WHICH HE OR SHE COULD HAVE BEEN IMPRISONED FOR MORE THAN ONE YEAR OR A CRIME THAT INVOLVES MORAL TURPITUDE OR DISHONESTY. AND ANY TIME EVIDENCE IN THIS MATTER IS OFFERED TO YOU, IT IS OFFERED ONLY UPON THE QUESTION OF THE CREDIBILITY OF THE WITNESS WHO HAS BEEN CALLED UPON TO TESTIFY.

NOW, LADIES AND GENTLEMEN, THERE HAVE ALSO BEEN ADMITTED INTO THIS CASE A STATEMENT OR STATEMENTS THAT ARE ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT. BEFORE YOU MAY CONSIDER ANY STATEMENTS AS EVIDENCE FOR ANY PURPOSE THAT ARE ALLEGED TO HAVE BEEN MADE BY A DEFENDANT, YOU MUST DETERMINE FOUR QUESTIONS: FIRST, DID THE DEFENDANT MAKE THE STATEMENT? SECOND, WAS THE DEFENDANT WARNED OF HIS CONSTITUTIONAL RIGHTS? THIRD, DID THE DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHTS? AND, FOURTH, WAS THE

STATEMENT GIVEN VOLUNTARILY?

LADIES AND GENTLEMEN, THE FACT THAT THE COURT HAS ADMITTED STATEMENTS INTO EVIDENCE SHOULD NOT BE CONSIDERED BY YOU AS ANY EVIDENCE WHATSOEVER THAT THE DEFENDANT MADE SUCH A STATEMENT OR THAT THE REQUIRED CONSTITUTIONAL SAFEGUARDS WERE, IN FACT, PROVIDED AND THEN WAIVED BY THE DEFENDANT OR THAT THE STATEMENT WAS VOLUNTARILY GIVEN. LADIES AND GENTLEMEN, THESE ISSUES ARE FOR YOU, THE JURY, TO DETERMINE. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT EACH OF THESE FOUR REQUIREMENTS HAVE BEEN MET BEFORE YOU MAY CONSIDER THE STATEMENT ALLEGED OR STATEMENTS ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT FOR ANY PURPOSE WHATSOEVER. THIS PROOF, AS I SAY, IS LIKE EVERY OTHER ELEMENT OF PROOF ON THE STATE AND THAT IS PROOF BEYOND A REASONABLE DOUBT.

LADIES AND GENTLEMEN, AS YOU ARE CONSIDERING ALL OF THE FACTORS IN CONNECTION WITH THE TESTIMONY THAT HAS BEEN PRESENTED TO YOU IN THIS MATTER, YOU DO NOT EXERCISE THESE FACTORS IN AN ARBITRARY FASHION, BUT IF YOU FIND IN YOUR GOOD JUDGMENT THAT THERE IS SOUND REASON IN THE RECORD OF THIS CASE FOR THE CONSIDERATION OF THESE FACTORS, THEN YOU MAY DO SO BECAUSE, LADIES AND GENTLEMEN, YOU HAVE BUT ONE OBJECTIVE AND THAT OBJECTIVE IS TO FIND THE TRUTH. AND IN EXERCISING YOUR MENTAL PROCESSES AND IN DETERMINING WHAT YOU CONSIDER TO BE TRUE, THE LAW SIMPLY REQUIRES THAT YOU EXERCISE YOUR GOOD JUDGMENT, YOUR COMMON SENSE, YOUR SENSE OF LOGIC AND REASON,

AND YOUR EXPERIENCES IN LIFE, AND YOU THEN APPLY THESE ATTRIBUTES TO THE EVIDENCE THAT HAS BEEN PRESENTED TO YOU AND YOU DETERMINE WHAT YOU, THE JURY, CONSIDER TO BE THE TRUTHFUL EVIDENCE. AND THEN TO THESE TRUE STATEMENTS OF FACT AS DETERMINED BY YOU, YOU APPLY THE LAW AS I GIVE IT TO YOU AND, THUS, YOU ARRIVE AT A TRUE VERDICT IN THE CASE.

PLEASE REMEMBER, LADIES AND GENTLEMEN, THAT YOUR VERDICT SHOULD NOT BE THE RESULT OF ANY PASSION, PREJUDICE, BIAS OR SYMPATHY IN THIS MATTER BECAUSE BY YOUR VERDICT YOU HAVE NO FRIENDS TO REWARD. YOU HAVE NO ENEMIES TO PUNISH. IT IS TO SIMPLY SPEAK THE TRUTH. AND VERDICT COMES FROM THE LATIN PHRASE VERIS DICTA WITH VERIS MEANING TRUTH AND DICTA MEANING TO SPEAK. SO THAT'S WHAT YOU DO WITH YOUR VERDICT IS YOU SPEAK THE TRUTH AS TO THIS DISPUTE BETWEEN THE STATE AND THIS DEFENDANT. YOU SPEAK THE TRUTH AS TO WHETHER OR NOT THE STATE HAS PROVEN THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

LADIES AND GENTLEMEN, THERE ARE TWO TYPES OF EVIDENCE WHICH ARE GENERALLY PRESENTED DURING THE TRIAL OF A CASE. THAT IS DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE. DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT SUCH AS AN EYEWITNESS. THEY GENERALLY COME IN AND THEY TESTIFY AS TO MATTERS THAT THEY PERCEIVE BY ONE OF THEIR FIVE SENSES THAT. THEY'VE SEEN IT, SMELLED IT, TOUCHED IT, TASTED IT, HEARD IT, THOSE TYPES

OF TESTIMONY. THEY PROFESS TO HAVE ACTUAL KNOWLEDGE.

THE OTHER TYPE OF EVIDENCE THAT'S OFTEN RECEIVED IN THE TRIAL OF A CASE IS CIRCUMSTANTIAL EVIDENCE. CIRCUMSTANTIAL EVIDENCE IS THE PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES THAT INDICATE THE EXISTENCE OF ANOTHER FACT. OFTENTIMES I EXPLAIN THAT BY USING THE EXAMPLE OF OUR SUMMERTIME THUNDER-SHOWERS. YOU MIGHT CHOOSE TO GO TO A MOVIE AT 7:00 IN THE EVENING. THE SUN IS SHINING. THE GROUND IS DRY. YOU GO IN AND WHILE YOU'RE IN THAT MOVIE FOR TWO HOURS YOU MIGHT HEAR SOME RUMBLING OUTSIDE, AND YOU COME BACK OUTSIDE AND NOW YOU FIND THAT THE SUN IS SHINING ONCE AGAIN BUT THERE ARE PUDDLES THAT ARE IN THE PAVEMENT AND THERE'S MOISTURE ALL OVER THE CAR.

WELL, THAT IS A CHAIN OF FACTS AND CIRCUMSTANCES THAT WOULD JUSTIFY YOU IN MAKING A DETERMINATION THAT ONE OF OUR FAST-MOVING THUNDERSTORMS CAME THROUGH AND RAINED ON THE PARKING LOT IN YOUR CAR WHILE YOU WERE IN THE MOVIE. YOU DIDN'T SEE IT, YOU DIDN'T SMELL IT TYPE THING, BUT YOU FIND THE FACTS AND CIRCUMSTANCES THAT WARRANT YOU MAKING SUCH A CONCLUSION. THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE WEIGHT OR THE VALUE TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN OF DIRECT EVIDENCE.

LADIES AND GENTLEMEN, YOU SHOULD WEIGH ALL OF THE EVIDENCE IN THIS CASE, AND AFTER WEIGHING ALL OF THE

EVIDENCE, IF YOU ARE NOT CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY. CONJECTURE, SPECULATION, SUSPICION OR PROBABILITIES DO NOT CONSTITUTE CIRCUMSTANTIAL EVIDENCE.

NOW, LADIES AND GENTLEMEN, I INSTRUCT YOU ONCE AGAIN THAT THE FACT THAT THIS DEFENDANT HAS BEEN ARRESTED, THAT HE HAS BEEN CHARGED, THAT HE HAS BEEN INDICTED IN THIS CASE IS, IN FACT, NO EVIDENCE IN THIS CASE, AND THESE INDICTMENTS THAT I HAVE HERE ON THE BENCH CANNOT BE CONSIDERED BY YOU AS EVIDENCE OF THE DEFENDANT'S GUILT IN ANY WAY. IT DOES NOT CREATE ANY PRESUMPTION, DOES NOT CREATE ANY INFERENCE OF GUILT. THESE ARE SIMPLY THE CHARGING PAPERS THAT NOTIFY AN INDIVIDUAL AS TO THE CHARGES THAT HAVE BEEN MADE AGAINST THEM AND BRINGS THEM INTO COURT. IT'S THE FORMAL DOCUMENT BY WHICH A CASE IS PROCESSED AND BROUGHT INTO COURT.

IN THIS PARTICULAR CASE AND AS TO EACH OF THESE CHARGES, THIS DEFENDANT HAS PLED NOT GUILTY, AND THAT PLEA CASTS THE BURDEN ON THE STATE TO PROVE THE DEFENDANT GUILTY BECAUSE A PERSON WHO IS CHARGED WITH COMMITTING A CRIMINAL OFFENSE IN SOUTH CAROLINA IS NEVER REQUIRED TO PROVE THAT THEY ARE INNOCENT. LADIES AND GENTLEMEN, I HAVE TOLD YOU PREVIOUSLY THAT WHEN YOU ARE CONSIDERING THE CHARGES AGAINST THIS DEFENDANT THAT, LADIES AND GENTLEMEN, YOU MUST LOOK AT EACH INDICTMENT SEPARATELY BECAUSE YOU HAVE TO CONSIDER WHETHER OR NOT THE STATE HAS MET ITS BURDEN OF PROOF AS TO EACH CHARGE.

YOU DO NOT SIMPLY MAKE A FINDING ON ONE INDICTMENT ONE WAY OR THE OTHER AND THEN CONCLUDE THAT WILL BE THE SAME FINDING ON THE OTHER TWO INDICTMENTS. EACH OF THESE INDICTMENTS ARE TO BE CONSIDERED SEPARATELY, AND EACH OF THESE MATTERS ARE TO BE CONSIDERED AND VOTED ON YOU IN A SEPARATE FASHION.

MODERN SCIENCE NOW GIVES US THE ABILITY TO HAND THOSE INDICTMENTS TO THE LAW CLERK SO THAT SHE CAN PREPARE THE VERDICT FORMS WHILE WE'RE IN THE PROCESS OF HAVING THIS DISCUSSION. SO PLEASE, LADIES AND GENTLEMEN, REMEMBER THAT EACH INDICTMENT MUST BE CONSIDERED SEPARATELY AND EACH ONE OF THE CHARGES MUST BE CONSIDERED SEPARATELY, AND YOU MAKE THAT DECISION BASED UPON THE EVIDENCE THAT YOU FIND EXISTS WITH RESPECT TO EACH OF THE CHARGES. DON'T LUMP THINGS TOGETHER. CONSIDER THEM SEPARATELY.

BUT PLEASE REMEMBER, LADIES AND GENTLEMEN, THAT A DEFENDANT IS NEVER REQUIRED TO PROVE THEMSELVES INNOCENT. IT IS A CARDINAL AND AN IMPORTANT RULE OF LAW THAT THE DEFENDANT IN A CRIMINAL TRIAL, NO MATTER HOW SERIOUS THE CHARGE MAY BE, A DEFENDANT IS ALWAYS PRESUMED TO BE INNOCENT OF THE CRIME FOR WHICH THEY HAVE BEEN CHARGED. THEY REMAIN INNOCENT UNLESS THEIR GUILT IS PROVEN BY EVIDENCE THAT SATISFIES YOU AND EACH OF YOU OF THEIR GUILT BEYOND A REASONABLE DOUBT. THIS PRESUMPTION OF INNOCENCE DOES NOT CEASE WHEN YOU GO BACK TO THE JURY ROOM, BUT IT IS WITH THE DEFENDANT FROM THE TIME THAT THEY ARE CHARGED. IT IS WITH THE DEFENDANT THROUGHOUT

THE TRIAL OF THE CASE, AND IT REMAINS WITH THE DEFENDANT UNTIL YOU AND EACH OF YOU ARE SATISFIED THAT THE STATE HAS PROVEN THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

OUR SUPREME COURT HAS SAID THAT THIS PRESUMPTION OF INNOCENCE IS LIKE A ROBE OF RIGHTEOUSNESS THAT HAS BEEN PLACED ABOUT THE SHOULDERS OF THE DEFENDANT. IT REMAINS WITH THE DEFENDANT AND ASSIGNS A DEFENDANT TO THE CLASS OF INDIVIDUALS KNOWN AS INNOCENT INDIVIDUALS UNTIL THAT PRESUMPTIVE ROBE OF RIGHTEOUSNESS HAS BEEN STRIPPED FROM HIS PERSON BY EVIDENCE THAT SATISFIES YOU OF GUILT BEYOND A REASONABLE DOUBT. THIS PRESUMPTION OF INNOCENCE IS NOT SOME MERE LEGAL THEORY. IT'S NOT JUST A LEGAL PHRASE. IT IS A SUBSTANTIAL RIGHT TO WHICH EVERY DEFENDANT IS ENTITLED UNLESS AND UNTIL YOU, THE JURY, ARE SATISFIED FROM THE EVIDENCE OF THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

WHAT IS A REASONABLE DOUBT IN THE LAW? A REASONABLE DOUBT IS A DOUBT WHICH MAKES AN HONEST, SINCERE, CONSCIENTIOUS JUROR IN SEARCH OF THE TRUTH IN THE CASE TO HESITATE TO ACT. PROOF BEYOND A REASONABLE DOUBT MUST, THEREFORE, BE PROOF OF SUCH A CONVINCING CHARACTER THAT A REASONABLE PERSON WOULD NOT HESITATE TO RELY AND ACT UPON IT IN THE MOST IMPORTANT OF HIS OR HER OWN AFFAIRS.

LADIES AND GENTLEMEN, REASONABLE DOUBT MAY ARISE FROM EVIDENCE WHICH IS IN THE CASE OR IT MAY RISE FROM THE LACK OR ABSENCE OF EVIDENCE IN THE CASE. STATED ANOTHER WAY, PROOF

BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT. THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH ABSOLUTE CERTAINTY, AND IN CRIMINAL CASES THE LAW DOES NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE YOU ARE FIRMLY CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME CHARGED, YOU MUST FIND HIM GUILTY. IF, ON THE OTHER HAND, YOU THINK THERE IS A REAL POSSIBILITY THAT HE IS NOT GUILTY, YOU MUST GIVE HIM THE BENEFIT OF THE DOUBT AND FIND HIM NOT GUILTY.

LADIES AND GENTLEMEN, THE STATE HAS THE BURDEN OF PROVING EACH AND EVERY ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT, AND ANY REASONABLE DOUBT THAT YOU HAVE IN YOUR DELIBERATIONS SHOULD BE RESOLVED IN FAVOR OF THE DEFENDANT. THEREFORE, IF YOU HAVE A REASONABLE DOUBT AS TO THE GUILT OF THE DEFENDANT AS TO ANY OF THE CHARGES IN THIS MATTER, HE IS ENTITLED TO THAT DOUBT AND WOULD BE ENTITLED TO AN ACQUITTAL ON ANY SUCH CHARGE.

LADIES AND GENTLEMEN, CRIMINAL INTENT IS A NECESSARY ELEMENT OF EACH CRIME THAT IS CHARGED. THEREFORE, CRIMINAL INTENT MUST BE PROVEN BY THE STATE BEYOND A REASONABLE DOUBT. CRIMINAL INTENT IS ALWAYS A MATTER THAT MUST BE DETERMINED BY THE JURY FROM THE CIRCUMSTANCES SURROUNDING THE SITUATION. THERE IS NO WAY TO PROVE INTENT TO A MATHEMATICAL CERTAINTY. THERE IS NO WAY MEDICAL SCIENCE CAN DISSECT THE MIND OF A

PERSON AND TELL US WHAT THAT PERSON HAD GOING ON IN THEIR MIND. SO THE LAW SAYS THAT CRIMINAL INTENT MAY BE INFERRED BY THE JURY FROM THE CIRCUMSTANCES SHOWN TO HAVE EXISTED, AND THIS WOULD BE HOW THE JURY WOULD MAKE A DETERMINATION AS TO WHETHER OR NOT THE ELEMENT REQUIRING INTENT HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT.

LADIES AND GENTLEMEN, I FURTHER CHARGE YOU THAT VOLUNTARY INTOXICATION IS NEVER AN EXCUSE FOR OR A DEFENSE TO A CRIME, REGARDLESS OF WHETHER THE CRIME IS ONE INVOLVING GENERAL OR A SPECIFIC INTENT. A PERSON WHO VOLUNTARILY RENDERS THEMSELVES INTOXICATED IS NO LESS RESPONSIBLE FOR THEIR ACTS WHILE THEY ARE IN SUCH CONDITION. IF ONE VOLUNTARILY BECAME INTOXICATED OR BECAME UNDER THE INFLUENCE OF DRUGS AND BECAUSE THEY ARE INTOXICATED TO SOME DEGREE AND IF WHILE IN THAT CONDITION THEY COMMIT AN ACT WHICH WOULD BE A CRIME IF THEY HAD NOT BEEN INTOXICATED OR IF THEY HAD BEEN SOBER, THE FACT THAT THEY MAY HAVE BEEN INTOXICATED WOULD NOT RELIEVE THEM FROM THEIR RESPONSIBILITY. BUT, AGAIN, LADIES AND GENTLEMEN, THE STATE MUST PROVE EACH AND EVERY ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT REGARDLESS OF WHETHER OR NOT A DEFENDANT WAS INTOXICATED FROM ALCOHOL OR DRUGS.

IN THIS PARTICULAR CASE, ONE OF THE CHARGES AGAINST THIS DEFENDANT IS THE CHARGE OF KIDNAPPING. LADIES AND GENTLEMEN, THAT CHARGE IS CONTAINED IN INDICTMENT 2004-GS-7-834. IT IS ALLEGED IN THAT INDICTMENT THAT THIS DEFENDANT, JOHN FRANCIS

DYKEMAN, JR., DID WITHOUT AUTHORITY OF THE LAW SEIZE, CONFINE, ABDUCT, AND CARRY AWAY THE PERSON OF ONE BRETT KENNEDY -- KINNEY OF BEAUFORT COUNTY BY STABBING THE VICTIM AND FORCING HIM INTO THE TRUNK OF THE DEFENDANT'S VEHICLE WHERE THE DEFENDANT WAS KEPT FOR SEVERAL HOURS AGAINST HIS WILL, DEPRIVING HIM OF HIS FREEDOM.

SECTION 16-3-910 OF THE SOUTH CAROLINA CODE OF LAWS PROVIDES IN PART THAT WHOEVER SHALL UNLAWFULLY SEIZE, CONFINE, INVEIGLE, DECOY, KIDNAP, ABDUCT OR CARRY AWAY ANY OTHER PERSON BY ANY MEANS WHATSOEVER WITHOUT AUTHORITY OF LAW SHALL BE GUILTY OF A FELONY. THE OFFENSE OF KIDNAPPING HAS CERTAIN ELEMENTS, EACH OF WHICH MUST BE PROVED BY THE STATE BEYOND A REASONABLE DOUBT BEFORE A GUILTY VERDICT MAY BE REACHED. THESE ELEMENTS ARE AS FOLLOWS: THAT A PERSON WAS SEIZED, CONFINED, INVEIGLED, DECOYED, KIDNAPPED, ABDUCTED OR CARRIED AWAY. TWO, THAT SUCH ACTION WAS DONE BY SOME MEANS AND, THREE, THAT IT WAS DONE WITHOUT AUTHORITY OF LAW.

IN ORDER TO ASSIST YOU IN UNDERSTANDING THESE ELEMENTS SOMEWHAT, I WILL DEFINE SOME OF THE WORDS THAT ARE USED IN THIS STATUTE. THE WORD SEIZE MEANS TO TAKE HOLD OF SUDDENLY OR FORCIBLY. THE WORD CONFINE MEANS TO LIMIT, RESTRICT, OR ENCLOSE WITHIN BOUNDS. IT CAN MEAN IMPRISONMENT OR SHUT UP OR KEPT IN. ABDUCT MEANS TO CARRY OFF SECRETLY OR BY FORCE FOR AN ILLEGAL PURPOSE, AND CARRY AWAY MEANS TO REMOVE.

WITH REGARD TO THE FIRST ELEMENT, IT IS NOT NECESSARY

THAT THE STATE PROVE THAT A SEIZURE, CONFINEMENT, INVEIGLEMENT, DECOY, KIDNAPPING, ABDUCTION, OR CARRYING AWAY ALL OCCURRED. IT IS ENOUGH TO ESTABLISH THE FIRST ELEMENT IF THE STATE CAN PROVE BEYOND A REASONABLE DOUBT AT LEAST ONE OF THESE ACTS OCCURRED.

REGARDING THE SECOND ELEMENT, IT MUST BE SHOWN THAT ONE OF THESE ACTS OCCURRED BY THE USE OF SOME MEANS. THE WORD MEANS STANDS FOR AN AGENCY, AN INSTRUMENTALITY OR A METHOD USED TO ATTAIN AN END. THE STATE MUST PROVE THAT A METHOD OR AN AGENCY WAS EMPLOYED TO ACCOMPLISH OR BRING ABOUT A SEIZURE, A CONFINEMENT, A KIDNAPPING, OR THE CARRYING AWAY OF AN ALLEGED VICTIM AND MUST DO SO BY EVIDENCE THAT ESTABLISHES THAT BEYOND A REASONABLE DOUBT.

THE LAST ELEMENT IS -- IN KIDNAPPING IS THAT THE KIDNAPPING WAS DONE WITHOUT AUTHORITY OF LAW. SOMETHING DONE WITHOUT AUTHORITY OF LAW IS SOMETHING WHICH THE LAW DOES NOT SANCTION, PERMIT, ALLOW, CONDONE, OR PROVIDE JUSTIFICATION FOR. TO DO A THING UNLAWFULLY IS TO DO IT WILLFULLY AGAINST THE LAW. A WILLFUL ACT IS DONE INTENTIONALLY OR VOLUNTARILY. I INSTRUCT YOU ALSO THAT THE KIDNAPPING NEED NOT BE FOR ANY PERSONAL OR MONETARY GAIN OR FOR ANY ILLEGAL PURPOSE BUT MAY BE FOR ANY REASON WHATSOEVER. AND SO STATED ANOTHER WAY, IT IS NOT NECESSARY THAT THE KIDNAPPING BE FOR A RANSOM OR FOR ANOTHER PURPOSE.

I ALSO CHARGE YOU THAT THE STATE MUST PROVE THAT THE

ALLEGED VICTIM OF A KIDNAPPING DID NOT GO IN A VOLUNTARY FASHION. THEY MUST PROVE THAT THE KIDNAPPING WAS INVOLUNTARY, THAT THE VICTIM WAS COERCED. SUCH COERCION MUST BE DONE WITH A WILLFUL INTENT TO CONFINE THE VICTIM, AND IT MAY BE ACHIEVED BY MENTAL AS WELL AS PHYSICAL MEANS.

SHOULD THE STATE NOT MEET ITS BURDEN OF PROOF AS TO THESE ELEMENTS FOR THE CRIME OF KIDNAPPING, THEN, LADIES AND GENTLEMEN, IT WOULD BE YOUR RESPONSIBILITY TO MAKE A FINDING OF NOT GUILTY AS TO THE CHARGE OF KIDNAPPING. IF YOU FIND THAT THE STATE HAS MET ITS BURDEN OF PROOF TO ESTABLISH THESE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT, THEN IT WOULD LIKEWISE BE YOUR OBLIGATION TO MAKE A FINDING OF GUILTY AS TO THAT CHARGE.

THE STATE HAS CHARGED THE DEFENDANT IN INDICTMENT 2004-GS-7-836 WITH THE CHARGE OF ARMED ROBBERY. IT ALLEGES THAT HERE IN BEAUFORT COUNTY ON OR ABOUT MAY 2, 2004, WHILE ARMED WITH A DEADLY WEAPON, THAT BEING A LARGE HUNTING KNIFE, THAT THE DEFENDANT DID FELONIOUSLY TAKE FROM THE PERSON OR PRESENCE OF THE VICTIM, THAT BEING BRETT KINNEY, BY MEANS OF FORCE OR INTIMIDATION GOODS OR MONIES OF THE VICTIM. LADIES AND GENTLEMEN, SECTION 16-11-330(A) PROVIDES IN PART THAT A PERSON WHO COMMITS ROBBERY WHILE ARMED WITH A PISTOL, A DIRK, A SLING SHOT, METAL KNUCKLES, RAZOR OR OTHER DEADLY WEAPON OR WHILE ALLEGING EITHER BY ACTION OR WORDS THAT HE WAS ARMED WHILE USING A REPRESENTATION OF A DEADLY WEAPON OR ANY OBJECT

WHICH A PERSON PRESENT DURING THE COMMISSION OF THE ROBBERY REASONABLY BELIEVED TO BE A DEADLY WEAPON WOULD BE GUILTY OF A FELONY.

LADIES AND GENTLEMEN, TO HELP FURTHER EXPLAIN WHAT IS MEANT BY ARMED ROBBERY, I AM GOING TO FIRST DEFINE FOR YOU THE CRIME OF LARCENY AND THEN THE CRIME OF ROBBERY AND THEN I AM GOING TO TELL YOU WHAT CONSTITUTES ARMED ROBBERY BECAUSE LARCENY IS WITH -- IS EMBRACED WITHIN ROBBERY AND ROBBERY IS EMBRACED WITHIN ARMED ROBBERY BECAUSE ARMED ROBBERY IS THE AGGRAVATION OF THE CRIME OF ROBBERY. SO WHAT IS A LARCENY? A LARCENY IS THE FELONIOUS TAKING AND CARRYING AWAY BY ANY PERSON OF THE GOODS OR PERSONAL PROPERTY OF ANOTHER WITH THE FELONIOUS INTENT TO PERMANENTLY DEPRIVE THE OWNER OF HIS PROPERTY AND CONVERT IT TO THE TAKER'S OWN USE.

THE ESSENTIAL ELEMENTS OF THE CRIME OF LARCENY, WHICH ORDINARILY IS CALLED STEALING, ARE, ONE, THE FELONIOUS TAKING INTO POSSESSION THE PERSONAL PROPERTY OF ANOTHER. TWO, THE CARRYING AWAY AND REMOVAL OF THE PERSONAL PROPERTY AND, THREE, THE FELONIOUS INTENT, THE INTENT TO STEAL ON THE PART OF THE TAKER TO PERMANENTLY DEPRIVE THE OWNER OF THE PERSONAL PROPERTY AND THEN TO CONVERT THE PROPERTY TO THE -- THE PROPERTY TO THE TAKER'S OWN USE.

NOW, LADIES AND GENTLEMEN, ROBBERY IS THE FELONIOUS TAKING AND CARRYING AWAY OF THE PERSONAL PROPERTY OF ANY VALUE OF ANOTHER FROM HIS PERSON OR IN HIS PRESENCE BY

VIOLENCE OR PUTTING HIM OR HER IN FEAR OF VIOLENCE. ROBBERY INCLUDES LARCENY, AND ALL OF THE ELEMENTS WHICH ARE NECESSARY TO CONSTITUTE LARCENY ARE ALSO NECESSARY TO CONSTITUTE ROBBERY.

THEREFORE, THE ELEMENTS OF ROBBERY ARE, FIRST, THE PROPERTY TAKEN MUST BE THE SUBJECT OF LARCENY; THAT IS, IT MUST BE PERSONAL PROPERTY. AND I CHARGE YOU THAT LAWFUL COIN AND CURRENCY AND SUCH THINGS AS THAT ARE PERSONAL PROPERTY AS LONG AS OTHER POSSESSIONS SUCH AS, BY WAY OF EXAMPLE ONLY, FOUNTAIN PENS OR GLASSES WOULD ALSO BE PERSONAL PROPERTY. SO ANYTHING THAT WOULD BE PERSONAL PROPERTY CAN BE THE SUBJECT OF ROBBERY. SECOND, THERE MUST BE A FELONIOUS TAKING AND CARRYING AWAY OF THE PERSONAL PROPERTY. THAT IS, THERE MUST BE A TRESPASS TO AND AN ASPORTATION OR A REMOVAL OF THE PERSONAL PROPERTY WITH THE INTENT TO STEAL IT. THE COMPLETE POSSESSION OF THE PERSONAL PROPERTY BY THE TAKER, EVEN FOR AN INSTANT, IS SUFFICIENT, AND THE CARRYING AWAY OR EVEN THE SLIGHTEST REMOVAL OF THE PERSONAL PROPERTY IS SUFFICIENT IN LAW.

THIRD, THE TAKING AND CARRYING AWAY OF THE PERSONAL PROPERTY MUST BE WITH A FELONIOUS INTENT, THAT IS, WITH THE INTENT TO STEAL ON THE PART OF THE TAKER, TO PERMANENTLY DEPRIVE THE OWNER OF THE PERSONAL PROPERTY AND TO CONVERT IT TO THE TAKER'S OWN USE. FOURTH, TO CONSTITUTE ROBBERY, THE AGGRAVATION OR CERTAIN AGGRAVATING CIRCUMSTANCES MUST BE

PRESENT.

IN ORDER TO CONSTITUTE ROBBERY AS SIMPLY TO -- AS SIMPLY TO DISTINGUISH FROM LARCENY, AS I SAY THERE ARE CERTAIN AGGRAVATION -- AGGRAVATING CIRCUMSTANCES THAT MUST BE PRESENT. THE PROPERTY MUST BE TAKEN FROM THE PERSON OF ANOTHER, BUT IF IT IS TAKEN IN HIS OR HER PRESENCE, IT IS TAKEN CONSTRUCTIVELY FROM HIS OR HER PERSON AND, B., THE TAKING MUST NOT ONLY BE WITHOUT THE OWNER'S CONSENT, BUT IT MUST BE ACCOMPLISHED WITH VIOLENCE OR BY PUTTING THE PERSON IN FEAR FOR HIS OR HER OWN LIFE.

SO WHEN YOU HAVE ROBBERY, YOU HAVE THE THREAT OF FORCE THAT GOES WITH THE TAKING THAT ELEVATES IT FROM SIMPLE LARCENY TO ROBBERY BECAUSE YOU CAN STEAL SOMEBODY'S PROPERTY WITHOUT ANY THREATS OF FORCE, BUT WHEN YOU TAKE IT FROM THEIR PERSON OR THEIR PRESENCE BY THREATS OF FORCE OR VIOLENCE, IT ELEVATES IT TO THE CRIME OF ROBBERY. IN ORDER FOR ONE TO BE GUILTY OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON OR ARMED ROBBERY, THE LAW REQUIRES THAT ONE MUST HAVE USED A DEADLY WEAPON TO ACCOMPLISH THE PERSON -- OR ACCOMPLISH THE PURPOSE OF THE ROBBERY. AND ACCORDINGLY, LADIES AND GENTLEMEN, SUCH THINGS AS THE STATUTE ANNOUNCES AS PISTOLS, DIRKS, KNIVES, AND OTHER DEADLY WEAPONS WOULD ELEVATE THE MATTER TO ARMED ROBBERY.

LADIES AND GENTLEMEN, NORMALLY THE TAKING OF PROPERTY FROM SOMEONE WHO IS ALREADY DEAD IS NOT ROBBERY -- IS NOT

ROBBERY BECAUSE IF SOMEBODY IS ALREADY DEAD, THEN YOU AREN'T TAKING IT FROM THEM BY FEAR AND THREATS AND FORCE AND INTIMIDATION. HOWEVER, LADIES AND GENTLEMEN, TAKING PERSONAL PROPERTY FROM THE BODY OF A PERSON WHO IS DEAD WOULD CONSTITUTE ROBBERY IF THE MURDER AND THE ROBBERY ARE SO CLOSE IN POINT OF TIME AND ARE SO CLOSELY INTERWOVEN TO BECOME INSEPARABLE SO THAT THE HOMICIDE OR THE MURDER AND THE TAKING OF THE PROPERTY ARE IN ESSENCE A SINGLE EVENT. THEN THAT TAKING WOULD CONSTITUTE ROBBERY AS WELL.

ALSO, LADIES AND GENTLEMEN, I WANT YOU TO UNDERSTAND THAT IN SOUTH CAROLINA THERE IS A PROPOSITION OF LAW THAT THE LESSER CRIME IS INCLUDED IN THE GREATER CRIME SO THAT IF YOU, IN FACT, FOUND THAT THERE WAS ROBBERY BUT NOT ARMED ROBBERY, THEN THE DEFENDANT WOULD BE ENTITLED TO A CONVICTION ON THE CRIME OF ROBBERY AND NOT ARMED ROBBERY. SO IF THERE IS ANY QUESTION IN YOUR MIND AS TO WHETHER OR NOT THE STATE HAS PROVEN ARMED ROBBERY BEYOND A REASONABLE DOUBT, A DEFENDANT IS ENTITLED TO THE BENEFIT OF THAT DOUBT AND WOULD BE ENTITLED TO A FINDING OF ROBBERY OR COMMON LAW ROBBERY OR STRONG ARM ROBBERY, AS IT IS SOMETIMES CALLED, INSTEAD OF ARMED ROBBERY. BUT, OF COURSE, LADIES AND GENTLEMEN, BEFORE THE DEFENDANT COULD BE FOUND GUILTY OF STRONG ARM ROBBERY OR ARMED ROBBERY, THE STATE WOULD HAVE TO ESTABLISH ALL OF THE ELEMENTS OF THE CRIME AS I HAVE DISCUSSED IT WITH YOU BEYOND A REASONABLE DOUBT. SO PLEASE REMEMBER THAT THERE CAN BE NO

FINDING OF GUILT AS TO EITHER THE CHARGE OF ARMED ROBBERY OR OF COMMON LAW ROBBERY UNLESS AND UNTIL THE STATE HAS MET ITS BURDEN OF PROOF, AND IF IT DOES NOT, THEN THERE WOULD BE A FINDING OF NOT GUILTY AS TO THOSE CHARGES.

LADIES AND GENTLEMEN, THE FINAL INDICTMENT AGAINST THIS DEFENDANT IS THE INDICTMENT 2004-GS-7-835, AND IT CHARGES THE CRIME OF MURDER. IT ALLEGES THAT JOHN FRANCIS DYKEMAN, JR., DID IN BEAUFORT COUNTY ON OR ABOUT MAY 2ND, 2004, FELONIOUSLY, WILLFULLY, AND WITH MALICE AFORETHOUGHT KILL ONE BRETT KINNEY BY MEANS OF HITTING THE VICTIM REPEATEDLY IN THE HEAD WITH A CEMENT ROCK, CHOKING THE VICTIM WITH A STRAP AND DUCT TAPE, STRIKING THE VICTIM WITH A SHOVEL, CAUSING MASSIVE TRAUMA, AND THAT BRETT KINNEY DID DIE AS A PROXIMATE RESULT THEREOF.

LADIES AND GENTLEMEN, IN SOUTH CAROLINA MURDER IS THE KILLING OF ANY PERSON WITH MALICE AFORETHOUGHT. IN ORDER FOR THE STATE TO PROVE THE DEFENDANT GUILTY OF MURDER, IT MUST BE PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID KILL A PERSON AND THAT THE KILLING WAS DONE WITH MALICE AFORETHOUGHT. THE STATE IS NOT REQUIRED TO PROVE ANY MOTIVE FOR THE KILLING, BUT THE STATE MUST PROVE THAT THE DEFENDANT DID KILL ANOTHER PERSON WITH MALICE AFORETHOUGHT.

MALICE IS THE INTENTIONAL DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO INFLICT INJURY. MALICE IS ALSO DEFINED AS BEING HATRED OR ILL WILL.

MALICE IS WRONGFUL INTENT TO INJURE ANOTHER PERSON. IT INDICATES A WICKED OR A DEPRAVED SPIRIT INTENT ON DOING WRONG. MALICE IS A LEGAL TERM IMPLYING WICKEDNESS AND EXCLUDING A JUST CAUSE OR EXCUSE. THE TERM MALICE INDICATES A FORMED PURPOSE AND DESIGN TO DO A WRONGFUL ACT UNDER CIRCUMSTANCES THAT EXCLUDE ANY LEGAL RIGHT TO DO IT.

MALICE AFORETHOUGHT IS THAT DELIBERATE AND WELL-FORMED PURPOSE TO DO THE UNLAWFUL ACT. AFORETHOUGHT MEANS THAT THE INTENTION TO DO THE UNLAWFUL ACT WAS CONCEIVED OR PLANNED SOME TIME BEFORE THE ACTUAL COMMISSION OF THE UNLAWFUL ACT. THE MALICE NEED NOT EXIST FOR ANY PARTICULAR LENGTH OF TIME PRIOR TO THE KILLING. AS I SAID, MALICE IS A WORD THAT SUGGESTS A WICKEDNESS OR A HATRED OR A DETERMINATION TO DO WHAT ONE KNOWS TO BE WRONG WITHOUT JUST CAUSE OR EXCUSE OR LEGAL PROVOCATION. MALICE NEED NOT BE IN THE MIND OF THE ONE DOING THE KILLING ANY PARTICULAR LENGTH OF TIME BEFORE THE ACT OF THE KILLING IN ORDER TO RENDER THE KILLING MURDER. IF IT IS PRESENT IN THE MIND OF THE ONE DOING THE KILLING ANY LENGTH OF TIME BEFORE THE ACT, THEN ITS PRESENCE WOULD BE SUFFICIENT TO RENDER THE KILLING MURDER.

MALICE MAY BE EXPRESS MALICE OR IT MAY BE INFERRED MALICE. THE WORDS EXPRESS OR INFERRED DO NOT MEAN DIFFERENT KINDS OF MALICE BUT MERELY THE MANNER IN WHICH THE ONLY KIND KNOWN TO THE LAW MAY BE SHOWN TO EXIST. MALICE IS SAID TO BE EXPRESS MALICE WHERE THERE IS MANIFESTED A VIOLENT,

DELIBERATE INTENTION TO UNLAWFULLY TAKE AWAY THE LIFE OF ANOTHER HUMAN BEING. MALICE MAY BE INFERRED WHERE ONE INTENTIONALLY AND DELIBERATELY DOES AN UNLAWFUL ACT WHICH HE OR SHE KNOWS TO BE WRONG AND IN VIOLATION OF THEIR DUTY TO ANOTHER. MALICE MAY BE INFERRED WHERE NO EXCUSE OR LEGAL PROVOCATION FOR THE KILLING APPEARS AND WHEN CIRCUMSTANCES ATTENDING A KILLING SHOW AN ABANDONED HEART OR A MALIGNANT HEART FATALLY BENT UPON MISCHIEF.

ONE, LADIES AND GENTLEMEN, WHO UNLAWFULLY INFLICTS AN INJURY UPON ANOTHER PERSON IS DEEMED BY THE LAW TO BE CRIMINALLY RESPONSIBLE FOR THAT PERSON'S DEATH IF THE INJURY INFLICTED CONTRIBUTED MEDIATELY OR IMMEDIATELY TO THE DEATH OF THAT PERSON. THE FACT THAT OTHER CAUSES CONTRIBUTED DOES NOT RELIEVE THE ACTOR OF RESPONSIBILITY. IN OTHER WORDS, THE ACT OF THE DEFENDANT MUST ONLY BE A PROXIMATE CAUSE. A PROXIMATE CAUSE IS A DIRECT CAUSE, AN EFFICIENT CAUSE, A CAUSE WITHOUT WHICH THE DEATH WOULD NOT HAVE OCCURRED.

SO, LADIES AND GENTLEMEN, A PERSON'S ACT OR INJURY INFLICTED MAY BE REGARDED AS THE PROXIMATE CAUSE OF DEATH IF IT WAS A CONTRIBUTING CAUSE TO THE DEATH, THAT IS, IF IT WAS A REAL AND AN EFFICIENT CAUSE, A CAUSE WHICH BROUGHT ABOUT AN INJURY OR DEATH AND WITHOUT WHICH THE INJURY OR, RATHER, THE DEATH WOULD NOT HAVE OCCURRED. A DEFENDANT'S ACT NEED NOT BE THE SOLE CAUSE OF DEATH, PROVIDED THAT IT IS A PROXIMATE CAUSE THAT ACTUALLY CONTRIBUTED TO THE DEATH OF THE DECEDENT.

LADIES AND GENTLEMEN, THE LAW ALSO SAYS THAT IF ONE INTENTIONALLY KILLS ANOTHER WITH A DEADLY WEAPON, THE INFERENCE OF MALICE MAY ARISE. A DEADLY WEAPON, LADIES AND GENTLEMEN, IS ANY OBJECT OR SUBSTANCE WHICH REASONABLY COULD BE USED TO CAUSE BODILY HARM. MALICE MAY BE INFERRED FROM THE USE OF A DEADLY WEAPON. YOU, LADIES AND GENTLEMEN OF THE JURY, ARE PERMITTED TO INFER MALICE FROM THE CONDUCT OF THE DEFENDANT IN THE USE OR HANDLING OF A DEADLY WEAPON IF SUCH CONDUCT RESULTS DIRECTLY IN THE DEATH OF ANOTHER. AND IF SUCH CONDUCT WAS SO INEXCUSABLE, SO AGGRAVATED, AND SO GROSSLY RECKLESS AS TO SHOW AN ACTUAL INTENTIONAL DISREGARD OF THE CONSEQUENCES TO HUMAN LIFE, A CONDUCT SUFFICIENT TO SHOW A DELIBERATE INTENTIONAL DESIGN TO USE, EMPLOY, OR HANDLE A DEADLY WEAPON SO AS TO ENDANGER THE LIFE OF ANOTHER OR OTHERS WITHOUT JUST CAUSE OR EXCUSE, THAT IS SUFFICIENT TO RAISE AN INFERENCE OF MALICE.

LADIES AND GENTLEMEN, IF ONE INTENTIONALLY KILLS ANOTHER DURING THE COMMISSION OF A FELONY, THE INFERENCE OF MALICE MAY ARISE. IF FACTS ARE PROVED BEYOND A REASONABLE DOUBT SUFFICIENT TO RAISE AN INFERENCE OF MALICE TO YOUR SATISFACTION, REGARDLESS OF HOW THAT INFERENCE MAY ARISE, IT IS SIMPLY ONE EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION ALONG WITH ALL OF THE OTHER FACTS THAT HAVE BEEN PRESENTED TO YOU. AND, LADIES AND GENTLEMEN, WHEN IT COMES TO AN INFERENCE, YOU MAY GIVE IT SUCH WEIGHT AS YOU DETERMINE IT TO

RECEIVE. AS WITH ALL INFERENCES, YOU ARE FREE TO ACCEPT OR REJECT THEM AS YOU DEEM APPROPRIATE.

A DEFENDANT IS NOT REQUIRED TO PROVE THE ABSENCE OF MALICE JUST AS A DEFENDANT IS NOT REQUIRED TO PROVE THEIR INNOCENCE. MALICE IS A FACTOR THAT MUST BE PROVEN BY THE STATE BEYOND A REASONABLE DOUBT.

NOW, LADIES AND GENTLEMEN, I'M GOING TO COME BACK AND I'M GOING TO TALK WITH YOU A LITTLE BIT MORE ABOUT THE INFERENCE THAT WOULD ARISE FROM A DEATH THAT OCCURRED DURING THE COMMISSION OF A FELONY BECAUSE THERE HAS BEEN RAISED IN THIS CASE DURESS OR COERCION BY THE DEFENDANT, AND I WILL GET TO THOSE MATTERS IN A MOMENT AND I WILL THEN DISCUSS THE FELONY MURDER RULE, THE INFERENCE THAT CAN ARISE FROM THAT WITH YOU IN A LITTLE MORE DETAIL.

LADIES AND GENTLEMEN, I WANT TO TELL YOU THAT IF AN INDIVIDUAL IS SEEING THE COMMISSION OF A CRIME AND THEY ARE JUST A CITIZEN, THERE IS NOT AN OBLIGATION ON SOMEONE TO STEP IN AND STOP THE COMMISSION OF A CRIME. IN THIS PARTICULAR CASE, ONE OF THE PRINCIPLES THAT HAS BEEN ALLEGED BY THE STATE FOR THE FINDING OF THIS DEFENDANT GUILTY IS THAT HE HAS AIDED AND ABETTED, IF NOT BEING THE PRINCIPAL WHO COMMITTED THE ACTIVITIES, THAT HE HAS AIDED AND ABETTED. HE BECOMES A PRINCIPAL IN A CRIME EITHER BECAUSE HE'S THE ONE WHO PRESENTS THE CRIME OR PERPETRATES THE CRIME OR HE IS ONE WHO IS PRESENT AND AIDS, ABETS, AND ASSISTS IN THE COMMISSION OF A

CRIME.

WHEN ONE DOES AN ACT IN THE PRESENCE OF AND WITH THE ASSISTANCE OF ANOTHER, THEN THE ACT IS DONE BY BOTH, AND WHERE THERE ARE TWO OR MORE PEOPLE ACTING WITH A COMMON DESIGN OR INTENT AND THEY ARE PRESENT AT THE COMMISSION OF THE CRIME, IT MATTERS NOT BY WHOSE IMMEDIATE AGENCY THE CRIME IS COMMITTED BECAUSE ALL ARE GUILTY. THE HAND OF ONE IS THE HAND OF ALL.

NOW, BEING PRESENT AT THE COMMISSION OF A CRIME MEANS TO BE SUFFICIENTLY NEAR TO AID AND ABET AND ASSIST IN THE COMMISSION THEREOF. HOWEVER, LADIES AND GENTLEMEN, I WANT YOU TO UNDERSTAND THAT MERE PRESENCE AT THE SCENE OF A CRIME IS INSUFFICIENT TO CONVICT ONE AS A PRINCIPAL ON THE THEORY OF AIDING AND ABETTING. INTENT IS ALSO A NECESSARY ELEMENT FOR THERE TO HAVE BEEN A COMMON DESIGN OR INTENT TO COMMIT A CRIME, AND THE CRIME MUST HAVE BEEN COMMITTED PURSUANT THERETO AND WITH THE PERSON AIDING AND ABETTING BY SOME OVERT ACT.

THE STATE MUST PROVE THAT SOMEBODY HAS AIDED AND ABETTED BY PROOF THAT SATISFIES YOU OF THAT BEYOND A REASONABLE DOUBT. TO AID WOULD MEAN TO PROMOTE THE COURSE OF OR THE ACCOMPLISHMENT OF, TO AFFORD SUPPORT TO, TO HELP, TO GIVE HELP OR ASSISTANCE, TO BE A HELPER. TO ABET MEANS TO ENCOURAGE OR GIVE THE APPEARANCE OF FAVOR OR MORAL SUPPORT AS AID OR APPROVAL.

SO, LADIES AND GENTLEMEN, UNDER THE THEORY OF HAND OF ONE IS HAND OF ALL, A CRIME MUST BE COMMITTED BY TWO OR MORE PERSONS WHO ARE, IN FACT, ACTING TOGETHER IN THE COMMISSION OF THE CRIME OR THE OFFENSE, AND THAT IS WHAT MAKES THE ACT OF ONE THE ACT OF ALL. THIS BECOMES TRUE IF THERE ARE TWO PEOPLE OR MORE THAN TWO PEOPLE WHO ARE INVOLVED IN THE ACT. IF TWO OR MORE PEOPLE ARE, IN FACT, ACTING TOGETHER, ASSISTING EACH OTHER IN THE COMMISSION OF AN OFFENSE, THE LAW SAYS THAT UNDER THESE CIRCUMSTANCES THE ACT OF ONE IS THE ACT OF ALL.

I FURTHER CHARGE YOU THOUGH, LADIES AND GENTLEMEN, PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE COMMITTED WITHOUT MORE IS NOT SUFFICIENT TO MAKE A PERSON GUILTY OF THAT CRIME. MERE KNOWLEDGE THAT THE PRINCIPAL IS GOING TO COMMIT AN OFFENSE, EVEN WHEN COUPLED WITH PRESENCE AT THE COMMISSION OF THE CRIME, IS INSUFFICIENT TO CONVICT THE ONE AS A PRINCIPAL. GUILT AS A PRINCIPAL IS ESTABLISHED BY ACTUAL OR CONSTRUCTIVE PRESENCE AT THE SCENE AS A RESULT OF SOME TYPE OF PREARRANGEMENT OR SOME TYPE OF AN AGREEMENT.

THERE MUST BE A FINDING BY YOU AS A JURY THAT THERE IS A COMMON SCHEME OR PLAN IN ORDER TO MAKE SOMEONE GUILTY AS AN AIDER OR AN ABETTOR ALONG WITH THE PRINCIPAL. AND, LADIES AND GENTLEMEN, ALL OF THESE ELEMENTS MUST BE PROVEN BY THE STATE BEYOND A REASONABLE DOUBT BEFORE YOU CAN FIND SOMEONE IS GUILTY AS A PRINCIPAL BECAUSE THEY WERE SIMPLY PRESENT AT

THE TIME A CRIME WAS COMMITTED, THAT MERE PRESENCE DOES NOT MAKE THEM A PARTICIPANT. YOU MUST FIND THAT THE STATE HAS ESTABLISHED THAT THEY WERE, IN FACT, ACTING IN CONCERT WITH THE PRINCIPAL FOR THEM TO BE RESPONSIBLE FOR THE ACTIONS OF SOMEONE ELSE.

LADIES AND GENTLEMEN, THE DEFENDANT HAS ASSERTED DURESS OR COERCION, THAT IS, THAT THE DEFENDANT ACTED THE WAY HE DID BECAUSE HE WAS FACED WITH A SITUATION WHERE HE HAD TO ACT IN THAT WAY BECAUSE HIS ACTING AND PARTICIPATING WAS THE RESULT OF THE CHOICE OF THE LESSER OF TWO EVILS. THE BURDEN OF PROVING THIS IS ON A DEFENDANT. THIS DEFENSE WOULD BE AVAILABLE FOR THE CHARGE OF ARMED ROBBERY OR -- AND/OR COMMON LAW ROBBERY AS WELL AS KIDNAPPING, BUT DURESS DOES NOT APPLY AS A DEFENSE TO MURDER.

BUT, LADIES AND GENTLEMEN, IF YOU ARE CONSIDERING MURDER ON THE THEORY OF THE INFERENCE CREATED BY FELONY MURDER THAT THE MURDER AROSE OUT OF THE COMMISSION OF A FELONY AND AS A RESULT OF THE FELONY THAT IT WAS A NATURAL PROXIMATE TYPE OF EVENT THAT YOU WOULD EXPECT TO OCCUR FROM A FELONY AND YOU FOUND THAT DURESS HAD BEEN ESTABLISHED SUFFICIENTLY BY THE DEFENDANT, THEN THE DEFENDANT CANNOT BE FOUND GUILTY OF MURDER ON THE FELONY MURDER RULE BECAUSE, IF ESTABLISHED, DURESS OR COERCION IS A VALID DEFENSE.

THE BURDEN OF PROOF ON A DEFENDANT TO ESTABLISH DURESS OR COERCION IS NOT LIKE THE BURDEN OF PROOF ON THE STATE.

THE STATE MUST PROVE THE ELEMENTS OF CRIME BEYOND A REASONABLE DOUBT. A DEFENDANT HAS THE BURDEN OF ESTABLISHING DURESS BY THE PREPONDERANCE OR THE GREATER WEIGHT OF THE EVIDENCE. THE PREPONDERANCE OF THE EVIDENCE IS OFTENTIMES ILLUSTRATED BY THE USE OF A TRADITIONAL SET OF SCALES. AS YOU ARE CONSIDERING WHETHER OR NOT THE DEFENDANT HAS ESTABLISHED THE DEFENSE OF DURESS, IF YOU FIND THOSE SCALES ARE STILL LEVEL AT THE END OF THE EVIDENCE ON THIS ISSUE OR THOSE SCALES TIP FORWARD OR TIP IN FAVOR OF THE STATE, THEN THE DEFENDANT WOULD NOT HAVE ESTABLISHED THE DEFENSE OF DURESS. IF YOU FIND THAT THE SCALES ON THE ISSUE OF DURESS TIP EVEN SLIGHTLY IN FAVOR OF THE DEFENDANT, THEN YOU WOULD FIND THAT THE DEFENDANT HAD MET HIS BURDEN OF PROOF AND DURESS WOULD BE ESTABLISHED.

BUT THERE ARE THREE ELEMENTS THAT THE DEFENDANT MUST PROVE IN ORDER TO ESTABLISH DURESS AND MUST PROVE BY THE PREPONDERANCE OF THE EVIDENCE. THE DEFENDANT MUST PROVE THAT THEY WERE -- THAT HE WAS FACED WITH IMMINENT THREAT OR AN EMERGENCY THAT AROSE WITHOUT ANY FAULT ON THE PART OF THE DEFENDANT. THE SECOND ELEMENT IS THAT THE THREAT OF INJURY OR THE EMERGENCY WAS OF SUCH A NATURE AS TO INDUCE A REASONABLE APPREHENSION OF DEATH OR SERIOUS BODILY HARM IF THE CRIMINAL ACT OF ARMED ROBBERY AND/OR OF KIDNAPPING WAS NOT COMMITTED BY THE DEFENDANT AND, THIRD, THAT THERE WAS NO OTHER REASONABLE ALTERNATIVE TO AVOID THIS THREATENED INJURY

OR EMERGENCY OTHER THAN COMMITTING THE CRIME OF ARMED ROBBERY AND/OR OF KIDNAPPING.

NOW, LADIES AND GENTLEMEN, I HAVE INDICATED TO YOU THAT WHEN THE STATE HAD THE BURDEN OF PROVING AN ELEMENT OF AN OFFENSE THAT IF THEY FAILED TO MEET ANY OR IF THEY FAILED TO ESTABLISH ANY OF THESE ELEMENTS, THEN THEY WOULD FAIL TO HAVE ESTABLISHED THE CRIME. AND, LIKEWISE, IF A DEFENDANT FAILS TO ESTABLISH ANY OF THESE THREE ELEMENTS OF THE DEFENSE OF DURESS, THEY HAVE FAILED TO ESTABLISH THAT DEFENSE AND WOULD NOT BE ENTITLED TO THAT DEFENSE.

NOW, LADIES AND GENTLEMEN, IF YOU ARE GOING TO FIND THE DEFENDANT RESPONSIBLE FOR THE DEATH OF THE DEFENDANT (SIC) BECAUSE YOU FIND THAT HE AIDED AND ABETTED AND DID NOT HIMSELF PARTICIPATE DIRECTLY IN STRIKING SOME BLOW BUT THAT HE AIDED OR ABETTED IN THE CRIMES OF ARMED ROBBERY AND/OR KIDNAPPING, YOU WOULD ALSO HAVE TO FIND THAT THE STATE HAD ESTABLISHED BEYOND A REASONABLE DOUBT THAT THIS CRIMINAL ACT OF MURDER WAS EITHER INTENDED BY THE DEFENDANT OR THAT IT WAS THE NATURAL OR PROBABLE CONSEQUENCE OF HAVING COMMITTED AN ARMED ROBBERY AND/OR KIDNAPPING.

SO, LADIES AND GENTLEMEN, YOU MUST DETERMINE WHETHER OR NOT THE STATE HAS PROVEN EACH AND EVERY ELEMENT OF THE THREE CRIMES THAT HAVE BEEN CHARGED BY THE STATE BEYOND A REASONABLE DOUBT, AND AS TO THE DEFENSE OF DURESS WHICH WOULD APPLY TO THE KIDNAPPING AND THE ARMED ROBBERY, YOU MUST

DETERMINE WHETHER OR NOT EACH AND EVERY ELEMENT OF THAT DEFENSE HAS BEEN ESTABLISHED BY THE DEFENDANT BY THE GREATER WEIGHT OR THE PREPONDERANCE OF THE EVIDENCE, A LESSER BURDEN OF PROOF THAN IS ON THE STATE.

LADIES AND GENTLEMEN, I DISCUSSED WITH YOU WHEN THIS CASE FIRST BEGAN THAT SOMETIMES A DEFENDANT OFFERS NO TESTIMONY WHATSOEVER AND DOES NOT APPEAR AND TAKE THE STAND, AND I TOLD YOU THAT, ONE, WHEN THAT HAPPENS THE DEFENDANT IS ENTITLED TO THE FINAL ARGUMENT. NOW, I WANT TO INSTRUCT YOU AND EMPHASIZE TO YOU ONCE AGAIN THAT THE FACT THAT THE DEFENDANT HAS NOT TESTIFIED IN THE TRIAL OF THIS CASE AND THAT NO EVIDENCE HAS BEEN PUT UP IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY WAY IN YOUR DELIBERATIONS, IN YOUR CONSIDERATIONS OF THE QUESTION OF THE GUILT OR THE INNOCENCE OF THIS DEFENDANT. IT MUST NOT BE CONSIDERED BY YOU IN ANY MANNER WHATSOEVER AGAINST THE DEFENDANT OR MITIGATE AGAINST HIM IN ANY RESPECT WHATSOEVER.

A DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND THE ASSERTION OF SUCH CONSTITUTIONAL RIGHT CANNOT AND MUST NOT BE CONSIDERED BY YOU IN YOUR DELIBERATIONS. THEREFORE, I REPEAT TO YOU THAT UNDER YOUR OATH YOU ARE TO REACH NO INFERENCE AND DRAW NO CONCLUSION WHATSOEVER FROM THE FACT THAT THIS DEFENDANT DID NOT HIMSELF TESTIFY. THIS FACT SHOULD NOT BE EVEN DISCUSSED BY YOU IN THE JURY ROOM. SO I REPEAT TO YOU: THE BURDEN OF PROOF, AS I HAVE STATED TO YOU,

IS UPON THE STATE. IT IS NOT INCUMBENT UPON THE ACCUSED TO PROVE INNOCENCE. THEY ARE DETERMINED UNDER THE LAW TO BE INNOCENT UNLESS THE STATE MEETS ITS BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT AS TO EACH OF THE FACTORS THAT THE STATE MUST MEET ITS BURDEN OF PROOF ON.

AND YOU CANNOT CONSIDER IN ANY WAY WHATSOEVER THE FACT THAT THIS DEFENDANT DID NOT TESTIFY AND CANNOT CONSIDER IT IN ANY WAY AS ANY EVIDENCE OF ANY GUILT BY THE DEFENDANT. IT DOES NOT CREATE ANY INFERENCE AND SHOULD NOT BE CONSIDERED BY YOU IN ANY WAY. A DEFENDANT IN THIS CASE, AS IN ANY CASE, IS CONSIDERED TO BE INNOCENT UNLESS THE STATE HAS MET ITS BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT AS TO ALL OF THE ELEMENTS OF THE CRIMES THAT HAVE BEEN CHARGED.

NOW, LADIES AND GENTLEMEN, YOU WERE SELECTED BY BOTH THE STATE AND THE DEFENDANT TO BE FAIR AND IMPARTIAL JURORS. YOU HAVE SWORN THAT YOU WOULD IMPARTIALLY TRY THE CASE AND DETERMINE THE FACTS IN THIS CASE IN THAT FASHION AND TO APPLY THE LAW THAT I HAVE GIVEN TO YOU TO THE FACTS AS YOU FIND THEM. WHEN YOU DO THIS, YOU WILL HAVE FULLY DISCHARGED YOUR DUTIES AS JURORS. YOU ARE TO MAKE YOUR DECISION SOLELY ON THE EVIDENCE THAT YOU HEARD IN THIS CASE. YOU ARE TO BE AFFECTED BY NOTHING THAT TOOK PLACE OUTSIDE OF THIS COURTROOM. THIS COURTROOM CREATED A VACUUM FOR YOU AS FAR AS CONSIDERATION OF THE EVIDENCE IN THIS CASE IN DETERMINING THE GUILT OF THE DEFENDANT OR IN DETERMINING HIS INNOCENCE. SO

PLEASE, LADIES AND GENTLEMEN, BEAR THAT IN MIND. BASE YOUR DECISION IN THIS MATTER SOLELY ON THE TESTIMONY AND ON THE EXHIBITS THAT HAVE BEEN CONSIDERED TO YOU FOR -- OR HAVE BEEN PRESENTED TO YOU FOR YOUR CONSIDERATION.

WHEN YOU GO BACK TO THE JURY ROOM IN JUST A MOMENT, YOU ARE NOT TO BEGIN YOUR DELIBERATIONS. I AM GOING TO DISCUSS WITH THE ATTORNEYS THE INSTRUCTIONS THAT I HAVE GIVEN TO YOU, AND I MAY NEED FOR YOU TO COME BACK OUT TO GIVE YOU FURTHER INSTRUCTIONS. YOU WILL KNOW THAT IT IS PROPER FOR YOU TO BEGIN YOUR DELIBERATIONS WHEN YOU HAVE RECEIVED THE VERDICT FORM AND YOU HAVE ALSO RECEIVED ALL OF THE DOCUMENTARY EVIDENCE THAT'S BEEN PRESENTED IN CONNECTION WITH THIS TRIAL. THEN YOU WILL KNOW THAT IT IS TIME TO BEGIN YOUR DELIBERATIONS.

NOW, LADIES AND GENTLEMEN, YOUR VERDICT IN THIS MATTER MUST BE UNANIMOUS. IT CAN'T BE EIGHT/FOUR, SEVEN/FIVE, OR SOME COMBINATION. IT MUST BE THE VERDICT OF EACH OF YOU AS TO THE CHARGES THAT HAVE BEEN BROUGHT BY THE STATE. LADIES AND GENTLEMEN, AS YOU ARE CONSIDERING THE CHARGE OF ARMED ROBBERY, YOU WILL HAVE THREE CHOICES. YOU CAN, OF COURSE, FIND THE DEFENDANT NOT GUILTY. YOU CAN FIND THE DEFENDANT GUILTY OF ARMED ROBBERY. YOU CAN FIND THE DEFENDANT GUILTY OF COMMON LAW ROBBERY.

AS TO THE CHARGE OF KIDNAPPING, YOU CAN FIND THE DEFENDANT NOT GUILTY OR YOU CAN FIND THE DEFENDANT GUILTY.

AS TO THE CHARGE OF MURDER, YOU CAN FIND THE DEFENDANT NOT GUILTY OR YOU CAN FIND THE DEFENDANT GUILTY.

PLEASE DO NOT IN ANY WAY CONSIDER HOW THESE CHOICES MAY HAVE BEEN SET UP ON THE VERDICT FORM AS ANYTHING TO INDICATE TO YOU WHAT I THINK YOU OUGHT TO DO OR WHAT FINDINGS I THINK YOU SHOULD MAKE. WHEN MY CLERK IS PREPARING THAT VERDICT FORM, SHE MUST OF NECESSITY PUT SOMETHING IN FRONT OF SOMETHING ELSE. SO YOU SIMPLY CONSIDER THOSE POSSIBLE CHOICES AND YOU MAKE A UNANIMOUS DECISION AS TO WHETHER OR NOT THE STATE HAS MET ITS BURDEN OF PROOF, AND THEN YOU MAKE YOUR VERDICT ACCORDINGLY.

LADIES AND GENTLEMEN, WHEN YOU ARE DELIBERATING THERE ARE TIMES THAT YOU HAVE THE RIGHT TO COME BACK INTO THE JURY (SIC) ROOM BEFORE YOU ACTUALLY REACH YOUR VERDICT. AND, OF COURSE, MR. FOREMAN, WHEN THE VERDICT IS REACHED, KNOCK ON THE DOOR AND LET US KNOW AND WE WILL BRING YOU BACK IN AND RECEIVE THE VERDICT THAT THE JURY HAS REACHED. BUT BEFORE A JURY REACHES A VERDICT, IF IT NEEDS TO, IT HAS THE OPPORTUNITY TO COME BACK INTO THE COURTROOM SHOULD IT NEED TO LISTEN TO ADDITIONAL TESTIMONY.

SO SHOULD THERE BE SOME QUESTION ABOUT WHAT A PARTICULAR WITNESS SAID, PLEASE, MR. SMOOT, WRITE THAT QUESTION DOWN, SIGN IT AND DATE IT AND KNOCK ON THE DOOR AND THE BAILIFF WILL BRING IT TO ME. WE WILL THEN HAVE THE COURT REPORTER LOCATE THAT PORTION OF THE TESTIMONY AND WE WILL BRING YOU

BACK INTO THE COURTROOM AND WE WILL PLAY THAT TESTIMONY OVER FOR YOU.

UNLESS WE CAN REACH A STIPULATION OF FACT, WE DON'T SIMPLY ANSWER THE QUESTION BECAUSE YOU ARE THE JURY. WE WANT YOU TO COME BACK IN AND MAKE YOUR FACTUAL FINDINGS ABOUT WHAT THAT TESTIMONY SAID AND WHAT IT MEANT TO YOU AFTER YOU HAVE HAD A CHANCE TO HEAR IT IF YOU NEED TO. BUT WE DON'T STEP INTO YOUR SHOES AND TRY TO SEND YOU AN ANSWER BACK UNLESS WE CAN SEND YOU A STIPULATION OF FACT. WE WANT YOU TO HEAR IT, YOU TO EVALUATE IT, YOU TO MAKE YOUR FINDINGS AS TO WHAT IT SAYS TO YOU, AND SO THAT'S HOW YOU CAN DO THAT.

IF THERE'S SOME QUESTIONS YOU HAVE AS TO THE INSTRUCTIONS I HAVE GIVEN YOU, WRITE ME A NOTE LIKEWISE IN THAT FASHION, DATE IT AND SIGN IT. GIVE IT TO THE BAILIFF. HE BRINGS IT BACK TO ME. I THEN CONSIDER IT, AND JUST AS I DO WITH THE NOTES THAT MAY RELATE TO TESTIMONY, I DISCUSS THESE MATTERS WITH THE ATTORNEYS FOR BOTH SIDES AND I MAKE THEM A COURT'S EXHIBIT. SO IF THERE IS SOME QUESTION ABOUT THE COURT'S INSTRUCTIONS ON THE LAW, WRITE ME A NOTE TO THAT EFFECT. I WILL DISCUSS IT WITH THE ATTORNEYS AND I WILL BRING YOU BACK OUT AND GIVE YOU SUCH FURTHER AND ADDITIONAL INSTRUCTIONS AS WOULD BE APPROPRIATE.

NOW, IF YOU WOULD AT THIS TIME, I'M GOING TO ASK IN JUST A MOMENT THAT ALL 14 OF YOU GO BACK. THEN AFTER I'VE HAD A CHANCE TO DISCUSS THE MATTERS WITH THE ATTORNEYS, I'LL EITHER

BRING EVERYBODY OUT OR THE BAILIFF WILL COME BACK WITH THE EXHIBITS AND THE VERDICT FORM. IF THAT IS WHAT HAPPENS, THEN MS. DAVIS AND MS. LAURICH, I WILL NEED FOR YOU TO COME OUT. YOU WOULD NOT BEGIN THE DISCUSSIONS WITH THE JURY, BUT I WILL NEED TO GET SOME ADDITIONAL INFORMATION FROM YOU. SO IF ALL OF YOU WOULD AT THIS TIME, IF YOU WOULD PLEASE STEP BACK BUT DO NOT YET BEGIN DISCUSSION OF THE CASE.

(WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT 3:26 P.M.)

THE COURT: ALL RIGHT. ANY EXCEPTIONS BY THE STATE?

MR. STONE: NO, SIR.

THE COURT: EXCEPTIONS BY THE DEFENSE?

MR. LEE: JUDGE, I GUESS WE WOULD JUST RENEW OUR REQUESTS THAT HAVE ALREADY BEEN SUBMITTED TO THE COURT REPORTER AS THE COURT'S EXHIBIT, AND THE OTHER THING THAT WE WANTED TO BRING UP IS IT APPEARS THAT A SPECIAL VERDICT FORM MAY BE APPROPRIATE ON THE MURDER CHARGE BECAUSE I CAN -- ONE -- ONE SCENARIO THAT COULD HAPPEN IS NOT GUILTY ON ARMED ROBBERY, NOT GUILTY ON KIDNAPPING, GUILTY ON MURDER. WHILE WE WOULD -- WE DON'T KNOW WHETHER THAT'S AN INCONSISTENT VERDICT OR WHETHER IT'S AN IMPOSSIBLE VERDICT UNDER THE LAW THAT YOU CHARGED THEM BECAUSE IF THAT MURDER VERDICT OF GUILTY IS BASED UPON FELONY MURDER AND THEY FOUND DURESS, THAT'S IMPROPER. IF IT IS JUST UNDER AN AIDER AND ABETTOR THEORY, THAT WOULD BE A PROPER VERDICT AND IT COULD HAPPEN

LIKE THAT.

SO, YOU KNOW, UNLESS WE CAN -- I DON'T THINK IT WOULD BE APPROPRIATE TO POLE THEM AFTERWARDS AND SAY, HEY, THIS IS YOUR VERDICT. IS THIS HOW YOU CAME TO IT? SO THAT'S WHAT OUR CONCERN IS IS IF -- IN THE EVENT THAT HAPPENED, WE WOULD -- PERHAPS WOULD NOT HAVE A WAY TO FIGURE OUT HOW THEY GOT TO THAT PARTICULAR VERDICT.

THE COURT: WHAT SAYS THE STATE?

MR. STONE: I DON'T THINK WE'RE ENTITLED TO KNOW HOW THE JURY GETS TO THEIR PARTICULAR VERDICTS. I THINK THE VERDICT FORM THAT YOU HAVE EXPLAINED IS PROPER.

MR. LEE: YOUR HONOR, I DON'T SEE ANY PREJUDICE TO THE STATE TO SEND A SPECIAL VERDICT FORM AND THAT THE PREJUDICE TO THE DEFENSE COULD BE -- COULD BE HUGE SINCE THEY DID AWAY WITH INCONSISTENT VERDICTS. I THINK THAT IS APPROPRIATE BECAUSE YOU DID CHARGE THEM UNDER TWO DIFFERENT THEORIES OF GUILT, AND THEY HAVE TO OBVIOUSLY USE ONE OF THEM.

THE COURT: THE BUSINESS OF INCONSISTENT VERDICTS, I'M TRYING TO REMEMBER WHETHER THAT'S A CIVIL LAW CONCEPT OR A CRIMINAL LAW CONCEPT. I'M NOT SURE.

MR. LEE: WELL, UNTIL SEVERAL YEARS AGO YOU COULD ARGUE THAT SOMETHING WAS AN INCONSISTENT VERDICT IN CRIMINAL LAW, BUT IT'S NO LONGER THE CASE. I THINK IT'S A 1992 CASE THAT DID AWAY WITH---

THE COURT: I REMEMBER THAT THERE WAS A CASE THAT

CHANGED IT. I'M JUST TRYING TO GET IT STRAIGHT IN MY MIND AS TO WHICH WAY IT WENT.

MR. LEE: YOUR HONOR---

THE COURT: THE STATE---

MR. LEE: I'M SORRY. THEY APPROACHED ME. THERE'S APPARENTLY SEVERAL PEOPLE THAT NEED TO GO TO THE REST ROOM. THEY WERE WONDERING IF IT'S ALL RIGHT IF THEY COULD LEAVE.

THE COURT: I'M GOING TO SEND IT AS IT IS. IN STATE V. ALEXANDER, 303 SOUTH CAROLINA 377, A 1991 CASE, THE RULE PROHIBITING INCONSISTENT -- INCONSISTENT VERDICTS IN THIS STATE HAS BEEN ABOLISHED, AND THAT WAS ALSO CITED IN STATE V. GARRETT, 350 S.C. 613, A 2002 CASE.

MR. LEE: YES, SIR.

THE COURT: SO YOU CAN HAVE INCONSISTENT VERDICTS IN CRIMINAL CASES.

MR. LEE: YES, SIR. I MEAN I...

THE COURT: SO---

MR. LEE: THAT'S WHAT I'M SAYING.

THE COURT: SO I DON'T SEE HOW THAT'S GOING TO BE INCONSIS -- HOW THAT'S WRONG IF THEY MAKE A DECISION. I DON'T THINK I NEED TO SEND THEM SOMETHING THAT SAYS: ARE YOU FINDING HIM GUILTY, IF THEY FIND HIM GUILTY, BECAUSE OF FELONY MURDER?

MR. LEE: BUT--

THE COURT: BECAUSE I TOLD THEM FELONY MURDER WOULDN'T

EXIST IF THERE WAS A VALID DURESS DEFENSE.

MR. LEE: BUT I DON'T THINK THAT -- I DON'T THINK THEY COULD -- I DON'T THINK IT WOULD BE AN INCONSISTENT VERDICT. I THINK IT WOULD BE AN IMPOSSIBLE VERDICT FOR THEM TO DO THAT. I MEAN---

THE COURT: WELL, LET'S SEE IF THAT'S WHAT THEY DO.

MR. LEE: OKAY.

THE COURT: I'M NOT GOING TO SEND BACK A SPECIAL VERDICT FORM.

MR. LEE: ALL RIGHT.

THE COURT: ALL RIGHT. DO WE HAVE A VERDICT FORM? LET'S SEE WHAT WE'VE GOT HERE. WE'LL BE IN RECESS. Y'ALL COME FORWARD AND I'LL SHOW YOU WHAT WE'VE GOT.

(PAUSE IN PROCEEDINGS WHILE THE ATTORNEYS REVIEWED THE EXHIBITS GOING TO THE JURY.)

THE COURT: KEEP YOUR SEATS, PLEASE. I UNDERSTAND THE EVIDENCE IS READY TO GO BACK TO THE JURY ALONG WITH THE VERDICT FORM?

MR. THORNTON: THAT IS CORRECT FROM THE STATE'S PERSPECTIVE, JUDGE. IN ADDITION, YOUR HONOR, I HAVE GIVEN THE BAILIFFS SOME GLOVES TO WALK THE STUFF BACK BECAUSE THEY'RE GOING TO HAVE TO CARRY THE WOOD AND THE DOOR WHICH ARE STILL HERE, AND I HAVE LEFT A PILE OF GLOVES -- I HAVE SHOWN TO DEFENSE COUNSEL A PILE OF GLOVES RIGHT THERE FOR THE JURY TO USE IF THEY SEE FIT.

THE COURT: VERY GOOD. WHEN YOU TAKE THE EVIDENCE AND THE VERDICT FORM BACK, IF YOU WILL ASK THE TWO ALTERNATES TO COME BACK INTO THE COURTROOM.

BAILIFF: ALL RIGHT, SIR. THANK YOU, YOUR HONOR.

(WHEREUPON, THE EVIDENCE WAS TAKEN BACK TO THE JURY ROOM, THE ALTERNATES WERE BROUGHT INTO THE COURTROOM, AND THE JURY BEGAN DELIBERATING AT 3:51 P.M.)

THE COURT: MS. DAVIS, MS. LAURICH, I APPRECIATE VERY MUCH THE SERVICE THAT YOU HAVE PROVIDED AS ALTERNATES IN THIS MATTER. I AM IN HOPES THAT THERE WILL BE NO ILL HEALTH EXPERIENCED BY OUR JURY, BUT IT IS ABOUT 4:00 IN THE AFTERNOON AND I NEVER KNOW HOW LONG IT'S GOING TO TAKE A JURY TO REACH A VERDICT. SO I AM GOING TO RELEASE YOU, BUT AT THE SAME TIME I'M GOING TO ALSO ASK THAT YOU NOT TALK WITH ANYBODY ABOUT THE CASE, NOT EXPOSE YOURSELF TO ANY NEWSPAPER OR TELEVISION COVERAGE ON THIS CASE.

I'M GOING TO ASK YOU TO TAKE A SHEET OF PAPER AND WRITE DOWN A TELEPHONE NUMBER FOR -- AND GIVE IT TO THE COURT REPORTER SO THAT IN SOME STRANGE EVENT THAT SOMEONE GOT SICK AND I NEEDED ONE OR TWO ALTERNATES TO COME, I COULD GIVE YOU A CALL, BRING YOU BACK IN, TALK WITH YOU TO INSURE THAT NOBODY HAD TALKED WITH YOU ABOUT THE CASE AND YOU HADN'T BEEN EXPOSED TO ANYTHING AND THEN MAKE A DETERMINATION AS TO WHETHER OR NOT IT WOULD BE APPROPRIATE TO PLACE YOU BACK ON THE JURY SINCE YOU HEARD THE TESTIMONY.

SO IF YOU WILL, I THANK YOU VERY MUCH, BUT IF I DON'T SEE YOU AGAIN, IT'S BEEN MY PLEASURE TO HAVE YOU WITH ME THIS WEEK. AND IF YOU WILL, IF YOU CAN JUST WRITE THAT DOWN AND THE BAILIFF CAN BRING IT BACK AND GIVE IT TO THE COURT REPORTER. THANK Y'ALL VERY MUCH AND HAVE A PLEASANT EVENING. ALL RIGHT. WE'LL BE IN RECESS WHILE THE JURY DELIBERATES.

(PAUSE IN PROCEEDINGS WHILE THE JURY DELIBERATES.)

THE COURT: THANK YOU. YOU MAY BE SEATED.

MR. STONE: CAN WE APPROACH BRIEFLY?

THE COURT: YES.

(WHEREUPON, A BENCH CONFERENCE WAS HELD.)

THE COURT: LADIES AND GENTLEMEN, I'M ADVISED THAT THE JURY HAS REACHED A VERDICT, AND I DO NOT KNOW WHAT THE VERDICT IS GOING TO BE IN CONNECTION WITH THIS MATTER. I DO KNOW THAT THE JURY HAS WORKED HARD AND HAS BEEN ATTENTIVE TO ALL OF THE EVIDENCE THAT HAS BEEN PRESENTED. IN THESE MATTERS QUITE OFTEN A VERDICT OF THE JURY IS GOING TO MAKE SOMEONE HAPPY AND IT'S GOING TO MAKE SOMEONE UNHAPPY. BUT REGARDLESS OF WHAT THE JURY'S VERDICT IS, I WANT TO EXPLAIN TO YOU THAT WE WILL RECEIVE THEIR VERDICT AND WE'LL BE COURTEOUS TO THEM.

THERE WILL NOT BE ANY PUBLIC DISPLAY ONE WAY OR THE OTHER. YOU'RE TO KEEP YOUR EMOTIONS IN CHECK, AND THAT WAY I DON'T HAVE TO WORRY ABOUT DEALING WITH SOMETHING THAT WOULD BE CONSIDERED AS A CONTEMPT OF COURT CONDUCT. I KNOW THESE

ARE EMOTIONAL TIMES FOR EVERYONE WHO HAS BEEN INVOLVED IN THE CASE, BUT THE JURY IS GETTING READY TO SPEAK IN JUST A MOMENT. AND SO REGARDLESS OF WHAT THEIR VERDICT IS, WE'RE GOING TO RESPECT THEM AND YOU'LL NEED TO KEEP YOUR EMOTIONS IN CHECK. IF YOU'LL BRING ME THE VERDICT OR BRING ME THE JURY AND THE VERDICT.

BAILIFF: YES, SIR, YOUR HONOR.

(WHEREUPON, THE JURY RETURNED TO OPEN COURT WITH A VERDICT AT 4:43 P.M.)

THE CLERK: MR. FOREMAN, HAVE YOU REACHED A VERDICT?

FOREMAN: WE HAVE.

THE CLERK: WOULD YOU PLEASE PASS IT TO THE BAILIFF, PLEASE?

THE COURT: THANK YOU SO MUCH. IF YOU'LL PUBLISH THE VERDICT.

THE CLERK: YES, SIR. THE STATE OF SOUTH CAROLINA VERSUS JOHN FRANCIS DYKEMAN, JR. 2004-GS-7-834, 2004-GS-7-835, 2004-GS-7-836. WE, THE JURY, BY UNANIMOUS CONSENT FIND THE DEFENDANT, JOHN FRANCIS DYKEMAN, JR., AS TO INDICTMENT 2004-GS-7-834 CHARGING KIDNAPPING, GUILTY. AS TO INDICTMENT 2004-GS-7-835 CHARGING MURDER, GUILTY. AS TO INDICTMENT 2004-GS-7-836 CHARGING ARMED ROBBERY, GUILTY OF ARMED ROBBERY. THIS WAS SIGNED BY FOREMAN, WILLIAM M. SMOOT. MR. SMOOT, WAS THIS YOUR VERDICT?

FOREMAN: YES, IT WAS.

THE CLERK: IF ALL AGREE, PLEASE RAISE YOUR RIGHT HANDS. THANK YOU.

THE COURT: THANK YOU. LET THE RECORD REFLECT THAT ALL THE JURORS HAVE RAISED THEIR RIGHT HAND. WOULD THE DEFENDANT REQUEST INDIVIDUAL POLLING?

MR. HOOD: NO, YOUR HONOR.

THE COURT: VERY GOOD. MR. SMOOT AND MEMBERS OF THE JURY, I WANT TO THANK YOU FOR YOUR CONSIDERATION OF ALL OF US IN THIS MATTER. I WANT TO COMMEND YOU ON THE ATTENTION THAT YOU HAVE SHOWN AS YOU HAVE LISTENED TO THE EVIDENCE. I WANT TO THANK YOU FOR HAVING LISTENED CAREFULLY TO EVERY POSITION THAT WAS PRESENTED TO YOU AND TO HAVE REFLECTED UPON THE SAME IN REACHING YOUR VERDICT.

I WILL NOW DISCHARGE YOU AND TELL YOU THAT WHEN YOU ARE DISCHARGED YOU'RE NOT REQUIRED AT ALL TO DISCUSS YOUR REASONING OR ANYTHING WITH ANYONE. IF YOU'D LIKE TO TALK WITH SOMEONE, YOU CAN, BUT WHAT YOU DO AND HOW YOU DO IT IS PROTECTED UNDER OUR LAW. IF YOU WANT TO TALK WITH SOMEONE, GIVE THEM A LITTLE MORE INFORMATION, AS I SAID, YOU CAN. IF YOU DON'T WANT TO, YOU DON'T HAVE TO.

IF ANYBODY PRESSES YOU, THEN LET ME KNOW ABOUT IT OR LET THE CLERK'S OFFICE KNOW ABOUT IT AND THEY'LL LET ME KNOW ABOUT IT. IF YOU START TALKING WITH SOMEONE AND THEN WANT TO STOP AND THEY KEEP PRESSING YOU, THAT WOULD BE IMPROPER AS WELL. SO I WOULD NEED FOR YOU TO REPORT THAT. YOU'RE

CERTAINLY FREE TO REMAIN WHERE YOU ARE WHILE SENTENCE WOULD BE IMPOSED OR IF YOU WOULD LIKE TO EXCUSE YOURSELF AT THIS TIME, I WILL GIVE YOU A FEW MOMENTS TO DO THAT. SO THANK YOU AGAIN FOR YOUR SERVICE, AND I WILL ALLOW YOU EITHER TO REMAIN WHERE YOU ARE OR TO HAVE YOURSELF SEATED BACK OUT IN THE AUDIENCE. YOU WANT TO STAY? IS THAT A CONSENSUS?

FOREMAN: I THINK WE WANT TO GO.

THE COURT: OKAY.

FOREMAN: CAN SOME STAY AND SOME GO?

THE COURT: ALL RIGHT. SOME STAY AND SOME GO. IT IS YOUR PREFERENCE. THOSE WHO WOULD LIKE TO LEAVE, I WILL ALLOW YOU TO LEAVE AT THIS TIME. THOSE OF YOU WHO WOULD LIKE TO STAY, JUST GO AHEAD AND HAVE A SEAT OVER HERE ON THE SIDE OUT IN THE GENERAL JURY PANEL OR OUT IN THE GENERAL AUDIENCE. SOLICITOR, ARE YOU WORKING ON A SENTENCING SHEET?

MR. STONE: I AM, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. STONE: DO YOU HAVE -- I THINK THE INDICTMENTS ARE UP HERE?

THE CLERK: YEAH.

MR. STONE: COULD I BORROW THOSE, YOUR HONOR, TO FILL OUT?

THE COURT: YES, YOU MAY.

(PAUSE IN PROCEEDINGS.)

THE COURT: STATE READY?

MR. STONE: YES, SIR.

THE COURT: DEFENSE, BRING MR. DYKEMAN FORWARD.

MR. STONE: THERE ARE THREE MEMBERS OF THE FAMILY THAT WISH TO ADDRESS -- I'M ASKING THEM TO GO AHEAD AND BE BROUGHT AROUND---

THE COURT: THANK YOU.

MR. STONE: ---IF THAT'S ACCEPTABLE, YOUR HONOR.

THE COURT: THAT IS FINE. SOLICITOR, IF I REMEMBER CORRECTLY, THE MORE UP-TO-DATE -- WELL, IS THERE A FORM THAT SPECIFICALLY PROVIDES FOR A CHECK MARK IF SOMEBODY WHO'S FOUND GUILTY OF KIDNAPPING DOES NOT GO ON THE SEX REGISTRY? THIS ONE DOES NOT---

MR. STONE: I DON'T KNOW THAT THERE'S A SPECIFIC FORM, BUT I THINK THAT'S -- THAT'S CORRECT.

THE COURT: THIS ONE DOES NOT SEEM TO HAVE ANY ELEMENTS OF---

MR. STONE: IT DOES NOT.

THE COURT: ---ANY SEXUAL CONDUCT---

MR. STONE: NO, SIR.

THE COURT: ---THAT WOULD RESULT IN A SEX OFFENSE REGISTRY.

MR. STONE: NO, SIR, IT DOES NOT.

THE COURT: I WILL MAKE THAT NOTATION. MR. HOOD, I'LL BE GLAD TO HEAR FROM YOU. I'M SORRY. MR. HOOD.

MR. HOOD: YOUR HONOR, YOU'VE HEARD ALL THE FACTS OF THE

CASE. YOU DON'T KNOW MUCH ABOUT JOHN DYKEMAN. I CAN TELL YOU THAT HE'S 44 YEARS OLD. THIS HAS BEEN AN EXTREMELY LONG DELAY GETTING THIS PARTICULAR CASE TO TRIAL. THE CASE IS ALMOST THREE YEARS OLD. IT'S JUST SHY OF A MONTH I THINK OF BEING THREE YEARS OLD.

JOHN'S LIVED IN BEAUFORT COUNTY ALL OF HIS LIFE IN BEAUFORT. HE WORKS AS A MECHANIC ABOUT 99 PERCENT OF HIS LIFE. HIS FAMILY MOST -- A LOT OF HIS FAMILY LIVES RIGHT HERE IN BEAUFORT STILL. PART OF HIS FAMILY HAS MOVED TO -- DUE TO THE SEPARATION OF FAMILY MEMBERS, BUT HE HAS THREE CHILDREN, TWO BOYS AND ONE GIRL. THEIR AGES ARE 20 -- I GUESS THEY'RE OLDER THAN THAT NOW THOUGH CONSIDERING THAT I FILLED THIS OUT BACK IN '04. SO I'D SAY THEY'RE PROBABLY 23 AND -- AND ONE NEWBORN THAT YOU'VE ALREADY HEARD ABOUT FROM BRANDY ROSS THAT -- WHO TESTIFIED DURING THE COURSE OF THE TRIAL.

IN MY OPENING STATEMENT I INDICATED THAT I DON'T THINK THERE WAS ANYBODY ANY MORE SORRY FOR WHAT HAD HAPPENED TO BRETT KINNEY THAN JOHN DYKEMAN. AS YOU PROBABLY KNOW BASED UPON EVERYTHING THAT WE HAVE HERE, THERE APPEARED TO BE NO PLAN OR DESIGN OR ANYTHING OF THAT NATURE ON THE PART OF JOHN DYKEMAN TO EVER GET INVOLVED IN THESE PARTICULAR EVENTS. HE DIDN'T MAKE THAT DECISION -- HE -- TO STRIKE THE INITIAL BLOW THAT SET THIS PARTICULAR THING IN MOTION, ALTHOUGH I THINK BASED ON EVERYTHING THAT WE HAVE, WE RECOGNIZE THAT HE WAS

INTOXICATED QUITE A BIT DURING THE COURSE OF THIS, PARTICULARLY WITH DRUGS, NARCOTICS, AND THAT WAS SOMETHING HE ADMITTED ON THE -- IN HIS -- IN HIS STATEMENT THAT HE BASICALLY HAS AN ADDICTION OF DRUGS.

WE WOULD SIMPLY ASK FOR AS LENIENT A SENTENCE AS YOU CAN RENDER UNDER THE CIRCUMSTANCES, BEARING IN MIND THAT, AGAIN, JOHN DYKEMAN WAS NOT THE MAIN INSTIGATOR OR THE MAIN ACTOR IN THIS PARTICULAR CASE. DO YOU HAVE ANYTHING YOU WANT TO SAY?

MR. DYKEMAN: I'D LIKE TO EXPRESS MY DEEPEST SORROWS FOR THE FAMILY. I WANT THEM TO KNOW THAT IT WAS NEVER MY INTENT TO BE INVOLVED IN ANYTHING LIKE THIS AND THAT I AM TRULY SORRY FOR WHAT HAPPENED.

THE COURT: MR. DYKEMAN, IF YOU WOULD LIKE TO ADDRESS THE COURT OR THE FAMILY, I'LL ALLOW YOU TO DO SO.

MR. DYKEMAN: THANK YOU, SIR. MEMBERS OF HIS FAMILY AND MEMBERS OF THIS COURT, I WOULD LIKE EVERYONE TO KNOW THAT I'M DEEPLY SORRY FOR WHAT HAPPENED TO THAT FAMILY'S SON. IT WAS -- IT WAS NEVER MY INTENT TO CAUSE ANYBODY ANY HARM. I HAVE OPENLY ADMITTED TIME AND AGAIN THAT I HAVE DRUG PROBLEMS. I HAVE BEEN IN TROUBLE MOST OF MY LIFE FOR THE SAME PROBLEM. I HAVE ASKED FOR HELP AND HAVE NEVER REALLY GOT IT. BRETT DIDN'T ASK FOR WHAT HE GOT, AND I THOUGHT AT THE TIME THAT MAYBE SHE WOULD TURN HIM LOOSE AND SHE NEVER DID.

I CAN'T EXPRESS THEIR LOSS. I'VE HAD A LOSS MYSELF AND NEVER GOT A CHANCE TO SAY GOOD-BYE, NEVER GOT TO RIGHT THE

WRONGS, WOULD DO WHAT WAS NECESSARY TO BE A GOOD PERSON, AND I AM TRULY SORRY FOR THEIR LOSS. I CAN'T TURN BACK THE HANDS OF TIME, BUT I WOULD LIKE FOR THEM TO UNDERSTAND THAT I NEVER HURT THEIR SON. I NEVER PUT MY HAND ON HIM, AND ALL THE EVIDENCE IN THIS COURT HAS SHOWN THAT I DID NOT HURT THAT MAN.

I DIDN'T HELP THAT MAN, AND I AM GUILTY AS HELL OF THAT. AND PARDON MY LANGUAGE, BUT I AM GUILTY OF THAT AND I AM DEEPLY SORRY FOR NOT HELPING HIM. AND I DON'T KNOW OF ANYTHING ELSE ON THIS EARTH I CAN DO TO EASE YOUR PAIN, BUT UNDERSTAND THAT I HURT JUST AS BAD AS YOU DO FOR BEING IN THE POSITION THAT I WAS IN.

Y'ALL HAVE TO UNDERSTAND THAT I AM A CONVICTED FELON. I WAS A CONVICTED FELON BEFORE THAT DAY EVER STARTED, AND NOBODY - OFFICER-WISE, COURT-WISE, ATTORNEY-WISE - OTHER THAN GOD CAN CHANGE ANY OF THAT. ANYTHING I SAY, ANYTHING I DONE, WHO WOULD BELIEVE? JUST AS MY STATEMENT THAT EVERYBODY READ. ANY HOW YOU TURN THIS CASE, I WAS A DONE MAN, NO MATTER WHAT I HAD DONE.

I DID NOT DESTROY EVIDENCE. AS THE COURT AND TESTIMONY WAS STATED, I HAD AMPLE TIME TO DO AWAY WITH EVERYTHING PERTAINING TO ME. I MADE A DECISION NOT TO DO THAT. I MADE A DECISION TO TELL THE TRUTH, AND THE TRUTH IS I NEVER HURT YOUR SON. I NEVER KNEW YOUR SON, BUT I NEVER HURT HIM AND I NEVER HELPED HIM AND I AM TRULY SORRY FOR THAT. IF YOU CAN

FORGIVE ME FOR THAT, THAT IS ALL I CAN ASK FOR. AND THAT IS ALL I CAN SAY TO THIS COURT, YOUR HONOR.

THE COURT: THANK YOU, SIR. SOLICITOR, BE GLAD TO HEAR FROM ANYONE.

MR. STONE: YOUR HONOR, THIS IS---

THE COURT: IF YOU WOULD GIVE US YOUR NAME SO THE COURT REPORTER CAN TAKE IT DOWN BEFORE YOU SPEAK.

MS. DOMERACKI: MY NAME IS SHARON KINNEY DOMERACKI. BRETT WAS MY YOUNGER BROTHER. HE WAS -- HE CHANGED OUR LIVES THREE MAJOR TIMES. HE WAS BORN WHEN I WAS IN EIGHTH GRADE AND CONNIE WAS IN TENTH GRADE, MARLENE IN FOURTH. HE WAS OUR -- FRANKIE, OF COURSE, WAS IN SECOND. HE CHANGED OUR LIVES SO MUCH. WE WERE HIS MOTHER, HIS SISTER. WE WERE EVERYTHING TO HIM AS HE WAS TO US.

THERE'S NOTHING IN THIS WORLD HE WOULDN'T DO FOR US NOR US FOR HIM. AND THEN ON -- WHEN HE WAS SIX YEARS OLD, FEBRUARY 25, 1976, HE FELL OUT OF A TREE THAT MAJORLY CHANGED OUR LIVES 1,000 PERCENT. HE BECAME HANDICAPPED.

WHAT WE WANT YOU TO KNOW IS THE KIND OF PERSON BRETT WAS. HE FELL OUT OF THAT TREE WHEN HE WAS SIX YEARS OLD. NEVER ONE TIME IN HIS LIFE DID HE EVER SAY "WHY ME?" OR COMPLAIN. HE GREW UP TO BE A FINE YOUNG MAN. HE WAS A GIFTED WRITER, A GIFTED PHOTOGRAPHER. HE WROTE POETRY LIKE YOU COULD NOT BELIEVE. HE LOVED HIS FAMILY. HE LOVED HIS DOG. HE LOVED LIFE. HE HAD MORE FAITH THAN ANYBODY I'VE

EVER KNOWN, AND I THINK HIS FAITH IS WHAT SUSTAINED HIM.

AND THEN ON MAY 2ND FOR NO GOOD REASON OTHER THAN $259, HIS LIFE WAS TAKEN FROM HIM, AND NOW OUR LIVES WILL NEVER BE THE SAME. WE DIDN'T LOSE JUST OUR BROTHER THAT DAY. ALL OF US LOST A PART OF OUR LIVES. MY MOTHER WILL NEVER, EVER BE THE SAME. NO ONE IN OUR FAMILY WILL EVER BE THE SAME.

I HAVE A SISTER WHO LAYS AWAKE AT NIGHT WONDERING: DOES BRETT KNOW WE WERE LOOKING FOR HIM? WHAT WAS HIS LAST THOUGHTS? WE DON'T CARE WHO DID THE FINAL BLOW; THAT DOESN'T MATTER TO US. WHAT MATTERS TO US IS THEY TOOK HIS LIFE FROM US, AND WE HOPE THAT JOHN DYKEMAN GETS THE WORST PUNISHMENT THAT HE CAN BECAUSE HE SHOULD NEVER BE FREE AND HE SHOULD NEVER BE ABLE TO WALK FREE AGAIN.

I FEEL SORRY FOR HIS FAMILY. HIS MOTHER IS A LOVELY PERSON AND I'M SURE HIS -- ARE HIS CHILDREN, BUT HE MADE THAT CHOICE. WE MAKE CHOICES. SOME OF US CHOOSE GOOD CHOICES. SOME OF US MAKE VERY BAD CHOICES, BUT THE CHOICES WERE HIS NONETHELESS AND WE DON'T FORGIVE HIM. YOU KNOW, THERE MIGHT BE A TIME WHEN WE CAN, BUT IT'S GOING TO BE A LONG TIME COMING AND WE JUST HOPE THAT HE GETS THE ULTIMATE PUNISHMENT.

MR. STONE: YOUR HONOR, CAN YOU SEE MS. KINNEY? I THINK SHE'S BEHIND...

THE COURT: I CAN. THAT WILL BE FINE FOR HER TO REMAIN SEATED.

MS. JUNE KINNEY: MY NAME IS JUNE KINNEY. I WAS BRETT'S

MOTHER, AND WHEN I LOST HIM, I LOST -- I'LL NEVER BE THE SAME. I LOST PART OF MY HEART, AND I'LL NEVER GET IT BACK. HE MEANT EVERYTHING TO ME. I RAISED HIM MOSTLY BY MYSELF WITH MY OTHER CHILDREN, BUT MOSTLY IT WAS JUST ME AND HIM AND HE WAS MY BEST FRIEND. WE DID EVERYTHING TOGETHER. AND I KNOW I WILL NEVER GET OVER THE LOSS OF HIM. I'M JUST GLAD THIS IS ALL OVER AND THAT WE DON'T HAVE TO GO THROUGH THIS ANYMORE. THAT'S ALL.

MR. STONE: MARLENE?

MS. MARLENE KINNEY: MY NAME IS MARLENE KINNEY. BRETT WAS MY BIRTHDAY PRESENT WHEN I WAS 11 YEARS OLD. I LOVED HIM SO MUCH. HE LOVED ALL OF US SO MUCH. WHEN I GOT THAT PHONE CALL AT FOUR SOMETHING IN THE MORNING, MY MAMA SAYS, "MARLENE, THEY FOUND BRETT ON JIM FRASIER BOULEVARD." I DIDN'T KNOW -- ALL I COULD THINK ABOUT WAS GETTING TO MY MOM, AND I DIDN'T WANT MY DAUGHTER TO SEE ME LIKE THAT. SHE WAS ONLY 10. I FINALLY GOT MY NEIGHBORS TO COME OVER. THEY WOULDN'T LET ME DRIVE. THEY DROVE ME OVER TO MOM'S, AND THEN I HAD TO GO BACK AND GET MY DAUGHTER FROM SCHOOL AND EXPLAIN TO HER THAT THESE TWO EVIL MONSTERS HAD BEAT HER FAVORITE UNCLE TO DEATH FOR NO REASON.

MY BROTHER BRETT WAS THE CLOSEST THING SHE HAD TO A FATHER. MY BROTHER BRETT IS THE ONE THAT TOOK HER TO FATHER-DAUGHTER DANCES, AND THE FOUR OF US - ME AND MY DAUGHTER AND MY MOM AND BRETT - USED TO DO THINGS TOGETHER ALL THE TIME.

WE WOULD GO TO CONCERTS AND WE WOULD JUST GET IN THE CAR AND GO SOMEWHERE FOR THE WEEKEND. AND BRETT WAS SO GOOD WITH HER. ALL HE HAD EVER WANTED WAS TO GET MARRIED AND HAVE CHILDREN, AND NOBODY WOULD REALLY GIVE HIM A CHANCE BECAUSE HE WAS SO HANDICAPPED.

I KNOW I'LL NEVER BE THE SAME, MY DAUGHTER WILL NEVER BE THE SAME, MY MOM. NONE OF US WILL EVER, EVER BE THE SAME. WE'VE LOST OUR ABILITY TO TRUST IN A LOT OF WAYS. AND I'M SORRY BUT I DO NOT FOR ONE SECOND BELIEVE THAT JOHN DYKEMAN DID NOT BEAT MY BROTHER JUST AS UNMERCIFULLY AS SHE DID. FOR NOW I JUST WOULD REALLY WANT THE COURT TO MAKE SURE THAT HE'S NEVER IN A POSITION TO DESTROY ANOTHER FAMILY LIKE HE HAS MINE.

THE COURT: THANK YOU, MA'AM.

MR. STONE: MAY IT PLEASE THE COURT, YOUR HONOR?

THE COURT: YES, SIR.

MR. STONE: MR. DYKEMAN'S PRIOR RECORD STARTS IN 1982. HE HAS TWO COUNTS OR TWO CONVICTIONS OF BURGLARY OF A RESIDENCE FROM TAMPA, FLORIDA. IN SOUTH CAROLINA HE HAS RECEIVING STOLEN GOODS, POSSESSION OF MARIJUANA, FAILURE TO STOP ON POLICE COMMAND, MANUFACTURING OF DRUGS, NUMEROUS TRAFFIC OFFENSES INCLUDING HABITUAL OFFENDER VIOLATIONS, AND MOST OF THIS RUNNING CONTINUOUSLY UP UNTIL 1976. IN FACT, ANOTHER RECEIVING STOLEN GOODS AND THEN IN 1997 HE WENT TO PRISON FOR TEN YEARS FOR RECEIVING STOLEN GOODS, AND THIS WAS

THE -- THIS WAS THE -- THE DATE ON THIS, YOUR HONOR, WOULD HAVE BEEN 1997. SO HE WOULD NOT HAVE BEEN OUT OF JAIL LONG BEFORE HE COMMITTED THIS OFFENSE.

YOUR HONOR HAS HEARD OBVIOUSLY ALL THE EVIDENCE THAT WE HAD IN THIS CASE. IT IS HARD FOR ME TO UNDERSTAND HOW WE CAN SIT HERE AND -- AND MR. DYKEMAN STILL TAKE THE POSITION HE HAD NOTHING TO DO WITH THIS. THE FOURTH STATEMENT THAT THE JURY DID NOT HEAR INDICATED THAT HE, IN FACT -- FOR WHAT HE COULD REMEMBER, HE ALSO STRUCK BRETT KINNEY.

IN MY TIME AS A LAWYER, I HAVE NEVER SEEN A MORE HEINOUS MURDER CASE EVER. WERE THIS A SHOOTING CASE, HAD BRETT KINNEY DIED WHEN HE WAS STABBED INITIALLY, WE MAY BE IN A DIFFERENT SITUATION, BUT THE TORTURE THAT THAT BOY ENDURED WAS SOMETHING THAT NOBODY SHOULD ENDURE AND FOR THE AMOUNT OF TIME IT TOOK HIM TO ENDURE IT IS UNSPEAKABLE.

I HAD A VERY TOUGH DECISION IN THIS CASE: WHETHER OR NOT TO SEEK THE DEATH PENALTY AGAINST MR. DYKEMAN AS I DID AGAINST SAMANTHA MORGAN-MAJOR. BECAUSE SAMANTHA MORGAN-MAJOR DIDN'T GET THE DEATH PENALTY, I FELT THAT THEY SHOULD BE TREATED THE SAME, AND I AM NOT SEEKING THE DEATH PENALTY IN THIS MATTER. I DO, HOWEVER, HAVE NO RESERVATIONS WHATSOEVER IN ASKING YOUR HONOR TO SENTENCE MR. DYKEMAN TO LIFE IN PRISON.

THE COURT: ALL RIGHT. ANYTHING ELSE, MR. HOOD?

MR. HOOD: NOTHING AT THIS TIME, YOUR HONOR.

THE COURT: MR. DYKEMAN, I DON'T KNOW HOW MUCH MEMORY YOU HAVE OR DON'T HAVE OF THE EVENTS THAT TOOK PLACE AND HOW MUCH YOU MAY HAVE CHOSEN TO REMOVE FROM YOUR MIND BECAUSE OF THE HEINOUSNESS OF THE CRIME. YOU INDICATED THAT YOU KNEW YOU WERE THERE IN YOUR STATEMENT, AND YOU TOOK THE POSITION THAT YOU WERE SOMEHOW COERCED OR UNDER DURESS AS IT RELATED TO THE CHARGES, PARTICULARLY OF ARMED ROBBERY AND KIDNAPPING, BUT YET THERE WERE SOME PICTURES OF YOU AT THE COUNTER IN THE LI'L CRICKET STORE WHERE YOU WERE CLEARLY OUT OF ANY HARM'S WAY WHEN MR. KINNEY WOULD HAVE BEEN IN THE AUTOMOBILE THAT YOU'D BEEN DRIVING AROUND.

THERE WOULD HAVE BEEN NO PROBLEMS, NO DANGER TO YOU OR ANYONE, TO HAVE SIMPLY SAID, "CALL THE POLICE. YOU WOULDN'T BELIEVE WHAT SOMEBODY HAS GOTTEN ME INVOLVED IN." THAT YOU WERE MORE INTERESTED IN, AS YOU SAID, SEEKING THE DRUGS THAN YOU WERE ANYTHING ELSE. CLEARLY IT APPEARS THAT YOU MAY HAVE BEEN UNDER THE INFLUENCE, BUT YOU WERE CERTAINLY A WILLING PARTICIPANT IN WHAT WAS TAKING PLACE IN THESE MATTERS, AND YOU CERTAINLY HAD NO PROBLEMS IN BEING THE BENEFICIARY OF THE ROBBERY AND OF THE KIDNAPPING THAT OCCURRED.

THE IDEA THAT YOU WERE IN THAT KIND OF DURESS IS JUST NOT REALLY CONCEIVABLE. YOU INDICATE THAT, YOU KNOW, MAYBE YOU DIDN'T WANT THE MURDER THAT TOOK PLACE. YOU SAW THINGS HAPPENING; YOU DIDN'T KNOW WHAT TO DO. BUT ONE OF THE PROBLEMS WITH GETTING INVOLVED IN KIDNAPPINGS AND ROBBERIES,

ARMED ROBBERIES, THESE FELONIES, IS THAT QUITE OFTEN DEATH IS A NATURAL AND PROBABLE CONSEQUENCE OF WHAT TAKES PLACE. SO EVEN THOUGH A SHOVEL WAS FOUND THAT HAD BEEN USED IN THIS CRIME, IN YOUR YARD, IF THAT WERE NOT EVIDENCE THAT YOU HAD PARTICIPATED, CERTAINLY THE TRAGIC MURDER WAS A PROBABLE AND NATURAL CONSEQUENCE OF THE ARMED ROBBERY AND THE KIDNAPPING.

THESE ARE UNFORTUNATE EVENTS. INDIVIDUALS WHO CHOOSE TO BEGIN THEIR LIVES IN THIS DOWNWARD SPIRAL BY BECOMING INVOLVED IN DRUGS ARE INDIVIDUALS WHO MAKE THAT CHOICE, AND THAT'S ONE OF THE MOST DANGEROUS PARTS OF MAKING SUCH CHOICES OR CONSEQUENCES OF MAKING SUCH CHOICES IS TOO MANY TIMES THESE ARE THE RESULTS. I DO NOT FIND THAT YOUR CULPABILITY IN THIS MATTER IS ANY LESS THAN YOUR CO-DEFENDANT'S.

AND AS TO THE INDICTMENT 2004-GS-7-835, THE SENTENCE OF THE COURT IS YOU BE COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR LIFE. AS TO THE KIDNAPPING, IT WILL BE 30 YEARS. AS TO THE ARMED ROBBERY, IT WILL BE 30 YEARS. ALL OF THESE MATTERS WILL, OF COURSE, RUN CONCURRENT, AND YOU'LL RECEIVE CREDIT AS PROVIDED FOR UNDER THE STATUTE. I'M SORRY YOU FIND YOURSELF IN THIS SITUATION, BUT I FEEL THAT UNDER THE CIRCUMSTANCES THIS IS AN APPROPRIATE DISPOSITION. THANK YOU.

MR. HOOD: YOUR HONOR, THERE'S ONE OTHER MATTER THAT I'D LIKE TO TAKE UP AT THIS TIME AND THAT I'D LIKE TO MAKE A MOTION FOR A NEW TRIAL AT THIS POINT IN TIME.

THE COURT: ALL RIGHT.

MR. HOOD: AND BASE IT ON THE PREVIOUSLY-DENIED MOTIONS AND OBJECTIONS THAT I MADE DURING THE COURSE OF THE TRIAL.

THE COURT: THANK YOU VERY MUCH. I CONSIDER THESE MATTERS, AS I HAVE PREVIOUSLY, AND FIND THAT YOU HAVE ABLY REPRESENTED MR. DYKEMAN IN THIS MATTER, BUT THE CIRCUMSTANCES WERE CLEARLY FOR A DETERMINATION BY THE JURY AND THEY HAVE SPOKEN, AND I FEEL THIS SENTENCE IS APPROPRIATE. AND SO I'M RESPECTFULLY DENYING YOUR MOTIONS FOR A NEW TRIAL.

MR. HOOD: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, SIR.

(WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR BEAUFORT COUNTY, SOUTH CAROLINA, ON THE 16TH THROUGH 18TH DAYS OF APRIL, 2007.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

DECEMBER 7, 2007

Daphne D Helms

DAPHNE D. HELMS, COURT REPORTER

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

John M. Milling, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN DYKEMAN,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Senior Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

The trial judge committed reversible error by instructing the jury that Dykeman would obtain a procedural advantage— "the final argument"— if he "offers no testimony whatsoever and does not appear and take the stand," as this procedural matter is irrelevant to the jury's determination of guilt or innocence and this instruction undermines the utility of having the final argument.

STATEMENT OF THE CASE

On April 16 through 18, 2007, John F. Dykeman, Jr., stood trial in Beaufort County, before Judge John M. Milling and a jury, on indictments charging him with murder, kidnapping and armed robbery. Dykeman and Samantha Morgan-Major, who withstood trial separately, were charged with stabbing and bludgeoning to death Brett Kinney, who was left paralyzed and with only half a brain when he fell out of a tree at age six, in order to get money to buy crack cocaine.

Although he did not testify or present any evidence, Dykeman's defense was that Morgan- Major had coerced him into accompanying her while she committed the crimes. The jury nevertheless found Dykeman guilty as charged, and the judge sentenced him to concurrent terms of life imprisonment for murder and thirty years each for kidnapping and armed robbery.

ARGUMENT

The trial judge committed reversible error by instructing the jury that Dykeman would obtain a procedural advantage— "the final argument"— if he "offers no testimony whatsoever and does not appear and take the stand," as this procedural matter is irrelevant to the jury's determination of guilt or innocence and this instruction undermines the utility of having the final argument.

During his preliminary remarks, the judge informed the jury that the State had to prove Dykeman guilty beyond a reasonable doubt and, "as a practical matter, if [the defense] choose to put up no witnesses, then they end up having the final argument." ROA p. 9 lines 14-17. He continued:

> A normal procedure is, the defense would argue first and the State would argue last, but if a defendant chooses not to put up any evidence, if they feel the State has not presented a sufficient case, they can put up no evidence, since they have no burden of proof and they get the last argument.

ROA p. 9 lines 18-23. The judge returned to this theme in his final charge on the law, reminding the jury, "I discussed with you when this case first began that sometimes a defendant offers no testimony whatsoever and does not appear and take the stand, and I told you that... when that happens the defendant is entitled to the final argument." ROA p. 123 lines 5-9. Defense counsel did not object in either instance.

When a defendant in a criminal case offers no evidence, he is entitled to the final closing argument to the jury. *State v. Gellis*, 158 S.C. 471, 155 S.E. 849 (1930). "The right to open and close the argument to the jury is a substantial right, the denial of which is reversible error." *State v. Rodgers*, 269 S.C. 22, 335 S.E.2d 808, 809 (1977).

> [The] denial to the defendant of the right to argue last falls in the trial error, rather than the structural defect, category. It is not the kind of error affect the entire conduct of the trial from beginning to end. [Citation omitted.] Therefore we may apply harmless error analysis to the ... error.

State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918, 921 (1997).

The judge's comments to the jury about the procedural advantage Dykeman gained by presenting no evidence was a structural error. Matters of procedure such as this have no place in the determination of the guilt or innocence. See, for example, *State v. Burkhart*, 371 S.C. 482, 640 S.E. 2d 450 (2007).

In prior cases involving structural errors of this type, the Supreme Court has not required a contemporaneous objection. See, for example, *State v. Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004). For this reason the Court should reverse Dykeman's convictions and remand for a new trial.

Respectfully submitted,

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of December, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 14, 2009

Joseph L. Savitz, III
Senior Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

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FORM 5

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
County of Beaufort)

2010-CP-07-5697

2010 NOV 18 PM 3:48

JEAN M. ROSEBEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

John Dykeman #245443
Full name and prison number (if any) of Applicant

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 Lieber Corr. Institution P.O. Box 205 Ridgeville, SC 29472

2. Name and location of Court which imposed sentence Beaufort County General Sessions P.O. Drawer 1128 Beaufort, SC 29901

3. Name(s) of co-defendant(s) (if any) Samantha Morgan-Major

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2004-GS-7-834 KIDNAPPING

(b) 2004-GS-7-835 MURDER

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(c) 2004-GS-7-836 ARMED ROBBERY

5. The date upon which sentence was imposed and the terms of the sentence:

(a) APRIL 18, 2007 30 YEARS CONCURRENT

(b) APRIL 18, 2007 LIFE

(c) APRIL 18, 2007 30 YEARS CONCURRENT

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty X

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. SOUTH CAROLINA COURT OF APPEALS

ii.

iii.

(b) the result in each such Court to which you appealed:

i. AFIRMED

ii.

iii.

(c) the date of each such result:

i. OCTOBER 12, 2010

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. RULE 220(b)(1), SCACR, RULE 215, SCACR.

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) N/A

(c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

(b) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

(c) JUDGE TRIAL COMMITTED REVERSIBLE ERROR

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) SEE ATTACHED

(b) SEE ATTACHED

(c) SEE ATTACHED

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(b) the name and location of the Court in which each was filed:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

(b) the proceedings in which each ground was raised:

i. N/A

ii. N/A

iii. N/A

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) N/A

(b) N/A

(c) N/A

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

YES

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

(a) the name and address of each attorney who represented you:

i. JOSEPH L. SAVTIZ,III P.O. BOX 11589 COLUMBIA, SC 29211

APPELLATE DEFENSE

ii. GENE G. HOOD P.O. BOX 525 BEAUFORT, SC 29901

TRIAL COUNSEL

iii.

(b) the proceedings at which each such attorney represented you:

i. DIRECT APPEAL, JOSEPH L. SAVTIZ,III

ii. ARRAIGNMENT, TRIAL, SENTENCING

GENE G. HOOD

iii.

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

I, John Dykeman #245443, 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.

John Dykeman
Applicant

SWORN or affirmed to and subscribed before me this 16th day of November, 2010.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2013

Revised 3/2003

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

* To have my convictions over turned and receive a new trial.

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

No

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Beaufort)

I, John Dykeman #245443, 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.

John Dykeman

SWORN to and subscribed before me this 16th day of November, 2010.

Sylvia Jones (L.S.)
Notary Public

My Commission Expires: 1/24/2018

Revised 3/2003

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STATE OF SOUTH CAROLINA	)
COUNTY OF BEAUFORT	)
	)
JOHN DYKEMAN #245443	)
APPELLANT	)
V.	)
STATE OF SOUTH CAROLINA	)
RESPONDENT	)
	)

2010 NOV 18 PM 3:48

MEMORANDUM OF LAW IN SUPPORT OF POST-CONVICTION RELIEF APPLICATION PURSUANT TO S.C. CODE Ann. §17-27-10,-160.

Now comes the appellant, John Dykeman #245443, who respectfully submits this Memorandum of Law in Support of his Post-Conviction Relief Application. Pursuant to S.C. Code of Laws §17-27-10,-160 as amended.

Respectfully submitted,

S/ John Dykeman

John Dykeman #245443
P.O. Box 205 L.C.I. CB-41
Ridgeville, SC 29472

ALLEGATION

1). Appellate counsel was ineffective by failing to brief defense motion For a Directed Verdict.

Appellant submits that trial counsel Motioned the Court for Directed Verdict See: Trial transcript p.436 lines 18 through p.442 lines 25; the Court denied the Directed Verdicts as to Armed Robbery; Kidnapping; Murder, which was an error of law which is reserved for Appellate review.

Appellant submits that the evidence that was presented during the course of the trial that there is no evidence to which could reasonably deduce that the appellant participated in an Armed Robbery; Kidnapping; or Murder, and therefore trial Court committed an error of law.

See: State v. McCombs, 368 S.C. 489, 629 S.E.2d 261(2006)

See: State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603(2009)

See: State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126(2000)

Wherefore, appellant respectfully asks for a Reversal of his convictions.

ALLEGATION

2). Appellant counsel was ineffective by failing to brief defense Motion as to the exclusion of Evidence in respect to videotape clip of Brett Kinney.

Appellant submits the trial Court erred by denying defense Motions as to the exclusion of the videotape clip of Brett Kinney.

See: SCRE Rule 403, pursuant to this rule the videotape clip of the deceased Brett Kinney should have been excluded, the probative value is substantially out weighed by the danger of unfair prejudice.

See: trial transcript p.194 lines 24 and 25

24 THE COURT: WELL, I UNDERSTAND THAT, OF COURSE IT HAS
25 SOME PREJUDICIAL EFFECT BECAUSE OF THE SETTING, BUT I THINK

But the Court denied the motion see: Trial transcript p.195 lines 8-9

8 WAS. AND SO I RECOGNIZE YOUR OBJECTION TO THE USE OF THAT
9 TAPE, BUT I'M GOING TO OVERRULE THE SAME.

See: State v. Alexander, 303 S.C. 377, 401 S.E.2d 146(1991)(relevant evidence may be excluded where its probative value is substantially out weighed by the danger of unfair prejudice).

ALLEGATION

3). Appellant counsel was ineffective by failing to brief defense Motion to strike specific portions of States witness Brandy Ross, and/or denying defense Motion For a Mistrial pertaining to this witnesses testimony.

See: Trial transcript p.374 lines 18 through p.382 lines 25

Appellant submits that the Court committed reversible errors by denying defense motion to strike specific portions of States witness Brandy Ross and/or denying motion for a mistrial pertaining to this witness.

Appellant submits that the testimony that Brandy Ross gave was different or, in addition, she added things that the appellant told her that was incriminating; and the State was aware of the fact she was going to make the incriminating statements and failed to give any notice of the statements to the defense, therefore in violation of the following Authorities of law.

See: Brady v. Maryland, 373 U.S. 83, S.Ct. 1194, 10 L.Ed2d 215(1963). See also: Rule 5(a);(1);(c) SCRCrimp and the decision in Brady requires the prosecution to disclose to the accused any and all evidence in its possession which is favorable to the

accused and material to guilt or punishment. The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. The Brady disclosure rule requires the prosecution to provide to the defense any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. See: Porter v. State, 368 S.C. 378, 629 S.E.2d 353, 356(2006); State v. Kennerly, 331 S.C. at 452, 503 S.E.2d at 220. Favorable evidence includes Both Exculpatory Evidence and evidence which may be used for Impeachment. See: United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed2d 481(1985).

The disclosure rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490(1995). likewise, the discovery rule requires the prosecution to disclose evidence material to preparation of the defense upon request of defendant applies to evidence within the actual possession of the prosecution and to evidence within the possession of other government agencies. Rule 5, SCRCrimp; State v. Kennerly, 331 S.C. 442, 503 S.E.2d (S.C. App.1998).

"[E]vidence is material only if there is a reasonable probability that, had evidence been disclosed to the defense, the result of the proceeding would have been different. 'Reasonable probability' is a probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 682, 105 S.Ct. 3375. However, once a Brady violation is established, reversal is required. See: Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70(2006); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220(Ct. APP.1998); Kyles, supra.

A Brady claim is complete if the accused can demonstrate:

(1) the evidence was favorable to the accused;

(2) it was in the possession of or known to the prosecution;

(3) it was suppressed by the prosecution, and

(4) it was material to guilt or punishment. Kyles, 514 U.S. at 432-42, 115 S.Ct. at 1565-69, 131 L.Ed.2d at 505-10(1995);Brady, 373 U.S at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218; State v. VonDohlen, 322 S.C. 234, 471 S.E.2d 689, 693(1996).

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WHEREFORE, appellant respectfully asks for a Reversal of his convictions.

John Dykeman #245443
P.O. Box 205 LCI CB-41
Ridgeville, SC 29472

ALLEGATION

Trial counsel was ineffective by failing to object to the Court charging the jury with Hands of One Hands of All where the defendant was indicted as a principle only and the charge of Hands of One Hands of All was insufficient, vague, misleading, confusing and along with principle charge deprived the defendant of a fair trial and Due Procee; counsel was also ineffective in failing to object to this charge and request a more specific charge.

Argument

Even if the charge could be said to be sufficient, it deprived the defendant of a fair trial and due process of law all the same. Trial counsel was ineffective for failing to object to this charge, and request a more specific charge. See: Coleman v. Lurey, 199 S.C. 442, 20 S.E.2d 887(1950); 6th and 14th Amendment of the U.S. Constitution.

Hand of One Hand of All charge is in effect similarly one of Conspiracy. And, the trial judge never told the jury that there had to be some meeting of the minds, some agreement of the minds to commit the alleged crime. This charge was especially prejudicial to the defendant due to fact the confusing manner in which the charge was made. Especially being that the record is void of any direct evidence that there was any agreement between the defendant and another to commit any crime, the crime of murder, the crime charged. And, any evidence that could not conclusively point to guilt of defendant of any agreement between him and another to commit the crime of murder, "to exclusion of every other reasonable hypothesis". State v. Edwards, 298 S.C. 272, 379 S.E.2d 88(1989). And, must so beyond a reasonable doubt. Inre Winship, 90 S.Ct. 1068, 1072(1970).

04

If Hands of One or accessory after the fact is not charged in an indictment, but is used as a jury instruction, such a finding is equivalent to a finding of not guilty to murder as a principle. Accordingly, counsel's omission in failing to argue such before the trial Court was a deficient performance as counsel and clearly prejudiced defendant because it permitted the jury to reach a compromised verdict of guilty on a non-charged offense. State v. Collins, 266 S.C. 566, 225 S.E.2d 189(1976), (Collins Id.).

Further, accessory of Hands of One Hands of All is not a lesser included offense of murder, noting that an indictment is sufficient only if it apprises the defendant of what he must prepare to meet. Thus, where the indictment failed to allege accessory or acting in concert with another, the Court lacked jurisdiction to convict and sentence under accessory or hands of one hands of all, finding that was not an element of the indicted offense deliberated upon by the Grand Jury. Lake v. Reader Const. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653(Ct. App.1998).

Moreover, to allow a hands of one jury instruction on the basis of language not contained in the body of an indictment opens the doors for the State to convict every criminal defendant for an offense that is not a lesser included offense of the offense True Billed by the Grand Jury.

Counsel was ineffective in failing to argue this very legal point. A new trial should be granted.

ALLEGATION

Trial counsel was ineffective in failing to object that a jury charge under theory of Hands of One, Hands of All, was error where the defendant had been indicted as a principle only.

Argument

If hands of one or accessory after the fact is not charged in an indictment, but is used as a jury instruction, such a

finding is the equivalent to a finding of not guilty to murder as a principle. Accordingly, counsel's omission in failing to argue such before the trial Court was a deficient performance and clearly prejudicial because it permitted the jury to reach a compromised verdict of guilty on a non-charged offense. State v. Collins, 266 S.C. 566, 225 S.E.2d 189(1976),(Collins Id).

Further, accessory or hands of one is the hands of all, is (not) a lesser included offense of murder, noting that an indictment is sufficient only if it apprises the defendant of what he must be prepared to meet. Thus, where the indictment failed to allege accessory or acting in concert with another, the Court lacked subject matter jurisdiction to convict and sentence under an accessory or hands of one finding that was not an element of the indicted offense deliberated on by the Grand Jury. Lake v. Reader Const. Co.,330 S.C. 242, 248, 298 S.E.2d 650, 653(Ct. App.1998).

Moreover, to allow a hands of one jury instruction on the basis of language not contained in the body of an indictment opens the doors for the State to convict every criminal defendant for an offense that is not a lesser included offense of the offense True Billed by the Grand Jury.

Counsel was ineffective in failing to argue this very legal point to the trial Court. Strickland v. Washington, 466 U.S. 668-669(1984). A new trial should be granted.

ALLEGATION

Trial counsel was Constitutionally ineffective by conceding Defendant's guilt during trial that impermissibly over-road Defendant's plea of not guilty that resulted in Structural Error and a Denial of Due Process.

See: Trial transcript p.210 lines 20 through lines 12 p.211
See: Trial transcript p.213 lines 4 through 7
See: Trial transcript p.213 lines 13 through 21
See: Trial transcript p.214 lines 5 through 11
See: Trial transcript p.475 lines 1 through 5

State v. Harbinson, 337 S.E.2d 504(N.C.1985) held that ineffective assistance of counsel, per se in violation of the Sixth Amendment was established when court appointed counsel admitted the defendant's guilt at jury during closing argument without defendant's consent.

ALLEGATION

The trial judge committed reversible error by instructing the jury that Dykeman would obtain a procedural advantage- "the final argument"- if he "offered no testimony whatsoever and does not appear and take the stand," as this procedural matter is irrelevant to the jury's determination of guilt or innocence and this instruction undermines the utility of having the final argument.

ARGUMENT

The trial judge committed reversible error by instructing the jury that Dykeman would obtain a procedural advantage- "the final argument"-if he "offers no testimony whatsoever and does not appear and take the stand," as this procedural matter is irrelevant to the jury's determination of guilt or innocence and this instruction undermines the utility of having the final argument.

During his preliminary remarks, the judge informed the jury that the State had to prove Dykeman guilty beyond a reasonable doubt and, "as a practical matter, if [the defense] choose to put up no witnesses, then they end up having the final argument." ROA p.9 lines 14-17. He continued:

> A normal procedure is, the defense would argue first and the State would argue last, but if a defendant chooses no to put up any evidence, if they feel the State has not presented a sufficient case, they can put up no evidence, since they have no burden of proof and they get the last argument.

ROA p.9 lines 18-23. The judge returned to this theme in his final charge on the law, reminding the jury, "I discussed with

you when this case first began that sometimes a defendant offers no testimony whatsoever and does not appear and take the stand, and I told you that... when that happens the defendant is entitled to the final argument," ROA p.123 lines 5-9. Defense counsel did not object in either instance.

When a defendant in a criminal case offers no evidence, he is entitled to the final closing argument to the jury. State v. Gellis, 158 S.C. 471, 155 S.E. 849(1930). "The right to open and close the argument to the jury is a substantial right, the denial of which is reversible error." State v. Rodgers, 269 S.C. 335 S.E.2d 808, 809(1977). State v. Mouzon, 326 S.C. 199, 485 S.E.2d 918, 921(1997).

The judge's comments to the jury about the procedural advantage Dykeman gained by presenting no evidence was a structural error. Matters of procedure such as this have no place in the determination of the guilt or innocence. See, for example, State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450(2007).

In prior cases involving structural error of this type, the Supreme Court has not required a contemporaneous objection. See, for example, State v. Owens, 362 S.C. 175, 607 S.E.2d 78(2004). For this reason the Court should reverse Dykeman's convictions and remand for a new trial.

Defendant submits that trial counsel committed Structural Error that is shocking to the universal sense of Justice in violation and deprivation of defendant's right to Due Process and effective Assistance of counsel that was prejudicial; and abandonment of defense was inherently prejudicial U.S.C.A. Const. Amend's. 5th, 6th. See: U.S. v. Swanson, cite as 943 F.2d 1070(9th Cir.1991).

Criminal Law Key 641.13(2) Abandonment of defense was inherently prejudicial, and thus no separate showing of prejudice was necessary U.S.C.A. Amend's 5,6. See also: Sherman v. Smith, cite as 89 F.3d 1134(4th Cir.1996).

Constitutional Law Key 266(7)

The Sixth Amendment to the United States Constitution Guarantees criminal defendant's the right to the assistance of counsel. See: Gideon v. Wainwright, 372 U.S. 335, 342(1963) the right to counsel is the right to effective assistance of counsel. See also: McMahan v. Richardson, 397 U.S 759, 771 n.14(1970) and also see: Strickland v. Washington, 466 U.S. at 687, the proper measure of attorney performance is reasonable under prevailing professional norms. These guarantees are also provided by the South Carolina Constitution, Article One and Fourteen, as South Carolina Code of Law §17-23-60.

Counsel's conduct so undermined the proper functioning of the adversial process that the trial cannot be relied on as having produced a just result. His representation fell below an objective standard of reasonableness and there's a reasonable probability that exists that the results of the proceeding would have been different had Attorney not conceded guilt in his opening and closing Arguments.

Applicant justly Demands a Reversal of his Convictions.

John Dykeman #245443
P.O.Box 205 LCI CB-41
Ridgeville, SC 29472

CLERK OF COURT
P.O. DRAWER 1128
BEAUFORT, SC 29901-1128

NOVEMBER 16, 2010

JOHN DYKEMAN #245443
P.O. BOX 205
RIDGEVILLE, SC 29472

Dear Clerk,

Please clock stamp and file this PCR application and return a copy to me.

Thank you in advance.

Respectfully submitted,

John Dykeman

John Dykeman, #245443
P.O. Box 205
Ridgeville, SC 29472

3-17-11

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
John Dykeman, #245443,	)	2010-CP-07-5697
	)	
Applicant,	)	**RETURN**
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

In response to the post-conviction relief application filed on November 13, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. The Applicant was indicted at the May 2004 term of the Beaufort County Grand Jury for kidnapping (2004-GS-07-834), murder (2004-GS-07-835), and armed robbery (2004-GS-07-836). Gene Hood, Esquire, represented the Applicant. On April 16-18, 2007, the Applicant proceeded to trial, after which a jury found him guilty as indicted. The Honorable John M. Milling sentenced the Applicant to confinement for life for murder, thirty (30) years for armed robbery, and thirty (30) years for kidnapping. The sentences were to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. Joseph L. Savitz, III of the South Carolina Commission on Indigent Defense represented the Applicant on appeal. Following full briefing by both sides, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Dykeman, Op. No. 2010-UP-436 (S.C.

Ct. App. filed October 12, 2010). The Remittitur was issued on October 28, 2010.

Attached and incorporated herein by reference are the records of the Beaufort County Clerk of Court, the records of the South Carolina Department of Corrections, the trial transcript, the Record on Appeal, the Final Brief of Appellant, Final Brief of Respondent, the Court of Appeals' opinion affirming the conviction and sentence, and the Remittitur dated October 28, 2010.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
   a. Failed to object to the court charging the jury with hand of on hand of all where defendant was indicted as a principal only and the charge of hand of one hand of all was insufficient, vague, misleading, and confusing.
   b. Conceded defendant's guilt during trial.
2. Ineffective assistance of appellate counsel in that counsel
   a. Failed to brief defense motion for a directed verdict.
   b. Failed to brief defense motion as to the exclusion of evidence in respect to videotape clip of Brett Kinney.
   c. Failed to brief defense motion to strike specific portions of State's witness Brandy Ross and/or denying defense motion for a mistrial pertaining to this witness testimony.
3. Trial judge committed reversible error by instructing the jury that Applicant would obtain a procedural advantage – "the final argument" – if he "offered no testimony whatsoever and does not appear and take the stand," as this procedural matter is irrelevant to the jury's determination of guilt or innocence and this instruction undermines the utility of having the final argument.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied upon as having produced a just result," Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper, 279 S.C. 264, 305 S.E.2d 247.

IV.

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).

The 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.

The Respondent contends that the 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. The Respondent requests an evidentiary hearing on this allegation.

V.

Applicant alleges that the trial court erred in instructing the jury that Applicant would obtain a procedural advantage – the final argument – if he did not offer any evidence or testimony. Respondent submits that this allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for 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). The Applicant could have

raised this issue at trial or on appeal. In fact, this issue was raised on appeal. Therefore, the Court should summarily dismiss this allegation.

VI.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

VII.

WHEREFORE, the Respondent requests an evidentiary hearing on the foregoing issues.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: _____
Attorneys for the Respondents

March 17, 2011.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2010-CP-07-05697

JOHN DYKEMAN,

APPLICANT,

v.

THE STATE OF SOUTH CAROLINA.

TRANSCRIPT OF RECORD

SEPTEMBER 4TH, 2012
BEAUFORT COUNTY COURTHOUSE
BEAUFORT, SOUTH CAROLINA
BEFORE THE HONORABLE PERRY M. BUCKNER, III, JUDGE.

APPEARANCES:

MR. SAMUEL KIRKLAND, ESQUIRE
LAW OFFICES OF JONES, SIMPSON & NEWTON, P.A.
POST OFFICE BOX 1938
BLUFFTON, SOUTH CAROLINA 29910
Attorney for the Applicant

ASST. ATTY. GEN. ASHLEY WILSON, ESQUIRE
SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE
POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211
Attorney for the State of South Carolina

Rebecca H. Hill
Official Court Reporter

INDEX

COURT EXHIBITS

THE COURT: Call your case, Ms. Wilson.

ASST. ATTY. GEN. WILSON: May it please the Court, Your Honor? Ashley Wilson for the State. The first case is John Dykeman v. The State of South Carolina, docket number 2010-CP-07-5697.

Mr. Dykeman proceeded to trial on April 16, 2007, before the Honorable John Milling. He was indicted for kidnapping, murder and armed robbery. He was found guilty by a jury and was sentenced to 30 years for kidnapping, a life sentence for murder, and 30 years for the armed robbery.

At trial, he was represented by Gene Hood, and today he is represented by Mr. Samuel Kirkland. It is my understanding that Mr. Kirkland is only going to proceed on some of the allegations put in the Applicant's Application, and I would like for him to put that on the record, and I will hand it over to Mr. Kirkland.

THE COURT: Very well. Identify yourself and who you represent, please, for the record.

MR. KIRKLAND: Good morning, Your Honor.

THE COURT: Good morning.

MR. KIRKLAND: My name is Samuel L. Kirkland. I represent John Dykeman in his Post-Conviction Relief. I have some preliminary matters that I would like to address to the Court. First of all, being that, Your Honor, I have

some exhibits that I would like to hand to the bailiff. I have provided a copy to the Attorney General's Office.

THE COURT: You would like to make it an exhibit as part of the record?

MR. KIRKLAND: I would, Your Honor.

THE COURT: In that case, always make sure you hand it to the Attorney General's Office, hand it to my law clerk, hand it to my court reporter and let her mark it, so I have a number to refer to.

MR. KIRKLAND: There are actually five exhibits there, Your Honor.

THE COURT: You want them separately marked, Mr. Kirkland, or marked as one?

MR. KIRKLAND: Marked separately, and they are numbered as I submitted them.

THE COURT: Have you pre-marked them, Becky?

COURT REPORTER: Yes, sir. I am right now.

(WHEREUPON, APPLICANT'S EXHIBIT NUMBER ONE, ARGUMENT MADE ON THE APPELLANT BRIEF, IS RECEIVED INTO EVIDENCE.)

(WHEREUPON, APPLICANT'S EXHIBIT NUMBER TWO, PORTION OF TRIAL TRANSCRIPT, IS RECEIVED INTO EVIDENCE.)

(WHEREUPON, APPLICANT'S EXHIBIT NUMBER THREE, PORTION OF TRIAL TRANSCRIPT, IS RECEIVED INTO EVIDENCE.)

(WHEREUPON, APPLICANT'S EXHIBIT NUMBER FOUR, PORTION OF TRIAL TRANSCRIPT, IS RECEIVED INTO EVIDENCE.)

(WHEREUPON, APPLICANT'S EXHIBIT NUMBER FIVE, STATEMENT OF BRANDY THOMPSON, IS RECEIVED INTO EVIDENCE.)

THE COURT: All right. I have now been handed Applicant's Exhibit One, Two, Three, Four and Five. Now, for the record, I will say, and I think it will probably be better that I did, that there is no objection from the State, that you identify for the record what each one is before I review them.

MR. KIRKLAND: Yes, sir. May I approach?

THE COURT: You certainly may.

MR. KIRKLAND: Your Honor, for the record, the first four exhibits are portions of the trial transcript solely for the purpose of the Court's quick reference.

THE COURT: And we always appreciate that, Mr. Kirkland.

MR. KIRKLAND: Thank you, Your Honor. Actually, the first exhibit is the copy of the argument made on the Appellate Brief, which consists of one and half pages of argument. Exhibits Two, Three and Four are portions of the trial transcript, and Exhibit Five, Your Honor, is a statement made by one, Brandy Thompson, for the authorities prior to the trial and submitted to the courts.

THE COURT: All right. Now, let me ask you this, because my office is in Walterboro, and we are here in Beaufort, and I realize this is a Beaufort case; although we

are doing some Jasper and Hampton and Allendale and Colleton cases this week. I always believe it's a good idea that I have with me whatever exhibits when I'm considering what I'm going to do in regards to a PCR Application.

And that means that this young gentleman who haven't met yet, but who's quiet and nice and seated right below me, and who is two weeks in to his brand new clerkship. His name is Camden Hodge, a graduate of the University of the South, Dudley. Very proud of him being a Suwanee graduate, and the University of South Carolina Law School, which will make Gene Hood happy. He's a Gamecock, Gene, working for a Clemson tiger right now, but doing a great job.

I'm going to need him to get copies, because I believe that my law clerk and I should have a working copy of any exhibit that Becky keeps in the record; do you understand, Mr. Kirkland?

MR. KIRKLAND: I do, Your Honor.

THE COURT: So I would appreciate it, if you have another copy, that you'd provide that now to my law clerk. If you do not, then we'll see that copies are made and I'll work off the ones you've admitted into the record, without objection by the State.

MR. KIRKLAND: If I could submit some copies later, Your Honor?

THE COURT: Absolutely. Are you ready to proceed? If

you'll hand up those; just make sure Camden Hodge gets that. All right.

Let's talk about the Application. You alleged ineffective assistance of Appellate counsel, you alleged ineffective assistance of trial counsel, and you alleged, interestingly enough, although I don't think I'm on the Appellate Court yet, that the trial judge committed reversible error. I'm not sure that that allegation is properly addressed in a PCR Application. Happy to hear from you as to what you wish to proceed on, and what you do not wish to proceed on.

MR. KIRKLAND: Well, Your Honor, I am pleased to tell you that I agree with your last statement as to issue number three, and we would withdraw that.

THE COURT: I know the Supreme Court will be relieved to know that you did not want to elevate me to that position, Mr. Kirkland.

MR. KIRKLAND: Thank you, Your Honor. Your Honor, in addition to that, we are withdrawing our first branch of the petition, which is alleging ineffective assistance of trial counsel, and are proceeding today simply on ineffective assistance of Appellate counsel, as it relates to paragraph B, the Appellate counsel's failure to brief and argue issues as to the admission of a videotape clip, which is arguably outweighed -- the probative value is outweighed by the

prejudicial value.

And then, in addition to that, the second branch of that that the Appellate Counsel failed to brief and argue as to the motion to strike certain testimony of one witness, Brandy Thompson, and the trial counsel's motion for a mistrial. Those two issues were never appealed and ---

THE COURT: Hold on a second, Mr. Kirkland. I'm going to listen to you carefully, but I want to make sure for the record that we're communicating. You are withdrawing any allegation in the petition, and you conferred with your client about it concerning that the trial judge committed reversible error; is that correct?

MR. KIRKLAND: That's correct. And I have consulted my client on that and he's in agreement, Your Honor.

THE COURT: And you want to proceed on the allegations of ineffective assistance of Appellate counsel, as well as ineffective assistance of trial counsel?

MR. KIRKLAND: We are withdrawing our argument on ineffective assistance of trial counsel.

THE COURT: So you're completely withdrawing ineffective assistance with trial counsel, and proceeding only on the grounds of ineffective assistance of Appellate counsel? All right.

MR. KIRKLAND: And as I have indicated, I have consulted my client in this regard. He understands the

consequences of that, and he's in agreement.

THE COURT: All right. Mr. Dykeman, you've heard what your attorney just told me. Do you understand that?

MR. DYKEMAN: Yes, sir.

THE COURT: Do you understand that he tells me that you knowingly and willingly and intelligently wish to withdraw two of your three allegations concerning ineffective or judge error in your Application for Post-Conviction Relief; is that correct?

MR. DYKEMAN: Yes, sir.

THE COURT: Very well. You have the floor now, Mr. Kirkland. I'm happy to hear from you.

MR. KIRKLAND: Your Honor, if it pleases the Court, I'd ask leave of Court to give you a very brief statement of the facts of the case to enlighten the Court?

THE COURT: Be happy to hear an opening statement. Let me ask you this, you've withdrawn your allegations as to trial counsel?

MR. KIRKLAND: Yes, sir.

THE COURT: I assume -- I don't assume, I know because I actually worked over Labor Day, even though Mr. Hood doesn't believe that, but I did. I assume he was trial counsel; is that correct?

MR. KIRKLAND: He was, Your Honor.

THE COURT: Is there any reason that you need Mr. Hood

to remain for this case?

MR. KIRKLAND: Yes, there is, Your Honor.

THE COURT: All right. Go ahead. I was trying to shorten his time. Go ahead, Mr. Kirkland.

MR. KIRKLAND: Thank you, Your Honor. Your Honor, as the Attorney General stated very clearly, this was a charge of kidnapping, armed robbery, and a resulting murder. The victim in this case was one, Brett Kenny, a young man who was disabled, and he was bludgeoned and stabbed to death in the course of a kidnapping and robbery by a co-defendant by the name of Samantha Morgan Major for the purpose of obtaining money to purchase drugs.

John Dykeman was also charged under the principle of murder as well, and although he did not testify at trial, his defense was, at that time, that he was present during the commission of the murder, but did not participate and did not aid and abet. And of course, they went forward with trial and he was found guilty on the murder trial charge on the theory of hands of one, hands of all.

Now, Your Honor, the Appellate Brief that has been submitted to you as Exhibit One, is a one and a half page argument that argued solely the argument that in -- let me get a copy of that, Your Honor. In the charge to the jury it failed; in that, there was a statement by the Court to the jury charging that the defendant did not take the

witness stand, and by virtue of that, obtained a procedural advantage. That is the sole argument made in the Appellate Brief. There was no issue raised as to any prejudicial videotape evidence. There was no issue raised as to the striking of some evidence testimony taken that Mr. Hood had asked for a mistrial.

So, Your Honor, that is a summary of where we're going, and I'd like to ask ---

THE COURT: Let me ask you about that. My understanding from the excerpt in Exhibit One that you provided the Court was that the actual remarks by Judge Milling were "A normal procedure is the defense would argue first, and the State would argue last. But if a defendant chooses not to put up any evidence, if they feel the State has not presented a sufficient case, they can put up no evidence, since they have no burden of proof, and they get the last argument." Is that a direct quote of what Judge Milling actually told the jury?

MR. KIRKLAND: It is, Your Honor.

THE COURT: All right. So the part that's italicized is argument when you talk about a procedural advantage. I don't see those words being communicated to the jury; am I correct in that assumption, Mr. Kirkland?

MR. KIRKLAND: You are, Your Honor.

THE COURT: All right. Proceed.

MR. KIRKLAND: Your Honor, I would, at this time, call Mr. Gene Hood.

THE COURT: Very well. Mr. Hood, if you would come around and be sworn.

(Whereas, the witness, Mr. Gene Hood, is duly sworn.)

THE COURT: Gene, I'm going to ask you to speak up for my sake, for Becky's sake, and for the lawyer's sake. If anybody can't hear the witness, raise your hand. I'll try to amplify his voice once we learn how to operate the equipment in the Beaufort Courthouse. Would you state your full name for the record and spell your last name for the court reporter?

MR. HOOD: Gene Hood, H-O-O-D.

THE COURT: Your witness, counsel.

MR. KIRKLAND: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. KIRKLAND:

Q. Mr. Hood, you're well-known to the Court, but for the record, please state your profession and how long you've been doing that.

A I'm an attorney. I've been an attorney for 37 years, I guess; I'm going on 38. I was a Jag attorney for 20 years. I have been the Public Defender for Beaufort County for approximately 20 years, and for the last four years plus, I have been the Circuit Public Defender for the Fourteenth

Circuit.
Q Thank you. And I understand that you were trial counsel in the trial of Mr. John Dykeman?
A I was.
Q Do you have a specific recall of that particular trial?
A Yes.
Q And do you know Mr. Dykeman by appearance?
A I've known John for 20-something years.
Q And he's in the courtroom here sitting beside me; is that correct?
A That's correct.
Q Mr. Hood, I'd like to direct your attention to the trial, and particularly to some testimony and evidence that was taken at the trial, if I could, please?
A Certainly.
Q I'd like to direct your attention to the victim himself, Mr. Brett Kenny, and I understand that Mr. Kenny was a disabled young man?
A That's correct.
Q Tell the court just briefly about what his disability was?
A I don't recall specifically his disabilities, and I would be mistaken if I tried to explain it, other than the fact that he had been disabled for many years. He had difficulty walking, difficulty actually communicating,

things of this nature. To remember specifically all of his problems, I just don't recall.

Q Thank you. Now, this was a case in which there were two co-defendants tried separately?

A That's correct.

Q And if I understand correctly, Ms. Samantha Morgan Major was tried prior to John Dykeman's trial?

A Not exactly. This was originally a death penalty case. Both Mr. Dykeman and Samantha Morgan Major were facing the death penalty. Ms. Major, she and her attorneys entered a plea before Judge Young, who took that plea and sentenced her to life, and not death.

As a result of that, I tried to get the State to withdraw their death penalty notice with respect to our client, John Dykeman. It took several months before they realized that it was impossible, as I kept telling him, for Mr. Dykeman to get the death penalty when the main actor, perpetrator, according to the State, was Samantha Morgan Major.

Well, eventually, they did. I think it was about three or four months later, they withdrew; and then, we actually had a trial with respect to Mr. Dykeman's participation in these charges.

Q Thank you. To maybe enlighten the Court a little bit further, you testified that the principle perpetrator was

Ms. Major. Can you just briefly explain to the Court the dynamics of the events on the commission of the murder charge?

A According to the information that we had, and the statements that were given, Ms. Major had a prior relationship with Mr. Kenny. She provided certain sexual services to a variety of different people in the community; Mr. Kenny was one of those.

She, along with the allegation being that John Dykeman was with her that particular night, when she arranged with Mr. Kenny to pick Mr. Kenny up, she and Mr. Dykeman went to Mr. Kenny's residence. Mr. Dykeman was driving, it was his vehicle, and picked up Mr. Kenny who was placed in the front seat of the car.

As they drove, Samantha Major was attempting to get Mr. Kenny to cooperate in giving her his pin number for one of his accounts. There was sort of a disagreement between that, and that Mr. Kenny had not received the services yet, and payment was not due, and things of that nature.

So, Samantha, unknown to Mr. Dykeman, who was sitting in the back seat of this small car, had a Bowie knife, about so long, if I recall correctly. And she took that knife and she stabbed Mr. Kenny through the seat, basically, and obviously caused significant damage to Mr. Kenny. That's basically how this thing got started, and from there it was

like a total shock, surprise.

Mr. Dykeman had no clue what was happening there and he sort of stopped the car and jumped out, you know, "What the 'F' is going on?" You have to understand that Mr. Dykeman and Samantha were using quite a bit of narcotics, drugs, for a considerable period of time before this event took place. The whole purpose was to get money from Mr. Kenny by providing the sexual services, which she had provided in the past, and that would give them some more money to buy them some more dope and keep on going.

So that was basically the process of how we got to Mr. Dykeman actually first realizing something is wrong here. But, as determining by the testimony of the statements of Ms. Major, and from conversations -- you don't argue with a woman who has a Bowie knife, and who has just stabbed a defenseless person into the back with that particular knife.

And so, he became a party to the event, perhaps not willingly, but very cautiously; knowing that should she turn on him, you know, I mean, it's just, he's driving and she's in the back seat with the knife; so, that's basically where we got with that.

Q Thank you. And as the trial proceeded, there was testimony elicited by the State as to hands of one, hands of all, and Mr. Dykeman's participation in perhaps moving Mr. Kenny around in the vehicle and or disposing of the body?

A That's correct.
Q And in doing so, I understand that the Solicitor attempted to, or proceeded to, present a video to the Court to be admitted?
A Correct.
Q But I also understand that there was parallel independent testimony from at least one, and maybe two, family members, as well ---
ASST. ATTY. GEN. WILSON: Objection, Your Honor. Counsel's testifying, he's not asking a question.
THE COURT: It is direct examination. The objection is sustained, counsel. This is your witness, ask direct questions.
MR. KIRKLAND: And I do apologize, Your Honor.
THE COURT: I don't mind giving you a little leeway, but you and Mr. Hood both know the rules very carefully.
MR. KIRKLAND: Yes, sir.
THE COURT: Objection sustained.
Q What was the purpose of the -- do you recall what the purpose of the Solicitor in presenting the video?
A Well, the video was basically, in my opinion, the video was just for the sole purpose of inflaming the jury.
Q And why do you say that?
A Well, you know, we had all of the testimony about his conditions and things to that nature; there was no doubt

about that. It was in Samantha Morgan Major's statements, and she was tired of having to put up with this person who wasn't really, fully there. If I recall correctly, there was testimony about the fact that Mr. Kenny had fell out of a tree -- I think it was a tree, but anyway, and resulted in some damage to his brain, which resulted in the removal of a portion of his skull. And in its place, they put in a plastic plate, basically to cover the hole that was there, as a result of losing part of his skull during that operation.

The tape -- I just thought it was another thing, the worst you can make the victim look, as far as being helpless, and this and that and the other, obviously that's going to go a long way with the jury, and that was, in my opinion, the sole purpose of that.

Q Do you have any recall of how long, previous to trial, that approximately that that video had been taken of Mr. Kenny?

A I don't remember.

Q Okay. Do you recall as to what the circumstances of the video was? Where Mr. Kenny would be filmed and what his condition was during the video?

A I don't recall.

Q Thank you. And I assume that you objected to the admission of that?

A I did.
Q And the argument that you made was based upon what?
A Basically, that it was done solely for the purpose of inflaming the jury to give them a sense as to how these people could have done this horrible thing to this person who was in this physical condition.
Q And the purpose for you making the objection would have been to preserve it for appeal?
A Oh, absolutely. Yes.
Q In your professional experience, did you consider that particular admission of that a significant and obvious appealable issue?
A Yes.
Q Now, Mr. Hood, also during the trial, I believe it came to the point that a witness was called by the name, Brandy Thompson?
A Correct.
Q And do you recall anything particular or out of the ordinary about that particular testimony or any objections you may have made during that?
A Yes. Ms. Thompson was a "girlfriend" of John Dykeman, okay? At least, there was a relationship. I'm not saying she was his girlfriend, but there was a relationship between the two of them during this period of time. And I don't recall whether she was pregnant at the time; I just don't

remember. I think she was pregnant at the time.

But anyway, they had some conversations, obviously between the two of them, either before and after this event, and prior to Mr. Dykeman's being arrested. She made statements to the police about those conversations, and in none of those statements did she ever mention that John Dykeman in any way harmed, touched, or hurt Mr. Kenny. And she was adamant about that particular thing, that all of their conversations it was nothing in that area.

When we got ready to go to trial, the State started looking for all of these witnesses, and informed me that they couldn't locate her. Well, I would have to call her as a witness, anyway, and the State didn't need her as a witness, because she was going to say Dykeman didn't do anything; everything was Samantha Morgan Major. So right before trial, I find out that they discovered that she was out in Las Vegas, but they weren't sure where, and they didn't know whether they were going to be able to get her back for the trial.

So that, basically, was where we left that at, and that was on a Wednesday; we started trial on Monday. So in between that period of time, I didn't have any further notice by the State, because they were going to call her, eventually, as a witness, but didn't know whether she was going to show or not or whether they could get her here.

So I am speaking to the prosecutor and his assistant in front of the jail as I was just either going in to speak with John, or coming out, and that's when they informed me that they were pretty sure she wasn't going to come. So I said okay, but thinking that if I need her as a witness, I'm just going to have to do whatever.

So we get into trial, and lo and behold, suddenly she appears as a -- they claimed they didn't know she was going to show; then, she shows up. Her name was on the list, I'm pretty sure, to be called as a witness. So then, I'm thinking she's going to testify consistent to all of the statements previously she had given to law enforcement.

So I'm not concerned about her, I mean she comes in, they call her as a witness, and I'm sort of surprised, but then she gets on the stand and through the assistant that was questioning her, Sean Thornton. Sean asked her questions that were very leading, and I objected to it, because he was trying to get her to say that Dykeman had harmed Mr. Kenny, which was not anywhere in any of the statements that I had.

I objected to it, and finally she said, "Yeah, he did tell me that he may have hit him a couple of times, or something along that line." That's when we stopped and we all took a little recess and we went in the back room ---

Q May I interrupt you? Was there any reference to any

kind of hypodermic syringe, as well, during that testimony?
A Yes. Yes.
Q What was that?
A I don't remember specifically about that, but there was some mention about that, taking blood or something of that nature.
Q Thank you. Please continue.
A So I objected to it; and then, I got back and we discussed the matter, and I found out that basically the State, after some questioning -- and I think I put all of this on the record, because it just struck me the wrong way. They knew many days prior to this, on the Wednesday that they were talking to me out in front of the jail, that they had this woman all set up to give testimony which contradicted her previous statements; they didn't give me any notice of that. They got in there and asked a whole bunch of leading questions which caused this problem, which caused me to object to it, and I find out all of this after the fact. And then, it's a rebuilding process, because I asked for a mistrial, this, that, and the other, if I recall correctly, and all of that was denied and we proceed.
Q And I would assume in your asking the Court for a mistrial that in your professional opinion, you consider that to be a very significant and obvious appeal on the issue?

A Yes.
Q Going back to the discussion about the video, I neglected to ask you, or pursue a little bit further, that there were independent witnesses available as to Mr. Kenny's condition, prior to the murder?
A Yes.
Q So just briefly, can you tell the Court what that testimony was available? If you recall.
A I don't recall. I know there were several witnesses. He was in very bad condition. He was, basically, defenseless, and it was painfully obvious to myself and I'm sure to anybody else who heard testimony, and the ---
THE COURT: Counsel, let's move along as to Appellate counsel. All right. I don't think we're trying trial counsel, according to your statements.
MR. KIRKLAND: No, we're not.
THE COURT: Proceed.
Q Mr. Hood, then, in concluding here, based upon those two issues -- have you done Appellate work?
A A long, long time ago.
Q Are those two issues that had you been hired to proceed with Appellate work, would you have briefed those and argued those two issues?
A I feel I would have, yes.
Q Do you have an opinion as to whether, within the

bounds of the duty of a reasonable attorney, that that should have been done?

A I think so. But in the heat of the battle, a lot of times you can't see the forest for the trees, and you're so upset, perhaps, that you've been misled, purposefully misled, and so you sort of lose a little bit of perspective. That may have been the condition that I was laboring under. At the time, we had assistant counsel, Scott Lee, who was with me at the time, and both of us were very shocked by the lack of respect to provide us with all of these statements that the State was in possession of.

Q Thank you, Mr. Hood. We appreciate your testimony today.

THE COURT: Cross-examination?

ASST. ATTY. GEN. WILSON: Thank you, Your Honor.

CROSS-EXAMINATION

BY ASST. ATTY. GEN. WILSON

Q Mr. Hood, do you recall if you were appointed or retained?

A We were appointed.

THE COURT: I take judicial notice of that, Ms. Wilson.

ASST. ATTY. GEN. WILSON: I always like to check, Your Honor.

THE COURT: Mr. Hood had been the Public Defender longer than anyone else in my circuit here in Beaufort.

Gene, how long?

MR. HOOD: Twenty-plus years.

THE COURT: Twenty-plus years. Mr. Hood and I are both past the speed limit. He is the Fourteenth Judicial Circuit-Wide Public Defender. Proceed.

BY ASST. ATTY. GEN. WILSON:

Q When you represented Mr. Dykeman, did you file any Brady or Rule Five motions on his behalf?

A Yes.

Q And did you review whatever discovery you received from the State with Mr. Dykeman?

A Yes.

Q And included in that discovery, were there statements from the State's witness, Brandy Thompson?

A Yes.

Q Did you discuss prior to trial with Mr. Dykeman, the elements of the charges against him and what the State was required to prove?

A Yes.

Q Did the Applicant give you any potential witnesses or any other additional things to investigate?

A We did a lot of stuff; I don't remember specifically. But yes, we -- this was, as I stated before, it was a death penalty case for a long period of time. And so we had an awful lot of background, and started gathering a whole mass

of information concerning Mr. Dykeman's history and the history of Samantha Morgan Major; everybody that was a player in that particular case. We, basically, had done background investigations and gathered what information we could from all of those.

Q And did you have ample time to prepare for trial?

A I think it was several years.

Q And after the Applicant was convicted, did you file his notice of appeal?

A Yes.

Q And you testified a second ago that you kind of have limited appeal experience?

A That's correct, yes.

Q And in your limited experience with filing for appeals, is it reasonable to expect that Appellate counsel present for appeal every possible preserved issue?

A Well, now, I need to clarify one thing. The only Appellate work that I did was in Jag Court, okay? And we have a little different procedure than they do in the civilian courts. It's still the same thing. I mean, you're looking for Appellate issues, things of that nature, to appeal certain matters on this, that, and the other. I have not done any State Appellate work, other than requesting the appeals, basically, the notice of intent to appeal and things of that nature. And discussing those issues with

the Appellate defense counsels located in Columbia.
Q Did you discuss Mr. Dykeman's Appellate issues with his Appellate counsel?
A I don't recall.
Q Thank you.
THE COURT: Redirect?
MR. KIRKLAND: Your Honor, just one further question.
REDIRECT EXAMINATION
BY MR. KIRKLAND:
Q Mr. Hood, in your extensive experience as trial counsel, one of your major responsibilities, if I'm correct, would be in preserving issues for appeal; is that correct?
A That's correct.
MR. KIRKLAND: Nothing further, Your Honor.
THE COURT: Recross, limited to redirect?
ASST. ATTY. GEN. WILSON: No questions, Your Honor.
THE COURT: As to this witness, Mr. Kirkland?
MR. KIRKLAND: Yes, sir, Your Honor.
THE COURT: May he be excused?
MR. KIRKLAND: Yes, sir.
THE COURT: Any objection, Ms. Wilson?
ASST. ATTY. GEN. WILSON: No, Your Honor.
THE COURT: I realize he's probably going to be with me for the next case as well; is that correct, Ms. Wilson?
ASST. ATTY. GEN. WILSON: Yes, Your Honor.

THE COURT: I don't think he's going very far, but you're excused from the hearing in this case, Mr. Hood.

Call your next witness, Mr. Kirkland.

MR. KIRKLAND: Your Honor, with the Court's permission, I'd like to call John Dykeman.

(Whereas, Mr. John Dykeman, the witness is duly sworn.)

THE COURT: Now, Beaufort has been unable to get a microphone that works in the courtroom; that's particularly difficult for the people in the back. Now, I want you to speak up. You can hear me, can't you?

MR. DYKEMAN: Yes, sir.

THE COURT: All right. That's because I'm used to projecting my voice in the courtroom, but many people are not. The court reporter has to be able to hear, even though she's in close proximity to you, and I've got a deputy in the back of the courtroom, if he raises his hand and tells me he can't hear, I want y'all to find me somebody that can fix a microphone.

BAILIFF: I'm working on it, Your Honor.

THE COURT: Okay. Thank you. State your full name and spell your last name for the court reporter. No uh-huh's or unh-unh's, no shaking your head; you understand?

MR. DYKEMAN: Yes, sir.

THE COURT: Very good. Speak up.

MR. DYKEMAN: John Dykeman, D-Y-K-E-M-A-N.

THE COURT: Your witness, Counsel. Direct examination.

DIRECT EXAMINATION

BY MR. KIRKLAND:

Q Mr. Dykeman, you are the Applicant in this particular case?

A Yes, sir.

Q And you're asking the Court today to review this matter for Post-Conviction Relief; is that correct?

A Yes, sir.

Q Now, Mr. Dykeman, you understand by virtue of the pre-discussion with the Court that we have limited your request to the ineffective Appellate counsel?

A Yes, sir.

Q And we're going to be talking specifically regarding those issues; do you understand?

A Yes, sir.

Q Okay. Now, Mr. Dykeman, did you have the opportunity to have conversation with your Appellate Counsel?

A Briefly.

Q Do you recall what his name was?

A Joseph Savitz.

Q And when you say "briefly," tell the Court what the extent of that was?

A Indigent Defense provided collect calls from us inmates to our prospective counsel. On numerous occasions, I've

called and was not able to either get through to him, or he was not in the office. The times I did talk to him, we discussed issues that I learned after being incarcerated, that these issues were preserved for the record, and he never really discussed any kind of strategy or anything based on what happened at trial.

After I received his initial brief, I read over it and realized that the initial brief and what he gave was a one and a half page argument. It was double-spaced, and probably took five minutes. And it was not preserved for review, for Appellate review, or anybody else's review. I filed a complaint with disciplinary counsel, because he didn't communicate, either by correspondence or on the telephone, what his intentions were, what issues he had planned on raising, or any kind of defense for me.

Q Do you understand the two issues that we have talked about today with Mr. Hood -- I asked about whether or not they should have been an appealable argument in brief?

A Yes, sir.

Q Talk about the first one, John, if you might, the video. Do you recall that video?

A Yes, sir.

Q Do you recall where that video had been filmed?

A The video had been filmed in a hospital setting. Mr. Kenny was placed between two parallel bars, and it was after

a leg surgery, and two months prior to the victim's death.
Q Thank you. And you were present at trial, obviously?
A Yes, sir.
Q And do you recall Ms. Marlene Jenning testifying to what Mr. Kenny's condition was prior to this incident?
A Yes, sir.
Q Did she describe his size and his mobility?
A Yes, sir.
Q Okay. Was there any other testimony from any other witnesses that adequately described -- let me strike the word adequately. Were there any testimony from any other witnesses in this regard?
A I believe his mom testified as well, as to his mobility, and lack thereof, or what he could actually do and how far he could go.
Q . And do you recall trial counsel objecting to the admission of that video?
A Yes, sir.
Q And that was overruled, I understand?
A Yes, sir.
Q Now, do you also recall the testimony of Ms. Brandy Thompson?
A Yes, sir.
Q Did you have opportunities prior to the trial to look at her statement?

A I read two statements that she filed at the same time that I was arrested, and the testimony that she gave was not consistent with the two statements that we were in possession of. Again, I understand that she was out in Las Vegas and homeless.

Q Do you have firsthand knowledge, personally, of what Mr. Hood or Mr. Lee had relative to those statements at the time of the trial?

A Yes, sir.

Q And is it your testimony, I think you just said that her testimony exceeded what those statements were?

A Yes, sir.

Q Can you be specific on how that exceeded the testimony?

A Well, the two statements, like I said, they were in conjunction with what we had, but the third one, she went totally outside of what she had given law enforcement and said that I done things or told her things over the telephone -- that had counsel or anybody else pulled the phone records, they would have found it would have been not true at all.

Q Were those statements highly incriminating?

A Yes, they were.

Q And your trial counsel, what was his reaction to those statements at trial?

A He was not very happy.

Q What did he do?
A He objected to it. She asked for a motion to strike her testimony.
Q Did you have discussion with your Appellate counsel about either one of these two incidents?
A I sent him material on both. Actually, I sent him material on directed verdict, on the video clip, and her statements.
Q And your purpose in doing so was what?
A To help benefit myself in gaining either a new trial or a sentence that fits my participation.
Q If I could re-paraphrase what you just said, that you were bringing that to his attention?
A Yes, sir.
Q For what purpose?
A To aid in his representation of myself.
Q Thank you. Now, Mr. Dykeman, you understand, of course, that this is limited to just the Appellate counsel, but this is also your opportunity to speak to the Court and tell the Court what your objections are about the appeal and the extent of that, if you would like to do that?
A Well, you know, I think trial counsel worked with what he had to work with, and I don't think that he had everything that he needed. However, Appellate counsel had everything that he needed and refused to use anything.

It just, to me, it's a black eye to the lawyer field or profession. I'm not a lawyer. I've never been educated that way. I've had to learn everything by being incarcerated and using our law library. You know, I could have probably have went to my 13 year old nephew and got a better brief prepared then what the Chief of Appellate Defense did.

Q Is there anything further that you would like me to say or do for you here today?

A If we could get a new trial, I'd appreciate that.

Q Thank you.

MR. KIRKLAND: Your Honor, I have nothing further.

THE COURT: Cross-examination.

ASST. ATTY. GEN. WILSON: Thank you, Your Honor.

CROSS EXAMINATION

BY ASST. ATTY. GEN. WILSON:

Q Mr. Dykeman, how shortly after Mr. Hood filed a notice of appeal in your case did you speak with your Appellate attorney, Mr. Savitz?

A I believe it was about a year.

Q And how many times do you think you spoke to him -- you said you spoke to him several times on the phone, about how many times?

A Approximately four.

Q And about how long was each phone conversation?

A Less than fifteen minutes.
Q As far as you know, did your Appellate attorney have a copy of your trial transcript?
A Yes, ma'am.
Q And when you discussed with him your case, did he seem to have some knowledge about the facts of your case?
A In the beginning, he didn't appear to be too knowledgeable, and as we kept going -- he claimed that he had a major case load, which I'm quite sure he probably does, and I don't think that he actually gave adequate time to the records.
Q Okay. So you don't feel like when you talked to him -- I'm not getting a yes or no from that. My question was when you discussed with him the case, did he sound knowledgeable about the facts of your case?
A Not completely.
Q And so over the course of the times that you talked to him on the phone, because you said you talked to him four times, did his knowledge increase?
A I would have to say yes.
Q And did you discuss with him the testimony of Ms. Thompson at trial?
A I discussed that with him, yes.
Q And you brought up these issues that you discussed today that you felt were important? You brought those up to

him?
A Yes, ma'am.
Q And you also testified that you're not a lawyer, correct?
A No, ma'am.
Q And you don't have any legal training?
A No, ma'am.
Q And were you aware that Appellate counsel wouldn't brief every appealable issue?
A Yes, ma'am.
Q You were aware of that?
A Yes, ma'am.
Q Thank you.
ASST. ATTY. GEN. WILSON: No further questions.
THE COURT: Redirect?
MR. KIRKLAND: Nothing further, Your Honor.
THE COURT: You may step down. Call your next witness.
MR. KIRKLAND: I have no further witnesses, Your Honor.
THE COURT: Does the State have any witnesses it wishes to call?
ASST. ATTY. GEN. WILSON: No, Your Honor.
THE COURT: Very well. I'll hear you briefly in closing.

CLOSING ARGUMENT

BY MR. KIRKLAND:

Your Honor, I know this Court is very, very familiar with the law in this regard.

THE COURT: Mr. Kirkland, you probably don't know this, but I started my career in the South Carolina Attorney General's Office. You might know that if you looked at my biography; and you will remember Mr. Kirkland, Emmett Claire, do you not?

MR. KIRKLAND: No, I don't.

THE COURT: Well, he was the head of the Post-Conviction Relief section in the Attorney General's Office. So I started, and I did Post-Conviction Relief, but I'd been appointed to represent Applicant's as a defense attorney and as an Applicant attorney for Post-Conviction Relief, so I've been on both sides of this issue, and I started doing it in 1975, Mr. Kirkland. So when I told you that Mr. Hood and I were past the speed limit, I was telling you the truth. Go ahead.

MR. KIRKLAND: Well, I appreciate that, and I did take the opportunity to talk to my partners, since I don't know you, personally, to get your background. In knowing that law, Your Honor, clearly the Attorney General is correct that not every unfrivolous appeal ---

THE COURT: Does Appellate counsel not have the opportunity as do you today, Mr. Kirkland, as the Applicant's attorney, to decide what issues should best be

presented to the Court, whether it be at trial or on appeal?

MR. KIRKLAND: Yes, absolutely.

THE COURT: And is that within the sole discretion of counsel, you believe, after conferring with your client?

MR. KIRKLAND: It is, Your Honor, but it isn't completely exclusive that all issues should be excluded.

THE COURT: Happy to hear from you.

MR. KIRKLAND: Yes. If there is an obvious and significant appealable issue, that should be raised.

THE COURT: And who should make that decision, obvious and significant, Mr. Kirkland?

MR. KIRKLAND: It's within the discretion of the Appellate counsel. But, Your Honor, in the situation that we have here where there was such an extraordinary issue where defense counsel actually called for a mistrial, that is something that is obvious and significant that I would respectfully submit to you. And the issue as to the prejudice value when there is independent testimony for the same purpose, that again, is also an issue that is obvious and significant.

I think Mr. Dykeman said it very, very well that there are cases where Appellate counsel is ineffective, and on the face of this brief alone, a one and a half page, double spaced -- it clearly hit the issue of that one issue. I think it appears very obvious to the Court, and it certainly

does to me, that the Appellate counsel could have very well erred. Thank you.

THE COURT: Thank you very much. Ms. Wilson, I'm happy to hear from you in closing.

ASST. ATTY. GEN. WILSON: Thank you, Your Honor.

CLOSING ARGUMENT

BY MS. WILSON:

It's the State's position that Appellate counsel did not provide ineffective assistance to Mr. Dykeman. Appellate counsel is not required to raise every non-frivolous claim, but instead they may select among them to reach the maximum likelihood of a favorable outcome. Your Honor ---

THE COURT: Let me ask you this, Ms. Wilson. You're very familiar with the record, because I know you, like me, worked over the Labor Day holiday to get ready for this term of Court, as did Mr. Kirkland, and I appreciate that very much when you have a holiday and you spend the day getting ready.

We all know what the law is, as far as the hand of one is the hand of all, and Mr. Hood knows it well. One of the reasons he apparently moved for a mistrial in this case was that he was concerned whether or not there was testimony that you were present aiding and abetting, because mere presence obviously would not be sufficient to convict one

under the theory of the hand of one is the hand of all.

However, what Mr. Kirkland is raising is the effectiveness of Appellate counsel, and in that, he raises it in two forms; one, he says is that this video was prejudicial, to which Mr. Hood says he objected, and apparently Judge Milling admitted over his objection. And although the video, which I have not seen, showed the condition of the victim. I assume Mr. Hood felt it was prejudicial to his client. The other was his testimony concerning the statements of this witness, which Mr. Hood felt was inconsistent with the prior statements. I want to hear you on both of those issues, Ms. Wilson.

ASST. ATTY. GEN. WILSON: Yes, Your Honor. In the context of whether or not Appellate counsel's ineffective --

THE COURT: In the context of Appellate counsel and not trial counsel, even though Mr. Kirkland wanted me to listen to Mr. Hood, we're not here to judge Mr. Hood today. We're here to judge Mr. Savitz, according to what Mr. Kirkland tells me.

ASST. ATTY. GEN. WILSON: Yes, Your Honor. Appellate counsel did not brief those two issues; but it's in their discretion to decide to present to Appellate courts what issues that they think more likely than not be more successful.

Also, Your Honor, in the context of ineffective assistance of counsel, in Strickland v. Washington, in addition to proving deficiency for ineffective assistance of Appellate counsel, the Applicant also has the burden of proving prejudice, and he has put forth no evidence of what prejudice resulted from Appellate counsel not briefing the issues that he proposed.

THE COURT: Do you believe that the prejudice prong in the Strickland case means that the outcome would have had to have been different but for counsel's position?

ASST. ATTY. GEN. WILSON: Yes, Your Honor. Also, Your Honor, they were preserved for appeal, but Appellate counsel did not present those issues, and it's the Applicant's testimony that he discussed those issues with Appellate counsel. They were before Appellate counsel when he was deciding what issues to brief, as far as we know from the Applicant's testimony.

The Applicant also testified that he was aware that Appellate counsel didn't have to brief every preservable issue and he was also aware that the Appellate counsel had a copy of the trial record and was able to review it before he made any decision about what to brief, Your Honor.

So it's the State's position that Appellate counsel was not ineffective, and that this Court should deny the Applicant's Post-Conviction Relief Application.

THE COURT: Have you reviewed the video?

ASST. ATTY. GEN. WILSON: No, Your Honor.

THE COURT: Mr. Kirkland, have you reviewed the video?

MR. KIRKLAND: No, sir.

THE COURT: So neither one of you have seen the video that Mr. Hood has seen, but you take Mr. Hood's word for it, he objected to it. Now, let me ask you this, Ms. Wilson. This discussion that we've had, and this evidence concerning this witness, is it not a situation that happened -- I realize Mr. Hood made some statements in his testimony that he thought the State knew she was going to testify inconsistently from the prior statements. Did you find anything in the record to support that conclusion, other than the fact that this witness's testimony was different from that in which the statements had been provided to Defense counsel prior to the trial of the case, Ms. Wilson?

ASST. ATTY. GEN. WILSON: Your Honor, it's my understanding that the statements were provided to defense counsel prior to ---

THE COURT: I understand that, but did you find any evidence in the record that Appellate counsel could have noticed that the State was aware that she was going to testify different from the statements?

ASST. ATTY. GEN. WILSON: Yes, Your Honor. From what I could recall from the transcript, there was some discussion

on the record about the defense being unaware that the witness would be present that day ---

THE COURT: I understand the defense was unaware. Mr. Hood believed, and he gave opinion testimony, that he thought the State knew that her testimony would be different. Did you find anything in the record to support that? I understand the defendant's position.

ASST. ATTY. GEN. WILSON: Your Honor, I can't recall right offhand. If you give me a minute to check my notes --

THE COURT: Sure.

(OFF THE RECORD, BRIEFLY.)

THE COURT: Ms. Wilson?

ASST. ATTY. GEN. WILSON: Yes, Your Honor?

THE COURT: Is there anything you've been able to locate from your looking at your notes?

ASST. ATTY. GEN. WILSON: Your Honor, from what I recall in the transcript, Mr. Hood put on the record that there may have been some Brady issues, and that they were unsure -- the Court was put on notice that Mr. Hood had received, after Ms. Thompson testified, some documents about her visitation to the detention center, if I'm correct on that. And preceding the Court's denial of the motion to strike Ms. Thompson's testimony, that's when he made a motion for a mistrial, which was denied, but I'm not seeing

anything specifically ---

THE COURT: You're not seeing anything specifically that states -- one lawyer stands in my courtroom at a time. Take a seat, counsel. Go ahead, Ms. Wilson.

ASST. ATTY. GEN. WILSON: Further, I have Mr. Hood's testimony that he received this document and he didn't know what it was. But anyway, at the end of that discussion, Mr. Hood does put on the record that he doesn't know how they found this particular witness, that he had been trying to contact her, some detectives contacted her, they ran her down ---

THE COURT: I'm certain Mr. Hood doesn't know how they found the witness. The question was, and I want to make sure you understand it, the question was, did you, from your examination of the record, find anything in the record to support Mr. Hood's opinion testimony that he gave, that he felt the State knew before they put the witness on the witness stand that she would testify differently from the prior statement she had given?

ASST. ATTY. GEN. WILSON: No, Your Honor.

THE COURT: Thank you. I'm going to ask that both sides submit proposed orders to me. Please submit them to me within 14 days of today. Please submit them to me at P.O. Drawer 470, Walterboro, 29488. Please copy opposing counsel on your transmittal of any proposed order to the

Court. Please include a self-addressed, stamped envelope with sufficient postage affixed thereto.

Mr. Kirkland, if you're going to send me a 15-page Order, do not send me an envelope with one stamp, and tell me that your paralegal or your secretary did it, because it is you, not your secretary, not your paralegal. I have to pay my own postage. I expect you to send me enough postage to return the order.

Any questions about the proposed Order procedure from counsel for the Applicant?

MR. KIRKLAND: No, Your Honor.

THE COURT: Any questions about the proposed Order procedure from counsel for the State?

ASST. ATTY. GEN. WILSON: No, Your Honor.

THE COURT: Now, Mr. Kirkland, I want to have the time to review each of your exhibits. Because I've got so many hearings today, I don't want your client or you thinking I'm not going to review them. But that means you're going to copy them and you will give them to Camden so that when I get your order in 14 days, and the State's order, I've got those exhibits with me -- I already have the transcripts.

MR. KIRKLAND: Yes, sir.

THE COURT: I don't need that, but I want to make sure that my mind is focused in on your exhibits at the time I review your order. Do you understand that?

MR. KIRKLAND: Yes, sir. Thank you, Your Honor.

THE COURT: All right. Now, you can e-mail me your Order, however, you're still going to have to snail mail me an envelope with sufficient postage to return to you. My e-mail address is PbucknerJ@Sccourts.org; if you're going to e-mail me, in addition to opposing counsel, I require that you also e-mail my law clerk. His e-mail address is PbucknerLC@Sccourts.org.

I will expect your Order within 14 days of today, and Mr. Kirkland, you are not to leave this courthouse without making sure that Camden Hodge has all the material that we need in order for me to review this matter thoroughly for you. Thank you for being prepared. Thank you for being on time. This concludes the record in the hearing of this case.

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF COLLETON)

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of Common Pleas - Post Conviction Relief for Beaufort County, South Carolina, on the 4th day of September 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 17, 2013

Rebecca H. Hill

Rebecca H. Hill,
Official Court Reporter

662
STATEMENT OF: r St Helena S.C. 29920 Date 5-5-04

Brandy Rose.
on early Monday morning John Dykeman called the cell phone and said Something bad had happened in the car but he was all right. Monday at aprox 7:30 AM he asked for a black trash bag joking I asked him if he had to get a body out of the trunk he said no but maybe the front Seat that day he said he knew Something bad happend in the car and he was putting it in the River, I found 2 forms of Id in Johns dirty Pants, a Medicade card and a expired military Id. The name was James Kinney (at a glance not close examanation) I asked John this evening if I could see the Id's he Said he got rid of them and asked why I Said because the name on the Id matched the name of the missing guy. he then Said he had nothing to do with it he found the Id in the car, I Said the mans dead he asked why did they find the body. I asked him to empty his pockets So I could make Sure he did not have them he Said he did not have time but he had nothing to do with it he loaned the car out for a couple hrs on Sunday for 200 dollars cash and said he bought a Prepaid Master card but the Pin had an error and could not get money from it till thursday.

Brandy ann Rose

on wensday may 5th after John Dykeman was arrested I found a 10 cc ~~[illegible]~~ BT Bdu fine point insulin syring in the car he was driving on the phone he stated to me that he was with Sam but he did not do anything she did every thing, and told him if he went to the ~~[illegible]~~ BT police She would Kill me him + the baby So he was in fear of his life. The shovel that was found was where John had parked the car there Monday morning to get parts off the other car. Mr John Lucky said fish man went back to the body w/ John and buried it. Every thing Sam supossedly did was John was driving Brett was in the front seat and Sam stopped every several times. John also told a ~~[illegible]~~ Johnathan Riley That Sam would do any thing for him even Kill

John Lucky

Brandy Thompson
Signature

664

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	2010-CP-07-5697
John Dykeman, #245443, Applicant, v. State of South Carolina, Respondent.	**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated November 13, 2010. The Respondent made its return on March 17, 2011. An evidentiary hearing on the matter was convened on September 4, 2012 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Samuel Kirkland, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

#1
PnB

The Applicant and Gene Hood, Esquire testified at trial. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the Applicant's appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the May 2004 term of the Beaufort County Grand Jury for kidnapping (2004-GS-07-

0834), murder (2004-GS-07-0835), and armed robbery (2004-GS-07-0836). He was represented by Gene Hood, Esquire.

On April 16-18, 2007, the Applicant proceeded to trial and was found guilty. He was sentenced by the Honorable John M. Milling to confinement for life for murder, thirty (30) years for armed robbery, and thirty (30) years for kidnapping. The sentences are to run concurrently.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Joseph Savitz, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Dykeman, Op. No. 2010-UP-436 (Ct. App. filed October 12, 2010).

ALLEGATIONS

#2 PmB In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that counsel
   a. Failed to object to the court charging the jury with hand of on hand of all where defendant was indicted as a principal only and the charge of hand of one hand of all was insufficient, vague, misleading, and confusing.
   b. Conceded defendant's guilt during trial.
2. Ineffective assistance of appellate counsel in that counsel
   a. Failed to brief defense motion for a directed verdict.
   b. Failed to brief defense motion as to the exclusion of evidence in respect to videotape clip of Brett Kinney.
   c. Failed to brief defense motion to strike specific portions of State's witness Brandy Ross and/or denying defense motion for a mistrial pertaining to this witness testimony.
3. Trial judge committed reversible error by instructing the jury that Applicant would obtain a procedural advantage – "the final argument" – if he "offered no testimony whatsoever and does not appear and take the stand," as this procedural matter is irrelevant to the jury's determination of guilt or innocence and this instruction undermines the utility of having the final argument.

At the hearing, Applicant proceeded solely on the claim of ineffective assistance of appellate counsel and withdrew the remaining allegations.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

The Applicant alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "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, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

#3 AnB

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. *See* Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

At the evidentiary hearing, the Applicant was present and testified. The Applicant testified that his appellate counsel, Joseph Savitz, provided ineffective assistance of counsel. The Applicant testified that he first spoke to appellate counsel about one year following the filing of his notice of appeal. He testified that over the course of his appeal he spoke to appellate counsel briefly about four times. The Applicant testified that he discussed appeal issues with counsel, but did not discuss the appeal strategy based on the trial issues.

The Applicant testified that he brought to appellate counsel's attention the issues that he felt should be addressed on appeal. The Applicant testified further that they discussed the testimony given at trial including that of Brandy Ross. He also testified that appellate counsel had a copy of the entire trial record and that appellate counsel's knowledge about the case increased over time. The Applicant testified further that his initial brief on appeal included a 1 ½ page argument section and the Court later held that the issue in the appeal had not been preserved for appeal. Lastly, the Applicant stated that he was aware that appellate counsel would not brief every preserved issue on appeal.[1]

#4
PmB

Trial counsel, Gene Hood, Esquire, also testified at trial. He testified that he has been practicing law for 37 years and that he has been a public defender for 20 years. He testified that he represented the Applicant at trial. Trial counsel recalls objecting to the admission of a video showing the victim as an invalid on the grounds that its purpose was to inflame the jury. He testified that he objected to the video and preserved the issue for appeal. He testified that he believed the issue was an appealable one.

[1] At the evidentiary hearing, the Applicant entered into evidence five exhibits. Exhibit 1- Final Brief of Appellate, Exhibit 2- Transcript of Testimony from Marlene Kinney, Exhibit 3- Transcript of Trial Counsel's Motions, Exhibit 4- Transcript of Testimony from Brandy Ross, and Exhibit 5-Brandy Ross' Statement.

Trial counsel testified further that Brandy Ross, the Applicant's former girlfriend, testified at trial that the Applicant may have hit the victim. Counsel testified that Ross' former statement to police did not include a statement about the Applicant hitting the victim. Counsel also testified that he was informed by the State prior to trial that Ross could not be located and that he had no notice before trial that Ross was going to show up to testify. Trial counsel testified that he objected to the State leading Ross during her testimony. Trial counsel testified that as a result of Ross' testimony he requested a mistrial on the basis of Ross' new incriminating statement. Counsel testified that he thought the issue was an appealable issue. Lastly, counsel testified that he filed a notice of appeal on the Applicant's behalf.

Ineffective assistance of appellate counsel

#5 PAGE

This Court finds that the Applicant has failed to carry his burden of proving ineffective assistance of appellate counsel. This Court finds that appellate counsel's performance was not deficient. This Court also finds that appellate counsel adequately conferred with the Applicant and reviewed the trial record prior to filing the appeal. Appellate counsel is not required to raise every non-frivolous issue on appeal. Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

The Applicant's testimony reflects that appellate counsel had knowledge of the issues at trial and the issues that the Applicant thought were relevant for appeal. The Applicant's testimony also reflects that appellate had the entire trial record available for review and that the Applicant was aware that appellate counsel would not address every preserved issue on appeal.

This Court further finds that even if the Applicant had proven that appellate counsel's performance was deficient, the Applicant has failed to prove that prejudice resulted from appellate counsel's alleged deficiency. To prove prejudice, the applicant must show that, but for

counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). This Court finds that the Applicant has put forth no evidence to show that there was a reasonable probability that he would have prevailed on appeal.

This Court also finds that the Applicant has failed to prove prejudice because there was overwhelming evidence of the Applicant's guilt presented at trial. Where there is overwhelming evidence of guilt, counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); *See also* Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001),Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C.,1991).

#6
PmB

At trial, the State presented overwhelming evidence of the Applicant's guilt. At trial, the Applicant was identified in a surveillance video using the victim's debit card with his co-defendant. The State's witness, Brandy Ross, testified that she found the victim's identification card in the Applicant's pocket. The State also put before the jury, the Applicant's statement that he and the co-defendant just wanted to get money from the victim to buy drugs. Lastly, the State presented a shovel covered in the victim's blood and a piece of bloody car carpet that was found in the Applicant's yard. This Court finds that the Applicant has failed to prove that appellate counsel was deficient and that but for appellate counsel's deficient performance he would have been successful on appeal. This Court finds that appellate counsel did not provide ineffective assistance of counsel to the Applicant.

All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived

such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial, sentencing, or appellate proceedings. Appellate counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order is he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely files.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1st day of October, 2012

The Honorable Perry M. Buckner
Presiding Judge
14th Judicial Circuit

Walterboro, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL DISTRICT
COUNTY OF BEAUFORT	)	CASE NO. 2010-CP-07-5697
JOHN DYKEMAN, #245443,	)	
	)	
Applicant,	)	
	)	APPLICANT'S MOTION TO ALTER
vs.	)	AND
	)	AMEND JUDGMENT
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	
	)	

Applicant John Dykeman, pursuant to SCRCP Rule 59, hereby moves for reconsideration of the Court's Order of Dismissal filed October 11, 2012, in the above-captioned Post-Conviction Relief case, a copy of which is attached hereto (hereafter "PCR"). The purpose of this motion is to request that the Court reconsider its findings and rulings so that issues raised and facts presented by Applicant are adequately addressed for preservation review pursuant to South Carolina Appellate Court Rules, Rule 227, should the Court not find an alteration of the judgment appropriate. In support of this motion, Applicant respectfully asserts as follows:

1. Applicant's PCR Petition was heard on September 4, 2012, by the Honorable Perry M. Buckner in the Beaufort County Court of Common Pleas.
2. At the conclusion of the hearing, Judge Buckner informed the parties that he would be taking the matter under advisement, but requested undersigned counsel and Assistant Attorney General Ashleigh R Wilson to each prepare proposed Orders setting out their proposed findings of fact and conclusions of law.
3. Judge Buckner issued his written decision on October 1, 2012, which decision was journalized on the record of the Court on October 11, 2012.

4. Applicant's attorney received a written copy of the signed and filed Order on October 24, 2012.

5. Applicant respectfully requests that the Court reconsider its October 11, 2012 Order of Dismissal holding that appellate counsel was not ineffective, on the following grounds:

   a. The Court incorrectly found that appellate counsel's performance was not deficient in that appellate counsel was not required to raise every non-frivolous issue on appeal.

   b. The Court incorrectly found that Applicant was not prejudiced by appellate counsel's performance.

6. Applicant respectfully asserts that the record reflects that appellate counsel did not raise two significant and obvious issues which were clearly stronger than that one issue raised by appellate counsel on appeal.

7. Trial counsel, Gene Hood, testified at the evidentiary hearing that witness Brandi Ross testified at trial that Applicant may have hit the victim, which statement was not included in that witness's prior statements provided by the State to defense counsel prior to the trial.

8. Trial counsel testified that he had objected to the admission of such incriminating testimony and requested that it be stricken, which request was denied.

9. Further, trial counsel testified that as a result of Ross' testimony he determined the impact of such testimony to be such that it warranted his requesting the court order a mistrial on the basis of this new incriminating statement, which the trial court denied.

10. Mr. Hood also testified at the evidentiary hearing that he had objected at trial to the admission into evidence of a "day-in-the-life" video of the victim based upon the prejudicial impact of the video outweighing its

probative value and, in fact, that the purpose of the video was to inflame the jury.

11. Appellate counsel filed an appellate brief solely on the issue that the trial judge committed reversible error by instructing the jury that Applicant would obtain a "procedural advantage" – final argument - if the Defendant "...offers no testimony whatsoever and does not take the stand, " as this procedural matter is irrelevant to the jury's determination of guilt or innocence and that the judge's charge to the jury on this point undermined the utility of having the final argument.

12. The "Argument" presented in appellate counsel's brief on this one issue consisted of just one and one-half double spaced pages.

13. Applicant is informed and believes that the comparison of the one issue actually raised on appeal to the above two potentially appealable issues demonstrates that these two issues are significant and obvious, and each of which were clearly stronger than the one issue that was briefed on appeal and the most promising of the non-frivolous potentially appealable issues.

14. Accordingly, applicant is further informed and believes that the Court's finding that appellate counsel's performance was not deficient was in error.

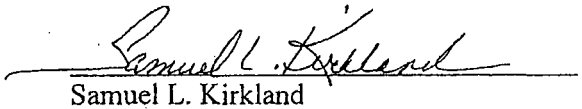
15. Trial counsel, Gene Hood, testified to his years of trial and appellate experience, and testified to his opinion as to the weight of the two potential appealable issues.

16. Applicant is informed and believes that the Court's finding that there is no reasonable probability Applicant would have prevailed on appeal was in error.

17. Applicant respectfully further requests that the Court reconsider its October 11, 2012, Order of Dismissal holding that Applicant was not prejudiced by appellate counsel's deficient performance.

For the reasons set forth above, Applicant respectfully requests that the Court reconsider its Order of Dismissal filed October 11, 2012, and amend same to grant the relief sought by Applicant in his PCR Application.

Respectfully submitted,



Samuel L. Kirkland
Attorney for Applicant
Post Office Box 1938
Bluffton, South Carolina 29910
Tel: 843.706.6111
Fax: 843.706.5667
skirkland@jsplaw.net

Nov. 5th, 2012
Bluffton, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT John Dykeman, #245443 Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS 2010-CP-07-5697 **RETURN AND MOTION TO DISMISS MOTION TO ALTER OR AMEND PURSUANT TO RULE 59(e) SCRCP**

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRCP, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR). The Respondent (the State) would submit the following:

I.

The Order of Dismissal of the Honorable Perry M. Buckner, dated October 15, 2012, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

The Applicant asserts:

1. The Court incorrectly found that appellate counsel's performance was not deficient in that appellate counsel was not required to raise every non-frivolous issue on appeal.
2. Respondent submits that this issue was addressed in the Court's Order of Dismissal on pages 5-6.

3. The Court incorrectly found that Applicant was not prejudiced by appellate counsel's performance.

4. Respondent submits that this issue was addressed in the Court's Order of Dismissal on page 6.

II.

The State therefore requests that the relief requested by the Applicant be denied and that his Motion be dismissed.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

BY: _____
ATTORNEYS FOR RESPONDENT

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

Columbia, South Carolina
November 15, 2012.

RECEIVED
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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

2012 DEC 11 PM 4:26

CASE NO: 2010 -CP- 07 - 5697

John Dykeman, #245443

PLAINTIFF(S)

vs. Bureau of South Carolina

BEAUFORT COUNTY, S.C.
CLERK OF COURT

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____.

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____.

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

Applicant's Motion to Alter or Amend Judgment is respectfully DENIED.

Dated at Walterboro, South Carolina, this 9 day of November, 2012.

PRESIDING JUDGE, 14th Judicial Circuit

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT